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THE NORTH CAROLINA CODE OF 1935

ALL THE GENERAL LAWS TO
AND INCLUDING THE LEGISLATIVE
SESSION OF 1935

COMPLETE ANNOTATIONS

UNDER THE EDITORIAL SUPERVISION OF

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ASSISTED BY

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PREFACE

This new edition of the North Carolina Code is submitted to the legal profession in all confidence that its merits will be recognized and that it will be accorded the same gratifying reception as the Codes of 1927 and 1931. Modern one volume codes are becoming more and more popular and it is believed that a work of this nature, incorporating as it does in one volume the entire body of the statute law, completely annotated with a thorough and accurate index, will prove of inestimable value to the bench and bar of the State.

The plan of the work is simple and requires no detailed explanation. New laws are inserted in their logical places with figures or letters in parentheses following the section numbers of the Consolidated Statutes. And this numbering applies to the Revenue and Machinery Acts of 1935 which supersede earlier enactments. The annotations include all direct constructions from the state reports beginning with volume 1 and concluding with page 285 of volume 208; and in a few instances cases from other jurisdictions have been used. The same standard of skillful editorial work which contributed to the popularity of the former editions of the North Carolina Code is maintained throughout this volume. Special attention is directed to the editors' notes, pointing out the changes effected by amendatory acts. It is believed that these notes will prove invaluable and will save the lawyer from laborious comparisons.

Charlottesville, Va.
October 1, 1935.

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CHAPTER 1

ADMINISTRATION

Art. 1. Probate Jurisdiction

§ 1. Clerk of superior court has probate jurisdiction.—The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration in cases of intestacy, in the following cases:

Cross Reference.—As to appellate review of exercise of power of clerk in appointing administrators or executors, see § 4139 and the note thereto. As to review of clerk's power in removing executors and administrators, see § 31 and the note thereto.

Character of Duties.—The powers and jurisdiction exercised by the clerk pursuant to this section are not those of a servant or ministerial officer or acting as and for the superior court, but those of an independent tribunal of original jurisdiction. Edwards v. Cobb, 95 N. C. 4, followed in In re Styers, 202 N. C. 715, 164 S. E. 123.

Summary Proceedings.—The proceedings of the clerk in respect to the exercise of his probate jurisdiction are summary in their nature. Edwards v. Cobb, 95 N. C. 4, 5, 9.

Jurisdiction Exclusive. — Jurisdiction to appoint an administrator of a deceased person, who has died intestate, and to issue letters for the administration of his estate is conferred by this section exclusively upon the clerk of the Superior Court of the county in which decedent was domiciled at or immediately previous to his death. Bank v. Commissioners of Yancey, 195 N. C. 678, 680, 681, 143 S. E. 252.

When Jurisdiction Presumed.—Where it is admitted that the plaintiff was regularly appointed administrator, it will be presumed that the clerk acted within his jurisdiction. Vance v. Southern R. Co., 138 N. C. 460, 50 S. E. 860.

More than One Appointment.—When letters of administration are once issued to a person who qualified, the powers of the clerk in that respect are exhausted and the subsequent appointment of another person, before the first appointment is revoked, is void. In re Bowman's Estate, 121 N. C. 373, 28 S. E. 404.

Collateral Attack.—When the clerk under this section has general jurisdiction of the subject matter of the inquiry, a decree appointing an executor or administrator may not be collaterally attacked. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20; Fann v. North Carolina R. Co., 155 N. C. 136, 71 S. E. 81; Tyer v. Blades Lumber Co., 188 N. C. 268, 124 S. E. 305. But where jurisdictional facts were lacking, it can be so attacked. Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240, and cases cited. And see Vance v. Southern R. Co., 138 N. C. 460, 462, 50 S. E. 860, where the court, after stating that jurisdiction is presumed, declares: "We do not mean to say that the validity of the letters cannot be questioned collaterally the existence of such assets and their proper situs being jurisdictional matter."

The facts very generally recognized as jurisdictional are stated in this section and where on application for letters of administration, these facts appear of record, the question of the qualification of the appointee cannot be collaterally assailed. Holmes v. Wharton, 194 N. C. 470, 472, 140 S. E. 93, citing Wharton v. Ins. Co., 178 N. C. 135, 100 S. E. 266. The only exception to this rule is that it may be shown collaterally that the person for whom an administrator has been appointed is not in fact dead, but is still living. Hines v. Foundation Co., 196 N. C. 322, 325, 145 S. E. 612. In such case, the order making the appointment being void, may be attacked collaterally. Holmes v. Wharton, 194 N. C. 470, 473, 140 S. E. 93, citing Clark v. Homes, 189 N. C. 703, 128 S. E. 20.

Evidence that deceased was not domiciled in the county of the clerk as required by subsec. 1, of this section was inadmissible in an action for wrongful death. Holmes v. Wharton, 194 N. C. 470, 140 S. E. 93.

The burden of proof to show jurisdictional facts rests upon the person applying for letters. Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240.

1. Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened.

In General.—Where the facts stated in this subsection exist, a grant in any county other than that prescribed by the subsection is absolutely void. Johnson v. Corpenning, 39 N. C. 216; Collins v. Turner, 4 N. C. 541.

Domicile.—Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240, contains an excellent discussion of "domicile" as distinguished from "residence," "inhabiting," etc.

Change of County Lines.—The county referred to in this subsection is the county at the time of the death of the decedent, and not the one subsequently formed by a change of county lines. Hannon v. Southern Power Co., 173 N. C. 520, 92 S. E. 353.

2. Where the decedent at his death had his fixed place of domicile in more than one county, the clerk of any such county has jurisdiction.

3. Where the decedent, not being domiciled in this state, died out of the state, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk.

Assets.—If the assets are bona notabelia (chattels or goods of sufficient value to be accounted for) they are sufficient to convey jurisdiction to the clerk. Hyman v. Gaskins, 27 N. C. 267. The value of chattels sufficient to be accounted for has varied at different times, but was finally established at five pounds in 1603.—Ed. Note.

The time and manner of bringing the assets into the jurisdiction is immaterial. Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

4. Where the decedent, not being domiciled in this state, died in the county of such clerk, leaving assets in the state, or assets of such decedent thereafter come into the state.

Provided, that in all cases where the clerk of the superior court is interested in an estate, the judge of the superior court resident in the district or the judge of the superior court holding the courts of the county by regular or special assignment shall have jurisdiction to take proof of wills and grant letters testamentary, letters of administration with the will annexed and letters of administration in cases of intestacy, to audit and approve the accounts of executors and administrators, to make orders and to do any and all things in connection with the administration of estates which the clerk of the superior court might or could have done, had he not been interested in the estate. (Rev., s. 16; Code, s. 1374; C. C. P., s. 433; R. C., s. 46, s. 1; 1868-9, c. 113, s. 115; 1931, c. 165.)

Editor's Note.—The Act of 1931 added the proviso to this section.

Death by Wrongful Act Sufficient Asset.—Where a nonresident is killed in this state, the cause of action for death by wrongful act is sufficient under this section, as a basis for the grant of letters in the county where the injury and death occurred. Vance v. Southern R. Co., 138 N. C. 460, 50 S. E. 860; Fann v. North Carolina Co., 155 N. C. 136, 71 S. E. 81. See notes to sections 160, 161.

§ 2. Exclusive in clerk who first gains. — The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate.

Domicile in Two Counties.—The provisions of this section apply even though the decedent at the time of his death was domiciled in both counties. And the jurisdiction first acquired cannot be collaterally impeached. Tyer v. Blades Lumber Co., 188 N. C. 274, 124 S. E. 306.

Superior Court to Determine Proper Grant.—Where two

clerks of different counties have granted letters to different parties, and the judgments granting them have been respectively affirmed by the superior court, that court will determine which of the letters were properly granted. Tyer v. Blades Lumber Co., 188 N. C. 274, 124 S. E. 306.

Art. 2. Necessity for Letters and Their Form

§ 3. Letters must issue; immediate rights of family.—No person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under the penalty of one hundred dollars, one-half to the use of the informer and the other half to the state; but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary, until the widow's year's support is assigned therefrom, as prescribed by law. (Rev., s. 1; Code, s. 1522; 1868-9, c. 113, s. 93.)

Penalty Not Incurred by Mere Possession.—To incur the penalty provided by this section, something more must be done than the mere taking of the property. Such taking may make the taker an executor **de son tort,** but it would not make him incur the penalty unless he **entered** upon the administration of the estate without first obtaining letters therefor. Administration implies management, not the mere holding the possession of property. Currie v. Currie, 90 N. C. 553, 556.

§ 4. Executor de son tort.—Every person who receives goods or debts of any person dying intestate, or any release of debt due the intestate, upon a fraudulent intent, or without such valuable consideration as amounts to the value or thereabout, is chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released, will satisfy. (Rev., s. 2; Code, s. 1494; 1868-9, c. 113, s. 67; 43 Eliz., c. 8.)

Claim under Fraudulent Conveyance.—One who sets up a claim to goods of an intestate under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor de son tort. Barnard v. Gregory, 14 N. C. 223. But under such a conveyance, which is void as to creditors, he will be liable to the creditors of the estate as an executor de son tort. Norfleet v. Riddick, 14 N. C. 221; McMorine v. Storey, 20 N. C. 83.

Time of Intermeddling.—One who intermeddles with goods of a decedent may be subject to liability as an executor de son tort although letters of administration afterwards issue. If administration is committed to him it entitles him to retain. But an intermeddling after a grant of administration does not make an executor de son tort, because he is answerable to the administrator. Norfleet v. Riddick, 14 N. C. 221; McMorine v. Storey, 20 N. C. 83.

A fraudulent donee of personalty which he has in his possession after the donor's death, is answerable as executor de son tort. Sturdivant v. Davis, 31 N. C. 365.

Purchaser of Exempt Property.—A purchaser of property exempt from execution under the Homestead Act cannot be held liable as executor de son tort. Winchester v. Gaddy, 72 N. C. 115.

Intermeddling under Colorable Right.—An intermeddling for which there is a colorable right will not make a wrongful executorship. Turner v. Child, 12 N. C. 25.

Bailee, etc., of Fraudulent Donee.—If a fraudulent donee of goods disposes of them to another who accepts them bona fide upon a purchase, or even to keep for the donee, the vendee or bailee would not be an executor de son tort. Bailey v. Miller, 27 N. C. 444.

An infant of tender years cannot be executor de son tort nor be sued as such. See Bailey v. Miller, 27 N. C. 444.

Character of Title.—It is not the paper title merely that makes one an executor of his own wrong, but it is the disposition, or possession and occupation of the effects. Bailey v. Miller, 27 N. C. 444.

§ 5. Form of letters.—All letters must be issued in the name of the state, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office, and shall have attached thereto copies of the section of this chapter requiring an inventory to be filed within three months, and of the section requiring annual accounts to be filed. (Rev., s. 36; Code, ss. 1399, 2172; C. C. P., ss. 471, 478; 1871-2, c. 46.)

For accounts to be filed, see section 105 and the note thereto.

Art. 3. Right to Administer

§ 6. Order in which persons entitled.—Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

Public Administrators.—See section 20, and notes thereto.

Effect of Appointment Out of Order.—The appointment as administrator of a person other than the one designated by the statute is not void, though the proper person has not renounced; but it may be set aside in favor of such proper person provided he has not waived his right to administer. Garrison v. Cox, 95 N. C. 353.

Where the executor dies, the next of kin, in the order named in the statute, or his appointee, is entitled to administration with the will annexed, in preference to the highest creditor. Little v. Berry, 94 N. C. 433.

1. To the husband or widow, except as hereinafter provided.

For appointment of widow under twenty-one, see note to section 8 par. 1.

Estoppel against Widow.—Though the widow has a prior right to administration than a brother of the decedent, where it appears that at the time the letters were duly granted to the brother she has shown no disposition to set up her right before the clerk, the appointment of the brother will stand. Tyer v. Blades Lumber Co., 188 N. C. 268, 124 S. E. 305.

2. To the next of kin in the order of their degree, to one or more of them, at the discretion of the clerk.

Clerk's Discretion. — Where there are several persons entitled in equal degree to administer, the clerk may select the one who in his discretion is most fit. Garrison v. Cox, 95 N. C. 353.

Right Not Absolute or Exclusive. — The right of the next of kin to letters of administration is not absolute and exclusive; and if the next of kin does not apply for letters of administration or fail to give bond, some other person may be appointed. Stoker v. Kendall, 44 N. C. 242.

Next of Kin Best Qualified.—The next of kin of a deceased person, after the widow, have the right, amongst themselves, of administration; but this right is not vested in one more than another, and the degree of propinquity does not give a legal priority. The court should select from the class, the person best qualified to take care of the estate. Atkins v. McCormick, 49 N. C. 274.

Between brothers, administration will be committed to the one most interested to execute it faithfully. Moore v. Moore, 12 N. C. 352.

Illiteracy of Next of Kin.—If none of the next of kin can read or write, it is proper for the clerk to refuse to appoint any one of them. In re Saville, 156 N. C. 172, 72 S. E. 220.

Appointee of Next of Kin.—When the next of kin resides abroad, it is in the power and is the duty of the court to grant administration to the appointee of such next of kin. Smith v. Munroe, 23 N. C. 345. See Ritchie v. McAuslin, 2 N. C. 220.

3. To the most competent creditor who resides within the state, and proves his debt on oath before the clerk.

Creditor Postponed to Next of Kin.—If administration cannot be granted to the nearest of kin owing to some incapacity, it shall be granted to the next after him, qualified to act, and the creditor shall be postponed, if such next of kin claims the right to administer within the time prescribed. Carthey v. Webb, 6 N. C. 268.

Assignee after Death Not a Creditor.—An assignment of debts of a person after his death does not make the assignee such a creditor as to entitle him to administer the estate of the deceased. Pearce v. Castrix, 53 N. C. 71.

4. To any other person legally competent.

(Rev., s. 3; Code, s. 1376; C. C. P., s. 456; R. C., c. 46, ss. 2, 3; 1868-9, c. 113, s. 115.)

Possessor of Insurance Policy.—The possession of a policy of life insurance authorizes the possessor to administer on the estate of the assured, a nonresident. Page v. Life Ins. Co., 131 N. C. 115, 42 S. E. 543. See Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

§ 7. Husband to administer to wife; right in surplus.—If any married woman dies wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband dies after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law. (Rev., s. 4; Code, s. 1479; 1871-2, c. 193, s. 32.)

Exclusive Right to Administer.—The statute of distribution does not apply to the estate of feme covert dying intestate, and the husband is entitled to administer for his own benefit. Any other person administering is in equity considered as a trustee for the husband with respect to the residue after payment of debts. Hoppiss v. Eskridge, 37 N. C. 54.

Wife Intestate or Testate.—A husband has right to administer the estate of wife, whether she dies intestate or leaves a will without naming an executor. In re Meyer's Estate, 113 N. C. 545, 18 S. E. 689.

Transfer of Right.—He may transfer this right to another by appointment, or may cause another to be associated with him. And the right is not affected by the filing and probating in common form of a writing purporting to be the will of the wife. In re Meyer's Estate, 113 N. C. 545, 18 S. E. 689.

Realty under Equitable Conversion.—Where a wife devised real property under circumstances which by the doctrine of equitable conversion is reduced to personalty, her husband after her death is, under this section, entitled to the estate as personalty, subject to demands of creditors. McIver v. McKinney, 184 N. C. 393, 399, 114 S. E. 399.

Death of Husband before Administering.—If the husband dies after his wife, without having administered, there is no authority to appoint an administrator upon her estate. In such a case the representative of the husband is to administer the wife's estate. Wooten v. Wooten, 123 N. C. 219, 31 S. E. 491.

Partial Intestacy as to Damages for Wrongful Death.—Where a wife dies by wrongful death the recovery therefor is not a part of her personal assets. And where she has left a will disposing of all her property and naming another executor, her husband may not administer upon the theory that the wife died "partially intestate" as to damages recoverable for wrongful death. Hood v. American Tel., etc., Co., 162 N. C. 92, 77 S. E. 1094.

Wife's Estate in Remainder for Benefit of Husband.—Where wife, a remainderman in personal property after a life estate, dies before the life tenant, her administrator upon the death of life tenant will be entitled to such property for the benefit of her husband. Colson v. Martin, 62 N. C. 125.

Husband's Administrator as against Wife's Administrator.—Where a legacy is given to a trustee for the use of a married woman who dies without receiving the same, the personal representative of the husband (the husband surviving the wife, but dying before receiving the legacy in his wife's favor) is entitled to the legacy as against the wife's administrator. Coleman v. Hallowell, 54 N. C. 204.

Husband Entitled to Annuity Payable to Wife.—Where the beneficiary of an annuity dies intestate before the death of the testator, leaving a husband, the bequest which vests an interest in such beneficiary shall be paid to her husband. In re Shuford's Will, 164 N. C. 133, 80 S. E. 420.

Husband Becoming Non Compos Mentis.—Where a husband has qualified as the administrator of his deceased wife but removed on account of his since becoming non compos mentis, the administrator of the wife, de bonis non, and guardian of the husband, is entitled to her assets to be held by him for the benefit of the husband. Neill v. Wilson, 146 N. C. 242, 59 S. E. 674.

Applied in Bank v. Gilmer, 116 N. C. 684, 701, 22 S. E. 2, for the protection of creditors where there was an unfulfilled verbal executory contract that property was to be held in trust for children.

Cited in In re Estate of Wallace, 197 N. C. 334, 335, 148 S. E. 456.

§ 8. Disqualifications enumerated. — The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—

1. Is under the age of twenty-one years.

A widow under 21 is not eligible to appointment as administratrix. The court may, however, appoint an administrator during her minority and, on arriving at full age, grant her the administration; or it may give the office to her appointee. Wallis v. Wallis, 60 N. C. 78.

2. Is a nonresident of this state; but a nonresident may qualify as executor.

Editor's Note.—Until the revisal of 1905, this subsection disqualified "an alien who is a nonresident of this state." And prior to 1868 there was no disqualification imposed upon aliens or nonresidents. It was formerly held that if a nonresident administrator took the oath and gave the bond required by law, he was not included in the disqualifications of this section. See Moore v. Eure, 101 N. C. 11, 16, 7 S. E. 471.

Nonresident Executor.—It is not a valid defense to a suit brought by an executor, that such executor was a nonresident. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

Nonresident Disqualified as Administrator.—A nonresident cannot be appointed an administrator; nor, having been appointed in the state of his intestate's residence, can he sue in the courts of this state. Hall v. Southern R. Co., 146 N. C. 345, 348, 59 S. E. 879.

Public administrator cannot be removed at the instance of nonresidents who have no right of appointment as administrator in consequence of not having the right to administer upon the estate in this state. Boynton v. Heartt, 158 N. C. 488, 74 S. E. 470.

Appointee of Nonresident Kin.—But a nonresident next of kin may appoint a resident, and it is within the power as well as the duty of the court to grant administration to the appointee. Smith v. Munroe, 23 N. C. 345; Ritchie v. McAuslin, 2 N. C. 220.

3. Has been convicted of a felony.

4. Is adjudged by the clerk incompetent to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding.

Illiteracy as Incompetency.—Under this provision a person who can not write or read, and has no experience in keeping accounts or in settling estates, is "incompetent." Stephenson v. Stephenson, 49 N. C. 472.

5. Fails to take the oath or give the bond required by law.

Collateral Attack for Mere Irregularity.—When, in disregard of the requirements of this subsection, letters are issued to a foreign executor, this is a mere irregularity and cannot be collaterally attacked in an action by the executor. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20. In other words the defect is not jurisdictional so as to render the grant of letters absolutely void.—Ed. Note.

6. Has renounced his rights to qualify. (Rev., s. 5; Code, ss. 1377, 1378, 2162; C. C. P., s. 457.)

§ 9. Effect of disqualification of person entitled.—Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of nonage, or is temporarily absent from the state, such person is entitled to six months, after coming of age or after his return to the state, in which to make application for letters testamentary, or letters of administration. (Rev., s. 6; Code, ss. 1379, 2165; C. C. P., ss. 452, 460; R. C., c. 46, s. 12.)

During Widow's Minority.—The court may appoint an administrator during a widow's minority and, on her arriving at full age, grant her the administration. Wallis v. Wallis, 60 N. C. 78.

Application after Lapse of Six Months.—If those entitled to administration apply for letters at any time prior to the appointment of a public administrator, even though six

months' period has elapsed, they will have priority to administer unless otherwise disqualified. In re Bailey's Will, 141 N. C. 193, 53 S. E. 844.

§ 10. Divorce a vinculo or felonious slaying is forfeiture.—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other, or of being accessory before the fact of such felonious slaying, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other. (Rev., s. 7; Code, s. 1480; 1889, c. 499; 1871-2, c. 193, s. 42.)

Editor's Note.—In Owens v. Owens, 100 N. C. 240, 6 S. E. 794, it was held that a widow convicted as accessory before the fact to her husband's murder and confined in prison is entitled to dower. But this rule has in terms been abrogated by the provisions of this section, as to the right of the wife to administer and obtain her distributive share.

Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, under this section and sections 137, 2522, his heirs may not claim under him the proceeds of the policy since the law will not allow a man or those claiming under him to benefit by his own wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to his heirs at law. Parker v. Potter, 200 N. C. 348, 157 S. E. 68.

§ 11. Elopement and adultery of wife is forfeiture.—If any married woman elopes with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate. (Rev., s. 8; Code, s. 1481; 1871-2, c. 193, s. 44.)

§ 12. Husband's conduct forfeiting rights in wife's estate.—If any husband shall separate himself from his wife, and be living in adultery at her death, or if she has obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband has abandoned his wife, or has maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate. (Rev., s. 9; Code, s. 1482; 1871-2, c. 193, s. 45.)

Failure to Provide Support Tantamount to Abandonment.—Where the husband made his wife leave, or where she had to leave because he would not give her anything to eat, it was held that his conduct amounted to abandonment. High v. Bailey, 107 N. C. 70, 12 S. E. 45.

§ 13. Executor may renounce.—Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed. (Rev., s. 10; Code, s. 2163; C. C. P., s. 450.)

Common Law and Present Rule.—At common law an administrator or executor who has qualified and entered upon the performance of his duties had no right to resign his office at his own convenience. Nor can he resign now except for causes specified in the statute or for equivalent causes. McIntyre v. Proctor, 145 N. C. 288, 59 S. E. 39; Washington v. Blunt, 43 N. C. 253.

Must Appear on Record.—Renunciation of executor must appear of record to enable the court to appoint an administrator with the will annexed. Springs v. Irwin, 28 N. C. 27.

Time of Renunciation.—An executor may, by permission of the superior court, renounce all right to the executorship and withdraw from a suit. Sawyer v. Dozier, 27 N. C. 97.

A court of probate may accept this renunciation at any time before the executor intermeddled with the effects of his testator, even after he has proved the will. Mitchell v. Adams, 23 N. C. 298.

The same rule applies to an executor of an executor under a prior will. Mitchell v. Adams, 23 N. C. 298.

But after probate an executor cannot renounce at his own pleasure, and must do so by leave of the court. Mitchell v. Adams, 23 N. C. 298.

Powers of Administrator c. t. a.—After renunciation of the executor, the administrator with the will annexed is competent to exercise his (executor's) powers under the will. Saunders v. Saunders, 108 N. C. 327, 12 S. E. 909.

Revocation of Letters for Cause Only.—The clerk should revoke letters testamentary, where the executor has entered upon performance of his duties, only by reason of some unfitness or unfaithfulness on the part of trustee, and never simply because the parties desire it. McIntyre v. Proctor, 145 N. C. 288, 59 S. E. 39.

Retraction of Renunciation.—A renouncing executor may retract his renunciation at any time before administration granted, and then administer. Any intermeddling with the estate before qualifying is evidence of such retraction. Davis v. Inscoe, 84 N. C. 396.

Renunciation by Some of Several.—Where there are several persons of the same class entitled to administer renunciation by some of them does not affect the rights of those not renouncing to administer. In re Jones' Estate, 177 N. C. 337, 341, 98 S. E. 827.

Right of Reinstatement.—There are decisions that an executor who has renounced can, under some circumstances come in and qualify. See Davis v. Inscoe, 84 N. C. 396, 401; Wood v. Sparks, 18 N. C. 389. But there is no case in which he has renounced with the formalities of this statute and afterwards has qualified, certainly not after the lapse of twenty years. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

§ 14. Renunciation of prior right required.—When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk. (Rev., s. 11; Code, s. 1378; C. C. P., s. 459.)

Expression of Intent Insufficient.—The mere expressed intent of such person entitled to administration by prior rights, that he would not have anything to do with the administration is no valid renunciation. Williams v. Neville, 108 N. C. 559, 13 S. E. 240.

§ 15. Failure to apply as renunciation.—If any person, entitled to letters of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation why he should not be deemed to have renounced. If, within the time named in the citation, he neglects to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person. If no person entitled to administer applies for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate. (Rev., s. 12; Code, s. 1380; C. C. P., s. 460(a); 1868-9, c. 203.)

In General.—The true intent and meaning of this and the previous section is that the persons primarily entitled to administration may have six months after the death of the intestate to assert their rights and comply with the law; and a party wishing to quicken their diligence within that time must do so by citation—he (the latter) may not by obtaining letters within the six months, deprive the party primarily entitled to administration should such party apply for letters before the expiration of six months period. Williams v. Neville, 108 N. C. 559, 562, 13 S. E. 240.

Applicable to Intestacy Only. — The provisions of this section contemplate the cases of intestacy. Hence in cases of testacy where no executor is appointed in the will, the

rights of the parties to administer are governed by section 6, without reference to the six months limitation contained in this section. In re Jones' Estate, 177 N. C. 337, 340, 98 S. E. 827.

Renunciation Presumed after Six Months. — After the expiration of six months from the death of the decedent, those entitled to prior rights having failed to apply, all rights of preference may be treated as renounced, and a suitable person to administer upon the estate may be appointed. Hill v. Alspaugh, 72 N. C. 402, 404.

Appointment within Six Months.—If the next of kin in answer to citation, name his appointee, and such person after appointment, fails to qualify, then though six months have not expired, the clerk will be authorized to appoint another. Williams v. Neville, 108 N. C. 559, 13 S. E. 240.

Appointment Not Revoked after Six Months. — If the parties who have precedence to administer fail to apply within six months from the death of the deceased, an appointment by the clerk of a proper person after that period will not be revoked. Withrow v. DePriest, 119 N. C. 541, 26 S. E. 110.

Failure to Apply within Six Months—Public Administrator.—Though it is the duty of the public administrator to apply after six months, if before his appointment at any time even after six months persons prior in rights to administer apply, they are entitled to appointment. In re Bailey's Will, 141 N. C. 193, 53 S. E. 844.

Unreasonable Delay.—No one who has precedence in a claim for letters loses such rights by delay merely, but by unreasonable delay, which is a matter of law. Hughes v. Pipkin, 61 N. C. 4.

Right not Absolute or Exclusive. — The right of next of kin to letters of administration is not absolute and exclusive, but dependent upon their proper and due application therefor and their giving bond and security as the law requires. Stoker v. Kendall, 44 N. C. 242.

Effect of Appointment by Clerk.—Where the clerk has appointed an administrator under this section a debtor of the estate cannot maintain the position that the appointment of a public administrator was necessary to receive payment of the debt. Brooks v. Clement Co., 201 N. C. 768, 161 S. E. 403.

§ 16. Person named as executor failing to qualify or renounce.—If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

Where more than one executor is appointed in any last will and testament duly probated in any court of this State, and one or more of such executors shall have qualified before the clerk of such court, and the other executor or executors shall have failed, within thirty days thereafter to qualify or shall have renounced in writing, then the qualifying executor or executors shall be clothed with all the powers, rights and duties, and be subject to all the obligations imposed upon all of said executors, in and by the terms of said will and the laws of this State, in like manner as if the non-qualifying executor or executors had not been named in said will. (Rev., s. 13; Code, s. 2164; C. C. P., s. 451; 1931, c. 183.)

Editor's Note.—The Act of 1931 added the second paragraph to this section.

Sale by One of Joint Executors.—If one of the joint executors fails to qualify, a sale of lands by the one qualifying is sufficient to pass the estate, without its appearing that the other either has renounced the executorship or refused to join in the sale. Wood v. Sparks, 18 N. C. 389, 390.

Art. 4. Public Administrator

§ 17. Appointment and term.—There may be a public administrator in every county, appointed by the clerk of the superior court for the term of four years. (Rev., s. 18; Code, s. 1389; 1868-9, c. 113; 1925, c. 253.)

Editor's Note.—The amendment of 1925, ch. 253, reduced the number of years, for which a public administrator could be appointed, from "eight" to "four".

Property Right.—His office is a property right which cannot be divested without due process of law. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Mistake of Clerk as to Term.—The appointment of public administrator is for the time specified in the section, and is not affected by a mistake of the clerk in stating in the appointment that it was for the unexpired term of his predecessor, or fixing the term of the new appointee for less period. Boynton v. Heartt, 158 N. C. 488, 74 S. E. 470.

Not an Office within Constitutional Prohibition.—A public administrator is not a holder of a public office within the constitutional prohibition against holding more than one office, and hence a quo warranto proceeding will not lie against him simply because he is also holding the office of recorder. State v. Smith, 145 N. C. 476, 59 S. E. 649.

§ 18. Oath.—The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court. (Rev., s. 19; Code, s. 1393; 1868-9, c. 113, ss. 2, 5.

§ 19. Bond.—The public administrator shall enter into bond, with three or more sureties, approved by the clerk, in the penal sum of four thousand dollars, payable to the state of North Carolina, conditioned. faithfully to perform the duties of his office, and obey all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands, and such bond shall be renewed every two years. Whenever the aggregate value of the real and personal property belonging to the several estates in the hands of the public administrator exceeds the one-half of his bond, the clerk shall require him to enlarge his bond in amount so as to cover, at all times, at least the double of such aggregate. (Rev., s. 320; Code, ss. 1390, 1391, 1392; 1868-9, c. 113, ss. 2, 3, 4; 1915, c. 216.

Notice for Failure to Renew Bond. — A public administrator can not be removed for failure to renew his bond without being notified to show cause. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Quoted In re Brinson, 73 N. C. 278.

§ 20. When to obtain letters.—The public administrator shall apply for and obtain letters on the estates of deceased persons in the following cases.

1. When the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for, and issued to any person.

Due Qualification Prerequisite. — A public administrator acquires no rights or interest to administer an estate until he is qualified after the period allowed to the relatives to qualify in the order prescribed. In re Neal's Will, 182 N. C. 405, 109 S. E. 70.

Prior Right of Others after Six Months. — While after the expiration of six months prior rights to administration may be deemed renounced and a public administrator appointed, yet even after lapse of six months, if he is not as yet appointed, persons of prior right to administration may be appointed in preference to him. In re Bailey's Will, 141 N. C. 193, 53 S. E. 844; Hill v. Alspaugh, 72 N. C. 402.

After the expiration of six months, should the public administrator fail to apply, the field is open to the clerk of the superior court to treat all right of preference as renounced and to appoint, in the exercise of his discretion, some suitable person to administer the estate. Brooks v. Clement Co., 201 N. C. 768, 771, 161 S. E. 403.

2. When any stranger, or person without known heirs, shall die intestate in any county.

3. When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator. (Rev., s. 20; Code, s. 1394; 1868-9, c. 113, s. 6.

§ 21. Powers generally and on expiration of term.—The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he has fully administered the same, if he then enters into a bond as required by law for administrators. (Rev., s. 21; Code, s. 1395; 1868-9, c. 113, s. 7; 1876-7, c. 239.

Art. 5. Administrator with Will Annexed

§ 22. When letters c. t. a. issue.—If there is no executor appointed in the will or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior court shall issue letters of administration with the will annexed to one or more of the legatees named in said will; but if no legatee qualifies, then letters may be issued to some suitable person or persons in the order prescribed in this chapter. (Rev., s. 14; Code, s. 2166; C. C. P., s. 453; 1923, c. 63.)

Editor's Note.—The effect of the amendment of 1923, ch. 63, was to give precedence, with respect to grant of letters c. t. a., to legatees named in the will over other persons entitled to administration under section 6. See 1 N. C. L. R. 315.

Appointment of Trustee Void. — The powers and duties (at least those personal) of an executor named in a will, devolve, upon his renunciation, on the administration with the will annexed, and the appointment by the clerk of a trustee in place of the executor is void. Clark v. Peebles, 120 N. C. 31, 26 S. E. 924; Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032. Council v. Averett, 95 N. C. 131; Hester v. Hester, 37 N. C. 330, he becomes a trustee for all trusts declared in the will as if he had been named executor. Jones v. Jones, 17 N. C. 387.

Powers of Administrator with the Will Annexed.—An administrator cum testaments annexo has all the rights, powers and is subject to the same duties as if he had been named as executor. Smathers v. Moody, 112 N. C. 791, 17 S. E. 532.

Appointment When There is Executor. — An administrator cum testamento annexo cannot be appointed where there is an executor laboring under no disability, until the renunciation by the latter. And an appointment in derogation of this rule is void—not merely voidable. Springs v. Irwin, 28 N. C. 27.

Principle applied in Suttle v. Turner, 53 N. C. 403, 404.

§ 23. Qualifications and bond.—Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators; but the executor of an executor shall not be entitled to qualify as executor of the first testator. (Rev., s. 15; Code, s. 2167; C. C. P., s. 454; 1905, c. 286.)

Art. 6. Collectors

§ 24. Appointment of collectors.—When, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. When, for any reason, a delay is necessary in the production of positive proof of the death of any one who may have disappeared under circumstances indicating death of such person, any person interested in the estate of such person so disappearing as heir at law, prospective heir at law, a creditor, a next friend, or any other person or persons interested, either directly or indirectly, in the estate of such person so disappearing, may file with the clerk of the superior court of the county in which the person so disappearng last resided, or in case such person so disappearing was at the time of his disappearance a nonresident of the State of North Carolina, with the clerk of the superior court of any county in which any property was or might have been located at the time of such disappearance, a petition for the appointment of a collector of the estate of such person so disappearing, or the property of such person so disappearing, located within the county of the clerk to whom application is made, which petition shall set forth the facts and circumstances surrounding the disappearance of such person, and which petition shall be duly verified and supported by affidavit of persons having knowledge of the circumstances under which such person so disappeared, and if from such petition and such affidavits it should appear to the clerk that the person so disappearing is probably dead, then it shall be the duty of the clerk to so find and to issue to some discreet person or persons, at his option, letters of collection authorizing the collection and the preservation of the property of such person so disappearing. (Rev., s. 22; Code, s. 1383; C. C. P., s. 463; R. C., c. 46, s. 9; 1924, c. 43.)

Editor's Note. — That part of this section which provides for the appointment of collectors in case of delay in the production of positive proof of the unknown death of any person, was enacted by the amendment of 1924, ch. 43. As to the effect upon this section of the amendment of 1924, see 3 N. C. L. R. 14.

Appointee in Discretion of Clerk. — It is discretionary with the clerk to appoint as collector either the person named as executor in the writing purporting to be the will, or some other person. In re Little's Will, 187 N. C. 177, 121 S. E. 453.

After a Will Admitted to Probate. — After a will has been admitted to probate in common form and letters testamentary have been issued, the clerk cannot remove the executor and appoint a collector, without a hearing based on notice to show cause why he should not be removed. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 104.

Appointment When Proper. — A collector is appointed only when there is no one in rightful charge of the estate, and this section is applicable only to cases where there are difficulties in limine disconnected with controversy or contest over the will, preventing the admission of the will to probate or the issuing of letters testamentary, e. g., protracted absence of witnesses, illness of the executor, etc., also where a caveat is entered at the time the will is offered to probate. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 104.

§ 25. Qualifications and bond.—Every collector shall have the qualifications and give the bond

prescribed by law for an administrator. (Rev., s. 23; Code, s. 1384; C. C. P., s. 464.)

§ 26. Powers of collectors.—Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts. (Rev., s. 24; Code, s. 1385; C. C. P., s. 465; R. C., c. 46, s. 6; 1868-9, c. 113, s. 115.)

Power to Lease Land.—A collector has no power to enter upon and make leases of land. Lee v. Lee, 74 N. C. 70.

§ 27. When collector's powers cease; duty to account.—When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator, in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment. (Rev., s. 25; Code, s. 1386; C. C. P., s. 466; R. C., 46, s. 7; 1868-9, c. 113, s. 115.)

Allowance of Counsel Fee. — A collector who resists the claim of the executor is not entitled to an allowance for counsel fees paid by him in such litigation, where the executor prevail in the litigation. Johnson v. Marcom, 121 N. C. 83, 28 S. E. 58.

Art. 7. Appointment and Revocation

§ 28. Facts to be shown on applying for administration.—On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise—

1. The death of the decedent and his intestacy.

Administration of Living Person's Estate. — Grant of administration upon the estate of a living man and a decree for the sale of his lands are void for lack of jurisdiction. Springer v. Shavender, 118 N. C. 33, 23 S. E. 976.

2. That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled.

3. The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same cannot, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit or other proof must be recorded and filed by the clerk. (Rev., s. 26; Code, s. 1381; C. C. P., s. 461.)

§ 29. Right to contest application for letters; proceedings. — Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings. (Rev., s. 27; Code, s. 1382; C. C. P., s. 462.)

Title of Property Not Question of Fact. — A dispute as to the title of property of the decedent is not such an issue of fact as is required by this section to be transferred to the superior court for trial. In re Tapp's Estate, 114 N. C. 248, 19 S. E. 150.

Collateral Attack after Letters Issued. — Once the letters are issued and appointment made, they cannot be collaterally attacked. Thus in an action by the administrator against defendant for damages for killing the decedent negligently, the legality of his appointment on the ground of residence cannot be raised. Fann v. North Carolina R. Co., 155 N. C. 136, 71 S. E. 81; Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

§ 30. Letters of administration revoked on proof of will.—If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or if, after letters testamentary are issued, a revocation of the will or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid. (Rev., s. 37; Code, s. 2170; C. C. P., s. 469.)

Applied in Shober v. Wheeler, 144 N. C. 403, 57 S. E. 152.

§ 31. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default. — If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that the surviving husband or widow or next of kin in the order of priority set out in subsections one and two of section six of article three of this chapter applies for letters of administration on said estate, and notwithstanding said applicants may have renounced their right to administer, if otherwise qualified, or that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in the due execution of his office, or that issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease. (Rev., s. 38; Code, 2171; C. C. P., s. 470; 1921, c. 98.)

Editor's Note. — That part of this section which authorizes the revocation of letters upon the application of the surviving husband or widow or the next of kin, is introduced by the amendment of 1923, ch. 63. Prior to that, revocation was confined to causes of incompetency, default or misconduct of the representative in office.

Power to Revoke Power to Refuse. — The power vested in clerk under this section to revoke letters for good cause carries with it the power to refuse to grant letters for cause for which a revocation would be justified. In re Will of Gulley, 186 N. C. 78, 80, 118 S. E. 839.

Clerk Has Primary and Original Jurisdiction. — The clerk under this section has original and primary jurisdiction of a probate judge to revoke letters, subject to review upon appeal by either party, and to this end he may require issues of fact to be tried by a jury in the superior court. Murrill v. Sandlin, 86 N. C. 54.

Refusal to Disclose Information. — Refusal on the part of the executor named in the will to disclose information as to the amount and nature of personalty coming into his possession, as to other matters relative to his fitness, is a ground for withholding or revoking letters testamentary

to him, and granting them to some other person. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839.

Appeal from Order of Clerk.—The powers of the clerk to remove executors and administrators, conferred by this section, are reviewable on appeal to the judge of the Superior Court of the county. Wright v. Ball, 200 N. C. 620, 158 S. E. 192.

Where the Superior Court judge, upon appeal from the order of the clerk of the court in removing executors or administrators of an estate, has exercised his discretion in retaining the cause in the Superior Court instead of remanding it to the clerk, the exercise of this discretion is not reviewable on appeal to the Supreme Court. Wright v. Ball, 200 N. C. 620, 158 S. E. 192.

But the judgment of the clerk is not a final adjudication of the unfitness of such person and is subject to review by the superior court judge, and as to matters of law by the Supreme Court of appeal. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839; In re Battle's Estate, 158 N. C. 388, 74 S. E. 23; Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430; Edwards v. Cobb, 95 N. C. 4; Barnes v. Brown, 79 N. C. 401. It is not required that he transfer the cause to the superior court for the trial of the issue. In re Battle, supra.

Necessity of Order to Show Cause. — The clerk cannot appoint a collector, (when the will has been probated and executor qualified) and remove the executor without a hearing based on notice to show cause why he should not be removed. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 104. Nor can he remove a public administrator without such notice. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Statement of Belief in Affidavit.—A statement in an affidavit for the removal of executor, of a mere belief that he will misapply the funds is not sufficient for removal. It should state the facts or reasons upon which such belief is based. Neighbors v. Hamlin, 78 N. C. 42.

Failure to Discharge Duties — Ground of Removal. — Where the executor becomes bankrupt and is the owner of no property, and has neglected for six years to file an inventory or return of any sort, and has failed to convert the personal property into money, upon application of creditors he may be required to give bond or, in default, be removed. Barnes v. Brown, 79 N. C. 401; for failure to make statement of account. Armstrong v. Stowe, 77 N. C. 360.

Insolvency in Lifetime of Testator. — But an executor will not be removed for insolvency, if such was his condition in the lifetime of his testator and known to him, when there is no evidence of waste or misapplication of funds. In re Knowles' Estate, 148 N. C. 461, 62 S. E. 549.

Poverty of an executor is not of itself a reason for restraining him from administering the estate. There must be some maladministration or some danger of loss from his misconduct or negligence for which he will not be able to answer by reason of his insolvency. Wilkins v. Harris, 60 N. C. 592.

Nor is poverty a ground to require him to give bond as an alternative of giving up his office. Fairbairn v. Fisher, 57 N. C. 390.

Disqualification for Adverse Interest. — Where there is no evidence of bad faith or fraudulent concealment, claiming by the administrator that he owned jointly with the decedent a part of the personal estate of the latter, is not such an adverse interest as to disqualify him in his office. Morgan v. Morgan, 156 N. C. 169, 72 S. E. 206.

Pleading and Procedure. — The application to remove an executor may be made by any person rightfully interested, by petition or motion in writing, or formal complaint, setting forth the grounds of application supported by affidavit. The allegations thus made may be met by a demurrer in a proper case, or by answer. Edwards v. Cobb, 95 N. C. 4, 5, 9.

§ 32. On revocation, successor appointed and estate secured.—In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate. (Rev., s. 35; Code, s. 1521; 1868-9, c. 113, s. 92.)

Order to Make Return and Settlement. — The removed administrator may be ordered to make immediate return and settlement of the estate in his hands. Until that is done he is within the jurisdiction of the court. In re Brinson, 73 N. C. 278.

See also, Taylor v. Biddle, 71 N. C. 1, where administrator was removed and an administrator de bonis non appointed.

Order to Surrender Funds. — It is proper for the clerk to order the displaced representative to surrender the funds in his possession belonging to the estate. Battle v. Duncan, 90 N. C. 546, 550.

Amount of Bond Dependent on What. — The framers of this section must have contemplated that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person. Williams v. Neville, 108 N. C. 559, 565, 13 S. E. 240.

Upon the examination of the applicant, the clerk may value the property at a higher figure than he had previously done. Williams v. Neville, 108 N. C. 559, 565, 13 S. E. 240.

Effect of Failure to Give Proper Bond. — The mere fact the bond of the representative is not justified before or approved by the clerk does not render the appointment void, or necessarily voidable. The provisions of this section requiring bond are directory and not essential to the appointment. It is only in the exercise of their jurisdictional functions that the clerks must observe these provisions as a condition precedent to the validity of their act. The only effect of noncompliance with these requirements is that the representative may be made to give the proper bond required. Garrison v. Cox, 95 N. C. 353, 357.

Good faith and the exercise of ordinary care and reasonable diligence are all that is required of executors and administrators, and covered by their bond. Moore v. Eure, 101 N. C. 11, 7 S. E. 471; Smith v. Patton, 131 N. C. 396, 42 S. E. 849; Atkinson v. Whitehead, 66 N. C. 296.

Money Received Covered by Bond.—Money applied for by an administrator, and paid to him as such, is received under color of his office and is covered by his bond. Lafferty v. Young, 125 N. C. 296, 34 S. E. 444.

Bond When Not Essential.—The execution of a bond, though incidental, is not an essential condition of an order admitting the plaintiff to prosecute an action as administrator. Hughes v. Hodges, 94 N. C. 56, 61.

Nor is the giving of the bond essential to the efficiency of the act of appointment itself. Howerton v. Sexton, 104 N. C. 75, 86, 10 S. E. 148; Hoskins v. Miller, 13 N. C. 360; Spencer v. Cahoon, 15 N. C. 225; Spencer v. Cahoon, 18 N. C. 27; Garrison v. Cox, 95 N. C. 353, 357.

When a foreign executor was regularly appointed and qualified his failure to give the bond specified by this section is only an irregularity and cannot be collaterally attacked. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 405, 151 S. E. 871.

Art. 8. Bonds

§ 33. Bond; approval; condition; penalty.—Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. Where such bond is executed by personal sureties, the penalty of such bond must be, at least, double the value of all the personal property of the deceased, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all the personal property of the deceased. The value of said personal property shall be ascertained by the clerk by examination, on oath, of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and

the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made, provided, however, that where such bond shall be executed by a duly authorized surety company, the penalty of said bond need not exceed one and one-fourth times the value of said real estate. (Rev., s. 319; Code, s. 1388; 1870-1, 93; C. C. P., s. 468; 1935, c. 386.)

Editor's Note.—The amendment of 1935 changed the penalty of the bond as formerly prescribed by the second sentence and added the proviso appearing at the end of the section.

Action May Be Brought on Bond to Recover Amount Due Estate.—Where an administrator, who has not fully administered the estate of his intestate, has died or has been removed from his office, an action may be maintained against his personal representative or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administrator d. b. n. of his intestate. Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430. The failure to account for and to pay such amount is a breach of the statutory bond. State v. Dunn, 206 N. C. 373, 374, 173 S. E. 900.

Applied in State v. Purvis, 208 N. C. 227.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 405, 151 S. E. 871.

§ 34. When executor to give bond.—Executors shall give bond as prescribed by law in the following cases:

Bankrupt Executor.—When an executor who is no owner of property has become bankrupt and has failed to file an inventory or return, the court (now the clerk) upon application of creditors may require him to give bond or in default remove him. Barnes v. Brown, 79 N. C. 401. But his insolvency known to the testator is no ground for requiring bond. Neighbors v. Hamlin, 78 N. C. 42.

Converting Assets into Money and Notes.—Where an executor converts his real and personal estate into notes and money, so as to lead to a reasonable apprehension that the assets are not sufficiently secure in his hands, it becomes the duty of the court to order that he give bond for the protection of the assets. Gray v. Gaither, 74 N. C. 237.

1. Where the executor resides out of the state. Except in the cases otherwise provided in this chapter, no foreign executor has any authority to intermeddle with the estate, until he has entered into bond, and the bond must be given not later than one year after the death of the testator.

Foreign Executors.—Under this subsection a foreign executor must apply to the clerk of the superior court for ancillary letters of administration and give bond. First Nat. Bank v. Pancake, 172 N. C. 513, 515, 90 S. E. 515.

Owing to the prohibition contained in this subsection, deeds made by foreign executors transferring lands situated in this state, under a power in the will to sell, convey no title until the statutory requirements have been complied with. Glascock v. Gray, 148 N. C. 346, 62 S. E. 433. But by section 38 of this chapter, (enacted subsequently) such conveyances executed under circumstances referred to prior to 1911, are validated by the express terms of that section.

But where such executor has been regularly appointed in all other respects, his failure to give bond under this subsection is only an irregularity and cannot be collaterally attacked in an action brought by him. Batchelor v. Overton, 158 N. C. 395, 396, 74 S. E. 20.

Removal to Federal Court.—A foreign executor will be required to give bond required by this section to remove a cause, instituted against his testate in his lifetime, to the Federal court on the ground of diversity of citizenship. First Nat. Bank v. Pancake, 172 N. C. 513, 514, 90 S. E. 515.

Meaning of Estate.—The use of the words "estate" in this subsection denotes real as well as personal estate. Glascock v. Gray, 148 N. C. 346, 62 S. E. 433.

2. When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other party interested in the estate, shall revoke the letters issued to the wife and grant letters of administration with the will annexed to some other person.

Executrix's Remarriage and Wasting the Assets.—Where it appeared that a wife, executrix of her first husband, remarried and was using the estate carelessly and without accounting therefor, it was held proper to require her to account and give bond. Godwin v. Watford, 107 N. C. 168, 169, 11 S. E. 1051.

3. Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinafter provided, the court or clerk to whom application is made shall require, before granting any order of sale, such executor to enter into bond. (Rev., s. 28; Code, s. 1515; R. C., c. 46, ss. 12, 13.)

§ 35. When executor may give bond after one year.—Where a nonresident of the state by will sufficient according to the laws of the state, and duly probated and recorded in the proper county, devises real property situated in this state, the executor acting under the will, if he has not intermeddled with the property devised in the will, and if no letters of administration in this state on the estate have been issued subsequent to the probate of the will, may, after the expiration of one year from the testator's death, give bond in double the value of the property devised, and he shall then be entitled to all the rights, powers and privileges of a resident executor. (1909, c. 825.)

§ 36. No bond in certain cases of executor with power to convey.—Where a citizen or subject of a foreign county or any other state of the United States, by will sufficient according to the laws of this state, and duly probated and recorded in the proper county, devises to his executor, with power to sell and convey, real property situated in this state in trust for a person named in the will, the power being vested in the executor as such trustee, the executor may execute the power without giving bond in this state. (1909, c. 901; 1925, c. 284.)

Editor's Note.—By the amendment of 1925, c. 284, citizens of other states of the United States were brought into the operation of this section.

§ 37. No bond where will does not require bond and co-executor a resident.—A nonresident executor appointed under a will which does not require the executor's bond shall not be required to give bond, if a resident of the state is appointed and qualifies as co-executor, unless the clerk of the court of the county where the will is first probated shall, upon the petition of the creditors or beneficiaries of the estate, deem the bond of the nonresident executor necessary for the protection of the creditors or beneficiaries. This section applies to nonresident executors who qualified before its enactment as well as to those qualifying afterwards. (1911, c. 176; Ex. Sess. 1920, c. 86.)

Editor's Note.—The only effect of the amendment of 1920, c. 86, was to substitute the words "does not require the executor's bond," near the beginning of this section, for the original words "dispenses with the executor's bond."

§ 38. Certain executor's deeds without bond before 1911 validated.—Where prior to January

first, one thousand nine hundred and eleven, a nonresident executor has sold and conveyed lands in this state under a power in the will of a citizen of another state or of a foreign country, and the will was executed according to the laws of this state and was duly proved and recorded in the state or foreign country where the testator and his family and the executor resided, the sale and conveyance is valid although the executor prior to the execution of the deed had not given bond or obtained letters in this state. (1911, c. 90.)

Constitutionality.—This section validating conveyances therein referred to is not unconstitutional as impairing a vested right. Vaught v. Williams, 177 N. C. 77, 97 S. E. 737.

§ 39. Oath and bond required before letters issue.—Before letters testamentary, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk, or before any other officer of any state or country authorized by the laws of North Carolina to administer oaths, that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk. (Rev., s. 29; Code, ss. 1387, 1388, 2169; C. C. P., ss. 467, 468; 1870-1, c. 93; 1923, c. 56.)

Editor's Note.—The part of this section which permits the taking of the oath before any officer of any state or county, was inserted by the act of 1923, ch. 56. See 1 N. C. L. R. 315.

See annotations, ante, to sections 33, 34.

§ 39(a). Oath before notary; curative statute.—In all cases prior to January the first, one thousand nine hundred and twenty-two, in which any foreign executor qualified or attempted to qualify as such executor by taking and subscribing the oath or affirmation required by law, before a notary public of this or any other state or territory of the United States, instead of taking and subscribing said oath or affirmation before the clerk, and having in all other respects complied with the laws of North Carolina prescribed for and pertaining to the qualification and appointment of foreign executors, such qualification and the letters testamentary issued in all such cases are hereby validated and made legal and binding. In all cases mentioned in this section, wherein such foreign executor has entered upon the discharge of the duties of such office and has performed any duty or exercised the powers and authority of such office regularly and according to law, except for the defect in the qualification and issuance of letters testamentary, then all such acts of any such executor are validated and are declared to be legal and binding. This section shall not affect litigation pending February 10, 1925, nor disturb any vested rights. (1925, c. 19.)

§ 40. Right of action on bond.—Every person injured by the breach of any bond given by an executor, administrator or collector may put the same in suit and recover such damages as he may have sustained. (Rev., s. 30; Code, s. 1516; 1868-9, c. 113, s. 87.)

Only Good Faith Guaranteed.—Bonds of administrators, executors, guardians, etc., guarantee only good faith. Smith v. Patton, 131 N. C. 396, 397, 42 S. E. 849; Moore v. Eure, 101 N. C. 11, 7 S. E. 471.

Action in Whose Name.—Actions upon the bonds of guardians, administrators, executors and collectors must be brought in the name of the state. Norman v. Walker, 101 N. C. 24, 7 S. E. 468.

In fact actions on all bonds payable to the state must be brought in the name of the state. The statute requiring the real party in interest to prosecute does not apply to such actions. Carmichael v. Moore, 88 N. C. 29.

But the objection to the omission to bring in state's name may be obviated by a motion to amend. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707. Amendment will be allowed even in the Supreme Court. Grant v. Rogers, 94 N. C. 755.

When an administrator dies, no one but an administrator de bonis non of his intestate can call his representative to account for the assets or sue on his bond. Merrill v. Merrill, 92 N. C. 657; State v. Goodman, 72 N. C. 508; Carlton v. Byers, 70 N. C. 691. And the next of kin cannot call for an account or settlement without having an administrator before the court. Lansdell v. Winstead, 76 N. C. 366, 367. (But see the dissenting opinion in Merrill v. Merrill, supra. See also, Neal v. Becknell, 85 N. C. 299, holding that the bond of an administrator whose appointment has been revoked may be sued on by his successor in office or by the next of kin.)

Thus where an administrator sells lands for assets to pay debts, and expends only a part of the fund for that purpose and dies before filing a final account, only an administrator de bonis non (not the next of kin) of his intestate can maintain an action on the bond to recover the unexpended balance. Neagle v. Hall, 115 N. C. 415, 20 S. E. 516; Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430. But where the administrator refuses to sue creditors may sue, making him a party defendant. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707.

Breach Not Merged in Judgment.—A judgment for damages on the breach of an administrator's bond does not merge the cause of action. The latter is satisfied only by actual payment. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707.

Action against Sureties.—An action can be maintained on an administration bond against the sureties before obtaining judgment against the administrator. Chairman of Court v. Moore, 6 N. C. 22; Williams v. Hicks, 5 N. C. 437; Strickland v. Murphy, 52 N. C. 242; Bratton v. Davidson, 79 N. C. 423.

What Constitutes Breach of Bond.—Bonds of administrators, executors, etc., guarantee good faith and reasonable care only. Smith v. Patton, 131 N. C. 396, 42 S. E. 849; Moore v. Eure, 101 N. C. 11, 7 S. E. 471; Atkinson v. Whitehead, 66 N. C. 296; Syme v. Badger, 92 N. C. 706. Executors are not insures. Nelson v. Hall, 58 N. C. 32; Beall v. Darden, 39 N. C. 76.

It is not breach of an administrator's bond to refuse to pay a claim until the same is established by judgment. Gill v. Cooper, 111 N. C. 311, 16 S. E. 316.

Where an administrator pays taxes out of the fund of the estate assessed against his intestate as guardian, it is an improper disbursement and his bond is liable therefor. Worthy v. Brower, 93 N. C. 344. So also where he pays inferior debts. Id.

Where a **devastavit** is charged the primary liability rests upon the administration bond. But a failure to apply for license to sell land for assets is not of itself a breach of such bond. Hawkins v. Carpenter, 88 N. C. 403.

Where an administrator fails to exhibit in court his final account at the end of two years from his qualification, the distributees may bring suit upon his bond, alleging such failure as a breach of the bond. Bratton v. Davidson, 79 N. C. 423.

An act of administrator done with the concurrence of the creditor will not entitle the latter to charge the former with a devastavit. Cain v. Hawkins, 50 N. C. 192.

Venue of Suit.—An administrator or executor must be sued as such in the county in which he took out letters of administration or letters testamentary, provided he or any one of his sureties lives in that county, whether he is sued upon his bond or simply as administrator or executor. Stanley v. Mason, 69 N. C. 1; Foy v. Morehead, 69 N. C. 512.

§ 41. Rights of surety in danger of loss.—Any surety on the bond of an executor, administrator or collector, who is in danger of sustaining loss by his suretyship, may exhibit his petition on oath to the clerk of the superior court wherein the bond was given, setting forth particularly the circumstances of his case, and asking that such executor, administrator or collector be removed from office, or that he give security to indemnify the petitioner against apprehended

loss, or that the petitioner be released from responsibility on account of any future breach of the bond. The clerk shall issue a citation to the principal in the bond, requiring him, within ten days after service thereof, to answer the petition. If, upon the hearing of the case, the clerk deem the surety entitled to relief, he may grant the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releasing the surety from liability on the bond for any subsequent act, default or misconduct of the principal. (Rev., s. 33; Code, s. 1519; 1868-9, c. 113, s. 90.)

§ 42. On revocation of letters, bond liable to successors.—When the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them. (Rev., s. 31; Code, s. 1517; 1868-9, c. 113, s. 88.)

See annotations to ante, section 40.

Administrator Must Sue.—The administrator de bonis non must first sue on the bond of a defaulting executor who preceded him, before he can obtain a license to sell the real estate for the payment of the debts. Carlton v. Byers, 70 N. C. 691. But where the preceding administrator is insolvent, his bond lost, and sureties unknown, the administrator de bonis non need not bring suit before he can obtain such license. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Action—By Whom Brought.—The action on the bond of the removed representative must be brought by the administrator de bonis non, and not by the next of kin. Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430.

§ 43. When new bond or new sureties required.—If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time. (Rev., s. 32; Code, s. 1518-9, c. 113, s. 89.)

Mortgage Instead of Bond. — An administrator who is also the heir of the intestate can not satisfy the requirement of an additional bond or security by mortgaging lands of his intestates, as such lands are already liable for the debts. In re Sellars, 118 N. C. 573, 24 S. E. 430.

§ 44. On failure, to give new bond, letters revoked.—If any person required to give a new bond, or further security, or security to indemnify, under the two preceding sections, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease. (Rev., s. 34; Code, s. 1520; 1868-9, c. 113, s. 91.)

Notice to Show Cause Essential. — A judgment removing a public administrator for failure to renew his bond, without notice to show cause, is not only irregular but void. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Clerk Has Jurisdiction. — The clerks of the superior courts have jurisdiction of proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N. C. 4.

Art. 9. Notice to Creditors

§ 45. Advertisement for claims.—Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to exhibit the same to such executor, administrator or collector, at or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six weeks in a newspaper, if any there be published in the county. If there is no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. The cost of publishing in a paper shall in no case exceed two dollars and fifty cents. (Rev., s. 39; Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2.)

Editor's Note.—Public Laws of 1931, c. 64, applicable only to Edgecombe and Nash Counties, amended this section by inserting in line eleven thereof, after the word "county" and immediately before the period, the following: "or in the city or town in which the deceased resided at the time of death," and by inserting in line twelve thereof, after the word "county" and immediately before the comma, the following: "or in the city or town in which the deceased resided at the time of death."

Public Laws 1933, c. 414, made the amendment of 1931, which was applicable in Nash and Edgecombe, applicable in Nash alone.

Time of Presenting Claims. — Before distribution of the estate to the next of kin, it is the duty of the administrator to pay the debts of the estate, provided such debts are presented within twelve months next after publication under this section. As against claims presented after that period he will not be chargeable with any distribution he may have made in good faith. Mallard v. Patterson, 108 N. C. 255, 13 S. E. 93.

Advertisement Essential to Bar Claims. — The mere lapse of time does not bar the creditor's claims against the estate. Only where the advertisement provided under this section has been made does the statute of limitation begin to run. Love v. Ingram, 104 N. C. 600, 10 S. E. 77. But see, Morissey v. Hill, 142 N. C. 355, 55 S. E. 193, where it was held that this section was enacted more for the protection of the representative, and hence a claim would be barred independent of whether the advertisement provided by this section was published or not. To the same effect, see also, Andres v. Powell, 97 N. C. 155, 2 S. E. 235; but see the dissenting opinion of Judge Merrimon.

Where the administrator neither avers nor proves that he gave the notice required by this section, the objection that the creditor has not shown that he ever presented his claim will not avail. Valentine v. Britton, 127 N. C. 57, 59, 37 S. E. 74; Love v. Ingram, supra. But see, Morissey v. Hill, supra.

§ 46. Proof of advertisement.—A copy of the advertisement directed to be posted or published in pursuance of the preceding section, with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall

be received as conclusive evidence of the fact of publication in all the courts of this state. (Rev., s. 40; Code, s. 1423; 1868-9, c. 113, s. 31.)

Necessity of Proof. — When an administrator pleads to a bill the provision of law which prescribes the time of bringing suits against him, he is bound to show by proof that he advertised as required by the statute. Gilliam v. Willey, 54 N. C. 128.

§ 47. Personal notice to creditor.—The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon. (Rev., s. 41; Code, s. 1424; 1868-9, c. 113, s. 32; 1885, c. 96.)

See annotations under section 45.

Art. 10. Inventory

§ 48. Inventory within three months.—Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk. (Rev., s. 42; Code, 1396; R. C., c. 46, s. 16; 1868-9, c. 113, s. 8.)

Conclusiveness of Inventory. — An inventory is but prima facie evidence to charge the executor with assets, so as to call on him for proof to rebut it. Hoover v. Miller, 51 N. C. 79. It is prima facie evidence of the solvency of persons owing debts to the estate and described in the inventory. It may be shown that the personal representative made errors in describing and noting the debts. But it seems that it is not evidence against an administrator de bonis non. Grant v. Reese, 94 N. C. 720.

Statement of Doubtful Debts. — Where an executor returns an inventory of debts without stating that some of the debts are doubtful, he will be held responsible for them, unless he can show that there were set offs against them, or that the debtors were insolvent. Graham v. Davidson, 22 N. C. 155. But where he inventories them as "doubtful", prima facie he will not be chargeable with them. Gay v. Grant, 101 N. C. 206, 8 S. E. 99, 106.

Return of Joint Executors. — Either one of joint executors making a joint return of inventory are answerable for what appears thereon, if it does not show what came to the hand of the other alone. Graham v. Davidson, 22 N. C. 155.

Barred of Commissions. — Failure to file an inventory coupled with acts of gross negligence and want of care in the management of the estate held to deprive the personal representative of his right to commissions. Grant v. Reese 94 N. C. 720; Stonestreet v. Frost, 125 N. C. 640, 31 S. E. 836.

Removal from Office. — Where the executor failed to file the inventory required and was also guilty of other acts of mismanagement it was held that he could be required to give bond or be removed from his office. Barnes v. Brown, 79 N. C. 401.

May Be Compelled to Account or File Inventory. — If the personal representative has failed to file his inventory or his accounts, he can be compelled to do so upon application to the clerk of the superior court. Atkinson v. Ricks, 140 N. C. 418, 53 S. E. 230.

Transfer of Funds to Other Jurisdiction. — The inventory required by this section must be filed before the transfer of moneys to another jurisdiction. Grant v. Rogers, 94 N. C. 755, 762.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 49. Compelling the inventory.—If the inventory and account of sale specified in the preceding section are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator, or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector. And under all proceedings provided for in this section, the defaulting executor, administrator or collector shall be personally liable for the costs of such proceeding to be taxed against him by the clerk of the superior court, or deducted from any commissions which may be found due such executor, administrator or collector upon final settlement of the estate. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (Rev., s. 43; Code, s. 1397; 1868-9, c. 113, s. 9; 1929, c. 9, s. 1; 1933, c. 100.)

Editor's Note.—The Act of 1929 added next to the last sentence to this section. Public Laws 1933, c. 100 added the last sentence of this section as it now reads.

Clerk's Original Jurisdiction. — Under this section the clerk has original jurisdiction to remove the representative for not filing the inventory required. Edwards v. Cobb, 95 N. C. 4, 8.

Clerk Has Power to Remove even Independent of Statute. —The clerk has power of removal for the failure of the administrator to discharge the duties of his office as prescribed by law. And even without invoking the aid of statute the power of removal is inherent in the office at common law, and must of necessity be so to prevent a failure of justice. Taylor v. Biddle, 71 N. C. 1, 5.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 50. New assets inventoried.—When further property of any kind, not included in any previous return, comes to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory. (Rev., s. 44; Code, s. 1398; 1868-9, c. 113, s. 10.)

§ 51. Trustees in wills to file inventories and accounts.—Trustees appointed in any will admitted to probate in this state, into whose hands assets come under the provisions of the will, shall file in the office of the clerk of the county where the will is probated inventories of the assets and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to any will in which a different provision is made for filing inventories and accounts. (1907, c. 804.)

Art. 11. Assets

§ 52. Distinction between legal and equitable assets abolished.—The distinction between legal and equitable assets is abolished, and all assets shall be applied in the discharge of debts in the manner prescribed by this chapter. (Rev., s. 45; Code, s. 1406; 1868-9, c. 113, s. 14.)

What Constitutes Assets — Rents Liable for Debts. — The rents on devised land may be subjected by the per-

sonal representative to the payment of the debts of deceased. Shell v. West, 130 N. C. 171, 41 S. E. 65.

Same—Rent Accruing before and after Death. — Rent due for the occupation of an equitable estate in land, in the lifetime of the cestui que trust, goes to his personal representatives, that accruing after his death goes to his heirs. Fleming v. Chunn, 57 N. C. 422; Rogers v. McKenzie, 65 N. C. 218.

Same — All Chattels Assets. — All the chattels of an intestate are, if the administrator by reasonable diligence might have possessed himself, assets. Gray v. Swain, 9 N. C. 15.

Same—Warrant for Pension Not Asset. — A warrant for a pension issued after death of pensioner does not become a part of his assets, but must be returned to the state for cancellation. In re Smith, 130 N. C. 638, 41 S. E. 802.

Same — Lands as Assets. — Land is not an asset until it is sold and the proceeds received by the personal representative. Wilson v. Bynum, 92 N. C. 718; Fike v. Green, 64 N. C. 665; Edenton v. Wool, 65 N. C. 379; Hawkins v. Carpenter, 88 N. C. 403.

Same — Damages for Death by Wrongful Act. — The right to recover damages for wrongful death rests entirely on statute, and when a recovery is had therefor it is not a part of the personal assets of the deceased. Hood v. American Tel., etc., Co., 162 N. C. 92, 77 S. E. 1094.

Such damages when recovered are not assets of the estate available to creditors. Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612.

Duration of Homestead Exemptions. — The personal exemptions in Art. X of the Constitution exists only during the life of the "homesteader," and after his death passes to his personal representatives, to be disposed of in a due course of administration. Johnson v. Cross, 66 N. C. 167.

§ 53. Trust estate in personalty.—If any trustee, or any person interested in any trust estate, dies leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets. (Rev., s. 46; Code, s. 1403; 1868-9, c. 113, s. 11.)

§ 54. Crops ungathered at death.—The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (Rev., s. 47; Code, s. 1407; 1868-9, c. 113, s. 15.)

The Principle Is Declaratory of the Common Law.—Flynt v. Conrad, 61 N. C. 190, 194.

This section does not control the title to crops not planted at the time of the death of the testator or devisor. Manifestly, in the forum of common sense, a crop could not be a crop until the seed were in the soil. The statute uses the expression, "crops . . . remaining ungathered at his death," etc. An ungathered crop is certainly not an unplanted crop. Carr v. Carr, 208 N. C. 246, 247.

Applied. — Upon the death of a cropper his personal representative is entitled to his share of the crop. Parker v. Brown, 136 N. C. 280, 48 S. E. 657; Thomas v. Lines, 83 N. C. 191.

§ 55. Real estate sold to pay debts is personal assets.—All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate. (Rev., s. 48; Code, s. 1404; 1868-9, c. 113, s. 12.)

Stamped with Character of Realty. — Proceeds of sale of realty are in fact personalty, although they are stamped with the character of realty to indicate the channel in which they shall go. Lafferty v. Young, 125 N. C. 296, 300, 34 S. E. 444.

§ 56. Surplus of realty sold for debts is real assets.—All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold. (Rev., s. 49; Code, s. 1405; 1868-9, c. 113, s. 13.)

See annotations to preceding section; Lafferty v. Young, 125 N. C. 296, 300, 34 S. E. 444.

Proceeds of Sale Held for Heirs. — Proceeds of sale of real estate in the hands of administrator are held, after payment of debts, for the heirs who upon the death of the administrator, may alone proceed against his personal representative. Alexander v. Wolfe, 88 N. C. 398. Such proceeds may not be applied to a judgment for widow's year's allowance. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116.

But where he also holds other proceeds than from the sale of realty, the administrator de bonis non of the estate must join with such heirs in proceeding against the personal representative of the deceased administrator. Alexander v. Wolfe, supra. But see Neagle v. Hall, 115 N. C. 415, 20 S. E. 516, where it was held that **only** administrator de bonis non of the estate can sue for the unexpended proceeds of realty sold.

§ 57. Personalty fraudulently conveyed recoverable.—If there is not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in any wise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fraudulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns. (Rev., s. 50.)

As to fraudulent conveyances, see post, sections 1005-1013.

§ 58. Debt due from executor not discharged by appointment.—The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator. (Rev., s. 51; Code, s. 1431; 1868-9, c. 113, s. 40.)

Applies to Executor whether He Acts or Not. — This section applies to an executor who **acts** as well as to one who does not act under the appointment. Moore v. Miller, 62 N. C. 359.

§ 59. Joint liability of heirs, etc., for debts.—All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent. (Rev., s. 52; Code, s. 1528; 1868-9, c. 113, s. 99.)

Editor's Note. — Not only persons succeeding to the property of the deceased are jointly liable (to the proper extent) for the payment of the debts, but also third persons who purchase the property. See post, section 76.

Purpose of Section. — This and the following sections are intended to limit the liability of heirs, devisees and distributees. Andres v. Powell, 97 N. C. 155, 160, 2 S. E. 235.

As between Legatees and Devisees. — Acceptance of legacy by the legatee does not discharge the testator's estate from outstanding obligations due to creditors, but is subject thereto to the extent of the legacy. But the

lands devised are not so subject until the legacies are exhausted. Badger v. Daniel, 79 N. C. 372.

Proportion of Devisee's Liability. — The whole debt, not exceeding the value of the devise, may be collected from the devisee; but in such a case he is entitled to contribution from the other devisees. That is, each devisee, heir, etc., is, to the extent of his share, a surety. Badger v. Daniel, 79 N. C. 372; Hinton v. Whitehurst, 71 N. C. 66, 68.

Applied in Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317.

§ 60. Extent of liability of heirs, etc.—No person shall be liable, under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable. (Rev., s. 53; Code, s. 1529; 1868-9, c. 113, s. 100.)

See annotations to preceding section.

The provisions in this section are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estates of dead men. Moffitt v. Davis, 205 N. C. 565, 567, 172 S. E. 317.

Devisee's Liability.—In an action under this section judgment can be entered against the devisee only to the extent of the property received under the will and no personal judgment can be entered against the devisee. Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317.

§ 61. Judgment against heirs, etc., apportioned; costs.—In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them. (Rev., s. 54; Code, s. 1530, 1868-9, c. 113, s. 101.)

Editor's Note. — Sections 102 and 106, prohibit the creation of a lien by the commencement of a suit against the representative, and issuance of execution upon the judgment; thereby protecting the persons liable for the debts from being made to pay inferior debts in the presence of superior claims.

§ 62. Persons liable for debts to observe priorities.—Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others. (Rev., s. 55; Code, s. 1531; 1868-9, c. 113, s. 102.)

§ 63. Existence of other debts of prior or equal class.—The defendants in such action may show that there are unsatisfied debts of a prior or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such portion of the excess as is a just proportion to the other debts of the same class with that in suit. (Rev., s. 56; Code, s. 1532; 1868-9, c. 113, s. 103.)

Who Are Defendants. — Debts against deceased persons must be sued by civil action against the personal representative. Hence the "defendants" referred to in this section are the executors and administrators. The phrase "the value of property acquired by them," refers to assets in the hands of the representative. Heilig v. Foard, 64 N. C. 710, 712.

§ 64. Debts paid taken as unpaid as against heirs, etc.—If any debts of a prior class to that in which the suit is brought, or of the same class, has been paid by any defendant, the amount, of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the preceding section. (Rev., s. 57; Code, s. 1533; 1868-9, c. 113, s. 104.)

§ 65. Compelling contribution among heirs, etc.—The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees and heirs also of the decedent if any part of the real estate be undevised, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court. (Rev., s. 58; Code, s. 1534; 1868-9, c. 113, s. 106.)

Application to Tenants in Common. — This section applies only to contributions sought to be enforced among **devisee,** and **heirs** to whom undivided land has descended. It has no application to contributions among tenants in common who claim by descent. Wharton v. Wilkerson, 92 N. C. 408, 414.

Section an Exception to Certain Rule.—The remedy given by this section is an exception to the rule that in actions for contribution, when the amount exceeds $200, the superior court in term has exclusive cognizance. Wharton v. Wilkerson, 92 N. C. 408, 414.

§ 65(a). Payment to clerk of sums not exceeding $300 due and owing intestates.—Where any person dies intestate and at the time of his or her death there is a sum of money owing to the said intestate not in excess of three hundred dollars, such sum may be paid into the hands of the clerk of the superior court, whose receipt for same shall be a full and complete release and discharge for such debt or debts, and the said clerk of the superior court is authorized and empowered to pay out such sum or sums in the following manner: First, for satisfaction of widow's year's allowance, after same has been assigned in accordance with law, if such be claimed; second, for payment of funeral expenses, and if there be any surplus the same to be disposed of as is now provided by law. This section shall apply to the counties of Guilford, Edgecombe, Randolph, Cabarrus, Iredell, Moore, Anson, Watuaga, Wilson, Craven, Cumberland, Johnston, Rutherford, Stanly, Davidson, Currituck, Yadkin, Alexander, Stokes, Clay, Greene, Wayne, Franklin, Macon, Beaufort, Swain, Haywood, Caldwell, Burke, Gates, Rockingham, Graham, Person, Catawba, Dare, Tyrrell, Perquimans, Transylvania, Duplin, Hyde, Pender, Alamance, Lincoln, Chowan, Forsyth, Hoke, Lee, Vance, Robeson, Orange, Davidson, Durham, Wake, Mecklenburg, Harnett, Union, Onslow, Nash, Halifax, Hertford, Pasquotank, Rowan and Martin. (1921, c. 93; Ex. Sess. 1921, c. 65; 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 49; 1935, cc. 69, 96, 367.)

Editor's Note.—This section, enacted in 1921, was subsequently amended by the Act of 1924, whereby the counties of Halifax, Hertford, Mecklenburg and Robeson were added thereto. The Act of 1927 added the counties of Rowan and Martin. The Act of 1929 added the counties of Edgecombe, Randolph, Lincoln, Granville, Chowan, Forsyth, Hoke, Lee, Vance, Davidson, Montgomery and Durham; and also the counties of Mecklenburg and Robe-

son which had been added by the Act of 1924. The Act of 1931 added the county of Wake.

By Public Laws 1933, cc. 16, 94, Wilson, Onslow and Nash counties were added to the list of those to which the section applies.

The amendment of 1935 made the section applicable in Craven, Orange and Union counties.

Art. 12. Sales of Personal Property

§ 66. Executor or administrator may sell without court order.—Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided to sell, as soon after his qualification as practicable, all the personal estate of his decedent. (Rev., s. 62; Code, s. 1408; 1868-9, c. 113, s. 16.)

For Application of Proceeds Purchaser Not Responsible.—A purchaser of personalty from the personal representative does not, by virtue of the latter's absolute power to dispose of the personalty, have to see to the proper application of the purchase price. This, even though the decedent has created a particular separate fund for the payment of his debts. But if the purchase be tainted with collusion, he will be held responsible for its proper application. Tyrrell v. Morris, 21 N. C. 559; Bradshaw v. Simpson, 41 N. C. 243; Gray v. Armistead, 41 N. C. 74; Cox v. First Nat. Bank, 119 N. C. 302, 26 S. E. 22.

The purchaser gets good title, unless he purchased **mala fide** and for the purpose of **devastavit.** Polk v. Robinson, 42 N. C. 235; Wilson v. Doster, 42 N. C. 231. Where he receives the property in payment of fiduciary's **personal** debt, the transaction is presumptively mala fide. Hendrick v. Gidney, 114 N. C. 543, 546, 19 S. E. 598; Dancy v. Duncan, 96 N. C. 111, 117, 1 S. E. 455; Wilson v. Doster, supra; Latham v. Moore, 59 N. C. 167.

§ 67. Collector may sell only on order of court.—All sales of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court, who shall specify in his order a descriptive list of the property to be sold. (Rev., s. 61; Code, s. 1409; 1868-9, c. 113, s. 17.)

§ 68. Sale to be public; notice.—All sales of personal estate by an executor, administrator or collector shall be publicly made, on credit or for cash, after twenty days notification posted at the courthouse and four public places in the county. (Rev., s. 63; Code, s. 1410, 1411; 1868-9, c. 113, ss. 18, 19.)

As to the right of the representative to purchase at the sale, see 6 Encyc. Dig. sections 123, 141, 295.

Provisions Peremptory.—The provisions of this section are peremptory and leave no discretion. Hence a non compliance with them renders the fiduciary liable to persons injured. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188. But see Wynns v. Alexander, 22 N. C. 58, where it is held that the common law rule on this point is not repealed by this section and that the statute is merely directory. See also, Dickson v. Crawley, 112 N. C. 629, 17 S. E. 158; Cox v. First Nat. Bank, 119 N. C. 302, 305, 26 S. E. 22; Odell v. House, 144 N. C. 647, 648, 57 S. E. 395.

If the fiduciary sells at public sale the price actually obtained is his justification. But if he sells at a private sale, he is liable for the true value without reference to the price obtained. Cannon v. Jenkins, 16 N. C. 422, 427.

If the provision of the section is properly conformed with, the fiduciary will not be held to guarantee the solvency of the purchaser, but will be held liable only for the insufficiency of the bond given for the purchase money. Davis v. Marcum, 57 N. C. 189.

It seems, however, that a private sale of a **chose in action** if made in **good faith,** is valid; though it is safer to follow the direction of this section to avoid any personal liability in case the fiduciary fails to obtain as much from the private sale as he would have obtained had he sold at public sale. Dickson v. Crawley, 112 N. C. 629, 632, 17 S. E. 158; Wynns v. Alexander, 22 N. C. 58; Gray v. Armistead, 41 N. C. 74.

Thus, in the absence of **fraud** or collusion, notes may be sold at private sale. But the **burden** of proof of fair and full price, in such a case, **rests** upon the representative Odell v. House, 144 N. C. 647, 57 S. E. 395.

What Constitutes Sale Other Than Public.—Giving a part of the standing crop for hauling the remainder does not, within the meaning of this section, constitute selling otherwise than at public auction. McDaniel v. Johns, 53 N. C. 414.

§ 69. Clerk may order private sale in certain cases; advance bids.—Whenever the executor or administrator of any estate shall be of the opinion that the interests of said estate will be promoted and conserved by selling the personal property belonging to it at private sale instead of selling same at public sale, such executor or administrator may, upon a duly verified application to the clerk of the Superior Court, obtain an order to sell, and may sell, such personal property at private sale for the best price that can be obtained, and shall report such sales to the clerk for confirmation; and upon satisfactory proof that said personal property has been sold for a fair and adequate price, such sale shall be confirmed by clerk.

The said sale or sales of personal property shall not be deemed closed under ten days from the filing of such report; and if in ten days from the filing of such report the sale price is increased by the deposit of ten (10) per cent with the said clerk, the said clerk shall order a new sale thereof. The clerk may in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with his said offer. If no advance bid is offered for the property and if no exception is filed thereto within said period of ten (10) days, the same shall be confirmed.

Where the estate consists in whole or in part of perishable property the executor or administrator may sell such perishable property at private sale without order or confirmation by the clerk of the Superior Court. (Rev., s. 64; 1893, c. 346; 1919, c. 66; 1925, c. 267.)

Editor's Note.—The essential changes which were effected in this section aside from its terminology, consist in: (1) the repeal of a specific enumeration of the types and classes of personalty which could be sold at private sale, and the substitution therefor of "personal property" in general; (2) addition thereto the provision with respect to proof and confirmation of sale by the clerk, in the first paragraph; (3) addition thereto of all the provisions contained in the second and last paragraphs of the section. See also, 4 N. C. L. Rev. 19.

Effect of Section upon Discretion of Judge and Clerk.—The provisions of this section do not take away from the clerk, or judge on appeal, the sound discretionary power of determining whether a public or a private sale would best subserve the interests of the parties, or prevent them from authorizing a private sale in proper cases. The section is permissive and not mandatory upon them. In re Brown's Estate, 185 N. C. 398, 117 S. E. 291.

Presumption as to Refusal to Confirm.—In an appeal upon refusal to confirm the sale under this section, the presumption is that there was sufficient evidence to sustain the findings of fact upon which the refusal is based. In re Brown's Estate, 185 N. C. 398, 117 S. E. 291.

§ 70. Clerk must confirm sale on creditor's objection.—When any person interested, either as creditor or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk. (Rev., s. 63; Code, s. 1411; 1868-9, c. 113, s. 19.)

Fair Sale at Inadequate Price. — In the absence of such objection, where the sale is perfected in all fairness and in compliance with the law, the mere fact that the property was sold to the widow of the decedent at a nominal price where the public would not bid, does not render the ad-

ministrator liable for the inadequacy of the price. Woody v. Smith, 65 N. C. 116.

Creditor Consenting Estopped.—Where the creditor consents to the sale at an inadequate price at the time of the sale, he cannot thereafter raise the question. Cain v. Hawkins, 50 N. C. 192, 194.

§ 71. Security required; representative's liability for collection.—The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security; and such proceeds shall be collected as soon as practicable: otherwise the executor, administrator or collector shall be answerable for the same. (Rev., s. 65; Code, s. 1413; 1893, c. 346, s. 2; 1868-9, c. 113, s. 21.)

Provisions Peremptory.—The provisions of this section are peremptory and leave no discretion in the representative. Hence a noncompliance with them renders him liable. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188.

What "Real Estate" Includes.—The "real estate" which the representative is authorized to lease under this section has reference to leasehold estates which belonged to the decedent. Reeves v. McMillan, 101 N. C. 479, 7 S. E. 906; Lee v. Lee, 74 N. C. 70.

Mere Bond Not Sufficient.—Taking no other security than the bond of the purchaser constitutes gross laches on the part of the representative. Roseman v. Pless, 65 N. C. 374, 375.

The amount and kind of security to constitute "good security" within the meaning of this section, differs in selling on short credit and in making a permanent investment. Camp v. Smith, 68 N. C. 537, 541.

§ 72. Hours of public sale; penalty.—All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares, and merchandise may be continued until the hour of ten o'clock p. m. provided, a certain hour for such sales shall be named and the sale shall begin without [within] one hour after the time fixed, unless postponed as provided by law, or delayed by other sales; and every executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same. (Rev., s. 66; Code, s. 1414; 1893, c. 346, s. 3; 1868-9, c. 113, s. 22; 1927, c. 19.)

Editor's Note.—The part of this section which provides for forfeiture, must be construed strictly in accordance with the meaning of the words employed, and must not be extended by implication or construction when the act to be penalized does not clearly fall within the spirit and letter thereof. See Alexander v. Atlantic, etc., R. Co., 144 N. C. 93, 56 S. E. 697.

The proviso as the hours designated was added by the Public Laws of 1927. The word appearing in brackets was inserted by the Editors as it is believed that it expresses the legislative intent.

Object of Section.—This section was enacted to provide a way for the representative to relieve himself of liability, and realize something from the choses in action which were not collectible but which might have some prospective value. Odell v. House, 144 N. C. 647, 57 S. E. 395.

Application to Private Sales.—The provisions of this section do not apply to private sales. Odell v. House, 144 N. C. 647, 57 S. E. 395.

Provisions Peremptory.—The provisions of this section are peremptory and leave no discretion in the representative. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188. But for qualification to this rule, see annotations to section 68.

As to validity of selling at private sale, see annotations to section 68.

§ 73. Debts uncollected after year may be sold; list filed.—Every executor, administrator and collector, at any time after one year from the grant of letters, is authorized to sell at public auction, in the manner prescribed in this chapter, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets. (Rev., s. 67; Code, s. 1412; 1868-9, c. 113, s. 20.)

Editor's Note.—This section is merely directory in two respects: (1) In that the representative under it is merely empowered and not directed to sell; (2) in that a purchaser from the representative at a sale made not in compliance with the terms of the statute e. g., a private sale, nevertheless gets good title. See Odell v. House, 144 N. C. 647, 57 S. E. 395.

Purpose of Statute.—This section was enacted to provide a way for the administrator to relieve himself of liability and at the same time realize something on incollectible debts. Odell v. House, 144 N. C. 647, 57 S. E. 395.

Good Faith as to Insolvency.—A finding that the representative sold some of the assets belonging to the estate believing them to be insolvent, will discharge him from liability although they were in fact collectible assets. Weisel v. Cobb, 118 N. C. 11, 22, 24 S. E. 782.

Art. 13. Sales of Real Property

§ 74. Sales of realty ordered, if personalty insufficient for debts.—When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent. When there is dower or right of dower in the land petitioned to be sold as aforesaid, the person entitled thereto shall be made a party to said proceeding, and on a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, at her election, the value of her annuity of six per cent, on such third, during her probable life or expectancy, shall be ascertained and paid to her absolutely out of the proceeds: Provided, that nothing herein contained shall be construed to deprive the widow from claiming her dower by metes and bounds in her husband's land.

Proceedings for the sale of the real estate of a decedent brought by his personal representative to create assets with which to pay debts must be instituted in the county where the land or some part thereof lies. If the land to be sold consists of one or more contiguous tracts lying in more than one county or consists of two or more separate tracts lying in different counties, proceedings may be instituted in any county in which a part of the land is situate, and the court of such county wherein the proceedings for sale are first brought shall have jurisdiction to proceed to a final disposition of said proceedings as if all of said land were situate in the county where the proceedings were instituted. Where the land to be sold consists of one or more contiguous tracts lying in more than one county, said land shall be advertised in all counties in which any part of said land lies, but the sale shall be conducted at the courthouse door of the county in which the proceeding

was instituted. Where the land consists of two or more distinct tracts lying in different counties, each tract shall be advertised in and sold at the courthouse door of the county in which it lies. Certified copies of the proceedings under the seal of the court of the county in which the proceedings were instituted, together with certified copies of the letters testamentary or letters of administration of the personal representative, shall be filed in the office of the clerk of superior court of each county wherein any part of the land lies and shall be recorded in the record of orders and decrees in special proceedings in said office. (Rev., s. 68; Code, s. 1436; 1868-9, c. 113, s. 42; 1923, c. 55; 1935, c. 43.)

Cross Reference.—For a discussion of the effect that a proposed statute of intestate succession would have on this section, see article in 11 N. C. Law Rev. 266, 279.

Editor's Note.—The provisions relating to the widow's dower were inserted by the Public Laws of 1923, ch. 55.

The amendment of 1935 added the last paragraph of the section relating to venue in case of sale.

Rule Prior to This Section.—Before the enactment of this section the lands of the decedent could not be sold for the payment of his debts upon which a judgment **quando** had been rendered against the administrator. But this section changed this rule. Wilson v. Bynum, 92 N. C. 718.

Nature of Authority. — The authority of the representative under this section is a naked power without title or interest in the estate. He is a mere agent of the court. Floyd v. Herring, 64 N. C. 409, 411.

Land Not Assets until Sold.—Lands are not assets for the payment of the debts until they are sold and the proceeds received by the administrator. Wilson v. Bynum, 92 N. C. 718, 723.

Correlation of This and Section 77.—The provisions of this section and section 77 hinge upon each other. Hence even where it is admitted that a substantial compliance was made with the provisions of the latter section, still it must appear under the provisions of this section that there is an unsettled indebtedness which cannot be paid out of the assets. Clement v. Cozart, 107 N. C. 695, 697, 700, 12 S. E. 254.

May Be Compelled to Sell.—Upon failure of the personal representative to apply for the sale of the lands for the payment of the debts, he may either be compelled by the clerk to do so or the creditor may file a creditor's bill. Whether he will be held liable on his bond for such failure, is a quaere. Wilson v. Bynum, 92 N. C. 718; Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763; Pelletier v. Saunders, 67 N. C. 261; Clement v. Cozart, 109 N. C. 173, 181, 13 S. E. 862; Hobbs v. Cashwell, 152 N. C. 183, 67 S. E. 495; Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

Who May Sell.—The personal representative is the proper party to sell the homestead of deceased for distribution. Tarboro v. Pender, 153 N. C. 427, 69 S. E. 425, 636.

He has, however, no concern with the realty until a situation justifying a sale thereof under this section exists. Coggins v. Flythe, 113 N. C. 102, 119, 18 S. E. 96; Gilchrist v. Middleton, 108 N. C. 705, 715, 13 S. E. 227.

Amount of Realty Which May be Sold.—This section authorizing the sale of the lands of a decedent is in derogation of the common law and hence the Courts will not deny to an administrator the discretion of selling less land than is ordered to be sold if necessity should not arise for such sale; and, conversely, the administrator will be allowed to continue to sell lands embraced in the license so long as the necessity to raise assets exists. Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797.

Personalty Must Be First Applied. — While the lands may be sold where the personal estate is insufficient, the general rule is that the personalty must be first applied before resorting to the realty; and this, even though the debts are secured by mortgage on realty. Mahoney v. Stewart, 123 N. C. 106, 31 S. E. 384; Sanderson v. Overman, 98 N. C. 235, 3 S. E. 502; Mosely v. Mosely, 192 N. C. 243, 134 S. E. 645, and cases cited; Wadfod v. Davis, 192 N. C. 484, 135 S. E. 353.

Under this section an administrator has the right, and it becomes his duty under certain conditions, to apply for license to sell the real estate of his intestate to make assets with which to pay debts, but it is necessary that the personal property shall first be exhausted. When this has been done and it has been ascertained that the personalty is insufficient to discharge the debts, resort may be had to the realty. The personalty, however, is always the primary fund for the payment of debts. Parker v. Porter, 208 N. C. 31, 34, 179 S. E. 28.

If the personalty has been wasted by the representative, his successor must first resort to his bond before proceeding against the lands. Lilly v. Wooley, 94 N. C. 412; Clement v. Cozart, 107 N. C. 695, 12 S. E. 254. Though not where the former is insolvent, his bond lost, and sureties unknown. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Application of Personal Assets. — This section construed in connection with the second clause of section 79, confers upon the representative the duty and the power to apply for license whenever the insufficiency of personalty, whether before or after an actual application thereof, can be shown. Shields v. McDowell, 82 N. C. 137, 140; Blount v. Pritchard, 88 N. C. 445; Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254. See post, section 79.

The cases of Wiley v. Wiley, 63 N. C. 182, and Bland v. Hartsoe, 65 N. C. 204, which contain expressions that no authority exists to decree a sale until the personal estate is actually exhausted, are distinguished in Shields v. McDowell, supra, and the true rule is announced to be that the mere showing of the insufficiency of the personal estate without showing its actual application is sufficient.

Debts Barred. — But a representative cannot sell land to pay debts barred. Robinson v. McDowell, 133 N. C. 182, 45 S. E. 545; and, to an application for license to sell for the payment of debts upon which **no judgment is obtained** the heirs or devisees may plead the statute of limitations or any other defense. Bevers v. Park, 88 N. C. 456; Syme v. Riddle, 88 N. C. 463; Proctor v. Proctor, 105 N. C. 222, 10 S. E. 1036; Speer v. James, 94 N. C. 417, 418; Person v. Montgomery, 120 N. C. 111, 26 S. E. 645.

But if a judgment has been previously obtained for such debt the heirs or devisees are concluded thereby (except where fraud and collusion can be shown) and they **cannot** now plead any defense which could be, but was not plead by the representative. Long v. Oxford, 108 N. C. 280, 13 S. E. 112. See also, Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211; Lassiter v. Upchurch, 107 N. C. 411, 12 S. E. 63; Proctor v. Proctor, 105 N. C. 222, 10 S. E. 1036; Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701; Smith v. Brown, 101 N. C. 347, 7 S. E. 890. (But see contra, Person v. Montgomery, 120 N. C. 111, 26 S. E. 645; apparently contra, Tilley v. Bivins, 112 N. C. 348, 16 S. E. 759.)

Even in such a case, however, the heirs or devisees may show that the personalty has not been administered, or remedies against representative's bond for **devastavit** have not been exhausted. Smith v. Brown, supra.

Removal to Proper County. — A petition filed in the wrong county may, upon application, be removed to the proper county. See Manufacturing Co. v. Brower, 105 N. C. 440, 11 S. E. 313.

"May Apply to Superior Court, etc." — The phrase "may * * * apply to the superior court" as used in this section means **"shall** apply to the **clerk** of that court." Pelletier v. Saunders, 67 N. C. 261. It is the duty of the representative to apply. Clement v. Cozart, 109 N. C. 173, 13 S. E. 862. But the jurisdiction of the **clerk** is not exclusive. The order of sale may be obtained from the **judge** of the superior court. Johnson v. Futrell, 86 N. C. 122. Doubtful expression as to the soundness of this last announced rule is found in Moore v. Ingram, 91 N. C. 376.

"At Any Time."—The phrase "at any time" presupposes an application without undue delay. Pelletier v. Saunders, 67 N. C. 261; Clement v. Cozart, 109 N. C. 173, 13 S. E. 862.

Same — Homestead of Minors. — But the homestead of a minor child of a testator cannot be sold **durante minoriate** of such child. Bruton v. McRea, 125 N. C. 206, 34 S. E. 397; Hinsdale v. Williams, 75 N. C. 430. The child, however, who was made a party must have claimed homestead rights, otherwise he cannot subsequently claim as against the purchaser of the land. Dickens v. Long, 112 N. C. 311, 17 S. E. 150.

Proper Venue. — The proper venue to make the application provided by this section, is the superior court of the county where the land or some part thereof is situated. Ellis v. Adderton, 88 N. C. 472, 477.

County in Which Application Must Be Filed. — It is in the Superior Court of the county where the land or some part thereof lies, and not in the Superior Court of the county where the decedent was domiciled and administration granted, that the application for sale must be filed. Though formerly it could be filed in the county last referred to. Ellis v. Adderton, 88 N. C. 472, 477.

When Application Filed. — The application may be filed at any time after the administrator ascertains that there is an insufficiency of assets, and before he can possibly convert the personal estate into money and make an ap-

plication of it to the debt. Blount v. Pritchard, 88 N. C. 446.

Notice to Creditors. — No notice to creditors is required to be given under this section. Thompson v. Cox, 53 N. C. 311.

Not Applicable to Executor Authorized to Sell. — The provisions of this section do not apply where the executor has, under the will, full power to sell the realty. It applies only to cases where otherwise the creditor would be compelled to resort to a scire facias against the heirs. Wiley v. Wiley, 61 N. C. 131.

Sale though Parties Not in Esse. — The application for sale may be made notwithstanding the existence of devises to parties not in esse. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

The Federal District Court has jurisdiction of a bill in equity by the United States to subject to payment of a judgment land situated in this state which had descended to the heirs of the judgment debtor, there being no personal assets. United States v. Minor, 254 Fed. 57.

Converting into Creditor's Suit. — When proceedings for the sale of land are instituted under this section by the representative, they cannot be converted into a creditor's suit. Brittain v. Dickson, 111 N. C. 529, 531, 16 S. E. 326.

Presumption of Regularity. — The regularity of the proceedings under this section will be presumed. Wadford v. Davis, 192 N. C. 484, 485, 135 S. E. 353.

Creditor Attacking Debt as Fraudulent. — A judgment creditor of a devisee desiring to attack a debt set forth in the petition to sell land, as being fraudulent must do so in the same proceedings, and not by independent action. Wadford v. Davis, 192 N. C. 484, 135 S. E. 353.

Parties and Their Defenses. — In proceedings to sell land heirs and devisees are necessary parties. They may resist the sale by showing sufficient personal assets, or that the debts are not due by the estate. In such a case the usual course is to refer the matter for determination. Person v. Montgomery, 120 N. C. 111, 113, 26 S. E. 645.

Enforcement by Creditor. — It is only after the personal representative fails to perform his duty to sell the land under this section that the creditor can enforce the sale. Lee v. McKoy, 118 N. C. 518, 525, 24 S. E. 210.

Sale for Secured or Lien Debts. — Even though the debts are secured by a mortgage upon land, they must be paid out of personalty first; and only in the event this latter proves insufficient that a sale of the land under this section is authorized. Moseley v. Moseley, 192 N. C. 243, 134 S. E. 645.

The creditor who has a judgment against the debtor which constitutes a lien upon the land, is not, after the death of the latter, permitted to sell the land under execution. Personalty is the primary source to satisfy the debt, and in case of its insufficiency the sale of the land may be effected by the procedure prescribed in this section. Tuck v. Walker, 106 N. C. 285, 288, 11 S. E. 183; Baker v. Carter, 127 N. C. 92, 94, 37 S. E. 81.

Nature of Proceedings. — A proceeding to sell the land under this section is a special proceeding before the clerk who has original and exclusive jurisdiction of the matter. If, however, equities are involved in the case upon which the superior court acquires jurisdiction of a part, it will determine the whole matter. Baker v. Carter, 127 N. C. 92, 94, 37 S. E. 81.

§ 75. When court may order rental.—Such executor, administrator or collector, in lieu of asking for an order for the immediate sale of real estate, may ask for an order authorizing him to rent out the same for a term of not exceeding three years, and if it appears to the court that the best interests of the heirs at law and devisees of the deceased will be promoted by granting such order and that it is probable that the rents derived from the real estate during the term will be sufficient to pay off and discharge the debts and the costs of the administration, the superior court may, with the consent of the creditors, make such order upon such terms as may be best for the heirs at law, devisees and creditors of the estate; or if it is made to appear to the court that such executor, administrator or collector is able to borrow sufficient money with which to pay off and discharge all valid and just claims against the estate of the deceased, then the court shall have the power to authorize said executor or administrator to borrow money for the purpose of paying off and discharging such claims and authorizing him to rent the real estate for a term not exceeding three years and to apply the rents to the repayment of the money thus borrowed, and the said estate shall be and remain liable for the payment of such sums as may be borrowed under such order of the court to the same extent and no further as the estate was liable for the indebtedness of the deceased to pay off and discharge the debt for which the said sums were borrowed. All orders made by the court pursuant to this section shall be approved by the judge residing in or holding the courts of the district in which such county is situated.

In lieu of renting said property or borrowing on the general credit of the estate, as hereinbefore authorized, the said executor, or administrator, may apply by petition, verified by oath, to the Superior Court, showing that the interest of the beneficiaries of the estate, for which he is executor or administrator, would be materially promoted by mortgaging the said estate, in whole or in part to secure funds to be used for the benefit of said estate, setting out the application to be made of the proceeds of said loan and if all or a part of its creditors have agreed to accept an amount less than the full amount of their debt that fact shall appear, which proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition having been ascertained by satisfactory proof, a decree may thereupon be made that a mortgage be made by such executor, or administrator, in his representative capacity, in such way and on such terms as may be most advantageous to the interest of said estate; but no mortgage shall be made until approved by the judge of the court, nor shall the same be valid unless the order or decree therefor is confirmed and directed by the judge and the proceeds of the mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify: Provided, the proceeds from said sale shall be used exclusively for the discharge of all existing creditors, except such as shall file a writing in said cause agreeing to other terms set out in said writing.

The said executor or administrator shall not mortgage the property of said estate for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" wherever used herein, shall be construed to include "deeds of trust." (Acts 1913, c. 49, s. 1; 1927, c. 222, s. 1.)

§ 76. Lands conveyed by heir within two years sold.—All conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent, shall be void as to the creditors, executors, administrators and collectors of such decedent but such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent, shall be valid even as against creditors. Provided, that if the decedent was a non-resident, such conveyances shall not be valid unless made after two years from the grant of letters. Rev., s. 70; Code, s. 1442; 1868-9, c. 113, s. 105; 1935, c. 355.)

As to who are bona fide purchasers, see Vendor and

Purchaser, 12 N. C. Enc. Dig. 189; Deeds, 4 N. C. Enc. Dig. 435; Lis Pendens, 8 N. C. Enc. Dig. 900.

Editor's Note.—The amendment of 1935 made the limitation begin to run from the death of the decedent rather than from the grant of letters. The proviso as to nonresidents is new.

Only Purchaser without Notice Protected. — Prior to 1869, a purchaser from the heirs after 2 years of the grant of letters, even though **with** notice of the existence of the debts, obtained a good title under this section. Brandon v. Phelps, 77 N. C. 44. It is noteworthy to observe that under the present section he must be a **bona fide purchaser** —without notice. Hooker v. Yellowley, 128 N. C. 297, 38 S. E. 889. For example actual notice of insolvency was held to invalidate purchaser's title. Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351. But a judgment against the representative is not notice of insolvency. Id. Nor proceedings for dower alleging insolvency are such notice. Lee v. Giles, 161 N. C. 541, 77 S. E. 852.

Of course, even a purchaser **with** notice from a purchaser **without** notice shall be protected. Arrington v. Arrington, supra.

Heirs Liable for the Price. — The heirs having sold the land, even after 2 years of the grant of letter, are liable to the creditor for the price received, and for the **whole** price, not for aliquot shares of the debt. Hinton v. Whitehurst, 71 N. C. 66; Davis v. Perry, 96 N. C. 260, 1 S. E. 610; Andres v. Powell, 97 N. C. 155, 166, 2 S. E. 235.

Conditionally Void. — The conveyances under this section, are only conditionally void, i. e., contingent upon the personal estate proving insufficient to pay the debts. Davis v. Perry, 96 N. C. 260, 1 S. E. 610. See also First Nat. Bank v. Zollicoffer, 199 N. C. 620, 623.

Conveyances of real property within two years from the grant of letters are only void as to creditors and personal representatives, and as to them, only in case the personal assets are insufficient to pay the debts and costs of administration; they are not void—they never cease to operate as to the parties to them. Jefferson Standard Life Ins. Co. v. Buckner, 201 N. C. 78, 81, 159 S. E. 1.

Voidable Merely. — A conveyance to a purchaser not for value is not, under this section, ipso facto void, but at the most merely voidable. Gilbert v. Hopkins, 204 Fed. 196, 202.

Purchaser after, from a Purchaser before Two Years. — If the land is sold within the two years, and after the two years have expired resold by the vendee to a purchaser for value without notice, the latter gets good title. Murchison v. Whitted, 87 N. C. 465.

Sale Consummated after Two Years. — But where land is sold for partition within the two years, though the deed is executed after, the conveyance is void. McArtan v. McLauchlin, 88 N. C. 391.

Agreement Consummated after Two Years. — An agreement by the heir for the sale of land, though entered into before the expiration of two years, if consummated **after** such time is valid as against creditors of the estate. Donoho v. Patterson, 70 N. C. 649.

To What Extent Purchaser Protected. — The purchaser for value contemplated by this section is, with respect to consideration paid by him, to be assimilated to a purchaser for value under the statute of 13 Eliz.; (N. C. Code of 1927, section 1009) viz. he need not have paid all of the purchase money. The test of "purchaser for value" is not the same under this section with the test in certain equity cases where the purchaser is protected **pro tanto,** i. e., to the extent of his payment before he receives notice. Arrington v. Arrington, 114 N. C. 151, 166, 19 S. E. 351. Hence even a purchaser upon credit is a "purchaser for value." Arrington v. Arrington, supra; Beasley v. Bray, 98 N. C. 266, 3 S. E. 497.

Deed of trust creditor is a purchaser for value within the meaning of this section. Francis v. Reeves, 137 N. C. 269, 272, 49 S. E. 213.

A deed conveying the timber on the land descended falls within the perview of this section. Camp Mfg. Co. v. Liverman, 128 N. C. 52, 38 S. E. 27.

§ 77. Lands conveyed in fraud of creditors sold.—The real estate subject to sale under this chapter shall include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interest in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud. (Rev., s. 72; Code, s. 1446; 1868-9, c. 113, s. 51.)

For fraudulent conveyances, see section 1005.

Conveyance Must Be by the Deceased. — Where A in embarrassed circumstances purchased land from B, and caused A to convey to his (B's) son, it was held that the land could not be sold for the payment of A's debts. Rhem v. Tull, 35 N. C. 57.

Conveyance to Wife and Children. — Property conveyed by the decedent to his wife and children without consideration in fraud of his creditors while insolvent may, under this section be recovered and sold by the administrator on behalf of the creditors. Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949; Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737.

Relation of Section 74 to This Section. — The provisions of this and section seventy-four hinge together. Hence a compliance with both is necessary. Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254.

Conveyance Must Be in Fraud of Creditors. — Under this section lands conveyed cannot be sold unless it can be shown that they were conveyed in fraud of creditors. McCaskill v. Graham, 121 N. C. 190, 28 S. E. 264.

Innocent Purchasers Protected. — Under this section an administrator cannot be compelled to sell property fraudulently conveyed and in the hands of an innocent purchaser. Harrington v. Hatton, 129 N. C. 146, 39 S. E. 780.

§ 78. Effect of bona fide purchase from fraudulent grantee.—When an executor, administrator or collector files his petition to sell lands which have been fraudulently conveyed, and of which there has been a subsequent bona fide sale, whereby he cannot have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against all persons who may have fraudulently purchased the same; and if the whole recovery is not necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made. (Rev., s. 73; Code, s. 1447; 1868-9, c. 113, s. 52.)

§ 79. Contents of petition for sale.—The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained:

The Purpose of Requisites in Application. — The personal estate, in law, is the primary fund and land is the secondary fund for the payment of debts, and the design of the act giving authority to the personal representative to sell and administer on the proceeds of lands in the requisites prescribed to a petition for a license to sell, evidently is to inform the Court of the condition of the estate with reference to its debts and the value and application of the personal estate, so that it may be seen that the personal estate is insufficient to pay the debts. If a petition be drawn in accordance with these requirements so as to show the insufficiency of the personal fund, the necessity to resort to the real estate to supply the deficiency will then be apparent. Shields v. McDowell, 82 N. C. 137, 139.

As the purpose of this section is to enable the court to see whether a sale is necessary, a petition which simply states that the personal estate "is wholly insufficient to pay intestate's debts," without setting forth the value of the personal estate, is defective. McNeill v. McBryde, 112 N. C. 408, 411, 16 S. E. 841.

Statement "as Far as Can Be Ascertained."—The main and essential fact to be stated in the petition is, that there is an insufficiency of assets to pay the debts, and that the court may know this, the statute requires a statement of the amount of the debts and the value of the personal estate; but these statements are not required to be made with exact particularity, but only "as far as can be ascertained," for these quoted words used in this section, according to grammatical construction qualify each of the sub-divisions of this section. Blount v. Pritchard, 88 N. C. 446, 448.

Indebtedness Must Be Ascertained. — The fact that this section requires an oath to be made implies that the indebtedness ought to be ascertained, approximately at least, to show the necessity of a resort to the land. Williams v. McNair, 98 N. C. 332, 336, 4 S. E. 131, 133.

The petition must show by a direct allegation or by implication the requirements of this section. Clement v.

Cozart, 107 N. C. 695, 697, 12 S. E. 254; Shields v. McDowell, 82 N. C. 137.

Burden of proof that the conveyance was fair and for a full consideration is upon the grantee. Webb v. Atkinson, 122 N. C. 683, 689, 29 S. E. 949.

Fraudulent Grantee's Rights as Creditor.—Where the wife is the fraudulent grantee and the creditor of her husband, in proceedings to set aside the conveyance to her, under this section, she is entitled to her pro rata claim out of the proceeds of the land the same as the other creditors are. Nadal v. Britton, 112 N. C. 188, 16 S. E. 915.

Salable Interest.—Every interest in real estate, whether legal or equitable is subject to sale. Mannix v. Ihrie, 76 N. C. 299; Waugh v. Blevins, 68 N. C. 167.

Only Debtor's Interest Subject to Sale.—Under this section only the interest of the deceased debtor in land which he may have conveyed in fraud of creditors, is subject to sale. Heck v. Williams, 79 N. C. 437; Egerton v. Jones, 107 N. C. 284, 290, 12 S. E. 434.

The petition need not show that the bond of the former administrator was sued on and exhausted. Monger v. Kelly, 115 N. C. 294, 20 S. E. 374. But see, Lilly v. Wooley, 94 N. C. 412; Clement v. Cozart, 107 N. C. 695, 12 S. E. 254, which declare that such bond must have been exhausted.

Allegation that the assets of the decedent are insufficient to pay the debts, and that a sale of property fraudulently conveyed is necessary, is held sufficient. Sullivan v. Field, 118 N. C. 358, 24 S. E. 735.

A petition which fails to state the value of the personal estate and the application thereof is defective and demurrable. McNeill v. McBryde, 112 N. C. 408, 16 S. E. 841. But see Blount v. Pritchard, 88 N. C. 445, where it is said that license may be granted even where there has been no application of the personalty, though where there **has** been an application the petition must so state.

Verification of Application.—In Stradley v. King, 84 N. C. 635, where the application for the sale of land was not verified by the administrator's oath, and the guardian for the infant defendant had not answered, the court said with regard to verification: "While we consider the statutory requirement that the petition for an order of sale of the decedent's lands shall be supported by oath and that an answer be put in on behalf of infant defendants, directory, and its nonobservance not fatal to the validity of the decree of sale made without, yet this departure from the statute, followed by the precipitate action of the Court in confirming the sale on the very day when it was reported and without opportunity afforded for objection, in our opinion warrants the order which reopens the case for such defenses as the infant defendants may be able to set up."

1. The amount of debts outstanding against the estate.

2. The value of the personal estate, and the application thereof.

3. A description of all the legal and equitable real estate of the decendent, with the estimated value of the respective portions or lots.

4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent. (Rev., s. 77; Code, s. 1437; 1868-9, c. 113, s. 43.)

§ 80. Heirs and devisees necessary parties.—No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law: Provided, that in any proceedings for the sale of land to make assets, when there are heirs of said decedent, or there may be heirs of said decedent whose names and residences are unknown, and it is desired to make all unknown heirs of said decedent parties to said proceedings, and the personal representative shall make such representation in his petition, then all unknown heirs of the said decedent shall be made party defendants in the same as the unknown heirs of said decedent naming him, and as thus denominated and under this name all said unknown heirs shall be served with summons by publication as now regularly provided by law for Superior Court, and upon such service being had, the service of summons by publication in the court shall appoint some discreet person as guardian ad litem, for said unknown heirs, and summons shall issue to him as such. Said guardian ad litem shall file answer for said unknown heirs, and defend for them, and he may be paid such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem, all said unknown heirs shall be before the court for the purposes of the action to the same extent as if each had been served with summons by name, and any claim that they may make to said real estate so sold shall be transferred to the funds in the hands of the personal representative to the same extent as other distributees of said estate and no further. This proviso shall apply to actions now pending, and all the proceedings to sell land for assets heretofore had, where unknown heirs have been summoned by publication, are hereby validated. (Rev., s. 74; Code, s. 1438, c. 113, s. 44; 1924, c. 3, s. 1.)

Editor's Note.—The proviso with regard to method of service of process upon unknown heirs, and the appointment of guardian ad litem to represent them, was introduced by the amendment of 1924, ch. 3, sec. 1.

"It has been held by the Supreme Court that generally the designation of the parties to an action as 'the heirs of M.' is insufficient. Kerlee v. Corpening (1887), 97 N. C. 330, 2 S. E. 664. Provision has been made for the joinder of unknown parties in a special proceeding for partition, C. S., secs. 3218, 3245; Thompson v. Rospigliosi (1913), 162 N. C. 145, 77 S. E. 113, and for the sale of estates subject to contingent interest, C. S., sec. 1744; Ryder v. Oates (1917), 173 N. C. 569, 92 S. E. 508, and this amendment makes the same practice apply in the sale of land for assets. The Code of Civil Procedure provides for the service of summons by publication upon unknown parties who are interested in real estate as the subject of a civil action, and in actions to foreclose mortgages on real estate; C. S., sec. 484, 6, 7, and the same rules of procedure apply in special proceedings; C. S., sec. 752, so that the case of unknown parties seems to be provided for under the general law. It places the question beyond controversy, however, to have it specially provided for in the cases mentioned." 3 N. C. L. R. 15.

All Heirs Necessary Parties.—An heir who was not made a party, or served, may subsequently assail the validity of the decree and proceed against the purchaser. Dickens v. Long, 109 N. C. 165, 13 S. E. 841. See also, Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949.

As to him, whether he be an adult or an infant, the decree is absolutely void, not merely voidable, and can be collaterally attacked. Card v. Finch, 142 N. C. 140, 54 S. E. 1009. Harrison v. Harrison, 106 N. C. 282, 11 S. E. 356. Nor would the fact that he had knowledge of the sale and took no steps to prevent cure the lack of service. Id.

Applies to Infant Parties as Well.—This section applies to making heirs and devisees parties, as well as adults. Perry v. Adams, 98 N. C. 167, 3 S. E. 729; Stancill v. Gay, 92 N. C. 462; Harrison v. Harrison, 106 N. C. 282, 283, 11 S. E. 356.

§ 81. Adverse claimant to be heard.—When the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly. (Rev., s. 76; Code, s. 1441; 1868-9, c. 113, s. 47.)

Issue as to Title.—Where the order of sale is granted without determining an issue of title raised under this section, the order is void, and the title of the purchaser with notice of such issue is voidable. Perry v. Peterson, 98 N. C. 63, 3 S. E. 834.

Any person who claims to be the owner of the land has the right to be made a party and to have an inquiry made as to his title. Gibson v. Pitts, 69 N. C. 155.

Claims of Undivided Interest.—One who claims an undivided interest in lands sought to be sold to pay debts, may be properly made a party to the proceedings. McKeel v. Holloman, 163 N. C. 132, 79 S. E. 445.

§ 82. Upon issues joined, transferred to term.—When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings. (Rev., s. 78; Code, s. 1440; 1868-9, c. 113, s. 46.)

Issue of Law Submitted to Judge.—Where a demurrer is filed to the petition filed before the clerk, the issue of law thereby raised must, under this section, be certified to the judge at chambers. Then the judge must transmit his decision thereon to the clerk; it is error for him to direct an order of sale after overruling the demurrer. Jones v. Hemphill, 77 N. C. 42.

Procedure.—The rulings or decisions of the clerk must be transferred for trial to the next succeeding term of the Superior Court, if determinative issues arise on the pleadings; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, or appeal taken. In passing upon these questions of fact, the court may act on the evidence already received, or may require the production of other evidence. Mills v. McDaniel, 161 N. C. 112, 76 S. E. 551.

§ 83. Order granted, if petition not denied.—As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegation in the petition are not denied or controverted, shall have power to hear the same summarily, and to decree a sale. (Rev., s. 79; Code, s. 1443; 1868-9, c. 113, s. 48.)

Capacity of the Clerk.—The clerk of the Superior Court, for the purpose of decreeing a sale in case provided by this section represents and is the court, and has authority to exercise the discretionary powers conferred. Tillett v. Aydlett, 90 N. C. 551, 553.

§ 84. Notice of sale as on execution.—Notice of sale under this proceeding shall be the same as for the sale of real estate by sheriffs on execution: Provided, however, that in case a re-sale of such real property shall become necessary under such proceeding, that such real property shall then be re-sold only after notice of re-sale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the re-sale and also published at any time during such fifteen day period once a week for two successive weeks of not less than eight days in some newspaper published in the county, if a newspaper is published in the county, but if there be no newspaper published in said county the notice of re-sale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the re-sale. (Rev., s. 81; Code, s. 1445; 1868-9, c. 113, s. 50; 1933, c. 187.)

Editor's Note.—All of the proviso, now appearing in this section, was added by Public Laws 1933, c. 187.

§ 85. Court fixes extent and terms; title on confirmation.—The court may decree a sale of the whole or any specified parcel of the premises in such a manner, as to size of lots, place of sale, terms of credit, and security for payment of purchase money, as may be most advantageous to the estate, and may also authorize and empower the petitioner or any commissioner appointed by the court to subdivide the land in question, or any part thereof, in such manner as he may deem proper and for the best interest of the state, and in making such division, to dedicate to the public such parts thereof as he may find necessary for public streets, alleys and highways, and to sell such premises, either in bulk or in separate lots, with such streets, alleys, and highways excepted or reserved; but no sale, whether public or private, shall be concluded until reported to and approved and confirmed by the court. When any order for a public sale hereunder has been made or may hereafter be made by the court and the personal representative of a decedent, a commissioner or any other person is or has been appointed by the court to make such sale the provisions of section 2591 shall apply and the provisions of section 763 shall not apply. Upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. (Rev., s. 80; Code, s. 1444; 1868-9, c. 113, s. 49; 1917, c. 127, s. 1; 1935, c. 72.)

Editor's Note.—The 1935 amendment inserted the next to the last sentence of the section relating to the nonapplicability of section 2591.

Discretion. — This section confers upon the court a large power of discretion; but this discretion as to the quantity to be sold and the manner of selling is not an arbitrary one, but a sound legal discretion. Tillett v. Aydlett, 90 N. C. 551; Tillett v. Aydlett, 93 N. C. 15.

When Entitled to Possession.—The purchaser is not entitled to an order for possession if the defendants are not in possession when the order of sale is made. Macon v. Wyatt, 117 N. C. 129, 23 S. E. 169.

Confirmation Necessary.—Before a purchaser at a judicial sale can be held to his bid, the sale must be confirmed by the court, and then in the same proceedings a rule issued to show cause why he should not be compelled to comply with his bid. An independent action for damages does not lie against him. Hudson v. Cobb, 97 N. C. 260, 1 S. E. 688.

Conversely, the purchaser acquires no rights under such sale until confirmation—until then he being considered as a mere proposer. The bid may be rejected in the sound discretion of the court at any time before confirmation. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232.

Confirmation of the sale is a condition precedent to the exercise of the executor's right to convey title. Joyner v. Futrell, 136 N. C. 301, 47 S. E. 649.

Confirmation is also necessary to divest the title out of the party applying for the order of sale, and to validate the commissioner's deed to the purchaser. Foushee v. Durham, 84 N. C. 56.

Inadequacy of the bid or its being for the benefit of the administrator, warrant the exercise of the discretion to reject the bid. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232; Shearin v. Hunter, 72 N. C. 493.

After Confirmation.—After the confirmation of the sale, however, the jurisdiction of the court is at an end, and the biddings under such sale may not be opened. Thompson v. Cox, 53 N. C. 311, 312. Nor can the order to collect and make title be revoked. Evans v. Singletary, 63 N. C. 205.

Nor can the decree be collaterally attacked after confirmation of the sale; for it then becomes final and can only be assailed, in the absence of substantial irregularity, in a direct and independent proceeding. McLaurin v. McLaurin, 106 N. C. 331, 10 S. E. 1056; Coffin v. Cook, 106 N. C. 376, 11 S. E. 371.

Unsigned Decree of Sale.—It is not essential to the validity of the decree that it should be signed. Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797.

Decree Not Conclusive of Debts.—The decree of the sale is not conclusive of the debts recited by the personal representative in his application for the sale of the land. Latta v. Russ, 53 N. C. 111.

Setting Aside Decree and Confirmation.—A decree and confirmation of sale will not be set aside as against bona fide purchasers, at the instance of infant heirs not served with process, if not made within a reasonable time, and in the absence of a valid defense to the sale. Glisson v. Glisson, 153 N. C. 185, 69 S. E. 55.

After decree of sale and the confirmation the judgment is final and can only be set aside in a direct proceeding for that purpose. Smith v. Gray, 116 N. C. 311, 21 S. E. 200.

Recital of Authority in the Deed.—When the representative exercises the power of sale conferred under an order of the court, but fails to recite in the deed the source of his authority, the implication is that he exercised the power so conferred. Coffin v. Cook, 106 N. C. 376, 11 S. E. 371.

§ 86. Court may order private sale; terms; sale

reopened.—If it is made to appear to the court by petition and by satisfactory proof that it will be more for the interest of said estate to sell such real estate by private sale, the court may authorize said petitioner, or any commissioner appointed by the court, to sell the same at private sale, either in whole or in part, for cash in hand, or upon deferred payments, with interest from date of sale, in such a manner as to size of lots, place of sale, terms of credit and security for payment of purchase money as shall be fixed in the order of sale, and if upon a time sale the deferred payments to be secured by mortgage or deed of trust upon the property, or by the retention of the title thereto until the purchase money is paid. When any order for private sale has been or may hereafter be made by any superior court of the state, the provisions of section 2591, chapter, Mortgages and Deeds of Trust, not inconsistent with this section shall apply; and the court may also, upon motion of any person interested in the proceeds of such sale, filed in writing within ten days from the date and report of said sale, together with satisfactory proof that said real property has not been sold for its real value, require the sale to be reopened, and thereupon the court may issue an order for the sale of such premises at public sale, as required by section 2591, chapter, Mortgages and Deeds of Trust, and in such order the court may require such premises to be sold in such parcels and on such terms as to the court may seem most advantageous to the estate. (1917, c. 127, s. 2; 1927, c. 16.)

See annotation under the preceding section.

Editor's Note. — The Public Laws of 1927 c. 16, omitted from this section the restriction limiting deferred payments to a period of two years, and added the provision as to the manner of sale.

§ 87. Undevised realty first sold.—When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator. (Rev., s. 69; Code, s. 1430; 1868-9, c. 113, s. 39.)

Principle applied in Camp Mfg. Co. v. Liverman, 123 N. C. 7, 31 S. E. 346.

Will Not Be Disturbed. — By virtue of this section a decree for the sale of the land should direct a sale in such a way as to disturb as little as practicable the will of the testator. Tillett v. Aydlett, 90 N. C. 551, 553.

§ 88. Specifically devised realty; contribution.—If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution. (Rev., s. 86; Code, s. 1535; 1868-9, c. 113, s. 107.)

§ 89. Under power in will, sales public or private.—Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein. (Rev., s. 84; Code, s. 1503; 1868-9, c. 113, s. 75.)

§ 90. Where executor with power dies, power executed by survivor, etc.—When any or all of the executors of a person making a will of lands to be sold by his executors die, fail or for any cause refuse to take upon them the administration; or, after having qualified, shall die, resign, or for any cause be removed from the position of executor; or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors as survive or retain the burden of administration, or the administrator with the will annexed, or the administrator de bonis non, may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold. (Rev., s. 82; Code, s. 1493; 1889, c. 461.)

Effect of Section on Common Law Rule.—At common law an executor had no control over realty, and hence a power conferred upon him by the will to sell the realty did not pass upon his death to the administrator d. b. n. c. t. a. But this section has changed the common law rule in this respect. Creech v. Grainger, 106 N. C. 213, 219, 10 S. E. 1032.

Sale by Administrator c. t. a.—The case of an administration with the will annexed where no executors were appointed is (at present) both within the letter and the spirit of this section. Hence where a testator empowers his executor to sell lands, but fails to designate any executor, the administrator c. t. a. can, under this section exercise that right. Hester v. Hester, 37 N. C. 330, 339.

Waiving Condition of Option.—Under this section, one of the two executors may not, in the absence of express power, waive the condition of time of an option given by them for the purchase of lands. Trogden v. Williams, 144 N. C. 192, 204, 56 S. E. 865.

Applied to sale by administrator c. t. a, and administrator d. b. n. c. t. a. in Saunders v. Saunders, 108 N. C. 327, 331, 12 S. E. 909; Orrender v. Call, 101 N. C. 399, 7 S. E. 878. Applied to sale by surviving executor in Simpson v. Simpson, 93 N. C. 373.

§ 91. Death of vendor under contract, representative to convey.—When any deceased person has bona fide sold any lands, and has given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract has been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: Provided, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract. (Rev., s. 83; Code, s. 1492; 1868-9, c. 113, s. 65; 1874-5, c. 251.)

Editor's Note.—Before the enactment of this section, the **heirs** of the vendor were the proper persons on whom the purchaser had the right to call for the conveyance. See Earle v. McDowell, 12 N. C. 16. Osborn v. McMillan, 50 N. C. 109; Twitty v. Lovelace, 97 N. C. 54, 2 S. E. 661.

Formerly this section applied only to cases where the vendor had executed a **bond**. It did not extend to agreements to convey made upon other considerations. Hodges v. Hodges, 22 N. C. 72.

Registration and Payment Prerequisites.—Unless the contract for the sale is proved and registered and the purchase money is paid in full, a deed made by the representative is inoperative. Taylor v. Hargrove, 101 N. C. 145, 7 S. E. 647.

Not Applicable to Restore Lost Deeds.—This section does

not apply to cases where a deed is executed in performance of the condition of the bond to convey, but is lost after the death of the vendor and before its registration. Hodges v. Hodges, 22 N. C. 72.

Equitable Defense Against Bond.—Where the representative in compliance with this section executes the deed to the purchaser, any equitable defense against the bond may be set up against such deed. McCraw v. Gwin, 42 N. C. 55.

Remedy of Heirs for Purchase Money. — It was formerly held that the heirs may not enjoin the representative from making a deed, upon the ground that the purchase money had not been paid. Their remedy is to call the representative to account for the money, or call for specific performance of the contract. White v. Hooper, 59 N. C. 152, 154. (But now see the proviso at the end of section.)

Showing of Consideration.—The person claiming under the contract must, under this section, show that there was a valuable consideration therefor, and such other circumstances as would be equivalent to a payment of that consideration. Lindsay v. Coble, 37 N. C. 602.

Heirs as Necessary Parties.—In an action brought by the personal representative of an obligor in a bond for title to subject the land to the payment of the purchase money, the heirs of the obligor are necessary parties. But if the bond referred to in this section is proved and registered and the section has been complied with, in proceedings for the sale of such land the presence of the heirs is perhaps, not necessary. Grubb v. Lookabill, 100 N. C. 271, 6 S. E. 390.

Bilateral Contracts Contemplated. — This section contemplates only contracts of conveyance of a **bilateral** nature. Hence where the optionee of a vendor dies before the option is exercised the representative has under this section, no power to convey; and the optionee's remedy is against the heir or the devisees. Mizell v. Dennis Simmons Lumber Co., 174 N. C. 68, 93 S. E. 436.

Warranty of Title. — This section empowers the representative to convey only such interest as the vendor could sell. Hence where the vendor contracts to sell **his interest** in the land, the representative cannot be expected to warrant the title of the land. Twitty v. Lovelace, 97 N. C. 54, 2 S. E. 661.

Deed Inoperative. — A deed executed by the representative before the contract for sale has been proven and registered and the purchase money paid in full, is inoperative. Taylor v. Hargrove, 101 N. C. 145, 7 S. E. 647.

Cited in Sears v. Braswell, 197 N. C. 515, 149 S. E. 846.

§ 92. Title in representative for estate, he or successor to convey.—When land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; which sale shall be public, after due advertisement, as for judicial sales, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his life or term of office, his successor may sell and convey such land as if the title had been made to him: Provided, if the predecessor has contracted in writing to sell said lands, but fails to convey same, his successor in office may do so upon payment of the purchase price. (Rev., s. 71; 1905, c. 342.)

§ 92(a). Validation of sales of real estate made in good faith to obtain assets to pay debts.—In all cases where real property devised upon contingent remainder, executory divise, or other limitation, shall have been sold and conveyed for a fair price in good faith by the executor named in said will, or by an administrator with the will annexed, for the purpose of making assets with which to pay the debts of said estate, under the mistaken belief that said will authorized such sale, and the proceeds of such sale shall have been applied to the payment of the indebtedness of such estate, and it shall be made to appear in any action brought by the purchaser of said land, or those claiming under such purchaser, that such executor, or other personal representative would have been entitled in a proper proceeding brought for that purpose to an order of court to sell said land for the purpose of making assets with which to pay the indebtedness of such estate, then such sale so made by such executor, or other representative, shall be valid and binding upon all such contingent remaindermen, executory devisees, or other person, who would have taken such property under said will upon the contingency or contingencies therein mentioned, notwithstanding said sale shall have been made by such executor or other personal representative without obtaining such order of the court. And in any such action instituted by the purchaser of such land, or those claiming under him, for the purpose of removing a cloud from the title thereto all contingent remaindermen, executory devisees, or other persons entitled to claim under any limitation in said will, if in being, and known to be residents of this state, shall be made parties defendant to such action, and served with summons as in other civil actions; all nonresidents, or persons whose names and residences are unknown, shall be served with summons by publication as now required by law, or such service in lieu of publication as now provided by law. In cases where the contingent remainder, executory devise, or other limitation will, or may, go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the judge of the superior court shall, in any such action brought for the purpose aforesaid, after due inquiry of persons who are in no way interested in or connected with such proceedings, designate and appoint some discreet person as guardian ad litem to represent such contingent remaindemen, or executory devisees, upon whom summons shall be served in such action as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such action, and when counsel is needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees. And all contingent remaindermen, executory devisees, or other persons, who may be entitled to claim a contingent interest in said land, whether known or unknown, in being or not in being, shall be conclusively bound by any final judgment entered in such action, if made parties thereto, and represented therein in the manner hereinbefore provided: Provided, however, that this law shall not apply to any sale of land made in which the executor or other personal representative shall have been either directly or indirectly the purchaser thereof. (1923, c. 70, s. 1.)

For a review of this act in the North Carolina Law Review, see 1 N. C. L. R. 315.

Validity, Operation and Effect. — This statute is curative and retrospective, and is constitutional, legal, and does not interfere with or destroy vested rights. A retrospective law, as in the case of this statute, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act. Charlotte Consol. Const. Co. v. Brockenbrough, 187 N. C. 65, 77, 121 S. E. 7.

§ 92(b). Presumption; burden of proof. — Where the purchaser of any lands made under

the circumstances narrated in the preceding section, or any person holding or claiming the same under or through such purchaser, shall have been in the peaceable possession thereof for more than twenty years without any adverse claim having been asserted to the same by any person claiming under such will, and the records of the administration of the said estate do not affirmatively show what disposition has been made of the proceeds of the sale of such land, then it shall be presumed, prima facie, that the proceeds of the sale of the said land have been applied to the payment of the necessary indebtedness of the said estate and the cost of the administration thereof, and the burden of proof to the contrary shall be upon the defendants in said action. (1923, c. 70, s. 2.)

See note under § 92a.

§ 92(c) Application of two preceding sections.—Sections 92(a) and 92(b) shall apply only to sales of lands made under the circumstances narrated in those sections, occurring prior to January 1, 1925. (1923, c. 70, s. 3; 1925, c. 48.)

See note under § 92a.

Editor's Note. — Prior to the act of 1925, ch. 48, the application of the two preceding sections was confined to sales occurring prior to February 24, 1923.

§ 92(d). Validation of bona fide sales of real estate made without order of court to obtain assets to pay debts.—In all cases where sales have been made by administrators of deceased persons of real estate, in good faith and upon a valuable consideration to obtain assets to pay debts of the estate and deeds executed by such administrators to the purchaser, who paid the purchase price thereof, and no action taken by the heirs of such deceased person to annul such sale by litigation or otherwise, such sale is hereby validated. (1931, c. 146, s. 1.)

Editor's Note.—As stated in 9 N. C. Law Rev. 404, the preamble of the act indicates that it is to apply where no order of court was obtained or where the court proceedings authorizing and confirming the sales have been lost without being recorded. As to its constitutionality against the charge of disturbing vested rights, see Charlotte Const. Co. v. Brockenbrough, 187 N. C. 65, 121 S. E. 7. As to validation of sales of real estate devised upon limitation made prior to January 1, 1925, see §§ 92(a)-92(c).

§ 92(e). Recitals in deeds presumed correct; purchase by administrator; impeachment for fraud.—In all cases where sales have been made under the circumstances narrated in the preceding section, and deeds have been made by administrators of such deceased persons to the purchasers, the recitals contained in such deeds that the sale was made under order or license of the court for the purpose of obtaining assets to pay debts of the estate, [such recitals] shall be presumed to be prima facie correct, and that the proceeds of sale of said land have been applied to the payment of the necessary indebtedness of said estate and the cost of administration thereof: Provided, however, that this act shall not apply to any sale of land made in which the administrator of such deceased persons shall have been directly or indirectly the purchaser thereof and nothing herein contained shall prevent such sale from being impeached for fraud. (1931, c. 146, s. 2.)

Editor's Note.—The wording of this section as it appears in the published act is somewhat confusing. The words in brackets could well be omitted and there is other faulty wording. But it seems clear not only that recitals in the deeds that the sale was made under order of court are to be presumed to be prima facie correct, but also those to the effect that the proceeds have been applied to the payment of the debts and costs of administration. See 9 N. C. Law Rev. 404.

§ 92(f). Application of two preceding sections.—Sections 92(d) and 92(e) shall only apply to sales by administrators made prior to January first, one thousand nine hundred twenty, and shall not apply to pending litigation nor to any pending or unsettled administration or estate. (1931, c. 146, s. 3; 1935, c. 31.)

Editor's Note.—This act became effective March 21, 1931.

By the amendment of 1935 the section was made applicable to sales prior to 1920 rather than to 1900 as formerly provided.

§ 92(g). Validation of sales of real estate by administrators d. b. n. prior to qualification.—In all cases, prior to January first, nineteen hundred thirty-one, where a sale of real estate has been made by an administrator de bonis non of a deceased trustee in a deed in trust, and such administrator de bonis non advertised and conducted such sale prior to his qualification as administrator de bonis non of the deceased trustee, but qualified as such before the execution of the trustee's deed made pursuant to such sale, said sale and deed shall be valid and as effectual as though such advertisement and sale had occurred after the qualification of such administrator de bonis non. (1935, c. 381.)

Art. 14. Proof and Payment of Debts of Decedent

§ 93. Order of payment of debts.—The debts of the decedent must be paid in the following order:

The intention of the Legislature is that the assets of a decedent shall be administered, as far as may be done, in one proceeding upon proper safeguards, for the benefit of all the creditors. Atkinson v. Ricks, 140 N. C. 418, 421, 53 S. E. 230.

Design of Section. — This section was only designed to recognize priorities among the creditors of the deceased and to establish the order of payment between claimants who have valid debts against the deceased. It was never intended to create a liability which did not otherwise exist. Bower v. Daugherty, 168 N. C. 242, 84 S. E. 265.

Recognizing priority of classes, this section provides for the administration of assets for the benefit of all the creditors according to definite and established rules. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

Strict Construction. — This section being in derogation of the equity of a pro rata distribution, should be strictly construed so as not to confer a priority over other creditors unless clearly called for. Baker v. Dawson, 131 N. C. 227, 228, 42 S. E. 588.

The fees of a referee taxed against an administrator are not a preferred debt under this section. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161.

This section creates no preference for payment on bank stock out of the assets of the estate of a deceased stockholder and none results from the application of the pertinent principles of equity. Hood v. Darden, 206 N. C. 566, 174 S. E. 460.

Duty of Representative. — To carry out the order designated by this section is a duty of the representative. State v. Oliver, 104 N. C. 467, 10 S. E. 709.

Testator Can Not Change Statutory Priority.—A testator may not so dispose of his estate as to avoid the payment of his debts in accordance with the priorities fixed by this section. First Security Trust Co. v. Lentz, 196 N. C. 398, 145 S. E. 776.

Cited in Statesville v. Jenkins, 199 N. C. 159, 163, 154 S. E. 15; Brown v. Brown, 199 N. C. 473, 154 S. E. 731.

First class. Debts which by law have a specific

lien on property to an amount not exceeding the value of such property.

A deed of trust executed to secure a debt which by law had a specific lien on property, as provided by the first class, has priority over the payment of taxes provided for eo nomine in the third subdivision of the statute. Farmville Oil. etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

The lien of a docketed judgment, which is eo nomine put in the fifth class, is not such a "specific lien on property," unless made so by its terms, as to come within the first class mentioned in the statute. Stewart v. Doar, 205 N. C. 37, 38, 169 S. E. 804.

Applied in State v. Oliver, 104 N. C. 467, 10 S. E. 709.

Second class. Funeral expenses.

Editor's Note. — The burial expenses, from the nature of things, are not an indebtedness of the deceased, for they accrue after his death; nor are they cost of administration. Yet from necessity they are chargeable upon the assets in preference to other claims hereinafter enumerated, both at common law and under our statute.

Expenses of Debtor Only. — The funeral and medical expenses referred to in this subdivision and subdivision 6 means those of the debtor, and not of his wife, child or tenants. Baker v. Dawson, 131 N. C. 227, 42 S. E. 588.

See subsequent case, Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265, where it was held that the husband's estate is liable for the funeral expenses of his predeceased wife, in preference to the beneficiaries under his will.

Third Party Paying. — The provisions of this subdivision enures to the benefit of one who after having paid such expenses as a matter of affection and duty wants to recover the same from the estate. Ray v. Honeycutt, 119 N. C. 510, 26 S. E. 127.

Third class. Taxes assessed on the estate of the deceased previous to his death.

This section has no application to the payment of assessments made against land by a municipality for the purpose of improving streets. Saluda v. County of Polk, 207 N. C. 180, 184, 176 S. E. 298; High Point v. Brown, 206 N. C. 664, 667, 175 S. E. 169.

Method of Collecting Taxes. — Section 7985 construed in the lights of this subdivision of this section indicates that the ordinary methods of collecting taxes by a sheriff do not apply to collection of taxes from a decedent's estate. Sherrod v. Dawson, 154 N. C. 525, 529, 70 S. E. 739.

Relation to and Effect of § 7980.—The General Assembly by enacting § 7980, providing that taxes assessed against land be paid from the proceeds of a foreclosure sale, did not intend to abolish the method definitely prescribed by this section for administerng the estate of a person deceased or to modify the statutory direction as to the order in which the decedent's debts should be paid. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

Fourth class. Dues to the United States and to the state of North Carolina.

Fifth class. Judgments of any court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Judgments Paid Out of Personalty. — The provision of this clause does not mean that the judgment shall be paid out of the realty of the decedent upon which it has become a lien. When a debtor dies against whom there is a judgment docketed his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there was no judgment against him, and the whole estate is to be administered just as if there were no judgment, that is to say, the personal property must be sold if necessary and all the personal assets collected, and out of these personal assets all the debts must be paid, if there be enough to pay all, as well docketed judgments as others. The reason for this mode of administration is that, although a lien on land exists, the judgment should be paid out of the personal estate, if any, in exoneration of the land for the benefit of the heir or devisee. Lee v. Eure, 82 N. C. 428.

When Priorities Determined. — The priorities among several judgment heirs which are dependent upon the date of their respective recordation, are to be determined as they existed at the death of the debtor, after which they remain unaffected by lapse of time until barred by the statute of limitations or by executions issued upon the judgment. Tarbors v. Penders, 153 N. C. 427, 430, 69 S. E. 425, 636; Mauney v. Holmes, 87 N. C. 431; Galloway v. Bradfield, 86 N. C. 163, 166; Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368.

Expired Judgment Lien. — The expiration of the judgment lien terminates the authority of the representative to pay such lien. The judgment lien must be in force at the time of payment. Matthews v. Peterson, 150 N. C. 132, 134, 63 S. E. 721, 722.

Statute of Limitations not Affected. — The fact that under this subdivision judgments docketed and in force, which have become a lien upon decedent's property at the date of his death, have priority over certain other claims, does not stop the running of the statute of limitation upon such judgments. Daniel v. Laughlin, 87 N. C. 433, 436.

Application of Proceeds under a Consent Judgment to Sell Land. — Where a consent judgment provides that a commissioner appointed for the purpose sell certain lands of a deceased person, and pay the net proceeds to the administratrix of the deceased to pay the debts of his estate, the distribution of these proceeds are thereunder to be made under the provisions of this section, and a judgment ordering them to be paid to a lien of a judgment creditor on the lands of the estate, adjudging it a prior lien, is reversible error. First National Bank v. Mitchell, 191 N. C. 190, 131 S. E. 656.

Application to Funds in Administrator's Hands. — The provision of this clause applies to funds in the administrator's hands. Matthews v. Peterson, 150 N. C. 134, 135, 63 S. E. 721.

Extent of the Lien. — If the real estate upon which the judgment is a lien is of less value than the amounts of the judgment, then the extent of the lien under this subdivision is the value of the land only. Jerkins v. Carter, 70 N. C. 500, 501. And if, in such a case a part of the lien has been paid out of the personalty (which is first liable for the payment) the extent of the lien is the difference between the value of the land and amount paid out of the personalty. It is not the difference between the amount of the lien and the amount paid from the personalty. Murchison v. Williams, 71 N. C. 137.

Applied. — In Murchison v. Williams, 71 N. C. 137, 138.

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease.

See note Baker v. Dawson, 131 N. C. 227, 42 S. E. 588, under class 2 of this section.

Seventh class. All other debts and demands. (Rev., s. 87; Code, s. 1416; 1868-9, c. 113, s. 24.)

§ 94. No preference within class.—No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class. (Rev., s. 88; Code, ss. 1417, 1418; 1868-9, c. 113, ss. 25, 26.)

Editor's Note. — The prohibition embodied in this section is against the representative. Hence a solvent person in his lifetime may by his will make preferences in favor of persons who would otherwise be postponed. But as upon his death his effects and property vest in his representative who must pay the debts first, if the estate is insolvent the representative cannot assent to the payment of preferences before the payment of prior debts as prescribed in the preceding section. The result is that preferences made by an insolvent decedent are rendered ineffective for all purposes. See Moore v. Byers, 65 N. C. 242.

Paying by Honest Mistake. — If the representative pays a debt belonging to an inferior class in preference to a superior debt, even though he does it through an honest mistake, he is chargeable for the same. Maye v. Albritton, 42 N. C. 62.

§ 95. When payment out of class held valid.— Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and

satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the emancipation of the slaves, or the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, or when any creditor has refused to accept payment of his debt in Confederate currency, and such currency was afterwards used by the executor or administrator in payment of debts of the estate, or it became of no value by the termination of the war, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof, without regard to the dignity of the debt thus paid, or on which such suit may be brought. (Rev., s. 96; Code, s. 1496; 1869-70, c. 150.)

Section Declaratory of Existing Law. — Even in the absence of this section the principle which it inculcates would hold true under legal and equitable principles. Coggins v. Flythe, 113 N. C. 102, 114, 18 S. E. 96.

§ 96. Debts due representative not preferred.— No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts. (Rev., s. 89; Code, s. 1420; 1868-9, c. 113, s. 28.)

§ 97. Debts not due rebated.—Debts not due may be paid on a rebate of interest thereon for the time unexpired. (Rev., s. 90; Code, s. 1419; 1868-9, c. 113, s. 27.)

§ 98. Affidavit of debt may be required.—Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit. (Rev., s. 91; Code, s. 1425; 1868-9, c. 113, s. 33.)

§ 99. Disputed debt may be referred.—If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it. (Rev., s. 92; Code, s. 1426; 1868-9, c. 113, s. 34; 1872-3, c. 141.)

Purpose of Section. — The section was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators or collectors and claimants against the estate of testators and intestates may be settled and determined. State v. Potter, 107 N. C. 415, 12 S. E. 55.

Effect of Agreement to Arbitrate. — An agreement to arbitrate and to award under this section is competent evidence to prove the indebtedness of the estate. Such an agreement is, where there is no fraud or collusion, binding upon the heirs even though they were not parties to the proceedings. Lassiter v. Upchurch, 107 N. C. 411, 12 S. E. 63.

Finding as Judgment. — The finding of arbitrators under this section is equivalent to a judgment, and the proceedings in which it is rendered can be impeached only for fraud or collusion. Lassiter v. Upchurch, 107 N. C. 411, 12 S. E. 63.

Not Applicable to Creditor's Suit under Sec. 110. — The proceedings authorized by this section are between a creditor and the personal representative, and have no application to creditor's bill under section 110 instituted to take the administration into the hands of the court. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

When Action on Claim against Executor Barred.—Where a claim against an executor is rejected by him in writing and is not referred in accordance with the provisions of this section, an action thereon is barred if not brought within six months after the rejection of the claim by the executor. See § 100. Batts v. Batts, 198 N. C. 395, 151 S. E. 868.

Thus, while § 93 classifies funeral expenses as a debt of the estate, the amount due therefor cannot be regarded as a legacy in this State, and where a husband who has paid the funeral expenses of his wife makes claim therefor upon her executor and the claim is rejected, and is not referred in accordance with this section, an action on the claim is barred by his failure to bring it within six months from the time of its rejection by the executor. Batts v. Batts, 198 N. C. 395, 151 S. E. 868.

§ 100. Disputed debt not referred, barred in six months.—If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in the preceding section, the claimant must, within six months after due notice in writing of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. (Rev., s. 93; Code, s. 1427; 1868-9, c. 113, s. 35; 1913, c. 3, s. 1.)

Strictly Construed. — The language of this section is positive and explicit, and must be enforced in accordance with the plain meaning of its terms. Morrisey v. Hill, 142 N. C. 355, 358, 55 S. E. 193.

Counterclaim Barred. — A claim barred under this section can not be pleaded even by way of counterclaim, in an action by the representative against the claimant, and this, regardless of the fact that the general notice provided for in section 45 had not been given. Morrisey v. Hill, 142 N. C. 355, 55 S. E. 193.

§ 101. If claim not presented in twelve months, representative discharged as to assets paid.—In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector. (Rev., s. 94; Code, s. 1428; 1868-9, c. 113, s. 37.)

The purpose of this section is to relieve administrators, executors and collectors from liability for assets they may pay or distribute to a person or persons entitled to have the same as to claims not presented within the prescribed time, and as well to facilitate and encourage the prompt settlement of the estates of deceased persons. Mallard v. Patterson, 108 N. C. 255, 259, 13 S. E. 93.

Administrator May Hold Funds for Twelve Month Period.—Under this section a bank, acting as an adminis-

trator, has a legal right to hold the funds of the estate for one year after appointment and to refuse to settle claims of heirs during this period. Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

§ 102. No lien by suit against representative.—No lien shall be created by the commencement of a suit against an executor, administrator or collector. (Rev., s. 95; Code, s. 1432; 1868-9, c. 113, s. 41.)

§ 103. When costs against representative allowed.—No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which case the court may award such costs against the defendant personally, or against the estate, as may be just. (Rev., s. 97; Code, s. 1429; 1868-9, c. 113, s. 38.)

The purpose of this section is to urge the representatives to an early and prompt settlement of claims against the deceased, and to protect the estate, when proper diligence was used, from cost needlessly incurred by the creditors in prosecuting their claims. May v. Darder, 83 N. C. 239.

Exception to Secs. 1241-1243.—This section forms an exception to sections 1241-1243 which are general provisions as to cost. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630.

Unreasonable Delay or Neglect. — Where an action was brought within fifty-two days of the qualification of the administrator, it was held that payment had not been "unreasonably delayed or neglected" within the meaning of this section. Whitaker v. Whitaker, 138 N. C. 205, 207, 50 S. E. 630. A fortiori the same rule was applied, in May v. Darden, 83 N. C. 239; when the suit was instituted twenty days after appointment.

From the opinion in Morris v. Morris, 94 N. C. 613, 618, it appears that the intestate died in December 1882 and letters were issued sometime in 1883, prior to July 19th when suit was commenced. It would seem from the rule stated in the third headnote of the case that this did not constitute unreasonable delay.

Appeal for Cost. — Although the general rule is that an appeal lies from a judgment for cost only, there is an exception to this rule in favor of fiduciaries, inferred from this section. May v. Darden, 83 N. C. 239.

Not Applicable When Funds Misapplied. — In proceedings to subject to representative to liability for misapplication of the funds, as distinguished from proceedings to recover a debt out of the estate, this section does not apply, and the representative is chargeable with the cost. Valentine v. Britton, 127 N. C. 57, 59, 37 S. E. 74.

Burden of Proof. — The burden is on the plaintiffs to show that they are entitled to recover cost under this section. Whitaker v. Whitaker, 138 N. C. 205, 207, 50 S. E. 630.

Land Chargeable with Cost. — In proceedings by the creditor to subject the land to the payment of debts, the land is subject to the payment of the cost, wherever the representative can be charged with the cost under the circumstances referred to in this section. Long v. Oxford, 108 N. C. 280, 13 S. E. 112.

§ 104. Obligations binding heirs collected as other debts.—Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased but shall be paid as other debts of the same class in the manner provided in this chapter. (Rev., s. 98; Code, s. 1404; 1868-9, c. 113, s. 12.)

Art. 15. Accounts and Accounting

§ 105. Annual Accounts.—Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (Rev., s. 99; Code, s. 1399; C. C. P., s. 478; 1871-2, c. 46.)

The word "accounts" as used in this section means "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates." It does not include the idea of payment and settlement. State v. Dunn, 134 N. C. 663, 668, 46 S. E. 949.

Prima Facie Evidence Only. — The sworn account referred to in this section, is only prima facie evidence. It is not conclusive as against any person adversely interested. The statute merely shifts the burden of proof. Allen v. Roster, 107 N. C. 278, 282, 12 S. E. 134. Turner v. Turner, 104 N. C. 566, 571, 10 S. E. 606; In re Hege, 205 N. C. 625, 172 S. E. 345.

And the representative himself is not estopped to impeach the account. Bean v. Bean, 135 N. C. 92, 47 S. E. 232.

Transfer of Funds to Other Jurisdiction. — The administrator in this state of the estate of a nonresident dying in his own state, before transferring the funds to the state of the domicile must comply with the provisions of this section. Grant v. Rogers, 94 N. C. 755, 762.

Ex Parte Proceeding. — The jurisdiction for auditing accounts conferred upon the clerk by this section is an ex parte jurisdiction of examining the accounts and vouchers of such persons, and does not conclude parties interested or affect suits inter partes upon the same matter. Heilig v. Foard, 64 N. C. 713; Bean v. Bean, 135 N. C. 92, 93, 47 S. E. 253; Grant v. Hughes, 94 N. C. 231.

Meaning of "Auditing Accounts". — The provisions as to auditing the accounts of executors, administrators, have reference to the duty of examining the accounts to see that the account of charges correspond with the inventories, passing upon the voucher and striking a balance after allowing commissions. Heilig v. Foard, 64 N. C. 713.

§ 106. Clerk may compel account.—If any executor, administrator or collector omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (Rev., s. 100; Code, s. 1400; C. C. P., s. 479; 1933, c. 99.)

Editor's Note.—The last sentence of this section as it now reads was added by Public Laws 1933, c. 99.

Original Jurisdiction.—Under this section the clerk has original jurisdiction to remove. Edwards v. Cobb, 95 N. C. 8.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 107. Vouchers presumptive evidence. — Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required,

make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character. (Rev., s. 101; Code, s. 1401; C. C. P., s. 480.)

Independent of this section receipts of living persons are not strictly legal evidence to show a full administration. Drake v. Drake, 82 N. C. 443.

What the Vouchers Must Show. — This section makes vouchers presumptive evidence of disbursements actually made, but not their nature, purpose and necessity. When these latter do not appear upon the vouchers to make them presumptive evidence they should state with reasonable particularity the purpose, the particular account upon which they were made, the time, etc., so as to make it appear that the expenditure or disbursement was a proper one. McLean v. Breese, 109 N. C. 564, 566, 13 S. E. 910.

Proof of Handwriting.—Under this section only when the voucher is relied on as presumptive evidence that the handwriting of the person signing the voucher need be proven. Costen v. McDowell, 107 N. C. 546, 549, 12 S. E. 432.

Presumptive Though Not Primary Evidence.—While this section makes the vouchers presumptive proof, it by no means provides that they shall be primary evidence, and therefore actual payment may still be established in the same way as before the enactment of this section when the receipts of living persons were not strictly legal evidence to show a full administration. Costen v. McDowell, 107 N. C. 546, 549, 12 S. E. 432; Drake v. Drake, 82 N. C. 443, 445.

§ 108. Gravestones authorized.—It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The cost thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. (Rev., s. 102; 1905, c. 444; 1925, c. 4.)

Editor's Note.—The last clause of this section as it formerly stood provided that the order be approved by the resident judge of the district. This was omitted by the act of 1925.

§ 109. Final accounts.—An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate, but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk. (Rev., s. 103; Code, s. 1402; C. C. P., s. 481.)

Jurisdiction.—Formerly the probate court had jurisdiction to make the representative account. Rowland v. Thompson, 65 N. C. 110, 112. Under this section the clerk of the superior Court has jurisdiction. McNeill v. Hodges, 105 N. C. 52, 54, 11 S. E. 265.

Ex Parte Proceeding No Estoppel.—The auditing by the clerk, whether under this or under the section preceding the last, is an **ex parte proceeding,** and does not work an estoppel upon the parties as a judgment in inter parte proceedings would. In this respect this and the section just referred to are alike. Bean v. Bean, 135 N. C. 92, 93, 47 S. E. 232.

Presumption of Correctness of Account.—When ex parte accounts are filed under this section, they are, as a matter of law, to be taken as correct until shown to be erroneous. Turner v. Turner, 104 N. C. 566, 572, 10 S. E. 606.

Auditing a Judicial Act.—The phrase "audit an account" means something more than the statement of an account by an unauthorized person. It means the act of a court, and therefore obligatory. Rowland v. Thompson, 65 N. C. 110, 112. Hence the auditing under this section must be performed by the clerk, and not by one of his ministerial officers for a clerk for his judicial functions can have no deputy. Id.

Auditing and Appeal Therefrom.—This section, which directs that the probate judge shall "audit" the account, implies that he shall pursue the usual course which has been formed to be just and convenient in such cases. Consequently an appeal may not be had from the decision of the probate judge upon every question collaterally arising in the course of his investigation, in view of the inconveniences incident to such practice peculiar to common law action of account now superceded by the more expeditious proceedings in equity. Rowland v. Thompson, 64 N. C. 714, 717.

Limitation for Action Against Representative.—An action against an administrator or executor is barred in ten years after the two years allowed under this section, even though no express demand is made by any party interested for the settlement of the estate. Edwards v. Lemmond, 136 N. C. 329, 332, 48 S. E. 737.

Applied in Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 110. Creditor's special proceeding for accounting.—Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively. (Rev., s. 104; Code, s. 1448; 1871-2, c. 213; 1876-7, c. 241, s. 6.)

The purpose of this section was to unite all the creditors in one special proceeding, in order to bring the personal representative to an account after two years and to compel an application of the assets by payment to the creditors whose debts have been ascertained. Graham v. Tate, 77 N. C. 120, 125.

Other Creditors May Come In.—Where a creditor has instituted a special proceeding under this section, all or any of the creditors not designated by name are at liberty to come in and share the benefits of the suit. Every creditor has an inchoate interest in the suit, and is, in an essential sense, a party to the action. Dobson v. Simonton, 93 N. C. 268.

Process or General Notice Essential.—Unless personally served with notice, or unless a general notice is published as prescribed by section 114, creditors are not bound by special proceedings instituted under this section by another creditor. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

Summons and Complaints Necessary. — Special proceedings under this section must be by summons and complaint in the first instance. But creditors subsequently coming in need not file a complaint unless their claim is denied. Isler v. Murphy, 76 N. C. 52.

Enjoining Creditor.—A creditor who chooses not to come in, and resorts to an independent action, may be enjoined by the court as soon as the decree for an account is rendered in the main suit. Dobson v. Simonton, 93 N. C. 268, 270.

Creditor's Suit Distinguished.—A special proceeding under this section differs from a creditor's bill is that in the latter case all the creditors **may** make themselves parties, while in the former case they are required to do so. Patterson v. Miller, 72 N. C. 516.

Mere Filing of Claim.—The mere filing by a creditor of a claim with the clerk gives him a standing in the court, and is all that is required of him unless the claim is contested. Warden v. McKinnon, 94 N. C. 378.

Equitable Character of Proceedings.—The special proceedings under this section are of equitable character. Hence the court may in the same proceedings make the heirs and the next of kin parties, and compel the latter to account for the personalty received by him, or may order the realty to be sold for the payment of the debts. Warden v. McKinnon, 94 N. C. 378; Devereux v. Devereux, 81 N. C. 12.

Stops Running of Statute of Limitations. — Proceedings

under this section instituted by one creditor not only prevent the running of the statute of limitations as to the claim of that creditor, but also of those in whose behalf they are instituted. Dobson v. Simonton, 93 N. C. 268, 271.

Personal Judgment Against Representative.—It is intimated that in special proceedings under this section the clerk has jurisdiction to render a personal judgment against the representative where the latter has committed **devastavit,** as well as a judgment in his representative capacity. Hester v. Lawrence, 102 N. C. 319, 325, 8 S. E. 915.

Termination of Special Proceedings.—Special proceedings commenced under this section are not terminated by being let off the docket, but continue until all the debts are discharged and there is a final judgment. When so dropped from the docket, they may be brought forward on a motion. Warden v. McKinon, 94 N. C. 378.

Nor the termination of collateral issues, such as on contested claims, terminate such proceedings. Id.

Concurrent Jurisdiction of Courts.—The act of 1876-77, ch. 241, sec. 6, which embodied also this section, which provided that action against the personal representative may be brought originally to the Superior Court at term time, and stipulated for the repeal of conflicting laws, is not in conflict with the jurisdiction of the Probate Court, (before the clerk) and the jurisdiction is concurrent. Hence the court first acquiring jurisdiction of the controversy will retain it.

Thus, where under this section special proceedings were instituted by a creditor, in the Superior Court, and the representative thereafter instituted proceedings in the Probate Court (before the clerk) for the sale of land, it was held that the Superior Court had acquired jurisdiction of the matter and the representative could be restrained from further proceeding in the Probate Court. Haywood v. Haywood, 79 N. C. 42, 43; Pegram v. Armstrong, 82 N. C. 326.

Remedy against Settlement before Payment of Debts.—If an administrator should file a petition for the settlement of the estate before he has paid the debts the remedy of the creditor is by a creditor's bill in accordance with this section, or an action upon the administration bond. They cannot seek to be made parties to the settlement proceedings, Carlton v. Byers, 93 N. C. 302, 304; or to a petition by the representative to sell land for the payment of debts. Dickey v. Dickey, 118 N. C. 956, 24 S. E. 715.

Allegations as to Exhaustion of Personalty.—Whether the suit be by the representative to set aside fraudulent conveyances of the decedent, under section 77, or by the creditor under this section or under the general equity jurisdiction of the court, allegations and proof of the exhaustion or insufficiency of the personalty are necessary. Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254; Clement v. Cozart, 109 N. C. 173, 181, 13 S. E. 862.

Effect of Irregularities.—Where, under this section, the court has jurisdiction of the person and subject matter, mere irregularities in the proceedings will not render them void, no objection being made as to such irregularities. Brooks v. Brooks, 97 N. C. 136, 1 S. E. 487.

Thus where the plaintiff does not in terms purport to see for himself and all other creditors in the absence of objection, the proceedings are not void. Id.

Jurisdiction of Judge in Term.—The proceedings under this section are exceptions to the rule that the judge in term has no jurisdiction over the settlement of intestate's estate. Moore v. Ingram, 91 N. C. 376, 379.

Each Complaint Distinct Proceeding.—In proceedings under this section each complaint of the several creditors constitutes a distinct proceeding to be proceeded in separately. Graham v. Tate, 77 N. C. 120.

Motion to Issue Execution.—In view of the remedy given to the creditors under this section and other sections of this chapter, a motion for leave to issue execution against the estate of a decedent cannot be allowed. Cowles v. Hall, 113 N. C. 359, 18 S. E. 329.

The cost of proceedings under this section are determined by the same provisions as are applicable to other proceedings. Patterson v. Miller, 72 N. C. 516, 518.

Nature of Superior Court's Jurisdiction.—Under this section the Superior Court has original jurisdiction over proceedings instituted against the representative. Bratton v. Davidson, 79 N. C. 423.

Correlation of Sec. 99 to This Section.—The proceedings authorized by section 99 are between a creditor and the representative, and have no application to situations arising under this section whose primary object is to take the administration into the hands of the court. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

Special Proceedings or Civil Action Optional.—Originally this section authorized the creditor to bring a "special proceeding" (which is always before the clerk of the court) and did not provide for "civil action." But the amendment of 1876-77 inserted the words "civil action." The effect of the amendment was to give the creditor an option to bring his action either before the clerk or at a regular term of the Superior Court. See Clement v. Cozart, 107 N. C. 695, 698, 12 S. E. 254.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345; Buchanan v. Oglesby, 207 N. C. 149, 176 S. E. 281.

§ 111. Rules which govern creditor's proceeding.—The special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter. (Rev., s. 105; Code, s. 1449; 1871-2, c. 213, s. 2.)

Summons and Complaint.—As the proceedings under the preceding section are not ex parte proceedings, within the contemplation of section 759, but are adverse within the meaning of section 753, they must, under the provisions of this section, be commenced by summons and complaint. Isler v. Murphy, 76 N. C. 52, 53.

The creditors subsequently coming in, however, need not file a new complaint, unless their claim is denied. Id.

§ 112. When and where summons returnable.—The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof. (Rev., s. 106; Code, s. 1450; 1871-2, c. 213, s. 3.)

Effect of Irregularity in the Time of Return.—Notwithstanding the irregularity in the time of the return as required by this section, the proceedings are valid unless objected to. Brooks v. Brooks, 97 N. C. 136, 141, 1 S. E. 487.

§ 113. Clerk to advertise for creditors.—On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims. (Rev., s. Code, s. 1451; 1871-2, c. 213, s. 4.)

Failure to Publish Assignable on Appeal.—Failure to publish as required by this and the succeeding section, is an error which may be assigned by the representative in an appeal from a judgment of the clerk to the Superior Court in term, even though no exception on this ground has been taken before the clerk. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

It is the duty of the clerk to advertise as directed by statute. Warden v. McKinnon. 94 N. C. 378, 388.

The proceedings, however, are not void for lack of advertisement (which is considered as a mere irregularity), unless objected to. Brooks v. Brooks, 97 N. C. 136, 12 S. E. 487.

The mode of advertisement under this section is regulated by the provisions of the next section. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

§ 114. Publication of advertisement.—The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county, besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication. (Rev., s. 108; Code, s. 1452; 1903, c. 134; 1871-2, c. 213, s. 5.)

See annotations under the preceding section.

Advertisement Both Published and Posted.—The advertisement under this section must be both published in a news-

paper, and posted at the court house door. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

§ 115. Creditors to file claims and appoint agent.—The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left; otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office. (Rev., c. 109; Code, c. 1453; 1871-2, 213, c. 6.)

§ 116. Proof of claims.—If the evidence of the demand is other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or, if he be nonresident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given. (Rev., s. 110; Code, s. 1454; 1871-2, c. 213, c. 7.)

§ 117. Representative to file claims; notice to creditors.—On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named has failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same directed to him as his usual address. (Rev., s. 111; Code, s. 1455; 1871-2, c. 213, s. 8.)

§ 118. Clerk to exhibit to representative claims filed.—On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office, with the evidences thereof. (Rev., s. 112; Code, s. 1456; 1871-2, c. 213, s. 9.)

§ 119. If representative denies claim, creditor notified.—Within five days thereafter the defendant shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases. (Rev., s. 113; Code, s. 1457; 1871-2, c. 213, s. 10.)

Each Complaint Distinct Proceeding.—Where, under this section, the claims of two or more creditors have been disputed and the issue joined upon the complaints sent to the superior court in pursuance of the succeeding section, the complaint of each creditor constitutes a distinct proceeding to be proceeded separately so as to "let each tub stand on its own bottom." Graham v. Tate, 77 N. C. 120, 124.

§ 120. Issues joined; cause sent to superior court.—If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by chapter on Civil Procedure in like cases. If the issue shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial. (Rev., s. 114; Code, s. 1458; 1871-2, c. 213, s. 11.)

Title of the Proceeding.—When, under this section, issues upon several complaints have been sent to the superior court, although the title of the cause should be in the name of the creditors who instituted the special proceedings, it is proper to make a further title setting out the name of the creditor upon whose complaint the issues are raised. Graham v. Tate, 77 N. C. 120, 124.

For example: x, (the original creditor) v. y. (administrator). Issues on the complaint of z. In this way the complaint of the several creditors will be kept separate and unnecessary confusion avoided.

§ 121. When representative personally liable for cost.—If any personal representative denies the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue is finally decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the state, unless it appears that he had reasonable cause to contest the claim and did so bona fide. (Rev., s. 1459; 1871-2, c. 213, s. 12.)

See annotation under sec. 103.

Correlation of This and Section 110.—This section applies to cases where the administrator unreasonably denies a claim filed under section 110. Valentine v. Britton, 127 N. C. 57, 59, 37 S. E. 74.

§ 122. Court may permit representative to appear after return day.—If the personal representative fails to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just. (Rev., s. 116; Code, s. 1460; 1871-2, c. 213, s. 13.)

§ 123. Clerk to state account.—Immediately after the return of the day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court. (Rev., s., 117; Code, s. 1461; 1871-2, c. 213, s. 14.)

§ 124. Exception to report; final report and judgment.—After the clerk has stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice. (Rev., s. 118; Code, s. 1462; 1871-2, c. 213, s. 15.)

§ 125. Appeal from judgment; security for costs.—Any party may appeal from final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor appeals and gives such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking. (Rev., s. 119; Code, s. 1464; 1871-2, c. 213, s. 17.)

§ 126. Papers on appeal filed and cause docketed.—On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term. (Rev., s. 120; Code, s. 1465; 1871-2, c. 213, s. 18.

§ 127. Prior creditors not affected by appeal may docket judgments.—If the exceptions and

questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon. (Rev., s. 121; Code, s. 1466; 1871-2, c. 213, s. 19.)

§ 128. Judgment where assets sufficient to pay a class.—If upon taking the account it is admitted, or is found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditor whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class is in litigation, the amount of such claim, with the probable cost of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended. (Rev., s. 122; Code, s. 1467; 1871-2, c. 213, s. 20.)

§ 129. Judgment where assets insufficient to pay a class.—If the assets are insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class. (Rev., s. 123; Code, s. 1468; 1871-2, c. 213, s. 21.)

§ 130. Contents of judgment; execution.—All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

1. The certain amount of the creditor's demand.

2. The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs. (Rev., s. 124; Code, s. 1469; 1871-2, s. 213, s. 22.)

§ 131. When judgment to fix with assets.—No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative pleading expressly admits assets. (Rev., s. 125; Code, s. 1470; 1871-2, c. 213, s. 23.)

Principle applied in Grant v. Bell, 91 N. C. 495; Holmes v. Foster, 78 N. C. 35.

An absolute judgment against the representative neither fixes the defendant with assets nor disturbes the order of administration. It merely ascertains the debt sued on. Dunn v. Barnes, 73 N. C. 273, 277.

§ 132. Form and effect of execution.—All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally. (Rev., s. 126; Code, s. 1471; 1871-2, c. 213, s. 24.)

§ 133. Report is evidence of assets only at date.—The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which adjudication relates. (Rev., s. 127; Code, s. 1472; 1871-2, 213, s. 25.)

§ 134. Creditor giving security may show subsequent assets.—Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary. (Rev., s. 128; Code, s. 1473; 1871-2, c. 213, s. 26.)

§ 135. Suits for accounting at term.—In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require. (Rev., s. 129; Code, ss. 215, 1511; 1876-7, c. 241, s. 6.)

In Nature of Bill in Equity.—A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate is in the nature of a bill in equity to surcharge and falsify the executor's account. Thigpen v. Farmers' Banking, etc., Co., 203 N. C. 291, 165 S. E. 720.

Extent of Jurisdiction.—The jurisdiction and the powers of the court in actions of this nature is very comprehensive as to the purposes contemplated by them. Hence the court is vested with all powers, such as the power to grant injunctions, appoint receivers, etc., to affectuate a just and equitable settlement of the controversy. Godwin v. Watford, 107 N. C. 168, 171, 11 S. E. 1051.

Under this section the superior court has jurisdiction to entertain suits brought not only by creditors but also by any party interested in the proper administration of an estate. It may bring the creditors in as defendants and protect the right of the parties by the appointment of a receiver. Fisher v. Trust Co., 138 N. C. 91, 98, 50 S. E. 592.

In an action instituted under this section to declare trust and to adjudge the liability of certain lands to the payment of legacies, the superior court (and also the supreme court) once having acquired jurisdiction of the controversy may retain the cause and incidentally grant the application of the personalty. Devereux v. Devereux, 81 N. C. 12, 18.

An action for the breach of representatives bond and for an account may under this section, be brought before the Superior court in term, without first seeking an account in the probate court. State v. Davidson, 79 N. C. 423.

The venue of an action under this section is the county of decedent's last domicile where the will is probated. No objection, however, as to the wrong venue can be raised on an appeal if not raised in the court below. Devereux v. Devereux, 81 N. C. 12, 18.

Concurrent Jurisdiction.—This section was construed in Haywood v. Haywood, 79 N. C. 42; Fisher v. Trust Co., 138 N. C. 91, 50 S. E. 592; Pegram v. Armstrong, 82 N. C. 326; Bratton v. Davidson, 79 N. C. 423, 425, and other cases, in all of which it is held that concurrent original jurisdiction with the probate court is conferred on the Superior Court in a civil action to settle estates and subject real estate to the payment of debts. Shober v. Wheeler, 144 N. C. 403, 409, 57 S. E. 152; Pegram v. Armstrong, 82 N. C. 326; State v. Davidson, 79 N. C. 423. The jurisdiction of the clerk of the Superior Court in such cases is not exclusive but concur-

rent with that of the Superior Court. State v. McCanless, 193 N. C. 200, 204, 136 S. E. 371.

Power of Judge in Term. — The expression in Moore v. Ingram, 91 N. C. 376, that "the judge in term has no jurisdiction over the settlement of intestates' estate" was made by inadvertence and only with reference to the situation presented in that case, not with reference to this section which confers this jurisdiction in express terms. Tillett v. Aydlett, 93 N. C. 15, 22.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 136. Proceedings against land, if personal assets fail.—If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the proceeding shall be as is directed in other like cases. (Rev., ss. 130, 131; Code, ss. 1474, 1475; 1871-2, c. 213, ss. 27, 28.)

Cross Reference.—For a discussion of the effect that a proposed statute of intestate succession would have on this and the following section, see article in 11 N. C. Law Rev. 266, 279.

Necessity of Summons.—In a case falling under the provisions of this section it is unnecessary for the clerk to issue the summons referred to in this section, where the parties are all in court. Dickey v. Dickey, 118 N. C. 956, 958, 24 S. E. 715.

Exhaustion of Personalty. — Whether the proceedings to sell the real estate be under this or section 110, it is essential that the insufficiency of the personalty be made to appear. Clement v. Cozart, 109 N. C. 173, 181, 13 S. E. 862.

Art. 16. Distribution

§ 137. Order of distribution.—The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

Cross Reference.—As to inheritance under insurance policy where insured has killed beneficiary and himself, see note to § 10.

In General. — At early common law the king took all the personalty. Afterwards the crown passed this prerogative to the church, which took all the personalty except the reasonable parts for the widow and the children, and the church officials claimed to dispose of it in **pios usus**. They were neither accountable for it nor required to pay the debts of the estate. By statute 13 Ed. III. (A. D. 1358) the churchmen were required to appoint an administrator who should be next of blood kin, and this relationship was computed by the civil law, and not by the common law, which was used in computing relationship in the descent of land. Subsequently by statute 21 Henry VIII (A. D. 1530) the administrator was appointed by the ordinary and was required to be the widow or next of kin, or both, who after paying the intestate's debts and the reasonable parts for the widow and children retained the surplus in their own right until the statutes of 22-23 and 29 Charles II, which required the surplus to be distributed among the next of kin in the manner provided in those statutes which became known as the Statute of distribution.

Under the English statutes 22, 23, and 29, Charles II, the mother as well as the father succeeded to all the personal effects of their children who died intestate and without wife or issue, to the exclusion of brothers and sisters of the deceased. And this is the law now in this state.

For an analysis of this section and the classification of the interest of the various classes of distributees thereunder, see Wells v. Wells, 158 N. C. 330, 333, 74 S. E. 114.

Correlation of This and Section 189. — This section as to inheritance of the father and mother, etc., dying without leaving husband, wife or child, and section 189 depriving the parent of the care, custody and services of the child in case of abandonment are not in pari materia. Avery v. Brantley, 191 N. C. 396, 397, 131 S. E. 721.

Distribution under Equitable Conversion. — While this section, as its subject matter implies, concerns the distribution of decedent's personalty, under circumstances which bring in the application of the doctrine of equitable conversion even realty or its proceeds is subject to the order of distribution prescribed under this section as if it had been personalty. McIver v. McKinney, 184 N. C. 393, 114 S. E. 399.

Wife Dissenting from the Will. — Even though a husband die testate, leaving a will in which he has provided for the wife, if she dissents from the will as to her, her husband has died intestate and she is entitled to her distributive right in accordance with this section, as if he had left no will. Hunter v. Husted, 45 N. C. 97. See annotations under Sec. 4097.

Per Capita or Per Stirpes.—Where a fund consist of personalty and the claimants at the death of the intestate, were and now are all in equal degree the next of kin of the intestate, the distribution under this section must be per capita. Representation in the distribution of this kind of property, when allowed, is restored to only when it is necessary to bring the claimants to equality of position as next of kin. Ellis v. Harrison, 140 N. C. 444, 53 S. E. 299.

Husband as Next of Kin. — The husband of a deceased wife is not her next of kin so as to be entitled to a distributive share as such, within the perview of this section. Peterson v. Webb, 39 N. C. 56.

Illegitimate Child.—See note under § 140.

Cited in In re Estate of Pruden, 199 N. C. 256, 257, 154 S. E. 7.

1. If there are not more than two children one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate and such persons as legally represent such children as may then be dead.

2. If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part.

"Child's Part" Interpreted. — The phrase "child's part" as used in this section refers to the personal estate of the intestate, not to the real estate. McKrow v. Painter, 89 N. C. 438, 440.

3. If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

See Editor's Note, supra.

Intestate's Mother His Next of Kin. — When an intestate leaves no children, but a widow, a mother and sisters, the distribution of his estate is governed by this subdivision, and his mother is his next of kin and entitled to share equally in his personalty with his widow. His sisters are one degree farther than his mother. Wells v. Wells, 158 N. C. 330, 74 S. E. 114.

Representation among Collateral Relations. — This subsection changes the former rule under the Revised Code of 1854, so as to allow representation among collateral relations as to personalty to the same extent as in the descent of real property; and where the aunts and uncles of the deceased must take the children of those who have died they may take the part of the personalty their parents would have taken if living. Moore v. Rankin, 172 N. C. 599, 601, 90 S. E. 759.

Reason Where Terms are Plain. — The terms of this subsection is plain and it is the duty of the court to observe them, even if it (the court) cannot supply the legislative reason therefor. Wells v. Wells, 156 N. C. 246, 72 S. E. 311.

4. If there is no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead.

5. If there is neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the kin of the intestate, who are in equal degree, and those who legally represent them.

See Editor's Note, supra.

Mother as Next of Kin. — If there are no children, no widow of an intestate, there is no one in equal degree with the mother; and she as the next of kin is entitled to the per-

sonal estate of her son, under this subdivision. Wells v. Wells, 158 N. C. 330, 333, 74 S. E. 114.

Extent of Representation among Collaterals. — Under the former law (Rev. Code, ch. 64 sec. 2.) it was held, in cases falling under this subsection, that among collateral kindreds no representative after brother's and sister's children shall be allowed to share in the distribution. See Nelson v. Blue, 63 N. C. 659; Johnson v. Chesson, 59 N. C. 146. But the provision upon which this conclusion is based no more appears. Ed. Note.

The father and mother of an intestate under this subsection are next of kin of equal degree. Davis v. Railroad Co., 136 N. C. 115, 120, 48 S. E. 591.

Brother and Children of Deceased Brother—Husband of Deceased Niece.—The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, as also the husband of a deceased niece who was living at the death of the intestate, under the facts of this case. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

6. If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. The terms "father" and "mother" shall not apply to a step-parent, but shall apply to a parent by adoption: Provided, that a parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relative or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section.

Editor's Note. — Prior to the amendment of 1915, (Pub. Laws, 1915, c. 37) this section entitled the father to the whole estate of his deceased child, to the exclusion of the mother. Hence it was formerly held that the mother of a deceased child in the lifetime of the father, may not recover for the mutilation of the child's body. Floyd v. Atlantic Coast Line R. Co., 167 N. C. 55, 83 S. E. 12. By the Public Laws of 1927, c. 231, the proviso to this section was added.

Father as Unworthy Beneficiary. — Notwithstanding the provisions of section 189 depriving a father who has abandoned his child of his services, etc., a father who has adandoned his minor child shall under this section, be entitled to his distributive share of the damages recovered for the wrongful death of such child. Avery v. Brantley, 191 N. C. 396, 131 S. E. 721; 5 N. C. L. R. 72.

Natural and Adopting Parents. — Natural parents, in case of adoption, are allowed to prevail over adopting parents in the distribution of a child's estate. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19; 5 N. C. L. R. 73.

Right of Divorced Husband to Share in Recovery for Death of His Child. — Where the husband has abandoned his wife and infant child, and the wife has obtained a divorce, and while still an infant a recovery is had for its wrongful death by her mother, who has again married, and has qualified as administratrix of her infant child, under the provisions of this clause of this section, casting the inheritance upon the father and mother under stated conditions when both are living, the father is entitled to half the money recovered by the mother for the wrongful death of their infant child, though under a separate statute he has lost the right to its care and custody by a former adjudication of the court in the wife's action for divorce. Avery v. Brantley, 191 N. C. 396, 131 S. E. 721.

Right of Action for Mutilation of Child's Dead Body. — A father's relation to his minor child and the consequent duties imposed on him by law clothes him with a preferential right of action over the mother of the child to bring an action to recover damages for the mutilation of its dead body, and the provisions of this section do not affect the result. Stephenson v. Duke University, 202 N. C. 624, 163 S. E. 698.

Distributee of Proceeds of War Risk Insurance Policy. —Where the mother of a deceased soldier was dead at the time of his death, but his father was living, and the soldier had no wife or child or issue of a child at the time of his death; it was held that under this section the proceeds of a war risk insurance policy vested in the father as sole distributee under the intestate laws of this State. In re Hall, 205 N. C. 241, 243, 171 S. E. 61.

Funds Due under Policy as Assets of Estate.—Where a soldier having a war risk insurance policy died intestate, leaving his father and mother surviving him as sole heirs at law, and where neither had received as beneficiary in the war risk insurance policy any installment from the government during his or her life, it was held that the whole fund in contemplation of law was assets of the estate of the dead soldier, to be distributed immediately to the estates of his father and mother. The fact that one beneficiary lived longer than the other and hence entitled to receive more money in installments from the government, has nothing to do with the right of property as distributee. The intestate law of this State pegged that right at the death of the soldier. In re Estate of Reid, 206 N. C. 102, 103, 173 S. E. 49.

In McCullough v. Smith, 293 U. S. 228, 231, 55 S. Ct. 157, it was held that unpaid installments which accrued under a war risk insurance policy in favor of the father and mother of the deceased soldier as beneficiaries during their lives became the property of their respective estates. Also that installments which accrued to the assured during his lifetime, and the commuted value of the installments payable subsequent to the mother's death, became the property of his estate, thereby reversing In re Estate of Reid, 206 N. C. 102, 173 S. E. 49, which held that the installments which accrued to the beneficiaries—father and mother—during their lives should be treated as parts of the estate of the insured.

Cited in In re Peaden, 199 N. C. 486, 154 S. E. 832.

7. If there is no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there is one, shall be entitled to all the personal estate of such intestate.

8. If a married woman die intestate leaving one child and a husband, the estate shall be equally distributed between the child and husband; if she leaves more than one child and a husband, the estate shall be distributed in equal portions and the husband shall receive a child's part, the child or children of any child or children of the intestate, who have died prior to the mother, to represent his, her, or their parent in such distribution. (Rev., s. 132; Code, s. 1478; R. C., c. 64, s. 1; R. S., c. 64, s. 1; 1893, c. 82; 1868-9, c. 113, s. 53; 1913, c. 166; 1915, c. 37; 1921, c. 54; 1927, c. 231.)

Editor's Note. — The provision at the end of this clause, that the child of the intestate's child shall represent his parent in the event such parent dies before the intestate's mother, is added by the act of 1921, ch. 54.

Husband's Note Set up As a Counterclaim. — Where a husband is under this clause entitled to his distributive part in the personal property of his deceased wife, and she had a certain amount of money deposited in a bank since becoming insolvent and in a receiver's hands, he may not successfully set up this interest under the provisions of section 521, as a counterclaim against his note, in an action by the receiver therein, until his wife's administrator has accounted for his trust or distributed the assets of his intestate's estate. Williams v. Williams, 192 N. C. 405, 135 S. E. 39.

Husband Entitled to His Distributive Share Only. — In Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988, it was held that under this section as amended by the laws of 1923, the administrator of the wife may recover from the husband notes made payable to the wife and husband in consideration of the sale of her real property, and that the husband was entitled only to his distributive share through the administration.

§ 138. Advancements to be accounted for.— Children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same distribution of the estate in the manner as provided by the second rule in the chapter entitled Descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate. (Rev., s. 133; Code, s. 1483; 1868-9, c. 113, s. 54.)

Advancement Defined. — An advancement is defined to be

an irrevocable gift in presenti of money or property, real or personal, by a parent to a child to enable the latter to anticipate the inheritance or succession of the property of the former to the extent of the gift. Thompson v. Smith, 160 N. C. 256, 257, 75 S. E. 1010.

Creature of Statute Law.—Advancements are the creatures of statute law. Kiger v. Terry, 119 N. C. 456, 458, 26 S. E. 38.

Advancement a Matter of Intention. — The question whether a transfer of property from a parent to the child was a gift, loan or advancement is to be settled by the intention of the parent and surrounding circumstances at the time of the transfer, which may be shown by parol evidence. Kiger v. Terry, 119 N. C. 456, 26 S. E. 38.

Consideration and Presumption of Advancement. — Where a valuable and adequate consideration is recited, the presumption is against the conveyance being an advancement, and the burden to overcome this presumption is upon him who alleges it to be an advancement. Kiger v. Terry, 119 N. C. 456, 26 S. E. 38.

Presumption of Advancement Rebuttable. — The presumption is that property transferred or money paid by the parent is prima facie an advancement. But, this presumption being prima facie, is rebuttable by parol even where there is recital of consideration in deed, by a showing that the parent had a contrary intention at the time. The rule is not altered by this section. Thompson v. Smith, 160 N. C. 256, 75 S. E. 1010; Hollister v. Attmore, 58 N. C. 373; Harper v. Harper, 92 N. C. 300, 301.

Advancements by the Mother. — The original statute (1 Rev. Stat. ch. 64, sec. 2.) which provides for the accounting of advancements used the pronouns "he" and "she", and under this terminology it was held that the statute applied to advancements made by the mother as well as by the father. Daves v. Haywood, 54 N. C. 253, 256. The present section uses the words "advanced by **him** in **his** lifetime." It is believed that the construction put upon the original statute would still hold true. Ed. Note.

But gifts made to the grandchildren are not so required. Daves v. Haywood, 54 N. C. 253; Skinner v. Wynne, 55 N. C. 41.

Return of Advancements as to the Widow. — Before the act of 1784, advancements were not required to be brought into the hotchpot for the benefit of the widow. But since that act, the policy of equality between the widow and the children as well as between the children themselves, is pronounced by the express terms of this section. Davis v. Duke, 1 N. C. 526, 527. This principal is applied in Eller v. Lillard, 107 N. C. 486, 491, 12 S. E. 462.

Dying Seized of Land Not a Prerequisite.—The advancements are to be accounted for even though the intestate has not died seized of any real estate. Headen v. Headen, 42 N. C. 159.

§ 139. Children advanced to render inventory; effect of refusal.—Where any parent dies intestate, who had in his or her lifetime given to, or put in the actual possession of, any of his or her children any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of the estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share. (Rev., ss. 134, 135; Code, ss. 1484, 1485; 1868-9, c. 113. ss. 55, 56.)

Restricted Meaning of Section. — The general words of this section requiring the child to give an inventory of "any personal property of what nature or kind soever" have uniformly been held to have a restricted meaning, in that every gift of personal property by a donor is not necessarily an advancement. Bradsher v. Cannady, 76 N. C. 445, 446.

§ 140. Illegitimates next of kin to mother and to each other.—Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and such shall be entitled to a share of her personal estate as prescribed in this chapter. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal state shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be in his next of kin if all such children had been born in lawful wedlock. (Rev., ss. 136, 137; Code, ss. 1486, 1487; 1868-9, c. 113, ss. 57, 58.)

Cross Reference.—For a discussion of the effect that a proposed statute of intestate succession would have on this section, see article in 11 N. C. Law Rev. 266, 294.

Editor's Note. — At common law bastards were incapable of being heirs, and no inheritable blood flows in their veins; hence, in the absence of other persons lawfully entitled to the property, the property escheated to the lord. They were considered the c h i l d r e n of nobody, and consequently could have no ascending heirs, but only the issue of their own body. The reason of this rule was the uncertainty of the bastard's paternity. But this has been changed in this state in cases where there is no such uncertainty.

Brothers and Sisters of Bastard's Mother Do Not Inherit.—Under this section the mother and brothers and sisters of a bastard may inherit from him, but the rule extends no further, and the brothers and sisters of the bastard's mother may not inherit from him. Sharpe v. Carson, 204 N. C. 513, 168 S. E. 829.

Distributive Share of a Bastard's Niece. — Where a bastard died intestate leaving the daughter of a bastard brother, born of the same mother, his next of kin and a widow, it was held that the widow was entitled only to one-third of the personal estate and the daughter of his bastard brother to two-thirds. Coor v. Starling, 54 N. C. 243. This decision however, now seems to be subject to the modifications in the amount of widow's distributive share under section 137. Ed. Note.

Inheritance from Father of Mother who Predeceased Him.—An illegitimate child may not inherit as heir at law from her deceased grandfather, dying intestate, through her legitimate mother who predeceased him, under this section and section 137, clauses 4 and 5. In re Estate of Bullock, 195 N. C. 188, 141 S. E. 577, citing Waggoner v. Miller, 26 N. C. 480; Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181; Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501; and distinguishing Skinner v. Wynne, 55 N. C. 41.

Conflict of Laws.—In the case of Kenny v. Seaboard, etc., R. Co., 167 N. C. 14, 82 S. E. 968, an action was brought to recover damage for wrongful death under the Federal employers liability act which made the "next of kin," in the absence of other specified persons, the distributee of the decedent. It was held that the persons included in the phrase "next of kin" are to be determined by the laws of this state; and hence, the half brothers and sisters of the illigitimate child deceased were his "next of kin" within the meaning of this section, and entitled to their respective distributive shares as such.

§ 141. Allotment to after-born child in real estate.—The share of an after-born child in real estate shall be alloted to him out of any land not devised, if there is enough for that purpose; and if there is none undevised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to the respective values as near as may be convenient, as will make the proper share of such child. (Rev., 138; Code, s. 1536; 1868-9, c. 113, s. 108.)

§ 142. Allotment to after-born child in the personal property.—The share of an after-born child in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there is enough for that purpose: and if there is none undisposed of, or not enough, then the whole share or the deficiency, as the case may be, shall

be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child. (Rev., s. 139; Code, s. 1573; 1868-9, c. 11, s. 109.)

Child Not en Ventre Sa Mere. — Before a child can be entitled to a distributive share under the statute of distribution in general, it must appear that he was either in being or **en ventre sa mere** at the time of the death of the intestate. Thus a half brother of the intestate born ten months and a half after her death is not entitled to a distributive share, though born before distribution. Grant v. Bustin, 21 N. C. 77.

Contributions as of What Time. — Contribution to make up the share of a child born after the execution of his father's will, must be made by the legatees in proportion to their respective interests under the will, dated as of the time when the estate was settled, or should have been settled, by the executor, bearing interest from such time. Johnson v. Chapman, 54 N. C. 130.

§ 143. Allotment of personalty from proceeds of realty.—If, after satisfaction of the child's share of real estate out of undevised lands, there is a surplus of such lands, and there is no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undevised land, or as much as be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there is a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant, non compos, or feme covert. (Rev., s. 140; Code, s. 1538; 1868-9, c. 113, s. 110.)

§ 144. Effect of allotment of realty; contribution to equalize burden.—Upon the allotment to such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee simple; and the court shall give judgment severally, in favor of such of the devisees and legatees of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees of whose land and legacies a just proportion has not been taken away, for such as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies. (Rev., s. 141; Code, s. 1539; 1868-9, c. 113, s. 111.)

§ 145. After-born child on allotment deemed devisee or legatee.—An after-born child after such decrees shall be considered and deemed in law a legatee and devise as to his portion shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisees and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit. (Rev., s. 142; Code, s. 1540; 1868-9, c. 113, s. 112.)

§ 146. Before settlement executor may have claimants' shares in estate ascertained.—In case no petition is filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said afterborn child, by petition in the superior court to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be alloted to said child, and the court shall adjudge and decree accordingly. (Rev., s. 143; Code, s. 1541; 1868-9, c. 113; s. 113.)

§ 147. Legacy or distributive share recoverable after two years.—Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceeding therein conducted as prescribed in other cases of special proceedings. (Rev., s. 144; Code, s. 1510; 1868-9, c. 113, s. 83.)

What Court Has Jurisdiction. — Under this section the Probate Court (i. e., the clerk of the Superior Court) has exclusive jurisdiction of proceedings for the recovery of legacies and distributive share. When, however, a specific pecuniary legacy has been asserted to by the executor it becomes a debt and must be recovered by action brought to the regular term of the Superior Court. Hendrick v. Mayfield, 74 N. C. 626, 632.

Proof of Assets. — While under this section a petition may be filed before the clerk of the Superior Court for the recovery of legacies, etc., and prosecuted as in other cases of special proceedings; but, unless the personal representative has assented to the legacy or the admission of assets is otherwise made to appear, a recovery **can** be had only upon proof that assets have either come or should have come into his hands applicable to the payment of the legacy. Unless this is done a judgment in legatee's favor is reversible error. York v. McCall, 160 N. C. 276, 278, 76 S. E. 884.

Jurisdiction in Special Proceeding. — Under this section the superior court has original jurisdiction by special proceedings for the recovery of legacies, etc. But where an **action** is brought for the same to the regular **term** of the superior court, the defect is cured by the act of 1870, 1871, ch. 108, (Bot. Rev. ch. 57, secs. 425, 426.) Bell v. King, 70 N. C. 330.

Section Exclusive Remedy. — This section in effect supersedes section 481 of the Code of Civil Procedure (§§ 109, 2183 of the Code of 1927) and is the only and exclusive remedy to recover a distributive share of an estate. Williams v. Williams, 71 N. C. 427.

Applied in Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

§ 148. Payment to clerk after one year discharges representative pro tanto.—It is competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator in-

testate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid. (Rev., s. 145; Code, s. 1543; 1881, c. 305, s. 1.)

The purpose of this section is to provide a safe public depository for such moneys and the exoneration of the personal representative. Ex parte Cassidey, 95 N. C. 225, 228.

Provisions Directory. — The provisions of this section are directory, and not mandatory. Moore v. Eure, 101 N. C. 11, 15, 7 S. E. 471; Thomas v. Connelly, 104 N. C. 342, 448, 10 S. E. 520.

Clerk's Responsibility. — Moneys paid to the clerk under this section, do not pass into the jurisdiction of the superior court, but the clerk receives and is chargeable with them, not, however, by virtue of his duties in connection with the court as a clerk, but as a safe public depository. Ex parte Cassidey, 95 N. C. 225, 227.

He receives them by virtue of his office as a clerk, and hence (his bond covering all moneys coming into his hands by virtue or color of his office) he is liable upon his bond. Presson v. Boone, 108 N. C. 78, 84, 12 S. E. 897, see Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520.

Deposit of Moneys of Heirs. — The deposit authorized by this section refers to moneys belonging to the legatees or distributees of the estate. It does not refer to funds belonging to the heirs, such as proceeds of realty after payment of debts, which by the term of sec. 56 are considered as realty belonging to the heirs or devisees. Thomas v. Connelly, 104 N. C. 342, 348, 10 S. E. 520.

Liability for Interest.—Where funds belonging to a minor are paid into the hands of the clerk of the Superior Court by an administrator under the provisions of this section, discharging the administrator and his sureties from liability in regard thereto, it is not required by §§ 153 and 956 that the clerk invest the funds, upon interest, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested, but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom, since a fiduciary will not be allowed to make a personal profit out of funds committed to his custody. Williams v. Hooks, 199 N. C. 489, 154 S. E. 828.

Where on appeal there is no agreed statement of fact or finding as to whether a deceased clerk of court invested and received interest, for which his estate must account, on a sum paid into his hands under the provisions of this section, the case will be remanded for a specific finding in regard thereto. Williams v. Hooks, 199 N. C. 489, 490, 154 S. E. 828.

§ 149. On payment clerk to sign receipt.—It is the duty of the clerk, in the cases provided for in the preceding section, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office. (Rev., 146; Code, s. 1544; 1881, c. 305, s. 3.)

See annotations under preceding section.

Recovery of Moneys Paid into Clerk's Office.—A similar proceeding as provided in section 135 and 147 may be maintained against the clerk either by special proceedings or civil action in the superior court, in cases where the representative has paid the money in his hands into the office of the clerk under the preceding section. Ex parte Cassidey, 95 N. C. 225, 228.

Art. 17. Settlement

§ 150. Representative must settle after two years. — No executor, administrator, or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased; and the clerk of the superior court in each county shall require settlement of the balance in hand due distributees as shown by the final account of any administrator, executor, or guardian, and shall audit same: Provided, that the several clerks of the superior courts of this State may, in their discretion, for good cause shown, extend the time for the final settlement of any administrator or executor; provided, that nothing herein contained shall relieve any such administrator or executor of the duty of administering and distributing such funds and property in his hands as may be available for such purposes; provided, further, that any party having an interest in any such estate may, within ten days from the entry of an order extending the time for final settlement, appeal from such order to the resident or presiding judge of the district, which appeal shall be heard as is now or may hereafter be prescribed by law for the hearing of other appeals from the clerk. (Rev., s. 147; Code, s. 1488; 1868-9, c. 113, s. 59; 1919, c. 69; 1933, c. 188; 1935, c. 377.)

Editor's Note. — The allowance of two years in this section is intended as a maximum limitation beyond which the representative may not retain any part of the estate; it is not a permissive limitation for a period of two years. It is based upon the supposition that many estates which are complicated cannot be settled in less time. Hence where there are no debts due from the estate, the representative will not be permitted to suspend the settlement for a period of two years. See Turnage v. Turnage, 42 N. C. 127.

By the 1935 amendment the proviso added by the 1933 amendment giving the clerk power to extend the time was changed and the two provisos at the end of the section were added.

The general policy of the laws regarding the settlement of the estate which is more specifically expressed in this section is that the personal representative shall regularly prepare the estate in his hands for final distribution immediately after the lapse of two years next after his qualification. The dissenting opinion in Andres v. Powell, 97 N. C. 156, 164, 2 S. E. 235.

Settlement within Two Years. — This section merely marks an utmost limit of time which the representative must settle; it does not authorize him to withhold settlement for that length of time (two years) where there is no justification therefor. Hence the parties interested may call on him to account within that period. Snow v. Boylston, 185 N. C. 321, 117 S. E. 14; see sec. 156.

Time of Final Account and Settlement. — The final account always precedes the settlement, for without it there is no way of telling what is due. Self v. Shugart, 135 N. C. 185, 196, 47 S. E. 484.

Settlement before Expiration of Two Years. — The provision making it obligatory on personal representatives to settle the estate at the end of two years does not authorize them to defer the settlement without necessity until that time. The allowance of two years is intended as an indulgence to them. Hence an action may be brought by the parties interested before the expiration of that time where there is no necessity of deferring settlement. Clements v. Rogers, 91 N. C. 63, 65. See post sec. 156.

Statute of Limitation. — After ten years from the expiration of the two years' period prescribed by this section, an action for settlement against the personal representative will be barred by the statute of limitation. Edwards v. Lemmond, 136 N. C. 329, 330, 48 S. E. 737.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 150(1). Extension of time for final accounts when funds are in closed banks.—Where as much as twenty-five per cent of the estate of any decedent is represented by deposits in a bank or trust company in course of liquidation, the personal representative of such decedent shall, in the discretion of the clerk of the superior court, have ninety days after the payment of the final dividend in which to file his final account. The several clerks of the superior court of this State may, in their discretion, upon good cause shown, extend the time for the final settlement of any executor or administrator; Provided, that this act shall not

relieve any personal representative of the duty of administering and distributing other funds and property in his hands, as now required by law. (1935, c. 244.)

§ 151. Representative may retain claim undue or in litigation.—If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim. (Rev., s. 148; Code, s. 1489; 1868-9, c. 113, s. 60.)

No Allowance for Contingent Liabilities. — Claims for which an allowance will be made to the representative, within the contemplation of this section, are such claims as are existing and capable of being ascertained and not a mere contingent liability which may never ripen into a cause of action, such as the contingent liability of a surety or co-security on an administration bond. Adams v. Durham, etc., R. Co., 110 N. C. 325, 14 S. E. 857.

§ 152. After final account representative may petition for settlement.—An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right. (Rev., s. 150; Code, s. 1525; 1868-9, c. 113, s. 96.)

Payment of Debt Necessary. — The personal representative should pay all debts before beginning a proceeding under this section. Carlton v. Byers, 93 N. C. 302, 304.

Allegations of Petition. — Where the petition filed under this section does not state that the personal representative has filed a final account or that he has the funds ready in hand for distribution, the petition will be dismissed. Moore v. Rankin, 172 N. C. 599, 602, 90 S. E. 759. Self v. Shugart, 135 N. C. 185, 196, 47 S. E. 484.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

Cited in In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

§ 153. Payment into court of fund due absent defendant or infant.—When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant. (Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317.)

As to seemingly implied repeal of this section in part, see note under § 962(a).

§ 154. Procedure where person entitled unheard of for seven years.—When the party entitled to the money has not been heard of for seven years or more, the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and such other evidence as may be required by the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either at term or at chambers. (Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317.)

§ 155. Parties to proceeding for settlement.—In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record. (Rev., s. 154; 1893, c. 206.)

§ 156. When legacies may be paid in two years.—It is the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court deems proper, when there is no necessity for retaining the fund. (Rev., s. 155; Code, s. 1512.)

Expiration of Two Years Not Prerequisite. — The provision of this section is only a legislative affirmance of the law as it existed before the code. The allowance of two years to the representative is intended as an indulgence; it does not authorize him to defer the settlement until the expiration of that time, without necessity. Clements v. Rogers, 91 N. C. 63, 65.

It follows that in a petition filed against the representative for settlement absence of allegation that two years have elapsed since his qualification is immaterial, where it is alleged that the estate is solvent and that there is no reason why the representative should further retain the fund. Leonard v. Leonard, 107 N. C. 168, 170, 11 S. E. 1051.

Call for Account within Two Years. — The representative may be called upon by the legatees or the next of kin to account for the distributive shares and legacies even before the expiration of two years from the time of grant of administration. Hobbs v. Craige, 23 N. C. 332. See Editor's Note to section 150.

§ 157. Commissions allowed representatives.—Executors, administrators and collectors shall be entitled to a commission not exceeding five per cent upon the amount of receipts and expenditures which shall appear to be fairly made in the course of administration, and such allowance may be retained out of the assets against creditors and all other persons claiming an interest in the estate. In determining the allowance the trouble and time expended in the management of the business shall be considered; but in sales of land for payment of debts commissions shall not be allowed on any large amount of the proceeds than the sum actually applied in payment of debts.

Such commissions are authorized and directed to be allowed by the clerk of the superior court when the final account of the representative entitled is filed for settlement, or by any judge of the superior court or commissioner appointed by the said court to take and state an account of the assets of any decedent in the hands of his representative upon a plea of fully administered. Nothing in this section shall prevent any executor, administrator or collector from retaining a reasonable sum for necessary charges and disbursements in the management of the estate. (Rev., s. 149; Code, s. 1524; 1868-9, c. 113, s. 95; 1869-70, c. 189.)

Object of Compensation. — The compensation is allowed to the representative in order to reward him not only for his time, labor and trouble but also for the responsibility incurred, and the fidelity with which he discharged the duties of his trust. It should not, however, be allowed where due to his neglect the estate has suffered loss. Kelly v. Odum, 139 N. C. 278, 280, 51 S. E. 953.

This same rule applies to the allowance of necessary charges and disbursements referred to in the last clause of this section—such as counsel fees. Id. For example where he resists a claim which has been adjudged against him in a prior litigation. Johnson v. Marcom, 121 N. C. 83, 28 S. E. 58.

Not Entitled at All Events. — The representative is not, under this section, entitled to commission at all events. He must have earned them by a just and reasonable discharge of his duties. It must appear that the "receipts and expenditures" referred to have been fairly made in the course of administration. The law will not allow compensation to one who disregards its commands. Grant v. Reese, 94 N. C. 720.

Commission on Specific Property Administered. — Specific articles inventoried merely by an executor and delivered to the legatee, are not "receipts," within the meaning of this section, upon which a commission is to be calculated. It may be proper, in estimating the commission, to take into consideration the trouble of managing such articles, but the value of such articles is not to be the basis of such commutation. Walton v. Avery, 22 N. C. 405, 412.

Appeal on Commission under 5%. — Notwithstanding the fact that the amount of commissions allowed in a given case has not exceeded 5% on the receipts and disbursements, the allowance is reviewable upon appeal for inadequacy or excessiveness. It cannot strictly be said that the lower court has **exclusive** discretion within the limit of 5%. Bank v. Bank, 126 N. C. 531, 537, 36 S. E. 39.

Similarity in Terms of This and Sec. 3902. — That part of this section which specifies the amount of commission allowance is practically identical in terms with section 3902. Bank v. Bank, 126 N. C. 531, 537, 36 S. E. 39.

Order for Commissions Final Judgment. — An order allowing commissions is a final judgment upon which an appeal may be taken. Bank v. Bank, 126 N. C. 531, 36 S. E. 39.

Commission on Both Receipts and Disbursements. — Commissions may be allowed to the representative on both receipts and disbursements, as separate acts. Bank v. Bank, 126 N. C. 531, 540, 36 S. E. 39.

Counsel Fees as Necessary Charges. — Besides commissions, the representative is allowed to retain his expenses for necessary charges and disbursements in the settlement of the estate. Among these necessary charges fees paid to counsel are embraced. Hester v. Hester, 38 N. C. 9; Love v. Love, 40 N. C. 201; Fairbairn v. Fisher, 58 N. C. 385, 387.

Dower as an "Interest in the Estate". — Manifestly, a claim of dower is an "interest" in the estate. Hence the wording of this section lends direct support to a judgment giving priority to commissions due executors, reasonable attorney's fees and costs. Parsons v. Leak, 204 N. C. 86, 92, 167 S. E. 563.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 158. Liability and compensation of clerk.—Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his service as the judge may allow. (Rev., s. 152; Code, s. 1527; 1868-9, c. 113, s. 98.)

Art. 18. Action by and against Representative

§ 159. Action survives to and against representative.—Upon the death of any person, all demands whatsoever, and right to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate. (Rev., s. 156; Code, s. 1490; 1868-9, c. 113, s. 63.)

As to abatement of action see section 461.

Editor's Note.—The rule of the common law is that a person's right of action dies with the person. But great changes in this respect have been wrought by legislation and the decisions of the courts, and the maxim **actio personalis moritur cum persona** has thereby lost much of its vitality. As to pure torts to person, feeling or reputation, it still retains its ancient force and vigor, but it does not now apply to torts committed to property, personal or real. As to the first kind of property, it was repealed by the act, 4 Edward III, ch 7, and as to the second kind by 3 and 4 William IV, ch. 42. These provisions have been substantially adopted by our legislature. See Mast v. Sapp, 140 N. C. 533, 536, 53 S. E. 350.

It was formerly held that this section did not change the common law rule that a right of action sounding in tort for personal injuries does not survive the tort feasor or the injured person where the injury did not cause death, in view of the express terms of section 162, which then declared inter alia, that injuries to person, not causing death to the injured party shall not survive, see Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813; Harper v. Commissioners, 123 N. C. 118, 31 S. E. 384; Bolick v. Railroad, 138 N. C. 370, 50 S. E. 689. Strauss v. Wilmington, 129 N. C. 99, 39 S. E. 772.

So also, under the same provision, it was held that an action against a telegraph company for mental anguish caused by failure to deliver a telegram abates upon the death of the plaintiff under sec. 461, and does not survive. Morton v. Western Union Tel. Co., 130 N. C. 299, 302, 41 S. E. 484.

But this provision of section 162 no more exists. The inference, therefore, is that such actions, at least those based on a tangible physical injury do survive, under the broad provisions of this section, irrespective of whether the injury has caused death or not; and that the provisions of section 162 specifying the actions which will not survive are limited to actions therein designated. See Fuguay v. A. & W. Ry. Co., 199 N. C. 499, 500.

As to those actions which are not based on a tangible physical injury, however, such as for mental anguish, etc., this last conclusion is somewhat doubtful, in view of the analogy between such actions and actions for libel and slander which by express terms of section 162 are still declared not to survive.

Relation of Revival and Survival.—The general rule is that wherever an action can be revived against the representative, it will also survive against him. Butner v. Keelhn, 51 N. C. 60.

Vindictive Damages.—Though the cause of action for trespass may survive against the representative of the trespasser, no vindictive damages may be recovered in such action. Rippey v. Miller, 33 N. C. 247.

Applied in Baird Co. v. Boyd, 41 F. (2d) 578.

§ 160. Death by wrongful act; recovery not assets; dying declarations.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collecters or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the

deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence. (Rev., s. 59; Code, ss. 1498, 1500; 1868-9, c. 113, ss. 70, 72, 115; R. C., c. 46, ss. 8, 9; 1919, c. 29; 1933, c. 113.)

I. In General.
II. Limitation of the Action.
III. Parties to the Action.
IV. Distribution of Recovery.
V. Admission of Declarations.

I. IN GENERAL.

See note under § 567.

For critical appraisal of this section, see 11 N. C. Law Rev. 263.

Editor's Note. — Under the common law there was no civil action for the wrongful death of a human being. Although the harshness of this doctrine was obvious it was not until 1846 that the English Parliament passed the statute known as Lord Campbell's Act (9 & 10 Vict., c. 93) which made such actions possible.

The wrongful death acts in the different states in this country are generally based upon Lord Campbell's Act, although there are distinct differences. The English Statute seems to have been especially designed to aid the families of the deceased but in regard to the North Carolina Act the Supreme Court in Russell v. Windsor Steamboat Co., 126 N. C. 961, 965, 36 S. E. 191, says: "This section unlike Lord Campbell's Act does not regard the family relation and is not for the purpose of "Compensating the families of persons killed by accident."

The exception as to burial expenses to the exemption of the amount from payment of debts was inserted by Public Laws 1933, c. 113.

Not a Common-Law Right. — The right of recovery for death by wrongful act did not exist at common law, and rests entirely upon this section. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216; Hall v. Southern R. Co., 149 N. C. 108, 110, 62 S. E. 899; Harper v. Commissioners, 123 N. C. 118, 119, 31 S. E. 384; Hinnant v. Tidewater Power Co., 189 N. C. 120, 121, 126 S. E. 307.

Purpose of Section. — The purpose of this section was to withdraw claims of this kind from the effect and operation of the maxim actio personalis moritur cum persona, and to continue, as the basis of the claim of his estate the wrongful injury to the person resulting in death. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

It Is Similar to the Georgia Statute.—The wrongful death statute of Georgia is not so dissimilar from this section in scope, meaning, and practical application as to deprive the trial courts of this state of jurisdiction to hear and determine a cause for the negligent killing in the state of Georgia of a resident of this state. Rodwell v. Camel City Coach Co., 205 N. C. 292, 171 S. E. 100.

Creates New Cause of Action. — The cause of action for personal injuries ceases with the death of the injured party and the action under this section is not a survival of the former but an entirely new action. Harper v. Commissioners, 123 N. C. 118, 119, 31 S. E. 384; Bolick v. Railroad, 138 N. C. 370, 50 S. E. 689; Taylor v. Cranberry, etc., Iron Co., 94 N. C. 526.

It creates a new cause of action, however, only in the sense that at common law the right did not survive to the personal representative. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

Liberal Construction. — This section is not penal but remedial in its nature, and it should be given such construction as will effectuate the intention of the legislature in enacting it. Hall v. Southern R. Co., 149 N. C. 108, 62 S. E. 899; Vance v. Railroad, 138 N. C. 460, 464, 50 S. E. 860.

Writ of Attachment May Issue. — A writ of attachment will issue under section 798 ch. 4 to enforce the right created by this section. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

A Property Right. — This section gives clear indication of the purpose of the Legislature to impress upon the right of action the character of property as a part of the intestate's. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Decedent Fully Compensated before Death. — Where the injured party has received in his lifetime full compensation for the injury which resulted in his death, a right of action arising from the same injury will not lie after his death for further damages for the benefit of his estate. Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635.

What Constitutes a Cause of Action. — It is entirely immaterial for the purpose of establishing a cause of action under the provisions of this section whether the act was wanton or cruel. Facts showing a legal duty and neglect thereof on the part of defendant with a resulting injury to the plaintiff are sufficient to constitute a cause of action. Western Union Tel. Co. v. Catlett, 177 Fed. 71, 74.

For a discussion of the right of husband or wife to recover damages for the loss of consortium by reason of injury or death, see Note, 3 N. C. L. R. 98.

Cited in Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169; Harper v. Bullock, 198 N. C. 448, 449, 152 S. E. 405; Wilson v. Clement Co., 207 N. C. 541, 543, 177 S. E. 797.

II. LIMITATION OF THE ACTION.

In General.—The limitation of the section is stated in Devis v. Norfolk Southern R. Co., 200 N. C. 345, 157 S. E. 11.

Condition Affecting Cause. — The provision that the action must be brought within one year is not a statute of limitation but is a condition affecting the cause of action itself. Trull v. Seaboard Air Line R. Co., 151 N. C. 545, 547, 66 S. E. 586. See also Mathis v. Camp Mfg. Co., 204 N. C. 434, 435, 168 S. E. 515; Curlee v. Duke Power Co., 205 N. C. 644, 647, 172 S. E. 329.

Hence it must be alleged and proved by the plaintiff to make out a cause of action and is not required to be pleaded as a statute of limitations. Bennett v. North Carolina R. Co., 159 N. C. 345, 74 S. E. 883; Hatch v. Alamance R. Co., 183 N. C. 617, 112 S. E. 529; Hanie v. Penland, 193 N. C. 880.

The requirement that the action shall be brought within one year is a condition annexed to the right of action and not to the person of the defendant and it must be shown by the plaintiff that he has complied therewith, and it is not necessary for the defendant to plead it as a statute of limitations. Neely v. Minus, 196 N. C. 345, 145 S. E. 771.

Provision as to Time Strictly Construed. — This provision requiring suit to be brought within one year after the death must be strictly complied with. Taylor v. Cranberry Iron, etc., Co., 94 N. C. 525, 526. And no explanation as to why the action was not brought within such time can avail. Id. Best v. Kinston, 106 N. C. 205, 10 S. E. 997. Therefore, the fact that no administrator was appointed does not vary the rule. Best v. Kinston, 106 N. C. 205, 10 S. E. 997.

Applies to Nonresident Defendant.—The provision that the action must be brought within one year applies with full force whether the defendant be a resident or a nonresident. Neely v. Minus, 196 N. C. 345, 347, 145 S. E. 771, citing McGuire v. Lumber Co., 190 N. C. 806, 131 S. E. 274.

After Nonsuit. — A new action under this section may be commenced within one year after a nonsuit, as provided in sec. 415. Neekins v. Norfolk, etc., R. Co., 131 N. C. 1, 2, 42 S. E. 333; Trull v. Seaboard, etc., R. Co., 151 N. C. 545, 548, 66 S. E. 586. See also Swainey v. Great Atlantic, etc., Tea Co., 204 N. C. 713, 715, 169 S. E. 618; Jones v. Bagwell, 207 N. C. 378, 388, 177 S. E. 170.

This section, construed with § 415, extends the time within which the action must be brought in case of nonsuit to the extreme limit of two years, and where the defendant has, under the Federal statutes, removed the cause from the State to the Federal Court, and there taken a nonsuit, and has commenced his action again in the State court, the fact that the second action between the same parties, upon the same subject-matter, was commenced in the State court more than one year after the date of the death does not bar the plaintiff's right of action. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532, citing Fleming v. R. R., 128 N. C. 80, 38 S. E. 253.

See § 415 and notes thereto.

After Discontinuance.—Where there is a break in the continuity in the issuance of alias and pluries summonses in a civil action to recover damages for a wrongful death there is a discontinuance, and service of a summons thereafter commences a new action, and if issued more than one year after the wrongful death of the action will be dismissed. Neely v. Minus, 196 N. C. 345, 145 S. E. 771. See note under § 481.

Conflict of Laws.—This section confers a right not existing at common law, and the provision that the action be brought within one year is a condition annexed to the cause of action and also a statute of limitation in regard thereto, and an action brought against a resident defend-

ant by a nonresident plaintiff for a wrongful death occurring in another State is controlled by our statute prescribing the time within which such action can be brought and not a general statute of the State in which the death occurred which allows a longer period. Tieffenbrun v. Flannery, 198 N. C. 397, 151 S. E. 857.

III. PARTIES TO THE ACTION.

Action against Estate of One Causing Wrongful Death.— Where a person is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death, within one year after the wrongful death caused by him, an action will lie against the executor and administrator of the deceased defendant under the provisions of this section. Tonkins v. Cooper, 187 N. C. 570, 122 S. E. 294.

Where Deceased Is an Infant. — Under this section the administrator may sue for the death of an infant a few months old. Russell v. Windsor Steamboat Co., 126 N. C. 961, 965, 36 S. E. 191; Davis v. Railroad Co., 136 N. C. 115, 116, 48 S. E. 591.

Action by Administrator of Child against Parents.—An unemancipated child living with his parents may not maintain an action in tort against them, nor can the administrator of the child recover damages against them for the child's wrongful death, as this section gives a right of action for wrongful death only where the injured party, if he had lived, could have maintained such action. Goldsmith v. Samet, 201 N. C. 574, 160 S. E. 835.

Joinder of Employer with Employee.—The right to maintain an action for the wrongful death of a deceased rests exclusively upon this section, and where the death is caused by the negligence of an employee while acting within the scope of his authority the employer may be joined as a defendant under the doctrine of respondent superior. Brown v. Southern R. Co., 202 N. C. 256, 162 S. E. 613.

Action by Administrator of Employee Who Has Received Workman's Compensation.—When an administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, under this section, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death of the intestate. Phifer v. Berry, 202 N. C. 388, 163 S. E. 119.

Suit Must Be Brought by Personal Representative — The personal representative of the deceased, his executor or administrator, etc., can alone maintain an action for damages for his wrongful death under the provisions of this section. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 16, 131 S. E. 402; Hood v. American Tel., etc., Co., 162 N. C. 70, 71, 77 S. E. 1096.

Nature of Suit. — The statute requires the suit to be brought by the administrator in his official and not in his private or individual capacity. He must sue as administrator. Hall v. Southern R. Co., 146 N. C. 345, 348, 59 S. E. 879.

Under this section an administrator sues in his own right and not **en autre droit**. Christian v. Railroad Co., 136 N. C. 321, 322, 48 S. E. 743.

Hence under this section an action cannot be maintained by a widow as such, but must be brought by the personal representative of the deceased. Bennett v. North Carolina R. Co., 159 N. C. 345, 74 S. E. 883; Howell v. Commissioners, 121 N. C. 362, 28 S. E. 362; Craig v. Suncrest Lumber Co., 189 N. C. 137, 126 S. E. 312, 313.

Nor can a husband as such sue for the wrongful death of his wife. Hood v. American Tel., etc., Co., 162 N. C. 70, 77 S. E. 1096. A father cannot maintain an action in his individual capacity for the death of his son. Killian v. Southern R. Co., 128 N. C. 261, 38 S. E. 873. Nor for the wrongful death of his daughter resulting from seduction. Scarlett v. Norwood, 115 N. C. 284, 285, 20 S. E. 459.

Appointment of Administrator. — A cause of action under this section is sufficient for the appointment of an administrator. Vance v. Railroad, 138 N. C. 460, 464, 50 S. E. 860. But where a deceased has left a will disposing of all his property and therein naming an executor, the right of action against a defendant for his wrongful death must be by the executor named. Hood v. American Tel., etc., Co., 162 N. C. 70, 93, 77 S. E. 1096.

Foreign Administrator Cannot Sue. — A foreign administrator cannot bring an action under this section. Hall v. Southern R. Co., 149 N. C. 108, 62 S. E. 899. Therefore when an administrator does not qualify in this state until after the commencement of the suit and the expiration of one year from the death of his intestate he cannot bring the action. Id. Vance v. Railroad, 138 N. C. 460, 50 S. E. 860.

IV. DISTRIBUTION OF RECOVERY.

In General. — With reference to the disposition of the recovery this section materially differs from the English statute and the statute in most of the states which generally provide for designated classes, such as the wife, the children. Furthermore, in some states the measure of damages is made to depend upon who takes the benefit of the recovery. In this state the measure of damages is not determined by such considerations, but is, in all cases, dependent upon considerations of fair and just compensation for the pecuniary injury resulting from such death. Ed. Note.

The damages when recovered are not to be simply distributed, but **disposed of** as provided in case of intestacy and the complaint need not allege that intestate left next-of-kin. Warner v. Western, etc., R. Co., 94 N. C. 250, 255, 257.

Existence of Beneficiaries Immaterial. — The existence of persons who will be entitled to the recovery under section 137 is not a condition precedent to the right to bring the action. The purpose of the section is to give the action irrespective of who may become beneficiaries of the recovery. Warner v. Western, etc., R. Co., 94 N. C. 250, 258.

Rights of Distributees Fixed. — Under this section the rights of the distributees are fixed as of the time when the intestate died. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Not Assets of Deceased's Estate. — The provision that the recovery is not to be applied as assets in the payment of debts or legacies extends to creditors of the intestate and not to creditors of the distributees. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Damages for a wrongful death are not assets of the estate available to creditors, and are to be disposed of according to the canons of descent and distribution. Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612.

Not Subject to Widow's Year's Support. — The damages recovered are not subject to the widow's year's support, as such support is not provided for "in this chapter" as specified by the section. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216.

Recovery Held in Trust. — The administrator holds the amount recovered in trust for those that may be entitled thereto as distributees. Avery v. Brantley, 191 N. C. 396, 399, 131 S. E. 721; Baker v. Raleigh, etc., 91 N. C. 308.

When Recovery Goes to University. — In action under this section for damages for negligently causing the death of the intestate, if there be no next-of-kin who are entitled to the recovery, under the statute of distributions, the recovery goes to the University. Warner v. Western, etc., R. Co., 94 N. C. 250.

Father as Unworthy Beneficiary. — Notwithstanding the provisions of section 189 depriving a father who has abandoned his child of his services, etc., a father who has abandoned his minor child shall, under this section, be entitled to his distributive share of the damages recovered for the wrongful death of such child. Avery v. Brantly, 191 N. C. 396, 131 S. E. 721, 5 N. C. L. R. 72.

Law of This State Governs. — Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile. Hartness v. Pharr, 133 N. C. 566, 45 S. E. 901. See Hall v. Southern R. Co., 146 N. C. 345, 350, 59 S. E. 879.

Recovery under Federal Employer's Liability Act.—In an action to recover damages under the Federal Employer's Liability Act, this state statute does not apply as to the distribution of the recovery. Horton v. Seaboard, etc., R. Co., 175 N. C. 472, 473, 95 S. E. 883. Overruling In re Stone, 173 N. C. 208, 91 S. E. 852.

V. ADMISSION OF DECLARATIONS.

Rule of Evidence Changed. — This is a general statute changing the rule of evidence, in which no one has a vested interest and which the law-making power can extend, alter or repeal at will. Williams v. Randolph, etc., R. Co., 182 N. C. 267, 273, 108 S. E. 915. And this change is valid and constitutional. Tatham v. Andrews Mfg. Co., 180 N. C. 627, 105 S. E. 423.

Applies to Prior Cases. — The amendment of 1919 to this section, enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. Williams v. Randolph, etc., R. Co., 182 N. C. 267, 108 S. E. 915.

What Declarations Permitted. — This section permits in evidence such declarations of the act of killing and circumstances immediately attendant on the act, which constitutes a part of the res gestae, and uttered when the

declarant was in actual danger of death, and full apprehension thereof, and when the death accordingly ensued. Tatham v. Andrews Mfg. Co., 180 N. C. 627, 105 S. E. 423.

The dying declarations of a deceased person for whose death an action has been brought under this section are competent as evidence, provided the preliminary facts are made to appear. Southwell v. R. R., 189 N. C. 417, 127 S. E. 361. Otherwise they are not admissible. Holmes v. Wharton, 194 N. C. 470, 475, 140 S. E. 93.

Declarations Must Have Been Voluntary. — In case of the admission of dying declarations, as in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused to be admissible upon the trial in an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and confined to the act of killing and the attendant circumstances forming a part of the res gestae. Dellinger v. Elliott Building Co., 187 N. C. 845, 123 S. E. 78.

§ 161. Damages recoverable for death by wrongful act.—The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death. (Rev., s. 60; Code, s. 1499; 1868-9, c. 113, s. 71; R. C., c. 1, s. 10.)

Mental Anguish Not to Be Considered. — Where the plaintiff brings an action, under this section, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. Byrd v. Express Co., 139 N. C. 273, 51 S. E. 851.

Evidence as to Number of Children Inadmissible. — In an action for death under this section, evidence of the number of children left by the deceased is inadmissible as irrelevant and calculated to mislead the jury. Kesler v. Smith, 66 N. C. 154.

Annuity Act Not to Be Considered. — In estimating the damages under this section the court should not permit the jury to consider the provisions of sec. 1791 (the Annuity Act) for the purpose of ascertaining the present value of intestate's life. Poe v. Railroad, 141 N. C. 525, 54 S. E. 406.

No "Hard and Fast Rule" Prescribed. — "This court has not prescribed any 'hard and fast rule' by which to bind the jury in making the estimate of what sum should be given or to require them to make the assessment of damages in any particular way." Poe v. Railroad, 141 N. C. 525, 528, 54 S. E. 406.

Nature and Quantum of Damages Recoverable. — It is well settled that no damages are to be allowed as a **solatium** or a punishment. Kesler v. Smith, 66 N. C. 154, 157; Bradley v. Ohio River, etc., R. Co., 122 N. C. 972, 974, 30 S. E. 8; Western Union Tel. Co. v. Catlett, 177 Fed. 71; Collier v. Arrington, 61 N. C. 356.

This section restricts the recovery for malpractice to compensatory damages. Gray v. Little, 127 N. C. 304, 37 S. E. 270.

In an action for wrongful death under this section the jury may consider evidence of the plaintiff's intestate's age, habits, industry skill, means and business, and the admission of testimony that the deceased had a 200-acre farm, a comfortable home, and a plenty for his family to eat and wear, was not error. Hicks v. Love, 201 N. C. 773, 161 S. E. 394.

The reasonable expectation of pecuniary advantage from the continuance of the life of the deceased must, in all cases, guide the jury in determining the quantum of damages, to which end evidence as to the age, habits, industry, business, etc., of the deceased is indispensable. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

The instruction for the determination of the quantum of damages must be so specific as to contain an explanation of the consideration to be given to the whole evidence in fixing the worth of the life. An error due to such a defect will not be cured by judges reducing the amount of damages assessed. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

"In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probate or even possible benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune." Russell v. Windsor Steamboat Co., 126 N. C. 961, 969, 36 S. E. 191.

The correct rule touching the quantum of damages is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. Kesler v. Smith, 66 N. C. 154.

The measure of damages for the wrongful killing of a mother of children is the value of her labor or the amount of her earnings if she had lived out her expectancy, without regard to the number of her children and the intellectual and moral training she might have given them. Bradley v. Ohio River, etc., R. Co., 122 N. C. 972, 30 S. E. 8.

"It has been held by this court, in several similar cases, that the statute does not limit the recovery to the actual pecuniary loss proved on the trial." Russell v. Windsor Steamboat Co., 126 N. C. 961, 969, 36 S. E. 191.

Under the State statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Horton v. Seaboard, etc., R. Co., 175 N. C. 472, 477, 95 S. E. 883; Carpenter v. Ashville Power, etc., Co., 191 N. C. 130, 131 S. E. 400.

In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of life, business calling or profession, etc., and the amount spent for his family, or those dependent upon him, should not be deducted. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

The total amount or net accumulated income, upon which the compensation is based, must be ascertained as of the time when, according to his expectancy, the intestate would have died in due course of nature; but this total may be composed of many annual incomes of different amounts. The present value of that sum, whatever it may be, is what the jury should allow in the way of damages. Poe v. Railroad, 141 N. C. 525, 528, 54 S. E. 406.

The age, health, strength, skill, industry, habits, and character of the deceased are elements of importance to be considered in fixing the amount of compensation. Burton v. Wilmington, etc., R. Co., 82 N. C. 505; Poe v. Railroad, 141 N. C. 525, 528, 54 S. E. 406.

In such an action the value of the life before twenty-one as well as after twenty-one years of age is recoverable. Gurley v. Southern Power Co., 172 N. C. 690, 695, 90 S. E. 943.

The court can not instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantages from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

The meaning of damages, in the case of the wrongful death of a child is the same as in the case of an adult. The difficulty is in the application. Russell v. Windsor Steamboat Co., 126 N. C. 961, 36 S. E. 191. See Gurley v. Southern Power Co., 172 N. C. 690, 695, 90 S. E. 943.

The damages recoverable for the wrongful death of another negligently caused, is the net present pecuniary worth of the deceased, to be ascertained by deducting the probable cost of his own living and his ordinary or usual expenses, from the probable gross income derived from his own exertions, based upon his life expectancy. Carpenter v. Asheville Power, etc., Co., 191 N. C. 130, 131 S. E. 400; Purnell v. Rockingham R. Co., 190 N. C. 573, 130 S. E. 313; Russell v. Windsor Steamboat Co., 126 N. C. 961, 967, 36 S. E. 191.

In estimating damages under this section, the question is, did the relatives suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

In an action for death under this section it is competent to prove the age, strength, health, skill, industry, habits and character of the deceased, with a view to arrive at his pecuniary worth to his family. Kesler v. Smith, 66 N. C. 154.

Stated in Wise v. Hollowell, 205 N. C. 286, 290, 171 S. E. 82.

Cited in Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612.

§ 162. Actions which do not survive.—The following rights of action do not survive:

1. Causes of action for libel and for slander, except slander of title.

2. Causes of action for false imprisonment and assault and battery.

3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after

death. (Rev., s. 157; Code, s. 1491; 1868-9, c. 113, s. 64; 1915, c. 38.)

As to abatement of actions, see section 461.

Editor's Note.—This section formerly contained an additional provision to the effect that "injuries to person, where such injury does not cause the death of the injured party" shall not survive. But this provision has been omitted by the amendment of 1915, ch. 38. See Editor's Note under section 159.

§ 163. Right of action survives to successor.—Executors and administrators shall have actions in like manner as the first testator or intestate might have had against any person, his executors and administrators, in all cases, except where such actions, being commenced, are not allowed by statute to be revived on the death of any party. (Rev., s. 158; Code, s. 1497; 1868-9, c. 113, s. 69; 1905, c. 286.)

Application to Administrator d. b. n.—The provisions of this section apply to suits brought by administrator de bonis non, as well as to original administrator, and are mandatory. There is no middle ground. Rogers v. Gooch, 87 N. C. 442.

§ 164. To sue or defend in representative capacity.—All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity. (Rev., s. 160; Code, s. 1507; 1868-9, c. 113, s. 79.)

Heirs and Next of Kin as Parties.—The heirs and next of kin have no right to be made parties to an action or account against the personal representative, although they allege collusion between the plaintiff and the representative. Byrd v. Byrd, 117 N. C. 523, 23 S. E. 324.

§ 165. Service on or appearance by one binds all.—In actions against several executors, administrators or collectors they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all. (Rev., s. 161; Code, s. 1508; 1868-9, c. 113, s. 81.)

§ 166. When creditors may sue on claim; execution in such action.—An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted. (Rev., s. 162; Code, s. 1509; 1868-9, c. 113, s. 82.)

Any Court May Entertain the Suit.—In construing this section, it was decided at a very early day after its enactment that any court having jurisdiction of the amount sued for could entertain the suit of the creditor so far as to establish his claim and give him judgment therefor. Heilig v. Foard, 64 N. C. 710; Vaughn v. Stephenson, 69 N. C. 212; Shields v. Payne, 80 N. C. 291, 293; Hoover v. Berryhill, 84 N. C. 133, 134.

Court to Grant Leave.—The court which, under this section, may grant leave to issue execution is the court which has jurisdiction of probate matters, and no other court. Vaughan v. Stephenson, 69 N. C. 212, 214.

Jurisdiction for Breach of Contract.—The superior court in term has, under this section, jurisdiction of an action by a creditor against an administrator for breach of a contract made by his intestate. Shields v. Payne, 80 N. C. 291.

§ 167. Service by publication on executor without bond.—Whenever process may issue against an executor who has not given bond, and the same cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions. (Rev., s. 163; Code, s. 1523; 1868-9, c. 113, s. 94.)

§ 168. Execution by successor in office.—Any executor, administrator or collector may have execution issued on any judgment recovered by any person, who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done. (Rev., s. 164; Code, s. 1513; 1868-9, c. 113, s. 84.)

§ 169. Action to continue, though letters revoked.—In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death. (Rev., s. 165; Code, s. 1514; 1868-9, c. 113, s. 85.)

Art. 19. Representative's Powers, Duties and Liabilities

§ 170. Representative may maintain appropriate suits and proceedings.—Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent. (Rev., s. 159; Code, s. 1501; 1868-9, c. 113, s. 73.)

Recovery of Realty by Administrator d. b. n. c. t. a.—Where an executor is entitled, under this section, to the possession of the land, his successor, an administrator de bonis non, cum testamento annexo is entitled to the same rights and remedies as his predecessor in office. Smathers v. Moody, 112 N. C. 791, 795, 175 S. E. 532.

§ 171. Representative may purchase for estate to prevent loss.—At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate when, in his opinion, this is necessary to prevent a loss to the estate. (Rev., s. 85; Code, s. 1505; 1868-9, c. 113, s. 77.)

In Sale of Realty Only.—This section authorizes the representatives to bid at the sale of realty only. Hence the non-statutory rule that a representative cannot bid at his own sale applies in sales of personalty. Woody v. Smith, 65 N. C. 116, 118.

§ 172. Representatives hold in joint tenancy.—Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy. (Rev., s. 166; Code, s. 1502; 1868-9, c. 113, s. 74.)

§ 173. Representatives liable for devastavit.—The executors and administrators of persons

who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been. (Rev., s. 167; Code, s. 1495; 1868-9, c. 113, s. 68.)

§ 174. Nonresident executor or guardian to appoint process agent.—A nonresident qualifying in the state as an executor or guardian shall at the time of his qualification appoint in writing a resident agent in the county of his qualification, on whom may be served citations, notices, and all processes required by law to be served on such executor or guardian. The executor or guardian shall file the appointment with the clerk in the county of his qualification, and the clerk shall record it in the record book immediately after the record of qualification, and shall properly index it in the record book. All citations, notices, and processes served on such process agent shall be as effective as if served on the executor or guardian, but the return date shall not be sooner than ten days from the date of the issuance of the citation, notice, or process. No letters shall be granted to an executor nor shall a guardian be permitted to qualify, unless the process agent is named simultaneously with the application for letters or for qualification. (1917, c. 198, ss. 1, 2, 3.)

§ 175. Executor or guardian removing from state; to appoint process agent.—When a resident executor or guardian removes from the state, he shall, before removing or within thirty days thereafter, appoint a process agent in the manner as provided in the case of a nonresident, and upon failure to make the appointment within thirty days, the clerk shall remove him and appoint an administrator with the will annexed, or a new guardian, as the case may be. (1917, c. 198, s. 4.)

§ 176. Nonresident's failure to obey process ground for removal.—The clerk may remove any nonresident executor or guardian who fails or refuses to obey any citation, notice or process served on the process agent appointed as provided in the preceding two sections, and appoint a resident. (1917, c. 198, s. 5.)

§ 176(a). Power to renew obligation; no personal liability.—In all cases where a decedent is the maker or one of the makers, a surety or one of the sureties, an endorser or one of the endorsers, a guarantor or one of the guarantor's of any note, bond or other obligation for the payment of money which is due or past due at the death of said decedent, or shall thereafter become due prior to the settlement of the estate of said decedent, the administrator, executor or collector of said decedent's estate is hereby authorized and empowered to execute as such administrator, executor or collector a new note, bond or other obligation for the payment of money, in the same capacity as decedent was obligated for the same amount or less but not greater than the sum due on the original obligation which shall be in lieu of the original obligation of the decedent, whether made payable to the original holder or another, and is authorized and empowered to renew said note, bond or other obligation for the payment of money from time to time, and said note, bond or other obligation for the payment of money so executed by said administrator, executor or collector shall be binding upon the estate of said decedent to the same extent and in the same manner and with the same effect that the original note, bond or other obligation for the payment of money so executed by the decedent was binding upon his estate: Provided, the time for final payment of the note, bond or other obligation for the payment of money, or any renewal thereof by said administrator, executor or collector shall not extend beyond a period of two years from the qualification of the original administrator, executor or collector as such upon the estate of said decedent: Provided, however that if it shall be made to appear to the court that it is for the best interest of the estate that said time for final payment extend for a longer period than two years, then the court in its discretion may empower and authorize the administrator, executor or collector of said estate to renew the note, bond or other obligation for the payment of money, or any renewal or extension thereof by said administrator, executor or collector for such period as the court may deem best or for a period of time not exceeding two years: Provided, further that when the time for final settlement of the estate of said decedent has been extended from year to year for a longer period by order of the clerk of the superior court, approved by the resident judge of the superior court, such note, bond or other obligation for the payment of money or any renewal thereof by the said administrator, executor or collector may likewise be extended but not beyond the period authorized by the court for the final settlement of the estate of said decedent. The executor of any note, bond or other obligation for the payment of money mentioned in this section by the administrator, executor or collector of the decedent shall not be held or construed to be binding upon said administrator, executor or collector personally. (1925, c. 86; 1933, cc. 161, 196, 498.)

Editor's Note.—Public Laws 1933, cc. 161, 196, 498, inserted the words "a guarantor or one of the guarantor's" near the beginning of the section, and added the provisos giving the administrator power to extend and renew obligations. The part of this section beginning with words "unless it shall be made to appear," and continuing to the end of the first sentence, does not apply in Mecklenburg and Pamlico counties. See § 2 of the Act of 1933.

For a descriptive survey of the 1933 amendment to this section, see 11 N. C. Law Rev. 264.

For review of statute, see 4 N. C. L. R. 18, discussing ch. 86 of the Acts of 1925.

§ 176(b). Continuance of farming operations of deceased persons. — When any person shall die while engaged in farming operations, his executor or administrator shall be authorized to continue such farming operations until the end of the current calendar year; and/or to any crop or crops which may be harvested after the end of said year; provided, that only the net income from such farming operations shall be assets of the estate, and any indebtedness incurred in connection with such farming operations shall be a preferred claim as to any heir, legatee, devisee, distributee, general or unsecured creditor of said estate. Nothing herein contained shall limit the powers of an executor under the terms of a will. (1935, c. 163.)

Art. 20. Construction and Application of Chapter

§ 177. Where no time specified, reasonable time allowed; extension.—If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk. (Rev., s. 169; Code, s. 1463; 1871-2, c. 213, s. 16.)

§ 178. Powers under will not affected.—Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will, provided creditors be not delayed thereby nor the order changed in which by law they are entitled to be paid. (Rev., s. 170; Code, s. 1415; 1868-9, c. 113, s. 23; R. C., c. 46, ss. 12, 13.)

§ 179. Chapter applies to administrations since 1869.—This chapter shall apply only to cases where the grant of letters of collection or of probate or of administration shall have issued on or after the first day of July, one thousand eight hundred and sixty-nine, except in case of administrations de bonis non upon estates where the former letters of administration or letters testamentary were granted prior to the first of July, one thousand eight hundred and sixty-nine, in all which cases estates shall be administered, closed up and settled according to the law as it existed just prior to the first of July, one thousand eight hundred and sixty-nine. (Rev., s. 173; Code, s. 1476; 1871-2, c. 213, s. 1872-3, c. 179.)

Judgments against Representatives.—A judgment by default against an administrator appointed prior to July, 1869, rendered in an action begun in 1882, conclusively fixes him with assets, as the case is governed by the laws as it existed prior to the first mentioned date. Brown v. McKee, 108 N. C. 387, 392, 13 S. E. 8.

A docketed judgment against an administrator in his representative capacity, where administration was granted before July 1, 1869, creates no lien upon his land. Williams v. Green, 80 N. C. 76.

Applied in Brandon v. Phelps, 77 N. C. 45; Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

§ 180. Cases pending at adoption of constitution of 1868.—All cases for the sale of real estate for assets heretofore in the county courts, in which final orders for collection and application or distribution of purchase money and making titles were not made before the adoption of the present constitution, may, at the instance of any person interested, be transferred, as other cases, to the superior court of the county where such proceeding was pending, and such court shall have full authority to make all necessary orders to complete the same. (Rev., s. 171; Code, s. 1542; 1871-2, c. 161.)

§ 181. Administrations prior to 1869.—This chapter shall apply to the estates of such deceased persons only whereof original administration has been granted subsequent to the first day of July, one thousand eight hundred and sixty-nine, and all estates whereon administration was granted prior to the said first day of July, one thousand eight hundred and sixty-nine, shall be dealt with, administered and settled according to the law as it existed just prior to said date, and it is hereby declared that such is the true intent and meaning of this chapter: Provided, that nothing herein shall be construed to prevent the application of this chapter so far as it relates only to the courts having jurisdiction of any action or proceeding for the settlement of an administration or to the practice and procedure therein. If any person shall have bona fide administered any estate or any part of the estate of any deceased person whereof original administration was granted prior to the first day of July, under the said act of one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, he shall not be deemed guilty of a devastavit. (Rev., ss. 168, 172; Code, ss. 1433, 1434; 1869-70, c. 53, ss. 1, 2.)

Applied in Glover v. Flowers, 95 N. C. 57; Brittain v. Dickson, 104 N. C. 547, 550, 10 S. E. 701; Little v. Duncan, 89 N. C. 416.

CHAPTER 2

ADOPTION OF MINORS

§§ 182-191. Repealed by Public Laws 1935, c. 243, codified as §§ 191(1)-191(12).

§ 191(1). Petition for adoption and change of name.—Any proper adult person or husband and wife, jointly, who have legal residence in North Carolina may petition the superior court of the county in which he or they have legal residence or the county in which the child resides, or of the county in which the child had legal residence when it became a public charge, or of the county in which is located any agency or institution operating under the laws of this State having guardianship and custody of the child, for leave to adopt a child and for a change of the name of such child: Provided, that in every instance the child shall have been an actual resident of this state for a period of at least one year. Such petition for adoption shall be filed in duplicate on standard form to be supplied by the state board of charities and public welfare, one form to be held in the files of the said superior court, and the other to be sent to said state board of charities and public welfare. (1935, c. 243.)

Editor's Note.—Section 2 of c. 243 of the Acts of 1935 provides that pending litigation shall not be affected.

§ 191(2). Use of true name of child unnecessary; identification.—It shall not be necessary in the petition for adoption or other papers, except the report on investigation of the conditions and antecedents of the child, to give the true or legal name of the child to be adopted, but it shall be competent to name or identify the child to be adopted by such name as may be presented in the petition of adoption, and the adoption proceedings shall not be invalidated by reason thereof. In every case, however, the true name of the child proposed to be adopted shall be set forth in, and made known to the court through, the report upon the conditions and antecedents of the child to be made by the superintendent or superintendents of public welfare or duly authorized representative of a child-placing agency as hereinafter provided. (1935, c. 243.)

§ 191(3). Investigation of conditions and antecedents of child and of suitableness of foster home.—Upon the filing of a petition for the adoption of a minor child the court shall instruct the

county superintendent of Public Welfare, or a duly authorized representative of a child-placing agency, licensed by the State Board of Charities and Public Welfare, to investigate the conditions and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, and to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child; or the court may instruct the superintendent of public welfare of one county to make an investigation of the conditions and antecedents of the child and the superintendent of public welfare of another county or counties to make any other part of the necessary investigation. The county superintendent or superintendents of public welfare or the duly authorized representative of such agency described hereinbefore shall make a written report of his or their findings, on a standard form supplied by the state board of charities and public welfare, for examination by the court of adoption. (1935, c. 243.)

§ 191(4). Parents or guardian necessary parties; release of rights to child.—The parents or surviving parent or guardian, or the person or persons having charge of such child, or with whom it may reside, must be a party or parties of record to this proceeding: Provided, that when the parent, parents, or guardian of the person of the child has signed a release of all rights to the child, the person, agency, or institution to which said rights were released shall be made a party to this proceeding and it shall not be necessary to make the parent, parents or guardian parties. (1935, c. 243.)

Editor's Note.—The case treated under this section was decided under the section that appeared in Michie's Code of 1931 as § 183, the provisions of which were substantially similar to this section.

Noncompliance Deprives Clerk of Jurisdiction.—In Truelove v. Parker, 191 N. C. 430, 123 S. E. 295, it it said: "Upon the record in this case it is held that neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of their person, (consequently) he had no jurisdiction of the subject-matter." See note of this case in 5 N. C. Law Rev. 67.

§ 191(5). Tentative approval and order of adoption; completion of adoption within two years.—Upon the examination of the written report of the Superintendent of Public Welfare or of a duly authorized representative of said agency described hereinbefore and with the consent of the parent or parents if living or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, except in cases hereinafter provided for, the Court, if it be satisfied that the petitioner is a proper and suitable person and that the child is a proper subject for adoption and that the adoption is for the best interests of the child, may tentatively approve the adoption and issue an order giving the care and cutody of the child to the petitioner. Within two years thereafter, but not earlier than one year from date of such order, the Court, at its discretion, may complete the adoption by an order granting letters of adoption and effect of adoption shall be retroactive to date of application. During this interval the child shall remain the ward of the Court and shall be subject to such supervision as the Court may direct. Upon making the interlocutory order the written report of the investigation made by the Superintendent or Superintendents of Public Welfare or representative of the child-placing agency described hereinbefore shall be forwarded by the Clerk of the Superior Court to the State Board of Charities and Public Welfare. Upon receipt of the same the said Board shall cause said report to be recorded in a book to be kept for that purpose, which book shall be properly indexed showing the name of the child, the names of its natural parents, the names of its adoptive parents, and the new legal name, if any, given to said child; and said Board shall also cause the original report to be permanently indexed and filed. Neither the original report nor the record thereof in the aforesaid book shall be made public, nor shall any information concerning the contents of either of them be disclosed by any person except upon order of a Judge of the Superior Court, made upon application of any party requiring such information, and when in the opinion of the said Judge it may be to the interests of the said child or to the public to have such information disclosed. It shall be a misdemeanor for any person having charge of the said report or record to allow said report or records to be examined by anyone or to give any information concerning the contents of either except upon order of a Judge of the Superior Court as herein provided. (1935, c. 243.)

Editor's Note.—The case treated under this section was decided under the section that appeared in Michie's Code of 1931 as § 184, the provisions of which were substantially similar to this section.

Collateral Attack.—The failure to observe the statutory requirements as to notice and consent is not a mere irregularity which is immune from collateral attack, for they are jurisdictional and without them as a general rule, a valid order of adoption cannot be made. Truelove v. Parker, 191 N. C. 430, 437, 132 S. E. 295. See note on this case in 5 N. C. Law Rev. 67 et seq.

§ 191(6). Relation of parent and child established; right of inheritance.—Such order granting letters of adoption, when made upon a standard form supplied by the state board of charities and public welfare, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitle to if such child had been the actual child of the person adopting it. The child shall not inherit and be entitled to the personal estate if the petitioner especially sets forth in his petition such to be his desire and intention. Any proceedings conducted under this section to which the adopting parent shall be a party shall be binding upon such party, regardless of lack of jurisdiction as to the other persons or any irregularities in the proceedings. (1935, c. 243.)

Editor's Note.—The cases treated under this section were decided under the section that appeared in Michie's Code of 1931 as § 185 and the section that appeared in the 1933 Supplement to the 1931 Code as § 191(5), the provisions of which were substantially similar to this section.

Strictly Construed.—As statutes, such as this section, are in derogation of the common law, they must not be con-

strued to enlarge or confer any rights not clearly given. Edwards v. Yearby, 168 N. C. 663, 665, 85 S. E. 19; Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

Time Relationship Begins.—Whether the section created the parental relation from the date of the order, or whether it is retroactive and the relation reverts back to the birth of the child was queried in King v. Davis, 91 N. C. 142.

Right of Inheritance.—This section has reference to cases of the intestacy of persons standing in loco parentis, and does not apply where the property is disposed of by will. King v. Davis, 91 N. C. 142; Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306.

A child adopted under this section does come within the terms of a devise to "heirs lawfully begotten." Love v. Love, 179 N. C. 115, 101 S. E. 562.

A deed to the grantor's daughter conveyed the lands to be held, with remainder over as designated thereinafter, with habendum to her for her natural life then over to any child or children she may leave surviving her in fee, qualified by the expression, "should any child or children born unto her predecease her the other such children should take in fee," with an ultimate and further contingent limitation over. It was held that a child adopted by the grantee after the death of the grantor, no other child having been born, is excluded as against the ultimate takers of the blood of the grantor provided by the deed. Tankersley v. Davis, 195 N. C. 542, 142 S. E. 765.

Same—Adopting Parent Does Not Inherit.—This section confers the right of inheritance on the adopted child only, and not on the adopted father. So where the adopted child dies seized of realty, without brothers or sisters, the law confers it upon the natural rather than the adopted father. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19. This case contains an excellent review of similar statutes in other states. Ed. Note.

It gives no power to the adopted child to inherit through the adoptive parent, or from any source other than the "estate of the petitioner." It limits the right to inherit to the property of the adoptive parent, and it cannot be construed to give the adopted child the right to inherit from his father's ancestors or other kindred, or to be a representative of them. Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

The effect of the adoption is simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child may inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child. Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

§ 191(7). Change of name; report to bureau of vital statistics; entry on birth certificate. — For proper cause shown the court may decree that the name of he child shall be changed to such name as may be prayed in the petition: Provided, that whenever the name of any child is so changed, the court shall immediately report such change to the bureau of vital statistics of the state board of health, authorizing said bureau to enter change of name on the original birth certificate of the child and to issue upon request a certificate of birth bearing the new name of a child as shown in the decree of adoption, the name of the foster parents of said child, age, sex, date of birth, but no reference in any certified copy of the birth certificate shall be made to the adoption of the said child. However, original registration of birth shall remain a part of the record of the said bureau of vital statistics. The provisions of this section shall apply to all minors heretofore adopted in accordance with the laws existing at the time of such adoptions in as full a manner as to adoptions hereunder. (1935, c. 243.)

§ 191(8). Surety bond required of petitioner where child with estate is without guardian. — When the court grants the petitioner the custody of the child, if the child is an orphan and without guardian and possesses any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians. (1935, c. 243.)

§ 191(9). Recordation of adoption proceedings; revocation of adoption order; distribution of copies.—All papers, except the report upon the conditions and antecedents of the child and consent of natural parents or guardian to the adoption, shall be recorded in the book or books in which other special proceedings are recorded in the office of the clerk of the superior court in the county in which the adoption is made, and may be revoked at any time by the court for good cause shown. On issuing such order granting letters of adoption, the clerk of the superior court of the county in which order is issued shall send copy of such order to the state board of charities and public welfare and likewise a copy of revocation of order to said board to be held as a permanent record. (1935, c. 243.)

Editor's Note.—Section 190 of Michie's Code of 1931 provided for the restoration of the parent's right to custody of a child after such right had been forfeited by abandonment. Under that section it was held in Newsome v. Bunch, 142 N. C. 19, 54 S. E. 785, that where the court, in habeas corpus proceedings for the custody of a child, found that there had been no abandonment, it was error to order a restoration of the child without considering the interest or welfare of the child as prescribed by that section. This case was remanded by the supreme court with a direction to the court below to make a finding as to whether the child's interests would be prejudiced, the lower court found that, under the circumstances, no prejudice would result from the restoration, and the supreme court affirmed this decision in 144 N. C. 15.

§ 191(10). Abandonment or unfitness of parents deemed forfeiture of rights. — In all cases where the parent or parents of any child have wilfully abandoned the care, custody, nurture and maintenance of the child to kindred, relatives or other persons, and in all cases where a court of competent jurisdiction has declared the parent or parents or guardians unfit to have the care and custody of such child, such parent or parents or guardian shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child, and upon finding of such fact by the court, shall not be necessary parties to any action or proceeding under this chapter. (1935, c. 243.)

Editor's Note.—The cases treated under this section were decided under the section that appeared in Michie's Code of 1931, as § 189, the provisions of which were substantially similar to this section.

Abandonment Judicially Determined. — The existence of abandonment as ground for an adoption without parental consent must be judicially determined. Truelove v. Parker, 191 N. C. 430, 439, 132 S. E. 295.

Abandonment Must Be Willful.—Where there was evidence in behalf of the defendant father tending to show that the plaintiff took possession of his children against his will and prevented him from performing his parental duty—as well as evidence to the contrary—, it was held that when the jury found for the defendant, the case did not fall within the meaning of this section. Howell v. Solmon, 167 N. C. 588, 83 S. E. 609. Wilfully as employed in this section means "purposely and deliberately in violation of law. State v. Whitner, 93 N. C. 590.

In the case of In re Jones, 153 N. C. 312, 69 S. E. 217, this section is cited and the statement is made that there was no abandonment shown of an illegitimate child.

Intention to Forego Parental Duties.—To constitute abandonment by a parent of its child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the parent which evinces a purpose to forego the parental duties. Truelove v. Parker, 191 N. C. 430, 132 S. E. 295.

Construed with Other Sections.—This section is not in pari materia with section 137, as to inheritance of the father and mother, dying without leaving husband, wife or child; nor is it in pari materia with section 160, as to death by wrongful act. Avery v. Brantley, 191 N. C. 396, 131 S. E. 721.

Death by Wrongful Act.—This section does not deprive the parent of the right to recover for the wrongful death of the child. Avery v. Brantley, 191 N. C. 396, 399, 131 S. E. 721.

Stated in In re Osborne, 205 N. C. 716, 721, 172 S. E. 491.

§ 191(11). Past adoption proceedings validated.—All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed, and the orders and judgments therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until the orders or judgments shall be vacated as provided by law. (1935, c. 243.)

§ 191(12). Procuring custody of child by forfeiting parents declared crime.—Any parent whose rights and privileges have been forfeited as provided by the second preceding section who shall procure the possession and custody of such child, with respect to whom his rights and privileges are forefeited, otherwise than by law provided, shall be guilty of a crime, and shall be punished as for abduction. (1935, c. 243.)

CHAPTER 2a.

AERONAUTICS

Art. 1. Municipal Airports

§ 191(a). Definition.—Airport or landing field for the purposes of this and the section following is defined as any plot of land or water formally set aside, and designated as a place where aircraft may land or take off. (1929, c. 87, s. 1.)

§ 191(b). Cities and towns authorized to establish.—The governing body of any city or town in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town. (1929, c. 87, s. 2.)

§ 191(c). Counties included. — The governing body of any county in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county. (1929, c. 87, s. 3.)

§ 191(d). Joint airport established by cities and towns and counties.—The governing bodies of any city, town and county in this state are hereby authorized to jointly acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such cities, towns and counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be jointly owned or controlled by such city, town and county. (1929, c. 87, s. 4.)

§ 191(e). Airport declared public purpose; eminent domain.—Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in sections two, three and four hereof, shall and are hereby declared to be acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose. (1929, c. 87, s. 5.)

§ 191(f). Acquisition of sites; appropriation of moneys.—Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city, town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than street purposes, or if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6.)

§ 191(g). Airports already established declared public charge; regulations and fees for use of.—The governing body or bodies of a city, town and/or county which has or have established an airport or landing field, and acquired, leased, or set apart real property for such purpose, may construct, improve, equip, maintain, and operate the same. The expenses of such construction, improvement, maintenance, and operation shall be a city, town and/or county charge as the case may be. The governing body or bodies of a city, town and/or county may adopt regulations and establish fees or charges for the use of such airport or landing field. (1929, c. 87, s. 7.)

§ 191(h). Appropriations for, each year to be raised, how.—The governing body or bodies of a city, town and/or county to which this act is applicable, having power to appropriate, individually or jointly, money therein, are hereby authorized to annually appropriate and cause to be raised by taxation in such city, town and/or county or may use from the net proceeds derived from the operation, by such city, town or county, of any public utility a sum sufficient to carry out the provisions of this act in such proportion and upon such pro-rata basis as may be determined upon by a joint board to be appointed by and from the governing body or bodies of the city, town and/or the county or individually as the case may be. Provided, nothing herein shall be construed to permit the governing bodies of any county, city or town to issue bonds under the provisions of this act without a vote of the people. (1929, c. 87, s. 8.)

§ 191(i). Constitutional parts of act upheld.—If any part or parts of this act shall be held to be unconstitutional, such unconstitutionality shall

not affect the validity of the remaining parts of this act. The General Assembly expressly declares that it would have passed the remaining parts of this act, if it had known that such part or parts thereof would be declared unconstitutional. (1929, c. 87, s. 9.)

Art. 2. State Regulation

§ 191(j). Definition of terms.—In this act "aircraft" includes balloon, airplane, hydroplane, and every other vehicle used for navigation through the air. A hydroplane while at rest on water and while being operated on or immediately above water shall be governed by the rules regarding water navigation; while being operated through the air otherwise than immediately above water, it shall be treated as an aircraft. "Aeronaut" and "airman" includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight. "Passenger" includes any person riding in an aircraft but having no part in its operation. (1929, c. 190, s. 1.)

§ 191(k). Sovereignty in space.—Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States. (1929, c. 190, s. 2.)

§ 191(l). Ownership of space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in section four. (1929, c. 190, s. 3.)

§ 191(m). Lawfulness of flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in section five. (1929, c. 190, s. 4.)

See 8 N. C. Law Rev. 281, 282.

§ 191(n). Damage on land.—The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it. (1929, c. 190, s. 5.)

§ 191(o). Collision of aircraft.—The liability of the owner of an aircraft, to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (1929, c. 190, s. 6.)

§ 191(p). Jurisdiction over crimes and torts.—All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State. (1929, c. 190, s. 7.)

§ 191(q). Jurisdiction over contracts.—All contractual and other legal relations entered into by aeronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath. (1929, c. 190, s. 8.)

§ 191(r). Dangerous flying a misdemeanor.—Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than one year, or both. (1929, c. 190, s. 9.)

§ 191(s). Hunting from aircraft a misdemeanor.—Any aeronaut or passenger who, while in flight within this State, shall intentionally kill or attempt to kill any birds or animals shall be guilty of a misdemeanor and punishable by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than thirty days, or both. (1929, c. 190, s. 10.)

§ 191(t). Qualifications of operator; federal license.—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of aerial navigation for which a license to operate aircraft issued by the United States Government would then be required if such aerial navigation were interstate, should have the qualifications necessary for obtaining and holding such a license, it shall be unlawful for any person to engage in operating aircraft within the State, in any such form or aerial navigation, unless he have such Federal license. (1929, c. 190, s. 11.)

§ 191(u). Possession and exhibition of license certificate.—The certificate of the license, herein required, shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager

or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 191(v). Aircraft; construction, design and airworthiness; federal registration.—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft to be operated within this State should conform, with respect to design, construction and airworthiness, to standards then prescribed by the United States Government with respect to aerial navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to operate an aircraft within this State unless it is registered pursuant to the lawful rules and regulations of the United States Government then in force, if the circumstances of such aerial navigation are of a character that such registration would be required in the case of interstate aerial navigation. (1929, c. 190, s. 13.)

§ 191(w). Penalties.—A person who violates any provision of sections eleven, twelve or thirteen of this act shall be guilty of a misdemeanor and punishable by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than ninety days, or both; provided, however, that acts or omissions made unlawful by sections eleven, twelve, or thirteen of this act shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14.)

§ 191(x). Jurisdiction of State over crimes and torts retained.—Provided that this article shall not be construed as a waiver of jurisdiction of the courts of the State of North Carolina over any crime or tort committed within the State of North Carolina, and provided, further, that the General Assembly of North Carolina may at any time amend, regulate or control any of the powers which may be assumed by the United States Department of Commerce under this act. (1929, c. 190, s. 15.)

Art. 3. Stealing, Tampering with, or Operating While Intoxicated

§ 191(y). Stealing of aircraft made crime of larceny.—Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of larceny and is punishable accordingly. (1929, c. 90, s. 1.)

§ 191(z). Tampering with aircraft made crime.—Any person who shall without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft shall be guilty of a misdemeanor and shall be punishable by fine of not more than one hundred ($100.00) dollars or imprisonment of not more than sixty days, or both, in the discretion of the court and it shall not be necessary to conviction hereunder to show wilful or malicious intent. (1929, c. 90, s. 2.)

§ 191(aa). Operation of aircraft while intoxicated made crime.—Any person who operates an airplane or other aircraft, whether on the ground or in the air while in an intoxicated condition, shall be guilty of a misdemeanor and punishable by fine not to exceed one hundred dollars or by imprisonment not to exceed sixty days, or both, in the discretion of the court. (1929, c. 90, s. 3.)

§ 191(bb). Serious bodily injury caused by operation of aircraft while intoxicated made felony.—Any person who, operating an airplane or other aircraft whether on the ground or in the air while in an intoxicated condition, does serious bodily injury to another shall be guilty of a felony. (1929, c. 90, s. 4.)

CHAPTER 3

ALIENS

§ 192. Rights as to real property.—It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands tenements or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding. (Rev., s. 182; Code, s. 7; 1870-1, c. 255.)

§ 193. Contracts validated.—All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes. (Rev., s. 183; Code, s. 8; 1870-1, c. 255, s. 2.)

§ 193(a). Bolich alien registration act.—The eight sections immediately following shall be known as the Bolich Alien Registration Act. (Acts 1927, c. 185, s. 1.)

§ 193(b). "Alien" construed.—The word "alien" as used in the sections shall be construed to mean any person more than sixteen years of age who is not a citizen of the United States. (Acts, 1927, c. 185, s. 2.)

§ 193(c). Regulation. — Every alien residing within the State of North Carolina shall, within ninety days after the ratification of this act, register with the clerk of the Superior Court of the county in which such alien resides; and every alien entering the State of North Carolina after this act goes into effect shall, if remaining within the State for a longer period than ninety days, register with the clerk of the Superior Court of the county into which he or she has come to reside within such ninety days.

At the time of registering every alien shall give the following information:

1. Name.
2. Nationality.
3. Date of birth.
4. Previous nationality (if any).
5. Profession or occupation.
6. Address of residence.
7. Names and addresses of five persons who have known the registrant for the longest period.
8. Address of last residence outside of North Carolina.
9. Government or military service.
10. Names and dates of birth of all children under sixteen years of age.
11. Must present a passport with proper vise admitting such alien into the United States under the United States statute, treaty, or regulation

in force at the date of entrance into the United States.

12. Must furnish two passport-size photographs, one of which shall be retained by the clerk for his record, and the other attached to the registration certificate of such alien and stamped with the official seal of the clerk of the Superior Court.

The above questions shall be answered under oath. (Acts, 1927, c. 185, s. 3.)

§ 193(d). Alien registration book.—Each clerk of the Superior Court shall keep a suitable book to be known as the Alien Registration Record, in which the above information shall be kept. (Acts, 1927, c. 185, s. 4.)

§ 193(e). Secretary of state to have books printed and distribute to clerks.—The Secretary State shall have printed and distribute to the several clerks of the Superior Court a sufficient number of small booklets suitable for the above registration, and which shall be numbered ad seriatim and known as the Alien Registration Certificates.

Upon registration the clerk of the Superior Court shall present to each alien a certificate containing the information required under section 193(c). (Acts, 1927, c. 185, s. 5.)

§ 193(f). Failure to register.—Failure to register, or altering a registration certificate, shall be a misdemeanor punishable by fine or imprisonment or both, in the discretion of the court. (Acts, 1927, c. 185, s. 6.)

§ 193(g). Fee.—A registration fee of one dollar shall be paid. (Acts, 1927, c. 185, s. 7.)

§ 193(h). Report of unlawful entry.—Whenever any court discovers that an alien has not made a lawful entrance into the United States, the matter shall be reported to the Secretary of State North Carolina, who is hereby directed to report same to the proper authorities of the United States government. (Acts, 1927, c. 185, s. 8.)

CHAPTER 4

ATTORNEYS AT LAW

Art. 1. Licenses and Qualifications of Attorney; Unauthorized Practice of Law

§ 194. Examination; scope; issuance of license.—No person shall practice law without first obtaining license so to do from the superior court. All examinations shall be in writing, and based upon such course of study, and conducted under such rules, as the court may prescribe. All applicants who satisfy the court of their competent knowledge of the law and upright character shall receive license to practice in all the courts of the state: Provided, however, any person duly licensed to practice law in another state may be licensed to practice law in this state without examination, if attorneys who are licensed in this state may be licensed without examination in the state from which he comes, upon said applicant furnishing to the superior court a certificate from a member of the court of last resort of such state that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such state, practicing in said court of last resort, as to the applicant's good moral character, whose signature shall be attested by the clerk of said court, and upon said application satisfying the court that he is bona fide resident and citizen of North Carolina, or intends immediately to become such: Provided further, that said applicant shall be required to deposit with the clerk of the Supreme court the same amount required of applicants who stand the examination. (Rev., s. 207; Code, s. 17; R. C., c. 9, s. 1; 1818, c. 963, s. 3; 1907, c. 70; Sess. 1920, c. 44.)

Editor's Note.—Admission by examination is now regulated by § 215(10) which makes no reference to attorneys for the state but apparently gives law examiners authority to provide for their admission.

Constitutionality. — This section, and the following sections of this article, are not unconstitutional as an unwarranted exercise of judicial power prohibited by sec. 8 of the Declaration of Rights, nor as an unlawful attempt to deprive the court of its inherent power to direct and control the conduct of the attorneys who are its officers. In re Applicants for License, 143 N. C. 1, 55 S. E. 635.

The establishment by the legislature of the qualifications for admission to the bar is a valid exercise of the police power, Id.

Upright Character. — The Revisal of 1905 made no provision concerning the upright character of the applicant, this requirement was added by the act of 1907—in view of the holding of In re Applicants for License, 143 N. C. 1, 55 S. E. 635, that an investigation into the moral character of the applicant was no longer permitted or required. This case contained two strong dissenting opinions by Brown, J. and Clark, C. J. See also Baggett v. Grady, 154 N. C. 342, 70 S. E. 618.

In the case of In re Matter of Ebbs, 150 N. C. 44, 56, 63 S. E. 190, the court says: "We had occasion in In re Applicants for License, 143 N. C. 1, 55 S. E. 635; to consider the question of our power to refuse to license applicants who were shown to be of bad moral character, and the extent to which it was subject to legislative control. The subject was carefully considered and the opinion of a majority of the court expressed in the able and exhaustive opinion of Mr. Justice Hoke. The Legislature promptly amended the statute, restoring to the court the power to pass upon the moral character of applicants. Laws 1907, ch. 70." In the Matter of Ebbs, 150 N. C. 44, 56, 63 S. E. 190.

Same — What Constitutes. — The upright character named by this section and the Rules of Court, is such as would qualify the applicant to practice a profession as an officer of the court, that has a widespread influence upon the people of the community, and such as the applicant enjoys among those with whom he has lived, and not alone a want of bad character, or one that is a bit indifferent. In re Applicants for License, 191 N. C. 235, 131 S. E. 661.

Where an applicant to obtain license to practice law from the Supreme Court admits that at a prior time his character was such as to have then disqualified him, he must make it appear that he has since lived such a life as to restore the character upon which a license should now be issued, which has not been done in the instant case. In re Applicants for License, 191 N. C. 235, 131 S. E. 661.

Where the application for license to practice law is resisted under the statute and Rule of the Supreme Court, the applicant must show that his character is of that quality of "uprightness" that entitles him to his license. In re Applicants for License, 191 N. C. 235, 131 S. E. 661.

Non Resident Attorneys.—See note to secs. 197 and 202.

§ 195. Superseded by § 215(10).

§ 196. Conditions precedent to examination.—Before being allowed to stand an examination each applicant must comply with the following conditions:

1. He must be at the time twenty-one years of age, or will arrive at that age before the time for the next examination.

2. He must file with the clerk of the court a certificate of good moral character signed by two

attorneys who practice in that court. An applicant must be a bona fide resident of North Carolina, or a non-resident student in an approved law school in North Carolina. (Rev., s. 208; Code, s. 18; R. C., c. 9, s. 2; 1777, c. 115, s. 8; 1929, c. 168, s. 1; 1935, c. 33, s. 4.)

Editor's Note.—The second sentence of subsection 2 of this section formerly read: "An applicant from another state may have such certificate signed by any state officer of the state from which he comes." The act of 1929 struck out the words quoted and inserted in lieu thereof the words now appearing in such second sentence.

Subdivision 3 of this section relating to fees was repealed by c. 33 of the Acts of 1935 and such fees are now provided for in § 215(10)a.

Moral Character.—See notes to sec. 194.

§ 197. Oaths taken in open court.—Attorneys before they shall be admitted to practice law shall in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior. (Rev., s. 209; Code, s. 19; R. C., c. 9, s. 3; 1777, c. 115, s. 8.)

Non-Resident Attorneys. — As this section requires the oath of allegiance to the state, it debars a citizen of another state from obtaining a license required by sec. 194, and a non-resident attorney does not acquire the right to practice habitually in this state by having been previously allowed, through the curtesy of the courts, to appear in special cases. Manning v. Roanoke, etc., R. Co., 122 N. C. 824, 828, 28 S. E. 963.

This state extends no preference to nonresident lawyers over those living here. And such an attorney in the state to practice in the Federal Court is not privileged from service of summons. Greenleaf v. Bank, 133 N. C. 292, 45 S. E. 638.

Aliens. — See notes to sec. 202.

§ 198. Persons disqualified.—No clerk of the superior or supreme court, nor deputy or assistant clerk of said courts, nor register of deeds, nor sheriff nor any justice of the peace, nor county commissioner shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars. This section shall not apply to Confederate soldiers. (Rev., ss. 210, 3641; Code ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205; 1933, c. 15.)

Editor's Note.—Registers of deeds were, by Public Laws 1933, c. 15, added to the list of these excluded from practice. For act permitting attorneys to act as justices of the peace in Burke County, see Public Laws 1933, c. 135.

Chapter 214 of the Acts of 1935 provides that it shall not be unlawful for any attorney residing in Madison County to act as a justice in said county, and when duly elected or appointed such appointment shall not disqualify from the practice of law, provided he shall not appear as counsel in any litigation that was or may be before him as justice.

What Constitutes Practicing Law. — To constitute a practicing of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he demanded compensation for his services as such. State v. Bryan, 98 N. C. 644, 4 S. E. 522.

The fact that a person on one occasion acted as an attorney for a party to an action, is some evidence for the jury to consider, but is not conclusive of the question. Id.

§ 199. Officers of inferior courts disqualified in certain cases.—No judge or prosecuting attorney of any recorder's, municipal, or county court shall appear in any other court on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. This section shall not apply to Iredell County. (1917, c. 213.)

§ 199(a). Corporations and persons other than members of State Bar prohibited from practicing law; exceptions. — It shall be unlawful for any corporation or any person or association of persons, except members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counsellor-at-law in any action or proceeding in any court in this State or before any judicial body or the North Carolina Industrial Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counselling in law or acting as attorney or counsellor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust serving purposes similar to those of a will, except life insurance trusts, or, for a fee or any consideration, to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from conferring with a person, firm or corporation with respect to the creation of a fiduciary relationship, or from coöperating with a licensed attorney of another in preparing any such legal document, if such attorney maintains his own place of business and is not an officer of a corporation represented by such person; or from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney at law. (1931, c. 157, s. 1.)

Editor's Note.—The act from which this section was codified became effective April 1, 1931, and provided that it should not apply to or affect "litigation now pending in any court." As to officers disqualified to practice law, see §§ 198, 199.

§ 199(b). Further prohibition as to practice of law by corporation; exception. — It shall be unlawful for any corporation to practice or appear as an attorney for any person other than itself in any court in this State, or before any judicial body or the North Carolina Industrial Commission; or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents not relating to its lawful business, or draw wills, or practice law, or give legal advice not relating to its lawful business; or hold itself out in any manner as be-

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ing entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular: Provided, that the foregoing shall not prevent a corporation from employing an attorney in regard to its own affairs or in any litigation to which it may be a party. Provided, further, that the above provisions of this act shall not be construed to prohibit a person or corporation acting in a fiduciary capacity from transacting the necessary clerical business incidental to the routine or usual administration of estates, trusts, guardianships, or other similar fiduciary capacities, such as offering wills for probate in common form, securing authority to expend principal as guardian or trustee, filing accounts, preparing and filing tax returns of every nature, and other such administrative acts, where no special compensation is charged for such service and no compensation whatever is charged or received other than the usual commissions allowed by the court for administering the trust, or provided for by the instrument creating the trust or other fiduciary relationship. And provided, further, that nothing herein shall prohibit any insurance company from causing to be defended, or prosecuted, or from offering to cause to be defended, through lawyers of its own selection, the insured in policies issued or to be issued by it, in accordance with the terms of such policies; and shall not prohibit one such licensed attorney at law from acting for several common carriers and/or other corporations and/or associations or any of its subsidiaries pursuant to arrangement between said corporations and/or associations. (1931, c. 157, s. 2.)

§ 199(c). Exacting fee for conducting foreclosures prohibited to all except licensed attorneys.—It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by a licensed attorney at law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received and retained by such attorney, without being directly or indirectly shared with or rebated to any one else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney at law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)

§ 199(d). Solicitors, upon application, to bring injunction or criminal proceedings. — The solicitor of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of this act, and it shall be the duty of the solicitors of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of this act. (1931, c. 157, s. 4.)

§ 199(e). Punishment for violation of §§ 199(a)-199(d); legal clinic of law schools excepted.—Any person, corporation, or association of persons violating the provisions of §§ 199(a)-199(d) shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. Provided, that this act shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5, c. 347.)

§ 199(f). Unlawful for any one except attorney to appear for creditor in insolvency and certain other proceedings.—It shall be unlawful for any corporation, or any firm or other association of persons, or for any individual other than an attorney duly licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, or to present or vote any claim of another, whether under an assignment or transfer of such claim or in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

§ 199(g). Violation of preceding section a misdemeanor.—Any individual, corporation, or firm or other association or person violating any provision of the preceding section shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

As to unlawful solicitation of claims of creditors in insolvency, etc., proceedings, see § 1653(a).

Art. 2. Relation to Client

§ 200. Authority filed or produced if requested.—Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerks' office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the person or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (Rev., s. 213; Code, s. 29; R. C., c. 31, s. 57 [16].)

Cross References. — For a complete treatment of the general subject attorney and client, including the office of attorney, retainer and authority, duties and liabilities and compensation and lien, discussed in detail, see 2 N. C. Enc. Dig. 109 et seq.; 13 N. C. Eve. Dig. 206 et seq. As to general and specific appearances, see sec. 401.

Unaffected by Subsequent Legislation. — The rule of practice, prescribed by this section, not being inconsistent with the present system is still in force. Hollingsworth v. Harman, 83 N. C. 153, 154.

Sufficiency of Writing. — The power of attorney which

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a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing qualification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N. C. 254.

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney at law to appear in a cause in court, although the agent has no written authority to make the power. Johnson v. Sikes, 49 N. C. 70.

A power of attorney, given by a married woman, under this section, to dismiss an action need not be registered. Hollingsworth v. Harman, 83 N. C. 153, 154.

Time of Demand for Authority. — In Reece v. Reece, 66 N. C. 377 it is held that the defendant has the right, because of this section, to demand the authority at the return term of a summons.

If the demand for the power of attorney be made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized it comes too late, unless there be peculiar circumstances tending to excuse the party for not making it in apt time. Reece v. Reece, 66 N. C. 377.

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This evidently means that the opposite party shall not call in question his authority, unless he does so within the time and in accordance with the provision of this section. New Bern v. Jones, 63 N. C. 606, 607; Day v. Adams, 63 N. C. 254, 256.

When Client Present. — If a written authority be required under this section the attorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N. C. 254, 256.

Authority to Dismiss Action. — Upon special appearance of the attorneys whose property has been attached by the wife, for the purpose of dismissing the action, the court should, on motion made, require them to file their written authority under this section. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

§ 201. Failure to file complaint, attorney liable for costs.—When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (Rev., s. 214; Code, s. 22; R. C., c. 9, s. 5; 1786, c. 253, s. 6.)

Power of Courts to Compel Payment. — This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind not included in this section) such conduct being a sort of contempt. Ex parte v. Robins, 63 N. C. 309.

§ 202. Fraudulent practice, attorney liable in double damages.—If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (Rev., s. 215; Code, s. 23; R. C., c. 9, s. 6; 1743, c. 37.)

Aliens Prevented from Practicing. — In Ex parte Thompson, 10 N. C. 355, 362, the court said "No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor would not have the full benefit of such legal remedy as the laws of the state provide, in the event of fraudulent or negligent practice." Hence the court reasoned that an alien could not be admitted to practice, as actions under this section would be removable to the United States courts.

Presumption of Fraud. — The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N. C. 172.

Art. 3. Arguments

§ 203. Court's control of argument.—In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The Judges of the Superior Court are authorized to limit the time of argument of Counsel to the jury on the trial of actions, civil and criminal as follows: To not less than one hour on each side in misdemeanors and appeals from Justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time argument of Counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three Counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury. (Rev., s. 216; 1903, c. 433; 1927, ch. 52.)

Cross References. — As to argument and conduct of counsel in criminal cases generally, see 4 N. C. Enc. Dig. p. 150 et seq.; 13 N. C. Enc. Dig. 616 et seq., in civil cases see 11 N. C. Enc. Dig. 967 et seq.; 15 N. C. Enc. Dig. 623 et seq. As to argument of counsel as ground for reversal, see 1 N. C. Enc. Dig. 459.

Discretion of Court. — The trial judge has a large discretion in controlling and directing the argument of counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Railroad, 141 N. C. 332; Irvin v. Southern R. Co., 164 N. C. 5, 17, 80 S. E. 78.

Arguing Law and Fact. — It is reversible error for the trial judge not to permit attorneys to argue law to the jury and to apply therein the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N. C. 495, 87 S. E. 313.

Failure to charge upon a certain point is reversible error especially after counsel has argued the whole case "as well of law as of fact" as is permitted by this section. Nichols v. Fibre Co., 190 N. C. 1, 128 S. E. 471. It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Banking Co., 191 N. C. 500, 132 S. E. 468.

Same—Reading and Commenting on Reported Cases. — As counsel have the right under this section to argue "the whole case as well as law as of fact," they may read to the jury reported cases and comment thereon; but the facts contained in the cases cannot be read as evidence of their existence in another case. Horah v. Knox, 87 N. C. 483.

Reading Dissenting Opinion as Law of Case.—It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto. It is the duty of the trial court, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion had no legal bearing upon the case. Conn v. Seaboard Air Line R. Co., 201 N. C. 157, 159 S. E. 331.

Limitation of Argument under Former Section. — See State v. Miller, 75 N. C. 73.

Cited in Teasley v. Burwell, 199 N. C. 18, 20, 153 S. E. 607.

Art. 4. Disbarment

§§ 204-207. Repealed by Public Laws 1933, c. 210, s. 20.

Art. 5. Proceedings for Disbarment

§§ 208-215. Repealed by Public Laws 1933, c. 210, s. 20.

Art. 6. North Carolina State Bar

§ 215(1). Creation of North Carolina state bar as an agency of the state.—There is hereby created as an agency of the state of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina state bar. (1933, c. 210, s. 1.)

For a review of this section and those immediately following, see 11 N. C. Law Rev. 191.

§ 215(2). Membership and privileges. — The membership of the North Carolina state bar shall consist of two classes, active and honorary.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the state of North Carolina. No person other than a member of the North Carolina state bar shall practice in any court of the state, except foreign attorneys as provided by statute.

The honorary members shall be (a) the chief justice and associate justices of the supreme court of North Carolina; (b) the judges of the superior courts of North Carolina; (c) all former judges of the above-named courts resident in North Carolina, but not engaged in the practice of law; (d) judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina state bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he desires to vote, and with the resident judge of the district in which he resides (and, after the North Carolina state bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina state bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2.)

§ 215(3). Government.—The government of the North Carolina state bar shall be vested in a council of the North Carolina state bar, hereinafter referred to as the "council," consisting of one councillor from each judicial district of the state, to be appointed or elected as hereinafter set forth, and the officers of the North Carolina state bar, who shall be ex officio members during their respective terms of office. Notwithstanding any provisions of this act as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina state bar in respect of the interpretation and administration of this article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in section sixteen hereof provided. The councillors elected shall serve as follows: Those elected from the first, fourth, seventh, tenth, thirteenth, sixteenth, and nineteenth districts shall serve for one year from the date of their elections; those elected from the second, fifth, eighth, eleventh, fourteenth, seventeenth, and twentieth districts shall serve for two years from the date of their election; and those elected from the third, sixth, ninth, twelfth, fifteenth, and eighteenth districts shall serve for three years from the date of their election: Provided, that upon the election of successors to the councillors first elected, the term of office and the period for which such councillors are elected shall be three years from the date of election.

All councillors elected from any additional judicial districts shall be elected for a term of three years.

Neither a councillor nor any officer of the council or of the North Carolina state bar shall be deemed as such to be a public officer as that phrase is used in the constitution and laws of the state of North Carolina. (1933, c. 210, s. 3.)

§ 215(4). Election of councillors. — Within thirty days after this article shall have gone into effect the judge of each judicial district shall, by notice posted at the front door of each courthouse within his district and by such other means as he shall think desirable, call a meeting of the attorneys residing within his district, and any others who may declare in writing their desire to be affiliated with that district, as hereinabove provided, for the purpose of organizing the bar of the district, the said meeting to be held at a place deemed by the judge to be convenient, on a day fixed, not less than twenty nor more than thirty days from posting of notice. At that meeting such attorneys as attend shall constitute a quorum, and shall forthwith form such organization herein referred to as the "district bar," as they may deem advisable, of which organization all active members of the North Carolina state bar entitled to vote in that district shall be members. The district bar shall be the subdivision of the North Carolina state bar for that judicial district, and shall adopt such rules, regulations and by-laws not inconsistent with this article as it shall see fit, a copy of which shall be transmitted to the secretary-treasurer of the North Carolina state bar when organized; and copies of any amendments of such rules, regulations, and by-laws shall likewise be sent to said secretary-treasurer. The district bar so formed shall, at the time of its formation, elect a councillor to represent that district, and all subsequent elections of councillors, whether for regular terms or to fill vacancies, shall be held as provided by the said rules, regulations, and by-laws so adopted by the district bar. In case the judge of any judicial district, by reason of physical disability or otherwise, shall fail to call the meeting aforesaid within thirty days after this article shall have gone into effect, the same may be called within thirty days thereafter by any two attorneys residing in said district, by written notice signed by them and delivered to the clerk of the court of each county in the district to be posted at the front door of each courthouse as aforesaid, the said meeting to be held on a day fixed not less than twenty nor more than thirty days after the posting of said notice; and thereupon the same

proceedings shall take place as though the meeting had been called by the judge as aforesaid. Any clerk to whom any such notice shall be delivered to be posted shall immediately post the same and shall write upon the said notice the exact date and time when the same is so posted. In case more than one notice shall be posted hereunder by different groups of attorneys, that posted first in point of time shall prevail and be deemed to be the notice provided for under this article. Pending the organization of the council as hereinafter provided, notification of the election of each councillor shall be sent within five days after such election by the secretary of the district bar to the clerk of the supreme court of North Carolina; but after the organization of the council such notices shall be sent to its secretary-treasurer. In case neither the judge nor any two members shall call a meeting as aforesaid, a councillor for the said district, residing therein, shall be named at a meeting of such members of the council as shall have been elected in accordance herewith, to serve until such district bar shall be organized under the provisions of this article (except as to the time for calling meetings), either on the call of the judge of the district court or of two members of the bar, and shall have elected a councillor to serve for the unexpired term of the councillor so named. (1933, c. 210, s. 4.)

§ 215(5). Change of judicial districts.—In the event that a new district shall hereafter be carved out of an existing district, the councillor for the old district shall remain in office and continue to represent the district constituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within thirty days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure shall be followed for the organization of the North Carolina state bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councillor to represent the same, as is prescribed by section 215(4); and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by section 215(4), in said new district, or in each of them if there be more than one, within thirty days after the election or appointment of the judge or judges thereof; but in that event the office of councillor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determine, and become vacant so soon as the bar or bars of such new district, or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councillor or councillors therefor, but not earlier: Provided, that if at such time any councillor whose office shall thus become vacant be actually serving upon a committee before which there is pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councillor, continue to serve as councillor for the purpose of trying such case until judgment shall have been rendered therein. (1933, c. 210, s. 5.)

§ 215(6). Compensation of councillors. — The members of the council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation, not exceeding ten ($10.00) dollars per day for the time spent in attending meetings, together with an expense allowance as follows: For subsistence—hotel and meals—not exceeding four dollars per day; for transportation, actual mileage, except when using personally owned automobiles, in which case a sum not exceeding five cents per mile of travel. The council shall determine per diem, subsistence and mileage to be paid. Such allowance as may be fixed by the council shall be paid by the secretary-treasurer of the North Carolina state bar upon certified statements presented by each member. (1933, c. 210, s. 6; 1935, c. 34.)

Editor's Note.—The part of this section following the colon was added by the 1935 amendment. The provision requiring that the members be "actually engaged in the performance of their duties" was also added.

§ 215(7). Organization of council; publication of rules, regulations and by-laws.—Upon receiving notification of the election of a councillor for each judicial district, or, if such notification shall not have been received from all said districts, within one hundred and twenty (120) days after this article shall have gone into effect, the clerk of the supreme court of North Carolina shall call a meeting of the councillors of whose election he shall have been notified, to be held in the city of Raleigh not less than twenty days nor more than thirty days after the date of said call; and at the meeting so held the councillors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councillors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this article. The regular term of all officers shall be one year, but those first elected shall serve until the first day of January, one thousand nine hundred thirty-five. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and by-laws, not inconsistent with this article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the supreme court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post office addresses, and the rules, regulations and by-laws adopted by it; and thereupon the chief justice of the supreme court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this article have not been complied with; and the said certificate shall not be again pre-

sented to the chief justice of the supreme court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this article have been complied with, or (b) if for any reason the chief justice or judge should not act thereon within thirty days, then, after the lapse of thirty days from the presentation to the chief justice or judge, as the case may be, of any certificate of organization hereinabove required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this article, may be amended by the council from time to time in any manner not inconsistent with this article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the chief justice of the supreme court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the chief justice are inconsistent with this article. (1933, c. 210, s. 7.)

§ 215(8). Officers and committees of the North Carolina state bar. — The officers of the North Carolina state bar shall be a president, a vice-president, and a secretary-treasurer, who shall be deemed likewise to be the officers, with the same titles, of the council. Their duties shall be prescribed by the council. The president and vice-president shall be elected by the members of the North Carolina state bar at its annual meeting, and the secretary-treasurer shall be elected by the council. All officers shall hold office for one year and until their successors are elected and qualified. The officers need not be members of the council. (1933, c. 210, s. 8.)

§ 215(9). Powers of council. — Subject to the superior authority of the general assembly to legislate thereon by general laws, and except as herein otherwise limited, the council is hereby the discipline, disbarment and restoration of attorneys practicing law in this state: Provided, that from any order suspending an attorney from the practice of law and from any order disbarring an attorney, an appeal shall lie, as of right in the manner hereinafter provided, to the superior court judge regularly holding the courts of the county wherein the attorney involved resides. The council shall have power to administer this article; to formulate and adopt rules of professional ethics and conduct; to publish an official journal concerning matters of interest to the legal profession, and to do all such things necessary in the furtherance of the purposes of this article as are not prohibited by law. (1933, c. 210, s. 9; 1935, c. 74, s. 1.)

Editor's Note.—The words "and restoration" were inserted by the amendment of 1935.

In State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99, construing former § 205, it was held that the court was without authority to set aside a judgment of disbarment on motion, especially since the enactment of this and subsequent sections.

§ 215(10). Admission to practice. — The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the supreme court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this article.

For the purpose of examining applicants and providing rules and regulations for admission to the bar including the issuance of license therefor, there is hereby created the board of law examiners, which shall consist of seven members of the bar, elected by the council of the North Carolina state bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the board of law examiners elected from the bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The secretary of the North Carolina state bar shall be the secretary of the board, and serve without additional pay. The board of law examiners shall elect a member of said board as chairman thereof, who shall hold office for such period as said board may determine.

The examination shall be held in such manner and at such times as the board of law examiners may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined.

The board of law examiners subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the bar as in their judgment shall promote the welfare of the state and the profession: Provided, that any change in the educational requirements for admission to the bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in section 215(7) in relation to the certificate of organization and the rules and regulations of the council. (1933, c. 210, s. 10; c. 331; 1935, c. 61.)

Editor's Note.—Prior to the amendment of 1935, this section provided for a member of the supreme court to act as a member of the board of law examiners. The amendment of 1935 struck out this provision and changed the number of members of the bar serving on the board from six to seven. The amendment also struck out all references to fees of

applicants and to compensation of the board. These subjects are now provided for in sections 215(10) a to c.

§ 215(10)a. Fees of applicants. — All applicants for examination before the board of law examiners for license to practice law in North Carolina, shall pay a filing fee of one dollar and fifty cents ($1.50) and shall deposit with the secretary of the board of law examiners the sum of twenty-two and 0/100 ($22.00) dollars, of which sum two dollars shall be a deposit to pay for license, if issued. Any applicant who shall fail to pass examination shall receive a refund of twelve dollars from said twenty-two dollars deposit. (1935, c. 33, s. 1.)

§ 215(10)b. Pay of board of law examiners. — Each member of the board of law examiners, for his services in connection with each examination, including the member of the supreme court selected and commissioned for the special purpose of serving on said board of law examiners, shall receive the sum of fifty ($50.00) dollars, together with an expense allowance as follows: For subsistence—hotel and meals—not exceeding four dollars per day; for transportation, actual mileage, except when using personally owned automobiles, in which case a sum not exceeding five cents per mile of travel. (1935, c. 33, s. 2.)

Editor's Note.—The words "including the member of the supreme court selected and commissioned for the special purpose of serving on said board of law examiners" were probably inadvertently inserted by the legislature because by the 1935 amendment to § 215(10) a member of the supreme court no longer acts as a member of the board of law examiners.

§ 215(10)c. Surplus received from applicants directed to supreme court library.—After the payment of all expenses incurred in connection with each examination held by the board of law examiners and expenses of said board at such meetings as may be necessary for the performance of its additional duties the said board of law examiners shall cause to be paid at the end of each fiscal year of the State of North Carolina to the supreme court of north carolina for its use in connection with the maintenance of its library, such surplus then remaining with said board of law examiners from fees received from applicants for examination. (1935, c. 33, s. 3.)

§ 215(11). Discipline and disbarment. — The council or any committee of its members appointed for that purpose shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina state bar; may administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes: 1. Commission of a criminal offense showing professional unfitness; 2. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney; 3. Soliciting professional business; 4. Conduct involving willful deceit or fraud or any other unprofessional conduct; may invoke the processes of the courts in any case in which they deem it desirable to do so; and shall formulate rules of procedure governing the trial of any such person. Such rules shall provide for notice of the nature of the charges and opportunity to be heard; for a complete record of the proceedings for purposes of appeal, and, in the event that the penalty adjudged be suspension from the practice, or disbarment, for an appeal, as of right to the superior court judge regularly holding the courts of the county wherein the attorney involved resides on the record made before the council, or the committee, as the case may be; upon appeal to the judge of the superior court, the accused shall have the right to have his cause heard by a jury. From the decision of the superior court judge hearing the appeal or the jury, the council (or committee) and the accused attorney shall each have the right of appeal to the supreme court of North Carolina. Trials shall be held in the county in which the accused member resides: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. In hearings before the council (or committee) and in all appeals the procedure shall conform as near as may be to the procedure now provided by law for hearings upon the report of referees in references by consent. (1933, c. 210, s. 11.)

Editor's Note.—The cases treated under this section were decided under those sections which appeared in Michie's Code of 1931 as §§ 204 and 205, the provisions of which were substantially similar to this section.

Constitutionality. — This section, and the other sections of this article, taken from the act of 1871, are constitutional. Ex parte Schenck, 65 N. C. 353.

The aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice. Id.

Civil Action. — Proceedings brought under this section are of a civil nature. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Not an "Enabling Act." — The act of 1871, upon which this and the other sections of this article are based, failed to provide any power to take the place of the power formerly invested in the courts, and so is a disabling statute. Kane v. Haywood, 66 N. C. 1; In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Indictment Necessary. — By a proper construction of this section, the court is shorn of its power to disrobe an attorney, except in the single instance where he has been **indicted** for some criminal offense, showing him unfit to be trusted in the discharge of the duties of his profession, and upon such indictment has either been convicted or plead guilty. Kane v. Haywood, 66 N. C. 1, 2.

Conviction or Confession of Guilt. — The words "conviction" and "confession," as used in the section, must be construed to convey the idea that the party has been convicted by a jury or has in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N. C. 1, 2.

So the admission of an attorney in an answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, is not a confession in open court as contemplated by this section. Id.

Same — Conviction in Foreign State. — This section does not confer upon the court the power to disbar an attorney because he has been "convicted" in the courts of another state or of the United States. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Nature of Offense. — Under the acts of 1871, upon which this action was originally based, conviction of a "criminal offense" showing untrustworthiness was sufficient basis for disbarment; but by the act of 1907 conviction of a "felony" was necessary; construing these provisions together the court, in State v. Johnson, 171 N. C. 799, 88 S. E. 437, holds that the two provisions are consistent and reconcilable (a view evidently adopted by the revision commission of 1920, as the section now contains the language of both provisions), and further stated that the conviction of a criminal offense—the sale of liquor prior to the national prohibition law and a fortiori since the law —is sufficient grounds for disbarment as showing the attor-

ney unfit for practice. See also State v. Johnson, 174 N. C. 345, 93 S. E. 847.

Confession of a Felony.—A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., was held a confession of a felony, and ground for disbarment if defendant is a practicing attorney under former section 205. State v. Harwood, 206 N. C. 87, 173 S. E. 24.

Fine and imprisonment is not the appropriate remedy to be applied to an attorney who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. Kane v. Haywood, 66 N. C. 1, 3.

§ 215(12). Concerning evidence and witness fees.—In any investigation of charges of professional misconduct the council and any committee thereof shall have power to summon and examine witnesses under oath, and to compel their attendance, and the production of books, papers, and other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons of subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings; but the council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the state be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof or by deposition shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted. (1933, c. 210, s. 12.)

§ 215(13). Rights of accused person. — Any person who shall stand charged with an offense cognizable by the council or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council and its committees in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel. (1933, c. 210, s. 13.)

§ 215(14). Designation of prosecutor; compensation.—Whenever charges shall have been preferred against any member of the bar, and the council shall have directed a hearing upon the charges, it shall also designate some member of the bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the superior and supreme courts. The council may allow the attorney performing such services at its request such compensation as it may deem proper. (1933, c. 210, s. 14.)

§ 215(15). Records and judgments and their effect.—In the case of persons charged with an offense cognizable by the council or any committee thereof, a complete record of the proceedings and evidence taken before the council or any committee thereof shall be made and preserved in the office of the secretary-treasurer, but the council may, upon sufficient cause shown and with the consent of the person so charged, cause the same to be expunged and destroyed. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court of the county wherein the accused resides, and also upon the minutes of the supreme court of North Carolina; and such judgment shall be effective throughout the state.

Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1933, c. 210, s. 15; 1935, c. 74, s. 2.)

Editor's Note.—The amendment of 1935 struck out the words "under the provisions of this article" after the word "license" in line two of the second paragraph.

§ 215(16). Annual and special meetings.—There shall be an annual meeting of the North Carolina state bar, open to all members in good standing, to be held at such place and time after such notice (but not less than thirty days) as the council may determine, for the discussion of the affairs of the bar and the administration of justice; and special meetings of the North Carolina state bar may be called, on not less than thirty days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five per cent of the active members of the North Carolina state bar; but at special meetings no subjects shall be dealt with other than those specified in the notice. Notice of all meetings, whether annual or special, may be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina state bar. The North Carolina state bar shall not take any action in respect of any decision of the council or any committee thereof relating to admission, exclusion, discipline or punishment of any person or other action, save after notice in writing of the action of the council or committee proposed to be directed or overruled, which notice shall be given to the secretary-treasurer thirty days before the meeting, who shall give, by mail, at least fifteen days notice to the members of the North Carolina state bar, and unless at the meeting two-thirds of the members present and voting shall favor the motion to direct or overrule. At any annual or special meeting ten per cent of the active members of the bar shall constitute a quorum; but there shall be no voting by proxy. (1933, c. 210, s. 16.)

§ 215(17). Membership fees and list of members.—Every active member of the North Carolina state bar shall on or before the first day of January, nineteen hundred and thirty-four, pay to the secretary-treasurer, without demand therefor, in respect of the calendar year nineteen hundred and thirty-three, a membership fee of three dollars, and shall thereafter, prior to the first day

of July of each year, beginning with and including the year nineteen hundred and thirty-four, pay to the secretary-treasurer, in respect of the calendar year in which such payment is herein directed to be made, an annual membership fee of three dollars; and in every case the member so paying shall notify the secretary-treasurer of his correct postoffice address. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this article shall have gone into effect until the first day of July of the second calendar year (a "calendar year" for the purposes of this article being treated as the period from January first to December thirty-first) following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transactions of the council, in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and postoffice addresses forwarded to him and from any other available sources of information a list of members of the North Carolina state bar and furnish to the clerk of the superior court in each county, not later than the first day of October of each year, a list showing the name and address of each attorney for that county who has complied with the provisions of this article, and thereafter shall notify the clerk of the name and address of any additional attorney resident in that county who shall have complied with the provisions of this article. The names and addresses of such attorneys so certified shall be kept available to the public. The commissioner of revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement. (1933, c. 210, s. 17.)

§ 215(18). Saving as to North Carolina bar association. — Nothing in this article contained shall be construed as affecting in any way the North Carolina bar association, or any local bar association. (1933, c. 210, s. 18.)

CHAPTER 5

BANKS

Art. 1. Definitions

§ 216. Superseded by § 217(a).

See the editor's note under secs. 216(a), 217(a).

§ 216(a). "Bank," "surplus," "undivided profits," and other words defined.—The following definitions shall be applied to the terms used in this chapter:

The term "bank" shall be construed to mean any corporation, partnership, firm, or individual receiving, soliciting, or accepting money or its equivalent on deposit as a business: Provided, however, this definition shall not be construed to include building and loan associations, Morris plan companies, industrial banks or trust companies not receiving money on deposit.

The term "surplus" means a fund created pursuant to the provisions of this chapter by a bank from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.

The term "undivided profits" means the credit balance of the profit and loss account of any bank.

The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.

The term "time deposits" means all deposits, the payment of which cannot be legally required within thirty days.

The term "demand deposits" means all deposits, the payment of which can be legally required within thirty days.

The term "insolvency" means: (a) when a bank cannot meet its deposit liabilities as they become due in the regular course of business; (b) when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; (c) when its reserve shall fall under the amount required by this act, and it shall fail to make good such reserve within thirty days after being required to do so by the commissioner of banks; (d) whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created. (1921, c. 4, s. 1; 1927, c. 47, s. 1; 1931, c. 243, § 5.)

Cross References.—As to definitions of "commercial and business paper" and "trade acceptance," see sec. 220(k). As to definition of "bank acceptance," see sec. 220(e). As to definition of "goods," see sec. 220(e). As to definition of "reserve," see sec. 220(g). As to definition of "Federal Reserve Act," "Federal Reserve Board," "Federal Reserve Banks," and "member banks," see sec. 220(g). As to definition of "banks" as used in the Negotiable Instruments Law, see sec. 2976. As to definition of "demand and time deposits" in the prior law, see C. S. 226. As to demand deposits under present law, see sec. 220(u). For a definition of "available funds" and "cash" under the prior law, see C. S. 226.

Editor's Note.—In 1921 the legislature passed this act which was intended, it would seem, to supplement the provisions of chapter five of the Consolidated Statutes by enlarging the corporation commission's powers of supervision over banks and making more specific regulations for the business of banking. This statute does not supersede or repeal any of chapter five of the Consolidated Statutes except those provisions which are in conflict with or repugnant to it. Mr. Justice Adams, in speaking of the effect of the banking act of 1921 in Litchfield v. Roper, 192 N. C. 202, 205, 134 S. E. 651, said: "A revision or codification of statutes as generally understood signifies a written expression of the entire body of the law on the particular subject; but, where the scheme of the revision is intended as a continuation of existing laws together with such changes as are necessary to make them more effective or to harmonize them, the revised laws will not usually operate as a repeal. The mere enactment of a part of a former statute will not necessarily repeal the part which is not included in the subsequent act. * * * After comparing the act of 1921 with chapter 5 of the Consolidated Statutes we are by no means convinced that the later statutes were intended by the Legislature as a repeal of the old law." He construed the act of 1921 as a supplement to the prior law.

In many instances the provisions of sections in the Consolidated Statutes are re-enacted in full in this new law, and

in others the terms of the Consolidated Statutes are so clearly repugnant as to be incapable of application. In all such cases the sections of the Consolidated Statutes are omitted from this compilation, and wherever the new law controls to the exclusion of the old, the old is omitted, a full explanation being made in editor's notes to the new law and referred to from the old. Occasionally, all the terms of a prior section are either superseded by or repeated in the new section except for a phrase, clause or sentence. In such cases the old section is not repeated but the phrase, clause or sentence is set out in an editor's note under the new section with an explanation of the effect, etc., and a reference made to it from the old section. Editor's notes are placed under each section pointing out the old section corresponding to it and the effect of the new statute when taken in conjunction with the old.

It should be borne in mind that in many instances this act is a copy of the National Banking Act and that in such cases the constructions of the National Act by the courts of the United States are persuasive authority as to the proper construction of this act in such cases.

There is no section in the prior law which corresponds to this section although various terms are defined here and there throughout the law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" in the last sentence of this section. See §§ 221(o), 221(s), and notes thereto.

The definition of "insolvency" of a bank as set forth in this section is correct. State v. Shipman, 202 N. C. 518, 163 S. E. 657.

Art. 2. Creation

§ 217. Superseded by §§ 217(b) (c) (d).

See the editor's note under sec. 217(b), (c), (d).

§ 217(a). How incorporated.—Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of business, or operating banks engaged in doing a trust, fiduciary, and surety business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

1. The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this state or of the congress, or so nearly similar thereto as to lead to uncertainty or confusion.

2. The location of its principal office in this state.

3. The nature of its business, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all of such classes of business.

4. The amount of its authorized capital stock which shall be divided into shares of ten, twenty, twenty-five, fifty or one hundred dollars each; the amount of capital stock with which it will commence business, which shall not be less than twenty-five thousand dollars in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns having a population of more than twenty-five thousand; the population to be ascertained by the last preceding national census: Provided that this subsection shall not apply to banks organized and doing business prior to its adoption. Provided further, that fractional shares may be issued for the purpose of complying with the requirements of § 221(k).

5. The names and postoffice addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.

6. Period, if any limited for the duration of the company. (1921, c. 4, s. 2. 1927, c. 47, s. 2. 1929 c. 72).

As to power to issue non par bank stock, sec. 1167(a) et seq.

Editor's Notes.—With the exception of a few changes which will be pointed out, this section is a substantial reenactment of C. S. Sec. 216.

Formerly three or more persons could incorporate for the purpose of establishing and operating banks.

There was a provision in subsection 2 that no branch office or business could be established and maintained without the approval of the corporation commission. This requirement has not been done away with but an entire section providing for the establishment of branches has been inserted (sec. 220r.) so that such a provision in this section would be superfluous.

The next changes came in the provision as to the amount each share of stock should represent; in raising the minimum capital stock and the population of the cities and towns in which such minimum might be maintained; and in changing the minimum of capital stock in cities and towns having a certain population. The Act of 1929 inserted in lines two and three of paragraph four the words: "ten, twenty, twenty-five."

The prior provision requiring that if more than one class of stock was created, the certificate must describe the different classes and state the terms upon which each was created, was not inserted in this section.

The proviso at the end of the fourth subsection of this section was added by the 1927 amendment.

The word "corporation" appearing in the sixth subsection of the prior section was changed to the word "company" as used in this section.

Cited in Cocke v. Hood, 205 N. C. 832, 170 S. E. 637.

§ 217(b). Certificate of incorporation; how signed, proved, and filed.—The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of this state to take proof or acknowledgment of deeds, and shall be filed in the office of the secretary of the state. The secretary of state shall forthwith transmit to the commissioner of banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the commissioner of banks as hereinafter provided. (1921, c. 4, s. 3; 1931, c. 243, s. 5.)

Editor's Note. — The first sentence of this section is identical in meaning with the first part of C. S. sec. 217. However the latter part of this section makes a radical departure from the provisions of the prior section. Formerly it was the duty of the secretary of state to record the certificate in the corporation book in his office if the certificate was in accordance with law, and then, upon the payment of the required fees, it became his duty to issue two certified copies of the certificate of incorporation and probate, one to be filed in the office of the clerk of the superior court and the other in the office of the corporation commission (now the commissioner of banks). Under this arrangement the secretary did not have power to inquire into the facts and circumstances connected with the formation of the proposed corporation and pass upon the bona fide character thereof. His power was limited to inspecting the certificate to ascertain if it complied with the requirements of the law. Nor did the corporation commission or any other officer or agency have power to inquire into the good faith etc., of the incorporators. Thus, it was not necessary for the Secretary of

State to transmit a copy of the certificate to the corporation commission and await its action upon the merits of the certificate before issuing the certified copies to the superior court clerk and the corporation commission (now the commissioner of banks). Thus, under the prior law, upon the performance of the ministerial duties of inspecting the certificate and issuing the copies, the proposed corporation became a corporate entity. This and the two following sections seem to supersede C. S. sec. 217.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(c). Preliminary examination.—Upon receipt of a copy of the certificate of incorporation of the proposed bank, the commissioner of banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the commissioner of banks shall so certify to the secretary of state, who shall thereupon issue and record such certificate of incorporation. But the commissioner of banks may refuse to so certify to the secretary of state, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any other than legitimate banking business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said bank is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted, or appropriated by an existing bank in this state, or so similar thereto as to be likely to mislead the public. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; 1931, c. 243, s. 5.)

Editor's Note. — There was no section in the prior banking laws corresponding to this section. As was stated in the editor's note under the preceding section, the proposed corporation was entitled to become a body corporate upon filing a certificate, conforming to the requirements of the law, with the secretary of state, and no investigation into the purposes, qualifications, etc., of the incorporators was necessary.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(d). Certificate of incorporation, when certified.—Upon receipt of such certificate from the commissioner of banks, the secretary of state shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the commissioner of banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the secretary of state or the clerk of the superior court of the county in which the same is recorded, or by [the clerk of] the commissioner of banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the secretary of state shall be void: Provided, however, the commissioner of banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; 1931, c. 243, s. 5.)

Editor's Note. — With the exception of the requirement that the secretary must await the receipt mentioned before issuing the certified copies, and the last sentence and the proviso which were added by the present act, this section is identical with the similar provisions of C. S. sec. 217. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section. It seems that the words "the clerk of" in brackets would have been omitted under a less haphazard method of amendment. See sec. 221(s) and note thereto.

Who May Take Advantage of Defect in Organization.—A defect in the organization of a bank because of a failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the state for that purpose. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35. This case was decided under the law prior to this section. The time limit within which to begin business was incorporated in the charter.—Ed. Note.

So it was held in the Boyd case that such a failure could not affect the validity of whatever lien a bank had upon the shares of stock of a stockholder indebted to it. [Only in case of a debt previously contracted in good faith may a bank purchase or receive pledge of its own stock under the present law. See sec. 220(t).]

§ 217(e). Payment of capital stock.—The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the commissioner of banks to commence business and the full payment in cash of the capital stock shall be certified to the commissioner of banks under oath by the president and cashier of the said bank. Provided, that the stock sold by any bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The commissioner of banks shall refuse authority to commence business to any bank if commissions or fees have been paid, or have been contracted to be paid by it, or by any one in its behalf, to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1921, c. 4, s. 6; 1927, c. 47, s. 3; 1931, c. 243, s. 5.)

As to the similar provision relating to industrial banks, see § 225(e).

Editor's Note. — The corresponding section of the former law, C. S. sec. 218, was confined to the subject-matter now contained in the first sentence. However it was provided that at least one half of the capital stock which should not be less than $5,000 should be paid in. The section also contained provisions regulating the payment of the balance. While the $5,000 provision was not inserted in the section as re-enacted in 1921, the requirement that only one-half of the capital stock need be paid in was not changed until the 1927 amendment, and this was the only change made by the amendment. Prior to the 1927 enactment the section, and this applies to the prior law as well, contained provisions regulating the payment of the balance of the capital stock. There is no occasion for such provisions since the 1927 amendment

and they were therefore omitted by it. C. S., sec. 218 is clearly superseded, being in conflict with the present law.

The remaining part of the section is new with the act of 1921, and is intended to prevent a payment of commissions to the promoters for the sale of stock, or an impairment of capital by reserving a part of the sum paid in as compensation for the sale of stock. Thus the proviso requires that the full amount for which the stock was sold shall be accounted for to the bank, and the following sentences specifically provides that no commissions shall be paid for the sale of stock. The authority to commence business is denied if the provisions are violated.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(f). Statement filed before beginning business.—Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the commissioner of banks a statement under oath by the president or cashier, containing the names of all the directors and officers, with the date of their election or appointment term of office, residence, and postoffice address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; 1931, c. 243, s. 5.)

Editor's Note. — This section is identical in meaning with the first two sentences of sec. 219 of the Consolidated Statutes. Section 217(g) covers the subject matter of the remaining part of sec. 219, except for one sentence which is repeated in the Editor's Note to sec. 217(g), and therefore section 219 is omitted from this code. See the editor's note under sec. 216(a).

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(g). Authorized to begin business.—Upon filing of such statement, the commissioner of banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital. The name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the commissioner of banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by [the chairman of] the commissioner of banks, attested by [the secretary of] the commissioner of banks, that such corporation has complied with all the provisions of the law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; 1931, c. 243, s. 5.)

Editor's Note. — This section covers the same subject-matter as the latter part of section 219 of the Consolidated Statutes, except for the last sentence of sec. 219 which reads as follows: "The corporation commission may withhold from any such corporation its certificate authorizing the commencement of business whenever it has reason to believe that the stockholders have formed the same for any other purpose than the legitimate objects contemplated by this chapter." Under the construction placed upon the banking act by the Supreme Court, and in view of the purpose of this section, it would seem that this sentence was not repealed but is in full force and effect.

This section requires a stricter investigation than was formerly required. Under the prior law, an examination into the affairs of the organization was discretionary in the discretion of the commission it was necessary; now it is made a duty. This strictness is further manifested by the fact that the prior law did not enumerate, as does this section, the particulars to which especial attention should be given.

It is apparent that the period after the word "capital" in the fifth line should be a comma and that the first letter of the word "the" immediately following, should be a small letter so that there would be but one sentence in the section down through the word "business" in the tenth line.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" or "commission" wherever these words appeared in this section. However, this lazy method of amending sometimes leads to the confusion if carried out literally, and it seems that the words in brackets would have been stricken by a more carefully drawn amendment. See § 221(s) and note thereto.

§ 217(h). Transactions preliminary to beginning business.—No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the commissioner of banks. (1921, c. 4, s. 9; 1931, c. 243, s. 5.)

Editor's Note. — There was no express provision corresponding to this section in the prior law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(i). Increase of capital stock.—A corporation doing business under the provisions of this chapter may increase its capital stock as provided by law for other corporations. (1921, c. 4, s. 10.)

As to the manner of increasing the capital stock of corporations generally, see sec. 1131.

Editor's Note. — While there was no express provision in the prior law which corresponds to this section, section 236 of the Consolidated Statutes provided that the general corporation law so far as applicable and not inconsistent with the banking laws should apply to banks, and it is probable that under that section the capital stock could be increased just as it is under this section.

§ 217(j). Decrease of capital stock.—A corporation doing business under the provisions of this chapter may reduce its capital stock in the manner provided for other corporations: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock certificates until it has been approved by the corporation commission. Such approval shall not be given except upon a finding by the commissioner of banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; 1931, c. 243, s. 5.)

As to manner of decreasing stock of corporations generally, see sec. 1161.

Editor's Note. — While there was no corresponding section in the prior law, it is very probable that a bank could decrease its stock under the provisions of sec. 236 of the Consolidated Statutes which made applicable all the general corporation law which was not in conflict with the banking laws.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(k). Consolidation of banks.—A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer shall file, or cause to be filed, with the commissioner of banks, certified copies of all pro-

ceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two-thirds of the stock voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid, the commissioner of banks shall cause to be made an examination of each bank to determine whether the interest of the depositors, creditors, and stockholders of each bank are protected, and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation or transfer shall be based upon such examination. No such consolidation or transfer shall be made without the consent of the commissioner of banks, The expense of such examination shall be paid by such banks. Notice of such consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the commissioner of banks, in a newspaper published in a city, town or county in which each of said banks is located, and a certified copy thereof shall be filed with the commissioner of banks. In case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; 1931, c. 243, s. 5.)

See section 218(c) and notes thereto.

Editor's Note. — While there is no statutory provision in the prior law corresponding to this section nor any regulating the consolidation of corporations generally, the subject was probably governed by the common law. See 3 Enc. Dig. 632, 13 Enc. Dig. 501.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Presumption of Approval by Corporation Commission.— Where under the provisions of this section a State bank under jurisdiction of the Corporation Commission has transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it will be presumed that the Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved of the transaction as the statute requires. Corporation Commission v. Stockholders, 199 N. C. 586, 155 S. E. 445.

§ 217(l). Consolidated banks deemed one bank.—In case of consolidation when the agreement of consolidation is made, and a duly certified copy thereof is filed with the secretary of state, together with a certified copy of the approval of the commissioner of banks to such consolidation, the banks, parties thereto, shall be held to be one company, possessed of the rights, privileges, powers and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such new company, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; 1931, c. 243, s. 5.)

See note to preceding section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(m). Reorganization.—Whenever any bank under the laws of this state or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two-thirds of its capital stock, with the approval of the commissioner of banks, to execute articles of incorporation as provided in this chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or state bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this state, and thereupon all assets, real and personal, of the dissolved national or state bank shall by operation of law be vested in and become the property of such state bank, subject to all liabilities of such national or state bank not liquidated under the laws of the United States or this State before such reorganization. (1921, c. 4, s. 14; 1931, c. 243, s. 5.)

Editor's Note. — This section is identical in its provisions to C. S. sec. 235, the prior law, except that the references to state banks in the last six lines of this section have been inserted.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(m) 1. Reorganization of closed banks.— The board of directors of any banking institution whose aggregate property (in the opinion of such board) shall not be sufficient in amount to pay its debts or which (in the opinion of such board) may be unable to pay its debts in the ordinary course of business as they mature or which may be in the possession of the commissioner of banks for liquidation, or which shall be without authority to conduct an unrestricted banking business, may formulate and propose a plan of reorganization. Such reorganization may provide for the continuance of the business of such existing institution, the formation of a new banking institution, state or national, or other corporations, or the consolidation of two or more banking institutions and may provide for the transfer of all or a part of the assets of the existing institution to such new or consolidated institution or corporation or to trustees, for such consideration in money, securities or evidences of debt or interest of any kind approved by such board. (1933, c. 271, s. 1.)

Editor's Note.—Sections 217(m)1 to 217(m)13 only apply to plans of reorganization presented prior to Jan. 1st, 1935.

Where a plan for the reorganization of a bank was proposed and approved as provided by this section, but was later abandoned, in a suit to enjoin the reorganization on the ground that this section is unconstitutional, it was held that no reorganization was contemplated and that whether this section is constitutional is a moot or academic question. In re Independence Trust Co., 206 N. C. 12, 173 S. E. 53.

§ 217(m) 2. Approval by commissioner of banks; certification to clerk of superior court.—The plan of reorganization shall be filed with the commis-

sioner of banks. He shall make such study and investigation of said plan as he may deem necessary; and no hearing before him shall be required. If the commissioner approves the plan, he shall cause a written outline under his hand and seal thereof to be filed in the office of the clerk of the superior court of the county in which the existing banking institution has its principal place of business, and shall at the same time deliver to the said clerk of the superior court at least one hundred copies of such outline which shall be available for inspection. The commissioner of banks shall also promptly file one hundred copies of such outline in the office of the clerk of the superior court of each county in which the banks shall have a place of business. The said outline shall, among other things, contain a statement of the amount due depositors and other creditors of the existing institution, as shown on its books as of the close of business on the last day on which it was open for unrestricted banking business or, if it still be open for such business, on the day next preceding the date of filing of the said outline with the commissioner of banks. (1933, c. 271, s. 2.)

§ 217(m) 3. Notice of reorganization; objections.—The commissioner of banks shall cause to be published, at least once a week for two weeks, in at least one newspaper in every county in which the institution maintains an office or place of business a notice briefly summarizing the plan of reorganization, stating where the outline has been filed in accordance with section 217(m) 2, and admonishing all stockholders, depositors, creditors and other interested persons to file with the clerk of the superior court of the county where the principal place of business of the institution is located, within thirty days from the date of first publication, any objection which they or any of them may have to said plan of reorganization. If there is no daily newspaper published in any county in which such bank has an office or place of business, it will be sufficient for such publication to be made in a daily newspaper generally circulating in said county. The affidavits of the publishers of the respective newspapers in which said notices are published, when filed in the office of the clerk of superior court of the county where the principal office of the institution is located, shall be prima facie evidence of compliance with this section. (1933, c. 271, s. 3.)

§ 217(m) 4. Notice of plan to stockholders, depositors and creditors. — The commissioner of banks shall also require the banking institution filing said plan to cause a copy of the published notice to be mailed or sent, within seven days from the first date of publication, to all stockholders, depositors and other creditors of such banking institution at their respective addresses shown on the records of the institution. The president or other proper officer of such banking institution shall file in the office of the clerk of the superior court of the county where the principal office of the institution is located a certificate to the effect that copies of such notice have been mailed; and said certificate shall be prima facie proof that the provisions of this section have been complied with. Any failure of any particular stockholder, depositor, creditor or other interested party to receive such notice shall not affect the validity of the reorganization. (1933, c. 271, s. 4.)

§ 217(m) 5. Filing objections to reorganization; determination of value of claims of objectors.—Any depositor, creditor, stockholder or other interested person who shall not approve the plan, may, within thirty days from the first publication of the notice provided for by section 217(m) 3, file with the clerk of the superior court of the county in which the principal place of business of said banking institution is located an objection to said plan and an application for the ascertainment of the fair liquidating value of his claim, stock or other interest. At the end of the period within which such objections and application must be filed, the judge of the superior court, resident in the district in which said county is located (or if such judge be not available, the judge holding the courts of such district) shall determine the present cash value of the interest of each party filing such objection on the basis of a judicial liquidation of said institution. (1933, c. 271, s. 5.)

§ 217(m) 6. Payment of claims thus valued; apportionment of assets to objectors. — The court may order such liquidating value paid in cash or, in lieu thereof, paid in kind. In the event such payment is ordered in kind, assets divisible in kind shall be so apportioned. With respect to assets indivisible in kind, the court may apportion said assets by allotting to the objecting party securities or certificates of interest issued by the institution or by a corporation or by a trustee, such securities or certificates of interest to reasonably and fairly represent the share of such non-assenting party in such indivisible assets. The entire amount allotted to such non-assenting parties shall be delivered and paid to the commissioner of banks as receiver for liquidation for the benefit of the non-assenting parties. (1933, c. 271, s. 6.)

§ 217(m) 7. Reorganization binding on all unless objected to by one-third of interested parties. —If, within said period of thirty days, less than thirty-three and one-third percent in interest of the depositors and other creditors of such banking institution (as shown on the outline filed in the office of the clerk of the superior court as provided in section 217(m) 2) shall file such objection and application with the clerk of the said superior court, the plan of reorganization shall be binding upon all such depositors and other creditors as fully as if they had assented to said plan. If, within said period of thirty days, less than thirty-three and one-third per cent in interest of the stockholders of said institution shall have made objection and application to the said clerk of the superior court, said plan shall be binding upon all stockholders as fully as if they had assented to said plan. No stockholders, depositors, or other parties in interest in said banking institution shall, however, be subjected by such plan of reorganization to any personal liability without their express consent. (1933, c. 271, § 7.)

§ 217(m) 8. Rights of objectors preserved.—The provisions of section 217(m) 7 shall not deprive the objecting stockholders, depositors, creditors and other interested parties of the right of valuation of their interest as provided in sections 217(m) 5 and 217(m) 6. Such valuation shall not,

however, postpone or delay consummation of such reorganization plan. If the same is consummated prior to the expiration of said thirty-day period, the reorganized or new institution shall be liable and responsible for the performance of the decree in said proceedings. Such reorganized or new institution may, however, at any time within seven days after such decree, abandon said plan of reorganization as it applies to any particular institution and restore said property to such institution. (1933, c. 271, s. 8.)

§ 217(m) 9. Two or more banks may reorganize together; branch banks allowed; subscription to capital stock.—Any one or more banking institutions, for the purpose of continuing all or a portion of its business or segregating its new from its old depositors, or for the purpose of otherwise promoting the interest of its stockholders, depositors, creditors and other interested parties, may, with the approval of the commissioner of banks, organize one or more new banking institutions, either state or national, with such capital and upon such terms as the board of directors of such existing institutions may determine. Any such banking institution which may take part in the organization of such new banking institution and any other banking institution with similar approval, may subscribe to the capital stock of such new banking institution and pay for said subscription with its funds or assets, and thereafter hold and exercise all the rights of stockholders. (1933, c. 271, s. 9.)

§ 217(m) 10. Stockholders not relieved.—Nothing contained in sections 217(m)1-217(m)13 shall be construed to relieve any stockholder of any banking institution, who is such of record at the time of the passage of such sections, from the liability imposed by law. (1933, c. 271, s. 10.)

§ 217(m) 11. Trust business preserved upon reorganization; transfer of trust estates. — If, pursuant to any plan of reorganization provided for under this article, the trust business of any banking institution be transferred to a new or other banking institution, state or national, having authority to act in fiduciary capacities, such plan of reorganization, upon being consummated and carried into effect, shall operate to transfer to such new or other banking institution and its successor or successors any and all appointments of the transferor banking institution in any fiduciary capacity, whether made by order of any court, or independently of any court, including all appointments of such transferor banking institution in any fiduciary capacity made by any will or other instrument executed prior to the said plan of reorganization being consummated and carried into effect, as effectually as if said new or other banking institution had been appointed by a court of competent jurisdiction as successor to the transferor banking institution in each fiduciary capacity in which said transferor banking institution had theretofore been acting, or to which it might have been appointed by will or other instrument theretofore executed. If a new banking institution is organized pursuant to any plan of reorganization provided for under this law, or, in case of a national bank if reorganized under the provisions of the act of congress of March 9, 1933, known as the "bank conservation act," any of said existing banking institutions subscribing to its capital stock may transfer to such institution all its existing trust estates and property held in a fiduciary capacity, and all the appointments of the transferor institution in any fiduciary capacity, whether made by order of any court or independently of any court, including all appointments of such transferor institution in any fiduciary capacity made by any will or other instrument executed prior to said transfer, as effectively as if said new institution had been appointed by a court of competent jurisdiction as successor to the transferor institution in each fiduciary capacity in which said transferor institution had theretofore been acting or to which it might have been appointed by will or other instrument theretofore executed. (1933, c. 271, s. 11; c. 499.)

§ 217(m) 12. Rules and regulations. — The commissioner of banks, with the approval of the advisory banking commission, shall have the power to make and promulgate from time to time such rules and regulations as he may deem necessary or advisable to carry out the provisions of this law. (1933, c. 271, s. 12.)

§ 217(m) 13. Purpose and intent of statute; time limit for reorganization. — This law is enacted in view of the banking emergency which has arisen and which has been accompanied by wide-spread unemployment, decreased values, untimely withdrawals of deposits, and other conditions beyond the control of the state; and the purpose of this law is to serve the welfare of the state as a whole and the depositors and creditors of banking institutions, and to promote justice, prevent distress and discrimination, and to establish an orderly method of reconstruction and further to carry out the purposes of sections 220(gg), 222(l)-222(n), 222(o) 1, 264(a)-264(l). Therefore, this law shall apply only to plans of reorganization presented to the commissioner of banks for approval prior to January 1, 1935. (1933, c. 271, s. 13.)

§ 217(n). Consolidation of banks with building and loan insurance corporations.—Banking corporations, with the approval of the commissioner of banks, and in conformity with such requirements and regulations as he may prescribe, and building and loan and insurance corporations, with the approval of the insurance commissioner, and in conformity with such requirements and regulations as he may prescribe may merge and consolidate under the provisions of § § 1224 (a) et seq. (1925, c. 77, s. 2; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 217(o). Consolidation of state banks or trust companies with national banking associations.—Any bank or trust company incorporated under the laws of North Carolina may be consolidated with any national banking association, or associations, under the charter of such national banking association or under a new charter issued to such consolidated association, upon such terms and conditions as may be lawfully agreed upon, provided that the laws of North Carolina governing the consolidation of State banks shall be first

complied with as to the consolidation of such bank or trust company. When such consolidation shall have been affected and approved, as provided by law, all the rights, franchises and interests of such bank or trust company so consolidated with the national banking association, or national banking associations, in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated, without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests, including the right of succession as trustee, executor, administrator, or in any other fiduciary capacity, in the same manner, and to the same extent, as was held and enjoyed by such bank or trust company so consolidated. In case of such consolidation the rights of creditors of such bank or trust company shall be preserved unimpaired and all lawful debts and liabilities of such bank or trust company shall be deemed to have been assumed by such consolidated national banking association. (1929, c. 148, s. 1.)

See note under § 217(p.).

§ 217(p). Fiduciary powers and liabilities of merged banks or trust companies. — Whenever any bank or trust company, organized under the laws of North Carolina or the acts of Congress, and doing business in this State, shall consolidate or merge with any other bank or trust company doing business in this State, as provided by the laws of North Carolina or the acts of Congress, all and every the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging banks and/or trust companies, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger, vest in, devolve upon, and thereafter be performed by, the consolidated or merged bank or trust company. (1931, c. 207.)

Editor's Note.—This statute, independent in form, is actually an amendment of §§ 217(o) and 4145. The first of these applies only when a state bank consolidates with and becomes a national bank. The other applies only when the original bank has been named executor or trustee in a will. The new statute covers both grounds, and, in addition, the cases where the original fiduciary was so constituted by order of court or by deed. N. C. Law Rev. 398.

§ 218. Superseded by § 217(e).

See the editor's note section 217(e).

Art. 3. Dissolution and Liquidation

§ 218(a). Voluntary liquidation.—A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this state by the affirmative votes of its stockholders owning two-thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence ten days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the commissioner of banks for his approval. If the commissioner of banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the commissioner of banks until said commissioner of banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the commissioner of banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in the chapter. When the commissioner of banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the commissioner of banks, and shall furnish such reports from time to time as may be called for by the commissioner of banks. All unclaimed deposits and dividends remaining in its hands of such bank shall be subject to the provisions of this chapter as hereinafter provided. Whenever the commissioner of banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind including stockholders' liability upon such terms as may be agreed upon and approved by the commissioner of banks by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the commissioner of banks. The purchasing bank may institute suit against the stockholders in the name of the selling bank as plaintiff at any time within three years from the date of the sale and transfer and judgment in the action shall be a lien against each stockholder for the amount of stock liability. Whenever voluntary liquidation shall be approved by the commissioner of banks or the sale and transfer of the assets of any bank shall be approved by the commissioner of banks, a certified copy of such approval under seal of the commissioner of banks, filed in the office of the secretary of state, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this act and the general law relative to corporations. (1921, c. 4, s. 15; 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5.)

For article discussing the statutory changes made in the

North Carolina banking law, see 11 N. C. Law Rev. 194 et seq.

Editor's Note.—Though it has been thought that this section was superseded by § 218(c) it would seem that the amendment of the section by the Public Laws of 1929 was legislative recognition that it had not been superseded. It is therefore set out as amended.

While there was no specific provision in the prior banking law which corresponded to this section, dissolution was probably effected under secs. 1182 et seq. the general corporation law, by virtue of sec. 236, providing that where applicable and not inconsistent with the banking laws the general corporation law should apply.

The 1927 amendment added the last four sentences to this section. The language used in the latter part of the first sentence added is somewhat obscure. Rather than reading "as many be agreed upon and approved by the commissioner of banks by two-thirds vote of its Board of Directors," it should read "as may be agreed upon by two-thirds vote of its board of directors and approved by the commissioner of banks."

It has been the policy of the legislature to continue the corporate existence upon a dissolution for a period of three years for the purpose of winding up the affairs of the corporation and to bring and defend suits. See sec. 1193, which is referred to in the last sentence of this section. The provisions of this section are in keeping with this general policy.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

When Receiver Has Title to Assets. — Upon the appointment of a receiver under the statute, whether voluntary or by act of the Commission, the title to all of its assets vest in the receiver to be administered for the benefit of its depositors, etc., alike, and where the directors are individually sued for having published false statements as to its solvency, and in the bank's report to the Corporation Commission, without alleging any damage peculiar to himself therefrom, as distinguished from a loss among the creditors generally, the action is maintainable only by the receiver or upon his refusal to so act upon application. Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195. The corporation commission would probably have title under the present law. See sec. 218(c). This case is not applicable to a suit by a depositor for damage or loss incurred because of a violation of § 224(g). Bayne v. Powell, 192 N. C. 389, 391, 118 S. E. 118.

Enforcement of Statutory Liability of Stockholders by Bank Purchasing Another Bank for Purpose of Liquidation.—Under the provisions of this section, either a state or national bank may purchase the assets of another bank, including the statutory liability of the stockholders of the selling bank, upon such terms as are agreed upon and approved by the Corporation Commission, and suit on the statutory liability of the stockholders of the selling bank may be instituted in the name of the purchasing bank to the use of the selling bank within three years from the date of the transfer, and § 218(c) does not repeal this section, as amended, and is inapplicable when the liquidation is under its provisions, and the amendment of the act of 1921 by chapter 73, Public Laws of 1929, being only to correct a typographical error, does not affect the right of action accruing prior to its enactment, it being significant only as legislative construction that the act of 1921 was not repealed by the act of 1927. Peoples Bank and Trust Co. v. Roscower, 199 N. C. 653, 155 S. E. 560.

Approval of Stockholders Not Necessary for Sale to Bank. —For a valid sale of assets to another bank the approval of the stockholders of the selling bank is not required by this section and the section is not invalid for that reason. Planters' Sav. Bank v. Earley, 204 N. C. 297, 299, 168 S. E. 225.

As to individual liability of stockholders see § 219(a) and annotations thereunder.

Cited in In re Lafayette Bank, etc., Co., 198 N. C. 783, 787, 153 S. E. 452.

§ 218(b). Commissioner of banks may take charge, when.—The commissioner of banks may forthwith take possession of the business and property of any bank to which this chapter is applicable whenever it shall appear that such bank:

1. Has violated its charter or any laws applicable thereto;

2. Is conducting its business in an unauthorized or unsafe manner;

3. Is in an unsafe or unsound condition to transact its business;

4. Has an impairment of its capital stock;

5. Has refused to pay its depositors in accordance with the terms on which such deposits were received;

6. Has become otherwise insolvent;

7. Has neglected or refused to comply with the terms of a duly issued lawful order of the commissioner of banks;

8. Has refused, upon proper demand, to submit its record, affairs, and concerns for inspection and examination to a duly appointed or authorized examiner of the commissioner of banks;

9. Its officers have refused to be examined upon oath regarding its affairs.

Such banks may, with the consent of the commissioner of banks, resume business upon such terms and conditions as may be approved by him. (1921, c. 4, s. 16; 1931, c. 243, s. 5.)

Editor's Note. — There was no section in the prior law which corresponded to this section. It was true however that the bank examiner could take possession where so authorized by the corporation commission and hold it until a receiver could be appointed. See C. S. sec. 253.

This section is certainly modified by sec. 218(c), subsection (1), as amended in 1927, if not totally superseded by it. This is also true as to the effect of sec. 218(p) upon the provision as to resuming business.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

See 3 N. C. Law Rev. 79, discussing this section.

Commissioner May Be Restrained from Taking Control of Assets of Reorganized Bank Where Assets Sufficient to Pay Claims.—Where a banking corporation, organized and doing business under the laws of this State, and for that reason subject to the jurisdiction of the Commissioner of Banks, has transferred, assigned and conveyed all its assets to another banking corporation, also organized and doing business under the laws of this State, in consideration of the agreement of the latter corporation to pay and fully discharge the claims of all the depositors and other creditors of the former corporation, and the Commissioner of Banks had consented to such transfer, assignment and conveyance (section 217(k), Corporation Commission v. Stockholders, 199 N. C. 586, 155 S. E. 445), but thereafter, before the latter corporation has fully performed its agreement with the former corporation, files notice that he has taken into his possession the former corporation, under the provisions of this section, for purposes of liquidation, the said former corporation, its depositors, and stockholders may restrain the Commissioner of Banks from taking into his possession the assets of the former corporation, which are then in the possession of the latter corporation, upon showing that said assets are sufficient in value for the payment in full of the claims of all its depositors and other creditors. Pending the trial of the issue involving the value of said assets, the Commissioner of Banks may also be restrained from levying and collecting assessments on the stockholders of the former corporation, because of their statutory liability. Stanly Bank, etc., Co. v. Hood, 206 N. C. 543, 545, 174 S. E. 503.

§ 218(c). Liquidation of banks, when commissioner to take possession. — (1) Whenever any State bank shall neglect or refuse for a period of sixty days to make a report to the commissioner of banks, as he may demand, or shall, after demand under seal of the commissioner of banks fail, neglect or refuse to comply with any of the rules, regulations or requirements of the commissioner of banks, or the provisions of the banking law, or if at any time the commissioner of banks shall find a bank subject to the supervision of the commissioner of banks, in an insolvent, unsafe or unsound condition to transact the business for which it was

organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the commissioner of banks, or any of his assistants; then, in either of such events, the commissioner of banks, through the commissioner of banks, or any duly authorized agent of the commissioner of banks, appointed under seal of the commissioner of banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the commissioner of banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the Superior Court under the provisions of this section.

(2) Voluntary Liquidation.—Any bank may place its assets and business under the control of the commissioner of banks for liquidation by resolution of a majority of its directors upon notice to the said commissioner of banks, and, upon taking possession of said bank, the commissioner of banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the commissioner of banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the commissioner of banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the commissioner of banks and subject to liquidation hereunder.

(3) Notice of Seizure to Court Bar to Attachment, Etc., Transfers Void.—When the commissioner of banks, through the commissioner of banks, or duly appointed agent, shall take possession of any bank under paragraph (1) or (2) hereof he shall, within forty-eight hours, file with the Clerk of the Superior Court in the county where said bank is located, a notice of his action which shall state the reason therefor; and such notice shall be deemed the equivalent of a summons and complaint against said bank in an action in the Superior Court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the commissioner of banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the commissioner of banks shall be submitted in place of the bank in all actions in the State or Federal Courts, pending at the time of the exercise of such authority.

(4) Notice to Banks, Corporation and Persons Holding Assets, Liens Not to Accrue.—On taking possession of the assets and business of any bank, as in this section authorized by the commissioner of banks, the commissioner of banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(5) Permission to Resume Business.—After the commissioner of banks has taken possession of any bank, he may permit such bank to resume business upon such conditions as may be approved by the commissioner of banks, but such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the Superior Court in the action pending against said bank.

(6) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc., Appeal. — Whenever any bank, of whose assets and business the commissioner of banks has taken possession as aforesaid, except where possession is taken under paragraph (2) hereof, shall deem itself aggrieved thereby, it may at any time within ten (10) days after the filing of the notice with the clerk of the Superior Court, file an answer to said notice and may also upon notice to the commissioner of banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said commissioner of banks, and the said judge may cite the said commissioner of banks to show cause within ten days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the commissioner of banks [or commissioner of banks]. If the judge shall enjoin further action of the commissioner of banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the commissioner of banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(7) Collection of Debts and Claims; Sale or Compromise of Debts, Claims; Commissioner Succeeds to All Property of Bank.—Upon taking possession of the assets and business of any bank by the commissioner of banks, the commissioner of banks, or the duly appointed agent, is authorized to collect all moneys due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner of banks,

or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested.

Upon taking possession of any bank under this act, the commissioner of banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in actions, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said Commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina Commissioner of Banks, and/or the duly appointed liquidating agent.

(8) Bond of Commissioner of Banks, Surety, Condition, Penalty Minimum. — Upon taking possession of any bank, the commissioner of banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the Superior Court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said commissioner of banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank the penal sum of said bond to be fixed by order of the commissioner of banks, which in no case shall be less than five thousand ($5,000) dollars. Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the commissioner of banks, he may, in his discretion with the approval of the advisory commission to the commissioner of banks, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America, which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the banking act of one thousand nine hundred and thirty-three enacted by congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the commissioner of banks, may serve as such agent without giving the bond required under all other circumstances in this subsection.

(9) Inventory Necessary.—Within thirty days after the filing of the notice of the taking possession of any bank in the office of the clerk of the Superior Court, the commissioner of banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the Superior Court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(10) Notice and Time for Filing Claims; Copies Mailed.—Notice shall be given by advertisement for four weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to present the same to the commissioner of banks at the office of the bank, and within the time to be specified in the notice, not less, however, than ninety (90) days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the commissioner of banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(11) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim. — If the commissioner of banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the Clerk of the Superior Court the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the commissioner of banks in the proper court of the county in which the bank is located within ninety days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the commissioner of banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the commissioner of banks, or duly appointed agent, and the commissioner of banks or duly appointed agent, after investigation, shall either allow such

objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the commissioner of banks or duly appointed agent, shall file a notice to this effect in the pending action; and within ten days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(12) List of Claims Presented and Deposits; Copies; Proviso.—Upon the expiration of the time fixed for presentation of claims, the chief state bank examiner, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the University of North Carolina. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the corporation commission, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(13) Assessment on Stockholders; Copy of Levy to Clerk; Force of Judgment; When Payment Due; etc.—After the expiration of thirty days from the date of the filing of the notice of the taking possession of any bank, in the office of the Clerk of the Superior Court, the commissioner of banks may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this State; and the same shall become due and payable immediately, and if not paid execution may at the instance of the commissioner of banks issue against the stockholder delinquent, and actions on said assessment may be instituted against any non-resident stockholders in the same manner as other actions against non-residents of the State. Any stockholder may appeal to the Superior Court from the levy of assessment; the issue raised by the appeal may be determined as other actions in the Superior Court. At any time before the determination of said appeal such stockholder may petition the resident or presiding judge to relieve his property of the lien, pending the determination of the question raised by said appeal; and such relief may be granted in the discretion of the judge hearing the petition and upon such terms as he may fix. The rights of levy and assessment herein given shall not affect the right of the commissioner of banks to enforce the liability of legal or equitable owners of stock not named in the certificate and the liability transferers of stock as provided in section two hundred and nineteen (d). All sums collected under the levy shall become immediately available as general assets of the bank for distribution as other assets; Provided, however, that whenever the expenses of liquidation have been paid and all of the liabilities to depositors and other creditors shall have been discharged, the money then remaining in the hands of the commissioner of banks shall be applied pro rata to the repayment of the amounts paid in by the stockholders.

(14) Declaration of Dividends; Order of Preference in Distribution.—At any time after the expiration of the date fixed by the commissioner of banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the commissioner of banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten (10) per centum of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder: (1) Taxes and fees due the commissioner of banks for examination or other services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation; (4) certified checks and cashier's checks in the hands of a third party as a holder for value and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; (5) amounts due creditors other than stockholders. The word "asset" used herein shall not be deemed to include bailments or other property to which such banks has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the

non-payment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the Superior Court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(15) Deposit of Funds Collected.—All funds collected by the commissioner of banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the commissioner of banks. The payment of interest on the net average of such sums on deposit shall be controlled by the governor and council of state, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(16) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation.—The commissioner of banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(17) Unclaimed Dividends Trust.—The unclaimed dividends remaining in the hands of the commissioner of banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the commissioner of banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of facts are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the commissioner of banks.

(18) Report by Commissioner of Banks.—If the assets of any bank when fully collected by the commissioner of banks are not more than sufficient to pay the depositors and creditors of said bank, the commissioner of banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the Clerk of the Superior Court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the commissioner of banks from all further liabilities by reason of the liquidation of the bank.

(19) Action by Commissioner of Banks after Full Settlement.—Whenever the commissioner of banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits, and disputed claims and deposits, and shall have in hand other assets of said bank, he shall, through the commissioner of banks, call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the commissioner of banks all the assets of said bank, then remaining in his hands; and the commissioner of banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The commissioner of banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the commissioner of banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Such agent, or agents, shall file semi-annually a report of all transactions with the superior court of the county in which the bank is located, and with the commissioner of banks, and shall be allowed for such services such fees not in excess of five per cent, as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the commissioner of banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank,

file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of Court or by action of the stockholders, distribution shall be provided for.

(20) Annual Report of Commissioner of Banks; Items in Report of; Publication. — The commissioner of banks shall file, as a part of his annual report to the governor, a list of the names of the banks so taken possession of and liquidated; and the commissioner of banks shall, from time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the commissioner of banks shall show the sum unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the commissioner of banks under the provisions of this section.

(21) Compensation of Commissioner of Banks. —The commissioner of banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the commissioner of banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the commissioner of banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(22) Exclusive Manner of Liquidation.—No bank created under the banking act or the industrial banking act, and under the supervision of the commissioner of banks, shall be liquidated in any other way or manner than that provided herein.

(23) Application of Act.—The applicable provisions of this act shall apply to all banks which on the date of the ratification of this act have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(24 Liquidation by Commissioner of Banks of All Banks in Receivership Required.—On and after the first day of January, one thousand nine hundred and thirty-six, the provisions of this act shall apply to all banks included in the definition or classification of banking institutions under this chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this act and by said banking commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection sixteen shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated. (1921, c. 4, s. 17; 1927, c. 113; 1931, c. 243, s. 5, cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1935, c. 81, s. 4, c. 231, s. 1, c. 277.)

As to enforcement of stockholder's liability by purchasing bank, see section 218(a).

Editor's Note. — Prior to the 1927 Amendment, the Supreme Court held in Litchfield v. Roper, 192 N. C. 202, 205, 134 S. E. 651, that this section did not supersede or repeal the provisions of C. S. section 239, 240, but that it was supplemental to those sections and should be construed in conjunction with them.

But in amending and reenacting this section, the act of 1927 seems to have left no doubt that not only are sections 239, 240 of the consolidated statutes repealed by it, but also section 253 secs. 218(a), 218(d), 218(e), at least a part of 218(f) and the portion of section 244 relating to receivers, for an entirely new scheme of liquidation is provided which must be followed to the exclusion of all others—the appointment of receivers and the assessment of stockholders by the court being done away with by it. However, there seems to have been legislative recognition that sections 218(e) and 240 were not superseded by the 1927 amendment of this section.

Prior to this amendment the superior court had exclusive jurisdiction over the affairs of an insolvent bank incorporated under the laws of this state. See Trust Co. v. Leggett, 190 N. C. 362, 131 S. E. 752. It was therefore the duty of the court to ascertain the amount of liability and assess the stockholders. By virtue of the amendment these duties, and all the others formerly performed by the court as well, were devolved upon the corporation commission.

Prior to the amendment it was held that a justice of the peace had no jurisdiction over an action of the receiver to collect an overpayment of dividends to a stockholder, where the amount of indebtedness had not been fixed by the superior court. Trust Co. v. Leggett, supra.

Public Laws of 1931-1933-1935.—This section was amended three times by Public Laws 1931, ch. 405, reenacted subsection (16), ch. 385, effective May 11, 1931, and excepting pending litigation, added the second paragraph to subsection (7), and provided that "the powers herein granted shall be in addition to and not in derogation of any existing acts ratified at this session of the General Assembly." This chapter provided that the first sentence of the added paragraph should be inserted before the last sentence of the former section, but it seemed to fit better after such sentence, and has been so placed in this Code.

Chapter 243 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section. As stated in note to sec. 221(s), this wholesale substitution of titles presents difficulties in this and other sections. The instances of substitution for "chief state bank examiner" in the subsections of this section are, excluding headings: (1), fourth, sixth and eighth instances; (2), (7), second and third instances; (3), (4), (5), (10), (15), second instance; (8) first and second instances; (9) one instance; (11) all instances except second; (12), (14), first instance; (20) third instance. Such substitution was also made in the heading of subsection (8), and in the bracketed portion of subsection (6).

By c. 546 of Public Laws 1933 subsection (12) of this section was amended by the addition of the second sentence relating to dividends on unclaimed deposits in closed banks. Prior to the Amendment of 1933, P. L. c. 175, s. 2, subsection 15, required a deposit a net average of three per cent per annum.

For an act regulating the time limit of liquidation of banks in Rutherford County, see Public Laws 1933, c. 567. As to act, applicable only in Buncombe County, providing that stockholders of closed banks shall be required to pay only one assessment, see Acts 1933, c. 27, p. 21.

The proviso at the end of subsection (8) of this section was added by the 1935 amendment. The act also added subsection (24) in its entirety. §§ 2-5½ of the amendatory act provide for the procedure by receivers in charge of liquidation in effecting the change required by subsection (24).

In General.—To remedy the defects in the procedure under the former statutes, sub-section 13 of this section was enacted. It is the only provision of this section, directly affecting stockholders of insolvent banking corporations, as individuals. Corporation Comm. v. Murphey, 197 N. C. 42, 44, 147 S. E. 667.

The functions of the Commissioner of Banks are not limited to the provisions of this section, and the courts of equity have inherent power to permit the Commissioner of Banks to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. Blades v. Hood, 203 N. C. 56, 164 S. E. 828.

Constitutionality—Notice—Appeal.—Subsection 13 of this section is constitutional and valid, and is not in contravention of the Due Process Clause of the Federal Constitution or the Law of the Land Clause of the State Constitution, since under its provisions the statutory liability of a stockholder of an insolvent bank is not enforceable

by execution under the order of the Corporation Commission until after he has been given notice and an opportunity to be heard in the course and practice of our courts, and an appeal has the effect of staying execution until his defense has been determined before a jury. Corporation Comm. v. Murphey, 197 N. C. 42, 147 S. E. 667, citing Coffin Bros. & Co. v. Bennett, 277 U. S. 29, 48 Sup. Ct. Rep., 422, and cited in Darden v. Coward, 197 N. C. 35, 36, 147 S. E. 671. See also 8 N. C. Law Rev. 285.

Section is constitutional and the superior court is not deprived of its constitutional jurisdiction. In re Independence Trust Co., 206 N. C. 12, 17, 173 S. E. 53.

Notice of the insolvency of the corporation is sufficient notice to each stockholder of his liability to the assessment. Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163. Though doubtless, in the administration of this section, the Commission will, as a matter of practice, give actual, personal notice to each stockholder, by mail or otherwise, before the assessment is made, and also before execution is issued to enforce the assessment. Corporation Comm. v. Murphey, 197 N. C. 42, 47, 147 S. E. 667.

An assessment made against a stockholder who prior to the assessment had been adjudged insane, without notice being served on his committee or guardian is void and can be attacked by his administrator after his death. Hood v. Holding, 205 N. C. 451, 455, 171 S. E. 633.

The correpsonding section of the general corporation law is not applicable to banks, see Sec. 1186.

Does Not Affect Right to Restrain Commission.—The jurisdiction of the Superior Courts of this State, in a proper case, to restrain the Commissioner of Banks, is not affected by the provisions of this section. The Commissioner of Banks is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the Superior Courts, in the exercise of their equitable jurisdiction. Stanly Bank, etc., Co. v. Hood, 206 N. C. 543, 546, 174 S. E. 503; Hood v. Burrus, 207 N. C. 560, 178 S. E. 362.

When the commissioner is made a party, he succeeds to the rights of the bank in the litigation pending and comes into the pending case for the purpose of protecting the rights of creditors in the recovery, not for the purpose of asserting a new and independent cause of action. Fidelity, etc., Co. v. People's Bank, 72 F. (2d) 932, 936.

Necessity of Closing Bank's Doors. — Among other powers conferred by statute, the Corporation Commission may, without taking possession of the business and property of a state bank, upon its appearing to the commission to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the banks complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

Liability Contractual. — The liability of a stockholder in addition to the par value he has paid, is contractual, under sections 237 and 219(a), and the amount of his liability when the bank had become insolvent and in the hands of a receiver prior to the 1927 amendment, was determinable in the original action brought for the liquidation of the bank and the issuance of summons duly served under order of court. Greenville Banking etc., Co. v. Leggett, 191 N. C. 362, 131 S. E. 752; Corp., Comm. v. Farmers, etc., Bank, 192 N. C. 366, 135 S. E. 48.

Same — For Benefit of Creditors. — The statutory liability of the stockholders is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. Hill v. Smathers, 173 N. C. 642, 649, 92 S. E. 607.

Ostensible Owner Relieved of Assessment.—See note under § 219(d).

Preferences.—It will be noted that under subsection 14 of this section claims against the estate of an insolvent bank for amounts due on collection made and unremitted for, or for which final actual payment has not been made by the bank, are given preference, in the final distribution of the assets of said bank. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236.

The words "or otherwise" in subsec. 14 of this section, are to be construed in connection with the other parts of the statute, meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "sending" the money to the payee of the check. Morecock v. Hood, 202 N. C. 321, 162 S. E. 730.

Where a check was purchased from a bank, which a few days later became insolvent and the bank on which the check was drawn refused to honor it, it was held that the purchaser could not claim a preference under this section. The transaction was that of debtor and creditor. If it were otherwise in every transaction involving the relationship of debtor and creditor, near to a bank's going into liquidation on account of insolvency, it would be claimed a preference—thus destroying the well recognized maxim that "equality is equity." Great Atlantic, etc., Tea Co. v. Hood, 205 N. C. 313, 316, 171 S. E. 344.

It is well settled that the purchase of a bank draft, a cashier's check or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and that the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased. Id.

Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawee bank for collection and it was returned with notiec of the banks insolvency, it was held that the drawer's claim was not entitled to a statutory preference under this section for the reason that the bank did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within twenty-four hours after its receipt by mail implied an acceptance under the provisions of sections 3118 and 3119, such acceptance did not ipso facto create a preference. Lamb v. Hood, 205 N. C. 409, 410, 171 S. E. 359.

Where a national bank received a draft for collection and remitted for the collection of the draft a draft drawn on one of its correspondents, but failed before this draft could be paid, it was held that the owner of the draft collected had no lien on the assets of the insolvent bank in the hands of the receiver. There was no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a trust. Spradlin v. Royal Mfg. Co., 73 F. (2d) 776.

It is clear, that even if this proviso be construed as having relation to solvent banks as distinguished from those in liquidation, it cannot affect national banks. Id.

The lien created, although it is to attach from the date of the charge, entry or collection, arises only upon "failing to remit" or "the non-payment of a check sent in payment;" and it is manifest that a solvent bank will not fail to remit collections or permit a check sent in payment of a collection to remain unpaid. It is only in case of banks which have failed, therefore, that the statute can have any practical application; and the lien which it creates is of such a character that it can be enforced only by a liquidation of the bank. Id.

Same—Cashier's Check.—Where a bank debits an account with the amount of a check drawn by the depositor and issues its cashier's check for the amount but is placed in a receiver's hands before remitting the proceeds to a third person as instructed to do by the depositor, the cashier's check does not constitute a preference as defined by this section. Board of Education v. Hood, 204 N. C. 353, 168 S. E. 522.

If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds, a draft for the purchase price of Liberty Bonds, and the bank is closed before the draft is paid, such transaction does not constitute a preference as defined by this section. In re Bank of Pender, 204 N. C. 143, 144, 167 S. E. 561.

Same—Draft on Another Bank.—Under subsec. 14 of this section a depositor who presents his check for payment over the counter of a bank which charges his account with the amount thereof and gives him a draft drawn on another bank which he deposits in a third bank, and the draft is returned unpaid, is not entitled to a preference in assets of the bank drawing the draft, the transaction not coming within the provisions of the statute for a preference when a bank receives a check by "mail," express or otherwise . . . with request that remittance be made therefor." Morecock v. Hood, 202 N. C. 321, 162 S. E. 730.

Taxes Held to Constitute Preferred Claim.—A bank, owning the land upon which the bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation by virtue of the statute. At the time of closing there was an outstanding mortgage securing an indebtedness of $25,000, all of which was unpaid and in default. The mortgagee took possession of the real estate and collected the rents and thereafter the liquidating agent of the bank listed the real property for taxation. County and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property. It was held that as the bank, the mortgagor, was the real owner it was liable for taxes unpaid at the time of the sale and by subdivision (14) of this section taxes constitute a preferred claim against the assets of the insolvent bank. Hood v. McGill, 206 N. C. 83, 85, 173 S. E. 20.

Payment of Dividends to Clerk of Court.—In In re Bank

of Ayden, 206 N. C. 821, 175 S. E. 177, dividends declared by Commissioner were paid to clerk of court to hold for three months, during which time conflicting contentions of creditors and depositors were heard and decided.

Prerequisites to Assessment. — Prior to the 1927 amendment it was held that the liability of the stockholders as fixed by section 219(a) could not be assessed under sections 239, 240 or this section prior to a determination of the amount of the deficiency. The value of the assets and the liabilities must have been determined before the extent of the liabilities of the shareholders could be fixed. Corp. Comm. v. Farmers, etc., Bank, 192 N. C. 366, 370, 135 S. E. 48; Corporation Comm. v. Merchants Bank, etc., Co., 193 N. C. 113, 116, 136 S. E. 362.

This was true after the passage of sections 239, 240, in 1911. And the decision in Smathers v. Bank, 135 N. C. 410, 47 S. E. 893, is not an authority to the contrary it being decided prior to 1911. Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 370, 135 S. E. 48. As to whether or not the corporation commission must ascertain the value of assets before assessing the stockholders under the 1927 amendment, quere.

When an issue was raised by denial of the receiver's allegation or statement thereof in the original suit for dissolution, an issue of fact was raised for the determination of the jury, or by reference under the provisions of section 753(1), (2). Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 135 S. E. 48; Jordan v. Farthing, 117 N. C. 181, 23 S. E. 244; State v. Askew, 94 N. C. 194; Ely v. Early, 94 N. C. 1. Where an issue was so raised, it is necessary to find the fact involved in the issue in order that the accounting may be had. Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 370, 135 S. E. 48, supra.

Right to Repudiate Subscription for Fraud.—Even if it be conceded that this section undertook to deal solely and exclusively with the methods of distribution of special funds arising from stockholders' assessments, nevertheless, the stockholder has the right to repudiate his stock subscription procured through the fraud of his own corporation, even after insolvency or bankruptcy. Hood v. Martin, 203 N. C. 620, 166 S. E. 793.

Right to Assess Stockholders for Statutory Liability Barred by Lapse of Time.—Where a State bank transfers all its assets to another State bank which assumes the former's liabilities, effecting a consolidation under the provisions of sec. 217(k), and the transferee bank later becomes insolvent, and is taken over by the Corporation Commission as liquidating agent, the right to assess the stockholders of the transferer bank on their statutory liability to cover the deficiency in its assets to pay its liabilities, for which it was liable to the transferee bank under the agreement of consolidation, is barred when the proceedings for the assessment are instituted more than three years after the transfer, in the instant case, sec. 240 is not applicable, no receiver having been appointed for the transferer bank, and the transfer being made before the enactment of this section. As to whether the Corporation Commission had the power to take possession of the transferer bank, quaere? Corporation Commission v. Stockholders, 199 N. C. 586, 155 S. E. 445.

Right of Stockholders to Be Heard. — The individual stockholders must be afforded an opportunity to be heard before assessments are made in order that they be thereafter precluded from contesting the amount. Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 135 S. E. 48.

Appeal from Assessment.—Where an appeal to the Superior Court is taken from an assessment made according to the provisions of this section, ordinarily the only issues of fact which may be raised in the Superior Court are whether the appellant was in fact a stockholder, and if so, the number of shares owned by him. Corporation Comm. v. McLean, 202 N. C. 77, 161 S. E. 854.

The appeal from assessments provided for by this section should be taken "within a reasonable time" and a delay of nineteen or twenty months is too long. In re Citizens' Bank, 208 N. C. 65, 66, 179 S. E. 24.

"Assets" Defined. — Section 239 and 240, providing for the assessment of the stockholders, were a recognition of the distinction between ordinary assets of the corporation and the statutory liability, and was substantially a legislative construction that the former does not include the latter. Hill v. Smathers, 173 N. C. 642, 649, 92 S. E. 607.

The term "assets" is broad enough to cover anything which is now or may be available to pay creditors, but as usually understood it refers to the tangible property of the corporation and not to the liability of stockholders, contingent upon insolvency. It does not include rights and property which do not belong to the corporation, and the current of opinion is that the statutory liability is not for the benefit of the corporation, but is an additional security for creditors. Hill v. Smathers, 173 N. C. 642, 648, 92 S. E. 607.

Personal Liability of Directors as Asset.—The right of action by the bank, and by its receiver (now Bank Examiner or agent) in case of insolvency for loss or depreciation of the bank's assets, due to their wilful or negligent failure to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and where the receiver has sued the shareholders of its stock for their additional or personal liability, the defendants, setting up this defense as an asset of the bank, are entitled to have the officer's or director's liability determined before the amount of their liability by assessment may be fixed. Corporation Comm. v. Merchants Bank, etc., Co., 193 N. C. 113, 114, 136 S. E. 362.

Individual Liability of Directors as Asset.—See note to section 218(a).

Purchase Price of Sale of Insolvent Bank's Property Must Be Paid to Corporation Commission.—Where the Corporation Commission takes possession of the assets of an insolvent bank under the provisions of this section, it is a statutory receiver and it is required by statute to collect the assets of the bank and to distribute them to the creditors and depositors, and the court having jurisdiction is without power to authorize the sale of an insolvent bank's property in bulk to purchasers under an agreement that the purchasers organize another bank and pay to it the purchase price for distribution to the creditors and depositors and thus relieve the Commission of its duty to collect and distribute the assets. As to whether the court might authorize the sale of the assets in bulk is not decided, though it would seem that under the statutory provision that he shall make such order as in his discretion will best serve the parties interested he has the power to authorize a sale in bulk, which would not be reviewable on appeal except on the ground of abuse of discretion. In re Lafayette Bank & Trust Co., 198 N. C. 783, 153 S. E. 452.

Defense that Bank Stock Was Bought Prior to Enactment of Section.—The statutory liability of the holder of bank stock for the amount equal to the par value of his shares is contractual and exists from the time of the purchase of the stock, and this section does not alter nor enlarge this liability, but has reference only to the procedure to enforce it, and the defense that the stock was bought prior to the enactment of the statute of 1927, and that the statute could have no retroactive effect, is untenable. In re Carolina Bank & Trust Co., 197 N. C. 613, 150 S. E. 118.

Applied as to subd. (14) in In re Champion Bank, etc., Co., 207 N. C. 802, 178 S. E. 555; as to sufficiency of evidence to show a preference in Williams v. Hood, 207 N. C. 737, 178 S. E. 669; Dixie Mercerizing Co. v. Hood, 207 N. C. 135, 176 S. E. 285.

Cited in Braswell v. Citizens' Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236; State v. Davidson, 205 N. C. 735, 172 S. E. 489; Pritchard v. Hood, 205 N. C. 790, 172 S. E. 485; Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481; In re Central Bank, etc., Co., 205 N. C. 822, 172 S. E. 484; Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61; Hood v. Johnson, 208 N. C. 77, 178 S. E. 855; as to subd. (3) in Hood v. Burrus, 207 N. C. 560, 178 S. E. 362; Stanly Bank, etc., Co. v. Hood, 206 N. C. 543, 174 S. E. 503; as to subd. (9) in Underwood v. Hood, 205 N. C. 399, 171 S. E. 364; as to subd. (13) in In re Bank of Murphy, 205 N. C. 840, 172 S. E. 181.

§ 218(c) 1. Sale of stocks of defunct banks validated.—All private sales of stocks in resident corporations, joint stock companies and limited partnerships, heretofore made by the commissioner of banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 218(d). Superseded by § 218(c).

Editor's Note.—The terms of this section are covered by subsection (17) of section 218(c), a different scheme being provided for the disposition of dividends and unclaimed deposits remaining in the hands of the commissioner of

banks so that this section is repugnant to section 218(c) and superseded by it.

§ 218(e). Statute relating to receivers applicable to insolvent banks. — Article ten, chapter twenty-two of the Consolidated Statutes relating to receivers, when not inconsistent with the provisions of § 218(c), shall apply to liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; 1931, c. 215.)

Editor's Note.—Since section 218(c) now provides that the duties formerly performed by receivers shall hereafter be performed by the commissioner of banks and his agents, it had been thought that this section was superseded. See note under such section. However, it would seem that the amendment of the section by the Act of 1931 was legislative recognition that it had not been superseded.

Effect in General.—This section serves to confer upon the commissioner of Banks possession and the right to possession of all property, rights, etc., with certain enumerated powers together with such incidental powers as are necessary to a sale of the insolvent bank's assets. Blades v. Hood, 203 N. C. 56, 164 S. E. 828.

§ 218(f). Books, records, etc., disposition of.— All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the commissioner of banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; 1931, c. 243, s. 5.)

Editor's Note.—Section 218(c) as amended substitutes the commissioner of banks and his agents for receivers and there are no longer any receivers appointed in connection with the liquidation of banks. There are no provisions in section 218(c) as amended which correspond to this section.

This section is certainly modified, to the extent that the commissioner of banks or his agents are inserted in the place of receivers. See note to § 218(e).

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 218(g). Appointment of substitute trustees for insolvent banks in certain instruments requiring trustees.—Whenever any bank or trust company created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the corporation commission of this State or by any other legally constituted authority, the powers and duties of such bank or trust company as trustee in any such instrument shall, upon the entry of an order of the Clerk of the superior court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1.)

Editor's Note.—The authority to liquidate banks is now vested in the commissioner of banks. See secs. 221(o) et seq.

§ 218(h). Petition for new trustee; service upon parties interested.—In all cases of such insolvency and liquidation mentioned in the preceding section of this act, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, and he is hereby fully authorized and empowered so to do, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in some newspaper published in the county, or in some adjoining county if no newspaper is published in the county where such application is made, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than thirty days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2.)

§ 218(i). Publication and contents of notice.— Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 218(j). Appointment where no objection made.—If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substituted trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 218(k). Hearing where objection made; appeal from order.—If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 218(l). Registration of final order.—The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 218(m). Petition and order applicable to all instruments involved.—The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 218(n). Additional remedy.—Sections 218(g)-218(m) shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Editor's Note.—As the remedy provided is cumulative, the statute should be read in connection with §§ 2583(a)-2583(h). And see § 218(p). N. C. Law Rev. 403.

§ 218(o). Validation of acts of officers of insolvent banks as trustees in deeds of trust.—Whenever any state bank, prior to January first, one

thousand nine hundred and thirty-one, shall have become insolvent and its assets and business been placed in the hands of the corporation commission or taken control of by the corporation commission for liquidation, and the board of directors of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as trustee under any deed in trust to it recorded in any county in this State: Provided, said resolution was passed prior to the eleventh day of May, one thousand nine hundred and thirty-one, the performance or exercise of any such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the corporation commission or taken control of by the corporation commission for liquidation. (1931, c. 403.)

§ 218(p). Validation of sales by corporation commission under mortgages, etc., to banks being liquidated.—Whenever it appears that either the North Carolina corporation commission, the chief state bank examiner, or any liquidating agent appointed pursuant to the provisions of Public Laws 1927, c. 113 [§ 218(c)], has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning the trust, of the North Carolina corporation commission and/or chief state bank examiner, and/or liquidating agent appointed as aforesaid, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note.—This section, which validates sales by the commission and its representatives in the course of liquidation of insolvent banks, when the power of sale was originally granted to such a bank before the state took it over, appears to have been intended to overcome the effect of the case of Mitchell v. Shuford, 200 N. C. 321, 156 S. E. 513, which held that the commission had no such authority. In view, however, of this case, and of Booth v. Hairston, 193 N. C. 278, 136 S. E. 879; s. c., 195 N. C. 8, 141 S. E. 480, doubt is cast upon the constitutionality of the validating act. Upon the rehearing of the latter case, Judge Brogden said: "* * * but the power to cure a crippled instrument, having at least a spark of legal life, does not extend to raising a legal corpse from the dead." It is believed, however, that if more emphasis is placed upon the need for a dependable device for translating the security into a satisfaction of the debt, which is all the deed of trust or mortgage amounted to, than upon questions of title or contracts, that the facts of the situation aimed at by the validating act can be distinguished.

Compare this statute with §§ 92(d), 1210(a)-1210(c). The future policy is stated in §§ 218(g) et seq., and in the 1931 Amendment to § 218(c), subsection 7. 9 N. C. Law Rev. 401, 402.

§ 218(p) 1. Commissioner to report to secretary of state certain matters relative to liquidation of closed banks; publication.—The commissioner of banks of the state of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the secretary of the state of North Carolina a report showing all banks under liquidation in the state of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance the contract.

Within five days from the receipt of said report the secretary of the state of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the secretary of the state of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

Art. 3A. Reopening of Closed Banks

§ 218(q). Conditions under which banks may re-open.—No bank or banking institution which has been taken in possession by the commissioner of banks under the provisions of the State banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

(a) The bank has been completely restored to solvency;

(b) The capital stock, if impaired, has been entirely restored in cash;

(c) It shall clearly appear to the commissioner of banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1931, c. 388, s. 1.)

See § 218(b) and note thereto.

§ 218(r). Re-opening of banks already authorized to do so.—The advisory banking commission is authorized to permit the reopening, prior to June first, nineteen hundred and thirty-one, of any bank or banking institution which North Carolina corporation commission has heretofore authorized to reopen; and the provisions of § 218(q) shall not prevent the reopening of such bank or banking institution. (1931, c. 388, s. 2.)

§ 218(s). Supervision of Advisory Banking Commission over deposits and stock of reopened banks.—In the case of any bank or banking institution which has heretofore reopened under authority of North Carolina corporation commission or which shall in the future reopen under the provisions of § 218(r) the advisory banking commission may in its discretion prescribe the terms and conditions under which such bank or banking institution may receive deposits during such period as its capital shall be impaired, and may further prescribe the terms and conditions under which stock of said bank or banking institution may be transferred during said period. (1931, c. 388, s. 3.)

§ 218(t). Existing contracts between banks and depositors unaffected.—Nothing in §§ 218(q)-218(s) shall impair or affect any contracts made by banks and its depositors heretofore reopened under the permission of the state banking department. (1931, c. 388, s. 4.)

§ 218(u). Fiduciaries authorized to enter depositors' agreements. — All executors, adminis-

trators, guardians, trustees, commissioners, and others, occupying and acting in fiduciary capacities be and they are hereby authorized and empowered to sign in their fiduciary capacities any agreement offered to depositors intended and designed to enable any bank, national or state, doing business in North Carolina prior to March sixth, nineteen hundred and thirty-three, to reopen: Provided the plan for the reopening of such bank has been first approved by the comptroller of the currency in the case of national banks, by the commissioner of banks in the case of state banks, and: Provided further, that such fiduciary first obtain the consent and approval of the clerk of the superior court of the county in which such fiduciary was appointed and of the resident judge, or the judge holding the courts of the judicial district in which such county is situate, such consent and approval to be entered upon the original record of the appointment of such fiduciaries in the counties in which such fiduciaries were appointed: Provided, that nothing in this act shall be construed to release the bondsman of any such guardian, ward or other fiduciary signing such release. (1933, c. 267.)

Art. 3B. Sale of Deposits in Closed Banks

§ 218(v). Purchasers may offset against debts due bank.—Any person, firm or corporation, society or organization, by whatsoever name designated, having any moneys or funds on deposit in any bank in Buncombe, Cherokee, Craven, Halifax, Haywood, Henderson, Jackson, Johnston, Macon, Robeson, Rutherford, Sampson, Stanly, Wilson and Transylvania, Alexander, Avery, Beaufort, Bertie, Bladen, Camden, Carteret, Catawba, Chatham, Chowan, Cleveland, Duplin, Edgecombe and all the municipalities therein with the exception of the town of Pine Tops, Gaston, Gates, Hertford, Hoke, Jones, Lee, Lenoir, Lincoln, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Pamlico, Pasquotank, Perquimans, Pitt, Polk, Richmond, Rockingham, Scotland, Stokes, Tyrrell, Wayne, Wilkes Counties, North Carolina, that is now closed, which has been closed eighteen months or longer prior to the ratification of the amendment of this section, and which has not paid its depositors and other creditors in full, shall, from and after the ratification of this act, have authority to sell and convey such accounts or deposits to any person, firm or corporation that may desire to purchase same and who owe such closed banks any money, and such person, firm or corporation purchasing such account or deposit shall be entitled to apply such account or deposit to the discharge of any debts owing by them to such closed banks at the full face value of such account or deposit. (Public Local Laws 1933, c. 344; 1933, c. 540, s. 1.)

Editor's Note.—Public Local Laws 1931, c. 344 applicable only to Buncombe County was amended by Public Laws, c. 540, s. 1, ratified May 15, 1933, so as to apply to the other counties named, and to banks which had been closed eighteen months or longer.

For act applicable only to Robeson County, see Public Laws 1933, c. 541, amending c. 540, s. 2.

Section Held Unconstitutional.—This section allowing purchased claims for deposits to be used at face value to pay debts to certain closed banks was held unconstitutional and void in In re Central Bank, etc., Co., 205 N. C. 822, 172 S. E. 484. And see Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481; Pritchard v. Hood, 205 N. C. 790, 172 S. E. 485.

Art. 4. Stockholders

§ 219. This section was superseded by §§ 217(f) (g).

Editor's Note.—Except for the last sentence, the terms of this section are covered by sections 217(f), (g). The last sentence is quoted in the note under section 217(g). Therefore the terms of this section are not set out in full. See the editor's notes under sections 217(f), (g).

§ 219(a). Stockholders, individual liability of.—The stockholders of every bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares, except as otherwise provided. The term stockholders, when used in this chapter, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person; but shall not apply to a person who may hold the stock as collateral for the payment of a debt. Such additional liability as is provided in this section shall cease on July first, one thousand nine hundred thirty-five, with respect to any shares which may have been or may hereafter be issued. (1921, c. 4, s. 21; 1933, c. 159; 1935, c. 99, s. 1.)

As to liability of officers under § 224(g) as asset, see note to § 224(g).

Editor's Note.—This section is very similar to C. S. sec. 237, the prior law, except that the words "one for another" were inserted by the 1921 act. This section and sec. 219(c) were formerly included in sec. 237.

Public Laws 1933, c. 159 added the words "except as otherwise provided," appearing at the end of the first sentence of the section.

The amendment of 1935 added the last sentence of this section relating to the time the additional liability shall cease. Sections 2 and 3 of the amendatory act provide for notice to creditors of the release from double liability and for release of securities by the commissioner of banks.

Liability of Directors under Agreement.—The agreement of the directors to make good the impairment of the capital stock of a state bank as a condition precedent to the management of its business by its own officers, and at the instance of the State Bank Examiner, acting according to the power conferred by sec. 218(c) upon the Corporation Commission, renders such directors, as stockholders, liable to the extent of the obligations they have thus assumed, this liability is independent of, and not contemplated by, this section creating an additional liability to the amount of stock held by them in the banking corporation. Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

Liability Contractual.—The liability of stockholders of a bank, organized under the laws of this State, by virtue of this section, is contractual. Smathers v. Bank, 135 N. C. 410, 47 S. E. 893; Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 369, 135 S. E. 48.

Liability as Asset of Bank.—The term "assets," as applied to a bank, is broad enough to cover anything which is or may be available to pay creditors; but, as usually understood, it refers to the tangible property of the corporation, and not to the liability of stockholders contingent upon insolvency. Hill v. Smathers, 173 N. C. 642, 92 S. E. 607.

But the liability provided by the statute against the stockholders is not considered an asset or right of the corporation. Corporation Comm. v. Merchants Bank, etc., Co., 193 N. C. 113, 116, 136 S. E. 362.

So as employed in the statute, the term was not intended to include the double liability of stockholders, or else the expression "other assets" would have been used, as such liability is given only for the benefit of creditors and not for the benefit of the corporation. Corporation Comm. v. Merchants Bank, etc., Co., 193 N. C. 113, 116, 136 S. E. 362.

Same—As Prequisite to Fixing Other Contingent Liabili-

ties.—The word "assets," in a bank receiver's judgment on notes against its former directors who had executed the notes in favor of the bank to relieve the institution of an amount of worthless paper, which judgment suspended execution till plaintiff had proceeded with the collection of the bank's assets and found them insufficient to discharge the bank's obligations, did not include the statutory liability of the bank's stockholders under this section. Hill v. Smathers, 173 N. C. 642, 92 S. E. 607.

But in such a case execution could issue when the receiver had proceeded far enough to ascertain that the assets would be insufficient, though he had not reduced every dollar of the bank's assets to actual cash. Hill v. Smathers, 173 N. C. 642, 92 S. E. 607.

Each shareholder is entitled to have the amount he is chargeable with lawfully determined, and when this has been done, he may pay it and be discharged from further liability without incurring costs in the proceedings. Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 135 S. E. 48.

Perquisites to Fixing Liability.—The shareholders in an insolvent bank in the hands of a receiver may not be assessed by their additional liability to the par value of their shares until the value of the bank's assets in proportion to its debts has been ascertained. Corporation Comm. v. Merchants Banks, etc., Co., 193 N. C. 113, 36 S. E. 362. The term "assets" as here used includes the personal liability of the officers of the bank for a negligent failure to perform their duties. Corp. Comm. v. Bank, etc., Co., supra.

Suit to Enforce Assessed Liability—Costs.—Where the assessments had been duly made against the individual stockholders under sections 239, 240 [now superseded by section 218(c)], the receiver under the order of court could have instituted an independent action against the shareholders in default for its payment, and if successful the costs of this action were taxable against such stockholders, but not those incurred in the original proceeding under the provisions of C. S. 240. Corporation Comm. v. Farmer's, etc., Bank, 192 N. C. 366, 135 S. E. 48.

The statutory liability does not constitute a priority for payment out of the assets of the estate of a deceased stockholder. Hood v. Darden, 206 N. C. 566, 174 S. E. 460.

Entry on Books of Bank as Evidence of Ownership—Rebuttal.—Entry on the books of a bank of the issuance of stock to the defendant sought to be held for his statutory liability is only prima facie evidence that the defendant is such owner, which may be rebutted by his evidence, and a verdict directed against him upon conflicting evidence is reversible error. Corporation Comm. v. Harris, 197 N. C. 202, 148 S. E. 174.

In an action to recover a stockholder's statutory liability under this section, evidence tending to show that he had not subscribed for the stock, had received no dividends nor acted as such owner is sufficient to take the case to the jury in rebuttal of the prima facie case raised by his appearing on the books of the bank as a subscriber to its stock, and alone furnishes no evidence of ratification or estoppel. Corporation Comm. v. Harris, 197 N. C. 202, 148 S. E. 174.

The books of a bank establish, prima facie, who are stockholders therein, and those whose names appear thereon as stockholders are ordinarily liable, upon the bank's becoming insolvent, for the statutory liability imposed upon them by this section. Corporation Comm. v. McLean, 202 N. C. 77, 161 S. E. 854.

Defenses—Misrepresentation as to Solvency.—While upon the issue raised in an action by the receiver of an insolvent bank to enforce individual liability of a shareholder, the defense that the subscription was obtained by the fraudulent representations of an officer of the bank as to its solvency, is available but must be acted upon promptly and with due diligence, the question being one for a jury. Chamberlain v. Trogden, 148 N. C. 139, 61 S. E. 628; Corporation Comm. v. Bank, 193 N. C. 113, 114, 136 S. E. 362.

Same—Transfers.—See § 219(d) and notes thereto.

Claims of depositors cannot be offset against the statutory liability on stock under this section, only dividends on such claims being so applicable, and § 218(v) has no application. Pritchard v. Hood, 205 N. C. 790, 172 S. E. 485.

Return of Assessment to Stockholders.—By reason of the liability under this section, stockholders are not entitled to a return to them of any part of the amounts which they have paid to the commissioner of banks, in discharge of such liability, until all the claims of depositors and other creditors against the bank, including interest, on the amounts of such claims from the date on which the said commission took possession of the assets of the insolvent bank for liquidation, have been paid. Hackney v. Hood, 203 N. C. 486, 489, 166 S. E. 323.

Period of Limitation.—Section 423, under which action must be brought against a stockholder of a bank since becoming insolvent to enforce the additional liability on his shares of stock imposed by this section was by the acts of 1921, extended to an action by the receiver to recover therefor to ten years from the discovery of the condition of the insolvent bank as provided in section 240. Litchfield v. Roper, 192 N. C. 202, 134 S. E. 651. This provision was probably repealed by section 218(c), see editor's note to such section.

When Trustee Liable—Notice to Corporation.—No person who appears upon the records of a bank as a stockholder therein is relieved of personal liability under this section, by virtue of the provisions of section 219(c), unless the said record, or the stock certificate issued to him, shows that he holds the said stock as trustee for a cestui que trust named on the record or in the certificate. American Trust Co. v. Jenkins, 193 N. C. 761, 766, 138 S. E. 139.

Depositors and creditors have a right to look to those whose names appear on the books of the bank as having stock therein for the amount of the statutory liability and a person having stock issued to him in his own name, and it so appears upon the books, cannot escape such liability on this ground that in fact he held said stock as trustee for an undisclosed cestui que trust, and that the officers of the bank knew of the trusteeship. American Trust Co. v. Jenkins, 193 N. C. 761, 138 S. E. 139.

It is immaterial when the rights of depositors and creditors of the bank are involved that its officers had notice of the trusteeship. The liability imposed by statute upon stockholders of a bank is for the benefit of depositors and creditors, and not of the bank. Smathers Western Carolina v. Bank, 155 N. C. 283, 71 S. E. 345. Notice to the bank is not necessarily notice to depositors or creditors. American Trust Co. v. Jenkins, 193 N. C. 761, 766, 138 S. E. 139.

Cited in Peoples Bank & Trust Co. v. Roscower, 199 N. C. 653, 155 S. E. 560; In re Carolina Bank, etc., Co., 197 N. C. 613, 150 S. E. 118.

§ 219(a) 1. New state banks to set up surplus fund in lieu of double assessment.—The common stockholders of any bank hereafter organized under the laws of the state of North Carolina shall pay in, in cash, a surplus fund in lieu of the additional liability imposed upon such common stockholders by section 21, chapter 4, Public Laws of 1921 or section 1, chapter 121, Public Laws of 1925 [§§ 219(a) and 225(o) of this Code], which surplus fund shall equal fifty per centum of its common capital stock, and said bank shall from the funds then in its hands purchase bonds of the state of North Carolina or the United States of America equal in face value to fifty per centum of the par value of the common capital stock of such bank, which bonds shall be deposited with a federal reserve bank or other bank approved by the commissioner of banks for such purpose, and such bonds and all bonds substituted or exchanged therefor shall be held by the receiving bank for the sole benefit of the creditors of said depositing bank in case of liquidation. The federal reserve bank or other bank shall issue its receipt therefor in the manner and form to be provided for by the commissioner of banks. The interest on the said bonds shall be invested in bonds of the state of North Carolina or the United States of America until the original investment and subsequent investments shall equal, in face value of such bonds, the total amount of the common capital stock of such bank, after which time the interest on such bonds shall be paid to the bank. Whenever any substitution or exchange is made in the bonds deposited, such substitution or exchange shall be of bonds of the state of North Carolina or the United States of America of equal par value. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Cross References.—For a discussion of history and scope of this section, see 11 N. C. Law Rev. 200. For an interesting article discussing the law of contracts, and referring

to provisions of the instant section, see 13 N. C. Law Rev. 91.

Editor's Note.—The amendment of 1935 added the word "common" wherever it appears in the section preceding the words "stockholders" and "capital stock."

§ 219(a) 2. Existing banks may make same provision. — Any bank organized and operating under the laws of the state of North Carolina upon the date of the ratification of this act, may provide, in lieu of the additional or double liability of its common stockholders provided in section 21, chapter 4, Public Laws 1921 or section 1, chapter 121, Public Laws 1925 [§§ 219(a) and 225(o) of this Code], a fund for the purpose of purchasing bonds of the state of North Carolina or of the United States of America for deposit as hereinbefore provided for new banks organized under the laws of the state of North Carolina in the following manner:

(a) Whenever the commissioner of banks shall certify that in his opinion its unimpaired common capital and surplus funds equal one hundred and fifty per centum of the par value of its common capital stock, the stockholders at a regular meeting or at a special meeting called for the purpose may, by a majority vote of each class of stockholders voting as a class, approve such action.

(b) Notice of such action on the part of the stockholders shall be published in some newspaper published in the city or town where the bank is located or if no paper is published in the city or town, then in a newspaper published in the county or in a newspaper having general circulation in said county, once each week for a period of ninety days immediately following such action by the stockholders.

(c) Upon completion of the publication herein provided the board of directors may approve such action of the stockholders and thereupon file with the commissioner of banks certified copy of (1) the action of the stockholders, (2) the notice, (3) affidavit of publication, and (4) action of the board of directors.

(d) The commissioner of banks shall, having first determined that the financial condition of such bank will not be weakened by such action, issue his order to the board of directors of the bank, which shall be recorded in the office of the clerk of the superior court of the county where the bank operates, authorizing such action and investment.

The investment, when made, shall be in like manner and for the same purposes as provided herein in the case of the organization of new banks, and shall be held and maintained as in such cases herein provided. (1933, c. 159, s. 3; 1935, c. 79, ss. 1, 2.)

Editor's Note.—The amendment of 1935 added the word "common" wherever it appears in the section preceding the words "stockholders" and "capital stock." The amendment also added the clause at the end of subdivision (a) reading "of each class of stockholders voting as a class."

§ 219(a) 3. Provisions mandatory on banks hereafter organized.—No new bank organized under the laws of the state of North Carolina shall be permitted to operate until it has complied with the provisions hereof. The common stockholders of any bank organized and operating under the laws of the state of North Carolina upon the date of the ratification of this act which shall fully comply with the provisions hereof, shall be by such full compliance relieved of the common stockholders' additional or double liability imposed by section 21, chapter 4, Public Laws of 1921, or section 1, chapter 121, Public Laws of 1925 [§§ 219(a) and 225(o) of this Code]. The compliance herewith shall be deemed to be complete upon the acceptance by the commissioner of banks of the receipt herein provided for. (1933, c. 159, s. 4; 1935, c. 79, s. 1.)

Editor's Note.—The amendment of 1935 added the word "common" wherever it appears in the section preceding the words "stockholders" and "capital stock."

§ 219(a) 4. Supervision of commissioner of banks.—Any advertisement, on the part of any bank now or hereafter to be organized and operating under the laws of the state of North Carolina, having reference to the surplus fund herein provided for, shall be subject to the approval and regulation of the commissioner of banks. (1933, c. 159, s. 5.)

§ 219(b). Exemption from liability, repealing of.—Any exemption from the individual liability imposed upon stockholders by section 219(a) contained in the charter of any bank incorporated prior to the first day of January, one thousand nine hundred and five, is repealed. (1921, c. 4, s. 22.)

Editor's Note.—This section is a re-enactment of C. S. sec. 238 except that a provision was changed from January 1903 to January 1905.

§ 219(c). Executors, trustees, etc., not personally liable.—Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23.)

Editor's Note.—This section is a substantial re-enactment of the latter part of C. S. sec. 237.

Extent of Section.—This provision is held to refer not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability; it does not apply where the bank's records show an unincumbered title in the alleged trustee as is contemplated by § 219(a). American Trust Co. v. Jenkins, 193 N. C. 761, 765, 138 S. E. 139.

In Smathers v. Western Carolina Bank, 155 N. C. 283, 71 S. E. 345, it was held that by reason of this statute, a person to whom a certificate for shares of the capital stock in a bank was issued, showing on its face that he held the said shares as trustee for a cestui que trust, also named in the certificate, is not liable personally as a stockholder in an action by the receiver of the bank to recover judgment upon the statutory liability of stockholders. American Trust Co. v. Jenkins, 193 N. C. 761, 764, 138 S. E. 139.

See Corporation Comm. v. Latham, 201 N. C. 342, 343, 160 S. E. 295, following the statement under this catchline in the Code of 1931.

§ 219(d). Transferrer not liable, when.—No person who has in good faith, and without intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to any person of full age, previous to any default in the payment of any debt or liability of the corporation, shall be subject to any personal liability on account of the nonpayment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to any default shall be liable for any such debt or liability of the corporation to the extent of

such stock, in the same manner, as if he had been such owner at the time the corporation contracted such debt or liability: Provided, that no transfer of the shares of stock of an insolvent state bank, made within sixty days prior to its suspension, shall operate to release or discharge the assignor thereof, but shall be prima facie evidence that such stockholder assigned the same with knowledge of the insolvency of such bank and with an intent to evade the liability thereon. (1921, c. 4, s. 24.)

Editor's Note.—This section is a substantial re-enactment of sec. 241 of the C. S., the prior law upon the subject. However, the proviso changed the time limit from thirty to sixty days.

Sale as Affecting Liability.—A stockholder is not relieved of his statutory liability by the sale of his stock. He remains subject to such liability so long as the shares of stock stand in his name upon the books of the bank. He can be relieved of such liability only by a transfer of such shares to a purchaser in accordance with the provisions of the statutes. American Trust Co. v. Jenkins, 193 N. C. 761, 767, 138 S. E. 139.

A subscriber to the shares of stock of a bank is not relieved of his statutory liability thereon by selling the stock unless the transfer is made on the books of the bank in accordance with the statute. Corporation Comm. v. Harris, 197 N. C. 202, 148 S. E. 174.

But where one sold his stock in a bank, assigning his shares on the certificate to the purchaser, and sometime thereafter the bank became insolvent, whereupon he was assessed with the shares which still stood in his name on the books of the bank owing to the neglect of the transfer-agent to reissue the shares to the purchaser, such ostensible owner should be relieved of the assessment. Darden v. Coward, 197 N. C. 35, 147 S. E. 671, distinguishing Trust Co. v. Jenkins, 193 N. C. 761, 138 S. E. 139.

See note under § 219(a).

Same—How Transfer Accomplished.—It is required of a person selling shares of stock of a bank to escape personal liability under the provisions of this section to surrender the possession of the shares to be transferred to the proper officials of the bank in order that they may be properly transferred on the books to the purchaser. American Trust Co. v. Jenkins, 193 N. C. 761, 138 S. E. 139.

A transfer of bank stock to an infant does not relieve the transferer of his statutory liability, under this section, an infant being incapable of making a binding contract. In re Goldsboro Sav., etc., Co., 203 N. C. 238, 165 S. E. 705.

Trust Created in Good Faith.—Where the owner of shares of stock in a bank transfers some of his stock to his sons in trust for his grandchildren, but there is nothing on the books of the bank to indicate for whom the trust was created, and the transfer is regularly made in good faith when the bank was solvent, Held: upon the bank becoming insolvent the transferer is not liable under this section for the statutory assessment against the stock. Corporation Comm. v. Latham, 201 N. C. 342, 160 S. E. 295.

Where the owner of bank stock has had the shares transferred on the books of the bank to a trustee for the benefit of a minor, and the transfer is made in good faith when the bank is solvent: Held, the transferer is not liable for the statutory assessment of the stock upon the bank's insolvency, the trustee being of full age and qualified to perform all the duties required of him in his fiduciary capacity. In re Goldsboro Sav., etc., Co., 203 N. C. 238, 165 S. E. 705.

§ 219(e). Stock sold if subscription unpaid.— Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder twenty days notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within thirty days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25.)

Editor's Note.—This section is a substantial re-enactment of C. S. sec. 243, the prior law, except that the sale limit allowed the directors was changed from six months to thirty days.

§ 219(f). Impairment of capital; assessments, etc. — The commissioner of banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in section 217 (j). If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the commissioner of banks, the commissioner of banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock; but in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against said stockholder, then, and in such event, the said stockholder shall be personally liable for the difference between the amount of said assessment and the price brought by the sale of said stock. (Ex. Sess. 1921, c. 56, s. 3; 1925, c. 117; 1931, c. 243, s. 5.)

As to the amount of reserve required see secs. 220(f), (g).

As to manner of liquidating banks, see sec. 218(c).

Editor's Note.—This section first appeared in the act of 1921, ch. 56, amending the act of 1921, ch. 4. Its provisions are substantially similar to the national banking act which was designed principally for the purpose of strengthening banks whose capital has become impaired. See Elon Banking, etc. v. Burk, 189 N. C. 69, 126 S. E. 163.

The 1925 amendment added the last nine lines, beginning with the word "but" after the semicolon. This was added

to overcome the construction placed upon this section by the case cited above. See annotations following in this note.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Rules of Construction.—This statute creates a new liability and provides a special remedy for its enforcement, viz., the sale of stock if the stockholder fails to pay assessment. This remedy is exclusive and actions or proceedings ordinarily available may not be resorted to. So a personal action against the stockholder for the difference between the price for which the stock sold and the amount of the assessment cannot be maintained. Elon Banking, etc., Co., v. Burke, 189 N. C. 69, 126 S. E. 163.

The effect of the holding that a personal action for the difference cannot be maintained was destroyed by the 1925 amendment which specifically provides for such an action, but the general rules laid down for the construction of this section remain applicable.—Ed. Note.

"Payable in Cash" Construed.—The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. Elon Banking, etc., Co. v. Burk, 189 N. C. 69, 126 S. E. 163.

As to necessity of making good an impaired reserve, see § 222(i).

Art. 5. Powers and Duties

§ 220. Superseded by § 220(a).

Editor's Note. — Section 220(a) is the corresponding section in the more recent law. While not all the provisions of this section were repealed in that section, it is a substantial re-enactment, and since the editor's note to it points out the provisions not repealed, this section is not here set out.

§ 220(a). General powers.—In addition to the powers conferred by law upon private corporations, banks shall have the power:

1. To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporations at the time of making loans or discounts may take and receive interest or discounts in advance.

2. To adopt regulations for the government of the corporation not inconsistent with the constitution and laws of this state.

3. To purchase, hold, and convey real estate for the following purposes:

(a) Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other apartments to rent as a source of income, which investment shall not exceed fifty per cent of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and twenty-one. Provided further, that the commissioner of banks may in his discretion authorize the continuance of investments made prior to the first day of February, one thousand nine hundred and twenty-five, of the character described in this paragraph: Provided, further, that the commissioner of banks may, in his discretion, authorize any bank located in a city having a population of more than ten thousand according to the last United States census, to invest more than fifty percent of its capital and permanent surplus in its banking house, furniture, and fixtures.

(b) Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

(c) Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subsection shall be sold by such bank within one year after it is acquired, unless, upon application by the board of directors, the commissioner of banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this chapter, are hereby repealed.

4. Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities, either directly or through subsidiary corporations: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation. Any provision in conflict with this subdivision contained in the Articles of Incorporation heretofore issued to any banking corporation is hereby revoked.

5. Subject to the approval of the commissioner of banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporation. (1921, c. 4, s. 26; 1923, c. 148, s. 5; 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1, c. 82.)

Editor's Note. — This section is a substantial re-enact-

ment of C. S., sec. 220. However there are several material changes. Subsection 2 was inserted; the date behind which investments are exempt from the section as now provided in clause (a) of subsection 3 was changed from 1903 to 1921, the second proviso permitting the commission to authorize the continuance of investments made prior to 1923 being inserted in 1924 and amended in 1925 by changing the date from 1923 to 1925, and the third proviso added by the 1927 amendment; a clause providing that real estate conveyed to a bank in satisfaction of debts previously contracted in the course of the dealings might be purchased, held and conveyed was not brought forward; and in clause (c) of subsection 3 the requirement that all real estate acquired under the subsection should be disposed of within one year was incorporated in 1921 when the section was passed, and the 1923 amendment inserted the words "and deeds of trust held or" in the second line of the clause. Otherwise the prior law is re-enacted in this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 changed the list of obligations excepted in paragraph four which was added by the 1933 amendment. Formerly all obligations of the state instead of "general" obligations were excepted. Obligations issued under Farm Loan Act or by Home Loan Banks and Home Owners' Loan Corporation were added to the list. Subdivision (5) was added by the 1935 amendment in its entirety.

Similarity of Section to Federal Act. — The words used in the statute relative to the powers of corporations engaged in the banking business under the laws of this State are almost identical with those used in the Federal statute, relative to the powers of National Banks. U. S. Comp. Stat. 1918, sec. 9661, subsec. 7. Indiana Quarries Co. v. Angier Bank, etc., Co., 190 N. C. 277, 283, 129 S. E. 619.

Power to Become Surety or Lend Credit.—In the absence of an express grant of authority, a banking corporation, as a rule, has not the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person. Indiana Quarries Co. v. Angier Bank, etc., Co., 190 N. C. 277, 283, 129 S. E. 619.

A bank is not authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law. Indiana Quarries Co. v. Angier Bank, etc., Co., 190 N. C. 277, 283, 129 S. E. 619.

Negotiation of Evidences of Debt.—In the course of its dealings and for a lawful purpose a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by this section; and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail. Richmond County v. Page Trust Co., 195 N. C. 545, 132 S. E. 786.

§ 220(a) 1. Banks, fiduciaries, etc., may invest in bonds guaranteed by United States.—(1). Any bank, building and loan association, land and loan association, savings and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this state, and operating under the supervision of the commissioner of banks, insurance commissioner, or superintendent of savings and loan associations; the state treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Thrift Society, any clerk of the court holding money by color of his office or as receiver; and any person, firm or corporation acting as executor, administrator, guardian, trustee, or other person acting in a fiduciary capacity, may invest in bonds issued, or in bonds which are fully and unconditionally guaranteed as to principal and interest by the United States, to the same extent as the same are now or may be hereafter authorized to invest in any obligation of the United States: Provided that all investments authorized hereunder shall be guaranteed, both as to the payment of principal and interest thereon, by the United States treasury.

(2). Security for Loans and Deposits.—No bank shall be required to maintain a reserve against deposits secured by any of the above mentioned bonds equal in market value to the amount of such deposits, and such bonds shall be valid security for all loans and deposits to the same extent as are any obligations of the United States.

(3). Bonds Deemed Cash in Settlements by Fiduciaries.—In settlements by guardians, executors, administrators, trustees and others acting in a fiduciary capacity, the bonds and securities herein mentioned shall be deemed cash to the amount actually paid for same, not exceeding par value thereof, including the premium, if any, paid for such bonds, and may be paid as such by the transfer thereof to the persons entitled and without any liability for a greater rate of interest than the amount actually accruing from such bonds. (1935, c. 164.)

§ 220(a) 2. Banks and fiduciaries authorized to invest in mortgages, etc., issued under National Housing Act.—(1). It shall be lawful for all commercial and industrial banks, trust companies, insurance companies, and other financial institutions engaged in business in this State, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or the moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured by the federal housing administrator pursuant to Title II of the National Housing Act, in mortgages on real estate which have been accepted for insurance by the federal housing administrator pursuant to Title II of the National Housing Act, and in obligation of national mortgage associations organized under Title III of the National Housing Act.

(2). Insured Loans. — All such banks, trust companies and insurance companies, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State, may make such loans, secured by real estate, as the federal housing administrator has insured or has made a commitment to insure, pursuant to Title II of the National Housing Act, and may obtain such insurance.

(3). Eligibility for Credit Insurance. — All banks, trust companies, insurance companies and other financial institutions, on being approved as eligible for credit insurance pursuant to Title I of the National Housing Act, may make such loans as are authorized by Title I of the National Housing Act: Provided, that all loans made by building and loan associations shall be secured in conformity with the requirements of section 5182, Consolidated Statutes.

(4). Mortgages Available as Depository Security.—Mortgages on real estate which have been accepted for insurance by the federal housing administrator pursuant to Title II of the National

Housing Act, debentures issued pursuant to Title II of the National Housing Act, and obligations of national mortgage associations organized under Title II of the National Housing Act, may be used as security for any depository bond or obligation whenever any kind of bonds or other securities are required or may by law be deposited as security.

(5). General Laws Not Applicable.—No law of this State prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. Provided, that all loans made by building and loan associations shall be secured in conformity with the requirements of section 5182, Consolidated Statutes. (1935, cc. 71, 378.)

§ 220(b). Limitations on investments or securities.—The investment of any bonds or other interest-bearing securities of any one firm, individual or corporation, unless it be the interest-bearing obligations of the United States, state of North Carolina, or other state of the United States, or of some city, town, township, county school district, or other political subdivision of the state of North Carolina, shall at no time be more than twenty per cent of the unimpaired capital and permanent surplus of any bank to an amount not in excess of two hundred and fifty thousand dollars; and not more than ten per cent of the unimpaired capital and permanent surplus in excess of two hundred and fifty thousand dollars: Provided, that nothing in this section shall be construed to compel any bank to surrender or dispose of any investment in the stock or bonds of a corporation owning the lands or buildings occupied by such bank as its banking home, if such stocks or bonds were lawfully acquired prior to the ratification of this act. (1921, c. 4, s. 27; 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199.)

As to the suspension of this section, see § 220(e).

As to limitation of amount of bank acceptances, see sec. (220(1).

Editor's Note. — There was no corresponding section in the prior law.

The 1927 amendment made radical changes in this section. The maximum investment which might be made in private securities was reduced from 25% to 20% of the uncompared capital and permanent surplus where the amount was not in excess of $250,000, and reduced to 10% of the unimpaired capital and permanent surplus in excess of $250,000. Prior to the amendment the section fixed 20% of the capital and permanent surplus as the maximum where the capital was between $250,000 and $500,000; of 15% where it was between $500,000 and $750,000; and 10% in excess of $750,000.

The last proviso in the section was also added by the 1927 amendment.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

By Public Laws 1933, c. 359, provisos, formerly appearing in the section, permitting restricted investments in stock or bonds of a corporation owning the building or land occupied by the bank, were omitted.

The amendment of 1935 added the words "or other state of the United States, or of some" near the beginning of this section.

§ 220(c). Stocks, limitations on investment in.—No bank shall make any investment in the capital stock of any other state or national bank: Provided, that nothing herein shall be construed to prevent the subscribing to or purchasing of the capital stock of banks organized under the act of congress commonly known as the "Edge Act;" or central reserve banks, having a capital stock of more than one million dollars; by banks doing business under this chapter, upon such terms as may be agreed upon. To constitute a central reserve bank as contemplated by this chapter, at least fifty per cent of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of congress commonly known as the "Edge Act," shall at no time exceed ten per cent of the paid-in capital and permanent surplus of the bank making same. No bank shall invest more than fifty per cent of its permanent surplus in the stocks of other corporations, firms, partnership, or companies, unless such stock is purchased to protect the bank from loss. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which such stocks shall be disposed of or charged off the books of the bank may be extended by the commissioner of banks if in his judgment it is for the best interest of the bank that such extension be granted; Provided that the limitations imposed in this section on the ownership of stock in or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the commissioner of banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; 1931, c. 243, s. 5; 1935, c. 81, s. 3.)

As to the suspension of this section, see § 220(e).

As to amount of bank acceptances, see sec. 220(l).

Editor's Note. — There was no provision in the prior law corresponding to this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 added the last proviso of this section relating to suspension of the limitations in case of banks operating under the supervision of the commissioner of banks.

§ 220(d). Loans, limitations of.—The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten per cent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the

bank: Provided, however, that the discount of bills of exchange, drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, secured by not less than a like face amount of bonds of the United States or State of North Carolina or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section. (1921 c. 4, s. 29; 1923, c. 148 s. 6; 1925, c. 119 s. 1; 1927, c. 47, s. 7.)

As to the suspension of this section, see the following section.

As to limitation of amount of bank acceptances, see sec. 220(l).

Editor's Note. — Section 227 of the C. S., was the corresponding section of the prior law. The provisions have been so changed that this section could not be called a re-enactment of the prior law. That section did not apply to banks with a paid-up capital of $100,000 or less. Formerly the liability to a bank could not exceed one-tenth of the paid-in capital stock and surplus.

The words "or business" appearing in the 17th line of this section were inserted by the acts of 1923.

The 1925 amendment changed the percentage where the paid-in capital is $250,000 or less from 25% to 20%. It also inserted a proviso that upon the approval of two-thirds of the directors a loan could be increased to 25% but this was omitted when revised by the act of 1927. The word "solvent" appearing in the fifteenth and sixteenth lines of the section were inserted by the amendment.

The acts of 1927 repealed the old section and re-enacted it with several important changes. Prior to it the section provided for a maximum loan of 20% where the paid-in capital was $250,000 or less; 20% between $250,000 and $500,000; 15% between $500,000 and $750,000; and 10% over $750,000.

A proviso at the end of the section providing that the limitations imposed should not apply to existing loans, or renewals or extension thereof, except as made to apply by the commission, was omitted.

Section Not Retroactive. — The statutory limitation upon a bank making loans to any one person or class of common interest, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of the statute. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Violation a Misdemeanor. — The violation of this section is a misdemeanor. See sec. 224(i) and note to sec. 221(e).

A bank must act through its officers, and where they have violated the provisions of this section as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N. C. 528, 130 S. E. 180; State v. Davidson, 205 N. C. 735, 738, 172 S. E. 489.

A construction of this section which would limit criminal liability to the bank would defeat the manifest purpose of the General Assembly. The loans prohibited can be made for the bank only by officers and directors, and to hold that the bank only is liable criminally, would result, upon its conviction, in the imposition of a fine, the only punishment that can be imposed by the court upon a corporation, thus resulting in most instances in a further depletion of the already impaired resources of the bank, and entailing further loss to depositors and stockholders, for whose protection the provisions are primarily included in the statute. State v. Cooper, 190 N. C. 528, 533, 130 S. E. 180.

An indictment charging the officer of the bank of violating section 222(i), and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, in violation of this section, alleges the commission of crimes of the same class, where there are two indictments thereof against the same person, that may be consolidated and tried together by the court. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Loss of Assets Must Result.—In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. Gordon v. Pendleton, 202 N. C. 241, 162 S. E. 546.

§ 220(e). Investment and loan limitation, suspension of.—The board of directors of any bank may, by resolution duly passed at a meeting of the board, request the commissioner of banks to temporarily suspend the limitations on loans and investments as same may apply to any particular loan or investment, which said bank desires to make in excess of the provisions of sections 220(b), 220(c), and 220(d). Upon receipt of a duly certified copy of such resolution, the commissioner of banks may, in his discretion, suspend the limitation on loans and investments in so far as it would apply to loans or investments which such bank desires to make: Provided further, that the power granted to the commissioner of banks in this section shall not be exercised by him on and after the first day of January, one thousand nine hundred and thirty-four, except in the following instances and manner: Where an excessive loan is paid, one-half of the excess during the year one thousand nine hundred and thirty-four and the balance of the excess during the year one thousand nine hundred and thirty-five, the commissioner of banks shall have authority to permit the bank to carry such excessive loan. The commissioner of banks may approve the carrying of an excessive loan for not more than one hundred and twenty days and when such excessive loan is amply secured. (1921, c. 4, s. 30; 1931, c. 243, s. 5; 1933, c. 239, s. 1.)

Editor's Note. — There was no corresponding section in the prior law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The proviso at the end of this section, relating to power of commissioner over excessive loans, was added by Public Laws 1933, c. 239.

§ 220(f). Reserve.—Every bank shall at all times have on hand or on deposit with approved reserve depositories, instantly available funds in an amount equal to at least fifteen per cent of the aggregate amount of its demand deposits, and five per cent of the aggregate amount of its time deposits. But no reserve shall be required on deposits secured by a deposit of United States bonds or the bonds of the state of North Carolina. Any bank that is now or may hereafter become a member of the Federal Reserve Bank shall maintain the same reserve with respect to deposits as shall be required of other members of such Federal Reserve Bank. (1921, c. 4, s. 31.)

As to effect of impaired capital upon reserve, see sec. 219(f).

As to provisions giving authority to join Federal Reserve Bank, see sec. 220(g).

Editor's Note. — The corresponding section of the old law was C. S. sec. 226. With the exception of the insertion of the phrase permitting deposits with approved reserve depositories, this section, in so far as it goes, is a re-enactment of the prior law. The prior section contained a provision prohibiting a bank from making new loans or discounts, otherwise than by discounting or purchasing bills of exchange payable at sight, or make any dividends of its profits when the available funds are below the reserve required. This provision will be found as a part of sec. 222(i).

The prior section also contained definitions of time and demand deposit, available funds and cash. The first two terms were defined under Sec. 216(a) so that a repetition here is uncalled for and a definition of the last two terms is omitted from the banking laws.

"Deposits" Defined. — This section means all deposits the payment of which can be legally required within

thirty days [see sec. 216(a)], this reserve consisting in cash on hand, balance payable on demand due from other approved solvent banks designated as depositors, [see sec. 220(g)], by resolution of the board of directors approved by the Corporation Commission, [see sec. 221(g).] State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 220(g). Reserve consists of what.—Reserve shall consist of cash on hand and balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this chapter. (1921, c. 4, § 32.)

See note under § 220(aa).

Editor's Note. — This section was new with the acts of 1921.

§ 220(h). Forged check, payment of.—No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged. (1921, c. 4, s. 33.)

Editor's Note. — This section is a substantial re-enactment of the C. S., Sec. 231 except that formerly the depositor had six months within which to give notice of the forgery.

The liability of the bank for payment of the forged instrument is predicated upon the presumption that it knows the genuine signature of its depositors. State Bank v. Cumberland Sav., etc., Co., 168 N. C. 605, 85 S. E. 5. The bank assumes the responsibility of holding the depositor's funds subject to his order and the burden is upon it, where a deposit is shown, to relieve itself of liability for the fund by proof of payment in accordance with the order of the depositor. Bank v. Thompson, 174 N. C. 349, 93 S. E. 849; and where payment is made the bank is presumed to have made it out of its own funds. Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 296.

The bank is just as liable for the payment of a forged check within the meaning of this section, when the endorsement is forged, as where the whole instrument is forged, it would seem, and this for the reason that the bank is authorized to pay only to the person designated by the depositor. Of course, if the payment is due to the negligence of the depositor, the bank would be relieved of liability. See Michie on Banks and Banking, p. 1209; 7 C. J. sec. 414, p. 686.

The general rule as to the liability of a bank upon a raised check is that it is liable for payment unless the depositor was so negligent in preparing his check that it was left incomplete or easily altered. But it should be observed in this connection that the depositor is not bound to prepare the checks so that it is impossible to alter them, and it would seem that if he used the care that an ordinary prudent man would use, the bank is liable. See Michie on Banks, pp. 1203 et seq. and 7 C. J. p. 684 sec. 413 for a collection of authorities.

The provision of this section requiring a return of the voucher, giving the bank notice within a specified time of the receipt thereof, is in keeping with the law of the majority of the states. This requirement is predicated upon the proposition that it is the duty of the depositor to examine his returned checks within a reasonable time and to report any forgeries or alterations. However, in the absence of a statute similar to this one, it has often been held that the depositor owes no such duty, and that even if he does and fails in it, the bank will not be relieved of payment unless it has been prejudiced by the delay. See Michie on Banks and Banking, pp. 1229-1239 for full treatment. See also 7 C. J. sec. 415, p. 687.

§ 220(i). Minor, payment of deposit in the name of.—Whenever any person who is a minor of the age of fifteen years and upwards shall make a deposit in any state or national bank in this state, the same shall be held for the exclusive benefit and right of such minor, free from the control of all persons whatsoever, and it shall be paid, together with the interest, if there be any interest thereon, to the person in whose name the deposit shall be made, and the receipt, check, or quittance of such minor to the said state or national bank shall be valid and sufficient release and discharge for such deposit, or any part thereof, to the bank in which said deposit was made. (1921, c. 4, s. 34.)

As to payment of deposit in trust for minor to minor upon death of trustee, see sec. 220(o).

Editor's Note. — The corresponding section of the prior law was C. S. sec. 228.

This section is an exception to the general rule that contracts of an infant are voidable at the option of the infant. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

§ 220(j). Transactions not performed during banking hours.—Nothing in any law of this state shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this state, because done or performed during any time other than regular banking hours: Provided, that nothing herein shall be construed to compel any bank in this state, which by law or custom is entitled to close at twelve noon on any Saturday, or for the whole or part day of any legal holiday, to keep open for the transaction of business, or to perform any of the acts or transactions aforesaid on any Saturday after such hour or on any legal holiday, except at its option. (1921, c. 4, s. 35.)

Editor's Note. — The corresponding section of the prior law was C. S. sec. 234 insofar as Saturdays, Sundays and holidays are concerned. There was no similar provision in the prior law relating to transactions not performed during banking hours on other days.

§ 220(k). Commercial and business paper defined.—The term "commercial or business paper," as used in this chapter, is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and state of North Carolina. Such notes, drafts and bills of exchange shall have a maturity at the time of discount of not more than nine days, except when drawn or issued for agricultural purposes, or based on livestock, when such maturities shall not exceed nine months from the date thereof, and must be actually owned by the person, firm or corporation negotiating the same. (1921, c. 4, s. 36; 1923, c. 148, s. 7.)

As to the general section on definitions, see sec. 216(a).

Editor's Note. — There was no provision corresponding to sections in the prior law.

§ 220(l). Bank acceptances defined.—Any bank doing business under this chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondence, provided that there is a definite

bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement or which grow out of transaction involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further that no bank shall accept, whether in a foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five per cent of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided. The commissioner of banks may issue such further regulations as to such acceptances as it may deem necessary in conformity with this chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; 1931, c. 243, s. 5.)

As to general section on definitions, see sec. 216(a). As to limitations on investments in securities, see sec. 220(b); stocks, 220(c); loans generally, sec. 220(d).

As to limitation upon loans, see sec. 220(l).

Editor's Note. — The corresponding provision of the prior law was C. S., sec. 222. It is probable that since this section does not set out all the terms of sec. 222 that it would be held a supplement of it and not a repealing statute. See the editor's note under sec. 216(a); see also sec. 222.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Acceptance Prior to Statute. — Notwithstanding that, prior to the enactment of the corresponding section of C. S., sec. 222, or this section, an acceptance was beyond the power of a bank when not expressly permitted by the charter, an acceptance by a bank not so authorized was not invalid, though actually beyond power, and a payment might be enforced. Sherrell v. American Trust Co., 176 N. C. 591, 97 S. E. 471.

§ 220(m). Nonpayment of check in error, liability for.—No bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven. (1921, c. 4, s. 38.)

Editor's Note. — The section is a substantial re-enactment of C. S., sec. 232.

A bank is held liable to the drawer for its breach of promise to pay the check, upon the ground that there is an implied promise by the bank, arising from the deposit of the funds with it, that it will pay the checks when and as they are presented. If the bank fails to perform this promise, it becomes liable to the drawer for the damage sustained by him on account of its refusal or failure to pay his check. But the holder of the check can only sue the drawer, and cannot sue the bank. The reason why the holder of the check is not permitted to sue the bank has been stated by the authorities to be, that there is no privity between the holder and the bank until by certification of the check or the acceptance thereof, expressed or implied, or by any other act or conduct it has made itself directly liable to the holder. Bank v. Whitman, 94 U. S. 343; Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524; Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245.

Notwithstanding that these principles have been recognized, there are courts which hold, in well considered opinions, that the bank should be held liable directly to the holder if it is notified that he has the check, or demand for its payment is made upon it, and it then has sufficient clear and unincumbered funds to the credit of the drawer with which to pay the check without any risk or embarrassment to itself. Standard Trust Co. v. Commercial Nat. Bank, 166 N. C. 112, 119, 81 S. E. 1074; Perry v. Bank, 131 N. C. 117, 42 S. E. 551; Commercial Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524; Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245.

For general treatment of subject, see Michie on Banks and Banking, pp. 1079, 1151 et seq. See also, 7 C. J. 425, p. 696.

Where Nonpayment Malicious.—This section does not apply where the complaint alleges that the nonpayment was wrongful and malicious. In such case the question of malice is for the jury, and the sustaining of a demurrer to the complaint is reversible error. The complaint is subject to demurrer only when it appears from the allegations that nonpayment was through error or mistake and without malice, and that no actual damages resulted to depositor from such nonpayment. Woody v. National Bank, 194 N. C. 549, 140 S. E. 150.

Damages.—Any person will be deemed substantially damaged upon the refusal of a bank to pay his checks, unless protected by the provisions of this section, and substantial damages may be awarded. And where the nonpayment is through malice, punitive damages may also be recovered. Woody v. First Nat. Bank, 194 N. C. 549, 140 S. E. 150, holding that on the facts admitted by demurrer plaintiff was entitled to nominal damages at least.

§ 220(n). Checks sent direct to bank on which drawn.—Any bank receiving for collection or deposit any check, note, or other negotiable instrument drawn upon or payable at another bank, located in another town or city, whether within or without this state, may forward such instrument for collection, direct to the bank on which it is drawn, or at which it is payable, and such method of forwarding direct to the bank on which it is drawn, or at which it is payable, and such method of forwarding direct to the payer bank shall be deemed due diligence, and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument. (1921, c. 4, s. 39.)

Editor's Note. — This section is a substantial re-enactment of C. S. sec. 233 except that the last line of that section which provided, "The provision of this section shall not apply where there is more than one bank in a town," was omitted.

Dealings Presumed to Contemplate Statute. — Banks must be presumed to have dealt with each other with re-

spect to a statute of the State in which a check was deposited for collection, defining the rights and liabilities of banks to which checks are forwarded for collection. Fed. Land Bk. v. Barrow, 189 N. C. 303, 310, 127 S. E. 3.

Sending Check to Federal Reserve Bank. — Under this section the sending of a cashier's check to the proper Federal Reserve Bank is due diligence in collecting the same, as would be sending it directly to the drawer bank. Fed. Land Bk. v. Barrow, 189 N. C. 303, 127 S. E. 3.

Abrogated Holdings. — The holding of the Supreme Court, in Bank v. Floyd, 142 N. C. 187, and in Bank v. Trust Co., 172 N. C. 345, that "It is negligence in a bank having a draft or check for collection to send it directly to the drawee, and this is true, though the drawee is the only bank at the place of payment," is abrogated by the express provisions of this statute. See Malloy v. Fed. Reserve Bank, 281 Fed. 1003; Federal Land Bank v. Barrow, 189 N. C. 303, 309, 127 S. E. 3.

Constitutes Good Presentment.—A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236.

When Section Not Applicable—Rights and Liabilities as to Collection.—When a collecting bank receives a check for collection payable at a bank in another town, there is no authority of agency conferred by the drawer of the check on it to receive in payment anything but money; and where the drawer of the check has money to meet the check on deposit in the drawee bank, on presentment in due course, and an intervening bank, in the course of collection, receives a check of the drawee bank in payment, which is not paid by reason of the drawee bank becoming insolvent before presentment of its check: Held, as a matter of law the drawer of the check is released from liability thereon. This section has no application to the facts in this case. Dewey Brothers v. Margolis, 195 N. C. 307, 142 S. E. 22.

See note under § 220(aa).

Cited in Qualls v. Farmers, etc., Bank, 197 N. C. 438, 149 S. E. 546; Bank of Canton, etc., Co. v. Clark, 198 N. C. 169, 151 S. E. 102.

§ 220(o). Deposits in trust, payment of.— Whenever any deposits shall be made in any bank or banking institution in this state by any person in trust for any other person who is a minor of the age of fifteen years and upward, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made: Provided, that the amount of said deposit is not in excess of one hundred dollars. (1921, c. 4, s. 40.)

See discussion in 9 N. C. L. Rev. 13.

As to whom a deposit in trust for a minor might be paid generally, see sec. 220(i).

Editor's Note. — This section is a substantial re-enactment of C. S. sec. 229, except that formerly the terms of the section limited the deposits to which the section applied to the amount of fifty dollars or less.

§ 220(p). Farm loan bonds, authorized investment in.—Any bank or insurance company organized under the laws of this state, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or joint-stock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, one thousand nine hundred and sixteen. (1921, c. 4, s. 41.)

Editor's Note. — This section is a re-enactment of the C. S. sec. 225.

§ 220(q). Federal Reserve Bank, authority to join.—The words "Federal Reserve Act," as herein used, shall be held to mean and to include the act of Congress of the United States, approved December twenty-third, nineteen hundred thirteen, as heretofore and hereafter amended. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "Federal Reserve Banks" shall be held to mean Federal Reserve Banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any National or State bank or bank and trust company which has become or which becomes a member of one of the Federal Reserve Banks created by the Federal Reserve Act.

(a) Any bank incorporated under the laws of this state shall have the power to subscribe to the capital stock and become a member of the Federal Reserve Bank.

(b) Any bank incorporated under the laws of this state which is, or which may become, a member of the Federal Reserve Bank is by this act vested with all powers conferred upon member banks of the Federal Reserve Banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(c) A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this state, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(d) Any such bank shall continue to be subject to the supervision and examination required by the laws of this state, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authorities of this state having supervision over such banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a Federal Reserve Bank. (1921, c. 4, s. 42.)

As to amount of reserve required, see sec. 220(f).

Editor's Note. — This section is a substantial re-enactment of the C. S. sec. 221.

§ 220(r). Establishment of branches.—Any bank doing business under this chapter may establish branches in the cities in which they are located, or elsewhere, after having first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks, in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such

branch. Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier and such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the commissioner of banks shall not authorize the establishment of any branch, the paid-in capital stock of whose parent bank is not sufficient in an amount to provide for the capital of at least twenty-five thousand dollars for the parent bank, and at least twenty-five thousand dollars for each branch which it is proposed to establish in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand, but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns whose population exceeds twenty-five thousand. All banks operating branches prior to February 18, 1921, shall, within a time limit to be prescribed by the commissioner of banks, cause said branch bank to conform to the provisions of this section: Provided, however, that any bank with a capital stock (including both common and preferred) of one million ($1,000,000.00) dollars or more which qualifies for non-assessable stock under the provisions of sections 219(a) 1 et seq., may without additional capital establish and operate such number of branches or agencies in the state of North Carolina as the commissioner of banks may in his discretion permit; but a bank operating branches under this proviso shall at all times maintain an unimpaired capital of at least one million ($1,000,000.00) dollars: Provided further, that the commissioner of banks shall not permit the establishment of additional branches, and/or agencies unless said bank maintains its capital stock and surplus in ratio of one to ten to its deposits; Provided that in small communities having no other banking facilities, and upon a finding by the commissioner of banks that the public convenience and advantage will be promoted thereby, the opening of "tellers window agencies or branches" of then existing banks may be permitted, but no more than one such agency or branch may be so opened in any one community nor shall any bank be permitted to open such an agency or branch when its unimpaired capital and surplus in proportion to deposits is below that herein required. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139.)

Editor's Note. — There is no provision in the prior law corresponding to this section. However, C. S. sec. 216 contained a provision prohibiting the establishment of branches except with the consent of the corporation commission. Authority to establish branches under the old law must have been given by the legislature in the charter, and this must have been given by express terms for the court could not construe a provision in a charter to give authority by implication. Morehead Banking Co. v. Tate, 122 N. C. 313, 316, 30 S. E. 341. In this case the court pointed out the reason for the policy, stating that past experience indicated that it was possibly a mistake to permit banks to establish branches.

It is likely that this section will go far to overcome the objections to branches which the court had in mind. The requirement that the parent bank have enough capital over and above its required capital to legally capitalize a branch as a separate bank, the vigilant supervision of the corporation commission and the provision that a local committee or board of managers shall be responsible for the conduct and management of the business are features calculated to bring such result.

The amendment of the section made at the extra session of 1925 changed the amount that must be provided for branch banks in cities and towns of 3,000 population or less from $20,000 to $15,000, so that it was the same amount required for parent banks in such cities and towns. The act of 1927 changed the amount in each instance to $25,000.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The second and third provisos of this section were added by Public Laws 1933, c. 451.

For comment on changes made by Acts 1933, see 11 N. C. Law Rev. 199.

The amendment of 1935 added the proviso at the end of the section making an exception in smaller communities having no other banking facilities.

Who May Question Authority to Establish.—Whether a banking company, chartered to do business in a certain place and without express authority to establish and conduct a branch at another place, can do so, is a matter for the State, through the Attorney General, to have determined by an action to vacate its charter. Morehead Banking Co. v. Tate, 122 N. C. 313, 30 S. E. 341. This case was decided before the statute.—Ed. Note.

Contracts of Branch Illegally Established.—A bond given by a cashier of a branch bank for the faithful performance of his duties is not against public morals because the parent corporation may not have had the express authority to establish a branch bank. Morehead Banking Co. v. Tate, 122 N. C. 313, 30 S. E. 341.

Branch as Agent of Parent.—The relation between bank and the branch is that of principal and agent, and all the assets and indebtedness of the agency are those of the principal. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

The establishment of a branch by a bank, having the authority under its charter to do so, is not an estoppel upon the latter so as to require it to treat the former as an independent bank. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

Creditors of Parent and Branch Share Ratably. — The creditors and depositors of the parent and branch share ratably where the assets are being liquidated. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

§ 220(s). Certificate of deposit, unlawful issuing of.—It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money; nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock. Any officer or employee of any bank violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 44.)

Editor's Note.—There was no provision in the prior law corresponding to this section.

§ 220(t). Bank's own stock, unlawful to loan on.—It shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder as pledgee, or as purchaser, of any portion of its capital stock unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith. Provided, that whenever any bank shall have shares of its own stock sold to, pledged to it, for the purpose of preventing a loss upon a debt previously con-

tracted, it shall dispose of all such shares of stock within a period of six months from the date such stock was sold or pledged to it and if not so disposed of, the same shall be charged to profit and loss and no longer carried as an asset of of the bank. (1921, c. 47, s. 9.)

Editor's Note.—The terms of the prior law, C. S. sec. 224, were somewhat similar to the provisions of this section. However, this section is fuller and goes into more detail than did the prior law. Prior to the former enactment (1903) there was no general law upon the subject and it was not unusual for the legislature to permit a bank to accept pledge of its own stock. But in order for stock so pledged to share in the assets of the bank when winding up business it must have been released by payment of the debt. First Nat. Bank v. Riggins, 124 N. C. 534, 32 S. E. 801. A prior statute gave a lien to a bank on stock of stockholder indebted to the bank and the statute was strictly construed. See Boyd v. Reed, 120 N. C. 335, 27 S. E. 35. See also In re Mills Co., 162 Fed. 42.

To What Indebtedness Lien Applies. — The lien given to a bank by its charter upon the stock of a stockholder indebted to it extends only to indebtedness incurred directly by such stockholders to the bank and not to his indebtedness to a third person acquired by the bank. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35.

Taking Stock in Payment of Note.—A payee bank may not cancel a note in consideration of shares of its stock delivered to it by the maker of the note, it not appearing that he was insolvent, or that the transaction was necessary to prevent loss to the bank, and payment so made is not a valid defense in the hands of another bank to which the note had been endorsed before maturity by the payee bank as collateral security. White v. Whitehurst, 194 N. C. 305, 139 S. E. 598.

§ 220(u). Deposits payable on demand.—Any bank may receive deposits of funds subject to withdrawal or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46.)

As to a definition of demand deposits, see § 216(a), under the prior law, C. S., 226.

§ 220(v). Deposits in savings banks.—Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook shall be issued to each depositor containing the rule and regulations adopted by the board of directors governing such deposits, in which shall be entered each deposit made, the interest allowed thereon, and each payment made to such depositor. By accepting such book the depositor assents and agrees to the rules and regulations therein contained. (1921, c. 4, s. 47.)

See discussion in 9 N. C. L. Rev. 13.

Editor's Note.—There were no provisions in the prior law which were similar to this section.

§ 220(w). Boards of directors, banks controlled by.—The corporate powers, business, and property of banks doing business under this chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held during the month of January for each year. (1921, c. 4, s. 48; 1925, c. 107.)

Editor's Note.—There was no provision in the prior law corresponding to this section. However, it is probable that by virtue of C. S. sec. 236, the general corporation law, sec. 1144, was applicable. The last sentence of this section was added by the 1925 amendment.

§ 220(x). Statements showing deposits of state and state officials.—All banks in which any money is on deposit by the state of North Carolina or any of the officials thereof shall, in their published statements as by law required, show the amount of money on deposit in such bank to the credit of the state or of any official thereof; and no officials of the state shall deposit money in any bank which shall refuse to comply with the provisions of this law. (1923, c. 211, s. 1.)

Editor's Note.—This provision did not appear in the prior banking law.

§ 220(y). Deposits by state departments or institutions.—All moneys collected by any state department or institution shall be deposited with or to the credit of the state treasurer, as and when directed by the governor and council of state. (1923, c. 211, s. 2.)

Editor's Note.—This provision did not appear in the prior banking law

§ 220(z). Fees on remittances covering checks.—For the purpose of providing for the solvency, protection, and safety of the banking institutions and trust companies chartered by this state, and having their principal offices in this state, it shall be lawful for all banks and trust companies in this state to charge a fee, not in excess of one-eighth of one per cent, on remittances covering checks, the minimum fee on any remittance therefor to be ten cents. (1921, c. 20, s. 1.)

As to what checks are exempted from this section, see sec. 220(cc).

Editor's Note.—There is no provision in the prior law similar to this section. See the editor's note under section 220(aa).

Transaction Not within Statute.—The exchange or collection charges authorized by this section apply only to "remittances" covering checks, and where checks, etc., are sent to a bank in the same town with the bank on which they are drawn, for which either money or bank entries are required, such transactions do not fall within the meaning of the term "remittances" which will entitle the bank on which they are drawn to the exchange charges specified in the statute. First Nat. Bank v. Peoples Bank, 194 N. C. 720, 140 S. E. 705.

Enforcement of Payment.—A bank may maintain its action against another bank to enforce by mandatory injunction its payment of the exchange charges drawn through the one on the other, allowed by the statute of this section, and the fact that the plaintiff is a national and the defendant a state bank, does not vary this principle, and § 220(dd) does not apply. First Nat. Bank v. Peoples Bank, 194 N. C. 720, 140 S. E. 705.

§ 220(aa). Checks payable in exchange.—In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said bank when any such check is presented by or through any Federal Reserve Bank, postoffice, or express company, or any respective agents thereof. (1921, c. 20, s. 2.)

As to what checks are exempted from this section, see

section 220(cc). See also note under § 220(n) and in 8 N. C. Law Rev. 55.

Editor's Note.—The prior banking law did not contain a provision similar to this section.

The general rule is that a check is payable only in cash and if the payee or holder accepts anything other than cash in payment, the drawer is discharged from liability. Thus the ordinary rule is that if the payee accept a draft from the payor bank on its reserve fund in another bank, the drawer is relieved from further liability.

But this section changes the rule so that payment on such a draft does not discharge the check until the draft is paid in money.

The purpose of this section is to relieve the North Carolina Banks of the pressure exerted upon them by the Federal Reserve Banks in seeking to enforce the policy of "par clearance," by presenting checks over the counters of the banks which would not agree to remit at par, and demand payment in cash. The effect of this demand for cash payment was not only to deprive the banks of their exchange charges on checks, but also to reduce their income-producing assets through the necessity of keeping in their vaults in cash a much larger portion of their resources than had heretofore been necessary. The purpose of this section is effected by the draft upon a reserve deposit as has always been the general custom. See the comprehensive article in 1 N. C. Law Rev. 133.

The effect of this section is as though the provision of the law is written into the face of the check; and consequently where the maker or drawer does not specify cash payment, he agrees, as does the payee in accepting it, that if presented by or through a Federal Reserve Bank, Express Co., etc., the check shall be payable by an exchange draft drawn by the payee bank on its reserved deposits. See Farmer, etc., Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct. 651; Cleve v. Groven Chem. Co., 18 Fed. (2d) 711; 12 Va. Law Reg., N. S.,——.

For comprehensive articles by C. J. Murchison, Professor of Applied Economics, U. of N. C. giving the history of the controversy out of which this statute grew, and a review of the subsequent litigation, see 1 N. C. Law Rev. 133; 2 N. C. Law Rev. 36.

The Federal Reserve Bank cannot require payment in any other medium than the exchange. Federal Land Bank v. Barrow, 189 N. C. 303, 310, 127 S. E. 3.

Constitutionality.—This section does not violate the federal constitution. Farmers, etc., Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct. 651, overruling the same case in 183 N. C. 546, 552, 112 S. E. 252; Federal Land Bank v. Barrow, 189 N. C. 303, 311, 127 S. E. 3.

Purpose of Statute.—This section was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the Federal Reserve Bank with respect to the collection of checks drawn on said banks and trust companies. It does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. The purpose of the section and its only effect, is to confer upon such banks and trust companies the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money. Morris v. Cleve, 197 N. C. 253, 264, 148 S. E. 253.

This section does not change the general rule that when a depositor draws his check on a bank or trust company chartered by this State, such check is payable in money, or at the option of the holder, in a medium other than money—such payment being at the risk of the holder. Morris v. Cleve, 197 N. C. 253, 265, 148 S. E. 253.

Construed Strictly.—This section should be construed strictly. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Right to Specify Medium of Payment.—Under this section the drawer has the right to specify on the face of the check that payment shall be made in money, and in such case the drawee bank or trust company must pay in money, in any event. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Payment in money may be required if the check is presented for payment, in person, or by an agent for collection other than as prescribed by this section. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Liability Where Exchange Unpaid.—It will not be held under this section, that a drawee bank can charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank or trust company chartered by this State is presented to the drawee bank, "by or through any Federal Reserve Bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid. Graham v. Proctorville Warehouse, 189 N. C. 533, 538, 127 S. E. 540.

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of this section and § 220(g) as being a check presented by or through a "postoffice," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236.

Where a bank receives a check in payment of a note and elects to put it in the hands of a Federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency, §§ 3108, 3167, 3042; and this result is not affected by this section since the payee bank has the option of presenting the check for payment through the Federal reserve bank or not. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253, criticizing Cleve v. Craven Chemical Co., 18 Fed. (2d) 711.

Charging Check to Drawers Account as Payment.—When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged from liability, not only on the check, but also for the debt in payment of which the check was drawn. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253, citing Dewey Bros. v. Margolis & Brooks, 195 N. C. 307, 142 S. E. 22; Quarles v. O. B. Taylor & Co., 195 N. C. 313, 142 S. E. 25.

§ 220(bb). Notation on checks forbidden.—It shall be unlawful for any person, or persons, other than the maker thereof to make, by rubber stamp or otherwise, any notation on any check drawn on any bank or trust company chartered in this state, the effect of which notation shall change or affect any condition or provision thereof, as created by this law. Any person or persons violating this section shall be guilty of a misdemeanor, and upon conviction shall pay a fine of not more than two hundred dollars, ($200) or be imprisoned not more than thirty days. (1921, c. 20, s. 3.)

Editor's Note.—The prior banking law did not contain a provision similar to this section. See note under preceding section.

§ 220(cc). Checks exempted.—All checks drawn on the banks and trust companies in this state in payment of obligations due the state of North Carolina or the federal goverment shall be exempt from the provisions of sections 220(z) and 220(aa). (1921, c. 20, s. 4.)

§ 220(dd). No protest on checks refused for nonpayment of exchange charges. No action on refusal to pay checks.—No officer in this state shall protest for nonpayment any check or checks drawn on any bank or trust company chartered by this state when payment is refused by the drawee bank solely on account of failure or refusal of the holder or owner thereof to pay exchange charges herein authorized; and there shall be no right of action, either in law or equity, against any bank or trust company chartered by this state, for refusal to pay any such

check when such action is based alone on the ground of refusal to pay exchange or collection charges herein authorized. (1921, c. 20, s 5.)

See note under § 220(z).

Editor's Note. — The prior law contained no provision which was similar to this section.

§ 220(ee). Statement of account from bank to depositor deemed final adjustment if not objected to within five years.—When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's passbook has been written up by the bank showing the condition of the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. (1929, c. 188, s. 1.)

§ 220(ff). Depositor not relieved from exercising diligence as to errors.—Nothing in the preceding section shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when rendered by the bank and of immediate notification to the bank upon discovery of any error therein, nor from the legal consequences of neglect of such duty; nor to prevent the application of § 220(h). (1929, c. 188, s. 2.)

§ 220(gg). Governor empowered to proclaim banking holidays.—The governor is hereby authorized and empowered, by and with the advice and consent of the council of state, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, state or national, in this state shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking business whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the commissioner of banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions. The banking holiday heretofore proclaimed by the governor of this state for Monday, Tuesday and Wednesday, March sixth, seventh and eighth, one thousand nine hundred and thirty-three, be, and it is hereby approved and validated, and the said days are hereby declared to be banking holidays in the state of North Carolina. (1933, c. 120, s. 1.)

For article discussing the inconsistency in this section by reason of the power vested in the Commissioner to permit transaction of certain business during holiday declared by Governor, see 11 N. C. Law Rev. 195.

§ 221. Superseded by § 220(q).

Art. 6. Officers and Directors

§ 221(a). Executive committee directors shall appoint.—The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or by-laws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe. (1921, c. 4, s. 49.)

For a complete treatment of the case law upon the subject, see 3 Enc. Dig. 291 et seq.; 13 Enc. Dig. 236, 237.

Editor's Note.—There were no sections in the banking law prior to 1921 corresponding to the sections under this article. The general corporation law, sections 1144 et seq., was applicable by virtue of sec. 236.

§ 221(b). Minutes of directors and executive committee meetings.—Minutes shall be kept of all meetings of the board of directors and of the executive committee or committees, and same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors and executive committee or committees, on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and executive committees shall make concerning the conduct, mangement, and welfare of the bank. The minutes of the executive committee or committees shall be submitted to the board of directors for approval at each meeting of the board. (1921, c. 4, s. 50.)

See note under sec. 221(a).

Effect of Not Writing Minutes.—The plaintiffs cannot be deprived of their right by reason of failure of the proper officer to actually make a written minute or record of the proceedings for the reason that proceedings of a corporate meeting of stockholders or directors are facts, and that they may be proved by parol testimony where they are not so recorded. Bailey v. Hassell, 184 N. C. 450, 459, 115 S. E. 166. And this notwithstanding this section, there being no objection appearing in the record to the testimony of the plaintiff and other witnesses as to what transpired among the directors about this transaction. Everett v. Staton, 192 N. C. 216, 220, 134 S. E. 492.

§ 221(c). Directors, qualifications of. — Every director of a bank doing business under this chapter shall be the owner and holder of shares of stock in the bank having a par value of not less than five hundred dollars: Provided, such bank shall have a capital stock of more than fifteen thousand dollars, and not less than two hundred dollars if such bank shall have a capital stock of fifteen thousand dollars or less. And every such director shall hold such shares in his own name unpledged and unencumbered in any way. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare his office vacant and proceed to fill such vacancy forthwith. Not less than three-fourths of the directors of every bank doing business under this chapter shall be residents of the state of North Carolina: Provided, that as to banks doing business before the ratification of this chapter the requirements as to amount of stock owned by a director shall not apply unless the

commissioner of banks shall rule that such director is not bona fide discharging his duties. (1921, c. 4, s. 51; 1931, c. 243, s. 5.)

For the law prior to the enactment, see sec. 1144.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 221(d). Directors shall take oath.—Every director shall, within thirty days after his election, take and subscribe, in duplicate, an oath that he will diligently and honestly perform his duties in such office; and that he is the owner in good faith of the shares of stock of the bank required to qualify him for such office, standing in his own name on its books, and one of such oaths shall forthwith be filed with the commissioner of banks, and the other shall be kept on file in the bank. (1921, c. 4, s. 52; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 221(e). Directors, liability of.—Any director of any bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents or employees of such bank, any of the provisions of this chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by section two thousand five hundred forty-five of the Consolidated Statutes, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; 1935, c. 464.)

For a complete treatment of the case law prior to section, see 3 Enc. Dig. p. 292, sec. 15; 13 Enc. Dig. p. 236, sec. 15. As to fraud of director of general corporation, see section 1152. As to criminal liability of bank directors, see § 224(a) et seq.

Editor's Note.—The amendment of 1935 added the last three sentences of the section relating to who may bring action, the number of actions and the procedure, respectively.

Similarity to National Act.—This section is, with mere verbal changes, Comp. Stat. 9831, R. S. 5239. For federal cases construing the national banking act see Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638; Thomas v. Taylor, 224 U. S. 73, 56 L. Ed. 673; 32 S. Ct. 403; Chesbrough v. Woodworth, 244 U. S. 72, 61 L. Ed. 1000, 37 S. Ct. 579

Effect of Violation.—Doubtless, the General Assembly, at the regular session of 1921, thought that the inclusion of section 220(d) and this section would be sufficient, without providing that the violation of either provision should be a crime. The provision with reference to the reserve was enforceable by the Corporation Commission in the exercise of its power of supervision of banks. No provision was made for the enforcement of the prohibition of loans to individuals exceeding the statutory limitation. Violations of these and other provisions of the statute by directors might result in civil liability, only. However, at the Extra Session of 1921, the General Assembly added section 224(e) making such violation a misdemeanor. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Elements of Crime in Violation.—An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The wilful doing of the unlawful act constitutes the crime declared by statute to be a misdemeanor, punishable as such in the discretion of the court. State v. Cooper, 190 N. C. 528, 534, 130 S. E. 180.

Who May Prosecute Action.—An action for damage against the directors for false statements as to the bank's solvency made to private persons and in the bank's report to the commission, is solely maintainable by the receiver of the bank unless the private person can show an injury peculiar to him as distinguished from the loss among the creditors generally. Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195.

Same—Insolvent Bank Receiving Deposits. — See notes to sec. 224(g).

Position as Evidence of Knowledge.—Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed in § 224(i). State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 221(f). Directors, examining committee of.—A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and the liabilities of the bank, and to report to the board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearing-house examiner in any city where such examination is provided for by the rules of such clearing-house association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the commissioner of banks. (1921, c. 4, s. 54; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 221(g). Depositaries designation by directors.—By resolution of the board of directors, other banks organized under the laws of this state, or of another state, or of the national banking act of the United States, shall be designated as depositaries or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the commissioner of banks and the depositary so designated shall be subject to the approval of the commissioner of banks. For causes which he may deem adequate, the commissioner of banks shall have authority at any time to withdraw such approval. (1921, c. 4, s. 55; 1931, c. 243, s. 5.

As to the amount, etc., of the reserve, see sec. 220(f). As to definition of reserve, see sec. 220(g). As to draft upon depositaries as payment of a check, etc., see secs. 220(z) et seq.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

For an act providing for the organization of cash depositories in Guilford county, see Public Laws 1933, c. 568.

For act applicable to organization of cash depositories in Guilford county and to certain towns in Nash and Halifax counties, see Public Laws 1933, c. 568, as amended by Public Laws 1935, c. 95.

Cited in State v. Cooper, 190 N. C. 528, 531, 130 S. E. 180.

§ 221(h). Stockholders' books.—The directors shall provide a book in which shall be kept the name and resident address of each stockholder, the number of shares held by each, the time when such person became a stockholder, together with all transfer of stock, stating the time when made, the number of shares and by

whom transferred, which book shall be subject to the inspection of the directors, officers and stockholders of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56.)

§ 221(i). Directors, officers etc., accepting fees, etc.—No gift, fee, permission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee, of any bank doing business under this chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper attorney's fees to any licensed attorney for professional services rendered. (1921, c. 4, s. 57.)

§ 221(j). Dividends, directors may declare.—The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. Before such dividend is declared, not less than twenty-five per cent of the undivided profits of any bank having a capital stock of fifteen thousand dollars or more, shall be carried to the surplus of such bank until its surplus amounts to fifty per cent of its paid-in capital stock; and not less than fifty per cent of the undivided profits of any bank having a capital stock of less than fifteen thousand dollars shall be carried to the surplus of such bank until its surplus amount to one hundred per cent of its paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

(a) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;

(b) Interest paid or then due on debts which it owes;

(c) All taxes due;

(d) All overdrafts which have been standing on the books of the bank for a period of sixty days or longer;

(e) All losses sustained by the bank. In computing the losses, debts owing to it which have become due and which are not in process of collection, and on which interest for one year or more is due and unpaid, unless same are well secured, and debts upon which final judgment has been recovered, but has been for more than one year unsatisfied, and on which also for a period of one year no interest has been paid, unless same are well secured, shall be included.

(f) All investments carried on its books, which are prohibited under the provisions of this act, or rules and regulations made by the commissioner of banks, pursuant to the powers conferred under this act. (1921, c. 4, s. 58; 1927, c. 47, s. 10; 1931, c. 243, s. 5.)

Editor's Note.—The 1927 amendment added subsection (f). The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 221(k). Surplus, shall not be used for.—The surplus of any bank doing business under this chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty per cent of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars shall reach an amount equal to one hundred per cent of its paid-in capital, the board of directors of such bank shall reclare a dividend of fifty per cent of said surplus and distribute the same as a stock dividend: Provided that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars, the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will be necessary to increase the stock of the said bank to fifteen thousand dollars. (1921, c. 4, s. 59.)

As to definition of surplus and undivided profits, see sec. 216(a).

§ 221(l). Overdrafts, payment by officer, etc.—Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amount of such overdrafts. (1921, c. 4, s. 60.)

§ 221 (m). Officers and employees shall give bond.—The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the commissioner of banks, the premium for same to be paid by the bank. The commissioner of banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; 1927, c. 47, s. 1; 1929, c. 72, s. 2; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1929 struck out the section as amended by the Act of 1927 and inserted in lieu thereof the above.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

This statute enters into and forms a part of the bond. Hood v. Simpson, 206 N. C. 748, 175 S. E. 193.

Effect of Renewal of Bond.—When a bond which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for each year the officer was re-elected, then each and every renewal thereof is a separate and distinct bond or independent contract. Hood v. Simpson, 206 N. C. 748, 753, 175 S. E. 193.

§ 221 (n). Officers and employees may borrow,

when.—No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness. Provided, however, this section shall not apply to directors who are neither officer nor employees of the bank. (1921, c. 4, s. 62; 1925, c. 119; 1927, c. 47, s. 12.)

Editor's Note.—The scope of this section was broadened by the Act of 1925. The prohibition was extended to employees as well as officers. The provision as to partnerships and corporations in which officers or employees are interested is new. The provision immediately preceding the proviso at the end of the section is also new. It is to be noted that a provision for authorization of such loan by a committee of directors is omitted.

The proviso at the end of this section was added by the 1927 amendment.

Loss of Assets Must Result.—See note to § 220(d).

Art. 7. Commissioner of Banks and Banking Department

§ 221(o). Appointment of commissioner of banks; advisory banking commission.—On or before April first, one thousand nine hundred and thirty-one, after the ratification of this act, and quadrennially thereafter, the governor, with the advice and consent of the senate, shall appoint a commissioner of banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal. The commissioner of banks shall, before entering upon the discharge of his duties, enter into bond with some surety company authorized to do business in the State of North Carolina, in the sum of not less than fifty thousand dollars, conditioned upon the faithful and honest discharge of all duties and obligations imposed by statute upon him.

An advisory commission to the commissioner of banks is hereby created to consist of the state treasurer and the attorney general, as ex-officio members, and three members to be appointed by the governor for a term of two years, two of which said members shall be practical bankers and one shall be a business man, and shall serve without compensation other than the same per diem and expense allowance paid to members of the advisory budget commission, and the same shall be paid from the fees collected under section 223(f) of Consolidated Statutes. It shall be the duty of said advisory commission to advise with the commissioner of banks from time to time upon the question of the administration of the banking laws with a view to working out a policy for the safe, sane and practical administration of the banking laws of the State: Provided, that no member of the advisory banking board shall divulge or make use of any information coming into his possession as a result of his service on such board; nor shall any member of said board otherwise give out any information with reference to any facts coming into his possession by reason of his service on such board in connection with the condition of any state banking institution, unless such information shall be required of him as a result of subpoena or other process.

The advisory commission shall meet at such time or times, not less than every three months as the commission shall by resolution prescribe; and a commission may be convened in special session at the call of the governor upon his own motion or upon request of the commissioner of banks. The treasurer shall be chairman of the commission.

Appeals may be made to such commission from any ruling of the commissioner of banks and the decision of such commission shall be final. (1931, c. 243, s. 1; 1935, c. 266.)

Editorial Note.—The most notable change in the banking law is the creation of a new banking department and of a new official—the commissioner of banks, to whom is transferred the supervision of banks heretofore exercised by the corporation commission. Co-operating with the commissioner of banks under the present law is an appointive, policy-determining commission which sits as a court of final jurisdiction on appeals from rulings of the bank commissioner. Outside of the provision for this commission the obvious purpose is a transfer of responsibility, not an increase or decrease of it in the new hands. That intent is made sufficiently clear by § 221(r) on powers, and § 221(s) which amends the former banking law by substituting "commissioner of banks" throughout for "corporation commission," "chief state bank examiner," etc.

As to the matter of appeal from the commissioner of banks provided for at the close of this section, two peculiarities demand notice: (1) the commission provided for is nowhere declared to be a judicial or quasi-judicial body as is the corporation commission to whose powers the commissioner of banks succeeds. It is characterized in the section as an "advisory commission" and the later provision for appeals to such a body is therefore somewhat singular. (2) Considering that the intent is to create an administrative board with quasi-judicial powers the right of appeal from its decisions seems to be expressly denied by the words, "the decisions of such commission shall be final." Unless this phrase be limited by judicial construction to finality on the facts there seems no chance of sustaining its constitutionality. There is nothing in the statute to suggest a legislative intent that such a construction be given.

Had the new banking department been created as a purely administrative agency it might fairly be contended that the finality of its action would be in an administrative sense only, and appropriate legal proceedings could be had to test them. But the corporation commission had judicial powers in dealing with banks—its stock assessments were, for example, given the effect of Superior Court judgments. See § 218(c), (13); Corporation Commission v. Murphey, 197 N. C. 42, 147 S. E. 667, aff'd 280 U. S. 534, 50 Sup. Ct. 161; see also Corporation Commission v. Bank of Vanceboro, 200 N. C. 422, 157 S. E. 59. And the new commissioner of banks succeeds to those judicial powers so that he is obviously not a purely administrative official. There still remains the possibility that as to certain matters his rulings are administrative and that it is in respect to such rulings only that the decisions of the new commission as an appellate administrative body are final. 9 N. C. Law Rev. 348-350.

The amendment of 1935 changed the first sentence of the second paragraph of this section so that the members may receive the same per diem and expense allowance as the advisory budget commission.

§ 221(p). Powers and duties of commissioner.—The commissioner of banks shall have the powers, duties and functions herein given, and in addition thereto such other powers and rights as may be necessary or incident to the proper discharge of his duties. (1931, c. 243, s. 2.)

The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take posses-

sion of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In re Central Bank, etc., Co., 206 N. C. 251, 253, 173 S. E. 340.

§ 221(q). Right to sue and defend in actions involving banks; liability to suit.—As commissioner of banks he is empowered to sue and prosecute or defend in any action or proceeding in any courts of this State or any other state and in any court of the United States for the enforcement or protection of any right or pursuit of any remedy necessary or proper in connection with the subjects committed to him for administration or in connection with any bank or the rights, liabilities, property or assets thereof, under his supervision; but nothing herein shall be construed to render the commissioner of banks liable to be sued except as other departments and agencies of the State may be liable under the general law. (1931, c. 243, s. 3.)

§ 221(r). Commissioner vested with powers and duties of corporation commission with respect to banks.—All the powers, duties and functions now vested in or exercised by the corporation commission of North Carolina, with respect to banks and institutions receiving money on deposit, trust companies and financial institutions now under the supervision of the said corporation commission or chief state bank examiner are hereby transferred to and are vested in, and shall hereafter be exercised by the commissioner of banks provided for in this act and his successors in office, subject to the provisions contained in section one of this act. Wherever and whenever, under existing law, report, petition, application, memorial or communication is required or permitted to be made or addressed to the corporation commission, of or concerning any of the subjects herein transferred to the commissioner of banks for administration or supervision, the same shall be made and addressed to the commissioner of banks. (1931, c. 243, s. 4.)

§ 221(s). Commissioner of banks substituted for corporation commission and chief state examiner in banking laws.—Chapter four, Public Laws of one thousand nine hundred and twenty-one, being chapter five of the Consolidated Statutes of North Carolina, chapter forty-seven of the Public Laws of one thousand nine hundred and twenty-seven, chapter one hundred and thirteen of the Public Laws of one thousand nine hundred and twenty-seven, chapter seventy-two of the Public Laws of one thousand nine hundred and twenty-nine, and all amendments thereto, and all public acts of the general assembly establishing or declaring the law relating to banks or banking, are hereby amended conformably to this act and where, in any parts, sections, or clauses of said laws and amendments thereto reference is made to the "Commission," "Commissioner," "Corporation Commission" or "Corporation Commission of North Carolina," or "Chief State Bank Examiner," the words "Commission," "Commissioner," "Corporation Commission," and "Corporation Commission of North Carolina" and "Chief State Bank Examiner," shall be deemed and treated as stricken out, and the words "Commissioner of Banks" substituted in lieu thereof; and wherever in any sentence, phrase or clause any pronoun or other word is used referring to said Commission, Commissioner, Corporation Commission or Corporation Commission of North Carolina or Chief State Bank Examiner, the appropriate pronoun or reference word shall be substituted as the context may require. (1931, c. 243, s. 5.)

Editor's Note.—The Legislature seemingly overlooked the confusion which such a lazy method of amending introduces into certain sections where under present law both the corporation commission and the state bank examiner are spoken of in relation to each other. To illustrate—§ 222(a) is affected as follows by the amending act: "The [corporation commission] commissioner of banks shall exercise control of and supervision over the banks doing business under this chapter and it shall be his duty to execute and enforce through the [chief state bank examiner] commissioner of banks, * * *." The wholesale substitution of titles provided for also presents difficulties in various parts of § 218(c), as well as in §§ 217(d), (g), 222(a), (g), 223(f), and 224(b), (b½), (i). Furthermore, § 223(a) as amended would provide that the [corporation commission] commissioner of banks should appoint a [chief state bank examiner] commissioner of banks to make examination of banks. Doubtless the court can cure the fault by making a substitution only in those places where the real objective of the new law will be served, but no such burden should have been thrown on the judiciary. 9 N. C. Law Rev. 348, 349.

Cited in Fidelity, etc., Co. v. People's Bank, 72 F. (2d) 932.

§ 221(t). Salary of commissioner; legal assistance and compensation.—The salary of the commissioner of banks shall be fixed by the advisory budget commission. The governor may in his discretion appoint and assign to the commissioner of banks such legal assistance as in his judgment may be necessary; and compensation therefor, when permanent, shall be fixed in like manner. (1931, c. 243, s. 6.)

§ 221(u). Banking department preserved; funds transferred to new department.—The banking department shall be maintained in the manner now provided by law, and no other assessments or levies shall be made therefor: Provided, all funds now held in the state treasury for the support of the banking department are hereby transferred to the banking department herein created and shall be used solely for its support. (1931, c. 243, s. 7.)

§ 221(v). Vacancy appointments and removal.—Vacancies existing in the office of commissioner of banks by death, resignation or otherwise shall be filled by the governor; and he shall have the power of removal for sufficient cause. (1931, c. 243, s. 8.)

§ 221(w). Seal of office of commissioner; certification of documents.—The commissioner of banks shall have a seal of office bearing the legend "State of North Carolina—Commissioner of Banks," with such other appropriate device as he may adopt. In all cases where the seal of the corporation commission has been required on any document the said seal shall be sufficient; and whenever any record paper or document is required to be certified or evidenced by the certificate of the corporation commission or its clerk, or by the chief state bank examiner attested by the clerk of the corporation commission, whether the seal of the corporation commission is required thereto or otherwise, or wherever any act or thing is required or permitted to be evidenced by such certificate, the certificate shall be made by the commissioner of banks, and shall have the validity, force and effect now given by law to such certificate. (1931, c. 243, s. 9.)

§ 221(x). Official records.—The commissioner of banks shall keep a record in his office of his official acts, rulings and transactions: Provided, however, that where any disclosure of the records in his office, or of any report or other transaction, might injuriously affect any bank actually operating, such disclosure shall not be made or required except as may now be done under the provisions of law in similar cases. (1931, c. 243, s. 10.)

§ 221(y). General or special investigations of insolvent banks.—Whenever it may appear to be to the public interest, the governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have led to such insolvency or which may have endangered or involved any public funds therein. The governor may assign counsel who shall prosecute such inquiry before the commissioner of banks, or a deputy or commissioner appointed by the commissioner of banks for the purpose; and the commissioner of banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of commissioner of banks in the city of Raleigh or at any other place or places in the State designated by the commissioner of banks under such rules and regulations as he may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such commissioner or deputy on subpoena or other due notice shall be served, at the instance of such commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the commissioner thereon, and a copy thereof submitted to the governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the solicitor of the judicial district likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11.)

§ 221(z). Clerical help.—The commissioner of banks is empowered to employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of his office with economy and efficiency. Persons so employed shall be paid as other employees in the departments of the State and shall be under the same rules and regulations. (1931, c. 243, s. 12.)

§ 221(aa). Suitable offices; transfer of books, records, etc., by corporation commission.—Suitable offices shall be provided for the commissioner of banks in some State owned public building in Raleigh. Upon his induction into office the corporation commission shall turn over and deliver to him all books, records, papers, and documents in its possession or control solely relating to banks and their supervision. (1931, c. 243, s. 13.)

§ 222. Acceptances.—Banking corporations and banking and trust companies doing a fiduciary business shall have power to accept drafts or bills of exchange drawn upon them, and to endorse drafts or bills of exchange drawn upon another, having not more than six months sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods, or which grow out of transactions involving the domestic shipment of goods. No such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per centum of its paid-up and unimpaired capital stock and surplus, unless the banking corporation or banking and trust company doing a fiduciary business is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance; and no such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse such bills or drafts to an amount equal at any one time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus. The commissioner of banks, however, under such general regulations as he may prescribe, which shall apply to all banking corporations or banking and trust companies doing a fiduciary business alike regardless of the amount of capital stock and surplus, may authorize any banking corporation or banking and trust company doing a fiduciary business to accept or indorse such bills or drafts to an amount not exceeding at any time in the aggregate one hundred per centum of its paid-up and unimpaired capital stock and surplus: Provided, that the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty per centum of such capital stock and surplus. (1919, c. 76; 1931, c. 243, s. 5.)

Editor's Note. — The corresponding section in the banking act of 1921 is section 220(l). While that section undoubtedly covers a part of the subject matter in this section it does not cover all of it. Section 220(l) would very probably be held to be a supplement to this section and for that reason this section is not omitted. See the editor's note under section 216(a).

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 222(a). Commissioner of banks shall have supervision over, etc.—Every bank, corporation, partnership, firm, company, or individual, now or hereafter transacting the business of banking, or doing a banking business in connection with any

other business, under the laws of and within this state, shall be subject to the provisions of this chapter, and shall be under the supervision of the commissioner of banks. The commissioner of banks shall exercise control of and supervision over the banks doing business under this chapter, and it shall be his duty to execute and enforce through [the commissioner of banks,] the state bank examiners, and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this chapter. For the more complete and thorough enforcement of the provisions of this chapter, the commissioner of banks is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this chapter, as may in his opinion be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure such safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositors, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the commissioner of banks. (1921, c. 4, s. 63; 1931, c. 243, s. 5.)

Editor's Note. — Section 244 of the consolidated statutes was the corresponding section of the law prior to this section, which changed the law considerably. Part of the old section provided for the control of receivers appointed by the superior court insofar as not inconsistent with the order of appointment. Of course this section makes no mention of receivers as their duties now devolve upon the commissioner of banks and his agents under section 218(c). See 3 N. C. Law Rev. 81.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section. The substitution for the latter officer was made in the phrase appearing in brackets. The amending act either should have stricken out this phrase, or made it clear as to the present status of the chief state bank examiner. See note to section 221(s).

§ 222(b). Reports of condition.—Every bank shall make to the commissioner of banks not less than three reports during each year, according to the form which may be prescribed by said commissioner of banks; which report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary, or treasurer of said bank, and in addition thereto, two of the directors, in the case of incorporated banks, and in other cases by the oath or affirmation of the partners, members of the firm, or individual owner. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the commissioner of banks specified, and shall be transmitted to the commissioner of banks within ten days after the receipt of a request or requisition therefor from the commissioner of banks; and in a form prescribed by the commissioner of banks; a summary of such report shall be published in a newspaper published in the place where the bank is located, or if there is no newspaper in the place, then in the nearest one published thereto in the county in which such bank is established. Proof of such publication shall be furnished the commissioner of banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; 1931, c. 243, s. 5.)

Editor's Note. — This section seems to cover all the terms of C. S. section 245, and supersedes it. However, there are a few changes. Formerly the secretary or treasurer could not verify the report on oath; and the full report must have been published "in a newspaper in the county in which the banking corporation or individual was located." The provisions prescribing the details of such report were also inserted.

The 1923 amendment changed the minimum number of reports from four to three.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 222(c). Reports of condition of trust and surety companies.—Every person, firm, corporation, or partnership doing a banking business, or a banking business in connection with any other business, shall make to the commissioner of banks not less than three reports during each year, on forms prescribed by the commissioner of banks. If any person, firm, corporation, or copartnership shall show by said reports, or by the examination of any state bank examiner, that such liabilities are equal to the amount of the capital stock of such bank, the commissioner of banks shall have authority, and is hereby empowered to make such rules and regulations for the reduction of said liabilities as it may deem necessary for the protection of the creditors and depositors of such banking institution. (1921, c. 4, s. 65; 1923, c. 148, ss. 1, 3; 1931, c. 243, s. 5.)

Editor's Note. — This section as passed in 1921 was a literal re-enactment of C. S. section 246 and supersedes it. As re-enacted a minimum of four reports a year were required, being changed to three by the 1923 amendment to this section. The old section contained a clause specifying that the report should show "the entire amount of trust and surety and fiduciary and guaranty business as a part of the liabilities of said banking institution, which report should be published as are the reports of other banking institutions. This too was changed by the 1923 amendment and the requirement that the report be made on forms furnished substituted therefor.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Liability Where False Statement Misleads. — A false and misleading statement made by the directors by which one was lead to make deposits gave a cause of action against the directors. It was also held that the directors are presumed to know the condition of the bank. Tate v. Bates, 118 N. C. 287, 24 S. E. 482. See also Houston v. Thornton, 122 N. C. 365, 29 S. E. 827; Townsend v. Williams, 117 N. C. 330, 23 S. E. 461; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, and the cases cited under section 220(d) and 221(e).

§ 222(d). Special reports. — The commissioner of banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the commissioner of banks, and shall be verified in the manner provided in section 222(b), and shall be published as therein provided, if required by the commissioner of banks so to be. (1921, c. 4, s. 66; 1931, c. 243, s. 5.)

Editor's Note. — There was no corresponding section in the prior law. However, under C. S. section 247 a special report might be required when necessary to acquire a full knowledge of a bank. There was no requirement as to form or publishing.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 222(e). Failure to make report, penalty for.— Every bank failing to make and transmit any report which the commissioner of banks is authorized to require by this chapter, and in and according to the form prescribed by said commissioner of banks, within ten days after the receipt of a request or requisition therefor, or failing to publish the reports as required, shall forthwith be notified by the commissioner of banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars. The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such actions. (1921, c. 4, s. 67; 1931, c. 243, s. 5.)

Editor's Note. — This section is a re-enactment of C. S. section 248.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 222(f). Annual report of stockholders. — Every bank doing business under this chapter shall at all times keep a correct record of the names of all its stockholders, and once in each year, or whenever called upon, file in the office of the commissioner of banks a correct list of all its stockholders, the resident address of each, and the number of shares held by each. (1921, c. 4, s. 68; 1931, c. 243, s. 5.)

Editor's Note. — This section is a substantial re-enactment of the first sentence of C. S. section 247.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 222(g). Official communications of commissioner of banks. — Each official communication directed by the commissioner of banks, or any state bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by [the banking department of] the commissioner of banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting same, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the commissioner of banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; 1931, c. 243, s. 5.)

Editor's Note. — The provisions of this section were new with the 1921 act.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section. It seems that the words appearing in brackets should have been omitted.

§ 222(h). Books, records, etc., commissioner of banks may prescribe. — Whenever in his judgment it may appear to be advisable, the commissioner of banks may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to produce uniformity in the books, accounts, and records of banks of the same class. (1921, c. 4, s. 70; 1931, c. 243, s. 5.)

Editor's Note. — The provisions of this section first appeared in the act of 1921.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 222(i). Reserve, when below legal requirement.—When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The commissioner of banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for thirty days thereafter to make good its reserve, the commissioner of banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated as provided for in this chapter. (1921, c. 4, s. 71; 1931, c. 243, s. 5.)

As to manner of making good an impaired capital, see section 219(f). As to other limitations upon loans, see section 220(d). As to definition of and amount of reserve, see section 221(g).

Editor's Note. — The first sentence of this section formerly appeared as a part of section 226 which now corresponds to section 220(f). The provisions of the latter part of this section were new with the act of 1921.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Purpose of Section. — The wisdom of this provision and section 220(d) is manifest; banks, whose business is conducted in strict compliance seldom become insolvent, and thus bring loss and disaster upon depositors and stockholders and usually, also, upon others who may have no direct interest in the insolvent bank, but who nevertheless suffer by reason of the loss sustained by those who do have such interest. These sections, although arbitrary as to details are supported in principle by the lessons taught in the school of experience. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Section Not Retroactive. — The limitation in the latter part of this section applies only to new loans made after the ratification of the act and is not retroactive. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Individual Liability of Officer. — A bank must act through its officers, and where they have violated the provisions of this section and section 220(d), as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

So where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by section 224(i). State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 222(j). Appraisal of assets of doubtful value. —If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the commissioner of banks, and for the purpose of making such appraisal the commissioner of banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the commissioner of banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any way, either in the bank or as an

employee of the commissioner of banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for ten (10) days to appoint an appraiser, the commissioner of banks may apply to the Clerk of the Superior Court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the appointment for the bank. (1927, c. 47, s. 13; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 222(k). Certified copies of records as evidence.—In all civil actions in the courts of this State wherein are involved as evidence or otherwise any of the records of the banking department of the commissioner of banks, a certified copy over the signature of the commissioner of banks attested by the Chief Clerk of the commissioner of banks under the seal of the commissioner of banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records of said department. (1927, c. 47, s. 14; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 222(l). Other powers of commissioner of banks.—In addition to all other powers conferred upon and vested in him, the commissioner of banks, with the approval of the governor, is hereby authorized, empowered and directed, whenever in his judgment the circumstances warrant it:

(a) To authorize, permit, and/or direct and require all banking corporations under his supervision, to extend for such period and upon such terms as he deems necessary and expedient, payment of any demand and/or time deposits.

(b) To direct, require or permit, upon such terms as he may deem advisable, the issuance of clearing house certificates or other evidences of claims against assets of such banking institutions.

(c) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as he shall designate or invested in such obligations of the United States and/or the state of North Carolina as he shall designate.

(d) To adopt for such banking institutions such regulations as are necessary in his discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3.)

§ 222(m). Orders of commissioner to be observed; right of appeal.—The commissioner of banks is hereby authorized, empowered and directed to make all necessary rules and regulations, and to give all necessary instructions with respect to such banking corporations which he may authorize, permit and/or direct and require to be conducted under the provisions of this act. And it shall be the duty of all such banking corporations and their officers, agents and employees, to comply fully with any and all such rules, regulations and instructions, established and promulgated by the commissioner of banks with respect to such banking corporations under the terms of this act; and such orders, rules, and regulations shall have the same force and effect as rules, regulations and instructions promulgated under the existing banking laws. The right of appeal provided in section 221(o) shall apply to all such rules, regulations and instructions adopted and issued by the commissioner of banks. (1933, c. 120, s. 4.)

§ 222(n). Commissioner need not take over banks failing to meet deposit demands.—The commissioner of banks is authorized and directed not to take possession of any banking corporation under his supervision for failure to meet its deposit liabilities during the period in which such banking corporation is operating under the terms of section 222(l), paragraph (a); and he is hereby relieved from any and all liability for permitting such banking corporations to continue operations under the terms hereof. (1933, c. 120, s. 5.)

§ 222(o). Additional powers with relation to deposits.—The commissioner of banks is hereby authorized and empowered in addition to other powers, vested in him, whenever in his judgment the circumstances warrant it, to authorize any bank, trust company, savings bank, industrial bank, or other institution under his supervision having the power to receive or which is receiving money on deposit:

(A) To extend for such period as he deems necessary and expedient payment of any time deposits where notice of withdrawal has been given or may hereafter be given.

(B) To postpone the payment of demand deposits for such time and to such extent as he deems necessary and expedient.

(C) To permit such bank to receive new deposits (after the time of the granting of the authority for the postponement of the payment of time and demand deposits) but such deposits so received shall not under any circumstances be subjected to any limitations as to payment or withdrawal and such deposits shall be segregated and held and used solely to meet such new deposit liabilities: Provided, that all sums received from such new deposits shall be invested, deposited and administered in all respects under the orders and directions of the commissioner of banks and said commissioner of banks shall have absolute power in regard to the handling of such new deposits and providing methods of checking against same and said commissioner of banks shall have absolute power to at any time withdraw the permission to receive such new deposits. All costs in connection with the receiving, handling and administering the proceeds of such new deposits shall be borne by the bank receiving the same and no part of such expenses shall be charged against such new deposits that can in any way prevent the payment of such new deposits in full.

In order that any institution may avail itself of the privileges herein granted, it shall accept such terms as the commissioner of banks from time to time impose upon it.

The commissioner of banks is authorized and directed not to take possession of any institution under his supervision for failure immediately to meet its deposit liabilities if it shall accept the terms imposed in accordance with the provisions

of this section, and he is hereby relieved of any and all liability for permitting such institution to continue operations.

Nothing herein contained shall be construed or interpreted as in any manner abating any of the powers granted to and exercised by the commissioner of banks under existing law.

The commissioner of banks is given full power and authority to make rules and regulations and to impose terms in regard to the management and administration of all banks which shall be permitted to, or which, under the direction of the commissioner of banks, is being conducted in any way under the provision of this section. (1933, c. 103.)

Referring to subd. (B) of this section, it was said in 11 N. C. Law Rev. 194 that this provision reverses all historic banking law for in the past a bank unable to meet the demand of its depositors was not deemed fit to receive others even if it would handle the new ones better than it had the old.

Applied in Baker-Cammack Textile Corp. v. Hood, 206 N. C. 782, 175 S. E. 151, as to liability of banks receiving deposit without restrictions as to withdrawals.

§ 223. Superseded by § 220(a).

Art. 8. Bank Examiners

§ 223(a). Appointment by commissioner of banks.—The commissioner of banks, for the purpose of carrying out the provisions of this chapter, shall appoint from time to time [a chief state bank examiner,] such state bank examiners, assistant state bank examiners, clerks and stenographers as may be necessary to make a thorough examination of and into the affairs of every bank doing business under this chapter, as often as the commission may deem necessary, and at least once each year. The commissioner of banks may at any time remove any person appointed by it under this chapter. (1921, c. 4, s. 72; 1931, c. 243, s. 5.)

Editor's Note. — This section is a re-enactment of a part of C. S. section 249, and does not make any change in the part re-enacted except that it changes the classification of examiners from "a bank examiner and such number of assistant bank examiners as are necessary" to a "chief state bank examiner, such state bank examiners and assistant state bank examiners" as are necessary.

As to the new sections containing the provisions of C. S. section 249 not incorporated in this section, see the note under section 249.

The Act of 1929 provided that "commissioner of banks" should be substituted for "corporation commission" or "chief state bank examiner." However, it seems that the general assembly may not have intended that such substitution should be made in the phrase appearing in brackets. See § 221(s) and note thereto.

For a case describing the manner in which the commission takes charge through the state bank examiner see Taylor v. Everett, 188 N. C. 247, 124 S. E. 316. See also the article in 3 N. C. Law Rev. 79, discussing the case and suggesting that the bank examiner probably has power to prescribe regulations without the express approval or direction of the commission although upon an appeal the decision of the commission would undoubtedly control.

§ 223(b). Duties and powers.—It shall be the duty of the examiners to verify all reports made to the commissioner of banks by the officers and directors, members, or individuals conducting any banking institution, as required by this chapter or by the commissioner of banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners, appointed under this chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purpose of making an examination as required by this chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the said examiner may forthwith take possession of the property and business of the bank and liquidate its affairs in accordance with the provisions of this chapter. (1921, c. 4, s. 73; 1931, c. 243, s. 5.)

Editor's Note. — The first sentence of this section is a re-enactment of a portion of the first sentence of C. S. 249, which required the examiners to verify the quarterly report which was required by sec. 245; thus, it will be seen that the terms have been extended to include all the reports made to the commissioner.

By virtue of C. S. sec. 250 it was the duties of the examiners to examine the books, papers and affairs of the bank, but the section did not go into detail as to the surrender of the books etc., nor fix a penalty for a refusal to do so. However, under C. S. sec. 253 the examiners were given power to take and retain possession of any bank for the purpose of examining into its affairs, when authorized to do so, but it fixed no penalty for a failure of the officers to fail to surrender the books, etc.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section. And it may have been the intent of the general assembly to substitute such words for the word "examiner" appearing near the end of the section.

§ 223(c). Officers and employees, removal of.—The commissioner of banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this state or the lawful orders, instructions, and regulations issued by the commissioner of banks. (1921, c. 4, s. 74; 1931, c. 243, s. 5.)

Editor's Note. — There was no section in the Consolidated Statutes corresponding to this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 223(d). Examiners may administer oath.—For the purpose of making examinations as required by this chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholders of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any person or persons resident of this state to appear before him and testify in relation thereto. (1921, c. 4, s. 75.)

Editor's Note. — This section is a substantial re-enactment of a portion of C. S. sec. 250.

§ 223(e). Examiners may make arrest.—When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this state relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiner shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the commissioner of banks, he may direct the release of the person or persons so held, or, if in his judgment such person or persons should be

prosecuted, the commissioner of banks shall cause the solicitor of the judicial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the solicitor to be present at the trial. (1921, c. 4, s. 76; 1931, c. 243, s. 5.)

As to malfeasance of bank examiners, etc., see sec. 224(e), 4401.

Editor's Note. — This section is a re-enactment of C. S. sec. 254.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "commission" formerly appearing in this section.

§ 223(f). Annual examination. — For the purpose of paying the salaries and necessary traveling expenses of the commissioner of banks, State bank examiners, assistant State bank examiners, clerks, stenographers and other employees of [the banking department of] the commissioner of banks, the following fees shall be paid into the office of the commissioner of banks: (a) Each bank and each branch of any bank which under the laws of the State of North Carolina is subject to supervision and examination by the commissioner of banks and is authorized to do business or is in process of voluntary liquidation shall, within ten days after the assessment has been made, pay into the office of the commissioner of banks according to its total resources as shown by its report of condition made to the commissioner of banks at the close of business December thirty-first, nineteen hundred and twenty-six, and on the thirty-first day of December, or the date most nearly approximating same of each year thereafter on which a report of condition is made to the commissioner of banks not in excess of the following fees for its annual examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such.

(b) All examinations made other than those provided for in subsection (a) hereof shall be deemed special examinations and for such special examination the bank shall pay into the office of the commissioner of banks the following fees for each special examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such. The fees paid for special examination shall be based on the assets of the bank examined as of the date of such examination.

(c) For services performed for any bank other than examination, the commissioner of banks may make such charge as in his opinion is fair and just.

(d) In all criminal cases tried in any of the courts of this state wherein any of the employees of [the banking department of] the commissioner of banks are used as witnesses, a fee of ten ($10.00) dollars per day and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the commissioner of banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the trial; and in all civil actions tried in any of the courts of this State, wherein any of the employees of [the banking department of] the commissioner of banks are required as witnesses, the party requiring such employee as witness shall deposit with the [banking department] when the subpoena is served a sufficient sum to cover the witness fee of ten ($10.00) dollars per day and expenses, and such sums as may thus be advanced shall thereafter be charged in the bill of costs as other costs are charged.

All sums paid under this subsection shall be paid to the commissioner of banks as are fees for examination and used in like manner.

(e) The commissioner of banks shall fix the compensation for and otherwise exercise control over those employed [in the banking department of] the commissioner of banks.

(f) The total compensation and necessary traveling expenses of the employees of the [banking department] shall not in any one year exceed the total fees collected under the provisions of this act.

(g) Any fees collected by the commissioner of banks for any regular or special examination made during the year nineteen hundred and twenty-seven prior to the ratification of this act shall be refunded to the bank having paid same. (1921, c. 4, s. 77; 1927, c. 47, s. 15; 1931, c. 243, s. 5.)

Editor's Note. — This section is a re-enactment of C. S. sec. 252. However there were several radical changes.

The amount of the fees payable was raised in all cases; under the prior section the full amount of the fees fixed for the annual examination must be paid and in addition the expenses incurred and services rendered, other than examinations performed, had to be paid for. But in no case was a bank required to pay for more than one examination unless its condition was precarious or in some other way unsatisfactory.

The act of 1921 raised the rate in all cases and changed the amount from a fixed sum to the maximum which might be charged, the specific sum actually charged up to the amount prescribed being left to the discretion of the commission. Under this act charges were made for both annual and special examinations. The provision relating to the payment of the balance into the state treasury was omitted.

The 1927 amendment or re-enactment made a radical change in the section. The section was subdivided, new provisions were added and in many instances the old provisions changed. The fees were again raised by this act and the classification of the capital stock which determines the amount of fee charged. The distinction between annual and special examinations was first made in this act; and subsections (d) and (g) were inserted.

Public Laws 1929, ch. 280, sec. 5, provided that all expenses of every kind concerning bank examinations be paid out of the fees collected under this section.

The Act of 1931 substituted "commissioner of banks" for "chief state bank examiner" formerly appearing in the third line of this section, as well as for "corporation commission" whereever appearing. As mentioned in note to sec. 221(s) this method of amending is apt to cause confusion. It seems that the words "the banking department of" appearing in brackets should have been omitted in the section as amended. It also seems that the words "banking department" in brackets in subsections (d) and (f) should have been replaced by "commissioner of banks," and the words in brackets in subsection (e) should have been replaced by the word "by."

§ 223(g). Examiners shall make report.—Examiners shall make a full and detailed report in writing to the commissioner of banks of the condition of each bank within ten days after each and

every examination made by them. (1921, c. 4, s. 78; 1931, c. 243, s. 5.)

Editor's Note. — This section is a reenactment of the last sentence of C. S. sec. 250.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 224. Superseded by § 220(t).

Cited in White v. Whitehurst, 194 N. C. 305, 307, 139 S. E. 598.

Art. 9. Penalties

§ 224(a). Examiner making false report. — If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than four months nor more than ten years. (1921, c. 4, s. 79.

§ 224(b). Examiners disclosing confidential information.—If any bank examiner or other employee of [the banking department of] the commissioner of banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not more than twelve months, or both, in the discretion of the court. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the Federal Reserve Bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary, or with the clearing-house officials and examiners. (1921, c. 4, s. 80; 1931, c. 243, s. 5.)

Editor's Note. — This section is a substantial reenactment of C. S. sec. 251.

The Act of 1931 substituted "commissioner of banks" for "corporation commission formerly appearing in this section. It seems that the words in brackets should have been stricken out by the amending act.

§ 224(b½). Loans or gratuities forbidden.— No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the commissioner of banks, any bank examiner or assistant bank examiner of [the Banking Department of] the commissioner of banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a misdemeanor and imprisoned not exceeding one year or fined not more than one thousand dollars, or both; and they may be fined a further sum equal to the money so loaned or gratuity given. If the commissioner of banks, or any bank examiner, or assistant bank examiner of [the Banking Department of] the commissioner of banks of North Carolina shall accept a loan of gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a misdemeanor and imprisoned not exceeding one year, or fined not more than one thousand dollars, or both, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "chief state bank examiner" and "corporation commission" formerly appearing in this section. It seems that the words in brackets should have been stricken out by the amending act.

§ 224(c). Bank, unauthorized use of the word. —No corporation shall hereafter be chartered under the laws of this state with the words "bank," "banking," "banker," or "trust" as a part of its name except corporations reporting to the commissioner of banks and under its supervision, or under the supervision of the insurance commissioner; nor shall any corporate name be so amended as to include the words "bank," "banking," "banker," or "trust," unless the corporation be under such supervision. No person, association, firm, or corporation domiciled within the state of North Carolina, except corporations, persons, associations, or firms reporting to and under the supervision of the commissioner of banks, or under the supervision of the insurance commissioner, shall therein advertise or put forth any sign as bank, banking, banker, or trust company, or use the word bank, banking, banker, or trust as a part of its name and title: Provided, that this chapter shall not be held to prevent any individual as such from acting in any trust capacity as heretofore. Any violation of the provisions of this section shall be a misdemeanor, and upon conviction thereof the offender shall be fined in a sum not exceeding five hundred dollars for each offense. (1921, c. 4, s. 81; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Alleging Corporation is a Bank. — Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the state of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. State v. Hedgecock, 185 N. C. 714, 117 S. E. 47.

§ 224(d). Derogatory reports, willfully and maliciously making.—Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 82.)

§ 224(e). "Misapplication, embezzlement of funds, etc. — Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent ap-

pointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificates, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars or imprisoned in the State's prison not more than thirty years, or both. (1921, c. 4, s. 83; 1927, c. 47, s. 16.)

Editor's Note. — This section was revised in 1927, the position of many phrases and clauses being changed. It would seem, however, that the section was not changed materially in many respects although it was made somewhat more comprehensive.

Section 4401 is a repetition of this section; a reference should therefore be made to the annotations thereunder. This section seems to cover, at least partially, the terms of sec. 4402 also.

The intent and purpose of this section is to prevent the deception of the officers of a bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers. State v. Cole, 202 N. C. 592, 163 S. E. 594.

A specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section, it being sufficient if the defendant wilfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent. State v. Lattimore, 201 N. C. 32, 158 S. E. 741.

In a prosecution under this section for wilfully making false entries on the books of a bank an instruction which was intended to stress and in effect did stress the necessity of proving that the false entries were wilfully and not inadvertently made, will not be held for error. State v. Lattimore, 201 N. C. 32, 158 S. E. 741.

"Abstracts" Construed. — The legal meaning of the word "abstract," as it appears in C. S., 4401, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

"Embezzle" means to misappropriate as well as to convert to one's own use. State v. Maslin, 195 N. C. 537, 143 S. E. 3, citing State v. Lanier, 89 N. C. 517; State v. Foust, 114 N. C. 842, 19 S. E. 275.

Section 4401 Not in Conflict. — C. S., 4401, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of C. S., 4401; and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of this section as passed in 1921. State v. Switzer, 187 N. C. 88, 121 S. E. 143

Same—Necessity of Being Present.—Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Allegation That All Defendants Were Officers.—It is not necessary for an indictment charging a conspiracy to violate the provisions of this section, to allege that all of the defendants were officers or employees of the bank, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. State v. Davis, 203 N. C. 13, 14, 164 S. E. 737.

Indictment.—In a prosecution under this section and § 4401 it was not necessary to aver or to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The words "did embezzle" sufficiently indicated the criminal act. The intent to defraud was sufficiently set out, under § 4621, without specifically naming any particular victim of the preconceived purpose. And the indictment was sufficient though there was nothing to indicate the number of abstractions, if more than one. State v. Maslin, 195 N. C. 537, 540, 143 S. E. 3, citing State v. Switzer, 187 N. C. 88, 121 S. E. 43.

Evidence.—In a prosecution under this section and § 4401 expert parol evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. In such case there was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. State v. Maslin, 195 N. C. 537, 143 S. E. 3.

Variance as to Some Items.—In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of this section, a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent. State v. Davis, 203 N. C. 47, 48, 164 S. E. 732.

False Statements. — See note to 221(e).

§ 224(f). False certification of a check.—Whoever, being an officer, employee, agent, or director of a bank, certifies a check drawn on such bank, and willfully fails to forthwith charge the amount thereof against the account of the drawer thereof, or willfully certifies a check drawn on such bank unless the drawer of such check has on deposit with the bank an amount of money subject to the payment of such check an equivalent to the amount therein specified, shall be guilty of a felony, and upon conviction shall be fined not more than five thousand dollars or imprisoned in the state prison for not more than five years, or both. (1921, c. 4, s. 84.)

§ 224(g). Insolvent banks, receiving deposits in.—Any person, being an officer or employee of a bank, who receives, or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent,

shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars or imprisoned in the state prison not more than five years, or both. Provided, that in any indictment hereunder insolvency shall not be deemed to include insolvency as defined under subsection (d) in the definition of insolvency under section two hundred and sixteen (a). (1921, c. 4, s. 85; 1927, c. 47, s. 17.)

Editor's Note.—The proviso at the end of this section was added by the 1927 amendment. This was the only change effected by the amendment.

The word "insolvent," in this section, means when the bank cannot meet its depository liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the same time on demand. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

A bank is insolvent within the meaning of this section, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors or other creditors. State v. Brewer, 202 N. C. 187, 188, 162 S. E. 363.

Elements of Crime.—In order for a conviction under the provisions of this section, the state must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

How Knowledge Determined. — The question as to an officer's knowledge is ordinarily to be determined with reference to a variety of facts and circumstances, and in defense it is permitted to him to go into an investigation of the assets and property of the bank at the date of the deposits, and their value at that time or thereafter, when bearing upon their worth at the time they were charged to have been unlawfully received. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

Same—Admissions.—Upon the trial of an officer of an insolvent bank under this section the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is competent testimony. State v. Brewer, 202 N. C. 187, 188, 162 S. E. 363.

Who May Bring Action for Civil Liability.—A violation of this section by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See Russell v. Boone, 188 N. C. 830, 125 S. E. 926; Houston v. Thornton, 122 N. C. 365, 29 S. E. 827; Townsend v. Williams, 117 N. C. 330, 23 S. E. 461; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478; Tate v. Bates, 118 N. C. 287, 24 S. E. 482; Bane v. Powell, 192 N. C. 387, 391, 135 S. E. 118.

In his opinion in State v. Hightower, 187 N. C. 300, 121 S. E. 616, speaking of this section, Chief Justice Stacy says: "The statute was designed to protect the depositing public against this kind of practice on the part of officers and employees of banks, and they will be held to a strict accountability under its provisions when they receive, or when any such officer permits an employee to receive deposits therein, with knowledge of the fact that, by reason of the bank's insolvency, such deposits then being received are taken at the expense or certain peril of the depositors presently making them." Bane v. Powell, 192 N. C. 387, 390, 135 S. E. 118.

The right of a depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, to recover damages in an action brought by him against the officers and directors, is not affected by the decision in Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195; the right is expressly recognized in the opinion in that case. Bane v. Powell, 192 N. C. 387, 391, 135 S. E. 118.

Same—Liability as Bank Asset. — Sums for which bank officers and directors receiving or permitting receipt of deposit with knowledge of bank's insolvency, contrary to this section, are liable is not an asset of the bank, the wrong being only to the depositor, he need not allege, to maintain an action, that bank's receiver refused to sue on demand. Bane v. Powell, 192 N. C. 387, 135 S. E. 118.

Action against Officers to Recover Deposit—Necessary Allegations.—In order for a depositor to maintain an action against the individual officers of an insolvent bank for permitting the deposits to be received it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. Wall v. Howard, 194 N. C. 310, 139 S. E. 449.

Bank Examiner as Expert Witness.—In an action to convict an officer of a bank under this section, the testimony of the State Bank Examiner is to be received as that of an expert upon the question of the bank's insolvency. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

Same—Weight of Evidence.—Where the State Bank Examiner and another expert have been permitted to give their testimony as to the bank's insolvency at the time of the crime, upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. State v. Hightower, 187 N. C. 330, 121 S. E. 616.

Certified Accountant as Witness.—Upon the trial of a bank official under the provisions of this section testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable. State v. Brewer, 202 N. C. 187, 162 S. E. 363.

§ 224(h). Capital stock, advertising larger amount than that paid in.—It shall be unlawful for any bank to advertise in a newspaper, letterhead, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violating this section shall be subject to a penalty of five hundred dollars for each and every offense. The penalty herein provided for shall be recovered by the state in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such actions. (1921, c. 4, s. 86.)

§ 224(i). Offenses declared misdemeanors; prosecution; employment of counsel; punishment.—Any offense against the banking laws of the state of North Carolina which is not elsewhere specifically declared to be a crime, or for which elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the court. The commissioner of banks is authorized and directed to prosecute all offenses against the banking laws of the state, and to that end is expressly authorized to employ counsel to prosecute in the inferior courts and to aid the solicitor in the superior courts. The auditor of the state shall, upon the certificate of [the chairman of] the commissioner of banks, accompanied by an itemized statement of the account, draw his warrant upon the state treasurer to compensate the counsel so employed, and the state treasurer shall pay the same out of the funds in the treasury and not otherwise appropriated. (Ex. Sess. 1921, c. 56, s. 4; 1927, c. 47, s. 18; 1931, c. 243, s. 5.)

See the annotations under secs. 220(d), 221(e).

Editor's Note.—The act of 1927 re-enacted this section in full.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section. It would seem that the words in brackets should have been stricken out by the amendment.

Unlawful Act of Making Loans.—Under this section, the unlawful act of making loans in violation of sec. 220(d) is made a misdemeanor, and is punishable as such at the discretion of the court. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Officers Individually Liable. — Guilt is personal, and the manifest purpose of the General Assembly in declaring the acts in violation of the statute misdemeanors, punishable at the discretion of the court, was to provide further assurance that these wise and prudent statutory provisions should be obeyed by those who alone could violate them, to wit, officers and directors of the bank. Their personal and individual

liability for damages sustained by the bank, its stockholders or other persons, as a result of the violation of these and other provisions of the statute by directors or officers, was evidently not deemed sufficient for the purpose in the mind of the General Assembly. State v. Cooper, 190 N. C. 528, 533, 130 S. E. 180, see sec. 220(d).

§ 224(j). General corporation law to apply.—All provisions of the law relating to private corporations, and particularly those enumerated in the chapter entitled "Corporations," not inconsistent with this chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87.)

Editor's Note.—The corresponding section of the prior law was C. S. sec. 236. This section is a re-enactment.

§ 225. Superseded by § 220(p).

Art. 10. Industrial Banks

§ 225(a). Industrial bank defined.—The term "industrial bank," as used in this article shall be construed to mean any corporation organized, or which may hereafter be organized, under the general corporation laws of this state, which is engaged in lending money to be repaid in weekly, or monthly, or other periodical installments, or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, or commercial or savings banks. (1923, c. 225, s. 1.)

Editor's Note.—It was stated in the caption of the act of 1923, which revised the law regulating industrial banks that the purpose was to provide for the supervision and examination of industrial banks. While this section is a re-enactment of C. S. sec. 255, it is more specific in its terms, the provisions respecting loans which are to be paid in weekly installments, etc., and the proviso, being added by the act of 1923.

§ 225(b). Manner of organization.—Corporations may be organized under this article in the same manner as provided for corporations authorized under the chapter on corporations. (1923, c. 225, s. 2.)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 256.

§ 225(c). Corporate title.—Every corporation incorporated or reorganized pursuant to the provisions of this article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3.)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 258.

§ 225(d). Capital Stock.—The amount of capital stock with which any industrial bank shall commence business shall not be less than twenty-five thousand ($25,000.00), in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars ($50,000.00), in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars ($100,000.00), in cities or towns whose population exceeds twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this section shall not apply to industrial banks organized and doing business prior to March 3, 1923. (1923, c. 225, s. 4.)

Editor's Note.—C. S. sec. 257, which was the corresponding section of the prior law merely provided that the capital should not be under $25,000.

§ 225(e). Sales of capital stock; accounting; fees.—The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The commissioner of banks shall refuse authority to commence business to any industrial bank where commissions or fees have been paid, or have been contracted to be paid by it, or by any one in its behalf to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1923, c. 225, s. 5; 1931, c. 243, s. 5.)

Editor's Note.—The provisions of this section are new with the act of 1923. It is very similar to sec. 217(e) of the banking laws.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 225(f). Powers.—In addition to the general powers conferred upon corporations by section 1126 of the Consolidated Statutes, every industrial bank shall have the following powers:

1. To loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.

2. To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness, or investment, and to receive from investors therein or purchasers thereof payments therefor in installments or otherwise, with or without an allowance of interest upon such payments, whether such evidence or certificates of indebtedness or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with such investors or purchasers with regard to such evidences or certificates of indebtedness, or of investment; and no such transaction shall in any way be construed to affect the rate of interest on such loans.

3. To charge for a loan made pursuant to this section one dollar for each fifty dollars or a fraction thereof loaned, up to and including loans of two hundred and fifty dollars, and for loans in excess of two hundred and fifty dollars, one dollar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or surety. An additional fee of five dollars may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.

4. To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the state, after having first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks in his discretion: Provided, that the commissioner of banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for the capital of at least twenty-five thousand dollars ($25,000.00) for the parent bank and at least twenty-five thousand dollars ($25,000.00) for each branch which it is proposed to be established in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars ($50,000.00) in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one

hundred thousand dollars ($100,000.00) in towns whose population exceeds twenty-five thousand.

5. Subject to the approval of the commissioner of banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations. (1923, c. 225, s. 6; 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2.)

Editor's Note.—This section is virtually a re-enactment of C. S. sec. 259. However, subsection 4 has been changed considerably; prior to the re-enactment it was provided that branch offices could be established only in the county in which the principal office was located.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 added subdivision (5) of this section in its entirety. As to investment in bonds guaranteed by United States, see § 220(a) 1. As to loans on mortgages, etc., issued under federal housing act, see § 220(a) 2.

§ 225(g). Restriction on powers.—No industrial bank shall—

1. Make any loan under the provisions of this article for a longer period than one year from the date thereof: Provided, however, that loans upon real estate security may be made for a period not exceeding two years.

2. Deposit any of its funds in any banking corporation unless such corporation has been designated as such depositary by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depositary, so designated, present at any meeting duly called at which a quorum is in attendance, and approved by the commissioner of banks. (1923, c. 225, s. 7; 1931, c. 243, s. 5.)

Editor's Note.—This section is a re-enactment of C. S. sec. 260 except that the proviso in the first subsection and the provisions requiring approval of the commissioner in the second subsection were added.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 225(h). Limit of loans.—The total liabilities to any industrial bank of any person, corporation, company, or firm, for money borrowed, including in the liabilities of the company or firm the liabilities of the several members thereof, shall at no time exceed ten per cent of the actually paid-up capital and surplus of such industrial bank, but the discount of bona fide bills of exchange or acceptances drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, company or firm negotiating the same, shall not be considered money so borrowed. (1923, c. 225, s. 8.)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 261.

§ 225(i). Directors.—At least three-fourths of the number of directors of any industrial bank shall be residents of the state of North Carolina. (1923, c. 225, s. 9.)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 262.

§ 225(j). Officers and employees shall give bond.—The active officers and employees of any industrial bank, before entering upon their duties, shall give bond to the bank in a bonding company authorized to do business in North Carolina in the amount to be required by the directors, and in such form as may be prescribed or approved by the commissioner of banks.

The commissioner of banks, or directors of such bank, may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damage as it may have sustained. (1923, c. 225, s. 10; 1931, c. 243, s. 5.)

Editor's Note.—The provisions of this section are new with the act of 1923.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 225(k). Supervision and examination.—Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this article whether as a separate business or in connection with any other business under the laws of and within this state, shall be subject to the provisions of this article and shall be under the supervision of the commissioner of banks. The commissioner of banks shall exercise control of and supervision over the industrial banks doing business under this article and it shall be his duty to execute and enforce, through [the commissioner of banks and] the state bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to industrial banks as defined in this article. For the more complete and thorough enforcement of the provisions of this article the commissioner of banks is empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this article, as may, in his opinion, be necessary to carry out the provisions of the laws relating to industrial banks as herein defined, and as may be further necessary to insure such safe and conservative management of industrial banks under his supervision as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations and instruc-

tions that may be promulgated or issued by the commissioner of banks. (1923, c. 225, s. 11; 1931, c. 243, s. 5.)

Editor's Note. — The corresponding section of the Consolidated Statutes was sec. 263. It provided for a supervision by the commission and subjected industrial banks to an examination under the provisions of the banking laws in so far as they were applicable and not inconsistent with the article on industrial banks.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section. The substitution for the latter office was made in the phrase appearing in brackets. It seems that a more careful amendment would have stricken out such phrase, or have made it clear as to the present status of the chief state bank examiner. See sec. 221(s) and note thereto.

§ 225(l). Commissioner of banks may take charge, when.—The commissioner of banks may forthwith take possession of the business and property of any industrial bank to which this act is applicable whenever it shall appear that such industrial bank—

1. Has violated its charter or any laws applicable thereto.
2. Is conducting its business in an unauthorized or unsafe manner.
3. Is in an unsafe or unsound condition to transact its business.
4. Has an impairment of its capital stock.
5. Has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold.
6. Has become otherwise insolvent.
7. Has neglected or refused to comply with the terms of a duly issued lawful order of the commissioner of banks.
8. Has refused upon proper demand, to submit its records, affairs, and concerns for inspection and examination to a duly appointed or authorized examiner of the commissioner of banks.
9. Its officers have refused to be examined upon oath regarding its affairs.

Such banks may, with the consent of the commissioner of banks, resume business upon such terms and conditions as may be approved by him. (1923, c. 225, s. 12; 1931, c. 243, s. 5.)

Editor's Note. — The provisions of this section were new with the act of 1923.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 225(m). Sections of general law applicable.—Sections 216(a), 217(b), 217(c) as amended, 217(d), 217(f), 217(g), 217(h), 217(i), 217(j), 217(k), 217(l), 218(a), 218(c) as amended, 218(d), 219(f), 220(c), 220(j), 220(s), 220(t), 220(w), 221(a), 221(b), 221(c), 221(d), 221(e), 221(f), 221(j) as amended, 221(k), 221(m) as amended, 221(n) as amended, 222(b), 222(d), 222(e), 222(g), 222(h), 223(a), 223(b), 223(c), 223(d), 223(e), 223(f) as amended, 223(g), 224(a), 224(b), 224(d), 224(e) as amended, 224(g) as amended, 224(i) as amended, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this article. (1923, c. 225, s. 13; 1925, c. 119, s. 2; 1927, c. 141.)

Editor's Note. — The provisions of this section were new with the act of 1923.

§ 225(n). Directors, officers, etc., accepting fees, etc. — No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any industrial bank doing business under this article, on account of any transaction to which such industrial bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director or employee of any industrial bank doing business under this article. Nothing in this section shall be construed to prevent the payment of necessary and proper attorney's fees to any licensed attorney for professional services rendered. (1923, c. 225, § 14.)

Editor's Note.—The provisions of this section were new with the act of 1923.

§ 225(o). Stockholders, individual liability of.—The stockholders of every industrial bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares, except as otherwise provided. The term stockholders, when used in this act, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person, but shall not apply to a person who may hold the stock as collateral for the payment of a debt. Such additional liability as is provided in this section shall cease on July first, one thousand nine hundred thirty-five, with respect to any shares which may have been or may hereafter be issued. (1925, c. 121, s. 1; 1933, c. 159, s. 1; 1935, c. 99, s. 1.)

See § 219(a) 1.

As to stockholders right of appeal from assessment, see § 218(c), subsec. 13.

Editor's Note. — The provisions of this section were new with the act of 1923.

Public Laws 1933, c. 159, added the words, "except as otherwise provided," at the end of the first sentence of this section.

The amendment of 1935 added the last sentence providing the time the additional liability shall cease. See § 219(a) and note thereto.

In General.—For case dealing with liability of stockholder in an industrial bank for assessment on nonassessable stock owned prior to passage of this section, see Hood v. Burrus, 207 N. C. 560, 178 S. E. 362.

§ 225(p). Executors, trustees, etc., not personally liable.—Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stock-holders, but the state and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such fund would be if living and competent to hold stock in his own name. (1925, c. 121, s. 2.)

Editor's Note. — The provisions of this section were new with the act of 1923.

§ 225(q). Transferrer, not liable, when. — No person who has, in good faith and without intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to any person of full age, previous to any default in the payment of any debt or liability of the corporation, shall be subject to any personal liability on ac-

count of the nonpayment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to any default shall be liable for any such debt or liability of the corporation to the extent of such stock, in the same manner as if he had been such owner at the time the corporation contracted such debt or liability: Provided, that no transfer of the shares of stock of an insolvent State bank, made within sixty days prior to its suspension, shall operate to release or discharge the assignor thereof, but shall be prima facie evidence that such stockholder assigned the same with knowledge of the insolvency of such bank and with an intent to evade the liability thereon. (1925, c. 121, s. 3.)

Editor's Note. — The provisions of this section were new with the act of 1923.

§ 225(r). Stock sold if subscription unpaid.—Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder twenty days notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within thirty days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1925, c. 121, s. 4.)

Editor's Note.—The provisions of this section were new with the act of 1923.

§§ 226-229. Superseded by §§ 220(f), (g); 220(d); 220(i); 220(o), respectively.

Article 11. Joint Deposits; Assignments as Evidence of Insolvency; Receivers

§ 230. Deposits in two names.—When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this state, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made. (1917, c. 243, s. 1.)

Editor's Note.—There is no section in the present banking law corresponding to this section and it is no doubt in full force and effect. See note to section 216(a).

"While there is some slight reason to believe that the omission of this section from the 1921 banking act operated to repeal it, the Supreme Court in 1929 assumed that it was in force." 9 N. C. L. Rev. 14.

"It is believed that this section should be revised, so as to eliminate any doubt as to its being in force; to make it control as between the estate of the deceased and the survivor in addition to protecting the bank; so as to make it conform to the Supreme Court decision by becoming applicable only when words of survivorship are used; and so as to forestall any litigation attempting to invalidate such a device as being in violation of the Wills Act. No other statute goes this far." 9 N. C. L. Rev. 15.

Purpose—Necessity of Words of Survivorship. — Like § 220(o), this section is obviously designed to protect the bank, and does not control as between the personal representative of the deceased and the other party. While, by its terms, the statute might apply whether there are words of survivorship in the deposit record or not, the Court, in one case, held that the authority of the survivor to withdraw, where no such words were used, was revoked by the death of the other person. 9 N. C. L. Rev. 15.

When Statute Applicable.—The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of this section. The statute applies only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229.

§§ 231-238. Superseded by §§ 220(h), 220(m); 220(m); 220(f); 217(m); 224(j); 219(a); and 219(b) respectively.

§ 239. Superseded by § 218(c).

See note under sec. 218(c)

§ 240. Receiver to sue and collect from stockholders.—The receiver of the insolvent bank is empowered to demand, sue for, and collect by lawful process all indebtedness due from its stockholders, whether they reside within or without the state, and wherever they or their legal representatives may be served with process, or wherever any property belonging to them, or their estate, may be subject to attachment, garnishment, or other lawful process. All indebtedness due from such stockholders, their representatives or estates, is payable to the receiver as corporate assets, and the title thereto vests in and must be applied by him for the equal benefit of all persons entitled to share in the distribution of the fund and disbursed ratably under the orders of the court. The receiver may, within three years after an assessment on the stock, institute civil actions against the stockholders to reduce their liability thereon to final judgment, and in any such action the creditors of the bank may be proper, but are not necessary parties plaintiff. (1911, c. 25, ss. 2, 3, 6; 1931, c. 212.)

Editor's Note.—Although the banking act of 1921 did not supersede this section, it has been thought that sec. 218(c) as amended in 1927 did supersede it. See note under such section.

However, the Act of 1931 purported to amend this section by reducing the period of limitation therein from ten to three years by a word substitution. It seems that this amendment was legislative recognition that the section had not been superseded, and it is therefore set out as amended. But receivers no longer liquidate North Carolina State banks. The inference from the amending act may be that it intended to limit the time in which the commissioner of banks can sue on stockholder's liability. This inference is strengthened somewhat by the 1931 amendment of § 218(e) which makes the statute on corporate receivers applicable to bank liquidation instead of to bank receivers as formerly was the case.

But § 218(c), subsection (13), instead of providing, as does § 243, for a suit on stockholders' liability to reduce it to judgment provides that a mere assessment against a stockholder shall have the force of a superior court judgment. Subsequent proceedings are in the nature of an appeal. See Corporation Commission v. Murphy, 197 N. C. 42, 147 S. E. 667. All of this sounds inconsistent with the present amendment to § 240 so far as liability on stock assessment goes. While these amendments might have been more exactly fitted to the present scheme of banking administration, the purposes probably can be effected by judicial construction when occasion arises. 9 N. C. Law Rev. 350.

As to the period of limitation under the present law, see note to section 423.

§ 241. Superseded by § 219(d).

See note under sec. 219(d).

§ 242. Assignment by bank evidence of insolvency.—When any state bank makes a voluntary assignment of its assets to trustees, such fact is prima facie evidence of insolvency, and sufficient

to authorize the appointment of a receiver. (1911, c. 25, s. 4.)

Editor's Note.—Although there is no specific section in the new banking laws corresponding to this section there is some question, since the 1927 amendment to section 218(c), whether or not this section is still operative. Receivers are no longer appointed to liquidate banks; this is done by agents of the corporation commission under its supervision. To this extent, at least, the section is modified.

§§ 243-248. Superseded by §§ 219(e); 222(a); 222(b); 245(c); 222(d); (f); and 222(e) respectively.

§ 249. Superseded by §§ 223(a), (f).

Editor's Note.—This section has been superseded by the provisions of several sections of the banking act of 1921. The provisions providing for the appointment and removal of examiners and clerks will be found re-enacted as section 223(a). The latter part of the first sentence which required the examiners to verify the quarterly reports required to be made by C. S. section 245, is re-enacted as the first sentence of 223(b); however the examiners are now required to verify all the reports made to the commissioner of banks. The provisions for the fixing of compensation by the commissioner are re-enacted as subsections (e) and (f) of section 223(f). See article in 3 N. C. Law Rev. 79.

§ 250. Superseded by §§ 223(d), (g).

Editor's Note.—This section has been superseded by various sections of the banking act of 1921. The power to examine into the books, etc., of the bank was re-enacted, with somewhat more detail, as a portion of C. S., section 223(b). The provisions relating to the summoning, compelling attendance and examining upon oath of any officials or persons touching the affairs of the bank were re-enacted as section 223(d). The last sentence of the section relating to the report of the examiners to the commission was re-enacted as section 223(g). See article in 3 N. C. Law Rev. 79.

§ 251. Superseded by § 224(b).

§ 252. Superseded by § 223(f).

§ 253. Superseded by §§ 218(c), 223(b).

See article in 3 N. C. Law Rev. 79.

§§ 254-264. Superseded by §§ 223(e); 225(a); 225(b); 225(c); 225(d); 225(f); 225(g); 225(h); 225(i); 225(k) and 225(a) respectively.

Art. 12. Conservation of Bank Assets and Issuance of Preferred Stock

§ 264(a). Provision for bank conservators; duties and powers.—Whenever he shall deem it necessary, in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the commissioner of banks may (with the approval of the governor), appoint a conservator for such bank and require of such conservator such bond with such security as he may deem necessary and proper. The conservator, under the direction of the commissioner of banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all such rights, powers and privileges, subject to the commissioner of banks, now possessed by or hereafter given to the commissioner of banks under Section 218(c), Consolidated Statutes, as amended, as are necessary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in Section 218(c), consolidated statutes, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the state government for similar services. (1933, c. 155, s. 1.)

This article is substantially a copy as to state banks of Titles II and III of the Federal Act of March 9, 1933, Public No. 1, 73rd Congress. 11 N. C. Law Rev. 196.

§ 264(b). Examination of bank.—The commissioner of banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 264(c). Termination of conservatorship.—If the commissioner of banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 264(d). Special funds for paying depositors and creditors ratably; new deposits.—While such bank is in the hands of the conservator appointed by the commissioner of banks, the commissioner of banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratable basis, such amounts as, in the opinion of the commissioner of banks, may safely be used for this purpose; and the commissioner of banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the commissioner of banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 264(e). Reorganization on agreement of depositors and stockholders.—By the agreement of (a) depositors and other creditors of any bank representing at least seventy-five per cent in amount of its total deposits and other liabilities as shown by the books of the banks, or (b) stockholders owning at least two-thirds of each class of its outstanding capital stock as shown by the books of the bank, or (c) both depositors and other creditors representing at least seventy-five per cent in amount of the total deposits and other liabilities, and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of

the commissioner of banks as by such agreement may be determined: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the per cent thereof as above provided.

When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the commissioner of banks. In any reorganization which shall have been approved, and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

The most important feature of the law is the provision for reorganization and the issuance of preferred stock. By a reorganization agreement having the assent of certain percentages of the creditors or stockholders and also of the Commissioner of Banks, the affairs of the bank may be removed from conservatorship and restored to the Board of Directors. All non-consenting depositors and their creditors are expressly made bound by the act. The provision in the second paragraph is identical with the federal act (Sec. 207) but its validity may be questioned on a constitutional ground not applicable to the Federal Government, i. e., impairment of contract. 11 N. C. Law Rev. 196.

§ 264(f). Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers. — After fifteen days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in section 264(e) hereof, the provisions of section 264(d) with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the commissioner of banks, a notice in form approved by the commissioner of banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of section 264(d) will not be effective after fifteen days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in such bank under section 264(d) a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank under section 264(d) after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6.)

§ 264(g). Issuance of preferred stock. — Notwithstanding any other provision of this article or any other law, and notwithstanding any of the provisions of its articles of incorporation or by-laws, any bank may, with the approval of the commissioner of banks, and by vote of stockholders owning a majority of the stock of such bank, upon not less than two days' notice given by registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one days' notice) issue preferred stock in such amount and with such par value as shall be approved by said commissioner of banks. A copy of the minutes of such directors' and stockholders' meetings, certified by the proper officer and under the corporate seal of the bank, and accompanied by the written approval of the commissioner of banks shall be immediately filed in the office of the secretary of state, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such bank.

No issue of preferred stock shall be valid until the par value of all stock so issued shall have been paid for in full in cash or in such manner as may be specifically approved by the commissioner of banks. (1933, c. 155, s. 7.)

§ 264(h). Rights and liabilities of preferred stockholders.—The holders of such preferred stock shall be entitled to cumulative dividends payable at a rate not exceeding six per centum per annum, but shall not be held individually responsible as such holders for any debts, contracts or engagements of such bank, and shall not be liable for assessments to restore impairments in the capital of such banks as now provided by law with reference to holders of common stock in banks. Notwithstanding any other provisions of law, the holders of such preferred stock shall have such voting rights and such stock shall be subject to retirement in such manner and on such terms and conditions as may be provided in the articles of incorporation or any amendment thereto, with the approval of the commissioner of banks.

No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and if the bank is placed in liquidation, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock and all accumulated dividends. In the event the bank is placed in liquidation, the commissioner of banks shall, if necessary, levy an assessment under existing laws, upon the holders of common stock for the purpose of paying the par value of the preferred stock and accumulated dividends. (1933, c. 155, s. 8.)

§ 264(i). Limitations of preferred stock; not to be used as collateral for loans.—Wherever in existing banking law, the words "stock," "stockholders," "capital" or "capital stock" are used, the same shall not be deemed to include preferred stock: Provided that no bank issuing preferred stock under the provisions hereof, shall be permitted at any time to make loans upon such preferred stock; Provided further that in determining whether or not the minimum capital or capital

stock required in sections 217(a), 217(j), 220(r), 225(d), and 6379, each of Consolidated Statutes as amended, has been supplied to such bank or banking corporation, the commissioner of banks shall include preferred stock as capital or capital stock. (1933, c. 155, s. 9; 1935, c. 80.)

Editor's Note.—The amendment of 1935 added the last proviso of this section relating to the determination of whether the capital stock has been supplied.

§ 264(j). Rights and liabilities of conservator.—The conservator appointed pursuant to the provisions of this article shall be subject to the provisions of and to the penalties prescribed by sections 220(a), 224(e) and 224(f), Consolidated Statutes, as amended. (1933, c. 155, s. 10.)

§ 264(k). Naming of conservator not liquidation.—No power conferred in this article upon the commissioner of banks, when exercised, shall be deemed an act of possession for the purposes of liquidation; and whenever the commissioner of banks shall, with reference to any bank for which a conservator is appointed, deem that liquidation is necessary, he shall exercise the powers for the purposes of liquidation as provided in section 218(c) as amended. (1933, c. 155, s. 11.)

§ 264(l). Right of appeal.—The provisions of section 221(o) with reference to the right of appeal from actions taken by the commissioner of banks shall be applicable to actions taken by the commissioner of banks under the provisions of this article. (1933, c. 155, s. 12.)

CHAPTER 6
BASTARDY

§§ 265-276: Repealed by Public Laws 1933, ch. 228, codified as §§ 276(a) et seq.

§ 276(a). Non-support of bastard child by parents made misdemeanor.—Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of sections 276(a)-276(i) shall be any person less than ten years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain if such child were the legitimate child of such parent. (1933, c. 228, s. 1.)

For full treatment of the subject of this chapter see Bastards, 2 N. C. Enc. Dig. 319 et seq.

Editor's Note.—A number of the cases treated in the following note were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

The question as to whether bastardy proceedings under the former law are criminal or civil in their nature presents a subject which has occasioned much controversy, and one in which there are three sharp lines of demarcation established by the cases. The early decisions up to and including State v. Edwards, 110 N. C. 511, 14 S. E. 741, (1892) held without dissent that the proceedings were civil in their nature, and that the statute did not even carry a quasi criminal aspect.

The period between 1892 and 1904, may be designated as the criminal era; during that time several decisions were rendered by the Supreme Court which flatly reversed the former holdings. The opinion in the second of these cases, State v. Ostwalt, 118 N. C. 1208, 24 S. E. 660, delivered by Judge Avery, is a cogent and forceful declaration of the principle that as section 273 then provided for a fine and imprisonment it abrogated the clause of section 267 permitting an appeal to the state, which necessarily prevented the proceedings from assuming a criminal nature. Subsequent to these decisions, in 1904, the court again reverts to the civil theory, and in an able opinion Chief Justice Clark who had dissented consistently from the criminal theory, recapitulates the subject, refutes Judge Avery's contention (by showing that the provision of section 266, permitting a five dollar fine or imprisonment if the mother refuses to declare the father, had always been in the statute and had not influenced the former decisions), and declares that while containing some anomalous features the proceeding is a civil action. This opinion is very interesting and gives the entire history of the subject. See State v. Liles, 134 N. C. 735, 47 S. E. 750. The following decisions confirming the Liles case held that bastardy is in its nature a civil action to enforce a police regulation. State v. Addington, 143 N. C. 683, 57 S. E. 398; State v. McDonald, 152 N. C. 802, 67 S. E. 762; State v. Currie, 161 N. C. 275, 76 S. E. 694; Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490; Payne v. Thomas, 176 N. C. 401, 97 S. E. 212; State v. Carnegie, 193 N. C. 467, 468, 137 S. E. 308.

The provision for a fine of ten dollars, formerly appearing in section 273, was omitted from the Consolidated Statutes, and it would therefore appear that the legislature, by adopting the Consolidated Statutes, evinced the intention to settle finally the controversy in favor of the proponents of the civil theory.

Purpose of Act. — The object of the bastardy act was to shift the burden of maintaining the child from the innocent many to the guilty one. State v. Roberts, 32 N. C. 350, 353.

The sole aim of the proceeding is to ascertain the paternity of the child and impose upon the father the burden of its support, such as he would incur if it were his lawful instead of his illegitimate offspring, and to save the county the expense of its maintenance. State v. Collins, 85 N. C. 511, 513. See also, State v. Robeson, 24 N. C. 46; State v. Brown, 46 N. C. 129; State v. Durham, 52 N. C. 100; Ward v. Bell, 52 N. C. 79.

Liberally Construed.—As former section 265 was not a penal act, but one of police regulation, it was held that it ought to receive such a construction as would carry out the intention of the legislature and facilitate its execution. State v. Roberts, 32 N. C. 350, 351.

The old bastardy act is repealed in toto by ch. 228, Public Laws of 1933, the provisions of sec. 2 that the act should not affect pending litigation or accrued actions being repugnant to the specific repealing clause of sec. 9, and in a prosecution under the Act of 1933 a demurrer on the grounds that proceedings under the old bastardy act were then pending should be overruled. See State v. Morris, 208 N. C. 44, 179 S. E. 19, holding that the Act of 1933 was intended to cover the entire subject dealing with bastardy.

And Proceeding under Former Law Will Not Bar Proceeding under Present Statute. — Bastardy proceedings against defendant under C. S., 265, et seq. (repealed by sec. 9, ch. 228, Public Laws of 1933), being civil, will not support a plea of former jeopardy in a prosecution under this and the following sections for wilful failure to support his illegitimate child. State v. Mansfield, 207 N. C. 233, 176 S. E. 761.

Warrant Must Charge a Crime.—Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed, since the defect is one appearing on the face of the record. State v. Tyson, 208 N. C. 231.

The failure of the warrant to charge defendant with wilful failure to support his illegitimate child is not cured by the charge or verdict, where the warrant fails to charge any criminal offense. Id.

The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the putative father of an unborn, illegitimate child is insufficient to support a prosecution under this statute, nor is such insufficiency cured by an amendment allowing the word "wilful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child. State v. Tyson, 208 N. C. 231.

Wilfulness Is Essential Element of Offense.—The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was wilful, that is, without just cause, excuse or justification. The wilfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proven beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of wilfulness in any failure on his part to support

his illegitimate child. The failure to support may be an evidential fact tending to show a wilful neglect, but it does not raise a presumption of wilfulness. State v. Cook, 207 N. C. 261, 262, 176 S. E. 757.

Construing the word "wilful" in the light of the decided cases, it is clear that one cannot be brought within the meaning of the statute without proving the criminal intent, and that it is error for the court to charge the jury that if the defendant failed to support his illegitimate child "the presumption is he wilfully did so." Id.

The word "wilfully" as used in the statute is used with the same import as in the act relating to wilful abandonment of wife by husband (see § 4447). State v. Cook, 207 N. C. 261, 262, 176 S. E. 757, and authorities therein discussed.

It is worthy of note that the new act operates against both parents, not primarily the father, and it is a criminal, not a civil statute; it begins by making wilful failure to support the illegitimate child by "any parent" a misdemeanor. It is the failure to support, not the bastardy, which is made a crime. The consequence or punishment of the crime is the fixing of a sum to be paid by the parent for the support of the child. The failure to pay this sum brings on the other possible consequences as previously enumerated. No provision is made for execution against the parent for the sum fixed; there is no section comparable to former § 275. The only means of enforcing payment specifically provided in the act are the list of alternatives above set forth to which the court can turn if payment is not made. 11 N. C. Law Rev. 205, 206.

The proceeding now being a criminal one, probably the defendant is now legally subject to extradition. See 11 N. C. Law Rev. 191, 206.

§ 276(b). Place of birth of child no consideration. — The provisions of sections 276(a)-276(i) shall apply whether such child shall have been begotten or shall have been born within or without the state of North Carolina: Provided, that the child to be supported is a bona fide resident of this state at the time of the institution of any proceedings under this act: Provided, the provisions of this act shall not apply to pending litigation or accrued actions. (1933, c. 228, s. 2.)

§ 276(c). Action must be commenced within three years after birth.—Proceedings under §§ 276-(a)-276(i) may be instituted at any time within three years next after the birth of the child and not thereafter. (1933, c. 228, s. 3.)

Editor's Note.—A number of the cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

In General.—Even when bastardy proceedings were considered criminal in their nature it was held that former § 274 provided the limitation and that such proceedings were not controlled by the provision limiting criminal prosecutions for misdemeanors to two years. State v. Perry, 122 N. C. 1043, 30 S. E. 139; State v. Hedgepeth, 122 N. C. 1039, 30 S. E. 140.

Compliance Must Appear from Examination.—The examination of the mother must appear on its face to have been taken within three years otherwise it will be quashed, State v. Lebetter, 26 N. C. 242. The objection however, must be made in the proper mode and at the proper time, i. e., before issue is tendered, or it will be deemed waived. State v. Robeson, 24 N. C. 46; State v. Carson, 19 N. C. 368.

A defendant may be prosecuted under this statute, for wilful failure to support his illegitimate child born after the passage of the act although the child was begotten before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is ex post facto cannot be sustained, since the offense is the wilful failure to support the child, and the time it was begotten is immaterial. State v. Mansfield, 207 N. C. 233, 176 S. E. 761, followed in State v. Morris, 208 N. C. 44, 179 S. E. 19.

§ 276(d). Parties plaintiff; indictments; death of mother no bar; determination of fatherhood.— Proceedings under sections 276(a)-276(i) may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the superintendent of public welfare or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Indictments under sections 276(a)-276(i) may be returned in the county where the mother resides or is found, or in the county where the putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the state of North Carolina shall not be a bar to indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in no wise affect any proceedings under sections 276(a)-276(i). Preliminary proceedings under sections 276(a)-276(i) to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next term of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4.)

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

In General. — The woman is not obliged to swear the child, provided she pays a fine of five dollars and gives bond for its maintenance. Self v. Clark, 55 N. C. 309, 311. See also, State v. Brown, 46 N. C. 129; State v. Price, 81 N. C. 516; State v. Crouse, 86 N. C. 617.

Married Women. — It was held in State v. Pettaway, 10 N. C. 623, and in State v. Wilson, 32 N. C. 131, cited with approval in State v. Allison, 61 N. C. 346, that, though the section specifies "any single woman big with child or delivered of the child," the subsequent language in the section, that the object is to protect the public against the charge of maintaining bastard children, includes married women, since a bastard child can be begotten upon a married woman as well as upon a single woman. See State v. Liles, 134 N. C. 735, 742, 47 S. E. 750; Wilkie v. West, 5 N. C. 319.

Child Not Born.—The former statute expressly authorized the mother to proceed against the putative father before the child was born, that is, when it was en ventre sa mere. The Court may continue the proceedings until the birth of the child. This clearly implies that the proceedings may be commenced during pregnancy. State v. Wynne, 116 N. C. 981, 21 S. E. 35; State v. Addington, 143 N. C. 683, 687, 57 S. E. 398.

Formalities of the Examination. — The examination need not be signed by the mother and if the warrant issued, signed by the justices, is on the same paper as the examination it is a sufficient signature of the examination. State v. Thompson, 26 N. C. 484; in any event the signature may be made by amendment. State v. Thomas, 27 N. C. 366. But the examination must be under oath as prescribed by the section or the proceedings will be quashed. State v. Ledbetter, 26 N. C. 242, 245.

Venue. — In bastardy cases the jurisdiction of the justice to issue the warrant before the birth of the child, depends upon the domicil of the mother at the time, and not on her legal place of settlement; and if the mother continues to reside in the same county until the birth of her child, making her whole residence therein more than twelve months, the full jurisdiction of the case will be in that county. State v. Hales, 65 N. C. 244. See also, State v. Elam, 61 N. C. 460; Merritt v. McQuaig, 63 N. C. 551.

The Judgment. — Under former section 267 authorizing the Court, in bastardy proceedings, to commit defendant "until he find surety," such a judgment though conditional, was valid. State v. Wynne, 116 N. C. 981, 21 S. E. 35. See 2 N. C. Enc. Dig. 349 sec. 60 et seq.

Promise of Father to Support Child. — Where the mother of a bastard child has refrained from enforcing maintenance thereof under former § 267, this was held to

constitute consideration to support an action on a promise of the father to support and educate it. Thayer v. Thayer, 189 N. C. 502, 127 S. E. 553.

The Appeal.—The provision in former section 267 that either party could appeal, applied to the affiant, the woman or the defendant, and so did not conflict with the general rule that the State may not appeal from a judgment upon a verdict of not guilty. Myers v. Stafford, 114 N. C. 234, 241, 19 S. E. 764. See Editor's note to sec 276(a).

A bastardy proceeding under the former law was, in its principal features and purposes, a civil action, and was within the operation of Superior Court Rule 24, which provides that appeals from Justices of the Peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term. State v. Edwards, 110 N. C. 511, 14 S. E. 741.

Rights of Surety. — The surety on the appearance bond of the defendant in bastardy proceedings appealed from a justice of the peace to the county court and there remanded for want of jurisdiction, may insist upon the exact terms of his bond; and where the defendant has been legally convicted and has served his term as the law provides on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability has been discharged. State v. Carnegie, 193 N. C. 467, 137 S. E. 308.

Death of Child. — What kind of order should be entered where the child dies pending the trial at the next term of court, is in the discretion of the judge. Former § 268 seemed to require an order in every case. State v. Beatty, 66 N. C. 648.

§ 276(e). Mother not excused on ground of self-incrimination; not subject to penalty; not compellable to testify against accused.—No mother of an illegitimate child shall be excused, on the ground that it may tend to incriminate her or subject her to a penalty or a forfeiture, from attending and testifying, in obedience to a subpoena of any court, in any suit or proceeding based upon or growing out of the provisions of §§ 276(a)-276(i), but no such mother shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, she may so testify, nor shall she be forced or compelled to testify against the accused party against her will. (1933, c. 228, s. 5.)

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

Constitutionality.—Former § 269 which provided that the woman's evidence as to paternity of child would be presumptive against accused was held constitutional and valid, being a change made in the rule of evidence, within the legislative power. State v. McDonald, 152 N. C. 802, 803, 67 S. E. 762.

The Legislature clearly has the power upon the trial of certain classes of criminal or civil actions, to provide that artificial weight shall be given to specific kinds of testimony such as provided by this section. State v. Burton, 113 N. C. 655, 18 S. E. 657; State v. Cagle, 114 N. C. 835, 19 S. E. 766; State v. Mitchell, 119 N. C. 784, 25 S. E. 783, 1020; State v. Rogers, 119 N. C. 793, 794, 26 S. E. 142.

"The Legislature has the power to make cases of this nature an exception to the general rule, and to make the examination of the woman presumptive evidence." State v. Burton, 113 N. C. 655, 664, 18 S. E. 657.

Meaning of Presumptive. — Prima facie evidence is that which is received or continues until the contrary is shown. Kelly v. Johnson, 6 Peters, (U. S.) 622. It is clear from the terms of this section that the word "presumptive" is used to define evidence that must be received and treated as true "till rebutted by other testimony, which may be introduced by the defendant," and that it is therefore synonymous with prima facie. State v. Mitchell, 119 N. C. 784, 785, 25 S. E. 783, 1020.

Proceedings in bastardy are of an anomalous nature, and therefore, though such proceedings are of civil character, the decisions that the terms "prima facie" and "presumptive," when applicable to civil issues, affect only the burden of proof, and not of the issue, are not applicable in proceedings in bastardy; and the affidavit of the prosecutrix, when properly made and presented in evidence, changes the burden of the issue as to defendant's paternity, and places on the defendant the burden of showing to the contrary. State v. McDonald, 152 N. C. 802, 67 S. E. 762.

Shifting Burden. — This section simply shifts the burden of proof as in the case of an indictment for an escape. Myers v. Stafford, 114 N. C. 234, 241, 19 S. E. 764. But see State v. Patton, 27 N. C. 180, 185.

Rebuttal. — The burden of rebutting the presumption raised by this section is on the putative father. State v. McDonald, 152 N. C. 802, 67 S. E. 762.

"The charge that if the oral testimony offered by the prosecution and the defendant, taken together, 'left the minds of the jury in doubt, then the presumption raised by the written examination (of the woman) would not be rebutted and the defendant would be guilty,' is correct. State v. Rogers, 79 N. C. 609." State v. Williams, 109 N. C. 846, 848, 13 S. E. 880.

Evidence of illicit intercourse with another man, offered by defendant, nine months previous to the birth of the child does not tend to rebut the presumption of paternity created by this section. State v. Bennett, 75 N. C. 305.

If presumptive evidence is not rebutted the preponderance upon the issue of paternity was on the side of the State, and there could be no even balance. State v. Williams, 109 N. C. 846, 13 S. E. 880; State v. Rogers, 79 N. C. 609; State v. Cagle, 114 N. C. 835, 839, 19 S. E. 766.

See note of State v. Carnegie, 193 N. C. 467, 137 S. E. 308, under section 276(d).

§ 276(f). Jurisdiction of inferior courts; orders. —Proceedings under this act may be instituted in any court inferior to the superior court in any county wherein such proceedings may be instituted under the provisions of sections 276(a)-276(i).

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to coöperate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this act or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof. (1933, c. 228, s. 6.)

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

Jurisdiction.—Former § 265 expressly conferred jurisdiction upon justices of the peace. State v. Mize, 117 N. C. 780, 23 S. E. 330. Some conflict is apparent from the cases (due to the opposing theories as to whether the proceeding was criminal or civil) in regard to the jurisdiction of the superior court; it would seem now to be well settled that the justice has exclusive jurisdiction. Ed. Note.

§ 276(g). Power of court to modify orders; sus-

pend sentence, etc.—Upon the determination of the issues set out in the foregoing section and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to coöperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require. The order or orders made in this regard may include any or all of the following alternatives:

(a) Commit the defendant to prison for a term not to exceed six months;

(b) Suspend sentence and continue the case from term to term;

(c) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;

(d) Apprentice the defendant to the superintendent of the county home to be employed there at a salary to be fixed by the board of county commissioners, or to some other person who will give bond for compliance with sections 276(a)-276(i), at a salary to be fixed by the board of county commissioners, the proceeds of his earnings to be paid to such person as the court may direct for the support, maintenance and education of the said child; and

(e) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;

(f) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this act. (1933, c. 228, s. 7.)

See the note to § 276(a).

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

Constitutionality.—Proceedings in bastardy under former § 273 for an allowance to be made to the woman were civil and not criminal, for the enforcement of police regulations, and that section was held not to be contrary to the provisions of the Constitution, Art. IV, sec. 27. Richardson v. Egerton, 186 N. C. 291, 119 S. E. 487.

A judgment for an allowance for the mother of the bastard, is not a debt arising out of contract, to which the protection afforded by the inhibition of the Constitution, Article I, sec. 16, extended, but is rendered as a means of enforcing a legal obligation and duty imposed by the Legislature under the police power of the State upon one who is responsible for bringing into existence a bastard child that may become a burden to society. State v. Cannady, 78 N. C. 539; State v. Parsons, 115 N. C. 730, 20 S. E. 511; State v. Manuel, 20 N. C. 144; State v. Nelson, 119 N. C. 797, 799, 25 S. E. 863; State v. Wynne, 116 N. C. 981, 21 S. E. 35.

Effect of Death of Child.—Under former § 273 the intention was to secure to the mother either her probable expenses or to reimburse her actual outlay, and the death of the child when born did not affect the right of the mother to "support"; among other things, she was entitled to pay for medical attention and medicine for herself, and the burial expenses of the child, consequent upon the defendant's unlawful act. State v. Addington, 143 N. C. 683, 57 S. E. 398.

The section simply required that this allowance should be made without directing how the money should be spent. This left it discretionary with her as to how she would apply it. She was compelled to pay for medical attention and medicine for herself, and the burial expenses of the child, all consequent upon the defendant's unlawful act. State v. Addington, 143 N. C. 683, 688, 57 S. E. 398.

Suggestion of Fraud.—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Cumulative Remedy.—Former § 275 which authorized a summary remedy against the reputed father of a bastard child was not a recital of the common-law right of suing all or either of the obligors on the bastardy bond; and in suits on such bond the notice required by the section need not be shown. Shew v. Stewart, 18 N. C. 412.

The summary remedy prescribed by that section was only cumulative, and applied only as against the reputed father, and not as against his securities on the bastardy bond. Shew v. Stewart, 18 N. C. 412.

Notice.—Where the mother of a bastard obtained judgment against the putative father, and purchased his land under an execution thereon, held, that in the ejectment for the land, she must prove the father had notice of her intention to move for judgment, or that the sheriff had returned non est inventus. Doe v. McCoy, 13 N. C. 391.

Defenses.—In a proceeding under that section a defendant, who alleged that he had paid the mother of the child a certain sum, for which he exhibited her receipt, which receipt, it was contended and so charged by said mother, was obtained from her by fraud, was entitled to have the issue thus joined tried by a jury; and it was error in the court below to refuse a trial by jury, when demanded by the defendant. State v. Beasely, 75 N. C. 211.

Same—Right to Claim Exemption.—The father was not entitled to the constitutional exemption of $500 as against such debt due the mother. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Imprisonment.—Where defendant was in default only for a fine of $10 and an allowance of $50 to the mother of the bastard, a sentence to imprisonment at hard labor for twelve months was excessive. State v. Nelson, 119 N. C. 797, 25 S. E. 863.

Imprisonment of the putative father for failure to obey an order of maintenance, or to give the bond, is a matter of legislative discretion, and is not imprisonment for debt. State v. Morgan, 141 N. C. 726, 53 S. E. 142; State v. Green, 71 N. C. 172; State v. Wynne, 116 N. C. 981, 21 S. E. 35.

Work on Roads.—When there is no house of correction in the county, the court can only commit the putative father to jail until the performance of the order of support. He cannot be put to work on roads. State v. Addington, 143 N. C. 683, 57 S. E. 398, overruling Myers v. Stafford, 114 N. C. 234, 19 S. E. 764.

Effect of Discharge.—After the defendant who had served a twenty day sentence for failure to pay under former § 276 had been discharged he could not be resentenced to the house of correction at a subsequent term. State v. Burton, 113 N. C. 655, 18 S. E. 657.

Insolvent Debtor's Law.—The provision of that section for imprisonment did not render the section unconstitutional as the defendant could be relieved by the insolvent debtor's law. State v. Giles, 103 N. C. 391, 9 S. E. 433; State v. Morgan, 141 N. C. 726, 53 S. E. 142; State v. White, 125 N. C. 675, 34 S. E. 532. For full treatment, see sec. 1632 and notes thereto.

Appeal.—Where judgment has been awarded in bastardy proceedings in conformity with former § 273, and upon defendant's motion in the Superior Court the judge has set the judgment aside upon sufficient evidence, the facts found accordingly are not reviewable on appeal to the Supreme Court. Baker v. West, 190 N. C. 335, 129 S. E. 804.

§ 276(h). Bond for future appearance of defendant.—At the preliminary hearing of any case arising under sections 276(a)-276(i) it shall be the duty of the court, if it finds reasonable cause for holding the accused for a further hearing, to require a bond in the sum of not less than one hundred dollars, conditioned upon the reappearance of the accused at the further hearing under sections 276(a)-276(i). This bond and all other bonds provided for in sections 276(a)-276(i) shall be justified before, and approved by, the court or the clerk thereof. (1933, c. 228, s. 8.)

§ 276(i). Title.—This statute shall be referred to as "An act concerning the support of children of parents not married to each other." (1933, c. 228, s. 11.)

§ 277. Legitimation of bastards.—The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which he resides, praying that such child may be declared legitimate; and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree. (Rev., s. 263; Code, s. 39.)

Private Acts of Legitimation.—For construction of private laws legitimating children, see 2 N. C. Enc. Dig. 325, 326.

Petition Addressed Directly to Judge. — The action of the judge of the court having jurisdiction in passing upon the matter is within the intent and meaning of the statute, and his decree is not void upon the ground that the petition should have been originally addressed to the clerk of the court. Dunn v. Dunn, 199 N. C. 535, 155 S. E. 165.

Right of Inheritance.—In Love v. Love, 179 N. C. 115, 117, 101 S. E. 562, it was said: "This statute seems to be clear enough on its face. It limits the right to inherit to the properties of the adopting father, and so clearly that it would seem unnecessary to cite authorities; but if authorities are necessary, it will appear that this Court has construed this and other statutes on all-fours to the effect that the legitimated child can only inherit from the adopting father, and cannot inherit from the father's ancestors or other kindred, or be representative of them. Such adopted child cannot be issue or heir general. The word 'only' as used in this statute qualifies the words 'inherit from the father,' and not the word 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father."

Presumption.—There exists a rebuttable presumption that child born in wedlock is legitimate. West v. Redmond, 171 N. C. 742, 88 S. E. 341.

§ 278. Effects of legitimation. — The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock. (Rev., s. 264; Code, s. 40.)

In General.—The plain intent and language of section 185 and this section is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father " in the same manner as if it had been born in lawful wedlock." Love v. Love, 179 N. C. 115, 116, 101 S. E. 562.

"The word 'only' as used in this section qualifies the words 'inherit from the father,' and not the words 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father." Love v. Love, 179 N. C. 115, 117, 101 S. E. 562.

§ 279. Legitimation by subsequent marriage.—When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock. (1917, c. 219, s. 1.)

Editor's Note.—Prior to the passage of this section in 1917, marriage of the parents did not legitimate the previous offspring. Ashe v. Cam. Mfg. Co., 154 N. C. 241, 70 S. E. 295.

But where, by the laws of the domicile of the parents at the time of the birth of their bastard child and of their marriage, their marriage legitimates him, the legitimacy attached at the time of the marriage, he being a minor, and follows him wherever he goes. Fowler v. Fowler, 131 N. C. 169, 42 S. E. 563.

Constitutionality.—Only those who would inherit, or have a vested right in the lands, may contest the constitutionality of this section, providing that a child born out of wedlock may inherit from her father who thereafter married the mother of the bastard. Bowman v. Howard, 182 N. C. 662, 110 S. E. 98.

Construed Strictly.—This section is strictly construed as being in derogation of the common law. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

Section Retroactive.—This section is, by its express terms, retroactive as well as prospective in effect; and upon the dying intestate of the father, under the facts of this case, the son is entitled to the balance of the proceeds of the sale of land to make assets to pay debts, subject to his mother's dower right, after paying creditors and court costs, as against the collateral heirs of the father. Stewart v. Stewart, 195 N. C. 476, 142 S. E. 577.

The provisions of this section are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

Irregularity in divorce proceedings is not, by virtue of this section, ground for declaring children by a subsequent marriage illegitimate. Reed v. Blair, 202 N. C. 745, 164 S. E. 118.

Inheritance from Maternal Uncle.—The provisions of this section do not extend to such inheritance from a maternal uncle dying intestate after the death of the mother through whom the claim is made as next of kin. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

How Shown.—Where one claims lands of his father by descent by reason of the subsequent marriage of his parents, the child so born is recognized as legitimate for the purpose of inheriting, and this may be shown by evidence of the declaration of the parents or by family traditions ante litem motam, this being an exception to the rule excluding hearsay evidence. Bowman v. Howard, 182 N. C. 662, 110 S. E. 98.

"Reputed Father."—In Bowman v. Howard, 182 N. C. 662 666, 110 S. E. 98, the Court said: " 'No contention as to the statute was made by the defendant except as the construction of the words "reputed father," which the defendant contended should be construed to mean "actual father." ' The exception is not meritorious. The word 'reputed' means considered, or generally supposed, or accepted by general or public opinion."

In Bowman v. Howard, 182 N. C. 662, 666, 110 S. E. 98, it was said: "In McBride v. Sullivan, 155 Ala. 174, Simpson, J., says: 'The use of the word "reputed" was intended merely to dispense with absolute proof of paternity, so that if the child is "regarded," "deemed," "considered," or "held in thought" by the parents themselves as their child, either before or after marriage, it is legitimate.' "

CHAPTER 7

BILLS OF LADING

Art. 1. General Provisions

§ 280. General definitions.—In this chapter, unless the context of subject-matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this chapter.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

"To purchase" includes to take as mortgagee and to take as pledgee. (1919, c. 65, s. 42.)

§ 281. Provisions of this chapter do not apply to existing bills.—The provisions of this chapter do not apply to bills made and delivered prior to the taking effect thereof. (1919, c. 65, s. 43.)

Editor's Note.—Previous to the adoption of this chapter it was the general rule that a bill of lading issued by a railroad company, for the transportation and delivery of freight, when accepted by the shipper and consignee became a valid and binding contract between them as to all reasonable stipulations thereon. Culbreth v. R. R., 169 N. C. 723, 86 S. E. 624; Mfg. Co. v. R. R., 121 N. C. 514, 28 S. E. 474.. And it was also held that the delivery to the shipper of a bill of lading was not necessary to bind the carrier. Smith v. R. R., 163 N. C. 143, 79 S. E. 433; Berry v. R. R., 122 N. C. 1002, 30 S. E. 14.

§ 282. Provisions and sections of this chapter are independent and severable.—The provisions and each part thereof, and the sections and each part thereof of this chapter are independent and severable, and the declaring of any provision or part thereof, or provisions or parts thereof, or section or part thereof, or sections or parts thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof, or section or part thereof. (1919, c. 65, s. 44.)

Art. 2. Issue of Bills of Lading

§ 283. Bills governed by this chapter.—Bills of lading issued by any common carrier for the transportation of goods from one point in North Carolina to another shall be governed by this chapter. (1919, c. 65, s. 1.)

§ 284. Definition of straight bill.—A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill. (1919, c. 65, s. 2.)

§ 285. Definition of order bill.—A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void, and shall not affect its negotiability within the meaning of this chapter unless upon its face and in writing agreed to by the shipper. (1919, c. 65, s. 3.)

§ 286. Order bills must not be issued in sets.—Order bills issued in North Carolina for transportation of goods from one point to another in North Carolina shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. (1919, c. 65, s. 4.)

§ 287. Duplicate order bills must be so marked.—When more than one order bill is issued in North Carolina for the same goods to be transported to any place in North Carolina, the word "duplicate" or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. (1919, c. 65, s. 5.)

§ 288. Straight bill shall be marked "nonnegotiable."—A straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character. (1919, c. 65, s. 6.)

§ 289. Insertion of name of person to be notified.—The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. (1919, c. 65, s. 7.)

Editor's Note.—Formerly it was the rule in this state that when goods were shipped under a bill of lading made out to the order of the vendor, the mere insertion of the name of the consignee to be notified, would not bring such consignee into contract relations with the carrier so as to enable him to bring suit against the carrier for delay, damage, etc. Mfg. Co. v. R. R., 149 N. C. 261, 62 S. E. 1091, and likewise in such a case the rule was that title did not pass until the draft was paid, id.; Bank v. R. R., 153 N. C. 346, 69 S. E. 261; Killingsworth v. R. R., 171 N. C. 47, 87 S. E. 947. But the law has been changed by legislative enactment. See sections 290 and 313 and annotations thereunder.

For a recent case of shipment made "Order, notify" see Watts v. R. R., 183 N. C. 12, 110 S. E. 582.

Art. 3. Obligations and Rights of Carriers upon Bills of Lading

§ 290. Obligation of carrier to deliver.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

1. An offer in good faith to satisfy the carrier's lawful lien upon the goods;

2. Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods if the bill is an order bill; and

3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. (1919, c. 65, s. 8.)

Possession of Properly Endorsed Bill is Sufficient. — An order bill of lading indorsed by the shipper, in the possession of the plaintiff is sufficient evidence of the plaintiff's ownership of the bill and of the goods for which the bill was issued. Temple v. R. R., 190 N. C. 439, 440, 129 S. E. 815.

Consignee Must Produce Bill.—The failure or refusal of consignee to produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession is ordinarily a valid defense to an action to re-

cover of the carrier the value of a shipment, which has never been delivered, but the burden is upon the carrier to prove that such demand has been made and not complied with. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

Bill Must Be Properly Endorsed.—Where shipper paid the draft and obtained the bill of lading but failed to have it endorsed by a certain bank as required by the terms of the bill, the carrier was not liable for failure to deliver the goods. Killingsworth v. R. R., 171 N. C. 47, 87 S. E. 947.

§ 291. Justification of carrier in delivery.—A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

1. A person lawfully entitled to the possession of the goods; or

2. The consignee named in a straight bill for the goods; or

3. A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (1919, c. 65, s. 9.)

§ 292. Carrier's liability for misdelivery.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 1 and 2 of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

1. Had been requested by or on behalf of a person having a right of property or possession in the goods not to make such delivery; or

2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request for information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (1919, c. 65, s. 10.)

§ 293. Order bills must be cancelled when goods delivered.—Except as provided in § 308, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. (1919, c. 65, s. 11.)

§ 294. Order bills must be canceled or marked when part of goods delivered.—Except as provided in section 308, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails, either—

1. To take up and cancel the bill, or

2. To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. (1919, c. 65, s. 12.)

§ 295. Altered bills.—Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, whether in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. (1919, c. 65, s. 13.)

§ 296. Lost or destroyed bills.—Where an order bill has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction, and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also, in its discretion, order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without an order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been, or shall be, negotiated for value without notice of the proceedings or of the delivery of the goods. (1919, c. 65, s. 14.)

§ 297. Effect of duplicate bills.—A bill, upon the face of which the word "duplicate," or some other word or words indicating that the document is not an original bill, is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. (1919, c. 65, s. 15.)

§ 298. Carrier can not set up title in himself.—No title to the goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of the bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. (1919, c. 65, s. 16.)

§ 299. Interpleader of adverse claimants.—If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate. (1919, c. 65, s. 17.)

As to bringing parties in by order of court see section 460.

§ 300. Carrier has reasonable time to deter-

mine validity of claims.—If some one other than the consignee or the person in possession of the bill has claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1919, c. 65, s. 18.)

§ 301. Adverse title is no defense as above provided.—Except as provided in the preceding sections of this article, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand. (1919, c. 65, s. 19.)

§ 302. Carriers not to insert "shipper's load and count" when goods are loaded by carrier.—When goods are loaded by a carrier, such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity, if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation or tariff, "shipper's weight, load count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or, in case of bulk freight and freight not concealed by packages, the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (1919, c. 65, s. 20.)

§ 303. Liability for nonreceipt or misdescription of goods loaded by shipper.—When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill of lading the words "shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and, if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading. Where the shipper of bulk freight, however, installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carrier shall not in such case insert in the bill of lading the words "shipper's weight," or other words of like purport; and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (1919, c. 65, s. 21.)

Editor's Note. — The rule formerly was that when goods were sent "shipper's load and count" the bill of lading was only prima facie evidence that the carrier received the goods described in it. And where the evidence showed that the loading was all done by the shipper the burden was upon the plaintiff to prove that the goods were actually delivered to the carrier. Peele v. R. R., 149 N. C. 390, 393, 63 S. E. 66. But see the next section where this rule is changed.

§ 304. Liability for nonreceipt or misdescription of goods.—If a bill of lading has been issued by a carrier, or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among several states and with foreign nations, the carrier shall be liable to—

1. The owner of goods covered by a straight bill, subject to existing right of stoppage in transit; or

2. The holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue. (1919, c. 65, s. 22.)

Editor's Note.—This section changes the rule which was laid down in the case cited in the preceding section, Peele v. R. R., 149 N. C. 390, 63 S. E. 66. For other cases which are in accord with the Peele case, supra, see Williams, Black & Co. v. R. R., 93 N. C. 42; Commercial Bank v. R. R., 175 N. C. 415, 95 S. E. 777. These latter cases went to the extent of holding that where the carrier had issued a bill of lading "shippers load and count" the carrier was not liable even to a holder of the bill who had taken it for value and without notice. This old doctrine as laid down in these cases is contrary to the modern theory of the negotiability of order bills of lading.

§ 305. Attachment or levy upon goods for which an order bill has been issued.—If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. (1919, c. 65, s. 23.)

§ 306. Creditor's remedy to reach order bills.—A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1919, c. 65, s. 24.)

§ 307. Lien for charges under order bill.—If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. (1919, c. 65, s. 25.)

§ 308. Effect of sale.—After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill. (1919, c. 65, s. 26.)

Art. 4. Negotiation and Transfer of Bills

§ 309. Negotiation of order bills by delivery.—An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank. (1919, c. 65, s. 27.)

§ 310. Negotiation of order bills by indorsement.—An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. (1919, c. 65, s. 28.)

§ 311. Transfer of bills.—A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right. (1919, c. 65, s. 29.)

In General.—The meaning of this section is that a valid transfer of a bill of lading is effected by the holder when he delivers it to a third party with the intention of transferring the title to the property represented thereby. Lawshe v. R. R., 191 N. C. 473, 475, 132 S. E. 160.

§ 312. Who may negotiate a bill.—An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. (1919, c. 65, s. 30.)

§ 313. Rights of person to whom a bill has been negotiated.—A person to whom an order bill has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. (1919, c. 65, s. 31.)

See Editor's Note under section 289.

In General.—The person to be notified on shipment to order of consignor has, by this section, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him direct, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. Watts v. Norfolk Southern R. Co., 183 N. C. 12, 110 S. E. 582.

§ 314. Rights of person to whom a bill has been transferred.—A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods. (1919, c. 65, s. 32; 1919, c. 290.)

§ 315. Transfer of negotiable bill without indorsement.—Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (1919, c. 65, s. 33.)

§ 316. Warranties on sale of bill.—A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

1. That the bill is genuine;
2. That he has a legal right to transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the bill;
4. That he has a right to transfer the title to

the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby. (1919, c. 65, s. 34.)

§ 317. Indorser not a guarantor.—The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorser of the bill to fulfill their respective obligations. (1919, c. 65, s. 35.)

§ 318. No warranty implied from accepting payment of a debt.—A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt, or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described. (1919, c. 65, s. 36.)

Editor's Note.—The rule which this section lays down stated by the court in Mason v. Cotton Co., 148 N. C. 492, 497, 498, 62 S. E. 625 and the earlier case of Finch v. Gregg, 126 N. C. 176, 35 S. E. 251 was discussed and overruled.

§ 319. When negotiation not impaired by fraud, accident, mistake, duress or conversion.—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion. (1919, c. 65, s. 37.)

§ 320. Subsequent negotiaton.—Where a person, having sold, mortgaged or pledged goods which are in a carrier's possession and for which an order bill has been issued, or, having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. (1919, c. 65, s. 38.)

§ 321. Negotiation defeats vendor's lien. — Where an order bill has been issued for goods no seller's lien or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transit. Nor shall the carrier be obliged to deliver or be justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. (1919, c. 65, s. 39.)

§ 322. When rights and remedies under mortgages and liens are not limited.—Except as provided in the preceding section, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien, and obtained possession of them. (1919, c. 65, s. 40.)

Art. 5. Criminal Offenses

§ 323. Issuing false bills or violating chapter made felony.—Any person who knowingly, or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment in this state, or with intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates or fails to comply with, or aids in any violation of, or failure to comply with any provision of this chapter, shall be guilty of a felony and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or both. (1919, c. 65, s. 41; 1919, c. 290.)

CHAPTER 8

BONDS

Art. 1. Official Bonds

§ 323 (a). Officers and employees charged with responsibility for cash to be surety bonded.—All officers, officials and employees of the State charged with responsibility for cash, securities and/or property shall be surety bonded in corporate sureties admitted to do business in the State in such sums as may be fixed by the Governor and the Advisory Budget Commission. The premiums on such surety bonds will be paid by the State out of the appropriations to the respective departments and institutions and other agencies. (1929, c. 337, s. 5.)

§ 324. Irregularities not to invalidate.—When any instrument is taken by or received under the sanction of the board of county commissioners, or by any person or persons acting under or in virtue of any public authority, purporting to be a bond executed to the state for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring of the office or making of the appointment, or any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the state for the benefit of the person injured by a breach of the condition thereof, in the same

manner as if the office had been duly conferred or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law: Provided, that no action shall be sustained thereon because of a breach of any condition thereof or any part of the condition thereof which is contrary to law. (Rev., s. 279; Code, s. 1891; R. C., c. 78, s. 9; 1842, c. 61; 1869-70, c. 169, s. 16.)

Cross Reference.—For an interesting article concerning the law of contracts, and referring generally to the instant section, see 13 N. C. Law Rev. 65, 76.

In General.—This section does not have the effect of introducing into an official bond provisions which are not, but ought to have been inserted in the conditions, so as to extend the liabilities of the obligors; but the purpose is to cure certain defects and irregularities in conferring the office and accepting the instrument, and to maintain its validity as an official undertaking, as far as it goes, notwithstanding the penalty or condition may vary from those prescribed by law. State v. Pool, 27 N. C. 105; State v. McMinn, 29 N. C. 344; State v. Jones, 29 N. C. 359; Commissioners v. Magnin, 86 N. C. 286, 289.

The section had a retroactive operation. State v. Jones, 29 N. C. 359; State v. Pool, 27 N. C. 105.

Official bonds should be liberally construed and any variance in the condition of such an instrument from the provisions prescribed by the law will usually be treated as an irregularity, in view of this section, but this principle does not abrogate the freedom of contract. Washington v. Trust Co., 205 N. C. 382, 385, 171 S. E. 438.

Nor does this rule preclude the parties from contracting in the bond for liability for a shorter period than the official term of office of the principal. Id.

Validity as Common-Law or Voluntary Bonds.—A statutory bond, not duly executed, or not conditioned as required by statute, may be sustained as a common-law or voluntary bond. Chambers v. Witherspoon, 10 N. C. 42; Justices v. Armstrong, 14 N. C. 284; Justice v. Dozier, 14 N. C. 287; Williams v. Ehringhaus, 14 N. C. 297; Vanhook v. Barnett, 15 N. C. 268; Davis v. Somerville, 15 N. C. 382; State v. McAlpin, 26 N. C. 140; Reid v. Humphreys, 52 N. C. 258.

Name of Constable Omitted.—Where a constable's official bond was signed by the obligors but a blank was left for the name of the constable, the omission was cured by this section. Grier v. Hill, 51 N. C. 572, 15 S. E. 424, distinguishing this section.

Failure to Register Constables' Bond. — An irregularity, such as want of registration, will not, under this section, invalidate a constable's bond. Warren v. Boyd, 120 N. C. 56, 26 S. E. 700.

Failure to Name Conditions in Sheriff's Bond.—Failure to name conditions required by section 3930, relating to sheriff's bonds, will not, under this section, invalidate the bond given. Commissioners v. Sutton, 120 N. C. 298, 26 S. E. 920.

Mistake in Name of Ward in Guardian's Bond.—Where, in the order of a County Court. appointing a guardian, the name Margaret is by mistake inserted as that of the ward instead of Miranda, a bond taken according to the proper requisitions, with the right name recited, will, under the operation of this section, be sustained as an official bond. Shuster v. Perkins, 46 N. C. 325.

No Penalty Named in Guardian's Bond.—Where defendants signed a bond intending to make it the guardian bond of their principal, but there was no penalty named in the bond the same being filled in subsequent to the signatures, it was held that this section does not apply, as it is confined to bonds wherein the amount of penalty varies from that fixed by law, being either more or less than the amount. Rollins v. Ebbs, 137 N. C. 355, 49 S. E. 341; Rollins v. Ebbs, 138 N. C. 140, 161, 50 S. E. 577. See dissenting opinion by Clark C. J. in the first report of the case.

Who May Sue.—The chairman of a board of fence commissioners, although not named in the tax collector's (sheriff's) bond, may bring suit on the same under this section, when the latter fails to pay the money collected for the erection of fences. Speight v. Staton, 104 N. C. 44, 10 S. E. 86.

Where a register of deeds issued a license for the marriage of a girl under eighteen without the consent of her father, the father is the person injured within the meaning of this section. Joyner v. Roberts, 112 N. C. 111, 114, 16 S. E. 917.

Cited in Barnes v. Lewis, 73 N. C. 138.

§ 325. Penalty for officer acting without bond. —Every person or officer of whom an official bond is required, who presumes to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the state for each attempt so to exercise his office. (Rev., s. 278; Code, s. 1882; R. C., c. 78, s. 8.)

Stated in Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317.

§ 326. Condition and terms of official bonds.— Every clerk, treasurer, sheriff, coroner, register of deeds, surveyor, and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of office to which such officers are chosen, respectively. (Rev., s. 308; Code, s. 1874; 1869-70, c. 169; 1876-7, c. 275, s. 5; 1895, c. 207, s. 4; 1899, c. 54, s. 54.)

As to bonds required of sheriff, see sec. 3930 and the notes thereto.

Stated in Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317.

§ 327. Annual examination of bonds; keeping good; increase. — The bonds shall be carefully examined on the first Monday in December of every year, and if it appears that the security has been impaired, or for any cause become insufficient to cover the amount of money or property or to secure the faithful performance of the duties of the office, then the bond shall be renewed or strengthened, the insufficient security increased within the limits herein prescribed, and the impaired security shall be made good; but no renewal, or strengthening, or additional security shall increase the penalty of said bond beyond the limits herein prescribed for the term of office. (Rev., s. 308; Code, s. 1874; 1869-70, c. 169; 1876-7, c. 275, s. 5; 1895, c. 207, s. 4; 1899, c. 54, s. 54.)

§ 328. Effect of failure to renew bond.—Upon the failure of any such officer to make such renewal of his bond, it is the duty of the board of commissioners, by an order to be entered of record, to declare his office vacant, and to proceed forthwith to appoint a successor, if the power of filling the vacancy in the particular case is vested in the board of commissioners; but if otherwise, the said board shall immediately inform the proper person having the power of appointment of the fact of such vacancy. (Rev., s. 309; Code, s. 1875; 1869-70, c. 169, s. 2.)

§ 329. Justification of sureties.—Every surety on an official bond required by law to be taken or renewed and approved by the board of commissioners shall take and subscribe an oath before the chairman of the board or some person authorized by law to administer an oath, that he is worth a certain sum (which shall not be less than one thousand dollars) over and above all his debts and liabilities and his homestead and personal property exemptions, and the sum thus sworn to shall in no case be less in the aggregate than the penalty of the bond. But nothing herein shall be construed to abridge the power of the said board of commissioners to require the personal presence of any such surety before the board when the bond is offered, or at such subsequent time as the board may fix, for examination as to his financial condition or other qualifications as surety. (Rev., s. 310; Code, s. 1876; 1869-70, c.

169, s. 3; 1879, c. 207; 1889, c. 207; 1889, c. 7; 1891, c. 385; 1901, c. 32.)

Purpose—Contribution.—The intendment of this section, was to provide a statement under oath to show the solvency of the sureties and afford information to the county commissioners under like sanction that the aggregate amount of the bond equaled the penalty required, and does not affect the doctrine of contribution as it relates to the rights of the sureties to contribution between themselves. Commissioners v. Dorsett, 151 N. C. 307, 66 S. E. 132.

Cited in State v. Patterson, 97 N. C. 360, 2 S. E. 262.

§ 330. Action against officer to compel justification; office vacated; successor appointed.—When oath is made before any judge of the superior court by five respectable citizens of any county within his district that after diligent inquiry made they verily believe that the bond of any officer of such county, which has been accepted by the board of commissioners, is insufficient either in the amount of the penalty or in the ability of the sureties, it is the duty of such judge to cause a notice to be served upon such officer requiring him to appear at some stated time and place and justify his bond by evidence other than that of himself or his sureties. If this evidence so produced fails to satisfy the judge that the bond is sufficient, both in amount and the ability of the sureties, he shall give time to the officer, not exceeding twenty days, to give another bond, the judge fixing the amount of the new bond, when there is a deficiency in that particular. And upon failure to give a good bond to the satisfaction of the judge within the twenty days, he shall declare the office vacant, and if the appointment be with himself, he shall immediately proceed to fill the vacancy; and if not, he shall notify the persons having the appointing power that they may proceed as aforesaid. (Rev., s. 316; Code, s. 1885; 1874-5, c. 120.)

In Mitchell v. Kilburn, 74 N. C. 483; Mitchell v. Hubbs, 74 N. C. 484, and Mitchell v. West, 74 N. C. 485, 486, the court refused to consider the constitutionality and construction of this section, because the appeal was improvidently awarded from a motion to dismiss.

§ 331. Successor to give bond; official bonds to be liabilities.—The person so appointed shall give bond before the judge, and the bond so given shall in all respects be subject to the requirements of the law in relation to official bonds; and all official bonds shall be considered debts and liabilities. (Rev., s. 317; Code, s. 1886; 1874-5, c. 120, s. 2.)

§ 332. Judge to file statement of proceedings with commissioners.—When a vacancy is declared by the judge, he shall file a written statement of all his proceedings with the clerk of the board of commissioners, to be recorded by him. (Rev., s. 318; Code, s. 1887; 1874-5, c. 120, s. 3.)

§ 333. Approval, acknowledgment and custody of bonds.—The approval of all official bonds taken or renewed by the board of commissioners shall be recorded by their clerk. Every such bond shall be acknowledged by the parties thereto or proved by a subscribing witness, before the chairman of the board of commissioners, or before the clerk of the superior court, registered in the register's office in a separate book to be kept for the registration of official bonds, and the original bond, with the approval of the commissioners endorsed thereon and certified by their chairman, shall be deposited with the clerk of the superior court, except the bond of said clerk, which shall be deposited with the register of deeds, for safe keeping. (Rev., s. 311; Code, s. 1877; 1869-70, c. 169, s. 4; 1879, c. 207, s. 2.)

§ 334. Votes of commissioners on approval recorded; penalty.—It is the duty of the clerk of the board of commissioners to record in the proceedings of the board the names of those commissioners who are present at the time of the approval of any official bond, and who vote for such approval. Every clerk neglecting to make such record, besides other punishment, shall forfeit his office. Any commissioner may cause his written dissent to be entered on the records of the board. (Rev., s. 312; Code, ss. 1878, 1881; 1869-70, c. 169, ss. 5, 8; R. C., c. 78, s. 7; 1790, c. 327; 1809, c. 777.

This section, passed in 1790, serves to show the light in which individual responsibility is regarded by the legislature. See Rawls v. Deans, 11 N. C. 299, 304.

§ 335. When commissioner liable as surety.—Every commissioner who approves an official bond, which he knows to be, or which by reasonable diligence he could have discovered to have been, insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond. (Rev., s. 313; Code, s. 1879; 1869-70, c. 169, s. 6.)

Construed with Section 3934.—This section supplements and somewhat extends the provision of section 3934, relating to the liability of sureties or a sheriff's bond. Hudson v. McArthur, 152 N. C. 445, 449, 67 S. E. 995.

Liable to All Injured Persons.—Public officials entrusted in so important a matter as this mandatory statute, are held individually liable to any one injured by their wilful failure or neglect of duty. To hold otherwise would put a premium on inefficiency and neglect. Moffitt v. Davis, 205 N. C. 565, 570, 172 S. E. 317.

Construing this section and § 1297(12) together it is held that the county commissioners may be held individually liable by a person sustaining loss by reason of their failure to perform their ministerial duty of requiring bond of a clerk of the Supreme Court. Id.

Cited in State v. Patterson, 97 N. C. 360, 2 S. E. 362, to show how stringently the obligation of seeing to the sufficiency of the bond is enforced.

§ 336. Record of board conclusive as to facts stated.—In all actions under the preceding section a copy of the proceedings of the board of commissioners in the particular case, certified by their clerk under his hand and the seal of the county, is conclusive evidence of the facts in such record alleged and set forth. (Rev., s. 314; Code, s. 1881; 1869-70, c. 169, s. 8.)

§ 337. Person required to approve bond not to be surety.—No member of the board of commissioners, or any other person authorized to take official bonds, shall sign as surety on any official bond upon the sufficiency of which the board of which he is a member may have to pass. (Rev., s. 315; Code, s. 1887; 1874-5, c. 120, s. 3.)

Art. 2. Bonds in Surety Company

§ 338. State officers may be bonded in surety company.—All persons who are required to give bond to the state of North Carolina to be received by the governor or by any department of the state government, in lieu of personal security, may give as security for said bond and for the performance of the duties named in the said bond any indemnity or guaranty company authorized to do business in the state of North Car-

olina, subject to such regulations as the governor or department may prescribe, and with power in them to demand additional security at any time. Any person presenting any indemnity or guaranty company as surety shall accompany his bond with a statement of the insurance commissioner as to the condition of such company as required by law. (Rev., s. 272; 1901, c. 754.)

Construed against Company. — A surety bond shall be construed most strongly against the company and most favorably to its general intent and essential purpose. Bank v. Fidelity Co., 128 N. C. 366, 38 S. E. 908. See the case as to compliance with requirement of notice of default.

§ 339. Surety company sufficient surety on bonds and undertakings.—A bond or undertaking by the laws of North Carolina required or permitted to be given by a public official, fiduciary, or a party to an action or proceeding, conditioned for the doing or not doing of an act specified therein, shall be sufficient when it is executed or guaranteed by a corporation authorized in this state to act as guardian or trustee, or to guarantee the fidelity of persons holding places of public or private trust, or to guarantee the performance of contracts, other than insurance policies, or to give or guarantee bonds and undertakings in actions or proceedings.

The bond or undertaking of a corporation having such power shall be sufficient, although the law or regulation in accordance with which it is given requires two or more sureties, or requires the sureties to be residents or freeholders. But the clerk of the superior court may exercise his discretion as to accepting such a corporation's surety on the bonds of fiduciaries or parties to actions or proceedings. (Rev., s. 273; 1895, c. 270; 1899, c. 54, s. 45; 1901, c. 706.)

Same Liability as an Individual.—A surety corporation allowed by this section to give guardian bonds, is held to the same liability on a bond given by it as an individual would be, and is responsible to the ward when the guardian's failure to properly perform his duties causes loss to the ward's estate. Roebuck v. National Surety Co., 200 N. C. 196, 156 S. E. 531.

Cited in Pierce v. Pierce, 197 N. C. 348, 349, 148 S. E. 438.

§ 340. Clerk to notify county commissioners of condition of company.—Each clerk of the superior court shall furnish the chairman of the board of county commissioners of his county with notice of each surety company licensed in this state, and of each surety company whose license has been revoked, in which any officer of the county has been bonded. (Rev., ss. 295, 4803.)

§ 341. Release of company from liability.—A company executing such bond, obligation or undertaking, may be released from its liability or security on the same terms as are or may be by law prescribed for the release of individuals upon any such bonds, obligations or undertakings. (Rev., s. 274; 1899, c. 54, s. 48.)

Getting Off Bond.—Under this section a surety company can be released from its liability on a bond only by getting off the bond. Bank v. Fidelity Co., 128 N. C. 366, 38 S. E. 908.

After Expiration.—A surety company is not liable for defalcations committed after the expiration of the term of office to which the bond refers. Blades v. Dewey, 136 N. C. 176, 48 S. E. 627.

§ 342. Company not to plead ultra vires.—Any company which executes any bond, obligation or undertaking under the provisions of this article is estopped, in any proceeding to enforce the liability which it assumes to incur, to deny its corporate power to execute such instrument or assume such liability. (Rev., s. 275; 1899, c. 54, s. 49; 1901, c. 706, s. 1, subsec. 5.)

§ 343. Failure to pay judgment is forfeiture.—If a surety company against which a judgment is recovered fails to discharge the same within sixty days from the time such final judgment is rendered, it shall forfeit its right to do business in this state, and the insurance commissioner shall cancel its license. (Rev., s. 275; 1901, c. 706, s. 1, subsec. 5.)

§ 344. On presentation of proper bond officer to be inducted.—Upon presentation to the person authorized by law to take, accept and file official bonds, of any bond duly executed in the penal sum required by law by the officer chosen to any such office, as principal, and by any surety company, as security thereto, whose insurance or guaranty is accepted as security upon the bonds of United States bonded officials (such insurance company having complied with the insurance laws of the state of North Carolina), or by any other good and sufficient security thereto, such bond shall be received and accepted as sufficient, and the principal thereon shall be inducted into office. (Rev., s. 276; 1899, c. 54, s. 53; 1901, c. 706, s. 1, subsec. 5.)

Although the failure of the treasurer to sign a bond was an irregularity under this section, both the treasurer and the surety recognized their liability thereon by offering a second bond in substitution, and both were estopped to deny the validity of the first bond on the ground of such irregularity. State v. Inman, 203 N. C. 542, 166 S. E. 519.

§ 345. Expense of fiduciary bond charged to fund.—A receiver, assignee, trustee, committee, guardian, executor or administrator, or other fiduciary required by law to give a bond as such, may include as part of his lawful expenses such sums paid to such companies for such suretyship not exceeding one-half of one per cent per annum on the account of such bonds as the clerk, judge or court may allow. (Rev., s. 277; 1901, c. 706, s. 1, subsec. 5.)

Art. 3. Mortgage in Lieu of Bond

§ 346. Mortgage in lieu of bond required to be given.—An administrator, executor, guardian, collector or receiver, or an officer required to give an official bond, or the agent or surety of such person or officer, may execute a mortgage on real estate, of the value of the bond required to be given by him to the state of North Carolina, conditioned to the same effect as the bond should be, were the same given, with a power of sale, which power of sale may be executed by the clerk of the superior court, with whom said mortgage shall be deposited, upon a breach of any of the conditions of said mortgage, after advertisement for thirty days. (Rev., s. 265; Code, s. 118; 1874-5, c. 103, s. 2.)

Mortgage of Intestate's Property.—A mortgage by an administrator on property of his intestate to which the administrator is heir does not comply with an order to increase the bond as such a mortgage does not increase the penalty. Sellars v. Faulk, 118 N. C. 573, 24 S. E. 430.

Failure to Record.—The mortgage or deed in trust permitted by this section, to be given in lieu of an official bond, is, as to proper registration, to be regarded as a mortgage, or deed in trust, and accordingly registered as the law re-

quires, construing the statute strictly, as required; and its entry upon the records in the clerk's office as a bond, alone without recording it in its proper place as a mortgage, is insufficient to give notice to, or priority of lien, over a deed of a subsequent purchaser of the land. Hooper v. Tallassee Power Co., 180 N. C. 651, 105 S. E. 327.

§ 347. Mortgage in lieu of security for appearance, costs, or fine.—Any person required to give a bond or undertaking, or required to enter into a recognizance for his appearance at any court, in any criminal proceeding, or for the security of any costs or fine in any criminal action, may also execute a mortgage on real or personal property of the value of such bond or recognizance, payable to the state of North Carolina, conditioned as such bond or recognizance would be required, with power of sale, which power shall be executed by the clerk or justice of the peace in whose court said mortgage is executed, upon a breach of any of the conditions of said mortgage.

Where such mortgage upon real property is executed before a justice of the peace the power of sale shall be enforced by the clerk of the court of the county in which the criminal proceeding is had.

No such mortgage on real property executed for the security for costs or fine shall allow a longer time for payment of said costs or fine than six months from the execution thereof, and no mortgage on personal property a longer time than three months, except in cases of appeal, when the time allowed shall be counted from the date of the final decision in the cause.

All legitimate expenses of sale, which shall only be made after due advertisement according to law, shall be paid out of the proceeds of the sale of the mortgaged property, as shall also the following fees, to wit: For each sale of real property mortgaged under this section the clerk shall receive two dollars, and for each sale of personal property mortgaged under this section the clerk or justice of the peace who enforces the power of sale shall receive one dollar. (Rev., s. 266; Code, s. 120; 1874-5, c. 103, s. 3; 1891, c. 425, ss. 1, 2, 3.)

Applicability to Justice's Court.—This section, as it read in the code of 1883, had no application in courts of justices of the peace. Comron v. Standland, 103 N. C. 207, 9 S. E. 317. Since the decision in this case, however, the section has been amended and the words "or justice of the peace" have been inserted near the end of the first paragraph. Ed. Note.

Foreclosure and Sale.—The clerk of the Superior Court may foreclose a mortgage on land given by plaintiff to secure costs of his action when the costs are awarded against him, or the clerk may report the matter to the court for a decree of sale by himself, the latter being the better practice to insure a safer title and prevent a needless sacrifice. Clark v. Fairly, 175 N. C. 342, 95 S. E. 550.

Where the Superior Court, in term, acting through the presiding judge, has duly acquired jurisdiction to decree foreclosure, it is his duty to supervise the sale and see that the land brings a fair price; and when such sale has not been made accordingly, he may set aside the sale, and permit the plaintiff to pay the costs properly chargeable against him. Clark v. Fairly, 175 N. C. 342, 95 S. E. 550.

It is proper for the court to confirm the sale, and possibly it is necessary for him to do so. Clark v. Fairly, 175 N. C. 342, 95 S. E. 550.

A decree of confirmation of the sale of lands to pay the cost of an action under a mortgage given to secure them, under this section, may be set aside by the judge during the term of the Superior Court at which it was entered. Clark v. Fairly, 175 N. C. 342, 95 S. E. 550.

Cited in State v. Jenkins, 121 N. C. 637, 28 S. E. 413.

§ 348. Cancellation of mortgage in such proceedings.—Any mortgage given by any person in lieu of bond as administrator, executor, guardian, collector, receiver or as an officer required to give an official bond, or as agent or surety of such person or officer, or in lieu of bond or undertaking or recognizance for his appearance at any court in any criminal proceeding, or for the security of any cost or fine in a criminal action which has been registered, when such party as administrator, executor, guardian, collector, or receiver has filed his final account and when the time required by statute for the bond given by any administrator, executor, guardian, collector, or receiver to remain in force for the purpose of action thereon has expired, or when the officer required to give an official bond has fully complied with the conditions of such bond and the time within which suit is allowed by law to be brought thereon has expired, or when the person giving such mortgage in lieu of bond has made his appearance at the court to which he was bound and did not depart the court without leave, or paid the cost or fine required, may be canceled or discharged by the clerk of the Superior Court of the county where such action was pending or where the mortgage in lieu of bond is recorded by entry of 'satisfaction' upon the margin of the record where such mortgage is recorded in the presence of the register of deeds, or his deputy, who shall subscribe his name as a witness thereto, and such cancellation shall have the effect to discharge and release all the right, title and interest of the State of North Carolina in and to the property described in such mortgage. (Rev., 267, 1905, c. 106; 1921, c. 29, ss. 1, 2; 1925, c. 252, s. 1.)

Editor's Note.— By the Public Laws of 1925 this section was amended, and the provision relating to cancellation after certain acts of the party "as administrator, executor, guardian, collector, or receiver" was added. The validating clause was omitted from this section, and will now be found as § 348(a).

§ 348(a). Validating statute.—All acts heretofore done by the several Superior Court clerks, canceling or satisfying any mortgage, or other instruments, herein mentioned and specified are hereby validated: Provided, this provision shall not affect vested rights nor litigation pending March first, one thousand nine hundred and twenty-five. (1925, c. 252, s. 2.)

§ 349. Clerk of court may give surety by mortgage deposited with register.—In all cases where the clerk of the superior court may be required to give surety, he may deposit a mortgage with the register of deeds, payable to the state, and conditioned, as the bond would have been required, with power of sale. The power of sale shall be executed by the register of deeds, upon a breach of any of the conditions of said mortgage; and the register of deeds shall in all cases immediately register the same, at the expense of the said clerk. (Rev., s. 268; Code, s. 122; 1874-5, c. 103, s. 6.)

§ 350. Mortgage in lieu of bond to prosecute or defend in civil case.—It is lawful for any person desiring to commence any civil action or special proceeding, or to defend the same, his agent or surety, to execute a mortgage on real estate of the value of the bond or undertaking required to be given, at the beginning of said action, or at any stage thereof, to the party to whom the bond

or undertaking would be required to be made, conditioned to the same effect as such bond or undertaking, with power of sale, which power of sale may be executed upon a breach of any of the conditions of the said mortgage after advertisement for thirty days. (Rev., s. 269; Code, s. 117; 1874-5, c. 103, s. 1.)

Strictly Construed.—This section is exceptional in its provisions, and must be strictly observed. Eshon v. Commissioners, 95 N. C. 75, 77. It does not apply where the mortgage was not made to the appellee. Id. This case contains a discussion as to whether section applies in lieu of appeal bond.

Not Applicable to Justice's Court.—This section has no application in courts of justices of the peace. Comron v. Standland, 103 N. C. 207, 99 S. E. 317.

Section Does not Require Mortgage. — This section does not authorize the court to require a party to execute a mortgage of real estate in the case therein provided for. It simply allows the party of whom an undertaking may be required in such cases to give such mortgage instead of it, and the former must be for the same amount as the latter. Wilson v. Fowler, 104 N. C. 471, 472, 10 S. E. 566.

Third Person Executing Mortgage for Defendant.—Where a mortgage is given by a third person for the defendant in an action, as is permitted by this section, and the mortgagor subsequently purchases a part of the mortgaged property, it was held, upon the plaintiffs recovering from the defendant, that the mortgagor has no such interest as will allow him to interfere with the plaintiff's rights under his judgment. Ryan v. Martin, 104 N. C. 176, 10 S. E. 169.

§ 351. Affidavit of value of property required.—In all cases where a mortgage is executed, as hereinbefore permitted, it is the duty of the clerk of the court in which it is executed, or of the justice, to require an affidavit of the value of the property mortgaged to be made by at least one witness not interested in the matter, action or proceeding in which the mortgage is given. (Rev., s. 270; Code, s. 121; 1874-5, c. 103, s. 4.)

§ 352. When additional security required.—If, from any cause, the property mortgaged in lieu of a bond becomes of less value than the amount of the bond in lieu of which the mortgage is given, and it so appears upon affidavit of any person having any interest in the matter as a security for which the mortgage was given, it is the duty of the mortgagor to give additional security by a deposit of money, or the execution of a mortgage on more property, or justify as required in cases where bond or undertaking is given. (Rev., s. 271; Code, s. 119; 1874-5, c. 103, s. 5.)

Art. 3(A). Cash Deposit in Lieu of Bond

§ 352(a). Cash deposit in lieu of bond; conditions and requirements.—In lieu of any written undertaking or bond required by law in any action pending in any court of the state, the party required to make such undertaking or bond may make a cash deposit of the amount required by law in lieu of the said undertaking or bond, and such cash deposit shall be subject to all of the same conditions and requirements as are provided for in written undertakings or bonds, in lieu of which such deposit is made. (1923, c. 58.)

When Applicable.—While this section by its terms applies to pending actions, as suggested in 1 N. C. Law R. p. 283, it is "probably not intended to be limited to pending actions but to apply to all cases in which such undertakings or bonds are required to be given. This extends to all cases the same requirements for making cash deposit as is now required in the plaintiff's undertaking for costs in a civil action (sec. 419), just as a mortgage on real or personal property may be given in lieu of bond or undertaking (sec. 347)."

Art. 4. Actions on Bonds

§ 353. Bonds in actions payable to court officer to be sued on in name of state.—Bonds and other obligations taken in the course of any proceeding at law, under the direction of the court, and payable to any clerk, commissioner, or officer of the court, for the benefit of the suitors in the cause, or others having an interest in such obligation, may be put in suit in the name of the state. (Rev., s. 280; Code, s. 51; R. C., c. 13, s. 11.)

Quoted in Lackey v. Pearson, 101 N. C. 651, 654, 8 S. E. 121.

§ 354. On official bonds injured party sues in name of state; successive suits.—Every person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, register, entry-taker, surveyor, sheriff, coroner, constable, county treasurer, or other officer may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the state, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment is given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty is recovered; and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office. (Rev., s. 281; Code, s. 1883; R. C., c. 78, s. 1; 1793, c. 384, s. 1; 1833, c. 17; 1825, c. 9; 1869-70, c. 169, s. 10.)

Cross Reference.—As to surety waiving his rights under this section and §§ 353, 355 by appearing and answering in a summary proceeding, see § 356 and the note thereto.

As to actions on bonds generally, see N. C. Dig.

Leave of Court Unnecessary.—The section gives in express terms the right to bring one or more suits upon one or more of the bonds to "every injured person," not on leave from the Court, but absolutely and unconditionally so soon as the breach occurs, except that it is to be instituted in the name of the state. Boothe v. Upchurch, 110 N. C. 62, 66, 14 S. E. 642.

Constitutes Additional Remedy.—This section is not repugnant to the provisions of section 943, which requires that each successive clerk shall receive from his predecessor all the records, moneys, and property of his office, but only gives an additional remedy for the benefit of individuals who have cause of complaint against an unfaithful clerk of the Superior Court. Peebles v. Boone, 116 N. C. 57, 21 S. E. 187.

The failure of a register of deeds to properly index the registry of a mortgage renders him liable on his official bond to one injured by such neglect. State v. Grizzard, 117 N. C. 106, 23 S. E. 93.

Person Injured.—Where H. places a note for collection in a constable's hands, and the constable sues out a warrant, obtains a judgment and receives the amount (even though there is no execution) and fails to pay the same to H., H. as the person injured is entitled to have the suit brought to his use under this section. Holcomb v. Franklin, 11 N. C 274, 277.

The father of a girl under eighteen, to whom a marriage license has been issued without the father's consent, is the person injured within the meaning of this section. Joyner v. Roberts, 112 N. C. 111, 114, 16 S. E. 917.

Under this section, claimants of a fund arising from a partition sale are the proper parties to sue on bond of the clerk for failure of clerk to pay funds by the commissioners in partition. Smith v. Patton, 131 N. C. 396, 42 S. E. 849.

An action can be maintained by the clerk of a superior court in his own name upon the official bond of the sheriff, for the recovery of costs accrued in such court and collected by the sheriff, and due and payable to said clerk and others. Jackson v. Maultsby, 78 N. C. 174.

By Virtue or Color of Office.—The last clause of this section is very comprehensive in its terms, scope and purpose. It, on purpose, enlarges the compass of the conditions

of official bonds and their purpose, and the Legislature intended by it, it seems, to prevent an evil pointed out in two or three of the cases. There were no adequate reasons why the conditions of official bonds should not extend to and embrace all the official duties of the office, and there were serious ones of justice and policy why they should. All persons interested are bound to accept the official services of such officers, as occasion may require, and they should be made secure in their rights, and have adequate remedy for wrongs done by them. Besides, such officers, indeed all public officers, should be held to a faithful discharge of their duties as such. It is singular that the clause last recited, notwithstanding a well known evil to be remedied, was not enacted until 1883. It first appears as part of The Code. So that now official bonds and the conditions of them embrace and extend to all acts done by virtue or under color of office of the officer giving the bond. Kivett v. Young, 106 N. C. 567, 569, 10 S. E. 1019; Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520.

In State v. Leonard, 68 F. (2d) 228 a sheriff's bond contained a condition limiting the faithful execution of the office to specific duties such as execution of process and in view of this, and the wording of this section, the bond was held to afford no basis for a recovery by a person whom the sheriff wounded while acting in his official capacity.

Same—Acts Which Should Have Been Performed.—It is true that the clause seems in terms to provide only for acts done by the officer, and not for those which he should do but does not. But it would be putting a very narrow construction on the statute to say that he and his sureties are liable for what he did, but not for what he should have done and did not do, although the damage to the party was equally as great. State v. Grizzard, 117 N. C. 106, 108, 23 S. E. 93.

Same—Illustration of Acts.—Where a clerk appointed the commissioner to make the sale, without bond, and on approving his report received and receipted the proceeds as clerk, took out his costs and entered the amount due each heir at law on his docket, and disbursed a portion of said fund to the parties entitled. This would seem to be a receipt of the fund by the clerk "by virtue of his office." Cox v. Blair, 76 N. C. 78; McNeill v. Morrison, 63 N. C. 508; Judges v. Deans, 9 N. C. 93.

But if this were otherwise the clerk received it "as clerk," and so receipted for it. This was certainly a receipt of the money "under color of his office," and, indeed, this is admitted in the answer. The older decisions were made when these words were not in the statute. The clause embraces all cases where the officer received the money in his official capacity, but when he may not be authorized or required to receive the same. In such case the bond is responsible for the safe custody of the fund so paid in. Presson v. Boone, supra; Sharpe v. Connelly, 105 N. C. 87, 11 S. E. 177; Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520; Ex parte Cassidey, 95 N. C. 225; Brown v. Coble, 76 N. C. 391; Greenlee v. Sudderth, 65 N. C. 470; Broughton v. Haywood, 61 N. C. 380; Smith v. Patton, 131 N. C. 396, 397, 42 S. E. 849.

Under this section of the Code the official bond of a constable is liable for the false imprisonment of a person by a constable, as such, without process or color thereof. Warren v. Boyd, 120 N. C. 56, 26 S. E. 700.

When the Clerk of the Superior Court is appointed receiver of a minor's estate, he takes and holds the funds by virtue of his office of Clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. Boothe v. Upchurch, 110 N. C. 62, 14 S. E. 642.

Bonds Cumulative.—Official bonds given by an officer during any one term of office are cumulative, and the new bond does not discharge the old one. Fidelity, etc., Co. v. Fleming, 132 N. C. 332, 43 S. E. 899; Poole v. Cox, 31 N. C. 69, 71, 49 Am. Dec. 410; Oats v. Bryan, 14 N. C. 451; Bell v. Jasper, 37 N. C. 597; Pickens v. Miller, 83 N. C. 544; Moore v. Boudinot, 64 N. C. 190.

Where the surety has renewed the bond of a clerk of the court upon his election to that office a second time, acknowledged its liability and received premiums thereon, its liability is cumulative for all defalcations thereunder, whether for the second term its principal was continuing to act de facto or de jure. Lee v. Martin, 186 N. C. 127, 118 S. E. 914.

The first bonds continue to be a security for the discharge of the duties during the whole term, and the new bonds become additional security for the discharge of such of the duties as have not been performed at the time they are given. Poole v. Cox, 31 N. C. 69, 49 Am. Dec. 410, cited in note in 23 L. R. A., N. S. 132. See also, Bell v. Jasper, 37 N. C. 597; Oats v. Bryan, 14 N. C. 451.

Action on Bond and on Case.—An action of debt on a sheriff's bond for money collected, and a nonsuit therein, is a sufficient demand to enable the plaintiff to sustain an action on the case for the same cause of action. Fagan v. Williamson, 53 N. C. 433.

§ 355. Complaint must show party in interest; election to sue officer individually.—Any person who brings suit in manner aforesaid shall state in his complaint on whose relation and in whose behalf the suit is brought, and he shall be entitled to receive to his own use the money recovered; but nothing herein contained shall prevent such person from bringing at his election an action against the officer to recover special damages for his injury. (Rev., s. 282; Code, s. 1884; R. C., c. 78, s. 2; 1793, c. 384, ss. 2, 3; 1869-70, c. 169, s. 11.)

Cited in Western Carolina Power Co. v. Yount, 208 N. C. 182, 179 S. E. 804.

§ 356. Summary remedy on official bond.—When a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, collects or receives any money by virtue or under color of his office, and on demand fails to pay the same to the person entitled to require the payment thereon, the person thereby aggrieved may move for judgment in the superior court against such officer and his sureties for any sum demanded; and the court shall try the same and render judgment at the term when the motion shall be made, but ten days notice in writing of the motion must have been previously given. (Rev., s. 283; Code, s. 1889; R. C., c. 78, s. 5; 1819, c. 1002; 1869-70, c. 169, s. 14; 1876-7, c. 41, s. 2.)

Cumulative Remedy.—It has never been understood that this cumulative and optional remedy obstructed the bringing a regular action on the bond, when the injured party preferred to have recourse to it. Lackey v. Pearson, 101 N. C. 651, 654, 8 S. E. 121.

There is no provision in the statute giving a preference to the party or parties who first seek such summary remedy. And, withal, before any claim, preferential or otherwise, can be established under this statute, notice must be given, the court must try the cause, and judgment must be obtained. Western Carolina Power Co. v. Yount, 208 N. C. 182, 184, 179 S. E. 804.

It was never intended that the mere lodging of a motion under this section, established a preference, or right to establish a preference, over other creditors when such other creditors had been guilty of no laches in asserting their claims. Id.

To What Officers Applicable.—In Smith v. Moore, 79 N. C. 86, it was held that the power conferred by this section as it read in the Revised Code of 1856, was confined to the officers named therein, and that there was no way to hold a commissioner appointed to make a judicial sale liable for the proceeds thereof, except by an action instituted by the parties entitled to the money. Subsequently to this decision the words "or other public officer," have been inserted in the section; but applying the ejusdem generis rule it would seem that these words would not include a master in chancery and that the Smith case declares the law as it still stands. See however Ex parte Curtis, 82 N. C. 435, where the court states that a remedy against executrix and clerk and master should have been by summary motion under this section.

Actions by Persons Entitled to Money.—This section gives a summary remedy against public officers, only to those entitled to the money, so that a new clerk cannot proceed under it against a former clerk, for not paying office money over to him as his successor. O'Leary v. Harrison, 51 N. C. 338.

Proceedings May Be Consolidated with General Creditors' Suit.—Plaintiff instituted summary proceedings under this section against the clerk of the Superior Court and the surety on his bond to recover for the clerk's default in failing to return to plaintiff, as ordered by the Superior Court, moneys deposited with the clerk. Notice and complaint in the proceeding were served on defendants. Thereafter another creditor of the clerk instituted suit in her own behalf and in behalf of all persons similarly situated, and decree was entered appointing a permanent receiver

for the clerk, authorizing the receiver to bring suit on the clerk's bonds, and enjoining all creditors of the clerk from instituting any other suit or action against him or on his bonds. In the summary proceeding under this section, the surety on the clerk's bond pleaded the decree affirming receiver in bar to plaintiff's right to judgment, and the trial court dismissed the summary proceeding. Held, the summary proceeding should have been consolidated with the suit in the nature of a general creditor's bill. Western Carolina Power Co. v. Yount, 205 N. C. 321, 171 S. E. 321.

Justice's Jurisdiction.—Since the repeal sec. 13 of c. 80 of Battle's Revision it has been decided by repeated adjudication of this Court that a justice of the peace has no jurisdiction of an action on a constable's bond. Coggins v. Harrell, 86 N. C. 317, 319.

Judgment.—Under this practice, judgment was entered for the amount of the bond, the execution to be satisfied on payment of the sum collected and costs. Fell v. Porter, 69 N. C. 140, 142. From the language of the opinion in this case, it would seem that at the time of decision the operation of this section had been suspended.—Ed. Note.

Where A. obtained a judgment against B., Clerk of the Superior Court, for a sum of money in his hands by virtue of his office, and B died, and his administrator, upon demand, failed to pay the money, it was held that the court below erred in overruling a motion by the plaintiff for a judgment upon the official bond of the clerk under the provisions of this section. Cooper v. Williams, 75 N. C. 94.

Notice.—As this section read in Battle's Revision the proceedings were "without other notice than is given by the delinquency of the officer." See Prairie v. Jenkins, 75 N. C. 545, 548.

Demand Not Necessary. — In a proceeding by the state, against a clerk of the Superior Court and the surety on his bond to recover sums embezzled by the clerk, the plaintiffs have the right to pursue the summary remedy under this section, upon their motion after due notice, and demand upon the clerk is not necessary. State v. Gant, 201 N. C. 211, 159 S. E. 427.

Waiver by Appearance. — Where a summary proceeding under this section has been instituted against a clerk of the superior court and the surety on his bonds to recover sums embezzled by the clerk, and the surety has entered a general appearance and filed answer, etc., the surety has waived its rights, if any it had, under §§ 353, 354, 355, to object that the plaintiffs could not maintain a summary proceeding under this section. State v. Gant, 201 N. C. 211, 159 S. E. 427.

§ 357. Officer unlawfully detaining money liable for damages.—When money received as aforesaid is unlawfully detained by any of said officers, and the same is sued for in any mode whatever, the plaintiff is entitled to recover, besides the sum detained, damages at the rate of twelve per centum per annum from the time of detention until payment. (Rev., s. 284; Code, s. 1890; R. C., c. 78, s. 9; 1819, c. 1002, s. 2; 1868-9, c. 169.)

Default of Officer Must Be Shown.—In an action to recover the 12 per cent allowed under this section, it is necessary that the plaintiff show some adequate default. Hannah v. Hyatt, 170 N. C. 634, 87 S. E. 517.

Liability of Surety.—While, as against the principal on the bond of a clerk of the Superior Court, interest under our statute at the rate of 12 per cent is collectible from the time of defalcation, the amount of the penalty on his bond determines the liability of the surety thereon. State v. Martin, 188 N. C. 119, 123 S. E. 631.

Effect of Waiver of Interest from Date of Defalcation.—Where, in an action against a clerk of the superior court and his surety to recover sums embezzled by the clerk, the state waives the interest from the date of the actual defalcations, but does demand the 12 per cent from the date of the expiration of each term of office; a judgment awarding damages at 12 per cent, under the provisions of this section, on the sums defaulted from the expiration of each term is not error, the amount being within the penalty of the bond. State v. Gant, 201 N. C. 211, 213, 159 S. E. 427.

Cited in Wood v. Citizens Bank, 199 N. C. 371, 372, 154 S. E. 623.

§ 358. Evidence against principal admissible against sureties.—In actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors or guardians, when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing which by law would be admissible and competent for or toward proving the same as against him, shall in like manner be admissible and competent as presumptive evidence only against all or any of his sureties who may be defendants with or without him in said actions. (Rev., s. 285; Code, s. 1345; R. C., c. 44, s. 10; 1844, c. 38; 1881, c. 8.)

Judgments as Evidence. — In an action against an officer and one of the sureties on his official bond, the record of a judgment against the officer, and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the officer. Morgan v. Smith, 95 N. C. 396.

In a learned note to the case of Charles v. Hoskins, 83 Am. Dec. 380, the annotator, Judge Freeman, says: "The question how far a judgment or decree is conclusive against a surety of a defendant, or against one who is liable over to a defendant, and who was not a party to the action, is involved in the greatest confusion. Between the intimate relations which exist between such a person and the defendant in the suit, on the one side, and the fundamental principle that no one ought to be bound by proceedings to which he was a stranger, on the other, the court has found it difficult to steer." Insurance Co. v. Bonding Co., 162 N. C. 384, 391, 78 S. E. 430.

The cases are numerous in which it has been decided that a judgment rendered against a guardian is not, unaided by the statute, admissible as evidence against the surety to his bond. McKellar v. Powell, 11 N. C. 34.

The same rulings have been made in regard to the sureties to an administration bond. Chairman v. Clark, 11 N. C. 43; Vanhook v. Barnett, 15 N. C. 268; Governor v. Carter, 25 N. C. 338; Governor v. Montford, 23 N. C. 155. So in reference to the liability of his surety to an amercement against the sheriff.

The act of 1844, (this section) however, changed the rule of law, and rendered competent against the sureties to official bonds, and those given by executors, administrators and guardians, whatever evidence would be competent against the principals, and this was declared to be conclusive, where the evidence was a judgment against him, in Brown v. Pike, 74 N. C. 531; and in Badger v. Daniel, 79 N. C. 386.

The act of 1881 amends the previous enactment by making the evidence "presumptive only" against the sureties. Moore v. Alexander, 96 N. C. 34, 36, 1 S. E. 536.

"It seems that our predecessors in office upon this Bench have intimated, and in one case held, that such judgments, unaided by the statute, are inadmissible in evidence against the surety. Moore v. Alexander, 96 N. C. 34, 36, 1 S. E. 536. But an examination of the question has convinced us that the decided trend of modern authority is to the effect that such a judgment against the principal prima facie only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense. Charles v. Hoskins, 83 Am. Dec. 379, and notes. In the notes to this case all the authorities are carefully reviewed." Insurance Co. v. Bonding Co., 162 N. C. 384, 392, 78 S. E. 430.

While this section fixed the rule as to actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors, or guardians, the precedents were in hopeless discord as to bonds not covered by the statute, until Associate Justice Brown laid down the rule in Dixie Fire Ins. Co. v. American Bonding Co., 162 N. C. 384, 392, 78 S. E. 430: "But an examination of the question has convinced us that the decided trend of modern authority is to the effect that such a judgment against the principal prima facie only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense." Charleston, etc., Ry. Co. v. Lassiter & Co., 208 N. C. 209, 212, 179 S. E. 789.

Debts and Assets. — In the construction of this section, it is decided that the judgment against the principal upon

such official bonds as the section mentions, is not only conclusive of the debt, as it was without the aid of the enactment, but of assets also, and this effect is given to a judgment against a guardian, upon his official bond, in Badger v. Daniel, 79 N. C. 386; Morgan v. Smith, 95 N. C. 396, 399; Brown v. Pike, 74 N. C. 531.

In Armistead v. Harramond, 11 N. C. 339, Hall, J., said that a "judgment against an administrator is evidence against him of a debt due by the intestate, and is evidence also of assets in his hands to discharge it; and although, for the reason before given, it is also evidence of a debt due, as far as it relates to his sureties," etc. Morgan v. Smith, 95 N. C. 396, 399. Since the passage of the act of 1844, the judgment is also evidence of the assets against the surety. Brown v. Pike, 74 N. C. 531, and cases cited.

Admissibility of Admissions of Administrator of Principal against Surety When Their Interests at Variance.— A judgment upon the admissions in the answer of the administrator bank of a deceased county treasurer is not competent in an action by the county commissioners as evidence against the surety on the official bond of the deceased when the bank has been made a party defendant and the surety at once raises the issue as to whether a part of the defalcation was moneys defaulted from the bank when the deceased was acting as its assistant cashier, the interest of the bank and the surety being in conflict, and this section not applying in such cases. Commissioners of Chowan v. Citizens Bank, 197 N. C. 410, 149 S. E. 380.

For case recognizing the principle adopted in Commissioner of Chowan County v. Citizens' Bank, 197 N. C. 410, 149 S. E. 380, but holding the rule inapplicable under peculiar facts of case, see Charleston, etc., Ry. Co. v. Lassiter & Co., 208 N. C. 209, 179 S. E. 879.

Not Applicable to Tort Action. — The rule that the judgment against the principal in an official or fiduciary bond is presumptive evidence against the sureties under this section does not apply, as this is not an action on the bond, but in tort. Martin v. Buffaloe, 128 N. C. 305, 309, 38 S. E. 902.

Annual account of guardian competent evidence against him, and presumptive evidence against his sureties. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Joinder of Administrator and Sureties. — Under this section the sureties on an administrator's bond are properly joined with the administrator, where it is shown that the administrator received a benefit from a falsified final account by reason of which the plaintiffs' judgment against the administrators remained unpaid. State v. McCanless, 193 N. C. 200, 136 S. E. 371.

Cited in Pullen v. Mining Co., 71 N. C. 563.

§ 359. Officer liable for negligence in collecting debt.—When a claim is placed in the hands of any sheriff, coroner or constable for collection, and he does not use due diligence in collecting the same, he shall be liable for the full amount of the claim notwithstanding the debtor may have been at all times and is then able to pay the amount thereof. (Rev., s. 286; Code, s. 1888; R. C., c. 78, s. 3; 1844, c. 64; 1869-70, c. 169, s. 12.)

Applicable to Claims Not Executions. — This section applies only to claims placed in the hands of the sheriff or other officer for collection—such claims as are within the jurisdiction of a justice of the peace, and may be collected by judgment and process of execution granted by that magistrate. It does not apply to executions issuing from the Superior or other courts of record. The reason for the distinction is clearly and certainly pointed out in McLaurin v. Buchanan, 60 N. C. 91. The statute, in effect, now is just as it was when that decision was made. Brunhild v. Potter, 107 N. C. 415, 419, 12 S. E. 55.

What Constitutes Negligence. — The degree of diligence required is that which a prudent man would ordinarily exercise in the management of his own affairs. A constable is not bound to such strict accountability as when process is delivered to him as an officer. Morgan v. Horne, 44 N. C. 25; Lipscomb v. Cheek, 61 N. C. 332. Therefore, what constitutes negligence must depend upon the facts in each particular case: five months delay was held, negligence in Nixon v. Bagby, 52 N. C. 4.

A constable is not bound to sue out a warrant on a claim put in his hands for collection, when the issuing of such process would be entirely fruitless. State v. Holcombe, 24 N. C. 211.

Art. 5. Bond-issuing Districts Incorporated

§ 360. Various districts issuing bonds incorporated.—The inhabitants of every road district special road district, school district, graded school district, or other district, in the name of which, or on behalf of which, bonds or other evidences of indebtedness are authorized by law to be issued, shall, for all purposes relating to the issuance or payment of such bonds or other evidence of indebtedness, constitute a body politic and corporate under the name given by law to such district; and all such bonds or other evidences of indebtedness hereafter issued shall be obligations of such corporation. The board or body authorized by law to issue such bonds or other evidence of indebtedness may adopt a seal for such corporation, and shall, except as otherwise provided by law, have and exercise all the powers and perform all the duties of such corporation relating to the issuance or payment of such bonds or other evidences of indebtedness. This article shall not apply to any notes or bonds heretofore issued. (1919, c. 308.)

See sec. 5464.

In General. — Under our statutes, in general terms, relating to special school districts, apparently all of them within the State are incorporated and given powers and duties in reference to the issue and payment of bonds for school purposes, by the board of trustees, when approved by the voters of the particular district upon an election duly held for the purpose; the term name called, this section; Laws 1921, chs. 244 and 133; and where two special school districts having equal rate of taxation, have been consolidated under the provisions 5469 et seq.; Laws 1921, ch. 179, sec. 1; such district so consolidated may issue valid bonds for the purpose stated, when it has complied with the appropriated statutes. Paschal v. Johnson, 183 N. C. 129, 110 S. E. 841.

Art. 6. Stolen, Lost Or Destroyed Bonds.

§ 360(1). Replacement of stolen, lost or destroyed state or municipal bonds; indemnity bond. —The State Treasurer of the State of North Carolina, by and with the consent and approval of the governor and council of State and the governing boards of the several counties, cities and political sub-divisions of the State, are hereby authorized and empowered to make settlement for or issue new bonds for bonds of the State or any of the political sub-divisions thereof, which have been stolen, lost or destroyed, provided that there is furnished an indemnity bond in double the amount of the said bonds, said indemnity bond to be approved by the State Treasurer or the governing boards of any political sub-division of the State issuing said replacement bonds; provided further, that said indemnity bond shall clearly designate the bonds which have been stolen, lost or destroyed. (1935, c. 292, s. 1.)

§ 360(2). Expenses borne by applicant. — All expenses in connection with printing and issuing any replacement bonds provided for in this article shall be borne by the person making application therefor. (1935, c. 292, s. 2.)

CHAPTER 9

BOUNDARIES

§ 361. Special proceeding to establish.—The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by

special proceedings in the superior court of the county in which the land or any part thereof is situated. (Rev., s. 325; 1893, c. 22.)

Origin of the Doctrine of the Section. — This section grew out of and is in some respects similar to the common law "writ of perambulation," although the procedure hereunder tends greatly to simplify the procedure obtaining under the former law. Until the passage of this section the consent of both adjoining land owners was necessary in order to have the dispute as to the bounds of their respective estates judicially determined. Under the present law either of the adjoining proprietors as a matter of right is entitled to have the land processioned, without the other's consent, and, where there has been an appeal, to have all the controverted matters settled by the jury under the guidance of the court. Green v. Williams, 144 N. C. 60, 63, 58 S. E. 549.

Purpose of Processioning. — The primary object of this section and the following sections of this article is to faciliate the speedy determination of disputed boundaries between adjoining land owners who do not contest the other's title to their respective tracts. Parker v. Taylor, 133 N. C. 103, 45 S. E. 473. Title to the land is not in issue unless so made by the pleadings, Cole v. Seawell, 152 N. C. 349, 67 S. E. 753; but when placed in issue by the defendant's denial of the plaintiff's ownership then, by sec. 758, the pending special proceedings are converted into a civil action to quiet title and the court will try all the issues in controversy connected therewith. Woody v. Fountain, 143 N. C. 67, 55 S. E. 425.

Relief under the Section — Injunctions. — To warrant the granting of an injunction in the cases of special proceedings, the relief sought must be subsiduary to the relief asked in the special proceedings, Hunt v. Sneed, 64 N. C. 176; and since this section gives no substantive relief —settles no rights, or titles to property, but only locates the dividing lines between the parties, the plaintiff was denied an injunction to restrain the defendant from commissions of trespasses when such order was asked for in the special proceedings instituted to determine the boundary line between the adjoining estates. Wilson v. Alleghany Company, 124 N. C. 7, 32 S. E. 326.

Dispute as to Boundary Necessary.—To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. Wood v. Hughes, 195 N. C. 185, 141 S. E. 569.

Effect of Binding Agreement.—Where in proceedings to establish the disputed boundaries between adjoining lands, a binding executed agreement between the parties has been established by uncontradicted evidence, the plaintiff is estopped from proceeding under this section, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law. Lowder v. Smith, 201 N. C. 642, 643, 161 S. E. 223.

§ 362. Occupation sufficient ownership.—The occupation of land constitutes sufficient ownership for the purposes of this chapter. (Rev., s. 326; 1893, c. 22; 1903, c. 21.)

Sufficiency of Ownership—When Title Not in Dispute.—The courts have construed the term "occupation", as used in this section, to mean possession, and uniformly hold that one in (a) possession of the land, and (or) (b) whose title thereto is not disputed so that no issue is raised save only that the location of the boundary, has sufficient ownership to avail himself of the special proceedings herein provided for. Williams v. Hughes, 124 N. C. 3, 32 S. E. 325; Parker v. Taylor, 133 N. C. 103, 45 S. E. 473.

Same—When Title is in Dispute. — Where, however, the defendant puts the title to the land in issue, and the case has taken the form of a civil action, then the plaintiff can no longer rest his case by merely proving his occupation of the land as evidencing the boundary, but must go further and prove his title to the land. Woody v. Fountain, 143 N. C. 67, 55 S. E. 425. See also Williams v. Hughes, 124 N. C. 3, 32 S. E. 325.

§ 363. Procedure.—1. Petition; Summons; Hearing.—The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

Compliance with the Procedural Steps Mandatory.—This section must be strictly followed in all material respects and any flagrant or negligent departure therefrom will be fatal to the proceedings. Forney v. Williamson, 98 N. C. 329, 4 S. E. 483. But the Court will look to the substance and not to the form of the pleadings, and where an affidavit contains a full and explicit denial of the line set out in the plaintiff's petition it will be treated as an answer since it contains all that is required by the section. Scott v. Kellum, 117 N. C. 664, 23 S. E. 180.

Effect of Misjoinder of Parties.—A proceeding under the provisions of this section to establish the true dividing line between adjoining owners of land, will be dismissed upon demurrer for misjoinder of parties and causes of action that involve the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. Rogers v. Rogers, 192 N. C. 50, 133 S. E. 184.

Burden of Proof.—Upon the institution of the proceedings to ascertain the true dividing line between the lands the burden is on the plaintiff to establish such line, Woody v. Fountain, 143 N. C. 67, 55 S. E. 425; Hill v. Dalton, 140 N. C. 9, 52 S. E. 273, and this burden does not shift to the defendant merely because, in addition to denying the line to be as claimed by the plaintiff, he alleges another to be the dividing line. Garris v. Harrington, 167 N. C. 86, 83 S. E. 253.

Applicability of Doctrine of Res Judicata—Title to Land Not in Issue.—Where the only fact in issue is the establishment and location of the boundary line, then the judgment of the clerk is, to this extent, binding on the parties and they may not again litigate on this precise point. Whitaker v. Garren, 167 N. C. 658, 83 S. E. 769. But his judgment may not estop the parties from asserting in a separate action title in the land, Nash v. Shute, 182 N. C. 528, 109 S. E. 353.

Same—Title in Issue.—Where, however, the parties join issue upon the title and the case is transferred to the regular term of the court a judgment therein estops the parties both as to the title and the location of the line. Whitaker v. Garren, 167 N. C. 658, 83 S. E. 759. See also, Nash v. Shute, 182 N. C. 528, 109 S. E. 353, the court in this case, saying: "The clerk of the Superior Court, under ch. 9, controlling proceedings to determine a dividing line, has no jurisdiction as to title or character of the possession of the claimants on either side of the dividing line of land authorized to be ascertained or determined by him under the provisions of this section, the occupancy alone being sufficient to confer jurisdiction, under this section; and where the clerk has acted within his jurisdiction in such proceedings, his judgment may not estop a party in a separate action to show the character or extent of his possession or, to establish an easement by adverse possession in the lands occupied by the other."

Evidence — Generally. — The general rules for ascertaining boundaries apply equally well when recourse is had through special proceedings. Power Co. v. Savage, 170 N. C. 625, 87 S. E. 629. See also, Woodard v. Harrell, 191 N. C. 194, 132 S. E. 12, containing dicta to the affect that parol evidence of location of boundary line by parties may be properly admitted, if they were merely locating the true boundary line, but not to show verbal agreement to change the true dividing line.

Same—The Surveyor's Report.—The surveyor, when acting under this section, is not in any sense a referee and his report to the court should not contain conclusions of law, but should only set forth a detailed account of the facts of the case and when it does this, it is entitled to great evidential weight although it is not conclusive as to the results contained therein. Norwood v. Crawford, 114 N. C. 513, 19 S. E. 349. See also Green v. Williams, 144 N. C. 60, 56 S. E. 549.

What Report of Processioners must Contain.—A report of a processioner is radically defective when it does not state, with precision, the claims of the respective parties, so as to show

what lines were disputed or how far they were disputed, and no undue laxity in the proceedings in this respect will be tolerated by the court. Hoyle v. Wilson, 29 N. C. 466. So also where one of the parties objects to the processioner's proceeding, the processioner must, in his return to the court, state, "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, etc., Carpenter v. Whitworth, 25 N. C. 204.

When Transfer to Regular Term Required.—The jurisdiction of the clerk in these special proceedings is limited in its scope. It extends only to those cases in which the only fact in issue is the location of the boundary line between the lands. Where the title to the land is put in issue the clerk has no authority to pass on any question involved but must transfer the whole proceedings to the regular term of the court. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302; Smith v. Johnson, 137 N. C. 43, 49 S. E. 62; Parker v. Taylor, 133 N. C. 103, 45 S. E. 473.

2. Appeal to Term.—Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard de novo.

Parties on Appeal.—Under the provision contained in this section for the appeal by either party to the regular term of the court, other parties having an interest in the locus in quo may, upon motion, be permitted to come in. Batts v. Pridgen, 147 N. C. 133, 60 S. E. 897.

3. Survey After Judgment.—When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

4. Procedure as in Special Proceedings.—The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. (Rev., s. 326; 1893, c. 22; 1903, c. 21.)

§ 364. Surveys in disputed boundaries.—When in any suit pending in the superior court the boundaries of land are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit. (Rev., s. 1504; Code, s. 939; R. C., c. 31, s. 119; 1779, c. 157; 1786, c. 252.)

Allowance for Costs of Survey.—The word "court", as used in the last provision of this section, refers to the judge, and not to the clerk, and where the trial judge has failed to make an order allowing compensation to the surveyor, the clerk has no power to make the allowance; but on appeal from the clerk's refusal, such order will be made by the judge of the Superior Court, Cannon v. Briggs, 174 N. C. 740, 94 S. E. 519; LaRoque v. Kennedy, 156 N. C. 360, 72 S. E. 454.

CHAPTER 10

BURNT AND LOST RECORDS

§ 365. Copy of destroyed record as evidence; may be recorded.—When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (Rev., s. 327; Code, s. 55.)

Admissibility of Parol Evidence.—As this chapter constitutes an enabling Act where it is attempted to prove by oral evidence and by copy the contents of the original report, the oral evidence is not excluded by its provisions. Hughes v. Pritchard, 153 N. C. 23, 63 S. E. 906. Varner v. Johnston, 112 N. C. 570, 576, 17 S. E. 483; Mobley v. Watts, 98 N. C. 284, 286, 3 S. E. 677.

But when a deed is lost or destroyed a copy must be produced if there be one, but if none, parol evidence may be admitted to prove its contents. Cowles v. Hardin, 91 N. C. 233; Dumas v. Powell, 14 N. C. 103; Baker v. Webb, 2 N. C. 43.

Same—Statements of One Not a Party.—A statement that he owned no interest in the property made by one not a party to the suit, and under whom the plaintiff does not claim, is not admissible under this section. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254.

Same—Not Admissible to Change Certified Copy.—This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N. C. 420, 16 S. E. 626.

§ 366. Originals may be again recorded.—All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (Rev., s. 328; Code, s. 56.)

Original Recorded upon Sufficient Evidence to Clerk. — Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the original one, to record it. Hill v. Lane, 149 N. C. 267, 62 S. E. 1067.

Effect of Failure to Re-register.—In Waters v. Crabtree, 105 N. C. 394, 402, 11 S. E. 240 the court said, in referring to this section: "This statutory provision, at least, admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. It, moreover, gave the public reason to expect that it would be faithfully observed by persons interested. However where the plaintiff has been negligent in again registering or recording a deed, such re-registration will not defeat the rights of bona fide purchasers."

§ 367. Establishing boundaries and interest, where original and copy destroyed.—When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the judge, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed. (Rev., s. 328; Code, s. 56.)

Remedy Additional and Not Exclusive.—This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254; Mobley v. Watts, 98 N. C. 284, 3 S. E. 677.

It does not repeal but aids the common law rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N. C. 233.

Evidence Must Show Existence, Nature, and Loss.—Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N. C. 252; Loftin v. Loftin, 96 N. C. 94, 1 S. E. 837.

Judgment has Only Force of Original.—A judgment under this section has only such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Laxton, 149 N. C. 334, 63 S. E. 278.

Private Acts.—In a special proceeding under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N. C. 577.

§ 368. Copy of lost will may be probated.—In counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the state, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be requred to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (Rev., s. 329; Code, s. 57.)

Probated before Clerk.—The probate of a lost will must be made before the clerk of the Superior Court, he alone having jurisdiction. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

Statute of Limitation Does Not Apply.—The statute of limitation does not apply to the simple taking probate of a will, hence it has no application to proceedings under this section. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

§ 369. Copy of lost will as evidence; letters to issue.—In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (Rev., s. 330; Code, s. 58.)

§ 370. Establishing contents of will, where original and copy destroyed.—Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (Rev., s. 331; Code, s. 59.)

Parol Evidence.—Parol evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381; Varner v. Johnston, 112 N. C. 570, 17 S. E. 483.

And such evidence is also admissible to show existence of such a will, its probate and registration. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381.

§ 371. Perpetuating destroyed judgments and proceedings.—Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded

or registered, or filed, according to the nature of the paper destroyed. (Rev., s. 332; Code, s. 60.)

Restored Record Free from Collateral Attack. — Where the destroyed record has been restored, the record so restored cannot collaterally attacked. Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398.

§ 372. Color of title under destroyed instrument.—Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction. (Rev., s. 333; Code, s. 61.)

Adverse Possession — Presumption of Grant. — In an action to recover land under this section, the plaintiff showed title out of the State by a thirty years' possession, it was held, that this statute did not make it necessary to show seven years' adverse possession in addition to the thirty years. The lapse of seven years' adverse possession concurrently with the thirty years is sufficient. Hill v. Overton, 81 N. C. 393.

§ 373. Action on destroyed official bond.—Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity. (Rev., s. 334; Code, s. 62.)

Nature of Proceeding is Equitable. — The nature of the proceedings under this section is equitable. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

§ 374. Destroyed witness tickets; duplicates may be filed.—The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof. (Rev., s. 335; Code, s. 63.)

§ 375. Replacing lost official conveyances.—Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance. (Rev., s. 336; Code, s. 64.)

§ 376. Court records as proof of destroyed instruments set out therein.—The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original. (Rev., s. 337; Code, s. 65.)

Evidence of Court Records as Proof. — When papers have been lost and under competent evidence and instructions, the jury has found their contents to be as contended by the plaintiff, the plaintiff prevails. Fain v. Gaddis, 144 N. C. 765, 57 S. E. 1111.

§ 377. Copies contained in court records may be recorded.—The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in the preceding section, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine. (Rev., s. 338; Code, s. 66.)

§ 378. Rules for petitions under this chapter.—The following rules shall be observed in petitions and motions under this chapter:

1. The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

Affidavit by Agent Not Sufficient. — In a proceeding under this section an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N. C. 577.

2. The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

3. All persons interested in the prayers of the petition or decree shall be made parties.

It seems that all persons whose estate may be effected by a proceeding to restore lost records, should be made parties. Cowles v. Hardin, 79 N. C. 577.

4. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

5. The costs shall be paid as the court may decree.

6. Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below.

7. It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices. (Rev., s. 339; Code, s. 69; 1893, c. 295.)

§ 379. Records allowed under this chapter to have effect of original records.—The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries. (Rev., s. 340; Code, s. 68.)

No More Effect than Originals.—The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278.

Bona Fide Purchaser—True Purpose of Original. — But it would seem that if the true purpose of the deed was to serve as a mortgage, and the plaintiff has been negligent in registering it, it will not have that effect against one who subsequently purchases without notice and for value. Waters v. Crabtree, 105 N. C. 402, 11 S. E. 240.

§ 380. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.—The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them. (Rev., s. 341; Code, s. 69.)

Constitutionality. — Making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., is constitutional. Barefoot v. Musselwhite, 153 N. C. 208, 209, 69 S. E. 71.

Evidence Must Show Destruction of Records. — The fact of the destruction by fire or otherwise of the records must be shown before the recitals, reference to, or mention of any decree, judgment, or other record recited in a deed of conveyance, etc., shall have the effect of evidence under this section. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71 See also Dail v. Suggs, 85 N. C. 104.

Application of Section. — This section was applied where a deed made in compliance to a decree of court was destroyed, the recitals in the decree being taken as prima facie evidence of facts and authority. Irvin v. Clark, 98 N. C. 444, 4 S. E. 30. See also Isler v. Isler, 88 N. C. 576.

Conversely, the recitals in a deed, which refer to the decree, so as to identify it, are of themselves prima facie evidence of its binding force and validity as against all persons who were parties to said decree. Pinnell v. Burroughs, 172 N. C. 182, 183, 90 S. E. 218; Everett v. Newton, 118 N. C. 925, 23 S. E. 961; Hare v. Hollomon, 94 N. C. 14; Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364.

Where the original papers of the judgment roll have been lost, the minute docket of the court may be introduced to prove the contents thereof. Everett v. Newton, 118 N. C. 925, 23 S. E. 961; Hare v. Hollomon, 94 N. C. 14.

§ 381. Conveyances reciting court records prima facie evidence thereof.—Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this state, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this chapter. (Rev., s. 342; Code, s. 70.)

Constitutionality. — The constitutionality and validity of this section cannot now be open to dispute. Barefoot v. Musselwhite, 153 N. C. 208, 211, 69 S. E. 71.

§ 382. Court records and conveyances to which chapter extends.—This chapter shall extend to records of any court which has been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (Rev., s. 343; Code, s. 71.)

§ 383. Local: Moore County; certain records presumed burned.—In all cases in Moore County of bonds, indentures, accounts, minutes, judgment rolls and all other records that cannot be found on record or on file in the said clerk's office after diligent search therefor by the clerk of the court, and cannot be otherwise accounted for, the same having been on record or file therein on or before September fifth, one thousand eight hundred and eighty-nine, shall be presumed to have been destroyed by fire. In all cases in which said bonds, indentures, accounts, minutes, judgment rolls and other records or any part thereof have been lost or destroyed and in which it may become necessary to use the same in evidence, it shall be presumed that the same were executed, filed, audited or adjudicated, as the case may be, in due and legal form and were in all respects lawful records and documents. (Rev., s. 344; 1891, c. 55.)

§ 384. Local: Haywood, Madison, Cherokee and Graham; destroyed court records therein.—Whenever any of the records of any of the courts in this State have been burnt, lost, destroyed or stolen, and there is in existence any copy thereof, or of any part of the same, duly certified, whether under the seal of the court or otherwise, by any former clerk of said court, it shall be the duty of the present clerk of said court, or any clerk of said court hereafter in office, upon presentation to him of such copy and the payment of his lawful fees therefor, to record said copy upon the minutes or records of said court; and after the same shall have been so recorded the record then shall be used as and be taken and deemed and shall have all the force and effect of the original record so burnt, lost, destroyed or stolen; and such record thereof, or a copy of the same duly certified by the clerk of said court, shall be in all respects competent in the same way and manner as the original record in all the courts of this State. If the copy so certified shall be on file or consti-

tute a part of a record of a case or otherwise of another court, either State or Federal, then said certified copy, when so recorded, as aforesaid, shall be returned to the court from which same was taken and shall not be required to remain on file in the clerk's office where so recorded. This section shall apply only to the counties of Haywood, Madison, Cherokee and Graham. (Rev., s. 345; 1905, c. 308; 1935, c. 25.)

Editor's Note.—The amendment of 1935 made this section applicable to stolen records. It also added the next to the last sentence providing for return of the certified copies. Prior to the amendment the section applied in Buncombe and Yancey, and did not apply in Cherokee and Graham.

CHAPTER 11
CITIZENSHIP RESTORED

§ 385. Petition filed.—Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship. (Rev., s. 2675; Code, ss. 2938, 2940; R. C., c. 58, ss. 1, 3; 1840, c. 36, s. 4.)

Loss of Citizenship. — Loss of citizenship does not form a part of the judgment of the court, but follows as a consequence of such judgment. State v. Jones, 82 N. C. 685.

§ 386. When and where petition filed.—At any time after the expiration of two years from the date of discharge of the petitioner, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found. (Rev., s. 2676; Code, ss. 2940, 2941; 1897, c. 110; R. C., c. 58, ss. 3, 4; 1840, c. 36, s. 3; 1933, c. 243.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 243, the petition was permitted to be filed after "four years from the date of conviction," instead of "two years from the date of discharge" as is now permitted.

Time of Making Application. — One who has been convicted of an infamous crime, imprisoned and pardoned can make application under this section only after a lapse of four years from the conviction. In re Petition of Jones, 160 N. C. 15, 75 S. E. 1007.

§ 387. Notice given.—Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard. (Rev., s. 2677; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.)

§ 388. Hearing and evidence.—The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this state for three years next preceding the filing of the petition. (Rev., s. 2678; Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; R. C., c. 58, ss. 1, 2; 1840, c. 36.)

§ 389. Decree.—At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of the applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto. (Rev., s. 2679; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.)

§ 390. Procedure in case of pardon or suspension of judgment.—Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor, or the court suspended judgment on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon has been granted by the governor, and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction. (Rev., s. 2680; 1899, cc. 44, 249; 1905, c. 547.)

Application. — This section is not applicable where one has been convicted of an infamous crime, imprisoned, and pardoned by the governor. In re Petition of Jones, 160 N. C. 15, 75 S. E. 1007.

CHAPTER 12
CIVIL PROCEDURE

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS

Art. 1. Definitions

§ 391. Remedies.—Remedies in the courts of justice are divided into—

1. Actions.
2. Special proceedings.

(Rev., s. 346; Code, s. 125; C. C. P., s. 1.)

Removals to Federal Courts. — Any of the proceedings included within this or the two succeeding sections are removable to the federal courts upon proper showing. Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 805, 130 S. E. 864.

Application of Sec. 450 to all Civil Remedies. — By virtue of this section and sec. 393 the terms of section 450, as to actions by guardians, embrace all civil remedies. Hollomon v. Hollomon, 125 N. C. 29, 33, 34 S. E. 99.

§ 392. Actions.—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (Rev., s. 347; Code, s. 126; C. C. P., s. 2; 1868-9, c. 277, s. 2.)

Recovery of Land. — A suit to recover the possession of land is a civil action and not a special proceeding. Woodley v. Gilliam, 64 N. C. 649.

Bastardy Not Ordinary Action. — A bastardy proceeding is not prosecuted for the enforcement or protection of an individual right or the redress or prevention of a wrong within the meaning of this section. Bastardy is a special proceeding prosecuted "like a criminal action." State v. Burton, 113 N. C. 655, 659, 18 S. E. 657; State v. McIntosh, 64 N. C. 607.

§ 393. Special proceedings.—Every other remedy is a special proceeding. (Rev., s. 348; Code, s. 127; C. C. P., s. 3.)

Cross References. — See section 110 providing a special proceeding by creditor against personal representative of a deceased. As to special proceeding for collection of legacies and distributive shares, see section 147.

Tests to Determine Special Proceedings. — Any proceedings which prior to the C. C. P. might have been commenced by petition, or motion on notice, such for instance as proceedings for dower, partition and year's allowance, are special proceedings under this section. Tate v. Powe, 64 N. C. 644; Felton v. Elliott, 66 N. C. 195.

Under this test, proceedings in bastardy (State v. McIntosh, 64 N. C. 607), or a petition by an administrator to sell lands for the payments of debts (Hyman v. Jarnigan, 65 N. C. 96; Badger v. Jones, 66 N. C. 305), classify as special proceedings.

In Woodley v. Gilliam, 64 N. C. 649, Mr. Justice Rodman expressed the opinion that a better test of a special proceeding is whether or not existing statutes direct a procedure different from the ordinary. He stated, however, that in practice the results of applying the two tests would almost always coincide, although he thought the one suggested by him the most convenient. And the court held in Sumner v. Miller, 64 N. C. 688, 689, Mr. Justice Dick delivering the opinion that proceedings to obtain damages for injuries to land caused by the erection of a mill are special proceedings because made so by the statute creating a statutory remedy.

Under either rule an action to recover the possession of land, as, for example, ejectment, is not a special proceeding. Woodley v. Gilliam, 64 N. C. 649. Nor is mandamus to try title to an office, notwithstanding that it is not an ordinary civil action. State v. Tate, 66 N. C. 231.

Section quoted in Jacobi Hdw. Co. v. Jones Cotton Co., 188 N. C. 442, 124 S. E. 756.

§ 394. Kinds of actions.—Actions are of two kinds—

1. Civil.
2. Criminal.

(Rev., s. 349; Code, s. 128; C. C. P., s. 4.)

§ 395. Criminal action.—A criminal action is—

1. An action prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof.

2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property. (Rev., s. 350; Code, s. 129; C. C. P., s. 5; Const., Art., IV, s. 1.)

Editor's Note. — This section worked a significant change in the law of the state with its enactment in the Code of Civil Procedure. Prior to that time "all suits prosecuted in the name of the state were not necessarily criminal suits as distinguished from civil suits—the true test being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the state, it was a civil suit." State v. Pate, 44 N. C. 244. Hence a warrant to keep the peace was a civil action though brought in the name of the state. See State v. Locust, 63 N. C. 574, 575. But this section changed the rule in all such cases, the test now being whether the person is charged with a public offense or whether the action is prosecuted by the state at the instance of an individual to prevent or apprehend crime against the person or property of the individual; in either case the action being a criminal proceeding. See State v. Lyon, 93 N. C. 575, 576; State v. Oates, 88 N. C. 668.

Bastardy Proceedings. — Until 1879 a bastardy proceeding was a civil action, see State v. Pate, 44 N. C. 244; State v. McIntosh, 64 N. C. 607. It is very probable that this section did not change it to a criminal action for its nature did not bring it within the terms of this section. But it was contended by Mr. Justice Avery in State v. Burton, 113 N. C. 655, 18 S. E. 657, that the Act of 1879, appearing in Michie's Code of 1931 as § 265 et seq., prescribing a fine as a punishment, changed the nature of the proceeding so as to make it fall within the terms of this section.

This view was opposed by Mr. Justice Clark in the same case, his contention being that the imposition of the fine by the act of 1879 did not change the nature of the proceeding. The purpose of bastardy proceedings has always been to force the father to support the child so that it will not become a public charge, and not to impose a punitive measure. The Supreme Court has held both ways upon the question and many North Carolina cases may be cited to support either view. However, the most recent cases upon the subject hold that bastardy is a proceeding in the nature of a civil action to enforce a police regulation. See State v. Currie, 161 N. C. 275, 76 S. E. 694. For a full citation of the authorities, pro and con, see 2 Enc. Dig. p. 329, section 16. See the discussion in the editor's note under sec. 276(a).

The cases discussed in the two preceding paragraphs were decided under the old law. For the present law, making bastardy proceedings a criminal action, see section 276(a) et seq.

Private Individuals as Prosecutors. — No person is regarded as a prosecutor for a public offense unless he is so marked on the bill of indictment. State v. Lupton, 63 N. C. 483.

Title of Case. — The terms "people of the state" as found in A IV, section 1 of the constitution, and "the state" as used in this section mean substantially the same. Thus a criminal case entitled "People v. A. B., criminal action" or "State v. A. B., indictment" as was used prior to the present constitution, are either correct forms. Larkins v. Murphy, 68 N. C. 381.

§ 396. Civil action.—Every other is a civil action. (Rev., s. 351; Code, s. 130; C. C. P., s. 6.)

A proceeding for dower is a civil action under this section. Tate v. Powe, 64 N. C. 644.

§ 397. When court means clerk.—In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant. (Rev., s. 352; Code, s. 132; C. C. P., s. 9.)

Clerks Act for Court. — See section 402. Although the terms "court" and "superior court" as used in this section mean the clerk of the court as indicated, the clerk is given no separate jurisdiction apart from the court itself. In so far as the civil procedure is concerned, at least, the clerk acts as and for the court in the specified instances. His acts are performed by the court through him and stand as that of the court if not excepted to and reversed or modified on appeal, and thus there is no divided jurisdiction between the clerks and the judge. The whole pro-

cedure is in the court and has its sanction. Jones v. Desern, 94 N. C. 32, 34. See also, 1 N. C. Law R. 15.

Same — Civil Actions. — It was pointed out in Brittain v. Mull, 91 N. C. 498, 502, that the clerk does not exercise power in respect to pleadings and practice to any considerable extent in civil actions (as distinguished from special proceedings) because questions arising in such matters arise mainly in term time when the judge must act directly. This was due to the suspension act, but since the Crisp Act in 1919 the rule is otherwise. See note to section 402, and see the Editorial in 1 N. C. Law R. 199. So the clerk represents and is the court and has authority to exercise the discretionary powers conferred for the purpose of decreeing a sale of a decedent's estate for the payment of debts. Indeed the clerk implies the court in cases like this. Tillett v. Aydlett, 90 N. C. 551, 553.

Same—Special Proceedings. — But in special proceedings he acts for the court in superintending the pleadings, practice and procedure, and in making all proper orders and judgments therein unless his action is revised or modified by the judge upon appeal. Jones v. Desern, 94 N. C. 32, 36; Adams v. Howards, 110 N. C. 15, 19, 14 S. E. 648.

It has never been doubted that it was competent for the legislature to confer such jurisdiction upon the clerk. Bank v. Wilkesboro Hotel Co., 147 N. C. 594, 601, 61 S. E. 570.

The word as used in art. IV, section 28 of the constitution does not mean the court of the clerk. McAdoo v. Benbow, 63 N. C. 461.

Since the statute providing that a summary remedy against a railroad for damages caused by construction of the road over the land in favor of persons owning land may be begun either in or out of term by service of petition upon the defendant, it is proper for the judge to appoint commissioners as provided, if begun in term, but where the proceeding is begun in vacation the clerk may act for the court in the manner explained in these annotations. Click v. Western, etc., R. Co., 98 N. C. 390, 392, 4 S. E. 183.

The reference in section 1825 to "the court" "or a judge thereof" refers to the clerk as well as the judge. Mills v. Biscoe Lumber Co., 139 N. C. 524, 52 S. E. 200.

The jurisdiction under section 3963 is conferred upon the clerk by virtue of this section. Bank v. Wilkesboro Hotel Co., 147 N. C. 594, 61 S. E. 570.

This section gives the clerk power to enter a judgment for the recovery of money. Bank v. Wilkesboro Hotel Co., 147 N. C. 594, 601, 61 S. E. 570.

Application of Section. — This section was cited in Pelletier v. Saunders, 67 N. C. 261, as authority for the proposition that the term "superior court" as used in section 74 means clerk of the superior court.

Term Clerk Has Been Impliedly Read into § 819.—In view of this section it has been held that when the judgment in garnishment proceedings under § 819 is entered up, the execution is awarded as a matter of course and can be issued by the clerk without application to the judge. Newberry v. Meadows Fert. Co., 206 N. C. 182, 189, 173 S. E. 67.

Art. 2. General Provisions.

§ 398. Remedies not merged.—Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. (Rev., s. 353; Code, s. 131; C. C. P., s. 7.)

Summons Served upon Person in Jail. — In view of this section it was proper to serve a summons and order of arrest upon the defendant while confined in jail upon failure to give appearance bond to answer for a secret criminal assault. White v. Underwood, 125 N. C. 25, 26, 34 S. E. 104.

Cited in Scales v. Wachovia Bank & Trust Co., 195 N. C. 772, 776, 143 S. E. 868.

§ 399. One form of action.—The distinction between actions at law and suits in equity and the forms of such actions and suits are abolished, and there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is denominated a civil action. (Rev., s. 354; Code, s. 133; C. C. P., s. 12; Const., Art. IV, s. 1.)

Effect upon Substantive Law—Torts. — Although there is but one form of action there are torts and contracts just as there was prior to the C. C. P., but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. Bitting v. Thaxton, 72 N. C. 541, 549.

Same—Legal and Equitable Principles. — Although one tribunal deals out both law and equity, the principles of law and equity remain separate and distinct, and it is just as important now as ever before to keep them separate. Jordan v. Lanier, 73 N. C. 90, 92.

But it is true that having but one tribunal causes the principles of law and equity to run into each other to some extent at least. For an illustration, see Jordan v. Lanier, 73 N. C. 90, 92.

The defendant's right of action by his counterclaim upon his unendorsed bond is still an equitable claim notwithstanding this section. Kiff v. Weaver, 94 N. C. 274, 279.

Nature of Defense Immaterial. — Any defense either legal or equitable may be set up by the defendant in an action by the endorsee upon a non-negotiable note. Thompson v. Osborne, 152 N. C. 408, 67 S. E. 1029.

Common Law Forms Immaterial. — Since the old technical distinctions in the forms of actions were abolished by this section, it is immaterial whether the plaintiff's remedy under the old practice was trespass or case. Sneeden v. Harris, 109 N. C. 349, 357, 13 S. E. 920.

An exception to a complaint that it is for money had and received and as such cannot be maintained unless the money has been actually received by the defendant is not maintainable under this section regardless of the common-law practice. Staton v. Webb, 137 N. C. 35, 38, 49 S. E. 55.

Where parties are brought into court by summons, the plaintiff can file his complaint, alleging a legal cause of action, or an equitable cause of action, or can combine them as he may elect. Wilson v. Waldo, 221 Fed. 505, 507.

§ 400. Plaintiff and defendant.—In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (Rev., s. 355; Code, s. 134; C. C. P., s. 13.)

§ 401. How party may appear.—A party may appear either in person or by attorney in actions or proceedings in which he is interested. (Rev., s. 356; Code, s. 109; C. C. P., s. 423.)

This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he be permitted ex gratia to do so. Abernethy v. Burns, 206 N. C. 370, 173 S. E. 899.

Cited in Buncombe County v. Penland, 206 N. C. 299, 305, 173 S. E. 609.

§ 402. Feigned issues abolished and substituted.—Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and this order is the only authority necessary for a trial. (Rev., s. 357; Code, s. 135; C. C. P., s. 15.)

Benefit of Feigned Issue Preserved. — See Harkey v. Houston, 65 N. C. 137.

Effect upon Proper Parties. — Since feigned issues in seduction cases have been abolished, the woman and not her father is the real party in interest if she be of age. Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397.

Effect of Carrying Feigned Issue to Supreme Court. — When an action upon a feigned issue is carried to the Supreme Court it will be dismissed. Blake v. Askew, 76 N. C. 325.

§ 403. Jurisdiction of clerk.—The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular term is expressly referred to. (Rev., s. 358; Code, s. 251; C. C. P., s. 108.)

Editor's Note. — See section 397 and note. This section was passed in 1868 as a part of the C. C. P. It was a part

of the scheme to simplify procedure and speed up litigation so that justice could be had much sooner and at less expense than was formerly possible. But due to the depressed financial conditions brought about by the civil war, the people were not desirous of a more speedy system of procedure for the reason that in actions for debts the unfortuniate litigants might have more time in which to improve their financial conditions so that they might be able to discharge the judgments. Under pressure of such demand the legislature passed in the same year what is known as the "Bachelor Act" which suspended the operation of certain portions of the C. C. P. temporarily. The legislature of 1870 made the suspension more permanent by providing that the act should remain in force until otherwise provided. The suspension act became chapter 18 of Battle's revisal, was incorporated in the Code as chapter 10 of the C. C. P., was carried forward in subsequent revisals (see Bynum v. Powe, 97 N. C. 374, 381, 2 S. E. 170), and remained in force until 1919 when the legislature passed what is known as the "Crisp Act" restoring the suspended provisions of the C. C. P. (See post, section 476). See Campbell v. Campbell, 179, N. C. 413, 415, 102 S. E. 737. See Editorial in 1 N. C. Law R. 199.

The effect of the suspension act was far-reaching, many sections having been totally suspended while others were suspended only in part. The editor's notes under the particular sections will point out the effect upon such sections.

The suspension act was chiefly directed at the portions of the C. C. P. which gave the clerk of the superior court power to decide questions of practice, procedure and other such matter out of term time. Hence this section was modified by the act. To prevent this section from operating in the class of cases named above, the act provided that the summons in all civil actions should be made returnable to the court in term time and that questions of pleading, practice and procedure should be determined during term time only. Therefore in such cases the operation of this section was totally suspended. But the suspension act did not affect special proceedings and in such cases the clerk continued to exercise the power hereby conferred upon him, except as such authority may have been modified or affected by subsequent statutes. Jones v. Desern, 94 N. C. 32, 35; Warden v. McKinnon, 94 N. C. 378, 387; Brittain v. Mull, 91 N. C. 498.

With the passage of the Crisp Act this section is in full force and effect and should be construed in connection with section 476 where the terms of the recent act will be found. See Campbell v. Campbell, 179 N. C. 413, 415, 102 S. E. 737.

Constitutionality of Suspension Act.—The constitutionality of the suspension act was attacked in McAdoo v. Benbow, 63 N. C. 461, upon the ground that the constitution required the clerk to hear and decide all questions of practice and procedure, but it was held that the constitution made no such provision and that the legislature had power thereunder to make such regulations. Although there was one dissent to the holding, it became to be universally recognized as the law until the Crisp Act of 1919. Bynum v. Powe, 97 N. C. 374, 381, 2 S. E. 170.

Nature of Clerk's Power. — In exercising the jurisdiction herein conferred, the clerk is no more than a servant of the court, subject to its supervision in the manner provided elsewhere by statute. Turner v. Holden, 109 N. C. 182, 186, 13 S. E. 731; Maxwell v. Blair, 95 N. C. 317, 321; Brittain v. Mull, 91 N. C. 498, 502.

As was indicated in McAdoo v. Benbow, 63 N. C. 461, 464, the jurisdiction is conferred upon the court, and not upon the clerk. He is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and judge, but they both function as officials of the same court exercising but one jurisdiction. Jones v. Desern, 94 N. C. 32, 35.

Regularly, in special proceedings (since the act of 1919 in all proceedings, see the editor's note to this section) the pleadings should be made up and perfected by the Clerk, acting as and for the Court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. Brittain v. Mull, 91 N. C. 498; Wharton v. Wilkerson, 92 N. C. 407. Loftin v. Rouse, 94 N. C. 508, 509.

The Court in Term, should not do more than to direct the Clerk to perfect the pleadings and to allow or disallow amendment according to law. If the Clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the Judge would become that of the Court. It was the duty of the Clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such respect, an appeal might be taken as indicated above. Loftin v. Rouse, 94 N. C. 508, 510.

It was not the duty of the Judge in term, after the issues were tried—there being no question of law to be decided, —to direct the Clerk what to do, or to make an order remanding the case to the Clerk. The latter ought to have proceeded without an order, and heard and determined the case upon its merits, subject to the right of appeal to the Judge. Brittain v. Mull, 94 N. C. 595, 599.

Same—To Grant Equitable Relief.—The C. C. P. does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the answer as a defense and then the clerk has power to hear all questions herein permitted. See Vance v. Vance, 118 N. C. 864, 24 S. E. 768; Bragg v. Lyon, 93 N. C. 151.

Same—Effect of Failure of Clerk to Decide Questions. — We are not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury, because they have not been decided by the Clerk, acting for the Court, and, upon appeal, by the Judge. It is the duty of the Clerk, acting for the Court, to decide whatever question may be presented, and to make all proper orders. Brittain v. Mull, 94 N. C. 595, 599.

Amendments after Joinder of Issues.—Where, in special proceedings, the pleadings are made up before the Clerk, and upon joinder of issues are transferred to the Court in Term, the Judge has power to allow amendments, or he may stay the trial and remand the papers to the Clerk, in order that he may consider a motion to amend. Loftin v. Rouse, 94 N. C. 508.

Same—Remanding Order Interlocutory. — An order remanding the papers to the Clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory and does not impair a substantial right, and cannot be appealed from. Loftin v. Rouse, 94 N. C. 508.

Application to Special Proceedings.—See the editor's note to this section. Proceedings to obtain partition, dower and the like are special proceedings, Jones v. Desern, 94 N. C. 32, 35. So is a proceeding by creditors to compel an administrator to an account and payment of the debts of the estate. Brittain v. Mull, 91 N. C. 498; Warden v. McKinnon, 94 N. C. 378, 387.

And the granting of a warrant of attachment was a special proceeding. Cushing v. Styron, 104 N. C. 338, 339, 10 S. E. 258.

SUBCHAPTER II. LIMITATIONS.

Art. 3. Limitations, General Provisions

§ 404. When action commenced.—An action is commenced as to each defendant when the summons is issued against him. (Rev., s. 359; Code, s. 161; C. C. P., s. 40.)

When Statute Adopted.—The statutes of limitation appearing in the following sections did not become effective until the adoption of the C. C. P.; prior to that time the statute of presumptions was in force. Crawford v. McLellan, 87 N. C. 169.

The statutes prescribing limitations in the code displace those contained in the Revised Code. Lynn v. Lowe, 88 N. C. 478, 483.

Subchapter Exclusive. — All civil actions must be commenced within the periods prescribed in this subchapter, "except where in special cases a different limitation is prescribed by statute." Woody v. Brooks, 102 N. C. 334, 340, 9 S. E. 294.

Modes of Commencing Action.—There are only two ways by which a civil action may be commenced: 1. By issuing a summons; 2. By submitting a controversy without action; When the former method is resorted to the action is commenced when the summons is issued, and not until that is done. But if the defendant sees proper to do so he may appear without a summons and thereby waive its issuance. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951.

Any form of action or special proceeding in this State must always be commenced by summons or attachment. Morris v. House, 125 N. C. 550, 560, 34 S. E. 712.

What Constitutes Issuing of Summons. — The word "issue," means going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. If the clerk delivers it to the Sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the Sheriff, this is an issue of the summons; or, as is often the case, if the summons is filled out by the attorney of plaintiff, and put in the

hands of the Sheriff. This is done by the implied consent of the clerk, and constitutes an issuance from the time it is placed in the hands of the Sheriff for service. But a summons simply filled up and lying in the office of an attorney, would not constitute an issuing of the summons. Nor would the fact that a summons was filled up and held by the clerk for a prosecution bond constitute the issuing of a summons, until the bond is given, or at least until it goes out by the consent of the clerk for the purpose of being served on the defendant. Webster v. Sharpe, 116 N. C. 466, 471, 21 S. E. 912; Pettigrew v. McCoin, 165 N. C. 472, 81 S. E. 701.

Notwithstanding the omission of the signature of the clerk, or the omission of the seal, it has been held sufficient where the clerk actually issued it, but where the clerk gave a blank summons to counsel who filed it out without either the seal or the signature of the clerk and had it served without giving the clerk an opportunity to pass upon the sufficiency of the undertaking, the summons was too defective to constitute a commencement. Redmond v. Mullenax, 113 N. C. 505, 511, 18 S. E. 708.

Effect of Defective Summons.—If a paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process, it may be amended to conform to the requirements of a perfect summons, and be considered as issued in the first instance. But, unless there is something upon face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all, and cannot be considered the commencement of an action. Redmond v. Mullenax, 113 N. C. 505, 510, 18 S. E. 708.

Issuance Does Not Confer Jurisdiction.—While an action is commenced as to each defendant when the summons is issued against him, jurisdiction of the cause and of parties litigant can be acquired only by a legal service of process, unless there is an acceptance of service or a general appearance, actual or constructive. Hatch v. Alamance Co., 183 N. C. 617, 112 S. E. 529. Bernhardt v. Brown, 118 N. C. 700, 701, 24 S. E. 527, 715; Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978; Warlick v. Reynolds, & Co., 151 N. C. 606, 66 S. E. 657, 21 R. C. L. 1315

§ 405. Run from accrual of cause of action; objection.—Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer. (Rev., s. 360; Code, s. 138; C. C. P., s. 17.)

Section not Statute of Presumptions.—Now we have no statute of presumptions. This section prescribes a statute of limitations only. Helm Co. v. Griffin, 112 N. C. 356, 358, 16 S. E. 1023.

This section applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale. In re Gibbs, 205 N. C. 312, 171 S. E. 55.

Necessity of Cause of Action or Claim. — If there is no claim or cause of action the statute will not run. This principle is recognized by this section and there is nothing in sec. 438 which conflicts with it. Miller v. Shoaf, 110 N. C. 319, 324, 14 S. E. 800.

Necessity of Pleading Statute. — It is familiar learning that the statute of limitations is not available unless pleaded, Guthrie v. Bacon, 107 N. C. 337, 12 S. E. 204; Randolph v. Randolph, 107 N. C. 506, 12 S. E. 374; and this is required by the statute. Albertson v. Terry, 109 N. C. 8, 10, 13 S. E. 713; King v. Powell, 127 N. C. 10, 11, 37 S. E. 62. But facts will suffice. Pipes v. Lum. Co., 132 N. C. 612, 44 S. E. 114.

It is error for the judge to instruct the jury where the statute of limitations is not pleaded that the plaintiff can not recover. Pegram v. Stoltz, 67 N. C. 144, 146.

Manner of Pleading.—It was unquestionably true under the former system, where an equitable claim appeared upon the face of the bill to be barred by lapse of time, or the statute of limitations, that it might have been taken advantage of by demurrer, and that it need not be specially pleaded, but the statute now requires it to be pleaded, and no distinction is made in this respect between equitable and legal causes of action. Guthrie v. Bacon, 107 N. C. 337, 339, 12 S. E. 204.

The statute of limitations cannot be pleaded in a demurrer, but must be taken advantage of only by answer, by express provision of the statute. In Bacon v. Berry, 85 N. C. 124, 125, the defendant demurred because more than seven years elapsed since the rendition of the judgment when the suit was commenced. The court held that "It was, in fact, a plea of the statute of limitations, which must be set up in the answer, it being an objection that can never be taken by demurrer, citing Green v. North Carolina R. Co., 73 N. C. 524. See also Kahnweiler v. Anderson, 78 N. C. 133; King v. Powell, 127 N. C. 10, 11, 37 S. E. 62. If the facts are admitted, the court may pass on the question of the bar, as in Ewbank v. Lyman, 170 N. C. 505, 87 S. E. 348. It was held in Long v. Bank, 81 N. C. 41, at p. 46, that even if the statutory bar is apparent on the face of the complainant, it could not be pleaded except by answer, and not by demurrer or motion to dismiss. The same was held in Oldham v. Rieger, 145 N. C. 254, at p. 259, 58 S. E. 1091, and the reason why such a thing cannot be done is fully stated, in addition to the positive requirement of the statute as the best of reasons, and a demurrer alleging that time had elapsed was in that case characterized as a "speaking demurrer." Nor could the bar of the statute be raised by a motion to dismiss. Oldham v. Rieger, supra.; Moody v. Wike, 170 N. C. 541, 543, 87 S. E. 350.

Under this section limitation on foreclosure of tax sale certificate cannot be taken advantage of by demurrer. Logan v. Griffith, 205 N. C. 580, 172 S. E. 348.

Application to Possessory Titles. — The rule does not apply to possessory titles, which are more in the nature of presumptions than strict limitations. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

Accrual of Cause Illustrated. — The statute of limitations where a party dies pending action begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. Lynn v. Lowe, 88 N. C. 478.

Where one pays another upon a debt which is uncertain in amount and takes an acknowledgment to a refund if overpaid, the statute does not begin to run against the agreement to refund until after the amount of overpayment is ascertained. Falls v. McKnight, 14 N. C. 421.

The defendant administrator, according to his own admission assuming to act as plaintiff's agent in the collection and application of the rents, cannot plead the Statute of Limitations unless there was a demand and a refusal, and then only from the time thereof. Shuffler v. Turner, 111 N. C. 297, 16 S. E. 417.

A cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. Hall v. Hood, 208 N. C. 59, 179 S. E. 27.

Where a municipal corporation constructs a sewer system which empties quantities of raw sewage and other obnoxious matter in a stream, which matter is periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land, all damages to the land based on trespass occurring prior to three years before the institution of the action are barred by the three-year statute of limitations under this section and section 441(3). Lightner v. Raleigh, 206 N. C. 496, 174 S. E. 272.

Cited in McNeill v. Suggs, 199 N. C. 477, 480, 154 S. E. 729.

§ 406. Deemed pleaded by insane party. — On the trial of any action or special proceeding to which an insane person is a party, such insane person is deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. The court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for his proper defense. (Rev., s. 361; 1889, c. 89, s. 2.)

Applicable Against State Instructions. — The superintendent of the State Hospital cannot recover compensation against guardian of insane person for the maintenance of his ward for more than three years preceding the bringing of the action. State Hospital v. Fountain, 129 N. C. 90, 39 S. E. 734.

Hearing of Family. — Conceding that this power is to be exercised within the discretion of the judge, see

Farmers, etc., Bank v. Duke, 187 N. C. 386, 392, 122 S. E. 1. If there was ever a time when the family of an insane person ought to be heard, it would seem that a petition for the appointment of a receiver for an insane person confined in the state asylum is one. In re Hybart, 119 N. C. 359, 366, 25 S. E. 963.

§ 407. Disabilities.—A person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued either—

Cross Reference.—As to insanity permitting the commencing of suit after expiration of statute of limitations see § 443 and the note thereto.

Editor's Note. — In 1899 the legislature struck the provisions which made coverture a disability on par with the others enumerated in this section. See Weathers v. Borders, 124 N. C. 610, 617, 32 S. E. 881; Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

But the statute provided that the time elapsing before its passage can not be counted against a married woman in actions of ejectment, and in other actions it should not apply to actions pending at its passage Lafferty v. Young, 125 N. C. 296, 297, 300, 34 S. E. 444; Swift v. Dixon, 131 N. C. 42, 42 S. E. 458.

1. Within the age of twenty-one years; or

2. Insane; or

Applicable to Idiot. — The statute of limitations does not run against an idiot by reason of the excepting clause in this section. Outland v. Outland, 118 N. C. 138, 23 S. E. 972.

3. Imprisoned on a criminal charge, or in execution under sentence for a criminal offense;

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298.

Section Relates to True Title. — Adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

Effect of Defects of Other Sections. — The criticism to which section 428 may be subjected in misciting other intended sections cannot affect the application of this section to the previously limited actions for real property, to which these are expressly made subject. Clayton v. Rose, 87 N. C. 106, 111.

Three Year Period Enforced. — In case of infancy, even after the expiration of the time of the limitation, an action may be brought within three years after full age. Campbell v. Crater, 95 N. C. 156, 162; and if not brought within that time the action is barred. Clendenin v. Clendenin, 181 N. C. 465, 472, 107 S. E. 458. Dissenting Opinion.

Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. Clayton v. Rose, 87 N. C. 106.

If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their rights to recover will be barred. Warlick v. Plonk, 103 N. C. 81, 9 S. E. 190.

Effect of Disability Continuing Through Life. — If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor. Ellington v. Ellington, 103 N. C. 54, 57, 9 S. E. 208.

Effect of Guardian Having Right to Sue. — Culp v. Lee, 109 N. C. 675, 678, 14 S. E. 74, has no application to actions for the recovery of realty when the legal title is in the person under disability. The court held that the distributees having had a general guardian, the executor, having been exposed to an action by him for the full period prescribed by the statute, was protected by the lapse of time. Cross v. Craven, 120 N. C. 331, 332, 333, 26 S. E. 940.

Running of Statute Where No Final Account Filed. — When no final account has been filed, the statute begins to run from the arrival of the ward at age. Self v. Shugart, 135 N. C. 185, 187, 47 S. E. 484.

May bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter. (Rev., s. 362; Code, ss. 148, 163; C. C. P., ss. 27, 142; 1899, c. 78.)

§ 408. Disability of marriage.—In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine. (Rev., s. 363; 1899, c. 78, ss. 2, 3.)

Purpose of Section. — This section is a part of the major stroke of the law to free the married woman from the merged identity fiction which deprived her of a legal existence. Other sections are 454 and 2606. See 2 N. C. Law Rev. 181.

Coverture Not Defense Since 1899.—Under the provisions of this section, and sections 454, 2606 et seq., passed in pursuance of Article X, section 6, of our State Constitution, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried. Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9.

Since the passage of this section if the feme covert's right of entry and title were defeated by defendants' adverse possession for seven years under color before the action was commenced, the plea of coverture will not avail her. Bond v. Beverly, 152 N. C. 56, 57, 67 S. E. 55.

Since the passage of this section coverture is not a defense in bar of the running of the statute of limitations. Carter v. Reaves, 167 N. C. 131, 83 S. E. 248.

In a suit to cancel deeds because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color, the coverture of the plaintiff will not avail her to repel the bar of the statute of limitations, which has run in favor of the defendant's title. Butler v. Bell, 181 N. C. 85, 106 S. E. 217.

Section Contemplates True Owner. — A possession cannot well be adverse, within the meaning of this section, to any one who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right to be barred by such a possession. It has sole reference to the owner of the title. Berry v. Ritter Lumber Co., 141 N. C. 386, 395, 54 S. E. 278.

Effect of Statute upon Proof. — Until twenty years had elapsed since the passage of this section, one claiming title by adverse possession had the burden of proving that the statute began to run prior to the disability of coverture. Holmes v. Carr, 172 N. C. 213, 90 S. E. 152.

§ 409. Cumulative disabilities.—When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed. (Rev., s. 364; Code, ss. 149, 170; C. C. P., ss. 28, 49.)

Editor's Note. — By the phraseology of this section, it is evident that cumulative disabilities will only prevent the running of a statute before it has started. Any number, after the statute has once begun to run, will not suspend or arrest the operation. See Holmes v. Carr, 172 N. C. 213, 90 S. E. 152. See also, sec. 410.

Operation of Section Illustrated. — The disability of coverture supervened upon that of infancy, and the statute of limitations is suspended in language too explicit to be capable of any other construction. Clayton v. Rose, 87 N. C. 106; Cross v. Craven, 120 N. C. 331, 332, 26 S. E. 940. Epps v. Flowers, 101 N. C. 158, 160, 7 S. E. 680; Lafferty v. Young, 125 N. C. 296, 297, 300, 34 S. E. 444.

This section can have no application when there is a clear running of the Statute for the period fixed after the

disability is removed, as when an infant attains his majority. Campbell v. Crater, 95 N. C. 156, 162.

Significance of Length of Time of Disabilities. — The length of time elapsing during cumulative disabilities so long as the disabilities are continuous is immaterial. Epps v. Flowers, 101 N. C. 158, 161, 7 S. E. 680.

§ 410. Disability must exist when right of action accrues.—No person may avail himself of a disability, unless it existed when his rights of action accrued. (Rev., s. 365; Code, s. 169; C. C. P., s. 48.)

Running of Statute Cannot Be Stopped. — If the statute of limitations commences to run nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298. See Clendenin v. Clendenin, 181 N. C. 465, 472, 107 S. E. 458; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467.

Principle Applied. — The principle of this section applies where the defendant is out of the state but left after the cause of action accrued. Blue v. Gilchrist, 84 N. C. 239, 241. It applies also in the case of insanity, see note under section 406; and applies formerly in the case of coverture, see note under sec. 408.

§ 411. Defendant out of state; when action begun or judgment enforced.—If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the state, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this state, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this state, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. (Rev., s. 366; Code, s. 162; C. C. P., s. 41; 1881, c. 258, ss. 1, 2.)

Retroaction Effect. — As a general rule statutes of this character apply to actions pending at the time they take effect provided the actions have not been barred by a provision limitation. See Cox v. Brown, 51 N. C. 100.

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action, or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. Armfield v. Moore, 97 N. C. 34, 37, 38, 2 S. E. 347.

Nonsuit in Absence of Supporting Evidence.—Where plaintiff resists under this section defendant's plea of the statute of limitations solely on the ground that defendant left the state prior to three years from the accrual of the cause of action, and defendant denies the allegation of nonresidence, in the absence of evidence by plaintiff in support of the allegation of nonresidence, defendant's motion as of nonsuit is properly allowed. Savage v. Currin, 207 N. C. 222, 176 S. E. 569. See § 415 and note thereto.

The words "any person," are employed to designate the person to be affected and embraced by the section, are very comprehensive, and there is nothing in its scope or purpose that excludes nonresidents. Armfield v. Moore, 97 N. C. 34, 37, 38, 2 S. E. 347.

"The times herein limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons. Armfield v. Moore, 97 N. C. 34, 2 S. E. 347; Williams v. Iron Belt Bldg., etc., Ass'n., 131 N. C. 267, 269, 42 S. E. 607.

The "return to the State," specified by this section, as necessary to put the statute in motion, is a return with a view to residence—not a casual appearance in the state, passing through it, or even making a visit here. Lee v. McKoy, 118 N. C. 518, 522, 24 S. E. 210.

Sufficiency of Return to Start Statute. — Where the debtor was a nonresident of this State, but was here on visit of a day or two each year, such visits would not have effect of putting the statute in motion. Armfield v. Moore, 97 N. C. 34, 2 S. E. 347.

This section, as necessary to put the statute of limitations in motion, is a return, animo manenda—not a casual appearance in the state, passing through it, or even making a visit here. Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

Same—Applicable Where Absence Started Before Accrual. —Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. Armfield v. Moore, 97 N. C. 34, 2 S. E. 347.

When Running Suspended by Action. — It will be observed that this statutory provision prescribes and embraces three distinct cases in which the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed; (1) Where the debtor was out of the state at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In it time does not begin to lapse in his favor until he shall return to the State—not simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence. And if, after such returns, he shall depart from the state for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor-resident or nonresident of the State—departed from and resided out of it, "the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or the enforcement of such judgment." (3) When, after the cause of action has accrued or judgment has been rendered or docketed, the debtor shall depart from the State, "and remain continually absent for the space of one year or more," the time of his absence shall not be allowed in his favor. Armfield v. Moore, 97 N. C. 34, 36, 2 S. E. 347; Arthur v. Henry, 157 N. C. 393, 395, 73 S. E. 206.

The statute of limitations is suspended in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remain continuously absent for a year or occassionally visits the state: (2) when such person retains his residence, but is absent from the state continuously for one year or more. Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

When a person becomes a nonresident of the state it is not necessary that he should remain continuously out of the state one year to stop the running of the statute, nor would occasional visits to the state put the statute in motion. Lee v. McKoy, 118 N. C. 518, 521, 24 S. E. 210.

And this without exception of instances where a proceeding in rem will lie against property situated here. No presumption of payment of the debt will be raised within the period allowed for the commencement of the action. Love v. West, 169 N. C. 13, 84 S. E. 1048. See concurring opinion.

When Limitation Begins to Operate against Foreign Corporation. — An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. Williams v. Iron Belt Bldg., etc., Ass'n, 131 N. C. 267, 42 S. E. 607.

When Judgment in Personam Not Rendered. — Where a nonresident defendant of this state has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of this section, may not be rendered against him in personam, in an action for debt; and where so rendered it will be set aside. Bridger v. Mitchell, 187 N. C. 374, 121 S. E. 661.

Section Not Applicable after Statute Has Run. — This section is not applicable after the statute of limitation has run. Southern R. Co., v. Mayes, 113 Fed. 84.

Applicability to Actions in Rem. — This section is applicable to actions in rem as well as actions in personam, no exception being made. Love v. West, 169 N. C. 13, 84 S. E. 1048.

Applicability to Suits against Bail. — Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the state in the meanwhile. Albemarle Steam Nav. Co. v. Williams, 111 N. C. 35, 15 S. E. 877.

Applicable to Enforce Resulting Trust.—Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the state, the elapsed time is less than ten years, then, under this section, the cause of action is not barred by the ten-year statute. Miller v. Miller, 200 N. C. 458, 157 S. E. 604.

Affect of Non-resident's Ownership of Property in State.—The fact that a non-resident debtor has property within the State will not affect this Section, which suspends the operation of the Statute of Limitations for the period during which the person, against whom the demand is made, is out of the State. Grist v. Williams, 111 N. C. 53, 15 S. E. 889.

This section applies notwithstanding the fact that defendant has property within the State and an agent therein duly appointed, upon whom process could have been served. Volivar v. Richmond Cedar Works, 152 N. C. 34, 67 S. E. 42.

Non-Resident Foreign Corporations.—The statute of limitations do not apply to foreign non-resident corporations. Grist v. Williams, 111 N. C. 53, 15 S. E. 889; Alpha Mills v. Watertown Steam Engine Co., 116 N. C. 797, 804, 21 S. E. 917.

But it does apply to non-resident corporations as well as individuals. Alpha Mills v. Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917; Grist v. Williams, 111 N. C. 53, 15 S. E. 889; Green v. Hartford Life Ins. Co., 139 N. C. 309, 310, 51 S. E. 887; Volivar v. Richmond Cedar Works, 152 N. C. 34, 35, 67 S. E. 42.

Effect of Corporation Service Statutes. — Section 6414, 6415, which authorize service of summons against non-resident insurance companies upon the Commissioner of Insurance, in no way abrogates or affects the suspension of the running of the statutes of limitation in such cases. That service can thus be had upon a non-resident corporation may be a reason why the General Assembly should amend this section, so as to set the statute running in such cases, but it has not done so and the courts can not. Green v. Hartford Life Ins. Co., 139 N. C. 309, 310, 51 S. E. 887.

Applicable to Operation of Sec. 442.—The existence of the conditions enumerated in this section will suspend the operation of sec. 442. Williams v. Iron Belt Bldg., etc., Ass'n, 131 N. C. 267, 269, 42 S. E. 607.

Cited in Osborne v. Board of Education, 207 N. C. 503, 504, 177 S. E. 642.

§ 412. Death before limitation expires; action by or against executor.—If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement. (Rev., s. 367; Code, s. 164; C. C. P., s. 43; 1881, c. 80.)

I. General Consideration.
II. Death of Creditor.
III. Death of the Debtor.
IV. Filing Claim.

I. GENERAL CONSIDERATION.

Editor's Note.—This section was new with the C. C. P. It has remained unchanged since its insertion except that the last sentence was added by the act of 1881, and the proviso at the end of the second sentence by the act of 1919.

The section has been held to be an enabling and not a disabling statute, and to apply only in those cases where, but for its interposition, a claim would be barred, Benson v. Bennett, 112 N. C. 505, 17 S. E. 432; Redmond v. Pippen, 113 N. C. 90, 93, 18 S. E. 50; Humphrey v. Stephens, 191 N. C. 101, 131 S. E. 383; Geitner v. Jones, 176 N. C. 542, 97 S. E. 494, intending to enlarge and extend the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. Irvin v. Harris, 184 N. C. 547, 114 S. E. 818. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases where, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. It was not intended to be a restriction on the statute of limitation so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course but for this section, it would not be barred till a later date. The object in view is that when the cause of action survives and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die defore the claim is barred action may be brought "After the expiration of the time limited, and within one year." Benson v. Bennett, 112 N. C. 505, 507, 17 S. E. 432; Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77.

Formerly there was no such extension of time to prevent the bar of the statutes from becoming complete as is provided in this section. Hawkins v. Savage, 75 N. C. 133; Bruner v. Threadgill, 88 N. C. 361. Patterson v. Wadsworth, 89 N. C. 407, 409.

Exception to General Rule.—This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. Matthews v. Peterson, 150 N. C. 134, 135, 63 S. E. 721. Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840.

However, it should be observed that it has no application where the bar attached before death. Grady v. Wilson, 115 N. C. 344, 347, 20 S. E. 518; Parker v. Hardin, 121 N. C. 57, 58, 28 S. E. 20; Copeland v. Collins, 122 N. C. 619, 30 S. E. 315; Winslow v. Benton, 130 N. C. 58, 59, 40 S. E. 840; Vaughan v. Hines, 87 N. C. 445, 450; Daniel v. Laughlin, 87 N. C. 433, 437; Humphrey v. Stephens, 191 N. C. 101, 131 S. E. 383.

And for that reason will not constitute an exception to the rule where such bar had attached at death. Nor will the section apply where the action is not barred within the year fixed by the section.

To What Limitations Applicable.—The section only applies to the limitations prescribed in the Code of Civil Procedure. Hall v. Gibbs, 87 N. C. 4, 5, 6.

It is the only provision which will defeat the operation of sec. 438(3). Syme v. Badger, 96 N. C. 197, 2 S. E. 61.

When it is pertinent to the subject it must be taken in connection with section 437. Redmond v. Pippen, 113 N. C. 90, 92, 18 S. E. 50.

Applicability in Action to Subject Lands.—The heirs at law can successfully plead the statute of limitations against the administrator seeking to subject their lands to the payment of deceased's debt as fully as he can against a creditor. Matthews v. Peterson, 150 N. C. 134, 63 S. E. 721.

A personal representative who seeks to subject descended or devised lands to make assets for the payment of debts represents the creditors of the estate and in that capacity is entitled to any benefit or exception which the creditors might have in prosecuting the action against him including the benefits of this section. Smith v. Brown, 101 N. C. 347, 7 S. E. 890.

When Section Begins to Run Against Insane.—This section, commences to run against an insane claimant only from the time of the qualification of his guardian. Irvin v. Harris, 182 N. C. 647, 109 S. E. 867.

Effect of Order to Odd Parties in Supreme Court. — See Gertner v. Jones, 176 N. C. 542, 97 S. E. 494.

Cited in 13 N. C. Law Rev. 60.

II. DEATH OF CREDITOR.

Brought within Year of Creditor's Death.—Actions upon claims in favor of an estate of a decedent must be brought within one year of his death, without regard to when administrator was appointed. Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77.

Construction upon Section.—Although it was held that a statute does not run against a party not in existence or under a disability or against such a person, it may be noted that Brawley v. Brawley, 109 N. C. 524, 14 S. E. 73, does not change the construction placed upon this section, that an action must be brought by a representative of a creditor within one year after his death, and against the representa-

tive of a debtor in one year after taking out letters of administration, when it would otherwise have become barred. Burgwyn v. Daniel, 115 N. C. 115, 119, 20 S. E. 462.

Time is counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remission in those entitled to administrations, and this notwithstanding what is said in Dunlap v. Hendley, 92 N. C. 115. Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77.

Same—Dunlap v. Hendley.—It is said in Dunlap v. Hendley, 92 N. C. 115, 117 that where the creditor died before the statute ran and the administrator brought action within the year after the death of the creditor but after the statute had run, it is questionable whether this section could help the case because the administrator should bring the action within the period of the statute of limitation and while it is running. This position is clearly contradictory to the terms of the section and it was held in Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77, that notwithstanding the language used the action could be brought any time within the year.

When Time Extended.—This section does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. Hughes v. Boone, 114 N. C. 54, 19 S. E. 63.

The death of the judgment creditor did not suspend the statute. The effect was only to give one year's time from the death of the creditor to the personal representative to bring action, if otherwise it would have been barred by the lapse of ten years before such year had expired. Benson v. Bennett, 112 N. C. 505, 17 S. E. 432. But there was more than one year after the death of the creditor before the ten years expired, and therefore this section has no place. Hughes v. Boone, 114 N. C. 54, 56, 19 S. E. 63.

Contract as to Limit Permissible.—A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by this section. Thigpen v. East Carolina Railway, 184 N. C. 33, 113 S. E. 562.

Principle Illustrated.—Where the statute had not run at the intestate's death, and the action was brought within one year after the issuing of the letters of administration, the action was not barred under this section notwithstanding that the ordinary statutory period had elapsed between the accrual and the bringing of the action. Robertson v. Dunn, 87 N. C. 191; Mauney v. Holmes, 87 N. C. 428.

III. DEATH OF THE DEBTOR.

Section Mandatory.—Actions upon claims against the estate of a decedent must be brought in one year after administration. Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77; Winslow v. Benton, 130 N. C. 58, 40 S. E. 840.

Running Arrested against Unrepresented Estate—Where Proceeding on Representative's Bond.—Brawley v. Brawley, 109 N. C. 524, 14 S. E. 73, held that the statute of limitation did not run to bar an action by an administrator de bonis non against the representative and bondsmen of a deceased administrator while there was no administrator de bonis non—no one in esse who could bring such action. This would not apply to an action brought by the creditor, or a distributee, or legatee, directly against the representative of the deceased executor, administrator or guardian and their sureties for breach of the bond. Benson v. Bennett, 112 N. C. 505, 17 S. E. 432; Coppersmith v. Wilson, 107 N. C. 31, 12 S. E. 77; Burgwyn v. Daniel, 115 N. C. 115, 119, 20 S. E. 462.

Flemming v. Flemming Qualified.—It is said in Flemming v. Flemming, 85 N. C. 127, 128, to be well settled that the death of the debtor after the cause of action has accrued will not suspend the running of the statute to the completion of the prescribed time. This was intended to be the statement of a general principle, resting upon numerous adjudications, and without reference to the modifications made by the words of the act recited, and to which attention was not at the moment of penning the sentence directed, and certainly with no intent to disregard or ignore the express statutory mandate. Mauney v. Holmes, 87 N. C. 428, 433.

Applicable to Partners.—Notwithstanding that a deceased partner's debt to his firm would have otherwise been barred by statute since his death, yet where no administrator has been appointed, the debt will not be barred until after one year from the appointment of an administrator unless more than ten years has elapsed since his death. Irvin v. Harris, 182 N. C. 656, 109 S. E. 871.

Principle Illustrated.—It was held that a claim reduced to judgment is barred by the ten years statute of limitation unless the claim was admitted by administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Where judgment is obtained against an administrator who dies five years later and there was no further administration until thirteen years later when steps were taken to collect the judgment, is was held that the ten year proviso applied to bar an enforcement. Fisher v. Ballard, 164 N. C. 326, 80 S. E. 239.

Where the period of limitation for a judgment was ten years, and some two months before it ran the judgment creditor died and no representative qualified until two and a half years later but in the meantime the debtor had died and his representative was not qualified until two years and eleven months after the death of the creditor, and the action was brought four months after the latter representative's qualification, by virtue of this section it was not barred. Dunlap v. Hendley, 92 N. C. 115.

Proviso—Issuing within Ten Years.—The proviso is a wise restriction to prevent the inconvenience and often the injustice of collecting stale claims. Matthews v. Peterson, 150 N. C. 134, 136, 63 S. E. 721.

When the letters of administration have been issued before the operative effect of the proviso the provision that such should have been issued within ten years from the death of the intestate is inapplicable. Matthews v. Peterson, 150 N. C. 134, 63 S. E. 721.

There is no statutory provision which prevents the expiration of a judgment lien in case of death and administration similar to that of the proviso. Matthews v. Peterson, 150 N. C. 134, 135, 63 S. E. 721.

IV. FILING CLAIM.

Not Retroactive.—The last sentence of this section applied only to those claims that were filed at the time of the passage of the act and were not then barred. It could not apply to those barred when the act became effective. Whitehurst v. Dey, 90 N. C. 542.

Purpose of Filing Claim.—The purpose of the creditor then is, by filing his claim with the abministrator, to avoid the running of the Statute against his debt, and to fix the debt by the admission of the personal representative—the very reverse of presenting the claim for instant payment. Stonestreet v. Frost, 123 N. C. 640, 650, 31 S. E. 836. From dissenting opinion.

The word "filed" has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or maybe both. The same end is subserved by tying together or bundling papers and labeling them or cataloguing them on rolls or lists for future use. Stonestreet v. Frost, 123 N. C. 640, 649, 31 S. E. 836. From dissenting opinion.

The filing of claim is intended to be of advantage to creditors who do not receive or who do not expect to receive payment of their debts on presentation, in enabling them to leave with the personal representative a memorandum of their claims to save the trouble and expense of bringing suit, and to prevent the bar of the Statute of Limitations. And the act of the creditor in filing the claim is an admission on his part that he does not expect the immediate payment of the debt, but that he wishes the claim entered, "filed," somewhere, in some way, by the personal representatives. Stonestreet v. Frost, 123 N. C. 640, 650, 31 S. E. 336. From dissenting opinion.

Notice to the executor for information is the prime purpose of the statute in requiring the claim to be filed and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. Hinton v. Pritchard, 126 N. C. 8, 10, 35 S. E. 127.

The term "filed" signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127.

Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, is not a filing of the claim within the meaning of this section, but where, after such notice, the executor carries the item as a debt on the books of the estate and reports it to the clerk as a debt owed by the estate, the executor's approval will be inferred, and the statute will not operate as a bar. Horne Corp. v. Creech, 205 N. C. 55, 169 S. E. 794.

Section Illustrated.—The exhibition by the Sheriff within one year of the date of adminstration to the administrator, of an execution issued in favor of the county against the intestate, which the administrator admits is correct and does not pay for want of assets—is a sufficient "filing" required by this section, so as to render unnecessary an ac-

tion to prevent the bar of Statute of Limitations. Stonestreet v. Frost, 123 N. C. 640, 642, 31 S. E. 836. See dissenting opinion.

In Stonestreet v. Frost, 123 N. C. 640, at pages 646 and 647, 31 S. E. 836, it is said that it is a sufficient "filing," when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. "The creditor can never compel the administrator to 'string' the claim. He has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt." Justice v. Gallert, 131 N. C. 393, 394, 42 S. E. 850.

Sufficiency of Presentation. — Where the plaintiff never presents his claim, or any proof of it, but simply announces its amount, without response from the representative, the running of the statute is not arrested under this section. Flemming v. Flemming, 85 N. C. 127, 131.

Sufficiency of Admission. — A partial payment by the personal representative, without objection, is an unequivocal act from which an admission of the justice of the claim may be inferred. Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127.

When the personal representative does not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this is strong proof that he admitted it. Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211.

Same — Silence. — If a claim is presented in the form of a bill of particulars, and the representative refuses an explicit admission of denial, the plaintiff has the right to deem its acceptance without remark as arresting the running of the statute. Flemming v. Flemming, 85 N. C. 127, 131.

Effect of Admission. — The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof. Justice v. Gallert, 131 N. C. 393, 42 S. E. 850.

Claims not barred presented to the administrator in one year after letters granted and admitted by him need not be put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them. Turner v. Shuffler, 108 N. C. 642, 13 S. E. 243.

A distinct acknowledgment and promise made by an executor or administrator and based upon a sufficient consideration imposes a personal liability upon the representative, but does not take away the protection afforded by lapse of time to the estate represented. Fall v. Sherrill, 19 N. C. 371; Oates v. Lilly, 84 N C. 643; Flemming v. Flemming, 85 N. C. 127, 128.

Application to Heirs. — This section is designed to protect both the representative and the heir and there is nothing leaving the heirs at law to be protected by the lapse of time. Woodlief v. Bragg, 108 N. C. 571, 572, 13 S. E. 211.

The personal representative represents the deceased, and his admission of the correctness of a claim, unless impeachment for fraud, will estop the heirs. Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211.

Since the amendment of 1881 the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative, as he would be by the latter submitting to a judgment. It will be noted that the claim in controversy in Bevers v. Park, 88 N. C. 456, was a cause of action accrued prior to the Code of Civil Procedure and this section did not apply to it at all. Hall v. Gibbs, 87 N. C. 4; Woodlief v. Bragg, 108 N. C. 571, 573, 13 S. E. 211.

Suit by Administrator Sufficient Notice of His Claim.— Harris v. Davenport, 132 N. C. 697, 44 S. E. 406.

Not Applicable to Judgments. — Where a judgment had been obtained on a claim, the amendatory act of 1881 can have no application. Woodlief v. Bragg, 108 N. C. 571, 573, 13 S. E. 211.

§ 413. Time of stay by injunction or prohibition. —When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (Rev., s. 368; Code, s. 167; C. C. P., s. 46.)

Nature of Operation upon Statute. — This section as its terms clearly impart, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. Gatewood v. Fry, 183 N. C. 415, 418, 111 S. E. 712.

Effect of Irregularity in Granting. — Mere irregularity in the granting of an injunction will not render it a nullity, so as to prevent the suspension of the statute of limitations, under this section, during the pendency of the injunction. Walton v. Pearson, 85 N. C. 34, 35.

§ 414. Time during controversy on probate of will or granting letters.—In reckoning time when pleaded at bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him. (Rev., s. 369; Code, s. 168; C. C. P., s. 47)

Persons Protected. — This section applies only to protect creditors, there being no one for them to sue. Stelges v. Simmons, 170 N. C. 42, 86 S. E. 801.

It does not apply to the heirs at law or devisees to nullify the protection given every one in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee that the title to the property is in another. Stelges v. Simmons, 170 N. C. 42, 46, 86 S. E. 801.

Effect Where No Representative during Contest. — This section applies only where there is no administrator or collector during the contest. Hughes v. Boone, 114 N. C. 54, 19 S. E. 63.

Cited In. — Frederick v. Williams, 103 N. C. 189, 191, 9 S. E. 298; Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

§ 415. New action within one year after nonsuit, etc.—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis. (Rev., s. 370; Code, ss. 142, 166; C. C. P., ss. 21, 45; 1915, c. 211, s. 1.)

See note under § 160.

Editor's Notes. — This section was amended in 1915 by adding the condition relating to costs.

This section is mandatory as to the payment of costs prior to the commencement of the record action. Rankin v. Oates, 183 N. C. 517, 112 S. E. 32.

The words "new action," "new suit," and "original suit" indicate a difference in the two actions though the causes may be identical. Cooper v. Crisco, 201 N. C. 739, 161 S. E. 310.

When Section Applies. — This section applies only when the party would otherwise be barred from his right of action from the lapse of time prescribed by the statute of limitations relating to the cause of action. Grimes v. Andrews, 170 N. C. 515, 87 S. E. 341.

It has been held in Bradshaw v. Citizens' Nat. Bank, 172 N. C. 632, 90 S. E. 789, that when both suits, as in this case, are brought within the time allowed by the general law, neither the section in question nor the amendment thereto requiring the prepayment of costs, applied for in such case it was not necessary to resort to it, nor could plaintiff be properly considered as proceeding under it, but, under the provisions of the general statute, establishing the time within which these actions should be brought. Summers v. Southern R. Co., 173 N. C. 398, 399, 92 S. E. 160.

Since the claim was not presented within the time limited before the first action was commenced, it is not protected from the operation of the statute after the nonsuit by this section. Royster v. Commissioners, 98 N. C. 148, 152, 3 S. E. 739.

Pendency of Action Suspends Statute. — An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the cotenant then out of possession. Locklear v. Bullard, 133 N. C. 260, 45 S. E. 580.

The reason of the law is that the running of the statute should, in the very nature of things, be arrested as soon

as the party has asserted his right by action. Locklear v. Bullard, 133 N. C. 260, 264, 45 S. E. 580.

Actions to Which Applicable. — This section has reference only to actions regularly instituted in the regular course of civil procedure, and does not embrace mere motions in an action or a motion for an execution upon a dormant judgment. This appears from the legal meaning of the terms employed and the obvious implication arising upon them, taken together, to express the legislative intent. The leading important words are "an action," "an action commended within the time prescribed therefor," "a judgment therein," "reversed on appeal," or "arrested," "the cause of action survived," "a new action." These words and such phraseology do not apply for the most part to motions and merely incidental proceedings. McIlhenny v. Wilmington Sav., etc., Co., 108 N. C. 311, 313, 12 S. E. 1001.

The cause of action in the first suit may be identical with the cause in the second, but it does not follow that the prosecution bond, the bond of indemnity, or the leave given by the Attorney-General in the first action can avail the defendant in the action last instituted. Cooper v. Crisco, 201 N. C. 739, 161 S. E. 310.

Where a foreign receiver, under the mistake that special permission was necessary for him to sue in the courts of our state, has taken a voluntary nonsuit, and obtains permission to sue in our courts, and brings the identical action again within one year from the nonsuit, if the former action has not been barred by a statute of limitations applicable, the second action is in time if brought within one year from the time of the voluntary nonsuit. Van Kempen v. Latham, 201 N. C. 505, 506, 160 S. E. 759.

Where a proceeding for compensation is instituted before the Industrial Commission, and the proceeding is dismissed, an action thereafter begun in the Superior Court by the widow as administratrix against the employer to recover for the employee's wrongful death will not be considered a continuation of the proceedings before the Industrial Commission so as to relate back to the time of the institution of such proceedings, and the action instituted in the Superior Court is barred if not brought within one year from the employee's death, there being a distinction between dismissal of proceedings under the compensation act and a nonsuit entered in an action instituted in the Superior Court entitling plaintiff to institute a new action within one year. Mathis v. Camp Mfg. Co., 204 N. C. 434, 168 S. E. 515.

Section as Extention of Time. — This section is an extention of time beyond that allowed by the general statutes in the instances as stated, including nonsuit. Summers v. Southern R. Co., 173, N. C. 398, 92 S. E. 160; Caldwell Land, etc., Co. v. Hayes, 157 N. C. 333, 72 S. E. 1078.

The time is extended because the new action is considered as a continuation of the former action, and they must be substantially the same, involving the same parties, the same cause of action, and the same right. Van Kempen v. Latham, 201 N. C. 505, 513, 160 S. E. 759.

Effect of No Cause Stated in First Action. — This section authorizes the commencement of a new action of the same cause of action within one year after reversal of judgment on appeal, though the first complaint was insufficient to state a cause of action. Woodcock v. Bostic, 128 N. C. 243, 38 S. E. 881.

Where the cause of action of the first and second suit are identical this section applies notwithstanding that the first action was dismissed because of a failure to state a cause. Webb v. Hicks, 125 N. C. 201, 202, 34 S. E. 395.

Effect of New Cause of Action. — Where a new cause of action is alleged the original action is no protection as against the statute of limitations. Woodcock v. Bostic, 128 N. C. 243, 248, 38 S. E. 881.

The statutory remedy against defunct corporations must be brought within the prescribed limitation and though an action is brought, but not in the proper manner, against the proper parties, this section will not apply to save the right of action from the statutory bar. VonGlahu v. DeRosset, 81 N. C. 467, 468.

Effect of Agreement Not to Plead Statute.—An agreement in the original action not to plead the statute of limitations does not apply to the new action. Citizens' Sav., etc., Co. v. Warren, 204 N. C. 50, 167 S. E. 494.

Nonsuit Operates as Res Adjudicata Only Where Second Action Is Substantially Identical with First.—In order for a judgment of nonsuit to operate as res adjudicata in a subsequent action brought under the provisions of this section, it is required that the trial court find as a fact that the second suit is based upon substantially identical allegations and evidence as the first, and where the trial court hears no evidence and finds no facts its judgment dismissing the action upon the plea of estoppel by the former judgment is prematurely and inadvertently made. Batson v. City Laundry Co., 206 N. C. 371, 174 S. E. 90.

Burden of Proving Identity of Causes. — In action to recover lands wherein the plaintiff depends upon a nonsuit in a former action to repel the bar of the statute of limitation, it is necessary for him to bring himself within the meaning of the statute and show identity of parties, cause of action, and title, or that he is the "heir at law or representative" of the former plaintiff, the second action being regarded as a continuance of the writ in the first one; and it is insufficient if the plaintiff in the second action was a grantee of the plaintiff in the first one before the latter commenced his action. Quelch v. Futch, 174 N. C. 395, 93 S. E. 899.

Parol Evidence to Prove Nature of Action. — In an action to recover land parol testimony that a prior action brought without filing a complaint is identical with the present action is inadmissible. Young v. Atlantic Coast Line R. Co., 189 N. C. 238, 126 S. E. 600. See also Drinkwater v. Western Union Tel. Co., 204 N. C. 224, 168 S. E. 410.

The question as to whether an action is a continuation of a former one so as to bring it within the provisions of this section is one of law to be decided from the original complaint, and when no complaint is filed in the prior action, the identity of the causes of action may not be shown by parol evidence. Motsinger v. Hauser, 195 N. C. 483, 142 S. E. 589.

Limitation Where Second Action Brought in Equity. — The fact that more than one year had elapsed before the beginning of the present action, from the termination by nonsuit of the defendant's action to recover for services rendered to her mother from the administrator does not bar her recovery upon her counterclaim, the same being of an equitable nature to which this section has no application, under the facts of the case. Shell v. Lineberger, 183 N. C. 440, 441, 111 S. E. 769.

Dismissals — Want of Jurisdiction. — This section applies where the first action was dismissed because the court in which it was brought had no jurisdiction. Webb v. Hicks, 125 N. C. 201, 202, 34 S. E. 395.

Application where Statute Not One of Limitation. — This statute contains no exception of cases under section 160, or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitation. There is no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others. Meekins v. Norfolk, etc., R. Co., 131 N. C. 1, 2, 42 S. E. 333; See Williams v. Iron Belt Bldg., etc., Ass'n, 131 N. C. 267, 269, 42 S. E. 607.

Same — Actions for Death by Wrongful Act. — While the requirements of section 160, giving a right of action for death caused by the wrongful act, etc., is not in strictness a statute of limitation, but a condition affecting the cause of action itself, yet when such suit has been brought within the time specified it comes within the provision of this section. Trull v. Seaboard Air Line R. Co., 151 N. C. 545, 66 S. E. 586. The maximum time allowed under the two sections when construed together is two years. Brooks v. Suncrest Lumber Co., 194 N. C. 141.

A new action for wrongful death commenced within one year from the date of nonsuit falls within the provisions of this section notwithstanding the provisions of § 160, and the fact that the plaintiff has been assessed with additional costs upon motion for reassessment made in the second action and has not paid the cost so reassessed is immaterial. Swainey v. Great Atlantic, etc., Tea Co., 204 N. C. 713, 169 S. E. 618. See notes to § 160.

Federal Employers' Liability Act.—This section has been held not applicable to an action brought in a State court under the Federal Employers' Liability Act. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 143, 138 S. E. 532, citing King v. R. R., 176 N. C. 301, 97 S. E. 29; Belch v. R. R., 176 N. C. 22, 96 S. E. 640.

Section Illustrated.—Where an action is begun within the prescribed period, but terminated in a non-suit after the period has run, this section applies to permit another action within one year from the date of non-suit. Hines v. Rowland Lumber Co., 174 N. C. 294, 93 S. E. 833.

Where it does not appear otherwise than that the first suit was commenced in time, and the second was instituted within a year of the nonsuit, this section operates to prevent a bar of the statute. Bank v. Loughran, 122 N. C. 668, 671, 30 S. E. 17.

Effect of Costs Provision. — This section does not forbid the commencement of a second action without paying the costs of the first, but annexes this as a condition to

bringing the new action free from the bar of the statute, if pleaded; and a motion to dismiss it before answer filed, upon the ground that the costs of the former one had not been paid, will be denied. Bradshaw v. Citizens' Nat. Bank, 172 N. C. 632, 90 S. E. 789.

But where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought in forma pauperis. Rankin v. Oates, 183 N. C. 517, 112 S. E. 32.

Same — When Applicable. — The amendment of 1915 requiring the payment of costs has no application when the second action has been brought within the time permitted by the general law. Summers v. Southern R. Co., 173 N. C. 398, 92 S. E. 160.

Same — Excuse. — It may be shown by plaintiff that his failure to pay costs before commencing his second action upon the same contract was caused by the failure or the delay of the clerk of the Superior Court to let him know the amount thereof though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute had he been able to ascertain them. Hunsucker v. Corbitt, 187 N. C. 496, 122 S. E. 378.

Cited in Collins v. Smith, 109 N. C. 468, 470, 14 S. E. 88.

Judgment of Nonsuit on Merits of Case as Bar to Subsequent Action on Same Cause on Substantially Same Evidence.—A plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may, under this section, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or res adjudicata, and thus end that particular litigation. Hampton v. Rex Spinning Co., 198 N. C. 235, 240, 151 S. E. 266.

Propriety of Directed Verdict for Plaintiff Where Record Contains No Evidence of Payment of Costs of Prior Action.—Where, after judgment as of nonsuit, another action has been brought on the same cause of action within one year under the provisions of this section, and defendant moves for judgment of nonsuit and excepts to the trial court's refusal of the motion, and on appeal the only question presented is whether the plaintiff had paid the costs of the prior action as required by the statute, held, the burden is upon the plaintiff to show compliance with the statute and where the record on appeal contains no evidence that the costs of the prior action had been paid, a directed verdict in the plaintiff's favor will be held erroneous, and it cannot be presumed that such evidence was properly before the jury from the fact that the trial court stated at the close of testimony that as he understood the evidence he would have to give a directed verdict that the costs had been paid, to which counsel did not object until after a verdict in the plaintiff's favor. Southerland v. Crump, 199 N. C. 111, 153 S. E. 845.

Applied in Jones v. Bagwell, 207 N. C. 378, 388, 177 S. E. 170.

Cited in Midkiff v. Palmetto Fire Ins. Co., 198 N. C. 568, 570, 152 S. E. 792.

§ 416. New promise must be in writing.—No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (Rev., s. 371; Code, s. 172; C. C. P., s. 51.)

I. General Consideration.
II. Acknowledgment or New Promise.
III. Part Payment.
IV. Request Not to Sue.

I. GENERAL CONSIDERATION.

See 13 N. C. Law Rev. 57 for comment on this section.

Effect upon Prior Law. — This section does not change the character or quality of the acknowledgment or new promise therefore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged." Phillips v. Giles, 175 N. C. 409, 95 S. E. 772.

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. McDonald v. Dickson, 87 N. C. 404, 406.

The Section Is Mandatory. — Fleming v. Staton, 74 N. C. 203.

Retroactive Effect. — This section has no application where the cause of action had accrued upon the new as well as the old cause. Farson v. Bowden, 74 N. C. 43, 45.

Section as Rule of Evidence. — This section is merely a rule of evidence enacted to prevent fraud and perjury. Royster v. Farrell, 115 N. C. 306, 310, 20 S. E. 475.

Applicability to Judgments. — A judgment is not a contract within the meaning of this section. This is true because a cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N. C. 404. See the dissenting opinion.

Action of One of Class Affecting All of Class. — Where from the condition stated upon a negotiable note, the endorsers sign as sureties, a payment thereon of the maker before the same is barred, suspends the running of the statute of limitations as to all within this class, and a payment of the interest on the note by one of the sureties will repel the bar of the statute as to all of the sureties thereon. Dillard v. Farmers Mercantile Co., 190 N. C. 225, 129 S. E. 598.

II. ACKNOWLEDGMENT OR NEW PROMISE.

The English Statute.—The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. Royster v. Farrell, 115 N. C. 306, 310, 20 S. E. 475, and citations.

Confined to Contracts.—The terms of this section as to written acknowledgments, etc., are confined to actions on contracts and is not applicable to judgments. McDonald v. Dickson, 87 N. C. 404. See dissenting opinion.

Elements Necessary to Valid Promise.—In Greenleaf v. Norfolk, etc., R. Co., 91 N. C. 33, the Supreme Court declared that the promise must be (1) in writing, (2) extend to the whole debt, (but see Pope v. Andrews, 90 N. C. 401) and must (3) be to pay money and not in something else of value. The promise to pay the debt, too, must be (4) unconditional. Greenleaf v. Norfolk, etc., R. Co., 91 N. C. 33; Bates & Co. v. Herren & Co., 95 N. C. 388; Taylor v. Miller, 113 N. C. 340, 18 S E. 504; Wells v. Hill, 118 N. C. 900, 904, 24 S. E. 771.

The promise must be (5) indentical and (6) between the original parties—by the same man; and, further, when the original contract is made with another one, and the promise relied on to repel the statute is made with another, who is the plaintiff in the action, the cause of action is the new promise, and it must be declared on; this new promise must be in writing. Fleming v. Staton, 74 N. C. 203; Pool v. Bledsoe, 85 N. C. 1, 2.

It has been held, that the promise must be made to the creditor himself (Parker v. Shuford, 76 N. C. 219, and Farson v. Bowden, 76 N. C. 425) or to an attorney or agent for the creditor (Kirby v. Mills, 78 N. C. 124; Hussey v. Kirkman, 95 N. C. 63, 67), and must be express (Cooper v. Jones, 128 N. C. 40, 38 S. E. 28), clear and positive (Hussey v. Kirkman, 95 N. C. 63) to repel the statute.

The new promise must be distinct and specific, and a mere acknowledgement of the debt, though implying a promise to pay, is not sufficient. Riggs v. Roberts, 85 N. C. 152; Faison v. Bowden, 76 N. C. 425. This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." Helm Co., v. Griffin, 112 N. C. 356, 358, 16 S. E. 1023.

In Riggs v. Roberts, 85 N. C. 152, the words "distinct and specific," "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. While either one of these qualifying words alone would be applicable to the promise or acknowledgment to take the case out of the statute of limitations, there is no special weight superadded by the use of them all at once. Taylor v. Miller, 113 N. C. 340, 343, 18 S. E. 504.

In other words there must be such facts and circumstances as to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute,

must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. This principle runs through all the decisions of the Supreme Court on this subject. Wells v. Hill, 118 N. C. 900, 903, 24 S. E. 771; Simonton v. Clark, 65 N. C. 525. See dissenting opinion.

A written acknowledgment, or new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations, under this section. It follows that a mere vague declaration of an intention to pay an undefined amount, and without reference to anything that can make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained," would be. Long v. Oxford, 104 N. C. 408, 409, 10 S. E. 525.

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment of a subsisting obligation as will repeal the statutory bar. Smith v. Gordon, 204 N. C. 695, 169 S. E. 634.

Must Be within Statutory Limit Itself.—The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. Smith v. Gordon, 204 N. C. 695, 169 S. E. 634.

When Promise Implied. — Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations unless there is something in the writing to repel such implication. Phillips v. Giles, 175 N. C. 409, 410, 95 S. E. 772. McRae v. Leary, 46 N. C. 91; Smith v. Leeper, 32 N. C. 86. Cecil v. Henderson, 121 N. C. 244, 246, 28 S. E. 481.

The Writing.—As to expression of opinion in charge on sufficiency of writing, see note to sec. 564.

A new promise to pay, if not in writing, can not defeat the operation of the statute of limitation. Raby v. Stuman, 127 N. C. 463, 37 S. E. 476.

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay the same in writing or a written, definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. Phillips v. Giles, 175 N. C. 409, 410, 95 S. E. 772. And it is proper to exclude parol evidence that a new promise was made (Christmas v. Haywood, 119 N. C. 130, 134, 25 S. E. 861.), although prior to the section the law was otherwise. Faison v. Bowden, 74 N. C. 43.

It was said in Flemming v. Flemming, 85 N. C. 127, that the oral assertion of a claim to an administrator who remains silent, even if the silence should be construed on admission, is ineffectual because not in writing, see sec. 412.

And so is security given for debts barred by the statute, at least to the extent of the property conveyed. Taylor v. Hunt, 118 N. C. 168, 172, 24 S. E. 359. But an unaccepted offer to discharge a bond by a conveyance of land (Riggs v. Roberts, 85 N. C. 152), or an unaccepted offer to pay a debt by a conveyance of land are not such recognition of subsisting liabilities as in law will imply a promise to pay. Wells v. Hill, 118 N. C. 900, 904, 24 S. E. 771; nor is a promissory note barred by the statute of limitations revived by an offer to pay in Confederate currency or bank-bills. Simonton v. Clark, 65 N. C. 525. See dissenting opinion.

The accumulation of adjectives used in their application to the words "acknowledgment and promise" in the statute, has produced the impression that it requires more than an ordinary promise in writing to repel the bar of the statute. The old law, before the promise need be in writing, was, "the new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied," McBride v. Gray, 44 N. C. 420; Faison v. Bowden, 72 N. C. 405; Riggs v. Roberts, 85 N. C. 152. Since the statute, the words used are as applicable to this case: "The promise must be unconditional." Greenleaf v. Norfolk, etc., R. Co., 91 N. C. 33. It must be "certain in its terms." Long v. Oxford, 104 N. C. 408, 10 S. E. 525; Taylor v. Miller, 113 N. C. 340, 342, 18 S. E. 504.

Same—Illustrations.—A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of this section. Irvin v. Harris, 182 N. C. 647, 109 S. E. 867. The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amount to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations. Taylor v. Miller, 113 N. C. 340, 18 S. E. 504, but a writing "I am going to pay it as soon as I can" is conditioned upon ability to pay and is therefore insufficient. Cooper v. Jones, 128 N. C. 40, 38 S. E. 28.

A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she has borrowed from her at various times, and stating the daughter was to have a certain sum of money from her estate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and a new promise, to repel the bar of the statute of limitations. Phillips v. Giles, 175 N. C. 409, 410, 95 S. E. 772.

Where a suit had already been commenced to recover an amount alleged to be due upon account, and the defendant set up the statutory bar as a defence, but wrote a letter to the plaintiff's attorney stating that, if he would take five hundred dollars in satisfaction, judgment might go against him at court, the letter is an admission and assumption of the debt to the specified amount ($500), and operates to remove the bar to the recovery of the time. Pope v. Andrews, 90 N. C. 401. But see Wells v. Hill, 118 N. C. 900, 904, 24 S. E. 771 and citations.

Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future it was held, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. Helm Co. v. Griffin, 112 N. C. 356, 16 S. E. 1023.

Acknowledgment as Rebutting Presumption of Satisfaction.—Before the adoption of The Code, proof of a promise or acknowledgment would rebut the presumption of the satisfaction of a mortgage, as is shown by numerous decisions. Brown v. Becknall, 58 N. C. 423; Ray v. Pearce, 84 N. C. 485; Hughes v. Edwards, 8 Wheat., 489; Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495. And now the bar of our present statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. Hill v. Hilliard & Co., 103 N. C. 34, 9 S. E. 639; Royster v. Farrell, 115 N. C. 306, 310, 20 S. E. 475.

III. PART PAYMENT.

Editor's Note.—It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I. and 9 Geo. IV. did nothing more than recognize the common law right. Thus it originated with the courts and its application depends upon the reasoning in such decisions. This is equally true in North Carolina for this section merely recognizes the right, leaving the application of the principles to the courts as has always been the case. See Battle v. Battle, 116 N. C. 161, 163, 21 S. E. 177.

Thus the effect of this section is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations, See State Nat. Bank v. Harris, 96 N. C. 118, 1 S. E. 459.

The effect of any payment of principal or interest, being expressly excepted from this section, thereby leaving as to such payments the principals obtaining at common law before the enactment of the statute. Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 S. E. 377.

Payment Tantamount to Writing.—This section dispenses with a writing where partial payment is made, because the payment is in effect a written promise. McDonald v. Dickson, 87 N. C. 404. See the dissenting opinion.

Provisions Not Applicable to Judgments.—A partial payment voluntarily made on a judgment does not remove the statutory bar. McDonald v. Dickson, 87 N. C. 404. See the dissenting opinion.

Elements Essential to Take Case Out of Statute. — The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment, (Cashmar-King Supply Co. v. Dowd, 146 N. C. 191, 197, 59 S. E. 685) for partial payment starts the statute running anew only when it is made under such circum-

stances as will warrant the clear inference that the debtor recognizes the debt as existing and his willingness or at least his obligation, to pay the balance. Battle v. Battle, 116 N. C. 161, 163, 21 S. E. 177. See also Lester Piano Co. v. Loven, 207 N. C. 96, 176 S. E. 290.

Thus when a payment is made by defendant only in contemplation of an agreed compromise of a debt, such payment will not repel the bar of the statute of limitations as to the balance thereof. Cashmar-King Supply Co., v. Dowd, 146 N. C. 191, 59 S. E. 685.

Same—Time from Which Statute Starts Anew.—There is no express provision that a partial payment shall prevent the operation of the statute except from the time it was made. The statute merely leaves its effect to be determined by the law as it was before the enactment of the section as to a new promise. Battle v. Battle, 116 N. C. 161, 21 S. E. 177; Bank v. Harris, 96 N. C. 121; Riggs v. Roberts, 85 N. C. 152; Cashmar-King Supply Co. v. Dowd, 146 N. C. 191, 196, 59 S. E. 685; Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 S. E. 377.

Same—Credits on Accounts.—When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year period, and accordingly given, the effect of this credit to repel the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given, is reversible error to the plaintiff's prejudice. Kilpatrick v. Kilpatrick, 187 N. C. 520, 122 S. E. 377.

The fact that the maker of a note has a claim against the holder which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note. State Nat. Bank v. Harris, 96 N. C. 118, 1 S. E. 459.

An account of transaction between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. Cashmar-King Supply Co. v. Dowd, 146 N. C. 191, 59 S. E. 685.

Persons Who May Make—Trustee for Creditors.—Where an assignment for benefit of creditors confers no power on the trustee, as agent of the debtor, to do any act to waive the Statute, or to express a willingness or intention to pay the debt after it becomes otherwise barred, as partial payment made by the trustee on a note of the debtor will not arrest the running or remove the bar of the Statute of limitations. Battle v. Battle, 116 N. C. 161, 21 S. E. 177.

Same—Principal upon Bond.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772.

Payment of interest on a note by the principal, before it is barred by lapse of time, arrests the operation of the statute of limitations as to all the makers, sureties as well as principal, and the statute commences again to run only from the day when the last payment was made. Green v. Greensboro Female College, 83 N. C. 449.

Same—Obligor of Same Class.—Where a payment is made upon a claim, before it is barred by the lapse of time, by one of several obligors of the same class, it becomes the legal act of all, and arrests the operation of the statute as to them but does not revive the liability of others of a different class. Wood v. Barber, 90 N. C. 76. But it was held in Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772 that a payment by the principal upon a bond under such circumstances arrests the operator as to the sureties "General Consideration," ante this note.

Same—Partner.—In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the acceptor acted in making such payment—whether as cashier or as a member of the firm. Wood v. Barber, 90 N. C. 76.

Burden of Proving Payment. — The burden is upon the plaintiff to show that a partial payment was made at such a time as to save the debt from the operation of the statute. Riggs v. Roberts, 85 N. C. 152.

IV. REQUEST NOT TO SUE.

Statement of Rule. — Where delay in bringing suit is caused by a request of the defendant, or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience. Joyner v. Massey, 97 N. C. 148, 1 S. E. 702. This principle is derived from equity as is a new promise or partial payment, and does not depend upon statute. However it is recognized as an exception in the application and instruction of this section. See Barcraft & Co. v. Roberts & Co., 91 N. C. 363, 369.

So it has been held that notwithstanding this section, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the statute of Limitations, the courts, in the exercise of their equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing. Cecil v. Henderson, 121 N. C. 244, 245, 28 S. E. 481.

Principles Controlling Application. — In giving effect to request not to sue and promises, not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and to encourage fraud to permit the debtor to repudiate them when by his contract he has lulled the creditor into a feeling of security and has induced him to delay bringing action (Daniel v. Board, 74 N. C. 494; Haymore v. Commissioners, 85 N. C. 268), and it is now "settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea. Tomlinson v. Bennett, 145 N. C. 279, 281, 59 S. E. 37; State v. United States Fidelity etc., Co., 176 N. C. 598, 97 S. E. 490.

Same—Request without Agreement Insufficient. — A request not to sue will not stay the statute of limitation, but it must be an agreement not to plead it. Raby v. Stuman, 127 N. C. 463, 37 S. E. 476.

It is essential, however, not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the statute if delay is given. Hill v. Hilliard, & Co., 103 N. C. 34, 9 S. E. 639; Cecil v. Henderson, 121 N. C. 244, 248, 28 S. E. 481.

A simple admission by an executor of the correctness of a claim against the testator's estate, and a verbal promise to pay the same out of the assets prior to the 1881 amendment of section 412, will not arrest the runnings of the statute of limitations, where there is no proof that the creditor refrained from suing at the request of the executor, or that there was any agreement for indulgence. This case falls within the terms of this section. Whitehurst v. Dey, 90 N. C. 542.

Necessity for Writing. — "It is true that Smith, C. J. for whose learning we have the highest respect, said in a concurring opinion in Joyner v. Massey, 97 N. C. 148, 153, 1 S. E. 702, that this statute applied to promises not to plead the statute of limitations, and this is referred to without approval or disapproval by Clark, C. J. in Brown v. Atlantic Coast Line R. Co., 60 S. E. 985, but the opinion of the majority of the Court in Joyner v. Massey was the other way, and it is expressly decided in Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481, that the statute has no application, and that request not to sue and promises not to plead the statute of limitations need not be in writing." State v. United States Fidelity etc., Co., 176 N. C. 598, 601, 97 S. E. 490.

§ 417. Admission by partner or comaker.—No act, admission or acknowledgment by partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment. (Rev., s. 372; Code, s. 171; C. C. P., s. 50.)

Section Changed Law. — In McIntire & Co. v. Oliver, 9 N. C., 209, it was held that the acknowledgment of a subsisting partnership debt by one partner, even after the dissolution of the firm, was binding on all the constituent members and prevented the operation of the statute of limitation. The same doctrine is announced in Willis v. Hill, 19 N. C., 231, and Walton v. Robinson, 27 N. C., 341. In the latter case, the same reviving effect is ascribed to a payment as involving a resumption of the residue of the

debt. In consequence of these rulings was passed the act of 1852, now embodied in this section. Wood v. Barber, 90 N. C. 76, 79.

Part payment of a note by the payee who had endorsed it will not repel the bar of the statute of limitations as against the maker, this section, confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note. LeDuc v. Butler, 112 N. C. 458, 17 S. E. 428. This principle is recognized and distinguished in Harper v. Edwards, 115 N. C. 246, 248, 20 S. E. 392; Garrett v. Reeves, 125 N. C. 529, 540, 34 S. E. 636. From the dissenting opinion see the excellent discussion in Green v. Greensboro College, 83 N. C. 451.

A payment made by the maker, after the bar of the statute, operates as a renewal as to himself only. Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636. Bonds are in the same class as notes. Rogers v. Clements, 98 N. C. 180, 183, 3 S. E. 512. It was held in this latter case that Co-obligors do not stipulate by implication in the joint obligation that each may bind the other by his admissions made after the obligation is due.

Section Defeated by Payment of Small Sum etc. — This section may be practically nullified by triennial payments of insignificant amounts or alleged promises not to plead the statute. A recent case, forcibly illustrating, is Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636; Luton v. Badham, 127 N. C. 96, 37 S. E. 143. Dissenting opinion.

Partial Payment Prior to Dissolution or Bar. — In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the acceptor acted in making such payment—whether as cashier or as a member of the firm. The section is not applicable to these facts until a dissolution. Wood v. Barber, 90 N. C. 76, 77.

A payment by the principal on a note, before the bar of the statute, operates as a renewal as to himself, the sureties and endorsers, this section not being applicable. Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636; Moore v. Goodwin, 109 N. C. 218, 219, 13 S. E. 772; Greene v. Greensboro Female College, 83 N. C. 449; Wood v. Barber, 90 N. C. 76, 80.

As to co-obligors on a note, it was held that a payment by one before the debt was barred would extend the time as to the other, but a promise to pay would not have that effect. The rule as to payment has been applied to all co-obligors who come within the same class as original makers of the instrument, having a community of interest and a common obligation. A payment by a principal or surety, before the debt is barred, will continue the obligation as to both. But the rule would not apply to obligors in different classes, as endorsers and makers. Davis v. Alexander, 207 N. C. 417, 421, 177 S. E. 417.

New Promise or Payment by Partner.—Under this section, no new promise or a payment by a partner, after the dissolution of the partnership, will have any effect to bind the other partners. Davis v. Alexander, 207 N. C. 417, 421, 177 S. E. 417.

Death of Partner. — Since the death of one of the partners dissolves the partnership, payment on a debt by the survivor will not repel the statute which would otherwise run against the estate of the deceased. Irvin v. Harris, 182 N. C. 656, 109, S. E. 871.

A Default Judgment on Debt Barred. — A judgment by default suffered by one joint obligor does not renew the note as to the others. Lane v. Richardson, 79 N. C. 159. See also Rogers v. Clements, 98 N. C. 180, 3 S. E. 512.

§ 418. Undisclosed partner.—The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (Rev., s. 373; 1893, c. 151.)

§ 419. Cotenants.—If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (Rev., s. 374; Code, s. 173; C. C. P., s. 52; 1921, c. 106.)

Editor's Note. — It is pertinent to point out a discrepancy between the phraseology of this section and the corresponding sections of the prior revisals and codes. The clause of this section which read in the consolidated Statutes "the rights of the others are affected thereby," formerly read "the rights of the others shall not be affected thereby." See Pell's Revisal sec. 374. This discrepancy was probably a clerical error in the Consolidated statutes and was corrected by the Public Laws of 1921.

Section Changes Rule—Realty Not Affected. — This section changes the rule in regard to personalty. It does not effect the law as to real property. Expressio unius exclusio alterius. Cameron v. Hicks, 141 N. C. 21, 36, 53 S. E. 728.

§ 420. Applicable to actions by state.—The limitations prescribed by law apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (Rev., s. 375; Code, s. 159; C. C. P., s. 38.)

This section abrogated the common law maxim "nullum tempus occurrit regi" protecting public property from the negligence of public officers. Furman v. Timberlake, 93 N. C. 66, 67.

The maxim no longer obtains even in the case of collecting taxes, unless the statute applicable to or controlling the subject provide otherwise. Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9; Furman v. Timberlake, 93 N. C. 66; Threadgill v. Wadesboro, 170 N. C. 641, 87 S. E. 521.

When Statute Does Not Apply. — No statute of limitations runs against the sovereign unless it is expressly so provided therein; hence, where an act authorizing the collection of arrearages of taxes for past years does not prescribe any limitation, the ten years' statute of limitations does not apply, and the unpaid taxes for any year can be recovered. Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9.

Insane Presumed to Have Plead Statute. — In view of the provisions of this section and section 406, an insane person is presumed to have plead the statute of limitations against the state. State Hospital v. Fountain, 129 N. C. 90, 39 S. E. 734.

§ 421. Action on open account.—In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side. (Rev., s. 376; Code, s. 160; C. C. P., s. 39.)

Accounts to Which Applicable. — In order that one item being in date shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings, kept by one with the knowledge and concurrence of the other. Hussey v. Burgwyn, 51 N. C. 385.

The mere existence of disconnected and opposing demands, between two parties, one of which demands is of recent date, will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. Green v. Caldcleugh, 18 N. C. 320.

There must be an assent of both parties that the items of the one account are to be applied to the liquidation of the other. The understanding of the plaintiff alone would not be sufficient. Ibid.

The purchase of merchandise on credit, the purchaser paying a certain sum in cash on the account each fall, and the balance due on the account being carried forward into the next year and the next year's purchases being added thereto, is not a mutual, open and current account within the purview of this section, but is an account current, and as to all items purchased within three years from the last cash payment the three year statute of limitations will begin to run from the date of the last cash payment, and in an action to recover the balance due, instituted more than three years after the last item charged, but within three years from the last cash payment, an instruction that the whole account was barred by the statute of limitations is error. Richlands Supply Co. v. Banks, 205 N. C. 343, 171 S. E. 358.

Same—Mutuality by Implication.—Mutuality of accounts may be the result of direct agreement, or it may be inferred from the dealings of the parties—if established, it renders unavailable the defense of the statute of limita-

tions to both parties. Stancell v. Burgwyn, 124 N. C. 69, 32 S. E. 378.

A mutual account may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other keeps it. Mauney & Son v. Colt, 86 N. C. 464; Green v. Caldcleugh, 18 N. C. 320, 321; Hussey v. Burgwyn, 51 N. C. 385; Robertson v. Pickerell, 77 N. C. 302; Stokes v. Taylor, 104 N. C. 394, 399, 10 S. E. 566.

Same—Extension of Credit.—To constitute a mutual account it must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of our decisions nor the statute applicable. Hollingsworth v. Allen, 176 N. C. 629, 97 S. E. 625.

Same—Running Account All on One Side. — Where there is a running account, all on one side, the statute of limitations begins to run on each item from its date; but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. Robertson v. Pickerell, 77 N. C. 302, 303.

Same—Draft Not Referring to Account. — The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to or recognition of the account, or any debt whatever. Hussey v. Burgwyn, 51 N. C. 385.

When Statute Not Applicable.—This section does not apply to an ordinary store account, though open and continued where the credit is all on one side and the only items of discharge consist in payments on account. In such case limitations will begin to run from the date of each purchase as to the item itself, unless the bar has been repelled in some recognized legal manner. Brock v. Franck, 194 N. C. 346, 139 S. E. 696.

An indefinite promise to pay intermittantly from time to time for such services as may be rendered by one party to another is not a mutual, open, and current account with reciprocal demands between the parties within the perview of this section. Phillips v. Penland, 196 N. C. 425, 147 S. E. 731.

Under an agreement with decedent to pay for services to be irregularly rendered from time to time as needed without a definite time fixed for payment, but under a general promise to pay for them, in an action against the administrator of the deceased promissor for the value of such services: Held, a payment made by the deceased in 1925, intended by him to be made upon the debt, will have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. Phillips v. Penland, 196 N. C. 425, 147 S. E. 731.

Effects of Conflicting Evidence as to Item. — When there is conflicting evidence as to whether the item sued on was to be related to other items upon which the defendant relied it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence. McKinnie Bros. v. Webster, 188 N. C. 514, 125 S. E. 1.

§ 422. Not applicable to bank bills.—The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this state. (Rev., s. 377; Code, s. 174; C. C. P., s. 53; 1874-5, c. 170.)

§ 423. Actions against bank directors or stockholders. — The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (Rev., s. 378; Code, s. 175; C. C. P., s. 54.)

Editor's Note.—In 1911, sec. 240 giving the receivers of insolvent banks ten years within which to bring actions to enforce the liability of stockholders was passed making an exception to this section. Since sec. 240 was likely repealed by sec. 218(c), which was passed in 1927 as explained in the note to sec. 240, this section would again be applicable were it not for the fact that the law was radically changed by the reenactment of sec. 218(c) in 1927, and that this change probably affects the period of limitation. The limitation prescribed both by this section and sec. 240 expressly relate to **actions** to enforce the liability of stockholders. Neither of the sections apply to the judgment after it has been rendered. Thus the judgments obtained in such actions have always been subject to the limitations applicable to judgments generally.

Now, since under the procedure prescribed in sec. 218(c) subsection (13), the filing of the individual liability of the stockholders with the clerk and the record as such constitutes the assessment a judgment upon which execution issues, there is no action as contemplated by this section and section 240, and thus nothing to which the sections can apply unless the assessment, under sec. 218(c), could be called an action in which case this section would likely apply. But if this section should be so applied to the procedure of sec. 218(c), the commission would have three years, after thirty days from the filing of the notice of taking possession in which to assess the stockholders. It would seem that there is no action as contemplated by secs. 240 and 425, notwithstanding that subsection (13) of sec. 218(c) uses the word "may" in conferring the power upon the commission to follow this procedure, because subsection (22) provides that liquidation shall be affected in no other way than in the manner prescribed by the section and this is a part of the process of liquidation. But if the word "may" should be given its ordinary construction and not construed as "shall", even then this section and sec. 240 would not be applicable in those cases where the procedure prescribed by sec. 218(c) is followed. The above discussion has no application to actions against directors.

When Statute Begins to Run. — It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on. Houston v. Thornton, 122 N. C. 365, 375, 29 S. E. 827.

§ 424. Aliens in time of war.—When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (Rev., s. 379; Code, s. 165; C. C. P., s. 44.)

As to right of alien enemy to sue in the courts of this state, see Krachanake v. Acme Mfg. Co., 175 N. C. 435, 95 S. E. 851.

Art. 4. Limitations, Real Property

§ 425. Title against state.—The state will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the state to the same—

For complete digest treatment of limitations against state, municipalities, counties, public officers and public service companies, see 8 Enc. Dig. 792, 793; secs. 10-10(4).

Law Prior to Section. — Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this state had adopted the arbitrary rule, that from the adverse possession of land for thirty years a grant from the state should be presumed—a rule so arbitrary that a jury was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himself with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, id certum est quod certum reddi potest. FitzRandolph v. Norman, 4 N. C. 564; Candler v. Lunsford, 20 N. C. 542; Price v. Jackson, 91 N. C. 11, 14.

Same—Nature of Presumption. — The question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon natural presumptions as to facts, but upon a statutory or arbitrary rule established by the Legislature, or by the Courts, to prevent the uncertainty of titles which would arise if the questions in each case were to be determined by a jury, on their belief of the fact, derived from a consideration of

all the circumstances in evidence. Melvin v. Waddell, 75 N. C. 361.

Effect of Section upon Prior Law. — But the law is now changed, and the thirty years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the state. Price v. Jackson, 91 N. C. 11, 14.

The State is deemed to have surrendered its right where it permits an adverse occupation of land under colorable title without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. Walker v. Moses, 113 N. C. 527, 18 S. E. 339.

Section Not Retroactive. — The right of action which accrued prior to the adoption of C. C. P., is not governed by its provisions. Johnson v. Parker, 79 N. C. 475, 477.

Extent and Limitation of Application. — This section may be confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same, nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title, and the State agrees that when the adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title to him; nor will she sue for the issues or profits. But this does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be thirty or twenty-one years. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 298, 90 S. E. 196.

Adverse Possession against Municipality. — Under the law of this State as it formerly prevailed, title by adverse occupation could be acquired against a municipality. This was established and recognized as a rule of property not only under our decisions applicable to the question, Moore v. Meroney, 154 N. C. 158, 163, 69 S. E. 838; State v. Long, 94 N. C. 896; Crump v. Mims, 64 N. C. 767; but the principle was embodied in our statute law in 1868, now sections 427 and 420. Threadgill v. Wadesboro, 170 N. C. 641, 87 S. E. 521.

Application to Rents, Profits etc. — It was not intended by this section that the state should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title; nor will she sue for issues or profits. The loss of rents and profits is incidental to the loss of land. But this does not mean that the time limited for bringing any suit for the rents, issues, or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, § 441, it should be thirty or twenty-one years. Those periods are not applicable to personal actions, but only to actions for the recovery of land or some interest therein. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 298, 90 S. E. 196.

Application to Personal Actions.—The limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 90 S. E. 196.

Essential Characteristics of Possession.—In order to put the statute of limitations in motion against the true owner of land, it is necessary that there should be an actual, open, visible occupation of the land by another, begun and continued under a claim of right. The assertion of a mere claim of title, as for instance the payment of taxes thereon, is not sufficient. Malloy v. Bruden, 86 N. C. 251.

A party may show, as against the State, possession under known and visible boundaries for thirty years. Mobley v. Griffin, 104 N. C. 113, 115, 10 S. E. 142.

Sufficiency of Possession.—The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the Legislature to ratify the apparent title. Hedrick v. Gobble, 61 N. C. 348, 349.

Possession is insufficient to constitute the basis of adverse possession against the state or a private individual where the plaintiff merely shows that the agent of plaintiff's grantor raked and hauled straw one or two years and plaintiff's father cultivated an acre or two of the land one year. Prevatt v. Harrelson, 132 N. C. 251, 43 S. E. 800.

Same — Lappage.—The rule that, in controversies between titles of different dates which lap, actual possession of the lappage is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under mesne conveyances which extend the boundaries of the original grant. Hedrick v. Gobble, 61 N. C. 348.

Necessity of Continuity. — Thirty years adverse possession is necessary only to bar the State, and this need not be a continuous occupancy, nor need there be any connection between the tenants. FitzRandolph v. Norman, 4 N. C. 564; Candler v. Lunsford, 20 N. C. 542; Reed v. Earnhart, 32 N. C. 516; Davis v. McArthur, 78 N. C. 357; Cowles v. Hall, 90 N. C. 330; Mallett v. Simpson, 94 N. C. 37; Bryan v. Spivey, 109 N. C. 57, 13 S. E. 766; Hamilton v. Icard, 114 N. C. 532, 19 S. E. 607; Walden v. Ray, 121 N. C. 237, 238, 28 S. E. 293; May v. Mfg. Co., 164 N. C. 262, 80 S. E. 380.

Necessity of Privity of Possession.—A plaintiff, in proving the title out of the State by an adverse possession of thirty years, may avail himself of any possession by others adverse to the State, although he may not be able to connect himself with them. Melvin v. Waddell, 75 N. C. 361. This case was decided under the law prior to this section. See page 366 of the opinion and the authorities cited.—Ed. Note.

In case of a reliance upon thirty years adverse possession the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. Price v. Jackson, 91 N. C. 11. This decision is in keeping with the express terms of the section.—Ed. Note.

Connection of Occupation with Boundaries.—Where there is a physical occupation with claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive control or dominion over the unoccupied portions of the land. May v. Manufacturing & Trading Co., 164 N. C. 262, 80 S. E. 380.

Possession Short of Period as Evidence of Grant.—If there has been an adverse possession for any time short of thirty years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an adverse possession of thirty years a jury is not at liberty to find that in fact no grant ever issued. Melvin v. Waddell, 75 N. C. 361.

Nature of Possession Is Question for Jury.—Conceding the evidence establishes 30 years' possession, there was still left for the jury's determination the questions as to whether such possession was adverse, and as to whether such possession was held up to known and visible lines and boundaries, as required by this section. McKay v. Bullard, 207 N. C. 628, 630, 178 S. E. 95.

Effect of Running of Statute against State. — When a title is shown out of the State by adverse possession, sec. 428 applies where one thereafter acquires title under a sheriff's deed and holds possession thereunder for seven years. Walker v. Moses, 113 N. C. 527, 18 S. E. 339.

Burden of Showing Good Title—Against State.—Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without prima facie proof of possession under colorable title for twenty-one years under subsection (2). Hamilton v. Icard, 114 N. C. 532, 538, 19 S. E. 607.

Effect upon Running Where Grant Made.—Where an occupant is seated on the interference when the overlapping grant is issued, and is claiming colorable title adversely to the state under this section, the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. Hamilton v. Icard, 114 N. C. 532, 542, 19 S. E. 607.

If, on the contrary, the occupant of the lappage, wishes to use his adversary's grant to show that the title is out of the state in order to establish it in himself, by virtue of sec. 428, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant. Hamilton v. Icard, 114 N. C. 532, 542, 19 S. E. 607.

Effect of Patent to Part Possession. — The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where

his actual possession is within the lappage. Hamilton v. Icard, 114 N. C. 532, 19 S. E. 607.

Cited in Ware v. Knight, 199 N. C. 251, 254, 154 S. E. 35.

1. When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

2. When the person in possession thereof, or those under whom he claims, has been in possession under colorable title for twenty-one years, this possession having been ascertained and identified under known and visible lines or boundaries. (Rev., s. 380; Code, s. 139; C. C. P., s. 18; R. C., c. 65, s. 2.)

§ 426. Possession presumed out of state.—In all actions involving the title to real property title is conclusively deemed to be out of the state unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195.)

Cross Reference.—As to admitting in evidence, to establish title by adverse possession, a deed insufficient to convey title, see § 430 and the note thereto.

Section Not Retroactive. — This section, having no retrospective effect, is applicable only to actions commenced since May 1, 1917. Riddle v. Riddle, 176 N. C. 485, 97 S. E. 382; Johnson v. Fry, 195 N. C. 832, 837, 143 S. E. 857.

Purpose of Section.—To remove the burdensome and untoward condition growing out of the difficulty of proving title out of the State the Legislature enacted this section. It provides that, in actions between individual litigants, title shall be conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Moore v. Miller, 179 N. C. 396, 399, 102 S. E. 627.

"Where either party exhibits a patent to the land in dispute, since the State can no longer assert any claim, it is familiar learning that either the grantee or the party claiming adversely to it after its introduction may, as a general rule, use it to show that the State is no longer a claimant and make good his own claim by proof of possession under colorable title for seven years only. Gilchrist v. Middleton, 107 N. C. 663, 12 S. E. 85; Hamilton v. Icard, 114 N. C. 532, 539, 19 S. E. 607.

This rule also applies where the question of title to land depends upon the true divisional lines between the parties to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which taken together, cover the locus in quo, and either one may then establish title to any part thereof by adverse possession for twenty years. Stewart v. Stephenson, 172 N. C. 81, 89 S. E. 1060.

Within Legislative Power.—This section affects the remedy—mode of procedure—and is within the power of the General Assembly to pass. Johnson v. Fry, 195 N. C. 832, 837, 143 S. E. 857.

May Show Title out of State.—Under this section neither party is required to show title out of the State though either may do so. Dill-Cramer-Truitt Corp. v. Downs, 195 N. C. 189, 190, 141 S. E. 570, citing Pennell v. Brookshire, 193 N. C. 73, 136 S. E. 257.

Sources of Title Available. — And where the plaintiff has sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. Stewart v. Stephenson, 172 N. C. 81, 89 S. E. 1060.

In an action to recover lands by twenty years adverse possession under § 430, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. Johnson v. Fry, 195 N. C. 832, 143 S. E. 857.

And it is error to instruct the jury that the burden of proof is on the plaintiff to show title out of state in addition to sufficient adverse possession to ripen the title in himself. Dill Corporation v. Downs, 195 N. C. 189, 141 S. E. 570.

Cited in Ware v. Knight, 199 N. C. 251, 254, 154 S. E. 35.

§ 427. Such possession valid against claimants under state.—All such possession as is described in the preceding section, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the state. (Rev., s. 381; Code s. 140; C. C. P., s. 19.)

Editor's Note. — Although this section uses the term "preceding section," it refers to sec. 425. The codifiers of the Consolidated Statutes inserted sec. 426 and failed to change the reference.

Sufficiency of Possession as Affecting Application. — This section does not apply where the proof of possession is insufficient under section 425. Prevatt v. Harrelson, 132 N. C. 250, 251, 43 S. E. 800.

Application against Municipality. — Prior to the enactment of § 435, title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under our statutes, this section and section 420, as construed by the decisions, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. Threadgill v. Wadesboro, 170 N. C. 641, 87 S. E. 521.

§ 428. Seven years possession under colorable title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability. (Rev., s. 382; Code, s. 141; C. C. P., s. 20.)

I. General Note on Adverse Possession.
  A. General Consideration.
  B. Character of Possession.
II. Note to Section 428.

For general digest treatment, see 1 Enc. Dig. p. 198, §§ 1 et seq.; 13 Enc. Dig. p. 33, § 1 et seq.

See note under § 430.

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Editor's Notes. — The scope of this note is limited to a treatment of the general principles of titles by adverse possession of property which are alike applicable and essential to all the sections of the code upon the subject. It would have been impracticable to cite all of the great mass of cases upon this subject in this note and no attempt has been made to do so but references have been made to the digest where cumulative citations may be found.

While statutes of limitations are generally held to bar the remedy and not affect the right, adverse possession affects the right by vesting the actual title in the disseizor. In this respect it is an exception to the general rule of limitations.

Definition.—Adverse possession consists of the actual possession of property held to the exclusion of others including the true owner, and is exercised by making the ordinary use of which the property is susceptible in its present state and taking the usual profits. Locklear v. Savage, 159 N. C. 236, 74 S. E. 347. See 1 Enc. Dig. 207, sec. 12 for other cases. Such acts must be so repeated as to show that they are done in the character of owner, in opposition to the right or claim of any other person and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the property will permit, affording unequivocal indication to all persons that the claimant is exercising the dominion of owner. Loftin v. Cobb, 46 N. C. 406. For other cases see 1 Enc. Dig. 208, sec. 12. This is the definition given by Judge Gaston in Williams v. Buchanan, 23 N. C. 535, 537,

and has generally been followed since the case was decided in 1841. See 8 Enc. Dig. 212, sec. 15.

Such adverse possession as will ripen into title must be for the prescribed period of time and be clear, definite, positive and notorious. It must be continuous, adverse, hostile, and exclusive during the whole statutory period, and under a claim of title to the land occupied. Bland v. Beasley, 145 N. C. 168, 58 S. E. 993.

In other words, the claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry and possession adverse. Snowden v. Bill, 159 N. C. 497, 75 S. E. 721.

There must be known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed. Barfield v. Hill, 163 N. C. 262, 79 S. E. 677 and cases cited.

A better and more concise definition than was given in Locklear v. Savage, 159 N. C. 236, 237, 74 S. E. 347, would be difficult to find. It is therefore quoted as a resume: "Adverse possession within the meaning of the law * * * consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

The particular elements will now be presented in somewhat more detail.

Color of title is defined in Smith v. Proctor, 139 N. C. 314, 324, 51 S. E. 889, as "a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." A deed to which the privy examination of the married woman is not taken is color of title. Norwood v. Totten, 166 N. C. 648, 82 S. E. 951, see Barbee v. Bumpass, 191 N. C. 521, 132 S. E. 275; Booth v. Hariston, 193 N. C. 278, 136 S. E. 879. In Garner v. Horner, 191 N. C. 540, 132 S. E. 290, it is held: Failure to comply with § 2515, renders a deed void, although it is good as color of title. Best v. Utley, 189 N. C. 356, 361, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571; Ennis v. Ennis, 195 N. C. 320, 323, 142 S. E. 8.

Whether a deed is champertous which conveys to the grantor's son certain described lands, reserving to the grantor and his wife a life estate, given in consideration of the grantee's successfully maintaining a suit to clear the title to the lands conveyed, it is sufficient color of title after registration and after the falling in of the reserved life estate, to ripen the title in the grantee under this section. Ennis v. Ennis, 195 N. C. 320, 142 S. E. 8.

An unregistered deed ordinarily is not color of title, except as between the original parties. Johnson v. Fry, 195 N. C. 832, 838, 143 S. E. 857.

And where the probate of a deed to lands is fatally defective it is not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee. McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

Property Subject to Prescription. — The title to property of the state (see sec. 425), and this included the property of the political subdivision prior to the enactment in 1891 of what is now sec. 435 which changed the rule, may be acquired by adverse possession. See the cases cited in 8 Enc. Dig. 205, secs. 5-7 (3); 13 Enc. Dig. p. 36, secs. 5-7 (3). But section 434 provides that property belonging to public service companies is not generally subject to title by prescription. It is the general rule that the property of private persons is always subject to title by adverse possession. See secs. 428, 432.

Persons against Whom Prescription May Be Claimed.— This subject was dealt with incidentally under the preceding catchline. Continuing that discussion, adverse possession and prescription may be had against a trustee and this though the cestui que trust is under a disability and out of the state. Blake v. Allman, 58 N. C. 407. And where the title is lost by the trustee, the cestui que trust is also concluded. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728; King v. Rhew, 108 N. C. 696, 13 S. E. 174.

Joint tenants and tenants in common may lose their property by adverse possession and what is sufficient against one is sufficient against all. Cameron v. Hicks, supra. But in order for one tenant to gain title by adverse possession against his joint tenants he must commit some act of sufficient notoriety as to clearly indicate to the cotenants that he is holding adversely to them and to their exclusion. This is true because the possession of one tenant is presumed to be the possession of all. For full treatment see 11 Enc. Dig. p. 736 secs. 20-20(6).

There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry. Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870.

So where a mortgage is made to a tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of Limitations, either under seven years color or under twenty years otherwise. Section 430. Crews v. Crews, 192 N. C. 679, 135 S. E. 784.

And where the plaintiffs seek to be let into the possession of lands as tenants in common, and it appears without conflicting evidence that the defendants have been in peaceful possession under a mortgage from ancestor for more than thirty years after ouster, no issue of fact is raised for the determination of the jury the title being complete in the adverse possessors. Crews v. Crews, 192 N. C. 679, 135 S. E. 784.

The statute will not ordinarily begin running against a remainderman until the falling in of the life estate. Roe v. Journigan, 181 N. C. 180, 106 S. E. 690. See post this note, catchline "Title to Remainder During Life Estate."

B. Character of Possession.

Must Be Actual. — There can be no adverse possession without an actual possession of the locus in quo, Cutler v. Blockman, 4 N. C. 368, and no constructive possession will ripen into a good title. Williams v. Wallace, 78 N. C. 354.

Thus the payment of taxes and the employment of agents in respect to land are insufficient acts to constitute possession. Ruffin v. Overly, 88 N. C. 369. As was said by the court in considering sec. 428, and this applies with equal force to all the statutes, "the adverse claimant should either possess it in person, or by his slaves, servants or tenants; for feeding of cattle or hogs, or building hog pens, or cutting wood from off the land, may be done so secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all of these are but acts of trespass: Whereas, when a settlement is made upon land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own." Grant v. Winborne, 3 N. C. 56; Andrews v. Mulford, 2 N. C. 311. It has been held that cutting timber and making shingles in a swamp unfit for cultivation continuously for seven years. (see sec. 428) is a good possession.

Same—Test for Determining Sufficiency. — As stated above in this note, using the land continuously and openly a sufficient length of time for the only purpose for which it is fit, is all that is required. Thus maintaining fish traps, erecting and repairing dams and using the property every year during the fishing season for a sufficient number of years is sufficient possession of a non-navigable stream. Locklear v. Savage, 159 N. C. 236, 74 S. E. 347, and citations. However cutting trees and feeding hogs upon land susceptible of other uses, is insufficient. Loftin v. Cobb, 46 N. C. 406; Vanderbilt v. Johnson, 141 N. C. 370, 54 S. E. 298, sets forth sufficient evidence of adverse possession

Applying the "use of which the land is capable" test the court has decided that the following acts were sufficient: Overflowing land under certain circumstances, see LaRoque v. Kennedy, 156 N. C. 360, 72 S. E. 454; erecting dams and fish traps, Gudger v. Kensley, 82 N. C. 482, 483; operating lime kiln, Moore v. Thompson, 69 N. C. 120; making turpentine, Gudger v. Kensley, 82 N. C. 482, 483; cultivation, Burton v. Carruth, 18 N. C. 2, 3 and citations. Wallace v. Maxwell, 32 N. C. 110, Smith v. Bryan, 44 N. C. 180, 183; pasturage, Andrews v. Mulford, 2 N. C. 311; and cutting timber, Wall v. Wall, 142 N. C. 387, 55 S. E. 283; Staton v. Mullis, 92 N. C. 624.

The following acts were held insufficient because of lack of continuity or insufficient duration. Cultivation, Hamilton v. Icard, 114 N. C. 532, 19 S. E. 607; Hamilton v. Icard, 117 N. C. 477, 23 S. E. 354; Prevatt v. Harrelson, 132 N. C. 250, 43 S. E. 800; State v. Suttle, 115 N. C. 784, 20 S. E. 725; gold hunting, Ward v. Herrin, 49 N. C. 23, 25, and citations; cutting timber, Barlett v. Simmons, 49 N. C. 295, 296; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Campbell v. Miller, 165 N. C. 51, 80 S. E. 974; Blue Ridge Land Co. v. Floyd, 167 N. C. 686, 83 S. E. 687.

Same—Payment of Taxes. — Paying taxes is not enough to constitute an adverse possession. The payment of taxes is an assertion of a mere claim of title and therefore is insufficient because it is not an actual, open, visible occupation begun and continued under a claim of right. Malloy v. Bruden, 86 N. C. 251. However it does constitute a relevant fact in establishing a claim of title and may be considered along with evidence of possession in proving adverse possession. Austin v. King, 97 N. C. 339, 2 S. E. 678; Christman v. Hillard, 167 N. C. 4, 7, 82 S. E. 949.

Same—Title to Remaindermen During Life Estate. — Title by adverse possession cannot be had against the remaindermen before the life estate has ended, because no actual possession of the remainder may be had, but title to the life estate may be gained at such time. Brown v. Brown, 168 N. C. 4, 84 S. E. 25. The statutes cannot begin to run against remaindermen until the expiration of the particular estate. Honeycutt v. Brooks, 116 N. C. 788, 21 S. E. 558; Roe v. Journigan, 181 N. C. 180, 106 S. E. 690.

Same — Adjoining Boundaries. — If, two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possession constituted by the inclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he had happened not to do. Currie v. Gilchrist, 147 N. C. 548, 61 S. E. 581; Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 546, 547, 88 S. E. 862.

Necessity of Being Visible and Notorious. — It was suggested under the definition that the possession must be as notorious as the nature of the property will permit. The illustrations given under the preceding catch line and the rule therein developed are but illustrations of this rule. The possession must always be as actual, as well as notorious, as the nature of the property will permit, but, although the possession must always be so notorious as to be visible, it is not necessary that the true owner have actual knowledge. It is sufficient if the possession would be notice of the adverse character to the ordinary person, if he should make the observation that the ordinary owner would make of his own property. The owner is bound to ascertain the nature of the claim after notice has been given him. Kennedy v. Maness, 138 N. C. 35, 50 S. E. 450.

The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the Legislature to ratify the apparent title. Hedrick v. Gobble, 61 N. C. 348, 349.

Posting land and keeping away trespassers is insufficient because it is not a visible and notorious possession. Berry v. Richmond Cedar Works, 184 N. C. 187, 113 S. E. 772.

Continuity and Duration. — The duration of the possession to ripen into title is always fixed by the statutes. The ordinary periods are fixed; as against the state by sec. 425, private individuals under color, sec. 428, and without color sec. 430. Certain limitations and exceptions are imposed upon these sections by secs. 434 and 435.

Proof that land was cultivated under one claiming title and that timber was cut thereon as needed, unaccompanied by any evidence of the length of time of the occupancy by cultivation, did not establish title by adverse possession without color of title under section 430. Betts v. Gahagan, 212 Fed. 120.

The continuity is largely a matter of interpretation and construction of these sections for none of them expressly indicate the extent to which the possession must be continuous.

In proving continuous adverse possession nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by "necessary implication." Ruffin v. Overby, 105 N. C. 78, 83, 11 S. E. 251. The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible. Locklear v. Savage, 159 N. C. 236, 239, 74 S. E. 347; Cross v. S. A. L. Co. 172 N. C. 119, 90 S. E. 14. Occasional trespasses are not sufficient, for the possession must be of such character as to continually expose the party to suit by the true owner. Alexander v. Richmond Cedar Works, 177 N. C. 137, 98 S. E. 312. The illustrations and the rule stated under the catchline "Actual Possession." in this note expound the true rule of continuity. It must be just as continuous as the nature of the property will permit provided it is sufficient to meet the requirement as to notoriousness.

So, where the plaintiff showed a sufficient and connected title to the land in controversy in himself, as contemplated by section 432, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years. Blue Ridge Land Co. v. Floyd, 167 N. C. 686, 83 S. E. 687.

It has been held that the possession by a tenant of defendant's ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. Blue Ridge Land Co. v. Floyd, 167 N. C. 686, 83 S. E. 687.

An intervening period of five months, Holdfast v. Shephard, 28 N. C. 361, and one year, Ward v. Herrin, 49 N. C. 23, 24; Malloy v. Bruden, 86 N. C. 251, 259, have been held to be sufficient intervals to defeat title by adverse possession.

A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. Malloy v. Bruden, 85 N. C. 251.

Same — Reasons for Rule as to Continuity. — The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the occupation of another actually ceases, the title again draws to it the possession, and the seizin of the owner is restored. A subsequent entry even by the same wrongdoer and under the same claim of title constitutes a new disseizin from the date of which the statute takes a fresh start. Malloy v. Bruden, 86 N. C. 251, 259. But it is not to be understood that the possession is interfered with by the casual entry of a trespasser sufficiently to defeat title. Hayes v. Lumber Co., 180 N. C. 252, 104 S. E. 527.

From the above authorities it would seem that the true rule is that whenever an occupation ceases for a period ever so brief the statute stops running but if the nature of the only use to which the land can be subjected is such or the actual and continuous occupation is such that from the very nature of things there are periods of time when the adverse possessor is not actually upon the land but is in fact occupying it under his claim the possession is not sufficiently interrupted to defeat title when so held for a sufficient period of time. Ed. Note.

The discussion under this catchline is limited to actions against private individuals. The rule regarding the continuity of the possession as against the state is converse to that respecting continuity as against private individuals. See note to sec. 425.

Tacking Possessions — Privity. — It is not necessary that the adverse claimant hold the possession for the statutory period provided he can establish a privity in claim, possession, etc., with the prior possessors, which when taken together will constitute the period of time necessary to give title. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. This privity is necessary where the claimant has not had possession for the statutory period for he cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title. Johnston v. Case, 131 N. C. 491, 42 S. E. 957.

This rule of privity applies alike to cases of adverse possession against the state and private individuals, whether with or without color of title, May v. Mfg., etc., Co., 164 N. C. 262, 80 S. E. 380; Johnston v. Case, 131 N. C. 491, 42 S. E. 957; although prior to sec. 425 the rule was otherwise as against the state. Phipps v. Pierce, 94 N. C. 514, 518; Price v. Jackson, 91 N. C. 11, 13. For other cases see 1 Enc. Dig. pp. 230, 231, sec. 36(2); 13 Enc. Dig. p. 40, sec. 36(2).

It has been held that to constitute privity, the later occupant must enter under a prior one and obtain his possession either by purchase or descent from him. Privity means privity of possession and not privity in blood for a "privity in blood" is one who derives his title by descent and applies to a real title which can descend and not to a mere colorable title. By this is meant, of course, that the possession descends and the heirs must take immediate possession to prevent a gap. Upon such entry the possession of the ancestor may be tacked to that of the

heirs as if he possessed the land under color of title, the heirs, by descent so possess it. Barrett v. Brewer, 153 N. C. 547, 69 S. E. 614; Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748; Truston v. Blount, 4 N. C. 455. In a like manner the widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead. (Atwell v. Shook, 133 N. C. 387, 45 S. E. 777) or dower. Jacobs v. Williams, 173 N. C. 276, 91 S. E. 951.

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them by adverse possession may be tacked to that of the husband. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

For the reason explained above possession by the legal representative is a continuation of the possession of the deceased. Trustees v. Blount, 4 N. C. 455.

The possession of a tenant is the possession of the landlord and is to be added to that of the landlord in person. Alexander v. Gibbons, 118 N. C. 796, 24 S. E. 748.

The same rule applies where a vendee holds possession under articles of purchase and his possession enures to ripen the defective title of the vendor. Rhodes v. Brown, 13 N. C. 195. This rule was applied as against co-tenants of a husband, notwithstanding that the husband, who held entire possession and while so holding deeded the property to his wife, was later decreed a tenant in common, the wife not being a party to the proceedings. Gill v. Porter, 176 N. C. 451, 97 S. E. 381.

It should be observed in this connection that the possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the seven years possession under color of title as required by sec. 428. Morrison v. Craven, 120 N. C. 327, 26 S. E. 940.

In cases where the claimant is holding possession under color of title he cannot tack his possession of the land not covered by his color to the possession of his grantor. This is an application of the rule that possession cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. See Jennings v. White, 139 N. C. 22, 51 S. E. 799; Blackstock v. Cole, 51 N. C. 560.

Same—Hostile Character. — It may be stated as a general proposition that the possession must be hostile to the true owner. This question becomes especially important where a person standing in a fiduciary relation has possession of the property in such capacity or where a tenant, a licensee, vendor or some other such person gains title in subordination to the true owner. See Rogers v. Mabe, 15 N. C. 180; Foscue v. Foscue, 37 N. C. 321; Johnson v. Farlow, 35 N. C. 84. For other cases see 1 Enc. Dig. p. 240 et seq. Such person cannot hold possession adversely until he commits some act sufficient to apprise the true owner of the fact that he is holding adversely to his interest under a claim of ownership.

Whenever the possessor holds in subordination to the true owner whether in such capacity as named above or by having recognized a superior title in another, his possession will not ripen into title. Gwyn v. Stokes, 9 N. C. 235. For other cases and full treatmet see 1 Enc. Dig. 240, et seq. secs. 44-69(3); 13 Enc. Dig. pp. 42 et seq. secs. 44-69(4).

Thus there is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to show such possession to have been continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership. Bland v. Beasley, 145 N. C. 168, 58 S. E. 993.

An adverse possession by one tenant in common is indicated by a hostile attitude apparent to the Court or jury, from which it may be seen by some act done that the intent to hold alone is manifested to the cotenants, as if they attempt to assert their claim, as to enter, or to demand an account of rents, etc., which is resisted by the occupant, his possession becomes adverse, and the statute begins to run. Tharpe v. Holcomb, 126 N. C. 365, 35 S. E. 608.

Burden of Proof — Presumptions. — When the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse. Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Bland v. Beasley, 145 N. C. 168, 170, 58 S. E. 993. See sec. 432.

II. NOTE TO SECTION 428.

Relation to Section 445.—This section and sec. 430 apply to actions for the recovery of real estate to the exclusion of sec. 445. Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

Effect of Disability.—Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. Clayton v. Rose, 87 N. C. 106, 107,

But a married woman who acquired no title by another junior grant issued to her cannot use her disability to defeat the right of the plaintiffs. Berry v. Lumber Co., 141 N. C. 386, 54 S. E. 278.

Extent of Estate Acquired.—A life estate must be acquired by adverse possession under color of title. Clendenin v. Clendenin, 181 N. C. 465, 107 S. E. 458 and citations. From dissenting opinion.

Connection with Grant as Requisite to Pleading Section.—The plaintiff may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. Blair v. Miller, 13 N. C. 407; Christenbury v. King, supra; Isler v. Dewey, 84 N. C. 345; Mobley v. Griffin, 104 N. C. 112, 115, 10 S. E. 142.

Sufficiency of Paper to Constitute Color.—There can be no color of title without some paper writing attempting to convey title, but which does not do it either because of want of title in the person making it or because of the defective mode of conveyance used; and, semble, that under the act of 1891 it must not be so plainly and obviously defective that a man of ordinary capacity could be misled by it. This is true notwithstanding the holding in Neal v. Nelson, 177 N. C. 394, 23 S. E. 428; Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

Same—Bond for Title as Color.—Where a bond for title is unconditional and calls for no future payment, the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is "color of title" to support adverse possession within this section. Betts v. Gahagan, 212 Fed. 120.

"After payment of the purchase money, a bond for title is 'color of title' to support adverse possession even against the vendor. Avent v. Arrington, 105 N. C. 377, 10 S. E. 991." Betts v. Gahagan, 212 Fed. 120, 123.

Same—Deed for Partition as Color.—A deed by the heirs of a deceased owner of land for partition thereof is not color of title within this section. Betts v. Gahagan, 212 Fed. 120.

A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition is color of title within this section, where the third person had no interest in the land outside of the deed. Betts v. Gahagan, 212 Fed. 120.

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, under section 430, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession under this section is immaterial. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

Same—Unregistered Deed.—An unregistered deed is not color of title as against judgment creditors of the grantor. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Same—Voidable Deed.—A voidable deed is sufficient color although it is a distinct and separate source of title from the one under which entry was first made. Butler v. Beil, 181 N. C. 85, 106 S. E. 217.

Same—Void Deed.—A void deed constitutes color of title. Bond v. Beverly, 152 N. C. 56, 67 S. E. 55.

A wife's deed to her husband is color of title even if it be void, and his sufficient adverse possession for seven years, under this section, will ripen the fee-simple title in him. Potts v. Payne, 200 N. C. 246, 156 S. E. 499.

Same—Deed by Mortgagor in Possession.—A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. Parker v. Banks, 79 N. C. 480.

Same—Deed of Non Compos Mentis.—The deed of a person non compos is color of title, and possession under it for seven years ripens into title against those not under disability. Ellington v. Ellington, 103 N. C. 54, 9 S. E. 208.

Character of Possession under Section.—Chief Justice Ruffin in Green v. Harman, 15 N. C. 158 at p. 162, said. "The operation of the statute of limitations depends upon two things: The one is possession continued for seven years; and the other the character of that possession—that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It

is presumed, indeed, that he will acquire the knowledge, and it is intended that he should." Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 546, 88 S. E. 862.

The possession of one under color is sufficient notice of his claim of title to the lands. Butler v. Bell, 181 N. C. 85, 106 S. E. 217.

The adverse possession for seven years under color, which bars the entry of the true owner, must be open, continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title, to show such actual adverse possession. Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Bland v. Beasley, 145 N. C. 168, 58 S. E. 993; Stewart v. McCormick, 161 N. C. 625, 626, 77 S. E. 761. For full treatment see part one of this note, supra.

If the character of the possession is insufficient to ripen a perfect title, the question of color of title does not arise. Clendenin v. Clendenin, 181 N. C. 465, 107 S. E. 458.

Charging This and Section 430.—Where, in an action for the recovery of land, defendant relied on this section and section 430, and the evidence justified a finding in his favor under this section, but there was no evidence to support a verdict under section 430, the error in refusing to charge that defendant could not hold under section 430 was not reversible, since it could not be inferred that the verdict was based on a finding of adverse possession for twenty years merely because the court refused to charge that there was no evidence of adverse possession for twenty years. Betts v. Gahagan, 212 Fed. 120, 121.

Conflict Making Jury Question.—Where the defendant in ejectment claims the locus in quo by sufficient evidence of adverse possession with and without "color," as against plaintiff's chain of paper title, and the defendant denies the genuineness of a lease to his predecessor which the plaintiff has introduced, an issue of fact is raised for the determination of the jury. Virginia-Carolina Power Co. v. Taylor, 191 N. C. 329, 131 S. E. 646.

Effect on Lien of Judgment Creditor.—Adverse possession against a judgment debtor for a period of seven years under color of title does not affect the lien of a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. Moses v. Major, 201 N. C. 613, 160 S. E. 890.

Effect of Miscitation.—The criticism to which this section may be obnoxious in misreciting other intended sections cannot affect the application of section 407 to the previously limited actions for real property, to which these are expressly made subject. Clayton v. Rose, 87 N. C. 106, 111. Formerly this section cited the statutes naming and defining the disabilities and it is to these citations that this annotation refers. Ed. Note.

Cited in Dill-Cramer-Truitt Corp. v. Downs, 195 N. C. 189, 141 S. E. 570.

§ 429. Seizin within twenty years necessary.—No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law. (Rev., s. 383; Code, s. 143; C. C. P., s. 22.)

Section Not Retroactive. — This salutary provision does not extend to actions already commenced or rights of actions already accrued at the ratification of the Code. Covington v. Stewart, 77 N. C. 148, 151.

Legal Title Prima Facie Evidence of Possession.—If a plaintiff establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Johnston v. Pate, 83 N. C. 110; Conkey v. Roper Lumber Co., 126 N. C. 499, 503, 36 S. E. 42.

Same—Section Construed with Section 432. — In cases where there is no tenancy in common this section of the Code must be construed with section 432, for this section is explained in sec. 432 by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, etc. Conkey v. Roper Lumber Co., 126 N. C. 499, 502, 36 S. E. 42.

Same—Effect of Plea of Section by Adversary. — The pleading by a defendant of this section does not shift upon the plaintiff the burden of showing that he has been in the possession within twenty years before the commencement of the action, but the presumption created by sec. 132 can only be rebutted by proof on the part of the defendant that the defendant had been in adverse possession of the premises for twenty years. Conkey v. Roper Lumber Co., 126 N. C. 499, 502, 36 S. E. 42.

Same—Character of Defendant's Possession as Affecting Application.—This section does not apply when the plaintiffs have shown legal title and it appears that the defendants' possession has not been for twenty continuous years. Bland v. Beasley, 145 N. C. 168, 58 S. E. 993. See also Clendenin v. Clendenin, 181 N. C. 465, 107 S. E. 458 where it was held that the other entry must be openly and notoriously adverse or some act must be done to clearly indicate that it has become adverse, and that the occupation of the mother-in-law's land after her death, where original entry was in subordination to her title, is insufficient. See also Rutledge & Co. v. Griffin Mfg. Co., 183 N. C. 430, 111 S. E. 774.

Same—Where Previously Gained by Adverse Possession.—Where plaintiffs acquired the title by adverse possession of the land under color for more than thirty years, it follows that they had at least constructive seizin or possession within twenty years before this suit was brought, which would satisfy the requirement, as seizin follows the title, if there is no actual possession and it is not incumbent on them to show an actual seizin or possession of the premises in question for twenty years before the commencement of the action. Bland v. Beasley, 145 N. C. 168, 58 S. E. 993; Stewart v. McCormick, 161 N. C. 625, 626, 77 S. E. 761.

Notwithstanding that a judgment was rendered against a party in an action to recover lands, if he subsequently enter, inclose and use the lands for the statutory period, he will acquire a new estate by disseizen and acquiescence and will be presumed to have been in possession within the past twenty years. Moore v. Curtis, 169 N. C. 74, 85 S. E. 132.

Evidence Sufficient under Section.—The evidence in Dean v. Gupton, 136 N. C. 141, 48 S. E. 576, was sufficient to sustain a finding under this section that the defendant held adversely to the plaintiff.

Cited in Johnson v. Fry, 195 N. C. 832, 836, 143 S. E. 857; Reid v. Reid, 206 N. C. 1, 4, 173 S. E. 10.

§ 430. Twenty years adverse possession.—No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability. (Rev., s. 384; Code, s. 144; C. C. P., s. 23.)

See note under § 426.

Editor's Note.—The first part of the annotations under section 428 are devoted to a treatment of the general principles of adverse possession and that treatment is just as pertinent to this section as sec. 428. Thus no repetition of the principle therein discussed will be made in this note.

Proof Out of State as Prerequisite to Pleading Section.—Prior to the passage of sec. 426, in 1917, before one could establish title to property under this section, title must have been proved to be out of the state.—Ed. Note.

Thus, where adjoining owners were litigating with respect to their boundaries and each introduced a grant from the state to their lands respectively, which taken together, covered the locus in quo, title was shown out of the state and either party could establish title to any part thereof by adverse possession for twenty years under this section. Stewart v. Stephenson, 172 N. C. 81, 89 S. E. 1060.

But since the passage of section 426 the title is conclusively presumed to be out of the state and such proof is not now necessary except in the cause specified.—Ed. Note.

Effect of Section Upon Prior Law. — The possession for twenty years which raised a presumption of title, as the law has been heretofore administered, has now the force and effect of giving an actual title in fee by the provisions of this section. Covington v. Stewart, 77 N. C. 148, 151.

Section Prescribes Maximum Required. — It is error to charge that the adverse claimant must maintain open and continuous possession without break for thirty years before the bringing of his action as only twenty years adverse possession is required to give a title in fee to the possessor, as

against all persons not under disability, except the state, see sec. 425. Walden v. Ray, 121 N. C. 237, 238, 28 S. E. 293.

Section 428 Immaterial When This Section Applicable.—Where title by adverse possession can be established under this section, the question of whether a color of title is sufficient under section 428 is immaterial. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

Even if there is a deed, with metes and bounds, the adverse possession of twenty years would bar the defendant under the statute of limitations. Railroad v. Olive, 142 N. C. 257, 271, 55 S. E. 263, cited and distinguished. May v. Atlantic Coast Line R. Co., 151 N. C. 388, 66 S. E. 310.

Section Applicable to Exclusion of Section 445.—This section and section 428 apply to actions for the recovery of real estate to the exclusion of section 445. Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

Presumption of Deed to Possession.—There is no error in a judge charging that where title is out of the state and the evidence shows possession for 20 years the jury might presume a deed to the possessor from any person having title. This is settled law. Melvin v. Waddell, 75 N. C. 361, 368.

Deed as Evidence of Possession. — Deed of sheriff to grantor of plaintiff in ejectment is no evidence of possession. Prevatt v. Harrelson, 132 N. C. 250, 43 S. E. 800.

Elements of Possession Necessary.—See general note under section 428.

Tenants in Common—Possession of One Possession of All. —The possession of one tenant in common is presumed to be the possession of all. Tharpe v. Holcomb, 126 N. C. 365, 35 S. E. 608.

Where plaintiff and defendants were tenants in common, the possession of the defendants, not having been adverse for twenty years, was the possession of the plaintiff. Conkey v. Roper Lumber Co., 126 N. C. 499, 36 S. E. 42.

To ripen title under a deed from a tenant in common twenty years adverse possession is necessary and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. Bradford v. Bank, 182 N. C. 235, 108 S. E. 750.

Evidence of Possession Sufficient to Sustain Charge. — Where the plaintiff introduced evidence to show that he had open and continuous adverse possession of the lands under known and visible metes and bounds for more than twenty years, it is sufficient under this section to sustain a charge of the court to the jury as to his title by adverse possession. Stewart v. Stephenson, 172 N. C. 81, 89 S. E. 1060.

Adverse possession sufficient to ripen title is the exclusive use of the claimant for twenty years, continuously taxing the exclusive benefits such as the land in question is capable of yielding, under known and visible metes and bounds. Johnson v. Fry, 195 N. C. 832, 143 S. E. 857.

Priority over Judgment Lien.—Where a judgment debtor has lost title to lands by adverse possession, prior to the acquisition and registration of the judgment, the judgment creditor under § 614, is not entitled to execution on the locus in quo, the judgment debtor having no title at the time of the judgment, and this result is not affected by the giving of a deed by the debtor to the claimant, which was not registered until after the judgment. Johnson v. Fry, 195 N. C. 832, 143 S. E. 857.

Effect of Exclusive Dominion after Dedication to Public.— Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees have an easement therein, but where he has later fenced off a part of the land so offered for dedication to the public and under known metes and bounds has exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations will begin to run against the easements of the grantees thus acquired, which will ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of this section, by twenty years adverse possession. Gault v. Lake Waccamaw, 200 N. C. 593, 158 S. E. 104.

Burden of Proof.—See note under § 432.

Question for Jury.—Where there is evidence that title to the lands had been acquired under twenty years adverse possession this question should be submitted to the jury. McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

Evidence of plaintiffs' testator's actual, open and notorious adverse possession of the land in question under known and visible metes and bounds, in the character of owner and adverse to the cliams of all other persons held sufficient to be submitted to the jury under this section. Reid v. Reid, 206 N. C. 1, 173 S. E. 10.

Claim to Timber—Evidence. — As to competency of evidence where question depended upon high and low water marks, see Rutledge & Co. v. Griffin Mfg. Co., 183 N. C. 430, 111 S. E. 774.

Cited in Dean v. Gupton, 136 N. C. 141, 48 S. E. 576; Mobley v. Griffin, 104 N. C. 112, 115, 10 S. E. 142; Dill-Cromer-Truitt Corp. v. Downs, 195 N. C. 189, 190, 141 S. E. 570.

§ 431. Action after entry.—No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this chapter. (Rev., s. 385; Code, s. 145; C. C. P., s. 24.)

Editor's Note. — At common law any person who had a right of possession could assert it by a peaceful entry, without the formality of a legal action, and being so in possession, could retain it, and plead that it was his soil and freehold. This was allowed in all cases where the original entry of the wrongdoer was unlawful. See 1 Bouv. Law Dict., title "Entry." This section seems to be a limitation upon the rule in that while an entry may be made, it must be followed by a suit within one year and within the period of limitation (either 20, 7, 30 or 21 years after the statute began running, as this case might be) prescribed by the various sections of the code. The effect seems to be that the common law entry without maintaining a suit within one year thereof is insufficient so that one cannot repossess himself by an entry without also maintaining an action. The latter part of this section, "and within the time prescribed by law before the commencement of the action" is but a recognition of the statutes prescribing the various periods necessary for an adverse possession ripening into title. See Clayton v. Cagle, 97 N. C. 300, 303, 1 S. E. 523.

§ 432. Possession follows legal title.—In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. (Rev., s. 386; Code, s. 146; C. C. P., s. 25.)

Necessity of Showing Legal Title. — The statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title", and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. Moore v. Miller, 179 N. C. 396, 102 S. E. 627.

Presumption of Subordination. — When the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. Blue Ridge Land Co. v. Floyd, 167 N. C. 686, 83 S. E. 687.

When the plaintiff in ejectment shows title to the locus in quo, and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence; otherwise, under this section, the defendants' occupation is deemed to be under and in subordination to the legal title. Hayes v. Cotton, 201 N. C. 369, 371, 160 S. E. 453.

Presumption of Possession and Rebuttal. — The presumption that one who proves legal title in himself has been in possession within twenty years is not rebutted by proof that an adverse claimant has been in possession where the claimant holds under a deed from a tenant in common with the devisor of the holder of the legal title. Roscoe v. Roper Lumber Co., 124 N. C. 42, 46, 32 S. E. 389.

It is not necessary to consider the effect of this section where, conceding the presumption raised thereby, it is rebutted by the admission in the case agreed. Kirkman v. Holland, 139 N. C. 185, 189, 51 S. E. 856.

Same—Where Neither in Possession. — Where the defendants have not shown twenty years' possession, and, the plaintiffs having shown the legal title, the law carries the seizin to the party having the legal title, when neither is in possession. Bland v. Beasley, 145 N. C. 168, 169, 58 S. E. 993.

Construed with Section 429. — Where the plaintiff by proving legal title has raised the presumption under this section that he has been in possession within twenty years the presumption operates to satisfy the requirements of sec. 429 so that the plaintiff does not have to prove such possession. The two sections are to be construed together—the defendant must show that he himself has been in possession adversely for twenty years. Johnston v. Pate, 83 N. C. 110; Conkey v. Roper Lumber Co., 126 N. C. 499, 36 S. E. 42.

Section Has Not Been Construed as to Ouster. — This section of The Code, which is taken from the New York Code, has never been construed by this Court. Monk v. Wilmington, 137 N. C. 322, 326, 49 S. E. 345; Dobbins v. Dobbins, 141 N. C. 210, 219, 53 S. E. 870.

What is the true construction of this section with reference to causes of action founded upon an ouster, which occurred since the date of its adoption, is left open for future consideration, when the matter is directly presented. Dobbins v. Dobbins, 141 N. C. 210, 220, 53 S. E. 870.

However, too many cases have been decided by the Court since this section was enacted as law, in which the rule as to a presumed ouster has been recognized and applied, to hold at this time that the rule has been changed by it, at least where the eviction or ouster took place prior to 1868. Dobbins v. Dobbins, 141 N. C. 210, 220, 53 S. E. 870.

Presumption as to Possession of One Not True Owner.— It was held, in Ruffin v. Overby, 88 N. C. 369. "That every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made." And it seems that the holding is in conflict with this section. This may be explained by reference to the fact that the ouster in that case occurred prior to 1868, as it did in Bryan v. Spivey, 109 N. C. 57, 13 S. E. 766. Thus there is no presumption under the section that the possession of the plaintiffs and those under whom they claim is adverse. Monk v. Wilmington, 137 N. C. 322, 325, 49 S. E. 345.

There is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to prove possession. Bland v. Beasley, 145 N. C. 58 S. E. 993.

But even if Ruffin v. Overby, 88 N. C. 369, is in conflict with this section, the section does not profess to be conclusive. The presumption does not arise until the claimant "establishes a legal right to the premises," and not then even, if "it appears that such premises have been held and possessed adversely to such legal title." Monk v. Wilmington, 137 N. C. 322, 328, 49 S. E. 345. From dissenting opinion.

Disability Exception Limited to Persons Having Right of Entry, etc.—Adverse possession relates only to the true title, and the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. Lumber Co., 141 N. C. 386, 396, 54 S. E. 278.

Application to Claims from Common Source. — Where the parties claimed title from a common source, the plaintiff's deed being the older, but the defendant's having been recorded first, and possession for many years was in defendant, there being no evidence of the plaintiff ever having possession, this section does not apply. Mintz v. Russ, 161 N. C. 538, 77 S. E. 851.

Burden and Sufficiency of Proof. — The defendant in an action to recover lands, depending upon adverse possession thereof under color of title, where the plaintiff has proved a perfect chain of paper title, has the burden of proving this defense by the greater weight of the evidence, under this section; and while an instruction thereon that the defendant must satisfy the jury thereof has been held sufficient, a further charge in connection therewith, that the defendant need not satisfy the jury by the greater weight of the evidence, is in effect a charge that the jury may be satisfied by less than the greater weight of the evidence, and constitutes reversible error. Bryan v. Spivey, 109 N. C. 57, 13 S. E. 766; Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Bland v. Beasley, 145 N. C. 168, 58 S. E. 993; Steward v. McCormick, 161 N. C. 625, 77 S. E. 761; Ruffin v. Overby, 105 N. C. 78, 11 S. E. 251; Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 88 S. E. 862.

The use of the word "satisfied" in a charge upon the sufficiency of evidence under this section did not intensify the proof required to entitle the plaintiffs to their verdict. The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. The plaintiffs' proof need not be more than a bare preponderance; but it must not be less. Fraley v. Fraley, 150 N. C. 501, 504, 64 S. E. 381; State v. McDonald, 152 N. C. 802, 807, 67 S. E. 762; Blue Ridge Land Co. v. Floyd, 171 N. C. 543, 545, 88 S. E. 862.

The burden of proving title by sufficient adverse possession is on the defendant in ejectment relying thereon, and where the evidence of the plaintiff has tended to show a perfect chain of paper title, the defendant's title is deemed to be in subordination thereto under this section, and it is reversible error for the trial judge in effect to instruct the jury that the burden of disproving the defendant's evidence is on the plaintiff. Virginia-Carolina Power Co. v. Taylor, 194 N. C. 231, 139 S. E. 381.

Applied in Johnston v. Pate, 83 N. C. 110, 112.

§ 433. Tenant's possession is landlord's.—When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (Rev., s. 387; Code, s. 147; C. C. P., s. 26.)

Section Operates as Estoppel. — The plaintiff can prove title by estoppel, as by showing that the defendant was his tenant (or derived his title through his tenant) when the action was brought. Conwell v. Mann, 100 N. C. 234, 6 S. E. 782; Melvin v. Waddell, 75 N. C. 361; Mobley v. Griffin, 104 N. C. 112, 115, 10 S. E. 142; Moore v. Miller, 179 N. C. 396, 398, 102 S. E. 627.

Section Fixes Maximum Period. — The presumption which attaches to the possession of a tenant following the termination of tenancy, is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. Melvin v. Waddell, 75 N. C. 361. Virginia—Carolina Power Co. v. Taylor, 191 N. C. 329, 331, 131 S. E. 646.

Establishment of Tenancy—Question of Fact. — Where the plaintiff in ejectment has shown paper title by mesne conveyances from a state grant of the lands in controversy, and the defendant, claiming under sufficient evidence of adverse possession with and without color, and denies a lease introduced by the plaintiff to the defendant's predecessor in title: Held, reversible error for the court to instruct the jury that defendant's possession is conclusively presumed to be that of a tenant for twenty years under the provisions of this section and exclude evidence of ownership of his predecessor in title during the continuance of the lease and for twenty years thereafter. Virginia-Carolina Co. v. Taylor, 191 N. C. 329, 131 S. E. 646.

Parol Gift as Rebuttal of Tenancy. — A parol gift of land will not convey title but it will rebut the idea of tenancy and possession under it will ripen into title if continued for twenty years. Wilson v. Wilson, 121 N. C. 525, 34 S. E. 685; Dean v. Gupton, 136 N. C. 141, 48 S. E. 576.

How Tenant May Maintain Action Involving Title. — A tenant under lease may not maintain an action against his lessor involving title during the period of the lease without first surrendering the possession he has under the lease. Lawrence v. Eller, 169 N. C. 211, 85 S. E. 291; Abbott v. Cromartie, 72 N. C. 292, 295.

Eviction under Legal Process and Re-entry. — Although where a tenant has been evicted by legal process and has entered under another claim, etc., the fact may be set up against the landlord and the principle of this section does not apply, if the eviction is the result of a collusion and the tenant then enter under the evictor, his property not having been moved from the premises, the court will not permit a defect of the landlord's title but will apply the principle of this section notwithstanding the eviction. Pate v. Turner, 94 N. C. 47.

Effect of Failure of Landlord to Prove Title. — Where the plaintiff fails to show any title in himself, and relies entirely on estoppel by this section, the judgment should be limited to a recovery of the possession, leaving the tenant free to assert any title he may have in another action. Benton v. Benton, 95 N. C. 559.

Competency of Evidence Respecting Tenancy. — Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as tenant

is competent. Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748; Shannon v. Lamb, 126 N. C. 38, 35 S. E. 232; Hatcher v. Hatcher, 127 N. C. 200, 37 S. E. 207; Bullock v. Bullock, 131 N. C. 29, 42 S. E. 458.

Application to Tenants in Common. — Where a tenancy in common is shown, the possession of one is the possession of all—and the rule is the same, when one enters to whom a tenant in common has by deed attempted to convey the whole land. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of the profits, for less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

Evidence that a tenant in common with defendant in ejectment claiming the locus in quo by adverse possession, paid rent to another, prior to the existence of the cotenancy, is not evidence that the defendant entered into possession under the title of such other person. Virginia-Carolina Power Co. v. Taylor, 191 N. C. 329, 131 S. E. 646.

A delay by feme covert, tenant in common, for three years and a few months after the death of her husband, and for seven years and a few months after the falling in of the life estate of her father does not raise a presumption of an actual ouster by her cotenants in common, so as to defeat her title, and under the statute of limitations bar her action. Day v. Howard, 73 N. C. 1.

Principle stated in McNeill v. Fuller, 121 N. C. 209, 28 S. E. 299; Prevatt v. Harrelson, 132 N. C. 250, 251, 43 S. E. 800.

Cited in Pitman v. Hunt, 197 N. C. 574, 576, 150 S. E. 13.

§ 434. No title by possession of right of way. —No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (Rev., s. 388; Code, s. 150; C. C. P., s. 29; R. C., c. 65, s. 23.)

Reason for Section. — The provisions of this section are justified upon the ground that the right of way is dedicated to a public use and for this reason is protected against loss by adverse possession. One using the right of way is at most a permissive licensee. Muse v. R. R. Co., 149 N. C. 446, 63 S. E. 102; Carolina, etc., R. Co. v. McCaskill, 94 N. C. 746; R. R. v. Olive, 142 N. C. 257, 55 S. E. 263.

When Section Applies. — This section applies, it would seem, only after the company has acquired and taken possession of a right of way and has no application where there is merely an executory contract. The decisions seem to go the length of holding that the section does not apply unless the company has operated the road. See May v. Atlantic, etc., R. Co., 151 N. C. 388, 66 S. E. 310.

So the grant to a railroad company of an undefined or "floating" right-of-way over the owner's lands is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of ten years upon failure of entry and of location by the company. Hemphill v. Annis, 119 N. C. 518, 26 S. E. 152; Willey v. Norfolk, etc., R. Co., 96 N. C. 408, 1 S. E. 446; May v. Atlantic, etc., Co., 151 N. C. 388, 66 S. E. 310.

Before this section can apply the company must have secured or acquired the right of way either by condemnation or otherwise and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance it must meet the formalities required of such an instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. Beattie v. Carolina R. Co., 108 N. C. 425, 12 S. E. 913.

Same—Where Grant Presumed by Charter.—Where a company acquired an easement by a provision of its charter and not by condemnation or purchase, it would seem that the principle of this section applies so that although a part of its right of way might be used by the owner it has a right of entry whenever it needs the property for its use. Railroad v. Sturgeon, 120 N. C. 225, 26 S. E. 779; Railroad v. Olive, 142 N. C. 257, 55 S. E. 263; Carolina Central R. Co. v. McCaskill, 94 N. C. 746, 753; Earnhardt v. Sou. R. Co., 157 N. C. 358, 72 S. E. 1062.

Effect of Section.—Under this section the possession by the defendants of the land covered by the right of way cannot operate as a bar to or be the basis for any presumption of abandonment by the railroad of its right of way. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263.

The title of the railroad to the right of way once acquired, can not be lost by occupancy as to any part of it by the lapse of time. Carolina, etc., R. Co. v. McCaskill, 94 N. C. 746; Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741.

Same—Effect of Permitting Improvements. — Mere silence while a trespasser is improving real estate as if it was his own, while it may sustain a claim for the value of such improvements when made in good faith, cannot be allowed to transfer the property itself to such trespasser. Carolina Central R. Co. v. McCaskill, 94 N. C. 746.

Effect upon Power of State, etc., to Change Grade.—This section does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. Atlantic, etc., R. v. Goldsboro, 155 N. C. 356, 357, 71 S. E. 514.

Cited in Durham v. R. R., 104 N. C. 261, 264, 10 S. E. 208; Railroad v. Olive, 142 N. C. 257, 55 S. E. 263; Bass v. Roanoke, etc., Power Co., 111 N. C. 439, 455, 16 S. E. 402; Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741; Loven v. Parson, 127 N. C. 301, 37 S. E. 271.

Section Not Applicable.—An incorporated city or town may obtain title to streets located upon the right of way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. In the Matter of Assesment against Property of Southern Ry. Co., 196 N. C. 756, 147 S. E. 301.

§ 435. No title by possession of public ways.— No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (Rev., s. 389; 1891, c. 224.)

Prior Law.—Prior to the enactment of this section title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under what are now sections 420, 425, as construed by the decisions of our Supreme Court, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. Threadgill v. Wadesboro, 170 N. C. 641, 87 S. E. 521.

For cases decided prior to section, see Turner v. Com., 127 N. C. 153, 37 S. E. 191; Moose v. Carson, 104 N. C. 432, 10 S. E. 689; State v. Long, 94 N. C. 896; Crump v. Mims, 64 N. C. 767.

Same—Effect of Section upon Title Acquired.—Where an owner has acquired title by adverse possession to a part of a street under the Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereafter by this Court cannot disturb the title theretofore acquired. Threadgill v. Wadesboro, 170 N. C. 641, 87 S. E. 521.

Application of Section.—Possession of the street by any one claiming it adversely cannot divest or destroy the right of the public therein. The Court, in Moose v. Carson, 104 N. C. 432, at p. 434, 10 S. E. 689, seems to have overlooked what was decided in State v. Long, 94 N. C. 896, with respect to the effect of adverse possession of a highway upon the right of the public or the citizen therein prior to this section. State v. Godwin, 145 N. C. 461, 465, 59 S. E. 132.

Where a county entered into the possession of a square for the public use before this section, the provisions of this section will not permit the plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a

part thereof. Gates County v. Hill, 158 N. C. 584, 73 S. E. 804.

A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user by virtue of this section. Lenoir County v. Crabtree, 158 N. C. 357, 74 S. E. 105.

Same—Curing Erroneous Charge. — An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years adverse possession, contrary to the provisions of this section, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. Atlantic, etc., R. Co. v. Dunn, 183 N. C. 427, 111 S. E. 724.

Applies Only to Streets Acquired by Municipality.—The principle of law of this section applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. Gault v. Lake Waccamaw, 200 N. C. 593, 158 S. E. 104.

Sections Construed with This Section. — Construing section 7618 providing that no statute of limitation shall effect the title or bar the action of one claiming it under an assignment from the State Board of Education, etc., with sections 420, 425, and this section, it is held, that the limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands; and the three years statute to recover damages for trespass in cutting and removing trees from the land applies under the facts in this case. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 90 S. E. 196.

Possession Prior to Enactment.—When sufficient adverse possesssion of a street of an unincorporated town by the present owners and those claiming under them has been shown, for thirty-five years prior to the enactment of this section the right of the town to the use of the street is barred by the statute of limitations. Tadlock v. Mizell, 195 N. C. 473, 132 S. E. 713.

Art. 5. Limitations, Other Than Real Property

§ 436. Periods prescribed. — The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (Rev., s. 390; Code, s. 151; C. C. P., s. 30.)

Statute Affects Remedy Only. — The statute of limitations relates only to remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy, either by action on the judgment, or motion in the nature of scire facias to revive it. Berry v. Corpening, 90 N. C. 395.

Same — Defenses against Former Statute. — Since the prior law was not an absolute bar to actions, but merely raised a presumption of payment which might be rebutted, the question of changed residence, destitution or insolvency of debtor and other such questions were material in rebutting the presumption raised, but under the present law are immaterial for such purposes since the present statutes totally bar the action. See Campbell v. Brown, 86 N. C. 376, 382.

Actions for Which No Statutes. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69. Nor is there any statute applicable to the probate of wills. In re Dupree's will, 163 N. C. 256, 79 S. E. 611.

Application of Statutes to Trust Relations.—Where a partner receives firm money in winding up the affairs of the partnership in pursuance of an agreement that he so receives such funds, he holds them in trust for the other partners and the statutes do not run. McNair v. Ragland, 7 N. C. 139, 145.

Suspension of Statutes.—The statute of limitation does not run when there is no one in esse capable of suing. Grant v. Hughes, 94 N. C. 231.

Effect of Change of Period by Amendment.—A reasonable time for the commencement of an action before the statute changing the period works a bar, Nichols v. R. R., 120 N. C. 495, shall be the balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years had elapsed before the amending act, then two years more would be a reasonable time. If three years time would bar the action and three years had elapsed, as in the present case, before the amending Act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions. Culbreth v. Downing, 121 N. C. 205, 206, 28 S. E. 294.

§ 437. Ten years.—Within ten years an action—

1. Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

2. Upon a sealed instrument against the principal thereto.

3. For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

4. For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued. (Rev., s. 391; Code, s. 152; C. C. P., ss. 14, 31.)

I. In General.
II. Subs. (1). Judgments and Decrees.
III. Subs. (2). Sealed Instruments.
IV. Subs. (3). Mortgage Foreclosure.
V. Subs. (4). Redemption of Mortgage.

I. IN GENERAL.

See 11 N. C. Law Rev. 220.

Law Prior to Section.—It was said of the statute of presumption immediately preceding this section that, "its obvious policy, as said in Ingram v. Smith, 41 N. C. 97, is to insist peremptorily on diligence in all cases to which it has any application, and it is one which the courts must fairly carry out. So emphatically is it a statute of repose, that no saving is made in it of the rights of infants, femes covert, or persons non compos." Hamlin v. Mebane, 54 N. C. 18; Hodges v. Council, 86 N. C. 181; Headen v. Womack, 88 N. C. 468, 470.

The presumption was not conclusive; it might have been rebutted by any pertinent proof, and such proof was presumed by the appellate court where there was no complaint of the finding of fact by the Court. In re Walker, 107 N. C. 340, 343, 12 S. E. 136.

Though not strictly a statute of limitations, the section was so denominated in a general sense, and hence it was made a part of the chapter denominated in the Revisal Code "Limitations." And although it did not create an absolute bar, it did, in a sense, create a conditional bar. Rogers v. Clements, 98 N. C. 180, 184, 3 S. E. 512.

Same—Effect of Present Section.—This section has taken the place of the former statute of presumptions, R. C., ch. 65, sec. 18 in respect to judgments. Brown v. Harding, 171 N. C. 686, 689, 89 S. E. 222.

Retroactive Effect.—This statute did not apply to actions commenced before August, 1868, or where the right of action accrued before that date. Gaither v. Sain, 91 N. C. 304.

A limitation is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute. Brown v. Harding, 171 N. C. 686, 689, 89 S. E. 222.

Application Limited to Actions or Suits—Power of Sale.—The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute it was held that a proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely an action of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678; Miller v. Coxe, 133 N. C. 578, 582, 45 S. E. 940.

The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision

for a party to avail himself of its protection when there is no action or proceeding in the nature of an action taken against him. Berry v. Corpening, 90 N. C. 395, 398.

Same—Leave to Issue Execution.—A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations. Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

Sufficiency of Plea of Section.—An answer alleging "that the plaintiff has not brought his action within the time prescribed by law, and the same is barred by the statute of limitations," is a sufficient plea of the statute of limitations. Pemberton v. Simmons, 100 N. C. 316, 6 S. E. 122.

Duty to Consider Unsatisfactory Plea.—Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined it, and a failure to do so was held to be error. Proctor v. Proctor, 105 N. C. 222, 10 S. E. 1036.

Effect of Part Payment.—A partial payment voluntarily made does not remove the statutory bar. McDonald v. Dickson, 87 N. C. 404. See dissenting opinion.

Effect of Making or Adding Parties.—Where this section applies, its provisions are not affected by the fact that additional parties to the action, ordered by the Supreme Court, had not been made before a succeeding term of the superior court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal. Geitner v. Jones, 176 N. C. 542, 97 S. E. 494.

Evidence as to Running.—Evidence as to the running of this statute can have no pertinency where but little more than three years has elapsed. Wilcoxon v. Logan, 91 N. C. 449.

Applied in Serls v. Gibbs, 205 N. C. 246, 171 S. E. 56; Farmville v. Paylor, 208 N. C. 108, 179 S. E. 459.

Cited in Sikes v. Parker, 95 N. C. 232; Usry v. Suit, 91 N. C. 406, 416; Wilcoxon v. Logan, 91 N. C. 449; Williams v. McNair, 98 N. C. 332, 4 S. E. 131, 133; In re Gibbs, 205 N. C. 312, 171 S. E. 55; Furr v. Trull, 205 N. C. 417, 420, 171 S. E. 641; Davis v. Alexander, 207 N. C. 417, 420, 177 S. E. 417.

II. SUBS. (1). JUDGMENTS AND DECREES.

Prior Law.—This statute of presumptions Rev. Code ch. 65, section 18, the former law corresponding to this section, which declared that judgments, decrees, etc., should be presumed to be satisfied within ten years was not conclusive. In re Walker, 107 N. C. 340, 12 S. E. 136.

A decree in proceedings for partition had in 1861, adjudging owelty of partition against certain shares of the land divided, was subject to the statute of presumptions, which corresponded to this section, because this section is not retroactive. Herman v. Watts, 107 N. C. 646, 12 S. E. 437.

If there are valid subsisting judgments for the unpaid mortgage debt and the vendee does not deny the liability, the assignee of a joint vendor cannot insist upon the statute of presumption of payment from lapse of time as to the original debt, nor upon a bar by the act of limitations, as to the reduced debt assumed by the assignee of the vendee. Ely v. Bush, etc., Co., 89 N. C. 358.

There is therefore no analogy which makes the decisions under the former precedents applicable to the present law (since the C. C. P. in 1868) inasmuch as they relate entirely to rules of evidence and not to the removal of a statutory bar where the action is upon a bond or judgment. McDonald v. Dickson, 87 N. C. 404, 406.

Prior to this statute there was no limitation absolutely barring the cause of action upon a judgment, but the statutes merely raised a presumption of payment which might be rebutted by competent evidence.

The period of time necessary to lapse before the presumption arose varied with the various statutes. At common law the period required was a great lapse of time, next the period was fixed by statute at 20 years, and then by the act of 1826 was changed to ten years. This remained the law until the C. C. P. of 1868 which changed the presumption to an absolute bar and the period fixed at ten years. See McDonald v. Dickson, 87 N. C. 404, 412.

Statute Strictly Construed. — A statute so entirely in derogation of common right as is the statute of limitations, should be strictly construed, and under it a judgment should not be treated as a contract, because it does not come within the necessity of that term. McDonald v. Dickson, 87 N. C. 404, 411.

Retroactive Effect.—A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure, is subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code. Johnston v. Jones, 87 N. C. 393.

Section Operates as Bar.—This section fixes the current period of ten years as that which terminates the lien of a judgment, and operates as a bar to a new action upon it. McDonald v. Dickson, 85 N. C. 248, 251.

Significance of Transcribing Justice's Judgment to Superior Court.—A creditor having a judgment in a justice's court may keep his judgment altogether in that court, and rely alone on such process for its enforcement as a justice of the peace may issue; and if he so do, the bar of section 438 will apply to it at the end of seven years, unless before that time he sues and obtains a new judgment as he lawfully may do; but if he elect to have a transcript docketed in the superior court, and it is done, then all right of execution in the justice's court is renounced and in lieu thereof, the creditor has the more efficient and far reaching executions and process of the superior court. Broyles v. Young, 81 N. C. 315, 318.

The transcript of a justice's judgment docketed in the superior court becomes, for the purpose of lien and execution, a superior court judgment and is subsequent to the ten-year limitation notwithstanding section 438. Broyles v. Young, 81 N. C. 315.

Land is not relieved under this section of a judgment lien by the mere transfer of the debtor's title. But it has been held that "the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun but not completed before the expiration of ten years. Osborne v. Board of Education, 207 N. C. 503, 504, 177 S. E. 642, citing Hyman v. Jones, 205 N. C. 266, 171 S. E. 103.

Application to Foreign Judgments. — This section applies to foreign judgments. Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212.

When Statute Begins to Run — Judgment for Costs. — A judgment for costs is considered part of the first judgment where the costs were first levied against the plaintiff but were later adjudged against the defendant, and there is no bar except from the lapse of ten years under par. (1) of this section. Owen v. Paxton, 122 N. C. 770, 772, 30 S. E. 343.

Same—At Time of Judgment or Confirmation of Sale. — Where an action is instituted to recover the amount due on a note and to foreclose the mortgage securing the same and judgment is rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limitations began to run at the date of the money judgment and not from the date of the confirmation of the sale. McCaskill v. McKinnon, 121 N. C. 192, 28 S. E. 265.

Same—Judgment for a Devastavit against Executor.— When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors. Syme v. Badger, 96 N. C. 197, 2 S. E. 61.

Same—Alimony Payable Annually. — In an action on a judgment for alimony, payable annually, the annual sums are barred within ten years from the time they become due under this section. Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212. See dissenting opinion.

Effect of Judgment upon Contract or Tort.—A cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N. C. 404.

Period of Statute—Effect of Admission of Claim by Administrator.—A claim reduced to judgment is barred by the ten years statute of limitation unless the claim was admitted by the administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Same—Specialties Reduced to Judgments. — Specialties, when reduced to judgments, are merged, and the statute barring judgments will then apply. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Effect of Issuing Executions During Period.—The statute of limitations may be set up as a defense by an administrator to a motion for leave to issue execution after ten years from the date of docketing a judgment against his intestate and this although executions have regularly been issued within each successive period of three years after the judgment was docketed. Berry v. Corpening, 90 N. C. 395.

The words "any state" must be taken to mean the judgment of a court of any state including our own. But it could make no material difference, even if not construed to include this state, since, by section 445, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. McDonald v. Dickson, 85 N. C. 248, 251.

Effect of Payment on Judgment. — A payment on a judgment does not arrest the running of the statute of

limitations. McCaskill v. McKinnon, 121 N. C. 192, 28 S. E. 265.

A partial payment on a judgment does not arrest the running of the statute of limitations. Hughes v. Boone, 114 N. C. 54, 55, 19 S. E. 63.

Comparison of Effect of Application of Section 445 with This Section.—It can make no difference whether subsection 1 of this section or section 445 applies. The result will be the same in either case. Ex parte Smith, 134 N. C. 495, 502, 47 S. E. 16.

Application to Issuance of Execution. — The issuing of an execution on a decree charging owelty in partition is barred within ten years. Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

The statute of limitations is a proper plea and a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. McDonald v. Dickson, 85 N. C. 248.

III. SUBS. (2) SEALED INSTRUMENTS.

When Statute Begins to Run—Breach of Warranty. — In an action for breach of a covenant of warranty the statute of limitation begins to run when there is an ouster of the grantee. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 578.

Same—Breach of Covenant of Seizin. — In an action for damages for breach of covenant of seizin the statute of limitation begins to run upon delivery of the deed. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 578.

Same—Coupons of Bonds. — The Statute of Limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons. Threadgill v. Commissioners, 116 N. C. 616, 617, 21 S. E. 425.

Same—Guaranty under Seal. — An action upon a guaranty under seal is not barred until ten years after the cause of action accrues. Coleman v. Fuller, 105 N. C. 328, 11 S. E. 175.

Application to Sureties. — This subsection is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Section 441 subs. (1) is applicable to sureties and the action against them is limited to three years. Welfare v. Thompson, 83 N. C. 279; Redmond v. Pippen, 113 N. C. 92, 18 S. E. 50; Barnes v. Crawford, 201 N. C. 434, 437, 160 S. E. 464; North Carolina Bank, etc., Co. v. Williams, 208 N. C. 243, 244, 180 S. E. 81.

Guarantor as Principal under Section. — Neither the spirit nor the letter of this section makes a guarantor principal to the original obligation. Coleman v. Fuller, 105 N. C. 328, 332, 11 S. E. 175. From dissenting opinion.

Application to Bills, Notes, etc. — The prior law, as does this section, embraced "single bills," as well as promissory notes and other demands therein designated. Rogers v. Clements, 98 N. C. 180, 3 S. E. 512.

Application to Bonds—Former Law. — The corresponding section of the former law was construed to embrace single bonds, though they were not named in terms. Rogers v. Clements. 98 N. C. 180, 184, 3 S. E. 512.

The presumption of payment of a bond arises after ten years from the time the right of action accrues, and the provisions of section 416 do not apply. Hall v. Gibbs, 87 N. C. 4.

Same—Section Not Retroactive. — A bond for the payment of money executed prior to this section, by the principal and his sureties is exempted from the operation of the statute of limitations as contained in this section. Knight v. Braswell, 70 N. C. 709.

Conditions Repelling Statute — Set-off. — A set-off in favor of the obligor is not a part payment as to an endorser and does not repel the statute. Woodhouse v. Simmons, 73 N. C. 30.

Power of Sale in Deed of Trust.—See generally, Merrimon v. Postal Tel.-Cable Co., 207 N. C. 101, 176 S. E. 246.

IV. SUBS. (3) MORTGAGE FORECLOSURE.

As to presumption of payment of debt secured after fifteen years, see sec. 2594. As to presumption of fulfillment of conditions of mortgages, see sec. 2594.

See note under § 2589.

The prior law corresponding to this section created a presumption that after ten years the mortgage was presumed to have been satisfied which might have been rebutted and did not operate to absolutely bar the right. Pemberton v. Simmons, 100 N. C. 316, 6 S. E. 122.

Only Limitation upon Right to Foreclose. — This section is the only limitation upon the mortgagee's right of action for foreclosure or sale. Parker v. Banks, 79 N. C. 480, 484.

Prerequisites to Bar. — In order to bar an action for relief under this section two things must concur, namely, the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and the possession of the mortgagor during that period. Woodlief v. Wester, 136 N. C. 162, 168, 48 S. E. 578.

Necessity for Possession. — The mere lapse of time, unaccompanied by any possession, does not obstruct the right to foreclose a mortgage. Simmons v. Ballard. 102 N. C. 105, 9 S. E. 495. Decided under prior statute.

The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. Headen v. Womack, 88 N. C. 468.

Same — Remainderman before Lapse of Life Estate. — The actual possession of the life tenant does not inure to the remainderman. Thus, during the continuance of the life estate the latter cannot avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. Malloy v. Bruden, 86 N. C. 251, 257; Woodlief v. Wester, 136 N. C. 162, 164, 48 S. E. 578.

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. Woodlief v. Wester, 136 N. C. 162, 48 S. E. 578.

Character of Possession Necessary.—It is impossible to suppose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter has the right of possession by construction of law, as he has the legal title, and, if a constructive possession was intended, there was no use in requiring possession at all, as, if neither party was in actual possession, the constructive possession would always be in the mortgagee. Dobbs v. Gullidge, 20 N. C. 197; London v. Bear, 84 N. C. 266; Deming v. Gainey, 95 N. C. 528; the Code, section 146; Williams v. Wallace, 78 N. C. 354; Simmons v. Ballard, 102 N. C. 105; Woodlief v. Wester, 136 N. C. 162, 166, 48 S. E. 578.

Same — Section Applicable to Exclusion of 445. — Where there is no possession by either party, there can be no running of the statute. If it was intended that section 445 should apply where there is no possession by either party, it was utterly useless to insert in subsection (2) and (4) the provision in regard to possession, as the statute under such a construction of section 445, would run whether there was any possession or not, and the period of limitation is the same in both sections. Woodlief v. Wester, 136 N. C. 162. 169, 48 S. E. 578.

Since this subsection is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before section 445 has any application. Such a construction would be a complete reversal of the will of the legislature as plainly expressed. Woodlief v. Wester, 136 N. C. 162, 168, 48 S. E. 578.

There are several cases decided under section 445 in which the principle of section 437 sub. 3 has been adopted by analogy, and in which it was held that a party who remains in possession of land is not barred of any equity therein by lapse of time, and that the statute runs only where the other party has had possession. Thornburg v. Mastin, 93 N. C. 258; Mask v. Tiller, 89 N. C. 423; Smith v. McKee, 87 N. C. 389; Norton v. McDevit, 122 N. C. 755, 756, 30 S. E. 24; Menzel v. Hinton, 132 N. C. 660, 44 S. E. 385, 95 Am. St. 660 was explained. Woodlief v. Wester, 136 N. C. 162, 168, 48 S. E. 578.

When Holding Becomes Adverse. — When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute in motion until condition broken. Woody v. Jones, 113 N. C. 253, 18 S. E. 205.

Absence from State as Suspending Section. — An action to foreclose a mortgage comes within the purview of section 411, and the absence of the mortgagor from the state suspends the running of the statute. Love v. West, 169 N. C. 13, 14, 84 S. E. 1048.

Where this subsection 3 is pleaded, the absence of the mortgagor from the state for a year or longer as prescribed in section 411 will not be counted, nor will any presumption of payment of the debt be raised within the period allowed for the commencement of the action. Love v. West, 169 N. C. 13, 84 S. E. 1048. See concurring opinion.

Effect upon Debt Secured. — The provisions of this paragraph only bar an action to foreclose the mortgage, and do not bar an action to recover the debt secured by the mortgage. Fraser v. Bean, 96 N. C. 327, 2 S. E. 159.

Effect of Bar of Debt upon Foreclosure. — The fact that a note is barred by the three-year statute, section 441, does not prevent the mortgagee from foreclosing his mort-

gage securing it, this section being applicable. Jenkins v Griffin, 175 N. C. 184, 95 S. E. 166.

Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced. Overman v. Jackson, 104 N. C. 4, 10 S. E. 87.

Where a note has not been barred, the foreclosure of a deed in trust, securing it, may be ordered. Geitner v. Jones, 176 N. C. 542, 97 S. E. 494.

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note. Humphrey v. Stephens, 191 N. C. 101, 131 S. E. 383.

Effect of Payment of Interest.—This section will not bar foreclosure on a deed of trust when, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. Dixie Gro. Co. v. Hoyle, 204 N. C. 109, 167 S. E. 469.

Section Not Applicable to Power of Sale — The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. Miller v. Coxe, 133 N. C. 587, 45 S. E. 940. For limitation upon execution of power of sale, see sec. 2589.

It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage, he would be barred, because in that event he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar. Woodlief v. Wester, 136 N. C. 162, 168, 48 S. E. 578.

The theory of the statute is that there has been an abandonment of the right, which will not be presumed unless the party resisting the enforcement of the right has had possession. Woodlief v. Wester, 136 N. C. 162, 169, 48 S. E. 578.

Effect of Barring Foreclosure upon Power of Sale. — "The court said in Menzel v. Hinton, 132 N. C. 660, 662, 44 S. E. 385, 'It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. Capehart v. Dettrick, 91 N. C. 344. This because the bar of the statute affects only the remedy and not the right,' and upon this point the court was unanimous." Jenkins v. Griffin, 175 N. C. 184, 186, 95 S. E. 166.

It was further said that the execution of a power of sale is not within the language of this subsection saying. "It is not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power of sale; hence no time is fixed by the statute within which he must execute the power. The word 'action' in the paragraph evidently has reference to the action for foreclosure, and not to the execution of the power of sale, which requires no action." See Miller v. Coxe, 133 N. C. 578, 582, 45 S. E. 940.

But the general assembly has changed the law in this particular by providing that the power of sale "shall become inoperative, and no person shall execute any such power when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations," section 2589, and this subsection, bars actions to foreclose a mortgage or deed of trust unless commenced within ten years. etc. Jenkins v. Griffin, 175 N. C. 184, 187, 95 S. E. 166.

Menzel v. Hinton was followed in Cone v. Hyatt, 132 N. C. 810, 812, 44 S. 678, and section 2589, which bars a power of sale when foreclosure is barred. Ferrell v. Hinton, 161 N. C. 348, 350, 77 S. E. 224, was passed to overcome the decisions. Humphrey v. Stephens, 191 N. C. 101, 104, 131 S. E. 383.

The Exercise of a Power of Sale under Mortgage is not a Suit. — See Miller v. Core, 133 N. C. 578, 582, 45 S. E. 940.

Applicability to Consent Judgment Allowing the Equity. —A consent judgment providing that the defendant has an equity to redeem the land upon the payment of a certain sum, on or before a certain day, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under this subsection ten years possession of the defendant, after default, bars the plaintiff. Bunn v. Braswell, 139 N. C. 135, 51 S. E. 92

Necessity of Pleading Section — Waiving Objection. — When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subdivision an objection that the same was not specially pleaded is waived when, after the conclusion of the evidence and argument, he obtains permission from the court to open the case and offer evidence tending to show that the mortgage had been kept in date of payment, thus rendering the issue appropriate and necessary. Ferrell v. Hinton, 161 N. C. 348, 77 S. E. 224.

Section Must Be Specifically Pleaded. — In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. Stancill v. Spain, 133 N. C. 76, 45 S. E. 466.

Power of Grantee to Plead. — The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations. Stancill v. Spain, 133 N. C. 76, 45 S. E. 466.

Section Applicable to Mortgage of Surety. — Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. Miller v. Coxe, 133 N. C. 578, 45 S. E. 940.

Applicability to Vendor and Vendee. — While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, this subsection does not embrace actions arising out of executory contracts for sales of land. Overman v. Jackson, 104 N. C. 4, 10 S. E. 87.

Cancellation of Barred First Mortgage by Second Mortgagee. — A second mortgagee cannot have the first mortgage canceled because it is barred by the statute of limitations. Miller v. Coxe, 133 N. C. 578, 45 S. E. 940.

Effect of Part Payment. — Payment on a bond secured by mortgage before it goes out of date, and within ten years before suit brought, will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred. Williams v. Kerr, 113 N. C. 306, 18 S. E. 501.

Sale under Barred Mortgage — Remedy of Mortgagor. — A sale under a mortgage barred by the statute would carry to the purchaser no title. The plaintiff mortgagor being in possession has a full defense to an action for ejectment when brought by the purchaser. Capehart v. Biggs & Co., 77 N. C. 261; Fox v. Kline, 85 N. C. 173; Hutaff v. Adrain, 112 N. C. 259, 17 S. E. 78.

Where a mortgagor in possession has a full defense to an action for ejectment when brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the court will not interfere by injunction to prevent a sale threatened by the mortgagee. It would be otherwise if there were a contest as to the amount due under the mortgage. Hutaff v. Adrian, 112 N. C. 259, 17 S. E. 78.

Principle illustrated in Woody v. Jones, 113 N. C. 253, 255, 18 S. E. 205.

V. SUBS. (4). REDEMPTION OF MORTGAGE.

Applicability to Trust Relation.—The personal representative of a trustee, constituted by a deed in trust, has no right to plead this statute of limitation against his cestui que trust calling for a settlement of the trust. Johnston v. Overman, 55 N. C. 182.

When Statute Begins Running. — Where, in accordance with the agreement expressed in the instrument, the mortgagee enters at once into possession of the lands, the mortgagor's right for an accounting arises when the bond the instrument secures has matured and remains unpaid; and his right of action and that of those claiming under him accrues then, and the mortgagor's right of action is barred by a continued peaceful possession by the mortgagee for ten years therefrom. Section 432, does not apply. Crews v. Crews, 192 N. C. 679, 135 S. E. 784.

Necessity for Possession in Mortgage.—The mere lapse of time, unaccompanied by possession, does not obstruct the right to redeem. Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495. Decided under prior statute.

The statute of limitation does not run against a mortgagor in possession of lands by reason of the legal title being in the mortgagee, not in possession. Cauley v. Sutton, 150 N. C. 327, 64 S. E. 3.

This section applies only where the mortgagee or trustee is in possession. The opinion of the Court in this case rests upon the ground that it does not apply where the mortgagee or trustee has not been in possession, hence such case necessarily is one not therein "provided for" and falls under section 445. Woodlief v. Wester, 136 N. C. 162, 170, 48 S. E. 578. From dissenting opinion. It was held in the main opinion that § 445 was not applicable.

Same—Holding under Tenant.—Where a mortgagee takes adverse possession of, and rents out the mortgaged land, the payments of rent to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298.

Nature of Possession.—It is not required that the possession of the mortgagee be adverse in order to bar the mortgagor's action in ten years, under the provisions of this section. Crews v. Crews, 192 N. C. 679, 135 S. E. 784.

The prior statute said nothing about an actual possession being essential to the prescribed effect of the lapse of time. Where there was no actual possession the constructive possession followed the legal title, and where such possession was had for more than ten years after the right to redeem accrued, the statute barred the right of redemption. Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495.

But the possession required by this statute must be actual and not merely constructive. Weathersbee v. Goodwin, 175 N. C. 234, 95 S. E. 491. Stevens v. Turlington, 186 N. C. 191, 119 S. E. 210, for the action to enforce the equity of redemption is barred after the lapse of ten years, from the date on which his cause of action accrued, where the mortgagee has been in the actual possession of the land. Crews v. Crews, 192 N. C. 679, 684, 135 S. E. 784. See Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495, and the dissenting opinion.

Possession presumed by virtue of section 432, is not sufficient to meet the requirements of this section, par. 4, for although more than ten years have passed since the cause of action accrued, an action for redemption, under this subsection is not barred, unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. McNair v. Boyd, 163 N. C. 478, 79 S. E. 966; Cauley v. Sutton, 150 N. C. 327, 330, 64 S. E. 3; Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495; Crews v. Crews, 192 N. C. 679, 683, 135 S. E. 784.

Effect of Intervening Disability. — Where the mortgagee sells the mortgaged land, buys it himself, and enters into adverse possession in the lifetime of the mortgagor, the action is barred as against the infant heirs under this section. Frederick v. Williams, 103 N. C. 189, 9 S. E. 298.

Nor did the prior statute contain a saving clause in favor of persons under disabilities. Houck v. Adams, 98 N. C. 519, 4 S. E. 502.

Applicability Where Action Not for Redemption. — The question as to whether the bar of this statute applies to recover lands held under a mortgage, the action not being one to redeem, was raised but not decided. Weathersbee v. Goodwin, 175 N. C. 234, 95 S. E. 491.

Principle Illustrated. — When a mortgagee has been in possession more than thirty years since the execution of the mortgage, the right of redemption is barred. Gray v. Williams, 130 N. C. 53, 40 S. E. 843.

Where the mortgagee has actual possession, either when the cause of action for redemption accrues or where he thereafter goes into and remains continuously in such possession for more than ten years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. Bernhardt v. Hagamon, 144 N. C. 526, 57 S. E. 222; Crews v. Crews, 192 N. C. 679, 683, 135 S. E. 784.

Edwards v. Tipton, 85 N. C. 479, 480, is a case illustrating the application of the prior statute.

§ 437(a). Actions to recover deficiency judgments limited to within one year of foreclosure.—No action shall be maintained on any promissory note, bond, evidence of indebtedness or debt secured by a mortgage or deed of trust on real estate after the foreclosure of the mortgage or deed of trust securing the same, except within one year from the date of sale under such foreclosure or from the date of the ratification of this section, if such sale precedes its ratification; but this section shall not extend the time of limitation on any such action. (1933, c. 529, s. 1.)

§ 438. Seven years.—Within seven years an action—

1. On a judgment rendered by a justice of the peace, from its date.

2. By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt. (Rev. s. 392; Code, s. 153; C. C. P., s. 32.)

I. Subsection One.
II. Subsection Two.

I. SUBSECTION ONE.

This section is not retroactive. Mossis v. Syme, 88 N. C. 453, 455.

When Statute Begins to Run.—Where a judgment was rendered by a justice of the peace and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the later, the first judgment having been vacated. Salmon v. McLean, 116 N. C. 209, 21 S. E. 178.

Judgment Docketed in Superior Court.—A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court in every respect, and may be enforced by execution at any time within ten years from the date of such docketing under section 437. McIlhenny v. Wilmington, etc., Co., 108 N. C. 311, 12 S. E. 1001; Adams v. Guy, 106 N. C. 275, 11 S. E. 535.

Where the judgment debtor made a motion, within ten years from docketing judgment, for leave to issue execution thereon, which was denied, and thereupon within one year after such denial, but more than ten years from the date of docketing, he brought an action on the judgment, it was held, that the action was barred by the statute of limitations, sec. 415 not being applicable to the facts. McIlhenny v. Wilmington Sav., etc., Co., 108 N. C. 311, 12 S. E. 1001.

Same—Where Action on Judgment.—In an action upon justice's judgments which have been docketed in the superior court and not merely a motion for executions, the seven years statute applied and barred a recovery of the claim. Oldham v. Rieger, 148 N. C. 548, 551, 62 S. E. 612; Daniel v. Laughlin, 87 N. C. 433.

An action in the nature of a creditor's bill, brought in the superior court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judgment of a justice of the peace. Oldham v. Rieger, 148 N. C. 548, 62 S. E. 612.

Application to Surety upon Stay of Execution.—Where one by signing a stay of execution upon a justice's judgment as surety becomes thereby a party to the judgment, the statutory bar of seven years applies to an action brought against the surety upon the judgment. Barringer v. Allison, 78 N. C. 79.

II. SUBSECTION TWO.

Prior Law.—Under the provisions of the Act of 1715, if the debt was due at the death of the debtor, an action must have been brought within seven years from the death, otherwise both the heir and the executor would have been discharged, and if the action arose after the death, the action must have been brought within seven years after the cause of action arose, or the act would have been a bar, provided the personal representative has paid over the assets. Syme v. Badger, 96 N. C. 197, 2 S. E. 61.

R. C. ch. 65, sec. 11, provided that creditors should make their claim within seven years after the death of their debtor, or be forever barred; and according to every interpretation which has been put upon its terms, it worked a complete bar to every demand, due at the death of the debtor, upon which suit was thereafter delayed for seven years, provided it appeared that in the meantime the estate had been fully administered, so that nothing remained in the hands of the administrator, with which to satisfy the claim. Godley v. Taylor, 14 N. C. 178; Cooper v. Cherry, 53 N. C. 323; McKeithan v. McGill, 83 N. C. 517; Morris v. Syme, 88 N. C. 453, 455.

Purpose and Effect of Statute.—Our present limitations in favor of estates of deceased persons are unconnected with assets to the distributees and taken refunding bonds as well after a given time, and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors. Lawrence v. Norfleet, 90 N. C. 533, 535.

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, e. g., the right to enforce specific performance or some lien or trust not covered by other provisions of the Code. Smith v. Brown, 118 N. C. 352. This is the only way to avoid the absurdity of barring a cause of action before it arises. When the creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject. The liability is that of the land, and not of the heir as such. Lee v. McKoy, 118 N. C. 518, 525, 24 S. E. 210.

Statute as Absolute Bar.—After the time prescribed in this section, the statute is an absolute bar to creditors. Lawrence v. Norfleet, 90 N. C. 533; Worthy v. McIntosh, 90 N. C. 536; Woody v. Brooks, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinion.

When Construed with Section 441. — While this section standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years," etc., we must take it in connection with section 441, which restricts "within three years an action upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the preceding sections" (which especially referred to contracts under seal, section 437 (2), Joyner v. Massey, 97 N. C. 148, 1 S. E. 702), and with section 412. Redmand v. Pippin, 113 N. C. 90, 92, 18 S. E. 50.

Section Confined to Creditors — Construed with Section 445.—The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. It would be anomalous to bar the creditor in seven years under this section and the personal representative in ten years under section 445. Lee v. McKoy, 118 N. C. 518, 525, 24 S. E. 210.

Same—Application to Action for Possession.—This section does not apply to an action, brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the former, the action being brought against the husband of the grantee after her death. Norton v. McDevit, 122 N. C. 755, 30 S. E. 24.

Same—Application to Suit between Administrators.—Where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment. Lawrence v. Norfleet, 90 N. C. 533.

Prerequisite to Running.—The mere lapse of time—seven years—does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. Love v. Ingram, 104 N. C. 600, 10 S. E. 77.

When Statute Begins to Run.—It was not intended by this statute that the seven years should begin to run from the time of "making the advertisement." If that was the intention of the legislature, they would not in the same connection have employed the words "next after the qualification of the executor or administrator," as that is an event which must precede the advertisement, and which under the provisions of the law may do so by the space of twenty days. To give the act that construction there would be two events and leave it doubtful from which the time is to be computed. Cox v. Cox, 84 N. C. 138, 141.

Suits against an administrator must be brought by creditors of the decedent within seven years next after the qualification of the administrator. The Code, sec. 153. Lawrence v. Norfleet, 90 N. C. 533.

This statute is construed in Cox v. Cox, 84 N. C. 138, and it is held that while the advertisement is an indispensable prerequisite to the operation, it is incidental, and the time must be computed from the qualification of the representative. Lawrence v. Norfleet, 90 N. C. 533, 535.

Effect of Failure to Present Claim.—Though the failure to present the claims is declared to be an absolute bar (except against those laboring under disabilities), without any qualification as to the advertisement, this statute does not protect an administrator unless he has paid over the assets, and are absolute and positive in denying the remedy as advertised in conformity to the act. Cooper v. Cherry, 53 N. C. 323; Cox v. Cox, 84 N. C. 138, 142.

Significance of Making Advertisement. — The words "and making the advertisement required by law," etc., were used simply to qualify the provisions of the act, and the act should be construed as if it read "within seven years next after the qualification of the executor or administrator, provided he shall have made the advertisement required by law for creditors of the deceased to present their claims," etc. Cox v. Cox, 84 N. C. 138, 142.

See the dissenting opinion in Woody v. Brooks, 102 N. C. 334, 9 S. E. 294.

While the advertisement for creditors to present their claims is an indispensable prerequisite to the operation of this section, yet, as to the time from which the statute begins to run, it is incidental. Lawrence v. Norfleet, 90 N. C. 533.

Same—Prerequisites to Pleading by Representatives.—The executor or administrator must show that seven years have transpired after his qualification before the commencement of the action, and that he had advertised as required by law. Without proof of the advertisement, the plea of the statute of limitations cannot avail him. Cox v. Cox, 84 N. C. 138, 142.

An executor or administrator who pleads the statute of limitations under this subsection must show that the seven years have expired next after his qualification before suit brought, and that he has advertised according to law. Without proof of the advertisement, the plea of the statute will not avail him. Cox v. Cox, 84 N. C. 138.

Same — Necessity for Affirmative Plea. — To enable the personal representative of a deceased person to avail himself of the limitations provided in this subsection, he must allege in his plea, and prove upon the trial, that he made the advertisement, or gave the personal notice to the creditors, as prescribed in the statute. Love v. Ingram, 104 N. C. 600, 10 S. E. 77.

Conditions Preventing the Running. — Nothing will defeat the operation of this subsection, except the disabilities mentioned in the Code, or such fraud or other matter of equitable nature, as would make it against conscience to rely on the statute. Syme v. Badger, 96 N. C. 197, 2 S. E. 61.

The death of the surety and the lapse of a time longer than that prescribed in the statute before the qualification of a personal representative did not suspend the operation of the statute, if the wards could, during that time, have proceeded against the guardian. Williams v. McNair, 98 N. C. 332, 4 S. E. 131, 133.

Pendency of Suit as Suspension. — If an action is brought by a creditor against the personal representative of his deceased debtor within seven years, etc., but by delays in the courts judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt. Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

So much of the ruling in Syme v. Badger, 96 N. C. 197, 2 S. E. 61. as holds that the realty is protected from liability for the debts of the deceased if the statutory period of seven years has expired, even though the creditor had begun proceedings within the seven years against the personal representative to enforce his claim, but by delays in the court had failed to obtain judgment till after that period is overruled. This decision has been much questioned and has been repeatedly shaken, among other cases, see Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211, and Smith v. Brown, 101 N. C. 347, bottom of p. 352, 7 S. E. 890. It may be noted that its supporting case, Andres v. Powell, 97 N. C. 155, 2 S. E. 235, which protected the heir at law by the lapse of seven years from the qualification of the personal representatives, even as to causes of action accruing subsequently to the death of the decedent, was overruled in Miller v. Shoaf, 110 N. C. 319, 14 S. E. 800, thereby establishing the dissenting opinion of Merrimon, J., in Andres v. Powell as the correct statement of the law. See v. McCoy, supra, therefore, overruled the decision in Syme v. Badger, which, after the long and repeated consideration given it, seems to have been founded upon a mistaken line of reasoning. See Smith v. Brown, pp. 352, 353. Since the obtaining a judgment against the personal representatives prevents the bar of the statute as to the real representatives, there can be no reason why the latter are not equally prohibited from pleading the statute when the action was begun against the personal representatives within seven years, but by delays in the courts judgment was not had against them after the lapse of seven years.

The ruling in Syme v. Badger would bar a cause of action before the right to sue on it had accrued. Lee v. McKoy, 118 N. C. 518, 523, 24 S. E. 210.

Same — As against Heirs Where Not Parties. — Where proceedings against the administratrix were instituted within the seven years after her qualification and making advertisement though the heirs at law were not made parties to the proceedings till after the lapse of seven years, the proceedings, not being barred as to the personal representative, cannot be barred as to the heirs at law by this section. Lee v. McKoy, 118 N. C. 518, 525, 24 S. E. 210.

Time of Accrual as Affecting Application. — This subsection contemplates those claims upon which the right of action had accrued at the time of qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. Syme v. Badger, 96 N. C. 197, 2 S. E. 61, and Andres v. Powell, 97 N. C. 155, 2 S. E. 235; distinguished. Miller v. Shoaf, 110 N. C. 319, 14 S. E. 800.

Necessity for Full Administration. — Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered. Morris v. Syme, 88 N. C. 453. Governed by R. C. ch. 65, section 11.

Effect of No Assets in Hands of Representatives. — This statute is an absolute bar unless suit is brought within the time specified, whether there be assets or not in the hands of the representative. Lawrence v. Norfleet, 90 N. C. 533.

What Must Be Pleaded and Proved by Administrator. — Where an administrator had assets and sets up the statute of limitations against a debt of his intestate he must aver and prove that he has properly administered the same, in order that his plea may avail him. If it is ascertained he has no assets, the statute is a complete bar. Little v. Duncan, 89 N. C. 416.

The statute was not a bar, at all events; if there were assets in the hands of the administrator, the plea of this section would not be good and avail him, unless he should, in that case, aver and prove that he had paid such assets to the persons entitled to the same. Little v. Duncan, 89 N. C. 416, 419.

Heirs as Parties. — In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. Lilly v. Wooley, 94 N. C. 412, which was cited with approval in Syme v. Badger, 96 N. C. 197, 2 S. E. 61, and which has been approved since in Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701; Lee v. McKoy, 118 N. C. 518, 526, 24 S. E. 210.

§ 439. Six years.—Within six years an action—

1. Upon the official bond of a public officer.

2. Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

3. For injury to any incorporeal hereditament.

4. Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation. (Rev., s. 393; Code, s. 154; C. C. P., s. 33; 1931, c. 169.)

I. In General.
II. Subsection One—Public Officers.
III. Subsection Two—Executor, Guardian, etc.

I. IN GENERAL.

See notes to § 441.

Editor's Note.—The Act of 1931 which added subsection 4 to this section became effective on March 23, 1931.

Prior Law. — Formerly there was no statute limiting the time in which actions must be brought on bonds, except a provision in favor of the surety. Humble v. Mebane, 89 N. C. 410, 415.

"The present statute takes the place of section 5, chapter 65 of the Revised Code. It is manifestly intended to serve the same purpose, and must receive the same construction as to the time when the statute begins to operate." Baker v. Monroe, 15 N. C. 412; Coomer v. Little, 1 N. C. 311. Commissioners of Monroe County v. MacRae, 89 N. C. 95, 97.

Manner of Pleading Section. — This section must be affirmatively pleaded. Humble v. Mebane, 89 N. C. 410, 415.

II. SUBSECTION ONE—PUBLIC OFFICERS.

Application to Bond of Defaulted Clerk. — This section is applicable to an action against the surety on the bond of a defaulted clerk of the Superior Court. State v. Martin, 186 N. C. 127, 118 S. E. 914.

Application to Action for Tort against Clerk. — In an action of tort against a Clerk of the Superior Court for failing to index a docketed judgment as required, this section does not apply. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101.

Application to Registers of Deeds. — The statutory limit for bringing actions on the official bond of the register of deeds seems to be six years, under this section. Thus the statute commences to run from the time of the failure to register. State v. Grizzard, 117 N. C. 105, 110, 23 S. E. 93.

When Statute Begins to Run. — An action upon an official bond may be brought within six years after a breach thereof; the statute does not begin to run from the date, but only from the breach of the bond. Commissioners v. MacRae, 89 N. C. 95.

Ordinarily the statute begins to run from the time of the breach of the bond. Upon the termination of a sinking fund commissioner's term the law required him to account for funds in his hands and his failure to do so constituted a breach of his official bond giving rise to a cause of action thereon immediately. Washington v. Bonner, 203 N. C. 250, 165 S. E. 683.

Where the official bond of a public officer by valid contractual limitation covers only the first year of the official's six-year term of office, the statute of limitations begins to run in favor of the surety on the bond from the expiration of the first year of the official's term of office and not the expiration of the official's statutory six-year term of office in view of this section. Washington v. Trust Co., 205 N. C. 382, 171 S. E. 438.

Protection Extends to Surety. — This statute protects both principal and surety upon the bond. Vaughan v. Hines, 87 N. C. 445.

III. SUBSECTION TWO—EXECUTORS, GUARDIANS, ETC.

Purpose of Section. — This section is intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estate of dead men. Andres v. Powell, 97 N. C. 155, 160, 2 S. E. 235.

Application and Relation of Various Sections.—This section, par. (2), expressly applies to actions on the "official bond," § 441 par. (6) to sureties only, and section 445 so far as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for fifteen years after the executor filed his final account, the action was barred by either this section or section 445. Culp v. Lee, 109 N. C. 675, 14 S. E. 74.

The statutes of limitation applicable to actions against administrators make a distinction between their fiduciary liabilities and their liabilities upon the administration bond. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. Dissenting opinion.

Application to Action for Account. — Where the action is not brought upon the official bond as administrator of the testator of the defendant, but it is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, the defendant is a trustee of an express trust, and the Statute of Limitations does not apply. Woody v. Brooks, 102 N. C. 334, 338, 9 S. E. 294.

Application to Action for Share. — The Statute does not run in favor of administrators against the suit of the next of kin for their distributive shares, Woody v. Brooks, 102 N. C. 334, 338, 9 S. E. 294; unless the action is on the bond to recover the amount of such share. Vaughan v. Hines, 87 N. C. 445.

When Applicable to Action for Balance Due. — No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, unless he can show that he has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Persons against Whom Section Absolute Bar. — An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent, within six years after the filing of the final account, or it will be barred by the statute. Andres v. Powell, 97 N. C. 155, 2 S. E. 235. See dissenting opinion.

The creditors must bring their action within the six year period of limitation. Andres v. Powell, 97 N. C. 155, 161, 2 S. E. 235. See dissenting opinion.

It would be a curious legal anomaly if, within six years, the next of kin should bring their action against the executor or administrator (and they must bring it within six years or be barred) and recover, and then more than six years after the auditing of the account a creditor of the deceased should bring action and be allowed to recover, either out of the executor or administrator, or out of the next of kin or heir. Andres v. Powell, 97 N. C. 155, 161, 2 S. E. 235.

An action on the bond must be prosecuted within the six years after the filing of the specified account as well by the next of kin as by creditors, in order to escape the statutory obstruction. Woody v. Brooks, 102 N. C. 334, 338, 9 S. E. 294.

After the time prescribed in this section and section 441, subsection 6, the statute is an absolute bar to the next of kin. Vaughan v. Hines, 87 N. C. 445; Spruill v. Sanderson,

79 N. C. 466; Woody v. Brooks, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinion.

This applies to an action upon a bond to recover distributive shares. Vaughan v. Hines, 87 N. C. 445.

Extent of Surety's Protection. — This statute protects the surety as well as the principal. Andres v. Powell, 97 N. C. 155, 156, 160, 2 S. E. 235; Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

In addition to the protection of this section, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond under section 441, par. 6. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the breach complained of under section 441(6); Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

Failure of Guardian to Pay Balance Due Ward.—An action against a guardian for failure to pay the ward the balance of the estate due the ward after the ward has attained his majority is not barred by the six-year statute of limitations where the guardian has not filed a final account as required under this section, the statute not applying to such action. State v. Fountain, 205 N. C. 217, 171 S. E. 85.

Significance of Final Account and Audit. — The final account is the initial point at which the Statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in the preceding section. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

Until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond is barred after six years from the auditing of his final account. Andres v. Powell, 97 N. C. 155, 156, 160, 2 S. E. 235. See dissenting opinion.

The bar is unavailable under this section, unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond in favor of the surety. Humble v. Mebane, 89 N. C. 410, 415.

Same—Effect of Failure to Make Final Settlement. — See note from Self v. Shugart, cited under the following catchline.

A guardian qualified in July, 1872; his ward came of age in September following; the guardian died without having settled his trust or making any of the returns required; in 1887 the ward made a demand upon, and brought suit against the sureties on the bond; held, that his action was barred. Norman v. Walker, 101 N. C. 24, 7 S. E. 468.

Significance of Demand Irrespective of Final Account. — Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years under sec. 441(6). Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

When such final account is filed, and there is no demand and refusal; Quaere, whether the action as to the executor, administrator or guardian himself is barred in six years or ten years. Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

Same — As Applied to Suit by Minor. — An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. Self v. Shugart, 135 N. C. 185, 47 S. E. 484. See dissenting opinion.

Where there is no final account filed, semble, that the statute begins to run from the arrival of the ward of age, but whether in such cases three years or ten years bars, quaere. Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

When Action Brought. — The action must be brought within six months after the auditing and filing of the account. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Suspension of Statute. — Where there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. Brawley v. Brawley, 109 N. C. 524, 14 S. E. 73.

§ 440. Five years.—Within five years—

1. No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

2. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (Rev., s. 394; 1893, c. 152; 1895, c. 224; 1897, c. 339.)

I. In General.
II. Subsection One—Right of Ways.
III. Subsection Two—Damages for Construction and Repair.

I. IN GENERAL.

Law Prior to Section.—Before this section a railroad could acquire the prescriptive right to pond water on adjacent lands only by subjecting itself to an action for the injury continuously for twenty years. Harrell v. Norfolk, etc., R. R. Co., 122 N. C. 822, 29 S. E. 56; Nichols v. Norfolk, etc., R. R. Co., 120 N. C. 495, 26 S. E. 643.

The former law permitted the plaintiff to bring at his option, an action for permanent damages, in which case the entire damages, "past, present and prospective," could be sued for in one action to which twenty years was the limitation, or, at plaintiff's election, from time to time, actions could be brought for the continuing damages, in which actions the recovery was limited to damages accruing within three years. Parker v. Norfolk, etc., R. R., 119 N. C. 677, 25 S. E. 722; Ridley v. Seaboard, etc., R. R. Co., 124 N. C. 34, 32 S. E. 325; s. c., 118 N. C. 996, 24 S. E. 730; Beach v. Wilmington, etc., R. Co., 120 N. C. 498, 506, 26 S. E. 703. From dissenting opinion.

Prior to this section, three years was the statutory limitation to actions for recovery of damages to crops. Ridley v. Seaboard, etc., R. Co., 124 N. C. 34, 32 S. E. 325.

Constitutionality. — This section is not a violation of the Fourteenth Amendment of the Constitution of the United States, prohibiting any State from denying to any person the equal protection of the laws. Narron v. Wilmington, etc., R. R. Co., 122 N. C. 856, 29 S. E. 356.

Power of Legislature to Change Period.—The Legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened, "a reasonable time must be given for the commencement of an action before the statute works a bar." Nichols v. Norfolk, etc., R. R. Co., 120 N. C. 495, 26 S. E. 643.

Retroactive Effect.—This section does not apply to a suit begun before its passage. Harrell v. The Norfolk, etc., R. R. Co., 122 N. C. 822, 29 S. E. 56; Nichols v. Norfolk, etc., R. R. Co., 120 N. C. 495, 26 S. E. 643.

Section Restricted to Railroad Companies.—The period of the acquisition by user for five years, allowed to railroad companies by this section, does not extend to telegraph companies. Teeter v. Postal Tel. Cable Co., 172 N. C. 784, 90 S. E. 941.

This section in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. Cherry v. Canal Co., 140 N. C. 422, 426, 53 S. E. 138.

The language in Mullen v. Canal Co., 130 N. C. 496, 505, 41 S. E. 1027, which is said to have extended this section to include canal companies, is as follows: "While chapter 224, Laws 1895, applies only to railroads, yet as the Court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in Ridley v. R. R., 118 N. C. 996, we see no reason why it should not apply equally to canals." It will thus be observed that the Court

here only declared that it would extend the rule of permanent damages to actions against the defendant company according to the principle announced and exploited in Ridley v. R. R., and as contemplated by the statute in reference to railroads, but did not, and did not intend, to extend the application of the statute or the period of limitation therein established to cases not contained in its provisions. Cherry v. Canal Co., 140 N. C. 422, 427, 53 S. E. 138.

When Statute Begins to Run.—The statute begins to run from the date of the first substantial injury. Stack v. Seaboard, etc., R. R., 139 N. C. 366, 51 S. E. 1024; Staton v. Atlantic, etc., R. R., 147 N. C. 428, 61 S. E. 455; Ridley v. Seaboard, etc., R. R., 118 N. C. 996, 24 S. E. 730; Beach v. R. R., 120 N. C. 498, 26 S. E. 703; Pickett v. Atlantic Coast Line R. R. Co., 153 N. C. 148, 150, 69 S. E. 8.

The right of action of a remainderman against railroad to recover lands accrues upon the death of the life tenant. Young v. Atl. Coast Line R. R., 189 N. C. 238, 126 S. E. 600.

II. SUBSECTION ONE—RIGHT OF WAYS.

Section a Statute of Limitation — Affirmatively Plead. — This section in regard to bringing an action against a railroad for damages for a right of way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. Abernathy v. South and Western R. Co., 159 N. C. 340, 74 S. E. 890.

Amount of Damages Recoverable.—The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damages, running indefinitely, perhaps forever, would be utterly incapable of calculation; and, moreover, it would be giving the defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use thereof as may be necessary to the easement. Beach v. Wilmington & Weldon R. R. Co., 120 N. C. 498, 502, 26 S. E. 703.

Allowance of Interest.—It is within the power of the lower court, to allow interest on the amount found since the actual taking by the railroad company of the owner's land for its right of way, as a part of the damages. Abernathy v. South & Western R. Co., 159 N. C. 340, 74 S. E. 890.

III. SUBSECTION TWO—DAMAGES FOR CONSTRUCTION AND REPAIR.

Amendment of 1895. — The Act of 1893 chap. 152, was merely a statute of limitation. The Act of 1895, chap. 224, professedly an amendment to the Act of 1893, provides that all actions for damages caused by the construction or repair of any railroad, shall be commenced within five years after the cause of action occurs; and that "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." Lassiter v. Norfolk, etc., R. R. Co., 126 N. C. 509, 512, 36 S. E. 48.

The provision in the Act of 1895 incidently providing for a statutory easement, rather by implication than direct terms, in effect is but little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in Ridley v. Seaboard, etc., R. R., 118 N. C. 996, 24 S. E. 730, which was decided a year after the act was passed. Lassiter v. Norfolk, etc., R. R. Co., 126 N. C. 509, 513, 36 S. E. 48.

Recovery for Easement and Damages.—Where the railroad is damaging plaintiff, but not permanently, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury without being forced to purchase the easement under this section. Lassiter v. Norfolk, etc., Ry. Co., 126 N. C. 509, 514, 36 S. E. 48.

Same—Ditches and Embankments as Permanent Structures. — A ditch is not necessarily a permanent structure. Suppose that a section master should carelessly dig a ditch that flooded a large brick building in such a manner that its continuance would probably eventually undermine its walls and cause its destruction. Could not the railroad fulfill its obligations by abating the nuisance and fully repairing the present damage, or would it be compelled to pay the full value of the building? Surely the statute never contemplated such injustice as the latter alternative. And yet, if it takes the easement, it must pay for it, and in any event must pay for the injury already done. Lassiter v. Norfolk, etc. R. R. 126 N. C. 509, 515, 36 S. E. 48.

Ditches may be made permanent, as far as the plaintiff is concerned, by the refusal of the defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as clearly intended by the statute. Lassiter v. Norfolk, etc., R. R. 126 N. C. 509, 515, 36 S. E. 48.

An action against a railroad company for damages caused to plaintiff's lands by an embankment built by the defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that have existed since, is barred by the statute of limitations after five years. Campbell v. Raleigh, etc., R. R. Co., 159 N. C. 586, 75 S. E. 1105.

Same — Recurrent Injuries — When Action Barred by Section 441. — In an action for damages against a railroad company arising from alleged negligence with respect to its roadbed, it is held, that for injuries arising from the original and permanent construction of the road, properly maintained, this section applies; but those arising from the negligent failure of the defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding the institution of the action, as in ordinary cases of recurrent injury. Perry v. Norfolk Southern R. Co., 171 N. C. 38, 87 S. E. 948.

Same — Inclusiveness of Section Respecting Damages. — The damages to land caused by the building of a railroad and structures within contemplation of this section are the entire damages, past, present, and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the enquiry to the time of trial, which may be assessed by the jury on separate issues as to each. Barclift v. Norfolk Southern R. Co., 175 N. C. 114, 95 S. E. 39.

The evident meaning of this act is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. Strickland v. Draughan, 91 N. C. 103. Nichols v. Norfolk, etc., R. R. Co., 120 N. C. 495, 498, 26 S. E. 643.

Since this section all damages accruing from the construction of a railroad must be sued for within five years and the entire amount of damages must be recovered in one action. This is a very just enactment and protects such corporations from the oppression of being sued again and again ad infinitum on the ground of continuing damages. Beach v. Wilmington & Weldon R. R. Co., 120 N. C. 498, 506, 26 S. E. 703. From dissenting opinion.

In actions brought in cases for damages to crops and personal injuries, since the passage of this section, only permanent damages, i. e., damages once for all, can be recovered; and such actions are barred by the lapse of five years. Ridley v. Seaboard, etc., R. R. Co., 124 N. C. 34, 32 S. E. 325.

It is true the act uses the words "shall assess," but they are expressly applied to the damages to which the plaintiff is entitled. This act does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. It is true that, if entitled thereto, he must recover them in the same action, but not necessarily in the same issue. In fact it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong; while the other is the conveyance of a right, as the allowance of permanent damages under this act is in effect the condemnation of land to the use of a statutory easement. Lassiter v. Norfolk, etc., R. R. Co., 126 N. C. 509, 513, 36 S. E. 48.

Same — Damages Arising after Construction. — This section does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. Barclift v. Norfolk Southern R. Co., 175 N. C. 114, 95 S. E. 39.

The Statute of Limitations begins to run in cases where the injury is continual and gradual, not necessarily from the construction of the road, but from the time when the first injury was sustained. This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal, and yet would be a bar to any future action. Beach v. Wilmington & Weldon R. R. Co., 130 N. C. 498, 502, 36 S. E. 703.

This section does not apply to damages for the diversion

of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. Savage v. Norfolk Southern R. Co., 168 N. C. 241, 84 S. E. 292.

By this section actions for damages occasioned by the construction of railroads are to be commenced within five years after cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done. Lassiter v. Norfolk etc., R. R. Co., 136 N. C. 509, 36 S. E. 48.

Same — Assessment of Permanent Damages Compulsory. —In the case of Beasley v. R. R., 147 N. C. 362, it was held that the assessment of "permanent damages" in a case against a railroad for injuries to land in construction or repair of its roadbed, is made compulsory by this subsection. Pickett v. Atlantic Coast Line R. R. Co., 153 N. C. 148, 150, 69 S. E. 8.

The word "permanent," as applied to injuries and damages, is apt to mislead, as it is used not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent," because it proceeds from a permanent cause and will probably continue indefinitely as the natural effect of the same cause. Such is the case where the cause is apparently permanent and the damage necessarily continuing or recurrent. The interest and inconvenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. Beach v. Wilmington etc., R. R. Co., 120 N. C. 498, 502, 26 S. E. 703.

The confusion liable to arise from the word "permanent" as applied to damages is pointed out in Beach v. R. R. 120 N. C. 496, 502, where the nature of such an easement is discussed. Whether the damage is permanent or not, must appear from the pleadings. If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are the same to him, if they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely prolong his agony, and may cause even greater loss. For instance, if a farmer knows that the railroad has acquired a right to flood his land, he will not plant it; whereas if he relies upon their subsequent forbearance from unlawful injury, he may suffer not only the damage to his land, but also the loss of his labor, seed and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop. Lassiter v. Norfolk etc., R. R. Co., 126 N. C. 509, 514, 36 S. E. 48.

Recovery by Present Owner. — The present owner of land may recover of a railroad company, under the provisions of this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass. Louisville etc. R. Co. v. Nichols, 187 N. C. 153, 120 S. E. 819.

Effect of Amendment of Pleadings as to Bar. — An amendment to the complaint in an action against a railroad company to recover damages to a crop caused by diversion of the natural flow of water, so as to allege permanent damages to the land does not add a new cause of action, but relates only to the measure of damages arising from the injury; and this section will not bar the plaintiff by reason of the amendment alone. Pickett v. Atlantic Coast Line R. R. Co., 153 N. C. 148, 69 S. E. 8.

Applied in Owenby v. Louisville, etc., R. R. Co., 165 N. C. 641, 81 S. E. 997.

§ 441. Three Years. — Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

2. Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.

3. For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

4. For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

5. For criminal conversation, or for any other injury to the person or rights of another, not arising in contract and not hereinafter enumerated.

6. Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

7. Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

8. For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

9. For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

10. For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed. (Rev., s. 395, Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 269, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23; 1913, c. 147, s. 4.)

I. In General.
II. Subsection One—Contracts.
III. Subsection Two—Liability Created by Statute.
IV. Subsection Three—Trespass upon Realty.
V. Subsection Four—Goods or Chattels.
VI. Subsection Six—Sureties of Executors, etc.
VII. Subsection Seven—Bail.
VIII. Subsecton Eight—Clerk Fees.
IX. Subsection Nine—Fraud or Mistake.
X. Subsection Ten—Realty Sold for Taxes.

I. IN GENERAL.

Section Not Retroactive. — A bond for the payment of money executed prior to this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. Knight v. Braswell, 70 N. C. 709.

Burden of Proving Section. — When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. Parker v. Harden, 121 N. C. 57, 38 S. E. 30.

Effect of Equity upon Claim.—The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. Mas v. Tiller, 89 N. C. 423.

Effect of Disability. — This statute does not begin running against a person under disability, such as infancy, until the disability is raised; hence it does not begin running until then notwithstanding that the cause may have otherwise accrued prior to that time. Settle v. Settle, 141 N. C. 553, 574, 54 S. E. 445.

Insane Persons Presumed to Have Plead Section. — See section 406.

Section Supplemented by Section 412. — This statute cannot avail as a defense where within six months after the death of the intestate, the plaintiff had qualified as her administrator and had commenced a special proceeding, in the county where the lands of the intestate were situated, to subject them to the payment of debts. Harris v. Davenport, 132 N. C. 697, 700, 44 S. E. 406.

Where plaintiff has taken a voluntary nonsuit and brings the identical action again, if the former action has not been barred by this section, the second action is in time if brought within one year from the time of the voluntary nonsuit. Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759.

When Proper to Decide Application in Appellate Court. — Upon the appeal it is unnecessary to decide whether this section or section 445 applies where there is an insufficient finding of fact to sustain a plea of either, and for this reason a new trial must be had. Dayton v. Asheville, 185 N. C. 12, 115 S. E. 827.

Application to Action to Recover Share of Estate. — An action by an administrator to recover his intestate's share of an estate, is governed by section 445, which provides that actions not otherwise provided for shall be brought within ten years, and not this section. Hunt v. Wheeler, 116 N. C. 422, 21 S. E. 915.

Bar Applies to Remedy. — The bar is applied under this section, not to the mode in which relief is sought, but to the relief itself. Spruill v. Sanderson, 79 N. C. 466, 471.

Cited in Bray v. Creekmore, 109 N. C. 49, 13 S. E. 723; Muse v. London Assur. Corp., 108 N. C. 240, 243, 13 S. E. 94; Griffith Profitt Co. v. English, 198 N. C. 66, 68, 150 S. E. 619; Rhodes v. Tanner, 197 N. C. 458, 149 S. E. 552.

II. SUBSECTION ONE—CONTRACTS.

As to what acknowledgments, admissions, etc., by the makers, repel this section, see section 417.

Application to Agreement to Arbitrate.—An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute. Sprinkle v. Sprinkle, 159 N. C. 81, 74 S. E. 739.

Action for Money Had and Received.—An action by a county board of school directors for fines and penalties collected by a city is in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and this sub-section applies. School Directors v. Asheville, 128 N. C. 249, 251, 38 S. E. 874.

Contract to Pay Money.—Where land was conveyed to J. with condition that he pay certain sums to his brothers, and he accepted the land and took possession under the devise, he immediately became liable, and the right of action was barred in three years under this section. Rice v. Rice, 115 N. C. 43, 20 S. E. 185.

Action for Damages against Carrier.—Where the demand in writing for damages of a carrier was made within thirty days, and action was brought within three years it was not barred by this section. U. S. Watch Case Co. v. Southern Exp. Co., 120 N. C. 351, 352, 27 S. E. 74.

Application to Sealed Instruments—Sureties.—This section applies to actions upon all sealed instruments, not referred to in preceding sections. One of these not mentioned in the preceding sections is an action on a sealed note against the sureties thereto. Although such an action against the principal is not barred until ten years by section 437 subs. (2), that provision does not refer to sureties. This has been the settled law since, Welfare v. Thompson, 83 N. C. 276, 279, was decided. Redmond v. Pippen, 113 N. C. 90, 92, 18 S. E. 50.

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. Jackson v. Martin, 136 N. C. 196, 198, 48 S. E. 672.

This section applies to sureties on a note under seal, and as to the sureties the right of action on the note is barred after the lapse of three years. Barnes v. Crawford, 201 N. C. 434, 160 S. E. 464.

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety under this section. Davis v. Alexander, 207 N. C. 417, 177 S. E. 417.

Statute Bars Remedy of Claim and Delivery.—Where there had been no new promise or payment on the purchase price for over three years prior to the institution of the action, the three-year statute of limitations, under this section, barred the ancillary remedy of claim and delivery. Lester Piano Co. v. Loven, 207 N. C. 96, 176 S. E. 290.

Parol Evidence Admissible to Show in What Capacity Parties Signed Note.—In an action by the payee of a negotiable note under seal, appearing upon its face to have been signed by several makers, it may be shown upon the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that the others signed as sureties only, entitling the sureties to their release upon their defense of the statute of limitations under this section. Furr v. Trull, 205 N. C. 417, 171 S. E. 641.

Same—Effect of Payment after Statute Has Run.—Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, and mortgages to another, the bar of the three-years' statute of limitations which has otherwise run will not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser, is not sufficient. Nance v. Hulin, 192 N. C. 665, 135 S. E. 774.

Indemnity or Fidelity Bond.—Where the liability of the insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, this section will not extend the period of indemnity for this is a statute of limitations and can have no effect upon the valid contractual relations existing between the indemnitor and indemnitee. Hood v. Rhodes, 204 N. C. 158, 159, 167 S. E. 558.

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay same upon maturity, and right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor, and suit against the guarantors is barred by this section after three years from the maturity of the note. Wachovia Bank, etc., Co. v. Clifton, 203 N. C. 483, 166 S. E. 334.

Accrual of Cause.—A cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that a plant was not free from all defects and flaws. Heath v. Moncrieff Furnace Co., 200 N. C. 377, 381, 156 S. E. 920.

Demand Necessary if Fiduciary Relation Exists.—Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. Efird v. Sikes, 206 N. C. 560, 562, 174 S. E. 513.

Statute Not Suspended by War Measures.—An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads is barred by our State statute of limitations after three years from the time of its accrual. Vanderbilt v. Atlantic, etc., R. Co., 188 N. C. 568, 125 S. E. 387.

Unpaid Subscription to Corporate Stock.—While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. Windsor Redrying Co. v. Gurley, 197 N. C. 56, 147 S. E. 676.

Same—Construed with Other Sections.—The application of this section with regard to the unpaid balance due a corporation by a subscriber to its capital stock, will be construed in pari materia with §§ 1160 and 1165. Windsor Redrying Co. v. Gurley, 197 N. C. 56, 147 S. E. 676.

Applied in Hall v. Hood, 208 N. C. 59, 179 S. E. 27.

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

Section Absolute Bar.—After the time prescribed in section 439, subsection 2, and this subsection, the Statute is an absolute bar to the next of kin. Vaughan v. Hines, 87 N. C. 445; Spruill v. Sanderson, 79 N. C. 466; Woody v. Brooks, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinion.

Action for Failure to Collect Check.—An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former is barred as against the latter bank by this section, where not commenced until five years after the transaction and four years after the transfer of the assets. Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 303.

Action to Recover Delinquent Taxes.—Neither the three nor the ten years' statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. Wilmington v. Cronly, 122 N. C. 383, 30 S. E. 9.

Municipal Lien for Pavement.—The lien given a city or town on the lots of an owner along its streets for paving its sidewalk, rests only by statute, and not by common law, and is enforceable only against the lots, in rem, and not against the owner individually or out of his other property, and to enforce the same action must be commenced within three years next after the completion of the work, or it will be barred by the statute of limitations. Morganton v. Avery, 179 N. C. 551, 103 S. E. 138.

Application to Tort against Clerk Failing to Index Judgment.—In an action of tort against a Clerk of the Superior Court for failing to index a docketed judgment as required

by section 613 this section is applicable. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101.

Application to Petition to Have Damages Assessed. — Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation of the action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of this section, subsections (2) and (3), and the refusal of the trial judge to submit an issue upon the Statute of Limitations was not error. Land v. Wilmington, etc., R. Co., 107 N. C. 72, 12 S. E. 125; Utley v. Wilmington, etc., R. Co., 119 N. C. 720, 25 S. E. 1021.

IV. SUBSECTION THREE—TRESPASS UPON REALTY.

Amendment of 1895.—The last sentence of this subsection was added by the Act of 1895. Culbreth v. Downing, 121 N. C. 205, 28 S. E. 294.

Prior to the passage of this Act, in such cases, the lapse of 20 years was necessary to bar the action, when the presumption of a grant would arise. Parker v. Norfolk, etc., R. Co., 119 N. C. 677, 25 S. E. 722; Culbreth v. Downing, 121 N. C. 205, 206, 28 S. E. 294.

Same—Application to Accrued Actions.—In changing the period of limitation a reasonable time must have been given to accrued actions which would otherwise be barred by the new regulation. A reasonable time for the commencement of an action before the statute works a bar, (Nichols v. Norfolk, etc., R. Co., 120 N. C. 495, 26 S. E. 643), is the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years have elapsed before the amending Act, then two years more would be a reasonable time. If three years time would bar the action and three years had elapsed, as in the present case, before the amending act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions. Culbreth v. Downing, 121 N. C. 205, 206, 28 S. E. 294.

Presumption as to Date of Conversion.—In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. Parker v. Harden, 121 N. C. 57, 28 S. E. 20.

Continuing Trespass Defined.—Speaking of this section in Sample v. Roper Lumber Co., 150 N. C. 161, pp. 165-166, 63 S. E. 731, the Court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass, and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong." Teeter v. Postal Tel-Cable Co., 172 N. C. 783, 785, 90 S. E. 941.

Same—As Applied to Telegraph Line.—Where a telegraph company has constructed its line of poles and wires along a railroad right of way on the lands of the owner more than three years next before the commencement of the owner's action for trespass, but within three years has constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones, in the same holes, it was held that the plaintiff's right to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded it. Teeter v. Postal Tel. Cable Co., 172 N. C. 783, 90 S. E. 941.

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572.

Application to Diversion of River Water.—The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations. Geer v. Durham Water Co., 127 N. C. 349, 37 S. E. 474.

Application to Negligence in Widening Canal.—In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under this subsection. Cherry v. Lake Drummond Canal, etc., Co., 140 N. C. 422, 53 S. E. 138.

Action for Cutting Timber.—The three years statute applies to recover damages for trespass in cutting and removing trees from the land. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 90 S. E. 196.

Burden of Proof.—Where the defendant pleads this section to an action for trespass, with damages for cutting timber on lands, the burden is on the plaintiff to prove that he commenced his action within the time prescribed; and where from an analysis of the evidence it appears that this has not been done, a judgment of nonsuit is proper. Tillery v. Whiteville Lumber Co., 172 N. C. 296, 90 S. E. 196.

V. SUBSECTION FOUR—GOODS OR CHATTELS.

Section Does Not Confer Title—Period Necessary.—Possession of a chattel for a sufficient period to bar its recovery under this section does not confer title. The prior law, ch. 65, section 20 Rev. Code, so provided, but it has been repealed so that now there is no statute fixing a period at the end of which title to personal property will vest in the possessor. It is true that if held for a sufficient time the title will vest, but four years possession is insufficient. Pate v. Hazell, 107 N. C. 189. 11 S. E. 1089.

Charging in Conjunction with Section 445.—Where if the action has not been barred by the provisions of subsections 4 and 9 of this section, it would have been barred under sec. 445, it was not error to tell the jury that the action was barred in three years, or in ten years. Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285.

When Applicable to Funds Held by Trustee.—When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitation begins to run, so that the cause of action is barred in three years. County Board v. State Board, 107 N. C. 366, 12 S. E. 452.

Property Advanced by Father.—Where slaves advanced by A to his son B were, on the death of the son, divided between his widow and children and held adversely thereafter for three years, A, the father is barred by the statute of limitations from afterwards reclaiming them. Jones v. Gordon, 55 N. C. 352.

Burden of Proof.—Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. Rankin v. Oates, 183 N. C. 517, 112 S. E. 32.

VI. SUBSECTION SIX—SURETIES OF EXECUTORS, ETC.

Purpose of Section.—This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after reasonable time, to give quiet and repose to the estates of dead men. Andres v. Powell, 97 N. C. 155, 160, 2 S. E. 235.

Section 445 Not Affected.—Section 445, limiting the time for the bringing of an action to ten years, and applying to an action against an executor or adminstrator for a final accounting and settlement, is not affected by the provisions of this section, as to actions on their official bonds. Pierce v. Faison, 183 N. C. 17, 110 S. E. 857.

Sureties also Protected by Section 439.—In addition to the protection of section 439 par. 2, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

While the sureties have the protection of six years under section 439 in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. Woody v. Brooks, 102 N. C. 334, 337, 9 S. E. 294.

Section 439(2), expressly applies to actions on the "official bond," this section to sureties only. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Effect of Surety Being Foreign Corporation.—The statute of limitations is not suspended against the surety on a guardian bond by reason of such surety being a foreign corporation when it is shown that it continuously had a general agent within the jurisdiction of our courts for executing judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Insurance commissioner. Anderson v. United States Fidelity Co., 174 N. C. 417, 93 S. E. 948.

Effect of Payment by Principal.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the

statute of limitations. Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772.

Intervening Disabilities.—When this statute begins to run, the subsequent marriage of the feme plaintiff will not stop it. Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See § 407 and note.

When Statute Begins to Run—Demand.—From the demand of the plaintiff for an account and settlement made on the administrator, and his failure and refusal to do so, this section began to run in favor of the defendant sureties on the administration bond. If the action is brought within three years of this time it is not barred. Stonestreet v. Frost, 123 N. C. 290, 292, 31 S. E. 718; Gill v. Cooper, 111 N. C. 311, 313, 15 S. E. 316.

Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years. Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

This section is applicable only when there has been a settlement, either by the acts of the parties or a decree of court. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294.

An action against a guardian and his bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. Anderson v. United States Fidelity Co., 174 N. C. 417, 93 S. E. 948.

The cause of action by the administrator d. b. n. under this section does not accrue until his appointment, and the action by such administrator therefore is not barred as against the bondsman until three years subsequent to his appointment. Dunn v. Dunn, 206 N. C. 373, 173 S. E. 900.

Action by Cestui against Trustee after Settlement. — Where there has been a settlement between the trustee and cestui que trust, or a final determination of the amount due by a decree of Court, the trust is closed, and an action will be barred within three years from a demand and refusal. Spruill v. Sanderson, 79 N. C. 466; Whedbee v. Whedbee, 58 N. C. 393; Barham v. Lomax, 73 N. C. 78; Wyrick v. Wyrick, 106 N. C. 84, 87, 10 S. E. 916.

Effect of Estate Being Unrepresented during Period.— When there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. Brawley v. Brawley, 109 N. C. 524, 14 S. E. 73.

Burden of Proof.—This section being pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. Hussey v. Kirkman, 95 N. C. 63; Moore v. Garner, 101 N. C. 374, 7 S. E. 732; Hobbs v. Barefoot, 104 N. C. 224, 10 S. E. 170; Nunnery v. Averitt, 111 N. C. 394, 395, 16 S. E. 683. This was not done, and the surety is protected by the lapse of three years after demand and refusal. Norman v. Walker, 101 N. C. 24, 7 S. E. 468; Woody v. Brooks, 102 N. C. 334, 9 S. E. 294; Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135; Brawley v. Brawley, 109 N. C. 524, 14 S. E. 73; Koonce v. Pelletier, 115 N. C. 233, 235, 20 S. E. 391.

Action to Reopen Account.—An action or proceeding to reopen an account stated by an executor and readjust a settlement made under the supervision of a Court, and sanctioned by a decree, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a Court of Law This conclusion finds some support in the provisions of this subsection. Spruill v. Sanderson, 79 N. C. 466.

Ward's Suit against Sureties.—A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three year limit. Norman v. Walker, 101 N. C. 24, 7 S. E. 468.

The running of the statute under this section as against the plaintiffs and in favor of the sureties was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations which began to run against each of his wards, when she became twenty-one years of age. State v. Fountain, 205 N. C. 217, 220, 171 S. E. 85.

Cited in State v. Purvis, 208 N. C. 227, 230, 180 S. E. 88.

VII. SUBSECTION SEVEN—BAIL.

Effect of Bail Being Out of State.—The language and meaning of this action is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. Albemarle Steam Nav. Co. v. Williams, 111 N. C. 35, 15 S. E. 877.

VIII. SUBSECTION EIGHT—CLERK FEES.

Application to Judgment for Costs.—A plaintiff in a judgment on which costs only are due, is not barred by this section from the proper proceedings to enforce his claim, the same being in his favor and not of the officers of the court. Cowles v. Hall, 113 N. C. 359, 18 S. E. 329.

Not Applicable to Referee.—The claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report is not barred by this section. Farmers' Bank v. Merchants', etc., Bank, 204 N. C. 378, 168 S. E. 221.

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Amendment of 1879.—Mistake.—This act was amended by the act of 1879, by inserting after the word "fraud," wherever it occurs, the words "or mistake." So that prior to the act of 1879, there was no statutory bar of three years to an action for relief on the ground of mistake. Mask v. Tiller, 89 N. C. 423, 425.

An action to correct a mistake should now be brought within the time limited in this section. Lanning v. Commissioners, 106 N. C. 505, 511, 11 S. E. 622.

The 1889 amendment of this section struck a provision limiting this section to cases solely cognizable in a court of equity. There are many cases decided prior to the amendment construing this section to be so limited. There are also cases so construing it since its passage but they are restricted to those arising before the statute became effective. See Dunn v. Beaman, 126 N. C. 766, 770, 36 S. E. 172; Alpha Mills v. Watertown, etc., Co., 116 N. C. 797, 803, 21 S. E. 917; Blount v. Parker, 78 N. C. 128; Jaffray v. Bear, 103 N. C. 165, 9 S. E. 382; Egerton v. Logan, 81 N. C. 172; Spruill v. Sanderson, 79 N. C. 466; Day v. Day, 84 N. C. 408; Batts v. Winstead, 77 N. C. 238. See also dissenting opinions in Kahnweiler v. Anderson, 78 N. C. 133, 144.

The amendment applied to an action for a false warranty in a sale made before the amendment, so that, in actions where relief on the ground of fraud was sought, the cause of action was not deemed to have accrued until the discovery of the fraud complained of. Alpha Mills v. Watertown, etc., Co., 116 N. C. 797, 21 S. E. 917.

This amendment leaves all actions subject to the same rule, whether they were heretofore cognizable solely in courts of equity or not, and makes all actions come under the same rule as if they had been originally cognizable in courts of equity. Alpha Mills v. Watertown, etc., Co., 116 N. C. 797, 803, 21 S. E. 917; Rouss v. Ditmore, 122 N. C. 775, 778, 30 S. E. 335.

Purpose and Construction of Section. — The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from being asserted after a long lapse of time. It ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation. The like spirit should govern the construction of the facts and circumstances of a transaction so as to take it out of the operation of the statute, where gross injustice would be worked by its application. Mask v. Tiller, 89 N. C. 423, 426.

When Applied to Exclusion of § 445.—This section cannot be applied where the allegations and proof are insufficient to sustain it, in preference to section 445, where there is a question as to which applies. Shankle v. Ingram, 133 N. C. 254, 255, 45 S. E. 578.

Applies to Actions at Law and Suits in Equity.—While this subsection originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of our courts it now applies to all actions for relief on the ground of fraud or mistake. Stancill v. Norville, 203 N. C. 457, 166 S. E. 319.

Fraud or Mistake Prerequisite to Application.—This section has no application to an action to recover money for there is no evidence or allegation of fraud and mistake. Barden v. Stickney, 132 N. C. 416, 417, 43 S. E. 912; Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781.

When Statute Begins to Run.—The statute runs from the discovery of the fraud or mistake, "or when it should have been discovered in the exercise of ordinary care"; and as it was the duty of plaintiff, as executor, to have laid off the land to the devisee and put her in possession, and as he could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years the various owners of the land had cultivated up to the boundaries, the statute had become a bar to the action.

Sinclair v. Teal, 156 N. C. 458, 72 S. E. 487. See also Stubbs v. Motz, 113 N. C. 458, 459, 18 S. E. 387; Peacock v. Barnes, 142 N. C. 215, 55 S. E. 99.

It is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. Latham v. Latham, 184 N. C. 55, 113 S. E. 623.

This statute begins to run from the time of discovery of a breach of the trust relationship and not from the time the relation was brought to an end. Egerton v. Logan, 81 N. C. 172, 179.

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the plaintiff had knowledge of the mistake alleged. Jefferson v. Roanoke R., etc., Co., 165 N. C. 46, 80 S. E. 882. See also Lanning v. Commissioners, 106 N. C. 505, 511, 11 S. E. 622.

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hereto unknown to him. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781.

It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on (after the investigation of the receiver) that the bank was insolvent at the time the incorrect statements were put forth. Houston v. Thornton, 122 N. C. 365, 375, 29 S. E. 827.

Applying this section to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, this section by correct interpretation is held to mean until the impeaching facts should have been discovered in the exercise of reasonable business prudence. Ewbank v. Lyman, 170, N. C. 505, 87 S. E. 348.

Where a clerk of the Superior Court embezzles funds and such fraud is not discovered until about 90 days prior to the institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not § 439 applies. State v. Gant, 201 N. C. 211, 159 S. E. 427; State v. American Surety Co., 201 N. C. 325, 160 S. E. 176.

The actual time of the discovery of the alleged mistake is not determinative, but the cause of action for reformation of the bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. Moore v. Fidelity, etc., Co., 207 N. C. 433, 177 S. E. 406. See also, in this connection, Hargett v. Lee, 206 N. C. 536, 539, 174 S. E. 498; Hood v. Paddison, 206 N. C. 631, 635, 175 S. E. 105.

Same—Record as Notice of Fraud.—True, as indicated in Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008; Modlin v. Roanoke R., etc., 145 N. C. 218, 58 S. E. 1075, and Stubbs v. Motz, 113 N. C. 458, 18 S. E. 387, the mere registration of a deed will not usually, in these and like cases, be imputed for constructive knowledge; but in the present case the deed under which feme defendant claims and now holds this property had been on the registry in the proper county for more than eleven years before this action was instituted, and plaintiff's judgment had been docketed in the county since 1897. Ewbank v. Lyman, 170 N. C. 505, 509, 87 S. E. 348.

While the mere registration of deed to lands from a husband to his wife will not usually be imputed for constructive knowledge that it was done in fraud of the husband's creditors, it may be otherwise regarded when taken in connection with other relevant circumstances, and under the circumstances of this case it is held that the failure of the plaintiff in not sooner investigating the records was such negligence as will be imputed to her for knowledge, and bar her cause of action. Ewbank v. Lyman, 170 N. C. 505, 87 S. E. 348.

Where a foreclosure sale of lands is attacked for fraud upon the ground that the trustee sold the timber on the land separate from the land and made deeds to each to separate parties, which were duly recorded, the record itself gives notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claim, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and bar their recovery after three years. Sanderlin v. Cross, 172 N. C. 234, 90 S. E. 213.

Same—Sale of Trust Land by Trustee as Notice. — Proceedings before clerk to sell trust lands to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom. Latham v. Latham, 184 N. C. 55, 113 S. E. 623.

Same—Necessity for Newly Discovered Evidence. — One can derive no aid from this section in an action to reconsider a case which has been sanctioned by the court and settled by a decree from it, in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at first that are now known the first action must stand notwithstanding this section. Spruill v. Sanderson, 79 N. C. 466, 471.

Same—Sufficiency of Evidence.—See Latham v. Latham, 184 N. C. 55, 113 S. E. 623; Sanderlin v. Cross, 172 N. C. 234, 90 S. E. 213.

Application to Foreign Corporation.—A foreign corporation cannot set up the statute of limitations in bar of an action for false warranty. Alpha Mills v. Watertown, etc., Co., 116 N. C. 797, 21 S. E. 917.

Actions to Which Applicable.—The relief afforded by the statute has a broader meaning than the common-law actions of fraud and deceit and applies to any and all actions, legal or equitable, where fraud is the basis or an essential element in the suit. Little v. Wadesboro, 187 N. C. 1, 121 S. E. 185.

Same—Fraudulent Conveyance.—Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, this section, limiting the action to three years in cases of fraud applies, and it is reversible error for the trial judge to hold, as a matter of law, that the ten years statute relating to actions to impress a trust upon property only was applicable. Little v. Wadesboro, 187 N. C. 1, 121 S. E. 185.

Same—A Fraudulent Distribution of Dividends.—This section relating to time to commence action after discovery of fraud, has no application to fraudulent distribution of dividends to shareholders of corporations under the facts of this case. Chatham v. Realty Co., 180 N. C. 500, 105 S. E. 329.

Same—Proceeding to Set Aside Probate. — This section is not necessarily controlling upon the hearing upon petition before the clerk of the Superior Court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

Same—Setting Aside Settlement by Guardian.—The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. Wheeler v. Piper, 56 N. C. 249; Whedbee v. Whedbee, 58 N. C. 392; Spruill v. Sanderson, 79 N. C. 466. State v. Smith, 83 N. C. 306, 307.

Same—Action for Obtaining Deed by Fraud.—In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. Modlin v. Roanoke R., etc., Co., 145 N. C. 218, 58 S. E. 1075.

Same—Action to Declare Purchasing Partner a Trustee.—An action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the surety of their debts, is not barred by this section. Quaere, as to the application of subsection 4. Ross v. Henderson, 77 N. C. 170.

Where Purchaser Did Not Participate in Fraud.—Where there is no allegation or proof that a purchaser fraudulently concealed the fact of sale or participated in any fraud in connection therewith, then as to him the action is barred by the lapse of three years, this section not applying as to the action against him. Johnson Cotton Co. v. Sprunt & Co., 201 N. C. 419, 160 S. E. 457.

Remedy Where Action on Contract Barred.—The remedy by the vendor of goods obtained by the fraud of the purchaser, first discovered after the action on the contract has been barred, is by an action for damages under this section as amended by chap. 269. Acts of 1889. Rouss v. Ditmore, 122 N. C. 775, 30 S. E. 335.

When Replication Required.—When the date of the accruing of the cause of action appears in the complaint and the statute of limitations is pleaded, the court can, of course,

pass judgment, unless matter in avoidance is pleaded as a new promise, or the like. It is only in such cases that a replication is now required. Moore v. Garner, 101 N. C. 374, 377, 7 S. E. 732, though under the former practice a replication was required whenever the statute of limitations was pleaded. Stubbs v. Motz, 113 N. C. 458, 459, 18 S. E. 387.

Burden of Proof. — In an action to set aside a conveyance on account of fraud, the statute of limitations being pleaded thereto, the burden is on the plaintiff to show that the fraud was not discovered until within three years of the commencement of the action. Hooker v. Worthington, 134 N. C. 283, 46 S. E. 726.

The burden is on the plaintiff to show that neither they nor their predecessor in title, did not know of the fraud, or would not have discovered it in the exercise of reasonable business prudence. Sanderlin v. Cross, 172 N. C. 234, 90 S. E. 213.

The plea of the statute of limitations put the burden upon the defendant, in the cross-action, to show that the statute of limitation had not barred his right, by a lapse of more than three years from the time he discovered the mistake to the time he had filed his pleading, and in failing to introduce such evidence he is concluded as a matter of law. Taylor v. Edmunds, 176 N. C. 325, 97 S. E. 42.

Effect of Non-Residence of Plaintiff. — The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action. Latham v. Latham, 184 N. C. 55, 113 S. E. 623.

A nonresident creditor who seeks to set aside a deed of his debtor for fraud is not excused by his absence for not complying with the provisions of this section, requiring that he must bring his action within three years from the discovery of the fraud. Ewbank v. Lyman, 170 N. C. 505, 87 S. E. 348.

Erroneous Ruling Not Cured by Other Defects. — The reversible error of ruling that as a matter of law the evidence was insufficient under this section, is not relieved by the principle that the statute does not begin to run till the undue influence constituting fraud has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question. Little v. Wadesboro, 187 N. C. 1, 121 S. E. 185.

Effect of Failure of Referee to Find Facts. — When the referee to whom the case was referred failed to find the facts upon which this statute of limitations can be determined, the case must be remanded. Lanning v. Commissioners, 106 N. C. 505, 11 S. E. 622.

Stated in Life Ins. Co. v. Edgerton, 206 N. C. 402, 411, 174 S. E. 96.

Cited in Fort Worth, etc., R. Co. v. Hegwood, 198 N. C. 309, 151 S. E. 641.

X. SUBSECTION TEN—REALTY SOLD FOR TAXES.

Application to Tenancy in Common. — The statute permits the sheriff to sell the lands of tenants in common for the nonpayment of taxes, and a tenant in common to pay his or her part of the tax and let the other shares go; and provides that three years possession by the purchaser under the tax deed bars the former rightful owners. Ruark v. Harper, 178 N. C. 249, 100 S. E. 584.

Application to Suit to Remove Cloud. — In Price v. Slagle, 189 N. C. 757, 128 S. E. 161, 166, the court said: "This three-year statute has been held not to apply when the suit is to remove a cloud, as distinguished from a suit to recover the land sold for taxes from the tax sale purchaser, or his assigns, who are in possession of the lands so sold."

Application Where Deed Color of Title Only. — Where a sheriff's deed given for the nonpayment of taxes is not under seal, it is good as color of title, which seven years adverse possession will ripen into an absolute one, under section 428. Ruark v. Harper, 178 N. C. 249, 100 S. E. 584.

Applies to Action for and against Claimants.—The three-year statute of limitations barring the right of action in favor of a claimant under a tax deed is broad enough to include actions for and against such claimant. Jordan v. Simmons, 169 N. C. 140, 85 S. E. 214.

Possession as Affecting Application. — "Semble, the three-year statute of limitations may not be successfully pleaded by the claimant under the tax deed against the original owner in possession of the lands." Jordan v. Simmons, 169 N. C. 140, 85 S. E. 214.

The purchaser's possession for three years under an irregular sheriff's deed would be sufficient to bar action thereon. Lyman v. Hunter, 123 N. C. 508, 31 S. E. 827; Kivett v. Gardner, 169 N. C. 78, 85 S. E. 145.

Necessity of Pleading Section. — The three-year statute of limitations in favor of or against the claimant under a tax deed to lands must be properly pleaded to be made available. Jordan v. Simmons, 169 N. C. 140, 85 S. E. 214.

In an action against the administrator of the deceased to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations in order to avail himself of it as a bar to the plaintiff's recovery thereon. Smith v. Allen, 181 N. C. 56, 106 S. E. 143.

§ 442. Two years.—Within two years—

1. All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon.

2. An action to recover the penalty for usury.

3. The forfeiture of all interest for usury: Provided, however, this section shall not apply to the counties of Cherokee and Clay. (Rev., s. 396; Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69; 1931, c. 231; 1933, c. 318, s. 1.)

I. Subsection One—Political Subdivisions of State.
II. Subsection Two—Penalty for Usury.
III. Subsection Three—Forfeiture of All Interest for Usury.

I. SUBSECTION ONE—POLITICAL SUBDIVISIONS OF STATE.

Editor's Note.—The proviso exempting Cherokee and Clay Counties from the operation of the section was added by Public Laws 1933, c. 318. As to limitation on vouchers and script issued in Carteret and Haywood Counties, see Public Laws 1933, c. 386.

Purpose of Section. — "The obvious purpose of the law is to enable those municipal bodies mentioned in it to ascertain and make a record of its valid outstanding obligations, and to separate them from such as are spurious or tainted with illegality and denounced in the Constitution." Wharton v. Commissioners, 82 N. C. 12, 16. See post this note, Nature and Effect of Section."

Constitutionality. — Under the interpretation of this section, it may admit of question whether the condition engrafted by it upon the contract, as affecting the pre-existing rights of the creditor, does not impair its obligation within the prohibition of the federal constitution. Wharton v. Commissioners, 82 N. C. 12, 14. See the following catchline.

Nature and Effect of Section. — The language of this section is plain and explicit, and there is room for but one construction of it. The court has said that the provision of the statute is not in strict terms a limitation of the time within which an action may be prosecuted, but that it imposes upon the creditor the duty of presenting his claim within a prescribed period of time, and, upon his failure to do so, forbids a recovery in any suit thereafter commenced. Wharton v. Commissioners, 82 N. C. 12, 16. See Moore v. Charlotte, 204 N. C. 37, 39, 167 S. E. 380.

In a later case the court held that "This is a statute of limitation, and such claims against the county should be presented within two years after maturity." Lanning v. Commissioners, 106 N. C. 505, 511, 11 S. E. 622, citing Rayster v. Commissioners, 98 N. C. 148, 3 S. E. 739; Moore v. Commissioners, 87 N. C. 209, 215.

In Board v. Greenville, 132 N. C. 4, 43 S. E. 472, 473, the court said, "We think it is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of a claim against a municipal corporation, the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute the claimant, by its very words, is 'barred from a recovery' of any part of the claim that did not mature within the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal."

But notwithstanding this conclusion a more recent decision upon the subject holds that "This section is not strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action." Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Liberal Construction. — In Wharton v. Commissioners, 82 N. C. 12, 16, the court said, "We are not disposed to give so strict an interpretation to the requirement of the act, which, as all its useful purposes are met, would be to sacrifice substance for form and convert a judicious measure of legislation into an instrument of injustice and wrong."

When Statute Begins to Run.—Where the plaintiff made a payment, the defendant promising to refund any excess of the amount due, and upon a reference a balance was reported in favor of the plaintiff it was held, in an action to recover the amount, that the statute begins to run only from the date of such finding. Moore v. Commissioners, 87 N. C. 209, 210.

Where the defendants and their predecessors in office had notice from the beginning of the origin, nature and amount of a claim against a county, and of the fact that it could not mature until the accuracy or inaccuracy of their previous settlement with the plaintiff could be ascertained, such a claim falls neither within the letter nor the spirit of this section. Moore v. Commissioners, 87 N. C. 209, 210, 215.

Effect of Failure to Present Claim in Time. — Where a creditor fails to present his claim in the prescribed time, any action thereon thereafter is barred. Board v. Greenville, 132 N. C. 4, 43 S. E. 472.

What Plaintiff Must Allege and Prove. — Where a claim has been made on the city for services rendered, and it nowhere therein appears when the services were rendered, in an action to recover therefor the plaintiff must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Same—When Defect Attacked by Demurrer. — Where upon the face of a complaint it does not appear that claim was made upon a town's officers as this section provides, within two years after its maturity, the claim is barred, and a demurrer that it states no cause of action should be sustained. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Same—When Action Amendable. — The complaint, not stating a cause of action under the requirements of this section, is demurrable; but as the complaint is a defective statement of a cause of action, and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff may amend by setting out the matters required by the statute. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Nonsuit as Extending Time under Section 415. — One who began suit within the time prescribed, took a nonsuit and began a second action within one year after the nonsuit, but more than two years after the maturity of the claims, was not barred. Wharton v. Commissioners, 82 N. C. 12.

Application to Claim of Sheriff. — A sheriff must present his claim against a county for an allowance to him to pay off a county debt within the two years prescribed in the section. Lanning v. Commissioners, 106 N. C. 505, 11 S. E. 622.

Cited in Lightner v. Raleigh, 206 N. C. 496, 499, 174 S. E. 272; Fletcher v. Parlier, 206 N. C. 904, 173 S. E. 343.

II. SUBSECTION TWO—PENALTY FOR USURY.

Origin of Section. — The right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action. Roberts v. Life Ins. Co., 118 N. C. 429, 24 S. E. 780.

Section Not Retroactive. — The right added by the Act of 1876-77 to recover back interest paid could not apply to contracts made prior to its passage. Moore v. Beaman, 112 N. C. 558, 561, 17 S. E. 676.

The act of 1895 (chapter 69), which provides for the recovery of usurious interest if the action is brought within two years after the payment in full of the indebtedness, by its express terms, does not apply to contracts antedating its ratification. Roberts v. Life Ins. Co., 118 N. C. 429, 24 S. E. 780.

When Statute Begins to Run. — The act of 1895 provides for bringing an action to recover back double the amount of usurious interest paid if the action is brought within two years after the payment in full of such indebtedness, in this respect changing section 3836 of The Code, now section 2306, which provided that "the action must be brought within two years from the time the usurious transaction occurred." Roberts v. Life Ins. Co., 118 N. C. 429, 435, 24 S. E. 780. The provision no longer appears in section 2306. Ed. Note.

The cause of action for the penalty for each payment of usury arises immediately and accrues upon the date of the payment. The action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. Sloan v. Piedmont Fire Ins. Co., 189 N. C. 690, 128 S. E. 2, 3.

Under this section the statute of limitations began to run at the date the cause of action accrued, and as service could have been made under the statute at any time before the commencement of this action, the statute continued to run against the plaintiffs. The defendant, although a nonresident or foreign corporation, was at all times from the date the cause of action accrued until the commencement of this action subject to the jurisdiction of the courts of this state and for that reason, two years having elapsed from the date the cause of action accrued to the date of the commencement of the action, the action is barred. Smith v. Finance Co., 207 N. C. 367, 369, 177 S. E. 183.

Same—Mutual Running Account. — Where the transaction constitutes a mutual running account an action for the penalty under our statute is not barred within two years next from the last item therein. English Lumber Co. v. Wachovia Bank, 179 N. C. 211, 102 S. E. 205.

Effect of Defendant Being Out of State. — This two-year prescription is subject to the provisions of § 411 that when a cause of action accrues against a person he shall be out of the State or shall thereafter depart therefrom and reside out of the State, "the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action." Williams v. Iron Belt etc., Asso., 131 N. C. 267, 269, 42 S. E. 607.

The two years within which an action may be brought, under this section, is to be construed in connection with the provisions of section 411, which provides that if the defendant departs from or resides out of the State, such action may be brought within two years after process can be served upon him; otherwise the statute would be illusory and partial, in favor of nonresidents. Armfield v. Moore, 97 N. C. at p. 34, 38; 2 S. E. 347. Williams v. Iron Belt etc., Asso., 131 N. C. 267 269, 43 S. E. 607.

Application to Action against Foreign Corporation. — An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. Williams v. Iron Belt, etc., Asso., 131 N. C. 267, 42 S. E. 607.

Bar of Counterclaim.—Where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged is barred. Farmers' Bank, etc., Co. v. Redwine, 204 N. C. 125, 167 S. E. 687.

Necessity of Pleading. — This section need not be specifically pleaded. Roberts v. Ins. Co., 118 N. C. 429, 24 S. E. 780.

Must Be Pleaded When Relied on as a Defense.—In an action to recover the statutory penalty for usury the two-year statute of limitations must be pleaded when relied on as a defense, the clause relating thereto having been taken out of section 3836 of the Code and placed in this section and thereby made a statute of limitations, but when properly pleaded the burden is upon the plaintiff to prove that his suit is brought within two years from the time the cause of action accrued. McNeill v. Suggs, 199 N. C. 477, 478, 154 S. E. 729.

Section 2306 Defines the Penalty for Usury. — The right to recover interest is governed by section 2306 which permits a recovery of twice the amount of interest paid if brought within the time prescribed by this section. Roberts v. Ins. Co., 118 N. C. 429, 24 S. E. 780.

Application Illustrated in Rogers v. Bank, 108 N. C. 574, 13 S. E. 245.

III. SUBSECTION THREE—FORFEITURES OF ALL INTEREST FOR USURY.

Editor's Note.—The Act of 1931 which added subsection 3 to this section provided that it should not affect pending litigation. It became effective April 1, 1931.

This section is prospective only, and is applicable only to a forfeiture under § 2306, which has occurred, or shall occur, since its ratification on April 1, 1931. Farmers' Bank, etc., Co. v. Redwine, 204 N. C. 125, 130, 167 S. E. 687.

§ 443. One year.—Within one year an action—

1. Against a public officer, for a trespass under color of his office.

2. Upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part to the party grieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

3. For libel, assault, battery, or false imprisonment.

4. Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. An application for a widow's year's allowance. (Rev., s. 397; Code, s. 156; C. C. P., s. 35; 1885, c. 96.)

Subsection One—Extent to Which Application Limited—Town Officers. — This section is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence or force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right of way for it. Brown v. Southern R. Co., 188 N. C. 52, 123 S. E. 633.

Same—Railroad Conspiring with Officials. — Where a railroad company, through its agents has participated in the unlawful appropriation of a town's funds, the mere fact that the trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of this section, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged privity between them. Brown v. Southern R. Co., 188 N. C. 52, 53, 123 S. E. 633.

Action against Justice of Peace.—A summons was issued to recover the penalty against a justice of the peace, for performing the marriage ceremony without the delivery of the license therefor to him, C. S. 2498, within less than a year from the time he had performed it, it was held, the plea of this section could not be sustained. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Subsection Two — Application to Clerk of Court.. — An action against a clerk for a penalty, if not brought within one year, is barred by the statute of limitations. State v. Nutt, 79 N. C. 263.

Subsection Three—Disability Preventing Bar.—An action for assault and battery is barred upon the plea of this section, if not commenced within one year, but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity, the time of such disability will be deducted from the running of the statute. Hayes v. Lancaster, 200 N. C. 293, 156 S. E. 530.

§ 444. Six months.—Within six months an action.

1. For slander.

2. Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitation shall commence from the date of the execution of such instrument: Provided, however, that the period of limitations for any action upon such instrument executed prior to the ratification of this act shall be six months from and after its ratification. (Rev., s. 398; Code, s. 157; C. C. P., s. 36; 1931, c. 168.)

See 11 N. C. L. R. 220.

Editor's Note.—The Act of 1931 which added subsection 2 of this section was ratified on March 23, 1931.

For an act, applicable only in Cleveland and Rutherford Counties, providing limitation in action against one purchasing crops with lien thereon, see Public Laws 1933, c. 167.

Necessity for Affirmative Plea. — In an action for slander, if the defendant does not plead the Statute of Limitations, the plaintiff may recover, though the proof shows that the words were spoken more than six months before the commencement of the action. Pegram v. Stoltz, 67 N. C. 144.

Same—Where Mislead by Petition. — If the defendant has been misled by allegation of a different date from the one proved, so that he failed to set up this statute in his answer, the judge would, of course, allow him to amend his answer. Pegram v. Stoltz, 67 N. C. 144.

An action for slander begun more than six months after the publication of the alleged defamatory words is barred by the statute of limitations under this section, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the discovery by plaintiff that defendants were the authors thereof. Gordon v. Fredle, 206 N. C. 734, 175 S. E. 126.

When Action Begun. — Where a writ in slander was issued, returnable to a term of the Court, and no alias issued from such return term, but a writ issued from the next term thereafter, it was held that the latter writ was the commencement of the suit, and the limitation to the action must be determined accordingly. Hanna v. Ingram, 53 N. C. 55.

Application Illustrated. — Where the plaintiff brought an action for slander more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen after the filing of the amended complaint, and the defendant pleaded the statute of limitations, it was held, (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred. Hester v. Mullen, 107 N. C. 724, 12 S. 447.

§ 445. All other actions, ten years.—An action for relief not herein provided for must be commenced within ten years after the cause of action has accrued. (Rev., s. 399; Code, s. 158; C. C. P., s. 37.)

I. In General.
II. Actions to Which Applicable.

I. IN GENERAL.

Purpose of Section. — This section was intended as a sweeping statute of repose and to cure omissions in former statutes. Brown v. Morsey, 124 N. C. 292, 296, 32 S. E. 687. From concurring opinion.

This section was intended to be a universal statute of repose, applying to all causes of action not included among those specifically enumerated in the preceding sections of the statute of limitation. It could have no other purpose. It being almost impossible to enumerate all cases for which a statute of repose was needed, this section was passed to embrace, in its very words, any "action for relief not herein provided for." Woodlief v. Wester, 136 N. C. 162, 169, 48 S. E. 578. From dissenting opinion.

See to same effect Ex parte Smith, 134 N. C. 495, 502, 47 S. E. 16; Wyrick v. Wyrick, 106 N. C. 84, 86, 10 S. E. 916.

When Statute Begins Running.—Where a covenant of warranty and seizin was breached at the time of delivery of the deed, this section begins running against an action for such breach from the time of the delivery. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 578.

This section begins to run against an action by the vendor to recover possession from the vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. Overman v. Jackson, 104 N. C. 4, 10 S. E. 87.

An action to impeach the final account of a personal representative must be brought within ten years from the filing and auditing thereof as provided in this section. Woody v. Brooks, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant. Frazier v. Gibson, 140 N. C. 272, 52 S. E. 1035; Philips v. Buchanan Lumber Co., 151 N. C. 519, 66 S. E. 603.

This statute does not begin to run until there is a person in esse competent to begin the suit, that is, until the appointment of an administrator. This is a well recognized rule. Murray v. The E. G. Co., 7 Eng. C. L. 66; Godley v. Taylor, 14 N. C. 178. Lynn v. Lowe, 88 N. C. 478, 483.

Application Immaterial Where Period Has Not Run.—Where ten years has not elapsed it is not necessary to determine whether this section applies. Burgwyn v. Daniel, 115 N. C. 115, 119, 20 S. E. 462.

Charging Section with Section 441. — Where, if the action had not been barred by the provisions of subsections 4 and 9 of section 441, it would have been barred under this section, it was not error to tell the jury that the action was barred in three years, or in ten years. Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285.

Section Not Affected by 441.—This section applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of Sec. 441, as to actions on their official bonds. Pierce v. Faison, 183 N. C. 177, 110 S. E. 857.

Cited in Mauney v. Coit, 86 N. C. 464, 472; Smith v. Smith, 72 N. C. 139, 141.

Practice.—Under the former practice an objection that the equity of plaintiff seeking to declare a trust in land was barred could be taken by demurrer; under the present practice it may be taken by a motion to dismiss the

action. Marshall v. Hammock, 195 N. C. 498, 502, 142 S. E. 776.

Cited in Tieffenbrun v. Flannery, 198 N. C. 397, 398, 151 S. E. 857.

II. ACTIONS TO WHICH APPLICABLE.

Creditor's Action against Purchasing Partners. — The question as to whether an action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the security of their debts, is barred by this section, was raised but not decided. Ross v. Henderson, 77 N. C. 170.

Passive Trust—Actions by Children against Trustee.— Where the testator creates his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after ten years, especially when the relationship of trustee has been openly repudiated. Latham v. Latham, 184 N. C. 55, 113 S. E. 623.

Claim for Admeasurements of Dower.—This section is applicable to the claim for admeasurement of dower against the heirs, or one claiming under them. Brown v. Morrisey, 124 N. C. 292, 296, 32 S. E. 687.

Action to Test Validity of Stockholder's Election. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69.

Action of Cotenants to Protect Title.—Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the ten-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. Gentry v. Gentry, 187 N. C. 29, 121 S. E. 188.

Impeachment of Final Account of Representative.—When a final account of a representative is filed and audited, an action to impeach it must be brought within ten years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. Woody v. Brooks, 102 N. C. 334, 339, 9 S. E. 294.

When the administrator of A died eight years after filing an ex parte account, the plaintiff qualified as his executor within one month, and within seventeen months began a proceeding to make real estate assets, to which the administrator de bonis non of A became a party, and filed a complaint to recover the amount due on said final account, it was held, that although this section applied for the reason stated in Woody v. Brooks, 102 N. C. 334, 9 S. E. 294, it did not bar the action. Wyrick v. Wyrick, 106 N. C. 84, 10 S. E. 916.

Release of Right to Surcharge and Restate Final Account.—There was no express Statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been ten years, the same length of time which is now required by this section to bar such action. Nunnery v. Averitt, 111 N. C. 394, 396, 16 S. E. 683.

Action for Balance Due Heirs.—Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for 15 years after the executor filed his final account, the action was barred by either section 439(2) or this section. Culp v. Lee, 109 N. C. 675, 14 S. E. 74.

Partition Proceedings.—Where a petition in partition is filed, and the petitioners enter into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the partition and decree of owelty in view of this section, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, does not alter this result. Aldridge v. Dixon, 205 N. C. 480, 171 S. E. 777.

Recovery of Real Estate.—This section does not apply to actions for the recovery of real estate because Secs. 429, 430 apply to its exclusion. Williams v. Scott, 122 N. C. 545, 551, 29 S. E. 877.

Same—Defendant in Ejectment.—The ten years statute of limitations does not apply to defendants in ejectment who claim the land by adverse possession, where they have recognized plaintiff's claim and title thereto within that time. William v. Scott, 122 N. C. 545, 29 S. E. 877.

Same—To Declare Senior Grantee a Trustee.—An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred, where not brought within 10 years from the registration of the senior grant, by this section. Ritchie v. Fowler, 132 N. C. 788, 44 S. E. 616.

Same—To Declare Vendee a Trustee.—Since the other statutes of limitations do not expressly mention the trust relation between vendor and vendee, it could be only included under this section, and it would then be allowed only where the possession was adverse or where it was necessary to prevent some wrong or gross injustice. Bradsher v. Hightower, 118 N. C. 339, 405, 24 S. E. 120.

Same—Enforcement of Parol Trust in Favor of Wife.— Section apparently not applicable, see Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

Same—To Recover Possession of Vendee. — In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section. Overman v. Jackson, 104 N. C. 4, 10 S. E. 87.

Same—Against Remainderman. — Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. Woodlief v. Wester, 136 N. C. 162, 48 S. E. 578.

Same—Contract Action for Breach of Covenant.—An action in contract for the breach of covenants of seizin and warranty in a deed, and not in tort for fraud, is not governed by section 441 subsec. 9, but by this section. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 578.

This section applies to an action which is brought upon the covenants in the deed and not upon the theory that there was fraud or mistake in the deed, nor upon the theory that the defendant had made a fraudulent representation as to the quantity or acreage, which would entitle the plaintiff to recover damages for deceit. Shankle v. Ingram, 133 N. C. 254, 257, 45 S. E. 578.

Same—Where No Possession by Either Party.—Where there is no possession by either the mortgagor or mortgagee there can be no running of the statute. If it were intended that this section should apply where there is no possession by either party, it was utterly useless to insert in section 437, subsec. 3 the provision in regard to possession, as the statute, under such a construction of this section, would run whether there was any possession or not, and the period of limitation is the same in both sections. Woodlief v. Wester, 136 N. C. 162, 169, 48 S. E. 578. But see dissenting opinion, and see the dissenting opinion in Simmons v. Ballard, 102 N. C. 105, 111, 9 S. E. 495.

Same—Action to Foreclose Mortgage.—Since section 437 sub-sec. 3 is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before this section would be a complete reversal of the will of the legislature as plainly expressed. Woodlief v. Wester, 136 N. C. 162, 168, 48 S. E. 578.

Same—Where Mortgagee Sells and Repurchases.—Where the mortgagee sells and conveys to one who reconveys to him the mortgagor or his representatives can call upon the mortgagee for an account at any time within ten years after the cause of action accrues. Bruner v. Threadgill, 88 N. C. 361.

Same—To Declare Defendants in Execution Equitable Owners.—A suit to declare one of the defendants in execution, the equitable owner of lands for the purchase of which he has furnished the price, and his codefendants trustees, is barred by the ten-year statute of limitations. Sexton v. Farrington, 185 N. C. 339, 117 S. E. 172.

Same—Failure to Call for Grant of State Lands.—A failure of the enterer upon unappropriated and vacant state lands, or those claiming under him, to call for the grant within ten years after entry, would presume an abandonment in favor of those claiming under and by virtue of a junior grant. Frazier v. Cherokee Indians, 146 N. C. 477, 59 S. E. 1005.

Same—Taking of Land without Compensation.—Wherein an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, in which the city pleaded the statute of limitations and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. Dayton v. Asheville, 185 N. C. 12, 115 S. E. 827.

Enforcement of Decree.—An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by this statute. Hunter v. West, 172 N. C. 160, 90 S. E. 130.

Alimony—Accrual of Right.—In proceedings for alimony under the provisions of C. S., 1667, the right of a wife for alimony pendente lite arises to her, in application of the statute of limitations, when the action is commenced, and not from the time of the separation from her husband. Garris v. Garris, 188 N. C. 321, 124 S. E. 314. See note of this case under sec. 1667.

Action to Declare Trust in Land.—In Marshall v. Hammock 195 N. C. 498, 142 S. E. 776, this section was held applicable to plaintiff's right of action to declare a trust in land.

Action for Delinquent Taxes.—Neither the three nor the ten years' statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. Wilmington v. Cronly, 122 N. C. 383, 30 S. E. 9.

Application to Judgments of State Courts.—The words "any State" appearing in sec. 437(1) must be taken to mean the judgment of a court of any State including our own, but it could make no material difference even if not construed to include this state, since, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. McDonald v. Dickson, 85 N. C. 248, 252.

SUBCHAPTER III. PARTIES

Art. 6. Parties

§ 446. Real party in interest; grantees and assignees.—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (Rev., s. 400; Code, s. 177; C. C. P., s. 55; 1874-5, c. 256.)

I. Real Parties in Interest.
  A. In General.
  B. Personal Actions.
  C. Actions Concerning Realty.
II. Actions by Grantees.
III. Assignments.

Cross References.

As to actions on fiduciary bonds, see secs. 33, 40, 2162; as to actions on official bonds, see secs. 353, 354; as to assignments for benefit of creditors, see sec. 1609 et seq; as to fee tail converted into fee simple, see sec. 1734; as to the general doctrine of assignability of rights, see 3 Pomeroy Eq. Jur., sec. 1275.

I. REAL PARTIES IN INTEREST.

A. In General.

As to real party in interest in assignment see hereunder part III of this annotation.

Purpose.—The provision requiring every action to be prosecuted in the name of the real party in interst is significant, and was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a resort to another action, so as to harmonize with the constitution. Art. II, Sec. 1. Abrams v. Cureton, 74 N. C. 526.

Enabling Act.—The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. Usry v. Suit, 91 N. C. 417.

Strict Compliance.—Under this section there is no middle ground: for whenever the action can be brought in the name of the real party in interest it must be so done. Rogers v. Gooch, 87 N. C. 444.

Who Is Real Party in Interest. — The real party in interest is the party who would be benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. 5 Western Law Monthly 80.

Right to Jury Trial.—On the issue as to whether the plaintiff was the real party in interest he was entitled to a trial by jury. Hershey Corp. v. Atlantic Coast Line R. Co., 207 N. C. 122, 124, 176 S. E. 265.

Action Dismissed.—When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence. Chapman v. McLawhorn, 150 N. C. 166, 63 S. E. 721.

Actions should be brought by the real parties in interest. Hyatt v. McCoy, 194 N. C. 25, 138 S. E. 405.

Question Cannot Be Raised on Appeal.—Where an action is instituted by a corporation on the theory that it was a duly substituted trustee of an active trust, under § 449, and the plaintiff's right to sue is not raised in the lower court, the question of whether the plaintiff is the real party in interest may not be raised by the defendant for the first time in the Supreme Court. Asheville Safe Deposit Co. v. Hood, 204 N. C. 346, 168 S. E. 524.

B. Personal Actions.

Contract for Benefit of Third Person.—The principle, sanctioned by several respectable authorities, is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A. This section provides that every action must be prosecuted in the name of the real party in interest. In all the cases close attention is given to the language of the agreement. We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. Voorhees v. Porter, 134 N. C. 591, 602, 47 S. E. 31; Shoaf v. Insurance Co., 127 N. C. 311, 37 S. E. 451.

Presumption from Possession of Chose in Action. — The possession of a chose in action raises a presumption that the person producing it on trial is the real party in interest. Jackson v. Love, 82 N. C. 408; Pate v. Brown, 85 N. C. 166.

Where the plaintiff produces an unendorsed bill of lading, and the evidence tends to show that he had sold the shipment to a person named therein as consignee, it is sufficient of the intent of the consignee to transfer the title by delivery of the bill of lading, to sustain the plaintiff's right to maintain his action as the real party in interest. Lawshe v. R. R., 191 N. C. 437, 132 S. E. 160.

Ward Equitable Owner of Bond Payable to Guardian.—A bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was turned over in the guardian's settlement, notwithstanding the legal title may have been transferred by the guardian's endorsement to another. Usry v. Suit, 91 N. C. 407. See also, Melbane v. Melbane, 66 N. C. 334.

Rights of Subrogated Insurer.—When an insurer against fire has completely indemnified the insured, he is subrogated to the rights of the insured and can alone, under this section, as the real party in interest, maintain an action against the wrongdoer. Cunningham v. Railroad, 139 N. C. 437, 51 S. E. 1029.

Employer or Insurer Subrogated to Rights of Injured Employee.—Where an employee has accepted compensation awarded by the Industrial Commission for an injury sustained by him in the course of his employment he cannot maintain an action against a third person upon the allegations that the negligence of the third person was the cause of the injury as the employer or insurance carrier were subrogated to the right of action against the third person and the injured employee was not the real party in interest. McCarley v. Council, 205 N. C. 370, 171 S. E. 323.

And May Sue Third Persons.—Under this section an insurance carrier who has paid compensation to an injured employee may proceed in an action which has been instituted against a third person by the injured employee or his personal representative. Betts v. Southern Ry. Co., 71 F. (2d) 787.

Endorser Subrogated to Rights of Payee.—Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of this section to determine the liability of the parties. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Rights of Undisclosed Principal on Contract.—An undisclosed principal holding the business rights and interests under the contract, may sustain the action thereon. Peanut Co. v. R. R., 155 N. C. 148, 71 S. E. 71; Williams v. Honeycutt, 176 N. C. 102, 96 S. E. 730.

Liability of Bank Directors to Each Other.—Where directors of a bank have paid the liability of others under an agreement, each one of them may maintain his action against each of the defaulting members under this section, and such is not a misjoinder of parties prohibited by statute. Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

Agent as Real Party in Interest.—Where, under agreement with his principal, the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggreived, within the meaning of this section, and may maintain his actions to recover the excess, and also the penalty when entitled thereunto. Tilley v. R. R., 172 N. C. 363, 90 S. E. 309.

Agent for Collection.—An agent for the collection of rents is not the real party in interest. Martin v. Mask, 158 N. C. 439, 74 S. E. 343.

Assignee for Collection.—An assignee for purposes of collection is not a "real party in interest." Bank v. Rochamora, 193 N. C. 1, 136 S. E. 259; Bank v. Exum, 163 N. C. 199, 79 S. E. 498; Abrams v. Cureton, 74 N. C. 523; Morefield v. Harris, 126 N. C. 628, 36 S. E. 125; Federal Reserve Bank v. Whitford, 207 N. C. 267, 176 S. E. 584. See also, 5 N. C. Law Rev. 369.

The assignee of a chose in action may bring an action thereon in his own name, under this section, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. North Carolina Bank, etc., Co. v. Williams, 201 N. C. 464, 160 S. E. 484.

Transferor of Claim. — A plaintiff having transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection, and with directions to apply the proceeds to demands which he held for collection against the said plaintiff, an action will not lie in the name of the plaintiff on the claim, he not being the real party in interest, Wynne v. Heck, 92 N. C. 415.

Suit by Retiring State Officer. — Where a state officer goes out of office pending a suit by him in his official capacity, his incoming successor is entitled to be made a party in his stead, the state is the real party in interest, appearing in the name of its successive agents. Lacy v. Webb, 130 N. C. 546, 41 S. E. 549. See also, Peebles v. Boone, 116 N. C. 57, 44 Am. St. 429.

Quo Warranto. — Every action must be prosecuted by the party in interest, and hence, in a quo warranto, (now a proceeding by the Attorney General) while it need not appear that the relator is a contestant for the office, it must appear from the complaint that he is an inhabitant and taxpayer of the jurisdiction over which the officer, whose title is questioned, exercises his duties and powers. Hines v. Vann, 118 N. C. 6, 23 S. E. 932; Foard v. Hall, 111 N. C. 369, 16 S. E. 420.

Transfer beyond Authority of Agent. — When a special agent goes beyond the scope of his authority and sells a negotiable bond, without endorsement, the purchaser thereof is not a real party in interest. McMinn v. Freeman, 68 N. C. 342.

Actions by Executor or Administrator. — An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. Rogers v. Gooch, 87 N. C. 442. See also Sitzer v. Lewis, 69 N. C. 133; Danis v. Fox, 69 N. C. 435.

When Action by Administrator d. b. n. — Where a bond for the payment of money is executed to an administrator as such, and he dies, an action on said bond can be maintained only by an administrator de bonis non of the testator. Ballinger v. Curriton, 104 N. C. 477, 10 S. E. 664.

Administrator of Deceased Guardian as Party. — An administrator of a deceased guardian cannot maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon, had become the property of the intestate's estate. Alexander v. Wriston, 81 N. C. 193.

Personal Representative.—Where an action has been instituted by an injured employee who subsequently accepts an award of compensation, the insurance carrier should be made a party plaintiff; but this is not necessary in the case of suit instituted by the personal representative of a deceased employee. Such personal representative continues the suit which has been commenced; but after the acceptance of an award of compensation, the recovery goes, so far as necessary, to the reimbursement of the insurance carrier and only the excess to the persons entitled under the wrongful death statute. Betts v. Southern Ry. Co., 71 F. (2d) 787, 791.

Widow Entitled to Burial Expenses of Husband. — A widow who pays an account for burial expenses of her husband is the proper party plaintiff in an action against the administrator, being the real party in interest. Ray v. Honeycutt, 119 N. C. 513, 26 S. E. 127.

Action of Heirs at Law on Doubtful Claim. — Where a trustee in bankruptcy or the creditor has waived a doubtful claim in favor of a bankrupt's estate and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. Cunningham v. Long, 185 N. C. 613, 125 S. E. 265.

Parties to Interpretation of Will. — Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. Bank v. Dustowe, 188 N. C. 777, 125 S. E. 546.

Claim under Workmen's Compensation Act.—It is required by this section, that an action be prosecuted in the name of the real party in interest, and where a statute names a person to receive funds and authorizes him to sue therefor, only the person named may litigate the matter, and where a claim under the Workmen's Cimpensation Act is litigated in the name of the deceased the proceeding is a nullity and will be dismissed on appeal to the Supreme Court. Hunt v. State, 201 N. C. 37, 158 S. E. 703.

Action for Seduction. — In an action brought to recover damages for seduction, if the female is under twenty-one years of age, the father is the real party in interest; if she be over twenty-one, then the wronged female is the real party in interest. Tillaston v. Currin, 176 N. C. 482, 97 S. E. 395; Snider v. Newell, 132 N. C. 614, 44 S. E. 354; Williford v. Bailey, 132 N. C. 404, 43 S. E. 929; Scarlett v. Norwood, 115 N. C. 285, 20 S. E. 459; Hood v. Sedderth, 111 N. C. 219, 16 S. E. 397.

Slander. — Where an action is brought by a husband, without making the wife a party thereunto, for slander of the wife, and the husband alleges no special damages, his action will not lie because he is not the real party in interest. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161.

Negligent Mutilation of Dead Body. — In order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. Floyd v. R. R., 167 N. C. 55, 83 S. E. 12.

Applied in Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61.

C. Actions Concerning Realty.

Conveyance of Land Pendente Lite. — Where it is sought by the owner of land, to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest. Plotkin v. Bank, 188 N. C. 711, 125 S. E. 541.

Where a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. Barbee v. Cannady, 191 N. C. 529, 132 S. E. 572.

Action by Remaindermen. — An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real

parties in interest. Blount v. Johnson, 165 N. C. 26, 80 S. E. 882.

Action to Vacate Grant When State Not Interested. — Where the state has no interest in the land, as where title would not revest in the state, an action to vacate a grant must be brought by the party in interest in his own name, the state not being such a party. State v. Bland, 123 N. C. 739, 31 S. E. 475. See also, Carter v. White, 101 N. C. 30; State v. Bevers, 86 N. C. 588; and Henry v. McCoy, 131 N. C. 586, 42 S. E. 955.

Action by Tenant. — Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereunto while it is being cultivated he may maintain an action in his own name for the injury. He is the real party in interest. State v. Higgins, 126 N. C. 1113, 36 S. E. 113; Bridges v. Dill, 97 N. C. 227.

Where the land has broom sage growing thereon the tenant is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except only for its value for farming purposes on the leased premises. Chaucy v. Atlantic Coast Line R. Co., 195 N. C. 415, 142 S. E. 327.

Action of Tenant for Trespass. — Under the provisions of this section, the court has the power to order the owner of the title to be made a party in his tenant's action for trespass involving an injury both to the possession and to the inheritance. Tripp v. Little, 186 N. C. 215, 119 S. E. 225.

Feme Covert as Party. — The rents arising from the real estate of a feme covert belong to her under the constitution of 1868, Art. 10, sec. 6, therefore an action therefor must be brought by the wife, she being the real party in interest. Thompson v. Wiggins, 109 N. C. 509, 14 S. E. 301.

A suit by mortgagor to correct mortgage, which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgages entitled thereto, will be entertained in equity, as he is a real party in interest. Gray v. Mewborn, 194 N. C. 348, 139 S. E. 695.

Reformation of Deed of Trust.—Where a substituted trustee brings an action to reform a deed of trust and certain mortgage notes which are negotiable, the holders of the notes are necessary parties. First Nat. Bank v. Thomas, 204 N. C. 599, 169 S. E. 189.

II. ACTIONS BY GRANTEES.

Constitutionality.—This section permitting a grantee of real estate to maintain an action in his own name is not unconstitutional. It is concerned only with the mode of procedure and does not affect the merits of the case. Justice v. Eddings, 75 N. C. 584; Buie v. Carver, 75 N. C. 563.

Rights of Grantee in Ejectment Suit. — An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the person in actual possession claims under a title adverse to that of such grantor. Osborne v. Anderson, 89 N. C. 263; Johnson v. Prairie, 94 N. C. 775; Buie v. Carver, 75 N. C. 561; Bland v. Beasly, 145 N. C. 168, 58 S. E. 993. As to Summary Ejectment, see sec. 2365, and the notes thereto.

III. ASSIGNMENTS.

Editor's Note. — This section is, with a slight alteration, an almost literal translation of secs. 111, 112 of the New York Code at the time the C. C. P. was adopted. The court had so much trouble, and there was so much conflict, in deciding what was assignable, that the Legislature of that State, in order to fix with some degree of certainty what things might be the subject of assignment, repealed those sections and enacted what is now sec. 1910 of the New York Code. It provides as follows: "Any claim or demand can be transferred, except in one of the following cases: 1. Where it is to recover damages for personal injury or for a breach of promise to marry. 2. Where it is founded on a grant which is made void by a statute of the state, or upon a claim to, or interest in, real property, a grant of which by the transfer would be void by such a statute. 3. Where a transfer thereof is expressly prohibited by a statute of the State, or of the United States, or would contravene public policy." In Petty v. Rousseau, 94 N. C. 355, Ashe, J., who wrote the opinion, was inadvertent to this change in the New York law. He quoted, in full, sec. 1910 as being the annotations of Mr. Bliss on secs. 111, 112. Therefore, the decision in that case is really based upon the then statutory law of New York, and is not authority in North Carolina. See Woodcock v. Bostic, 118 N. C. 829, 24 S. E. 362.

Effect in General. — A construction was given to this section in Harris v. Burnwell, 65 N. C. 584, where Pearson, C. J., says, "it abrogates the principle of the common law, that a chose in action cannot be assigned—confers an unlimited right to assign 'anything in action' arising out of contract, and subjects the assignee to any set-off or other defense existing at the time of or before notice of the assignment; the only saving being in regard to 'negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due.' This language is as broad as it well can be; so that a note assigned after it is due, a half dozen times, will be subject to any set-off or other defense that the maker had against any one or all of the assignees at the date of the assignment or before notice thereof."

General Rule. — It would seem that something of a general rule concerning the relation of this section to assignability was laid down in Woodcock v. Bostic, 118 N. C. 830, 24 S. E. 362, in which Montgomery, J. says: "If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts would not and could not entertain a suit at the hands of an assignee, because of the uselessness to him in any event of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, even though based on contract, could be assigned if it could not possibly be of use to the assignee. The law means, when it says that a thing is assignable, that the assignment carries with it rights of property, and that those rights can be enforced in the courts. It would seem to be clear, too, that a thing to be assignable, must be the subject of assignment generally, to every one, and not to be confined in its application to particular persons."

Effect of Assignment of Negotiable Paper. — In Holly v. Holly, 94 N. C. 670, 672, it was said: "Unquestionably, the complete equitable title to, and the substantial ownership of, a note or bond, negotiable by endorsement, may, without endorsement, be passed by the payee or obligee, to another person, by a sale and delivery thereof, and in this State, the purchaser thus becomes so thoroughly the owner, that an action upon the note or bond so transferred, can only be maintained in the name of the real or equitable owner."

Assignee Sues in Own Name. — An assignee may sue in his own name, under this section, as an equitable assignee or cestui que trust could formerly have done in equity. Miller v. Tharie, 75 N. C. 151. See also, Sutton v. Owen, 65 N. C. 124.

Equitable Owner Real Party in Interest. — In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law merchant, which transfers the legal title, the equitable owner being the real party in interest may sue in his own name. Tyson v. Joyner, 139 N. C. 73, 51 S. E. 803; Ball-Thrash v. McCormick, 162 N. C. 472, 78 S. E. 303; Andrews v. McDaniel, 68 N. C. 385; Egerton v. Carr. 94 N. C. 653; Milley v. Gatling, 70 N. C. 410.

Assignee of Negotiable and Non-Negotiable Notes. — The assignee of a promissory note or bill of exchange endorsed before maturity, takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a non-negotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between original parties at the time of the assignment; bonds or sealed notes, are on the same footing with non-negotiable instruments. Spence v. Tabscott, 93 N. C. 248; Hanens v. Potts, 86 N. C. 31; Loan Association v. Merritt, 112 N. C. 244, 17 S. E. 296; See also, Andrews v. McDaniel, 68 N. C. 385; Bank v. Bynum, 84 N. C. 24.

Unauthorized Endorsement of Negotiable Paper. — The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and, as such, has, prima facie, the equitable title, and can maintain a suit thereon. Bresee v. Crumpton, 121 N. C. 123, 28 S. E. 351.

Assignment of Note by One of Joint Payees. — A note payable to three persons as executors of their testator, assigned by one of them without the concurrence of the others, does not enable the assignee to sue the makers thereon, under this section. Johnson v. Mangum, 65 N. C. 148.

Past Due Notes Subject to Defenses. — A note taken after it is due is subject to any set-off, or any other defense existing at the time of or before notice of assigment. Vaughan v. Jeffreys, 119 N. C. 144, 26 S. E. 94; Guthrie v. Moore, 182 N. C. 24, 108 S. E. 334. See also Capell v. Long, 84 N. C. 17; Mosby v. Hodge, 76 N. C. 387.

Action on Assigned Non-Negotiable Note. — The assignee of a non-negotiable note can maintain an action thereon; and so can the owner where there is no written assignment. Wilcoxon v. Logan, 91 N. C. 452.

When Judgments Treated as Contracts. — While judg-

ments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising ex delicto, and are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. Moore v. Norvell, 94 N. C. 270; Winbury v. Koonce, 83 N. C. 351.

Assignment of a Judgment Pending Appeal. — Where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought by another person, such person, and not the nominal assignee, should be substituted as plaintiff. Field v. Wheeler, 120 N. C. 270, 26 S. E. 812.

Assignor of Contract Not a Party. — The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence and he has assigned the contract to a third party, not to the action, and has no further interest therein. Vaughan v. Davenport, 157 N. C. 156, 72 S. E. 842.

When Executory Contracts Assignable. — As a general rule, executory contracts of an ordinary kind are not assignable, except that contracts involving a personal relation, or imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust, or confidence in the other party cannot be assigned. R. R. v. R. R., 147 N. C. 368, 61 S. E. 185.

Installments of Pension. — Installments of a pension payable in the future are not assignable. Gill v. Dixon, 131 N. C. 87, 42 S. E. 538.

§ 447. Suits for penalties.—Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by any one who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the state. (Rev., ss. 401, 402; Code, ss. 1212, 1213; R. C., c. 35, ss. 47, 48.)

Editor's Note. — The three provisions permitting the plaintiff to reply fraud to a plea of release in a suit for penalty; the defendant to plead satisfaction in a suit on bonds; and that the sum due, with interest and costs, discharges penalty bonds, were secs. 932, 933, 934 of the Code of 1883. They were left out of the Consolidated Statutes, but were again inserted by Laws 1925, c. 21. See §§ 447(a) to 447(c).

The construction of this section in Norman v. Dunbar, 53 N. C. 319, is that the suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, while in the subsequent case of Duncan v. Philpot, 64 N. C. 479, it is held that it should be prosecuted in the name of the state for his use. But in looking to the cases which have been maintained in the Supreme Court, and to which no objection on this ground seems to have been taken, we find that all have been in the name of the state. Branch v. R. R. 77 N. C. 347; Katzenstein v. R. R. 84 N. C. 688; Keeter v. R. R. 86 N. C. 346; Whitehead v. R. R. 87 N. C. 255; Branch v. R. R. 88 N. C. 570; Middleton v. Wilmington, etc., R. Co., 95 N. C. 167, 169; Maggett v. Roberts, 108 N. C. 174; Carter v. R. R. 126 N. C. 439, 36 S. E. 14. This uniform practice, acquiesced in, if not sanctioned by the court, must be deemed a settlement of the construction of the statute.

Constitutionality. — This section does not conflict with the constitution. Goodwin v. Fertilizer Works, 119 N. C. 122, 25 S. E. 795; Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968; Hodge v. R. R., 108 N. C. 24, 12 S. E. 1041; Katzenstein v. R. R., 84 N. C. 688.

Penalty against Railroads Recovered by Statute. — The penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action brought by the state. Hodge v. R. R., 108 N. C. 24, 12 S. E. 1041.

Applied, in fixing penalty for illegal weighing of cotton, in State v. Briggs, 203 N. C. 158, 165 S. E. 339.

§ 447(a). Suit for penalty, plaintiff may reply fraud to plea of release.—If an action be brought in good faith by any person to recover a penalty under a law of this state, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin; whether before action brought or after, shall be in anywise available or effectual. (Code, s. 932; R. C., c. 31, s. 100; 4 Hen. VII, s. 20; Rev., 1521; 1925, c. 21.)

§ 447(b). Suit on bonds; defendant may plead satisfaction. — When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such obligor, his heirs, executors or administraing to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII, c. 20; Rev., 1522; 1925, c. 21.)

§ 447(c). Sum due with interest and costs, discharges penalty of bonds.—If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also all such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly. (Code, s. 934; R. C., c. 31, s. 102; 4 Anne, c. 16; Rev., 1523; 1925, c. 21.)

§ 448. Action by purchaser under judicial sale. —Any one given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court

directing the sale; and the suit brought is under the control of the court ordering the sale. (Rev., s. 403; Code, s. 942; 1858-9, c. 50.)

No Rights Acquired by Bidder before Confirmation. — In Attorney-General v. Navigation Co., 86 N. C. 411, it is said: "The doctrine has been settled in this state, that the bidder at a judicial sale acquired no right before the confirmation of the report of the commissioner who made the sale under the order of the Court." In re Dickerson, 111 N. C. 114, 15 S. E. 1025, holds: "The sale then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with." Both cases being quoted, approved and followed in Vanderbilt v. Brown, 128 N. C. 498, 500, 39 S. E. 36.

But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. Vass v. Arrington, 89 N. C. 14.

Notice to Purchaser. — All that a purchaser at a judicial sale is required to know is that the court has jurisdiction of the subject matter and the person. Cord v. Finch, 142 N. C. 139, 54 S. E. 1009; Hackley v. Roberts, 147 N. C. 201, 60 S. E. 975; Harris v. Bennett, 160 N. C. 340, 76 S. E. 217.

Collection of Purchase Price. — The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause. Davis v. Pierce, 167 N. C. 135, 83 S. E. 182.

§ 449. Action by executor or trustee.—An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another. (Rev., s. 404; Code, s. 179; C. C. P., s. 57.)

An express trust is defined to be a trust created by the direct and positive acts of the parties, by some writing or deed, or will. 22 N. Y. 389; 28 Ind. 112. See Hepburn's cases on Code Pl. 546, 552 n.

It often seems difficult to distinguish between such trustees and those with whom or in whose name contracts are made for the benefit of others, and many of the Code states (including North Carolina by this section) make the term "trustee of an express trust" cover this latter class of persons. Bliss Code Pl. § 55.

As illustrations of the former may be mentioned: An assignee for the benefit of creditors, 4 Abb Pr. 106; an obligee of a statutory bond, 25 O. S. 567; 29 O. S. 452; one holding possession of money upon trust for the benefit of others, 1 C. C. 57; 13 Bull. 294; assignees of a contract in trust to reimburse out of the proceeds thereof third persons for advances made, 4 Keyes 514; a mortgage trustee for holders of promissory notes secured by mortgages, 29 O. S. 330; trustees appointed to take and collect subscriptions for colleges and other similar purposes, 34 Howard Pr. 320; insurance brokers holding an open policy for "those and whom it may concern," 6 O. S. 554; one to whom the legal title in a note and mortgage has been transferred for the purpose of collection, 3 Bull. 365; 7 Rec. 9; an assignee of stock subscriptions, 12 Wis. 688; see 41 O. S. 321.

Includes Suits by Agent. — This section, permitting "a trustee of an express trust" to maintain an action in his own name, by its explanation of such a trustee, that he "shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another," extends the meaning of the statute so as to include an agent who sues upon a note to him, as an agent, with the consent and for the benefit of his principal. Martin v. Mask, 158 N. C. 436, 74 S. E. 343.

Excludes Personal Representative of Trustee. — The "trustee of an express trust," as used in this section, does not include the personal representative of such trustee. Alexander v. Wriston, 81 N. C. 192.

Exception to § 446.—Under the provisions of this section a trustee of an express trust may sue without joining the one for whose benefit the action is brought, this being an exception to § 446, requiring actions to be brought by the real party in interest. Sheppard v. Jackson, 198 N. C. 627, 152 S. E. 801.

When Name of Beneficiary Undisclosed. — Under this section, when a person contracts in his own name, but really for the benefit of another, he is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not. Winders v. Hill, 141 N. C. 704, 54 S. E. 440.

Where a note was made payable to "J, cashier," and collateral security delivered to him, he being a member and cashier of the firm of "C. & J," the owners of the debt, an action for the foreclosure of the mortgage security was properly brought in the name of the cashier, he being the holder of the collateral as trustee for the firm. Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696.

Beneficiary Not a Necessary Party. — This section provides that an executor or trustee of an express trust may sue without joining with him the party equitably interested. Biggs v. Williams, 66 N. C. 429; Davidson v. Elms, 67 N. C. 229. See also, Jones v. McKinnon, 87 N. C. 294.

When Beneficiary May Be a Party. — The section, does not apply so as to exclude the beneficiary as a necessary party in a suit involving the question as to whether the trustee has exceeded his authority under the terms of the instrument creating the trust, and wherein the interests of the beneficiary may be seriously affected. Barbee v. Penny, 172 N. C. 653, 90 S. E. 805.

Suit upon Administration Bond. — In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, and in such a suit the administrator of the principal in the bond need not be joined. Flack v. Dawson, 69 N. C. 44.

When Assignor May Sue Alone. — This section applies where a judgment creditor has assigned the judgment as security, and in such case an action may be brought by the assignor without joining the assignee. Chatham v. Realty Co., 180 N. C. 500, 115 S. E. 329.

Transferee as Trustee of Express Trust. — Where a plaintiff transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties. The effect of the transfer was to vest ownership of the claim in the attorney, as a "trustee of an express trust," and the action should have been brought in his name alone, or in conjunction with those of the cestuis que trustent. Wynne v. Heck, 92 N. C. 414.

An answer setting forth that B is the real owner of a note sued upon, but that it was assigned to the plaintiff, is to be taken as meaning that the plaintiff is trustee of an express trust, and so is properly plaintiff. Rankin v. Allison, 64 N. C. 673.

Speaking Demurrer Not Allowed. — Where the holder of a promissory note in due course, etc., sues thereon, who, as it appears, is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer that the plaintiff is, in fact, suing as the agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. Union Trust Co. v. Wilson, 182 N. C. 166, 108 S. E. 500.

Question Cannot Be Raised on Appeal.—See note to § 446.

§ 450. Infants, etc., sue by guardian or next friend.—In actions and special proceedings when any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must appear by their general or testamentary guardian, if they have any within the state; but if the action or proceeding is against, or if there is no such guardian, then said persons may appear by their next friend. The duty of the state solicitors to prosecute in the cases specified in chapter entitled Guardian and Ward is not affected by this section. (Rev., s. 405; Code, s. 180; 1893, c. 5; C. C. P., s. 58; 1870-1, c. 233; 1871-2, c. 95.)

Court's Duty to Exercise Care in Making Appointment.—In Morris v. Gentry, 89 N. C. 248, 254, it was said, "It is the duty of courts to have special regard for infants, their rights and interests, when they come within their cognizance. The law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The appointment of guardians ad litem and

their duties are prescribed by a statute. But while the statute allows infants to sue by their next friends, the manner of the appointment of them and their duties are left as at the common law."

Presumption of Proper Appointment. — Where the lands of infants are sold under an order of the Superior Court upon an ex parte petition, in which the infants are represented by next friends, it is presumed that the Court protected their interests, and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N. C. 112, 9 S. E. 634.

Appointment of Next Friend in Justice's Court. — There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in Justice's court, the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the Clerk, in actions properly brought in the Superior Court. Houser v. Bonsal & Co., 149 N. C. 51, 62 S. E. 776.

Next Friend an Officer of Court. — The next friend of an infant ought always to be appointed by the court, and really he is an officer of the court, and under its supervision and control. Tate v. Mott, 99 N. C. 19.

Removal of Next Friend. — The court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Designation as Guardian Instead of Next Friend.—It would have been more regular if the representative of infants had been designated in a proceeding as next friend, rather than as guardian, but as he did not undertake to represent the infants otherwise than as next friend, it is immaterial that he was designated as guardian and not as next friend. Ex parte Huffstetler, 203 N. C. 796, 798, 167 S. E. 65.

Interest of Guardian or Next Friend. — Any person who has an interest in the action hostile to that of the infant's will not be allowed to conduct it on their behalf—whether he be guardian or next friend. George v. High, 85 N. C. 113, 114.

Foreign Guardian Sues as Next Friend. — A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this state, but when he brings suit for them as guardian it will be treated as if he were next friend. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Suits by Persons Non Compos Mentis. — There can be no question but that persons non compos mentis may sue by their next friend when they have no general or testamentary guardian. Smith v. Smith, 106 N. C. 498, 502, 11 S. E. 188.

Same—Inquisition of Lunacy Not Essential. — Where allegation of insanity of husband is admitted by demurrer, suit may be brought by his next friend though no inquisition of lunacy was had; and the wife may bring the action as such next friend, being regularly appointed. Abbott v. Hacock, 123 N. C. 99, 31 S. E. 268.

Widow May Sue by Next Friend. — In dissenting from her husband's will and applying for year's allowance, the widow, being a minor without guardian, may be represented by next friend, duly appointed. Hollmon v. Hollmon, 125 N. C. 29, 34 S. E. 99.

Infants Are Real Parties Plaintiff. — One who conducts a suit as guardian or next of friend for infants is not a party of record, but the infants themselves are the real plaintiffs. George v. High, 85 N. C. 113, 114; Krachanake v. Mfg. Co., 175 N. C. 435, 95 S. E. 851.

Infant Need Not Know of the Suit. — It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

When Infant Appears by Attorney. — A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Opposite Party Cannot Object to Appointment. — The defendant cannot object to the next friend appointed by the trial judge. Carroll v. Montgomery, 128 N. C. 278, 38 S. E. 874.

Not Subject to Collateral Attack. — The presence of a next friend or guardian ad litem to represent an infant party, as the case may be, and his recognition by the court, in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding. Sumner v. Sessoms, 94 N. C. 371, 376. See also, Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Objection by a Plea in Abatement. — The objection that the next friend has not been regularly appointed should be taken by a plea in abatement. Carroll v. Montgomery, 128 N. C. 278, 279, 38 S. E. 874.

When Next Friend Pays Costs. — While the "next friend" is not, strictly speaking, a party to the action, and generally will not be taxed with costs, yet where the Court finds the fact that he officiously procured his appointment, or was guilty of mismanagement or bad faith, it may tax him with costs. Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

Attorney's Fees. — Where it is proper for the attorneys for a ward, employed by the next friend, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for sole determination of the court, irrespective of any contract that may have been made, to be fixed with regard to the value of the services in relation to that of the estate. In re Stone, 176 N. C. 336, 97 S. E. 216.

Where Administrator Represents Minor Heir. — In an ex parte proceeding to sell land for assets, infant heirs are represented by a guardian or next friend, and the order of sale must be approved by the judge. While it is irregular for the administrator in such cases to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of the purchaser. Harris v. Brown, 123 N. C. 419, 31 S. E. 877; Syme v. Trice, 96 N. C. 246.

When Infant Reaches Majority Pendente Lite. — Where an infant institutes an action in his own name and arrives at full age before the trial, the judgment is binding on both plaintiff and defendant. Hicks v. Beam, 112 N. C. 642, 646, 17 S. E. 490.

Infants Bound by Judgment. — Infants without general guardians may appear by their next friend, appointed in the manner prescribed by the statute, and judgments rendered in such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants in the same manner and to the same extent as persons sui juris. Settle v. Settle, 141 N. C. 553, 54 S. E. 445; Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

§ 451. **Infants, etc., defend by guardian ad litem.** — In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must defend by their general or testamentary guardian, if they have one within this state; and if they have no general or testamentary guardian in the state, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idots, lunatics, or persons non compos mentis. The guardian so appointed shall, if the cause is a civil action file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After twenty days notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants. (Rev., s. 406; Code, s. 181; C. C. P., s. 59; 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2.)

As to service on corporations, infants, lunatics, etc., see sec. 483.

See note under § 1744.

Editor's Note. — This section and section 483 par. (2) were intended to afford protection to infants, persons non compos mentis, etc., against the able and the cunning who might seek to take advantage of their handicaps. There can be no question but what the requirement as to service of summons on persons falling within the purview of these sections should be strictly observed.

However, the question inevitably arises as to what is the legal effect of failure to make such summons. In

Allen v. Shields, 72 N. C. 504, it is doubted by the court whether personal service on an infant is not indispensable, with a strong intimation that it is. But it appears that our authorities are fairly uniform on the point, and the doctrine has long and almost universally prevailed, that the interests of the minor having been presented, and an answer having been filed by his general guardian, or guardian ad litem, the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. Groves v. Ware, 182 N. C. 553, 556, 109 S. E. 568; Harris v. Bennett, 160 N. C. 339, 76 S. E. 217; Glisson v. Glisson, 153 N. C. 185, 69 S. E. 55; Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975; Carraway v. Lassiter, 139 N. C. 145, 91 S. E. 968; Matthews v. Joyce, 85 N. C. 258.

Should Be Strictly Observed. — The provisions of the statute in regard to the appointment of guardians ad litem should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. Ward v. Lowndes, 96 N. C. 367, 2 S. E. 591; White v. Morris, 107 N. C. 93, 101, 12 S. E. 80.

Enforced as Mandatory. — In Moore v. Gidney, 75 N. C. 34, 38; Bynum, J., speaking for the court, says: "So careful is the law to guard the rights of infants, and to protect them against hasty, irregular and indiscreet judicial action. Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void, or set aside."

When Clerk May Appoint. — In a special proceeding by an executor to sell lands, the clerk has the power to appoint a guardian ad litem for an infant defendant, where the executor is the general guardian of such infant. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

Removal of Guardian Ad Litem. — In Carraway v. Lassiter, 139 N. C. 145, 152, 51 S. E. 968, it was said: "The Superior Court has, independently of this section, the power to appoint a guardian ad litem for an infant defendant. It may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. We can see no good reason why the clerk who acts as and for the court, may not do the same in special proceedings pending before him. The object to be obtained is the protection of the infant, whose interest is the special care of the court; the guardian ad litem is the officer of the court, and we can see no good reason or conflict with well-settled principles why it may not for any good reason appoint such guardian."

When Husband Need Not Appear. — Where an infant feme covert cestui que trust who has no general guardian, appears in a proceeding for the appointment of a trustee by guardian ad litem, the husband need not appear. Roseman v. Roseman, 127 N. C. 494, 497, 498, 37 S. E. 518.

Ward Protected by Court.—Where a guardian ad litem has been duly appointed to represent a party, who is under disability, in an action, the court will protect his interest, and though our statute specifies that a summons must be served on such persons, no practical harm would result therefrom to the ward where a guardian ad litem has been appointed, and he accepts the service of summons and presumably performs his statutory duty; and the proceedings will not be declared void as to the ward when such has been done. Groves v. Ware, 182 N. C. 553, 109 S. E. 568.

Return as Evidence of Service. — Where it is sought to condemn the lands of an infant, such infant must defend by general guardian where one has been appointed; and where service of process has been made upon the general guardian, and it appears from the officer's return of notice that service has been executed, upon the infant, such return is sufficient evidence of its service to take the case to the jury upon the question involved in the issue. Long v. Rockingham, 187 N. C. 199, 121 S. E. 461.

Decree Not Conclusive When Guardian Negligent of Interest.—A decree for the sale of land in a special proceeding is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian ad litem, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. Gulley v. Macy, 81 N. C. 356; Moore v. Gidney, 75 N. C. 34.

Irregularities Cured.—The appointment of a guardian ad litem before service of summons upon the infant is an irregularity which may be cured by the service of summons upon the infant thereafter, and the filing of the answer of the guardian, etc. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025.

Plaintiff Need Not Move for Appointment.—A plaintiff is not bound to move for the appointment of a guardian ad litem for an infant defendant; and his failure to do so is not such laches as will work a discontinuance of the action. Turner v. Douglass, 72 N. C. 127.

When Change of Venue is Erroneous. — In an action against an infant who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant, upon his arriving at age. Turner v. Douglas, 72 N. C. 127.

Vacation of Irregular Judgment.—Where it appears that there was no service of process upon infant defendants, and no guardian was appointed to protect their interests, a judgment rendered against them is absolutely void ab initio, and may be set aside at any time for irregularity. Larkins v. Bullard, 88 N. C. 35, 36; Mason v. Miles, 63 N. C. 564. See also, Pearson v. Nesbitt, 14 N. C. 315; White v. Albertson, 14 N. C. 241.

Judgment Not Subject to Collateral Attack.—Where infant defendants are served with a summons in proceedings for the partition of land and a guardian ad litem is appointed, a judgment affirming the sale cannot be set aside in a collateral proceeding for alleged fraud or irregularity. Smith v. Gray, 116 N. C. 311, 21 S. E. 200.

Appointment Valid When Infant Not Regularly Served.—The appointment of a guardian ad litem is valid, although the infant has not been regularly served with process, but has only accepted service thereof. Cates v. Pickett, 97 N. C. 21, 1 S. E. 763.

Applied to Action to Foreclose for Taxes.—In an action under § 8037 the delinquent shall be made a defendant, and if a minor he must defend by a guardian, either general, testamentary, or ad litem. Forsyth County v. Joyce, 204 N. C. 734, 738, 169 S. E. 655.

Jury Trial Waived.—It is competent for the attorney and guardian ad litem to waive a jury trial for infants, even where they have not been regularly served with summons. White v. Morris, 107 N. C. 93, 12 S. E. 80.

Nominal Plaintiff Disqualified to Represent Infant. — A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and persistent defense, in every way commendable, and approved by the Court, do not relieve the impropriety of his appointment as guardian ad litem, so long as his name appears on the plaintiff side of the docket. Ellis v. Massenburg, 126 N. C. 129, 35 S. E. 240.

Mere Colorable Interest Disqualifies. — A mere colorable interest, if at all adverse, is sufficient to disqualify either a guardian ad litem or his attorney from appearing for an infant defendant. Ellis v. Massenburg, 126 N. C. 129, 134, 35 S. E. 240; Molyneux v. Huey, 81 N. C. 106.

Supreme Court May Appoint.—The Supreme Court may appoint a guardian ad litem. Perry v. Perry, 175 N. C. 141, 144, 95 S. E. 98; Robeson v. Hodges, 105 N. C. 50.

Applied in Wyatt v. Berry, 205 N. C. 118; as to service on insane persons in Hood, Comr. of Banks v. Holding, 205 N. C. 451.

§ 452. Appointment of guardian ad litem in actions begun by publication.—In all actions and special proceedings wherever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, and it shall become necessary to serve the summons on said infants, idiots, lunatics, or persons non compos mentis by publication, it shall not be necessary to await the completion of the service of summons by publication before moving for the appointment of a guardian ad litem for said infants, idiots, lunatics, or persons non compos mentis, but a guardian ad litem may be appointed on motion at the time of the issuance of the order of publication; and the service of a summons, with a copy of the complaint or petition, can be made on the guardian ad litem returnable on the same date as the infant defendants are required to appear in the notice of publication; and after ten days notice of said summons and complaint in special proceed-

ings and after answer filed as prescribed in section 451 under this article, the court may proceed in the same cause to final judgment and decree therein, in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants, and any decree or judgment in the cause shall conclude the infant, idiot, lunatic, or person non compos mentis, defendants, effectually as if he, or they, had been personally summoned. (1919, c. 246.)

Cited in Hines v. Williams, 198 N. C. 420, 152 S. E. 39.

§ 453. Guardian ad litem to file answer.—When a guardian ad litem is appointed, he shall file an answer in the action or special proceeding, admitting or denying the allegations thereof. The costs and expenses of the answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of division shall be charged upon the land if the sale or division is ordered by the court, and, if not ordered, in any other manner the court directs. (Rev., s. 407; Code, s. 182; 1870-1, c. 233, s. 4.)

Minors Not Properly Represented Not Bound.—Where, in a proceeding to caveat a will, the interests of minors are involved, who are not properly represented, the issue of devisavit vel non cannot be answered by consent of the parties to the action so as to bind the infants. Holt v. Ziglar, 159 N. C. 272, 74 S. E. 813. See also, Moore v. Gidney, 75 N. C. 34.

§ 454. Married women. — When a married woman is a party, her husband must be joined with her, except that—

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

In no case need she prosecute or defend by a guardian or next friend. (Rev., s. 408; Code, s. 178; C. C. P., s. 56.)

Const. Art. X. sec. 6.

Cross References.—As to the Martin Act of 1911, see secs. 2507, 2515; As to personal torts, see sec. 2513.

As to earnings and damages for personal injury of feme covert, see sec. 2513.

Editor's Note.—A glance at the evolution of the law, concerning married women as parties, is both interesting and instructive in connection with this section. By the early common law the identity of a married woman was merged into that of her husband. She could not sue or be sued alone, neither could she be held on her contracts. The husband was liable for his wife's torts, and, in many cases, her less serious crimes. At a later stage she could sue and be sued if her husband was joinder as a party. Of course, the basis for this joinder was the "one person" fiction, or the theory of the identity of person. This theory crept into the common law through the ecclesiastical judges, who in turn based it upon the biblical story of the Garden of Eden. In North Carolina, by the constitution of 1868, for the first time, all the separate property of a married woman, including both realty and personalty, acquired before or after marriage, was secured to her for her sole and separate use. But the statutory evolution thus begun has been followed up by legislative and judicial action until now the personal earnings of a feme covert and damages for personal injuries to her, are her separate property, and she can sue alone to recover the same.

At present a married woman can be plaintiff or defendant in an action arising out of either contract or tort. Prior to 1911 a feme covert could be sued upon contract, without her husband being joined, if she was a free trader. By the Martin Act of 1911 a married woman may now, as to her separate property, contract and be contracted with, sue and be sued, as if sole. Since the passage of this Act, it is not necessary to join the husband in a contract action. In a 1914 case, Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820, the dictum went so far as to say that, where the wife was sued on a contract, that the husband was not a necessary, **or even a proper party.** While this is merely dictum, yet it indicates the trend of modern judicial thought.

As to tort actions, prior to 1913, it was necessary to join the husband when the wife was a party plaintiff. In 1913 the legislature gave to married women the right to sue alone for damages for personal injuries. When the wife was party defendant for her torts, at common law, the husband was joined, not because of any wrong on his part, "but," as said in Roberts v. Lisenbee, 86 N. C. 136, 137, 41 Am. Rep. 450, "from the necessity of the thing, arising from the incapacity of the wife to be sued without him." This was true even though they were living apart. The Act of 1881 restricted the husband's liability in this respect, by making him liable jointly with his wife for her torts only if he was "living with his wife." By this statute he was joined with his wife, if she was sued in tort "ex necessitate," or he could be sued alone. That act was repealed in 1921, and under the present law the husband is free from liability for his wife's torts. As yet no cases of value have arisen under the present law.

It will be seen that the cases hereunder cited must be considered in the light of this evolution of the law as embodied in this section. Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18; Shore v. Holt, 185 N. C. 212, 117 S. E. 165; 2 N. C. Law Rev. 56, 57, 58.

Capacity Generally. — Since the enlarged capacity of a married woman to have a separate property, and to be reponsible for liabilities dum sola, and on such contracts during the marriage as by the marriage act (Bat. Rev., ch. 69) she has power to make, it is provided by this section that, in actions concerning her separate property, a married woman may sue alone, and also may sue her husband and be sued by him, but that in all other instances the husband must be joined. Nicholson v. Cox, 83 N. C. 48, 50.

This section, expressly authorizes a married woman to sue and be sued, requiring only that her husband be joined with her (except in certain cases.) McLeod v. Williams, 122 N. C. 451, 461, 30 S. E. 129.

When Husband is Nonresident or Fugitive.—In an action against a married woman for the possession of personal property claimed by the plaintiff under a chattel mortgage given by her husband, where it is alleged in the complaint and admitted by demurrer that the husband is a nonresident and a fugitive from justice, the husband is not a necessary party. Heath v. Morgan, 117 N. C. 504, 23 S. E. 489.

Limitation of Actions.—The exception of married women from the statute of limitation was repealed in 1899, chapter 78, and, indeed, had no logical place in our laws after the enactment in 1868, and that she could bring suit in her own name without joining her husband. That exception was to protect a married woman from being barred when she delayed to bring action. Whitfield v. Boyd, 158 N. C. 451, 455.

The laches which will defeat the right of an heir at law of the deceased to file a caveat to his will, will now also defeat the right of such who is a marrried woman, for she is put to her action by this section. Under the seven-year statute of 1907 married woman is required to bring her action or file her caveat within three years ater becoming discovert. In re Bateman's Will, 168 N. C. 234, 84 S. E. 272.

While the general rule is that an action or proceeding to readjust a settlement made under the supervision of a competent court must be brought within three years from the time of such settlement, yet there is an exception where the settlement is made with a feme covert against whom the statute of limitations does not run pending the coverture. Briggs v. Smith, 83 N. C. 306.

The provisions of this section allowing a feme covert to sue or be sued concerning her separate property, does not remove the disability of coverture so as to allow the statute of limitations to bar a feme covert's right of action. Lippard v. Trautman, 72 N. C. 551.

When Married Woman Sues for Seduction of Daughter.—A married woman can sue for the seduction of her infant daughter where her husband has been declared insane, or is residing out of the state. Abbott v. Hancock, 123 N. C. 99, 102, 31 S. E. 268.

Action for Breach of Promise.—The husband of a plaintiff, in an action for a breach of promise of marriage, married since such action commenced, is not a necessary party thereto. Shuler v. Millsaps, 71 N. C. 297.

Husband as Agent of Wife in Action.—The joinder of the husband in an action maintainable against the wife alone, though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purposes of the suit; this does not obtain if she is insane, and his consent in such case to the entry of a judgment affecting her lands is voidable, and she may there-

after move to have it set aside. Craddock v. Brinkly, 177 N. C. 125, 98 S. E. 280.

It is manifest that to her husband's management and protection are entrusted the interest of the wife in an adversary suit, and in the absence of collusion or fraud on his part with the plaintiff, the judgment must be conclusive as to antecedent matters, and as effectual as in other cases. More especially must this be so, since the law dispenses with a guardian or prochein ami, and now leave to them alone to set up and establish any defense that either may have against the plaintiff's demand. Vick v. Pope, 81 N. C. 22, 26.

Husband May Be Joined to Aid Wife.—While a wife may sue in her own right to recover her lands, her husband may join therein to assist her in the vindication of her right. Sipe v. Herman, 161 N. C. 107, 108, 76 S. E. 556.

In an action on a note seeking to charge her personal estate, the wife and husband are properly joined as parties defendant; but he is only required to be a party for the protection of her interest, and no judgment could be rendered against him. Harvey v. Johnson, 133 N. C. 352, 355, 45 S. E. 644.

When Husband Not Served with Process.—A decree for the sale of land made in a special proceeding is not conclusive upon a feme covert defendant whose husband is not served with a process nor otherwise made a party, or leave from court to proceed without him. Gulley v. Macy, 81 N. C. 356, 357.

Wife May Accept or Refuse Aid of Husband.—As there are cases where a feme covert may sue or be sued alone and need in no case prosecute or defend by guardian or next friend, and her husband may on leave of the court and with her consent defend in her name and behalf, it would seem, unavoidably, to follow that she has capacity to accept or refuse his proffered aid to employ an attorney to prosecute her action and to make her defense. Hollingsworth v. Harman, 83 N. C. 153, 155.

Fraudulent Conveyances to Wife Recoverable.—Where an insolvent husband has conveyed property to his wife in fraud of his creditors, it may be recovered in her hands, the husband being joined as defendant, if the wife is not a free trader. If she has invested the proceeds in other property the fund may be followed. Pender v. Mallett, 123 N. C. 57, 58, 31 S. E. 351.

Action for Rents.—The rents arising from the real estate of a feme covert belong to her, and an action therefor must be brought by the feme; it is not even necessary that the husband be joined as a party. Thompson v. Wiggins, 109 N. C. 508, 509, 14 S. E. 301.

Action in Tort.—A wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. Brown v. Brown, 121 N. C. 8, 27 S. E. 998.

Husband Not a Necessary Party. — In an action by a married woman to compel the conveyance of bank stock, her husband is not a necessary party. Earnhardt v. Clement, 137 N. C. 91, 92, 49 S. E. 49.

Not Bound by Agreement to Arbitrate. — A married woman cannot bind herself by agreeing to arbitrate the question of title to land owned by her. Smith v. Bruton, 137 N. C. 79, 49 S. E. 64.

Action for Personal Injuries. — A married woman may sue, without joining her husband, to recover damages she has sustained by reason of a personal injury wrongfully inflicted; in this case, a trespass with the use of excessive force. Revisal, 408(1). Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602.

Tort Action against Husband. — While at common law a wife could not maintain an action without joining her husband, or against him personally, this was changed by this section, with relation to her separate property, and by the Legislature of 1913 under this section a wife, including the right as to personal injuries and torts, may maintain an action against her husband as in assault, for coercing her and willfully and maliciously giving her a venereal disease, in which case, punitive as well as compensatory damages may be awarded. Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206.

Action against Husband for Personal Injury. — A wife may maintain an action against her husband for personal injury sustained by her due to his negligence. Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9.

Action for Performance of Trust. — Where the husband conveyed a tract of land to S., in trust "to allow the said B. and M., his wife, to have the rents, etc., for their own use; and further, that out of said rents, etc., to support the said M. in such manner as she has heretofore lived," etc. The wife could, in her name alone, maintain an action against the trustee and the husband to compel a performance of the trust, especially as it was evident the husband refused to be associated with her, and it was probable the plaintiff might be entitled to some relief against him. Barnes v. Barnes, 104 N. C. 613, 10 S. E. 304.

Husband Made Party Defendant. — Generally and ordinarily, when a married woman brings an action, her husband must join with her in it, except "when the action concerns her separate property," or "when the action is between herself and her husband." But if he will not join her, as he ought to do, she may make him a party defendant, if need be. Barnes v. Barnes, 104 N. C. 613, 616, 10 S. E. 304; McGlennery v. Miller, 90 N. C. 215.

Guardian or Next Friend Not Needed. — Indeed, she may sue her husband, or be sued by him alone; and in no case need she prosecute or defend by a guardian or next friend. Shuler v. Millsaps, 71 N. C. 297, 298; McCormac v. Wiggins, 84 N. C. 278, 279.

It is not required that the wife, as such, prosecute or defend an action concerning her lands by guardian or next friend. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280.

Cited in Earle v. Earle, 198 N. C. 411, 151 S. E. 884.

§ 455. Who may be plaintiffs. — All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided. If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the court may order separate trials or make such other order as may be expedient. (Rev., s. 409; Code s. 183; C. C. P., s. 60; 1931, c. 344, s. 1.)

Cross References. — As to rules governing plaintiffs generally, see sec. 446; as to action on bond of outgoing clerk, see sec. 944; As to suits for penalties, see sec. 447.

Editor's Note.—The Act of 1931 added all of this section appearing after the word "plaintiffs," and omitted the phrase "except as otherwise provided" formerly ending the section. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

In General. — Plaintiffs, where interests are several, may jointly maintain an action under § 5005 of the Ohio Code (the language of which is identical with this section) where all are interested in the subject of the action, are protected from loss, if at all, by one and the same instrument, and their loss occurs at one and the same time, and all the rights of each can be fully protected in a single action without any prejudice to the defendant. 24 Circuit Court Reports of Ohio 156.

There May Be Several Plaintiffs Whose Interests Are Not Identical.—In a suit for damages to a truck where the cause of action of the individual plaintiff for damage to his truck, as well as the cause of action of the corporate plaintiff for the loss of his security by reason of the damage to said truck, both arose out of the same transaction or transaction connected with the same subject of action, namely, the damage to the same truck proximately caused by the same negligent act of the same agent of the defendant, it was held that both parties could be joined as plaintiffs. Clearly both parties plaintiff had an interest in the subject of this action and in obtaining the relief demanded. Neither this section nor section 507 requires, by word or by implication, that the causes of action of the party plaintiffs shall be identical. Wilson v. Horton Motor Lines, 207 N. C. 263, 264, 176 S. E. 750.

The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. Id.

Trustee as Plaintiff. — A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N. C. 550, 14 S. E. 77.

Non-residents Not Barred. — Non-residents may be parties plaintiff in the courts of this state. Thompson v. Western Union Tel. Co., 107 N. C. 449, 456, 12 S. E. 427; Walters v. Breeder, 48 N. C. 64; Miller v. Black, 47 N. C. 342.

Uninterested Party as Co-Plaintiff. — It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with

the assent of the other. Perkins v. Berry, 103 N. C. 131, 132, 9 S. E. 621.

Creditors as Plaintiff. — In Pelletier v. Saunders, 67 N. C. 261, 262, Rodman J., who delivered the opinion; said, "In a proceeding for the sale of lands, the creditors are not necessary parties. Nevertheless, as they have an interest, as well in the taking of the administration accounts as in the terms on which the land shall be sold, and the application of the proceeds, they must have a right to become parties at some stage of the proceedings, and we cannot see that any inconvenience, or injury to any interest, can arise by allowing them to come in at the beginning, by commencing the proceeding." See also, Ex parte Moore, 64 N. C. 90.

§ 456. Who may be defendants. — All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action. If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable. (Rev., s. 410; Code, s. 184; C. C. P., s. 61; 1931, c. 344, s. 2.)

Editor's Note.—The Act of 1931 inserted the words "either jointly, severally, or in the alternative" appearing in the first sentence of this section, and added the last sentence. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

Interest in Controversy. — In Wade v. Sanlers, 70 N. C. 277, 278, Pearson C. J., while admitting the wording of the section to be very broad refused the construction of "any person may be made defendant who claims an interest in the controversy adverse to the plaintiff" to mean "any person who claims an interest in the thing which is the subject of controversy." as placed upon it by a Superior Court Judge. However, it would seem that cases subsequent to this decision have apparently given it a wider scope. Bryant v. Kenlaw, 90 N. C. 337, 342.

This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any persons who may have a cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. McDonald v. Morris, 89 N. C. 99, 100; Batchelor v. Macon, 67 N. C. 181, 184; Harkey v. Houston, 65 N. C. 137, 139.

See also, Attorney-General v. Simonton, 78 N. C. 57, 59; Emry v. Parker, 111 N. C. 261, 264, 16 S. E. 236, and cases therein cited; Gregory v. Gregory, 69 N. C. 522, 526.

It is not everyone who may have a remote interest in a cause who must be made a party, but it will suffice if those are before the court who are in a legal sense necessary to the determination or settlement of the questions involved. McCaskill v. Lancashire, 83 N. C. 393, 399.

It has been held that this section applies only when the person applying is connected in interest with one or the other of the parties, as co-tenant with the plaintiff or in privity with the defendant, or on claim of a common possession with them. Colgrove v. Koonce, 76 N. C. 363. See also, Harkey v. Houston, 65 N. C. 137, 138.

Where alleged fraudulent conveyances are made to several grantees, they all have an interest in the subject-matter, and are necessary and proper parties in order to a final determination of the controversy. Dawson Bank v. Harris, 84 N. C. 206.

Where an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper to join them as defendants in an action for damages. Long v. Swindell, 77 N. C. 176; Gill v. Young, 82 N. C. 274, 276.

Same—Judgment Creditors. — The judgment creditors of the decedent, having an interest in the sale of realty to make assets to pay debts, are such necessary or proper parties as to entitle them to intervene in the proceedings of the executor, and make themselves parties before final judgment. Wadford v. Davis, 192 N. C. 484, 485, 35 S. E. 353.

Under this section and section 1460, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney-General to annul and vacate the charter of the corporation. Attorney-General v. Simonton, 78 N. C. 57.

A creditor of the deceased has a right, to come in and be made a party defendant, for the purpose of excepting to an admeasurement of dower, in the course of a petition by the widow. Ex parte Moore, 64 N. C. 90, 91.

Same—Plaintiff in a Creditor's Bill. — A plaintiff in a creditor's bill may join causes of action for the recovery of an indebtedness not therefore reduced to judgment; for the removal of an insolvent trustee; for the appointment of a receiver; to declare a conveyance to the creditor of the principal defendant void, and that a prior mortgage shall be foreclosed and the surplus money applied to the debts of the other creditors, and persons having an interest in these several causes of action should be made parties defendant. LeDuc v. Brandt, 110 N. C. 289, 14 S. E. 778.

Same — Wife as Defendant. — Where the plaintiff brought at an execution sale the interest of the husband in land claimed by the wife and whereon both resided, she was held entitled to come in and defend her estate and their possession. Cecil v. Smith, 81 N. C. 285.

Same—When Causes Are Separable. — Where there is no unity of design or concert of action, and the separate action of each defendant causes the single injury, the share of each in causing it, is separable and may be accurately measured. In such case the jury can properly assess several damages. Long v. Swindell, 77 N. C. 176.

Necessary Parties. — The law does not allow unnecessary and improper parties to be brought into an action. The plaintiff has the right to have his action tried upon its merits, uninfluenced and unaffected by persons who have no concern in it. McDonald v. Morris, 89 N. C. 99, 102.

In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39.

Same—Removal of Cause to Federal Courts. — A nonresident defendant surety of a contractor for the completion of the building may not remove the cause from the state to the federal court upon the ground that the resident defendants were not necessary parties to the determination of the controversy. Morgantown v. Hutton, etc., Co., 187 N. C. 736, 122 S. E. 842; Cited in Jackson County Bank v. Hester, 188 N. C. 68, 123 S. E. 308. As to who are necessary parties, see § 446 and notes thereto.

Landlord and Tenant — When Two Persons Claim as Landlord. — Where two parties, each claiming to be landlord of a tenant in possession, and one sues, the other has an interest in the controversy and may be admitted to defeat the action. Rollins v. Rollins, 76 N. C. 264.

Same—Defenses of Landlord. — Under the provisions of this section, a landlord let in to defend in a civil action for the recovery of land is not restricted to the defenses to which his tenant is confined, nor is this principle varied by the circumstance that the plaintiff is the purchaser at execution sale against such tenant, and that the latter was in possession at the date of the sale and of the commencement of the action. Maddrey v. Long, 86 N. C. 383, 385; Isler v. Foy, 66 N. C. 547.

Action to Recover Land—Joint Owner Made Party Defendant. — In an action to recover land a third party, claiming to be joint owner with defendant, has the right, on affidavit, to be let in as a party defendant. Lytle v. Burgin, 82 N. C. 301, 303.

Same — Purchaser under Mortgage Sale as Party. — In Keathly v. Branch, 84 N. C. 202, the mortgagor was sued, and the purchaser of the land sold under the mortgage was allowed to come in and set up his own title.

Same—Action against Administrator. — Where a suit was pending by the next of kin against an administrator for the distribution of the estate in his hands, and the defendant died, the action could not be continued by the next of kin, and the court had no power to allow an admin-

istrator de bonis non to be made a party plaintiff in the pending action. Merrill v. Merrill, 92 N. C. 657.

Same—Undivided Interest in Lands. — One who claims an undivided interest in lands in proceedings to sell them and divide the proceeds among tenants in common and to pay debts, etc., may be properly made a party to such proceedings. McKeel v. Holloman, 163 N. C. 132, 79 S. E. 445.

Same—Adverse Holder to Title to Both Parties. — In an action for the recovery of real estate, a third person who claims title paramount and adverse both to plaintiff and defendant, should not be permitted to make himself a party to the action. Colgrove v. Koonce, 76 N. C. 363.

Same—Authority of Clerk. — The clerk of the Superior Court, under the general provisions of this section, has the authority to permit persons claiming an interest in the land to be made a party defendant. Empire Mfg. Co. v. Spurill, 169 N. C. 618, 86 S. E. 522.

Parties for Purpose of Setting up Counterclaim.—Where a mother has placed her son in a sanitarium for treatment and is personally responsible for the services therein rendered, in an action to recover therefor against her she may not qualify as guardian for her son and make herself and him parties for the purpose of recovering for him damages upon a counterclaim alleged to have been caused by malpractice, as such does not fall within the scope of the plaintiff's cause of action, and she in her capacity as guardian is not a necessary party under this section or § 460. Michigan Sanitarium, etc., Ass'n v. Neal, 194 N. C. 401, 139 S. E. 841.

Before allotment of dower is made in the lands of a deceased husband dying intestate his heirs at law should be made parties plaintiff or defendant. Holt v. Lynch, 201 N. C. 404, 160 S. E. 469.

Surety.—Where a contractor gives a surety bond for the faithful performance of a contract for the cutting of timber, it is not necessary to first ascertain by action or otherwise the amount of the liability of the contractor before uniting his surety as a party to an action for damages for its breach, the surety being a proper party for the complete determination or settlement of the question involved. Watson v. King, 200 N. C. 8, 156 S. E. 93.

Junior Mortgagee.—In an action to set aside a sale under a deed of trust the junior mortgagee should be made a party. Lockbridge v. Smith, 206 N. C. 174, 173 S. E. 36.

Assignee of Judgment and Levying Officer.—In an action against the makers of a note and to have a judgment obtained by one of the makers against the payee applied to the payment of the note, it was held that the assignee of the judgment and the sheriff, who was about to obtain execution on the judgments, were properly made parties defendant. The principal relief sought was against the makers and the relief sought against the other defendants was but incidental. North Carolina Joint Stock Land Bank v. Kerr, 206 N. C. 610, 175 S. E. 102.

In an action against a stockholder in an insolvent bank to collect the statutory assessment on his stock parties who had contracted to pay the liabilities of the bank in case of insolvency and save the stockholders from liability should have been made parties defendant on motion of defendant stockholder. Hood v. Burrus, 207 N. C. 560, 178 S. E. 362.

Joinder of Beneficiaries in Deeds of Trust.—In an action by a judgment creditor to set aside alleged fraudulent conveyances of property by deeds of trust and mortgages as made to hinder, delay and defraud him in the collection of his judgment under execution, the joinder therein of the grantees and beneficiaries in the deeds is not objectionable as a misjoinder and demurrer to the complaint alleging such conveyances entered on the ground of misjoinder of causes and parties, and that it failed to state a cause of action is properly overruled. Moorefield v. Roseman, 198 N. C. 805, 153 S. E. 399.

Review on Appeal.—The action of the trial judge in making necessary parties to an action is reviewable on appeal, and the making of proper parties is addressed to his sound discretion and not reviewable. Williams v. Hooks, 200 N. C. 419, 157 S. E. 65.

Cited in Jeffreys v. Hocutt, 195 N. C. 339, 344, 142 S. E. 226; Mack Truck Corp. v. Wachovia Bank & Trust Co., 199 N. C. 203, 154 S. E. 42; Shemwell v. Lethro, 198 N. C. 346, 151 S. E. 729; Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39.

§ 457. Joinder of parties; action by or against one for benefit of a class.—Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it: Provided, however, this section shall apply only in actions concerning such certificates and/or policies of insurance. (Rev., s. 411; Code, s. 185; C. C. P., s. 62; 1933, c. 182.)

Cross Reference. — As to real parties in interest, see sec. 446 and annotations thereunder. As to plaintiffs and defendants generally, see annotations secs. 455, 456; as to amendment by adding and striking out parties, see sec. 547 and annotations thereunto.

See note under § 507.

Editor's Note.—The last sentence of this section, relating to unincorporated, beneficial organizations, fraternal orders, etc., was added by Public Laws 1933, c. 182.

Parties Not Necessary to Determination.—See note under § 511.

Persons in Interest. — Persons in interest are necessary parties to a final adjudication. Meadows v. Marsh, 123 N. C. 189, 193, 31 S. E. 476.

But it is necessary as a rule that all defendants have a responsible interest; a judgment that determines points of law adverse to a person, is not sufficient ground for making him defendant. Clark v. Bonsal & Co., 157 N. C. 270, 72 S. E. 954.

In construing the same provision of the Ohio statute the negative rule is stated as follows: "If there is no unity of interest there can be no joinder of plaintiffs." See 51 O. S. 433.

Where the stockholders of an insolvent bank authorize the trustee of the bank to bind them individually, but not jointly, for money to be borrowed on their credit and agree to repay the same in proportion to the amount of the stock held by each, they are properly joined as defendants in an action to recover money so lent, since the subject of action is of common and general interest. Hanover Nat. Bank v. Cocke, 127 N. C. 467, 37 S. E. 507.

Breach of Trust. — The principal actress in a breach of trust and fraud, must be joined with the other defendants, alleged to have concurred with her as coadjutors. Paxton v. Wood, 77 N. C. 11, 15.

Will Not Yet Established. — One who claims under a will, which is not established, must have before the court all the parties interested, to establish it. Thompson v. Applewhite, 16 N. C. 460.

Joint Contractors. — If a quarry company and a stone company contracted jointly to furnish rock, both companies were interested in an action to recover the amount due to each company, and were properly joined as plaintiffs. Balfour Quarry Co. v. West Const. Co., 151 N. C. 345, 66 S. E. 217.

A petition to vacate a grant, brought against a person in possession by purchase from the original grantee, where such grantee is not before the court, will be dismissed. Tyrrell v. Logan, 10 N. C. 319.

When Wife an Unnecessary Party. — A wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone, her right being unaffected by the conveyance. Browning v. Pratt, 17 N. C. 44

The executor, and not the heirs, represents the estate where land is directed by will to be sold and converted into money, and the latter are not necessary parties to a suit concerning the disposition of and charges on such estate. Harris v. Bryant, 83 N. C. 568.

It is not necessary to join as parties the heirs of a deceased tenant in common who disposed of his interest in the common property pendente lite. Dawkins v. Dawkins, 93 N. C. 283.

Ulterior Legatees as Parties. — In an action against an executor, the ulterior legatees should be parties where it is sought to charge him with a fund arising out of a sale of land under a power in a will, the land being bequeathed to plaintiff for life, and after his death to his children, with a remainder over in case of his death without children. Peacock v. Harris, 85 N. C. 147.

Donee in Suit by Donor. — A deed by a feme covert conveying slaves to her after the death of the donor, creates an interest which survives to her, after the death of her husband, and she is a necessary party to a bill by him, seeking relief upon her title. Kornegay v. Carroway, 17 N. C. 403.

Unconnected Parties with Common Interest. — When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause. Virginia-Carolina Chemical Co. v. Floyd, 158 N. C. 455, 74 S. E. 465.

Joinder Necessary to Disposition of Cause. — Demurrer for misjoinder of parties is properly overruled, where it appears that the two defendants are so intimately connected with the transactions that it would be almost impossible to investigate any of the grounds of complaint unless both are made parties. Oyster v. Iola Min. Co., 140 N. C. 135, 52 S. E. 198.

Insolvency of Defendant. — Mere insolvency of a defendant can not alone determine the right of a plaintiff to join him with others in an action for tort, if he is liable, since the test is in the validity of the cause of action and the good faith of the plaintiff in making the joinder, and insolvency does not destroy the remedy, but merely effects the prospects of collection. Hough v. Southern R. Co., 144 N. C. 692, 57 S. E. 469.

Party Unheard of for Years. — Where a person concerned in interest is stated in the bill to have moved away and not since heard of for many years, so that he cannot be served with process, that is a good reason as between third parties for not making him; and the court will proceed to a hearing notwithstanding. Ingram v. Lanier, 2 N. C. 221.

Tenant in Common May Sue Alone. — One tenant in common may sue without joining his cotenants for the recovery of the possession of the common property. Thames v. Jones, 97 N. C. 121, 1 S. E. 692. See also, Wilson v. Arentz, 70 N. C. 670.

Suit against Unincorporated Society. — This section permitting the joinder of parties and recognizing representation by common interests, cannot have application to an attempted suit against an unincorporated society, when no individual has been made a party defendant, or appears to defend the action in behalf of himself or other members of the society. Tucker v. Eatough, 186 N. C. 505, 120 S. E. 57.

Action by Member of Congregation. — Where, there is no higher governing body in any denomination than the congregation, every member has such a beneficial interest as would enable him, in behalf of his brethren and associates, to maintain an action to restore a lost title deed for the church at which he worships, and for the removal of trustees who have attempted to defraud their beneficiaries, and for the substitution of others or the adjudication that the title is in the congregation at large. Nash v. Sutton, 109 N. C. 550, 553, 14 S. E. 77.

A complaint in an action by the state on the relation of certain parties claiming to be school trustees against defendants, also claiming to be such officers, is not subject to demurrer for misjoinder of parties because of no community of interest between plaintiffs; their terms being separate and distinct. School Trustees v. Baker, 164 N. C. 382, 80 S. E. 415.

That the defendants have separate defenses does not affect the plaintiff's right to sue them jointly, if he has a cause of action against them in which they may be properly joined. Davis v. Rexford, 146 N. C. 418, 59 S. E. 1002.

One having a joint and several cause of action in tort against several may sue such of them as he may elect. Gudger v. Western, etc., R. Co., 87 N. C. 325.

Consent of Proper Plaintiff. — Notice to a person to show cause why he should not be made a party was an invitation to make him a party plaintiff if he chose, or notice to make him a party defendant in invitum. It was therefore a substantial compliance with the statute to serve such notice on him. Emry v. Parker, 111 N. C. 261, 264, 16 S. E. 236; McCormac v. Wiggins, 84 N. C. 278.

Same—Suit by Purchaser against Mortgagee. — A purchaser of land from a mortgagor upon consideration that the former pay off the mortgage, the amount of which the latter agreed to ascertain, but failed or refused so to do, may maintain his action against the mortgagee as a necessary party under this section as the mortgagee refused to be joined as a party plaintiff, for an accounting, in order that he may relieve the land from the lien of the mortgage, and remove the cloud upon his title. Elliott v. Brady, 172 N. C. 828, 90 S. E. 951.

Same—Administrator d. b. n. — If an administrator de bonis non refuse to join as plaintiff; he must be made a party defendant. Hardy v. Miles, 91 N. C. 131; Wilson v. Pearson, 102 N. C. 290, 9 S. E. 707.

Necessity for Summons. — When additional parties plaintiff are made, no summons issues, because the plaintiff is the moving party, and comes into court voluntarily. Reynolds v. Smathers, 87 N. C. 24; Jarrett v. Gibbs, 107 N. C. 303, 12 S. E. 272. But if the party objects to appearing as plaintiff and he is made a party defendant, under this section, he must be served with summons. Plemmons v. Southern Improve. Co., 108 N. C. 614, 13 S. E. 188.

Existence of Common Interest of Many Persons. — The construction of this section, "has been established by the courts, and the rule is settled, as already stated, that where the question to be decided is one of common or general interest to a number of persons, the action may be brought by or against one or all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others, even though they have no common or general interest in the question at issue, and the necessary facts to bring the case within one or the other of these conditions must be averred." Bronson v. Wilmington, N. C. Life Ins. Co., 85 N. C. 411, 414, quoting Pom. Rem. sec. 391. The cases of Glenn v. Farmers Bank, 72 N. C. 626; Von Glahn v. De Rosset, 81 N. C. 467, are cases sustaining the proposition here laid down. See also, Thames v. Jones, 97 N. C. 121, 1 S. E. 92.

The exception to the general rule that all persons interested in and to be affected by the determination of the suit must be made parties on one or the other side obtains when they "may be very numerous and it may be impractical to bring them all before the court," a rule prevailing in the former equity practice, and recognized by the express terms of this section. Bronson v. Wilmington N. C. Life Ins. Co., 85 N. C. 411, 414; Glenn v. Farmers Bank, 72 N. C. 626; Foster v. Hackett, 112 N. C. 546, 554, 17 S. E. 426; Story Eq. Pl., sec. 122.

But where one rests his right to sue alone in behalf of himself and others on the ground that the parties in interest are so numerous that it is impractical to bring them before the court, he must so allege. Foster v. Hackett, supra; Thames v. Jones, 97 N. C. 121, 1 S. E. 692; McMillan v. Reeves, 102 N. C. 550, 9 S. E. 449.

§ 458. Persons severally liable. — Persons severally liable upon the same obligation, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff. (Rev., s. 412; Code, s. 186; C. C. P., s. 63:)

As to joint and several debators, see sec. 497.

Makers and Endorsers of Bills and Notes. — The makers and endorsers of bills of exchange and promissory notes, or any of them, may be joined as defendants. Wooten v. Maultsby, 69 N. C. 462, 463.

Judgment as a Merger.—Between the parties to an action wherein a judgment is rendered the judgment is a merger and the note or instrument sued upon is extinguished; but as to sureties or indorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument. Bank v. Eureka Lumber Co., 123 N. C. 24, 27, 31 S. E. 348.

Action on Surety Bond. — In an independent action by plaintiff in claim and delivery to recover upon the defendant's surety bond damages for the deterioration, etc., of the property wrongfully detained, the surety may be sued alone without joining the principal defendant in the former action. Moore v. Edwards, 192 N. C. 446, 135 S. E. 302.

In an action against one surety on an official bond, the other sureties need not be joined. Brown v. McKee, 108 N. C. 387, 391, 13 S. E. 8. See also, Syme v. Bunting, 86 N. C. 175; Flack v. Dawson, 69 N. C. 42.

Action for Trust Funds Loaned by Guardian.—Where a guardian lent trust funds to a firm of which he was a member and took their note payable to himself, it cannot be objected that the guardian is not made a party to a suit brought thereon by the husband of the cestui que trust, to whom the guardian had assigned it, as under this section,

persons severally liable may all or any be included as defendants. Gudger v. Baird, 66 N. C. 438, 441.

Cited in Wachovia Bank, etc., Co. v. Black, 198 N. C. 219, 151 S. E. 269.

§ 459. Persons jointly liable.—In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts. (Rev., s. 413; Code, s. 187; R. C., c. 31, s. 84; 1871-2, c. 24, s. 1.)

Editor's Note.—Contracts made by copartners (or other joint obligors) were made separate by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against others afterwards, by the Revised Code, c. 31, sec. 84. This provision was not introduced into the C. C. P., and hence, the principle governing contracts as construed at common law was restored. The necessity for remedy arose. The omitted section, which in Merwin v. Ballard, 65 N. C. 168, was decided to have been repealed, was enacted at the session of the general assembly of 1871-72, c. 24, sec. 1, which was sec. 187 of the Code, and now constitutes this section. See Rufty v. Claywell, 93 N. C. 306, 308; and Merwin v. Ballard, supra.

Effect.—In Rufty v. Claywell, 93 N. C. 306, 308, it was said: "The result is to render contracts joint in form, several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint. * * * * That the contract possesses the two-fold quality of being joint as well as several in law, cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York. Standard v. Mattin, 7 How. Pr. 4; Lakey v. Kingan, 13 Abb. Pr., 192."

A firm in Maryland gave its promissory note to A signed in the name of the firm, and A sued one of the partners alone, he was permitted to do so, as this section does not affect the contract, but only extends the remedy. Palyart v. Goulding, 1 N. C. 691.

Partnership Liability. — Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners, Hanstein v. Johnson, 112 N. C. 253, 17 S. E. 155. See also, Daniel v. Bethell, 167 N. C. 218, 83 S. E. 307; Bain v. Clinton Loan Ass'n, 112 N. C. 248, 253, 17 S. E. 154.

Where a judgment has been obtained in an action against a partnership and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process. Daniel v. Bethell, 167 N. C. 218, 83 S. E. 307.

Procedure in Partnership Actions.—Where a judgment is taken against two or three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered, it is only when the liability is joint and not several that the motion in the cause is proper. Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815.

Cited in Jones v. Rhea, 198 N. C. 190, 192, 151 S. E. 255.

§ 460. New parties by order of court; intervener.—The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the right of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs. The court may make such an order. (Rev., s. 414; Code, s. 189; C. C. P., s. 65.)

Cross References.—As to necessary and proper parties, see secs. 446, 447, 448, 449, 450, 451, 454, 455, 456, and annotations thereunder; as to demurrer for defect of parties, see sec. 511; as to intervention in attachment, see sec. 829; as to claim and delivery, see sec. 840.

Court Brings in New Parties. — The court, to the end that substantial judgment may be done, may before or after judgment direct the bringing in of new parties. Walker v. Miller, 139 N. C. 448, 5 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep 805; Bullard v. Johnson, 65 N. C. 436.

In General. — In construing the section of the Ohio Code which is practically identical with the first sentence of this section, the court, in 14 Ohio State Reports, 302, 306, holds that the language of the section is permissive with the exception of the last clause which is mandatory. Note the employment of the words "may" and "must" in the first sentence of this section.

This section serves to confer upon the trial court the power if not as a matter of right, then as a matter in his discretion, to allow an intervener to claim property while it is still in custodia legis. Unaka, etc., Nat. Bank v. Lewis, 203 N. C. 644, 166 S. E. 800.

Necessary Parties.—When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. McKeel v. Holloman, 163 N. C. 132, 134, 79 S. E. 445; Maxwell v. Barringer, 110 N. C. 76, 84, 14 S. E. 516; Parton v. Allison, 111 N. C. 429, 431, 16 S. E. 415; Kornegay & Co. v. Farmers, etc., Co., 107 N. C. 115, 117, 12 S. E. 123; Burnett v. Lyman, 141 N. C. 500, 54 S. E. 412; Barbee v. Cannady, 191 N. C. 529, 132 S. E. 572; Fry v. Pomona Mills, 206 N. C. 768, 175 S. E. 156.

Persons Entitled to Intervene.—A claimant under another title to land in dispute between parties to a suit cannot intervene. Asheville Division v. Aston, 92 N. C. 588; Keathly v. Branch, 84 N. C. 202; Bryant v. Kinlaw, 90 N. C. 337, 341.

The right of an outside claimant to intervene is well settled by precedent, and, if not directly authorized by statute, subserves the general policy of the new system which aims to adjust in one action, when practicable, conflicting claims to the same property. Sims v. Goettle Bros., 82 N. C. 269, 271.

A party may intervene who has an interest in the controversy, but not when he claims an interest in the thing which is the subject of controversy. Wade v. Sanders, 70 N. C. 277; Asheville Division v. Aston, 92 N. C. 588, 589.

But when the action is for the recovery of real or personal property, a person not a party to it, who has an interest in the subject-matter of the action, may, upon his application, be made a party by proper amendment. Kornegay & Co. v. Farmers, etc., Co., 107 N. C. 115, 117, 12 S. E. 123.

The right of interpleader given by this section was intended to apply to a controversy or action properly constituted in court. Bates v. Lilly, 65 N. C. 232, 233; Millikan v. Fox, 84 N. C. 107, 108, 109.

Necessity Must Clearly Appear.—An order to bring additional parties into an action will not be granted until the necessity for making them parties clearly appears. Lee v. Eure, 92 N. C. 283.

To Order New Process.—A court has no power to order a new process to bring in a new defendant during the pendency of a suit. Camlin v. Barnes, 50 N. C. 296.

To Validate Action by Making Necessary Parties.—The court has no authority to correct a pending action, that cannot be maintained, into a new one by admitting a new party plaintiff solely interested, and allow him to assign a new and different cause of action, if the defendant shall object. There is neither principle, nor statute, nor practice that allows such a course of procedure. An action separate and distinct from the pending one, must be begun according to

the ordinary course of procedure. Merrill v. Merrill, 92 N. C. 657, 665; Turner v. Turner, 96 N. C. 416, 2 S. E. 51.

Consent of the Parties.—Unless by consent of the parties, only such new parties can regularly be admitted, by amendment, to the action as are necessary to its proper determination; but, where defendants do not object to such amendment introducing new plaintiffs, their assent is to be taken as implied. Richards v. Smith, 98 N. C. 509, 4 S. E. 625.

Determination of Right Preliminary to Proceeding with Suit.—Where one is entitled, as a matter of right, to intervene in a suit and applies for leave to do so, it is error to proceed with the case until the question of such right is determined. Jones v. Asheville, 116 N. C. 817, 21 S. E. 691, citing Keathly v. Branch, 84 N. C. 202.

Pleadings.—Amendments by the court to the complaint, and the bringing in of new parties, which merely broadens the scope of the action so as to take in the whole controversy for its settlement in one action, and made without substantial change in the action as originally constituted, do not change the original cause, but are within the contemplation of our statute, and may be allowed by the court. Lumberman's Mut. Ins Co. v. Southern R. Co., 179 N. C. 255, 102 S. E. 417.

A Partner Made a Party after Judgment. — Where a partner was not served with summons, he may be made a party after judgment is rendered, and then execution may issue against his separate property. Daniel v. Bethell, 167 N. C. 218, 83 S. E. 307.

Proceedings Supplemental to Execution. — Proceedings supplemental to execution are in the nature of a creditor's bill, and it being the policy of the law to settle the entire controversy in one action, it is not error to permit a third party to interplead and assert title to the property which is sought to be subjected. Munds v. Cassidey, 98 N. C. 558, 4 S. E. 353, 355.

Action for Conveyance of Land.—During the pendency of an action relating to land between P and C, in which there was subsequently a decree directing P to convey the land to C upon the payment by the latter of the balance of the purchase money, P conveyed to other parties; thereafter C brought suit for the land against P and his grantees, who were in possession: Held, that P was not a necessary party, and it was not error to allow plaintiff to enter a nonsuit as to P, the grantor of the other defendants. Carr v. Alexander, 112 N. C. 783, 17 S. E. 577.

Real Owners as Parties in Action between Lessor and Lessee.—Where lessors sued lessees for rent, and the latter showed, as a counter claim, that the lessors had no right to make the lease, and that the real owners thereof had brought suit against one of the lessees, and would recover damages for its use during such lease, the persons claiming as real owners should be made parties to the action. McKesson v. Mendenhall, 64 N. C. 286.

In an action to set aside a deed to a purchaser at a foreclosure of a tax sale certificate, the purchaser at the sale, the owners of the property and all persons having any interest in the property should be made parties for a complete determination of the controversy. Buncombe County v. Penland, 206 N. C. 299, 173 S. E. 609.

Limitation of Parties.—The statute does not confer the power to make parties to actions generally, but it designates particularly a variety of classified cases in which it may be done, thus clearly indicating a limitation upon the power conferred, and recognizing its importance to the original parties to the action. Who shall and who shall not be made additional parties, are questions in many cases of serious moment, and we can see no reason why the decision of a question of law, arising in the exercise of the power to make it, shall not be reviewed like the decision of any other question of law affecting the merits in the progress of an action. There is nothing in the statute or in the nature of the power that forbids it, and justice may require it. Merrill v. Merrill, 92 N. C. 657, 660.

When Trustee is Necessary Party.—Where the plaintiff claims under a voluntary conveyance made by cestui que trust, he cannot, in any form of action, obtain the legal title and possession until the trustee is made a party, which may be done under this section. Matthews v. McPherson, 65 N. C. 191.

Action against Sheriff.—When a sheriff has money in his hands raised under executions against the same defendant, in favor of two or more different creditors, and the money is claimed by one of the creditors, to the exclusion of the others, he may, for the purpose of asserting his claim, obtain a rule against the sheriff, and under this section cause the other creditors to be brought in by notice. Dewey v. White, 65 N. C. 225.

After Nonsuit.—No one can be made a party to an action after nonsuit therein. Shell v. West, 130 N. C. 171, 41 S. E. 65.

Cited in Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729; Mack Truck Corp. v. Wachovia Bank & Trust Co., 199 N. C. 203, 154 S. E. 42.

§ 461. Abatement of actions. — 1. No action abates by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survives, or continues. In case of death, except in suits for penalties and for damages merely vindictive, or in case of marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

2. After a verdict is rendered in any action for a wrong, the action does not abate by the death of a party.

3. At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it directs and upon application of any person aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than twelve months from the granting of the order.

4. No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor, or against the corporation in case a new receiver is not appointed. (Rev., s. 415; Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46, s. 43.)

As to damages for wrongful death, see secs. 160, 161.

Death of a Party.—No action abates with death except as herein provided. Wood v. Watson, 107 N. C. 52, 55, 12 S. E. 49; Sledge v. Reid, 73 N. C. 440, 443; Baggarly v. Calvert, 70 N. C. 688, 689.

In case of death, except in suits for penalties and for damages merely vindictive, the court, on motion, may allow the action to be continued by or against the personal representative of the deceased. Shields v. Lawrence, 72 N. C. 43, 45; Latham v. Latham, 178 N. C. 12, 100 S. E. 131.

If a defendant to a cause in the Supreme Court die pending the suit there, his representative may be made a party by process from that court. Justices v. Crawford, 8 N. C. 17.

Actions for Penalties.—"The court has no power in actions for penalties to make the personal representative of a deceased defendant a party, and in this condition of the record the action must abate." Wallace v. McPherson, 139 N. C. 297, 51 S. E. 897.

Where an action was brought against the administrator of a clerk on his official bond, for the penalty, for issuing a writ without requiring security to the protection of the bond, the court held that the right to sue for the penalty abated at the death of the clerk. Fite v. Lander, 52 N. C. 247.

Continuance of Action.—In case of death, the court, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. Pennington v. Pennington, 75 N. C. 356, 359.

State's Action upon Official Bond.—In an action brought by the state upon official bonds, the relator is but an agent of the state in seeking to recover the moneys due, and if he dies or goes out of office the action does not abate. Davenport v. McKee, 98 N. C. 500, 508, 4 S. E. 545.

Petition to Make Assets.—An administrator d. b. n. cannot be compelled by the creditors of an estate to proceed with a petition to make assets begun by the former administrator, deceased. Brittain v. Dickson, 111 N. C. 529, 16 S. E. 326.

Right of Counterclaim Survives to Executor.—Under the laws of New York State, and of North Carolina and under

this section which provide that, on the death of any person, all demands against him with certain exceptions and the right to prosecute any action or proceeding thereon shall survive against his executors, a claim against a firm of factors doing business in New York, arising out of a consignment of goods to such firm for sale, may be set up as a counterclaim in an action brought in North Carolina against the owner of such claim by the executors of a general partner in such firm of factors. Davis v. Bessemer City Cotton Mills, 178 Fed. 784.

Survival of Insurance Due.—The member of an insurance order becomes entitled, as a matter of right, to the sick benefits accruing to him under his policy of insurance, and upon his death without having received payment thereof the cause of action against the order survives and is enforcible under this section. Kelly v. Trimont Lodge, 154 N. C. 97, 69 S. E. 764.

Assignment Pendente Lite.—Under this section a cause may proceed, notwithstanding a transfer of the property, in the name of the original party, or the assignee may be allowed to be substituted in his place by the express provisions hereof. Davis v. Higgins, 91 N. C. 382, 388.

Actions for Personal Torts.—At common law, a right of action sounding in tort for personal injuries inflicted does not survive the tort feasor, and the doctrine is not changed where the injury does not cause death by this section, providing that no action shall abate by death, etc., or that the court may allow the action to continue, etc.; these provisions relating to such actions as survive, and not to actions for personal injuries, which do not survive. Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813.

Personal Injuries. — An action brought by a plaintiff against a railroad company, to recover damages for personal injuries, does not abate by the death of the plaintiff. Peebles v. North Carolina R. Co., 63 N. C. 238, 239. See also, Collier v. Arrington, 61 N. C. 356, 357.

Action for Trespass. — In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830.

Breach of Promise. — An action for damages for breach of marriage does not abate upon the death of the defendant. Allen v. Baker, 86 N. C. 92; Shuler v. Millsaps, 71 N. C. 297.

Action for Seduction. — An action by a father for the seduction of his daughter abates by the death of the father, and cannot be revived by his executors. McClure v. Miller, 11 N. C. 133.

Mental Anguish. — An action against a telegraph company to recover for mental anguish caused by its delay in delivering a telegram dies with the person. Morton v. Western Union Teleg. Co., 139 N. C. 299, 41 S. E. 484.

Action of Deceit. — An action of deceit may be brought against an executor for the deceit of testator in selling an unsound slave. Helme v. Sanders, 10 N. C. 563, 565; Arnold v. Lanier, 4 N. C. 143.

Trover. — An action of trover does not abate by the death of the party doing the wrong. Weare v. Burge, 32 N. C. 169.

Right of Appeal. — The right of appeal is not lost on account of the death of the adverse party. Wood v. Watson, 107 N. C. 52, 12 S. E. 49.

Coverture. — Coverture is recognized and treated as a disability in this section. State v. Troutman, 72 N. C. 551, 553.

Want of Jurisdiction. — The want of jurisdiction is a ground of abatement. Newman v. Tabor, 27 N. C. 231; Allison v. Hancock, 13 N. C. 296; Green v. Mangum, 7 N. C. 39.

Administrator d. b. n. Bound by Judgment. — A privity exists between an administrator de bonis non and the first administrator, as well in the case of plaintiff as of defendants, so that a judgment against the first administrator is conclusive evidence against the administrator de bonis non in an action to renew it. Thompson v. Badham, 70 N. C. 141.

When Action Abates. — Where a cause of action survived, the action does not abate by the death of the plaintiff ipso facto, but only upon the application of the party aggrieved; and then only in the discretion of the court, and in a time to be fixed, not less than six months nor more than one year from the granting of the order. Moore v. North Carolina, R. Co., 74 N. C. 528.

In Moore v. Moore, 151 N. C. 555, 557, 66 S. E. 598, Hoke, J., said: "Under this section, where the right survives, an action does not abate by the death of a party, except by order of the court, Burnett v. Lyman, 141 N. C. 500; and while we have held in Rogerson v. Leggett, 145 N. C. 7, that a failure of the court to make such order for a period of eight years or more, and when there was nothing to indicate that the heirs of deceased were aware that an action was pending against them, was such an abuse of legal discretion as to constitute error, and might be available in some instances as a defense, the principle does not apply, we think, to the facts presented here, when the mother of these heirs was and continued to be a party of record, and these heirs themselves, or all who were resident in the state, were served within two years from the death of their ancestor and within the time fixed by order of the court; for we hold that the order which was made in this case, by fair intendment, meant the next civil term, and did not contemplate the intervening criminal term of the court; and there was no error, therefore, in denying defendants' motion for abatement of the action."

Death of Part of Plaintiffs. — Where two of several plaintiffs died and, there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, it was within the discretion of the presiding judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause. State v. Flythe, 114 N. C. 274, 19 S. E. 701.

Judgment Ex Mero Muto. — A judgment is necessary to abate an action, for the court may, ex mero muto, enter judgment when it appears that plaintiff failed for a year to prosecute his action against the "representatives or successors in interest" of the original defendant, whose death has been suggested though the records show there had been no discontinuance of the action. Rogerson v. Leggett, 145 N. C. 7, 58 S. E. 596.

Applied in Betts v. Southern Ry. Co., 71 F. (2d) 787.

§ 462. Procedure on death of party. — When party to an action in the superior court dies pending the action, his death may be suggested before the clerk of the court where the action is pending, during vacation. It is then the duty of the clerk to issue a summons to the party who succeeds to the rights or liabilities of a deceased defendant, commanding him to appear before him on a day named in the summons, which must be at least twenty days after its service, and answer the complaint, and the issue joined by the filing of the answer stands for trial at the succeeding term of the superior court. It is the duty of the clerk to issue a notice to the party succeeding to the rights of a deceased party who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff; and if the party made plaintiff files an amended complaint, the defendant has twenty days after notice of same in which to file an answer thereto, and the issue thus made up stands for trial at the succeeding term. (Rev., ss. 416, 417, 418; 1887, c. 389.)

As to substitution of administrator d. b. n. or c. t. a., see sec. 155.

Continuity of Action. — In an action begun by or against a person who has since died, and the action is continued by or against his representative or successor in interest, this section requires that, in such instances, the summons shall be returnable before the clerk and in effect the action shall be ready for a speedy trial, thus recognizing the continuity of the action and the trial thereof in the county in which it had been brought. Latham v. Latham, 178 N. C. 12, 100 S. E. 131.

Duty of Adverse Party. — When either party to a suit dies before judgment, it is the duty of the adverse party to suggest the death to the court. Wood v. Watson, 107 N. C. 52, 12 S. E. 49.

Upon the suggestion of death of defendant, it is the duty of the clerk to issue summons to the representatives or persons who succeed to the rights or liabilities of the deceased defendant; the law does not contemplate that plaintiff may keep his action in semidormant condition

until it suits his pleasure or interest to call the heir at law into court, when by such conduct he has become disabled to make his defense. Rogerson v. Leggett, 145 N. C. 7, 58 S. E. 596.

Presumption When Administrator Defends. — Where the record shows that a party through his counsel assumed the defense of an action as administrator, the regularity of his admission as a party in place of his intestate is sufficiently established, though the death of the intestate as having occurred during the progress of the cause was not suggested, and no service of the notice issued to him appeared to have been made. Alexander v. Patton, 90 N. C. 557.

Administrator of Obligee on Bond Made a Party. — Where the obligor on a bond given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the superior court clerk has the authority to make his administrator a party under this section. Martin v. Martin, 162 N. C. 41, 77 S. E. 1104.

Action for Account. — In an action for an account and settlement, the death of the defendant being suggested, his executor comes in and is made a party defendant. Grant v. Bell, 91 N. C. 495.

SUBCHAPTER IV. VENUE.

Art. 7. Venue

§ 463. Where subject of action situated.—Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power to the court to change the place of trial, in the cases provided by law:

1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. Partition of real property.
3. Foreclosure of a mortgage of real property.
4. Recovery of personal property. (Rev., s. 419; Code, s. 190; 1889, c. 219; C. C. P., s. 66.)

I. In General.
II. Actions Relating to Real Property.
III. Partition of Realty.
IV. Foreclosure of Mortgage of Real Property.
V. Recovery of Personal Property.

Cross References.

For full treatment of venue, see 12 N. C. Enc. Dig. 266 et seq; 15 Enc. Dig. 716 et seq. As to venue in criminal actions, see sec. 4606 and notes thereto. As to waiver of venue in suits for divorce, see notes to sec. 1657.

I. IN GENERAL.

See note under § 469.

Editor's Note. — That the differences between venue and jurisdiction have been the source of some confusion in North Carolina, as elsewhere, is apparent from a perusal of the cases pertaining to the subject of this article. In order to point out the nice distinctions existing between these two subjects the following excerpt, appearing in most of the later text treatises, is quoted insofar as it is applicable to North Carolina.

Dean Lile, of the University of Virginia, in his admirable treatise on Equity Pleading and Practice contrasts jurisdiction and venue as follows:

"1. Jurisdiction connotes the powers of the court—venue the place of suit.

"2. Jurisdiction is a question of law—venue a question of fact to be established by testimony.

"3. Jurisdiction must appear from the allegation of the bill—venue need not so appear.

"4. Jurisdiction (potential) may not be conferred by consent—venue may.

"5. Error in jurisdiction is fatal—error in venue, not pleaded in abatement, is harmless.

"6. ****

"7. Jurisdiction (potential) contemplates subject-matter only—venue contemplates locality only; error in the one is in the selection of the court, in the other in the selection of the place.

"8. Jurisdiction is essential to confer venue; but venue is not essential to jurisdiction."

Venue a Matter of Legislative Control. — The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. Interstate Cooperage Co. v. Eureka Lumber Co., 151 N. C. 455, 456, 66 S. E. 434. It deals with procedure and is not jurisdictional, in the absence of statutory provision to that effect. State v. Seaboard Air Line Railway, 146 N. C. 568, 60 S. E. 506; Latham v. Latham, 178 N. C. 12, 13, 100 S. E. 131; Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 25.

This subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the state. State v. Stone, 52 N. C. 382.

Contract Stipulation Regarding Venue. — There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject-matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the Legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied. Gaither v. Charlotte Motor Car Co., 182 N. C. 498, 109 S. E. 362.

Determining Nature of Transaction. — In Councill v. Bailey, 154 N. C. 54, 59, 69 S. E. 760, it is said; "This Court has recently held in Bridgers v. Ormond, 148 N. C. 375, 62 S. E. 422, that such a motion as this one (as to proper venue) must be considered with reference to the questions that may be raised by the pleadings, and do not depend for their decision solely upon the allegations of the complaint."

Applicability to Trials before Justices. — In Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799; the Court said: "We do not find any statute making the provisions of the Code of Civil Procedure (this section), as to the place for trial, applicable to trials before a justice." But section 1500 provides that the whole chapter on civil procedure is applicable in certain attachment cases before justices. Mohn v. Creesey, 193 N. C. 568, 571, 137 S. E. 718.

An action by an administrator is not within any of the subdivisions of this section. Whitford v. North State Life Ins. Co., 156 N. C. 42, 72 S. E. 85.

Cited in Bohannon v. Virginia Trust Co., 198 N. C. 701, 153 S. E. 262; Guy v. Gould, 199 N. C. 820, 155 S. E. 925; Miller v. Miller, 205 N. C. 753, 172 S. E. 493.

II. ACTIONS RELATING TO REAL PROPERTY.

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate or interest therein, within the intent and meaning of this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N. C. 12, 103 S. E. 915.

Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of the demands of his creditors, the suit to establish the plaintiffs' claims will be considered as incident to the essential and controlling purpose of setting aside the deed, and the venue is governed by this subdivision. Wofford-Fain & Co. v. Hampton, 173 N. C. 686, 92 S. E. 612.

Setting Sale Aside.—A suit by a purchaser of land to set aside the purchase and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of the lots, without which he would not have purchased, the controversy involves an interest in the lands as required by this section, to be brought in the county where the land is situated. Vaughan v. Fallin, 183 N. C. 318, 111 S. E. 513.

An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue, under this section, therefore, is in the county in which the land is situated. Williams v. McRackan, 186 N. C. 381, 119 S. E. 746.

Action on Note Secured by Deed of Trust.—An action against the endorser of a negotiable note, secured by a deed of trust on land, is not an action involving an estate or interest in land and does not have to be brought where the land is located. White v. Rankins, 206 N. C. 104, 173 S. E. 282.

Specific Performance.—The fact that there are other questions to be determined in the action, does not alter the case when the chief purposes of the suit are to compel one defendant (trustee) to sell and another defendant to convey lands situated in a county other than that in which the action is pending. Falls, etc., Mfg. Co. v. Brower, 105 N. C. 440, 11 S. E. 313.

An action for subrogation to the rights of the vendor

must be tried in the county where the land is situated. Fraley v. March, 68 N. C. 160.

Conversion as Aggravation of Damages.—Where the intent of the pleading was to sue for a trespass on the land, and a part allegation of a conversion was inserted in aggravation of damages, the refusal of the lower court to the county properly made in due time, to remove the cause to the county in which the land was situated, was erroneous. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 603, 77 S. E. 770.

Setting Aside Grant or Patent.—This section applies to the exclusion of section 7594, which controls where there are separate transactions affecting distinct pieces of property lying wholly in different counties. Kanawha Hardwood Co. v. Waldo, 161 N. C. 196, 76 S. E. 680.

Docketed judgments confer no estate or interest in real estate within the meaning of this subdivision of the section, but merely the right to subject the realty to the payment of the judgments by sale under execution, and hence an action to set aside judgments as fraudulent and for the appointment of a receiver need not be brought in the county where the property upon which such judgments are liens is situated. Baruch v. Long, 117 N. C. 509, 23 S. E. 447.

An action for the breach of covenants of seizin and the right to convey is not required to be tried in the county in which the realty is situated. Eames v. Armstrong, 136 N. C. 392, 48 S. E. 769.

Petitions for dower should be filed in the county of the husband's usual residence, but the jury of allotment may assign the same in one or more tracts situated in one or more counties. Askew v. Bynum, 81 N. C. 350.

Injuries to Land.—The fact that a complaint for injuries to real estate fails to expressly allege in what county the land lies is immaterial where the complaint sets up as a cause of action a breach of an agreement contained in a former judgment between the same parties which is appropriately referred to in the complaint and set out in the answer and which shows the proper county. Lucas v. Carolina Cent. R. Co., 121 N. C. 506, 28 S. E. 265.

In an action for wrongful conversion of oysters taken from oyster beds, the defendant is not entitled to a change of venue to the county in which the beds are situated. Makely v. Boothe Co., 129 N. C. 11, 39 S. E. 582.

Same—Burning Timber. — An action against a railroad company to recover damages for burning land is a local one in its nature and triable in the county in which the injury occurred irrespective of section 468. Perry v. Seaboard Air Line R. Co., 153 N. C. 117, 66 S. E. 1060. See note of this case under section 468.

Same—By Public Officers. — Section 464, providing for venue in actions against public officers, constitutes an exception to this section, see notes to sec. 464.

Polution of Stream.—An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining machine appears to be a transitory one and is not such as contemplated by this section. Harris Clay Co. v. Carolina China Clay Co., 203 N. C. 12, 164 S. E. 341.

Cutting and Removing Timber.—The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass de bonis asportatis, for the value of the trees, both of which actions are transitory, or for trespass quare clausum fregit, which is local, and should be brought in the county wherein the land is situated. Blevens v. Kitchen Lbr. Co., 207 N. C. 144, 146, 176 S. E. 262.

An action to recover the value, or "worth," of timber cut, removed and converted to its own use by the defendant is an action of trover and conversion, or of trespass de bonis asportatis, and is therefore transitory. Id.

Fraudulent Representations Inducing Conveyance of Lands.—When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under subsection 1 of this section and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue under § 469. Causey v. Morris, 195 N. C. 532, 142 S. E. 783.

Removal of Action to County Where Land Lies.—Where on the facts alleged in his complaint, the plaintiff is entitled not only to a judgment that he recover of the defendant the amount of his debt, but also to a decree for the foreclosure of the mortgage by which his debt is secured, and the action was begun and is pending in the county in which the plaintiff resides, but the land conveyed by the mortgage is in another county, the plaintiff cannot deprive the defendant of his right, under the statute, to the removal of the action to the county in which the land is situate, for trial, by his failure to pray for a foreclosure of the mortgage, at least, when he prays judgment for his debt, and also for such other and further relief as he may be entitled to, in law or in equity, on the facts alleged in his complaint. Carolina Mtg. Co. v. Long, 205 N. C. 533, 536, 172 S. E. 209.

Appeal from Order of Removal.—See note under § 913(a).

III. PARTITION OF REALTY.

Editor's Note.—Section 3214, in the article on Partition, is substantially the same as subdivision two of this section. The two provisions seem to constitute simply an illustration or application of the first subdivision of this section, as proceedings for partition certainly determine "a right or interest" in real property.

This sub-section has never received a direct construction from the courts, but in The Matter of Skinner, 22 N. C. 63, decided prior to the merger of the courts of law and equity, it is held that land situated in two counties could be sold for partition by a decree of the court of equity of either county.

IV. FORECLOSURE OF A MORTGAGE OF REAL PROPERTY.

Vendor's Lien.—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is within this subdivision. Councill v. Bailey, 154 N. C. 54, 69 S. E. 760.

Subrogation.—An action by the holder of certain notes given for the purchase of land against the purchaser of the land, and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which is substantially the same as an action "for the foreclosure of a mortgage of real estate," within the meaning of this subdivision. Fraley v. March, 68 N. C. 160.

In Connor v. Dillard, 129 N. C. 50, 39 S. E. 641, it is said: The action is "substantially for the foreclosure of a mortgage" (Fraley v. March, 68 N. C. 160), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action. Falls, etc., Mfg. Co. v. Brower, 105 N. C. 440, 11 S. E. 313. If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docketing the judgment would not convey to plaintiff any estate in debtor's land. Gammon v. Johnson, 126 N. C. 64, 35 S. E. 185; McLean v. Shaw, 125 N. C. 491, 34 S. E. 634.

Land in Two Counties.—A foreclosure sale of land lying in two counties under a mortgage registered in but one is authorized by this subdivision. King v. Portis, 81 N. C. 382.

Injunction.—The similar section of the Ohio code was held not applicable to an injunction against enforcing a lien claimed to be invalid. 8 Circuit Court Reports 614, 619.

V. RECOVERY OF PERSONAL PROPERTY.

Editor's Note.—In Smithdeal v. Wilkerson, 100 N. C. 52, 6 S. E. 71, it was held that the requirements of subsection 4 of this section, were restricted to personal property, "distrained for any cause." Thereupon the act of 1889, chapter 219, struck out the restriction and made the venue for the "recovery of personal property" in all cases in the county where the property is situated. Brown v. Cogdell, 136 N. C. 32, 33, 48 S. E. 515.

It is now held that the venue of actions for the recovery of personal property is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515.

Recovery as Sole Object.—Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located. Woodard v. Sauls, 134 N. C. 274, 46 S. E. 507; Bowen Piano Co. v. Newell, 177 N. C. 533, 98 S. E. 774.

Thus an action being for an accounting, and the question of ownership of notes and bonds being raised only incidentally, it need not be brought in the county in which they are situated. Clow v. McNeill, 167 N. C. 212, 83 S. E. 308.

But where it appears that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with the injunctive restraint

as an incident thereto, the cause is within this subdivision. Fairley Bros. v. Abernathy, 190 N. C. 494, 130 S. E. 184.

Setting Aside Transfer.—An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by this subdivision of the section. Baruch v. Long, 117 N. C. 509, 23 S. E. 447.

§ 464. Where cause of action arose.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the case provided by law:

1. Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer. (Rev., s. 420; Code, s. 191; C. C. P., s. 67.)

Editor's Note.—In spite of the fact that section 463 provides that actions for injuries to realty must be brought in the county where the land lies, it is held that damage to land occasioned by the acts of public officers, officiating in counties other than where the land lies, must be brought, as provided in this section, where the cause arose. For example in Cecil v. High Point, 165 N. C. 431, 81 S. E. 616 it was held that the venue of an action to recover from an incorporated town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such cause arose by reason of the official conduct of municipal officers and consequently is regulated by this section.

This interpretation is not irreconcilable with the provision of the preceding section; it merely constitutes an illustration of the doctrine that the courts will be reluctant to declare any part of a statute inoperative when the same may be harmonized with other seemingly inconsistent parts—in this instance by interpreting this section as an exception to the preceding section whenever necessary, i. e. whenever the land is in one county and the acts of the officers take place in another.

Nature of Acts of Officer.—An action is controlled by this section irrespective of the question as to whether the damages arose from a negligent discharge by the officer of an administrative duty or a technically governmental one. Light Company v. Comm., 151 N. C. 558, 66 S. E. 569.

Thus a cause of action for damages for breach of contract made by a board of a municipal corporation is within the meaning of this subsection. Id.

"By His Command" or "In His Aid."—The words, "in his aid," immediately following the words, "by his command," were meant to extend the immunity to all who assisted and took part in the act with his assent, though not by his direct orders, for all such stand upon the same footing. Harvey v. Brevard, 98 N. C. 93, 94, 3 S. E. 911.

The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution, are not included in that class of persons "who by his command or in his aid shall do anything touching the duties of such office." Harvey v. Brevard, 98 N. C. 93, 3 S. E. 911.

Officers of Counties and Cities.—The Supreme Court has repeatedly and uniformly held that actions against county commissioners and other officers must be brought in the county of which they are officers, and cities and towns are of the like nature, and should stand upon the same footing as to actions against them. Johnston v. Board, 67 N. C. 101; Alexander v. Commissioners, 67 N. C. 330; Jones v. Board, 69 N. C. 412; Steele v. Commissioners, 70 N. C. 137; Jones v. Statesville, 97 N. C. 86, 88, 2 S. E. 346.

In Jones v. Statesville, 97 N. C. 86, 2 S. E. 346, this section was construed by this Court, in the following language, to embrace a municipal corporation: "The defendant is a municipal corporation, public in its nature; it is an artificial person, created and recognized by the law, invested with important corporate powers, public and, in a sense, artificial in their nature, and charged with public duties, which it executes by and through its officers and agents. We therefore think that actions against it fairly come within the meaning of and are embraced by the statutory provision first above recited (this section)." Brevard Light, etc., Co., v. Board, 151 N. C. 558, 560, 66 S. E. 569.

Against Register of Deeds. — An action for the penalty against a register of deeds for unlawfully issuing a marriage license is controlled by this section. Dixon v. Haar, 158 N. C. 341, 74 S. E. 1.

Quo Warranto and Mandamus.—This section should apply in the writs of quo warranto (no longer used in this state) and mandamus, where an official act of usurpation, or failure to do some act which the duties of the office require, constitute the charge, and in effect amounts to a criminal action, or an action to subject the parties to pains and penalties. Johnston v. Board, 67 N. C. 101.

An action by an administrator does not come within this section. Whitford v. North State Life Ins. Co., 156 N. C. 42, 72 S. E. 85.

Co-defendants—Nol Pros of Officers.—An action against the sheriff of X county instituted in Y county does not entitle the co-defendant of the sheriff to have the suit removed to X county where the cause is nol prossed as to the sheriff. Harvey v. Rich, 98 N. C. 95, 3 S. E. 912.

Proving Defendants are Officers.—If made to appear properly by affidavit or otherwise that the defendants came within the terms of this section, the fact that they insist that the action was brought against them as individuals and not as public officers, is immaterial. Shaver v. Huntley, 107 N. C. 623, 629, 12 S. E. 316.

Venue in Other Cases.—Section 469 may constitute an exception to this section. See notes to sec. 469.

Trial of Whole Controversy in County Where Offense Occurred.—Where in an action against the clerk of the Superior Court of one county and the sheriff of another county the clerk makes motion for removal of the cause as to him to the county of his office under this section, the motion should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of this section being effected in such instances by trial of the whole controversy in the county where the offense occurred. Kellis v. Welch, 201 N. C. 39, 158 S. E. 742.

Actions for Penalties—Applicability to Justice's Court. — This section, providing that actions for recovery of penalties, must be brought in the county where the cause of action arose, applies to those actions of which the Superior Court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace (i. e. $200. or less). Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799; Dixon v. Haar, 158 N. C. 341, 342, 74 S. E. 1.

Same—Applied.—In State v. Seaboard Air Line Railway, 146 N. C. 568, 60 S. E. 506.

Cited in McFadden v. Maxwell, 198 N. C. 223, 151 S. E. 250.

§ 465. Official bonds, executors and administrators.—All action upon official bonds or against executors and administrators in their official capacity must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. (Rev., s. 421; Code, s. 193; 1868-9, c. 258.)

Applicable to All Actions Against Administrators.—"The object of the statute," says Mr. Justice Reade, speaking for the Court, "was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters and where they make their returns and settlements and transact all the business of the estate in their hands." Stanley v. Mason, 69 N. C. 1; Foy v. Morehead, 69 N. C. 512; Bidwell v. King, 71 N. C. 287. And the same principle is recognized, in reference to an action upon a guardian bond, in State v. Staton, 78 N. C. 235, where the same eminent judge delivers the opinion also.

These cases were followed in Farmers State Alliance v. Murrell, 119 N. C. 124, 25 S. E. 785 where it said:

Under this section an action against an administrator of a decedent, whether upon the official bond of the administrator or for the purpose of holding him liable for any act of his, or for any liability of his intestate incurred in his lifetime, must be brought in the county where the bond was given if the principal or any of his sureties is in such county.

The same case criticizes and refuses to follow the dictum in State v. Peebles, 100 N. C. 348, 351, 6 S. E. 798, where it is stated that: "manifestly this section exempts from the operation of the preceding sections suits upon official bonds, and none other, and this appears in the fact that such bonds, as giving rise to the action, are mentioned three times in the section."

A personal action against an administrator is not, of course, within the meaning of this section. Craven v. Munger, 170 N. C. 424, 87 S. E. 216.

Applies to Actions against Not by Administrators.—This section applies only to actions against administrators and not to actions brought by them. Whitford v. North State Life Ins. Co., 156 N. C. 42, 72 S. E. 85.

The clear inference from this section is that it was the purpose of the Legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrator, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted. Whitford v. North State Life Ins. Co., 156 N. C. 42, 43, 72 S. E. 85.

"Instituted."—The word "instituted" as used in this section signifies the commencement of the proceedings—to institute an action is to bring an action. Here a difference is apparent from the language of the other sections pertaining to venue as they provide that the action shall be 'tried.'

In consequence of this distinction it is held that this section has no application where an action has been commenced in another county against a defendant, who has since died, and his administrator has been made a party. Latham v. Latham, 178 N. C. 12, 100 S. E. 131.

Action for Account and Settlement. — Where an action involves an account and settlement of an estate, by the express words of this section, such an action must be instituted in the county where the administrator qualified. The case of Roberts v. Connor, 125 N. C. 45, 34 S. E. 107, does not conflict with this position. That was a suit which concerned the conduct of a bank operated by an executor, and the decision was put on the express ground that the official acts and conduct of the executor was in no wise involved. Thomas v. Ellington, 162 N. C. 131, 132, 78 S. E. 12.

Suits against Successor of Administrator.—A qualified as administrator of B, in Halifax County, and gave bond there. Afterwards A died in Northampton, and C qualified as his administratrix in that county. C, administratrix, and D, one of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a resident of Halifax: Held, that the action was properly brought in Halifax, under this section. State v. Peebles, 100 N. C. 348, 6 S. E. 798.

§ 466. Domestic corporations. — For the purpose of suing and being sued the principal place of business of a domestic corporation is its residence. (Rev., s. 422; 1903, c. 806.)

Cross Reference.—As to foreign corporations after domestication see § 1181 and the note thereto.

Editor's Note.—Prior to the passage of this section, there was no express statute regulating the venue in actions against domestic corporations and such actions were controlled by sec. 469. Farmers State Alliance v. Murrell, 119 N. C. 124, 25 S E.. 785. See also Cline v. Bryson, etc., Co., 116 N. C. 837, 21 S. E. 791.

The purpose of this section was not to change the provisions of section 468 or to deny plaintiff's right to sue a domestic corporation in the county of his residence; but to remedy the defect of section 468 so that a domestic corporation can be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by sections 463, 464 and 465. Robertson v. Greenleaf Johnson Lumber Co., 153 N. C. 120, 68 S. E. 1064.

This section is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his wife alleged to be in fraud of the creditors' rights. Wofford-Fain & Co., v. Hampton, 173 N. C. 686, 92 S. E. 612.

"Principal Place of Business" — The words "principal place of business," as used in this section must be regarded as synonymous with the words "principal office," as used in secs. 1114, 1099, 1101, and other sections of the Code. Roberson v. Greenleaf Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.

Same—Fixed by Charter. — The residence of a corporation for the purpose of suing and being sued is where the governing power is exercised, and is fixed by the charter, without power on the part of the corporation to affect it by a change of its principal place of business. Garrett & Co. v. Bear, 144 N. C. 23, 56 S. E. 479.

Applied in Eastern Cotton Oil Co. v. New Bern Oil, etc., Co., 204 N. C. 362, 168 S. E. 411.

Cited in McCue v. Times-News Co., 199 N. C. 802, 803. 156 S. E. 129; Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

§ 467. Foreign corporations.—An action against a corporation created by or under the law of any other state or government may be brought in the superior court of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside in the following cases:

1. By a resident of this state, for any cause of action.

2. By a nonresident of this state in any county where he or they are regularly engaged in carrying on business.

3. By a plaintiff, not a resident of this state, when the cause of action arose or the subject of the action is situated in this state. (Rev., s. 432; Code, s. 194; C. C. P., s. 361; 1876-7, c. 170; 1907, c. 460.)

See notes to sec. 468 and sec. 469.

Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as therefore existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts of transitory causes of actions. Ledford v. Western Union Tel. Co., 179 N. C. 63, 101 S. E. 533.

In Robinson v. The Oceanic Steam Co., 112 N. Y. 322, construing the prototype of this section, it is said: "This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service or process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction." See Ledford v. Western Union Tel. Co., 179 N. C. 63, 66, 101 S. E. 533.

Section 468 an Exception. — The enactment of section 468 does not repeal this section, but the latter will be confined to corporations, other than railway companies, which have been chartered by any other state, government or country. Propst v. Railroad, 139 N. C. 397, 51 S. E. 920.

Applicability to Justices Court. — This section refers only to actions of which the superior court has jurisdiction, and was not intended to give a court of justices jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed $200. Howard v. Mutual Reserve Fund Life Ass'n, 125 N. C. 49, 53, 34 S. E. 199.

Cutting Timber. — Where a nonresident plaintiff sues to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situated, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situated that being the county wherein the cause of action arose. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 603, 604, 77 S. E. 770.

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. Allen-Fleming Co. v. Southern R. Co., 145 N. C. 37, 58 S. E. 793.

Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it: Held, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. Ange v. Sovereign Camp, W. O. W., 171 N. C. 40, 87 S. E. 955.

Claim of State. — Where a receiver of an insolvent foreign corporation was appointed under the corporation act of 1901, a claim by the state which chartered the corporation, for annual license fees, was provable; this section, as to actions against foreign corporations, not applying to this proceeding. Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650.

Garnishment against Salesmen. — The courts of this state have jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action brought in the state against its salesmen; the cause of action against it and in favor of the salesmen having arisen here, and the subject of the action being situated here. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Action by Administrator for Death by Wrongful Act. — A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. Hannon v. Southern Power Co., 173 N. C. 520, 92 S. E. 353.

§ 468. Actions against railroads.—In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time, or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424.)

Editor's Note. — This section was first enacted as a proviso to section 424 of the Revisal. Section 424 of the revisal is now section 469; it contains the language "in all other cases." It was held that this language modified the proviso, this section, and that the proviso did not operate as a repeal or modification of sec. 463. In view of this pronouncement of the legislative intent, it is to be presumed that the language of section 469 still applies to this section, although the two sections are now apparently independant.

The Acts of 1905, chapter 367, amending the Code, section 192 (Revisal, section 424), expressly included actions for injury to lands by making it apply to other cases than those specified in the previous, sections, and does not repeal or modify section 63 B, in regard to the venue of actions of this character, since it is for damages for personal injuries. Propst v. Railroad, 139 N. C. 397, 51 S. E. 920; Perry v. Seaboard Air Line R. Co., 153 N. C. 117, 68 S. E. 1066.

Effect of Section in General. — This section does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county, for that purpose, where the defendant had a track, unless the injury occurred, or plaintiff resided, therein. Watson v. North Carolina R. Co., 152 N. C. 215, 67 S. E. 502.

Section Pertains to Venue Not Jurisdiction. — This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. McGovern & Co. v. Atlantic Coast Line R. Co., 180 N. C. 219, 104 S. E. 534.

Applies to All Railroads. — This section applies to all railroad companies, both domestic and foreign. Forney v. Black Mountain R. Co., 159 N. C. 157, 74 S. E. 884.

Actions against Railroads under Federal Control. — It was within the power of the director general to prescribe the venue of suits against railroads under federal control. Federal Control Act, March 21, 1918, § 10; Alabama, etc., R. Co. v. January, 257 U. S. 111, 66 L. Ed. 15, 42 S. Ct. 6.

Same—That Are Sole Defendants. — This section should be construed and held to apply to cases where a railroad company alone is defendant, and that the venue in actions where there are other parties defendant is not controlled by the section. Smith v. Patterson, 159 N. C. 138, 140, 74 S. E. 923.

Where both plaintiff and defendant are corporations, nonresident of the state, an action concerning land brought in a different county from the situs of the property, wherein neither has property, nor conducts its business, the case falls within the intent and meaning of section 467 and this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N. C. 12, 103 S. E. 915.

Suits by Administrators. — Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the section. the terms appearing therein, "where plaintiff resided at the time the cause of action arose," have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. Whitford v. North State Life Ins. Co., 156 N. C., 42; 72 S. E. 85; Roberson v. Greenleaf etc., Co., 153 N. C., 120, 68 S. E. 1064; R. R. v. Stith, 120 Ky. 237; Turner v. R. R., 110 Ky., 819; Smith v. Patterson, etc., R. Co., 159 N. C. 138, 140, 74 S. E. 923. Dictum.

§ 469. Venue in all other cases.—In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the state, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the state, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute. (Rev., s. 424; Code, s. 192; C. C. P., s. 68; 1868-9, cc. 59, 277; 1905, c. 367.)

See note under § 463.

Editor's Note. — The Rev. Chap. 31, Sec. 37, (prior to the enactment of this section) appointing the venue for transitory actions, made no provision for the case of a resident plaintiff and a non-resident defendant, and it was; held, therefore, that the case remains as at common law, which allows the plaintiff to sue in any county, subject to the power of the court to change the venue according to certain rules governing its course. Covill v. Moffitt, 52 N. C. 381.

The purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. Palmer v. Lowe, 194 N. C. 703, 705, 140 S. E. 718.

Construed with Other Provisions for Venue. — This section is general in its terms and subject to the provisions of section 463. Wofford-Fain & Co. v. Hampton, 173 N. C. 686, 92 S. E. 612.

Section 464, providing, among other things, that an action against a public officer be brought in the county wherein the cause of action arose, subject to the power of the court to change the place of trial, is general in its terms, and this section should be construed as an exception thereto, allowing an administrator to sue at his election in his own county for the wrongful death of his intestate. Hannon v. Southern Power Co., 173 N. C. 520, 521, 92 S. E. 353.

Section Pertains to Venue Not Jurisdiction. — This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. McGovern & Co. v. Atlantic Coast Line R. Co., 180 N. C. 219, 104 S. E. 534.

The word "parties" as used in this section means parties to the record. Rankin v. Allison, 64 N. C. 673.

Action for Personal Services to Administrator. — An action brought to recover for services rendered personally to an administrator, is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. Craven v. Munger, 170 N. C. 424, 87 S. E. 216.

Action by Administrator. — An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues. Whitford v. North State Life Ins. Co., 156 N. C. 42, 72 S. E. 85. See notes of this case under section 465.

Action by Receiver. — Where a receiver of a corporation resides in a different county from the concern he represents, the venue of the action brought by him for breach of contract is determined by the place of residence of the receiver and not necessarily by that of insolvent corporation. Biggs v. Bowen, 170 N. C. 34, 86 S. E. 692.

Action by Unemancipated Illegitimate Child. — Such a child sues in county of mother even though living in different county with grandparents. Thayer v. Thayer, 187 N. C. 573, 122 S. E. 307.

Suit for Alimony without Divorce.—Where a husband forced his wife to leave his home at night and she was compelled to take refuge in the home of a neighbor she could acquire a separate domicile, and may sue the husband for alimony without divorce in the county of her residence and he cannot remove the case to the county of his residence. Miller v. Miller, 205 N. C. 753, 172 S. E. 493.

Where Bank and Its Officers Sued Jointly. — Where in good faith a citizen and resident of one county, sues jointly

in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed for trial to the county wherein the bank conducts its business. Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194.

Nonresident Plaintiffs. — The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. Southern Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

The venue of an action brought by a nonresident of the State in a different county herein from that where the defendants reside or do business, and wherein the defendant has no property, is an improper one. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section. Sugg v. Pollard, 184 N. C. 494, 495, 115 S. E. 153.

Where Principal Office of Corporation Is in County Other than Residence of Defendants.—Where the plaintiff is a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina, and the defendants are citizens of this state, and residents of Sampson County, Durham County is the proper venue for the trial of the action. North Carolina Joint Stock Land Bank v. Kerr, 206 N. C. 610, 614, 175 S. E. 102.

Action against Foreign Corporation and Resident Defendant.—Where a nonresident plaintiff brings action against a foreign corporation, with the joinder of a resident defendant, and the venue in the action is laid here in a differnt county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, and the action is removable thereto upon his motion duly made. §§ 463, 467, and 468 do not apply. Palmer v. Lowe, 194 N. C. 703, 140 S. E. 718; Brown v. Brevard Auto Service Co., 195 N. C. 647, 143 S. E. 258.

Effect of Change of Residence. — The defendant by a mere change of residence cannot change the venue as fixed by this section. Taylor v. Sharp, 108 N. C. 377, 382, 13 S. E. 138; Hannon v. Southern Power Co., 173 N. C. 520, 92 S. E. 353.

Applied in Carolina Mtg. Co. v. Long, 205 N. C. 533, 172 S. E. 209.

Cited in McCue v. Times-News Co., 199 N. C. 802, 803, 156 S. E. 129.

§ 470. Change of venue.—If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

3. When the judge has, at any time, been interested as party or counsel. (Rev., s. 425; Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118; 1870-1, c. 20.)

I. In General.
II. The Application for Removal.
A. Time of Demand.
B. Jurisdiction of Application.
III. Waiver of Right to Change.
IV. Appeal.
A. Where County Designated Not Proper.
B. Convenience of Witnesses and Ends of Justice Promoted

Cross References.

See 12 N. C. Enc. Dig. 276 et seq.; 15 N. C. Enc. Dig. 718 et seq. For cases holding venue properly or improperly laid, see the notes to the preceding sections of this sub-chapter.

I. IN GENERAL.

Section Relates to Venue Not Jurisdiction. — It has been held repeatedly that these statutes, sections 465-470, relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived. Davis v. Davis, 179 N. C. 185, 188, 102 S. E. 270.

Under the present practice, venue may be waived because it is not jurisdictional, and is available to the objecting party, not by demurrer, but by motion in the cause. Shaffer v. Morris Bank, 201 N. C. 415, 418, 160 S. E. 481.

All Inclusive. — This section indiscriminately embraces all the previously enumerated actions of this sub-chapter as well as those for the recovery of real estate, which under the former system of pleading were called local actions, as those which were transitory or personal actions; all are embraced in the sweeping enactment. Lafoon v. Shearin, 91 N. C. 370, 371.

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from the trees were severed is situated. Foreman-Blades Lumber Co. v. Tunis Heading, etc., Co., 196 N. C. 38, 144 S. E. 297.

Power of Clerk.—See note under § 913(a).

Cited in Murchison Nat. Bank v. Broadhurt, 197 N. C. 365, 369, 148 S. E. 452; Miller v. Miller, 205 N. C. 753, 172 S. E. 493.

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

This section is explicit and the cases are uniform in holding that the demand to remove to the proper county must be made before the time for answering expires. See Lafoon v. Shearin, 91 N. C. 370; Riley v. Pelletier, 134 N. C. 316, 46 S. E. 734; Garrett v. Bear, 144 N. C. 23, 56 S. E. 479.

The objection must be taken not only "before the time of answering expires," as required by this section, but it must be taken in limine and before answering to the merits. County Board v. State Board, 106 N. C. 81, 10 S. E. 1002, and cases there cited. Shaver v. Huntley, 107 N. C. 623, 627, 12 S. E. 316.

But if the motion is based on clause 2 of this section, i. e., when the convenience of witnesses and the ends of justice demand, the motion may be made at any time in the progress of the cause. Riley v. Pelletier, 134 N. C. 316, 46 S. E. 734.

"While this language is slightly different from the Federal statute regulating motions to remove to the Federal Court, which specifies that said motion must be made 'at the time or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff,' we think the tenor and object of the two statutes are the same, i. e., to require the defendant to object to the jurisdiction in limine by moving to remove as soon as he is afforded opportunity from filing the complaint to know definitely the scope of the action." Riley v. Pelletier, 134 N. C. 316, 318, 46 S. E. 734.

If the application for removal of an action to the proper county be made before time for answering expires, it matters not when the motion is heard. Farmers State Alliance v. Murrell, 119 N. C. 124, 25 S. E. 785.

A motion for change of venue, under this section, must be made before a demurrer to the action may be filed for misjoinder of the parties. Cedar Works v. Lumber Co., 161 N. C. 604, 77 S. E. 770.

Before Time for Filing Answer.—a motion for removal made before the time for the filing of an answer to the complaint had expired, was made in apt time. Carolina Mtg. Co. v. Long, 205 N. C. 533, 534, 172 S. E. 209.

During Term.—"Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. Howard v. Hinson, 191 N. C. 366, 131 S. E. 748." Causey v. Morris, 195 N. C. 532, 534, 142 S. E. 783.

B. Jurisdiction of Application.

Editor's Note.—It was formerly held that the filing of an affidavit and motion for change of venue in vacation before the clerk was invalid. Riley v. Pelletier, 134 N. C. 316, 46 S. E. 734. The motion was required to be made in the district and during the term of court. Garrett v. Bear, 144 N. C. 23, 56 S. E. 479.

By P. L. 1919, c. 304 and P. L. 1920, c. 96 it was provided that the defendant could file in motion with the clerk instead of applying to the court, the clerk could not, however, order the removal—as he may under the most recent legislation, which is discussed in the next paragraph. See Southern. Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

Power of Clerk under Section 913a.—The power to entertain a demand of defendant to remove an action to the

proper venue under the provisions of this section, is now conferred by a recent statute (section 913a of this code) upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon de novo. Roberts v. Moore, 185 N. C. 254, 116 S. E. 723; Southern Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Appeal to Judge.—Where the clerk of the Superior Court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has complied with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority. Southern Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

III. WAIVER OF RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of this section, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Venue cannot be jurisdiction and it may always be waived. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 25.

Waiver occurs when motion was neither "made in writing" nor "before the time of answering expired." McMinn v. Hamilton, 7 N. C. 300; Lafoon v. Shearin, 91 N. C. 370 (which was an action of ejectment); Morgan v. Bank, 93 N. C. 352; County Board v. State Board, 106 N. C. 81; 10 S. E. 1002; Baruch v. Long, 117 N. C. 509, 23 S. E. 447; Lucas v. Carolina Central R. Co., 121 N. C. 506, 508, 28 S. E. 265.

Where a defendant moves to transfer a cause to another county, and he is allowed to a certain day of the term to file affidavits, which he failed to do, and his motion for removal is denied, without his excepting or appealing, his conduct will waive all of his rights thereto. Oettinger v. Hill Live Stock Co., 170 N. C. 152, 86 S. E. 957.

Filing Answer to Merits.—The defendant who files a formal answer to the merits within the time allowed, thereby waives his privilege of amendment. Trustees v. Fetzer, 162 N. C. 245, 78 N. C. 152; Stevens Lumber Co. v. Arnold, 179 N. C. 269, 102 S. E. 409.

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove. Garrett v. Bear, 144 N. C. 23, 56 S. E. 479, and cases cited.

Withdrawing Answer.—Where answer has been filed and withdrawn for the purpose of the motion, to remove at the proper term, the right to remove will be taken as waived. Trustee v. Fetzer, 162 N. C. 245, 78 S. E. 152.

Accepting Continuances.—A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. Oettinger v. Hill Live Stock Co., 170 N. C. 152, 86 S. E. 957.

Enter of Default.—Where a defendant has waived his rights to transfer a cause to another county or the same has been refused in the discretion of the trial court, and he has permitted the time to file his answer to expire, it is within the discretion of the trial judge to refuse his motion to file an answer later, and a judgment final by default thereof may be entered in proper instances. Oettinger v. Hill Live Stock Co., 170 N. C. 152, 86 S. E. 957.

When Judgment by Default Vacated.—When a judgment by default final has been entered against a defendant for the want of an answer, and it appeared that the defendant had lodged his motion in apt time, for a change of venue in accordance with the provisions of this section, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, sec. 912, before time for answering has expired, will not affect his right to have the judgment by default against him vacated. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

IV. APPEAL.

A. Where County Designated Not Proper.

No Discretion in Court.—The question of removal, when the action is not brought in the proper county, is not one of discretion, but "may" means shall or must, as it is construed in every act imposing a duty. Pelletier v. Saunders, 67 N. C. 262; Jones v. Statesville, 97 N. C. 86, 2 S. E. 346; and cases there cited. Neuse Mfg. Co. v. Brower, 105 N. C. 400, 444, 11 S. E. 313.

Appeal Lies.—Consequently, that an appeal lies from an order denying a motion for the removal of a case to the proper county for trial has been thoroughly settled by repeated decisions of the Supreme Court. Neuse Manufacturing Co. v. Brower, 105 N. C. 440, 11 S. E. 313; Connor v. Dillard, 129 N. C. 50, 39 S. E. 641; Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515; Perry v. R. R., 153 N. C. 117, 68 S. E. 1060; Cedar Works v. Roper Lumber Co., 161 N. C. 603, 606, 77 S. E. 770.

Not Premature.—An appeal from the refusal of the Superior Court judge to remove a case to the proper county is not premature. Dixon v. Haar, 158 N. C. 341, 74 S. E. 1.

Appeal for Delay.—A party to an action cannot be permitted to move repeatedly at each succeeding term for a change of venue and then appeal from each successive refusal for purposes of delay. Ludwick v. Uwarra Mining Co., 171 N. C. 60, 62, 87 S. E. 949.

B. Convenience of Witnesses and Ends of Justice Promoted.

Discretion of Court.—The removal of a case from one county to another for the convenience of witnesses is discretionary with the trial judge. Belding v. Archer, 131 N. C. 287, 42 S. E. 800; Eames v. Armstrong, 136 N. C. 392, 48 S. E. 769; Oettinger v. Stock Co., 170 N. C. 152, 86 S. E. 957.

In Craven v. Munger Lumber Co., 170 N. C. 424, 426, 87 S. E. 216, it is said: "The statute is explicit that the judge 'may' remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be served thereby. The language of itself makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this Court has sustained the plain meaning of the words as giving the judge a discretionary power * * * *."

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice under this section is addressed to the sound discretion of the trial judge, and is not subject to review in the Supreme Court. Western Carolina Power Co. v. Klutz, 196 N. C. 358, 145 S. E. 681; Causey v. Morris, 195 N. C. 532, 142 S. E. 783. Except upon abuse of this discretion. Grimes v. Fulton, 197 N. C. 84, 147 S. E. 680.

Matters Not Presented on Appeal.—Where, on appeal from the clerk's order removing the action on this ground and on the ground of movant's legal right, the court sustains the order on the latter ground alone, the clerk's right to issue the discretionary order is not presented on appeal to the Supreme Court, but the correctness of the order based on movant's legal right is left to be determined. Causey v. Morris, 195 N. C. 532, 142 S. E. 783.

When the trial judge in the proper exercise of his discretion under this section, has transferred a cause from one county to another for trial, the question of his ultimate purpose to consolidate the cause with other like cases does not arise on appeal to the Supreme Court. Western Carolina Power Co. v. Klutz, 196 N. C. 358, 145 S. E. 681.

No Appeal Lies.—Consequently, refusal of superior court judge to order removal of cause for convenience of witnesses and in the interest of justice, is not reviewable in the supreme court. Garrett v. Baar, 144 N. C. 23, 56 S. E. 479; Perry v. Perry, 172 N. C. 62, 89 S. E. 999; Byrd v. Carolina Spruce Co., 170 N. C. 429, 435, 87 S. E. 241. Except upon evidence of abuse of discretion. Ludwick v. Mining Co., 171 N. C. 60, 87 S. E. 949; Craven v. Munger Lumber Co., 170 N. C. 424, 87 S. E. 216.

What Constitutes Abuse of Discretion — Illustrated. — Under the provisions secs. 469, 479, it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, it is held, that his discretion in refusing to remove the cause was not such an abuse thereof as to reverse his judgment on appeal. Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194.

In Craven v. Munger, Lumber Co., 170 N. C. 424, 426, 87 S. E. 216, it is said: "This (an abuse of discretion), we cannot impute to the learned judge who refused this motion, and upon the evidence before him refused to find as a fact that the ends of justice would be served by such removal or to remove the case for the convenience of witnesses."

Second Appeal. — Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfect, and at some subsequent term renewed the motion, but upon another ground —for the convenience of witnesses and to promote the ends of justice, etc., and appealed from the refusal of this motion, and perfected it. Held, the granting or refusing of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by the Supreme Court and dismissed upon appellee's motion therein properly made. Ludwick v. Mining Co., 171 N. C. 61, 87 S. E. 949.

§ 471. Removal for fair trial.—In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the state or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (Rev., s. 426; Code, s. 196; 1879, c. 45; 1899, cc. 104, 508; 1806, c. 693, s. 12; 1917, c. 44.)

Reasons for Removal. — An affidavit for the removal of a cause, which does not set forth the reason of affiants' belief that justice cannot be done in the county from which it is removed, is insufficient. State v. Turtty, 9 N. C. 248. A statement that a fair and impartial trial cannot be had will not suffice. Id. p. 259.

Discretion of Trial Judge. — Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. Stroud v. United States, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50. See also State v. Davis, 203 N. C. 13, 26, 164 S. E. 736.

Counter Affidavit. — When the judge is not satisfied by the affidavits offered, it is immaterial that counter affidavits were not presented. Benton v. R. R., 122 N. C. 1009, 30 S. E. 333.

Appeal. — The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the granting or refusal of a motion to remove under this section is not reviewable. Albertson v. Terry, 109 N. C. 9, 13 S. E. 713, and cases cited. State v. Smarr, 121 N. C. 669, 28 S. 549; State v. Turner, 143 N. C. 641, 57 S. E. 158; State v. Johnson, 104 N. C. 780, 10 S. E. 257.

This is true, even though the judge further states in his order that his findings were based on his personal observation. Gilliken v. Norcom, 193 N. C. 352, 137 S. E. 136.

The rule of law governing motions for removal for the causes specified, is thus declared in Phillips v. Lentz, 83 N. C. 240; "The distinction seems to be where there are no facts stated in the affidavit as grounds for removal, the ruling of the court below may be renewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final." See Gilliken v. Norcom, 193 N. C. 352, 137 S. E. 136.

Admission of Facts. — The affidavit is required to make the facts appear to the Court, but if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. Emry v. Hardee, 94 N. C. 787.

It is within the power of counsel to consent that the Court might hear and consider the facts as if stated in an affidavit. Emry v. Hardee, 94 N. C. 787.

When it is stated in the order, that the motion is heard "as on affidavit," the implication is, nothing else appearing, that all the parties consented to accept the facts as if stated under oath. Emry v. Hardee, 94 N. C. 787.

Cited in McFadden v. Maxwell, 198 N. C. 223, 151 S. E. 250.

§ 472. Affidavits on hearing for removal; when removal ordered. — No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (Rev., s. 427; Code, s. 197; 1879, c. 45; 1899, c. 104, s. 2.)

See notes to preceding Section.

§ 473. Additional jurors from other counties instead of removal.—Upon suggestion made as provided by the second section preceding, or on his own motion, the presiding judge, instead of making order of removal may cause as many jurors as he deems necessary to be summoned from any county in the same judicial district or in an adjoining district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve as jurors in said action. The judge may direct the required number of names to be drawn from the jury box in said county in such manner as he may direct, and a list of the same to be delivered to the sheriff or other proper officer of the county, who shall at once summon the jurors so drawn to appear at the time and place specified in the order. In case a jury is not obtained from those so summoned the judge may, in like manner, from time to time, order additional jurors summoned from any county in the same judicial district or in an adjoining district, or from the county where the trial is being held, until a jury is obtained. These jurors are subject to challenge for cause as other jurors, but not for nonresidence in the county of trial, or service within two years, or not being freeholders, and all jurors so summoned are entitled to compensation for mileage and time, to be paid by the county to which they are summoned, at the rate now provided by law for regular jurors in the county of their residence. Provided, that when the judge shall determine that it is necessary to have a special venire drawn from an adjoining county, instead of directing the jurors to appear at the courthouse in the county where the trial is pending, he may order them to appear at the courthouse of their own county and in lieu of their receiving mileage in going from their own county to the county in which the trial is held, it shall be optional with the county where the trial is held to provide transportation to said jurors from their own county seat to the place of trial and return instead of paying mileage to the jurors in going from their county seat to the place of trial. This proviso shall not apply to Ashe County and Durham County. (1913, c. 4, ss. 1, 2; 1931, c. 308; 1933, c. 248, s. 1.)

Editor's Note.—The Act of 1931 amended this section to allow the presiding judge "on his own motion" to cause additional jurors to be summoned from any county in "an adjoining district" to try a case in the county where it is pending and from which removal of the cause was sought because of the possibility of an unfair trial by a local jury. He was restricted to "any adjoining county or any county in the same judicial district" by the former law. See 9 N. C. Law Rev. 379.

The proviso at the end of this section relating to special venires to save mileage allowance, was added by Public Laws 1933, c. 248.

Discretion of Judge. — The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned from any adjoining county, or from any county in the same judicial district, or have jurors drawn from the jury box of such county. State v. Kincaid, 183 N. C. 709, 110 S. E. 612; State v. Baxter, 208 N. C. 90, 179 S. E. 450.

Under this section the granting of a solicitor's motion that the jury be drawn from the body of another county is within the court's discretion. State v. Shipman, 202 N. C. 518, 163 S. E. 657.

Applied in State v. Beard, 207 N. C. 673, 178 S. E. 242.

Cited in State v. Green, 207 N. C. 369, 177 S. E. 120.

§ 474. Transcript of removal; subsequent proceedings. — When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court. (Rev., s. 428; Code, ss. 195, 198; R. C., c. 31, s. 118; 1806, c. 694, s. 12; 1810, c. 787; C. C. P., s. 69.)

Time to Deposit. — When an action is ordered removed to another county, it is error in the Judge presiding in the Superior Court of the county from which the cause is removed, at the next term thereof, and before the term of the Court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the Court to which the cause is removed to deposit his transcript. Fisher v. Cid. Copper Mining Co., 105 N. C. 123, 10 S. E. 1055.

Quoted in Clark v. Peebles, 100 N. C. 352, 6 S. E. 798.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS

Art. 8. Summons

§ 475. Civil actions commenced by.—Civil actions shall be commenced by issuing a summons; but no summons need issue in controversies submitted without action, and in confessions of judgment without action. (Rev., s. 429; Code, s. 199; C. C. P., s. 70.)

Cross References. — For full treatment of the subject of this article, see Process, 10 N. C. Enc. Dig. 518, et seq.; 15 N. C. Enc. Dig. 265, et seq. As to confessions of judgment, see section 623 et seq. As to summons in special proceedings, see section 753. As to summons in attachment, see sec. 802. As to summons as commencement of action with relation to limitations, see sec. 404. As to relief from judgment based on erroneous summons, see notes to sec. 600. As to excusable neglect in failing to answer, see the same section.

Necessity for Service of Summons. — Service of process or notice to appear is essential to the jurisdiction of all courts, as sufficiently appears from the well known legal maxim, that no one shall be condemned in his person without notice, and an opportunity to be heard in his defense. Smith v. Woolfolk, 115 U. S. 143, 149, 29 L. Ed. 357; Renaud v. Abbott, 116 U. S. 277, 288, 29 L. Ed. 629.

If jurisdiction is taken where there has been no service of process, or notice, or a statutory substitute for it, the proceeding is not only voidable but absolutely void, and may be collaterally attacked. Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914; Cox v. United States, 131 U. S. Appx. c., 19 L. Ed. 500.

The object of the summons is to advise the defendant of the plaintiff's action, and that he must appear at the time and place named and make his defense. Scott v. Jarrell, 167 N. C. 364, 365, 83 S. E. 563; Rector v. Laurel River Logging Co., 179 N. C. 59, 61, 101 S. E. 502; Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 55, 42 S. E. 447. Its office is to bring the parties into court. Barneycastle v. Walker, 92 N. C. 198.

Distinguished from Complaint. — The summons in no way indicates the cause of action which is to be learned from the complaint. In this respect it differs from the writ, under the old practice, which did to some extent indicate the plaintiff's cause of action. Battle v. Baird, 118 N. C. 854, 861, 24 S. E. 668.

When Necessary. — A civil action shall be commenced by issuing a summons, except, in cases where the defendant is not within reach of the process of the court and cannot be personally served, when it shall be commenced by the filing of the affidavit to be followed by publication. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951, overruled. Grocery Co. v. Bag Co., 142 N. C. 174, 55 S. E. 90.

Same—Injunction Prior to Summons. — An injunction ordered by the judge upon reading the complaint, coupled with an order at the same time to issue a copy of the complaint and a summons to the defendant, was irregular and premature, and therefore should be dissolved. Patrick v. Joyner, 63 N. C. 573. But this irregularity, if waived by the defendant, will not be noticed by the court, see parte, Heilig v. Stokes, 63 N. C. 612.

Where no process was issued the injunction can not be sustained. Horne v. Board, 122 N. C. 466, 29 S. E. 581; Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

A summons is "issued" within the meaning of this section when it passes from the clerk's office, or the office of a justice of the peace, under the sanction and authority of such officer, for the purpose of being served. Morrison v. Lewis, 197 N. C. 79, 80, 147 S. E. 729.

Suit Pending from Issuance of Summons.—A civil action is commenced when the summons is issued and, as this section fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served. Atkinson v. Greene, 197 N. C. 118, 120, 147 S. E. 811; Morrison v. Lewis, 197 N. C. 79, 147 S. E. 729.

Delivery to Sheriff. — A summons is issued when it is delivered to the sheriff, or some one for him; this is the consummation and it then relates back to the time of filling out and dating by the clerk. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951; Smith v. Cashie, etc., Lumber Co., 142 N. C. 26, 54 S. E. 788.

A summons simply filled in and lying in the office of an attorney, while he waited for the prosecution bond would not constitute an issuance. Webster v. Sharpe, 116 N. C. 466, 468, 21 S. E. 912.

As to officer's notation of delivery as controlling issuance, see section 479 and notes thereto.

How Jurisdiction in Actions in Personam Acquired. — In Hatch v. Almance R. Co., 183 N. C. 617, 112 S. E.529, it was said:—"An action is commenced as to each defendant when the summons is issued against him (section 404, and this section), but in actions in personam jurisdiction of a cause of parties litigant can be acquired only by personal service of process within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. Bernhardt v. Brown, 118 N. C. 700, 701, 24 S. 527; Vick v. Flurnoy, 147 N. C. 209, 212, 60 S. E. 978; Warlick v. Reynolds & Co., 151 N. C. 606, 610, 66 S. E. 657, 21 R. C. L., 1315." The various forms of service are prescribed by the following sections of this article. Ed. Note.

Effect of Nonsuit.—Where certain named individuals, directors of a corporation, are served with summons as trustees, and as to them the plaintiff takes a voluntary nonsuit and moves that the corporation be made the defendant in the action, and the complaint amended, the effect of the motion is to commence a new action against the corporation, and not to amend the original complaint. Jones v. Vanstory, 200 N. C. 582, 157 S. E. 867.

Cited in Western Carolina Power Co. v. Yount, 208 N. C. 182, 179 S. E. 804.

§ 476. Contents, return, seal.—The summons must run in the name of the State, be signed by the Clerk of the Superior Court having jurisdiction to try the action, and be directed to the sheriff or other proper officers of the county or counties in which the defendants or any of them reside or may be found. It must be returnable before the clerk and must command the sheriff or other proper officer to sustain the defendant, or defendants, to appear and answer the complaint of the plaintiff within thirty (30) days after

its service upon defendant, or defendants; and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint within the time specified the plaintiff will apply to the court for the relief demanded in the complaint; and must be dated on the date of its issue. Every summons addressed to the sheriff or other officer of a county, other than that from which it issued, must be attested by the seal of the court; but when addressed to the sheriff or other officer of the county in which it issued, such seal is unnecessary. Summons must be served by the sheriff to whom it is addressed for service within ten (10) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within ten (10) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served. In all cases where service of summons is made by publication, such service by publication shall be completed within fifty days from the order of publication. (Rev., ss. 430, 431; Code, ss. 200, 203, 213; C. C. P., s. 74; 1876-7, cc. 85, 241; 1919, c. 304, s. 1; Ex. Sess. 1920, c. 96; Ex. Sess. 1921, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 132; 1929, c. 237, s. 1; 1935, c. 343.)

Cross Reference.—As to amendment when a summons fails to comply with the requirement of the instant section, see § 547 and the note thereto.

As to issuance and return to justices court, see section 1487; as to issuance on Sunday, see section 3958.

Editor's Note. — In view of the importance of the changes in this section effected by recent sessions of the legislature, it is thought that an outline of the procedure under the various acts may be of service.

The only change effected by the 1935 amendment occurs in the proviso at the end of the section. Prior to the amendment service was required to be completed within fifty days from the commencement of the action instead of from the order of publication.

Same—Under the Original Code of Civil Procedure. — "The original Code of Civil Procedure required the defendant to appear and answer within a certain number of days after service of summons, in no case to be less than twenty days, thus making the day of service fix the time within which answer was to be filed. When summons was made returnable to the term, if issued less than ten days before the next term, the second term thereafter became the return term, the case was placed on the summons docket for that term and if issued more than ten days before the next term, and the pleadings were made up at the next succeeding term." 1 N. C. Law Rev. 281.

One of the striking features of the new procedure, effective with the adoption of the original Code of Civil Procedure in 1868, was that all summonses should be returnable before the clerk, and that all pleadings should be made up and perfected before him; and when an issue of law is raised an appeal should lie to the judge at chambers, and be promptly acted on by him and returned. And further, that when an issue of fact arose upon the pleadings, and in such cases only, the cause should be transferred to be tried before the judge at term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for trial except those in which the issues of fact had been formulated before the clerk by the pleadings. See Campbell v. Campbell, 179 N. C. 413, 415, 102 S. E. 737.

In Campbell v. Campbell, 179 N. C. 413, 102 S. E. 737, it was said: "This system has been continued in all the States, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of action there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, what was commonly known as the 'Batchelor Act,' entitled, an act suspending the Code of Civil Procedure in certain cases,' ch. 76 Laws 1868-9, ratified 22 March, 1869, was enacted, which provided that summons should be made returnable to the term instead of before the clerk. This act provided, sec. 13, that the suspending act should be temporary and in force only 'until 1 January, 1871,' But, owing to the final conditions of the time, it was later continued indefinitely, and then by oversight, though contradictory to concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk), it has endured to this time though such anomaly has not obtained, it is believed, in any other State."

Same—Under Section 476 of the Consolidated Statutes. — By the Public laws of 1919 what is commonly known as the "Crisp Act" was passed, and this law was written into the Consolidated Statutes. According to the provision of the "Crisp Act" the summons was required to be returnable before the clerk at a date named therein, not less than ten nor more than twenty days from its issue, and the defendant was required to answer within twenty days of its return.

For example suppose the summons issued on June 1; a day for its return was required to be named between June 10 and June 20; if June 15 was selected the defendant would have until June 25 to appear and answer. Service played no part in this system.

Same—Under Public Laws of 1923.—The Public laws of 1923 c. 53 s. 2, codified as sec. 492(a) of volume III of the Consolidated Statutes, reads as follows:

"When any summons issued by any clerk of the Superior Court in North Carolina is not served upon any one or more of the defendants therein named ten days before the return day thereof, but is served before the return day thereof, such failure to serve the said summons shall not affect the pendency of the action, and as touching the defendant or defendants therein named upon whom service has not been made ten days before the return day named in the summons, the return day as to such defendants shall be the tenth day after the service of the summons on the said defendant or defendants."

The original return day under this act was the same as that pointed out in discussing the law under the Consolidated Statutes; but if the sheriff did not serve the summons within ten days of the original return day then the return day was postponed automatically to ten days from the date of the service. For example if a summons issued on June 1 and the return day was named as June 20 and the service was not perfected until June 15 the return day was extended to June 25.

This act was repealed by the act of 1927 which amended this section (as explained in a succeeding paragraph). The act was subjected to the following criticism in 1 N. C. Law Rev. 281: "The present change introduces again the element of uncertainty, since the plaintiff cannot know when the summons will be served, and his right to proceed at a definite time depends upon the diligence of the officer or other circumstances not within his control. It would seem desirable that the definite return day named in the summons should still control, not only for the sake of definiteness and uniformity in procedure, but because it enables the plaintiff to know when to look after his case, and at the same time gives reasonable protection to the defendant by giving him twenty days in all cases to answer, with the power in the clerk to extend the time for good cause shown." 1 N. C. L. R. 281.

This criticisim probably prompted the passage of the 1927 Act.

Same—The Extra Session of 1921.—This act provided that the "summons must be served as now provided by law." This provision was omitted in the 1927 amendment, as the method of service is there specifically mentioned.

Same—Public Laws of 1927.—This section as amended in 1927 constitutes more or less a reversion to the procedure extant before the passage of the "Crisp Act." There is now no specified return day; appearance and answer are **always thirty days after service** (in conformance with the criticism cited above); service must be ten days after issuance; if not served within ten days it must be returned with reasons for nonservice. If the reason was lack of time the issuing officer executed (within three days) an alias or pluries summons, as the case required; but this provision was struck out by the Act of 1929, as noted in a succeeding paragraph. The directory provision that the officer shall note the date of service is also new.

Same—The Extra Session of 1920.—"In Campbell v. Campbell (179 N. C. 413, 102 S. E. 727) the summons was issued on July 21, returnable before the clerk on August

8; but since the defendant was a nonresident, and service was to be made by publication, the time of publication did not expire until August 23. It was held that the time was necessarily extended by operation of law, so that the return day for the defendant was August 23." See 1 N. C. Law Rev. 9.

To meet this case, ch. 96, of the Public Laws, Extra Session 1920 enacted a proviso that the summons was to be returnable within forty days. This proviso was amended by the Act of 1927, and the time is extended from forty to fifty days.

Same—Public Laws of 1929.—This act amended this section by striking out the following: "Upon the return of a summons unserved for want of time to make service, as to any defendant or defendants not served, the Clerk shall, within three (3) days thereafter issue an alias or pluries summons, as the case may require."

Previous to this amendment the clerk was required to issue such summons if the process officer has not had time to serve the original within the time prescribed by statute, without the necessity of the plaintiff in the action applying therefor. Neely v. Minus, 196 N. C. 345, 145 S. E. 771. See Note under § 480.

Notice that Relief Will Be Demanded.—Whether the omission of notice that "the plaintiff will apply to the court for the relief demanded in the complaint" would be futile semble. Davis v. Ely, 100 N. C. 283, 285, 5 S. E. 239. The Court stated that this has become a material part of the pleading.

Excuse for Failure to Answer or Demur in Time. — See note of Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627, in 5 N. C. Law Rev. 269.

Ten Days After Issuance.—The construction given section 200 of the Code of 1883, providing that personal service should be "ten days before the beginning of the term," was that service before midnight of Friday, the tenth day before court, was a sufficient compliance. See Taylor v. Harris, 82 N. C. 25; Guilford County v. Georgia Co., 109 N. C. 310, 311, 313, 13 S. E. 861. It would seem, then by analogy, that a service before midnight of the tenth day after issuance would constitute a sufficient compliance with the requirement of this section that service must be ten days after issuance. Ed. Note.

Effect of Summons Calling for Premature Appearance.—The rights of the defendant cannot be abridged by irregularity in making the summons require an appearance within less than the twenty days (now thirty after service) allowed by this section. Such summons is not necessarily on that account void, and the probate judge is not bound to dismiss it but he should allow the defendants the time allowed by this section for an appearance. Guion v. Melvin, 69 N. C. 242.

Meaning of Return.—The Code of 1883, sec. 200, expressly requires a sheriff to whom a summons is directed to execute the same and return it to the Superior Court of the county from which it is issued. "The term 'return' implies that the process is taken back to the place from which it was issued." In re Crittenden, 2 Flip., 215. It is the "bringing of a process into Court with such endorsements as the law requires, whether they in fact be true or false." Harman v. Childress, 3 Yerg., 329. As the statute requires the officer to make his return to the Superior Court of Northampton County, and as the return could not be made elsewhere, it must follow that the cause of action arose in the said county. Watson v. Mitchell, 108 N. C. 364, 12 S. E. 836.

When Summons Returnable.—Public Laws 1927, made material changes in the law theretofore existing. Formerly a summons was returnable before the clerk "at a date named therein not less than ten nor more than twenty days from its issuance." The law now in force provides that a summons must be returnable before the clerk and must notify the defendant to appear and answer the complaint within thirty days after service thereof. It is further provided, however, that the sheriff to whom the summons is addressed, must serve the same within ten days after the date of issuance, and if not served within ten days, it must be returned by the officer holding the same for service to the clerk of the court issuing the summons, "with notation thereon of its nonservice and the reasons therefor as to every defendant not served." By implication only, it would appear that a summons in a civil action is now returnable within ten days. Neely v. Minus, 196 N. C. 345, 346, 145 S. E. 771.

Sections 476 and 593 Construed Together.—In Young v. Davis, 182 N. C. 200, 204, 108 S. E. 630, it was said that this section and section 593 providing for default judgment are not necessarily repugnant, but on the contrary it is clear, that the one is an exception to the other, or rather the first affords an additional and more speedy method of relief in the stated class of suits.

Signature of Sheriff.—Where a summons was properly served and the sheriff's return was unsigned, though endorsed in proper form, the judge at the trial did not exceed his powers in permitting the sheriff to sign the return nunc pro tunc. Luttrell & Co. v. Martin, 112 N. C. 593, 17 S. E. 573.

Seal.—A writ issuing to one county from the superior court of another county must have the seal of the court from which it issues impressed on it. Shackelford v. M'Rea, 10 N. C. 226. The rule is that when the process is to be executed within the county where it issued, no seal is required, but if it goes beyond such county the seal is required, and without it the process is void. This difference applies to all precepts or process, such as summons, execution and the like. This distinction has been sustained by numerous decisions of the supreme court. Freeman v. Lewis, 27 N. C. 91; Taylor v. Taylor, 83 N. C. 116; McArter v. Rhae, 122 N. C. 614, 615, 30 S. E. 128; Shackelford v. M'Rea, 10 N. C. 226; Seawell v. Bank, 14 N. C. 279; Finley v. Smith, 15 N. C. 95. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.

Same—Omission from Copy. — Where the original summons bore the proper seal and the copy purported to have been attested in like manner, and the copy included every material part of the original except the seal, the omission of the seal, not affecting the substance of the writ did not impair the efficacy of the service or in any way mislead or prejudice the defendant. In affixing the seal the object is to evidence the authenticity of the summons, but the seal is not a part of the summons in the sense that its impress upon the copy is essential to the validity of the original. Elramy v. Abeyounis, 189 N. C. 278, 126 S. E. 743, 744.

Amendment of Summons.—See sec. 547 and notes thereto.

§ 477. Issued to several counties.—The plaintiff may issue a summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action. When the summons is returned, it shall be docketed as if only one had issued, and if any defendant is not served with such process, the same proceeding shall be had as in other cases of similar process not executed. (Rev., s. 432; Code, s. 204; R. C., c. 31, s. 44; 1789, c. 314, ss. 1, 2; 1831, c. 14, s. 2.)

§ 478. When directed to officer of adjoining county.—If at any time there is not in the county a proper officer to whom summons or other process of a court of record is or ought to be directed, who can lawfully execute it; or if such officer refuses or neglects to execute the same, the clerk of the court from which it has issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such summons or process to the sheriff of any adjoining county, who has power to and shall execute the same in like manner as if he were sheriff of the county. In all cases where the sheriff of any county is interested, if there is no coroner in the county, process may be issued to and shall be executed by the sheriff of any adjoining county. (Rev., ss. 1530, 1531; Code, ss. 929, 930; R. C., c. 31, s. 55; 1779, c. 156; 1821, c. 1080; 1882, c. 1132; 1846, c. 61; 1869-70, c. 175.)

As to when coroner acts as sheriff, see sec. 1021.

Applied in an anonymous case in 2 N. C. 422.

§ 478(a). Uniform pleading and practice in inferior courts where summons issued to run outside of county.—In all cases in which any court in North Carolina inferior to the Superior Court, except courts of Justices of the Peace, shall issue any summons to run outside the county of such inferior court, the case in which such summons is issued shall, as to the summons and the filing of all pleadings, be subject to, and governed by,

the laws and rules applicable to actions in the Superior Court of North Carolina. (1931, c. 420.)

§ 479. When officer must execute and return. —The officer to whom the summons is addressed must note on it the day of its delivery to him, serve it by delivering a copy thereof to each of the defendants, and return it within the time specified therein for its return. In all cases when a summons is issued by any court of this state, and the officer to whom said summons is directed shall find that the person or persons against whom said summons is issued cannot be served without danger of injury to said person or persons on account of the condition of said person or persons arising from illness, accident or otherwise, the officer shall file with his returns a certificate from a reputable physician certifyng to this fact, and said returns shall relieve the said officer from any liability by reason of failure to actually serve the summons. The said officer shall as soon as possible make actual service of said summons, and when actually served the cause of action shall be deemed to have been commenced as of the date of the original summons, and the defendant shall have twenty days from the date of actual service within which to demur, answer or otherwise plead. (Rev., s. 433; Code, s. 200; 1876-7, c. 85; 1919, c. 304, s. 1; Ex. Sess. 1921, c. 92, s. 1; 1923, c. 62.)

Editor's Note.—As this section appears in Volume III. of the Consolidated Statutes (with a citation to the Public Laws of the Extra Session of 1921 c. 92 sec. 1 and the Public Laws of 1923 c. 62) there are several apparant changes which render the section inconsistent with section 476 as amended in 1927—explained in the editor's note, to that section, supra. The phrase at the end of the first sentence "and return it within the time specified therein for its return" seems to be nullified by the fact that the summons no longer names a return day; the return will have to comply with the provision of section 476.

The phrase in the same sentence, "serve it by delivering a copy thereof to each of the defendants," seems to supersede the provision of section 482 requiring reading as the usual mode of service. The section formerly provided that the summons was to be served "as provided by law."

The Public Laws of 1923 added the last two sentences of the section, relating to service in case of danger or injury to the person. "This applies to all courts, since the words used are 'when the summons is issued by any court of this state.' The first purpose is to relieve the officer from liability to a penalty for failure to serve the summons in proper time, (sections 3936, 3938). It may be that such facts stated in his return, as an excuse for failure to serve the summons, would exonerate the officer in any case (21 R. C. L. 1318), but this places it beyond question." 1 N. C. Law Rev. 279.

What effect the amendment of 1927 to sec. 476 will have upon the last sentence of this section is conjectural; unless this section is construed as an exception to 476, the defendant will have thirty instead of twenty days after service in which to answer. It is more probable that this section will be construed as impliedly amended by the amendment to sec. 476.

Effect of Officer's Notation. — A summons is issued when the clerk delivers it to the sheriff to be served, and where there is no intermediary, but the process is delivered by the clerk himself to the officer, the notation of the officer on it as to the date of its receipt by him must be controlling evidence as to when it was issued. Smith v. Cashie, etc., Lumber Co., 142 N. C. 26, 54 S. E. 788.

A civil action is commenced when the summons is issued, and the presumption when nothing else appears is that the summons passed from the control of the Clerk and was delivered to the sheriff, and therefore issued at the time when the sheriff received it; and this is generally determined by the entry on the process of the date it was received by the sheriff, as he is required by statute to make such an entry. Smith v. Cashie, etc., Lumber Co., 142 N. C. 26, 30, 54 S. E. 788, explaining Houston v. Thornton, 122 N. C. 365, 375, 29 S. E. 827.

Failure to Make Notation.—The sheriff ought regularly to note on the summons the day of its delivery to him, as required by the statute but his failure to do so does not vitiate or render the summons void. Such a notation is not of the essence of the summons, or the service of it by the sheriff. Its purpose is to provide evidence convenient to fix the day the summons passed into the hands of the sheriff for any proper purpose. Strayhorn v. Blalock, 92 N. C. 293, 294.

Summons Issued from Justice's Court. — Construing sec. 1500, sub-sec. 15, and this section together, it is clear that a summons issued from a court of a justice of the peace must be served in the same manner as a summons issued from the Superior Court. Pass v. Elias, 192 N. C. 497, 498, 135 S. E. 291.

Return of Sheriff Generally.—See secs. 3936 et seq. and the notes thereto.

§ 480. Alias and pluries.—When the defendant in a civil action or special proceeding is not served with summons within the time in which it is returnable, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses. Provided, however, that in case of tax suits brought under the provisions of Consolidated Statutes, section eight thousand thirty-seven, as amended, an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or puries summons has heretofore been issued or not, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action. (Rev., s. 437; Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71; 1929, c. 237, s. 2; 1931, c 264.)

Editor's Note.—The second sentence of this section was added by the Act of 1929 which also amended § 476 by striking out the provisions relating to issuance of an alias or pluries summons by the clerk. The Act of 1931 added the proviso.

It was held in McGuire v. Montvale Lumber Co., 190 N. C. 806, 808, 131 S. E. 274, that the word "may" as herein used means "must." The McGuire case further states that "the true office of an alias summons is to continue the action referable to its original date of institution, when the first summons issued had not been served," and cites Powell v. Dail, 172 N. C. 261, 90 S. E. 194; Rogerson v. Leggett, 145 N. C. 7, 58 S. E. 596.

Cited in Neely v. Minus, 196 N. C. 345, 145 S. E. 771.

§ 481. Discontinuance. — A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when the summons was issued. (Rev., s. 438.)

When Discontinuance Occurs.— A discontinuance under this section occurs only when the summons has not been served. Rogerson v. Leggett, 145 N. C. 7, 10, 58 S. E. 596.

The failure of service of the original summons in an action must be followed by an alias or pluries writ or a summons successively and properly issued in order to preserve a continous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant. And another summons served after the break in the chain is a new action. Hatch v. Alamance R. Co., 183 N. C. 617, 112 S. E. 529.

Under this section where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance, and where a summons is thereafter served it commences a new action. Neely v. Minus, 196 N. C. 345, 145 S. E. 771.

The failure of the plaintiff to move before the clerk of the court for an alias summons on or before the return day thereof works a discontinuance of the action. McGuire v. Montvale Lumber Co., 190 N. C. 806, 131 S. E. 274.

§ 482. Service by reading. — The summons shall be served in all cases, except as hereinafter provided, by the sheriff or other officer reading it to the party or parties named as defendant. (Rev., s. 439; Code, s. 214; 1876-7, c. 241.)

Editor's Note. — Section 479 as amended provides that service must be by **delivering** a copy to the defendant. Whether the summons has to be read and then delivered or whether delivery alone will suffice has not been decided. It is probable that this section is superseded.

Purpose.—On the one hand this section contemplates the exhibition of the process to the party and affords him and the officer greater assurance of its validity, and, on the other hand, it assures him that the person was the one designated. Lowman & Co. v. Ballard, 168 N. C. 16, 84 S. E. 21.

Return "Served" Implies Reading.—This section prescribed how the officer shall make service of the summons, and prescribes his duty as to the manner of discharging it. When the sheriff returns that he has "served" the summons, this implies that he has discharged his official duty in that respect, and that he has read it to the defendant. Strayhorn v. Blalock, 92 N. C. 293, 295. See also Isley v. Boon, 113 N. C. 249, 251, 18 S. E. 174.

Service of summons over a telephone line, the parties being necessarily separated and the method not contemplated by this section, as telephones were not in existence at the time of its passage, is not valid. Lowman & Co. v. Ballard, 168 N. C. 16, 84 S. E. 21.

In the Federal Courts.—While the federal courts conform their mode of procedure to that of the state courts, they will reject any subordinate provisions which will unwisely encumber the administration of justice. This section is not applied in Federal Practice. In Lowry v. Story, 31 Fed. 769, 772 the court says: "The reading of a summons by a sheriff may be sufficient service in a state court, where actions are usually brought in the county in which the defendants reside; but I think that service by delivery of a copy is more just and appropriate in the federal courts of more extensive territorial limits of jurisdiction, and where the times and places of holding court are not so well known and convenient to the defendants." See as to delivery section 479.

Waiver.—The defendant may waive the reading prescribed by this section. Williamson v. Cocke, 124 N. C. 585, 32 S. E. 963.

§ 483. Service by copy.—The summons shall be served by delivering a copy thereof in the following cases:

1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this state for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this state, or when it can be made personally within the state upon the president, treasurer or secretary thereof.

2. If against a minor under the age of fourteen years, to the minor personally, and also to his father, mother or guardian, or if there are none within the state, to any person having the care and control of the minor, or with whom he resides, or in whose service he is employed.

3. If against a person judicially declared of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally. If the superintendent or acting superintendent of an insane asylum informs the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on an insane person confined in such asylum, that the summons, or process, or notice, cannot be served without danger of injury to the insane person, it is sufficient for the officer to return the same without actual service, but with an endorsement that it was not personally served because of such information; and when an insane person is confined in a common jail it is sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorsement that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which the jail is situated.

4. Every unincorporated, fraternal, beneficial organization, fraternal benefit order, association and/or society issuing certificates and/or policies of insurance, whether foreign or domestic, now or hereafter doing business in this state, shall be subject to service of process, in the same manner as is now or hereafter provided for service of process on corporations: Provided, this paragraph shall only apply in actions concerning such certificates and/or policies of insurance. (Rev., s. 440; Code, s. 217; C. C. P., s. 82; 1874-5, c. 168; 1889, c. 89; 1933, c. 24.)

I. In General.
II. Service on Corporations.
  A. Corporations Generally.
  B. Foreign Corporations.
III. Service on Minors.
IV. Service on Insane Persons.

I. IN GENERAL.

Editor's Note. — By the wording of section 479 as it appeared in volume III of the Consolidated Statutes, delivery of a copy was made the usual method of serving the summons. This section prescribes to whom the delivery is to be made in certain specified instances.

Public Laws 1933, c. 24 added paragraph 4 of this section, relating to service on unincorporated, fraternal, beneficial organizations, fraternal orders, etc.

Applicability to Criminal Actions. — This section though primarily intended as a regulation in the institution of a civil action, is equally appropriate in a criminal action, and its terms are sufficiently comprehensive to embrace both. State v. Western, etc., R. Co., 89 N. C. 584, 586.

Applicability in Justices' Court. — This section does not embrace a process returnable before a magistrate, Kirkland v. Hogan, 65 N. C. 144; but those provisions, in regard to the service of process upon corporations, apply to justices' courts. Katzenstein v. Raleigh, etc., R. Co., 78 N. C. 286, 287.

What Constitutes Delivery. — It would seem that the use of the word "delivery" in this section contemplates a delivery to the defendant in person, or his qualified agent as specified in the section. It has been held that leaving a copy of the summons with the wife of the person named in the summons will not suffice, First Nat. Bank v. Wilson, 80 N. C. 200; nor does leaving a copy at the dwelling house constitute a delivery. State v. Jacobs, 47 N. C. 52.

Same—Delivery of Original. — The service is void where the original summons only is delivered to an officer of the corporation, who after reading it, returned the same to the officer making the service. Aaron v. Pioneer Lumber Co., 112 N. C. 189, 16 S. E. 1010.

Cited in Welch v. Welch, 194 N. C. 633, 637, 140 S. E. 436; Tinker v. Rice Motors, 198 N. C. 73, 74, 150 S. E. 701; Smith v. Finance Co. of America, 207 N. C. 367, 177 S. E. 183.

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Requirement Mandatory. — This requirement as to the mode of service on corporations must be strictly observed. Hatch v. Alamance R. Co., 183 N. C. 617, 621, 112 S. E. 529, quoting Amy v. Watertown, 130 U. S. 301, 317, 32 L. Ed. 946, 9 S. Ct. 530.

The provisions of this section must be strictly followed, and a separate copy of the summons must be served on and left with the agent for each corporate defendant. Hershey Corp. v. Atlantic Coast Line R. Co., 203 N. C. 184, 165 S. E. 550.

The provisions of this section as to service of summons on private corporations must be observed, and where individuals, directors of a corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named. Jones v. Vanstory, 200 N. C. 582, 157 S. E. 867.

Local Agent. — The term local pertains to place, and a local agent to receive and collect money, ex vi termini, means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent. Moore v. Freeman's Nat. Bank, 92 N. C. 590, 596.

But the authority to receive money is not the exclusive test of a local agent upon whom service of process may be made. Copeland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501; Pardue v. Absher, 174 N. C. 676, 679, 94 S. E. 414.

This language was not intended to limit the service to such a class of agents, but rather to extend the word "agent" to embrace them. The authority to receive money, of itself, makes one a local agent for the purpose of the statute, but this is not the exclusive test of agency. Cape Fear Rys. v. Cobb, 190 N. C. 375, 377, 129 S. E. 828.

A local agent receiving premiums or commissions for a bonding company doing business in this State is within the contemplation of this section. Pardue v. Absher, 174 N. C. 676, 94 S. E. 414.

Service on Bank Director. — The service of process authorized to be made on a director of a corporation, under this section, as applied to a bank, means one of the eleven principal directors, annually elected by the stockholders, and not a director appointed by the authorities of the bank for its branches or agencies. Webb v. President and Directors, 50 N. C. 288.

Service on Receiver. — An action against the receivers of a corporation is in fact an action against the corporation; hence, under this section, service of summons on a local agent is service on the receivers. Farris v. Richmond, etc., R. Co., 115 N. C. 600, 20 S. E. 167.

Service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon the president and superintendent, and service upon the local agent of the receivers has the same legal effect as if made upon the receivers personally. Grady v. Richmond, etc., R. Co., 116 N. C. 952, 21 S. E. 304.

A person acting for a corporation as a caretaker as a matter of friendship, without compensation, is not an agent of such company for receiving and paying out moneys upon whom process may be served under this section. Kelly v. LeFaiver & Co., 144 N. C. 4, 56 S. E. 510.

President before Court in Individual Capacity. — Where a bill was amended so as to make a corporation a party, it was held to be proper to serve the president of the corporation with a copy of the bill, although he was already before the court in his individual capacity. McRae v. Guion, 58 N. C. 129.

Agent of Telephone Company as Agents of Telegraph Company. — In Brown v. Western Union Tel. Co., 169 N. C. 509, 86 S. E. 290, it was held that the fact that an agent of a telephone company received messages for a telegraph company and telephoned them to a nearby town, collected for telegrams, etc., was sufficient to be submitted to the jury on the question of whether the agent of the telephone company was such an agent of the telegraph company as is contemplated by this section.

For other cases applying the agency doctrine of this section to Foreign Corporations, see post, this note, the next analysis line.

B. Foreign Corporations.

As to service on statutory agent of foreign corporation see 1137 and notes thereto. As to service on insurance commissioner, see § 6414.

In General. — "The several cases respecting a foreign corporation, it will be observed, are put disjunctively; and the meaning is, that in either of the first three cases service may be made by delivery of a copy of the summons to one of the offices named in the first clause of the section, among which is the managing agent. In the last case, that is, when the foreign corporation has no property within the State, and the cause of action did not arise therein, and the plaintiff does not reside therein then service may be made on the president, treasurer or secretary, if he can be found within the State, but it may not be made on a management agent found here. A reason for the difference may be discovered. The first three classes of cases embraced all of which would usually occur, and in them every reasonable facility for the service of process is provided. But there was a fourth class of cases, not likely; but still possible, and therefore needing to be provided for, viz.; where a non-resident might be allowed to sue in this State a foreign corporation having no property here, on a cause of action arising elsewhere. The necessity of suing here, might arise out of the fact, that the chief officers were to be found here, and not elsewhere. In such a case, either because the corporation could not well have a managing agent here, or for other reasons, which may be imagined, it was provided that service should be made on some one of the principle officers." Cunningham v. Southern Exp. Co., 67 N. C. 425, 427.

The construction of this statute, which has been uniformly followed, in Cunningham v. Southern Exp. Co., 67 N. C. 425, 426, and all cases since, is thus clearly stated by Hoke, J., in Whitehurst v. Kerr, 153 N. C. 76, 68 S. E. 913; "Construing a statute of similar import, it has been held that the first clause enumerates the persons on whom service of process can be made, to wit, on the president or other head of the corporation, secretary, treasurer, director, managing or local agent thereof, and in that respect applies to all corporations, both domestic and foreign. Then follows the proviso as to who shall be considered local agents for the purpose of the section, and the last clause establishes certain conditions, restrictive in their nature, which are required and necessary to a proper and valid service on foreign corporations. That is, service on the persons designated in the first clause, shall only be good as to foreign corporations: (1) when they have property in the State, or (2) when the cause of action arose therein, or (3) when the plaintiff resides in the State. And then a fourth method is established, (4) when service can be made within this State personally on the president, treasurer, or secretary thereof."

This construction has been held also in McDonald v. McArthur Bros. Co., 154 N. C. 122, 69 S. E. 832; Higgs & Co. v. Sperry, etc., Co., 139 N. C. 299, 51 S. E. 1020; Greenleaf v. People's Bank, 133 N. C. 292, 45 S. E. 638; Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447; Clinard v. White, 129 N. C. 250, 39 S. E. 960; Jones v. Hartford Ins. Co., 88 N. C. 499; Menefee v. Riverside, etc., Cotton Mills, 161 N. C. 164, 165, 76 S. E. 741.

An attorney for a foreign corporation, who has claims to collect for it in this State, is not a local agent upon whom process can be served. Moore v. Freeman's Nat. Bank, 92 N. C. 590.

Superintendent. — The agent of a foreign corporation who superintends all its work in this State and has general charge of its employees is its "managing agent" within the meaning of this section. Clinard v. White, 129 N. C. 250, 39 S. E. 960.

President. — Service of summons on the president of a foreign corporation is valid, if made within the State, whether the president is in the State on private or official business. Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447.

A traveling auditor of a foreign corporation, who presented an account to the plaintiff and requested payment to himself, but presented the account without authority and received no money, is not a "local agent" (under this section) for the purpose of service of summons. Higgs & Co. v. Sperry, etc., Co., 139 N. C. 299, 51 S. E. 1020.

See Blades Lbr. Co. v. Finance Co., 204 N. C. 285, 168 S. E. 219, following Higgs & Co. v. Sperry, etc., Co., 139 N. C. 299, 51 S. E. 1020, and holding also that the fact that such agent received money for the corporation on a single instance does not alter this result.

A local agency for a foreign corporation acting as its general sales agent, and collecting and receiving money in such capacity, is of such character as to make it an agency upon which service of summons for the foreign corporation can be made under our statute. Cape Fear Rys. v. Cobb, 190 N. C. 375, 129 S. E. 828.

A foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. Steele v. Western Union Tel. Co., 206 N. C. 220, 224, 173 S. E. 583.

When a foreign corporation has property in this state and is here present transacting its corporate business through local agents, such corporation is amenable to service of process according to the provisions of this section in a transitory cause of action arising in another state and brought by a non-resident of this state and this statute neither offends against the commerce clause of the Federal Constitution nor runs counter to the Fourteenth Amendment. Id.

A foreign express company, while a member of the Fed-

eral Government Control Act, a war measure, does not fall within the provision of this section as to local process agent. McAlister v. American Ry. Exp. Co., 179 N. C. 556, 103 S. E. 129.

A foreman, acting under the direction of the superintendent of a corporation, is neither an "officer" nor "a managing or local agent," within the meaning of this section. Simmons v. Defiance Box Co., 148 N. C. 344, 62 S. E. 435.

An operator of a wireless telegraph in sole charge of defendant's property, and in control of its business, is a local agent within the meaning of this section. Copeland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501.

Service of process on the bookkeeper of a foreign corporation who was apparently the only financial agent of the corporation in the state will suffice under this section. Whitehurst v. Kerr, 153 N. C. 76, 68 S. E. 913.

A buyer for the defendant foreign corporation, who made the contract with plaintiff on which the action is based, was held a "managing agent." Royal Furniture Co. v. Wichita Furniture Co., 180 N. C. 531, 105 S. E. 176.

III. SERVICE ON MINORS.

Service upon Minor over Fourteen. — "Service of the summons by reading it to a minor is good unless he is under the age of 14 years, and, as to a purchaser, it so appears on the face of the record or he has actual knowledge of the fact." Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763, 765. See, however, section 479 and notes.

Service upon Minor under Fourteen. — "Formerly an infant was brought into court just as any other defendant was. If he had a general guardian, process was served upon the guardian, if there was no general guardian, the court acquired jurisdiction by service of process upon the infant, and appointed some suitable person—frequently some officer of the court—as guardian ad litem, who accepted service and defended for him; but since the Code of Civil Procedure (this section), the service upon a minor under the age of fourteen must be upon him personally, and also his father, mother or guardian, or, if there be none in the state, then upon any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed." White v. Morris, 107 N. C. 92, 93, 98, 12 S. E. 80. See also, Ward v. Lowndes, 96 N. C. 637, 2 S. E. 591.

Process on Infant Personally. — In Matthews v. Joyce, 85 N. C. 258, the court said, "while according to recent decisions jurisdiction over the person of infants is acquired only as in the other cases by the service of process on them, and then it is competent to appoint, in case there is no general guardian, a guardian ad litem, to act in their behalf and to protect their interests, so as to bind them by judicial action, a different practice has long and almost universally prevailed in this state, and this power of appointment has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed them to the defense of this special guardian." Groves v. Ware, 182 N. C. 553, 109 S. E. 568, 570.

Process Served on General Guardian.—The general guardian is the proper person on whom process against infant defendants should be served, and it is his duty to protect their interest in the suit, Chambers v. Penland, 78 N. C. 53, 55.

Service on Guardian ad Litem. — As to failure to serve summons on Guardian ad Litem. See Editor's note under section 451.

Appearing by Guardian Ad Litem. — Where an infant appears by guardian ad litem, a copy of the summons having been left with him, and served on his guardian, the fact that no copy of summons was left with his "father, mother or guardian," is immaterial. Roseman v. Roseman, 127 N. C. 494, 37 S. E. 518.

Slight Irregularity Does Not Vitiate. — A judgment will not be vacated because some of a number of infant defendants, united in interest, appeared only by a guardian ad litem, appointed without process previously served on such infants. Matthews v. Joyce, 85 N. C. 258.

In an action for the recovery of the possession of land, the defendant, in support of his title, offered in evidence a special proceeding and order for sale of land for assets and deed thereunder, to which plaintiff objected because it did not appear that the guardian ad litem appointed for the feme plaintiff, who was a party to the proceeding, was served with summons, or appeared or filed any answer. Summons was served upon the infant according to law: Held, there was not such irregularities as made the proceeding void. Coffin v. Cook, 106 N. C. 376, 11 S. E. 371.

It has been held that where a judgment has been rendered against an infant on whom summons was not served as required by this section, but for whom a guardian ad litem was appointed by the court, and an answer was filed by such guardian ad litem in good faith, the judgment is conclusive on the infant, notwithstanding the irregularity, until set aside on motion in the cause. But such judgment is not conclusive and binding on the infant, where it appears upon the face of the record that the interests of the infant in the subject-matter of the action were not presented to the court in good faith by the guardian ad litem, and passed upon by the court. Wyatt v. Berry, 205 N. C. 118, 122, 170 S. E. 131.

Nonresident Infant. — A court cannot obtain jurisdiction of a bill against a nonresident infant, as the statute gives no provision for any other than personal service. Jones v. Mason, 4 N. C. 561.

IV. SERVICE ON INSANE PERSONS.

Delivery of Summons to Committee of Insane Person Is Necessary.—Where an action is brought against a person judicially declared to be of unsound mind or incapable of conducting his own affairs for whom a committee or guardian has been appointed a copy of the summons must be delivered to the committee or guardian and to the defendant personally. Hood v. Holding, 205 N. C. 451, 455, 171 S. E. 633.

Or Final Judgment Cannot Be Entered.—If the declared incompetent has no committee or guardian, service of notice may be made upon him personally or the notice may be returned without actual service with the endorsement required by the statute when service cannot be made without the danger of injury to him; but in no event should final judgment be rendered against him without adequate notice to his committee, or to his general or testamentary guardian, or to a guardian ad litem duly appointed by the court. Hood v. Holding, 205 N. C. 451, 455, 171 S. E. 633.

Ex parte proceedings brought by a husband to have his wife declared sane, without any notice or service upon the guardian to whom the law had confided the protection of her rights, were a nullity under this section. Sims v. Sims, 121 N. C. 297, 300, 28 S. E. 407.

§ 484. Service by publication.—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

1. Where the defendant is a foreign corporation and has property, or the cause of action arose, in the state.

2. Where the defendant, a resident of this state, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of a summons.

3. Where he is not a resident, but has property in this state, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this state, and the defendant has, or claims, or the relief demanded consists wholly or partly in excluding him from any actual or contingent lien or interest therein.

5. Where the action is for divorce.

6. Where the stockholders of a corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate the subject of an action are unknown, if the name of at least one of the parties to the action and interested in the subject matter thereof is known, and he is a resident of the state, the court having jurisdiction may, upon affidavit that

after due diligence the names or residences of such parties cannot be ascertained, authorize service by publication.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can be made can, after due diligence, be found in the state, and such facts are made to appear by affidavit. This subsection also applies to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners, or by individuals. (Rev., s. 422; Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334.)

I. In General.
II. Service by Publication on Foreign Corporations.
III. Service by Publication on Nonresident with Property within State.
IV. Service by Publication where Lien is Subject of Litigation.
V. Service by Publication in Actions for Divorce.
VI. Service by Publication on Domestic Corporation.

Cross References.

As to service by summons in attachment, see sec. 802. As to service by publication in making parties to a petition to sell land for assets, see section 80, and the Editor's note thereto.

See note to § 491.

I. IN GENERAL.

Strictly Construed.—The service of the summons or notice, as an original process in the action by publication, must be made strictly in accordance with the requirements of the statute. This method of service of process and giving the court jurisdiction is peculiar, and out of the usual course of procedure. The statute prescribes, with particularity and caution, the cases and causes that must exist and appear by affidavit to the court in order that it may be allowed. The court must see that every prerequisite prescribed exists in any particular case before it grants the order of publication. Otherwise the publication will be unauthorized, irregular and fatally defective, unless in some way such irregularity shall be waived or cured. Spiers v. Halstead, etc., Co., 71 N. C. 209; Windley v. Bradway, 77 N. C. 333; Wheeler v. Cobb, 75 N. C. 21; Faulk v. Smith, 84 N. C. 501; Bacon v. Johnson, 110 N. C. 114, 116, 14 S. E. 508.

Unless the provisions of this section are observed the service of a summons by publication in such cases will be ineffective. Martin v. Martin, 205 N. C. 157, 159, 170 S. E. 651.

Not only must it be shown that the defendant has property in this state; the cause of action must be stated with such clearness and comprehension as may enable the court to determine its sufficiency. Id.

The Affidavit—By Whom Made.—The affidavit required by this section may be made by an agent or attorney. Weaver v. Roberts, 84 N. C. 494.

Same—When Made.—It seems that the affidavit may be made after the order, provided the order remains in obeyance until the affidavit is filed. Bank v. Blossom, 92 N. C. 695.

Same—Allegations. — Everything necessary to dispense with personal service must appear by affidavit. Wheeler v. Cobb, 75 N. C. 21.

Same—Proper Party and Cause of Action Must Be Shown.—A brief summary of the facts constituting the cause of action, or of the facts showing that the parties are necessary parties to the action, should be stated so that the court can see and determine that there exists a cause of action, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties sought to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine the legal question as to whether there is a cause of action or not. Nor is it sufficient to state that the party is a neccessary party to an action to compel specific performance of a contract to convey land in a particular locality. The facts must be stated with sufficient fullness to develop the contract and the relation of the parties to it. Otherwise the party demanding the order will determine that he has a cause of action, while the statute requires the the court to do so upon facts appearing by affidavit. Claflin v. Harrison, 108 N. C. 157, 12 S. E. 895, and the cases cited. Bacon v. Johnson, 110 N. C. 114, 117, 14 S. E. 508.

Where, upon the facts alleged, no judgment can be rendered affecting lands, it must follow that the defendant is not a proper or necessary party, such as is contemplated by this section. Claflin v. Harrison, 108 N. C. 157, 158, 12 S. 895.

Same—Necessity for Averment of Due Diligence.—The authorities seem to be decisive that, under this section as now framed, the allegation that a defendant can not be found in the state, after diligent search, is an essential averment to a service of original process by publication. Sawyer v. Camden Run Drainage Dist., 179 N. C. 182, 183, 102 S. E. 273; Wheeler v. Cobb, 75 N. C. 21; Faulk v. Smith, 84 N. C. 501; Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

This allegation as to diligence is the very cornerstone to obtain jurisdiction by publication. Fowler v. Fowler, 190 N. C. 536, 540, 130 S. E. 315.

And the fact that the defendant is a nonresident, is not a sufficient averment in the affidavit, it being necessary to show that after due diligence he cannot be found within the state. Davis v. Davis, 179 N. C. 185, 102 S. E. 270. A publication based upon the mere allegation that the defendant is a nonresident does not give the court jurisdiction under the section. Flint v. Coffin, 176 Fed. 872.

Same—What Constitutes Due Diligence.—When the affidavit for publication sets out the return of the sheriff and avers that the defendants cannot be found "after due search," this is tantamount to "due diligence." Rose v. Davis, 140 N. C. 266, 269, 52 S. E. 780.

But, as will be seen from a later paragraph, this section does not require the issuance and return of summons not served. The preceding paragraph is only an illustration of the diligence that will suffice. Ed. Note.

Same—Specific Allegation of Jurisdiction.—There is no requirement in this section that an allegation as to the court's jurisdiction shall be made specifically in the affidavit. If the jurisdiction of the court, as to the subject of the action, appears from the facts alleged in the affidavits, and in the complaint, which was on file at the time the orders were made, this was sufficient. Page v. McDonald, 159 N. C. 38, 43, 74 S. E. 642; Bacon v. Johnson, 110 N. C. 114, 14 S. E. 508; Davis v. Davis, 179 N. C. 185, 102 S. E. 270; County Sav. Bank v. Tolbert, 192 N. C. 126, 129, 133 S. E. 558.

Same—Other Allegations.—Specific allegations necessary to obtain the order under the particular subdivisions of the section will be found under the following analysis line of this note. Ed. Note.

Same—Amendment.—Where the affidavit for the publication of a summons was defective, it was proper for the judge to permit an amendment and grant an alias order of publication instead of dismissing the action. Mullen v. Norfolk, etc., Canal Co., 112 N. C. 109, 16 S. E. 901.

Affidavit Not Required in Proceedings to Foreclose Tax Certificate.—Where the summons in proceedings to foreclose a tax certificate of the sale of lands in the action against the listed owner of the lands has been returned the defendant "not to be found," it is not required as under the provisions of this section, that this fact be made to appear by affidavit to the satisfaction of the court in order for valid service by publication. Orange County v. Jenkins, 200 Mass. 202, 203, 156 S. E. 774.

Issuance and Return of Summons Not a Prerequisite. — This section does not require the issuance and return of summons not served as the basis of or condition precedent to the publication. Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90, overruling McClure v. Fellows, 131 N. C. 509, 42 S. E. 951, and reinstating. Best v. British, etc., Mortg. Co., 128 N. C. 351, 38 S. E. 923.

Rights of Heirs May Be Determined Where Service Is by Publication.—A judgment entered in an action to determine the heirs at law of intestate for the purpose of distributing funds in the hands of his administrator, in which the court has jurisdiction of the administrator and the funds in his hands, and some of the heirs appear in court and the other heirs are duly served by publication, is not void, the judgment being one in rem, and service valid under this section. Ferguson v. Price, 206 N. C. 37, 173 S. E. 1.

Where the suit is merely in personam to determine the personal rights and obligations of the defendants, constructive service upon a resident is ineffectual for any purpose.

Hinton v. Penn. Mut. Life Ins. Co., 126 N. C. 18, 35 S. E. 182.

II. SERVICE BY PUBLICATION ON FOREIGN CORPORATION.

Editor's Note.—Section 1137, providing for service on a statutory agent of a foreign corporation, would seem to apply in nearly all the instances in which the circumstances prescribed by this subsection would occur. In view of the holding in Pardue v. Absher, 174 N. C. 676, 94 S. E. 414, it is probable that the two sections would be construed as cumulative, one of the other, and that the plaintiff might exercise an option as to the method of procedure.

Under this subsection, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this state are property of such corporation. Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

III. SERVICE BY PUBLICATION ON NONRESIDENT WITH PROPERTY WITHIN STATE.

In General.—A valid service by publication cannot be made on a nonresident unless he has property within the state. Everitt v. Austin Bros., 169 N. C. 622, 86 S. E. 523, and it is necessary to set forth this fact in the affidavit. Bacon v. Johnson, 110 N. C. 114, 14 S. E. 508.

A chose in action is property, and embraced in the terms of this subsection. Winfree v. Bagley, 102 N. C. 515, 9 S. E. 198.

Where the summons has been duly returned "defendant not to be found in the State," and at the time of its issuance it was alleged in a verified complaint and in supporting affidavits that the cause of action was for money had and received, and that the defendant was beyond the limits of the State, and was a resident of another State, this section has been substantially complied with and the validity of the service is upheld. Bethell v. Lee, 200 N. C. 755, 158 S. E. 493.

Attachment Necessary. — In an action in personam, in which no attachment has been or can be issued, service by publication on a nonresident is ineffectual for any purpose. Winfree v. Bagley, 102 N. C. 515, 9 S. E. 198. See also Price v. Cox, 83 N. C. 261; Wilson v. St. Louis Cook Mfg. Co., 88 N. C. 5.

Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons, or hence, actual service in another state "in line of publication" would be invalid. Long v. Home Ins. Co., 114 N. C. 465, 466, 19 S. E. 347; Bernhardt v. Brown, 118 N. C. 700, 701, 24 S. E. 527.

General Judgment Cannot Be Taken.—A plaintiff cannot take a general and personal judgment against a defendant, who is a nonresident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. May v. Getty, 140 N. C. 310, 53 S. E. 75.

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident for the purpose of service of summons by publication within subsection 3 of this section even though he may have retained his domicile in this state. And the cause of his absence from the state is immaterial if such absence prevents personal service for an indefinite period of time. Brann v. Hanes, 194 N. C. 571, 140 S. E. 292. See note under § 799.

IV. SERVICE BY PUBLICATION WHERE LIEN IS SUBJECT OF LITIGATION.

In General.—In Pennoyer v. Neff, 95 U. S. 714, it is said: "Such service (by publication) may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose." This is cited and approved in Winfree v. Bagley, 102 N. C. 515, 684, 9 S. E. 198; and Long v. Ins. Co., 114 N. C. 465. Bernhardt v. Brown, 118 N. C. 700, 701, 706, 24 S. E. 527, 715.

A judgment to enforce a mechanic's lien is a proceeding in rem, and service by publication is authorized by this subsection. Bernhardt v. Brown, 118 N. C. 700, 701, 706, 24 S. E. 527, 715.

V. SERVICE BY PUBLICATION IN ACTIONS FOR DIVORCE.

For article on "North Carolina and Jurisdiction for Divorce," mentioning this section, sec. 1 N. C. Law Rev. 95 et seq.

The Affidavit. — The requirements of this section are mandatory, and must be followed in good faith in actions of divorce to obtain an order of publication of service of summons, and where the plaintiff in divorce fails to make affidavit that the defendant cannot after due diligence be found in the state, knowing that she was residing in another county therein, subject to personal service, and the summons has been returned endorsed that defendant cannot be found within the county or its issuance, etc., the judgment rendered therein by the superior court is void, and may be vacated by the court granting it within its inherent powers. Fowler v. Fowler, 190 N. C. 536, 130 S. E. 315. For cases pertaining to the affidavit generally, see ante, this note, "In General" I.

Order of publication of service of summons in an action by the wife for divorce is not objectionable as irregular, for the failure of the affidavit to set forth a good cause of action, when there are therein allegations that the husband had abandoned his wife, had left the State after having wrongfully appropriated her separate property to his own use, leaving her without support, and had subjected her to an inquisition of lunacy, and is now professionally engaged in another State upon a good salary, etc.; and this principle also applies to a suit of the wife to recover lands purchased by the husband with her separate money, and title taken in himself without her consent, and in either case publication may be made. White v. White, 179 N. C. 592, 103 S. E. 216.

The Supreme Court has the power to permit an amendment therein to an affidavit made for the publication of a summons; but where the action is for divorce a vinculo, and the defect is in omitting the averment that the defendant cannot after due diligence be found in this state, and it is admitted that the defendant is a nonresident and at the time embraced by the publication, was absent from the state, the Supreme Court may remand the case to the Superior Court to hear and consider the evidence, and the Superior Court Judge, for the purpose of being advised may submit the question to a jury. Davis v. Davis, 179 N. C. 185, 102 S. E. 270.

Applied in King v. King, 84 N. C. 32.

VI. SERVICE BY PUBLICATION ON DOMESTIC CORPORATION.

Editor's Note.—As in the case of service of process by publication on a foreign corporation, discussed ante this note under the analysis line, "Service by Publication on a Foreign Corporation," II, it would appear that this subsection has been radically affected by the provisions of section 1137 which were taken from the Public Laws of 1901. The exact effect of this latter act is conjectural as the point has not been adjudicated by the cases.

In General.—Until the passage of this section there was no means provided for service of process against a domestic corporation whose officers and agents could not be found. It was simply a casus omissus. Bernhardt v. Brown, 118 N. C. 701, 707, 24 S. E. 527, 715.

"Certainly it is competent for the legislature to provide that, as to a corporation created by it, if no officer or agent of such corporation can be found in the state, then service can be had by publication." Bernhardt v. Brown, 118 N. C. 700, 701, 708, 24 S. E. 527, 715.

§ 485. Manner of publication. — The order must direct the publication in one or two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as is deemed reasonable, not less than once a week for four successive weeks, of a notice, giving the title and purpose of the action, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, or mailing of the summons and complaint, is necessary. The cost of publishing in a newspaper shall not exceed one dollar and fifty cents an inch of solid type, and shall in no case exceed six dollars for the notice. (Rev., s. 443; Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3.)

Sufficiency of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void. Guilford County v. Georgia Co., 109 N. C. 310, 13 S. E. 861.

Service of summons made by publication from 3 of August to 31 of August, the term of the court to which the

process was returnable beginning on the latter day, is a sufficient publication of "once a week for four weeks," and a compliance with the statutes in that respect. Guilford County v. Georgia Co., 109 N. C. 310, 13 S. E. 861.

There being no specific requirement of statute that an order for the publication of summons state that the paper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served," a judgment that the clerk be restrained from ordering publication in a certain paper without such finding in the order is beyond the terms of the statute and would seem to be discriminatory, and on appeal the judgment will be modified; and order for publication of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made, without specific adjudication in the order to that effect. Elias v. Commissioners of Buncombe, 198 N. C. 733, 153 S. E. 323.

Warrant of Attachment Insufficient.—The publication of the warrant of attachment does not serve the purpose of this section, as the section specifies that the publication of notice must be in a newspaper. Ditmore v. Goins, 128 N. C. 325, 327, 39 S. E. 61.

§ 486. Filing complaint, in cases of publication.—In all cases wherein publication is made, the complaint must be filed before the expiration of the time of publication ordered. (Rev., s. 442; Code, s. 218.)

§ 487. When service by publication complete.—In the cases in which service by publication is allowed, the summons is deemed served at the expiration of the time prescribed by the order of publication, and the party is then in court. (Rev., s. 444; Code, s. 227; C. C. P., s. 88.)

§ 488. Jurisdiction acquired from service. — From the time of service of the summons, in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. (Rev., s. 445; Code, s. 229; C. C. P., s. 90.)

§ 489. Proof of service.—Proof of the service of the summons or notice must be—

1. By the certificate of the sheriff or other proper officer.

2. In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.

3. The written admission of the defendant. (Rev., s. 446; Code, s. 228; C. C. P., s. 89.)

This section is exhaustive and proof of the service of a notice must be such as is required by this section. Allen v. Strickland, 100 N. C. 225, 6 S. E. 780.

Necessity for Proof.—Where service of process on nonresidents was necessary it is error for the judge of probate (or clerk) to make an order for the sale of lands without adjudging by the proofs required by this section that the defendants had been regularly served with process by publication. Hyman v. Jarnigan, 65 N. C. 96.

Written Admission.—Where service is accepted in writing, it will be treated as "the written admission of" service as contemplated by this section. First Nat. Bank v. Wilson, 80 N. C. 200; Nicholson v. Cox, 83 N. C. 44. Godwin v. Monds, 106 N. C. 448, 450, 10 S. E. 1044.

It is manifest that no verbal admission of service or assent to the service as made will be a service within the provision of this section. First Nat. Bank v. Wilson, 80 N. C. 200, 202.

Personal service of a copy of the summons on a defendant, or his written admission thereof, is necessary to constitute a case in court. A copy left with defendant's wife is not a legal service, and proof of its delivery to him by her, or of his recognition of or verbal assent thereto, will not make it sufficient. First Nat. Bank v. Wilson, 80 N. C. 200.

Cited in Brann v. Hanes, 194 N. C. 571, 140 S. E. 292.

§ 490. Voluntary appearance by defendant. — A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. (Rev., s. 447; Code, s. 229; C. C. P., s. 90.)

Effect of General Appearance. — A general appearance waives all defects and irregularities, and is sufficient even if there has been no service at all of the summons shown. Ashford v. Davis, 185 N. C. 89, 116 S. E. 162. Burton v. Smith, 191 N. C. 599, 132 S. E. 605.

"By making a general appearance and filing an answer upon the merits the defendant waived any defect in the service of the summons. The statute provides that the voluntary appearance of a defendant is equivalent to personal service of the summons." McCollum v. Stack, 188 N. C. 462, 465, 124 S. E. 864; Moody v. Moody, 118 N. C. 926, 23 S. E. 933.

An appearance for the purpose of filing a demurrer or answer to the complaint is a general appearance to its merits and confers jurisdiction by waiving a proper service of summons. Reel v. Boyd, 195 N. C. 273, 141 S. E. 891; Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

The giving of a replevy bond is equivalent to a general appearance entered by a defendant in attachment, and is a waiver of the irregularities, if any, in the service of summons, or the necessity of such service, and estops the defendant from denying ownership of the property levied on, but it does not estop defendant from traversing the truth of the allegation on which the attachment is based. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

Cited in Brann v. Hanes, 194 N. C. 571, 140 S. E. 292.

§ 491. Personal service on nonresident.—When the place of residence is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the papers shall, in making his return, use a form of certificate substantially as follows:

State of .....

County of .....

I, ..., clerk of the ..... court of ..... county, in the state of ....., which court is a court of record having a seal, which is hereto attached, do certify that ....., to me well known as the sheriff of said county of ....., who being by me duly sworn, says that as such sheriff he has full power to serve any and all legal processes issuing from the courts of said state, and that on the ..... day of ....., 19...., he served the summons hereto attached by reading and delivering a copy of same to ....., the defendant therein named.

....., Sheriff,

..... County,

State of .....

Sworn to and subscribed before me, this .... day of ....., 19....

....., Clerk ..... Court,

County of .....

[L. S.]

(Rev., s. 448; 1891, c. 120.)

When Service by Mail Permitted. — The service of summons and other process authorized by this section is "in lieu of publication in a newspaper," and can only be made in those cases where publication could be made, to wit, in actions which are virtually proceedings in rem or quasi in rem, and in which the jurisdiction as to nonresidents only authorizes a judgment acting upon the property, Long v. Home Ins. Co., 114 N. C. 465, 19 S. E. 347.

Cumulative Method. — The method of mailing the process is optional and not exclusive of service by publication in cases in which this last is proper. Mullen v. Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106.

Jurisdiction Acquired. — The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings in rem or quasi in rem,

when personal service is made by complying with the requirements of this section and the property is situated here. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.

Omission of Clerk's Seal.—A summons issued without the seal of the clerk of the court, personally served upon nonresident defendants under this section, is an irregularity. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.

Objection made to the summons, which was issued under this section without the seal of the clerk of the court to nonresident defendants, cannot be sustained when it appears that the defendants have been actually notified of the time and place of the trial and informed of the nature and purpose of the action. Such defect may now be cured by the act of the clerk in supplying the seal pursuant to an order properly made in the cause. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.

Application. — A motion, by special appearance of the nonresident defendants, to dismiss the action for want of jurisdiction of the person will not be granted in a suit to redeem lands and to enforce a contract solely in respect of the same, when the locus in quo is situated within the State and personal service was made in compliance with this section. Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978.

Where from the verified pleadings of a party the location of the defendant is determined and personal service has been made, an exception to the validity of the service on the ground that the place of residence of defendant in another state was not made to appear by affidavit to the clerk prior to the mailing of the summons cannot be sustained, the provisions of this section having been substantially complied with. Fidelity, etc., Co. v. Green, 200 N. C. 535, 157 S. E. 797. But a different rule applies to § 484, relating to service by publication where the defendant's rights may be lost through lack of knowledge and lapse of time.

This section has no application to service of subpoenas in criminal actions. There is no statute which authorizes service on witnesses beyond the state in such cases. State v. Means, 175 N. C. 820, 824, 95 S. E. 912.

§ 491(a). Service upon non-resident drivers of motor vehicles.—The acceptance by a non-resident of the rights and privileges conferred by the laws now or hereafter in force in this state permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such non-resident on the public highways of this state, or the operation by such non-resident of a motor vehicle on the public highways of the state other than as so permitted or regulated, shall be deemed equivalent to the appointment by such non-resident of the Commissioner of Revenue, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and vitality as if served on him personally. Service of such process shall be made by leaving a copy thereof with a fee of one dollar, in the hands of said Commissioner of Revenue, or in his office, and such service shall be sufficient service upon the said non-resident: Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the Commissioner of Revenue to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1.)

This section is constitutional and valid. Bigham v. Foor, 201 N. C. 14.

Section Not Retroactive.—This section providing that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process thereunder in an action accruing before the effective force of the statute is void. Ashley v. Brown, 198 N. C. 369, 151 S. E. 725.

Car Must Be under Control of Nonresident Defendant.—In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. Smith v. Haughton, 206 N. C. 587, 174 S. E. 506.

Findings by Trial Court That Defendant Was a Nonresident Is Conclusive on Appeal.—Upon motion to dismiss an action on the ground that the defendant was a resident of this state and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. Bigham v. Foor, 201 N. C. 14.

§ 491(b). Record of such processes; delivery of return.—The Commissioner of Revenue shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the Commissioner of Revenue, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff. (1929, c. 75, s. 2.)

§ 491(c). Alternative method of service upon nonresident defendants.—In addition to the method provided in section 491(a) and 491(b), the plaintiff may adopt the following method of giving notice to a non-resident defendant or defendants:

When the place of residence of the defendant or defendants in the action described in sections 491(a) and 491(b) is made to appear by affidavit filed with the Commissioner of Revenue and the plaintiff files with the Commissioner of Revenue at least five ($5.00) dollars to pay the costs of the service hereinafter provided for, then it shall be sufficient for the Commissioner of Revenue to mail a copy of the summons, together with a statement sufficient to show the nature of the action or proceedings, accompanied by his certificate that the summons and complaint had been served on him, to the sheriff or other process officer of the county and state where the defendant or defendants reside. This sheriff or other process officer, authorized to serve process in the state to which it is sent, shall serve the same according to its tenor. This sheriff or process officer, who serves the papers, shall, in making his return, use a form of certificate substantially as follows; and this form of certificate shall accompany the other papers in the case:

STATE OF .....

COUNTY OF .....

I, ..., Clerk of the ..... Court of ..... County in the State of ....., which court is a court of record, having a seal, which is hereto attached, do certify that ....., to me well known as a proper process officer of said county of ....., who being by me duly sworn, says that as such process officer he has full power to serve any and all legal processes, issued from the courts of said State, and that on the ..... day of ....., 19.....,

he served the summons and accompanying statement hereto attached, by reading and delivering a copy of the same to the defendant therein named (if more than one defendant, copies to each of them).

SIGNED.....
Process Officer.
.....County
.....State

Sworn to and subscribed before me this..... day of ....., 19....., ..., Clerk..... Court, county of ....., or city of ..... (SEAL)

Said sheriff or process officer shall immediately upon the execution of this evidence of service, return the same with the original papers in the cause to the Commissioner of Revenue, Raleigh, North Carolina. When the Commissioner of Revenue shall receive these papers, thus served, he shall deliver the same to the plaintiff on request, and keep a record showing the date of their receipt by him and their delivery to the plaintiff. Upon the filing of these papers in the court where the action is pending, accompanied by evidence of service upon the Commissioner of Revenue, as required by section 491(a), that shall constitute presumptive evidence of actual notice to the defendant or defendants of the pendency of the action and of its nature and effect. (1931, c. 33, s. 1.)

§ 492. Defense after judgment on substituted service. — The defendant against whom publication is ordered, or who is served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (Rev., s. 449; Code, s. 220; C. C. P., s. 85; 1917, c. 68.)

This section will be broadly construed to include within the term "representatives" all persons succeeding the rights of such party, in this case a mortgage creditor. Hood v. Freel, 206 N. C. 432, 174 S. E. 310.

Right to Remedy Afforded by Section.—Where the judgment affects the rights of the petitioner's debtor and is based upon substituted service, the petitioner's debtor is entitled to invoke the remedy contained in this section. Hood v. Freel, 206 N. C. 432, 435, 174 S. E. 310.

Not Applicable to Justices' Court. — This section is not applicable to a proceeding in a justices' court. Thompson v. Lynchburg Notion Co., 160 N. C. 519, 76 S. E. 470.

Effect and Sufficiency of Findings by Clerk—Extension of Time to Plead.—A nonresident defendant served by publication, and failing to file answer within the time prescribed by law, may make application to the clerk before judgment for good cause shown to be allowed to file pleadings and defend the action, as provided by this section, and where upon such application and affidavits filed by him setting forth facts showing prima facie good cause and a meritorious defense, the clerk finds as a fact that he has a meritorious defense and has shown good cause, the clerk's order allowing him to file answer and defend the action will not be held for error for the clerk's failure to more specifically find the facts constituting such meritorious defense, and it is within the discretion of the judge of the Superior Court on appeal to enter an order allowing an extension of time for filing answer as provided by sections 536, 637. Vann v. Coleman, 206 N. C. 451, 174 S. E. 301.

Judgment as Bar to Action against Administrator.—Where an administrator has disbursed the funds in his hand in accordance with the judgment and filed his final account, the judgment will bar an action against the administrator by those heirs unknown at the time of the institution of the action and who did not see the notice by publication and did not appear in the action, this section providing that no fiduciary officer acting in good faith shall be personally liable for such disbursement. Ferguson v. Price, 206 N. C. 37, 173 S. E. 1.

Vacation of Judgment. — Under this section the defendant, where his affidavit fully justifies the findings of fact made by the court and brings him within the terms of the section, has a legal right to have the judgment vacated. Such a right is absolute and not within the discretion of the presiding judge. Rhodes v. Rhodes, 125 N. C. 191, 34 S. E. 271; Page v. McDonald, 159 N. C. 38, 74 S. E. 642; Moore v. Rankin, 172 N. C. 599, 600, 90 S. E. 759.

The allegations of the complaint particularly describing the lands situate here of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be sold accordingly, practically amount to an attachment of the lands indicated. White v. White, 179 N. C. 592, 103 S. E. 216.

Good Cause. — Allegations by the movant to set aside a judgment, for irregularity, that he has "a good and meritorious defense," is but his own opinion, and is insufficient; nor is it aided by erroneous statements of matters of law or of conflicting facts that have been judicially found adverse to his contentions. White v. White, 179 N. C. 592, 103 S. E. 216.

No "good cause is shown" to set aside a judgment allowing alimony to the wife pendente lite her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, where publication of summons has been regularly made under this section, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the action, and the death of the wife has caused the loss of the evidence upon which the judgments were rendered. White v. White, 179 N. C. 592, 103 S. E. 216.

The words of this section "upon such terms as are just" ought not to be construed as limiting or modifying the right to defend, which is an absolute, legal right of the defendant. They should be construed as conferring upon the court, by whose order the defendant obtains his legal right to defend, power, by the imposition of just terms, to put plaintiff and defendant, as near as may be, in the same relative position, with reference to the subject-matter of the litigation, as they were in at the time the action was begun, or at least at the time the defendant would have been required to answer the complaint if the summons had been personally served upon him. The court has power to do this by orders with reference to the costs that have accrued, or by interlocutory orders, with respect to property within its jurisdiction, or by such orders, designed to protect the plaintiff who had recovered the judgment, set aside and vacated upon the motion of the defendant, upon service of summons on the defendant as provided by the laws of this state, from loss which might result to him from the action of the court. It ought not to be held that the court has power to impose terms upon the defendant which would result in depriving him of a right guaranteed to him by law. The right to defend an action

necessarily involves a right to answer or demur to the complaint, in accordance with the provisions of the statute or general rule of court, and thus to raise issues of fact to be tried by a jury, or issues of law to be tried by the court. It cannot be said that although this right is absolute a defendant can enjoy it only at the discretion of the court. Burton v. Smith, 191 N. C. 599, 605, 132 S. E. 605.

Any Exception. — Being a remedial statute, a just construction allows the party against whom a judgment has been taken to set up any exception which would have prevented or modified the judgment, e grege, inequality of partition. Rhodes v. Rhodes, 125 N. C. 191, 34 S. E. 271.

The defense intended to be allowed, under this section, to one who has not been actually but only constructively in court (by publication), is not confined to matters which if pleaded in apt time would defeat the action. Rhodes v. Rhodes, 125 N. C. 191, 34 S. E. 271.

Facts Must Be Found by Court. — Upon a motion to be allowed to defend under this section, the facts in the case must be found by the court in which the motion is made. Utley v. Peters, 72 N. C. 525.

Judgments by Default. — Where a judgment by default in the state court in an action against a nonresident defendant by a resident plaintiff, in which summons by publication was made, has been set aside on defendant's motion, the mere fact that the judge has allowed him the statutory time in which to answer or demur, without defendant's objection, does not call for the exercise of the court's discretion, and the defendant may therein aptly file his petition and bond for the removal of the cause to the Federal Court as a matter of his legal right. Burton v. Smith, 191 N. C. 599, 132 S. E. 605.

A judgment by default final in favor of material furnishers, etc., for a building erected on the lands of a nonresident owner, by service of summons by publication, may be set aside upon defendant's motion under this section, made in two days after he had notice of the pendency of the action, upon a finding of a meritorious defense. Burton v. Smith, 191 N. C. 599, 132 S. E. 605, and other cases, cited as controlling. Bassett Lumber Co. v. Rhyne, 192 N. C. 735, 135 S. E. 926.

Where service has been made by publication, upon defendant's motion to set aside a judgment by default in plaintiff's favor, within five years from its date, or one year after notice, this section applies to the exclusion of section 600. Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648.

By appearing and moving to set aside a judgment by default rendered, a nonresident defendant upon whom summons by publication had been made, and who brings himself within the provisions of this section by moving within a reasonable time after notice, has as a matter of right twenty days from the time such judgment had been set aside in which to answer or demur, and only by requesting or acquiescing in a longer time granted by the court is there a waiver of his right to file a petition and bond for the removal of the cause to the United States Court, under the Federal Satute. Burton v. Smith, 191 N. C. 599, 132 S. E. 605.

Exception as to Lands Sold in Divorce Proceedings. — The provisions of this section, as to setting aside judgments against nonresident defendants served by publication, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendition on such terms as may be just, with restitution, etc., does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her. White v. White, 179 N. C. 592, 103 S. E. 216. See note of this case under § 1666.

Same — Attachment of Lands — Alimony — Notice. — Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony regularly allowed the wife pendente lite her suit for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her separate money, to which he had taken title in himself, without her consent, nor in either case is any notice required beyond publication of summons. White v. White, 179 N. C. 592, 103 S. E. 216.

§ 492(a). Repealed by Laws 1927, c. 66, s. 2.

See notes to sec. 476.

Art. 9. Prosecution Bonds

§ 493. Plaintiff's, for costs.—Before issuing the summons the clerk shall require the plaintiff to do one of the following:

1. Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

2. Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

3. File with him a written authority from a judge or a clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to cities and towns; provided, further, that cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (Rev., s. 450; Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71; 1935, c. 398.)

Cross References.—As to a mortgage in lieu of a bond for prosecuting or defending in civil cases, see sec. 350. As to a surety company as bond, see sec. 339. As to costs generally, see sections 1225 et seq.

Editor's Note.—The amendment of 1935 adds the two provisos, at the end of subsection (3), relating to cities and towns.

The object of the prosecution bond is not to secure the officers but to secure the defendant in the recovery of costs wrongfully paid out. Waldo v. Wilson, 177 N. C. 461, 100 S. E. 182.

Who Can Take Bond. — The action of the Clerk in taking prosecution bonds was always held to be ministerial. They may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. Shepherd v. Lane, 13 N. C. 148; Croom v. Morrisey, 63 N. C. 591; Marsh & Co. v. Cohen, 68 N. C. 283, 288.

When Bond Not Given. — When the prosecution bond has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action peremptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. Brittain v. Howell, 19 N. C. 107; Russell v. Saunders, 48 N. C. 432; Albertson v. Terry, 109 N. C. 8, 13 S. E. 713; Cooper v. Warlick, 109 N. C. 672, 673, 14 S. E. 106.

A motion to dismiss for the failure of the plaintiff to file a prosecution bond required by this section, made for the first time in the Supreme Curt on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. Costello v. Parker, 194 N. C. 221, 139 S. E. 224.

Undertaking Under Seal. — Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal. Holly v. Perry, 94 N. C. 30.

Undertaking Written On Summons. — Where an undertaking under seal to secure the defendant's costs, was written on the back of the summons, but did not specify the name of either the plaintiff or defendant, or the surety, it was held to be sufficient. Holly v. Perry, 94 N. C. 30.

Increasing Penalty of Bond. — The court can increase the penalty on the bond, which is not an unusual procedure in the courts. Jones v. Cox, 46 N. C. 373; Adams v. Reeves, 76 N. C. 412; Vaughan v. Vincent, 88 N. C. 116; Rollins v. Henry, 77 N. C. 467; Kenney v. Seaboard Air Line R. Co., 166 N. C. 566, 571, 82 S. E. 849.

Same — When Exercised. — Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kennedy v. Seaboard Air Line R. Co., 166 N. C. 566, 567, 82 S. E. 849.

Same—Court Has Discretion. — Where a plaintiff has given a bond for costs which has become insufficient, the court has the power to allow him to proceed with his case without giving additional security. Holder v. Jones, 29 N. C. 191; Dale v. Presnell, 119 N. C. 489, 491, 26 S. E. 27.

What Undertaking Covers. — The undertaking provided for by this section may cover the defendant's costs on appeal. Kenney v. Seaboard Air Line R. Co., 166 N. C. 566, 82 S. E. 849.

Same — Does Not Apply to Plaintiff's Costs. — In contemplation of law, the parties pay the cost of the litigation as the action proceeds and this bond is given, it is true, entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. Hallman v. Dellinger, 84 N. C. 1; Smith v. Arthur, 116 N. C. 871, 873, 21 S. E. 696.

No Appeal from Judge's Refusal to Require Bond. — The refusal of the trial judge to require a prosecution bond is not appealable. Christian v. Atlantic, etc., R. Co., 136 N. C. 321, 48 S. E. 743.

Appeal by Surety. — Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur, 116 N. C. 871, 872, 21 S. E. 696.

County Trustee Suing On Sheriff's Bond. — A suit by a county trustee, suing upon a sheriff's official bond, as relator in the name of the State, is within the meaning of this section requiring clerks to take prosecution bonds before issuing a leading process. King v. Wooten, 52 N. C. 533.

§ 494. Suit as a pauper; counsel.—Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (Rev., ss. 451, 452; Code, ss. 210, 211; C. C. P., s. 72; 1868-9, c. 96, s. 2.)

Cross References. — As to costs in suits in forma pauperis, see sec. 1247. As to appeals in forma pauperis, see sec. 649.

Exception to Preceding Section. — This section is in the nature of an exception to the general rule in section 493. Dale v. Presnell, 119 N. C. 489, 492, 26 S. E. 27.

Section Does Not Apply to Appeals. — The leave to sue as a pauper, under this section and section 1247, does not extend in civil actions, beyond the trial in the superior court, his appeal being governed by section 649, which only relieves him from giving security for the costs of the appeal, but he must pay the fees as to the appeal due the officers of both courts for services rendered. Speller v. Speller, 119 N. C. 356, 26 S. E. 160. See Martin v. Chasteen, 75 N. C. 96; Bailey v. Brown, 105 N. C. 127, 129, 10 S. E. 1054.

Court Has Discretion. — The right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the Court. Dale v. Presnell, 119 N. C. 489, 492, 36 S. E. 27.

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the court may well refuse leave to sue as a pauper, under its discretion, Dale v. Presnell, 119 N. C. 489, 36 S. E. 27, unless, as said in McKiel v. Cutler, 45 N. C. 139, it appears that the beneficiaries of the estate cannot give bond, for the officers of the court ought not needlessly be deprived of pay for their services. Christian v. Atlantic, etc., R. Co., 136 N. C. 321, 323, 48 S. E. 743.

Judge, Clerk or Justice May Grant. — A judge or clerk of the superior court may, in cases within the jurisdiction of said court, make an order authorizing any person complying with the provisions of the said act to sue in forma pauperis. A justice of the peace has like power, in cases within the jurisdiction of his county. Rowark v. Gaston 67 N. C. 291.

Plaintiff's Affidavit Necessary. — Whether the application be to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. The necessity of such affidavit is held in Miazza v. Calloway, 74 N. C. 31; Stell v. Barham, 85 N. C. 88, 89.

Proving Good Cause of Action. — In granting an order for a person to sue in forma pauperis, it is sufficient compliance with this section for the presiding judge to be satisfied, by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover. Miazza v. Calloway, 74 N. C. 31.

Security for Costs. — Under this section the judge may, in his discretion, require a plaintiff who has been allowed to sue in forma pauperis to give security for costs. Dale v. Presnell, 119 N. C. 489, 26 S. E. 27.

Pauper Must Pay Witnesses. — Although this section, allowing a party to sue as a pauper, excuses such party from paying fees to any officer and deprives him of the right to recover costs. It is held, that it does not excuse the pauper from liability for his witnesses. Morris v. Rippy, 49 N. C. 533; Bailey v. Brown, 105 N. C. 127, 129, 10 S. E. 1054.

Who Can Sue in Forma Pauperis. — "A guardian can sue in forma pauperis." Christian v. Atlantic, etc., R. Co., 136 N. C. 321, 322, 48 S. E. 743.

Same — Non-Resident. — The words of this section are broad enough to include any litigant whatever, and hence residents of another state can sue here in forma pauperis. Porter v. Jones, 68 N. C. 320; Christian v. Atlantic, etc., R. Co., 136 N. C. 321, 48 S. E. 743.

Same — Personal Representative. — It has been the unquestioned practice since the adoption of the Code, that a personal representative could sue as a pauper upon proper affidavit and certificate. Allison v. Southern R. Co., 129 N. C. 336, at p. 344, 40 S. E. 91; Christian v. Atlantic, etc., R. Co., 136 N. C. 321, 48 S. E. 743.

No Presumption of Contingent Fee. — The bringing of a pauper suit does not raise the presumption that the attorney took the case for a contingent fee and was therefore a party in interest. Allison v. Southern R. Co., 129 N. C. 336, 40 S. E. 91.

Where Plaintiff Assigns Interest Pending Action. — Where a plaintiff, pending an action brought in forma pauperis, assigned his interest in the land which was the subject of the action, the court will require the assignee to give security, or it will withdraw the privilege given to the assignor and dismiss the action. Davis v. Higgins, 91 N. C. 382; Dale v. Presnell, 119 N. C. 489, 491, 26 S. E. 27.

Cited in Costello v. Parker, 194 N. C. 221, 139 S. E. 224.

§ 495. Defendant's, for costs and damages in actions for land.—In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits. (Rev., s. 453; Code, s. 237; 1869-70, c. 193.)

Cross References.—As to justification of sureties, see sec. 647. As to judgment by default final upon failure of defendant to file undertaking or of his sureties to justify, see sec. 595 (4).

Purpose of Section.—The purpose of the Legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond. Henning v. Warner, 109 N. C. 406, 408, 14 S. E. 317.

Relation to Other Sections of Code.—This section and section 595, par. 4 are in pari materia with section 509 as amended by Public Laws of 1921, ch. 92, sec. 1, par. 3, and should be construed together. Battle v. Mercer, 187 N. C. 437, 446, 122 S. E. 4.

Time in Which to File Bond.—Where the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the lands the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, by this section, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. Jones v. Jones, 187 N. C. 589, 122 S. E. 370. As to change in the time of answer after service, see section 476 and the note thereto.

Judge May Grant Extension.—Section 536 confers on the judge the discretion to extend the time for filing the defense bond. Taylor v. Pope, 106 N. C. 267, 271, 11 S. E. 257; Tennessee River Land Co. v. Butler, 134 N. C. 50, 45 S. E. 956; White v. Lokey, 131 N. C. 72, 42 S. E. 445.

Same—Effect of Amendments of 1921.—Under the provisions of chapter 92, section 1, par. 18, Public Laws of 1921, the power of the superior court judge, to allow amendments to pleadings (given by section 547), or to allow answer to be filed (section 536), applying also to the defendant, in possession of lands and claiming an interest therein, giving bond (this section) is not affected. Battle v. Mercer, 187 N. C. 437, 122 S. E. 4.

Same—No Appeal.—Extension of time to file a defense bond is a matter in the discretion of the judge, for which no appeal will lie. Dunn v. Marks, 141 N. C. 232, 233, 53 S. E. 845.

Failure to File Answer or Give Bond.—Where, in an action to recover **possession of land,** the defendant failed to file an answer or the bond required by this section and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under Sec. 595 to give judgment against the defendant of the land without damages. Jones v. Best, 121 N. C. 154, 28 S. E. 187. Junge v. MacKnight, 135 N. C. 105, 107, 47 S. E. 452.

Same—Excusable Neglect Immaterial.—Where, in an action to recover land, the defendant fails to file, or is not excused from filing, the bond required by this section, a judgment by default is authorized by section 595 of the Code, even if there has been a failure to file an answer arising from excusable neglect. Vick v. Baker, 122 N. C. 98, 29 S. E. 64.

Failure to Give Undertaking.—Where a defendant in ejectment fails to file the undertaking required by this section, or procure leave to defend without bond, section 496, the court, at such term, may strike out the answer and render judgment by default. Patrick v. Dunn, 162 N. C. 19, 77 S. E. 995.

Where the defendant in a petition for partition pleaded sole seizin, it was error to strike out his answer without notice, because no defense bond had been filed, but he should have been given an opportunity to file a bond or obtain leave to defend without it under section 496. Cooper v. Warlick, 109 N. C. 672, 14 S. E. 106.

Same—When No Objection Made.—When an answer has been filed without any bond, and has remained on file for some time without objection, it is held to be irregular to strike it out and give judgment without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond. McMillan v. Baker, 92 N. C. 111; Cooper v. Warlick, 109 N. C. 672, 14 S. E. Becton v. Dunn, 137 N. C. 559, 563, 50 S. E. 289.

Same—Same—Waiver — The failure for three years to move for judgment by default for failure to file a defense bond waives the right thereto. Tennessee River Land, etc., Co. v. Butler, 134 N. C. 50, 45 S. E. 956.

Defective Bond May Be Cured.—A failure to file a "justified" defense bond as required by this section and 595 par. 4, and 647 does not necessarily avoid the bond, but it is a defect which may be cured by waiver, and an exception to the filing of the bond entered by the plaintiff on the back thereof, but no action taken by the court in reference to it, does not authorize the court to give judgment by default without notice to the defendant. Becton v. Dunn, 137 N. C. 559, 50 S. E. 289; McMillan v. Baker, 92 N. C. 111.

When Landlord and Tenant Joint Defendants.—Where a landlord is joined as a defendant with his tenant, the tenant and landlord thus defending must under this section each give bond with good security to pay costs and damages if the plaintiff recovers; or if he be not able to give such bond, he must make affidavit of that fact under section 496, and get the certificate of an attorney practicing in the court that, in his opinion, the plaintiff is not entitled to recover. Harkey v. Houston, 65 N. C. 137.

When the tenant fails to give such bond, or to swear to his answer when the plaintiff has sworn to his complaint, the plaintiff may take a judgment against him; but he cannot have an execution against him until the further order of the court, which will not be made until after the trial of the issues between him and the landlord defendant, Harkey v. Houston, 65 N. C. 137.

A tenant in common in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. Battle v. Mercer, 187 N. C. 437, 122 S. E. 4.

Vendee in Possession.—Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by this section before he will be allowed to answer. Allen v. Taylor, 96 N. C. 37, 1 S. E. 462.

In an action to remove a cloud on the title a defense bond is not required. Tennessee River Land, etc., Co. Butler, 134 N. C. 50, 45 S. E. 956.

Liability of Surety.—The surety on the bond under this section is liable only for rents and profits pending litigation and subsequent to filing the bond. Hughes v. Pritchard, 129 N. C. 42, 43, 39 S. E. 632.

Same—Summary Judgment.—Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond. Rollins v. Henry, 84 N. C. 570.

Liability for Costs on Appeal.—The defense bond and the sureties thereon, in an action of ejectment under this section are liable to the amount of the bond for the costs in the Supreme Court on appeal as well as those incurred in the superior court. Grimes v. Andrews, 171 N. C. 367, 88 S. E. 513. Kenney v. Seaboard Air Line R. Co., 166 N. C. 566, 82 S. E. 49.

Court May Appoint Receiver.—This section, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N. C. 327; Durant v. Crowell, 97 N. C. 367, 374, 2 S. E. Arey v. Williams, 154 N. C. 610, 70 S. E. 931.

Same—When Unnecessary.—In an action to recover real property or its possession, upon the approval of the defendant's bond by the clerk of the Superior Court for continued possession, given under this section, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, sec. 860, par. 1, is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. Jones v. Jones, 187 N. C. 589, 122 S. E. 370.

Ignorance That Bond Required. — Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, § 509 as amended in 1921, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof. Battle v. Mercer, 187 N. C. 437, 122 S. E. 4.

Mortgage Given for Bond.—A mortgage, given in lieu of the bond required by this section, may be foreclosed by motion, upon notice, in the original action. Ryan v. Martin, 103 N. C. 282, 9 S. E. 197.

§ 496. Defense without bond.—The undertaking prescribed in the preceding section is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit that he is unable to give and not worth the amount of the undertaking in any property whatsoever. (Rev., s. 454; Code, s. 237; 1869-70, c. 193.)

Editor's Note. — This section appeared formerly as a proviso attached to the preceding section. In regard to this proviso (now this section) the court said in Wilson v. Fowler, 104 N. C. 471, 472, 10 S. E. 566: "The terms of the proviso are clear, explicit and exclusive. It declares 'that no such undertaking shall be required' in the case provided for. The words 'no such' are used in the broad sense of not any like that required. There is nothing in the statute that suggests the contrary, or that an undertaking for a less sum than two hundred dollars in amount may be required in any case. The purpose is to allow persons thus poor to make defense in such actions without giving any undertaking, nor does section 350 authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allows the party, of whom an undertaking may be required in such cases, to give such mortgage instead of it, and the former must be for the same amount as the latter."

It will be observed that when one proposes to sue in forma pauperis, or to appeal (section 494 and 649) he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but

further, that "he is not worth the amount of the said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. Taylor v. Apple, 90 N. C. 343, 347.

Notice to Adverse Party Unnecessary.—Nothing in this section requires notice to be given to the adverse party, on an application for permission to defend a suit without giving the required security. Deal v. Palmer, 68 N. C. 215.

Upon Compliance No Order Needed.—Notice of the certificate and affidavit under this section is not necessary, and it may be questioned whether it is necessary in any case that the court should make an order allowng the defendant, upon filing such certificate and affidavit, to answer, because he answers as of right under the statute. Deal v. Palmer, 68 N. C. 215; Jones v. Fortune, 69 N. C. 322; Taylor v. Apple, 90 N. C. 343. Dempsey v. Rhodes, 93 N. C. 120, 125.

Same—Waiver.—But if such order is necessary the plaintiff is deemed to have waived its absence where the certificate of counsel and the affidavit of the defendant fully meet the requirements of the statute, and they and the answer were on file without objection for two years and until the trial. Dempsey v. Rhodes, 93 N. C. 120, 125.

Certificate of Counsel.—Where counsel certifies that he has examined the case of the defendant, and that in his opinion the plaintiff is not entitled to recover; held, a substantial compliance with the statute. It is not intended that the enquiry of counsel should extend beyond the information derived from the defendant. Taylor v. Apple, 90 N. C. 343.

Same—Applies Only to Present Action.—The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for same or similar relief. Wilson v. Fowler, 104 N. C. 471, 10 S. E. 566.

Example of Sufficient Compliance.—In an action to recover land, this section was sufficiently complied with when the defendant made affidavit that he was not worth two hundred dollars in any property whatever, and was unable to give the undertaking required, and his counsel certified that they had examined his case and were of opinion he "had a good defense to the action." Wilson v. Fowler, 104 N. C. 471, 10 S. E. 566.

Costs.—This section allowing a defendant in an action of ejectment to defend without giving bond, and section 649 allowing an appeal without bond, go no further than dispensing with the bond, and neither exempts the party from paying his own costs nor forbids his recovering costs. Speller v. Speller, 119 N. C. 356, 357, 26 S. E. 160; Justice v. Eddings, 75 N. C. 581; Lambert v. Kinnery, 74 N. C. 348; Bailey v. Brown, 105 N. C. 127, 129, 10 S. E. 1054.

Art. 10. Joint and Several Debtors

§ 497. Defendants jointly or severally liable.—Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

2. If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in the action, the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action. (Rev., s. 455; Code, s. 222; C. C. P., s. 87.)

See 13 N. C. Law Rev. 83, 84, for comment on cases discussed in following note.

Partners—In General.—Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. Hanstein v. Johnson, 112 N. C. 253, 17 S. E. 155.

Where, in an action against a partnership, service of summons has been made on some of the partners but not all, upon a verdict in plaintiff's favor, a judgment is properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. Hancock v. Southgate, 186 N. C. 278, 119 S. E. 364.

Same—Purpose of Section.—This section was intended to prevent a partner, who was not served with the summons, from defeating an action against him on the ground that judgment had already been taken against his co-partner; and so the cause of action was merged in the judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. Navassa Guano Co. v. Willard, 73 N. C. 521, 523.

§ 498. Summoned after judgment; defense.—When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally. (Rev., ss. 456, 457; Code, ss. 223, 224; C. C. P., ss. 318, 322.)

Statute of Limitations May Bar Action.—Where an action was begun against certain administrators and the sureties on their bond, and one surety was not served with summons and more than three years thereafter this latter surety was served, it was held that the three year statute of limitations was a bar to the action against the surety. Koonce v. Pelletier, 115 N. C. 233, 20 S. E. 391; See Rufty v. Claywell, etc., Co., 93 N. C. 306.

Where an action was instituted and judgment obtained against A. B. & Co., upon a bill of exchange, and C, who was a secret partner in the firm,was not joined as defendant, and the plaintiff afterwards, and more than three years after the cause of action accrued, discovered that C was a partner and instituted an action against him: Held, that the action was barred by the statute of limitations. Navassa Guano Co. v. Willard, 73 N. C. 521.

When Motion in Cause Proper.—Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815.

§ 499. Pleadings and proceedings same as in action.—The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. The answer and reply must be verified in like cases and manner and be subject to the same rules that apply in an

action, and the issues may be tried and judgment given in the same manner as in action and enforced by execution if necessary. (Rev., ss. 458, 459; Code, ss. 225, 226; C. C. P., ss. 323, 324.)

Art. 11. Lis Pendens

§ 500. Filing of notice of suit.—In action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby. (Rev., s. 460; Code, s. 229; C. C. P., s. 90; 1917, c. 106.)

Cross References.—For full treatment of lis pendens, see 8 N. C. Enc. Dig. 900, 910; 14 N. C. Enc. Dig. 703, 704.

In General.—The general doctrine of lis pendens is familiar and is firmly established. It may be stated to be thus: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. Rollins v. Henry, 78 N. C. 342, 251.

The principle of lis pendens is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the tendency of such suit duly prosecuted is notice to a purchaser so as to bind his interest. Todd etc., Co. v. Outlaw, 79 N. C. 235, 239.

The established rule is that a lis pendens, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the lis pendens begins from the service of the subpoena after the bill is filed. Lacassagne v. Chapin, 144 U. S. 119, 125, 36 L. Ed. 368.

A Harsh Rule.—The rule lis pendens, while founded upon principles of public policy and absolutely necessary to give effect to the decree of the courts is, never-the-less, in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is strictissimi juris. Arrington v. Arrington, 114 N. C. 151, 159, 19 S. E. 351.

Section Similar to English and New York Statutes.—This section is in substance a copy of 2 Victoria, which has received a construction by the English Courts. It is there held that no lis pendens, of which a purchaser has not express notice, will now bind him unless it be duly registered. The provisions of the New York Code for the filing of lis pendens, is similar to ours, and has received there the same construction as the English statute. Todd etc., Co. v. Outlaw, 79 N. C. 235, 240.

Modifies Common Law Rule.—The common law rule, was that if the real estate to be affected by the judgment or decree were situated in several counties, it would all be bound by the lis pendens arising from the pendency of a suit in the county in which only a part of it lies, since, "all persons are supposed to be attentive to what passes in Courts of Justice"; whereas the plain purpose of this section was to modify the rule so as to require notice in all counties where the real estate is situated. Collingwood v. Brown, 106 N. C. 362, 368, 10 S. E. 868.

As to real property, there is but one rule of lis pendens in North Carolina, and the provisions of this section are a substitute for the common law rule. Collingwood v. Brown, 106 N. C. 362, 367, 10 S. E. 868.

Section Adequately Protects Rights of Trustor.—In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the cestui que trust, the purchaser at the sale, is properly dissolved, since plaintiff trustor has an adequate remedy at law by filing notice of lis pendens in accordance with this and subsequent sections. Whitford v. North Carolina Joint Stock Land Book, 207 N. C. 229, 176 S. E. 740.

This section and § 807 are to be construed in pari materia, and where notice of levy of attachment on defendant's land in a county has been given under the provisions of § 807, by certification of the levy to the clerk of the court for that county and his notation thereof on his judgment docket and indexing in the index to judgments the effect is to take the land in custodia legis, and is not an action affecting the title to lands within the purview of this section, but from the day of such notice, unless the land is released, the attachment constitutes a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings relates back to the filing and indexing of the attachment, and where such notice under § 807 has been given, the filing of lis pendens in the same county under the provisions of this section is unnecessary. Pierce v. Mallard, 197 N. C. 679, 150 S. E. 342.

Jurisdiction of Court.—In order that the right to real property and personal chattels may be affected by lis pendens, they must be within the jurisdiction of the court and subject to its power. Enfield v. Jordan, 119 U. S. 680, 693, 30 L. Ed. 523.

Continuous Litigation.—In order for the doctrine of lis pendens to apply, there must be continuous litigation. Lee County v. Rogers, 7 Wall. 181, 19 L. Ed. 160.

An unreasonable delay in prosecution, so far as third persons are concerned, loses its force as a lis pendens. Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 176, 28 L. Ed. 109.

Applies to Action in Another County.—Strangers to an action are not affected with constructive notice of an action involving the title to lands situate in a county other than that in which the action is pending, unless the notice, lis pendens, is given under this section. Spencer v. Credle, 102 N. C. 68, 8 S. E. 910.

Action Not Affecting Title to Realty.—Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of this section, and the judgment of the lower court canceling and removing the notice of lis pendens from the records will be affirmed on appeal. Threlkeld v. Malcragson Land Company, 198 N. C. 186, 151 S. E. 99.

Breach of Option Contract Not Included.—An action to recover damages for the breach of an option contract is not an action affecting the title to realty, within this section, and the filing of notice in such case will not affect a purchaser pending that action. Horney v. Price, 189 N. C. 820, 128 S. E. 321.

When No Notice Required.—No entry of lis pendens, under this section, is required in any case when the action is in the county where the land lies. Collingwood v. Brown, 106 N. C. 362, 10 S. E. 868; Arrington v. Arrington, 114 N. C. 151, 156, 19 S. E. 351; Rollins v. Henry, 78 N. C. 342, 352; Todd, etc., Co. v. Outlaw, 79 N. C. 235; Badger v. Daniel, 77 N. C. 251; Spencer v. Credle, 102 N. C. 68, 8 S. E. 901; Bird v. Gilliam, 125 N. C. 76, 79, 34 S. E. 196.

No change in the rule is brought about by this section prescribing how notice of a lis pendens shall be given when the transaction is in one and the same county, and notice is furnished in the record in the pending action. Morgan v. Bostic, 132 N. C. 743, 751, 44 S. E. 639.

Where the action is brought in the county where the land is situated, and the pleadings contain "the names of the parties, the object of the action, and the description of the property to be affected in that county," this is a substantial compliance with this section, as to the filing of notice, and puts in operation all of the provisions of the statute. Collingwood v. Brown, 106 N. C. 362, 367, 10 S. E. 868.

Sufficient Description.—"Although it is necessary in order to constitute lis pendens that the proceedings should, directly or indirectly, designate specific property, yet where the description is so definite that any one reading it can learn thereby, either by the description or reference, what property is intended to be made subject to litigation, it is sufficient." Benn. Lis Pend., sec. 93, 1 Freem. Judgm., sec. 197. Arrington v. Arrington, 114 N. C. 151, 156, 19 S. E. 351.

Transfer of Suit.—Where the suit is transferred by consent to another county on the original papers and nothing is left on the files to inform a purchaser of the nature of the action and the property to be affected by it, the lis pendens fails and a bona fide purchaser will be protected. Arrington v. Arrington, 114 N. C. 157, 152, 19 S. E. 351.

§ 501. Cross-index of lis pendens.—Any party to an action desiring to claim the benefit of a notice of lis pendens, whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called Record of Lis Pendens, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action. (Rev., s. 464; 1903, c. 472; 1919, c. 31.)

Cited in Pierce v. Mallard, 197 N. C. 679, 682, 150 S. E. 342.

§ 502. Effect on subsequent purchasers.—From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice. (Rev., s. 462; Code, s. 229; C. C. P., s. 90; 1919, c. 31.)

Editor's Note.—Previous to the adoption of section 501, regarding a cross index the filing of notice as provided in section 500 was all that was necessary to affect all purchasers with notice. See Toms v. Warson, 66 N. C. 417, 419.

Judgment Relates Back to Beginning of Suit.—If a suit was pending against a person for certain property when he parted with it, in which there was afterwards a judgment, that judgment relates to the commencement of the suit and binds subsequent purchasers. Briley v. Cherry, 13 N. C. 2; Cates v. Whitfield, 53 N. C. 266; Dancy v. Duncan, 96 N. C. 111, 116, 1 S. E. 455.

Fraudulent Purchaser of Lands.—Where the president of a corporation, a substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's right, taken deed for same from his company, before complaint filed, he and his corporation are concluded from setting up the doctrine of lis pendens as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. Morris v. Basnight, 179 N. C. 298, 102 S. E. 389.

Purchase before Complaint Filed.—A purchaser of land for value after the filing of a lis pendens, but before the filing of the complaint in the action, is not charged with constructive notice of any defects in the title. Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639.

Purchase from Litigant with Notice.—The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. Morris v. Basnight, 179 N. C. 298, 102 S. E. 389.

Purchaser from Successful Party.—One who, relying upon the judgment of the superior court, takes a conveyance from the successful party before the expiration of the ten days, takes it subject to the right of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. Rollins v. Henry, 78 N. C. 342; Dancy v. Duncan, 96 N. C. 111, 1 S. E. 455, Bird v. Gilliam, 125 N. C. 76, 79, 34 S. E. 196.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317; Pierce v. Mallard, 197 N. C. 679, 682, 150 S. E. 342.

§ 503. Notice void unless action prosecuted.—The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after the cross-indexing. (Rev., s. 461; Code, s. 229; C. C. P., s. 90; 1919, c. 31.)

Service Within 60 Days Required.—Where a party lives in a different county of the state, and claims as a bona fide purchaser, to affect him with notice of lis pendens the requirements of the statute must be strictly followed; among other things, it must be served within sixty days after its filing. Powell v. Dail, 172 N. C. 261, 90 S. E. 194.

Cited in Pierce v. Mallard, 197 N. C. 679, 682, 150 S. E. 342.

§ 504. Cancellation of notice.—The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this article to be canceled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order. (Rev., s. 463; Code, s. 229; C. C. P., s. 90.)

Notice Continues Until Cancelled.—Where the suit has been prosecuted with proper diligence the lis pendens continues until the final judgment, or until it has been canceled under the directions of the court. Arrington v. Arrington, 114 N. C. 151, 159, 18 S. E. 351.

Loss or Destruction of Notice.—The mere loss or destruction of the notice will not effect its efficiency, if the statute has been fully complied with. Arrington v. Arrington, 114 N. C. 151, 159, 19 S. E. 351.

Same—When by Act of Party.—If the party, by any act of his own has, contrary to the usual course of the court, consented to or been instrumental in the removal from its files of the notice of lis pendens (or, as in some cases, its substitute, the complaint), leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. Arrington v. Arrington, 114 N. C. 151, 159, 19 S. E. 351.

Cited in Threlkeld v. Malcragson Land Co., 198 N. C. 186, 189, 151 S. E. 99.

SUBCHAPTER VI. PLEADINGS.

Art. 12. Complaint

§ 505. First pleading and its filing.—The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons and a copy thereof delivered to the defendant, or defendants, at the time of the service of summons; provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such order; except that when application is made to the court, under article forty-four, chapter twelve, of the Consolidated Statutes, for leave to examine the defendant prior to filing complaint, and it shall be made to appear to the court that such

examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by section nine hundred and two of the Consolidated Statutes. When the complaint is not filed at the time of the issuance of the summons, the plaintiff shall, when he files complaint, likewise file at least one copy thereof for the use of the defendant and his attorney. When there are more than one defendants, the clerk, may, by written notice to the plaintiff, require the filing of additional (not to exceed six) copies of the complaint within the time specified in such notice, not to exceed ten days. Such notice may be served by mailing to the plaintiff or his attorney of record. (Rev., ss. 465, 466; Code, ss. 206, 232, 238; C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; 1919, c. 304, s. 2; 1927, c. 66, s. 3.)

Editor's Note. — By the amendment of 1919 a clause "otherwise the suit may, on motion, be dismissed" which originally appeared in the section was omitted, but subsequently was restored by the Consolidated Statutes. In changing other provisions of ch. 156 of the laws of 1919, this section in its original form was reenacted without change by the Extra Session of the Public Laws of 1920 and 1921. See Campbell v. Asheville, 184 N. C. 492, 493, 114 S. E. 825.

The act of 1927, ch. 66, not only materially enlarged the provisions of the section but changed the time of the filing of the complaint. Prior to this amendment the complaint was to be filed on or before the return day of the summons, on pain of suit being dismissed at the cost of the plaintiff, and the clerk was authorized to extend, upon motion, the time of filing to a day certain. This was substantially all that this section had formerly provided.

The change in the time of the filing the complaint was effected in view of the changes introduced in section 476 with regard to the service and return of the summons. See section 476 as amended by the laws of 1927.

The act of 1927, ch. 132, was enacted to amend an act amendatory of four different sections (including this) but did not touch this section.

Prior to the amendment of 1919 the complaint was to be filed on or before the third day of the term to which the action was brought. See Hill v. Hotel Co., 188 N. C. 585, 588, 125 S. E. 266.

Similarity to Former Equity Practice. — The Code and the constitution substantially adopt the practice and procedure of the courts of equity. The only difference between the practice under the Code and the former equity practice is that by the Code the summons does not follow, but precedes the complaint. Wilson v. Moore, 72 N. C. 558, 561; Staton v. Webb, 137 N. C. 35, 39, 49 S. E. 55. (Decided under the former law.) The summons no more precedes the complaint under the present law, save under the exceptional circumstances designated in the section as amended. Ed. Note.

New Complaint as to New Defendant. — A new or an amended complaint must be filed as against a new defendant brought in subsequent to the filing of the original complaint. And a judgment by default for want of an answer where no such complaint is filed is irregular and capable of being set aside. Vass v. People's Bldg., etc., Ass'n, 91 N. C. 55, 56.

Extension of Time. — Prior to 1921, (the time when the Civil Code of procedure was restored) it was discretionary with the judge of the superior court to allow extention of time for the filing of pleadings; and the motion to extend the time for filing the complaint should be made before the judge, and not before the clerk. Anderson v. Anderson, 1 N. C. 20. See also, Brendle v. Heron, 68 N. C. 495. But this is no longer the rule. See Campbell v. Asheville, 184 N. C. 492, 114 S. E. 825.

Where the clerk of the court has extended the time for filing the complaint in accordance with this section, and the defendant has appealed to the Superior Court, it is within the sound legal discretion of the trial judge, given by § 536, to allow the complaint to be filed, and his sustaining the clerk's order to that effect is an exercise of this discretion. Hines v. Lucas, 195 N. C. 376, 142 S. E. 319.

When it appears that the clerk of the court has extended the time to file the complaint by orders regularly entered and in continuous and unbroken sequence for a period of about a year, and the defendant at the end of the full period so extended excepts and appeals to the Superior Court: Held, it is a valid exercise by the clerk of the power conferred by this section. Hines v. Lucas, 195 N. C. 376, 142 S. E. 319.

Same — By Consent of Parties. — In Howard v. Southern R. Co., 122 N. C. 944, 29 S. E. 778, neither the complaint nor the answer was filed at the proper time, but there was an entry made on the minutes, which on its face did not purport to be by order of the court, and which was admitted to have been by consent of the parties to the effect that the plaintiff have thirty days to file his complaint and the defendant sixty days thereafter. This procedure seems to be permissible.

Same — Motion to Dismiss Necessary to Prevent Extension. — The fact that this section requires the complaint to be filed at or before the return day of the summons, (before the amendment of 1927) does not prevent the plaintiff from filing it thereafter if the defendant fails to move to dismiss the action for the plaintiff's failure to so file. Roberts v. Allman, 106 N. C. 391, 393, 11 S. E. 424.

Judgment of Non Pros. — In the absence of a complaint filed at the proper time the defendant may move for a judgment of non pros. Vass v. People's Bldg., etc., Ass'n, 91 N. C. 55, 59.

§ 506. Contents.—The complaint must contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered.

3. A demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated.

4. In actions for the recovery of a debt contracted for the purchase of land, a statement that the consideration of the debt was the purchase money of certain land, describing the land in an intelligible manner, such as the location, boundaries, and acreage. (Rev., ss. 467-8; Code, ss. 233-4; C. C. P., s. 93; 1879, c. 217.)

I. In General.
II. Formal Parts of Complaint.
III. Statement of Facts Constituting the Cause of Action.
IV. Demand for Relief.
V. Statement of Consideration for the Purchase of Land.

Cross References.

As to limitations of judgment to demand in complaint, see section 606.

I. IN GENERAL.

Logics and Precision of Common Law Not Discarded. — The rules of common law as to the pleading which are only the rules of logic, have not been abolished by the Code. Crump v. Mims, 64 N. C. 767. The notion that the Code of civil procedure is without order or certainty and that any pleading however loose or irregular, may be upheld, is erroneous, while it is not perfect it has both logical order, precision and certainty, when it is properly observed. Webb v. Hicks, 116 N. C. 598, 604, 21 S. E. 672.

Construction of Pleadings. — While the pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which he is charged with liability. Thomason v. Seaboard, etc., R. Co., 142 N. C. 318, 325, 55 S. E. 205.

Old and New Procedure Distinguished. — Under the former system the practice was in declaring to proceed on the special contract and also in other counts, called the common counts, so that, if unable to recover on the special assumpsit, relief might be had on some of the counts in general assumpsit on the implied promise or obligation. If the plaintiff under that system had "counted" only on the special contract, not being able to recover on that, he would have failed in his action. But under the Code all forms of pleading which existed before are abolished, and now we

have only the forms of pleading and the rules by which their sufficiency is to be determined, part of which are prescribed in this section. Jones v. Mial, 82 N. C. 252, 257.

For an eloquent expression on the abolition of the old system of pleading and the substitution therefor the new system, see, Pierce v. North Carolina R. Co., 124 N. C. 83, 97, 32 S. E. 399.

For a discussion of the similarity between the civil procedure adopted in this state and that which prevailed in the courts of King's Bench, in England, see Staton v. Webb, 137 N. C. 35, 36, 49 S. E. 55.

Same Substantial Certainty as at Common Law a Requisite.—The object of the Code was to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration. Oates v. Gray, 66 N. C. 442.

Theory and Form of Action Immaterial.—Where the facts in the complaint in an action for damages caused by an action brought by the defendant to have plaintiff's deed declared void constitute a cause of action, it is immaterial whether the action is for slander of title, malicious prosecution, or for an abuse of legal process, and the complaint is sufficient. Chatham Estates v. American Nat. Bank, 171 N. C. 579, 88 S. E. 783.

Cited in Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729; Tar Heel Hosiery Mill v. Durham Hosiery Mills, 198 N. C. 596, 152 S. E. 794.

II. FORMAL PARTS OF COMPLAINT.

Title of Cause. — A paper-writing introduced before a justice of the peace, purporting upon its face only to be a verified account upon which judgment is sought, lacking the requisites of a complaint, under the provisions of this section, in failing to state the title of the cause, the name of the county and parties, will not be considered as a verified complaint on the trial in the superior court, requiring the answer there to be verified; and upon an oral answer denying the liability and raising the issue, the question is for the determination of the jury under proper evidence. Van Smith Bld. Material Co. v. Tarbora Hardware Co., 173 N. C. 55, 91 S. E. 524.

Parties.—A general designation of parties as the "heirs of M. C." is irregular and will not be tolerated. Kerlee v. Corpening, 97 N. C. 330, 2 S. E. 664.

It also constitutes a fatal defect on demurrer to designate the plaintiffs in a complaint as "H. M. & Co.," without setting out the individual names of persons composing the firm. Morrow v. Morgan, 117 N. C. 504, 23 S. E. 489.

As to parties generally, see sections 446 et seq. and the notes thereto.

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

Provisions of Section Not Mere Matter of Form.—This section requiring that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, is not a mere matter of form. It is of the essential substance of the litigation. It is necessary to the end that the contending parties may understand and prepare to meet each the other's contention, and prepare himself for the trial of issues of law or fact presented, that the court may have a proper, just and thorough apprehension of the controversy, and that the same may go into the record and stand as a perpetual memorial of the litigation and all that it embraces. Any other course of procedure would lead to endless confusion and litigation. If this were not done, it would be difficult to show what any litigation embraced or that it had been settled and ended, and when and how. It is not sufficient that the plaintiff had a cause of action and can prove it: he must first plead it, then prove it. McLaurin v. Cronly, 90 N. C. 50, 51, 52.

Result of Noncompliance. — Unless the complaint contains a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition pursuant to this section, courts will be hampered in determining what are the proper issues, both as to form and to number. The principles of good pleading are retained under our present system. Hunt v. Eure, 189 N. C. 482, 127 S. E. 593, 596.

Defendant Must Not Be Left in Doubt.—The facts should be so stated as to leave the defendant in no doubt as to alleged cause of action against him, so that he may know how to answer and what defense to make. Hussey v. Norfolk, etc., R. Co., 98 N. C. 34, 3 S. E. 923.

Right to Demand Filing of Amended Complaint.—Several elements of damages may be alleged on one cause of action, and where this has been done, defendant's motion to require plaintiff to file an amended complaint, based on the theory that each element of damage constituted a separate cause of action and should be separately alleged, is properly refused under this section. Pemberton v. Greensboro, 205 N. C. 599, 172 S. E. 196.

"A plain and concise statement of facts," within the meaning of this section, means a statement of all the facts necessary to enable the plaintiff to recover. By a "plain" statement is meant a direct and positive averment of fact, which does not leave the existence of the fact to be inferred merely from the existence of some other fact. Commissioners v. McPherson, 79 N. C. 524, 525.

Facts Must Be Stated Not Conclusions or Evidence.—The code of civil procedure modifying the method of pleading does not abolish "all forms" of pleading. The fundamental principle of pleading that facts or circumstances constituting the cause of action must be pleaded and not the pleader's conclusions of law drawn from those facts or evidence, holds as true as ever, with respect to the statement of these facts there has been no relaxation of the requisite in the new form, and no alteration from the old, except to require greater particularity of separately numbering every material fact. Moore v. Hobbs, 79 N. C. 535, 537; Lassiter v. Roper, 114 N. C. 17, 19, 18 S. E. 946; Gossler v. Wood, 120 N. C. 69, 73, 27 S. E. 33.

A complaint which merely states a conclusion of law is demurrable both at common law and under the Code. Rountree v. Brinson, 98 N. C. 107, 3 S. E. 747.

Matters of Defense Need Not Be Alleged.—If it is alleged that the consideration for the debt or the note sued upon is the purchase money of certain lands, and the lands are specifically described, it is not necessary to allege that the plaintiff has a good title, and that he had tendered a deed to the defendant—these being matters of defense. Toms v. Fite, 93 N. C. 274.

Complaint Considered as a Whole.—A complaint will be sustained, as against a demurrer, if any part presents facts sufficient to constitute a cause of action, or if fact sufficient for that purpose can be gathered from it, under a liberal construction of its terms. Hendrix v. Southern R. Co., 162 N. C. 9, 77 S. E. 1001; New Bern Banking, etc., Co. v. Duffy, 156 N. C. 83, 72 S. E. 96. See also, Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566; McEachin v. Stewart, 106 N. C. 336, 11 S. E. 274; Halstead v. Mullen, 93 N. C. 252; Purcell v. Richmond, etc., R. Co., 108 N. C. 954, 12 S. E. 954; Holden v. Warren, 118 N. C. 327, 24 S. E. 770.

Sufficiency of the Facts.—If the facts stated in the complaint, together with those drawn into issue on the answer of the defendants, constitute a right to any relief whatever, the plaintiff is entitled to have it on the case as it was, without amendment. Jones v. Mial, 82 N. C. 252, 258.

Averment of Willingness in Reciprocal Contract. — Where the plaintiff sues upon a special contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. Jones v. Mial, 79 N. C. 165.

Facts Warranting Joinder of Actions.—Where two causes of action are sought to be joined in the same complaint, the complaint must state such facts as would show that the two causes of action can be united under section 507. Allen v. Jackson, 86 N. C. 321; Manufacturing Co. v. Barrett, 95 N. C. 36, 38.

Proof of Foreign Law. — This section requires that the complaint contains a plain and concise "statement of facts constituting the cause of action." Upon those facts, if true, the law gives a "right of action." This right of action is a matter of law of which the court usually takes judicial notice, but if the tort or contract accrued beyond the state line the law of the foreign state should be pleaded and proved—not because it is in that case a part of the "cause of action" any more than if the transaction had taken place within the state, but because the court is not presumed to know the law of all other states. Lassiter v. Norfolk, etc., R. Co., 136 N. C. 89, 90, 48 S. E. 642.

A complaint for converting a mortgaged crop, which avers title to such crop raised by the mortgagor and by him conveyed to the plaintiff, its delivery to the defendant, its value, and its appropriation by the defendant to his own use, after demand by the plaintiff, is a concise and definite statement of every material fact upon which the right to recover depends, and complies with this section. Womble v. Leach, 83 N. C. 84.

Statutory Actions.—A priviso need not be stated in a declaration; but, if the defendant wishes to avail himself of it, it must be averred in his plea. Wilmington, etc., R. Co. v. Robeson, 27 N. C. 391.

Motion to Strike Out Redundant Matter from Complaint. —Where the trial court has allowed the plaintiff to file

an amendment to the complaint to be confined to certain phases of the controversy or to allegations as to certain and specific matters, the plaintiff must confine himself to the restrictions under which he is permitted to amend or the trial judge may order stricken therefrom any further matters or any allegations that are irrelevant or redundant and not in conformity with the statute requiring a plain and concise statement of the cause of action without unnecessary repetition, and the granting of the defendant's motion to strike out certain parts of the amended complaint will be sustained on appeal if the complaint is sufficient in its allegations after the portions objected to have been stricken out to present every phase of the controversy. Ellis v. Ellis, 198 N. C. 767, 153 S. E. 449.

Other Specific Instances.—For what constitutes a sufficient statement of facts in particular instances, see the specific titles of the N. C. Enc. Dig.

IV. DEMAND FOR RELIEF.

Relief Prayed and Afforded.—It is the apparent purpose of the new system, while simplifying the method of procedure, to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. Jones v. Mial, 79 N. C. 165, 168.

Relief Prayed Should Correspond to Proof.—The relief to be granted in an action does not depend upon that asked for in the complaint; but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. Bryan v. Canady, 169 N. C. 579, 86 S. E. 584.

Party Not Limited to Specific Relief Prayed.—Under this section a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved show to be just and proper. Knight v. Houghtalling, 85 N. C. 17; McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265; Hendon v. North Carolina R. Co., 127 N. C. 110, 37 S. E. 155.

What Determines the Measure of Relief. — Under the Code system the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now no general prayer need be expressed, but is always implied. Knight v. Houghtalling, 85 N. C. 17; Staton v. Webb, 137 N. C. 35, 36, 49 S. E. 55; Harris v. Sneeden, 104 N. C. 369, 374, 10 S. E. 477; Gattis v. Kilgo, 125 N. C. 133, 135, 34 S. E. 246.

In the absence of any formal demand for judgment the court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs. Demsey v. Rhodes, 93 N. C. 120; Staton v. Webb, 137 N. C. 35, 36, 42, 49 S. E. 55.

Alternative Relief.—The form of the prayer for judgment is not material, and the plaintiff can unite two causes of action relating to the same transaction and obtain alternative relief. Herring v. Cumberland Lumber Co., 159 N. C. 382, 74 S. E. 1011.

V. STATEMENT OF CONSIDERATION FOR THE PURCHASE OF LAND.

See § 520 and clause 5 of § 675 and the notes thereto.

§ 507. What causes of action may be joined.—The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

1. The same transaction, or transaction connected with the same subject of action.

2. Contract, express or implied.

3. Injuries with or without force to person or property.

4. Injuries to character.

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be seperately stated.

In actions to foreclose mortgages, the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that remains unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor is personally liable for the debt secured; and if the mortgage debt is secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make that person a party to the action, and the court may adjudge payment of the residue of the debt remaining unsatisfied after a sale of the mortgaged premises, against the other person, and may enforce such judgment as in other cases. (Rev., s. 469; Code, s. 267; C. C. P., s. 126.)

I. In General.
II. Causes of Action with Reference to Transaction, or Subject of Action.
III. Causes of Action in Contract.
IV. Causes of Action for Tort to Person or Property.
V. Must Affect All Parties and Have Same Venue.

I. IN GENERAL.

See notes under §§ 456, 511.

The common law does not generally allow the joinder of causes of action of different natures because it leads to prolixity, the multiplication of issues and confusion. Gregory v. Hobbs, 93 N. C. 1, 4.

The purpose of this section is to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, so that the court may not be forced "to take two bites at a cherry," but may dispose of the whole subject of controversy and its incidents and corollaries in one action. Hamlin v. Tucker, 72 N. C. 502, 503; Livingston v. Tanner, 12 Barb, 486; Vanderroot v. Gould, 36 N. Y. 645; Gregory v. Hoobs, 93 N. C. 1, 3.

Joinder Not Mandatory but Permissive. — The provisions of this section are permissive. They are not mandatory as to compel the joinder of separate causes of action arising out of the same transaction. Gregory v. Hobbs, 93 N. C. 1; Raper Lumber Co. v. Wallace, 93 N. C. 22, 26; Tyler v. Capeheart, 125 N. C. 64, 68, 34 S. E. 108.

Effect of Section upon Existing Law.—This section does not make any substantial change in the rules of practice which obtained before the adoption of the Code in the Courts of Equity with regard to multifariousness. Whatever effect it may have had has been to enlarge the right of uniting in one action different causes of action. The equity rule as existing prior to the Code was thus announced by Ruffin, C. J., in Bedsole v. Monroe, 40 N. C. 313: "If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end—if one unconnected story can be told of the whole, the objection of misjoinder of actions cannot apply." And it has been held not to apply, "When there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct." Heggie v. Hill, 95 N. C. 304, 305.

Each Cause Must Belong to Same Class.—No two causes of action which belong to different classes enumerated in this section can be joined in the same cause of action. Land Co. v. Beaty, 69 N. C. 329. And this, it is said, even though the different causes of action are connected with the same subject of the action or arise out of the same transaction. Id. But this last conclusion has been repeatedly repudiated in the case of joinder of tort and contract actions which are corrected with the same subject of the action or arise out of the same transaction. Ed. Note. See post, "Causes of Actions with Reference to Transaction and Subject to Action," II.

In order for joinder causes of actions to be permissible, the causes joined must arise out of any one (and not out of different) of the classes enumerated in this section. In other words, each clause allowing joinder is to be taken independent of the other. See Sutton v. McMillan, 72 N. C. 102.

Thus a condemnation proceeding being purely statutory, a cause of action for compensation and one for damages as for a trespass can not be joined. Abernathy v. South, etc., R. Co., 150 N. C. 97, 63 S. E. 180.

Under this section, if the complaint states a connected story, forming a general scheme and tending to a single end, the plaintiff may unite in the same complaint several causes of action. Shaffer v. Morris Bank, 201 N. C. 415, 419, 160 S. E. 481.

Inconsistent Causes.—Even if the causes of action were to some extent inconsistent, there is authority to the effect that the complaint is not always on that account demurrable. Hardin v. Boyd, 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141. Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590, 592.

No Undue Increase of Cost or Inconvenience.—Under the provisions of this section where there is but one subject-matter of the suit or action in which several parties have divergent interests, and they may all be united in one suit without undue increase of cost or inconvenience to the parties, a motion to dismiss for multifariousness and misjoinder of parties is properly denied. Craven County v. Investment Co., 201 N. C. 523, 524, 160 S. E. 753.

Former Equity Practice Followed.—In interpreting this section with regard to multifariousness and misjoinder of parties our courts will take into consideration the principles of the old practice formerly existing exclusively in suits in equity. Craven County v. Investment Co., 201 N. C. 523, 524, 160 S. E. 753.

Judgments.—Causes of action based on several judgments may be joined in one complaint. Moore v. Nowell, 94 N. C. 265.

Method of Taking Advantage of Misjoinder.—A misjoinder of causes of action is a ground of demurrer and can be taken advantage of in no other way. Burks v. Ashworth, 72 N. C. 496. See sec. 511, clause 5, and the notes thereto.

Demurrer for misjoinder of parties and causes of action will be sustained under this section if the several causes of action alleged do not affect all the parties to the action. Lucas v. North Carolina Bank, etc., Co., 206 N. C. 909, 174 S. E. 301.

Execution of Deed and Demand for Land.—The plaintiff can unite, in the same action, a demand for the execution of a deed and for possession of the land, while under the old system the lost or destroyed deed could only be established in a court of equity, where a decree for title and such other relief as might be proper could be made and enforced according to the practice of that court. Jennings v. Reeves, 101 N. C. 447, 450, 7 S. E. 897.

Cited in Berger v. Stevens, 197 N. C. 234, 237, 148 S. E. 244; Pender County v. King, 197 N. C. 50, 56, 147 S. E. 695; Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39; Pender County v. King, 197 N. C. 50, 56, 147 S. E. 695; Berger v. Stevens, 197 N. C. 234, 237, 148 S. E. 244; Shuford v. Yarborough, 197 N. C. 150, 151, 147 S. E. 824; Andrews Music Store v. Boone, 197 N. C. 174, 176, 148 S. E. 39; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729; Mack Truck Corp. v. Wachovia Bank & Trust Co., 199 N. C. 203, 204, 154 S. E. 42; Taylor v. Taylor, 197 N. C. 197, 200, 148 S. E. 171.

II. CAUSES OF ACTION WITH REFERENCE TO TRANSACTION, OR SUBJECT OF ACTION.

The general rule which may be deduced from the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole——they may be joined in order to determine the whole controversy in one action. Young v. Young, 81 N. C. 92; Bedsole v. Monroe, 40 N. C. 313; Hawk v. Pine Lumber Co., 145 N. C. 47, 48, 58 S. E. 603, 604; Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590, 592; Howell v. Fuller, 151 N. C. 315, 66 S. E. 131; Fisher v. Trust Co., 138 N. C. 224, 50 S. E. 659; King v. Farmer, 88 N. C. 22; Balfour Quarry Co. v. West Constr. Co., 151 N. C. 345, 66 S. E. 217; Bedsole v. Monroe, 40 N. C. 313; Taylor v. Postal Life Ins. Co., 182 N. C. 120, 122, 108 S. E. 502.

Source of Litigation.—While it was the object of legislature to avoid a multiplicity of suits and to prevent protracted and vexatious litigation, this subdivision of this section has given rise to more unprofitable litigation upon its construction than any other section. Young v. Youug, 81 N. C. 92.

The word "transaction" is used in the statute in reference to the joinder of actions in the sense of the conduct or finishing up of an affair, which constitutes as a whole the "subject of action." Cheatham v. Bobbitt, 118 N. C. 343, 346, 24 S. E. 13.

Under this section it is not necessary that the causes of action of several plaintiffs be identical, but only that the causes of action arise out of the same transaction or transactions connected with the same subject of action. Wilson v. Horton Motor Lines, 207 N. C. 263, 176 S. E. 750.

Legal and equitable causes of action, arising out of tort and ex contractu, may be united under this section in the same complaint where they arise out of the same transaction or series of transactions forming a connected whole. Fry v. Pomona Mills, 206 N. C. 768, 175 S. E. 156.

Series of Transactions Forming One Course of Dealing. — Causes of action which arise from a series of transactions connected together and forming one cause of dealing may be joined. King v. Farmer, 88 N. C. 22; Balfour, etc., Co. v. West Constr. Co., 151 N. C. 345, 66 S. E. 217, 220.

General Right Arising out of Series of Transactions. — Young v. Young, 81 N. C. 92.

Tort and Contract May Be Joined.—An action arising upon a contract united in the same complaint with one arising in tort is not a misjoinder, and a demurrer thereto will not be sustained "where they arise out of the same transaction or are connected with the same subject of action." Hawk v. Pine Lumber Co., 145 N. C. 48, 58 S. E. 603; Cook v. Smith, 119 N. C. 350, 355, 25 S. E. 958; Reynolds v. Mt. Airy, etc., R. Co., 136 N. C. 345, 346, 48 S. E. 765; Railroad Co. v. Wakefield Hdw. Co., 135 N. C. 73, 75, 47 S. E. 234; Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 603, 77 S. E. 770, 774.

In the earlier cases of Logan v. Wallis, 76 N. C. 416, and Doughty v. Atlantic, etc., R. Co., 78 N. C. 22, it was broadly stated that a cause of action founded on a tort could not be joined with one founded on contract; but in Hodges v. Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917, this rule was explained and extended so as to permit such a joinder of action, provided they arose out of the same transaction. Benton v. Collins, 118 N. C. 196, 198, 24 S. E. 122; Daniels v. Baxter, 120 N. C. 14, 17, 26 S. E. 635; Hodges v. Wilmington, etc., R. Co., 105 N. C. 170, 171, 10 S. E. 917.

For example in Hamlin v. Tucker, 72 N. C. 502, it was held that a plaintiff may in the same complaint join as separate causes of action: (1) the harboring and maintaining his wife; (2) the conversion of certain personal property, to which the plaintiff is entitled jure mariti; (3) inducing the wife while harbored and mantained to execute to defendant a deed for land, under which he had received the rents, and (4) converting to defendant's own use certain mules, farming utentils, etc., set out in a marriage settlement executed by the plaintiff and his wife. Hawk v. Pine Lumber Co., 145 N. C. 48, 49, 58 S. E. 603.

Likewise in Young v. Young, 81 N. C. 92, the court held that a complaint containing several causes of action, viz: (1) to declare one defendant a trustee of land, (2) to recover judgment of other defendants for purchase-money of same, (3) and to recover possession of the land with damages for withholding it, is not demurrable.

Stockholder's Suit against Corporate Officers. — Where the stockholders of a corporation sue its officers for damages for their mismanagement and negligence in accepting worthless paper, and inducing the plaintiffs to become indorsee thereon to their loss and damage, and in failing to indorse these papers themselves under an agreement to do so, the causes of action are properly joined, one sounding in tort and the other being to enforce an equitable right arising out of transactions connected with the same subject-matter. Ayers v. Bailey, 162 N. C. 209, 78 S. E. 66.

Suit against Defaulting Corporate Officer and Surety.—A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. Shuford v. Yarborough, 197 N. C. 150, 147 S. E. 824, distinguishing Clark v. Bonsol, 157 N. C. 270, 72 S. E. 954, and citing Carswell v. Talley, 192 N. C. 37, 133 S. E. 181; Robinson v. Williams, 189 N. C. 256, 126 S. E. 621; S. v. Bank, 193 N. C. 524, 137 S. E. 593; Shuford v. Yarborough, 197 N. C. 150, 151, 147 S. E. 824.

Actions on Insurance Policies. — In McGowan v. Life Insurance Co., 141 N. C. 367, 54 S. E. 287, the complaint alleged that the plaintiff had been induced to take out fifteen policies on the lives of herself, her children and grandchildren by means of certain false and fraudulent representations made to her by the defendant's agents that they were ten-year tontine policies; that after paying her weekly assessments for ten years, when she demanded performance it was refused, and she discovered that the policies did not mean what the defendant's agents had represented to her. It was held that the causes of action

were properly joined, on the theory that they all arose out of a transaction connected with the same subject of the action. See also, Pretzfelder & Co. v. Merchants Ins. Co., 116 N. C. 491, 21 S. E. 302.

Suit to Engraft Parol Trust on Land.—Where the complaint in a suit to engraft a parol trust upon the title to lands in favor of a husband and wife, alleges that they gave a mortgage on three tracts of land, the husband having title in two of them and his wife in the other, and that the husband for himself and as agent for his wife had agreed with a third person that the latter should bid it in at the sale and hold the title in trust for them upon certain trust relations: Held, in a suit against the administrator of the alleged deceased trustee, the complaint was not demurrable upon the ground of a misjoinder of parties and causes of action. Cole v. Shelton, 194 N. C. 741, 140 S. E. 734.

In an action to recover land on the ground that the sale under execution was void, it was held that all matter raised by the pleading could all be settled in one action. Jeffreys v. Hocutt, 195 N. C. 339, 142 S. E. 226.

Action to Foreclose Mortgage and Recover Land. — An action brought to foreclose a mortgage upon a tract of land cannot be joined with an action to recover the possession of another tract of land, as these causes do not arise out of the same transaction, nor are the transactions connected with the same subject of action. Edgarton v. Powell, 72 N. C. 64.

Actions for Mortgaged Property and Mortgage Debt. — A demand for judgment for the possession of mortgaged property is properly joined with a demand for judgment for the debt secured thereby. Kiger v. Harmon, 113 N. C. 406, 18 S. E. 515; Martin v. McNeely, 101 N. C. 634, 8 S. E. 231.

Action for Damages by Husband and Wife.—Where a civil action for damages is brought by a husband and wife for an alleged assault against them both, for alleged false arrest of the male plaintiff and abuse of process in swearing out a peace warrant against him and his false imprisonment, the defendant's demurrer on the ground of misjoinder of parties and causes of action is properly sustained and the case dismissed, the several causes of action not affecting all the parties to the action as required by this section and § 2513, authorizing a married woman to bring suit for damages for personal injuries without the joinder of her husband. Sasser v. Bullard, 199 N. C. 562, 155 S. E. 248.

Warranties—Predecessors in Title. — A grantee of lands against whom a recovery has been had for a part thereof may sue his grantor for damages upon the covenants and warranty in his deed, and the successive warrantors in his chain of title, separately or in the same action, the subject-matter being the same, our Code system not favoring a multiplicity of suits. Winders v. Southerland, 174 N. C. 235, 93 S. E. 726.

Proceedings under § 1667.—A complaint in proceedings by the wife under § 1667, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good and a demurrer thereto for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject-matter or transaction. Taylor v. Taylor, 197 N. C. 197, 148 S. E. 171.

III. CAUSES OF ACTION IN CONTRACT.

Contracts and Torts. — See notes under the preceding analysis line.

Implied Contract Arising out of Tort. — Generally a cause of action based on a contract cannot be joined with a cause of action based on tort. But where the tort is of such a nature that the plaintiff may waive it and sue upon an implied contract, the causes of action may be properly joined. Logan v. Wallis, 76 N. C. 416.

Specific Performance and Action for Damages. — It is well settled that a cause of action for specific performance may be joined with one for damages resulting from a breach of the contract, or from a delayed performance, or for any other damages growing out of the transaction to which the plaintiff may show himself entitled. Winders v. Hill, 141 N. C. 694, 703, 54 S. E. 440.

Action for Statutory Penalties.—An action for a penalty given by a statute to any person injured is an action on a contract. Hence it may not be joined with another cause of action based on tort to person or property. Doughty v. Atlantic, etc., R. Co., 78 N. C. 22, 23; Hodges v. Wilmington etc., R. Co., 105 N. C. 170, 10 S. E. 917.

A party suing for penalties against the same defendant may unite several such causes of action in the same complaint. Burrell v. Hughes, 116 N. C. 430, 437, 21 S. E. 971; Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14.

A cause of action for a penalty for unreasonable delay in delivery of goods may be joined with one for recovery of the value of goods not delivered. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413; McCullen v. Seaboard Air Line R. Co., 146 N. C. 568, 60 S. E. 506.

Under this section allowing the joinder of several causes of action arising out of contract, express or implied, three causes of action against a register of deeds for statutory penalties for failure to record, and for wrongful issuance of, marriage licenses, may be united in the same complaint. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Action for Rescission and breach.—Plaintiff may not unite in the same complaint an action for the recission of a contract and one for its breach. The rights are opposed and the remedies inconsistent. Lykes & Co. v. Grove, 201 N. C. 254, 159 S. E. 360.

IV. CAUSES OF ACTION FOR TORT TO PERSON OR PROPERTY.

Injury to Person and Property May be Joined. — Causes of action for "injuries with or without force to persons and property, or to either," may be joined, and different causes of action for such injuries may be joined against one or more defendants, provided that each of such causes affects all the parties defendant. Howell v. Fuller, 151 N. C. 315, 66 S. E. 131.

Trespass and Assault.—A count in trespass for forcibly entering the plaintiff's close may be joined with a count for an assault and battery. Flinn v. Anders, 31 N. C. 328.

Destroying Property and Trespass. — An action for willingly destroying a horse may be joined with a count for trespass in entering on the plaintiff's tenement. Rippey v. Miller, 46 N. C. 479.

Trespass Vi Et Armis and on the Case. — In an action for false imprisonment, under the Code, the common-law actions of trespass vi et armis and of trespass on the case may be joined in one complaint. Bryan v. Stewart, 123 N. C. 92, 31 S. E. 286. Hogwood v. Edwards, 61 N. C. 350, 352.

V. MUST AFFECT ALL PARTIES AND HAVE THE SAME VENUE.

As to general provisions relating to parties, see secs. 446 et seq.

General Rule. — As stated in the next to the last paragraph of the section causes of action may not be united under the provisions of this section, except those for the foreclosure of mortgages, unless they affect all the parties thereto. Roberts v. Utility Mfg. Co., 181 N. C. 204, 106 S. E. 664.

Same—Mandatory. — This provision of the statute is mandatory and not merely directory. Thus in Eller v. Carolina, etc., R. Co., 140 N. C. 140, 145, 52 S. E. 305, where no formal objection was taken to the defect, the court said that they would take notice of it so that attention may be called to this important provision of the law which is mandatory and intended to protect a substantial right of the defendant.

Causes Affecting Different Parties. — Comprehensive as are the provisions of this section, allowing several causes of action to be united in the same action, it does not extend to and embrace distinct causes of action against different persons having no substantial connection with each other in respect of such causes of action. It does not provide for the consolidation of all sorts of causes of action in the same action, nor does it allow two or more different persons to be sued in the same action in respect to distinct causes of action where there is no joint or common liability among them. Different causes of action in favor of and against different parties must be litigated in different actions. Brown v. Coble, 76 N. C. 391; Logan v. Wallis, 76 N. C. 416; Street v. Tuck, 84 N. C. 605; Burns v. Williams, 88 N. C. 159; Mitchell v. Mitchell, 96 N. C. 14, 17, 1 S. E. 648.

When a complete determination of a cause of action joined with others requires parties not necessary to the other causes of action, it is demurrable. Logan v. Wallis, 76 N. C. 416.

Thus a plaintiff could not unite in one suit a cause of action for wrongful attachment and one against the surety on the attachment bond for a breach thereof. Railroad Co. v. Hardware Co., 135 N. C. 73, 47 S. E. 234.

Injuries to Father and Son by the Same Negligence. —

The joinder of a cause of action brought by a son, an employee, to recover of his employer damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. Thigpen v. Cotton Mills, 151 N. C. 97, 65 S. E. 750.

Causes Affecting Husband and Wife Separately. — A husband and wife can not join their separate actions for damages for mental anguish caused by defendant's negligence, and recover one sum in satisfaction of their several claims. Eller v. Railroad, 140 N. C. 140, 52 S. E. 305.

Actions against Different Insurance Companies.—Where a person was insured in several companies, and each policy limited the amount of his recovery thereunder to the proportion of the loss which the policy should bear to the total insurance, it was proper, in an action to recover for a loss, to make each company a party defendant. Pretzfelder & Co. v. Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 302.

Action against Partner. — A cause of action against one on a joint contract as a partner may be joined with a cause of action against such partner individually. Logan v. Wallis, 76 N. C. 416.

Actions upon Administrator's and Clerk's Bond.—A complaint in which are joined two causes of action, the one upon a clerk's and the other upon a bond of an administrator, is demurrable. Street v. Tuck, 84 N. C. 605.

Action against Two Carriers. — Where a carrier has accepted a shipment beyond its own line, and upon its not being delivered, agrees by parol to have it reshipped to the starting point, and delivery is made there in bad condition, a joinder of causes of action against the two defendants to recover damages to the shipment while in their possession is proper. Lyon v. Atlantic, etc., R. Co., 165 N. C. 143, 81 S. E. 1.

Joinder of Contract and Tort Actions against Different Defendants. — A contract action against one person may not be joined with a tort action against the same person; much less may a contract action against one person be joined with a tort action against the same and another person. Land Co. v. Beatty, 69 N. C. 329. For causes relating to joinder of tort and contract actions generally, see ante, this note, "Causes of Action with Reference to Transaction, or Subject of Action," II

Different Venue. — Actions requiring different places of trial cannot be joined. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 603, 613, 77 S. E. 770.

Art. 13. Defendant's Pleadings

§ 508. Demurrer and answer. — The only pleading on the part of the defendant is either a demurrer or an answer. He may demur to one or more of several causes of action stated in the complaint, and answer to the residue. (Rev., ss. 470, 471; Code, ss. 238, 246; C. C. P., ss. 94, 103.)

Applies to Several Causes of Action Not to Several Allegations. — If a party answer and also demur to the same cause of action, the answer overrules the demurrer; but pleadings, in which a party answers to some and demurs to others of the allegations made in support of any one cause of action, are erroneous. This section applies only where a complaint or answer contains several causes of action. Ransom v. McClees, 64 N. C. 17. A party can not answer some of the allegations of a single cause of action, and demur to others. Speight v. Jenkins, 99 N. C. 143, 5 S. E. 385; State v. Young, 65 N. C. 579; Von Glahn v. De Rossett, 76 N. C. 292; Love v. Commissioners, 64 N. C. 706.

Cited in Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729.

§ 509. Demurrer and answer.—The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under C. S. section six hundred, or to set aside a judgment under C. S. section four hundred and ninety-two. If the time is extended for filing complaint, then the defendant shall have thirty (30) days after the final day fixed by such extention in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. This section shall also apply to all courts of record inferior to the superior court, where any defendant resides out of the county from which the summons is issued and no court of record inferior to the superior court shall fix such return date at less than thirty (30) days. (Rev., ss. 473; Code, 207; 1870-1, c. 42, s. 4; 1919, c. 304, s. 3; Ex. Sess. 1919, c. 92, s. 3; 1927, c. 66, s. 4; 1935, c. 267.)

As to default judgments see secs. 592 et seq. and the notes thereto.

As to provisions on summons, see sections 475, et seq.; 1 N. C. L. Rev. p. 9 et. seq.

Editor's Note. — This section underwent material changes both in its phraseology and substance by every amendment since 1920, cited at the end thereof. As it originally stood in the Consolidated Statutes, it required that the defendant must appear and demur or answer within twenty days after the **return day** of the summons, and in case of extention of time for the filing of the complaint, twenty days from the filing of such complaint, with an authority in the clerk to extend the time for filing the answer or demurrer for good cause shown; otherwise the plaintiff would have judgment by default.

By the laws of 1921, (Ex. Sess. 1921, ch. 92, sec. 3) these provisions were so framed, as to allow the filing of the answer or demurrer twenty days after service of complaint, or within twenty days after the final determination of a motion to remove as a matter of right.

The same amendment inserted a provision to the effect that in case the complaint was not served, for good cause shown, the clerk may extend the time to a day certain; and a limitation upon the power of the clerk not to extend beyond twenty days after service of the complaint upon each of the defendants. (To this latter effect see, Battle v. Mercer, 187 N. C. 437, 122 S. E. 4; Lerch v. McKinne, 186 N. C. 244, 119 S. E. 193, where it was said that this limitation is a material part of the statute the object of which is to give the defendant twenty days after he is informed of the complaint.)

The amendment of 1927 changed the bases of the time within which the demurrer or the answer was to be filed. While formerly this was dependent upon the **return day** of the summons, being twenty days from such day, now, under the section as amended, the return day of the summons has no bearing upon the time for filing the answer or the demurrer, the basis of such time now being the **service** of the summons upon the defendant, irrespective of the time of its return. This change was effected to harmonize the time of filing the answer or demurrer with the new changes wrought into section 505 fixing the time of filing the complaint, and section 476 relative to the service and return of process.

This amendment also increased (from twenty to thirty days) the number of days within which the answer may be filed where the time is extended for the filing of the complaint. The limitation against extending the time more than once is also new. So also is the requirement for filing a copy of the answer for the use of the plaintiff.

The Act of 1927, ch. 132, was to amend an amendatory act of four sections (§ 476, 505, 509, 753) but did not affect any part of this section individually.

The amendment of 1935 added the last sentence of the section relating to courts to which it is applicable.

Not Repugnant to § 524.—Construing the acts amendatory of this section and section 524 together there is no repug-

nancy between them so as to repeal by implication the provision of the latter, that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff of his attorney. Williams-Fulghun Lumber Co. v. Welch, 197 N. C. 249, 148 S. E. 250.

Extension of Time. — It has been held that the power of court to extend the time of filing the pleadings or doing of any other act is neither affected nor curtailed by the provisions of this section. See McNair v. Garboro, 186 N. C. 111, 118 S. E. 913; Roberts v. Merritt, 189 N. C. 194, 126 S. E. 513.

This section does not affect the right of the Superior Court judge to allow an extension of time under section 536. Washington v. Hodges, 200 N. C. 364, 156 S. E. 912.

Same—Consent of Defendant. — The clerk has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by this section, (prior to amendment of 1927) but he may not, of his own motion, extend the time without the defendant's consent, beyond that requested, and bar him of his right to move the cause to another county when his motion is made before answer filed within the twenty days allowed him from the filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, the time to which he is entitled by the statute. Stevens Lumber Co. v. Arnold, 179 N. C. 269, 102 S. E. 409.

Same—Beyond Time Requested. — Where a defendant has acted within the time allowed him by law to file his motion to change the venue of the action, and has requested the clerk for an extension of two weeks from the filing of the complaint in which to answer under a misapprehension of the statutory time allowed by this section, the extension of time by the clerk beyond that requested is not upon his application, and the failure of the defendant to specially controvert this upon the argument will not deprive him of his right. Stevens Lumber Co. v. Arnold, 179 N. C. 269, 102 S. E. 409.

Same—On Appeal. — The defendant against whom the judgment by default has been rendered, may on appeal apply to the judge for an extention of time. Brooks v. White, 187 N. C. 656, 122 S. E. 561.

Same—Modification of Order at Subsequent Term. — An order extending time for defendant to plead, and providing that, in case he did not do so within the time limited, judgment should be entered for plaintiff, is not a judgment conclusively affecting rights and interests of parties, and is not made so by defendant's consent to entry of such order, and hence it may be modified by another judge at a subsequent term. Woodcock v. Merrimon, 122 N. C. 731, 30 S. E. 321; United, etc., Baptist Church N. E. Conference v. United, etc., Baptist Church, N. W. Conference, 158 N. C. 564, 74 S. E. 14; Cook v. Bank, 131 N. C. 96, 42 S. E. 550.

Same—Sufficient with Order. — If defendant prays time to answer and afterwards within the time he answers, denying combination and demurs for the residue, that is sufficient compliance with the order. Littlejohn v. Burton, 3 N. C. 127.

Plaintiff May Have Judgment by Default. — If the complaint is filed in compliance with section 505, and the defendant fails to appear and answer at the same term, the plaintiff may have a judgment by default. Brown v. Rhinehart, 112 N. C. 772, 775, 16 S. E. 840.

Removal. — The provision relating to the time of filing answer or demurrer after determination of the motion for removal was inserted in this section by the Public Laws of 1921, Ed. Note.

Same—Time of Removal to Federal Court. — The Federal statute (25 U. S. St. at large, 435) with respect to removal of causes of action from the state to the Federal courts provides that the defendant must file his petition "at or before the time at which he is required to plead."

This requirement is imperative that it shall be filed when the plea is due, and no order of the court or stipulation of the parties allowing an extension of time to plead can extend the time for filing the petition. Howard v. Southern R. Co., 122 N. C. 944, 29 S. E. 778; Meeke v. Valleytown Mineral Co, 122 N. C. 790, 796, 29 S E. 781.

But the holdings of the Federal circuit court are in conflict with the holdings of the Supreme Court of this state. Thus in Avent v. Deep River Lumber Co., 174 Fed. 298, following Wilcox Co. v. Ins. Co., 60 Fed. 929, it was held that under this section requiring the defendant to plead within twenty days after the return day of his summons, unless the time is extended, an order made by the court extending the time to answer, operates to extend the time for filing the petition for removal. Ed. Note.

The filing of an answer in the state court by a defendant after his petition for removal has been denied does not affect his right to file the record in the Federal court and obtain an order of removal therefrom before the time when his answer was due. Aven v. Deep River Lumber Co., 174 Fed. 298.

The time for filing an answer expires when it is actually filed, so far as it affects the defendant's right to apply for a removal of the cause to the Federal court. Howard v. Southern R. Co., 122 N. C. 944, 29 S. E. 778.

Applied in Harrell v. Welstead, 206 N. C. 817, 175 S. E. 283.

§ 510. Sham and irrelevant defenses.—Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose. (Rev., s. 472; Code, s. 247; C. C. P., s. 104.)

What Constitutes Sham Defenses. — A sham answer is false in fact; an irrevelant or frivolous one has no substantial relation to the controversy and presents no defense to the action, though its contents may be true. Howell v. Ferguson, 87 N. C. 113.

The answer or defense must be really a sham pleading; that is to say, it must set up matter as a defense which is a mere pretense and has not the color of fact. The design was to prevent vexatious defenses by the plea of matter for delay, false in fact, and so known to be by the pleader. And, while in general such a pleading may be stricken out where the falsehood can be clearly shown, the power ought not to be exercised in any case where the matter objected to, as presented or in any other form, might constitute a defense. Boone v. Hardie, 83 N. C. 471, 473.

An answer which avers that "no allegation of the complaint is true," is a sham plea, and will be stricken on motion as provided by this section. Flack v. Dawson, 69 N. C. 42.

So also is a plea that the court had no jurisdiction of the action, or a plea alleging the want of parties. As these are required by the following section to be raised by demurrer. Id.

Conclusions of Law. — An answer stating conclusions of law puts no fact in issue, and for this reason is a sham pleading which may be stricken out. Deloatch v. Vinson, 108 N. C. 147, 148, 12 S. E. 895.

A reference of issues upon sham pleas is erroneous, but if the reference embrace an issue on a good plea which may be referred, it will be sustained as to that while it is reversed as to the others. Flack v. Dawson, 69 N. C. 42.

Answer after Sham Demurrer Overruled — It is in the discretion of the trial judge to permit the defendant to answer after overruling a demurrer to the complaint, though the demurrer were frivolous. Parker v. North Carolina R. Co., 150 N. C. 433, 64 S. E. 186.

Appeal. — The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable (Walters v. Starnes, 118 N. C. 842, 24 S. E. 713; Abbott v. Hancock, 123 N. C. 89, 31 S. E. 271), where the reasons are given. Parker v. North Carolina R. Co., 150 N. C. 433, 435, 64 S. E. 186; Abbott v. Hancock, 123 N. C. 89, 31 S. E. 271.

The action of the judge of the Superior Court in passing upon the judgment of the clerk of the court in refusing to strike out the defendant's answer as sham and frivolous, under this section, is upon a matter of law requiring exception thereto and an appeal to the Supreme Court. Wellons v. Lassiter, 200 N. C. 474, 157 S. E. 434.

The Superior Court has the power and authority to determine on appeal the order of the clerk of the court in refusing a motion under this section to strike out the defendant's answer on the ground that it was sham and frivolous. Wellons v. Lassiter, 200 N. C. 474, 157 S. E. 434.

Art. 14. Demurrer

§ 511. Grounds for.—The defendant may demur to the complaint when it appears upon the face thereof, either that:

1. The court has no jurisdiction of the person of the defendant, or of the subject of the action; or,

2. The plaintiff has not legal capacity to sue; or,

3. There is another action pending between the same parties for the same cause; or,

4. There is a defect of parties plaintiff or defendant; or,

5. Several causes of action have been improperly united; or,

6. The complaint does not state facts sufficient to constitute a cause of action. (Rev., s. 474; Code, s. 239; C. C. P., s. 95.)

I. In General.
II. Lack of Jurisdiction.
III. Lack of Legal Capacity.
IV. Pendency of Another Action.
V. Defect of Parties.
VI. Misjoinder of Several Causes of Action.
VII. Failure to State Sufficient Facts.

I. IN GENERAL.

All Demurrers Special.—Under our practice all demurrers are special and may be pleaded only for the causes specified in this section. Shaffer v. Morris Bank, 201 N. C. 415, 417, 160 S. E. 481.

Enumeration of Grounds Exclusive.—The enumeration in this section of the grounds upon which a demurrer may be based is exclusive. Hence a demurrer does not lie except in the cases specifically mentioned in this section. Smith v. Summerfield, 108 N. C. 284, 288, 12 S. E. 997; Dunn v. Barnes, 73 N. C. 273.

Thus the statute of limitation which does not appear in the enumeration may not be taken advantage of by demurrer, but must be raised by answer. Green v. North Carolina R. Co., 73 N. C. 524.

Objections Waived—Exceptions. — All objections except those on the ground that the court has no jurisdiction of the person of the defendant or the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, are waived unless they are taken by demurrer or answer. But the exceptions referred to may be taken advantage of by demurrer even in the appellate court. Clements v. Rogers, 91 N. C. 63, 64. See sec. 518, and the note thereto.

Same—No Cause Stated.—The objection that the complaint states no cause of action or that the court has no jurisdiction may be made either by written demurrer or demurrer ore tenus and cannot be waived. Baker v. Garris, 108 N. C. 218, 225, 13 S. E. 2.

Motion to Make More Certain.—Where a pleading is indefinite and uncertain, it is not subject to demurrer, but the proper remedy is by motion to make more definite and certain. Seaboard Air Line R. Co. v. Main, 132 N. C. 445, 43 S. E. 930.

The same rule applies where the complaint does not fully state the terms of the contract sued on. Wood v. Kincaid, 144 N. C. 393, 57 S. E. 4.

Where a complaint alleging negligence states a cause of action, the remedy of a defendant desiring a more definite statement of the alleged negligence is by motion to make the complaint more definite and certain, and not by demurrer. Jones v. Henderson, 147 N. C. 120, 60 S. E. 894; Allen v. Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76. See § 537, and notes thereto.

Redundancy in pleading must be objected to by motion before answer, and not by demurrer. Smith v. Summerfield, 108 N. C. 284, 12 S. E. 997. See § 537, and notes.

Alternative, Argumentative, or Hypothetical Allegations. —That a complaint is "argumentative, hypothetical, and in the alternative," is no ground for demurrer. Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635; Pender v. Mallett, 123 N. C. 57, 31 S. E. 351; Smith v. Summerfield, 108 N. C. 284, 12 S. E. 997.

Inconsistency of Causes.—A complaint is not always demurrable because two alleged causes of action are to some extent inconsistent. Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590.

Informality in the Demand for Judgment.—Any informality in the demand for judgment in a complaint is not ground for demurrer, and must be disregarded when the sum demanded, and how it is due, sufficiently appear from the summons and complaint. Dunn v. Barnes, 73 N. C. 273.

Cited in Pender County v. King, 197 N. C. 50, 56, 147 S. E. 695; Morris v. Cleve, 197 N. C. 253, 258, 148 S. E. 253; Shuford v. Yarbrough, 198 N. C. 5, 150 S. E. 618; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729.

II. LACK OF JURISDICTION.

Motion Ore Tenus.—A petition which is demurrable on this ground may also be taken advantage of by a motion ore tenus. Tucker v. Baker, 86 N. C. 1, 3. See sec. 518.

The decision of the question whether a cause of action arose out of tort or contract so as to determine whether the superior court or the justice of the peace has exclusive original jurisdiction, involves only the cause of action as alleged in the complaint, and evidence offered by plaintiff cannot be considered in deciding the question presented by demurrer ore tenus, under subsection 1 of this section and § 518. Roebuck v. Short, 196 N. C. 61, 144 S. E. 515.

Plea to Jurisdiction is a Sham Plea.—See note to sec. immediately preceding.

Plea That Industrial Commission Has Jurisdiction.—In an action by an administrator to recover for the wrongful death of his intestate, a plea to the jurisdiction of the court on the ground that the industrial commission had exclusive jurisdiction of the cause is in effect a demurrer to the complaint, and where it does not appear from the complaint that the defendant regularly employed more than five employees in this state, the plea to the jurisdiction should be overruled. Southerland v. Harrell, 204 N. C. 675, 169 S. E. 423.

Demurrer for Want of Proper Service of Summons. — Where a nonresident defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demurrer to that objection alone; and where he has entered a general appearance, or demurred on the further ground that the court has no jurisdiction of the subject matter, it is to be taken as a general appearance as to the merits, waiving the objection as to proper service, and he will be bound by the adverse judgments of the court having jurisdiction over the subject-matter of the action. Dailey Motor Co. v. Reaves, 184 N. C. 260, 114 S. E. 175.

Under this section the defendant may demur to the complaint when it appears upon its face, the court had no jurisdiction of the person of defendant, and the right to dismiss an action for want of jurisdiction by entering a special appearance for the purpose is imbedded in our procedure. Smith v. Haughton, 206 N. C. 587, 588, 174 S. E. 506.

III. LACK OF LEGAL CAPACITY.

In General.—Demurrer lies where a partnership does not show a right to sue, 13 O. S. 210; where it appears upon the face of the pleading that plaintiff suing as a corporation is not such, 26 O. S. 565; 29 Bull 61; 40 N. Y. 410, Affg. 41 Barb. 571; 37 N. Y. 648; where some legal disability of the plaintiff such as infancy, idiocy or coverture, is disclosed, 31 Ind. 355, 11 Kas. 128; 16 Neb. 483; see 6 Ohio Nisi. Pruis Reports 60.

It is held that it can only be sustained on these grounds, 67 Ind. 570.

Mr. Bliss says that this is too narrow a view to take of the statute, and that incapacity to sue may arise from want of title to the character in which the plaintiff sues, Bliss Code pl. § 408, citing Mooks Van Stan Voord 68 ;as when an executor does appear to have proved the will of his testator, or appears to have proved it in an improper or insufficient court, as he does not show a complete title to sue as executor, a demurrer will lie, Bliss Code pl. § 48; Mitfords Eq. Pl. 155; see 47 Hun 281; and when an action is brought by a foreign executor or administrator without showing authority from the State in which the proceeding is had, a demurrer will lie for want of capacity to sue, 26, How. Pr. 15; and when an invalid appointment of a receiver has been made, demurrer should lie for incapacity to sue, 3 Abb Pr. 119.

Must Appear on the Face of Complaint.—Unless the lack of legal capacity appears on the face of the complaint, a demurrer cannot be sustained based on that objection. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 219, 48 S. E. 667.

IV. PENDENCY OF ANOTHER ACTION.

In General.—The character of the prior action is not material if full relief could have been given therein, 16 Barb, 461; but if it was for relief, which could not be granted in the action demurred to the demurrer will not be sustained, 5 N. Y. 357.

Pendency in This State Prerequisite.—Upon a demurrer on the ground of pendency of action, it must appear that the other action is pending in courts of this state. Carpenter, etc., Co. v. Hanes, 162 N. C. 46, 47, 77 S. E. 1101; Ridley v. Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730; Sloan & Co. v. McDowell, 75 N. C. 29.

Pending in Another County.—A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, under this section, and, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. Allen v. Salley, 179 N. C. 147, 101 S. E. 545.

For full treatment of the general subject of pendency of another suit, see "Abatement and Revival", 1 N. C. Enc. Dig. 7 et seq.

Availed of by Demurrer or Answer.—If the pendency of the former action appear on the face of the complaint, it may be taken advantage of by demurrer; otherwise by answer. Allen v. Salley, 179 N. C. 147, 148, 101 S. E. 545; Curtis v. Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944; Reed v. Caroline Mtg. Co., 207 N. C. 27, 175 S. E. 834.

Conclusiveness of Prior Judgment.—Under this section the rights of plaintiff are remitted to a prior judgment, and defendant's demurrer to the complaint in the second action will be sustained. Turner v. Turner, 205 N. C. 198, 200, 170 S. E. 646.

V. DEFECT OF PARTIES.

See Parties 9 N. C. Enc. Dig. 829. As to joinder of parties, see sec. 457 and notes.

Lack of Necessary Parties.—Where a substituted trustee brings an equitable action to reform a deed of trust and certain mortgage notes which are negotiable and the holders of these notes are not parties plaintiff a demurrer under this section will be sustained. First Nat. Bank v. Thomas, 204 N. C. 599, 169 S. E. 189.

How Taken Advantage of.—If there is a defect of material parties, the defendant must take advantage of the same by demurrer if the defect appears from the complaint, and if not, by answer. Otherwise he will be deemed to have waived such objection. Kornegay v. Farmer's, etc., Steamboat Co., 107 N. C. 115, 117, 12 S. E. 123; Lanier v. Pullman Co., 180 N. C. 406, 409, 105 S. E. 21; Styers v. Alspaugh, 118 N. C. 631, 634, 24 S. E. 422. See Sims v. Dalton, 202 N. C. 249, 162 S. E. 550, affirming Lanier v. Pullman Co., 180 N. C. 406, 105 S. E. 21; Yonge v. New York Life Ins. Co., 199 N. C. 16, 153 S. E. 630; Wiggins v. Harrell, 200 N. C. 336, 156 S. E. 9.

The rule of the common law requiring the non-joinder of defendants in actions ex contractu to be pleaded in abatement, has been changed, and the omission of a necessary party defendant may, under this section be taken advantage of by demurrer when the defect appears upon the face of the complaint. Merwin v. Ballard, 65 N. C. 168, 169.

A plea alleging want of parties is a sham plea. The objection must be raised by demurrer. Flack v. Dawson, 69 N. C. 42.

The non-joinder of parties plaintiff may not be taken advantage of under a general issue. It must be raised by demurrer. Lewis v. McNatt, 65 N. C. 63.

A motion to dismiss the action is an inappropriate method of raising the question of want of proper parties. This must be raised by a demurrer. Davidson v. Elms, 67 N. C. 228.

How Defect of Party Cured.—Where there is a defect of parties, the question may be raised by demurrer, and when so raised the defect may be cured by making the lacking party a party to the action. Graves v. Barrett, 126 N. C. 267, 270, 35 S. E. 539.

Same—Correction of Misjoinder of Parties.—A misjoinder of parties plaintiff may upon demurrer or motion be corrected by taxing the plaintiff with such costs as are incurred by the misjoinder. Pritchard v. Mitchell, 139 N. C. 54, 56, 51 S. E. 783.

Misjoinder of an Unnecessary Party.—While a nonjoinder of one who is a necessary party is fatal, a misjoinder of one who is not a necessary party is a mere surplusage. Green v. Green, 69 N. C. 294. Hence the misjoinder of an unnecessary party is not a ground for demurrer. Sullivan v. Field, 118 N. C. 358, 24 S. E. 735; Hargrove v. Hunt, 73 N. C. 24, 25; Green v. Green, 69 N. C. 294, 297; State v. Berryhill, 84 N. C. 133, 137.

To sustain a demurrer to the complaint there must be a misjoinder of parties and causes of action, and a misjoinder of an unnecessary party is alone insufficient to have the action dismissed. Shuford v. Yarborough, 197 N. C. 150, 147 S. E. 824; Star Furniture Co. v. Carolina, etc., Ry. Co., 195 N. C. 636, 143 S. E. 242, citing Abbott v. Hancock, 123 N. C. 99, 31 S. E. 368; Bank v. Angelo, 193 N. C. 576, 137 S. E. 705; Roberts v. Mfg. Co., 181 N. C. 204, 106 S. E. 664 See Winders v. Hill, 141 N. C. 694, 54 S. E. 440.

Plaintiff Not Real Party in Interest.—Where the plaintiff in the complaint is not the real party in interest under section 446, the complaint is subject to demurrer under this section. Fishell v. Evans, 193 N. C. 660, 662, 137 S. E. 865.

Averment of Corporate Capacity.—In a suit against a railroad company, it may be designated as a company by its corporate name, without an averment of its corporate capacity, and if this is disputed, it should be by answer and not by demurrer. Stanly v. Richmond, etc., R. Co., 89 N. C. 331.

Cited in Lamson Co. v. Morehead, 199 N. C. 164, 167, 154 S. E. 50.

VI. MISJOINDER OF SEVERAL CAUSES OF ACTION.

As to what causes may be joined, see sec. 507, and the notes thereto.

What Constitutes Misjoinder.—A complaint in an action which is not so prolix as to mislead or confuse the defendants or to conceal or obscure, by its elaboration or redundant words, the real cause of action is sufficient; and if the matters alleged arise out of one and the same transaction, or series of transactions, forming one course of dealings, all tending to one end, narrating the transaction as a whole, the cause stated is not objectionable as multifarious. Lee v. Thornton, 171 N. C. 209, 88 S. E. 232.

It does not lie on this ground when causes of action which may have been united in one pleading, had they been separately stated, have been improperly mingled in one count, 64 N. Y. 173; the remedy is by motion, Id; 29 O. S. 144; 6 Kas. 547; nor where the petition (or complaint) contains a single cause of action, though stated in different counts as separate causes of action, 30 O. S. 308; 13 Kas. 351; nor where the petition (or complaint) states a single cause of action, but asks several distinct forms of relief, all properly obtainable under the facts stated. 41 N. Y. 107.

Same—Motion to Make More Certain.—Where the several causes af action are of such a nature that they can be properly joined under section 507, but they are not put together in a very logical way, the proper method of taking advantage of the defect is not by demurrer but by a motion to make more certain and definite. State v. McCanless, 193 N. C. 200, 206, 136 S. E. 371.

The Court May Divide the Several Misjoined Causes.—Even if the several causes have been improperly joined the court may allow the pleadings to conform thereto upon such terms as are just, and order the action to be divided into as many actions as are necessary for the proper determination of the controversy. See post section 516. State v. McCanless, 193 N. C. 200, 136 S. E. 371.

Applied in Grady v. Warren, 201 N. C. 693, 161 S. E. 319.

VII. FAILURE TO STATE SUFFICIENT FACTS.

See sec. 506 clause 2, and note.

Fatal Defect in Complaint.—When it appears upon the face of the complaint that it is fatally defective, a demurrer will be sustained under this section. Carson v. Jenkins, 206 N. C. 475, 476, 174 S. E. 271.

Demurrer to Several Causes One of Which is Sufficiently Stated.—Where the petition states several causes of action any one of which is good, a demurrer to the whole petition on the ground that it states no cause of action will be overruled. State v. McCanless, 193 N. C. 200, 206, 136 S. E. 371.

Motion to Divide or Make More Certain.—Objection for misjoinder of causes of action should be made upon motion to divide them; objection to the complaint for multifarious, irrelevant, and redundant allegations, upon motion, made before answer or demurrer or time allowed to plead, to make it more definite and certain. Lee v. Thornton, 171 N. C. 209, 88 S. E. 232.

Defective Statement Which Can Be Cured by Amendment.—Where a pleading contains a defective statement, as the omission of a necessary allegation which can be cured by amendment, a demurrer will lie. New Bern Banking, etc., Co. v. Duffy, 156 N. C. 83, 72 S. E. 96; Bowling v. Burton, 101 N. C. 176, 7 S. E. 701; Mizzell v. Ruffin, 118 N. C. 69, 23 S. E. 927; Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190; Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874.

But a complaint can not be overthrown by a demurrer unless it be wholly insufficient. Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874,

Complaint Considered as a Whole.—A demurrer can not be sustained to a complaint if in any portion or to any extent it presents a cause of action, or if sufficient facts can be fairly gathered therefrom. Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807; Jones v. Henderson, 147 N. C. 120, 60 S. E. 894; Caho v. Norfolk, etc., R. Co., 147 N. C. 20, 60 S. E. 640; New Bern Banking, etc., Co. v. Duffy, 156 N. C. 83, 72 S. E. 96; Womack v. Carter, 160 N. C. 286, 75 S. E. 1102.

A demurrer to a complaint on the ground that its allegations were insufficient to constitute a cause of action will not be sustained if, taking the pleading in its entirety it is sufficient in one or more of its parts; and where the demurrer is that the contract sued on was a wagering one and no recovery could be had under §§ 2144, 2145, and two causes of action are alleged, if only one of them should be good the demurrer should be overruled. Meyer v. Fenner, 196 N. C. 476, 146 S. E. 82.

Time of Demurrer.—The demurrer on this ground may be taken at any stage of the case, 32 N. Y. 397, before final judgment in error; but if such objection has not been made prior to filing the petition in error, it should in some form

appear in the record of the reviewing court before the case is heard, 30 O. S. 133. Ed. Note.

Motion Ore Tenus.—A petition which is demurrable on this ground may also be taken advantage of by a motion ore tenus. Tucker v. Baker, 86 N. C. 1, 3.

Applied in Grady v. Warren, 201 N. C. 693, 161 S. E. 319.

Cited in Key v. Home Chair Co., 199 N. C. 794, 795, 156 S. E. 135; Lamson Co. v. Morehead, 199 N. C. 164, 167, 154 S. E. 50; Redfern v. McGrady, 199 N. C. 128, 132, 154 S. E. 3; Begnell v. Safety Coach Line, 198 N. C. 688, 691, 153 S. E. 264; Brewer v. Brewer, 198 N. C. 669, 153 S. E. 163; Cole v. Wagner, 197 N. C. 692, 150 S. E. 339.

§ 512. Must specify grounds.—The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein. (Rev., s. 475; Code, s. 240; C. C. P., s. 96.)

The purpose of this section seems to be to give an opportunity to ask for an amendment if the defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being indicated, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. Thompson v. Johnson Funeral Home, 205 N. C. 801, 808, 172 S. E. 500.

Comparison of Statute of 4 Anne and This Section.—In regard to demurrers this section improves upon the Statute of 4 Anne, and requires every demurrer, whether for substance or form, to specify distinctly the ground of objection to the complaint. Garrett v. Trotter, 65 N. C. 430, 433.

Nature of Demurrer Under the Code.—A demurrer under the Code differs from the former demurrer at law in this: Every demurrer, whether for substance or form, is now special, and must distinctly specify the ground of objection to the complaint, or be disregarded; it differs from the former demurrer in equity, in that the judgment overruling it is final, and decides the case, unless the pleadings are amended by leave to withdraw the demurrer and put in an answer. Love v. Commissioners, 64 N. C. 706.

Must Specify for Purposes of Amendment.—A demurrer must specify the ground upon which it is based to the end that the defect may be supplied by amendment. Garrett v. Trotter, 65 N. C. 430. 433.

A demurrer to the complaint ore tenus must distinctly specify the grounds of objection or it may be disregarded. Seawell v. Chas. Cole & Co., 194 N. C. 546, 140 S. E. 85.

Otherwise It May Be Disregarded.—Under this section if the demurrer, interposed by the defendants, does not "distinctly specify the grounds of objection to the complaint," it may be disregarded or treated as a motion to dismiss from the refusal of which no appeal lies. Griffin v. Bank of Coleridge, 205 N. C. 253, 254, 171 S. E. 71.

A demurrer will not be sustained if the pleadings, liberally construed are sufficient to sustain the causes therein, to which objection is made. Enloe v. Ragle, 195 N. C. 38, 141 S. E. 477.

Upon an appeal from a judgment overruling a demurrer to the complaint the merits of the controversy are not presented, and the court will determine only whether a cause of action has been sufficiently alleged. Star Furniture Co. v. Carolina, etc., Ry. Co., 195 N. C. 636, 143 S. E. 242.

Strictness of the Requirement. — In Love v. Commissioners, 64 N. C. 706, the court said: "It is so easy to specify the ground of objection that the court is not disposed to relax the rule. There is no use in having a scribe unless you cut up to it." Bank v. Bogle, 85 N. C. 203; Alford v. McCormac, 90 N. C. 151.

A demurrer "that the complaint states no cause of action whatever" against the defendant, will be disregarded. It must distinctly specify the grounds of objection to the complaint. Goss v. Waller, 90 N. C. 149.

A demurrer is also insufficient which states generally that "there is a defect of parties" or that plaintiff has no legal capacity to sue. 9 Misc. N. Y. 91.

Motion to Dismiss Must Also Specify Grounds.—A motion to dismiss an action because the complaint does not state facts sufficient to constitute a cause of action is a demurrer, and should be disregarded unless it specifies the particulars of the alleged defect. Elam v. Barnes, 110 N. C. 73, 14 S. E. 621.

Demurring to Some Allegations and Replying to Others.—The latter sentence of this section clearly refers to a complaint containing several causes of action; or an answer taking two distinct grounds. Hence a party may not demur to some of the allegations supporting the same cause of action or the same defense, and reply to others. Ransom v. McCless, 64 N. C. 17, 21.

Cited in State v. Suncrest Lumber Co., 197 N. C. 4, 6, 147 S. E. 682; Brewer v. Brewer, 198 N. C. 669, 671, 153 S. E. 163.

§ 513. Amendment; hearing.—If a demurrer is filed the plaintiff may be allowed to amend. If plaintiff fail to amend within five days after notice, the parties may agree to a time and place of hearing the same before some judge of the superior court, and upon such agreement it shall be the duty of the clerk of the superior court forthwith to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer: Provided, if there be no agreement between the parties as to the time and place of hearing the same before the judge of the superior court, then it shall be the duty of the clerk of the superior court to send the complaint and demurrer to the judge holding the next term of the superior court in the county where the action is pending, who shall hear and pass upon the demurrer at that term of the court. (1919, c. 304, s. 4; Ex. Sess. 1921, c. 92, s. 5.)

See notes under §§ 515, 547.

Editor's Note.—Prior to the amendment of 1921 the plaintiff was allowed to amend within three days, and upon failure to amend within such time, and in the absence of agreement between the parties as to the time and place of hearing the demurrer, it was made the duty of the clerk to send the complaint and the demurrer to the judge holding the courts of the district or to the resident judge of the district who was required to fix the time and place of hearing and notify the parties when and where he shall hear and pass upon the demurrer. There was no provision made as to the procedure in case there was no agreement between the parties. Besides these substantial changes, the phraseology of the section was also materially affected.

As to the changes affected upon this and other sections, see article entitled "Changes in North Carolina Procedure," in 1 N. C. L. R. 7-14.

Presumption on Appeal.—Where the plaintiff has not asked to be permitted to file an amendment to his complaint upon a demurrer being interposed thereto on the ground that a cause of action had not been sufficiently alleged, it will be considered on appeal that he has concluded to rely solely on the pleading he has filed. Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761.

§ 514. Appeals.—Upon the rendering of the decision upon the demurrer, if either party desires to appeal. notice shall be given and the appeal perfected as is now provided in case of appeals from decisions in term time. (1919, c. 304, s. 5; Ex. Sess. 1921, c. 92, s. 6.)

See § 638 and notes thereto.

Editor's Note.—The word "rendering" was substituted for the word "return" near the beginning of the section, and the words "from the decision" were inserted near the end of the section, by the amendment of 1921.

§ 515. Procedure after return of judgment.—Within ten days after the return of the judgment upon the demurrer, if there is no appeal, or within ten days after the receipt of the certificate from the supreme court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the answer shall be filed within ten days after the receipt of the judgment, if there is no appeal, or within ten days after the receipt of the certificate of the supreme court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry

according to the course and practice of the court. (1919, c. 304, ss. 6, 7; Ex. Sess. 1921, c. 92, ss. 7, 8.)

Editor's Note. — By the amendment of 1921 the word "judgment" was substituted for the words "decision overruling the demurrer" in the sentence preceding the last.

Statute Liberally Construed.—This section is in aid of an expeditious administration of justice and should be liberally construed and applied, to the end that actions may be tried on their merits and not dismissed because of defective pleadings. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Discretion of Court.—A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power under this section, in the exercise of his sound discretion, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Superior Court of the certificate showing that the judgment of the Superior Court had been affirmed. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253, affirmed in McKeel v. Latham, 202 N. C. 318, 162 S. E. 747.

A motion for leave to amend a complaint under this section addressed to the sound discretion of the trial court, and his order denying the motion is not subject to review on appeal in the absence of gross abuse of this discretion. McKeel v. Latham, 203 N. C. 246, 165 S. E. 694.

Dismissal Unless Motion to Amend Is Made.—Where a demurrer ore tenus interposed in the Supreme Court is sustained, questions of law presented by appellant's exception to the overruling of his written demurrers by the lower court need not be considered, and the case will be remanded with direction that it be dismissed, unless in apt time plaintiff moves for leave to amend as provided by this section. White v. Charlotte, 207 N. C. 721, 178 S. E. 219.

Under this section where an action has been dismissed for misjoinder of parties and causes the action is not pending and the court has no power to allow a motion to amend the pleadings. Grady v. Warren, 202 N. C. 638, 163 S. E. 679.

Appeal.—Where the trial judge has allowed the plaintiff's motion to amend his complaint under this section upon due notice, within ten days after the receipt of the certificate by the clerk of the trial court from the Supreme Court on a former appeal, sustaining a demurrer to the complaint, the procedure is, if objected to by the defendants, to note an exception and appeal from the final judgment, and an appeal otherwise will be dismissed as premature. Morris v. Cleve, 194 N. C. 202, 139 S. E. 230.

Judgment of Clerk Final and Conclusive.—The judgments of the clerk of the court rendered within the authority given him by this section, are judgments of the Superior Court, and have the same effect as those rendered by the judge, and when not appealed from, are final and conclusive. Williams v. Williams, 190 N. C. 478, 130 S. E. 113.

Cited in Morris v. Cleve, 197 N. C. 253, 257, 148 S. E. 253; Shuford v. Yarbrough, 198 N. C. 5, 150 S. E. 618.

§ 516. Division of actions when misjoinder.— If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of the action therein mentioned. (Rev., s. 476; Code, s. 272; C. C. P., s. 131.)

Provisions of Section Mandatory.—It is the duty of the judge, on just terms to divide the action on the docket for separate trials. Gattis v. Kilgo, 125 N. C. 133, 136, 34 S. E. 246.

See Weeks v. McPhail, 128 N. C. 134, 138, 38 S. E. 292, where the division of the action is spoken of as being within the discretion of the court.

With or Without Terms.—The judge may permit an amendment to divide the action with or without terms. State v. Roberts, 108 N. C. 174, 177, 12 S. E. 890.

Different Venues.—Where causes of action have been improperly joined, the court may order the action to be divided upon demurrer, though triable in different counties. Richmond Cedar Works v. Roper Lumber Co., 161 N. C. 603, 604, 77 S. E. 770.

Dismissal of One of Two Causes for Lack of Jurisdiction. —Where two causes of action are improperly joined, but one of them, because of the amount involved, is not within the jurisdiction of the court, it may be dismissable as to the one over which the court has no jurisdiction. Railroad Co. v. Wakefield Hdw. Co., 135 N. C. 73, 47 S. E. 234.

Misjoinder of Causes and Parties. — Where there is not only a misjoinder of distinct causes of action, but also misjoinder of parties having no community of interest, the action cannot be divided under this section. Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 648; Cromartie v. Parker, 121 N. C. 198, 204, 28 S. E. 297; Mortan v. Western Union Tel. Co., 130 N. C. 299, 41 S. E. 484; Jones v. McKinson, 87 N. C. 294, 298; Roberts v. Utility Mfg. Co., 181 N. C. 204, 106 S. E. 664; Taylor v. Postal Life Ins Co., 182 N. C. 120, 108 S. E. 502; Rose v. Freemont Warehouse, etc., Co., 182 N. C. 107, 109. 108 S. E. 389; Citizens Nat. Bank v. Angelo, 193 N. C. 576, 137 S. E. 705.

For example an action brought by the wife in which her husband has joined, each independently seeking to recover from the defendant the value of their services separately rendered, upon a quantum meruit, is a misjoinder both of parties plaintiff and causes of action, which will ordinarily be dismissed upon demurrer; but the court may sustain the demurrer and permit the defect to be cured by an amendment and the wife's cause proceeded with upon such terms as it considers just. Shore v. Holt, 185 N. C. 312, 117 S. E. 165.

Divisible, Even Though Demurrable. — A complaint in which are joined two causes of action, the one upon a clerk's bond and the other upon a bond of an administrator, is demurrable. But in such case the court may order the action to be divided. Street v. Tuck, 84 N. C. 605.

Further Service of Summons. — Where a division of the action is ordered under this section, no further service of summons is necessary. Hodges v. Wilmington, etc., R. Co., 105 N. C. 170, 172, 10 S. E. 917.

Motion to Divide. — In Dunn v. Aid Society, 151 N. C. 133, 65 S. E. 761, the court held that where there is a misjoinder of actions the remedy is by motion to divide the actions where the defendant was already in court and had received notice by the summons and complaint. To same effect, see Lee v. Thornton, 171 N. C. 209, 88 S. E. 232; Solomon v. Bates, 118 N. C. 311, 316, 24 S. E. 478.

Principle of the section stated in State v. McCanless, 193 N. C. 200, 136 S. E. 371.

Cited in Pender County v. King, 197 N. C. 50, 56, 147 S. E. 695; Shuford v. Yarbrough, 198 N. C. 5, 150 S. E. 618; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729.

§ 517. Grounds not appearing in complaint.— When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. (Rev., s. 477; Code, s. 241; C. C. P., s. 98.)

Controverting Allegations of Complaint. — Where the defendant controverts the truth of the allegations contained in the complaint, this must be done by an answer and not by a demurrer. Laney v. Hutton, 149 N. C. 264, 62 S. E. 1082.

Pendency of Another Suit. — Where another action is pending for the same cause and between the same parties, which fact does not appear on the face of the complaint, the objection may be taken by answer. Cook v. Cook, 159 N. C. 46, 47, 74 S. E. 639; Allen v. Salley, 179 N. C. 147, 101 S. E. 545. It is a ground of demurrer, if it appears on the complaint. See ante, section 511, clause 3, and annotations.

This rule was followed in State v. Gant, 201 N. C. 211, 229, 159 S. E. 427.

Defect of parties which does not appear on the face of the complaint must be taken advantage of by answer, otherwise it will be deemed as waived. Lunn v. Shermer, 93 N. C. 164, 167. See the next section.

But where the defect does appear on the face of the complaint, it is a ground of demurrer and cannot be taken advantage of in any other way. Burns v. Ashworth, 72 N. C. 496.

Cited in Hawkins v. Carter, 196 N. C. 538, 541, 146 S. E. 231; Murchison Nat. Bank v. Broadhurst, 197 N. C. 365, 148 S. E. 452.

§ 518. Objection waived.—If objection is not taken either by demurrer or answer the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action. (Rev., s. 478; Code, s. 242, C. C. P. s. 99.)

See note under § 511.

In General.—The similar section of the N. Y. Code means

that when objection is not taken by demurrer, when that mode is proper, or by answer in cases where that is the appropriate method, it is waived. 13 N. Y. 332.

When the objection is one proper to be raised by demurrer, the defendant waives it by raising the objection by answer 9 How. 246; 37 N. Y. 372; 13 How. 207.

Exceptions Not Waived—Motion to Dismiss at Any Time. — As to the two exceptions mentioned in this section there can be no waiver, and objections may be made at any time. Johnson v. Finch, 93 N. C. 205, 208. Halstead v. Mullen, 93 N. C. 252, 255.

Same—In the Supreme Court. — The want of jurisdiction and the failure of the complaint to state facts sufficient to constitute a cause of action cannot be waived and may be taken advantage of at any time even in the Supreme Court. Hunter v. Yarborough, 92 N. C. 68, 70; Tucker v. Baker, 86 N. C. 1; Clements v. Rogers, 91 N. C 63, 64; Knowles v. Norfolk, etc., R. Co., 102 N. C. 59, 62, 9 S. E. 7.

Defective Statement and Defective Cause Distinguished. —A defective statement of a good cause of action must be taken advantage of by demurrer, and will be deemed to have been waived or cured unless so taken; but a statement of a defective cause may be taken advantage of by a motion to dismiss at any time even in the Supreme Court; or the court may dismiss the action of its own motion. Cook v. American Exch. Bank, 129 N. C. 149, 153, 39 S. E. 746; Baker v. Garris, 108 N. C. 218, 219, 230, 13 S. E. 2.

The second exception mentioned in this section applies to complaints that fail "to state facts sufficient to constitute a cause of action," or in other words when it appears therefrom that the action will not lie. The other objections must be raised by demurrer or answer in proper time, or else they will be deemed waived. Halstead v. Mullen, 93 N. C. 252, 255.

In Garrett v. Trotter, 65 N. C. 430, 435, the court used the following illustrative language which explains the nature of the two exceptions referred to in this section; "The counsel for the defendant, and his Honor, fell into error by not adverting to the distinction above referred to, between a defective statement of a cause of action and a statement of a defective cause of action. There is a like distinction between a defect of jurisdiction in respect to the subject of the action, and a want of jurisdiction in respect to the person; for illustration: Action in a Superior Court upon a note for less than $200; here, there is a defect of jurisdiction in respect to the subject of the action; it cannot be helped by waiver, consent, amendment or otherwise, and the sooner the proceeding is stopped the better. Action in the county of Orange, against the Charlotte and Columbia Railroad Company; here is a want of jurisdiction in respect to the person, which may be waived by consent, or by making full defense or pleading by an attorney of the Court."

The failure of a complaint in an action for nondelivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action. Blalock v. Clark, 133 N. C. 306, 45 S. E. 642.

Lack of Jurisdiction.—The defendant by filing an answer to the complaint in the Superior Court did not waive his right to demur ore tenus to the complaint on the ground that the court had no jurisdiction of the action and that the complaint does not state facts sufficient to constitute a cause of action. Finley v. Finley, 201 N. C. 1, 3, 158 S. E. 549.

Defect of Parties.—The defect of nonjoinder of a plaintiff unless availed of by demurrer or by plea shall be deemed to have been waived. Lewis v. McNatt, 65 N. C. 63. The general rule is that defects of parties must be raised by demurrer or answer. Usry v. Suit, 91 N. C. 406, 414; Godwin v. Jernigan, 174 N. C. 76, 93 S. E. 443; Knowles v. Norfolk, etc., R. Co., 102 N. C. 59, 62, 9 S. E. 7; Mizzell v. Ruffin, 118 N. C. 69, 71, 23 S. E. 927. See ante, section 511, cl. 4, and annotations.

Same—Legal Capacity to Sue. — A demurrer ore tenus to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, will not be sustained, as such defense is deemed waived unless taken by a written answer or demurrer. Kochs Co. v. Jackson, 156 N. C. 326, 72 S. E. 382. See also, Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 220, 48 S. E. 667. See also, ante, sec. 511, cls. 2 and 4, and annotations thereto.

Arrest of Judgment for Defective Causes. — The provisions of this section as regards complaints which do not contain facts sufficient to constitute a cause of action, are satisfied by arresting the judgment in cases where they apply. Love v. Commissioners, 64 N. C. 706.

Premature Institution of Action. — In an action against an executor the objection that the action is prematurely commenced should be set up by the defendant in his answer. Clements v. Rogers, 91 N. C. 63, 64.

Demurrer after Answer. — A demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn with leave of the court before demurring to the complaint, does not apply. Cherry v. Atlantic Coast Line R. Co., 185 N. C. 90, 116 S. E. 192.

Cited in Morris v. Cleve, 197 N. C. 253, 258, 148 S. E. 253; Roebuck v. Short, 196 N. C. 61, 144 S. E. 515; Tallassee Power Co. v. Peacock, 197 N. C. 735, 737, 150 S. E. 510; Mountain Park Institute v. Lovill, 198 N. C. 642, 153 S. E. 114; Begnell v. Safety Coach Line, 198 N. C. 688, 691, 153 S. E. 264; Brewer v. Brewer, 198 N. C. 669, 671, 153 S. E. 163; Bechtel v. Bohannon, 198 N. C. 730, 153 S. E. 316.

Art. 15. Answer

§ 519. Contents.—The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. (Rev., s. 479; Code, s. 243; C. C. P., s. 100.)

I. In General.
II. Denials.
  A. General and Specific Denials.
  B. Denial of Information or Knowledge.
III. New Matter in Defense.

Cross Reference.

As to contents of complaint, see section 506.
See note under § 521.

I. IN GENERAL.

Any Defense Available under Old System, Available under the New.—Under the Code the defendant may avail himself of any defense that would have been available under the old mode of procedure, either legal or equitable. Clark v. Clark, 65 N. C. 655, 660.

Must State Facts. — The answer, like the complaint, must state facts upon which the validity of the defense rests. An averment of a general principle of law will not do. Knight v. Killebrew, 86 N. C. 400, 403.

Statement in Plain and Intelligible Manner. — The defendant must state his grounds of defense in a plain, strong and intelligible manner. McLaurin v. Cronly, 90 N. C. 50, 52.

Precision and Particularity in Alleging Defenses. — The defendant's defense must be alleged with the same precision and certainty as if alleged in a complaint. American Nat. Bank v. Hill, 169 N. C. 235, 85 S. E. 209.

Although an answer to a complaint in an action on a note does not set out the allegations of fraud with that particularity that the rules of pleading ordinarily require, yet, if it seems intended to raise a serious question of fraud, it will not be stricken out as frivolous, for, if filed in good faith, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury. Campbell v. Patton, 113 N. C. 481, 18 S. E. 687.

Allegata and Probata Must Correspond. — No defense which is not set up in the answer may be introduced at terms and proved. The rule that the allegata and probata must correspond prevails as much under the Code as under the old system. McLaurin v. Cronly, 90 N. C. 50.

Stated in Bourne v. Board of Financial Control, 207 N. C. 170, 178, 176 S. E. 306.

Cited in Jeffreys v. Hocutt, 195 N. C. 339, 344, 142 S. E. 226; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729; Hutchins v. Mangum, 198 N. C. 774, 775, 153 S. E. 409.

II. DENIALS.

A. General and Specific Denials.

Old General Issue and Denials under the Code. — One principal object of the new system was to abolish or restrict the use of the general issue; to require of plaintiffs, as far as it was practicable, a statement of the facts as they were, and not according to their legal effect; and thus both to enable and to require defendants to specify the particular facts which they intended to controvert. To permit a denial of the facts of the complaint en masse,

would be to lose this object and to allow and extend, at least where the answer is not under oath, and abuse the general issue, which formerly existed. It would seem also to ignore the requirements that the denial shall be of each material allegation. The requirement seems to demand that the defendant should separately answer each material allegation by a general denial either of the whole allegation (not the whole complaint), or by a specific denial of some selected and specific part of the allegation. Heyer v. Beatty, 76 N. C. 28, 30.

Nature of Denials under the Code and Purpose Thereof.— The denials referred to in this section may be a general denial—that is that the allegation is not true, or specific—that is, that it is true in some respects but not true in others. The purpose is to require the defendant frankly to deny the truth of the allegations of the complaint, if he can, or, if he can not, then to admit the truth of them, or to specifically admit the truth of them, so far as they are true within his knowledge and deny the truth of the same in particular respects, so far as he may be warranted in doing so by the facts; and he is further required to state such knowledge and information as he may have as to the allegations sufficient to form a belief. Such denials, admissions and statements of facts should be direct, positive and unequivocal—not argumentative and evasive. Rumbough v. Southern Improve. Co., 106 N. C. 461, 464, 11 S. E. 528.

General Denial. — It has been repeatedly held that a general denial, that "no allegation of the complaint is true," is not a sufficient answer under this section, because such a plea may put in one issue several matters of fact, some of which are triable by the court, and others by the jury. Flack v. Dawson, 69 N. C. 42; Brown v. Cooper, 89 N. C. 237.

Specific Denial. — An answer denying "the truth of the averments contained in the first, second, third, fourth, fifth and sixth paragraphs of the complaint" (being the number contained in the complaint), is a specific denial of each allegation and a sufficient compliance with this section. Brown v. Cooper, 89 N. C. 237.

Effect of Failure to Deny. — If an allegation in the complaint is not denied in the answer, it is admitted, and is as effectual as if found by a jury. Bonham v. Craig, 80 N. C. 224.

Where the only controverted fact has no bearing on the rights of the parties, judgment may be rendered on the pleadings upon the facts admitted. Jeffreys v. Boston Ins. Co., 202 N. C. 368, 162 S. E. 761.

B. Denial of Information or Knowledge.

Denial of Both Knowledge and Information Necessary.— A denial of knowledge without a denial of information sufficient to form a belief is not sufficient to fulfill the requirement of this section. Durden v. Simmons, 84 N. C. 555; Fagg v. Southern Bldg., etc., Ass'n., 113 N. C. 364, 368, 18 S. E. 655.

Denial upon Information and Belief. — Where an allegation in a complaint is within the personal knowledge of the defendant, a statement in the answer that he is informed and believes that the allegations of the complaint are not true, and therefore denies the same, is not, under this section, sufficient to raise an issue. The answer may, however, be amended in the discretion of the court. Avery v. Stewart, 134 N. C. 287, 299, 46 S. E. 519.

An allegation in an answer that defendant has no information of facts alleged in a certain paragraph of the complaint, and demands proof thereof, is not sufficient to put such facts in issue. Woodcock v. Bostic, 128 N. C. 243, 38 S. E. 881; Flagg v. Southern Bldg., etc., Ass'n, 113 N. C. 364, 18 S. E. 655.

A denial of the allegations of the complaint, made in the form prescribed, i. e., of any knowledge or information thereof, sufficient to form a belief, being allowed by the Code of Civil Procedure, raises, when interposed, a sufficient issue; and such answer is not subject to the objection of being insufficient or frivolous. Farmers, etc., Bank v. Board, 75 N. C. 45.

However where a complaint alleges a matter to be within the personal knowledge of defendant an answer "that defendant has no knowledge or information sufficient to form a belief" stated no defense and was an admission of the truth of the allegation of the complaint. Lay Gas Mach. Co. v. Falls, etc., Mfg. Co., 91 N. C. 74.

In an action on notes given for the price of land, denial on information and belief of a count of the complaint alleging that the notes were indorsed for valuable consideration was sufficient. Willis v. Williams, 174 N. C. 769, 94 S. E. 513.

In an action for specific performance of a lost bond for title, which denies that the bond embraces the land in controversy according to defendant's best recollection and belief, is sufficient and raises an issue of fact. Conder v. Stallings, 161 N. C. 17, 76 S. E. 627.

III. NEW MATTER IN DEFENSE.

New Matter Equitable or Legal. — The answer may contain new matter in defense whether equitable or legal. Bean v. Western, etc., R. Co., 107 N. C. 731, 741, 12 S. E. 600.

Matters in Justification. — Under the old system of pleading, upon the general issue matter in justification could not be proved; it must be pleaded specially. Barker v. Burham, 3 Wilson, 368, on pages 370, and 371; Bush v. Parker, 1 Bing, N. C. 312; Brown v. Burnett, 5 Cowen, 181; 1 Chitty on Pl., 501. Under the Code practice the principle is not changed. A defense which can not be maintained by a denial of the allegations in the complaint, must be set up as new matter in the answer. Raynor v. Wilmington Seacoast R. Co., 129 N. C. 195, 198, 39 S. E. 821.

Time of Existence of New Matter in Defense. — This section does not require that new matter constituting a defense must exist at the time of the commencement of the action, and a defense arising thereafter was recognized in Puffer v. Lucas, 101 N. C. 281, 285, 7 S. E. 734, and in the later case of Smith & Co. v. French, 141 N. C. 1, 2, 53 S. E. 435, it was held that, "A counterclaim connected with the plaintiff's cause of action or with the subject of the same should not necessarily or entirely mature before action commenced, nor even before answer filed." Williams v. Hutton, etc., Co., 164 N. C. 216, 223, 80 S. E. 257. But as to this latter conclusion, see section 521 class (2) and annotations thereto.

§ 520. Debt for purchase money of land denied. —If the defendant shall deny in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury. (Rev., s. 480; Code, s. 235; 1879, c. 217; 1921. c. 45.)

Editor's Note. — The amendment of 1921, substituted the words "shall deny," near the beginning of this section, for the word "denies."

For a similar provision requiring the plaintiff to state that the consideration of debt was the purchase money of land, see section 506 clause 4.

Defendant Entitled to Have Issue Determined by Jury. — In an action on a note alleged to have been given for the purchase-money of land, the defendant, if he demands it in apt time and tenders an appropriate issue, has the right to have the question submitted to the jury as to whether or not the note was given for the purchase-money of the land. Davis v. Evans, 142 N. C. 464, 55 S. E. 344.

Waiver of Right of Jury Trial. — Although the defendant is under this section, entitled to have the issue whether the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned, he fails to appear and answer, he waives that right. Durham v. Wilson, 104 N. C. 595, 10 S. E. 683.

§ 521. Counterclaim.—The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. (Rev., s. 481; Code, s. 244; C. C. P., s. 101.)

I. In General.
  A. Editor's Note.
  B. General Constructions.
II. Claims Arising out of Plaintiff's Demand.
  A. General Rules and Instances.
  B. Time of Existence.
III. Claims Arising out of Independent Contract.
  A. General Rules and Instances.
  B. Time of Existence.

IV. Pleading and Practice.
A. Rules of Pleading.
B. Non Suit.
C. Jurisdictional Amount.

Cross Reference.

For an exhaustive treatment of the nature and grounds of counterclaims in particular, see, 11 N. C. Enc. Dig. 179. As to assessment in counterclaim by jury of amount of recovery, see section 588 and notes thereto.

See 13 N. C. Law Rev., 86, for annotation.

I. IN GENERAL.

A. Editor's Note.

Settlement of two independent disputes between the same parties in the action was beyond the conception of the common law system of pleading and practice. Claims in favor of defendant arising out of the same transaction as sued upon by the plaintiff, for example a breach of warranty of soundness of personalty sold to the defendants, in an action by the plaintiff upon the purchase price of the property sold, could be set up to defeat plaintiff's claim, and this was known as recoupment. The characteristic features of recoupment were (1) that the defense must arise out of the plaintiff's action on which it is based, (2) it need not be liquidated, (3) could not be used against sealed instruments, (4) and could not be an equitable defense, and (5) no recovery over be had thereon.

While those claims of the defendant which arose out of the same transaction were available in the same action by way of recoupment, subject to the features just enumerated, the defendant could not avail himself of any claim which he might have against the plaintiff and which arose out of a different transaction, and had to bring an independent action therefor. But the inefficiency involved in this method of procedure and the injustices resulting therefrom soon lead to the enactment of the statute of set-off, under which liquidated claims arising out of different transactions could be availed of by the defendant against the plaintiff's demand in the same action. As in the case of recoupment, no recovery over the plaintiff's claim could be had. Another distinction of defenses available by way of counterclaim and those available by way of set-off consisted in the fact that in the former case if the defenses were not pleaded in the same action it was concluded and could not be made the subject of an independent subsequent action; whereas in the latter case it was optional with the defendant to avail himself of his claim, so that in case he did not avail himself in the same action, an independent subsequent action could be maintained thereon.

The effect of the Code is to consolidate the common law recoupment and the statutory set-off, by abolishing all differences that existed between them, by treating the two under the name of **counterclaim,** with a liberal tendency in favor of the defendant.

The consequence of this consolidation is to enable the defendant to avail himself of his claim in the same action, whether such claim arises out of the same transaction, or different transactions, and whether or not it exceeds the claim of the plaintiff, as recovery for the excess is now permissible.

Cited in Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729; English Drug Co. v. Helms, 199 N. C. 755, 757, 155 S. E. 871.

B. General Constructions.

Liberal Construction.—This section is very broad in its scope and terms, and should be liberally construed by the court in furtherance of the most desirable and beneficial purpose for which it is enacted. Smith v. French, 141 N. C. 1, 6, 53 S. E. 435; Smith v. Young Bros., 109 N. C. 224, 226, 13 S. E. 735; Garrett v. Love, 89 N. C. 205, 207.

This section on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose. Bourne v. Board of Financial Control, 207 N. C. 170, 178, 176 S. E. 306.

More Comprehensive Than the Old Set Off.—The counterclaim, in an action on contract, embraces not only matter that under the old practice was termed a set-off, but every other cause of action arising out of contract, whether legal or equitable, between the plaintiff and defendant. Where there are more than one plaintiff or defendant it is further extended so that not only mutual debts between the plaintiffs and defendants, but every claim by the defendants, or any one of them, against the plaintiffs, or any of them, between whom a several judgment might be had in the action, is embraced. Neal v. Lea, 64 N. C. 678.

Subject to the limitations expressed in this section, a counterclaim includes practically every kind of cross-demand existing in favor of defedant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured on the same state of facts. Smith v. French, 141 N. C. 1, 7, 53 S. E. 435, followed in Aetna Life Ins. v. Griffin, 200 N. C. 251, 253, 156 S. E. 515; Bourne v. Board of Financial Control, 207 N. C. 170, 178, 176 S. E. 306.

Enumeration of Grounds Exclusive.—A defendant cannot set up as a defense or counterclaim any and every cause of action he may have against the plaintiff. He may set up only such causes as counterclaims, that fall within one of the subdivisions of this section. Byerly v. Humphrey, 95 N. C. 151.

Criterion to Determine a Valid Counterclaim.—The criterion, for determining whether a defense set up can be maintained as a counterclaim, is whether there is a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if there is, then such cause of action is a counterclaim. Battle v. Thompson, 65 N. C. 406, 408.

Payment and Counterclaim Compared. — A payment pro tanto extinguishes the debt eo instanti and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim which now includes a set-off, is the assertion by the defendant of an independent demand which might be maintained in an independent action. General Elect. Co. v. Williams, 123 N. C. 51, 31 S. E. 288.

Cannot Be Set against the State.—A person, indebted to the State and sued on such indebtedness, cannot offer as a set-off or counterclaim the indebtedness of the State to him. The reason being that a counterclaim is allowed to avoid circuity of actions, and as none of its citizens can bring suit against the State, the counterclaim is not permissible. Battle v. Thompson, 65 N. C. 406.

With a few exceptions, growing out of public policy, the rules of law which apply to the government and individuals are the same. McKnight v. United States, 98 U. S. 179, 186, 25 L. Ed. 115.

Waiver of Exemption by United States.—Although direct suits cannot be maintained against the United States, yet, when the United States institutes a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal or equitable, to the extent of the demand made or property claimed. The Siren, 7 Wall. 152, 154, 19 L. Ed. 129; United States v. Ringgold, 8 Pet. 150, 8 L. Ed. 899.

Against an Action for Tax.—A set-off is not pleadable to an action for recovery of taxes. Wilmington v. Bryan, 141 N. C. 666, 681, 54 S. E. 543.

Equitable Counterclaim.—An equitable cause of action may be set up as a counterclaim against a legal cause of action. Dempsey v. Rhodes, 93 N. C. 120, 127.

Counterclaim Where Lien upon Property Involved.—In an action upon a contract, though a lien upon property is involved, it is competent for the defendant to extinguish the debt. due from him, by a proof of counterclaim. Poston v. Rose, 87 N. C. 279.

II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

A. General Rules and Instances.

Counterclaim for Independent Tort Not Allowed.—Under this section a counterclaim is not permissible for a distinct and independent tort, and applying the principle, in an action to recover a tract of land alleged to belong to the plaintiff, a counterclaim for a trespass by the plaintiff on a different tract of land belonging to defendant is not maintainable. Louisville, etc., R. Co., Nichols, 187 N. C. 153, 155, 120 S. E. 819.

Same—But Permissible if it Grows Out of Same Transaction.—The contention that a tort can not under any circumstances constitute a counterclaim although "connected with the subject of the action" contained in the complaint is unfounded. The contrary is decided in Walsh v. Hall, 66 N. C. 233, and Bitting v. Thaxton, 72 N .C. 541; Lee v. Eure, 93 N. C. 5, 9.

Tort against Contract Claim.—If it arises out of the same transaction or is connected with the subject of the action, a tort claim may be pleaded as a counterclaim against a contract claim. McKinnon v. Morrison, 104 N. C. 354, 360, 10 S. E. 513; Smith v. Old Dominion Bldg., etc., Ass'n, 119 N. C. 257, 26 S. E. 40; Branch v. Chappell, 119 N. C. 81, 25 S. E. 783. The same rule applies to tort claims as against tort actions. Branch v. Chappell, supra.

Damages for slander cannot be set up as a counterclaim

to an action for debt. Merritt Milling Co. v. Finlay, 110 N. C. 411, 15 S. E. 4.

Contract against Tort Claim.—In giving effect to this clause it has been held that not only the defendant could plead a counterclaim grown out of the contract sued on, but that where action is brought for what would have been formerly denominated a tort, the defendant may set up a claim arising out of contract, if it also arises out of the same transaction or vice versa. Bitting v. Thaxton, 72 N. C. 541; Walsh v. Hall, 66 N. C. 233. Smith v. Young Bros., 109 N. C. 224, 226, 13 S. E. 735.

Contract against Contract Claims Arising Out of Same Transaction.—In an action upon a primissory note given in pursuance of a contract for the sale by payee of a specific article of merchandise, the maker may set up by way of counterclaim that the article furnished was not in compliance with the contract of sale, and that he was thereby damaged. Patapsco Guano Co. v. Tillery, 110 N. C. 29, 14 S. E. 639.

Recovery of Excess.—See section 588 and the notes thereto; particularly the Editor's note.

Same—In Tort Action.—If a person be sued in tort, he may, under this section set up a counterclaim for any damages arising out of the same transaction disclosed in the complaint, and if his damages exceed those of the complaint he is entitled to a judgment for the excess. Bitting v. Thaxton, 72 N. C. 541; McKinnon v. Morrison, 104 N. C. 354, 10 S. E. 513; Brown v. Brown, 121 N. C. 8, 10, 27 S. E. 998.

Nature of Transaction Not Determined by What Plaintiff Calls His Action.—When the plaintiff files his complaint, setting forth the "transaction," whether it be a tort or a contract, the defendant may set up any claim which he has against the plaintiff, connected with the transaction set up in the complaint. In this state there being only one form of action, when the plaintiff states the "transaction" in his complaint he cannot by calling it one name or another—as tort or contract—cut off the defendant's counterclaim growing out of the same transaction. It is the transaction that is to be investigated, without regard to its form or name. Walsh v. Hall, 66 N. C. 233; Bitting Thaxton, 72 N. C. 541, 549.

What Constitutes "Subject of the Action"—Example.—In an action for trespass for wrongful entry on land and cutting timber, the defendants filed a counterclaim, alleging that the plaintiffs had wrongfully raised a dam and caused water to back on defendant's land, which was part of the land described in the complaint as that on which the alleged trespass had been committed: Held, that the subject of the action was the trespass committed, and not the land, and hence the counterclaim was not connected with the cause of action, and hence it was not permissible. Bazemore v. Bridgers, 105 N. C. 191, 10 S. E. 888.

What Constitutes "Arising Out of Same Transaction" Examples.—Where the cause of action alleged was an obstruction placed by the defendant on the upper edge of his land, and the counterclaim attempted to be set up was that the plaintiff had placed an obstruction on the lower edge of his own land, it was held that these were two separate and distinct torts, and that the latter did not " arise out of the transaction set forth in the complaint," nor was it "connected with the subject of the section." Street v. Andrews, 115 N. C. 417, 422, 20 S. E. 450.

Same—Breach of Warranty of Soundness. — In an action for the specific recovery of a horse, the defendant pleaded as a counterclaim, that the plaintiff sold the horse to the defendant, and, at the time of the sale, warranted that it was sound, which warranty was false, and in consequence of which the defendant had been damaged; Held, that the counterclaim arose out of the transaction set out in the complaint and was properly pleaded as a counterclaim. Wilson v. Hughes, 94 N. C. 182.

Same—Action for Libel and Counterclaim for Slander.—Where the plaintiff sued the defendant for libel, and the defendant set out as counterclaim slanderous words uttered by the plaintiff, it was held that the counterclaim did not fall within the first subdivision of this section. Knott v. Burwell, 96 N. C. 272, 273, 2 S. E. 588.

B. Time of Existence.

See post, this note, "Time of Existence" III, B.

The counterclaims referred to in this clause must be existent and continue to exist between the same parties in the same right at the time they are offered and they must be due at the time the answer is filed, that is, not demands to become due in the future, but they need not be due at the time of commencement of the action. And they must arise out of the same contract or transaction which is the foundation of plaintiff's claim, or they must be connected with the subject of the action that is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself. Smith v. French, 141 N. C. 1, 8, 53 S. E. 435.

III. CLAIMS ARISING OUT OF INDEPENDENT CONTRACT.

A. General Rules and Instances.

Relation to Original Cause.—This section goes beyond the common-law pleading and practice, and under its provisions a defendant in an action on contract may file a counterclaim arising on a contract unrelated to the cause of action sued on when the required mutuality exists, so that two independent disputes between the parties may be settled in one action. Bourne v. Board of Financial Control, 207 N. C. 170, 176 S. E. 306.

Need Not Arise out of Same Transaction.—Under this clause a counterclaim need not arise out of the same transaction if it existed at the commencement of the action. Brown v. Carter, 111 N. C. 183, 186, 15 S. E. 934; Bitting v. Thaxton, 72 N. C. 541, 549.

Must Be a Debt—Tax Not a Debt.—A counterclaim or set-off is a defense to an action, and exists only in favor of a defendant under this subdivision. It arises when the demand, both of the plaintiff and the defendant, is a debt, arising out of contract and existing at the commencement of the action. A tax is not a debt. Gatling v. Commissioners, 92 N. C. 536.

Store Account against Action for Services of Minor.—In an action to recover for services of minor children, a counterclaim of a store account against plaintiff which had been assigned to defendant, is proper under this clause. Lynn v. Stanly Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877.

Action on Note by Bank Deposit Counterclaimed. — A depositor in a bank may set off amounts due him as deposits in an action by the bank against him to recover on a promissory note. Graham v. Proctorville Warehouse, 139 N. C. 533, 127 S. E. 540.

Share in Stock against Indebtedness upon Note.—Where a bank was in course of liquidation, and a stockholder was indebted to the bank by a note secured by a pledge of stock, his supposed share in the assets was held not to be available as a set-off, legal or equitable, in a suit upon the note. First Nat. Bank v. Riggins, 124 N. C. 534, 32 S. E. 801.

Damages for Assault in Action or Note.—Damages for an alleged assault by an officer in taking goods under claim and delivery or false arrest by him, cannot be maintained as a counterclaim in an action upon a note given by the defendant to the plaintiff for fertilizer sold to him, as it does not arise out of, and is not connected with the subject-matter of the action, and does not accrue until after the commencement of the main action. Godwin v. Kennedy, 196 N. C. 244, 145 S. E. 229.

Damages for Slander of Title in Action to Establish Title.—Where the plaintiff's action is to establish their title to and recover possession of mineral interest in a described 5-acre tract of land, and defendants set up as a counterclaim damages alleged to have been caused by the plaintiff's slander of their title in 500-acre tract: Held, the cross-action alleged is for damages founded upon a tort, and not on contract, and does not fall within the equitable principle of a suit to quiet title, under the provisions of this section and §§ 519, 522, and a demurer thereto is good. Thompson v. Buchanan, 195 N. C. 155, 141 S. E. 580.

An unpaid judgment in favor of a party to an action rendered previously to the commencement of the present action is in legal effect a contract upon which a counterclaim may be pleaded in an action by the opposing party brought against him to recover on a promissory note. McClure v. Fulbright, 196 N. C. 450, 146 S. E. 74.

Other Instances.—See 11 N. C. Enc. Dig. 179.

Where a corporation gives its note to its president to secure him against any loss he might sustain by reason of his endorsement of the corporation's notes, and the president transfers the note to a third person, who brings suit, the corporation may not set up as a counterclaim in the action indebtedness due the corporation by the president. Wellons v. Johnston, 196 N. C. 94, 144 S. E. 521.

Where the owner of lands living thereon abandons his wife and children, and leaves the state, and his wife and minor children without support, and another took and supported them and has purchased the lands from the purchaser under an execution sale, taking deed with full covenants and warranty of title, upon the return of the execution debtor and his successfully maintaining his suit to have the deeds declared void: Held, the one who took and supported them is entitled in the settlement to the moneys he has reasonably expended for the support and maintenance of the wife and children, and this may be set

up as a counterclaim against a recovery for the rents and profits, and judgment may be rendered in the same action. Jeffreys v. Hocutt, 195 N. C. 339, 142 S. E. 226.

B. Time of Existence.

See paragraphs under preceding analysis line.

In General.—The requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the class of counterclaims described in this clause. Such is the law, for the very just and obvious reason that, when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to costs by allowing defendant to buy up claims sufficient or more than sufficient to off-set his debt. But this limitation is not expressed with reference to counterclaim in the first clause of this section. Smith v. French, 141 N. C. 1, 7, 53 S. E. 535. See also, Griffin v. Thomas, 128 N. C. 310, 38 S. E. 903; Bank v. Wilson, 124 N. C. 561, 570, 32 S. E. 889; Riddick v. Moore, 65 N. C. 382, 385.

Under this section a counterclaim must exist at the commencement of the action. The defendant "is not obliged to set up such counterclaim. He may omit it and bring another action. He has his election. But when he does set up his counterclaim, it becomes a cross-action, and both opposing claims must be adjudicated. The plaintiff then has the right to the determination of the court of all matters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy without or against the consent of the other." McGee v. Frohman, 207 N. C. 475, 480, 177 S. E. 327.

Collateral Demand against Assignee of Note. — The defense of set-off has, by this section, been merged in that of counterclaim, the effect of which, in one respect, is that a defendant is not allowed to off-set the claim of a plaintiff as assignee of a note past due when assigned, by showing that the assignor was indebted to such defendant at the time of the assignment, unless such counterclaim had attached itself to the note before the assignment. Haywood v. McNair, 19 N. C. 283; Wharton v. Hopkins, 33 N. C. 505; McConnaughey v. Chambers, 64 N. C. 284, approved. Neal v. Lea, 64 N. C. 678.

In Neal v. Lea, 64 N. C. 678, it is held that by the proper construction of this section, no collateral demand against the assignor of a note can be set up against the assignee, and "that to make it available, the demand must have attached itself to the note in the hands of the assignor; for instance, a payment made to him not entered on the note, or a claim, which the assignor had agreed should be taken in satisfaction." The doctrine of Haywood v. McNair, 19 N. C. 283, was repudiated and that of Borough v. Moss, 10 B. & C. 558 adopted. Harris v. Burwell, 65 N. C. 584, 585.

A set-off at law must exist when the plaintiff's action is brought; in equity, every set-off or counterclaim must be shown before decree, and this is also the case under the Code. Hogan v. Kirkland, 64 N. C. 250, 253.

IV. PLEADING AND PRACTICE.

For a treatment of the general rules of pleading, see 13 N. C. Enc. Dig. 150.

A. Rules of Pleading.

Allegation of Facts.—The counterclaim must disclose such a state of facts as would entitle the defendant to his action, as if he was plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and contain a plain and concise statement of the facts constituting a cause of action. There is no formula prescribed and in determining its effects, its allegations shall be liberally construed with a view to substantial justice. Battle v. Thompson, 65 N. C. 406, 408. It is held in the United States Supreme Court that a counterclaim is unavailable unless set up by defendant in his pleading. McGovern v. American Pressed Tan Bark Co., 121 U. S. 575, 30 L. Ed. 1027.

Same—Demand of Relief.—Strictly, a counterclaim is a cross-action against the plaintiff in which the defendant may have affirmative relief; but it must, like a complaint, state the cause of action and demand the relief to which the defendant alleges he is entitled. Hurst, etc., Co. v. Everett, 91 N. C. 399, 400.

Particularity in Alleging.—A counterclaim is in substance a cross-action and it should be set out with the same particularity and accuracy required in stating a cause of action in the complaint. State v. Scott, 84 N. C. 184, 187.

For instance a counterclaim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded, and should be disregarded. American Nat. Bank v. Northcutt, 169 N. C. 219, 85 S. E. 210.

Allegation as to Time of Existence. — An answer setting up a counterclaim, but which fails to show that the same subsisted between the parties when the action was begun, or that it arose out of, or was connected with the subject of the plaintiff's action, is demurrable. Reynolds v. Smathers, 87 N. C. 24, 25.

Replication to Counterclaim. — Whenever a counterclaim is pleaded the plaintiff must make a replication, or else it will be treated as admitted. Davison v. West Oxford Land Co., 121 N. C. 146, 28 S. E. 266.

B. Nonsuit.

When Counterclaim Is Pleaded, a Nonsuit Cannot Be Taken.—McGee v. Frohman, 207 N. C. 475, 480, 177 S. E. 327.

Nonsuit by Plaintiff. — Where a defendant sets up a counterclaim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a nonsuit. Olmsted v. Smith, 133 N. C. 584, 45 S. E. 953.

Same—Nonsuit in United States Courts. — It has been repeatedly decided that the courts of the United States have no power to order a peremptory nonsuit, against the will of the plaintiff, unless the right is given by a state statute in which case it will be followed in that state, or unless it is given by a federal statute, or by agreement of parties. Meehan v. Valentine, 145 N. C. 611, 618, 36 L. Ed. 835; Thompson v. Selden, 20 How. 194, 15 L. Ed. 1001; Elmore v. Grymes, 1 Pet. 469, 7 L. Ed. 224.

Same—Where Counterclaim Arises out of Same Transaction.—When the defendant pleads, as a counterclaim, a cause of action arising out of a contract or transaction set forth in the complaint as a foundation of the plaintiff's cause of action, the plaintiff cannot be permitted to take a nonsuit, without the consent of the defendant, for the reason that, as it is a connected transaction and cause of action, the whole matter is controversy between the parties should be determined by the one action. But when the counterclaim does not arise out of the same transaction as the plaintiff's cause of action but falls under subdivision 2 of this section, the plaintiff may submit to a nonsuit. In such case the defendant may either withdraw his counterclaim, when the action will be at an end, or he may proceed to try it, at his election. Whedbee v. Leggett, 92 N. C. 465, 469. Nor can he take a nonsuit where the defendant has acquired in an equitable action any other right or advantage which he is entitled to have tried and settled in the action. Bynum v. Powe, 97 N. C. 374, 2 S. E. 170.

Same—As to Parties Not Necessary. — As to persons who are not necessary or proper parties, and who have been joined as defendants, the plaintiff may be permitted at any time to enter a nonsuit, or nol pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. Lee v. Eure, 93 N. C. 5.

Same—Against One of Several Defendants. — And where there are several defendants against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. Castle v. Bullard, 23 How. 172, 183, 184, 16 L. Ed. 424.

Nonsuit by Defendant. — Where the defendant has set up a counterclaim as allowed by this section, as to the cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of this section, he may, as a matter of right, take a nonsuit thereon at any stage of the trial before verdict. Cahoon v. Cooper, 186 N. C. 26, 118 S. E. 834.

But where the defendant's answer sets up a counterclaim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of his action, existing at the commencement thereof, it becomes a cross-action, and both opposing claims must be adjusted in the action, and he may not take a nonsuit thereon as a matter of right, without the plaintiff's consent. Cahoon v. Cooper, supra.

Same—After Verdict.—Where the jury have returned their verdict into court upon the issue as to defendant's counterclaim, and as to the others except one to which the judge has held no response was required, the defendant may not take a voluntary nonsuit as to the counterclaim he has set up in his answer. Cahoon v. Cooper, 186 N. C. 26, 118 S. E. 834.

C. Jurisdictional Amount.

Jurisdictional Amount for Counterclaims. — As to the power of court to render judgment in favor of the defendant upon a counterclaim involving an amount exceeding the jurisdictional amount of the court, see 1 N. C. Law Rev. 224; and annotations to section 588.

Same—In Several Counterclaims.—Where several counter

claims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount. General Elect. Co. v. Williams, 123 N. C. 51, 31 S. E. 288.

Jurisdictional Amount in Justice's Court. — The counterclaim must be one on which judgment might be had in action, and must therefore come within the jurisdiction of the court. It cannot exceed $200 in a justice's court. General Elect. Co. v. Williams, 123 N. C. 51, 31 S. E. 288.

§ 522. Several defenses.—The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished. (Rev., s. 482; Code, s. 245; C. C. P., s. 102.)

Reference. — For more particular phases of this subject see 10 N. C. Enc. Dig. 171. See also note under sec. 521.

Same Certainty as Complaint Required. — The defenses in the answer must be as certain as the allegations of the complaint, so that the jury may separately determine the merits of each issue. See Gossler v. Wood, 120 N. C. 69, 73, 27 S. E. 33.

All matters equitable in their nature should be alleged in the pleadings with such reasonable fullness, and particularly as to the constituent facts which will enable the court to see clearly the character of the equity alleged, the purpose of the pleading and the issues raised. Bean v. Western, etc., R. Co., 107 N. C. 731, 741, 12 S. E. 600.

Contradictory Defenses. — Under this section even contradictory defenses are permissible to be pleaded. Upton v. R. R. 128 N. C. 173, 178, 38 S. E. 736; Bean v. Western, etc., R. Co., 107 N. C. 731, 12 S. E. 600; Reed v. Reed, 93 N. C. 462, 465; Williams v. Hutton, etc., Co., 164 N. C. 216, 80 S. E. 257; McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426. But see, Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343, 25 S. E. 960.

Hence, where the answer denies the allegations of the complaint and for further defense to the action pleads matters in avoidance, it is error for the court below to disregard the denials and adjudge that the answer admits the instrument sued upon. Reed v. Reed, 93 N. C. 462.

Upon the same principle where the answer sets up defenses in bar, and also asks an account between plaintiff and defendant, the demand for an account can not be construed as a waiver of such defenses, but is merely contingent on their failure. Mull v. Walker, 100 N. C. 46, 6 S. E. 685.

The inconsistent defenses, however, must be separately stated. McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.

Both Equitable or Legal Defenses—Affirmative Relief.— The defendant may set up as many defenses as he might have, whether denominated legal or equitable, or both, and to have such relief, affirmative or negative, as may be legally authorized on the facts constituting his defense. Covington v. Ingram, 64 N. C. 123; Melvin v. Stephens, 82 N. C. 284, 288.

An equitable counterclaim may be asserted in an answer to a complaint containing a purely legal cause of action. Dempsey v. Rhodes, 93 N. C. 120.

No Leave of Court Necessary. — The defendant may plead several defenses without asking the leave of the court. Whitaker v. Freeman, 12 N. C. 271, 279.

Cited in Jeffreys v. Hocutt, 195 N. C. 339, 344, 142 S. E. 226; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729.

§ 523. Contributory negligence pleaded and proved.—In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial. (Rev., s. 483; 1887, c. 33.)

For substantive law of contributory negligence, see 9 N. C. Enc. Dig. 672. See 13 N. C. Law Rev., 256, for comment on Contributory Negligence as evidence relevant to damages.

Editor's Note. — Prior to the enactment of this section there was some doubt as to whether the fact of contributory negligence was in the first instance to be negatived by the plaintiff, or to be pleaded by the defendant in bar. But the cases are now uniform in holding that whatever doubt that may have existed upon the question, is removed by the enactment of this section, which imposes the burden of both pleading and proving it upon the defendant.

Constitutionality — Impairs No Vested Right. — This section placing the burden of proving contributory negligence upon the defendant affects only the remedy and impairs no vested right. It was competent for the Legislature to enact it. Wallace v. Western etc., R. Co., 104 N. C. 442, 450, 10 S. E. 552.

The general rule inculcated by this section is that the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving his allegation of contributory negligence. Moore v. Chicago Bridge, etc., Works, 183 N. C. 438, 440, 111 S. E. 776.

Same — Where Complaint Negatives Contributory Negligence. — The defendant can avail himself of anything appearing in plaintiff's evidence which tends to disprove contributory negligence, but this does not change the burden of proof as fixed by this section. Wallace v. Western, etc., R. Co., 104 N. C. 442, 450, 10 S. E. 552.

Applies to Actions of Employee against Employer. — This section applies to actions brought by an employee against his employer. Hudson v. Charleston, etc., R. Co., 104 N. C. 491, 10 S. E. 669.

In an action for wrongful death, where defendant fails to plead contributory negligence it is not entitled to have the issue submitted to jury under this section. Murphy v. Power Co., 196 N. C. 484, 146 S. E. 204, citing Fleming v. Norfolk, etc., R. Co., 160 N. C. 196, 76 S. E. 212.

Presumption against Contributory Negligence. — Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense. Norton v. North Carolina R. Co., 122 N. C. 910, 29 S. E. 886, cited in note in 33 L. R. A., N. S., 1116.

Same — Burden of Proof in Supreme Court. — The Federal Supreme Court has held repeatedly that the burden of proving contributory negligence rests on the defendant; hence, it is not to be negatived or disproved by the plaintiff. Union Pacific R. Co. v. O'Brien, 161 U. S. 451, 456, 40 L. Ed. 766; Texas, etc., R. Co. v. Volk, 151 U. S. 73, 77, 38 L. Ed. 78.

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself. Cogdell v. Wilmington, etc., R. Co., 132 N. C. 852, 44 S. E. 618.

How the Burden of Negligence Shifts. — The burden of proof is on the plaintiff to show that his injury was caused by the negligence of the defendant. After the plaintiff has shown such negligence if the defendant wishes to plead contributory negligence as a defense, the burden is on him to show that the plaintiff was guilty of contributory negligence. After the defendant has shown this, if the plaintiff wishes to take advantage of the doctrine of last clear chance, the burden is on him. 5 N. C. L. R. 63. Cox v. Norfolk, etc., Railroad, 123 N. C. 604, 31 S. E. 848.

A plaintiff in the first instance must show negligence on the part of the defendant. Having done this he need not go further in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. Baltimore, etc., R. Co. v. Landrigan, 191 U. S. 461, 48 L. Ed. 262; Looney v. Metropolitan R. Co., 200 U. S. 480, 487, 50 L. Ed. 564.

Assumption of Risk. — While there is a marked distinction between the doctrines of assumption of risks and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. Pigford v. Norfolk, etc., R. Co., 160 N. C. 94, 75 S. E. 860.

Motion to Nonsuit — Scintilla of Evidence. — This section imposes the burden of proving contributory negligence upon the defendant. It therefore follows, that on a motion to nonsuit the court can only consider the evidence relating to the negligence of the defendant, and if there is more than a mere scintilla of evidence tending to prove such negligence, the motion must be denied and the case submitted to the jury. Cox v. Norfolk & etc., Railroad, 123 N. C. 604, 31 S. E. 848.

Question for Jury. — The question whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. Miller v. Scott, 185 N. C. 93, 116 S. E. 86.

Hence the trial judge cannot submit a verdict on a plea of contributory negligence, but must submit the issue to the jury. United States Leather Co. v. Howell, 151 Fed. 445.

It is not error, even when contributory negligence is pleaded, since the enactment of this section, to submit only the question whether the injury was caused by the defendant's negligence, and instruct the jury to respond in

the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. McAdoo v. Richmond & etc., R. Co., 105 N. C. 140, 11 S. E. 316.

Same—Where Court Explains to the Jury the Testimony. —While it is better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence and it was apparent that defendant had been given the benefit of such testimony with its application. Ruffin v. R., 142 N. C. 120, 55 S. E. 86.

A Specific Application. — The plea that an employee of the plaintiff had negligently failed to see that he had entirely extinguished a fire started by the locomotive of the defendant railroad company, and that the fire rekindled and caused the plaintiff the damages complained of in his action, is one of contributory negligence which is required by this section to be pleaded. Kearney v. Seaboard Air Line R. Co., 177 N. C. 251, 98 S. E. 710.

What Law Governs — Federal or State. — The procedure for the establishment of contributory negligence has been defined and approved under numerous decisions construing the State statutes which control contributory negligence, as referred to in the Federal Statutes, and it has been declared that it should be considered and treated as a partial defense, coming within the terms of the local law, and to make the same available it must be set up in the answer and proved as required by this section. Fleming v. Norfolk etc., R. Co., 160 N. C. 197, 76 S. E. 212.

As the Federal act makes no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence, etc." Fleming v. Norfolk. etc., R. Co., 160 N. C. 197, 76 S. E. 212.

The Rule the Same in Federal Courts. — The same rule as to the burden of proof of contributory negligence which prevails in the courts of this state, also prevails in Federal Courts, Cox v. Norfolk etc., Railroad, 123 N. C. 613, 31 S. E. 848; Coasting Co. v. Tolson 139 U. S. 551.

Applied in Butner v. Atlantic, etc., Ry. Co., 199 N. C. 695, 696, 155 S. E. 601; Farrell v. Thomas, etc., Co., 204 N. C. 631, 169 S. E. 224.

Art. 16. Reply

§ 524. Demurrer or reply to answer; where answer contains a counterclaim.—If the answer contains a counterclaim against the plaintiff or plaintiffs, or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is plead, or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be plead shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim: Provided, for good cause shown, the clerk may extend the time of filing such answer or reply to a day certain. If a counterclaim is plead against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served upon the plaintiff or plaintiffs or his or their attorneys of record, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer: Provided, for good cause shown, the clerk or judge, in the event the cause shall have been transferred to the civil issue docket, may extend the time to a day certain. (Rev., s. 484; Code, s. 208; 1870-71, c. 42, s. 5; 1919, c. 304; 1921, c. 92, s. 54; 1924, c. 18.)

Cross References. — As to provisions for the hearing of the demurrer, see section 513 et seq. As to replies in particular, see 10 N. C. Enc. Dig. 177; 15 N. C. Enc. Dig. 212. See also notes to secs. 509, 536.

Editor's Note. — The acts of 1919, ch. 304, which effected certain changes in the time of filing the complaint, the demurrer and the answer, contained no provision with respect to the time of filing the reply; but the Consolidated Statutes carried out the general meaning of the plan by requiring the reply, when necessary, to be filed within twenty days after the answer. But this time was subsequently changed to ten days by the acts of 1920 and 1921. See 1 N. C. Law Rev. 12. The same acts inserted a proviso to the effect that the clerk for good cause shown may extend the time to a day certain which proviso was subsequently modified by acts 1924 c. 18 to provide that the extension by the clerk for good cause could be effected in the event the cause shall have been transferred to the civil issue docket. The acts of 1924, c. 18, extended the time of filing the reply to twenty days beginning from the filing of the answer, as the section has provided before the amendment of 1921.

But the most radical effect of the amendment of 1924 was to enlarge the provisions of the section. Thus the provision at the beginning of the section, requiring service of the counterclaim upon the plaintiff, etc., with the proviso annexed thereto; and the provision prescribing the effect of failure to serve the counterclaim as required, has been introduced by the amendment of 1924, see 3 N. C. Law Rev. 24.

Powers of Court under Section 536 Not Affected. — The restriction put upon the power of the clerk to extend the time of filing, does not affect the broad powers conferred upon the court by section 536. Roberts v. Merritt, 189 N. C. 194, 126 S. E. 513.

Failure to Serve Copy of Answer Setting up Counterclaim. —It is proper for the judge of the Superior Court to set aside a judgment by default on defendant's counterclaim under this section when the plaintiff, or his attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made. Williams-Fulghun Lumber Co. v. Welch, 197 N. C. 249, 148 S. E. 250.

Applied in Kassler v. Tinsley, 198 N. C. 781, 153 S. E. 411.

§ 525. Content; demurrer to answer. — When the answer contains new matter constituting a counterclaim, the plaintiff may reply to the new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer. The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint. In other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter, and such reply shall be subject to the same rules as a reply to a counterclaim. (Rev., s. 485; Code, s. 248; C. C. P., s. 105; 1919, c. 304.)

See 10 N.C. Enc. Dig. 177.

Matter in Defense Deemed as Denial Without Replication. — If the new matter in the answer does not constitute a counterclaim, even in the absence of a replication such new matter is to be deemed controverted by the plaintiff as upon a direct denial. Wilson v. Brown, 134 N. C. 400, 407, 46 S. E. 762; Fitzgerald v. Shelton, 95 N. C. 519; Williams v. Hutton, etc., Co., 164 N. C. 216, 80 S. E. 257; Smith v. Bruton, 137 N. C. 79, 49 S. E. 64.

For in such a case no replication is necessary, unless required by the court. Simon v. Masters, 192 N. C. 731, 135 S. E. 861; Fishblate v. Fidelity Co., 140 N. C. 589, 594, 53 S. E. 354; Jones v. Cohen, 82 N. C. 75, 80. It is only when a counterclaim is relied on that the plaintiff's failure to reply may afford ground for a judgment for want of a replication,

but not when the matter constitutes a defense to the action merely. Barnhardt v. Smith, 86 N. C. 473, 483.

The Court May Require Reply.—Though no counterclaim is pleaded the court can order a reply to be filed to any defence set up in the answer or may allow it to be filed as a matter of discretion. James v. Western, etc., R. Co., 121 N. C. 530, 28 S. E. 537.

May Contain New Matter.—The plaintiff may not only reply to a counterclaim, but may allege "new matter" which has no connection with the matter alleged in the complaint or the new matter alleged in the counterclaim, the requirement being that it shall not be inconsistent with the complaint. Boyett v. Vaughan, 79 N. C. 528, S. C. 85 N. C. 364.

Reply Only to New Matter in Answer.—A reply can be made only to new matter brought out in the answer. Olmstead v. Raleigh, 130 N. C. 243, 41 S. E. 292.

Must Not be Radically Inconsistent.—A party will not be allowed to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication state another which is entirely inconsistent. Berry v. Hyde County Land, etc., Co., 183 N. C. 384, 386, 111 S. E. 707.

Waiver by Failure to Demur.—Where an answer is defective in failing to allege that the plaintiff had knowledge of the fraud, a failure to demur thereto will have the effect of waiving such defect. Printing Co. v. McAden, 131 N. C. 178, 184, 42 S. E. 575.

Sufficient Denial in Replication.—An answer having alleged a set-off, the replication thereto alleged that such answer is "untrue and denied" and reiterated the cause of action stated in the complaint: Held, sufficient to put the plea of set-off in issue and require evidence in its support. Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936.

Statute of Limitations.—Formerly a replication was required to be filed whenever the statute of limitation was pleaded; but now a replication is necessary, only in the event the plaintiff has some matter in avoidance, such as a new promise, etc. Stubbs v. Motz, 113 N. C. 458, 18 S. E. 387.

§ 526. Demurrer to reply.—If a reply of the plaintiff to a defense set up by the answer of the defendant is insufficient, the defendant may demur thereto, and must state the grounds thereof. (Rev., s. 486; Code, s. 250; C. C. P., s. 107.)

Amended Reply.—A judgment will not be reversed for error in sustaining a demurrer to the reply when the plaintiff, on leave, files an amended reply, presenting, in addition to others, the same issues, and the same proceeds to trial and final judgment upon the issues thus presented. 22 Ohio St. Reports. Construing a similar section of the Ohio Code.

Reply Set up New Matter.—In construing the Ohio statute it was held that where a reply, which sets up new matter sufficient in law to avoid the defense, is, on demurrer, erroneously held insufficient, and the case is finally disposed of by a finding against the plaintiff on issues of fact, under which the special matter in the reply is not available to the plaintiff, the error of the court in sustaining the demurrer constitutes a good ground for reversing the final judgment, and awaiting a new trial, unless the records show such error to have been otherwise. 18 Ohio State Reports 353.

If Reply Is a Departure.—If reply is a departure, demurrer should be sustained. 1 Cincinnati Superior Court Reporter 12. It was so held in construing the Ohio Code.

Failure to Demur to Reply. — A failure to demur to a reply that does not contain matter sufficient to avoid a defense set up in the answer, is not a waiver of the right to object to the sufficiency of the reply, and will not affect the judgment to be rendered. 31 Ohio State Reporter 492. So held in construing the Ohio Code.

Art. 17. Pleadings, General Provisions

§ 527. Forms of pleading.—The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter. (Rev., s. 487; Code, s. 231; C. C. P., s. 91.)

For abolition of the differences between actions at law and suits in equity, see section 399. As to uniform practice in inferior courts where summons issues to run outside of county, see § 478(a).

General Effect of New Form of Procedure.—The subtle science of pleading heretofore in use is not merely relaxed but abolished by the Code, so that the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this chapter. The new system inaugurated thereby is such that few, if any, of the ancient rules are now applicable. Moore v. Edmiston, 70 N. C. 510, 518.

In construing the Ohio Code, it was held that when the facts set out in the petition entitled the plaintiff to judgment, it is immaterial what the form of action would have been at law. 21 Ohio State Reporter 596, 603.

Same—Rules for Certainty Not Abolished.—While the distinction between actions at law and suits in equity and all feigned issues have been abolished, and there is now but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which is denominated a civil action, and while new rules have been prescribed by the chapter for determining the sufficiency of a pleading, it was not intended to repeal those rules of pleading which are essential to produce certainty of statement and issue between the parties. Turner v. McKee, 137 N. C. 251, 259, 49 S. E. 330.

Forms of Actions Abolished.—All the forms of pleading heretofore existing are abolished, and under the present system there is but one form of action. Bitting v. Thaxton, 72 N. C. 541, 548.

Thus the forms of action trespass vi et armis or trespass on the case have been abolished and a civil action for all cases has been substituted therefor. Sneeden v. Harris, 109 N. C. 349, 357, 13 S. E. 920.

Pleading Should Be in Writing.—In the United States Courts it is held that pleadings should be in writing, at law as in equity. McFaul v. Ramsey, 20 How. 523, 15 L. Ed. 1010.

What They Must Contain in General.—Pleadings should clearly, distinctly and succinctly state the nature of the wrong complained of, the remedy sought, and the defense set up. Bradford v. Southern R. Co., 195 U. S. 243, 49 L. Ed. 178: Cheaspeake, etc., R. Co., v. Dixon, 179 U. S. 131, 45 L. Ed. 121.

Meaning of the Pleader.—In construing the Ohio Code it was held that the meaning of the pleader must be fairly ascertained from the whole instrument without regard to technical rules. If legal or technical words are used they are to be taken in their recognized sense, unless the context shows another sense was intended. 42 Ohio State Reporter 625, 9 Circuit Court Reports 421.

§ 528. Subscription and verification of pleading.—Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Rev., s. 488; Code, s. 257; C. C. P., s. 116.)

For authorities dealing with verification of pleadings, see, 10 N. C. Enc. Dig. 202, et seq.; 15 N. C. Enc. Dig. 221.

When Verification Necessary.—The provisions of this section which are applicable also to special proceedings, do not require that the petition (or any other pleading) be, at all events, verified. It simply requires that when one pleading is verified every subsequent one, except a demurrer, be verified. Lindsay v. Beaman, 128 N. C. 189, 190, 38 S. E. 811.

Requirement One of Substance.—The requirement as to the verification of pleadings is one of substanec, and not of form, and a defect therein is jurisdictional. Martin v. Martin, 130 N. C. 27, 40 S. E. 822; Holloman v. Holloman, 127 N. C. 15, 37 S. E. 68; Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296.

The object of the verification is, that if the defendant does not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points. Griffin v. Ashville Light Co., 111 N. C. 434, 16 S. E. 423.

It is to give the pleader a convenient substitute for the old bill of discovery in equity, and to eliminate all issues of fact that the parties are not willing to raise under oath. Miller v. Curl, 162 N. C. 1, 77 S. E. 952.

Want of Verification Fatal Defect.—Where a statute directs that the complaint of the petitioner "shall be sworn to as in other actions," the want of a **proper** verification is a fatal defect for which judgment will be arrested. Cowles v. Hardin, 79 N. C. 577.

Effect of Non-Verification. — Where a pleading is not verified in compliance with this and the two succeeding sections, the other party has a right to file an unverified plead-

ing, and it is error to deny him such right. See Reynolds v. Smathers, 87 N. C. 24.

In construing this section the court has repeatedly held that if a pleading be verified and the subsequent pleading be not, the latter may be set aside and disregarded. Harkey v. Houston, 65 N. C. 137; Alspaugh v. Winstead, 79 N. C. 526; Wynne v. Prairie, 86 N. C. 73; Rogers v. Moore, 86 N. C. 86; Alford v. McCormac, 90 N. C. 151, 152.

Upon this principle if the plaintiff verify his complaint and the defendant fail to verify his answer, the plaintiff is entitled to judgment. Alford v. McCormac, supra; Griffin v. Asheville Light Co., 111 N. C. 434, 438, 16 S. E. 423.

Substantial Compliance.—The requirements of this section must be substantially complied with. Miller v. Curl, 162 N. C. 1, 77 S. E. 952.

Applicable to Courts of Record Only.—The requirements of this section with regard to verification applies only to courts of record, and have no application to pleading in a justice's court, which is not a court of record. Van Smith Building, etc., Co. v. Pender, 173 N. C. 55, 91 S. E. 524.

Amended Complaint.—A complaint amended in a material part after being verified is, in effect, unverified; and the answer to it is not required to be verified. Rankin v. Allison, 64 N. C. 673.

§ 529. Form of verification.—The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides and is capable of making the affidavit. (Rev., s. 489; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.)

Cross References.—See generally, 10 N. C. Enc. Dig. 202, et seq; 15 N. C. Enc. Dig. 221. For verification in divorce cases, see section 1661.

Amendment to Insufficient Verification.—Where the verification of an answer was insufficient, it is not error for the trial court to allow an amended verification, where such allowance tends to a fair trial of the case on the merits, and the adverse party is given a reasonable time to meet the amended pleadings. Best v. Dunn, 126 N. C. 560, 36 S. E. 126.

No Literal Formula Required.—This section provides that the verification must be in "substance" as therein prescribed. Hence a verbal and literal following of the formula prescribed is not necessary. McLamb v. McPhail, 126 N. C. 218, 220, 35 S. E. 426.

Same—But Following the Terms of Section Recommended.—With reference to the contents and forms of verification, the court in Cole v. Boyd, 125 N. C. 496, 498, 34 S. E. 557, said: "We do not wish to be understood as insisting upon a literal compliance. Such a requirement would be contrary to the spirit of our present system. Any form of words that is equivalent thereto will be sufficient. We may even go further and say that we should permit any form of verification that, taken in connection with the form of statement in the pleading, clearly distinguishes between personal knowledge and information so as to render the affiant legally responsible for the truth of every material allegation. But the object of verification is to verify. If it fails to do this, it is worse than useless. If a party wishes to bind his opponent with the obligations of a verified pleading, he must bind himself, and must so state every material allegation that it will not only rest under the moral sanctity of an oath, but that its falsity will fasten upon him the penalties of perjury. This is the object of a verification and the true test of its sufficiency. While it is not necessary to follow the exact words of the statute, it is always safe to do so, and we would strongly advise such course in preference to mere experimental practice, which is always dangerous."

Instances of Sufficient Verification. — An allegation that plaintiff has "reason to believe," and therefore "alleges," etc., is sufficient under this section, requiring matter to be alleged as of plaintiff's knowledge or upon "information and belief." Ware-Kramer Tobacco Co. v. American Tobacco Co., 180 Fed. 160.

So, where an instrument in writing is charged to have been executed by a person other than the deceased, the affidavit will be sufficient if it states that the affiant has reason to believe that such instrument was not executed by the decedent or by his authority. Apache County v. Barth, 177 U. S. 538, 44 L. Ed. 878, construing an Arizona statute of similar import.

The verification of the answer in the words following, "The foregoing answer of the defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true," is a substantial compliance with this section. McLamb v. McPhail, 126 N. C. 218, 220, 35 S. E. 426.

Same—Insufficient Verifications. — A verification in the words following: "he has read the foregoing answer and knows the contents thereof; that the facts setforth therein of his own knowledge are true, and that those stated on information and belief he believes to be true," is held insufficient. Carroll v. McMillan, 133 N. C. 141, 45 S. E. 530.

A verification in the words "sworn and subscribed to" is not sufficient in an ordinary action, and a fortiori in a divorce action which the law does not favor. Martin v. Martin, 130 N. C. 27, 40 S. E. 822; see section 1661.

Subscribing the Verification by Affiant.—This section does not in terms or specifically require that the verification of the pleading shall be subscribed by the affiant, and it need not be so signed unless an affidavit is incomplete and inoperative without it. Alford v. McCormac, 90 N. C. 151, 152. Though the signing by him is commendable. Cahoon v. Everton, 187 N. C. 369, 121 S. E. 612.

Oath by Whom Administered.—It is sufficient if the oath is administered by one authorized to administer oaths. Alford v. McCormas, 90 N. C. 151.

§ 530. Verification by agent or attorney.—The affidavit may also be made by the agent or attorney, if the action or defense is founded upon a written instrument for the payment of money only and the instrument is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party. (Rev., s. 490; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.)

Cross References.—See generally, 10 N. C. Enc. Dig. 202, et seq; 15 N. C. Enc. Dig. 221.

Editor's Note.—This section contemplates only two cases where the affidavit may be made by the attorney. The one, when the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. The one or the other of these facts are essential to the validity of a verification by an agent or attorney. See Hammerslaugh v. Farrior, 95 N. C. 135, 136.

Not Applicable to Ancillary Remedies.—The provisions of this section, requiring that verifications made by agents shall state why they are not made by the principals, and that the material facts are personally known to the agent, apply only to actions in which the responsive pleadings must also be under oath, and not to those ancillary remedies intended merely to secure the fruits of an ultimate recovery, in seeking which greater latitude is allowed. Bruff v. Stern, 81 N. C. 183.

The pleadings of a non-resident may be verified by an agent or attorney, if either one of the two requiremets of this section be present. Griffin v. Ashville Light Co., 111 N. C. 434, 436, 16 S. E. 423.

Verification by Corporate Officer Need Not State Knowledge, etc.—A verification to a complaint made by an officer of a corporation need not set forth "his knowledge or the grounds of his belief on the subject and the reason why it was made by the party." A corporation acts only through its officers and agents, and such verification is the verification of the corporation itself. Bank v. Hutchison, 87 N. C. 22. See generally the annotations to the succeeding section.

Instances of Good and Defective Verifications by Agents.—A verification to a complaint, made by an agent or attorney of a non-resident, to the effect that the claim sued on is in writing and in his possession for collection, giving facts in his personal knowledge and sources of other information, meets the substantial requirements of this section. Clark & Co. v. Maxwell, 87 N. C. 18.

A verification of a complaint made by an attorney of the

plaintiff, setting forth in the affidavit "that the facts set forth * * * as of his own knowledge are true, and those stated on information and belief he believes to be true * * * ; that the action is based on a written instrument for the payment of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of this section," does not comply with the requisites of the statute, and is defective in not stating the grounds of his belief and the reason why the party himself did not make the verification. Miller v. Curl, 162 N. C. 1, 77 S. E. 952.

In a proceeding to restore certain records destroyed by fire, an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N. C. 577.

§ 531. Verification by corporation or the state. —When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (Rev., s. 491; Code, s. 258; 1901, c. 610; C. C. P., s. 117; 1868-9, c. 159, s. 7.)

Editor's Note.—Formerly it was held that a verification by an "agent" of a corporation was inoperative, and that it must be made by a corporate officer. Banks v. Gay Mfg. Co., 108 N. C. 282, 12 S. E. 741; Phifer v. Traveler's Ins. Co., 123 N. C. 405, 406, 31 S. E. 715. But now, this section in terms provides for verification by "managing or local agent." To this latter effect, see Godwin v. Carolina Tel., etc., Co., 136 N. C. 258, 48 S. E. 636. And see § 483 and notes thereto.

The managing director of a foreign corporation may verify its pleadings. Best v. British, etc., Montg. Co., 131 N. C. 70, 42 S. E. 456.

Knowledge or Ground of Belief of Corporate Agent. — See Bank v. Hutchison, 87 N. C. 22, in the annotations to the preceding section.

§ 532. Verification before what officer. — Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the state, or justice of the peace, is competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes. (Rev., s. 492; Code, s. 258; 1891, c. 140; C. C. P., s. 117; 1868-9, c. 159, s. 7.)

Editor's Note.—Many decisions of the supreme court had formerly declared that the notaries public authorized to take affidavits for the verification of the pleadings were those of this, and not of some other state. Benedict, etc., Co. v. Hall, 76 N. C. 113; Hinton v. Life Ins. Co., 116 N. C. 22, 24, 21 S. E. 201. But this has now been changed by the express terms of this section which permit verification to be taken by notaries in as well as out of the state. See Hinton v. Life Ins. Co., supra.

And it seems that the phrase "in or out of the state" immediately succeeding the words "notary public," has reference not only to notaries, but to the other officers designated in the section. Thus in Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201, the verification was made before the clerk of the Hustings Court of Richmond, Va., and it was held valid, the court announcing the general rule that courts take judicial notice of the seal of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public.

§ 533. When verification omitted; use in criminal prosecutions.—The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it. (Rev., s. 493; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.)

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he is alleged to have embezzled, is erroneous in view of this section. State v. Ray, 206 N. C. 736, 175 S. E. 109.

Applied in State v. Dula, 204 N. C. 535, 168 S. E. 836.

§ 534. Items of account; bill of particulars.— It is not necessary for a party to set forth in a pleading the items of an account alleged in it; but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath or that of his agent or attorney if within the personal knowledge of the agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or judge may order a further account when the one delivered is defective, and may, in all cases, order a bill of particulars of the claim of either party to be furnished. (Rev., s. 494; Code, s. 259; C. C. P., s. 118.)

Cross References.—As to kindred provisions applicable to proceedings before justices of the peace, see section 1500, rule 10; as to proof of items of book accounts under sixty dollars, see section 1786, et seq. See also, generally 10 N. C. Enc. Dig. 207.

Purpose and Effect of Section. — This section, which, in case of a disregard of the demand, shuts out all proof of the items of the claim coming from any witness (and does not close the mouth of the party making it), is intended to meet the case of a complaint that does not set out the particulars, and confines the evidence at the trial to such as are set forth. Its aim is to supply an omission to give them in the pleadings, and hence, when furnished, they become substantially and in legal effect a part of the complaint itself. Wiggins v. Guthrie, 101 N. C. 661, 675, 7 S. E. 761.

Indefiniteness as to Dates, Locality, etc.—For indefiniteness of the complaint as to dates, etc., the defendant may ask for a bill of particulars. Lumber Co. v. Atlantic, etc., R. Co., 141 N. C. 171, 179, 53 S. E. 823. The same rule applies to indefiniteness of locality. Lucas v. Carolina Cent. R. Co., 121 N. C. 506, 509, 28 S. E. 265; Bryan v. Spivey, 106 N. C. 95, 11 S. E. 510; Fulps v. Mock, 108 N. C. 601, 13 S. E. 92.

Indefinite Statement of Cause.—An uncertain or an indefinite statement of a cause of action may be corrected by an application for a bill of particulars under this section. Bristol v. Carolina, etc., R. Co., 175 N. C. 509, 95 S. E. 850.

Time of Application for Bill of Particulars.—The application for a bill of particulars should always be made in time to avoid any delay being caused in the trial. If too long delayed, the court will refuse the application. State v. Brady, 107 N. C. 822, 827, 12 S. E. 325; Wiggins v. Guthrie, 101 N. C. 661, 7 S. E. 761.

Same—Before Trial.—The better practice, for a party who intends to preclude his adversary from proving an account on the ground that he has not complied with a demand or an order for the particulars of such account, is to apply for an order to that effect before the trial, so as to have the question settled before the trial. Wiggins v. Guthrie, 101 N. C. 661, 675, 7 S. E. 761.

Discretion of Court as to Bill of Particulars.—A motion for a bill of particulars under this section rests in the discretion of the presiding judge, and its grant or refusal is not reviewable. State v. Bryant, 111 N. C. 693, 16 S. E. 326. While this is true, yet such motions should be liberally allowed by trial courts when made in time to avoid any delay in the trial, unless clearly useless or merely for the purpose of annoyance. Townsend v. Williams, 117 N. C. 330, 337, 23 S. E. 461. See also Savage v. Currin, 207 N. C. 222, 176 S. E. 569.

The court has the discretionary power to allow an application for a bill of particulars, under this section, or to grant a motion to require a pleading to be made more definite and certain under section 537, or to strike out in its discretion orders previously made under the statutes, and no appeal will lie from such discretionary orders. Temple v. Western Union Tel. Co., 205 N. C. 441, 171 S. E. 630.

Defective Bill of Particulars—How Taken Advantage. — If the bill of particulars be defective the remedy is not by a demurrer thereto, for its sufficiency or insufficiency rests with the presiding judge, but by an application to the court to order a more definite bill. Townsend v. Williams, 117 N. C. 330, 337, 23 S. E. 461.

Demand for Account Where Bill of Particulars Filed. —

A demand for a copy of the account is not warranted where the plaintiff attaches a bill of particulars to his complaint, and has made it a part thereof by reference. Wiggins v. Guthrie, 101 N. C. 661, 7 S. E. 761.

Motion to Make Complaint More Definite. — Under the provision of this section and section 537, the Superior Court judge may, in his sound discretion, allow defendant's motion, after answer filed, to make the complaint more definite and certain as to the grounds upon which the relief is sought, especially when it affects book records and other written data easily accessible to the plaintiff. Elizabeth City Water, etc., Co. v. Elizabeth City, 188 N. C. 278, 124 S. E. 611.

Evidence Must Relate to Items in Bill.—When a bill of particulars is required or allowed the evidence at the trial must be confined to the specific items set forth in such bill. Savage v. Currin, 207 N. C. 222, 225, 176 S. E. 569.

Effect of Destruction of Records by Fire.—Where plaintiff's failure to comply with an order of the court, as provided by this section, to file an itemized statement of the account sued on is due to the fact that his records had been destroyed by fire, plaintiff is not precluded by his failure to comply with the order from establishing the debt by competent evidence. Savage v. Currin, 207 N. C. 222, 176 S. E. 569.

In Criminal Proceedings. — For the procedure in obtaining a bill of particulars in criminal proceedings, and its similarity to that in civil actions, see State v. Brady, 107 N. C. 822, 827, 12 S. E. 325. See also, section 4613.

Cited in Sentelle v. Board of Education, 198 N. C. 389, 391, 151 S. E. 877; State v. Suncrest Lumber Co., 199 N. C. 199, 201, 154 S. E. 72; Gruber v. Ewbanks, 199 N. C. 335, 338, 154 S. E. 318; Hood v. Love, 203 N. C. 583, 166 S. E. 743; Pemberton v. Greensboro, 205 N. C. 599, 172 S. E. 196.

§ 535. Pleadings construed liberally.—In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties. (Rev., s. 495; Code, s. 260; C. C. P., s. 119.)

Cross References. — For an exhaustive digest treatment of the general rules of the construction of pleadings, see 10 N. C. Enc. Dig. 163; 15 N. C. Enc. Dig. 208; for specific instances, see the different title in N. C. Enc. Digest.

Editor's Note. — Under the common-law rules of pleading, the requirement of accuracy and precision was often pushed to the extreme, and the rights of litigants were determined not on the merits of the controversy but on sheer technicalities such as using the verb "to have" in the past tense, instead of in the present. These ideas were entirely abrogated in this country by the Codes of Civil Procedure wherever adopted. In England, after a series of improvements, beginning in 1834, when the celebrated "Rules of Hilary Term" were adopted, the British Parliament has swept them out of the English law also and has introduced the substance of the American Reformed Civil Procedure.

The object of the procedure under the Code is to try cases on their merits and not on technicalities and refined distinctions of the old system of pleading, under which the victory depended too much upon the skill of the pleader, rather than upon the merits of the successful party's case. The present system is far more liberal, and seeks first of all things, to try each case upon its facts and without so much regard to form. Its main purpose is to avoid miscarriages of justice by mere slips in pleadings, and, therefore, it requires that pleadings be construed sensibly, "with a view to substantial justice between the parties," as prescribed in this section.

Common Law Rule of Construction Modified—Reasonable Construction. — The common law rule requiring every pleading to be construed against the pleader has been materially modified by this section. Sexton v. Farrington, 185 N. C. 339, 117 S. E. 172. Hence a pleading will be upheld if any part presents sufficient facts; or if such facts may be gathered from the whole pleading by a liberal and reasonable construction, the pleading will be sustained. Pridgen v. Pridgen, 190 N. C. 102, 105, 129 S. E. 419.

In Favor of Pleader.—The court is required on demurrer to construe the complaint liberally "with a view to substantial justice between the parties," under this section, and, contrary to the common-law rule, every reasonable intendment is to be made in favor of the pleader. Joyner v. Woodard, 201 N. C. 315, 317, 160 S. E. 288.

Construction in View of Merits. — The pleadings must be liberally construed, with a view to present the case upon its real merits. Lyon v. Atlantic, etc., R. Co., 165 N. C. 143, 81 S. E. 1.

Statement of Cause of Action. — If the facts alleged are sufficient for a cause of action when liberally construed, however inartificially the complaint may have been drawn, it will be sustained. Renn v. Seaboard Air Line R. Co., 170 N. C. 128, 86 S. E. 964; Conrad v. Board, 190 N. C. 389, 130 S. E. 53. Same rule applies to an answer. Pridgen v. Pridgen, 190 N. C. 102, 129 S. E. 419; Dixon v. Green, 178 N. C. 205, 100 S. E. 262. See also Farrell v. Thomas, etc., Co. 204 N. C. 631, 633, 169 S. E. 224.

But there should be at least a substantial accuracy in the averments of pleadings, and a compliance therein with the essential rules of pleading so that the real issues may be evolved from the controversy. New Bern Banking, etc., Co. v. Duffy, 156 N. C. 83, 72 S. E. 96.

Upon the inquiry as to whether the complaint states a cause of action, it will be liberally construed with every reasonable intendment therefrom in the plaintiff's favor, however uncertain, defective and redundant its allegations may be drawn. Enloe v. Ragle, 195 N. C. 38, 141 S. E. 477; Sewell v. Chas. Cole & Co., 194 N. C. 546, 140 S. E. 85, citing S. v. Bank, 193 N. C. 513, 527, 137 S. E. 587; Foy v. Stephens, 168 N. C. 438, 84 S. E. 758; S. v. Trust Co., 192 N. C. 246, 134 S. E. 656; Elam v. Barnes, 110 N. C. 73, 14 S. E. 621.

A complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. Fairbanks, etc., Co. v. Murdock Co., 207 N. C. 348, 351, 177 S. E. 122.

Same—Judged from Whole Pleading. — When it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained under the rule of liberal construction. Muse v. Ford Motor Co., 175 N. C. 466, 95 S. E. 900; Dixon v. Green, 178 N. C. 205, 100 S. E. 262.

Extent of Liberal Construction Rule. — The rule of liberal construction does not mean that a pleading shall be construed to say what it does not say, but that if it can be seen from its general scope that a party has a cause of action or defense he will not be deprived thereof merely because he has not stated it with technical accuracy. Chesson v. Lynch, 186 N. C. 625, 626, 120 S. E. 198. Nor does it mean that the court shall supply the necessary allegations; nor is it intended thereby to repeal those rules of pleading which are essential to produce certainty of issues. Turner v. McKee, 137 N. C. 251, 259, 49 S. E. 330. See also Fairbanks, etc., Co. v. Murdock Co., 207 N. C. 348, 351, 177 S. E. 122.

Errors in Language and Use of Words. — A plea that a cause of action did not "arise" within the time prescribed by the statute for the commencement of an action, while not strictly accurate, will be construed under the liberal system of pleading in force under this section, to mean that it did not "accrue" within that time. Stubbs v. Motz, 113 N. C. 458, 18 S. E. 387.

Conflicts of Laws. — The rules of construction of the pleadings are governed by the lex fori, i. e. by the law of the state in which the cause is being litigated. McNinch v. American Trust Co., 183 N. C. 33, 110 S. E. 663.

Variances. — Under the liberal principle which this section inculcates, a variance between the pleadings and proof will not be regarded as material unless it misleads the complaining party to his prejudice in maintaining his action upon its merits. Renn v. Seaboard Air Line R. Co., 170 N. C. 128, 86 S. E. 964; Muse v. Ford Motor Co., 175 N. C. 466, 95 S. E. 900. And where the variance is not material the judge may direct the fact to be found according to the evidence. Dorsey v. Corbett, 190 N. C. 783, 130 S. E. 842.

A demurrer to the evidence will not be sustained if it is sufficient under a liberal construction to sustain the plaintiff's action. State v. National Bank, 193 N. C. 524, 137 S. E. 593.

Cited in Jeffreys v. Hocutt, 195 N. C. 339, 344, 142 S. E. 226; Virginia-Carolina, etc., Bank v. First, etc., Bank, 197 N. C. 526, 531, 150 S. E. 34; Lee v. Caveness Produce Co., 197 N. C. 714, 150 S. E. 363; Shemwell v. Lethco, 198 N. C. 346, 348, 151 S. E. 729; Brewer v. Brewer, 198 N. C. 669, 153 S. E. 163; Mack Truck Corp. v. Wachovia Bank & Trust Co., 199 N. C. 203, 204, 154 S. E. 42; Smithwick

v. Colonial Pine Co., 199 N. C. 431, 154 S. E. 917; Cole v. Wagner, 197 N. C. 692, 150 S. E. 339.

§ 536. Time for pleading enlarged. — The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge the time. (Rev., s. 512; Code, s. 274; C. C. P., s. 133.)

Cross References. — As to provisions relating to amendments, see sections 545-553; as to power of judge to set aside judgments for mistake, surprise or excusable neglect, see section 600. As to extention of time for filing the pleadings, see generally 10 N. C. Enc. Dig. 169, 15 N. C. Enc. Dig. 210. See also note under sec. 505.

Editor's Note. — It will be noticed that this section confers upon the judge two supplementary powers: (a) To allow an answer to be filed **after** the time limited for their filing, which presupposes that the power is to be exercised after the expiration of such time; (b) a power to **extend** the time of filing the answer or reply, which presupposes that the power is to be exercised before the expiration of the time limited for the filing of the answer of reply.

While it is true the line of cases cited under this section, refer more particularly to filing answer, no sound reason occurs why the same power does not exist for enlarging the time for filing complaint. Smith v. New York Life Ins. Co., 208 N. C. 99, 102, 179 S. E. 457.

Inherent Power to Extend Time. — Even independent of this section, and a fortiori under this section, the superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interferred with. Gilchrist v. Kitchen, 86 N. C. 20.

Review of Discretion. — It is generally held that whenever the judge is vested with a discretion, his doing or refusal to do the act in question is not reviewable upon appeal. United Am., etc., Baptist Church v. United Am., etc., Baptist Church, 158 N. C. 564, 74 S. E. 14; Wilmington v. McDonald, 133 N. C. 548, 45 S. E. 864; Beck v. Bellamy, 93 N. C. 129; Best v. British, etc., Mortg. Co., 131 N. C. 70, 42 S. E. 456. This discretion however is not an arbitrary but a legal discretion. Hudgins v. White, 65 N. C. 393.

Ample Power in Questions of Pleading and Practice. — In Austin v. Clarke, 70 N. C. 458, 459, the court said that this section invests the Court with ample powers, in all questions of practice and procedure, to be exercised at the discretion of the judge presiding, who is presumed, to know best what orders and what indulgence will promote the ends of justice, in each particular case. With the exercise of discretion, we cannot interfere, and it is not the subject of appeal.

Extension Not to Be Encouraged. — After the defendant has failed to file a verified answer, the court may in its discretion extend the time for filing it, though such extension of time is a practice not to be encouraged. Griffin v, Asheville Light Co., 111 N. C. 434, 438, 16 S. E. 423.

Extension beyond Next Term. — The trial court cannot extend the time for pleading beyond the next term of court, unless by consent of the parties. Sheek v. Sain, 127 N. C. 266, 37 S. E. 334.

Extension after Supreme Court's Decision. — The trial court cannot permit an answer to be filed after the Supreme Court has decided that judgment should have been entered by default for the plaintiff. Cook v. American Exch. Bank, 130 N. C. 183, 41 S. E. 67.

Enlarging Time for Filing Answer.—The judge of the Superior Court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. Aldridge v. Greensboro Fire Ins. Co., 194 S. E. 683, 140 S. E. 706. See also Vann v. Coleman, 206 N. C. 451, 174 S. E. 301.

Same—Setting Aside Default.—On an appeal from an order of the clerk of the superior court denying motion to set aside a default judgment the judge of such court has jurisdiction under this and § 637 to set aside the judgment and enlarge the time for filing the defendant's answer. Acme Mfg. Co. v. Kornegay, 195 N. C. 373, 142 S. E. 224, citing Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329.

Upon a proper finding of a meritorious defense and excusable neglect, the judge of the Superior Court, on appeal from the clerk, has authority under § 600 to set aside a judgment rendered by the clerk, against the defendant by default of an answer, to which exception has been duly entered before the clerk, and to permit an answer to be filed under this section. Dunn v. Jones, 195 N. C. 354, 142 S. E. 320.

At the Time of Trial. — It is in the discretion of the court to allow filing of the answer or demurrer even where the case is reached for trial. Morgan v. Harris, 141 N. C. 358, 360, 54 S. E. 381.

Allowance to File Answer after Five Years. — In Mallard v. Patterson, 108 N. C. 255, 13 S. E. 93, the defendant filed an unverified answer, the complaint in the action having been verified, and the defendant, after a lapse of five years, asked to be allowed to file a new answer, properly verified, and the court allowed him the leave, though he was not entitled to it as a matter of right. The Supreme Court approved of the order, and declared that the exercise of the discretion by the judge was not reviewable. Best v. British, etc., Mortg. Co., 131 N. C. 70, 42 S. E. 456.

Irrespective of Laches. — Even if the delay in filing the pleading is due to the pleaders laches, it is in the discretion of the presiding judge to permit it to be filed. McMillan v. Baxley, 112 N. C. 578, 583, 16 S. E. 845.

Filing Defense Bond. — A trial judge may at any time extend the time for filing a defense bond. Timber Co. v. Butler, 134 N. C. 50, 45 S. E. 956; Dunn v. Marks, 141 N. C. 232, 53 S. E. 845.

Delay in Motion for Judgment May Be Considered. — In passing on a motion to file or verify an answer after the time limit, the court may in its discretion consider the delay of the plaintiff in moving for judgment. Horney v. Mills, 189 N. C. 724, 128 S. E. 324.

Answer to Amended Complaint. — The trial judge has the discretionary power conferred on him by this section to allow the defendant to file an answer to the amended complaint during the term, and his action will not be reviewed on appeal when an abuse of this discretion has not been shown. Brown v. Hillsboro, 185 N. C. 368, 117 S. E. 41.

Effect of Section 509. — Section 509 prohibits the clerk of the court only from extending the time for defendant to answer, and does not impair the broad powers conferred by this section upon the judge. McNair v. Yarboro, 186 N. C. 111, 118 S. E. 913.

Effect of Section 524 on Power of Court. — The restrictions in section 524 do not impair the discretion of the court in allowing an answer to be filed after the time limited. Roberts v. Merritt, 189 N. C. 194, 126 S. E. 513.

§§ **524 and 2593(a)** have reference to the clerk, and were not intended to impair the broad powers conferred on the judge under this section. Aldridge v. Greensboro Fire Ins. Co., 194 N. C. 683, 140 S. E. 706.

Applied in Bailey v. Commissioners, 120 N. C. 388, 27 S. E. 28.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 410, 151 S. E. 871.

§ 537. Irrelevant, redundant, indefinite pleadings.—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. (Rev., s. 496; Code, s. 261; C. C. P., s. 120.)

Cross References.—For more particular phases of motions to strike out or make the pleadings more certain, see 10 N. C. Enc. Dig. 213, et seq.; 15 Enc. Dig. 223, et seq.

As to power of Superior Court to determine on appeal order of clerk refusing motion to strike out answer as frivolous see § 510 and the note thereto.

Editor's Note.—The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action are stated in the complaint or can be inferred therefrom by reasonable intendment, though the allegations are imperfect, incomplete and defective, and such insufficiency pertains rather to the form than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial but by a motion, before the trial, to make the averments more definite by amendment. To this effect see, Moore v. Edmiston, 70 N. C. 510; Stokes v. Taylor, 104 N. C. 394, 397, 10 S. E. 566; Nye v. Williams, 190 N. C. 129, 129 S. E. 193; Fulps v. Mock, 108 N. C. 601, 605, 13 S. E. 92. Blackmore v. Winders, 144 N. C. 212, 56 S.

E. 874; Bristol v. Carolina, etc., R. Co., 175 N. C. 509, 95 S. E. 850.

Power to Strike.—Under this section or under section 633, the superior court has power to strike out an answer whenever it appears to the satisfaction of the court that it is irrelevant or frivolous. Commissioners v. Piercy, 72 N. C. 181; Dail & Bro. v. Harper, 83 N. C. 5, 7.

The Test of Right to Have Allegation Stricken.—Whether evidence in support of an allegation would be competent upon the trial does not determine plaintiff's right to have it stricken out upon motion under this section, the test being whether the allegation is of a probative or of an ultimate fact. Revis v. Asheville, 207 N. C. 237, 176 S. E. 738.

The allegation as to a city carrying accident and liability insurance was an allegation of an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out under this section. Id.

Equitable matters in defense relevant only upon the motion to confirm a foreclosupre sale are properly stricken from the answer upon motion, under this section, since plaintiff seeks a legal remedy only and invokes no equitable jurisdiction of the court, and the foreclosure sale cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure. First Carolina's Joint-Stock Land Bank v. Stewart, 208 N. C. 139, 179 S. E. 463.

Power to Make Explicit Ex Mero Motu.—The court has a right ex mero motu to direct that the pleadings shall be more explicit. Martin v. Goode, 111 N. C. 288, 16 S. E. 232; Allen v. Carolina Cent. R. Co., 120 N. C. 548, 550, 27 S. E. 76. Or it may direct the same upon the application of a party interested. Buie v. Brown, 104 N. C. 335, 336, 337, 10 S. E. 465.

Manner of Correction May Not Be Directed.—While the trial judge is authorized in the exercise of his discretion to order that a pleading be made more definite under the provisions of this section, he may not direct the manner in which this may be done. Hensley v. McDowell Furniture Co., 164 N. C. 148, 80 S. E. 154.

Argumentative, Hypothetical or Alternative Pleading. — The proper method of taking advantage of an argumentative, hypothetical or an alternative pleading is not by demurrer but by a motion under this section to make more explicit. Daniels v. Baxter, 120 N. C. 14, 18, 26 S. E. 635.

Discretion of Court.—A motion to make a pleading more definite and certain is addressed to the discretion of the court. Womack v. Carter, 160 N. C. 286, 75 S. E. 1102. See also, Allen v. Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76; Smith v. Summerfield, 108 N. C. 284, 12 S. E. 997; Conley v. Richmond, etc., R. Co., 109 N. C. 692, 14 S. E. 303. See also Temple v. Western Union Tel. Co., 205 N. C. 441, 171 S. E. 630.

If the pleader thinks that it is impossible to make the allegations of his pleading more definite, this fact must be addressed to the judge who has a large discretion in such matters, and if it appears to him that such was the case, he will disallow a motion to make such pleading more definite and certain. Bristol v. Carolina, etc., R. Co., 175 N. C. 509, 95 S. E. 850.

Waiver or Cure of Defects in Absence of Motion.—If the defect of uncertainty or indefiniteness is not raised by a motion to make more certain, and an answer is filed, such defect will be deemed as waived or cured. Ricks v. Brooks, 179 N. C. 204, 102 S. E. 207.

The defect in the statement of locality may be raised either by a motion for a bill of particulars or a motion under this section to make the pleading more specific. Lucas v. Carolina Cent. R. Co., 121 N. C. 506, 509, 28 S. E. 265.

Scandalous and Impertinent Matter.—Where "impertinent" matter is introduced into the pleadings, it may be stricken out at the expense of the party introducing it. Powell v. Cobb, 56 N. C. 1.

Application to Justice's Court.—The provision of this section, as to motions to make pleadings more certain, applies to justices' courts as well as to the superior courts. Wilson v. Batchelor, 182 N. C. 92, 108 S. E. 355.

Time of Motion.—Under this section the motion must be made in apt time before answer or demurrer, and if not made within time the granting of the motion rests within the discretion of the judge. Hensley v. McDowell Furniture Co., 164 N. C. 148, 80 S. E. 154.

Motion to strike matter from an answer comes too late, when filed after the jury is impaneled. Roller v. McKinney, 159 N. C. 319, 74 S. E. 966.

A motion to strike out alleged improper matter from a complaint will not be considered after an answer to demurrer is filed, or after an order for time to plead. Lee v. Thornton, 171 N. C. 209, 88 S. E. 232.

It was held not an abuse of discretion for the trial court to order the complaint made more definite and certain, although the complaint was filed at October term, 1916, and the motion was made at the December term, 1917, immediately before trial. Bristol v. Carolina, etc., R. Co., 175 N. C. 509, 95 S. E. 850.

Where a motion is made on the eve of the trial, it should be granted with great caution, if the moving party has been very dilatory. Bristol v. Carolina, etc., R. Co., 175 N. C. 509, 95 S. E. 850.

Review of Refusal of Motion to Strike.—The refusal of a motion to strike out certain portions of a bill of particulars as irrelevant and immaterial, under this section, will be affirmed where it appears that defendant was not prejudiced thereby, the matter lending itself to an easier determination by correct rulings on the admissibility of evidence offered in support of such allegations. Pemberton v. Greensboro, 205 N. C. 599, 172 S. E. 196.

Applied in McCarley v. Council, 205 N. C. 370, 375, 171 S. E. 323.

Cited in Cole v. Wagner, 197 N. C. 692, 150 S. E. 339; Tar Heel Hosiery Mill v. Durham Hosiery Mills, 198 N. C. 596, 152 S. E. 794; Ellis v. Ellis, 198 N. C. 767, 153 S. E. 449; Hutchins v. Mangum, 198 N. C. 774, 153 S. E. 409; Yonge v. New York Life Ins. Co., 199 N. C. 16, 18, 153 S. E. 630; Hood v. Love, 203 N. C. 583, 166 S. E. 743.

§ 538. Pleading judgments. — In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. If this allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. (Rev., s. 497; Code, s. 262; C. C. P., s. 121.)

References.—As to pleading of judgments as res adjudicata, see generally, 8 N. C. Enc. Dig. 289 et seq.; 14 N. C. Enc. Dig. 587.

§ 539. How conditions precedent pleaded.— In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. If this allegation is controverted, the party pleading must establish, on the trial, the facts showing performance. (Rev., s. 498; Code, s. 263; C. C. P., s. 122.)

In Actions upon Insurance Policy.—In Britt v. Mutual Ben. Life Ins. Co., 105 N. C. 175, 178, 10 S. E. 896, it was held under this section that, in an action upon an insurance policy, the truth of the representations in the application as conditions precedent may be averred generally by stating that the party duly performed all the conditions on his part.

§ 540. How instrument for payment of money pleaded.—In an action or defense founded upon an instrument for the payment of money only, it is sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims. (Rev., s. 499; Code, s. 263; C. C. P., s. 122.)

§ 541. How private statutes pleaded. — In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it. (Rev., s. 500; Code, s. 264; C. C. P., s. 123.)

Public Law Published in Private Laws, and Vice Versa.— Notwithstanding the fact that a public statute is erroneously published in the private laws, the court will take judicial notice thereof without the necessity of its being pleaded. Hancock v. Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679. And conversed, the fact that a private statute is published among the public statutes will not make it a public statute so as to do away with the necessity of pleading and proving it. Durham v. Richmond, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1.

Private Statute with Public Provisions.—A private statute does not assume the character of a public statute be-

cause of the fact that it contains public statutory provisions. Upon this principle the charter of a corporation which contains public statutory provisions is not a public statute. Carrow v. Washington Toll-Bridge Co., 61 N. C. 118; Durham v. Richmond, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1. (A fortiori where it does not contain such provisions) and must be specifically pleaded. Corporation Comm. v. Seaboard Air Line System, 127 N. C. 283, 37 S. E. 266.

Nature of Statute is a Question of Law. — Whether a statute is public or private is a question of law which the courts must determine in the absence of a statutory enactment declaring and settling its nature. Humphries v. Baxter, 28 N. C. 437; State v. Wallace, 94 N. C. 827.

Qualification of the Rule in Supreme Court.—While the courts will not as a general rule, take judicial notice of a private statute or its terms and will require that it shall be specially pleaded in the manner required by this section, this rule will not be allowed to prevail when a private statute relating to and effectually settling the matter in controversy has, after due notice, been formally brought to the attention of the Supreme Court; for then only an abstract proposition would be left for the Court's determination, which will not be entertained. Reid v. Norfolk Southern R. Co., 162 N. C. 355, 78 S. E. 306.

Proof of Private Statutes. — Private statutes must not only be pleaded as provided by this section, but also proved when they become necessary as evidence. Durham v. Richmond, etc., R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1.

§ 542. Pleadings in libel and slander.—In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. (Rev., ss. 501-2; Code, ss. 265-6; C. C. P., ss. 124-5.)

References.—For provisions on libel and slander in general, see section 2429 et seq.; for a full treatment of the pleadings in actions for slander and libel, see 8 N. C. Enc. Dig. 675 et seq.

For an article entitled "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N. C. Law Rev. 24.

Plea Prerequisite to Evidence of Truth.—A plea of justification or of mitigation is a prerequisite to the allowance of evidence of the truth of the charge. Without it such evidence is incompetent. Burris v. Bush, 170 N. C. 394, 87 S. E. 97; Upchurch v. Robertson, 127 N. C. 127, 128, 37 S. E. 157; Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803.

Where the truth of words alleged to be slanderous is not specifically pleaded, evidence thereof was held properly rejected. Elmore v. Atlantic Coast Line R. Co., 189 N. C. 658, 127 S. E. 710.

Sufficient Averment.—It is material only to aver in the complaint that the slanderous words were spoken of the plaintiff, the facts which point to them and convey to the hearer the sense in which they are used, are matters of proof before the jury. Wozelka v. Hettrick, 93 N. C. 10.

Sufficient Publication.—Under this section where the complaint in an action for libel alleges that the defendant sent the plaintiff an open post card through the mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient. McKeel v. Latham, 202 N. C. 318, 162 S. E. 747.

Evidence of Justification under General Issue.—When the defendant pleads the general issue, he may not introduce evidence in justification or mitigation. Upchurch v. Robertson, 127 N. C. 127, 37 S. E. 157.

§ 543. Allegations not denied, deemed true.—Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the action. taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires. (Rev., s. 503; Code, s. 268; C. C. P., s. 127.)

References.—For the application of the principles of admissions by failure to deny, to particular circumstances, see 10 N. C. Enc. Dig. 174; 15 N. C. Enc. Dig. 174; 15 N. C. Enc. Dig. 211.

Editor's Note.—The rule established by this section disposed of the necessity of submitting to the jury matters which the law deems as admitted in the absence of denial.

New Matter Not Amounting to Counterclaimed.—If the new matter in the answer does not amount to a counterclaim such matter will be deemed as denied by the operation of law. Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144; McQueen v. People's Nat. Bank, 111 N. C. 509, 513, 16 S. E. 270. Thus in an action for the purchase price of land sold, the allegation of defective title is a matter of defense, and not a counterclaim, and hence the burden is on defendant, even though not specifically denied by the operation of law. Bank v. Loughran, 122 N. C. 668, 674, 30 S. E. 17.

The allegations of the complaint, and every material allegation of new matter constituting a counterclaim in an answer, directly admitted or not denied, have the effect of a finding by a jury. Bonham v. Craig, 80 N. C. 224; Helms v. Green, 105 N. C. 251, 262, 11 S. E. 470.

As a corollary to this general principle it follows that new matter in the answer not amounting to counterclaim disposes of the necessity of a replication. McLamb v. McPhail, 126 N. C. 218, 221, 35 S. E. 426; Wilson v. Brown, 134 N. C. 400, 408, 46 S. E. 762; Smith v. Bruton, 137 N. C. 79, 80, 49 S. E. 64; Askew v. Koonce, 118 N. C. 526, 24 S. E. 218.

Admission as Basis for Referee's Finding.—Allegations in a complaint, not denied in the answer, are a sufficient basis for the referee's findings of fact; but allegations not so admitted and not sustained by proof, are not evidence, unless put in evidence. Stephenson v. Felton, 106 N. C. 114, 11 S. E. 255.

Application in Divorce Actions.—Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. McQueen v. McQueen ,82 N. C. 471. The admissions of the parties are not competent evidence, as in other actions, of the truth of the material allegations of the pleadings. Perkins v. Perkins, 88 N. C. 41. But when a defendant demurs to a petition for divorce the court here must consider the demurrer as a concession, not only that the facts alleged are true, but that they can and will be proved, so as to secure the verdict of the jury. Steele v. Steele, 104 N. C. 631, 634, 10 S. E. 707.

Admissions as Evidence in other Actions.—Admissions implied under this section by failure to controvert allegations of the opposite pleading constitute evidence against the party making them in **all** actions and proceedings against him, wherein they may be pertinent and competent, just as are admissions and declarations of a party made adverse to his right on any occasion. Their weight depends always upon whether or not they were made with deliberation or incautiously, and they are subject to proper explanation. Mason v. McCormick, 85 N. C. 226; Adams v. Utley, 87 N. C. 356; Guy v. Manuel, 89 N. C. 83; Brooks v. Brooks, 90 N. C. 142; White v. Beaman, 96 N. C. 122, 1 S. E. 789; Smith v. Nimocks, 94 N. C. 243. And the fact that the former action was decided in favor of the party admitting can not affect his admissions as evidence in the subsequent action. Grant v. Gooch, 105 N. C. 278, 282, 11 S. E. 571. See also Lowder v. Smith, 201 N. C. 642, 648, 161 S. E. 223.

Cited in Brewer v. Brewer, 198 N. C. 669, 671, 153 S. E. 163.

§ 544. Pleading lost, copy used.—If an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original. (Rev., s. 504; Code, s. 600; C. C. P., s. 357.)

Before Cause Argued in Supreme Court.—The lost pleading or paper should always be supplied by a copy, before

the cause is argued in the supreme court. Blackmore v. Winders, 144 N. C. 212, 219, 56 S. E. 874.

Order of Substitution Not Reviewable. — Judgments of trial courts permitting lost pleadings to be substituted, are not reviewable. Bray v. Creekmore, 109 N. C. 49, 13 S. E. 723.

Art. 18. Amendments

§ 545. Amendment as of course.—Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it is made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appears to the court or judge that the amendment was made for that purpose, it may be stricken out, and such terms imposed as seem just to the court or judge. (Rev., s. 505; Code, s. 272; C. C. P., s. 131.)

Cross Reference.—As to allowing an amendment to make the defense plea more specific, see § 547 and the note thereto. See 10 N. C. Enc. Dig. 189.

Editor's Note.—The resultant frustration of justice from the absurb technicalities of the common law system of pleading and practice aroused from the very early days of its history a liberal movement towards the emancipation of the rules of procedure from needless and cumbersome formalities. The movement originated with the gradual development in England of courts of equity which "delight to disregard from and look into the substance," and was supplemented by the statute of Jeofails which provided for the cure and disregard of formal defects.

In this country this liberal tendency expressed itself in the form of express enactments towards the adaptation of the rules of pleading and procedure, for the protection of substantive rights and for a speedy and effective administration of justice.

In accord with what one may justly call the "renaissance" of the procedural law, the legislative policy of this state has been so prone to respond to the calls of a more rational administration of justice independent of technicalities and form, that in this state it may now be well said that "anything may be amended at any time," with the qualifications to be hereafter noted.

These statutory provisions authorizing amendments may generally be classified under two principal categories: (A) Provisions authorizing amendments as a matter of right, and (B) Provisions authorizing amendments within the discretion of the court to subserve the ends of justice.

The former category (A) may be further analyzed by dividing it into (a) amendments made before the time for answering the pleading has expired, and (b) amendments after such time has expired. In the former case there is no limitation or condition upon the right to amend, except the condition that it must be exercised without prejudice to the proceedings already had; in the latter case the right to amend as a matter of course does not exist, see Goodwin v. Caraleigh, etc., Fertilizer Works, 121 N. C. 91, 28 S. E. 192; Kron v. Smith, 96 N. C. 389, 2 S. E. 532; Commissioners v. Blair, 76 N. C. 136. From the doctrine of these cases the inference is deduced that the phrase "or it can be so amended at any time" appearing in the first part of the section, has no reference to the right to amend as a matter of course, and that it simply means that the pleading may be amended after the period for answering it has expired, "without costs and without prejudice to the proceedings already had."

The scope and the extent of the latter category (B) is entirely dependent upon the discretion of the court, which is subject only to the usual limitation upon the exercise of discretionary powers, viz., that it must not be abused.

Time of Amendment as a Matter of Right.—Where the motion to amend is made after the time for answering has expired, and after an answer has been filed, it will be too late to amend as a matter of course; after such time the privilege of amending the pleadings is at the discretion of the court which is not reviewable. Commissioners v. Blair, 76 N. C. 136; Kron v. Smith, 96 N. C. 389; 2 S. E. 532; Goodwin v. Caraleigh, etc., Fertilizer Works, 121 N. C. 91, 28 S. E. 192.

Practice of Allowing Amendments at All Times Is Becoming Liberal.—Under this and subsequent sections, and under the liberal practice as set out in § 535, the court below, in its sound discretion, in furtherance of justice, can amend the pleading, before and after judgment, to conform to the facts proved, keeping in mind always that an amendment cannot change substantially the nature of the action or defense, without consent. The system is broadening and expanding more and more, with the view at all times that a trial should be had on the merits and to prevent injustice. Lipe v. Citizens' Bank, etc., Co., 206 N. C. 24, 29, 173 S. E. 316.

Form and Notice of Motion to Amend.—After the time for answering has expired it has been the uniform practice to apply to the court for permission to amend. This application may be oral or written, but notice of such motion is required unless made during a term of court at which the action stands for trial. Carolina Discount Corp. v. Butler, 200 N. C. 709, 712, 158 S. E. 249.

§ 546. Pleading over after demurrer.—After the decision on a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. (Rev., s. 506; Code, s. 272; C. C. P., s. 131; 1871-2, c. 173.)

Cross References.—See sections, 510, 599 as to frivolous and sham defenses, 513 as to amendments and hearing, and 515 as to procedure after judgment on demurrer. For a digest treatment, see also, 10 N. C. Enc. Dig. 189 et seq.

Formerly Section Discretionary—Now Mandatory.—Prior to the act of 1872, it was discretionary with the judge to permit any amendment the provision being: the judge "may in his discretion" etc. Matthews v. Copeland, 80 N. C. 30, 33. But now the requirement is mandatory under proper circumstances. See Moore v. Hobbs, 77 N. C. 65 66.

Application to Contracts Prior to C. C. P.—This section, which provides that after the decision of a demurrer interposed in good faith the judge shall allow the party to plead over, has no application to actions on contracts entered into prior to the ratification of the C. C. P. Matthews v. Copeland, 80 N. C. 30.

Not Applicable to Plaintiff.—This section has been often construed to give to the defendant, after a demurrer interposed by him in good faith has been overruled, the right to answer over, but it has never been extended to the plaintiff as a right to amend his complaint. Barnes v. Crawford, 115 N. C. 76, 79, 20 S. E. 386.

Request at the Same Term.—Where a demurrer, being interposed in good faith, is overruled, the defendant is entitled to plead over, if the request to do so is made at that term, and he may also appeal from the overruling of the demurrer. Perry v. Board, 130 N. C. 558, 41 S. E. 787; Gore v. Davis, 124 N. C. 234, 32 S. E. 554.

Demurrer Must Have Been Interposed in Good Faith. — The right to put in an answer after the overruling of a demurrer, as created by this section, is subject to the qualification that it shall appear that the demurrer was interposed in good faith. Bronson v. Wilmington N. C. Life Ins. Co., 85 N. C. 411, 415.

Hence where the demurrer is frivolous, the plaintiff is entitled to judgment, unless the court in the exercise of a sound discretion permits the defendant to answer over. Morgan v. Harris, 141 N. C. 358, 360, 54 S. E. 381.

Time of Answering.—Upon the overruling of the demurrer the defendant is entitled under this section to answer, but he must answer at that term, and the allowance of further time is in the discretion of the court. Gore v. Davis, 124 N. C. 234, 32 S. E. 554.

Leave to Amend Must Be Obtained.—Where a demurrer is overruled the party may not as a matter of course answer or reply; but the case is open for judgment, as if the party had made no defense, unless he obtains leave to amend his pleadings by putting in an answer or reply as authorized by this section. Ranson v. McClees, 64 N. C. 17, 21.

Cited in Morris v. Cleve, 194 N. C. 202, 139 S. E. 290.

§ 547. Amendments in discretion of courts.—The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming

the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto. (Rev., ss. 507, 512; Code, ss. 273, 274; C. C. P., ss. 132, 133.)

I. In General.
II. Discretionary Powers of the Court.
III. Introducing New Cause of Action, Defense or Relief.
IV. Conforming Pleadings to Facts Found.
V. Amendments of Process.
VI. Amendments as to Parties.
VII. Amendments Before Justices of the Peace..
VIII. Specific Instances.

Cross References.

For an exhaustive digest treatment of the various phases of amendments, see 10 N. C. Enc. Dig. 189 et seq. As to power of judge to vacate or set aside a judgment, see section 600.

I. IN GENERAL.

See notes under §§ 513, 515.

Amplest Powers of Amendment.—In civil actions, the amplest powers of amendment are given to the courts to amend any process, pleading or proceeding in such actions either in form or substance for the furtherance of justice, on such terms as shall be just, at any time before or after judgment rendered therein. State v. Vaughan, 91 N. C. 532, 535.

Power to Amend Independent of Statute.—Even independently of the Code, the superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with, and a fortiori under the liberal provisions of the Code which have uniformly been beneficially construed by the Supreme Court. Gilchrist v. Kitchen, 86 N. C. 20; Cantwell v. Herring, 127 N. C. 81, 82, 37 S. E. 140.

Inherent Power of Amendment.—The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N. C. 20.

To the same effect in Gilchrist v. Kitchen, 86 N. C., 20, the Court says: "But, independent of the Code, we hold that the right to amend pleadings in the cause and allow answers or other pleadings to be filed at any time, is an inherent power of the superior courts which they may exercise at their discretion. The judge presiding is presumed to know best what orders and what indulgence as to filing of pleadings will promote the ends of justice as they arise in each particular case, and with the exercise of this discretion this Court cannot interfere because it is not the subject of appeal." Autin v. Clarke, 70 N. C. 458; Woodcock v. Merrimon, 122 N. C. 731, 735, 30 S. E. 321.

It has been held that the allowance of amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866.

Liberal Allowance on Proper Terms—Exception.—Amendments to pleadings which further justice, speed the trial of controversies or prevent unnecessary circuity of action and unnecessary expense, should be liberally allowed on proper terms, Commissioners v. Blair, 76 N. C. 136, except when the effect of the amendment is to allege substantially a new cause of action. Dosenbacher v. Martin, 170 N. C. 236, 86 S. E. 785. See post, this note, "Introducing New Cause of Action or Defense", III.

Allowance in the Liberal Spirit of the Code.—The whole scope and design of the new Code is to discountenance all dilatory pleas, and to afford the parties a cheap and speedy trial upon the merits of their matter in controversy. To effect this end it is the duty of all the courts to allow amendments in the liberal spirit clearly indicated in the Code. Wilson v. Moore, 72 N. C. 558, 562.

"Anything May Be Amended at Any Time."—The scale of amendments is so liberal that it may well be said that "anything may be amended at any time." Garrett v. Trotter, 65 N. C. 430.

Power to Make Any Conceivable Amendment.—In Moore v. Edmiston, 70 N. C. 510, 619, the court speaking of this section says: "By a sweeping curative supplement to this most curative system of pleading, this section confers upon the court the power, both before and after judgment, to make almost any conceivable amendment so as to conform the pleadings to the facts proved."

Powers to be Exercised Freely.—While the court cannot, without the consent of the parties, so amend, change or modify the pleadings in a pending action so as to make it substantially a new one, Merrill v. Merrill, 92 N. C. 657; McNair v. Board, 93 N. C. 364, (see post "Introducing new cause of action") its general powers, and especially those expressly conferred by this and the following sections, to allow amendments of the pleadings "in furtherance of justice," are broad and comprehensive, and in all proper cases should be exercised freely by the court, having due regard to fairness and the rights of the parties. Ely v. Early, 94 N. C. 1, 4.

Object to Try Cases upon Their Merits.—It is the policy of our Code system to be liberal in allowing amendments of process, pleadings, and proceedings, so that causes may be tried upon their merits, and to prevent a failure of justice for reasons which may be technical or frivolous, not affecting the substantial rights of the parties. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

This provision and numerous others of the C. C. P. show that its purpose is to prevent actions from being defeated on grounds that do not affect the merits of the controversy, whenever it can be done by amending such actions. The pervading idea being to settle controversies by one action, and thereby prevent the loss of the labor and money expended in that action, and the necessity for incurring like labor and expense in a second. Bullard v. Johnson, 65 N. C. 436, 438.

The purpose and scope of the new system is to facilitate the trial and disposition of causes upon their merits; and to this end, when necessary, the process and pleadings are liberally reformed by amendments which do not substantially change the claim or defense. Cheatham v. Crews, 81 N. C. 343, 345.

Time of Amendment.—Formerly this section applied only to amendments made before or at the trial, and not at a time subsequent. Askew v. Capehart, 79 N. C. 17, 19. But now it in terms provides for amendments after judgment as well as before. Ed. Note.

There is no force in the argument, that an amendment which removes the objections must be made before they are taken, and can not be made afterwards, since it is precisely for such a purpose the power is conferred to be exercised in furthering the ends of justice, at the discretion of the judge, in order that such as are trivial, and do not affect the substantial and understood matters in controversy, may be removed. State v. Giles, 103 N. C. 391, 393, 9 S. E. 433.

Amendment after Judgment.—If necessary, the pleadings may be reformed even after judgment to conform to the facts proved. Hendon v. North Carolina R. Co., 127 N. C. 110, 113, 37 S. E. 155.

Same—The Answer.—The court may in its discretion even after judgment allow an answer to be amended to conform to the proof. Waters v. Waters, 125 N. C. 590, 593, 34 S. E. 548.

Amendment after Verdict.—The court has power to allow an amendment after verdict, so as to supply the omission of an averment in the pleading. Pearce v. Mason, 78 N. C. 37; Penny v. Smith, 61 N. C. 35; Roberson v. Hodges, 105 N. C. 49, 11 S. E. 263.

After Reversal.—Under this section upon the receipt of a certificate of reversal of judgment overruling a demurrer, the lower court may allow an amendment of the summons and complaint in accordance with the opinion. Commissioner of Banks v. Harvey, 202 N. C. 380, 162 S. E. 894.

Amendment after Order and Confirmation of Sale.—In Stafford v. Harris, 72 N. C. 198, the court held that the Probate Court (now the clerk of the superior court) had no authority, after order of sale and confirmation of sale and order to make title, to entertain a motion in the cause on the part of the purchaser to so amend the pleadings as to include another tract of land not mentioned, and that the judge would have no power to amend the petition upon parol evidence that a tract of land had been omitted therefrom through mistake.

Presumption of Facts Supporting Amendment.—The trial judge will be presumed to have found the facts necessary to support his order allowing an amendment to the pleading, when no facts are stated in the record. Patterson v. Champion Lumber Co., 175 N. C. 90, 94 S. E. 692.

Relation Back Doctrine.—An amendment when properly allowed will date back to the time of the institution of the suit. Lefler v. Lane & Co., 170 N. C. 181, 86 S. E. 1022.

Jurisdiction.—In order to allow an amendment, the court must have jurisdiction of the cause. An amendment presupposes jurisdiction of the case. Hodge v. Williams, 22 How. 87, 88, 16 L. Ed. 237.

Power of Clerk of Court.—The clerk of the court acting as and for the court has authority, out of term time, to allow all proper amendments. Cushing v. Styron, 104 N. C. 338, 340, 10 S. E. 258.

Verification of Answer by Amendment.—An unverified answer may be allowed to be verified by amendment in the discretion of the court. Banks v. Gay Mfg. Co., 108 N. C. 282, 283, 12 S. E. 741.

Void Proceedings not Curable by Amendment.—If the proceedings are so defective in form and substance that they are void upon their faces, no amendment can cure them. Merchants Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 524, 20 S. E. 765.

In the Supreme Court.—In proper cases the Supreme Court will allow an amendment to the complaint for the furtherance of justice. Deligny v. Tate Furniture Co., 170 N. C. 189, 190, 86 S. E. 980. See section 1414.

On appeal from a motion to dismiss, on the ground of the insufficiency of the complaint to allege a cause of action, where merely a good cause has been defectively stated, the action will not be dismissed in the Supreme Court on motion made there, but if necessary, an amendment will be allowed to conform the pleadings to the facts proved. Ricks v. Brooks, 179 N. C. 204, 250, 102 S. E. 207.

Cited in Bridgeman v. Pilot Life Ins. Co., 197 N. C. 599, 150 S. E. 15; Pierce v. Mallard, 197 N. C. 679, 181, 150 S. E. 342; Hargett v. Lee, 206 N. C. 536, 539, 174 S. E. 498.

II. DISCRETIONARY POWERS OF THE COURT.

Powers Discretionary—When Reviewable.—It has been well settled in this State that no appeal lies to the supreme court from the exercise of a discretionary power of the superior court. But if the exercise of a discretion by that court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of that court is reviewable. Gilchrist v. Kitchen, 86 N. C. 20, 21. See Life Ins. Co. v. Edgerton, 206 N. C. 402, 174 S. E. 96; Smith v. New York Life Ins. Co., 208 N. C. 99, 101, 179 S. E. 457.

Discretionary, with or without Terms.—The judge can, in his discretion, refuse the motion to amend or grant it with or without terms. Maggett v. Roberts, 108 N. C. 174, 177, 12 S. E. 890.

Not Reviewable Except for Palpable Abuse.—The discretion is not reviewable in the absence of palpable abuse. Gordon v. Pintsch Gas Co., 178 N. C. 435, 436, 100 S. E. 878.

Discretion Not Arbitrary but Legal.—This discretion however is not arbitrary, but implies a legal discretion. Hudgins v. White, 65 N. C. 393.

Changing Affidavit into Complaint.—While the action of the trial judge in refusing to permit an amendment to the pleadings is usually a matter within his discretion and not reviewable, it was held error, under the circumstances of the case, for the judge to refuse an amendment in effect to change the affidavit into the form of a complaint. Mason v. Stephens, 168 N. C. 369, 84 S. E. 528.

Verification to an Answer.—It is discretionary with the trial court to allow an amendment of a verification to an answer. Cantwell v. Herring, 127 N. C. 81, 37 S. E. 140.

Amendment Setting Up Statute of Limitation.—It is discretionary with the court whether or not to allow an amendment setting up the statute of limitations. Smith v. Smith, 123 N. C. 229, 31 S. E. 471; Balk v. Harris, 130 N. C. 381, 383, 41 S. E. 940.

Reinstatement of Nonsuited Causes.—Where plaintiff voluntarily amends his complaint by entering a nol pros as to certain causes of action, it is a matter of discretion in the court, whether he shall reinstate them. Grant v. Burgwyn, 88 N. C. 95.

Costs.—When the superior court has power to amend, the question of costs is entirely in its discretion. Robinson v. Willoughby, 67 N. C. 84.

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.

Permissible When It Introduces No New Cause.—Unless its effect is to add a new cause of action or change the subject-matter of the original action, no objection can successfully be urged where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated. Lefler v. Lane & Co., 170 N. C. 181, 86 S. E. 1022.

The judge of the Superior Court has within his sound discretion the statutory authortiy to permit the plaintiff to amend his complaint when thereby the ground of the alleged cause is not so substantially changed as to become a new or different cause of action. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

Amendment by Referee.—It would seem that this section is broad enough to warrant the action of the referee in allowing partner to come in as party plaintiff and adopt complaint previously filed by copartner. Sheffield v. Alexander, 194 N. C. 744, 745, 140 S. E. 726. See note under § 576.

Instances of New Cause Not Introduced.—In an action to recover damages for a conspiracy to prevent the employment by others of a discharged employee, under §§ 4477, 4478, the cause of action alleged was not substantially changed by allowing an amendment to the effect that the plaintiff had been employed by the defendant prior to the time of the alleged conspiracy. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

An amendment to a complaint in an action to set aside a conveyance of land for fraud is not substantially changed by an amendment allowed the plaintiff in the discretion of the trial court, to allege damages sustained and provable as directly resulting therefrom. Parker v. Mecklenburg Realty, etc., Co., 195 N. C. 644, 143 S. E. 254.

Where the complaint in an action for nonpayment of draft alleged that defendant failed to pay when it was received, it was held not error to allow an amendment alleging that defendant had in fact accepted the draft by entering it on its books and had held it for more than 24 hours thereafter during which time it failed and refused to return it accepted or nonaccepted. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Same—Amendatory Summons.—Where one administratrix has renounced her right, and a second has been appointed, and the second administratrix has brought action and made her mark to the complaint, the action of the trial judge in correcting a mistake in the summons and complaint by changing the name of the first administratrix to that of the second does not change the cause of action, and does not constitute error. Hill v. Norfolk So. Ry. Co., 195 N. C. 605, 143 S. E. 129.

Consent Necessary when New Cause Introduced.—The court cannot, except by consent, allow an amendment which changes the pleadings so as to make it substantially a new action, but an amendment which only adds to the original cause of action is not of this nature, and may be allowed. Ely v. Early, 94 N. C. 1.

Tests as to When New Cause Introduced.—In construing the similar statute in other code states, two tests are given by which it may be determined whether a second petition (or complaint) is an amendment or a substitution of a new cause of action: (1) that the same evidence will support both petitions (or complaints); (2) that the same measure of damages will apply to both. If both these tests fail the new pleading is not an amendment. Lumpkin v. Collier, 69 Mo. 170; Scoville v. Glasner, 79 Mo. 449.

Defective Statement of a Good Cause.—A defective statement of a good cause of action, as distinguished from a failure to state a good cause of action, is a defect which is curable by amendment, even after verdict. Blalock v. Clark, 133 N. C. 306, 308, 45 S. E. 642. To the same effect see also, Fidelity, etc., Co. v. Jordan, 134 N. C. 236, 244, 46 S. E. 496.

Adding New Plea after Appeal Reached Supreme Court.—The power and duty of the judge in respect to amendments after the appeal has reached this court depend on these sections, and there is nothing in these sections requiring the judge to allow a new plea to be put in, though he may do so on payment of all costs up to that time. The Code is liberal in allowing amendments, but the adding of a new plea stands on different grounds from the amending of a formal or even a substantial defect in a plea which does not introduce a substantially new defence. Hinton v. Deans, 75 N. C. 18, 20.

Changing the Form of Action.—In Oates, etc., Co. v. Kendall, 67 N. C. 241, 243, the main objection to the recovery was that the plaintiff, in his complaints, had alleged and set out a case in trover, when the case, as proved on the trial, showed that it should have been in the nature of an assumpsit for money had and received, the court said: "It would be in violation of one of the most important provisions of the New Code to permit a party to defeat a recovery, upon the sole ground that the form of the complaint is not just as it should have been, from the facts established by the proofs in the case. To allow such an objection now to avail a party would be to defeat that great and vital principle of the Code and Constitution which declares that there shall be but one form of action, and it would incorporate into our new system all the mischief and intricacies touching the form of action intended to be obviated by that provision. No such objection can be permitted to defeat a recovery."

Same—Changing the Cause from Contract to Tort.—It is not error to allow a plaintiff to amend his complaint, assumed to state a cause of action on contract, so as to declare on a tort arising out of the same transaction. Reynolds v. Mt. Airy, etc., R. Co., 136 N. C. 345, 48 S. E. 765.

Amendment Changing the Relief Sought.—A complaint in an action for the possession of the land under a deed absolute which has been declared to be a mortgage may be so amended as to allow a demand for a judgment of foreclosure of the mortgage. Robinson v. Willoughby, 67 N. C. 84.

Statute of Limitation.—Where a distinct cause of action is allowed to be inserted in a complaint, by amendment, it is tantamount to bringing a new action, and the statute of limitation runs to the time when the amendment is allowed; but this rule does not apply when the new matter allowed by the amendment constitutes a part of the original cause of action. Ely v. Early, 94 N. C. 1.

So where, in an action to recover land, the Court allowed the plaintiff to amend, so as to set up a mutual mistake in a deed, the statute only runs against the relief demanded by the amended complaint to the time when the action was commenced. Ely v. Early, 94 N. C. 1.

Amendment of Insufficient Affidavit.—The Court has the power to allow the amendment of an affidavit upon which a warrant of attachment had issued, although the former affidavit is wholly insufficient. Brown, etc., Co. v. Hawkins, 65 N. C. 645.

IV. CONFORMING PLEADINGS TO FACTS FOUND.

See sections 549, 552.

Leave to Amend to Conform Pleadings to Facts.—Under this section and section 552, a plaintiff may sue for a horse and recover a cow; but in order to do this, when the variance appears, the plaintiff must obtain leave to amend by striking out "horse" and inserting "cow", or else the jury must find the facts specially or the case must be submitted to the jury "on issues," so that the pleading may be amended and be made to conform to the facts proved on such terms as the judge may deem proper, "unless the amendment affects the merits and substantially changes the claim or defense." Shelton v. Davis, 69 N. C. 324, 328.

Evidence Cannot Be Considered Without Amendment.—Where, in an action for the alleged conversion of money, the complaint did not state that funds were received by the person charged with the conversion as trustee or agent, evidence tending to show that they were so received cannot be considered in the absence of an amendment, under this section, conforming the complaint to the evidence. Parker v. Harden, 121 N. C. 57, 28 S. E. 20.

In Dickens v. Perkins, 134 N. C. 220, 223, 46 S. E. 490, the court said: "If the plaintiffs were unable to show by their proof that the contract was made as alleged, and by the evidence established a different agreement, they could have availed themselves of the latter and have enforced the same only by an amendment, provided the cause of action was not thereby substantially changed."

Conforming Complaint to Facts Found by Referee.—Under this section the trial court may, upon the coming in of a referee's report, permit an amendment to the complaint to conform to the facts found if the amendment does not change substantially the cause of action. Nims Mfg. Co. v. Blythe, 127 N. C. 325, 37 S. E. 455.

V. AMENDMENTS OF PROCESS.

Generally.—If the paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process, and the broad discretion with which judges are clothed by this section may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervening rights of third parties. Cheatham v. Crews, 81 N. C. 343; Thomas v. Womack, 64 N. C. 657; Redmond v. Mullenax, 113 N. C. 505, 510, 18 S. E. 708.

For an elaborate review of the authorities upon amendments of the process, particularly as to the signature and seal thereof, see Henderson v. Graham, 84 N. C. 496.

Not Permissible as to Prejudice Acquired Interest.—Amendments of process are not admissible when the effect will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. Phillips v. Holland, 78 N. C. 31. Henderson v. Graham, 84 N. C. 496, 498.

Defects Curable by General Appearance Amendable.—With reference to the amendment of a process, it is held that whether a summons should be amended is a discretionary matter and not reviewable (Henderson v. Graham, 84 N. C. 496). From this is to be deduced the rule, in regard to the amendment of process, that any defect or omission of a formal character, which would be waived or remedied by a general appearance or answer upon the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no protection withdrawn from the officer. Jackson v. McLean, 90 N. C. 64, 65.

Absence of Clerk's Signature.—Under this section the absence of the clerk's signature on a summons is a defect of a formal character which may be waived by general appearance and is therefore remediable by amendment. Hooker v. Forbes, 202 N. C. 364, 368, 162 S. E. 903.

The Seal.—But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all—no more than one of the usual printed blanks kept by the clerks of the courts. The seal of the court is evidence throughout the state of the fact that a paper to which it is attached emanates from the tribunal to which it belongs, and though the clerk's signature is the prescribed evidence of genuineness as to all process to be served in the county in which his court is held, yet, if he issue to such county a summons in the usual form, attested by his official seal, but not subscribed, and containing his name only as printed in the body of the paper, the court has the power, after the defendant has entered an appearance, to amend by allowing the clerk to sign his name. Henderson v. Graham, 84 N. C. 496; Redmond v. Mullenax, 113 N. C. 505, 510, 18 S. E. 708.

On the other hand, where a summons is issued to an adjacent county, signed by the clerk of the superior court, but not attested by the seal, and served upon the defendant, it was held that, after an appearance by virtue of such service, the court might, in its discretion, allow the seal to be attached, as it could also to final process upon which property had been sold in another county, and after it had been returned by the officer who sold. Clark v. Hellen, 23 N. C. 421; Seawell v. Bank, 14 N. C. 279; Purcell v. McFarland, 23 N. C. 34. Redmond v. Mullenax, 113 N. C. 505, 511, 18 S. E. 708.

The seal, though not required, or the signature, though not imparting authenticity in the county to which the summons issues, is evidence of the fact that the clerk has approved the prosecution bond or permitted the issuance on a proper affidavit; and when the defendant waives the informality or irregularity by appearing, the curative power of amendment may be invoked, but not when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. Redmond v. Mullenax, 113 N. C. 505, 512, 18 S. E. 708.

Same—Process Issued Out of County.—By amendment a seal may be affixed to a process issued out of the county after its return. McArter v. Rhea, 122 N. C. 614, 30 S. E. 128.

Informalities Cured.—Informalities in the process may be cured by amendment, if allowed by the court. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Amendment to Give Effectual Jurisdiction.—Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process and proceedings in order to give it effectual jurisdiction, if no intervening and vested right is injuriously affected, and when the process is thus amended, it justifies the original service of any official action previously taken under it. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Allegations as to Value Supplied.—Where in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation. Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.

VI. AMENDMENTS AS TO PARTIES.

Generally.—The power of the judge to make additional parties to an action is settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party. Mills v. Callahan, 126 N. C. 756, 36 S. E. 164.

Discretionary and Not Reviewable.—It very rarely happens that the making of additional parties prove prejudicial, and hence orders making such parties are discretionary with the trial court, and are not reviewable upon appeal. Tillery v. Candler, 118 N. C. 888, 889, 24 S. E. 709; Bernard v. Shemwell, 139 N. C. 446, 447, 52 S. E. 64. Burrel v. Hughes, 116 N. C. 430, 21 S. E. 971; State v. Arrington, 101 N. C. 109, 7 S. E. 652; Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

New Parties to a Pending Action.—By amendment proper new parties may be brought in to a pending action. Dobson v. Southern Ry. Co., 129 N. C. 289, 40 S. E. 42.

Making Parties after Judgment.—In a proper case additional parties can be made even after judgment. Bird v. Gilliam, 125 N. C. 76, 78, 34 S. E. 196.

Joint Payees—Statute of Limitation.—Where a note is made to the husband and his wife as joint payees, and the action thereon is brought by the husband alone, an amendment joining the wife as a party to the action, after the running of the statute of limitations is in effect the bringing of a new action, which also will be barred. Fishell v. Evans, 193 N. C. 660, 137 S. E. 865.

Correction of Mistake as to Parties Defendant.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. Rosenbacher & Bro. v. Martin, 170 N. C. 236, 86 S. E. 785.

Disintegrating Misjoined Parties.—Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision, to permit the withdrawal of one of the parties, leaving the action proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked no affirmative relief and his defense cannot be prejudiced; but the defendant is entitled to recover his cost against the party retiring from the case. Campbell v. Washington Light, etc., Co., 166 N. C. 488, 82 S. E. 842.

Withdrawal of One of Joint Plaintiffs—Statute of Limitation.—Where damages are sought by joint plaintiffs upon the alleged negligence of the defendant, the cause of action is such negligence; and where one of them is permitted to withdraw and the other to amend, owing to a mistaken construction of a contract as to the joint ownership of the property damaged, the amendment referring to the same alleged negligent act does not create a new cause of action, but, being upon the same cause, relates back to the issuance of the summons, and when that was done in time the statute of limitations will not have run against it. McLaughlin v. Raleigh, etc, R. Co., 174 N. C. 182, 93 S. E. 748. See "Introducting New Cause of Action, Defense or Relief," III.

Striking One of Several Plaintiffs.—Under this section the court, in its discretion, may allow the motion of one of the several plaintiffs to strike out his name, and the exercise of such discretion, whether by refusing or granting the motion, is not reviewable. Jarrett v. Gibbs, 107 N. C. 303, 12 S. E. 272.

Refusal to Strike Discretionary.—The refusal or granting of a motion to strike out the name of a party is a matter of discretion and not reviewable, unless the refusal is placed on the want of power, in which case an appeal lies. Henderson v. Graham, 84 N. C. 496; Jarrett v. Gibbs, 107 N. C. 303, 304, 12 S. E. 272.

Substituting a Stranger for a Party.—In Bullard v. Johnson, 65 N. C. 436, 438, the question whether, under the broad power of amending, the superior court in an action by A could strike out the name of A and insert that of B, a stranger to the controversy, either directly or indirectly, as by first adding the name of B as co-plaintiff, and then striking out the name of A, was raised but was not decided.

Substitution of Corporation for President Thereof. — The trial judge has the power to allow the substitution of the company as the party plaintiff for the president of the company, the character or nature of the action not being substantially changed thereby. Street v. McCabe, 203 N. C. 80, 164 S. E. 329.

Making Trustee Party.—Where money is borrowed to pay off a prior mortgage and the lender takes another mortgage to secure the money so borrowed which is later declared invalid for improper acknowledgment, and the lender brings action to foreclose under the first mortgage under the doctrine of equitable subrogation: Held, the trustee can be made a party by amendment if it should be necessary. Investment Securities Co. v. Gash, 203 N. C. 126, 164 S. E. 628.

Making New Parties upon Appeal to Superior Court.—A connecting line of carriers had been sued in a justice's court for the statutory penalty in failing to transport the shipment within a reasonable time, and appealed to the superior court from an adverse judgment. It was held proper for the court, in its discretion to order the other carrier to be made a party therein, though the amount involved was less than $200, without the necessity of remanding the case to the justice's court for that purpose. Sellars Hosiery Mills v. Southern R. Co., 174 N. C. 449, 93 S. E. 952.

Substitution of Plaintiff upon Appeal to Superior Court.—In Bullard v. Johnson, 65 N. C. 436, and State v. Cauble, 70 N. C. 62, a new plaintiff was allowed to be substituted in a warrant issued by a magistrate after it reached the superior court by appeal. Cheatham v. Crews, 81 N. C. 343, 364.

Mistake in Designating Parties Defendant.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. Rosenbacher & Bro. v. Martin, 170 N. C. 236, 86 S. E. 785.

Correction of Mistake in Name Authorized.—The correction of a mistake in the name of a party after judgment is expressly authorized by this section and does not come within the limitation of "one year after notice thereof" prescribed by section 600. Rosenthal v. Roberson, 114 N. C. 594, 597, 19 S. E. 667.

Descriptio Personae.—In a summons against A. H. B., the words "President of Southern Improvement Company," are mere descriptio personae and do not make the company a party to the proceeding, but the court can allow an amendment making the company a party either with its consent or by service of such amended summons upon the corporation. Plemmons v. Southern Improve. Co., 108 N. C. 614, 13 S. E. 188.

To Show Real Parties.—Upon the facts in this case, it is held, on appeal, that the trial court properly allowed the plaintiffs to amend their complaint to allege that some of the plaintiffs had acquired the interests of the others in a policy of insurance against loss by fire, in furtherance of justice, under the provisions of this section. Redmon v. Netherlands Fire, etc., Ins. Co., 184 N. C. 481, 114 S. E. 758.

VII. AMENDMENTS BEFORE JUSTICES OF THE PEACE.

Generally.—A justice of the peace has power to amend any warrant, process, pleading or proceeding in any action pending before him, either civil or criminal, either in form or substance. Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.

Before the adoption of the Code there was no statute investing the court with the power of amending a process, proceedings, &c., had before justice of the peace. The only legislation on that subject was that "no process issued by a justice of the peace shall be set aside for the want of form if the essential matters are set forth therein." This embraced civil as well as criminal process, but gave no power to amend in matters of substance. State v. Vaughn, 91 N. C. 532, 534.

Nature of Pleadings—Ample Power to Amend.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the court to amend either in substance or form, at any time before or after judgment in furtherance of justice. Aman v. Dover, etc., R. Co., 179 N. C. 310, 102 S. E. 392.

Amendment to Show Jurisdiction.—In a proceeding before a justice's court, if the averment of value is omitted from the summons by mistake or inadvertance, an amendment may be allowed even on the trial in the superior court, to make it appear that the justice's jurisdiction was not improperly exercised. Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.

VIII. SPECIFIC INSTANCES.

Setting up Mistake in Deed.—In an action to recover land, the Court may allow an amendment so as to set up a mistake in a deed. Ely v. Early, 94 N. C. 1.

A petition to lay out roads is within the meaning of this section authorizing the court to amend pleadings in any action, etc. Pridgen v. Anders, 52 N. C. 257.

Express Contract of Complaint on Quantum Meruit.—Upon a complaint broad enough to set out an action on the quantum meruit, the plaintiff will not be confined to the express contract, and if not broad enough, the court may allow an amendment after a verdict making it so. Roberts v. Deming Woodworking Co., 111 N. C. 432, 16 S. E. 415.

Increasing Amount of Demand.—In an action by the mortgagee to recover the value of a crop, subject to the lien of his chattel mortgage against the defendant, who is alleged to have received it to his own use, it is discretionary with the trial judge to allow the plaintiff to amend his complaint, either before or after verdict, so as to increase the amount of his demand in conformity with the facts he has proved upon the trial. Warrington v. Hardison, 185 N. C. 76, 116 S. E. 166.

To Allege Warranty.—Where the plaintiff seeks to recover damages upon the allegation that the defendant falsely and knowingly induced him to purchase an automobile upon false representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in addition to the allegations in the original complaint; and where the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different result. Wiggins v. Landis, 188 N. C. 316, 124 S. E. 621.

After Plea of Contributory Negligence.—Where, in an action involving the issue of negligence, contributory negli-

gence is pleaded in substance by defendant, an amendment allowed defendant to make his allegation more specific is not held reversible error. Gholson v. Scott, 200 N. C. 429, 157 S. E. 64.

§ 548. Amendment changing nature of action or relief; effect.—When the complaint is so amended, as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment. (Rev., s. 508; 1901, c. 486.)

Cited in Pierce v. Mallard, 197 N. C. 679, 681, 150 S. E. 342.

§ 549. Unsubstantial defects disregarded.—The court or judge shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect. (Rev., s. 509; Code, s. 276; R. C., c. 3, ss. 5, 6; C. C. P., s. 135.)

As to effect of immaterial variances between pleadings and proof, see section 552.

Under this section the form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. Bolich v. Prudential Ins. Co., 206 N. C. 144, 150, 173 S. E. 320.

Trial of Causes upon Their Merits.—It is manifest from this and other sections of the Code that the new system, in its whole structure and scope, looks to a trial of a cause upon its merits, and discountenances objections for defects which may be corrected and removed when made in apt time, and will not entertain them after trial and verdict. Halstead v. Mullen, 93 N. C. 252, 255.

In construing the identical section of the Ohio Code it is said: "Slight mistakes or omissions in pleading, will be cured by judgment; but where the pleading is totally defective, showing on its face that the party can claim no right under it, the judgment will be held erroneous." See 2 Ohio State Reports 21.

Clerical errors shall be disregarded under the provisions of this section. See Patterson v. Walton, 119 N. C. 500, 26 S. E. 43; Clawson v. Wolfe, 77 N. C. 100, 102.

A warrant in attachment, in substantial conformity with sec. 805, and, in fact, executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of this section. May Co. v. Menzies Shoe Co., 186 N. C. 144, 119 S. E. 227.

Defective Return of Process—Defect in Name.—A defective or informal return of process will be cured after judgment. Crawford v. Bank, 61 N. C. 136; so will also a defect in the name of a defendant in the summons. Clawson v. Wolfe, 77 N. C. 100.

Mistake in Name.—Names are used to designate persons, and where the identity is certain a variance in the name is immaterial, and hence will be disregarded. Patterson v. Walton, 119 N. C. 500, 26 S. E. 43.

By the Supreme Court.—The Supreme Court will disregard errors or defects in the pleadings or proceedings in the Superior Court, which are immaterial and where no substantial rights of the appellant will be injuriously affected thereby. Ricks v. Brooks, 179 N. C. 204, 102 S. E. 207.

The interpretation put upon a similar section in the courts of New York is that such defects as would be remediable by amendment that does not change substantially the claim or defense, will not sustain an application to dismiss the action. Loundsbury v. Purdy, 18 N. Y. 515. Halstead v. Mullen, 93 N. C. 252, 255.

Cited in Bridgeman v. Pilot Life Ins. Co., 197 N. C. 599, 150 S. E. 15; Brewer v. Brewer, 198 N. C. 669, 153 S. E. 163; Pierce v. Mallard, 197 N. C. 679, 681, 150 S. E. 342.

§ 550. Defendant sued in fictitious name; amendment.—When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly. (Rev., s. 510; Code, s. 275; C. C. P., s. 134.)

Editor's Note.—A defendant ought to be sued in the surname of his ancestors and the christian name given to him in baptism. If he is known by two names, he may be sued by either, or if the real name is unknown he may be sued, under this section, by a fictitious one.

Discretion of Court.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. Rosenbacher & Bro. v. Martin, 170 N. C. 236, 86 S. E. 785.

Two Names Designated.—In construing the similar section of the Ohio Code it is said: "The law supposes every one to have a family name and a given name, and allows two fictitious names to be inserted when either of the real ones are unknown." 5 Rob. 599.

Middle Name.—The law recognizes but one middle name. The omission of a middle name is unimportant, and if a wrong middle name is inserted, it may be struck out as surplusage. 39 Barb. 479; 5 Johns 84. See also, Evans v. Brendle, 173 N. C. 149, 91 S. E. 723.

§ 551. Supplemental pleadings.—The plaintiff or defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after, or of which the party was ignorant when his former pleading was filed. Either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of an action, determining all or any part of the matter in controversy in said action, and if the judgment is set up by the plaintiff, it shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in the action on his behalf. Such motions may be made before the clerk of the superior court of the county in which the action is pending, by filing with the clerk the original and one copy of the proposed amended pleading and motion, which copy shall be forwarded to the opposing party or counsel and in which motion the clerk shall name a day and time of not less than ten days, unless by consent, to hear any objection to same; from the determination of the clerk, either party may have the matter sent to the judge of, or holding courts in the judicial district in which the matter is pending, by giving notice thereof to the clerk and opposing party or counsel within ten days from such date of hearing by the clerk: Provided, such motion shall be made at least thirty days before the convening of a term of court at which the cause may be calendared for trial. (Rev., s. 511; Code, s. 277; C. C. P., s. 136; 1929, c. 95.)

Editor's Note.—At common law defendant could take advantage of a defense arising after the commencement of the action by a plea puis darrein continuance if it occurred after the plea was filed. Williams v. Hutton, etc., Co., 164 N. C. 216, 80 S. E. 257. The supplemental answer prescribed by this section takes the place of the former plea puis darrein continuance.

The Act of 1929 added the third sentence and proviso to this section.

The office of a supplemental pleading is to bring into the record new facts, so that the court may render its final judgment upon the facts existing at the time of its rendition. See 90 Indiana Reports 585. And it has been held that the analogus section of the Ohio Code affords the only proper method of presenting facts occurring during the pendency of an action. See 37 O. S. 291; 10 O. S. 372.

It is within the discretionary power of the trial court to allow the filing of a supplemental complaint. Speas v. Greensboro, 204 N. C. 239, 167 S. E. 807.

Plea of Puis Darrein Waived Previous Pleas.—At common law such a plea confesses the matter which was before in dispute between the parties, and is therefore a waiver of all the pleas previously pleaded. But in this state a plea

of puis darrein continuance is in no case construed as a relinquishment of any plea or pleas previously entered. Morgan v. Cone, 18 N. C. 234, 235.

Truth of Plea of Puis Darrein.—A plea of puis darrein continuance will be refused unless the court is satisfied of its truth. McNaughton & Co. v. Naylor, 2 N. C. 180.

Same—When Allowance Discretionary.—Where a petition to be allowed to file a plea puis darrein continuance does not set forth facts which, if true, would be a bar to a recovery, its allowance is discretionary with the court. Balk v. Harris, 130 N. C. 381, 41 S. E. 940.

Release Puis Darrein.—A release to party to a suit, made during its pendency and after the issues are joined, can not operate as a defense, unless it be pleaded specially since the last continuance. Smithwick v. Ward, 52 N. C. 64, 75 Am. Dec. 453.

Defect of Title Raised by Plea Puis Darrein.—While a plaintiff cannot recover upon the title accruing after the commencement of an action to recover land, a defendant will be permitted by an amendment to his answer in the nature of a plea since last continuance to plead defects in the plaintiff's title, or matter validating his own, which accrued since the action began. Taylor v. Gooch, 110 N. C. 387, 15 S. E. 2.

When Supplemental Complaint or Answer Required of New Parties.—A supplemental complaint or answer, is required from new parties only when the previous record of the cause does not show how they are connected with the controversy or interested in its result: but where the death of the original party and the relationship of the new parties to him are ascertained, there seems to be no necessity for supplemental pleading. Hughes v. Hodges, 94 N. C. 56.

When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim. Sydnor Pump etc., Co. v. Rocky Mount Ice Co., 125 N. C. 80, 34 S. E. 198.

Laches is, in the discretion of the court, ground for refusing consent to file supplemental pleadings. 16 Abb. 269; 6 Duer 661, affirming 19 N. Y. 207.

§ 552. Variance, material and immaterial.— 1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (Rev., ss. 515, 516; Code, ss. 269, 270; C. C. P., ss. 128, 129.)

Editor's Note.—Under this section two situations may present themselves: (1) If the variance is not material, the court may direct the facts to be found according to the evidence; (2) if the variance is material and the adverse party has been taken by surprise or been misled, the court may allow an amendment upon such terms as may be just. Deligny v. Tate Furniture Co., 170 N. C. 189, 86 S. E. 980; Brown v. Morris, 83 N. C. 252, 256; Wills v. Branch, 94 N. C. 142, 148.

Hence, when the proof materially departs from the allegation, there can be no recovery without an amendment. McKee v. Lineberger, 69 N. C. 217; Brittain v. Daniels, 94 N. C. 781; Faulk v. Thornton, 108 N. C. 314, 12 S. E. 998; Pendleton v. Dalton, 96 N. C. 507, 2 S. E. 759; Hunt v. Vanderbilt, 115 N. C. 559, 20 S. E. 168; Green v. Biggs, 167 N. C. 417, 83 S. E. 553; Talley v. Harriss Granite Quarries Co., 174 N. C. 445, 447, 93 S. E. 995.

In construing the same provision of the Ohio Code it is said: To constitute a variance between the allegations and the proofs, the difference must be as to the substantial elements of the case, and not as to the legal conclusions from the facts drawn by the pleader. 27 O. S. 159.

Difference of the Old and New Rule on Variances.—The only observable difference between the old and the new rule is that a variance, so slight and unimportant that the adverse party cannot have been misled by it is deemed immaterial and the court will either order an amendment without terms, or will consider the pleading as if amended, and permit evidence to be given under it. And even in the case of a material variance, so substantial that the adverse party may have been misled by the averments, still, if the proofs have an apparent relation to and connection with the allegations, the court will allow an amendment, though, upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail. Carpenter v. Huffsteller, 87 N. C. 273, 278.

Uniformity of Allegata et Probata Not Wholly Dispersed.—The liberal construction given to pleadings under the Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the difference between the allegation of the pleading and the proof is substantial, so as to grossly mislead the other party, amounting to alleging one cause of action and proving another, it is not allowed. Talley v. Harriss Granite Quarries Co., 174 N. C. 445, 93 S. E. 995; Willis v. Branch, 94 N. C. 142, 148.

The chief purpose of pleading is to enable the parties to litigate their rights intelligently and fairly and prevent shifts and undue advantage. It is a well-settled rule that there must be allegata et probata. If it follows that the court should not receive evidence that is not pertinent in some aspect of material allegations in the complaint, nor should it receive evidence to prove a cause of action not alleged. McKee v. Lineberger, 69 N. C. 217; McLaurin v. Cronly, 90 N. C. 50; Brittain v. Daniels, 94 N. C. 781; Greer v. Herren, 99 N. C. 492, 6 S. E. 257; Faulk v. Thornton, 108 N. C. 314, 320, 12 S. E. 998.

Evidence Not Rejected unless Party Misled.—Even though there be a variance between the allegations of the complaint and the evidence adduced, the evidence should not be rejected unless the variance will mislead the other party to his prejudice. Mode v. Penland, 93 N. C. 292, 293, 295; Morgan v. First Nat. Bank, 93 N. C. 352, 357.

Accordingly it is held that where a railroad company is sued by a passenger for a wrongful ejection from its train alleged to have been at a certain one of its stations, and upon the trial the evidence of both parties relates with unanimity to a certain other of its stations. the variation will not be deemed as material. Edwards v. Southern R. Co., 162 N. C. 278, 78 S. E. 219.

Leave to Amend in Case of Substantial Variance.—Where there is a substantial variance between the allegations of the pleading and the proof, the proper procedure is to ask leave to amend the pleading to conform to the proof, (which will be allowed without cost) and it cannot be maintained that the judge should disregard the variance and give judgment according to the proof irrespective of the allegations of the pleading. Haughton v. Newberry, 69 N. C. 456, 459.

Objection to Be Taken in Apt Time.—An objection to a variance between the allegations of the pleadings and the proof, when prejudicial and misleading, etc., should be taken in apt time. Patterson v. Champion Lumber Co., 175 N. C. 90, 94 S. E. 692.

Defendant Must Pursue Remedy Prescribed.—In the case of a variance between the allegations of the complaint and the proof upon the trial, the defendant must pursue the remedy prescribed in this section or the variance, under our liberal practice of construction, will be deemed immaterial. Simmons v. Roper Lumber Co., 174 N. C. 220, 221, 93 S. E. 736.

The adverse party must allege that he was misled, and must prove that fact "to the satisfaction of the court," and show wherein he was misled, and the only penalty and remedy prescribed is an amendment upon such terms as the court may deem just. There is no penalty allowed of dismissal of the action or loss of substantial rights by either party. The sole object is that the case shall be tried and decided upon its merits. Wright v. Teutonia Ins. Co., 138 N. C. 488, 496, 51 S. E. 55.

Allegations of time and place are not in general material, and hence a variance between them and the proof shall be disregarded. Pegram v. Stoltz, 67 N. C. 144, 147.

Examples of Immaterial Variances.—In an action against a street car company for injuries sustained, the plaintiff alleges that at the time of his injury he was using an iron rod to replace the derailed car on the track, and that he first connected the rod with the car and then with the rail, and he was permitted to prove that he first connected the rod with the rail and then with the car. This was held to be a variance but not such as to mislead the defendant, and therefore immaterial. Dellinger v. Charlotte Elect. R. Co., 160 N. C. 532, 539, 76 S. E. 494.

Where the complaint against a telegraph company for damages for delay in the delivery of a message alleges that the defendant received the telegram sued on at its office at A., and the evidence tends to show that it was received at B., a near-by point, and telephoned to A., by the de-

fendant's agent there, and there is nothing to indicate that the defendant was misled or was unprepared to meet the evidence introduced, or was thereby prejudiced. Held, the variance between the allegation and the proof was neither material nor fatal. Brown v. Western Union Tel. Co., 169 N. C. 509, 86 S. E. 290.

Where the answer averred a mutual understanding between the intestate and feme defendant, that an adequate compensation should be provided in the former's will, "to the extent of $2,000 at least," while the verdict establishes a fixed and definite sum, it was held that this did not constitute a material variance. Lawrence v. Hester, 93 N. C. 79, 81.

Where the allegations of the complaint set forth a promissory note, and the evidence introduced proved the instrument to be a bond, the variance was, in view of the circumstances of the case, held to be an immaterial one which should be disregarded. Lilly v. Baker, 88 N. C. 151, 152.

Where a plaintiff, in his complaint, alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held, that the plaintiff was entitled to recover, notwithstanding the variance. Oates, etc., Co. v. Kendall, 67 N. C. 241.

In an action for the recovery of the possession of personal property where the proof revealed that the defendant did not have the possession of such property, though he had converted it, the complaint may be so amended as to change the relief sought from that for the possession of the property to that for the recovery of the value thereof, since the defendant will not be misled thereby. Haughton v. Newberry, 69 N. C. 456; Webb v. Taylor, 80 N. C. 305.

§ 553. Total failure of proof.—Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof. (Rev., s. 517; Code, s. 397; C. C. P., s. 223.)

Editor's Note.—A failure of proof is where no cause of action or defense whatever has been proved. 9 Daley 391. If there is a failure to prove a cause of action or ground of defense in some particular, it is a variance only, but if there is total want of any allegation in the pleading of the subject matter as a cause of action or ground of defense, it is a failure of proof. 10 Barb. 321; 2 N. Y. 500.

No Amendment Where Proof Wholly Different from Allegations.—No amendment of pleadings will be allowed where the cause of action proved is wholly different from that alleged. Grant v. Burgwyn, 88 N. C. 95.

Same—Relief.—A plaintiff cannot sue upon one contract and prove another essentially different contract. This is more than a mere variance; it is a failure of proof. But if he sues for specific relief, to which he is not entitled, upon facts which show him entitled to other and different relief, he may be adjudged to have that relief to which he is in law entitled. Wright v. Teutonia Ins. Co., 138 N. C. 488, 492, 51 S. E. 55.

SUBCHAPTER 7. TRIAL AND ITS INCIDENTS

Art. 19. Trial

§ 554. Defined.—A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact. (Rev., s. 526; Code, s. 397; C. C. P., s. 223.)

Summary Proceedings.—In construing the section of the Ohio Code which it identical with this section, the court, in Railway v. Thurstin, 44 O. S. 523, 528 says: "It seems clear that the issues here referred to are those which arise upon the pleadings and do not relate to controversies involved in summary proceedings like the one now under consideration, although the pendency of the action in which it is involved depends upon the disposition of it by the court."

Impaneling a jury is embraced in a "trial" 42 Ohio State Reports, 596, 602.

§ 555. Joinder of issue and trial.—Pleadings shall be made up and issues joined before the clerk. After pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court, and on appeal with the same procedure as is now in force. (1919, c. 304; s. 8; Ex. Sess. 1921, c. 92, s. 13.)

Editor's Note. — This section was re-enacted without change by the Public Laws of 1921, Extra Session.

Trial Procedure Before Passage of This Section.—Prior to this act the practice, concisely stated, was as follows: the summons was returnable to a regular term of the superior court to be held in the county from which it was issued; the complaint was to be filed in the clerk's office on or before the third day of the term to which the action was brought, and at the same term the defendant was to appear and demur or answer; if the defendant failed to appear the plaintiff, if not entitled to a judgment by default final, was authorized to take a judgment by default and inquiry. The inquiry was to be executed at a succeeding term for the obvious reason, if for no other, that the defendant's right to answer precluded such inquiry at the return term. Hill v. Huffines Hotel Company, 188 N. C. 586, 588, 125 S. E. 266.

This section has reference to the clerk and was not intended to impair the broad powers conferred on the judge, who "may in his discretion and upon such terms as may be just allow an answer or reply to be made, or other act done, after the time limited or by an order to enlarge the time," under section 536. Smith v. New York Life Ins. Co., 208 N. C. 99, 101, 179 S. E. 457.

Transferring Papers Where No Answer Filed.—If this section were interpreted as providing that original papers can be transferred to the docket for trial in term only after an answer is filed, some difficulty might be encountered in assessing damages in cases where no answer is filed. Hill v. Huffines Hotel Company, 188 N. C. 586, 589, 125 S. E. 266.

§ 556. How issue tried.—An issue of law must be tried by the judge or court, unless it is referred. An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. (Rev., s. 527; Code, ss. 398, 399; C. C. P., ss. 224, 225.)

For reference by consent see sec. 572 and annotations. For compulsory reference see section 573 and annotation.

Plaintiff Entitled to Jury Trial.—In all actions under the C. C. P., where legal rights are involved and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury, and cannot be deprived of this right except by his consent. Andrews v. Pritchett, 66 N. C. 387; approving Hatchell v. Odom, 19 N. C. 302.

Methods of Waiving Jury Trial.—There are three modes of waiving a jury trial: 1, by default; 2, by written consent; and 3, by oral consent, entered on the minutes of the Court. Armfield v. Brown, 70 N. C. 27, 29.

When Issues of Fact Tried by Judge.—The duty of trying issues of fact cannot be imposed on the judge except when, by consent of the parties, the judge is substituted for the jury. Lee v. Pearce, 68 N. C. 76, 89, overruling Goldsborough v. Turner, 67 N. C. 403.

What the evidence would have been had a jury been impaneled could not be anticipated by the court, and the court was without jurisdiction under this section to try the issues of fact which arose upon the pleadings. Hershey Corp. v. Atlantic Coast Line R. Co., 207 N. C. 122, 124, 176 S. E. 265.

Judge May Disregard Agreement to Waive Jury Trial.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial shall be waived or that a reference shall be made of issues other than those of fact in an action upon contract. Lumber Company v. Lumber Company, 137 N. C. 431, 49 S. E. 946. As to waiver, see § 568 and notes thereto.

Right to Jury Trial When Case Referred.—Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, the excepting party has the right to have all issues of fact which arise on the pleadings, submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. State v. Askew, 94 N. C. 194; Armfield v. Brown, 70 N. C. 27.

Equitable Element Cannot Defeat Right to Jury Trial.—A

party has a right to a jury trial of an issue of fact, as well when it involves an equitable as a legal element entering into the merits of the controversy. Worthy v. Shields, 90 N. C. 192.

Submission of Evidential Issues Error.—The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, and when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted. Patton v. Western, etc., R. Co., 96 N. C. 455, 456, 1 S. E. 863.

Jury Impaneled but No Evidence Adduced.—On the trial of a civil action when the jury were sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury were discharged without verdict it was Held,

(1) That the parties stood at issue on the pleadings just as they were before the jury were sworn.

(2) That in such case the judge has no right to pass upon the issues, except upon a waiver of jury trial in accordance with section 568. Chasteen v. Martin, 81 N. C. 51.

Cited in Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144.

§ 557. Issues of fact.—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order. (Rev., s. 528; Code, s. 400; C. C. P., s. 226; 1923, c. 54.)

Editor's Note.—Prior to the passage of the Act of 1923 the time specified by this section was thirty days before the term. The same act substituted the word "may" for "must" in the next to the last line of the section.

Acts 1925, c. 5 did not affect the wording of the section but corrected an error in the amending act of 1923.

Power of Judge to Compel Party to Proceed.—The judge is without authority to compel a party to an action to proceed with the trial of a cause transferred to the civil issue docket when the issue has been joined within ten days from the commencement of the term. Cahoon v. Everton, 187 N. C. 369, 121 S. E. 612.

Amended Answer Raising Additional Issue.—Where, at trial term, an amended answer to an amended complaint raises additional issues of fact, the defendant is entitled to a continuance. Dobson v. Southern Ry. Co., 129 N. C. 289, 40 S. E. 42.

Issue of Insanity.—In an indictment for murder, there being no allegation that the prisoner was insane at the time of the trial, no issue as to insanity need be submitted. State v. Spivey, 132 N. C. 989, 43 S. E. 475.

Cited in Demark v. Atlantic, etc., R. Co., 107 N. C. 185, 12 S. E. 54.

§ 558. Issues of fact before the clerk.—All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529.)

Denial of Good Faith in Condemnation Proceedings. — When in proceedings by a railroad company to condemn lands, the answer denies the intention of the petitioner in good faith to construct the proposed railroad, the pleadings, in this respect, do not raise an issue of fact to be transferred to and tried by the Superior Court in term, under the provisions of this section. Madison County R. Co. v. Gahagan, 161 N. C. 190, 76 S. E. 696.

Review of Clerk's Decisions.—The rulings or decisions of the clerks of the court must, as stated in this section, be transferred for trial to the next succeeding term of the Superior Court, if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. Mills v. McDaniel, 161 N. C. 112, 76 S. E. 551.

§ 559. Continuance before term; affidavit.—A party to an action may apply to the court in which it is pending, or to the judge thereof, by affidavit, thirty days before the trial term, and after three days notice in writing to the adverse party, to have the trial continued to a term subsequent to that in which it is regularly triable. The court or judge may continue the trial as asked for, on such terms as may be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial.

2. That by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term. If the application is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant must in all cases pay the costs of the application. (Rev., s. 530; Code, 401; C. C. P., s. 227.)

For full treatment of continuances, see 3 N. C. Enc. Dig. 383 et seq.

Continuance Lies in Discretion of Judge.—The matter of granting or refusing a continuance of a cause for trial rests in the discretion of the trial judge, and the exercise of such discretion is not reviewable on appeal, in the absence of gross abuse. Piedmont Wagon Company v. Bostic, 118 N. C. 758, 24 S. E. 525.

Continuances Not Favored by Law.—Continuances are not favored by the law. One of the immortal provisions of the Magna Charta is that justice shall neither be delayed nor denied, and these are coupled together, for a delay of justice is often a denial of justice. Piedmont Wagon Company v. Bostic, 118 N. C. 758, 759, 24 S. E. 525.

Who May Make Affidavit.—In the United States Supreme Court it has been held that an affidavit for a continuance must be made by some one interested in the suit or action. See Hunter v. Kennedy, 1 Dall. 81, 1 L. Ed. 46.

§ 560. Continuance during term.—The judge at any time during the term at which an action is triable may continue the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.

2. That he cannot have a fair trial at that term, by reason of circumstances stated, and if the ground of application is the nonattendance of a witness, the affidavit must contain the particulars required by subdivision two of the preceding section. Unless the applicant also sets forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in the preceding section, and that his application is made as soon as it reasonably could be after the knowledge of those facts, the continuance shall not be granted, except on the payment of the costs in the action for the term. (Rev., s. 531; Code, s. 402; C. C. P., s. 228; R. C., c. 31, c. 57)

Continuance Discretionary with Judge.—The granting or refusing a continuance is entirely discretionary with the presiding judge, and cannot be assigned for error on appeal, in the absence of gross abuse. Dupree v. Va. Home Ins. Co., 92 N. C. 418; Piedmont Wagon Co. v. Bostic, 118 N. C. 758, 24 S. E. 525; Slocumb v. Construction Co., 142 N. C. 349, 55 S. E. 196; Watson v. Black Mountain R. Co., 164 N. C. 176, 80 S. E. 175. For other cases supporting this statement, see 3 N. C. Enc. Dig. 384. See In re Bank, 202 N. C. 251, 162 S. E. 568, affirming the rule announced in the Dupree case.

A court cannot lay down a general rule for the continuance of causes; but must, under the circumstances of each case, take care that injustice is not done, either by precipitate

trials or wanton delays, and where there appears to be a fair ground for the postponement, the case will be continued. Symes v. Irvine, 2 Dall. 383, 384, 1 L. Ed. 425.

The absence of a party or witness must be accounted for before a cause will be continued on these grounds. Crites v. Lanier, 1 N. C. 110.

Attorney Son of Trial Judge.—The fact that an attorney in an action is the son of the trial judge is not a ground for continuance. Allison v. So. R. Co., 129 N. C. 336, 40 S. E. 91.

Sickness of members of a defendant's family may be a ground on which the judge, in his discretion, may grant a continuance. Skinner v. Bryce, 75 N. C. 287.

Insanity of Defendant.—Where defendant becomes insane pending an action against her for divorce, the action should be continued if there is any hope of recovery. Stratford v. Stratford, 92 N. C. 297.

To Prove Bad Character of Witnesses.—Where defendant has asked for a continuance under this section without complying with the requirements and the purpose given for seeking the continuance is to secure depositions as to the bad character of the State's witnesses when defendant has already been permitted to cross-examine the witnesses and they admitted being prosecuted for criminal offenses, refusal of the trial judge to grant the continuance is not an abuse of discretion. State v. Banks, 204 N. C. 233, 167 S. E. 851.

Amendment of Pleadings.—Refusal of a continuance on a defendant filing on the day of trial, an answer substantially like that of the other defendants, and raising no additional issue, is not an abuse of discretion. Slingluff v. Hall, 124 N. C. 397, 32 S. E. 739.

But where an amendment is such as to cause surprise, it is cause for continuance, Martin v. Bank, 131 N. C. 121, 42 S. E. 558; Sams v. Price, etc., Co., 119 N. C. 572, 26 S. E. 170; and ordinarily an amendment which changes the issues on the parties causes such surprise as will authorize the continuance. Watson v. Black Mountain R. Co., 164 N. C. 176, 80 S. E. 175; and it has been held that the allowance of an amendment alleging fraud, if such as to take defendant by surprise, entitles him to a continuance. Dockery v. Fairbanks Morse Co., 172 N. C. 529, 90 S. E. 501. See also note of Dobson v. Southern Railway Co., 129 N. C. 289, 40 S. E. 42, under § 557. Likewise if an allegation of time and place is made, and a party has prepared his evidence, based wholly upon such allegation, and is surprised at the trial by the evidence of another time or place, he should be given another opportunity to meet such evidence. Brown v. Western Union Tel. Co., 169 N. C. 509, 86 S. E. 290.

Conditions on Granting.—See 3 N. C. Enc. Dig. 385.

§ 561. Counter affidavits as to continuance. — It is competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. The judge shall not allow the continuance unless satisfied, after thorough examination of the evidence aforesaid, that the ends of justice demand it. (Rev., s. 532; 1885, c. 394.)

In General.—As the two preceding sections, in the judgment of the legislature, were not sufficient to protect against the "laws delay," this section was passed. Piedmont Wagon Co. v. Bostic, 118 N. C. 758, 759, 24 S. E. 525.

Judge Must Be Satisfied.—If the judge is left in doubt he must refuse the continuance. Piedmont Wagon Co. v. Bostic, 118 N. C. 758, 759, 24 S. E. 525.

§ 562. Order of business.—The criminal calendar must be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issue on the civil calendar must be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court otherwise directs:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

(Rev., s. 533; Code, s. 403; C. C. P., s. 229.)

§ 563. Separate trials.—A separate trial between a plaintiff and any of several defendants may be allowed by the court when, in its opinion, justice will thereby be promoted. (Rev., s. 534; Code, s. 407; C. C. P., s. 230.)

For criminal cases see 4 Enc. Dig. 134 et seq. For civil cases see 11 Enc. Dig. 952 et seq.

Severance Not a Matter of Right.—It is within the sound discretion of the court, on motion of the defendants, or any of them, to allow severance and a separate trial as to each defendant if thereby justice will be promoted. However it was error for the court to hold that the defendants had a right to demand it, and a judgment rendered upon such holding will be reversed. Bryan v. Spivey, 106 N. C. 95, 11 S. E. 510.

Division Allowed in Case of Misjoinder.—Where there is a misjoinder of causes of action, the court may allow the action to be divided; or, where there is a misjoinder of parties, the court in its discretion can do the same. Pretzfelder, etc. v. Merchants' Ins. Co., 116 N. C. 491, 496, 21 S. E. 302.

Result of Order of Severance.—An order of severance is equivalent to dividing the action into several suits, with all the usual provisions for costs, etc., incident thereto. Bryan v. Spivey, 106 N. C. 95, 11 S. E. 510.

§ 564. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon. (Rev., s. 535; Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452.)

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I. EDITOR'S NOTE.

Editor's Note. — This section is but a renewal of an act, Rev. Stat., ch. 31, sec. 136. The policy differs from the federal rule and the rule in most states, and the section has been the subject of some criticism.

It should, in the opinion of most legal writers on the subject, not only be the right but the duty of the court to aid the jury by recalling the testimony to their recollection, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by stating the true point of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripping off every consideration which otherwise might mislead or confuse them. At common law the judge was not forbidden to express an opinion upon the facts in the case, for it was deemed that the judge could be of aid to the jury in expressing an opinion upon the reasonable inference to be drawn from the evidence, though of course he could not direct the verdict when there was conflicting evidence. The same rule still obtains in England, in all the federal courts, and the courts of nearly every state of the union.

II. OPINION OF JUDGE.

A. General Considerations.

Purposes and Effect of Section. — The necessity of judges, in obedience to the statute, avoiding any expression, however inadvertent or well intentioned, which may be reasonably construed by a jury, quick to perceive the judge's point of view, as more favorable to one side than the other, has never been better expressed than by Mr. Justice Walker in Withers v. Lane, 144 N. C. 184, 187, 56 S. E. 855. He quotes, from Chief Justice Taylor in Reel v. Reel, 9 N. C. 63, as follows: "Upon considering the whole of the charge, it appears to us that its general tendency is to preclude that full and free inquiry into the truth of the facts which is contemplated by the law, with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very justice of the case should be administered. We are not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have only to obey."

Mr. Justice Walker, continues in his own language as follows: "What these eminent jurists have so well said about the duty of the trial judge under our statute, and the consequence of a violation of it, will, if it is properly heeded, conduce to the more perfect and satisfactory trial of causes. The judge should be the embodiment of even and exact justice. He should at all times be on the alert lest in an unguarded moment something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." Starling v. Selma Cotton Mills, 171 N. C. 222, 228, 88 S. E. 242.

In State v. Jones, 181 N. C. 546, 106 S. E. 817, the court said: "This Court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opinion in the trial of causes before the jury, this section, extending the inhibition to such expression in the hearing of the jury at any time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain."

An expression of an opinion by the judge as to an essential fact involved in an issue is condemned by this section. Abernethy v. State Planters' Bank, etc., Co., 202 N. C. 46, 49, 161 S. E. 705.

A Substantial Right of Litigants. — This section gives the parties to the action a substantial right. The jury has the sole and exclusive function of finding the facts from the evidence under the law thus given them, and it is not their duty, in any event, to determine what is the law. Wilson v. Wilson, 190 N. C. 819, 130 S. E. 834.

Cannot be Extended. — The North Carolina statute being a restriction upon the almost universal rule, cannot be extended beyond its terms. State v. Baldwin, 178 N. C. 687, 689, 100 S. E. 348; State v. Pugh, 183 N. C. 800, 111 S. E. 849.

Evidence Must Be Stated Impartially. — It has been accepted as the proper construction and meaning of the act of this section, though it goes beyond the words: that a judge in charging a jury shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of evidence. State v. Jones, 67 N. C. 285.

Where Law Gives Testimony Artificial Weight. — It is only where the law gives to testimony an artificial weight that the judge is at liberty to express an opinion upon its weight. Bonner v. Hodges, 111 N. C. 66, 15 S. E. 881.

Section Not Confined to Charge. — In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial which is calculated to prejudice either of the parties. And when once expressed such opinion or intimation cannot be recalled. State v. Bryant, 189 N. C. 112, 126 S. E. 107, 108.

Section Applies Throughout Trial. — This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. State v. Cook, 162 N. C. 586, 77 S. E. 759.

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and, while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. Morris v. Kramer Bros. Co., 182 N. C. 87, 90, 108 S. E. 381.

Motive of Judge Immaterial. — The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. State v. Bryant, 189 N. C. 112, 126 S. E. 107, 108.

What Remarks Presumed Correct. — The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are prima facie presumed on appeal to be correct. State v. Pugh, 183 N. C. 800, 111 S. E. 849.

Province of Court and Jury. — It is not for the judge to pass upon the intensity of the proof. That is a matter which lies solely within the province of the jury. The verdict may be set aside by the court, if found to be against the weight of the evidence, but the right of the plaintiff to have it submitted to the jury can not be denied provided there is some evidence tending to establish the plaintiff's contention. The jury should be instructed that the evidence must be clear and satisfactory in cases to which that principle applies, but it is for them to say whether the evidence is of that convincing character. Avery v. Stewart, 136 N. C. 426, 430, 48 S. E. 775.

Weight and Sufficiency of Evidence Question for Jury. — Whether there be any evidence is a question for the judge. Whether it is sufficient evidence is a question for the jury. Wittkowsky v. Wasson, 71 N. C. 451; State v. Hardee, 83 N. C. 619; State v. Moses, 13 N. C. 452; Withers v. Lane, 144 N. C. 184, 56 S. E. 855.

A judge is prohibited by this section from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. Earnhardt v. Clement, 137 N. C. 91, 95, 49 S. E. 49.

It is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. In re Will of Bergeron, 196 N. C. 649, 146 S. E. 571.

Judge Cannot Withdraw Case. — A judge cannot pass upon the weight of evidence and withdraw a case from the jury when it appears to him that the evidence is not clear, strong, and convincing. Lehew v. Hewett, 138 N. C. 6, 9, 50 S. E. 459.

Nonsuit. — It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff. Kearns v. R. Co., 139 N. C. 470, 52 S. E. 131.

But he cannot enter a judgment of nonsuit on the grounds of plaintiff's contributory negligence without deciding an issue of fact. Osborne v. Southern R. Co., 160 N. C. 309, 311, 76 S. E. 16.

Directing a Verdict. — Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by this section. United States Railroad Administration v. Hilton Lumber Co., 185 N. C. 227, 117 S. E. 50.

Court Cannot Direct Affirmative Finding. — Where the party upon whom the burden of proof rests offers no evidence to prove the issue the trial judge should direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the court withdraw the issue from the jury and direct an affirmative finding. Anniston Nat. Bank v. School Committee, 121 N. C. 107, 28 S. E. 134; Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Examination of Witnesses Discretionary. — The manner of conducting the examination of witnesses is left largely to the discretion of the judge and can but seldom be the subject of review, even when not entirely approved by this court. State v. Brown, 100 N. C. 519, 6 S. E. 563.

Dissertation upon Moral Questions.—This section does not prohibit a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial, provided the language used is without prejudice to either party. Stilley v. McCox, 88 N. C. 18.

A Venire de Novo for Violation. — Under this section the trial judge is restricted to stating plainly and correctly the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis, or language, or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusion of facts, a venire de novo will be ordered. Withers v. Lane, 144 N. C. 184, 56 S. E. 855.

Exceptions after Verdict. — The fact that exception was not entered at the time a remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner, with the admission of evidence made incompetent by statute,

may be excepted to after the verdict. State v. Bryant, 189 N. C. 112, 126 S. E. 107, 109.

This case apparently overrules, without so stating, State v. Brown, 100 N. C. 519, 6 S. E. 568. In that case it was held that an objection made after verdict was too late.

Record on Appeal Must Show Error. — If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts the record must allege the tone, emphasis or manner. Davis v. Blevins, 125 N. C. 433, 34 S. E. 541. Citing State v. Wilson. 76 N. C. 120; State v. Jones, 67 N. C. 285.

Applied in Misskelley v. Home Life Ins. Co., 205 N. C. 496, 508, 171 S. E. 862; Rand v. Home Ins. Co., 206 N. C. 760, 768, 174 S. E. 749; Lamm v. Lamm, 206 N. C. 905, 173 S. E. 309.

Cited in Hunsinger v. Carolina, etc., Ry., 194 N. C. 679, 681, 140 S. E. 608; State v. Newsome, 195 N. C. 552, 143 S. E. 187; Bridgeman v. Pilot Life Ins. Co., 197 N. C. 599, 150 S. E. 15; Bostwick v. Jackson, 197 N. C. 785, 148 S. E. 925; State v. Sawyer, 198 N. C. 459, 152 S. E. 153; American Exch. Nat. Bank v. Winder, 198 N. C. 18, 22, 150 S. E. 489; Brown v. Postal Telegraph-Cable Co., 198 N. C. 771, 153 S. E. 457; Moss v. Brown, 199 N. C. 189, 154 S. E. 48; Pyatt v. Southern R. Co., 199 N. C. 397, 407, 154 S. E. 847; Nelson v. Jefferson Standard Life Ins. Co., 199 N. C. 443, 450, 154 S. E. 752; Rogers v. Ray, 199 N. C. 577, 155 S. E. 253; State v. Johnson, 205 N. C. 839, 171 S. E. 926; Jones v. Metropolitan Life Ins. Co., 206 N. C. 916, 918, 175 S. E. 162.

B. What Constitutes an Opinion.

In General. — This section has been interpreted to mean that no judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved. State v. Mitchell, 193 N. C. 796, 798, 138 S. E. 166, citing State v. Kline, 190 N. C. 177, 129 S. E. 417; State v. Hart, 186 N. C. 582, 120 S. E. 345. See Speed v. Perry, 167 N. C. 122, 83 S. E. 176, where this section, in all of its phases, is discussed at considerable length, with full citation of authorities.

The judge who tries a cause has no right to intimate in any manner his opinion as to the weight of the evidence, nor to express an opinion on the facts. Powell v. Wilmington, etc., R. Co., 68 N. C. 395.

A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by this section, when nothing of this character appears from a careful perusal of the charge on appeal that could bias a mind of ordinary firmness and intelligence. Keller v. Caldwell Furniture Co., 199 N. C. 413, 414, 154 S. E. 674.

Test of Violation. — It is a violation of this section for a judge at any time in the progress of a trial (as well as during his charge to the jury) to express an opinion as the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact. State v. Browning, 78 N. C. 555.

Direct Language Not Necessary to Constitute Error. — Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of this section. State v. Hart, 186 N. C. 582, 120 S. E. 345.

Possibility of Unfair Inference Insufficient. — It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were capable of a construction from which his opinion on the weight of testimony might be inferred; but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was likely to convey to the jury his opinion on the weight of the testimony. State v. Jones, 67 N. C. 285.

Section Applies to Issues. — The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends. Long v. Byrd, 169 N. C. 659, 86 S. E. 574; Citing State v. Angel, 29 N. C. 27.

Language Subject to Misapprehension. — When there is a conflict of testimony which leaves a case in doubt before the jury, and the judge uses language which may be subject to misapprehension and is calculated to mislead, the Supreme Court will order a venire de novo. State v. Rogers, 93 N. C. 523, 524.

Remarks Made in Mere Pleasantry. — Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. State v. Jones, 181 N. C. 546, 106 S. E. 817.

Charge Predicated on Jury Findings. — Where the trial judge predicates his statements in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by this section. Ivie v. King, 167 N. C. 174, 83 S. E. 339.

Positive and Negative Testimony. — It is not error, as a general proposition, for a judge to say that positive testimony is entitled to more weight than negative. Henderson v. Crouse, 52 N. C. 623.

Assumption of Truth of Fact. — An instruction which assumes the truth of controverted facts is erroneous, as invading the province of the jury. Bradley v. Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Pigford v. Norfolk, etc., R. Co., 160 N. C. 93. 75 S. E. 860.

Assumption of Non-Existence of Facts. — A new trial will be awarded, where the charge of the court assumed that certain facts had not been proved, thus taking the questions from the jury. Powell v. Wilmington, etc., R. Co., 68 N. C. 395.

Uncontroverted Facts. — An instruction is not erroneous in assuming an admitted fact. Crampton v. Ivie, 124 N. C. 591, 32 S. E. 968.

Uncontroverted Evidence. — Where the defense is based on the uncontradicted testimony of a witness, it is proper for the court to instruct the jury to find for defendant if they believe such witness. Love v. Gregg, 117 N. C. 467, 23 S. E. 332; Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741; Chemical Co. v. Johnson, 101 N. C. 223, 7 S. E. 770, 775.

However, this principal does not apply where the evidence, if true, is susceptible of more than one deduction. Armour Fertilizer Works v. Cox, 187 N. C. 654, 122 S. E. 479.

Submission to Jury. — Where issues are submitted to the jury, an instruction that plaintiff can not recover can not be granted. Bradley v. Ohio River, etc., R. Co., 126 N. C. 735, 36 S. E. 181; Witsell v. West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125.

Instruction That There Is No Evidence. — If any testimony, however slight or insufficient, is given, which tends to establish the issue, it is error to instruct the jury that there is none. State v. Allen, 48 N. C. 257.

Failure of Proof. — Where there is no evidence to prove the affirmative of an issue, the jury may be instructed to answer it in the negative if they believe the evidence. Woodbury v. Evans, 122 N. C. 779, 30 S. E. 2; Newsome v. Western Union Tel. Co., 144 N. C. 178, 56 S. E. 863.

Remark That Fact is "Sufficiently Proved." — The judge is not permitted to express an opinion as to whether a fact, is sufficiently proved, in his charge to the jury. Williams v. Crosby Lumber Co., 118 N. C. 928, 934, 24 S. E. 800.

Hypothetical Statements by Judge. — Merely hypothetical instructions are erroneous, and should not be indulged in, as they proceed on an assumption of facts. State v. Collins, 30 N. C. 407; State v. Benton, 19 N. C. 196; Johnson v. Bell, 74 N. C. 355; State v. Murph, 60 N. C. 129.

It is not error to refuse any instruction asked on a hypothetical state of facts. Wilson v. Holley, 66 N. C. 408.

Applies to Inferences of Fact. — Whether a fact if sufficiently proved is within the province of the jury to determine, and upon which the court may not intimate an opinion, and this inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony upon which the ultimate facts necessarily depend. Phillips v. Giles, 175 N. C. 409, 410, 95 S. E. 772.

Remarks Must Be Prejudicial. — Unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error. State v. Browning, 78 N. C. 555.

Evidence Tends to Show. — It is not error, as commenting on the weight of evidence, to use in instructions the phrases, "the evidence tends to show," and "evidence tending to show." Lewis v. Norfolk, etc., R. Co., 132 N. C. 382, 43 S. E. 919.

The use of the words "the evidence tends to show" by the trial court in his charge to the jury, applied both to the evidence for the State and for the defendant, is not

an expression by him upon the weight and credibility of the evidence forbidden by this section. State v. Jackson, 199 N. C. 321, 154 S. E. 402.

Remarks to Counsel. — Remarks of the judge, made, not in his charge but to counsel during the introduction of the evidence, are not a ground for a new trial, unless it reasonably appears that a party is prejudiced in the minds of the jury by such remarks. Williams v. Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800.

Reprimand of Spectators. — A reprimand of spectators is not a violation of this section. State v. Robertson, 121 N. C. 551, 28 S. E. 59.

Credibility of Witnesses. — Where there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always a question for the jury, and this is so though the testimony may be all on one side. In this case, the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way; but not upon the evidence, so to answer it. Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; Smith v. Cashie, etc., Lumber Co., 140 N. C. 375, 53 S. E. 233.

Appearance and Manner of Witness. — The presiding judge should not state to the jury his estimate of the appearance and manner of a witness. Crutchfield v. Richmond, etc., R. Co., 76 N. C. 320.

Remark Complimentary to Witness. — A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is empanelled, is not forbidden by this section. State v. Howard, 129 N. C. 584, 40 S. E. 71.

Amount of Recovery. — Mathematical computations in a charge on the measure of damages is not a usurpation of the powers of the jury, where the court charges they are used merely as an example. Spreight v. Seaboard, etc., Railway, 161 N. C. 80, 76 S. E. 684.

Remarks Made in Directing Nonsuit of One of Several Defendants. — It is error for the judge in the presence of the jury, to nonsuit one of several defendants upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. State v. Sullivan, 193 N. C. 754, 138 S. E. 136.

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

a. Remarks Concerning a Party to the Trial.

Parties as Witnesses.—Where plaintiff and defendant are the principal witnesses, and the former testifies distinctly to one contract and its breach by defendant, who testifies as distinctly to another and a different contract, it is not error to charge that, if the jury find that plaintiff has stated the contract correctly, they will find for him, but, if defendant stated it correctly, then the verdict should be for him. Barringer v. Burns, 108 N. C. 606, 13 S. E. 142.

Remarks During Former Trial. — The remarks of the judge in sentencing a prisoner during the previous week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. State v. Baldwin, 178 N. C. 687, 688, 100 S. E. 348.

Remark That Prisoner Would Escape. — A remark of the judge before trial began, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts. State v. Jacobs, 106 N. C. 695, 10 S. E. 1031.

Statement That Judge Did Not Understand Claim. — Where the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff based the eleven thousand and some odd dollars," it was held that this was not an expression of opinion prohibited by this section. McDonald v. MacArthur Bros. Co., 154 N. C. 11, 69 S. E. 684.

b. Remarks Concerning Witnesses.

Remark Concerning Emotion of Witness. — On a trial for rape a remark by the judge concerning the mother of the prosecutrix, that "some allowance must be made for the woman, as she is overcome with emotion": was held not to be error. State v. Laxton, 78 N. C. 564.

Statement That Witness Corroborates Another. — A recitation that the testimony of a witness corroborated the testimony of another witness is not an expression of opinion. State v. Mitchell, 193 N. C. 796, 138 S. E. 166.

Remark That Witness Has Fully Answered Question. — Where the same witness has several times fully answered a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the credibility of the witness. State v. Mansell, 192 N. C. 20, 133 S. E. 190.

Referring to Eyewitnesses.—Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eye-witnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eye-witnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by this section. State v. Boswell, 195 N. C. 496, 142 S. E. 583.

c. Remarks Concerning Weight and Credibility of Testimony.

Instruction Based on Law. — Where there is evidence of fraud and undue influence in the making of a will, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge, In re Will of Hardee, 187 N. C. 381, 121 S. E. 667.

Statement That Phases of Case Were Admitted. — A trial judge in an action for damages who stated to the jury that there were phases of the case apparently admitted by the defendant's counsel and if not, to be passed upon by the Jury, did not violate this section. Means v. Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813.

Statement Concerning Admission. — It is not a violation of this section for the judge to tell the jury that the evidence that the defendant had admitted execution of a bond, if believed by the jury to be true, is entitled to more weight than the opinion of experts to the genuineness of the signature, and that such opinions should be received with caution. Buxly v. Buxton, 92 N. C. 479.

Reference to Testimony of One Witness. — Where the court was evidently stating the contentions of the parties as to the force of the evidence taken as a whole, his reference to the testimony of one witness is not improper as tending to restrict the consideration of the jury to it alone. Wheeler v. Cole, 164 N. C. 378, 80 S. E. 241.

Charge Based on Uncontradicted Testimony. — A charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of an uncontradicted witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence. State v. Moore, 192 N. C. 209, 134 S. E. 456.

Statement That Evidence Satisfies "Beyond Reasonable Doubt."—Where the trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence, "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc.: Held, the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of this section. State v. Johnson, 207 N. C. 273, 176 S. E. 581.

d. Miscellaneous Remarks.

Where Defense Not Applicable to Issue. — Where the testimony of all the officers of a bank conversant with the facts that the bank was an indorsee for value and a holder in due course of the note sued on was not contradicted, and the maker relied solely on the fraud of the payee in procuring the note, the court properly charged that if the jury believed the evidence, the verdict should be for the bank. First Nat. Bank v. Griffin, 153 N. C. 72, 68 S. E. 919.

Statement to Jury. — Where the jury has returned for further instructions which the court fairly and impartially gives, his statement to them that they should reconcile the evidence if they could and that if they could not, the court would "have to do something else," is not an intimation as to whether "any fact has been fully and sufficiently proved." Nixon v. Buckeye Cotton Oil Mill, 174 N. C. 730, 94 S. E. 410.

Comment on Jury's Duty. — Where the jury has failed to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., was held, not to be

an expression of opinion by the judge upon the evidence. State v. Pugh, 183 N. C. 800, 111 S. E. 849.

Statement after Verdict Excusing Jurors for Term. — When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, cannot be construed as an expression of opinion forbidden by this section though one of the same jurors sat upon this case. State v. Pugh, 182 N. C. 800, 111 S. E. 849.

Remark Concerning Recall of Witness. — A remark by a judge, when he permitted a witness to be recalled, and asked a question to impeach his credibility, that if he had known the counsel intended to ask that question he would not have allowed the witness to be recalled, is not an expression of opinion about the facts. DeBerry v. Carolina Cent. R. Co., 100 N. C. 310, 6 S. E. 723.

Question to Counsel. — Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. State v. Brown, 100 N. C. 519, 6 S. E. 568.

Response to Request of Counsel. — Where the prisoner's counsel called attention to the judge's failure to state in his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of the judge in violation of this section. State v. Freeman, 100 N. C. 429, 5 S. E. 921.

Suggestion of Method of Settlement. — In an action for the purchase price of a horse, defended upon the ground of a breach of warranty, a suggestion by the judge, that a good test would be for each party to select a man and drive the horse sufficiently to see what his condition was, is not an expression of opinion. Long v. Byrd, 169 N. C. 658, 86 S. E. 574.

Matters Subject to Mathematical Calculation.—Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error under this section. State v. Gant, 201 N. C. 211, 212, 159 S. E. 427.

Opinion on One Count Applies to Others. — Where the verdict of the jury has acquitted the defendant under a count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes error. State v. Sparks, 184 N. C. 745, 114 S. E. 755.

2. Remarks Held Error.

a. Remarks Concerning a Party to the Trial.

Character of Accused. — It was held to be error for a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf"; the true rule being that in all cases a good character is to be considered. State v. Henry, 50 N. C. 66.

Motive. — A charge, "While it is permissable to show a motive as a circumstance to be considered by the jury, it is not necessary. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the indictment," was held to be error under this section. State v. Morgan, 136 N. C. 628, 629, 48 S. E. 670.

Comment on Absence of Defendants. — Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion forbidden by this section. Greene v. Newsome, 184 N. C. 77, 113 S. E. 569.

Ordinary Care. — An instruction, that if a porter, injured in getting on a train, could have got on in safety by using both hands, his failure to do so was not the exercise of ordinary care, was erroneous. Sanders v. Atlantic, etc., R. Co., 160 N. C. 526, 76 S. E. 553.

"Proverbial Slowness of Messenger Boy." — In an action against a telegraph company it is error for the court to refer in its charge to the "proverbial slowness of the messenger boy." Meadows v. Western Union Tel. Co., 131 N. C. 73, 42 S. E. 534.

Corporation Benefits. — In an action against a corporation the judge recited the benefits conferred by corporations upon the citizens, without mentioning the benefits they received in return, and intimated that he would not permit a verdict rendered upon "guesswork, sympathy, pity, or prejudice," etc., the charge was held to be an expression of opinion. Starling v. Selma Cotton Mills, 171 N. C. 222, 223, 88 S. E. 242.

Identification of Defendant. — Where the only evidence connecting the defendant with operating a still was a coat found there with a receipt with defendant's name on it in one of the pockets, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, is an expression of an opinion. State v. Allen, 190 N. C. 498, 130 S. E. 163.

Remark Concerning Plaintiff as Witness. — In an action of claim and delivery for a horse, an instruction by the trial judge, that in passing upon the credibility of the plaintiff as a witness the jury should consider the fact that he had $50 of the defendant's money in his pocket and refused to give it to him, amounts to an expression of an opinion upon the facts. Faulkner v. King, 130 N. C. 494, 41 S. E. 885.

Time Plaintiff Would Live.—In an action to recover damages for a permanent injury alleged to have been negligently inflicted, an expression in the charge as to the presumed time the plaintiff would live, and the consequent diminution of his earning capacity, falls within the inhibition of our statute. Cogdill v. Boice Hardwood Co., 194 N. C. 745, 140 S. E. 732.

b. Remarks Concerning Witnesses.

Remark That Witness was "Admirably Lucid." — The expression of the opinion of the court as to the "admirably lucid" testimony of a medical expert witness constituted reversible error. State v. Horne, 171 N. C. 787, 88 S. E. 433.

Comments upon Witnesses. — "The expression, 'This witness has the weakest voice or the shortest memory of any witness I ever saw'—is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit." State v. Bryant, 189 N. C. 112, 126 S. E. 107, 109.

Questioning Non-Resident As to Professional Ethics. — In an action to recover damages for personal injury, where a release from liability is set up, it is an ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own State, of such conduct; which reflected on the witness. Morris v. Kramer Bros. Co., 182 N. C. 87, 108 S. E. 381.

Witness Included in Same Indictment. — Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. State v. Jenkins, 85 N. C. 544.

Interest of Witness. — It is error to charge the jury that they are bound to believe who is unimpeached and uncontradicted. Though he tells a credible story, his connection with the parties may shake the jury's confidence. Noland v. McCracken, 18 N. C. 594.

Minister As Witness. — Where a judge charged that, because a witness was clergyman, his testimony was therefore entitled to more weight, it is sufficient ground for a new trial. Sneed v. Creath, 8 N. C. 309.

Statement That "Both Witnesses Are Gentlemen." — For the judge, where the testimony of two witnesses conflicted, to tell the jury: "Both witnesses are gentlemen. It is a matter of memory"—was erroneous, as interfering with the province of the jury to determine the credibility. McRae v. Lawrence, 75 N. C. 289, cited in notes in 61 L. R. A. 514, 515.

c. Remarks Concerning Weight and Credibility of Testimony.

Remark That Circumstance Was a "Strong Badge of Fraud." — Where a creditor postponed taking judgment because the debtor alleged that he was making arrangements to borrow the money, but before the expiration of the extended time the debtor made an assignment, preferring other creditors, an instruction that the circum-

stance was a strong badge of fraud was held to be error. Bonner v. Hodges, 111 N. C. 66, 15 S. E. 881.

Instruction As to Former Marriage. — In an indictment for bigamy an instruction that the weight of the evidence was that there had been no first marriage, is a violation of this section. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Determination of Preponderance. — A request in a civil action that, "when the minds of the jury are in doubt, they must find for the defendant," is error. Willis v. Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941.

Instruction That Evidence Rebuts a Prima Facie Case.— When the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates this section. Sherrill v. Western Union Tel. Co., 116 N. C. 655, 657, 21 S. E. 429.

Statement That Evidence Left Matter Unproved. — Where the judge presiding at a trial said that, while there was some evidence to go to the jury, it was a bare scintilla, leaving the matter not proved, it was held error. The evidence was competent or it was not, and should have been withdrawn from the jury or submitted without expression of opinion. Boing v. Raleigh, etc., R. Co., 87 N. C. 360.

Concerning Value of Book As Testimony. — For the judge to say that a book on farriery, which had been read by counsel, was entitled to as much authority as a witness who had been examined as an expert in the science of diseases of horses, is a clear violation of this section. Melvin v. Easley, 46 N. C. 386, 62 Am. Dec. 171.

Concerning Map. — Where a certain location is material and a surveyor had testified and his map was put in evidence, it is reversible error for the trial judge to instruct the jury that they must be guided in their judgment, not from the map, but from the testimony of the surveyor and other witnesses. Swain v. Clemons, 172 N. C. 277, 90 S. E. 193.

Concerning Location and Acreage. — The weight of the circumstance that one claimed location would give the acreage called for by the deed, while the other would give a greater acreage, being for the jury, it was error to charge that the acreage was not of great value to aid the jury in determining the location. May v. Manufacturing, etc., Co., 164 N. C. 262, 80 S. E. 380.

Instruction as to Value of Deed. — In an action for ejectment it was error to instruct the jury that the deed was sufficient to vest the title in the grantees, where plaintiff's right to recover was dependent upon evidence that the defendant's grantor was estopped to claim the land, as the credibility of the witnesses was a matter for the jury. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

Where the charge on the issue of testamentary capacity, read from the text-book, is that where the testator's sickness is wholly physical, proof of his condition as to lethargy, unconsciousness, etc., "is entitled to little consideration," and that the courts will "scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude," and that "the will of an aged person should be regarded with great tenderness" when not procured by fraud, etc., is held as reversible error under this section. In re Will of Bergeron, 196 N. C. 649, 146 S. E. 571.

d. Miscellaneous Remarks.

Instruction Not Barred on All Elements — An instruction which states that, if the jury find certain facts grouped in the instruction, there was no negligence, is objectionable, unless all the material elements of the case are included. Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86.

Inference from Evidence. — An instruction charging the jury that, if they believed the evidence, they should find certain evidential facts to be true and that thereupon, certain other facts must be true, is error. Kinney v. North Carolina R. Co., 122 N. C. 961, 30 S. E. 313.

Charge Based on Contradicted Witness. — It is error in the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. State v. Rogers, 93 N. C. 523.

On Contradictory Evidence. — Where the evidence was conflicting, an instruction, "if the jury believe the evidence, the answer to the first issue should be no," is a violation of this section. Rickert v. Southern R. Co., 123 N. C. 255, 31 S. E. 497; Leak v. Covington, 99 N. C. 559, 6 S. E. 241.

Where the case is tried upon special issues, an instruction that plaintiffs are not entitled to recover if the jury believe the evidence is improper. Jones v. Balsley, 154 N. C. 61, 69 S. E. 827; Baker v. Brem, 103 N. C. 72, 9 S. E. 629. See Cauley v. Dunn, 167 N. C. 32, 83 S. E. 16.

Assumption of Conflicting Fact.—Where defendant railway claimed that decedent found on its tracks was already dead when struck by the train, and the evidence on this point was in sharp conflict, an instruction which assumed that decedent was killed by the train was erroneous under this section. Hunsinger v. Carolina, etc., Ry., 194 N. C. 679, 140 S. E. 608.

Remark That "We Are Not Informed." — Where there is any evidence to the contrary, it is erroneous in the judge to say, "We are not informed" of the fact upon which it is for the jury to pass. Powell v. Wilmington, etc., R. Co., 68 N. C. 395.

Degree of Crime. — Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. State v. Gadberry, 117 N. C. 811, 23 S. E. 477.

When No Presumption at Law. — A trial judge cannot say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it. National Bank v. Gilmer, 116 N. C. 684, 703, 22 S. E. 2.

Arguing Law to Jury. — That a case cited by counsel for plaintiff, and relied on to establish his position, was an authority directly against that position, and that counsel knew or ought to have known it, was held to be error. Perry v. Perry, 144 N. C. 328, 57 S. E. 1.

Trial for Attempted Rape. — On a trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant had been found on the six year old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" State v. Dancy, 78 N. C. 437.

Insurance. — A requested charge that, if insured was more than 55 years of age when he applied for membership, the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of insured, was properly refused as an expression of opinion upon the facts. Tillery v. Royal Ben. Soc., 165 N. C. 262, 80 S. E. 1068.

Regarding Duty of Railroad to Build Culvert. — It was held error in a trial judge to instruct the jury that it was the duty of a railroad company to build a culvert over a certain ravine, and it was also held error to express the opinion that the said branch, regarding which there was conflicting evidence, was not a natural water-course. Fleming v. Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714.

Validity of Lien. — In an action involving the validity of a lien on certain crops, an instruction that the lien is void, because it was recorded in one county, while the debtor resided in another, involves an expression of opinion as to the facts of the case. Weisenfield v. McLean, 96 N. C. 248, 2 S. E. 56.

Bills and Notes. — In an action on a note, where defendant testified that he signed as surety, with the knowledge of the payee, and the payee testified to the contrary, it was error to instruct the jury that if they believed the evidence they should find that the payee knew that defendant signed as a surety. Harris v. Carrington, 115 N. C. 187, 20 S. E. 452.

Value of Property. — In an action for damages plaintiff testified that the property destroyed was worth a specified sum, and defendant introduced as a witness the tax lister who testified that plaintiff stated that a much lower valuation was too high for purposes of taxation, it was held, that instructions that the jury had the uncontradicted evidence of plaintiff as to the value of the property destroyed was erroneous, as withdrawing from the consideration of the jury the testimony of the tax lister. Dobson v. Southern R. Co., 132 N. C. 900, 44 S. E. 593.

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Considerations of the Charge.

Editor's Note. — When the Supreme Court in Hinshaw v. Raleigh, etc., R. Co., 118 N. C. 1047, 24 S. E. 426, overruled Emry v. Raleigh, etc., R. Co., 109 N. C. 589, 14 S. E. 352, and modified the broad rule laid down in State v. Boyle, 104 N. C. 800, 10 S. E. 696, 1023, in a series of adjudications that followed it, it was not intended that the jury should be left to grope in utter darkness, unless counsel were sufficiently diligent to draw fire from the court by prayers for instruction. McCracken v. Smathers, 119 N. C. 617, 620, 26 S. E. 157.

The Object of Instructions. — The chief object contem-

plated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Bird v. United States, 180 U. S. 356, 361, 45 L. Ed. 570.

Benefits to be Derived from Charge. — The principal benefit to be derived from a charge to the jury is not a statement of law but the elimination of irrelevant matters. Irvin v. Southern R. Co., 164 N. C. 5, 80 S. E. 78.

Theory as to Evidence. — Much confusion as to proceeding with evidence, when a prima facie showing has been made, is eliminated by a proper application of this section. Under our system the trial court, during the production of the evidence, must necessarily proceed upon the theory that the jury has a right to find as true all the evidence submitted by either party. Hunt v. Eure, 189 N. C. 482, 127 S. E. 593, 595.

Charge Must Be Considered as a Whole. — The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so considered, it presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. Gilliland v. Board, 141 N. C. 482, 54 S. E. 413. In re Will of Hardee, 187 N. C. 381, 121 S. E. 667.

"The charge must be considered contextually and not disjointly. Riverview Milling Co. v. State Highway Comm., 190 N. C. 692, 697, 130 S. E. 724, and cases cited therein.

In determining whether a charge comes up to the requirements of this section it (charge) must be considered as a whole. Gore v. Wilmington, 194 N. C. 450, 457, 140 S. E. 71. See State v. Moore, 197 N. C. 196, 197, 148 S. E. 29.

The charge of the trial court will be construed as a whole, and if, upon such construction, it fully charges the law applicable to the facts and does not impinge this section, it will not be held for error on appeal. Harrison v. Metropolitan Life Ins. Co., 207 N. C. 488, 177 S. E. 423.

Matters Stricken from Complaint. — Requested instructions as to matters stricken from the complaint as to which the evidence had been withdrawn from the jury should be refused. Tilghman v. Seaboard, etc., R. Co., 167 N. C. 163. 83 S. E. 315.

Applications of Instructions to Case. — It is not error for the court to refuse to give instructions which, though correct in the abstract, are not applicable to the case. McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845.

The refusal to instruct as to a point not material to the verdict is not prejudicial error. Mendenhall v. North Carolina R. Co., 123 N. C. 275, 31 S. E. 480.

However, the giving of an instruction not strictly applicable to the material questions to be determined is not ground for reversal, where no prejudice is shown and it appears the jury could not have been misled thereby. Evans v. Howell, 84 N. C. 461.

Arguments of Counsel.—It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence on the issues. Clark v. Wilmington, etc., R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749.

Unauthorized Charge. — A judge cannot make a charge not authorized by the pleadings. Thus in an action for a debt barred by the statute of limitation, where the statute is not pleaded, the judge cannot charge that the debt is barred although requested to make such a charge. Albertson v. Terry, 109 N. C. 8, 13 S. E. 713.

Inconsistent or Contradictory Instructions. — An inconsistent charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is error. Patterson v. Nichols, 157 N. C. 406, 73 S. E. 202; Blanton Grocery Co. v. Taylor, 162 N. C. 307, 78 S. E. 276.

Erroneous Instruction Not Cured by Correct Instruction. —An error in giving an erroneous instruction is not cured by subsequently correctly stating the law. State v. Morgan, 136 N. C. 628, 48 S. E. 670.

When Charge Contains a "Powerful Summing up." — Where the trial judge in his general charge gives "every reasonable contention of the state," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the state. State v. McDowell, 129 N. C. 523, 39 S. E. 840.

Contentions Not Necessarily a Part of Instructions. — The contentions of the parties to an action are not a necessary part of the instruction of the trial judge to the jury upon the law of the case. State v. Whaley, 191 N. C. 387, 132 S. E. 6.

Requiring Jury to Be Satisfied. — An instruction requiring the jury to be "satisfied" as to the facts of justification relied on to defeat an action for false arrest and imprisonment does not require too great a degree of proof to establish justification. Sigmon v. Shell, 165 N. C. 582, 81 S. E. 739.

Weight of Defendant's Testimony. — The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. State v. Beavers, 188 N. C. 595, 125 S. E. 258.

Instructions Should Be Restricted to Answers Expected. —Where the case is submitted for a special verdict, the jury should only be instructed on questions which they are to answer, and it is error to inform them as to the effect their answers will have on the ultimate rights of the parties, or to authorize them to answer in the form of a legal conclusion. Earnhardt v. Clement, 137 N. C. 91, 49 S. E. 49; Bottoms v. Seaboard, etc., R. Co., 109 N. C. 72, 13 S. E. 738.

Defendants can not complain that the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instructions, the court correctly applies the law of negligence and contributory negligence to the facts of the case. Blackwell v. Lynchburg, etc., Railroad, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786.

Where Charge Favorable to Appellant. — The failure of the court to comply with this section will not be sufficient ground for a new trial, where the case on appeal shows that the charge of the court presented the case in the most favorable light for the defendant. State v. Pritchett, 106 N. C. 667, 668, 11 S. E. 357.

Requests for Instructions Must Be Timely. — A party desiring more specific instructions than those given in the general charge must ask for them in apt time. A complaint of the charge, made after verdict, is too late. Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225. See also State v. Brady, 107 N. C. 822, 12 S. E. 325.

Exception Must be Specific. — An exception that the trial judge "failed to state in a plain and correct manner the evidence, and declare and explain the law arising thereon as required in this section," is too general and cannot be sustained. Jackson v. Ayden Lumber Co., 158 N. C. 317, 74 S. E. 350.

Error Cured by Verdict. — Where there are several counts of an indictment, and the charge was correct upon those on which a conviction has been had, the verdict cures the error committed in not giving the principles of law arising from the evidence upon the count which the appealing defendant was acquitted. State v. Church, 192 N. C. 658, 135 S. E. 769.

Same—Failure to Call Judge's Attention to Error. — The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so as an exception after verdict comes too late to be considered on appeal. State v. Beavers, 188 N. C. 595, 125 S. E. 258.

B. Explanation Required.

1. In General.

Rule Stated. — It is held under the requirements of this section, to be the duty of the judge in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Rogers, 93 N. C. 523, 531. Citing State v. Dunlop, 65 N. C. 288; State v. Jones, 87 N. C. 547.

He is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be a true one. State v. Matthews, 78 N. C. 523, 537.

And in criminal cases this section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. State v. Fulford, 124 N. C. 798, 801, 32 S. E. 377.

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. State v. Graham, 194 N. C. 459, 140 S. E. 26.

Where the trial court in his charge to the jury explains the law applicable and gives the contention of the parties, but fails to instruct the jury as to the application of the law to the substantial features of the case, the charge is insuf-

ficient to meet the requirements of this section and a new trial will be awarded. Com'r of Banks v. Florence Mills, 202 N. C. 509, 163 S. E. 598.

Where the charge of the court fails to point out the distinction between the counts in the indctment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error, under this section. State v. Ray, 207 N. C. 642, 178 S. E. 224.

Scope of Instruction. — The court should instruct the jury on all the issues presented by the pleadings and the evidence. Patterson v. North Carolina Lumber Co., 145 N. C. 42, 58 S. E. 437.

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substantially prejudice one of the parties, in the consideration of the evidence by the jury, it is error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. Bowen v. Schnibben, 184 N. C. 248, 114 S. E. 170.

Where Facts Are Simple. — The section does not require the judge to "charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirement of the statute. Duckworth v. Orr, 126 N. C. 674, 677, 36 S. E. 150, citing Holly v. Holly, 94 N. C. 96; State v. Reynolds, 87 N. C. 544; State v. Grady, 83 N. C. 643.

Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not appear to have misled the jury, the error in this respect will not be held as reversible. Craig v. Stewart, 163 N. C. 531, 79 S. E. 1100.

Mere Statement of Contentions. — It is error simply to state the contentions of the parties, both as to the facts and as to the law and not declare and explain the law applicable to the facts as the jury might find them from the evidence. Nichols v. Champion Fibre Co., 190 N. C. 1, 5, 128 S. E. 471; Parker v. Thomas, 192 N. C. 798, 803, 136 S. E. 118. See Fowler v. Champion Fibre Co., 191 N. C. 42, 131 S. E. 380.

Contentions of Parties.—Although it is not required by this section that the trial judge should state the contentions of the parties to the jury, the practice has grown up in our courts as a helpful and accepted procedure, and a fair statement of the contentions of a party will not be held for error upon exception. Rocky Mount Sav., etc., Co. v. Aetna Life Ins. Co., 204 N. C. 282, 167 S. E. 854.

Explanation of Subordinate Features of Case.—The charge of the court did not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for special instructions. State v. Ellis, 203 N. C. 836, 167 S. E. 67.

Duty Cannot Be Omitted. — The duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them. State v. Clark, 134 N. C. 698, 47 S. E. 36.

Salutation of Instruction. — The trial judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence." State v. Green, 134 N. C. 658, 46 S. E. 761; State v. Seaboard Airline R., 145 N. C. 570, 59 S. E. 1048.

But where instructions consisting of several clauses contain at the beginning the words, "If the jury find from the evidence," it is not necessary to repeat such words in each clause. Wilkie v. Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204. Rehearing in 128 N. C. 113, 38 S. E. 289.

2. Statement of Evidence.

In General.—All that is required of a charge by this section is that the essential evidence offered at the trial be stated in a plain and correct manner, together with an explanation of the law arising thereon. State v. Fleming, 202 N. C. 512, 514, 163 S. E. 453; In re Beale, 202 N. C. 618, 163 S. E. 684.

By virtue of this section where the charge of a trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded. Myers v. Foreman, 202 N. C. 246, 162 S. E. 549.

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. State v. Sterling, 200 N. C. 18, 19, 156 S. E. 96.

Repetition of Testimony Insufficient.—This duty is not performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. State v. Boyle, 104 N. C. 800, 10 S. E. 696, 1023.

This section is not complied with where the court reads to the jury full notes of all the testimony in the cause, and tells them that he does this to refresh, and not to control, their recollection of the testimony, that it is their duty to remember the testimony, and that they ought to rely in the last resort on their own recollection. State v. Boyle, 104 N. C. 800, 10 S. E. 696, 1023.

Possibilities of Fact.—Where there are several possibilities of fact, different from the inference tended to be drawn from the evidence offered, a judge is not required to note one such possibility, and specifically bring it to the attention of the jury. State v. Clara, 53 N. C. 25.

Restricting Evidence to Purpose for Which Admissible.—It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. Burton v. Wilmington, etc., R. Co., 84 N. C. 193. See also, State v. Ballard, 79 N. C. 627.

Recapitulation Unnecessary.—The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032; State v. Gould, 90 N. C. 658.

Nor is the judge required to recite the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue. State v. Jones, 97 N. C. 469, 1 S. E. 680.

Second Recapitulation Not Required.—The trial judge is not required to recapitulate the testimony a second time, although one of the parties may request it to be done. Aston v. Craigmiles, 70 N. C. 316.

Judge May Omit Testimony.—Unless there be some reason why the judge should remark particularly on the testimony of a witness, he may with propriety, decline to comply with a request to do so. Findly v. Ray, 50 N. C. 125.

Agreement of Counsel.—The failure of a judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated. Wiseman v. Penland, 79 N. C. 197.

Effect of a "Slip of the Tongue".—A mere inadvertent "slip of the tongue" in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. State v. Sinodis, 189 N. C. 565, 127 S. E. 601.

Weight and Credibility.—Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of this section, in expressing his opinion upon the weight and credibility of the evidence, is untenable. State v. Durham, 201 N. C. 724, 726, 161 S. E. 398.

3. Explanation of Law.

In General.—This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. Williams v. Eastern Carolina Coach Co., 197 N. C. 12, 15, 147 S. E. 435, citing Wilson v. Wilson, 190 N. C. 819; S. v. O'Neal, 187 N. C. 22, 24; Blake v. Smith, 163 N. C. 274, 79 S. E. 596; Bowen v. Schnibben, 184 N. C. 248, 249, 114 S. E. 170.

As was said in S. v. Matthews, 78 N. C. 523, 537, the requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. Williams v. Eastern Carolina Coach Co., 197 N. C. 12, 15, 147 S. E. 435.

Party Must Request.—Where the judge has sufficiently charged the jury as to the law arising under the evidence in the case in compliance with this section, such further matters of instruction as the appellant may desire should be offered by special request of instruction. Gore v. Wilmington, 194 N. C. 450, 140 S. E. 71; Murphy v. Power Co., 196 N. C. 484, 483, 146 S. E. 204. See Graham v. State, 194 N. C. 459, 140 S. E. 26.

But the rule stated in Bank v. Rochamora, 193 N. C. at p. 1, 8, 136 S. E. 259, that "where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it," applies to subordinate elaboration, but not substantive, material and essential features of the charge. McCall v. Lumber Co., 196 N. C. 597, 602, 146 S. E. 579.

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it. Acme Mfg. Co. v. McPhail, 179 N. C. 383, 388, 102 S. E. 611; Riverview Milling Co. v. State Highway Comm., 190 N. C. 692, 130 S. E. 724; State v. Johnson, 193 N. C. 701, 138 S. E. 19.

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions on any point, or a more detailed and complete statement of his contentions to aptly make request therefor. State v. Caudle, 208 N. C. 249, 180 S. E. 91.

If the indictment fully describes the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to aptly tender a request therefor. State v. Gore, 207 N. C. 618, 178 S. E. 209.

Explanation Must Cover any Authorized Finding.—It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence. Lawton v. Giles, 90 N. C. 374, 375, 379; State v. Jones, 87 N. C. 547.

Law on Facts and Inferences.—It is necessary to state the law arising on the various phases of the evidence, and on all facts which the jury should find from the evidence, when such facts constitute a part of the basis for the answers to the issues. Wilson v. Wilson, 190 N. C. 819, 821, 130 S. E. 834, and cases therein cited.

Instructions Based on Assumption.—When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the question so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts which may be reasonably assumed upon the evidence. State v. Dunlop, 65 N. C. 288.

But where a prayer for instructions assumes certain facts to be in proof, and in the opinion of the judge there is no evidence tending to prove them, he ought to say so, and thus not embarass the jury by the consideration both of the assumed facts and of the questions of law predicated on their assumption. State v. Dunlop, 65 N. C. 288.

Instruction Necessary to Reach Verdict.—Where an instruction upon the law is necessary for the jury to arrive at a verdict upon a material issue, it is the duty of the trial judge to charge the law thus arising without a request for special instruction. Jacob Stove Works v. Boyd, 191 N. C. 523, 132 S. E. 273.

Substantial Compliance with Request Sufficient.—The trial judge is not required to give special instructions in the precise works asked, even when unobjectionable. A substantial compliance is sufficient. State v. Booker, 123 N. C. 713, 31 S. E. 376.

The trial court is not required to give instructions in the language of the prayers, provided the instructions given are correct and cover the various phases of the testimony. State v. Wilcox, 132 N. C. 1120, 44 S. E. 625.

Charge Covering Subordinate Features.—When a judge has followed this section and charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but on the substantive features of the case arising on the evidence, the judge is required to give a correct charge concerning it. Acme Mfg. Co. v. McPhail, 179 N. C. 383, 388, 102 S. E. 611.

Request for Special Instructions.—Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of this section when he has not submitted in apt time correct special prayers for instruction to such effect. Planters Bank, etc., Co. v. Yelverton, 185 N. C. 314, 117 S. E. 299.

Refusal to Correct Special Request for Instructions. — Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case, and of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant. Williams v. Hedgepeth, 184 N. C. 114, 113 S. E. 602.

Waiver of Error.—A failure to comply with this section is error which is not waived by failure to request special instructions, where there is no charge applicable to the facts given in evidence. Nichols v. Champion Fibre Co., 190 N. C. 1, 128 S. E. 471.

Objection as to Fullness of Statement. — An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof, is not erroneous as failing to explain and declare the law arising from the evidence, as required by this section and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission. Tatham v. Andrews Mfg. Co., 180 N. C. 627, 105 S. E. 423.

Charge on Degrees of Crime.—Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with this section. State v. Hardee, 192 N. C. 533, 535, 135 S. E. 345, citing State v. Lee, 192 N. C. 225, 134 S. E. 458; Watson v. Sylva Tanning Co., 190 N. C. 840, 130 S. E. 833; Wilson v. Wilson, 190 N. C. 819, 130 S. E. 834; State v. Williams, 185 N. C. 685, 116 S. E. 736.

Failure to Charge on Second Degree Murder.—See note under § 4642.

Cited in State v. Weston, 197 N. C. 25, 26, 147 S. E. 618.

C. Illustrative Cases.

Instructions on Interest of Counsel.—An instruction that "it is the business of counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. State v. Hardy, 189 N. C. 799, 128 S. E. 152.

Instruction as to Presumption of Character.—Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. State v. Pugh, 183 N. C. 800, 111 S. E. 849.

Omission of Necessary Instruction.—Where the defendant, charged with murder, introduced evidence of an alibi which was material to his defense, but the judge in his charge to the jury did not refer to this evidence and it was held to be error. State v. Melton, 187 N. C. 481, 122 S. E. 17.

Instruction to "Settle Case as Between Man and Man".—Where there is much conflicting evidence, it is error for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case. Blake v. Smith, 163 N. C. 274, 79 S. E. 596.

Charge as Essay.—Though the charge of a judge presiding over a trial for murder is correct as a general essay on homicide, and his propositions taken generally are supported by the authorities, still it is not a full compliance with this section. State v. Dunlop, 65 N. C. 288.

Omission in Charge.—Where a charge excluded from consideration important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under an agreement, if he had any, and agreed to go back to an original contract, it was erroneous. Acme Mfg. Co. v. McPhail, 179 N. C. 383, 387, 102 S. E. 611.

Instruction as to Subordinate Features.—In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. State v. O'Neal, 187 N. C. 22, 120 S. E. 817.

Duty of Judge in Issue of Contributory Negligence.—Where no requests for instruction are made by counsel as to the application of the law to the testimony bearing upon an issue involving contributory negligence, it is the duty of the trial judge to give the general definition of ordinary care. McCracken v. Smathers, 119 N. C. 617, 26 S. E. 157.

Same—Fraud Necessary to Violate Deed.—It is not required to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of this section. Williams v. Hedgepeth, 184 N. C. 114, 113 S. E. 602.

Same—Bills and Note.—Where from the pleadings and evidence an issue is raised for the jury to determine whether the holder of a note had elected to sue the original payee instead of the maker, under the provisions of this section it is the duty of the trial judge to charge the jury upon the phase of the case, material to the determination of the controversy upon the principles of law applying thereto, without a prayer for special instructions. Darden v. Baker, 193 N. C. 386, 387, 137 S. E. 146.

Same—Fraud in Negotiable Instrument.—Where there is evidence in a suit to set aside an instrument for fraud, tending to show the existence of the fraud both in the factum and in the treaty, a failure of the trial judge to charge the principles arising therefrom upon fraud in the factum is error. Parker v. Thomas, 192 N. C. 798, 136 S. E. 118.

Same—Illegality of Contract.—Where in an action upon a contract there is evidence that the contract was a wagering one, the judge should explain the statute, the consideration of the contract which would make it illegal, and the law applicable; and his merely instructing the jury to answer the issue "Yes" if the defendant had shown it was illegal, but if it had failed in this respect to answer it "No", is insufficient. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N. C. 231, 91 S. E. 948.

Cited in Mulholland v. Brownrigg, 9 N. C. 349; Currie v. Clark, 90 N. C. 355; Fry v. Currie, 91 N. C. 436; Dupree v. Virginia Home Ins. Co., 92 N. C. 418; State v. Chastain, 104 N. C. 900, 904, 10 S. E. 519; McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845; Dissension of C. J. Faircloth in State v. Melton, 120 N. C. 591, 597, 26 S. E. 933; State v. Kale, 124 N. C. 816, 32 S. E. 892; Gates v. Max, 125 N. C. 139, 34 S. E. 266; Davis v. Blevins, 125 N. C. 433, 34 S. E. 541; Neal v. Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117; State v. Edwards, 126 N. C. 1051, 1053, 35 S. E. 540; Kearns v. Southern R. Co., 139 N. C. 470, 52 S. E. 131; State v. Rogers, 168 N. C. 112, 83 S. E. 161; Ball Thrash Co. v McCormack, 172 N. C. 677, 90 S. E. 916; Futch v. Atlantic, etc., R. Co., 178 N. C. 282, 100 S. E. 436. See State v. Cline, 179 N. C. 703, 103 S. E. 211.

Same—Forcible Trespass.—In a prosecution for forcible trespass, a charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, is not a compliance with this section. State v. Lawson, 98 N. C. 759, 4 S. E. 134.

Contributory Negligence.—Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff under the provisions of this section. Lipscomb v. Cox, 197 N. C. 64, 147 S. E. 683.

Particulars of Duty Required of Automobile Driver.—Where the plaintiff was not walking along the highway but ran out from behind another automobile near an intersection and was struck and injured by the defendant's car for which injury he seeks to recover damages in his action: Held, it is not reversible error for the trial judge to fail to charge the jury specifically upon the various particulars as to the speed, etc., required of the driver of an automobile upon the highway at a cross-road, if he charges correctly upon the general law arising from the evidence. Fisher v. Deaton, 196 N. C. 461, 146 S. E. 56, distinguishing Bowen v. Schnibben, 184 N. C. 248, 114 S. E. 170.

Negligence in Injury to Passenger.—In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of this section and constitutes reversible error. Williams v. Eastern Carolina Coach Co., 197 N. C. 12, 147 S. E. 435.

§ 565. Request for instructions.—Counsel praying of the judge instructions to the jury, must put their requests in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They must be filed with the clerk as a part of the record. (Rev., s. 538; Code, s. 415; C. C. P., s. 239.)

For further treatment see 11 Enc. Dig. 1031 et seq.

Editor's Note.—This section does not fix a time limit within which the request for instructions must be filed, and there is an apparent conflict in the reported cases as to the proper time allowed. The succeeding section, section 566, requires requests for written instructions from the judge to be made at or before the close of the evidence. There seems to be a divergence of opinion in the Supreme Court as to whether these two sections should be read together. In Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003, it was held that these two sections should not be read together and the time limit expressed in section 566 had no bearing on this section. In Barringer v. Deal, 164 N. C. 246, 80 S. E. 161, section 566 was read into this section and the headnote to the case stated that requests for special instructions had to be made before the close of the evidence. This is mere dicta, however, for the requests in this case were handed up after the conclusion of the charge.

The headnote to Merrill v. Whitmire, 110 N. C. 367, 15 S. E. 3, also, defined "apt time" as "at or before the close of testimony." In this case, however, the requests for special instructions was made after argument had opened. The definition of the court as to "apt time" is dicta, therefore the headnote to Ward v. Albemarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921, makes the same error. Here, too, the request for special instructions was made during argument.

The discrepancy here is more apparent than real and the error seems to have crept into the headnotes rather than into the decisions. The Craddock case seems correct. In that case at the close of the testimony the court adjourned until the next day, and at the opening of the court the next morning the plaintiff tendered in writing certain special instructions and the refusal of the judge to consider them was held to be error. There seems to be no reason, other than propinquity, why section 566 should be read into this section. The true rule, as garnered from the decided cases, seems to be that requests for special instructions must be in before the beginning of argument. This rule apparently fits all the decisions, though dictoa to the contrary will be found.

Time Limit for Request for Instructions.—See Editor's note above.

Requests for special instructions should be presented in time to give the Court opportunity to consider them before submitting them to the jury. State v. Rowe, 98 N. C. 629, 4 S. E. 506.

Special instructions requested after the Judge has concluded his charge will not be considered on appeal. Posey v. Patton, 109 N. C. 455, 14 S. E. 64. But this does not mean that the court is prevented from granting the request if he desires, and it has been held that it is discretionary with the presiding judge whether he will recall the jury and submit instructions, which were not presented until the charge was finished and the jury had retired to consider their verdict. Scott v. Green, 89 N. C. 278.

Section Mandatory.—Failure to grant an instruction not asked for in writing is not ground for exception. Marshall v. Stine, 112 N. C. 697, 17 S. E. 495. And the trial judge may disregard oral requests. Justice v. Gallert, 131 N. C. 393, 42 S. E. 850; State v. Hoiton, 100 N. C. 443, 6 S. E. 238.

Failure to Sign—Discretion of Court.—It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by this section. Avery County Bank v. Smith, 186 N. C. 635, 120 S. E. 215.

Court Need Not Use Exact Words of Instruction.—Where a party prays for an instruction to which he is entitled, it is error to refuse it. The court, however, is not required to adopt the words of the instruction prayed for, but it is error to change its sense or to so qualify it as to weaken its force. Brink v. Black, 77 N. C. 59; Lloyd v. Bowen, 170 N. C. 216, 86 S. E. 797.

Party Cannot Complain of Favorable Instructions. — The defendants cannot, on appeal from a conviction, complain of an erroneous instruction which was not prejudicial to them but in their favor. State v. Freeman, 122 N. C. 1012, 29 S. E. 94.

Instruction Arising only on Verdict.—It is not error in the judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury. Dupree v. Virginia Homes Ins. Co., 92 N. C. 418.

Oral Exception.—Where the judge in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for. Lee v. Williams, 112 N. C. 510, 17 S. E. 165.

Assignment of Error.—Though the failure to give an instruction asked for in writing is deemed excepted to, yet, it it is not set out in the case on appeal, it will be deemed to have been waived, and will not be passed on by the Supreme Court. Marshall v. Stine, 112 N. C. 697, 17 S. E. 495. Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266.

Exceptions to the refusal of the court to grant a prayer for instructions, or in granting a prayer, or to instructions generally, cannot be taken for the first time in the Supreme Court; they should be made on a motion for a new trial, but it is sufficient if they are assigned in the statement of the case on appeal. Lee v. Williams, 111 N. C. 200, 16 S. E. 175.

The appellant is entitled to have his assignments of error for refusing or granting special instructions, if set out by him in his statement of the case on appeal, incorporated by the judge in the case settled. If they are omitted, certiorari will lie. Lowe v. Elliott, 107 N. C. 718, 12 S. E. 383.

Judge's Statement of Oral Instructions Binding.—A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. Justice v. Gallert, 131 N. C. 393, 42 S. E. 850..

Conflicting Evidence.—The trial judge commits reversible error in failing to give substantially a material instruction duly requested under this section embodying a correct principle of law supported by the evidence in the case, though the evidence may be conflicting. Parks v. Security Life, etc., Co., 195 N. C. 453, 142 S. E. 473.

Cited in Lowe v. Elliott, 107 N. C. 718, 12 S. E. 383; Pleasants v. Raleigh and Augusta R. R., 95 N. C. 195; State v. Macon, 198 N. C. 483, 152 S. E. 407; Penland v. French Board Hospital, 199 N. C. 314, 318, 154 S. E. 406; Pyatt v. Southern R. Co., 199 N. C. 397, 402, 154 S. E. 847; Lane v. Paschall, 199 N. C. 364, 154 S. E. 626.

§ 566. Instructions in writing; when to be taken to jury room.—The judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, must put his instructions in writing and read them to the jury. He shall sign and file them with the clerk as a part of the record of the action.

When a judge puts his instructions in writing either of his own will or at the request of a party to the action, he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury must return the instructions with their verdict to the court. (Rev., ss. 536, 537; Code, s. 414; C. C. P., s. 238; 1885, c. 137.)

Editor's Note.—It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge. As what he may tell the jury in matters of law for their information and guidance must be written and read, so he is not permitted to add to, take from, modify or explain what he delivers as his charge, for this would be to change perhaps the meaning which would otherwise be ascribed to the writing and produce the very mischief intended to be remedied. But the act, upon any reasonable interpretation of its terms, does not go further and put an interdict upon every oral utterance with is in precise accord with what is written and affects it in none of the suggested particulars, at the peril of a venire de novo if he does thus speak. Currie v. Clark, 90 N. C. 355, 361. See State v. Crowell, 116 N. C. 1052, 1058, 21 S. E. 502.

For discussion of this section with the preceding section, see the Editor's Note to § 565.

Section Mandatory.—The requirements of this section are mandatory in criminal as well as civil cases and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered. Currie v. Clark, 90 N. C. 355; State v. Connelly, 107 N. C. 463, 12 S. E. 251. The question is not whether the record contains the instructions as actually delivered, there being no admission in regard to it, but whether the request was duly made and refused and the refusal followed by an exception. State v. Black, 162 N. C. 637, 638, 78 S. E. 210.

The court must put its charge, as to the law, in writing, however inconvenient, if the request is made in apt time. Jenkins v. Wilmington, etc., R. Co., 110 N. C. 438, 15 S. E. 193.

Applies to Later Instructions.—It is error to charge the jury orally upon any point when they return into court for instructions, when counsel has requested written instructions. State v. Young, 111 N. C. 715, 16 S. E. 543.

"Instructions" Defined.—The word "instructions" as used in this section, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issue. State v. Dewey, 139 N. C. 556, 51 S. E. 937.

Does Not Include Evidence.—A request to give instructions in writing, under this section does not require that the recapitulation of evidence be in writing. Phillips v. Wilmington, etc., R. Co., 130 N. C. 582, 41 S. E. 805; Dupree v. Virginia Home Ins. Co., 92 N. C. 418.

Request Must be Specific.—A request that the trial judge "charge the jury in writing, and as follows" is a request solely to deliver those instructions to the jury, and is not a request to put the entire charge in writing. Phillips v. Wilmington, etc., R. Co., 130 N. C. 582, 41 S. E. 805.

But where the defendant at the close of the evidence requested the court "to put the charge to the jury in writing and in part to charge the jury as follows," and the whole charge on the law was not put in writing, this was held to be error. Sawyer v. Lumber Co., 142 N. C. 161, 55 S. E. 84.

Oral Instructions Same as Written.—Where the court gave oral instructions not differing from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial. Currie v. Clark, 90 N. C. 355.

Exception.—An exception to the failure of the judge to put his charge in writing, when asked "at or before the close of the evidence." is taken in time if first set out in appellant's "case on appeal." Sawyer v. Lumber Co., 142 N. C. 161, 55 S. E. 48. The headnote to Phillips v. Wilmington, etc., Ry. Co., 130 N. C. 582, 41 S. E. 805, is not the holding of that case but is merely dicta.

An exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing. State v. Adams, 115 N. C. 775, 20 S. E. 722.

Effect of Violation.—When it appears from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by the Supreme Court. State v. Connelly, 107 N. C. 463, 12 S. E. 251.

Judge's Statement of Oral Instructions Controlling. — A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. Justice v. Gallert, 131 N. C. 393, 42 S. E. 850; Cameron v. Power Co., 137 N. C. 99, 49 S. E. 76.

Request of Juror.—It is proper for the court to permit the jury to carry the charge with them on retiring to the jury room, at the request of one of the jurors. Gaither v. Carpenter, 143 N. C. 240, 55 S. E. 625.

Request Made after Charge in Hands of Jury.—Where the trial judge, having at the request of plaintiff put his charge in writing, read and handed it to the jury and allowed them to carry it to the jury room, the plaintiff objected upon the ground that the court had not been requested to hand the written charge to the jury. Thereupon, and after his Honor had offered to withdraw the written charge from the jury in whose possession it had been about five minutes, the defendant requested that the jury be permitted to keep the written charge, it was held that it was not error upon such request of the defendant to permit the jury to retain the written charge. Little v. Carolina Central R. Co., 119 N. C. 771, 26 S. E. 106.

Special Prayers Not Included.—Where the charge of the court was taken to the jury room on retirement, but by oversight the special prayers asked by appellant and given were not also handed to the jury, this does not constitute error, where his counsel were present in the court room and did not then, or at any time before verdict, call the matter to the attention of the court. Gaither v. Carpenter, 143 N. C. 240, 55 S. E. 625.

Data Other than Charge.—It is error for the trial judge, under objection, to permit the jury to take plats of or certificates relating to the location of disputed lands to their room and inspect them in their deliberations. Nicholson v. Eureka Lumber Co., 156 N. C. 59, 72 S. E. 86. So with plaintiff's estimate of damages. Burton v. Wilkes, 66 N. C. 604. An account rendered. Watson v. Davis, 52 N. C. 178.

Depositions read on trial. Lafoon v. Shearin, 95 N. C. 391. Papers read as evidence. Williams v. Thomas, 78 N. C. 47.

Cited in Lowe v. Elliott, 107 N. C. 718, 12 S. E. 383; Powell v. Wilmington, etc., R. Co., 68 N. C. 395; Merrill v. Whitmire, 110 N. C. 367, 15 S. E. 3; Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53; Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003; Barringer v. Deal, 164 N. C. 246, 80 S. E. 161.

§ 567. Demurrer to evidence.—When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the supreme court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant has the benefit of his exception on appeal to the supreme court. After the motion is refused he may waive his exception and introduce his evidence just as if he had not made the motion, and he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal to the supreme court. (Rev., s. 539; 1897, c. 109; 1899, c. 131; 1901, c. 594.)

For further treatment see 11 Enc. Dig. 984.

Editor's Note.—The power of the superior court to grant an involuntary nonsuit is altogether statutory, and did not exist prior to the passing of this section in 1897. See Riley v. Stone, 169 N. C. 421, 422, 86 S. E. 348.

Under this section as originally passed, Acts 1897, chap. 109, upon the defendant's motion being refused, he could introduce evidence, and at the close of the evidence on both sides, renew the motion to dismiss, on the first motion and also on the second motion. Purnell v. Raleigh, etc., R. Co., 122 N. C. 832, 29 S. E. 953; Wood v. Bartholomew, 122 N. C. 177. But under the amendment of 1899, Acts of 1899, chap. 138, this practice is not allowed. The defendant may stop his case at the close of the plaintiff's evidence, and move to dismiss upon the ground that the plaintiff has not made a prima facie case. And if his motion is refused he has the right of appeal from the ruling of the court.

But if he does not stop his case and appeal, and introduce evidence, he loses the right of appeal from the refusal to dismiss. When the evidence is all in, he may again move to dismiss upon the ground that the plaintiff has not made out a case, and the only difference between this motion and the one made at the close of the plaintiff's evidence, is that the plaintiff's evidence stands as it stood when the first motion was made, and he also has the benefit of any new evidence that may have been introduced since that motion was made, by either side, favorable to the plaintiff.

The rule now seems to stand just as it did before the passage of the Act 1897, chap. 109, and the amendment of 1899, except that under this legislation it is now discretionary with the defendant whether he will introduce evidence after the motion to dismiss, or not; while before these acts, it was discretionary with the court whether it would allow the defendant to introduce evidence after resting his case and making the motion. See Means v. Carolina Central R. R. Co., 126 N. C. 424, 35 S. E. 813.

It was held in State v. Houston, 155 N. C. 432, 71 S. E. 65, that this statute did not apply to criminal cases. Thereupon the legislature enacted chap. 73, Laws 1913, (Sec. 4643, of this code) extending this section to all criminal courts. For Criminal Cases see annotations under that section.

Section Explained.—Under this section the defendant is not put to his election to move for a judgment of nonsuit or proceed with the evidence unless the plaintiff has produced his evidence and rested his case. If the motion for judgment is therein refused he can note his exception and proceed as if he had made no motion. Worth v. Ferguson, 122 N. C. 381, 29 S. E. 574.

Nonsuit under this section, is permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings. Dix-Downing v. White, 206 N. C. 567, 174 S. E. 451.

Time to Make Motion to Nonsuit.—The allowance of a motion as of nonsuit is based upon purely statutory grounds, and the requirements of this section must be strictly followed, and where the defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his exception to the refusal of his motion therefor at the close of all the evidence is not sufficient to present on appeal the question of whether upon all the evidence the plaintiff is entitled to recover. Penland v. French Broad Hospital, 199 N. C. 314, 154 S. E. 406.

Admissions and Inferences.—A motion to dismiss under this section, is substantially a demurrer to the evidence, which waives all objection to its competency, and admits as true that which the evidence tends to prove. Roscoe v. Lumber Co., 124 N. C. 42, 32 S. E. 389.

The demurrer to the evidence admits all facts of which there is any evidence and all conclusions which can be fairly and logically drawn from such facts. This rule is substantiated by a long array of cases. See Snider v. Newell, 132 N. C. 614, 44 S. E. 354. Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1. For other cases, see 11 N. C. Enc. Dig. 984, 985, 986.

A demurrer to evidence is defined to be a proceeding by which the court, in which the action is pending, is called upon to decide what the law is upon the facts shown in evidence; and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 128, 134, 35 L. Ed. 961.

Evidence Adjudged Against Defendant.—In cases of demurrer and motions to dismiss under this section the evidence must be taken most strongly against the defendant. Gates v. Max, 125 N. C. 139, 34 S. E. 266; Purnell v. Raleigh etc., R. Co., 122 N. C. 832, 29 S. E. 953; Cowles v. McNeill, 125 N. C. 385, 34 S. E. 499.

Plaintiff Entitled to Benefit of Inferences.—On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and reasonable inference to be drawn therefrom. Standard Oil Co. v. Hunt, 187 N. C. 157, 121 S. E. 184. Southwill v. Atlantic Coast Line R. Co., 189 N. C. 417, 127 S. E. 361; Lindsey v. Suncrest Lumber Co., 189 N. C. 118, 126 S. E. 174. Ghorley v. Atlantic, etc., Ry. Co., 189 N. C. 634, 127 S. E. 634. Inge v. Seaboard Air Line R. Co., 192 N. C. 522, 135 S. E. 522. Considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable. Newby v. Atlantic, etc., Realty Co., 182 N. C. 34, 108 S. E. 323; Rush v. McPherson, 176 N. C. 562, 97 S. E. 613. For other cases following this rule, see Smith v. Raleigh Granite Co., 202 N. C. 305, 162 S. E. 731; Pearson v. Standard Garage, etc., Co., 202 N. C. 14, 161 S. E. 536; Almond v. Oceola Mills, 202 N. C. 97, 161 S. E. 731; Sampson v. Jackson Bros. Co., 203 N. C. 413, 166 S. E. 181; Puckett v. Dyer, 203 N. C. 684, 167 S. E. 43; Pendergraft v. Royster, 203 N. C. 384, 166 S. E. 285; Tuttle v. Bell, 203 N. C. 154, 165 S. E. 333; Thigpen v. Jefferson Standard Life Ins. Co., 204 N. C. 551, 168 S. E. 845; Lynch v. Carolina Tel., etc., Co., 204 N. C. 252, 257, 167 S. E. 847; Holton v. Northwestern Oil Co., 201 N. C. 744, 746, 161 S. E. 391; Broadway v. Gate City Life Ins. Co., 201 N. C. 639, 640, 161 S. E. 71; Sanders v. Atlantic Coast Line R. Co., 201 N. C. 672, 676, 161 S. E. 320; Nance v. Merchants' Fertilizer, etc., Co., 200 N. C. 702, 158 S. E. 486; Hunt v. Meyers Co., 201 N. C. 636, 637, 161 S. E. 74; Smithwick v. Colonial Pine Co., 200 N. C. 519, 157 S. E. 612; Moore v. Atlantic Coast Line R. Co., 201 N. C. 26, 158 S. E. 556; Hobbs v. Kirby, 205 N. C. 238, 171 S. E. 94; Keller v. Southern R. Co., 205 N. C. 269, 171 S. E. 73; Smith v. Equitable Life Assur. Soc., 205 N. C. 387, 171 S. E. 346; Moore v. Powell, 205 N. C. 636, 172 S. E. 327; Dickerson v. Reynolds, 205 N. C. 770, 172 S. E. 402; Broadway v. Cope, 208 N. C. 85, 179 S. E. 452; Gossett v. Metropolitan Life Ins. Co., 208 N. C. 152, 179 S. E. 438; Brunswick County v. North Carolina Bank, etc., Co., 206 N. C. 127, 173 S. E. 327; Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61; Sherwood v. Southeastern Exp. Co., 206 N. C. 243, 173 S. E. 605; Blackman v. New York Life Ins. Co., 206 N. C. 429, 174 S. E. 294; Kitchen Lbr. Co. v. Tallassee Power Co., 206 N. C. 515, 174 S. E. 427.

On a motion to nonsuit under this section, the evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefits of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. Brown v. Southern Ry. Co., 195 N. C. 699, 701, 143 S. E. 536; Cromwell v. Logan, 196 N. C. 588, 593, 146 S. E. 233; Newbern v. Western Union Tel. Co., 195 N. C. 258, 141 S. E. 592; Gilbert v. Wright, 195 N. C. 165, 168, 141 S. E. 577; Finch v. North Carolina R. Co., 195 N. C. 190, 141 S. E. 550; Nash v. Royster, 189 N. C. 408, 410, 127 S. E. 356; Smith v. Ritch, 196 N. C. 72, 74, 144 S. E. 537; Cromartie v. Stone, 194 N. C. 663, 140 S. E. 612; State v. Carter, 194 N. C. 293, 139 S. E. 604.

Consideration of Defendant's Evidence.—Upon a motion

as of nonsuit the defendant's evidence will not be considered unless favorable to the plaintiff or not in conflict therewith, when it may be used to explain or make clear the evidence introduced by the plaintiff. Harrison v. North Carolina R. R. Co., 194 N. C. 656, 140 S. E. 598.

Defendant's evidence, which conflicts with that tending to support plaintiff's claim, is not to be considered on motion to nonsuit under this section. Davidson v. Western Union Tel. Co., 207 N. C. 790, 178 S. E. 603.

When Motion Should Be Disallowed.—Defendant's motion as of nonsuit, will be denied when the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment therefrom, is sufficient to take the case to the jury and support a verdict as a matter of law in the plaintiff's favor. Robinson v. Ivey & Co., 193 N. C. 805, 138 S. E. 173.

The defendant, after the court has refused his motion as of nonsuit upon the evidence, may except, introduce evidence, and renew his motion after all the evidence has been introduced; but his last motion only can be considered, and upon all the evidence in the case, and if therein the plaintiff has made out a case, the motion should be disallowed. Blackman v. Woodmen, 184 N. C. 75, 113 S. E. 565.

Not Allowed after Verdict.—An exception that there is no evidence on an issue in a case can only be taken before verdict. Hart v. Cannon, 133 N. C. 10, 45 S. E. 351; Sugg v. Fatson, 101 N. C. 188, 7 S. E. 709; Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770.

Where the court reserves his rulings on motions of nonsuit until after rendition of a verdict the court may not set aside the verdict for insufficiency of the evidence as a matter of law, and grant the motion for judgment as of nonsuit made at the close of all the evidence. Batson v. City Laundry Co., 202 N. C. 560, 163 S. E. 600.

Plaintiff's Evidence Must be Nil.—If there is more than a scintilla of evidence tending to prove the plaintiff's contention it must be submitted to the jury. Gates v. Max, 125 N. C. 139, 34 S. E. 266. Cable v. Southern Ry. Co., 122 N. C. 892, 29 S. E. 377. Cox v. Norfolk, etc., R. Co., 123 N. C. 604, 31 S. E. 848, and cases therein cited.

It was not the intention or effect of the passage of this section, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the courts. Willis v. Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941.

How Questions of Law and Fact Presented. — Whether there is evidence from which the jury could answer an issue in the affirmative is a question of law, and is presented to the court for decision by motion for judgment of nonsuit. McCall v. Textile Industrial, 189 N. C. 775, 128 S. E. 349.

On demurrer to evidence, the court is substituted in the place of the jury, as judges of the facts. Bank v. Guttschlick, 14 Pet. 19, 10 L. Ed. 335.

Additional Evidence Allowable.—Where a motion to nonsuit under this section is made, it is discretionary with the judge, before passing on it, to allow the plaintiff to introduce additional evidence. Featherston v. Wilson, 123 N. C. 623, 31 S. E. 843.

The trial court, after the plaintiff had rested his case, and after the motion of the defendants for judgment as of nonsuit under this section was denied, and before either of the defendants had offered evidence, allowed the plaintiff to offer additional evidence. This action of the court was within its discretion, and for that reason is not reviewable by this court, and the rights of the defendants under this section were not affected by the action of the court. Pearson v. Simon, 207 N. C. 351, 354, 177 S. E. 124.

Motion Must be Renewed.—Where defendant moved to dismiss the case and direct a verdict, when plaintiff rested her case, but after denial of the motion introduced evidence, and did not renew at the close of the whole case, it was held that the defendant could not, on appeal, complain of the denial of his motion to dismiss. Cole Mfg. Co. v. Mendenhall, 240 Fed. 641.

Waiver.—The introduction of evidence by the defendant upon the overruling of his motion at the conclusion of the plaintiff's evidence, and his failure to renew his motion on all the evidence, is a waiver of his right under the statute. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628; Nash v. Royster, 189 N. C. 408, 127 S. E. 356; Gilland v. Carolina, etc., Co., 189 N. C. 783, 128 S. E. 158.

The defendant waives his right to maintain the insufficiency of the evidence to take the case to the jury by not making a motion as of nonsuit thereon at the close of the evidence. Gibbs v. Telegraph Co., 196 N. C. 516, 146 S. E. 509; Murphy v. Power Co., 196 N. C. 484, 494, 146 S. E. 204.

Where the defendant in a civil action does not comply with the provisions of this section, in making a motion for judgment as of nonsuit he waives the question of the sufficiency of the evidence. Harris v. Buie, 202 N. C. 634, 163 S. E. 693.

A motion for dismissal or for judgment of nonsuit made, under this section at the close of the plaintiff's evidence and not renewed at the close of all the evidence is waived. Debnam v. Rouse, 201 N. C. 459, 460, 160 S. E. 471.

Where a defendant makes a motion as of nonsuit at the close of the plaintiff's evidence, and upon the motion being overruled, introduces evidence in his own behalf, he waives his right to present the question of the sufficiency of the evidence to go to the jury by failing to renew his motion at the close of all the evidence, and his appeal will be regarded as if no motion had been made by him. Lee v. Penland, 200 N. C. 340, 157 S. E. 31.

Where the defendant does not move for nonsuit as provided by this section, in the lower court he waives his right to have the insufficiency of the evidence to be submitted to the jury considered on appeal. Harrison v. Metropolitan Life Ins. Co., 207 N. C. 487, 177 S. E. 423.

Same—Introduction of Evidence.—A defendant waives his right to object to the sufficiency of the evidence on his motion of nonsuit made at the close of the plaintiff's evidence by introducing evidence in his own behalf and not renewing his motion after the close of all the evidence in the case. Grant v. Power Co., 196 N. C. 617, 146 S. E. 531; Harrison v. North Carolina R. R. Co., 194 N. C. 656, 140 S. E. 598.

Exception Considered on Appeal. — Where exception is taken to the refusal of the court to dismiss the action, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be considered on appeal, under the express provision of this section, and, so considered, the evidence must be accepted as true and construed in the light most favorable to the plaintiff. Butler v. Holt-Williamson Mfg. Co., 182 N. C. 547, 109 S. E. 559.

Where exception is taken to refusal to grant defendant's motion to nonsuit made at close of plaintiff's evidence, but he then elected to offer evidence only the exception noted at the close of all the evidence could be urged or considered on appeal. Harrison v. North Carolina R. Co., 194 N. C. 656, 140 S. E. 598, citing Nash v. Royster, 189 N. C. 408, 127 S. E. 356; Harper v. Supply Co., 184 N. C. 204, 114 S. E. 173.

Under this section an exception to a motion to dismiss in a civil action, taken after the close of the plaintiff's evidence and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the plaintiff's evidence alone, and a judgment will be sustained under the second exception if there is any evidence on the whole record of the defendant's liability. Lynn v. Pinehurst Silk Mills, 208 N. C. 7, 11, 179 S. E. 11.

Motion to Set Aside Verdict.—An order of the court setting aside a verdict upon motion that it was against the weight of evidence is in conflict with his further sustaining a motion to nonsuit the plaintiff upon the evidence under this section. Riley v. Stone, 169 N. C. 421, 86 S. E. 348.

Motion for Judgment on Exceptions.—In a proceeding attacking the validity of an improvement assessment, the burden is on the defendant municipality to sustain the assessment, and a motion by the plaintiff for judgment on her exceptions after defendant's evidence is in, is in effect a motion for judgment as of nonsuit under this section. Holton v. Mocksville, 189 N. C. 144, 126 S. E. 326.

Effect of Remanding Case.—When in the Supreme Court the lower court is reversed for refusing a motion to dismiss upon the evidence as of nonsuit, it is equivalent to the direction to dismiss the action. Tussey v. Owen, 147 N. C. 335, 61 S. E. 180; Hollingsworth v. Skelding, 142 N. C. 246, 55 S. E. 212.

The superior court is without authority to allow an amendment or to proceed contrary to the opinion, but the plaintiff may bring another suit within twelve months after the judgment of nonsuit. Tussey v. Owen, 147 N. C. 335, 61 S. E. 180.

Evidence Sufficient for Jury.—Defendant's motion as of nonsuit upon the evidence will be denied if there is any sufficient evidence, testified to by either the plaintiff's or defendant's witnesses, circumstantial or otherwise, viewed in the light most favorable to the plaintiff, to take the issue to the jury for determination. Goss v. Williams, 196 N. C. 213, 145 S. E. 169. See Dalton v. Stoneville Cabinet Co., 195 N. C. 870, 142 S. E. 480; Burnett v. Williams, 196 N. C. 620, 146 S. E. 533; Cromartie v. Stone, 194 N. C. 663, 140 S. E. 612.

Same—Illustrative Cases.—Where the defense of an independent contractor is relied upon in an action to recover damages for alleged negligent injury, evidence in plaintiff's behalf tending to show that the relationship of in-

dependent contractor had before the happening of the accident been severed and that the defendant's employees were in charge of and loading logs upon the defendant's tramroad when the plaintiff's injury occurred in the course of his employment, is sufficient to take the case to the jury as to his employment by the defendant at the time, upon defendant's motion as of nonsuit. Lilley v. Interstate Cooperage Co., 194 N. C. 250, 139 S. E. 369.

Where in a personal injury negligence case there is evidence for defendant that the injury in suit was caused either by the act of God, etc., or by an accident, and, per contra, that it was proximately caused by the defendant's negligence in the exercise of ordinary care to furnish the plaintiff, his employee, a reasonably safe place to work or reasonably safe appliances under the circumstances, defendant's motion for nonsuit will be denied. Jones v. Atlantic Coast Line R. Co., 194 N. C. 227, 139 S. E. 242.

When the father has entered into a contract with his son for support of himself and wife for life, and gives as a consideration certain of his property, without retaining sufficient property to pay his then existing creditors, and the pleadings and evidence raise the question of the son's good faith and part performance without notice, these questions should be submitted to the jury upon appropriate issues; and motion for nonsuit is properly refused. Peoples Bank, etc., Co. v. Mackorell, 195 N. C. 741, 143 S. E. 518.

In an action for negligence of defendant's delivery truck driver, evidence as to the driver's identity and that he was acting within scope of his employment at time of injury, is sufficient to take the case to the jury and deny defendant's motion for a nonsuit. Misenheimer v. Hayman, 195 N. C. 613, 143 S. E. 1.

Evidence tending to show that plaintiff's intestate was struck and killed by defendant's train, that the engineer failed to blow for the crossing, and that the track was straight and unobstructed for a distance of about two hundred yards and that the engineer could have seen the intestate and the cow for that distance is held sufficient to take the case to the jury on the doctrine of last clear chance, the evidence tending to show that the intestate was on the track oblivious or otherwise insensible of danger, and defendant's motion for judgment as of nonsuit is properly denied. Triplett v. Southern R. Co., 205 N. C. 113, 110 S. E. 146.

In an action on a disability clause in a policy of life insurance where plaintiff testified that at the time of the issuance of the policy his eyesight was not impaired and that he was thoroughly examined by insurer's physician upon his application for the policy, and that no impairment or disease of his sight was disclosed by the physician's examination and test of his eyes, and that subsequent blindness had rendered him disabled, and defendant introduced testimony of an eye specialist that from his examination of plaintiff's eyes plaintiff was suffering from a chronic eye disease several years prior to the application for the policy, and moved for a nonsuit on the ground that the evidence showed that the disease resulting in plaintiff's disability originated prior to the issuance of the policy: Held, the evidence, viewed in the light most favorable to plaintiff, was sufficient to be submitted to the jury and a motion for a nonsuit was properly overruled. Misskelley v. Home Life Ins. Co., 205 N. C. 496, 171 S. E. 862.

The parking of a truck on a public highway at night without lights in violation of statute, is negligence per se, and where the evidence is conflicting as to whether such improper parking proximately caused plaintiff's injuries, resulting from a collision between the truck and the car in which he was riding as a guest, the question of proximate cause is for the determination of the jury upon an appropriate issue, and a motion as of nonsuit is properly denied. Barrier v. Thomas, etc., Co., 205 N. C. 425, 171 S. E. 626.

In an action by the daughter of the deceased against his administrators to recover the value of services rendered deceased, it was held that under the evidence the relationship between plaintiff and her father raised no presumption that the services were gratuitous, and a motion as of nonsuit was properly denied. Keiger v. Sprinkle, 207 N. C. 733, 178 S. E. 666.

The conviction of the defendant in a criminal action in a lower court procured by the prosecuting witness upon evidence known to him to be perjured is not conclusive evidence of probable cause, and in an action by the defendant against the plaintiff for malicious prosecution, a motion for judgment as in case of a nonsuit is properly denied. Moore v. Winfield, 207 N. C. 767, 178 S. E. 605.

Where the evidence tended to show an agent had apparent authority, the evidence that the act of agent was within his apparent authority and binding on his principal is a question for the jury, and a motion as of nonsuit on the ground of not being bound by an agent's unauthorized act is properly denied. Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 177 S. E. 9.

It is improper for the court to sustain a motion for judgment under this section where the evidence is anticipated, the plaintiff not having "introduced his evidence and rested his case" as provided by this section. Hershey Corp. v. Atlantic Coast Line R. Co., 207 N. C. 122, 176 S. E. 265.

Where there is evidence in support of plaintiff's contention as to the amount of indebtedness sued on, defendant's motion as of nonsuit under this section is properly denied, although there is evidence in contradiction. Pearson v. Simon, 207 N. C. 351, 177 S. E. 124.

Where every element of the crime of having carnal knowldege of a female child under sixteen years of age in violation of § 4309 of the Code, is supported by the State's evidence in the case, defendant's motion as of nonsuit under this section is properly denied. State v. Houpe, 207 N. C. 377, 177 S. E. 20.

Where the evidence is sufficient to support a verdict in plaintiff's favor, defendant's motion as of nonsuit under this section is properly overruled. Davidson v. Western Union Tel. Co., 207 N. C. 790, 178 S. E. 603.

Evidence which raises only a mere suspicion or conjecture of the issue to be proved is insufficient to be submitted to the jury. Sutton v. Herrin, 202 N. C. 599, 163 S. E. 578; Shuford v. Scruggs, 201 N. C. 685, 687, 161 S. E. 315; Shuford v. Brown, 201 N. C. 17, 18, 158 S. E. 698.

It is well settled that evidence which does no more than raise a suspicion, that a fact material to the cause of action alleged in the complaint, may be as alleged therein, is not sufficient for submission to the jury as tending to sustain the allegation of the complaint. Broughton v. Standard Oil Co., 201 N. C. 282, 288, 159 S. E. 321.

Evidence tending to show a definite contract by deceased to devise his property to plaintiff, and upon the death of the deceased intestate, is sufficient to be submitted to the jury in plaintiff's action against deceased's administrator for breach of the contract and motion as of nonsuit was properly refused. Hager v. Whitner, 204 N. C. 747, 169 S. E. 645.

Where the plaintiff brought suit on a policy of accident insurance in which she was named beneficiary, and which provided for the payment of a certain sum if the assured was killed by being struck by a gasoline propelled vehicle: the evidence that the assured met his death by being struck by a vehicle propelled by gasoline was sufficient to be submitted to the jury and motion for nonsuit was properly refused. Colboch v. Independent Life Ins. Co., 204 N. C. 716.

Where the answer pleads a counterclaim the plaintiff may not take a voluntary nonsuit over the defendant's objection. Aetna Life Ins. Co. v. Griffin, 200 N. C. 251, 156 S. E. 515.

Defendant Cannot Withdraw Counterclaim in Order to Enter Motion as of Nonsuit.—Where the defendant in an action on a contract sets up a counterclaim arising out of the same contract declared upon by the plaintiff, the defendant may not withdraw his counterclaim over the plaintiff's objection in order to enter a motion as of nonsuit as provided by this section, on the plaintiff's cause of action. McGee v. Frohman, 207 N. C. 475, 177 S. E. 327.

When Nonsuit Proper.—Where the evidence of paintiff is not sufficient to be submitted to the jury it is proper for the court to sustain defendant's motion for judgment as in case of nonsuit at the close of plaintiff's evidence. Lloyd v. Speight, 195 N. C. 179, 180, 141 S. E. 574.

In the absence of any evidence tending to sustain an affirmative answer to the issue submitted to the jury there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. Ford v. Willys-Overland, 197 N. C. 147, 150, 147 S. E. 822.

Where there is no evidence tending to sustain the plaintiff's cause of action the defendant's exceptions to the refusal of the trial court to grant his motion of nonsuit or his request for a directed verdict will be sustained on appeal. Ferguson v. Glenn, 201 N. C. 128, 159 S. E. 5.

Same—Illustrative Cases.—Where a contract creating a local representative for the sale of automobiles by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited. Ford v. Willys-Overland, 197 N. C. 147, 147 S. E. 822.

Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in defendant's store on Saturday when the son was helping his father therein, is insufficient to

hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. Norman v. Porter, 197 N. C. 222, 148 S. E. 41.

A contract of hire at a stipulated hourly wage, without reference to the number of hours the employment was to continue, gives the employee no right of action for damages because he was employed a fewer number of hours than other employees engaged at the same time, and it was not error to nonsuit the plaintiff under this section. Sherrill v. Graham County, 205 N. C. 178, 170 S. E. 636.

Where plaintiff's evidence tended to show plaintiff was not acting within the scope of his employment at the time of the injury, defendant's motion as of nonsuit should have been allowed, plaintiff being sui juris. Colvin v. Atlantic Coast Line R. Co., 205 N. C. 168, 170 S. E. 639.

In an action by an employee against her employer to recover for personal injury alleged to have resulted from the employer's negligence, it was held that where there was no evidence of any negligence on the part of defendant employer, the evidence tending to show that the injury resulted solely from the act of plaintiff's fellow-servant, a judgment as of nonsuit should be sustained under this section. Armstrong v. Acme Spinning Co., 205 N. C. 553, 172 S. E. 313.

Where the evidence tended to show the negligence of a municipality in the care of its streets, it was held that to be liable the danger must be of an unusual character and one that exposes travelers to unusual hazards, and that a demurrer to the evidence should be properly sustained unless such danger was shown. Haney v. Lincoln, 207 N. C. 282, 176 S. E. 573.

Contributory Negligence.—The burden of proof on an issue as to contributory negligence rests upon the defendant, and while the court can hold that a party upon whom rests the burden of proof has failed to offer any evidence to sustain it, it cannot adjudge that he has proved his case, for where there is any evidence the jury alone can pass upon its truth. Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19.

A judgment of nonsuit upon the evidence may not be granted under this section when there is legal evidence of the employers negligence upon the sole ground of the plaintiff's contributory negligence. Inge v. Seaboard Air Line R. Co., 192 N. C. 522, 135 S. E. 522.

Where the plaintiff's evidence made out a case of negligence, and contributory negligence was relied upon as a defense, under this section it was not error to refuse to dismiss the action. Wood v. Bartholomew, 122 N. C. 177, 29 S. E. 959.

But where the evidence on the part of the plaintiff (the defendant having introduced none) is demurred to, and if true, establishes negligence on the part of the plaintiff, and of the defendant, concurrent to the last moment, a judgment as of nonsuit, sustaining the demurrer, is proper. Neal v. Carolina Central R. Co., 126 N. C. 634, 36 S. E. 117. See Hollingsworth v. Skelding, 142 N. C. 246, 55 S. E. 212.

Contributory negligence may be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it. Elder v. Plaza Ry., 194 N. C. 617, 140 S. E. 298. See also Hendrix v. So. R. Co., 198 N. C. 142, 144, 150 S. E. 873.

In an action for wrongful death at a railroad crossing it was held that the defendant's motion as of nonsuit should have been sustained on the issue of contributory negligence. Harrison v. North Carolina R. R. Co., 194 N. C. 656, 140 S. E. 598.

Same—Logging Railroad Employee.—As the contributory negligence of a logging railroad employee under §§ 169, 3467 and 3470 does not bar the recovery of damages for his death when engaged in performance of his duties, defendant's motion for judgment as of nonsuit is properly refused. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Same—Evidence Sufficient to Deny Nonsuit.—Where the failure of defendant employer to furnish the plaintiff, its employee, a safe place to work, concurs with the negligence of a fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion as of nonsuit upon the evidence, under this section is properly denied. Beck v. Thomasville Chair Co., 188 N. C. 743, 125 S. E. 615.

Where there is evidence that the defendant railroad company negligently coupled a car under which the deceased was at work to its train, causing his death, the fact that the deceased was guilty of contributory negligence in failing to place the customary signals where he was at work, does not entitle the defendant to a judgment as of nonsuit. Ritchie v. Denton R. Co., 192 N. C. 666, 315 S. E. 770.

Where a railroad company has for some time kept a watchman to warn travelers crossing its tracks at a public street and this is known to the plaintiff, who was injured by a train while attempting to cross, the absence of the watchman and the failure to give warning is an implied invitation to the traveler to cross, which may be considered by the jury and the defendant's motion as of nonsuit upon the evidence is properly denied. Barber v. Southern R. Co., 193 N. C. 691, 138 S. E. 17.

See, also, Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Same—Demurrer Sustained.—Where the plaintiff was employed by defendant, and defendant's superintendent, as a matter of accommodation, invited the plaintiff to ride to his home in an automobile furnished him by defendant, during which ride plaintiff was injured as a result of the superintendent's negligent driving, it was held that defendant's demurrer to the evidence should have been sustained. Peters v. Great Atlantic & Pacific Tea Co., 194 N. C. 172, 138 S. E. 595.

Sufficiency of Evidence May Be Res Judicata on Second Appeal.—Where the Supreme Court has ruled on a former appeal that the evidence was sufficient to overrule defendant's motion as of nonsuit under this section, and the evidence upon the second trial is substantially the same, the question of the sufficiency of the evidence is res judicata and will not be considered on the second appeal. Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587.

Setting Aside after Refusal of Motion.—Where the trial court has refused to grant the defendant's motion as of nonsuit, he may not set aside the verdict on the ground of the insufficiency of the evidence as a matter of law, but may do so only as a matter within his discretion. Lee v. Penland, 200 N. C. 340, 157 S. E. 31.

Ejectment.—On a trial in an action of ejectment, where the question involved is whether a tenant holding over the possession from a former owner had agreed to pay rent to the purchaser, and the evidence is conflicting, a motion as of nonsuit is properly denied. Carnegie v. Perkins, 191 N. C. 412, 131 S. E. 750.

However it is error for the judgment to incorporate an adjudication in defendant's favor as to his title, as such is only permissible on affirmative findings sufficient to justify it. Moore v. Miller, 179 N. C. 396, 102 S. E. 627.

Where the defendant denied being in possession, but there was evidence that he was present at a survey made for the plaintiff, and claimed to be the owner, pointed to wood he had cut upon it, and forbade the surveyor to enter on it, a judgment of nonsuit was improper. Cowles v. McNeill, 125 N. C. 385, 34 S. E. 499.

Where, in an action to recover damages for procuring the sheriff to wrongfully seize and sell plaintiff's property, the complaint alleged that the sheriff sold his property under an execution, it was incumbent on the plaintiff to show on the trial that the seizure and sale were unlawful, and upon his failure to offer any evidence as to the invalidity of the judgment, it was not error to nonsuit the plaintiff under this section. O'Briant v. Wilkerson, 122 N. C. 304, 30 S. E. 126.

Agency.—Where there is evidence to show that defendant's night watchman was employed to perform his duties only within a certain enclosure; that he had been deputized to act for defendant as special policeman; that he had arrested the plaintiff at a remote place on the mill settlement property, where he was not authorized to guard, and caused his incarceration in the city jail; that the case was dismissed by the justice of the peace for the lack of evidence and the plaintiff finally discharged: It was held, a question for the jury in plaintiff's action for damages, of whether the defendant's night watchman was acting within the scope of his employment and a motion of nonsuit upon the evidence was properly denied. Butler v. Holt-Williamson Mfg. Co., 182 N. C. 547, 109 S. E. 559.

New Trial Granted.—In an action to set aside a sale of lands under a former judgment defendants moved to nonsuit at the close of the plaintiff's evidence, but did not renew the motion at the close of the plaintiff's evidence. As fraud was alleged, which plaintiff might show, a new trial was granted by the Supreme Court instead of dismissing the action. Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975.

Joinder in Demurrer.—No judgment can be rendered upon a demurrer to the evidence, until there is a joinder in demurrer. Fowle v. Alexandria, 11 Wheat. 320, 6 L. Ed. 484. But it is a matter of discretion with a court, whether it will compel a party to join in demurrer to evidence. Young v. Black, 7 Cranch 565, 3 L. Ed. 440.

One party cannot insist upon the other party joining in demurrer, without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove. Young v. Black, supra.

Applied in Sakellaris v. Wyche, 205 N. C. 173, 170 S. E. 638; Love v. Queen City Lines, 206 N. C. 575, 576, 174 S.

E. 514; Keith v. Liggett, etc., Tobacco Co., 207 N. C. 645, 178 S. E. 90.

Cited in Daniels v. Fowler, 123 N. C. 35, 31 S. E. 598; State v. Cooke, 176 N. C. 731, 97 S. E. 171; White v. Boyd, 124 N. C. 177, 32 S. E. 495; Gore v. Wilmington, 194 N. C. 450, 452, 140 S. E. 71; Boswell v. Tabor, 196 N. C. 196, 145 S. E. 17; Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 632, 143 S. E. 248; Abel v. Dworsky, 195 N. C. 867, 142 S. E. 475; Southerland v. Crump, 195 N. C. 856, 857, 142 S. E. 7; Tyler v. Atlantic Coast Line R. R. Co., 194 N. C. 800, 801, 139 S. E. 773; Cox v. Albemarle Drainage District, 195 N. C. 264, 266, 141 S. E. 885; Ogle v. Black Mountain Ry. Co., 195 N. C. 795, 797, 143 S. E. 833; Tate v. Parker, 196 N. C. 499, 501, 146 S. E. 85; Askew v. Interstate Hotel Co., 195 N. C. 456, 457, 142 S. E. 590; Morris v. Cleve, 197 N. C. 253, 254, 148 S. E. 253; Hemphill v. Standard Oil Co., 197 N. C. 339, 340, 148 S. E. 443; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 392, 148 S. E. 436; Frady v. Harris Granite Quarries Co., 198 N. C. 207, 208, 151 S. E. 246; Groves Mills v. Carolina & N. R. Co., 197 N. C. 388, 389, 148 S. E. 441; Farr v. Tallassee Power Co., 198 N. C. 247, 151 S. E. 242; George v. Smathers, 198 N. C. 212, 151 S. E. 194; Gibson v. Leaksville Cotton Mills, 198 N. C. 267, 151 S. E. 251; Conley v. Cable, 198 N. C. 298, 299, 151 S. E. 645; Houck v. American Eagle Fire Ins. Co., 198 N. C. 303, 304, 151 S. E. 628; Moseley v. Atlantic Coast Line R. Co., 197 N. C. 628, 633, 150 S. E. 184; Bonapart v. Nissen, 198 N. C. 180, 151 S. E. 94; Harper v. Bullock, 198 N. C. 448, 152 S. E. 405; Sheppard v. Jackson, 198 N. C. 627, 628, 152 S. E. 801; Hawkins v. Rowland Lumber Co., 198 N. C. 475, 152 S. E. 169; Smith v. Aetna Life Ins. Co., 198 N. C. 578, 581, 152 S. E. 688; Begnell v. Safety Coach Line, 198 N. C. 688, 153 S. E. 264; Nat. Exch. Bank v. Sklut, 198 N. C. 589, 592, 152 S. E. 697; Morris v. Y. and B. Corp., 198 N. C. 719, 721, 153 S. E. 335; Morris v. Y. and B. Corp., 198 N. C. 705, 153 S. E. 327; Berry v. Inter-Carolina Motor Bus Co., 198 N. C. 817, 818, 151 S. E. 245; Citizen's Lumber Co. v. Elias, 199 N. C. 103, 111, 154 S. E. 54; Southerland v. Crump, 199 N. C. 111, 112, 153 S. E. 845; Smith v. Wharton, 199 N. C. 246, 250, 154 S. E. 12; Pyatt v. Southern R. Co., 199 N. C. 397, 402, 154 S. E. 847; Eaker v. International Shoe Co., 199 N. C. 379, 381, 154 S. E. 667; Lane v. Paschall, 199 N. C. 364, 154 S. E. 626; Gruber v. Ewbanks, 199 N. C. 335, 338, 154 S. E. 318; Reich v. Triplett, 199 N. C. 678, 155 S. E. 573; Chambers v. Winston-Salem, etc., R. Co., 199 N. C. 682, 685, 155 S. E. 571; Dix v. High Point, etc., R. Co., 199 N. C. 651, 652, 155 S. E. 448; Winfree v. Seaboard, etc., R. Co., 199 N. C. 590, 591, 155 S. E. 259; Duncan v. Gulley, 199 N. C. 552, 556, 155 S. E. 244; Denny v. Snow, 199 N. C. 773, 774, 155 S. E. 874; Merritt v. Charlotte, etc., Foundry Co., 199 N. C. 775, 777, 155 S. E. 873; Flythe v. Lassiter, 199 N. C. 804, 805, 153 S. E. 844; Greene v. Carroll, 205 N. C. 459, 171 S. E. 627; Sharp v. Latham, 205 N. C. 827, 828, 170 S. E. 654; Holland v. Dulin, 205 N. C. 202, 203, 170 S. E. 784; Belk's Department Store v. Washington Fire Ins. Co., 208 N. C. 267, 270, 180 S. E. 63; Reid v. Reid, 206 N. C. 1, 3, 173 S. E. 10; Lipe v. Citizens' Bank, etc., Co., 206 N. C. 24, 29, 173 S. E. 316; Bowie v. Tucker, 206 N. C. 56, 59, 173 S. E. 28; High Point v. Brown, 206 N. C. 664, 175 S. E. 169; Rand v. Home Ins. Co., 206 N. C. 760, 174 S. E. 749; Lamm v. Lamm, 206 N. C. 905, 173 S. E. 309; Hanson v. Dickson, 206 N. C. 912, 174 S. E. 442; Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295; Davis v. Alexander, 207 N. C. 417, 177 S. E. 417; Alexander v. Southern Public Utilities Co., 207 N. C. 438, 177 S. E. 427; Gaffney v. Phelps, 207 N. C. 553, 555, 178 S. E. 231; Hinton v. West, 207 N. C. 708, 178 S. E. 356; Garren v. Youngblood, 207 N. C. 86, 176 S. E. 252; Bank of Beaufort v. Commercial Nat. Bank, 207 N. C. 216, 176 S. E. 734; Oliver v. Hecht, 207 N. C. 481, 177 S. E. 399; James v. Carolina Coach Co., 207 N. C. 742, 178 S. E. 607; Lincoln v. Atlantic Coast Line R. Co., 207 N. C. 787, 178 S. E. 601; Gasque v. Asheville, 207 N. C. 821, 178 S. E. 848.

§ 568. Waiver of jury trial.—Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

1. By failing to appear at the trial.

2. By written consent, in person or by attorney, filed with the clerk.

3. By oral consent, entered in the minutes. (Rev., s. 540; Code, s. 416; C. C. P., s. 240.)

Editor's Note.—A waiver of jury trial is provided for by act 4, Sec. 13, of the constitution.

As to waiver of jury trial by reference see sec. 572 and note thereto.

Consent Necessary.—A party cannot be deprived of the right to a trial by jury except by his own consent. Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427.

Methods of Waiver.—The waiver of a jury trial by consent, must be in writing, filed with the papers in the case, or by oral consent entered on the minute-docket of the court. Hahn v. Brinson, 133 N. C. 7, 45 S. E. 359.

Waiver by Failure to Make Motion in Apt Time.—The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Article IV, § 13, but the manner of such waiver is governed by this section, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time for the preservation of its right to trial by jury under § 868, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived. Holmes Electric Co. v. Carolina Power & Light Co., 197 N. C. 766, 150 S. E. 621.

Reference.—If a reference is made by consent it is a mode of trial selected by the parties and is a waiver of the right of trial by a jury. Green v. Castlebury, 70 N. C. 21; Green v. Castleberry, 77 N. C. 164. See § 572 and notes thereto.

Consent Necessary to Vacate Waiver.—Consent to waiver under this section binds both parties until it is vacated by common consent. Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754.

Failure to Object.—Failure to object to an order of reference at the time it is made is equivalent to consent. Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427.

Judge May Disregard Waiver.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial shall be waived. Lumber Co. v. Lumber Co., 137 N. C. 431, 49 S. E. 946.

Review of Decision Refusing to Submit Issues.—Where after the jury has been empanelled the parties to an action on a note admit facts sufficient to support a judgment determining the rights of the parties under the law applicable to such facts, the refusal of the court to submit issues to the jury will be upheld in view of this section. Federal Reserve Bank v. Jones, 205 N. C. 648, 172 S. E. 185.

Applied in Blades v. Wilmington Trust Co., 207 N. C. 771, 772, 178 S. E. 565; Shore v. Norfolk Nat. Bank of Commerce, 207 N. C. 798, 178 S. E. 572.

Cited in Governor v. Lassiter, 83 N. C. 38; Caldwell v. Wilson, 121 N. C. 425, 526, 28 S. E. 554; Green Sea Lumber Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119; Brown v. Sheets, 197 N. C. 268, 271, 148 S. E. 233.

§ 569. Findings of fact and conclusions of law by judge.—Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the fact found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly. (Rev., s. 541; Code, s. 417; C. C. P., s. 241.)

For additional treatment see 11 Enc. Dig., 1073 et seq.

Consent Necessary. — On the trial of a civil action a jury was sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury was discharged without rendering a verdict, it was held that the judge had no right to pass upon the issues, except upon a waiver of jury trial in accordance with this section. Chasteen v. Martin, 81 N. C. 51.

Sufficient Compliance.—Where the court does nothing more than indicate from what source the facts may be gleaned, it is not a sufficient compliance with the requirements of this section that the court's decision shall contain a statement of the facts found. Shore v. Norfolk National Bank of Commerce, 207 N. C. 798, 799, 178 S. E. 572.

Separate Conclusions of Facts and Law. — A judge of the Superior Court, in passing upon a mixed question of law and fact, should, as required by this section, state the facts found and the conclusions of law separately. Foushee v. Pattershall, 67 N. C. 453; Walker v. Walker, 204 N. C. 210, 167 S. E. 818.

The decision of the judge in writing, with a separate statement of his findings of fact and conclusions of law

is sufficient under this section. Eley v. Atlantic, etc., R. Co., 165 N. C. 78, 80 S. E. 1064.

Findings of Judge Conclusive. — When a trial by jury has been waived by the parties for the judge to find the facts his findings thereof are conclusive on appeal if there is evidence to support them. Eley v. Atlantic, etc., R. Co., 165 N. C. 78, 80 S. E. 1064; Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763.

Exceptions. — Where the judge has acted according to this section the relevant and pertinent facts found by him are conclusive on appeal when there is sufficient legal evidence to support them. An exception to a finding of fact on the ground that there was no evidence thereof, must be made in apt time before the judge. Buchanan v. Clark, 164 N. C. 56, 80 S. E. 424.

Where the Court simply responded formally to the issues and directed judgment, to which no exception was taken, and no assignment of error was made, the judgment will be affirmed. Parks v. Davis, 98 N. C. 481, 4 S. E. 202.

Motion to Vacate Attachment. — This section is not applicable to a motion to vacate a warrant of attachment. Millhiser v. Balsley, 106 N. C. 433, 11 S. E. 314.

Cited in Surratt v. Dennis, 199 N. C. 757, 758, 155 S. E. 865.

§ 570. Exceptions to decision of court. — 1. For the purpose of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. Either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (Rev., s. 542; Code, s. 418; C. C. P., s. 242.)

Editor's Note. — In Green v. Castlebury, 70 N. C. 20, which since its decision has been cited as the case par excellence on this section it was held that the right of appeal, and not the mere matter of making up the case, was the subject of this section.

In that case it was also decided that "case or exceptions" was a correct print and an attempt to point out that this section should read "case on exceptions" was erroneous.

Purpose of Section. — The main object of this section is to declare that the trial by the Court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the court. Green v. Castlebury, 70 N. C. 20, 25.

Exceptions Necessary. — Where the decision of all questions both of law and fact is left to the judge, his findings and conclusions will not be reviewed by the Supreme Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out. Chastain v. Coward, 79 N. C. 543.

§ 571. Proceedings upon judgment on issue of law.—On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section 595 herein upon failure of the defendant to answer, where the summons was personally served. If judgment is for the defendant, upon an issue of law, and if taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section 596 herein. (Rev., s. 543; Code, s. 419; C. C. P., s. 243.)

Cited in Ranson v. McClees, 64 N. C. 17; Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754.

Art. 20. Reference

§ 572. By consent.—Any or all of the issues in an action, whether of fact or law, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation. (Rev., s. 518; Code, s. 420; C. C. P., s. 244.)

For complete treatment of the subject of Reference see 10 Enc. Dig. 903 et seq., 15 Enc. Dig. 353 et seq.

Editor's Note. — A trial by reference cannot have the effect of withdrawing the actions or the causes of action from the jurisdiction of the court. The referee, by consent of the parties, becomes a mere adjunct, and acts in the place of the court, and, in appropriate cases, in the place of the court and jury, in respect to the trial.

He must make a report of his proceedings and actions, and his report, unless objected to in the way prescribed, stands as the decision of the court, and on application to the judge, he may enter judgment upon the same.

If the judge does not formally find the facts, it is presumed that he accepts the facts as found by the referees.

A reference, by consent of the parties, of an entire cause, for the determination of its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Oteri v. Scalzo, 145 U. S. 578, 36 L. Ed. 824.

It was not intended by this and the following sections to deprive parties of the right to refer all or any matters in controversy to arbitrators with power to make an award, which should be a rule of the court. It was said by the court in Lusk v. Clayton, 70 N. C. 185, 187, that "The parties can undoubtedly make such a reference, and the only question possible would be whether the judge would recognize the award and make it a rule of court, enforceable by its process, or leave the parties to their action on the arbitration bond or other like remedy. We can not suppose it was intended to abolish so useful a mode of adjusting rights by indirection, and we think that the power to make an award a rule of court still exists as included to every court under its power to enter judgment by confession." It has often been held by the court that these sections have not repealed the common law practice of reference to arbitrators, and that the practice is still extant, notwithstanding them. See Keener v. Goodson, 89 N. C. 273, 276, and citations.

The common law practice was extant until the legislature of 1927 passed a statute regulating arbitration and award. This statute has been codified as §§ 898(a) et seq., of this code, and the notes written thereto which set forth the prior law, discuss the relation to this and the following sections, and set out pertinent annotations from cases construing similar provisions of the statutes of other states.

Definitions. — A reference has been defined as the act of sending any matter by a court of chancery, or (as in North Carolina), one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. Bouv. Law Dict., title Reference.

Distinction between Consent and Compulsory Reference. — Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, either party has the right to have all issues of fact which arise on the pleadings submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. State v. Askew, 94 N. C. 194; State v. Brown, 70 N. C. 27.

What May Be Referred. — All or any of the issues in an action may be referred by consent of the parties. Lusk v. Clayton, 70 N. C. 184, 185, 187.

Waiver of Jury Trial. — A reference made by consent is a waiver of the right of trial by a jury. Green v. Castlebury, 70 N. C. 20.

Judge May Disregard Agreement to Refer. — The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a reference shall be made. Lumber Co. v. Lumber Co., 137 N. C. 431, 49 S. E. 946.

Strict Words of Statute Not Required. — It is proper that the agreement to refer should specify in terms the "issues of law and fact;" but where the purpose is obvious, the strict words of the statute will not be required. Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754; Vaughan v. Lewellyn, 94 N. C. 472.

Order Entered of Record Sufficient. — An order of reference by consent entered of record is a sufficient compliance with this section requiring the same to be in writing.

And when entered it must stand until a full report is made. White v. Utley, 86 N. C. 415.

Plea in Bar.—A reference of a cause cannot be ordered when anything is pleaded in bar of plaintiff's right of action, until such plea is tried. Jones v. Beaman, 117 N. C. 259, 23 S. E. 248.

Reference Does Not Deprive Court of Jurisdiction. — Sending a case to be tried by a referee does not deprive the court of its jurisdiction, and it can make any and all necessary orders therein pending the trial before the referee. McNeill v. Lawton, 97 N. C. 16, 1 S. E. 493.

Plaintiff May Take Non-Suit.—A plaintiff may take a non-suit while the case is pending before a referee, if the case be one in which he is entitled to do so. McNeill v. Lawton, 97 N. C. 16, 1 S. E. 493.

No Appeal from Order of Reference. — Upon a consent reference to try a cause, the question as to whether all the issues raised by the pleadings are to be considered depends upon the extent of the agreement of the parties, and the finding of the trial court is conclusive. Barrett v. Henry, 85 N. C. 322.

Referee Must Discharge Duties. — The referee selected by the parties must remain in the discharge of his duties, unless with like consent another is substituted in his place, until the order has been fully executed and the final report made. Perry v. Tupper, 77 N. C. 413.

Referee's Report Set Aside. — When for cause the referee's report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not consent to such a second trial. Flemming v. Roberts, 77 N. C. 415.

Consent Necessary to Vacate Reference. — Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427; Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754. Unless a sufficient cause therefor is made to appear. Patrick v. Richmond, etc., R. Co., 101 N. C. 602, 8 S. E. 172.

Cited in Green Sea Lumber Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119; Andrews v. Jordan, 205 N. C. 618, 623, 172 S. E. 319.

§ 573. Compulsory.—Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

2. Where the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect.

3. Where the case involves a complicated question of boundary, or one which requires a personal view of the premises.

4. Where a question of fact other than upon the pleadings arises upon motion or otherwise, in any stage of the action.

5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars.

The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the referee. (Rev., s. 519; Code, s. 421; 1897, c. 237, ss. 1, 2; C. C, P., s. 245; 1917, c. 280; 1919, c. 7.)

I. Editor's Note.
II. General Consideration.
III. Illustrative Cases.

Cross References.

For complete treatment of the subject of reference see 10 Enc. Dig. 903 et seq., 15 Enc. Dig. 353 et seq.

I. EDITOR'S NOTE.

Editor's Note. — It is the order of reference that extends the jurisdiction and controls the relation of the court to the trial by referees of the issues of fact and law, and extends its authority to compel the parties to the action, by proper judgments and orders in the regular course of procedure, to do and submit to what ought to be done as the result of the reference.

The referee, once appointed, is like the judge when there is a waiver of a jury trial, invested with the powers of both judge and jury, but with the difference that the authority is conferred upon the referee not for a particular term or limited time, but until a final hearing of the cause.

The difficulty of examining or taking long and often complicated accounts in the progress of a trial, so as to enable a jury to reach a satisfactory conclusion in reference to the bearing of such evidence upon their verdicts, rendered it necessary to confer upon the trial judge the power to order compulsory reference for the purpose of making calculations and presenting results instead of data.

The right to refer by consent is without limit, but the court cannot order a compulsory reference except in the cases enumerated in this section. This distinction exists because in the compulsory reference the parties reserve their right to jury trial upon the coming in of the report of the referee, and as the parties will be subjected to expense and delay of two trials, it ought not to be resorted to for the trial of the issues raised by the pleadings, except when a long account, complicated boundary, or some other intricate questions arise which cannot be intelligently investigated before a jury (Hall v. Craige, 65 N. C. 51, 53; Peyton v. Hamilton-Brown Shoe Co., 167 N. C. 280, 282, 83 S. E. 487). Where there is a plea in bar it must be disposed of before a reference for an account can be made. Royster v. Wright, 118 N. C. 152, 24 S. E. 746; Oldham v. Rieger, 145 N. C. 254, 255, 58 S. E. 1091. The reason of this rule is that it would be useless to take an account, if the plea in bar would defeat the plaintiff's action, if found for the defendant. But it is otherwise where the matter pleaded in bar would not defeat the plaintiff's action, if found for the defendant. Humble v. Mebane, 89 N. C. 410. This is so for the reason that what is pleaded in bar is not a bar. See Lee v. Thornton, 176 N. C. 208, 97 S. E. 23.

When a reference is ordered for any of the reasons set forth in this section, it should appear clearly and affirmatively that the courts act upon the authority herein found. See Kerr v. Hicks, 133 N. C. 175, 177, 45 S. E. 529.

No order of reference should be permitted by the court until the pleadings are in and the parties are at issue. The failure to observe the law of procedure always results in confusion and too often in sacrifice of substantive rights.

In State v. McKenzie, 65 N. C. 102 it was held that a party had no right to demand a trial by jury of an issue involving a complicated account, but the court subsequently declared the ruling modified (State v. Brown, 70 N. C. 27; Lippard v. Roseman, 70 N. C. 34) so as to concede the right, if not barred by failure to demand it in apt time (Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427).

II. GENERAL CONSIDERATION.

Liberally Construed. — This section, allowing a compulsory reference by order of the trial judge, should be liberally construed, to expedite the trial of causes and to promote substantial justice between the parties litigant. Murchison Nat. Bank v. Evans, 191 N. C. 535, 132 S. E. 563.

Where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, but under the facts and circumstances of this case the court's order of compulsory reference of one of the causes of action was upheld, it appearing that the action involved a long account and that the controversy was so involved that it could not be readily presented to a jury, this section being liberally construed to afford the salutary procedure therein provided. Fry v. Pomona Mills, 206 N. C. 768, 175 S. E. 156.

What Constitutes a "Long Account."—There is no statutory or judicial definition of a "long account," but a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of a given case, and the account in controversy was correctly classified as a "long account." Dayton Rubber Mfg. Co. v. Horn, 203 N. C. 732, 167 S. E. 42.

What constitutes a "long account" must be determined upon the facts of each particular case, it not being necessary that the action be for an accounting, it being sufficient if a long account is directly and not merely collaterally involved in the action. Fry Pomona Mills, 206 N. C. 768, 175 S. E. 156.

No Waiver of Jury Trial. — By a compulsory reference the parties waive nothing, and are still entitled to a trial by jury, on the issues as if no reference had been made. State v. Askew, 94 N. C. 194; Green v. Castlebury, 70 N. C. 20.

But a failure to object to an order of reference, at the time it is made, is a waiver of the right to a trial by jury. Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655.

Exception to Order of Court. — By excepting to an order of court referring to a long account between the parties as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference provided for by this section. Green Sea Lumber Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119.

A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. Brown v. Buchanan, 194 N. C. 675, 140 S. E. 749.

But the failure of a party to except to an order for compulsory reference and to file exceptions in apt time to particular findings of fact by the referee when the report is unfavorable and to tender issues on the exceptions and demand a jury trial thereon will be deemed a waiver of his right to trial by jury. C. S., 573. Booker v. Highlands, 198 N. C. 282, 151 S. E. 635.

A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should reasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. Marshville Cotton Mills v. Maslin, 200 N. C. 328, 329, 156 S. E. 484.

Where a case is one properly subject to a compulsory reference under this section, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. Atlantic Joint Stock Land Bank v. Fisher, 206 N. C. 412, 173 S. E. 907.

Where defendant sets up no plea in bar, and the pleadings indicate the necessity of examining a long account between the parties, defendant's exception to an order for compulsory reference will not be sustained under this section. Texas Co. v. Phillips, 206 N. C. 355, 174 S. E. 115.

Common Law Arbitration. — The provisions of the code of Civil Procedure have not repealed the common law practice of reference to arbitrators. Keener v. Goodson, 89 N. C. 273, 276.

Judge of Probate Court Cannot Refer. — A judge of the court of probate cannot refer the taking of the account to a referee, and, if he does, the account will be set aside as irregularly taken. This section does not extend the jurisdiction of the probate judge. Rowland v. Thompson, 65 N. C. 110.

Power of Court to Vacate Reference.—Where the trial judge has orderd a compulsory reference upon the ground that the complaint stated a long and involved account, and where no exception is taken to the order by either party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee has committed error in excluding certain evidence materially bearing upon the controversy. American Trust Co. v. Jenkins, 196 N. C. 428, 146 S. E. 68.

Motion to Refer Must Be Timely. — A motion for a compulsory reference should be made in an action before the jury has been impaneled, or the rights of a party thereto will be considered as waived. Peyton v. Hamilton-Brown Shoe Co., 167 N. C. 280, 83 S. E. 487.

It is not error to refuse a compulsory reference, when the motion to refer is not until after the close of the evidence. Hughes v. Boone, 102 N. C. 137, 138, 9 S. E. 286.

Reference Should Follow Pleas. — A reference should not be ordered, after overruling a demurrer, until the pleadings are in and the parties are at issue. Penn. Lumber Co. v. McPherson, 133 N. C. 287, 45 S. E. 577.

Reference Precedes Court Adjudication of Liability. — A reference to hear and determine all matters in controversy, under this section, precedes any adjudication by the court of the liability of the parties. Governor v. Lassiter, 83 N. C. 38.

But it is irregular to proceed with a reference to state an account while there are matters of defense left open which, if sustained by evidence, would bar the claim to have such account. The issue raised by the replication should be submitted to the jury before ordering a reference to take the account demanded. Sloan v. McMahon, 85 N. C. 296.

Appeal before Judgment Premature. — In Leroy v. Saliba, 182 N. C. 575, 108 S. E. 303, it was said: "The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and must be dismissed. The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment."

When Non-Suit Allowed. — A plaintiff may take a nonsuit while the case is pending before a referee, if the case be one in which he is entitled to do so. McNeill v. Lawton, 97 N. C. 16, 1 S. E. 493.

However, in cases purely equitable in their nature, if a reference for an account has been ordered and a report made, the plaintiff will not be allowed to take judgment of nonsuit. Boyle v. Stallings, 140 N. C. 524, 53 S. E. 346.

Jury Trial on Issues. — In a case of a compulsory reference either party may, at some stage of the proceedings to be determined by the Court, demand a trial by jury of the issues arising in the report of the referee. State v. Brown, 70 N. C. 27.

Plea in Bar Defeats Order of Reference. — When the answer raises a plea in bar, which if established would end the action, a compulsory order of reference can not be properly ordered until such plea is decided. Bank v. Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588; Commissioners v. White, 123 N. C. 534, 31 S. E. 670.

It is error for trial court to order a compulsory reference under this section before disposing of pleas in bar set up by defendants on the grounds of laches and the bar of the statute of limitations. Graves v. Pritchett, 207 N. C. 518, 177 S. E. 641.

A plea in bar of a reference is not conclusive unless it extends to the whole cause of action so as to defeat it absolutely and entirely. Reynolds v. Morton, 205 N. C. 491, 171 S. E. 781.

Pleas in Bar. — The following pleas have held to be pleas in bar: (1) Statute of Limitations. Oldham v. Rieger, 145 N. C. 254, 58 S. E. 1091. (2) Account stated. Kerr v. Hicks, 129 N. C. 141, 39 S. E. 797; Kerr v. Hicks, 131 N. C. 90, 42 S. E. 532; Jones v. Wooten, 137 N. C. 421, 49 S. E. 915. (3) Failure to comply with the provisions of a contract which are conditions precedent to liability. Bank v. Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588. (4) Plea of sole seizin by reason of adverse possession of twenty years against a tenant in common. But plea of sole seizin which by its very terms involves an accounting, is not a good plea. Duckworth v. Duckworth, 144 N. C. 620, 57 S. E. 396. (5) Release. McAuley v. Sloan, 173 N. C. 80, 91 S. E. 701. (6) Accord and satisfaction. McAuley v. Sloan, 173 N. C. 80, 91 S. E. 701. (7) Estoppel by judgment. Jones v. Beaman, 117 N. C. 259, 23 S. E. 248. (8) Answer denying trust. Reynolds v. Morton, 205 N. C. 491, 171 S. E. 781.

Party Cannot Object to Reference. — A party to an action may not successfully object to a compulsory reference when the same is allowed by this section and the complaint states a good cause of action, and no complete plea in bar to the entire cause is set up by him. Murchison Nat. Bank v. McCormick, 192 N. C. 42, 133 S. E. 183.

Consent Necessary to Vacate Reference. — Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427.

Failure to Refer Not Error. — Where the controversy involves the taking of a long account, it should be referred but where it has otherwise been tried, without error or prejudice to the appellant, the judgment of the trial court will not be disturbed. Ragland v. Lassiter-Ragland, 174 N. C. 579, 94 S. E. 100.

Report of Referee as Evidence.—Compulsory references are authorized in certain instances by this section, but when such a reference is ordered under the statute neither party is deprived of his constitutional right to a trial by jury of the issues of fact arising on the pleadings. It is provided, however, that "such trial shall be only upon the written evidence taken before the referee." This refers to the testimony of all the witnesses taken down by the referee, or under his direction, signed by them, and returned to the court as a part of the record in the cause as required by § 577. But the report of the referee, consisting of his findings of fact and conclusions of law, would not be competent as evidence before the jury. See Bradshaw v. Hilton Lumber Co., 172 N. C.

219, 90 S. E. 146. Booker v. Highlands, 198 N. C. 282, 285, 151 S. E. 635.

It has been said, however, that where an amendment to the pleadings is allowed, after the report is in, containing an additional charge, the parties ought to be allowed to offer evidence before the jury as to such charge, for it was not embraced in the reference. See Moore v. Westbrook, 156 N. C. 482, 72 S. E. 482. Boooker v. Highlands, 198 N. C. 282, 285, 151 S. E. 635.

Applied in Marshville Cotton Mills v. Maslin, 200 N. C. 328, 156 S. E. 484; Perry v. Pulley, 206 N. C. 701, 702, 175 S. E. 89.

III. ILLUSTRATIVE CASES.

Location of Dividing Line.—A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass, and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of the premises. Waller v. Dudley, 194 N. C. 139.

Suit to Vacate Deed. — Where a suit to set aside a deed to lands, an action for possession, and a petition for dower, have been consolidated, an allegation of the wife's adultery is in bar of the wife's right, and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference of each action and proceeding under one form, it is improvidently entered. Lee v. Thornton, 176 N. C. 208, 97 S. E. 23.

Reservation of Timber. — When a conveyance of lands reserved all the trees of a certain size on the date of the deed, it is error for the court to dissolve an order restraining the cutting of the trees solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size on the date of the deed, as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. Kelly v. Enterprise Lumber Co., 157 N. C. 175, 72 S. E. 957.

Suit to Sell Corporation Assets. — Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation, but that they were omitted by mistake it was a proper case for a reference. Pinchback v. Bessemer Min., etc., Co., 137 N. C. 171, 172, 49 S. E. 106.

Contract for Rent. — Where the question involved in the action is the amount of rent due under a contract placing the rental at not less than a certain monthly sum, with obligation of the lessee to pay more in accordance with what other tenants were paying in the locality for other stores, etc., of the same rental value, the question to be determined by the jury does not require a view of the premises, entitling the party requesting it to a compulsory reference under the provisions of this section. Kearns v. Huff, 191 N. C. 593, 132 S. E. 566.

Suit on Confessed Judgment. — A compulsory reference cannot be ordered by the court in a suit on a judgment confessed by the defendants as executors before the Civil War, where the only matters of defense are payments made by them in Confederate currency during the war, and alleged counter-claims for notes due from the plaintiffs to them as executors. Hall v. Craige, 65 N. C. 51.

Action by Ward against Guardian. — Where in an action by a guardian to impeach a former decree, it appeared that alleged expenditures for the benefit of the ward should be ascertained before final judgment, it was held not to be error in the court to direct a mistrial and order a reference. Sutton v. Schonwald, 80 N. C. 20.

Action on Administration Bond. — A plea in an answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue taken upon it may be the subject of a compulsory reference under this section. Flack v. Dawson, 69 N. C. 42.

Suit by Creditor against Executor. — In an action by a creditor against an executor if the defendant denies the debt, and also that he has assets, the issue as to the debt is tried in the ordinary way; and if the debt be established a reference is to be had to ascertain the amount of the debts and their several classes, and upon the coming in of the report a judgment will be entered in favor of all the creditors who have proved their debts, for such part of the fund as they may be entitled to. Heilig v. Foard, 64 N. C. 710.

Cited in Wall v. Covington, 76 N. C. 150; Patrick v. Richmond, etc., R. Co., 101 N. C. 602, 8 S. E. 172; Lassiter v. Upchurch, 107 N. C. 411, 414, 12 S. E. 63; Dunn v. Johnson, 115 N. C. 249, 258, 20 S. E. 390; Kerr v. Hicks, 133 N. C. 175, 45 S. E. 529; Corporation Comm. v. Farmers, etc., Bank, 192 N. C. 366, 135 S. E. 48; Waller v. Dudley, 194 N. C. 139, 138 S. E. 595; Bank of Rose Hill v. Graham, 198 N. C. 530, 532, 152 S. E. 493; Nissen v. Baker, 198 N. C. 433, 152 S. E. 34, 38.

§ 574. How referee chosen or appointed.—In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who are free from exception. No person may be appointed referee to whom all parties in the action object. No judge or justice of any court may sit as referee in action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. (Rev., s. 520; Code, s. 423; C. C. P., s. 247.)

§ 575. Referees may administer oaths.—Every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. (Rev., s. 521; Code, s. 599; C. C. P., s. 356.)

§ 576. Powers of referee of trial.—The trial by referees shall be conducted in the same manner as a trial by the court. Referees have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for nonattendance or refusal to be sworn or to testify, as is possessed by the court. (Rev., s. 522; Code, s. 422; C. C. P., s. 246.)

For complete treatment of qualifications, powers and duties of referees see 10 Enc. Dig. 920-925, 15 Enc. Dig. 356.

Referee Has No Inherent Power. — A referee has no inherent or original powers and can only do those things expressly enumerated in the code, and such as he is authorized to do by the court which sends him the case. While he may "allow amendments to any pleadings," he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent. Jones v. Beaman, 117 N. C. 259, 23 S. E. 248.

May Make New Parties. — Under this section, a referee has power to admit new parties to an action. Perkins v. Berry, 103 N. C. 131, 9 S. E. 621.

However a notice issued by a referee and served upon a surety on the administrator's bond to appear before him, no order having been made to make such surety a party, is not a legal process effective to bring him into court. Koonce v. Pelletier, 115 N. C. 233, 20 S. E. 391.

Power to Enforce Rulings. — The referee has power to enforce obedience to the rulings on the trial of the issues before him, just as the court would have upon the trial before it. LaFontaine v. Southern Underwriters Ass'n., 83 N. C. 133.

To review the action of the referee in permitting amendments to pleadings and the making of new parties, under this section, and contending successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal to the Supreme Court. Sheffield v. Alexander, 194 N. C. 744, 140 S. E. 726.

Power to Amend Pleadings and Make New Parties.—The authority of the referee to allow amendments to pleadings and to make new parties is expressly given by this section. Sheffield v. Alexander, 194 N. C. 744, 140 S. E. 726, citing Rosenbacher & Bro. v. Martin, 170 N. C. 236, 86 S. E. 785; Blanton v. Bostic, 126 N. C. 418, 35 S. E. 1035; Koonce

v. Pelletier, 115 N. C. 233, 20 S. E. 391. See note under § 547.

Cited in Gillam v. Life Ins. Co., 121 N. C. 369, 373, 28 S. E. 470.

§ 577. Testimony reduced to writing.—The testimony of all witnesses on both sides must be reduced to writing by the referee, or under his direction, and signed by the witnesses, and the evidence so taken and signed shall be filed in the cause, and constitute a part of the record. (Rev., s. 523; 1897, c. 237, s. 3.)

Cited in American Trust Co. v. Jenkins, 196 N. C. 428, 146 S. E. 68; Texas Co. v. Phillips, 206 N. C. 355, 358, 174 S. E. 115.

§ 578. Report; review and judgment.—The referee shall make and deliver a report, within the time ordered by the court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the judge. (Rev., s. 524; Code, s. 423; C. C. P., s. 247.)

See note under § 579.

Editor's Note. — Originally, as cited in C. C. P. sec. 247, the time limit of the referee's report was 60 days, and in default thereof either party could end the reference. Maxwell v. Maxwell, 67 N. C. 383.

Power of Judge—Recommittal of Case.—The supervisory power of the trial judge over the referees report under this section is broad and comprehensive. Dumas v. Morrison, 175 N. C. 431, 95 S. E. 775. In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. Mills v. Apex Ins., etc., Realty Co., 196 N. C. 223, 225, 145 S. E. 26, citing Commissioners v. Magnin, 85 N. C. 115; Lutz v. Cline, 89 N. C. 186; S. v. Jackson, 183 N. C. 695, 110 S. E. 593; Coleman v. McCullough, 190 N. C. 590, 130 S. E. 508.

Reference to Another Referee. — Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge may not refer to it to another referee with partial approval thereof for action upon the unapproved parts. Mills v. Apex Ins. etc., Co., 196 N. C. 223, 145 S. E. 26.

Judge May Set Aside Reference. — The judge, in his discretion, may set aside a reference after the report is filed and proceed and try the case. Cummings v. Swepson, 124 N. C. 579, 32 S. E. 966.

When Decisions Reviewable. — The decision of the judge in revising the report of a referee, is available as to questions of law, but not as to the findings of fact. Vaughan v. Lewellyn, 94 N. C. 472

The Supreme Court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. Boyle v. Stallings, 140 N. C. 524, 53 S. E. 346.

The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee; and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. Cummings v. Swepson, 124 N. C. 579, 32 S. E. 966.

Under this section the Superior Court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. Wallace v. Benner, 200 N. C. 124, 156 S. E. 795. But the findings of fact of a referee approved by the trial judge cannot be reviewed upon appeal if supported by any competent evidence. Id.

Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee, and where the court has made additional findings and there is evidence to sustain them the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. Thigpen v. Farmers' Banking, etc., Co., 203 N. C. 291, 165 S. E. 720.

The referee's findings are subject to review by the District Judge and where exceptions are not filed in the District Court to the admission of testimony before the referee, they will not be considered by the Circuit Court of Appeals. Fruit Growers' Exp. Co. v. Plate Ice Co., 59 F. (2d) 605.

§ 579. Report, contents and effect. — The referee must state the facts found and the conclusions of law separately. His decision must be given, and may be excepted to and reviewed in like manner and with like effect in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue stands as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report has the effect of a special verdict. (Rev., s. 525; Code, s. 422; C. C. P., s. 246.)

Cross Reference.—As to reviewing, on appeal, findings of fact by referee, see § 578 and the note thereto.

For full treatment of the Referee's Report see 11 Enc. Dig. 925 et seq. 15 Enc. Dig. 376 et seq. For reference by consent see annotations under sec. 572. As to Compulsory Reference see annotations under sec. 573.

Editor's Note. — The referee must state in his report his findings of fact and law separately, and when the judge, who hears exceptions to the report, makes no special finding of fact, it is presumed that he adopts those of the referee which are considered prima facie correct. In such cases the Supreme Court will not review the findings of fact made or adopted by the judge below, its appellate jurisdiction being confined to the review of matters of law. This is so even though the action is one cognizable in a court of equity prior to 1868. Battle v. Mayo, 102 N. C. 413, 9 S. E. 384; Barcroft & Co. v. Roberts & Co., 91 N. C. 363.

In the exercise of the power conferred by this section, as well as in the application of general principles of procedure of courts of equity, the court has authority to set aside, modify, or confirm, in whole or in part, the report of the referee, and the appellate jurisdiction attaches to the ruling in matters of law only, Vaughan v. Lewellyn, 94 N. C. 472. The court may modify the report and recommit the matter to the referee. Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754. Also see Barcroft & Co. v. Roberts & Co., 91 N. C. 363; Patterson v. Wadsworth, 89 N. C. 407.

One valid objection may be raised to the findings of fact by the referee adopted by the judge, directly or by failure to modify them, or to those of the judge substituted for the referee's, but this raises in reality only a question of law, i. e., whether there is any evidence to support the conclusions of fact. When no such objection is made in apt time, the findings of the judge, whether made or adopted, are final and cannot be reviewed in the Supreme Court. If, upon hearing such exceptions when taken, it appears in the Supreme Court that there is no evidence to sustain the finding it will be deemed conclusive. Usry v Suit, 91 N. C. 406; Reaves v. Davis, 99 N. C. 425, 6 S. E. 715.

In cases of reference by consent if no exceptions be taken before the referees, and their report goes up without exceptions, and either party desires to except, then and there in term time he must be permitted to do so. And then his honor must pass upon the exceptions as if they had been taken before the referees. The practice is the same in compulsory references, except that when a report is made, exceptions filed, and issues made by the exceptions, either party has the right to have the issues submitted to a jury; because, not having waived a jury trial, as is done when the reference is by consent, the party has a constitutional right to a trial by jury. And in a case where the reference is by consent, if issues arise on exceptions which the judge is unwilling to try himself he may order a jury to find the issue to aid him, but it is not a right which the party has. Green v. Castlebury, 70 N. C. 20, 24, 26.

Exceptions to the order of the court should conform to the ruling of the Supreme Court in Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427. For a striking illustration of the confusion and uncertainty into which the rights of the parties litigant are thrown by a failure to

observe the provisions of this section and the holdings thereunder, see Kerr v. Hicks, 133 N. C. 175, 45 S. E. 529.

Referee's Duty under This Section. — It is the duty of a referee to state positively and definitely all the facts constituting the grounds of action or defence, and not to leave to inference what is the precise fact intended to be found. Conclusions of law and fact must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, and the report of the referee will be set aside as being defective. Earp v. Richardson, 75 N. C. 84; State v. McKenzie, 65 N. C. 102.

Findings of Fact Conclusive. — The findings of fact by a referee, adopted by the trial judge, are conclusive. Joyner v. Stancill, 108 N. C. 153, 12 S. E. 912, following Battle v. Mayo, 102 N. C. 413, 9 S. E. 384.

Presumption. — The findings of fact reported by a referee are presumed to be right unless shown to be wrong. If there is no evidence to support them, they will not be sustained. Green v. Jones, 78 N. C. 265.

Report Has Effect of Special Verdict. — Where the reference is by consent the referee's report has the effect of a special verdict. Battle v. Mayo, 102 N. C. 413, 9 S. E. 384. Subject however to the right of either party, on notice, to move the court to review his report, to set it aside, to modify or confirm it. Barrett v. Henry, 85 N. C. 322, 325.

Agreement to Arbitrate Made Out of Court. — Where an agreement to submit the matters in controversy in a pending action is made out of court, and no order of court is made to make the award when filed a rule of court, the court has no power to enter a judgment on the award, but the remedy is by a new action on the award. Jackson v. McLean, 96 N. C. 474, 1 S. E. 785.

Judge May Submit Issues to Jury. — It is not the duty of a judge, in passing on exceptions to a referee's report, to decide all questions of fact without a jury, but on the contrary, if the facts depend upon doubtful and conflicting testimony, he may cause issues to be framed and submitted to a jury for information. Maxwell v. Maxwell, 67 N. C. 383.

Unfinished Report. — It is error for the judge to pass upon exceptions to an unfinished report. White v. Utley, 86 N. C. 415.

Right to Jury Trial. — In case of a compulsory reference a litigant can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for the issues. Wilson v. Featherstone, 120 N. C. 446, 27 S. E. 124.

But to avail himself of this right he should, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall thus be determined. Yelverton v. Coley, 101 N. C. 248, 7 S. E. 672.

Conclusiveness—Exception to Report.—Construing this and § 579 together as being in pari materia: it is held that a party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee. Hardaway Contracting Co. v. Western Carolina Power Co., 195 N. C. 649, 143 S. E. 241.

Exceptions to Referees' Report Must be Specific. — An exception to the report of a referee must be specific; it must point out the conclusion at which it is aimed and the precise error complained of. Battle v. Mayo, 102 N. C. 413, 9 S. E. 384.

An exception to the admission of evidence by a referee, which is not specific, but is vague and indefinite in form, will not be considered. Perkins v. Berry, 103 N. C. 131, 9 S. E. 621.

Exceptions to a referee's report made the basis of a demand for a trial by jury should be explicit enough for the opposing party to see clearly what the issue will be, so as to prepare to meet it with his evidence. Wilson v. Featherstone, 120 N. C. 446, 27 S. E. 124.

An exception, "The plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. Commissioners v. Erwin, 140 N. C. 193, 52 S. E. 785.

Exceptions before Court. — If no exceptions be taken before the referees and their reports go up without exceptions and either party desires to except then and there in term time, he must be permitted to do so. The court must then pass upon them as if they had been taken before the referees. Green v. Castlebury, 70 N. C. 20, 21; Green v. Castleberry, 77 N. C. 164.

Failure to Specify Objection Constitutes Waiver. — Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report. Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427.

Exceptions Should Be to Court Action. — Where an appeal is taken from the action of the trial court in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the court which it is sought to have reviewed, and the case ought not to be sent to the Supreme Court to be heard only on the exceptions taken to the ruling of the referee. Traders Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363.

All Evidence Not Reported. — That the referee has not reported all the evidence is not a ground of exception. If all the evidence is not sent up, the remedy of the prejudiced party is, by application to the judge for an order directing the referee to send up that which has been omitted. Perkins v. Berry, 103 N. C. 131, 9 S. E. 621.

No Appeal From Order Recommitting Report. — Where the court orders a compulsory reference, an appeal does not lie from an order recommitting the report of the referee for the correction of errors and irregularities. State v. Magnin, 85 N. C. 115.

Art. 21. Issues

§ 580. Defined.—Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.
2. Of fact.

(Rev., s. 544; Code, s. 391; C. C. P., s. 219.)

For a full treatment of the subject of issues see 10 Enc. Dig. 216 et seq., 15 Enc. Dig. 224 et seq.

In General. — An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and, generally, should be made up by an affirmative and negative. Simonton v. Witner, 5 Pet. 141, 149, 8 L. Ed. 75.

An issue is a statement of a material fact in the pleading of one party which is denied in its pleading of another party. 7 Ohio Law Reporter 163, 164.

Form of Issues. — Defendant can not complain of the form of the issues where he did not except or submit other issues. Drennan v. Wilkes, 178 N. C. 512, 103 S. E. 9.

Failure to Submit Issue. — Where defendant in a processioning proceeding did not tender any issues, and did not except to the one submitted, he can not complain on appeal that no issue of title was submitted, particularly where he offered no evidence to support his allegations of title. Exum v. Chase, 180 N. C. 95, 104 S. E. 67.

Province of Judge and Jury. — The province of the jury is restricted to passing upon issues of fact raised by the pleadings in the light of the testimony offered. When no testimony is offered, it is the duty of the trial judge to determine the issues of law, if any are raised, and then to proceed to enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings and the determination of the controverted questions of law. McQueen v. Peoples Nat. Bank, 111 N. C. 509, 513, 515, 16 S. E. 270.

Cited in Braswell v. Johnston, 108 N. C. 150, 12 S. E. 911; Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 468, 26 S. E. 144; Tucker v. Satterthwaite, 120 N. C. 118, 119, 121, 27 S. E. 45; Dees v. Apple, 207 N. C. 763, 766, 178 S. E. 557.

§ 581. Of law.—An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof. (Rev., s. 545; Code, s. 392; C. C. P., s. 220.)

§ 582. Of fact.—An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer, controverted by the reply; or,
3. Upon new matter in the reply, unless an issue of law is joined thereon. (Rev., s. 546; Code, s. 393; C. C. P. s. 221.)

For further treatment see 10 Enc. Dig. 217 et seq. 15 Enc. Dig. 224 et seq.

Pleadings Must Raise Issues. — The issues in a cause are made by the pleading, and it is not error to refuse to submit an issue which the pleadings do not raise. McElwee v. Blackwell & Co., 82 N. C. 345; Wright v. Cain, 93 N. C. 296; Patton v. Western N. C. R. Co., 96 N. C.

455, 1 S. E. 863. But see Lackett v. Rumbaugh, 45 Fed. 23. See also Ellis Motors Co. v. Belcher, 204 N. C. 769.

An issue should be directed to the matter alleged on the one side and denied on the other. The judge may, in addition to the issue, submit a question to the jury pertinent to the matters in controversy, but he is not compelled to do so and his refusal is not reviewable. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663.

However, it is error to submit an issue as to a contract different from that alleged in the complaint. Dickens v. Perkins, 134 N. C. 220, 46 S. E. 490.

In an action for the recovery of land, if the defendant wishes to disclaim as to any portion of the locus in quo and put in issue the title to only a specific portion, he should do so in his answer. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663.

Issue Cannot Be Raised by Evidential Fact. — Where there are no allegations in the pleadings which suggest the matter set out in the issue, it is improper to submit such an issue to the jury nor can an issue be raised by evidential facts. Fortesque v. Crawford, 105 N. C. 29, 31, 10 S. E. 910, citing Miller v. Miller, 89 N. C. 209; Howard v. Early, 126 N. C. 170, 35 S. E. 258.

Issues Should Be Material. — It is only necessary to submit such issues as arise out of the pleadings material to be tried and such as will admit all material evidence upon the whole matter in controversy. Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481.

Refusal to Submit Defendant's Issue. — Where an issue raised by the new matter in the answer, controverted by the reply, is material to the defense, there is error in refusing to submit the issue tendered by defendants, or at least an issue involving the matters relied upon by the defendants, and alleged in their answer. Brown v. Ruffin, 189 N. C. 262, 126 S. E. 613, 615.

Cited in Abbott v. Georgia, etc., R. Co., 90 N. C. 462.

§ 583. Order of trial.—Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In these cases the issues of law must be first tried, unless the court otherwise directs. (Rev., s. 547; Code, s. 394; C. C. P., s. 222.)

Pleas in bar must be tried before a reference is ordered. See Annotations under sections 572, 573.

§ 584. Form and preparation.—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, or before during the trial. (Rev., ss. 548-9; Code, ss. 395-6.)

For full treatment of the subject of issues see 10 Enc. Dig. 216, 15 Enc. Dig. 224.

Editor's Note. — The Supreme Court in construing this section has laid down three rules; (1) only issues of fact raised by the pleadings must be submitted; (2) the verdict, whether in response to one or many issues must establish facts sufficient to enable the court to proceed to judgment; (3) of the issues raised by the pleadings, the judge may, in his discretion, submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issues passed upon.

This section is mandatory and where no issues are tendered by either party it is the duty of the judge either to compel counsel to prepare the proper issues or to prepare them himself and submit them to the jury. Such an adherence to the statute is absolutely essential, not only to the fair trial of the case, but to an intelligent appreciation of its merits upon an appeal. Denmark v. Atlantic, etc., R. Co., 107 N. C. 185, 12 S. E. 54; Burton v. Rosemary Mfg. Co., 132 N. C. 17, 43 S. E. 480.

It should be borne in mind that the code system contemplates distinct findings upon material issues. These should be submitted where it can be done without repetition of confusion. Emery v. Raleigh, etc., R. Co., 102 N. C. 209, 9 S. E. 139. It is not necessary that the language of the pleadings should be incorporated in the issues, or that it should be clearly followed in drawing them.

While the pleadings are to be construed liberally with a view to substantial justice between the parties, the proof must conform substantially to the allegation. As was said by the Supreme Court in Parsley v. Nicholson, 65 N. C. 207, 209. "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure, the essential principles still remain and have only been modified as to the technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty." See Tucher v. Satterthwaite, 120 N. C. 118, 27 S. E. 45; Braswell v. Johnston, 108 N. C. 150, 12 S. E. 911.

For an excellent discussion by the Supreme Court of the provisions and requirements of this section see Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144.

When Sufficient. — It seems that the law is settled that if the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. Bailey v. Hassell, 184 N. C. 450, 459, 115 S. E. 166.

Issues Precede Testimony. — This section contemplates that the issues shall be drawn before the introduction of testimony. Beasley v. Surles, 140 N. C. 605, 53 S. E. 360.

Multiplicity of Issues. — This section does not contemplate or require, that an issue shall be submitted to the jury as to every important material fact controverted by the pleadings, nor it is necessary, expedient, or proper to do so. Patton v. Western N. C. R. Co., 96 N. C. 455, 464, 1 S. E. 863.

The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, when found by the jury only furnish facts which would be evidence to prove the main issue, should never be submitted. Patton v. Western N. C. R. Co., 96 N. C. 455, 456, 1 S. E. 863.

Separate Causes of Action. — Where the plaintiff brings a single suit on two distinct causes of action a separate issue should be submitted as to the damages arising on each separate cause of action. Kelly v. Durham Tract. Co., 133 N. C. 418, 45 S. E. 826.

Complaint Differs with Issue. — Where a contract alleged in the complaint is different from that submitted in the issue, an instruction that if the contract was as alleged, the issue should be answered in the affirmative, is error. Dickens v. Perkins, 134 N. C. 220, 46 S. E. 490.

Issues Not Determinative. — A judgment upon the verdict of the jury upon issues raised by the pleadings which are not determinative of the controversy between the parties, is erroneously entered. Merchants Nat. Bank v. Carolina Broom Co., 188 N. C. 508, 125 S. E. 12.

Single Issue Sufficient. — It is not error for the court, to submit only an issue involving the question whether a plaintiff has been injured and has sustained damage through the negligence of a defendant, even where contributory negligence is set up as a defense. McAdoo v. Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316; Boyer v. Teague, 106 N. C. 576, 633, 11 S. E. 665.

Insufficient Issues. — When issues of fact are raised by the pleadings it is error to submit only the question whether the plaintiff is entitled to recover; that is a question of law arising after verdict and addressed solely to the court. Braswell v. Johnston, 108 N. C. 150, 12 S. E. 911.

Example of Insufficient Issues. — Where in an action for damages, the defendant tendered the issues; (1) Were plaintiff's injuries caused by the defendant's negligence? (2) Was there contributory negligence on the part of the plaintiff? (3) What damage is the plaintiff entitled to recover? And the court declined to submit these, but substituted instead a single issue—What damages, if any, is the plaintiff entitled to recover? It was held to be error. Denmark v. Atlantic, etc., R. Co., 107 N. C. 185, 186, 12 S. E. 54.

Inconsistent Causes of Action. — Where the plaintiff alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on a single issue as to whether plaintiff was injured by defendant's negligence, as alleged in the complaint. Griffin v. Atlantic, etc., R. Co., 134 N. C. 101, 46 S. E. 7.

Cited in Wilson v. Featherstone, 120 N. C. 446, 27 S. E. 124, 126; Howard v. Early, 126 N. C. 170, 35 S. E. 258.

Art. 22. Verdict

§ 585. General and special.—A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leav-

ing the judgment to the court. (Rev., s. 550; Code, s. 408; C. C. P., s. 232.)

I. General Consideration.
II. Rendition and Reception.
III. Polling Jury.

Cross Reference.

For full treatment of verdicts generally, see Trial, 11 N. C. Enc. Dig. 1055.

I. GENERAL CONSIDERATION.

General Verdict.—The verdict is general when the jury, under appropriate instructions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted. Porter v. Western, etc., R. Co., 97 N. C. 66, 71, 2 S. E. 591; Morrison v. Waston, 95 N. C. 479.

Such a verdict settles in favor of the prevailing party every litigated question of fact. It is to be liberally construed, and to be sustained unless it is clearly inconsistent with any theory provable under the issues that the evidence may tend to support. Ed. Note.

Same—Embodies Law & Fact.—A general verdict embodies both the law and facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. Walker v. New Mexico, etc., R. Co., 165 U. S. 59, 596, 41 L. Ed. 837.

The only way in which the jury can decide the law of a case is by finding a general verdict. Georgea v. Brailsford, 3 Dall. 1, 5, 1 L. Ed. 483.

Special Verdict.—The adoption of this section wrought a radical change upon the old practice in regard to what should be stated in special verdicts. Under the former practice, after the finding as to all the facts necessary in determining the rights of the parties, with a prayer for the advice of the court as to the law arising thereon, the special verdict concluded conditionally, that if, upon the whole matter, the court shall be of opinion that the plaintiff has a cause of action, they then find for the plaintiff; if otherwise, for the defendant. Under the law as it now stands it is no longer necessary for the condition to be included. Ed. Note.

See 13 N. C. Law Rev., 321, for a note on the special verdict in Criminal Procedure.

Special Verdict Cannot be Added to.—"In any case, the trial judge may decline to receive a special verdict, and insist that the jury return a general verdict of guilty or not guilty; but when a special verdict is found by the jury, neither the trial court nor the appellate court can add any fact not directly found, nor can its existence be presumed." State v. Colonial Club, 154 N. C. 177, 186, 69 S. E. 771.

The court can not add any facts to the verdict, nor pass upon any facts not stated or derivable from the facts appearing by such verdict, except such as are admitted by the pleadings. 8 N. Y. 483.

Where Findings of Jury in Conflict.—If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. Morrison v. Watson, 95 N. C. 479. And where such is the case, the rule that requires a special verdict to prevail over a general (under section 586) one has no application. Porter v. Western, etc., R. Co., 97 N. C. 66; 2 S. E. 581.

II. RENDITION AND RECEPTION.

Presence of Court.—A special verdict requires the presence and assent of the court. Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978.

If it is not received by the court, nor in any way made matter of record, and where, with the assent of the attorney of the party in whose favor it was given, the jury retire by the courts direction and consider further of their verdict and return another verdict of which ouster is entered, it is of no weight as evidence for any purpose. United States v. Addyson, 6 Wall. 291, 18 L. Ed. 919.

Presence of Parties.—A party has the right to be present upon the rendition of the verdict, State v. Jones, 91 N. C. 654. This right is personal to the parties themselves and the absence of the counsel at the rendition is not a ground for a new trial. Barger Bros. v. Alley, 167 N. C. 362, 83 S. E. 612.

But the entry of a verdict against a plaintiff, who is not present either in person or by attorney, is irregular. Graham v. Tate, 77 N. C. 120.

Waiver of Right to be Present — (1) In Civil Cases.—The right of the parties to be present when the verdict is returned in a civil case is waivable. Barger Bros. v. Alley, 167 N. C. 362, 83 S. E. 612, and cases there cited.

Same — (2) Criminal Cases.—In the trial of capital felonies the rule of practice seems to be uniform in all the states that the prisoner **must** be present during the whole trial. See State v. Paylor, 89 N. C. 539, 541, which contains also a full discussion of the application of the principle in regard to felonies of a lower nature and as to misdemeanors.

Verdict Received by Clerk.—A clerk of the court may by consent receive a verdict, even if the judge is not in the court room, provided it was done before the expiration of the term. Ferrell v. Hales, 119 N. C. 199, 25, 821; Barger Bros. v. Alley, 167 N. C. 362, 83 S. E. 612.

III. POLLING JURY.

Not Indispensable but May be Asked for.—It is not essential to the validity of the proceedings that the jury be polled, this being merely a privilege which may be asked for by either party. State v. Toole, 106 N. C. 736, 11 S. E. 168; Smith v. Paul, 133 N. C. 66, 67, 45 S. E. 348.

The right of a party to have the jury polled after the rendition of its verdict exists in civil as well as criminal cases. Smith v. Paul, 133 N. C. 66, 45 S. E. 348; State v. Toole, 106 N. C. 736, 11 S. E. 168; State v. Young, 77 N. C. 498.

Dissent or Disagreement of Jurors.—On a poll of the jury, the dissent of one juror renders the verdict invalid. Owens v. Southern R. Co., 123 N. C. 183, 31 S. E. 383; but mere **reluctance** on the part of one juror will not be fatal to the verdict, Lowe v. Morgan, 125 N. C. 301, 34 S. E. 442.

§ 586. Special controls general. — Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly. (Rev., s. 552; Code, s. 410; C. C. P., s. 234.)

See note of Porter v. Western, etc., R. Co., 97 N. C. 66, 2 S. E. 581, under sec. 585, analysis line "General Considerations." 1.

Editor's Note.—It is well settled by the reported cases in other states, construing provisions of their codes similar to this section, that a general verdict should stand unless the special findings are necessarily repugnant to it. To be inconsistent with the general verdict it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and to justify to the court in setting aside the general verdict on the ground that it is inconsistent with such findings the conflict must be clear and irreconcilable. See 69 Ohio State Reports 101. In other words the special verdict must admit of no rational conclusion which is consistent with the general verdict.

§ 587. Character of, for different actions.—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding the property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes. (Rev., s. 551; Code, s. 409; C. C. P., s. 233.)

When Character of the Verdict Discretionary with Jury.—The section contains two specific cases in which the jury may, in their discretion, render either a general or special verdict, they being for the recovery of, (1) money only or (2) specific real property. In **every other** case the court may insist upon a special verdict upon any or all the issues. See Porter v. Western etc., R. Co., 97 N. C. 66, 2 S. E. 581. Ed. Note.

Injuries to Personal Property in Seizure.—In claim and delivery, when for any cause judgment cannot be given for

the recovery of the property in specie, as where **pendente lite** the property was sold under order of the court, judgment should be rendered for the recovery of the value of the property at the time of the tortious taking, with interest thereon, in lieu of damages for deterioration and detention, and for the costs. Hall v. Tillman, 110 N. C. 220, 14 S. E. 745, and cases there cited.

Time of Assessment of Damages.—In an action for claim and delivery of personal property, when the property cannot be redelivered by plaintiff in specie, the value thereof, in case of a judgment for the defendant, should be assessed at the time of the trial and not at the time of its seizure by the sheriff. Holmes v. Godwin, 69 N. C. 467, 468.

Account and Settlement of Trust Fund.—The court has the power under this section, to direct a special finding upon an issue in an action for an account and settlement of a trust fund, and so also, in all other cases except where the suit is for "money only" or "specific real property." Commissioners v. Lash, 89 N. C. 159; Porter v. Western, etc., R. Co., 97 N. C. 66, 2 S. E. 581. See also, Bean v. Western, etc., R., Co., 107 N. C. 731, 742, 12 S. E. 600.

§ 588. Jury to assess damages; counterclaim.—When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly. (Rev., s. 553; Code, s. 411; C. C. P., s. 235.)

Editor's Note.—Great difficulty has been encountered in the decision of the question whether an affirmative judgment can be given in favor of a defendant upon a counterclaim, the amount of which is not within the jurisdiction of the court. This section serves as an additional guide-post for the courts and its chief purpose would seem to be to carry out the provisions of the Code to the effect that the superior court may render such judgment as is necessary to do justice between the parties in administering both law and equity, thus placing the decision of this much disputed question in the same category with those cases falling within the accepted construction of the general provisions of the Code. This being the true interpretation of the section then, as was said in 1 N. C. Law Rev. 229.

"These decisions (falling under and bearing on this section) fix the rule of practice in North Carolina in accordance with the practice declared to exist in other jurisdictions. In a court of limited jurisdiction, the defendant may use his demand as set-off or recoupment to defeat or reduce the plaintiff's demand, but he cannot obtain an affirmative judgment upon his counterclaim, when the amount exceeds the jurisdiction. In a court of **general** jurisdiction, judgment may be rendered for the excess of defendant's claim, although no original action could have been brought thereon in such court." (Parenthesis and black type supplied.)

Allowance of "Interest to Date".—The verdict must be understood in connection with the charge, and when it allows "interest to date," it must be taken to intend it, and in conformity with the instruction, and thus the time for which the computation is to be made is rendered definite and certain. Greenleaf v. Norfolk, etc., R. Co., 91 N. C. 33, 38.

Reduction of Verdict.—The trial judge has no power to reduce a verdict without the consent of the party in whose favor the verdict is rendered, but when the trial judge thinks injustice has been done it is his duty to set aside the verdict, and he may set it aside as to damages either excessive or inadequate. Isley v. Bridge Co., 143 N. C. 51, 55 S. E. 416; Shields v. Whitaker, 82 N. C. 516, 523.

Punitive Damages.—The question of punitive damages is one properly to be submitted to the jury as one within their discretion, under a proper charge of the law applicable, and is not a matter of law for the court. Blow v. Joyner, 156 N. C. 140, 72 S. E. 319.

§ 589. Entry of verdict and judgment.—Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict. (Rev., s. 554; Code, s. 412; C. C. P., s. 236.)

To Whom Returnable.—The verdict should be returned before the presiding judge, Zagier v. Southern Exp. Co., 171 N. C. 692, 89 S. E. 43, but by consent of the counsel, the clerk of the superior court can represent the judge in taking the verdict of the jury. Barger Bros. v. Alley, 167 N. C. 362, 83 N. C. 612.

The discretionary act of the trial judge in rendering judgment upon a verdict of the jury returned during recess of the court without the consent of counsel will not be reviewed on appeal when it appears from the finding of the court that the jury had not discussed the case before delivering it to the clerk, though several had done so thereafter with appellee's attorney; that the verdict was agreed to before the jurors separated, no improper influence had induced it, and the issues were not recorded until after the verdict was returned to the judge. Zagier v. Southern Express Co., 171 N. C. 692, 89 S. E. 43.

An agreement empowering the judge to sign judgment "out of terms" gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. Knowles v. Savage, 140 N. C. 372, 374, 52 S. E. 930.

Verdict Must Be Accepted.—Before a verdict returned into open court by a jury is complete, it must be accepted by the court for record, and it is the duty of the judge to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records. State v. Godwin, 138 N. C. 582, 50 S. E. 277

Informal and Irregular Verdict.—When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a verdict in proper form; but it is incumbent upon the judge not even to suggest the alteration of a verdict in substance. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

§ 590. Exceptions.—1. If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge's minutes and filed with the clerk as a part of the case upon appeal.

Exceptions as Condition for Appeal.—See section 643 and the notes thereto—analysis line, "Requisites of Case on Appeal, III.

Time for Exception.—It is a general rule, applicable alike to criminal and civil causes, that exceptions must be taken in apt time on the trial, State v. Ballard, 79 N. C. 627, and unless so taken it will be deemed to have been waived. Byrd v. Hudson, 113 N. C. 203, 213 18 S. E. 209.

It is too late after the trial to make exceptions to the evidence, remarks of the judge, or other matters occurring during the trial, except as to the charge. Alley v. Howell, 141 N. C. 113, 114, 53 S. E. 821.

Where, however, evidence is made incompetent by statute, exception thereto may be made after verdict. Broom v. Broom, 130 N. C. 562, 41 S. E. 673.

Taking and Noting.—Under this section, the trial judge is not required to take down the exceptions himself, but may require the attorneys for the excepting party to prepare them in writing. Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 225.

Exception Should be Specific.—Exceptions taken upon the trial should be as specific as possible and should point out the nature of the error complained of. Williams v. Johnston, 94 N. C. 633; State v. English, 164 N. C. 497, 498, 80 S. E. 72, and cases cited.

Indefinite Exception.—An indefinite exception will be overruled. Streator v. Streator, 145 N. C. 337, 9 S. E. 112; Hendricks v. Ireland, 162 N. C. 523, 77 S. E. 1011.

A "broadside" exception cannot be entertained on appeal. Jackson v. Williams, 152 N. C. 203, 67 S. E. 755; Kelly v. Johnson, 135 N. C. 650, 47 S. E. 672.

Motion for Judgment.—If an answer or reply is insufficient, the opposite party may move for judgment, and if the motion is refused he can have his exception noted. If he fails to

do this, the objection is usually waived. Walker v. Scott, 106 N. C. 56, 57, 11 S. E. 364.

2. If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections. (Rev., s. 554; Code, s. 412; C. C. P., s. 236.)

As to instructions generally, see sec. 564-566 and notes thereto.

Editor's Note.—The courts have given to this provision a rather limited interpretation. The phrase "the refusal to grant at prayer for instructions" has been construed as not to have for its purpose the elimination of the necessity for formal objections. The phrase "in his instructions generally" has been construed to mean to embrace erroneous statements of the law, that is, for inherent and apparent error, and not to allow the broad wording of this enactment to be used by counsel as a method for obtaining a reviewal of every instruction given by the trial judge.

Where Exceptions Taken Orally.—Where the Judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for by the excepting counsel. Lee v. Williams, 112 N. C. 510, 511, 17 S. E. 165.

Errors in Charge.—An exception taken for the first time in the appellant's assignment of error will not be considered on appeal, except under this section as to the charge of the court, etc., when it is required that the record show that the exception had been duly and properly taken. Brown v. Brown, 182 N. C. 42, 108 S. E. 380.

Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in proper time; and when exceptions are taken they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal to the Supreme Court. Consolidated Statutes, secs. 643, 641, 640, and this section. Paul v. Burton, 180 N. C. 45, 104 S. E. 37.

Exceptions to the Judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of section 643, and this section. And an exception to a previous intimation of the judge made upon the trial to the effect objected to, is not required. Cherry v. Atlantic Coast Line R. Co., 186 N. C. 263, 119 S. E. 361.

Failure to Give Charge Requested.—An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. Fry v. Currie, 91 N. C. 436. See sec. 566.

Effect of Failure to Object or Except.—Instructions, the giving or refusal of which was not excepted to on the trial, and where the attention of the court was not called to anything objectionable therein, will not be considered on appeal. White v. Clark, 82 N. C. 6.

An assignment of error cannot be considered if it appears from the record that neither objection nor exception, as provided by this section was made at the trial. Stadiem v. Harvell, 208 N. C. 103, 106, 179 S. E. 448.

Cited in Metropolitan Life Insurance Co. v. Boddie, 196 N. C. 666, 667, 146 S. E. 598.

§ 591. Motion to set aside.—The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When the motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had. (Rev., s. 554; Code, s. 412; C. C. P., s. 236.)

For full treatment of grounds for new trial, see New Trial, 9 N. C. Enc. Dig. 704.

Sufficiency, Scope, and Time for Taking Exceptions.—See note to sec. 590.

Discretion of the Judge.—A motion to set aside a verdict as not in conformity with the evidence is addressed to the discretion of the trial judge, when the evidence is conflicting, and will not be considered on appeal. Hoke v. Tilley, 174 N. C. 658, 94 S. E. 446.

The discretion given by this section to the trial judge to set aside a verdict, is not an arbitrary one to be capriciously exercised, but reasonably with the view to an equitable result in the correct administration of justice, and will not be reviewed on appeal except in cases of abuse thereof. Baily v. Dibbrell Mineral Co., 183 N. C. 525, 112 S. E. 29. See also Strayhorn v. Fidelity Bank, 203 N. C. 383, 166 S. E. 312; Goodman v. Goodman, 201 N. C. 808, 161 S. E. 686; Harrison v. Metropolitan Life Ins. Co., 207 N. C. 487, 177 S. E. 423.

The trial judge has the discretionary power during the term to set aside a verdict as being against the weight and credibility of the evidence, and his action in so doing is not ordinarily reviewable, but an order setting aside the verdict on such grounds at a succeeding term of court upon a continuance of the defendant's motion therefor will be reversed on appeal where the record shows that the plaintiff did not consent to the continuance and did not waive his right to accept thereto. Manufacturers' Finance Accept. Corp. v. Jones, 203 N. C. 523, 166 S. E. 504.

The power of a trial court to set aside a verdict and to order a new trial, in its discretion, is inherent, and is necessary to the proper administration of justice, which is after all the function of a court, and is recognized by this section; its exercise at any time during the term at which the action was tried has been uniformly approved by this court. Brantley v. Collie, 205 N. C. 229, 231, 171 S. E. 88.

Same—Reduction of Verdict.—The discretionary power of the trial judge to set aside the verdict of the jury for "excessive" or "inadequate" damages, does not extend to his authority to reduce the verdict and render judgment accordingly, unless assented to by the party against whose interest it has been done, and without this consent the Supreme Court, on appeal, will direct that the amount of the judgment be entered according to the verdict. Hyatt v. McCoy, 194 N. C. 760, 140 S. E. 807.

Where Jury Commits Palpable Error.—When it appears from the evidence, the charge of the court, and the verdict, that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice. Hussey v. Atlantic Coast Line R. Co., 183 N. C. 7, 110 S. E. 599.

Court Not Empowered to Change Verdict.—The trial judge has the authority to set aside the verdict of the jury as to matters in his sound discretion or as a matter of law, leaving the cause at issue, but he may not change the verdict and thereupon dismiss the action as a matter of law, the exercise of such power being allowed only for want of jurisdiction or upon the ground that no cause of action has been sufficiently alleged in the complaint. Rankin v. Oates, 183 N. C. 517, 112 S. E. 32.

The court under this section has the power to set aside the verdict, but none to reverse the answers of the jury. Bundy v. Sutton, 207 N. C. 422, 427, 177 S. E. 420.

Agreement Made by Attorney for Client.—Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff's attorney agreed without the consent of his client and against her instructions, and the judgment so agreed upon has been accordingly entered, the plaintiff may not thereafter repudiate the agreement made in her behalf by her attorney, and also repudiate the result thereby attained, and she is estopped from resisting the entry of judgment setting aside the verdict nunc pro tunc. Bizzell v. Auto Tire, etc., Co., 182 N. C. 98, 108 S. E. 439.

Where Matter Determined Out of Term. — Where the losing party moves to set aside a verdict after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the motion, but the parties agree that he may determine the matter out of the term, in view of attempting to compromise the disputed matter; and not hearing from the parties the judge renews his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses the suggestion of the judge as a basis of a just settlement, his then setting the verdict aside within his reasonable discretion deals with the record as it originally stood, and is not abuse of the discretion given him by this section. Bailey v. Dibbrell Mineral Co., 183 N. C. 525, 112 S. E. 29.

SUBCHAPTER VIII. JUDGMENT

Art. 23. Judgment

§ 592. Defined.—A judgment is either interlocu-

tory or the final determination of the rights of the parties in the action. (Rev., s. 555; Code, s. 384; C. C. P., s. 216.)

Cross References. — For full treatment of the subject-matter in this article, see Judgments, 8 N. C. Enc. Dig. 20; 14 N. C. Enc. Dig. 536.

Definition of Final Judgment. — A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. Sanders v. May, 173 N. C. 47, 91 S. E. 526; Flemming v. Roberts, 84 N. C. 532.

Definition of Interlocutory Order. — An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree. Johnson v. Robertson, 171 N. C. 194, 88 S. E. 231. It remains in the control of and in the breast of the court, and upon good cause shown they may be amended, modified, charged or rescinded, as the court may think proper. Maxwell v. Blair, 95 N. C. 317, 318.

Jurisdiction. — It is a well established principle that in order that a judgment or decree may be valid and binding, the court rendering the same must have jurisdiction both of the person and of the subject matter. Wetmore v. Karrick, 205 U. S. 141, 51 L. Ed. 745.

Nature of Judgment. — In its ordinary acceptation, a judgment is the conclusion of the law or facts admitted or in some way established. Sedbury v. Southern Exp. Co., 164 N. C. 363, 79 S. E. 286.

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose of perpetuating them. They are the foundation of legal repose. Williams v. Woodhouse, 14 N. C. 257.

A judgment or decree has been defined as an act or conclusion of the mind, founded upon a view of all the facts and circumstances surrounding the subject as to which that conclusion is formed. Steamer Oregon v. Rocca, 18 How. 570, 15 L. Ed. 515.

It is the result of the courts exercise of its jurisdiction, or right to hear and determine. Daniels v. Tearney, 102 U. S. 415, 26, L. Ed. 187.

Sanction of Court.—Every judgment should and must have the sanction of the court, except in case of consent judgments, and those must be entered with its knowledge and permission. Branch v. Walker, 92 N. C. 87.

Relief Granted. — Since the gist of the accepted definition of a judgment is "the final determination of the rights of the parties to an action," courts are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. Hutchinson v. Smith, 68 N. C. 354, 355; Lee v. Pearce, 68 N. C. 77, 80; McCown v. Sims, 69 N. C. 159, 161.

A judgment may grant to the defendant any affirmative relief to which he may be entitled. Hutchinson v. Smith, 68 N. C. 354, 355.

Judgment as a Contract. — While judgments are sometimes spoken of as contracts, they are not in reality contracts, and are never so considered in reference to the clause in the federal constitution which forbids that contracts should be impaired by state legislation. Mottu v. Davis, 151 N. C. 237, 65 S. E. 969.

However, judgments are considered as contracts to distinguish a cause of action thereon from one ex delicto. Moore v. Nowell, 94 N. C. 265.

A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, the promise to pay is implied where such legal obligation exists. Louisiana v. New Orleans, 190 U. S. 285, 27 L. Ed. 936.

It is upon this principle that an action in form ex contractu will lie on a judgment of a court of record. Chitty on Contracts 87. Garrison v. New York, 21 Wall. 196, 22 L. Ed. 612. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Louisiana v. New Orleans, 109 U. S. 285, 27 L. Ed. 936.

Operation of Judgment In Rem as Passing Title. — A condemnation in a proceeding in rem does not necessarily exclude all claim to other interests than those which were seized. Day v. Micou, 18 Wall, 156, 21 L. Ed. 860. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire property to the thing condemned and sold. Day v. Micou, 18 Wall, 156, 21 L. Ed. 393.

But such is not the case in many proceedings which are in rem. Decrees of courts of probate or orphan's courts directing sales for the payment of a decedent's debt or for distribution are proceedings in rem. So are sales under attachments or proceedings to foreclose a mortgage in rem. In none of these is anything more sold than the estate of the decedent, or of the debtor, or of the mortgagor in the thing sold. The interests of others are not cut off or affected. Day v. Micou, 18 Wall, 156, 21 L. Ed. 860.

Extrinsic Evidence. — Extrinsic evidence to aid in the interpretation of a judgment or decree is inadmissible, unless, after reference to the pleadings and proceedings, there remains some ambiguity or uncertainty in it. Burthe v. Denis, 133 U. S. 514, 33 L. Ed. 768.

Cited in Never Fail Land Co. v. Cole, 197 N. C. 452, 456, 149 S. E. 585.

§ 593. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.—The clerks of the superior courts are authorized to enter the following judgments: (a) All judgments of voluntary nonsuit. (b) All consent judgments (judgments coming within the meaning of (a) and (b) may be entered at any time). (c) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court. (d) All judgments by default final and default and inquiry as are authorized by sections 595, 596, 597, and in this law provided. (e) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power and authority now exercised by the judge of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale thereof or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order. (1919, c. 156; ex. sess. 1921, c. 92, s. 12; 1929, cc. 35, 49.)

Editor's Note. — The primary object of this section is to effect a speedy hearing and determination of uncontested rights involved in the particular class of actions enumerated herein. It was settled even when the section provided for a different return day, that this section was not repugnant to section 476 which purports to apply to "all civil actions in the superior court," and hence the general repealing clause of that section did not serve to repeal the remedy herein provided for in these specially designated cases. The courts, in their endeavor to discover the legislative intent, have construed the two sections together and section 593, although ratified four days prior to the amendment of section 476 in 1919, was considered an exception to that section and the remedy prescribed regarded as an additional and more speedy method of relief in the stated classes of suits. Young v. Davis, 182 N. C. 200, 108 S. E. 630.

Prior to the amendment of this section by the Public Laws of 1921, the section pertained merely to what is now the third class (c); the other classes (a), (b), (d) and (e), were added by the act of 1921. See 1 N. C. Law Rev. 16.

This section was amended twice by the Public Laws 1929. Ch. 35 added the last sentence and provided that the amendment should not affect pending litigation or vested rights. Ch. 49 inserted the words "conditional sales contract" in subsection (e).

Constitutionality. — This section is not an unconstitutional interference with the jurisdiction of the judge of the court, as the clerk is a component part of the superior court, and the exercise of the power of the judge is recognized and preserved by the right of appeal. Thompson v. Dillingham, 183 N. C. 566, 112 S. E. 321.

An Enabling Act. — This statute is an enabling act and does not deprive the superior court in term of its jurisdiction to render judgments, and the jurisdiction of a judge in term to render judgments upon voluntary non-suits, by consent of the parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt within the jurisdiction of the superior court, is not affected by the provisions of this section. The authority of the clerk is concurrent with and additional to that of the judge in term. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329; Hill v. Huffines Hotel Co., 188 N. C. 586, 125 S. E. 266; Young v. Davis, 182 N. C. 200, 108 S. E. 630, 1 N. C. Law Rev. 16, 282.

The clerk of the Superior Court has jurisdiction under this section to sign a consent judgment in an action even while the action is pending before a referee. Weaver v. Hampton, 204 N. C. 42, 167 S. E. 484.

A consent judgment may be entered at any time by the clerk of the superior court in which the action is pending by this section, and it is not required that such judgment be entered on a Monday as is the case with other judgments which the clerk is authorized to enter under § 597(b). Hood v. Wilson, 208 N. C. 120, 179 S. E. 425.

Judgment by Default When Plaintiff Fails to Answer. — Where the parties are properly before the court and the subject-matter of the action is also jurisdictional in the superior court, the clerk, having authority under the provisions of this section, may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief. Finger v. Smith, 191 N. C. 818, 133 S. E. 186.

Effect of Judgments Entered by Clerk. — Judgments entered by the clerk as authorized by this section, are judgments of the superior court, and are of the same force and effect, in all respects, as if entered in term and before a judge of the superior court. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329.

Appeals from Clerk to Judge. — There is no provision in the statute regulating an appeal from a judgment entered by the clerk under the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from such judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute, for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the Supreme Court. Caldwell v. Caldwell, 189 N. C. 805, 128 S E. 329, 332.

Statutory Lien, see notes to sec. 595,—analysis line "Definite Debt."

Stated in Buncombe County v. Penland, 206 N. C. 299, 302, 173 S. E. 609.

Cited in Ward v. Agrillo, 194 N. C. 321, 323, 139 S. E. 451; Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248; Baker v. Corey, 195 N. C. 299, 141 S. E. 892.

§ 593(a). Return of execution; order for disbursement of proceeds.—In all executions issued by the clerk of the Superior Court upon judgment before the clerk of the Superior Court, under section five hundred and ninety-three, and execution issued thereon, the sheriff shall make his return to the clerk of the Court, who shall make final order directing the sheriff to disburse the proceeds received by him under said execution: Provided, that any interested party may appeal to the Superior Court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§ 594. When clerk transfers to term for default judgment.—In cases where the clerk has no jurisdiction and the plaintiff shall be entitled to have judgment by default and inquiry or judgment by default final, the clerk shall transfer the same to the court at term time to be determined by the court under existing procedure. (1919, c. 304, s. 9.)

Judgment Made Final after Transfer by Clerk. — Where the clerk has failed to enter a judgment by default and inquiry by default of an answer when the statute so provides, but transfers the cause to the civil issue docket, it is not error for the trial judge, after the lapse of several terms, and the answer having long since been due, to proceed with the inquiry before the jury on the issue of damages, and when accordingly the jury has assessed the damages, his action in refusing to sign judgment thereon on the defendant's motion as a matter of law, as not being in accordance with the due course and practice of the courts, is reversible error. Hill v. Huffines Hotel Co., 188 N. C. 586, 125 S. E. 266.

§ 595. By default final.—Judgment by default final may be had on failure of defendant to answer—

1. Where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered as provided in the last section for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

2. Where the defendant, by his answer in such action, does not deny the plaintiff's claim, but sets up a counterclaim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of his claim over the counterclaim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting the counterclaim, which statement must be annexed to and be a part of the judgment roll. Or the court may in its discretion, order the pleadings to be so amended and the action severed as to entitle the plaintiff to judgment upon all of the claims admitted over and above the setoff or counterclaim pleaded by the defendant; and, upon application of the plaintiffs, shall enter judgment for the plaintiff for so much of the claim as is admitted. The action shall thereupon be continued as to subsequent proceedings, as if it had been brought for the remainder of the claim, and the counterclaim or setoff as pleaded by the defendant shall apply thereto. Said remainder of the claim shall in any event be sufficient to cover the full amount of the principal and interest set up by the defendant in the counterclaim or setoff, and an amount in excess thereof, if in the discretion of the court the same is necessary, the court being empowered to designate and determine what part of the plaintiff's claim shall be held for the subsequent proceedings herein referred to.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of

the demand mentioned in the complaint, and if the defendant is not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in the case the defendant or his representatives apply and are admitted to defend the action, and succeed in such defense.

4. In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

5. In actions for the recovery of personal property, or for the possession thereof, or to have the plaintiff or plaintiffs adjudged the owner or owners thereof, if the complaint be verified. (Rev., s. 556; Code, ss. 385, 390; C. C. P., s. 217; 1870-1, c. 42; 1867-70, c. 193, s. 4; 1919, c. 26; 1929, c. 66.)

I. In General.
  A. Failure to File Answer.
  B. The Complaint.
II. Nature and Essentials.
  A. Definite Debt.
  B. Service of Summons.
III. Affirmative Relief by Defendant, (Counterclaim).
IV. Real Property.
V. Personal Property.
VI. Setting Aside.

Cross Reference.

See judgment by default 8 N. C. Enc. Dig. 43, 14 N. C. Enc. Dig. 539.

I. IN GENERAL.

A. Failure to File Answer.

Against State. — It has been held in several instances by the U. S. Supreme Court that judgment by default for want of appearance may be entered against a state. United States v. Girault, 11 How. 22, 13 L. E. 587.

Time to Answer. — As to time for answering, see sec. 467 and the notes thereto. As to time of filing complaint and extension thereof, see 505 and notes thereto.

In a suit to set aside certain deeds alleged to be void and to declare the plaintiff the owner of the title to lands, a judgment by default is regularly entered when the defendant has failed to file an answer within the statutory time, and the summons has been duly served. Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184.

Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, the court may, where the defendant makes no appearance or defense, enter judgment by default final as to the first charge but not as to the second. Stewart v. Bryan, 121 N. C. 46, 28 S. E. 18.

Where Answer Insufficient. — When matters are alleged in the complaint to be in the personal knowledge of the defendant, an averment in the answer thereto that he "has no knowledge or information sufficient to form a belief as to the truthfulness thereof and, therefore, denies the same," is insufficient, and judgment can be rendered for want of an answer if such allegation goes to the cause of action. Streator v. Streator, 145 N. C. 337, 59 S. E. 112.

Effect of Failure Promptly to Take Judgment by Default.—A failure to take a judgment by default as soon as the same is allowable does not work a discontinuance. Governor v. Lassiter, 83 N. C. 38.

B. The Complaint.

Should Conform to the Complaint. — Judgment by default should be so drawn as to be in strict conformity with the complaint filed. Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980.

Complaint Should Be Definite. — A pleader desiring a judgment by default must set forth clearly the facts upon the admission of which, by failure to answer, he bases his right to relief, that the court may, upon the interpretation of his complaint, adjudge his rights to correspond with such facts, for otherwise the judgment would be irregular. Currie v. Mining and Milling Co., 157 N. C. 209, 72 S. E. 980.

Court Must Construe Complaint. — Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, under this section, and also heard on appeal in the superior court, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment, will be set aside. Beard v. Sovereign Lodge, 184 N. C. 154, 113 S. E. 661.

New Parties. — Where a complaint was filed against the defendant, and in the progress of the action another party defendant is brought in, the complaint must be amended or another complaint filed as to him, unless he waive his right to the same by answering the original complaint. Vass v. Building, etc., Ass'n., 91 N. C. 55. If no complaint is filed as to such new parties the judgment is irregular and may be set aside. Id.

Verification of Complaint Essential. — A complaint which is not verified as required by statute is insufficient and must be regarded as unverified, upon which a final judgment by default can not be rendered, for it is only proper to render a final judgment when the complaint is verified. Witt v. Long, 93 N. C. 388.

Same — Substantial Compliance Sufficient. — While it is essential that the complaint be verified it is not necessary that it be subscribed by the party making it, and a substantial compliance is sufficient, and meets the requirements when it appears that the plaintiff swore to the complaint before an officer authorized to administer oaths. Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980; Miller v. Curl, 162 N. C. 1, 77 S. E. 952.

Same—Where Complaint Improperly Verified. — Where a properly verified complaint would entitle a plaintiff to a judgment final, for want of an answer, if the complaint is not properly verified, the judgment should be by default and inquiry. Cole v. Boyd, 125 N. C. 496, 34 S. E. 557.

Breach of Contract.—In order to authorize a judgment by default final in an action based on the contract the complaint must set forth not only the agreement of the parties, but the alleged breach, so that the court may determine whether the action as stated can be maintained. Baker v. Corey, 195 N. C. 299, 141 S. E. 892.

II. NATURE AND ESSENTIALS.

A. Definite Debt.

Editor's Note. — This section, authorizing the clerk to enter judgment in all cases where the defendant fails to answer, carries out the general intent of the statute, namely, to effect a speedy settlement of the controversies in litigation. To warrant the granting of a judgment by default final the debt must be **definite;** when it is for an unascertained amount, the judgment is by default and inquiry, the case going up to the term for the inquiry. See 1 N. C. Law Rev. 17.

Express Promise to Pay.—When personal service on the defendant has been properly made, a judgment by default for want of an answer may be obtained, if the complaint alleges an express promise to pay a sum due. Currie v. Mining and Milling Co., 157 N. C. 209, 72 S. E. 980.

Implied Promise to Pay. — Where the allegation is of a sum certain expended for the benefit of the defendant and therefore upon an implied promise to repay, and the complaint is verified and no answer filed, the judgment is properly by default final. Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476.

Same — Goods Sold and Delivered. — Where the action is on an implied contract to pay for goods sold and delivered the judgment rendered should be by default and inquiry and not by default final. Jeffries v. Aaron, 120 N. C. 167, 26 S. E. 696.

On Note. — A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects. Morehead Banking Co. v. Duke, 121 N. C. 110, 28 S. E. 191.

Failure to Allege Promise to Pay. — Where the complaint only alleges the value of the goods sold without also alleging a promise to pay, upon a failure to answer, the judgment should be by default and inquiry. Hartman v. Farrier, 95 N. C. 177, 178.

Damages Must Be Certain. — When the amount of the debt is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. Adrian v. Jackson, 75 N. C. 536, 539.

Same—Breach of an Official Bond.—In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be final since the section is not for the breach of an express or implied contract to pay a definite sum of money. Battle v. Baird, 118 N. C. 854, 24 S. E. 668.

Same—Bail Bond. — A judgment by default final for want of an answer in a suit upon a bail bond cannot be sustained. It should be by default and inquiry. Roulhac v. Miller, 90 N. C. 175.

Sum Certain or Computable.—A judgment by default final is irregularly entered upon a pleading that does not allege a sum certain or computable, due upon contract, express or implied. Byerly v. Acceptance Corporation, 196 N. C. 256, 145 S. E. 236.

Express Promise to Pay.—If the verified complaint alleges a breach of an express promise to pay absolutely a definite sum of money particularly specified for valuable consideration, judgment by default final is proper. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Goods Sold and Delivered.—A judgment by default final is irregular when rendered for the want of an answer filed in an action upon contract for goods sold and delivered when the alleged cause, as appearing from the complaint, is not upon an expressed contract, but for the reasonable value of the goods, in which event a judgment by default and inquiry is the proper one, unless it is made to appear that the defendant has by his acts or conduct or in some recognized legal way admitted owing the amount in suit. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Services Rendered Decedent.—In order for the plaintiff to be entitled to a judgment by default final upon the complaint for the want of an answer in his action to recover from the estate of the deceased for services rendered before her death, in taking care of and providing a support for her, at her request and promise to pay for them, there must have been a definite price fixed upon and understood and agreed to by both of the parties; and where the complaint alleges merely an estimate by the parties of a reasonable price to be paid for such services it supports a judgment by default and inquiry only. Baker v. Corey, 195 N. C. 299, 141 S. E. 892.

Where Complaint States More than One Cause of Action.—Where a complaint states two or more causes of action arising from the same default, and any one is sufficient to uphold a judgment by default final for the want of an answer, which has been entered in the due course of practice of the courts, such judgment will be upheld. Bostwick & Bros. v. Laurinburg R. Co., 179 N. C. 485, 102 S. E. 882.

Same—Separate Notes Sued on in Same Complaint. — Where two notes are set out in the complaint, each being used as a separate cause of action, and no defense is interposed as to one, it is error to refuse judgment as to this one, and from such refusal, since it is a denial of a substantial right, an appeal may be taken. Curran v. Kerchner, 117 N. C. 264, 265, 23 S. E. 177.

Where Complaint Sets up Matter Constituting Statutory Lien. — Where the complaint declares upon a contract and alleges damages for its breach in a sum certain, and sets up matters that would constitute a statutory lien upon the subject-matter of the contract, the clerk of the court, under the provisions of our statute, has authority to render judgment by default for the want of an answer in the specific amount demanded, and to declare and enforce the lien, (section 595, 593) and issue an execution thereunder, and order a distribution of the funds so received, Crye v. Stoltz, 193 N. C. 802, 138 S. E. 167.

B. Service of Summons.

As to summons generally, see secs. 475 et seq.

Necessity for Service of Summons. — As in the case of judgments and decrees generally it is essential to the rendition of a valid decree pro confesso, for failure to appear, that the court shall have acquired jurisdiction of the defendant by due service of sufficient process. Thomson v. Wooster, 114 U. S. 104, 29 L. Ed. 105.

Judgments by default form no exception to the general rule that in order to render a valid judgment or decree a court must have jurisdiction of the person as well as of the subject matter, and it is essential that jurisdiction of the person shall have been obtained by the due service of process. Wetmore v. Herrick, 205 U. S. 141, 51 L. Ed. 745.

When Personal Service Required. — Where a personal judgment is sought against a defendant it is essential that personal service of summons be made on him. Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980.

Charged with Notice. — Notice to the adverse party of a motion in term for a judgment by default for the want of an answer is not necessary, for in legal contemplation the defendant is in court by service of a summons and is charged with notice of whatever action the court takes during the pendency of the suit. Reynolds v. Greensboro Boiler, etc., Co., 153 N. C. 342, 69 S. E. 248; Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184.

Judgment Void Where No Process Had. — Where there is no service of process the court has no jurisdiction and its judgment is void. Bank v. Wilson, 80 N. C. 200; Stancill v. Gay, 92 N. C. 455, 462.

III. AFFIRMATIVE RELIEF BY DEFENDANT.

For full treatment of this subject, see Set-Off and Counterclaim, 11 N. C. Enc. Dig. 179; see also Judgments, 8 N. C. Enc. Dig. 200.

Judgment by Default Not Allowed Where Court Permits Formal Denial. — The defendant is not entitled to judgment by default on his counterclaim where the court in the exercise of its discretion allows a formal denial to be entered. Tillinghast Co. v. Cotton Mills, 143 N. C. 268, 55 S. E. 621; Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651.

IV. REAL PROPERTY.

Recovery of the Property Sought. — Where in an action to recover land, the defendant fails to file, or is not excused from filing the required bond, a judgment by default may be entered; and this is true even if there has been a failure to file an answer arising from excusable neglect. Vick v. Baker, 122 N. C. 98, 100, 29 S. E. 64.

Possession of the Property. — In an action to recover possession of land, where the defendant fails to file an answer or the required bond, and does not ask leave to answer without giving bond until the time for answering has expired, it is proper to enter judgment by default. Jones v. Best, 121 N. C. 154, 28 S. E. 187.

Where a tenant is joined with his landlord as co-defendant, and the tenant fails to give the required undertaking, judgment may be entered against him. Harkey v. Houston, 65 N. C. 137.

Nature and sufficiency of undertaking, see section 495.

Time of Filing. — The trial judge, in his discretion, may permit a defendant at the trial to file the required bond. Carraway v. Stancill, 137 N. C. 472, 49 S. E. 957.

Notice. — Upon the failure of the defendant to file the necessary bond, it is error to strike out his answer and enter judgment by default without due notice and an opportunity to show cause. Cooper v. Warlick, 109 N. C. 672, 14 S. E. 106. See also, McMillan v. Baker, 92 N. C. 111.

Waiver of Bond. — The bond required of the defendant is for the benefit of the plaintiff and he can waive it, and will be deemed to have done so, if he allows a number of terms of court to pass without demanding it. If not waived entirely, it is waived until demanded. McMillan v. Baker, 92 N. C. 111.

Failure to "Justify" Bond. — A failure to file a "justified" bond, as is required, does not necessarily avoid the bond, but it is a defect which may be cured by waiver. Becton v. Dunn, 137 N. C. 559, 560, 50 S. E. 289.

V. PERSONAL PROPERTY.

Editor's Note.—The Act of 1929 added subsection 5.

VI. SETTING ASIDE.

Meritorious Defense.—A judgment by default final for want of an answer, when it is made to appear on appeal that one by default and inquiry should have been entered, is an irregular judgment, but on defendant's motion to set aside, he must show a meritorius defense. Baker v. Corey, 195 N. C. 299, 141 S. E. 892; Standard Supply Co. v. Vance Plumbing, etc., Co. 195 N. C. 629, 143 S. E. 248.

Remand for Determination of Question.—Where on appeal from the setting aside an irregular judgment of default final it does not appear that the question of a meritorious defense was considered or passed upon, and that the movant intended to allege one, the case will be remanded for the determination of this question as to whether the defendant has such meritorious defense as calls for the vacating of the judgment. Baker v. Corey, 195 N. C. 299, 141 S. E. 892.

§ 596. By default and inquiry.—In all other actions, except those mentioned in the preceding section, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had as provided in the last section but one, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law. (Rev., s. 557; Code, s. 386.)

See note under § 595.

Editor's Note. — This section is somewhat in the nature of a "residuary clause," the provisions of which are applicable to all those classes of cases not falling within the provisions of section 595. The same purpose found in the preceding section is likewise embodied in this section, although the procedure herein provided is more time-consuming since it is necessary in these cases to determine, by way of inquiry, the respective rights of the parties and, more particularly the precise amount of recovery the one is entitled to receive.

Nature in General. — "A judgment by default is one thing; a judgment by default and inquiry consists of two things. There are two kinds of judgments by default—one final, the other interlocutory. In actions **sounding in damages** the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of **the** cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed." (Black type by the Court.) Junge v. MacKnight, 137 N. C. 285, 288, 49 S. E. 474. See also Bowie v. Tucker, 206 N. C. 56, 173 S. E. 28, also referring to sections 593-5.

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of the amount of damages open to the inquiry. Farmer-Cole Plumbing Co. v. Wilson Hotel Co., 168 N. C. 577, 84 S. E. 1008; Armstrong v. Ashbury, 170 N. C. 160, 86 S. E. 1038; but the burden of proving any damages beyond such as are nominal still rests upon the plaintiff. Hill v. Hotel Co., 188 N. C. 586, 125 S. E. 266.

A judgment by default and inquiry is conclusive that the plaintiff has a cause of action and entitles him to nominal damages without further proof. Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

A judgment by default final as authorized by § 595, is different in effect and result from a judgment by default and inquiry as authorized by this section. The former establishes the allegations of the complaint and concludes by way of estoppel, while the latter "establishes a right of action in the plaintiff of the kind stated in the complaint" the precise character and extent of which remain to be determined by a hearing in damages and final judgment thereon. DeHoff v. Black, 206 N. C. 687, 689, 175 S. E. 179.

Where Action Sounds in Damages. — In an action sounding in damages, for an unliquidated money demand, the judgment should be by default and inquiry. Moore v. Mitchell, 61 N. C. 304.

In actions sounding in damages, as in assumpsit, covenant and trespass, a judgment by default is only interlocutory, and the amount of damages must be ascertained by a jury. But in actions not sounding in damage it is held, that if the plaintiff's claim for damages is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only where the claim is uncertain. Adrian v. Jackson, 75 N. C. 536, 539, cited in note in 20 L. R. A., N. S., 23.

Where a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action and that he is entitled at least to nominal damages. And in this State it is further held that such a judgment concludes on all issuable facts properly pleaded and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages. DeHoff v. Black, 206 N. C. 687, 689, 175 S. E. 179.

Action on Official Bond. — See note of Battle v. Baird, 118 N. C. 854, 24 S. E. 668. Section 595,—Analysis Line, "Definite Debt." Also 8 N. C. Enc. Dig. 53.

Action on Contract for Goods Sold and Delivered. — See note of Jeffries v. Aaron, 120 N. C. 167, 26 S. E. 496, Section 595—Analysis Line, "Definite Debt." Also 8 N. C. Enc. Dig 55.

Where Amount Cannot Be Ascertained by Computation. —Where it appears that the amount of the final judgment on default of answer could not be ascertained by computation or be fixed by the terms of the contract sued on, it is proper to enter judgment by default and inquiry. Skinner v. Terry, 107 N. C. 103, 12 S. E. 118.

Time of the Inquiry. — An inquiry as to damages cannot be executed at the same term or that at which judgment by default is rendered, unless it is expressly allowed by statute. Brown v. Rinehart, 112 N. C. 772, 774, 16 S. E. 840.

Where it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made as this section provides. And this is true although the defendant was in the courtroom and did not except to the inquiry or to the submission of the issues there in the capacity of a witness for plaintiff. As to whether a party may waive this provision of the statute, quaere? Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

Cited in Ward & Ward v. Agrillo, 196 N. C. 95, 96, 144 S. E. 697.

§ 597. By default for defendant.—If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case requires it, an order for an inquiry of damages by a jury may be made. (Rev., s. 558; Code, s. 249; C. C. P., s. 106).

Editor's Note. — In the dissenting opinion by Walker, J., in Wilmington v. Bryan, 141 N. C. 666, 682, 54 S. E. 543, it is intimated that in view of the fact that the section does not expressly make provision for the defendant taking judgment for the excess of his counterclaim, as is the case of the plaintiff whose claim exceeds the defendant's counterclaim, it is contemplated that there be rendered a separate judgment for the respective claims of the parties. But there was an inclination to construe the section so as to conform with the general spirit of the code that all controversies should be settled in one action and as far as possible by one judgment.

Section Applicable Only Where Affirmative Relief Sought. —It is only when a counterclaim is relied on as grounds for substantial relief that the plaintiff's failure to reply may afford grounds for a judgment for want of a replication, but not when the matter constitutes a defense to the action merely. Barnhardt v. Smith, 86 N. C. 473, 483.

Where Defendant's Counterclaim Unanswered. — Where the defendant seeks substantial relief in his answer, by way of counterclaim, and the plaintiff fails to reply (or demur) thereto in apt time, the defendant is entitled to judgment for such relief as the facts therein set forth may warrant. Dempsey v. Rhodes, 93 N. C. 120, 127, and the defendant is entitled to judgment even though the objection to his counterclaim would have been refused if it had been made in apt time and form. Rountree v. Britt, 94 N. C. 104.

Where in an action in which defendants set up a counterclaim, the plaintiff failing to reply thereto, and the defendants failed to except to a refusal of their motion for judgment by default, it was held, that the defendants had waived the right to judgment on their counterclaim for want of a reply. Faucette v. Ludden, 117 N. C. 170, 171, 23 S. E. 173.

Recovery by Administrator Prior to That on Defendant's Counterclaim. — Where an administrator recovers judgment upon his cause of action, and the defendant also upon his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant's judgment will be stayed until it is ascertained what amount of the assets of the estate of the intestate is applicable thereto. Rountree v. Britt, 94 N. C. 104.

Cited in Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248; Baker v. Corey, 195 N. C. 299, 141 S. E. 892; Bowie v. Tucker, 206 N. C. 56, 58, 173 S. E. 28.

§ 597(a). Judgment by default where no answer filed; record; force; docket.—If no answer is filed, the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by

sections 595, 596, and 597, and all present or future amendments of the said sections; and all judgments by default final shall be duly recorded by the clerk and be docketed and indexed in the same manner as judgments rendered in term, and in all respects be and become judgments of the superior court and be of the same force and effect as if rendered in term and before a judge of the superior court; and in all cases of judgment by default and inquiry rendered by the clerk, the clerk shall docket the case in the superior court at term time for trial upon the issues raised before a jury, or otherwise, as provided by law, and all judgments by default and inquiry shall be of the same force and effect as if rendered in term and before a judge of the superior court. (Ex. Sess., 1921, c. 92, s. 9.)

Cited in Earle v. Earle, 198 N. C. 411, 151 S. E. 884.

§ 597(b). Time for entering judgments; liens.— No judgment shall be entered by the clerk except as herein otherwise provided, except on every Monday of each month. The liens of all judgments rendered on the same Mondays shall each be of equal priority, and each Monday shall be held and construed, in determining the priority of judgment liens, as a term of court, and the first day thereof. (Ex. Sess. 1921, c. 92, s. 10; 1923, c. 68.)

Editor's Note. — The act of 1923 amended this section by authorizing the clerk to render judgment on every Monday of each month instead of on the first and third Monday. It is said in 1 N. C. Law Rev. 283, that since the clerk is required to be personally in his office on every Monday for the transaction of probate business, this gives him a greater latitude for disposing of civil actions in which he may render judgment. See also 1 N. C. Law Rev. 17.

It was also pointed out in the Law Review article that the failure of the amendment to apply to section 597(c), was probably an oversight. The purpose of the 1925 amendment to section 597(c) was to cure the oversight and make the practice uniform in this respect.

By the Act of 1927, chapter 187, section 1, the legislature of North Carolina provided: "That in every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final has been entered by the clerk of the Superior Court of any county in this State on a day other than Monday, contrary to section five hundred and ninety-seven (b) and nine hundred and ninety-seven (c), volume three, Consolidated Statutes, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated; 'Provided, however, nothing in this act shall be construed to affect the rights of any interested party, as provided in section six hundred of Consolidated Statutes, volume three, other than for irregularity as to date of entry of the judgment by the clerk of the court.' That this act shall not apply to pending litigation."

This section does not apply to judgments by consent, which were rendered, as authorized by § 593, on a day other than a Monday. Hood v. Wilson, 208 N. C. 120, 123, 179 S. E. 425.

Cited in Earle v. Earle, 198 N. C. 411, 414, 151 S. E. 884.

§ 597(c). Time for entering judgment where copy of complaint served on defendant. — If the plaintiff or plaintiffs shall cause a copy of the complaint to be served upon any of the defendants, either at the time of issuing summons or thereafter, then judgment shall be entered by the clerk as to the defendants served on any Monday after the expiration of time to answer. (Ex Sess. 1921, c. 92, s. 11; 1925, c. 16.)

See Editor's note to the preceding section.

§ 598. Rendered in vacation.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. (Rev., s. 559; Code, s. 230; 1871-2, c. 3.)

Judgment May Be Taken out of Term by Consent. — By consent of the counsel of both sides, a judgment may be entered in vacation. Westhall v. Hoyle, 141 N. C. 337, 53 S. E. 863, and cases cited.

Amendment of Judgment after Adjournment without Consent Invalid. — An amendment of a judgment made by a judge after the last session of the court, in his room at a hotel, without the consent, and in the absence of the opposing counsel, is invalid. Hinton v. Insurance Co., 116 N. C. 22, 21 S. E. 201.

§ 599. On frivolous pleading.—If a demurrer, answer or reply is frivolous, the party prejudiced thereby may apply to the court or judge for judgment thereon, which may be given accordingly. (Rev., s. 560; Code, s. 388; C. C. P., s. 218.)

For full treatment of this subject see Pleading, 10 N. C. Enc. Dig. 207.

Purpose of the Section. — The main object of this section is to prevent the rights of one of the parties from being prejudiced by the impertinent and unwarranted pleadings of the other, and to accomplish this result the provision of the section, when brought into operation, simply sets the demurrer (or answer) aside, and leaves the party prejudiced by it to obtain his judgment as if it had not been filed. Shinner v. Terry, 107 N. C. 103, 12 S. E. 118.

Nature of Frivolous Answer. — A frivolous answer, entitling the plaintiff to a judgment on the pleadings, is one which is manifestly impertinent, as alleging matters which do not affect the plaintiff's right to recover. Dail & Bros. v. Harper, 83 N. C. 5, 8.

When the answer is filed in good faith, and the matter of it is not manifestly impertinent, the defendant is entitled to have the facts alleged therein admitted by demurrer or passed on by the jury. Dail & Bros. v. Harper, 83 N. C. 5.

Its Bad Character Should Be Apparent. — An answer should never be held frivolous unless it is so clearly and palpably bad as to require no argument or illustration to show its character. Hull Co. v. Carter, 83 N. C. 249.

Manner of Objecting. — On the refusal of the court to hold the answer frivolous, no appeal lies, but the plaintiff should have their exception noted in the record, and if they should lose their case at the trial term the exception would then come up on appeal from the final judgment, or by motion for judgment **non abstante veredicto.** Walters v. Starnes, 118 N. C. 842, 24 S. E. 713; Joyner v. Roberts, 112 N. C. 111, 113, 16 S. E. 917; Abbott v. Hancock, 123 N. C. 89, 90, 31 S. E. 271.

Judgment on Frivolous Answer.—When the complaint in an action on a note is verified, judgment may be rendered on a frivolous answer. Bank v. Pearson, 119 N. C. 494, 26 S. E. 46.

Nature of Frivolous Demurrer. — A demurrer is not frivolous that raises a question fit for consideration or discussion. New Bern Banking Co. v. Duffy, 156 N. C. 83, 72 S. E. 96.

Relief. — When a demurrer to the complaint is frivolous, the plaintiff is entitled to judgment by default, unless the trial court is of the opinion that in the exercise of a discretion the facts justify permission to answer over. Morgan v. Harris, 141 N. C. 358, 54 S. E. 381.

Cited in Shuford v. Yarbrough, 198 N. C. 5, 150 S. E. 618.

§ 600. Mistake, surprise, excusable neglect.—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion de novo: Provided, however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service

is obtained. (Rev., s. 513; Code, s. 274; 1893, c. 81; C. C. P., s. 133; Ex. Sess. 1921, c. 92, s. 14.)

I. In General.
II. The Relief.
III. Application of the Principles.
A. Neglect of Party.
B. Neglect of Counsel.
C. Omissions.
IV. Pleading and Practice.

Cross References.

For full treatment of the subject matter herein contained, see 8 N. C. Enc. Dig. 64; 14 N. C. Enc. Dig. 559.

I. IN GENERAL.

See note under § 536.

Editor's Note.—The last provision of this section was added by the Ex. Sess. of 1921.

The older decisions indicate that this section received, at first, a rather strict construction and the party seeking relief hereunder was required to show that his case fell within the accepted definition, which was a rigid one, of the particular term on which he based his request. However, the courts, in the more recent cases, have been far more liberal. The statute is remedial in its nature and bespeaks the legislative intent for the courts to discover the substantial rights and equities of the parties and to prevent as far as possible the miscarriage of justice because of some technical rule of law.

In reference to the conflicting decisions under this section, the court in Depriest v. Patterson, 85 N. C. 376, 378, said: "The cases are numerous and not in entire harmony upon the proper rendering of this statute, which enlarges the authority of the court over its own judgments, and permits, in specified cases, their reversal (or modification) within a year after notice of their rendition, at the discretion of the court." (Parenthesis supplied).

Applies only to Matters of Fact.—This section does not extend to mistakes as to the law applicable, but only as to matters of facts by which the party may reasonably be misled or surprised. Skinner v. Terry, 107 N. C. 103, 12 S. E. 118.

Applicable to Both Adult and Infant Parties.—In application for relief under this section no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. Mauney v. Gidney, 88 N. C. 200.

Not Applicable to Irregular Verdicts.—Where an irregular verdict is rendered by the court the same cannot be set aside or altered under the provisions of this section. Becton v. Dunn, 137 N. C. 559, 50 S. E. 289; Gough v. Bell, 180 N. C. 268, 104 S. E. 535.

Where Judgment Rendered on Verdict.—The statute, in conferring the power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as **necessarily follow the verdict,** and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in response to the jury findings. Flowers v. Alford, 111 N. C. 248, 16 S. E. 319. Hence, where a judgment has been rendered on a verdict the judgment and verdict may not be set aside for excusable neglect under this section. Brown v. Rhinehart, 112 N. C. 772, 777, 16 S. E. 840; Clemmons v. Field, 99 N. C. 400, 6 S. E. 790.

Applicable only to Judgments Rendered at Prior Terms.—A motion to set aside a judgment for excusable neglect, made at the time the judgment was signed, will be denied, such matters being **in fieri** during the term, as this section applies only to judgments rendered at prior terms. Gold v. Maxwell, 172 N. C. 149, 90 S. E. 115.

Excusable Neglect and Meritorious Defense.—A judgment may be set aside under this section if the moving party can show excusable neglect, and that he has a meritorious defense. Dunn v. Jones, 195 N. C. 354, 356, 142 S. E. 320. And see Henderson Chevrolet Co. v. Ingle, 202 N. C. 158, 162 S. E. 219; Bowie v. Tucker, 206 N. C. 56, 59, 173 S. E. 28, affirming 197 N. C. 671, 150 S. E. 200.

The action of the trial court in setting aside the judgment for surprise and excusable neglect, etc., and placing the parties in statu quo, will be upheld on appeal, under this section, the record disclosing that the answer of the defendant set up a meritorious defense. Cagle v. Williamson, 200 N. C. 727, 158 S. E. 391.

The court's order setting aside the judgment by default against the corporation that had not been properly served with summons on the ground of excusable neglect was not error, the motion having been made in apt time and a meritorious defense also being found as a fact upon supporting evidence. Hershey Corp. v. Atlantic Coast Line R. Co., 203 N. C. 184, 165 S. E. 550.

Where a cause has been remanded to the State from the Federal court by the latter court, and the clerk of the former court has had entered, without notice to defendant, a judgment by default and inquiry for the want of an answer, pending the disposition of the cause in the Federal Court, and the order of remand has been regularly made, upon motion of the plaintiff's attorney, the judge of the Superior Court of the State having jurisdiction may set aside the judgment by default and inquiry upon the ground of mistake, inadvertence, surprise, or excusable neglect, upon the showing of a meritorious defense. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

Where the judge presiding at a term of the Superior Court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed. Bowie v. Tucker, 197 N. C. 671, 150 S. E. 200.

Meritorious Defense Must Be Shown.—In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another **trial,** if granted, would result advantageously for the defendant. Farmers, etc., Bank v. Duke, 187 N. C. 386, 122 S. E. 1; Hill v. Huffines Hotel Co., 188 N. C. 586, 125 S. E. 266. See also Fellos v. Allen, 202 N. C. 375, 162 S. E. 905.

A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as **prima facie** amounts to a valid defence; whether the defence is valid, is a question to be determined by the court, not by the party. Mauney v. Gidney, 88 N. C. 200.

Same—When Defendant Non Compos Mentis.—A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. Farmers, etc., Bank v. Duke, 187 N. C. 386, 122 S. E. 1.

Under this section a verification of a complaint which is in substantial compliance with the law is not a sufficient ground for setting aside a judgment entered by default. Fellos v. Allen, 202 N. C. 375, 376, 162 S. E. 905.

Where the trial court upon conflicting evidence finds as a fact that the summons in the action was in fact served on the defendant, the finding is conclusive. Hooker v. Forbes, 202 N. C. 364, 162 S. E. 903.

Consent Judgment.—Where the court enters a judgment on its record appearing to have been by the consent of the parties, it cannot thereafter be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that it was obtained by fraud or mutual mistake, or that consent had not in fact been given, the burden is on the party attacking the judgment to show facts which will entitle him to relief. Gardiner v. May, 172 N. C. 192, 89 S. E. 955.

Where, upon a motion to set aside a judgment for surprise and excusable neglect as provided by this section, on the ground that the judgment was a consent judgment and was signed by movant's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movant's attorney, the court finds, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movant, the finding is conclusive on the Supreme Court upon appeal, and the order refusing the motions will be upheld. Alston v. Southern Ry. Co., 207 N. C. 114, 176 S. E. 292.

Valid Judgment Regularly Entered.—In order for the trial judge to set aside a judgment of the clerk of court, for default of an answer, under this section, the judgment must be a valid one and regularly entered. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

The "Mistake, etc.," Must Be of the Party Seeking Relief.—This section applies only where the mistake, surprise, etc. is that of the party seeking relief and has no application where the mistake, and surprise arises from the fraudulent conduct of another. Boyden v. Williams, 80 N. C. 95; nor where a motion is made to correct an erroneous judgment rendered at a former term if it appears that the error committed was that of the **court** and not that of the **party.** Simmons v. Dowd, 77 N. C. 155.

Time.—A party operating under this section has a right to set aside a judgment rendered against him within a year after notice thereof. Howell v. Harrell, 71 N. C. 161, 162; Long v. Cole, 74 N. C. 267; and where the motion is not

made within such time it is fatal to the proceedings. Young v. Greenlee, 85 N. C. 593, 594. But an irregular judgment need not be set aside within this period. Monroe v. Whitted, 79 N. C. 508, 510.

Same—Estimation of Period Allowed.—Where the judgment complained of is rendered on a summons personally served within the jurisdiction, this one-year period shall be estimated from its rendition. Lee v. McCracken, 170 N. C. 575, 87 S. E. 497; McLean v. McLean, 84 N. C. 366.

Personal Notice Required.—The language "through his" contained in this section indicates personal knowledge. Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648. Where not personally served, the party may make his motion within twelve months after **actual** notice of the judgment. McLean v. McLean, 84 N. C. 366, 367; Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184.

Where a party has been brought into court by the personal service of a summons, or voluntarily does so as a party defendant, he is presumed to take notice of all the various legal steps in the proceedings, and when he seeks to have a judgment therein rendered set aside after notice, etc., he must show the surprise, mistake or excusable neglect necessary for his purpose within one year, under the provisions of this section. Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648; Askew v. Capehart, 79 N. C. 17.

Where judgment was rendered against the defendant in a justice's court, from which he appealed to the superior court, where judgment was again rendered against him, he making no defence to the action, and more than one year after the docketing of the judgment the judge of the superior court sets the same aside and ordered the case to be reopened on the ground that defendant had no notice of the judgment, it was held to be error. McDaniel v. Watkins, 76 N. C. 399.

Same—Where Service Had by Publication. — Where the summons is served by publication the rights of the parties are more directly affected and controlled by sec. 492 of the Code not under this section. Bank v. Palmer, 153 N. C. 501, 69 S. E. 507; Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648.

Applicable in Supreme Court.—Although this section, in terms, applies only to a judge of the superior court, the spirit and equity of its provisions extend equally to the Supreme Court, and the same power resides here to relieve from a judgment taken against a party through "mistake, inadvertence, surprise or excusable negligence." Wade v. New Bern, 73 N. C. 318, 319.

Facts Must be Stated.—Before a judge can vacate a judgment under this section on the grounds of excusable neglect he must find and state the facts. Clegg v. New York White Soapstone Co., 66 N. C. 391; Powell v. Weith, 66 N. C. 423.

Nature of Question Involved.—The mistake, surprise, inadvertence or excusable neglect, as a ground for relieving a party from a judgment, etc., is a question of law, and if the judge below errs in his ruling in regard thereto, his decision is subject to review. Powell v. Weith, 68 N. C. 342, 343.

Applied in Anderson v. National Union Fire Ins. Co., 202 N. C. 835, 162 S. E. 922; Spell v. Arthur, 205 N. C. 405, 171 S. E. 171.

Cited in Buchanan v. B. & D. Coach Line, 194 N. C. 812, 813, 140 S. E. 439; Union Nat. Bank v. Hagaman, 208 N. C. 191, 193, 179 S. E. 759.

II. THE RELIEF.

Discretionary with the Judge.—The application for relief under this section is addressed to the discretion of the judge presiding. Bank v. Foote, 77 N. C. 131, 132.

The discretion to set aside a judgment is not given by this section, unless there has been excusable neglect. If the judge finds correctly that the negligence was inexcusable, that ends the motion; if he finds correctly that the negligence was excusable or not, his discretion to set aside is not reviewable, unless in case of gross abuse of discretion. Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269. As to setting aside the judgment see note of Beck v. Bellamy, 93 N. C. 129—analysis line, "Pleading and Practice."

The setting aside of a judgment under this section is in the sound legal discretion of the trial judge. Dunn v. Jones, 195 N. C. 354, 142 S. E. 320.

Nature of Relief.—A judgment may be set aside, in whole or in part; the court is invested by the statute with full legal discretion over the matter. Geer v. Reams, 88 N. C. 197, 198.

Refusal to Entertain Motion.—The provisions of this section make it discretionary with a judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes, because he thinks he has no power to grant it, then there is error, and he has failed to exercise the discretion conferred on him by law. Hudgins v. White, 65 N. C. 393.

Injunction Improper. — An injunction to restrain plaintiff from executing his judgment against defendant will not be granted. The proper remedy to remove an alleged grievance is an application to modify the terms of the judgment. Parker v. Bledsoe, 87 N. C. 221; Walker v. Gurley, 83 N. C. 429, 430.

Modification by One Judge of Judgment Rendered by Another.—Where on notice and showing that there was on the part of the complainant a mistake, inadvertence, surprise or excusable neglect by which he was injured, the judgment rendered against him may be modified by a judge other than the one by whom it was rendered. Johnson v. Marcom, 121 N. C. 83, 28 S. E. 58.

Effect of Availability of Other Relief.—The fact that a plaintiff may, when nonsuited, bring a new action within a year does not prevent the judgment from being set aside, like any other judgment, on the ground of excusable neglect, but to authorize the court to set aside such a judgment excusable neglect must clearly appear. Stith v. Jones, 119 N. C. 428, 25 S. E. 1022.

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

Cross Reference.—For treatment of neglect in general, see 8 N. C. Enc. Dig. 64; 14 N. C. Enc. Dig. 544, 545.

For the personal inattention of a suitor no relief can be granted under this section. Royster & Co. v. Wicker, 87 N. C. 14, 15.

Where Summons Regularly Served.—A party is guilty of inexcusable neglect, and is not entitled to relief against a judgment rendered against him, where it appears that a summons was regularly served, and he paid no attention to the case either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy. Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205.

Mistake as to Nature of Summons.—The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measure to answer the same, is not such excusable neglect as entitled him to relief. White v. Snow, 71 N. C. 232, 233. See Holden v. Purefoy, 108 N. C. 163, 167, 12 S. E. 848, where relief was granted a party who thought he was being summoned as a witness when in fact he was summoned as the defendant.

Where Party Very Old and Forgetful.—That the defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action does not show excusable neglect. Pierce v. Eller, 167 N. C. 672, 83 S. E. 758.

Sickness of Party.—Where the defendant was of sound mind, and, though his bodily infirmities confined him, carried on business and defended other suits, a default judgment against such defendant will not be vacated on account of excusable neglect, because of his infirmities. Jernigan v. Jernigan, 179 N. C. 237, 102 S. E. 310.

Sickness of Family.—Where the defendant indorser of a note was required by the illness of his wife to be outside the state, and the complaint was filed on the first day of the term, and judgment by default was entered two days later, there was sufficient excuse for failure to answer to justify the opening of the default. Bank v. Brock, 174 N. C. 547, 94 S. E. 301.

Where Party Obligated to Question His Counsel.—While, as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolves upon the client to question his counsel in regard to his case, his failure to do so is inexcusable neglect and relief will be denied. Holland v. Edgecombe Benev. Ass'n, 176 N. C. 86, 97 S. E. 150.

Where the defendant, upon the suggestion of his counsel, allows judgment by default to go against him, he cannot, upon discovering that the recovery is greater than he had anticipated, seek relief under this section for his action does not amount to excusable neglect. State v. Matthews, 81 N. C. 289.

Where Endeavor Is Made to Compromise.—Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. Union Guano Co. v. Middlesex Supply Co., 181 N. C. 210, 106 S. E. 832.

Misled by Conversation of Counsel.—The fact that the party was misled by a conversation between his counsel and

the attorney for the adversary does not entitle him to relief under this section. Hutchinson v. Rumfelt, 83 N. C. 441, 443.

Change of Post Office.—A judgment by default will not be set aside on the ground of excusable neglect, when it appears that defendants changed their postoffice and did not receive the answer mailed to them by their counsel until eleven months after it was mailed, no inquiry for letters having been made by them at their former postoffice, and no communication being addressed to their counsel concerning the matter until eleven months after the time for answering the complaint had expired. Vick v. Baker, 122 N. C. 98, 29 S. E. 64.

Attorney's Death within Knowledge of Client.—Where an attorney, in whose hands a cause has been placed, dies and the client has notice of such fact and fails to file his answer at the proper time, he cannot later claim relief under this section on the ground of excusable neglect. Simpson v. Brown, 117 N. C. 482, 23 S. E. 441.

Under this section wife's neglect to file answer upon assurances of her husband that he would do so is excusable in joint action against them. Wachovia Bank, etc., Co. v. Turner, 202 N. C. 162, 162 S. E. 221.

Absence from Trial.—It is the duty of a party to be present in court at the trial of his cause for the performance of matters outside the proper duties of his attorney, and where he without cause remains out of court, he cannot claim relief under this section as his act amounts to inexcusable neglect. Cobb v. O'Hagan, 81 N. C. 293.

But the fact that an order in the cause which in effect deprived the plaintiff of the right of appeal, was made at midnight when the plaintiff was absent and did not know, and had no reason to believe that the court was in session, and his counsel not being able to attend to the trial, constitutes a case of "excusable neglect." Long v. Cole, 74 N. C. 267.

Applied in Colt Co. v. Martin, 201 N. C. 354, 160 S. E. 287.

B. Neglect of Counsel.

For full treatment of the subject, see 14 N. C. Enc. Dig. 545.

Editor's Note.—As to what acts of an attorney are or are not attributable to the client, the courts do not appear to be entirely in accord. All seem to adhere to the same general principles, but an almost irreconcilable conflict arises upon the application of these principles to the particular cases. The ruling in each case had been predicated upon one or two outstanding features found therein, and the great weight attached thereto by the courts. A few of the leading cases illustrative of the applicability of the provisions of this section to this particular subject are found in the following passages.

Dividing Line between the Cases Difficult to Determine.—It is difficult to deduce any distinct practical principle from the numerous adjudications, or to run a well-defined line separating those **neglects** that are, from those that are not excusable in the sense of the statute, and hence the facts relied on must be arranged on the one and then on the other side of that line, in each case as they arise. Mebane v. Mebane, 80 N. C. 34, 40.

Gross Negligence of Attorney.—The omission of an attorney, retained as counsel in a cause, to perform his duty as such in the conduct of the cause is excusable neglect in the party, and the judgment may be vacated under this section. Wiley v. Logan, 94 N. C. 564, 566; Griel v. Vernon, 65 N. C. 76; and this is especially true where the counsel is insolvent and unable to respond in damages for his negligence. Ice Mfg. Co. v. Raleigh, etc., R. Co., 125 N. C. 17, 24, 34 S. E. 100. This view was adopted in English v. English, 87 N. C. 497, and also in Deal v. Palmer, 68 N. C. 215.

Where Reputable Counsel Employed.—Where a party to an action employs a reputable attorney and is guilty of no negligence himself, the attorney's negligence in failing to appear and answer will not be imputed to such parties in proceeding to vacate default judgment, but the law will excuse the party and afford him relief. Stallings v. Spruill, 176 N. C. 121, 96 S. E. 890.

Where defendants who employed counsel, learned in the law, and skillful and diligent in its practice, whose zeal and fidelity to the cause of a client are unquestioned, verified their answers promptly and intrusted them to their attorneys for filing, attorneys' failure to file the answers within time required by law was not due to such negligence on part of defendants as deprived the judge of power to grant them relief from a default judgment under this section. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the state, to defend an action brought in another county, and has put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the case has been calendared and called for trial without notice to the defendant or his attorney, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion aptly made, have the judgment set aside for surprise, excusable neglect, etc., under this section upon a showing of a meritorious defense, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17.

This section has no bearing on a case of neglect to file answer to a summons and complaint. Washington v. Hodges, 200 N. C. 364, 156 S. E. 912.

Where Counsel Instructed to Employ Other Counsel.—Where the defendant in an action has retained an attorney for his defense, of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and has fully relied on him to notify him of the steps necessary to be taken in his defense, and seeks to set aside a judgment by default therein entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, is not attributable to the defendant and the order of the superior court setting aside the judgment for his excusable neglect when otherwise counsel will be sustained on appeal. Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627.

Where Counsel Notified by Mail.—The refusal of a motion as provided by this section, to set aside a judgment for surprise and excusable neglect will be upheld where the trial court finds from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail, but was not received by him. Clayton v. Adams, 206 N. C. 920, 175 S. E. 185.

Client Misinformed by Attorney as to Time of Trial.—When a defendant moved to vacate a judgment, upon the ground of excusable neglect, and the excuse assigned was that his counsel, by mistake, had misinformed him as to the time of holding court whereby he failed to answer, it was held that the excuse was not sufficient, when the facts show that the defendant did not suffer harm by the mistake of his counsel. Clegg v. New York White Soapstone Co., 67 N. C. 302, 304.

Where an attorney has ample notice as to the day of the trial, the continued absence of the client for two successive calls is inexcusable neglect for which no relief can be had under this section. Henry v. Clayton, 85 N. C. 372, 374.

Disqualification of Counsel During Pendency of Trial.—Pending a reference, the counsel for a party to the action became disqualified, but the client, although having notice of the subsequent orders, proceedings, etc. in the cause, neglected to retain another counsel. It was held, that this did not require the court to set aside the report and recommit the matter passed upon therein. Smith v. Smith, 101 N. C. 461, 8 S. E. 128.

Where Attorney Withdraws.—Though an attorney may withdraw from a case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights, and where for the failure of such notice a judgment upon a verdict has been obtained against the client and he was without laches in moving to set it aside for surprise and excusable neglect upon a showing of a meritorious defense, it is correct for the trial judge to grant his motion under this section. Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52.

Mistaken Legal Advice.—Mistaken legal advice by counsel acted on by client, is not remediable under this section—being a mistake of law and not of fact. Phifer v. Travellers Ins. Co., 123 N. C. 405, 406, 31 S. E. 715.

Attorney Prevented from Examining Complaint.—On motion to set aside a judgment on the ground of excusable negligence, it appeared that the defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and the clerk promised to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the remainder of the term was absent in obedience to a summons as a witness, it was held that the defendant's neglect was excusable. Wynne v. Prairie, 86 N. C. 73.

Where Negligence of Attorney Attributable to Party.—A judgment will not be set aside for irregularity and surprise when it appears that it had come to issue and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident local attorneys, who were not notified, though means of easy communication in ample time were available, the neglect of the attorneys being personally attributable to the party of the action, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. Hyde County

Land, etc., Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12.

Failure of Defendant's Attorney to File Answer.—Where it appears upon the defendant's motion to set aside a judgment by default, pursuant to this section, that the same was regularly calendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion under the provisions of the statute. Gaster v. Thomas, 188 N. C. 346, 124 S. E. 609; but where no laches are attributable to the client he will be granted relief. Geer v. Reams, 88 N. C. 197, 198.

Removal to Federal Court.—Where the clerk has erroneously granted defendants' motion to remove a cause to the Federal Court under § 913(b), the moving defendants may assume that no further proceedings will be had in the State Court until the cause has been remanded from the Federal Court, and where a judgment by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys upon relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendant to file answer will not be disturbed on appeal. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

C. Omissions.

Duty of Court to Supply Omissions.—It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of the action or the verity of its records, as made —— and no lapse of time will debar the court of the power to discharge this duty. Walton v. Pearson, 85 N. C. 35, 49.

May Not Be Collaterally Attached.—The effect of an amendment made by the court cannot be collaterally considered, but must be done in a proceeding brought for that purpose. Foster v. Woodfin, 65 N. C. 29.

IV. PLEADING AND PRACTICE.

Burden of Proof.—A party seeking to vacate a judgment under this section is always at default and the burden is upon him to show facts which would make the refusal to vacate appear to be an abuse of discretion. Kerchner v. Baker, 82 N. C. 169, 170.

Filing of Affidavits.—In hearing a motion to set aside judgments under this section, there is no rule requiring the affidavits to be filed before the hearing of the motion is entered on. Jones v. Swepson, 94 N. C. 700, 706.

Failure of Judge to State the Facts Found.—When, in setting aside a judgment for excusable negligence, the judge does not state the ground on which he founded his order, his action will be upheld if in any aspect of the case it would be proper. Foley, Bro. & Co. v. Blank, 92 N. C. 476.

Rehearing.—A rehearing under this section is not a matter of right, but rests in the sound discretion of the court. Williams v. Alexander, 70 N. C. 665.

Appeal from Order of Clerk.—A motion to set aside and vacate a judgment entered by the clerk, as authorized by statute, may be made before and passed upon by either the judge or the clerk. From an order made by the judge, upon such motion, an appeal may be taken to this court, which has jurisdiction to pass upon and determine all matters of law or legal inference duly presented by appeal. Const. of N. C. art. 4, § 8. From an order made by the clerk, upon such motion, an appeal will lie to the judge, who shall hear and pass upon the motion, de novo. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329, 332.

The findings of fact by the trial judge upon an appeal from an order of the clerk denying defendant's motion to set aside a judgment under this section, are not reviewable when supported by competent evidence. Kerr v. North Carolina Joint Stock Land Bank, 205 N. C. 410, 171 S. E. 367.

Presumption on Appeal.—When the court below refused a party permission to file an answer at a term subsequent to the time allowed by a former order, the appellate court must assume that the question of "excusable neglect" was passed upon. Clegg v. New York White Soapstone Co., 67 N. C. 302, 304.

Where no evidence appears in the case on appeal from an order setting aside a judgment for surprise and excusable neglect under this section, it will be presumed that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed where the findings sustain the court's holding that movants have shown excusable neglect and meritorious defense. Radeker v. Royal Pines Park, 207 N. C. 209, 176 S. E. 285.

Right of Appeal May be Lost.—The right of appeal from a judgment, and a review thereof for errors of law in it, cannot be restored to a party who has lost the right by a mere motion to vacate and an appeal from the refusal, whether founded on irregularity or for the causes under this section. Badger v. Daniel, 82 N. C. 468, 470.

Same—Certiorari.—The writ of certiorari, as a substitute for an appeal lost, as alleged in this case, will be granted only when the petitioner shows that he has been diligent, and there has been no laches on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party, or some other person or cause in some way connected with it and not within his control. Graves v. Hines, 106 N. C. 323, 324, 11 S. E. 362. Williamson v. Boykin, 99 N. C. 238, 5 S. E. 378.

Questions Reviewable on Appeal.—Whether upon the facts found by the judge, the neglect of attorneys for defendants to file answers to the complaint within the time required by statute was excusable, or whether, in any event, such neglect was imputable to defendants, are questions of law, with respect to which the conclusions of the judge are reviewable on appeal. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

Discretion of Judge Not Reviewable on Appeal.—The Supreme Court can review on appeal what is a mistake, surprise or excusable neglect under this section, but it cannot review the discretion exercised by a judge of the superior court under the section. Foley, Bro. & Co. v. Blank, 92 N. C. 476; Branch v. Walker, 92 N. C. 87, 91. But should the judge set aside a judgment upon a state of facts which did not bring the case within the scope of the statute, his action would be subject to correction on appeal. Beck v. Bellamy, 93 N. C. 129.

When the judge grants the relief, **in the exercise of his discretion,** that conclusion is also not reviewable; but whether the facts found constitute, in law, mistake, inadvertence, surprise, or excusable neglect, may be reviewed, and if it be determined that the court below erred therein, the judgment will be corrected, and the motion remanded, to the end that the trial judge may exercise the discretion conferred on him alone by the statute. Weil & Bro. v. Woodard, 104 N. C. 94, 10 S. E. 129.

Same—Abuse of Discretionary Power.—The refusal of a motion to set aside a judgment on the grounds of surprise or excusable neglect is a matter of discretion with the judge below and cannot be reviewed on appeal, unless it should appear that such discretion was abused. Cowles v. Cowles, 121 N. C. 272, 273, 28 S. E. 476.

After hearing the evidence and finding the facts under this section, the action of the judge is conclusive upon the parties, from which there is no appeal; yet this discretion, however, is not arbitrary, but implies a legal discretion. As for instance, if the judge mistake the meaning of the statute as to what is "mistake, inadvertence, surprise, or excusable neglect." In such cases his judgment is the subject of appeal and review. Hudgins v. White, 65 N. C. 393; Albertson v. Terry, 108 N. C. 75, 77, 12 S. E. 892.

Where Remedy Sought by Independent Action.—The institution of an independent action in lieu of a renewal of the motion is such an abandonment of the remedy by motion as worked a discontinuance of the same. Norwood v. King, 86 N. C. 81, 85.

§ 601. Stands until reversed.—Every judgment given in a court of record having jurisdiction of the subject is, and continues to be, in force until reversed according to law. (Rev., s. 561; Code, s. 935; R. C., c. 31, s. 103; 4 Hen. IV, c. 23.)

Cross Reference.—See 13 N. C. Law Rev., 251, for note on the "Effect of judgment pending" with reference to this section.

Irregular Judgments.—Even though the judgment be irregular it stands until vacated or reversed, Stafford v. Gallops, 123 N. C. 19, 20, 31 S. E. 265; and such judgment may be corrected only in a direct proceeding. Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364; Brown v. Harding, 170 N. C. 253, 86 S. E. 1010.

Applied in Myers v. Wilmington-Wrightsville, etc., Causeway Co., 204 N. C. 260, 167 S. E. 858.

Cited in Tallassee Power Co. v. Peacock, 197 N. C. 735, 150 S. E. 510.

§ 602. For and against whom given; failure to prosecute.—1. Judgment may be given for or

against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

2. It may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. (Rev., s. 563; Code, s. 424; C. C. P., s. 248.)

Editor's Note.—The primary object of the provisions of this section is to prevent as far as possible multiplicity of actions, and to settle in a single suit all the controverted matter arising or likely to arise out of the transaction. That this end may be accomplished the courts, wherever the particular case can be justly and equitably brought within the provisions of this section, have allowed, and sometimes compelled, the parties to submit and litigate all the issuable matters in one suit, whether the respective claim be against a party on the same side or against one on the other side.

Both Legal and Equitable Rights Recognized.—The courts in North Carolina are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. Hutchinson v. Smith, 68 N. C. 354, 355; Melvin v. Stephens, 82 N. C. 284, 288. And this is true of any relief to which the facts alleged and proved entitle him, whether demanded in the prayer for relief or not. McNeill v. Hodges, 105 N. C. 52, 55, 11 S. E. 265.

Anyone or All May be Compelled to Answer.— The proper construction of this section is that when the plaintiffs bring the defendant into court to answer a claim for a debt which he owes them, he cannot only require **them,** but either **one** of them, to answer for a debt due him, whether it is connected specially with their debt against him or is an independent claim. Sloan & Co. v. McDowell, 71 N. C. 356, 358.

The Rights and Liabilities of the Defendants May be Determined.—The court is fully empowered under this section to determine the rights and liabilities of the defendants, not to the plaintiff but among themselves. Clark v. Williams, 70 N. C. 679, 684. And when in the exercise of their power a judgment is rendered in favor of a plaintiff and an affirmative one in favor of a defendant, they constitute but one judgment though written and attested separately. Hall v. Younts, 87 N. C. 285.

Where the Defense Set up Applies to Entire Res.—When a bill is filed for the specific performance of a contract to convey a tract of land, and the defendant alleges that the tract consists of two parts, of which he admits that he is the owner of one, but avers that the other belongs to his wife, and sets up a defense which, if good, applies to the whole contract, it is erroneous to make a decree in favor of the plaintiff as to the part of which the defendant admits he is the owner, and to reserve the question as to the other part. Swepson v. Rouse, 65 N. C. 34.

Primary and Secondary Liability.—The primary and secondary liability as between two joint tort-feasors should be adjusted in the same action, where there are two defendants sued for the same negligent act alleged in the complaint, and judgment in the consolidated cases accordingly may be rendered under this section. Bowman v. Greensboro, 190 N. C. 611, 130 S. E. 502.

Where Another Suit Pending.—The entire spirit of our code procedure is to avoid multiplicity of actions and where an action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counterclaim, pursuant to this section; and that relief may be asked for by each in his own action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. Allen v. Salley, 179 N. C. 147, 101 S. E. 545.

"Cross Complaint" Allowed.—Under this section the defendant is entitled to file a "cross complaint" to establish his rights in the premises and to seek the appropriate relief. Dillon v. Raleigh, 124 N. C. 184, 186, 32 S. E.. 548.

Same—Conformity to Original Complaint Required.—A cross action by a defendant against a co-defendant or third party must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. Independent and unrelated causes of action cannot be litigated by cross actions. Bowman v. Greensboro, 190 N. C. 611, 130 S. E. 502.

Recovery on Counterclaim.—Where an action on contract has originally and properly been brought in the superior court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the superior court, will not be denied for want of jurisdiction on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of C. S., sections 519, 521, and this section. Singer Sewing Mach. Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

Where There is Concert of Action Among the Defendants.—Where an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper under this section, to join them as defendants in an action for damages. Long v. Swindell, 77 N. C. 176.

Where, however, there is no unity of design or concert of action, and the separate action of each defendant causes the single injury, the share of each in causing it is separable and may be accurately measured. In such case the jury can properly assess several damages. Long v. Swindell, 77 N. C. 176.

In an action against a railroad company and the Director General of Railroads, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the action may be continued against the Director General under the provisions of this section, that a several judgment may be entered. Kimbrough v. R. R., ante, 234, cited and applied. Smith v. Seaboard Air Line R. Co., 182 N. C. 290, 109 S. E. 22.

§ 603. Against married women.—In an action brought by or against a married woman, judgment may be given against her for costs or damages or both, in the same manner as against other persons, to be levied and collected solely out of her separate estate. (Rev., 563.)

Where the Wife Can Sue and be Sued Alone.—It is not required that the wife, as such, prosecute or defend an action concerning the lands by guardian or next friend. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280.

Same—Husband, When Joined, is the Agent of the Wife.—The joinder of the husband in an action maintainable against the wife alone, though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purpose of the suit. Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280.

Judgment by Consent Not Binding on The Wife.—Where a married woman, pending an appeal by her from a personal judgment rendered against her husband on notes given for property bought by her husband and secured partly by a mortgage on her land, consented to withdraw the appeal and to allow a compromise judgment to be entered against her husband for a certain amount payable in installments, it was held, that she had no power to consent to such judgment, and it had no binding force on her although she was personally present and represented by counsel of her own selection at the time of its rendition. McLeod v. Williams, 122 N. C. 451, 30 S. E. 129.

§ 604. Nonsuit not allowed after verdict.—In actions where a verdict passes against the plaintiff, judgment shall be entered against him. (Rev., s. 1520; Code, s. 936; R. C., c. 31, s. 110; 2 Hen. IV, c. 7.)

Theory of Nonsuit Explained.—"A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit,' by absenting himself at the trial term. If he does so and fails to answer, when called, by himself or by his attorney, the court directs a nonsuit to be entered, the cost is taxed against him, and that is an end of the case. Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and by the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is every day's practice. It is based upon the idea that the plaintiff announces his purpose not to answer when called to hear the verdict, and the advantage is that the plaintiff can have his Honor's opinion reviewed, and should the decision of the Supreme Court be against him, he can commence another ac-

tion; whereas if he allows a verdict to be entered it is conclusive unless set aside." Graham v. Tate, 77 N. C. 120. Southern Cotton Oil Co. v. Shore, 171 N. C. 51, 55, 87 S. E. 938.

The Principle Stated.—The principle would seem to be that a plaintiff may elect to be nonsuited in every case where no judgment other than for costs can be recovered against him by the defendant, and when such judgment may be recovered he cannot so elect. McKesson v. Mendenhall, 64 N. C. 502, 504.

Retirement of Jury for Correction of Formal Defect.—It is too late after verdict upon an issue or issues of fact for a plaintiff to take a nonsuit; and where the jury, after rendering a verdict, had returned to the jury-room to correct a mere formal defect in the verdict, and as they retired the counsel for plaintiff informed the trial judge that the plaintiff would take a nonsuit, there was no error in refusing it. Strause v. Sawyer, 133 N. C. 64, 45 S. E. 346.

Where Defendant Seeks Affirmative Relief.—When, by the pleadings, the plaintiff ceases to be merely an **actor,** and becomes also a defendant, as, for example, if the defendant seeks affirmative relief and demands judgment, the right to take a nonsuit ceases. McKesson v. Mendenhall, 64 N. C. 502, 504; McLean v. McDonald, 173 N. C. 429, 92 S. E. 148. But after a plea of tender or payment of money into court the plaintiff may take a nonsuit. Id.

Same—Counter Claim Must be Independent of Plaintiffs' Complaint.—When the counterclaim on a cause of action arises independently of that alleged in the complaint, the plaintiff may submit to a voluntary nonsuit as to his own cause of action. Yellowday v. Perkinson, 167 N. C. 144, 83 S. E. 341.

Same—Where Counterclaim Arises Out of Matter Set Forth in Complaint.—Where, however, the defendant's counterclaim arises out of the contract or transaction set forth in the complaint as the grounds of the plaintiff's cause of action, the plaintiff cannot take a nonsuit, this being placed on the principle that it is equitable and just that the right of the parties arising out of such contract be settled in one suit and at the same time. Yellowday v. Perkinson, 167 N. C. 144, 83 S. E. 341.

Where Interlocutory Order Entered.—An interlocutory judgment does not deprive a plaintiff of the right to take a nonsuit. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 11 S. E. 264.

Nonsuit Not Allowed Where Defendant Wrongfully Dispossessed.—Whenever a defendant is wrongfully dispossessed of his land by legal process, he is entitled to a writ of restitution and an inquisition of damages **in that action** of which the plaintiff is not permitted to deprive him by taking a nonsuit. Lane v. Morton, 81 N. C. 38, 39.

Refusal to Allow Nonsuit after Verdict Not Reviewable.—Refusal of the superior court to allow a nonsuit after verdict and judgment will not be reviewed in the Supreme Court. Brown v. King, 107 N. C. 313, 12 S. E. 137.

§ 605. Party dying after verdict.—In no action shall the death of either party between the verdict and the judgment be alleged for error, if the judgment is entered within two terms after the verdict. (Rev., s. 564; Code, s. 938; R. C., c. 31, s. 112; 17 Charles II, c. 8.

Judgment for or against Deceased Parties.—The great weight of authority in this country is to the effect that where the court has acquired jurisdiction of the subject matter and the person during the lifetime of a party, a judgment for or against a deceased person is not wholly void or open to collateral attack. De La Vergne, etc., Mach. Co. v. Featherstone, 147 U. S. 209, 37 L. Ed. 138, 13 S. Ct. 283.

Judgment Neither Void nor Irregular.—A judgment in favor of a dead man is not void, and not, on that account, irregular. Wood v. Watson, 107 N. C. 52, 12 S. E. 49.

Judgment Against Dead Person Voidable.—A judgment **against** a party to a suit rendered after his death is voidable, even if the fact of death was unknown. Wood v. Watson, 107 N. C. 52, 12 S. E. 49.

Parties on Appeal.—If appeal by the adverse party was desired, the proper course was to make the heirs at law parties to the action, and serve notice of appeal upon them. Wood v. Watson, 107 N. C. 52, 12 S. E. 49.

§ 606. When limited by demand in complaint.—The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. (Rev., s. 565; Code, s. 425; C. C. P., s. 249.)

Purpose of the Section.—The apparent purpose of this section, while simplifying the method of procedure, is to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. Jones v. Mial, 79 N. C. 164, 168.

General Relief Where Answer Filed.—If there be an answer any relief may be granted which is consistent with the case made by the complaint and embraced within the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. Wright v. Teutonia Ins. Co., 138 N. C. 488, 492, 51 S. E. 55; Bryan v. Canady, 169 N. C. 579, 86 S. E. 584; Council v. Bailey, 154 N. C. 54, 69 S. E. 760.

Relief Limited to That Demanded Where No Answer Filed.—Where no answer is filed then the relief shall not exceed that demanded in the complaint. Jones v. Mial, 82 N. C. 252, 257.

Where Improper Action Brought.—Where a plaintiff, in his complaint alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held that the plaintiff was entitled to recover, notwithstanding the variance. Oats, etc., Co. v. Kendall, 67 N. C. 241.

Where Amount Tendered is Larger than Amount Due.—The verdict of the jury rendered in an action upon a mortgage note will not be affected by a tender of a larger amount made before the commencement of the action, which was refused and not kept good, and the relief will be confined to that found to be due. DeBruhl v. Hood, 156 N. C. 52, 72 S. E. 83.

Cited in Bowie v. Tucker, 206 N. C. 56, 59, 173 S. E. 28.

§ 607. When passes legal title.—In any action wherein the court declares a party entitled to the possession of real or personal property, the legal title of which is in another party to the suit, and the court orders a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court orders that one of the parties holding property in trust shall convey the legal title to be held in trust to another person although not a party, the court, after declaring the right and ordering the conveyance, has power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof is to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered were in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as are adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. A party taking benefit under the judgment has the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed. (Rev., s. 566; Code, s. 426; R. C., c. 32, s. 24; 1850, c. 107; 1874-5, c. 17.)

Strict Conformity with the Section Required. — A decree does not operate as a conveyance, unless it complies with the requirements of this section and section 608 declaring "that it shall be regarded as a deed of conveyance" ——— and the mere fact that the court, while omitting this statement, **intended** that the decree should have such effect, is not sufficient for this purpose. Morris v. White, 96 N. C. 91, 2 S. E. 254.

This decision was criticized in the case of Evans v. Brendle, 173 N. C. 149, 91 S. E. 723, it was said that a too narrow construction was being given to the statute. The precise point arose in both cases, namely, the failure of the court to insert in the decree the words "that it shall be regarded as a deed of conveyance," although it was left undecided in the Evans case, the court merely expressing its disfavor as to the former holding and then resting its own decision upon a different ground. In the dissenting opinion in Evans v. Brendle, in which two justices concurred, much weight is attached to the argument used by the court in Morris v. White. Ed. Note.

Same—Where Specific Performance Asked for.—It is not necessary that a decree in favor of the plaintiff in a suit for specific performance should declare that it should operate as

a conveyance in order to constitute a complete adjudication of the rights of the holder of the naked legal title —— and the failure to make such insertion in no manner effects the equitable title which the plaintiff acquired by decree. Skinner v. Terry, 134 N. C. 305, 309, 46 S. E. 517.

Married Woman May be Declared Trustee.—Where a married woman admits the execution of a fraudulent deed which does not convey all that was expected by the grantee, she will not be allowed to profit by the fraud but will be declared a trustee of the part of the land not conveyed, the purchase price of which she has received. Bell v. McJones, 151 N. C. 85, 65 S. E. 646.

Consent Decree until Impeached Passes Legal Title.—A decree by consent binds the parties and their privies in estate, but is open to impeachment by the privies on the ground that it was fraudulent to their injury; but until impeached the decree passes a legal title. Rollins v. Henry, 78 N. C. 342, 352.

Cited in Ayden v. Lancaster, 197 N. C. 556, 562, 150 S. E. 40.

§ 608. Regarded as a deed and registered. — Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (Rev., ss. 567-8; Code, ss. 427, 429; R. C., c. 32, ss. 25, 27; 1850, c. 107, ss. 2, 4; 1874-5, c. 17, ss. 2, 4.)

See sec. 607 and notes thereto.

Consent Decrees Convey Title.—A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee "as between the parties," and is good as against third persons in the absence of fraud or collusion. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25.

Same—Agreement in Divorce Proceedings.—In an action brought by the wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25.

Marginal Cancellation Not Essential but Advisable.—When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. Smith v. King, 107 N. C. 273, 277, 12 S. E. 57.

Cited in Ayden v. Lancaster, 197 N. C. 556, 562, 150 S. E. 40.

§ 609. Certified registered copy evidence.—In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (Rev., s. 569; Code, s. 428; R. C., c. 32, s. 26; 1850, c. 107, s. 3; 1874-5, c. 17, s. 3.)

§ 610. In action for recovery of personal property.—In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same. (Rev., s. 570; Code, s. 431; C. C. P., s. 251.)

In General.—Where the defendant in claim and delivery replevies the property, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention. Boyd v. Walters, 201 N. C. 378, 160 S. E. 451.

Judgment Should Be Alternative.—In claim and delivery the judgment should be for the delivery of the property or its value, Oil Co. v. Messick Grocery Co., 136 N. C. 354, 48 S. E. 781; Hendrick v. Ireland, 162 N. C. 523, 77 S. E. 1011; and this is true of a judgment on a forthcoming bond in claim and delivery proceedings. Grubbs v. Stephenson, 117 N. C. 66, 67, 23 S. E. 97.

Same—When Judgment for Defendant.—When the pleadings, in an action to declare valid a sale of property under mortgage, raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted. Penny v. Ludwick, 152 N. C. 375, 67 S. E. 919.

Applicability of Doctrine of Res Judicata.—Where judgment is rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property it does not estop the plaintiff from bringing an independent action to recover such damages. Moore v. Edwards, 192 N. C. 446, 135 S. E. 302; Woody v. Jordan, 69 N. C. 189.

Same—Where Judgment Unsatisfied.—Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff, in such action for damages for the conversion of the property, it was held that he was entitled to recover. Asher v. Reizenstein, 105 N. C. 213, 10 S. E. 889.

Same—Applicable Only as to Matters Litigated upon.—The fundamental reasons for the application of the doctrine of **res adjudicata** are that there should be an end of litigation and that no one should be vexed twice for the same cause; therefore, when the defendant in claim and delivery proceedings has recovered of the plaintiff therein such damages for his wrongful seizure of the defendant's property as allowed by this section and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings, and the doctrine of **res adjudicata** has no application. Ludwick v. Penny, 158 N. C. 104, 105, 73 S. E. 228.

Where Counterclaim Filed.—A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. Ludwick v. Penny, 158 N. C. 104, 105, 73 S. E. 228.

Measure of Damages When Property Beyond Control of Court.—In an action of claim and delivery, where it appears that the defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities will be adjusted and judgment rendered against the defendant for the balance of the purchase money, with interest from the date of purchase. Hall v. Tillman, 115 N. C. 500, 20 S. E. 726.

Estimation of Interest.—When the verdict of the jury has only established that the plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. Penny v. Ludwick, 152 N. C. 375, 67 S. E. 919.

Where Additional Item Allowed by Consent.—Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the

plaintiff will be held as binding upon the parties on appeal. Hendricks v. Ireland, 162 N. C. 523, 77 S. E. 1011.

Liability of Surety.—Where the plaintiff is successful in his action wherein claim and delivery have been issued, the surety on the defendant's replevin bond, given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by the plaintiff; or second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment to the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. Orange Trust Co. v. Hayes, 191 N. C. 542. 132 S. E. 466.

Where the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with the provisions of the statute. Orange Trust Co. v. Hayes, 191 N. C. 542, 132 S. E. 466.

Issues and Judgment Should Cover Whole Case.—Where the action is brought to recover property conveyed to secure a debt, in order to avoid circuity of action, when the debt is denied, the issues and judgment should cover the whole case, including the balance due upon the debt, and for the benefit of the sureties upon the undertaking the value of the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N. C. 377, 35 S. E. 620.

Cited in Harrell v. Tripp, 197 N. C. 426, 428, 149 S. E. 548; Green v. Carroll, 205 N. C. 459, 464, 171 S. E. 627.

§ 611. What judge approves judgments.—In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions. (Rev., s. 571; Code, s. 432; 1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51.)

Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover. Corbin v. Berry, 83 N. C. 28.

Restraining Orders must be made returnable before the judge in the district in which the action is pending. Galbreath v. Everett, 84 N. C. 546.

§ 612. Judgment roll.—Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. (Rev., s. 572; Code, s. 434; C. C. P., s. 253.)

Section Directory.—The provisions of this section as to the judgment roll should be complied with, but they are directory, and the clerk's failure to "attach together" the papers did not vitiate the judgment which was entered of record and regular in form. See Brown v. Harding, 171 N. C. 686, 89 S. E. 222, in spite of the holding in Dewey v. Sugg, 109 N. C. 328, 329, 13 S. E. 923, to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner.

§ 613. Docketed and indexed; held as of first day of term.—Every judgment of the superior court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term, for the purpose only of establishing equality of priority as among such judgments. (Rev., c. 573; Code, s. 433; C. C. P., s. 252; Supr. Ct. Rule VIII; 1909, c. 709; 1929, c. 183.)

Editor's Note.—The Act of 1929 added to the second paragraph the words "for the purpose only of establishing equality of priority as among such judgments." The section was also amended by Public Laws 1929, ch. 88, applicable only to Durham County, by adding at the end thereof the following:

"Provided, that it shall be necessary to enter upon the index and cross index of the judgment docket as defendant only such party or parties to any proceeding who or which may be fixed and charged with any liability in the judgment."

Strict Compliance Necessary.—The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing obtains, a very strict compliance with its provisions in every respect is required. Jones v. Currie, 190 N. C. 260, 129 S. E. 605.

Clerk Liable upon Failure to Index Judgment.—An action of tort will lie against the clerk upon his failure to index a judgment, such neglect resulting in damage to the plaintiff. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101.

Same—Duty of Judgment Creditor to See Judgment Properly Docketed.—It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of the failure to docket the judgment. Holman v. Miller, 103 N. C. 118, 9 S. E. 429.

Where Judgment Docketed in Foreign County.—Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must not only be docketed but must be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. Jones v. Currie, 190 N. C. 260, 129 S. E. 605; Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923.

Contents of the Index and Purpose Thereof.—When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. Dewey v. Sugg, 109 N. C. 328, 329, 13 S. E. 923. Jones v. Currie, 190 N. C. 260, 264, 129 S. E. 605.

Initials in Index Valid.—"J. Mizell' or "Jo. Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell." Valentine v. Britton, 127 N. C. 57, 37 S. E. 74.

One Cross-Indexing Not Sufficient for Two Judgments.—One cross-indexing is insufficient for two judgments, though they appear on the same page and include the same parties, and only the first judgment on its page will constitute a lien. Valentine v. Britton, 127 N. C. 57, 37 S. E. 74.

Judgment Signed out of Term.—The provisions of this section that judgments relate to the first day of the term, apply when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was

not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. Contestee Chemical Co. v. Long, 184 N. C. 398, 114 S. E. 465.

Consent Judgments.—The provisions of this section that judgments rendered during a term should relate back to the first day thereof, and that the liens of all judgments rendered on the same Monday shall be of equal priority, do not apply to judgments by consent. Hood v. Wilson, 208 N. C. 120, 179 S. E. 425.

Judgment against Corporations.—A judgment against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under the statute, who had in the meantime been appointed. Odell Hdw. Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Cited in Pentuff v. Park, 195 N. C. 609, 143 S. E. 139.

§ 614. Where and how docketed; lien.—Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (Rev., s. 574; Code, s. 435; C. C. P., s. 254.)

I. In General.
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I. IN GENERAL.

See 11 N. C. Law Rev., 365, 367.

Applicable to Legal and Equitable Estates. — This section is sufficiently comprehensive to include equitable as well as legal estates. Mayo v. Staton, 137 N. C. 697, 50 S. E. 331, the principle is equally applicable when the sale to satisfy the judgment is made by an administrator. Mannix v. Ihrie, 76 N. C. 299, 301.

Where a debtor executes a deed in trust to a trustee to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same docketed, the judgment, under the provisions of this section, is a lien upon the equitable estate of the debtor. McKeithan v. Walker, 66 N. C. 95.

A judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under execution or not. Glenn Co. v. Shober, 69 N. C. 154.

A lien is a right of property, and not a mere matter of procedure. So far as it relates to lands, it is a technical term, that means a charge upon the lands running with them, and incumbering them in every charge of ownership. Ingles v. Bringhurst, 1 Dall. 341, 345, 1 L. Ed. 167.

Property converted from its original nature, as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute gives a lien, under the judgment, on all the real property of the debtor in the county, which by construction of this court embraced both legal and equitable estates. Clifton v. Owens, 170 N. C. 607, 87 S. E. 502, 505, citing Dixon v. Dixon, 81 N. C. 323.

Liability of Trustee. — A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. Barrett v. Barnes, 186 N. C. 154, 119 S. E. 194.

Requirement That Clerk to Docket Judgment Mandatory.—A judge cannot, under this section, validly issue an order to the clerk not to docket a judgment pending the fulfillment of a conditional order directed to the parties. Hopkins v. Bowers, 111 N. C. 175, 179, 16 S. E. 1; see also, section 613 and notes thereto.

Applied in Dillard v. Walker, 204 N. C. 67, 167 S. E. 632.
Cited in Jones v. Rhea, 198 N. C. 190, 151 S. E. 255.

II. CREATION OF THE LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter the purchaser takes subject to the statutory lien given by this section. Moore v. Jordan, 117 N. C. 86, 89, 23 S. E. 259. The mere rendition of the judgment will not constitute a lien, Alsop v. Mosely, 104 N. C. 60, 63, 10 S. E. 124; nor does the execution fix the lien. Pasour v. Rhyne, 82 N. C. 149, 152.

A judgment for a fine, duly docketed, constitutes a lien on realty under § 4655, and attaches immediately upon the docketing of the judgment under the provisions of this section. Osborne v. Board of Education, 207 N. C. 503, 177 S. E. 642.

In other words, the section specifies two requisites as conditions precedent to the fixing of the lien, namely (1) rendition and (2) docketing; when these two requirements are met the lien attaches as of the date of rendition. Ed. Note.

Same—Subsequent Purchasers. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights. Cowen v. Withrow, 112 N. C. 736, 741, 17 S. E. 575. See post, this note, "Priorities" II, B.

Same—Not Essential to Issuing an Execution. — Docketing is not a condition precedent to the enforcement of the judgment by final process. Bernhardt v. Brown, 122 N. C. 587, 594, 29 S. E. 884. See also, Holmon v. Miller, 103 N. C. 118, 9 S. E. 429, where it was said, "under the present system no lien is acquired upon land in **the absence of an execution and levy,** until the judgment has been docketed."

Docketing First in County of Rendition. — A judgment rendered in one county can not be docketed in another without having been first docketed in the county where it was rendered. McAden v. Banister, 63 N. C. 479.

Transcript Sent to Foreign County. — In Wilson v. Patton, 87 N. C. 318, it was held that the transcript of a judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land. Lee v. Bishop, 89 N. C. 256, 260.

2. Personalty.

Levy Necessary to Constitute Lien on Personalty. — There is no lien upon personal property, except from the levying. Merchants Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 524, 20 S. E. 765; Selby v. Dixon, 11 N. C. 424.

B. Priorities.

Record as Notice. — A plaintiff will be charged with notice of judgment entered at a regular term of court as

of the time of the entry. Sluder v. Graham, 118 N. C. 835, 23 S. E. 924.

Consent judgments, under this section, have priority in accordance with priority of docketing, since the provisions of § 613 are not applicable to consent judgments. Hood v. Wilson, 208 N. C. 120, 179 S. E. 425.

Between Judgments. — If a number of justice's judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. Perry v. Morris, 65 N. C. 221.

Between Docketed Judgment and Unrecorded Deed. — The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Where there is a lien by judgment under this section against the holder of an equitable title to lands who also holds a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed registered after the lien of the judgment had taken effect, cannot render the lien under the mortgage superior to the judgment lien, and equity will remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331; Mills v. Tabor, 182 N. C. 722, 109 S. E. 850.

An adverse holder of land under § 430, pursuant to an unrecorded deed, has title superior to the lien of a judgment based on this section, but acquired and registered after the elapse of the 20-year period against the original grantor. Johnson v. Fry, 195 N. C. 832, 143 S. E. 857.

Between Judgment and Previous Conveyance.—A judgment is not a lien upon the lands of the judgment debtor that he had previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Between Judgment and Subsequent Mortgage.—Where after the recordation of a judgment, the judgment debtor executes a mortgage on certain of his land, and the land is foreclosed under prior mortgages antedating the judgment, and the judgment debtor makes no claim to his homestead, the judgment creditor has a preference in the proceeds of the sale over the subsequent mortgage made. Duplin County v. Harrell, 195 N. C. 445, 142 S. E. 481.

Between Lien and Subsequent Purchaser.—Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of its docketing, under this section, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. Moses v. Major, 201 N. C. 613, 160 S. E. 890.

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. Byrd v. Pilot Fire Ins. Co., 201 N. C. 407, 160 S. E. 458.

Execution Sale under Prior Judgment.—A judgment is not a lien upon the lands of the judgment debtor conveyed under execution sale of a prior docketed judgment. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Subject to Homestead.—A lien on the lands of the judgment debtor, is subject to the homestead interest as provided by Const., Art. X, sec. 2. Farris v. Hendricks, 196 N. C. 439, 146 S. E. 77.

Purchaser at Execution Sale. — Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. Mills v. Tabor, 182 N. C. 722, 109 S. E. 850.

Sale under Junior Judgment. — The effect of a sale under a junior judgment is to pass the debtor's estate unencumbered with the lien of an older docketed judgment; and the affect of a sale under both is to vest the title in the purchaser, and transfer the liens, in the same order of priority to the proceeds of sale. Cannon v. Parker, 81 N. C. 320, 321.

Same—Priorities Must Be Observed. — The sheriff must observe these priorities, of which he has notice upon the face of the execution, in paying out the money to the respective creditors. Cannon v. Parker, 81 N. C. 320, 321.

Merger. — Where a creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. Springs v. Pharr, 131 N. C. 191, 42 S. E. 590.

As to Bona Fide Purchasers. — Where a judgment is entered during the term, the lien has no application against claimants who have in the meantime acquired bona fide title, and in such case the law will take notice of fractions of a day in favor of such a purchaser, and receivers of the debtor should be classed as a purchaser. Odell Hdw. Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Bona fide purchasers are also protected where there is a great delay in making motion to revive the lien, and execution being issued after the lapse of the ten year period. See note of Spicer v. Gambill, post this note, analysis line, "Issuing Execution" IV.

Judgment Creditor Prior to Debtor's Homestead. — The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtors allotted homestead, and therefore, the proceeds of the sale of such land should be applied first to the payment of the judgment debt. Gulley v. Thurston, 112 N. C. 192, 195, 17 S. E. 13. But see note of Kirkwood v. Peden, and also Vanstorn v. Thornton, post this note, analysis line, "Property Subject to the Lien" III.

Interlocutory Judgment. — An interlocutory judgment, containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, and the land was not sold, does not affect the rights of the parties. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331.

III. PROPERTY SUBJECT TO THE LIEN.

A. Property Located in County Where Judgment Docketed.

In General. — A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. King v. Portis, 77 N. C. 26, but it gives no peculiar lien upon any particular parcel of land. Bryan v. Dunn, 120 N. C. 36, 27 S. E. 37.

A judgment is a lien upon the lands of the judgment debtor that he may own in the country at the time the judgment was docketed. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Title to Standing Timber. — An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852.

Property converted from its original nature, see note of Clifton v. Owens, ante this note, analysis line "In General" I.

Homestead Not Subject to Judgment Lien. — The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. Kirkwood v. Peden, 173 N. C. 460, 92 S. E. 264. See also Gardner v. Batts, 114 N. C. 496, 19 S. E. 794, where it was said that the homestead right or estate is salable or assignable and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence.

Same—Reversionary Interest May Be Subjected. — The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. Kirkwood v. Peden, 173 N. C. 460, 92 S. E. 264.

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. Vanstory v. Thornton, 112 N. C. 196, 204, 17 S. E. 566.

Cited in Cheek v. Walden, 195 N. C. 752, 143 S. E. 465.

B. After-Acquired Property.

In General. — Under this section the lien of docketed judgments attaches to after-acquired lands in the same

county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed **pro rata** without reference to the day when they were docketed. Moore v. Jordan, 117 N. C. 86, 87, 23 S. E. 259.

Judgment by Confession. — Though a judgment by confession is given out of the ordinary course of procedure, nevertheless, it at once, when docketed, becomes a lien upon the judgment debtor's real property. Sharp v. R. R., 106 N. C. 308, 319, 11 S. E. 530.

Judgments against Land Held in Remainder. — The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien upon such estate, which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. Stern Bros. v. Lee, 115 N. C. 426, 20 S. E. 736.

Successive Transfers of Different Tracts. — Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and the rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. Brown v. Harding, 170 N. C. 253, 86 S. E. 1010, rehearing denied 171 N. C. 686, 89 S. E. 222.

Attaches upon Conveyance to Judgment Debtor. — The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or a subsequently recorded conveyance. Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 85 S. E. 40.

C. Nature of Right Acquired.

No Estate Vested. — The lien created by docketing a judgment does not vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed of at the time it attaches. Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790.

Title to Property in Third Party. — A docketed judgment constitutes no lien upon real property purchased and paid for by the debtor, where title is taken in the name of some third person. Dixon v. Dixon, 81 N. C. 323, 324.

Same—Remedy of Creditor. — In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. Dixon v. Dixon, 81 N. C. 323, 324.

Persons Entitled to Enforce. — In an action to enforce the lien of judgments against land formerly owned by the judgment debtor, it was no concern of the defendants that the person in whose name the judgments were taken was not the beneficial owner of the judgments, as defendants would be protected by payment to the plaintiff of record. Brown v. Harding, 170 N. C. 253, 86 S. E. 1010, rehearing denied, 171 N. C. 686, 89 S. E. 222.

Where Equitable Execution and Accounting Necessary. — Where there was a conflict as to the priorities of the secured creditors the plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution but had to resort to an action in the nature of an equitable execution where an account could be taken. Trimble v. Hunter, 104 N. C. 129, 134, 10 S. E. 291.

Same—Reason for the Rule. — As it (the resulting trust) could not be levied on or sold by the common law to satisfy the execution, no lien arose from its issuing or what the sheriff calls its levy. For as the lien arises or is created as a means to the end, it would be in vain for the law to raise it when the end could not be attained. McKeithan v. Walker, 66 N. C. 95, 96.

IV. ISSUING EXECUTION.

See the analysis line immediately following in this note.

Purpose. — The sole office of the execution is to enforce the lien by the sale of the land upon which it has attached. Pasour v. Rhyne, 82 N. C. 149, 152.

Time Allowed. — Leave to issue execution upon a docketed judgment may be granted at any time within ten years from the docketing. Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535.

Same—Appeal. — The motion for leave to issue execution is made in apt time, though the ten years expired pending the appeal and though no undertaking is given; this is true because the time during which the judgment creditor was restrained by the operation of the appeal is not to be counted, as the appeal had the effect to prevent the issuing of execution within the time prescribed. Adams v. Guy, 106 N. C. 278, 11 S. E. 535.

Motion to Revive. — Where a judgment creditor delays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of a motion to revive and for leave to issue execution, and the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who **bona fide** bought the land during the ten years. Pipkin v. Adams, 114 N. C. 201, 19 S. E. 105; Lilly v. West, 97 N. C. 276, 1 S. E. 834. The same principle applies where the execution is levied before the expiration of the lien but the sale does not take place until after the expiration of the lien. Spicer v. Gambill, 93 N. C. 378, 383.

Failure to Docket Judgment. — If a party who obtains judgment below neglects to docket it in any county, then upon obtaining judgment in the Supreme Court, he will have no lien prior to the **teste** of his execution from that court. Rhyne v. McKee, 73 N. C. 259, 260, 262.

Leave of court is not necessary for execution upon a judgment after the lapse of three years where the execution is issued after the effective date of the act of 1927, which repealed § 668, and within ten years from the date of the docketing of the judgment. Moses v. Major, 201 N. C. 613, 160 S. E. 890.

V. LOSS OF THE LIEN.

In General. — The lien of a judgment docketed under this section is lost by the lapse of ten years from the date of the docketing of the judgment; and this is so notwithstanding execution has been issued within the ten years. Pasour v. Rhyne, 82 N. C. 149, 152; Lyon v. Russ, 84 N. C. 588.

When Mandate to Sell the Land Expires. — A judgment recovered in the superior court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than forty days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. Jeffreys v. Hocutt, 193 N. C. 332, 335, 137 S. E. 177.

Cancellation of Judgment to Remove Cloud. — Where a deed of trust to secure certain bonds upon the lands has been duly registered, and contains the provisions that the lands may be sold in part by the trustor, and with the consent of the trustee who is to receive the purchase price and apply it on the bonds secured by the instrument, one who has purchased a part of the lands and paid part of the purchase price to the trustee who has paid it on the secured bond but has not joined in the deed by the trustor and the trust deed is uncanceled of record, the docketing of a judgment against the trustor before the party to whom the trustor conveyed a part of the land without consent in writing of trustee—purchaser who paid the purchase price, is entitled to the relief sought in his suit, to have the judgment canceled to the extent that it is a cloud upon the title to his land thus conveyed to him. Boyd v. Bristol Typewriter Co., 190 N. C. 794, 130 S. E. 858.

In What Court Judgment Impeachable. — A justice's judgment docketed in the superior court is for the purpose of execution there, and that court has no power to set it aside, unless the **cause** be carried up by appeal or writ of **recordari.** A judgment can be vacated only by the court which rendered it. Morton v. Rippy, 84 N. C. 611, 612.

§ 615. Of supreme court docketed in superior court; lien.—It is the duty of the clerk of the supreme court, on application of the party obtaining judgment in that court, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior

court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the supreme court otherwise directs. (Rev., s. 575; Code, s. 436; 1881, c. 75, ss. 1, 4.)

Editor's Note.—The foundation of the purpose of the enactment of this section is to be found in the great importance attached to the requirement that every judgment, to constitute a lien, must be docketed, the imperativeness of which has been dealt with in the preceding section. Hence by the very provisions of this section the substantial elements of a final judgment rendered by the Supreme Court must be transmitted to the various superior courts and when docketed (and not until then) in the proper county the judgment forms a lien upon the real estate of the debtor situated therein.

Rendition Does Not Perfect Lien.—The simple rendition of a judgment in the Supreme Court will not constitute a lien upon the judgment debtor's land until "docketed" in the county where the land lies, as required by the statute. Alsop v. Moseley, 104 N. C. 60, 64, 10 S. E. 124.

Issuing Execution Prior to Docketing.—See note of Bernhardt v. Brown, under section 614.

Judgment of Supreme Court Applied to Docketed Lower Court Judgment.—The defendant, by a decree in the Supreme Court, had recovered from the plaintiffs a sum of money; while the execution was in the hands of the sheriff the plaintiff recovered from the defendant, by judgments before a magistrate, a like amount for items in their account not allowed in the case in the Supreme Court. These latter judgments were docketed, and executions were taken out upon them and returned **nulla bona;** the plaintiffs then asked for an order to have the amount of the decree in favor of the defendant applied to their judgments and it was held that they were entitled to such relief. Hogan v. Kirkland, 64 N. C. 250.

§ 615(a). Fees for filing transcripts of judgments by clerks of superior courts.—The fee for filing, docketing and indexing transcripts of judgments in the offices of the several clerks of the superior court in North Carolina shall be the same fee charged for filing, docketing and indexing transcripts of judgments in the office of the clerk of the superior court of the county from which the transcript of judgment is sent to said county. (1933, c. 435, s. 1.)

§ 616. Of federal court docketed; lien.—Judgments and decrees rendered in the circuit and district courts of the United States within this state may be docketed on the judgment dockets of the superior courts in the several counties of this state for the purpose of creating liens of such judgments and decrees upon property within the county where the same are so docketed in like manner as judgments of superior courts for the purpose of creating liens upon property, but in no other manner, extent or order than as contemplated, provided and intended by the act of Congress entitled "An act to regulate the liens of judgments and decrees of the courts of the United States," approved August first, one thousand eight hundred and eighty-eight. And it is the duty of the clerk of the superior court, when a judgment roll of said circuit and district courts is filed with him, to docket it as judgments of the said superior courts are required to be docketed. (Rev., s. 576; 1889, c. 439.)

Judgment Rendered in District Court.—Judgment rendered by district and circuit courts, in order to be liens must be docketed as required by the state laws, and, since the United States may take advantage of any state or federal statute without being bound by its limitations, it may enforce the lien of the judgment in its favor though barred by the ten years limitation contained in this statute. United States v. Minor, 235 Fed. 101.

Date of Docketing Fixes the Lien.—Under the act of Congress as to docketing judgments of federal courts, and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this state for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. Riley v. Carter, 165 N. C. 334, 81 S. E. 414.

§ 616(a). On what property judgment of federal court constitutes a lien; recordation.—Judgments and decrees rendered in a circuit or district court of the United States within this State shall be a lien on property in this State and its various subdivisions in the same manner and to the same extent and under the same conditions when the same shall be registered, recorded, docketed and indexed as is required of a judgment or decree of the courts of this State, in the same way and manner and to the same extent as the same judgment rendered in a court of this State and so registered, recorded, docketed and indexed would become a lien when so registered, recorded, docketed and indexed, and such judgments shall then have all the rights, and force, and effect, as judgments of the Superior Court of said county. Such decrees and judgments of a circuit court or a district court of the United States within this State when authenticated in the same way and manner as required of judgments and decrees of courts of this State are authorized to be registered, recorded and indexed exactly under the same conditions and circumstances and in the same offices and in the same way and manner and with the same effect as judgments of courts of this State are authorized to be.

It is the intent and purpose of this section to conform the State law to the requirements of the acts of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the act of August first, one thousand eight hundred and eighty-eight, chapter seven hundred and twenty-nine, twenty-five Statutes at large, page three hundred fifty-seven. (1929, c. 310, ss. 1, 2.)

§ 617. Paid to clerk; docket credited; transcript to other countries.—The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judg-

ment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied." (Rev., s. 577; Code, s. 438; R. C., c. 31, s. 127; 1823, c. 1212; 1911, c. 76.

Payment Made to Clerk.—A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment. Sugg v. Bernard, 122 N. C. 155, 156, 29 S. E. 221.

A judgment debtor under this section is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the Superior Court in whose office the judgment is docketed, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. Dalton v. Strickland, 208 N. C. 27, 179 S. E. 20.

Same—Where Execution is in the Hands of Sheriff. — A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. Bynum v. Barefoot, 75 N. C. 576.

Clerk Receiving Depreciated Currency.—Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff or that the plaintiff has done acts from which such an authority may fairly be implied. Purvis v. Jackson, 69 N. C. 474.

Misappropriation of Payment by Clerk.—Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the Superior Court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. Gilmore v. Walker, 195 N. C. 460, 142 S. E. 579.

Liability for Loss.—The clerk of the Superior Court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, as provided by this section. Dalton v. Strickland, 208 N. C. 27, 179 S. E. 20.

§ 618. Payment by one of several; transfer to trustee for payor.—In all cases in the courts of this state wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof; if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant.

If the judgment debtors do not agree as to their proportionate liability, and it be alleged in such action by petition that any judgment debtor is insolvent or is a nonresident of the state and cannot be forced under the execution of the court to contribute to the payment of the judgment, the court shall, in the action in which the judgment was rendered, after notice to the defendants or such of them as may be within the jurisdiction of the court, submit proper issues to a jury to find the facts arising on such petition and any answer that may be filed thereto, and shall, upon such verdict and any admissions in the petition and answer, enter judgment declaring the proportionate part each judgment debtor shall pay.

Any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of a judgment debtor who shall tender payment and demand in writing a transfer thereof to a trustee to preserve his rights in the same action, as contemplated by this section, shall not thereafter be entitled to an execution against the judgment debtor so tendering payment. (1919, c. 194, ss. 1, 2; 1929, c. 68.)

Editor's Note.—The Act of 1929 amended the first paragraph of this section by permitting contribution between joint tort-feasors, and the joinder of joint tort-feasors not made parties. The amendment, of course, does not apply to a suit commenced before its enactment. Bargeon v. Transportation Co., 196 N. C. 776, 777, 147 S. E. 299.

Assignment to Third Party Necessary to Claim Subrogation.—A surety defendant in a judgment with the principal according to principles heretofore obtaining in North Carolina, without the aid of a statute, in order to preserve the judgment lien and enforce it for his reinbursement, is required on payment to have it assigned to some third person for his benefit, and, in case of collateral security, he is in such instances also entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he himself is bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal. Bank v. Sprinkle, 180 N. C. 580, 104 S. E. 477.

Subrogation Applicable between Co-Sureties.—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own credit, and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852.

What Constitutes a Refusal to Transfer.—Under a proper interpretation of the relevant parts of this section the refusal of the judgment creditor to transfer the judgment to some third person to preserve the lien thereof for the benefit of the surety, tendering payment of the same, means his final refusal to do so, and not when the status of the parties remain the same, and the judgment creditor subsequently offers and stands willing to assign the judgment as the statute requires. Bank v. Sprinkle, 180 N. C. 580, 104 S. E. 477.

Proportionate Liability of Sureties.—The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or who have property available to process within the jurisdiction of the court. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852.

Surety Cannot Raise Question of Liability after Judgment.—By paying the whole judgment, one joint tort-feasor, under this section, can lose no right it has against the other tort-feasor or its surety. If the surety is a party

to the judgment and bound thereby it cannot thereafter raise the question of its liability to the defendant, when it pays the judgment in full and requires the transfer of said judgment to a trustee by virtue of the provision of this section. Hamilton v. Southern R. Co., 203 N. C. 468, 471, 166 S. E. 392.

Contribution between Joint Tort Feasors.—This section seems to abrogate the well-settled rule, that, subject to some exceptions (Gregg v. Wilmington, 155 N. C. 18, 70 S. E. 1070), there can be no contribution between joint tort-feasors. Lineberger v. Gastonia, 196 N. C. 445, 146 S. E. 79, 82, citing Raulf v. Elizabeth City Light, etc., Co., 176 N. C. 691, 97 S. E. 236.

Cited in Jones v. Rhea, 198 N. C. 190, 151 S. E. 255; Gaffney v. Phelps, 207 N. C. 553, 560, 178 S. E. 231.

§ 619. Clerk to pay money to party entitled.—The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution. (Rev., s. 578; Code, s. 439; R. C., c. 31, s. 128; 1823, c. 1212, s. 2.)

§ 620. Credits upon judgments.—Where a payment has been made on a judgment docketed in the office of the clerk of the superior court, and no entry made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render his judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on the appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification has been finally disposed of. (Rev., s. 579; 1903, c. 558.

Parol Agreement to Convey Land Not within Section.—Upon a motion to enter satisfaction of a judgment under this section, a defendant may not set up his parol executory agreement to convey lands to the plaintiff for that purpose, such is not in the purview of the statute, and not enforcible by him under the statute of frauds. Brown v. Hobbs, 154 N. C. 544, 70 S. E. 906.

§ 621. For money due on judicial sale.—The supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection. (Rev., s. 1524; Code, s. 941; R. C., c. 31, s. 129.)

Constitutionality.—This section is constitutional and does not contravene the right of trial by jury. Ex parte Cotten, 62 N. C. 79, 81.

Motion Proper Method to Enforce Contract.—An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale will not be entertained if objection be made in apt time; the proper course is to enforce the contract by a motion in the cause in which the sale is decreed, Lackey v. Pearson, 101 N. C. 651, 8 S. E. 121; but this matter is within the control of the court and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time —in this case, sixty days. Davis v. Pierce, 167 N. C. 135, 83 S. E. 182.

Same—When Independent Action Allowed.—If the objection is not made at the proper time the court may proceed with the independent action. Lackey v. Pearson, 101 N. C. 651, 8 S. E. 121. Such objection will not be entertained when made for the first time in the Supreme Court. Id.

Failure of Purchaser to Comply with His Bid.—If a purchaser at a judicial sale fails to comply with his bid, the court may either decree, first, that he specially perform his contract, or, second, that the land be resold and the purchaser released, or third, that without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price. Hudson v. Coble, 97 N. C. 260, 1 S. E. 688.

Ten Days' Notice Required.—Any court, which orders a judicial sale, has the power to make a decree for the money after ten days' notice thereof. Exparte Cotten, 62 N. C. 79.

Waiver of Right to Jury Trial.—Although the defendant under this section is entitled to have the issue, where the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned he fails to appear and answer, he waives that right. Durham v. Wilson, 104 N. C. 595, 10 S. E. 683.

Sale by Administrator.—A sale of land for assets, made by an administrator, pursuant to a judgment in a probate court, in a proceeding instituted for that purpose, is a judicial sale, and the provisions of this section are applicable thereto. Mauney v. Pemberton, 75 N. C. 219, 220; Chambers v. Penland, 78 N. C. 53.

When Court May Reopen Case.—Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

Petition by Commissioner.—A commissioner appointed for the sale of land in proceedings for partition, after confirmation of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited. It was held, upon demurrer, that the allegations of the petition must be considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

§ 622. Applicable to justices' courts.—This article applies, wherever appropriate, to proceedings in courts of justices of the peace. (Rev., s. 562; Code, s. 389.)

Art. 24. Confession of Judgment

§ 623. When and for what.—A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article. (Rev., s. 580; Code, s. 570; C. C. P., s. 325.)

See section 624 and notes thereto.

This section and §§ 624, 625 are mere procedural statutes, regulating the practice of the courts, and can of course have no extraterritorial effect or be looked to as limiting the powers of corporations. Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790, 793.

Court Must Have Jurisdiction.—It is essential that the court have jurisdiction before a judgment on confession can be validly entered. Slocumb v. Shingle Co., 110 N. C. 24, 14 S. E. 622.

Same—May Be Collaterally Impeached.—Judgment, void if

for want of jurisdiction in the court, if such appears on the record, may be collaterally impeached in any court in which the question arises. Hervey v. Edmunds, 68 N. C. 243.

Manner of Attacking Judgment by Confession.—Judgment by confession, being a final judgment, cannot be collaterally attacked for fraud, this must be done by an independent action properly constituted for that purpose. Sharp v. Danville etc., R. R., Co., 106 N. C. 308, 11 S. E. 530; Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6.

For What Judgment May be Confessed.—A judgment by confession may be taken to cover a future debt. Bank v. Higginbottom, 9 Pet. 48, 9 L. Ed. 46.

So also a judgment may, it seems, be confessed for a specific sum claimed, subject to the right of the party confessing to reduce the amount, and in case of failure or omission to do so the whole amount will be collectible. Gear v. Parish, 5 How. 168, 12 L. Ed. 100.

Confession by Partner.—It would seem to be well settled that, even before dissolution, one partner cannot confess judgment so as to bind his copartners. Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271.

Confession by Guardian.—A judgment confessed by a guardian of one non compos mentis, under the provisions of this section, if the statement required be verified by the guardian in the absence of fraud, is not irregular. McAden v. Hooker, 74 N. C. 24.

In White v. Albertson, 14 N. C. 241, the process had been served on the guardian above, [alone] and not on the infants also, as it should have been, and the guardian permitted judgment against the infants by nil decit; yet it was held that the judgment was not irregular, although in that case it was said the court had acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to represent him in that case. The analogy between infants and lunatics is so close as to justify the conclusion that a similar judgment against a lunatic would not be irregular. McAden v. Hooker, 74 N. C. 24, 29.

A judgment confessed by executors on a debt created after the death of the testator and during the time of administration will bind them in their individual capacity, though they style themselves as executors in making such a confession. Hall v. Craige, 65 N. C. 51.

Confession May be Made to State.—A person may confess a judgment, or recognizance on record, to the state for a sum of money, as well as to an individual. Therefore, where A was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B, in consideration that A should be discharged from custody, confessed a judgment to the state for the fine and costs, it was held that the judgment could not afterwards be set aside. State v. Love, 23 N. C. 264.

Confession by Corporation.—A corporation, nothing to the contrary appearing, may by the action of its proper officers confess judgments as a natural person, if the essential requirements of the statute are complied with. Sharp v. Danville etc., R. R. Co., 106 N. C. 308, 11 S. E. 530.

Same—Authority Should Be Shown.—A corporation may confess judgment, without action, in or out of term, but the record should show that the officer or person who represented the corporation in the proceedings was duly authorized to act, and that he did act under the direction of his principal. Nimocks v. Cape Fear Shingle Co., 110 N. C. 20, 22, 14 S. E. 622.

Construction of Warrant of Attorney.—It seems to be an established principle that an authority given by warrant of attorney to confess a judgment against the maker of a note must be clear and explicit and strictly construed, and the court cannot supply any supposed omissions of the parties. National Exchange Bank v. Wiley, 195 U. S. 257, 49 L. Ed. 184.

Effect of Confession.—It has been held that the confession of a judgment does indeed create a contract; but it is only on the side of the defendant, who thus acknowledges or assumes upon himself a debt, which may be made the ground of an action. Livingston v. Moore, 7 Pet. 469, 8 L. Ed. 751.

But on the side of the plaintiff, the necessity of resorting to certain means of enforcing that judgment, is not an obligation arising out of contract, but one imposed upon him by the laws of the country. Id.

Parol Evidence Not Admissible.—Where a judgment is confessed by one against himself, and so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another. Davidson v. Alexander, 84 N. C. 620.

Mistake as Ground for Relief.—If a judgment be confessed under a clear mistake, a court of law will set the judgment aside, if application be made, and the mistake shown, while the judgment is in its power. Walden v. Skinner, 101 U. S. 577, 25 L. Ed. 963.

But, if the judgment is no longer in the power of a court of law, relief may be obtained in a court of chancery. Id.

§ 624. Debtor to make verified statement.—A statement in writing must be made, signed, and verified by the defendant, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it is for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed is justly due, or to become due.

3. If it is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same. (Rev., s. 581; Code, s. 571; C. C. P., s. 326.)

Editor's Note.—This section must be read in connection with the preceding one, as compliance with the provisions of the one without the other is not sufficient. As was said in Sharp v. Danville, etc., R. R. Co., 106 N. C. 308, 319, 11 S. E. 530, "It is not sufficient simply to confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by the statute." (Reference being made to this section.)

Section Strictly Construed.—Strict compliance with the provisions of this section is required, and if all the requirements are not met the judgment is void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. Smith v. Smith, 117 N. C. 348, 23 S. E. 270.

It is essential to the validity of a judgment by confession that it be confessed and entered of record according to the provisions of this section. These are essential matters required by the section to confer jurisdiction on the court, and to insure validity of the judgment. Farmers' Bank v. McCullers, 201 N. C. 440, 160 S. E. 494.

Verified Statement of Facts Required.—A judgment confessed under this section must contain a verified statement of the facts and transactions out of which the indebtedness arose. Davenport v. Leary, 95 N. C. 203, 204. And a mere statement that the debts are **bona fide** due, without embracing the account which was filed, is not a sufficient compliance. Id. See also, Davidson v. Alexander, 84 N. C. 620, and Merchants Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765, the latter case holding that the confession is sufficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price and value of the goods.

Debts Evidenced by Note or Bond.—A judgment confessed upon the statement that defendant is indebted to the plaintiff in a certain sum "arising from the acceptance of a draft," setting out a copy thereof, is irregular and void. Davidson v. Alexander, 84 N. C. 621.

A statement that the amount was due by a certain note described in the judgment, that said note became due on a day named, and that the consideration was cotton sold and delivered—was a compliance with this section. Merchants Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Where the affidavit stated that the amount was due on a bond under seal for borrowed money, due and payable 2 November, 1876, it was held that the statement was sufficient. Uzzle & Co. v. Vinson, 111 N. C. 138, 16 S. E. 6.

Same—This Requirement Mandatory.—The filing of the concise statement of the facts out of which the indebtedness arose, required of the party confessing judgment, is mandatory. Davidson v. Alexander, 84 N. C. 620, 625.

Same—Reason for the Rule.—A confession of judgment being a proceeding in derogation of a common right, the statute requires, as a protection against the perpetration of fraud, that the consideration out of which the debt arose be stated, and an averment that the debt for which the judgment is confessed "is justly due." Smith v. Smith, 117 N. C. 348, 350, 23 S. E. 270.

Confession of Judgment with Defeasance.—It is a well recognized practice to confess a judgment with a defeasance, and the courts will take notice of the condition, and will not permit an execution to issue in violation of it. Hardy v. Reynolds, 69 N. C. 5.

A stipulation in a confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of

other creditors, and does not vitiate the judgment. Merchants Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment is insufficient to meet the requirements of the statute, and is void. Farmers' Bank v. McCullers, 201 N. C. 440, 441, 160 S. E. 494.

Showing that Debt is Due Sufficient without Statement.—A confession of judgment which states the amount for which the judgment is confessed, and states that the same is due by a certain promissory note due and payable on a day named, and that the consideration for the same was an article sold and delivered, sufficiently conforms to the statute provided the statement is true, for then it follows that it is shown that the amount "is justly due." Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Description of the Nature of the Indebtedness Sufficient.—The failure to file with the confession of judgment the note or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Where Judgment Does Not Expressly Authorize Filing.—Although a confession of judgment does not contain words expressly authorizing the clerk to enter the same upon the records, yet, if the record shows that the confession was sworn to and filed and judgment thereupon entered, the filing is equivalent to an express authority for its entry and sufficiently conforms to the statute. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Judgment Is a Lien for the Amount Named.—A judgment confessed to provide security against a contingent liability is authorized by the code, and must be a lien for the full amount named till the actual loss is determined at a lesser sum. Darden v. Blount, 126 N. C. 247, 250, 35 S. E. 479.

Judgment Containing Irregularities.—Ordinarily, a judgment by confession without action will not be set aside for mere irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it will be set aside or quashed. Nimocks v. Cape Fear Shingle Co., 110 N. C. 20, 22, 14 S. E. 622.

Same—Judgments by Confession May Be Amended as Other Judgments.—Such irregularities in a confession of judgment as might be corrected by amendment in the case of ordinary judgments may be the subject of amendment in a confession of judgment. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Same—Irregularities Only May Be Cured by Amendment.—If the proceedings are so defective in form and substance that it is void upon its face, no amendment can be made to give it life; but if there are irregularities they may be cured by amendment. Bank v. Newton Cotton Mills, 115 N. C. 507, 524, 20 S. E. 765.

Same—Who May Set Aside the Judgment.—A judgment may be set aside for irregularity only upon the application of a party thereto. Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6.

§ 625. Judgment; execution; installment debt.—The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form; but must have indorsed thereon, by the attorney or person issuing it, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment remains as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may, in like manner, be issued for its collection and enforcement. (Rev., s. 582; Code, s. 572; C. C. P., s. 327.)

Substantial Compliance Required.—The requirements of this section, like those contained in the two preceding sections, must be, at least, substantially complied with. Sharp v. Danville, etc., R. R. Co., 106 N. C. 308, 321, 11 S. E. 530.

When and Where Judgment Entered.—The mere fact that the judgments were entered in the night time and in the law office of counsel, which was near to the courthouse and convenient, did not render them void or irregular. Sharp v. Danville, etc., R. R. Co., 106 N. C. 308, 321, 11 S. E. 530.

Art. 25. Submission of Controversy without Action

§ 626. Submission, affidavit, and judgment. — Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending. (Rev., s. 803; Code, s. 567; C. C. P., s. 315.)

Editor's Note.—The prime (and practically the only) object of this section is to prevent expensive litigation. This being true, its provisions are quite limited in their operation. They are applicable only to a case where there are parties to a question which might be the subject of a civil action in which a judgment might be rendered for one party against the other.

The purpose of this section, is to enable parties to a question in difference, which might be the subject of a civil action, where they agree as to the facts involved, to submit the facts to the court, for its decision of the question in difference, and for its judgment in accordance therewith, without the expense and formalities required for a civil action. Hicks v. Greene County, 200 N. C. 73, 76, 156 S. E. 164.

Where the parties submit to the court questions of law arising upon facts agreed, without showing that they have rights involved in the questions, upon which they would be entitled to judgment, in a civil action the court is without jurisdiction, under this section, and should decline to consider the questions submitted for its decision. Id.

The jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts, was not conferred by this section. Wright v. McGee, 206 N. C. 52, 54, 173 S. E. 31.

Court Must Have Jurisdiction.—The submission of controversy without action under this section must be to a court of competent jurisdiction over the subject matter. Lenoir Drug Co. v. Town, 160 N. C. 571, 76 S. E. 480: And as the superior court has no jurisdiction over an action to recover a town tax of $5 paid to an incorporated town under written protest, an action therefor in that court should be dismissed. Id.

A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the provisions of this section, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, § 11; and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed. Greene v. Stadiem, 197 N. C. 472, 149 S. E. 685.

Not Applicable to Justices' Court. — This section has no application to the court of a justice of the peace. Wilmington v. Atkinson, 88 N. C. 54, 55. .

Verification by Affidavit Essential.—It is essential that the submission be verified by an affidavit. Millikan v. Fox, 84 N. C. 108, 109; Hervery v. Edmunds, 68 N. C. 243. And where there is a failure to file an affidavit to the effect that the controversy is real, and the proceedings are in good faith to determine the rights of the parties, the Supreme Court will refuse to hear the case, as this requirement, under the section, is an indispensable requisite to the exercise of jurisdiction in such a case. Grant v. Newsom, 81 N. C. 36. 37. See also, Grandy v. Gulley, 120 N. C. 176, 177, 26 S. E. 779; Arnold v. Porter, 119 N. C. 123, 25 S. E. 785; Wilmington v. Atkinson, 88 N. C. 54.

Same—Exception.—While the Supreme Court has no jurisdiction of a case submitted without action, under this section, where it does not appear by affidavit that a controversy is real, yet, where all the parties interested in the construction of a will (including the executor, who is a claimant and is in possession of the property concerning which the question arises) agree, as petitioners, to submit the question to the decision of a judge of the superior court, it was held, that this court will take cognizance of the case as an application by the executor for a construction of the will, so as to enable him to dispose of the fund in his hands. Ruffin v. Ruffin, 112 N. C. 102, 16 S. E. 1021.

Interests Must Be Antagonistic.—For the courts to pass upon a controversy submitted under the provisions of this section the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are one in interest, or desire the same relief. Burton v. Durham, etc., Realty Co., 188 N. C. 473, 125 S. E. 3.

Where it appears that an action is instituted solely to obtain the advice and opinion of the Court as to the validity of a proposed county bond issue upon the facts agreed, and that the interest of both parties is the same and there is no "question of difference" between them, the proceeding will be dismissed for want of jurisdiction. Moore v. Caldwell County, 207 N. C. 311, 176 S. E. 580.

An agreement as to the facts and for the court to rule the law, in a suit to quiet title to lands, differs from a controversy submitted without action under the provisions of this section. Dowling v. So. Ry. Co., 194 N. C. 488, 140 S. E. 213.

Section Contemplates the Rendition of a Judgment.—The true construction of this section is, that it does not confer upon certain parties who differ as to their rights to propound to the court on a case agreed interrogatories in respect thereto, but that the purpose is simply to dispense with the formalities of a summons, complaint and answer, and upon an agreed state of facts to submit the case to the court for decision, and thereupon the judge shall hear and determine the case and "render judgment thereon as if an action were pending." McKethan v. Ray, 71 N. C. 165, 170; Farthing v. Carrington, 116 N. C. 315, 325, 22 S. E. 9 ; Little v. Thorne, 93 N. C. 69.

Same—Sufficiency of Facts Stated.—The statement of the facts agreed upon should contain sufficient averments to constitute a cause of action upon which the court could render judgment. Farthing v. Carrington, 116 N. C. 315, 335, 22 S. E. 9.

When a case is heard under this summary method authorized by the Code, the statement should embrace all the facts material to a final and complete determination, with nothing further to be done except to carry the judgment into effect. Moore v. Hinnant, 87 N. C. 506.

Same—Where Question of Great Public Concern Involved.—Where, under this section a controversy is submitted which involves matters of great public concern and which is supported by an affidavit that a real case exists, and that the controversy is submitted in good faith to determine the rights of the parties, the Supreme Court will, upon appeal, determine the question of law thus raised, it being stated with entire distinctness, although the statement of facts is not full enough to render a judgment commanding or prohibiting a thing to be done. Farthing v. Carrington, 116 N. C. 315, 22 S. E. 9.

No Prayer for Judgment Necessary.—In an action submitted without controversy no prayer for judgment is necessary. Williams v. Commissioners, 132 N. C. 300, 43 S. E. 896.

Exhibits Containing Facts Not Attached.—The summary method provided by this section for the submission of an action upon a case agreed, contemplates that all the facts necessary to a determination of the questions submitted shall be fully stated in the case agreed; and where it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given the parties to add other matters, the cause was remanded to be perfected. Piedmont R. Co. v. Reidsville, 101 N. C. 404, 8 S. E. 124.

Plaintiff Permitted to File Affidavit after Case Docketed.—Where, when the case was docketed in the Supreme Court, no affidavit had been filed as required by this section, the plaintiff upon motion (the defendant being present and not objecting) was allowed to file the required affidavit. Bank v. Trust Co., 119 N. C. 553, 554, 26 S. E. 131.

Parties.—All persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in case of an action instituted in the same way. McKethan v. Ray, 71 N. C. 165, 170.

Facts Must Show Equitable Dealings When Wife is Party.—Where a controversy, properly constituted, is submitted without action under the provisions of this section, involves the question as to the necessity of the wife of a tenant in common to join in his deed voluntarily given to divide the lands between himself and the other tenants in common, on appeal the case will be remanded if it does not appear in the facts agreed that the division so made was a fair and equitable one. Valentine v. Granite Corp., 193 N. C. 578, 137 S. E. 668.

Conflicting Claims to Money, in Sheriff's Hands.—Where a sheriff has money in his hands under executions in favor of different creditors, against the same defendant, and the creditors set up conflicting claims to the money, it is not such a case as may be submitted to a judge, without an action, under this section, by the adverse claimants. Bates v. Lilly, 65 N. C. 232.

Title to Office May Not Be Tried under Section.—A civil action in the nature of a writ of **quo warranto** it the proper mode of trying title to a public office; the submission of a controversy without action under this section for that purpose cannot be sustained. Davis v. Moss, 81 N. C. 303.

Where Controversy May Not Be Considered.—An action brought by the seller of a cotton-scale beam may not be maintained against the purchaser thereof in anticipation of the latter's claim for damages arising upon the breach of an implied warranty against defects that caused damages to the purchaser, and under this section upon demurrer the controversy may not be considered by the court as upon a case agreed. Equitable rights of bills of peace, quia timet, and to remove clouds on title to lands distinguished. Jacobi Hdw. Co. v. Jones Cotton Co., 188 N. C. 442, 124 S. E. 756.

Jury Trial Not Contemplated by the Section.—This section does not contemplate a trial by jury. Moore v. Hinnant, 90 N. C. 163, 164. Whether or not the Supreme Court can remand the case and direct an issue of fact to be tried by a jury in the court below was left undecided, although inclination was shown that this might be done if the application therefor is made in apt time.

Illustrative Cases.—It is impossible in a work of this nature to collect all the cases bearing upon this section, and to state the facts found and the question involved therein. A few of the leading cases are given to show that where the essential requirements have been complied with, the courts have not confined the application of the method prescribed by the provisions of this section to any particular classes of questions. Ed. Note.

Case May Be Submitted after Issues Joined.—The parties may agree upon a state of facts and submit it to the judge for his decision, even after issues are joined. Hervey v. Edmunds, 68 N. C. 243, 247.

Same—Recovery of Specific Legacy.—A controversy, the purpose of which was to recover a specific legacy given by the terms of a will, and to determine the conditions on which it was to be received, was submitted to the court under this section. University v. Gatling, 81 N. C. 508, 509.

Same—Homestead and Personal Property Exemption. — The question whether or not minor children, whose mother and father died, neither of whom having applied for a homestead or personal property exemption, were entitled to claim such exemptions, was decided under the method prescribed by the provisions of this section. Welch v. Welch, 78 N. C. 240.

Same—Bank Deposit Applied on Matured Note. — The legality of the application by the banks of the balance of a bankrupt depositor on a note already matured, was the question submitted without action in Trust Co. v. Spencer, 193 N. C. 745, 138 S. E. 124.

Same—Sheriff's Right to Commission.—The facts agreed upon in the case of Board v. Commissioners, 137 N. C. 63, 49 S. E. 47, presented for determination the question whether or not a sheriff is allowed to retain a commission out of the school taxes collected by him.

Same—Specific Performance.—The question whether the plaintiff, who had contracted to convey certain land, could compel the defendant to fulfill the contract, when some doubt as to whether he (the plaintiff) could convey a good and indefeasible title arose by force of certain terms used in a will under which the plaintiff acquired the land, was submitted in Watts v. Griffin, 137 N. C. 572, 50 S. E. 218.

Same—Land Claimed under Conflicting Grants.—Where the parties claimed the same land under conflicting grants, the question as to the true owner was submitted without action in Janney v. Blackwell, 138 N. C. 437, 438, 50 S. E. 857.

Same—The recovery of advances of money to meet losses sustained by a broker, the advances being made at the request of his principal, was the purpose of the action in Black & Co. v. Carr, 80 N. C. 295.

Same—The determination of the owner of the legal title of a safe sold upon a conditional sales contract, followed by the bankruptcy of the purchaser, was the question in Brem v. Lockhardt, 93 N. C. 191, 192.

Taxes.—The section is applicable in the determination of the question whether a party is obligated for taxes demanded of him. Pullen v. Commissioners, 68 N. C. 451.

Same—Purchase of Municipal Bonds.—The determination of the liability of the defendants, under an agreement to purchase certain municipal bonds, was the question involved in the case submitted in Charlotte v. Shepard, 120 N. C. 411, 412, 27 S. E. 109.

Same—General Assignment.—The question submitted without action in Winston v. Biggs, 117 N. C. 206, 23 S. E. 316 was this: Is the assignee under a general assignment for the benefit of creditors required upon demand to pay a dividend out of funds in his hands for distribution upon the basis of the entire debt of one of the creditors secured in the deed, who has, and who had at the time of the execution of the assignment, a prior security upon a piece of property also conveyed in the assignment, or is the trustee to pay such creditor a dividend only on the balance due after the creditor has exhausted his prior security and applied the same to his debt?

Part Due Bonds as Counterclaim.—The question presented without action in Bourne v. Board of Financial Control, 207 N. C. 170, 176 S. E. 306, was this: Can past due county bonds owned at the commencement of the action, be used as a counterclaim against a promissory note belonging to said county?

Parity of Street Assessment with Tax Liens.—The question presented for determination under this section and § 628 in the case of Saluda v. Polk County, 207 N. C. 180, 176 S. E. 298, was whether a street assessment constitutes a lien on a parity and of equal dignity with tax lien.

Applied in Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377, with reference to the constitutionality of certain private corporate acts; in Beaufort County v. Mayo, 207 N. C. 211, 176 S. E. 753, with reference to determining title to land.

Cited in Posey v. Board of Education, 199 N. C. 306, 154 S. E. 593; Zimmerman v. Board of Education, 199 N. C. 259, 260, 154 S. E. 397; De Laney v. Hart, 198 N. C. 96, 150 S. E. 702; Qualls v. Farmers', etc., Bank, 197 N. C. 438, 439, 149 S. E. 546; Wachovia Bank & Trust Co. v. Black, 198 N. C. 219, 151 S. E. 269; Commerce Union Trust Co. v. Thorner, 198 N. C. 241, 151 S. E. 263; New York Indemnity Co. v. Corporation Commission, 197 N. C. 562, 150 S. E. 16; Lowery v. Goldsboro Lumber Co., 197 N. C. 299, 148 S. E. 926; Callahan v. Flack, 205 N. C. 105, 170 S. E. 125.

§ 627. Judgment roll.—Judgment shall be entered on the judgment docket, as in other cases, but without cost for any proceedings prior to trial. The case, the submission, and a copy of the judgment, constitute the judgment roll. (Rev., s. 804; Code, s. 568; C. C. P., s. 316).

Judge May Sign Judgment in Vacation.—A judge of the superior court has a right, with consent of parties, to sign a judgment in vacation out of court, and to order the same to be entered of record at the ensuing term. Hervey v. Edmunds, 68 N. C. 243; but this does not apply to criminal cases. State v. Alphin, 81 N. C. 567.

§ 628. Judgment enforced; appeal.—The judgment may be enforced in the same manner as if it had been rendered in an action, and is subject to appeal in like manner. (Rev., s. 805; Code, s. 569; C. C. P., s. 217.)

No particular assignment of error is necessary, when the appeal is taken from a judgment on an agreed statement of facts. Davenport v. Leary, 95 N. C. 203, 204.

Facts Showing No Cause of Action.—Where the facts agreed in a controversy without action show no cause of action, an appeal from a judgment thereon will be dismissed in the Supreme Court, as where the plaintiff claims title under a deed, avers that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth sufficiently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action, thus presenting a moot question which the court will not decide. Waters v. Boyd, 179 N. C. 180, 102 S. E. 196.

Art. 25A. Declaratory Judgments

§ 628(a). Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

See 12 N. C. Law Rev., 57, for note on this section.

Editor's Note.—Section 14 of the act from which this article is codified provides: "The several sections and provisions of this act, except sections one and two, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative."

This valuable legislation is passed in substantially the form of the Uniform Act recommended by the National Conference of Commissioners on Uniform State Laws, the variations from that standard being to adjust it more effectively to local procedure. See the explanation and comments in 9 N. C. Law Rev. 20-24.

One has only to look at the state of the law in North Carolina as disclosed in the case of Hicks v. Greene County, 200 N. C. 73, 156 S. E. 164, by way of contrast to appreciate the improvement which the Declaratory Judgment Act brings to procedure in this state. N. C. Law Rev. 352, 353.

This and subsequent sections applied in Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481, to determine the rights and duties of the parties with respect to the administration of assets of the Rutherford Bank under the provisions of Chapter 344, public local laws of North Carolina, 1933.

Necessity for a Controversy.—If it does not appear that any controversy exists between plaintiffs and defendants as to their respective rights, status, or legal relations, the action will be dismissed as not coming within the provisions of this and the following sections. Wright v. McGee, 206 N. C. 52, 173 S. E. 31.

Applied in Farnell v. Dongan, 207 N. C. 611, 178 S. E. 77, with reference to rights in the property of deceased.

Cited in In re Reynolds, 206 N. C. 276, 286, 173 S. E. 789.

§ 628(b). Courts given power of construction of all instruments.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

§ 628(c). Who may apply for a declaration. — Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1931, c. 102, s. 3.)

§ 628(d). Enumeration of declarations not ex-

clusive.—The enumeration in sections 628(b) and 628(c) does not limit or restrict the exercise of the general powers conferred in section 628(a) in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 102, s. 4.)

§ 628(e). Discretion of court.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (1931, c. 102, s. 5.)

§ 628(f). Review.—All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

§ 628(g). Supplemental relief.—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

§ 628(h). Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding, which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

§ 628(i). Jury trial.—When a proceeding under this act involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

§ 628(j). Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.—Proceedings under this act shall stand for trial at a term of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the Superior Court. If in such case the parties do not agree upon a judge for the hearing, then upon motion of the plaintiff the proceeding may be heard by the resident judge of the district, or the judge holding the courts of the district, or by any judge holding a term of the Superior Court within the district. Such motion shall be in writing, with ten days notice to the defendant, and the judge so designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the Clerk of the Superior Court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearing in other civil actions before a judge without a jury. The term "Superior Court Judge" used in this section shall include emergency and special judges of the Superior Court. (1931, c. 102, s. 10.)

§ 628(k). Costs.—In any proceeding under this act the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

§ 628(l). Liberal construction and administration.—This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 102, s. 12.)

§ 628(m). Word "person" construed. — The word "person" wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 102, s. 13.)

§ 628(n). Uniformity of interpretation. — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 102, s. 15.)

§ 628(o). Short title.—This act may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)

SUBCHAPTER IX. APPEAL.

Art. 26. Appeal

§ 629. Writs of error abolished.—Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this chapter. (Rev., s. 583; Code, s. 544; C. C. P., s. 296.)

Editor's Note. — Prior to the adoption of the Code of Civil Procedure writs of error were allowed in proper cases. But in Smith v. Cheek, 50 N. C. 213, it was held that the Supreme Court had no power to issue a writ of error. Section 296 of the Code of Civil Procedure abolished writs of error and substituted appeals therefor. Lynn v. Lowe, 88 N. C. 478; White v. Morris, 107 N. C. 93, 12 S. E. 80.

Cited in King v. Wilmington, etc., Ry., 112 N. C. 318, 16 S. E. 929.

§ 630. Certiorari, recordari, and supersedeas.— Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (Rev., s. 584; Code, s. 545; 1874-5, c. 109.)

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II. Certiorari.
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For complete note on this subject see 2 Enc. Dig. 920 et seq; 13 Enc. Dig. 366, 367.

I. EDITOR'S NOTE.

The original Code of Civil Procedure of 1868, abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari, as was pointed out by the Supreme Court in Marsh v. Williams, 63 N. C., 371. And thereupon this section was enacted, (Public Laws 1874-75, c. 109).

Whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that has been provided proves inadequate, the Supreme Court to all courts of the state and the superior courts to all subordinate courts, over which they exercise appellate power, may issue one or more of these writs and thereby see that the error is corrected and justice administered. State v. Tripp, 168 N. C. 150, 154, 83 S. E. 630.

II. CERTIORARI.

A. Editor's Note.

For regulations of the Supreme Court in regard to the writ of certiorari see Supreme Court rule 34. It is very important that appellant's petition should comply with these regulations as the writ will be dismissed for his failure to do so. Where petitioner failed to give the notice required by Supreme Court Rule 34 the writ will not issue. Sanders v. Thompson, 114 N. C. 282, 19 S. E. 225; Keerans v. Keerans, 109 N. C. 101, 13 S. E. 895. However notice may be waived. Anonymous, 2 N. C. 405.

The writ of certiorari is an extraordinary remedial writ and lies for two purposes: First, as a writ of false judgment to correct errors of law and, second, as a substitute for an appeal. In either case it can issue only to the court where the judgment is. Therefore when the cause has been transferred by appeal the writ must be dismissed. Williams v. Williams, 71 N. C. 427. Its object is to prevent an improper deprivation of appeal.

Where a cause is removed from one superior court to another, the latter has the right to issue a writ of certiorari to the former, directing a more perfect transcript to be certified; for the right to issue writs of certiorari is not founded on the circumstance that the court from which the writ issues is superior to that to which it is directed; but upon the principal that all courts have the right to issue any writ necessary to the exercise of their powers. State v. Reid, 18 N. C. 377.

Where appellant has lost his right to appeal by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. McConnell v. Caldwell, 51 N. C. 469.

Where a statute authorizing a proceeding makes no provision for a review, certiorari may be maintained for that purpose. Board of Comm'rs v. Smith, 110 N. C. 417, 14 S. E. 972.

Where no appeal to the superior court from an inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a certiorari in lieu of appeal will issue from the superior court. McPherson Drug Co. v. Norfolk, etc., R. Co., 173 N. C. 87, 91 S. E. 606.

It is the only method by which the Supreme Court can review the judgment in habeas corpus proceedings in matters not involving the custody of children. In re Holley, 154 N. C. 163, 69 S. E. 872. Certiorari may issue from the superior courts as well as the Supreme Court. Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57.

B. General Consideration.

Substitute for Appeal. — A writ of certiorari to bring up the record in a case is the proper substitute for an appeal. State v. McGimsey, 80 N. C. 377.

If an appeal is unavoidably lost, certiorari may be granted as a substitute. Anonymous, 2 N. C. 302; Norwood v. Pratt, 124 N. C. 745, 32 S. E. 979.

Discretion of Supreme Court. — The granting or refusing of a petition for a certiorari, is a matter within the discretion of the Supreme Court. King v. Taylor, 188 N. C. 450, 124 S. E. 751; Waller v. Dudley, 193 N. C. 354, 137 S. E. 149; Peoples Bank, etc., Co. v. Parks, 191 N. C. 263, 131 S. E. 637.

When Certiorari a Matter of Right. — Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. Wiley v. Lineberry, 88 N. C. 68; State v. Bennett, 93 N. C. 503; State v. Bill, 35 N. C. 373. Even though the conduct was unintentional. Walton v. Pearson, 83 N. C. 309.

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as "a matter of course." Bledsoe v. Snow, 48 N. C. 100.

Cannot Be Dispensed with. — Certiorari is a discretionary writ, and counsel may not despense with it by agreement. In re McCade, 183 N. C. 242, 111 S. E. 3; State v. Hooker, 183 N. C. 763, 111 S. E. 351.

Persons Entitled. — To entitle one to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. Petty v. Jones, 23 N. C. 408. See Shober v. Wheeler, 119 N. C. 471, 26 S. E. 26; Otey v. Rogers, 26 N. C. 534.

When Another Remedy Available. — Certiorari is not a proper remedy where another adequate remedy is available. Petty v. Jones, 23 N. C. 408; Watson v. Shields, 67 N. C. 235.

Finality of Determination. — Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. Smith v. Miller, 155 N. C. 247, 71 S. E. 355.

Applicant Must Negative Laches. — He who seeks a certiorari must negative laches. Peoples Bank, etc., Co. v. Parks, 191 N. C. 263, 131 S. E. 637; Cox v. Kinston Carolina, etc., R. Co., 177 N. C. 277, 98 S. E. 704; Mitchell v. Baker, 129 N. C. 63, 39 S. E. 633.

Negligent Delay. — One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. Suiter v. Brittle, 92 N. C. 53, In re Brittain, 93 N. C. 587.

Necessity of Filing Record. — The appellant must aptly file a record proper in the case appealed from as a prerequisite for the Supreme Court to grant his motion for a certiorari to bring up the case for review. Brock v. Ellis, 193 N. C. 540, 137 S. E. 585; Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Necessity of Security. — Since certiorari is but a substitute for an appeal, it can only be allowed on the same security, and justification thereof, as in cases of appeal. Chastain v. Chastain, 87 N. C. 283.

But the Supreme Court has the power, in a proper case, to allow the writ to issue without such undertaking. Brittain v. Mull, 93 N. C. 490. The contrary is apparently held in Weber v. Taylor, 66 N. C. 412, but this was in reality not a "proper case."

Certiorari Denied When Appeal Waived. — A writ of certiorari will not issue where the right of appeal has been waived. King v. Taylor, 188 N. C. 450, 124 S. E. 751.

Imposition of Terms on Applicant. — When granted the appellant may be laid under terms not to avail himself of a technical advantage. Collins v. Nall, 14 N. C. 224.

Only Errors Apparent of Record. — Under a writ of certiorari, the object of which is only to bring up the record of an inferior court, only such errors or defects as appear on the face of such record can be considered. Hartsfield v. Jones, 49 N. C. 309; Boseman v. McGill, 184 N. C. 215, 114 S. E. 10.

Case on Appeal Not Settled. — When for any sufficient cause the case on appeal is not settled in time to have the case docketed at the term of the Supreme Court to which the appeal should be brought, the appellant should in apt time file a transcript of the record proper and move for a certiorari. Tripp v. Somersett, 182 N. C. 767, 108 S. E. 633; McNeil v. Virginia-Carolina R. Co., 173 N. C. 729, 92 S. E. 484. See Walsh v. Burleson, 154 N. C. 174, 69 S. E. 680.

In such a case if appellant does not apply for certiorari at the first term next after the trial, he is not entitled to certiorari at the next term. Joyner v. Hines, 108 N. C. 413, 12 S. E. 901; Haynes v. Coward, 116 N. C. 840, 21 S. E. 690.

Issuance of Successive Writs.—Although a certiorari has once been issued from the Supreme Court, upon a suggestion of a defect of the record, and has been returned, yet the court may, a second time or oftener direct writs of certiorari to issue if it sees reason to think the transcript defective. State v. Munroe, 30 N. C. 258.

But where the return of a certiorari, substituted for an appeal, shows an imperfect record, and no statement of the case, a new writ of certiorari will not be granted. Skinner v. Badham, 80 N. C. 14.

Effect of Certiorari. — Where a defendant has lost his

appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal as to stay of execution, and if the offense be bailable, he is entitled to bail. State v. Walters, 97 N. C. 489, 2 S. E. 539. See Pender v. Mallett, 122 N. C. 163, 30 S. E. 324.

Docketing as a Condition Precedent for Certiorari. — All of the transcript that can be obtained must be docketed at the first term and certiorari asked to complete the transcript. Pittman v. Kimberly, 92 N. C. 562; Slocumb v. Construction Co., 142 N. C. 349, 55 S. E. 196; Walsh v. Burleson, 154 N. C. 174, 69 S. E. 680.

Same—Waiver. — Requirement of Supreme Court that on application for certiorari for case on appeal transcript of record proper must be docketed cannot be waived by appellee. Murphy v. Carolina Elect. Co., 174 N. C. 782, 93 S. E. 456.

Same—When Transcript Cannot Be Docketed. — Where the papers constituting the record proper have been misplaced without any laches of an appellant, the proper practice is to file the case on appeal settled by the trial judge, and ask for certiorari for the record proper. Slocumb v. Construction Co., 142 N. C. 349, 55 S. E. 196. See also Burrell v. Hughes, 120 N. C. 277, 26 S. E. 782; Parker v. Southern R. Co., 121 N. C. 501, 504, 28 S. E. 347; McMillan v. McMillan, 122 N. C. 410, 29 S. E. 361.

Applied in Hamilton v. Southern R. Co., 203 N. C. 468, 166 S. E. 392.

Cited in In re Guerin, 206 N. C. 824, 175 S. E. 181.

C. Illustrative Cases.

Failure to Serve Case on Appeal. — A petition for a writ of certiorari to bring up the case on appeal will not be granted where the appeal was lost by failure to serve the case on appeal. Zell Guano Co. v. Hicks, 120 N. C. 29, 26 S. E. 650.

Waiver of Statutory Requirements. — When there is an alleged waiver of the statutory requirements in settling case on appeal, a certiorari will issue if the allegations of petitioner's affidavit are not denied. Holmes v. Holmes, 84 N. C. 833, 834.

Delay of Judge. — Where the delay in prosecuting the appeal is owing to no fault of the appellant, but to the delay of the judge, certiorari, in lieu of an appeal may be granted. Sparks v. Sparks, 92 N. C. 359; Haynes v. Coward, 116 N. C. 840, 841, 21 S. E. 690.

Retirement of Judge before Preparing Case. — Where the trial judge goes out of office before preparing a case on appeal, held, that certiorari is proper as a substitute for appeal, if the parties can agree on a statement of the case. Shelton v. Shelton, 89 N. C. 185. But where the trial judge has died certiorari will not lie. Taylor v. Simmons, 116 N. C. 70, 20 S. E. 961.

Loss Caused by Mistake of Clerk. — After a party has prayed an appeal and offered his sureties, if he be defeated of the appeal by the neglect, omission or delay of the clerk, he shall have his cause carried up by a certiorari. Chambers v. Smith, 2 N. C. 366; Graves v. Hines, 106 N. C. 323, 327, 11 S. E. 362.

But not where the clerk fails to send up the transcript. Pittman v. Kimberly, 92 N. C. 562.

Neglect of Counsel.—Where the appellant's counsel told him that he would do everything necessary towards perfecting his appeal, but the counsel failed to file a proper appeal bond it was held, no ground for a certiorari. Winborne v. Byrd, 92 N. C. 7.

Sickness of Appellant. — Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. Howerton v. Henderson, 86 N. C. 718.

Sickness of Applicant's Attorneys. — The sickness of an attorney is a sufficient excuse for want of diligence in perfecting an appeal, and certiorari will lie. Mott v. Ramsay, 90 N. C. 372.

However the sickness of one of two attorneys is not sufficient although the other is absent from the county. Boyer v. Garner, 116 N. C. 125, 21 S. E. 80.

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for the certiorari, except under very exceptional circumstances. Smith v. Miller, 155 N. C. 247, 71 S. E. 355; Barber v. Justice, 138 N. C. 20, 50 S. E. 445.

Failure to File Appeal Bond. — The fact that the appeal was not perfected because of the failure of appellant's counsel to file a proper appeal bond is not ground for certiorari in lieu of appeal. Winborne v. Byrd, 92 N. C. 7; Churchill v. Brooklyn Life Ins. Co., 92 N. C. 485. Nor for failure to file appeal bond in time. Bowen v. Fox, 99 N. C. 127, 5 S. E. 437. Nor when justification of sureties is omitted. Turner v. Powell, 93 N. C. 341.

For a contra case see Manning v. Sawyer, 8 N. C. 37, where it was held that where the appellant has failed to bring up the appeal bond along with the transcript, and swears that neither he nor the clerk knew it was his duty to do so, and that he did not intend to abandon his appeal, he shall have a certiorari to bring it up. This case decided at an early day seems to be the only one where a certiorari was allowed because an appeal was lost through the applicant's ignorance as to the requirements of the appeal bond.

Inability to Give Bond. — A certiorari will not be granted where the petitioner is unable to give bond for his appeal, unless it be shown that the judge below refused to make an order allowing the appeal in forma pauperis. Lindsay v. Moore, 83 N. C. 444.

Failure to Pay Clerk's Fees. — Certiorari will not be granted where it appears that the petitioner lost his appeal owing to his failure to comply with a demand for the payment of clerk's fees for making out the transcript. Smith v. Lynn, 84 N. C. 837; Sanders v. Thompson, 114 N. C. 282, 19 S. E. 225. Even though the clerk's fees were exhorbitant. Brown v. House, 119 N. C. 622, 26 S. E. 160.

Omission of Assignment of Errors. — If by accident or inadvertence, without appellant's negligence, an assignment of errors is omitted from the record on appeal appellant may apply to the Supreme Court for certiorari to have such assignments sent up. McDowell v. Kent Co., 153 N. C. 555, 69 S. E. 626, and for incorporation of exceptions. Cameron v. Power Co., 137 N. C. 99, 49 S. E. 76.

Stenographer's Notes. — The mistake of appellant's counsel in sending up the stenographer's notes on appeal, instead of a properly settled case, does not entitle appellant to a certiorari. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

D. Requirements of Application.

Editor's Note. — Under the analysis line "General Considerations," II, B, ante, this note, will be found many cases pertaining to, though not expressly referring to, the application. These cases considering the subject generally should be consulted with reference to the requisites of the application.

Affidavit Required. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. Taylor v. Johnson, 171 N. C. 84, 87 S. E. 981.

Affidavit Must Show Merits. — An application for a writ of certiorari must show a prima facie case of merits. March v. Thomas, 63 N. C. 249; Short v. Sparrow, 96 N. C. 348, 349, 2 S. E. 233. For affidavit held sufficient see Bayer v. Raleigh, etc., R. Co., 125 N. C. 17, 34 S. E. 100.

When Merit in Appeal Need Not Be Shown. — Where defendant is not able, at the time, to procure sufficient sureties for an appeal, he is entitled to a certiorari, without showing any merits in fact, where the case discloses that there were questions of law which he had a right to have decided by the superior court. Britt v. Patterson, 31 N. C. 197.

Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted, without reference to the merits. Collins v. Nall, 14 N. C. 224; McConnell v. Caldwell, 51 N. C. 469, 470.

Loss of Papers. — Where an application for certiorari states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue. Sanders v. Thompson, 114 N. C. 282, 19 S. E. 225.

Failure to Show Reason for Neglect. — Where a petition for a writ of certiorari did not allege that the adverse party prevented defendants from taking an appeal, and it did not appear that an appeal was ever taken, and no reason was assigned for the neglect, it was held that the writ would not issue. Cox v. Pruett, 109 N. C. 487, 13 S. E. 917.

Case Inaccurately Made. — When it is suggested that the case on appeal is inaccurately made out, the Supreme Court will award a certiorari, in order that the judge, if he sees proper, may make correction. State v. Gay, 94 N. C. 821.

Must Show Judge Will Make Corrections. — Where it is sought to have the case as settled by the judge corrected by a certiorari, the petitioner should set out his grounds for believing that the judge would make the corrections if given an opportunity, and not merely that he believes that probably the judge would do so. Porter v. Western, etc., R. Co., 97 N. C. 63, 2 S. E. 580; Allen v. McLendon, 113 N. C. 319, 18 S. E. 205.

Ability and Willingness to Correct. — The Supreme Court will not, by certiorari, direct the trial court to

make changes in the case on appeal where the letter of the trial judge states his opinion that the record is fair and correct; the relief being granted only when the judge by letter indicates that he is willing to make the corrections desired. Slocumb v. Construction Co., 142 N. C. 349, 53 S. E. 196.

Omitted Matter Must Be Relevant. — A certiorari will be denied where it does not appear that the matter omitted from the case settled is relevant to the exceptions presented on appeal. City Nat. Bank v. Bridgers, 114 N. C. 107, 19 S. E. 276; Clark v. Soco-Pettee Mach. Works, 150 N. C. 88, 63 S. E. 153.

Mistake Must Be Apparent. — Certiorari to correct a mistake stated on appeal will not be granted unless it is probable that the judge below would make the desired correction, or unless it is apparent that there was a mistake. Currie v. Clark, 90 N. C. 17; Cheek v. Watson, 90 N. C. 302; Ware v. Nisbet, 92 N. C. 202; Allen v. McLendon, 113 N. C. 319, 18 S. E. 205.

E. Time of Application.

When Applied for. — Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of the Supreme Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown. State v. Johnson, 93 N. C. 559; State v. Sloan, 97 N. C. 499, 2 S. E. 666.

Application Must Be Timely. — An application for certiorari to supply omissions in the appellate record must be presented to the appellate court with proper diligence, and the result of any laches by the applicant will fall upon him. Todd v. Mackie, 160 N. C. 352, 76 S. E. 245.

Agreement to Waive Time. — To the rule that appeal will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: First, where the record shows a written agreement of counsel waiving the lapse of time; and secondly, where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant. In either case certiorari is the proper substitute. Walton v. Pearson, 82 N. C. 464.

Tacit Agreement to Waive Delay. — Where there is an undenied tacit agreement to waive delay certiorari will issue. Holmes v. Holmes, 84 N. C. 833; Willis v. Atlantic, etc., R. Co., 119 N. C. 718, 25 S. E. 790.

Denial of Oral Agreement. — A certiorari will not be granted, where an alleged oral agreement between counsel to await the decision of a certain other case is denied. Hutchinson v. Rumfelt, 83 N. C. 441; Graves v. Hines, 106 N. C. 323, 324, 11 S. E. 362; Short v. Sparrow, 96 N. C. 348, 349, 2 S. E. 233.

Time for Requesting Certiorari. — An appellant who has ground for a certiorari as a substitute for appeal must move for it before the cause is reached for argument. State v. Harris, 114 N. C. 830, 19 S. E. 154; State v. Marsh, 134 N. C. 184, 187, 47 S. E. 6. As to when allowed after argument, see Boyer v. Teague, 106 N. C. 571, 11 S. E. 330.

F. Issuance of Writ from Superior Court.

Review of Hearing on Lunacy Writ. — Where a writ of lunacy was issued by a county court, and the party found non compos, and a guardian appointed, in the absence of the said party, and without notice, it was held, that the petitioner was entitled to a certiorari, to have the case taken into a superior court. Dowell v. Jacks, 53 N. C. 387.

Action on Bond. — Where the principal obligor in a bond was called, and, failing to appear, judgment was rendered against his surety, it was held that the fact that the principal was sick, and unable to attend at the term for which he was bound, did not entitle the surety to a certiorari to have the case removed into the superior court. Buis v. Arnold, 53 N. C. 233.

Failure to Plead and Appeal.—Where a defendant fails to enter a plea and to take an appeal, he is not entitled to a certiorari to bring the case into the superior court. Rule v. Council, 48 N. C. 33.

Deprived of Defense by Fraud of Opposite Party. — Where a party is deprived, by the fraud of his opponent, of the opportunity of making a defense in the county court, which can be made in the superior court as well as in the county court, his proper remedy is by a writ of certiorari. Lunceford v. McPherson, 48 N. C. 174.

But a mere suggestion of fraud is insufficient. McLaughlin v. McLaughlin, 47 N. C. 319. See also Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9.

III. RECORDARI.

For further treatment see 8 Enc. Dig. 485 et seq; 14 Enc. Dig. 618 et seq.

A. Editor's Note.

"The writ of recordari under the former practice, and retained in the new, is used for two purposes; the one in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." King v. Wilmington, etc., R. Co., 112 N. C. 318, 320, 16 S. E. 929.

The adoption of this section of the Code (Acts 1874-75 C. 109) seems to retain this practice. King v. Wilmington, etc., R. Co., Ibid, cites many cases in which the writ of recordari has been used as a writ of false judgment since the adoption of this section by the legislature. It has been said that the writ of recordari is used only in North Carolina, writs of error and certiorari being substituted for it elsewhere. State v. Griffis, 117 N. C. 709, 23 S. E. 164.

B. General Consideration.

Scope of Recordari. — If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by a proper application, obtain a writ of recordari as a substitute for an appeal. Ledbetter v. Osborne, 66 N. C. 379. It is in the nature of an extension of the power of appeal. Webb v. Durham, 29 N. C. 130.

But though this is the ordinary and most common, it is not the only use of the writ. It may be employed as a writ of false judgment, to correct in law, and then it is the means whereby the superior court, the highest court of original jurisdiction in this state, can control inferior tribunals, in matters for which no writ of error lies, by bringing up their judicial proceedings to be reviewed in the matter of law. In such case the certiorari is in effect a writ of error, as all that can be discussed and determined in the superior court are the power and sufficiency of the proceedings as they appear upon the face of them. Commissioners v. Kane, 47 N. C. 288, 291.

Writ of False Judgment or Substitute for Appeal. — The writ of recordari may be used, either as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co., 150 N. C. 519, 64 S. E. 366; Morton v. Rippy, 84 N. C. 611; Caldwell v. Beatty, 69 N. C. 365.

The writ of recordari is authorized by this section and recognized by the decisions of this court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment. King v. Wilmington & Weldon R. Co., 112 N. C. 318, 16 S. E. 929.

The writ of recordari may be used as a writ of false judgment. Parker v. Gilreath, 28 N. C. 221; Kearney v. Jeffreys, 30 N. C. 96. Bailey v. Bryan, 48 N. C. 357, 358.

Lies to Inferior Tribunal Whose Proceedings Are Not Recorded. — The writ of recordari lies to an inferior tribunal, whose proceedings are not recorded. Hartsfield v. Jones, 49 N. C. 309, 310.

Jurisdiction of Superior Courts. — The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested by the state constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the state. Taylor v. Johnson, 171 N. C. 84, 87 S. E. 981.

Failure to Docket Appeal. — When an appeal from a justice's court has not been docketed within the time prescribed by section 870, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed. Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978; Abell v. Thornton Light, etc., Co., 159 N. C. 348, 349, 74 S. E. 881; Powell & Co. v. Rogers, 180 N. C. 657, 104 S. E. 70.

Right to Object to Petition for Recordari Not Waived.— An appellee who does not docket an appeal from justice court not docketed in time by appellant and move for affirmance, does not waive the right to object to appellant's petition to bring up the appeal by recordari. Pickens v. Whitton, 182 N. C. 779, 109 S. E. 836.

Dismissal for Failure to Docket. — A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case, and have it dismissed. Johnson v. Reformers, 135 N. C. 385, 47 S. E. 463.

Review of Judge's Decision. — The decision of the judge upon a petition for recordari as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to

vacate it for mistake, surprise or excusable negligence. Barnes v. Easton, 98 N. C. 116, 3 S. E. 744. See also Stewart v. Craven, 205 N. C. 439, 171 S. E. 609.

Where, upon application to the superior court for a writ of recordari, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal and refuses to grant the writ, his judgment will not be disturbed in the Supreme Court; praying for the appeal and the payment of the fees in the justice's court by the appellant are not sufficient to entitle him to the order as a matter of right. Tedder v. Deaton, 167 N. C. 479, 83 S. E. 616.

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ. Perry v. Whitaker, 77 N. C. 102.

C. Requirements for Writ.

Issued at Term Following Trial. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only at the next term of the supervising court following trial in the lower court. Taylor v. Johnson, 171 N. C. 84, 87 S. E. 981; Boing v. Raleigh, etc., R. Co., 88 N. C. 62.

At Earliest Possible Time. — The writ of recordari or of certiorari, as a substitute for an appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the party's power to make the application must be satisfactorily accounted for. Todd v. Mackie, 160 N. C. 352, 359, 76 S. E. 245.

See Koonce v. Pelletier, 82 N. C. 237, in which it was held that, under the circumstances, a delay of three months in applying for the writ was not unreasonable.

Necessity of Affidavit or Petition. — A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing. Wilcox v. Stephenson, 71 N. C. 409.

Averment as to Payment of Costs. — Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees. Steadman v. Jones, 65 N. C. 388.

Excuse for Laches and Meritorious Grounds. — Recordari will not be issued unless party applying shows (1) excuse for laches and (2) meritorious grounds. Pritchard v. Sanderson, 92 N. C. 41.

Application Must Negative Laches. — An applicant for recordari must show that he has not been guilty of laches. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co., 150 N. C. 519, 64 S. E. 366. See also, Pritchard v. Sanderson, 92 N. C. 41; March v. Thomas, 63 N. C. 249; In re Brittain, 93 N. C. 587.

Sufficient Ground for Recordari Must Be Shown. — It was incumbent on one failing to docket his appeal from justice court in the time required by law to show sufficient ground for a recordari in lieu of the appeal. Baltimore Bargain House v. Jefferson, 180 N. C. 32, 103 S. E. 922.

Applicant Must Show Merits. — An applicant for a writ of recordari must show merit. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co., 150 N. C. 519, 64 S. E. 366.

Failure to Show Meritorious Defense. — It is error to issue a writ of recordari to a justice's court, requiring him to send up the cause for trial de novo after entry of default judgment against defendant, and loss of right to appeal, where there is no showing of a meritorious defense. Hunter v. Atlantic Coast Line R. Co., 161 N. C. 503, 77 S. E. 678.

Effect of Failure to Assign Errors. — Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. Leatherwood v. Moody, 25 N. C. 129; Sossamer v. Hinson, 72 N. C. 578.

Supersedeas Should Accompany. — An order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. Steadman v. Jones, 65 N. C. 388.

D. When Granted.

Loss of Appeal without Fault of Applicant. — A recordari is a substitute for an appeal, where the party has lost his right to appeal otherwise than by his own default. Marsh v. Cohen, 68 N. C. 283; Pickens v. Whitton, 182 N. C. 779, 109 S. E. 836.

Party Denied Right of Appeal. — If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. Birdsey v. Harris, 68 N. C. 92; Ledbetter v. Osborne, 66 N. C. 379.

Refusal of Appeal on Frivolous Ground. — If an appeal be refused by a magistrate on frivolous ground, the remedy is by a writ of recordari. Bailey v. Bryan, 48 N. C. 357, 67 Am. Dec. 246.

Appeal Lost by Excusable Neglect. — Where a party has lost his appeal by excusable neglect he may have relief by a writ of recordari as a substitute for an appeal. Navassa Guano Co. v. Bridgers, 93 N. C. 439.

Loss by Technical Default. — Where a party has lost his appeal by a technical default the superior court judge can have it brought up by recordari. Suttle v. Green, 78 N. C. 76, 77.

Loss of Appeal by Misfortune. — The writ of recordari is not resorted to as a rule except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. State v. Griffis, 117 N. C. 709, 23 S. E. 164. See also, Boing v. Raleigh, etc., R. Co., 88 N. C. 62; Davenport v. Grissom, 113 N. C. 38, 41, 18 S. E. 78.

Erroneous Supposition as to Agreement. — A writ of recordari is properly granted, where the defendant had merits, and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney. Carmer v. Evers, 80 N. C. 56.

Notice of Appeal Not Returned. — On appeal from a justice of the peace to the superior court, where justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where superior court judge was absent from such next term, to file motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

E. When Denied.

When Appeal Available. — Where a party has a remedy by appeal which he willfully or negligently fails to exercise he is not entitled to a writ of recordari. State v. Griffis, 117 N. C. 709, 23 S. E. 164; Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978.

Duty to See That Appeal Is Filed in Time. — It is not enough that parties to a suit should engage counsel and leave the matter of taking an appeal entirely in his charge, as they should, in addition to this, give to the matter that amount of attention which a man of ordinary prudence usually gives to his important business, and should to that extent see that the appeal was filed in time. Baltimore Bargain House v. Jefferson, 180 N. C. 32, 103 S. E. 922.

Not Deprived of Appeal by Fraud, Accident or Mistake.— Where a party is not deprived of his appeal by any fraud, accident, surprise, or denial by the court, he is not entitled to the aid of a writ of recordari. Satchwell v. Rispess, 32 N. C. 365; Hare v. Parham, 49 N. C. 412, 413.

When Appellant Has Not Perfected Appeal. — A motion for recordari made in the superior court several terms after the judgment has been entered in the justice's court for failure to send up the transcript, should be denied when the appellant has not paid the fees required or taken proper steps to perfect the appeal. Helsabec v. Grubbs, 171 N. C. 337, 88 S. E. 473.

Appeal Lost through Negligence of Applicant's Attorney. —A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. Boing v. Raleigh, etc., R. Co., 88 N. C. 62.

Illness of One Member of Law Firm. — As every member of a law firm is charged with knowledge of all the business of the firm, the illness of one member of a new firm which prevented him from attending a trial in justice court, and thus caused defendant to suffer a default judgment and lose its right of appeal, is not a showing of excusable neglect which will warrant the issuance of a writ of recordari. Hunter v. Atlantic Coast Line R. Co., 163 N. C. 281, 79 S. E. 610.

IV. SUPERSEDEAS.

Editor's Note. — See Supreme Court Rule 34 as to requirements of application for this writ.

An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. sec. 655. Sykes v. Everett, 167 N. C. 600, 83 S. E. 585.

For supersedeas bond see sec. 650 et seq., and annotations thereunder.

Definition and Scope of Writ. — "Supersedeas" is a writ issuing from an appellate court to preserve the status quo pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review, and is granted only by court ordering removal of cause, and is regulated by statute. Seaboard Air Line R. Co. v. Horton, 176 N. C. 115, 96 S. E. 954.

A writ of supersedeas may issue to vacate the order of

the lower court. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824; In re Blake, 184 N. C. 278, 114 S. E. 294; Page v. Page, 166 N. C. 90, 80 S. E. 1060; McArthur v. Timber Co., 164 N. C. 383, 80 S. E. 403; Arey v. Williams, 154 N. C. 610, 70 S. E. 931, 5 N. C. L. R. 26.

Section 226—Authority of Court or Judge. — The superior court can not supersede the process of an inferior court, unless the writ of supersedeas be auxiliary to the appellate jurisdiction of the former. Bank v. Stanley, 13 N. C. 476.

A supersedeas is ancillary to a writ of error, and the former may be granted by the same judge who has granted the latter. Seaboard Air Line Railway v. Horton, 176 N. C. 115, 96 S. E. 954.

The Supreme Court of North Carolina has no power to grant a supersedeas pending a petition to the United States Supreme Court for certiorari. Seaboard Air-Line R. Co. v. Horton, 176 N. C. 115, 96 S. E. 954.

When Granted—Case of Necessity. — A writ of supersedeas is only granted in case of necessity. McArthur v. Commonwealth Land, etc., Co., 164 N. C. 383, 80 S. E. 403.

Where the rights of a party can be fully protected in other proceedings which he seeks to restrain, a writ of supersedeas will not be granted. McArthur v. Commonwealth Land, etc., Co., 164 N. C. 383, 80 S. E. 403.

Appeal from Nonappealable Order. — Where an appeal is taken in a matter wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal. Dunn v. Marks, 141 N. C. 232, 53 S. E. 845.

Review of Clerk's Decision. — A supersedeas, is the proper remedy to stay proceedings in a cause, pending the review of a decision of the clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal. Saulsbury v. Cohen, 68 N. C. 289.

Injunction. — An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. Green v. Griffin, 95 N. C. 50; Fleming v. Patterson, 99 N. C. 404, 6 S. E. 396.

An appeal from an order dismissing a temporary injunction could not have the effect of continuing the injunction. Reyburn v. Sawyer, 128 N. C. 8, 37 S. E. 954.

It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order dissolving it. James v. Markham, 125 N. C. 145, 34 S. E. 241.

Supersedeas upon Judgment. — An appeal from an order granting a supersedeas upon a judgment leaves the judgment creditor at liberty to enforce his judgment. Bank v. Jones, 17 N. C. 284.

Custody of Child. — Where, in divorce proceedings, the trial court granted custody of a child to a mother and the husband appealed, and the mother sued out habeas corpus for the custody of the child pending the appeal, the Supreme Court might supersede the order as to custody pending the appeal, by virtue of Const. art. 4, § 8, authorizing it to issue remedial writs. Page v. Page, 166 N. C. 90, 81 S. E. 1060.

§ 631. Appeal to supreme court; security on appeal; stay.—Cases shall be taken to the supreme court by appeal, as provided by law. All provisions in this article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the supreme court. (Rev., ss. 595, 1540; Code, ss. 561, 946; C. C. P., s. 312.)

§ 632. Who may appeal.—Any party aggrieved may appeal in the cases prescribed in this chapter. (Rev., s. 585; Code, s. 547; C. C. P., s. 298.)

Cross Reference. — For cases in which an appeal lies, see annotations under section 638. As to designation and description of parties, see 1 Enc. Dig. 481 et seq.

Interest in Subject-Matter. — A commissioner appointed to make a deed is not a "party to the action," and, having no personal interest in the subject of it can not appeal from an order of the court requiring him to correct his deed, and his attempted appeal will be dismissed. Summerlin v. Morrisey, 168 N. C. 409, 84 S. E. 689.

A creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under this section. Irvin v. Harris, 182 N. C. 647, 109 S. E. 867.

Parties Whose Only Interest Is Payment of Moneys Secured by Trust Deed. — In an action to restrain a trustee from selling lands under a trust deed, till the determination of plaintiff's interest in the premises, parties whose only interest in the suit is the payment of the moneys secured to them by the trust deed can not appeal from a judgment declaring a parol trust in the equity of redemption in favor of plaintiff. Faison v. Hardy, 118 N. C. 142, 23 S. E. 959.

Receivers of a corporation can not appeal from a judgment of instructions because the instructions are, as between two classes of stockholders, prejudicial to one of such classes. Strauss v. Carolina Interstate, etc., Loan Ass'n, 117 N. C. 308, 23 S. E. 450, affirmed in 118 N. C. 556, 24 S. E. 116.

Parties of Record. — One not a party or privy to the record can not appeal. Siler v. Blake, 20 N. C. 90, 93.

Administrators. — Where in proceedings by the administrator to sell lands of the estate to pay debts, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor whose claim has been disallowed, may appeal to the Supreme Court as a party aggrieved. Irvin v. Harris, 182 N. C. 647, 109 S. E. 867.

Propounders in Caveat Proceeding.—In a caveat proceeding where the jury found against propounder, and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial, it was held that the propounders were not the "parties aggrieved" by the order setting aside the verdict and could not appeal. In re Hargrove, 207 N. C. 280, 176 S. E. 752.

A defendant, who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of this section and cannot appeal. Guy v. Aetna Life Ins. Co., 206 N. C. 118, 120, 172 S. E. 885.

But if defendants are not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affects their interest, they have the right to appeal under this section. Hargett v. Lee, 206 N. C. 536, 174 S. E. 498.

Application to Be Made a Party Denied.—If an application to be made a party defendant is denied, the applicant is a "party aggrieved" for all the purposes of an appeal, under this section. Rollins v. Rollins, 76 N. C. 264.

Person Denied Right to Intervene. — One whose claim to intervene in a suit has been rejected by the court can not appeal from the judgment rendered in the suit. Phelps v. Long, 31 N. C. 226; Evans v. Governor's, etc., Min. Co., 50 N. C. 332; Rollins v. Rollins, 76 N. C. 264.

Interveners for Purpose of Appeal. — Where a judgment for costs is rendered in a claim and delivery proceeding against a person who is not a party thereto, and who does not appear on the record as a party, such person may appeal on a special appearance made for that purpose. Loven v. Parson, 127 N. C. 301, 37 S. E. 271.

Party Not Served with Process. — One not a party can not appeal and the entry of a special appearance for one not served with process, though named as a defendant, does not authorize counsel so appearing to appeal from a default judgment against his client. Houston v. Lumber Co., 136 N. C. 328, 48 S. E. 738.

Submission of Controversy. — Parties to an equity suit, who agree that the judge should find the facts, are precluded from asking the Supreme Court, on appeal, to review the finding. Runnion v. Ramsay, 93 N. C. 410.

Joinder. — All parties against whom a joint judgment or decree is rendered must join in an appeal. Mastin v. Porter, 32 N. C. 1; Kelly v. Muse, 33 N. C. 182.

Appeal from Joint Verdict and Judgment. — One defendant can not sustain an appeal from a joint judgment against two or more, when all had joined in the pleadings, and the trial was joint. Hicks v. Gilliam, 15 N. C. 217.

Where there is a joint judgment against two defendants in the court below, and one only appeals, the appeal will be dismissed on motion, no matter what steps have been taken in the cause after the filing of the appeal. Smith v. Cunningham, 30 N. C. 460.

Judgment against One of Two Parties. — Where an action is brought in the county court against two defendants, who plead severally, and a verdict and judgment are rendered in favor of one and against the other, the latter may alone appeal from the judgment rendered against him. Stephens v. Batchelor, 23 N. C. 60.

In assumpsit against two, if the jury find against one and in favor of the other, the former may appeal alone to the Supreme Court. Sharpe v. Jones, 7 N. C. 306.

Appeal by Justices of County. — Where, in a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment is rendered against them, they may appeal, although a minority of the justices refuse to join in the appeal. Kelly v. Justices, 24 N. C. 430.

Appeal by Statutory Receiver.—Objection that the statutory receiver has no right of appeal without the approval of

the court is untenable when it appears that the Superior Court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should constitute the case on appeal after notice of appeal by the receiver. In re Central Bank, etc., Co., 206 N. C. 251, 173 S. E. 340.

Cited in Simmons v. Andrews, 106 N. C. 201, 204, 10 S. E. 1052.

§ 633. Appeal from clerk to judge.—Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served upon the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (Rev., ss. 586, 610-11; Code, ss. 116, 252-3; C. C. P., ss. 109, 492; 1927, c. 15.)

Cross Reference.—As to powers of clerks, see section 938 and annotations thereunder. As to powers of the judge on appeal, see section 637 and annotations.

Editor's Note.—No notice was required by this section prior to 1927. At that time by Public Laws 1927, ch. 15 the portion relating to "due notice in writing" was added.

By this section any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference, to the judge, without undertaking; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from. National Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

This section and sections 635 and 636, regulating appeals from the clerk to the judge, are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, E. S. These sections of the Code do not apply to orders and judgments made or entered by the clerk as authorized by the latter statute. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329.

Clerk Acts for Court.—The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. Brittain v. Mull, 91 N. C. 498.

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless, all his power is delegated by virtue of his office as clerk of the superior court. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83.

Action of Clerk Not Conclusive.—The action of the clerk is not final and conclusive. In a proper case, on appeal it is the duty of the court to review the findings of fact by the clerk and correct his errors of law. He is no more than the servant of the court, and subject to its supervision. Turner v. Holden, 109 N. C. 182, 186, 13 S. E. 731.

Applies to Special Proceedings.—This section applies in special proceedings as well as in civil actions generally. Welfare v. Welfare, 108 N. C. 272, 276, 12 S. E. 1025.

Order to Sell Land for Debt.—This section applies to an appeal from an order of the clerk to sell lands of decedent to pay debts. Perry v. Perry, 179 N. C. 445, 448, 102 S. E. 772.

Docketing Tax Not Applicable.—Where an appeal is taken from an order of the clerk of the superior court to the judge thereof under this section, the judge has jurisdiction by mandate of section 637, and no "docketing" in a technical sense is involved, and section 7880(88) requiring a tax of two dollars for "docketing" an apepal from a lower court in the superior court does not apply. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83.

Sufficiency of Bonds.—The power to revise and control the action of a clerk of the superior court in passing upon the sufficiency or insufficiency of bonds to be taken by him, necessarily exists with the judge, whose minister and agent he is; and the proper mode of bringing the question before the judge is by an appeal from the ruling of the clerk. Marsh & Co. v. Cohen, 68 N. C. 283.

Setting Aside Commissioner's Report.—An order of the clerk, setting aside the report of commissioners making partition of land, and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed. McMillan v. McMillan, 123 N. C. 577, 31 S. E. 729.

Removal of Executors.—An appeal will lie to the judge in proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N. C. 4, 5.

Order Concerning Judgment Debtor.—An appeal lies from an order of the clerk requiring a judgment debtor to appear and answer concerning his property, where the affidavit for the order is objected to on the ground of its insufficiency. Farmers Nat. Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

Refusal to Issue Execution.—Where a clerk of the Superior Court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken to the resident judge of the district. Huntley v. Hasty, 132 N. C. 279, 43 S. E. 844.

Proceedings Supplemental to Execution.—Where in proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient and made the order demanded, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. Nat. Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

On appeal from the assessment of damages for lands taken by the State Highway Commission the clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Where the clerk has failed to transmit the record the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Commission, 194 N. C. 46, 138 S. E. 350.

Jurisdiction of Clerk.—Where an equitable proceedings, brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the supreme court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. Smith v. Gudger, 133 N. C. 627, 45 S. E. 955.

Laches.—An appeal from the clerk to the judge should be dismissed on the ground of inexcusable laches. Hicks v. Wooten, 175 N. C. 597, 96 S. E. 107.

Cited in Daniel v. Bellamy, 91 N. C. 78, 82; Edwards v. Cobb, 95 N. C. 4, 5, 8; Chowan & Southern Ry. Co. v. Parker, 105 N. C. 246, 249, 11 S. E. 328; Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535; Holly Shelter Ry. Co. v. Newton, 133 N. C. 136, 45 S. E. 549.

§ 634. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (Rev., s. 588; Code, s. 256; C. C. P., s. 115).

Cross References.—As to issues of fact see secs. 557, 558. As to definitions of issues see secs. 580, 581, 582. As to form and preparation of issues see sec. 584.

Rule Stated.—Where issues of fact are joined before the clerk in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the superior court—another jurisdiction—to be tried. Brittain v. Mull, 91 N. C. 498.

Special Proceedings.—When an issue of fact is joined in a special proceeding, or issues of both fact and law, it is the duty of the Clerk to place the proceeding on the docket of the trial term, for trial. Jones v. Desern, 94 N. C. 32.

Partition Proceedings.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk, upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. Beckwith v. ex parte, 124 N. C. 111, 32 S. E. 393.

Right May Be Waived.—In special proceedings, pending before Clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the

controverted facts they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it. Chowan & Southern R. Co. v. Parker, 105 N. C. 246, 11 S. E. 328.

Cited in Vance v. Vance, 118 N. C. 864, 867, 24 S. E. 768; Sneed v. State Highway Commission, 194 N. C. 46, 138 S. E. 350.

§ 635. Duty of clerk on appeal.—On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision. (Rev., s. 612; Code, s. 254; C. C. P., s. 110.)

See annotations to section 633.

As to powers and duties of clerks see 3 Enc. Dig. 116 et seq., 13 Enc. Dig. 384.

Absolute Duty of Clerk.—The clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Commission, 194 N. C. 46, 138 S. E. 350.

But see Hicks v. Wooten, 175 N. C. 597, 96 S. E. 107, where it was held that the neglect of the clerk in sending up the appeal would not excuse gross laches of the appellant.

What Statement Should Contain.—This statement should embrace the material facts, copies of necessary paper writings, or such papers themselves so that the judge may review the decision of the clerk appealed from upon its full merits. Brooks v. Austin, 94 N. C. 222..

Partition Proceedings.—Under proceedings for the partition of lands, when an appeal is taken from the decision of the clerk, upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the judge. Little v. Duncan, 149 N. C. 84, 62 S. E. 770.

When Clerk Does Not Act for Court.—In appeals from the clerk, in that class of cases of which he has jurisdiction, not as and for the court as in special proceedings, but in his capacity as clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N. C. 271.

Court May Order Statement.—The clerk has no authority to allow or disallow an appeal; and on his refusal to prepare a statement of the case as required by this section, the court in term, or a judge at chambers, may direct him to do so by simple order. Nat. Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

Where the clerk has failed to transmit the record to the court on appeal, upon notice of appeal given in proceedings under the provisions of this section, the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Com., 194 N. C. 46, 138 S. E. 350.

No Appeal From Order to Send up Transcript.—No appeal lies to the Supreme Court from an order of the superior court directing the clerk, to send up to the next term a transcript of proceedings supplemental to execution had before him. National Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

When Statement Not Required.—It is not necessary to make out a statement of the case on appeal when the record proper shows the grounds of appeal. Cape Fear etc. R. Co. v. Stewart, 132 N. C. 248, 43 S. E. 638.

Clerk Should Give Reasons.—Where the clerk refuses to allow an amendment affecting the substance of an affidavit in attachment proceedings he may, and should, state his reason for such refusal, even after appeal to the court in term. Cushing v. Styron, 104 N. C. 338, 10 S. E. 258.

After Retirement of Clerk.—Where a clerk has gone out of office, it is not proper to order him to file with the court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk. Ex parte Spencer, 95 N. C. 271.

Rendering Decision Out of District.—In Byrd v. Nivens, 189 N. C. 621, 127 S. E. 673, 674. The court said. "We do not think that the judge residing in the district or, in his absence, the judge holding the courts for the district, can hear the questions and render a decision out of the district."

Irregular for Judge to Order Docket of Issues.—It is irregular for the judge in making his decision to order the clerk to place the proceeding on the docket of the regular term for trial—it being the duty of the clerk to do this without such order when an issue of fact is joined. Jones v. Desern, 94 N. C. 32.

Applied in Windsor v. McVay, 206 N. C. 730, 175 S. E. 83.

Cited in Lovinier v. Pearce, 70 N. C. 168, 172.

§ 636. Duty of judge on appeal.—It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after notify the attorneys of the parties of the decision and, on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law. (Rev., s. 613; Code, s. 255; C. C. P., s. 113.)

See section 657 and annotations thereunder.

Full Jurisdiction of Case.—Under this section an appeal in partition action from order of the clerk overruling demurrer carried the entire case into the superior court, and vested it with full jurisdiction of the cause. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

When Issues of Fact Tried.—When issues of fact are tried the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact. Brittain v. Mull, 91 N. C. 498, 500.

Appeal May Be Heard Outside County.—Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of the county where the proceeding is pending, and within the district. Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123.

Appeals from the clerk may be heard at chambers at any place in the district. Monroe v. Lewald, 107 N. C. 655, 12 S. E. 287.

When Notice Not Reasonable.—Where notice of appeal from action by the clerk is served on the day before the hearing, the notice is not reasonable within this section. Byrd v. Nivens, 189 N. C. 621, 127 S. E. 673.

Pending Appeal from Clerk.—A motion for a receiver to take possession of a debtor's property, in supplemental proceedings, may be made before a judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N. C. 377.

Presumption as to Proceedings.—Where nothing in the record indicates that a judge, who rendered a judgment on an appeal from the clerk of the superior court, was requested in writing to fix a time for the hearing and to give the parties notice, it will be presumed that the proceeding was rightly and regularly conducted. Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123.

May Hear Any Evidence.—Upon an appeal from an order of the clerk to the judge, the latter may hear any evidence that would have been competent before the former, although in fact not introduced. McAden v. Banister, 63 N. C. 479.

Special Proceedings for Partition.—The controversy involved in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal. Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123.

Proceedings to Sell Lands.—A proceeding to sell lands to make assets to pay of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as

justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N. C. 445, 102 S. E. 772.

Appeal from Clerk's Decision upon Commissioners' Report.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. Ex parte Beckwith, 124 N. C. 111, 32 S. E. 393.

Proceedings Dismissed by Clerk.—Where clerk of superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. Roseman v. Roseman, 127 N. C. 494, 37 S. E. 518.

Issue of Law Joined in Special Proceedings.—When an issue of law is joined in a special proceeding it is the duty of the judge to decide the question thus presented, and to transmit his decision in writing to the clerk, who will then proceed with the special proceeding according to law. Jones v. Desern, 94 N. C. 3[illegible].

When Clerk Does Not Act for Court.—In appeals in cases in which the clerk does not act for the court, it is the duty of the judges to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The judge can decide the questions of fact in such cases himself, or if he see fit, he can submit issues for his better information to the jury. Ex parte Spencer, 95 N. C. 271.

§ 637. Judge determines entire controversy; may recommit. — Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (Rev., s. 614; 1887, c. 276.)

Cross References.—As to power of judges in general see 7 Enc. Dig. 1001 et seq., 14 Enc. Dig. 527. See also note under sec. 536.

Editor's Note.—By passing this section in 1887, Acts 1887, ch 276, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in Brittain v. Mull, 91 N. C. 498. In that case it was held that when the appeal was taken from the clerk the judge should hear the appeal and decide the questions of law present, and then remand the matter, including his decision, to the clerk.

Because of its beneficial results this section has always received a liberal interpretation. Williams v. Dunn, 158 N. C. 399, 74 S. E. 99.

It was not contemplated by the legislature that by the provisions of this section a party who should be coram non judice before the clerk could take advantage of his own mistake or purposely make it in order to obviate a well grounded objection to the jurisdiction, and secure by indirection what he could not obtain directly. Nash v. Sutton, 109 N. C. 550, 14 S. E. 77.

Judge May Determine Entire Controversy.—Under this section, the judge now has final jurisdiction to determine the whole matter in controversy. Lictie v. Chappell, 111 N. C. 347, 353, 16 S. E. 171. Faison v. Williams, 121 N. C. 152, 28 S. E. 188; Oldham v. Rieger, 145 N. C. 254, 58 S. E. 1091; Hall v. Artis, 186 N. C. 105, 118 S. E. 901.

Court May Remand.—The court has the right in its discretion to remand the cause to the clerk for further proceedings. York v. McCall, 160 N. C. 276, 280, 76 S. E. 84.

Appointment of Administrator.—On appeal from the order of a clerk appointing an administrator the Superior Court may reverse the order but the case should then be remanded. In re Styers, 202 N. C. 715, 164 S. E. 123.

Upon appeal from an order of the clerk removing certain executors and administrators, c. t. a., and appointing others in their place, by virtue of this section, the Superior Court judge may, in the exercise of his discretional powers, retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administrate the estate subject to the orders of the court, the entire matter being before the Superior Court on appeal. Wright v. Ball, 200 N. E. 620, 621, 158 S. E. 192.

When Judge Cannot Merely Remand.—Where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of it on the merits, and had no power to merely reverse the clerk's action and remand the case to him, though there may have been irregularities in the proceedings before the clerk. Little v. Duncan, 149 N. C. 84, 62 S. E. 770.

Judge May Make Amendments. — The judge has power to make amendments to give jurisdiction. Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508; Elliott v. Tyson, 117 N. C. 114, 23 S. E. 102. He may strike out an answer that is irrelevant. Commissioners v. Piercy, 72 N. C. 181.

Judge May Add Issues. — The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. In re Herring, 152 N. C. 258, 76, 67 S. E. 570.

Judge May Set Aside Judgment. — The judge has power to set aside a judgment for newly discovered testimony and to permit an amendment in the complaint. Faison v. Williams, 121 N. C. 152, 28 S. E. 188.

Clerk without Equity Jurisdiction. — The clerk of the superior court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. Southern State Bank v. Leverette, 187 N. C. 743, 123 S. E. 68.

Proceedings Improperly Brought Before Clerk. — When a case properly cognizable in the superior court, but which is erroneously brought before a clerk, gets in the superior court on any ground the judge has jurisdiction to retain and hear the cause as if originally instituted in the superior court. Hall v. Artis, 186 N. C. 105, 118 S. E. 901; Robeson v. Hodges, 105 N. C. 49, 11 S. E. 263. See also Ryder v. Oates, 173 N. C. 569, 92 S. E. 508; Spence v. Granger, 207 N. C. 19, 175 S. E. 824.

Agreement That Judge Shall Hear Appeal. — Where the parties agree that the judge shall hear an appeal in term, he acquires jurisdiction of the whole case, and should finally dispose of it on its merits, without remanding it to the clerk. Cushing v. Styron, 104 N. C. 338, 10 S. E. 258.

Such agreement cures all irregularities. Foreman v. Hough, 98 N. C. 386, 3 S. E. 912.

Judge Must Hear Controversy Although Clerk without Jurisdiction. — Where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion. Williams v. Dunn, 158 N. C. 399, 74 S. E. 99.

Clerk Erroneously Transfers Issues. — Where the clerk of the superior court has erroneously at once transferred the proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therefrom has been taken to the superior court, the judge thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of this section, and may order other proper or necessary parties to be made for the further determination of the cause. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Question of Price of Land. — The discretion vested in the superior court judge on appeal from the clerk, by this section, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under C. S., 2591, to further pass thereon in the absence of an increased bill. In re Mortgage Sale of Ware Property, 187 N. C. 693, 122 S. E. 660.

Proceedings to Sell Land. — A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N. C. 445, 102 S. E. 772; Ledbetter v. Pinner, 120 N. C. 455, 27 S. E. 123. See Harrington v. Hatton, 129 N. C. 146, 39 S. E. 780.

In a suit for partition of land the jurisdiction acquired by appeal includes the right of the court to accept a private bid through its commissioner. When the bid is ac-

cepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. Wooten v. Cunningham, 171 N. C. 123 126, 88 S. E. 1.

Proceedings to Subject Lands to Dower.—An ex parte proceeding by a widow to subject land in the hands of heirs to the payment of dower charges thereon cannot be had before the clerk and on appeal may be dismissed by the judge for want of jurisdiction. In re Hybart's Estate, 129 N. C. 130, 39 S. E. 779.

Drainage Assessment Proceedings. — Under this section giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings, and section 5287, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, an appeal may be taken from an order of the clerk to the superior court. Spence v. Granger, 207 N. C. 19, 175 S. E. 824.

Motion to Retax Bill of Costs. — When a motion, to retax a bill of costs in a case which originated before the clerk but was appealed to the superior court is made at the next term after judgment is entered, it is error for the judge to hold that he has no power to entertain it. In re Smith, 105 N. C. 167, 10 S. E. 982.

Cited in Skinner v. Carter, 108 N. C. 106, 12 S. E. 908; Fowler v. Fowler, 131 N. C. 169, 42 S. E. 563; Settle v. Settle, 141 N. C. 553, 569, 54 S. E. 445; Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 409, 151 S. E. 871; Vann v. Coleman, 206 N. C. 451, 174 S. E. 301; Buncombe County v. Arbogast, 205 N. C. 745, 172 S. E. 354.

§ 638. Appeal from superior court judge.—An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial. (Rev., s. 587; Code, s. 548; C. C. P., s. 299; 1818, c. 962, s. 4.)

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As to appellate jurisdiction of the Supreme Court, see section 1411, and constitution art. IV. sec. 8. As to who may appeal see section 632. As to power of Supreme Court on appeal, sections 658, 1412. For appeals in criminal cases, see sections 4649, et seq., and annotations thereunder. For an exhaustive treatment of this subject, see 1 N. C. Enc. Dig. 376 et seq.; 13 N. C. Enc. Dig. 70 et seq.

I. EDITOR'S NOTE.

Editor's Note. — The appellant should be very careful to conform with the rules of the Supreme Court regarding appeals. The penalty for failure to comply with these rules is the dismissal of the appeal. Exceptions which are not brought forth among the assignments of error, are deemed abandoned under Supreme Court Rule 21.

At common law there was no appeal from the decision of any court, and a decision could only be reviewed by a writ of error or writ of false judgment. By our law appeals are used as a substitute for those writs. Previous to the adoption of the Code of Civil Procedure an appeal was allowed by the court and the preparation and perfection of it was the act of the court. But the Code of Civil Procedure made a notable change in that particular. Appeals were no longer prayed for but were taken. As said in Campbell v. Allison, 63 N. C. 568, "The judge below has nothing to do with the granting of an appeal; it is the act of the appellant alone."

Under the provisions of our state constitution, Article IV, section 8, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court. See Robinson v. Ivy, 193 N. C. 805, — S. E. —

Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much inconvenience and delay is occasioned by the practice of appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings.

Certiorari is the proper substitute for an appeal where the appellant has failed to perfect his appeal through no fault or negligence of his own. See section 630 and notes thereunder.

II. APPEAL IN GENERAL.

A. General Considerations.

Purpose of Appeal. — "The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits." Rush v. Halcyon Steamboat Co., 67 N. C. 47, 49.

Method of Correcting Errors. — Where an adjudication is based on the erroneous application of legal principles the proper remedy to correct the error is by a proceeding in appeal. Stafford v. Gallops, 123 N. C. 19, 21, 31 S. E. 265; McLeod v. Graham, 132 N. C. 473, 475, 43 S. E. 935; Rawls v. Mayo, 163 N. C. 177, 180, 79 S. E. 298.

Jurisdiction Properly Acquired.—As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. Gordon v. Sanderson, 83 N. C. 1.

Jurisdiction Not Conferred by Consent.—Jurisdiction of an appeal can not be given by consent of parties. Cary Co. v. Allegood, 121 N. C. 54, 28 S. E. 61; Rodman v. Davis, 53 N. C. 134, 135.

Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it. Caudle v. Morris, 158 N. C. 594, 74 S. E. 98; Byrd v. Southerland, 186 N. C. 384, 119 S. E. 2.

An appellant's right of appeal to the Supreme Court is dependent upon his observance of the rules regulating appeals. State v. Butner, 185 N. C. 731, 117 S. E. 163; Kerr v. Drake, 182 N. C. 764, 108 S. E. 393; Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals and where the appellant has failed to comply with these rules the appeal will be dismissed. Rose v. Rocky Mount, 184 N. C. 609, 113 S. E. 506.

Failure to Transmit Record.—An appellant who merely prays an appeal in open court, and files a bond with the clerk, without settling and transmitting the record, does not "take" an appeal, within the meaning of this section. Wilson v. Seagle, 84 N. C. 110.

Both Parties Interested on Same Side of Case. — The Supreme Court will dismiss an appeal from a judgment in an action brought to obtain a construction of such act where it is apparent that both parties are interested on the same side of the case. Kistler v. Southern R. Co., 170 N. C. 666, 79 S. E. 676.

Party Not Appealing.—A party not appealing or assigning any errors is not in position to complain of a ruling. Hannah v. Hyatt, 170 N. C. 634, 87 S. E. 517.

Separate Appeals in Related Causes. — Where causes of action which could not be merged were tried together merely for convenience, and were not united or consolidated by order of the court into one action, there should be separate appeals. Williams v. Carolina, etc., R. Co., 144 N. C. 498, 57 S. E. 216.

B. From What Decisions, Orders, etc., Appeal Lies.

For particular orders, decisions, etc., see post this note, "Appeal as to Particular Subjects," III.

Cause Directly Affected.—An appeal lies from an order or determination in an action which affects the right litigated —the cause of action in controversy therein—in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and not affecting directly the cause of action litigated. Bynum v. Comm'rs 101 N. C. 412, 418, 8 S. E. 136.

An order directing reference to ascertain certain alleged expenditures by guardian is not appealable, it not affecting any substantial rights. Sutton v. Schonwald, 80 N. C. 20.

It was formerly held that every order of a court of equity by which the rights of the parties may be affected may be reviewed in the Supreme Court. Graham v. Skinner, 57 N. C. 94.

Final Judgment. — Except where statute otherwise expressly provides, appeal to Supreme Court lies only from final judgment or one in its nature final. McIntosh Grocery Co. v. Newman, 184 N. C. 370, 114 S. E. 535; Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337, 338. See Thomas v. Carteret, 180 N. C. 109, 104 S. E. 75, 76.

As a general rule, an appeal will not lie until there is a final disposition of the whole case. Moore v. Hinnant, 87 N. C. 505; State v. Keeter, 80 N. C. 472, 473; Norfolk, etc., R. Co. v. Warren, 92 N. C. 620; Hailey v. Gray, 93 N. C. 195.

All issues should be determined, and a final judgment rendered, before an appeal to the Supreme Court should be permitted. Yates v. Dixie Fire Ins. Co., 176 N. C. 401, 97 S. E. 209.

Any decision, order, or decree of the circuit court, which puts an end to the proceedings, between the parties to a cause in that court, is final, and may be reviewed upon appeal. Ex parte Spencer, 95 N. C. 271; Bain v. Bain, 106 N. C. 239, 11 S. E. 327. For further consideration of what constitutes a final judgment, see § 592 and the notes thereto.

Same—Premature Appeal.—See post, this note, "What Supreme Court Will Consider," II, C.

Interlocutory Orders.—In order to present the subject of appeals in a logical manner as a whole, interlocutory orders are discussed here. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by section 640. As to what constitutes an interlocutory order, see section 592 and the notes thereto. Ed. Note.

An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. Skinner v. Carter, 108 N. C. 106, 12 S. E. 908; Warren v. Stancill, 117 N. C. 112, 23 S. E. 216.

Appeals to the Supreme Court will be entertained from interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant. Martin v. Flippin, 101 N. C. 452, 8 S. E. 345.

By special act the legislature may provide that no appeal lies from an interlocutory order in a specific proceedings. Norfolk & Southern R. Co. v. Warren, 92 N. C. 620.

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. Perry v. Tupper, 71 N. C. 380.

Where a party appeals from an interlocutory order, and proceeds to trial, without waiting for a decision upon the matter appealed from, the appeal will be dismissed with costs. Love v. Johnston, 34 N. C. 367.

Appeal from Order Allowing Amendment to Pleadingss.—Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. Nissen Company v. Nissen, 198 N. C. 808, 153 S. E. 450.

Judicial Nature of Decision.—An appeal lies in all cases from the judgment applying the law to the facts found. Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269; Ladd v. Teague, 126 N. C. 544, 36 S. E. 45; Stokes v. Cogdell, 153 N. C. 181, 69 S. E. 65.

Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. Pender v. North State Life Ins. Co., 163 N. C. 98, 79 S. E. 293.

Refusal to Dismiss Action.—An appeal does not lie from the refusal to dismiss an action. Goldsboro v. Holmes, 183 N. C. 203, 111 S. E. 1; Capps v. Atlantic, etc., R. Co., 182 N. C. 7, 58, 108 S. E. 300; Winder v. Penniman, 181 N. C. 7, 105 S. E. 884, 886.

Appeal taken from an order denying a motion to dismiss a special proceeding is premature. After denying such motion, the judge should proceed with the hearing, and the appeal should be from the final decision. Mitchell v. Kilburn, 74 N. C. 483; Mitchell v. Hubbs, 74 N. C. 484; Mitchell v. West, 74 N. C. 485.

Dismissal of Appeal.—A party who loses on appeal to the Supreme Court can not review its decision by second appeal, but the only way is by petition to rehear. Holland v. Railroad, 143 N. C. 435, 55 S. E. 835; Carter v. White, 134 N. C. 466, 46 S. E. 983.

Refusal of Motion for Judgment upon Special Verdict.—An order by the trial court, denying defendants' motions for judgment on the special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as may be necessary to determine the rights of the parties, with leave to file amended pleadings, is not a final judgment. Thomas v. Carteret, 180 N. C. 109, 104 S. E. 75.

Application for Citizenship.—Under this section an alien may appeal from decree of superior court denying application for citizenship. United States v. Ovens, 13 Fed. 376. 2d Series.

Judgment Confessed. — One who confesses judgment has no right of appeal from such judgment; but where an appeal was allowed, and the plaintiff failed to move to dismiss, the Supreme Court may pass by the irregularities and consider the errors. Rush v. Halcyon Steamboat Co., 67 N. C. 47.

Decisions of Intermediate Courts.—An appeal lies from the dismissal of an action, or of an appeal from justice court; but it does not lie from a refusal to dismiss, for an exception should be noted, and an appeal lies from the final judgment. Bargain House v. Jefferson, 180 N. C. 32, 103 S. E. 922.

Decisions and Orders Favorable to Appellant.—See post, this note, "Estoppel to Allege Error," II, D.

Matters in Discretion of the Trial Court.—The discretion of the trial court will not be reviewed, unless it appears that such discretion was abused or that the ruling was based upon a matter of law. Fayetteville Light, etc., Co. v. Lessem Co., 174 N. C. 358, 93 S. E. 836; Gordon v. Pintsch Gas Co., 178 N. C. 435, 100 S. E. 878. See 5 N. C. Law Rev. 14.

This section applies only to "matters of law or legal inferences," and not to an order involving a mere discretion. Jenkins v. N. C. Ore Dressing Co., 65 N. C. 563.

If, in the trial court, the verdict of the jury is, in the opinion of the presiding Judge, contrary to the weight of the evidence, he has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate court. Watts v. Bell, 71 N. C. 405.

Appeals from Subsidiary Proceedings.—Where, after the issuing of an injunction from which an appeal is taken, it appears that the case has been tried, and the issues found, and judgment rendered against appellant, the appeal will be dismissed. Pritchard v. Baxter, 108 N. C. 129, 12 S. E. 906.

Detached Rulings.—The Supreme Court will not entertain appeals from detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. Arrington v. Arrington, 91 N. C. 301.

Removal of Public Officer.— An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office, is allowed by this section. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

C. What Supreme Court Will Consider.

See post, this note, "Presumption on Appeal—Burden of Proof," II, E.

Record Discloses no Error.—Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Lupton, 193 N. C. 428, 137 S. E. 175.

Exception Not Considered by Trial Court.—An exception which the trial court, through inadvertence, did not consider, can not be reviewed on appeal, but the case will be remanded that such exception may be passed on. Scroggs v. Stevenson, 100 N. C. 354, 6 S. E. 11.

Points Reviewed Must Have Been Passed on.—In case of an appeal, from the probate court to the judge, if there be a further appeal from the judge to the Supreme Court, the latter tribunal can review no point before the probate court that was not passed upon by the judge. Rowland v. Thompson, 64 N. C. 714.

Error Not Based on Exceptions.—An assignment of error not based on any exception in the record can not be considered. Morse v. Freeman, 157 N. C. 385, 72 S. E. 1056; Thompson v. Seaboard, etc., R. Co., 147 N. C. 412, 61 S. E. 286.

Will Not Go Behind Judge's Finding of Fact.—A finding by the trial judge as a fact that plaintiff moved to set aside a judgment only upon ground of excusable neglect prevents supreme court from considering any other ground. Shepherd v. Shepherd, 180 N. C. 494, 105 S. E. 4.

Questions Decisive of Appeal.—The supreme court will pass only on the questions decisive of the appeal. Richardson v. Southern Exp. Co., 151 N. C. 60, 65 S. E. 616.

Where there is not enough evidence to take case to the jury, it will not be decided whether defendant would be liable to plaintiff if allegations of complaint had been established. Pegram v. Canton, 179 N. C. 700, 103 S. E. 371.

Questions Which May Not Arise on New Trial.—Where a new trial must be granted for certain reasons, questions in controversy, which may not arise again in the case, need not be decided. Supervisor & Comm'rs v. Jennings, 181 N. C. 393, 107 S. E. 312; Moore v. Chicago Bridge, etc., Works, 183 N. C. 438, 111 S. E. 776.

Appellant Not Entitled to Favorable Decision in Any Event.—Plaintiff can not complain of technical error of

the court in the exclusion of evidence offered, where the whole case shows that he could not recover in any event. Wilcox v. McLeod, 182 N. C. 637, 109 S. E. 875; Rankin v. Oates, 183 N. C. 517, 112 S. E. 32.

Defendant's Appeal.—Where, on plaintiff's appeal, it was decided that plaintiff could not maintain his action, defendants' appeal need not be considered. Beard v. Sovereign Lodge, W. O. W., 184 N. C. 154, 113 S. E. 661.

Verdict Bars Right of Action.—Where jury's answer to one issue is a complete bar to plaintiff's right of action, and no error is alleged in determination of that issue, it is unnecessary to consider exceptions relating to other issues. Lamm v. Holloman, 176 N. C. 686, 97 S. E. 161.

Error Must Be Prejudicial. — Error to warrant reversal must be prejudicial. McKeel v. Holloman, 163 N. C. 132, 79 S. E. 445; Steeley v. Dare Lumber Co., 165 N. C. 27, 80 S. E. 963; Brogden v. Gibson, 165 N. C. 16, 80 S. E. 966.

"Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails." Carter v. Seaboard, etc., R. Co., 165 N. C. 244, 249, 81 S. E. 321.

Errors Not Affecting Result.—The finding for defendant upon one issue renders harmless any error in regard to that issue, and judgment for plaintiff is not reversible therefor. Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308; Perry v. Insurance Co., 137 N. C. 402, 49 S. E. 889.

Error Must Be Material.—Mere error in the trial of a cause is not sufficient grounds for reversal but it should be made to appear that the ruling was material and prejudicial to appellant's rights. Shaw Cotton Mills v. Acme Hosiery Mills, 181 N. C. 33, 106 S. E. 24; Schas v. Equitable Life Assur. Soc., 170 N. C. 420, 87 S. E. 222.

Trivial Errors.—Courts do not lightly grant reversals or set aside verdicts, and a motion for such to be meritorious should not be based on any merely trivial errors committed manifestly without errors committed manifestly without prejudice. Rierson v. Carolina Steel, etc., Co., 184 N. C. 363, 114 S. E. 467.

Technical Errors.—Verdicts and judgments will not be set aside and new trial granted for a technical or formal error, but to accomplish this result it must appear not only that the ruling was erroneous, but that it amounted to a denial of some substantial right, and this rule applies especially where the trial was a long drawn out and vigorous contest. In re Will of Ross, 182 N. C. 477, 109 S. E. 365.

Error Cured by Verdict or Judgment.—Exceptions to a portion of a charge on an issue which was immaterial under the special verdict, can not be sustained. Fourth Nat. Bank v. Wilson, 168 N. C. 557, 84 S. E. 866. Gambier v. Kimball, 168 N. C. 642, 85 S. E. 3.

Error Cured by Withdrawal.—An exception has no point on appeal, where the testimony objected to was stricken on the appellant's motion. In re Will of Staub, 172 N. C. 138, 90 S. E. 119; Raulf v. Elizabeth City Light, etc., Co., 176 N. C. 691, 97 S. E. 236.

Error Not Involved on Appeal.—Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. In re Rawlings' Will, 170 N. C. 58, 86 S. E. 794.

Opinion in Case Not Properly Before Court.—The supreme court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. Taylor v. Johnson, 171 N. C. 84, 87 S. E. 981; Bargain House v. Jefferson, 180 N. C. 32, 103 S. E. 922.

On dismissal of a fragmentary appeal, the supreme court may in its discretion express its opinion upon the merits so far as it may be a guide in further proceedings in the court below. Penn-Allen Cement Co. v. Phillips, 182 N. C. 437, 109 S. E. 257.

Where supreme court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion is authoritative on subsequent appeal. Yates v. Dixie Fire Ins. Co., 176 N. C. 401, 97 S. E. 209; North Carolina Public Service Co. v. Southern Power Co., 181 N. C. 356, 107 S. E. 226.

When Court Gave Wrong Reason for Judgment.—A correct judgment will not be disturbed on writ of error because the trial court gave a wrong reason therefor. Burns v. McFarland, 146 N. C. 382, 59 S. E. 1011; Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961; King v. McRacken, 171 N. C. 752, 88 S. E. 226.

Errors in Case of Decisions Correct on Merits. — A judgment will be affirmed, though irregularly rendered, where the correct result was accomplished. Rankin v. Oates 183 N. C. 517, 112 S. E. 32.

Moot Question.—Where the record on appeal presents only a moot question, the court will not express an opinion concerning it. Greenleaf Johnson Lumber Co., v. Valentine, 179 N. C. 423, 102 S. E. 774; Waters v. Boyd, 179 N. C. 180, 102 S. E. 196; Kistler v. Southern R. R. 170 N. C. 666, 79 S. E. 676.

Proceedings Frivolous or for Delay. — Where it appears upon record that no serious assignment of error is made and that appeal is frivolous and taken solely for delay, appeal will be dismissed. Blount v. Jones, 175 N. C. 708, 95 S. E. 541; Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

An appeal by defendant from an order denying a change of venue made at a term subsequent to denial of a motion for change of venue on another ground will be dismissed as made for delay. Ludwick v. Uwarra Min. Co., 171 N. C. 60, 87 S. E. 949.

Premature Appeal.—The supreme court will not entertain premature or fragmentary appeals. Thomas v. Carteret, 180 N. C. 109, 104 S. E. 75, 76. See Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833; Joyner v. Reflector Co., 176 N. C. 274, 97 S. E. 44, 45.

A premature or fragmentary appeal will not be considered. Railway v. King, 125 N. C. 454, 34 S. E. 541; Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 383.

Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. Brown v. Nimocks, 126 N. C. 808, 36 S. E. 278.

Where no final judgment was given, nor was there any interlocutory order or determination that put an end to the proceeding, or that could destroy or seriously impair some substantial right of the appellants, if the appeal should be delayed until the final judgment, an appeal will not lie. Fragmentary appeals are not allowed. Leak v. Covington, 95 N. C. 193, and cases there cited; Martin v. Flippin, 101 N. C. 452, 8 S. E. 345.

When Appeal Is Premature.—Where the pleadings present issues of fact that have not been tried below, an appeal is premature. Goode v. Rogers, 126 N. C. 62, 35 S. E. 185.

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. Graded School Trustees v. Hinton, 156 N. C. 586, 71 S. E. 1087.

Same—Effect of Dismissal. — Though an appeal is dismissed as premature, its entry is equivalent to "noting an exception." Gray v. James, 147 N. C. 139, 60 S. E. 906; Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121; Kerr v. Hicks, 154 N. C. 265, 70 S. E. 468; Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64.

Fictitious Action.—The supreme court will not hear an appeal in a fictitious action. Blake v. Askew, 76 N. C. 325.

Abstract Propositions.—The supreme court will not entertain a cause to settle abstract propositions no longer at issue. Reid v. Norfolk, etc., R. Co., 162 N. C. 355, 78 S. E. 306; Davis v. Pierce, 167 N. C. 135, 83 S. E. 182.

Admission Rendering Question Academic.—That in referendum election, to amend city charter pursuant to a legislative enactment, no booth was provided, etc., becomes academic upon express admission that no person was interfered with or prevented from casting free ballot. Taylor v. Greensboro, 175 N. C. 423, 95 S. E. 771.

Where Appeal Becomes Irrelevant.—Where an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. Page v. Page, 167 N. C. 350, 83 S. E. 627; Cannon v. Commissioners, 170 N. C. 677, 87 S. E. 31.

Case Not before Appellate Court. — An agreement that other pending causes shall abide the determination in the one in question is a matter between the parties, and does not authorize the supreme court to assume jurisdiction in cases not before it, or warrant the expression of an opinion speculative. Belden v. Snead, 84 N. C. 243.

D. Estoppel to Allege Error.

In General.—A defendant can not ask that a party be brought in, and when it is so ordered object because he is an improper party. Armfield Co. v. Saleeby, 178 N. C. 298, 100 S. E. 611.

A party to an action can not except to an instruction which was given by the trial court at his request. Washington Horse Exch. Co. v. Bonner, 180 N. C. 20, 103 S. E. 907; Bell v. Harrison, 179 N. C. 190, 102 S. E. 200.

The defendant can not object on appeal to evidence to the same effect as that elected by his cross-examination of the witness. Jenkins v. Long, 170 N. C. 269, 87 S. E. 47.

Prevailing Parties.—A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. Hoke v. Carter, 34 N. C. 327; Lenoir v. South, 32 N. C. 237.

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is

entirely in his favor, so that he does not desire a new trial his appeal must be dismissed. McCullock v. North Carolina R. Co., 146 N. C. 316, 59 S. E. 882.

Errors Favorable to Party Complaining.—A party can not complain of error in his favor. Shaw v. North Carolina Public Service Corp., 168 N. C. 611, 84 S. E. 1010; Gaston Farmers Warehouse Co. v. American Agr. etc., Co., 176 N. C. 509, 97 S. E. 472; Nance v. King, 178 N. C. 574, 101 S. E. 212.

A ruling in appellant's favor is not reviewable, where appellee does not complain of it. Miller v. Curl, 162 N. C. 1, 77 S. E. 952; Hendon v. North Carolina R. Co., 127 N. C. 110, 37 S. E. 155.

Favorable Instructions. — A party can not complain of charges favorable to himself. Lupton v. Southern Exp. Co., 169 N. C. 671, 86 S. E. 614; Belk v. Belk, 175 N. C. 69, 94 S. E. 726; Borden v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 442.

Acceptance of Benefits.—Where plaintiff recovered judgment on two of the causes of action alleged in the complaint, and no exception was taken to the ruling of the court, the plaintiff by the payment of the judgment was not estopped from complaining on appeal of exclusion of evidence as to other causes of action pleaded in the complaint. Garland v. Linville Improv. Co., 184 N. C. 551, 115 S. E. 164.

Party Who Acquiesces in Judgment.—Where, after judgment sustaining a demurrer to the complaint, plaintiff did not except, but amended his complaint in accordance with the views of the trial court, he acquiesced in the judgment, and can not assign it as error. Rice v. McAdams, 149 N. C. 29, 62 S. E. 774.

Consent Judgment.—No appeal lies from a consent judgment. Overman v. Lanier, 156 N. C. 537, 72 S. E. 575; Union Bank v. Commissioners, 119 N. C. 214, 226, 25 S. E. 966; Hartsoe v. Southern R. Co., 161 N. C. 215, 76 S. E. 684.

Order in Furtherance of Parties' Own Demand.—A party has no right of appeal from an order which does not affect a substantial right claimed in the action and which is in furtherance of his own demand. Leak v. Covington, 87 N. C. 501; Hocutt v. Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681.

E. Presumptions on Appeal—Burden of Proof.

Presumption against Error. — On appeal there is a presumption against error. Mason v. Town of Andrews, —— N. C. —— 138 S. E. 341; Carstarphen v. Carstarphen, 193 N. C. 541, 137 S. E. 658; In re Will of Ross, 182 N. C. 477, 109 S. E. 365; Fellows v. Dowd, 182 N. C. 776, 109 S. E. 69.

The presumptions are in favor of the correctness of the rulings of law of the superior court, with the burden upon appellant to show error. Rawls v. Lupton, 193 N. C. 428, 137 N. C. 175.

Prejudicial error will not be presumed. Blevins v. Norfolk, etc., R. Co., 184 N. C. 324, 114 S. E. 298.

Burden on Appellant to Show Error.—The burden is on the party alleging error to show it affirmatively by the record. Rawls v. Lupton, 193 N. C. 428, 137 S. E. 175; Baggett v. Lanier, 178 N. C. 129, 100 S. E. 254; Quelch v. Futch, 175 N. C. 694, 94 S. E. 713.

Facts Not Shown by Record.—Where the testimony on which the trial court based its findings is not in the record, the findings must be accepted on appeal as final, as it is presumed that they are supported by the evidence. Caldwell v. Robinson, 179 N. C. 518, 103 S. E. 75.

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment. Bowers v. Bryan Lumber Co., 152 N. C. 604, 68 S. E. 19.

Where the charge is not in the record, it will be presumed that it correctly stated the law. Ellison v. Western Union Tel. Co., 163 N. C. 5, 79 S. E. 277; Harrison v. Western Union Tel. Co., 163 N. C. 18, 79 S.. E. 281.

Burden to Show Prejudice from Error.—The burden is on the appellant to show clearly that error was prejudicial. Quelch v. Futch, 175 N. C. 694, 94 S. E. 713; Mercer v. Hitch Lumber Co., 173 N. C. 49, 91 S. E. 588; Universal Oil, etc., Co. v. Burney, 174 N. C. 382, 93 S. E. 912.

But the immateriality of an error must clearly appear to warrant the court to treat it as surplusage. McLenan v. Chisholm, 64 N. C. 323.

Admission of Evidence. — Evidence improperly admitted will be presumed to be prejudicial. Johnson v. Railroad Co., 140 N. C. 574, 581, 53 S. E. 362; Patton v. Porter, 48 N. C. 539.

F. Effect of Appeal on Proceedings in Lower Court.

See section 655 and annotations thereunder. For undertaking to stay execution on appeal see section 650.

III. APPEAL AS TO PARTICULAR SUBJECTS.

A. Costs.

As to costs on appeal, see §§ 1246 et seq., and the notes thereto.

Costs Alone Involved.—An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. Hasty v. Funderburk, 89 N. C. 93; Martin v. Sloan, 69 N. C. 128; State v. Richmond, etc., R. Co., 74 N. C. 287; Russell v. Campbell, 112 N. C. 404, 17 S. E. 149.

Where, pending an appeal, the subject-matter of an action, or the cause of action, is destroyed, in any matter whatever, the supreme court will not go into a consideration of the abstract question which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. Wikel v. Board, 120 N. C. 451, 27 S. E. 117; Herring v. Pugh, 125 N. C. 437, 34 S. E. 538.

When Appeal Lies for Costs.—The exceptions to the general rule that the supreme court will not decide upon a mere question of costs are: (1) Where the very question at issue is the legality of a particular item of costs (Elliott v. Tyson, 117 N. C. 114, 23 S. E. 102; Blount v. Simmons, 120 N. C. 19, 26 S. E. 649); or (2) the liability of a prosecutor for costs in a criminal action (State v. Byrd, 93 N. C. 624); or, (3) taking the case below as properly decided, whether the costs of that court were adjudicated against the proper party (State v. Horne, 119 N. C. 853, 26 S. E. 36). Herring v. Pugh, 125 N. C. 437, 34 S. E. 538.

If some important substantial right be involved an exception will be made and an opinion given. Martin v. Sloan, 69 N. C. 128.

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, is appealable. Waldo v. Wilson, 177 N. C. 461, 100 S. E. 182.

Fiduciaries.—Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." May v. Darden, 83 N. C. 237.

Denial of Motion to Retax Costs.—Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from party taxed, or whether one or more items have been erroneously inserted in bills of costs. Vandyke v. Aetna Life Ins. Co., 174 N. C. 78, 93 S. E. 444.

Rulings Founded upon Lack of Power.—A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. Horner v. Oxford Water, etc., Co., 156 N. C. 494, 72 S. E. 624; Martin v. Bank, 131 N. C. 121, 42 S. E. 558.

B. Demurrer.

Demurrer to Whole Cause.—An appeal lies fron an order sustaining or overruling a demurrer to a whole cause of action or defense. Shelby v. Charlotte Elect. R., etc., Co., 147 N. C. 537, 61 S. E. 377; Pender v. Maliett, 122 N. C. 163, 30 S. E. 324; Abbott v. Hancock, 123 N. C. 89, 31 S. E. 271.

Demurrer Sustained but No Verdict Rendered.—The supreme court will not entertain an appeal from an order sustaining a demurrer to a counterclaim where no verdict or judgment was rendered. Teal v. Liles, 183 N. C. 678, 111 S. E. 617; Bazemore v. Bridges, 105 N. C. 191, 10 S. E. 888.

Overruling Demurrer.—On an overruling of its demurrer a party made a defendant is entitled to appeal, unless the demurrer has been held frivolous. Joyner v. Champion Fibre Co., 178 N. C. 634, 101 S. E. 373.

An appeal lies to the Supreme Court from an order of the court below overruling a demurrer, Commissioners v. Magnin, 78 N. C. 181.

An order overruling demurrer to part of answer with leave to reply is not a final order and an appeal therefrom will be dismissed. Chambers v. Seaboard Air Line R. Co., 172 N. C. 555, 90 S. E. 590.

Court, on appeal having considered those grounds of demurrer to complaint which may finally dispose of action, will not review the overruling of demurrer to allegation embracing only part of cause of action, and which, if sustained, will not dismiss it. Headman v. Board, 177 N. C. 261, 98 S. E. 776.

Refusal to Hold Demurrer or Answer Frivolous.—The refusal to hold a demurrer or answer frivolous, and to render judgment thereon is not appealable. Walters v. Starness, 118 N. C. 842, 24 S. E. 713; Morgan v. Harris, 141 N. C. 358, 54 S. E. 381.

Withdrawal of Matter Demurred to.—An appeal cannot be taken from a refusal of the court to proceed to try the

action on the demurrer, after the withdrawal of the subject-matter to which it relates and the consequent order of continuance. Gay v. Brookshire, 82 N. C. 409, 411.

C. Granting or Denying New Trial.

In General.—An appeal from an order granting or refusing a new trial, only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not a party to the action is entitled to a new trial as of right, and as a matter of law. Braid v. Lukins, 95 N. C. 123.

An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal. Carson v. Dellinger, 90 N. C. 226; Thomas v. Myers, 87 N. C. 31.

The Supreme Court has jurisdiction to review, upon appeal, the decision of the court below, granting, or refusing to grant, a new trial, where a matter of law or legal inference is involved. Johnson v. Bell, 74 N. C. 355.

Setting Aside Verdict and Granting New Trial.—The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. Coats v. Norris, 180 N. C. 77, 104 S. E. 71; Harrill v. Seaboard Air Line R. Co., 181 N. C. 315, 107 S. E. 136.

An appeal from an order setting aside the award of damages as excessive is premature. Billings v. Observer, 150 N. C. 540, 64 S. E. 435. Rogerson v. Lumber Co., 136 N. C. 266, 48 S. E. 647.

Order setting aside verdict, as matter of law is appealable. Tuthill v. Norfolk, etc., R. Co., 174 N. C. 77, 93 S. E. 446.

Grant of Partial New Trial.—An appeal from refusal of motion for judgment upon verdict and a grant of partial new trial, which has been granted as matter of law and not of discretion is not fragmentary and premature. Grove v. Baker, 174 N. C. 745, 94 S. E. 528.

Contents of Record when New Trial Granted or Refused.—To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not. Carson v. Dellinger, 90 N. C. 226.

D. Injunction.

Order Refusing Injunction.—A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. First National Bank v. Jenkins, 64 N. C. 719.

Interlocutory Injunction. — An appeal from an injunction pendente lite against counting and certifying the result of a special election granted on the ground that women, infants, and nonresidents, though freeholders, were not counted in determining the necessary number of the signers, is not subject to dismissal as fragmentary and premature. Gill v. Board, 160 N. C. 176, 76 S. E. 203.

Order Continuing Injunction.—Overruling a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected; but, when an injunction has been issued, an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. Reynolds & Co., 151 N. C. 606, 66 S. E. 657.

Finding of Fact Reviewable in Injunction Cases.—While the Supreme Court may review findings of fact in an action for injunction, it will not, where no special findings are set out in the case, reverse what were apparently the judge's findings necessary to sustain his judgment unless such findings are clearly wrong. Davenport v. Board, 183 N. C. 570, 112 S. E. 246.

Overruling Demurrer to Complaint for Injunction. — An appeal taken from a judgment overruling demurrers to the complaint and allowing defendants to answer for the purposes of a motion to restrain one of defendants from suing plaintiff in the federal court, remains in the court below, and he must obtain relief there and not by appeal. Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590.

Seeking to Restrain Act Already Committed.—The correctness of a ruling dissolving a restraining order will not be considered on appeal, when it is made to appear that the act sought to be restrained has been committed. Kilpatrick v. Harvey, 170 N. C. 668, 86 S. E. 596; Moore v. Cooper Monument Co., 166 N. C. 211, 81 S. E. 170; Wallace v. North Wilkesboro, 151 N. C. 614, 66 S. E. 657; Galloway v. Board, 184 N. C. 245, 114 S. E. 165.

E. Nonsuit.

In General.—If, as a matter of law, plaintiff was not entitled to a verdict, he could not take a voluntary nonsuit, and have the decision reviewed, as the setting aside of a verdict for such reason is not reviewable; being controlled by the sound discretion of the court. McKinney v. Patterson, 174 N. C. 483, 93 S. E. 967.

No appeal lies to set aside a voluntary nonsuit. White v. Harris, 166 N. C. 227, 81 S. E. 687; Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337.

An order sustaining a motion for nonsuit as to one cause of action and overruling it as to other causes of action is not appealable by defendant. Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833.

An appeal will lie from the judgment of the superior court reversing the clerk's order permitting the plaintiff to take a voluntary nonsuit. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329; Goldsboro v. Holmes, 183 N. C. 203, 111 S. E. 1.

An appeal can not be taken from a nonsuit to test an adverse ruling of the judge, leaving issuable matter presented and undetermined. Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337.

Where Court Intimates Opinion.—Where the court on the trial intimates an opinion that plaintiff can not maintain his action, he may take a judgment of nonsuit and appeal; and the appeal will not be dismissed on the ground that plaintiff voluntarily took a nonsuit. Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551; Wharton v. Commissioners, 82 N. C. 12; Hedrick v. Pratt, 94 N. C. 101, 103; Midgett v. Manufacturing Co., 140 N. C. 361, 364, 53 S. E. 178.

A plaintiff may, in deference to an intimation from the court that he can not maintain his action, submit to a nonsuit and have the questions of law reviewed upon appeal. Hedrick v. Pratt, 94 N. C. 101; Warner v. Western, etc., R. Co., 94 N. C. 250.

Where court intimated that he would charge jury that certain deed did not convey land described in complaint, which was vital to plaintiff's recovery, plaintiff had the right to submit to a nonsuit and appeal. Quelch v. Futch, 172 N. C. 316, 90 S. E. 259.

But where the court intimated that the complaint stated a cause of action for rescission of a contract, but not for reformation; whereupon plaintiff suffered nonsuit, and appealed. Held that, as the intimation by the court was open to reconsideration, an appeal was error. Davis v. Ely, 100 N. C. 283, 5 S. E. 239. See also, Hayes v. Railroad, 140 N. C. 131, 52 S. E. 416; Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227.

Construction of Evidence in Nonsuit Cases. — Where the Supreme Court passes on a motion to nonsuit, the plaintiff is entitled to have the evidence considered as true and construed most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom. Munick v. Durham, 181 N. C. 188, 106 S. E. 665; Allen v. Gardner, 182 N. C. 425, 109 S. E. 260.

The court is not limited to a consideration of the evidence of defendant, but must examine all the evidence. Ridge v. Norfolk Southern R. Co., 167 N. C. 510, 83 S. E. 762.

F. Order of Reference and Referee's Report.

As to reference generally, see §§ 572 et seq. and the notes thereto.

Motion to Refer.—Where the answer in a proceeding to compel an accounting did not constitute a valid plea in bar, the denial of a motion to refer on the ground that such answer did not set up a valid plea in bar affected a substantial right, and was appealable. Jones v. Sugg, 136 N. C. 143, 48 S. E. 575.

Appointing Referee.—An appeal from a judgment adjudging that plaintiff recover nothing on account of certain items, and referring all matters in controversy as to other items to a referee to take and state an account, is premature. International Waste Co. v. Bloomfield Mfg. Co., 168 N. C. 92, 83 S. E. 609.

An appeal will not lie from an interlocutory judgment adjudging plaintiff entitled to recover damages and appointing a referee to hear evidence as to the amount. Richardson v. Southern Exp. Co., 151 N. C. 60, 65 S. E. 616.

Relating to Reference of Cause.—Where the court ordered a reference to take an account of partnership receipts and expenses, an appeal from such order before judgment on the report thereon is premature. Leroy v. Saliba, 182 N. C. 757, 108 S. E. 303.

Plea in Bar.—When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment and then appeal. Pritchett v. Greensboro Supply Co., 153 N. C. 344, 69 S. E. 249.

An appeal lies from a judgment sustaining or overruling

a plea in bar, and no reference should be ordered until the plea is finally determined. Royster v. Wright, 118 N. C. 152, 24 S. E. 746; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248. Where a matter pleaded in bar is an estoppel was discussed in Rogers v. Ratcliffe, 48 N. C. 225.

Order of Reference Made before Disposition of Plea in Bar.—An order of reference made before disposition of a plea in bar of an action is one from which an appeal can be immediately taken. Jones v. Wooten, 137 N. C. 421, 49 S. E. 915; Austin v. Stewart, 126 N. C. 525, 36 S. E. 37; Duckworth v. Duckworth, 144 N. C. 620, 57 S. E. 396.

Submitting Issue on Plea in Bar.—An action on the part of the court submitting to the jury an issue on a plea in bar before ordering a reference decides no substantial right, and is not the subject of an appeal. Sloan v. McMahon, 85 N. C. 296.

Setting Aside Judgment.—The supreme court can review the ruling of the judge below on a motion to set aside a judgment. Clegg v. New York White Soapstone Co., 67 N. C. 302.

Order to Show Cause.—An order of a judge for the defendant to appear at a subsequent time and show cause why a receiver should not be appointed is not such an order as can be appealed from. Gray v. Gaither, 71 N. C. 55.

Exceptions Must Be Passed on by Judge.—The Supreme Court will not review exceptions of law to a referee's report, unless they are passed upon by the judge. John Church Co. v. Dawson, 157 N. C. 566, 72 S. E. 1009.

Exceptions Overruled.—Where some of the exceptions to a referee's report were overruled, and the case retained by the court to try the other issues raised by the pleadings, it was held that this was an interlocutory order and not appealable. Leak v. Covington, 95 N. C. 193.

Exception to Partial Report of Referee.—A judgment passing on exceptions to a referee's report, distributing part of the fund, and sending the case back for further report as to certain claims, is not final so as to support an appeal. Pritchard v. Panacea Spring Co., 151 N. C. 249, 65 S. E. 968; Smith v. Miller, 155 N. C. 242, 71 S. E. 353.

Sustaining Exceptions.—An appeal from an order sustaining an exception to a referee's report, and recommitting the case to the referee to take further evidence, is premature. Wallace Bros. v. Douglas, 105 N. C. 42, 10 S. E. 1043; Grant v. Reese, 90 N. C. 3.

Where the rulings on exceptions to a referee's report and an order of recommittal do not affect the substantial rights of either party, no appeal will lie. Lutz v. Cline, 89 N. C. 186; Jones v. Call, 89 N. C. 188.

Approval of Findings Supported by Evidence.—Where a referee's finding of fact is supported by evidence and approved by the judge on exception to the report, it will not be reviewed by the Supreme Court. Marler-Dalton-Gilmer Co. v. Golden, 172 N. C. 823, 90 S. E. 909; Lewis v. May, 173 N. C. 100, 91 S. E. 691.

Necessity for Further Action.—Where an order based on the report of a receiver as to claims establishes the priority of a claim, but continues the proceeding for further consideration of the report except as to matters "adjudicated herein," an appeal from such order as to the claim mentioned is premature. Corporation Comm. v. Farmers Bank, etc., Co., 183 N. C. 170, 110 S. E. 839. See Beck & Co. v. Bank, 157 N. C. 105, 72 S. E. 632.

Setting Aside Referee's Report and Ordering a Trial by Jury.—An order setting aside a report of a referee, and ordering a jury trial, is appealable, as it affects the substantial rights of the parties. Stevenson v. Felton, 99 N. C. 58, 5 S. E. 399.

Report Set Aside for Newly Discovered Evidence.—The discretion of a Superior Court Judge to set aside a report of a referee, on the ground of newly discovered testimony, can not be reviewed in the Supreme Court. Vest v. Cooper, 68 N. C. 131, Braid v. Lukins, 95 N. C. 123.

G. Appeals as to Miscellaneous Subject.

Editor's Note.—In the foregoing note most of the salient rules controlling the subject of appeals have been discussed. The cases illustrating these principles are legion in number and in a work of this nature it is impossible to give all the citations. They constitute nearly a volume of the digest, in which they appear in an orderly analytical treatment. See 1 N. C. Enc. Dig. 376 et seq.; 13 N. C. Enc. Dig. 70 et seq. Many of the subjects are also treated under the particular sections of this Code relating to them; for example under section 560 the appealability of a decision as to continuances is treated.

§ 639. Appeal from judge in special proceedings.—Any party, within ten days after notice of such judgment, may appeal to the supreme court of the state, upon any matter of law or legal inference therein, under the regulations provided for appeals in other cases. (Rev., s. 588; Code, s. 256; C. C. P., s. 115.)

See annotations under section 638.

§ 640. Interlocutory orders reviewed on appeal from judgment.—Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. (Rev., s. 589; Code, s. 562; C. C. P., s. 313.)

As to appeals from interlocutory orders see section 638. As to effect of appeal from interlocutory orders on proceeding in lower court, see section 638—analysis line "Effect of Appeal on Proceedings in Lower Court."

§ 641. When appeal taken.—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required. (Rev., s. 590; Code, s. 549; 1889, c. 161; C. C. P., s. 300.)

See 1 Enc. Dig. 482 et seq., 13 Enc. Dig. 98 et seq.

Intimation of Intent to Appeal.—Under this section it is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute within the time prescribed by law. Russell v. Hearne, 113 N. C. 361, 18 S. E. 711.

Appeal by Serving Notice.—A party to an action may appeal by serving notice thereof within ten days after the adjournment of court. Houston v. Lumber Co., 136 N. C. 328, 48 S. E. 738.

Computation of Time. — Within ten days notice thereof, means ten days after notice of the rendition thereof. Fisher v. Fisher, 164 N. C. 105, 109, 80 S. E. 395. See Delafield v. Lewis Mercer Constr. Co., 115 N. C. 21, 20 S. E. 167.

Cited in Brantley v. Jordan, 90 N. C. 25; Jones v. Asheville, 114 N. C. 620, 19 S. E. 631; Seaboard Air Line R. Co. v. Brunswick County, 198 N. C. 549, 152 S. E. 627.

§ 642. Entry and notice of appeal.—Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient. (Rev., s. 591; Code, s. 550; C. C. P., s. 301.)

See 1 Enc. Dig. 506 et seq.

Former Rule.—Under the statute in force before the adoption of the Code, a notice of appeal filed in the clerk's office was sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. Brantley v. Jordan, 90 N. C. 25.

Appellee Entitled to Notice.—In all cases the appellee is entitled to notice of an appeal as provided by statute. Marion v. Tilley, 119 N. C. 473, 474, 26 S. E. 26.

Effect of Failure to Give Notice.—Where the notice of appeal is not given in the prescribed time, the appeal will be dismissed. Campbell v. Allison, 63 N. C. 568; Bryan v. Hubbs, 69 N. C. 423; Applewhite v. Fort, 85 N. C. 596; Brantley v. Jordan, 90 N. C. 25, 26.

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appeal was taken during a term of the court from which it was taken. Campbell v. Allison, 63 N. C. 568.

Record Must Show Notice.—The appeal will be dismissed, where the record does not show service of notice of appeal. Howell v. Jones, 109 N. C. 102, 13 S. E. 889.

When Record Need Not Show Notice.—The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal, state that appeal was taken. Delozier v. Bird, 123 N. C. 689, 31 S. E. 834.

Filing of Bond as Notice.—The filing of an appeal bond

and its approval in open court afford notice to the appellee of the appeal. Capehart v. Biggs & Co., 90 N. C. 373.

Codefendant.—Where one appeals from so much of a judgment as is in favor of his codefendant, he must give such codefendant notice of his appeal. Rose v. Baker, 99 N. C. 323, 5 S. E. 919.

When Party Resides Out of State.—A writ of error may be granted upon notice to the attorney at law who obtained the judgment when the party resides out of the state. Leake v. Murchie, 1 N. C. 258.

Notice Held to Be in Proper Time.—Where appellant's counsel, five days after the adjournment of court, mails notice of appeal to the sheriff at the county seat, so as to leave ample time for the latter to serve it on appellee's counsel, laches is not imputable to appellant because the sheriff does not take it from the post office till after the ten days allowed for service. Arrington v. Arrington, 114 N. C. 113, 19 S. E. 105.

Notice to a Co-party.—Notice must be given to the real party in interest, notice to a co-party, not a real party in interest, is insufficient. Barden v. Pugh, 129 N. C. 60, 39 S. E. 724.

Waiver of Notice.—Agreements of counsel, to waive notice of appeal, to be recognized in the appellate court, must appear upon the record. Wade v. New Bern, 72 N. C. 498.

Disagreement as to Waiver of Notice.—Notice of appeal will not be considered when filed after the statutory time, where one counsel swears that consent to an extension was given, and the other denies such statement. Pipkin v. McArtan, 122 N. C. 194, 29 S. E. 334.

A statement in the case on appeal, that notice of appeal was waived, can not be contradicted for the first time on argument in the appellate court. Atkinson v. Asheville St. R. Co., 113 N. C. 581, 18 S. E. 254.

Notice as a Waiver of Objection.—The fact that a notice of appeal served after the expiration of the term at which judgment was rendered, stated only that the appeal was "on account of the erroneous rulings of the judge on motion for a new trial," did not constitute a waiver of an exception to the judgment. Ferrell v. Thompson, 107 N. C. 420, 12 S. E. 109.

Entry of Appeal Not Absolutely Necessary.—That an appeal was not entered of record as required was not material, where the fact of the appeal having been taken was not denied, and notice had been served. Barden v. Stickney, 130 N. C. 62, 40 S. E. 842.

The record need not show that an appeal was duly entered, when it affirmatively appears from the case on appeal, which bears date within the time within which an appeal could be taken, that the appeal was taken, and notice thereof waived. Atkinson v. Ashville St. R. Co., 113 N. C. 581, 18 S. E. 254.

Effect of Failure to Enter.—Failure of the clerk to enter the appeal is not ground for dismissal. Simmons v. Allison, 119 N. C. 556, 26 S. E. 171. Allison v. Whittier, 101 N. C. 490, 8 S. E. 338. But see Moore v. Vanderburg, 90 N. C. 10 and Bryan v. Hubbs, 69 N. C. 423.

Cited in Seaboard Air Line R. Co. v. Brunswick County, 198 N. C. 549, 152 S. E. 627.

§ 642(a). Appeals from judgments not in term time.—When appeals are taken from judgments of the clerk or judge not made in term time, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a.)

§ 643. Case on appeal; statement, service, and return.—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case. (Rev., s. 591; Code, s. 550; C. C. P., s. 301; 1905, c. 448; 1921, c. 97.)

I. Editor's Note.
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See 1 Enc. Dig. 521 et seq., 13 Enc. Dig. 100 et seq. As to the necessity and requisites of exceptions, see section 590 and annotations thereunder. As to settlement, see section 644. As to the transcript see section 645.

I. EDITOR'S NOTE.

Prior to the adoption of the Reformed Procedure in 1868, all cases on appeal were settled by the judges, whose practice was to perform this duty before leaving the court at which the case was tried. It was thought that their duty in this respect might be lightened by changing the statute, so as to permit counsel to agree upon settlement of the case on appeal and to call in the aid of the judge only where counsel failed to agree. The time originally allowed for this purpose was five days for the appellant to serve case on appeal and three days for the appellee to serve a counter case. This was lengthened from time to time until by this section it is now fifteen days to serve case on appeal and ten days to serve counter case, except where the parties by consent to extend the time. The result has not been beneficial. There has been an increasing tendency to postpone and put off the settlement of cases on appeal by lengthening the time, and the legislature in 1921, Act 1921, ch. 97 added the portion of the section which permitted the judges to extend the time even when counsel do not agree. But the Supreme Court has never changed its rule, of which it is sole judge, that in every instance when the case on appeal is not docketed in the time required, at the term, the appellant must docket the record proper and ask for a certiorari. Whenever this is not done the case not docketed until the next succeeding term will be dismissed. See State v. Johnson, 183 N. C. 730, 110 S. E. 782.

This section and Supreme Court Rule 19(3) require the assignment of errors relied on to be tabulated and inserted in the case on appeal or record, preferably at the end.

Formerly when two or more appeals were taken in the same case separate transcripts were required but the Supreme Court Rules adopted in 1926 changed this. Now only one transcript is required but it shall contain separate statements of the cases on appeal. See Supreme Court Rule 19 (2).

II. GENERAL CONSIDERATIONS—COUNTER CASE.

Strict Observance Required.—The statutory requirements as to making up cases on appeal to the Supreme Court and docketing them are conditions precedent which must be complied with, or the appeal will be dismissed. Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Record Imports Verity.—The record on appeal imports verity and the Supreme Court is bound thereby. State v. Brown, 207 N. C. 156, 176 S. E. 260.

Distinction between Record and Case on Appeal. — The **record on appeal** consists of the "record proper," i. e., the summons, pleadings, and judgment and the **case on appeal** which is the exceptions taken and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to. Cressler v. Ashville, 138 N. C. 482, 51 S. E. 53.

No Presumption of Regularity.—An appeal being now the act of the appellant alone, no presumption of regularity arises because of its having been taken during a term of the Court from which it comes. Campbell v. Allison, 63 N. C. 568.

Necessity for Taking Appeal.—An appeal will be dismissed if the record fails to show affirmatively that an appeal was taken. Randleman Mfg. Co. v. Simmons, 97 N. C. 89, 1 S. E. 923; Howell v. Jones, 109 N. C. 102, 13 S. E. 889.

When Grouping of Exceptions Unnecessary.—Where the

exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

Duty When Case on Appeal not Settled.—Where an appeal is taken, the record should be transmitted to the supreme court and the appeal docketed, whether the case is settled or not, so that all proper action can at once be taken to perfect it for hearing. Owens v. Phelps, 91 N. C. 253.

When Case on Appeal Dispensed with.—A "case on appeal" can be dispensed with only when the errors are presented by the record proper. Errors occurring during the trial can be presented only by case on appeal. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Same—Order Entered at Chambers.—On appeal from an order of court entered by the judge at chambers no case is necessary. North Carolina Bessemer Co. v. Piedmont Hdw. Co., 171 N. C. 728, 88 S. E. 867.

Same—Appeal from Judgment. — An appeal from a judgment alone is maintainable without any case on appeal. American Soda Fountain Co. v. Schell, 160 N. C. 529, 76 S. E. 631.

Same—Case Tried on Agreed Statement of Facts.—On appeal from the judgment in a case tried on an agreed statement of facts, no separate "case" is necessary. Chamblee v. Baker, 95 N. C. 98; Davenport v. Leary, 95 N. C. 203.

Same—Granting or Refusing Injunction.—On appeal from an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 713; Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519.

Same—Order of Reference.—It is not necessary to make a statement of the case on appeal from an order of reference, where the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order. Duckworth v. Duckworth, 144 N. C. 620, 57 S. E. 396; Cape Fear, etc., R. Co. v. Stewart, 132 N. C. 248, 43 S. E. 638.

On appeal to the Supreme Court from the action of the superior court judge in passing upon the report of a referee, the facts found and the conclusions of law by the lower court must be regularly stated with the exceptions thereto in the record of the case on appeal. Wilson v. Beasley, 192 N. C. 231, 134 S. E. 485.

Appeal from Construction of Will.—On an appeal involving the construction of a will in which it is essential, for a determination, to know whether or not a certain person died without issue, a statement in the case made up by counsel, that "plaintiffs claim that he died without issue," is not sufficient. Arnold v. Hardy, 131 N. C. 113, 42 S. E. 553.

Appellee May Prepare Counter Case.—It is no objection to the objections filed by the appellee to the appellant's case that it is in the form of a counter-case, and not of specific objections. State v. Gooch, 94 N. C. 982.

Where the exceptions to appellant's case on appeal are served within the required time, appellant can not complain that the statement of his case on appeal was not returned to him, but must have the case on appeal settled. Stevens v. Smathers, 123 N. C. 497, 31 S. E. 721.

Appellee May Make Specific Objections.—Upon the appellant's serving of his case on appeal, the appellee may file specific objections. Holloman v. Holloman, 172 N. C. 835, 90 S. E. 10.

Request for Substitution.—Where the appellee makes his objections to the appellant's statement of the case on appeal by asking that a statement prepared by him be substituted, it is a sufficient compliance with the section. Horne v. Smith, 105 N. C. 322, 11 S. E. 373.

Counter-Case May Become Case on Appeal. — Where appellee returned a counter case as a statement of his exceptions to appellant's case, and such counter case was adopted by the court, it constitutes the "case on appeal." Harris v. Carrington, 115 N. C. 187, 20 S. E. 452; McDaniel v. Scurlock, 115 N. C. 295, 20 S. E. 451.

Effect of Failure to Serve Counter Case.—Where the appellant's case on appeal is served in time, and no exceptions are taken thereto, nor any counter case served, it stands as the case on appeal. State v. Carlton, 107 N. C. 956, 12 S. E. 44.

Counter-Case Not Considered.—When counter case of the state has not been served or service acknowledged thereon or filed for more than a month after the state has accepted service of case of defendants, in an appeal by the defendant the counter case will not be considered. State v. Freeman, 127 N. C. 544, 37 S. E. 206.

Clerk Authorized to Complete Case.—A mere outline of the case incorporating instructions to the clerk to fill in certain portions of the evidence stenographically taken and transcribed, the charge of the court, etc., is not sufficient compliance with this section, it being the duty of the appellant to make out his case and fully perfect it before serving it upon the appellee, and no part of the duty of the clerk to do so. Sloan v. Equitable Life Assur. Soc., 169 N. C. 257, 85 S. E. 216.

No Return of Appellant's Case.—If the appellant's case on appeal is not returned by appellee in ten days with objections, it shall be deemed approved. Barber v. Justice, 138 N. C. 20, 50 S. E. 445.

Conflict between Statements of Judge and Counsel. — Where the case on appeal prepared by counsel conflicts with a statement of a fact found by the judge, the latter must control. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

Service of Counter-Case.—See post, this note "Service of Case and Counter-Case," V.

Cited in Carter v. Bryant, 199 N. C. 704, 155 S. E. 602; McMahan v. Southern R. Co., 203 N. C. 805, 167 S. E. 225.

III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

See Supreme Court Rule 19(1) and (3), 21.

Concise Statement of Case.—One of the essential requisites of an appeal to the Supreme Court is that a "concise statement of the case" shall be made and filed with the Clerk, to be transmitted to this Court as part of the record, for the want of which the judgment will be affirmed unless there is error apparent in the record, in which case it would be the duty of the Judge to arrest the judgment or award a venire de novo. State v. Thompson, 83 N. C. 595, 597.

The appellant is required, in stating his case on appeal, to make a concise statement of the entire case necessary to present the assignments of error relied upon, and set out the necessary and pertinent evidence in narrative form, together with the charge of the court necessary to be considered; and when this is not done the appellee may move before the trial judge to dismiss the appeal. Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment and the case on appeal, setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. Sigman v. Southern R. Co., 135 N. C. 181, 47 S. E. 420.

And the statement should only contain matter explanatory of exceptions taken. Surratt v. Crawford, 87 N. C. 372.

Narrowed to Substance and Amount.—When counsel come to prepare the statement of case on appeal, both record and briefs should be narrowed to matters of substance and moment. State v. Davis, 203 N. C. 13, 34, 164 S. E. 737.

Testimony Should Be in Narrative Form.—Testimony reported by the stenographer should be sent up on appeal in narrative form, instead of in questions and answers. Overman v. Lanier, 157 N. C. 544, 73 S. E. 192. The sending up of the stenographer's notes is a failure to prepare "a concise statement of the case." Skipper v. Kingsdale Lbr. Co., 158 N. C. 322, 74 S. E. 342.

This rule must be observed, though the case on appeal is settled by agreement of counsel. Boggs v. Cullowhee Min., etc., Co., (N. C.) 76 S. E. 717.

When the stenographer's full notes of the evidence taken on the trial of a case on appeal are transcribed in the record, immediately followed by an unsigned entry, repudiated by appellee's counsel, that "the record, stenographer's notes, the judgment, and the exception to the nonsuit shall constitute the case on appeal to the Supreme Court," the case on appeal is not properly constituted. Brewer v. Mineola Mfg., Co., 161 N. C. 211, 76 S. E. 237.

This requirement can not be waived by the parties. First Nat. Bank v. Fries, 162 N. C. 516, 77 S. E. 678.

Appellant must make concise statement necessary to present assignments of error, and should set out all pertinent evidence in narrative form, with the charge, and the judge must correct the narrative. Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

For penalty for violation of this rule see Fisher v. Montvale Lumber Co., 162 N. C. 531, 78 S. E. 286.

Evidence to Present Questions of Law. — The appeal should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. Green v. Collins, 28 N. C. 139; Durham v. Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

Sufficiency of Evidence Brought up.—Only so much of the evidence as is needed to show the questions raised by the exceptions should be made a part of the case on appeal. Durham v. Richmond etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; Surratt v. Crawford, 87 N. C. 372.

Evidence Unnecessary.—Where the findings of the court below are admitted by both parties to be true, it is unneces-

sary that the case contain the evidence. Tayloe v. Tayloe, 108 N. C. 69, 12 S. E. 836.

Necessity of Setting Forth Evidence Excluded.—A judgment will not be reversed because of the exclusion of evidence, where such evidence is not set out in the record. Elm City Lumber Co. v. Childerhose, 167 N. C. 34, 83 S. E. 22.

The exclusion of evidence can not be reviewed where the record does not disclose what the witness would have testified to, or what was proposed to be proven. In re Will of Smith, 163 N. C. 464, 79 S. E. 977.

Omission of Matter Not Pertinent to Issue.—Matter not pertinent to the points raised should be omitted. Hilton v. McDowell, 87 N. C. 364; Sampson v. Atlantic, etc., R. Co., 70 N. C. 404; Surratt v. Crawford, 87 N. C. 372.

Exhibits Should Accompany Case.—Where deeds, records etc., are referred to, and make a necessary part of the case transmitted to the supreme court, it is the duty of the appellant to see that they accompany the case. Waugh v. Andrews, 24 N. C. 75.

Surveys.—In an action for the diversion of surface water by the construction of a railway, surveys of the locality, made under order of the court, must accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing. Whichard v. Wilmington, etc., R. Co., 117 N. C. 614, 23 S. E. 437.

Exceptions—Case Must Show Exceptions.—If the case on appeal does not show that exceptions were taken to the ruling of the court below, the appellate court will not review the same on appeal. Power v. Wilmington, 177 N. C. 361, 99 S. E. 102. See § 590 and the notes thereto.

Questions can not be considered on appeal which are not presented by motion or exception in the case on appeal. Trimmer v. Gorman, 129 N. C. 161, 39 S. E. 804.

The presentation of matters for the first time in the assignments of error on appeal is too late. Bloxham v. Stave, etc., Corp., 172 N. C. 37, 89 S. E. 1013.

Same—Broadside Exceptions.—As a general rule a broadside exception to the judge's charge is inadmissible. In favorem vitae, in a capital case, the attorney-general will readily assent to the assertion of proper exceptions, nunc pro tunc. State v. Kinsauls, 126 N. C. 1095, 36 S. E. 31.

An "unpointed broadside" exception to the court's instructions to the jury will not be considered. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. Lambert v. Caronna, 206 N. C. 616, 621, 175 S. E. 303.

What Need Not Be Set Out.—The Court will not consider any exceptions not set out in the "case on appeal," other than exception to the jurisdiction or because complaint does not state a cause of action, or to the sufficiency of an indictment. Walker v. Scott, 106 N. C. 56, 11 S. E. 364; Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266.

The object of the "case on appeal" is to set forth the alleged errors appealed from, and, if it sufficiently discloses these, the appeal will not be dismissed, though the record does not show formal exceptions. Singer Mfg. Co. v. Barrett, 95 N. C. 36.

Same—Must Point out Error.—The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. Clements v. Rogers, 95 N. C. 247.

Same—Judge May Pass on Exceptions.—When exceptions are filed the recitals contained therein are not conclusive, but it is open to the appellee to controvert them, and to have the Judge pass upon their correctness in "settling the case on appeal." Walker v. Scott, 106, N. C. 56, 11 S. E. 364.

The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. State v. Bittings, 206 N. C. 798, 801, 175 S. E. 299.

What Assignments of Error Considered.—The Supreme Court will not consider any assignments of error except those appearing in the record proper and in the case settled on appeal. Rodman v. Harvey, 102 N. C. 1, 8 S. E. 888; State v. Campbell, 184 N. C. 765, 114 S. E. 927.

The assignment of error must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time. State v. Bittings, 206 N. C. 798, 801, 175 S. E. 299.

Requirements Mandatory.—The requirements that assignments of error must be based upon exceptions duly taken during the trial to be considered on appeal are statutory, as well as mandatory under numerous decisions of the court. The supreme court on appeal exercises only appellate jurisdiction, and it is necessary that the errors alleged should be presented as the law directs. State v. Bittings, 206 N. C. 798, 801, 175 S. E. 299.

When Assignment of Error Unnecessary.—No assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor when the exception to the judgment is the only one taken and the appeal itself is an exception thereto. North Carolina Bessemer Co. v. Piedmont Hdw. Co., 171 N. C. 728, 88 S. E. 867; Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 713.

No Error Assigned.—Where no errors were assigned in the case, and none appeared in the record proper, but it appeared that counsel for both sides had agreed that all the papers in the cause should constitute the case on appeal, the case was remanded, in order that error might be properly assigned. Holly v. Holly, 94 N. C. 639.

IV. APPEALS FROM INSTRUCTIONS.

Exception to Instruction.—If there is an error in the instruction given, an exception thereto is valid if entered within ten days after adjournment for the term. Williams v. Harris, 137 N. C. 460, 49 S. E. 954. And the appellant is entitled to have his exceptions to the charge included in his statement of the case on appeal. Paul v. Burton, 180 N. C. 45, 104 S. E. 37.

The requests to charge being "separately stated and numbered" an exception for giving them is equally specific and not 'broadside' since it gives the judge and the appellee specific information of each instruction excepted to, what evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss on appeal. Coley v. Statesville, 121 N. C. 301, 316, 28 S. E. 482.

Exception Taken after Trial.—Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of our statute, this section and § 590(2). Cherry v. Atlantic Coast Line R. Co., 186 N. C. 263, 119 S. E. 361.

Error in Instructions Must Be Assigned.—The refusal to give instructions, if asked in writing and in apt time, like the change as given, is deemed excepted to but none the less it is the duty of the appellant to assign such as error in making up his statement of case on appeal and if this is not done, the exception is deemed waived. Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266.

Assignment of Error Must Be Fully Presented.—Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must be made to appear in some appropriate and recognized way that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. Rawls v. Lupton, 193 N. C. 428, 137 S. E. 175.

Necessity of Case on Appeal.—The instructions cannot be reviewed in the absence of a case on appeal. Oak Hall Clothing Co. v. Bagley, 147 N. C. 37, 60 S. E. 648.

Where the case settled does not state that the judge charged as recited in the exceptions, the matter is not before the court on appeal. Hart v. Cannon, 133 N. C. 10, 45 S. E. 351.

Instruction Not in Record. — Where the instructions are not in the record, the supreme court cannot judicially determine whether they were as stated in exceptions thereto. Todd v. Mackie, 160 N. C. 352, 76 S. E. 245; Jenkins v. Carson, 173 N. C. 725, 92 S. E. 328.

Where the settled "case" does not show the giving of instructions requested by a party, exceptions to the giving of such instructions will not be considered. McCord v. Southern R. Co., 130 N. C. 491, 41 S. E. 886.

A statement in the case on appeal that appellant's requests to charge were given "in substance" is insufficient to show what was given, and hence, where the requests are in conflict with the general charge, a new trial will be granted. Wilson v. Winston-Salem R., etc., Co., 120 N. C. 531, 27 S. E. 46.

Requests for Instructions.—Where the record contains no prayers for instructions, assignments of error in refusing to give defendant's prayers furnishing for consideration. Davis v. Seaboard, etc., Railway, 132 N. C. 291, 43 S. E. 840.

As to requests for instructions generally, see section 565 and notes thereto.

Setting Out of Instructions. — Appellant is entitled to have the judge set out what he charged in lieu of the prayer, that the appellate court might see that it "fully" covered the prayer asked. Bennett v. Telegraph Co., 128 N. C. 103, 38 S. E. 294.

Application of Instruction to Evidence.—An objection to a certain instruction on the ground that there was no evidence to sustain it cannot be reviewed unless all of the evidence is contained in the record. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

V. SERVICE OF CASE AND COUNTER-CASE.

As to counter-case in general, see ante, this note "General Considerations—Counter-Case" II.

A. Necessity and Mode of Service.

Necessity for Serving.—A case on appeal signed only by appellant's counsel, and not showing that it had been served on appellee or his counsel, cannot be considered. Walker v. Scott, 102 N. C. 487, 9 S. E. 488; Peebles v. Braswell, 107 N. C. 68, 12 S. E. 44; Howell v. Jones, 109 N. C. 102, 13 S. E. 889.

Necessity for Serving Codefendant.—Where one appeals from so much of the judgment as is in favor of his codefendant, he must serve on such codefendant his statement of the case. Rose v. Baker, 99 N. C. 323, 5 S. E. 919.

Each Appellee Must Be Served.—Where the interests of different appellees are not identical, and they are represented by different counsel, only as to such appellees as have been served with the appellant's "case" in due time, will the appeal be considered. Shober v. Wheeler, 119 N. C. 471, 26 S. E. 26.

Service of Original Instead of Copy.—This section is complied with by a service of the original instead of a copy. McDaniel v. Scurlock, 115 N. C. 295, 20 S. E. 451.

Necessity for Service by Officer.—A case on appeal must be served by an officer, unless appellee's attorneys accept service otherwise. Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170.

Service by Counsel.—A service of the case on appeal by counsel is a nullity unless accepted by appellee. Roberts v. Partridge, 118 N. C. 355, 24 S. E. 15.

Service by Improper Officer.—The case on appeal cannot be considered when it was served by an improper officer during, and by a proper officer after the time limited for service thereof. McNeill v. Raleigh, etc., R. Co., 117 N. C. 642, 23 S. E. 268, and cases there cited.

Service by Constable.—A constable is not such an officer as can serve on appellee appellant's case on appeal. Forte v. Boone, 114 N. C. 176, 19 S. E. 632.

Service by Mail.—Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not estop respondent to deny the legality of the service, as, if the case had been promptly returned, it would have been too late for legal service. Smith v. Smith, 119 N. C. 311, 25 S. E. 877.

Service Where Parties Make Common Cause.—When it appears of record that several cases on appeal to the supreme court were consolidated by consent and duly served in that form, and the parties made common cause in its prosecution, a motion to dismiss made by one of the appellees on the ground that appellant had not served the case on him individually will be denied. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

Service by Officer May Be Waived.—The improper service of a case on appeal is cured by the appellee's acceptance of the case and filing exceptions thereto, without objection to the mode of service, Ashville Woodworking Co. v. Southwick, 119 N. C. 611, 26 S. E. 253. See also Willis v. Atlantic, etc., R. Co., 119 N. C. 718, 25 S. E. 790.

Effect of Failure to Serve Countercase or Exceptions.—Where the appellant prepares his statement of case on appeal and service thereof is accepted by the appellee within the time allowed by the judge, and is certified by the clerk as a part of the record, in the absence of service of exceptions or countercase it is deemed approved by the appellee, and will stand in the Supreme Court as the case on appeal. Texas Co. v. Beaufort Oil & Fuel Co., 199 N. C. 492, 154 S. E. 829.

Settlement as Curing Failure to Serve Legally.—Failure to serve appellant's case on appeal legally on appellee cannot be cured by the judge's subsequent settlement of the case. Forte v. Boone, 114 N. C. 176, 19 S. E. 632.

B. Time of Service.

1. In General.

Strict Compliance Required.—The statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time, in which case the proceeding must be taken within the time so extended. Kerr v. Drake, 128 N. C. 764, 108 S. E. 393.

Waiver of Time.—A motion to dismiss an appeal, because case was not served within time, was fully met by statements in supplemental transcript that appellees accepted service of notice of appeal, and agreed to extend time for serving case, and accepted service of case within extended time. Sanford v. Junior Order of United American Mechanics, 176 N. C. 443, 97 S. E. 384.

Where the appellant in apt time submitted the case on appeal to the appellee's counsel, who declined to sign it, but suggested that he would prepare another and get the judge to settle the case, and agreed that no advantage would be taken of the delay, but failed to prepare a case, the appellee waived the code-time and cannot take advantage of his own negligence. Mott v. Ramsay, 91 N. C. 249.

Where there is a controversy as to whether the exceptions were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. State v. Ray, 206 N. C. 736, 737, 175 S. E. 109.

Same—Promise to Accept Service. — Where appellant's counsel telegraphs, within the time appellee is required to serve his counter case, that he will, on his return home, accept service, he is estopped to claim that the counter case was not served in time. Watkins v. Raleigh, etc., R. Co., 116 N. C. 961, 21 S. E. 409.

Same—Acceptance of Service Conditionally.—In accepting service of a case on appeal, after time limited by statute, it was competent for counsel to add to the indorsement the date, and that he did not waive the objection that the case was not presented in time. Barrus v. Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187.

Same—Necessity for Waiver Appearing of Record.—Within certain limits the parties may by consent waive the time of complying with the rules for perfecting an appeal, and the supreme court will respect such agreements between counsel if they appear upon the record. If such agreement does not so appear, the supreme court will adhere to and enforce the rules prescribed in the Code. Wade v. New Bern, 72 N. C. 498.

Failure of Sheriff to Take Copy from Post Office.—Where appellee mailed his counter case, with fees, to the sheriff of the county in which appellant's counsel resided, and the sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post office till too late, there was no laches on appellee's part. Arrington v. Arrington, 114 N. C. 115, 19 S. E. 145. See also Arrington v. Arrington, 114 N. C. 113, 19 S. E. 105.

Agreement Misunderstood. — When counsel misunderstand terms of written agreement as to time of settling case on appeal, and there is reasonable ground for being misled thereby, and the case, as served by appellant, is lost, the case will be remanded with leave to parties to serve case and counter-case de novo. Mitchell v. Haggard, 105 N. C. 173, 10 S. E. 856.

Illness of Counsel.—Illness of counsel is no excuse for failing to settle the case on appeal in time, where such counsel is not the only counsel for appellant, and, even if he is, it is the duty of the party to obtain other counsel. Tripp v. Somersett, 182 N. C. 767, 108 S. E. 633.

Negligence of Counsel.—That appellant's failure to serve his case in time was the result of negligence of his counsel was no excuse; his remedy being an action against the counsel for damages sustained. Cozart v. Assurance Co., 142 N. C. 522, 55 S. E. 411.

Stenographer Too Busy to Transcribe Note.—When counsel for appellee consented to an extension of time in which to serve case on appeal, the Supreme Court will not relieve appellant, on an excuse that stenographer was busy and could not transcribe her notes within that time, since the stenographer's notes are not the supreme authority as to what occurred at the trial. Rogers v. Asheville, 182 N. C. 596, 109 S. E. 865.

Transcript of Evidence Not Obtained in Time.—It was negligence on part of defendant appellants, not to have had any arrangement with clerk of court to let them have copy of transcript of testimony when filed, and not to have requested him to notify them when transcript was filed, and to have failed to inquire of him thereafter. Murphy v. Carolina Elect. Co., 174 N. C. 782, 93 S. E. 456.

No Certiorari Until Time is Up.—Where the parties to an action have agreed to an extension of time for service of case and countercase, that will prevent its being docketed in the time prescribed by Supreme Court Rule 5, and consequently no case has been yet settled by the trial judge, appellant's motion in the Supreme Court for a writ

of certiorari will be denied. Waller v. Dudley, 193 N. C. 354, 137 S. E. 149.

When Appellant Guilty of Laches.—A motion for a certiorari will not be considered in the Supreme Court when it appears that appellant has been guilty of laches in respect to serving his case. Peoples Bank, etc., Co. v. Parks, 191 N. C. 263, 131 S. E. 637.

2. Computation of Time.

The term ends when the judge leaves, and the time within which a case on appeal can be served must be computed from the day he leaves. Delafield v. Lewis Mercer Constr. Co., 115 N. C. 21, 20 S. E. 167.

The time for service of a case on appeal must be computed from the day of the actual adjournment of the court, and not from the last day to which a term of court could be extended. Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667.

An agreement "plaintiff may have thirty days to file his case on appeal from adjournment of court, and defendant thirty days thereafter," entitled defendant to thirty days after service of appellant's case. Mitchell v. Haggard, 105 N. C. 173, 10 S. E. 856.

When Appeal Taken after Adjournment.—When an appeal is taken at the trial, the case on appeal must be served within ten days from adjournment of the court, but the appellant has the right to reserve taking his appeal and enter it within ten days after adjournment of the court, in which case he has ten days after entry of the appeal to serve the case on appeal. The same applies to appeals from judgment taken out of term. Mecke v. Valleytown Mineral Co., 122 N. C. 790, 29 S. E. 781.

When Judgment Becomes Final.—Until the term expires there is no final determination of the cause, so that the case on appeal need only be filed within fifteen days after the end of the term at which judgment is rendered. Turrentine v. Richmond, etc., R. Co., 92 N. C. 642.

Time Computed from Judgment.—Where, on judgment rendered during the term, it was agreed that entry should be made thereafter, the appellant being allowed 90 days to complete the appeal, he was entitled to 90 days from the judgment, and not from the judgment entry. Caldwell Land, etc., Co. v. Chester, 170 N. C. 399, 87 S. E. 111.

Judgment Rendered during Vacation.—Where judgment is rendered during vacation by a consent of parties, the time in which to appeal is counted from the filing of the judgment in the clerk's office. Caldwell Land, etc., Co. v. Chester, 170 N. C. 399, 87 S. E. 111; Fisher v. Fisher, 164 N. C. 105, 80 S. E. 395.

First and Last Day Counted.—Under an agreement extending the time as to the service of the case or countercase, in computing the time, the first day allowed in the time extended is counted as well as the last, allowing the full number of days agreed upon. Board v. Orr, 161 N. C. 218, 76 S. E. 693.

3. Effect of Failure to Serve in Time.

Appeal Dismissed.—Where the statement was not made or served in time, the appeal will be dismissed. Twitty v. Logan, 85 N. C. 592.

Service a Nullity.—Service after the expiration of the time granted is a nullity. Hardee v. Timberlake, 159 N. C. 552, 75 S. E. 799; Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667. See Barber v. Justice, 138 N. C. 20, 50 S. E. 445.

Service by the solicitor of exceptions and objections after the expiration of ten days renders the service of such exceptions and objections nugatory in the absence of an extension of time or waiver, and defendant's statement becomes the statement of case on appeal. State v. Ray, 206 N. C. 736, 715 S. E. 109.

Same—Trial Court May Strike Case.—Where a dispute arises in a trial court as to whether there has been service on appellee of appellant's case on appeal within the statutory time, and the court finds that there has not, it may direct appellant's case to be stricken from the files. Hicks v. Westbrook, 121 N. C. 131, 28 S. E. 188.

Agreement to Waive Time.—Where appellant fails to prepare a statement of the case in time, the judgment should be affirmed, unless the record shows a written agreement of counsel waiving the lapse of time, or it appears that the alleged agreement is oral and disputed, and such waiver shown by the affidavit of the appellee. Twitty v. Logan, 85 N. C. 592.

The statute has fixed the time for the settlement of cases on appeal, and this should be strictly observed, unless there is a mutual agreement which is either in writing or admitted. Tripp v. Somersett, 182 N. C. 767, 108 S. E. 633. As to sufficiency of waiver, see Graham v. Edwards, 114 N. C. 228, 19 S. E. 150.

Oral Agreement to Extend Time.—A parol agreement to waive an oral agreement made between the parties as to the time of serving a counter case to an appeal will not be considered by the Supreme Court if denied. Board v. Orr, 161 N. C. 218, 76 S. E. 693.

Where the appellant alleges in an affidavit, or duly verified statement, that there was an agreement for an extension of time and this affidavit is not disputed by the oath of the appellee, a certiorari, upon proper application, will issue if the court deems it proper. Justice v. Boone Fork Lumber Co., 181 N. C. 390, 107 S. E. 232.

When Exceptions Returned Alone.—An appellant cannot complain that his original statement of case on appeal was not returned to him within ten days, when in fact the appellee's exceptions thereto were duly filed with him within the ten days. McDaniel v. Scurlock, 115 N. C. 295, 20 S. E. 451.

Failure to Serve Objections in Time.—An appellant has a right to disregard an objection to the case on appeal, not served on him within ten days. Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170.

VI. RELIEF GRANTED.

When no Case on Appeal.—An appeal will not be dismissed simply because there is no case on appeal before the Supreme Court, but the judgment will be affirmed, unless error appears on the face of the record proper. Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519; Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170.

When Judgment Affirmed.—Where there is no case on appeal, and no error on the face of the record proper, the judgment will be affirmed. Table Rock Lumber Co. v. Branch, 150 N. C. 110, 63 S. E. 171; State v. Foster, 110 N. C. 510, 14 S. E. 966.

Where there is no "case agreed" on appeal and none "settled" by the judge, and no error upon the face of the record proper, the judgment must be affirmed. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

The absence of a case on appeal does not entitle appellee to a dismissal. Hicks v. Westbrook, 121 N. C. 131, 28 S. E. 188. Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667.

See Royster v. Burwell, 90 N. C. 24, where it was held that an appeal will be dismissed where there is no statement of the case and no bond with proper justification filed within the time allowed by law.

Case Affirmed in Absence of Exception.—In the absence of exceptions in the record as a basis for the assignments of error, appellee's motion to affirm must be allowed. Boyer v. Jarrell, 180 N. C. 479, 105 S. E. 9.

In Absence of Motion to Affirm.—Where a case on appeal is required, but none is filed, respondents' remedy is by motion to affirm, and not to dismiss the appeal, since, if the motion to affirm is not made, it is the duty of the court of its own motion to inspect the record proper for errors appearing on the face thereof. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 713; Hicks v. Westbrook, 121 N. C. 131, 28 S. E. 188; Barrus v. Wilmington, etc., R. Co., 121 N. C. 504, 28 S. E. 187.

Appeal Not Dismissed for Absence of Statement of Facts.—An appeal will not be dismissed for failure to furnish a statement of facts signed by the judge or by both counsel, as required by rule, where everything necessary to a consideration of the case appears from the record. Clark v. Peebles, 120 N. C. 31, 26 S. E. 924.

Oath of Counsel.—A motion to dismiss an appeal because it does not appear that a case had been made and served as prescribed by the code will not be granted when an opposing counsel states on oath, in this court, that all the requirements of the code were complied with in the court below. Kirk v. Barnhart, 74 N. C. 653.

Appeal a Nullity.—Where a case on appeal is signed only by appellant's counsel, and it does not appear that it was served on appellee, it must be treated as a nullity; but the appeal will not be dismissed on that ground, since there may be errors on the face of the record proper. Walker v. Scott, 102 N. C. 487, 9 S. E. 488; Howell v. Jones, 109 N. C. 102, 13 S. E. 889.

When New Trial Granted.—Where appellant has been guilty of no laches or fraud and the trial judge certifies, after an appeal, that his notes of the trial have been lost, that he is unwilling to trust to memory to set forth the evidence in detail, as should be done in fairness to both parties, and requests that a new trial be ordered, a new trial will be granted. McGowan v. Harris, 120 N. C. 139, 26 S. E. 690. Ritter v. Grimm, 114 N. C. 373, 19 S. E. 239.

A new trial will be granted, when, from no default of the appellant, no assignment of errors accompanies the record, and the omission can not be supplied by reason of the retirement from office of the presiding judge. Nichols v. Dunning, 91 N. C. 4, 6.

But a new trial will not be granted where it appears that the papers constituting the record of a case in the court below were carried off by the judge and mislaid, and the judge has gone out of office. The appellant should first make an effort to have the papers returned to the court below, for until the filing of a transcript of the record here, the application for a new trial cannot be entertained. Nichols v. Dunning, 91 N. C. 4.

Certiorari to Bring up Case for Review Denied.—State v. Angel, 194 N. C. 715, 140 S. E. 727; Womble v. Moncure Mill, etc., Co., 194 N. C. 577, 140 S. E. 230.

§ 644. Settlement of case on appeal. — If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appellant delays longer than fifteen days after the respondent serves his countercase, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and countercase or exceptions to the judge, then the exceptions filed by the respondent shall be allowed, or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it. (Rev., s. 591; Code, s. 550; C. C. P., s. 301; 1889, c. 161; 1907, c. 312.)

Cross References.—As to settlement of case on appeal generally see 1 Enc. Dig. 535 et seq., 13 Enc. Dig. 101 et seq. As to contents of case on appeal see section 643 and annotations thereunder.

Intent of Section.—Appellants are too often prone to forget that appellees have rights. The intent of this section is to safeguard them. Board v. Chapman, 151 N. C. 327, 66 S. E. 221.

When Settlement Necessary.—It is necesssary that the trial judge settle the case on appeal when the parties do not agree. Queen v. Snowbird Valley R. Co., 161 N. C. 217, 76 S. E. 682.

Appellant Must Request Notice.—An appellant cannot complain that he was not notified of the time and place of settlement of the case when he did not request to be so notified. State v. Williams, 109 N. C. 846, 13 S. E. 880; Walker v. Scott, 106 N. C. 56, 11 S. E. 364.

When Appellant Fails to Request Settlement.—Upon the service of a counter-case on appeal it is the duty of the appellant to immediately request the judge to appoint a time and place to settle the case, and upon his failure to do so the case of the appellee becomes the case on appeal. Burlingham v. Canady, 156 N. C. 177, 72 S. E. 324; Booth v. Ratcliffe, 107 N. C. 6, 12 S. E. 112.

Same—Case May Be Remanded.—Where an appellant, after exceptions filed to his "case on appeal," fails to apply to the judge to settle the case, this court may consider the appellant's "statement" and the appellee's exceptions as the case on appeal, or in case of any complications, the case will be remanded in order that the judge may settle the case. McDaniel v. Scurlock, 115 N. C. 295, 20 S. E. 451.

Same—Judgment Affirmed.—A judgment will be affirmed, on error being assigned on the record, where the statement has been returned with objections, and appellant has failed to apply to the court below to settle the case. Kirkman v. Dixon, 66 N. C. 406.

Where appellant, after a failure to agree on the case on appeal, does not "immediately" request the trial judge to settle the same, but delays for several weeks, and in the meantime the judge dies, and no excuse is shown for the appellant's laches, the judgment below will be affirmed. Heath v. Lancaster, 116 N. C. 69, 20 S. E. 962.

Same—Excuse Shown.—Where appellant's failure to send appellee's counter case to the judge to settle was caused by his bona fide contention that it was served too late, the case will be remanded for settlement. Arrington v. Arrington, 114 N. C. 115, 19 S. E. 145.

When Statements Not Submitted to Judge.—When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the Supreme Court, that court will not dismiss the appeal, but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal. Owens v. Phelps, 92 N. C. 231.

Appellant's Duty When Case Settled.—It is required of the appellant to redraft the case on appeal when the judge in settling it has modified his case by adopting portions of the exceptions or countercase of the appellee, etc., and have the judge to sign the case so redrafted and incorporate it in the record. Waller v. Dudley, 193 N. C. 749, 138 S. E. 128.

Same—When Appellant Fails in This Regard.—Where, after the court had adopted "appellant's case as amended by appellee's exceptions," appellant submitted the record in that shape without redrafting and incorporating the amendments and having the same signed by the trial judge there was no "case settled." Gaither v. Carpenter, 143 N. C. 240, 55 S. E. 625; State v. King, 119 N. C. 910, 26 S. E. 261.

Duty of Judge.—If counsel agree, the judge has nothing to do with making up the "case on appeal"; but when they differ, he sets a time and place for settling the case, after notice that counsel of both parties may appear before him. He then "settles" the case. In so doing he does not merely adjust the differences between the two cases, but may disregard both cases, and should do so, if he finds that the facts of the trial were different. Slocumb v. Construction Co., 142 N. C. 349, 55 S. E. 196; State v. Gooch, 94 N. C. 982.

Upon exception, when the appellant has set out the evidence in narrative form, it is the duty of the trial judge to supervise and correct it, where correction is required. Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

Judge's Action Conclusive.—The action of the Judge in settling the case on appeal, when the parties cannot agree, is final, and cannot be reviewed by the Supreme Court. State v. Gooch, 94 N. C. 982.

Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that he has settled the case on appeal, it is binding upon the Supreme Court and it will not be dismissed on the ground that no case on appeal had been stated and settled. Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

Statement in Record Considered True.—Any statement in the record is taken as true, and the Supreme Court will act on it, until it shall be modified in some proper way by the judge who made it. McCoy v. Lassiter, 94 N. C. 131.

Conflict between Record and Case.—Where the "case" on appeal prepared by counsel conflicts with a record statement of a fact found by the judge, the latter must control. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

Making and Filing Agreed Case.—The case stated by the judge, having been filed with the transcript of the record, and treated by the parties and the court as a part of it, though not so certified, can not be displaced by another paper, purporting to be a case agreed on, signed by the counsel. Walton v. McKesson, 101 N. C. 428, 7 S. E. 566.

Supplemental Statement.—The appellate court will not consider assignments of error filed as a "supplemental state-

ment,' which the court below declined to make a part of the case settled for appeal. Rodman v. Harvey, 102 N. C. 1, 8 S. E. 888.

Case Not Signed by Judge.—Where the case as settled by the trial judge is not signed by him, and there is no agreed statement of the case, the record contains no proper statement of the case on appeal. Ingram v. Yadkin River Power Co., 181 N. C. 359, 107 S. E. 209.

Right of Judge to Make Stenographer's Notes Part of Record.—While a stenographer's notes are material for the consultation of the trial judge in making up the case, he may not send them up as a part of the record of his own motion. Green v. Dunn, 162 N. C. 340, 78 S. E. 211.

Failure of Judge to Settle Case.—Where appellant's timely request, for settlement of his case on appeal is denied, he is entitled to certiorari to procure settlement. Chauncey v. Chauncey, 153 N. C. 12, 68 S. E. 906.

The remedy for a refusal to settle a case on appeal, when judgment has been entered by consent, is a motion to set aside the judgment. King v. Taylor, 188 N. C. 450, 124 S. E. 751.

Failure to Send up Correct Statement.—The failure of a judge to send up a correct statement is not sufficient ground for mandamus, but the mistake may be corrected by certiorari. McDaniel v. King, 89 N. C. 29.

Prerequisites for Application for Certiorari.—If for any reason the judge fails to settle the case on appeal, in time for the appeal to be docketed in the supreme court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before the Supreme Court. Waynesville Transp. Co. v. Waynesville Lbr. Co., 168 N. C. 60, 84 S. E. 54.

Laches of Appellant.—An application for a certiorari to a judge to settle a case on appeal, made seven months after the appeal was taken, will be denied in the absence of an affidavit to negative laches. Peebles v. Braswell, 107 N. C. 68, 12 S. E. 44. A delay of two months, without excuse, is too long. Stroud v. Western, U. Tel. Co., 133 N. C. 253, 45 S. E. 592.

Delay of Appellee's Counsel.—Where appellant in apt time submitted the case on appeal to appellee, who declined to sign it, but suggested that he would prepare another, and get the judge to settle the case, and promised that no advantage should be taken, it was held, that he was bound by his promise. Mott v. Ramsay, 91 N. C. 249.

Authority of Judge after Settling Case.—Having "settled" the case, at the time and place of which counsel had notice, the judge is functus officio unless, by agreement of parties, or by certiorari from this court upon proof of his readiness to make correction, opportunity is given him of correcting such errors as have occurred by inadvertence, mistake, misapprehension and the like. Slocumb v. Construction Co., 142 N. C. 349, 55 S. E. 196.

Authority of Supreme Court Over Settled Case.—The supreme court has no power to amend a settled case. Walker v. Scott, 102 N. C. 487, 9 S. E. 488.

Authority of Clerk.—The clerk has no authority to find the fact of such delay as provided by this section, nor to settle the case on appeal upon the admission of such fact, it being required that the case on appeal in such instance be settled in an approved manner by agreement of counsel or by the judge. Weaver v. Hampton, 206 N. C. 741, 175 S. E. 110.

Modification of Settled Case.—Where it is made to appear to the supreme court by proper evidence, that the Judge has made an omission or mistake in the settlement of the case on appeal, the Supreme Court will give him an opportunity to correct it, or to modify an inaccurate statement. State v. Gooch, 94 N. C. 982.

It is only when the trial judge has settled the case on appeal, in the exercise of his proper jurisdiction, that the Supreme Court, upon affidavit of error therein, and a letter from the judge that he wishes to make the correction, will give him such opportunity. Barber v. Justice, 138 N. C. 20, 50 S. E. 445.

A judge can not resettle a case on appeal; he can only correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like. Boyer v. Teague, 106 N. C. 571, 11 S. E. 330.

Judge's Duty in Modifying Case.—Where a certiorari is ordered to correct a case on appeal, the trial judge should be given an opportunity to consider the case with reference to the corrections, and counsel should be present at the settlement thereof. Cameron v. Power Co., 137 N. C. 99, 49 S. E. 76.

Place of Settlement.—The requirement that the place appointed for the settlement of the case on appeal shall be within the district, if the judge has not left, is mandatory. Cameron v. Power Co., 137 N. C. 99, 49 S. E. 76.

An appeal will not be dismissed because the statement of the Judge below was made out of the district in which the suit was tried, unless the record shows that the appellee demanded to be present and that by reason of his absence he was prejudiced, especially when the error consists in the rejection of material and competent evidence. Whitesides v. Williams, 66 N. C. 141.

The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, except by agreement of the parties, or when the countercase or exception had been served, respectively, within the time prescribed by the statute. State v. Humphrey, 186 N. C. 533, 120 S. E. 85.

Effect of Absence of Judge from District.—The absence of the judge from the district does not dispense with the requirements that he should settle the case on appeal upon disagreement of counsel. Owens v. Phelps, 92 N. C. 231. When he has so left he may settle case upon notice without returning to the district. Cameron v. Power Co., 137 N. C. 99, 49 S. E. 76.

Case May Be Settled After Expiration of Sixty Days.—Although the failure of the Judge to settle a case on appeal within sixty days after the courts of the district closed, might subject him to a civil action for the penalty prescribed in the statute, he may, after that time, make up the case. State v. Williams, 109 N. C. 846, 13 S. E. 880.

Retirement of Judge.—The mere fact that a judge who tried a cause has gone out of office will not prevent his settling the case on appeal. Ritter v. Grimm, 114 N. C. 373, 19 S. E. 239.

Where the Judge who presided at a trial goes out of the office without making up a case of appeal, and the appellant is in no default, a new trial will be awarded. Simonton v. Simonton, 80 N. C. 7.

Illness of Judge.—Where the judge is unable to settle the case on appeal on account of sickness and appellee, to expedite matters, agrees to a new trial, and it appears that the judge will not be able to settle the case within a reasonable time, a new trial will be granted even though appellant opposes one. Turner v. Southern Gas Improv. Co., 171 N. C. 750, 87 S. E. 970.

Impossible to Settle Case an Appeal.—Where it appeared by affidavits that the statement of a case upon appeal had been lost by no fault of the attorneys for appellant, and that, by reason of lapse of time, the judge had forgotten the exceptions, and a new case could not be prepared, a new trial will be granted. Board v. Old Dominion Steamship Co., 98 N. C. 163, 3 S. E. 505; Isler v. Haddock, 72 N. C. 119; Adams v. Reeves, 74 N. C. 106.

Cited in State v. Angel, 194 N. C. 715, 140 S. E. 727; Metropolitan Life Insurance Company v. Boddie, 196 N. C. 666, 667, 146 S. E. 598; Penland v. French Broad Hospital, 199 N. C. 314, 317, 154 S. E. 406; McMahan v. Southern R. Co., 203 N. C. 805, 167 S. E. 225.

§ 645. Clerk to prepare transcript.—The clerk on receiving a copy of the case settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the clerk of the supreme court. The clerk, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the supreme court until the appellant has given the undertaking on appeal or made the deposit required. (Rev., s. 592; Code, s. 551; 1889, c. 135; C. C. P., s. 202.)

I. Editor's Note.
II. General Considerations.
III. Contents of Transcript.
IV. Effect on Appeal of Improper Transcript.
  A. When Appeal Remanded.
  B. When Appeal Dismissed.

Cross References.

For a general discussion of the transcript see 1 Enc. Dig. 521 et seq., 13 Enc Dig. 100 et seq. As to the distinction between the record and the case on appeal and the requisites of the latter, see sec. 643, and annotations thereunder. See sec. 644 as to settlement of case on appeal. As to the jurisdiction acquired by the Supreme Court, see sec. 1411, et seq.

I. EDITOR'S NOTE.

The transcript of record is necessary to give the Supreme Court jurisdiction of the case. The transcript is prepared

by the clerk of the court, but it is the appellant's duty to see that this is properly done. The appellant should comply with the rules of the Supreme Court in regard to the transcript. The penalty for a failure to so comply is the dismissal of the appeal. For regulations as to the arrangement of matter in the transcript see Supreme Court Rule 19, as to printing, see Supreme Court Rule 22, 23 and 24. See also Supreme Court Rule 5 in regard to docketing the transcript.

II. GENERAL CONSIDERATIONS.

Section is Directory.—This section is directory merely, and where a party has duly perfected his appeal, and tendered the necessary fees, the clerk must forthwith transmit a transcript of the record, notwithstanding the attorneys have not settled a case. Russell v. Davis, 99 N. C. 115, 5 S. E. 895.

Matter Not Contained in Transcript.—The Supreme Court will not consider matters not contained in the transcript of the record on appeal. Presnell v. Garrison, 122 N. C. 595, 29 S. E. 839.

How Transcript Drawn.—The transcript of record on appeal should be drawn in accordance with Eaton's Forms. State v. Butts, 91 N. C. 524.

Original Papers.—The requirement that appellant file a transcript on appeal is not complied with by filing the original papers from the court below. Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013. Emmons v. McKesson, 58 N. C. 92.

Duty to Transmit.—On the taking of an appeal, the record should be transmitted to the appellate court, and the appeal docketed, whether the statement of the case on appeal is settled or not. Owens v. Phelps, 91 N. C. 253.

When Appeal Not Properly Constituted.—Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. Cross v. Williams, 91 N. C. 496.

Costs of Irrelevant Matter.—The costs of unnecessary and irrelevant matter, accompanying a transcript, in regard to which no exception is taken below, will be taxed against the appellant, whether he succeeds or not. Clayton v. Johnson, 82 N. C. 423.

Commission of Evidence and Charge.—The evidence and the charge of the court are properly omitted from the appeal record where there is no exception involving the same. Parker v. Southern Exp. Co., 132 N. C. 128, 43 S. E. 603.

Contradictory Records.—Where two transcripts are sent, contradictory to each other, and the parties do not agree which is correct, the court will direct the proper officer to attend with the original record. State v. Reid, 18 N. C. 377.

Failure to Tender Required Fees.—Failure of the clerk of the court below to send up a transcript after the case on appeal had been filed by appellant in his office does not excuse appellant's failure to file the transcript or the case on appeal where he does not show that he has tendered the required fees and is otherwise free from laches. Critz v. Sparger, 121 N. C. 283, 28 S. E. 365.

Stenographer's Notes.—A statute authorizing the employment of an official stenographer and providing that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the records, does not make those notes a part of the record proper on appeal, or of the case on appeal. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Bill of Exceptions Unnecessary.—Errors apparent on the record may be reviewed though there is no bill of exceptions. Cape Fear, etc., R. Co. v. Stewart, 132 N. C. 248, 43 S. E. 638.

Demurrer.—A demurrer and the action of the court thereon are part of the record, and no bill of exceptions or case is necessary. Chamblee v. Baker, 95 N. C. 98.

Refusal to Sign Judgment.—The fact that a form of judgment offered by plaintiff, and which the court declined to sign, recited that plaintiff was refused leave to take a nonsuit as to certain defendants, did not make such recital a part of the record; it not being stated in the case by the judge, and nowhere appearing in the record proper. Tennessee River Land, etc., Co. v. Butler, 134 N. C. 50, 45 S. E. 956.

Binding Effect of Record.—The Supreme Court is bound by the record, even though it seems improbable that it can be true. Davidson v. Southern R. Co., 156 N. C. 578, 72 S. E. 622; McDaniel v. King, 89 N. C. 29, 30.

Amendment of Record.—The appellate court has no authority to allow an amendment of the record. Neal v. Cowles, 71 N. C. 266.

Showing Additional Facts.—Where the findings of fact made the basis of a judgment denying a motion for vacation of a judgment are not in the record, the record can not be amended so as to show the facts on the request of a single party. Smith v. Whitten, 117 N. C. 389, 390, 23 S. E. 320.

How Errors in Record Corrected.—Errors in the record should be corrected by means of certiorari, and not by having the amendment made by the clerk below while the transcript is on file in the appellate court. State v. Jackson, 112 N. C. 849, 16 S. E. 906.

Response to Issue.—An appeal will not be dismissed because the response to the issue was omitted in printing the record, where the omission was palpably a printer's error; the response being recited and printed in the judgment. Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253.

Failure of Judge to Return Papers.—Where the trial judge takes the papers and does not return them in time for the seasonable preparation of appellant's transcript, a dismissal for failure to file will be vacated, and a certiorari issued to bring up the appeal. Seay v. Yarborough, 94 N. C. 291; Roulhac v. Miller, 89 N. C. 190.

Proper Transcript Obtainable.—An appeal will not be dismissed because the clerk of the lower court fails to transmit a proper transcript, especially when a proper transcript is obtainable before the case will stand for argument. Bryan v. Moring, 99 N. C. 16, 5 S. E. 739.

Cited in Carter v. Bryant, 199 N. C. 704, 706, 155 S. E. 602.

III. CONTENTS OF TRANSCRIPT.

Transcript Essential.—Before the Supreme Court will entertain an appeal the appellant must cause to be properly filed and docketed therein a duly certified transcript of the record of the action in the court where the judgment sought to be reviewed was rendered. State v. Preston, 104 N. C. 733, 734, 10 S. E. 84.

In General.—It must appear in the record, with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the place and time prescribed by law. In all cases, it must appear that the court had jurisdiction of the parties and of the subject matter; and so much not more, of the record in every case, ought to be sent up as will properly present the exceptions taken, that is as will show that they were taken, the rulings of the court to which they apply, and how they bear upon the action. The Supreme Court must be able to see that a court was held and that the action was properly constituted before it. This requirement is not a mere matter of form that may be dispensed with. It is an essential part of procedure in every action. And however informal a record may be, these essential requisites must appear in it, else the court cannot proceed to examine the alleged errors, and decide the questions of law sought to be presented. State v. Butts, 91 N. C. 524.

In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment. Spence v. Tapscott, 92 N. C. 576, 577.

And that the action was properly constituted in the court below. Markham v. Hicks & Co., 90 N. C. 1.

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict, and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. Sigman v. Railroad Co., 135 N. C. 181, 47 S. E. 420.

Jurisdiction of Action.—It is the appeal that puts the Supreme Court in relation with the case in the court below, and that court in respect to the judgment appealed from; and the Supreme Court must be able to see, from the record, the relation thus established. Moore v. Vanderburg, 90 N. C. 10.

Essential Part of Record.—The transcript or record on appeal consists of the record proper (that is, summons, pleadings, and judgment) and the case on appeal, which is the exceptions taken, and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to for review. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Taking of Appeal.—Where the record on appeal does not show that any appeal was taken, the appellate court has no jurisdiction. Randleman Mfg. Co. v. Simmons, 97 N. C. 89, 1 S. E. 923; Howell v. Jones, 109 N. C. 102, 13 S. E. 889.

Authority of Court or Judge.—Every transcript or record, to be authoritative must set forth before what person or persons the proceedings were had, or by whose authority the record was made, so that it may appear that such proceedings were not coram non judice. Howell v. Ray, 83 N. C. 558.

A transcript on appeal, which contains a copy of a commission to a judge other than the one regularly designated by statute, to hold a term in the county whence it comes, and of a judgment certified to have been signed by him, does not show, "with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the time and place prescribed by law," and hence it is insufficient. Jones v. Hoggard, 107 N. C. 349, 12 S. E. 286.

Opening of Court.—The record on appeal from the superior court of a county is fatally defective if it does not show that a superior court was opened and held for such county at all. High v. Carolina Cent. R. Co., 112 N. C. 385, 17 S. E. 79.

When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. Broadfoot v. McKeithan, 92 N. C. 561.

Jurisdiction of Parties.—The transcript is imperfect if it does not appear therefrom, with reasonable certainty, that the court was duly held, and that it had obtained jurisdiction of the parties by service or waiver of process. Daniel v. Rogers, 95 N. C. 134; Jones v. Hoggard, 107 N. C. 349, 12 S. E. 286.

Agreed Case.—Where a matter is before the Supreme Court on a case agreed, the whole of that paper is an essential part of the record. Upper Appomattox Co. v. Buffaloe, 121 N. C. 37, 27 S. E. 999.

Incidental Matters.—Entries of continuances, and other docket entries, interlocutory judgments, and incidental matters, such as judgments nisi against witnesses, as well as the evidence, prayers for instructions, and charge of the court, are not part of the record on appeal unless there is some exception presenting them for review. Cressler v. Asheville, 138 N. C. 482, 51 S. E. 53.

Second Appeal.—On second appeal, the formal recitals and the proceedings subsequent to the filing of the opinion on reversal and the exceptions only need appear in the record. Simmons v. Allison, 119 N. C. 556, 26 S. E. 171. Smith v. Miller, 155 N. C. 247, 71 S. E. 355.

Special Orders as to Contents.—The clerk of the superior court, in sending up the transcript to the Supreme Court, should be guided solely by the order of the superior judge, and should send no other papers than those directed. Clark v. Saco-Pettee Mach. Works, 150 N. C. 88, 63 S. E. 153.

Appeals from Interlocutory Judgments.—Upon appeals from interlocutory judgments nothing should be certified except so much of the case below as is necessary to present the point to be reviewed. Smith v. Collier, 20 N. C. 60.

IV. EFFECT ON APPEAL OF IMPROPER TRANSCRIPT.

A. When Appeal Remanded.

Imperfect Transcript.—Where the transcript of the record sent to the supreme court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up. Spence v. Tapscott, 92 N. C. 576.

Fragmentary Record.—Where the transcript did not contain the record, and it was ordered sent up on certiorari, to which the clerk returned fragmentary parts of the record, certifying that these were all he could by diligent search find, it was held, that the case must be remanded to the court below to supply the necessary record, and to make all necessary amendments thereto to perfect the appeal. Cox v. Jones, 110 N. C. 909, 14 S. E. 782.

Remand for Proper Transcript.—A transcript which fails to show any process, or waiver thereof, or any pleading, by which defendant was brought into court, or any agreement for the submission of the controversy without action, is insufficient, and the cause will be remanded for a proper transcript. Jones v. Hoggard, 107 N. C. 349, 12 S. E. 286.

Proper Proceedings below.—An appeal will be remanded where the transcript does not show that the action was properly constituted in the court below. Markham v. Hicks & Co., 90 N. C. 1.

Failure to Show Process and Pleading.—Where the transcript on appeal contains only the judgment of the court below, and shows no process or pleading, the cause will be remanded. Rowland Bros. v. Mitchell, & Son, 90 N. C. 649; Bethea v. Byrd, 93 N. C. 141.

Failure to Show Contention of Parties.—Where the transcript on appeal merely shows process, a reference to arbitration, an award, exception thereto, the action of the court below thereon, and an appeal, but there are no pleadings, nor an agreed statement of facts, so that the Supreme Court can see the contention of the parties, and that the court below had jurisdiction, and where both parties are not able to file the pleadings nunc pro tunc in the Supreme Court, the cause will be remanded. Wyatt v. Lynchburg, etc., R. Co., 109 N. C. 306, 13 S. E. 779.

Failure to Show Entry of Judgment.—Where the record on appeal contains no judgment entry, the appeal or writ of error cannot be considered. Logan v. Harris, 90 N. C. 7; Harvey v. Rich (N. C.), 1 S. E. 647. See Vann v. Winders, 184 N. C. 629, 113 S. E. 927.

B. When Appeal Dismissed.

Absence of All Essential Matters.—An appeal will be dismissed on motion when, in the transcript sent up, there is no record of any trial, verdict or judgment, no errors assigned or statement of the case for appeal, and no appeal bond or order dispensing with one. State v. Gaylord, 85 N. C. 551.

Where there is no case on appeal settled by the judge or by counsel, the evidence is in the record by question and answer, there is no leave to appeal as a pauper, although the action was brought as a pauper, and no appeal bond, printed record, or printed brief for plaintiff, the appeal will be dismissed. Queen v. Snowbird Valley R. Co., 161 N. C. 217, 76 S. E. 682.

Failure to Make Transcript.—Where appellant failed to file a transcript, but filed a certificate by the clerk that such a case had been tried, the appellee could docket and dismiss without filing additional certificate of his own. Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Incomplete Transcript.—Where the transcript is incomplete, and not such as will enable the appellate court to examine the case on its merits, the appeal will be dismissed. Mitchell v. Moore, 62 N. C. 281.

Omission of Affidavits.—Where, in settling the case on appeal, the judge directed the clerk to include certain affidavits in the transcript, after which the appellant directed the clerk to omit them, the appeal will be dismissed. Finch v. Strickland, 130 N. C. 44, 40 S. E. 841.

Omission of Complaint.—Appeal will be dismissed when the consideration of the complaint is essential to determination of the question involved, it not being in the record, and appellant having made no motion for certiorari to perfect the record. Allen v. Hammond, 122 N. C. 754, 30 S. E. 16.

Record Consists Only of Case on Appeal.—Where the record consists only of the case on appeal, without the summons or pleadings, and no excuse is offered for the defective record, nor application for a certiorari, nor that the case be remanded, the appeal will be dismissed. Rice v. Guthrie, 114 N. C. 589, 19 S. E. 636.

Failure to Pay Fees.—Where a certiorari has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case as settled, but the clerk of the superior court returns that defendant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed. Broadwell v. Ray, 112 N. C. 191, 16 S. E. 1009.

§ 646. Undertaking on appeal; filing; waiver.—To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the supreme court on the ground that the undertaking on appeal was not filed, or deposit made, earlier, if the undertaking is filed or the deposit made before the record of the case is transmitted by the clerk of the superior court to the supreme court. When no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the supreme court, the supreme court shall, upon good cause shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit. (Rev., ss.

593, 595; Code, ss. 552, 561; C. C. P., ss. 303, 312; 1889, c. 135, s. 2; 1871-2, c. 31.)

I. General Considerations.
II. Time of Filing.
III. Waiver.
IV. Parties.

Cross References.

As to the undertaking on appeal in general, see 1 Enc. Dig. 489 et seq. For the undertaking to stay execution, see section 650 et seq. See also annotations under section 638. As to costs on appeal see section 1256 and annotations thereunder.

I. GENERAL CONSIDERATIONS.

Compliance with This Section or Section 649.—As to the necessity, for those desiring an appeal, of complying with either the provisions of this section or those of § 649, see annotations under the latter section.

Necessity of Security to Perfect Appeal.—An appeal bond or undertaking is necessary to the perfection of an appeal. Ex parte Berry, 107 N. C. 326, 12 S. E. 125; Hinton v. Pritchard, 107 N. C. 128, 12 S. E. 242.

The Supreme Court has no power to order a certiorari without requiring bond and security thereon. Weber v. Taylor, 66 N. C. 412.

See also, Walsh v. Burleson, 154 N. C. 174, 69 S. E. 680.

Duty to Provide Bond.—Providing an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches. Lunsford v. Alexander, 162 N. C. 528, 78 S. E. 275.

After Perfecting of Appeal.—When an appeal is perfected, the trial court has no longer any jurisdiction of the cause, and can not require an additional bond. McRae v. Board, 74 N. C. 415.

New Security on Second Appeal.—After a cause has been remanded because the record is imperfect, the trial court may order that an appeal bond be filed to perfect the appeal, an undertaking previously filed having been defective. Spence v. Tapscott, 93 N. C. 250.

Deposit as Security.—Under this section the clerk may accept a deposit of such sum of money as may be ordered by the court in lieu of an undertaking on appeal. Graves v. Hines, 106 N. C. 323, 11 S. E. 362; State v. Parish, 151 N. C. 659, 65 S. E. 762.

No Substitute for Undertaking or Deposit.—The clerk has no authority to accept any substitute for the undertaking on appeal, or deposit of money in lieu thereof, provided by the statute. Eshon v. Board, 95 N. C. 75.

Surety Misinformed Concerning Legal Effect of Bond.—One who has signed a bond given to stay execution pending an appeal can not defend on the ground that he was misinformed concerning the legal effect of the bond. McMinn v. Patton, 92 N. C. 371.

See Oakley v. Van Noppen, 100 N. C. 287, 5 S. E. 1.

Extent of Liability.—An appeal bond given under this section to secure "all" costs, means the appellee's costs. Morris v. Morris, 92 N. C. 142.

When there is judgment in the Supreme Court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee, or their principal. Clerk's Office v. Huffsteller, 67 N. C. 449.

See also, Kenney v. Seaboard Air Line R. Co., 166 N. C. 566, 82 S. E. 849.

Attempt to Cure Defects in Bond.—An uncompleted undertaking on appeal, filed on the last day on which by statute it could be filed, and then immediately withdrawn to be completed by obtaining the signatures of other parties, is ineffectual. Smith v. Reeves, 85 N. C. 594.

Misrecital of Judgment.—A misrecital in the appeal bond of the date of the judgment or order appealed from is not fatal error, if the judgment or order is otherwise correctly and sufficiently described. Lackey v. Pearson, 101 N. C. 651, 8 S. E. 121.

Effect of Failure to Give Undertaking.—In the absence of an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. Lunsford v. Alexander, 162 N. C. 528, 78 S. E. 275.

Giving bond on appeal or the granting leave to appeal without bond are jurisdictional, and, unless the statute is complied with, the appeal will be dismissed. Honeycutt v. Watkins, 151 N. C. 652, 65 S. E. 762; Smith v. Reeves, 85 N. C. 594. See also Brown v. Kress & Co., 207 N. C. 722, 178 S. E. 248.

Effect of Failure to File Bond within Statutory Time.—Appeals will be dismissed if the bond on appeal is not given within the time required by law. McCanless v. Reynolds, 90 N. C. 648; Applewhite v. Fort, 85 N. C. 596.

II. TIME OF FILING.

Presumption of Timely Filing.—Where an appeal bond has no date it will be presumed to have been filed on the day it is justified. Boyden v.. Williams, 92 N. C. 546.

Computation of Time.—The ten days within which the undertaking on appeal must be filed are not counted from the day on which the judgment is rendered, but from that on which the court adjourned. Chamblee v. Baker, 95 N. C. 98.

Ten Days after Rendition of Judgment.—The undertaking on appeal must be filed within ten days after the rendition of the judgment. Boyden v. Williams, 92 N. C. 546; Wade v. New Bern, 72 N. C. 498; Sever v. McLaughlin, 82 N. C. 332.

Ten Days after Trial.—Where an undertaking on appeal recited that the judgment appealed from was rendered on the first day of the term (following the fiction that all the business of a term is done on its first day), but it appeared that the trial took place during the second week, and the justification was dated within ten days after the trial, it was held that the bond was filed in time. Worthy v. Brady, 91 N. C. 265.

Day Facts Were Found.—Where the record does not show on what day the judgment appealed from was rendered, it having been rendered out of term by consent, an appeal bond filed on the same day that the facts were found, the case on appeal filed, and the amount of the bond fixed, is given in time. Gwathney v. Savage, 101 N. C. 103, 7 S. E. 661.

Delay in Filing Caused by Clerk.—An undertaking filed within a few days after the time agreed on will be treated as valid where it appears that the appeal was in good faith, that appellant made diligent effort from time to time to give the undertaking, but was prevented by the absence of the clerk, and that the delay was without prejudice to appellee. Harrison v. Hoff, 102 N. C. 25, 8 S. E. 887; Jones v. Wilson, 103 N. C. 13, 9 S. E. 580.

Before Transmission of Record to Appellate Court.—An appeal bond, filed and sent up with the record, is in time, provided it should be given before the record of the case is transmitted to the Supreme Court. In re Snow's Will, 128 N. C. 100, 38 S. E. 295; Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148.

Reasonable Excuse Must Be Shown.—While the Supreme Court may allow an undertaking on appeal to be filed in that Court, the power thus conferred will not be exercised unless the appellant shows a reasonable excuse for his failure to give the undertaking within the time prescribed by this section. Harrison v. Hoff, 102 N. C. 25, 8 S. E. 887; Jones v. Asheville, 114 N. C. 620, 19 S. E. 631.

The same cause that excused failure to perfect the appeal excuses the failure to file appeal bond. Graves v. Hines, 106 N. C. 323, 11 S. E. 362.

Before or after Motion to Dismiss.—The Supreme Court may allow an appellant to substitute a sufficient for an insufficient appeal bond, after a motion by the appellant to dismiss the appeal for such defect. Robeson v. Lewis, 64 N. C. 734.

III. WAIVER.

Waiver as to Costs.—Parties to a suit have no right to waive an appeal bond so far as costs are concerned. Cape Fear, etc., Nav. Co. v. Costen, 63 N. C. 264.

Waiver of Timely Filing.—The necessity of filing the appeal bond within the prescribed time may be waived by agreement. Wade v. New Bern, 72 N. C. 498.

Same—Must Appear of Record.—No agreement of parties waiving the necessity of timely filing of appeal bond will be respected by the appellate court unless it appears on the record. Wade v. New Bern, 72 N. C. 498.

Same—Verbal Agreements Disregarded.—Verbal agreements to waive the statutory requirements will not be regarded. McCanless v. Reynolds, 91 N. C. 244. See also Skinner v. Bland, 91 N. C. 1.

Same—Delay in Making Objection.—Where the absence of a bond on appeal is not objected to for two years, and in the meantime the cause has been continued, and witnesses summoned, respondent will be deemed to have waived objection to the defect. Arrington v. Smith, 26 N. C. 59.

Same—By Failure to Object.—Where the appellant is in court and the bond is offered and accepted without objection, and this is noted in the record, this is construed to be a sufficient waiver in writing under the statute. Harshaw v. McDowell, 89 N. C. 181, 183; Howerton v. Henderson, 86 N. C. 718.

Same—By Proceeding with Trial.—If the appellee let the cause go to the jury in the appellate court, he thereby

waives objections to defects in the appeal bond, but the court, in its discretion, may require further security. Ferguson v. M'Carter, 4 N. C. 544.

IV. PARTIES.

Obligee.—An undertaking on appeal, though not so expressed, is, by implication, taken to be made with the appellee. Clerk's Office v. Huffsteller, 67 N. C. 449.

Omission of Obligor's Name.—The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. Chamblee v. Baker, 95 N. C. 98.

Operates Favorably to Respondent.—The undertaking for costs and damages on appeal, operates in favor of the respondent, although he is not required to be named in it as a party. Clerk's Office v. Huffsteller, 67 N. C. 449.

Made Payable to State.—An appeal bond made payable to the state is void. The state will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law—as guardian bonds, etc. Dorsey v. Raleigh, etc., R. Co., 91 N. C. 201.

Necessity for Obligor's Signature.—The signature of the appellant is not essential to a bond or undertaking on appeal or error. Cohoon v. Morton, 49 N. C. 256; Walker v. Williams, 88 N. C. 7.

Party Acting as Surety.—An undertaking on appeal may be good although signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. Syme v. Badger, 91 N. C. 272.

Opposite Party.—A plaintiff can not be principal obligor on a bond where an appeal is taken by defendant. Speed v. Harris, 4 N. C. 317.

Signature by Mark.—An appeal bond may be executed by the surety making his mark. State v. Byrd, 93 N. C. 624.

Name Signed by Magistrate.—A magistrate, who has rendered a judgment on a warrant, is not a fit person to sign the name of another as obligor on the appeal bond. Weaver v. Parish, 8 N. C. 319.

§ 647. Justification of sureties.—The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than five days. (Rev., s. 594; Code, s. 560; C. C. P., s. 310; 1887, c. 121.)

Editor's Note.—The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing, unless a sum of money be deposited with the clerk by order of the court in lieu of the undertaking. The statute is careful to provide, in strong, peremptory and exacting terms, that the appeal shall be ineffectual for any purpose unless perfected in the way prescribed in it. The language is plain and mandatory, and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects.

Necessity of Justification.—An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. Singer Mfg. Co. v. Barrett, 94 N. C. 219; Greenlee v. McCelvey, 92 N. C. 530.

Dismissal of Appeal.—An appeal will be dismissed when the surety on the undertaking does not justify in double the amount thereof. McCanless v. Reynolds, 91 N. C. 244; State v. Roper, 94 N. C. 859.

Justification Must Be by Surety.—The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. . Morphew v. Tatem, 89 N. C. 183.

Failure to Show Proper Amount.—A justification of two sureties that each is worth the amount of the bond, is not a sufficient compliance with this section. Anthony v. Carter, 91 N. C. 229.

Need Not Mention Liabilities.—The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified, without stating that it is above his liabilities and homestead and exemption allowed by law. Witt v. Long, 93 N. C. 388.

Justification Held Insufficient.—Where the approval of an unjustified bond in the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents. Gruber v. Washington, etc., R. Co., 92 N. C. 1.

Indorsement of Clerk Not a Substitute for Justification.—An indorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance within the statutory requirement that the bond must be accompanied by an affidavit of the sureties showing their justification. Bryson v. Lucas, 85 N. C. 397.

Justification May Be Waived.—While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily avoid the bond. It is a defect which may be cured by waiver. Becton v. Dunn, 137 N. C. 559, 563, 50 S. E. 289. McMillan v. Baker, 92 N. C. 111.

Necessity of Written Waiver.—Where the record fails to show that appellee in writing waived an appeal bond, the appeal will be dismissed if such bond is not justified. Lytle v. Lytle, 90 N. C. 647.

When Waiver Sufficient.—Where the record stated, "Plaintiff appealed. Notice waived. Bond filed," which was signed by the judge, it is a sufficient waiver in writing of a formal justification of the bond, and the appeal will not be dismissed because the sureties do not justify in double the amount. Singer Mfg. Co. v. Barrett, 94 N. C. 219.

An acceptance by the appellee of the surety tendered on an appeal bond, constitutes a waiver of the justification required by statute. Greenlee v. McCelvey, 92 N. C. 530.

Same—Appellee Present When Bond Taken.—When it appears by the case settled that the appellees were present when the appeal bond was taken, and made no objection to the sufficiency of the sureties, such objection will be deemed waived. Gruber v. Washington, etc., R. Co., 92 N. C. 1; Moring v. Little, 95 N. C. 87.

Same—Acceptance in Open Court.—The acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justified can not be sustained. Jones v. Potter, 89 N. C. 220.

Same—Signing Case on Appeal.—An objection to an appeal bond on the ground that the sureties failed to justify is not waived when the counsel for the adverse party agrees to and signs the statement of the case on appeal. McMillan v. Nye, 90 N. C. 11, distinguishing Howerton v. Henderson, 86 N. C. 718, distinguished in Gruber v. Washington, etc., R. Co., 92 N. C. 1.

Same—Entry on Record.—On entry on the record, "bond fixed at $25; filed and approved," was held a sufficient waiver in writing. Hancock v. Bramlett, 85 N. C. 393. See also State v. Wagner, 91 N. C. 521.

§ 648. Notice of motion to dismiss; new bond or deposit.—Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal or for failure of sureties to justify, he must give written notice to the appellant of such motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellant may file with the clerk of the supreme court a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below. (Rev., s. 596; 1887, c. 121.)

As to the time of the motion to dismiss, see Supreme Court Rule 16.

Section is Mandatory.—A motion to dismiss because of imperfections in the undertaking on appeal, will not be entertained, unless the provisions of this section are complied with. Jones v. Slaughter, 96 N. C. 541, 2 S. E. 681.

Section Does Not Apply When no Bond Filed. — No

notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty days required for a motion to dismiss by the section applies only when there is an irregularity in the bond or in the justification of sureties. Jones v. Asheville, 114 N. C. 620, 19 S. E. 631.

Nor When Not Filed in Time.—A failure to execute and file an undertaking on appeal within the time prescribed by law is not a mere "irregularity," and hence a motion to dismiss the appeal for such failure does not require the twenty days notice, as provided by this section. Bowen v. Fox, 98 N. C. 396, 4 S. E. 200.

Necessity of Written Notice.—A motion to dismiss appeal for insufficient bond will not be entertained, unless after written notice, as required by this section. McGee v. Fox, 107 N. C. 766, 12 S. E. 369.

At Hearing of Motion.—Though a void bond has been given on appeal from the county to the Superior Court, the appeal should not be dismissed where the appellant offers to file a good bond at the hearing of the motion to dismiss. March v. Griffith, 53 N. C. 264.

Failure to File New Bond.—Where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed. Goodman v. Call, 185 N. C. 607, 116 S. E. 724.

Effect of Appearance.—The failure to state, from inadvertence, that counsel appeared specially in the court above to move to dismiss the appeal for failure to docket it in time, should not be deemed a waiver of the grounds of the motion. Suiter v. Brittle, 90 N. C. 19.

§ 649. Appeals in forma pauperis; clerk's fees.—When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the supreme court, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the supreme court as in other cases of appeal, without giving security therefor. The party desiring to appeal from said judgment shall within five days make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the supreme court of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. (Rev., s. 597; Code, s. 553; 1889, c. 161; 1873-4, c. 60; 1907, c. 878.)

See, for a general consideration of this subject, 1 Enc. Dig. 498 et seq.

Editor's Note.—Appeals in forma pauperis was not originally allowed in civil cases at all, but were first provided for in ch. 60, Laws 1873-74, under which they could only be allowed, as in criminal cases, by the judge, and during the term. But in 1889, Laws 1889, ch. 161, this section was amended and appeals in forma pauperis were allowed by the judge either at term or on affidavit filed within five days after court, or the clerk might pass upon and allow such application during term, or within ten days after its expiration.

Formerly the clerk of the Superior Court was not bound to render his services gratuitously but in 1907, Acts 1907, ch. 878, this section was again amended and the clerk of the Superior Court is not now allowed to demand his fees for making the transcript in appeals in forma pauperis.

Supreme Court Rule 22 offers appellants in forma pauperis the option of filing seven typewritten copies of the record, rather than having the same printed.

Section Mandatory.—Where a party to a civil action which has been tried in the Superior Court, desires to appeal from a judgment rendered at such trial to this court, without giving security as required by this section, he must comply strictly with the provisions of this section, which are mandatory. McIntire v. McIntire, 203 N. C. 631, 632, 166 S. E. 732.

Necessity of Affidavit.—In pauper appeals it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the supreme court, and a provision in the judgment allowing plaintiff to appeal in forma pauperis does not relieve plaintiff of the necessity of filing the jurisdictional affidavit required by section 646, or the twenty-five printed or mimeographed copies of the brief required by rule 22 of the supreme court. Brown v. Kress & Co., 207 N. C. 722, 178 S. E. 248.

Statement of Attorney.—On an appeal in forma pauperis, an affidavit not containing the averment that appellant "is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court," is fatally defective. Honeycutt v. Watkins, 151 N. C. 652, 65 S. E. 762; Russell v. Hearne, 113 N. C. 361, 18 S. E. 711. See also Hanna v. Timberlake, 203 N. C. 556, 166 S. E. 733.

Order Allowing Appeal.—To appeal as a pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient. Queen v. Snowbird Valley R. Co., 161 N. C. 217, 76 S. E. 682.

Order Must Be Obtained within Statutory Time.—An order allowing an appeal in forma pauperis entered by the clerk after the expiration of the statutory time is beyond the clerk's authority and the Supreme Court is without jurisdiction to entertain the appeal and it will be dismissed, the provisions of this section being mandatory and not directory. Powell v. Moore, 204 N. C. 654, 169 S. E. 281.

Applies to Administrators, etc.—Administrators and all other parties to the record, prosecuting or defending, are permitted to appeal to the Supreme Court without giving security therefor. Mason v. Osgood, 71 N. C. 212.

Intention to Appeal Need Not Be Intimated at Trial.—The appellant in such case need not intimate his desire to appeal at the time of trial, his timely compliance with the statute being sufficient indication of his desire at the time of trial. Russell v. Hearne, 113 N. C. 361, 18 S. E. 711.

Other Proceedings Not Stayed.—An order allowing a party to appeal in forma pauperis dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from. Leach v. Jones, 86 N. C. 404.

Stenographer's Note.—In view of section 643, requiring appellant to prepare a concise statement of the case on appeal, it is improper to submit as a prepared case the stenographer's notes in the form of question and answer, though plaintiff sued in forma pauperis. Skipper v. Kingsdale Lumber Co., 158 N. C. 322, 74 S. E. 342.

Appellant Must Pay for Transcript.—An order granted under this section permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of cost of transcript in advance. Speller v. Speller, 119 N. C. 356, 26 S. E. 160; Martin v. Chasteen, 75 N. C. 96.

§ 650. Undertaking to stay execution on money judgment.—If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is sat-

isfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court. (Rev., s. 598; Code, s. 554; C. C. P., ss. 304, 311.)

Undertaking Not Necessary to Appeal.—But security for payment of the judgment, in addition to the security for costs, is not necessary to bring up the appeal if a stay of execution is not desired. Bledsoe v. Nixon, 69 N. C. 82.

No Particular Form Required.—No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such undertaking repugnant to its intent, they will be rejected as surplusage. Oakley v. Van Noppen, 100 N. C. 287, 5 S. E. 1.

Bond Given to Mortgagee.—This section does not apply to a bond by a mortgagor to the mortgagee stipulating that the mortgagor will not commit waste on the premises, and, if the judgment shall be affirmed, that he will pay for the use and occupation. Alderman v. Rivenbark, 96 N. C. 134, 1 S. E. 644.

Security Operates as Stay.—Upon compliance with this section there will be a stay of execution as to parties appealing from a final judgment. Smith v. Miller, 155 N. C. 247, 71 S. E. 355; Bryan v. Hubbs, 69 N. C. 423, 432.

Where First Bond Insufficient.—The trial court's order that appellant file supersedeas bond with another surety upon its finding that the surety upon the first bond was not sufficient is not error, as such matter rests within the sound discretion of the court. Love v. Queen City Lines, 206 N. C. 575, 174 S. E. 514.

When Surety Bound.—Where the trial judge, upon sufficient findings, has properly adjudged that the defendant has abandoned his appeal to the Supreme Court, it is not required that the appeal should have been docketed and dismissed in the Supreme Court in order to bind the surety on his bond given to stay execution in accordance with the terms of this section. Murray v. Bass, 184 N. C. 318, 114 S. E. 303.

Judgment against Surety.—Where an undertaking to stay execution on appeal has been given by the defendant against whom judgment has been rendered, and pending appeal he has been adjudicated a bankrupt in the Federal Court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt proceedings, the judgment against the surety becomes fixed and absolute. Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654, cited and distinguished. Murray v. Bass. 184 N. C. 318, 114 S. E. 303.

Applied in Hamilton v. Southern R. Co., 203 N. E. 136, 164 S. E. 834; Hamilton v. Southern R. Co., 203 N. E. 468, 166 S. E. 392.

Cited in Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535; Hinson v. Adrian, 91 N. C. 372, 374; State v. Goff, 205 N. C. 545, 172 S. E. 407; Current v. Church, 207 N. C. 658, 178 S. E. 82.

§ 651. How judgment for personal property stayed.—If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal. (Rev., s. 599; Code, s. 555; C. C. P., s. 305.)

Cited in Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535; State v. Goff, 205 N. C. 545, 172 S. E. 407.

§ 652. How judgment directing conveyance stayed.—If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (Rev., s. 600; Code, s. 556; C. C. P., s. 306.)

Duty of Clerk.—After the undertaking has been given it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. Bryan v. Hubbs, 69 N. C. 423.

Cited in Hancock v. Bramlett, 85 N. C. 393, 394; Hannon v. Commissioners, 89 N. C. 123, 124; State v. Goff, 205 N. C. 545, 172 S. E. 407.

§ 653. How judgment for real property stayed.—If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affrmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (Rev., s. 601; Code, s. 557; C. C. P., s. 307.)

Effect on Purchaser at Sale.—Where an appeal is taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust and an appeal bond is filed to stay execution, under this section and sections 654, 655, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from. Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

Cited in Hancock v. Bramlett, 85 N. C. 393, 394; Cox v. Hamilton, 69 N. C. 30; State v. Goff, 205 N. C. 545, 172 S. E. 407.

§ 654. Docket entry of stay.—When an appeal from a judgment is pending, and the un-

dertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution can issue upon such judgment during the pendency of the appeal. (Rev., s. 621; Code, s. 435; 1887, c. 192; C. C. P., s. 254.)

Purpose of Section.—The purpose of this section is to have a summary judgment in the Supreme Court for any sum there directed to be paid. Alderman v. Rivenbank, 96 N. C. 134, 138, 1 S. E. 644.

Cited in State v. Goff, 205 N. C. 545, 172 S. E. 407.

§ 655. Scope of stay; security limited for fiduciaries.—When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum. (Rev., s. 602; Code, s. 558; C. C. P., s. 308.)

See section 657 for effect of stay on judgment.

Entire Cause Transferred to Appellate Court.—Under the North Carolina practice, an appeal carries the whole cause up to the Supreme Court, equally whether security is given to stay proceedings, or for costs only. Bledsoe v. Nixon, 69 N. C. 82; Isler v. Brown, 69 N. C. 125.

Appeal Must Be Perfected.—An appeal does not take the case beyond the control of the superior court, until it is perfected. Coates Bros. v. Wilkes, 94 N. C. 174.

Authority of Lower Court Terminated.—The perfection of an appeal terminates the authority of the inferior court. State Bank v. Twitty, 13 N. C. 386.

An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. Pruett v. Charlotte Power Co., 167 N. C. 598, 83 S. E. 830.

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly-discovered evidence cannot be entertained. Combes v. Adams, 150 N. C. 64, 63 S. E. 186.

An appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the Supreme Court. Combes v. Adams, 150 N. C. 64, 70, 63 S. E. 186; Sykes v. Everett, 167 N. C. 600, 83 S. E. 585.

Where after appeal from a formal judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee, the supreme court, upon affirming the judgment overruling the demurrer, will order the judgment confirming the report of the referee stricken out because the parties were entitled to have the appeal from the judgment overruling the demurrer heard and determined before the exceptions to the referee's report were passed upon. Griffin v. Bank of Coleridge, 205 N. C. 253, 171 S. E. 71.

When Proceedings not Stayed by Interlocutory Appeal.—When an appeal is taken from an interlocutory order from which no appeal is allowed by the Code, not upon any matter of law and which affects no substantial right of the parties, it is the duty of the judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense and procrastinate a final judgment. Carleton v. Byers, 71 N. C. 331, 334.

Subsequent Proceedings in Lower Court.—Where a cause has been ordered to the Supreme Court, no subsequent action of the court below can affect it. Murry v. Smith, 8 N. C. 41.

Allowing Proceedings by Lower Court.—Ordinarily an appeal stops all proceedings in the lower court, including proceedings under an order from which, if considered alone, an appeal would be premature. But the Supreme Court may direct that certain matters should not be suspended. Pender v. Mallett, 123 N. C. 57, 31 S. E. 351.

Orders Not Affected by Judgment.—During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders, not affected by the judgment appealed from. Herring v. Pugh, 126 N. C. 852, 36 S. E. 287.

Disposition of Collateral Matter.—Pending an appeal, the lower court, in its discretion, may refuse to dispose of a collateral matter which the decision on the appeal may render unimportant. Penniman v. Daniel, 91 N. C. 431.

Motion for New Trial.—The fact that an appeal is pending does not prevent a motion in the trial court for a new trial on the ground of newly-discovered evidence. Bledsoe v. Nixon, 69 N. C. 82; but see Skinner v. Bland, 87 N. C. 168, where it was held that a judge of the superior court has no power to entertain a motion in a cause, which by appeal is in the superior court. See also, Isler v. Brown, 69 N. C. 125.

On appeal to the Supreme Court the case remains alive in the superior court until the case is certified back and final judgment entered in accordance with the certificate, and the superior court may entertain motion for a new trial for newly discovered evidence at the next term prior to such final judgment. Allen v. Gooding, 174 N. C. 271, 93 S. E. 740.

Second Trial Pending Appeal Unlawful.—Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellants' exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to this section and a new trial will be ordered on appeal. Likas v. Lackey, 186 N. C. 398, 119 S. E. 763.

Motion to Set Aside Verdict.—An appeal, perfected pending a motion to set aside a verdict, the time for the hearing of which has been extended by consent, does not divest the trial court of jurisdiction to determine the motion. Myers v. Stafford, 114 N. C. 231, 19 S. E. 232.

Order Refusing to Discharge Attachment. — An appeal from an order refusing to discharge an attachment takes the case out of the jurisdiction of the court whose order is appealed from, and an order can not subsequently be made by that court discharging the attachment. Pasour v. Lineberger, 90 N. C. 159.

Appeal Does Not Carry up Fund.—An appeal from a decree of distribution does not bring up the fund, the court below retaining charge of its safe-keeping and investment pending the appeal. Hinson v. Adrian, 91 N. C. 372.

Cited in Bohannon v. Virginia Trust Co., 198 N. C. 702, 153 S. E. 263.

§ 656. Undertaking in one or more instruments; served on appellee.—The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (Rev., s. 603; Code, s. 559; C. C. P., s. 309.)

As to undertaking for costs, see section 646. As to undertaking to stay execution, see section 650 et seq.

Surety Insolvent.—Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. Alderman v. Rivenbark, 96 N. C. 134, 1 S. E. 644.

Cited in State v. Goff, 205 N. C. 545, 172 S. E. 407.

§ 657. Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the supreme court. (Rev., s. 604; 1887, c. 192.)

As to effect of appeal on proceedings in lower court generally, see section 655 and annotations thereunder.

Editor's Note.—This section was added to the code in 1887, Laws 1887, c. 192.

In Black v. Black, 111 N. C. 300, 16 S. E. 412, it was held that this section required that a motion for a new trial upon newly discovered evidence, made after appeal and final decree in Supreme Court, should be made in the superior court. Pending the appeal the practice remains the same as it was before this act.

Does Not Annul Judgment.—A judgment is not annulled by an appeal therefrom. State v. Mizell, 32 N. C. 279.

An appeal from an order to vacate a judgment, leaves such judgment, and any execution issued under it, in full force. Murphy v. Merritt, 63 N. C. 502.

Cited in Dixon v. Smith, 204 N. C. 480, 168 S. E. 683; State v. Goff, 205 N. C. 545, 172 S. E. 407.

§ 658. Judgment on appeal and on undertakings; restitution.—Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (Rev., s. 605; Code, s. 563; C. C. P., s. 314; R. C., c. 4, s. 10; 1785, c. 233, s. 2; 1810, c. 793; 1831, c. 46, s. 2.)

Cross References.—See section 1412, especially as to the power of the Supreme Court to review issues of fact. As to the disposition of causes generally, see 1 Enc. Dig. 786 et seq.; 13 Enc. Dig. 156 et seq. As to the jurisdiction of the Supreme Court on appeal, see the Constitution Art. IV, section 8 and section 1411 of this code

Whole Case Taken Up.—Under the provisions of this section of the Code an appeal on the trial and determination of the cause in the inferior court carries the whole case to the Supreme Court for review, and such court has plenary jurisdiction to reverse, affirm, or modify the judgment. Hudson v. Charleston, etc., R. Co., 55 Fed. 252.

Power to Direct Judgment in Lower Court.—A party litigant has a substantial right in a verdict obtained in his favor, and where one has been rendered on issues which are determinative, and is set aside as matter of law, and such ruling is held to be erroneous on appeal, the Supreme Court will direct that judgment be entered on the verdict as rendered. Ferrall v. Ferrall, 153 N. C. 174, 69 S. E. 60; Wilson v. Rankin, 129 N. C. 447, 40 S. E. 310.

Judgment on Compromise.—As the Supreme Court may enter final judgment if proper, a judgment so entered on a compromise by parties pending appeal will be treated as a final judgment by consent. Chavis v. Brown, 174 N. C. 122, 93 S. E. 471.

Where the parties' respective counsel on appeal agreed to modification and amendment of the judgment, the cause will be remanded to the trial court, with directions to carry out the agreement. Stokes-Grimes Grocery Co. v. Hill, 176 N. C. 697, 97 S. E. 468.

Any Relief Consistent with Pleadings.—On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief they will not be restricted to that demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings and the facts proved. Voorhees v. Porter, 134 N. C. 591, 47 S. E. 31.

Separate Judgments for Separate Parties.—Where two parties have been joined as parties defendant in an action, and issues have been submitted as to each, and adverse verdict rendered as to each, under this section the action may be dismissed as to one party and affirmed as to the other. Kimbrough v. Hines, 182 N. C. 234, 109 S. E. 11.

Setting Aside of Erroneous Part Only.—Where a judgment appealed from consists of independent matters, so that the erroneous part thereof can be segregated, the court will only set aside the erroneous part. Newberry v. Seaboard, etc., R. Co., 160 N. C. 156, 76 S. E. 238.

Parties Not Appealing.—Where but one of a number of judgment defendants appeal from the judgment of the superior court, the Supreme Court, in affirming the judgment, will remand the case, that the judgment of affirmance may be enforced against all such defendants. Baxter v. Wilson, 95 N. C. 137.

But the Supreme Court will not determine the rights of persons represented in the trial but who do not appeal. Van Dyke v. Aetna Life Ins. Co., 173 N. C. 700, 91 S. E. 600.

Same—Determining Interest in Land.—In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and, as the plaintiff did not appeal, the judgment is accordingly modified and affirmed. Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057.

When Judgment Reversed.—When, upon the inspection of the whole record, it appears that the judgment was unwarranted upon the facts, the Supreme Court will, ex mero motu, reverse it. Everett v. Raby, 104 N. C. 479, 10 S. E. 526.

Reversal as to Certain Issues.—Ordinarily, for error in the charge, or the reception or rejection of evidence, the verdict is set aside entirely, but it may be set aside in part, and as to certain issues only, when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues. Burton v. Wilmington, etc., R. Co., 84 N. C. 193.

Judgment Reversed for Substantial Cause Only.—Courts will not order reversals upon grounds which do not affect real merits and where no substantial prejudice will result. Ball-Thrash Co. v. McCormack, 172 N. C. 677, 90 S. E. 916.

Where appellant has had a fair submission of the real issues, the substantial benefit of all prayers for instructions, and determinative facts have been found against him, a reversal will not be granted for technical errors. Smith v. Hancock, 172 N. C. 150, 90 S. E. 127.

Modifying Provisions of Judgment. — Where defendants were joint tortfeasors, error in submitting to the jury the issue as to which was primarily liable, and rendering a judgment based on a finding of primary liability by one, does not require a reversal, but the judgment can be modified to impose a joint and several liability. Hodgin v. North Carolina Public Service Corp., 179 N. C. 449, 102 S. E. 748.

Same—Omission of Parties.—In suit to foreclose deed of trust, executed by husband and wife, securing note executed by husband, against trustee and wife, where there was doubt whether personal representative of deceased husband was necessary party, Supreme Court will modify judgment dismissing action for failure to join him, and direct that plaintiff executors may bring him in. Geitner v. Jones, 173 N. C. 591, 92 S. E. 493.

Modification as to Amount of Recovery.—Although on appeal an issue involving several items can not be amended where one item is erroneous, and appeal is on that item, the court can allow appellee to deduct that much, or stand a new trial. Ragland v. Lassiter-Ragland, 174 N. C. 579, 94 S. E. 100.

Where judgment has been rendered, in an action upon the note and mortgage, subjecting the collateral in part to the payment for the supplies for the preceding year, and error has been committed as shown by the facts and figures ascertained, the judgment appealed from will be reformed accordingly. Planters Stores Co. v. Bullock, 180 N. C. 656, 104 S. E. 65.

Judgment Affirmed.—The Supreme Court may affirm the judgment of the trial court. Selwyn Hotel Co. v. Griffin, 182 N. C. 539, 109 S. E. 371; Wilson v. Jones, 176 N. C. 205, 97 S. E. 18.

New Trial May Be Granted.—The Supreme Court has power to grant a new trial. Hall v. Hall, 131 N. C. 185, 42 S. E. 562; Hawk v. Pine Lumber Co., 149 N. C. 10, 62 S. E. 752.

The Supreme Court may order a new trial and direct further proceedings in lower court. Williams v. Kearney, 177 N. C. 531, 98 S. E. 705.

Same—For Newly Discovered Evidence.—The Supreme Court may, in its discretion order a new trial for newly-discovered evidence, on motion in that court. Clark v. Riddle, 118 N. C. 692, 24 S. E. 492.

The Supreme Court, in its discretion, may refuse to grant a new trial for newly discovered evidence. Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702; Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797.

Same—To Introduce New Evidence.—After appeal, the cause may be remanded to the court below, upon petition of the plaintiff, to enable him to take further proofs, upon terms. Springs v. Wilson, 17 N. C. 385.

Same—When Necessary Party Absent.—Where it appears that a necessary party is missing from the case, or that the issues are not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. Vaughan v. Davenport, 159 N. C. 369, 74 S. E. 967, modifying opinion on rehearing S. C., 157 N. C. 156, 72 S. E. 842.

When New Trial Granted.—When the judgment is not supported by the record (as where the record shows that there was no verdict), or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded. McCanless v. Flinchum, 98 N. C. 358, 362, 4 S. E. 359.

Ordering New Trial of Certain Issues Only.—The court on appeal, upon ordering a new trial, may confine the issues to those which it deems necessary to a proper determination of the cause. Davis v. Southern R. Co., 176 N. C. 186, 96 S. E. 945, denying motion to recall mandate, 175 N. C. 648, 96 S. E. 41.

On appeal, it is in the discretion of the court whether to restrict a new trial to the issues affected by the error; wherever the error is confined to one or more issues separable from others, and it appears to the court that no prejudice will result from such course, a new trial as restricted to such issues is usually granted. Huffman v. Ingold, 181 N. C. 426, 107 S. E. 453.

All Issues.—When the Supreme Court grants a new trial generally without further disposition, the new trial is upon all of the issues, though it has power to grant either a general or partial new trial. Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164.

Technical, Formal, or Trivial Defects.—The Supreme Court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a prospect of ultimate benefit to the appellant. Cauble v. Southern Exp. Co., 182 N. C. 448, 109 S. E. 267.

To Amend Verdict, Findings or Judgment.—The Supreme Court has power to remand a cause, so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. Gulf Refin. Co. v. McKernan, 178 N. C. 82, 100 S. E. 121.

Findings as to Costs.—On appeal, a cause may be remanded for a special finding as to the right to costs. Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

To Find Additional Facts.—Where the pleadings and affidavits in an injunction suit are conflicting, and there is no finding of facts, the case will be remanded, that the facts may be found by the trial court or by a jury upon proper issues submitted to it. Kitchen v. Troy, 72 N. C. 50.

In a proceeding before a township board of supervisors to lay out a cartway, where an appeal was taken to the county board of commissioners and from there to the superior court, and the superior court exceeded its jurisdiction and amended the petition to one for the laying out of a public road, the Supreme Court on appeal will not dismiss the case, but will direct the superior court to strike out the void order and proceedings thereunder and to proceed according to law. Holmes v. Bullock, 178 N. C. 376, 100 S. E. 530.

A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, in that the money was taken while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the superior court, it is remanded so that the omission may be supplied. Sedbury v. Southern Exp. Co., 164 N. C. 363, 79 S. E. 286.

Plaintiff Entitled to Judgment against Sureties on Undertaking.—Upon the affirmance by the Supreme Court of a judgment of the superior court, in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal, and such affirmance is conclusive of the liability of the sureties. Oakley v. Van Noppen, 100 N. C. 287, 5 S. E. 1.

§ 659. Procedure after determination of appeal.—In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court. (Rev., s. 1526; 1887, c. 192, s. 2.)

As to general considerations of this subject, see 1 Enc. Dig. 822 et seq.

Jurisdiction of Appellate Court after Remand.—The Supreme Court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. Seaboard Air-Line R. Co. v. Horton, 176 N. C. 115, 96 S. E. 954; Davis v. Southern R. Co., 176 N. C. 186, 96 S. E. 945.

Jurisdiction of Lower Court after Affirmation.—After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the Supreme Court it becomes final, and the court below has no power to remit or modify it. In re Griffin, 98 N. C. 225, 3 S. E. 515.

Final Assessment Invalid before Opinion Certified. — In Atlantic Coast Line R. Co. v. Sanford, 188 N. C. 218, 219, 124 S. E. 308, the Court said: "The defendants seem to have proceeded upon the assumption that it was not necessary to await the certification of the opinion rendered on appeal, but in this respect they were in error. They had no legal right to make a final assessment against the plaintiff's property before the opinion had been certified to the superior court and while the questions presented on the appeal were yet in fieri."

Proceedings in Trial Court, after Affirmation, Simply Formal.—When a judgment of the superior court was affirmed on appeal, an entry on the docket of the superior court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely suspended, and not vacated by the appeal, the affirmation by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued. Bond v. Wool, 113 N. C. 20, 18 S. E. 77.

Effect in Lower Court of Decision of Appellate Court.—Where a judgment has been affirmed or reversed, but no final judgment entered by the Supreme Court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the Supreme Court. Lancaster v. Bland, 168 N. C. 377, 84 S. E. 529.

Procedure When Lower Court Contravenes Judgment of Supreme Court.—A judgment in appellant's favor taxing the costs of action at variance with the decision of the Supreme Court rendered on appeal, signed upon appellant's motion in the superior court, after examination had been afforded to the appellee's attorney, is not irregular, and when not thus taken through mistake, inadvertence, surprise or excusable neglect, the procedure is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. Phillips v. Ray, 190 N. C. 152, 129 S. E. 177.

Pro Forma Order.—An order "that execution of said judgment do proceed" was pro forma under this section. North Carolina R. Co. v. Story, 193 N. C. 362, 366, 137 S. E. 166.

Applied in Hamilton v. Southern R. Co., 203 N. C. 136, 164 S. E. 834.

§ 660. Appeal from justice heard de novo; judgment by default; appeal dismissed.—When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed

account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law. (Rev., ss. 607, 609; Code, ss. 565, 881; C. C. P., s. 540; 1889, c. 443; R. C., c. 31, s. 105; 1777, c. 115, s. 63; 1794, c. 414.)

I. Editor's Note.
II. General Considerations.
III When Appeal Lies.
IV. Power of Superior Court on Appeal.
V. Dismissal for Failure to Docket—Recordari.

Cross References.

As to the review of proceedings in justices' courts, generally, see 8 Enc. Dig. 454 et seq.; 14 Enc. Dig. 615 et seq. As to manner of taking appeal, see section 1530 and annotations thereunder. As to effect of appeal, see section 1529.

I. EDITOR'S NOTE.

The plain purpose of the legislature, as manifested in this section, was to expedite the disposition of appeals from the courts of justices of the peace, by providing that they should stand for trial de novo on the dockets of the superior courts at the first term after the appeal should be taken; that if both parties should appear, judgment should be tendered against the party cast, and that where the defendants should make default; the judgment in certain classes of cases should be final, and in other actions by default and inquiry "to be executed forwith by a jury." This section was subsequently amended (Laws of 1889, ch. 443) so that where the party appealing should fail to cause his appeal to be docketed before the next term of the superior court, the opposing party should have the right to procure a transcript of the justice's record, docket it and move to dismiss the appeal at said term. The amendment seems to have been enacted in furtherance of the same purpose to prevent unnecessary delay in disposing of those causes involving small amounts.

A justice's court is an inferior court of limited jurisdiction, not proceeding according to the course of common law, and although a justice is required to keep a docket and enter his proceedings, this does not constitute his court a court of record. Accordingly, when an appeal is taken from his judgment he does not send up a duly certified transcript of record as the foundation of the action of the appellate court, but he is required to file the original papers in the cause.

Public Laws 1935, c. 32, applying only to Transylvania county and not affecting pending litigation, amended this section by adding immediately after the first sentence a sentenec reading as follows: "Such appeal shall be docketed ten days prior to the next succeeding term of the superior court if the judgment appealed from shall have been entered more than twenty days prior to such term of the superior court."

II. GENERAL CONSIDERATIONS.

Jurisdiction Dependent on Jurisdiction of Lower Court.—The jurisdiction of the superior court on appeal from justice court is entirely derivative, and, if the justice had no jurisdiction of the action, the superior court acquires none by the appeal. Lower Creek Drainage Com'rs v. Sparks, 179 N. C. 581, 103 S. E. 142.

Derivative Jurisdiction.—The jurisdiction of the superior court on appeals from a justice of the peace is entirely derivative, so that, if the justice had no jurisdiction in an action as it was before him, the superior court can derive none by amendment. Stacey Cheese Co. v. Pipkin, 155 N. C. 394, 71 S. E. 442; McLaurin v. McIntyre, 167 N. C. 350, 83 S. E. 627.

Where the justice did not have jurisdiction of a party, the superior court can not obtain it on appeal from the justice court, by ordering a summons to issue to bring the party before it. Durham v. Fertilizer Co. v. Marshburn, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 408.

Jurisdiction Can Not Be Conferred by Consent.—Where the superior court acquired no jurisdiction of a case on appeal from justice's court was without jurisdiction, the parties can not by consent waive the want of jurisdiction. Love v. Huffines, 151 N. C. 378, 66 S. E. 304.

Plaintiff Must Prove Case.—As on appeal from a justice the whole case must be tried de nevo in the superior court, the mere absence of the defendant, who has answered, and raised a material issue, does not relieve plaintiff from the necessity of establishing his cause of action, and it is error, because of such absence, to dismiss the appeal. Barnes v. Southern R. Co., 133 N. C. 130, 45 S. E. 531.

Appeal Waives Objections to Proceedings before Justice.—Where a party appealed from the judgment of a magistrate to the county court, and a trial was had by jury, the matter being gone through with de novo, the defects in the proceedings before the magistrate are not material, as they are vacated by the appeal. Kearney v. Jeffreys, 30 N. C. 96.

Where it did not appear in the summons, and there was no complaint, that the amount sued for was over the jurisdictional amount limited to justice courts, the objection as to the court's jurisdiction can not be raised for the first time on appeal to the superior court. Cromer Bros. v. Marsha, 122 N. C. 563, 29 S. E. 836.

Trial De Novo.—On appeal from a judgment of a justice of the peace to the superior court, the judgment appealed from is vacated, and a trial de novo had in the superior court. Carolina Bagging Co. v. United States Railroad Administration, 184 N. C. 73, 113 S. E. 595. See also State v. Goff, 205 N. C. 545, 172 S. E. 407.

New Trial of All Litigated Matters.—On appeal to the superior court from the judgment of a justice, all litigated matters in the action are to be tried de novo. Falkner v. Pilcher, 137 N. C. 449, 49 S. E. 945.

Trial upon Original Papers.—The appeal takes the whole action into the Superior Court, where it is to be tried de novo, not upon a transcript of the record in the justice's court, but upon the original papers, which must be sent up with the appeal. Phelps v. Worthington, 92 N. C. 270, 271.

Can Not Change Nature of Action.—Defendant, on appeal from a justice of the peace in an action for rent, can not amend so as to change the nature of the action, and make it one of which a justice's court has no jurisdiction. Shell v. West, 130 N. C. 171, 41 S. E. 65.

Right to Remit Claim.—Where plaintiff brought suit in the court of a justice of the peace claiming a debt, and also possession of a horse and wagon, under mortgage, on appeal from the justice's judgment to the Superior Court, he had a right to remit his claim for the personal property and declare only for the debt. Jones v. Palmer, 83 N. C. 303.

Party Cannot Answer and Demur.—In an action in justice's court where defendant pleaded to the merits and went to trial, and was cast and appealed, his answer, not withdrawn, waived his demurrer, subsequently filed in the Superior Court. Rosenbacher & Bros. v. Martin, 170 N. C. 236, 86 S. E. 785.

Cited in Sneed v. State Highway Commission, 194 N. C. 46, 47, 138 S. E. 350; Drafts v. Summey, 198 N. C. 69, 150 S. E. 631.

III. WHEN APPEAL LIES.

Judgment Must Put an End to Action.—This section implies a final judgment—that is, one that in some way puts an end to the action. Phelps v. Worthington, 92 N. C. 270, 271.

No Appeal from Interlocutory Judgment.—Appeals cannot be taken from justices of the peace to the Superior Courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, the judgment of the Superior Court on appeal dismissing the plaintiff's action on the ground that no service of process had ever been made was erroneous, as no appeal lay from the order of the justice and the Superior Court should only have dismissed the appeal. Phelps v. Worthington, 92 N. C. 270.

Appeal from County Commissioner.—An appeal from the board of county commissioners in establishing a public road should be taken in accordance with this section. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

Taxing Prosecutor with Costs of Criminal Prosecution.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. State v. Morgan, 120 N. C. 563, 26 S. E. 634; State v. Cole, 180 N. C. 682, 104 S. E. 136.

Motion To Set Aside Judgment.—If a motion to set aside a judgment in the court of a justice of the peace should be allowed or denied improperly, the complaining party may appeal to the superior court. Whitehurst v. Merchants, etc., Transp. Co., 109 N. C. 342, 13 S. E. 937.

Waiver of Right of Appeal.—A defendant by voluntarily paying a judgment taken against him before a justice of the peace waives his right of appeal. Cowell v. Gregory, 130 N. C. 80, 40 S. E. 849.

Appeal and Not Motion to Set Aside Judgment Proper Remedy.—Where a defendant relied on the assurance of a justice of the peace, that his cause would not be tried, after which the justice rendered a judgment against him in his absence, the remedy is by an appeal or a recordari as a substitute therefor, and not by a motion to set aside the judgment. Navassa Guano Co. v. Bridgers, 93 N. C. 439.

IV. POWER OF SUPERIOR COURT ON APPEAL.

Limiting Trial to Particular Issues.—The Superior Court may limit the trial on appeal to particular issues, where there is no evidence to support those excluded. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234.

Incidental Questions.—An appeal from a court of a justice of the peace comprehends in its scope a new trial of the whole subject matter of the action, and any determination by the magistrate of an incidental question involved therein, though not directly appealed from, is, when relevant and necesssary, to be conidered and determined by the appellate court. White v. American Peanut Co., 165 N. C. 132, 81 S. E. 134.

Amount Claimed Limited to Jurisdictional Amount of Justice's Court.—Where the Superior Court acquires jurisdiction on appeal from justice's court upon law and fact, the trial proceeds de novo, the appellate court can not allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited. Meneely & Co. v. Craven, 86 N. C. 364. See, as to applicability of section, Cowles v. Hayes, 67 N. C. 128.

May Disregard Finding of Facts.—On appeal to the Superior Court from an order of a justice denying a motion to open a default judgment the court may disregard the justice's finding of fact, and proceed to hear the matter anew. Turner v. Threshing Mach. Co., 133 N. C. 381, 45 S. E. 781. Finlayson v. American Acci. Co., 109 N. C. 196, 13 S. E. 739.

Same—But Not in Summary Proceedings.—Where on a trial in summary proceedings before a justice, there is evidence to establish equitable title in defendant, and the court finds from such evidence in favor of defendant, and dismisses the action, his judgment can not be reviewed; but, where there is no evidence, his decision becomes a question of law, and reviewable. McDonald v. Ingram, 124 N. C. 272, 32 S. E. 677.

Power to Allow New or Amended Pleadings.—Upon an appeal in a civil action from the court of a justice of the peace to the Superior Court, the latter has power to amend the pleadings and allow new pleas or matters of defense to be set up. Moore v. Garner, 109 N. C. 157, 13 S. E. 768.

Same—Discretion of Court.—The trial on appeal in the superior court from a justice's judgment is de novo, and the judge may, in his discretion, allow pleadings to be filed. Teal v. Templeton, 149 N. C. 32, 62 S. E. 737.

Same—Plea of Statute of Limitations. — The plea of the statute of limitations, not relied on before a justice, can not be set up on appeal in the superior court without leave. Amendment of pleadings in such case is matter of discretion. Poston v. Rose, 87 N. C. 279.

Same—Error in Amount of Summons.—Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retroactive. McPhail Bros. v. Johnson, 115 N. C. 298, 20 S. E. 373.

Same—Error in Initials of Party.—Error in one of the initials of defendant's name in a justice's summons, if the right man is served, and is not misled, does not vitiate judgment by default, and may be amended on an appeal. Clawson v. Wolfe, 77 N. C. 100.

May Allow Counterclaim.—The superior court may on appeal from justice court allow the defendant to set up a counterclaim not urged in justice court. Norfolk, etc., R. Co. v. Dill, 171 N. C. 176, 88 S. E. 144. See, also, Thomas v. Simpson, 80 N. C. 4.

Same—Refusal to Allow Counterclaim.—Where it appeared that a defendant made no defense to the action, but suffered judgment to be entered against him in a justice's court and appealed to the superior court, but failed to answer or ask for leave to do so until the trial three years later, the court properly refused to allow a plea of counterclaim then to be set up. Johnson v. Rowland, 80 N. C. 1.

Court Cannot Set Aside Judgment and Docket Case.—Where a judgment was obtained before a justice of the peace and docketed in the office of the Superior Court Clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. Ledbetter v. Osborne, 66 N. C. 379.

May Make Additional Parties.—Under this section the superior court, on appeal from justice's judgment is authorized to bring in an additional defendant, though less than $200 might be recoverable against such defendant. Sellars Hosiery Mills v. Southern R. Co., 174 N. C. 449, 93 S. E. 952. But not where the presence of the co-defendant is unnecessary. Morgan v. Royal Ben. Soc., 167 N. C. 262, 83 S. E. 479.

V. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

Effect of Failure to Docket in Time.—An appeal from justice court not docketed at the first term to which it was returnable is properly dismissed. Tedder v. Deaton, 167 N. C. 479, 83 S. E. 616; Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978.

If appellant fails to docket his appeal by the next succeeding term of the superior court, the appellee may have the case placed on docket, and have the judgment affirmed. Simonds v. Carson, 182 N. C. 82, 108 S. E. 353.

Under this section the judgment of affirmance is, in substance, equivalent to a judgment dismissing the action, and the appellate court is not required to look into the record for the purpose of passing upon the merits of the exceptions. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

Failure to Pay Clerk's Fees.—When the justice of the peace was paid for transcript of appeal, made it out the day of the trial and handed it to the clerk of the superior court, but the appellant neither tendered nor paid the clerk his fees nor requested that it be docketed, a motion to dismiss the appeal will be granted. Lentz v. Hinson, 146 N. C. 31, 59 S. E. 144; Ballard v. Gay, 108 N. C. 544, 13 S. E. 207.

Dismissal for Failure to Docket Not Reviewable.—The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal. McClintock v. Life Ins. Co., 149 N. C. 35, 62 S. E. 775.

When Appeal Not Dismissed.—Where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace, the appeal will not be dismissed for the failure of the clerk of the superior court to docket the same. Johnson v. Andrews, 132 N. C. 376, 43 S. E. 926.

Where, on appeal from a justice of the peace, the case was not docketed, because the fees for this service were not tendered or paid to the clerk, but the clerk did not demand his fees or notify the appellant that the appeal would not be docketed unless they were paid, it was no error for the judge to allow the appeal to be docketed two terms after the regular time, and as soon as the appellant was notified that this had not been done. West v. Reynolds, 94 N. C. 333.

Waiver of Right to Object to Failure to Docket in Time.—Where defendant failed to see that his appeal from judgment of a justice of the peace was docketed at next term of superior court, but appeal was on docket 1½ years without notice from plaintiff that he intended to take advantage of irregularity, it was held that plaintiff waived his right to object. Rawls, etc., Co. v. Norfolk Southern R. Co., 172 N. C. 211, 90 S. E. 116.

Same—Agreement of Attorneys as Waiving Requirement.—Where the opposing attorneys agree that plaintiff's attorney shall make up the transcript of appeal with the justice of the peace, and submit it to defendant's attorney, and plaintiff's attorney failed to conform to the agreement, the appeal will not be dismissed at his instance on the ground that the case was not docketed at the term next ensuing after the appeal was taken. Jerman v. Gulledge, 129 N. C. 242, 39 S. E. 835.

Same—Agreement That Defendant Should Hold the Property.—An agreement made after judgment by a justice for plaintiff that defendant should hold the property until the cases should be determined by the higher court did not waive plaintiff's right to have the appeal dismissed because not docketed in time. Jones v. Fowler, 161 N. C. 354, 77 S. E. 415.

Effect of Not Moving to Dismiss for Failure to Docket in Time.—Upon appellant's failure to docket appeal from justice of the peace to superior court at the next term, appellee can move to dismiss at such term, but his failure to do so does not estop him from asserting appellant's failure to docket appeal at the next term as a bar to the trial of the case in the superior court. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708. See, also, Love v. Huffines, 151 N. C. 378, 66 S. E. 304.

Privilege of Appellee Only.—The power given by this sec-

tion to the appellee to docket a case at the first term of the superior court, if the appellant does not, and to have the judgment affirmed, is a privilege granted to the appellee only, and the appellant can draw no argument against appellee from his failure to use it. Davenport v. Grissom, 113 N. C. 38, 39, 18 S. E. 78.

Laches in Applying for Recordari.—When an appeal from a justice's court has not been docketed within the time prescribed by section 661, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a recordari and to make proper inquiry of the clerk of the superior court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him. Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978.

Appeal Lost through Default of Appellant.—The provisions of this section, as to the writ of recordari, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a refordari. Pickens v. Whitton, 182 N. C. 779, 109 S. E. 836; See, also, Helsabeck v. Grubbs, 171 N. C. 337, 88 S. E. 473.

No Recordari after Removal.—A plaintiff who appealed from the judgment of a justice for less than $25, in his favor, he claiming more, and the judge having affirmed the judgment on the papers sent up to him, under this sec., is not entitled to a recordari to the justice, as the case has already been removed from his court. Cowles v. Hayes, 67 N. C. 128.

Liability of Justice for Negligent Failure to Docket Appeal.—A justice who is paid the appeal fee and the fee for docketing the appeal, and yet who negligently fails to docket the appeal, so that the right of appeal is thereby lost, is not liable therefor in a civil suit. Simonds v. Carson, 182 N. C. 82, 108 S. E. 353. See 1 N. C. L. Rev. 55.

§ 661. Appeal from justice docketed for trial de novo.—When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. (Rev., s. 608; Code, s. 880; C. C. P., s. 539; 1876-7, c. 251, s. 8.)

As to docketing of appeals from justice's courts, generally, see 8 Enc. Dig. 863 et seq. As to notice of appeal, see sections 1530, 1531 and annotations thereunder.

Docketed at Next Ensuing Term.—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the superior court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978; Southern Pants Co. v. Smith, 125 N. C. 588, 34 S. E. 552.

Term to Which Appeal Is Taken.—An appeal must be taken to the next term of the appellate court; and it is therefore error to proceed in a case on appeal from a justice's court taken after that time, in the absence of notice to the appellee, that he may show cause against it. Hahn v. Guilford, 87 N. C. 172.

See State v. Edwards, 110 N. C. 511, 14 S. E. 741.

The "next term" of the court means that term which shall begin next after the expiration of the ten days allowed for service of notice of appeal. Sondley v. Asheville, 110 N. C. 84, 14 S. E. 514.

Same—Whether Civil or Criminal.—The phrase "next term," within rule requiring appeals from justice's judgments to be docketed at the next term, means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708; Johnson v. Andrews, 132 N. C. 376, 43 S. E. 926; Jerman v. Gulledge, 129 N. C. 242, 39 S. E. 835.

An appeal from the action of the county commissioners in altering a public road should be taken to the next term of the superior court, though it was a criminal term. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

Same—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be tried at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. Helsabeck v. Grubbs, 171 N. C. 37, 88 S. E. 473; Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708. Formerly the rule was different. See West v. Reynolds, 94 N. C. 333.

Subsequent Term.—When the term of the appellate court begins within the ten days allowed by section 1530 to perfect an appeal, the appeal is taken to the next term. Gregory v. Hobbs, 92 N. C. 39; Sondley v. Asheville, 110 N. C. 84, 14 S. E. 514.

When Judge Does Not Attend Next Term.—When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed in time, all matters then pending being carried over in the same plight and condition, to the subsequent term. Rev., Sec. 1510. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

Duty of Appellant to See Case Properly Docketed.—One appealing to the superior court from a judgment of a justice of the peace must see that the case is properly docketed, or he loses his appeal. Abell v. Thornton Light, etc., Co., 159 N. C. 348, 74 S. E. 881.

Failure of Appellant to Docket Appeal in Apt Time.—Under this section it is appellant's duty to docket his appeal in the superior court in time, and his failure to have done so by the next succeeding term of the superior court, wherein the motion of appellee to dismiss has been properly allowed, or to apply for a recordari, in apt time, is his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent. Simonds v. Carson, 182 N. C. 82, 108 S. E. 353.

Docketing at Subsequent Term as Entitling Appellant to Nonsuit.—Under this section a docketing at a subsequent term is a nullity, and does not entitle the plaintiff appellant to take a nonsuit. Davenport v. Grissom, 113 N. C. 38, 18 S. E. 78.

Finality of Judgment.—Where a justice of the peace has taken a case under advisement and later renders judgment against the defendant without notice to him, and the defendant does all that the law requires of him, after he had notice of the judgment, to perfect his appeal to the Superior Court within the time required by statute, and later has recordari issued from the latter court, the judgment appealed from will not be held as final. Blacker v. Bullard, 196 N. C. 696, 146 S. E. 807.

Plea of Limitations.—An appeal from a court of a justice of the peace is tried de novo in the Superior Court, under this section, and when the account sued on is admitted in the former court, it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up. Fochtman v. Greer, 194 N. C. 674, 140 S. E. 442.

Effect of Dismissal.— The dismissal of an appeal from a court of a justice of the peace, when not docketed by the appellant at the term of the superior court prescribed by this section, has the same effect as an affirmation of a judgment thereof under section 660. McClintock v. Life Ins. Co., 149 N. C. 35, 62 S. E. 775.

§ 662. Plaintiff's cost bond on appeal from justice.—When a defendant appeals from the judgment of a justice of the peace to the superior court, or when the judgment of the justice is removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of the appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect. (Rev., s. 606; Code, s. 564; R. C., c. 31, s. 104; 1831, c. 29.)

As to the bonds on appeal from justice's courts, see 8 Enc. Dig. 459 et seq. As to costs on appeal, see section 1256 and annotations thereunder. As to undertaking to stay execution, see section 1526.

Necessity for Surety.—The Code requires no surety on an appeal from a justice's judgment. Steadman v. Jones, 65 N. C. 388.

Discretion of Judge as to Requiring of Security.—In an appeal by a defendant to the superior court from a judgment of a justice of the peace, it lies within the discretion of the presiding judge to require the plaintiff to give security for the further prosecution of the suit, or not. Smith v. Richmond, etc., R. Co., 72 N. C. 62.

SUBCHAPTER X. EXECUTION.

Art. 27. Execution

§ 663. Judgment enforced by execution.—Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (Rev., s. 615; Code, s. 441; C. C. P., s. 257.)

References.—As to provisions for punishment for contempt, see sections 978-986. As to the nature and essentials of execution in general, see 5 N. C. Enc. Dig. 883 et seq.

In General.—An execution is a writ, issuing from a court, and is an authority to the sheriff or other officer to do what it commands. Wayman v. Southard, 10 Wheat. 1, 32 L. Ed. 253.

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. Sheppard v. Bland, 87 N. C. 163. The general rule is that the power to issue an execution is a necessary consequence to the power to render judgment. Bank v. Halstead, 10 Wheat. 51, 64, 6 L. Ed. 264.

A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is that of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. Vegelahn v. Smith, 95 N. C. 254, 255.

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor in personam, may compel payment by proceeding in rem, or pursue both remedies at the same time. Boseman v. McGill, 184 N. C. 215, 114 S. E. 10.

Purpose of Execution.—An execution is the end and life of the law, and is indispensably necessary to the beneficial exercise of the jurisdiction of a court. Bank v. Halstead, 10 Wheat. 51, 55, 6 L. Ed. 264. The purpose of an execution is to give effect to the judgment on which issued. Harshman v. Knox County, 122 U. S. 306, 319, 30 L. Ed. 1152.

Property Subject to Execution.—An execution may ordinarily be levied upon all property that has a visible, tangible existence, within the jurisdiction of the courts and the precinct of the officer; and all rents, profits and rights, arising from or appurtenant or appendant thereto. Ager v. Murray, 105 U. S. 126, 130, 26 L. Ed. 942; Stevens v. Gladding, 17 How. 447, 453, 15 L. Ed. 155.

The property need not be the subject of sale. It is the title of the defendant, and not the property itself, which is subject to execution. Turner v. Fendall, 1 Cranch 117, 134, 2 L. Ed. 53; The Moses Taylor, 4 Wall. 411, 427, 18 L. Ed. 397.

What Law Governs.—Liability of property to be subjected to execution is in the case of real estate, to be determined by the law of the jurisdiction of the situs. Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512.

Liability in the case of personal property is determined by the law of the state where the property actually is, regardless of the domicile of the owner. Hervey v. R. I. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003.

And in the case of choses in action and trusts, liability is determined by the place where created or found. Spindle v. Shreve, 111 U. S. 542, 547, 28 L. Ed. 512.

Debtor's Funds in Hands of Third Person.—Where it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the fund. Boseman v. McGill, 184 N. C. 215, 114 S. E. 10. As to garnishment, see §§ 711 et seq., and the notes thereto.

An order taxing the cost of action against a party, is in effect a judgment, upon which an execution may be issued under the provisions of this section. Sheppard v. Bland, 87 N. C. 163.

After Death of Defendant.—But an execution issued on a judgment after the death of the defendant is void. Williams v. Weaver, 94 N. C. 34; Sawyers v. Sawyers, 93 N. C. 321. For new execution against the property after defendant dying in execution, see section 674.

Execution against Counties Not Authorized.—A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. Gooch v. Gregory, 65 N. C. 142.

Remedy for Refusal of Clerk to Issue Execution.—Should the clerk refuse to issue the execution to which the plaintiff is entitled on his judgment, he has two remedies for enforcing his rights: (1) he may obtain a rule on the clerk as an officer of the court to compel him to perform his duty, or be subject to an attachment for a contempt; or (2) he may sue the clerk on his official bond. He is not entitled to a writ of mandamus against the clerk. Gooch v. Gregory, 65 N. C. 142; Electric Co. v. Engineering Co., 128 N. C. 199, 201, 38 S. E. 831.

Justice's Judgments Enforceable by Execution.—For the purposes of its enforcement by execution the judgments of a justice's court is given the same effect and force as the judgments of the superior courts. Broyles v. Young, 81 N. C. 315.

§ 664. Kinds of; signed by clerk; when sealed.—There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court. (Rev., s. 616; Code, s. 442; C. C. P., s. 258.)

Cross References.—As to forms of executions, see section 675; for execution against the person, see section 673 and 675.

Sealing Execution Issued to Another County.—Sealing is necessary to the validity of all executions issuing to another county; and a sheriff, by acting under an unsealed writ, does not render it valid. Seawell v. Bank, 14 N. C. 279; Finley v. Smith, 15 N. C. 95; Shackelford v. M'Rea, 10 N. C. 226; Freeman v. Lewis, 27 N. C. 91; Taylor v. Taylor, 83 N. C. 116.

Without a seal it confers no power on the sheriff, and his acting under it can not give it validity. Shackelford v. M'Rea, 10 N. C. 226; Shepherd v. Lane, 13 N. C. 148, 154.

§ 665. Against married woman.—An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (Rev., s. 617; Code, s. 443; C. C. P., s. 259.)

Effect of the Restriction.—The provision of this section that the execution shall be levied only upon her separate property can give no effect other than to exempt what she holds ex jure mariti, i. e., her contingent right of dower. There is nothing else to which the restricton could possibly apply. Harvey v. Johnson, 133 N. C. 352, 366, 45 S. E. 644. See McLeod v. Williams, 122 N. C. 451, 30 S. E. 129, infra.

Execution on All Separate Property Except Exemptions.—Under this section execution can be levied on all the separate property owned by a married woman, with the same exceptions allowed to men or a feme sole. Harvey v. Johnson, 133 N. C. 352, 367, 45 S. E. 644.

Claiming Exemptions.—In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644.

Application of Restriction as to Property Charged with Debt.—This section does not restrict the issue of execution against "the property she had charged with the debt." The words, "her separate property," evidently mean that an execution against her cannot be collected, as formerly, out of the husband, though he is still a necessary party defendant with her. McLeod v. Williams, 122 N. C. 451, 462, 30 S. E. 129. Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Thrash v. Ould, 172 N. C. 730, 90 S. E. 915.

Requisites Should Appear on Record.—The mandate of

this section that whenever an execution may issue against a married woman it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise, presupposes that all these requisites appear of record, and that the existence of such separate property is fixed by the judgment. Dougherty v. Sprinkle, 88 N. C. 300, 304.

§ 666. Clerk to issue, in six weeks; penalty.—The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff, within six weeks of the rendition of the judgment, and must endorse upon the record the date of such issue. If the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks must issue alias executions, within six weeks thereafter, unless otherwise instructed as aforesaid. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (Rev., s. 618; Code, s. 470; R. C., c. 45, s. 29; 1850, c. 17, ss. 1, 2, 3.)

Cross Reference.—As to issuance of execution in garnishment proceedings, see section 819.

Clerk to Issue.—The clerk of the superior court, not the judge, is the proper officer to issue execution. McKethan v. McNeill, 74 N. C. 663.

It is the duty of a clerk, as a ministerial officer of the court, to issue execution. Gooch v. Gregory, 65 N. C. 142. See also, Spencer v. Hawkins, 39 N. C. 288.

A deputy clerk has power to issue execution in the name of the clerk. Miller v. Miller, 89 N. C. 402.

Suspension of Section by Ordinance of 1866.—In 1866 a temporary ordinance entitled "an ordinance to change the jurisdiction of the courts" forbade any execution to be issued from the spring term of 1867 without the permission of the court. This for the time being repealed the requirement making it a duty of the clerk to issue execution of his own motion within six weeks. And consequently under this ordinance the clerk was held not liable for the penalty imposed upon him in the event of his default to issue execution. Ed. Note. See Badham v. Jones, 64 N. C. 655; Richardson v. Wicken, 80 N. C. 172, 176.

But this ordinance did not relieve clerks whose liability under this section had accrued prior to the passage of the ordinance. McIntyre v. Merritt, 65 N. C. 558; nor did it apply, by its express terms, to "any debts or demands contracted or penalties incurred since the first day of May 1865." Williamson v. Kerr, 88 N. C. 11, 12.

What Constitutes "Issuing" of Execution. — When the execution is made out but not delivered to the sheriff or sent out of or issued out of the clerk's office, though the memorandum of "execution" is entered on the docket, it is not "issued" within the meaning of this section. McKeithen v. Blue, 149 N. C. 95, 62 S. E. 769.

It is settled by the decisions of the Supreme Court that a writ of execution is not issued, within the meaning of this section, until the clerk hands it to the sheriff, or to the party or his agent. The mere filing and retaining it, where it does not leave the office of the clerk is not sufficient. State v. McLeod, 50 N. C. 318, 321.

It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under this section, and does not prevent the judgment from becoming dormant. McKeithen v. Blue, 149 N. C. 95, 62 S. E. 769.

The signature of the clerk is an absolute necessity to the validity of the writ and this is all the more so since the Legislature dispensed with the other indicium of the writ's authenticity, that is, a seal when the writ was to be executed within the county in which it issued. Shepherd v. Lane, 13 N. C. 148.

The signature of a justice is absolutely necessary to an alias, as well as to an original execution on a justice's judgment. Hence an entry of "execution renewed" without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it. Huggins v. Ketchum, 20 N. C. 550.

A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nullity, and the sheriff is not liable for not acting under it Shepherd v. Lane, 13 N. C. 148.

Endorsement on Execution Docket.—The requirement to "endorse on the record the date of the issuing" means that the entry should be made on an "execution docket," and is not complied with by an entry on the execution. Bank v. Stafford, 47 N. C. 98, 100.

Option to Issue to One of Two Counties—Amercement.—An allegation that the clerk failed to issue an execution to one county when he had an option to issue to one of two counties will not justify an amercement under this section. Bank v. Stafford, 47 N. C. 98.

Liability in Damages of Clerk for Failure to Issue.—Under this section a clerk and master, who failed to issue an execution based upon a decree obtained when the defendant had become insolvent, were held liable in damages for whatever sum the plaintiff can show he has sustained by such non-feasance. McIntyre v. Merritt, 65 N. C. 558.

Payment of Fees Condition to Clerk's Liability.—This section and section 3849, providing that the clerk shall not be compelled to perform any services unless his fees be paid or tendered, must be construed together. It follows that clerks of the superior court will not incur the penalty prescribed by this section for failure to issue execution within six weeks, unless the plaintiff pays or tenders him his fees for that service. Williamson v. Kerr, 88 N. C. 11, distinguished. Bank v. Robbitt, 111 N. C. 194, 16 S. E. 169.

Penalty to Whose Benefit.—This section gives the penalty to the party aggrieved; hence the plaintiff must show himself to be the party aggrieved by the default of the clerk. Simpson v. Simpson, 63 N. C. 534, 535.

Remedy for Refusal of Clerk to Issue.—See Gooch v. Gregory, 65 N. C. 142, in annotations to section 663.

Applied in Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 173 S. E. 67.

§ 667. Enforcement as of course. — The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution, as provided in this article; Provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition of judgment, or any judgment directing the payment of alimony." (Rev., s. 619; Code, s. 437; C. C. P., s. 255; 1927, c. 24; 1935, c. 98.)

Editor's Note.—The amendment of 1935 added the proviso relating to time for issuing execution on judgments. Section two of the amendatory section provides that it shall not affect the validity or force of any execution issued prior to ratification of act.

Preserving Vitality of Judgment by Successive Executions.—Where under this section the vitality of the judgment has been preserved by the issuance of executions within each successive period of three years (that being the limitation prior to 1927 amendment) after its rendition, the statutory bar of ten years which is the time prescribed for bringing actions on judgments, does not prevent an execution from being issued, and the seizure and sale of personal property thereunder, after the expiration of the limited period. Williams v. Mullis, 87 N. C. 159, 160.

§ 668.—Repealed by Acts 1927, c. 24.

§ 669. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of execu-

tions or other final process shall be made to the court of the county from which it issued. (Rev., s. 623; Code, s. 444; 1871-2, c. 74; 1881, c. 75.)

As to penalty for false return by sheriff, see section 3936.

Return to Another County not Authorized.—Since the passage of the act of 1870-'71, ch. 42, the clerk of the superior court of one county cannot issue a summons returnable in the superior court of another. State v. Tate, 66 N. C. 431.

May Isssue Only from Court Rendering Judgment. —Under the original code, executions might be issued from any county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-'72, Chap. 74, Sec. 1, executions shall issue only from the court in which the judgment was rendered. Hasty v. Simpson, 77 N. C. 69, 71.

§ 670. To what counties issued.—When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court of any county upon a judgment until it is docketed in that county. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. (Rev., s. 622; Code, s. 443; C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; 1905, c. 412.)

Editor's Note.—Formerly this section did not require as a condition precedent to the issuance of the execution that the judgment be already docketed in such other county at the time the execution was issued. The execution and the transcript of judgment for docketing were allowed to be sent to such other county at the same time, and the execution was nonetheless valid. Bernhardt v. Brown, 122 N. C. 587, 592, 29 S. E. 884. This rule was changed by the insertion, in 1905, of the second sentence of the section. It was held in Cox v. Boyden, 153 N. C. 522, 69 S. E. 504, that this amendment was not retroactive and did not apply to executions issued prior to its passage.

Necessity of Docketing Judgment in Other County.—It seems that the requirement that the judgment be docketed in the other county for an execution to issue from one county to such other county is merely directory, and that where execution is issued and levied without the judgment being docketed a sale of property thereunder is valid. Lytle v. Lytle, 94 N. C. 683; Evans v. Aldridge, 133 N. C. 378, 379, 45 S. E. 772. But as between the purchaser at the execution sale, and a subsequent purchaser of the property from the defendant in execution, the latter will prevail unless the judgment upon which the execution has issued was docketed in the county where the property was situated. Rollins v. Henry, 78 N. C. 342.

Several Defendants.—A writ was issued against three defendants, two of whom were in one county and the other in another county, in which the judgment was rendered. Held, that in the absence of special instructions, the clerk might issue an execution to either county. Bank v. Stafford, 47 N. C. 98.

§ 671. Sale of land under execution.—Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (Rev., s. 622; Code, s. 443; C. C. P., s. 259.)

Cross References.—For an exhaustive treatment of the various aspects of execution sales, see 5 Enc. Dig. 942. As to provisions requiring the sheriff to execute a deed, see section 698.

Foreclosure Sales Not Affected.—The provisions of this section relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the lands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice. Kidder v. McIlhenny, 81 N. C. 123.

Sale by Successor in Office.—Where a fi. fa. was levied by one sheriff before his death, his successor had no authority to sell the property under a venditioni exponas, since an execution is an entire thing, and must be completed by the hand which commenced it. Sanderson v. Rogers, 14 N. C. 38.

A writ directed to the sheriff for the sale of land levied on by a sheriff who had gone out of office will not authorize a sale of land by the late sheriff. Tarkinton v. Alexander, 19 N. C. 87.

Where a sheriff has levied on lands and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. Tarkinton v. Alexander, 19 N. C. 87, explaining and reconciling the cases of Holliday v. Eastwood, 12 N. C. 157, and Sanderson v. Rogers, 14 N. C. 38, with those of Barden v. M'Kinne, 11 N. C. 279, and Seawell v. Bank, 14 N. C. 279, and offending them all.

Upset Bid—Setting Aside Sale.—An execution sale, when closed, is not subject to an upset bid—§§ 688, 2591 and 3243 not being applicable—and, when regularly made, such sale is not to be set aside, except for some trick, artifice, fraud, oppression or undue advantage, which must be alleged and proved, with each case to be judged by its own facts. Weir v. Weir, 196 N. C. 268, 269, 145 S. E. 281.

§ 672. When dated and returnable.—Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not less than forty nor more than ninety days from said date, and no executions against property shall issue until the end of the term during which the judgment was rendered. (Rev., s. 624; Code, s. 449; 1903, c. 544; 1870-1, c. 42, s. 7; 1873-4, c. 7; 1927, c. 110; 1931, c. 172.)

Editor's Note.—The amendment of 1927, (Pub. Laws, ch. 110) materially changed the provisions of this section. Formerly, in lieu of the present provision relative to the dating of the execution, the section had provided for the attestation thereof as of the term next before the day on which it was issued. Then the execution was returnable to the next term of the court beginning not less than forty days after the issuance thereof.

The amendment of 1931 substituted ninety days for sixty days in this section as formerly amended, and inserted the words "to the court from which they were issued" in the third and fourth lines.

Computation of First and Last Day.—In computing the number of days within which the writ of execution must be returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. Taylor v. Harris, 82 N. C. 25.

Attestation and Dating Directory.—This section which formerly required the attestation of the execution is merely directory, and the omission of such attestation does not vitiate the process. Bryan v. Hubbs, 69 N. C. 423; Williams v. Weaver, 94 N. C. 134, 135. This rule would now be equally applicable to the provision requiring the dating of the execution. Ed. Note.

The Return Day Formerly.—Formerly, when the section required that the execution be returned to the next term of the court, it was held that the sheriff was not compelled to make his return of an execution on the first day of the term, though it was more regular, and for many reasons desirable that he should do so, and that it was sufficient if he makes the return during the term, unless ruled to make it on an earlier day of the term. Boyd v. Teague, 111 N. C. 246, 247, 16 S. E. 338.

§ 673. Against the person.—If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of ac-

tion or not. (Rev., s. 625; Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 260.)

Cross References.—As to provisional remedies by arrest and bail, see section 767 et seq. For Digest treatment of this subject, see 5 N. C. Enc. Dig. 1005.

General Doctrine.—Where the complaint alleges a cause of arrest, whether the same be necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, after an unsatisfied execution under a judgment against his property has been returned. Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969, cited and applied. Turlington v. Aman, 163 N. C. 555, 79 S. E. 1102.

Three Classes of Cases Contemplated.—This section providing for execution against the person of the defendant, taken in connection with section 769, contemplates three classes of cases: (1) Where the cause of arrest is not set forth in the complaint; (2) where the cause is set forth in the complaint, but only collateral and extrinsic to the plaintiff's cause of action; (3) where the cause set forth in the complaint is essential to the plaintiff's claim. State v. Foote, 83 N. C. 102.

Same—The First Class.—In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information, when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served. State v. Foote, 83 N. C. 102.

Same—The Second Class.—In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor. State v. Foote, 83 N. C. 102.

Same—The Third Class.—In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, no affidavit for the order of arrest is needed, and no such order is required before execution may be issued against the person of the defendant, provided the complaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, etc. State v. Foote, 83 N. C. 102.

Upon Docketed Judgment of Justice. — An execution against the person can only issue upon a docketed judgment of a justice of the peace when it is authorized by this section, or when it appears to the clerk that the defendant had been arrested before judgment. McAden v. Banister, 63 N. C. 479, 481.

Necessity of Recovery of Judgment.—No execution can issue against the person of the defendant, even though the complaint alleges facts to justify an arrest, unless the plaintiff has recovered a judgment against the defendant. Thus in Stewart v. Bryan, 121 N. C. 46, 50, the court expounding this doctrine, said: It will not do to carry the doctrine of Peebles v. Foote, under this section, to the extent contended for in the argument for plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the constitution.

Two Alternative Conditions Prerequisite.—There are two alternative essential conditions upon which depends the issuance of an execution against the person of the defendant. They are: (a) a lawful arrest before judgment, or (b) a complaint averring such facts as would have justified an order for an arrest. Houston v. Walsh, 79 N. C. 36, 39.

Facts Must Enter into Judgment.—An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. Doyle v. Bush, 171 N. C. 10, 86 S. E. 165.

Facts Pleaded and Proved and Issue Determined.—In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. Turlington v. Aman, 163 N. C. 555, 79 S. E. 1102.

In the Absence of Order for Arrest, or Complaint.—Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under this section. Houston v. Walsh, 79 N. C. 36.

It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43.

Motion before the Clerk—Appeal to Superior Court.—Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after an unsatisfied return of the execution against his property, and from any adverse ruling his decision is subject to review on appeal to the superior court; and if a judgment in the superior court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. Turlington v. Aman, 163 N. C. 555, 79 S. E. 1102.

Execution for Conversion.—Under this section and section 727, subsec. 1, providing that a defendant may be arrested when the action is for wrongfully taking, detaining or converting personal property, where the defendant, cotenant of a race horse, converted it by selling the horse while in his (defendant's) possession, such defendant was subject to execution against the person. Doyle v. Bush, 171 N. C. 10, 86 S. E. 165.

For Injury Committed to Plaintiff's Person—Stay of Execution.—Where judgment was rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to the person of the plaintiff who appealed without giving bond to stay execution, it was held, (1) upon the return of execution against defendant's property unsatisfied an execution upon the person may issue; (2) filing an inventory of his property, etc., will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judgment. Howie v. Spittle, 156 N. C. 180, 72 S. E. 207.

Injury Wilfully Inflicted.—Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper under this section and § 768. Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: Held, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper under such sections. Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

Liability in Damages for Malicious Prosecution.—Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody under this section the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecution, though the verdict and finding of the jury or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. Overton v. Combs, 182 N. C. 4, 108 S. E.. 357.

Discharge of Person Under Execution.—The person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of $50. Fertilizer Co. v. Grubbs, 114 N. C. 470. The effect of an execution against the person of the judgment debtor, therefore, is to deprive the defendant in the execution of his homestead exemption and of any personal property exemption over and above $50.

Allegation and Proof.—Where plaintiff suggests fraud in defendant's affidavit of insolvency he must sufficiently allege and prove fraud or proceeding will be dismissed. Hayes v. Lancaster, 202 N. C. 515, 163 S. E. 602.

Cited in Foster v. Hyman, 197 N. C. 189, 148 S. E. 36.

§ 674. Defendant dying in execution; new execution against property.—Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may, after the death of the person so taken and dying in execution, have new execution, against the property of the person deceased, as they might have had if that person had never been in execution. (Rev., s. 626;

Code, s. 469; R. C., c. 45, s. 28; 21 James I, s. 24.)

Editor's Note.—The last phrase of this section which reads "they might have had if that person had never been in execution" seems to conflict with the well established rule that after the death of a person no execution can be issued againt his property upon a judgment recovered in the lifetime of the deceased and that the creditor must collect his judgment in the due course of administration.

§ 675. Form of execution.—The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Reference.—As to subscribing and sealing the execution by the clerk, see section 664 and annotations thereto.

1. Against property—no lien on personal property until levy.—If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Refusal to Produce Personalty Warrants Sale of Realty.—The provision requiring that the officer satisfy the judgment first out of the personalty, is solely for the debtor's benefit, and if he refuses to produce his personalty his lands may be sold. McCoy v. Beard, 9 N. C. 377, 379.

Lien as of What Time against Purchasers.—Under this section the lien of execution against the personal property of the defendant, as against bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. Weinsenfield v. McLean, 96 N. C. 248, 2 S. E. 56.

The lien of an execution against the realty dates from the time of the rendition of judgment, provided it is docketed. See section 614.

Sale of Realty Without Levy.—A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate under execution is that the requirements of the law be observed and that it be fully made known at the sale what property is being sold. Farrior v. Houston, 100 N. C. 369, 6 S. E. 72.

2. Against property in hands of personal representative.—If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

3. Against the person.—If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.

See the preceding two sections.

When Irregular.—An execution is irregular if it does not run in the name of the state and convey its authority to the officers to arrest the defendant. Houston v. Walsh, 79 N. C. 36.

Should Command the Sheriff.—Executions issued under this section should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he shall pay the judgment or be discharged according to law. Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43.

4. For delivery of specific property.—If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

5. For purchase money of land.—If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (Rev., s. 627; Code, ss. 234-236, 448; C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217.)

Recital in Judgment Conclusive.—If the judgment of the court recites the fact that the debt was contracted for the purchase of land, as prescribed by this clause of this section, such recital is conclusive as between the parties to the record. Durham v. Wilson, 104 N. C. 595, 10 S. E. 683.

Reason of Recital as to Homestead Interest.—The homestead interest of a defendant is subject to execution issued upon a judgment recovered for the purchase money of the land sold. Toms v. Fite, 93 N. C. 274. Hence the requirement that it shall be set forth in the judgment and execution that the debt sued on was contracted for the purchase money of land, so that the sheriff may sell the land without regard to the homestead. Id.

Same—Sale Not Void.—Land purchased but not yet paid for is not exempt from execution as a homestead under a judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. Durham v. Bostick, 72 N. C. 353.

§ 676. Variance between judgment and execution.—When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property. (Rev., s. 628; Code, s. 1347; R. C., c. 44, s. 13; 1848, c. 53.)

Liberal Construction.—This section is to be liberally construed. Wilson v. Taylor, 98 N. C. 275, 280, 3 S. E. 492.

Execution for Less Amount than Judgment.—The fact that the execution varied from the judgment in being for a less amount is expressly cured by this section. Maynard v. Moore, 76 N. C. 158, 161.

Execution for Larger Amount than Judgment.—In the case of Hinton v. Roach, 95 N. C. 106, 110, the docket showed a judgment in favor of Hinton against Roach for $28; while the execution recited also other judgments and called for a larger sum than $28. It was held that the irregularity was cured by this section.

Technical Variance Immaterial.—Where a judgment was rendered against H for $182.20 and against other defendants, separately mentioned, for various amounts and an

execution was issued reciting only the judgment against H for $182.20, and commanding the sheriff to satisfy it out of H's property, it was held, that the execution sufficiently conformed to the judgment and the variance was technical and immaterial. Marshburn v. Lashlie, 122 N. C. 237, 29 S. E. 371.

§ 677. Property liable to sale under execution.—The property of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

Cross References.—For an exhaustive digest treatment of property subject to execution, see 5 N. C. Enc. Dig. 887. As to exemptions, see 3 N. C. Law Rev. 130.

1. Goods, chattels, and real property belonging to him.

Common Law, and Historical Legislation.—For an excellent exposition of the historical development of legislation by which the lands of debtors became subject to execution, thus changing the common law rule, see Jones v. Edmonds, 7 N. C. 43, 45.

Public Property and Institutions.—Property held for necessary public uses and purposes, such as court-houses, jails, schoolhouses, etc., can not be sold under execution. Morganton Hardware Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583; Gooch v. Gregory, 65 N. C. 142; Vaughan v. Commissioners, 118 N. C. 636, 24 S. E. 425.

Life Estate.—Where a life estate is devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoyment of a life tenant in the event a creditor should bring action against him for a debt: Held, the condition upon which the title is to be held in trust is void and his title as tenant for life will continue for the duration of his life, and under this section may be sold under execution on a judgment against him. Mizell v. Bazemore, 194 N. C. 324, 139 S. E. 453.

Vested Remainders.—The vested remainder of a devisee in lands is subject to sale under execution during the term of the life tenant. Ellwood v. Plummer, 78 N. C. 392; Bristol v. Hallyburton, 93 N. C. 384.

Contingent remainders are not subject to execution while they remain contingent. Watson v. Dodd, 68 N. C. 528, affirmed in S. C., 72 N. C. 240. See also, Watson v. Watson, 86 N. C. 400; Bristol v. Hallyburton, 93 N. C. 384.

Reversions.—A reversion in fee is liable to be taken and sold under execution. Murrell v. Roberts, 33 N. C. 424.

Standing matured crops are subject to execution. Shannon v. Jones, 34 N. C. 206. See last paragraph of this section.

2. All leasehold estates of three years duration or more, owned by him.

3. Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him. But when the equity of redemption in personal property is sold under execution, notice of the time and place of said sale shall be given the mortgagee.

At common law an equity of redemption in land was not subject to levy and sale under execution, and was first made so in this State by Acts of 1812, ch. 4, section 2, and this was true also as to the trusts mentioned in Acts of 1812, ch. 4, sec. 1, which changed the law in this respect (see subsection 4). Rowland Hardware, etc., Co. v. Lewis, 173 N. C. 290, 296, 92 S. E. 13.

General Doctrine. — An equity of redemption whether created by a mortgage deed made to the creditor or to the third person, with or without power of sale, may be sold under execution according to this subsection. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331. Whiteside v. Wlliams, 22 N. C. 153.

Mortgagee Subjecting Mortgagor's Equity of Redemption.—A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by this section. The words of the section are general, but this exception arises necessarily out of the subject and the spirit of the act. Camp v. Coxe, 18 N. C. 52, in which Ruffin, C. J. points out with great clearness the reasons upon which this exception to this section is based. McPeters v. English, 141 N. C. 491, 494, 54 S. E. 417.

The interest of a vendee, who holds a bond for the title to land, cannot be subjected to sale under execution upon a judgment rendered for the purchase money. McPeters v. English, 141 N. C. 491, 54 S. E. 417.

Interest of Cestui Que Trust.—Under this subsection and the one immediately following an execution will not lie against the interest of a cestui que trust in real property held by trustee in active trust. Patrick v. Beatty, 202 N. C. 454, 163 S. E. 572.

Rule Prior to Statute.—In Allison v. Gregory & Sons, 5 N. C. 333 the court held that an equity of redemption in real property was not liable to be sold on execution. This was prior to the act of 1812.

4. Real property or goods and chattels of which any person is seized or possessed in trust for him.

But no execution shall be levied on growing crops until they are matured. (Rev., ss. 629, 632; Code, ss. 450, 453; R. C., c. 45, ss. 1-5, 11; 5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29; 1812, c. 830, ss. 1, 2; 1822, c. 1172; 1844, c. 35; 1919, c. 30.)

At Common Law.—An equitable right in land can not be levied upon and sold under an execution at common law. Payne v. Hubbard, 4 N. C. 195.

Must Be Equitable Estate and Not Mere Right.—By this section an equitable estate but not a mere right is subject to execution. Nelson v. Hughes, 55 N. C. 33. But see Deaton v. Gaines, 4 N. C. 424.

"A right" to have one declared a trustee is not subject to execution. Nelson v. Hughes, 55 N. C. 33.

Purpose of Subsection—Did not Change Nature of Trusts.—This subsection did not mean to change the nature of trusts, the relation between the trustee and cestui que trust, or the rights of the latter against the former. The sole purpose of it was to render the interest of the cestui que trust liable at law, as it was before in equity, for the debts of the cestui que trust in certain cases by transferring by a sale on execution against the cestui que trust the legal estate of the trustee, as well as the trust estate of the debtor. Rowland Hardware, etc., Co. v. Lewis, 173 N. C. 290, 297, 92 S. E. 13.

Nature of Trustees Interest as Affecting Salability under Execution.—When land is conveyed to a trustee upon a declaration of trust (and there is no clause of defeasance in the deed) to sell for the payment of a debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, the interest, estate, or right of the judgment debtor, although subject to the lien of the docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331. In other words the subsection does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid; but only where the naked title is outstanding with the right of the cestui que trust to demand it as a matter of right under the Statute of Uses. Rowland Hardware, etc., Co. v. Lewis, 173 N. C. 290, 92 S. E. 13. It is a passive instead of an active trust, in which the trustee has nothing to do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as the mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. Rowland Hardware, etc., Co. v. Lewis, 173 N. C. 290, 296, 92 S. E. 13.

Residue of Property Conveyed in Trust for Payment of Debt.—Where real estate is conveyed in trust for the payment of certain debts of the grantor, the interest of the grantor, after the payment of such debts, is subject to sale under execution against him. Harrison v. Battle, 16 N. C. 537. Pool v. Glover, 24 N. C. 129, Harrison v. Battle, 16 N. C. 537.

Prior to 1884 and at Common Law, growing crops were the subject of levy and sale under execution as personal property, but now under this section, they are not subject to levy till matured. Kesler v. Cornelison, 98 N. C. 383, 385, 3 S. E. 839. Shannon v. Jones, 34 N. C. 206.

§ 678. Sale of trust estates; purchaser's title.—Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encum-

brances of the trustee. (Rev., s. 630; Code, s. 452; R. C., c. 45, s. 4; 1812, c. 830.)

Application to Certain Trusts Only.—This section, as has been repeatedly decided, comprehends those cases only where the whole beneficial estate is in the debtor, and nothing remains in the trustee but a naked legal estate. Deaver v. Parker, 37 N. C. 40, 45. See also, Mayo v. Staton, 137 N. C. 670, 50 S. E. 331.

§ 679. Sheriff's deed on sale of equity of redemption.—The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale. (Rev., s. 631; Code, s. 451; R. C., c. 45, s. 5; 1812, c. 830, s. 2; 1822, c. 1172.)

Provisions Not Mandatory.—The provisions of this section are not mandatory. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331.

§ 680. Forthcoming bond for personal property.—If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as heretofore to the plaintiff's claim. (Rev., 633; Code, 463; R. C., c. 45, s. 21; 1807, c. 731, s. 3; 1828, c. 12, s. 2.)

Definition.—A forthcoming and delivery bond is a bond given for the security of an officer, conditioned to produce the property levied on when required. Bovier's Law Dict., Vol. 1, P. 834.

Jurisdiction.— It has been held, that a motion upon a forthcoming bond given to secure possession of property taken under an execution, will not be allowed other than in the same court from which the execution issued. Stuart v. Laird, 1 Cranch 299, 302, 2 L. Ed. 115.

Nature and Purpose.—The forthcoming bond is regarded as part of the process of execution; but it cannot be considered as a substitute for the property, as a condition requires its return to the sheriff. Amis v. Smith, 16 Pet. 303, 313, 10 L. Ed. 973; Hagan v. Lucas, 10 Pet. 400, 404, 9 L. Ed. 314.

On the giving of a forthcoming bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff, but the property is not withdrawn from the custody of the law. Hagan v. Lucas, 10 Pet. 400, 404, 9 L. Ed. 470.

So the giving of the bond does not release the lien upon the property; the property, in contemplation of law, remains in possession of the officer, and the property in the hands of the claimant, under the bond for its delivery, is as free from the reach of other process as it would be in the hands of the sheriff. Kirppendorf v. Hyde, 110 U. S. 276, 279, 25 L. Ed. 145.

The debtor is at liberty to deal with the property as his own. Brown v. Clark, 4 How. 4, 14, 11 L. Ed. 850. So a second judgment is a lien thereon, and the lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. Id.

Failure to Deliver Property.—On failure to deliver property held under a forthcoming bond, the bond, on being returned into the clerk's office, will have the effect of a judgment. Gwin v. Breedlove, 2 How. 29, 36, 11 L. Ed. 167.

Estopped to Deny.—A person by executing a forthcoming bond thereby recognizes and is estopped to deny a claim and the validity of a judgment against him rendered upon such claim; the execution of the bond is tantamount to a confession of judgment for the demand. Sample v. Barnes, 14 How. 70, 75, 14 L. Ed. 330.

Judgment Reversed.—If the original judgment be reversed the reversal of the dependent judgment on the forthcoming bond follows of course. Bartow v. Petit, 7 Cranch 288, 3 L. Ed. 348.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. Gray v. Bowls, 18 N. C. 437.

Peaceable Production, etc., of the Property.—Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified—otherwise their bond will be forfeited. Poteet v. Bryson, 29 N. C. 337.

§ 681. Summary remedy on forthcoming bond.—If the condition of such bond be broken, the sheriff or other officer, on giving ten days previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before a justice of the peace, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice. (Rev., 635; Code, s. 465; R. C., c. 45, s. 23; 1822, c. 1141.)

§ 682. Requirement of bond; possession and sale of property.—When the forthcoming bond is taken the officer must specify therein the property levied upon and furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it. (Rev., 634; Code, s. 464; R. C., c. 45, s. 22; 1844, c. 34; 1846, c. 50.)

§ 683. Entry of returns on judgment docket; penalty.—When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall on motion, be fined one hundred dollars nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county. (Rev., s. 636; Code, s. 445; 1871-2, c. 74, s. 2; 1881, c. 75.)

Execution Returned Becomes Part of Record.—An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case. Walters v. Moore, 90 N. C. 41.

§ 684. Cost of keeping livestock; officer's account.—The court or justice shall make a rea-

sonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the justice or court to whom the excution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (Rev., ss. 637-8; Code, ss. 466-7; R. C., c. 45, ss. 25-6; 1807, c. 731.)

§ 685. Purchaser of defective title; remedy against defendant.—Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if personal, must be present at the sale and actually delivered to the purchaser. (Rev., s. 639; Code, s. 468; R. C., c. 45, s. 27; 1807, c. 723.)

Editor's Note.—The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, though it be a bare legal title, the equitable title being in some other person, or a defective title, the purchaser at the execution sale acquires the title of the judgment debtor, and has no relief against such debtor in case he suffers loss by reason of a defect in the title. See Lewis v. McDowell, 88 N. C. 261, 265.

Judgment Satisfied — Purchaser's Remedy against Execution Debtor.—The judgment of an execution creditor, purchasing at the execution sale property which did not belong to the judgment debtor and which is recovered from him by its own real owner, is nonetheless satisfied, and the remedy of the creditor is under this section not upon the judgment, but against the judgment debtor for reimbursement. Halcombe v. Loudermilk, 48 N. C. 491, 493; Wall v. Fairley, 77 N. C. 105.

Tantamount to Implied Warranty of Title.—This section authorizes a remedy upon an implied warranty of title to property sold under execution as belonging to a debtor, and whose debt has been thereby discharged or reduced against such debtor, and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser for such sums as he may have paid. Holliday v. McMillan, 83 N. C. 270, 271.

Nature of Claim.—The claim which a purchaser at a sheriff's sale has against the defendant in an execution, on account of lack of title, is but a simple contract debt. Laws v. Thompson, 49 N. C. 104.

Substitution or Subrogation to the Rights of Execution Creditor.—Under this section a purchaser at an execution sale will be substituted to the rights of the execution creditor, as upon a failure of title in the defendant to the thing sold, to the extent that the execution creditor has been benefited. Pemberton v. McRae, 75 N. C. 497, 504.

The substitution spoken of in this case, however, is not a technical subrogation, as to place the purchaser upon the same dignity as a lien or judgment creditor, for as soon as the execution sale takes place and the proceeds are applied to the payment of the judgment, it is satisfied and its lien subsides thereby. All that this substitution means is that the purchaser can collect from the execution debtor an amount which the execution debtor would have to pay out of his own assets to the execution creditor for the satisfaction of the judgment.—Ed. Note.

To this effect, see earlier case, Laws v. Thompson, 49 N. C. 104, 106.

§ 686. Costs on execution paid to clerk; penalty.—The sheriff or other officer must pay the costs on all executions which are satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court; and any such officer making default herein shall forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs. (Rev., s. 640; Code, s. 472; R. S., c. 76, s. 5; 1822, c. 1149.)

Art. 28. Execution and Judicial Sales

§ 687. How advertised.—No real property shall be sold under execution, deed of trust, mortgage or other contracts, except as provided in the following section until notice of sale has been posted at the court-house door in the county for thirty days immediately preceding the sale, and also published once a week for four successive weeks in some newspaper published in the county, if a paper is published in the county, provided that if there be no newspaper published in said county the notice of such sale must be posted at the court-house door and three other public places in the county for thirty days immediately preceding the sale. (Rev., s. 641; Code, s. 456; 1885, cc. 38; 1905, c. 147; 1868-9, c. 237; s. 10; R. C., c. 45, s. 16; 1881, c. 278; 1909, c. 705; 1927, c. 255, s. 1.)

Cross References.—As to advertisement of a sale of personal property, see section 695. As to notice and place of sale of personalty sold under mortgage or other contract, see section 2585. See also generally, 5 N. C. Enc. Dig. 948.

Editor's Note.—The amendment of 1927 (Pub. Laws, ch. 255) introduced some changes into this section. Prior to this amendment the notice of sale was to be posted at three public places, in addition to the courthouse door, regardless of the existence in the county of a newspaper published, whereas under the section as amended the notice is to be posted at three public places in addition to the court-house door only in the event there is no newspaper published in the county.

The section as amended also provides for publication for "successive" weeks, formerly there being no requirement that the publication be successive.

Application to Mortgages, etc., under Power of Sale.—This section, which prescribes the notice of sale under mortgages and deeds of trust, has an operative force only in cases where the parties have made no provisions of their own prescribing the giving of notice of sale. But it is the accepted rule that the notice be given in strict compliance with express provisions contained in the instrument, or, in the absence of such provisions, in compliance with the terms of the statute; and, in either case, the sale must be effected in strict conformity with the notice given. Ed. Note. See Ricks v. Brooks, 179 N. C. 204, 208, 102 S. E. 207; Hogan v. Utter, 175 N. C. 332, 333, 95 S. E. 565; Eubanks v. Becton, 158 N. C. 230, 234, 73 S. E. 1009; Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17; though the law prima facie presumes the regularity of mortgage sales under power of sale. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166.

It is usual to advertise under the terms of the deed of trust or mortgage and also as required by this section. This course is commended, but is not a legal requirement. Frequently the requirements in the deed of trust or mortgage are the same as the law provides for sales of real estate under execution or judicial sale. Douglas v. Rhodes, 188 N. C. 580, 585, 125 S. E. 261. And where there is doubt as to the meaning of any terms of the instrument, it shall

be given that construction which is to effectuate the provisions of this section. Ed. Note. Thus where a mortgage of lands provided that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of sale," and the language employed closely followed the provision of this section it was held, that the advertisement should be inserted in the newspaper once a week for four successive weeks, as provided by this section, and not consecutively for thirty days. Raleigh Sav. Bank, etc., Co. v. Leach, 169 N. C. 706, 86 S. E. 701.

Same—Requirements Directory Only as to Execution Sales.—The statement in Palmer v. Latham, 173 N. C. 60, 91 S. E. 525, that requirements as to advertising are directory only, was not necessary to the decision of the case as the question involved was as to the place of sale, and is in conflict with the decision in Eubanks v. Becton, 158 N. C. 230, 73 S. E. 1009, and therefore is overruled except so for as applicable to execution sales (Shaffer v. Bledsoe, 118 N. C. 279, 23 S. E. 1000). Hogan v. Utter, 175 N. C. 332, 336, 95 S. E. 565.

Same—Place of Sale.—The same considerations, with regard to the necessity, nature and method of giving notice of sale where the instrument itself prescribes that course, are applicable to the place of sale; that is, the place of sale designated in the instrument controls. Palmer v. Latham, 175 N. C. 60, 91 S. E. 525.

Application to Execution Sales—Requirements Directory.—The requirements of this section are held to be only directory. It is well settled, as a general rule, that a purchaser at an execution sale is not bound to look further than to see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. Mordecai v. Speight, 14 N. C. 428; McEntire v. Durham, 29 N. C. 151. It follows from this, that a purchaser may as a general rule get a good title at a sheriff's sale when there has been no advertisement of the sale. Burton v. Spiers, 92 N. C. 503, 505.

But when at such sale the plaintiff in the execution, or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding for that purpose. Burton v. Spiers, 92 N. C. 503.

Same—Purchaser Must be a Bona Fide Purchaser.—The general principle, that a purchaser at a judicial sale is not bound to look further than to see that the one selling is an officer and employed to do so by a valid execution, etc., does not obtain when the purchaser is one with personal knowledge of defects in the service of the summons, as appearing upon the face of the execution, and of other facts and circumstances rendering the sale irregular, if not void, for such purchaser can not be considered an innocent purchaser for value, etc. Phillips v. Hyatt, 167 N. C. 570, 83 S. E. 804.

§ 687(a). Immediate advertisement; notice of sale and resale.—When any mortgage or deed of trust on real property shall be foreclosed by judicial proceedings it may be provided in the decree of foreclosure that the advertisement of the sale shall be begun at any time after the date of the decree of foreclosure, and such real property shall then be sold under judicial foreclosure proceedings only after notice of sale has been duly posted at the courthouse door in the county for thirty days immediately preceding the sale and also published at any time during such thirty day period once a week for four successive weeks of not less than twenty-one days in some newspaper published in the county if a newspaper is published in the county, but if there is no newspaper published in said county, the notice of such sale must be posted at the courthouse door and three other public places in the county for thirty days immediately preceding the sale: Provided, however, that in case a resale of such real property shall become necessary under such judicial foreclosure proceedings, that such real property shall then be resold only after notice of resale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the resale and also published at any time during such fifteen day period once a week for two successive weeks of not less than seven days in some newspaper published in the county if a newspaper is published in the county, but if there be no newspaper published in said county, the notice of resale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the resale. (1929, c. 44, s. 1; 1933, c. 96, s. 1.)

Editor's Note.—By Public Laws 1933, c. 96, "twenty-two" was changed to "twenty-one" as it now appears in the thirteenth line of the section, and "eight" was changed to "seven" as it now appears in the seventh from the last line of the section.

§ 687(b). Minimum notice required in all sales.—In any sale of real property under execution, deed of trust, mortgage or other contracts, wherever any statute calls for publication of notice in a newspaper for four successive weeks or for two successive weeks, the duration of said period shall be not less than twenty-one days for the one period of publication and not less than seven days for the period of the other publication. (1929, c. 44, s. 2; 1933, c. 96, s. 2.)

Editor's Note.—Prior to Public Laws 1933, c. 96, this section required publication for "twenty-one" days for one period and "eight" days for the other.

§ 687(c). Validation of certain sales.—All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks, and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice: Provided, nothing in this validating section shall affect pending litigation. (1933, c. 96, s. 3.)

§ 688. Advertisement of Resale.—No real property shall be sold under execution, deed of trust mortgage or other contracts, except as provided in the following section until notice of sale has been posted at the court-house door in the county for at least fifteen days and published at least once a week for two successive weeks in some newspaper, if a paper is published in the county where the resale is made. (1913, c. 19; 1927, c. 255, s. 2.)

Editor's Note.—The amendment of 1927 radically changed the phraseology of this section, the former section being more specific in its provisions as to persons making the resale and the causes for the resale. Formerly the notice was required to recite the cause of resale, and to be posted on at least three other public places than the courthouse door, and the publication in the newspaper was not required to be successive.

Not Applicable to Execution Sale.—This section is not applicable to execution sales. Weir v. Weir, 196 N. C. 268, 269, 145 S. E. 281.

§ 689. Notice served on defendant; when on governor.—In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally if he is found in the county, or on his agent if he has a known agent therein, or if he cannot be found within the county and has no known agent therein, but his address is known, by mail to such address;

and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address. In case of the sale under execution, or under the order of any court, of any real or personal property in which the state is interested as a stockholder or otherwise, notice in writing must be served upon the governor and attorney general, at least thirty days before the sale, of the time and place of sale, and under what process it is made, otherwise the sale is invalid. (Rev., s. 642; Code, s. 457; 1868-9, c. 237, s. 11; 1876-7, c. 224.)

Requirements Directory.—The requirements of section 687, that a sheriff advertise a sale under execution, and of this section, that he serve a copy upon the defendant ten days before the sale, are directory, and when not followed will not render the sale void as against a stranger without notice of the irregularity. Williams v. Dunn, 163 N. C. 206, 79 S. E. 512.

Procedure to Set Aside Sale.—The procedure to set aside a sale of lands under an execution which has not been advertised, and where notice has not been given the defendant in compliance with this section, is, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale cannot be collaterally attacked. Williams v. Dunn, 163 N. C. 206, 79 S. E. 512.

Liability of Sheriff for Failure to Give Notice.—If the sheriff fails to give the notice provided by this section, he is liable in damages for any loss the defendant may have suffered through his failure to notify. Williams v. Johnson, 112 N. C. 424, 432, 17 S. E. 496.

Cited in Corporation Comm. v. Murphey, 197 N. C. 42, 47, 147 S. E. 667.

§ 690. Sale days; place of sale; ratification of prior sales.—All real property sold under execution shall be sold at the court house door of the county in which all or a part of the property is situated on the first Monday in any month or during the first three days of any term of the superior court of said county. All sales of real property sold under order of court shall be sold at the court house door in the county in which all or any part of the property is situated on any Monday in any month or during the first three days of any term of the superior court of said county, unless in the order directing such sale some other place and time are designated and then it shall be sold as directed in such order on any day except Sunday after advertising as required by law. All sales heretofore made under execution or by order of court on any day other than the first Monday in any month are hereby validated, ratified and confirmed, provided this act shall not affect pending litigation. (Rev., s. 643; Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; 1931, c. 23.)

See 5 N. C. Enc. Dig. 948.

Editor's Note.—Under the amendment to this section, which became effective February 11, 1931, sales under execution are to be made, as heretofore. Sales under order of court may be made on any Monday, instead of the first Monday as formerly provided. The former provision as to sales on days designated in orders of court excepted holidays as well as Sunday. The amendment also validates sales heretofore made on a day other than the first Monday except as to pending litigation. See 9 N. C. Law Rev. 355.

The question whether a sale, not effected in strict compliance with the time and place at which this section requires that it should be effected, is void, so as to render the title of the purchaser invalid, has at various times given great difficulty to the court, which has resulted in conflicting decisions. Thus in Mayers v. Carter, 87 N. C. 146, it was held that an execution sale made at an improper time and place is void. For the same effect, see State v. Rivers, 27 N. C. 297. The abstract principle of law announced by these cases is that the non-observance, by the officer making the sale, of those provisions of law which are directory merely and relate to matters in pais, in the absence of notice on the part of the purchaser, will not affect the title acquired under an execution sale. Thus it is stated in the last cited case that third persons need not show affirmatively the observance on the part of the sheriff of all legal prerequisites for the sale, nor are they charged to take notice of all the irregularities. That this is the rule is plainly shown by the annotations to section 687. But we can find no case which dares to answer in definite terms the specific question whether the requirement of time and place of the sale under this section is mandatory with the necessary result of avoiding the purchasers title, or merely directory, the disregard of which will merely subject the sheriff to an action for damages. The decision reached in Mayers v. Carter, supra, tends to indicate that it is mandatory and yet the case cites with approval Brooks v. Ratcliff, 33 N. C. 321, Mordecai v. Speight, 14 N. C. 428, in which it was held that a sale made on Tuesday and Wednesday of the week will pass title, and the case of Wade v. Saunders, 70 N. C. 270, to the same effect.

If we regard Mayers v. Carter, supra, as not overruling the expressions in the early cases in favor of the view that the disregard of the sheriff of his duty under this section does not invalidate the title of the purchaser, we find at least one early case, Mordecai v. Speight, supra, whose reason appears to us to be more sound, and whose principle more just. It declares that in as much as it is a common knowledge, and the purchaser knows that the usual place for a sheriff to sell is at the court house door, if he purchases at any other place than the court-house door, the sale is void and his title invalid. But since the day designated by this section is not necessarily the only day at which sales may be made to the exclusion of other days, as for example section 692 authorizing postponement of the sale to other days for causes, if he purchases on a day other than the one designated by this section, as to him, the sale is valid and he acquires a good title, provided he has no notice of the irregularity.

Assent of Debtor Validates Sale.—The debtor may waive the benefit of the law which requires that the sale be made at a certain place and time, and assent to the sale at a place and time other than that prescribed by law, in which case the sale will be valid. Biggs & Co. v. Brickell, 68 N. C. 239; Mayers v. Carter, 87 N. C. 146, 148.

§ 690(a). Sales on other days validated. — All sales of real or personal property heretofore made by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, be, and the same are hereby validated. (1933, c. 79, s. 1.)

§ 691. Sale hours.—No sale under an execution or decree shall commence before ten o'clock in the morning, or continue after four o'clock in the afternoon, of the day on which the sale is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until ten o'clock p. m. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales. (Rev., s. 644; Code, s. 459; R. C., c. 45, s. 17; 1794, c. 41; 1927, c. 19.)

Editor's Note.—The proviso appearing at the end of this section was added by the amendment of 1927, Pub. Laws, ch. 19.

§ 692. Postponement.—The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the sale from day to day, but not for more than six days in all, and upon postponement he must post a notice thereof on the courthouse door of his county. (Rev., s. 645; Code, s. 455; 1868-9, c. 237, s. 9.)

Sale on Friday upon Postponement.—A sheriff, who advertises a sale of land levied upon execution to take place on Monday, the first day of the term, as prescribed by law, which sale is postponed from day to day, has a right to sell the same on the Friday succeeding. Wade v. Saunders, 70 N. C. 270.

Strict Provisions of Law not Applicable in Case of Postponement.—The strict compliance with the terms of the mortgage and statutory provisions required to make a valid sale upon foreclosure does not apply when a postponement is had by reason of the sale being enjoined or for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, as in this State, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Application to Court Sales and Mortgage Sales.—This section, authorizing the postponement of the sale from day to day for not more than six days, is held to apply to sales by the sheriff or person acting under court decrees, and not to apply to sales under power contained in a mortgage. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Sufficiency of Notice.—Under the facts of the case where a sale under a power contained in a mortgage was adjourned not less than four times, the notice of the postponement consisting of a mere memorandum at the bottom of one of the original notices was held insufficient. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

§ 693. Certain sales validated.—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (Rev., s. 646; 1901, c. 742.)

§ 694. Certain private acts repealed.—All private acts, by which lands in particular counties are required or allowed to be sold at places, or at times, other than those hereinbefore prescribed, are hereby repealed. (Rev., s. 647; Code, s. 458; 1868-9, c. 237, s. 12.)

§ 695. Advertisement as to personal property.—No sale of personal property under execution may be made until it has been advertised for ten days at the door of the courthouse of the county in which it is to be sold, and at three other public places in the county, and the advertisement must designate the place and the time of sale. (Rev., s. 648; Code, s. 460; R. C., c. 45, s. 16; 1808, c. 753; 1820, c. 1066.)

As to advertisement of sale of real property, see section 687.

Purchaser with Notice of Lack of Advertisement.—A purchaser at an execution sale of personalty, who has full knowledge of such irregularities as absence of advertisement, etc., required by this section, is not an innocent purchaser, and the rule that a purchaser at a sheriff's sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, is not applicable to his case, for the rule presupposes that the purchaser is a bona fide purchaser. Phillips v. Hyatt, 167 N. C. 570, 573, 83 S. E. 804.

§ 696. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the offense is committed. (Rev., s. 649; Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3.)

As to liability of sheriff's bond, see section 3930, 3940.

§ 697. Officer's return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (Rev., s. 650; Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887.)

As to penalty for false return, see section 3936.

§ 698. Officer to prepare deed for property sold.—Sheriffs or other officers selling lands by authority of any execution or process shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased. The purchaser of land must furnish the officer with a description of it. (Rev., s. 651; Code, s. 471; R. C., c. 45, s. 30; 1848, c. 39.)

As to execution of a deed of trust estate sold, see section 678.

A deputy clerk has power to issue executions in the name of the clerk. Miller v. Miller, 89 N. C. 402.

Means to Compel Sheriff.—A motion in the cause, and not a distinct action, is also the proper means of compelling the sheriff to make title to the purchaser at the execution sale. Fox v. Kline, 85 N. C. 174.

Where the purchaser is implicated in the sheriff's derelictions, he is not entitled to call for a conveyance. Skinner v. Warren, 81 N. C. 373.

Failure to Pay Purchase Money—Resale by Sheriff.—If a purchaser at sheriff's sale fails to pay his bid the sheriff may resell immediately, or he may apply for a rule of court to compel payment, or he may at his own peril as to the plaintiff indulge the purchaser. Maynard v. Moore, 76 N. C. 158, 161, citing McKee v. Lineberger, 69 N. C. 217.

But a sheriff is not obliged to resell immediately, but may give the purchaser time in which to pay the purchase money, if neither party to the execution objects or complains. Id.

Recital in Deed Prima Facie Evidence.—The recital of execution and sale in a sheriff's deed is prima facie evidence thereof. Wainwright v. Bobbitt, 127 N. C. 274, 37 S. E. 336.

Recitals in a sheriff's deed are prima facie evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. Miller v. Miller, 89 N. C. 402.

Necessity of Seal.—A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint. Fisher v. Owens, 132 N. C. 686, 44 S. E. 369.

Art. 29. Betterments

§ 699. Petition by claimant; execution suspended; issues found.—A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment

and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause. (Rev., s. 652; Code, s. 473; 1871-2, c. 147.)

Cross References.—As to registration of conveyances, contracts to convey, and leases of land, see Sec. 3309; As to judgment for betterments having priority over homestead right, see annotation "Judgment for Betterments," division III, under section 728.

Editor's Note.—In Scott v. Battle, 85 N. C. 185, 192, it was held that the purchaser of lands from a feme covert, who was not privily examined, and whose husband did not join in the conveyance, was charged by implication of law with the invalidity of his title, and could not maintain a claim for betterments. This decision was based on Battle's Revisal (1873), ch. 17, sec. 262, which provides that "Where any person or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, they may be allowed for the same over and above the value of the use and occupation of the land."

In 1883, after the decision in Scott v. Battle was published, the legislature changed the wording of the law, by the Code, sec. 473, so as to render nugatory the future effects of this decision by removing this objectionable construction of the law, with the rank injustice necessarily flowing therefrom. The Code provided, and it was carried forward as sec. 652 of the Revisal of 1905, that it would be sufficient to support the claims of such a person for betterments, if he had "held the premises under color of title believed by him to be good." Such is a provision of this section.

From the earliest period in the judicial history of North Carolina, a married woman's deed defectively executed, while a nullity as to her, has nevertheless been held to constitute good color of title. Pearse v. Owens, 3 N. C. 234; Perry v. Perry, 99 N. C. 270, 273, 6 S. E. 86; Ellington v. Ellington, 103 N. C. 54, 58, 9 S. E. 208; Smith v. Allen, 112 N. C. 223, 226, 16 S. E. 932; Greenleaf v. Bartlett, 146 N. C. 495, 60 S. E. 419. And it was expressly decided that such a deed, while not binding on the feme, is nevertheless valid as color of title, and sufficient for a claim for betterments under this section. Gann v. Spencer, 167 N. C. 429, 432, 83 S. E. 620.

Historical Observations.—The right to betterments is a doctrine that gradually grew up in the courts of equity. It was recognized that the owner of land, who recovers it, had no just and equitable claim to anything but the land itself, and a fair compensation for being kept out of possession. If it was inhanced in value by improvements, made under the belief that one was the owner, he ought not to take the increased value. It is now an established equitable principle that whenever a plaintiff seeks aid in a court of equity, against such a person, aid will be given him, only upon the terms that he shall make due compensation to such innocent person, being based upon the principle that he who seeks equity must do equity. As there are now no separate courts in which the rule can be enforced, all relief must be sought in one tribunal. The Legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinction. Barker v. Owen, 93 N. C. 198, 203; Wharton v. Moore, 84 N. C. 479; Merritt v. Scott, 81 N. C. 385; Story Eq. Jurisp., sec. 799; 2 Greenleaf Ev. sec. 549.

The civil law recognized the principle of reimbursing to the bona fide possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. The betterment laws of the several states proceed upon that equitable view. Searl v. School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

Constitutionality.—This section contravenes no part of the organic law, Federal or State. Barker v. Owen, 93 N. C. 198, 203.

The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice. Searl v. School District, No. 2, 133 U. S. 553, 561, 33 L. Ed. 740.

Claim Can Be Made Only after Judgment.—A claim for betterments, under this section, cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. Wood v. Tinsley, 138 N. C. 507, 515, 51 S. E. 59. See also Rumbough v. Young, 119 N. C. 567, 26 S. E. 143.

Sheriff's Return of Writ as Execution.—The sheriff's return of a writ of possession with the endorsement thereon is an execution of the judgment as contemplated by the section, notwithstanding the fact that the judgment is not satisfied. Boyer v. Garner, 116 N. C. 125, 130, 21 S. E. 180.

Color of Title.—Under this section one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover for betterments in an action by the true owner to recover the lands. Pritchard v. Williams, 176 N. C. 108, 96 S. E. 733. See the discussion under the Editor's note, supra.

Same—Parol Contract to Convey.—A vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements. Baker v. Carson, 16 N. C. 381; Albea v. Griffin, 22 N. C. 9; Hedgepeth v. Rose, 95 N. C. 41; Luton v. Badham, 127 N. C. 96, 37 S. E. 143.

The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. Vann v. Newsom, 110 N. C. 122, 14 S. E. 519.

One who was induced to enter on and improve land by a parol promise that it shall be settled on him as an advancement or gratuity will not be evicted until compensation has been made for improvements which he has erected on the property. Hedgepeth v. Rose, 95 N. C. 41.

Same—Fraudulent Misrepresentations.—Where, a fraudulent misrepresentations as to area by the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. Hill v. Brower, 76 N. C. 124.

Same—Unregistered Deed.—One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. Eaton v. Dorib, 190 N. C. 14, 23, 128 S. E. 494, 499.

Same—Notice Required.—Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. Carolina Cent. R. Co. v. McCaskill, 98 N. C. 526, 4 S. E. 468.

Where the title to the land was in a feme covert who married in 1846, when under age, and she and her husband executed a bond to convey the land after she became of age to a party from whom the defendant derived title by mesne conveyances, which bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good, the doctrine of constructive notice from registration did not apply to such party, and he is entitled to compensation under the section for permanent improvements made by him on the land. Justice v. Baxter, 93 N. C. 405.

Same—Reasonable Belief.—The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had good reason for such belief. Pritchard v. Williams, 176 N. C. 108, 109, 96 S. E. 733.

One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. Harriett v. Harriett, 181 N. C. 75, 106 S. E. 221.

Court Must Be Satisfied of Probable Truth.—The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required that the courts impanel a jury to ascertain the value of the betterments. Hallyburton v. Slagle, 132 N. C. 957, 44 S. E. 659.

One purchasing land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, is not a bona fide holder of the premises under a color of title believed by him to be good, and is therefore not entitled to the value of improvements placed thereon by him. Hallyburton v. Slagle, 132 N. C. 957, 44 S. E. 659.

Same—Evidence.—A defendant in possession of land under the belief that he has a good title, has the right to show in evidence in an action to recover the land, that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits claimed by the plaintiff. Merritt v. Scott, 81 N. C. 385, 389.

Either Party Entitled to Jury Assessment.—Either party is entitled to have the issue as to the value of betterments

assessed by the jury, if they so desire. Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910.

Not Applicable to Tenants in Common.—The section does not apply to tenants in common. Pope v. Whitehead, 68 N. C. 191, 198.

But while this and the following sections of this article do not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved alloted to him in partition and its value assessed as if no improvements had been made if this can be done without prejudice to the interests of his cotenants, but this equitable principle does not apply as between mortgagor and mortgagee. Layton v. Byrd, 198 N. C. 466, 152 S. E. 161.

§ 700. Annual value of land and waste charged against defendant.—The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (Rev., ss. 653-4; Code, ss. 474-5; 1871-2, c. 147, ss. 2-3.)

Three Year Limitation Inapplicable.—Where one in possession of lands is entitled to recover, against the true owner, for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. Pritchard v. Williams, 176 N. C. 108, 109, 96 S. E. 733; Whitfield v. Boyd, 158 N. C. 451, 453, 74 S. E. 452.

But this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. Harriett v. Harriett, 181 N. C. 75, 78, 106 S. E. 221.

When Remaindermen May Not Recover.—When one holding under a tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, and he or the life tenant has received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. Harriett v. Harriett, 181 N. C. 75, 106 S. E. 221.

§ 701. Value of improvements estimated.—If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. (Rev., s. 655; Code, s. 476; 1871-2, c. 147, s. 4.)

Cross References.—As to bona fide belief as to title, see sec. 699, and annotations thereto. As to color of title, see Editor's Note under sec. 699; As to color of title, see Editor's Note under sec. 699; As to notice which bars right, see annotations under 699.

Value of Property Permanently Enhanced.—The sole matter for consideration is embraced in one proposition, and that is, "how much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same?" Pritchard v. Williams, 181 N. C. 46, 50, 106 S. E. 144.

Same—Fact for the Jury to Find.—It is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether improvements have added permanent enhanced value to the realty. Pritchard v. Williams, 181 N. C. 46, 49, 106 S. E. 144.

If unsuitable improvements are put upon the premises, no matter what the cost, the jury can find that it was no enhancement to the property thereby, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. Pritchard v. Williams, 181 N. C. 46, 50, 106 S. E. 144.

Same—"Permanent" Defined.—The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the Century Dictionary as "lasting, or intended to last indefinitely," "fixed or enduring," "abiding," and the like, and it was held in Simpson v. Robinson, 37 Ark., 132, that an improvement does not mean a general enhancement in value from the occupant's operations. Pritchard v. Williams, 181 N. C. 46, 49, 106 S. E. 144.

How Value of Improvements Estimated.—The rule for estimating the value of improvements is not what they have cost the defendant, but how much they have added to the value of the premises. Daniel v. Crumpler, 75 N. C. 184, 186; Wetherell v. German, 74 N. C. 603.

The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another by his consent, in fraud of the rights of his creditors, may recover as for betterments, the value of the improvements to the land, but not a greater amount so expended. Garland v. Arrowood, 179 N. C. 697, 103 S. E. 2.

§ 702. Improvements to balance rents.—If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (Rev., s. 656; Code, s. 477; 1871-2, c. 147, s. 5.)

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. Whitfield v. Boyd, 158 N. C. 451, 74 S. E. 452; Barker v. Owen, 93 N. C. 198, 202.

§ 703. Verdict, judgment, and lien.—After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (Rev., ss. 657-8; Code, ss. 478-9; 1871-2, c. 147, ss. 67.)

If the plaintiff does not exercise his right of election, the sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. Barker v. Owen, 93 N. C. 198, 202.

§ 704. Life tenant recovers from remainderman.—If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (Rev., s. 659; Code, s. 480; 1871-2, c. 147, s. 8.)

General Rule.—It is the general rule that a life tenant is

not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. Harriett v. Harriett, 181 N. C. 75, 77, 106 S. E. 221.

A devise of lands for life with limitation over, does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy. Northcott v. Northcott, 175 N. C. 148, 149, 95 S. E. 104.

Same—Mistake of Contract.—The section does not apply to a situation where the tenant makes improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor does the fact that the lessor silently acquiesced in the putting up the improvements change the situation. Dunn v. Bagby, 88 N. C. 91.

§ 705. Value of premises without improvements.—When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (Rev., ss. 661-2; Code, ss. 482-3; 1871-2, c. 147, ss. 10-11.)

The rents should be assessed upon the basis of the property without the betterments. Whitfield v. Boyd, 158 N. C. 451, 453, 74 S. E. 452; Barker v. Owen, 93 N. C. 198.

§ 706. Plaintiff's election that defendant take premises.—The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (Rev. s. 663; Code, s. 484; 1871-2, c. 147, s. 12.)

If the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. Barker v. Owen, 93 N. C. 198, 202.

§ 707. Payment made to court; land sold on default.—The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant, but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (Rev., s. 664; Code, s. 485; 1871-2, c. 147, s. 13.)

If the payment is not made to the plaintiff or into court for his use within a time to be fixed by the court, a sale may be ordered, and therefrom the sum due the plaintiff taken, and the residue, if any, paid to defendant. Barker v. Owen, 93 N. C. 198, 202.

§ 708. If plaintiff is a married woman, minor or insane.—If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (Rev., s. 665; Code, s. 486; 1871-2, c. 147, s. 14.)

§ 709. Defendant evicted, may recover from plaintiff.—If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (Rev., s. 666; Code, s. 487; 1871-2, c. 147, s. 15.)

In ejectment a writ of ouster should not issue until a judgment for betterments has been paid. Bond v. Wilson, 129 N. C. 325, 332, 40 S. E. 179.

§ 710. Not applicable to suit by mortgagee.—Nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (Rev., s. 660; Code, s. 481; 1871-2, c. 147, s. 9.)

When Section Inapplicable.—Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from mortgagor, this section, does not apply. Metropolitan Life Ins. Co. v. Allen, 208 N. C. 13, 179 S. E. 15.

In Wharton v. Moore, 84 N. C. 479, 483, it was said: "It is very probable the Legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them." In 2 Washburn Real Prop., it is laid down that, "if the mortgagor or any one standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made after satisfying the debt."

Art. 30. Supplemental Proceedings.

§ 711. Execution unsatisfied, debtor ordered to answer.—When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (Rev., s. 667; Code, s. 488, subsec. 1; C. C. P., s. 264; 1868-9, 95, s. 2.)

Purpose of Proceedings Supplemental.—The purpose is to give supplemental proceedings only in case the debtor has no property liable to execution, or to what is in the nature of execution, viz: proceedings to enforce its sale. Hutchison v. Symons, 67 N. C. 156, 159; McKeithan & Sons v. Walker, 66 N. C. 95; Rand v. Rand, 78 N. C. 12, 15.

The proceeding is intended to perfect the creditors' remedy in the same action and to supersede that which in a divided jurisdiction was attainable before by a bill of equity. Bronson v. Wilmington N. C. Life Ins. Co., 85 N. C. 411, 413.

Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings. International Harvester Co. v. Brockwell, 202 N. C. 805, 164 S. E. 322.

Same—Substitute for Creditor's Bill.—In Carson v. Oates, 64 N. C. 115, it was said: "Supplemental proceedings were

intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law." Such proceedings are held to be a substitute for the former creditors' bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. Rand v. Rand, 78 N. C. 12, 14. See Dillard v. Walker, 204 N. C. 67, 167 S. E. 632.

Such proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. Righton v. Pruden, 73 N. C. 61.

Same—Complete Determination of Action. — Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits. Rand v. Rand, 78 N. C. 12, 15.

Nature of Proceedings—Final Process.—They are in the nature of a final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable fi. fa. Goodwin v. Claytor, 137 N. C. 224, 225, 236, 49 S. E. 173.

Same—Equitable Execution.—Such proceedings are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same according to law, to the payment of the judgment. Vegelahn v. Smith, 95 N. C. 254, 256; Coates Bros. v. Wilkes, 92 N. C. 377.

Judgment Conclusive.—A judgment, whether just or unjust, if regularly taken in a court of competent jurisdiction, may be enforced by proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. Heggie v. People's Bldg. & L., etc., Ass'n., 107 N. C. 581, 590, 12 S. E. 275.

Lunatic Liable.—Supplemental proceedings lie against a lunatic in aid of execution. Blake v. Respass, 77 N. C. 193, 197.

Proceedings Lie against Private Corporations.—Proceedings supplemental to execution lie against a private corporation created by a special act of the Legislature, and organized for the purposes of the private gain for its shareholders. LaFountain v. Southern Underwriters Ass'n., 79 N. C. 514.

Not Applicable to Supreme Court.—The provisions respecting supplemental proceedings are not applicable to the supreme court, and no power has been given it to issue an attachment in such case. Phillips v. Trezevant, 70 N. C. 176, 177.

Manner of Instituting Proceedings—Demand Unnecessary.—A personal demand on the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental proceedings. The prosecution of the suit to judgment and execution is a sufficient demand. Weller & Co., v. Lawrence, 81 N. C. 65.

Same—What Must Be Made to Appear.—To authorize the grant of an order of examination, these three facts must be made to appear, by affidavit or otherwise, to-wit: the want of known property liable to execution, which is provided by the sheriff's return of "unsatisfied," the nonexistence of any equitable estates in land within the lien of the judgment, and the existence of property, choses in action and things of value unaffected by any lien and incapable of levy. Hinsdale v. Sinclair, 83 N. C. 339, 343; Hutchison v. Symons, 67 N. C. 156; McKeithan & Sons v. Walker, 66 N. C. 95.

Same—Who Entitled to Benefits.—Those creditors only are entitled to the benefit of supplementary proceedings who bring themselves within the provisions of the statute by instituting such proceedings. Righton v. Pruden, 73 N. C. 61.

The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment. Heggie v. People's Bldg., etc., Ass'n, 107 N. C. 581, 12 S. E. 275.

A judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and he then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an account to ascertain the amount due upon unpaid stock, to pay debts of the corporation. Such suit was a new and independent action, and not demurrable on the ground that his remedy was by proceeding supplementary to execution. Bronson v. Wilmington N. C. Life Ins., Co., 85 N. C. 411.

Action against an Administrator.—A judgment creditor whose execution has been returned unsatisfied cannot maintain an action against an administrator or to subject a distributive share of the judgment debtor in the estate to the satisfaction of the debt. He must proceed by supplemental proceedings. Rand v. Rand, 78 N. C. 12.

Three Year Limitation.—When the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the time the execution is issued, is entitled to an order of the court, requiring the debtor to appear and answer respecting his property. Vegelahn v. Smith, 95 N. C. 254, 256.

Authority of Clerk.—This section confers upon the clerk of the superior court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. Bank v. Burns, 107 N. C. 465, 466, 12 S. E. 252.

Where the defendant was ordered to appear before the clerk to be examined in a supplementary proceeding, when the clerk was properly informed that a similar proceeding was then pending before the judge, he should have refused to proceed, and failing to do so, the judge had the power to order that he desist from further action. Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969.

Same—Appeal.—From an order requiring the debtor to appear, made by the clerk, an appeal lay at once to the judge as a matter of right, and the clerk cannot allow or disallow it. Bank v. Burns, 107 N. C. 465, 466, 12 S. E. 252.

Choses in Action.—In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured it has an equitable right of set-off when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold, which specifically affects the property. McIntosh Grocery Co v. Newman, 184 N. C. 370, 114 S. E. 535.

A bank may apply the deposits of its customer to the payment of his note after maturity, by way of set-off, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. McIntosh Grocery Co. v. Newman, 184 N. C. 370, 371, 114 S. E. 535.

Choses in action cannot be reached by execution. They are subjected to the satisfaction of a judgment under the practice prevailing in this state by supplemental proceedings under this section which are in the nature of an equitable fi. fa. or creditor's bill. Newberry v. Davidson Chemical Co., 65 F. (2d) 724, 727.

Notice Required.—"If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court. But in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment suit is conducted." Rood on Garnishment, sec. 280, quoted in Wright v. Southern R. Co., 141 N. C. 164, 168, 53 S. E. 831.

Ten Days' Notice Not Required.—The requirement of ten days' notice of motions generally, has no reference to the examination of judgment debtors under supplementary proceedings, but are governed by this section, which refers the time and place of examination to the discretion of the court or judge. Weiller & Co. v. Lawrence, 81 N. C. 65, 67.

§ 712. Property withheld from execution; proceedings.—After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order,

require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this and the preceding section, although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (Rev., s. 668; Code s. 488, subsec. 2; C. C. P., s. 264; 1868-9, c. 95, s. 2.)

See sec. 711, and annotations thereto.

Sufficiency of Affidavit.—Such extraordinary proceedings will not be ordered, unless a necessity for it is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action, or things of value, "which he unjustly refuses to apply to the satisfaction of the judgment." Hutchison v. Symons, 67 N. C. 156, 158.

An affidavit by a judgment creditor, his agent or attorney, that an execution has been issued upon his judgment—though it has not been returned—and that the defendant has not sufficient property "subject to execution" to satisfy the judgment, but has property "not exempted from execution," which he unjustly refuses to apply to its satisfaction, is sufficient to support an order from the examination of the debtor, and persons alleged to be indebted to him. Farmers etc., Bank v. Burns, 109 N. C. 105, 13 S. E. 871.

Same—Must Negative Existence of Property Liable to Execution.—An affidavit is insufficient to warrant the examination of the judgment debtor, if it does not negative property in the defendant liable to execution and the existence of equitable interests which may be subjected by sale in the nature of an execution; but the omission of such negative averments may be remedied by amendment at the hearing. Weiller & Co. v. Lawrence, 81 N. C. 65; Hackney v. Arrington, 99 N. C. 110, 5 S. E. 747.

Same—Objection as to Property of Defendant.—Objection that the plaintiff, in proceedings supplementary to execution, has not shown, in support of the order to examine the defendant and others, that the defendant has other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit without denial. Farmers, etc., Bank v. Burns, 109 N. C. 105, 13 S. E. 817, cited and approved. Boseman v.. McGill, 184 N. C. 215, 114 S. E. 10.

Clerk's Finding of Fact Sufficient.—Where, upon the plaintiff's affidavit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplmentary to execution, it is sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the return of execution does not affect. Boseman v. McGill, 184 N. C. 215, 114 S. E. 10.

Alias Execution Unreturned.—The fact that the sheriff has an alias execution in his hands unreturned, which was issued on the same judgment on which supplemental proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. Vegelahn v. Smith, 95 N. C. 254.

Sufficient Service of Order to Appear.—Leaving a copy of an order on a judgment debtor, to appear and answer in supplemental proceedings, with the debtor's wife, is a sufficient notice. Turner v. Holden, 109 N. C. 182, 13 S. E. 731.

Court to Apply Property to Judgment.—The section intends that when the debtor refuses to apply such property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end that the court, in a proper way, may so apply the property to which the debtor may direct attention. Farmers, etc., Bank v. Burns, 109 N. C. 105, 108, 13 S. E. 871.

§ 713. Proceedings against joint debtors.—Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (Rev., s. 669; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245.)

As to procedure under this section, see sec. 711, and annotations thereto.

Joint, as well as single debtors, may be examined after the issuance of an execution, and before its return. Weiller & Co. v. Lawrence, 81 N. C. 65.

§ 714. Debtor leaving state, or concealing himself, arrested; bond.—Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the state or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the state, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (Rev., s. 671; Code, s. 488, subsec. 4; 1868-9, c. 148, s. 4; 1868-9, c. 277, s. 8.)

§ 715. Examination of parties and witnesses.—On examination under this article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this article in the same manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. (Rev., ss. 670, 676; Code, s. 488 [subsec. 2], 491, 492; C. C. P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245.)

Cross-Examination.—Where the judgment debtor is examined the creditor does not make him his witness, but may cross-examine and contradict him. Coates Bros. v. Wilkes, 92 N. C. 377.

Evidence Taken Down in Writing.—In supplemental proceedings the evidence should be taken down in writing. Coates Bros. v. Wilkes, 92 N. C. 377, 383.

Production of Documents.—Where, on examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. Coates Bros. v. Wilkes, 92 N. C. 377.

§ 716. Incriminating answers not privileged; not used in criminal proceedings.—No person, on examination pursuant to this article, is excused from answering any question on the ground that it will tend to convict him of the commission of

a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (Rev., s. 672; Code, s. 488, subsec. 5; C. C. P., s. 264; 1868-9, c. 95, s. 2.)

Witness Must Answer Questions.—A witness cannot shield himself behind his declaration questions that they involve self-crimination, but must answer them. LaFontaine v. Southern Underwriter's Ass'n., 83 N. C. 133, 144.

So when called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, he cannot excuse himself on the ground the evidence thus elicited might be used on the trial indictments pending against him and others for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation. LaFontaine v. Southern Underwriters Association, 83 N. C. 133.

Not Available for Criminal Proceedings.—Facts developed on the examination of the defendants in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. State v. Mallett, 125 N. C. 718, 34 S. E. 651.

§ 717. Disposition of property forbidden.—The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (Rev., s. 673; Code, ss. 488 [subsec. 6], 494; C. C. P., s. 264; 1868-9, c. 95, s. 2.)

Only Parties May Be Restrained.—In supplemental proceedings, the court cannot restrain the transfer of property owned by one not a party to the action. Banks v. Burns, 109 N. C. 105, 13 S. E. 871.

Where it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party in some way to the proceeding. Coates Bros. v. Wilkes, 94 N. C. 174.

§ 718. Debtors of judgment debtor may satisfy execution.—After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (Rev., s. 647; Code, s. 489; C. C. P., s. 265.)

Protection to Debtors of Judgment Debtor.—The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. Parks v. Adams, 113 N. C. 473, 477, 18 S. E. 665.

Authority of Sheriff.—A sheriff is authorized by this section to receive from debtors of the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in satisfaction of another. Smith v. McMillan, 84 N. C. 593.

§ 719. Debtors of judgment debtor, summoned.—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (Rev., s. 675; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245.)

When Proceedings May Commence.—The proceedings given by the section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. McKeithan & Sons v. Walker, 66 N. C. 95, 99.

Purpose of Appearance and Answer.—The purpose of the appearance and answer required by the section is to determine whether the sum alleged, or any part thereof is due the judgment debtor. Rice v. Jones, 103 N. C. 226, 231, 95 S. E. 571.

Assignee May Be Examined.—An order for examination may issue against the defendant's assignee. Bruce v. Crabtree, 116 N. C. 528, 21 S. E. 194.

Procedure.—The section expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, not for the purpose of contesting any right of such persons having the same. If they claim an interest in the property, or that the same belongs to them, they may properly suggest so. Banks v. Burns, 109 N. C. 105, 109, 13 S. E. 871; Boseman v. McGill, 184 N. C. 215, 114 S. E. 10.

Where one, who is charged in supplemental proceedings as holding property belonging to a judgment debtor, claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. Carson v. Oates, 64 N. C. 115.

Same—Notice to Defendant.—Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. Wright v. Southern R. Co., 141 N. C. 164, 168, 53 S. E. 831. Wilmington v. Sprunt, 114 N. C. 310, 19 S. E. 348.

§ 720. Where proceedings instituted and defendant examined. — Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides. (Rev., s. 677.)

Editor's Note.—This section is a substantial enactment of the rule laid down in Hasty v. Simpson, 77 N. C. 69, 70. In Huchison v. Symons, 67 N. C. 156, it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered. Hasty v. Simpson, supra, quoted, and approved this holding, but, in addition, held that the place designated for the appearance and answer of the defendant should be in the county of his residence. Thus a beneficial rule was formulated which was, apparently, followed by the legislature in enacting this section.

§ 721. Debtor's property ordered sold.—The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (Rev., s. 678; Code, s. 493; C. C. P., s. 269; 1870-1, c. 245.)

Order for Condemnation of Debtor's Property.—In proceedings supplemental to execution, an order for the condemnation made by the clerk against land was within the scope of this section. Boseman v. McGill, 184 N. C. 215, 114 S. E. 10.

Property Subject to Sale.—The court may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. Rand v. Rand, 78 N. C. 12, 16.

If it appears that a third person is indebted to the judgment debtor, the court may order such indebtedness, or so

much thereof as may be necessary, to be applied to the satisfaction of the judgment against the judgment debtor. Rice v. Jones, 103 N. C. 226, 231, 95 S. E. 571.

Sale Required.—Where it appears from an examination under supplementary proceedings that the judgment debtor holds a claim against a third party, to be discharged by the delivery of corn at a stipulated price per bushel, it is error for the court to order such third person to deliver to the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order is to sell the corn and apply the proceeds to the debt. In re Davis, 81 N. C. 72.

When Final Order Made.—No final order can be made appropriating to the creditor any property discovered under section 719 until the property previously levied on is exhausted, for until that is done it cannot be known whether anything is still owing. McKeithan & Sons v. Walker, 66 N. C. 95, 99.

Earnings for Sixty Days.—The exemption of earnings for sixty days allowed to a judgment debtor under the section applies only as to proceedings on judgments for private debts and for taxes due. Wilmington v. Sprunt, 14 N. C. 310, 314, 19 S. E. 348.

The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure in garnishment by this section. Goodwin v. Claytor, 137 N. C. 224, 225, 237, 49 S. E. 173 cited in Wierse v. Thomas, 145 N. C. 261, 268, 59 S. E. 58.

Salaries of Public Officers and Employees.—For reasons of public policy, the salaries of officers and the pay of employees of the state can not be reached by creditors by proceedings supplementary to execution. Swepson v. Turner, 76 N. C. 115.

Gratuitous Services.—While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for services rendered to any person with the understanding that it was gratuitous. Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285.

Where supplemental proceedings are instituted upon return of execution unsatisfied on a judgment against a husband and wife, and it appears that the husband is totally and permanently disabled and has no property upon which execution could be levied, but is receiving the sum of three hundred dollars a month under disability insurance, the judgment debtor is entitled, under his personal property exemption, to the three hundred dollars each month if such amount is necessary for the support of himself and wife. Commissioner of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505.

§ 722. Receiver appointed.—The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (Rev., s. 679; Code, s. 494; C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.)

As to duty of receiver generally, see secs. 859 to 862.

Appointed by Clerk. — The receiver must be appointed by the judge, and not by the clerk. Parks v. Sprinkle, 64 N. C. 637, 639. This case was decided prior to the amendment inserting the word "Court" at the beginning of the section. Ed. Note.

In a race of diligence between creditors under the supplementary proceedings, the earliest applicant is presumed to be entitled to the earliest appointment. Parks v. Sprinkle, 64 N. C. 637.

Action as a Prerequisite to Appointment.—Where supplemental proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal to appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund. Ross v. Ross, 119 N. C. 109, 25 S. E. 792.

Evidence with Application.—The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. Coates Bros. v. Wilkes, 92 N. C. 377, 383.

Motion Pending Appeal.—The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N. C. 377.

Subject to Review.—The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review by the Supreme Court. Coates Bros. v. Wilkes, 92 N. C. 377.

Reasonable Ground.—It is sufficient for the appointment of a receiver if there is reasonable grounds to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. Coates Bros. v. Wilkes, 92 N. C. 377.

Judge to Ascertain if Other Proceedings Pending.—While it is the duty of a judge appointing a receiver under this section to ascertain if other supplemental proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. Corbin v. Berry, 83 N. C. 28.

There Shall Be but One Receiver.—This section prescribes that there shall be but one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. Corbin v. Berry, 83 N. C. 28, 31.

Consolidation of Several Proceedings.—Where several supplemental proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. Monroe Bros. & Co. v. Lewald, 107 N. C. 655, 12 S. E. 287.

§ 723. Filing and record of appointment; property vests in receiver.—When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are found. (Rev., s. 680; Code, s. 495; C. C. P., s. 270; 1870-1, c. 245.)

When Property Vests in Receiver.—The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and is vested with the property therein. Turner v. Holden, 94 N. C. 70, 71.

The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the

duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. Coates Bros. v. Wilkes, 92 N. C. 377.

In proceedings supplementary to execution if the debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the clerk of the superior court, the property and effects of such judgment debtor do not vest in the receiver. Rankin v. Minor, 72 N. C. 424.

Remedy of Debtor When Receiver Is Negligent.—If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, upon his bond to secure a faithful discharge of duty, he cannot interfere with the receiver's collection and control of the property. Turner v. Holden, 94 N. C. 70, 72.

Receiver Is under Direction of Court.—A receiver may be appointed who is invested with all the property and effects of the debtor, and may collect, preserve, and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. Rand v. Rand, 78 N. C. 12, 16.

While the court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate, necessary actions without special leave or direction of the court. Weill v. First Nat. Bank, 106 N. C. 1, 5, 10, 11 S. E. 277.

A receiver, in supplemental proceedings, may bring actions to recover the judgment debtor's property without special leave or direction of the court. Weill v. First Nat. Bank, 106 N. C. 1, 11 S. E. 277. See also Coates Bros. v. Wilkes, 92 N. C. 377.

§ 724. Where order of appointment recorded.—Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerks of the superior court of the county in which the debtor resides. (Rev., s. 681; Code, s. 496; C. C. P., s. 270.)

Death of Judgment Debtor before Order Filed.—When the judgment debtor dies before the filing in the clerk's office of an order appointing a receiver, the judgment creditor has no lien on his property as against the administrator of the debtor. Rankin v. Minor, 72 N. C. 424, cited in note in 3 L. R. A., N. S. 133.

§ 725. Receiver to sue debtors of judgment debtor.—If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdictions on such security as he directs. (Rev., s. 682; Code, s. 497; C. C. P., s. 271; 1870-1, c. 245.)

Court May Restrain Transfer of Property.—Under this section when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such is brought by the receiver as the agent of the court. Ross v. Ross, 119 N. C. 109, 112, 25 S. E. 792.

Same—Notice Required.—In Coates Bros. v. Wilkes, 94 N. C. 174, 180, it was said that very clearly this section cannot be construed as implying that the order forbidding "the transfer or other disposition of such property or interest," may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right. In some way, the person to be affected adversely by an order or judgment of the court, must have notice of the proceedings against him, so that he can appear, and be heard in his own behalf. This section must be taken and construed in connection with section 710, which provides that "the court or judge, may by an order, require such person or corporation, or any officer or member, thereof, to appear at a time and place, and answer concerning" the property or debt alleged to belong to the judgment debtor. It moreover gives to the court or judge, authority in its or his discretion, to require the notice of such order to be given in "such manner as may seem to him or it to be proper." Notice must be given, not necessarily by summons, but as the court or judge may direct, and when the party is before the court to answer as required, the order forbidding "a transfer or other disposition of such property or interest," may be made Thus two sections of the same statute may operate consistently and without working injustice.

Third Parties May Interplead.—In supplemental proceedings it was adjudged that the fund in question belonged to the judgment debtor, and an order made that the fund be paid into court. Afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought action against the judgment debtor to try the question of title to the fund. Held, that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings. Wilson v. Chichester, 107 N. C. 386, 12 S. E. 139.

Fraudulent Transactions of Debtor Set Aside.—A receiver is not the representative of the debtor alone, and can maintain an action to set aside fraudulent transactions of such debtor. Pender v. Mallett, 123 N. C. 57, 31 S. E. 351.

§ 726. Reference.—The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time. (Rev., s. 683; Code, s. 498; C. C. P., s. 272.)

Cross References.—As to examination before referee, see sec. 715; as to referees generally, see secs. 574 to 579; as to disobedience of orders of referee see sec. 727, and annotations thereto.

Definition.—A reference has been defined as the act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. 2 Bouv. Law Dict., title Reference.

What Law Governs.—The general rule that whatever constitutes part of the procedure is determined by the law of the forum, applies to references, and the validity of a reference, and the proceedings and judgment upon it must be tested by the laws of the forum. Alexandria v. Swann, 5 How. 83, 12 L. Ed. 60.

The practice of referring pending actions under a rule of court, by consent of parties was well known at common law, and the report of the referees appointed, when regularly made to the court pursuant to the rule of reference, and duly accepted, is now universally regarded in the state courts as the proper foundation of judgment. Such references are proper in federal as well as state courts. Chicago, etc., R. Co. v. Clark, 178 U. S. 363, 44 L. Ed. 1099.

The evidence taken before a referee must accompany his report if there are any exceptions to which it is applicable, or perhaps any adverse rulings made in the progress of the injury which the evidence whould tend to elucidate or explain. Vestal v. Sloan, 83 N. C. 555, 556.

§ 727. Disobedience of orders punished as for contempt.—Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as

are just. (Rev., s. 684; Code, s. 500; C. C. P., s. 274; 1869-70, s. 3.)

As to contempt generally, see §§ 978 to 985. As to whether the violation of a void order of a court constitutes contempt, see note in 12 N. C. Law Rev., 260.

Court May Enforce Its Lawful Orders.—It is an essential attribute of a court to enforce by proper process its lawful orders, and without this its essential functions would be paralyzed or destroyed. LaFontaine v. Southern Underwriters, 83 N. C. 132, 133, 137; Pain v. Pain, 80 N. C. 322.

Contempt of Referee Punished by Court.—When, in the course of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83 N. C. 132, 133.

Judge Passes on Inability to Comply.—Where a party to an action, having been directed to perform an order of the court, otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. Childs v. Wiseman, 119 N. C. 497, 26 S. E. 126.

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS

Art. 31. Property Exempt from Execution

§ 728. Property exempted.—The homestead and personal property exemptions as defined and declared by the article of the state constitution entitled Homesteads and Exemptions are exempt from sale under execution and other final process, as provided in the state constitution: Provided, the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead: Provided, further, the owners of judgments docketed since March eleventh, one thousand eight hundred and eighty-five, have two years from the first day of April, one thousand nine hundred and one, within which to assign and set apart their homesteads under such judgments. (Rev., s. 685; Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; 1879, c. 256; R. C., c. 45, s. 7; 1848, c. 38; R. C., c. 45, s. 8; 1844, c. 32; 1846, c. 53; 1848, c. 38, s. 2; 1866-7, c. 61, s. 7; 1867-7, c. 263.)

I. In General.
  A. Nature of Homestead.
  B. Nature and Duration of Exemptions.
II. Constitutional Provisions and Purpose.
  A. In general.
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  C. Homestead in Land Only.
III. Judgments and Liens.

Cross References.

As to conveyance of homestead, see sec. 729 and annotations thereto.

I. IN GENERAL.

Editor's Note.—In Poe v. Hardie, 65 N. C. 447, the homestead has been called a "determinable fee," and in Littlejohn v. Egerton, 77 N. C. 379, it is spoken of as "a quality annexed to land whereby the estate is exempted from sale under execution". These inadvertent expressions, as to the effect produced upon the debtor's estate in the exempt land, have led to serious difficulties in interpreting the beneficent provisions of the constitution and subsidiary statutes in securing a home to the debtor and his family, without trenching needlessly upon the rights of creditors.

The correct view is expressed by Bynum, J., in Bank v. Green, 78 N. C. 247, 252: "Their legal effect is simply to protect the occupant in the enjoyment of the land, set apart as a homestead, unmolested by his creditors". No new estate is conferred upon the owner, and no limitation is imposed upon his old estate. It is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. It cannot be contended that the assignment is in any sense a conveyance of land, nor does it profess to pass title. It only serves to indicate where the homestead is and whether there is any excess subject to levy and sale to pay judgment creditors. See Keener v. Goodson, 89 N. C. 273; Mebane v. Layton, 89 N. C. 396; Markham v. Hicks, 90 N. C. 204.

Favored by Law.—The law favors the homestead. Every safeguard is given the homesteader and the courts have carefully protected his rights as guaranteed by the Constitution. Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

Estoppel to Claim.—Under certain circumstances the homesteader is estopped from claiming the homestead exemption. Cheek v. Walden, 195 N. C. 752, 755, 143 S. E. 465, citing Caudle v. Morris, 160 N. C. 168, 76 S. E. 17; Simmons v. McCullin, 163 N. C. 409, 412, 79 S. E. 625; Duplin County v. Harrell, 195 N. C. 445, 142 S. E. 481.

Equity of Redemption.—It is well settled that the homestead may be allotted in an equity of redemption. Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465. Citing Cheatham v. Jones, 68 N. C. 153; Gaster v. Hardee, 75 N. C. 460; Burton v. Spiers, 87 N. C. 87; Hinson v. Adrian, 92 N. C. 122; Thurber v. LaRoque, 105 N. C. 301; Montague v. Bank, 118 N. C. 283, 24 S. E. 6; Duplin Co. v. Harrell, 195 N. C. 445, 142 S. E. 481.

A. Nature of Homestead.

Exceptions to Homestead Exemption.—A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted in the purchase of the premises; (3) for mechanics and laborer's lien; (4) for debts contracted prior to the constitution. Mebane v. Layton, 89 N. C. 396; Cumming v. Bloodworth, 87 N. C. 83, 85.

Definition of a Homestead.—In Hager v. Nixon, 69 N. C. 108, 110, it is said: "No precise definition of a homestead is given in the constitution, and it would only mislead us if we should look into dictionaries or the laws of other states and take the definitions there given as fixing the meaning of the word as given in our laws. We must look to our own legislation alone to ascertain what it is."

Same—Not an Estate.—A homestead is not an estate at all, but merely an exemption. Candle v. Morris, 160 N. C. 168, 76 S. E. 17; Chadbourn Sash, etc., Co. v. Parker, 153 N. C. 130, 69 S. E. 1; Thomas v. Fulford, 117 N. C. 667, 23 S. E. 635; Jones v. Britton, 102 N. C. 166, 9 S. E. 554. See also, Hicks v. Wooten, 175 N. C. 597, 96 S. E. 107.

In Thomas v. Fulford, 117 N. C. 667, 671, 23 S. E. 635, it was said: "In some of the earlier decisions it is treated as an estate and called a determinable fee, but this doctrine has long since been abandoned and we have numerous decisions that hold the homestead is not an estate, but an exemption only.

Same—Not Color of Title.—The assignment of a homestead does not constitute color of title. Keener v. Goodson, 89 N. C. 273, 277.

Time of Application.—The "poor debtor" is in time if he makes his application and procures the assignment to be made at any time before the property is changed and converted by a sale. State v. Floyd, 33 N. C. 496, 498.

Assignment by Sheriff Not Needed to Vest Right.—The action of a sheriff in assigning a homestead by metes and bounds is not needed to any extent to vest the right, but merely to find the quantum so as to enable him to ascertain the excess, if any. Gheen v. Summey, 80 N. C. 188. See also, Littlejohn v. Egerton, 77 N. C. 379, 380.

Sale by Homesteader of Estate in Reversion.—A sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. Jenkins v. Bobbitt, 77 N. C. 385, 387.

When Applicable to Old Debts.—The provisions of the law, securing a homestead and personal property exemption, are not necessarily void as against "old debts," but only so, in case they should defeat their payment in whole or in part. Even against such claims, the debtor has a right to have his allotments made and the excess sold and applied in payment thereof. Albright v. Albright, 88 N. C. 238.

B. Nature and Duration of Exemptions.

Effect of Exemption Laws.—Exemption laws have no extraterritorial force or effect. Goodwin v. Claytor, 137 N. C. 225, 49 S. E. 173; Sexton v. Phoenix Ins. Co., 132 N. C. 1, 43 S. E. 479; Balk v. Harris, 122 N. C. 64, 30 S. E. 318.

The exemption laws of this state protect the property of a debtor in this state from exemptions issuing from the courts of this state, and (by congressional action) from the courts of the United States. Balk v. Harris, supra.

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum. Goodwin v. Claytor, 137 N. C. 225, 49 S. E. 173; Sexton v. Phoenix Ins. Co., 132 N. C. 1, 3, 43 S. E. 479.

Same—Remedial in Nature.—Exemption laws are remedial in their nature and should always receive a liberal construction. Goodwin v. Claytor, 137 N. C. 225, 236, 49 S. E. 173.

Same—Exchange of Exempt Goods.—If an article of property, which has been exempt from execution, is exchanged for another article, the one received in exchange is not exempt. Lloyd v. Durham, 60 N. C. 282, 283.

Presumption in Favor of Exemption. — There is a presumption of fact in favor of the exemption, and the creditor who seeks to subject the homestead to the payment of his debt, must bring himself within one of the exceptions by proper averment and proof. Mebane v. Layton, 89 N. C. 396.

Duration of Exemption.—The personal property exemption exists only during the life of the homesteader. Smith v. McDonald, 95 N. C. 163; Johnson v. Cross, 66 N. C. 167.

How Choses in Action Made Available.—Except in case of attachment proceedings wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable fi. fa. or by the statutory method of supplemental proceedings, both of which remedies in proper instances are here still open to claimants. McIntosh Grocery Co. v. Newman, 184 N. C. 370, 373, 114 S. E. 535; Boseman v. McGill, 184 N. C. 215, 114 S. E. 10.

II. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Favored by Constitution.—The homestead interest is favored by the Constitution. Leak v. Gay, 107 N. C. 468, 12 S. E. 312.

Purpose of Homestead Provisions.—The framers of the Constitution meant exactly what they said and ordained, that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no children of the marriage, and if there were children then during the minority of the children or any one of them. The leading idea, if not the only one, was to create an exemption and not an estate, and an exemption for a limited period only, leaving the estate which the debtor already had in the land unimpaired. Joyner v. Sugg, 132 N. C. 580, 583, 44 S. E. 122.

The homestead law is a beneficent provision for the protection of a wife and children against the neglect and improvidence of the father and husband. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437.

Pre-existing Debt.—The second section of Article X of the Constitution of 1868, which exempts from execution real property of a resident debtor not exceeding in value one thousand dollars, was declared void as to pre-existing debts, being in contravention of Article I. Sec. 10 of the Federal Constitution. Edwards v. Kearzey, 96 U. S. 595, decided in Edwards v. Kearsey, 74 N. C. 241. For the law governing cases which arose subsequent to this one concerning pre-existing debts, see Earle v. Hardie, 80 N. C. 177; Richardson v. Wicker, 80 N. C. 172, 173; Gamble v. Rhyne, 80 N. C. 183.

Where a homestead is sold to satisfy a debt created before the ratification of the Constitution of 1868, one thousand dollars of the proceeds of sale, if that sum is left after paying the old debt, will be treated as the homestead. Leak v. Gay, 107 N. C. 468, 12 S. E. 312.

Homestead is Vested Right.—The homestead right is a right vested by the Constitution, and cannot be destroyed by any irregularity in the proceedings for its allotment. Formeyduval v. Rockwell, 117 N. C. 320, 23 S. E. 488.

B. Who Entitled to Homestead and Exemptions.

Only Residents Entitled to Homestead and Exemptions.—The homestead and personal property exemptions can be claimed only by residents of this state. Goodwin v. Claytor, 137 N. C. 225, 49 S. E. 173; Jones v. Alsbrook, 115 N. C. 46, 20 S. E. 170.

Same—Constitutional Purpose.—The right of homestead provided and secured by the Constitution (Art. X, sections 2, 5, 8), is incident to residence in this state. Only residents have and are entitled to such right. A non-resident has no such right, although he may be the owner of real property situated in the state. The terms of the Constitution do not embrace him, and moreover, the plain purpose is to exempt the homes of those who have or can acquire them "from sale under execution or other final process obtained on any debt." He has no home within the state for himself or his family, and the reason for the exemption as to him does not exist. Baker v. Legget, 98 N. C. 304, 305, 4 S. E. 37.

Residents Defined.—The leading purpose of the Constitution, Article X, secs. 1, 2, 3, 8, is to secure the homestead to the debtor and his family and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. Chitty v. Chitty, 118 N. C. 647, 649, 24 S. E. 517.

The words "a resident of this state," employed in the Constitution, Art. X, Sec. 2, in respect to homesteads, have a more restricted meaning than that usually given to domicile. Lee v. Mosely, 101 N. C. 311, 7 S. E. 874.

The residence must be actual, and not constructive. Munds v. Cassidy, 98 N. C. 558, 4 S. E. 353, 355.

Same—Forfeiture of Right. — If the person claiming a homestead voluntarily removes from the state, with a purpose to make his home elsewhere, he forfeits his right in this respect. Finley v. Saunders, 98 N. C. 462, 4 S. E. 516.

Where a debtor ceased to be a resident of the state before his property became applicable to a creditor's claim, the general exemption laws of the state do not operate in his favor. Wierse v. Thomas, 145 N. C. 261, 59 S. E. 261, 59 S. E. 58, 15 L. R. A. (N. S.) 1008.

A resident, after executing a deed of trust of his property, with a recital reserving his personal property exemptions, and after assigning his exemptions so reserved, became a nonresident without having his exemptions allotted to him. Neither the assignee nor the attaching creditors could get the benefit of the exemptions. Latta v. Bell, 122 N. C. 639, 30 S. E. 15. See also, Norman v. Craft, 90 N. C. 211.

Right Not Destroyed by Fraud.—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them, and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. Rose v. Bryan, 157 N. C. 173, 72 S. E. 960; Rankin v. Shaw, 94 N. C. 405, 407.

When Wife and Children Succeed to Homestead.—The wife and children only succeed to the homestead in the event of the death of the father or husband. They are not entitled to it after his removal from the state, though they may remain. Finley v. Saunders, 98 N. C. 462, 4 S. E. 516.

A widow is not entitled to a homestead in the lands of her husband if he die leaving children—minors or adults. Wharton v. Leggett, 80 N. C. 169, 171. See also Hager v. Nixon, 69 N. C. 108, 113. But see later case under "Purpose of Homestead Provisions," supra.

When Dower Right Paramount to Homestead Right.—In Watts v. Leggett, 66 N. C. 197 Pearson, C. J., speaking for the court, said: "If the homestead had been laid off in the lifetime of the husband, at his death the dower of the wife would have been assigned so as to include the dwelling house in which the husband had usually resided and buildings used therewith. Thus the dower would be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage, would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower, until the death of the widow, leaving them, of course, to the present enjoyment of such part of the homestead and land appertaining thereto as is not covered by the dower." See also, Gregory v. Ellis, 86 N. C. 579, 583.

Reversionary Interest.—The reversionary interest in a homestead cannot be sold by an administrator in a petition to make real estate assets during the minority of one of the children of the intestate. Hinsdale v. Williams 75 N. C. 430. See also, Mebane v. Layton, 89 N. C. 396, 400; Maynard v. Moore, 76 N. C. 158, 162; Barnes v. Cherry, 190 N. C. 772, 130 S. E. 611.

Collateral Attack—When Void.—The allotment of a homestead to one having no right thereto is void, and may be attacked collaterally. Williams v. Whitaker, 110 N. C. 393, 14 S. E. 924.

Mortgage or Deed of Trust Paramount.—As against a mortgage or deed of trust, the grantor has no right of homestead. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

Adverse Possession under Sheriff's Deed.—Where there is an actual adverse possession under a sheriff's deed, the Supreme Court, in order to give full effect to the constitutional provision, will remand the case to the end that the superior court may have the homestead laid off. Littlejohn v. Egerton, 77 N. C. 379.

C. Homestead in Land Only.

Not Applicable to Proceeds of Sale.—The law confers a homestead right only in land, and not in the proceeds of the sale of land. Utley v. Jones, 92 N. C. 261.

Where a homestead is sold, the proceeds lose the quality of homestead exemptions, and become subject to the per-

sonal property exemption. Lane v. Richardson, 104 N. C. 642, 10 S. E. 189.

Lands Subject to Homestead Right.—To claim a homestead in land it must be owned and occupied by and allotted to the claimant at the time of the issuance of the execution; and the vendee of a judgment debtor cannot claim and have laid off a homestead in the lands conveyed as against a levy by the sheriff thereon under a judgment had against the vendor prior to his deed. Chadbourn Sash etc., Co. v. Parker, 153 N. C. 130, 131, 69 S. E. 1.

The owner of land is not restricted to the tract of land on which he resides. Mayho v. Cotton, 69 N. C. 289.

Reservation of Right.—A reservation of an indefinite right of homestead in land from a conveyance thereof is valid. Kirkwood v. Peden, 173 N. C. 460, 92 S. E. 264.

III. JUDGMENTS AND LIENS—SUSPENSION OF LIMITATIONS.

Limitations.—The running of the statute of limitations on a judgment is not suspended until there has been an actual allotment of a homestead. Farrar v. Harper, 133 N. C. 71, 45 S. E. 510.

Same—As to Judgments.—When the judgment debtor's homestead is allotted, the allotment, as to all property therein embraced, suspends the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. Barnes v. Cherry, 190 N. C. 772, 774, 130 S. E. 611; Formeyduval v. Rockwell, 117 N. C. 320, 325, 23 S. E. 488.

Same—Judgments Docketed.—The statute of limitations does not run against a debt of a homesteader during the existence of his interest in the homestead, provided it has been actually laid off; and then only as to debts affected by the allotment, that is, judgments docketed in the county where the land is situated and solely with reference to the lien of such judgments upon the reversionary interest. Morton v. Barber, 90 N. C. 399; McDonald v. Dickson, 85 N. C. 248.

In Cotten v. McClenahan, 85 N. C. 254, 258, it was said: "There is no stay to the statute until there has been an allotment of the homestead, and then only to the enforcement of the liens of docketed judgments upon the interest in reversion. As to all other debts and for all other purposes the statute runs." Quoted in Kirkwood v. Peden, 173 N. C. 460, 465, 92 S. E. 264.

The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. Watters v. Hedgpeth, 172 N. C. 310, 90 S. E. 314.

In Davenport v. Fleming, 154 N. C. 291, 294, 70 S. E. 472, it was said: "It follows that when the ownership of a tract of land and any and all interests therein, except the homestead interest, has been passed from the debtor by valid conveyance, and such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee in such conveyance, and where such conveyance has become effective before a judgment is docketed, there is no estate in the debtor to which a judgment lien could attach and no interest of the judgment creditor in the property that would call for or permit the interference of a court in his behalf by injunction or otherwise." Quoted, approved, and followed in Kirkwood v. Peden, 173 N. C. 460, 463, 92 S. E. 264.

Same—Ten Year Limitation.—The lien of a judgment on land in which a homestead has been duly alloted does not cease upon the expiration of ten years from the date of the judgment but continues during the continuance of the homestead estate, notwithstanding a sale and conveyance of the land by the homesteader. Bevan v. Ellis, 121 N. C. 224, 28 S. E. 471.

Under a statute limiting the life of the docketed judgment to ten years, a lien of such judgment is not prolonged by the allotment and recording of the homestead to the debtor after the expiration of ten years, though the judgment was kept revived. Wilson v. Beufort County Lumber Co., 131 N. C. 163, 42 S. E. 565.

The Judgment Lien.—The Acts of 1885, ch. 359 restored the lien of a docketed judgment upon land set apart as a homestead. Rankin v. Shaw, 94 N. C. 405, 408.

In Jones v. Britton, 102 N. C. 166, 168, 9 S. E. 554, it was said: "The condition and measure of the state of the owner of the homestead in the land is not changed by, or because of, the homestead—the estate, unchanged, continues—and the restriction, the limitation that distinguishes the homestead, is upon the right of the judgment creditor to have the land sold by execution or other proper final process to satisfy his docketed judgment, which constitutes his lien upon the land."

This lien is not meaningless and nugatory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt, as far as may be necessary, when and as soon as the exemption of it from sale shall be over. The law is true and sincere; it does not thus create and allow a lien in favor of the creditor, and leave the owner of the homestead at liberty to destroy the property, and thus render such lien worthless. He is allowed to live upon and use it, but not destroy or impair the substance of it, as against the creditor having a lien. Jones v. Britton, 102 N. C. 166, 170, 9 S. E. 554.

Lien by Attachment.—The lien of an attachment levied upon land of a non-resident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. Watkins v. Overby, 83 N. C. 165.

Vendor's Lien.—A vendor's lien for the purchase money "does not attach to personalty" (39 Cyc., 1804), and in this State we have gone further and have refused to follow the English doctrine, giving such a lien in sales of land. Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321.

Judgment for Improvements.—A defendant has the equitable right to improvements he has put on the land, and the plaintiff is not entitled to a homestead in the improved lands as against a judgment for the improvements. Barker v. Owen, 93 N. C. 198, 204.

Merger of Judgments.—Where a judgment creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. Springs v. Pharr, 131 N. C. 191, 42 S. E. 590, 92 Am. St. Rep. 775.

Judgments Obtained Prior to 1868.—A judgment obtained on an obligation incurred prior to the Constitution of 1868, could have been enforced on the lands of the judgment debtor, notwithstanding the allotment thereof as a homestead under another judgment, and is barred by the ten-year statute of limitations. Blow v. Harding, 161 N. C. 375, 77 S. E. 340.

As against the liens of judgment creditors, a mortgagor of lands is entitled to his homestead exemption in his equity of redemption and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Cheek v. Walden, 195 N. C. 752, 143 S. E. 465.

§ 729. Conveyed homestead not exempt.—The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the constitution, article ten, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (Rev., s. 686; 1905, c. 111.)

Construction of Constitution.—This section is in accordance with the views of the court, and expresses the proper construction of the Constitution, Article X, sec. 2. Chadbourn v. Sash, etc., Co. v. Parker, 153 N. C. 130, 69 S. E. 1.

Conveyance of Homestead.—The homestead exemption ceases upon its conveyance by the homesteader. Crouch v. Crouch, 160 N. C. 447, 449, 76 S. E. 482; Candle v. Morris, 160 N. C. 168, 173, 76 S. E. 17.

Title to exempt property does not pass to the trustee in bankruptcy, and where the debtor's homestead has been laid off and the lien of a judgment has attached thereto after the discharge of the bankrupt, the judgment creditor, under whose judgment the homestead was first laid off, may issue execution against the lands after the same has been conveyed by the homesteader. Watters v. Hedgpeth, 172 N. C. 310, 90 S. E. 314.

Same—Examination of Wife.—Where a homesteader seeks to convey his homestead, joinder and privy examination of the wife is necessary only when the homestead has been allotted. Dalrymple v. Cole, 170 N. C. 102, 104, 86 S. E. 988; Mayho v. Cotton, 69 N. C. 289, 292; Hager v. Nixon, 69 N. C. 108.

Section Not Retroactive.—By its express terms this section does not have a retroactive effect, and has no application to homesteads allotted prior to 1905. Watters v. Hedgpeth, 172 N. C. 310, 90 S. E. 314.

Under the section a vendee cannot acquire title under

color until seven years adverse possession since 1905. Crouch v. Crouch, 160 N. C. 447, 449, 76 S. E. 482.

Cited in Farris v. Hendricks, 196 N. C. 439, 442, 146 S. E. 77; Duplin County v. Harrell, 195 N. C. 445, 142 S. E. 481; Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 730. Sheriff to summon and swear appraisers.—Before levying upon the real estate of any resident of this state who is entitled to a homestead under this article, and the constitution of this state, the sheriff [a deputy sheriff designated by the sheriff, and who shall be twenty-one years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. (Rev., s. 687; Code, s. 502; 1893, c. 58; 1868-9, 137, s. 2; 1931, c. 58.)

Cross References.—As to the form of a certificate to be endorsed on return, see sec. 751 no. 4; as to resident within the meaning of this section, see annotations under sec. 728.

Editor's Note.—The Act of 1931 inserted the words in brackets in this section, and provided that the amendment should apply only to the counties of Guilford, Mecklenburg, Ashe, Jackson, Alamance, Martin, Brunswick, Davidson, Sampson, Davie, Randolph, Lenoir, Durham, Wilson, Cumberland, Scotland, New Hanover, Vance, Rowan, Henderson, Cabarrus, Pitt, Rockingham, Chowan, Gates, Perquimans, Pasquotank, Camden, Currituck, Hertford, Edgecombe, Harnett, Forsyth, Iredell, Lincoln, Bertie, Caldwell, Wayne, Halifax, Buncombe, Johnston, and Moore.

Public Laws 1933, c. 37, makes the amendment of 1931 applicable also in Duplin, Graham and Martin counties. Public Laws 1933, c. 147, made the amendment of 1931 applicable in Onslow county.

Duty of Officer Mandatory.—This section enjoins upon the sheriff the mandatory duty of summoning three discreet persons to appraise and allot a homestead to any judgment debtor who is entitled to such exemption, before levying an execution in his hands upon the land. Neither his ignorance of the rights of a debtor nor his obstinate refusal to recognize them will be allowed to defeat the latter's claim to the benefit of a homestead for which the Constitution provides, though the presumption of law prevails in favor of the legality of his action in selling until a party attacking it shows its invalidity because made in disregard of a statute enacted to carry into effect the organic law. Dickens v. Long, 112 N. C. 311, 316, 17 S. E. 150.

Costs on Creditor.—A sheriff who has an execution against a debtor entitled to a homestead should have such homestead laid off at the expense of the execution creditor. Lute v. Reilly, 65 N. C. 20; Taylor v. Rhyne, 65 N. C. 530.

Appraisers—Qualifications.—There is no requirement that appraisers in order to allot the homestead shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors," i. e., as ordinary or regular jurors. Hale Bros. v. Whitehead, 115 N. C. 28, 20 S. E. 166.

Same—Exception.—An exception on the ground of the disqualification of an appraiser of a homestead exemption should be taken before the appraisers enter upon the discharge of their official duties. Burton v. Spiers, 87 N. C. 87.

Same—May Be Appointed by Clerk.—For the allotment of a homestead, the court may direct the clerk to appoint three commissioners for that purpose. Benton v. Collins, 125 N. C. 83, 95, 34 S. E. 242.

Same—Constable May Summons.—A constable, to whom an execution from the court of a justice of the peace has been delivered, may summons appraisers and administer to them the prescribed oaths. McAuley v. Morris, 101 N. C. 369, 373, 7 S. E. 883.

Necessity That Appraisers Be Sworn.—Appraisers appointed to lay off a homestead must be sworn; and unless it appears that they were sworn the proceedings may be treated as a nullity. Smith v. Hunt, 68 N. C. 482.

Same—Oath Administered by Deputy Sheriff.—That appraisers laying off a homestead were sworn by a deputy sheriff is, at most, an irregularity, and can not be taken advantage of in a collateral proceeding if exceptions were not taken in apt time. Oates v. Munday, 127 N. C. 439, 37 S. E. 457.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 731. Duty of appraisers; proceedings on return.—The appraisers shall value the homestead with its dwelling and buildings thereon, and lay off to the owner or to any agent or attorney, in his behalf, such portion as he selects not exceeding in value one thousand dollars, and must fix and describe the same by metes and bounds. They must then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. The officer must likewise make a transcript of the return over his hand and return it without delay to the clerk of the court of the county from whence the execution issued, and said clerk must likewise file and make minute of the same as above directed. In all judicial proceedings the original return or a certified copy may be read in evidence. (Rev., ss. 688, 689; Code, ss. 503-4; 1868-9, c. 137, ss. 3-4; 1877, c. 272.)

Cross References.—As to appeal as to reallotment, see sec. 733. As to reallotment for increase of value, see sec. 732; As to form of appraisers return, see sec. 751. As to costs of laying of and appraising homestead, see sec. 1251.

Interpretation of Section.—The section, prescribing how the homestead shall be valued and laid off, is as broad and comprehensive in its terms and effect as it can be; properly interpreted, there is no exceptive provision in it, by implication or otherwise, as to any debt or class of debts; it allows, and in legal effect requires, that the homestead shall be valued and laid off in every case where it may be done. Long v. Walker, 105 N. C. 90, 118, 10 S. E. 858.

Valuation of Land and Buildings.—The section provides that "the appraisers shall thereupon proceed to value the homestead with its dwellings and buildings thereon, and lay off," etc. This evidently means that the land and buildings there shall be valued together in making up the estimate of a thousand dollars. Ray v. Thornton, 95 N. C. 571, 577.

Same—Must Not Exceed $1,000.—Where lands belonging to a judgment creditor are indivisible, he is not entitled to have the whole of it allotted to him as a homestead, if it exceeds one thousand dollars in value. Campbell v. White, 95 N. C. 491, 494.

Where the jury value the tract at $2,000, the land should be divided into two parts of equal value, and the homesteader will take his choice. Shoaf v. Frost, 123 N. C. 343, 344, 31 S. E. 653.

Same—When Less than $1,000.—An allotment of a homestead to the value of $800, laid off under execution, does not render the allotment void, especially when the plaintiff in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. Carstarphen v. Carstarphen, 193 N. C. 541, 137 S. E. 658.

Same—Conclusive.—The valuation placed on the tract of land by the jury is conclusive. Shoaf & Co. v. Frost, 123 N. C. 343, 344, 31 S. E. 653.

Same—May Take Present Value.—Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead. Leak v. Gay, 107 N. C. 482, 12 S. E. 315.

Same—Duty of Appraisers.—The duty of the appraisers extends no further than the valuation and allotment by bounds of the homestead. Aiken v. Gardner, 107 N. C. 236, 239, 12 S. E. 250.

In the allotment of a homestead the appraisers should estimate the value of the interest of the homesteader in the

land, taking into consideration any encumbrances thereon, and assign to him his interest in the land, and not the corpus itself. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 273.

Manner of Allotment.—The law does not intend that the defendant shall have the empty form of a homestead, but the substance as well, when he has land that may be laid off to him for that purpose, and this without reference to whether it embraces the dwelling house or not. Generally the dwelling house and buildings used therewith, must be embraced, but there may be reasons why this cannot be done, as when the land on which they are situated is encumbered for all or more than its value. Flora v. Robbins, 93 N. C. 38, 40.

Where a judgment debtor owned several town lots, some of which, including the one on which his dwelling was situated, in which he resided—were encumbered by prior liens (mortgages) to the extent of their full value, and the others were unencumbered, it was held, that he had the right to have his homestead allotted from the unencumbered lands without reference to whether they embraced his dwelling and other buildings. Flora v. Robbins, 93 N. C. 38.

Same—Must Be in Severalty.—There must be a specific allotment of the homestead in severalty without any community of interest between the homesteader and the purchaser of the excess. Campbell v. White, 95 N. C. 491, 494.

Debtor's Right to Select.—A judgment debtor is entitled to an opportunity to be present and exercise his constitutional right to select his homestead; and where it appears upon the face of the return that he was not present, by no fault of his own, the appraisal and allotment of a homestead under an execution is void. McKeithen v. Blue, 142 N. C. 360, 55 S. E. 285; McGowan v. McGowan, 122 N. C. 164, 29 S. E. 372.

Same—What Constitutes.—Where a mortgagor conveyed his personal property, more than $500 in value, with a clause in the deed reserving his "personal property exemption and to be selected by him" the title to the whole of it passed to the mortgagee and remained in him, until the exempted articles were legally set apart; and the act of executing a second mortgage conveying a part of said property is not a selection of such part, nor a separation of the same from the bulk. Norman v. Craft, 90 N. C. 211.

Description of Allotment.—When the land is sufficiently identified the allotment is not open to the objection that the homestead should have been fixed and described by metes and bounds. Kelly v. McLeod, 165 N. C. 382, 384, 81 S. E. 455; Ray v. Thornton, 95 N. C. 571.

Report of Appraisers.—The omission of appraisers to insert in their report the date of the allotment is not a sufficient ground for vacating it. Bevans v. Goodrich, 98 N. C. 217, 223, 3 S. E. 516.

It is allowable for appraisers of a homestead to amend their return before it has been filed. Gudger v. Penland, 118 N. C. 832, 834, 23 S. E. 921.

Same—When Registration Not Necessary.—It is not necessary to have the appraisers' return of the allotment of the homestead registered in the office of the Register of Deeds of the county in which the homestead is situated, (provided it is filed in the judgment roll of the action in which the judgment was rendered) in order to make the judgment lien valid and binding on the homestead until the homestead estate shall expire. The filing of the return in the judgment roll, is constructive notice to all who have dealings with the homesteader concerning the homestead. Bevan v. Ellis, 121 N. C. 224, 28 S. E. 471. See also, Carstarphen v. Carstarphen, 193 N. C. 451, 546, 137 S. E. 558; Crouch v. Crouch, 160 N. C. 447, 76 S. E. 482.

The unregistered allotment of a homestead is competent evidence, unless objected to in apt time. Gudger v. Penland, 118 N. C. 832, 833, 23 S. E. 921.

Same—As Notice of Extent.—The direction contained in the section as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, but to subject it to a motion made in a reasonable time to set it aside. Burton v. Spiers, 87 N. C. 87, 90.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 732. Reallotment for increase of value.—A judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which the homestead lies for an order for its reallotment, if there is in the hands of the sheriff of that county an execution issued from the proper court against said debtor. The application must be accompanied by the affidavits of three disinterested freeholders of the county in which the homestead lies, setting forth that, in their opinion, it has increased in value fifty per centum or more since the last allotment. Upon the filing of the application and affidavits the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of its service and show cause why his homestead should not be reallotted. The notice must state upon whose application it is issued. Upon the return day of the notice the clerk shall consider the affidavits filed, as heretofore required, and any additional affidavits filed by either party, and if he is of opinion that the homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to reallot to the judgment debtor his homestead, in the same manner as if no homestead had been allotted. If upon the reallotment any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. This section does not prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a reallotment of the homestead of his judgment debtor in any case. (Rev., s. 691; 1893, c. 149.)

As to costs, see sec. 1244.

Procedure for Reallotment.—If the increase is 50 per cent or more, the creditor may have a reallotment in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent, the judgment creditor can proceed by suit in the nature of an equitable action to subject the excess to his debt. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 273; Vanstory v. Thornton, 110 N. C. 10, 14 S. E. 637.

Where a portion of the land included in the allotment was subject to a mortgage prior thereto, and has since been sold thereunder, in making the reallotment it must clearly appear that this portion was not included in the revaluation. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 273.

Same—Intrinsic and Market Value.—If it appears, upon a reallotment of the homestead, that the value thereof has increased, it is immaterial in point of law whether the increase had come in the market value or in the intrinsic value, the effect is the same—the homestead is not to exceed in value the sum of $1,000. McCaskill v. McKinnon, 125 N. C. 179, 34 S. E. 273.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 733. Appeal as to reallotment.—From the order of the clerk commanding or refusing a reallotment, either party may appeal to the judge resident in or holding the courts of the district, who shall hear the matter in chambers in any county of the judicial district to which, belongs the county in which the proceedings were instituted. In other respects the proceedings upon such appeal are as now provided for appeals from the clerk on issues of law. (Rev., s. 691; 1893, c. 149.)

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 734. Levy on excess; return of officer.—The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be), who set off to X. Y. the homestead exempt by law. Levy made upon the excess." (Rev., s. 692; Code, s. 505; 1868-9, c. 137, s. 5.)

Cross Reference.—As to sale of the excess, see annotations to sections under Execution, Article 27, and Execution and Judicial Sales, Article 28.

The levy must be only upon the excess. Gardner v. McConnaughey, 157 N. C. 481, 483, 73 S. E. 125.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 735. When appraisers select.— If no selection is made by the owner, or any one acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make selection for him, including always the dwelling and buildings used therewith. (Rev., s. 693; Code, s. 506; 1868-9, c. 137, s. 6.)

When No Buildings on the Land.—If the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there is no dwelling house or other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provisions of the Constitution. McCracken v. Adler, 98 N. C. 400, 403, 4 S. E. 138; Flora v. Robbins, 93 N. C. 38; Murchison v. Plyer, 87 N. C. 79; Spoon v. Reid, 78 N C. 244.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465

§ 736. Homestead in tracts not contiguous.— Different tracts of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars. (Rev., s. 694; Code, s. 509; 1868-9, c. 137, s. 15.)

Application of Section.—While it may have been supposed by the framers of the organic law that a debtor would usually elect to have his homestead allotted in his dwelling-place and the surrounding land, his choice is not positively restricted to that, nor to contiguous land. Fulton v. Roberts, 113 N. C. 421, 425, 18 S. E. 510. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437; Flora v. Robbins, 93 N. C. 38

A homestead may be laid off in two tracts of land not contiguous, the two not exceeding $1,000 in value. Martin v. Hughes, 67 N. C. 293.

§ 737. Personal property appraised on demand. —When the personal property of any resident of this state is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf selects and to which he is entitled under this article and the constitution of the state, in no case to exceed in value five hundred dollars, which articles are exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption. (Rev., s. 695; Code, s. 507; 1868-9, c. 137, ss. 12, 13.)

Cross References.—As to summons, oath, and qualification of appraisers, see sec. 730, and annotations thereto. As to return made by appraisers, see sec. 731. As to oath and fees, see sec. 738. As to residents, see annotations under sec. 728. As to persons entitled to exemptions, see annotations under sec. 728. As to costs of appraisal and laying of exemptions, see sec. 1252.

As to right to claim income from life insurance policies as exempt, see note in 12 N. C. Law Rev., 67.

Section Subsidiary to Constitution.—This section was enacted to carry out the provisions of Art. X section 1. Jones v. Allsbrook, 115 N. C. 46, 49, 20 S. E. 170.

Continuation of Levy.—In Shepherd v. Murrill, 90 N. C. 208, 210, the language of the section, "whenever the personal property of any resident of this state shall be levied upon," etc., is held to mean, at any time, while it is levied upon, and the levy continues to the day of sale.

Same—Time of Allotment.—The complete capacity to make the allotment would always remain until the day of sale, and we can see no reason, certainly no substantial reason, why it might not be done on the day of the levy, or on any day before the sale, or on that day. Shepherd v. Murrill, 90 N. C. 208, 210.

Unlike the homestead exemption, which must be allotted before levying upon the land, the right to personal property exemption may be insisted on at any time before sale, or appropriation of the property by the court. Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321; Chemical Co. v. Sloan, 136 N. C. 122, 48 S. E. 577.

So long as an execution is in the officer's hands and in force, the preliminary action of the appraisers is in fieri and capable of correction and amendment, and it is a right both of the debtor and the creditor that the exemption shall be ascertained up to and just before the process is executed by a sale, so that, in behalf of the debtor, the exemption may be enlarged if any property to which he is entitled has been omitted, and so that, in behalf of the creditor, no exemption shall be allowed to the debtor if it appears at the sale that he is not entitled to the same. Jones v. Allsbrook, 115 N. C. 46, 20 S. E. 170.

Order of Court as Final Process.—The order of the court directing the payment of money is "final process," within the meaning of the Constitution and this section. Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321.

Debtor's Right of Selection.—It is immaterial how much, or what other personal estates, the debtor possessed, the statute gives him the right, when his property is seized under execution, to select such, not exceeding the limits in value, as he may prefer to retain as exempt. Scott v. Kenan, 94 N. C. 298, 303.

Property from Which Exemption is Made.—In laying off the personal property exemption of a debtor, the property upon which there is no lien must be first exempted. Cowan v. Phillips, 122 N. C. 72, 28 S. E. 961.

Same—Choses in Action.—A chose in action may be chosen by a debtor as a part of his exemption. Frost v. Naylor, 68 N. C. 325, cited in note in L. R. A. 1915 D. 382.

A judgment is personal property, and, if it was required to make up the amount to which the person, in whose favor it was rendered, is entitled to exemption, it is the duty of the officer having the execution to so allot it. Curlee v. Thomas, 74 N. C. 51, 54.

Property Not Subject to Exemption.—A tenant cannot claim his personal property exemption out of the crops, as against his landlord, until the rents are paid. Hamer v McCall, 121 N. C. 196, 197, 28 S. E. 297.

Fines and Costs in Criminal Action.—The personal property exemption cannot be claimed as against a fine and costs in a criminal action. State v. Williams, 97 N. C. 414, 415, 23 S. E. 370.

Value of Exemption.—The section merely follows the language of the Constitution, Art. X, Sec. 1, in giving each resident of the state a personal property exemption of $500, against execution as any other final process. Befarrah v. Spell, 178 N. C. 231, 233, 100 S. E. 321.

A debtor is entitled to $500 of personal property as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other personal property he may have exempted, up to the prescribed limit. Campbell v. White, 95 N. C. 344.

Right Personal to Debtor.—As far as personal property is concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is transferred. Lane v. Richardson, 104 N. C. 642, 10 S. E. 189.

Appraiser's Report.—When there has been a failure to levy under an execution on the property of a judgment debtor, a report of the jury of appraisers to set aside his personal property exemption will be void which does not set aside to him specifically the articles his exemption gives him, or allow him an opportunity to select the articles. Gardner v. McConnaughey, 157 N. C. 481, 73 S. E. 125.

Same—Made to Clerk.—The return of the appraisers of personal property exemptions should be made to the clerk of the superior court, but an allotment is not vitiated by making it returnable to another place. The court has power to direct the return to be made to the proper office, and it should exercise that power instead of dismissing the proceedings for defect in the return. McAuley v. Morris, 101 N. C. 369, 7 S. E. 883.

When Exception Not Regular.—Where a defendant's exceptions to an allotment did not comply with the requirements of the section and while the proceeding was not, in some respects, regular, but when it appears that the defendant's constitutional right has not been preserved, the matter of form becomes immaterial, and the facts having been found by the judge and all the parties are before the court, the proceeding may be treated as a motion in the cause and relief administered. McKeithen v. Blue, 142 N. C. 360, 55 S. E. 285.

§ 738. Appraiser's oath and fees.—The persons summoned to appraise the personal property exemption must take the same oath and are entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers must lay off both, and are entitled to but one fee. (Rev., s. 696; Code, s. 508; 1868-9, c. 137, s. 14.)

As to oaths required of homestead appraisers, see sec. 730.

Necessity of Oath.—Freeholders appointed to allot personal property exemptions must be sworn, and it must appear that they were sworn. Smith v. Hunt, 68 N. C. 482, 484.

§ 739. Returns registered.—It is the duty of the register of deeds to indorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. He shall receive for registering the returns the same fees allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of the returns by the register. (Rev., s. 698; Code, s. 513; 1868-9, c. 137, s. 9.)

§ 740. Exceptions to valuation and allotment; procedure.—If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to made upon demand, together with his objections in writing to said return. Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next term thereof as other civil actions, and such issue joined has precedence over all other issues of that term. The sheriff shall not sell the excess until after the determination of said action. The ten days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (Rev., s. 699; Code, s. 519; 1887, c. 272, s. 2; 1883, c. 357.)

As to proof of service, see section 489. As to costs of reassessment, see sec. 1252.

Editor's Note.—By the Act of 1868-69, ch. 137 it was provided that if a judgment creditor, or debtor entitled to a homestead, should be dissatisfied with the allotment of the appraisers, it should be the duty of the township trustees to examine the action of the appraisers, and make a report of their findings.

The township board of trustees was a quasi corporation, organized under the Constitution of 1868, with limited governmental functions. The duty of reassessing the allotments of homesteads, etc., was not one of its corporate powers, but was a duty imposed upon its individual members by the Legislature.

The Act of 1876-'77, ch. 141 abrogated several sections of Art. VII of the Constitution of 1868, including the one creating the Board of Township Trustees. The Board of County Commissioners was created to exercise the jurisdiction vested in and exercised by the boards of trustees of the several counties. But it would seem that the county commissioners were given only the corporate duties and powers of the boards of trustees, and not those duties and obligations imposed by legislative enactment. Hence, there was a failure to deposit elsewhere an appellate jurisdiction for revising the action of the appraisers. The remedy for a party, creditor or debtor aggrieved, seemed to be in a direct application to the court to which the execution and allotment were returnable, yet there was no basis for such procedure. The Legislature came to the relief of the situation by passing the Act of 1883, ch. 357; the the first section of which constitutes this section. See Hartman v. Spiers, 94 N. C. 150; Jones v. Commissioners, 85 N. C. 278; Burton v. Spiers, 87 N. C. 87, 90; Hartman v. Spiers, 87 N. C. 28, 31.

Estopped from Claiming Additional Allotment.—An allotment of a homestead to the debtor of lands less in value than one thousand dollars, regular in form and unobjected to within the time allowed by law, was an estoppel of the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. Whitehead v. Spivey, 103 N. C. 66, 9 S. E. 319.

Time of Application.—The application for a re-assessment of a homestead by the township board of trustees (now the superior court) must be made before the sale of the excess by the sheriff. Heptinstall v. Perry, 76 N. C. 190.

Service of Notice.—Notices of dissatisfaction with allotment of personal property exemption under the section cannot be served by mail or given orally. Allen v. Strickland, 100 N. C. 225, 6 S. E. 780.

Where Exception Filed.—Exceptions to the allotment of a homestead or personal property exemptions, in all cases, must be filed in the office of the clerk of the superior court of the county where the allotment is made, together with a transcript of the allotment or appraisement. McAuley v. Morris, 101 N. C. 369, 7 S. E. 883.

The section does not require that the exception be filed in the court of a justice of the peace if the judgment shall be in or the execution shall issue thereupon from that court. McAuley v. Morris, 101 N. C. 369, 371, 7 S. E. 883.

Appraiser's Return.—The return of the appraisers of the personal property exemption in question should regularly have been made by the constable to the clerk of the superior court of the county in which the appraisal was made, and filed there as directed in the statute; but that the return was inadvertently or improperly made to the court of the justice of the peace did not render the appraisal and allotment void. McAuley v. Morris, 101 N. C. 369, 372, 7 S. E. 883.

Collateral Attack of Allotment.—An allotment of a homestead cannot be collaterally attacked by the judgment debtor or anyone claiming under him. Formeyduval v. Rockwell, 117 N. C. 320, 325, 23 S. E. 488; Welch v. Welch, 101 N. C. 565, 570, 8 S. E. 156.

If he is dissatisfied therewith, he must present his objections in the manner prescribed by this section. Welch v. Welch, 101 N. C. 565, 8 S. E. 156.

Where a homesteader acquiesces in allotment of his homestead for many years, a grantee of the homesteader will not be permitted to defeat judgment creditors by proof of purchase in good faith for a full price. Oates v. Munday, 127 N. C. 439, 37 S. E. 457.

§ 741. Increase demanded; jury verdict; commissioners; report.—When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallotment is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being

sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next term of the court, when it shall be heard by the court upon exceptions thereto. (Rev., s. 700; 1885, c. 347.)

When Valuation by Jury Unnecessary.—Where the debtor designated the particular land which he desires to have allotted him as "an increase of exemption" and the creditors assent thereto, neither party can demand that the property shall be valued by a jury. Bevans, etc. & Co. v. Goodrich, 98 N. C. 217, 220, 3 S. E. 516.

Appointment and Summons of Commissioners.—Upon an appeal from the appraisal of a homestead and personal property exemptions and the assessment of the value thereof by a jury, the commissioners to set apart the exemptions in accordance with the verdict must be appointed by the court and summoned by the sheriff. Shoaf & Co. v. Frost, 116 N. C. 675, 21 S. E. 409.

Valuation by Jury Is Final.—Upon an appeal from an appraiser the valuation as determined by the verdict of the jury is final and the commissioners appointed by the court to set apart the exemptions in accordance with the verdict must be guided by that valuation. Shoaf & Co. v, Frost, 116 N. C. 675, 21 S. E. 409; Shoaf & Co. v. Frost, 121 N. C. 256, 28 S. E. 412.

§ 742. Undertaking of objector.—The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors under execution or petition must file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party of such costs as are adjudged against him. (Rev., s. 701; Code, s. 522.)

§ 743. Set aside for fraud, or irregularity.—An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court at term time, as hereinbefore provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value. (Rev., s. 702; Code, s. 523.)

Cross References.—As to reallotment for increase of value, see sec. 732; as to appeal as to re-allotment, see sec. 733.

When Reason Not Sufficient.—An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the homesteader. Ray v. Thornton, 95 N. C. 571.

Where the homestead has once been regularly allotted and set apart, it cannot be re-allotted at the instance of a judgment creditor whose debt was in existence when the allotment was made, except for fraud or other irregularity. Gully v. Cole, 96 N. C. 447, 1 S. E. 520. This case was decided before the enactment of Secs. 732, 733.

§ 744. Return registered; original or copy evidence.—When the homestead and personal property exemption is decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Rev., s. 703; Code, s. 524.)

Object of Section.—The object of the section is to give notice to all persons dealing with the owner of the homestead, that it is his homestead, not subject to be sold "under execution" or other final process obtained on any debt against him. Gully v. Cole, 96 N. C. 447, 449, 1 S. E. 520.

§ 745. Allotted on petition of owner.—When any resident of this state desires to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the state constitution, or by this article, such resident, his agent or attorney, must apply to a justice of the peace of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the justice, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, sign and return a descriptive list thereof to the register of deeds. (Rev., s. 697, 704; Code, ss. 511, 512; 1868-9, c. 137, ss. 7, 8.)

Cross Reference.—As to form of petition, see section 751, no. 2; as to form for return, see sec. 751 no. 3; As to who is a resident within the meaning of the section, see annotations under sec. 728; as to qualifications of assessors, see annotations under sec. 730; as to precedure generally see annotations under secs. 728-731.

Who May Petition.—In Hughes v. Hodges, 102 N. C. 236, 254, Merrimon, J., dissenting, said as follows:

"It is not true that the homestead right is operative and beneficial only when the owner is in debt, or pressed by 'final process, obtained on any debt.' It is ever operative; the owner has the right, though he might owe nothing, and be possessed of great wealth, his wife and children have the benefit of it, and he could divest himself of it only with the assent of his wife. He might have it valued and laid off to him at any time, though ordinarily he would not do so."

Nature of Proceedings.—The allotment of a homestead is a quasi in rem proceeding. Williams v. Whitaker, 110 N. C. 393, 395, 14 S. E. 924.

Return of Appraisers.—A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the section requires. Ray v. Thornton, 95 N. C. 571.

Same—Descriptive List.—Appraisers of personal property for exemption, must make such a descriptive list of the property as will enable creditors to ascertain what property is exempt. Smith v. Hunt, 68 N. C. 482, 484.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 746. Advertisement of petition; time of hearing.—When a person entitled to a homestead and personal property exemption files the petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the justice shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than twelve months from the day of making advertisement as above required. (Rev., s. 705; Code, s. 515; 1868-9, c. 137, s. 11.)

Who Are Bound.—Only those persons having actual or constructive notice are bound thereby. Williams v. Whitaker, 110 N. C. 393, 14 S. E. 924.

§ 747. Exceptions, when allotted on petition.—When the homestead or personal property ex-

emption is allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of the assessment or appraisal, and upon ten days notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of that county, who shall place them on the civil issue docket, and they shall be tried as provided for homestead and exemptions set off under execution. (Rev., s. 706; Code, s. 520.)

§ 748. Allotted after death of homesteader.—If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of twenty-one years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (Rev., s. 707; Code, s. 514; 1893, c. 332; 1868-9, c. 137, s. 10.)

As to widows and minor children entitled to homestead, see annotations under Sec. 728.

Purpose and Constitutionality.—The manifest purpose of the section is to prevent the widow and minor children from being prejudiced by the failure of one entitled to a homestead to cause it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution when its professed object is to carry into effect its provisions. Watts v. Leggett, 66 N. C. 197.

Widow Entitled to Homestead.—A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even though no homestead was allotted to him during his life. Smith v. McDonald, 95 N. C. 163.

But a widow cannot, under this section, have a homestead laid off for herself and minor children after the death of her husband when he died without leaving debts. Hager v. Nixon, 69 N. C. 108.

Unborn Child Entitled to Allotment.—A child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted from the homestead of its father. In Re Seabolt, 113 Fed. 766, 771.

When to "Widow and Minor Children".—The fact that an assignment of a homestead was made to "the widow and minor children" of decedent does not make it void, since it will be considered surplusage as to the widow. Formeyduval v. Rockwell, 117 N. C. 320, 23 S. E. 488.

When Homestead Can Not Be Divested.—A homestead, whether laid off to a husband in his lifetime, or to his widow (there being no children), after his death, can not be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. Tucker v. Tucker, 103 N. C. 170, 9 S. E. 299.

Widow Not Entitled to Exemption of Personalty.—The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her. Smith v. McDonald, 95 N. C. 163.

§ 749. Liability of officer as to allotment, return and levy.—Any officer making a levy, who refuses or neglects to summon and qualify appraisers as heretofore provided, or fails to make due return of his proceedings, or levies upon the homestead set off by appraisers or assessors except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action. (Rev., ss. 708, 3584; Code, s. 516; 1868-9, c. 137, s. 17.)

Officer's Breach of Duty.—The section subjects the sheriff to indictment and to liability on his official bond for disregard or non-performance of his duty under the provisions of the law relating to homestead and personal property exemptions. Welch v. Welch, 101 N. C. 565, 569, 8 S. E. 176; Mebane v. Layton, 89 N. C. 396, 400. Richardson v. Wicker, 80 N. C. 172, 174; State v. Barefoot, 104 N. C. 224, 228, 10 S. E. 170.

And for such a breach of duty, an action on the officer's official bond lies in favor of the debtor. Scott v. Kenan, 94 N. C. 298, 302.

Where a complaint alleges that a judgment debtor demanded his personal property exemptions in apt time, but that the sheriff failed and refused to allot it to him, and afterwards sold the property and applied the money to executions in his hands, it sufficiently alleges a breach of the bond. Scott & Burton v. Kenan, 94 N. C. 298.

Same—Measure of Damages.—The measure of damages is the actual loss sustained, and not the value of the property at the time of the levy. Jones v. Allsbrook, 115 N. C. 46, 53, 20 S. E. 170.

Cited in Cheek v. Walden, 195 N. C. 752, 754, 143 S. E. 465.

§ 750. Liability of officer, appraiser, or assessor, for conspiracy or fraud.—Any officer, appraiser, or assessor who willfully or corruptly conspires with a judgment debtor, judgment creditor, or other person, to undervalue or to overvalue the homestead or personal property exemption of a debtor, or applicant, or assigns false metes and bounds, or makes or procures to be made a false and fraudulent return thereof, is guilty of a misdemeanor and is liable to the party injured thereby for all costs and damages in a civil action. (Rev., ss. 690, 3585, 3586; Code, ss. 517, 518; 1868-9, c. 137, ss. 18, 19.)

Duty of Sheriff.—It is the duty of a sheriff to lay off the homestead of the defendant in the execution, and to sell the excess in a prudent and just manner so as to realize a fair price. Andrews v. Pritchett, 72 N. C. 135, 137.

§ 751. Forms.—The following forms must be substantially followed in proceedings under this article:

[No. 1]

Appraiser's Return.

When the homestead is valued at less than one thousand dollars, and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of ..... Township, ... County, by C. D., Sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of.....and .....is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to

the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this..... day of ....., 19 .....

O. K.....[L. S.]
L. M.....[L. S.]
R. S.....[L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D.....(Sheriff or Constable.)

[No. 2]

Petition for Homestead before a Justice of the Peace.

Before....., J. P.
.....County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal exemption, and report according to law.

[No. 3]

Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of ..... Township, ... County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit: ..... which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this ..... day of ..... 19 .....

O. K.....[L. S.]
L. M.....[L. S.]
R. S.....[L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable.)

[No. 4]

Certificate of Qualification to be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the ..... exemption of the said A. B., under an execution in favor of X. Y., this .....day of 19.....

C. D.....(Sheriff).

[No. 5]

Minute on Execution Docket.

X ..... Y .....
vs
A ..... B .....
Execution issues ....., 19 .....
Homestead appraised and set off and return made ....., 19 ..... (Rev., s. 709; Code, s. 524.)

SUBCHAPTER XII. SPECIAL PROCEEDINGS

Art. 32. Special Proceedings

§ 752. Chapter applicable to special proceedings.—The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Rev., s. 710; Code, s. 278.)

Statutory Provisions.—The provision that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, etc.," contained in section 456 is applicable in special proceedings. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025; but in an action by the heirs at law for partition of an intestate's lands, the administrator cannot be made a party defendant, upon his opposition to the partition, as he does not come within the foregoing provision. Garrison v. Cox, 99 N. C. 478, 6 S. E. 124.

§ 753. Contested special proceedings; commencement; summons. — Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall command the officer to summons the defendant or defendants to appear and answer the complaint of the plaintiff within thirty days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint within the time specified, plaintiff will apply to the court for the relief demanded in the complaint. The return date of the summons, the manner of service, whether by the sheriff or by publication shall be as is prescribed for summons in civil actions by section four hundred and seventy-six (476) of the Consolidated Statutes; provided, however, the clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. Provided, however, that in special proceedings before the Clerk, the plaintiff or petitioner shall not be required to serve a copy of the petition upon each of the defendants, as required in civil actions, but in lieu thereof such petitioner or petitioners may deliver to the Clerk at the time of the issuance of the summons copies (not to exceed three) of the petition for the use of the defendants; and provided, further

that the summons in special proceedings shall command the sheriff or other proper officer to summons the defendant, or defendants, to appear and answer the complaint of the plaintiff within ten (10) days after its service upon defendant or defendants in lieu of thirty (30) days as required in civil actions. (Rev., ss. 711, 712; Code, ss. 279, 287; 1868-9, c. 93, s. 4; 1927, c. 66, s. 753; 1929, cc. 50, 237, s. 3.)

Editor's Note.—This section was amended twice by Public Laws of 1929. Ch. 50 changed the second sentence which formerly read: "The summons shall command the officer to summons the defendant to appear at the office of the Clerk of the Superior Court on a day named in the summons, to answer the complaint or petition of the plaintiff." Ch. 237, also amended the second sentence and added the proviso.

Condemnation Proceedings.—A special proceeding for the purpose of condemning land for railroad purposes must be begun by the issuance of a summons. Carolina R. R. Pennearden Lumber Co., 132 N. C. 644, 650, 44 S. E. 358.

No Sessions of Court in Proceedings Before Clerk.—There are no terms or sessions of court for proceedings pending before the clerk, each case having its own return day; and a demurrer to a petition or written motion made and entitled in the original cause in proceedings for partition before the clerk to set aside a judgment therein, on the ground that it fails to state the term at which it was rendered, is bad. Hartsfield v. Bryan, 177 N. C. 166, 98 S. E. 379.

Duty of Clerk to Issue Execution.—It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. Kinney v. Laughenour, 97 N. C. 325, 329, 2 S. E. 43.

Some form of action or special proceeding is essential to the rendition of a judgment and in this state it must always be commenced by summons or attachment. Morris v. House, 125 N. C. 550, 560, 34 S. E. 712.

Less Than Ten Days Notice Given.—When the time between service and the return day of the summons is less than the time allowed by this section the clerk is not bound to dismiss the action, but should allow further time to the defendant for an appearance. Stafford v. Gallops, 123 N. C. 19, 23, 31 S. E. 265, and a judgment so rendered is not void but merely irregular. Id.

Where Service Made Returnable to Court in Term.—Where a summons in a special proceeding was improperly made returnable to the superior court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. Simmons v. Norfolk, etc., Steamboat Co., 113 N. C. 147, 18 S. E. 117.

§ 754. Return of summons.—The officer to whom the summons is addressed shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (Rev., s. 713; Code, s. 280; C. C. P., s. 75.)

Cross Reference.—See section 475 et seq. and notes thereto.

The failure of the clerk to note on the summons the day it was received is irregular but does not render the summons void. Strayhorn v. Blaloch, 92 N. C. 292, 294.

Before Whom Returnable.—The summons in special proceedings is returnable before the clerk. Tate v. Powe, 64 N. C. 644

"Service" Prima Facie Sufficient.—When the sheriff returns that he has "served" the summons, this is **prima facie** sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. Strayhorn v. Blaloch, 92 N. C. 292, 294.

Fees—Under the practice of the Code of Civil Procedure a sheriff is not required to **execute** process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a **return** of the process. A writ of summons is a mandate of the court, and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. Jones v. Gupton, 65 N. C. 48; Johnson v. Kenneday, 70 N. C. 436.

§ 755. When complaint filed.—The plaintiff must file his complaint or petition with the clerk of the court to which the summons is returnable, at the time of issuing the summons or within ten days thereafter. (Rev., s. 714; Code, s. 281; C. C. P., s. 76; 1876-7, c. 241, s. 4.)

Regular Action Bars Right to Special Proceedings.—Where an action in the nature of a creditor's bill was brought by the plaintiff (a creditor of defendant's testatrix) to the superior court at term time, and after the institution of the action the defendant commenced a special proceeding in the probate court for a sale of the land of his testatrix for assets, it was held, that the superior court had acquired jurisdiction of the matter, and that the defendant should be restrained from further proceedings in the probate court. Haywood v. Haywood, 79 N. C. 42.

§ 756. Nonsuit for failure to file.—If the plaintiff fails to file his complaint or petition within the time limited by the summons for the appearance and answer of the defendant, the defendant may demand judgment of nonsuit against the plaintiff. (Rev., s. 715; Code, s. 282; C. C. P., s. 78.)

§ 757. Filing time enlarged.—The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applving had no control, or by the fraud of the opposing party. (Rev., s. 716; Code, s. 283; C. C. P., s. 79.)

Power of Clerk Extinguished.—Where the power of the clerk to enlarge the time allowed for the filing of an answer no longer exists where he refused the motion for the removal of an administrator from office and on appeal the order is reversed and the case remanded. Patterson v. Wadsworth, 94 N. C. 538, 540.

§ 758. Defenses pleaded; transferred to civil issue docket; amendments.—In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (Rev., s. 717; 1903, c. 566.)

Clerk Must Transfer Case Where Equitable Defense Pleaded.—"When a party shall plead any equitable or other defence, or ask for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the Judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits." Little v. Duncan, 149 N. C. 84, 85, 62 S. E. 770.

Questions of Fact Decided by Clerk.—Questions of fact are first determined by the clerk and on appeal they are subject to review by the judge. Vanderbilt v. Roberts, 162 N. C. 273, 78 S. E. 156.

Clerk May Not Grant Affirmative Equitable Relief.—The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered. Vance v. Vance, 118 N. C. 864, 24 S. E. 768.

Right to Jury Trial.—In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for

trial by jury. Southern R. Co. v. Porter, 105 N. C. 246, 247, 11 S. E. 328.

Same—Alimony without Divorce.—When in special proceedings for alimony without divorce, the right of trial by jury arises and the case should be transferred by the judge to the civil issue docket for the purpose. Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

Same—Waiver.—Where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury. Southern R. Co. v. Porter, 105 N. C. 246, 248, 11 S. E. 328.

Boundary Disputes.—For full treatment of partitioning of land and settlement of boundary disputes, see section 361 et seq. and the notes thereto.

Amendments on Appeal.—In cases of appeal from the probate court (now the clerk of the superior court) to the superior court the judge has the same right to allow amendments as if the case had been constituted in his court. Sudderth v. McCombs, 67 N. C. 353.

Evidence Considered Upon Appeal.—If there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. Mills v. McDaniel, 161 N. C. 112, 76 S. E. 551.

§ 759. Ex parte; commenced by petition.—If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (Rev., s. 718; Code, s. 284; 1868-9, c. 93.)

Judgment Creditors May Become Parties.—Where the executor has filed a proper petition for the sale of realty to pay debts, the judgment creditors interested in the surplus, if not made parties, and desiring to contest one of the debts set out in the partition for fraud, may make themselves parties and proceed therein accordingly, the procedure being **ex parte** on the part of the executor and an independent action by them will not lie for fraud until after final judgment in the proceedings. Wadford v. Davis, 192 N. C. 484, 135 S. E. 353.

§ 760. Clerk acts summarily; authority from nonresident.—In cases under the preceding section, if all persons to be affected by the decree, or their attorney, have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. If any of the petioners reside out of the state, an authority from them, to the attorney, in writing, must be filed with the clerk before he may make any order or decree to prejudice their rights. (Rev., s. 719; Code, s. 285; 1868-9, c. 93, s. 2.)

All Parties Interested Must be Joined.—When in special proceeding, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain persons of age were not made parties, or that they have not appeared as such in person or by attorney, or have waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face. Moore v. Rowland Lumber Co., 150 N. C. 261, 63 S. E. 953.

§ 761. Judge approves when petitioner is infant.—If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (Rev., s. 720; Code, s. 286; 1887, c. 61; C. C. P., s. 420; 1868-9, c. 93, s. 3.)

Infants Represented by Guardian.—In an **ex parte** proceeding to sell land for assets infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. Harris v. Brown, 123 N. C. 419, 424, 31 S. E. 877.

Same—Where Represented by Administrator.—While it is irregular for the administrator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. Harris v. Brown, 123 N. C. 419, 420, 31 S. E. 877.

Who May Approve.—An emergency judge has the same jurisdiction for making approvals under this section as has the regular judge of the superior court. See discussion in 1 N. C. L. Rev. 284.

One who joins as infant in a petition is bound by the judgment, though it is not approved by the judge of the court. Lindsay v. Beaman, 128 N. C. 189, 190, 38 S. E. 811.

Court Presumed to Have Protected Interests of Infants.—Where the lands of infants are sold under an order of the superior court upon an **ex parte** petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N. C. 112, 9 S. E. 634.

Cited in Ward v. Agrillo, 194 N. C. 321, 323, 139 S. E. 451.

§ 762. Orders signed by judge.—Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of term, must be authenticated by his signature. (Rev., s. 722; Code, s. 288; 1868-9, c. 93, s. 5; 1872-3, c. 100.)

Section, While Directory, Should Always Be Observed.—"We have a plain provision in our statute law requiring every judgment granted by a judge to be signed by him. And this Court has held that this statute, apparently mandatory, should always be observed; still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge." Range Co. v. Carver, 118 N. C. 328, 338, 24 S. E. 352. Matthews v. Joyce, 85 N. C. 258; Rollins v. Henry, 78 N. C. 342; Keener v. Goodson, 89 N. C. 273; Spencer v. Credle, 102 N. C. 68, 8 S. E. 901; Bond v. Wool, 113 N. C. 20, 18 S. E. 77.

§ 763. Reports of commissioners and jurors.—Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within twenty days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (Rev., s. 723; 1893, c. 209.)

Confirmation Discretionary with the Court.—The confirmation by the court, if no exception is filed to the report within the twenty days after it is filed with the clerk, lies within the discretion of the court. Ex parte Garrett, 174 N. C. 343, 93 S. E. 838; but in partition proceedings it is obligatory for the court to confirm the same. Id.

Proceedings to Sell Land Appealable.—A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealed from the clerk of the Superior Court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N. C. 445, 102 S. E. 772.

Same—Jurisdiction of Judge.—The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the Superior Court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties require it. Perry v. Perry, 179 N. C. 445, 102 S. E. 772.

Power of Clerk.—The clerk has no power to confirm a

sale reported by a commissioner until the expiration of twenty days from the date on which the report was filed. Vance v. Vance, 203 N. C. 667, 668, 166 S. E. 901.

Applied in Buncombe County v. Arbogast, 205 N. C. 745, 172 S. E. 364.

§ 764. No report set aside for trivial defect.—No report or return made by any commissoners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (Rev., s. 724; Code, s. 289; 1868-9, c. 93, s. 7.)

Report Conclusive until Set Aside.—The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. Norfolk Southern R. Co. v. Ely, 101 N. C. 8, 7 S. E. 476.

Substantial Rights Affected.—The omission in a report of commissioners to make partition of lands to state affirmatively that the allotments in their opinion were equal in value, affects the substantial rights of the parties, and the clerk or judge may set it aside with directions, either that the commissioners shall make a reallotment, or that others shall be appointed to do so. Skinner v. Carter, 108 N. C. 106, 12 S. E. 908.

Description of Land Unnecessary. — A report of the commissioners is not invalid because it does not contain a description. Hanes v. R. R., 109 N. C. 490, 491, 13 S. E. 896; nor is it mandatory that such report be under seal. Id.

§ 765. Commissioner of sale to account in sixty days.—In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceeding before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner's fee, earned by said commissioner in said action or special proceeding. (Rev., s. 725; 1901, c. 614, ss. 1, 2; 1933, c. 98.)

Editor's Note.—The last two sentences of this section, giving the clerk power to force a final settlement, were added by Public Laws 1933, c. 98.

Applied in Peal v. Martin, 207 N. C. 106, 176 S. E. 282.

§ 766. Commissioners selling land for reinvestment, etc., to give bond.—Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale or for any other purpose, and the proceeds from such sale are held by a commissioner or other officer designated by the court to receive such money, for purposes of reinvestment or otherwise, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the state of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling of reinvestment of said funds and for the faithful and final accounting of the same to the parties interested; but the court in its discretion may waive the requirement of such bond in those cases where the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers direct to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1919, c. 259; 1935, c. 45.)

Editor's Note.—Prior to the amendment of 1935 the clause at the end of the first sentence provided that the court could dispense with the bond where it was not contemplated that the money would be ultimately reinvested under the direction of the court. Section two of the amendatory act provides that within sixty days of ratification the secretary of state shall send certified copies of the act to various judges and clerks. It also specifies that the act does not apply in Duplin county.

Bond.—Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc.; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. Midyette v. Lycoming Timber & Lumber Co., 185 N. C. 423, 117 S. E. 836. See also, Pools v. Thompson, 183 N. C. 588, 112 S. E. 323.

§ 766(a). Action in which clerk may allow fees of commissioners; fees taxed as costs.—In all civil actions and special proceedings instituted in the superior court in which a commissioner, or commissioners, are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority and he is hereby authorized and empowered to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services performed under such order, decree or judgment, which fee shall be taxed as a part of the costs in such action or proceeding, and any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1923, c. 66, s. 1.)

§ 766(b). Jurisdiction and authority of emergency judges.—In all special proceedings where it is now required by law that the orders, judgments and decrees of the clerk shall be approved or heard by the judge of the superior court, the emergency judges shall have full power and authority and jurisdiction to hear and determine such matters under the course and practice of the court. (1923, c. 66, s. 2.)

This section is limited by Art. IV, § 11 of the Constitution, which provides that special and emergency judges shall have the power and authority of regular judges in the courts which they are appointed to hold. Hence an emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency judge is not holding court in the county. Ipock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 175 S. E. 127.

SUBCHAPTER XIII. PROVISIONAL REMEDIES

Art. 33. Arrest and Bail

§ 767. Arrest only as herein prescribed.—No person may be arrested in civil action except as prescribed by this article, but this provision shall not apply to proceedings for contempt. (Rev., s. 726; Code, s. 290; C. C. P., s. 148.)

Cross References.—As to execution against the person, see section 673. On the general subject of arrest in civil actions, see 1 Enc. Dig. 922-950 and 13 Enc. Dig. 175-176. As to arrest in criminal actions, see Art. 5, ch. 83 on Criminal Procedure. As to bail in criminal action, see Art. 8, ch. 83 on Criminal Procedure.

Editor's Note.—Statutes authorizing arrest in civil cases are in derogation of personal liberty and should be strictly construed; the conditions are jurisdictional and not directory.

Article I, section 16 of the state Constitution provides that "There shall be no imprisonment for debt in this state except for fraud." This provision of the Constitution has no application to actions of tort but is confined to actions arising ex contractu. Long v. McLean, 88 N. C. 3.

The words except in cases of fraud are very broad, and they comprehend not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but embraces also fraud in making the contract, false representations, for instance, and fraud in increasing the liabilities, as when an administrator, by applying the funds of the estate to his own use, paying his own debts, and the like. Powers v. Davenport, 101 N. C. 286, 293, 7 S. E. 747; Melvin v. Melvin, 72 N. C. 384.

Now, in order to avoid a violation of this article of the Constitution and at the same time protect honest creditors against dishonest debtors, it devolved upon the legislature, in cases of fraud, to enact such laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This is done in this and the following sections. Preiss v. Cohen, 117 N. C. 54, 59, 23 S. E. 162.

Section 1621 Applies.—Parties arrested and in custody, in pursuance of the provisions contained in this and the following sections, if the order of arrest is not vacated "on motion," must seek their discharge in the mode prescribed in sec. 1621. Wingo v. Watson, 98 N. C. 482, 485, 4 S. E. 463; Preiss v. Cohen, 117 N. C. 54, 60, 23 S. E. 162.

Application to Partnership.—Where a partnership has terminated and all debts have been paid and the partnership affairs otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one against the other, and if the facts bring the claim within the provisions of this article on arrest and bail, the plaintiff is entitled to this ancillary remedy. Ledford v. Emerson, 140 N. C. 288, 52 S. E. 641.

Where Judgment of Nonsuit Reversed.—Where there has been a motion for an order of arrest and bail under this section, and a judgment of non-suit is reversed, the motion may be reviewed. Hensley v. Helvenston, 189 N. C. 636, 127 S. E. 625.

For definition of arrest see State v. Buxton, 102 N. C. 129, 8 S. E. 774; Journey v. Sharpe, 49 N. C. 165, 167; Hadley v. Tinnin, 170 N. C. 84, 86 S. E. 1017.

§ 768. In what cases arrest allowed.—The defendant may be arrested, as hereinafter prescribed, in the following cases;

1. In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the state or is about to remove therefrom, or where the action is for injury to person or character, or for injuring, or for wrongfully taking, detaining or converting real or personal property.

See note under § 673.

In General.—In Hoover v. Palmer, 80 N. C. 313, 315, the court said: It is fair to conclude that the legislature in providing for arrest and bail in an action for injury to person used those words—injury to person—according to their established legal signification in the classification of rights and injuries thereto as taught in the elementary writers, and, thus considered, the language employed in legal effect authorized, as we think, an arrest for all those injuries (seduction included) which may be suffered in respect of any rights of person, absolute or relative. This, we hold, was intended to be and is the proper construction of the section.

A nonresident of the state may be arrested here in a civil action in like manner with a resident for sufficient cause under this section, but he may not be arrested and held to bail in a civil action instituted in this state for no cause other than that of nonresidence; to subject a nonresident to liability on the sole ground of his nonresidence would transgress his right of free ingress and egress and would abrogate his constitutional guaranty of immunity. Little v. Miles, 204 N. C. 646, 650, 169 S. E. 220.

Mere Negligence Insufficient.—A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property; in order to justify such execution under this section and section 673, the injury must have been intentionally or maliciously inflicted, i. e., with some element of violence, fraud, or criminality. Oakey v. Lasater, 172 N. C. 96, 89 S. E. 1063.

Wrongful Conversion. — Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. Doyle v. Bush, 171 N. C. 10, 86 S. E. 165.

In Action for Libel.—An arrest in an action for libel is not within the provisions of the Constitution (Art. I, § 16) prohibiting imprisonment for debt. Moore v. Green, 73 N. C. 394.

Slander of Title.—Although it was not necessary in the case to decide the precise point, the court stated in Sneeden v. Harris, 109 N. C. 349, 354, 13 S. E. 920 that it was questionable whether an action for slander of title was embraced by this article on arrest and bail.

Seduction.—The seduction of a daughter, being an infringement of the father's relative rights of persons, is an injury to his person within the meaning of this section, and a sufficient ground for the arrest of the defendant in an action for such tort. Hoover v. Palmer, 80 N. C. 313. It involves also fraud and deceit ex vi termini. Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397. See also the next subsection as to seduction.

This section was mentioned as applying to injury to character in Michael v. Leach, 166 N. C. 223, 225, 81 S. E. 760. As applying to injury to person in Howie v. Spittle, 156 N. C. 180, 181, 72 S. E. 207.

Cited in Foster v. Hyman, 197 N. C. 189, 190, 148 S. E. 36; Braxton v. Matthews, 199 N. C. 484, 154 S. E. 735. E. 215.

2. In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

Editor's Note. — Originally, this section contained the words "in an action on a promise to marry." In Moore v. Mullen, 77 N. C. 327, the court held this provision to be in conflict with Art. I, section 16 of the Constitution. Soon thereafter this provision was stricken out of the section by the legislature and the word "seduction" substituted. This seems to be a legislative construction that where a woman should sue for the seduction, instead of a mere breach of promise, an arrest would lie. Hood v. Sudderth, 111 N. C. 215, 221, 16 S. E. 397.

In General.—This section is plain and very comprehensive in its terms and purpose. It intends, certainly, to embrace all cases where the relation of trust and confidence, in respect to money received by, or personal property in the possession of one party for the benefit of another, is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff. Travers v. Deaton, 107 N. C. 500, 503, 12 S. E. 373; Boykin v. Maddrey, 114 N. C. 89, 98, 19 S. E. 106; Chemical Co. v. Johnson, 98 N. C. 123; 3 S. E. 723; Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

The section gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail, that he may the better compel his unfaithful agent or

trustee to make amends for his unfaithfulness, and it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was a breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. Boykin, etc. Co. v. Maddrey, 114 N. C. 89, 100, 19 S. E. 106.

Applications of the Section.—Where a firm of merchants gave to manufacturers of fertilizers its note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. Boykin, etc. Co. v. Maddrey, 114 N. C. 89, 19 S. E. 106.

One who fraudulently conveys property held by him as trustee can be legally arrested under this section. Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.

An action for seduction may be brought under this section by the woman seduced, and an order for the arrest of the defendant may be granted in such action. Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397. As to parent bringing action, see Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43.

A defendant, in an action for money received or property fraudulently misapplied by him as agent, may be arrested under the provisions of this section. Gossler v. Wood, 120 N. C. 69, 27 S. E. 33.

This section applies to arrest for alienating the affections of a wife. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 898.

Fraud Committed in Another State.—The fact that the fraud for which the defendant was arrested was committed in another state is no ground for immunity from arrest, under this section, authorizing arrests for frauds in fiduciary transactions. Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

When Partner Liable.—Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance, or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, from such knowledge and acts, for all the purposes of arrest and bail. Boykin, etc. Co. v. Maddrey, 114 N. C. 90, 19 S. E. 106.

Insolvent May Be Arrested.—An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied. Carroll v. Montgomery, 128 N. C. 278, 38 S. E. 874.

Non-resident Liable.—A non-resident of this State may be arrested and held to bail for fraud under this section. Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

3. In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

No Arrest Unlesss Action Pending.—Where plaintiff brought an action against defendant, setting out two causes of action, one on a note and the other for embezzlement, and judgment was rendered on the note by default but no judgment was entered upon the other cause and it was removed from the docket, no order of arrest was permissible under this section since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. Stewart v. Bryan, 121 N. C. 46, 28 S. E. 18.

Contract Action Not Affected.—Where, in an action on contract, the plaintiff alleges fraud and deceit on the part of the defendant and sues out the ancillary process of arrest and bail, this does not change the nature of the contract action. Copeland v. Fowler, 151 N. C. 353, 355, 66 S. E. 215.

Fraud Necessary for Arrest under Section.—A defendant cannot be arrested under this section, unless he has been guilty of fraud in contracting the debt for which the action is brought. McNeely v. Haynes, 76 N. C. 122.

A debt is fraudulently contracted where a purchase of property is made with an intent on the part of the purchaser not to pay for the same. See 69 Ohio State Reports, 311, construing the similar provision of the Ohio Code.

Section Applies to Subsequent Fraud.—A person may be arrested and held to bail for a fraud committed after the contracting of the debt—e. g.—by concealing property, or other devices for the purpose of defeating his creditor. Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

Partner Must Have Knowledge.—One partner can not be arrested for the fraud of his copartner of which he had no knowledge, and in which he in nowise connived. McNeedy v. Haynes, 76 N. C. 122; Boykin, etc. Co. v. Maddrey, 114 N. C. 89, 101, 19 S. E. 106.

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

No woman shall be arrested in any action except for a willful injury to person, character or property, and no person shall be arrest on Sunday. (Rev., s. 727; Code, s. 291; C. C. P., s. 149; 1869-70, c. 79; R. C., c. 31, s. 54; 1777, c. 118, s. 6; 1891, c. 541.)

In General.—The words "removed, or disposed of" used in this section are of different and broader meaning than the words in subsection 2, supra, and are broad enough to comprehend real estate. Durham Fertilizer Co. v. Little, 118 N. C. 808, 818, 24 S. E. 664.

That there can be no arrest on Sunday, see White v. Morris, 107 N. C. 93, 99, 12 S. E. 80.

Fraudulent Conveyance.—One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.

A nonresident debtor is not subject to imprisonment for debt, since the only exceptions to the general rule of non-imprisonment, are debtors who are about to remove beyond the limits of the state, which manifestly have no reference to nonresidents. McKay v. Ray, 63 N. C. 46.

Arrest for "Willful Injury."—For the arrest of a woman under the provisions of this section, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. Weathers v. Baldwin, 183 N. C. 276, 111 S. E. 183.

§ 769. Order and affidavit.—An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this article. (Rev., ss. 728, 729; Code, ss. 292, 293; C. C. P., ss. 150, 151.)

The Order.—The order of arrest must proceed from the court in which the action is brought or from a judge thereof. Houston v. Walsh, 79 N. C. 36, 38.

Same—Jurisdiction.—An order of arrest, under this section is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction. Bryan v. Stewart, 123 N. C. 93, 31 S. E. 286.

Same—Voidable Only.—An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. Tucker v. Davis, 77 N. C. 330.

Grounds May Be Stated in Complaint.—The grounds for the arrest may be, and most usually are, set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 768. Roulhac v. Brown, 87 N. C. 1, 3. The cause of arrest may be stated in the complaint but the statement must be as explicit as if set forth in an affidavit and properly verified. Peebles v. Foote, 83 N. C. 102.

Positive Statement of Facts Desirable. — The affidavit should state the facts positively, when this can be done. Harriss v. Sneeden, 101 N. C. 273, 278, 7 S. E. 801; Peebles v. Foote, 83 N. C. 102.

Grounds of Belief Should Be Stated.—If the affidavit states certain things which the party believes are about

to be done, then the grounds of belief must be stated in order that the court may judge of the reasonableness thereof. Peebles v. Foote, 83 N. C. 102, 104 and cases cited.

Examples—Sufficient Statement.—In an action for arrest and bail, the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property: Held, sufficient to justify the order of arrest. Paige v. Price, 78 N. C. 10.

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: "That the said P. has disposed of and secreted his property with intent to defraud his creditors—it was held to be sufficient." Hughes v. Person, 63 N. C. 548.

Same—Insufficient Statement.—An affidavit for arrest of an administrator who has been charged with assets to a certain amount is not sufficient if it does not show fraud in the misapplication of the funds by an administrator. Melvin v. Melvin, 72 N. C. 384.

General Rumor.—Mere general rumor that a person indebted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application. Tucker v. Wilkins, 105 N. C. 272, 11 S. E. 575.

Court Must Be Convinced.—It is not sufficient that the cause of action may exist—this must not be left to conjecture or bare probability—the court must be satisfied from the evidence before it that a cause does exist. Harriss v. Sneeden, 101 N. C. 273, 278, 7 S. E. 801.

Allowing Second Affidavit.—The refusal to allow a second affidavit to be filed, is an exercise of discretion, which can not be reviewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest. Wilson v. Barnhill, 64 N. C. 121.

Question of Law.—The question of the sufficiency of the affidavit is one of law, addressed to the court alone. Wood v. Harrell, 74 N. C. 338, 340.

§ 770. Undertaking before order.—Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars, with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (Rev., s. 730; Code, s. 294; C. C. P., s. 152; 1868-9, c. 277, s. 7.)

As to giving the bond of a surety company as surety, see Art. 2, ch. 8 on Bonds.

Applies to Suits in Forma Pauperis.—A plaintiff who is allowed to sue, in forma pauperis, has no right to an order of arrest, without first filing the undertaking required by this section. Rowark v. Homesley, 68 N. C. 91.

Judge Can Increase Bond.—The trial court has power to increase or diminish the bond, and an order increasing the bond can not be questioned unless abuse of discretion is shown. Fayetteville Light, etc., Co. v. Lessem Co., 174 N. C. 358, 93 S. E. 836.

Amount of Bond Not Subject to Review.—The discretion of the court in fixing the amount of the bond is not subject to review. Fayetteville Light, etc., Co. v. Lessem Co., 174 N. C. 358, 93 S. E. 836.

§ 771. Issuance and form of order.—The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. (Rev., s. 731; Code, s. 295; C. C. P., s. 153.)

As to execution against the person of a debtor after judgment, see section 673.

In General.—The words "before judgment," as used in this section mean "final judgment" upon the matters put in issue by the pleadings, and hence the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted. Preiss v. Cohen, 117 N. C. 54, 23 S. E. 162. Houston v. Walsh, 79 N. C. 35.

Process Can Be Served on Prisoner in Jail.—The sheriff can serve process anywhere in his county—the jail possesses no "privilege of sanctuary" and service of process upon a prisoner there is valid. White v. Underwood, 125 N. C. 25, 34 S. E. 104.

This section is mentioned in Powers v. Davenport, 101 N. C. 291, 7 S. E. 747.

Written Warrant Necessary.—For the benefit of the citizen therefore, that he may at all times be able to call upon the officers to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. Lutterloh v. Powell, 2 N. C. 395, 396.

Defendant under Criminal Process.—A defendant, who has been brought into court on criminal process, and discharged from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the court room. Moore v. Green, 73 N. C. 394.

The exemption of witnesses and jurors from civil arrest accorded by §§ 1808 and 2328, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceeding. White v. Underwood, 125 N. C. 25, 34 S. E. 104.

Witnesses Attending Court.—The principle of the common law, that a suitor, while going to, remaining at, and returning home from court, is exempted from arrest, is in force in this state. Hammerskold v. Rose, 52 N. C. 629.

Nonresident Attending as Witness.—A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. Ballinger v. Elliott, 72 N. C. 596.

§ 772. Copies of affidavit and order to defendant.—The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (Rev., s. 732; Code, s. 296; C. C. P., s. 154.)

§ 773. Execution of order.—The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (Rev., s. 733; Code, s. 297; C. C. P., s. 155.)

§ 774. Vacation of order for failure to serve.—The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (Rev., s. 734; Code, s. 295; C. C. P., s. 153.)

Twenty Days Necessary.—Unless the order of arrest is served twenty days before it is docketed, it is unavailing and on motion may be vacated or set aside. Houston v. Walsh, 79 N. C. 36, 38.

§ 775. Motion to vacate order; jury trial.—A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (Rev., s. 735; Code, s. 316; 1889, c. 497; C. C. P., s. 174.)

In General.—This section and sections 777 and 1637 et seq., prescribing the methods by which a prisoner may be

discharged in certain instances before final judgment, should be construed together; and, when so construed, the remedies given in section 1637 et seq. are in addition to those given in sections 775 and 777. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 898.

Motion Must Be Made before Judgment.—A motion to vacate the order of arrest can only be made before judgment. Roulhac v. Brown, 87 N. C. 1, 3. And where such a motion has been once refused, and no appeal taken, the matter is **res adjudicata** and a similar motion will not be entertained. Id.

Motion Heard Anywhere in District.—A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. Parker v. McPhail, 112 N. C. 502, 16 S. E. 848. See also Ledbetter v. Pinner, 120 N. C. 455, 457, 27 S. E. 123.

Clerk Can Hear Motion.—It would be perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge, as was done in Roulhac v. Brown, 87 N. C. 1. But the clerk might be dilatory in acting, and the party has his election to proceed more summarily by applying in the first instance to the judge. Parker v. McPhail, 112 N. C. 502, 504, 16 S. E. 848.

New Matter Not to Be Considered.—The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit, and existing at the time when the proceeding is institufed, not upon new matter which may have afterwards transpired. Devries & Co. v. Summit, 86 N. C. 126.

Where Jury Trial Demanded.—If the defendant demanded the jury trial permitted by this section the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of court. Parker v. McPhail, 112 N. C. 502, 16 S. E. 848.

Lower Court's Finding of Fact Conclusive. — In arrest and bail proceedings, where a motion was made by the defendant to vacate the order of arrest and the court found that the facts were sufficient to sustain the order, the findings of fact by the court below are final, and will not be reviewed unless it be objected properly that there was no evidence to support them. Travers v. Deaton, 107 N. C. 500, 12 S. E. 373; Harriss v. Sweeden, 101 N. C. 273, 7 S. E. 801; Parker v. McPhail, 112 N. C. 502, 16 S. E. 848.

A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised. Wingo v. Watson, 98 N. C. 482, 4 S. E. 463.

Irregular or False Order Will Be Vacated.—An order of arrest will be vacated by a judge without any undertaking by the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. Bear v. Cohen, 65 N. C. 511.

Supplemental Affidavit Sufficient.—Where an order of arrest was made upon an invalid affidavit, and a counter affidavit was filed by the defendant, and a supplemental one by the plaintiff which was duly verified, it was held, that the judge below erred in vacating the order. Benedict, etc., Co. v. Hall, 76 N. C. 113.

Rendition of judgment prior to hearing is not reversible error. Allison v. Maddrey. 114 N. C. 421, 19 S. E. 646.

Prior Acquittal in Another State.—It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge. Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

Appeal.—An order vacating an order of arrest "affects a substantial right claimed" and hence an appeal from such order lies. Fertilizer Co. v. Grubbs, 114 N. C. 470, 474, 19 S. E. 597.

But where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and can not be reviewed. Parker v. McPhail, 112 N. C. 502, 16 S. E. 848.

An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. Patton v. Gash, 99 N. C. 280, 6 S. E. 193.

§ 776. Counter affidavits by plaintiff. — If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (Rev., s. 736; Code, s. 317; C. C. P., s. 175.)

Simple Denial Insufficient.—If the order was properly granted it ought not to be vacated upon the simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. Harriss v. Sneeden, 101 N. C. 273, 7 S. E. 801.

Facts Must Be Fully Controverted.—When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully and clearly, otherwise the order of arrest will be continued. Powers v. Davenport, 101 N. C. 286, 7 S. E. 747.

Additional Evidence.—Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence. Harriss v. Sneeden, 101 N. C. 273, 7 S. E. 801.

§ 777. How defendant discharged.—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (Rev., s. 737; Code, s. 298; C. C. P., s. 156.)

Rights of Nonresidents.—Where nonresidents are arrested under the provisions of this article they are entitled to the benefit of sections 1637-1650, relating to insolvent debtors, in securing their discharge. Burgwyn v. Hall, 108 N. C. 489, 13 S. E. 222.

§ 778. Defendant's undertaking.—The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (Rev., s. 738; Code, s. 299; C. C. P., s. 157.)

The word "amenable" as used in this section means "answerable" or "responsive" to the process of the court having jurisdiction; and when execution is issued against the person of the debtor it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

Voluntary Appearance.—The condition of the undertaking that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court is met when the defendant voluntarily appears in court upon the hearing of the motion against his surety. Stepp v. Robinson, 203 N. C. 803, 805, 167 S. E. 147.

§ 779. Defendant's undertaking delivered to clerk; exception.—Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (Rev., s. 739; Code, s. 304; C. C. P., s. 162.)

§ 780. Notice of justification; new bail.—On the receipt of notice of exception to the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice

of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bondsmen given, there must be a new bond, in the form hereinbefore prescribed. (Rev., s. 741; Code, s. 305; C. C. P., s. 163.)

§ 781. Qualifications of bail.—The qualifications of bail must be as follows:

1. Each of them must be a resident and freeholder within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (Rev., s. 740; Code, s. 306; C. C. P., s. 164.)

Definition.—Bail are those persons who become sureties for the appearance of a defendant in court. Bouvier's Law Dict., Vol. 4, p. 209.

Bond Should Show Facts.—A bail bond should show on its face that the surety is a resident and freeholder within the state, or his justification should establish these facts. Howell v. Jones, 113 N. C. 429, 18 S. E. 672.

§ 782. Justification of bail.—For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (Rev., s. 742; Code, s. 307; C. C. P., s. 165.)

§ 783. Allowance of bail.—If the court, judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (Rev., s. 743; Code, s. 308; C. C. P., s. 166.)

Purpose of Bail.—The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

§ 784. Deposit in lieu of bail.—The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (Rev., s. 744; Code, s. 309; C. C. P., s. 167.)

§ 785. Deposit paid into court; liability on sheriff's bond.—Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (Rev., s. 745; Code, s. 310; C. C. P., s. 168.)

As to payment by sheriff of money collected on execution, see section 3940.

§ 786. Bail substituted for deposit.—If money is deposited, as provided in the two preceding sections, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (Rev., s. 746; Code, s. 311; C. C. P., s. 169.)

§ 787. Deposit applied to plaintiff's judgment.—When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (Rev., s. 747; Code, s. 312; C. C. P., s. 170.)

§ 788. Defendant in jail, sheriff may take bail.—If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (Rev., s. 748; Code, s. 318; R. C., c. 11, s. 8.)

§ 789. When sheriff liable as bail.—If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (Rev., s. 749; Code, s. 313; C. C. P., s. 171.)

In General.—A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby and knew what was going on when an alleged justification was being made by the surety. Howell v. Jones, 113 N. C. 429, 18 S. E. 672.

In State v. Brittain, 25 N. C. 17, it is said that after once taking the bail the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and that the defendant in such a case is justified in resisting the arrest. State v. Queen, 66 N. C. 615, 617.

Escape of Prisoner.—A sheriff having permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, was guilty of an escape and subjected himself to the liability as bail. Winborne & Bro. v. Mitchell, 111 N. C. 13, 15 S. E. 882.

Same—Defendants Insolvency Immaterial. — When the sheriff is sued as bail he cannot give in evidence, in mitigation of damages, the defendant's insolvency. Winborne & Bro. v. Mitchell, 111 N. C. 13, 14, 15 S. E. 882.

Notice and Exceptions Unnecessary.—If the sheriff fails to take bail, the plaintiff need not file exceptions nor

give notice to fix him as bail. Adams v. Jones, 60 N. C. 198.

Defective Bond Does Not Satisfy Section. — A paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. Adams v. Jones, 60 N. C. 198, 199.

§ 790. Action on sheriff's bond.—If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (Rev., s. 750; Code, s. 314; C. C. P., s. 172.)

§ 791. Bail exonerated.—At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (Rev., s. 751; Code, s. 303; C. C. P., s. 161.)

Meaning of "State Prison".—The term "State prison," as used in this section, applies to either the penitentiary or the county jail. Sedberry v. Carver, 77 N. C. 319.

When Imprisonment Does Not Exonerate.—Where the imprisonment of a defendant under this section, expired before judgment was obtained, either against the principal in the original action or against the bail upon his undertaking: Held, that such imprisonment does not exonerate the bail. Sedberry v. Carver, 77 N. C. 319; Adrian v. Scanlin, 77 N. C. 317.

Exoneration by Surrender of Principal.—The obligors on the bond may, at any time before final judgment against them, be released by the defendant's voluntary surrender of his person, or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

When Absolute Judgment Error.—Where a defendant and the sureties on his appearance bond appear in answer to a scire facias and show that defendant's failure to appear at a prior term of court in accordance with the terms of the bond was due to the fact that defendant had been turned over to a federal court by a prior bondsman and that defendant was then serving a sentence imposed by that court, it is error for the court to enter absolute judgment on the bond, the cases against defendant as well as the hearing on the scire facias being subject to continuance. State v. Welborn, 205 N. C. 601, 172 S. E. 174.

§ 792. Surrender of defendant.—At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (Rev., s. 752; Code, s. 300; C. C. P., s. 158.)

Cross References.—As to surrender of defendant when he appears upon motion against the surety, see § 794 and annotations thereunder.

As to claim and delivery, see sections 830-842.

Where Prisoner Again Arrested.—Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, semble, upon the refusal of the sheriff to receive the prisoner from the obligors on the bail bond, that the trial judge upon hearing the obligors' motion should order the prisoner retained in custody pending the action of the Governor, who, upon notification, may consider the rights of our own courts as being prior to those of other jurisdiction, and hold the prisoner to answer in our courts. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

§ 793. Bail may arrest defendant.—For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over twenty-one years of age to do so. (Rev., s. 753; Code, s. 301; C. C. P., s. 159.)

In General.—Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in person or by agent in this or another State, upon the Sabbath or otherwise, and, if necessary, break and enter his house for that purpose. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

§ 794. Proceedings against bail by motion.—In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days' notice to them. (Rev., s. 754; Code, s. 302; C. C. P., s. 160.)

As to when the statute of limitations runs against an action under this section, see section 441, par. 7.

Motion Must Be Brought Within Three Years.—Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the state in the meantime. Albemarle Steam etc., Co. v. Williams, 111 N. C. 35, 15 S. E. 877.

Principal's Insolvency No Defense.—Insolvency of the principal is no defense to an action against the bail. Winborne & Bro. v. Mitchell, 111 N. C. 13, 15 S. E. 882.

When Action Against Bail Lies.—Where the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor's property, and afterwards against his person, if returned "nulla bona"; and should the latter writ be returned "non est inventus," the plaintiff may move on ten days' notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error. Pickelsimer v. Glazener, 173 N. C. 630, 92 S. E. 700.

Where the defendant, appeared in open court, in response to notice served upon his surety or bail, he was then "amenable to the process of the court," notwithstanding his refusal thus to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail, for failure to surrender him. Stepp v. Robinson, 203 N. C. 803, 804, 167 S. E. 147.

§ 795. Liability of bail to sheriff.—The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (Rev., s. 755; Code, s. 315; C. C. P., s. 173.)

§ 796. When bail to pay costs.—When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead,

is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (Rev., s. 756; Code, s. 319; R. C., c. 11, s. 10.)

Certain Costs Not Allowed.—The costs allowed against bail, notwithstanding a surrender, &c., do not include such as are incurred on account of an improper and ineffectual appeal. Clark v. Latham, 53 N. C. 1.

§ 797. Bail not discharged by amendment.—No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (Rev., s. 757; Code, s. 320; R. C., c. 11, s. 11.)

Art. 34. Attachment

§ 798. In what actions attachment granted.—A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in this article, when the action is to recover a sum of money only, or damages for one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to real or personal property, in consequence of negligence, fraud, or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act. (Rev., s. 758; Code, s. 347; 1893, c. 77; 1901, c. 740; C. C. P., s. 197.)

Cross References.—For full treatment of attachment, see 2 N. C. Enc. Dig. 111-189; 13 N. C. Enc. Dig. 198-205.

Editor's Note.—In chapter 7 section 16 of the Rev. Code it was provided that an attachment would lie against the property of one who injured the person or property of another, and within three months thereafter absconded from the State. The attachment had to be issued within three months from the time of the injury. For cases under this old provision, see Blankinship v. McMahon, 63 N. C. 180; Webb v. Bowler, 50 N. C. 362.

Definitions and Object.—An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. See Green v. Van Buskirk, 7 Wall. 139, 149, 19 L. Ed. 109.

Attachment is a mesne process, merely an incident to a suit. Ex parte Des Moines, etc., R. Co., 103 U. S. 794, 796, 26 L. Ed. 46.

The object of the writ is to enable the plaintiff to obtain a lien upon the property which may be subsequently enforced by a sale upon execution, if judgment be obtained. Roller v. Holly, 176 U. S. 398, 406, 44 L. Ed. 520, 523.

Origin of the Writ.—Attachment, other than the common-law writ which issued out of the common pleas upon the non-appearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. Grocery Co. v. Bag Co., 142 N. C. 174, 177, 55 S. E. 90.

History of the Section.—Under the Code of 1868, as originally enacted, this provisional remedy was allowed in actions on a contract for the recovery of money only, or in actions for wrongful conversion of personal property; and several decisions of the court, construing the first clause of the statute, held that an attachment was only permissible for breaches of contract involving the recovery of liquidated damages, or damages which could be limited and defined by some standard or data contained in the contract itself. See Price v. Cox, 83 N. C. 261; Wilson v. St. Louis Cook Mfg. Co., 88 N. C. 5. Shortly after these decisions were announced, the statute was amended so as to provide the remedy for breach of contract (express or implied), wrongful conversion of personal property, any other injury to personal property in consequence of negligence, fraud or other wrongful act. Code 1883, section 347. The legislature of 1893 (chapter 77) added "injuries to real property" to the section, and in 1901 there was another amendment adding, "or any injury to the person, caused by negligence or other wrongful act," making the law on the subject as it now appears. Worth v. Knickerbocker Trust Co., 151 N. C. 191, 194, 65 S. E. 918.

The amendment of 1901 showed the intent of the Legislature to broaden the right to this writ, and make the same almost coextensive with any well grounded demand for a judgment in personam. And there is no valid reason for the distinction between actions for slander and libel, and any other demand for unascertained and unliquidated damages for injuries to the person. Tisdale v. Eubanks, 180 N. C. 153, 156, 104 S. E. 339.

Nature and Function.—An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. Marsh v. Williams, 63 N. C. 371; Toms v. Warson, 66 N. C. 417. Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. Ditmore v. Goins, 128 N. C. 325, 328, 39 S. E. 61.

Created by Statute.—Attachment is the creature of local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. Harris v. Balk, 198 U. S. 215, 222, 49 L. Ed. 1023.

Conflict between State and Federal Jurisdiction.—In case of conflict of authority under a state and federal process, in order to avoid unseemly collision between them, the question as to which authority should for the time prevail does not depend upon the rights of the respective parties to the property seized, whether the one is paramount to the other, but upon the question as to which jurisdiction has first attached by the seizure and custody of the property under its process. Covell v. Heyman, 111 U. S. 176, 177, 28 L. Ed. 390.

And this rule applies notwithstanding the fact that the property has been brought into custody by illegal means. Gumbel v. Pitkin, 124 U. S. 131, 155, 31 L. Ed. 374.

Defects or Irregularities.—The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment, by the fact that the affidavit may have been defective, or that the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities. Copper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931.

Custody of the Law.—Property in custodia legis is not subject to levy under process which would have the effect of taking it out of his possession and control. Gumbel v. Pitkin, 124 U. S. 131, 156, 31 L. Ed. 374.

Possession of Goods.—As a general rule it matters not in whose possession the property is found, if the taking be otherwise rightful. Livingston v. Smith, 5 Pet. 90, 98, 8 L. Ed. 57.

A defendant's property or choses in action in the hands of third persons may be attached under this section. Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 173 S. E. 67.

An Unusual Writ.—There is a marked distinction between the ordinary writ and an attachment. In this latter the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as a protection to the absent defendant, the statute requires all the material facts to be set out in an affidavit, which is made the ground work of this proceeding. Webb v. Bowler, 50 N. C. 362, 364.

A Proceeding Quasi in Rem.—Attachment of the property of nonresident defendants in this state is a proceeding quasi in rem, for the purpose of bringing him under the jurisdiction of the state court for the purpose of determining the controversy in the action brought against him, when properly constituted. Mohn v. Cressey, 193 N. C. 568, 137 S. E. 718.

Strict Construction.—In 2 Lewis's Sutherland on Statutory Construction (2 Ed.), sec. 566, p. 1049, it is stated: "A party seeking the benefit of such a statute must bring himself strictly, not within the spirit, but within the letter; he can take nothing by intendment ..... The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms." And the decisions of this state are in full approval of this position. Skinner v. Moore, 19 N. C. 138-146; State Bank v.

Hinton, 12 N. C. 397, 398-399; Carson v. Woodrow, 160 N. C. 143, 146, 75 S. E. 996.

In State Bank v. Hinton, 12 N. C. 397, it was said by the court, in speaking of the attachment law, that "there is no law in the statute book which more imperiously demands a strict construction; for the property of an absentee may be sold upon an attachment wrongfully sued out before he is appraised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect." Leak v. Moorman, 61 N. C. 168.

But where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. Grant v. Burgwyn, 79 N. C. 513; Best v. British, etc., Mortg. Co., 128 N. C. 351, 38 S. E. 923; Page v. McDonald, 159 N. C. 38, 41, 74 S. E. 642.

Unliquidated Damages.—Previous to 1893, in a number of cases arising under the section, it was held that the remedy of attachment was confined to actions upon contracts in which the amount of damages could be specified in the affidavit, and that the remedy would not apply if the action be one for unliquidated damages. See Price v. Cox, 83 N. C. 261; Wilson v. St. Louis Cook Mfg. Co., 88 N. C. 5; Mullen v. Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106.

But since the amendment of 1893 the issuance of the writ has been upheld in actions for money, and for unliquidated damages in the cause specified, and for none other. Judd v. Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81; Long v. Home Ins. Co., 114 N. C. 465, 19 S. E. 347; Winfree v. Bagley, 192 N. C. 515, 9 S. E. 198; Tisdale v. Eubanks, 180 N. C. 153, 156, 104 S. E. 339.

An attachment can be granted under this section, in an action for unliquidated damages before judgment. Newberry v. Meadows Fertilizers Co., 206 N. C. 182, 188, 173 S. E. 67.

Meaning of "Property".—Webb v. Bowler, 50 N. C. 362 was an action where the validity of an attachment was in question, and it was held that the term "property" should be confined to tangible property, and that a false warranty or deceit in the sale of personal property was not an injury to the property of another, within the meaning of the statute. Since these decisions were rendered, however, and probably in consequence of them, this restricted significance of the word "property," when used in statutes or the rule of interpretation on the question presented, has been altered by express enactment, section 3949. Worth v. Knickerbocker Trust Co., 151 N. C. 191, 195, 65 S. E. 918.

When Attachment Lies.—An action is clearly one in which the writ of attachment is allowed where the wrong alleged is an injury by which the plaintiff's interest and investment in a power company has been wrongfully destroyed or very greatly impaired. Worth v. Knickerbocker Trust Co., 151 N. C. 191, 196, 65 S. E. 918.

An attachment in equity will lie against the principal, even though the remedy at law against his surety has not been exhausted. Alexander v. Taylor, 62 N. C. 36.

Same—Slander.—The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and will sustain a proceeding for an attachment within the intent and meaning of this section, as an "injury to the person by ..... wrongful act." Tisdale v. Eubanks, 180 N. C. 153, 104 S. E. 339.

Same—Death by Wrongful Act.—The history of legislation as to attachments culminating in this section, shows a legislative intent to broaden the right of this writ to make the same almost coextensive with any well-grounded demand for judgment in personam, and is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect, or default of another." Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

Tax Books of Sheriff Not Liable.—Though a sheriff, who has settled for the taxes due on a tax list which have not been paid to him, may collect the same within the time allowed by law, yet the tax books, showing the debts thus due him, cannot be attached by a creditor to whom he is indebted. Davie v. Blackburn, 117 N. C. 383, 23 S. E. 321.

Bill Can Name Several Persons.—A bill seeking an attachment, on account of a single claim, is not multifarious because it prays that such attachment issue against property in the hands of various persons, or because it seeks from such persons an account of their respective dealings with the debtor. Alexander v. Taylor, 62 N. C. 36.

An intervener in an action wherein attachment on the defendant's property has been issued, and who claims a prior lien by reason of a former order of court in another and independent proceeding, becomes party to the present action and may not successfully attack the validity of the proceedings in attachment, and the question of priority is left to be determined in the present action. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

Cited in Farmers Federation v. Lockman, 198 N. C. 77, 150 S. E. 673.

§ 799. Affidavit must show what.—To entitle the plaintiff to a warrant of attachment he must show by affidavit to the satisfaction of the court as follows:

1. That one of the causes of action specified in the preceding section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him. (See Witz *v.* Gray, 116-48; Knight *v.* Hatfield, 129-191.)

2. That the defendant is either a foreign corporation or a nonresident of the state, or a domestic corporation none of whose officers can be found in the state after due diligence; or, if he is a natural person and a resident of the state that he has departed therefrom, or keeps himself concealed therein, with intent to defraud his creditors or to avoid service of summons; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with like intent. (Rev., s. 759; Code, s. 349; 1897, c. 476; C. C. P., s. 201.)

I. In General.
II. The Affidavit.
  A. Necessary Allegations.
  B. What Can Be Omitted.
  C. Amendment.
III. Pleading and Practice.

I. IN GENERAL.

Editor's Note.—In Abrams v. Pender, 44 N. C. 260, it was decided that, under the section as it then read, it was required that the removal of the defendant should have been fraudulent or with intent to evade the process before an attachment lay. But an attachment is now made a provisional remedy in the progress of a cause and can be sued out whenever the defendant is a non-resident regardless of intent. Wheeler v. Cobb, 75 N. C. 21, 26.

Strict Construction.—The provisions of this section must be strictly followed. Spiers v. Halstead, etc. Co., 71 N. C. 209, 210; Wheeler v. Cobb, 75 N. C. 21, 24; Leak v. Moorman, 61 N. C. 168.

By Whom Made.—An affidavit in attachment may be made generally by the plaintiff, his agent or attorney. Henrietta Min. etc., Co. v. Gardner, 173 U. S. 123, 43 L. Ed. 640.

When One a Non-Resident.—Where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such a one is a nonresident of this state for the purpose of an attachment, and that notwithstanding he may occasionally visit this state, and that he may have the intent to return at some uncertain future time. Wheeler v. Cobb, 75 N. C. 21, 26.

But the fact that a person leaves the state to seek work, for the purpose of prospecting with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549.

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident under subsection 2 of this section notwithstanding he may intend to return at some time in the future, and his motion made by special appearance to vacate the attachment on the ground of residence will be denied. Brann v. Hanes, 194 N. C. 571, 140 S. E. 292.

Domicile is not determinative of the question whether one is a nonresident within the meaning of such subsection. Nor is the cause of the absence, such as severe illness,

material if such absence prevents prsonal service of summons upon him during an indefinite period of time. Brann v. Hanes, 194 N. C. 571, 140 S. E. 292.

Intent.—This section, authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of, and not to the manner in which the property is acquired. Howland v. Marshall, 127 N. C. 427, 37 S. E. 462.

Affidavit Necessary in Attachment.—In order for the valid issuance of an attachment from the superior court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance under this section. Carson v. Woodrow, 160 N. C. 143, 75 S. E. 996.

Submission to Jurisdiction as Relieving from Attachment.—Where the service by publication and attachment on a defendant absent from the State comes within the provisions of § 484 and subsection 2 of this section, and thereunder his property here has been attached as required to give validity to the publication of service, he may submit himself to the jurisdiction of the court and releive his property of the levy in attachment. Brann v. Hanes, 194 N. C. 571, 140 S. E. 292.

Cited in Bizzelll v. Mitchell, 195 N. C. 484, 142 S. E. 706; Farmers Federation v. Lockman, 198 N. C. 77, 150 S. E. 673.

II. THE AFFIDAVIT.

A. Necessary Allegations.

Specific.—The affidavit to procure an attachment must be specific. Bacon v. Johnson, 110 N. C. 114, 14 S. E. 508, and must set forth one of the grounds recited in this section. Mullen v. Norfolk, etc., Canal Co., 114 N. C. 8, 10, 19 S. E. 106.

Grounds of Belief Must Be Stated.—Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. Penniman v. Daniel, 90 N. C. 154.

When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," which is not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out so that the court may adjudge if they are sufficient. Hughes v. Person, 63 N. C. 548; Gashine, etc., Co. v. Baer, 64 N. C. 108; Clark v. Clark, 64 N. C. 150; Penniman v. Daniel, 90 N. C. 154. Judd v. Crawford Gold Min. Co., 120 N. C. 397, 399, 27 S. E. 81. And if not set out the affidavit is fatally defective. First Nat. Bank v. Tarboro Cotton Factory, 179 N. C. 203, 102 S. E. 195.

Examples of Sufficient Statement.—Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this state, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

An affidavit for an attachment is sufficient which states that the defendant is a nonresident and has property in this state, or has removed, or is about to remove some of his property from this state with intent to defraud his creditors. The statute puts the modes in the alternative, and the plaintiff succeeds if he establishes either. Penniman v. Daniel, 90 N. C. 154.

In proceedings for attachment an affidavit is sufficient which sets out: 1st., that the defendant is indebted, etc.; 2d., that the defendant has departed from this state with intent, as the affiant is informed and believes, to avoid the service of summons. Hess, etc., Co. v. Brower, 76 N. C. 428.

B. What Can Be Omitted.

Absence of Defendant.—It is not requisite, and therefore need not be averred, that the defendant can not be found in the state in order to procure a warrant of attachment. Luttrell v. Martin, 112 N. C. 593, 605, 17 S. E. 573.

Defendant's Property.—It is not necessary that the affidavit upon which an attachment is sought should state that the defendant has property in this state. Branch v. Frank, 81 N. C. 180. Foushee v. Owen, 122 N. C. 360, 363, 29 S. E. 770; Parks v. Adams, 113 N. C. 473, 476, 18 S. E. 665 **overruling** Windley v. Bradway, 77 N. C. 333 and Spiers v. Halstead, etc., Co., 71 N. C. 209.

Jurisdiction of Court.—Where, in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject-matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. County Sav. Bank v.. Tolbert, 192 N. C. 126, 133 S. E. 558. Page v. McDonald, 159 N. C. 38, 43, 74 S. E. 642; Bacon v. Johnson, 110 N. C. 114, 14 S. E. 508; Davis v. Davis, 179 N. C. 185, 102 S. E. 270.

When Made by Agent.—An affidavit made by an agent under this section need not state why it is not made by the principal. Bruff, etc., Co. v. Stern, & Bro., 81 N. C. 183; Sheldon v. Kivett, 110 N. C. 408, 14 S. E. 970.

Examples of Defective Statement.—An affidavit in attachment against a non-resident, which fails to set out how the debt was due, and that the defendant could not, after due diligence, be found in North Carolina, is defective. Sheldon v. Kivett, 110 N. C. 408, 14 S. E. 970.

An affidavit for a warrant of attachment, under this section, which states "that the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of summons," is fatally defective. Love & Co. v. Young, 69 N. C. 65.

Allegations in affidavits for attachment against an insolvent corporation's property, that executions had been issued against it, and that it had failed to make use of a small piece of its land, and had not paid the taxes thereon; or that its president claimed this land, or its proceeds are insufficient upon the question of fraud of the corporation, for the granting of the warrant. First Nat. Bank v. Tarboro Cotton Factory, 180 N. C. 128 104 S. E. 129.

C. Amendment.

Court Can Allow Amendment.—It is settled that an affidavit can be amended by leave of the court, granted in its discretion, even though the first affidavit was wholly insufficient. Brown, etc., Co. v. Hawkins, 65 N. C. 645; Branch v. Frank, 81 N. C. 180; Bank v. Blossom, 92 N. C. 695; Penniman v. Daniel, 93 N. C. 332; Cushing v. Styron, 104 N. C. 338, 10 S. E. 258. Sheldon v. Kivett, 110 N. C. 408, 410, 14 S. E. 970.

Same—Effect of Findings.—An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, his findings has the effect of an amendment allowed by him. Thornburg v. Burton, 197 N. C. 193, 148 S. E. 28.

Relates Back to Beginning.—An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. Cook v. New York Corundum Min. Co., 114 N. C. 617, 19 S. E. 664.

Error for Clerk to Refuse.—A plaintiff has a right to amend his affidavit as to mere matters of form, and if he is ready to swear to the amended affidavit it is error in the clerk to refuse it. Palmer v. Bosher, 71 N. C. 291.

No Appeal from Courts Order.—From the leave to amend the affidavit no appeal lies. Lippard v. Roseman, 72 N. C. 427; Henry v. Cannon, 86 N. C. 24; Wiggins v. McCoy, 87 N. C. 499; Jarrett v. Gibbs, 107 N. C. 303, 12 S. E. 272. Sheldon v. Kivett, 110 N. C. 408, 411, 14 S. E. 970; Cook v. New York Corundum Min. Co., 114 N. C. 617, 19 S. E. 664.

III. PLEADING AND PRACTICE.

Court Finds Facts.—In attachment and other ancillary proceeding it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Pasour v. Lineberger, 90 N. C. 159.

Determination of Validity.—The validity of a warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. Devries & Co. v. Summit, 86 N. C. 126.

Remedy When Affidavit Defective.—A plea in abatement is the proper mode of taking advantage of a defect in the affidavit for an attachment. Leak v. Moorman, 61 N. C. 168.

Collateral Attack.—The validity of the affidavit cannot be collaterally attacked. Wehrmant v. Conklin, 155 U. S. 314, 29 L. Ed. 167.

Appeal.—Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the apeal takes the case out of its jurisdiction. Pasour v. Lineberger, 90 N. C. 159.

The findings of fact of the clerk of the Superior Court, on a motion to vacate an atttachment, supported by the evidence and approved by the judge, are not subject to review on appeal to the Supreme Court. Brann v. Hanes, 194 N. C. 571, 140 S. E. 292.

§ 800. Affidavit to be filed.—It is the duty of the plaintiff procuring a warrant of attachment,

within ten days from its issuance, to file the affidavit on which it was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom, the process is returnable. (Rev., s. 760; Code, s. 355; C. C. P., s. 201.)

§ 801. By whom granted.—If the action is not founded on a contract, or if founded on a contract and the sum demanded exceeds two hundred dollars, a warrant of attachment may be obtained from the judges of the district embracing the county in which the action was begun, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action or debts due him, and shall be made returnable before the clerk at the same time and place to which the summons is returnable. (Rev., s. 761; Code, s. 351; C. C. P., s. 199; 1869-70, c. 147; 1870-1, c. 166, ss. 1, 3; 1874-5, c. 111; 1876-7, c. 251; Ex. Sess. 1921, c. 92, s. 17.)

Editor's Note.—Previous to 1921 the last clause in this section read "and shall be made returnable in term time to the court from which the summons issued." By Law Ex. Sess. 1921 Ch. 92, Sec. 17 this clause was changed to read "and shall be made returnable before the clerk at the same time and place to which the summons is returnable." As to the summons, see section 476 and the notes thereto.

Clerk Can Grant Attachment Out of Term Time. — The clerk of the court, acting as and for the court, has authority out of term time to grant the warrant of attachment, and likewise to allow all proper amendments in that respect and connection.. Howland v. Marshall, 127 N. C. 427, 429, 37 S. E. 462. Cushing v. Styron, 104 N. C. 338, 10 S. E. 258.

A Ministerial Act.—The clerk only acts ministerially in issuing the process for attachment. Evans v. Etheridge, 96 N. C. 42, 1 S. E. 633.

Clerk May Grant When He is Plaintiff.—A clerk of the superior court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. Evans v. Etheridge, 96 N. C. 42, 1 S. E. 633.

Issuance of Blank Forms Not Permitted.—When an attachment form in blank, including a form for the affidavit, has been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give sufficient bond, the writ and the levy thereunder are both void, though subsequently approved by the clerk. Carson v. Woodrow, 160 N. C. 143, 75 S. E. 996.

When Clerk Denies Amendment.—Where the clerk refuses to allow an amendment he may, and should, state his reason for such refusal, even after appeal to the court in term. Cushing v. Styron, 104 N. C. 338, 10 S. E. 258.

Appeal from Clerk's Decision.—From the decision of the clerk in granting a warrant of attachment an appeal lies to the judge. Howland v. Marshall, 127 N. C. 427, 429, 37 S. E. 462. Cushing v. Styron, 104 N. C. 338, 10 S. E. 258.

§ 802. Time of Issuance; service of summons.—The warrant of attachment may be granted to accompany the summons, or at any time thereafter. Personal service of the summons must be made upon the defendant against whose property the attachment is granted, within thirty days after its granting, or else upon the expiration of the same time service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof. (Rev., s. 762; Code, s. 348; C. C. P., s. 197.)

Editor's Note.—Service of summons by publication is mentioned in this section and in section 806. As to when service by publication can be resorted to, and for the meaning of "due diligence" in such cases, see section 484 and annotations thereunder.

Service by Publication.—The provisions of the Code, authorizing the attachment of the property of a non-resident defendant upon constructive service of a summons by publication, have many of the features of the foreign attachment. Such proceeding is an extraordinary and summary remedy, and is in derogation of the common law and statute law of the United States, and cannot be recognized in a case commenced in a Federal court. Even in a State court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. Jurisdiction in such cases cannot be acquired or enlarged by implication and liberal construction. Lackett v. Rumbaugh, 45 Fed. 23, 29.

"Within Thirty Days" Not Applicable to Publication.—Under this section publication is not required to be made, like personal service of summons, "within thirty days after the attachment granted," but upon expiration of the thirty days; that means "after" the expiration of the thirty days, and where publication was begun on the day after the expiration of the thirty days, that strictly conforms to the statute. Mills v. Hansel, 168 N. C. 651, 652, 85 S. E. 17.

Time Can Be Extended.—In Finch v. Slater, 152 N. C. 155, 156, 67 S. E. 264, it is held that where the court has acquired jurisdiction by attachment of property, the time for serving summons by publication, when it has not been properly made, can be extended in the discretion of the court. Mills v. Hansel, 168 N. C. 651, 653, 85 S. E. 17.

Main Action Commenced By Summons.—The warrant of attachment is only a provisional or ancillary remedy in and dependent upon a main action commenced by the issuing of a summons. Lackett v. Rumbaugh, 45 Fed. 23, 29.

When Summons Unnecessary.—In proper instances, where civil actions are commenced and service is obtained by attachment of the defendant's property, and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action is unnecessary. Jenette v. Hovey & Co., 182 N. C. 30, 108 S. E. 301.

Same—Section 1487 Not Applicable.—In attachment and publication on a nonresident defendant before a justice of the peace, where the defendant's property within the jurisdiction of the court has been levied on, a summons is not required; and therefore the requirements of sec. 1487, that the summons must be made returnable not more than thirty days after its issuance, are inapplicable. Best British, etc., Mortg. Co., 128 N. C. 351, 352, 38 S. E. 923, cited and affirmed by Walker, J.; Grocer Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90, and by Allen, J., Currie Golconda Min., Co., 157 N. C. 209, 217, 72 S. E. 980. Mills v. Hansel, 168 N. C. 651, 85 S. E. 17.

Where Nonresident Has No Actual Notice.—A nonresident defendant in attachment proceedings, against whom judgment has been rendered under service of summons by publication, and who has not had actual notice of the action until after the judgment had been rendered, may, as a matter of right upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

Proceedings When Notice Not Duly Served.—If the notice was not duly served by the publication, it was error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendments. Branch v. Frank, 81 N. C. 180. Mills v. Hansel, 168 N. C. 651, 652, 85 S. E. 17.

The remedy is not to dismiss the attachment, but by ordering a republication, for, as the defendant is a nonresident, to dismiss the attachment may deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment can be had. Price v. Cox, 83 N. C. 261; Penniman v. Daniel, 90 N. C. 154, 159; Penniman v. Daniel, 93 N. C. 332. Mills v. Hansel, 168 N. C. 651, 652, 85 S. E. 17.

Cited in Bizzell v. Mitchell, 195 N. C. 484, 487, 142 S. E. 706.

§ 803. Undertaking.—The officer, before issuing the warrant, must require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recovers judgment, or the attachment is set aside by order of the court, the plaintiff will pay all costs that are awarded to the defendant, and all damages which he sustains by reason of the attachment, not exceeding the sum specified in the undertak-

ing, which must be at least two hundred dollars. (Rev., s. 763; Code, 356; C. C. P., s. 202.)

Separate Action By Successful Defendant.—This section clearly implies that the successful defendant in attachment must seek relief in a separate action on the undertaking. Mahoney v. Tyler, 136 N. C. 40, 43, 48 S. E. 549.

Mistake in Signing Undertaking.—Where, by mistake, the surety on the undertaking of the plaintiff signs his name to the justification of the undertaking instead of to the undertaking itself, this is held to be a valid and binding undertaking. Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 559, 81 S. E. 784.

Misjoinder of Principal and Surety.—An action will not be dismissed for a misjoinder of parties where the plaintiff is suing, in the same action, the principal and surety on an attachment bond. The remedy is by motion to have the causes divided. Smith v. American Bonding Co., 160 N. C. 574, 76 S. E. 481.

When Action Lies Against Creditor.—In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations begins to run from the rendition of the judgment and not from the time the property was replevied, the recovery of the judgment in the former action is the condition authorizing the present suit, and a vacation of the attachment. Smith v. American Bonding Co., 160 N. C. 574, 76 S. E. 481.

Creditor Not Liable For Sheriff's Failure.—An attaching creditor is not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property. Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549.

When Bond Sufficient.—Where an attachment was sued out against the owner of a vessel, it was held that a prosecution bond, made payable to the "owner" of the vessel by that description, was sufficient. Bryan v. Steamer Enterprise, 53 N. C. 260.

§ 804. Validity of undertaking.—It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause. (Rev., s. 764; Code, s. 358.)

§ 805. To whom warrant directed; duty of officer.—The warrant shall be directed to the sheriff of any county in which the property of the defendant is located, or, in case it is issued by a justice of the peace, to the sheriff or any constable of such county, and shall require the sheriff or constable to attach and safely keep all the property of the defendant within his county, or so much thereof as is sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties, but where the warrant is issued by a justice of the peace to another county than his own, the clerk of the superior court of his county must certify that he is a justice of the peace and that the signature to the warrant is in the handwriting of the justice. (Rev., s. 765; Code, s. 357; 1895, c. 435, s. 1; C. C. P., s. 203.)

Editor's Note.—The former statute, of which section 805 is a modification, contained the clause, "Provided such county be that of the justice issuing the warrant" (Battle's Revisal, 186 sec. 203; the Code, sec. 357); but the proviso was subsequently struck from the statute. Public Laws 1895, ch. 435. The amendment apparently indicates the legislative intent to extend the reach of the warrant of attachment, as distinguished from original process, beyond the boundaries of the county in which the justice resides. See Mohn v. Cressey, 193 N. C. 568, 572, 137 S. E. 718.

Superior Court Writ Should Be Directed to Sheriff.—By reason of the same rule of strict construction mentioned in the annotations under sec. 798 it must be held that a writ of attachment issuing out of the superior court on causes within that jurisdiction shall be addressed to the sheriff of the county. Carson v. Woodrow, 160 N. C. 143, 147, 75 S. E. 996.

This section makes a clear distinction between writs issuing from the superior court and the court of a justice of the peace, and in express terms requires that writs of attachment from the superior courts shall be addressed to the sheriff of the county. Carson v. Woodrow, 160 N. C. 143, 147, 75 S. E. 996.

Warrant Issued to Constable Instead of Sheriff.—An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. Temple v. Eades Hay Co., 184 N. C. 239, 114 S. E. 162.

An attachment issued by the clerk of a court for a sum within the jurisdiction of the court, and made returnable to the proper term of the court, will not be dismissed for want of form because directed "to any constable or other lawful officer to execute and return within thirty days (Sundays excepted)," when it appears that it was executed by the sheriff. Askew v. Stevenson, 61 N. C. 288.

Clerical Error in Warrant.—A warrant in attachment, in substantial conformity with this section, and, in fact executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments is plenary under the provisions of C. S., sec. 549. May Co. v. Menzies Shoe Co, 186 N. C. 144, 119 S. E. 227.

When Sheriff is Defendant.—The words of this section "all the property of the defendant" do not, when the sheriff is the defendant, include his tax books showing debts due to him for taxes. Davie v. Blackburn, 117 N. C. 383, 23 S. E. 321.

§ 806. Notice; service and content.—When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in the publication to the defendant of the issuing of the attachment. When the warrant of attachment is obtained after the issuing of the summons, the defendant must be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if none, then in one published in the judicial district including said county. The publication shall state the names of the parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable. In proceedings by attachment begun before justices of the peace, advertisement in a newspaper is not necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks is sufficient publication, both as to the summons and warrant of attachment. (Rev., s. 766; Code, s. 352; 1893, c. 363; 1870-1, c. 166, s. 3; 1874-5, c. 111, s. 2.)

Cross References.—As to service by publication, see annotations under section 802 and under section 484.

Editor's Note.—Under former statutes, when the defendant was a nonresident, attachment issued either in the form of an original or a judicial attachment, and without any notice until there had been a levy or caption of the goods of the debtor, when advertisement was required if the defendant resided without the jurisdiction. Rev. Code, ch. 7, secs. 12 and 13. By sec. 12 it was provided that "No judicial process shall be issued against the estate of any person residing without the limits of the state, unless the same be grounded on an original attachment, or unless the leading process of the suit has been executed on the person of the defendant when within the state." This was the method of proceeding against nonresidents until the adoption of the Code system. The remedy then became ancillary to the principal suit for the recovery of the debt. But there was no essential change in the procedure by which the defendant was brought before the court and compelled to appear and submit his person to its jurisdiction, or lose his property as the penalty for his default, or so much thereof as was necessary to satisfy the plaintiff's demand. See Grocery Co. v. Collins Bag Co., 142 N. C. 174, 177, 55 S. E. 90.

Summons Necessary.—The issuance and service of a summons in an action are indispensable to a valid judgment. Ditmore v. Goins, 128 N. C. 325, 327, 39 S. E. 61.

When Publication of Summons Sufficient.—In order that the cardinal principle of our judicial system should not be even seemingly violated, it was required that in the original action, instead of the idle and unless ceremony of issuing a summons for a man whom it was well known could not be found, publication in such manner as would be likely to give notice of the action should be made; and such is the meaning and clear intent of this section as plainly manifested by its words. It is true that civil actions are commenced by issuing a summons, but this refers to cases where the defendant, being within the jurisdiction of the court, can be served personally. Best v. British, etc., Mortg. Co., 128 N. C. 351, 38 S. E. 923, cited and approved. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951 overruled. Grocery Co. v. Collins Bag Co., 142 N. C. 174, 178, 55 S. E. 90.

Omission of Notice in the Order.—Where notice of the attachment is omitted from the order of publication, but in the published notice the defendant is informed that an attachment has been issued against his property, to what court it is returnable, etc., the court has power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. Bank v. Blosssom, 92 N. C. 695.

Affidavit after Order.—It seems that the affidavit to obtain an order for the publication of a summons may be made after the order, provided the order remains in abeyance until the affidavit is filed. Bank v. Blossom, 92 N. C. 695.

Publication for Five Weeks.—Where notice of an attachment and the summons were published in one notice for five weeks, it was held, a sufficient publication of the notice of the attachment, but not of the summons. Bank v. Blossom, 92 N. C. 695.

Where a publication of a summons was only made for five weeks, the court has power to retain the action and order a sufficient publication. Bank v. Blossom, 92 N. C. 695.

Warrant and Summons Distinguished.—This section provides that in attachment proceedings in a justice's court, advertisement in a newspaper shall not be necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks shall be sufficient publication, both as to the summons and warrant of attachment. This modification permits the incorporation of the warrant of attachment to be made in the summons, not the summons in the warrant. The summons is an official process, and must be signed and issued by the justice of the peace, whether its service is to be made personally or by publication, while the warrant, if not incorporated in the summons as above provided, is not official and may be signed by the plaintiff himself, and if not taken out at the time of issuing the summons, has to be served separately. Ditmore v. Goins, 128 N. C. 325, 327, 39 S. E. 61.

Failure to Order or Make Service.—Where an affidavit, filed in an action wherein attachment is sought against the property of a nonresident within the jurisdiction of the court, is sufficient for the clerk to order service of the summons by publication, but service has not been ordered or made, and the cause has come up on the defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, has obtained an order of publication from the clerk, it is within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant's motion. Jenette v. Hovey & Co., 182 N. C. 30, 108 S. E. 301.

Defendant's Bond Constitutes Waiver.—Where property has been levied on under the writ, a bond given by the defendants in discharge of the attachment as provided by section 815 will be considered equivalent to a personal appearance in the action and a waiver of the requirement for further service of the summons. It amounts to a voluntary submission of the defendant's cause to the jurisdiction of the court. Mitchell v. Elizabeth City Lumber Co., 169 N. C. 397, 398, 86 S. E. 343.

Statement of Amount.—Under this section which provides that when the summons in an attachment suit is to be served by publication, the publication shall state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims are fatally defective. Flint v. Coffin, 176 Fed. 872, 873.

In attachment the plaintiff can not recover an amount in excess of that stated in the summons. Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218.

§ 807. Execution, levy, and lien.—The officer to whom the warrant of attachment is directed and delivered shall seize and take into his possession the tangible personal property of the defendant or so much as is necessary, and he is liable for the care and custody of such property, as if it had been seized under execution. He shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on, and, subject to the direction of the court, shall collect all debts owing to the defendant, and take such legal proceedings in his own name or that of the defendant as are necessary for that purpose. Where the sheriff or other officer levies an attachment upon real estate, he must certify the levy to the clerk of the superior court of the county where the land lies, with the names of the parties, and the clerk must note the same on his judgment docket and index it on the index to judgments, and the levy is a lien only from the date of entry by the clerk, except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made. (Rev., s. 767; Code, s. 359; 1895, c. 435, s. 2; C. C. P., s. 204.)

Cross References. — For further cases on this subject, see 2 N. C. Enc. Dig. 152-157; 13 N. C. Enc. Dig. 201.

Section 500 and This Section Construed in Pari Materia.—See note to § 500.

A levy on land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. Grier v. Rhyne, 67 N. C. 338.

Homestead.—The lien of an attachment levied upon land of a nonresident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the state prior to the rendition of judgment in the action. Watkins v. Overby, 83 N. C. 165.

Effect of Levy.—Property seized under attachment is only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment. State v. Rhyne, 80 N. C. 183.

Enforceable against Subsequent Purchasers.—When the officer has complied with the provisions of this section, the plaintiffs have a lien on such property, which is enforceable against all subsequent purchasers from the defendant. Newberry v. Meadows Fert. Co., 203 N. C. 330, 338, 166 S. E. 79.

Levy in a Different County.—A levy on land located in another county than that in which the judgment was obtained may be made without docketing a transcript of the judgment in the county where the land lies. Evans v. Aldridge, 133 N. C. 378, 45 S. E. 772.

Failure to Certify Does Not Invalidate Levy.—The failure to certify a levy therein to the clerk of the superior court of the county in which the land lies, in an attachment proceeding, does not invalidate such levy. Evans v. Aldridge, 133 N. C. 378, 45 S. E. 772.

§ 808. Return of warrant by Sheriff.—The sheriff shall return the warrant of attachment, and the undertakings provided for in this article, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, the return, he may obtain from the court to which the warrant was returnable a certified copy thereof, which, for the purpose of giving him authority, is the same as the original, and when the warrant has been fully executed or discharged, the sheriff shall return it, with his proceedings, to said court. (Rev., s. 768; Code, s. 376; C. C. P., s. 214.)

§ 809. When granted by justice of peace.—If the action is not founded on contract and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of

attachment may, or if the action is founded on contract and the sum demanded does not exceed two hundred dollars, the warrant of attachment must be obtained from and made returnable before a justice of the peace of a county to the superior court of which it would have been returnable had the sum demanded exceeded two hundred dollars, or had the action not been founded on contract. (Rev., s. 769; Code, s. 353; C. C. P., s. 200; 1876-7, c. 251.)

Wrongful Issue by Justice.—An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. Merrell v. McHone, 126 N. C. 528, 36 S. E. 35.

§ 810. Publication in justice's court.—The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, must cause publication thereof to be made for four successive weeks at the courthouse door and four other public places in the county where the warrant is returnable. (Rev., s. 770; Code, s. 350; C. C. P., s. 198; 1868-9, c. 95, s. 3; 1870-1, c. 166, s. 4; 1874-5, c. 111.)

Failure to Serve Summons.—Where a justice issued a summons and warrant of attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of the summons. Ditmore v. Goins, 128 N. C. 325, 39 S. E. 61.

§ 811. Justice's attachment against land.—If the attachment is levied on real property, the justice shall proceed to try the action, but may not issue an execution to sell the real property, and shall return the papers in the case to the office of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, is a lien on the real estate, when the provisions of the section as to execution and levy of attachment are complied with. (Rev., s. 771; Code, s. 354; 1868-9, c. 95, s. 4.)

Lien Created from Levy of Attachment. — Attachment issued by a justice creates a lien from its levy, and not merely from docketing of the judgment in the superior court. Morefield v. Harris, 126 N. C. 626, 36 S. E. 125.

§ 812. Sale of attached property pending litigation.—If any property seized under attachment is perishable, or of a character to materially deteriorate in value pending litigation, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, does not within ten days after the serving of the attachment reclaim the same, the sheriff or other officer having possession shall apply to the court for authority to sell the property, stating the circumstances. The property shall then be sold, under the order and direction of the court, and the proceeds are liable to the judgment obtained upon the attachment, and shall be retained by the sheriff or other officer to await the judgment. (Rev., 772; Code, s. 360; R. C., c. 7, s. 6; 1777, c. 115, s. 28; C. C. P., s. 205.)

Sale of Third Party's Goods. — Where an attachment is levied upon the goods of a third party which, being perishable, are sold by the sheriff, and the third party interpleads in the action and recovers judgment, the costs and expenses of the attachment, sale, etc., are not properly chargeable against the fund arising from such sale. Haywood v. Hardie, 76 N. C. 384.

An intervener obtaining the possession of property attached by giving a replevy bond may not sell part of the property, such sale not being made as provided by this section, and claim the right to pay for the part sold and return the balance thereof. Bulluck v. Haley, 198 N. C. 355, 151 S. E. 731.

§ 813. Replevy by defendant; undertaking.—The person owning the property advertised to be sold according to the provisions of this article, or his agent or attorney, may, at any time before the sale, replevy the same, by giving an undertaking in double the amount of the value of the property, with sufficient surety, to the effect that he will return the property to the sheriff or other officer, if its return is adjudged by the court, and pay all costs that are awarded against him; and if return of the property cannot be had, then that he will pay plaintiff its value, and all costs and damages that are awarded against him. Upon the execution of this undertaking, the sheriff, or other officer, shall deliver the property to the person owning it. (Rev., s. 773; Code, s. 361; R. C., c. 7, s, 5; 1777, c. 115, s. 28.)

Recovery of Expenses Incurred under This Section.—In an action to recover on an attachment bond for the wrongful levy therein, damages may be awarded for the reasonable expense the plaintiff has incurred in procuring the undertaking he had given to obtain the release of the property attached. Smith v. American Bonding Co., 160 N. C. 574, 76 S. E. 481.

But damages may not be recovered in an action for a wrongful levy in attachment for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. Smith v. American Bonding Co., 160 N. C. 574, 76 S. E. 481.

Cited in Bizzell v. Mitchell, 195 N. C. 484, 487, 142 S. E. 706.

§ 814. Defendant may apply for discharge and delivery of property.—When the defendant has appeared in such action, he may apply to the court in which it is pending, or to the judge thereof, for an order to discharge the attachment; and if the order is granted, all the proceeds of sale, and moneys collected in the action, and all property attached remaining in the hands of any officer of the court, under any process or order in the action, shall be delivered or paid to the defendant or his agent, and released from the attachment. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may apply in like manner for relief. (Rev., s. 774; Code, s. 373; C. C. P., s. 212.)

Clerk Has Jurisdiction. — The clerk of the superior court has jurisdiction to vacate an attachment. Palmer v. Bosher, 71 N. C. 291.

By giving the undertaking in the manner provided by § 815 the debtor may procure the release of the attachment. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706. See note under § 815.

Vacation without Undertaking. — An attachment will be vacated by the Judge without any undertaking on the part of the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. Bear v. Cohen, 65 N. C. 511.

Motion out of Term. — It would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the court, which might be nearly six months after the seizure, hence he may move to vacate before the return term. Palmer v. Bosher. 71 N. C. 291, 293.

When Motion Lies.—Where in an action against a foreign fraternal insurance society, the funds in the hands of a collector were attached and the society claimed that such funds were held upon an express trust for the benefit of the widows and orphans of the deceased members, and were not subject to attachment, the society was entitled to

raise such a question by motion to vacate the attachment. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

When Defendant Bankrupt. — Where the defendant was adjudged a bankrupt, that was held to be sufficient ground for vacating an attachment levied upon his property. Mixer v. Oil etc., Co., 65 N. C. 552; Ward v. Hargett, 151 N. C. 365, 66 S. E. 340.

When Discharge Not Granted. — A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved the finding of facts, and such as he has no interest in. Foushee v. Owen, 122 N. C. 360, 29 S. E. 770.

Same—Insufficient Affidavit. — It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendment. Branch v. Frank, 81 N. C. 180; Price v. Cox, 83 N. C. 261.

Hence, where the application to vacate an attachment is to the clerk before the sitting of the court to which the summons is made returnable, a further order of publication to cure a defective service may be obtained upon an affidavit to the court without discharging the attachment. Penniman v. Daniel, 90 N. C. 154.

Failure of Defendant to Move to Vacate. — The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant if insufficient, and upon his failing to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. Page v. McDonald, 159 N. C. 38, 74 S. E. 642.

No Sale after Vacation. — The sales of property mentioned in this section and sec. 826 have reference to those made before the attachment is vacated, as, for instance, sales made under the order of the court in accordance with section 812 when the property is perishable. The sheriff has no right, after the attachment has been vacated, to sell any property seized by him, as it then becomes his duty to deliver at once to the defendant all property in his hands. Mahoney v. Tyler, 136 N. C. 40, 44, 48 S. E. 549.

Does Not Apply to Subsequent Sale. — This section, providing for the restitution of property upon an order dissolving the attachment, does not apply to cases where there has been a sale or transfer of the property by the defendant to the plaintiff after the levy of the attachment. Jackson, etc., Co. v. Burnett, 119 N. C. 195, 25 S. E. 868.

Same—Jury Trial. — Notwithstanding the dissolution of an attachment, the plaintiff, who claims that the property has been transferred to him by the defendant after the levy of the warrant, is entitled to have submitted to the jury an issue as to the ownership of the property. Jackson, etc., Co. v. Burnett, 119 N. C. 195, 25 S. E. 868.

Court Retains Attached Property. — The property attached will remain in the custody of the court to await the determination of the action unless replevied. Page v. McDonald, 159 N. C. 38, 40, 74 S. E. 642.

Refusal of Sheriff to Deliver Property. — If the sheriff fails or refuses to deliver the property, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default, but the plaintiff would not be liable. Mahoney v. Tyler, 136 N. C. 40, 44, 48 S. E. 549.

Proceedings upon Vacating Attachment. — When the court vacates the attachment and taxes the plaintiffs with the costs of the attachment proceedings, and then gives judgment in favor of the plaintiffs for the debt and the costs of the action other than the costs awarded to the defendant, its jurisdiction and power are exhausted. Nothing else can be done except, perhaps, to make an order for the return of the property seized under the attachment to the plaintiffs, if the provision in this section is not self-executing, (Devries v. Summit, 86 N. C. 126) and such an order is necessary. The general practice has been to insert such a direction to the sheriff in the order vacating the attachment. Jackson etc., Co. v. Burnett, 119 N. C. 195, 25 S. E. 868; Mahoney v. Tyler, 136 N. C. 40, 45, 48 S. E. 549.

Decision is Res Judicata. — A decision on a motion to vacate an attachment is res judicata until reversed. Roulhac v. Brown, 87 N. C. 1; Pasour v. Lineberger, 90 N. C. 159; Morganton Manufacturing, etc., Co. v. Lumber Co., 177 N. C. 404, 99 S. E. 104.

Appeal. — An appeal lies from the refusal to dismiss an attachment. Sheldon v. Kivett, 110 N. C. 408, 14 S. E. 970, Fertilizer Co. v. Grubbs, 114 N. C. 470, 19 S. E. 597; Judd v. Crawford Gold Mining Co., 120 N. C. 397, 399, 27 S. E. 81.

Same—When Facts Must Be Set Out. — The superior court judge is not required to set out the facts upon which he has vacated an attachment levied on the defendant's property, unless the party, appealing and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. Coharie Lumber Co. v. Buhmann, 160 N. C. 385, 75 S. E. 1008.

Same—Same—Not Reviewable. — On appeal it will be presumed that the superior court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of record; and any facts found by him, so appearing, are not reviewable. Coharie Lumber Co. v. Buhmann, 160 N. C. 385, 75 S. E. 1008.

Bond in Lieu of Attachment Lien. — Where attachment has been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver is permitted by the court to continue operations, the giving of the bond is in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by this and the following section; and he may not take advantage of the bond by continuing to ship his property thereunder beyond the jurisdiction of the court, and thereby repudiate it. Martin v. McBryde, 182 N. C. 175, 108 S. E. 739.

§ 815. Defendant's undertaking.—Upon the application provided for in the preceding section the defendant must deliver to the court an undertaking in at least double the amount claimed by the plaintiff in his complaint, executed by two sureties residing in this state, approved by the court, to the effect that the surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking. If it appears by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court or judge may order it to be appraised, and the amount of the undertaking shall then be double the amount so appraised. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may deliver to the court an undertaking, in accordance with this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against him, and all of this section, applicable to such an undertaking, shall be applied thereto. (Rev., s. 775; Code, s. 374; C. C. P., s. 213.)

When Undertaking Unnecessary. — The undertaking required in this section is not necessary when the warrant "on its face appears to have been issued irregularly, or for a cause insufficient in law or false in fact." Bear v. Cohen, 65 N. C. 511; Devries & Co. v. Summit, 86 N. C. 126, 131.

When an attachment on the debtor's property has been vacated by the superior court judge, the defendant should not be required to give the undertaking under this section to regain possession of the property. Coharie Lumber Co. v. Buhmann, 160 N. C. 385, 75 S. E. 1008.

Effect of Undertaking as Waiver or Estoppel.—Giving the undertaking by defendant under this section is equivalent to a general appearance in the action, and waives certain irregularities. It estops the defendant from denying ownership of the property levied on, but not from traversing the truth of the allegation on which the attachment is based. Giving the undertaking does not waive the validity of the statutory ground of attachment. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

Hearing as to Validity of Ground of Attachment.—When defendant gives the undertaking under this section the matter of the validity of statutory ground on which attachment was procured may be heard on affidavits before the trial of the main issue, but, if demand is made, it may be heard on affidavits before the trial of the merits or it may be tried with the main issue. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

Necessity for Separate Action on Undertaking.—By consent a surety on an undertaking on attachment can come in and the matter of the validity of the grounds of attachment be determined in one action; otherwise a separate action must be brought on the undertaking. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

The judgment contemplated in this section is not only

a judgment establishing the debt, but a judgment establishing the validity of the ground on which the attachment is procured, the validity is traversed. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

No summary judgment against the surety on the undertaking under this section can be rendered. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

Discharge of Surety.—When defendant in attachment enters a general appearance and traverses the allegations of fraudulent concealment of his property upon which the attachment was based, and gives bond to retain possession of the property attached, and upon the trial the issue as to fraud is found in his favor, the surety on the bond is discharged from liability, and it is not necessary that a motion to vacate the attachment be previously made. Bizzell v. Mitchell, 195 N. C. 484, 142 S. E. 706.

Surety Concluded from Asserting Insufficiency of Bond.—Where judgment by default final has been rendered against the principal debtor and the surety on an attachment bond given in the action, in the form required by this section, to secure whatever judgment may be rendered, and the property attached has accordingly been retained by the debtor, the surety is concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. Thompson v. Dillingham, 183 N. C. 566, 112 S. E. 321.

§ 816. All property liable to attachment.—The rights or shares of the defendant in the stock of any association or corporation, with the interest and profits thereon, and all other property in this state of the defendant, are liable to be attached, levied on, and sold to satisfy the judgment and execution. (Rev., s. 776; Code, s. 362; C. C. P., s. 206.)

In General. — The intention of the Legislature, as clearly expressed, in section 799, was to authorize the attachment of stock in foreign corporations, and also in the case of individuals or domestic corporations which are removing their property from the State with the intent to defraud creditors, or doing any other act for which attachment would lie, and to authorize the attachment of stock in domestic corporations also. It seems to us that this section means that, as it clearly says: "The rights or shares of the defendant's stock in any corporation or association are liable to be attached." Parks-Cramer Co. v. Southern Express Co., 185 N. C. 428, 430, 117 S. E. 505. As to attachment of stock in a foreign corporation, see 3 N. C. Law Rev. 103.

Under this section, all property in this state, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of § 798, is liable to attachment. Newberry v. Meadows Fert. Co., 203 N. C. 330, 337, 166 S. E. 79.

Unpaid Balances Due to Corporation. — Under this section of the Code, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this State are property of such a corporation, and subject to attachment for the payment of its debts. Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

Property Absorbed by Nonresident Corporation. — Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company in the one continuing to do business here is subject to attachment under the provisions of sections, 816, 817, 819 et seq., where the cause of action arose here; and the fact that the certificates of stock are not physically in the jurisdiction of the courts of this State is immaterial. Parks-Cramer Co. v. Southern Exp. Co., 185 N. C. 428, 117 S. E. 505.

A distributive share in the hands of an administrator, due the wife of a non-resident debtor, can not be subjected to the payment of the husband's debts in this State by means of an attachment in equity. McLean v. McPhaul, 59 N. C. 15.

§ 817. Levy on intangible property.—The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or with the debtor or individual holding such property, with a notice showing the property levied on. This certified copy must be furnished to the sheriff by the plaintiff, and the certification must be by the clerk of the court from which the warrant was issued, or by the justice of the peace who issued it. A person receiving or collecting moneys within this state on behalf of any corporation of this or any other state or government is deemed a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose or the plaintiff resides in the state, or when the service can be made within the state personally upon the president, treasurer or secretary thereof. Whenever a writ of attachment may be sued out against a nonresident debtor owning shares of stock in a resident corporation, and no officer of said resident corporation may be found in the county of its principal office upon whom service of said attachment may be made, said writ may be served by leaving a certified copy of the warrant of attachment with the person in charge of the property of said corporation in said county, together with a notice showing the stock levied upon. (Rev., s. 777; Code, s. 363; C. C. P., s. 207; 1905, c. 294; 1921, c. 94.)

Editor's Note. — By Laws 1921 ch. 94 this section was amended by the addition of the last sentence. The effect of this amendment is discussed by the court in a recent case as follows: The defendant relies upon Laws 1921, ch. 94, which amends sec. 817, by expressly providing that shares of stock held by a nonresident debtor in a resident corporation of this state may be attached, as an implied authority that if the stock is held in a foreign corporation doing business here it cannot be attached; but we do not think that that was the purpose or the effect of the Act of 1921, which was intended simply to make it plainer that the stock of a nonresident in a North Carolina corporation could be attached under sec. 817. Parks-Cramer Co. v. Southern Express Co., 185 N. C. 428, 432, 117 S. E. 505.

If it were true that stock owned by a nonresident is not attachable here, the Amendment of 1921 is ineffectual, for whether the stock attached is that of a domestic corporation of this state or a foreign corporation, in either event, if the owner is a nonresident the certificates of stock would not be physically liable in this state. Parks-Cramer Co. v. Southern Express Co., 185 N. C. 428, 432, 117 S. E. 505.

This section is commented upon in 2 N. C. Law Review 119 and 3 N. C. Law Review 103, 106.

Corporation a Party to Proceedings. — A corporation is a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts. Cooper v. Adel Security Co., 122 N. C. 463, 30 S. E. 348.

§ 818. Certificate of defendant's interest to be furnished to sheriff.—When the sheriff or other officer, with a warrant of attachment or execution, applies to a president or other head or director, secretary, cashier or managing agent of any association or corporation, or to any debtor or individual, for the purpose of attaching or levying on property of the defendant in such warrant, such officer, debtor or individual must furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If the officer, debtor or individual refuses to do so, he may be

required by the court or judge to appear before him, and be examined on oath concerning the matter, and obedience to this order may be enforced by attachment. (Rev., s. 778; Code, s. 369; C. C. P., s. 208.)

Examination Operates as Lien. — An exmaination of the city officials operates a lien on anything owing by the city to the defendants in the suit, as of the day when the copy of the warrant of attachment was delivered; and thereby prevents any alterations of the state of accounts between the defendants and the city. Carmer v. Evers, 80 N. C. 56, 59.

§ 819. Proceedings against garnishee.—When the sheriff or other officer serves an attachment on any person supposed to be indebted to, or to have any property of the defendant in the attachment, he shall at the same time summon in writing such person as a garnishee. The summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment is returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what property of the defendant he has in his hand and had at the time of serving the attachment, and to his knowledge and belief what effects or debts of the defendant there are in the hands of any other, and what person. When an attachment is served on a garnishee in the above manner, upon his appearance and examination, judgment may be entered up and execution awarded for the plaintiff against the garnishee, for all sums of money due the defendant from him, and for all property of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as will satisfy the debt and costs and all charges incident to levying the same. All property whatsoever in the hands of any garnishee belonging to the defendant is liable to satisfy the plaintiff's judgment, and must be delivered to the sheriff or other officer serving attachment. (Rev., s. 779; Code, s. 364; R. C., c. 7, s. 7; 1777, c. 115, s. 28.)

Cross References.—As to garnishment in general, see 6 N. C. Enc. Dig. 818-834; 14 N. C. Enc. Dig. 265-266, as to exemption of earnings, see section 721.

In General. — A garnishment is in effect a suit by this principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. Goodwin v. Claytor, 137 N. C. 224, 225, 231, 49 S. E. 173.

This section applies alike to residents and nonresidents, persons and corporations, and it will not be declared unconstitutional in an action instituted long subsequent to its enactment. Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 173 S. E. 67.

Nature of Garnishment. — It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. Miller v. United States, 11 Wall. 268, 297, 20 L. Ed. 135.

The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. Wanzer v. Truly, 17 How. 584, 586, 15 L. Ed. 216.

The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to defeat his creditors. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 715, 43 L. Ed. 1144.

Proceeding in Rem. — In garnishment proceedings, whatever of substance there is must be with the debtor, he holding the res in his hands, giving character to the action as one in the nature of a proceeding in rem. Chicago, etc., R. R. Co. v. Sturm, 174 U. S. 710, 715, 43 L. Ed. 1144.

Intention of the Section. — The language employed in this section clearly indicates the intention that any money due by the garnishee, or goods in his hands belonging to the debtor at the time of appearance and answer, shall be applied in satisfaction of the debt. Goodwin v. Claytor, 137 N. C. 224, 225, 230, 49 S. E. 173.

Jurisdiction Necessary. — The court entertaining a garnishment must have some jurisdiction over the thing garnished. Balk v. Harris, 124 N. C. 467, 32 S. E. 799.

Personal Service Necessary. — This section in relation to garnishments evidently contemplated personal service, as no provision is made for a constructive service of the summons; and this statute has always been strictly construed. Parker v. Scott, 64 N. C. 118, 120.

Purpose of Warrant. — The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the state, and is only incidental to the relief sought in the original action under this section, and the warrant in garnishment may run beyond the limit of the county wherein the action was brought. Mohn v. Cressey, 193 N. C. 568, 137 S. E. 718.

Warrant Incidental to Original Action. — Want of authority in the justice to issue an original process to any county other than his own did not inhibit the running of the warrant of attachment to another county, or the service of a notice upon the garnishee to appear before the court to which the attachment was returnable to answer upon oath as the statute provides; for issuing the warrant was only incidental to the original action. Baker etc., Co. v. Belvin, 122 N. C. 190, 30 S. E. 337; Mohn v. Cressey, 193 N. C. 568, 572, 137 S. E. 718.

Judgment against Garnishee. — A judgment may be taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and is not necessary to bring a separate action against such garnishee. Baker, etc., Co. v. Belvin, 122 N. C. 190, 30 S. E. 337. Carmer v. Evers, 80 N. C. 56, a case which held the opposite of this, discussed and overruled since it was decided under former law.

Same—Rights Acquired. — A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Same—Order. — Where judgment is given against a garnishee in an action against the debtor, it is proper to make an order applying the collections made on such judgment to the judgment obtained, or to be obtained, against the debtor. Baker, etc., Co. v. Belvin, 122 N. C. 190, 30 S. E. 337.

Judgment against Both. — Where service of summons was had by publication on a nonresident of the state, and a debt due the defendant was garnisheed, the plaintiff did not lose any lien on the debt by taking a judgment against the defendants and the garnishee. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

No Personal Judgment. — In garnishment proceedings against a nonresident defendant, service being had by publication, no jurisdiction is acquired to support a personal judgment against the defendant. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Moneys Not Yet Due. — Under this section, moneys due by a garnishee, or goods in his hands at the time of appearance and answer, are applicable to the debt, though not earned and due when he was summoned to answer. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Exemption of Earnings. — Section 721 provides that earnings of a debtor for his personal services for the 60 days next preceding shall be exempt from execution. It was held that the exemption protects such earnings from seizure in garnishment. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Same—Claim Must Be Made. — When a man has earned wages they can be garnished as his property, if no personal exemption is claimed. Pocomoke Guano Co. v. Colwell, 177 N. C. 218, 98 S. E. 535.

Bank May Be Garnishee. — A national bank may be proceeded against by garnishment to impound the proceeds of a draft in its hands. Markham-Stephens Co v. Richmond Co., 177 N. C. 364, 99 S. E. 17.

What Law Governs. — To enable the judgment creditor to arrest the payment of what is due the judgment debtor, which might be paid so as to defeat the rights of the creditor, he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. It is a legal necessity and considerations of situs are somewhat artificial. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 716, 43 L. Ed. 1144.

The obligation of the garnishee can be enforced by the courts of the foreign state after personal service of process therein, just as well as by courts of the domicil of the debtor. Harris v. Balk, 198 U. S. 215, 223, 49 L. Ed. 1023.

Execution and Proceedings to Enforce.—Under this section no lien attaches to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. Newberry v. Meadows Fert. Co., 203 N. C. 330, 166 S. E. 79.

Execution may be issued against garnishees prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment. Newberry v. Meadows Fertilizers Co., 206 N. C. 182, 173 S. E. 67.

There is no distinction between an execution on an ordinary judgment issued under § 666, and an execution on a judgment against a garnishee issued under this section. They are both judgments and sections to be construed in pari materia. Id.

Where judgment has been regularly entered against certain garnishees in proceedings under § 798, the clerk of the Superior Court may issue execution on the judgment against the garnishees without notice or a hearing under this section and § 666. Id.

§ 820. Failure of garnishee to appear. — When a garnishee is summoned and fails to appear and discover on oath as directed the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment should not be entered against him. Upon due execution of the notice, if the garnishee fails to appear at the time and place named, and discover on oath in the manner aforesaid, the court shall confirm the judgment and award execution for the plaintiff's whole judgment and costs. Upon examination of the garnishee, if it appears to the court that there is any of the defendant's property in the hands of a person who has not been summoned, the court, upon motion of the plaintiff, shall grant a judicial attachment, to be levied in the hands of every such person having any of the property of the defendant in his custody or possession, who must appear and answer and be liable as other garnishees. (Rev., s. 780; Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1838, c. 2.)

§ 821. Garnishee denying debt; issue tried.— When a garnishee denies that he owes to, or has in his possession any property of, the defendant, and the plaintiff on oath suggests to the court the contrary, or when a garnishee makes such a statement of facts that the court cannot proceed to give judgment thereon, the court shall order an issue to be made up, which must be tried by a jury, and on their verdict judgement shall be rendered. In a court of a justice of the peace, he may try such issue, unless a jury is demanded, and then proceedings are to be conducted, in all respects, as in jury trials before justices of the peace. (Rev., s. 781; Code, s. 366; R. C., 7, s. 9; 1793, c 389, s. 2.)

Jury Trial. — Under this section the plaintiff in garnishment proceedings, upon the suggestion that he wishes to traverse the return of the garnishee, is entitled, without any formal or verified statement, to have the issue tried by a jury. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

Where Defendant Denies Ownership. — The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denies ownership of the attached property, cannot be injured by the judgment, and hence, is not entitled to have an issue submitted as to the title to the property. Foushee v. Owen, 122 N. C. 360, 29 S. E. 770.

Garnishee a Mere Stakeholder. — The requirement of this section that an issue shall be made up and determined by the jury where the garnishee in attachment denies owing the principal defendant, should be construed with section 460, requiring the making of all necessary parties to a full determination of the controversy; and it does not apply when the garnishee takes the position of a mere stakeholder and sets up in his answer that another, not a party to the action, is the owner of the funds attached, and asks that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court. Temple v. Eades Hay Co., 184 N. C. 239, 114 S. E. 162.

§ 822. Property with garnishee valued; garnishee exonerated.—When a garnishee on oath confesses that he has in his hands any property of the defendant of a specific nature, or is indebted to him by any security or promise for the delivery of any specific article, except as hereinafter excepted, the court shall immediately order a jury to be impaneled and sworn to inquire into the value of such specific property, and the verdict of the jury subjects the garnishee to the payment of the valuation, or as much of it as is sufficient to satisfy the debt or damages and costs of the plaintiff. In a court of a justice of the peace, he may try such issue, unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. If the garnishee states in his answer that the specific property was left with him by the defendant as a bailment, or that he has tendered said specific articles according to contract, and that they were refused by the defendant, and that he then was and always had been ready to deliver the same; or that he had such specific articles at the time and place specified in such covenant or agreement ready to be delivered, and is still ready to deliver them; and such statement is admitted by the plaintiff or found by a jury or the court, then in any such case the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been orginally levied on the property. (Rev., s. 782; Code, s. 367; R. C., c. 7, s. 11; 1793, c. 389; 1794, c. 424.)

Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him full consideration, and the husband afterwards absconded before the teeth were furnished, the dentist was not liable as garnishee to a creditor for the value of the teeth. Cherry v. Hooper, 52 N. C. 82.

§ 823. Conditional judgement against garnishee.—When a garnishee declares in his answer that the money or specific article due by him will become payable or deliverable at a future day, and this is admitted by the plaintiff or found by a jury or the court, a conditional judgement shall be entered against the garnishee, and the plaintiff may obtain judgment against the defendant for his demand, but may not take final judgment against the garnishee without notice to show cause. (Rev., s. 783; Code, s. 368; R. C., c. 7, s. 12; 1794, c. 424, s. 2.)

§ 824. Satisfaction of judgement.—If judgment is entered for the plaintiff in the action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose—

1. By paying over to the plaintiff the proceeds of all property sold and debts or credits

collected by him, or so much as is necessary to satisfy the judgment.

2. If any balance remains due, and an execution has been issued on the judgment, he shall sell under the execution as much of the attached real or personal property, except as provided in subdivision four of this section, as is necessary to satisfy the balance, if enough for that purpose remains in his hands. In case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale, and the purchaser has all the rights and privileges in respect thereto which were had by the defendant.

3. If any of the attached property belonging to the defendant has passed out of the hands of the sheriff without having been sold or converted into money, he shall repossess himself of the same, and for that purpose has all the authority which he had to seize it under the attachment. A person who willfully conceals or withholds such property from the sheriff is liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant is paid, the sheriff may collect the notes and other evidences of debt, and the debts that were seized or attached, under the warrant of attachment, and prosecute any bond he has taken in the course of such proceedings, and apply the proceeds to the payment of the judgment.

At the expiration of six months from the docketing of the judgment the court has power, upon petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as is deemed proper. Notice of this application must be given to the defendant or to his attorney, if the defendant has appeared in the action. If the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice and time of service, as is deemed just. When the judgment and all costs of the proceedings have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property of the proceeds thereof. (Rev., s. 784; Code, s. 370; C. C. P., s. 209.

Section Grants Power. — This section gives an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invests him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. Electric Co. v. Engineering Co., 128 N. C. 199, 38 S. E. 831; Chemical Co. v. Sloan, 136 N. C. 122, 48 S. E. 577; May v. Getty, 140 N. C. 310, 318, 53 S. E. 75; Morganton Mfg. etc., Co. v. Lumber Co., 177 N. C. 404, 407, 99 S. E. 104.

Duty of Sheriff. — The attachment is simply a levy before judgment, and upon execution issuing on the judgment it is the duty of the sheriff to sell the attached property. Gamble v. Rhyne, 80 N. C. 183; Morganton Mfg., etc. Co. v. Lumber Co., 177 N. C. 404, 407, 99 S. E. 104, Farmers Manufacturing Co. v. Steinmetz, 133 N. C. 192, 194, 45 S. E. 552.

Same—Not Error to Condemn Property. — Where ancillary proceedings of attachment are brought with the main action, and the attachment is not discharged, it is not error to condemn the attached property for sale to pay the judgment, as the sheriff would be required to sell the same upon issuance of execution. Farmers Manufacturing Co. v. Steinmetz, 133 N. C. 192, 45 S. E. 552.

Sale under Execution. — A sale under an execution issuing upon a judgment on an attachment only passes the right of the defendant in attachment. Electric Co. v. Eng. Co., 128 N. C. 199, 38 S. E. 831.

Judgment Against Nonresident. — No judgment in personam may be entered or enforced against a nonresident who has not been personally served with summons. Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057.

Exemptions after Judgment. — Property seized under attachment is only a legal deposit in the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment. Gamble v. Rhyne, 80 N. C. 183.

Where Property Is in Possession of Third Party.—Where a person in possession of property is not a party to the attachment suit, the plaintiff, in addition to a judgment for his debt, is not entitled to a judgment for such property, but must proceed under this section. Electric Co. v. Eng. Co., 128 N. C. 199, 38 S. E. 831.

Property Held until Final Judgment.—This section indicates that the property is held until final judgment and the sheriff can collect from the garnishee against whom judgment is entered. Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 188, 173 S. E. 67.

§ 825. Plaintiff may sue on defendant's bond. —The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. The sureties must in all cases, when required by the sheriff, justify by making an affidavit that each is a freeholder, and worth double the amount of the penalty of the bond, over and above all demands, liabilities and exemptions. (Rev., s. 785; Code, s. 371; C. C. P., s. 210.)

§ 826. On defendant's recovery, bonds and property delivered to him.—If the foreign corporation, or the absent, absconding, or concealed defendant, recovers judgment against the plaintiff in such action, any bond taken upon the issuing of the warrant of attachment, and any bond taken by the sheriff, except such as are mentioned in the preceding section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released. (Rev., s. 786; Code, s. 372; C. C. P., s. 211.)

Sheriff Cannot Sell after Vacation. — The sales of property mentioned in this section refer to those before the attachment is vacated as for instance sales made under the order of the court in accordance with section 812 when property is perishable. The sheriff has no right, after the attachment has been vacated, to sell any property seized by him, as it then becomes his duty to deliver at once to the defendant all property in his hands. Mahoney v. Tyler, 136 N. C. 40, 44, 48 S. E. 549.

Bank a Mere Stakeholder. — Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the

action, in order to protect itself in the payment of the funds attached in its hands. Temple v. Eades Hay Co., 184 N. C. 239, 114 S. E. 162.

§ 827. Motion to vacate or increase security.—The defendant, or person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies. (Rev., s. 787; Code, s. 377.)

As to appeal from order of clerk denying motion to increase security see notes to §§ 635, 636.

When Third Party Intervenes. — Parties who intervene in attachment proceedings can not be heard to object to the irregularity of the same, that is a matter between the parties to the main action. Cook v. N. Y. Corundum etc., Co., 114 N. C. 617, 19 S. E. 664.

Motion May Be Made by One of Several Defendants.—Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. Luff v. Levey, 203 N. C. 783, 166 S. E. 922.

Vacation in Case Increased Bond Is Not Filed.—The judge of the Superior Court has the power to order the plaintiff to give further security or an increased bond, under this section, but he may not add a condition to the order that the attachment be vacated ipso facto if the increased bond is not filed by a certain time, and it appearing that the time set by the court for filing the increased bond has expired, the plaintiff will be given a reasonbale time for filing the bond. Luff v. Levey, 203 N. C. 783, 166 S. E. 922.

Cited in Bizzell v. Mitchell, 195 N. C. 484, 487, 142 S. E. 760.

§ 828. Exceptions to and justification of sureties.—The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as prescribed in respect to bail upon an order of arrest. (Rev., s. 788; Code, s. 378.)

§ 829. Interpleader.—When the property attached is claimed by any other person, the claimant may interplead, as provided for interpleader in claim and delivery. (Rev., s. 789; Code, s. 375; R. C., c. 7, s. 10; 1793, c. 389, s. 3.)

Cross References. — As to interpleader in claim and delivery, see section 840 and annotations thereunder.

Purpose of Bill. — The very nature of a bill of interpleader presupposes that the party by whom it is exhibited would be liable a second time, if he should either voluntarily, or otherwise, pay the money which he owes, to a wrong claimant. George v. Brailsford, 2 Dall. 415, 418, 1 L. Ed. 438.

Nature of Bill. — A bill in the nature of a bill of interpleader will not lie by a party in interest to ascertain and establish his own rights when there are other conflicting rights between third persons, unless the relief sought is equitable relief. Killian v. Ebbinghans, 110 U. S. 568, 572, 28 L. Ed. 246.

Justice Has Jurisdiction. — Attachment proceedings relating to personal property, being only ancillary to the main action, a justice of the peace may entertain and try an interplea to determine the title, although the value of the property exceeds $50. Grambling, etc., & Co. v. Dickey, 118 N. C. 986, 24 S. E. 671.

Necessary Averments. — In a bill of interpleader it is necessary to aver that the complainant has no interest in the subject matter of the suit; he must admit title in the claimants and aver that he is indifferent between them, and he cannot seek relief in the premises against either of them. Groves v. Sentill, 153 U. S. 465, 485, 38 L. Ed. 785.

Remedies of Claimant. — One whose property has been attached by a sheriff, under a warrant issued in an action to which he is not a party, may intervene or interplead in the action, and demand judgment that he is the owner of the property, and an order directing the sheriff to release the property under this section. Or he may bring an action against the sheriff and the sureties on his official bond for the property or for damages for its conversion. Stein v. Cozart, 122 N. C. 280, 30 S. E. 340. Or he may bring an action against the plaintiffs at whose instance the warrant was issued, and the property wrongfully seized, joining the sheriff as a defendant or not as he sees fit; if the sheriff has taken an indemnity bond, he may sue the obligor and the sureties on such bond. Tyler v. Mahoney, 168 N. C. 237, 84 S. E. 362; Martin v. Buffaloe, 128 N. C. 305, 38 S. E. 902; Gay v. Mitchell, 146 N. C. 509, 510, 60 S. E. 426; Tatham v. Dehart, 183 N. C. 657, 112 S. E. 430; Flowers v. Spears, 190 N. C. 747, 752, 130 S. E. 710.

Separate Trial.—In attachment a separate trial for the intervenor is discretionary with the trial judge. Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218.

Intervenor Cannot Interfere in Main Action. — In attachment an intervenor has no right to interfere in the action between the original parties, since he is interested only as to the title to the property. Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218.

Burden of Proving Title. — In attachment the burden is on the intervenor to establish title to the property. Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218.

Defendant Holding Property as Agent. — Where the evidence tends to show that a defendant holds property levied on as agent for another, such third person should be allowed to be made a party. Farmers' Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621; Francis v. Mortgage Security Corp., 198 N. C. 734, 735, 153 S. E. 317.

Art. 35. Claim and Delivery

§ 830. Claim for delivery of personal property.—The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the property as provided in this article. (Rev., s. 790; Code, s. 321; C. C. P., s. 176.)

Cross References. — For a general treatment of the subject of claim and delivery, see 3 N. C. Enc. Dig. 74-107; 13 N. C. Enc. Dig. 381-383.

In General. — Strictly speaking, there is no such action under the Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to recover the value of the property, as in trover or trespass. Wilson v. Hughes, 94 N. C. 182. Jarman v. Ward, 67 N. C. 32; Allsbrook v. Shields, 67 N. C. 333; Hopper v. Miller, 76 N. C. 402.

Founded on Right to Possession. — Replevin (and the action of claim and delivery is but a longer name for the same thing) is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain or be restored to the possession, as the case may be. Holmes v. Godwin, 69 N. C. 467, 472.

A Substitute for Common Law Remedies. — Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff: if not, it is a substitute for the action of detinue or trover. Jarman v. Ward, 67 N. C. 32; Hopper v. Miller, 76 N. C. 402, 404.

An Ancillary Remedy. — Under the State Constitution, Art. IV. Sec. 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i. e., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked, even if the party is entitled to them, Wilson v. Hughes, 94 N. C. 182, and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. Deloatch v. Coman, 90 N. C. 186; Morris v. O'Briant, 94 N. C. 72; Hargrove v. Harris, 116 N. C. 418, 419, 21 S. E. 916.

Adopted from New York Code. — This statutory remedy is adopted from the Code of New York. Manix v. Howard, 82 N. C. 125, 129.

Statute Must Be Followed. — To entitle a party to maintain an action for claim and delivery of personal property,

there must be a compliance with all the requisites specified in this and the following section. Hirsh v. Whitehead & Co., 65 N. C. 516.

Object Is to Recover Specific Property. — The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property can not be had. Hendley v. McIntyre, 132 N. C. 276, 277, 43 S. E. 824.

Who May Bring the Action. — One in the rightful possession of property as bailee can maintain an action of claim and delivery against a wrong-doer who is depriving him of possession. Hopper v. Miller, 76 N. C. 402.

Same—Tenant. — The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. Boone v. Darden, 109 N. C. 74, 13 S. E. 728.

But one tenant in common of personal property may not maintain claim and delivery against a third person in possession without the other owners, it being required that the claimant show sole ownership. Allen v. McMillan, 191 N. C. 517, 132 S. E. 276.

Same—Landlord. — Where, in a contract between the landlord and tenant, no time was fixed for the division of the crops, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. Rich v. Hobson, 112 N. C. 79, 16 S. E. 931. But see State v. Copeland, 86 N. C. 692, 694; Jordan v. Bryan, 103 N. C. 59, 9 S. E. 135.

Same—Mortgagee. — After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor had the right to redeem, until the property is sold; and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who had the possession of his property. Kiser & Co. v. Blanton, 123 N. C. 400, 404, 31 S. E. 878.

Same—Assignee of Chattel Mortgage. — The assignee of a chattel mortgage may maintain proceedings in claim and delivery for the possession of the mortgaged property or for its value, etc., in his own name and right, after the note secured by the mortgage is overdue and remains unpaid. Johnson v. Bray, 174 N. C. 176, 93 S. E. 728.

Against Party in Possession. — An action for the possession of property must be brought against the party in possession. Haughton v. Newberry, 69 N. C. 456; Webb v. Taylor, 80 N. C. 305; Moore v. Brady, 125 N. C. 35, 37, 34 S. E. 72; General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. Webb v. Taylor, 80 N. C. 305, citing Jones v. Green, 20 N. C. 488; Charles v. Elliott, 20 N. C. 606; Foscue v. Eubank, 32 N. C. 424; Haughton v. Newberry, 69 N. C. 456; Slade v. Washburn, 24 N. C. 414.

Recovery of Title Deed. — Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it. Pasterfield v. Sawyer, 132 N. C. 258, 43 S. E. 799.

Where Crops Removed. — The action will lie where the crops are removed from the land leased. Livingston v. Farish, 89 N. C. 140.

Crops on Wife's Land. — Claim and delivery will not lie for crops produced on wife's land, under a crop lien given by husband without her consent. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597.

Where Nature of Goods Changed. — If a person bestows his labor upon the property of another, thereby changing it into another species of article (as if corn be made into whiskey, prior to prohibition acts, etc.), the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. Potter v. Mardre, 74 N. C. 36.

Statute of Limitations Applies.—The three-year statute of limitations in § 441(1) is also applicable to an action of claim and delivery. Hence where a note was given in payment for personal property and the statute of limitations had run on the note no action of claim and delivery could be maintained. Lester Piano Co. v. Loven, 207 N. C. 96, 176 S. E. 290.

Jurisdiction of Justice. — Where plaintiff, in an action before a justice of the peace to recover $75 due for rent, alleged that defendant wrongfully detained the crop on which the rent was a lien, and incidentally asked for a delivery of the crop which was not alleged to be worth "not more than fifty dollars," the justice of the peace was not deprived of jurisdiction by such allegation and prayer. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

Trial by Jury. — Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in claim and delivery, the question is one for the jury. Allen v. McMillan, 191 N. C. 517, 518, 132 S. E. 276.

Judgment. — Where claim and delivery is brought to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. Austin v. Secrest, 91 N. C. 214.

In claim and delivery the judgment should be for the delivery of the property or its value. Oil Co. v. Grocery Co., 136 N. C. 354, 48 S. E. 781.

Cited in McKinney v. Sutphin, 196 N. C. 318, 321, 145 S. E. 621.

§ 831. Affidavit and requisites.—Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention, according to his best knowledge, information and belief.

4. That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property. (Rev., s. 791; Code, s. 322; C. C. P., s. 177; 1881, c. 134.)

Broad Language. — The words of this section are as broad as can well be imagined, and include every case, with four specified exceptions, where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the "undertaking". Jones v. Ward, 77 N. C. 337, 338.

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. The language of the Code is immensely broader in its scope than the language of the revised statutes on the subject in hand. Mitchell v. Sims, 124 N. C. 411, 415, 32 S. E. 735.

Rights Conferred. — Under this section when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law. Mitchell v. Sims, 124 N. C. 411, 415, 32 S. E. 735.

When Section Applies. — It is only in cases when the plaintiff seeks to have the property delivered to him instanter, and to have the possession pending the action, as in the old action of replevin, that the affidavit and undertakings are required. Jarman v. Ward, 67 N. C. 32, 33.

Affidavit Essential. — The affidavit required by the Code is indispensable to maintain claim and delivery. Griffith v. Richmond, 126 N. C. 377, 35 S. E. 620.

Affidavit Must Comply with Section. — In making the affidavit this section must be strictly followed. Hirsh v. Whitehead, 65 N. C. 516.

Plaintiff Should State Interest. — It seems that the plaintiff should set forth his special interest in the property. Cooper v. Evans, 174 N. C. 412, 93 S. E. 897.

Affidavit Made "Per" Another. — In claim and delivery of personal property, an affidavit made by plaintiff "per" another is sufficient. Spencer v. Bell, 109 N. C. 39, 13 S. E. 704.

Deputy Can Take Affidavit. — The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. Jackson v. Buchanan, 89 N. C. 74.

Burden of Proof.—In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. Smith v. Cook, 196 N. C. 558, 146 S. E. 229.

Applied in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in McKinney v. Sutphin 196 N. C. 318, 145 S. E. 621.

§ 832. Order of seizure and delivery to plaintiff.—The clerk of the court shall, thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff. (Rev., s. 792; Code, s. 323; C. C. P., s. 178)

Summons Necessary. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons is no justification to the sheriff or the defendant for any action in the premises. Potter v. Mardre, 74 N. C. 36.

A Ministerial Act. — In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do under the statute, but he performs a ministerial act peremptorily enjoined, and exercises a function belonging to the office. Jackson v. Buchanan, 89 N. C. 74, 76.

Same—Deputy Can Make Order. — It was held in Jackson v. Buchanan, 89 N. C. 74, that the clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery only does a ministerial and not a judicial act or service, and therefore a deputy clerk might make such order. Evans v. Etheridge, 96 N. C. 42, 43, 1 S. E. 633.

Plaintiff Must Continue the Action. — In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. Manix v. Howard, 82 N. C. 125.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 833. Plaintiff's undertaking.—The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (Rev., s. 793; Code, s. 324; 1885, c. 50; C. C. P., s. 179.)

Cross Reference. — As to the judgment in an action for the recovery of personal property, see section 610.

Judgment Should Be in Alternative. — A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages. Grubbs v. Stephenson, 117 N. C. 66, 67, 23 S. E. 97.

Value Ascertained. — For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N. C. 377, 35 S. E. 620.

Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant, if so adjudged, is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor. Barrington v. Skinner, 117 N. C. 47, 48, 23 S. E. 90.

The plaintiff and surety are not liable where sheriff seized and retained certain property not specified or described in the affidavit. Williams v. Perkins, 192 N. C. 175, 134 S. E. 417.

Voluntary Nonsuit by Plaintiff.—Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with this section, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 S. E. 176.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 834. Sheriff's duties.—Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (Rev., s. 793; Code, s. 324; C. C. P., s. 179; 1885, c. 50.)

Sheriff Acts Officially.—The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court. Williams v. Perkins, 192 N. C. 175, 178, 134 S. E. 417.

Action against Sheriff.—Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. Williams v. Perkins, 192 N. C. 175, 134 S. E. 417.

Quoted in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 835. Exceptions to undertaking; liability of sheriff.—The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county-seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as provided in the succeeding section. (Rev., s. 794; Code, s. 325; C. C. P., s. 180.)

Sheriff Liable as Surety.—In delivering property to a defendant, when seized in claim and delivery proceedings without taking a proper undertaking and requiring the same

to be justified, a sheriff becomes liable as a surety thereon. Wells v. Bourne, 113 N. C. 82, 18 S. E. 106.

Same—Measure of Damages.—In such case the measure of liability is the delivery of the property to the plaintiff (if such delivery be adjudged), with damages for its deterioration, or (failing delivery) the value of the property; and to subject the sheriff as surety, it is necessary to show that execution has been returned unsatisfied. Wells v. Bourne, 113 N. C. 82, 18 S. E. 106.

Same—What Plaintiff Must Prove.—Where plaintiff, in an action against a sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him at the instance of the plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and can not recover, actual damage against such sheriff. Wells v. Bourne, 113 N. C. 82, 18 S. E. 106.

When Objection Must Be Made.—The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. Spencer v. Bell, 109 N. C. 39, 13 S. E. 704.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 836. Defendant's undertaking for replevy.—At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (Rev., s. 795; Code, s. 326; 1885, c. 50, s. 2; C. C. P., s. 181; 1911, c. 17.)

Cross References.—As to judgment in an action for the return of personal property, see section 610.

Liability of Surety.—The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the property the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation. Wallace & Sons v. Robinson, 185 N. C. 530, 117 S. E. 508.

Where, in claim and delivery, the defendant pleads that he became possessed of the property under a contract of sale, upon the facts being so found by the jury (the property having been sold under an order of the court pendente lite), judgment should be rendered against the sureties to the defendant's undertaking for the penalty of the bond, to be discharged upon the payment of the contract price with interest and cost, less the payments by the defendant Hall v. Tillman, 110 N. C. 220, 14 S. E. 745.

The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action. Federal Finance, etc., Co. v. Teeter, 196 N. C. 232, 145 S. E. 8.

Same—Debt Recovered.—The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any debt which the plaintiff may recover in the action. Hall v. Tillman, 103 N. C. 276, 9 S. E. 194.

Liability Where Bond Voluntary.—Where an action of claim and delivery is instituted in a court inferior to the superior court, the defendant is not required by this section to give bond for the payment by him of the costs of the action, if a judgment adverse to him is rendered in the action. However, when, the bond is so conditioned, the bond is not for that reason void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound according to the terms of the bond, which they executed voluntarily. Wright v. Nash, 205 N. C. 221, 223, 171 S. E. 48.

The recovery against the surety can in no event exceed the penalty of the bond. Boyd v. Walters, 201 N. C. 378, 160 S. E. 451.

Summary Judgment against Sureties. — Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by this section, and sec. 610. Hall v. Tillman, 103 N. C. 276, 9 S. E. 194.

Form of Judgment against Surety.—Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against the surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. Boyd v. Walters, 201 N. C. 378, 160 S. E. 451.

Sureties' Defenses. — The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. Garner v. Quakenbush, 188 N. C. 180, 124 S. E. 154.

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. Wallace & Sons v. Robinson, 185 N. C. 530, 117 S. E. 508.

Sheriff Retaining Possession of Goods.—When the sheriff of the county retains possession of the goods, replevied in claim and delivery under section 3403, instead of surrendering possession to the plaintiff who has given the replevin bond prescribed by this section, the status of his possession changed from that of a custodian of the law, and his liability is to be determined under the provisions of this section and those of his official bond, and he is responsible for the loss of the goods when destroyed by fire in his possession, irrespective of any question of negligence on his part in keeping it. Motor Co. v. Sands, 186 N. C. 732, 120 S. E. 459.

Recovery of Costs.—The language of this section is not so explicit as that of the original section of the Code, but it is fairly susceptible of the interpretation that the entire costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. Hall v. Tillman, 110 N. C. 220, 229, 14 S. E. 745.

Quoted in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621; McCormick v. Crotts, 198 N. C. 664, 665, 153 S. E. 152.

§ 837. Qualification and justification of defendant's sureties.—The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court, a judge or justice of the peace, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived and, he may retain the property until that time; but if they, or others in their place, fail to

justify at the time and place appointed, he must deliver the property to the plaintiff. (Rev., ss. 796, 797; Code, ss. 327, 328; C. C. P., ss. 182, 183.)

As to qualifications of bail in arrest and bail, see section 781. As to justification, see section 782.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 838. Property concealed in buildings.—If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may sieze the person, and search for and take it. (Rev., s. 798; Code, s. 329; C. C. P., s. 184.)

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 839. Care and delivery of seized property.—When the sheriff has taken property, as provided in this article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (Rev., s. 799; Code, s. 330; C. C. P., s. 185.)

Expenses of Seizing Included in Costs.—It is proper to allow in the bill of costs the expense of seizing and caring for the property. Hendricks v. Ireland, 162 N. C. 523, 525, 7 S. E. 1011.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 840. Property claimed by third person; proceedings.—When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may interplead upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title; and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in intervenor or third person's affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him; this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. In a court of a justice of the peace he may try such issue unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. In a court of a justice of the peace an interpleader shall not be required to serve on the plaintiff and defendant the affidavits and bonds required by this section, ten days before return day; but if said bond and affidavit are filed by any person owning the property when such case is called for trial, he shall be allowed to interplead: Provided that this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property pending the trial of the issue. (Rev., s. 800; Code, s. 331; C. C. P., s. 186; 1793, c. 389, s. 3; R. C., c. 7, s. 10; 1913, c. 188; 1933, c. 131.)

Cross References.—As to bringing in third parties in general, see section 460. For further cases under "interpleader," see annotations under section 829, the provisions of which are identical with this section.

Editor's Note.—Public Laws 1933, c. 131, substituted the words "intervenor or third person," now appearing in the eighth and ninth lines, for the word "plaintiff." It also added the proviso at the end of the section, declaring bond not necessary.

The original section required that the undertaking be in double the value of the property stated in the plaintiff's affidavit, while the 1933 amendment required double the value as stated in the intervenor's affidavit. This was probably intended to apply where the intervening claimant does not demand all the property involved or its value has depreciated, and not to allow his statement of the value generally to control as against the security which the plaintiff has been required to give. 11 N. C. Law Rev., 217.

Purpose.—Is it not the purpose of the section to allow the person interpleading to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and, if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring? This seems to us to be the just and reasonable view, and the one that harmonizes with well-settled principles of the law applicable. Claywell v. McGimpsey, 15 N. C. 89; Churchill v. Lee, 77 N. C. 341; Hudson v. Wetherington, 79 N. C. 3; Wallace Bros. v. Robeson, 100 N. C. 206, 211, 2 S. E. 650.

Right to Intervene Well Settled.—The right of an outside claimant to intervene is well settled by precedent. Sims v. Goettle Brothers, 82 N. C. 269; Toms v. Warson, 66 N. C. 417; Bruff v. Stern, 81 N. C. 183; McKesson v. Mendenhall, 64 N. C. 286; Clemmons v. Hampton, 70 N. C. 534.

Intervenor Restricted to Question of Title. — It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. McLean v. Douglas, 28 N. C. 233; Dawson v. Thigpen, 137 N. C. 462, 467, 49 S. E. 959.

In a proceeding under this section the intervenor is not called on or required, and indeed he is not permitted to question the validity of the plaintiff's claim against the defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervenor, has himself become the actor in the suit, and, on authority, is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882; Maynard v. Ins. Co., 132 N. C. 711, 44 S. E. 405; Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218; Hill v. Patillo, 187 N. C. 531, 532, 122 S. E. 306.

Intervenor Must Prove Title.—In proceedings in attachment one who interpleads under this section is an actor upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff. Wallace Bros. v. Robeson, 100 N. C. 206, 2 S. E. 650, Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218.

Appearance Waives Objections.—A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervener, as not having been made in accordance with the requirements of our statute, by appearing at the taking of depositions in his behalf and cross-examining his witness. Allen v. McMillan, 191 N. C. 517, 132 S. E. 276.

Voluntary Recognition of Jurisdiction.—Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party to the action must first attack the validity of the order, if he so desires, and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive. Allen v. McMillan, 191 N. C. 517, 132 S. E. 276.

Separate Trial.—A separate trial for the intervenor is discretionary with the trial judge. Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218.

Three Years Delay by Intervenor.—In an action for the possession of personal property, under this section, a third

party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead. Clemmons v. Hampton, 70 N. C. 534.

Surety Cannot Interplead.—Where the defendant in claim and delivery proceedings consents to a judgment against himself and sureties on the replevin bond, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by this section. McDonald v. McBryde, 117 N. C. 125, 23 S. E. 103.

Nonsuit by Plaintiff.—In an action to recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a nonsuit, but the action goes on for the interpleader. Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959.

Jurisdiction of Justice of the Peace.—A justice of the peace may entertain and try an interplea to determine the title although the value of the property exceeds $50. Grambling v. Dickey, 118 N. C. 986, 24 S. E. 671.

When Garnishee Bank a Mere Stakeholder. — Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. Temple v. Eades Hay Co., 184 N. C. 239, 114 S. E. 162.

Same—No Bond Required.—The bond required of an intervenor by this section, has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same, for the adjudication of the court between two conflicting claimants. Temple v. Eades Hay Co., 184 N. C. 239, 114 S. E. 162.

Husband and Wife.—Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give an interpleader bond under this section is not error. Unaka, etc., Nat. Bank v. Lewis, 201 N. C. 148, 159 S. E. 312.

Applied in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621; Francis v. Mortgage Security Corp., 198 N. C. 734, 153 S. E. 317.

§ 841. Delivery of property to intervener.— Upon the filing by the claimant of the undertaking set forth in the preceding section, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (Rev., s. 801; Code, s. 332; R. C., c. 7, s. 10; 1793, c. 389, s. 3.)

Purpose of Section.—This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the the plaintiff an indemnity against such claim before he delivers the property to him. It does not amount, on the part of the third claimant, to becoming a party to the action, it is not a necessary step in that direction, and the third claimant may become a party under section 460 without having made and served such affidavit. Clemmons v. Hampton, 70 N. C. 534.

Sheriff Must Take Security.—Under this section the property is not to be delivered to the intervenor by the sheriff until the security is given. Bear v. Cohen, 65 N. C. 511, 514.

§ 842. Sheriff to return papers in ten days.— The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within ten days after taking the property mentioned therein. (Rev., s. 802; Code, s. 133; C. C. P., s. 187.)

Art. 36. Injunction

§ 843. When temporary injunction issued.—A temporary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried.

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it appears by affidavit that a party thereto is doing, or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (Rev., s. 806; Code, ss. 334, 338; C. C. P., ss. 188, 189.)

I. General Considerations.
II. Nature.
III. Grounds of Relief.
  A. Character of Relief In General.
  B. Availability of Other Relief.
  C. Application of Section.

Cross Reference.

For full treatment of this subject, see the title Injunctions 7 N. C. Enc. Dig. 636 et seq.

I. GENERAL CONSIDERATION.

Effect upon Prior Law.—This section is merely a statutory recognition of the abolition of the distinction between special and common injunctions, a distinction existing under the old practice. Under the Code all injunctions are simply ancillary proceedings and are not available to anyone the basis of whose claim for such relief does not come within at least one of the enumerated classes of this section. Person v. Person, 154 N. C. 453, 70 S. E. 752. Under the existing procedure issuance of an injunction presupposes, as an essential requisite, the pendancy of an action which is receiving or will receive a judicial determination. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

Definitions.—An injunction in its ordinary sense is a command, and this command may be either to do or refrain from doing some particular thing. See Frinck v. Hay, 22 Wall, 250, 22 L. Ed. 857.

Injunctions are also classified as interlocutory or temporary and perpetual. Kickliffe v. Owings, 17 How. 47, 49, 15 L. Ed. 44.

Restraining Order and Injunction Distinguished. — This section in no wise abolishes the distinction between restraining orders and injunctions. The distinctive features between these remedial agencies remain and are respected to the utmost extent by the courts.

A restraining order can be issued in any cause by any judge of the superior court anywhere in the state, and made returnable at any time within twenty days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated; but a perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519. See also Kinston v. Wooten, 150 N. C. 295, 63 S. E. 1061.

An injunction may be granted by a judge out side the county in which the main cause is pending since this is an ancillary proceeding not involving the merits of the cause. Parker v. McPhail, 112 N. C. 502, 503, 16 S. E. 848. This principle was recognized and applied in Ledbetter v. Pinner, 120 N. C. 405, 27 S. E. 123, a case in which the validity of a judgment obtained in special proceedings was contested

on the grounds that it was entered outside of the county in which the main action was litigated.

Mandamus and Mandatory Injunction Distinguished. — In North Carolina, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and mandatory injunction, the former is permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter is confined usually to causes of an equitable nature, and to the enforcement of rights which solely concerns individuals. Clinton Dunn Tel. Co. v. Carolina Tel. etc., Co., 159 N. C. 9, 74 S. E. 636.

Good Faith and Reasonable Diligence Necessary. — Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action, Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69, and such facts exhibited by the plaintiff must constitute a substantial cause of action. Moore v. Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

Constitutional Provisions. — The constitutional prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the property of continuing or vacating an order for a provisional injunction. Heilig v. Stokes, 63 N. C. 612, 613.

Increasing Bond.—Under this section the garnishees may be restrained and enjoined from making further payments on their indebtedness to the defendant, until the final determination of the action, but the defendant and the garnishees may move that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction. Newberry v. Meadows Fert. Co., 203 N. C. 330, 339, 166 S. E. 79.

Cited in Collins v. North Carolina State College, 198 N. C. 337, 151 S. E. 646; Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

II. NATURE.

Beneficial Process. — The injunction is a beneficial process for the protection of rights, and is favorably viewed by courts of chancery, as its object is to prevent rather than redress injuries. See Cherokee Nation v. Georgia, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting Opinion).

Extraordinary and Provisional Remedy. — Although the specific details for the granting of injunctions are set out in the section, an injunction is still regarded as an extraordinary and provisional remedy, recourse to which may only be had by a party who has exhausted all available remedies. Chambers v. Penland, 78 N. C. 53, 56; or unless it be made to appear that the party will suffer irreparable injury unless such relief is granted. Fink v. Stewart, 94 N. C. 484.

Equitable Remedy. — Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except in so far as it may come within some plain statutory provision. Person v. Leary, 127 N. C. 114, 117, 37 S. E. 149.

Must Be an Adequate Remedy at Law.—The remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. See Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 12, 43 L. Ed. 341.

Inadequacy of Other Remedies. — The general rule is that where a complainant has unquestioned rights which are not adequately protected by legal remedies, he is entitled to the aid of equity. Union Pacific R. Co. v. Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; Corleus v. Alaska Treadwell Min. Co., 187 U. S. 455, 47 L. Ed. 256.

But an injunction will not issue to protect the complainant's rights, where he has an adequate legal remedy. Allen v. Baltimore, etc., R. Co., 114 U. S. 311, 29 L. Ed. 200; Arkansas Building etc., Ass'n v. Madden, 175 N. C. 269, 272, 44 L. Ed. 159.

Remedy Only in Foreign Courts. — Formerly a court of equity would grant an injunction where otherwise the party seeking it would be driven to the courts of another state for the purpose of obtaining it. Richardson v. Williams, 56 N. C. 116; Hauser v. Mann, 5 N. C. 410, 411.

Power of Courts. — The section tends greatly to enlarge the power of the court to grant equitable relief, especially since the granting of the temporary injunction, herein provided, may be accompanied with the appointment of a receiver when necessary for the protection of the subject-matter of the action. Roper Lumber Co. v. Wallace, 93 N. C. 22, 23.

III. GROUNDS OF RELIEF.

A. Character of Relief in General.

An injunction can only operate **in personam** and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity; and upon this principle proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the state, should be dismissed. Warlick v. Reynolds, 151 N. C. 606, 66 S. E. 657; Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

The writ does not operate in rem but in personam, Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473. An injunction issues only to the parties before the court and not to the court. Central Nat. Bank v. Stevens, 169 U. S. 432, 463, 42 L. Ed. 807.

Must Be Some Interference. — There must be some interference, actual or threatened, with property or rights of a pecuniary nature, to give chancery jurisdiction to exercise the injunctive powers of the court. See In re Deles, 158 U. S. 564, 583, 39 L. Ed. 1092.

B. Availability of Other Relief.

In General.—It is well established that when proper relief can otherwise be had then no injunction will be issued, and where a party can obtain his relief by a motion in the original action he will not be permitted later to institute a new and independent action for the purpose of obtaining an injunction. Faison v. McIlwaine, 72 N. C. 312, 313, and cases there cited.

Irreparable Injury.—The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is peculiar in nature, one that cannot be repaired, put back again, or atoned for in damages. Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 127 N. C. 130, 37 S. E. 152. See also, McKesson v. Hennessee, 66 N. C. 473. As to allegations of insolvency when injury is irreparable, see note to § 844.

Where Execution Improperly or Prematurely Issued. — Where there has been an improper or premature execution by the clerk, the injured party's remedy is the perfection of his appeal and notice thereof which will have the effect of staying the proceedings, and an injunction will not be granted in such case. Bryan v. Hubbs, 69 N. C. 423, 433.

Where it is shown that injury will result from the issuance of an irregular execution, the proper remedy is by motion to set aside and not injunction. Foard v. Alexander, 64 N. C. 69, 71.

C. Application of the Section.

Criminal Law. — The courts cannot enjoin the enforcement of the criminal law, nor can the validity of an ordinance be tested by an injunction. Paul v. Washington, 134 N. C. 363, 380, 47 S. E. 793.

Act Already Committed. — An injunction will not issue to restrain an act which has already been committed. Yount v. Setzer, 155 N. C. 213, 71 S. E. 209.

Specific Instances.—It is impossible in a work of this nature to state the facts and circumstances appearing in the numerous cases pertaining to the subject. A few of the leading cases illustrative of the principles herein before set out, together with references to the particular places in the digest where other cases are collected, are given in order that the practitioner may have a key to the subject. Ed. Note.

Wasteful or Wrongful Disposition of Property of Dissolved Corporation. — The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary for the protection of such property, an injunction may be properly issued. State v. Roanoke Nav. Co., 84 N. C. 705.

Wasteful Destruction by Personal Representative. — A temporary injunction restraining the disposition of assets in this state of an estate administered on in another state, in which the administrator is alleged to have committed a **devastavit,** was properly continued in their action to the hearing of the cause. Coleman v. Howell, 131 N. C. 125, 42 S. E. 555.

Utility Companies and Municipal Corporations. — The section applies equally as well whether the parties litigants be public service or municipal corporations or individuals. See Woodley v. Carolina Tel. etc., Co., 163 N. C. 284, 79 S. E. 598; Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319; Merrick v. Intramontaine R. Co., 118 N. C. 1081, 24 S. E. 667.

Other Instances. — Injoining trespass, see Injunctions, 7 N. C. Enc. 671 et seq; continuing trespass, see § 844, and the notes thereto; contracts, see Injunctions; 7 N. C. Enc.

Dig. 678 et seq; nuisances, see Injunctions, 7 N. C. Enc. Dig. 685 et seq; corporate franchises, management, and dealings, see Injunctions, 7 N. C. Enc. Dig. 679 et seq; public officers and boards and municipalities, see Injunctions, 7 N. C. Enc. Dig. 680 et seq; public welfare, property, and rights, see Injunctions, 7 N. C. Enc. Dig. 685 et seq; personal rights and duties, see Injunctions, 7 N. C. Enc. Dig. 685, et seq; criminal acts, conspiracies, and prosecutions, see Injunctions, 7 N. C. Enc. Dig. 686 et seq.

§ 844. When solvent defendant restrained.—In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees. (Rev., s. 807; 1885, c. 401.)

Irreparable Injury. — The cases are in accord in holding that if the injury which the plaintiff is sustaining or is about to sustain is an irreparable one so that there can be no sufficient recompense in money, then the plaintiff need not, in his pleadings, allege the insolvency of the defendant, but if the injury is an ordinary one which may be atoned for in money, then the plaintiff, in order to secure a temporary injunction, must allege the defendant's insolvency, for otherwise he has an adequate remedy in an action for damages. Stewart v. Munger, 174 N. C. 402, 93 S. E. 927; Lewis v. Roper Lumber Co., 99 N. C. 11, 5 S. E. 19.

Continuing Trespass. — Where it appears that the facts of the case are in dispute and the trespass by the defendant would be continuous, and would produce injury to the plaintiff, a restraining order should issue to the hearing, Sutton v. Sutton, 161 N. C. 665, 77 S. E. 838, and, because of this section, it is unnecessary in such case to allege the insolvency of the defendant, Cobb v. Atlantic etc., R. Co., 172 N. C. 58, 89 S. E. 807. The same principle is applicable where the plaintiff shows apparent title to the lands and satisfies the court that his claim for injunctive relief is made in good faith. Lodge v. Ijames, 156 N. C. 159, 72 S. E. 204.

Effect upon Discretionary Power of the Court. — The construction placed on this section does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a **bona fide** contention as to the title to lands or timber trees thereon. Stewart v. Munger, 174 N. C. 402, 93 S. E. 927.

Continuance to Hearing.—When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon convicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. Norfolk So. R. Co. v. Rapid Transit Co., 195 N. C. 305, 141 S. E. 882.

Destruction of Trees. — Allegations that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient to authorize the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. McKay v. Chapin, 120 N. C. 159, 26 S. E. 701.

Constitutional Provisions. — Although the time for cutting the timber trees was extended with the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. Riley & Co. v. Carter, 165 N. C. 334, 81 S. E. 414.

§ 845. Timber lands, trial of title to.—In all actions to try title to timber lands and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (Rev., s. 808; 1901, c. 666, s. 1; 1903, c. 642.)

Purpose of Section. — The primary object of this section is to throw a greater safe-guard around the rights of the litigating parties and to preserve the timber upon the lands in dispute, until the rights of the respective parties can be adjudicated. Moore v. Fowle, 139 N. C. 51, 51 S. E. 796.

Plaintiff Must Show a Bona Fide Claim. — The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, **and** (2) that such claim is based upon evidence constituting a **prima facie** title. Moore v. Fowle, 139 N. C. 51, 51 S. E. 796.

§ 846. When timber may be cut.—In any action specified in the preceding section, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (Rev., s. 809; 1901, c. 666, ss. 2, 3.)

Editor's Note. — This section shows clearly the legislative intent to preserve the power of the courts to require a bond of the party who succeeds in having the injunction dissolved, and who is then allowed to proceed to cut the timber trees: but the exercise of this procedure is greatly limited by the provisions of this section, most of which are conditions precedent to its exercise.

Essential Elements. — Under this section the plaintiff must not only show (a) that his claim is made in good faith and (b) that he has a **prima facie** title thereto, but the court must be able to find as a fact, (c) that the claim of the adverse party is not made in good faith. When relief is sought under this provision **all** these conditions must be complied with. Johnson v. Duvall, 135 N. C. 642, 47 S. E. 611.

Injunction Granted Where Contention Bona Fide. — This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a **bona fide** contention, then it should grant an injunction under sections 844, 845. Kelly v. Enterprise Lumber Co., 157 N. C. 175, 72 S. E. 957.

§ 847. Time of issuing.—The injunction may be granted when or at any time after commencing the action, before judgment, upon its appearing satisfactorily to the judge, by affidavit of the plaintiff or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. (Rev., s. 810; Code, s. 339; C. C. P., s. 190.)

Section Construed Strictly. — This section has received a strict construction and a compliance with the procedural steps is mandatory, and is not subject to waiver by agreement of the parties. Taylor v. Boone, 172 N. C. 93, 89 S. E. 1065.

Requisites—(a) Affidavit. — Where there is a failure to serve a copy of the affidavit with the injunction, and the judge does not allow such service to be thereafter made, the injunction will be dissolved. Taylor v. Boone, 172 N. C. 93, 89 S. E. 1065.

Same—(b) Summons. — An injunction granted before the issuing of the summons in action is premature, since by the

express provision of the section an injunction can only be granted at the commencement of the action, (or sometime thereafter). Trexler v. Newsom, 88 N. C. 13, 14; Horne v. Commissioners, 122 N. C. 466, 470, 29 S. E. 581. But if the defendant goes to trial after the summons has been irregularly issued, and answers the plaintiff's complaint, he is held to have waived the irregularity. Heilig v. Stokes, 63 N. C. 612.

§ 848. Not issued for longer than twenty days without notice.—No restraining order, or order to stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court, of not less than two nor more than ten days. (Rev., s. 811; Code, s. 346; C. C. P., s. 345; 1905, c. 26.)

See note under § 4065.

Old Procedure Retained. — The Code does not change the mode of setting aside an irregular execution; it must still be done by a motion in the cause, and an injunction, where necessary, must be obtained in like manner. Foard v. Alexander, 64 N. C. 69, 71.

Effect of Issuance for More than Twenty Days without Notice.—An order to stay proceedings, made, without notice, by a judge out of court for a longer time than twenty days, is irregular and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. Foard v. Alexander, 64 N. C. 69.

§ 849. Issued after answer, only on notice.—An injunction shall not be allowed after the defendant has answered, except upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction. (Rev., s. 812; Code, s. 340; C. C. P., s. 191.)

When Special Notice Required.—Special notice of motions for injunctions is only required when made or to be heard out of term; but in such cases, if the opposing party voluntarily appears, in person or by attorney, he will be ordinarily deemed to have waived notice. In cases other than these, the principle that one who has been duly made party to a pending action is bound to take notice of all motions, orders, etc., made during term time, applies with full force and no further notice is required. Hemphill v. Moore, 104 N. C. 378, 10 S. E. 313.

§ 850. Order to show cause. — If the judge deems it proper that the defendant, or any of several defendants, should be heard before granting an injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained. (Rev., s. 813; Code, s. 342; C. C. P., s. 193.)

Service upon Corporation.—Ordinarily a corporation before the grant of injunction has a right to service of an order to show cause upon some officer or agent, but if the officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if the service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. See Eureka Lake, etc., Canal Co. v. Yuba County, 116 U. S. 410, 418, 29 L. Ed. 671.

§ 851. What judges have jurisdiction.—The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order. (Rev., s. 814; Code, s. 335; 1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3.)

Restraining Orders.—The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts. Any judge of such court may issue a restraining order in any cause and anywhere in the state. Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519.

Perpetual Injunction. — A perpetual injunction must be granted only in the county in which the cause is pending. Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519. See also, Ledbetter v. Pinner, 120 N. C. 455, 456, 27 S. E. 123.

Motions for Receiver.—Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district or one holding the courts thereof by exchange, at the option of the mover. Corbin v. McGowan, 83 N. C. 28.

Cited in Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

§ 852. Before what judge returnable.—All restraining orders and injunctions granted by any of the judges of the superior court, except one holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is pending, within twenty days from date of order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application, or to continue them to some other time and place, any judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavit or otherwise that the judge before whom the matter was returnable failed to act upon or to continue the same to some other time and place. This removal continues in force the motion and application theretofore granted, till they can be heard and determined by the judge having jurisdiction. (Rev., s. 815; Code, s. 336; 1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51.)

Restraining Order.—A restraining order for a period of twenty days can be made returnable anywhere in the state. Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519.

Failure of Judge to Hear Motion. — Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon ten days notice to the parties. Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519.

Judge Holding Special Term. — A judge holding a special term cannot make a restraining order returnable before himself where the summons is returnable to a term of court beginning after the special term. Royal v. Thornton, 150 N. C. 293, 63 S. E. 1040.

Perpetual Injunctions. — See section 851.

Receivers. — See note to section 851.

Cited in Ward v. Agrillo, 194 N. C. 321, 323, 139 S. E. 451; Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

§ 853. Stipulation as to judge to hear.—By a stipulation in writing, signed by all parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage

money to be furnished to the judge. (Rev., s. 816; Code, s. 337; 1883, c. 33.)

Stipulation of Parties. — Agreement in writing by all parties concerned as to what judge of the superior court shall hear the motion is allowed under this section. Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519; Crabtree v. Scheelky, 119 N. C. 56, 58, 25 S. E. 707.

Same—Duty of Judge Designated. — When the parties have thus stipulated as to what judge shall hear the motion, it is the duty of such judge, if he has before him all the facts, to hear and determine the case, and it is error to continue the injunction. Cooper v. Cooper, 127 N. C. 490, 37 S. E. 492.

Applied in Forester v. North Wilkesboro, 206 N. C. 347, 174 S. E. 112.

§ 854. Undertaking.—Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it. (Rev., s. 817; Code, s. 341; C. C. P., s. 192.)

Editor's Note. — The phrase "such damages as he may sustain by reason of the injunction," included in this section, has been a fruitful source of much litigation. Persons against whom injunctions have been issued and which were later dissolved, have frequently sought shelter under the broad wording of this section and have attempted to prove all imaginable types and forms of "damages." The courts, however, are inclined to construe the section quite strictly and, wherever possible, the general principles on the subject of damages have been applied rather than the loose construction of which the section is capable of being given.

Section Mandatory. — The provision in this section that the plaintiff in injunction give bond is mandatory, the amount fixed by the judge, conclusive of the extent of the liability thereon, the procedure being for the defendant to move to have the amount increased when he so desires, or thinks it necessary for his protection. McAden v. Watkins, 191 N. C. 105, 131 S. E. 375; James v. Withers, 114 N. C. 474, 478, 19 S. E. 367.

Burden of Proof as to Amount. — Before judgment can be given upon an injunction bond, the party alleging that he had been damnified by reason of said injunction must establish the **quantum** of damages sustained. Hyman v. Devereux, 65 N. C. 590. And this amount does not include the personal expenses in attending the hearing. Midgett v. Vann, 158 N. C. 128, 73 S. E. 801. For full discussion as to attorneys' fees, see Hyman v. Devereux, 65 N. C. 588, 590.

Effect of Failure to Require Bond. — The validity of an injunction is not affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve. Young v. Rollins, 90 N. C. 125.

Effect of Filing Defective Bond. — Failure to give the required undertaking is merely an irregularity which will be cured by a subsequent execution thereof. McKay v. Chapin, 120 N. C. 159, 26 S. E. 701.

Failure to give the required undertaking under this section is merely an irregularity, which will be cured by the subsequent execution thereof. Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842, 845, citing McKay v. Chapin, 120 N. C. 159, 26 S. E. 701.

Where Money Deposited without Sureties. — Where an injunction is issued under an order that the plaintiff shall give an undertaking with sufficient sureties in a certain sum, it seems that a deposit in money of the sum named will be sufficient, but whether so or not the giving by the plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it, will supply the alleged defect, and prevent the injunction from being vacated on that account. Richards v. Baurman, 65 N. C. 162.

Undertaking Given Prior to Injunction. — Where an undertaking has been given before the issue of a restraining order, it is not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiff unless it be shown that the bond already given is insufficient. Preiss v. Cohen, 112 N. C. 278, 17 S. E. 520.

Procedure under Section. — It is not contemplated, under this section. that a separate action shall be brought upon an injunction bond but the damages sustained by reason of an injunction shall be ascertained by proper proceedings in the same action, and may be by reference or otherwise as the judge shall direct. North Carollna Gold, etc., Co. v. North Carolina Ore, etc., Co., 79 N. C. 48. See also, Nansemond Timber Co. v. Rountree, 122 N. C. 45, 29 S. E. 61; Crawford v. Pearson, 116 N. C. 718, 21 S. E. 561.

Cited in Gruber v. Ewbanks, 199 N. C. 335, 338, 154 S. E. 318.

§ 855. Damages on dissolution.—A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages upon all the persons who have an interest in the undertaking. (Rev., s. 818; Code, s. 341; 1893, c. 251.)

Want of Probable Cause. — Prior to the amendment of this section by the Acts of 1893 it was an essential element of the defendant's recovery on the plaintiff's indemnity bond that he be able to prove malice or want of probable cause in the institution of the injunction proceedings. Burnett v. Nicholson, 79 N. C. 548. Under the section as it now stands it is no longer necessary to allege want of probable cause. Crawford v. Pearson, 116 N. C. 718, 21 S. E. 561.

Injunction Sought with Malice. — The preceding section, requiring a bond in an injunction to cover the defendant's damages, and this section, providing for the recovery thereof in the same action, do not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to an action on the bond when the damages sought are in excess of that amount. Shute v. Shute, 180 N. C. 386, 104 S. E. 764.

For procedure under the section, see notes to section 846.

Cited in Gruber v. Ewbanks, 199 N. C. 335, 338, 154 S. E. 318.

§ 856. Issued without notice; application to vacate.—If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such application is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit. (Rev., s. 819; Code, s. 344; C. C. P., s. 195; 1905, c. 26.)

Section Mandatory. — The requirement of notice to the defendant is essential to the validity of the proceedings, and where an injunction has been granted without such notice the injunction will be vacated. Armstrong v. Kinsell, 164 N. C. 125, 80 S. E. 235.

Modification of Previously Granted Injunction. — A judge may at the instance of the defendant modify an injunction previously granted without giving notice to the plaintiff, but in such case he must found his action merely upon the

complaint, and cannot consider the answer or affidavits on the part of the defendant. Sledge v. Blum, 63 N. C. 374, 375.

Answer Treated in Affidavit. — The answer under the present practice, in an application to vacate an injunction, is itself but an affidavit when verified and the plaintiff may introduce other affidavits to support the allegations in his complaint; such a verified answer is not conclusive but has only the effect of an affidavit. Blackwell Durham Tobacco Co. v. McElwee, 94 N. C. 429.

After the answer and all the affidavits have been filed, if it appears to the court that the plaintiff's whole equity is denied and his case is fully met, the injunction will not be continued to the final hearing. Rigsbee v. Durham, 98 N. C. 81, 3 S. E. 749. See also, Cooper v. Cooper, 127 N. C. 490, 37 S. E. 492.

However, where it appears from the affidavits that there is probable cause or it can reasonably be seen that the plaintiff will be able to make out his case at the final hearing, then the injunction will be continued. Seip v. Wright, 173 N. C. 14, 91 S. E. 359.

Time within Discretion of Judge. — The time, when the affidavits of defendants should be filed and the granting of continuance in injunction cases, is largely within the discretion of the judge. Tobacco Growers Co-op. Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

§ 857. When opposing affidavits admitted.— If the application is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted. (Rev., s. 820; Code, s. 345; C. C. P., s. 196.)

Original Affidavits Supported by Counter Affidavits. — When the defendant, in an application for a provisional remedy, meets the plaintiff's allegations by counter affidavits, it is competent for the plaintiff to support his original affidavits by others to the same effect and in reply to those offered by the defendants. Young v. Rollins, 85 N. C. 485.

Defective Affidavit Made Sufficient by Counter Affidavit.— Where the plaintiff's first affidavit is insufficient in form, and objection is made thereto by the defendant, the replying affidavit by the plaintiff will cure the objectional consequence of the defects contained in the original affidavit. Clark v. Clark, 64 N. C. 150.

Sufficiency of Verification. — An affidavit, upon which an application for a provisional remedy is based, is sufficiently verified when made before a commissioner for this state resident in another state and authenticated by his official signature and seal. Young v. Rollins, 85 N. C. 485.

§ 858. To restrain collection of taxes.—No injunction may be granted by any court or judge to restrain the collection of any tax or any part thereof, or to restrain the sale of any property for the nonpayment of any tax, unless such tax or the part thereof enjoined is levied or assessed for an illegal or unauthorized purpose, or the tax assessment is illegal or invalid. (Rev., s. 821; 1901, c. 558, s. 30; 1899, c. 15, s. 78: 1887, c. 137, s. 84.)

Editor's Note. — The primary object of this section is to prevent, as far as possible, any unnecessary delay in the collection of revenue, so essential to the progress and development of the taxing sovereign. The inexpediency of allowing every tax payer to contest the validity (and the subsequent collection) of the tax for any and all trivial reasons can be readily seen. Hence the adoption of this section, the provisions of which set out in detail the circumstances under which the legality of the levy may be tested by injunction, and the circumstances under which the tax payer must pay the tax and then sue for its recovery. A similar section is found in the codes of practically all the states.

The Act of 1887 contained no provision for the granting of an injunction when the tax was illegal. The remedy (suit) provided for the repayment of taxes paid under protest was, by the Constitution, made to apply to illegal and invalid taxes. See Hall v. Fayetteville, 115 N. C. 281, 284, 20 S. E. 373. However, with the Act of 1889, the provision for the restraining of the collection of illegal taxes was included.

Constitutional Provisions. — This section cannot be attacked on the grounds that it is a violation of the "due process" clause of the Constitution. All the tax payer can claim under this clause is the right to be heard before a competent body capable of giving relief to which he may be entitled, and he has the opportunity, when he lists his taxes, to have the amount, if excessive, reduced. Wilmington v. Sprunt, 114 N. C. 310, 19 S. E. 348.

Applicability of the Exceptive Words. — The exception to the limitations in this section applies, not to the levy or illegal levy of the taxes, but to the illegal or unauthorized purpose of the levy. Mace v. Commos, 99 N. C. 65, 5 S. E. 740.

Illegal or Invalid Tax.—Where the tax is illegal or invalid injunctive relief may be sought. Armstrong v. Stedman, 130 N. C. 217, 41 S. E. 278; Range Co. v. Carver, 118 N. C. 328, 331, 24 S. E. 352.

No Injunction When Tax Not Illegal nor Invalid.—Where the tax is not illegal nor invalid, an injunction will not be granted. McDonald v. Teague, 119 N. C. 604, 26 S. E. 158.

The plaintiff's remedy for contesting the validity of the ruling of the State Commissioner of Revenue in erroneously classifying him for the purpose of taxation is by paying the tax under protest and suing to recover it. Where there is no question as to the legality of the tax thus imposed, and where there is no element of an equitable nature involved, the remedy by injunction is unavailable. Ragan v. Doughton, 192 N. C. 500, 135 S. E. 328.

Tax Void in Part.—Where a tax is void in part and valid in part, the whole should be enjoined. Williams v. Commissioners, 119 N. C. 520, 26 S. E. 150. See the dissenting opinion by Clark, J.

Statutory Revival of Collection of Over-due Taxes.—Where the right to collect taxes in arrears is revived by statute which contains no restriction applicable to a particular case arising thereunder, then this section does not apply. Moore v. Sugg, 112 N. C. 233, 234, 17 S. E. 72.

§ 858(a). Restraining orders and injunctions in effect pending appeal; indemnifying bond.— Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the supreme court, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the supreme court. (1921, c. 58.)

Discretion of Court Not Reviewable.—Where an appeal has been taken from a judgment of the Superior Court judge, vacating a restraining order upon the county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal is within the sound discretion of the trial judge, and not reviewable. Clark v. McQueen, 195 N. C. 714, 143 S. E. 528.

Cited in Boyd v. Brooks, 197 N. C. 644, 647, 150 S. E. 178.

Art. 37. Receivers

§ 859. What judge appoints.—Any judge of the superior court with authority to grant restraining orders and injunctions has like juris-

diction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions. (Rev., s. 846; Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.)

Cross References.—For full treatment of receivers, see 10 N. C. Enc. Dig. 839-877; 15 N. C. Enc. Dig. 344-349. As to corporate receivers, see sections 1208-1217. As to compensation of receivers, see annotations under section 1215. As to receiver of ward's estate, see section 2200. As to what judges have jurisdiction to grant restraining orders and injunctions, see section 851. As to receiver in supplemental proceedings, see section 722 et seq.

In General.—The provisions of this sec. and sec. 843, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject-matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief. Roper Lumber Co. v. Wallace, 93 N. C. 22, 27.

Definition.—A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do it. See Booth v. Clark, 17 How. 322, 331, 15 L. Ed. 164.

Purpose.—It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges were denominated in the order in which we find them because it was supposed that one or the other of them would at all times be within the district of the action. Galbreath v. Everett, 84 N. C. 546, 549.

An Inherent Power.—The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. Skinner v. Maxwell, 66 N. C. 45, 47.

Discretion of Judge.—The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360.

Same—Necessary Number.—The court should not appoint more receivers than are necessary. Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39.

Necessity That Judge "Find the Facts."—Upon an application for an injunction and receiver it is not necessary for the judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. City Nat. Bank v. Bridgers, 114 N. C. 381, 19 S. E. 642, citing Jones v. Boyd, 80 N. C. 258.

Effect on Both Parties Considered.—It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. Venable v. Smith, 98 N. C. 523, 4 S. E. 514, citing Hanna v. Hanna, 89 N. C. 68. See also, Lewis v. Roper Lumber Co., 99 N. C. 11, 5 S. E. 19, 20.

Order without Prejudice.—Where it appears from verified pleadings that there is a bona fide controversy between the parties, the mortgagor's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagees to move for the appointment of a receiver. Bennett v. Mortgage Service Corp., 206 N. C. 902, 173 S. E. 22.

What Judge Appoints.—Ordinarily the motion for a receiver must be made before the resident judge of the district, or one assigned to the district or holding the courts thereof by exchange, at the option of the mover. Corbin v. Berry, 83 N. C. 28; Worth v. Piedmont Bank, 121 N. C. 343, 347, 28 S. E. 488.

Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other judge than one of those just named, the order must be made returnable before one of such judges. Galbreath v. Everett, 84 N. C. 546; Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519, Worth v. Piedmont Bank, 121 N. C. 343, 347, 28 S. E. 488.

Clerk Cannot Appoint.—The clerk cannot appoint a receiver as that power is reserved to the judge alone. Parks v. Sprinkle, 64 N. C. 637, 639.

Operation and Effect of Appointment.—The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled but not to change the title, or even the right of possession in the property. Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 97, 36 L. Ed. 632, 12 S. Ct. 787.

An Officer of Court.—A rec iver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. Battle v. Davis, 66 N. C. 252.

Nature of Office.—A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. He is the right arm of the jurisdiction invoked. Union Bank v. Kansas City Bank, 136 U. S. 223, 236, 34 L. Ed. 341, 10 S. Ct. 1013.

Powers and Duties.—A receiver is an officer of the court and subject to its directions and orders. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. Stuart v. Boulware, 133 U. S. 78, 81, 33 L. Ed. 568, 10 S. Ct. 242.

Title Relates Back.—"The title of the receiver dated back to the time of granting the order, even though preliminary conditions must be performed, and he remains out of possession pending such performance." Beach on Rec. Sec., 200. Worth v. Piedmont Bank, 121 N. C. 343, 349, 28 S. E. 488.

Place of Hearing.—The hearing as to a receiver may be held outside of the county where the main action is pending. Parker v. McPhail, 112 N. C. 502, 504, 16 S. E. 848.

The interest of the owner is in no wise changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is to be administered under the orders of the court. Southern Pants Co. v. Rochester German Ins. Co., 159 N. C. 78, 80, 74 S. E. 812.

Necessary Allegations.—Where the appointment of a receiver is sought as an ancillary remedy the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity entitling them to the ancillary relief in aid of their main relief. Witz, etc., Co. v. Gray, 116 N. C. 48, 20 S. E. 1019.

Security Omitted.—An order appointing a receiver is not void by reason of an omission of the court to require adequate security. Nesbitt & Bro. v. Turrentine, 83 N. C. 536.

Matter of Record.—The appointment of receivers is matter of record, and should be shown by the record. Person v. Leary, 126 N. C. 504, 36 S. E. 35.

Conflict of Concurrent Jurisdictions. — The court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its rights to do so because it may not have first obtained physical possession of the property in dispute. Moran v. Sturges, 154 U. S. 256, 274, 38 L. Ed. 981, 14 S. Ct. 1019.

Priority Where Two Receivers Appointed.—The test of jurisdiction in a case of two receivers being appointed is not the first issuing of the summons, nor the first preparation and verification of the papers, which are the acts of the parties, nor which receiver first took possession, but which court is first "seized of jurisdiction" by making an order upon legal proceedings exhibited before it. Worth v. Piedmont Bank, 121 N. C. 343, 348, 28 S. E. 488.

Same—Date Determines. — Priority as between receivers is determined by reference to the date of appointment since the court will not permit both to act. High on Rec. Sec., 162. Worth v. Piedmont Bank, 121 N. C. 343, 349, 28 S. E. 488.

Same—Same—Fractions of a Day.—Where proper proceedings for the appointment of a receiver are begun in two different courts and a different receiver is appointed in each case, the court, in determining the priority of appointment as between the receivers, will take notice of fractions of a day. Worth v. Piedmont Bank, 121 N. C. 343, 28 S. E. 488.

Complaint Should Be Verified.—The practice of appointing a receiver upon an unverified complaint and without notice to creditors and other persons interested, is not commended. Fisher v. Trust Co., 138 N. C. 91, 50 S. E. 592.

Proof of Appointment of Foreign Receivers.—Persons suing as receivers of a foreign court should, on their appointment being denied, prove the same by a certified copy of the decree dissolving the corporation and appointing them. Person v. Leary, 127 N. C. 114, 37 S. E. 149, reversing on rehearing judgment in 126 N. C. 504, 36 S. E. 35.

Cited in Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

§ 860. In what cases appointed.—A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent

right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations in the article Receivers; and in like cases, of the property within this state of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder. (Rev., s. 847; Code, c. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.)

In General.—This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of our courts upon this subject. Skinner v. Maxwell, 66 N. C. 45, 48.

Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by the defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. Other instances pointed out by Walker, J. Kelly v. McLamb, 182 N. C. 158, 108 S. E. 435.

Before Judgment.—Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. McNair v. Pope, 96 N. C. 502, 2 S. E. 54, citing Kerchner v. Fairley, 80 N. C. 24, and cases there cited; Nesbitt & Bro. v. Turrentine, 83 N. C. 536, and cases cited; Oldham v. Bank, 84 N. C. 304; Horton v. White, 84 N. C. 297; Roper Lumber Co. v. Wallace, 93 N. C. 22.

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined. Skinner v. Maxwell, 66 N. C. 45, 48.

Discretion of Court. — The appointment of a receiver pendente lite is not a matter of strict right, but rests in the sound discretion of the court. Hanna v. Hanna, 89 N. C. 68, 71.

Power of Court to Impose Conditions. — In appointing a receiver the court has a right, within certain recognized limits, to prescribe the terms and conditions of the appointment. See Bosworth v. St. Louis Terminal R. Ass'n, 174 U. S. 182, 187, 43 L. Ed. 941, 19 S. Ct. 625.

Contracts and Expenditures.—A receiver is not authorized, without previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation, as contemplated by his appointment. See Thompson v. Phenix Ins. Co., 136 U. S. 287, 293, 34 L. Ed. 408, 10 S. Ct. 1019.

Right to Sue.—A receiver is vested with very little discretion, and he must apply to the court for liberty to bring or defend actions. See Booth v. Clark, 17 How. 322, 331, 15 L. Ed. 164.

Exhaustion of Remedy at Law.—An objection that a judgment creditor applying for the appointment of a receiver has not exhausted his remedy at law will be disregarded where not raised in time, or where the procedure at law would have been an idle ceremony, or where the objecting party has consented to or acquiesced in the appointment. See Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. Ed. 1021, 10 S. Ct. 604.

Danger of Loss.—Under this section apparent danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession, is the ground for appointing a receiver thereof. Twitty v. Logan, 80 N. C. 69; Rollins v. Henry, 77 N. C. 467.

Property or funds will not be taken from one entitled to custody thereof, and transferred to a receiver, unless there is imminent danger of loss. Rheinstein v. Bixby, 92 N. C. 307, citing Thompson v. McNair, 62 N. C. 121.

Same—Examples. — Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due ascertained, the defendant mortgagee is entitled to have a receiver appointed to take charge of the property and secure the rents and profits where the same are in danger of being lost. Oldham v. First Nat. Bank, 84 N. C. 304.

Plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose a mortgage; the property conveyed was inadequate to pay the debt, and the mortgagor in possession was insolvent; the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto: Held, that in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation. Ten Broeck v. Orchard, 74 N. C. 409; Rollins v. Henry, 77 N. C. 467, cited and approved. Kerchner v. Fairley, 80 N. C. 24.

Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appeared there was some danger of waste of the property, and the solvency of the vendee-executors was doubtful: Held, to be a proper case for the appointment of a receiver. Stith v. Jones, 101 N. C. 360, 8 S. E. 151.

General Allegations Insufficient. — A receiver will not be appointed pendente lite, on a general allegation that loss will ensue from nonappointment, without a full statement of the facts. Hanna v. Hanna, 89 N. C. 68, citing Hughes v. Person, 63 N. C. 548; Wood v. Harrell, 74 N. C. 338. See also, Southern Flour Co. v. McIver, 109 N. C. 120, 13 S. E. 905.

Insolvency Alone Insufficient. — The mere insolvency of the party in possession of property, where there is no allegation that the defendant intends to run off with or conceal or destroy the property, is not sufficient ground for the appointment of a receiver. Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360.

Property Threatened by Fraud and Insolvency. — Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. Peoples Nat. Bank v. Waggoner, 185 N. C. 297, 117 S. E. 6.

Same—Question Postponed. — Where an application for a receiver is based on fraud as to creditors in a deed, the question of fraud will not be determined on hearing of the application, but must stand till the final hearing of the case. Rheinstein v. Bixby, 92 N. C. 307, citing Levenson & Co. v. Elson, 88 N. C. 182.

Fraudulent Confession of Judgment. — A receiver may be appointed under this section, in a suit against a debtor and others to restrain an execution sale, where the debtor has confessed judgment apparently with fraudulent intent, and executions have been levied on the only property of the debtor within the state in favor of nonresident creditors who seek to take the property out of the state. Stern & Co. v. Austern, 120 N. C. 107, 27 S. E. 31.

Insolvent Foreign Corporation. — An insolvent corporation, with its property or plant located in this state, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another State, approving Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 820.

Infant's Estate. — On the principle of protection, a receiver may be appointed of an infant's estate if it be not vested in a trustee, for he is incompetent to take charge of it himself. Skinner v. Maxwell, 66 N. C. 45, 48.

To Prevent Suspension of Business. — Where the property and franchise of a city water company were to be sold to satisfy a judgment it was held that in order to prevent all possible risk of the temporary suspension of the business of the water company, it would be proper to appoint a re-

ceiver under par. 2 of this section. McNeal Pipe, etc., Co. v. Howland, 111 N. C. 615, 625, 16 S. E. 857.

What Property May Be Taken. — Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into the possession of a receiver. See Davis v. Grav, 16 Wall. 203, 217, 21 L. Ed. 447.

Who May Apply for a Receiver. — Upon the insolvency of a railroad company a receiver may be appointed upon the application of the holders of the majority of the stock and of the judgment creditors, other persons interested, being made parties and given an opportunity to be heard upon the merits and upon the adjudication and allowance of claims against the property. See Union Trust Co. v. Illinois Mid. R. Co., 117 U. S. 434, 29 L. Ed. 963, 6 S. Ct. 809.

Upon Application for Injunction. — Under the broad terms of this section the court has power to appoint a receiver, upon an application for an injunction where it appears that this action will best serve the interests of both parties. Hurwitz v. Carolina Sand, etc., Co., 189 N. C. 1, 126 S. E. 171.

Notice to Owner. — Notice to the owner of property should be given before appointment of a receiver therefor. York v. McCall, 160 N. C. 276, 76 S. E. 84.

Effect of Instrument Giving Mortgagee Power of Appointment of Trustee.—The appointment of a receiver is an equitable remedy and the provisions of this and the following section enacted before the giving of a deed of trust upon lands may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions so as to prevent our courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428, 160 S. E. 475.

Apparently Good Title Sufficient. — Where a party, in this case a defendant, in an action involving the title and possession of land, demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted, or not unequivocably denied by his adversary. Lovett v. Slocumb, 109 N. C. 110, 13 S. E. 893.

Where Receivership Would Cause Loss. — A receiver will not be appointed, in an action to foreclose a mortgage on a newspaper, when the defendant denies owing anything on the mortgage debt, and it is apparent that, owing to the peculiar nature of the property, the appointment of a receiver would practically destroy its value. Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360.

§ 861. Appointment refused on bond being given.—In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking. (Rev., s. 848; 1885, c. 94.)

In General. — Upon application for a receiver it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. Frank v. Robinson, 96 N. C. 28, 1 S. E. 781. See also, Kron v. Smith, 96 N. C. 386, 2 S. E. 463; Godwin v. Watford, 107 N. C. 168, 11 S. E. 1051.

Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. Durant v. Crowell, 97 N. C. 367, 2 S. E. 541; Roper Lumber Co. v. Wallace, 93 N. C. 22; Lewis v. Roper Lumber Co., 99 N. C. 11, 5 S. E. 19, 20; Ousby v. Neal, 99 N. C. 146, 5 S. E. 901.

Opportunity to File Bond. — The court erred in directing a receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom, as the court might subsequently direct. Stith v. Jones, 101 N. C. 360, 8 S. E. 151.

Section 495 Does Not Apply. — Section 495, requiring a defendant in ejectment to give bond before putting in a detense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N. C. 327; Durant v. Crowell, 97 N. C. 367, 374, 2 S. E. 541; Arey v. Williams, 154 N. C. 610, 70 S. E. 931.

Applied in Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428, 160 S. E. 475.

§ 862. Receiver's bond.—A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Rev., s. 849; Code, s. 383.)

Cross References. — As to giving bond in surety company, see sections 338 and 339. As to clerk's bond liable when clerk appointed receiver, see annotations under section 2200.

Effect of Failure to Require Bond. — An order appointing a receiver is not void by reason of an omission of the court to require adequate security. Nesbitt & Bro. v. Turrentine, 83 N. C. 536.

Breach. — Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. Bank v. Creditors, 86 N. C. 323.

Same—Must Be Ascertained. — A receiver and his surety can not be sued upon the bond for an alleged breach of his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to render his account. Bank v. Creditors, 86 N. C. 323; Atkinson v. Smith, 89 N. C. 72.

Same—Burden of Proof. — The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Judgment. — The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failing to pay the same, for the court to grant leave to sue upon the bond. Atkinson v. Smith, 89 N. C. 72.

Action against Sureties. — The liability of sureties on a receiver's bond can only be enforced by independent action against them and not by motion in the cause. Black v. Gentery, 119 N. C. 502, 26 S. E. 43.

Same—Receiver Not a Party. — Where judgment has been recovered against the receiver, he is not a necessary party to an action against the sureties on his bond. Black v. Gentery, 119 N. C. 502, 26 S. E. 43.

§ 862(a). Sale of property in hands of receiver. —The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly ap-

pointed by the Superior Court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. (1931, c. 123, s. 1.)

§ 862(b). Confirmation of sales outside county of action; notice to creditors.—Any sale made by a receiver may be confirmed outside of the county in which said action is pending, either by the resident judge or the judge assigned to hold any of the courts of the district in which said sale is made, upon proof of written notice to each creditor who has filed his claim with said receiver of at least ten days prior to the date of confirmation. The said notice shall specify the time and place when application for confirmation shall be made, and an affidavit of the receiver showing that notice was mailed to each creditor at his last known post office address shall be sufficient proof of notice to said creditors. (1931, c. 123, s. 2; c. 267.)

Editor's Note.—Public Laws 1931, c. 267, purported to amend this section by inserting the word "by" in the first line of this section, although the published section already contained such word.

§ 862(c). Validation of sales made outside county of action.—All receiver's sales heretofore made where orders were made and confirmation decreed or either outside the county in which said actions were pending by a resident judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

Art. 38. Deposit or Delivery of Money or Other Property

§ 863. Ordered paid into court.—When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security subject to the further direction of the judge (Rev., s. 850; Code, s. 380; C. C. P., s. 215.)

Party Entitled May Retain. — The rule is quite well settled that, unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. Thompson v. McNair, 62 N. C. 121; Levenson & Co. v. Elson, 88 N. C. 182, 184.

When Court Will Retain. — When a disputed fund is in possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. Morris v. Willard, 84 N. C. 293, and cases there cited; Ponton v. McAdoo, 71 N. C. 101; Levenson & Co. v. Elson, 88 N. C. 182, 184.

§ 864. Ordered seized by sheriff.—When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (Rev., s. 851; Code, s. 381; C. C. P., s. 215.)

§ 865. Defendant ordered to satisfy admitted sum.—When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy. (Rev., s. 852; Code, s. 382; C. C. P., s. 215.)

Claim Not Denied. — Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other. Curran v. Kerchner, 117 N. C. 264, 23 S. E. 177.

Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance: Held, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note is authorized by this section. Meadows Fert. Co. v. Farmers Trading Co., 203 N. C. 261, 165 S. E. 694.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES

Art. 39. Mandamus

§ 866. Begun by summons and verified complaint.—All applications for writs of mandamus must be made by summons and complaint, which must be duly verified. (Rev., s. 822; Code, s. 622; 1871-2, c. 75.)

I. Historical.
II. Nature.
III. When Mandamus Will Lie.
  A. General Rules.
  B. Illustrations of Mandamus as Proper Remedy.
  C. Illustrations of Mandamus as Improper Remedy.

Cross References.

For full treatment of mandamus, see 8 N. C. Enc. Dig. 985-1012; 14 N. C. Enc. Dig. 729-740. As to mandamus to aid relator in civil action to try title to office, see section 883. As to questions of pleading and practice in mandamus, see 8 N. C. Enc. Dig. 1004 et seq.

I. HISTORICAL.

In England mandamus was a prerogative writ, when no other remedy could be had, with many refinements issuing only at the pleasure of the court. By statute 9 Anne, chap. 20, the remedy was made one of right, and the general rules of pleading and practice were made applicable to mandamus as in other personal actions. At common law the return to a writ of mandamus could not be traversed, and if the matters set forth were sufficient in law, the defendant had judgment to go without day. If the return was false, the remedy of the person aggrieved thereby was an action on the case for making a false return; and if the plaintiff proved the matters of fact false he recovered damages and costs. By 9 Anne, chap. 20 in certain cases all or any of the material facts set forth in the return may be traversed. These sections extend this provision to all cases, and upon a traverse of any of the material facts "the summons, pleading and practice shall be the same as is prescribed for civil actions," and if an issue of fact is raised by the pleadings, it must be decided by a jury. Tucker v. Justices, 46 N. C. 451, 459. Lyon v. Commissioners, 120 N. C. 237, 241, 26 S. E. 929.

As long ago as Bacon's time it was laid down as a general rule that, where a man is refused to be admitted or wrongfully turned out of any office or franchise that concerns the public on the administration of justice he may be admitted or restored by mandamus. Rhodes v. Love, 153 N. C. 468, 473, 69 S. E. 436.

The writ of mandamus was introduced to prevent disorder from a failure of justice and defect of police. See Labette County Comm'rs. v. Moulton, 112 U. S. 217, 225, 28 L. Ed. 698.

II. NATURE.

Judicial Writ.—The writ of mandamus is a judicial writ, a part of the recognized course of legal proceedings. See Thompson v. Allen County, 115 U. S. 550, 558, 29 L. Ed. 472.

A Writ of Right.—There is no further contention that the writ of mandamus is a high prerogative writ, as it was at common law. It is now a writ of right, to be used as an ordinary process, and every one is entitled to it where it is

the appropriate process for asserting the right claimed. Belmont & Co. v. Reilly, 71 N. C. 260. Burton v. Furman, 115 N. C. 166, 168, 20 S. E. 443.

Mandamus is an extraordinary remedy, and the writ will not issue except in cases of necessity, where no other adequate remedy is available; and when an issue of fact is raised by the pleadings the determination of which may conclude the matter, the issuance of the writ should in the meanwhile be denied. Edgerton v. Kirby, 156 N. C. 347, 72 S. E. 365; Duke v. Turner, 204 U. S. 623, 631, 51 L. Ed. 652.

Legal Remedy.—The relief granted by mandamus is affirmative, and the remedy is essentially and exclusively a legal remedy, and is unknown to equity. See Walkley v. Muscatine, 6 Wall, 481, 18 L. Ed. 930; Smith v. Bourbon County, 127 U. S. 105, 111, 32 L. Ed. 73.

Sufficient Evidence.—Before mandamus can be issued to compel the board of commissioners, of a county to levy a tax to pay a judgment against the commissioners, the plaintiff, judgment-creditor, must show affirmatively by the record or other competent evidence that the consideration of the debt, upon which the judgment was obtained, was of such character as to fall under the head of ordinary or necessary county expenses. Bear v. Commissioners, 124 N. C. 204, 210, 32 S. E. 558.

Within Judicial Discretion.—The issuance of the writ is within the judicial and not the arbitrary discretion of the court, and where there is a right with no other adequate remedy, this writ should not be denied, if it is the proper remedy. Edgerton v. Kirby, 156 N. C. 347, 72 S. E. 365.

Resembles a Civil Action.—While mandamus is in the nature of an execution, it is also in the nature of a civil action, with summons, pleadings, and Code practice. Bear v. Commissioners, 124 N. C. 204, 32 S. E. 558.

The motion of the plaintiff in mandamus proceedings, on the pleadings and admissions of the defendant, for a mandamus, is in the nature of a demurrer ore tenus to the answer, involving the admission of the facts set out therein. Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737.

Cited in Leonard v. Sink, 198 N. C. 114, 115, 150 S. E. 813; MacRae v. Fayetteville, 198 N. C. 51, 52, 150 S. E. 810.

III. WHEN MANDAMUS WILL LIE.

A. General Rules.

Mandamus Will Not Control Discretion of Officers.—It may be said, generally, that if a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to judge for themselves, and, therefore, no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law would not then be their own, but that of the court under whose mandate or compulsion they gave it. Attorney-General v. Justices, 27 N. C. 315; Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737. Edgerton v. Kirby, 156 N. C. 347, 350, 72 S. E. 365.

In Brown v. Turner, 70 N. C. 93, we find a very clear statement by Mr. Justice Bynum: "Mandamus will lie when the fact required to be done is imposed by law, is merely ministerial, and the relator has a clear right and is without any other adequate remedy." Moses on Mandamus, 68. But it does not lie where judgment and discretion are to be exercised; nor to control the officer in the manner of conducting the general duties of his office. Burton v. Furman, 115 N. C. 166, 169, 20 S. E. 443.

"The rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And whenever public officers are vested with power of a discretionary nature as the performance of any official duty, or, in reaching a given result of official action, they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action upon all matters officially entrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion nor attempt by mandamus to control or dictate the judgment to be given." High on Ex. Rem., p. 50 Sec. 42, et seq; Barnes v. Commissioners, 135 N. C. 27, 37, 47 S. E. 737.

In Tapping on Mandamus (Ed. 1853), at star pages 14 and 41, it is stated generally that mandamus will not lie to command the exercise of a discretionary or voluntary act or right, of what kind soever; so neither does it lie to influence nor control the exercise of such a discretionary act, power or right. It must, however, be clearly understood that, although there may be a discretionary power, yet if it be exercised wrongfully or with manifest injustice, the court is not precluded from commanding its due exercise. So, when one is to act according to his discretion, and he will not act nor consider the matter, the court will by mandamus command him to put himself in motion to do it, that is, to hear and determine or to inquire, so that he may exercise a considerate discretion. Barnes v. Commissioners, 135 N. C. 27, 36, 47 S. E. 737.

An Effectual Remedy.—Mandamus by the statute of Anne, chap. 20, is an effectual remedy; First, for refusal of admission where a person is entitled to an office; and Secondly, for a wrongful removal where a person is legally possessed. 3 Bl. Com. 264. Lyon v. Commissioners, 120 N. C. 237, 243, 26 S. E. 929.

To Compel the Performance of a Duty. — In Person v. Doughton, 186 N. C. 723, Justice Stacy says: "Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced." Lenior County v. Taylor, 190 N. C. 336, 342, 130 S. E. 25.

The purpose of this writ of mandamus is to require some superior court, officer, corporation or person to do some particular thing which appertains to their office or duty, and it will not be granted where the law affords to the party aggrieved another and complete specific remedy. Burton v. Furman, 115 N. C. 166, 168, 20 S. E. 443.

It is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present, clear, legal right to the thing claimed, and that it is the duty of the defendants to render it to him. Brown v. Turner, 70 N. C. 98; Lyon v. Commissioners, 120 N. C. 237, 243, 26 S. E. 929.

The writ of mandamus is a remedy to compel the performance of a duty required by law, where the one seeking relief has no other legal remedy, and the duty sought is clear and indisputable. See Bayard v. White, 127 U. S. 246, 250, 32 L. Ed. 116.

When Office Is Vacant.—When an office is vacant by reason of a motion, the remedy is mandamus. Doyle v. Raleigh, 89 N. C. 133. Lyon v. Commissioners, 120 N. C. 237, 242, 26 S. E. 929.

Who Can Exercise.—A mandamus lies only for one who has a specific legal right, and who is without any other adequate legal remedy. 1 Chitty v. Gen. Pr., 790; State v. Justices, 24 N. C. 430. Edgerton v. Kirby, 156 N. C. 347, 351, 72 S. E. 365; Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737 Lyon v. Commissioners, 120 N. C. 237, 244, 26 S. E. 929; Tucker v. Justices, 46 N. C. 451.

B. Illustrations of Mandamus as Proper Remedy.

For further cases when mandamus is the proper remedy, see annotations under section 870.

When Treasurer Refuses to Pay as Lawfully Ordered. — Upon refusal of a county treasurer to pay from the public funds of a county an order made on him by a board of audit and finance for the payment of moneys authorized and prescribed by a legislative enactment, a mandamus will lie. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283. See Martin v. Clark, 135 N. C. 178, 180, 47 S. E. 397.

Same—Knowledge as to Validity.—It is not within the power of a county treasurer to refuse to pay moneys upon a proper order when he has funds sufficient and applicable, and his knowledge as to whether they were due to the one to whom payment was ordered is immaterial in proceedings for a mandamus to compel him to pay. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283; Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

To Compel Deposit of Public Funds.—A public officer may be compelled by mandamus to deposit public funds in his hands in the proper depository. Bearden v. Fullam, 129 N. C. 477, 40 S. E. 204.

To Compel Ex-Sheriff to Give up County Property. — A mandamus at the suit of the county commissioners will lie to compel a sheriff wrongfully holding over from a preceding term to turn over the county property pertaining to his office to his successor, lawfully appointed, qualified and inducted therein. Lenior County v. Taylor, 190 N. C. 336, 130 S. E. 25.

Commissioners Locating County Site.—Where discretion has been given to commissioners in selecting and locating a site for the seat of justice for a county, and it was sought by mandamus to compel them to change the location already made, the court, said: "If the defendants had neglected or refused to execute the power entrusted to them, we certainly might call upon them to show cause why they had been so negligent, and upon insufficient return might have issued a peremptory mandamus. Here all we would do would be

to command them to select the site for the permanent seat of justice for the county according to law, which under their oaths, they say they have done." Hill v. Bonner, 44 N. C. 257; Barnes v. Commissioners, 135 N. C. 27, 38, 47 S. E. 737. See also Young v. Jeffreys, 20 N. C. at p. 357; State v. Moore, 46 N. S. at p. 276, 279; Taylor v. Comm'rs, 55 N. C. at p. 141, 145; 64 Am. Dec., 566; Raleigh & A. R. Co., v. Jenkins, 68 N. C. 502, 504; County Board v. State Board, 106 N. C. 81, 10 S. E. 1002.

C. Illustrations of Mandamus as Improper Remedy.

Granting Liquor License.—Since the justices have a discretion, under circumstances, to refuse a liquor license to the relator, although he be a fit person, he cannot have mandamus. For it is the nature of a discretion in certain persons that they are to judge for themselves, and therefore no power can require them to decide in a particular way, or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not then be their own, but that of the court under whose mandate they gave it. Barnes v. Commissioners, 135 N. C. 27, 34, 47 S. E. 737.

Certificate by Board of Examiners.—The courts cannot by a mandamus compel the board of dental examiners to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by examining board, is lacking. Burton v. Furman, 115 N. C. 166, 20 S. E. 443; Loughran v. Hickory, 129 N. C. 281, 40 S. E. 46; Ewbank v. Turner, 134 N. C. 77, 83, 46 S. E. 508.

Judgments upon School Order.—Judgments rendered upon school orders against the county commissioners will not be enforced by mandamus, when not for necessary expenses within the purview of Art. VII, section 7 of the Constitution. Bear v. Commissioners, 124 N. C. 204, 32 S. E. 558.

Determination of Title to Office.—In Dillon's work on Municipal Corporations, Vol. 2, at sec. 892, it is stated in substance that generally in this country, by adoption from the English law, where one is in the actual possession of an office under a claim by election or commission, and is performing the duties of the office, mandamus is not the proper proceeding in which to try the validity of such election or commission to admit another, but that quo warranto is the remedy. Lyon v. Commissioners, 120 N. C. 237, 250, 26 S. E. 929.

High, in his Extraordinary Legal Remedies, after discussing mandamus, concludes under this head, sec. 70: "When the writ is sought to compel the restoration of one claiming the right to an office, it is not sufficient for him to show that he is the officer de facto, but it is also incumbent upon him to show a clear legal right, and, failing in this, he is not entitled to the peremptory writ." I Chit. Gen. Pr., 791; Worthy v. Barrett, 63 N. C. 199. Lyon v. Board of Commissioners, 120 N. C. 237, 243, 26 S. E. 929.

As a Writ of Error.—Mandamus cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal (in that case a board of health), and the court "will not and cannot look into the evidence of fact upon which the judgment of the board was based for the purpose of determining whether the conclusions drawn from it were correctly or incorrectly formed," quoting from Kirchegessner v. Board of Health, 53 N. J. Law, 594. Ewbank v. Turner, 134 N. C. 77, 85, 46 S. E. 508.

Compelling Treasurer to Pay Warrants.—Where it is the duty of the county treasurer "to pay all warrants legally drawn on the treasurer by the auditor, and no moneys shall be paid out of the treasury except on the warrant of the auditor," no mandamus will lie to compel the treasurer to pay except upon his refusal to honor a warrant. Burton v. Furman, 115 N. C. 166, 171, 20 S. E. 443.

§ 867. For money demand.—In application for a writ of mandamus when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice are the same as prescribed for civil actions: "Provided that in all applications seeking a writ of mandamus to enforce a money demand on actions ex contractu against any county, city, town or taxing district within the state, the applicant shall allege and show in the complaint that the claim or debt has been reduced to a final judgment establishing what part of said judgment, if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuing of such writ. (Rev., s. 823; Code, s. 623; 1871-2, c. 75, s. 2; 1933, c. 349.)

Editor's Note.—The catchline of this section as it appeared in the Consolidated Statutes read: "For money demand returnable at term;" since the amendment of section 476 in 1919 and again in 1927 it is believed that this catchline no longer states the law. See section 476 and the notes thereto.

By Public Laws 1933, c. 349, the proviso, relating to mandamus against local units to enforce collection of judgments, was added.

Purpose in Action for Money Demand.—There is now in this state, Art. IV, sec. 1, Const., but one form of action, and the writ of mandamus is but a process of the court in that action, the purpose of the writ is, in actions for money demands, to give the plaintiff a more speedy and effectual recovery of his debt than could be had in the ordinary way. Belmont & Co. v. Reilly, 71 N. C. 260, 262.

Return of Summons.—It is clear from the positive language of the statute that if the action is for a money demand the summons must be made returnable to the superior court in term time only; there is no room for construction. Belmont v. Reilly, 71 N. C. 260, 261; Rogers v. Jenkins, 98 N. C. 129, 131, 3 S. E. 821; Howerton v. Tate, 66 N. C. 231. These cases were decided prior to the amendments to section 476. See Editor's note above.

Examples of a Money Demand.—An application by a holder of North Carolina bonds for a mandamus to be directed to the auditor of the state, commanding him to cause to be levied certain special taxes to pay the accrued interest on the said bonds, is an application "to enforce a money demand," and as such a judge at chambers has no jurisdiction thereof. Belmont & Co. v. Reilly, 71 N. C. 260.

When the treasurer of a town school committee seeks a writ of mandamus to compel the treasurer of the county to pay certain money which is alleged to be due by provisions of law, such action is to "enforce a money demand" and this section applies. Rogers v. Jenkins, 98 N. C. 129, 3 S. E. 821.

But an action to compel a city to pay over certain fines and penalties to the county board of education was held not an action to enforce a money demand, but an action to compel a public officer to deposit public funds in the proper place. Bearden v. Fullam, 129 N. C. 477, 40 S. E. 304.

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, §§ 1400, 3205, 3206, 4385, is not in strictness "a money demand," under this section, but comes under section 868. Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 337.

§ 868. For other relief returnable in vacation; issues of fact.—When the plaintiff seeks relief other than the enforcement of a money demand, the summons must be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court. (Rev., s. 824; Code, s. 623; 1871-2, c. 75, s. 3.)

As to service of summons generally, see section 476, and notes thereto.

Demand and Refusal Necessary.—A proceeding in mandamus may be made returnable before the judge at chambers, but it cannot be sustained without demand and refusal, or what is equivalent to a refusal. Alexander v. Commissioners, 67 N. C. 330. Horne v. Commissioners, 122 N. C. 466, 471, 29 S. E. 581.

Necessity for Motion for Jury Trial.—Where neither party move for a trial jury of an issue of fact raised by the pleadings under this section, the issue may be determined by the court. Cannon v. Wiscasset Mills Co., 195 N. C. 119, 126, 141 S. E. 344.

Payment of Dividends—Remand for Proper Procedure.—When proceedings in mandamus have been instituted by stockholders of a private corporation to compel the distribution of a surplus ascertained in accordance with the provisions of § 1178, before the judge holding the terms of court of the district, and the judge has issued a mandamus to compel the payment of the dividends without evidence of the actual cash value of the assets or taking into his consideration a proper deduction for the depreciation of the plant, the case will be remanded to him to be proceeded with according to law. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

When There Are Issues of Fact.—If a case is before the judge at chambers, and there are issues of fact appearing upon the pleadings, the cause should not be dismissed, but should be transferred to term for trial before a jury, just as the clerk might so transfer it. For, it would be strange to dismiss an action already in the superior court because before the clerk or the judge at chambers, and tell the plaintiff to come back into the same court at term before the same judge, and the same clerk, by service of another summons upon the same parties. Ewbank v. Turner, 134 N. C. 77, 80, 46 S. E. 508.

Where Only Evidentiary Matters Raised.—When the answer and affidavits of a railroad company in mandamus proceedings by a city to enforce its ordinance requiring the railroad to change from a grade crossing with its street to an underpass, raises only evidentiary matters on the controlling issues, or as to the extent of the dangerous conditions requiring the change, no issues are raised requiring the intervention of the jury, and the judge before whom the proceedings are returnable will determine the matter. Durham v. Southern R. Co., 185 N. C. 240, 117 S. E. 17.

Art. 40. Quo Warranto

§ 869. Writs of sci. fa. and quo warranto abolished.—The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article. (Rev., s. 826; Code, s. 603; C. C. P., s. 362; R. C., c. 26, ss. 5, 25.)

Cross References.—For a general treatment of scire facias, see 11 N. C. Enc. Dig. 148-152. For general treatment of quo warranto, see 10 N. C. Enc. Dig. 645-654; 15 N. C. Enc. Dig. 286-288.

Quo Warranto—In General.—Although the proceeding by information in the nature of the writ of quo warranto has been abolished, the remedy to be pursued whenever the controversy is as to the validity of an election or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the Legislature seems to have considered paramount to that of the private rights of the persons aggrieved: Hence, the requirement that such actions must be brought by the Attorney-General in the name of the people of the state, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney-General in the name of the people. Such is the construction which has been given to these sections of the Code by numerous decisions of this court. Patterson v. Hubbs, 65 N. C. 119; Hargrove v. Hunt, 73 N. C. 24; People v. Hilliard, 72 N. C. 169; People v. McKee, 68 N. C. 429; Brown v. Turner, 70 N. C. 93. Saunders v. Gatling, 81 N. C. 298, 301.

Same—Historical.—Questions as to the title and possession of offices at common law were determined by the writ of quo warranto, which was the appropriate remedy in such cases. It was originally a high prerogative writ issued out of chancery, and was used by the Crown of Great Brtain unjustly and oppressively upon its subjects, until it was modified and stripped of many of its harsher features by what were called the statutes quo warranto; and then, after the justices in eyre were displaced by the judges of the superior courts, it fell into disuse, and the information in nature of a writ of quo warranto obtained in its stead. Ex Parte Daughtry, 28 N. C. 155; State v. Hardie, 23 N. C. 42. Saunders v. Gatling, 81 N. C. 298, 300.

The writ of quo warranto was a common-law writ in the nature of a writ of right by the King against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them, and the first process was summons. See Ames v. Kansas, 111 U. S. 449, 461, 28 L. Ed. 482.

The original common-law writ of quo warranto was a civil writ, at the suit of the crown, and not a criminal prosecution. Id.

Same—Action Still Called Quo Warranto.—Though for convenience the action of quo warranto is still spoken of, it must be remembered that the action has been specifically abolished, and we have in fact only a civil action in which the subject matter is a trial of the title to an office. Cozart v. Fleming, 123 N. C. 547, 561, 31 S. E. 822.

In this country the proceeding is conducted in the name of the state or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect. Territory v. Lockwood, 3 Wall. 236, 238, 18 L. Ed. 47.

The right of private relators to bring such actions was not restricted in England by requiring leave of the Crown officer until Statute 9 Anne, Chapter 20; ibid., Section 608. State v. Hall, 111 N. C. 369, 371, 16 S. E. 420.

Scire Facias—In General.—Writs of scire facias consisted of two classes; the object of the first class was to remedy defects in or to continue an action; that of the second class to commence some proceeding. McDowell v. Asbury, 66 N. C. 444.

Proceedings in the nature of a sci. fa. of the first class are almost indispensable in the administration of justice, and the object of this section was merely to abolish the name and form of writs of this class and simplify the process into a notice or summons to show cause why further proceedings should not be had to provide further relief in matters where parties had had a day in court, etc., and not to effect the substance of the remedy. McDowell v. Asbury, 66 N. C. 444.

On such motion the judge may allow the defendant to make any defense which he could have availed himself of under the old scire facias proceeding. Id.

Same—Continuation of Former Suit.—A scire facias on a judgment is not a new action, but is only issued as a continuation of the former suit. Binford v. Alston, 15 N. C. 351. McDowell v. Asbury, 66 N. C. 444, 447.

Cited in Bouldin v. Davis, 197 N. C. 731, 150 S. E. 507.

§ 870. Action by attorney-general.—An action may be brought by the attorney-general in the name of the state, upon his own information or upon the complaint of a private party, against the parties offending, in the following cases:

1. When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or,

2. When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

3. When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of the section of article one of the chapter entitled State Lands which declares entries and grants not authorized by that chapter to be void and not to constitute color of title (Rev., s. 827; Code, s. 607; C. C. P., s. 366; 1911, cc. 195, 201.)

Cross References.—As to actions in the nature of quo warranto against corporations, by the attorney general, see section 1187. As to actions by attorney general in the name of the state to vacate land grants, see section 7596. For additional cases dealing with contested elections, see 5 N. C. Enc. Dig. 97-102; 13 N. C. Enc. Dig. 833. For cases on office holding, see 9 N. C. Enc. Dig. 774-799; 15 N. C. Enc. Dig. 132-139. As to discussion of doctrine of Hoke v. Henderson as overruled by Mial v. Ellington, see Editor's Note under section 3200.

In General.—This and the subsequent sections provide for the fullest relief to the rightful claimant, against an unlawful intrusion, and thereby dispenses with the need of recourse to another process, unless those required to induct, still refuse to do so, after the motion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting

claims to office by an adjudication between the contesting parties. Ellison v. Raleigh, 89 N. C. 125, 130.

In Dillon on Municipal Corporations sec. 680 it is stated that "The adjudged cases in this country agree that quo warranto, or an information or proceeding in the nature of a quo warranto, is the appropriate remedy, when not changed by charter or statute, for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices"; and the author proceeds: "If another is commissioned and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a mandamus, but must resort to quo warranto." The wrongful occupant must, however, have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy. Ellison v. Raleigh, 89 N. C. 125, 129.

Who Can Be Complainant.—Actions of this character may be instituted in the name of the state on the relation of the Attorney-General or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. State v. Taylor, 122 N. C. 141, 29 S. E. 101; State v. Vann, 118 N. C. 3, 23 S. E. 932; State v. Hall, 111 N. C. 369, 371, 16 S. E. 420; Saunders v. Gatling, 81 N. C. 298. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

Relator Need Not Allege Title.—In a quo warranto brought by a citizen, qualified voter and taxpayer of a municipal corporation, upon leave of the Attorney-General, to try the title of an officer, the chief of police of said corporation, it is not necessary to allege that the relator is entitled to the office or has any interest therein. State v. Hall, 111 N. C. 369, 16 S. E. 420.

But the action is none the less personal as to the parties claiming the office, the issue between them being the right to the same. Rhodes v. Love, 153 N. C. 468, 470, 69 S. E. 436; Ellison v. Raleigh, 89 N. C. 125, 129.

Interpleader by Judgment Creditor.—Under sections 456 and 460, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney-General to annul and vacate the charter of the corporation. State v. Simonton, 78 N. C. 57.

Determining Title to Public Office.—Quo Warranto is the remedy in England and this country by which the title to an office can be established by judicial determination. It is the only appropriate and efficacious remedy, sanctioned by an overwhelming current of authority both in this state and in England. High on Ex. Leg. Rem., Secs. 49, 53 and 77; Ex Parte Daughtry, 28 N. C. 155; State v. Hardie, 23 N. C. 42. Saunders v. Gatling, 81 N. C. 298, 300.

Same—Holding Two Offices.—A citizen and tax-payer of a county is entitled to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time. State v. Thompson, 122 N. C. 493, 29 S. E. 720; State v. Vann, 118 N. C. 3, 23 S. E. 932; State v. Hall, 111 N. C. 369, 16 S. E. 420.

Same—Allegation of Illegality.—Usually in such actions there is an allegation that the defendant has usurped and is illegally exercising the duties of the office, but section 876 does not require such averment. Cozart v. Fleming, 123 N. C. 547, 561, 31 S. E. 822.

Same—Mandamus and Injunction Improper—It is not permissible to try the title to an office by injunction, nor by mandamus—a civil action in the nature of quo warranto, is the appropriate remedy, to be tried before a judge and jury. Cozart v. Fleming, 123 N. C. 547, 548, 31 S. E. 822; Ellison v. Raleigh, 89 N. C. 125, 131; Lyon v. Board, 120 N. C. 237, 242, 26 S. E. 929.

In High on Extraordinary Remedies, it is said that "In cases where relief has been sought to determine disputed questions of title to and possession of public offices, the courts have almost uniformly refused to lend their aid by mandamus, since the remedy by information in the nature of a quo warranto is justly regarded as the most appropriate and efficacious remedy for testing the title to the office." Lyon v. Board, 120 N. C. 237, 249, 26 S. E. 929.

The title to a public office in dispute between two rival claimants must be determined by an action in the nature of quo warranto, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. Rogers v. Powell, 174 N. C. 388, 389, 93 S. E. 917, Burke v. Commissioners, 148 N. C. 46, 61 S. E. 609.

Same—Examples.—Where the board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been, but the latter failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party: Held, that this could not in any wise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts in an action under this section. State v. Calvert, 98 N. C. 580, 4 S. E. 127.

An action against a judge of probate to vacate his office is properly brought by the attorney general under this section. Patterson v. Hubbs, 65 N. C. 119; People v. Heaton, 77 N. C. 18.

Contested Seat in General Assembly.—The Constitution of our state withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly, and an action in quo warranto will not lie under this section. State v. Pharr, 179 N. C. 699, 103 S. E. 8.

What Is a Public Officer.—An officer, such as properly to come within the legitimate scope of a quo warranto information, may be defined, says a recent author, "as a public position to which a portion of the sovereignty of the county, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public." High Ex Leg. Rem, sec. 620. Elson v. Coleman, 86 N. C. 236, 239.

It is manifest, that the act has reference to such usurping occupants as are exercising public functions or conferred franchises, wrongfully, an is confined to an office which, as is said in Nichols v. McKee, 68 N. C. 429, "is a part of the government and part of the state policy," and to an officer "who takes part in the government." Eliason v. Coleman, 86 N. C. 236, 239.

The true test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. Eliason v. Coleman, 86 N. C. 236.

Same—Examples.—It has often been a matter of controversy what shall be said to be a public office. It has, however, long since been decided that a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works, were officers of such a public character as to come within the rule. Rhodes v. Love, 153 N. C. 468, 473, 69 S. E. 436.

The office of chief of police is such an office that an action in the nature of a quo warranto may be brought to try the title to it. State v. Hall, 111 N. C. 369, 16 S. E. 420.

It is held in Eliason v. Coleman, 86 N. C. 236, that this section did not authorize a quo warranto as to the office of chief engineer in a quasi private corporation, namely, the Western North Carolina R. R. Co. State v. Hall, 111 N. C. 369, 372, 16 S. E. 420.

The selling of liquor is not an office so that the defendant's right to it shall be tested by an action in the nature of a quo warranto under this section. Hargett v. Bell, 134 N. C. 394, 396, 46 S. E. 749.

To Determine Validity of Election.—A civil action in the nature of a writ of quo warranto is the appropriate remedy to test the validity of an election of the right to a public office. Such action must be brought in the name of the people of the state by the attorney-general on the relation of the party aggrieved. Saunders v. Gatling, 81 N. C. 298; Davis v. Moss, 81 N. C. 303.

Same—Tabulation Prima Facie Correct.—A tabulation of the result of an election by the clerk, in the manner required by law is prima facie correct, and can only be questioned in an action in the nature of a quo warranto proceeding. Cozart v. Fleming, 123 N. C. 547, 548, 31 S. E. 822, citing Swain v. McRae, 80 N. C. 111; Gatling v. Boone, 98 N. C. 573, 3 S. E. 392.

Same—Proper Certificate Ordinarily Conclusive.—"The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts." Dillon's Work on Municipal Corporations, Vol. 2, at sec. 892. Lyon v. Board, 120 N. C. 237, 250, 26 S. E. 929.

Same—Ballot Boxes Brought into Courts.—In Broughton v. Young, 19 N. C. 915, 27 S. E. 277, it was held that the preservation of the ballots is required that they may be kept as evidence to certify or correct the election returns when impeached, and that on a quo warranto the ballot boxes might be brought into court and the recount made in the presence of the court and jury. Cozart v. Fleming, 123 N. C. 547, 557, 31 S. E. 822.

The facts found by the referee as to the result of an election in proceeding in the nature of a quo warranto, and approved by the trial judge, are not subject to review on ap-

peal when supported by competent evidence. State v. Jackson, 183 N. C. 695, 110 S. E. 593.

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence. State v. Jackson, 183 N. C. 695, 110 S. E. 593.

Applied in State v. Holmes, 207 N. C. 293, 176 S. E. 746.
Cited in Bouldin v. Davis, 197 N. C. 731, 150 S. E. 507.

§ 871. Action by private person with leave.—When application is made to the attorney-general by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the state, upon the relation of such applicant, upon the applicant tendering to the attorney-general satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the action. (Rev., s. 828; Code, s. 608; 1874-5, c. 76; 1881, c. 330.)

As to mandatory dissolution of a corporation at the instance of private persons, see section 1185.

Section Constitutional.—This section allowing the prosecution of an action in the name of the state to assert the right of a citizen to a public office is not, for that reason, unconstitutional. McCall v. Webb, 135 N. C. 356, 47 S. E. 802.

Security Must Be Given.—The section clearly provides that before an action may be instituted or maintained on the relation of a private citizen, such leave shall be obtained and that satisfactory security must be furnished, indemnifying the State against all costs and expenses which may accrue in consequence of bringing the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

Interest of Public Is Paramount.—In proceedings under this and § 869 to try title to a public office the interest of the public is involved and is paramount to the rights of the relator, and the consent of the attorney-general, the filing of the bond, etc., as required by this section, is a prerequisite to the right of the relator to maintain the action. Cooper v. Crisco, 201 N. C. 739, 740, 161 S. E. 310.

Permission Essential.—The right to proceed by an action in the nature of a quo warranto information is not guaranteed to every citizen, and can only be prosecuted by leave of the Attorney-General. Ellison v. Raleigh, 89 N. C. 125, 132.

Same—Second Suit after Voluntary Nonsuit.—Common-law procedure by quo warranto, and proceedings by information in the nature thereof have been abolished by § 869 and the remedy in such matters is under the provisions of this section and where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject-matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again complied with before the bringing of the second action. Cooper v. Crisco, 201 N. C. 739, 161 S. E. 310.

Same—Effect of Section 873.—This view that leave is essential is strengthened by the subsequent section, 873, which provided that even after leave is given and action commenced, the same may, under certain conditions be withdrawn and, on certificate to that effect being properly filed, the judge shall, on motion, dismiss the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

May Be Given After Commencement of Suit.—The court has held in State v. Withers, 121 N. C. 376, 28 S. E. 522, that it is not absolutely essential that the leave should be had before the suit is commenced, provided it is obtained afterwards and supplied, but it must always be made to appear, pending the proceedings, that the leave of the Attorney-General has been given to prosecute the action. Midgett v. Gray, 158 N. C. 133, 135, 73 S. E. 791.

Upon Failure to Show Leave Action Dismissed.—It appearing that, by inadvertance, the record in this action of quo warranto to try the title of office did not show that permission of the Attorney-General was given according to the requirements of this section, it is held that proof of such permission given anterior to the commencement of the action may be offered upon the new trial awarded, and upon failure thereof the action may be dismissed. State v. Gray, 159 N. C. 443, 74 S. E. 1050.

Applied in State v. Holmes, 207 N. C. 293, 176 S. E. 746.
Cited in Bouldin v. Davis, 197 N. C. 731, 150 S. E. 507.

§ 872. Solvent sureties required.—The attorney-general, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the state against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (Rev., s. 829; 1901, c. 595, s. 2.)

§ 873. Leave withdrawn and action dismissed for insufficient bond.—When the attorney-general has granted leave to a private relator to bring an action in the name of the state to try the title to an office, and it afterwards is shown to the satisfaction of the attorney-general that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the attorney-general may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the attorney-general to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (Rev., s. 830; 1891, c. 595.)

§ 874. Arrest and bail of defendant usurping office.—When action is brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. (Rev., s. 831; Code, s. 609; C. C. P., s. 369; 1883, c. 102.)

§ 875. Several claims tried in one action.—Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (Rev. s. 832; Code, s. 614; C. C. P., s. 374.)

§ 876. Trials expedited.—All actions to try the title or right to any state, county or municipal office stand for trial at the return term of the summons, if a copy of the complaint was served with the summons at least thirty days before the return day thereof; and it is the duty of the judges to expedite the trial of these actions, and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (Rev., s. 833; Code, s. 616; 1901, c. 42; 1874-5, c. 173.)

§ 877. Time for bringing action.—All actions brought by a private relator, upon the leave of the attorney-general, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried;

and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (Rev., s. 834; 1901, c. 519; 1903, c. 556.)

When Section Does Not Apply.—This provision requiring a private relator, upon leave of the attorney general, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where it is impossible under the circumstances to give the required notice. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

§ 878. Defendant's undertaking before answer.—Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (Rev., s. 835; 1895, c. 105.)

§ 879. Possession of office not disturbed pending trial.—In any civil action pending in any of the courts of this state in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emolument thereof. (Rev., s. 836; 1899, c. 33.)

Purpose of the Section.—An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings and the public would be made to suffer by this mode of contesting the right to the office and to the fees and emoluments. Hence, in this and the like cases, the appropriate remedy is by an action in the nature of a quo warranto not an injunction. Patterson v. Hubbs, 65 N. C. 119, 121.

Title Should Be Determined First.—Individuals claiming to comprise the board of trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendants to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. Rogers v. Powell, 174 N. C. 388, 93 S. E. 917.

§ 880. Judgment by default and inquiry on failure of defendant to give bond.—At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in second section preceding. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (Rev., s. 837; 1899, c. 49; 1895, c. 105, s. 2.)

As to effect of this section on an independent suit for damages, see editor's note under section 885.

§ 881. Service of summons and complaint.—The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (Rev., s. 838; 1899, c. 126.)

§ 882. Judgment in such actions.—In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars. (Rev., ss. 839, 840; Code, ss. 610, 615; R. C., c. 95; C. C. P., ss. 370, 375; Const., Art. IX, s. 5.)

Discretion of Court as to Fine.—Where the defendant went into office under the authority of an unconstitutional appointment by the general assembly, the court presumed that there was no criminal intent and did not impose the fine. Nichols v. McKee, 68 N. C. 429, 440.

§ 883. Mandamus to aid relator.—In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (Rev., s. 841; 1885, 406, s. 1.)

As to mandamus in general, see sections 866-868.

§ 884. Appeal; bonds of parties.—No appeal by the defendant to the supreme court from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be

executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (Rev., s. 842; 1885, c. 406, s. 2.)

§ 885. Relator inducted into office; duty and damages.—If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. He may then recover by action the damages which he has sustained by reason of the usurpation by the defendant of the office. (Rev., ss. 843, 844; Code, ss. 611, 613; C. C. P., ss. 371, 373.)

Editor's Note.—It was held, under this section, that compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. Swain v. McRae, 80 N. C. 111; State v. Jones, 80 N. C. 127; State v. Tate, 70 N. C. 161.

In McCall v. Webb, 135 N. C. 356, 47 S. E. 802, the question as to the recovery of damages in an independent action again came up and the court discussed the effect of section 880 as amended in 1895 and 1899. The court said: these amendments in regard to the method of recovering damages in such cases do not provide for a cumulative remedy, but it was intended by them to substitute the remedy by inquiry in the action brought to recover the office for the former remedy by separate action on the undertaking, which was given by section 613 of the Code; and besides, the amendments are inconsistent with the provisions of section 613, and the latter is therefore repealed by them. McCall v. Webb, 135, 356, 364, 47 S. E. 802. See also Morgantown Graded School v. McDowell, 157 N. C. 316, 72 S. E. 1083.

Person Entitled Has Property.—A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor. State v. Tate, 70 N. C. 161.

Court Can Enforce Demand for Documents.—When the relator has taken office and made the demand for the books and papers belonging to the office, the court can issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. Rhodes v. Love, 153 N. C. 468, 474, 69 S. E. 436.

§ 886. Refusal to surrender official papers misdemeanor.—If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor. (Rev., s. 3601; Code, s. 612; C. C. P., 372.)

§ 887. Action to recover property forfeited for state.—When any property, real or personal, is forfeited to the state, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (Rev., s. 845; Code, s. 621; C. C. P., s. 381.)

Art. 41. Waste

§ 888. Remedy and judgment.—Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (Rev., s. 853; Code, s. 624; C. C. P., s. 383.)

For a full treatment of the action of waste, see 12 N. C. Enc. Dig. 298-305; 15 N. C. Enc. Dig. 729.

Editor's Note.—In England the clearing of land by a lifetenant was waste. In Shine v. Wilcox, 21 N. C. 631 the court says "While our ancestors brought over to this country the principles of common law, these were nevertheless accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste." And in King v. Miller, 99 N. C. 583 the court says "While in its essential elements waste is the same in this country and in England .... yet in respect to acts which constitute waste, the rule that governs in a new and unopened land covered largely with primeval growth must be different." Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Definition.—Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the country. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Nature of Action.—An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. Butner v. Keelhn, 51 N. C. 60; Rippey v. Miller, 33 N. C. 247; Collier v. Arrington, 61 N. C. 356; Peebles v. N. C. R. Co., 63 N. C. 238; Shuler v. Millsaps, 71 N. C. 297. Shields v. Lawrence, 72 N. C. 43, 44.

Discretion of Jury.—It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance. Sherrill v. Connor, 107 N. C. 630, 633, 12 S. E. 588. King v. Miller, 99 N. C. 583, 6 S. E. 660.

To Determine Liability.—In ascertaining whether a given act or omission falls within the rule, and subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed. Sherrill v. Connor, 107 N. C. 630, 634, 12 S. E. 588.

Cited in Batten v. Corporation Commission, 199 N. C. 460, 154 S. E. 748.

§ 889. For and against whom action lies.—In all cases of waste, an action lies in the superior court at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (Rev., s. 854; Code, s. 625; R. C., c. 116, s. 1; 52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5.)

No Action Unless Plaintiff Has Estate.—The writ of waste is founded upon principles, peculiar to itself, and more especially dependent upon a privy between the reversioner and tenant. No one shall have the action of waste, unless he hath the immediate estate of inheritance; and between the heir of the reversioner and the tenant, who commits waste, there is no privy, the waste being committed in the lifetime of the reversioner. Browne v. Blick, 7 N. C. 511.

Contingent Remainderman Cannot Sue.—A contingent remainderman can not sue for waste, but, for the protection of his right, he must resort to equity for the protection of his interest. Richardson v. Richardson, 152 N. C. 705, 68 S. E. 217. Latham v. Lumber Co., 139 N. C. 8, 51 S. E. 780. Gordon v. Lowther, 75 N. C. 193.

No Application to Judgment Creditor. — The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common law, nor is he embraced in any one of the classes "for and against whom an action of waste lies" under this section. Jones v. Britton, 102 N. C. 166, 173, 9 S. E. 554.

Right To Restrain Included.—The right to sue for waste includes the right to restrain its commission.. Morrison v.

Morrison, 122 N. C. 598, 599, 29 S. E. 901; Hinson v. Hinson, 120 N. C. 400, 27 S. E. 80.

Holder of a Vested Estate for Life.—In the case of Gordon v. Lowther, 75 N. C. 193, the court said, in effect, that while persons holding a vested estate for life, coupled with contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry. That case was cited with approval in the later case of Jones v. Britton, 102 N. C. 166, 9 S. E. 554; Farabow v. Green, 108 N. C. 339, 343, 12 S. E. 1003.

Conflicting Evidence as to Title.—In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of the plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertance or mutual mistake this should have conveyed the fee. The defendant was in possession and claimed title by adverse possession under color of this deed. It was held that the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principle that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of this section. It was held further, that while the evidence in this case as to location of the land was meager it was sufficient. Howell v. Shaw, 183 N. C. 460, 112 S. E. 38.

§ 890. Tenant in possession liable.—Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years. (Rev., s. 855; Code, s. 626; R. C., c. 116, s. 2; 11 Hen. VI, c. 5.)

§ 891. Action by tenant against cotenant.—Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (Rev., s. 856; Code, s. 627; R. C., c. 116, s. 4; 13 Edw. I, c. 22.)

Section Changes the Common Law Rule.—One of the settled rules at common law in England, was that one tenant in common could not sue his co-tenant, except for partition, and our Legislature, feeling the practical difficulties at an early date, enacted that one tenant in common might maintain an action for waste against his co-tenant or joint tenant. Morrison v. Morrison, 122 N. C. 598, 599, 29 S. E. 901. And the tenant can also restrain his co-tenant from the commission of waste. Id.

Cutting Trees.—Under this section of the Code, one tenant in common may sue his co-tenant for waste for cutting down trees to be sold as cross ties and hauled off the land. Hinson v. Hinson, 120 N. C. 400, 27 S. E. 80.

Applied in Daniel v. Tallassee Power Co., 204 N. C. 274, 168 S. E. 217.

§ 892. Action by heirs.—Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own. (Rev., s. 857; Code, s. 628; R. C., c. 116, s. 5; 6 Edw. I, c. 5; 11 Hen. VI, c. 5; 20 Edw. I, st. 2.)

Heirs Cannot Set up Damages for Waste as Counterclaim.—In a suit by a widow against the heirs to recover payments allowed to her as dower and made a charge on the land, the heirs cannot set up by way of counterclaim damages for waste committed by the widow but must proceed under the statute. Hybart v. Jones, 130 N. C. 227, 41 S. E. 293.

§ 893. Judgment for treble damages and possession.—In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment. (Rev., s. 858; Code, s. 629; R. C., c. 116, s. 3; 6 Edw. I, c. 5; 20 Edw. I, st. 2.)

In General.—Under this section a tenant in dower, or other life-tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liablity to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if he should in the meantime fail to pay the damages recovered of him. Sherrill v. Connor, 107 N. C. 630, 636, 12 S. E. 588.

Section Changes Former Law.—This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was, manifestly, amended when the Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and fixing the time for forfeiture of the place wasted on failure to pay the amount recovered. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Prospective Damages Not Allowed.—The jury cannot allow prospective damages, where the roof of a building has become decayed, for the value of the whole building, on the supposition that the tenant will suffer the decay to continue till the structure shall have rotted and fallen down. Sherrill v. Connor, 107 N. C. 630, 637, 12 S. E. 588.

Where Damages Insignificant.—In an action for waste, where the jury find insignificant damages, judgment will be arrested. Sheppard v. Sheppard, 3 N. C. 382.

Judgment for Damages Only.—It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. Bright v. Wilson, 1 N. C. 251.

New Action for Subsequent Injury. — If the life-tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Appeal.—Section 893 says the court may give judgment for treble damages and the place wasted, and on appeal the court will not make such discretionary power obligatory. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

Art. 42. Nuisance

§ 894. Remedy for nuisance.—Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (Rev., s. 825; Code, s. 630; C. C. P., s. 387.)

Cross References.—For full treatment of nuisance, see 9 N. C. Enc. Dig. 747-763; 15 N. C. Enc. Dig. 126-131. As to injunction against nuisance, see sec. 843 and annotations thereunder.

Editor's Note.—Nuisances consist of two general classes, public and private. A public nuisance exists when a right or privilege, common to all the citizens of the community, is interfered with, even though no actual damage to any individual is caused. In such cases in order to maintain a civil action under this section the plaintiff must show special damages differing both in degree and in kind from that suffered by the general public.

A private nuisance exists where the right or privilege interfered with is essentially a private one. If the offense is so general to affect a number of citizens in the neighborhood the aggravation of offenses will amount to a public wrong and may be the subject of a public prosecution. But in such a case the individual can still maintain a civil action, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. See McManus v. Southern Ry. Co., 150 N. C. 655, 660, 64 S. E. 766.

When the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. See Farmer,

etc., Mfg. Co. v. R. R., 117 N. C. 579, 23 S. E. 43; Pruitt v. Bethell, 174 N. C. 454, 457, 93 S. E. 945.

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. See Baltimore, etc. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329, 27 L. Ed. 739.

An Adequate Remedy.—Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our state is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. Cherry v. Williams, 147 N. C. 452, 61 S. E. 267; Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761; Raleigh v. Hunter, 16 N. C. 12; Bell v. Blount, 11 N. C. 384; McManus v. Southern Ry. Co., 150 N. C. 655, 661, 64 S. E. 766.

Purpose of Damages.—Damages in nuisance should be such as to lead to the abatement of the nuisance. Bradley v. Amis, 3 N. C. 399.

Appreciable Damage Must Be Suffered.—To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. McManus v. Southern R. Co., 150 N. C. 655, 64 S. E. 766.

When Special Damage Necessary.—No person can maintain an action (on a public nuisance) unless he sustains a special damage therefrom differing from that sustained by the rest of the public. McManus v. Southern Ry. Co., 150 N. C. 655, 664, 64 S. E. 766; Pedrick v. R. R., 143 N. C. 485, 55 S. E. 877.

But an action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family, although others in the community suffered sickness from the same cause. Pruitt v. Bethell, 174 N. C. 454, 93 S. E. 945.

Diminution of Damage.—In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that special benefits arising out of the establishment of the nuisance may be set off in diminution of damages. Brown v. Virginia-Carolina Chemical Co., 162 N. C. 83, 77 S. E. 1102.

Injunction Lies.—One suffering peculiar damages from a public nuisance is not restricted but may sue for an injunction. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761.

Same—No Permanent Damage.—Permanent damages for the depreciation of property can not be recovered. The owners may enjoin commission of the acts constituting the nuisance and recover such temporary damages as their property has sustained thereby. Taylor v. Seaboard, etc., Railway, 145 N. C. 400, 59 S. E. 129.

Proximate Cause. — In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. McGhee v. Norfolk, etc., R. Co., 147 N. C. 142, 60 S. E. 912.

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS

Art. 43. Compromise

§ 895. By agreement receipt of less sum is discharge.—In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same. (Rev., s. 859; Code, s. 574; 1874-5, c. 178.)

I. Editor's Note.
II. In General.
III. Effect of Compromise.
IV. Application of Section.
V. Procedure.

I. EDITOR'S NOTE.

It has been a long established doctrine of the English, and most American courts, that the payment of a portion of a specific or liquidated demand or claim in the same manner as the whole liquidated demand or claim ought to be paid, is part payment only. This is true even though there is an express agreement between the parties that the lesser sum shall extinguish the greater. The reason assigned for the rule is that the agreement to give up the residue is without consideration. One of the most famous of the cases so holding is Sibree v. Tripp, 15 M. & W. 22, in which Alderson, B., said:

"If you substitute for a sum of money a piece of paper, or a stick of sealing wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of $100, a horse of the value of five pounds, but not five pounds."

The illustrations thus put by Baron Alderson show the glaring absurdity and extreme technicality of the distinctions made by the courts. As in the English case referred to, supra, courts have come to question the good sense of such technical distinctions, nevertheless, it is a settled doctrine. Currie v. Kennedy, 78 N. C. 91; Koonce v. Russell, 103 N. C. 179, 9 S. E. 316; Bank v. Commissioners, 116 N. C. 339, 21 S. E. 410. But when we come to the case of a true compromise, the state of the law is different. In Barnawell v. Threadgill, 56 N. C. 50, 58, Battle, J., citing Leonard v. Leonard, 2 Ball. & Best, 178, and quoting the words of Lord Chancellor Manners, he says: "In the case of a compromise as distinguished from a release, both parties are ignorant of their rights, and the agreement is founded on that ignorance, and the party surrendering may, in truth, have nothing to surrender; and whether the uncertainty rests upon a doubt in point of fact or a doubt in point of law, if both parties are in the same ignorance, the fairness of the compromise cannot be affected by a subsequent investigation and result." And in Williams v. Alexander, 39 N. C. 207, 209, the court thus refers to the subject: "While the title is thus in contestation, or while he (the defendant) is claiming them as his property, and the plaintiff holding them as hers, they agree, in order to put an end to the dispute, to divide the property. The compromise of a doubtful right, fairly entered into, with due deliberation, will be sustained in a court of equity. It is reasonable and proper that it should be so; parties must be at liberty to settle their own controversies by dividing the property in controversy, and public policy upholds the right." Mayo v. Gardner, 49 N. C. 359, is also directly in point on this phase of the question.

However, the Legislature took cognizance of the situation in 1874-5 and enacted, ch. 178, this section, which is a substantial enactment and extension of the holding of the cases dealing with the compromise of doubtful claims, to "all claims or money demands, of whatever kind, and howsoever due." Thus the evils necessarily flowing from the technical distinctions pointed out in the first part of this note, are now removed by the wise enactment of this beneficial section. York v. Westall, 143 N. C. 276, 280, 55 S. E. 724; Mathis v. Bryson, 49 N. C. 508; Findly v. Ray, 50 N. C. 125; Petit v. Woodlief, 115 N. C. 120, 126, 20 S. E. 208; 1 Parson on contracts (5 Ed.) 438, 439.

II. IN GENERAL.

Cross Reference.—For a discussion of the law of contracts in relation to this section, see 13 N. C. Law Rev., 45.

Definition.—A compromise has been defined by the United States Supreme Court to be "an agreement between two or more persons, who, in order to stop or put an end to a law suit, adjust their differences by mutual consent in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing." See New Orleans v. Warner, 180 U. S. 199, 45 L. Ed. 493.

Essentials of Compromise.—Thus, as in the case of other contracts, mutuality is essential to a valid compromise. There must be a meeting of minds upon every feature and element of such agreement. See Horn v. Detroit, etc., Co., 150 U. S. 610, 37 L. Ed. 1199.

The agreement, in order to be binding upon the parties, must have been executed voluntarily and without duress, or undue influence, in good faith, deliberately and understandingly. Hennessy v. Bacon, 137 U. S. 78, 34 L. Ed. 605.

Conclusiveness.—It is held in the Supreme Court of the United States that it is of the very essence of the compromises or settlements entered into in adjustment of disputes that the contest should be closed, and they are held to be final and conclusive as to the interested parties. Oglesby v. Attrill, 105 U. S. 605, 26 L. Ed. 1186.

In order to be thus conclusive, however, there must have been an actual compromise or settlement, and not merely negotiations for a settlement, or facts from which such an agreement might be inferred. Swift, etc., Co. v. United States, 111 U. S. 22, 28 L. Ed. 341.

Constitutionality of Section.—The section is constitutional. Wittkowsky v. Baruch, 127 N. C. 313, 315, 37 S. E. 449; Koonce v. Russell, 103 N. C. 179, 9 S. E. 316.

What Constitutes Accord and Satisfaction.—When at a sale under a deed of trust, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt. Held, that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. Jones v. Wilson, 104 N. C. 9, 10 S. E. 79.

When a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such. King v. Phillips, 94 N. C. 555.

Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, the plaintiff's agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, when it appears that the settlement had been made in contemplation of the first item alone. Garland v. Improvement Co., 184 N. C. 551, 115 S. E. 164.

Same—Tort and Contract Actions.—Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. Walker v. Burt, 182 N. C. 325, 109 S. E. 43.

Same—Mistake as to Amount.—Where the plaintiff agreed to accept a lesser sum in discharge of a larger, which he thought was the amount of the debt, but was mistaken and later found that the debt was larger, there was no compromise as to the amount of the mistake. Holden v. Warren, 118 N. C. 326, 24 S. E. 770.

Same—Money Paid into Court.—Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by the plaintiffs, pending the litigation, it amounts to a satisfaction of their claims, and subjects the plaintiffs to all subsequently accruing costs. Cline v. Rudisill, 126 N. C. 523, 36 S. E. 36.

Slight Irregularities Do Not Vitiate.—Where a plea in accord and satisfaction, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. McAuley v. Sloan, 173 N. C. 80, 91 S. E. 701.

Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise. Ramsey v. Browder, 136 N. C. 251, 48 S. E. 651.

Offer and Acceptance by Telegram.—Offer and acceptance by telegram to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by the debtor, constitutes a valid compromise in full satisfaction of the claim. Pruden v. R. R. Co., 121 N. C. 509, 28 S. E. 349.

III. EFFECT OF COMPROMISE.

Acts as Complete Discharge. — The receipt of a part in satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. Wittkowsky v. Baruch, 127 N. C. 313, 314, 37 S. E. 449; Tiddy v. Harris, 101 N. C. 589, 593, 8 S. E. 227.

Precludes Further Action Thereon. — Where a plaintiff agreed to accept a certain sum by way of compromise in full satisfaction of his claim, and having been paid that amount by the defendant, he cannot maintain an action thereon. Pruden v. R. R. Co., 121 N. C. 509, 512, 28 S. E. 349.

Extinguishes Cause of Action.—A valid compromise and settlement extinguishes the cause of action, and where a party is willing to yield something for the sake of a settlement, he cannot afterwards maintain a suit for which he voluntarily surrendered. See Boffinger v. Tuyes, 120 U. S. 198, 205, 30 L. Ed. 699.

Checks Accepted as Settlement in Full. — Under a uniform construction of this section, as announced in a long line of decisions, it is held that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. Blanchard v. Peanut Co., 182 N. C. 20, 21, 108 S. E. 332. De Loache v. DeLoache, 189 N. C. 394, 127 S. E. 419. Mercer v. Lumber Co., 173 N. C. 49, 54, 91 S. E. 588.

Where an employee was discharged and received and cashed a check for $125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services." Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943.

IV. APPLICATION OF SECTION

Incorporated in Contract.—Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. Bank v. Commissioners, 116 N. C. 339, 363, 21 S. E. 410; Koonce v. Russell, 103 N. C. 179, 9 S. E. 316.

Must Be Compromise.—The section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. Smith v. Richards, 129 N. C. 267, 269, 40 S. E. 5.

When Creditor Remitted to Original Rights.—If the debtor, as in Hunt v. Wheeler, 116 N. C. 422, 425, 21 S. E. 915, repudiates the agreement or unreasonably delays to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. Ramsey v. Browder, 136 N. C. 251, 253, 48 S. E. 651.

Right to Demand Acceptance.—When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three judgment debtors, is accepted by the creditor, and the debtor within a reasonable time tenders the amount, he has the right to demand that it shall be received and applied in discharge of his obligation to make any further payment. Boykin v. Buie, 109 N. C. 501, 503, 13 S. E. 879.

When Payer is Entitled to Restitution.—Where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. Fickey v. Merrimon, 79 N. C. 585.

Principal Bound by Acts of Agent.—A principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor. Cashmar Supply Co. v. Down, 146 N. C. 191, 195, 59 S. E. 685.

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt will be restricted to the amount due, and will not be construed as a compromise of the whole claim of indemnity for future sickness. Moore v. Casualty Co., 150 N. C. 153, 154, 63 S. E. 675.

Where one of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under this section, and the warranty in the former transaction is a part of the consideration for the new one, and is enforceable. Bank v. Walser, 162 N. C. 53, 54, 77 S. E. 1006.

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Discretion of Court.—Where, among other defenses to an action, the defendant pleads accord and satisfaction, the discretionary power of the trial judge in submitting this issue to the jury before submitting the other issues upon the merits will not be reversed on appeal. McAuley v. Sloan, 173 N. C. 80, 91 S. E. 701.

Landlord and Cropper.—Where the cropper sues for damages arising from the breach by the landlord of his contract in several particulars, and there is evidence on the trial of full accord and satisfaction between them, the submission of the one issue as to the compromise and settlement will not be considered for error when the case has thereunder been presented to the jury, without prejudice to any of the appellant's rights. Walker v. Burt, 182 N. C. 325, 109 S. E. 43.

Compromise Pending Writ of Error.—Where there has been a decision in the lower court, a valid compromise of the matter in dispute may be made while a writ of error is pending. See Dakota County v. Glidden, 113 N. C. 222, 28 S. E. 981.

§ 896. Tender of judgment.—The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof in writing within ten days, he may file the summons, complaint, and offer,

with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer. If the defendant sets up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow the counterclaim to the amount specified, with costs. If the defendant accepts the offer, and gives notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitles him to judgment, or if the amount specified in the offer is allowed him in the trial of the action. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the defendant fails to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in the offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. (Rev., s. 860; Code, s. 573; C. C. P., s. 328.)

As to tender of judgment in justice's court, see Rule 15, sec. 1500.

Nature of Offer Required.—An offer of compromise to be sufficient under the statute must be in a form that will enable the plaintiff, if he accepts it, to have judgment entered by the clerk conformably to the offer. It must consequently come from all the defendants, or their common attorney at law, since otherwise the clerk would not be authorized to enter judgment against all. Williamson v. Canal Co., 84 N. C. 629, 630.

The defendant would have no right, under the provisions of the section to force the plaintiff to accept the property, when it might have been injured or rendered worthless after conversion, or pay the costs, on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Citing Stephens v. Koonce, 103 N. C. 266, 269, 9 S. E. 315. Wood's Mayne on Damages, secs. 520, 521.

Unaccepted Tender of Judgment.—The purpose of the section can be best subserved by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict before the judge, to enable him to adjudge who shall pay the costs. Blanton Grocery Co. v. Taylor, 162 N. C. 307, 313, 78 S. E. 276.

In Blanton Grocery Co. v. Taylor, 162 N. C. 307, 313, 78 S. E. 276, it was said: "The statute authorizing a tender of judgment says that the tender, when not accepted, is to be deemed withdrawn, and cannot be given in evidence, and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced."

Tender Sufficient to Stop Costs.—A tender of payment under the section, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. Medicine Co. v. Davenport, 163 N. C. 294, 295, 79 S. E. 602.

Costs—When Taxed on Plaintiff.—Where a plaintiff is given judgment for no more than the amount tendered by the defendant, costs from the time the tender was made should be taxed on the plaintiff. Cowles v. Assurance Society, 170 N. C. 368, 377, 87 S. E. 119.

Same—When Taxed on Defendant.—Where, in a justice's court, judgment was rendered against two defendants, and one appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a less sum than the amount of the justice's judgment, but more than that ultimately rendered in the superior court, the plaintiff was entitled to costs. Wyatt v. Wilson, 152 N. C. 276, 67 S. E. 501.

Error to Dismiss.—Where on the admissions in the pleadings the plaintiff is entitled to recover any amount it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that the defendant had tendered the amount admitted to be due with interest and cost to the time of filing answer, and had paid it into court subject to the plaintiff's order does not vary this result. Penn v. King, 202 N. C. 174, 162 S. E. 376.

§ 897. Conditional tender of judgment for damages.—In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signifies his acceptance thereof in writing, ten days before the trial, and on the trial has a verdict, the damages shall be assessed accordingly. If the plaintiff does not accept the offer, he must prove his damages, as if it had not been made, and may not introduce it in evidence. If the damages assessed in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. This expense shall be ascertained at the trial. (Rev., ss. 861, 862; Code, ss. 575, 576; C. C. P., ss. 329, 330.)

As to costs, see sec. 896, and annotations thereto.

Tender Should Accompany Answer.—A tender may accompany an answer, and this alone is its proper placing so far as a pleading is concerned, or in reply to a counterclaim; it will not be permitted as an aid to a defective demurrer. Hall v. Telegraph Co., 139 N. C. 369, 873, 52 S. E. 50.

Agreement as Evidence Fixing Damages.—Where, pending an action to recover for damages done to a lot of tobacco which the plaintiff had bought and paid for under a guarantee of soundness by the defendants, an agreement was entered into adjusting the amount of damage per pound which the plaintiff should recover, if entitled to recover at all, said agreement to be without prejudice to either party; Held, that such an agreement was not an offer of compromise in the meaning of this section and was admissible on the trial of the action to determine the amount of the plaintiff's recovery. Garrett v. Pegram, 120 N. C. 288, 26 S. E. 778.

§ 898. Disclaimer of title in trespass; tender of judgment.—In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands on which the trespass is alleged by the complaint to be done, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. If the plaintiff controverts such answer or a part thereof, and at the trial verdict is found for the defendant, or if the plaintiff is nonsuited, he is barred from the said action and all other suits concerning the same. (Rev., s. 863; Code, s. 577; Rev. Code, c. 31, s. 79; 1715, c. 2, s. 7.)

Involuntary Trespass.—Where a person occupying land adjoining another and in ignorance of the true boundaries of the tracts, trespasses upon the land of the adjacent owner, but disclaims title and tenders reasonable amends before the suit was brought, such trespasser is protected by this section. Blackburn v. Bowman, 46 N. C. 442.

Effect of Disclaimer Generally.—If a defendant is sued for the recovery of land, a part of which he does not claim or about which he does not intend to litigate with the plaintiff, he should enter a disclaimer; and when he does so, he cannot be taxed with any costs relating to that part of the land; but when, instead of doing so, he takes issue with plaintiff as to all of the land, and the plaintiff recovers any part of it, he is entitled to recover his costs, although

he may have failed to recover the other tract. Swain v. Clemmons, 175 N. C. 240, 95 S. E. 498.

Art. 43A. Arbitration and Award

§ 898(a). Agreement for arbitration.—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforcible, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract. (1927, c. 94, s. 1.)

As to competency of arbitrators under prior law, see 1 Enc. Dig. 879, sec. 24. As to admission of new parties to arbitration by arbitrators, see 1 Enc. Dig. 880, sec. 24.

Editor's Note.—This statute is a verbatim enactment of the uniform arbitration act proposed to the states for adoption by the American Bar Association in 1924 and 1925. North Carolina is among the first states to adopt it. This act is based upon the arbitration acts of the various states and several sections of it are restatements of the corresponding sections of various state laws.

This is North Carolina's first arbitration statute; prior to this time the common law arbitration has been in use. While the statute changes the common law in many instances, it is an enactment of it in others. A discussion of the changes wrought will be found under each section where the prior North Carolina cases which are pertinent are cited and the probable effect upon them is indicated.

The question of costs was left by the proposed act to the various states adopting it.

The reference statute, sec. 572 et seq., did not affect common law arbitration (see cases cited under sec. 572.) and it is likewise probable that this statute does not affect that statute.

Same—Distinction Between Arbitration and Reference.—There are several distinctions between arbitration and references under the code. While a reference may be by consent of the parties it may also be compelled by the judge in certain instances (see sec. 537); but an arbitration under this act is always by consent. It would seem that in a reference the referee must report the facts upon which his conclusions are based—the finding of facts may be the extent of his duty—and state them separately from the conclusions of law; but the arbitrator is not required to report the facts but only his award or conclusion which must be done in writing. Referees are required to conduct a trial according to the rules of court and have the same power generally as judges (see sec. 576) but there are no rules restricting the arbitrators to any particular mode or manner of trial, they are not even required to decide according to law and their award may be general. The proceedings for setting aside, vacating, confirming, and entering judgment are also different. For distinctions between reference and common law award, see Keener v. Goodson, 89 N. C. 273, 276.

Arbitrator Defined.—"An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission, [and this statute since its passage] and he must be incorrupt and impartial, and not exceed or fall short of his duty, and if he acts otherwise, his award may be set aside." Crisp v. Love, 65 N. C. 126, 127.

Liberal Construction.—This statute will probably be given a liberal construction, because, looking to the purpose of arbitration, it is the policy of the law to encourage the settlement of litigation or controversy with as much speed and as little expense as the exigencies of the case will permit, not to sacrifice justice. Persuing this policy, arbitration has always been encouraged. See the Editor's Note to sec. 572.

Applicability to Agreement Respecting Future Controversies.—Attention is called to the fact that this section limits the agreement to arbitrate "to any controversy existing between the parties at the time of the agreement to submit". These terms do not expressly extend to and include agreements to submit controversies arising in the future, for it clearly appears from the debates of the committee which framed this act that it should not extend to such agreements. See "Handbook on the National Conference of Commissioners on Uniform State Laws and the Proceedings of the 35th. Annual Meeting of 1925, pp. 63, 754.

It seemed to be the opinion of the committee that this section does not apply to and will not affect the law respecting contracts to arbitrate future controversies since it is expressly limited to controversies existing at the time of contract and that the prior law as to future disputes remains as it was prior to the passage. If this be the proper construction then, under the law of this state as it now exists, future contracts to arbitrate which classify as conditions precedent are valid but those classifying as collateral stipulations are invalid. The test applied to the contract being whether it ousts the court of jurisdiction over the contract generally; if it does, it is invalid. See Swaim v Swaim, 14 N. C. 24.

The following North Carolina cases discuss the rule and illustrate the application of it as to future disputes.

"The original doctrine, with its modifications, is well summoned up by Justice Manning in Kelly v. Trimont Lodge, 154 N. C. 97, 100, 69 S. E. 764; 'Our court has uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer,' citing Mfg. Co. v. Assur. Co., 106 N. C. 28, 19 S. E. 1057, and in Braddy v. Ins. Co., 115 N. C. 354, 20 S. E. 477, Justice Avery says the proposition is well settled that an agreement to submit to arbitration the single question of the amount of loss by fire is valid." Nelson v. Atlantic R. Co., 157 N. C. 194, 201, 72 S. E. 998.

"It is generally accepted that it is competent to contract that the amount of damages may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement." Nelson v. Atlantic Coast Line R. Co., 157 N. C. 194, 199, 72 S. E. 998.

Although an agreement to arbitrate the entire controversy is not enforcible, and prior to the award either party may revoke the agreement, if he fails to do so, and enters upon the arbitration, and an award is made, he is bound. Nelson v. Atlantic Coast Line R. Co., 157 N. C. 194, 202, 72 S. E. 998; Williams v. Mfg. Co., 154 N. C. 205, 208, 70 S. E. 290.

The law of this state is in accord with the law of the majority of the American States (See 5 C. J. pp. 43 et. seq., sections 69-72), but it may be of interest to note that a very recent school of thought has given rise to the doctrine that all contracts to arbitrate future contracts are valid and enforcible. This is made statutory in several jurisdictions including New York (passing the first of such statutes in 1920), New Jersey, Massachusetts, Oregon, California and the Federal Government. See the discussion in the Handbook, cited supra in this note.

Arbitration Pending Reference.—Where a cause has been referred, and pending the reference the parties agree to an arbitration and that the referee's conclusions of law should be based on the arbitrators' findings, the arbitration is not one submitted in accordance with this section and its provisions do not apply. Andrews v. Jordan, 205 N. C. 618, 172 S. E. 319.

Arbitration as Matter of Contract.—It will be observed that this statute makes the right of arbitration a matter of contract; and it is only by agreement of the parties that a proceeding under it may be had. This is but the adoption of the common law in this respect for it has been held uniformly in this state that a submission to arbitration was a contract resulting from the agreement to refer, and that it was governed by the general law concerning contracts. Sprinkle v. Sprinkle, 159 N. C. 81, 74 S. E. 739.

Same—Claim Which May Be Arbitrated.—It is to be observed that this statute permits the submission of any controversy existing. It makes no express exception of controversies involving the right or title to real estate. It has been said by some of the standard authorities that arbitration statutes usually prohibit, either expressly or by necessary implication, such controversies. While it is a fact that the statutes of many of the states expressly prohibit the submission to arbitration of questions involving the title of freehold estates in land, it is doubtful whether statutes silent upon the subject or which use language that is broad enough to include disputes concerning the title to such estates are construed as prohibiting their submission. Nevertheless the case of Fowler v. Bigelow, 8 Mass. 1, so

construed a statute using the words "disputes of what nature soever" but placed the decision upon the ground that another provision that the party found indebted may discharge himself by paying the sum awarded indicated an intention of the legislature to limit arbitration to personal demands. But there is a vigorous criticism of this holding in the footnotes to the case which submits that the statute is not so limited and that even if it were the arbitration should have been held good at common law.

It would seem that there are no words in the present statute which so limit its application.

While at old common law such cases could not be arbitrated because of the restriction upon the alienation of realty under feudal tenure, under the later common law such questions could be submitted to arbitration provided the submission was in writing. Oral submissions were invalid because they fell within the statute of frauds. This was the law of this state prior to this statute (see Fort v. Allen, 110 N. C. 183, 14 S. E. 685; Crissman v. Crissman, 27 N. C. 498; and it would seem that this statute, since it requires a written submission, would extend to all disputes existing, including those involving title to land.

It has been held as a general rule that claims arising out of illegal contracts or transactions cannot be submitted to arbitration, (it has so been held in Virginia, Georgia, Tennessee, Mississippi, Massachusetts and Pennsylvania), although the decisions of some of the states hold otherwise (Alabama and New Hampshire). As to whether such disputes may be arbitrated under this statute, quaere.

Same—Sufficiency of Contract.—Since under this statute the submission of a dispute to arbitration is a contract, it is but reasonable to suppose that such contracts must have all the elements necessary to a binding contract. See the general discussion in 5 C. J. [15 et seq.] 23.

Thus, the parties thereto must have the legal capacity to enter into it. The general rule is that if they have the capacity to contract or release their rights generally they may agree to arbitrate, otherwise they cannot. While there are no decisions, as yet, so construing this statute, this has always been the general rule and it is but reasonable to suppose that the framers of this statute intended to leave it unchanged.

A party having this capacity can not act through an agent or attorney in the same manner as was always possible. See 2 C. J. [302] 655; 6 C. J. [158] 650 et seq.

The consideration supporting the contract of arbitration is the mutual promises and this is sufficient. See Mayo v. Gardner, 49 N. C. 359.

Who May Make Contract.—This section provides that "Two or more parties may agree." It does not specify whether the parties may do so by their general agents or by their attorneys. Prior to this act it was held under the common law practice that the attorneys might make such an agreement and this without the consent of the clients (Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988, and citations); it would seem that a party could have made the contract by agent in the same manner that any other contract could have been made. It is to be presumed that the word "parties" as here used is given the meaning ordinarily ascribed to the word in legal terminology and that about the same latitude will be given the parties in making the agreement that they have always had. As has always been the case, administrators (see sec. 99, and McLeod v. Graham, 132 N. C. 473, 43 S. E. 935), trustees, guardians and other representatives may no doubt represent the estates or their wards, cestui que trusts, etc., in this capacity.

It was held prior to this section, following the ordinary rule of contracts, that an agreement made by an infant was voidable. It was also held that a guardian ad litem could not bind the infant by a submission to arbitration, even though the submission was made the rule of the court. Millsaps v. Estes, 137 N. C. 535, 536, 50 S. E. 227.

Necessity of Controversy Being Litigated.—It is not necessary, it would seem, that the controversy be pending in a court before it can be arbitrated, for any existing controversy might be arbitrated. See Parrish v. Strickland, 52 N. C. 504. A cause that is pending may be arbitrated (See Islay v. Steward, 20 N. C. 297); this was true at common law and under all the statutes, it would seem, unless the contrary is expressly provided for. See 5 C. J., p. 26, secs. 22-24; 1 Enc. Dig. p. 870 [sec. 3].

Same—Consent of Court.—It was a rule at common law that where a pending case is submitted the consent of the court is a prerequisite.

Necessity for Writing.—Prior to this act, the necessity of the agreement being in writing depended upon the law of general contracts so that some of such contracts had to be in writing and others did not, depending upon whether they fell within the statute. See Fort v. Allen, 110 N. C. 183, 189, 14 S. E. 685; Crissman v. Crissman, 27 N. C. 498.

Power to Revoke.—Since the word "submission" means to agree to refer the matter in dispute (See Words and Phrases, title "Submission" and see 56 C. J. [19] p. 21), this section denies the right to revoke a contract to submit an existing controversy to arbitration after it is once made. It changes the prior rule in this state which permitted a revocation by either party at any time before the rendition of the award [for prior law see Long v. Cromer, 181 N. C. 354, 107 S. E. 217; Williams v. Mfg. Co., 153 N. C. 7, 68 S. E. 902 and citations. For other cases see 1 Enc. Dig. p. 874, section 14(1)], or thereafter, even when it has been made a rule of the court, with the consent of the judge (see Tyson v. Robinson, 25 N. C. 333, 1 Enc. Dig. p. 815, section 14 (2), for the prior law).

Same—Causes for Which Contract May Be Revoked.—See the title Contracts, 3 Enc. Dig. pp. 418 et seq., sections 59 et seq., 13 Enc. Dig. pp. 447 et seq., sections 59 et seq.

Effect of Death of Party.—While prior to this act the death of one of the parties before the award automatically revoked the contract to arbitrate, (see Whitfield v. Whitfield, 30 N. C. 163; Williams v. Branning Mfg. Co., 153 N. C. 7, 68 S. E. 902) this section changes the rule so that now the effect of such death upon contract is the same as it is upon an ordinary contract.

Number of Arbitrators. — Notwithstanding that section 898(d) provides that in case the agreement fails to prescribe a method for appointment of the arbitrators the judge shall appoint three, there are no provisions prescribing the number of arbitrators the parties may appoint. If an even number should be appointed by the parties and they should divide evenly as to what the award should be, no method of determining the tie is prescribed. Under the prior law the arbitrators could appoint an umpire (See Stevens v. Brown, 82 N. C. 460; Lusk v. Clayton, 70 N. C. 185. For full treatment, 1 Enc. Dig. 882, sections 30 et seq.); as to whether this would be permissible in the absence of an agreement to that effect, quaere.

Notice to Arbitrators of Appointment.—See annotations under sec. 898(d).

§ 898(b). Statement of questions in controversy.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based. (1927, c. 94, s. 2.)

§ 898(c). "Court" defined.—The term "court" when used in this article means a court having jurisdiction of the parties and of the subject matter. (1927, c. 94, s. 3.)

§ 898(d) Cases where court may appoint arbitrator; number of arbitrators.—Upon the application in writing of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators.

(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(c) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate. (1927, c. 94, s. 4.)

As to competency of arbitration under prior law, see 1 Enc. Dig. 879, sec 24.

As to number of arbitrators generally, see note to sec. 898(a).

Editor's Note.—Prior to this act the appointments must have been made by the parties in pursuance of the agreement if the controversy was not pending. But if it were

pending the appointment might have been made by the court with the consent of the parties. See the note under sec. 898(a).

Notice of Appointment to Arbitrators.—There was no necessity that the arbitrators under the former law be informed of their appointment by a formal or written notice. It was sufficient if they were appointed, met and made an award. Allison v. Bryson, 65 N. C. 44. This will probably apply to appointments made under the present law whether by the parties or the courts. Ed. note.

§ 898(e). Application in writing; hearing.—That any application made under authority of this act shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions, except as otherwise herein expressly provided. (1927, c. 94, s. 5.)

§ 898(f). Notice of time and place of hearing.—The arbitrators shall appoint a time and place for the hearing, and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award. (1927, c. 94, s. 6.)

Former Law.—It may be stated as a general rule that the parties had a right to a notice of the time and place of hearing if the judgment of the arbitrators may have been influenced or enlightened by evidence. Grimes v. Brown, 113 N. C. 154, 18 S. E. 87; Zell v. Johnston, 76 N. C. 302. This probably extended to adjourned meetings, except that no notice of a final meeting to make up and sign the award was ever necessary. Zell v. Johnston, supra; 5 C. J. [§181], 87.

§ 898(g). Hearing if party fails to appear.—If any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. (1927, c. 94, s. 7.)

§ 898(h). Award within sixty days.—If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing. (1927, c. 94, s. 8.)

Former Law. — Under the former law, the time given in which to submit the award was fixed either by the agreement or the order of the court submitting the question by the consent of the parties. See 5 C. J. [288], 123.

Provisions Subject to Waiver.—Where hearings are held before the arbitrators more than sixty days after the submission to arbitration, and all parties are present or represented by counsel, the unsuccessful party may not wait until after the award has been made and then set up for the first time his contention that the award was of no effect because not made within sixty days after the submission, the provisions of this section being subject to waiver, and the award as rendered is binding on the parties. Andrews v. Jordan, 205 N. C. 618, 172 S. E. 319.

§ 898(i). Representation before arbitrators.—No one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney-at-law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration. (1927, c. 94, s. 9.)

§ 898(j). Requirement of attendance of witnesses.—The arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them as a witness, and to bring with him any book or writing or other evidence.

The fees for such attendance shall be the same as the fees of witnesses in the Superior Court.

Subpœnas shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpœnas to testify before a court of record in this State; if any person so summoned to testify shall refuse or neglect to obey such subpœnas, upon petition the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State. (1927, c. 94, s. 10.)

Editor's Note. — At common law the arbitrators could not of themselves compel the attendance of witnesses. And where they heard evidence they were not compelled to administer oaths, though they could do so. (See Pierce v. Perkins, 17 N. C. 250; McCrae v. Robeson, 6 N. C. 127). The mode of hearing testimony must have been fair and impartial to the parties. See Pierce v. Perkins, supra. Hurdle v. Stallings, 109 N. C. 6, 13 S. E. 720.

§ 898(k). Depositions.—Depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions in suits pending in the courts of record in this State. (1927, c. 94, s. 11.)

Editor's Note. — There was no method of taking depositions in arbitration proceedings at common law.

§ 898(l). Orders for preservation of property.—At any time before final determination of the arbitration the court may upon application of a party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award. (1927, c. 94, s. 12.)

Editor's Note. — Under this section the incidental remedies of attachment, injunction, receivership, and arrest, all occasionally vital to the protection of the plaintiff's interest, may be had; while under the New York law and the states which have passed it [see Editor's note under sec. 898(a)], the plaintiff cannot avail himself of them without having his right to compel arbitration.

§ 898(m). Powers of arbitrators.—The arbitrators may, on their own motion, and shall by request of a party to the arbitration,

(a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in the making of their award:

(b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing. (1927, c. 94, s. 13.)

§ 898(n). Award in writing and signed by arbitrators.—The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them; the award shall definitely deal with all matters of difference in the submission requiring a settlement, but the arbitrators may, in their discretion, first make a partial award which shall

be enforceable in the same manner as the final award; upon the making of an award, the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay. (1927, c. 94, s. 14.)

Prior Law—Necessity for Writing. — It would seem that under the prior law the award need be in writing only when required by the agreement or come within the general statutes of fraud. See Crissman v. Crissman, 27 N. C. 498, 503; Gaylord v. Gaylord, 48 N. C. 368, 369. See also 5 C. J. [262] 114.

Same—Signature of Arbitrators. — In order for an award to have been available, as evidence under the prior law it was necessary that it be signed by the arbitrators. Morrison v. Russell, 32 N. C. 273. The signature by persons other than the arbitrators has been held not to vitiate the award when it is properly signed by a majority of the arbitrators. Carter v. Sams, 20 N. C. 321.

Same—Dealing with All Matters Submitted. — It has always been necessary for arbitrators to pass on all the points particularly referred to them Osborne v. Calvart, 83 N. C. 365; for further cases see 1 Enc. Dig. sec. [44(3)] 886); otherwise the award was entirely void. But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had notice, and the award was good. Walker v. Walker, 60 N. C. 255.

"The award on its face ought to show that the arbitrators have acted upon all the matters submitted." Crisp v. Love, 65 N. C. 126, 127.

For cases on limited submission and conformity thereto, see 1 Enc. Dig. [sec. 44(5)] 887, 13 Enc. Dig. [44(5) 172.]

Same—Matters Not Submitted. — Matters passed on by the arbitrators not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. Robertson v. Marshall, 155 N. C. 167, 71 S. E. 67. The power of the arbitrators is derived from the submission and the award must be made in strict accordance with it, and must not go beyond what is embraced in it. Cullifer v. Gilliam, 31 N. C. 126; Cutler v. Cutler, 169 N. C. 482, 86 S. E. 301.

However, if the decision of submitted questions involved the decision of other questions not submitted, the decision of the latter was not error. Zell v. Johnston, 76 N. C. 302.

Same—Copy and Delivery of Award. — Under the prior law it was not necessary, in the absence of agreement to that effect, that a copy of the award be given to the parties. All that was necessary was that the parties have notice of the award as by being present when it was agreed upon and signed. With full understanding as to its meaning a demand for a copy should have been made at the time of rendition if the parties wanted it. See Crawford v. Orr, 84 N. C. 246; Morrison v. Russell, 32 N. C. 273.

Form of Award. — There has never been any requirement in this state as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. Ball Thrash Co. v. McCormack, 172 N. C. 677, 90 S. E. 916.

Award Liberally Construed. — Under the prior law it was held that the court will always intend everything in favor of an award and will give such construction to it that it may be supported if possible. Carter v. Sams, 20 N. C. 321.

§ 898(o). Time for application for confirmation. —At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is vacated, modified, or corrected, as provided in the next two sections. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. (1927, c. 94, s. 15.)

Effect upon Prior Law. — This section provides the method of enforcing an award after it is made.

The practice in this state regarding the enforcement of this award depended upon whether or not the matter submitted was pending in court. If it were, and the agreement was made in court, then the arbitrators reported the award to the court when it became a rule of the court if confirmed. If the controversy was pending but the agreement was made out of court, then the award had to be submitted to the court for conformation in order that it may be effective to settle the controversy and become the judgment of the court. The court had no power to make submissions to arbitration rules of court except when the subject matter was a pending suit. See Alexander v. Burton, 21 N. C. 469. If the cause were not pending then the award could be enforced in court only by a suit upon it as if it were a contract. Under this section the award operates as a verdict of the jury irrespective of whether the cause was pending, and upon application to the court as prescribed, judgment is entered thereon. For full treatment of prior law see the cases cited in 1 Enc. Dig. [secs. 58, 67, 68, 69] pp. 900, 906, 907-913.

§ 898(p). Order vacating award.—In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or other undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. (1927, c. 94, s. 16.)

As to effect of exceeding or imperfectly exercising powers under prior law, see note to sec. 898(n). As to effect of fraud, misconduct, mistakes, error, partial invalidity, and impeachments or vacations under prior law, see 1 Enc. Dig. [secs. 50-52, 60-63] 893-897, 900-902. As to recommittal under prior law, see 1 Enc. Dig. [58] 900.

Editor's Note.—It was proposed to the committee which framed this act [see note to sec. 898(a)] by one of its members that the word "either" in sub-section(b) should be changed to "any"; and that the words "signing the award" should be added so that corruption or partiality on the part of a minority of the arbitrators should not oblige the court to vacate the award. The committeeman contended that as the language now stands, it would oblige the court to vacate the awards. His suggestion was not adopted because the section, when construed with the prior section of the act, would be given the interpretation which he contends should be placed upon it.

The language of this section follows the language used in the same section in the law of several of the states.

§ 898(q). Order modifying or correcting award. —In any of the following cases the court shall, after notice and hearing make an order modifying or correcting the award, upon the application of any party to the arbitration:

(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them.

(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order must modify and correct the award, so as to effect the intent thereof. (1927, c. 94, s. 17.)

§ 898(r). Notice of motion to vacate, modify or correct award within three months.—Notice of

a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (1927, c. 94, s. 18.)

As to motion to vacate under prior law, see 1 Enc. Dig. [sec. 62] 901.

§ 898(s). Judgment or decree entered.—Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. (1927, c. 94, s. 19.)

See editor's note under 898(o) as to when judgment may have been entered under prior law; see also 1 Enc. Dig. [sec. 68] 907-911 as to manner of entry, defenses thereto, and necessity of conformity to award.

§ 898(t). Papers to be filed on motion relating to award.—The party moving for an order confirming, modifying, correcting or vacating an award, shall at the time such motion is filed with the clerk, file, unless the same have theretofore been filed, the following papers with the clerk:

(a) The written contract or a verified copy thereof containing the agreement for the submission; the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any within which to make the award.

(b) The award.

(c) Every notice, affidavit and other paper used upon an application to confirm, modify, correct or vacate the award, and each order made upon such an application.

The judgment or decree shall be entered (or docketed) as if it were rendered in an action. (1927, c. 94, s. 20.)

§ 898(u). Force and effect of judgment or decree.—The judgment or decree so entered (or docketed) shall have the same force and effect, in all respects, as, and be subject to all provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered. (1927, c. 94, s. 21.)

Prior Practice.—Prior to the enactment of this section the procedure depended upon whether the arbitration was of a matter pending in court, or whether it was a submission in pais and not as incident to a pending proceeding.

Under the first class judgment was entered upon the award in cases where no exceptions were filed thereto. And this was true irrespective of whether the proceeding was had by order of the court or by agreement of the parties so long as in the latter case the parties agreed to such an entry of judgment. In case exceptions were filed, and the parties always had the right to file them, there was a right to have the issues tried by a jury if demanded. For citation of authority see 1 Enc. Dig. 907 sec. 68.

In the second class mentioned in the first paragraph of this note the parties had to go into court and sue on the award thereby obtaining judgment. A thorough treatment will be found in the 1 Enc. Dig. 911 sec. 69.

Force and Effect under Prior Law.—"Ordinarily, if their award be within their powers and unaffected by fraud, mistake, surprise or irregularity, the judge has no power over it except to make it a rule of court and enforce it according to the course of the court." Lusk v. Clayton, 70 N. C. 185, 188.

Same—Agreement to Become Rule of Court.—"An agreement that an award shall be a rule (or judgment) of Court is merely an agreement to confess judgment according to the award when it shall be made. If such agreement be made by persons having no suit in court respecting the matters referred, a court (in this state at least) will not compel performance of the agreement by attachment because the parties have not put themselves under its jurisdiction, but will leave them to their remedy by action on the agreement. Alexander v. Burton, 21 N. C. 469. If, however, such an agreement is made between the parties to a suit, the court having jurisdiction over the persons and the subject-matter will compel the parties by attachment to perform the agreement by confessing judgment according to the award, or, as a more direct way to the same end, will (in this state at least) enter judgment according to the award." Cunningham v. Howell, 23 N. C. 9; Lusk v. Clayton, 70 N. C. 185, 188.

Effect of Arbitrators Attempting to Decide by Law.—Where it appears that the arbitrators intended to decide according to law, if they clearly mistake the law, the judge may set aside the award, and perhaps in some cases give such judgment as they ought in law to have given. Lusk v. Clayton, 70 N. C. 185, 188.

§ 898(v). Appeal.—An apppeal may be taken from the final judgment or decree entered by the court. (1927, c. 94, s. 22.)

Editor's Note.—This section was taken from the law of Illinois, which was passed by the acts of 1893, sec. 15.

This section is specific in that it is limited to the final judgment or decree entered by the court, and cannot be taken from the arbitration directly. In other words it may be taken in accordance with section 898(n) and (p).

Notwithstanding that in many states an appeal can be had only in cases of fraud or some matter that goes to the very essence of the thing, this section gives the right of appeal in all cases. See Handbook on the National Conference of Commissioners on Uniform State Laws and the proceedings of the 35th annual meeting of 1925, pages 63, 701.

§ 898(w). Uniformity of interpretation — Interpretation of article.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23.)

§ 898(x). Citation of article.—This article may be cited as the uniform arbitration act. (1927, c. 94, s. 24.)

Art. 44. Examination of Parties

§ 899. Action for discovery abolished.—No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this article. (Rev., s. 864; Code, s. 579; C. C. P., s. 332.)

As to inspection of documents, see sec. 1823; as to examination of corporations, see sec. 900.

Editor's Note.—In 1851 Parliament passed what was known as Lord Denman's Act, which provided that in all actions or proceedings and at all stages, before any person having authority to hear evidence, "the parties thereto and the persons in whose behalf any such suit or action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding."

In section 6 of Lord Denman's Act it was also provided that in all actions pending in the superior courts of common law the right to compell the production of, to inspect and take copies of the papers of an adversary party should be confined to those cases where a discovery might have been obtained at the instance of the moving party by a bill or other proceeding in a court of equity. 14 and 15 Vic., 91 Stat. at Large, ch. 99, §§ 2 to 6, inclusive; 2 Taylor on Ev., sec. 1217. See Harper v. Pinkston, 112 N. C. 293, 296, 17 S. E. 161.

At the time this Act was passed, the various courts of law and chancery were still maintained with the established procedure in each. When the courts of equity were abolished in this State, Lord Denman's Act was practically incorporated into the C. C. P. These provisions were carried forward in the Code of 1883 as sections 578 to 584, both inclusive, and section 588 in totidem verbis, except the pro-

viso to sec. 580. With few variations, Battle's Revisal, ch. 17, sections 332 to 341 are the same as the sections of the Code referred to.

With some exceptions and additions, these provisions were carried forward in a substantial form, and now constitute sections 899 to 907 of this Code. The Code of New York, Voorhees, section 389 to 397, both inclusive, contains practically the same provisions as are found in our statutes. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161; McLeod v. Bullard, 84 N. C. 516.

Substitute for Bill of Discovery. — This article abolishes and is a substitute for the old equitable bill of discovery. Dunn v. Johnson, 115 N. C. 249, 257, 20 S. E. 390; Helms v. Green, 105 N. C. 251, 261, 11 S. E. 470; Harper v. Pinkston, 112 N. C. 293, 297, 17 S. E. 161; Hudson v. Jordan, 108 N. C. 10, 13, 12 S. E. 1029.

Same—Rules Governing.—In Harper v. Pinkston, 112 N. C. 293, 301, 17 S. E. 161. Avery, J., quoting 1 Pomeroy, Jur., sec. 194, says: "The principles and doctrines relating to discovery, which have been settled by the courts of equity and which determine what facts parties can be compelled to disclose and what documents to produce, and under what circumstances the disclosures or productions can be obtained, will still continue to be recognized by the courts and to regulate their action in enforcing the examination of parties and the production of writings by means of the more summary statutory proceedings. The abolition or discontinuance of technical 'discovery' has not abrogated those principles and doctrines. Recurring to the language of the statutes for the purpose of giving my own construction we find that the legislature may be said to have discontinued the formal bill of discovery, but to have retained the right to compel similar disclosures in the manner prescribed."

§ 900. Adverse party examined.—A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents. (Rev., s. 865; Code, s. 580; C. C. P., s. 333; 1907, c. 799.)

Cross References.—As to examination of parties and witnesses in supplemental proceedings, see sec. 715; as to examination before trial, see sec. 901 and annotations thereto.

Construction.—This section is remedial, and should be liberally construed to advance the remedy afforded. Abbitt v. Gregory, 196 N. C. 9, 11, 144 S. E. 297.

Substitute for Bill of Discovery.—This section is a substitute for a bill of discovery. Abbitt v. Gregory, 196 N. C. 9, 144 S. E. 297.

Order for Bill of Particulars.—The fact that a defendant might have proceeded under this section and the following section for an examination of the adverse party does not render the granting of his motion to require plaintiff to make his complaint more definite and certain as provided by § 537, or file a bill of particulars under § 534, improvident as a matter of law, and the trial court's action in striking out such order on the ground that it was improvidently entered is reviewable and will be held for error. Temple v. Western Union Tel. Co., 205 N. C. 441, 171 S. E. 630.

Leave of Court Unnecessary.—It is not necessary that a party to an action, who desires to examine an adverse party, as authorized by this section, shall first obtain leave from the court to make such examination. Abbitt v. Gregory, 196 N. C. 9, 10, 144 S. E. 297.

Nonresidence.—The right to make such examination, is not affected by the nonresidence of the adverse party when he has submitted to the jurisdiction of the court by filing pleadings. Abbitt v. Gregory, 196 N. C. 9, 144 S. E. 297.

Premature Appeal.—Where an order for an examination of an adverse party in order to obtain evidence is granted in an action in which the pleadings have been filed, an appeal from such order prior to the examination is premature, and will be dismissed. Abbitt v. Gregory, 196 N. C. 9, 144 S. E. 297.

An appeal from an order for the examination of the agents of the defendant corporation under this section in order to obtain information upon which to base the complaint, is premature and will be dismissed. Johnson v. Mills, 196 N. C. 93, 144 S. E. 534.

Joinder with Order for Inspection of Writings.—An examination of an adverse party under this section may be joined with an order under § 1823 for an inspection of writings. Abbitt v. Gregory, 196 N. C. 9, 11, 144 S. E. 297.

Manner of Examination.—Where the court has entered an order that an adverse party answer questions he had refused to answer before a commissioner appointed under the provisions of sec. 901, a further provision that the party would be deemed to have complied if he thereafter filed answer under oath, deprives the examining party of his right to be present for cross-examination, etc., and is contrary to the provisions of this section requiring that such examination must be in the same manner and subject to the same rules as applicable to other witnesses, etc. Cartwright v. Southern, etc., R. Co., 176 N. C. 36, 96 S. E. 647.

County of Examination.—An examination under this and following sections of the article may be had in any county wherein the witness resides or where he may be found within the state. Commissioners v. Lemly, 85 N. C. 342, 347.

Directors of Corporation Examined.—In an action by a stockholder of a corporation to set aside as fraudulent an assignment of a contract by the corporation, the directors may be compelled to disclose information to enable the plaintiff to frame his complaint even though their evidence may result in pecuniary injury. Holt v. Southern Finishing, etc., Co., 116 N. C. 480, 21 S. E. 919.

Same—Appeal Does Not Lie from Order.—An appeal does not lie (being premature) from an order directing the examination of directors of a corporation under the provisions of this section in an action by a stockholder against the corporation, or from a refusal to discharge such order. Holt v. Southern Finishing, etc., Co., 116 N. C. 480, 21 S. E. 919.

Answers as Evidence.—Where a defendant has been examined after the filing of the complaint in the action, but before trial in accordance with this section, his answers to the questions propounded on the examination are competent as evidence at the trial. Swainey v. Great Atlantic, etc., Tea Co., 204 N. C. 713, 169 S. E. 618.

§ 901. Before trial in his own county.—The examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise. (Rev., s. 866; Code, s. 581; 1893, c. 114; C. C. P., s. 334; 1899, c. 65, s. 1.)

See section immediately preceding and annotations thereto.

Examination at Option of Party Claiming.—The examination is treated as a right to be exercised before trial at the option of the party claiming it. Vann v. Lawrence, 111 N. C. 32, 33, 15 S. E. 1031.

Examination Must Be Necessary to Secure Order.—To obtain an order for the examination of the defendant to discover necessary information to file his complaint under this section, it is necessary for the plaintiff to show under oath that in good faith the information sought is not otherwise available to him, and its necessity in such detail as will enable the court to pass thereon, and when upon an appeal from the refusal of the order this has not been done, the decision of the lower court will not be disturbed. Chesson v. Washington County Bank, 190 N. C. 187, 129 S. E. 403.

The court is not bound to order an examination of a defendant for the purpose of preparing a complaint, unless it is made to appear under oath of the mover that such an order is necessary, that the evidence sought to be elicited is material, and that the application is made in good faith. Bailey v. Matthews, 156 N. C. 78, 72 S. E. 92.

Same—Appeal from Order.—An affidavit in support of a motion in the cause to allow the plaintiffs to examine the defendant adversely under the provisions of this section, showing that the defendant had assumed to manage the estate of a deceased person of whom the plaintiffs were the heirs at law under a paper purporting to be a will, but which had been set aside by the court upon caveat entered, and that this was the only available way in which certain information necessary in the action could be obtained, is sufficient to sustain the order of examination allowed by the clerk and approved by the judge of the superior court, and the defendant's appeal is accordingly dismissed in the Supreme Court. Jones v. Union Guano Co., 180 N. C. 319, 104 S. E. 653, cited and distinguished. Whitehurst v. Hinton, 184 N. C. 11, 113 S. E. 500.

A party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings. Pender v. Mallett, 122 N. C. 163, 30 S. E. 324.

An appeal will not lie directly to the Supreme Court from an order of the superior court judge affirming the action of the clerk in ordering the examination of the defendant to elicit certain information, alleged to be not otherwise obtainable, and material to the filing of the complaint, when it does not appear that the defendant will be prejudiced or injured thereby. Monroe v. Holder, 182 N. C. 79, 108 S. E. 359.

Defendant Examined to Aid in Framing Complaint.—Under this section the defendant may be examined before the pleadings are filed to procure information in framing the complaint. Pender v. Mallett, 123 N. C. 57, 60, 31 S. E. 351.

The plaintiff in an action for injuries by alleged neglect of a physician may, under this section providing that an examination of a defendant may be had at any time before the trial, have an examination of the defendant to aid him in filing his complaint, where he alleges that he knows the facts generally and substantially, but that the defendant has the precise knowledge necessary for proper proceedings. Smith v. Wooding, 177 N. C. 546, 94 S. E. 404.

Upon application to examine a defendant before the clerk of the superior court, prior to trial and to aid in preparing the complaint, such facts as will entitle the movant to the order must be made to appear by affidavit; but after filing a verified complaint setting out a cause of action, the plaintiff has a right to the order for examination, and the leave of the court is unnecessary. Ward v. Martin, 175 N. C. 287, 95 S. E. 621.

Examination—Before Commissioner. — The party may be examined before a commissioner appointed to take the examination, but the commission must issue out of the court in which the cause is pending. Vyne v. Fogle Bros. Co., 176 N. C. 351, 352, 97 S. E. 147.

Same—Before Clerk.—When a party elects to have the examination before the clerk it would seem that the mode of conducting it must be in all respects the same as if had before the judge. Harper v. Pinkston, 112 N. C. 293, 303, 17 S. E. 161.

Under this section the clerk is clothed with precisely the same authority as the judge. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 147, 17 S. E. 69.

Same—Not Part of Pleadings.—The examination of the defendant filed in the record should not be taken as part of the answer for the purpose of passing upon a demurrer. The examination is not intended by the law to be a part of the pleading, but is in its very nature simply evidence which can be used by the plaintiff in support of his allegations and which may be rebutted by the defendant. Whitaker v. Jenkins, 138 N. C. 476, 481, 51 S. E. 104.

Sufficiency of Application.—An application for an order for the examination of an adverse party under this section must contain positive averments, and must not be argumentative, and mere statements that the examination is necessary and material is not sufficient, but the statute will not be construed so as to preclude an examination of an adverse party when the affidavit shows good faith, necessity, and materiality, and where it is alleged that the necessary information cannot be had from any person except the adverse party because all other persons with such information are outside the jurisdiction, the application is sufficient, and an order based thereon will be upheld. Bell v. Murchison National Bank, 196 N. C. 233, 145 S. E. 241.

Notice.—The provision, "unless for good cause shown, the judge or court orders otherwise," applies to the length of notice which he can make less than the five days prescribed. Vann v. Lawrence, 111 N. C. 32, 33, 15 S. E. 1031.

§ 902. Compelling attendance of party for examination before trial.—The party to be examined, as provided in the preceding section, may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial. (Rev., ss. 866, 867; Code, ss. 581, 582; C. C. P., ss. 334, 335; 1899, c. 65, s. 2.)

Either Party May Subject Other to Examination.—Either plaintiff or defendant may subject the adversary party or person adversely interested in the action to examination before the clerk or judge, or a commissioner appointed by the court for the purpose of eliciting evidence in support of his contention in the controversy. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 144, 17 S. E. 69.

Claim of Privilege against Self-Crimination.—An order to examine a defendant will not be denied on the ground that the answers of the defendant will tend to incriminate him, in an action wherein the complaint has been filed alleging that the defendant had misappropriated the plaintiff's money while acting as his bookkeeper and accountant, the answers of the defendant not necessarily having to show a criminal intent, etc., and the time for his refusal to answer being when such incriminating questions are asked on the examination. Ward v. Martin, 175 N. C. 287, 95 S. E. 621.

An order to examine the party to an action under this section may not be revoked on motion made on written notice of his attorney, stating that the answers sought to be elicited will tend to incriminate him. Ward v. Martin, 175 N. C. 287, 95 S. E. 621.

County of Examination.—An examination of the defendant to discover facts necessary to be obtained in preparing a complaint must be made in the county of his residence. Bailey v. Matthews, 156 N. C. 78, 72 S. E. 92.

Proceedings to examine an adverse party before the clerk or upon commission must be instituted after summons has been issued and action commenced, and on motion before the clerk of the superior court of the same county or the judge presiding over that court, or holding the courts of the district; and a clerk of another county, where the action is not pending, is without jurisdiction over the proceedings, and his order made therein will be quashed. Vyne v. Fogle Bros. Co., 176 N. C. 351, 97 S. E. 147.

Same—Appeal. — An appeal to the Supreme Court will directly lie from the refusal of the superior court judge to vacate an order of the clerk of that court to examine an adversary party to an action pending in another county; and there being no cause therein in which an exception may be noted and preserved, an objection that the appeal is fragmentary cannot be sustained. Vyne v. Fogle Bros. Co., 176 N. C. 351, 97 S. E. 147.

May Be Read by Either Party. — The examination of an adverse party, as this section provides, may be read by either party on the trial, and is, like a deposition, de bene esse, in that it becomes "the evidence of the law." So to speak, it is "canned evidence," kept in cold storage, for it cannot be altered. In both, the testimony is subject to all valid objections taken at the time, and there is stronger reason for its competency at the trial, for, besides the express authority without any exception, that such testimony can be read "by either party at the trial," in the case of evidence de bene esse the deposition is taken in favor of the party offering it, while in a bill of discovery it is taken at the instance of the adversary party. Phillips v. Interstate Land Co., 174 N. C. 542, 546, 94 S. E. 12; Beck v. Wilkins-Ricks Co., 186 N. C. 210, 119 S. E. 235.

Party Examining Not Compelled to Use Testimony.—The fact that the plaintiff examined the defendant under this section did not compel the plaintiff to use that testimony on the trial, nor did it make that defendant in any sense the plaintiff's witness. Shober v. Wheeler, 113 N. C. 370, 376, 18 S. E. 328.

Death Does Not Render Inadmissible. — In Phillips v. Interstate Land Co., 174 N. C. 542, 546, 94 S. E. 12, quoting Rowland v. Pickney, 8 Miss. 458, it is said: "The deposition of a witness, taken before the death of one of the parties, is not inadmissible on the trial."

§ 903. Party's refusal to testify; penalty.—If a party refuses to attend and testify, as provided in the preceding sections, he may be punished as for a contempt, and his pleadings may be stricken out. (Rev., s. 869; Code, s. 584; C. C. P., s. 337.)

§ 904. Rebuttal of party's testimony.—The examination of the party thus taken may be rebutted by adverse testimony. (Rev., s. 868; Code, s. 583; C. C. P., s. 336.)

Editor's Note. — It is a well settled rule of law that one who offers and examines a witness will not be heard to impeach his character and veracity; a party is not to take and use evidence and then directly impeach the source from which it comes. To give these sections, providing for the

examination of adverse parties, such a meaning would certainly introduce a novel feature into the law and practice, and subvert this ancient and time honored rule in the conduct of civil suits. It is laid down, as a clear rule, in a line of cases reaching from the early days of English jurisprudence down to the present time, that a party has no right to put a witness into the box, as a witness of credit, and when he gives unfavorable evidence, to call a witness to discredit him. Such would be fraud of the rankest kind upon the jury. While a party is not permitted to produce general evidence to discredit his own witness, but, if the witness prove facts in a cause which make against the party who called him, the party may call other witnesses to prove that the facts were otherwise. This has nothing to do with the integrity of the witness, but merely shows that, as any man might be, he is mistaken as to certain facts.

This section seems to fall within the general rule, and preclude the party who takes and introduces the examination as evidence in his own behalf from discrediting or impeaching the witness himself, except as that result may be incidental to proof of a different state of facts. By calling his adversary, a party makes him so far his own witness that he cannot impeach or disparage his general credibility. In Strudwick v. Broadnax, 83 N. C. 401, 405, it was said that we should hesitate to ascribe to the rebuttal "by adverse testimony," authorized by this section, which is defined by Worcester as "a driving or beating back, a repelling or opposing by argument or evidence," an effect so sweeping as to break down a principle so long and thoroughly established and acted on in judicial practice, without some more clear and distinct manifestation of the legislative will than is furnished by the word employed to express it. Hice v. Cox, 34 N. C. 315, citing Holdsworth v. Dartmouth, 2 M. & Rob. 153; Spencer v. White, 23 N. C. 236; Shelton v. Hampton, 28 N. C. 216; Wilson v. Derr, 69 N. C. 137.

May Rebut Deposition on Trial. — A plaintiff can rebut the defendant's deposition on trial by adverse testimony. Hudson v. Jordan, 108 N. C. 10, 13, 12 S. E. 1029.

May Contradict but Can Not Impeach. — A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his. Helms v. Green, 105 N. C. 251, 262, 11 S. E. 470; Coates v. Wilkes, 92 N. C. 377, 382.

§ 905. Irresponsive answers may be met by party's own testimony.—A party examined by an adverse party, as provided in this article, may be examined in his own behalf, subject to the same rules of examination as other witnesses. But if he testifies to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto or to discharge himself when his answers would charge himself, the adverse party may offer himself and must be received as a witness in his own behalf or in respect to the new matter, subject to the same rules of examination as other witnesses. (Rev., s. 870; Code, ss. 583, 585; C. C. P., ss. 336, 338.)

§ 906. Real party in interest examined.—A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he was named as a party. (Rev., s. 871; Code, s. 586; C. C. P., s. 339.)

As to examination of officers and agents of a corporation, see sec. 900.

The testimony sought must be that of a person immediately interested in the action. Strudwick v. Broadnax, 83 N. C. 401, 403.

§ 907. Examination of coplaintiff or codefendant.—A party may be examined on behalf of his coplaintiff or codefendant as to any matter in which he is not jointly interested or liable with such coplaintiff or codefendant, and as to which a separate and not joint verdict or judgment can be rendered. He may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken cannot be used in behalf of the party examined. When one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself, and must be received, as a witness to the same cause of action or defense. (Rev., s. 872; Code, s. 587; C. C. P., s. 340.)

As to production of writings, see sec. 1823 et seq.

A party may be compelled to attend court, and be examined in behalf of a coplaintiff, or a codefendant, "as to any matter in which he is not jointly interested or liable," etc.; and in such a case he is entitled to pay as a witness. Penny v. Brink, 75 N. C. 68.

Art. 45. Motions and Orders

§ 908. Definition of order.—Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. (Rev., s. 873; Code, s. 594; C. C. P., ss. 344, 345.)

An appeal from an order continuing in force a former order made in the cause will be dismissed. Childs v. Martin, 68 N. C. 307.

§ 909. Motions; when and where made.—An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for a new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, have preference over all other motions. (Rev., s. 874; Code, s. 594; C. C. P., ss. 344, 345.)

Editor's Note. — A motion in general relates to some incidental question collateral to the main object of the action. A motion is not a remedy in the sense of the Code, but is based upon some remedy, and is always connected with the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy. See 78 N. Y. 601, 55 N. Y. 145.

Form of Motion.—A motion must be in writing. Cotton Oil Co. v. Grimes, 183 N. C. 97, 99, 112 S. E. 598.

On appeal to the Supreme Court a statement of record that the defendant filed a written motion to dismiss, negatives the exception that it was an oral motion, not in conformity with the requirements of the statute. Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

While it is the better form for one making a written motion, as an attorney at law, and in fact to first state the names of those he represents and then that he is acting for them in the capacity of attorney, the error in stating that he appears as attorney at law and in fact for certain named parties, etc., is merely informal and harmless, and therefore good against a demurrer, it clearly appearing that the attorney is not claiming any interest in the lands for himself, but is acting solely in a representative capacity for the persons named. Hartsfield v. Bryan, 177 N. C. 166, 98 S. E. 379.

Where Motions Must Be Made. — Except by consent or in those cases specially permitted by statute the judge can make no orders in a cause outside of the county in which the action is pending. Parker v. McPhail, 112 N. C. 502, 504, 16 S. E. 848; McNeill v. Hodges, 99 N. C. 248, 6 S. E. 127; Bynum v. Powe, 97 N. C. 374, 2 S. E. 170; Gatewood v. Leak, 99 N. C. 363, 6 S. E. 706.

As to injunctions, attachments, and arrest and bail, authority is granted to hear and pass on motions to vacate or modify such orders out of the county. Parker v. McPhail, 112 N. C. 502, 504, 16 S. E. 848.

When Procedure Must Be by Motion. — It is well established in this state that no party to a suit is permitted

by a new and independent action praying for an injunction to seek any relief which he might obtain by a motion in the original action. Mason v. Miles, 63 N. C. 564; Jarman v. Saunders, 64 N. C. 367; Faison v. McIlwaine, 72 N. C. 312, 313.

An action is inadmissible as a mode of obtaining relief against an execution for irregularity; the proper relief is, as formerly, by motion to set it aside. Foard v. Alexander, 64 N. C. 69.

A proceeding by a motion supported by affidavits after a notice to the opposite party, to have satisfaction of a judgment entered of record upon the ground that it has been paid since its rendition, is the appropriate remedy in such a case, but is neither a special proceeding nor a civil action. It is only a motion in a cause still pending. Foreman v. Bibb, 65 N. C. 128.

Power of Judge. — After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless, they are such as are cognizable at chambers. May v. Insurance Co., 172 N. C. 795, 90 S. E. 890.

An order to stay proceedings, made without notice by a judge out of court for a longer time than twenty days, is irregular, and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. Foard v. Alexander, 64 N. C. 69.

Same—To Continue Motions, etc.—The judge below has no power to continue motions for judgments or to set aside verdicts to be passed upon by him at a subsequent term of court, without the consent of the parties litigant. Oak Hall Clothing Co. v. Bagley, 147 N. C. 37, 60 S. E. 648.

Such consent should certainly appear in a writing signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the better way; or such consent should appear by fair implication from what appears in the record. Godwin v. Monds, 101 N. C. 354, 355, 7 S. E. 793.

Same—Can Not Reverse Another. — One superior court judge cannot reverse or set aside an order of another. Henry v. Hilliard, 120 N. C. 479, 487, 27 S. E. 130.

When Refused by Judge without Jurisdiction. — The refusal of a judge to grant a motion for want of jurisdiction is no bar to an entertainment of the motion by a judge having jurisdiction. First National Bank v. Wilson, 80 N. C. 200.

Motions Which May Be Renewed. — Motions made in the progress of a cause to facilitate the trial, but which involves no substantial right, and the decision of which is not subject to an appeal to the Supreme Court, may be renewed as subsequent events require, and are not obstructed by the former action of the court. Sanderson v. Daily, 83 N. C. 68, 70; Roulhac v. Brown, 87 N. C. 1; Henry v. Hilliard, 120 N. C. 479, 487, 27 S. E. 130.

Res Adjudicata.—If a decision affects a substantial right, and may be reviewed and corrected on appeal, and the complaining party acquiesces, the doctrine of res adjudicata applies. Sanderson v. Daily, 83 N. C. 68, 69.

§ 910. Affidavit for or against, compelled.—When a party intends to make or oppose a motion in a court of record, and it is necessary for him to have the affidavit of any person who has refused to make it, the court may, by order, appoint a referee to take the affidavit or deposition of such person. The person may be subpoenaed and compelled to attend and make an affidavit before such referee, as before a referee to whom an issue is referred for trial. (Rev., s. 875; Code, s. 594; C. C. P., ss. 344, 345.)

The matter of reference, under the section, rests in the discretion of the court. In Re Brown, 168 N. C. 417, 424, 84 S. E. 690.

§ 911. Motions determined in ten days.—When a motion is made in a cause or proceeding in any of the courts to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or to vacate or modify the same, it is the duty of the judge before whom the motion is made to render his decision within ten days after the day on which the motion was submitted to him for decision. (Rev., s. 876; Code, s. 594; C. C. P., ss. 344, 345.)

§ 912. Notice of motion.—When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time. (Rev., s. 877; Code, s. 595; C. C. P., s. 346.)

As to notice in supplemental proceedings, see sec. 711 and annotations thereto.

Editor's Note. — By section 346 of the C. C. P. only eight days notice was required. However, this was changed by section 595 of the Code of 1883 to ten days, which was unchanged in the Revisal, section 877, and was brought forward by the revisers of this section. See Branch v. Walker, 92 N. C. 87, 89.

Compliance with Section Required.—Notice of a motion to set aside a judgment must ordinarily be given as required by this section, and the pleadings in an action to reform a deed of trust upon allegations of mutual mistake are insufficient as notice of a motion to set aside the decree of foreclosure for irregularity and surprise, etc., the pleadings in the suit for reformation containing no allegations of irregularities in the foreclosure or of surprise. Virginia-Carolina Joint Stock Bank v. Alexander, 201 N. C. 453, 160 S. E. 462.

When Notice Required—When Heard Out of Term. — Notice of a motion applies only when such motion is heard out of term; parties are fixed with notice of all motions or orders made during the term of court in causes pending therein. Jones v. Jones, 173 N. C. 279, 283, 91 S. E. 960; Hemphill v. Moore, 104 N. C. 379, 10 S. E. 313.

Same—Proceedings before Clerk.—A party is not fixed with notice of orders before the clerk. Blue v. Blue, 79 N. C. 69; State v. Johnson, 109 N. C. 852, 855, 13 S. E. 843.

Same—Appeal from Justice of the Peace.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken of the trial), and within ten days both upon the justice who tried the case and upon the appellee. State v. Johnson, 109 N. C. 852, 13 S. E. 843.

Same—New Trial for Newly Discovered Evidence.—When a motion for a new trial for newly discovered evidence in the Supreme Court is contemplated, notice of such motion should always be given the other side. The appellant should give notice at least ten days before the beginning of the call of the district to which the cause belongs, unless the information comes to him after that time, when the court may shorten the notice. Herndon v. R. R., 121 N. C. 498, 499, 28 S. E. 144.

Failure to Give Notice in Proceedings under § 470. — Where a judgment by default final has been entered against a defendant for the want of an answer, and it appears that the defendant lodged his motion in apt time for a change of venue, in accordance with section 470, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, required of this section before time for answering has expired, will not affect his rights to have the judgment by default against him vacated. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Orders in Fieri during Term.—Judgments and orders are in fieri during the term they are rendered, and motions may be made to set them aside without notice; but after that term such motions can only be heard after due notice. Harper v. Sugg, 111 N. C. 324, 16 S. E. 173.

Ten Days Notice Required.—Notice of all motions and orders made out of term must be given, and the time is fixed at ten days, but the judge is authorized to shorten the time. Jones v. Jones, 173 N. C. 279, 284, 91 S. E. 960.

Unless a verbal or written motion to amend a complaint after time for filing answer has expired be made at the trial term of the action, previous notice of ten days must be given the defendant unless the time is shortened by the court, and an order allowing the amendment to be made, entered without such notice, is irregular. Carolina Discount Corp. v. Butler, 200 N. C. 709, 158 S. E. 249.

When No Provision Made for Notice.—When a statute confers power upon a judicial tribunal or an administration agency to render judgment or make an order affecting rights of a person or property, and no provision is made for notice, the court will require a reasonable notice. Bank v. Hotel Co., 147 N. C. 594, 601, 61 S. E. 570.

§ 913. Orders without notice, vacated.—An order made out of court, without notice to the adverse party, may be vacated or modified without

notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made. (Rev., s. 514; Code, s. 546; C. C. P., s. 297.)

When Judge May Vacate or Modify.—A judge of the superior court has the power to vacate or modify orders made in a cause at any time before final judgment. Welch v. Kingsland, 89 N. C. 178.

In Sledge v. Blum, 63 N. C. 374, 376, Pearson, C. J., speaking for the court, said: "Where a judge acting on the complaint without notice to the defendant grants an injunction, he may afterwards, acting on the complaint alone, without notice to the plaintiff modify or vacate the injunction as irregularly or improvidently granted. But if he goes out of the complaint and takes into consideration the answer and the affidavits filed for the defendants the plaintiff is then entitled to notice, and may meet the affidavit by counter-affidavits."

Motion for Change of Venire before Clerk.—The power to entertain a demand of the defendant to remove an action to the proper venue under the provisions of this section, is now conferred upon the clerk, subject to the right of appeal to the judge, when the motion shall be heard and passed on de novo. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Where a defendant has made a motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

§ 913(a). Orders by clerk on motion to remove; right of appeal; notice.—All motions to remove as a matter of right shall be made before the clerk, who is authorized to make all necessary orders, and an appeal shall lie from such order upon such motion to the judge at chambers or at the next term, who shall hear and pass upon such motion de novo. But no such motion shall be heard until ten days notice thereof shall first have been given to the opposing party or his attorney. (Ex. Sess. 1921, c. 92, s. 15; 1925, c. 282, s. 1.)

Editor's Note.—The provision authorizing the clerk to hear all motions to remove as a matter of right and make the necessary orders therein, allowing for an appeal therefrom, was enacted by the Legislature, Acts 1921, c. 92, sec. 15. It was amended by Acts 1925, c. 282, sec. 1, by writing in the words "at chambers or" after the word "judge," and before the words "at the next term," and adding the sentence allowing ten days notice.

This act is a part of the legislation to restore to the clerk the power originally given him by the C. C. P. but taken away by the suspension acts.

During the suspension period the defendant was authorized to apply to the Court in term for a removal. By the public laws of 1919, 1920, restoring the power, the motion was filed before the clerk and after the answer was filed all the papers were transferred to the court in term time and by him heard and acted upon. Thus this section changed the law by permitting the clerk to hear the motion but giving a right of appeal. See Southern Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

Change of Venue under Section 470 Effected by Section.—The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of sec. 470, is now conferred by this section upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon de novo. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Effect of Motion upon Further Proceedings.—Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

When the defendant has proceeded by motion to have the action removed to the proper county before the time for filing the answer has expired, a judgment by default final for the want of answer is contrary to the practice of the courts, and will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. Roberts v. Moore, 185 N. C. 254, 116 S. E. 728.

Motion to Dismiss as Affecting Removal.—Where the defendant moves the clerk to dismiss the action for want of proper venue, but the clerk upon his own motion orders a removal, and upon appeal the judge at term orders the cause removed, the fact that the motion to dismiss was made is immaterial as affecting the judge's power to order a removal. Southern Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

Removal by Judge Valid.—The act of the judge in ordering a removal, where the defendant has complied with all the requirements of the law as to filing a motion in apt time, is a valid exercise of jurisdictional authority. Southern Cotton Oil Co. v. Grimes, 183 N. C. 97, 112 S. E. 598.

Removal Not Matter of Right.—This section refers only to motions to remove as a matter of right. Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. Howard v. Hinson, 191 N. C. 366, 131 S. E. 748. The clerk is without power, under the statute, to remove an action, upon the ground that the convenience of witnesses and the ends of justice would be promoted by the removal. The motion for removal upon this ground can be made only before the judge, during a term of the superior court. Causey v. Morris, 195 N. C. 532, 534, 142 S. E. 783.

Effect of Motion on Other Proceedings.—See note under § 600.

On appeal from order of clerk transferring a cause to another county as a matter of right, on the ground that the action involves an interest in lands under § 463 the matter should be heard de novo during the term of court. Causey v. Morris, 195 N. C. 532, 142 S. E. 783.

Applied in Miller v. Miller, 205 N. C. 753, 172 S. E. 493; White v. Rankin, 206 N. C. 104, 173 S. E. 282.

§ 913(b). Motions to remove to federal court; notice.—Motions to remove to the federal court shall be made before the clerk, and an appeal shall lie from his order to the judge at chambers at the next term, who shall hear and pass upon such motion de novo. But no such motion shall be heard until ten days notice thereof shall first have been given to the opposing party or his attorney. (Ex. Sess. 1921, c. 92, s. 16; 1925, c. 282, s. 2.)

The provision for motions for removal to the federal court to be made before the clerk, and allowing an appeal therefrom to the judge, was enacted by the Legislature 1921, c. 92, sec. 16. The provision was amended by the Acts 1925, c. 282, sec. 2, by writing in the words "at chambers," after the word "judge," and before the words "at the next term." The sentence allowing ten days notice was also added by this section. Ed. Note.

Effect of Improper Order.—An order of the clerk of the Superior Court, having jurisdiction of a motion to remove a cause under this section, that the cause be removed as prayed by the defendants, meeting the requirements of the Federal statutes relating thereto, and made in apt time, when improperly made is erroneous and not void. Such order is effective until reversed on appeal or until remand by the Federal court. Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587.

Art. 46. Notices

§ 914. Form and service.—All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter. (Rev., ss. 878, 879; Code, s. 597; C. C. P., ss. 349, 353.)

Cross References.—As to service on Sunday, see s. 3958; as to service of summons, see sec. 475 et seq.

Form of Notice Required.—When, a statute requires notice to be given, it must be given in writing, addressed to the proper person, contain the substance, intelligently and sufficiently expressed, of the information to be communicated, signed by the party giving it, or his attorney, and served in such way so that the court can see and learn that it has been served, and, it, or a copy of it, must be returned into court, properly authenticated unless it shall in some way be waived, as by the appearance of the party to be affected by it. Allen v. Strickland, 100 N. C. 225, 228, 6 S. E. 780; Harper v. Sugg, 111 N. C. 324, 327, 16 S. E. 173, 174.

Section Should Be Strictly Observed.—The service of no-

tice, made in a way and manner recognized and sanctioned by the law, is an essential requisite of it; without this it is ineffectual for the purpose intended and void. Unless it is given as the law directs or allows, the party to whom it is given is not bound to recognize or act upon it; nor, indeed, is it notice. It is the legal sanction that gives the notice, in sufficient form and substance, life and efficacy. Allen v. Strickland, 100 N. C. 225, 229, 6 S. E. 780. Citing Wade on notice, sections 1293, 1295, 1335, 1342.

Applicable to Cases on Appeal.—The statute regulating the manner of service of notices, is applicable to service of cases on appeal and exceptions thereto. State v. Price, 110 N. C. 599, 15 S. E. 116.

Verbal Notice Insufficient.—A motion heard upon verbal notice given on the day of the hearing is irregular, and should have been dismissed. Harper v. Sugg, 111 N. C. 324, 326, 16 S. E. 173.

Notice Not Required—Road Duty.—A summons to a person liable to road duty does not fall within the purview of this article, and need not be in writing. State v. Telfair, 130 N. C. 645, 40 S. E. 976.

Same—Sureties on Sheriff's Bond.—Notice to sureties on an indemnity bond that the sheriff has been sued for the wrongful levy of an execution need not be in writing. Martin v. Buffaloe, 128 N. C. 305, 38 S. E. 902.

Service Made on Attorney.—The counsel is responsible to the court and his client, and generally, the court recognizes him as having charge of the action, and authorized and bound to take notice of all motions and proceedings in it. This is so upon general principles that govern courts ordinarily in the administration of justice; and under this section, in respect to notices and the filing and service of papers, expressly provides that service may be made on the party or his attorney. Branch v. Walker, 92 N. C. 87, 89.

Personal Notice.—Where notice of appeal was served on the plaintiff by leaving a copy with him, another notice of the same appeal served the next day by reading it to the plaintiff was unnecessary under this section. Sondley v. Asheville, 110 N. C. 84, 89, 14 S. E. 514.

Same—Determined by Clerk.—The fact that personal notice was given to the defendant is determined affirmatively by the clerk in making the order. Surratt v. Crawford, 97 N. C. 372, 375.

Service Must Be by Officer.—Service of all papers, except subpoenas, and in cases where service by publication is authorized, must be by an officer, or acceptance of service. Smith v. Smith, 119 N. C. 314, 318, 25 S. E. 878.

Same—Case on Appeal.—A case on appeal, unless service is accepted, can be served only by an officer. Forte v. Boone, 114 N. C. 176, 177, 19 S. E. 632; State v. Johnson, 109 N. C. 852, 13 S. E. 843.

Same—Appeal from Justice of the Peace.—The notice of appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. Clark v. Manufacturing Co., 110 N. C. 111, 14 S. E. 518.

Qualifications of Officer Serving.—Service of notices must be made by an officer authorized generally and by virtue of his office to serve process of the court having jurisdiction of the action in which the notice is given. Cullen v. Absher, 119 N. C. 441, 26 S. E. 33.

Same—Town Constable.—A town constable can not serve a notice to take a deposition in an action pending in the superior court. Cullen v. Absher, 119 N. C. 441, 26 S. E. 33; Forte v. Boone, 114 N. C. 176, 177, 19 S. E. 632.

Same—Chief of Police or Marshal.—Where a town charter provides for the appointment of a chief of police or marshall and declares that, in the execution of process, he shall have the same power, etc., which sheriff and constables have, the service by such officer of a summons directed to "the sheriff of W. county or town constable of W. town" is valid. Lowe v. Harris, 121 N. C. 287, 28 S. E. 535.

§ 915. Service upon attorney.—Notice upon an attorney may be served during his absence from his office, by leaving a copy of the paper with his clerk, or a person having charge of the office; or, when there is no person in the office, by leaving it, between the hours of six a. m. and nine p. m., in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion. (Rev., s. 880; Code, s. 597; C. C. P., ss. 349, 353.)

Notice to Attorney is Notice to Client. — In Ladd v. Teague, 126 N. C. 544, 548, 36 S. E. 45, quoting from United States v. Currey, 6 Howard (U. S.) 106, it was said:

"No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there, the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself." See also Branch v. Walker, 92 N. C. 87; Walton v. Sugg, 61 N. C. 98.

Notice of Motion.—A notice of a motion to set aside a judgment may be properly served on the attorney of record of the opposing party. Branch v. Walker, 92 N. C. 87.

§ 916. Service upon a party.—Notice upon a party may be served by leaving a copy of the paper at his residence, between the hours of six a. m. and nine p. m., with some person of suitable age and discretion. (Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353.)

Notice Left with Wife.—Notice may be duly served by leaving a copy thereof at the residence of the person sought to be served, with his wife, she being of suitable age and discretion. Turner v. Holden, 109 N. C. 182, 185, 13 S. E. 713.

Compliance with Section Sufficient.—Service made under the section is sufficient. The court has jurisdiction in cases like this of the party to the action, and it is deemed sufficient to give him notice in the way prescribed for any motion or proceeding in the action. It is the duty of parties to actions to be on the alert at all times, until the same shall be completely ended. Turner v. Holden, 109 N. C. 182, 185, 13 S. E. 731.

§ 917. Service by publication.—Notice upon a person who cannot be found after due diligence, or who is not a resident of this state, may be served by its publication once a week for four successive weeks in a newspaper published in the county from which the notice is issued; and if no newspaper is published therein, then in some newspaper published within the judicial district; and the proof of service is the same as is required by law in the case of service of summons by publication. (Rev., s. 882; Code, s. 597; C. C. P., ss. 349, 353.)

Cross References.—As to service by publication generally, see secs. 484, 485 and annotations thereto; as to when service by publication is complete, see sec. 487 and annotations thereto; as to filing complaint in cases of publication, see sec. 486.

Substitute for Ten Days Personal Notice.—The publication "once a week for four successive weeks" is a substitute for and stands in lieu of the "ten days," which is allowed to a party personally served. Guilford v. Georgia Co., 109 N. C. 310, 313, 13 S. E. 861.

Form of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void. Guilford v. Georgia Co., 109 N. C. 310, 13 S. E. 861.

§ 918. Service by telephone or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas and summonses for jurors by telephone or by registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail a copy shall be mailed and a written receipt demanded and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 48; 1925, c. 98.)

Editor's Note.—The last sentence of this section providing for service by registered mail is new with the Laws 1925 c. 98. The words "Or by registered mail," immediately following the word telephone, in the first sentence, are also new with the Act.

If served by registered mail a written receipt must be demanded and filed with the return, such receipt being a necessary part thereof. While the meaning of this provision is by no means clear, it would seem to refer to a written receipt given for the registered letter by the postmaster. This seems a more logical interpretation of the legislative mean-

ing than to say that it refers to a written receipt signed by the addressee, showing that he had received the letter. See 3 N. C. Law Rev. 129.

§ 919. Subpoena, service and signature. — Service of a subpoena for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpœna for witnesses need not be signed by the clerk of the court, and is sufficient if subscribed by the party or by his attorney. (Rev., s. 884; Code, s. 597; C. C. P., ss. 349, 353.)

As to issuance by the clerk, see sec. 1803.

A subpoena may be served by any person not a party to the action, and proved by his oath. State v. Johnson, 109 N. C. 852, 853, 13 S. E. 843; Smith v. Smith, 119 N. C. 314, 318, 25 S. E. 878.

§ 920. Application of this article. — This article does not apply to the service of a summons, or other process (except summonses for jurors, as provided in the second section preceding), or of any paper to bring a party into contempt. (Rev., s. 885; Code, s. 597; C. C. P., ss. 349, 353.)

Article Applies where Papers Not Excepted.—It seems clear that the article applies to all papers except those excepted by this section. State v. Price, 110 N. C. 599, 601, 15 S. E. 116.

The exceptions provided for in this section do not include the service of cases and counter-cases on appeal. State v. Price, 110 N. C. 599, 601, 15 S. E. 116.

§ 921. Officer's return evidence of service. — When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service. (Rev., ss. 886, 1529; Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537.)

Officer's Return is Prima Facie Correct. — In Caviness v. Hunt, 180 N. C. 384, 386, 104 S. E. 763, it was said: "While this is one of the states in which the return on the process is not conclusive, even between the parties and privies to the action, still, under this section, and the authorities, such return is prima facie correct and cannot be set aside unless the evidence is clear and unequivocal."

The sheriff's return is taken as prima facie correct, and may not be successfully attacked by motion in the cause, except by clear and unequivocal evidence, requiring the testimony of more than one person to overturn the official return of the officer. Commissioners v. Spencer, 174 N. C. 36, 93 S. E. 435.

Same—Service on Infant. — Where service of process has been served upon the general guardian of the infant, and it appears from the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. Long v. Rockingham, 187 N. C. 199, 121 S. E. 461.

Imports Verity.—Where the summons in an action has been duly served on a party defendant by a proper officer, it imports verity, and will not be set aside and a judgment vacated in the absence of clear and unequivocal proof that the summons had not in fact been served, and such proof must be more than the one affidavit by the defendant. Raleigh, etc., Trust Co. v. Nowell, 195 N. C. 449, 142 S. E. 584.

Sheriff's Signature Acted on without Proof. — The official returns of the sheriff are acted on without proof of his signature in a court in which he is an officer. McDonald v. Carson, 94 N. C. 497, 502.

"Executed by Delivery."—The term used in a return, "executed by delivering copy," necessarily implies a delivery to each of those to whom the notice is addressed, as otherwise it would be but a partial and uncompleted service. McDonald v. Carson, 94 N. C. 497, 502.

Executed.—The word "executed" in the return of a process ex vi termini carries with it the idea of a full performance of all that the law requires. Isley v. Boon, 113 N. C. 249, 18 S. E. 174.

Art. 47. Time

§ 922. How computed. — The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday, it must be excluded. (Rev., s. 887; Code, s. 596; C. C. P., s. 348.)

Uniform Rule. — The cases all go to establish one uniform rule, whether the question arises upon the practice of the courts, or the construction of a statute, and the rule is to exclude the first day from the computation. Cook v. Moore, 95 N. C. 1, 3; Burgess v. Burgess, 117 N. C. 447, 23 S. E. 336; Walker v. Scott, 104 N. C. 481, 10 S. E. 523.

"From the Day of the Date." — "From the day of the date" and "from the date" signify the same thing, and according to the intent are either inclusive or exclusive. Houser v. Reynolds, 2 N. C. 114, 1 Am. Dec. 551, cited in notes in 49 L. R. A. 200, 201.

Actions on Judgments. — Where a judgment was rendered on October 20, 1873, and an action was brought on the judgment on October 20, 1883, it was held that the statute barring actions on judgments in ten years was a defense. Cook v. Moore, 95 N. C. 1, cited in note in 49 L. R. A. 214.

Time for Filing Appeal. — In calculating the five days after the end of the term within which the case on appeal must be filed, the first day on which the court adjourned, is to be excluded. Turrentine v. Richmond, etc., R. Co., 92 N. C. 642.

Petition for Rehearing. — Under the rule requiring petitions to rehear to be filed within twenty days after the commencement of the succeeding term, the first day of the period allowed is to be excluded from the count. Barcroft v. Roberts, 92 N. C. 250, cited in note in 49 L. R. A. 226.

Service of Case. — Where thirty days were allowed by agreement within which to serve a case on appeal, and the court adjourned on October 31st, the time for service expired on November 30th, the last day not being Sunday, the service on December 1st was a nullity. Zell Guano Co. v. Hicks, 120 N. C. 29, 26 S. E. 650.

Bill and Notes. — A note drawn payable one day after date is due the second day after its execution without demand. Baucom v. Smith, 66 N. C. 537.

Limit of Option. — An option given February 7th, provided no better offer was received that day by mail, to close "by 8 February," includes the latter day. Blalock v. Clark, 133 N. C. 306, 45 S. E. 642, cited in note in 15 L. R. A., N. S. 688.

When Loss of Time Not Imputed to Appellant. — Where appellant's counsel, five days after the adjournment of court, mailed by registered letter notice of appeal, etc. to the sheriff of the county so as to leave ample time for service on appellee's counsel, the failure of the sheriff to take the notice, etc., from the postoffice until after the ten days allowed for service cannot be imputed to the appellant as his laches. Arrington v. Arrington, 114 N. C. 113, 19 S. E. 105.

When Last Day is Sunday. — The last day for service of a case on appeal being Sunday, service on the following day was legal. Pittsburg Lumber Co. v. Rowe, 151 N. C. 130, 65 S. E. 750.

In computing the time wherein a case on appeal may be served under an agreement, when, by excluding the first, the last day falls on Sunday, service on the next succeeding day is sufficient. Pittsburg Lumber Co. v. Rowe, 151 N. C. 130, 65 S. E. 750; Sondley v. Asheville, 110 N. C. 84, 14 S. E. 514.

Sunday Excluded Only When Last Day. — The section excludes Sunday only when it is the last day of the time limited. Glanton v. Jacobs, 117 N. C. 427, 428, 23 S. E. 335, cited in note in 49 L. R. A. 242.

The Legislature has not written the words "Sundays excluded" into the statute, and the court has no authority to do so. The Revisal, sec. 887, by providing that, in computing time, if the last day is Sunday it shall be excluded, shows that, except when Sunday is the last day, it shall be counted in the time "provided by law." Davis v. Atlantic etc., R. Co., 145 N. C. 207, 211, 59 S. E. 53.

Same—Cases on Appeal and Counter-Cases. — Appeals must be taken in ten days, cases on appeal served in ten days, counter-cases in five days, under penalty of loss, yet the court has not extended the time by writing in the statute "Sundays not counted," though lawyers are no more expected to work on Sundays than freight trains. Davis v. Atlantic etc., R. Co., 145 N. C. 207, 212, 59 S. E. 53.

Same—Execution of Ca. Sa. — In Drake v. Fletcher, 50 N. C. 411, in construing the statute which allowed twenty days in which a ca. sa. must be executed, the court held that Sundays must be counted, though the statute forbade service of such process on Sunday, the court saying that

when Sundays are to be excluded the Legislature so declares in express terms. In Barcroft v. Roberts, 92 N. C. 250, the court held, as to the twenty days allowed in which a petition to rehear could be filed, that the first day is to be excluded from the count, and the last day is to be counted unless Sunday, and counted all other Sundays in the twenty days. Davis v. Atlantic etc., R. Co., 145 N. C. 207, 211, 59 S. E. 53.

Same—Transportation of Freight.—Though freight trains are prohibited from running on Sunday within certain hours, Sundays are not excluded from the reasonable time in which railroads are given to transport freight, except when Sunday is the last day in computing the time. Davis v. Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

Cited in Adcock v. Fuquay Springs, 194 N. C. 423, 425, 140 S. E. 24.

§ 923. Computation in publication.—The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication. (Rev., s. 888; Code, s. 602; C. C. P., s. 359.)

Cross References. — As to matter of publication generally, see sec. 485; as to service and content of notice of attachment, see sec. 806; as to publication of warrant of attachment obtained from a justice of the peace, see sec. 810.

§ 924. Advertisement of public sales. —When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875.)

Cross References. — As to manner of publication generally, see sec. 485; as to advertisement, and cost of newspaper publication, see sec. 687; as to advertisement of resale, see sec. 688; as to sale days, see sec. 690; as to sale hours, see sec. 691; as to postponement, see sec. 692; as to personal property, notice and place of sale, see sec. 2585.

Notice of Sale under Mortgage. — Powers of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the requirements of giving notice of the sale. Jenkins v. Griffin, 175 N. C. 184, 186, 95 S. E. 166.

Where a mortgage of lands provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of the sale," by the agreement the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the superior court for an advertisement for thirty consecutive days was erroneous. Saving Bank & etc., Co. v. Leach, 169 N. C. 706, 86 S. E. 701.

Burden of Proof. — However, "the presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden was on defendant (here on plaintiffs) to show it." Jenkins v. Griffin, 175 N. C. 184, 186, 95 S. E. 166.

CHAPTER 13.

CLERK OF SUPERIOR COURT

Art. 1. The Office

§ 925. Judge of probate abolished; clerk acts as judge.—The office of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court as clerks of said court, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court. (Rev., s. 889; Code, s. 102.)

Cross Reference.—As to powers and jurisdiction generally, see sections 397, 403, 752, 765, and 938.

Editor's Note. — The office of probate judge was created by the constitution of 1868. The powers of the probate judge were extensive and his jurisdiction embraced many of the vital transactions of the business community. It covered the proof of wills, deeds, and official bonds; the appointment and revocation of guardians of infants and lunatics; the granting and revocation of letters testamentary and of administration; the auditing of the accounts of guardians, executors, and administrators; he could bind out apprentices, cancel indentures, and exercise jurisdiction in many other matters which might be prescribed by law. Although the office has now been abolished by the Constitution of 1883, the Legislature has seen fit, on the score of economy and practical administration, to shift the **jurisdiction** of matters of probate, plus certain other specified matters, to the clerk of the superior court.

Jurisdiction. — Under this section the duties of the probate judge devolve upon the clerk of the superior court, and in such case he has a special jurisdiction which is distinct and separate from his general duties as clerk. Brittain v. Mull, 91 N. C. 498; Helms v. Austin, 116 N. C. 751, 753, 21 S. E. 556.

The clerk acts not as the servant or ministerial officer of or as and for the superior court, but as an independent tribunal of original jurisdiction. Edwards v. Cobb, 95 N. C. 4.

The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. Brittain v. Mull, 91 N. C. 498.

The clerk has jurisdiction of a proceeding by a ward against his guardian for an account. McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265. See also Rowland v. Thompson, 65 N. C. 110.

The clerks of superior courts have jurisdiction of proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N. C. 5.

Although the clerks of the Superior Courts have no equity jurisdiction, they are given probate jurisdiction by this section, and in the exercise of their probate jurisdiction they may hear and rule on a petition of an executor for authorization to operate the estate's farms to preserve the property pending the determination of caveat proceedings. Hardy & Co. v. Turnage, 204 N. C. 538, 168 S. E. 823.

§ 926. Election; term of office.—A clerk of the superior court for each county shall be elected by qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly. Clerks of the superior court shall hold office for four years. (Rev., s. 890; Const., Art. 4, ss. 16, 17.)

Appointee. — When there is a vacancy and the judge appoints one to fill that vacancy, such appointee holds office only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319. (Deloatch v. Rogers, 86 N. C. 358, overruled.)

§ 927. Clerk's bond.—At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it is the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than twenty-five thousand dollars, payable to the state of North Carolina, and with a condition to be void if he shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession, by virtue or color, of his office, and shall in all things faithfully perform the duties of his office as they are or thereafter shall be prescribed by law. (Rev.,

s. 295; Code, s. 72; 1899, c. 54, s. 52; 1903, c. 747; 1889, c. 7; 1891, c. 385; 1901, c. 32; C. C. P., s. 137; 1895, cc. 270, 271; 1931, c. 170.)

Cross Reference. — As to liability and action on the bond, see secs. 928, 354, 356. As to interest, see sec. 2309. As to cemeteries, see sec. 5028.

Editor's Note.—The Act of 1931 increased the maximum penalty of the bond required by this section from fifteen thousand to twenty-five thousand dollars.

Purpose. — In Thomas v. Connelly, 104 N. C. 342, 346, 10 S. E. 520, it was said, "The purpose of this provision is very broad and comprehensive. It requires every clerk of the superior courts to give bond, with sufficient sureties, to secure the faithful discharge of his official duties, and especially, among other things, to secure the accounting for and paying over according to law of all moneys and effects that may be or come into his hands 'by virtue or color of his office'."

"Color of His Office." — "Color of his office," has been construed to embrace all cases where the officer receives the money in his official capacity, when he is not authorized or required to receive the same. Presson v. Boone, 108 N. C. 78, 12 S. E. 897; Sharpe v. Connelly, 105 N. C. 87, 11 S. E. 177; Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520: Ex Parte Cassidy, 95 N. C. 225; Brown v. Cable, 76 N. C. 391; Greenlee v. Sudderth, 65 N. C. 470. See also Cox v. Blair, 76 N. C. 78; McNeill v. Morrison, 63 N. C. 508.

Scope of Bond. — This section requires only one bond to be given by the clerks, and the condition is extensive enough to cover every possible default in office. Hunter v. Routlege, 51 N. C. 216, 220.

An official bond given by a clerk, upon his entry into office, covers his whole official term, whether a new bond be given afterwards or not. Hunter v. Routlege, 51 N. C. 216.

The clerk's bond embraces receiverships and incidental liabilities growing out of them. Presson v. Boone, 108 N. C. 78, 83, 12 S. E. 897; Syme v. Bunting, 91 N. C. 48; Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

The bond also covers funds which have come into the hands of the clerk under a statute enacted subsequent to the execution of the bond. Wilmington v. Nutt, 78 N. C. 177, and 80 N. C. 266; Presson v. Boone, 108 N. C. 78, 83, 12 S. E. 897. See also, State v. Bradshaw, 32 N. C. 229; Cameron v. Campbell, 10 N. C. 285.

Cumulative Security. — The clerk's bonds are cumulative security for the performance of official duties. Darden v. Blount, 126 N. C. 247, 35 S. E. 479.

Liability on the Bond. — The surety bond of a clerk of the superior court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon. when a different principle applies and the surety is liable for 6 per cent interest on the judgment until it is paid. State v. Martin, 188 N. C. 119, 123 S. E. 631; Presson v. Boone, 108 N. C. 78, 87, 12 S. E. 897.

A clerk and his sureties are liable on his bond as an insurer for money that comes into his hands, and not merely for the exercise of good faith in regard to such money. Smith v. Patton, 131 N. C. 397, 42 S. E. 849. See generally, Bd. of Education v. Bateman, 102 N. C. 52, 11 Am. St. 708, 8 S. E. 882; Morgan v. Smith, 95 N. C. 396; Havens v. Lathene, 75 N. C. 505.

Where a defaulting clerk succeeds himself, and has given the required bond for each term, with the same surety, and continues his defalcation, the surety is liable only to the amount of the bond given for each term. State v. Martin, 188 N. C. 119, 123 S. E. 631.

And the burden is on the sureties of the bond in force when the money was received by the clerk to show that he paid it over to himself as his own successors. Morgan v. Smith, 95 N. C. 396, 397.

The clerk is liable on his bond for failure to pay over funds paid to him by commissioners in partition. Smith v. Patton, 131 N. C. 396, 42 S. E. 849.

Where a clerk of the Superior Court has forged the signatures of Confederate pensioners to warrants issued by the State Auditor and sent to him for payment to the persons entitled, and has witnessed such signatures, cashed the warrants, and converted the funds to his own use, such sums are received by him by virtue of and under color of his office, and come within the terms of his bonds given under the provisions of this section, and the surety thereon is liable within the penalty of the bonds for the amount so embezzled. State v. Gant, 201 N. C. 211, 159 S. E. 427.

Same—Negligence.—A clerk who is negligent in issuing an execution was held to be liable in damages for whatever sum the plaintiff might show he had sustained by such non-feasance. McIntyre v. Merritt, 55 N. C. 558.

Action on the Bond. — No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there has been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. Jones v. Biggs, 46 N. C. 364.

In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be final, since the action is not for the breach of an express or implied contract to pay a definite sum of money fixed by the terms of the bond or ascertainable therefrom, but must be "by default and inquiry." Battle v. Baird, 118 N. C. 854, 24 S. E. 668. See also Morgan v. Bunting, 86 N. C. 67, 68.

A demand is necessary before bringing an action upon the bond of a clerk for moneys, payable to private individuals, received under color of his office, and the statute of limitations will not begin to run in his favor until after such demand is made. But it is otherwise if he has converted the money, or if it is public money. Furman v. Timberlake, 93 N. C. 66.

Same—Proper Parties. — Under this section, claimants of a fund arising from a partition sale are the proper parties to sue on the bond of the clerk for failure of the clerk to pay funds by the commissioners in partition. Smith v. Patton, 131 N. C. 396, 42 S. E. 849.

Where a clerk wrongfully prefers one judgment creditor over another in issuing executions, the wronged party has a remedy upon the official bond of the clerk for the actual loss sustained by his misconduct. Bank v. Jones, 17 N. C. 284.

Same—Evidence. — In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. Morgan v. Smith, 95 N. C. 396.

Effect Where Penalty of Bond Exceeds Amount Prescribed.—Although this section is directory and prescribes the penalty on the bond of a clerk of the Superior Court, both the clerk and his surety are presumed to know the provisions of the statute, and where the clerk has voluntarily executed a bond in a greater sum, and the surety has accepted premiums based on a bond in this amount, the surety is estopped to deny the validity of the bond, and the plaintiff may recover of the surety, upon a proper showing, to the full amount of the penalty of the bond. State v. Gant, 201 N. C. 211, 213, 159 S. E. 427.

Clerical Error.—An error in reciting the term of office in the bond, which is clearly clerical and inadvertent, does not invalidate the bond, but will be treated as surplusage. Battle v. Baird, 118 N. C. 854, 24 S. E. 668. See also, Sprinkle v. Martin, 69 N. C. 175.

§ 928, Clerk's bond; approval, acknowledgments and custody.—The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds. (Rev., s. 296; Code, s. 73; C. C. P., s. 138.)

Cross Reference.—See annotations to §§ 354, 356.

Proof—Evidence.—Such a bond may be proved, as at common law, without being subjected to the strict rules of evidence, and if there is a subscribing witness it may be proved by other witnesses, as if there was no subscribing witness. Battle v. Baird, 118 N. C. 854, 24 S. E. 668.

A duly certified copy of the record of the registered bond is competent evidence of its provisions. Battle v. Baird, supra.

Same—Presumption.—The clerk of the superior court being required to give a bond for the discharge of the duties of his office, etc., it will be presumed, in the trial of an action on such bond, that he did so; and any such bond found

in the keeping of the proper custodian will be presumed to have been properly given and accepted as such. Battle v. Baird, 118 N. C. 854, 24 S. E. 668.

§ 929. Local modifications as to clerk's bond.—The bonds of the clerks of the superior court of Carteret, Jones and Pamlico counties may be fixed at an amount not less than five thousand dollars, in the discretion of county commissioners.

The clerk of the superior court of Currituck County shall not be required to give bond in a larger penalty than the sum of five thousand dollars, unless the money or funds coming into his hands by order of the court or otherwise, by virtue of his office as clerk, at any time exceed in the aggregate one-half the penalty of his bond. In that case he shall, within twenty days, file with the clerk of the board of commissioners a good and sufficient bond duly executed and justified as required by law, of like condition as already prescribed, and in a penalty double the amount of said funds, though not exceeding ten thousand dollars. This shall not be construed to modify or repeal any provisions of law whereby the county commissioners are authorized at any time to require said clerk to justify or renew his bond whenever necessary. The bond of the clerk of Superior Court of Mecklenburg County shall be in an amount to be named by the board of commissioners of said county in its discretion, such an amount to be not less than ten thousand dollars ($10,000) and not more than sixty thousand dollars ($60,000): Provided, however that the premiums upon the amount of said bond in excess of fifteen thousand dollars ($15,000) shall be paid by Mecklenburg County. (Rev., s. 295; 1907, c. 103; 1907, c. 990; 1925, c. 6, 184.)

§ 930. Oath of office.—The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county. (Rev., 891; Code; s. 74; C. C. P., s. 139.)

Cross Reference.—See sec. 4383. See also notes to secs. 927, 928. As to deputy, see sec. 935.

§ 931. Vacancy; judge of district fills.—1. Otherwise than by expiration. In case the office of clerk of a superior court for a county becomes vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

2. Failure to qualify. In case any clerk fails to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

3. Resignations. Any clerk of the superior court may resign his office to the judge of the superior court residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy. (Rev., ss. 892, 893, 895; Const., Art. 4, s. 29; Code, ss. 76, 78; C. C. P., s. 140.)

See sec. 349.

Commissioners' Duty.—A failure on the part of the clerk to give bond must be ascertained by the commissioners before the judge is authorized to declare a vacancy. And in accepting or rejecting the bond tendered, the court cannot interfere in the exercise of their discretion. Buckman v. Commissioners, 80 N. C. 121.

Conflicting Claimants.—Where there are conflicting claimants for a vacant office a court must act upon the prima facie evidence of right and admit the right of possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. Clark v. Carpenter, 81 N. C. 309.

§ 932. Removal for cause.—Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state. (Rev., s. 894; Code, s. 123; 1868-9, c. 201, s. 53.)

See notes to sec. 385.

§ 933. Office and equipment furnished.— The requisite stationery, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross-index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person. (Rev., s. 896; Code, ss. 82, 84, 113; C. C. P., s. 428.)

§ 934. Solicitor to examine and report on office.—The Solicitor of the Judicial District shall inspect the office of the clerk as often as he shall deem it necessary, and shall make written report of his inspection to the court. (Rev., s. 897; Code, s. 88; C. C. P., s. 147; 1917, c. 81, s. 1; 1935, c. 423.)

Editor's Note.—Prior to the amendment of 1935 the section required an inspection at every regular term and also provided the penalty in case the solicitor neglected or failed to perform his duty.

Art. 1(A). Assistant Clerks

§ 934(a). Appointment; oath; powers and jurisdiction; responsibility of clerks.—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint an assistant clerk of the superior court, who before entering upon his duties shall take and subscribe the oath prescribed for clerks: Provided, that no more than one such assistant clerk shall hold office in any county at one time. Upon compliance with the provisions of this article such assistant clerk shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks. (1921, c. 32, s. 1.)

Funds of minors paid into the hands of the assistant clerk of the Superior Court, appointed guardian, were not paid into court, and the surety on the guardianship bond may not successfully contend that the clerk's bond was liable therefor. State v. Royal Indemnity Co., 203 N. C. 420, 166 S. E. 327.

§ 934(b). Certificate of appointment; confirmation; revocation of appointment; compensation.—Any clerk of the superior court desiring to appoint such an assistant clerk shall present a formal written certificate of such appointment to the superior court judge residing in his district, and such judge, if he concurs in and approves such appointment, shall in writing enter his consent and approval upon such certificate and confirm such appointment. Said certificate of appointment, and approval of the judge, together with the oath subscribed by the appointee, shall thereupon be entered in full upon the minute docket of the court, and shall be recorded and cross-indexed in the office of the register of deeds for such county. The appointment of any such assistant clerk may be revoked at any time by the clerk who appointed him or by the superior court judge resident in the district, by the entry of the word "revoked" and the date thereof, with the signature of such clerk or judge, upon the margin of the records of such appointment in the offices of the clerk of the superior court and the register of deeds; and all such appointments shall expire by limitation when the clerk making same ceases to hold office. Nothing in this article shall increase the fees or compensation now allowed by law to the clerks or deputy clerks of the superior court of the several counties of the state. (1921, c. 32, s. 2.)

§ 934(c). Clerks not relieved from duties; deputies.—This chapter shall not in any wise excuse or relieve the clerk of the superior court from giving to the performance of his duties the same time, care, and attention as is now required of such clerks by law, nor shall it change or amend the present laws with reference to deputy clerks of the superior court: Provided, that one person may be appointed both as assistant clerk and as deputy. (1921, c. 32, s. 3.)

Art. 2. Deputies

§ 935. Appointment. — Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks. (Rev., s. 898; Code, s. 75; R. C., c. 19, s. 15; 1777, c. 115, s. 86.)

See sec. 3?92, See also Co..stitut. , Art. VI, sec. 8, Art. XIV, sec. 7.

Purpose.—In Miller v. Miller, 89 N. C. 402, 404, it was said: "The purpose of creating the office of 'deputy clerk' was to help the dispatch of public business, and to provide for the same when the clerk might be necessarily absent from his office, or unable for any cause to give personal attention to his official duties."

Section Provides Only Method of Appointment.—Deputy clerks can be appointed only in the manner prescribed by this section. Shepherd v. Lane, 13 N. C. 148. And are required to take the same oaths before entering upon their duties which are required of their principals. Jackson v. Buchanan, 89 N. C. 75, 76.

The certificate of probate of a deed by a deputy clerk, expressly authorized by statute to acknowledgment, etc., the deed having been duly registered, was prima facie evidence of his appointment and qualification. Piland v. Taylor, 113 N. C. 2, 18 S. E. 70.

Scope of Authority.—Deputy clerks may do all the acts which the clerk may do, except such as are judicial in their character, or such as a statute may require specially to be done by the clerk himself. Miller v. Miller, 89 N. C. 402, 404; Piland v. Taylor, 113 N. C. 3, 185 S. E. 70.

Deputies are expressly authorized to take acknowledgment and proof of deeds, and in exercising such functions a deputy acts by force of the statute alone, and not as the agent of or by a delegation of authority from the clerk. Piland v. Taylor, 113 N. C. 2, 18 S. E. 70.

The probate of a deed of trust or mortgage by one acting as deputy clerk, but who had not been duly appointed, nor had not taken the prescribed oath, is invalid. Suddereth v. Smyth, 35 N. C. 452.

Women as Deputies.—It would seem that women are not disqualified under the constitution nor any statute from holding the office of deputy clerk. See Bank v. Redwine, 171 N. C. 559, 569, 572, 88 S. E. 878; Preston v. Roberts, 183 N. C. 62, 110 S. E. 586; State v. Bateman, 162 N. C. 588, 77 S. E. 768, referred to in Bank v. Redwine, Supra, 171 N. C. 569, 572, 88 S. E. 878.

§ 936. Record of appointment and discharge; copies.—Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index of the same, and shall furnish to the register of deeds of his county a transcript of such record; and such register of deeds shall record the same in the records of deeds in his office and make a cross-index thereof on the general index in his office. When any such deputy clerk is removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "Revoked" and the date of such revocation, and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts. (Rev., s. 899; 1899, c. 235, s. 3.)

§ 937. Responsibility of clerk for deputy's acts.—The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks. (Rev., c. 900; 1899, c. 235, s. 2.)

Liability for Acts.—Both deputy and clerk are liable for an unlawful act committed by the deputy under color of the office. Coltraine v. McCain, 14 N. C. 308. See also, Bank v. Redwine, 171 N. C. 559, 569, 88 S. E. 878.

Deputy's Bond.—This section does not require any bond of a deputy clerk; but, as the clerk is liable for the defaults and misfeasance of his deputies, common prudence dictates that he require bonds of them for his own protection. Such a bond, not being required by law, is not an official bond in the strict sense of that term. When given, however, it is valid as a common-law bond, the clerk individually, and not the public, being the obligee in interest thereunder. The fact that it runs in the name of the clerk as clerk is immaterial. Fidelity, etc., Co. v. Hoyle, 64 F. (2d) 413, 415.

Art. 3. Powers and Duties

§ 938. Powers enumerated.—Every clerk has power—

1. To issue subpœnas to compel the attendance of any witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court.
2. To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office.
3. To issue commissions to take the testimony of any witness within or without this state.
4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.
5. To enforce all lawful orders and decrees, by execution or otherwise, against those who fail

to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the state, and to be returned before him.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state.

7. To preserve order in his court and to punish contempts.

8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

10. To enter judgment in any suit pending in his court in the following instances: judgment of voluntary nonsuit in any case where judgment is permitted by law; and judgment in any suit by consent of parties.

11. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

12. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice.

13. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

14. To take proof of wills and grant letters testamentary and of administration.

15. To revoke letters testamentary and of administration.

16. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

18. To exercise jurisdiction conferred on him in every other case prescribed by law. (Rev., s. 901; Code, ss. 103, 108; C. C. P., ss. 417, 418, 442; 1901, c. 614, s. 2; 1919, c. 140.)

Cross Reference.—As to oaths, see sec. 3293; As to depositions, see secs. 1809-1813; As to process, see secs. 664, 666, 669, 675; As to direction of court papers, sec. 1779; As to probate, secs. 1, 2, 3293, 3305, 3322, 4143; As to administration, secs. 30, 31, 44; As to guardians, secs. 2150-2155, 2158, 2165, 2166, 2187, 2191, 2285, 2286; As to accounts of executors, etc., see secs. 105, 109, 123, 124, 765, 2188. For "Color of his office" construed, see annotations to sec. 927.

Jurisdiction—Limited.—The clerk is a court of very limited jurisdiction—having only such jurisdiction as is given by statute. It has no common law or equitable jurisdiction. McCauley v. McCauley, 122 N. C. 288, 292, 30 S. E. 344.

Same—Corrections.—The clerk has the jurisdiction to correct a mistake in a partition proceeding. Little v. Duncan, 149 N. C. 84, 62 S. E. 770; Wahab v. Smith, 82 N. C. 232. Or in a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, he has the right to set aside the sale and order a resale by showing proper cause. Lovinier v. Pearce, 70 N. C. 168.

Same—Administrators.—The clerk has the power, for good and sufficient cause, to remove an administrator; or for like cause, as necessarily equivalent, to permit him to resign his trust. Tulburt v. Hollar, 102 N. C. 406, 409, 9 S. E. 430; Murrill v. Sandlin, 86 N. C. 54, 55.

It is thus incumbered on the probate judge (now the clerk) to make inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer is to be exercised. Murrill v. Sandlin, supra.

Same—Accounts.—The jurisdiction for auditing accounts of executors, administrators, etc., conferred upon the clerk is an ex-parte jurisdiction of examining the accounts and vouchers of such persons, allowing them commissions, etc., as formerly practiced, and does not conclude legatees, etc., or affect suits inter partes upon the same matters. Heilig v. Foard, 64 N. C. 710.

The words, "audit the account of executors, administrators and guardians," have reference to the duty of examining accounts filed by executors, etc., to see that the account of charges corresponds with the inventories, passing upon the vouchers and striking a balance, after allowing commissions, as under the existing laws. Heilig v. Foard, 64 N. C. 710, 713.

Appeals.—In appeals from the clerk, in that class of cases of which he has jurisdiction in his capacity as clerk, as given under this section, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex Parte Spencer, 95 N. C. 271.

§ 939. Disqualification to act.—No clerk can act as such in relation to any estate, proceeding or civil action—

1. If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

2. If he is so related to any person having or claiming such interest that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him.

3. If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

4. If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

5. If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate. (Rev., s. 902; Code, s. 104; C. C. P., s. 419; 1871-2, c. 196; 1935, c. 110.)

See generally, secs. 3242, 3293, 3299, 3343.

Editor's Note.—This section has been amended by the laws 1921, c. 99, which is itself amended by Laws 1923, c. 14. It is so amended that where the clerk is a devisee, or legatee under the will, a subscribing witness thereunto, or has any interest in the property thereby disposed of, it may be probated by the clerk of the adjoining county, upon a petition filed before him by interested parties. The petition and probate, along with a certified copy of the will shall be returned to, and filed with, the clerk of the original county and there properly recorded. Thereupon, the clerk of the original county is authorized to issue the necessary letters to the personal representative of the deceased. Then the personal representative is entitled to qualify and administer the estate, and the title to the property shall, in all respects, be as valid as if the will had been originally probated in such county.

The legislative intent was to provide a speedy, yet sound and practical method of admitting a will to probate in cases where the clerk is disqualified. This has been accomplished. Whether or not the amendments were intended to change the former practice, in case of interest, and, if so, to what extent, is not so clearly shown. See 1 N. C. L. R. 313.

The amendment of 1935 effected only one change in the section. Prior to the amendment the opening statement read: "No clerk can act as such in relation to any estate or proceeding." Section two of the amenda-

tory act declares it shall apply to pending actions. Section three of the act prescribes that in all cases where the procedure set out in sections 940 and 941 was followed all orders or judgments rendered in civil actions are validated, provided that no action has been instituted attacking the order or judgment.

Clerk Interested.—The clerk is disqualified, both by common law rules and by this section, to act in any cause wherein he is interested. Gregory v. Ellis, 82 N. C. 225, 226; Land Co. v. Jennett, 128 N. C. 3, 37 S. E. 954; White v. Connelly, 105 N. C. 65, 72, 11 S. E. 177.

And probate of a deed by a clerk interested therein is a nullity. Land Co. v. Jennett, supra.

And where he is personally interested in the commissions to be allowed the executors, he is excluded from jurisdiction. Barlow v. Norfleet, 72 N. C. 535, 539.

Same—Judicial and Ministerial Acts.—The act of "admitting to probate" is a judical act, and a clerk is prohibited from acting on a deed or deed of trust in which he is grantor or grantee. White v. Connelly, 105 N. C. 65, 69, 11 S. E. 177; Freeman v. Person, 106 N. C. 251, 10 S. E. 1037; Piland v. Taylor, 113 N. C. 2, 18 S. E. 70; Norman v. Ausbon, 193 N. C. 791, 138 S. E. 162.

But the issuing of a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can be performed by a deputy, or even by the clerk, in a case to which he is a party. White v. Connelly, supra; Evans v. Etheridge, 96 N. C. 42, 1 S. E. 633.

Nor is a clerk incompetent to take acknowledgment of the execution of a deed because he is a subscribing witness to the document. He cannot take **proof** of a deed of which he is the subscribing witness, because he cannot administer oath to himself. Trenwith v. Smallwood, 111 N. C. 132, 134, 15 S. E. 1030.

And it has been the practice in this state for clerks to issue process either for or against themselves. Evans v. Etheridge, 96 N. C. 42, 1 S. E. 633.

Clerk Related to Party.—A clerk is prohibited from acting as such in relation to any estate or proceeding if he is so related to any person having, or claiming to have, such interest that he would by reason of such relationship be disqualified as a juror. Land Co. v. Jennett, 128 N. C. 3, 37 S. E. 954.

But probate and private examination taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N. C. 264, 32 S. E. 715.

§ 940. Waiver of disqualification.—The parties may waive the disqualification specified in subdivisions one, two, three and five of the preceding section, and upon filing in the office such waiver in writing, the clerk shall act as in other cases. (Rev., s. 903; Code, s. 105; C. C. P., s. 420.)

Written Waiver.—The waiver must be in writing and made when the opposing parties are present and capable of objecting. White v. Connelly, 105 N. C. 65, 71, 11 S. E. 177.

Probate a Nullity.—When the probate of a deed is a nullity because the clerk was disqualified to act, the defect is not cured by the approval of the final decree, under which it is made, by the judge of the superior court. Land Co. v. Jennett, 128 N. C. 3, 37 S. E. 954.

§ 941. Disqualification unwaived; cause removed or judge acts.—When any of the disqualifications specified in this chapter exist, and there is no waiver thereof, or when the disqualification does not permit of waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerks of the superior court of an adjoining county in the same district; or may apply to the judge to make and render either in vacation or term time all necessary orders and judgments in any proceeding where the clerk is disqualified, and the judge in such cases is hereby authorized and empowered to make and render any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceeding. (Rev., s. 904; Code, s. 106; C. C. P., s. 421; 1913, c. 70, s. 1.)

§ 942. Disqualification at time of election; judge acts.—In all cases where the clerk of the superior court is executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it is his duty to order the proper record to be made by the clerk, and the accounts to be filed in court. (Rev., s. 905; Code, s. 107; 1871-2, c. 197.)

Action.—The proper practice, in a proceeding against an administrator who at the time was elected clerk, seems to be to make the summons returnable before him, and then, transfer the whole proceeding before the district judge, who will make the necessary orders in the premises. Wilson v. Abrams, 70 N. C. 324.

§ 943. Custody of records and property of office.—1. Receipt from Predecessor. — Immediately after he has given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk refuses or fails within a reasonable time after demand to deliver such records, books, papers, moneys and property, he is liable on his official bond for the value thereof.

2. Transfer to Successor; Penalty.—Upon going out of office for any reason, any clerk of the superior, inferior, or criminal court shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate) all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. In case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, fails to transfer and deliver them as herein directed, he shall forfeit and pay to the state one thousand dollars, which shall be sued for by the prosecuting officer of that court. (Rev., ss. 906, 907; Code, ss. 81, 124; R. C., c. 19, s. 14; C. C. P., s. 142.)

Cross Reference.—As to failure to deliver as a misdemeanor, see secs. 4384, 4385. As to summary remedy, see sec. 356.

Order and Demand.—A person, duly elected clerk of the superior court by the people, needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. Peebles v. Boone, 116 N. C. 58, 21 S. E. 187.

But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge, directing the person temporarily in charge, to deliver the possession of his office to such clerk. Peebles v. Boone, 116 N. C. 58, 60, 21 S. E. 187.

Right of Action.—The right of clerk of a superior court to bring an action against his predecessor on the latter's official

bond to recover the records, money, etc., in his hands, does not rest on any injury done to the plaintiff, but on the ground that the law requires that each successive clerk shall receive from his predecessor all the records, money and property of his office. Peebles v. Boone, 116 N. C. 58, 62, 21 S. E. 187.

Remedy.—When an out-going clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty. O'Leary v. Harrison, 51 N. C. 338, 341.

When Liability Ceases.—When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. Gregory v. Morisey, 79 N. C. 559, 562.

§ 944. Unperformed duties of outgoing clerk. —1. Performance Secured. — When, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk has failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk.

2. Liability on Outgoing Clerk's Bond.— Such portion thereof as may be paid by the county may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relations of the board of commissioners of the county. (Rev., s. 908; Code, s. 87; R. C., c. 19, s 19; 1844, c. 5, s. 6.)

Proceeding Recorded.—Where an outgoing clerk has failed to record a proceeding, the court has the power, and it is its duty, on the application of an interested party, to have such proceeding recorded as of its proper date. Foster v. Woodfin, 65 N. C. 29, 30.

§ 945. Location of and attendance at office.—The clerk shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock a. m. to three o'clock p. m., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit his office. (Rev., s. 909; Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136.)

Forfeiture of Office.—A single failure on the part of a clerk to keep his office open on Monday from 9 a. m. to 4 p. m., for the transaction of probate business (unless such failure is caused by sickness), is a distinct and complete cause for forfeiture of his office. People v. Heaton, 77 N. C. 18.

Quo Warranto.—The forfeiture of office incurred by a superior clerk as herein provided by failing to keep open his office on Monday, can only be enforced by proceedings in the nature of quo warranto. State v. Norman, 82 N. C. 687, 689; People v. Heaton, 77 N. C. 18, 20.

§ 946. Obtaining leave of absence from office. —Upon application of any clerk of the superior court to the judge of the superior court residing in the district in which the clerk resides the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk, showing good and sufficient reason for the clerk to absent himself from his office, the judge may issue an order allowing him to absent himself from his office for such time as the judge may deem proper. But he shall at all times leave a competent deputy in charge of his office during his absence. The order of the judge granting leave of absence shall be filed and recorded in the office of the clerk of the county in which the clerk resides. (Rev., s. 910; 1903, c. 467; 1935, c. 348.)

Editor's Note.—The amendment of 1935 makes the section applicable when application is made by "the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk."

§ 947. To keep fee bill posted. — Every clerk shall keep posted in his office in some conspicuous place the fee bill, for public inspection and reference, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for same. (Rev., s. 2774; Code, s. 3740.)

§ 948. To furnish blank process, bonds and undertakings.—Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them. (Rev., s. 911; Code, s. 3761; C. C. P., s. 559; 1868-9, c. 279, s. 558.)

§ 949. To file papers in proceedings.—The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment. All such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor. (Rev., s. 912; Code, ss. 86, 111; C. C. P., ss. 146, 426.)

Filing Papers.—The fee allowed the clerk for "filing papers," is allowed for the single act of filing all the papers when the case is closed, as herein provided. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

§ 950. To keep records of his office; obtaining originals or copies.—He shall keep in bound volumes a complete and faithful record of all his officials acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor. (Rev., s. 913; Code, s. 82; C. C. P., s. 143; 1868-9, c. 159, s. 4.)

Clerks are required to keep a record, in which shall be recorded all orders and decrees passed in their office, which they are required to make in writing. Gulley v. Macy, 91 N. C. 356, 359.

§ 951. To endorse date of issuance on process. —The clerk shall note on all precepts, process and executions the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do shall forfeit and pay one hundred dollars. (Rev., s. 914; Code, s. 100.)

Action in Name of State.—An action brought against a sheriff, for the penalty herein provided for neglecting to note upon process the day on which it was received, should

be in the name of the state as plaintiff. Duncan v. Philpot, 64 N. C. 479, 480.

Final Process.—This section has no reference to the final process. Wyche v. Newsom, 87 N. C. 144, 145. See also, Person v. Newsom, 87 N. C. 142.

§ 952. To keep books; enumeration. — Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:

1. Summons Docket, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

2. Judgment Docket, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

3. Civil Issue Docket, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

4. Cross-index to judgments, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket.

5. Cross-index of Parties to Actions.—The clerk shall keep an alphabetical index and cross-index of all parties to all action and special proceedings. Upon the issuance of summons or commencement of an ex parte proceeding he shall forthwith index and cross-index the names of all parties to such action or proceeding. When an order is made that any new or additional party be brought into an action or proceeding his name shall forthwith be indexed and cross-indexed by the clerk. The index shall be so arranged that beside each name shall appear a reference to the book and page whereon the action or proceeding will be found upon the summons docket, civil issue docket, special proceeding docket, and judgment docket, or such of said dockets as carry reference to said action or proceeding; and immediately upon said action or proceeding being entered upon any of said dockets the clerk shall cause said index to carry reference thereto upon the index and cross-index as to every party.

6. Record of lis pendens, which shall contain the names of the parties to the action, place where such notice, whether formal or in the pleadings, is filed, the object of the action, the date of indexing, and a sufficient description of the land to be affected, and which shall be cross-indexed.

7. Criminal docket, which shall contain a note of every proceeding in each criminal action.

8. Minute docket of superior court, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

9. Special proceedings docket, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

10. Minute docket of proceedings before clerk, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

11. Record of wills, which shall contain a record of all wills, with the certificate of probate thereof.

12. Record of appointments, which shall contain a record of appointments of executors, administrators, guardians, and collectors, with revocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

13. Record of orders and decrees, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

14. Records of accounts, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

15. Record of settlements, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, commissioners, trustees under assignments for creditors, and guardians.

16. Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

17. Record of justices of the peace, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

18. Record of books, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records, and books returned to him.

19. Cross-index of wills, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each devisor, and all devisees as they are given in the will, together with the date of the probate of such will.

20. Cross-index of executors and administrators, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators made by the courts of their county, showing the name of the appointee, the name of the decedent, and date of appointment.

21. Cross-index of guardians, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

22. Record of fines and penalties, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

23. Lien docket, which shall contain a record of all notices of liens filed in his office, properly indexed, showing the names of the lienor and lienee.

24. Record of appointment of receivers, which shall contain a record of all appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

25. Record of corporations, which shall contain a record of the certificate of incorporation of all corporations charted under general law, with principal office or place of business in his county.

26. Accounts of indigent orphans, which shall contain a record of all receipts from persons for money paid for indigent children.

27. Register of physicians and surgeons, which shall contain a list of the names and places of residence, with date of registration, of all persons registered by him as physicians and surgeons.

28. Register of dentist, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

29. Register of chiropodists, which shall contain a list of the names and places of residence, with date of certificate, of all persons registered by him as chiropodists.

30. Register of trained nurses, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

31. Permanent roll of registered voters, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

32. Record of payment of poll tax, which shall contain a list by townships of all persons certified to him by sheriff or tax collector as having paid their poll tax by May first.

33. Lunacy docket, which shall contain a record of all the examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

34. Record of county treasurer's report, which shall contain an itemized statement of all fines and penalties paid to the county treasurer; which said itemized statement of fines and penalties received by the county treasurer shall be by him reported to the clerk on the first day of January, April, July and October, respectively, of each and every year.

35. Nol. pros. with leave record, which shall contain a record of all cases in which a nolle prosequi with leave is entered in criminal actions, with the term of court at which the order is made, and which shall be cross-indexed.

36. Record of permits to purchase weapons, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons. (Rev., s. 915; Code, ss. 83, 95, 96, 97, 112, 1789; 1893, c. 52; 1899, c. 110; 1903, c. 51; 1901, c. 2, s. 9, 1899, c. 82, 1889, c. 181, s. 4; 1887, c. 178, s. 2; 1903, c. 359, s. 6; 1901, c. 550, s. 3; 1901, c. 89, s. 13; 1899, c. 78, s. 7; 1919, c. 197, s. 4.)

Editor's Note.—Public Laws 1929, c. 88, amended this section as to Durham County only by adding at the end of sub-section five the following: "Provided, that it shall not be necessary to enter upon the cross index of the judgment docket the names of a party or parties against whom or which no liability of any kind is fixed or charged by the judgment."

Purpose.—The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. Edwards v. Cobb, 95 N. C. 4, 8.

Notice of Judgment Docket.—The law prescribes what shall be recorded on the judgment docket, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice. Dewey v. Sugg, 109 N. C. 328, 333, 13 S. E. 923; Holman v. Miller, 103 N. C. 118, 120, 9 S. E. 429.

Civil Issue Docket.—Not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put upon the civil issue docket. Brown v. Rhinehart, 112 N. C. 772, 776, 16 S. E. 840. See also, Brittain v. Mull, 91 N. C. 498; Walton v. McKesson, 101 N. C. 428, 7 S. E. 566.

Minute Docket.—The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made. Walton v. McKesson, 101 N. C. 428, 7 S. E. 566; Guilford v. Commissioners, 120 N. C. 23, 28, 27 S. E. 94.

When Minute Docket Prevails.—While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail. Walton v. McKesson, 101 N. C. 428, 7 S. E. 566.

Record of Fiats.—Clerks are required to record in general order books copies of all fiats made by them. Perry v. Bragg, 111 N. C. 159, 164, 16 S. E. 10.

Evidence of Appointment.—The record of appointments is admissible as evidence to show a guardian's appointment. Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

Sufficient Notice of Lien.—A notice of a lien filed on the lien docket should go into details sufficiently so as to give reasonable notice to all persons of the character of the claim and the property upon which the lien is attached. Fulp v. Power Co., 157 N. C. 157, 160, 72 S. E. 867. See also Cook v. Cobb, 101 N. C. 68, 70, 7 S. E. 700; Cameron v. Lumber Co., 118 N. C. 266, 24 S. E. 7.

Treasurer's Report as Evidence.—The record of county treasurer's report is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of statements therein made. Davenport v. McKee, 98 N. C. 500, 4 S. E. 545.

§ 953. To notify commissioners of insolvency of surety company in which county officer bonded.—Every clerk of the superior court shall furnish the chairman of the board of county commissioners with all notifications furnished him, in accordance with section 6380 under the article Fidelity Insurance of the Chapter Insurance, by the insurance commissioner, that any surety company in which any officer of the county is bonded is insolvent or in imminent danger of insolvency. (Rev., 295.)

Art. 4. Reports

§ 954. List of justices to secretary of state.—The clerk of the superior court of each county in

which justices of the peace are not elected by the qualified voters thereof on the first Monday in January preceding each regular session of the general assembly shall certify to the secretary of state a correct list of all justices of the peace in office in his county, the township in which each resides, the term of office of each, time of election or appointment, and when the respective terms of office of each expires. He shall also report the names of those elected or appointed justices of the peace, but who have failed to qualify, and when their terms of office began and the length thereof. (Rev., s. 916; Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326.)

§ 954(a). List of attorneys-at-law to commissioner of revenue.—It shall be the duty of the Clerk of the Superior Court in each county of the State on or before the first day of May of each year to certify to the Commissioner of Revenue of the State of North Carolina the names and addresses of all Attorneys-at-Law located within the county and engaged in the practice of law. (1931, c. 290.)

§ 955. Criminal statistics to attorney-general.—Within twenty days after the adjournment of any term of the superior court at which criminal causes were triable, the clerk thereof shall transmit to the office of the attorney-general of the state a duly certified statement of the number of indictments finally disposed of at such court, specifying the number for each separate offense, the number on which convictions were had and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial, and also the name, age, occupation, sex, race and offense of every person convicted at such court, or pleading guilty of any offense, together with such other items of information in relation to such convicts and their offenses as the attorney-general shall require, on a form prescribed by him. For every neglect of any clerk of said court he shall forfeit the sum of fifty dollars, to be adjudged in the superior court of Wake County on the motion of the attorney-general, whose duty it is hereby made to make such motion at the first term of said court held after such neglect of any clerk. (Rev., s. 917; 1889, c. 341, ss. 1, 2, 3.)

Art. 5. Money in Hand; Investments

§ 956. Public funds to be reported to county commissioners.—On the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority upon ten days' written notice, clerks of the superior courts shall make an annual report of all public funds which may be in their hands. The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include a statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths. (Rev., s. 918; 1891, c. 580; 1931, c. 156.)

Editor's Note.—The Act of 1931 inserted the words: "upon ten days' written notice" in the first sentence of this section.

Cross Reference.—As to failure to report, or a false report, as a misdemeanor, see sec. 4386. For construction of "color of his office," see sec. 927.

Method of Procedure.—Where a clerk has admitted money to be due in the manner prescribed by this section, he can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years. Summey v. Johnston, 60 N. C. 98.

Prima Facie Case of Correctness.—This section raises a prima facie case of the correctness of the annual report of the clerk only when the statute is substantially complied with. Gilmore v. Walker, 195 N. C. 460, 142 S. E. 579.

§ 957. Approval, registration, and publication of report.—The board of commissioners shall refer all itemized statements made by the clerks of the superior courts to a special committee of their board, who shall compare the same with the records of the clerk's office from which the report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which book shall be styled Record of Official Reports, with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "Approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. The register shall also cause a copy of the report to be published one time in some newspaper of general circulation published in the county of the register and also posted at the courthouse door within twenty days after filing the reports; and if no newspaper is published in the county the posting of the report at the courthouse door shall be a sufficient publication. The cost of publishing the report shall be paid by the county. (Rev., s. 919; Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; 1874-5, c. 151; 1876-7, c. 276.)

Cited in Gilmore v. Walker, 195 N. C. 460, 142 S. E. 579.

§ 958. Report compelled by commissioners.—If any clerk fails to report, or if after a report has been made the board of county commissioners have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action. (Rev., s. 920; Code, s. 92; 1891, c. 580, s. 2; 1874-5, c. 151, s. 3; 1876-7, c. 276.)

§ 959. Payment to persons entitled.—The said clerks shall, on or before the first day of January in every year after statements required in the foregoing sections are made, account with and pay to the persons entitled to receive the same all

such balances reported as aforesaid to be in their hands. (Rev., s. 921; Code, s. 1865; R. C., c. 73, s. 2; 1823, c. 1186, s. 2; 1831, c. 3, ss. 1, 3; 1893, c. 14, s. 1.)

Account.—"Account" means a statement in writing of debts and credits, or of receipts and payments, and when payments or settlement is intended, additional words are used. State v. Dunn, 134 N. C. 663, 668, 46 S. E. 949.

§ 960. Unclaimed fees of jurors and witnesses paid to school fund.—All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports. (Rev., s. 922; 1891, c. 580, s. 4; 1893, c. 14, s. 3.)

§ 961. Use by public until claimed. — The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner. (Rev., s. 923; Code, s. 1869; R. C., c. 73, s. 6; 1828, c. 41, s. 1.)

§ 962. Payment of money for indigent children and persons non compos mentis. — When any moneys in the amount of three hundred dollars or less are paid into court for any minor, indigent or needy child or children for whom no one will become guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. That in all cases where a minor child is now or may hereafter be the beneficiary of any policy of life insurance and the sum due to said minor child by virtue of any such policy does not exceed three hundred dollars, the insurance company which issued said policy may pay the sum due thereunder to the clerk of the superior court of the county where said minor child resides whose duty it shall be to receive it, and said clerk shall issue and deliver to such insurance company his receipt for the sum so paid, which shall be a complete release and discharge of said company from any and all liability to said minor child under and by virtue of any such policy of insurance. Moneys so paid to said clerk shall be held and disbursed by him in the manner and subject to the limitations provided by this section. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession $300.00 or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (Rev., s. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91; 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15 s. 1; 1933, c. 363.)

Cross References.—As to application of section when judge does not provide for the disbursement upon an order confirming partition, see § 2180 and note thereto.

Editor's Note.—This section was amended by the Laws 1924, c. 1 to apply to all funds contemplated by it, which are now, or may come into the hands of the clerk of the superior court, when the amount thereof does not exceed one hundred dollars ($100) for each child who may be entitled to share therein. The Act of 1927 added a proviso relating to persons non compos mentis which was struck out by the Act of 1929. The latter Act changed the word "one" formerly appearing in line two to "three." See note under sec. 962(a).

The last sentence of the section, relating to payment of $300 or less held for a "minor child or indigent child, or incompetent or insane person," was added by Public Laws 1933, c. 363.

§ 962(a). Limitation on investment of trust funds.—It shall be unlawful for the clerk of the superior court of any county in the State of North Carolina receiving any money by color of his office to apply or invest any of said money except as hereinafter provided. (1931, c. 281, s. 1.)

Editor's Note.—The act from which this and the six following sections are codified, was apparently intended to supply the need indicated in William v. Hooks, 199 N. C. 489, 154 S. E. 828, wherein the court held that "there is no mandatory requirement of law imposing upon the clerk of the Superior Court the express duty of investing funds in his hands belonging to minors." The act is broader than that, however, and applies to all funds held by the clerk as such or as receiver or trustee for any infant or person non compos mentis. It should be read in connection with §§ 153, 956 and 5027. The first, in part, and the last, in part, would seem to be impliedly repealed by the act. The effective reform inaugurated by the act suggests the need of a general overhauling of the law relating to investments by fiduciaries. Apparently no law regulates investments by saving banks. Sections 2308 and 4018 are wholly permissive. Section 6334, as to insurance companies, is, aside from this new statute, the only restrictive regulation. Independently of statute, the Supreme Court has consistently adhered to the rule that a fiduciary, in handling investments, is required only to exercise good faith and the care that a prudent man, under the particular circumstances, would use in the management of his own affairs. In Sheets v. Flynt Tobacco Co., 195 N. C. 149, 141 S. E. 355, apparently the latest decision in this field, a guardian, without an order of court, invested all of the funds of his ward in the preferred stock of a local tobacco company, purchased from the company. The stock depreciated. The wards attempted to recover the amount of the investment, less dividends, from the company. The court held that on the record the company was not liable, but intimated that the company and the guardian might be liable if the guardian had not complied with the test of good faith and due care. This case should be compared with Mobley v. Phinizy (Ga. App.), 155 S. E. 73, where a trustee, without an order of court, and in violation of a Georgia restrictive statute, had invested funds in bank stocks. The bank failed. The trustee was held responsible both to the beneficiaries and to the Superintendent of Banks. 9 N. C. Law Rev. 399, 400.

For act applicable in Cleveland County only, see Public Laws 1933, c. 110.

§ 962(b). Investments prescribed; funds from lands of infants and persons non compos mentis. —The clerk of the superior court of any county in the State may in his discretion invest moneys secured by color of his office or as receiver in any of the following securities:

(a) By loaning the same upon real estate security, such loans not to exceed fifty per cent (50%) of the assessed tax value; and said loans

when made to be evidenced by a note, or notes, of the borrower and secured by first mortgage or deed of trust.

(b) United States Government bonds.

(c) United States Government Postal Savings Certificates.

(d) North Carolina State bonds.

(e) North Carolina county or municipal bonds which are approved by the Sinking Fund Commission.

(f) Certificates of deposit for on time deposit with any bank or trust company where such protection is furnished as required in section four of this act.

(g) When the clerk of the superior Court as receiver or trustee for any infant or **non compos mentis** shall come into the possession of any lands for the use of such person and it shall be necessary to make investments of the funds of such person to manage or cultivate said lands, the clerk may make such investments as are necessary for said purposes: Provided, the same is approved by the resident judge of the superior court or the judge holding the court of the district. (1931, c. 281, s. 2.)

Editor's Note.—In the investment of funds of infants or persons non compos mentis used in the management or cultivation of lands held for them by the clerk as receiver or trustee, he is unlimited by the items mentioned in this section. 9 N. C. Law Rev. 399.

For act applicable in Cleveland County only, see Public Laws 1933, c. 110.

§ 962(c). Securing bank deposits.—It shall be the duty of the clerk of the superior court of any county in the State to require of any bank or trust company, wherein he may deposit money placed with him in trust, a corporate surety bond in an amount sufficient to protect such deposits, but in lieu of such corporate surety bond, the clerk may require such bank to furnish bonds of the United States Government, North Carolina State bonds, or North Carolina county or municipal bonds which have been approved by the Sinking Fund Commission. (1931, c. 281, s. 3.)

§ 962(d). Inspection of records by local government commission; report to solicitor of mismanagement. — The County Government Advisory Commission, or its successors, is hereby authorized and empowered to inspect the records of any clerk of the superior court in the State for the purpose of ascertaining that such clerk is complying with the requirements of this act and if, in the course of such inspection, it is found that such clerk has failed to comply with the requirements of this act, it shall be the duty of the County Government Advisory Commission, or its successors, to report such findings to the solicitor of the district in which the county is located and said solicitor shall proceed to prosecute as hereinafter provided. (1931, c. 281, s. 4.)

Editor's Note.—By Public Laws, 1931, c. 60, the Local Government Commission is the successor of the County Government Advisory Commission. 9 N. C. Law Rev. 398.

§ 962(e). Inspection and audit by county auditors or accountants; reports of audits.—It shall be the duty of the County Auditor or County Accountant of any county to inspect and audit the records and accounts of the Clerk of the Superior Court of the county for the purpose of ascertaining that such clerk is complying with the requirements of this act and that such clerk is properly safeguarding and accounting for all funds of every nature and character which have come into his hands by virtue of his office; such audits to be made and a report thereof made by the County Auditor or County Accountant to the board of county commissioners of the county and to the County Government Advisory Commission or such other governmental agency as shall succeed to the rights and duties of the County Government Advisory Commission. (1931, c. 281, s. 6.)

See note under § 962(d).

§ 962(f). Liquidation of present funds within year. — It shall be the duty of the clerk of the superior court of any county in the State, who shall have funds invested other than as provided for in this act, to liquidate same within one year from the passage of this act: Provided, however, that upon approval of the resident judge of his district, the clerk may extend from time to time, the time for sale or collection of any such investments; that no one extension shall be made to cover a period of more than one year from the time the extension is made. (1931, c. 281, s. 7.)

§ 962(g). Violation of §§ 962(a)-962(f) a misdemeanor. — The clerk of the superior court of any county in the State who shall have violated the provisions of §§ 962(a)-962(f) shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of this court. (1931, c. 281, s. 5.)

CHAPTER 14

COMMISSIONERS OF AFFIDAVITS AND DEEDS

§ 963. Appointment by governor; term; oath. —The governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. (Rev., ss. 926, 927; Code, ss. 632. 633.)

§ 964. Record of appointments; certified copies evidence.—It is the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner is filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the state, who shall record the certificate of the secretary at length. All removals of commissioners by the governor, and the names of all commissioners whose commissions have expired by law, and which have not been renewed,

shall be recorded and certified in like manner. A certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the secretary of state, shall be sufficient evidence of the appointment or removal of such commissioner. (Rev., s. 928; Code, s. 634.)

It is the duty of the Secretary of State forthwith upon the appointment of such commissioners, to certify the same to the several clerks of the superior courts of the State, and, in like manner, to certify to the said clerks all removals of commissioners, and of all whose commissions have expired. Evans v. Etheridge, 99 N. C. 43, 5 S. E. 386, 388.

§ 965. List of appointments prepared and published by secretary of state.—The secretary of state shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the state, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death. (Rev., s. 929; Code, ss. 635, 636, 637, 639.)

§ 966. Published list conclusive.—The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof. (Rev., s. 930; Code, s. 638.)

§ 967. Powers of such commissioners. — The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. Such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this state. The commissioners also have full power and authority to administer an oath or affirmation to any person willing or desirous to make it before him, to take depositions, and to examine the witnesses under any commission emanating from the courts of this state, relating to any cause depending or to be brought in said courts. Every deposition, affidavit, or affirmation made before him is as valid as if taken before any proper officer in this state. (Rev., ss. 926, 927; Code, ss. 632, 633.)

Editor's Note.—In the case of De Courcy, etc., Co. v. Barr, 45 N. C. 181, the court, construed section 2, chapter 21, of the Revised Statutes, as empowering commissioners of affidavits to take the acknowledgments of nonresidents only, upon the ground that the section declared that the acknowledgment should have "the same power and effect," etc., if the same had been made "before some of the judges of supreme jurisdiction in any other state." Section 5, chapter 37, of the Revised Statutes, authorizes judges of courts of supreme jurisdiction in other states to take the acknowledgment of grantors residing "in any of the United States other than this state." The Revised Code was enacted at the next session of the General Assembly held after that decision was rendered, and the law (as embodied in section 2, chapter 21, Rev. Code) seems to have been drawn with the purpose of enlarging the powers of commissioners of affidavits, and enabling them to take and certify acknowledgments of grantors of deeds, whether they were nonresidents, or residents of this state temporarily absent from the state. The section last mentioned has been in force since its enactment by the Legislature of 1854-55, being almost the same as section 633 of the Code. The latter gives to acknowledgments, taken before commissioners of affidavits, "the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this state." It does not seem that any serious doubt has been entertained as to the true meaning of the law now in force since the case of Simmons v. Gholson, 50 N. C. 401, was decided. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of executions or the acknowledgment of grantors, who may be in the state for which they were appointed (whether there temporarily or as residents), as to the execution of deeds conveying land or other property located in this state that are required or allowed by law to be registered—that is, given by law to the clerk of the superior court of the county in which the land lies but the clerk has power to adjudge that the execution has been properly proven and order the registration, while the commissioner is functus officio, as to any given deed, when he has attached to it his certificate as to proof or acknowledgment of its execution. Evans v. Etheridge, 99 N. C. 43, 5 S. E. 386; James, etc., Co. v. Pegram, 102 N. C. 540, 543, 9 S. E. 412.

Scope of Commissioner's Authority.—Under the section commissioners of affidavits have full authority to take the acknowledgment, within the states for which they are appointed, of the grantors to any deed or conveyance of lands in this state, and to take the private examination of femes covert. James, etc., Co. v. Pegram, 102 N. C. 450, 9 S. E. 412; Maphis v. Pegram, 107 N. C. 505, 12 S. E. 235.

Commissioners of affidavits are empowered by the section to take acknowledgments of deeds in other states, by residents of both this state and that for which such commissioners are appointed. Barcello v. Hapgood, 118 N. C. 712, 717, 727, 24 S. E. 124.

Acknowledgments of Residents Visiting in Another State.—Where a man and his wife, being residents of this state, duly acknowledged a deed before a commissioner in Virginia, where they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the superior court of the county in which the land was situated, and the deed duly recorded, the registration was valid. James, etc., Co. v. Pegram, 102 N. C. 540, 9 S. E. 412; Maphis v. Pegram, 107 N. C. 505, 12 S. E. 235.

Seal Unnecessary.—A commissioner of deeds for this state, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this state. Johnson v. Duvall, 135 N. C. 642, 47 S. E. 611; Sluder v. Wolf Mountain Lumber Co., 181 N. C. 69, 106 S. E. 215.

Acknowledgment a Judicial Act.—In this state it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a commissioner is a judicial, or at least a quasi judicial, act. This was laid down by Pearson, J., in Decourcy, etc., Co. v. Barr, 45 N. C. 181; Long v. Crews, 113 N. C. 256, 257, 18 S. E. 499.

Sufficient Verification.—An affidavit upon which an application for a provisional remedy is based is sufficiently verified when made before a commissioner for this state resident in another state and authenticated by his official signature and seal. Young v. Rollins, 85 N. C. 485.

§ 968. Powers of clerks of courts in other states.—Every clerk of a court of record in any other state has full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this state. (Rev., s. 931; Code, s. 640.)

As to probate and registration by officials of the United States, foreign countries, and sister states, see sec. 3294.

Authority of Clerks to Act.—The section confers upon clerks of courts of record in other states the powers both of commissioners of affidavits and of deeds and of commissioners regularly appointed by the courts, and the courts will take judicial notice of their seals. Barcello v. Hapgood, 118 N. C. 712, 727, 24 S. E. 124; Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201.

§ 969. Clerks and notaries to take affidavits.—The clerks of the supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the state; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notarial seal. (Rev., s. 925; Code, s. 631.)

Judicial Notice of Seals.—Courts take judicial notice of the seals of the courts of another state for the purpose of declaration of the will of the legislature. Kent, Vol. 1, just as they do of the seals of foreign courts of admiralty and notaries public. Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201.

Verification of Pleadings Before Clerk.—A verification of a pleading made before the clerk of the Hustings Court of Richmond, Virginia, and authenticated by his seal, is valid. Hinton v. Life Ins. Co., 116 N. C. 22, 21 S. E. 201.

CHAPTER 15

COMMON LAW

§ 970. Common law declared to be in force.—All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state. (Rev., s. 932; Code, s. 641; R. C., c. 22; 1715, c. 5, ss. 2, 3; 1778, c. 133.)

For more particular instances in which the common law of England has been held a part of the organic law of this state, see 3 N. C. Enc. Dig. 157.

General Considerations.—The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. Kent, Vol. 1, P. 471; Kansas v. Colorado, 206 U. S. 46, 96, 51 L. Ed. 956.

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs, immemorial antiquity, or from the judgments and decrees of the courts recognizing. Affirming and enforcing such usages and customs. Black Law Dict., P. 232; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 102, 45 L. Ed. 765.

The term "common law" refers to the common law of England and not of any particular state. Eidman v Martinez, 184 U. S. 578, 46 L. Ed. 697.

So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. State v. Mitchell, 202 N. C. 439, 444, 163 S. E. 581.

Vested Rights in Common Law.—A person has no property, no vested interest, in any rule of common law. Hurtado v. California, 110 U. S. 516, 532, 28 L. Ed. 232.

Section 8028 Part of Same Act.—This section declaring the common law to be in force, first enacted in North Carolina in 1715, re-enacted in 1778, and successively with each complete re-enactment of our statute law, and finally in 1919, must be construed as a part of the same Act as sec. 8028. Price v. Slagle, 189 N. C. 757, 128 S. E. 161, 166.

Reference to Debts Due to State Abrogated.—The English common law which gave a debt due to the sovereign a preference over the debts due to others, is abrogated by this section, and is not in force as applied to a debt due to this state. This on the principle that the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. Corp. Com. v. Trust Co., 193 N. C. 513, 137 S. E. 587.

Right of Bail in Capital Cases.—At common law bail might be granted in capital cases only by a high judicial officer upon thorough security of the facts and great caution. This right though once modified by the old constitution against its existence in felony cases where the proof was evident and the presumption was great, now prevails in this state as it existed at common law, since that Constitution is superseded by the present Constitution which contains no provisions which qualify the right. In England the power to bail was exercised by the King's superior courts of justice; and in this state the power is conferred upon the justices of the Supreme Court, judges of the superior and criminal courts. State v. Herndon, 107 N. C. 934, 941, 12 S. E. 268.

Exemption of Attorneys from Arrest.—The common law exemption of an attorney from arrest in a civil action, should, under our institutions and because of absoluteness by nonusage, not prevail, except where the attorneys are actually in attendance upon court in the due course of their employment as attorneys. Greenleaf v. Bank, 133 N. C. 292, 296, 45 S. E. 638.

Medietate Jury.—The statute, 28 Ed., VIII, cl. 13, in England, giving a jury de medietate, is not in force in this state. State v. Antonio, 11 N. C. 200.

Percolating Waters.—The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and the English common law doctrine to the contrary is inapplicable under this section. Rouse v. Kinston, 188 N. C. 1, 123 S. E. 482.

Habeas Corpus.—It is an admitted principle of common law that every court of record of superior jurisdiction has the power to issue the writ of habeas corpus. This power is preserved in this state and can be exercised by all courts of record of superior jurisdiction. In re Bryan, 60 N. C. 1, 42.

Forfeiture for felony which was the established rule at common law, has had no force in this state since 1778. White v. Fort, 10 N. C. 251, 264.

Exemption from Civil Process.—The common law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this state, as suitors or witnesses, was not repealed by implication by sections 1808, 2328. Cooper v. Wyman, 122 N. C. 784, 29 S. E. 947.

Survivorship; Husband and Wife Tenants by Entireties.—The common law doctrine of survivorship between husband and wife as tenants by entireties has not been changed by statute and is in force in this state. Dorsey v. Kirkland, 177 N. C. 520, 99 S. E. 407.

Presumption as to Common Law in Sister States.—Where there is no evidence to the contrary, the presumption is that the common law is in force in a sister state. Hipps v. Southern R. Co., 177 N. C. 472, 99 S. E. 335.

Presumption of Death.—The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. Steele v. Metropolitan Life Insurance Co., 196 N. C. 408, 145 S. E. 787.

Limitation Over in Personal Property.—The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this state, under this section and has been recognized by judicial decision and by statutory implication. Speight v. Speight, 208 N. C. 132, 179 S. E. 461.

Cited in Hinton v. Hinton, 196 N. C. 341, 342, 145 S. E. 615; Rhodes v. Collins, 198 N. C. 23, 26, 150 S. E. 492; Grantham v. Grantham, 205 N. C. 363, 366, 171 S. E. 331.

CHAPTER 16

CONSTABLES

§ 971. Election and term.—In each township there shall be a constable, elected by the voters thereof, who shall hold his office for two years. (Rev., s. 933; Const., Art. 4, s. 24.)

For more particular treatment of the law relating to constables in general, see 11 N. C. Enc. Dig. 242.

The provision of Art. IV, section 25 of the Constitution that officers shall hold office until their successors are qualified, does not embrace the office of constable. State v. McLure, 84 N. C. 153.

§ 972. Oaths to be taken.—All constables, before they shall be qualified to act, shall take before the board of county commissioners the oaths prescribed for public officers, and also an oath of office. (Rev., s. 934; Code, s. 642; R. C., c. 24, s. 8.)

§ 973. Bond; where registered; how fees paid.—The board of commissioners of each county shall require of each constable, elected or appointed for a township, on entering upon the duties of his office, to give a bond with good surety, payable to the state of North Carolina, in a sum not exceeding one thousand dollars, conditioned as well for the faithful discharge of his duty as constable as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same may be due. Said bond shall be duly proved and registered and, after registration, filed in the office of the register of deeds; and certified copies of the same from the register's office shall be received and read in evidence in all actions and proceedings where the original might be. The fees for proving and registering the bond of constable shall be paid by the constable. In Stanly County the fees shall be paid by the county. (Rev., s. 302; Code, s. 647; R. C., c. 24, s. 7; 1818, c. 980; 1820, c. 1045, s. 2; 1833, c. 17; 1869-70, c. 185; 1899, c. 54, s. 52; 1891, c. 229.)

See §§ 324 et seq. and the notes thereto.

No Formal Condition.—This section does not prescribe any formal condition of a constable's bond. Holcomb v. Franklin, 11 N. C. 274, 275.

Liability Where No Execution Issued.—The securities on a constable's bond are accountable for his default in paying the moneys collected, even though no execution was issued for the purpose of collecting the same. Holcomb v. Franklin, 11 N. C. 274, 277.

Failure to Pay over Money.—Where a claim against a nonresident of the state, but subject to a single justice's jurisdiction, was put into a constable's hands for collection, and he collected the money, it was held that a failure to pay over such money on demand was a breach of his official bond. Dunton v. Doxey, 52 N. C. 222, distinguishing Dade v. Morris, 7 N. C. 146.

Money in Excess of Amount of Execution.—Where a sale of property under execution is made by a sheriff or a constable, and the property brings more than the amount of execution, it is the duty of such sheriff or constable to see that the excess is paid to the owner of the property. If he fails to do so, he is liable on his official bond. State v. Reed, 27 N. C. 357.

Failure to Collect.—Where a person put into the constable's hands for collection a note, the amount of which exceeded the jurisdiction of a justice of the peace, and the constable procured the maker to substitute for it two notes, each within the jurisdiction of a justice, and afterwards failed to collect the same when he might have done so, it was held that he was liable on his bond. State v. Stephens, 25 N. C. 92.

Failure to Return Uncollected Notes.—Where a constable received notes to collect, and for want of time did not collect them before his term of office expired, and afterwards refused to deliver them up, it was held that his surties were liable therefor on his official bond. State v. Johnson, 29 N. C. 77.

Constable Becoming Surety.—If an insolvent constable become surety for stay of execution committed to him for collection, it is a breach of his bond. The law requires him to take responsible sureties. Governor v. Davidson, 14 N. C. 361. See also, Governor v. Coble, 13 N. C. 489.

Necessity of Demand.—In an action upon a constable's bond for failing to pay over money collected by him, it is necessary to prove a demand on him. White v. Miller, 20 N. C. 50.

Where negligence in failing to collect is the breach assigned in a suit on a constable's bond, no demand is necessary. Nixon v. Bagby, 52 N. C. 4.

Defense to Suit on Constable's Bond.—It is a sufficient defense to a suit on a constable's bond for failing to return a note given him for collection that the note had been sued and judgment obtained upon it. The note is thus sufficiently accounted for. Miller v. Pharr, 87 N. C. 396. See also, State v. Hooks, 33 N. C. 371.

Limitation of Action.—An action by warrant against a constable's sureties to recover moneys collected by a constable by virtue of his office, can only be barred by the same length of time that bars an action on the bond. Wilson v. Coffield, 27 N. C. 513.

Parties.—Where a debt is due to A., and he places it in the hands of a constable for collection, A. is the only person who can maintain, as relator, an action on the official bond of the constable for a breach of duty, notwithstanding A. may have afterwards assigned his interest in the debt to another. Governor v. Deavor, 25 N. C. 56.

Nature of Damages.—In an action on the official bond of a constable for his failure to collect notes placed in his hands for collection, the plaintiff is entitled to recover only nominal damages, unless he shows some actual injury sustained. State v. Skinner, 25 N. C. 564.

§ 974. Special constables.—For the better executing any precept or mandate in extraordinary cases, any justices of the peace may direct the same, in the absence of or for want of a constable to any person not being a party, who shall be obliged to execute the same under like penalty that any constable would be liable to. (Rev., s. 935; Code, s. 645.)

Decision of Justice Conclusive as to Extraordinary Case.—The decision of the justice of the peace is conclusive as to the existence of an "extraordinary case" for which he is, under this section, authorized to appoint anyone a special constable to execute his mandate. State v. Wynne, 118 N. C. 1206, 1208, 24 S. E. 216; State v. Armistead, 106 N. C. 639, 641, 10 S. E. 872.

However, while what has been stated in the preceding paragraph is true, it is always well to state that the person specifically appointed is so appointed for the want of a regularly constituted officer; as the section does not contemplate the appointment of special constables except on "extraordinary cases." State v. Dula, 100 N. C. 423, 428, 6 S. E. 89.

Defective Deputation of Special Officer.—Though the process be defective because it is not signed, or the deputation of the special officer is not in writing, as this section by fair intendment would seem to require, the defect may be waived by the defendant by his appearance before the court. In such a case, whatever may be the rights of the defendant making the arrest, the validity of the judgment is not thereby affected. State v. Cale, 150 N. C. 805, 63 S. E. 958.

Powers and Duties of Special Constables.—When a special constable is appointed under this section, in writing and without words restricting his authority, it confers upon him a general power to serve all processes and perform all the duties in regard to the particular case as those of a regular constable. State v. Armistead, 106 N. C. 639, 10 S. E. 872.

What Validity of Arrest Dependent upon.—The validity of the prisoner's arrest by the special constable depends upon the validity of the officer's deputation and not upon the sufficiency of the mittimus which is to terminate his duties. State v. Armistead, 106 N. C. 639, 640, 10 S. E. 872.

In Civil Actions.—A justice of the peace has no authority to depute a special officer to serve process in a civil action. McKee v. Angel, 90 N. C. 60.

§ 975. Vacancies in office.—Upon the death, failure to qualify or removal of any constable out of the township in which he was elected or appointed constable, or upon the failure of the voters of a township to elect a constable as required in section nine hundred and seventy-one of the consolidated statutes, the board of commissioners may appoint another person to fill the vacancy, who shall be qualified and act until the next election of constables. (Rev., s. 936; Code, s. 646; R. C., c. 24, s. 6; 1925, c. 206.)

Editor's Note. — The clause providing for appointment in case of failure to elect was inserted by the Public Laws of 1925. By the terms of the amendment it does not apply to Washington County.

County commissioners have the power to fill vacancies under the Constitution, Art. IV, section 24. State v. McLure, 84 N. C. 153.

§ 976. Powers and duties.—Constables are hereby invested with and may execute the same power and authority as they have been by law heretofore vested with, and have executed; and,

in discharge of their duties, they shall execute all precepts and processes of whatever nature to them directed by any justice of the peace or other competent authority within their county or upon any bay, river, or creek adjoining thereto; and the said precepts and processes shall be returned to the magistrate, or other proper authority. (Rev., s. 937; Code, s. 643; R. C., c. 24, s. 9.)

See generally, 11 N. C. Dig. 242.

Common Law Rule Not Changed.—This section and section 3936 do not change the common law rule that an escape convict may be rearrested, in any county of the State without new process, by the officer in charge of him. State v. Finch, 177 N. C. 599, 99 S. E. 409.

Effect of Constitutional Requirement.—Section 24, Article IV, of the Constitution of North Carolina, was not meant to restrict the powers and duties of the constables to the township in which they were elected, but to intersperse the constables throughout every part of the county. State v. Corpening, 207 N. C. 805, 806, 178 S. E. 564.

How Process Addressed to Officer.—To make a valid service of process from the superior courts by constables, the same should be specially addressed to such officer by his official title. Carson v. Woodrow, 160 N. C. 143, 147, 75 S. E. 996.

§ 977. To execute notices within justice's jurisdiction.—Constables shall likewise execute, within the places aforesaid, all notices tendered to them which are required by law to be given for the commencement or in the prosecution of any cause before a justice of the peace; and the service thereof shall be made by delivering a copy to the person to be notified or by leaving a copy at his usual place of abode, if in the jurisdiction of the constable, which service, with the time thereof, he shall return on the notice, and such return shall be evidence of its service. On demand they shall deliver the notice to the party at whose instance it was issued. (Rev., s. 938; Code, s. 644; R. C., c. 24, s. 10.)

Town Constable's Authority to Serve Papers Other Than Process.—A town constable is given no authority to serve any papers for the superior court except process, and that only when expressly directed to him by the court. Forte v. Boone, 114 N. C. 177, 19 S. E. 632.

CHAPTER 17

CONTEMPT

§ 978. Contempts enumerated; common law repealed.—Any person guilty of any of the following acts may be punished for contempt:

For an exhaustive treatment of the more particular phases of the law of contempts, see 3 N. C. Enc. Dig. 355.

Editor's Note.—It is essential for an effective administration of justice in an orderly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See Snow v. Hawkes, 183 N. C. 365, 111 S. E. 621; Ex parte McCown, 139 N. C. 95, 107, 51 S. E. 957.

These powers, however, as they existed at common law, while they may not be abrogated, may be reasonably regulated by legislation. See In re Robinson, 117 N. C. 533, 23 S. E. 453. Thus, this and the following sections are regulatory legislation upon the subject, and being in accord with modern doctrine, cannot be assailed on the ground of unconstitutionality. See In re Brown, 168 N. C. 417, 84 S. E. 690; In re Oldham, 89 N. C. 23, 26.

The enumeration of the acts punishable for contempt under this section is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See In re Odum, 133 N. C. 250, 252, 45 S. E. 569.

For a masterly opinion on the history, nature, and extent of the power of courts to punish for contempt, see In re Brown, 168 N. C. 417, 84 S. E. 690, and Ex Parte McCown, 139 N. C. 95. 51 S. E. 957.

Construed Strictly.—This section should be strictly construed as a criminal statute. West v. West, 199 N. C. 12, 13, 153 S. E. 600. See also In re Hege, 205 N. C. 625, 630, 172 S. E. 345.

Definition.—Contempt is a willful disregard of the authority of a court of justice, or a legislative body or disobedience to its lawful orders. Black Law Dist.

Nature and Purpose of Proceedings.—The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. In The Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey. See In re Chiles, 22 Wall, 157, 22 L. Ed. 819; Bessette v. Conkey Co., 194 U. S. 324, 337, 48 L. Ed. 997.

Nature of Offense.—A contempt proceeding is sui generis. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action. In The Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

Facts Must Be Found and Filed.—In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on those findings. In re Odum, 133 N. C. 250, 252, 45 S. E. 569.

Inherent Powers Incident to Punish for Contempt.—This and the following sections regulating proceedings for contempt confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. State v. Little, 175 N. C. 743, 94 S. E. 680.

The power to punish for contempt is inherent in all courts. Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405.

Not Repugnant to Principle of Due Process.—Summary proceedings for contempt, in which there is no right of appeal or trial by jury or removal before another judge, are not within the constitutional prohibition contained in the due process clause. The power to punish summarily for contempt has existed at common law "as far as the annuals of the law extends." State v. Little, 175 N. C. 743, 748, 94 S. E. 680.

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

Must Be in Presence of the Court.—A wilful disobedience of the process or order of the superior court to desist from obstruction of a public road is not a contempt committed within the immediate presence or view of the court. In re Parker, 177 N. C. 463, 99 S. E. 342. But see, clause 4 of this section.

Nature of the Acts Punishable for Contempt.—Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough, designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business presently before it. State v. Little, 175 N. C. 743, 94 S. E. 680.

Protection Extended to Officers of Court, Witnesses, etc.—It is an act of contempt to interfere with the functioning of the business not only of the judge but also of all the officers of the court, and persons such as attorneys, jurors and witnesses, who in the line of their duty are assisting the court in the dispatch of its business. State v. Little, 175 N. C. 743, 94 S. E. 680. Snow v. Hawkes, 183 N. C. 365, 111 S. E. 621.

Assaulting the Judge during Recess of Court.—Where the respondent visited the judge at his boarding house during a recess of the court, before the adjournment of the term and assaulted the judge, it was held that this conduct was a direct contempt of the court as much as if the assault had been committed in the court during trial. Ex Parte McCown, 139 N. C. 95, 51 S. E. 957.

Appeal.—Acts committed in the presence of the court are not reversible on appeal. See State v. Nowell, 156 N. C. 648, 72 S. E. 590; In re Davis, 81 N. C. 72, 75; Ex parte Biggs, 64 N. C. 202. The contrary, however, is true of acts

committed not in the presence of the court. In re Deaton, 105 N. C. 59, 11 S. E. 244.

Fighting in Courthouse Yard.—In State v. Woodfin, 27 N. C. 199, fighting in the yard of the courthouse, before the courthouse door, constituted the basis of the offense of contempt.

2. Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

Punishment by Court Making the Reference.—When, in the course of supplementary proceedings before a referee, a contempt is committed by refusing to answer the questions, it must be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83 N. C. 133.

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

See annotations under clause (1).

4. Willful disobedience of any process or order lawfully issued by any court.

See 12 N. C. Law Rev., 260, for comment on this and succeeding sections.

"Wilful" and "Unlawful" Distinguished. — "The word 'wilful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law." "The term unlawfully implies that an act is done, or not done as the law allows, or requires; while the term wilfully implies that the act is done knowingly and of stubborn purpose." In re Hege, 205 N. C. 625, 630, 172 S. E. 345, citing West v. West, 199 N. C. 12, 153 S. E. 600.

Refusal to Deliver Note.—In Thompson v. Onley, 96 N. C. 9, 14, 1 S. E. 620, it was held that a refusal to obey the order requiring the surrender of a note, whether amounting to contempt or not, warranted a commitment as a means of forcing a compliance.

Disavowal of Disrespectful Intent.—The wilful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt under this section, from which he may not purge himself by disavowing a disrespectful intent. In re Parker, 177 N. C. 463, 99 S. E. 342

Impossibility to Comply with the Order or Process. — Where the disobedience to the process or order is due to circumstances which make it impossible for the contemnor to obey such an order or process, he may not be punished for contempt. Thus where the clerk issued a notice to the respondent to produce a certain will which was in the custody of some other clerk, it was held the order to adjudge the respondent guilty of contempt was reversible on appeal. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931. But where the impossible circumstances are removed prior to the arrest for contempt the defendant will not be excused. Shooting Club v. Thomas, 120 N. C. 334, 26 S. E. 1007. The excuse is sufficient where the defendant has been unable to pay money according to an order. Kane v. Haywood, 66 N. C. 1; Boyett v. Vaughan, 89 N. C. 27; Smith v. Smith, 92 N. C. 304.

Where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was wilful, and he may not be adjudged in contempt of court and a sentence imposed upon him. West v. West, 199 N. C. 12, 153 S. E. 600.

Order Void Ab Initio.—Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one "lawfully issued" as provided by this section. In re Longley, 205 N. C. 488, 171 S. E. 788.

Advice of Counsel No Excuse.—The failure to obey the order of the court placing property in possession of a receiver is, under this clause, a direct contempt, even though the contemnor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. Delozier v. Bird, 123 N. C. 689, 694, 31 S. E. 834. In such a case the counsel himself may be subjected to contempt proceedings. Id. This fact, however, will be considered by the judge in imposing the punishment. Weston v. Roper Lumber Co., 158 N. C. 270, 73 S. E. 799. See Green v. Griffin, 95 N. C. 50.

Disobeying Order of Clerk.—Where, in supplementary proceedings, the defendant has willfully disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court under the provisions of this section. Bank v. Chamblee, 188 N. C. 417, 124 S. E. 741.

Must Be Able to Obey.—The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse—for example payment of money. Kane v. Haywood, 66 N. C. 1; Boyett v. Vaughan, 89 N. C. 27; Smith v. Smith, 92 N. C. 304.

Other Actions Held to Constitute Contempt.—Disobeying an injunction or restraining order such as cutting timber after injunction against the same. Weston v. Roper Lumber Co., 158 N. C. 270, 73 S. E. 799; In re Carolina R. Co., 151 N. C. 467, 66 S. E. 438; Fleming v. Patterson, 99 N. C. 404, 6 S. E. 396. Writ of habeas corpus Id. Failure to pay alimony, Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334; failure of clerk to make transcript of record, Worth v. Bank, 121 N. C. 343, 344, 28 S. E. 488. See also generally Murray v. Berry, 113 N. C. 46, 18 S. E. 78, failure to deliver property, McLean v. Douglass, 28 N. C. 233; failure to return process, Ex parte Summers, 27 N. C. 149; failure to settle estates by public administrator, In re Brinson, 73 N. C. 278.

5. Resistance willfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory.

Refusal to testify before a commissioner, held contempt in Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69; and before a referee in LaFontaine v. Southern Underwriters, 83 N. C. 133.

Commissioner May Ask Aid of Judge; Declaration of Power.—The commissioner before whom the witness had refused to answer, may invoke the aid of the judge to punish for contempt. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69. But the judge has no right to delegate the judicial power to punish for contempt to an executive officer. Id.

Self-Incrimination No Defense.—Witness may not refuse to answer on the ground that his answer may tend to incriminate him. LaFontaine v. Southern Underwriters, 83 N. C. 133.

7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.

In General.—To state that the judges of the Supreme Court singly or en masse moved from the path of judicial propriety because of political zeal, subjected the party so stating to liability under this clause of the section. In re Moore, 63 N. C. 396, 397.

Publication after Adjournment of Court.—For constructive contempt by publication of false matter relating to the conduct of the presiding judge, published after the adjournment of the court, the judge must seek redresss by the ordinary method and bring his cause before an impartial tribunal. He may not proceed to determine the matter summarily without the intervention of a jury. In re Brown, 168 N. C. 417, 84 S. E. 690.

Publication of Past Matter.—There no longer exists the power to punish summarily for defamatory reports and publications about a matter which is past and ended. To justify contempt proceedings the publication must have been pendente lite. In re Brown, 168 N. C. 417, 418, 84 S. E. 690.

Trial of Issue by the Court instead of the Jury.—If on the face of the publication there is nothing to show that it was grossly incorrect or calculated to bring the court into contempt, the respondent is entitled to have the issue tried not by a jury but by a court. In re Robinson, 117 N. C. 533, 23 S. E. 453.

8. Misbehavior of any officer of the court in any official transaction.

The several acts, neglects and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be subject of contempt of court. And if there are any parts of the common law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled. (Rev., s. 939; Code, s. 648; 1905, c. 449.)

Attorneys failure to pay the costs of cases in which they have been guilty of gross negligence is a sort of contempt, and the court may order them to pay. Ex parte Robins, 63 N. C. 310.

§ 979. Appeal from judgment of guilty.—Any person adjudged guilty of contempt under the preceding section has the right to appeal to the supreme court in the same manner as is provided for appeals in criminal actions, except for the contempts described and defined in subsections one, two, three, and six. Nor shall the right to appeal lie under subsections four and five if such contempt is committed in the presence of the court. (Rev., s. 939; Code, s. 648; 1905, c. 449.)

Finding of Fact Not Disturbed.—Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, the finding will not be disturbed by appeal. State v. Little, 175 N. C. 743, 94 S. E. 680; In re Deaton, 105 N. C. 59, 62, 11 S. E. 244. Nor upon an appeal on an indirect contempt will the finding of fact by the judge be disturbed. In re Parker, 177 N. C. 463, 99 S. E. 342.

It is otherwise however on appeals from a subordinate court to the superior court. In such a case the facts as well as the law will be reviewed, and even additional testimony may be heard. In re Deaton, 105 N. C. 59, 63, 11 S. E. 244.

Habeas Corpus and Not Appeal.—Where the defendant punished for **direct contempt** contends that his legal rights have been denied, and it is made to appear that the court had no jurisdiction, his remedy is not by appeal, but by habeas corpus proceedings which, if necessary, may be carried up by a writ of certiorari. State v. Little, 175 N. C. 743, 94 S. E. 680.

As to contempts not committed in the presence of the court, an appeal lies. In re Deaton, 105 N. C. 59, 62, 11 S. E. 244; In re Davis, 81 N. C. 72; In re Walker, 82 N. C. 95; Cromartie v. Commissioners, 85 N. C. 211.

§ 980. Solicitor or attorney-general to appear for the court.—In all cases where a rule for contempt is issued by any court, referee, or other officer, the solicitor shall appear for the court or other officer issuing the rule, and in case of appeal to the supreme court, the attorney-general shall appear for the court or other officer by whom the rule was issued. (Rev., s. 939; Code, s. 648; 1905, c. 449.)

§ 981. Punishment.—Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court. (Rev., s. 940; Code, s. 649.)

Imprisonment for 60 days and a fine of $2000 were held illegal under this section. In re Patterson, 99 N. C. 407, 6 S. E. 643. See also In re Walker, 82 N. C. 95.

Imprisonment for Debt.—The abolishment of imprisonment for debt does not include commitment under attachments for failure to comply with an order of court. Wood v. Wood, 61 N. C. 538.

Commitment until Alimony Paid.—A judgment for commitment until alimony is paid was held valid. Green v. Green, 130 N. C. 578, 41 S. E. 784.

Imprisonment until the order is complied with is valid. Cromartie v. Commissioners, 85 N. C. 211; Thompson v. Onley, 96 N. C. 9, 5 S. E. 120; Delozier v. Bird, 123 N. C. 689, 694, 31 S. E. 834.

A fine for contempt goes to the State, being a punishment for a wrong to the State, and should not be directed to be paid to a party to the suit. In re Rhodes, 65 N. C. 518; Morris v. Whitehead, 65 N. C. 637.

Punishment by Working on Road.—A person sentenced to jail as for contempt of court can not be worked on the roads. State v. Moore, 146 N. C. 653, 61 S. E. 463.

Punishment Immediate.—The punishment in contempt cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. State v. Yancy, 4 N. C. 133.

No Defense to Criminal Prosecution.—The fact that a person has been punished for contempt of court, is no defense to a criminal indictment for the act constituting the contempt. State v. Yancy, 4 N. C. 133. In re Griffin, 98 N. C. 225, 3 S. E. 515.

Power of Industrial Commission.—The Industrial Commission proceeding under the Workmen's Compensation Act, being expressly given the authority to subpœna witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and in imposing a sentence or a fine or imprisonment under the provisions of this section. In re Hayes, 200 N. C. 133, 134, 156 S. E. 791.

§ 982. Summary punishment for direct contempt.—Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order. (Rev., s. 941; Code, s. 650.)

Remedy by Habeas Corpus.—This section, providing that the court shall find the facts constituting the contempt and have them spread upon the record, does not have the effect of giving the right of an appeal nor to a writ of certiorari in direct contempts. But such facts when spread upon the record may authorize a revising tribunal on habeas corpus to discharge the party. In re Deaton, 105 N. C. 59, 62, 11 S. E. 244.

Jury Trial.—It is well settled that the defendant, in contempt proceedings, is not entitled to a jury trial upon the controverted facts. In re Deaton, 105 N. C. 59, 64, 11 S. E. 244.

Assaulting Judge During Adjournment.—For assaulting a judge in his house pending an adjournment of the court the petitioner was properly punished for contempt by attachment in summary proceedings. Ex parte McCown, 139 N. C. 95, 51 S. E. 957.

§ 983. Courts and officers empowered to punish.—Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or corporation commissioner, has power to punish for contempt while sitting for the trial of causes or engaged in official duties. (Rev., s. 942; Code, ss. 651, 652.)

Authority of Mayor to Punish.—The authority given under this section to a justice of the peace to punish for contempt is extended to mayors by sections 2634-5. State v. Aiken, 113 N. C. 651, 18 S. E. 690; In re Deaton, 105 N. C. 59, 65, 11 S. E. 244.

Referee.—Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83 N. C. 133.

Authority of Commissioner Not Exclusive.—The authority, if any of the commissioner to commit the person refusing to answer, was not exclusive, and that the court, on reports of the facts by the former, might lawfully commit such person. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

A judge of the district court has no authority, except in his own district, to punish for contempt. In re Rhodes, 65 N. C. 518; Morris v. Whitehead, 65 N. C. 637.

Nisi Prius Judge.—The right of a nisi prius judge to order a witness or anyone else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. State v. Ownby, 146 N. C. 677, 61 S. E. 630; State v. Dick, 60 N. C. 440; State v. Swink, 151 N. C. 726, 728, 66 S. E. 448.

§ 984. Indirect contempt; order to show cause.—When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter. (Rev., s. 943; Code, s. 653.)

In the cases of contempts out of the presence of the court the practice is to have a foundation laid by facts shown forth, by affidavit or otherwise, constituting a prima facie case, and then by a rule to put the accused to show cause against the attachment by an answer denying the alleged facts of which he had notice in the rule or on the record, or excusing his conduct, or, where the gravamen of the charge rested on intention, by a disavowal of the imputed purpose. 4 Blk., 286; 3 Whar. Cr. Law, 3449, 50; In re Moore, 63 N. C. 396, 397. In re Walker, 82 N. C. 95, 97.

§ 985. Acts punishable as for contempt.—Every court of record has power to punish as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

Cross References.—See 12 N. C. Law Rev., 260, for comment on this and other sections dealing with contempt.

For a discussion of this section and its relation to the preceding sections, see Cromartie v. Commissioners, 85 N. C. 211.

Applicable to Civil Actions.—The provisions of this section, except subsections 4, 5, and 6, apply only to civil actions. In re Deaton, 105 N. C. 59, 64, 11 S. E. 244.

Jury Trial.—Respondents in proceedings as for contempt are not entitled to a jury trial. In re Gorham, 129 N. C. 481, 40 S. E. 311.

Persuading Witness.—Where a defendant in a criminal action tried to persuade the state's witness to leave the state and not to appear against him, it was held that he was subject to proceedings as for contempt. In re Young, 137 N. C. 552, 50 S. E. 220.

Refusal to effectuate an agreement to sign a consent judgment may not be made the basis for contempt proceedings by this section where it does not appear that the parties ever agreed to the exact terms of such judgment. State v. Clark, 207 N. C. 657, 178 S. E. 119.

1. Any clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed, or prejudiced, for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

2. Parties to suits, attorneys, and all other persons for the nonpayment of any sum of money ordered by such court, in cases where execution cannot be awarded for the collection of the same.

3. All persons for assuming to be officers, attorneys or counselors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

Under this clause a person may be punished as for contempt, for unlawful interference with proceedings in any action. In re Gorham, 129 N. C. 481, 40 S. E. 311.

Suggesting to Witness Not to Attend.—Suggesting to a material witness not to attend court, etc., with apparent intent to prevent the attendance of the witness, is under this clause an unlawful interference with the process and proceedings of the court. State v. Moore, 146 N. C. 653, 61 S. E. 463.

4. All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

Applied.—Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

5. Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom.

Juror Improperly Influenced.—Under this subdivision a juror may be punished as for contempt for allowing himself to be improperly influenced. In re Gorham, 129 N. C. 481, 40 S. E. 311.

6. All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

7. All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state to enforce the civil remedies or protect the rights of any part to an action. (Rev., s. 944; Code, ss. 654, 656.)

§ 986. Trial of proceedings in contempt.—Proceedings as for contempt shall be prosecuted and carried on as provided in provisional remedies. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or other judicial officer. When the personal conduct of the judge or judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor, to proceedings for the disobedience of a judicial order rendered in any pending action. (Rev., s. 945; Code, s. 655; 1915, c. 4.)

CHAPTER 18

CONTRACTS REQUIRING WRITING

§ 987. Contracts charging representative personally; promise to answer for debt of another.—No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and

signed by the party charged therewith or some other person thereunto by him lawfully authorized. (Rev., s. 947; Code, s. 1552; R. C., c. 50, 1826, c. 10; 29 Charles II, c. 3, s. 4.)

An exhaustive treatment of the subject of Statute of Frauds is found in 6 Enc. Dig. 638, to which the counsel is referred for the specific applications of the general rules.

See 13 N. C. Law Rev., 263, for comment on this section.

Editor's Note.—This and the following sections of this chapter are generally known as the "Statute of Frauds," and are based upon the original English Statute entitled "An Act for the Prevention of Frauds and Perjuries." As the name indicates, its object was to prevent fraud and perjury; and it was designated by Lord Campbell as the most important piece of judicial legislation of which England can boast.

Though the scope of the original English Statute was not confined to provisions with regard to necessity of writing for the enforceability of certain contracts, which were embodied in the first four and the seventeenth sections of the Statute, in modern usage the term "Statute of Frauds" has assumed an exclusive meaning as to the necessity for certain contracts to be in writing.

An oral contract under the old common law was sufficient for all types of transactions. But the tendencies for the perpetration of fraud and perjury arising from the inherently alluring nature of certain transactions, such as contracts for sale of land, contracts to answer for the debt or default of another, necessitated a legislation which would exclude all but written evidence for the establishment and enforcement of such contracts. How far, and whether at all, the accomplishment of the object of its legislators has justified its existence and whether it has not resulted in a tendency opposite to the motive which impregnated it, is a matter of conjecture.

Contracts Within the Statute.—The Supreme Court of the United States has expressed the opinion that the relaxing construction of the Statute of frauds under which so many cases have been taken out of its operation, which seem to be within its letter, ought not to be extended further than it has already been carried. Grant v. Naylor, 4 Cranch 224, 235, 2 L. Ed., 222.

The clause relating to promise to answer for the debt, default, miscarriage, etc., of another does not apply to a promise in respect to debts created at the instance and for the benefit of the promisor. Davis v. Patrick, 141 U. S. 479, 35 L. E. 826, 12 S. Ct. 58. But it applies only to those by which the debt of one party is sought to be charged upon and collected from another. Id.

The question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Id.

Contracts Not within the Statute.—One financially interested in a crop induced the landlord to part with his lien, in order that the tenant might retain possession, and to sign an appeal bond of the tenant, and promised to save the landlord from harm thereon. The landlord was required to pay the bond. It was held that the release of the landlord's lien was sufficient consideration for the promise to save from harm, and the transaction was not within this section. Jennings v. Keel, 196 N. C. 675, 146 S. E. 716.

Plaintiff held assignments covering all funds to become due under a building contract, and was entitled to apply such funds to the extinguishment of claims it held for advancements made to carry on the work. Defendant, surety on the contractors' bond, orally agreed that if allowed to use part of the money received by plaintiff, on a payment under the contract, to pay claims for labor and materials so the construction could be carried on without going outside of the funds derived from the work, it would pay the balance due plaintiff from the contractors. It was held that such agreement was not within this section. National Surety Co. v. Jackson County Bank, 20 Fed. (2d) 644.

Oral Promise by Administrator.—A promise by the administrator that he would see that a debt of his intestate is paid, or that he would pay it, is void under this section, unless made in writing. Smithwick v. Shepherd, 49 N. C. 196.

Out of Representative's Estate.—The agreement, in order not to be enforceable unless in writing, must be to pay out of the representative's own estate. Norton v. Edwards, 66 N. C. 367.

Original Undertakings—New Consideration.—The general rule is that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, must be in writing to satisfy this section. It is otherwise when the other does not remain liable. Mason v. Wilson, 84 N. C. 51, 53.

In other words if the promise is an original undertaking, it need not be in writing. For example, where the debtor places in the hands of the promisor property for the payment of the debt, who converts it into money and promises to pay the debt. And if the promise is supported by a new and independent consideration, whether the old debt subsists or not, the case does not fall within the statute. See Mason v. Wilson, supra; Cooper v. Chambers, 15 N. C. 261; Whitehurst v. Hyman, 90 N. C. 487; Hickory Novelty Co. v. Andrews, 188 N. C. 59, 123 S. E. 314; Taylor v. Lee, 187 N. C. 393, 121 S. E. 659; Hasty Mercantile Co. v. Bryant, 186 N. C. 551, 120 S. E. 200; Peele v. Powell, 156 N. C. 553, 73 S. E. 234. And this is true even where the benefit of the consideration for the promise accrues to a person other than the promisor. Gainesville, etc., Hospital Ass'n v. Hobbs, 153 N. C. 188, 69 S. E. 79. But see Stanly v. Hendricks, 35 N. C. 86; Threadgill v. McLendon, 76 N. C. 24, 26, where it is said that a new consideration does not take the promise out of the operation of the Statute. In connection with the rule set out above, see Sharp v. Tatham, 205 N. C. 827, 170 S. E. 654; Gennett v. Lyerly, 207 N. C. 201, 176 S. E. 275.

In order for the defendant to fall within the protection of the Statute, it must be shown that the debt is that of a third person who still continues liable for the same. If the debt is an original obligation of the defendant, or if the creditor in accepting the promise of the defendant has released a third person who was the original debtor, the Statute has no application. Sheppard v. Newton, 139 N. C. 533, 535, 52 S. E. 143. The Statute does not forbid an oral contract to assume the debt of another who is thereupon discharged of all liability to the creditor, the promisor becoming sole debtor in his stead. Jenkins v. Holley, 140 N. C. 379, 53 S. E. 237.

A promise made at the time or before the debt is created, and where credit is given solely to the promisor, or a promise based on a new consideration between the promisor and the creditor, or a promise for the benefit of the promisor where he has a personal and pecuniary interest in the transaction in which a third party is the original obligor, has been held to be an original promise. Whitehurst v. Padgett, 157 N. C. 424, 73 S. E. 240.

Similarly a direct and unconditional promise by one to pay for goods furnished to a third party, made prior to the delivery of the goods, upon the faith of which the goods are delivered is an original undertaking. Morrison v. Baker, 81 N. C. 76; Garrett Co. v. Hamill, 131 N. C. 57, 42 S. E. 448.

What Constitutes Collateral Promise.—Where there is no benefit to the one promising to answer for the debt of another, and the promise does not create an original obligation, but is a collateral promise, merely superadded to the promise of another, the original promisor remaining liable, the collateral promisor is not liable unless there is a writing, whether the promise is made when the debt is created or not. Peele v. Powell, 156 N. C. 553, 73 S. E. 234; Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143.

Where the promisor says to the creditor "collect from him (the debtor) and if he fails to pay, I will," the undertaking is a collateral one, and not enforceable unless in writing. Garrett Co. v. Hamill, 131 N. C. 57, 42 S. E. 448.

Promise Made to Debtor Not within Statute.—It is held that, where a purchaser agrees by parol in consideration thereof to pay certain debts of his vendor due to a third person, the promise is original and not within the Statute. Stanly v. Hendricks, 35 N. C. 86; Rice v. Carter, 33 N. C. 298.

Intent of Promisor—How Determined.—The intent of the promisor to become bound may be shown by the surrounding circumstances and other transactions or written communications between the creditor and the promisor. Hickory Novelty Co. v. Andrews, 188 N. C. 59, 123 S. E. 314.

Where a writing or notation is not a continuing guaranty, each order being a separate and independent transaction, the defendant is bound only for the order upon which his guaranty appears. Gennett v. Lyerly, 207 N. C. 201, 176 S. E. 275.

Goods Furnished to Son on Father's Credit.—If goods are furnished to a son upon the promise and credit of the father, the promise need not be in writing; but if the son was the principal debtor and the father merely a surety, the promise must be in writing. White v. Tripp, 125 N. C. 523, 34 S. E. 686.

Definiteness of Subject Matter of Contract.—The principle that no contract can be enforced unless the subject matter upon which it is intended by the parties to operate can first be definitely ascertained from its terms, either

through an explicit description therein or a reference which points to extrinsic means of identification applies to verbal agreements as well as to those required by this section to be in writing. Hemphill v. Annis, 119 N. C. 514, 26 S. E. 152.

Evidence of Guarantor's Obligation.—The obligation of one as guarantor of payment must be evidenced and established by a written agreement, or some written note or memorandum signed by him or some person authorized to sign for him. Supply Co. v. Finch, 147 N. C. 106, 60 S. E. 904; Hickory Novelty Co. v. Andrews, 188 N. C. 59, 123 S. E. 314.

What Amounts to Contract of Guaranty.—A telegram that the debtor is a reliable person and that any justifiable claims will be taken care of is insufficient to establish a contract of guaranty or a promise to answer for the debt, etc., of another, in the absence of a promise to pay the debt if the debtor does not pay. Fain Grocery Co. v. Early, etc., Co., 181 N. C. 459, 107 S. E. 497.

Parol Assumption of Mortgage Debt Not within the Statute.—A promise by a grantee of mortgaged land to assume and pay the amount of the mortgage is not a promise to pay the debt of another required by this section to be in writing, but is a direct obligation of the grantee supported by sufficient consideration. Parlier v. Miller, 186 N. C. 501, 119 S. E. 898.

Agreement to Prevent Sale of Land.—An agreement in consideration of the extention of an option that the defendant will pay a certain mortgage note owned by the plaintiff or otherwise prevent the sale of the land is not a promise to answer for the debt, etc., of another, within this section. Whedbee v. Ruffin, 189 N. C. 257, 126 S. E. 616.

Promise to Guarantee Safety of Money.—An oral promise to guarantee the safety of money placed in the promisor's hands for investment is not an agreement to answer for the debt of another within the meaning of this section. Partin v. Prince, 159 N. C. 553, 75 S. E. 1080.

A promise by the president of a bank to become personally liable for a deposit when supported by a new and independent consideration constitutes an original undertaking by him, and the agreement does not come within the provisions of this section. Dillard v. Walker, 204 N. C. 16, 167 S. E. 636.

The guaranty of payment of a deposit made by the vice-president, director and stockholder of the bank was an original promise to answer for the debt, upon sufficient consideration, and does not come within the provisions of this section, and upon the insolvency of the bank and loss to the depositor the plea of the statute of frauds is not a valid defense. Garren v. Youngblood, 207 N. C. 86, 176 S. E. 252.

The president and treasurer of a corporation who has no personal, immediate and pecuniary benefit in the purchase of materials by the corporation is not an original promisor under this section and may not be held personally liable for the purchase price because of verbal promises to answer for the benefit made in his behalf by the secretary for the corporation as his alleged agent. Gennett v. Lyerly, 207 N. C. 201, 176 S. E. 275.

An oral guarantee of genuineness or validity of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is not a promise contemplated by this section to be in writing. Adcock v. Fleming, 19 N. C. 225; Ashford v. Robinson, 30 N. C. 114; Rowland v. Rorke, 49 N. C. 337.

Statement of Consideration.—Under this section, the consideration for a promise to answer need not be contained in the writing. Standard Supply Co. v. Person, 154 N. C. 456, 70 S. E. 745; Green v. Thornton, 49 N. C. 230.

Cited in Newburn v. Fisher, 198 N. C. 385, 387, 151 S. E. 875; Coxe v. Dillard, 197 N. C. 344, 148 S. E. 545.

§ 988. Contract for sale of land; leases.—All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. (Rev., s. 976; Code, ss. 1554, 1743; R. C., c. 50, s. 11; 29 Ch. II, c. 3, ss. 1, 2, 3; 1819, c. 1016; 1844, c. 44; 1868, c. 156, ss. 2, 33.)

I. In General.
II. What Constitutes an Interest in or Concerning Land.
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Cross References.

For full treatment, see 6 N. C. Enc. Dig. 651 et seq., 14 N. C. Enc. Dig. 243 et seq.

I. IN GENERAL.

Purpose to Prevent Fraud.—Contracts within the meaning of this section were required to be in writing, to prevent frauds and perjuries. Winberry v. Koonce, 83 N. C. 351, 354.

This section will not prevent an unwritten promise from being the basis for an action to cancel a deed where the promise was merely a device to accomplish fraud, and the relief sought is not to enforce the promise or to recover damages for its breach. Mitchell v. Mitchell, 206 N. C. 546, 174 S. E. 447.

Executory Contracts.—This section applies to executory and not executed contracts. Rogers v. Lumber Co., 154 N. C. 108, 69 S. E. 788; Bailey v. Bishop, 152 N. C. 383, 67 S. E. 968; Choat v. Wright, 13 N. C. 289; Herndon v. Durham, etc., R. Co., 161 N. C. 650, 77 S. E. 683; Bailey v. Bishop, 152 N. C. 383, 67 S. E. 968.

This section applies to executory contracts, and not to those that have been executed. Kieth Bros. v. Kennedy, 194 N. C. 784, 140 S. E. 721.

Where a contract was for the sale of an automobile in consideration of the conveyance of certain realty, and the vendor executed a good and sufficient deed, it was held that the contract was executed as to the conveyance of lands under this section. Keith Bros. v. Kennedy, 194 N. C. 784, 140 S. E. 721.

Parol Trusts.—That section of the English Statute of Frauds which prohibited the establishment of trusts by parol, has never been reenacted in this State. Hence a parol agreement to purchase land and hold it in trust for another is valid and enforceable. Newby v. Atlantic, etc., Realty Co., 182 N. C. 34, 108 S. E. 323.

But a parol agreement to create a trust, entered into after the purchase of property is void under this section. To establish a parol trust the agreement to hold in trust must have been entered into before or at the sale of the property. Kelly v. McNeill, 118 N. C. 349, 24 S. E. 738.

Effect of Non-Compliance.—The contracts which are not entered into in compliance with this section are not void, but voidable merely at the instance of the party charged. And when such party takes advantage of the provisions of the statute, he repudiates the contract in its entirety and can not derive any benefit from it. For example a vendee cannot recover the money he has paid the vendor under a parol contract which he has repudiated. Improvement Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952. They are enforceable unless the party to be charged takes advantage of the statute. McCall v. Textile Industrial Inst., 189 N. C. 775, 128 S. E. 349, 353.

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

Parol Transfer of Parol Contract.—A parol transfer of the interest of a purchaser of land under a parol contract is invalid. Wilkie v. Womble, 90 N. C. 254, cited in note in 3 L. R. A., N. S., 148.

An agreement to buy and sell land at a profit is not a contract relating to any interest in land which is required to be in writing. It relates only to profits of the land, and is valid even though not in writing. Newby v. Atlantic, etc., Realty Co., 182 N. C. 34, 108 S. E. 323; Brogden v. Gibson, 165 N. C. 16, 80 S. E. 966.

The section contemplates those transactions in which there is a conveyance of land from one party to another; not those as to ventures for profits in realty. Id.

A dower interest can not be surrendered by parol. Houston v. Smith, 88 N. C. 312. See the title Dower, 4 N. C. Enc. Dig. p. 886.

Partition.—A contract between tenants in common for the partition in lands is a contract concerning realty, within the meaning of this section. Medlin v. Steele, 75 N. C. 154; Anders v. Anders, 13 N. C. 529; Fort v. Allen, 110 N. C. 183, 14 S. E. 685; Rhea v. Craig, 141 N. C. 602, 54 S. E. 408.

A contract to devise real property comes within the pro-

visions of this section, and performance of services by the promisee as consideration for the contract does not take the contract out of the provisions of the section, and the promisee cannot successfully maintain an action for specific performance of the contract. Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331.

Crops and Fruit.—Crops which are produced annually are personal chattels, and a sale of them while growing is only a sale of goods, and not a contract or sale of land, or any interest in or concerning land, under this section. Brittain v. McKay, 23 N. C. 265, cited in note in 23 L. R. A., N. S., 1219.

Fruits on trees cannot be reserved by the vendor by a parol agreement. Flynt v. Conrad, 61 N. C. 190.

Standing Timber.—A contract conveying standing timber is a contract concerning realty. Drake v. Howell, 133 N. C. 162, 45 S. E. 539; Ward v. Gay, 137 N. C. 397, 49 S. E. 884; Mizell v. Burnett, 49 N. C. 249; Ives v. Railroad, 142 N. C. 131, 55 S. E. 74.

Guaranty of Acreage.—A vendor's guaranty of the number of acres need not be in writing. Sterne v. Benbow, 151 N. C. 460, 66 S. E. 445; Currie v. Hawkins, 118 N. C. 593, 24 S. E. 476.

Also an agreement between vendor and purchaser that the latter shall have the land surveyed, and that if it falls short the vendor shall refund pro tanto, need not be in writing. Sherrill v. Hagan, 92 N. C. 345.

Equitable Estates.—A parol contract of sale of an equitable estate in land is void. Holmes v. Holmes, 86 N. C. 205.

Parol Release of Mortgage.—An agreement to terminate the relationship of a mortgagor and mortgagee does not fall within the intent and meaning of this section. Hence a parol contract to release a part of the mortgaged property is valid and enforceable. Stevens v. Turlington, 186 N. C. 191, 119 S. E. 210; Hemmings v. Doss, 125 N. C. 400, 402, 34 S. E. 511. This is upon the theory that the mortgagee does not, by the mortgage, acquire an interest in land (but a mere lien in equity), and hence his release does not transfer back an "interest" in land.—Note.

Where a mortgagee agreed by parol to release the mortgage to a purchaser of the land from the mortgagor, the mortgagee was held stopped to deny the validity of the agreement under the Statute of Frauds. Stevens v. Turlington, 186 N. C. 191, 119 S. E. 210.

A parol lease for three years is not within the statute. It must be for a term exceeding three years. Smithdeal v. McAdoo, 172 N. C. 700, 704, 90 S. E. 907.

In order to determine whether a lease is for more than three years or not the computation must be made from the time of making the agreement to lease, and not from the time of its going into effect. Hence a parol agreement of lease for three years to commence in futuro is voidable by the lessor and renders the tenant a tenant at will. Mauney v. Norvell, 179 N. C. 628, 103 S. E. 372; Falkner v. Hunt, 73 N. C. 571.

Where the owner of land agrees to erect a certain kind of building thereon for a proposed lessee, and makes a parol lease for the rental of the property for three years to take effect upon the completion of the building, the lease for three years to take effect in the future comes within the provisions of the Statute of Frauds, and where in an action thereon the lessee denies the contract of lease and pleads the statute, he may not be held liable unless it was executed in writing, or some memorandum thereof made and signed by the party to be charged therewith or by some other person by him duly authorized. Sammax Inv. Co. v. Zindel, 198 N. C. 109, 150 S. E. 704.

Assignment of Lease.—A verbal assignment of an unexpired lease to continue more than three years is void under this section. Alexander v. Morris, 145 N. C. 22, 58 S. E. 600.

Negative Easement.—A restriction on the use of land being in effect a negative easement is an interest in land required under this section to be contracted for in writing. Davis v. Robinson, 189 N. C. 589, 127 S. E. 697.

Where land in a development is sold by deeds containing certain restrictive covenants, the covenants are in the nature of an easement, and it would seem that ordinarily such easement may not be released by parol agreement. Moore v. Shore, 206 N. C. 699, 175 S. E. 117.

Party Walls.—The right to contribution for costs of a party wall is implied in law regardless of the promise; and hence enforceable notwithstanding that the agreement was not in writing. Reid v. King, 158 N. C. 85, 73 S. E. 168.

Creation of Mill Dam.—A permanent right to overflow land by the erection and maintenance of a mill dam can not be created by parol. Bridges v. Purcell, 18 N. C. 492.

Judicial Sales.—Judicial sales were not within the contemplation of the legislature at the time of making this enactment. Tate v. Greenlee, 15 N. C. 149, 150.

Judgment.—The Statute of Frauds does not require that a judgment constituting a lien on land should be assigned by a written instrument. Winberry v. Koonce, 83 N. C. 351.

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

No special form or instrument is required. A letter, note, bill or draft is sufficient. Neaves v. North State Min. Co., 90 N. C. 412.

A promissory note for the purchase price signed and given by the purchaser is not such a contract or memorandum thereof. Burriss v. Starr, 165 N. C. 657, 81 S. E. 929.

Letters addressed to third party may be used against the writer as a memorandum of it. Such writings are sufficient evidence of the contract to warrant the court in giving effect to it. Mizell v. Burnett, 49 N. C. 249, 254; Nicholson v. Dover, 145 N. C. 18, 58 S. E. 444, cited in note in 24 L. R. A., N. S., 316.

Series of Letters Construed Together.—A series of letters, telegrams or other papers, documents, etc., signed as required by this section, will be construed together, and when the contract appears to be complete, the omission in some of the writings will be supplied by the others. Simpson v. Beaufort County Lumber Co., 193 N. C. 454, 137 S. E. 311.

As to Seal.—The Statute of Frauds does not require a contract for the sale of land to be under the seal of the party to be charged. Simmons v. Spruill, 56 N. C. 9; Stephens v. Midyetti, 161 N. C. 323, 77 S. E. 243.

The admissions of the parties in their pleadings may stand for the writing. Sandlin v. Kearney, 154 N. C. 596, 70 S. E. 942.

Time of Making Memorandum.—The written memorandum required by this section need not necessarily be made at the time of the agreement. Even if made thereafter, if otherwise good, it will be valid. McCall v. Lee, 182 N. C. 114, 108 S. E. 390; McGee v. Blankenship, 95 N. C. 563, cited in note in 22 L. R. A. 273; Mizell v. Burnett, 49 N. C. 249; Winslow v. White, 163 N. C. 29, 31, 79 S. E. 258.

Contract Partly Written Partly Oral.—A contract for the sale of land may be partly verbal and party in writing, unless the writing purports to embrace all the contract. Thus where the vendor upon a conveyance by deed, verbally agreed that he would make good any deficiency in the acreage, it was held that this section did not require the agreement as to the quantity to be embraced by the written contract or deed. McGee v. Craven, 106 N. C. 351, 356, 11 S. E. 375.

What the Writing Must Contain.—In order that a contract falling within the sphere of this section be enforceable it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement which must have been signed as required by the section. Hall v. Misenheimer, 137 N. C. 183, 186, 49 S. E. 104; Gwathmey v. Cason, 74 N. C. 5.

Memorandum Inconsistent with Contract.—Where the memorandum of a contract partly in parol was inconsistent with the terms of the contract, it was held that the memorandum not being the contract between the parties, the plaintiff suing under the parol contract is not entitled to recover. Keith v. Bailey, 185 N. C. 262, 116 S. E. 729.

Even though the contract be informally and awkwardly expressed in the writing, yet if its nature, scope and purpose clearly appear from it, there is a sufficient compliance with the requirements of this section. Mayer v. Adrian, 77 N. C. 83; Farmer v. Batts, 83 N. C. 387; Thornburg v. Masten, 88 N. C. 293; Gordon v. Collett, 102 N. C. 532, 537, 9 S. E. 486.

The vendor of lands in substantial conformity with his parol agreement tendered the vendee a deed to the lands, which the latter refused because the amount of the agreed purchase price had been increased after the vendor had sold the lands the vendee brought an action for damages. It was held that the deed tendered was a sufficient writing within the statute of frauds to bind the vendor, and the vendee could recover damages sustained by defendant's breach of contract to convey. Oxendine v. Stephenson, 195 N. C. 238, 141 S. E. 572.

Sufficiency of Description.—This section does not render void a contract which contains a defective description merely. It only requires that the contract be in writing and signed by the party to be charged. Improvement Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952.

A written contract to convey the grantor's entire tract

of land consisting of 146 acres was, under the circumstances of the case, held to be sufficiently certain as to the land conveyed, so as to admit parol evidence in regard to the identity of the land without violating the Statute of Frauds. Norton v. Smith, 179 N. C. 553, 10 S. E. 14. See Higdon v. Rice, 119 N. C. 623, 625, 26 S. E. 256, where it is said that a defective description cannot be aided by parol testimony because that would mean to substitute by parol an essential portion of a contract required by this section to be in writing; though mistakes can be corrected and ambiguities explained by parol.

Where the calls of a deed are sufficiently definite, the locations cannot be changed by parol agreement unless contemporaneous. Haddock v. Leary, 148 N. C. 378, 62 S. E. 426.

The following memorandum found in the books of the defendant's intestate was held too vague and uncertain to take the contract out of the Statute: "1841, W. P. to H. C. O. Dr. To 4 loads of Rock, one lot at one year's credit, $125." Plummer v. Owens, 45 N. C. 254, 255.

The memorandum of a sale of standing timber must be sufficiently definite in its essential elements to comply with the requirements of the Statute of Frauds to enable the court to decree specific performance; but latent ambiguities may be explained by parol evidence. Camp Mfg. Co. v. Jordan, 292 Fed. 182; see also, Keith v. Bailey, 185 N. C. 262, 116 S. E. 729.

When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. Gilbert v. Wright, 195 N. C. 165, 168, 141 S. E. 577; Norton v. Smith, 179 N. C. 553, 103 S. E. 14.

Agreement "to buy the vacant lot," from the vendor was held not unenforceable under this section where the evidence showed that it was the only lot owned by the vendor anywhere. Gilbert v. Wright, 195 N. C. 165, 141 S. E. 577.

B. The Signature.

What Constitutes Signing.—The signing of a paper, writing or instrument is the affixing of one's name thereto with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. McCall v. Textile, etc., Co., 189 N. C. 775, 128 S. E. 349, 353.

Actual Signature—Position Immaterial. — Although the place of the signature upon the writing of the party to be charged is immaterial, and such party need not necessarily "subscribe" the writing, yet there must be a writing in which such party must have put his name with the intention of signing it. Thus where the plaintiff, the purchaser, gave for the purchase price a note to the defendant which was filled in by the latter payable to his own name, it was held that the note was not signed by the defendant, since filling in the note with his own name was not equivalent to signing it. Burriss v. Starr, 165 N. C. 657, 81 S. E. 929.

This section is satisfied when the writing contains the signature anywhere in the instrument. Flowe v. Hartwick, 167 N. C. 448, 83 S. E. 841.

Subscribing or Signing.—This section does not require that the memorandum of sale be "subscribed," it only requires that it be signed. Hence the signing by the auctioneer of the name of the highest bidder on the side of a printed advertisement is a sufficient signing of the contract. Proctor v. Finley, 119 N. C. 536, 26 S. E. 128; Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902.

Mark Sufficient.—When written by the party to be charged, a mark of an illiterate person is a sufficient signature to fulfill the requirement of the Statute. Devereux v. McMahon, 108 N. C. 134, 142, 12 S. E. 902.

The phrase "the party to be charged" does not necessarily refer to the vendor, it may refer to the vendee. The party to be charged, within the meaning of the section is the defendant in the action, whoever he may be. Hall v. Misenheimer, 137 N. C. 183, 187, 49 S. E. 104.

In a suit for the specific performance of a contract to convey land the "party to be charged" is the vendor, and hence the contract must have been signed by him. The vendee does not fulfill the condition imposed on him to show that the Statute has been complied with, by a writing by which he alone is bound. Clegg v. Bishop, 188 N. C. 564, 125 S. E. 122.

The "party to be charged" under this section is the one against whom the relief is sought; and if the contract is sufficient to bind him, he can be proceeded against, though the others could not be held because, as to them, the Statute is not fully complied with. Lewis v. Murray, 177 N. C. 17, 97 S. E. 750.

Thus a contract in writing to sell land, signed by the vendor is good against him, although the correlative obligation to pay the price is not in writing and cannot be enforced against the purchaser. Mizell v. Burnett, 49 N. C. 249.

The Statute requires that the writing be signed by the party to be charged. So that if A contract in writing to sell land to B, the former's promise being in writing and signed, but the latter's not, A would be bound to perform, but B would not. Improvement Co. v. Guthrie, 116 N. C. 381, 384, 21 S. E. 952; Mizell v. Burnett, 49 N. C. 249. See also, Durham Consol. Land, etc., Co. v. Guthrie, 116 N. C. 381, 382, 21 S. E. 952.

Member of Corporation or Partner May Sign.—Under the clause "or by some other person by him thereto lawfully authorized" a member of a corporation or a partner is a competent agent to sign for the corporation or partnership. Neaves v. Mining Co., 90 N. C. 412, 415.

Signature of Agent.—If signed by one who is proved or admitted by the principal to have been authorized as agent, it is a sufficient compliance with the Statute if the agent sign his own name instead of that of his principal by him. Hargrove v. Adcock, 111 N. C. 166, 171, 16 S. E. 16.

Where the agent is the one by whom the contract or the memorandum is signed, the authority of the agent to sign it for his principal need not have been given in writing. And even a subsequent ratification of an unauthorized signing will suffice. Johnston v. Sikes, 49 N. C. 70.

It is not necessary that the name of the principal or his relation to the transaction shall appear upon the writing itself or in the form of the signature. Neaves v. Mining Co., 90 N. C. 412, 415.

Ordinance, Resolution or Vote.—An ordinance, resolution or vote of a municipal corporation, accepting a lease or contract tendered, does not constitute a signing within the meaning of the Statute. Wade v. New Bern, 77 N. C. 460.

C. Statement of Consideration.

Whether oral or in writing, the contract must have a consideration to support it. Draughan v. Bunting, 31 N. C. 10; Stanly v. Hendricks, 35 N. C. 86, 87; Combs v. Harshaw, 63 N. C. 198; Haun v. Burrell, 119 N. C. 544, 547, 26 S. E. 111. But if in writing, the consideration need not appear in the writing, and may be shown by parol. Nichols v. Bell, 46 N. C. 32; Haun v. Burrell, 119 N. C. 544, 547, 26 S. E. 111; Peele v. Powell, 156 N. C. 553, 557, 73 S. E. 234; Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133; Lewis v. Murray, 177 N. C. 17, 19, 97 S. E. 750.

But see Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104, where it is said that a memorandum of a contract for the sale of land is not good as against the vendee unless it shows the price to be paid.

IV. PART PERFORMANCE.

In General.—The doctrine which prevails in many states, that a part or even a full performance of the stipulation of an unwritten agreement for the disposition of an interest in land exempts such agreement from the operation of the Statute of Frauds, is not recognized in this state under this section which declares such agreements to be void and of no effect. Kivett v. McKeithan, 90 N. C. 106, 108; Ellis v. Ellis, 16 N. C. 342. In such a case, however, the party who has advanced the purchase price or has made improvements shall be refunded his advances. Kivett v. McKeithan, supra; Barnes v. Brown, 71 N. C. 507; Luton v. Badham, 127 N. C. 96, 37 S. E. 143; Smithdeal v. McAdoo, 172 N. C. 700, 703, 90 S. E. 907. But see the dissenting opinion of Judge Douglas, in Luton v. Badham, supra. See also Dunn v. Moore, 38 N. C. 364; Albea v. Griffin, 22 N. C. 9; Plummer v. Owens, 45 N. C. 254, 255, where cases were held not within statute.

V. PLEADING AND PRACTICE.

General Issue or General Denial.—A party may rely on the Statute of Frauds under the general issue or a general denial. Luton v. Badham, 127 N. C. 96, 37 S. E. 143; Winders v. Hill, 144 N. C. 614, 57 S. E. 456.

A denial of the contract as alleged is equivalent to a plea of the Statute. McCall v. Textile Ind. Inst., 189 N. C. 775, 128 S. E. 349, 353.

But see Curtis v. Piedmont, etc., Min. Co., 109 N. C. 401, 13 S. E. 944, where it is held that in an action on a contract for lumber the defendant in order to avail himself of the defense of the Statute of Frauds should plead it specifically.

Demurrer.—The Statute of Frauds cannot be taken advantage of by demurrer, since that admits the contract. The contract is valid and binding unless the invalidity, by

reason of the Statute, is set up by the answer. Hemmings v. Doss, 125 N. C. 400, 402, 34 S. E. 511; Stevens v. Midyetti, 161 N. C. 323, 77 S. E. 243.

Record on Appeal.—Where upon appeal, the insufficiency of letters to constitute a valid contract under this section is sought to be raised, the contents of the letters must appear upon the record. Layton v. Godwin, 186 N. C. 312, 119 S. E. 495.

Oral Arbitration.—An oral agreement of arbitration as to real property cannot be enforced. Fort v. Allen, 110 N. C. 183, 14 S. E. 685.

Issues as to title of land cannot be shown by parol. Cox v. Ward, 107 N. C. 507, 12 S. E. 379; Presnell v. Garrison, 122 N. C. 595, 29 S. E. 839.

Discharge by Matter in Pais.—A written contract for the sale of land can be discharged by matter in pais. Miller v. Pierce, 104 N. C. 389, 10 S. E. 554, cited in note in 19 L. R. A., N. S., 881.

§ 989. Contracts with Cherokee Indians.—All contracts and agreements of every description made with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same: Provided, that this section shall not apply to any person of Cherokee Indian blood or any Cherokee Indian who understands the English language and who can speak and write the same intelligently. (Rev., s. 975; Code, s. 1553; R. C., 50, s. 16; 1907, c. 1004, s. 1.)

Defense Concluded by Judgment.—While, under this section, there may be defenses available against a contract, if they are not availed before a judgment is rendered, the judgment is res adjudicata. Rogers v. Kimsey, 101 N. C. 560, 563, 8 S. E. 159.

One Party White.—This section applies as well where the contract is between two Indians as where one of the parties is white. Lovingood v. Smith, 52 N. C. 601; State v. Ta-Cha-Na-Tah, 64 N. C. 614, 616.

§ 990. Promise to revive debt of bankrupt.—No promise to pay a debt discharged by any decree of a court of competent jurisdiction, in any proceeding in bankruptcy, shall be received in evidence unless such promise is in writing and signed by the party to be charged therewith. (Rev., s. 978; 1899, c. 57.)

See 13 N. C. Law Rev., 60, for possible construction of this section.

CHAPTER 19

CONVEYANCES

Art. 1. Construction and Sufficiency

§ 991. Fee presumed, though word "heirs" omitted.—When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. (Rev., s. 946; Code, s. 1280; 1879, c. 148.)

Cross References.—As to presumption of conveyance in fee simple when deed and registry of conveyance destroyed, see section. 1766; as to establishing boundaries and interests, where original and copy destroyed, see section 367; as to burnt and lost records generally, see section 365 et seq.

Editor's Note.—This section changes the common-law rule that in order to convey a fee simple the words "heirs" should appear either in the premises or the habendum of the deed. Carolina Real Estate Co. v. Bland, 152 N. C. 225, 67 S. E. 483. Even prior to the enactment of the section the courts of this State commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the subject show a marked tendency to mitigate the harshness of the law. So an exception as to devises and equitable estate had already been made. (See Whichard v. Whitehurst, 181 N. C. 79, 106 S. E. 463; Hollowell v. Manly, 179 N. C. 262, 102 S. E. 386, relating to a conveyance in trust). And a series of cases established the proposition that the word "heirs," when used as indicative of the estate to be granted, no matter where the word appeared in the instrument, would be transposed and inserted so as to cause the instrument to operate as a fee simple. See Smith v. Proctor, 139 N. C. 314, 319, 51 S. E. 889. But perhaps the most radical departure from the early rule is found in the case of Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308, where it was decided that if it appeared that the word "heirs" was omitted from the instrument because of ignorance, because of inadvertance or because of a mistake, the word would be supplied so as to pass title in fee in accordance with the intention of the grantor.

These early cases may be of importance as this section is not retroactive, and the construction of instruments enacted prior to its passage will be governed by the rules herein set out.

Same Rule as for Construction of Devises.—This section provides the same rule of construction of deeds as is contained in section 4162 for construction of devises. Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308.

Construction of Word Heir.—The word "heirs" is always a word of limitation and vests the absolute property in chattels as well as land. Cutlar v. Cutlar, 3 N. C. 154.

Word "Heirs" Unnecessary to Create Equitable Estate.—An equitable estate in fee may be declared without the use of the word "heirs," if an intention to pass such estate can be gathered from the instrument. Holmes v. Holmes, 86 N. C. 205; Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

Interpreted in Accord with Intent.—Where it is the manifest purpose of a deed to pass a fee, the court will effectuate this purpose, if it can do so by any reasonable interpretation. Ricks v. Pulliam, 94 N. C. 225.

The presumption of fee raised by this section is rebutted by the fact that the deed in this case intended to convey only a life estate which is manifest from the many restraining expressions contained therein. Boomer v. Grantham, 203 N. C. 230, 231, 165 S. E. 698.

Same—Fee Simple Presumed Unless Clear Intent Otherwise.—All conveyances of land executed since the passage of the act are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Triplett v. Williams, 149 N. C. 394, 398, 63 S. E. 79.

And by this section, which was section 946 of the revisal of 1905, a deed though not using the word "heirs", is a conveyance in fee, unless the contrary intention appears. Holloway v. Green, 167 N. C. 91, 83 S. E. 243.

The section was applied where the intent of the donor, appearing by proper construction of a deed, was to give a fee simple estate to his grandchild upon the birth of her child by marriage. Sharpe v. Brown, 177 N. C. 294, 98 S. E. 825.

Section as Curing Repugnancy.—The premises of a deed to land read, among other things, "unto said M. G., her heirs and assigns;" and the habendum, "to herself, the said M. G. during her lifetime, and at her death said land is to be equally divided between" her children. It was held that since under this section, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there is no repugnance in this deed between the granting clause and habendum. Triplett v. Williams, 149 N. C. 394, 63 S. E. 79.

The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M. G. with a remainder over to her children. Triplett v. Williams, 149 N. C. 394, 63 S. E. 79.

Deeds Executed Prior to Effective Force of Section.—Although a deed to lands executed and delivered prior to the effective force of this section would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" is sufficient to pass a fee simple title to the lands conveyed therein. Tucker v. Smith, 199 N. C. 502, 154 S. E. 826.

Deed to Husband and Wife and Heirs of Wife.—A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of this section,

for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910.

Restraint of Alienation.—Where a conveyance is construed under this section to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. Holloway v. Green, 167 N. C. 91, 83 S. E. 243.

Correction of Instrument.—The court, in its equitable jurisdiction, may correct an instrument so as to pass a fee in land when the intent so appears in the submission of a case agreed. Whichard v. Whitehurst, 181 N. C. 79, 106 S. E. 463.

Deed with Possible Reverter.—A deed to lands to be held for school purposes under this section transfers a fee simple estate. The fact that there was a possible reverter to the grantor, which could have been removed by a subsequent unqualified deed, does not show the intent to convey an estate of less dignity, but merely shows the purpose of the conveyance. Claremont College v. Riddle, 165 N. C. 211, 81 S. E. 283.

Reservation of Easement.—In Ruffin v. Seaboard Air Line Railway, 151 N. C. 330, 66 S. E. 317, this section applied in holding that a reservation of an easement was a reservation in fee, as no contravening intent appeared from the conveyance.

Retention of Mineral Rights.—Under this section where a deed conveys land "with the exception of one half of all the mineral found upon the premises, which is hereby expressly reserved," the grantor retains the fee in one half the mineral rights. Central Bank, etc., Co. v. Wyatt, 189 N. C. 107, 126 S. E. 93.

§ 992. Vagueness of description not to invalidate.—No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing. (Rev., s. 948; 1891, c. 465, s. 2.)

Editor's Note.—In Blow v. Vaughan, 105 N. C. 198, 10 S. E. 891, it was held that a deed describing land "as adjoining lands of A, B, and others and containing 25 acres, more or less," etc., was too vague and indefinite to be aided by parol proof. A similar holding appears on p. 411 of the same volume of the reports where the case of Wilson v. Johnson is set out. These two cases, published in 1890, were received by the bar and the state with manifest disapproval and were the cause of much concern as to the validity of titles. Hence, the Legislature in 1891 enacted the salutory provisions of this section. The section does not operate retrospectively. Hemphill v. Annis, 119 N. C. 514, 519, 26 S. E. 152.

Description.—The word "description" imports such a description as is susceptible of being aided by parol proof. Hemphill v. Annis, 119 N. C. 514, 26 S. E. 152.

And a deed which fails to describe any land is as void now as it was prior to the passage of this section. Moore v. Fowle, 139 N. C. 51, 51 S. E. 776.

Application.—In Harris v. Woodard, 130 N. C. 580, 581, 41 S. E. 790, it was said: "The statute (§§ 1763 and 992), applies only where there is a description which can be aided, but not when, as in this case, there is no description." Quoted in Bryson v. McCoy, 194 N. C. 91, 95, 138 S. E. 420.

A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, this section not applying to such cases. Katz v. Daughtrey, 198 N. C. 393, 151 S. E. 879.

Capable of Being Reduced to Certainty.—A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the instrument refers. Patton v. Sluder, 167 N. C. 500, 83 S. E. 818.

Application.—A description in a mortgage to a life estate in lands as being in a certain county and township, containing twenty acres more or less, a part of a certain estate, and giving the names of two parties whose lands join it, is sufficient to admit parol evidence to fit the locus in quo to the description in the instrument, and is not void for vagueness of description under this section. Bissette v. Strickland, 191 N. C. 260, 131 S. E. 655.

A description of land in a deed, which designates all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain state grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient under this section to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land, etc., Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630.

Same—Sufficiency of Description in Will.—Where a will leaves to the widow of the testator for life, "at least 75 acres of land * * * * * * * to include the dwelling house and to be located as she may want it to be, and as near four-square as is consistent," it is sufficient under this section to be located by parol evidence. Heirs at Law of Freeman v. Ramsey, 189 N. C. 790, 128 S. E. 404.

§ 993. Conveyances to slaves.—When it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same was conveyed by deed or parol, and the bargainee or donee has been placed in actual possession of the same, such gift or conveyance shall have the force and effect of transferring the legal title to the lands and tenements to such bargainee or donee: Provided, such possession shall have continued for the term of ten years prior to the ninth day of March, one thousand eight hundred and seventy: Provided, further, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty-six, shall not be held as an abandonment or discontinuance of the possession: Provided, also, that this section shall not affect the interest of a bona fide purchaser for value from the grantor or bargainor of the lands or tenements in dispute. (Rev., s. 949; Code, s. 1278; 1869-70, c. 77.)

As to vagueness of description in pleadings, see section 1783.

Affects Remedy Only.—The statute affects the remedy only and does not interfere with vested rights. Buie v. Carver, 75 N. C. 559, 563.

Former Laws Do Not Defeat Purpose of Section.—Whenever it shall judicially appear that a slave purchased and paid for any property, real or personal, and that conveyance thereof was made to him, or to any one for his use, such purchaser, or those lawfully representing him, shall be entitled to such property, anything in the former laws of this State forbidding slaves to acquire and hold property, to the contrary notwithstanding. Caldwell v. Watson, 74 N. C. 296.

When Not Applicable to Will.—Where a man made a will in 1860 and dies in 1861, leaving certain property to his wife during her life and then to his slaves, naming them, and the widow died in 1899, the slaves cannot take under the will. Jervis v. Lewellyn, 130 N. C. 616, 41 S. E. 873.

Conveyor Must Have Had Title.—The section does not apply to a case where one having himself no title made a parol conveyance of land to a slave and put the slave in possession more than ten years before the passage of the act, but extends only to cases where the alleged donor or vendor had title himself. Buie v. Carver, 75 N. C. 559.

§ 994. Conveyances by infant trustees.—When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court

may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such other decree shall be as effectual in law as if made by a person of full age. (Rev., s. 1036; Code, s. 1265; R. C., c. 37, s. 27; 1821. c. 1116, ss. 1, 2.)

Editor's Note.—The general rule is that the contracts of an infant are voidable at the option of the infant, and when avoided, the contract is null and void ab initio. Pippen v. Mutual Ben. Life Ins. Co., 130 N. C. 23, 40 S. E. 822. To this general rule, there is one exception as old as the rule itself: "An infant may bind himself for necessaries." Jordan v. Coffield, 70 N. C. 110; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574. It would seem that this section added a second exception to the general rule in this State. It expressly creates a class of contracts which an infant is authorized to make, and which are as binding "as if made by a person of full age." See 3 N. C. Law Rev. 110.

Cited in Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

§ 995. Official deed, when official selling or empowered to sell is not in office.—When a sheriff, coroner, constable or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and when he dies or removes from the state before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled. (Rev., ss. 950, 951; Code, s. 1267; R. C., c. 37, s. 30; 1891, c. 242.)

A tax deed executed by an "ex-sheriff" may be authorized under this section. Manufacturing Co. v. Rosey, 144 N. C. 370, 57 S. E. 2; McNair v. Boyd, 163 N. C. 478, 79 S. E. 966.

When Executed by Successor.—A deed made by a succeeding sheriff (or coroner) operates by virtue of the section to pass the title to what was sold. Edwards v. Tipton, 77 N. C. 222; Isler v. Andrews, 66 N. C. 553.

Same—May Demand Clear Evidence.—Before a successor in office can be required to make a conveyance sought under this section he is entitled to demand clear and conclusive evidence that a sale was made by his predecessor, and also that the price was paid by him. Isler v. Andrews, 66 N. C. 553; Harris v. Irwin, 29 N. C. 432.

Deeds as Evidence. — A sheriff's deed made pursuant to this section after he has gone out of office is still subject to the rule that such deeds are prima facie evidence of sale and execution. Curlee v. Smith, 91 N. C. 172. But the recitals in a deed made by a successor of the sheriff are only hearsay, as they constitute his opinion based on information and not from his own knowledge. Id. See also Edwards v. Tipton, 77 N. C. 222; McPherson v. Hussey, 17 N. C. 323.

Power of Court to Correct Deeds. — A sheriff's deed is under control of the court, and the court can compel a sheriff to correct his deed; if the sheriff who executes the deed dies, the court can compel his successor to correct the deed, pursuant to this section, hence, the court may on motion during the trial of the suit correct such a deed. Millsaps v. McCormick, 71 N. C. 531, 533.

Does Not Extend to Clerks.—This section does not extend to clerks, and they cannot exercise the power herein conferred after going out of office. Shew v. Call, 119 N. C. 450, 453, 26 S. E. 33.

§ 996. Revocation of deeds of future interest made to persons not in esse.—The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner. The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect: provided that in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective. (Rev., s. 1045; 1893, c. 498; 1929, c. 305.)

Editor's Note.—The Act of 1929 added the last sentence to this section. Formerly the section applied only to voluntary conveyances; as amended, it includes the creation of voluntary trusts in real or personal property, not only for the benefit of the grantor, maker, or trustor, and of persons not in esse, but for the benefit of persons determinable upon the happening of a future event. Furthermore, as amended, it applies to trusts heretofore created as well as to such as may be created hereafter. Stanback v. Citizens' Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Section Not Retroactive.—This section does not apply to deeds executed prior to its enactment. Roe v. Journegan, 175 N. C. 261, 95 S. E. 495; Roe v. Journigan, 181 N. C. 180, 106 S. E. 680.

The amended section has no reference to crimes, and is therefore not ex post facto. Nor does it disturb any vested rights. Stanback v. Citizens' Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Voluntary Trusts.—A trust estate in personalty created by the donor in consideration of one dollar and natural love and affection is a voluntary trust revocable by the donor under this section. Stanback v. Citizens Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Where a voluntary trust is created in bank stock for the life of the donor or until he reach the age of fifty years, and at the termination to his issue or in the absence of issue to his next of kin, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the trust may be revoked by the donor. Stanback v. Citizens Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Where a woman receives property without restriction from her father's estate and executes a deed in marriage settlement in trust without consideration, the deed is a voluntary trust in contemplation of this section. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 715, 155 S. E. 614.

Revocation of Trust Settlement.—Where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children, their interests do not ipso facto become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 715, 155 S. E. 614.

Law Governing Power of Revocation of Trust Settlement.—Where the daughter of a British subject takes property absolutely from the trustees under his will upon her marriage, and marries in North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies, the lex loci contractu governing the marriage settlement is that of North Carolina and controlled by the provisions of our statutes as to its revocation. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 155 S. E. 614.

Art. 2. Conveyances by Husband and Wife

§ 997. Instruments affecting married woman's title; husband to execute; privy examination. — Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or heredita-

ments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided, and executed by her husband also, shall be valid in law to pass, bond or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject-matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby. (Rev., s. 952; Code, s. 1256; 1899, c. 235, s. 9; C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15.)

I. General Considerations.
II. Executed By Both Husband and Wife.
A. In General.
B. The Husband's Acknowledgment and Proof Thereof.
C. Acknowledgment and Privy Examination of Feme Covert.
III. Effect of Feme Covert's Deed.

Cross References.

As to form of private examination of a feme covert, see sec. 3324; as to the husband's acknowledgment and the wife's examination before the same officer, see sec. 3325; as to conveyances made by a free trader prior to September 24, 1913, see sec. 3351; as to the feme covert as a free trader generally, see secs. 2525 to 2530 inclusive; as to the Martin Act of 1911, see sec. 2507; as to officer authorized to take examination, see sec. 1000; as to a deed made without privy examination constituting color of title, see sec. 428; as to such a deed constituting color of title in betterments proceedings, see sec. 699 and annotations thereunder.

See 12 N. C. Law Rev., 68, for comment in reference to this section.

I. GENERAL CONSIDERATIONS.

Editor's Note.—In arriving at the legislative intent and a sound construction of this section, it must be considered in connection with Article X, section 6 of the Constitution of North Carolina, and the statute pertaining to married women, sections 2506 to 2530, inclusive, of this code. The Constitution secures to a feme covert her property, real and personal, acquired before or after marriage, as her sole and separate estate and property. However, it requires the written consent of the husband before she can make a valid conveyance thereof.

The very year of the adoption of the Constitution the Legislature, in the endeavor to carry out and give effect to this provision, passed an act requiring that for the validity of a conveyance or other instrument, affecting the "estate, right or title of any married woman in lands, tenements or hereditaments," her privy examination must be taken by the proper officer. Code, Civil Procedure, sec. 429, sub-sec. 6. Re-enacted, with some slight modifications, Laws 1868, 69, ch. 277, sec. 15. This enactment continued, in substance, through the various codes and laws on the subject, appearing in Revisal 1905 as sec. 952, Council v. Pridgen, 153 N. C. 443, 445, 69 S. E. 404, which was brought forward in a substantial manner as this section. Section 2113 of the Revisal, now 2526 of the Code, conferred upon a free trader the "power to contract and deal as if she were a feme sole." In Council v. Pridgen, 153 N. C. 443, 69 S. E. 404, it was held that this referred to the ordinary contracts made in some business in which the feme might engage, and did not change her status as to conveyance, or contracts to convey her real estate. The Legislature of 1911, ch. 109, enacted the Martin Act, which is sec. 2507 of the Code.

Since this enactment it is held that contracts wrongfully broken by married women will subject them to liability for damages, even though they cannot be compelled to convey unless they have been privily examined according to forms of law. In other words they may be liable for damages, although specific performance cannot be required. Warren v. Dail, 170 N. C. 406, 87 S. E. 126; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Royal v. Southerland, 168 N. C. 405, 84 S. E. 708; Pomeroy Contracts (2 Ed.), p. 11; Anson Contracts, pp. 384, 385.

Constitutionality.—This section is constitutional. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6; Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Graves v. Johnson, 172 N. C. 176, 90 S. E. 113.

It is not in conflict with the constitutional provision which secures to the wife her entire estate, notwithstanding her coverture. Southerland v. Hunter, 93 N. C. 310.

This section is distinct from § 4103, Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

Extent to Which Feme Covert Deemed Feme Sole.—After a full review of the decisions in this State and an exhaustive examination of the subject, the conclusion arrived at in Hardy v. Holly, 84 N. C. 662 is thus announced by Ruffin J. "We must take it to be the settled law of this State, at least, that a married woman as to her separate property, is to be deemed a feme sole only to the extent of the power expressly given her in the deed of settlement."

The section expressly provides that a married woman can contract and thereby "affect" both her personal and real property, requiring only in some cases her husband's "written consent" and dispensing with it in others. Ball v. Paquin, 140 N. C. 83, 96, 52 S. E. 410.

Strict Compliance Necessary.—Unless the formalities of this section are complied with the deed is absolutely void. Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6, and cases cited.

Same—Creation of Trust.—A woman under coverture cannot create a trust by parol or in any other manner except by embodying it in a written instrument executed in accordance with this section. Ricks v. Wilson, 154 N. C. 282, 287, 70 S. E. 476.

Registration of Power of Attorney Unnecessary.—A power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity. Hollingsworth v. Harman, 83 N. C. 153, 154.

No Distinction between Legal and Equitable Interests.—The section admits no distinction between legal and equitable interests and embraces every "estate, right and title," which the married woman may possess in land, and such is the construction put upon it by the court. Clayton v. Rose, 87 N. C. 106, 109.

II. EXECUTED BY BOTH HUSBAND AND WIFE.

A. In General.

Reason for Joinder of Husband.—The purpose of the section in making these requirements as to the deeds of feme covert is stated by Chief Justice Smith in Ferguson v. Kinsland, 93 N. C. 337, as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." And Connor, J., in Ball v. Paquin, 140 N. C. 83, 52 S. E. 410, says: "For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that with certain exceptions she could not contract without the written consent of her husband." Jackson v. Beard, 162 N. C. 105, 108, 78 S. E. 6.

It is true that the husband, under our Constitution, Art. X, sec. 6, has no interest as husband in his wife's property, real or personal. The provision that he must give his written assent to conveyances by her of realty is the sole survival in our Constitution of the ancient idea that a wife must be under the guardianship and control of her husband and is incompetent to transact business. This requirement in our Constitution is omitted in nearly all the other State constitutions. It is not based upon his having any interest in his wife's land, nor on his having a vested interest therein at her death, for she has full authority to devise the same without his consent and deprive him of any interest as tenant by the curtesy. Accordingly, it is held that while his assent must be in writing, it need not be by deed, for he has nothing to convey; that his joining with her in the instrument is sufficient. Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, and cases there cited, and that his signing the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187; or a letter written by him is sufficient. Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631. Stallings v. Walker, 176 N. C. 321, 323, 97 S. E. 25.

Execute Same Instrument.—This section clearly contemplates that the same instrument of writing shall be executed

by both husband and wife. Slocomb v. Ray, 123 N. C. 571, 31 S. E. 829; Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

Order of Procedure.—It is contemplated and required by the statute that the deed shall be first acknowledged by the husband and wife, and that her privy examination shall be taken afterwards; or if, for any of the causes specified in the statute, this cannot be done, then, first, the husband must acknowledge the execution of the deed, or it must be proved as to him by witnesses before a judge or the county court, and then, upon suggestion to the judge or county court, as directed by the statute, the commission may go out to take the acknowledgment and privy examination of the wife. Graves v. Johnson, 172 N. C. 176, 178, 90 S. E. 113.

Binding Dower Interest by Mortgage.—To bind the dower interest by mortgage the husband and wife must join in the execution of the deed, separate conveyances will not comply with the requirement of this section. Slocomb v. Ray, 123 N. C. 571, 31 S. E. 829.

B. Husband's Acknowledgment and Proof Thereof.

Time of Acknowledgment.—While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the section that the act of acknowledgment by both should be contemporaneous. Lineberger v. Tidwell, 104 N. C. 506, 512, 10 S. E. 758.

Same—Husband Executes First.—The deed is none the less effectual to pass the title of the wife because the husband not only executes it before she does, but after execution sends the officer to take her acknowledgment and privy examination at a point several miles distant, provided that she does then voluntarily assent and her acknowledgment and privy examination is taken and certified in form substantially the same as that prescribed by Code, sec. 1246(7), by a competent officer. Lineberger v. Tidwell, 104 N. C. 506, 511, 10 S. E. 758.

Must be Proved as to Husband.—The statute has been changed to permit the acknowledgment of the husband to be taken after that of the wife and before a different officer (next section), but this section still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title or interest of the wife; and the principle announced, that the General Assembly has power to prescribe the form in which the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimpaired, and was fully recognized in Warren v. Dail, 170 N. C. 406, 87 S. E. 126. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

The case of Southerland v. Hunter, 93 N. C. 310, which has been approved on this point in Lineberger v. Tidwell, 104 N. C. 506, 511, 10 S. E. 758, and in Slocomb v. Ray, 123 N. C. 571, 574, 31 S. E. 829, construes section 1256 of the Code (1883), Revisal, sec. 952 which is this section; and it is there held that a deed signed by the husband, but not proved as to him, was ineffectual to pass the title of the wife, although her acknowledgment and private examination were taken, which is the precise question now before us. The fact that the General Assembly saw fit to change the statute requiring proof as to the husband and wife to be taken before the same officer, and that proof as to the husband should precede proof as to the wife, after the decisions of McGlennery v. Miller 90 N. C. 215, 218, and Ferguson v. Kinsland, 93 N. C. 337, 339, and left the statute unchanged as to the requirements that the deed must be proved as to the husband to pass the title or interest of the wife, after the decision in Southerland v. Hunter, furnishes the strongest possible evidence that the General Assembly thought the latter a safeguard which ought to be retained. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

Acknowledgment after Wife's Death.—A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by this section requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, and thereafter the husband writes in his name as a grantor, and, here death acknowledges its execution before the clerk, is invalid to pass title. Hensley v. Blankinship, 174 N. C. 759, 94 S. E. 519.

Consent Proved and Recorded after Wife's Death.—No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto was not proved and recorded until after the death of the wife. Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

Evidence of Husband's Consent. — Where an instrument executed by a husband and wife specifically charges the latter's land with the payment of a debt, the consent of the husband need not be specifically set out in the deed, since his joining in the conveyance is sufficient evidence of his consent. Bank v. Ireland, 122 N. C. 571, 29 S. E. 835.

Effect of Husband's Minority.—The part of this section requiring execution by the husband when his wife's lands are conveyed, is contractual in its nature; and hence when the husband is a minor the conveyance is subject to the usual rules applying to infant's contracts, and he may avoid or ratify it upon reaching his majority. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6.

Veto Power of Husband.—While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written assent, without which her conveyances of realty are invalid. Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

C. Acknowledgment and Privy Examinations of Feme Covert.

Origin of Privy Examination.—A provision for the privy examination is found for the first time in 18 Edw. I. It was first enacted in this State in 1715. Paul v. Carpenter, 70 N. C. 502, 504.

Deed Void without Privy Examination.—That a deed of a feme covert, until she is privily examined by the proper authorities, is mere blank paper, so utterly void that even if it contains a stipulation in her own behalf, she cannot have the benefit thereof. Smith v. Ingram, 130 N. C. 100, 105, 40 S. E. 984; Askew v. Daniel, 40 N. C. 321, cited, quoted and approved in Scott v. Battle, 85 N. C. 185, 39 Am. Rep. 694, which in effect overrules Daniel v. Crumpler, 75 N. C. 184.

Where a conveyance of land is made under a power of attorney sufficient in form by the heirs at law of a deceased owner of land, as tenants in common, but one of them, a feme covert, at the time, had not had her privy examination taken under the provisions of this section, both the power of attorney and the deed predicated and dependent upon it are ineffective to convey her interest, and she holds as a tenant in common with the purchaser, or those who may have acquired title under his deed. Adderholt v. Lowman, 179 N. C. 547, 103 S. E. 1.

Where the private examination of a married woman is not taken to a deed of trust executed by her it is void. Boyett v. First Nat. Bank, 204 N. C. 639, 169 S. E. 231.

Same—When Executed in Another State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this state, without privy examination of the wife, as required by this section is void. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

When only Interest is Dower.—Where the only interest of a married woman in land is her dower, her failure to sign the deed and to be privily examined does not preclude the grantee from recovering possession during her husband's life. Deans v. Pate, 114 N. C. 194, 19 S. E. 146.

Time of Privy Examination.—Privy of acknowledgment of execution by one or both (husband and wife) must precede the examination in reference to the volition and freedom of the wife. Southerland v. Hunter, 93 N. C. 310, 312; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691. See the Curative Act, section 3349 of this Code, which was held in the Barrett case not to apply so as to impair or divest the rights of intervening third persons. But the decision in these cases is now changed by the following section.

A deed which conveys the estate of a feme covert must be proved or acknowledged as to both husband and wife, before the private examination of the married woman is made, otherwise the deed will be inoperative to divest her estate. Southerland v. Hunter, 93 N. C. 310, now changed by the next section.

Same—Husband not to be Present.—The last scene necessary to the valid execution of such a deed by the wife is certainly one that the law does not intend shall be witnessed by the husband. Proof of execution by him must be made on his acknowledgment, taken before that of his wife, and her privy examination must be subsequent to both, but the law fixes no definite interval that must elapse between these acts, and it is not even essential that the probate as to the husband should be taken and certified to by the same officer who conducts the privy examination of the wife. Lineberger v. Tidwell, 104 N. C. 506, 512, 10 S. E. 758.

III. EFFECT OF FEME COVERT'S DEED.

How Lands of Feme Covert Bound.—In Green v. Branton, 16 N. C. 500, 504, the court says that a feme covert can be bound as to her land in only two ways: first, by her deed executed jointly with her husband with her privy examination thereto, and, secondly, by the judgment of a competent court. Smith v. Ingram, 130 N. C. 100, 105, 40 S. E. 984.

Specific Performance.—Specific performance of the realty of a married woman will not be decreed when the contract is executed in compliance with the statute. Tillery v. Land, 136 N. C. 537, 48 S. E. 824.

Delivery of Deed Not Presumed. — The delivery of a

deed will not be presumed from the acknowledgment of the husband and the acknowledgment and privy examination of the wife. Tarlton v. Griggs, 131 N. C. 216, 42 S. E. 591.

When Deed is Inoperative. — In Scott v. Battle, 85 N. C. 185, it is held that a feme covert's deed, not executed in the prescribed mode, is wholly inoperative. Clayton v. Rose, 87 N. C. 106, 110.

Same—Formalities Not Observed. — A purchase-money deed given by a feme covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife, is void because not complying with this section and Art. X, sec. 6 of the Constitution. Hardy v. Abdallah, 192 N. C. 45, 133 S. E. 195.

Estoppel. — A married woman is not estopped by a deed not executed in the mode prescribed by the statute. Smith v. Ingram, 130 N. C. 100, 107, 40 S. E. 984, citing 11 A. & E. Enc. (2 Ed.), 393; Towles v. Fisher, 77 N. C. 437.

Subject to Collateral Attack. — A deed and privy examination of a feme covert does not have the effect of an assurance of record, and may be collaterally impeached on the ground of infancy or other disability. Warlick v. Lowman, 111 N. C. 532, 16 S. E. 336. It was to meet the decision in this case that section 1001 was passed, changing the rule.

When Not Subject to Collateral Attack. — Where an infant feme covert acknowledged the execution of a deed, and her privy examination was taken before a judge of the superior court, the deed was then a conveyance of record and could not be collaterally impeached in an action of ejectment. Wright v. Player, 72 N. C. 94.

§ 998. Acknowledgment at different times and places; before different officers; order immaterial. —In all cases of deeds or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and acknowledgment and private examination of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this state or only one in this state and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, including the private examination of the wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after the acknowledgment and private examination of the wife. (Rev., s. 953; 1899, c. 235, s. 9; 1895, c. 136.)

As to probate before judges of the Supreme or superior courts or clerks before 1889, see sec. 3339; as to probate before clerks of inferior courts prior to 1885, see sec. 3340.

Editor's Note. — Prior to the enactment of this section a deed made by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband and wife, and then her privy examination taken. This order was regarded as material, and of the substance of the execution of such a deed. Unless this order of acknowledgment and probate was observed, the deed was ineffectual to pass any title or interest whatsoever. McGlennery v. Miller, 90 N. C. 215. And in Barrett v. Barrett, 120 N. C. 127, 129, 130, 26 S. E. 691, it was said that the only defect in the privy examination in question was that it was taken a few minutes or hours before the husband's acknowledgment on the same day of the execution of the deed by him.

Obviously such stringent and technical requirements could hardly be said to be in line with the spirit of a statute whose leading purpose was to facilitate alienation by married women, or as said in Barfield v. Combs, 15 N. C. 514, its object is to protect, not to hamper, married women. It is hard to see where any additional protection is afforded married women, while the evils and inconveniences resulting therefrom are only too apparent. This section offers a solution to the difficulty by removing the technicalities while in no wise decreasing the protection provided for married women. Burgess v. Wilson, 13 N. C. 306; Pierce v. Wanett, 32 N. C. 446; Malloy v. Bruden, 88 N. C. 305; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, citing Cooley Const. Lim. (6 Ed.), 463, 464; Graves v. Johnson, 172 N. C. 176, 90 S. E. 113.

Need Not Be at Same Time or before Officer. — It is not necessary that the husband should actually sign at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer. Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758.

Cannot Be Taken over Telephone. — This section, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by sections 3323 and 3324, as to acknowledgments of grantors and married women; and such acknowledgment taken of the wife over a telephone does not meet the statutory requirements, and renders the conveyance invalid as to her. Southern State Bank v. Sumner, 187 N. C. 762, 122 S. E. 848.

Acknowledgment of Husband Required. — The acknowledgment of the husband or proof of his execution of the deed is still required to pass the title or interest of the wife. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

§ 999. Absence of wife's examination does not affect deeds as to husband.—When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, whether the private examination of the wife is properly taken or not, but no such instrument shall be the act or deed of the wife unless her private examination is taken according to law. (Rev., s. 954; 1899, c. 235, s. 8; 1901, c. 637.)

As to private examination of a feme covert, see secs. 997, 3324, 3325.

When Assent of Wife Not Needed. — An unembarrassed owner of land, no matter when the land was acquired, can convey the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, except in the following cases: (1) Where the land in question has been allotted to him as a homestead, either on his own petition or by an officer, in accordance with law; (2) where no homestead has been allotted, but there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have his homestead allotted; (3) where no homestead has been allotted, but he has made a mortgage, reserving an undefined homestead, which mortgage constitutes a lien on the land that could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors, and no homestead has been allotted in other lands. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437.

Constitutional Requirement as to Homestead. — By the eighth section of the tenth Article of the Constitution, a deed made by the owner of a homestead without the voluntary signature and assent of his wife is void. Wittkowsky v. Gidney, 124 N. C. 437, 441, 32 S. E. 731.

When Probate Does Not Authorize Registration.—Where probate deed recites the acknowledgment and privy examination of the wife of the grantor only, it is insufficient and does not authorize registration. Hatcher v. Hatcher, 127 N. C. 200, 37 S. E. 207.

§ 1000. Officers authorized to take privy examination.—The Officials authorized by law to take proofs and acknowledgments of the execution of any instrument are empowered to take the private examination of any married woman, when her private examination is necessary, touching her free and voluntary assent to the execution of any instrument to which her assent is or may be necessary, and to certify the fact of such private examination. (Rev., s. 955; 1899, c. 235, s. 6.)

Cross References. — As to probate, examination, and registration generally, see "Probate and Registration," sec. 3293 et seq.; as to the effect in certain cases of the officer's interest or connection with the proceedings, see sections 3299, 3300, 3301, 3305; as to conduct of private examination, see sec. 997 and annotations thereto; as to private examination by officials of the United States, foreign counties, and sister states, see sec. 3994.

When Husband and Wife out of State. — When the husband and wife reside in a foreign country her acknowledgment, etc., may be taken by an ambassador, etc., of the United States, or by the mayor or other chief officer of any city or town. Paul v. Carpenter, 70 N. C. 502, 508.

Acknowledgment before Military Officer. — An acknowledgment and private examination taken by the provost

marshal of the city of New Bern while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect as foreign judgments. Paul v. Carpenter, 70 N. C. 502.

When Officer Employee of Grantee. — The privy examination of a married woman as to her execution of a deed is not invalid because taken by a notary public who was a clerk in the office of the grantee, but had no interest in the transaction. Bank v. Ireland, 122 N. C. 571, 575, 29 S. E. 835.

When Officer Related to Parties. — Probate and private examinations taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715.

Omission of Seal by Justice of the Peace. — The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, which is otherwise regular. Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758.

Corrections after Expiration of Office. — A justice of the peace cannot correct his certificate made to a deed after his term of office has expired, such authority not having been given by statute. Cook v. Pittman, 144 N. C. 530, 57 S. E. 219.

§ 1001. Innocent purchaser not affected by fraud in treaty, if privy examination regular.—No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence. (Rev., s. 956; 1889, c. 389; 1899, c. 235, s. 10.)

As to sufficiency of probate and registration without livery, see sec. 3308, and annotations thereunto.

See 12 N. C. Law Rev., 71.

Presence and under Influence of Husband. — The presence and undue influence of the husband at the ceremony of the privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. Brite v. Penny, 157 N. C. 110, 72 S. E. 964, citing Butner v. Blevins. 125 N. C. 585, 34 S. E. 629; Davis v. Davis, 146 N. C. 163, 59 S. E. 659.

When Fraud of Probate Office Alleged. — Where a married woman has signed a mortgage or deed of trust to secure borrowed money, she may not have it set aside upon allegation of fraud of a probate officer in taking her separate examination, when she admits that the examination was taken in substance of the requirement of the statute and she had signed the conveyance, and there is no evidence that the mortgagee participated in the fraud. Whitaker v. Sikes Co., 187 N. C. 613, 122 S. E. 468.

In Whitaker v. Sikes Co., 187 N. C. 613, 615, 122 S. E. 468, the court said: "Even if the justice practiced a fraud upon her, since she does not allege that the Sikes Company, the party to whom the instrument was made, had any knowledge thereof, or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside."

When Privy Examination Not Taken. — In an action to invalidate a deed to lands because, in fact, the privy examination of the feme covert, the owner and plaintiff, had not been taken, though expressed to have been taken, as required in the certificate of the justice of the peace, the plaintiff, may by clear, cogent, and convincing proof show that her examination had not been taken at all, and when, under a proper charge thereon from the judge, the jury has found that such examination was not taken, the verdict will stand, though the grantee may not have been fixed with notice. Davis v. Davis, 146 N. C. 163, 59 S. E. 659.

Same—Or Was Irregular. — Where the privy examination of a wife is not taken, or is taken in a manner insufficient to fulfill the requirements of the law, though the grantee has had no knowledge thereof, the matter is open to judicial investigation. Benedict v. Jones, 129 N. C. 470, 40 S. E. 221.

Must Allege Guilt of Grantee. — A defense by a married woman that her privy examination as to her execution of a deed was procured by fraud and imposition is unavailing unless supported by an allegation that the grantee had notice of or participated in the same. Bank v. Ireland, 122 N. C. 571, 29 S. E. 835.

Innocent Purchaser from Guilty Grantee. — The section also protects the title of an innocent purchaser for value from a grantee, who did have notice of such fraud, duress or undue influence. Butner v. Blevins, 125 N. C. 585, 34 S. E. 629.

Note Procured by Duress.—Upon the principle embodied in this section, a note given by a husband and wife, where the husband procures her execution by duress, is voidable only, and is good in the hands of a bona fide holder. L. A. Randolph Co. v. Lewis, 196 N. C. 51, 144 S. E. 545.

§ 1002. Power of attorney of married woman.—All conveyances which may be made by any person under a power of attorney from any feme covert, freely executed by her with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments as are mentioned or included in such power of attorney. (Rev., s. 957; Code, s. 1257; R. C., c. 37, s. 11; 1798, c. 510.)

§ 1003. Wife need not join in purchase-money mortgage. — The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage or deed of trust. (Rev., s. 958, Code, s. 1272; 1868-9, c. 204; 1907, c. 12.)

Cross References.—As to dower generally, see secs. 4099, 4100; as to the effect of a conveyance by husband alone upon dower, see sec. 4101.

Dower Right Subject to Defeat. — The dower right of a feme covert may be defeated by a mortgage of the husband alone, when for part of the purchase money. Corporation Comm. v. Dunn, 174 N. C. 679, 683, 94 S. E. 481.

§ 1004. Wife insane, husband's deed transfers her interest.—Every man whose wife is a lunatic or insane and whose homestead has been allotted, may bargain, sell, release, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust or lease, except his homestead, without the signature or private examination of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the state, or any other state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease.

Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed free and exempt from the dower rights and other interests of his wife: Provided, this section shall not apply to the homestead of

the husband. (Rev., s. 959; 1905, c. 138, ss. 1, 3; 1919, c. 20; Ex. Sess. 1920, c. 94.)

Cross References. — As to wife of insane person entitled to special proceedings for sale of his property, see sec. 2294; as to sale of land of wife of lunatic upon petition, see sec. 2293.

Editor's Note. — Chapter 65 of the Acts of 1923 is a re-enactment of this section which is not referred to in the Act. The Act contains a general repealing clause, repealing all laws and clauses of laws in conflict therewith, and a special repealing clause, purporting to repeal all parts of section 4903 which conflict with the act. Clearly this has reference to 1003 rather than 4903. See 1 N. C. Law Rev. 271.

The dower of an insane wife may be conveyed by the husband alone. Corporation Comm. v. Dunn, 174 N. C. 679, 683, 94 S. E. 481.

Art. 3. Fraudulent Conveyances

§ 1005. Conveyance with intent to defraud creditors void.—For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (Rev., s. 960; Code, s. 1545; 1893, c. 78; R. C., 50, s. 1; 50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4.)

I. General Considerations.
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Cross References.

As to the effect of a fraudulent conveyance upon the right of homestead exemption, see annotations to sec. 728; as to registration of conveyances, contracts to convey, and leases of land, see sec. 3309.

I. GENERAL CONSIDERATIONS.

Editor's Note. — This section is a substantial re-enactment of the statute 13 Eliz., C. 5, sec. 2. Bank v. Adrian, 116 N. C. 537, 547, 21 S. E. 792. Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. Farthing v. Carrington, 116 N. C. 315, 328, 22 S. E. 9. At an early period in the judicial history of this state, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. Logan v. Simmons, 18 N. C. 13, 16; Lee v. Flannagan, 29 N. C. 471; Hardy & Bro. v. Skinner, 31 N. C. 191; Helms v. Green, 105 N. C. 251, 259, 11 S. E. 470; Wharton on Evidence, sec. 131. 13 Eliz., is declaratory of the common law so far as regards existing creditors. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. In this sense the statute is sometimes spoken of as being in affirmance of the common law. Long v. Wright, 48 N. C. 290, 293, citing Co. Lit. 290 b 3 Ba. Ab. Titl. "Fraud," p. 307.

The object of the English statute was to prevent debtors from dealing with their property in any way to the prejudice of their creditors. See Central Bank v. Hume, 128 U. S. 195, 203, 32 L. Ed. 370, 9 S. Ct. 41.

Scope of Section. — The statute dealing with fraudulent conveyances applies to the state as well as to individuals, and the state can not rely on its prerogative. Hoke v. Henderson, 14 N. C. 12.

It applies to voluntary conveyances of personalty, as well as realty, as against creditors. Garrison v. Brice, 48 N. C. 85.

Prevents Passage of Any Estate. — The section makes fraudulent conveyances absolutely void, and in that way prevents the passing of any estate whatever, as against creditors of the grantor. Flynn v. Williams, 29 N. C. 32.

Same—Conveyance Made by Debtor. — The section operating, as it does, to wholly avoid the conveyances coming within its purview, can be applied only to conveyances made by the debtor himself. Gowing v. Rich, 23 N. C. 553.

Mortgagor Considered as Owner. — In expounding the statute against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an encumbrancer. Wall v. White, 14 N. C. 105, 107.

Cited in Askew v. Interstate Hotel Co., 195 N. C. 456, 142 S. E. 590.

II. WHAT CONSTITUTES FRAUD.

A. In General.

Rule Stated. — In Aman v. Walker, 165 N. C. 224, 227, 81 S. E. 162, it was held that the principles to be deduced from the authorities as to fraudulent conveyances, are: (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void. Black v. Sanders, 46 N. C. 67; Warren v. Makely, 85 N. C. 12, 14; Credle v. Carrawan, 64 N. C. 422, 424; Worthy v. Brady, 91 N. C. 265, 268; Savage v. Knight, 92 N. C. 493, 498; Clement v. Cozart, 112 N. C. 412, 420, 17 S. E. 486; Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 58, 68 S. E. 926.

Employing an attorney who resides at some distance, and in another county, to draw the deed of assignment, and making a provision therein authorizing public or private sale for cash, are not circumstances of fraud. Barber v. Buffaloe, 111 N. C. 206, 16 S. E. 386.

Fraud a Compound Question of Law and Fact. — In Crow v. Holland, 12 N. C. 481, 482, it was said: "Fraud is

a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when proved, they will amount to such a fraud as will vacate a grant is a question of law for the court to decide."

B. Intent.

See ante, this note, the preceding analysis line.

Intent as Poisonous Element. — In Moore v. Hinnant, 89 N. C. 455, 459, Chief Justice Smith, speaking for the court said: "The intent is the essential and poisonous element in the transaction, and not merely the effect; since in every conveyance and appropriation of property, the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate. But the inquiry is, was this the purpose of the assignment; and if so, and it was participated in by the assignee or party to take benefit under it, the assignment is invalid, though the debt or liability professed to be the object to be secured be bona fide due, and itself tinged with no vicious ingredient."

Sufficiency of Intent. — It is not necessary that there should have been an intent to hinder, delay, and defraud, but an intent either to hinder and delay, or an intent to defraud, is sufficient. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59.

Same—Actual Delay Need Not Result. — In the language of Lord Ellenborough in Mieux v. Howell, 4 East., 1-13: "The Act of Parliament (and ours conforms to it) was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors." Quoted in Moore v. Hinnant, 89 N. C. 455, 459.

"It is clear, however, from the language of the statute of 13 Elizabeth," remarks a recent author after a full discussion of the subject, and as his conclusion from a review of adjudged cases, "that its provisions were directed exclusively against conveyances made with an actual intent on the part of the debtors to hinder, delay or defraud creditors, as distinguished from the mere effect or operation of such conveyances. The expressions in the premable, 'devised and contrived,' 'to the end,' 'purpose and intent,' etc., leave no room for doubt on this point. Hence it has been sometimes very expressively designated, as the statute against fraudulent intents in alienation." Moore v. Hinnant, 89 N. C. 455, 460, quoting Burrill Assign., sec. 332.

Intent as Objective Element. — The intention of a conveyance is to accomplish the objects that moved the maker to execute it, and if any of these latter be covinous, the intent is necessarily so. Stone v. Marshall, 52 N. C. 300, 302.

Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its conveyances the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. Cheatham v. Hawkins, 80 N. C. 161, 163, cited in note in 23 L. R. A., N. S., 386.

Mutuality of Fraudulent Intent.—In Horback v. Hill, 112 U. S. 144, 148, 28 L. Ed. 670, 5 S. Ct. 81, it was said that the fraud which will vitiate a sale must be mutual, that is, must be intended by both parties, or by one with knowledge of the other's purpose, and thus acquiesced in and furthered, and actual notice or knowledge, of such intent of the grantor, or reasonable cause to suspect the existence of such intent, is sufficient. Shaver v. Alterton, 151 U. S. 607, 621, 38 L. Ed. 286, 14 S. Ct. 442.

Evidence of Intent.—The rule laid down by Mr. Justice Boyden in Reiger v. Davis, 67 N. C. 185, 189, was that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret and no one is present to witness the trade but these near relatives, it is regarded as fraudulent, but when these relatives are made witnesses in the cause, and dispose to the fairness and bona fides of the transaction, and that, in fact, there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent, or otherwise, as the evidence may satisfy them. Helms v. Green, 105 N. C. 251, 263, 11 S. E. 470.

Same—Reservation of Exemptions. — The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent. Barber v. Buffaloe, 111 N. C. 206, 16 S. E. 386.

Same—Conveyance Fraudulent on Face.—A conveyance sometimes contains provisions which in themselves justify the inference of a fraudulent intent. Peters v. Bain, 133 U. S. 670, 686, 33 L. Ed. 696, 10 S. Ct. 354.

Intent Not Clear—Badges of Fraud.—It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent—his purpose to be—to defraud his creditors, we need not look further. This will avoid the assignment. But if he had not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made—to what are called the "badges of fraud." Royster v. Stallings, 124 N. C. 55, 64, 32 S. E. 384. These "badges of fraud" constitute the subject of the next succeeding analysis line of this note.

C. Badges of Fraud.

Badges of Fraud Defined.—As stated in the last paragraph under the preceding analysis line of this note it frequently becomes necessary, in order to ascertain the debtor's intentions, to look for what are designated as "badges of fraud."

These badges of fraud are suspicious circumstances that overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not acceptable to his adversary. Helms v. Green, 105 N. C. 251, 11 S. E. 470.

The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. Royster v. Stallings, 124 N. C. 55, 65 32 S. E. 384.

Same—Possession Not Fraudulent Per Se. — Possession retained by the vendor of chattels does not, per se, make the sale fraudulent in law. It is but presumptive evidence of fraud, proper to be left to a jury. To repel this presumption the vendee may show that consideration passed, though none be stated in the bill of sale. Howell v. Elliott, 12 N. C. 76.

Same—Permitting Mortgagor to Remain in Possession of and Sell Stock of Merchandise.—Where mortgagees expressly agree to permit mortgagor to remain in possession of the stock of merchandise and sell the same in the usual course of trade, but do not require him to account for the proceeds of same, which the mortgagor does, until he is adjudged bankrupt, the mortgage is presumptively fraudulent in law and the burden is upon the mortgagor to rebut that presumption by proof that there were no pre-existing debts at the time the mortgage was executed, or that the mortgagor had assets sufficient and available to pay the existing debts exclusive of the property embraced in the mortgage. In re Joseph, 43 F. (2d) 252. See also Morris Plan Bank v. Cook, 55 F. (2d) 176, 179.

Same—Secrecy.—It is a mark of fraud if the transaction be secret; and it is meant by secrecy, if it be done in the presence only of near relatives, being such persons as may be relied on not to disclose what they know to the neighborhood; or if it be done at such distance from the neighborhood, that it is unlikely that the affair will become known to them. Vick v. Kegs, 3 N. C. 126.

That the only parties present, at a conveyance of all the vendor's land in satisfaction of old debts, were the vendor and vendee who were brothers-in-law and subscribing witnesses, also a brother-in-law of the vendee, is a fact calculated to throw suspicion upon the transaction, i. e., is a badge of fraud. Peebles v. Horton, 64 N. C. 374.

Same—Kinship.—The U. S. Supreme Court held in Gottlieb v. Thatcher, 151 U. S. 271, 279, 38 L. Ed. 157, 14 S. Ct. 319, that the relationship of brothers does not, of and in itself, cast suspicion upon a transfer from one to the other of property, or create such a prima facie presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor participated in by the grantee.

Conveyance of Exempt Property. — The U. S. Supreme Court held in Rio Grande R. Co. v. Vinet, 132 U. S. 565, 571, 33 L. Ed. 438, 10 S. Ct. 168, that where a member of a firm covered his homestead with a mortgage, which was used to raise money by the firm to pay its debts, it was not a transaction that should be branded as a fraud by other creditors.

Wife's Separate Property.—In Schreyer v. Scott, 134 U. S. 405, 415, 33 L. Ed. 955, 10 S. Ct. 579, it was held that the transfer by a husband to his wife of the legal title to property of which she was prior thereto, the equitable owner, or in which she had at least a large equitable interest, is not voluntary.

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Bona Fide Purchaser without Notice.—A purchaser for a valuable consideration, and without notice, from a fraudulent grantee, acquires a good title against the creditors of the

fraudulent grantor. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590. And in Young v. Lathrop, 67 N. C. 63, 69, Chief Justice Pearson said: "Whatever may be said about fairness or unfairness towards creditors, the legislative will gives preference to a bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin."

Purchaser with Notice.—Since the passage of the Act of 1840 a purchaser of land with notice at the time of a former fraudulent conveyance is not protected in his purchase, although he paid value therefor. Triplett v. Witherspoon, 70 N. C. 589; Hiatt v. Wade, 30 N. C. 340.

Same—Constructive Notice.—A purchaser from a trustee, under a conveyance containing upon its face evidence of a fraudulent purpose to defeat creditors, takes with notice of such evidence. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

Valid Against Maker.—A conveyance made with an intent to defraud creditors, is nevertheless valid against the maker and all others, except creditors and those who purchase under a sale made for their benefit. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590.

When Parties in Pari Delicto.—In York v. Merritt, 77 N. C. 213, the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The court held that when the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against the public policy or contra bonos mores, the courts will not enforce it against either party. Bank v. Adrian, 116 N. C. 537, 540, 21 S. E. 792.

Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors his purchase will be void. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

A bond given as a pretext to enable one person to set up a claim to the property of another, so as to defraud the creditors of that other, is void even as between the parties to the same. Powell & Co. v. Inman, 53 N. C. 436.

When Conveyance to Trustee Void.—A conveyance to a trustee for the use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent, and his conduct is bona fide. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

Personal Liability of Wife.—It was held in Trust Co. v. Sedgwick, 97 U. S. 304, 24 L. Ed. 954, that where property is conveyed to a wife in fraud of her husband's creditors, a judgment inpersonam for its value cannot be taken against her, nor, in case of her death, against her executors.

Burden of Proof.—Where a conveyance from an insolvent husband to his wife is attacked for fraud, the onus is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59.

The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

IV. RIGHTS AND REMEDIES OF CREDITORS.

As to status of a preference of one creditor due another, or others in case of a voluntary assignment for the benefit of creditors, see s. 1609.

Editor's Note.—It would seem that this Article dealing with fraudulent conveyances is the controlling law until the debtor makes an assignment for the benefit of creditors, whereupon sections 1609 to 1620, inclusive, govern. Under section 1609 when a debtor executes a deed of trust, or deed of assignment, all of the debts of the said debtor shall become due and payable at once. The said deed shall not contain any preference whatsoever of one creditor over another, except as provided in Article 1, Chapter 28.

Section 1611 makes it the duty of the trustee to recover any property which was conveyed by the debtor for the purpose of defrauding his creditors, or of giving a preference. In defining a preference, the section goes on to say that it shall be deemed to have been given when the conveyance is within four months of the registration of the deed of trust or deed of assignment. This definition is quite similar to section 60(a) of the Federal Bankruptcy Act.

Preference of Creditors.—It is stated in emphatic terms by Gaston, J., speaking for the court in Hafner v. Irwin, 23 N. C. 490, 496, thus: "Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under operation of the statute against fraudulent conveyances." It is entirely well settled, both in England and America, that at common law a debtor, insolvent or in failing circumstances, has a right to prefer certain creditors to whom he is under special obligations, where done in good faith and without fraud, though by such preference the fund for the payment of other creditors be lessened or absorbed. See Huntley v. Kingman, 152 U. S. 527, 532, 38 L. Ed. 540, 14 S. Ct. 688.

But an agreement by which a conveyance, made for the purpose of preferring a creditor, is to be kept secret until the debtor has an opportunity to get beyond the reach of process issued by his other creditors, renders the conveyance fraudulent towards other creditors, as intended to hinder, delay, or defeat them. Hafner v. Irwin, 23 N. C. 490.

Same—Private Motions Immaterial.—In a case decided in the U. S. Supreme Court, Emerson v. Senter, 118 U. S. 1, 10, 30 L. Ed. 49, 6 S. Ct. 981, it is said: private motives for giving the preference cannot affect the exercise of the right, if the preferred creditor has done nothing improper to secure it.

Conveyance to Defeat Claims for Torts.—A secret conveyance of a mill made to defeat, hinder or delay a party injured by the erection thereof in the recovery of his damages, is fraudulent and void as to such party, and the former owner of the mill, notwithstanding such conveyance, continues liable for the damage. Purcell v. McCallum, 18 N. C. 221.

Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under the section, as to his creditors. Helms v. Green, 105 N. C. 251, 11 S. E. 470.

Secret Trusts.—In Clement v. Cozart, 109 N. C. 173, 179, 13 S. E. 862, it was said that if a deed be made, showing upon its face a full valuable consideration, but upon the secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time, or any liabilities that he may subsequently incur, such a deed would be void as to all persons whose claims are, shall or might be defrauded thereby. As to pre-existing debts such a deed would be ipso facto fraudulent and void. Morgan v. McLelland, 14 N. C. 82.

Same—Evidence.—In Barber v. Buffaloe, 122 N. C. 128, 129, 29 S. E. 336, it was held that there was sufficient evidence of fraud to take the case to the jury. There the party preferred was a relative of the assignor, went 16 miles on Sunday night with the attorney who drew the deed or assignment, brought in the property with the debt secured, and allowed the assignor to remain in possession free of rent; this was evidence of a secret trust and benefit to the assignor, and the turning point in the case. Royster v. Stallings, 124 N. C. 55, 65, 32 S. E. 384.

Absolute Transfers Intended as Security.—A deed absolute but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. Gregory v. Perkins, 15 N. C. 50.

A deed absolute on its face, which is mere security for a debt, is void as against creditors of the grantor. Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884.

Absolute Transfer Intended as Mortgage.—A deed absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors. Halcombe v. Ray, 23 N. C. 340.

When Insolvent Debtor Improves Wife's Estate. — An insolvent debtor cannot withdraw money from his own estate and give it to his wife to be invested by her in the purchase or improvement of her property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. Michael v. Moore, 157 N. C. 462, 73 S. E. 104.

Mortgage for Just Debt.—It would seem that a mortgage of land for a just debt can not be a fraud upon another creditor, because it can not obstruct his remedy by a sale of all that under any circumstances ought to be sold, namely, the debtor's entire interest in the premises. Lee v. Flannagan, 29 N. C. 471.

Prior and Subsequent Creditors. — Indebtedness, at the time of making a voluntary conveyance of part only of the grantor's property, is, in respect to subsequent creditors seeking satisfaction out of the property conveyed, merely evidence of fraud, the consideration of which belongs to the jury; but in respect to prior creditors where debts can not be otherwise satisfied, it constitutes fraud in law to be declared by the court. O'Daniel v. Crawford, 15 N. C. 197.

Same—Surety on Bond.—The liability of a principal to indemnify a surety on a bond is an existing liability at the time the bond is executed, within the rule that conveyance with intent to defraud creditors is void as to existing obligations. Graeber v. Sides, 151 N. C. 596, 66 S. E. 600.

Void in Part Void in Toto.—If only a part of the con-

sideration of a deed is fraudulent against creditors, the whole deed is void. Hafner v. Irwin, 23 N. C. 490.

Same—Fraud in Law.—As respects fraud in law as contradistinguished from fraud in fact where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void in toto," does not necessarily apply, and the instrument may be sustained notwithstanding the invalidity of a particular provision. Peters v. Bain, 133 U. S. 670, 688, 33 L. Ed. 696, 10 S. Ct. 354.

When Deed of Trust Fraudulent.—A deed of trust executed by a corporation, or an individual for the purpose of creditors, in order to dispose of property to advantage, and prevent a sacrifice by a sale for cash, when the company or individual has the means and resources from which enough might be realized to pay all the debts, is fraudulent and void as against creditors. London v. Parsley, 52 N. C. 313.

It is no ground for a court to pronounce a deed of trust fraudulent per se, as against other creditors, that the property conveyed was to be sold at a private sale. Burgin v. Burgin, 23 N. C. 453.

When Wife Participates in Husband's Bank Deposits. — Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void under this section which was enacted to prevent fraudulent gifts, and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. Moore v. Greenville Banking, etc., Co., 173 N. C. 180, 91 S. E. 793.

When Trustee in Bankruptcy May Have Conveyance Set Aside.—A trustee in bankrutcy is entitled to have a fraudulent conveyance set aside and to recover the property transferred, provided any creditor of the bankrupt would be entitled to the same. Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

Fraudulent Conveyance of Life Insurance Policy.—A life insurance policy issued to one for the benefit of himself is an integral part of his estate, and a voluntary assignment thereof to his children, made when he is insolvent, is fraudulent and void. Burton v. Farinholt, 86 N. C. 261.

Feigned and Covinous Judgment.—A feigned and covinous judgment is made utterly void as against the person who is in anywise hindered, delayed, or defrauded of his debts. Powell v. Howell, 63 N. C. 283, 285.

Bona Fide Purchaser from Fraudulent Vendee. — The statute 13 Elizabeth being intended to protect creditors, a bona fide purchaser from a fraudulent vendee has no title against the creditors of the vendor. Hoke v. Henderson, 14 N. C. 12.

§ 1006. Conveyance with intent to defraud purchasers void.—Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person who has purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alledged fraudulent conveyance, charge, lease, or encumbrance shall be always deemed and taken as notice in law of the same. (Rev., s. 961; Code, s. 1546; R. C., c. 50, s. 2; 27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2.)

Cross References.—As to conveyances to defraud creditors, see sec. 1005 and annotations; as to registration (the Connor Act), see secs. 3308-3310; as to promise for protection of innocent purchaser for value, see sec. 1009.

Editor's Note.—The section is substantially the same as 27 Eliz. c. 4, sec. 2, with the exception of two important changes. The Act of 1860 amended it so as to limit its operation to the purchaser, both for full value and without notice, and gave to creditors of bargainors or mortgagors, and to such purchasers of their interests, but not to the bargainors or mortgagors themselves, the right to impeach conveyances on the ground that they were executed to hinder, delay or defeat, or defraud creditors or such purchasers. Bank v. Adrian, 116 N. C. 537, 547, 21 S. E. 792.

In Cadagan v. Kennett, Comp. 434, Lord Mansfield, in his sweeping manner, commences his opinion with this broad proposition, i. e., "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 and 2 Eliz." This proposition has never received the sanction of any adjudication, and is treated by writers as dictum. In Long v. Wright, 48 N. C. 290, 293, Pearson, J., speaks of it as "a striking illustration of his Lordship's proneness to break through the distinction between law and equity."

In Plummer v. Worley, 35 N. C. 423, Ruffin, C. J., uses this language "It is true that the statute of 27 Eliz. is in its terms confined to lands, but it has been often said that it is but in affirmance of the common law." It is apparent that reference is here made to the dictum of Lord Mansfield, and the inference is indistinctly suggested that the principle of 27 Eliz. might be extended to "things personal;" but the idea is not followed out in the decision. So it came to be a settled and unbroken holding in this State that the section applied only to land. However, the need for an extension of its provisions to "things personal" was keenly felt. So, while the rule was too well established for the courts to break away, the statute brought relief by extending the section to "goods and chattels," the change appearing for the first time in section 1546 of the Code of 1883.

Section Construed with Registration Act.—This section and the Registration Act (Sections 3308-3311) were both intended to prevent fraud, and must be construed together with that view. Austin v. Staten, 126 N. C. 783, 36 S. E. 338.

First Bona Fide Purchaser Protected.—27 Elizabeth being intended for the benefit of purchasers, the first bona fide purchaser, whether from the fraudulent vendor or vendee, is within its operation. Hoke v. Henderson, 14 N. C. 12.

"Purchaser" Defined. — The term "purchaser" is not used in the statute in its technical sense, for one who comes to an estate by his own act. It is to be received in its popular meaning as denoting one who buys for money, and, as we think, buys fairly and of course at a fair price. Fullenwider v. Roberts, 20 N. C. 420, 425, citing Upton v. Basset, Cro. Eliz. 445.

The Legislature thought proper in 1840 to declare that no person shall be deemed a purchaser unless he purchased the land for the full value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. Hiatt v. Wade, 30 N. C. 340, 342.

Second Purchaser Must Be Bona Fide.—The second purchaser must now, as before the Act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonable fair price, such as would indicate fair dealing and not be suggestive of fraud. Austin v. Staten, 126 N. C. 783, 788, 36 S. E. 338.

Validity as between Parties. — In a U. S. Supreme Court case, Railroad Co. v. Soutter, 13 Wall. 517, 523, 20 L. Ed. 543, it was held that a fraudulent purchaser of property when deprived of its possession by attacking creditors, cannot recover of them for repairs or improvements, or for incumbrances lifted by him whilst in possession.

Bona Fide Purchaser Prevails.—A bona fide purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person. Plummer v. Worley, 35 N. C. 423.

Same—Equity Will Not Deprive of Legal Advantage.—No one has superior claims to the consideration of a court of equity than a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. Crump v. Black, 41 N. C. 321, 324.

Curing Invalidity. — It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto. See Sumner v. Hicks, 2 Black 532, 535, 17 L. Ed. 355.

Consideration.—To constitute a good purchase, good faith and a fair price are requisite. Fullenwider v. Roberts, 20 N. C. 420, 428.

Same—A "Petty" Sum. — When the consideration is pecuniary, a "petty" sum, when compared with the value of the land, would not help a second over the head of a first conveyance. Fullenwider v. Roberts, 20 N. C. 420, 426.

Same—One-half or Two-thirds Value. — Under the section a man cannot be held to be a purchaser for a valuable consideration who gives for the land not more than one-half or two-thirds of the value. Harris v. DeGraffenreid, 33 N. C. 89.

Possession by Third Person Legal Notice. — Where one purchases land which he knows to be in the possession of a person other than the vendor, he is affected with legal notice and must inquire into the title of the possessor. Bost v. Setzer, 87 N. C. 187.

Burden of Proof. — Where both parties claim by deed from a common grantor, the deed of the plaintiff being the younger, but registered first—he makes out a prima facie case, and the burden of proof is shifted upon the defendant to attack the bona fides of the plaintiff's deed, and to defeat it, if he can, by establishing fraud. Austin v. Staten, 126 N. C. 783, 36 S. E. 338.

Same—Mortgages. — A mortgage to secure a present loan constitutes the mortgagee a purchaser for value within the meaning of the section. Fowle v. McLean, 168 N. C. 537, 541, 84 S. E. 852.

And the same principle obtains in reference to mortgages and deeds of trust to secure a part indebtedness, except as to an estate or interest existent in the property conveyed. Fowle v. McLean, 168 N. C. 537, 541, 84 S. E. 852; Brem v. Lockhart, 93 N. C. 191; Potts v. Blackwell, 57 N. C. 59.

Same—Deed in Trust. — A deed in trust to sell property and pay certain creditors is supported by a valuable consideration, and is valid against a prior deed of gift as being a subsequent sale to a purchaser for a valuable consideration under this section. Ward v. Wooten, 75 N. C. 413, 416.

Same—Assignee of Fraudulent Vendee. — An assignee of a fraudulent vendee for the benefit of creditors, incurring no new liability on the faith of his title, is not protected. Wallace v. Cohen, 111 N. C. 103, 105, 15 S. E. 892, which cites: Farley v. Lincoln, 51 N. H. 577; Harris v. Horner, 30 Am. Dec. 182; Stevens v. Brennan, 79 N. Y. 254; Montgomery v. Bucyrus Mach. Works, 92 U. S. 257, 23 L. Ed. 656; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993.

But such an assignee takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor. Carpenter v. Duke, 144 N. C. 291, 293, 56 S. E. 938.

Possession. — It is clear that the possession here spoken of is not a possession continued by the fraudulent donor, but is that of the donee himself or his tenant, taken under the conveyance, and that such possession of the donee or for him amounts to notice in respect only of those tracts or parcels to which that possession extends, and cannot affect a person who buys a parcel which is not, at the time of his purchase, in the possession of the fraudulent donee. Wade v. Hiatt, 32 N. C. 302, 303.

§ 1007. Voluntary conveyance evidence of fraud as to existing creditors.—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (Rev., s. 962; Code, s. 1547; R. C., r. 50, s. 3; 1840, c. 28, ss. 3, 4.)

Gifts of Visible Estate and Retention of Choses in Action. —Gifts of visible estates can not be defeated, where the debtor has resources in stocks or other securities of value to meet his liabilities. Worthy v. Brady, 91 N. C. 265.

When Donor Is Unable to Pay Debts. — It is a well settled rule of law in this state, that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed. Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; McCanless v. Flinchum, 89 N. C. 373.

When Conveyance Avoided Only as between Parties to Action. — When the court, in an action under this section has declared a voluntary conveyance void as to the plaintiff, and decreed that it be "set aside, revoked, rescinded, and annulled," it is avoided only as between the parties to the action. Sturges v. Portis Min. Co., 206 Fed. 534, 538; Allred v. Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924.

Legatee Must Suffer Loss. — The assent of an executor to a legacy, before he has paid all of the debts of his testator, is void as to the creditors; for it is a fraud, an act done in violation of the maxim, "A man must be just before he is generous." So long as the executor is solvent, no debt can be left unpaid, for he is liable to the creditors de bonis propriis, by reason of the devastavit. If the executor be insolvent, the loss must fall upon the legatee rather than upon a creditor. Barnawell v. Threadgill, 40 N. C. 86 Barnawell v. Threadgill, 56 N. C. 50, 62; Pullen v. Hutchins, 67 N. C. 428, 433.

A qualification is made in cases where the donor, at the time of the gift "retained property, fully sufficient and available for the satisfaction of all of his then creditors." This modification of the maxim "A man must be just before he in generous," is confined to gifts inter vivos. In respect to legacies, or gifts by will, there has been no modification of the maxim; on the contrary, the legislation upon the subject tends to enforce a strict adherence to it. Pullen v. Hutchins, 67 N. C. 428, 432.

Conveyance to Son. — Where a deed to the grantor's son is impeached as a voluntary gift upon the ground that he did not retain property "fully sufficient and available for the satisfaction of his then creditors," as required by the section, it was held, that such a conveyance is valid if not made with a fraudulent intent and enough property is retained for all his creditors. Worthy v. Brady, 91 N. C. 265.

But where such a deed provides that the grantee shall support his invalid brothers (naming them) and comply with the conditions imposed, it is not voluntary within the meaning of the section, but rests upon a valuable consideration. Worthy v. Brady, 91 N. C. 265.

A voluntary conveyance to a son is not avoided by the fact that the grantor was indebted at the time, if he afterwards paid the debt. Smith v. Reavis, 29 N. C. 341.

A contract made in consideration of support by the son of his father and mother for life for one hundred dollars and certain shares of stock of the father, of the value of seven thousand dollars, and the father has not retained sufficient property out of which to pay his then existing creditors, and the son has acted in good faith without notice or knowledge, the transfer of the stock to the son is not valid as against his father's creditors beyond the amount he has previously expended for the support, and for which he was liable under the terms of the contract, and where issues raising this question have been tendered, refused, and exceptions entered, and this phase of the evidence in the case has not been presented to the jury, a new trial will be ordered on appeal. Peoples Bank, etc., Co. v. Mackorell, 195 N. C. 741, 143 S. E. 518.

Same—When Void Per Se.—A voluntary deed of land or other property made to a son by a father unable to pay his debts is void per se as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court declares it void in law. Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; McCanless v. Flinchum, 89 N. C. 373.

Conveyances to Wife. — A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. Finch v. Cecil, 170 N. C. 114, 86 S. E. 991.

Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay his debts in existence at the time of the gift, it is not fraudulent as to creditors. Taylor v. Eatman, 92 N. C. 601, 602.

Same—Evidence. — When a deed from a husband to his wife is sought to be set aside by his creditors for fraud, evidence, tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her, is inadmissible under the principle that a grantor in a deed to lands may not engraft a resulting trust upon his conveyance of the fee simple title with full covenants and warranty of title. Kelly Springfield Tire Co. v. Lester, 192 N. C. 642, 135 S. E. 778.

In an action to set aside a husband's deed to his wife for fraud as to his creditors, the presumption formerly arising from a voluntary conveyance is removed and the indebtedness of the husband is evidence only from which the intent may be inferred, and a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. Shuford v. Cook, 169 N. C. 52, 85 S. E. 142, citing Hobbs v. Cashwell, 152 N. C. 183, 67 S. E. 495.

Partition between Husband and Wife.—Where a bank-

rupt is allotted an undivided interest in certain lands as his homestead and the remainder in the undivided interest in such lands is sold to make assets, and at the sale it is bought by the wife of the bankrupt, and the land is partitioned by order of court, and in the partition proceeding the husband acknowledges the interest in remainder of his wife, the judgment in the partition proceeding estops the husband from denying the interest of his wife, and operates as a gift to her within the meaning of this section. Wallace v. Phillips, 195 N. C. 665, 143 S. E. 244.

Necessary Allegations to Set Aside Gift.—In order for a creditor of a husband to set aside a gift to his wife as fraudulent against creditors, his complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer thereto is good. Wallace v. Phillips, 195 N. C. 665, 143 S. E. 244.

Presumption and Burden of Proof. — The law presumes that the sale was made in good faith and with honest intentions; in the absence of proof to the contrary, the validity of the sale could not be questioned. See Shauer v. Alterton, 151 U. S. 607, 625, 38 L. Ed. 286, 14 S. Ct. 442.

The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor failed to retain property sufficient and available to pay his then existing creditors. Hood v. Cobb, 207 N. C. 128, 176 S. E. 288.

Same—When Presumed Fraudulent. — If there is an existing debt, and the debtor makes a voluntary conveyance, and afterwards becomes insolvent, so that the creditor must lose his money, unless the property conveyed can be reached, such voluntary conveyance is presumed as a matter of law to be fraudulent. Black v. Sanders, 46 N. C. 67.

Deed Made for Benefit of Debtor's Family. — Where a deed, made without consideration by a debtor, expresses on its face that it is made for the benefit of the debtor and his family, the court can itself pronounce it fraudulent and void as against a then existing creditor. Sturdivant v. Davis, 31 N. C. 365.

Sufficiency of Property Retained. — A deed of gift may be fraudulent, though the donor, at the time of the gift, honestly believed that she had property sufficient to satisfy all her debts then existing, when in fact she was mistaken. Black v. Sanders, 46 N. C. 67.

In an action to set aside a deed, evidence that the grantor retained $11,625 to pay debts to the amount of $11,500 is not sufficient to show that the grantor retained property sufficient to pay his debts. Williams v. Hughes, 136 N. C. 58, 48 S. E. 518.

In an action to set aside a deed as being fraudulent as to creditors, under this section, evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors. Hood v. Cobb, 207 N. C. 128, 176 S. E. 288.

Same—Question for Jury. — It is a question of fact for the determination of the jury whether the donor had retained property amply sufficient to pay his creditors at the time of his making a gift, within the intent and meaning of the section, which determines the validity of the transaction, and the question of his intent to defraud has no significance. Garland v. Arrowood, 177 N. C. 371, 99 S. E. 100.

When Value Determined.—A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, is held incompetent, under this section, the issue being the value of all the debtor's lands at the time of the voluntary deed attacked in the action. Hood v. Cobb, 207 N. C. 128, 176 S. E. 288.

Prior and Subsequent Creditors. — The controlling principle is stated in Aman v. Walker, 165 N. C. 224, 227, 81 S. E. 162, as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally." Sutton v. Wells, 177 N. C. 524, 527, 99 S. E. 365.

A voluntary conveyance is necessarily and in law fraudulent when opposed to the claim of a prior creditor; as against subsequent creditors, whether fraudulent or not, depends upon the bona fides of the transaction, and the question is one of intent to be passed upon by the jury. O'Daniel v. Crawford, 15 N. C. 197, in which the subject of fraudulent conveyances is elaborately discussed in concurring opinions by Ruffin, C. J., and Gaston, Daniel, JJ. Clement v. Cozart, 109 N. C. 173, 180, 13 S. E. 862.

When Question of Fraud for Jury. — The section only requires the question of fraud to be submitted to a jury, in cases where property fully sufficient and available to pay all creditors is retained by the donor. Black v. Sanders, 46 N. C. 67.

§ 1008. Marriage settlements void as to existing creditors.—Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial. (Rev., s. 963; Code, ss. 1270, 1820; 1871-2, c. 193, s. 11; R. C., c. 37, s. 25; 1785, c. 283, s. 2.)

Cross References. — As to married women generally, see secs. 2506-2530; as to contracts between husband and wife, see sec. 2516.

Women Affected with Notice. — The law recognizes no disability on the part of married women which gives them the fruits of a fraud on the ground that they are not, like persons sui juris in all respects, affected by actual notice of its perpetration. Peeler v. Peeler, 109 N. C. 628, 633, 14 S. E. 59.

Gifts between Husband and Wife Good Inter Se. — All gifts from a husband to his wife are good inter se, and against all persons claiming under them; and good against all persons, if he is not in debt at the time; but such gifts are voidable as to existing creditors, if their rights are not secured, and as to subsequent purchasers without notice, and creditors, if made with intent to delay or defraud them. Kelly Mar. Women, Chapter 6, sec. 9, at page 137, quoted in Walton v. Parish, 95 N. C. 259, 263.

May Surrender Curtesy Initiate. — Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. Teague v. Downs, 69 N. C. 280.

Same—Proceeds to Separate Use of Wife. — And an agreement, that the wife shall receive such a price in personal property and hold the same to her separate use to enable her to lay it out in the purchase of another tract of land, is valid, such price not vesting in the husband jure mariti, so as to subject the same to the claims of his creditors. Teague v. Downs, 69 N. C. 280.

Application. — Where, in 1862, a husband was about to enter military service made a deed to his wife of certain land for her support, but retained sufficient property to pay all of his existing debts, it was held, that the consideration was a meritorious one. Walton v. Parish, 95 N. C. 259.

Where a man, upon the eve of marriage, agreed with his intended wife that a previous transaction by which he had mortgaged a certain tract of land to one who was a trustee for her children, in order to secure a part of the purchase money due for such land, should be cancelled, and that, in lieu of what was due, which exceeded the then value of such land, the land should be conveyed to such children, and this was done; it was held that this was not an act of which creditors of the husband could complain. Credle v. Carrawan, 64 N. C. 422.

§ 1009. Purchasers for value and without notice protected.—Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud. (Rev., s. 964; Code, s. 1548; R. C., c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6.)

See note under § 1007.

Editor's Note. — In Reiger v. Davis, 67 N. C. 185; Lassiter v. Davis, 64 N. C. 498, and the class of cases of which they are the leading representatives, the question as to the burden of proof was not involved. The court decides in those cases merely that the fraudulent conveyance is void

unless it appears that the vendee was not a party to the fraud, or purchased without any notice of the fraudulent intent. See Devries & Co. v. Phillips, 63 N. C. 53; Cox v. Wall, 132 N. C. 730, 741, 44 S. E. 635.

Intended as Proviso.—The purpose of the Legislature in enacting this section was to constitute an independent provision, operating as a proviso to the other sections on fraudulent conveyances. Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

Scope and Effect.—In Young v. Lathrop, 67 N. C. 63, 72, 12 Am. Rep. 603, the court held that the section was a proviso to the preceding sections of the chapter, and Pearson, C. J., in referring to it, uses this language: "The proviso can only be made operative by giving to it the scope and effect of purging the original conveyances of the fraud with which it was tainted, by allowing the bona fides and the full valuable consideration of the second conveyance to supply the want of these qualities to the first, so as to perfect the title to the bona fide purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being impeached and made void." Cox v. Wall, 132 N. C. 730, 735, 44 S. E. 635.

Bona Fide Purchaser before Execution Sale. — Where a fraudulent grantee of land conveyed it to a bona fide purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and tested of the term where it was obtained, it was held that by force of the proviso obtained in this section (4th section of the 50th ch. of the Rev. Code, 13th Eliz., ch. 5, sec. 6), the title of the bona fide purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. Young v. Lathrop, 67 N. C. 63.

Bona Fide Purchaser Gets Good Title.—Under this section a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor. Peoples Bank, etc., Co. v. Mackorell, 195 N. C. 741, 745, 143 S. E. 518.

Trustees and Mortgagees Subject to Equities. — It is a settled principle, acted upon every day, that the trustee or mortgagee is a purchaser for a valuable consideration with the provisions of 13 and 27 Elizabeth; but it would seem they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice. Potts v. Blackwell, 56 N. C. 449, 453.

Good Consideration.—"Good consideration" means valuable consideration, or a fair price. Young v. Lathrop, 67 N. C. 63, 72; Arrington v. Arrington, 114 N. C. 151, 167, 19 S. E. 351, citing 2 Bigelow Frauds 443.

Onus Probandi.—When a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of a fraudulent intent on the part of his grantor. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639; Cansler v. Cobb, 77 N. C. 30, 32.

In Bamberger v. Schoolfield, 160 U. S. 149, 40 L. Ed. 374, 16 S. Ct. 225, what is said by the court with reference to the burden of proof does not relate to the notice of the fraud, but to the fraud itself, and of course the burden to establish the latter was placed upon the contesting creditor. Cox v. Wall, 132 N. C. 730, 741, 44 S. E. 635.

When Wife Takes with Notice of Fraud.—Where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife, with a knowledge of his purpose, accepts the benefit of the act and claims under it, she puts herself beyond the pale of the protection offered to innocent purchasers by the section. Peeler v. Peeler, 109 N. C. 628, 633, 14 S. E. 59.

Conveyance to Daughter in Consideration of Services. — Where A made a deed to his daughter, in consideration of services rendered and to be rendered in the future for attending upon him in his old age, with intent to defraud his creditors, the deed is void, even though the daughter had no knowledge of such fraudulent intent. Cansler v. Cobb, 77 N. C. 30.

Cited in Threlkeld v. Malcragson Land Co., 198 N. C. 186, 151 S. E. 99.

§ 1010. Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.—No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement is forbidden by law, if such purchaser, at the time of his purchase, did not have notice of the unlawful consideration of such debt, contract or agreement. (Rev., s. 965; Code, s. 1549; R. C., c. 50, s. 5; 1842, c. 70.)

When Part of Debts Secured are Fictitious.—A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title, even against the creditors of the fraudulent trustor. McCorkle v. Earnhardt, 61 N. C. 300.

Mortgage Note Tainted with Usury.—This section does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at the sale under the mortgage, who buys without notice of the usurious taint in the debt secured. The only case in our reports that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is Coor v. Spicer, 65 N. C. 401, which held that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the section. Aside from the fact that this is held expressly otherwise in the latter case of Moore v. Woodward, 83 N. C. 531, an examination of the section will show that Coor v. Spicer was a palpable inadvertence. Ward v. Sugg, 113 N. C. 489, 493, 18 S. E. 717.

Where a deed of trust is made to secure certain specified debts one of which is tainted with usury, and a purchaser buys at the trustee's sale for a valuable consideration without notice of the illegality of the consideration of the said debt his title is not affected thereby. McNeill v. Riddle, 66 N. C. 290.

§ 1011. Bona fide purchaser of fraudulently conveyed property treated as creditor.—Purchasers of estate previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase. (Rev., s. 966; Code, s. 1550; R. C., c. 50, s. 6.)

§ 1012. Persons aiding debtor to remove to defraud creditors liable for debts.—If any person removes or aids and assists in removing any debtor out of any county in which he has resided for the space of six months, or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by civil action. (Rev., s. 1939; Code, s. 1551; R. C., c. 50, s. 14; 1820, c. 1063.)

What Constitutes Aid and Assistance.—Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him to do the principal act, or effect some primary purpose. Wiley & Co. v. McRee, 47 N. C. 349, 351.

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the section. Moore v. Rogers, 48 N. C. 91.

Where a party, having the money of his principal in his hands for a fair and honest purpose, paid it to his son fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the principal and the agent, the former allowed the latter's bill for money thus applied does not amount to such a ratification as to subject the principal. Moore v. Rogers, 51 N. C. 297.

Same—Carrying Debtor to Railway Station. — Where a party, with his horse and buggy, carried a debtor to a railroad station, and there procured the money to enable him to leave the State, with the intent to assist him in the

purpose of avoiding his creditors, it was held to be a fraudulent removal within the statute. Moffit v. Burgess, 53 N. C. 342.

Same—Property Not Carried Entirely Out of County. — Where a debtor removes out of a county with intent to defraud his creditors, a person who, knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. Godsey v. Bason, 30 N. C. 260.

Same—Aid without Acts.—There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words, the criterion of the plaintiff's right of action and the defendant's liability being, that the one should have been damaged in consequence of the fraud of the other. March v. Wilson, 44 N. C. 143.

Same—Mere Advice Insufficient. — Simply advising a debtor to run away, though the advice be given to delay, etc., is not equivalent to aiding and assisting, and will not sustain an action under the statute against the fraudulent removing of debtors. Wiley & Co. v. McRee, 47 N. C. 349.

Knowledge of Particular Debt Unnecessary. — Where a person who has removed a debtor out of a county is sued by a creditor it is not necessary to show that this person had a knowledge of any particular debt due from the debtor, but is sufficient if the circumstances of the case induce the jury to believe that the removal was made with a view to defraud creditors. Godsey v. Bason, 30 N. C. 260.

One Arrested under Writ of Capias Ad Respondendum. — The bail of a person arrested under a writ of capias ad respondendum may maintain an action on the case at common law against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had to pay the debt sued on. March v. Wilson, 44 N. C. 143.

Surety on Constable's Bond Not Creditor.—A surety on a constable's bond, upon which there has been a breach, but no judgment nor payment by him, is not a creditor, so as to entitle him to recover against one for fraudulently removing his principal. Booe v. Wilson, 46 N. C. 182.

Measure of Damages.—In an action under this section the measure of damages is the amount of the debt due by the debtor to the plaintiff. Godsey v. Bason, 30 N. C. 260.

Same—Jury in Suit by Different Creditors.—An action on the case, brought by A. against B., for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C. against B. for the same act of removing, and are challenged by the plaintiff. They are under a legal bias by reason of having decided the case of A. against B., and the challenge ought to be allowed, and this although additional evidence is to be adduced in the second trial. Baker v. Harris, 60 N. C. 271.

Intent of Escaped Debtor Immaterial.—The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial. Moffitt v. Burgess, 53 N. C. 342.

§ 1013. Sales in bulk presumed fraudulent.—The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be prima facie evidence of fraud, and void as against the creditors of the seller, unless the seller, at least seven days before the sale, make an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and conditions thereof. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, so far as it will go in payment of debts actually owing by the owner or owners, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 6, s. 1; 1933, c. 190.)

Editor's Note.—The words "seven days before the proposed sale," near the end of the first sentence, were substituted by Public Laws 1933, c. 190, for the words "within said time."

Constitutionality.—This section is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property. Pender v. Speight, 159 N. C. 612, 75 S. E. 851.

Same—Valid Exercise of Police Power.—This section regulating the sale of merchandise in bulk, with certain requirements as to notice to creditors, inventories, etc., making such sales, contrary to the provisions of the statute, prima facie evidence of fraud and void as against creditors of the seller, is a valid exercise of the police powers of government, and such sale is to be regarded as prima facie fraudulent in the trial of an issue, as to its validity. Raleigh Tire, etc., Co. v. Morris, 181 N. C. 184, 106 S. E. 562; Whitmire-Ligon Co. v. Hyatt, 175 N. C. 117, 119, 95 S. E. 38; Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; Pennell v. Robinson, 164 N. C. 257, 80 S. E. 417.

Construed Strictly.—The statute making void as against creditors a sale of a large part or the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8.

A sale in bulk of a large part or the whole of a stock of merchandise under the conditions set forth in the statute, without an inventory and proper notice to creditors or without an adequate and proper bond to account for the proceeds, is absolutely void as to creditors and may be made available for their debts and claims. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; Pennel v. Robinson, 164 N. C. 257, 80 S. E. 417; Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 119, 95 S. E. 38.

Merchandise Defined.—Within the intent and meaning of the section the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, the subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to its customers for meals, or to the furniture and fixtures used therein in connection with conducting the business of a restaurant. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8.

"Sale" within Statute.—Where a bankrupt transfers a large part of his stock of goods to a corporation, which does not assume any of the debts, but merely issues its capital stock in payment, the sale is void as against creditors, in view of this section, the word "sale" in the statute meaning the transfer of property from one person to another for consideration of value, regardless of the mode of payment of consideration. First Nat. Bank v. Raleigh Sav. Bank & Trust Co., 37 F. (2d) 301.

Subsequent Creditors Not Included.—This section applies only as to creditors of the seller at the time of the sale and not to a subsequent creditor: Certainly where there are no creditors at the time of the sale. Farmer's Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527.

Notice within Seven Days. — The statutory requirement that the seller of a stock of merchandise in bulk shall give notice thereof to his creditors "within seven days" is interpreted to mean that such notice may be given at any time

within the number of days specified. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209.

Vendor's Right to Personal Property Exemption.—A vendor of merchandise in bulk which is void under our statute is not deprived of his right to his personal property exemption under execution of his judgment creditor. Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 95 S. E. 38.

When Question for Jury.—In an action to set aside the sale of a stock of merchandise in bulk as void against creditors, it is for the jury to determine the fact as to whether the seller had complied with the statutory requirement as to invoice, notice to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent, and not that it was void, is reversible error. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209.

Liability of Purchaser. — Where a dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the latter may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares under the doctrine announced in Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8, for the sale of the original creditor is itself void for noncompliance with this section. Raleigh Tire, etc., Co. v. Morris, 181 N. C. 184, 106 S. E. 562.

Purchaser Not Liable.—Under the provisions of this section a creditor, at most, would be entitled to have the transfer set aside, but not to hold the purchaser personally liable. Goldman & Co. v. Chank, 200 N. C. 384, 156 S. E. 919, discussing but not deciding whether sale was contrary to section.

Cited in Begnell v. Safety Coach Lines, 918 N. C. 688, 153 S. E. 264.

Art. 4. Voluntary Organizations and Associations

§ 1013(a). Authority to acquire and hold real estate.—Voluntary organizations and associations of individuals, when organized for the purposes which are not prohibited by law, are authorized and empowered to acquire real estate and to hold the same in their common or corporate names. (Ex. Sess. 1921, c. 95, s. 1.)

§ 1013(b). Title vested; conveyance; probate. — Where real estate has been or may be hereafter conveyed to such organizations or associations in their common or corporate name the said title shall vest in said organization, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyances thus made by such organizations, and associations shall convey good and fee simple title to said land. (Ex. Sess. 1921, c. 95, s. 2.)

§ 1013(c). Effect as to conveyances by trustees. —Nothing in this law shall be deemed in any manner to change the law with reference to the holding and conveyance of land by the trustees of churches or other voluntary organizations where such land is conveyed to and held by such trustees. (Ex. Sess. 1921, c. 95, s. 3.)

§ 1013(d). Effective date of article; limitation. — This law shall be in force from and after December 20, 1921, and shall expire by limitation on May 1, 1922. (Ex. Sess. 1921, c. 95, s. 4.)

Art. 5. Sale of Building Lots in North Carolina

§ 1013(e). Application for permit to sell.— Hereafter before a building lot or lots in a new sub-division of real estate is offered for sale or sold in North Carolina wherein it is represented or agreed that streets, sidewalks, water sewer, lights or other improvements are to be made for the benefit of the purchaser or purchasers, the person, firm or corporation desiring to offer the same for sale shall first apply to the Clerk of the Superior Court of the county wherein the building lot or lots are situated for a permit to so sell said lots. (1927, c. 210, s. 1.)

§ 1013(f). Contents of application.— The application for a permit to sell must state the location of the lots or lot with an estimate of the cost of the improvement proposed to be made on each lot as a whole; that the estimate of cost so made shall be certified as approximately correct by a civil engineer or county surveyor licensed to practice in the State of North Carolina. (1927, c. 210, s. 2.)

§ 1013(g). Matters to be investigated by clerk. —Upon the filing of said application and the certificate of the cost of the improvement, the clerk of the court shall satisfy himself that the land or lots are located in his county and he shall also satisfy himself of the genuineness of the application and certificate of the engineer or county surveyor, and shall, if so satisfied, require a good and sufficient bond, in a sum equal to the amount certified by the engineer or county surveyor as the approximate cost of the improvement or improvements, with a corporation licensed to do business in the State of North Carolina as surety thereon, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased. (1927, c. 210, s. 3.)

§ 1013(h). Application, certificate, bond and order filed as permanent record.—The clerk of the Superior Court shall preserve the application, certificate and bond and his orders thereon as a permanent record for the benefit of any party whose rights are affected thereby and shall, when the provisions of this act have been fully complied with, together with a filing fee of one dollar, issue a permit to the applicant to sell said lot or lots. (1927, c. 210, s. 4.)

§ 1013(i). Penalty for violation.—Any person, firm or corporation selling or offering for sale any building lot or lots in violation of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1927, c. 210, s. 5.)

CHAPTER 20
CORONERS

§ 1014. Election; appointment by clerk in special cases.—In each county a coroner shall be elected by the qualified voters thereof in the same manner and at the same time of the election of members of the General Assembly, and shall hold office for a term of two years, or until his successor is elected and qualified. When there is no coroner in the county, or in the case of a vacancy in the office of coroner occurring for any rea-

son, the clerk of the Superior Court for the county shall appoint the coroner, who shall, upon qualification, hold office until his successor is elected and qualified; Provided, that the clerk of the superior court for the county shall appoint some competent person to act as coroner in any case wherein the law requires a coroner's inquest to be held when the coroner shall be out of the county, or when the coroner shall for any reason be unable to hold the necessary inquest as provided by law. (Rev., s. 1047; Const. Art. IV, s. 24; Extra Sess. 1924, c. 65; 1935, c. 376.)

Editor's Note.—The provision in this section that the coroner shall hold office "until his successor is elected and qualified" is new with the Acts of 1924. The provision for filling vacancies "occurring for any reason" is also new. The old section provided only for appointment by the clerk for special cases, but since the Acts of 1924 the clerk appoints a coroner to fill the vacancy "until his successor is elected and qualified."

The amendment of 1935 adds the proviso at the end of this section relating to appointment when the coroner is out of the county or for any reason is unable to hold the inquest.

Upon a failure to give or renew bond, as the case may be, and the office declared vacant, the commissioners appoint. See section 1297, subsection 12, 13.

§ 1015. Oaths to be taken. — Every coroner, before entering upon the duties of his office, shall take and subscribe to the oaths prescribed for public officers, and an oath of office. (Rev., s. 1048, Code, s. 1661; Extra Sess. 1924, c. 65.)

Editor's Note.—This section was not changed by Acts of 1924.

§ 1016. Coroner's bond.—Every coroner shall execute an undertaking conditioned upon the faithful discharge of the duties of his office with good and sufficient surety in the penal sum of two thousand dollars ($2,000), payable to the State of North Carolina, and approved by the board of county commissioners. (Rev., s. 299; Code, s. 661; R. C., c. 25, s. 2; 1791, c. 342, ss. 1, 2; 1920, c. 1047, s. 562; 1889, c. 54, s. 52; 1924, c. 65.)

For action on bond of coroner acting as sheriff, see § 3930.

Editor's Note.—The words "and sufficient" and "penal sum" in this section are new with the Acts of 1924.

Want of Official Bond.—Where one has been appointed coroner of a county, though it may appear he has not renewed his official bonds, as required by law, yet his acts as coroner de facto are valid, at least as regards third persons. Mabry v. Turrentine, 30 N. C. 201.

§ 1017. Coroners' bonds registered; certified copies evidence.—All official bonds of coroners shall be duly approved, certified, registered, and filed as sheriff's bonds are required to be; and certified copies of the same duly certified by the register of deeds, with official seal attached, shall be received and read in evidence in the like cases and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence. (Rev., s. 200; Code, s. 662; 1860-1, c. 18; 1924, c. 65.)

Editor's Note.—The Acts of 1924 substituted in this section the words "certified by the register of deeds with official seal attached" in lieu of "from the register's office."

§ 1018. In case of vacancy, clerk appoints special.—Whenever there is a vacancy existing in the office of coroner in any county, and it is made to appear to the clerk of the Superior Court of such county by satisfactory evidence that a deceased person whose body has been found within the county probably came to his death by the criminal act or default of some person, it is the duty of the clerk of the Superior Court of such county to appoint some suitable person as special coroner to hold an inquest over the body of the deceased. Such special coroner shall not be appointed, however, unless, in the opinion of the clerk, the coroner's investigation ought to be made before he has sufficient time to select a coroner to fill such a vacancy for the remainder of the term, and if it is practical for him to fill such vacancy for the remainder of the term in time for the investigation of the deceased, he shall do so; otherwise, he shall make a special appointment and shall fill the vacancy in the office of coroner for his county as soon as it is practical for him to do so, and not later than thirty days thereafter. (Rev., s. 1049; 103, c. 661; 1924, c. 65.)

Editor's Note.—In this section, the Acts of 1924 substituted the words "to the clerk of the superior court of such county by satisfactory evidence" for "by the affidavit of some responsible person." The latter half of this section is new with the same Act.

§ 1019. Powers, penalties, and liabilities of special coroner.—The special coroner appointed under the provisions of the preceding section shall be invested with all the powers and duties conferred upon the several coroners in respect to holding inquests over deceased bodies, and shall be subject to the penalties and liabilities imposed on the said coroners. (Rev., 1050; 1903, c. 661, s. 2; 1924, c. 65.)

Editor's Note.—This section was not changed by the Act of 1924.

§ 1020. The duties of coroners with respect to inquests and preliminary hearings. — The duties of several coroners with respect to inquests and preliminary hearings shall be as follows:

1. Whenever it appears that the deceased probably came to his death by the criminal act or default of some person, he shall go to the place where the body of such deceased person is and make a careful investigation and inquiry as to when and by what means such deceased person came to his death and the name of the deceased, if to be found out, together with all the material circumstances attending his death, and shall make a complete record of such personal investigation: Provided, however, that the coroner shall not proceed to summons a jury as is hereinafter provided if he shall be satisfied from his personal investigation that the death of the said deceased was from natural causes, or that no person is blamable in any respect in connection with such death, and shall so find and make such finding in writing as a part of his report, giving the reason for such finding; unless an affidavit be filed with the coroner indicating blame in connection with the death of the deceased.

2. To summon forthwith a jury of six good and lawful men, freeholders, who are otherwise qualified to act as jurors, who shall not be related to the deceased by blood or marriage, or to any person suspected of guilt in connection with such death, and the coroner, upon the oath of the jury at the said place, which oath may be taken by him or any other person authorized to administer oaths, shall make further inquiry as to when, how and by what means such deceased person came to his death, and shall cause to come before

himself and the said jury all such persons as may be necessary in order to complete said inquiry.

3. If it appears that the deceased was slain, or came to his death in such manner as to indicate any person or persons guilty of the crime in connection with the said death, then the said inquiry shall ascertain who was guilty, either as principal or accessory, or otherwise, if known, or in any manner, the cause of his death.

4. Whenever in such investigations, whether preliminary or before his jury, it shall appear to the coroner or to the jury that any person or persons are culpable in the matter of such death, he shall forthwith issue his warrant for such person and cause the same to be brought before him and the inquiry shall proceed as in the case of preliminary hearings before justices of the peace, and in case it appears to the said coroner and the jury that such persons are probably guilty of any crime in connection with the death of the deceased, then the said coroner shall commit such person to jail, if it appears that such person is probably guilty of a capital crime, and in case it appears that such persons are not probably guilty of a capital crime, but are probably guilty of a lesser crime, then such coroner to have the power and authority to fix bail for such person or persons, all such persons as are found probably guilty in such hearing shall be delivered to the keeper of the common jail for such county by the sheriff or such other officer as may perform his duties at such hearings and committed to jail unless such persons have been allowed and given the bail fixed by such coroner.

5. As many persons as are found to be material witnesses in the matters involved in such inquiry and hearings, and are not culpable themselves shall be bound in recognizance with sufficient surety to appear at the next Superior Court to give evidence, and such as may default in giving such recognizance may be by such coroner committed to jail as is provided for State witnesses in other cases.

6. To summon a physician or surgeon and to cause him to make such examination as may be necessary whenever it appears to such coroner as proper to have such examination made, or, upon request of his jury, or upon the request of the solicitor of his district or counsel for any accused or any member of the family of the deceased: Provided, however, that when the coroner shall himself be a physician or surgeon, he may make such examination himself.

7. Immediately upon information of the death of a person within his county under such circumstances as, in the opinion of the coroner, may make it necessary for him to investigate the same, to notify the solicitor of his district, and to make such additional investigation as he may be directed to do by such solicitor.

8. To permit counsel for the family of the deceased, the solicitor of his district, or any one designated by him, and counsel for any accused person to be present and participate in such hearing and examine and cross-examine witnesses and, whenever a warrant shall have been issued for any accused person, such accused person shall be entitled to counsel and to a full and complete hearing.

9. To begin his inquiry with his jury where the body of the deceased shall be, said hearing may be adjourned to other times and places, and the body of the deceased need not be present at such further hearing.

10. To reduce to writing all of the testimony of all witnesses, and to have each witness to sign his testimony in the presence of the coroner, who shall attest the same, and, upon direction of the solicitor of the district, all of the testimony heard by the coroner and his jury shall be taken stenographically, and expense of such taking, when approved by the coroner and the solicitor of the district, shall be paid by the county. When the testimony is taken by a stenographer, the witness shall be caused to sign the same after it has been written out, and the coroner shall attest such signature. That the attestation of all the signatures of witnesses who shall testify before the coroner shall include attaching his seal, and such statements, when so signed and attested, shall be received as competent evidence in all courts either for the purpose of contradiction or corroboration of witnesses who make the same, under the same rules as other evidence to contradict or corroborate, may be now admitted. (Rev., 1051; Code, s. 657; 1899, c. 478; 1905, c. 628; 1909, c. 707, s. 1; 1924, c. 65.)

Editor's Note.—No radical changes were made to the old section by the Act of 1924. The same procedural steps are retained but are set out in much greater detail. Subsections 7, 8, 9, and the portions of 10 referring to stenographic reports are new.

The Inquest a Judicial Proceeding.—The inquest is the coroner's court and it is an indispensable requisite that the jury which is summoned be sworn and charged by the coroner in the presence of the body of the deceased. Though the coroner is judge of the court and the power and authority to administer oaths to the witnesses rests in him, the administration of oaths is a ministerial act and may be performed by anyone by the direction and in the presence of the court. State v. Knight, 84 N. C. 790.

§ 1021. Acts as sheriff in certain cases; special coroner.—If at any time there is no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process and in all other things to act as sheriff, until some person is appointed sheriff in said county; and he shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law for neglect or disobedience of the same duties. If at any time the sheriff of any county is interested in or a party to any proceeding in any court, and there is no coroner in such county, or if the coroner is interested in any such proceeding, then the clerk of the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process, and such special coroner shall be under the same rules, regulations, and penalties as hereinabove provided for. (Rev., s. 1052; Code, s. 658; 1891, c. 173; 1924, c. 65.)

Editor's Note. — This section was re-enacted without change by the laws of 1924.

Service of Summons by Coroner when Sheriff is Party.—In an action to which the sheriff is a party it is proper that the summons be addressed to and served by the coroner, State v. Baird, 118 N. C. 854, 862, 24 S. E. 668, or by his deputy since the service of a summons is the discharge of a purely ministerial duty. Yeargin v. Siler, 83 N. C. 348.

Deputization of Special Officers.—The words "any proceedings in any court" contained in the provision for deputizing special officers where the sheriff and coroner are interested, have been given a literal interpretation and the provision is held applicable to courts of justices of the

peace as well as to the higher courts. Baker v. Brem, 127 N. C. 322, 37 S. E. 454.

§ 1022. Compensation of jurors at inquest.—All persons who may be summoned to act as jurors in any inquest held by a coroner over dead bodies, and who, in obedience thereto, appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the Superior Courts. The coroners of the respective counties are authorized and empowered to take proof of the number of days of service of each juror so acting, and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the Superior Courts. (Rev., s. 1053; Code, ss. 659, 660; 1924, c. 65.)

Editor's Note. — This section was re-enacted without change by the Laws of 1924.

Right to Compensation.—A person summoned as a juror on a coroner's inquest is not entitled to any compensation. Green v. Wynne, 66 N. C. 530.

§ 1022 (a). Hearing by coroner in lieu of other preliminary hearing; habeas corpus. — All hearings by a coroner and his jury, as provided herein, when the accused has been arrested and has participated in such hearing, shall be in lieu of any other preliminary hearing before a justice of the peace or a recorder, and such cases shall be immediately sent to the clerk of the Superior Court of such county and docketed by him in the same manner as warrants from justices of the peace. Any accused person who shall be so committed by a coroner shall have the right, upon habeas corpus, to have a judge of the Superior Court review the action of the coroner in fixing bail or declining the same. (1924, c. 65.)

§ 1022 (b). Service of process issued by coroner.—All process, both subpoenas and warrants for the arrest of any person or persons, and orders for the summoning of a jury, in case it may appear necessary for such coroner to issue such order, shall be served by the sheriff or other lawful officer of the county in which such dead body is found, and in case it is necessary to subpoena witnesses or to arrest persons in a county other than such county in which the body of the deceased is found, then such coroner may issue his process to any other county in the State, with his official seal attached, and such process shall be served by the sheriff or other lawful officer of the county to which it is directed, but such process shall not be served outside of the county in which such dead body is found unless attested by the official seal of such coroner. (1924, c. 65.)

CHAPTER 21

CORPORATION COMMISSION; UTILITIES COMMISSIONER

Art. 1. Organization and Abolition of Commission

§§ 1023-1034: Repealed by Acts 1933, ch. 134, codified as §§ 1112(a)-1112(q).

Editor's Note.—Public Laws 1933, ch. 134, which in section 1 abolished the corporation commission and the office of corporation commissioner, became effective on and after January 1, 1934.

Art. 2. Corporations and Business Within Control of Commissioner

§ 1035. Corporations and business within control of commissioner.—The utilities commissioner shall have such general control and supervision as is necessary to carry into effect the provisions of this chapter and the laws regulating the companies, corporations, copartnerships and individuals specified herein, over—

1. Railroad, street railway, steamboat, canal, express and sleeping car companies, and all other companies or corporations engaged in the carrying of freight or passengers, and all copartnerships or individuals engaged in the business of common carriers. (Rev., s. 1066; 1899, c. 164, s. 1; 1901, c. 679.)

2. Telegraph and telephone companies and all other companies engaged in the transmission of messages; over persons and individuals owning and operating telegraph or telephone lines in North Carolina and who rent phones and wires to persons generally. (Rev., ss. 1066, 1096; 1899, c. 164, ss. 1, 2; 1907, c. 966.)

3. Electric light, power, water and gas companies and corporations, other than such as are municipally owned or conducted, and over all persons, companies and corporations, other than municipal corporations now or hereafter engaged in furnishing electricity, electric light, current or power and gas. (1913, c. 127, s. 1.)

4. All water power, hydro-electric power and water companies now doing business in this state, or which may hereafter engage in doing business in this state, whether organized under the general or private laws of this state, or under the laws of any other state or country. Such companies are deemed to be public service companies and subject to the laws of this state regulating public-service corporations. (1913, c. 133, s. 1.)

5. Flume companies which avail themselves of the power of eminent domain as provided in the chapter Eminent Domain. (1907, c. 39.)

6. Corporations, other than municipal corporations, or individuals, owning and operating a public sewerage system in North Carolina. (1917, c. 194.)

7. Public and private banks, and all loan and trust companies or corporations. (Rev., s. 1066; 1899, c. 164, s. 1; 1901, c. 679.)

The power of control and supervision vested in the utilities commissioner under this section with respect to the various classes of public-service corporations and individuals engaged in furnishing the public utilities mentioned shall be the same as that vested in him in respect to railroads and other transportation companies. (1913, c. 127, s. 7.)

Editor's Note.—The words "utilities commissioner" have been substituted for "corporation commission" in this and following sections of this chapter as directed by Public Laws of 1935, chapter 134, section 8, codified as section 1112(g), which also provides for the proper substitution of pronouns. Where only the word "commission" appeared "commissioner" has been substituted therefor.

General Considerations — Right of State to Regulate. — The right of the State to establish regulations for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to

enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion. Efland v. Southern R. Co., 146 N. C. 135, 138, 59 S. E. 355, citing Harrill Bros. Southern R. Co., 144 N. C. 532, 57 S. E. 383; Stone & Co. v. Atlantic Coast Line R. Co., 144 N. C. 220, 56 S. E. 932; Walker v. Railroad, 137 N. C. 163, 168, 49 S. E. 84; McGowan v. Wilmington, etc., Railroad, 95 N. C. 417; Branch v. Wilmington, etc., R. Co., 77 N. C. 347; Seaboard Air Line Railway v. Florida, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 513, 29 L. Ed. 463, 6 S. Ct. 110; Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Munn v. Illinois, 94 U. S. 113. See note "Legislative Power to Regulate," under sec. 1023. See also Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 60, 175 S. E. 698.

Same—Classification Must Not Be Arbitrary.—As to intrastate or domestic matters, the general assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Efland v. Southern R. Co., 146 N. C. 135, 59 S. E. 355.

In Tullis v. Lake Erie, etc., R. Co., 175 U. S. 348, 44 L. Ed. 192, 20 S. Ct. 136. Chief Justice Fuller, quotes with approval from the decision in Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552, 19 S. Ct. 281, 562: "The state in exercising the power to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion; it was sufficient to satisfy the demands of the constitution if the classifications were practical and not palpably arbitrary." Efland v. Southern R. Co., 146 N. C. 135, 139, 59 S. E. 355.

Same—Not a Federal Question.—Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the powers delegated to the commission is not a federal question. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

Subsection One—Legislature May Regulate Directly or Indirectly.—Railroad companies from the public nature of the business by them carried on, and the interest which the public has in their operation, are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

Same—Rate Fixing Power May Be Delegated.—The General Assembly has the power to establish a commission to supervise and regulate the rates of common carriers. Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 240, 52 S. E. 941; Corporation Comm. v. Railroad, 137 N. C. 114, et seq., 49 S. E. 191; Corporation Comm. v. Seaboard Air Line System, (Rate Case), 127 N. C. 283, 37 S. E. 266; Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393; Corporation Comm. v. Atlantic Coast Line R. Co., ("Track Scales case",) 139 N. C. 126, 51 S. E. 793.

Same—When State May Regulate Interstate Commerce.—The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Colley Const. Lim. 595; Mobile v. Kimball, 102 U. S. 691, 697, 26 L. Ed. 238; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Wilson v. Blackbird Creek Marsh Co., 2 Peters, 245, 7 L. Ed. 412; Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525; Turner v. Maryland, 107 U. S. 38, 27 L. Ed. 370, 2 S. Ct. 44; Morgans Steamship Co. v. Louisiana, 118 U. S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; Morris, etc., Co. v. Southern Exp. Co., 146 N. C. 167, 173, 59 S. E. 667.

Same—Power of Commission Over Railroads.—This section gives the Commission general control and supervision of all railroad corporations. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

Same—Same—Lacks Power to Appraise and Assess.—Either intentionally or accidentally, the Corporation Commission was not clothed with the power of appraising and assessing railroad property. Southern R. Co. v. North Carolina Corp. Comm., 97 Fed. 513, 518.

Same—When Power to Regulate Arbitrarily Exercised.—The public power to regulate railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

Same—When Duty of Railroad Entails Pecuniary Loss.—The state has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

Subsection Two — Telephone Company Subject to State Control.—A telephone company, acting under a quasi public franchise, is properly classified among the public service corporations, and as such is subject to public regulation and reasonable control. Clinton-Dunn Tel. Co. v. Carolina Tel., etc., Co., 159 N. C. 9, 14, 74 S. E. 636; Godwin v. Carolina Tel. Co., 136 N. C. 258, 48 S. E. 813; Leavell v. Western Union Teleg. Co., 116 N. C. 211, 21 S. E. 391; Horner v. Oxford Water, etc., Co., 163 N. C. 535, 69 S. E. 607; Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319; Telegraph v. Telegraph Co., 61 Vt. 241; Telephone Co. v. Telegraph Co., 66 Md. 399; Yancy v. Telephone Co., 81 Ark. 486; Cumberland Tel,, etc., Co. v. Kelly, 160 Fed. 316.

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay, is a public-service corporation and comes within the provisions of this section. Horton v. Interstate Tel., etc., Co., 202 N. C. 610, 163 S. E. 694.

Same—Jurisdiction of Court Not Ousted. — The section giving general control of telephone companies to the Corporation Commission does not oust the court of its jurisdiction to compel the company to perform a public duty it owes to an individual. Walls v. Strickland, 174 N. C. 298, 93 S. E. 857.

Same—When Message Not Interstate Commerce. — In State v. Western Union Teleg. Co. (Albea's case), 113 N. C. 213, 18 S. E. 389, the court held that telegraphic messages transmitted by a company from and to points in this state, although tranversing another state in the route, do not constitute interstate commerce and are subject to the tariff regulation of the Commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by Fuller, C. J., in Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 S. Ct. 806, to the same purport, Campbell v. R. R., 86 Iowa, 587; Leavell v. Western Union Teleg. Co., 116 N. C. 211, 220, 21 S. E. 391.

Subsection Seven—Cross References.—As to power to fix rates for public utilities, see section 2783; as to manner of enforcing regulations, see section 2784; as to existing power, see section 2785.

Cited in In re Lafayette Bank & Trust Co., 198 N. C. 783, 787, 153 S. E. 452.

Art. 3. Powers and Duties

§ 1036. To be Board of State Tax Commissioners. — The corporation commissioners constitute the Board of State Tax Commissioners with the powers and duties prescribed by article four of the chapter entitled Taxation. (Rev., s. 1119.)

Editor's Note.—Public Laws of 1935, ch. 134, sec. 8, codified as § 1112(g), directed that the words "utilities commissioner" be substituted for "corporation commissioners" in this section which conferred upon the former board of state tax commissioners the powers and duties prescribed by former article four of the chapter on taxation. The utilities commissioner is now a member of the State Board of Assessment. See § 7971(3).

Commission Functions in Corporate Capacity.—The Corporation Commission acts as a body and in a corporate capacity, and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions are not individual or personal, but corporate. Hence mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not lie against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036.

§ 1037. To make and enforce rules for public-service corporations. — The utilities commissioner has power to make any necessary and proper rules, orders and regulations for the safety,

comfort and convenience of passengers, shippers or patrons of any public-service corporation, and to require the observance of and to enforce the same by the company and its employees, such power being the same as that provided in this chapter in respect to railroads and other transportation companies. (1907, c. 469, s. 1a; 1913, c. 127, s. 2.)

See editor's note under sec. 1035.

Legislative Intent.—There was no intention to give to a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons, which such Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealing to the unrestricted will of one party—the carrier. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 132, 51 S. E. 793.

Power to Make Orders and Regulations.—The Corporation Commission is given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public-service corporation. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 77 S. E. 994.

§ 1037(a). System of accounts. — The utilities commissioner may establish a system of accounts to be kept by the public utilities, under his jurisdiction, or may classify said public utilites and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept. (1931, c. 455.)

See editor's note under sec. 1035.

§ 1037(b). Reports. — The utilities commissioner shall at least once every twelve months require any public utility to file annual reports in such form and of such content as the commissioner may require and special reports concerning any matter about which the commissioner is authorized to inquire or to keep himself informed, or which he is authorized to enforce. All reports shall be under oath when required by the commissioner. (1931, c. 455.)

See editor's note under sec. 1035.

§ 1037(c). Investigations. — The utilities commissioner may, on his own motion and whenever it may be necessary in the performance of his duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigation the commissioner may proceed either with or without a hearing as he may deem best, but he shall make no order without affording the parties affected thereby a hearing.

If after such an investigation, or investigation and hearing, the commissioner, in his discretion, is of the opinion that the public interest shall be more greatly conserved by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the commissioner to report his findings and recommendation to the governor and council of state with request for an allotment from the emergency and contingency fund to defray such expense which may be granted as provided by law for expenditures from such fund or may be denied. (1931, c. 455.)

See editor's note under sec. 1035.

§ 1037(d). Certificate of Convenience and Necessity. — No person, or corporation, their lessees, trustees or receivers shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control of, either directly or indirectly, without first obtaining from the utilities commissioner a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to new construction in progress at the time of the ratification of this act, nor to construction into territory contiguous to that already occupied and not receiving similar service from another utility, nor to construction in the ordinary conduct of business.

The utilities commissioner is hereby empowered to make rules governing the application for, and the issuance of such certificates of public convenience and necessity. (1931, c. 455.)

See editor's note under sec. 1035.

§ 1037(e). Contracts of public service corporations.—All public service corporations when requested by the utilities commissioner shall submit copies of contracts made with any person, firm or corporation classed as a holding, managing or operating company or selling service of any kind, and the utilities commissioner shall have the right to disapprove any such contract, after hearing, if in his judgment it is found to be unjust or unreasonable, and designed, or entered into for the purpose of concealing, abstracting, or dissipating the net earnings of the public service corporation receiving such services. (1931, c. 455.)

See editor's note under sec. 1035.

§ 1038. To require transportation and transmission companies to maintain facilities. — The utilities commissioner has power to require all transportation and transmission companies to establish and maintain all such public-service facilities and conveniences as may be reasonable and just. He may require steamboat companies to provide such wharf and warehouse facilities as may be reasonable and just. (1907, c. 469, s. 2; Ex. Sess. 1913, c. 52, s. 1.)

See editor's note under sec. 1035.

§ 1039. To authorize lumber companies to transport commodities. — The utilities commissioner has power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers, and to charge therefor reasonable rates to be approved by the commissioner. (1915, c. 160, s. 1; 1915, c. 6.)

See editor's note under sec. 1035.

Establishing Joint Rate of Transportation. — A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Corporation Commission, under the provisions of this section. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 121 S. E. 767.

§ 1040. To establish and regulate stations for freight and passengers.—The commissioner is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it,

the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading livestock and for feeding, sheltering and protecting the same in transportation. The commissioner shall not require any company or corporation to establish any station nearer to another station than five miles. (Rev., s. 1097; 1899, c. 164, s. 2, subsec. 12; 1913, c. 155.)

See editor's note under sec. 1035.

Power to Require and Regulate Depots.—The Commission can order new depots established wherever they are needed, R. R. v. Minnesota, 193 U. S. 53, 63, 24 S. Ct. 396, and of course, has the lesser power to require proper facilities at those already established. Corporation Comm. v. Railroad, 139 N. C. 126, 130, 51 S. E. 793.

Orders Subject to Review by the Courts.—This power can not be unreasonably exercised, and such orders are subject to review by the superior and Supreme Courts. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793.

May Require Track Scales.—The Commission is empowered, under this section, to require "depot accommodations commensurate with such business and revenue", which justifies the Commission in requiring "track scales" at points along the line. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 131, 51 S. E. 793.

The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793.

Railroad Not Released from Private Contract.—The limitation on the powers of the Commission to require common carriers to establish stations within five miles of each other does not release the said carriers from a contract, with an individual, to maintain a flag stop within the bounds of his plantation. Parrott v. Atlantic, etc., R. Co., 165 N. C. 295, 81 S. E. 348.

§ 1041. To require change, repair, and additions to stations.—The commissioner is empowered and directed to require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary. (Rev., s. 1097; 1899, c. 164, s. 2, subsec. 13.)

See editor's note under sec. 1035.

As to grade crossings, see sec. 1048 and the notes thereto. See also note under sec. 1042.

Liberal Construction.—This section and section 1042 are of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563. See also State v. Southern R. Co., 196 N. C. 190, 145 S. E. 19.

Entire Expense on Railroad.—In New York, etc., R. Co. v. Bristol, 151 U. S., 556, 38 L. Ed. 269, 14 S. Ct. 437, it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right. Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 359, 71 S. E. 514.

In the case of Cleveland v. Augusta, 102 Ga. 233, 43 L. R. A. 638, the court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city, and where the public welfare demands a change or grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossings as will conform to the new grade. In the course of its opinion the courts said: "Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings (Lancaster v. R. R., 29 Neb., 412; R. R. v. Smith, 91 Ind., 119, 13 Am. & Eng. R. R. Cases, 608), and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands." Eng. v. New Haven Co., 32 Conn. 240. Quoted and approved in Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 361, 71 S. E. 514.

§ 1042. To provide for union depots.—The commissioner is empowered and directed to require, when practicable, and when the necessities of the case, in his judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the commissioner shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the commissioner to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the commissioner, are adequate and convenient and offer suitable accommodations for the traveling public. (Rev., s. 1097; 1903, c. 126.)

See editor's note under sec. 1035.

As to power of railroad companies to condemn land for union depots, etc., see section 1708. See also note under section 1041.

Remedial in its Nature.—The statute in its principal purpose may be considered as remedial in its nature, and as to that feature will receive a liberal construction. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 399, 55 S. E. 292. Endlich on Interpretation of Statutes, secs. 107-108. Lewis' Southerland, Statutory Construction, sec. 336.

When Union Stations May Be Required.—Under the section the Corporation Commission is empowered to direct the establishment of union stations under certain conditions, to wit; when practicable, and when the necessities of the case require two or more railroads entering a city or town to have one common union passenger depot for the security, accommodation, and convenience of the traveling public. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 273, 76 S. E. 554.

The remedy was intended to apply to all the towns and cities in the state where, in the legal discretion of the commissioners, the move is practicable, the convenience of the traveling public requires it, and the existing facilities, in the judgment of the commissioners, are inadequate. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 401, 55 S. E. 292.

Same—Must Be Practicable.—Whenever the Commission requires and orders a union station to be built, the only restriction in the statute is when "practicable." The other matters as to the security, accommodation, and convenience of the public are simply reasons addressed to the judgment of the commissioners. When there is an appeal from their order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." The finding of the Corporation Commission that it is practicable is prima facie correct; and the burden is upon the defendant to show evidence to the contrary. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 274, 76 S. E. 554.

Same—To Be Commensurate with Business and Revenues.—When these conditions are found to exist, then the two railroads may be compelled to unite in the erecting, constructing, and maintaining such union passenger depot commensurate with the business and revenues of such railroad companies on such terms, regulations, provisions and conditions as the Corporation Commission shall prescribe. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 273, 76 S. E. 554.

New Union Station.—Under the provisions of this section and § 1041, the commission has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new

union passenger station in such city or town upon its finding that the present station is inadequate. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Jurisdiction Original — Exercised upon Own Motion on Petition of Interested Parties. — The jurisdiction of the Commission with respect to the construction of passenger stations is original, and may be exercised either upon its own motion or upon petition of interested parties. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Parties.—Under this section the commission is not without jurisdiction of a proceeding with respect to the erection, construction, and maintenance of a new union passenger station in city or town, because one or more railroad companies entering such city or town are not made parties in the proceeding. The presence of two or more railroad companies as parties is sufficient. Corporation Commission v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Same—Lessor—Appeal.—Where three railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Corporation Commission or the Superior Court on appeal under § 1097 that in the proceedings before the Corporation Commission under this section and § 1041 to compel them to build and maintain an adequate station, that the lessor railroad be a party, but it is not error for the trial judge to order that the lessor road be made a party, but it is not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Section Valid Exercise of Legislative Power.—The power of the Legislature to enact a statute of this character has been established by numerous and well-considered decisions of this and other courts of Supreme jurisdiction, and is no longer open to question. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 399, 55 S. E. 292; Corporation Comm. v. Railroad, 140 N. C. 239, 52 S. E. 941; Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793.

Powers Given by Necessary Implication.—The statute authorizing the Corporation Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end. Griffin v. Southern R. Co., 150 N. C. 312, 64 S. E. 16.

Inter and Intra-State Carriers.—The order of the Corporation Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as objectionable so far as it relates to the intrastate carrier, as a burden on interstate commerce, when it appears that the commission was passing upon the petition of only a few cities or towns in the state separately and not as a part of a state wide scheme, and the expenditures required were in amount too small to affect such commerce. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Same—"Esch-Cummings" Act Prospective.—The Federal Transportation or the "Esch-Cummings" Act is prospective in its enforcement, and cannot relate back to a final order of the State Corporation Commission not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier cross each other, the execution of which has been stayed by the Commission until after the passage of the Federal Statute solely for the advantage of the carriers at their request. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

§ 1043. To provide for separate waiting rooms for races. — The commissioner is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races. (Rev., s. 1097; 1899, c. 64, s. 2, subsec. 14.)

See editor's note under sec. 1035.

§ 1044. To require construction of sidetracks.— The commissioner is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commissioner authority to require railroad companies to construct sidetracks more than five hundred feet in length. (Rev., s. 1097; 1899, c. 164, s. 2, subsec. 15.)

See editor's note under sec. 1035.

Editor's Note.—Prior to the enactment of this provision of the statute, the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue them at will. Such power, it will be seen at once, placed the industrial development of the state at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it, if established. This power could be used for both political and pecuniary advantage.

The General Assembly, while not prohibiting the carrier from continuing to establish sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the Corporation Commission to require the establishment of such sidings in proper cases. Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 241, 52 S. E. 941.

Not an Interference with Interstate Commerce.—The establishment of an industrial siding under the authority of the Corporation Commission, is not an interference with interstate commerce. Missouri Pac. R. Co. v. State, 216 U. S., 262, 54 L. Ed. 472, 30 S. Ct. 330; State v. Southern R. Co., 153 N. C. 559, 563, 69 S. E. 621.

Restriction upon Power.—The Corporation Commission can require a railroad company to build a side track to an industrial plant only upon the company's right of way or when the right of way is tendered. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 621.

Same—Revenue.—The power conferred upon the Corporation Commission to order a railroad company to build a side track, is with the restriction that the revenue from such side track shall be "sufficient within five years to pay the expenses of construction"; and the lower court having denied the authority of the Commission in this action, the presumption is in favor of its judgment, and it will be affirmed in the absence of evidence tending to show that the revenue will be sufficient according to the terms of the statute. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 621.

Same—Length.—The section confers upon the Corporation Commission the power to establish sidings under certain conditions, and restricts the exercise of such a right to 500 feet in length. Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11, 13.

Rights of Intervening Owners.—A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use side tracks to private industries off their right of way and over the lands of intervening owners against the will of such owners. When they have once permanently located their line, they are, as a rule, restricted to that and the right of way incident to it. Pierce on Railroads, c. 9, p. 254; Elliot on Railroads (2d Ed.) section 930. Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11, 13.

Non-Resident Railroad without Power of Eminent Domain. — The Corporation Commission cannot confer the power of eminent domain, and when the Legislature has not conferred such power upon a nonresident railroad company respecting the construction of a side track over the lands of others, an order of the Commission for the railroad to build such a track is void. This matter is res judicata. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 621; Butler v. Pen. Tobacco Co., 152 N. C. 416, 68 S. E. 12.

Cited in Aileen Mills v. Norfolk-So. R. R. Co., 194 N. C. 647, 140 S. E. 306.

§ 1045. To require trains to be run over railroads and connections at intersections.—The commissioner is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the commissioner, demand, that any railroad in this state shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, that no order under this section shall be made unless the business of the railroad justifies it. (1907, c. 469, s. 3.)

See editor's note under sec. 1035.

Connection Contemplated One of Trains as Well as

Tracks.—The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track. Both are required to furnish facilities for traveling at all, and close connection of both to secure the convenience of the traveling public. North Carolina Corp. Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 195.

Running Additional Trains.—It is within the power of a state railroad commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

§ 1046. To inspect railroads as to equipment and facilities, and to require repair.—The commissioner is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by him to be unsafe, he shall at once notify and require the railroad company to put the same in repair. (1907, c. 469, s. 3.)

See editor's note under sec. 1035.

§ 1047. To require installation and maintenance of block system and safety devices. — The commissioner is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road upon which is not operated as many as or more than eight trains each way per day. (1907, c. 469, s. 1b.)

See editor's note under sec. 1035.

The lack of a "block system", when required, is held to be negligence per se. Gerringer v. North Carolina R. Co., 146 N. C. 32, 59 S. E. 152; Stewart v. Raleigh, etc. R. Co., 137 N. C. 687, 50 S. E. 312; Stewart v. Railroad, 141 N. C. 253, 53 S. E. 877.

§ 1048. To regulate crossings and to require grade crossings.—The commissioner is empowered and directed to require the raising or lowering of any tracks or highway at any highway or railroad crossing, and designate who shall pay for the same; and, when he thinks proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested. (1907, c. 469, s. 1 (c); 1911, c. 197, s. 1.)

Cross References.—As to intersection with highways, see sec. 3448; as to obstructing highways, defective crossings, and failure to repair after notice a misdemeanor, see sec. 3449; as to service of notice of defective crossings, see sec. 3450; as to cattle-guards and private crosssings, see sec. 3454; as to concurrent right of a city to regulate crossings, see sec. 2675.

See editor's note under sec. 1035.

See sec. 1041 and the notes thereto. And see sec. 3846(y).

Editor's Note.—Throughout Europe grade crossings are forbidden by law. Some few of the American States, including New York, New Jersey, and Connecticut have followed the European example and abolished such crossing. This section confers upon the Corporation Commission the power to require the track to be raised or lowered at crossings where deemed necessary. This provision was Rev., section 1097 (2), which was re-enacted and emphasized in Laws of 1907, c. 469, s. 1 (2).

See section 1041 of this Code, and the notes thereto.

The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Corporation Commission, and can place the cost of doing so upon the corporations, whose duty it is to remove them. Northern Pac. R. Co. v. Minnesota, 208 U. S. 583, 52 L. Ed. 630, 28 S. Ct. 341, cited Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 362, 71 S. E. 514. In the meantime, like any other collision, or a derailment, the act itself is prima facie negligence on the part of the railroad company. Marcom v. Raleigh, etc., R. Co., 126 N. C. 200, 35 S. E. 423. This matter has heretofore been called to the public attention in Cooper v. Railroad, 140 N. C., 209, 52 S. E. 932; Wilson v. Railroad, 152 N. C. 333; 55 S. E. 257; Gerringer v. Railroad, 146 N. C., 32, 59 S. E. 152; Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 71 S. E. 514, (affirmed on writ of error, Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S., 548, 58 L. Ed. 721, 34 S. Ct. 364; McMillian v. Atlantic, etc., R. Co., 172 N. C. 853, 90 S. E. 683. (Where the matter is fully discovered with full citation of authorities), and Borden v. Southern R. Co., 175 N. C. 179, 95 S. E. 146; Goff v. Atlantic Coast Line R. Co., 179 N. C. 216, 224, 102 S. E. 320.

That the State may exercise its police power either directly, or indirectly through some delegated agency is undisputed. The fact that some particular agency is delegated does not of necessity make that exclusive. Hence, while the section gives to the Corporation Commission the power to regulate crossings and require grade crossings, it is merely a delegated power, and does not preclude the State from direct, or indirect action. See 2 N. C. Law Rev. 104.

Commission Vested with Full Power.—The Corporation Commission is vested with full and complete power to compel the raising or lowering of the track, to remove all danger to those using the public roads. Gerringer v. North Carolina R. Co., 146 N. C. 32, 37, 59 S. E. 152.

Authority is conferred by statute upon the Corporation Commission to abolish grade crossing by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling alone their highways or private ways. Tate v. Seaboard Air Line R. Co., 168 N. C. 523, 84 S. E. 808.

Municipal Authority. — See § 2675 and notes thereto.

§ 1049. To require installation and maintenance of automatic signals at railroad intersections, etc.—The commissioner is empowered and directed to require, when public safety demands, when and in case two or more railroads now cross or may hereafter cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be just and proper. (1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1.)

See editor's note under sec. 1035.

§ 1050. To require railroads to enter towns and maintain depots in certain cases.—Where two or more railroads may maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the town, it is the duty of the utilities commissioner, upon the petition of a majority of the qualified voters of the said town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the commissioner.

When a petition is filed with the utilities commissioner as aforesaid, the commissioner shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of

said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the notice, the commissioner, if he deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner roadbeds, yards and depots, and any other necessary buildings or equipment, at convenient places within the limits of said town, as to him seems proper for the needs and growth of the business and inhabitants of the said town.

The order of the utilities commissioner to the railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day of such failure and neglect, to the board of commissioners or aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

This section shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the utilities commissioner shall have the power to require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said utilities commissioner may seem proper.

The railroads have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as are necessary for the purposes of this section, the condemnation proceedings to be had in the same manner as now provided by law. (1907, c. 465.)

See editor's note under sec. 1035.

§ 1051. To consent to abandonment or relocation of depots.—A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains, except by consent of the commissioner. Freight or passenger depots may be relocated upon the written approval of the commissioner. (Rev., s. 1098; 1899, c. 164, ss. 19, 20.)

See editor's note under sec. 1035.

§ 1052. To regulate crossings of telephone, telegraph and electric power lines.—Power is conferred on the utilities commissioner whenever any telephone, telegraph or electric power lines cross, to require such crossings to be constructed and maintained in a safe manner, so that the wires of one line will not fall upon the other; to prescribe the manner in which this shall be done; to discontinue or prohibit such crossings where they are unnecessary and can reasonably be avoided; and to apportion the cost of proper changing and construction of such crossings among the lines interested, as to said commissioner may seem just: Provided, that in all crossings made dangerous by the presence of high tension wire or wires of any power or light company, the cost shall be paid by such power or light company. (1913, c. 130, s. 1.)

See editor's note under sec. 1035.

Editor's Note.—Public Laws of 1929, c. 101, applicable only to Ashe County, amended this section by adding the following: "Whenever it may be necessary for an electric light and power company furnishing public service to cross a railroad with its transmission wires or lines, such crossing may be made, either with or without condemnation proceedings, provided it be constructed and maintained according to the rules and regulations of the Corporation Commission, and provided further, that the Corporation Commission may assess the actual damage, if any, of such crossing."

§ 1053. To regulate delivery of freight, express, and baggage. — The utilities commissioner shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations. (Rev., s. 1094; 1899, c. 164, s. 2, subsecs. 2, 7.)

See editor's note under sec. 1035.

§ 1054. To prevent discriminations.—The utilities commissioner shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers, or in furnishing electricity, electric light, current, power or gas.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers, or in furnishing electricity, electric light, current, power or gas. (Rev., s. 1095; 1899, c. 164, s. 2, subsecs. 3, 5; 1913, c. 127, s. 6.)

See editor's note under sec. 1035.

Cross References.—As to discrimination by rebate or reduced charges, misdemeanor, see sec. 3417; as to discrimination against connecting lines, see secs. 1107, 3418; as to discrimination against Atlantic and North Carolina Railroad, a misdemeanor, see sec. 3419.

See 12 N. C. Law Rev., 297, for discussion of this topic.

Discrimination Defined.—Discrimination in freight tariffs by railroad companies, means to charge shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. Hines v. Wilmington, etc., Railroad, 95 N. C. 434.

Discrimination by Log Road. — A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than it charges a shipper who makes no such agreement. Lumber Co. v. Railroad, 136 N. C. 479, 48 S. E. 813.

§ 1055. To fix a standard for gas.—The utilities commissioner shall fix, establish and promulgate a standard of quality for gas and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32.)

See editor's note under sec. 1035.

§ 1056. To regulate shipment of inflammable substances.—The utilities commissioner is authorized and empowered to adopt and promulgate rules for the shipment of inflammable and explosive articles; cotton which has been partially consumed by fire, and such other like articles as in his opinion may be apt to render transportation dangerous. And after the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier

be liable for any penalty for refusal to receive such article for shipment until all the rules prescribed by the utilities commissioner in regard to the shipments of the same shall be complied with. (1907, c. 471, s. 1.)

See editor's note under sec. 1035.

The commission is particularly authorized to regulate the carriage of inflammable articles as freight. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

§ 1057. To regulate demurrage, storage, placing, and loading of cars. — The commissioner shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment. (Rev., s. 1100; 1903, c. 342.)

See editor's note under sec. 1035.

§ 1058. To fix rate of speed through towns; procedure.—If a railroad company is of the opinion that an ordinance of a city or town through which a line of its railroad passes, except in the counties of Cumberland, Rockingham, Union and Wayne, regulating the speed at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the utilities commissioner, setting forth all the facts, and asking relief against such ordinance, and that the utilities commissioner prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the utilities commissioner, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the utilities commissioner shall hear the petition, but any hearing granted by the utilities commissioner shall be had at the town, city or locality where the conditions complained of are alleged to exist, [or some member of the said commission shall take evidence, both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission.]

Either party, petitioner or respondent, has the right to introduce testimony and to be heard by counsel; and the utilities commissioner, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commissioner finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs, to be taxed by the clerk to the utilities commissioner. If the commissioner is of the opinion that the ordinance is unreasonable, he shall so adjudge; and in addition thereto he shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the utilities commissioner, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

If the judgment of the utilities commissioner is in favor of the petitioner, it shall be lawful for the utilities commissioner to make such order as to the payment of the costs as shall seem just. He may require either party to pay the same or he may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court. (Rev., ss. 1101, 1102, 1103; 1903, c. 552.)

Editor's Note.—It would seem that the words in brackets in the first paragraph of this section should be omitted. See editor's note under sec. 1035.

In Gladson v. Minnesota, 166 U. S. 427, 430, 41 L. Ed. 1064, 17 S. Ct. 628, the court said: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction. It may prescribe the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its incorporation, and the safety, good order, convenience and comfort of its passengers and of the public." North Carolina Corp. Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 197.

§ 1059. To hear and determine controversies submitted. — When a company or corporation embraced in this chapter has a controversy with another corporation or person, and all the parties to such controversy agree in writing to submit such controversy to the commissioner as arbitrator, the commissioner shall act as such, and after due notice to all parties interested shall proceed to hear the same, and his award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (Rev., s. 1073; 1899, c. 164, s. 25.)

See editor's note under sec. 1035.

§ 1060. To investigate companies and businesses under its control.—The commissioner shall from time to time visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, or in the furnishing of other public utilities the supervision and control of which is vested in the utilities commissioner, all public or private banks, loan and trust companies, to ascertain if all the orders, rules and regulations of the utilities commissioner have been complied with, and shall have full power and authority to examine all officers, agents and employees of such companies, individuals, firms or corporations, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter, and the chapter entitled Banks. (Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; 1899, c. 164, s. 1.)

See editor's note under sec. 1035.

§ 1061. To investigate accidents.—The commissioner may investigate the causes of any accident on a railroad or steamboat which he may deem to

require investigation, and any evidence taken upon such investigation shall be reduced to writing, filed in the office of the commissioner, and be subject to public inspection. (Rev., s. 1065; 1899, c. 164, s. 24.)

See editor's note under sec. 1035.

§ 1062. To notify of violation of rules and institute suit.—The commissioner, whenever in his judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney-general, who shall take such proceedings thereon as he may deem expedient. (Rev., s. 1113; 1899, c. 164, s. 8.)

See editor's note under sec. 1035.

Construed as Mandatory.—This provision is positive, and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney-General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the State, in regard to the fixing of maximum rates. This section, when construed in accordance with the rule laid down in the Regan case, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014, and the Ames case, 169 U. S. 466, 43 L. Ed. 819, 18 S. Ct. 418, clearly charges the Attorney-General with a duty in relation to the enforcement of the act in question. Southern R. Co. v. McNeill, 155 Fed. 756, 775.

Procedure.—The section provides that the Commission, whenever in its judgment any corporation has violated any law, shall first give notice of such violation to the offending corporation, and, in the event of a failure on the part of such corporation to comply with the law, to present the facts to the Attorney-General. Southern R. Co. v. McNeill, 155 Fed. 756, 775.

§ 1063. To keep record of receipts and disbursements. — The commissioner shall keep a record showing in detail all receipts and disbursements. (Rev., s. 1115; 1899, c. 164, s. 34.)

See editor's note under sec. 1035.

§ 1064. To pay fees and money into treasury.—All license fees and seal tax and all other fees paid into the office of the utilities commissioner shall be turned into the state treasury; also all moneys received from fines and penalties. (Rev., s. 1114, 1899, c. 164, ss. 33, 26.)

See editor's note under sec. 1035.

§ 1065. To report annually to governor.—It shall be the duty of the commissioner to make to the governor annual reports of his transactions, and recommend from time to time such legislation as he may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution. (Rev., s. 1117; 1899, c. 164, s. 27; 1911, c. 211, s. 9, 1913, c. 10, s. 1.)

See editor's note under sec. 1035.

Reports of the Corporation Commission of North Carolina are matters of public record, of which the courts therein will take judicial notice. Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794.

§ 1065(a). Investigation of record of movement of less than carload shipments.—The North Carolina utilities commissioner is empowered and authorized to employ one or more special agents, having knowledge and experience in transportation, to make thorough investigation of the record of movement of less than carload shipments of freight between points in this state, and particularly with relation to such shipments involving transfer from one railway system to another, or shipments passing through concentration points on one system; and if unreasonable delays are found, to ascertain the cause or causes of such unreasonable delays and to make report of their findings and recommendations to the utilities commissioner, which said utilities commissioner shall pass upon such reports, and make and promulgate necessary rules and regulations in the manner now prescribed by law, to the end that such shipments of freight may be transported within a reasonable time. For the purposes herein expressed an appropriation is hereby made of five thousand dollars ($5,000.00) per year for a period not to exceed two years. (1923, c. 239.)

Cited in 1 N. C. Law Rev. 305.

Art. 4. Rate Regulation

§ 1066. Commissioner to fix rates for public utilities.—Subject to the provisions as to passenger rates in the chapter, Railroads, and as to railroad freight rates in this chapter, the commissioner shall make reasonable and just rates and charges, in intrastate traffic, and regulate the same, of and for—

See editor's note under sec. 1035.

Cross References.—As to carriage of passengers, including rates, see sec. 3489 et seq.; as to freight rates, see sec. 1078 et seq.; as to free carriage, see sec. 1070; as to authority to fix rates to be charged by public service corporations, see sec. 2783.

See 12 N. C. Law Rev., 289, 294, for article on "Electric Rates."

General Rate Fixing Power.—By the section the Commission is given broad and general powers to make rates for freight and passengers service. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

Duty to Fix Rates.—When the Corporation Commission is called upon, by either a corporation or those to whom the services are rendered, under its franchise to exercise its rate fixing power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such services. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 72, 128 S. E. 465.

Power to Classify.—The Legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformly upon all. Efland v. Southern R. Co., 146 N. C. 135, 143, 59 S. E. 355.

Same—Must Not Be Arbitrary.—In Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 151, 41 L. Ed. 666, 17 S. Ct. 255, it was said: "The mere fact of classification in rate regulating is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection." Efland v. Southern R. Co., 146 N. C. 135, 140, 59 S. E. 355.

"Traffic" Defined.—The word "traffic," used in the section includes the transportation and also the sale and distribution of the commodities affected. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

1. Railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

As to corporations and businesses within control of Commission, see subsection 1 of section 1035.

"Company" Defined.—The term "company" was used and intended to include all corporations, companies, firms or individuals who were engaged as common carriers in the transportation of freight. Efland v. Southern R. Co., 146 N. C. 135, 142, 59 S. E. 355.

Supervisory Power of Commission.—The Corporate Commission is given general supervision over railways, street railways, and like companies of the State, and empowering it to fix such rates, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable

earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these being police powers delegated to this commission, governmental so far as they extend. In re Southern Pub. Utilities Co., 179 N. C. 151, 152, 101 S. E. 619.

When Fares of Street Railway May Be Raised.—A public service street railway company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized by the Commission, to raise its charges to its passengers, when in the opinion of the Commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Utilities Co., 179 N. C. 151, 152, 101 S. E. 619.

Cannot Fix Fares by Contract.—A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the Corporation Commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In re Southern Pub. Utilities Co., 179 N. C. 151, 152, 101 S. E. 619.

2. The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephonic communication by any telephone company or corporation.

As to Commission's control over telephone and telegraph companies, see subsection 2 of section 1035.

Telephone System Must Not Discriminate.—In Telegraph Co. v. Telephone Co., 61 Vt., 241, 5 L. R. A., 15 Am. St. Rep., 893; 3 Am. Elec. Cases, at p. 435, it is said: "A telephonic system is simply for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

Telephones are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a comomn carrier, can rightfully refuse to perform its duty of the public. Telephone Co. v. Telegraph Co., 66 Md., 399, at p. 414, 59 Am. Rep., 167; quoted with approval in Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

In Clinton-Dunn Tel. Co. v. Carolina Tel., Co., 159 N. C. 9, 16, 74 S. E. 636, the court says of the duty and the remedy: "It is very generally recognized that a telephone company acting under a quasi public franchise, is properly classified among the public-service corporations, and as such is subject to public regulations and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions." Godwin v. Telephone Co., 136 N. C. 258, 48 S. E. 636; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

Same—Preference to Railroad. —A contract whereby a telegraph company gives to a railroad company a preference of business over its line to the exclusion of others is an illegal discrimination. Leavell v. Western Union Tele. Co., 116 N. C. 211, 21 S. E. 391.

Mandamus to Compel Telephonic Accommodations. — In Godwin v. Telephone Co., 136 N. C. 258, 259, 48 S. E. 636, the court declares: "A mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide by the reasonable regulations of the company." State v. Telephone Co., 52 Am. Rep. 404; Am & Eng. Ency. (2d Ed.), 1022, 19 ib., 877; Joyce on Electric Law, sec. 1036; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

When Message Transmitted Over Lines of Another Company.—Where a telegraph company has a continuous line between two points in this State, the fact that, in transmitting a message, it sent the message over the lines of another company does not excuse its violation of the rate prescribed by the Railroad Commission for the transmission of a message sent over the lines of one company. Leavell v. Western Union Tele. Co., 116 N. C. 211, 21 S. E. 391.

Messages Traversing Another State.—Telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, are subject to the tariff regulations of the Commission of this State. State v. Western Union Tele. Co., 113 N. C. 213, 18 S. E. 389.

Public Duty to Transmit Messages.—It is the duty of a telegraph company to have sufficient facilities to transmit all the business offered to it for all points at which it has offices, since it is not a mere private duty but a public duty which its franchise authorizes it to perform. Leavell v. Western Union Teleg. Co., 116 N. C. 211, 21 S. E. 391.

Power to Ascertain Corporation in Control.—The Commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any line in this State, in order that it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. State v. Western Union Teleg. Co., 113 N. C. 213, 18 S. E. 389.

3. Persons, companies and corporations, other than municipal corporations, engaged in furnishing electricity, electric light current, power or gas, or owning or operating a public sewerage system in North Carolina.

As to power to fix and enforce rates vested in Corporation Commission, see secs. 2783-2785.

Discrimination Remedied by Mandamus.—Where a public-service corporation has discriminated among its patrons in its charges for the same or similar service, a mandamus will lie to compel it to charge a uniform or undiscriminating rate; for the question does not require the courts to fix a rate, or pass upon its reasonableness, the lowest rate charged becoming, automatically, the proper one. North Carolina Public Service Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

Rates Coextensive with State's Jurisdiction.—When the Corporation Commission has finally established, under the provisions of the statute, rates to be charged by a public-service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Police Power of State.—The authority, conferred upon the Corporation Commission to establish reasonable and just rates of charges by a public-service corporation for furnishing to its customers electrical power, comes within the police powers of the State, and contracts previously made are subordinate to the public interest, and that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investments, having proper regard to the public interest that plants of this character should be properly run and maintained. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Sale of Electricity Generated in Another State.—While the generation of electricity in another State when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Corporation Commission to establish a just and reasonable rate of charge in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Hydroelectric Company Authorized to Sell to Other Companies.—Where a public-service corporation engages in a class of business authorized by its charter, it dedicates its property to that particular class of use, and where a hydroelectric company having a monopoly has been authorized by its charter to sell to other electric companies, etc., power, etc., for retail or distribution among customers, it may not resist the jurisdiction of our courts upon the ground that they were not legally required to do so, though the distributing or retail company is in some sense a competitor, and has the charter right to generate or manufacture its own electricity. North Carolina Pub. Service Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

4. The through transportation of freight, express or passengers.

5. The use of railway cars carrying freight or passengers.

6. And shall make rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

7. And he shall make, require or approve for intrastate shipments what is known as milling-in-

transit, or warehousing in transit rates on grain, or lumber to be dressed, or cotton or peanuts or tobacco. (1929, cc. 82, 91.)

Editor's Note.—This subsection was amended by c. 37 of the Acts of 1925, by adding at the end the provision giving the Corporation Commission "authority to make, require and approve what is known as warehousing-in-transit rates on cotton." Chapters 82 and 91 of the Public Laws of 1929, which are identical, substituted the above in lieu of the stricken section.

Milling in Transit.—"Milling in Transit," is where freight is shipped a long distance and the carrier will, at his own cost, defray the expense of its change in form en route because of the easier handling in a more compact shape, as, for example, Cowan v. Bond, 39 Fed. 54, where a railroad company receiving cotton in Louisiana for shipment to mills in New England had it compressed en route at Vicksburg at its own expense, charging the shipper no more than if it had carried the uncompressed cotton all the way, the same privilege being open to all shippers. Lumber Co. v. Railroad, Discrimination Case, 136 N. C. 479, 486, 48 S. E. 813.

8. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commissioner.

The powers vested in the commissioner by this section over the several subjects enumerated shall be the same as that vested in him in respect to railroads and other transportation companies. (Rev., ss. 1096, 1099; 1899, c. 164, ss. 2, 14; 1903, c. 683; 1907, c. 469, s. 4; 1913, c. 127, s. 2; 1917, c. 194; 1925, c. 37; 1929, cc. 82, 91.)

See editor's note under sec. 1035.

§ 1066(a). Railroads less than fifty miles in length. — The utilities commissioner shall fix such freight and passenger rates for railroads of less than fifty miles in length, which may hereafter be constructed, as will yield a net amount equal to the legal rate of interest on the amount of actual capital invested in such railroads; but this section shall not apply to the counties of Haywood, Swain, Jackson and Transylvania. (Ex. Sess. 1920, c. 56.)

See editor's note under sec. 1035.

Editor's Note.—This section was chapter 56 of the Extra Session Laws of 1920, which was an act to regulate passenger and freight rates on short line railroads of less than fifty miles in length. The rates are to be so fixed as to yield a net amount equal to the legal rate of interest on the capital invested. The counties of Haywood, Jackson, Swain, and Transylvania are expressly excepted from the operation of the section.

§ 1067. Rates established deemed just and reasonable.—The rates or charges established by the commissioner shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership or individual engaged in the businesses enumerated in the preceding section other than those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any shipper or receiver of freight, and a hearing thereon, if the commissioner shall find the rates or charges collected, to be unjust, unreasonable, discriminatory or preferential, the commissioner may enter an order awarding such petitioner a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the commissioner to be just and reasonable, nondiscriminatory and nonpreferential upon all shipments made or received by said petitioner within two years prior to the filing of such petition; provided, however that this shall only apply to charges assessed and collected on and/or after the date of ratification of this act. (1913, c. 127, s. 3; 1929, cc. 241, 342.)

See editor's note under sec. 1035.

Editor's Note.—This section was amended twice by Public Laws of 1929. Chapter 241 inserted the first proviso and Chapter 342 added the other.

Burden of Proof.—The rates or charges, established by the Commission, shall be deemed just and reasonable. The burden was therefore upon the appellant to offer evidence sufficient for the jury to find upon appeal and under the instructions of the court, that the schedule of rates established by the Commission, in this case, was not just and reasonable to both petitioner and respondent. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 72, 128 S. E. 465.

Rates Other Than Those Fixed Deemed Unjust.—Including public-service corporations furnishing its customers electricity for power, etc., the Corporation Commission is authorized by statute to fix just and reasonable rates of charges, and when these rates are so fixed, other or lower rates are to be deemed as unjust and unreasonable. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Deemed Reasonable Until Modified.—Under the provisions of our statute, Rev., 1054, et seq. (ch. 20), any party affected by the order of the Corporation Commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the courts from such order, and the charges so fixed are to be considered just and reasonable charges for the services rendered, unless and until they shall be charged or modified on appeal or the further action of the commission itself. State v. Seaboard Air Line Ry. Co., 173 N. C. 413, 92 S. E. 150, was approved In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619.

§ 1068. How maximum rates fixed.—In fixing any maximum rate or charge, or tariff of rates or charges, for any common carrier, person or corporation subject to the provisions of this chapter, the commissioner shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. He shall furthermore consider the original cost of construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs. (Rev., s. 1104; 1899, c. 164, s. 2, subsec. 1.)

See editor's note under sec. 1035.

See 12 N. C. Law Rev., 289, 298, for comment on this section.

Section Controls.—In establishing rates the Commission is governed and controlled by the provision of this section. Southern R. Co. v. McNeill, 155 Fed. 756, 769.

Word "Maximum" Explained.—The word "maximum," used in an order of the Corporation Commission for fixing the rates of charges allowed to a petitioning public-service corporation, was not intended to mean that a descending rate therefrom was to be allowed under the contract set up by the customers or users, but to distinguish it from the word "minimum," which also was used in reference to the subject. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Manner of Arriving at Rate. — Under the provisions of this section, which is a valid statute, the Corporation Commission, in fixing a reasonable and just rate of charges for public service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

§ 1069. Commissioner entitled to free carriage. — The commissioner and his clerks shall be transported free of charge over all railroads and transportation lines which are under the supervision of the commissioner; and when traveling on official business, he may take with him experts or other agents whose services he may deem temporarily of public importance. (Rev., s. 1105.)

See editor's note under sec. 1035.

§ 1070. Free carriage.—Nothing in this chapter shall prevent or prohibit—

1. The carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while traveling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereat.

2. The free carriage of destitute or homeless persons transported by charitable societies, and the necessary agents employed in such transportation; or the free transportation of persons traveling in the interest of orphan asylums or homes for the aged or infirm, or any department thereof, or traveling secretaries of Railroad Young Men's Christian Associations, or ex-Confederate soldiers attending annual reunions.

3. The use of passes for journeys wholly within this state which have been or may be issued for interstate journeys under the authority of the United States interstate commerce commission.

4. The issuance of mileage, excursion or commutation passenger tickets.

5. Common carriers from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

6. Common carriers from giving free carriage to their own officers and employees and members of their families, or furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of such common carrier, and the remains of a person killed in the employment of a common carrier, and employees traveling for the purpose of entering the service of such common carrier, and the families of those persons named; also the families of persons killed, and the widows during widowhood, and minor children during minority of persons who died while in the service of such common carrier.

7. The principal officers of any common carrier from exchanging passes, franks or tickets with other common carriers for their officers or employees, and members of their families.

8. Transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the parties for said consideration.

9. Transportation companies, if they so desire, from furnishing transportation to such agricultural extension and demonstration workers as are engaged in work in the field in efforts to increase production on the farm and to improve the farm home, when such workers are actually engaged in the performance of duties requiring travel.

10. Any common carrier that is operating under lease a railroad in this state, in which the state owns a majority of the capital stock, from giving free carriage, according to the contract of lease, to the officers and their families and the committees of the lessor owning such leased railroad, nor prevent such operating common carrier from issuing annually free transportation to ex-presidents of such lessor owning companies and their families in compliance with the contract of lease entered into by them or according to and for such period of time as may have been prescribed by any by-law of the lessor which was in force at the time such lease was made. (Rev., s. 1105; 1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652; 1905, c. 312; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160.)

As to the carriage of passengers, see sec. 3489 et seq.

Unlawful Transportation.—The transportation, by a common carrier, of any person except of the classes specified without charge, is unlawful under sec. 4 of said act, the offense being the actual free transportation and not the issuance of the free pass. State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133.

A gratuitous passenger is not in pari delicto with the common carrier. McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

Injured while Riding on Pass Illegally Issued. — The rights, privileges and protection attaching to the relation of the passenger are imposed by law upon common carriers upon consideration of the public policy, independent of contract, and arises from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

Construction of Penal Statute.—In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133.

§ 1071. Revision of rates. — The commissioner shall from time to time, and as often as circumstances may require, change and revise or cause to be changed or revised any schedules of rates fixed by the commissioner, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company. The powers of the commissioner, under this section, shall be exercised with respect to railroad freight and passenger rates under the limitations prescribed by article 5 of this chapter and article 10 of the chapter entitled Railroads. (Rev., s. 1106; 1899, c. 164, s. 7.)

See editor's note under sec. 1035.

Limitation on Rate Fixing Authority.—Article 5 herein referred to is chapter 20, Laws Extra Session 1913, and it limited the authority of the Corporation Commission as to increasing the maximum rates for freight carriers. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 429, 121 S. E. 767.

Joint Rate between Lumber Road and Connecting Carrier.

—When a lumber road is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 121 S. E. 767.

§ 1072. Long and short hauls.—It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commissioner, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commissioner may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this state for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad carrying the same are charged by such railroads. (Rev., s. 1107; 1899, c. 164, s. 14; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1.)

See editor's note under sec. 1035.

§ 1073. Contracts as to rates.—All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commissioner for inspection and correction, that it may be seen whether or not they are a violation of law or the rules and regulations of said commissioner, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the commissioner for inspection and approval in so far as they affect the rules and regulations made by the commissioner to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commissioner may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commissioner, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void. (Rev., s. 1108; 1899, c. 164, s. 6.)

See editor's note under sec. 1035.

§ 1074. Rates to be published.—All carriers shall, whenever required by the commissioner, file with him a schedule of their rates of charges for freight and passengers, and the commissioner is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules, if he deems it advisable. (Rev., s. 1109; 1899, c. 164, s. 7; 1907, c. 217, s. 5.)

See editor's note under sec. 1035.

§ 1075. Interstate commerce. — The utilities commissioner, or other body charged by law with the supervision and regulation of intrastate rates, is authorized and empowered upon his own investigation to bring such cases before the Interstate Commerce Commission, or other body of the National Government supervising and regulating the interstate freight rates, rules and practices, as in his opinion may be necessary to secure for the receivers and shippers of freight in this State such just and reasonable schedule of freight rates as in his opinion may be necessary; and is authorized to maintain before the courts of this State, or the United States, such action as in his opinion may be necessary for the enforcement of just and reasonable schedules of freight rates. In the performance of this duty the said commissioner shall receive upon application the services of the Attorney General of the State to represent him before the Interstate Commerce Commission or the courts of this State or the United States. (Rev., s. 1110; 1899, c. 164, s. 14; 1907, c. 469, s. 5; 1929, c. 235.)

See editor's note under sec. 1035.

Editor's Note.—The Act of 1929 struck out the former section and inserted in lieu thereof the above.

§ 1076. Duplicate freight receipts; charges stated; freight delivered on payment of charges.—All railroad companies shall on demand issue duplicate freight receipts to shippers in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and so far as practicable shall state the freight charges over the roads that carry such freight. When the consignee presents the railroad receipt to the agent of the railroad that delivers such freight such agent shall deliver the articles shipped upon payment of the rate charged for the class of freight mentioned in the receipt. (Rev., s. 1111; 1899, c. 164, s. 17.)

As to additional provisions as to rates, see chapter on railroads, articles 10 and 11.

When Bill of Lading Demanded.—A consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

§ 1077. Schedule of rates to be evidence.—The schedule of rates fixed by statute or under this article shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, to be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence the schedules of the commissioner without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commissioner that the same is a true copy of the schedule prepared or approved by him for the railroad company or corporation therein named. (Rev., s. 1112; 1899, c. 164, s. 7.)

See editor's note under sec. 1035.

Prima Facie Evidence.—The schedules of rates are de-

cared to be prima facie evidence that such rates are just and reasonable, by the section, which also provides for the certification of copies of all such schedules by the clerk of the Commission. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

Art. 5. Railroad Freight Rates

§ 1078. Classification of articles, commodities, and property.—For the purposes of this article all articles, commodities, and property are classified as now provided and specified by law, or by order or orders of the North Carolina utilities commissioner, in numbered and lettered classes and as commodities, subject to change in classification in the manner which is now or which may be provided by law. (Ex. Sess. 1913, c. 20, s. 1.)

See editor's note under sec. 1035.

As to additional provisions as to freight rates, see secs. 3513 to 3534.

SCHEDULE OF MAXIMUM REASONABLE RATES OF FREIGHT

NORTH CAROLINA, 1914

	Per Hundred Pounds											Per Ton	Per Carload			Lumber, Carload 30,000 Lbs., Per 100 Pounds	Molasses in Hhds. and Bbls Per 100 Pounds	Rough Logs, Carload 40,000 Pounds	Cotton in Bales, Per 100 Pounds	Fertilizer Per Ton, Carload 12 Tons
	1	2	3	4	5	6	A	B	C*	D*	K	L	N	O	P					
5 miles and under	$.12	$.10	$.08	$.07	$.06	$.05	$.04	$.05	$.05	$.04	$.03	$ .50	$ 9.00	$ 7.00	$ 5.00	$ .02	$ .04	$.....	$ .07	$ .60
10 miles and over 5	.15	.13	.11	.09	.08	.06	.05	.06	.06	.05	.04	.60	10.00	8.00	6.50	.02½	.05	5.00	.09	.75
15 miles and over 10	.18	.15	.13	.11	.09	.07	.06	.07	.07	.06	.04½	.70	11.00	9.00	7.50	.03	.05½	.....	.11	.85
20 miles and over 15	.21	.18	.16	.13	.10	.08	.07	.08	.08	.07	.05	.75	12.00	10.00	8.50	.03½	.06	6.00	.13	.95
25 miles and over 20	.24	.20	.18	.14	.11	.09	.08	.09	.09	.08	.05½	.80	14.00	11.00	9.50	.03½	.06½	.....	.14	1.05
30 miles and over 25	.27	.23	.20	.16	.12	.10	.08	.10	.10	.08	.06	.85	16.00	11.00	10.50	.04	.07	7.00	.15	1.10
35 miles and over 30	.29	.25	.21	.17	.13	.10	.09	.11	.10	.09	.06	.90	17.00	12.00	11.50	.04	.07½	.....	.16	1.15
40 miles and over 35	.31	.26	.22	.18	.14	.11	.09	.11	.10	.09	.06½	.95	18.00	12.00	12.00	.04	.08	8.00	.17	1.20
45 miles and over 40	.33	.27	.23	.19	.14	.11	.10	.12	.11	.09	.06½	1.00	19.00	13.00	12.00	.04½	.08½	.....	.18	1.25
50 miles and over 45	.35	.28	.24	.20	.15	.12	.10	.12	.11	.09	.06½	1.00	20.00	13.00	12.00	.04½	.09	9.00	.19	1.30
55 miles and over 50	.36	.29	.25	.20	.16	.12	.11	.13	.11	.10	.07	1.05	21.00	14.00	13.00	.04½	.09	.....	.20	1.35
60 miles and over 55	.37	.30	.26	.21	.16	.13	.11	.13	.11	.10	.07	1.05	22.00	14.00	13.00	.05	.10	10.00	.21	1.40
65 miles and over 60	.38	.31	.27	.21	.17	.13	.12	.14	.12	.10	.07	1.10	23.00	15.00	13.00	.05	.10	.....	.22	1.45
70 miles and over 65	.39	.32	.28	.21	.17	.14	.12	.14	.12	.10	.07½	1.10	24.00	15.00	14.00	.05	.11	11.00	.22	1.50
75 miles and over 70	.40	.33	.29	.22	.18	.14	.12	.15	.12	.10	.07½	1.15	25.00	16.00	14.00	.05½	.11	.....	.23	1.55
80 miles and over 75	.41	.34	.30	.22	.18	.15	.13	.15	.13	.11	.07½	1.15	26.00	16.00	14.00	.05½	.12	12.00	.23	1.60
85 miles and over 80	.42	.35	.30	.22	.19	.15	.13	.16	.13	.11	.08	1.20	27.00	17.00	15.00	.05½	.12	.....	.24	1.65
90 miles and over 85	.43	.36	.31	.22	.19	.15	.13	.16	.13	.11	.08	1.20	28.00	17.00	15.00	.05½	.13	13.00	.24	1.70
95 miles and over 90	.44	.37	.31	.23	.19	.16	.14	.16	.13	.11	.08	1.25	29.00	18.00	15.00	.06	.13	.....	.25	1.75
100 miles and over 95	.45	.38	.32	.24	.20	.16	.14	.17	.14	.12	.08	1.25	29.00	18.00	16.00	.06	.14	14.00	.25	1.80
110 miles and over 100	.47	.40	.33	.25	.20	.16	.14	.17	.14	.12	.08½	1.30	30.00	19.00	16.00	.06	.15	15.00	.26	1.85
120 miles and over 110	.49	.42	.34	.25	.21	.17	.15	.18	.15	.13	.08½	1.30	31.00	20.00	17.00	.06½	.16	16.00	.27	1.90
130 miles and over 120	.51	.44	.35	.26	.21	.17	.15	.18	.15	.13	.09	1.35	32.00	20.00	17.00	.06½	.17	17.00	.28	1.95
140 miles and over 130	.53	.45	.36	.26	.22	.18	.16	.19	.16	.14	.09	1.35	33.00	21.00	18.00	.06½	.18	18.00	.29	2.00
150 miles and over 140	.55	.47	.37	.27	.22	.18	.16	.19	.17	.14	.09	1.40	34.00	21.00	19.00	.07	.18	19.00	.30	2.10
160 miles and over 150	.57	.48	.39	.29	.24	.19	.16	.20	.17	.14	.09½	1.40	34.00	22.00	19.00	.07	.19	20.00	.31	2.20
170 miles and over 160	.59	.49	.40	.30	.26	.20	.17	.20	.18	.15	.09½	1.50	35.00	22.00	20.00	.07	.19	21.00	.32	2.25
180 miles and over 170	.60	.50	.41	.31	.26	.20	.17	.21	.18	.15	.10	1.50	35.00	23.00	20.00	.07½	.20	21.00	.33	2.30
190 miles and over 180	.61	.51	.42	.32	.28	.21	.17	.21	.18	.15	.10	1.55	36.00	23.00	21.00	.07½	.20	22.00	.34	2.35
200 miles and over 190	.62	.52	.43	.33	.29	.22	.17	.21	.19	.16	.10½	1.55	37.00	24.00	21.00	.07½	.20	22.00	.35	2.40
210 miles and over 200	.63	.53	.44	.34	.29	.22	.17	.22	.19	.16	.10½	1.60	38.00	24.00	22.00	.08	.21	23.00	.36	2.45
220 miles and over 210	.64	.54	.45	.35	.30	.23	.18	.23	.20	.17	.11	1.60	39.00	25.00	22.00	.08	.21	23.00	.36	2.50
230 miles and over 220	.64	.54	.45	.35	.30	.23	.18	.23	.20	.17	.11	1.65	40.00	25.00	23.00	.08	.21	24.00	.37	2.55
240 miles and over 230	.65	.55	.45	.35	.30	.23	.19	.24	.21	.18	.11½	1.65	40.00	26.00	23.00	.08	.22	24.00	.37	2.60
250 miles and over 240	.65	.55	.45	.36	.30	.23	.19	.24	.21	.18	.11½	1.70	41.00	26.00	23.00	.08½	.22	25.00	.38	2.65
260 miles and over 250	.65	.55	.45	.36	.30	.23	.20	.25	.22	.19	.12	1.70	41.00	27.00	24.00	.08½	.22	25.00	.38	2.70
270 miles and over 260	.66	.56	.46	.36	.31	.23	.20	.25	.22	.19	.12	1.75	42.00	27.00	24.00	.08½	.22	26.00	.39	2.75
280 miles and over 270	.66	.56	.46	.36	.31	.23	.20	.26	.23	.20	.12½	1.75	42.00	28.00	24.00	.08½	.23	26.00	.39	2.80
300 miles and over 280	.67	.57	.47	.37	.31	.24	.21	.26	.23	.20	.13	1.85	43.00	29.00	25.00	.09	.23	27.00	.40	2.90
320 miles and over 300	.68	.58	.48	.38	.31	.24	.21	.26	.24	.21	.14	1.95	44.00	30.00	26.00	.09½	.23	27.50	.41	3.00
340 miles and over 320	.69	.59	.49	.39	.31	.24	.21	.26	.24	.21	.14	2.05	45.00	31.00	27.00	.10	.24	28.00	.42	3.10
360 miles and over 340	.70	.59	.49	.39	.32	.24	.21	.27	.25	.22	.15	2.15	46.00	32.00	28.00	.10½	.24	28.50	.43	3.20
380 miles and over 360	.71	.60	.50	.40	.33	.25	.22	.27	.25	.22	.15	2.25	47.00	33.00	29.00	.11	.24	29.00	.43	3.30
400 miles and over 380	.72	.61	.50	.40	.33	.25	.22	.27	.25	.22	.16	2.35	48.00	34.00	30.00	.11½	.25	30.00	.44	3.40
420 miles and over 400	.73	.62	.51	.41	.34	.26	.22	.27	.25	.22	.16	2.45	49.50	35.00	31.00	.11½	.25	30.50	.44	3.50
440 miles and over 420	.74	.62	.51	.41	.34	.26	.22	.27	.26	.23	.17	2.55	50.00	36.00	32.00	.12	.25	31.00	.45	3.50
460 miles and over 440	.75	.63	.52	.41	.34	.26	.23	.28	.26	.23	.17	2.65	51.00	37.00	33.00	.12	.25	31.50	.45	3.60
480 miles and over 460	.76	.63	.52	.42	.35	.27	.23	.28	.26	.23	.18	2.75	52.00	38.00	34.00	.13	.26	32.00	.45	3.60
500 miles and over 480	.77	.64	.53	.42	.35	.27	.24	.29	.27	.24	.18	2.75	52.00	39.00	35.00	.13	.26	32.50	.45	3.70

*NOTE.—Classes C and D, carload shipments, 20% less than rates shown, including hay in straight or mixed carloads with grain or grain products other than flour.

§ 1079. Changes in classification.—The utilities commissioner, or such commission as may have conferred upon it by law the powers and duties now exercised by the North Carolina utilities commissioner with reference to public-service companies, has the power to establish a different classification of freight than that referred to in the preceding section if thereby a more systematic or uniform method can be secured, in the opinion of such commissioner; but shall not, except as provided in this article, increase the rates fixed herein as a maxima. Such commissioner has the power, if in his judgment it seems just to do so, to change the percentage relation of other classes of freight than the first class, to the first class: Provided, he shall not thereby raise the rate on any class, except in the manner and upon the conditions specified in this article: Provided, further, that before any carrier, subject to the jurisdiction of the utilities commissioner, shall be authorized or empowered to make effective within the limits of this State any change in the classification for intrastate application of any article transported by freight, intrastate, the carrier, or carriers, proposing said change in classification shall file notice of such intention with the utilities commissioner at least thirty days in advance of the proposed effective date of such change and shall file with said notice a sworn affidavit in duplicate setting forth the name and address, or names and addresses, of the person, or persons, by or for whom the change, or changes in the classification was proposed, with their place, or places, of business and the nature of such business, together with the name, or names, of the carrier, or carriers, sponsoring such changes, together with the name and address, or names and addresses, of all persons, firms or corporations who have placed themselves on record as being opposed to the change, or changes, contemplated, stating in connection therewith the facts and arguments relied upon by both proponents and opponents of such proposed changes and provided, further, that after the receipt of such notice of a proposed change in the classification of any article, the utilities commissioner is authorized to suspend such proposed change pending the hearing and decision thereon and may waive the requirement of thirty (30) days' notice. (Ex Sess. 1913, c. 20, s. 2; 1929, c. 239.)

See editor's note under sec. 1035.

Editor's Note.—The Act of 1929 added all of this section beginning with the second proviso.

§ 1080. Rates established.—Except where the utilities commissioner shall order or has ordered to the contrary, the following specified rates are declared to be reasonable maximum rates to be charged by railroad companies owning, operating, controlling or maintaining seventy-five or more miles of railroad in North Carolina, it being understood that articles heretofore included in Class E, under the state classification, are here rated under fifth class; articles heretofore included in Class H, under the state classification, are here rated under fourth class; flour in barrels is here rated double Class C per barrel, and flour in barrels same as Class C; articles heretofore included in Class M, under state classification, are here rated two-thirds of Class A: (See table on preceding page.)

The rates so fixed are for the number of miles indicated in the first column, and for the amount of charge indicated for the respective classes and commodities opposite the number of miles stated in the first column, and the rates so indicated for the respective classes are in cents per hundred pounds except where otherwise indicated at the head of the column. (Ex. Sess. 1913, c. 20.)

See editor's note under sec. 1035.

§ 1081. Rules governing rates.—The following rules shall limit and modify the application of the rates in the next preceding section:

1. The rates are subject to southern classification, except where lower ratings are or may be published by the North Carolina utilities commissioner, in which cases the lower ratings shall prevail.

2. Rates which were lower prior to October thirteenth, one thousand nine hundred and thirteen, than contained in the scale of rates are continued in effect, except that, in such isolated cases as may occur where an advance of not more than one cent in a particular class will bring the existing rate up to the rate here prescribed, such advance is allowed in the interest of uniformity.

3. When rates are not shown for the exact distance, the charge shall not exceed the rate for the nearest distance. In cases where the haul is equidistant the charge shall be that for the next higher distance.

4. When one railroad company has two or more routes between two given points the rate shall be based on the shortest route. On joint hauls, the line handling the traffic must base their rates upon the shortest practicable route having physical connection.

5. For joint hauls over two or more independently controlled railroads under the management of companies operating seventy-five or more miles of railroads within the State, add the following to the straight mileage rates for the combined total distance:

Per 100 Pounds

Class	1	2	3	4	5	6	A	B	C	D
	5	4	3	3	2	2	2	2	2	2

Other classes and commodities, 1c.

6. In the absence of an agreed basis of division between roads participating in a joint haul, locals shall be used as factors in dividing after first deducting cost of transfer, if any, at interchange point.

7. The minimum charge on small shipments shall be for actual weight at the tariff rate, but not less than 25 cents for a haul over one road, or 30 cents for a joint haul over two roads, or 40 cents for a joint haul over three or more roads.

8. Existing rates on commodities not mentioned in the schedule of rates in the preceding section are continued in effect. (Ex. Sess. 1913, c. 20.)

See editor's note under sec. 1035.

§ 1082. Charging or receiving greater rates forbidden.—No railroad company being engaged in the business of common carrier of property within the state of North Carolina shall charge, take, or receive any sum for carrying property entirely within the state of North Carolina between initial and terminal points which are within the state, greater than the amount specified in

this article for the respective classes and commodities, and for the respective distances mentioned in said schedule, except in the manner and to the extent and on the conditions mentioned in this article. (Ex. Sess. 1913, c. 20, s. 5.)

§ 1083. Application for investigation of rates; appeal; rates pending appeal. — The utilities commissioner, or such commission or body upon which jurisdiction and power may be conferred to fix rates for the transportation of property to be charged by the railroads doing business in North Carolina, may, and upon request of any person directly interested in such charge shall, under rules and regulations fixed by law or prescribed and established by such commissioner, hear evidence as to the reasonableness of the maximum rates fixed by law, or by such commissioner or body, and establish such rates, in the manner prescribed and allowed by law, as may, in the judgment of said commissioner, be just, subject to the limitations fixed by this article; and from such an order of such commissioner any shipper or railroad company directly affected by such order may, under rules and regulations prescribed by law, or under reasonable rules and regulations prescribed by such commissioner, appeal to the superior court of North Carolina: Provided, that pending the appeal of any railroad company from an order of such commissioner fixing maximum rates, there shall be no suspension of such order of such commissioner. (Ex. Sess. 1913, c. 20, s. 7.)

See editor's note under sec. 1035.

This section expressly confers authority upon the Corporation Commission to investigate rates upon the request of any person directly interested. It permits that body to hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and to establish such rates as it may deem just. The authority conferred upon the Commission is plenary. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 429, 121 S. E. 767.

§ 1084. Rates lower than maximum prescribed to be maintained.—When any commodity or particular kind of property is at the time of the ratification of this article allowed to be shipped at a rate to be charged by any railroad company, which rate is lower than the maximum rate specified in this article for the shipment of such article, or for the class in which such article is assigned, by lawful classification at the time of the ratification of this article, or when such article is not assigned to any class, such rate so charged for the shipment of such commodity or property shall be the maximum rate which shall lawfully be charged, unless the same be raised in the manner and under the circumstances contemplated, provided for and allowed by the provisions of this article for an increase in the maximum rate fixed herein. (Ex. Sess. 1913, c. 20, s. 8.)

§ 1085. Rates between points connected by more than one route.—When there is more than one railroad route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by such commissioner for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route. (Ex. Sess. 1913, c. 20, s. 11.)

See editor's note under sec. 1035.

§ 1086. Action for double of overcharge; penalty.—Any railroad company in the state of North Carolina which shall charge a rate for transporting property wholly within the state of North Carolina, between terminals within the state, in excess of that fixed by law or by the lawful order of such commissioner or board, and which shall omit to refund the same within thirty days after written notice and demand of the person or corporation overcharged, shall be liable to an action for double the amount of such overcharge, and to a penalty of ten dollars per day for each day's delay after thirty days from such notice, in case of shipments of less than carload lots, and to a penalty of twenty dollars per day in the event of shipments of carload lots. (Ex. Sess. 1913, c. 20, s. 12.)

See editor's note under sec. 1035.

§ 1087. Double penalty.—Any such railroad company so doing business in the state of North Carolina that shall knowingly charge a rate in excess of that fixed by law or by such board or commissioner, for shipments wholly within the state, shall be subject to a penalty and shall pay double the penalty above prescribed. (Ex. Sess. 1913, c. 20, s. 13.)

See editor's note under sec. 1035.

§ 1088. Persons to receive penalties; accounts and receipts kept separate.—The penalties herein provided for shall be payable to the person or corporation who pays the freight or against whom the freight is charged, and such person or corporation may sue such railroad company and recover such penalty and the amount of such overcharge. The commissioner shall require the railroad companies, and may require all other such public-service companies as are mentioned in this chapter, to keep separate the cost of doing interstate and intrastate business in North Carolina, and to keep separate receipts from the respective classes, and to direct the manner of keeping the accounts, and to enforce, by penalties, contempt, or otherwise as the law provides, obedience to its orders. (Ex. Sess. 1913, c. 20, s. 14.)

See editor's note under sec. 1035.

§ 1089. Minimum carload.—In no event shall the minimum carload freight of any kind be less than is now allowed by law, unless such commissioner shall allow it, and it is authorized to fix such minimum weight. (Ex. Sess. 1913, c. 20, s. 15.)

See editor's note under sec. 1035.

To Fix Minimum Carload.—The Corporation Commission may provide what shall constitute a minimum carload for particular commodities. Corporation Comm. v. Seaboard Air Line System, 127 N. C. 283, 37 S. E. 266.

§ 1089(a). Freight Rate Commissioner.—The Governor shall designate one member of the Corporation Commission as the Freight Rate Commissioner, who shall be authorized and empowered to supervise, direct and prosecute all interstate rate cases and to investigate any and all interstate freight rate schedules affecting the

welfare of the State or any portion thereof. (1929, c. 336, s. 1.)

Editor's Note.—Public Laws of 1935, ch. 135, sec. 8, codified as § 1112(g), directed that the words "utilities commissioner" be substituted for "corporation commissioner" in this chapter.

§ 1089(b). Report.—The Freight Rate Commissioner shall make a report to the Governor annually. (1929, c. 336, s. 2.)

See note under preceding section.

Art. 6. Powers in Respect to Procedure

§ 1090. Witnesses; production of papers; contempt. — The utilities commissioner shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (Rev., s. 1067; 1899, c. 164, ss. 1, 9, 10.)

See editor's note under sec. 1035.

§ 1091. Witnesses before utilities commissioner. — If any person duly summoned to appear and testify before the utilities commissioner shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded to him by said commissioner in the discharge of duty, or shall conduct himself in a rude, disrespectful or disorderly manner before said commissioner deliberating in the discharge of duty, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one thousand dollars. (Rev., s. 3691; 1899, c. 164, s. 10.)

See editor's note under sec. 1035.

§ 1092. Rules of practice.—The utilities commissioner shall prescribe rules of practice and procedure in all matters before him and in all examinations necessary to be made under this chapter. (Rev., s. 1068; 1899, c. 164, s. 2, subsec. 24.)

See editor's note under sec. 1035.

In footnote 33, page 74, Vol. 2 of the North Carolina Law Review, it is said of this section that it "expressly authorized the Commission to prescribe the rules of practice and procedure in all matters before it. The rules adopted in accordance therewith may be found in the annual reports of the Commission under the caption, 'Rules of practice in cases and proceedings before the court of North Carolina Corporation Commission.'"

§ 1093. Rules of evidence.—In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil actions, except as provided by this chapter. (Rev., s. 1069; 1899, c. 164, s. 26.)

As to evidence generally, see secs. 1747 et seq.

Rules Same as in Civil Actions. — The section provides that the rules of evidence shall be the same as in other civil actions. The petitioner must prove the existence of the facts alleged as the basis for the relief sought, unless the respondent admits them or fails to answer. In case of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require. Subpoenas will issue requiring the attendance of witnesses or the production of books, papers, documents, etc., relating to any matter pending before the Commission. And depositions may be taken in any cause at issue, 2 N. C. Law Rev. 74.

§ 1094. Subpoenas; issuance; service. — All subpoenas for witnesses to appear before the commissioner, and notice to persons or corporations, shall be issued by the commissioner or his clerk and be directed to any sheriff, constable or to the marshal of any city or town, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. (Rev., s. 1070; 1899, c. 164, s. 10.)

See editor's note under sec. 1035.

§ 1095. Service of orders.—The clerk of the commissioner may serve any notice issued by him and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and other officers to serve any process, subpoenas and notices issued by the commissioner, and they shall be entitled therefor to the same fees as are prescribed by law for serving similar papers issuing from the superior court. (Rev., s. 1071; 1899, c. 164, s. 9.)

See editor's note under sec. 1035.

§ 1096. Undertakings.—All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state. (Rev., s. 1072; 1899, c. 164, s. 7.)

§ 1097. Right of appeal; how taken.—From all decisions or determinations made by the utilities commissioner any party affected thereby shall be entitled to an appeal. Before such party shall be allowed to appeal, he shall, within ten days after notice of such decision or determination, file with the commissioner exceptions to the decision or determination of the commissioner, which exceptions shall state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exception, and shall, within ten days after the decision overruling the exception, give notice of his appeal. When an exception is made to the facts as found by the commissioner, the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commissioner exceptions to the decision or determination overruling the exception, which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commissioner shall, within ten days, transmit all the papers and evidence considered by him, together with the assignment of errors filed by the appellant, to a judge of the superior court holding court or residing in some district in which such company operates or the party resides. If there be no exceptions to any facts as found by the commissioner, it shall be heard by the judge at chambers at some place in the district, of which all parties shall have ten days notice. (Rev., s. 1074; 1899, c. 164, ss. 7, 28; 1903, c. 126; 1907, c. 469, s. 6; 1913, c. 127, s. 4.)

See editor's note under sec. 1035.

As to appeal to Supreme Court, see sec. 1100. As to appeal generally, see sec. 629 et seq. See also note under sec. 1042.

Right Confined to Parties.—The section distinctly confines the right of appeal to a party to the proceeding. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 87 S. E. 785.

Appeal Limited to Party.—The right of appeal, conferred

by this section is limited to a party to the proceedings. For purposes of appeal, those who have no property or proprietary rights which are or may be affected by orders of the Commission, are not such parties. An appeal by persons who are not parties to the proceeding will be dismissed by the Superior Court, for the reason that said court acquires no jurisdiction by such appeal. State v. Southern Ry. Co., 196 N. C. 190, 193, 145 S. E. 19.

Any Party Affected.—Under the provisions of our statute, Rev., 1054, et seq. (ch. 20), any party affected by the order of the corporation commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the courts from such order. In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619.

"From all decisions or determinations made by the Corporation Commission any party affected thereby shall be entitled to an appeal," must necessarily mean from a decision which affects or purports to affect some right or interest of a party to the controversy and in some way determinative of some material question involved. State v. Southern R. Co., 147 N. C. 483, 489, 61 S. E. 271.

It is the duty, and assuming the right, of a municipality granting its charter to a corporation to operate a street car system therein and which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon a petition filed by the railway company before the Corporation Commission requesting that it be permitted to raise the fares beyond those limited in the contract, and the municipality may appeal through the courts as the statute prescribes, when the order is adverse to it or the interest it represents, as a "party affected by the decision and determination of the Commission," expressly provided for by the statute. In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619.

Who Are Not Parties.—Citizens seeking to have a railway station moved may not appeal from the Commission's decision, because they are not parties. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 87 S. E. 785.

Notice.—When notice of appeal to the superior court is given to the Corporation Commission by a railroad company, and the other requirements of the section relating thereto, have been met by the company, it is sufficient without giving notice of the appeal to the complaining party in the proceedings had before the Commission, as upon this appeal the statute makes the Commission the party plaintiff. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 66 S. E. 427.

Same—Mandatory.—The statutory notice of an appeal by a railroad company from an order of the Corporation Commission is mandatory and cannot be extended by the consent of the parties of record. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

To Superior Court.—Appeal from the Commission must be to the superior court. Pate v. Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334.

Same—De Novo.—And there the trial will be de novo, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but that it shall be from a final judgment or one final in its nature. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Jurisdiction of Superior Court—Dismissal.—The jurisdiction of the superior court with respect to the trial of law and fact on appeal under this section is derivative and not original, and therefore if the Corporation Commission was without jurisdiction of the proceeding in which the order was made, from which the appeal was taken, because of the absence of a necessary party, or upon any other ground, the Superior Court is likewise without jurisdiction, and the proceeding pending therein, upon appeal, should be dismissed by said court. State v. Southern Ry. Co., 196 N. C. 190, 193, 145 S. E. 19.

Hearing on Appeal.—Upon appeal by a party to a proceeding before the Corporation Commission from an order made therein, under §§ 1041, 1042, the Superior Court has jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Corporation Commission. The trial of such issues by the Superior Court is de novo. State v. Southern Ry. Co., 196 N. C. 190, 193, 145 S. E. 19, citing S. v. R. R., 161 N. C. 270, 76 S. E. 554.

Final Process. — The Corporation Commission has no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. State v. Southern R. Co., 147 N. C. 483, 61 S. E. 271.

Removal to Federal Courts.—In proceedings for the removal of a cause from the state to the federal courts upon the question of diversity of citizenship under the federal statute applicable, the state court is not bound to surrender its jurisdiction until a case has been made which on the face of the petition, shows the petitioner has a right to the transfer of the cause to the federal courts. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 66 S. E. 427.

Same—Diverse Citizenship.—Assuming that the mere fact that an order of the Corporation Commission made to compel the carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, it does not transform the proceedings in which the order is made into "a suit at law or in equity," and, as such, removable from the superior court of the state to an inferior federal tribunal, upon the ground of diverse citizenship. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 66 S. E. 427.

Cited in Corporation Commission v. Southern R. Co., 197 N. C. 699, 150 S. E. 335.

§ 1098. Appeal docketed; priority of trial; burden.—The cause shall be entitled "State of North Carolina on relation of the utilities commissioner against (here insert name of appellant)," and if there are exceptions to any facts found by the commissioner, it shall be placed on the civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the commissioner shall be prima facie just and reasonable. (Rev., s. 1075; 1899, c. 164, s. 7.)

See editor's note under sec. 1035.

As to right of appeal, and how taken, see sec 1097; as to appeal generally, see sec. 629 et seq.

Editor's Note. — The concluding words of this section make clear that there is a presumption in favor of the validity of an order or determination of the Commission. The question inevitably and necessarily arises: How strong is the presumption? Can it be overcome by a mere preponderance of evidence? These questions have not yet been definitely answered by the Supreme Court. In a case involving a similar provision of the Interstate Commerce Act, Meeker & Co. v. Lehigh Valley R. Co., 236 U. S. 412, 430, 59 L. Ed. 644, 35 S. Ct. 328. Mr. Justice Van Devanter said: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the states whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends."

Parties on Appeal.—In case of an appeal to the courts, the only authorized parties are the State of North Carolina on relation of the Corporation Commission as plaintiff and the railroad or other corporation as defendant. The statute is plain as to who may appeal, viz., the state and the corporation whose legal rights are affected by the decision. No one else can appeal, because there are, and under the statute can be, no other parties, and the right to appeal is of course confined to the parties to the proceeding. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

Any Relevant Evidence Admissible.—On appeal from an order of the Corporation Commission, the trial is de novo by express provision of the statute and tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence may be there introduced, whether it had theretofore been introduced before the Commission or not. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 76 S. E. 554.

Irrelevant Evidence.—In a case wherein a union passenger depot had been ordered by the Commission it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a near-by town, where the present station of one of the

roads is located. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 76 S. E. 554.

§ 1099. Appeal heard at chambers by consent.—By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business. (Rev., s. 1076; 1899, c. 164, s. 7.)

§ 1100. Appeal to supreme court. — Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the state of North Carolina, if it shall appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing. (Rev., s. 1077; 1899, c. 164, s. 7.)

Right Confined to State and Corporation.—The section plainly indicates that the right of appeal is confined to the state and the corporation whose legal rights are affected by the Commission's order. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

Direct Appeal Does Not Lie.—An appeal will not lie directly from the Corporation Commission to the Supreme Court. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 87 S. E. 785.

§ 1101. Judgment of superior court not vacated by appeal.—Any freight or passenger rates fixed by the commissioner, when approved or confirmed by the judgment of the superior court, shall be and remain the established rates, and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal thereto, and until changed by the utilities commissioner. (Rev., s. 1079; 1899, c. 164, s. 7.)

See editor's note under sec. 1035.

§ 1102. Judgment on appeal enforced by mandamus.—In all cases in which, upon appeal, a judgment of the utilities commissioner is affirmed, in whole or in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed. (Rev., s. 1080; 1905, c. 107, s. 2.)

See editor's note under sec. 1035.

As to mandamus generally, see secs. 866, 867, and 868.

Performance Compelled by Mandamus.—The state court can compel performance only by resort to the high prerogative writ of mandamus, and that by authority of this section. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 454, 66 S. E. 427.

Under this section, the right to a mandamus to enforce a valid order is given in causes which have been carried to the superior court by appeal. State v. Southern R. Co., 147 N. C. 483, 488, 61 S. E. 271.

§ 1103. Peremptory mandamus to enforce order, when no appeal.—If no appeal is taken from an order or judgment of the utilities commissioner within the time prescribed by law, but the corporation affected thereby fails to put said order in operation, the utilities commissioner may apply to the judge riding the superior court district which embraces Wake County, or to the resident judge of said district at chambers, upon ten days notice, for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commissioner was valid and within the scope of his powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the utilities commissioner, or the defendant corporation, from the refusal or the granting of such peremptory mandamus. (Rev., s. 1081; 1905, c. 107.)

See editor's note under sec. 1035.

As to mandamus generally, see secs. 866, 867, and 868.

Mandamus to Enforce Final Order.—Where the Corporation Commission has ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads have lost or waived their statutory right to appeal, such order is regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom is the remedy authorized by the section. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Independent Proceedings for Mandamus.—Under this section an appeal may be had by independent proceedings for mandamus to enforce a valid order from which no appeal has been taken. State v. Southern R. Co., 147 N. C. 483, 488, 61 S. E. 271.

Orders of Commission Are Not Judgments.—The Commission makes such order as the circumstances of the case justify, but these orders are not judgments of a court. The Commission cannot issue execution to enforce them, they simply serve as the basis for judicial action in the superior court to enforce them or to punish their violation. 2 N. C. L. R. 74. See also, Mayo v. Western Union Teleg. Co., 112 N. C. 343, 16 S. E. 1006.

The Corporation "Affected".—This section also reveals what is meant by the words "any party affected thereby," for it provides, if the corporation "affected" by the order fails to obey, how obedience may be enforced. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

§ 1104. Fiscal year.—The fiscal year for which all reports shall be made which may be required of any railroad or transportation company by the commissioner under this chapter shall end on the thirtieth of June. (Rev., s. 1116; 1899, c. 164, s. 28.)

See editor's note under sec. 1035.

Art. 7. Penalties and Actions

§ 1105. For violating rules.—If any railroad company doing business in this state by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the commissioner, and if after due notice of such violation given to the principal officer thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commissioner shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. (Rev., s. 1086; 1899, c. 164, s. 15.)

See editor's note under sec. 1035.

Cross References.—As to corporations and businesses within control of the Commission, see sec. 1035; as to public utilities for which the Commission is empowered to fix rates, see sec. 1066.

Section Is Valid.—The section giving authority to the Commission after notice for failure of any railroad company to make full and ample recompense for the violation of such rules and regulations to proceed in the courts, to enforce the penalties to be prescribed herein for such violation is valid without providing in detail the methods of procedure. Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393.

Duty to Enforce Rules and Orders.—While the Corporation Commission has no power to render a judgment for the

payment of money, etc., it is their duty to enforce their rules and orders, and the power to do so is given by this section. State v. Southern R. Co., 147 N. C. 483, 489, 61 S. E. 271.

Right to Investigate Complaint.—Under this section the commission had the undoubted right and it was eminently proper for them to institute an inquiry and inform themselves as to whether a complaint was grounded in truth. They were not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before them. They did right to investigate the matter for themselves, but the end of such investigation was simply to afford them information and enable them to act intelligently in determining whether they would sue for the penalty of $500 given by the statute. State v. Southern R. Co., 147 N. C. 483, 490, 61 S. E. 271.

§ 1106. Refusing to obey orders of commissioner.—Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the utilities commissioner shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake County, in the name of the state of North Carolina on the relation of the utilities commissioner; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the utilities commissioner shall be a separate offense. (Rev., s. 1087; 1899, c. 164, s. 23.)

See editor's note under sec. 1035.

As to meaning of "company", see annotations under subsection one, section 1066.

§ 1107. Discrimination between connecting lines.—All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commissioner relating to trackage. (Rev. s. 1088; 1899, c. 164, s. 21; 1935, c. 258.)

See editor's note under sec. 1035.

As to what constitutes discrimination, see annotations under sec. 1054. See also sec. 3418 and notes.

Editor's Note.—The amendment of 1935 inserted the word "routes" making the section applicable as to discrimination as to routes.

Declaratory of Common Law.—A similar section in the act creating the Railroad Commission was held, in Atlantic Exp. Co. v. Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, to be merely declaratory of the common law, and not to enlarge its scope.

May Require Trains to Make Connection.—The Corporation Commission of the state has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. Corp. Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191.

Express Facilities.—A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for itself or affords to any other express company. Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393.

§ 1108. Failure to make reports.—Every officer, agent or employee of any railroad company, express or telegraph company, who shall willfully neglect or refuse to make and furnish any report required by the commissioner for the purpose of this chapter, or who shall willfully or unlawfully hinder, delay or obstruct the commissioner in the discharge of the duties hereby imposed upon him, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was willful. (Rev., s. 1089; 1899, c. 164, s. 18.)

See editor's note under sec. 1035.

As to parties to suits for penalties, see sec. 447.

Construction of Similar Statute.—In construing a statute (Code of 1883, s. 1960.) which provided a similar penalty against corporations for failure to make the returns into the court, in State v. Marietta, etc., Railroad, 108 N. C. 24, 12 S. E. 1041, it was held, that it could only be recovered in an action brought by the state. A private relator could not maintain the action. State v. Marietta, etc., Railroad, 108 N. C. 24, 12 S. E. 1041.

§ 1109. Offenses by railroads, not otherwise provided for.—If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured. (Rev., s. 1090; 1899, c. 164, s. 17.)

As to parties to suits for penalties generally, see sec. 447.

Action Ex Contractu.—It would seem that an action for the penalty hereunder is an action ex contractu for breach of an implied contract to perform a statutory duty. State v. Wilmington, etc., R. Co., 126 N. C. 437, 442, 36 S. E. 14.

Construction of Penal Statute.—The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines v Wilmington. etc.. Railroad, 95 N. C. 434.

§ 1110. Violation of rules, causing injury; damages; limitation.—If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commissioner, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. (Rev., s. 1091; 1899, c. 164, s. 16.)

See editor's note under sec. 1035.

There is no requirement at common law, and no statute in the state, obliging railroad companies to fence their tracks. Jones v. Western North Carolina Railroad, 95 N. C. 328.

§ 1111. Action for penalty; when and how brought.—An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the utilities commissioner against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the utilities commissioner

upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney-general or the solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the attorney-general or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions. (Rev., s. 1092; 1899, c. 164, s. 15.)

Cross References.—As to whether or not the Attorney-General, or solicitor, must turn the compensation provided for in the section over to the State Treasurer, see sec. 3850; as to action for penalty being an action ex contractu, see annotation under section 1109; as to construction of statutes imposing penalties, see sec. 1109; as to parties to suits for penalties generally, see sec. 447. As to substitution of "utilities commissioner" for "corporation commission," see editor's note under sec. 1035.

§ 1112. Remedies, cumulative.—The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies. (Rev., s. 1093; 1899, c. 164, s. 26.)

Art. 8. Utilities Commissioner

§ 1112(a). Office of utilities commissioner created.—There is hereby created the office of utilities commissioner, who shall have general power and control over the public utilities and public-service corporations of the state, and such supervision as may be necessary to carry into full force and effect the laws regulating the companies, corporations, partnerships, and individuals hereinafter referred to, and to fix and regulate the rates charged the public for service, and to require such efficient service to be given as may be reasonably necessary. (1933, c. 134, s. 2.)

Cross References.—For comment on this and subsequent sections, see 12 N. C. Law Rev., 292, and references therein.

Editor's Note.—The General Assembly of 1891, c. 320, passed and ratified an Act establishing a Railroad Commission, and four days later passed another Act, Laws of 1891, c. 498, making the said Commission a court of record. As was said by Clark, C. J., in Corporation Comm. v. Railroad, 137 N. C. 1, 12, 49 S. E. 191, by the passage of these Acts, "the State made a radical change in its attitude towards railroads. * * * This Act was passed after the fullest discussion for years before the people of the State. It expressed their deliberate conviction that the time had arrived when the State, in the public interest, should supervise and control the charges and the conduct of common carriers, including express companies, telegraphs, telephones, and steamboats." The Amendatory Act of 1897, c. 206, extended very greatly the jurisdiction and powers of the Commission by giving it jurisdiction over street railways, express and telegraph companies, and power to require telephone companies to extend their lines and establish new agencies, to make rules for receiving, forwarding and delivering messages. A penalty was provided for a violation of these laws.

The acts discussed above were repealed by Acts 1933, c. 134. The following cases, decided before the acts were repealed, construed section 1023 as it appeared in Michie's Code of 1931, and are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

Legislative Power to Regulate.—The general power of the Legislature to provide reasonable rules and regulations, directly or through a commission, has been held in Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 472, 16 S. E. 393, 32 Am. St. 805; in Corporation Comm. v. Seaboard Air Line System, 127 N. C. 283, 288, 37 S. E. 266, and cases there cited. Among the federal decisions, this was asserted in Munn v. Illinois, 94 U. S. 113, and has been reiterated in numerous cases since, collected in 9 Rose's Notes, pp. 21-55. And in New York is stated in People v. Budd, 117 N. Y. 1, 5 L. R. A. 566, 51 Am. St. 460. See Corporation Comm. v. Railroad, 137 N. C. 1, 14, 49 S. E. 191.

The power of the Legislature, either directly or through appropriate governmental agencies, to establish reasonable regulations for public-service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved in well considered decisions dealing directly with the question. Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 71 S. E. 314, affirmed on writ of error to Supreme Court of United States, 232 U. S. 548-558; Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239; 52 S. E. 941; Corporation Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191; In re Southern Public Utilities Co., 179 N. C. 151, 159, 101 S. E. 619.

Does Not Interfere with Interstate Commerce.—The Railroad Commission, established by c. 320, Acts of 1891 existed solely under the Constitution and laws of this State and had no recognition in the laws of the United States, and being concerned solely in domestic affairs and trade, did not interfere with interstate commerce. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

§ 1112(b). Supervisory powers. — Under the rules and regulations herein prescribed and subject to the limitations hereinafter set forth, the said utilities commissioner shall have general supervision over the rates charged and the service given, as follows, to wit:

(1) By railroads, street railways, steamboats, canals, express and sleeping-car companies, and all persons, firms or corporations engaged in the carrying of freight or passengers or otherwise engaged as common carriers;

(2) By telephone and telegraph companies and all other companies engaged in the transmission of messages, and by all firms and individuals owning or operating telephone or telegraph lines in the state;

(3) By electric light, power, water, and gas companies, and corporations, other than such as are municipally owned or conducted, and all other companies, corporations, or individuals engaged in furnishing electricity, electric light current, power, or in transmitting or selling the same or producing the same from the water courses of this state;

(4) By all water power and hydroelectric companies or corporations now doing business in this state or which may hereafter engage in doing business in this state, whether organized under the laws of this state or under the laws of any other state or country, and such companies and corporations are deemed to be public-service companies and subject to the laws of this state regulating the same;

(5) By flume companies, corporations, other than municipal corporations, or individuals owning or operating public sewerage systems in the state of North Carolina;

And the said utilities commissioner is hereby vested under this section with all power necessary to require and compel any public utility or public-service corporation of the kinds herein designated or any other class of public utility to provide and furnish to the citizens of this state reasonable service of the kind it underakes to furnish and fix and regulate the reasonable rates and charges to be made to the citizens of the state who may be entitled to use the same under such rules and regulations as may be lawfully prescribed. (1933, c. 134, s. 3.)

§ 1112(c). Governor to appoint commissioner; term of office.—On or before the first day of April, 1933, the governor, with the advice and consent of the senate, shall appoint a utilities commissioner who shall enter upon the duties of his office on the first day of January, 1934, and hold his said office until the first day of January, 1935, or until his successor has been elected and qualified.

In the general election in 1934 and quadrennially thereafter, there shall be elected a utilities commissioner whose term of office shall begin on the first day of January, 1935, and quadrennially thereafter, and continue for a term of four years or until his successor has been elected and qualified.

Any vacancy in the office of the utilities commissioner caused by death, resignation, removal, failure to qualify, or any incapacity to perform the duties of his office, or otherwise, shall be filled by appointment by the governor, and the person so appointed shall fill the office until the expiration of the term of office of the person whose vacancy he was appointed to fill, or until the first day of January following the general election, subject to the provisions hereinafter set out.

Should the vacancy occur as hereinbefore set out more than sixty days prior to a general election, then at the next general election there shall be elected a utilities commissioner who shall serve for the unexpired term. In the event the vacancy should occur less than sixty days prior to a general election, the appointee of the governor shall serve until the expiration of the term of the person he was appointed to succeed. (1933, c. 134, s. 4.)

Editor's Note.—The following cases were decided under section 1027, now repealed, as it appeared in Michie's Code of 1931. That section provided for the removal of the commissioner by the governor. These cases are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

No Federal Question Involved.—The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by the U. S. Supreme Court. A law of that kind provides for the carrying out and enforcement of the policy of a State with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive upon the said court. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a federal question. Wilson v. North Carolina, 169 U. S. 586, 593, 43 L. Ed. 865, 18 S. Ct. 435.

In Wilson v. North Carolina, 169 U. S. 586, 594, 43 L. Ed. 865, 18 S. Ct. 435, it was said: "In its internal administration the state (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court."

Appearance before Governor "Due Process of Law." — Where a railroad commissioner, holding office under a statute which makes it the duty of the Governor of the State to suspend him until the next meeting of the general assembly in case he becomes subject to the disqualifications prescribed in the statute, is cited by the Governor in writing to appear and answer certain charges recited in the notice as to his disqualification and, in response thereto, appears or files an answer, such notice is, in effect, a citation and such appearance in person or by answer filed gives complete jurisdiction to the Governor and the consequent action of the Governor in suspending such commissioner from office, followed by a notification of the suspension and an appointment of his successor, is "due process of law." Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

In this latter case it is said: "The duty of suspension was imposed upon the Governor from the highest motives of public policy, to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the Legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the Governor was therefore by the very letter and spirit of the law required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law." Quoted with approval by Mr. Justice Peckham in Wilson v. North Carolina, 169 U. S. 586, 592, 43 L. Ed. 865, 18 S. Ct. 435.

Suspension Reported to General Assembly.—Under former § 1027 before there could be any removal, the fact of suspension had to be reported to the next Legislature by the Governor, and unless that body removed the officer the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension. Wilson v. North Carolina, 169 U. S. 586, 591, 43 L. Ed. 865, 18 S. Ct. 435.

§ 1112(d). Salary; oath of office. — The utilities commissioner shall receive an annual salary of six thousand ($6000.00) dollars, and before entering upon the duties of his office shall file with the secretary of state his oath of office to support the constitution and laws of the United States and the constitution and laws of the state of North Carolina, and to well and truly perform the duties of his said office as utilities commissioner, and that he is not the agent or attorney of any utility company or public-service corporation, or an employee thereof, and that he has no interest in any such company or corporation. (1933, c. 134, s. 5; 1935, c. 280.)

Editor's Note.—The amendment of 1935 increased the salary from forty-five hundred to six thousand dollars.

§ 1112(e). Express and implied powers.—The utilities commissioner shall have, exercise, and perform all the functions, powers, and duties and have all the responsibilities conferred by this article, and all such other powers and duties as may be necessary or incident to the proper discharge of the duties of his office. (1933, c. 134, s. 6.)

§ 1112(f). Existing powers of corporation commission devolve upon utilities commissioner.—All the powers, duties, and functions, rights and responsibilities of any statute or law of this state heretofore conferred upon or vested in or exercised by the corporation commission in this state, or any member thereof, are hereby vested in the utilities commissioner, and shall from and after the dates herein specified be assumed, exercised, and performed by the utilities commissioner created by this article and his successor in office subject to the provisions of this article. Wherever and whenever, under any existing law, any report, petition, application, memorial, or communication is required or permitted to be made or addressed to the corporation commission, or any member thereof, concerning any of the matters, things, and subjects over which the said corporation commission may have heretofore exercised control, authority, or direction, such report, petition, application, or communication concerning the same shall be addressed to the utilities commissioner, and he shall have full power and supervision over the same and to act therein or thereon in such manner as was heretofore provided for the corporation commissioners or commission. (1933, c. 134, s. 7.)

§ 1112(g). Substitution of utilities commissioner for old designation.—Chapter twenty-one (21) of

the Consolidated Statutes of 1919, chapter one hundred and forty-nine (149) of the Public Laws of 1927, all revenue and machinery acts of this state, and any and all acts and laws and clauses of laws amendatory thereof and supplemental thereto, and all laws and clauses of laws relating to the functions, powers, duties, rights, and responsibilities of the corporation commission, or any member thereof, be and they are hereby amended so that all functions, powers, duties, rights, and responsibilities prescribed to be done and performed by the corporation commission, or any member thereof, by any of said acts and laws, shall hereafter be done and performed by the utilities commissioner, and wherever in chapter twenty-one (21) of the Consolidated Statutes of 1919, or any act amendatory thereof, reference is made to "corporation commissioner," "corporation commission of the state of North Carolina," "corporation commission of North Carolina," "corporation commission of this state," "chairman of the corporation commission," or "securities commissioner," or other designation, the aforesaid chapter and laws amendatory thereof shall be amended by striking out the aforesaid "corporation commission," "chairman of the corporation commission of the state," "securities commissioner," or other designation words, and inserting in lieu thereof the words "utilities commissioner," and wherever in any sentence or clause any pronoun or any other word is used referring to the said commissioner, corporation commission of North Carolina, or securities commissioner, appropriate pronoun or reference word shall be substituted as the context may require to follow and carry out the purposes of this section. (1933, c. 134, s. 8.)

§ 1112(h). Pending investigations and hearings to be concluded by commissioner. — The utilities commissioner shall make all investigations and conduct all hearings with respect to the matters, things, and controversies which prior to the ratification of this article were under the control and required to be made by the corporation commission, or any member thereof, as set out in chapter twenty-one of the Consolidated Statutes, chapter one hundred and forty-nine of the Public Laws of 1927, revenue and machinery acts of this state, and all other acts, laws, and clauses of laws conferring the functions, duties, powers, rights, and responsibilities upon said corporation commission, or any member thereof, and the rulings, findings, judgments, and conclusions of said utilities commissioner with respect to such matters and things, made in accordance with the provisions of this article, shall have the same force and effect and validity as the findings and conclusions heretofore made or required to be made by the corporation commission, or any member thereof, or existent under the powers conferred upon said corporation commission or any member thereof prior to the ratification of this article, and for this purpose and to this end the said utilities commissioner and the associate commissioners hereinafter provided for shall be and they are hereby constituted a court of record, known as the "utilities commission" of the state of North Carolina, and shall adopt a seal and have all the powers and jurisdiction of a court of general jurisdiction as to all the subjects embraced in this article; and the commissioners and clerks thereto shall have full power to administer oaths, hear and take evidence, and said commission or commissioners shall render their decisions upon questions of law and of fact as other courts of similar jurisdiction. (1933, c. 134, s. 9.)

Editor's Note.—The following cases were decided under the section that appeared in Michie's Code of 1931 as § 1023, the provisions of which are substantially set forth in this section.

Object in Making Court of Record.—In Caldwell v. Wilson, 121 N. C. 425, 472, 28 S. E. 554, Douglas, J., said: "It was the object of the act (i. e. making the Corporation Commission a court of record) simply to give authenticity to its records and proceedings, and it adds nothing to its duties and powers."

Extension of Time Must Appear on Record.—The Corporation Commission was a court of record under former § 1023, and it had to appear thereon that a railroad company claiming an extension of time to file exceptions to the commissioner's order had done so, and no alleged parol agreement for an extension of time would be considered. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Nature of Powers.—The Commission was not a judicial court under former § 1023, but an administrative agency of the State, possessing certain quasi judicial and legislative powers. State v. Southern R. Co., 151 N. C. 447, 66 S. E. 427; North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 563, 87 S. E. 785.

§ 1112(i). Commissioner to call in associates to determine questions of facts where amount involved exceeds $3,000.00.—Whenever in the performance of the duties herein prescribed any material issue of fact shall arise in any subject matter or controversy pending before the utilities commission, wherein the amount involved shall be three thousand ($3,000.00) dollars or more, or, in the opinion of the utilities commissioner, the interest of the public is concerned, the said commissioner shall, upon request of any party to the petition or proceeding, or upon his own motion, if he deem it advisable, and to the public interest, notify the associate commissioners hereinafter provided for, to sit with him for the purpose of hearing and determining such matters or issues of fact. The said associate commissioners shall be given ten days notice by the utilities commissioner of the time and place of such hearing, and a similar notice shall likewise be given to all parties interested in such proceeding or hearing. In all matters, controversies, or proceedings brought before said utilities commissioner wherein the amount involved is less than the sum of $3,000.00, and in the opinion of the commissioner the public interest is not concerned, the said utilities commissioner sitting alone shall hear the matter and proceed to judgment thereon, subject to the right of appeal to the superior court as now provided by law. (1933, c. 134, s. 10.)

§ 1112(j). Governor to appoint two associate commissioners.—As soon as practicable after the ratification of this article and before the same goes into effect, the governor, with advice and consent of the senate, shall appoint two associate commissioners who shall be residents of this state and otherwise qualified, one of whom shall hold office until the first day of January, 1935, or until his successor shall have been appointed and qualified, and one shall hold office until the first day of January, 1937, or until his successor shall have been appointed and qualified, who shall, when notified and called upon by said utilities commissioner, sit with him for the purpose of hearing and determining all controverted matters or issues of fact as hereinabove provided. At the expiration of each of the above named terms and quadrennially

thereafter there shall be appointed in the same manner one associate commissioner who shall hold office for the term of four years.

The said associate commissioners shall receive as compensation for their services rendered hereunder the sum of twenty-five ($25.00) dollars per day and actual expenses while engaged in said hearings: Provided the total amount expended for such per diem for said associate commissioners shall not exceed the sum of eighteen hundred ($1800.00) dollars per year. In case of a vacancy in the office of commissioner from any causes, the unexpired term of such commissioner shall be filled by appointment of the governor: Provided said associate commissioners shall enter upon the duties of their office January 1, 1934. (1933, c. 134, s. 11.)

§ 1112(k). Judgments of commission.—The said utilities commissioner, in matters solely within his jurisdiction, and the said commissioner, together with the associate commissioners, when called upon as hereinabove provided, shall hear and determine such matter, thing, or controversy in dispute, pass upon and determine the issues of fact raised thereon, and the questions of law involved therein, and make and enter their findings and conclusions thereon as the judgment of the said utilities commissioner of North Carolina. From the decision of said utilities commissioner, or the said utilities commission, any party to said proceeding may appeal to the superior court at term as designated in and under the rules of procedure required by section (s) 1097, 1098, 1099, 1100, 1101, 1102, consolidated statutes, said appeal to be prosecuted and the said matter and controversy there to be heard and disposed of as is now provided by law, and upon such appeal being taken, it shall be the duty of the utilities commission to certify its decision and rulings to the said superior court as now provided by law. (1933, c. 134, s. 12.)

§ 1112(l). Public record of proceedings. — The utilities commissioner shall keep in his office at all times a record of his official acts, rulings, and transactions, which shall be public records of the state of North Carolina, and all rulings and determinations of said commission upon matters and things authorized to be passed upon by this article, and shall have and appoint a chief clerk, who shall be experienced in railroad and other public utilities statistics, transportation and public-service charges, and whose term of office shall be for a period of two years, and he shall file with the secretary of state the oath of office similar to that prescribed for the utilities commissioner. The utilities commissioner shall have power to remove such clerk for cause at any time. (1933, c. 134, s. 13.)

§ 1112(m). Clerical assistance. — The utilities commissioner shall be allowed such stenographic and other clerical assistance as he may require for the performance of the duties and functions of his said office, to be established and fixed by such department, bureau, or other state agency as may be charged by law with the duty of determining the extent of such assistance in said departments, all such stenographers, clerks, and assistants and special investigators so provided for to be appointed by the utilities commissioner and subject to removal or discharge by him. The salaries and compensation of such clerical assistants, special investigators, or other office force as may be allowed in the office of the utilities commission shall be fixed in the manner as now provided by law for fixing and regulating the salaries and compensation by other state departments. (1933, c. 134, s. 14.)

§ 1112(n). Seal of office; certificate.—In all cases where the seal is required on any document, the seal adopted as herein prescribed by the utilities commissioner shall be sufficient, and whenever any record, paper, or document is required to be certified or evidenced by the certificate of the utilities commissioner or his chief clerk or wherever any act or thing is required or permitted to be evidenced by such certificate, the certificate shall be made by the utilities commissioner, and shall have the valid force and effect now given by law to any such certificate which may have heretofore been required to be made by the corporation commission. (1933, c. 134, s. 15.)

§ 1112(o). Commissioner to keep himself informed as to utilities.—The said utilities commissioner shall at all times be required to keep himself-informed as to the public-service corporations hereinbefore specified and enumerated, their rates and charges for service, and the service supplied to the citizens of the state and purposes therefor; and he shall at all times be empowered and required to inquire into such service and rates charged therefor, and to fix and determine as herein provided the reasonableness thereof, and upon petition or otherwise to make full inquiry into such rates and charges in behalf of the citizens of the state, and compel and require compliance with the regulations and charges, and final determination fixed therefor under the provisions of this article, and no corporation, association, partnership, or individual doing business in the state of North Carolina as a public-service corporation, or any corporation herein designated, shall be allowed to increase its rate and charge for service or change its classification in any manner whatsoever except upon petition duly filed with the utilites commission and inquiry held thereon and final determination of the reasonableness and necessity of any such increase change in classification or service: Provided, however, that nothing herein shall be construed to prevent any public-service corporation from reducing its rates either directly or by change in classification. (1933, c. 134, s. 16.)

§ 1112(p) Surrender of present quarters to commissioner. — The utilities commissioner shall occupy the offices now occupied by the corporation commission and the securities commissioner, or so much thereof as shall be necessary for the performance of the functions and duties herein prescribed, and such offices shall be turned over to the said utilities commission. Upon the induction into office of the utilities commissioner, the corporation commission shall turn over and deliver to him all books, records, papers, and documents and he shall be responsible for the safe keeping thereof. (1933, c. 134, s. 17.)

§ 1112(q). Continuance of present rate inquiry by corporation commission. — The corporation commission shall proceed as promptly as possible

to investigate, determine and fix fair and equitable rates on telephone, telegraph and other public utility service in line with present economic conditions. (1933, c. 134, s. 18.)

Art. 9. Public Utilities Act of 1933

§ 1112(1). Definitions.—(a) The term "corporation," when used in this article, includes a private corporation, an association, a joint stock association or a business trust.

(b) The term "person," when used in this article, includes a natural person, a partnership or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "municipality," when used in this article, includes a city, a county, a village, a town, and any other public corporation existing, created or organized as a governmental unit under the constitution or laws of the State.

(d) The term "commission" shall mean the corporation commission.

(e) The term "public utility," when used in this article, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) Producing, generating, transmitting, delivering or furnishing gas, electricity, steam or any agency for the production of light, heat or power to or for the public for compensation;

(2) Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation;

(3) Transporting persons or property by street, suburban or interurban railways for the public for compensation;

(4) Transporting persons or property by motor vehicles for the public for compensation, but not including taxicab, operating on call, or truck transfer service in cities or towns;

(5) Transporting or conveying gas, crude oil or other fluid substance by pipe line for the public for compensation;

(6) Conveying or transmitting messages or communications by telephone or telegraph, where such service is offered to the public for compensation;

(7) The term "public utility" shall for rate making purposes only include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others. The business of any public utility other than of the character defined in subdivisions 1 to 7, inclusive, of subdivision (e) of this section is not subject to the provisions of this act.

(f) The term "rate," when used in this article, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service, product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, toll, rental or classification. (1933, c. 307, s. 1.)

Editor's Note.—Public Laws of 1935, ch. 134, codified as secs. 1112(a)-1112(q), abolishing the corporation commission, created the office of utilities commissioner and provided for the appointment of two associate commissioners. Section 8 of the act, codified as sec. 1112(g), provided that this chapter be amended so that all the functions, powers, duties, etc., of the corporation commission "shall hereafter be done and performed by the utilities commissioner." The sections of this article should be read with this provision in mind though the act constituting this article was subsequently enacted.

§ 1112(2). Rates must be just and reasonable.—Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. (1933, c. 307, s. 2.)

§ 1112(3). Service. — Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, s. 3.)

§ 1112(4). To file rate schedules with commission.—Under such rules and regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by it and collected or enforced, or to be collected or enforced within the jurisdiction of the commission. The utility shall keep copies of such schedules open to public inspection under such rules and regulations as the commission may prescribe. (1933, c. 307, s. 4.)

§ 1112(5). Rates higher than schedule prohibited.—No public utility shall directly or indirectly, by any device whatsoever, or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this act, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules. (1933, c. 307, s. 5.)

§ 1112(6). Discrimination prohibited.—No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The commission may determine any questions of fact arising under this section. (1933, c. 307, s. 6.)

For a discussion of this and related sections, see 11 N. C. Law Rev., 246.

§ 1112(7). Change of rates.—Unless the commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this article, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All pro-

posed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates, without requiring the thirty days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

Whenever there is filed with the commission by any public utility any schedule stating a new rate or rates, the commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than ninety (90) days beyond the time when such rate or rates would otherwise go into effect unless the commission shall find that a longer time will be required, in which case the commission may extend the period for not to exceed six (6) months: Provided, and notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect on the date when it or they would have become effective, if not so suspended, by filing with the commission a bond in a reasonable amount approved by the commission, with sureties approved by the commission, conditioned upon the refund, in a manner to be prescribed by order of the commission to the persons entitled thereto of the amount of the excess, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond, other arrangements satisfactory to the commission for the protection of the parties interested. If the public utility fails to make refund within thirty (30) days after such final determination, any person entitled to such refund may sue therefor in any court of this state of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within two years after such final determination. Any number of persons entitled to such refund may join as plaintiffs and recover their several claims in a single action; in which action the court shall render a judgment severally for each plaintiff as his interest may appear. During any such period of suspension the commission may, in its discretion, require that the public utility involved shall furnish to its consumers or patrons a certificate or other evidence of payments made by them. (1933, c. 307, s. 7.)

§ 1112(8). Changing unreasonable rates after hearing.—Whenever the commission, after a hearing had after reasonable notice upon its own motion or upon complaint, finds that the existing rates in effect and collected by any public utility for any service, product, or commodity, are unjust, insufficient or discriminatory, or in any wise in violation of any provision of law, the commission shall determine the just, reasonable and sufficient rates to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. (1933, c. 307, s. 8.)

§ 1112(9). Compelling telephone and telegraph companies to form continuous lines to certain points.—The commission may upon complaint, in writing, by any person, or on its own initiative after a hearing on reasonable notice, by order require any two or more telephone or telegraph companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities which can not be communicated with or reached by the lines of either company alone, where such service is not already established or provided, to establish and maintain through lines within the state between two or more such localities. The rate for such service shall be just and reasonable and the commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as may be required by the commission. (1933, c. 307, s. 9.)

§ 1112(10). Compelling efficient service after hearing.—Whenever the commission, after a hearing after reasonable notice had upon its own motion or upon complaint, finds that the service of any public utility is unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, the commission shall determine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced or employed and shall fix the same by its order, rule or regulation. (1933, c. 307, s. 10.)

§ 1112(11). Fixing standards, classifications, etc.; testing service.—The commission may, after hearing upon reasonable notice had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices or service to be furnished, imposed, observed and followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility. (1933, c. 307, s. 11.)

§ 1112(12). Valuing and revaluing utility property.—The commission may, on hearing after reasonable notice, ascertain and fix the value of the whole or any part of the property of any public

utility insofar as the same is material to the exercise of the jurisdiction of the commission, and may make revaluations from time to time and ascertain the value of all new construction, extension and additions to the property of every public utility. (1933, c. 307, s. 12.)

§ 1112(13). Establishment of accounting system.—The commission may establish a system of accounts to be kept by the public utilities, subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept. (1933, c. 307, s. 13.)

§ 1112(14). Visitorial and inspection powers of commission.—The commissioners and the officers and employees of the commission may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examination, tests and inspections. (1933, c. 307, s. 14.)

§ 1112(15). Annual reports.—The commission may require any public utility to file annual reports in such form and of such content as the commission may require and special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. (1933, c. 307, s. 15.)

§ 1112(16). Investigation into management of utilities.—The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigations the commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. (1933, c. 307, s. 16.)

§ 1112(17). Permission of commission to pledge assets.—No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the commission and by order obtain its permission so to do; nor shall any such utility pay any fees, commissions or compensation of any description whatsoever, to any holding, managing, operating, constructing, engineering, financing, or purchasing company or agency including subsidiary or affiliated companies, for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the commission and obtaining its approval. (1933, c. 307, s. 17.)

§ 1112(18). Assumption of certain liabilities and obligations to be approved by commission.—No utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by the utility, and after investigation by the commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within the corporate purposes of the utility, (b) is compatible with the public interest, (c) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service, and, (d) is reasonably necessary and appropriate for such purpose. Any such order of the commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the utility making such application. (1933, c. 307, s. 18.)

§ 1112(19). Commission may approve in whole or in part or refuse approval.—The commission, by its order, may grant or deny the application provided for in the preceding section as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so theretofore authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section. (1933, c. 307, s. 19.)

§ 1112(20). Contents of application for permission.—Every application for authority for such issue or assumption shall be made in such form and contain such matters as the commission may prescribe. Every such application and every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the utility by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the utility. (1933, c. 307, s. 20.)

§ 1112(21). Applications to receive immediate attention; continuances.—All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the commission's docket and disposed of promptly, and all such applications shall be disposed of in thirty (30) days after the same are filed with the commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is con-

tinued beyond thirty (30) days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21.)

§ 1112(22). Notifying commission as to disposition of securities.—Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unincumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within ten days after such sale, pledge, repledge, or make other disposition of, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission. (1933, c. 307, s. 22.)

§ 1112(23). No guarantee on part of state.—Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the state of North Carolina. (1933, c. 307. s. 23.)

§ 1112(24). Article not applicable to note issues; renewals likewise excepted.—The provisions of the foregoing sections shall not apply to notes issued by a utility for the proper purposes and not in violation of law, payable at a period of not more than two (2) years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two (2) years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes and shall not apply to renewals thereof from time to time not exceeding in the aggregate six (6) years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two (2) years from the date thereof, shall, however, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities of another kind of any term or character or from the proceeds thereof without the approval of the commission. (1933, c. 307, s. 24.)

§ 1112(25). Not applicable to debentures of court receivers; notice to commission.—Nothing contained in this article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificate or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity. Within ten (10) days after the making of any such notes, so payable at periods of not more than two (2) years from the date thereof, the utility issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission. (1933, c. 307, s. 25.)

§ 1112(26). Periodical or special reports.—The commission shall require periodical or special reports from each utility hereafter issuing any security including such notes payable at periods of not more than two (2) years from the date thereof, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof. (1933, c. 307, s. 26.)

§ 1112(27). Failure to obtain approval not to invalidate securities or obligations.—(a) Securities issued and obligations and liabilities assumed by a utility, for which under the provisions of this article the authorization of the commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption. (b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this article or rule or regulation of the commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto. (c) A copy of any order made and entered by the commission as in this article provided (duly certified by the clerk of the commission) approving the issuance of any securities or the assumption of any obligation or liability by a utility shall, in and of itself, be sufficient evidence, for all purposes, of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. (d) Any utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the commission with respect thereto, contrary to the provisions of this article, shall be liable to a penalty of not more than ten thousand dollars, but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27.)

§ 1112(28). Commission may act jointly with agency of another state where utility operates. — If a commission or other agency or agencies is empowered by another state to regulate and control the amount and character of securities to be issued by any public utility within such other state, then the corporation commission of the state of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this state, and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the state of North Carolina if said issue is separately approved by the corporation commission of the state of North Carolina. (1933, c. 307, s. 28.)

§ 1112(29). Willful acts of employees deemed

those of utility. — The willful act of any officer, agent, or employee of a utility, acting within the scope of his official duties of employment, shall, for the purpose of this article be deemed to be the willful act of the utility. (1933, c. 307. s. 29.)

§ 1112(30). Actions to recover penalties.—Actions to recover penalties under this article shall be brought in the name of the state of North Carolina, in the county in which the offense was committed. Whenever any utility is subject to a penalty under this article, the commission shall certify the facts to the attorney-general, who shall institute and prosecute an action for the recovery of such penalty: Provided, the commission may compromise such action and dismiss the same on such terms as the court will approve. (1933, c. 307. s. 30.)

§ 1112(31). Penalties to school fund. — All penalties recovered by the state in such action shall be paid into the state treasury to the credit of the school fund. (1933, c. 307, s. 31.)

§ 1112(32). Abandonment and reduction of service. — Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the commission shall have power, after petition, notice and hearing, to authorize by order any utility to abandon or reduce its service or facilities. (1933, c. 307, s. 32.)

§ 1112(33). Water gauging stations.—The commission may require the location, establishment, maintenance and operation of water gauging stations, and the commission and the North Carolina department of conservation and development may co-operate with each other as to such locations, construction and reports and upon the results of operation. (1933, c. 307, s. 33.)

§ 1112(34). Reports from municipalities operating own utilities. — Every municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity, or purchasing same for distribution and resale, or operating telephone exchanges, shall make an annual report to the commission, verified by the oath of the general manager or superintendent thereof, on the same blanks as now provided for reports of privately owned utilities, giving the same information as required of such utilities. (1933, c. 307, s. 34.)

§ 1112(35). Refusal to permit commission to inspect records made misdemeanor.—Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the commission, or a majority of said commission, and under the seal of the commission, to permit the commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable by a fine of not less than five hundred and not more than five thousand dollars. (1933, c. 307, s. 35.)

§ 1112(36). Willful disobedience to orders of commission incurs forfeiture.—Every public utility and the officers, agents and employees thereof shall obey, observe and comply with every order made by the commission under authority of this article so long as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this article, shall forfeit to the state of North Carolina not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this article shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

No present provision of law shall be deemed to be repealed by this article except such as are directly in conflict therewith. (1933, c. 307, s. 36.)

CHAPTER 22
CORPORATIONS

Art. 1. Definitions

§ 1113. Definitions.—The following words and phrases where used in this chapter, unless differently defined or described, have the meanings and references stated below:

1. "Corporation" refers to a corporation which may be created and organized under this chapter, or under any other general or any special act.
2. "Certificate of incorporation" is the instrument filed by the incorporators and by which the corporation is formed.
3. The words "special act" refer to the act of the legislature enacted for the purpose of creating the corporation.
4. The word "charter" means either "certificate of incorporation" or "special act," together with all appropriate parts of this chapter and its amendments.
5. "Court," "superior court," or "judge of the superior court" means the judge of the superior court resident in the district or holding the courts of the district in which the corporation affected has its principal place of business.
6. "Receiver" as used in this chapter includes receivers and trustees appointed by the court, as herein provided. (Rev., ss. 1136, 1222, 1247; Code, s. 668; 1901, c. 2, ss. 7, 74, 111.)

Cross References.—For a complete treatment of corporations, see 3 N. C. Enc. Dig. 506-651 and 13 N. C. Enc. Dig. 470-505. For the constitutional provisions concerning corporations, see Constitution, Art. 8. For the power of the Legislature over charters, see Constitution Art. 8, sec. 1 and also sec. 1135 infra. As to the requirement of the certificate of incorporation, see sec. 1115. As to jurisdiction of superior courts over corporations, see sec. 1195. As to receivers of corporations, see sec. 1208 et seq.

In General.—A corporation, though very hard to define, has been said to be "an artifical being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. See the famous case of Dartmouth College v. Woodward, 4 Wheat, 518, 636, 4 L. Ed. 629.

It has been described as an "association of persons," contracting a joint capital for a common purpose, with assignability of shares in perpetual succession, and is a mere creature of the legislature. Horn Silver Min. Co. v. New York, 143 U. S. 305, 312, 36 L. Ed. 164.

Private, Public and Quasi Public Corporations.—Corporations are private, where the property of the corporation is

private, although the corporation is engaged in a quasi public business, such as a railroad corporation, and the fact that the state owns a portion of its stock does not change its character; public and quasi public corporations, are corporations exercising a public employment, and having duties to the public to perform. Railroad Co. v. Commissioners, 103 U. S. 1, 26 L. Ed. 359; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 50, 35 L. Ed. 55.

A Charter Defined.—A charter, is an instrument or authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation, and an amendment thereto may be treated as part thereof. Humphrey v. Pegues, 16 Wall. 244, 21 L. Ed. 326.

Art. 2. Formation

§ 1114. How created.—Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads, other than street railways, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except corporations created for charitable, educational or reformatory purposes that are to be and remain under the patronage and control of the state): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

Cross References.—As to the constitutional power of the Legislature to form corporations, see Constitution Article 8, section 1. As to the power of the Legislature to amend this chapter and the charters of corporations, see section 1135. As to the requirements for incorporating banks, see sec. 216 et seq. As to the establishment of railroads, see sec. 3412 et seq. As to creating insurance companies, see sec. 6328. As to incorporating building and loan associations, see sec. 5170.

Strict Construction. — The requirements of this section should be strictly construed. Hill v. Lumber Co., 113 N. C. 173, 180, 18 S. E. 107.

Position of Corporators and Promoters. — The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or undisclosed profit in the organization by way of shares therein or otherwise. Goodman v. White, 174 N. C. 399, 93 S. E. 906.

When Powers Granted by Special Act.—When corporate powers are granted by a special, instead of a general act of the Legislature, there must be evidence of acceptance by the corporators and compliance with all the conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. Powell Brothers v. McMullan Lumber Co., 153 N. C. 52, 55, 68 S. E. 926.

1. The name of the corporation. No name can be assumed which is already in use by (a) a domestic corporation, or (b) a foreign corporation authorized to do business under the laws of this State, or (c) a corporation which has heretofore or may hereafter sell its good will to any other person, firm or corporation, and notice thereof has been or may hereafter be filed in the office of the Secretary of State of North Carolina, and the filing fee of twenty-five dollars paid to the said Secretary of State: Provided, however, that the purchaser of the good will of such corporation, or his or its assigns, may be permitted to use the same name, or one similar thereto, of the corporation whose good will it has purchased. The prohibition of this paragraph shall extend to names so similar in sound or appearance to such existing corporate names as may tend to confusion of identity. The name adopted must end with the word "company," "corporation," "incorporated" or the abbreviation "inc."

As to the necessity for displaying the name of the corporation, see sec. 1136.

Editor's Note.—Prior to the 1935 amendment this subdivision read as follows: "No name can be assumed already in use by another domestic corporation, or so similar as to cause uncertainty or confusion, and the name adopted must end with the word 'company,' 'corporation' or 'incorporated.' "

Right to Name.—One corporation cannot prevent another from using in its corporate title a name to which others have a common right. Howe Scale Co. v. Wyckoff, 198 U. S. 118, 47 L. Ed. 972.

And in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. Id.

2. The location of its principal office in the state.

As to change in principal office, see sec. 1133 and for meaning of the expression, see note thereunder.

3. The object or objects for which the corporation is to be formed.

Corporation Limited to Objects Stated.—A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of taking tolls, does not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. Wiswall v. Greenville Plank-Road Co., 56 N. C. 183.

Need Not Use All Powers.—The fact that a corporation avails itself of only one of several privileges granted by its charter—that is, manufacture all the products it is permitted to manufacture—does not invalidate the act of incorporation. Wadesborro Cotton Mills Co. v. Burns, 114 N. C. 353, 19 S. E. 238.

4. The amount of the total authorized capital stock, the number of shares into which it is divided, the par value of each share, the amount of capital stock with which it will commence business, and, if there is more than one class of stock, a description of the different classes. The provisions of this subsection shall not apply to religious, charitable, nonprofit social or literary corporations, unless they desire to have a capital stock. If they desire to have no capital stock, that fact and the conditions of membership shall be stated.

Editor's Note.—The Legislature has recently made two changes in this paragraph of the section. The first sentence formerly contained the additional clause "with the terms on which the respective classes of stock are created." This concluding clause was stricken out by ch. 55, Ex. Sess. 1920.

By ch. 98, Laws of 1924 the second sentence in the paragraph was amended by inserting the words "non-profit social" immediately after the word "charitable," thus adding to the list of corporations to which the paragraph does not apply.

5. The names and postoffice addresses of the subscribers for stock and the number of shares subscribed for by each; the aggregate of the subscriptions shall be the amount of capital with which the corporation will commence business. If there is to be no capital stock, the certificate must contain the names and postoffice addresses of the incorporators.

Editor's Note.—Formerly it was not required that the number of shares taken by each subscriber be set out in the certificate of incorporation. In Cotton Mills v. Cotton Mills. 115 N. C. 475, 478, 20 S. E. 770, the court says that although this was not at that time required it is the usual practice to set them out and should have been required by statute.

6. The period, if any, limited for the duration of the corporation.

Limit of Corporate Existence.—It is unquestionably true that a corporation, whose term of existence is fixed and limited in the act which creates it, cannot endure beyond the prescribed time, unless prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. The expiration of the time ends the life given to the artificial body, as death terminates the life of the natural person. Asheville Division v. Aston, 92 N. C. 578, 579, 585.

Exhaustion.—When a charter power is once exhausted it is, in respect to further contracts and rights, as though it had never been granted. East Tennessee, etc., R. Co. v. Frazier, 139 U. S. 288, 292, 35 L. Ed. 196.

7. The certificate of incorporation may also contain any provision, consistent with the laws

of this state, for the regulation of the affairs of the corporation, or creating, defining, limiting and regulating its powers, directors and stockholders, or any class or classes of the latter. (Rev., s. 1137; Code, s. 677; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318; 1897, c. 204; 1899, c. 618; 1901, c. 2, s. 8, cc. 6, 41, 47; 1903, c. 453; 1911, c. 213, s. 1; 1913, c. 5, s. 1; Const., Art. 8, s. 1; 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320.)

Under Dual Incorporation.—Where a corporation is incorporated under the laws of two states, all its powers in relation to land lying in one of them must be derived from the law of that state alone. Beaty v. Knowler, 4 Pit. 152, 167, 7 L. Ed. 813.

Liabilities. — A corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature, and courts will not allow corporations to escape from their proper responsibilities by means of any disguise. New York, etc., R. Co. v. Winans, 17 How. 30, 40, 15 L. Ed. 27.

§ 1115. Requirements as to certificate of incorporation.—The certificate of incorporation shall be signed by the original stock subscribers, or a majority of them, and must be acknowledged before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. The certificate shall then be filed in the office of the secretary of state, and there remain of record, and he shall, if it is in accordance with law, cause it to be recorded in his office in a book to be kept for that purpose and known as the Corporation Book. Upon the payment of the organization tax and fees, the secretary of state shall certify under his official seal a copy of the certificate of incorporation and probates, which certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of the corporation in this state is, or is to be, established, in a book to be known as the Record of Incorporations. The certificate, or a copy thereof, duly certified by the secretary of state, or by the clerk of the superior court of the county in which it is recorded, is evidence in all courts and places, and in all judicial proceedings is prima facie evidence of the complete incorporation and organization of the corporation purporting thereby to have been established. (Rev., s. 1139; Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343.)

Cross References. — As to the taxes for filing the certificate, see sec. 1218. As to amending certificate, see sec. 1130. As to effect of errors or omissions in the certificate, see sec. 1120. As to fees for recording, see sec. 1219.

Record of Incorporations Admissible in Evidence.—Under the former wording of this section which provided that the letters of incorporation or copies duly certified by the clerk should be admissible in evidence, it was held that the Record of Incorporation's book was also admissible as prima facie evidence of the complete organization and incorporation of the company. Iron Co. v. Abernathy, 94 N. C. 545, 547.

Proof of Existence—By Reputation. — The existence of a corporation may be proved by reputation. Gulf States Steel Co. v. Ford, 173 N. C. 195, 91 S. E. 84. Existence or nonexistence is a fact and may be proved as other facts. Id.

Same—By Written Contract. — Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. Otis Elevator Co. v. Cape Fear Hotel Co., 172 N. C. 319, 90 S. E. 253.

Same—Copies Prima Facie Evidence. — Copies of letters of incorporation are admissible to show prima facie the existence of a corporation, and it can not avoid its liability for debts because in fact it had but an inchoate existence. Marshall v. Macon County Bank, 108 N. C. 639, 13 S. E. 182.

§ 1116. When incorporators become corporation.—From the date the certificate of incorporation is filed in the office of the secretary of state, the stock subscribers, their successors and assigns, are a body corporate by the name specified in the certificate, subject to amendment and dissolution as provided in this chapter. (Rev., s. 1140; 1901, c. 2, s. 10.)

Signing and Recording Articles Sufficient. — When corporate powers are granted by a special act of the Legislature, there must be evidence of the acceptance by the corporators of the privileges conferred and compliance with all conditions precedent prescribed by law in order to show affirmatively that the corporation is lawfully organized. It is otherwise when the corporation if formed under the general law, for by the signing of the articles of agreement, and the due recording thereof, the corporators become a body politic for the purposes set forth in the agreement. Benbow v. Cook, 115 N. C. 324, 325, 20 S. E. 453.

No Requirement for Stock Issue. — There is no requirement of the statute that the stock should be issued or paid up before a valid organization can be effected or corporate action taken. Fayetteville Street Ry. v. Aberdeen R. R., 142 N. C. 423, 434, 55 S. E. 345.

Adoption of By-Laws Not Necessary.—By signing and recording the articles of incorporation three or more persons become a body corporate and it is not necessary for the exercise of such powers as are conferred by statute on corporations, that the one so formed shall issue certificates of stock or adopt by-laws. Powell Brothers v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926.

De Jure and De Facto Existence. — A corporation de jure is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

If the corporation has acted as such and exercised its franchises, then it is a corporation de facto, and in such case any irregularity in its organization is immaterial. Whitney v. Wyman, 101 U. S. 392, 395, 25 L. Ed. 1050.

Same—Distinctions. — So far as the State is concerned, the ultimate distinction between a corporation de jure and a corporation de facto is, that the former, having made substantial compliance with the charter requirements looking to the proper organization, can successfully resist the suit instituted by the State or its officers for the direct purpose of annulling the charter, while the latter cannot; but as to private persons holding claims against them, the individual corporators, in either case, are not personally liable for debts, except and to the extent the charter and law applicable may so provide. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

§ 1117. Incorporators act until directors elected.—Until directors are elected the signers of the certificate of incorporation shall have the direction of the affairs of the corporation, and may take proper steps to obtain the necessary subscription to stock and to perfect the organization of the corporation. (Rev., s. 1141; 1901, c. 2, s. 11.)

Subscribers May Release Member. — Under this section the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have supervened, the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

§ 1118. First meeting; notice.—The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in a newspaper of the county where the corporation is established;

or the meeting may be called without publication, if two days notice is personally served on all the incorporators; or if all the incorporators in writing waive notice and fix a time and a place of meeting, no notice or publication is required. (Rev., s. 1142; Code, s. 665; 1901, c. 2, s. 18.)

As to stockholders meetings generally, see sec. 1168 and annotations. As to meeting called by three stockholders, see sec. 1169.

Waiver of Notice. — The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive it, the meeting and all proceedings are as valid as they would be had the full statutory notice been given. Benbow v. Cook, 115 N. C. 324, 325, 330, 20 S. E. 453.

Meeting outside of State. — Though the first meeting of stockholders may have been held outside of the State, that fact cannot be shown by the body assuming the powers of a corporation in order to avoid its liability, nor by its debtors for the purpose of evading their accountability under contracts made with it, but the State only can set up that fact. Tuckasegee Mining Co. v. Goodhue, 118 N. C. 981, 985, 24 S. E. 797.

§ 1119. Death of incorporators; vacancy filled.—When one or more of the incorporators of any corporation die before the corporation has been organized pursuant to law, the survivor or survivors may, in writing, designate others who may take the place and act instead of the deceased, in the organization; and the organization so effected by their aid is as effectual in law as if it had been effected by all the original incorporators. (Rev., s. 1143; 1901, c. 2, s. 36.)

§ 1120. Errors or omissions in certificate of incorporation.—Whenever in the certificate of incorporation under any general law there is an error or omission in the recital of the act under which the corporation is created or an error or omission of any matter required to be stated therein, it is lawful for the corporation to correct the error or supply the omission in the following manner: The board of directors shall pass a resolution declaring that the error or omission exists and that the corporation desires to correct it, and shall call a meeting of the stockholders to take action upon the resolution. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail. If two-thirds in interest of all the stockholders vote in favor of the correction of the error or omission, a certificate of their action shall be made and signed by the president and secretary under the corporate seal; which certificate shall be acknowledged as in the case of deeds of real estate, and together with the written consent in person or by proxy of two-thirds in interest of all the stockholders of the corporation shall be filed in the office of the secretary of state. Upon the filing thereof, in conformity with this section, the certificate of incorporation has the same force and effect as if it had been originally drafted in conformity with the amendment so made. (Rev., s. 1144; 1901, c. 2, s. 109.)

§ 1121. Street railways.—Corporations may be organized under the provisions of this chapter for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, includes railways operated either by steam or electricity, or other motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the municipality in which is the home office of the company and the territory contiguous thereto, and such railways may carry and deliver freights. No such railway may operate a line extending in any direction more than one hundred miles from the municipality in which is located its home office, or in any city or town without the consent of the municipal authorities thereof. (Rev., s. 1138; 1901, cc. 6, 41; 1903, c. 350; Ex. Sess. 1913, c. 70, s. 1.)

§ 1122. Security selling companies.—Corporations may be formed under the provisions of this chapter to conduct the business of selling securities and bonds of any kind, including its own bonds and choses in action, on the partial payment, installment, or other plan of payment, and to loan money on mortgage, personal, or other security, and to collect interest in advance on the same, and to charge a fee of $1 for investigating the loan, but no fee shall be charged for a renewal of the loan. A corporation chartered by another state or by a foreign state, kingdom, or government, having in its charter the power to conduct the business described in this section, may become domesticated in this state in the manner and upon the terms and conditions provided in section 1181 under this chapter; but such company must also file with the secretary of state a statement, verified by its president and secretary, showing that its paid-up cash capital is at least $100,000 and that it has complied with all the requirements of the laws of the state of its creation. The business of such corporation in this state is restricted to the business described in this section. Such corporation is liable to pay the franchise tax imposed by section 7861 under the chapter entitled Taxation, and also an ad valorem tax on all of its real and personal property situated in this state. No foreign corporation domesticated under this section is required to pay any other taxes or license fees than those named herein. (1909, c. 502; 1915, c. 180.)

§ 1123. Public parks and drives.—Three or more persons may be incorporated under this chapter for the purpose of creating and maintaining public parks and drives. It is not necessary, however, to set forth in the certificate of incorporation of any corporation created for such purpose the amount of authorized capital stock, the number of shares into which the same is divided, the par value of such stock, or the amount of capital stock with which it will commence business. Any corporation created hereunder shall have full power and authority to lay out, manage, and control parks and drives within the state, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and sub-

ject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors; and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. All property owned by it and appropriated exclusively for public parks and drives shall not be subject to taxation and no such corporation shall be liable in damages on account of the construction or maintenance of any such parks or drives. (1911, c. 155, ss. 1, 2, 3, 4.)

§ 1124. Word "trust" in corporate name.—No corporation may be chartered under the laws of North Carolina with the word "trust" as a part of its name except those reporting to and under the supervision of the corporation commission; nor may any corporate name be amended to include the word "trust" unless the corporation is under such supervision. (1915, c. 196, s. 2.)

As to trust companies and the word "trust," see also section 1142.

§ 1125. Certain religious, etc., associations deemed incorporated.—In all cases where a religious, educational or charitable association has been formed prior to January first, one thousand eight hundred and ninety-four, and has since said date been acting as a corporation, exercising the powers and performing the duties of religious, educational or charitable corporations as prescribed by the laws of this state, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this state on January first, one thousand eight hundred and ninety-four, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts: Provided, this act shall not apply to any pending litigation. (1919, c. 137.)

Art. 2A. North Carolina State Thrift Society.

§ 1125(a). North Carolina state thrift society incorporated.—In order the better to provide for the education of the school children of the state in the principles and practice of thirft and saving and in order to aid them in making better provision for their future advanced education, there is hereby created under the patronage and control of the state a non-stock corporation to be known as the North Carolina state thrift society. (1933, c. 385, s. 1.)

§ 1125(b). Charter perpetual.—The charter of the society shall be perpetual. (1933, c. 385, s. 2.)

§ 1125(c). Membership and directors. — The membership of the society shall be identical with the membership of the governing board, which shall consist of sixteen directors. The state treasurer, the superintendent of public instruction, the president of the North Carolina bankers association and the president of the University of North Carolina shall throughout their terms of office be ex officio members of the board. The remaining twelve members of the board shall be appointed by the governor for successive terms of four years each, and shall be equally divided between the business and financial and the educational interests of the state, six members to each of the named groups: Provided that at least four of those representing business must be experienced bankers. (1933, c. 385, s. 3.)

§ 1125(d). Vacancies. — In the event of a vacancy occurring before the expiration of the terms of office of any director, the board by a majority vote of its full membership, including ex officio members, shall have power to elect persons to fill out the unexpired terms. (1933, c. 385, s. 4.)

§ 1125(e). Officers of society.—The officers of the society shall be elected by the board, and shall include a president, vice-president, secretary, treasurer and auditor. The treasurer of the society shall be responsible for the funds of the society, and shall furnish good and sufficient surety in such amount as may be fixed from time to time by the board of directors. (1933, c. 385, s. 5; 1935, c. 489, s. 1.)

Editor's Note.—Prior to the amendment of 1935 the state treasurer was ex officio treasurer and depository of the fund of the society. The last sentence as it now reads is entirely new.

§ 1125(f). Powers of purchase and sale.—The society shall have power and authority to purchase, lease and otherwise acquire such real and personal property as may be deemed useful to the prosecution of the objects for which it is created. It may sell and dispose of the same and may hold or may sell and convey such property also as may be taken in whole or partial satisfaction of any debt due to it. It may also receive gifts of money and property to be applied to its corporate purposes. (1933, c. 385, s. 6.)

§ 1125(g). Deposits of school children. — The society may receive deposits of the funds of children and others attending any of the public schools or colleges of North Carolina, as provided in section 1125(m), and subject to repayment on terms established by the board: Provided that no individual account may exceed $1,000. (1933, c. 385, s. 7.)

§ 1125(h). Depositories. — The funds in the treasurer's hands may be deposited by him, to his credit, with banks which are members of the Federal Deposit Insurance Corporation. In no case may the amount in any one bank exceed the amount covered by insurance. The interest accruing and paid on such deposits shall be added to the funds of the society. (1933, c. 385, s. 8; 1935, c. 489, s. 2.)

Editor's Note.—By the amendment of 1935 this section was changed to conform to the changes effected in section 1125(e). As the state treasurer is no longer ex officio treasurer of the society this change is necessary.

§ 1125(i). Exemption from taxation. — Neither deposits in the society nor its property investments and assets shall at any time be subject to taxation by the state of North Carolina or any of its sub-divisions, except that gift, inheritance or estate taxes may be levied on the transfer of private deposits in the society. (1933, c. 385, s. 9.)

§ 1125(j). Repealed by Public Laws 1935, c. 489, s. 3.

§ 1125(k). Investments.—The funds of the society may, at the discretion of the board, be invested in obligations of the United States Government, or of the State of North Carolina, or deposited as previously provided in section 1125(h). (1933, c. 385, s. 11; 1935, c. 489, s. 4.)

Editor's Note.—By the amendment of 1935 this section provided that the funds where not required for student loans could at the discretion of the board be invested in obligations of the United States government or of the state of North Carolina. As to investment in bonds guaranteed by the United States, see section 220(a)1.

§ 1125(l). No expense to state.—Provided that no liability of any kind shall rest on the state of North Carolina by reason of this article. (1933, c. 385, s. 12; 1935, c. 489, s. 5.)

Editor's Note.—Prior to the amendment of 1935 this section provided also that "no expense of any nature" should rest on state. This provision was omitted.

§ 1125(m). Thrift instruction provided by superintendent of public instruction in schools. — Within 150 days from the approval of this section the state superintendent of public instruction shall provide in the public schools of the state for instruction in thrift and the principles, practice and advantage of saving.

In connection with the instruction so provided arrangements shall be made at each school for the receiving of students' savings deposits into the North Carolina state thrift society, subject to its rules and on the terms provided therein.

The administration of the system in each school shall be in charge of one or more of the teachers in said school to be designated by the principal.

The savings deposits shall be transmitted to the treasurer of the said society from time to time, in accordance with rules to be established by the governing board of the North Carolina state thrift society, and shall be held for the purposes declared in the charter of the said society. (1933, c. 481, ss. 1-4; 1935, c. 489, s. 6.)

Editor's Note.—Prior to the amendment of 1935 this section provided, in the last paragraph, that deposits should be transmitted to the state treasurer instead of the treasurer of the society.

Art. 3. Powers and Restrictions

§ 1126. Express powers.—Every corporation has power—

1. To have succession, by its corporate name, for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years.

2. To sue and be sued in any court.

3. To make, use, and alter a common seal.

4. To purchase, acquire by devise or bequest, hold and convey real and personal property in or out of the state, and to mortgage the same and its franchises.

5. To elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation, and define their duties and obligations. And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent for its benefit, and in all cases where a religious, educational or charitable corporation or institution shall be or has been named as beneficiary in any policy of life insurance by a friend, student, former student or any person who for any reason is loyal to such corporation or institution and has himself or herself paid the premiums on said policy then such corporation or institution shall be deemed to have an insurable interest in the life of such person.

6. To conduct business in this state, other states, the District of Columbia, the territories, dependencies and colonies of the United States, and in foreign countries, and have offices in or out of the state.

7. To make by-laws and regulations, consistent with its charter and the laws of the state, for its own government, and for the due and orderly conduct of its affairs and management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved, in the manner hereafter mentioned.

9. To sell any part of or all of its corporate property, whenever such sale shall be authorized by a two-thirds vote of the board of directors of such corporation and approved by the vote of the holders of two-thirds of the stock entitled to vote at any stockholder's meeting, notice of which contains notice of the proposed sale: Provided, that any corporation hereafter organized may insert a provision in its charter that the powers granted by this subsection nine may be exercised only when such sale shall be approved by the holders of such amount of the stock of the corporation (not less than two-thirds of such stock entitled to vote) or such amount of each class of stock as may be specified in said charter; and provided further, that any corporation heretofore organized may by vote of the holders of two-thirds of the stock entitled to vote amend its charter at any stockholders' meeting, notice of which contains notice of the proposed amendment so as to provide the vote of stockholders (not less than two-thirds of the stock entitled to vote) required to enable the corporation to exercise the powers granted by this subsection nine: Provided, this act shall not be construed as authorizing the sale of stock in bulk, in violation of the bulk sales law: Provided, this act shall not be construed to limit or abridge the powers now given by law to any corporation. Provided this section shall not be construed to limit or abridge the right or power of any corporation from selling any of its assets in its regular course of business. (Rev., s. 1128; Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; 1909, c. 507, s. 1; 1925, c. 235; 1925, c. 298; 1929, c. 269.)

I. Editor's Note.
II. Suits by and against Corporations.
III. The Common Seal.
IV. Rights as to Property.
V. The Officers; Conducting Business; By-Laws and Dissolution.

Cross References.

As to powers of building and loan associations, see sec. 220. As to powers of insurance companies, see sec. 6331. 5170. As to powers of banks, see sec. 220. As to powers of insurance companies, see sec. 6331. As to powers of corporations, see sec. 3444 et seq. For full treatment of corporate powers and liabilities, see, 3 N. C. Enc. Dig. 572-611; 13 N.

C. Enc. Dig. 489-496. As to corporate power of eminent domain. see sec. 1705 et seq.

I. EDITOR'S NOTE.

Previous to 1925 this section enumerated 8 general powers. By chapter 235, Laws 1925 paragraph 9 containing an additional power with several provisos was added. At the same session the legislature amended section 1131 by providing for a majority instead of two thirds vote to approve an amendment to a charter. See Editor's note under section 1131. Probably this par. 9, supra, was intended as an exception to the general rule laid down in the amendment to sec 1131. It would seem that in regard to general amendments sec. 1131 applies but if the amendment is to give the corporation the right to take advantage of a power of sale, then par. 9, this sec. applies. See 3 N. C. Law Rev. 137.

By ch. 298, Laws 1925 an addition was made to par. 5 of this section. Formerly the paragraph ended with the word "benefit" about the center of the present form. In 3 N. C. Law Rev. 147 this amendment is discussed and it is concluded that although the Legislature intended to extend the doctrine of insurable interest, it has merely stated a well-established rule of insurance law.

The Act of 1929 added the last proviso to this section.

II. SUITS BY AND AGAINST CORPORATIONS.

Must Be in Corporate Name. — A suit against a corporation must be brought in its corporate name, and not against its officers or agents. Young v. Barden, 90 N. C. 424; Britain v. Newland, 19 N. C. 363. However, in case of insolvency, where a receiver has been appointed, he may sue either in his own name or in that of the corporation. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Mfg. Co., 114 N. C. 321, 19 S. E. 371. As to receivers and their powers see secs. 1208 and 1209 and notes.

Misnomer Immaterial. — A misnomer does not vitiate provided the identity of the corporation with that intended by the parties is apparent, whether it is in a deed, Asheville Division v. Aston, 92 N. C. 579, 584, or in a judgment, or in a criminal proceeding, McCrea v. Starr, 5 N. C. 252. See Gordon v. Pintsch Gas Co., 178 N. C. 435, 100 S. E. 878.

Same Liability as Natural Person. — A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. Redditt v. Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392.

No Application to Governmental Agencies. — The general authority to sue and be sued conferred on corporations by this section, has reference only to private and quasi public corporations, and not to corporations like the state prison, which are merely governmental agencies. As to these the authority to be sued must be expressly given. Moody v. State's Prison, 128 N. C. 12, 13, 38 S. E. 131.

Same—State Highway Commission. — This section giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental agency of the State, but only to private and quasi-private corporations. Carpenter v. Atlantic, etc., Ry. Co., 184 N. C. 400, 114 S. E. 693.

Suits against Cities and Towns. — As to cities and towns, though by their charters they are broadly authorized "to sue and be sued," it is equally well settled that this suability does not create any liability for damages caused by the torts of their officers and agents when acting in a governmental capacity. McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, and numerous cases there cited. Moody v State's Prison, 128 N. C. 12, 13, 16, 38 S. E. 131.

Suits against Counties. — As to counties, we have an unbroken line of authorities that they can be sued only in such cases and for such causes of action as are authorized by statute, and such cases do not embrace liabilities for negligence or other torts of their officers and agents. White v. Commissioners, 90 N. C. 437; Manuel v. Commissioners, 98 N. C. 9, 3 S. E. 829; Threadgill v. Commissioners, 99 N. C. 352, 6 S. E. 189; Pritchard v. Commissioners, 126 N. C. 908, 36 S. E. 353; Bell v. Commissioners, 127 N. C. 85, 37 S. E. 136; Moody v. State's Prison, 128 N. C. 12, 13, 16, 38 S. E. 131.

Liability for Slander. — A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. Cotton v. Fisheries Products Co., 177 N. C. 56, 97 S. E. 712.

Cited in Independence Trust Co. v. Keesler, 206 N. C. 12, 16, 173 S. E. 53.

III. THE COMMON SEAL.

As to when seal is used, see section 1138.

An Inherent Power. — The power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such a power is one of the incidental and implied powers of every corporation when not expressly conferred. 14 C. J. § 404, p. 334. Bailey v. Hassell, 184 N. C. 450, 454, 115 S. E. 166, 168.

Any Device May Be Used. — While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166. See notes of this case under sec. 3326.

The simple word "seal" with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

IV. RIGHTS AS TO PROPERTY.

Cross References. — As to corporate conveyance and when same are void as to torts, see sec. 1138. As to mortgaged property subject to execution, see sec. 1140.

Corporation Not Stockholders Own Property. — The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the state is like any other stockholder. Marshall v. Western N. C. Railroad Co., 92 N. C. 322.

Same—Where State a Stockholder. — Where the state is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its character as a sovereign and places itself on a footing of equality with the individual stockholders. Marshall v. Western N. C. Railroad Co., 92 N. C. 322.

May Hold Estates in Fee. — Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee. Asheville Division v. Aston, 92 N. C. 578, 579.

Same—Not Forfeited upon Suspension of Business. — A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased because it ceases to pursue the objects for which it was incorporated. Asheville Division v. Aston, 92 N. C. 578, 579.

Adverse Possession. — A corporation may acquire land by showing sufficient adverse possession for the statutory period. Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 90 S. E. 14.

Ejectment and Trespass Will Lie. — Corporations, in contemplation of the law, are capable of having actual possession of the land, and whatever may have been supposed to the contrary in the distant past, it is now settled that the actions of ejectment and trespass lie against them. Young v. Barden, 90 N. C. 424, 426.

Right to Dispose of Property.—A private corporation may dispose of its property without express authority of the Legislature. Benbow v. Cook, 115 N. C. 324, 325, 20 S. E. 453.

Same—Quasi Public Corporation.—A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can; but such is not the case with corporations which are quasi public and have duties to perform in which the public is interested. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Same—Example.—A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Right to Dispose of Franchise.—The franchise or the right of being a corporation, unlike the property and other powers and privileges, can never be alienated by the corporation without express authority and provision therefor, painting out how it may be effected. New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501, 508, 29 L. Ed. 244.

A quasi public corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of its duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 49, 35 L. Ed. 55.

Right to Mortgage Property. — Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness. Anitetam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143, 20 S. E. 366.

Right to Mortgage Franchise—Power of Sale.—The power

given to mortgage the franchise of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed. Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 464, 50 L. Ed. 1102.

Where Powers Exceeded.—Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed it not void, but only voidable upon the objection of the State. Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 120, 90 S. E. 11.

V. THE OFFICERS; CONDUCTING BUSINESS; BY-LAWS AND DISSOLUTION.

Officers.—As to directors and officers, see sec. 1144 et seq. As to election of directors, see secs. 1175 and 1176. As to jurisdiction of superior courts over election, see sec. 1177. For change in paragraph 5, see ante, this note, "Editor's Note." 1.

Same—Power to Insure Life of Officer.—A manufacturing corporation engaged in the operation of a cotton mill had no implied power to insure the life of its president, at least beyond the period of his connection with the company. Victor v. Louise Cotton Mills, 148 N. C. 107, 61 S. E. 648; Victor v. Chadwick Mfg. Co., 148 N. C. 119, 61 S. E. 653. These cases were decided in 1908 when the section did not contain the present provision as to insurable interest. The question of implied power would of course no longer arise. Ed. Note.

A corporation may transact business anywhere unless prohibited by its charter or excluded by local laws. Garrett v. Bear, 144 N. C. 23, 25, 56 S. E. 479; Ex Parte Schollenberger, 96 U. S. 369, 377, Waite, C. J.

As to by-laws in general, see sec. 1127. As to amendments, see sec. 1131.

As to dissolution generally, see sec. 1182 et seq.

§ 1127. By-laws.—A corporation may, by its by-laws, when consistent with its charter, determine the manner of calling and conducting all meetings; the number of members that constitute a quorum, but in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum, and if the quorum is not so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, constitutes a quorum; the number of shares that will entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessments; the tenure of office of the several officers, and the manner in which vacancies in any of the offices shall be filled till a regular election; and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars for any one offense. The power to make and alter by-laws is in the stockholders, but a corporation may, in the certificate of incorporation, confer that power upon the directors. By-laws made by the directors under power so conferred may be altered or repealed by the stockholders. (Rev., ss. 1145, 1146; Code, s. 664; 1901, c. 2, ss. 12, 13.)

Cross References.—As to power to make by-laws, see par. 7 of the preceding section. As to by-laws of insurance companies, see sec. 6330. As to by-laws of building and loan association, see sec. 5170.

Extent to Which Stockholder Is Bound by By-Laws.—The principle by which a shareholder in a corporation is bound by a corporate resolution regularly passed pursuant to its charter and by-laws, prevails only in reference to his status and rights as a shareholder and not where he deals independently with it as one of its customers in the line of its business. Cardwell v. Garrison, 179 N. C. 476, 103 S. E. 3.

By-Law to Sell Defaulting Subscriber's Stock. — Under this section a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments. Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 27 S. E. 1001. See § 1165 and note thereto.

Strangers Must Have Notice. — The by-laws of the corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. Smith v. N. C. R. R. Co., 68 N. C. 107.

§ 1128. Implied powers.—In addition to the powers enumerated in the two preceding sections, and the powers specified in its charter, every corporation, its officers, directors and stockholders, possess all the powers and privileges contained in this chapter so far as they are necessary or convenient to the attainment of the objects set forth in such charter, and shall be governed by the provisions and be subject to the restrictions and liabilities in this chapter contained, so far as they are applicable to and not inconsistent with such charter; and no corporation may possess or exercise any other corporate powers, except such incidental powers as are necessary to the exercise of the powers so given. Nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways. (Rev., s. 1129; Code, s. 701; 1897, c. 204; 1901, c. 2, s. 4; 1901, c. 6.)

Cross References. — As to express powers, see sec. 1126. As to street railways, see sec. 1121. As to power of the Legislature to amend or repeal charter, see sec. 1135. For full treatment of corporate powers, see 3 N. C. Enc. Dig. 572-611; 13 N. C. Enc. Dig. 489-496.

In General. — Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Charter Subsequent to General Law Prevails. — Where a charter was granted to a corporation after the passage of a general law and the charter confers powers conflicting with the general law, then by this section the provisions of the charter prevail. Carolina Power Co. v. Power Co., 171 N. C. 248, 256, 88 S. E. 349.

Ultra Vires Acts. — It is true, as held by numerous courts, including our own, that the doctrine of ultra vires has been very much modified in recent years, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were formerly declared absolutely void. Hutchins v. Bank, 128 N. C. 72, 38 S. E. 252; Womack Pr. Corp. 142.

Same—State May Bring Action. — This modification of the doctrine does not involve the right in an appropriate case, of the State to enjoin a threatened ultra vires act. Victor v. Louise Cotton Mills, 148 N. C. 107, 61 S. E. 648, 650.

Same—Stockholder May Bring Action. — If the Act of the corporation be ultra vires, any one or more stockholders may by some appropriate method call it in question and, unless by having consented to or acquiesced in it he is barred, have relief. Victor v. Louise Cotton Mills, 148 N. C. 107, 110, 61 S. E. 648; Lutterloh v. Fayetteville, 149 N. C. 65, 62 S. E. 758.

Same—Law Governing. — When the question of ultra vires arises, the validity of a corporate contract is to be determined by the lex loci contractus, not the lex fori. Eastern Building, etc., Ass'n v. Ebaugh, 185 U. S. 114, 121, 46 L. Ed. 830.

Conclusion of Law. — The question of whether acts are ultra vires is a conclusion of law to be drawn from the facts stated. Spencer v. Railroad, 137 N. C. 107, 117, 49 S. E. 96.

§ 1129. Banking powers not conferred by this act.—No corporation created under the provisions of this chapter shall have the power to carry on the business of discounting bills, notes or other evidences of debt, of receiving deposits of money, of buying gold or silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money; but in the transaction of its business it may make and take and indorse, when necessary, all such bonds, notes and bills of exchange as the business may

require. (Rev., s. 1134; Code, s. 684; 1901, c. 2, s. 5.)

As to banks and banking in general, see chapter 5.

Cited in Independence Trust Co. v. Keesler, 206 N. C. 12, 17, 173 S. E. 53.

§ 1130. Amendments before payment of stock. —The incorporators of a corporation, before the payment of any part of its capital, may file with the secretary of state an amended certificate of incorporation, duly signed and acknowledged by the incorporators named in the original certificate, changing the original certificate of incorporation, in whole or in part, which amended certificate takes the place of the original one, and when recorded in the proper county is deemed to have been filed and recorded on the date of filing and recording the original certificate. The officers are entitled to the same fees for filing and recording the amended certificate of incorporation as if it were original; but there shall be charged no additional organization tax, except when the certificate is amended by increasing the capital stock, in which event such tax shall be paid upon the increase. (Rev., s. 1174; 1901, c. 2, s. 28.)

Cross References. — As to the original certificate of incorporation, see sec. 1115. As to taxes for filing, see sec. 1218. As to amendments generally, see next section.

Subscriber Released. — Any fundamental change in the charter of a corporation relieves a non-assenting subscriber from liability upon his stock. Bank v. City, 85 N. C. 433.

§ 1131. Amendments, generally. — A corporation, whether organized under a special act or general laws, and which might now be created under the provisions of this chapter, may, in the manner set out below—

1. Change the nature or relinquish one or more branches of its business, or extend its business to such other branches as might have been inserted in its original certificate of incorporation.
2. Change its name.
3. Extend its corporate existence.
4. Increase or decrease its capital stock.
5. Change the par value of the shares of its capital stock.
6. Create one or more classes of preferred stock.
7. Make any other desired amendment. In all cases the certificate of amendment can obtain only such provisions as could be lawfully and properly inserted in an original certificate of incorporation filed at the time of making the amendment.

The board of directors shall pass a resolution declaring that the amendment is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail; if [the holders of a majority of the shares of stock] two-thirds in interest of each class of stockholders with voting powers vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged as in the case of deeds to real estate, and this certificate, together with the written assent, in person or by proxy, of said stockholders, shall be filed and recorded in the office of the secretary of state. Upon such filing the secretary of state shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation is amended accordingly. The certificate of the secretary of state, under his official seal, that such certificate of amendment and assent have been filed in his office, is evidence of the amendment in all courts and places. A corporation which cannot now be created under the provisions of this chapter may in like manner increase or decrease its capital stock, or change its name, or extend its corporate existence: Provided, that before the Secretary of State shall issue a certificate of such amendment to any corporation possessing powers, franchises, privileges or immunities, which could not be obtained under this chapter, he shall forthwith transmit to the Corporation Commission a copy of said certificate and shall not issue or record the same until duly authorized so to do by the Corporation Commission as provided for the issuing of certificates of incorporation of banks in chapter five, volume three, Consolidated Statutes of North Carolina, provided that nothing herein shall be construed to require the increase of the capital stock of a bank renewing its charter over the capital of such bank at the time such renewal is applied for. [Any corporation hereafter organized may insert a provision in its charter that amendments to said charter may be made or amendments to said charter in certain specified respects may be made only when such amendments shall be approved by the holders of such amount of the stock of the corporation (not less than a majority of the shares of stock with voting powers) or such amount of each class of stock as may be specified in said charter and any corporation heretofore organized may by vote of the holders of a majority of the stock entitled to vote amend its charter at any stockholders' meeting, notice of which contains notice of the proposed amendment so as to provide the vote of stockholders (not less than a majority of the stock entitled to vote) required to enable the corporation to amend its charter or to amend it in certain specified respects:

Provided, however, that no new class of stock shall hereafter be created by amendment of the charter or otherwise entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with the consent of the holders of records of two-thirds (of such greater amount as may be specified in the chapter) of the number of shares of such outstanding preferred stock having voting powers. Provided further that the portions of this section in brackets shall apply to all corporations other than banks and building and loan associations.] (Rev., ss. 1175, 1178; 1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30, 37; 1903, c. 516; 1925, c. 1118, ss. 1, 2a. 1927, c. 142.)

Cross References. — As to amendments before payment of stock, see preceding section. As to amendments by charitable, educational, penal or reformatory corporations, see following section.

Editor's Note. — This section has been recently amended several times. The seventh paragraph formerly provided that any proposed amendment should require a favorable vote by "two-thirds in interest of each class of stockholders." By ch. 118, Laws 1925, these words were stricken out and the words "the holders of a majority of the shares of

stock" substituted therefor. The paragraph providing that a corporation may insert in its charter at the time of its organization a rule regulating amendments and the proviso at the end of the section were also added by ch. 118, supra. For a discussion of the effects of these amendments, see 3 N. C. Law Review 134.

Chapter 142, Laws of 1927 makes further changes. Par. three formerly contained a provision following the word "existence" which made the corporation, in extending its existence, waive and abandon any privileges, franchises or immunities which could not be obtained under this chapter. This provision was stricken out.

Par. 7 formerly contained the following provision: "A corporation which cannot now be created under the provisions of this chapter may in like manner increase or decrease its capital stock or change its name." Chapter 142, supra, struck out the period at the end of that sentence and added the words "or extend its corporate existence" and the proviso which immediately follows.

§ 1131(a). Inadvertent omission to file amendment extending corporate existence.—Any private corporation chartered under the general laws of the State of North Carolina whose period of existence fixed in its charter has expired and which corporation has continued to act and do business as a corporation, but has through inadvertence, omitted to file an amendment extending the period of its corporate existence, may at any time after the expiration of the period of corporate existence set forth in its original charter, file an amended certificate in the office of the Secretary of State as provided by section one thousand one hundred and thirty-one of the Code to extend or renew its corporate existence, as provided for in the amended certificate; provided, this section shall not apply to any pending litigation nor serve to impair the validity of any contract or vested right in existence at the time of the filing of said amended charter. All acts of such a corporation, purporting to be the acts of the corporation, done or performed after the expiration of its period of existence and before the amendment to its charter, shall be legal and valid as the acts and deeds of said corporation. (1929, c. 271; 1935, c. 6.)

Editor's Note.—Prior to the amendment of 1935 this section contained a seven year limitation after the expiration of the original period in which the amended certificate should be filed. This provision was omitted.

§ 1131(b). Amendment of charter by railroad; changing value of and issuing stock without par value.—Any railroad company heretofore or hereafter organized under the laws of this State, whether under a special act, or otherwise, may, in the manner provided by section one thousand one hundred and thirty-one of the Code, as heretofore amended, amend its certificate of incorporation, articles of association or charter, for the purpose of increasing or decreasing its capital stock, changing its name, changing the par value of the shares of its capital stock, creating one or more classes of common or preferred stock, creating shares of stock with or without nominal or par value, or for any purpose authorized by statutes now in force relating to the amendment of certificates of incorporation, articles of association or charters of corporations: Provided, however, that in case of a consolidated railroad company, heretofore or hereafter organized under a special act or general laws of this State and of any other state or states, a new class or classes of stock may be created upon authorization by vote of such amount of the outstanding capital stock, in no case less than a majority thereof, as may be prescribed by the provisions of the agreement of consolidation in pursuance of which such consolidated company was formed. (1929, c. 261.)

Editor's Note.—See § 1167(h).

§ 1132. Amendments by charitable, educational, penal or reformatory corporations.—A charitable, educational, social, ancestral, historical, penal, or reformatory corporation not under the patronage or control of the state, and any corporation, without capital stock organized for the purpose of aiding in any work of any church, religious society or organization, or fraternal order whether organized under a special act or general laws, may change its name, extend its corporate existence, change the manner in which its directors, trustees or managers are elected or appointed, abolish its present method of electing such officers and create a different method of election, and generally reorganize the manner of conducting such corporation, and make any other amendment of its charter desired, in the following manner: The board of directors, trustees, or managers shall pass a resolution declaring that the amendment is advisable, and call a meeting of trustees, managers, and directors to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice given personally or by mail. If two-thirds of the directors, trustees, or managers of the corporation vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged as provided in the case of deeds to real estate, and such certificate, together with the written assent in person or proxy of two-thirds of the directors, trustees, or managers, shall be filed and recorded in the office of the secretary of state, and upon filing it he shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, or in which the corporation is doing business, and thereupon the certificate of incorporation shall be deemed amended accordingly. Such certificate of amendment may contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making the amendment, and the certificate of the secretary of state, under his official seal, that such certificate and assent has been filed in his office shall be taken and accepted as evidence of such amendment in all courts. (1917, c. 62, s. 1; 1925, c. 42; 1925, c. 257.)

Editor's Note. — Two additions were made to this section in 1925. By ch. 257, Laws of 1925 the words "social, ancestral, historical" were inserted in the first line of the section.

Chapter 42, Laws of 1925 added the following clause after the word "state" in the first sentence: "and any corporation, without capital stock, organized for the purpose of aiding in the work of any church, religious society or organization of fraternal order."

As to amendments generally see preceding section.

§ 1133. Change of location of principal office.—The board of directors of a corporation organized under the laws of this state may, by resolution adopted at a regular or special meeting by a two-thirds vote of its members, change the location of the principal office of the corporation in the

state. A copy of the resolution, signed by the president and secretary of the corporation and sealed with the corporate seal, shall be filed in the office of the secretary of state. No certificate need be filed of the removal of an office from one point to another in the same town, city, or township. (Rev., s. 1176; 1901, c. 2, s. 31.)

"Principal Place of Business." — The words "principal place of business," as used in section 466 must be regarded as synonymous with the words "principal office," as used in this section and sections 1114, par. 2 and 1168. Roberson v. Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.

§ 1134. Curative act; amendments prior to 1901.—All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An act to revise the corporation law of North Carolina," being chapter two, public laws of nineteen hundred and one, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of chapter three hundred and eighty of the public laws of eighteen hundred and ninety-three or in accordance with the provisions of chapter two of the public laws of nineteen hundred and one; but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of chapter two of the public laws of nineteen hundred and one. (Rev., s. 1248; 1905, c. 316.)

§ 1135. Amendment or repeal of this chapter; a part of all charters.—This chapter may be amended or repealed by the legislature, and every corporation is bound thereby; but such amendment or repeal shall not take away or impair any remedy against the corporation, or its officers, for any liability which has been previously incurred. This chapter and all amendments are a part of the charter of every corporation formed hereunder, so far as the same are applicable and appropriate to the objects of the corporation. (Rev., s. 1136; 1901, c. 2, s. 7.)

§ 1136. Name must be displayed.—The name of every corporation must be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof for sixty days the corporation is liable to a penalty of one hundred dollars, to be recovered with costs, by the state, in an action to be prosecuted by or under the direction of the attorney-general. (Rev., s. 1242; 1901, c. 2, s. 50.)

§ 1137. Resident process agent.—Every corporation having property or doing business in this state, whether incorporated under its laws or not, shall have an officer or agent in this state upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In the latter event, process in an action or proceeding against the corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this state, service could be made. For this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made. (Rev., s. 1243; 1901, c. 5.)

As to service of process on a foreign corporation, see sec. 483, par. 1. As to service on foreign insurance companies, see sec. 6414. As to foreign corporations in general, see secs. 1180-1181.

Section Constitutional. — This section is constitutional and valid. Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980; Fisher v. Ins. Co., 136 N. C. 217, 222, 48 S. E. 667.

Strict Compliance Not Required. — Formal compliance with the statutory requirements for domesticating these corporations and the appointment of process agents is not required, but it is sufficient if such corporations doing business or holding property within the state have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments in personam against them. Anderson v. United States Fidelity Co., 174 N. C. 417, 418, 93 S. E. 948.

A Federal Land Bank created by act of Congress and deriving its right to own property and to do business in this State solely through a Federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and this section is not applicable to such corporation, and our courts acquire no jurisdiction over it by such service. Leggett v. Federal Land Bank, 204 N. C. 151, 167 S. E. 557.

Jurisdiction over Foreign Corporation. — A foreign corporation, having neither property nor process agent in this state and not having domesticated in North Carolina, must be engaged in business within the state in order to give our courts jurisdiction over it. Goldey v. Morning News, 156 U. S. 518; Lunceford v. Commercial Travelers Mutual Asso., 190 N. C. 314, 318, 129 S. E. 805.

Foreign Corporation May Plead Statute of Limitations.— A foreign corporation which had complied with the requirements of this section in maintaining an agent in this state upon whom process may be served, together with public-service corporations doing business in this state, may plead the statute of limitations. Volivar v. Richmond Cedar Works, 152 N. C. 656, 68 S. E. 200. Overruling Green v. Insurance Co., 139 N. C. 309, 51 S. E. 887, and cases cited. See also, Anderson v. U. S. Fidelity Co., 174 N. C. 417, 418, 93 S. E. 948.

The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor where constantly from the accrual of the cause of action it might have been served with summons under the provisions of this section. Smith v. Finance Co., 207 N. C. 367, 177 S. E. 183.

Service on Insurance Company. — In Fisher v. Ins. Co., 136 N. C. 217, 224, 48 S. E. 667, it was held that service of process on an insurance company is not restricted to that method as prescribed by section 6414 but that it may be made also in the manner prescribed by this section. Pardue v. Absher, 174 N. C. 676, 678, 94 S. E. 414.

Merger of Express Companies. — An express company conveyed its property, used in transportation, for its appraised value, to the American Express Company formed at the suggestion of the Director General of Railways, etc., under government control, retaining property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, and having its own officials and shareholders distinct from those of the new corporation. In such a case the American Express Company is not affected by the provisions of this section, requiring foreign corporations to keep a process agent in this state. McAlister v. American Ry. Exp. Co., 179 N. C. 556, 103 S. E. 129.

Doing Business Here is Acceptance of Section. — Where foreign corporations come into the state to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which they are allowed to do business within the state, and their doing so here thereafter is an acceptance by them of the statutory method and in recognition of its validity to confer jurisdiction on our courts by service thereunder. Anderson v. United States Fidelity Co., 174 N. C. 417, 93 S. E. 948.

What Constitutes Doing Business. — A foreign company acquiring membership of persons in North Carolina for life insurance without soliciting agents to whom policies are issued upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of this section, and valid service of summons may be had on such corporation upon compliance with its provisions in respect thereto. Lunceford v. Commercial

Travelers Mutual Accident Asso., 190 N. C. 314, 129 S. E. 805.

It cannot be held that the issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another state, and not authorized to do business in this state, insuring citizens of this state against loss or damage by fire to property situate in this state, the contracts for such policies having been made, and the premiums having been paid in the state in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this state, constitutes "doing business" in the State of North Carolina within the meaning of these words in this section. Ivy River Land, etc., Co. v. National Fire etc. Co., 192 N. C. 115, 119, 133 S. E. 424.

In determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the state. Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co., 192 N. C. 115, 119, 133 S. E. 424.

A foreign banking corporation which sends its agents here for the purpose of investigating and looking after the properties in its capacity as trustee, does business in the State, "doing business in this State" as used in this section meaning engaging in, carrying on, or exercising in this State some of the functions for which it was created. Ruark v. Virginia Trust Co., 206 N. C. 564, 174 S. E. 441.

Same—Question of Fact. — The question as to doing business is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. In the last analysis, the question is one of due process of law under the Constitution of the United States, 14a C. J., 1372, sec. 4079. Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co., 192 N. C. 115, 119, 133 S. E. 424.

Finding by Trial Court Conclusive.—Where there is evidence to show that a foreign corporation, is doing business in this State at the time the summons in the action is served on the Secretary of State, a finding by the trial court to the contrary is conclusive and not subject to review of this Court. Brown v. Tennessee Coal, etc., R. Co., 208 N. C. 50, 52, 178 S. E. 858.

Cited in White v. Vaca Land & Lumber Co., 199 N. C. 410, 154 S. E. 620.

§ 1138. Corporate conveyances; when void as to torts.—Any corporation may convey lands, and other property which is transferable by deed, by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation, and attested by a witness, or by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee and attested by the secretary or assistant secretary of the company. But any conveyance of its property, whether absolutely or upon condition, executed by a public service corporation, is void as to torts committed by such corporation prior to the execution of said deed, if persons injured, or their representatives, commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed as required by law. (Rev., s. 1130; Code, s. 685; 1891, c. 118; 1893, c. 95, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1; 1905, c. 114; 1929, c. 28; 1931, c. 238.)

I. In General.
II. The Seal.
III. Pleading and Practise.
IV. Former Provision as to Creditors.

Cross References.

As to probate of corporate conveyances, see section 3326. As to probate of corporate deeds where corporation has ceased to exist, see section 3307. As to corporate deeds by president, see sec. 3352 et seq. As to probates before stockholders in building and loan association, see sec. 3301.

I. IN GENERAL.

Editor's Note.—The Act of 1929 cited inserted the words "public service" before corporation in line 14 of this section. Public Laws of 1929, c. 189 provided that such amendatory act should not affect pending litigation, and Chapter 256 provided that it should be construed to apply only to instruments executed after its ratification. The Act of 1931 which became effective April 2, 1931, except as to pending litigation, repealed the last mentioned chapter. Consequently the section, limited to public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. N. C. Law Rev. 363.

Purpose of Section. — The primary purpose of this section is to impose restraints upon insolvent corporations, and disable them from borrowing money and conveying their property to secure it, whereby present liabilities might go unpaid. Traders National Bank v. Lawrence Mfg. Co., 96 N. C. 298, 307, 3 S. E. 363.

Applies Generally. — By this section the Legislature expressed a general intention with regard to a general subject-matter, that is, it applies to all conveyances and to all creditors and to all torts. Boston Safe-Deposit & Trust Co. v. Hudson, 68 Fed. 758, 760.

Not Applicable to Leases.—It is not required that a lessee corporation should sign a lease, this section applying only to conveyances, and the failure of a lessee corporation to affix its seal to a lease to it if lands necessary to the purpose of its business does not of itself render the lease invalid. Raleigh Banking & Trust Co. v. Safety Transit Lines, 198, N. C. 675, 153 S. E. 158.

An Enabling Act. — This section is an enabling act, additional to and not exclusive of the common law mode of executing deeds. Clark v. Hodge, 116 N. C. 761, 765, 21 S. E. 562; Bason v. Mining Co., 90 N. C. 417.

Power to Convey Belongs Primarily to Stockholders. — The extraordinary powers of a corporation, such as that of selling or leasing the corporate property, where it exists, belongs primarily to the stockholders but may be delegated by them, as it can be by an individual, to the directors or to an agent designated in the resolution of the body, either by his official title or his name. Barcello v. Hapgood, 118 N. C. 712, 714, 730, 24 S. E. 124.

Hence a mortgage deed executed according to the provisions of this section is the act of the corporation alone, and not that of the corporation officers, by whose agency the deed is executed. Traders National Bank v. Mfg. Co., 100 N. C. 345, 5 S. E. 81.

Other Methods of Execution Permissible. — The statutory method of alienation by corporations, like that provided by this section is not exclusive of the common law mode of conveyance, and does not prohibit other methods of execution by authorized agents. Barcello v. Hapgood, 118 N. C. 712, 713, 730, 24 S. E. 124.

Same—Example. — A deed of a corporation, the concluding clause being, in witness whereof the said corporation "has caused this indenture to be signed by its president and attested by its secretary, and its common seal to be affixed," with the signatures and seal, is properly executed as a common law deed. Bason v. Mining Co., 90 N. C. 417.

Sixty Day Provision Mandatory. — Under this section the action should be commenced within sixty days after the registration of the mortgage. Joyner v. Reflector Co., 176 N. C. 274, 275, 97 S. E. 44.

Construed with Section 1140.—See notes to § 1140.

Judgment for Tort Committed before Transfer.—Under this section as construed with §§ 3309, 3311, an absolute sale by a corporation of its personal property, accompanied by delivery to the purchaser, is not void as to a judgment creditor of the corporation on a judgment obtained against the corporation for a tort committed before the transfer. Carolina Coach Co. v. Begnell, 203 N. C. 656, 166 S. E. 903.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489; Begnell v. Safety Coach Lines, 198 N. C. 688, 153 S. E. 264.

II. THE SEAL.

Corporation Seal Necessary. — When a mortgage by a corporation is signed by the president, secretary and two stockholders and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknowledged by the secretary, who also proves the execution by the president and two stockholders," such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors. Duke v. Markham, 105 N. C. 138, 10 S. E. 1003.

An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, but not having the common seal of the corporation attached, is not effective as a deed, under this section for lack of the

common seal. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.

Where a corporate act must be executed by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

Presumption of Validity.—When a corporation deed recites that it is sealed with the corporate seal it will be presumed that what purports to be such seal placed after the name of the officer executing the deed is the seal of the corporation. Benbow v. Cook, 115 N. C. 324, 325, 20 S. E. 453. As to rebuttal see the next succeeding analysis line.

When Private Seal of Officer Used.—An instrument purporting to be the deed of a corporation and executed in its name by its president with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under this section but is only the personal act of the president, and is not admissible in evidence to prove a conveyance by the corporation. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475. See Clark v. Hodge, 116 N. C. 761, 21 S. E. 562.

Same—May Be Adopted by Corporation.—A corporation may adopt and make effectual as its seal the individual seals of its officers affixed to a deed of the corporation, when it has no seal of its own. Taylor v. Heggie, 83 N. C. 244.

III. PLEADING AND PRACTISE.

No Action to Vacate Required.—This section does not require that an action be brought for the purpose of setting aside or vacating the assignment, but that it becomes void and of no effect immediately upon the bringing of an action by the creditor to "enforce his claim." Hence it is unnecessary for the plaintiffs in their action to make any reference or to ask any judgment in respect to the deed of assignment. Fisher v. Western Carolina Bank, 132 N. C. 769, 778, 44 S. E. 601.

Recital in Deed Proof of Authority.—A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.

When Demurrer Insufficient. — In an action against a corporation for specific performance of a contract the defense, that it is not in writing with the corporate seal attached or signed by an officer, must be taken advantage of by plea and not by demurrer. Friedenwald Co. v. Asheville Tobacco Works, 117 N. C. 544, 23 S. E. 490.

Presumption of Authority Rebutted. — The presumption that a mortgage, with its seal affixed, was authorized by a corporation is rebutted when it was executed to the company's officers to secure a pre-existing debt. Edwards v. Hill Supply Co., 150 N. C. 171, 63 S. E. 742.

When Authority Granted at Special Meeting.—A mortgage executed by a corporation pursuant to a resolution adopted by a majority of the stockholders at a meeting which was specially called, but was not a "regular general meeting," is valid against creditors of the corporation other than the mortgage creditors. Artiexam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143, 20 S. E. 366.

IV. FORMER PROVISIONS AS TO CREDITORS.

Editor's Note.—Prior to 1901 this section provided that conveyances should be void as to creditors existing prior to or at the time of the execution of the said deed provided they commenced proceedings within sixty days after registration. See Fisher v. Bank, 132 N. C. 769, 771, 777, 44 S. E. 601 where this former provision is discussed by the court.

The following constructions were given while the provision above referred to was a part of the section.

In General.—The provisions of this section manifestly are designed to prevent a fraudulent conveyance by a corporation contemplating insolvency to the detriment of its existing creditors. It recognizes the principle that the property of an insolvent corporation is a trust fund for the benefit of its creditors. Giving to this creature of the law the rights of property of a natural person, the statute in express terms protects its existing creditors from fraud in disposition of this property. Finance Co. v. Charleston, C & C. R. Co., 61 Fed. 369, 371.

An insolvent corporation may, under the laws of this State, exercise preference in favor of creditors, not corporators or officers, provided it is not done with a purpose to defeat, delay or hinder other creditors or parties in interest (Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107, Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680, distinguished), and subject (in the case of preference by a conveyance by deed) to the right of other creditors to avoid the preference by commencing suit to enforce their claims within sixty days from the date of the registration of the deed, as provided in this section. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Creditors Must Act within Sixty Days.—An assignment by an insolvent corporation for the benefit of creditors will be set aside at the suit of creditors within sixty days from the assignment, as provided in this section. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770. But the right must be asserted within sixty days. William v. R. R., 126 N. C. 918, 36 S. E. 189.

A conveyance by a corporation of its property in trust for creditors is not void as to pre-existing creditors, unless the latter shall bring suit to enforce their claims, within sixty days after the registration of such conveyance. Blalock v. Kernersville Mfg. Co., 110 N. C. 99, 100, 14 S. E. 501.

§ 1139. Conditional sale contracts.—Contracts, in writing, for the purchase of personal property by corporations, providing for a lien on the property or the retention of the title thereto by the vendor as a security for the purchase price, or any part thereof, are sufficiently executed if signed in the name of the corporation by the president, secretary or treasurer in his official capacity, and may be acknowledged and ordered to registration as is provided by law for the execution, acknowledgment and registration of deeds by natural persons. (1909, c. 335, s. 1.)

Cited in Pick & Co. v. Morehead Bluffs Hotel Co., 197 N. C. 110, 147 S. E. 819.

§ 1140. Mortgaged property subject to execution for labor, clerical services, and torts.—Mortgages of public service corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured. (Rev., s. 1131; Code, s. 1255; 1897, c. 334; 1901, c. 2, s. 3; 1915, c. 201, s. 1; 1929, c. 29; 1931, c. 238.)

I. In General.
II. Relation to Other Sections.
III. Effect on Mortgages.
IV. Certain Judgments Preferred.
  A. Labor Performed.
  B. Torts Committed.

Cross References.

As to the power of a corporation to mortgage its property, see sec. 1126 par. 4. As to when corporate conveyances are void as to torts, see sec. 1138. As to wages being a prior lien, upon the insolvency of a corporation, see sec. 1197.

I. IN GENERAL.

Editor's Note.—It must be noted in studing the cases under this section that there were formerly included the words "for material furnished." These words were stricken out in 1897.

Under the section as formerly constituted it was held that coal is "material furnished." Pocahontas Coal Co. v. Henderson Elec., etc., Co., 118 N. C. 232, 24 S. E. 22. Steam Engine and boiler not "material furnished" where it did not appear that they were necessary to the conduct of the business. James v. Lumber Co., 122 N. C. 157, 29 S. E. 358. A mortgage is now not postponed to a judgment for material furnished. Cheesborough v. Sanatorium, 134 N. C. 245, 46 S. E. 494; Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 166, 67 S. E. 477.

The words "clerical services" were added to the section by ch. 201, Laws of 1915.

The Act of 1929 inserted the words "public service" before corporations in line three of this section. Public Laws of 1929, c. 256 provided that such amendatory act should be construed to apply only to instruments executed after its ratification. The Act of 1931, which became effective April 2, 1931, except as to pending litigation, repealed the last amendment and consequently the section, limited to public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363.

The Act of February 13, 1929, was not intended to affect instruments executed before its passage, since it does not

expressly state that they shall be also affected and acts of the Legislature are to be construed prospectively, not retroactively. Dial v. Chatham, 70 F. (2d) 21, 23.

Strict Construction.—This section being in derogation of the common law, must be strictly construed. Fidelity Insurance, Trust, etc., Deposit Co. v. Norfolk & W. R. Co., 90 Fed. 175.

Purpose.—This section is exceedingly comprehensive in its terms, and was intended manifestly to prevent corporations within the State of North Carolina, and those doing business with them, from avoiding the payment of obligations due to laborers. Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193, 204.

This section was passed to secure labor and materials, and to give ample protection against the necessary consequences of the use of plant and machinery. Finance Co. v. Charleston, C. & C. R. Co., 61 Fed. 369, 372.

Protects Employees and Not Officers.—This section is for the protection of employees of a corporation and not for its officers. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 376.

Applies Only to Property within State.—This section can only operate on property within the State. Fidelity Insurance Trust, etc., Deposit Co. v. Norfolk & W. Ry. Co., 114 Fed. 389, 393.

Does Not Create a Lien.—This section neither creates nor provides for the creation of a lien. It does not seem to provide against prior judgment liens, whether taken upon a prior or subsequent debt; nor does it provide against an absolute bona fide sale, but only provides that the property mortgaged shall stand, so far as their debts and liabilities are concerned, just as if there had been no such mortgage made. Clement v. King, 152 N. C. 456, 463, 67 S. E. 1023.

The section confers no lien or priority. It simply wipes out a mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there was no mortgage, by execution if the property is not in the hands of a receiver, or by prorating with the mortgage creditors if a receiver has taken charge. Clement v. King, 152 N. C. 456, 460, 67 S. E. 1023, and cases cited. Joyner v. Reflector Co., 176 N. C. 274, 275, 97 S. E. 44.

Same—Example.—This section confers no lien on the products of a cotton factory corporation in favor of one furnishing coal used in their manufacture, but only the right to enforce their claims by judgment and execution, as against the holders of mortgages upon the corporate property. Norfleet v. Tarbora Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Priorities.—This section creates a priority in favor of those performing labor or rendering clerical services only from the time a judgment has been entered by a court of competent jurisdiction ascertaining the amount and declaring the priority, and when so established it relates back and becomes prior to that of general creditors of the corporation under a prior registered judgment. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Same—Purchaser at Foreclosure Sale.—A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of this section, does not affect the title conveyed to the purchaser at the sale, but the claimants after obtaining judgment against the corporation may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard, and may bring suit to restrain the execution. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Judgments Not Superior Except as Provided in This Section.—Judgments against a corporation for its obligations arising on a contract are not superior to the lien of a prior registered deed of trust given to secure bondholders when the judgments were not in actions to recover for labor and clerical services performed or to recover damages for a tort or for injuries to property within the meaning of this section. Amoskeag Mfg. Co. v. Yadkin Cotton Mills, 200 N. C. 10, 156 S. E. 101.

II. RELATION TO OTHER SECTIONS.

Editor's Note.—In Boston Safe-Deposit and Trust Co. v. Hudson, 68 Fed. 758, the court makes an exhaustive comparison between this section and section 1138. The decision reached was that a judgment against a railroad company for a tort causing injury to the person is superior to the mortgage executed after the tort was committed, and that the bringing of the action within 60 days, as provided by section 1138, did not apply.

See also Finance Co. v. Charleston, etc., R. R. 61 Fed. 369, where the court discusses the history and purpose of this section and section 1138.

Gives a Different Remedy.—This section was enacted after sections 1138 and 2433 and could not have been intended to give the same relief they gave; and it is equally certain it was passed for the benefit of the class of persons mentioned in the enactment, and it is the duty of the court to take into consideration the object for which it was passed and to construe it in that light. Pocahontas Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 236, 24 S. E. 22.

Applies to Labor and Torts after Mortgage.— This section must mean such labor performed, and such torts committed after making the mortgage, as the Act was passed in 1879. If it were for liabilities existing prior to making the mortgage, they would have been provided by section 1138 which was enacted in 1798, and there would have been no need for the enactment of this section. Pocahontas Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 234, 24 S. E. 22.

Mechanics' Lien under Sec. 2433.—The mechanics' lien, under section 2433 has no preference over a prior registered mortgage. Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 165, 67 S. E. 477.

III. EFFECT ON MORTGAGES.

Refers to Mortgage of Corporation Itself.—This section expressly refers to a mortgage given by the corporation itself, and not to mortgages on the corporate property acquired by a stranger and registered before the formation of the corporation. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

This section does not directly invalidate the mortgages, but notwithstanding the attempted alienation, exposes the corporate property to execution issued upon a judgment recovered upon the causes of action mentioned. Traders National Bank v. Lawrence Mfg. Co., 96 N. C. 298, 308, 3 S. E. 363.

Property Acquired Subject to Prior Mortgage.—This section, which gives to judgments against corporations for labor performed and torts committed priority over prior mortgages executed by the corporation, has no application where the corporation acquired the property subject to such prior mortgage. Humphery Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971; Walker v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331.

Conveys Nothing.—A mortgage of a corporation conveys nothing as against a subsequent judgment for a tort by the corporation. Howe v. Harper, 127 N. C. 356, 358, 37 S. E. 505; R. R. Co. v. Burnett, 123 N. C. 210, 213, 31 S. E. 602; Clement v. King, 152 N. C. 456, 67 S. E. 1023.

Prior Claim.—A mortgagee of the legal title of property of a corporation, to secure a debt, takes subject to laborers' liens, judgments for torts, and expenses of receivership, and other court proceedings to wind it up, in case of insolvency. Humphery Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 515, 93 S. E. 971.

Judgment against Lessee.—This section does not make a judgment, against the lessee of a railroad, a lien on the property superior to a mortgage given by the lessor before the lease. And where the road is in the hands of receivers, appointed in a suit to foreclose the mortgages, the judgment creditor has no right to payment from earnings of the road as all rights and interests of the lessee were ended by the appointment of the receiver. Hampton v. Norfolk & W. Ry. Co., 127 Fed. 662.

IV. CERTAIN JUDGMENTS PREFERRED.

A. Labor Performed.

Meaning of Labor.—The word "labor" in legal parlance and as used in this section has a well defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly (prior to the addition of the word "clerical" in the section) consisting in the protracted exertion of muscular force. Moore v. Industrial Co., 138 N. C. 304, 305, 50 S. E. 687.

Foreman Included.—A foreman is a laborer, and the money paid him is entitled to any preference for "labor performed" which is given his co-laborers whom he supervised and with whom he worked. Moore v. Industrial Co., 138 N. C. 304, 50 S. E. 687; Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 167, 67 S. E. 477.

Services Need Not Add to Value of Plant.—Debts of a corporation for labor performed to keep it "a going concern," have a priority over a mortgage previously recorded, although the labor done or materials furnished do not add to the plant or enhance its value. Pocahontas Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 24 S. E. 22.

What Services Excluded.—The words "labor performed," as used in this section, do not embrace such services as superintending the conduct of its milling operations, or conducting a commissary store and keeping the books of the corporation. Moore v. Industrial Co., 138 N. C. 304, 305, 50 S. E. 687, and cases cited. (But note the effect of the addition of the word "clerical" in the section.)

Independent Contractor's Laborers Excluded.—Under this section the preference given for "labor performed" over prior mortgages of corporations is intended to, and does, give such preference only to laborers employed by the corporation in carrying on the ordinary business of the company, including its repairs and up-keep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property. Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 167, 67 S. E. 477.

Prior Judgment Unnecessary.—Under this section it is not necessary that claims for labor should be reduced to a formal judgment before they can be proved and given priority over a mortgage. The decree, adjudging the amount of the claim, is to all intents and purposes such a judgment as will meet the requirements of the statute. Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193, 194, 204.

B. Torts Committed.

Must Injure Person or Property.—This section expresses a particular intention with regard to a restricted subject-matter, and applies only to torts which injure persons or property. Boston Safe-Deposit & Trust Co. v. Hudson, 68 Fed. 760.

Action against Purchaser. — An insolvent railroad company is not a necessary party to a suit against a purchaser at the foreclosure of a mortgage on its road for an injury while it was operating the road. Howe v. Harper, 127 N. C. 356, 37 S. E. 505.

Remedy for Injured Person. — While this section does not create a lien, it gives to the tort-claimant, who has reduced his claim to judgment, a right (remedy) to follow and subject to the payment of his claim such property as the corporation has disposed of by mortgage, even where the sale under the mortgage had taken place before the judgment has been rendered. Clement v. King, 152 N. C. 456, 464, 67 S. E. 1023.

Judgment Pending Foreclosure Proceedings. — A passenger recovered judgment in the courts of this state against a railroad company for personal injury. At the time, a suit to foreclose a mortgage against the railroad was pending in the federal courts. Held, the judgment in the state court constituted a prior lien on the property of the railroad. Trust Co. v. Norfolk, etc., R. Co., 183 Fed. 803.

Deed of Trust Subordinate.—While this section does not give a tort claimant a lien for his judgment for the tort committed, it does create a priority and has the effect of rendering a deed of trust subordinate to the judgment. Dial v. Chatham, 70 F. (2d) 21, 23.

§ 1141. Gas and electric power companies.—Gas and electric light and power companies have power to lay, extend, construct, erect, maintain, repair and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, and appurtenances upon, through and over any roads, streets, avenues, lanes, alleys and bridges within and near any city, town or village where said company is located; and all such roads, streets, lanes, alleys and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers, poles, wires, conductors and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies. (Rev., s. 1133; 1889 (Pr.), c. 35, s. 2.)

Cross References. — As to electric, telegraph and power companies in general, see chapter 32; under that chapter as to use of public highways, see sec. 1695 et seq. and annotations thereunder. As to eminent domain, see chapter 33, sec. 908.

§ 1142. Trust companies and word "trust."—No person, firm, association or corporation domiciled in the state of North Carolina, except corporations reporting to and under the supervision of the corporation commission of this state, may therein advertise any sign as a trust company or in any way solicit or receive deposits or transact business as a trust company, or use the word "trust" as a part of his or its name or title. This section shall not prevent any individual, as such, from acting in any trust capacity as heretofore. A violation of this section is a misdemeanor, and on conviction the offender shall be fined not exceeding five hundred dollars for each offense: Provided, however, that it shall be lawful for any corporation incorporated prior to January 1, 1905, to retain the word "trust" in the name of said corporation, though it does not transact a banking business or such other business as requires its examination by the corporation commission. (1915, c. 196, s. 3; 1919, c. 108.)

As to the word "trust" in the corporate name, see sec. 1124.

§ 1143. Actions by attorney-general to prevent ultra vires acts, etc.—In the following cases the attorney-general may, in the name of the state, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—

1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.
2. Restraining any person from exercising corporate franchises not granted.
3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.
4. Removing such officers or trustees upon proof of gross misconduct.
5. Securing, for the benefit of all interested, the said property or funds.
6. Setting aside and restraining improper alienations of the said property or funds.
7. Generally compelling the faithful performance of duty and preventing all fraudulent practices, embezzlement, and waste. (Rev., s. 1197; Code, ss. 607, 686; 1901, c. 2, s. 107.)

Application. — This section applies when the purpose of the action is not to dissolve a corporation but to preserve it in order that its useful functions may be performed and at the same time that it may not be able to abuse its powers or transcend them. Attorney General v. R. R., 28 N. C. 456, 464.

The above case was decided under the old R. S. ch. 26 sec. 10, the provisions of which are contained in this section. For actions by the Attorney-General to dissolve a corporation, see sec. 1187.

Art. 4. Directors and Officers

§ 1144. Directors.—The business of every corporation shall be managed by its directors, who must be at least three in number, and at all times bona fide stockholders in case the corporation is one issuing stock. A corporation may, by its certificate of incorporation or by-laws, determine the number of shares a stockholder must own to qualify him as a director. The directors shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, a corporation may classify its directors in respect to the time

for which they will severally hold office, the several classes to be elected for different terms, but no class may be elected for a shorter period than one year, or for a longer period than five years, and the term of office of at least one class must expire in each year. A corporation which has more than one kind of stock may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of such class, to the exclusion of the others. One director of every corporation of this state shall be, and only one need be, an actual resident of the state, notwithstanding the provisions of the charter or any other act. (Rev., ss 1147, 1148; 1901, c. 2, ss. 14, 44.)

Cross References. — As to election of directors, see sec. 1175. As to proceedings upon failure to hold election, see sec. 1176. As to directors' meetings, see sec. 1168. As to directors' power to declare dividends, see sec. 1178. As to directors' power to make assessments, see sec. 1165. As to directors' liability for impairing capital, see sec. 1179. As to liability for fraud, see sec. 1152. As to directors acting as trustees upon dissolution of corporation, see sec. 1194. As to directors' duty to produce books at election, see sec. 1171.

Director Occupies Fiduciary Relation. — A director of a company occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107. Directors are to be considered and dealt with as trustees or quasi trustees. Besseliew v Brown, 177 N. C. 65, 67, 97 S. E. 743.

Care Required of Directors. — Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. Anthony v. Jeffress, 172 N. C. 378, 90 S. E. 414.

They are not, as a rule, responsible for mere errors of judgment (Fisher v. Fisher, 170 N. C. 378, 87 S. E. 113, and authorities cited), nor for slight omissions from which the loss complained of could not have been reasonably expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and are charged with a like duty, usually the care that he shows in the conduct of his own affairs of a similar kind. Besseliew v. Brown, 177 N. C. 65, 97 S. E. 743.

Director Cannot Prefer Himself as Creditor. — A director, who is also a creditor of a corporation, cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Bank v. Cotton Mills, 115 N. C. 507, 20 S. E. 765; McIver v. Young Hardware Co., 144 N. C. 478, 483, 57 S. E. 169.

Powers of Directors. — It is well settled that the directors of a corporation, unless they are specially restrained by the charter or by-laws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on the corporate property. Wall v. Rothrock, 171 N. C. 388, 88 S. E. 633.

Same—May Loan Money to Corporation. — While a director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction be open and entirely fair and capable of strict proof as to its bona fides, yet where a corporation is insolvent a director who is a creditor can not, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107.

Liens of Directors. — Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the purchase price, duly docketed, constitute liens in favor of the directors against the corporate property. Caldwell v. Robinson, 179 N. C. 518, 523, 103 S. E. 75.

Right of Directors to Security. — By taking mortgage on corporate property, when the corporation is in failing circumstances, directors, occupying a fiduciary relation, are not permitted to secure themselves against pre-existing liabilities of the corporation upon which they are already bound. Wall v. Rothrock, 171 N. C. 388, 88 S. E. 633; Caldwell v. Robinson, 179 N. C. 518, 523, 103 N. C. 75.

Right of Corporation to Sue Negligent Directors.—Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its receiver. Besseliew v. Brown, 177 N. C. 65, 97 S. E. 743.

§ 1145. Officers, agents, and vacancies.—Every corporation organized under this chapter shall have a president, secretary, and treasurer, to be chosen either by the directors or stockholders, as the by-laws direct, and they shall hold office until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as are assigned to him; the treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety or sureties, as are required by the by-laws. Any two of these offices may be held by the same person, if the body electing so determine. The corporation may have such other officers and agents, who shall be chosen in the manner and hold office for the terms, and upon the conditions, prescribed by the by-laws or determined by the board of directors. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, shall be filled in the manner provided for in the by-laws; in the absence of such provision the vacancy shall be filled by the board of directors. (Rev., ss. 1149, 1150, 1151; 1901, c. 2, ss. 15, 16, 17.)

Cross References. — As to liability of officers for failing to make reports or for false reports see section 1151. As to their liability for fraud, see sec. 1152. For full treatment of officers and agents, see 3 N. C. Enc. Dig. 561-572; 13 N. C. Enc. Dig. 486-489.

Officers Must Act in Good Faith. — The officers of the company had no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a pre-existing debt. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Electric Light Co. v. Electric Light Co., 116 N. C. 112, 21 S. E. 951; Graham v. Carr, 130 N. C. 271, 274, 41 S. E. 379; Holshouser v. Copper Co., 138 N. C. 248, 251, 50 S. E. 650; Edwards v. Hill Supply Co., 150 N. C. 171, 172, 63 S. E. 742.

Powers of President. — The president of a corporation is not bound by any secret limitation upon the authority usually vested in the chief officer of a corporation; hence a defense to a note, issued by the president of a corporation, that it was unauthorized because of an unwritten by-law is untenable. Phillips v. Interstate Land Co., 176 N. C. 514, 97 S. E. 417.

The president of a corporation under this section has implied power to sign a note and secret limitations on his authority will not be binding on the payee, and a plea of **ultra vires** by the corporation, having placed its president in a position to mislead plaintiff and cause the loss, will be excluded. White v. Johnson & Sons, 205 N. C. 773, 172 S. E. 370.

Power of General Manager. — The general manager of one of a chain of stores has implied authority to employ clerks by the year, and the corporation is bound by such contract though there exists an undisclosed limitation of the agent's authority to make contracts of employment for more than a month. Strickland v. Kress & Co., 183 N. C. 534, 112 S. E. 30.

Implied Authority of Secretary. — The secretary of an incorporated garage and auto repair company has the implied authority under this section to settle claims made for damages upon the corporation, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. Beck v. Wilkins-Ricks Co., 186 N. C. 210, 119 S. E. 235.

Individual Liability of Officers. — Where officers of a corporation knowingly participate in a wrong which is ac-

tionable they are jointly and severally liable therefor. Cone v. United Fruit Growers' Ass'n, 171 N. C. 530, 83 S. E. 860.

Necessity for Contract for Compensation. — The cases very generally hold that an officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. There can be no recovery on a quantum meruit. Chiles v. United States, etc., Mfg. Co., 167 N. C. 574, 83 S. E. 812, citing Caho v. Norfolk, etc., R. Co., 147 N. C. 20, 60 S. E. 640.

Removal. — The officers of a corporation created for private purpose have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless. Eliason v. Coleman, 86 N. C. 236, 240.

§ 1146. Books to be audited on request of stockholders.—Upon request of twenty-five per cent of the stockholders, or of any stockholder or stockholders owning twenty-five per cent of the capital stock, of a private corporation organized under the laws of North Carolina and doing business in this state, it is the duty of the officers of the corporation to have all of its books audited by a competent accountant, so that its financial status may be ascertained. Upon refusal or failure of the corporation to commence the auditing of its books within thirty days after such request, the requesting stockholder or stockholders, after ten days notice to the corporation, may apply to the judge of the district, or to the judge holding the courts of the district, in which the corporation has its residence, either at chambers or term time, at any place in the district, and the judge shall appoint an auditor and require the books to be audited at the expense of the corporation. The officers of the corporation shall render to the auditor any assistance or information they can, and give him access to all of the assets, books, papers, etc., relating to the affairs of the corporation, in order that a proper audit may be made. Upon completion of the audit the auditor shall render a statement to the corporation, and to the petitioning stockholder or stockholders. (1911, c 174, s. 1; 1913, c. 76, s. 1.)

§ 1147. Loans to stockholders.—No loan of money may be made to a stockholder or officer of a corporation, and if any is made, the officers who made it or assented thereto are jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum loaned. (Rev., s. 1160; 1901, c. 2, s. 53.)

§ 1148. Reports to corporation commission.—In addition to the information required to be given in the annual report of corporations to the corporation commission under the provisions of the Revenue and Machinery Acts, spaces shall be provided in such manner as the corporation commission deem proper so that each corporation, whether stock or nonstock, shall report whether the stock, if any, issued by it was issued for cash or for purchase of property, designating what property, the names of all the directors and officers, with the date of the election or appointment, terms of office, residence and postoffice address of each, the character of its business, and the name of the agent in charge thereof upon whom process against the corporation may be served; but this shall not prevent service of process on other agents authorized by law. This information, together with the amount of stock issued and outstanding by the corporation, shall be available to the public upon application to the corporation commission. After these reports have been made to the corporation commission and the excess tax thereon has been computed and determined, it is the duty of the corporation commission to certify a list of such corporations, showing amount of stock issued by each, whether owing an excess tax or not, to the state treasurer, who shall add to such excess tax, if any, the amount due by the corporation on account of franchise tax, and forward a statement of such indebtedness to the corporation for payment, under the penalties provided by law. Every corporation failing to comply with the provisions of this section shall forfeit to the state $100, to be collected by the sheriff of the county where the principal office of the corporation is situated, in a civil action to be brought before a justice of the peace, and when collected shall be remitted by the sheriff to the corporation commission, after deducting his cost as allowed by law, which he shall collect in addition to the penalty. (1913, c. 198, ss. 1, 2, 3.)

§ 1148(a). Forfeiture of corporate charter and organization of new corporation. — Wherever a corporation created under the laws of the state of North Carolina has, on account of failure to make reports of the different state authorities, for such a length of time as to lose its charter and where thereafter, under the laws of the state of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this state, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value as held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation had never expired by reason of its failure to make the reports hereinbefore referred to. (1933, c. 124.)

See 11 N. C. Law Rev., 211, for criticism and interpretation of this section.

§ 1149. Secretary of state may call for special reports.—The secretary of state has power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem the public interest requires, but no fees shall be charged for filing these special reports. (Rev., s. 1153.)

§ 1150. Secretary of state to publish list of corporations created. — The secretary of state shall

annually compile and publish from the records of his office a complete alphabetical list of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the amount issued, the date of filing the certificate, and the period for which the corporation is to continue; but the secretary of state and the corporation commission shall confer and arrange the statistics so as to prevent the same facts being embodied in the reports of both departments. (Rev., s. 1244; 1901, c. 2, s. 104; 1911, c. 211, s. 10; 1913, c. 198, s. 5.)

§ 1151. Liability of officers failing to make reports or making false reports.—If any of the officers neglect or refuse to make any report required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they are jointly and severally liable to the person demanding such report, for the amount of his debt if he is a creditor, or for the amount of his loss if he is a stockholder. If any report or certificate made, or any public notice given, by the officers in pursuance of the provisions of this chapter, is false in any material representation, all the officers who signed the same, knowing it to be false, are jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this state only. (Rev., ss. 1154, 1163; 1901, c. 2, ss. 27, 56.)

§ 1152. Liability for fraud.—In case of fraud by the president, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the directors and stockholders who were concerned in the fraud. (Rev., s. 1155; Code, s. 686; 1901, c. 2, s. 107.)

Cross References. — As to directors in general, see sec. 1144 and annotations. As to officers in general, see sec. 1145 and annotations. For joint as several liability of officers, see next section.

While directors of a corporation are not insurers, or guarantors and therefore liable for its debts, yet they are trustees and liable as such for losses attributable to their bad faith, misconduct, or want of care. Townsend v. Williams, 117 N. C. 330, 23 S. E. 461.

Officer Cannot Appropriate Corporate Business.—A corporate officer cannot for himself take business from the corporation. Brite v. Penny, 157 N. C. 110, 72 S. E. 964.

Action by Creditor or Stockholder.—It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. Solomon v. Bates, 118 N. C. 311, 24 S. E. 478; White v. Kincaid, 149 N. C. 415, 63 S. E. 109; Braswell v. Pamlico Ins., etc., Co., 159 N. C. 628, 75 S. E. 813.

Action in Alleged Fraudulent Merger. — In an action against a corporation charged to be fraudulently in possession of the assets of another corporation which had been merged into it, the officers of the corporation are not necessary parties. Friedenwald Co. v. Asheville Tobacco Works, 117 N. C. 544, 23 S. E. 490.

§ 1153. Joint and several liability of officers, etc., contribution.—When the officers, directors or stockholders of a corporation are liable to pay its debts, or any part thereof, any person to whom they are liable has a right of action against any one or more of them. And any such officer, director or stockholder has the right of equitable contribution in any action for that purpose against any other officer, director or stockholder who is liable with him for any amount which he has been compelled to pay as provided in this section. (Rev., s. 1156; 1901, c. 2, s. 90.)

Cross References.—As to directors and officers in general, see sections 1144 and 1145 and references and annotations thereunder. As to liability for fraud, see preceding section.

Corporation Need Not Be Joined.—The directors of a corporation are jointly and severally liable for their torts, and the corporation itself can be joined or not, at the election of the plaintiff, in an action to enforce that liability. Solomon v. Bates, 118 N. C. 311, 24 S. E. 478.

Neither a corporation nor its trustee in bankruptcy was a necessary party defendant to a suit for the defendants' wrong as officers of the corporation in misappropriating the plaintiff's money and notes. Virginia-Carolina Chemical Co. v. Floyd, 158 N. C. 455, 74 S. E. 465.

§ 1154. Officers paying may enforce exoneration against corporation.—An officer, director or stockholder who pays a debt of a corporation for which he is made liable by the provisions of this chapter may recover the amount paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation is liable to be taken, and not the property of any stockholder, except as provided in the preceding section. (Rev., s. 1157; 1901, c. 2, s. 91.)

§ 1155. Assets of corporation first exhausted.—No sale or other satisfaction shall be had of the property of a director or stockholder for a debt of the corporation of which he is director or stockholder until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied, or until it is shown to the court that the corporation has no property available for the satisfaction of the indebtedness. (Rev., s. 1158; 1901, c. 2, s. 92.)

Art. 5. Capital Stock

§ 1156. Classes of stock.—Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restriction or (qualification thereof as are prescribed by those holding a majority two-thirds in the case of banks and building and loan associations) of its outstanding capital stock; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate thereof; and the holders thereof are entitled to receive, and the corporation is bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-yearly or yearly, before any dividend is set apart or paid on the common stock, and such dividends may be made cumulative. In case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock except by authority given to the board of directors by a vote of at least a majority (two-thirds in the case of banks and building associations) of the stock voted at a meeting of the common stockholders, duly called for that purpose. Provided, that, except in the case of banks and building and loan associations, no new class of stock shall hereafter be created entitled to dividends or shares in distribution of assets in prior-

ity to any class of preferred stock already outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers. The terms "general stock" and "common stock" are synonymous. (Rev., s. 1159; 1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; 1923, c. 155; 1925, c. 118, ss. 2, 2a.)

Cross References. — For full treatment of capital stock, see 3 N. C. Enc. Dig. 527-540; 13 N. C. Enc. Dig. 477-482.

Editor's Note.—This section was amended by ch. 118, Laws of 1925 by substituting the words "a majority" for the words "two-thirds" in the two places dealing with the vote of stockholders except in the case of banks and building and loan associations. The proviso was also added by the same chapter. This change is in accordance with the change made in section 1130 by the same act. See editor's note under sec. 1130. See also 3 N. C. Law Review 34, 137, for a discussion of this amendment.

Capital Stock—As Distinguished from Capital. — The capital stock of a corporation, strictly speaking, is the amount in money or property subscribed and paid in or secured to be paid in by the shareholders, and always remains the same unless changed by proper legal authority, while its capital is a broader term and includes all funds, securities, credits, and property of every kind whatever belonging to the corporation, though the words are often used interchangeably in revenue statutes. Person v. Board, 184 N. C. 499, 115 S. E. 336.

A Trust Fund for Creditors.—The capital stock and property of a corporation, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next, for its stockholders. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Gilmore v. Smathers, 167 N. C. 440, 83 S. E. 823.

Generally speaking, the property and assets of a corporation become, upon its insolvency, a "trust fund" for the benefit of its stockholders and creditors. Millen v. Moline, etc., Iron Works, 131 U. S. 352, 366, 33 L. Ed. 178.

Meaning of "Trust Fund." — The term "trust fund," as used in various decisions of the courts in reference to the assets of a corporation, does not imply that upon the insolvency of a corporation its assets will be administered strictly as a trust for the benefits of all creditors pro rata, but that whenever proceedings under the statute are had, and the court takes charge of the assets through its receiver, it will make equitable distribution, among all the creditors, of all the assets not subject to prior liens or rights. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

The preferred stock forms a part of the capital stock of the corporation, under this section, entitling the holders to all rights of the stockholder subject to the terms and conditions on which their stock was issued. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 813, 172 S. E. 373.

A preferred stockholder of a corporation is not a creditor of the corporation, and must be confined to his rights as a stockholder. Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 76, 69 S. E. 747.

Lien of Preferred Stockholders—Rights of Creditors.—This section fixes the authority of the corporation to issue its preferred stock and the priorities thereof are always subject to the rights of creditors. So an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter is ineffectual as to the prior rights of creditors. Ellington v. Supply Co., 196 N. C. 784, 147 S. E. 307.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 61, 147 S. E. 676.

§ 1157. Stock to be paid in money or money's worth; issue for labor or property.—Nothing but money shall be considered as payment for any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed. Any corporation may issue stock for labor done or personal property or real estate, or leases thereof, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive. (Rev., ss. 1159, 1160; 1901, c. 2, ss. 19, 53; 1903, c. 660, ss. 2, 3.)

Cross References.—As to stock issued for property, see the next section. As to stock issued in payment for construction work, see sec. 1159. As to non par value stock, see sec. 1167.

Purposes to Prevent Fraud.—This section was passed in order that such subscriptions may be protected in their integrity and not become a means of deceiving those who deal with the corporation. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906.

Effect of Charter Provision.—A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock," does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 36.

Judgment of Directors Arbitrary.—This section makes the judgment of the board of directors, in fixing the value of property of its subscribers to its shares of stock to be accepted in lieu of money, arbitrary and of artificial weight, in the absence of fraud; and where there is no evidence of fraud therein, a judgment as of nonsuit is properly granted. Gover v. Malever, 187 N. C. 774, 122 S. E. 841.

Cash Payment Unnecessary.—It is not essential to a bona fide subscription to stock in a corporation that there be a present payment in cash by the subscriber or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

Conditional Subscription.—A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount. Alexander v. North Carolina, etc., Trust Co., 155 N. C. 124, 71 S. E. 69; citing Queen City Printing, etc. Co. v. McAden, 131 N. C. 178, 183, 42 S. E. 575; Penniman v. Alexander, 111 N. C. 427, 428, 16 S. E. 408; Kelly v. Oliver, 113 N. C. 422, 443, 18 S. E. 698.

Illegal Payment.—Under this section a transaction whereby the defendant borrowed a certain sum and bought a half interest in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. Goodman v. White, 174 N. C. 399, 93 S. E. 906.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 61, 147 S. E. 676.

§ 1158. Stock issued for property; how value ascertained; how stock reported.—Any corporation formed under this chapter may purchase any property necessary for its business, and issue stock to the amount of the value thereof in payment therefor. The stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive. In all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts. (Rev., s. 1161; 1901, c. 2, s. 54.)

Cross References.—As to issue of stock for labor or property, see also the preceding section. As to stock issued to construction companies, see the following section. As to non par value stock, see sec. 1167.

Evidence of Fraud.—In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

Proceedings Where Property Overvalued. — Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders individually who sell the property, as for an unpaid sub-

scription. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906; Hobgood v. Ehlen, 141 N. C. 344, 345, 53 S. E. 857.

Burden of Proof.—The burden of proving that the property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation is upon the person who alleges payment. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 61, 147 S. E. 676.

§ 1159. Construction companies building railroads, etc., may take stock therein; how issued, valued, and reported.—Corporations having for their object the building or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock, in full or partial performance of the whole, or any part of such subscription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact. (Rev., s. 1172; 1901, c. 2, s. 55.)

As to stock issued for labor or property, see the two preceding sections.

§ 1160. Liability for unpaid stock.—Where the capital stock of a corporation has not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder is bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations; but no person holding stock in any corporation in this state as executor, administrator, guardian, or trustee, or as collateral security, is personally subject to any liability as a stockholder of the corporation; but the person pledging the stock is considered as holding the same, and is liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian, or trustee, is liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been had he been living and competent to act and hold the stock in his own name. (Rev., s. 1162; 1893, c. 471; 1901, c. 2, s. 22.)

In General.—Both under general principles of corporate law, appertaining to the subject, and by this section, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538; McIver v. Hardware Co., 144 N. C. 478, 57 S. E. 169; Claypoole v. McIntosh, 182 N. C. 109, 111, 108 S. E. 433.

Construed with § 441.—See note under § 441.

Unpaid Balances to Be Collected.—The capital stock paid or unpaid of a corporation being a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770.

In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the settlement of outstanding claims. Whitlock v. Alexander, 160 N. C. 465, 468, 76 S. E. 538.

Suspension of Enterprise.—The mere fact, alone, that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription according to his agreement. Raleigh Impr. Co. v. Andrews, 176 N. C. 280, 96 S. E. 1032. Decree affirmed, 178 N. C. 328, 100 S. E. 514.

Agreement Contrary to Section.—No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. Marshall Foundry Company v. Killian, 99 N. C. 501, 6 S. E. 680; Heggie v. Building and Loan Asso., 107 N. C. 581, 591, 12 S. E. 275. See also, Gilmore v. Smathers, 167 N. C. 440, 83 S. E. 823.

Stockholder Estopped. — Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership he can not, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized. Waderborro Cotton Mills Co. v. Burns, 114 N. C. 353, 19 S. E. 238; Academy v. Lindsey, 28 N. C. 476; Navigation Co. v. Neal, 10 N. C. 520, 537; R. R. v. Thompson, 52 N. C. 387; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680.

Same—Preliminary Agreement Broken.—Except in cases of fraud, and then only in restricted instances (Chamberlain v. Trogden, 148 N. C. 139, 61 S. E. 628), a subscriber to stock in a corporation, absolute in terms, may not be relieved of his obligation by reason of nonperformance of conditions attached to a preliminary agreement among some of the members prior to incorporation, a position especially insistent where the rights of creditors have supervened. Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680; North Carolina R. Co. v. Leach, 49 N. C. 340.

Set-Offs.—In a receiver's action to collect unpaid stock subscriptions, a subscriber can not set off a debt due him by the corporation. Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. C. 502, 92 S. E. 376. Nor can he credit himself with amounts he paid on another subscription. Id.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 59, 147 S. E. 676.

§ 1161. Decrease of capital stock.—The decrease of capital stock may be effected by—

1. Retiring or reducing any class of the stock.
2. Drawing the necessary number of shares by lot for retirement.
3. The surrender by every stockholder of his shares and the issue to him in place thereof of a decreased number of shares.
4. The purchase at not above par of certain shares for retirement.
5. Retiring shares owned by the corporation.
6. Reducing the par value of shares.

When a corporation decreases the amount of its capital stock as above provided, the certificate decreasing the same shall be published at least once a week for three successive weeks in a newspaper published in the county in which the principal office of the corporation is located, the first publication to be made within fifteen days after the filing of the certificate. In default of such publication the directors of the corporation are jointly and severally liable for all debts of the corporation contracted before the filing of the certificate, and the stockholders are also

liable for such sums as they respectively receive of the amount so reduced. No such decrease of capital stock decreases the liability of any stockholder whose shares have not been fully paid, for debts of the corporation theretofore contracted. (Rev., s. 1164; 1901, c. 2, s. 32.)

Cross References.—As to increasing or decreasing amount of capital stock by amendment to charter, see sec. 1131. As to director's liability for impairing capital stock, see sec. 1179. As to capital stock a trust fund for creditors, see annotations under sec. 1156.

Bona Fide Creditors Protected. — The right to buy in and cancel its own stock may sometimes be exercised by a corporation, but not in derogation of the rights of bona fide creditors. Heggie v. Peoples Building and Loan Asso., 107 N. C. 581, 12 S. E. 275.

Purpose of Provision for Notice. — This provision as to notice is only necessary to afford the stockholders of a corporation protection against creditors. As between the stockholders the reduction, if otherwise lawful and valid and pursuant to resolutions properly passed, will bind the members, and may be enforced by corporate action. Meisenheimer v. Alexander, 162 N. C. 226, 235, 78 S. E. 161.

While Debts Unpaid. — No part of capital stock can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 76, 69 S. E. 747.

Repurchase of Stock.—This section was held inapplicable to suit by receiver against directors for repurchase of stock by corporation in Thompson v. Shepherd, 203 N. C. 310, 165 S. E. 796.

§ 1162. Certificates and duplicates.—Every stockholder shall be entitled to have a certificate signed by the president or a vice-president and by the treasurer or an assistant treasurer or the secretary or an assistant secretary of the corporation certifying the number of shares owned by him in such corporation. A corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against the corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper to do so. (Rev., ss. 1165, 1166; 1885, c. 265; 1901, c. 2, s. 94; 1927, c. 173.)

As to action to compel issuance of duplicate certificates, see next section.

Editor's Note.—The first sentence in this section formerly read, "Every stockholder shall have a certificate signed by the president and treasurer, or secretary, certifying the number of shares owned by him." The present first sentence was added by ch. 173, Public Laws 1927.

Nature of Stock Certificate.—A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it; and its legal status is in the nature of a chose in action. Person v. Board, 184 N. C. 499, 115 S. E. 336.

Evidence of Ownership of Stock.—A certificate for shares is not the stock itself, but constitutes only prima facie evidence of the ownership of that number of shares. Misenheimer v. Alexander, 162 N. C. 226, 78 S. E. 161, citing Cook on Corporations (6th Ed.) § 13; Clark on Corporations, p. 260.

Certificate Unnecessary.—Insurance of stock certificates is unnecessary either to the existence of the corporation or to confer title to the stockholder. Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926.

Reissue—Application of Last Sentence.—The last sentence of this section, relative to the reissue of stock to supply lost certificates, is valid and applies to all incorporated companies, and interferes with the chartered rights of none. Hendon v. North Carolina R. Co., 125 N. C. 124, 34 S. E. 227.

§ 1163. Action to compel issuance of duplicate certificates.—When a corporation has refused to issue a new certificate of stock in place of one theretofore issued by it, or by a corporation of which it is a successor, alleged to have been lost or destroyed, the owner of the lost or destroyed certificate or his legal representatives may maintain a civil action in the superior court of the county in which the principal office of the corporation is located to compel the corporation to issue a duplicate certificate in the place of the one alleged to have been lost or destroyed; and if the issues of fact arising upon the pleadings are found in favor of the plaintiff, the court shall make an order requiring the corporation or other party, within such time as it designates, to issue and deliver to the plaintiff a new certificate for the number of shares of the capital stock of the corporation which have been found to be owned by the plaintiff. In making the order the court shall direct that the plaintiff deposit such security as to the court appears sufficient to indemnify any person other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed; and the court may also direct publication of such notice, either preceding or succeeding the making of such final order, as it deems proper. Any person who thereafter claims any rights under the certificate so lost or destroyed shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order. (Rev., s. 1167; 1901, c. 2, s. 95.)

As to the original certificate, see preceding section.

Loss Question of Fact.—Where a stockholder in an unincorporated company loses his certificate of stock and sues his company for a reissue and the allegation of loss is denied, an issue of fact is raised for trial by jury and it must be submitted to them. Hendon v. North Carolina R. Co., 125 N. C. 124, 34 S. E. 227.

§ 1164. Transfer of shares.—The shares of stock in a corporation are personal property, and are transferable on the books of the corporation in the manner and under the regulations provided by the by-laws. Whenever a transfer is made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer. (Rev., s. 1168; Code, s. 689; 1901, c. 2, s. 21.)

As to transfer of shares of corporate stock, see 2 N. C. Law Review 118, where the subject is fully discussed.

In General.—Although shares of stock are personal property and are transferable on the books of the corporation as provided by the by-laws, such provision, it is held, can be of no practical benefit to those not connected with the corporation, because they have "no means of knowing whether the transfer has been made or not." Castelloe v. Jenkins, 186 N. C. 166, 172, 119 S. E. 202.

To Protect Corporation.—The purpose of the section requiring a transfer upon the books of the corporation is to prevent fraudulent transfers and to protect the corporation in determining the question of membership, the right to vote, the right to participate in the management of the corporation, and the payment of dividends. Bleakley v. Candler, 169 N. C. 16, 19, 84 S. E. 1039.

Transfer on Books Not Necessary.—It is well settled that the requirement of this section as to entering transfers of stock upon the books of the corporation is for the protection of the corporation, and that the failure to enter such transfer upon the corporate books has no effect upon the legality of the transfer as between the parties themselves. Grissom v. Sternberger, 10 Fed. (2d.) 765, 766 citing numerous cases.

In Morehead v. R. R., 96 N. C. 365, there is an intima-

tion that a transfer of stock can only be effectual by a transfer upon the books of a corporation, but the later cases of Havens v. Bank, 132 N. C. 214, 43 S. E. 639, and Cox v. Dowd, 133 N. C. 537, 45 S. E. 846, are in line with the current of authority. Bleakley v. Candler, 169 N. C. 16, 21, 84 S. E. 1039. See also 1 N. C. Law Review 59 for further authorities.

Duty of the Corporation.—It is the duty of the corporation to protect persons interested, such as contingent remaindermen or legatees when the corporation has knowledge of the contents of the will, from an unauthorized transfer of stock. Wooten v. Railroad, 128 N. C. 119, 38 S. E. 298; Baker v. Railroad, 173 N. C. 365, 92 S. E. 170.

Requests by Representatives.—If an agent makes a demand for a transfer the corporation must look to the power of attorney; if an executor, to the will; if an administrator to his letters, because these are the sources of power. Baker v. Railroad, 173 N. C. 365, 369, 92 S. E. 170.

Holder Has Preference.—The holder of the stock either as a purchaser or a pledgee has the preference over an attaching creditor although the transfer of the stock has not been entered on the books of the corporation. Bleakly v. Candler, 169 N. C. 16, 20, 84 S. E. 1039.

Charter Restriction.—There is no statute in North Carolina forbidding restrictions and limitations in the sale and transfer of stock; under the constitution the Secretary of State has the power to issue and approve charters containing such restrictions and when approved they constitute valid and binding agreements as between the stockholders who take with notice of the provisions. Wright v. Iredell Tel. Co., 182 N. C. 308, 108 S. E. 744, distinguishing Bridgers v. First Nat. Bank, 152 N. C. 293, 67 S. E. 770, and Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 S. E. 894.

Corporation May Trade in Own Stock.—Shares of stock are declared by this section to be personal property, and may be sold or purchased by the corporation which has created them. Byrd v. Tidewater Power Co., 205 N. C. 589, 591, 172 S. E. 183.

§ 1165. Assessments, sale, and notice.—The directors of a corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed shall be paid to the treasurer at such times and by such installments as the directors direct, the directors having given thirty days notice of the assessment and of the time and place of payment, either personally, by mail, or by publication in a newspaper published in the county where the corporation is established. If the owner of any share or shares neglects to pay a sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such share or shares of the delinquent owner as will pay any assessment due from him, with interest, and all necessary incidental charges, and shall transfer the share or shares sold to the purchaser, who is entitled to a certificate therefor. The treasurer shall give notice of the time and place appointed for the sale, and the sum due on each share, by advertising the same once a week for three successive weeks before the sale in a newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and by mailing a notice thereof to the last known postoffice address of the delinquent stockholder. (Rev., ss. 1169, 1170, 1171; 1901, c. 2, ss. 23, 24, 25.)

Construed with § 441.—See note under § 441.

Assessment as Incumbrance.—Acceptance of an offer of sale of corporation stock cannot be enforced when the proposed purchaser was unaware at the time that there had been an assessment made upon the shares; the usual implied warranty of title applies to such sales. Martin v. McDonald, 168 N. C. 232, 84 S. E. 258.

Setting Aside Sale.—Where the plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest to the date of tender and cost of advertisement. Wilson v. Tel. Co., 139 N. C. 395; 52 S. E. 62.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 58, 147 S. E. 676.

§ 1166. One corporation may purchase stock, etc., of another.—A corporation may purchase stock, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such may exercise all the rights, powers and privileges of ownership. (Rev., s. 1173; 1903, c. 660, s. 3.)

Corporation May Purchase Its Own Stock.—A corporation, unless restrained by some provision of its organic law, may purchase its own stock from holders thereof, and the latter are entitled to all rights of other creditors of the corporation for the protection and enforcement of their demand for payment. Blalock v. Kernersville Mfg. Co., 110 N. C. 99, 100, 14 S. E. 501. As to power of corporation to purchase its own stock, see sec. 1161, par. 4. Shares of its own stock held by corporation cannot be voted, see last sentence of sec. 1174.

Cited in Citizens Lumber Co. v. Elias, 199 N. C. 103, 108, 154 S. E. 54; Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489.

§ 1167. Mutual corporations may create stock.—A mutual corporation, upon the consent in writing of all its members, may provide for and create a capital stock and may provide for the payment of the stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law. (Rev., s. 1245; 1901, c. 2, s. 105.)

Art. 5(A). Capital Stock without Nominal or Par Value

§ 1167(a). Corporations which may create shares without nominal or par value. Classes of stock or debentures.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies, railroad companies and insurance companies, may, in its original certificate of incorporation, articles of association, charter or any amendment thereof, create shares of stock with or without nominal or par value, and may create two or more classes of stock or debentures, any class or classes of which may be with or without nominal or par value, with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter or amendment thereof, or by resolution adopted by those holding two-thirds of the outstanding capital stock entitled to vote. Subject to any provisions so fixed, every share without nominal or par value shall equal every other such share. (1921, c. 116, s. 1; 1925, c. 262, s. 1.)

Editor's Note.—This law as passed in 1921 was the first legislation in this state permitting the issuance of non-par stock in corporations. It grew out of a pressing demand to overcome the difficulties in financing corporations, whose stock is either above or below par value, resulting from misrepresentations and misunderstandings arising through the difference between the actual value and face value of stock, and from the blue sky laws which prohibit the sale of new stock unless the actual value and par value correspond, and require that new stock be sold at its actual value. (For a detailed description of these hardships, see 1 N. C. L. Rev. 28, 29.)

New York was the first state to pass such laws (1912), but since that time over half of the states have enacted them. See Wickersham on "Stock without par value." Along with the many advantages of the law are many objections to it and it might be said that the wisdom of such legislation

is yet speculative. The article in the Law Review, cited supra, gives an excellent discussion of such problems.

The N. C. Law Review, vol. 3, p. 136, gives an interesting discussion of the changes affected by the 1925 amendment. The first section was stricken and reenacted in the form in which it now appears, several changes having been made.

The provision permitting two thirds of those holding the outstanding capital stock entitled to vote, to create stock with or without par value and fix its status with respect to voting, preference, etc., was inserted. It is pertinent to point out here an apparent inconsistency between this provision, and section 1156 as amended by the acts of 1925 seven days before this statute was passed.

Prior to the amendment section 1156 provided that a corporation may create two or more kinds of stock of such classes, with such designation, preferences and voting powers, etc., as a majority of its outstanding capital stock may designate except that priority could not be given over existing preferred stock without a two-thirds vote. The 1925 amendment changed it from a two-thirds requirement to a majority. This section [1167(a)] provides that with respect to stock with or without par value it snall take a two-thirds vote to exercise such powers.

The Law Review, cited supra, suggested two possible positions that might be taken with respect to the operation and effect of these statutes. In the first instance, it was suggested that non par stock might be considered as giving such a priority per se as to fall within the exception of section 1156 requiring a two third vote, thus reconciling them. This interpretation would present two difficulties: First the exception in 1156 limits the vote to those holding preferred stock while this section requires two thirds of those holding the outstanding capital stock entitled to vote, which provisions are inconsistent. Second, this section is not confined to stock of non-par value, the language being "with or without par or nominal value." This apparently conflicts with the "majority" provision of section 1156 with respect to stock with par value. In view of these considerations it would seem that the first suggested construction is objectionable because it does not wholly reconcile the sections, thus defeating its object.

The second suggested interpretation is that the statutes are in conflict and that this section, being the latest legislative expression, repeals section 1156 making non-par stock an exception to it. If this section repeals the inconsistent provision of section 1156, it does more than make non-par stock an exception to section 1156 unless the word "with" in the expression "with or without par or nominal value" as used in this section be disregarded.

The 1925 amendment also inserted the provision that "any class or classes may be with or without par value," the reference to "special acts of the legislature" and the words "charter" and "designations."

§ 1167(b). Stock issues; payment for stock; terms and manner of disposition.—The provisions of law relating to the issuance of stock with par value shall apply to the issuance of stock without nominal or par value, and such corporation may issue and dispose of its authorized shares without nominal or par value for such consideration and on such terms and in such manner as may be determined or approved from time to time by the board of directors, subject to such conditions or limitations as may be contained in the certificate of incorporation, articles of association, charter, or any amendment thereof or as may be contained in any vote of the holders of a majority of the stock of the corporation, such consideration to be in the form of cash, property, tangible or intangible, services or expenses. Any and all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable to any further call or assessment thereon, nor shall the subscriber or holder be liable for any further payments. (1921, c. 116, s. 2; 1925, c. 262, s. 2.)

Editor's Note.—The 1925 amendment struck out this section as enacted in 1921 and revised it. While the section is made more comprehensive generally, it would seem the most important change is that the stockholders are now given power to prescribe the consideration, terms and manner of issue and disposal of the stock whereas formerly they exercised such power only with respect to an increase in capital stock.

In some respects, at least, this section is very similar to the corresponding section of the New Jersey Statute. Respecting the similar provision of the New Jersey Statute which provides for fixing the selling price of the stock, Wickersham on "Stock without Par Value" on page 16, says, "This provision is important. The corporation may now issue its stock for what it can get for it, provided proper corporate action is taken. It is no longer bound by the par consideration rule, nor to seek evasions of that rule for its legitimate purposes."

Although the consideration for the stock is fixed as prescribed in this section, it must be remembered that the right to fix such values is statutory and therefore subject to the statutory limitation. The price must be fixed with at least some relation to value and courts of equity would probably interfere to protect stockholders from the issuance of stock for such inadequate consideration as to jeopardize their rights by unduly reducing the value of their stock. For a general treatment of this subject see Wickersham on "Stock without Par Value," section 30-38.

§ 1167(c). Statements as to value of shares; reports of amount of stock.—In any case in which the law requires that the par value of the shares of stock of a corporation be stated, it shall be stated, in respect to shares without nominal or par value, that such shares are without nominal or par value, and wherever the amount of stock authorized or issued is required to be stated, if any shares without nominal or par value are authorized, the number of shares authorized or issued of the several classes shall be stated, and it shall also be stated whether such shares are with or without nominal or par value, and what the par value is of such shares as have par value. (1921, c. 116, s. 3.)

§ 1167(d). Amendments to existing charters.—Any corporation, whether organized under a special act of Legislature or otherwise, having outstanding shares either with or without nominal or par value, may amend its certificate of incorporation of association of charter, as follows:

(a) So as to change its shares with nominal or par value or any class thereof into an equal number of shares without nominal or par value; or

(b) So as to provide for the exchange of its shares with nominal or par value, or any class thereof, for an equal or different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis; or

(c) So as to provide for the exchange of its shares without nominal or par value, or any class thereof, for a different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis:

Provided, however, the preferences on liquidation, redemption price, dividend rate and like preferences or limitations lawfully granted or imposed with respect to any class of outstanding stock so changed or exchanged under the provisions hereof, shall not be impaired, diminished or changed as to any nonassenting holders thereof. Such preferences, rights and limitations, however, may be expressed in dollars, or in cents, per share rather than by reference to par value. Whenever such a corporation has heretofore issued shares without nominal or par value, in exchange for an equal or different number of shares with par

value, such exchange and the issue of an equal or different number of shares without nominal or par value in consummation of such exchange, be and the same are hereby validated, ratified and confirmed. (1921, c. 116, s. 4; 1925, c. 262, s. 3; 1931, c. 59.)

Editor's Note.—Prior to the 1925 revision this section merely provided that any such corporation "may amend its certificate of incorporation so as to change its certificate of stock from certificates with par value to certificates with non-par or nominal value, or vice versa." All the other provisions making the section more comprehensive, such as the bases of exchange provided together with the proviso are new. The revisal also subdivided the section into paragraphs.

The Act of 1931 struck out the words "such" and "heretofore organized" formerly appearing before and after the word corporation in line one of this section, and inserted after the word "whether" the word "organized."

Under this section both the authorized and outstanding stock may be changed.

As to the rights of minority stockholders who object to the exchange of stock with, for stock without, par value, see Wickersham on "Stock without Par Value," sections 24-29, pages 58-73.

§ 1167(e). Tax on certificate of incorporation or amendments.—The tax upon the certificate of incorporation, or extension or renewal of corporate existence, or increase of capital stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. (1921, c. 116, s. 5.)

Editor's Note.—It is very doubtful whether this section is valid under Article V, sec. 3, of the Constitution, requiring uniformity and equality of taxation. It is submitted that under it two corporations with a great variance between the amount of authorized capital and volume of business, but having the same number of shares without par value (in one case the value of which would be much more per share than in the other), would be required to pay the same amount of taxes thereon.

This question has arisen in several of the states and in some of them the law held valid while in others invalid. The holdings supporting the statutes proceed upon the theory that there is no inequality within the meaning of the constitution because the tax is levied in the same manner upon all corporations, viz., on the basis of $100 per share.

Notwithstanding such decisions, as a matter of practical fact there is a decided inequality where a corporation with $50,000 capital represented by 5,000 shares of outstanding stock has to pay the same amount of tax thereon as one with $150,000 capital represented by 5,000 shares of outstanding stock, and several courts have held this an inequality within the constitutional provisions.

The statute has been upheld in at least one case upon the theory that in the case of stock without par value, there is no valuation which will form a basis for taxation and that a fictitious value is necessary and that the amount of such value is a question of legislative discretion. This is said to be true notwithstanding that the laws regulating the issuance of such shares require a statement of the capital stock, and the number of shares issued. In such case the words "capital stock" were construed to mean the shares of stock and not the authorized capital, so that in fact there was no requirement of a statement as to the value of the shares. See Roberts, etc., Co. v. Emmerson, 313, Ill. 137, 144 N. E. 818; s. c. as affirmed in 271 U. S. 50, 46 S. Ct. 375. On the other hand, it has been held in New York that the New York statute was invalid as to foreign corporations (it would seem to be true also with domestic corporations) because the fixed value was entirely arbitrary, there being no basis to assume such a value, and would inevitably result in unequal taxation. See People v. Walsh, 202 App. Div. (N. Y.) 652, 195 N. Y. S. 184.

The construction placed upon "capital stock" by the former cases has been severaly criticised. See the able discussion by Mr. Wickersham in his treaties on "Stock without Par Value," secs. 76-80, where all the decisions are discussed and criticised.

Especial attention is called to the fact that sec. 1167 (g) makes the general corporation law applicable, that sec. 1114 provides that the capital stock and number of shares [see also sec. 1167 (c)] must be stated in the articles of incorporation. The rate of taxation is fixed by the Revenue Act of 1927, sec. 211 (3), ch. 80, Public Laws, at 1/10 of 1% of the issued and outstanding capital stock. So it might well be contended in North Carolina that in order for the tax to be uniform and equal under Art. V, sec. 3 of the constitution, the basis cannot be fixed at the fictitious value of $100 per share on stock without par value; that in order to be equal and uniform it must be based upon the value of the shares and that this basis may be determined by the statement of capital stock and the number of shares required by sec. 1114, and thus that there is no necessity for fixing a fictitious value for the purpose of taxation. (This theory was rejected in the Roberts case, supra). However, there seems to be no express requirement that amendments increasing the capital stock or exchanging par value for non par value stocks, should state the aggregate amount of increase of capital and the number of shares (it may be that sec. 1131, par. 7, to the effect that the certificate of amendment "can contain only such provisions as could be lawfully and properly inserted in an original certificate of stock" is construed to mean "must contain," etc., and thus under sec. 1114 required to make such statements) and in the absence of such requirement there is no statement of the definite value of the increase or exchanged shares of stock without par value which could form a basis for taxation. In the latter case a fictitious value as fixed in this section would undoubtedly be necessary to the taxation of such stock created by amendment.

§ 1167(f). Intent or purpose of law.—The intent and purpose of this article is to require a share of stock to be treated and represented, subject to lawful preferences, rights, limitations, privileges, and restrictions as a mere evidence of an aliquot part or divisional interest in the assets and earnings of the corporation issuing the same, whatever the extent or value of such assets or earnings may be, to the end that misrepresentation or misunderstanding arising through the difference between actual value of a share of stock and the value appearing on the face of the certificate therefor may be eliminated. (1921, c. 116, s. 6.)

§ 1167(g). Laws applicable to corporations.—Except as otherwise provided by this article, corporations issuing shares without any par or face value under the provisions hereof shall be and remain subject to the laws of the state now or hereafter in force relating to the formation, regulation, or reorganization rights, powers, and privileges of such corporation, and all other laws applicable thereto. (1921, c. 116, s. 7.)

§ 1167(h). Exchange by a corporation of par value shares of stock for no par value shares.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies, and insurance companies, may, in its original certificate of incorporation, articles of association, charter, or any amendment thereof, provide for the exchange of its shares to be issued with nominal or par value for an equal or different number of outstanding shares without nominal or par value. (1929, c. 338, s. 1.)

Editor's Note.—See § 1131(b).

Art. 6. Meetings, Elections and Dividends

§ 1168. Place of stockholders' and directors' meetings.—The meetings of the stockholders of every corporation of this state shall be held at the principal office in this state. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside the state. Every corporation shall maintain a principal office in this state, and have an agent in charge thereof. (Rev., s. 1179; 1901, c. 2, s. 49.)

Cross References. — As to first meeting of corporations,

see sec. 1118. That books must be kept at principal office, see sec. 1170. As to changing location of principal office, see sec. 1133. As to meeting called by three stockholders, see next section.

Where Chapter Provision Contrary.—Although the act incorporating a company provided that Norfolk, Virginia, should be the place of its principal office, it was held in Simmons v. Norfolk & Baltimore, etc., Co., 113 N. C. 147, 18 S. E. 117, that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the state which incorporates it, to an extent necessary to the fullest jurisdiction and visitorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporations. Roberson v. Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.

Scope of Meetings.—The scope of a special meeting of stockholders is limited to the purpose stated in the notice thereof; business action beyond this scope is void unless all stockholders are present, consent, or subsequently ratify. Asbury v. Mooney, 173 N. C. 454, 92 S. E. 267.

Must Act in Meeting.—It is essential to the validity of the acts of stockholders of a corporation that they should be assembled in their representative capacity as they are not permitted to discharge any of their duties as stockholders unless so organized. Hill v. Railroad, 143 N. C. 539, 55 S. E. 854, citing Duke v. Markham, 105 N. C. 131, 10 S. E. 1017.

Same—Individual Assent Invalid. — The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company. Duke v. Markham, 105 N. C. 131, 10 S. E. 1017.

Necessity for Notice.—In order to protect the rights of minorities the law requires that notice of the meetings of the stockholders of a corporation shall be given to every shareholder, either by the method prescribed in the charter or by-laws or by express notice; but where it appears that every person interested had express notice and participated in a meeting, there is no necessity for proving a compliance with section 1118 as to such notice. Benbow v. Cook, 115 N. C. 325, 20 S. E. 453.

Meetings of Directors.—To make the proceedings of a meeting of the directors of a corporation regular, it must be at a stated time provided for in the charter or by-laws or held after notice to all of the directors. First Nat. Bank v. Asheville, etc., Lumber Co., 116 N. C. 827, 21 S. E. 948.

Same—Necessity for Notice.—The acts of the majority of the directors at a meeting held at an unusual time and place, without notice to the other directors, are not valid. First Nat. Bank v. Asheville, etc., Lumber Co., 116 N. C. 827, 21 S. E. 948.

§ 1169. Meeting called by three stockholders.—When, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three stockholders with voting power may call such meeting by publishing in a newspaper published in the county in which the principal office in this state is located ten days notice of the time, place and purposes of the meeting, and mailing this notice to all stockholders whose postoffice address is known or can be ascertained. A meeting so called is a legal meeting of the corporation, and if there are no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the minute book of the corporation. (Rev., s. 1190; 1901, c. 2, s. 51.)

As to place of stockholders' meetings, see preceding section. As to first meeting of corporation, see sec. 1118.

§ 1170. Transfer and stock books.—Every corporation shall keep at its principal and registered office in this state the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders, and the number of shares held by them respectively, and shall at all times during the usual hours for business be open to the examination of every stockholder. These books shall be the only evidence as to who are the stockholders entitled to examine them, and to vote at elections. In case the right to vote upon any share of stock is questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote. (Rev., ss. 1180, 1181; 1901, c. 2, ss. 38, 45.)

§ 1171. Directors to produce books at election.—The board of directors shall produce at the time and place of elections the transfer books and the stock books, there to remain during the election, and the neglect or refusal of the directors to produce the same after a demand therefor shall render them ineligible to any office at such election. All elections of directors held under this chapter prior to February 28, 1913, where these books were not produced, and no demand was made therefor, are ratified and confirmed and given full legal force and effect, but this ratification does not affect litigation pending on the above date. (Rev., s. 1180; 1901, c. 2, s. 38; 1913, c. 14.)

§ 1172. Superior court may require production.—The superior court may, upon proper cause shown, order any or all of the books of the corporation to be forthwith brought within this state, and kept therein at such place and for such time as is designated in such order. The charter of any corporation failing to comply with such order may be declared forfeited by the court making the order, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of the order. (Rev., s. 1179; 1901, c. 2, s. 49.)

As to jurisdiction of superior court upon dissolution of corporation, see sec. 1195. As to jurisdiction of superior court over elections, see sec. 1177.

§ 1173. Votes stockholders entitled to; cumulative voting.—Unless otherwise provided in the charter or by-laws of a corporation, at every election each stockholder is entitled to one vote in person, or by proxy duly authorized in writing, for each share of the capital stock held by him, but no proxy may be voted after three years from its date; nor may there be voted at any election a share of stock which has been transferred on the books of the corporation within twenty days prior to the election. The certificate of incorporation of any corporation authorized to issue shares of capital stock may provide that at all elections of directors, managers, or trustees, each stockholder is entitled to as many votes as equal the number of his shares of stock multiplied by the number of directors, managers, or trustees to be elected, and that he may cast all of his votes for a single director, manager, or trustee, or may distribute them among the number to be voted for, or any two or more of them, as he sees fit. This right of cumulative voting may be exercised in the absence of charter provision when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that more than one-fourth of the capital stock of the corporation is owned or controlled by one person. A stockholder owning or controlling more than twenty-five per cent of the stock has the same right to vote cumulatively as any other stockholder; and no amendment of the charter or by-laws of a corporation can abrogate or abridge any right herein

conferred. The right to vote cumulatively cannot be exercised unless some stockholder announces in open meeting, before the voting for directors, trustees, or managers begins, his purpose to exercise such right, and then every other stockholder may likewise vote cumulatively. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1: 1909, c. 827, s. 1.)

When Cumulative Voting Applies.—It is impossible for a person to vote cumulative upon a single proposition. It is only when several persons are voted for at the same time that the voter can "cumulate" his votes. Bridgers v. Staton, 150 N. C. 216, 217, 218, 63 S. E. 892.

The right to cumulative voting is not given generally, but only in the election of officers. It could not apply to other matters, as the motion to adjourn, for instance, where there is only one proposition and nothing to "cumulate" upon. Bridgers v. Staton, 150 N. C. 216, 217, 220, 63 S. E. 892.

Voting Trust Illegal.—An agreement which deprives the stockholders of the right to vote is contrary to public policy and void. Harvey v. Improvement Co., 118 N. C. 693, 24 S. E. 489; Sheppard v. Rockingham Power Co., 150 N. C. 776, 778, 64 S. E. 894.

Same—Not a Proxy.—An agreement pooling stock in a corporation which creates a voting trust, with absolute powers to decide upon matters arising for a period exceeding three years cannot be considered as a proxy authorized by this section for a proxy is only good for the period of three years. Sheppard v. Rockingham Power Co., 150 N. C. 776, 777, 64 S. E. 894.

A proxy cannot be made irrevocable. Sheppard v. Rockingham Power Co., 150 N. C. 776, 777, 64 S. E. 894.

§ 1174. Stock held by fiduciary, pledgor, life tenant, or corporation. — Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent it at all meetings of the corporation, and may vote it as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust provides to the contrary. Every person who has pledged his stock as collateral security may represent it at all such meetings, and may vote it as a stockholder, unless in the transfer to the pledgee on the books of the corporation he has expressly empowered the pledgee to vote it, in which case only the pledgee or his proxy may represent and vote said stock. Where stock is owned by, or has been transferred on its record books to, one for life and remainder over, the life tenant at all meetings of the corporation may represent and vote the stock in person or by proxy, in the same manner and with the same effect as if he were the absolute owner thereof. Shares of stock of a corporation belonging to the corporation cannot be voted directly or indirectly. (Rev., ss. 1185, 1186, 1187; 1901, c. 2, ss. 42, 43; 1901, c. 474, ss. 1, 2.)

As to corporation's power to purchase its own stock, see annotation under sec. 1166.

When Trustee May Vote.—When the terms and provisions of a will, bequeathing a life interest in certain shares of stock in a corporation, are construed to be that the shares are to be held and controlled by trustees therein named as executors and trustees, the trustees may vote the same in stockholders' meetings under this section and the provisions for voting of the shares by the life tenant has no application. Haywood v. Wright, 152 N. C. 421, 422, 67 S. E. 982.

Assignee Empowered to Vote.—A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors who retain possession the right to all dividends, amounts only to a proxy. Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

§ 1175. Election of directors.—All elections for directors shall be by ballot, unless otherwise provided in the charter, or by-laws, and a majority of the issued and outstanding stock must be present in person or by proxy; the persons receiving the greatest number of votes shall be the directors. (Rev., s. 1182; 1901, c. 2, s. 39; 1927, c. 138.)

Cross References.—As to directors in general, see sec. 1144 and cross references and annotations thereunder. As to proceedings upon failure to hold election as here provided, see next section.

Editor's Note.—This section formerly contained this additional provision: "The polls must remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing." This sentence was stricken out by ch. 138, Public Laws 1927.

Effect of Motion of Adjournment.—When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding an election of officers cannot be lawfully held thereafter at that meeting, though the adjournment was carried by an illegal vote. Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

§ 1176. Failure to hold election.—If the election for directors of a corporation is not held on the day designated by the charter or by-laws, the directors shall cause the election to be held as soon thereafter as is convenient. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding stock, to call a meeting for the election, the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder, and on notice to the directors, order an election or make such other order as justice requires. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing. (Rev., s. 1188; 1901, c. 2, s. 46.)

Mandamus Cannot Issue.—A mandamus sought under the provisions of this and the following section cannot issue to compel the reconvening of the stockholders for the election of directors because of an illegal adjournment to a certain date by unlawful voting of stock, when that date has passed but the provisions of this section should be followed. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

When Meeting Ordered by Judge.— A meeting of the stockholders of a corporation ordered upon application by the judge in accordance with the provisions of this section must be composed of a majority of shares held twenty days before such meeting, as it appears from the stock book, or, in case of a discrepancy, the transfer book of the corporation. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

Notice.—The notice of a meeting called under this section by custom and by analogy to section 1169 should be mailed to all stockholders whose address is known. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

Stated in In re Hotel Raleigh, 207 N. C. 521, 527, 177 S. E. 648.

§ 1177. Jurisdiction of superior court over elections; appointment of receivers. — The superior court judge, upon application of any person who may complain of any election, or any proceeding, act or matter pertaining to the same, ten days notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, at chambers, in any county in the district in which the principal office of the corporation is situated, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election complained of, or order a new election, or make

any order and give any relief in the premises as right and justice requires. If it shall, upon such hearing, appear to the satisfaction of the court that one or more of the stockholders owns one-half of the capital stock of such corporation, and that because of the equal ownership of stock, the stockholders are unable to agree upon the management, operation, and conduct of the corporation, the superior court judge hearing said matter may thereupon, for good cause shown, appoint a receiver to operate the business of such corporation for such time, and under such terms and conditions as to the court may seem just and proper; Provided creditors of the corporation shall be notified before the appointment of a permanent receiver. The proceedings shall, as far as applicable, be the same as in injunctions. (Rev., s. 1189; 1901, c. 2, s. 47; 1935, c. 413.)

Cross References.—As to power of superior court to require production of books, see sec. 1172. As to superior court's jurisdiction upon dissolution of corporation, see sec. 1195.

Editor's Note.—The amendment of 1935 inserted the next to the last sentence of this section relating to the appointment of receiver.

Failure to Elect Directors.—A proceeding based upon the failure of stockholders of a corporation to elect directors at the annual meeting held for that purpose is a proceeding under this section, and notice in writing signed by complainant served on the adverse parties by the sheriff ten days before the date designated for the hearing of the complaint confers jurisdiction upon the judge of the Superior Court over the parties and subject-matter of the proceeding, and the conditions precedent to proceedings under section 1176, are not applicable. In re Hotel Raleigh, 207 N. C. 521, 177 S. E. 648.

In this proceeding the corporation is neither a necessary nor a proper party, nor may its rights be affected, and the judge of the Superior Court has no jurisdiction to appoint a receiver for the corporation in such proceeding. Id.

§ 1178. When dividend declared.—The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or by-laws, give the directors power to fix the amount to be reserved as a working capital. (Rev., s. 1191; 1901, c. 2, s. 52.)

As to dividends, see also, next section. As to dividends in general, see 3 N. C. Enc. Dig. 540-544; 13 N. C. Enc. Dig. 482. See also note under § 868.

Profits Must Be Earned.—Stock dividends may be declared by a solvent corporation from its profits, where the total amount of the stock is kept within the charter limits and the profits have really been earned. Whitlock v. Alexander, 160 N. C. 465, 466, 76 S. E. 538.

Dividend Must Not Impair Capital Stock or Working Capital.—Neither the capital stock of the corporation, paid in and outstanding, nor its working capital as fixed pursuant to the provisions of this section, may be impaired by the payment of a dividend, under any circumstances. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Determining Accumulated Profits Available for Dividend.—For the purpose of determining the amount of accumulated profits to be declared and paid as a dividend, it is necessary that the true value of the assets, in cash, and not the mere book value should be ascertained in view of the restrictions of § 1779. There should be deducted from such amount the capital stock, the working capital, and all other liabilities of the corporation. For this purpose the amount reserved for depreciation is a liability. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Mandamus to Compel Dividend.—Where under the provisions of this section the accumulated profits of a private corporation in excess of the working capital has been ascertained, the directors are without authority to carry it to the surplus fund, and upon the demand of the stockholders it must be distributed into dividends in accordance with the requirements of the statute, and mandamus will lie to compel such distribution. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Stock Dividend May Be Declared.—The issuance of paid-up stock as a dividend cannot be attacked by an existent creditor, nor by one who has notice of the facts, since it withdraws nothing from the corporation or in any way depletes its assets. Whitlock v. Alexander, 160 N. C. 465, 466, 76 S. E. 538.

Effect of Sale.—A sale of corporate stock carries dividends not yet payable. Burroughs v. North Carolina R. Co., 67 N. C. 376.

Declared Dividend Is Debt.—A dividend declared by and due from a private corporation is a debt due to the shareholder, and is recoverable as such. Trustees v. North Carolina R. Co., 76 N. C. 103.

Debt Can Not Be Deducted from Dividend.—A bank has no right to retain out of the dividends upon the stock a debt due from the stockholder. Attorney General v. State Bank, 21 N. C. 545.

An action to compel declaration of a dividend can not be maintained where the stockholder has not applied to the directors, and he must allege that the directors refused to entertain such application. Winstead v. Hearne Bros. & Co., 173 N. C. 606, 611, 92 S. E. 613, citing 2 Cook on Corps., § 684, p. 209.

§ 1179. Dividends from profits only; directors' liability for impairing capital. — No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to this chapter: Provided, a public service corporation may declare and pay such dividends from the surplus or net profits arising from its business except when its debts, whether due or not, exceed three-fourths of its assets: Provided, further, that any corporation, other than a public service corporation, which is a member of a partnership may declare and pay dividends from the surplus or net profits arising from its business when the sum of the corporation's separate debts, whether due or not, and that part of the partnership debts which is the same proportion of all the partnership debts, whether due or not, as the corporation's interest in the partnership assets is of all such assets, does not exceed two-thirds of the corporation's assets, and in such calculation the amount of its interest in the partnership assets shall be considered assets of the corporation. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissented from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it. (Rev., s.

1192; Code, s. 681; 1901, c. 2, ss. 33, 52; 1927, c. 121; 1933, c. 354, s. 1.)

Cross References.—As to when dividend declared, see preceding section. As to officers' liability for fraud, see sec. 1152. As to joint and several liability of officers, see sec. 1153. See generally the notes to the preceding section.

See 11 N. C. Law Rev., 212, for criticism of this section.

Editor's Note.—The proviso following the semicolon in the first sentence was added by ch. 121, Public Laws of 1927.

The second proviso, relating to dividends by corporation holding membership in partnership, was inserted by Public Laws 1933, c. 354.

Surplus or net profits, as used in this section, are what remains after deducting from the present value of all the assets of a corporation the amount of all the liabilities, including the capital stock. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 125, 141 S. E. 344.

Where Charter Exempts Stockholder from Liability. — The charter provisions, that "no stockholder of the corporation shall be individually liable for debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle embodied in this section holding the stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. McIver v. Young Hardware Co., 144 N. C. 478, 479, 57 S. E. 169.

Fraudulent Representation that Dividend is Earned.—Evidence that the agent for the sale of shares of stock in a corporation had induced the defendant to purchase, by falsely representing that a dividend would be credited upon his notes given for the shares, is in effect a representation that the corporation had earned the dividend as represented in this section; and it may be received as a circumstance of fraud, together with other evidence tending to establish it. Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859.

The declaration of a dividend and issuance of stock for it, by an excessive overvaluaton of property or by an excessive and entirely unwarranted estimate of profits or the unearned increment would be evidence from which fraud could be inferred, and in extreme cases it might be regarded as conclusive. Whitlock v. Alexander, 160 N. C. 465, 473, 76 S. E. 538.

Liability of Director.—A director of a corporation who has not brought himself within the provisions of this section, exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two-thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. Claypoole v. McIntosh, 182 N. C. 109, 108 S. E. 433.

Question of Fraud for Jury.—The question as to actual fraud in issuing a stock dividend must be referred to a jury. Whitlock v. Alexander, 160 N. C. 465, 473, 76 S. E. 538.

Repurchase of Stock.—This section was held inapplicable to suit by receiver against directors for repurchase of stock by corporation in Thompson v. Shepherd, 203 N. C. 310, 165 S. E. 796.

§ 1179(a). No personal liability on corporate manager of partnership.—Any corporation created under this chapter which is a member of a partnership may have its interests in such partnership managed, and may be engaged in or have charge of the management and affairs of such partnership, by and through any of its officers, directors, stockholders, agents and servants, and no such person acting as manager of the interests of any corporation in such partnership, or engaged in or having charge of the management and affairs of such partnership, whether as executive, member of an executive committee or board, employee or otherwise, shall be personally subject to any liability for the debts of such partnership of such corporation. (1933, c. 354, s. 2.)

Section Misplaced.—Referring to this section it was said in 11 N. C. Law Rev., 213, that ch. 354, 1933 wholly misplaces the section on the supposed power of a corporation and the non-liability of a corporate officer for partnership obligations by annexing it to a section on dividends, in the article on "Meetings, Elections and Dividends," to which it is not in the slightest degree germane.

Art. 7. Foreign Corporations

§ 1180. Powers existing independently of permission to do business.—A corporation created by another state of the United States, or by any foreign state, kingdom, or government may acquire by devise or otherwise, and may hold, mortgage, lease, and convey real estate in this state for the purpose of prosecuting its business or objects, or such real estate as it may acquire by way of mortgage or otherwise in the payment of debts due to it, but is not eligible or entitled to qualify in this state as executor, administrator, guardian, or trustee under the will of any person domiciled in this state at the time of his death. The right to acquire, hold and convey real estate exists only where at the time of the acquisition, the foreign state, government, or kingdom under whose laws the corporation was created is not at war with the United States. (Rev., s. 1193; 1901, c. 2, s. 93; 1915, c. 196, s. 1.)

In General.—The Legislature of this State has not undertaken to regulate by statute the powers and methods of business of foreign corporations, nor to prescribe how their contracts shall be executed; and the general principles of law applicable to corporations apply. Rumbough v. Southern Improvement Co., 106 N. C. 461, 466, 11 S. E. 528.

A Matter of Comity Only.—A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid Federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or upon conditions made a prerequisite by statute. Lunceford v. Commercial Travelers Mutual Assso., 190 N. C. 314, 129 S. E. 805; Blackwells Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 59 S. E. 123, citing Range Co. v. Carver, 118 N. C. 328, 329, 24 S. E. 352.

Internal Management. — The courts of North Carolina have not the power and will not interfere with the internal management of the business matters of foreign corporations. Howard v. Mutual Reserve Fund Life Association, 125 N. C. 49, 34 S. E. 199; Reid v. Norfolk, etc., R. Co., 162 N. C. 355, 78 S. E. 306.

Power to Acquire and Sell Land.—Foreign corporations, having a right under their charters to acquire and sell land, can exercise such rights in this State to the same extent that corporations of this State can do so. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Capacity to Sue and Be Sued.—A foreign corporation can sue in the courts of another state by comity only, and the Legislature may deny to a foreign corporation that right, or may impose conditions on its exercise. Exchange Bank v. Tiddy, 67 N. C. 169.

Not Restricted to Authority Conferred in Home State.—A corporation incorporated in another State with authority to conduct business in North Carolina, which has complied with the statutes of this State, can maintain an action in the courts of this State although its charter may not authorize it to do business in the State of its incorporation. Troy, etc., Co. v. Snow Lumber Co., 173 N. C. 593, 92 S. E. 494.

§ 1181. Requisites for permission to do business.—Every foreign corporation before being permitted to do business in this state, insurance companies excepted, shall file in the office of the secretary of state a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized, the amount actually issued, the principal office in this state, the name of the agent in charge of such office, the character of the business which it transacts, and the names and post-office addresses of its officers and directors. And such corporation shall pay to the secretary of state, for the use of the state, forty cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such

corporation, but in no case less than forty dollars nor more than five hundred dollars; and also a filing fee of five dollars. Such corporation may withdraw from the state upon filing in the office of the secretary of state a statement signed by its president and secretary and attested by its corporate seal, setting forth the fact that such corporation desires to withdraw, and upon payment to the secretary of state of a fee of five dollars. Every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney-general, who shall prosecute such actions whenever it appears that this section has been violated. This section does not apply to railroad, banking, express or telegraph companies which, prior to March 9, 1915, had been licensed to do business in this state, or were engaged in business in this state, having a regularly appointed agent upon whom service of process could be made, located in this state. (Rev., s. 1194; 1901, c. 2, s. 57; 1903, c. 76; 1915, c. 263; 1935, c. 44.)

Editor's Note.—One extremely important question which has arisen under this section is in regard to the effect of compliance by foreign corporations, particularly whether after compliance they have a right to sue in the federal courts on the ground of diverse citizenship. This question arose in 1900 in the case of Debnam v. Tel. Co., 126 N. C. 831, 36 S. E. 269 and it was decided that the purpose of this section was to require all corporations doing business in the state to become domesticated and that the result of this domestication was that the corporation could not remove a cause, when sued in the state courts, to a federal court, on the ground of diverse citizenship. This ruling was upheld the following year in Allison v. Southern Ry. Co., 129 N. C. 336, 40 S. E. 91, and again in 1903 in Beach v. Southern Ry. Co., 131 N. C. 399, 42 S. E. 856. The Allison case, supra, was appealed to the U. S. Supreme Court and was pending at the time the Beach case, supra, was decided. In 1903 the U. S. Supreme Court handed down its opinion, reversing the N. C. Supreme Court and holding that a foreign corporation, by compliance with this section did not lose its right to remove to the federal courts. Southern Ry. v. Allison, 190 U. S. 326. This decision reverses Allison v. R. R., supra, and overrules Debnam v. Tel. Co., supra, and Beach v. R. R., supra.

The amendment of 1935 increases the amount payable on every one thousand dollars of captial stock from twenty to forty cents and placed the minimum at forty instead of twenty-five cents and the maximum as five hundred instead of two hundred and fifty dollars. The changes occur in the second sentence of the section.

In General.—Although this section excludes insurance companies from its operation, the statutes will be construed in relation to their subject-matter. The exception in this section is because insurance companies are exclusively dealt with elsewhere. Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

Exercise of Police Power.—There is nothing in the U. S. or State Constitution which prohibits the state, in the exercise of its police power, from making the transaction of business by a foreign corporation prior to procuring a license an indictable offense. State v. Agency, 171 N. C. 831, 834, 88 S. E. 726.

The only restriction of the constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

Property Not Removed to State.—This section requiring "domestication" enables plaintiffs to get personal service upon a foreign corporation, but does not remove its property to the State nor the situs of its debts created elsewhere. Stause Bros. v. Aetna Fire Ins. Co., 126 N. C. 223, 35 S. E. 471.

Effect of Non-Compliance.—From the character of this section and its evident purpose the contracts of a foreign corporation doing business in the State without compliance are not avoided, but the penalty alone is enforceable, and by action as the statute prescribes. Miller v. Howell, 184 N. C. 119, 122, 113 S. E. 621; Ober & Sons Company v. Katzenstein, 160 N. C. 439, 76 S. E. 476. And in such a case the State sues for the penalty. Blackwell's Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 363, 57 S. E. 5; Ober & Sons Company v. Katzenstein, supra.

If the State, in addition to the penalty, has desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling and other illegal contracts. Ober & Sons Company v. Katzenstein, 160 N. C. 439, 441, 76 S. E. 476.

How Charter Proven.—The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State of the State in which the corporation was created. Barcello v. Hapgood, 118 N. C. 712, 714, 24 S. E. 124.

Right to Sue and Be Sued.—Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of this section, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation, and where it brings action on a note in the county of its designated residence the defendants are not entitled to removal to the county of their residence as a matter of right. Smith-Douglass Co. v. Honeycutt, 204 N. C. 219, 167 S. E. 810.

Cited in Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773.

§ 1181(a). Sale of shares of stock held by life tenant.—The shares of the capital stock of a foreign corporation, in which any person owns a life estate, may be sold by an order in a special proceeding, unless prohibited by the instrument under which such title was acquired. All persons in esse who are interested in the property aforesaid shall be made parties to the proceedings. Whenever it appears from the petition, or otherwise, that among those interested are persons not in being, or who, because of some contingency, cannot be presently ascertained, such persons shall be made parties defendant by publication of notice of the proceeding, according to the usual practice, and a guardian ad litem shall be appointed for them, and he shall file answer, as provided by sections four hundred and fifty-two and four hundred and fifty-three of the Consolidated Statutes of North Carolina. The clerk of the Superior Court shall have power to make, from time to time, appropriate orders for the sale of said shares of stock, and for handling, securing and investing the net proceeds of sale. In lieu of the payment to the life tenant of the income and profits on the net proceeds of sale, the clerk may order the present cash value of the life tenant's share, ascertained as by law provided, to be paid to the life tenant absolutely, out of said proceeds and order the balance thereof to be invested and kept invested for the remaindermen, or paid over to a trustee appointed for the purpose, after the trustee shall have qualified by filing with the clerk an undertaking, to be approved by him, payable to the State of North Carolina, for the benefit of the remaindermen, in a sum double the amount of the balance of the net proceeds aforesaid, and conditioned for the prompt forthcoming and payment of the principal and interest or income thereof, and the faithful performance of duty and compliance with the orders of court relating thereto. The orders aforesaid shall be approved by the judge of the Superior Court residing in or holding the courts of the district, where such approval is now required by law. (1925, c. 59.)

Art. 8. Dissolution

§ 1182. Voluntary, generally.—When in the judgment of the board of directors it is deemed advisable and for the benefit of a corporation that it be dissolved, the board, within ten days

after the adoption of a resolution to that effect by a majority of the whole board, at a meeting called for that purpose, of which meeting every director shall have received three days notice, shall cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known postoffice address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation has its principal office, at least once a week for four successive weeks, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolution. The stockholders' meeting thus called may, on the day appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at one time, of which adjourned meeting notice by advertisement in said newspaper shall be given. If at such meeting two-thirds in interest of all the stockholders consent in writing that a dissolution take place, their consent, together with the list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that the consent has been filed, and the board of directors shall cause this certificate to be recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and published once a week for four successive weeks in a newspaper published in said county. Upon the filing in the office of the secretary of state of an affidavit of the manager or publisher of such newspaper that the certificate has been so published, the corporation is dissolved, and the board shall proceed to settle up and adjust its business and affairs. Whenever all the stockholders consent in writing to a dissolution, no meeting or notice thereof is necessary, but on filing the consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located. (Rev., s. 1195; 1901, c. 2, s. 34.)

Cross References.—As to the status of debts due and actions pending at time of dissolution, see sec. 1199. As to voluntary dissolution before payment of stock, see sec. 1184. As to involuntary dissolution, see sections 1185, 1186, 1187, 1188 and 1190.

Section Settles Mooted Question.—As far as North Carolina is concerned, this statute settles the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

A Part of Every Charter.—The provision of this section enters into every charter, and unless otherwise enacted by the Legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution, by resolution of the directors concurred in by two-thirds in interest of the stockholders. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

Motive Generally Immaterial.—When a corporation lawfully proceeds to wind up its affairs in accordance with this section the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the injury; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. White v. Kincaid, 149 N. C. 415, 416, 63 S. E. 109.

Same—Directors Are Trustees.—The directors of a corporation in proceedings for dissolution, under this section, are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. White v. Kincaid, 149 N. C. 415, 63 S. E. 109.

Liquidation to Escape Judgment.—An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. Chatham v. Realty Co., 180 N. C. 500, 105 S. E. 329.

Suits Pending Dissolution.—Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had under this section, the proper party plaintiff being the corporation or a receiver appointed therefor. Worthington v. Gilmers, 190 N. C. 128, 129 S. E. 153.

§ 1183. Liability of stockholders. — The stockholders of a corporation chartered under the laws of this state are individually liable for all taxes, costs and fees for the dissolution of the corporation, and the attorney-general is authorized to enforce the provisions of this section by suit before a justice of the peace or in the superior court in the county where such corporation had its principal place of business, whenever it appears upon report from the secretary of state that the corporation has ceased to transact business and fails to pay the taxes due the state or to file annual statements or to dissolve itself as provided by law. If a nonresident stockholder of the corporation refuses to sign the certificate of dissolution the resident stockholders shall make affidavit to that effect, and the written assent of such resident stockholders, accompanied by such affidavit, is sufficient to dissolve the corporation. If no stockholder of such corporation is found within the state the secretary of state has authority to declare the charter of the corporation forfeited, and shall publish annually in his corporation report a list of the corporations whose charters have been so forfeited. (1909, c. 730, s. 1.)

As to liability for unpaid stock, see sec. 1160 and annotations thereunder.

Cited in Life Ins. Co. v. Edgerton, 206 N. C. 402, 411, 174 S. E. 96.

§ 1184. Voluntary, before payment of stock.— The incorporators named in a certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate, verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises. Thereupon the corporation is dissolved. (Rev., s. 1177; 1901, c. 2, s. 35.)

§ 1185. Involuntary, at instance of private persons. — Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the attorney-general in the name of the state, in the following cases:

1. For any abuse of its powers to the injury of the public or of its stockholders, creditors, or debtors.

2. For nonuser of its powers for two or more consecutive years.

3. When it is insolvent, or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights.

4. Upon any conviction of the company of a persistent criminal offense. (Rev., s. 1196; Code, s. 694; 1901, c. 2, s. 73.)

Cross References.—As to voluntary dissolution, see secs. 1182 and 1184. As to other means of involuntary dissolution, see secs. 1186, 1187, 1188, 1190 and 1191.

Editor's Note.—The provision in the next section, that the stockholder instituting the dissolution proceeding must own one-fifth or more of the stock, does not apply to proceedings under this section. Laisley v. Merchantile Co., 179 N. C. 575, 103 S. E. 213.

Nor is it necessary that the stockholder allege or prove that he first made application to the directors or management to take action in the matter for this relates to suits concerning corporate management. Id.

Failure to Maintain Principal Place of Business in State.—The persistent failure of a corporation chartered in this State to maintain its principal place of business within the State as required by its charter, and the withdrawing of all its agencies from the State, will authorize the courts to decree a dissolution of such corporation upon the suit of a stockholder, under this section. Simmons v. Norfolk etc., Steamboat Co., 113 N. C. 147, 18 S. E. 117. As to requirement to maintain principal place of business in the state, see secs. 1168 and 1133.

Direct Proceeding Necessary.—A cause of forfeiture cannot be taken advantage of collaterally or otherwise than by a direct proceeding for that purpose so that the corporation may be heard in answer. Asheville Division v. Aston, 92 N. C. 579, 585.

Amount of Stock Held by Plaintiff Immaterial.—In a suit to dissolve a corporation for nonuser of the powers the right to proceed is conferred on the individual stockholder by express provision of the statute, and without regard to the amount of his holdings. Lasley v. Mercantile Co., 179 N. C. 575, 577, 103 S. E. 213.

Proceedings May Be in Equity.—While it is more orderly to proceed under this section to appoint a receiver for a corporation, this could have been done in the courts of equity, wherein, under the decree, all parties were before the court or thereunder could be brought in, and the same relief awarded as if the provision of the statute had been complied with. Greenleaf v. Land & Lumber Co., 146 N. C. 505, 60 S. E. 424.

Bankruptcy Proceedings Not Authorized.—The fact that minority stockholders have instituted a suit in the State court under this section, and that a receiver has been appointed under sec. 1208, does not entitle creditors to avail themselves of the relief provided for them in the federal bankruptcy statute until the corporation has become insolvent and committed an act of bankruptcy. Bank v. Gudger, 212 Fed. 49, 54. As to voluntary dissolution by bankruptcy, see sec. 1190.

Where Creditors Estopped.—Where a provision in a deed of trust is to the effect that upon default in the payment of the interest, etc., the trustee shall have the power to foreclose upon request of the holders of a certain part of the par value of the bonds, those who hold such a proportionate part are bound by the valid provision of their contract, and without complying therewith a permanent receiver may not be appointed by the court under the provisions of this section in their suit for the purpose, though the corporation itself may be insolvent. Jones v. A. & W. Ry. Co., 193 N. C. 590, 137 S. E. 707.

§ 1186. Involuntary, by stockholders. — When stockholders owning one-fifth or more in amount of the paid-up stock of any corporation organized under the laws of and doing business in this state, except corporations organized for religious, charitable, fraternal, and educational purposes, and except banking and public-service corporations, apply in term or vacation to the judge of the superior court holding the courts for the county in which the principal place of business of the corporation is situated, by petition containing a statement that for three years next preceding the filing of the petition, which time shall begin to run from three years after it has begun business, the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation, over and above the salaries and expenses authorized by its by-laws and regulations, or that the corporation has paid no dividend for six years preceding said application; or whenever stockholders owning one-tenth or more in amount of the paid-up common stock of any such corporation apply to the judge of the superior court as aforesaid by petition containing a statement that the corporation has paid no dividend on the common stock for ten years preceding said application, and that they desire a dissolution of the corporation, the judge shall make an order requiring the officers of the corporation to file in court, within a reasonable time, inventories showing all the real and personal estate of the corporation, a true account of its capital stock, the names of the stockholders, their residences, the number of shares belonging to each, the amount paid in upon said shares and the amount still due thereon, and a statement of all the encumbrances on the property of the corporation and all its contracts which have not been fully satisfied and canceled, specifying the place and residence of each creditor, the sum owing to each, the nature of the debt or demand, and the consideration therefor, and the books and papers of the corporation. Upon the filing of the inventories, accounts and statements, the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not be dissolved. If it appears to the court that the statements contained in the petition are true, the court may adjudge a dissolution of the corporation and shall appoint one or more receivers, who shall have all powers of receivers conferred by this chapter for the winding up the affairs and distribution of assets of the corporation. If it appears to the court that the corporation is insolvent or in imminent danger of insolvency, the court may appoint a temporary receiver of the corporation pending dissolution. No suit shall be brought for the dissolution of a corporation under the provisions of this section until each and all of the petitioners have owned their stock for the term of two years prior to the institution of the action; nor shall any such suit be brought for the period of three years after a final judgment upon a prior petition as herein provided. (1913, c. 147; 1915, c. 137, s. 1.)

Cross References.—As to voluntary dissolution, see secs. 1182 and 1184. For other means of involuntary dissolution, see the preceding section and the three following sections.

Editor's Note.—The provision for dissolution, upon the application of stockholders owning one-tenth or more of the paid up common stock, when the corporation has paid no dividends for ten years preceding, was added by Laws of 1915, ch. 137. In regard to this amendment the court said in Winstead v. Hearne Bros., 173 N. C. 606, 610, 92 S. E. 613; "This amendment would appear to be inconsistent with the six-year clause of the original act, and to require ten years complete suspension of dividends on the common stock of a corporation before application can be made for a receiver on that ground."

The constitutionality of this section providing for the dis-

solution of corporations in certain instances, cannot be successfully assailed in an action thereunder to dissolve a corporation organized subsequent to its enactment. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373.

A Remedial Statute.—This section is a remedial statute, and intended to remedy an abuse of power by the majority shareholders by a suspension of dividends, a method at times resorted to for the purpose of freezing out minority holders or depressing the market value of the shares. Winstead v. Hearne Bros., 173 N. C. 606, 92 S. E. 613.

Applies to "A Going Concern."—This section is intended to control and regulate suits for the dissolution of a corporation doing business as "a going concern," and by reason of the fact that they have not earned for three years next preceding the filing of the petition a net dividend of 4 per cent, or who have not paid a dividend for six years, and clearly has no application to an action under the preceding section to dissolve a corporation for nonuse of its powers. Lasley v. Mercantile Co., 179 N. C. 575, 577, 103 S. E. 213.

When Stockholders Estopped. — Where a stockholder in a corporation has actively participated in its management and consented to the increase in its capital stock from the earnings of a profitable concern, which has proven decidedly advantageous, he is thereafter estopped to assert the right given a holder of a certain amount of the stock to throw the corporation into a receiver's hands for nonpayment of dividends within a certain period. Winstead v. Hearne Bros., 173 N. C. 606, 92 S. E. 613.

Construed with Art. 12 on Reorganization. — Standing alone, this section might be considered as confining the court, in such a proceeding, to a decree strictly of dissolution, involving a destruction of the corporate franchise, but when construed as it should be (Keith v. Lockhart, 171 N. C. 451, 457, 88 S. E. 640), in connection with other provisions of our statute law on the subject, namely Art. 12 of this chapter, the court has ample power to enter a decree for a sale of franchise with the corporate property, transferring the same to the purchasers and conferring upon them the right to recognize and carry on the business as a new corporation. Coal and Ice Co. v. R. R., 144 N. C. 732, 57 S. E. 444; Wood v. Staton, 174 N. C. 245, 250, 93 S. E. 794.

Paid-Up Stock Refers to Common and Preferred.—It is not required that stockholders suing for its dissolution under this section should own one-fifth of its common stock in order to maintain the action, it being sufficient if they own common and preferred stock constituting one-fifth or more of the total paid-in capital stock of the corporation, and their right to maintain the action is not affected by the fact that holders of preferred stock are given no vote in the management of the corporation. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373.

Dividend Must Equal 4%.—The fact that a corporation has earned net income sufficient to pay in good faith dividends on its preferred stock within three years prior to the institution of an action for its dissolution under this section, is not sufficient to resist the action for dissolution if the earned dividends do not amount to four per cent on its total capital stock, preferred and common. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373.

When Order for Inventories Proper.—Where a petition in an action for dissolution of a corporation meets all requirements of this section, it is not error for the court to require the defendant corporation to file inventories as provided. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 810, 172 S. E. 373.

Dissolution in Discretion of Court.—Whether the court will order dissolution upon the final hearing is to be determined in its discretion according to whether, from all facts shown, the failure of the corporation to earn the required dividends was due to temporary conditions or to its management. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 810, 172 S. E. 373.

§ 1187. Involuntary, by attorney-general. — An action may be brought by the attorney-general in the name of the state against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion, or concealment of a material fact, by the persons incorporated or by some of them, or with their knowledge or consent; or for the purpose of annulling the existence of a corporation, other than municipal, when such corporation—

1. Offends against the act creating, altering, or renewing it.

2. Violates any law by which it has forfeited its charter by abuse of its power.

3. Has forfeited its privileges or franchises by failure to exercise its power.

4. Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises.

5. Has exercised a franchise or privilege not conferred upon it by law.

6. Has failed to use its powers for two or more consecutive years.

7. Has become insolvent as manifested by the return of an execution unsatisfied upon a judgment against the corporation docketed in the superior court of the county where it has its principal place of business.

It is the duty of the attorney-general, whenever he has reason to believe that any of these acts or omissions can be established by proof, to bring an action in every case of public interest, and also in every other case in which satisfactory security is given to indemnify the state against the costs and expenses to be incurred thereby. (Rev., s. 1198; Code, ss. 604, 605; 1889, c. 533.)

Cross References.—As to voluntary dissolution, see secs. 1182 and 1184. As to other means of involuntary dissolution, see the two preceding sections and the three following sections. As to action in the nature of quo warranto by Attorney-General against corporations, see sec. 870.

Editor's Note.—Formerly this section provided that an action might be brought against a corporation by the Attorney-General, "whenever the Legislature shall so direct." Under this wording it was held that the Attorney-General could not bring an action to vacate the charter of a corporation of his own motion, but that the authority of the Legislature was necessary. Attorney General v. R. Co., 134 N. C. 481, 46 S. E. 959.

Forfeiture without Proceedings.—A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause but for any other cause of forfeiture a direct proceedings must be instituted by the sovereign to enforce the forfeiture. Asheville Division v. Aston, 92 N. C. 579.

An information in the nature of a writ of quo warranto against a corporation, to have its privileges declared forfeited because of neglect and abuse in the exercise of them, must be filed in the name of the Attorney-General of the state, and can not be instituted in the name of a solicitor of a judicial circuit. Houston v. Neuse River Nav. Co., 53 N. C. 476.

An information, filed by the Attorney-General, for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place and overt acts. Attorney General v. Petersburg, etc., R. Co., 28 N. C. 456.

Area of Rural Community Misrepresented.—The right of action is given the Attorney-General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one school district," secs. 7380, 7381, under the provisions of this section, authorizing the Attorney-General to bring action when a certificate of incorporation has been procured upon "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc. State v. Rural Community, 182 N. C. 861, 109 S. E. 576.

§ 1188. Forfeiture or dissolution for failure to organize or act. — When a charter has been granted creating a corporation, and the incorporators for two years neglect to organize and carry into effect the intent of the charter, or when organized, if they for two consecutive years cease to act, then this disuse of their corporate privileges and powers is a forfeiture of the charter. If, after thirty days notice by the secretary of

state, the corporation fails to surrender its corporate rights or to dissolve, in the manner provided in this chapter, the secretary of state shall report it to the attorney-general, who shall institute an appropriate action for its dissolution. (Rev., s. 1246; Code, s. 688; 1901, c. 2, s. 106.)

State Must Bring Action.—The fact that a bank failed to organize within two years after it was chartered cannot affect the validity of whatever lien the bank may, by its charter, have on the shares of stock of a stockholder indebted to it. Such defect in the organization of the bank can be taken advantage of only by a direct proceeding by the state for that purpose. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35.

§ 1189. Forfeiture for nonuser by hydro-electric companies. — All waterpower, hydro-electric power, and water companies or corporations organized in this state shall be required to begin active work in making their proposed development within two years after their organization and diligently to prosecute their work on the same until it has been completed; and a failure to begin the work or development within the time, and to diligently prosecute work on the same until its completion, as herein provided, shall be legal grounds for declaring their charter rights, privileges and franchises forfeited, by the state, acting through its attorney-general, upon the recommendation of the corporation commission of this state: Provided, this section shall not apply to any company which is supplying the public and is meeting the demands of the public for its services. (1913, c. 133, s. 2.)

§ 1190. Involuntary, by bankruptcy. — When a corporation chartered under the laws of this state is adjudged bankrupt under the laws of the United States or when it shall be made to appear to a judge of the superior court that all of the assets of the corporation of whatever kind or character have been lost to the stockholders by reason of foreclosure, assignment, or execution under judgment, and that the corporation is therefore unable to conduct the business for which it was organized, the charter of the corporation is forfeited without further action, unless the stockholders determine by appropriate resolutions to continue the corporate existence of the corporation after the adjudication in bankruptcy, foreclosure, assignment or sale under executions, and furnish the secretary of state with a duly certified copy of the resolutions, all within six months after the adjudication, foreclosure, assignment or sale under executions. The stockholders of a bankrupt corporation whose existence is continued by the foregoing procedure must pay all privilege taxes which have accrued against the corporation since the adjudication, together with a fee of one dollar allowed the secretary of state for recording and filing the certificate provided for in this section. (1915, c. 134, ss. 2, 3; 1931, c. 310.)

Editor's Note.—Under this section prior to the Act of 1931, corporate charters were automatically forfeited by an adjudication of bankruptcy unless the stcokholders took certain specified action within six months. The amendment extends a like forfeiture to a corporation which is shown in the superior court to have lost its entire assets either through foreclosure, assignment or execution. 9 N. C. Law Rev. 363.

§ 1191. When franchises forfeited by neglect, etc., corporation dissolved; costs. — If it is adjudged that a corporation against which an action has been brought has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such rights, privileges and franchises, and that it be dissolved. If judgment is rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons making the claim, or by attachment process against the directors or other officers of the corporation. (Rev., ss. 1209, 1210; Code, ss. 617, 618.)

§ 1192. Service of summons in action for dissolution.—In an action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and any others interested in the affairs of the company by publishing a copy at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse of such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a newspaper published in the city of Raleigh. This publication is sufficient service on all the stockholders, creditors of, or dealers with, the corporation, and upon the corporation, if no officer can after due diligence be found in the state and it has no process agent in the state; and all such stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest, under such rules as the court for the purpose of justice prescribes. (Rev., s. 1199; Code, s. 695; 1911, c. 173, s. 1.)

§ 1193. Corporate existence continued three years. — All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. In any pending action the court, in its discretion, may extend the time for winding up the affairs of such corporation. (Rev., s. 1200; Code, s. 667; 1901, c. 2, s. 58.)

In General.—This section expressly extends the life of the corporation for three years after dissolution, for the purpose of winding up its affairs. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893.

Purpose.—The provisions of this section are free from any ambiguity. The mischief to be remedied was the confusion possibly resulting from the abrupt dissolution of the corporation from any cause. The plan adopted was the continuation of the corporate character solely for the purpose of winding up its affairs. General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, 388.

Applies to All Corporations.—This section is not a provision of the charter of a particular corporaton but a general

provision of law applying to all corporations, and the repeal of this particular charter does not repeal the section pro tanto. Indeed, the repeal makes it applicable actively to the particular corporation, as a sort of statutory letters of administration; whereas before the repeal it was a passive provision. General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, 388.

Under this section, a corporation continues for three years to be a body corporate for the purpose of disposing of its property and dividing its assets, and the section is applicable to any corporation. Burnet v. Lexington Ice, etc., Co., 62 F. (2d) 906, 909.

Remedy Must Be Pursued within Three Years. — The statutory remedy is exclusive of all others, and must be pursued within the three years, and a failure to proceed within that period will be a complete defense, not only to the corporation, but to the stockholders, who by its charter, are made individually responsible in the event of its insolvency. VonGlahn v. DeRosset, 81 N. C. 468.

Where a corporation is actually dissolved, the lapse of more than three years from dissolution, will serve as a complete defense to actions against it. Standard Trust Co. v. Commercial National Bank, 240 Fed. 303, 306.

Same—Only Applies Where Charter Expired.—This provision has no application to a case where a corporation had ceased to do business but its charter had not expired or been annulled. Heggie v. Building & Loan Assn., 107 N. C. 581, 592, 12 S. E. 275.

Hence the action of a judgment creditor is not barred in three years after the corporation has ceased to do its regular business. Heggie v. Building & Loan Assn., 107 N. C. 581, 12 S. E. 275.

Deed from Dissolved Corporation.—Where the certificate of the probate of a deed from a corporation, dissolved upon certificate of the secretary of state, made within the time allowed by this section, recites as a fact judicially found that the deed was made in the name of the corporation by the order of the directors, the trustee's objection that it was not executed in the method required by sec. 1194, is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mortgage, is only surplusage, and harmless. Lowdermilk v. Butler, 182 N. C. 502, 109 S. E. 571.

Liquidation by National Bank.—Where a national bank liquidated under Rev. St. secs. 5220, 5221 (Comp. St. 1913, secs. 9806, 9808) it did not terminate its existence as a legal entity nor did it cease to be a corporate entity which can sue and be sued. Hence this section does not apply. Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 303.

Section Does Not Apply to Merger.—Where an old corporation is by a transfer of all its property, franchises and privileges merged into a new corporation, with the same stockholders and directors as the old, which assumes all the liabilities of the old corporation, this section does not apply so as to make the old corporation a necessary party to the action against the new. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

No Equity Jurisdiction.—This section and the two following sections, which continue the existence of defunct corporations for three years after the expiration of their charters for the purpose of bringing and defending suits and closing their general business, oust the former equity jurisdiction for the appointment of a receiver, at the instance of creditors to wind up the corporate affairs. VonGlahn v. DeRossett, 81 N. C. 468.

Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464.

§ 1194. Directors to be trustees; powers and duties. — On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of the property. They have power to sue for and recover the said debts and property in the name of the corporation, and are suable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees. (Rev., ss. 1201, 1202; Code, s. 687; 1901, c. 2, ss. 59, 60.)

As to directors in general, see sec. 1144 and notes thereunder.

Trustees Sell in Corporate Name.—The certificate of the secretary of state for the dissolution of a corporation, continues the corporation for three years, and the provisions of this section, that the directors as trustees may sell and convey the corporate property, does not exclude the idea that they may do so in the name of the corporation in whom the original legal title was originally vested. Lowdermilk v. Butler, 182 N. C. 502, 109 S. E. 571.

Confession of Judgment in Director's Favor.—A confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107.

Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464; Life Ins. Co. v. Edgerton, 206 N. C. 402, 411, 174 S. E. 96.

§ 1195. Jurisdiction of superior court. — When a corporation is dissolved, in any manner whatsoever, the superior court, on application of a creditor or stockholder, may either continue the directors as trustees or appoint one or more persons receivers of the corporation. The court has jurisdiction of the application, and of all questions arising in the proceedings thereon, and may make, at any place in the district, any orders, injunctions, or decrees therein as justice and equity require. The powers of such trustees or receivers are as elsewhere given in this chapter, and may be continued as long as the court thinks necessary. (Rev., ss. 1203, 1204; Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62.)

Cross References.—As to appointment of receiver, see sec. 1208 and annotations. As to powers and duties of receivers, see sec. 1209 and annotations.

When Section Applies.—Although by section 1194 the directors, unless otherwise determined by order of some court having jurisdiction, are made trustees with power to settle or wind up the corporate business under this section, this entire matter of winding up the corporate business after dissolution may be taken charge of by the court, and must be at the instance of either the creditors or stockholders, or any one of them. White v. Kincaid, 149 N. C. 415, 422, 63 S. E. 109.

Who Is a "Creditor".—Any one who has a debt or demand against an insolvent corporation upon a contract, express or implied, comes within the meaning of the word "creditor" used in the statute, and may apply to the courts and obtain, in proper instances, the appointment of a receiver for the corporation. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 422, 70 S. E. 820.

Property In Custodia Legis.—The property of an insolvent corporation in a receiver's hands is in custodia legis, and the court has jurisdiction by virtue of its general equitable powers, and by express provision of this section. Lasley v. Scales, 179 N. C. 578, 103 S. E. 214.

Jurisdiction Over Foreign Corporation.—An insolvent corporation, with its property or plant located in this state, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another state. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 422, 70 S. E. 820, approving Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650.

Authority to Adjust Claims.—While in the statute relating to the winding up of the affairs of an insolvent corporation no specific directions are given as to mutual debts and credits, yet under this section which provides that the court shall make such orders as justice and equity shall require and direct how claims shall be approved, the claims may be adjusted. Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371.

When Receiver Appointed.—When a corporation is insolvent or in imminent danger of insolvency, and especially when its business operations have practically been suspended owing to its financial condition, the court may, upon proper application of a creditor or stockholder, appoint a

receiver of its assets to be administered for the benefit of all of its creditors. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 820.

Judgment against Corporation.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity. Dobson v. Simonton, 86 N. C. 492.

§ 1196. Injunction; notice and undertaking.—An injunction to suspend the general and ordinary business of a corporation or to appoint a receiver shall not be granted without due notice of the application therefor to the corporation, except where the state is a party to the proceeding, unless the plaintiff gives a written undertaking, executed by two sufficient sureties to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum mentioned in the undertaking, which the corporation may sustain by reason of the injunction, or the appointment of the receiver, if the court finally decides that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court directs. (Rev., s. 1205; Code, s. 343; C. C. P., s. 194.)

As to injunction in general, see ch. 12, Art. 36 and annotations. As to receivers, see sections 1195, 1208-1217.

§ 1197. Wages for two months lien on assets.—In case of the insolvency of a corporation all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, which lien is prior to all other liens that can be acquired against such assets. (Rev., s. 1206; 1901, c. 2, s. 87.)

As to mortgaged property subject to execution for labor, see section 1140 and annotations thereunder.

An Ancillary Remedy.—This section, giving to laborers of insolvent corporations a specific lien upon the assets of the company for two months' wages at least, was not intended to militate against rights that they might otherwise have under the existing law for debts due them, but gives them a special lien for certain wages. Union Trust Co. v. Southern Sawmills etc., Co., 166 Fed. 193, 204.

Applicable Only to Corporations.—The claim for services rendered an individual is not entitled to a preference upon the individual's insolvency and receivership, as the section applies only to employees of an insolvent corporation. In re Reade, 206 N. C. 331, 173 S. E. 342.

Clear Expression of Intent.—The language used in this section is admirably fitted to give expression to the legislative intent with respect to the favored class of creditors to which it undertakes to accord preferential treatment in the distribution of the assets of an insolvent corporation, and small latitude is afforded for speculation. The favored creditors are "laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations." Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 513, 86 S. E. 184.

Prior Lien Holders Protected.—Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in this section cannot affect the vested rights obtained by the prior lien holders. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

Contractor Not Included.—A contractor, furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation having since become insolvent within the two months next preceding the date of the institution of the proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of this section. Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 86 S. E. 184.

Agent Having Authority to Deduct Salary.—Under this section an agent with authority to make collections and to deduct his salary and expenses from the sums collected, has no lien for claims for salary and expenses owing before his appointment to the position. Cummer Lumber Co. v. Seminole Phosphate Co., 189 N. C. 206, 126 S. E. 511.

Notice Need Not Be Filed.—Under this section the laborer is not required to file a notice of his claim. Walker v. Lumber Co., 170 N. C. 460, 87 S. E. 331.

Service after Receivership.—This section is not intended to destroy the lien for such wages and services performed after the company goes into the hands of a receiver. The word "within" means "subsequent," that is, that after 60 days prior to the insolvency the laborers and workmen shall have a first lien for their wages. Walker v. Lumber Co., 170 N. C. 460, 462, 87 S. E. 331.

§ 1198. Distribution of funds.—After payment of all allowances, expenses and costs, and the satisfaction of all general and special liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same. Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, it shall be divided and paid to the general stockholders proportionately, according to their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered and a certified copy of the judgment filed in the office of the secretary of state, and also in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and the same shall be recorded in the Corporation Book and in the Record of Incorporations in these offices respectively. Thereupon the corporation is dissolved without being required to comply with section 1182 under this chapter. (Rev., s. 1207; Code, s. 670; 1901, c. 2, ss. 63, 89; 1909, c. 15, s. 1.)

In General.—When the receiver shall have collected the assets he is required to pay all the debts, if the funds shall be sufficient, and, if not sufficient, to distribute the same ratably, among all the creditors who shall prove their claims. When once the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 515, 20 S. E. 765.

No Conflict with Constitution.—The enactment of statutes regulating the manner in which corporations shall equitably discharge the claims of their creditors, or to subject all or a portion of their property to sale at the instance and for the benefit of creditors, is not in conflict with the constitutional provisions in respect to vested rights or the obligation of contracts. Bass v. Roanoke Navigation Co., 111 N. C. 439, 16 S. E. 402.

Real Property Does Not Revert.—Upon the dissolution or extinction of a corporation for any cause, the real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the state; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, overruling Fox v. Horah, 36 N. C. 358.

Creditors Come before Stockholders.—A corporation can not settle with its members, by the application of assets to the retirement or redemption of the stock of the shareholders, until it has first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors. Heggie v. Building & Loan Asso., 107 N. C. 581, 12 S. E. 275.

Costs.—It is error to tax the costs against first-mortgage creditors, who have established the priority of their lien over the rights of general creditors, in statutory proceedings to wind up the affairs of an insolvent corporation and to distribute its assets. Hickston Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 63 S. E. 1048.

Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464.

§ 1199. Debts not extinguished nor actions abated.—In case of the dissolution of a corporation, the debts due to and from it are not thereby extinguished, nor do actions against a corporation which is dissolved before final judgment abate by reason thereof, but no judgment shall be entered therein without notice to the trustees or receivers of the corporation. (Rev., ss. 1201, 1208; Code, s. 687; 1901, c. 2, ss. 59, 64.)

As to directors becoming trustees upon dissolution, see sec. 1194. As to distribution of funds, see preceding section.

§ 1200. Copy of judgment to be filed with secretary of state; costs.—A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the secretary of state, and a note thereof shall be made by the secretary of state on the charter or certificate of incorporation and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court in the action wherein the corporation is dissolved. (Rev., s. 1211; 1901, c. 2, s. 65.)

Art. 9. Execution

§ 1201. How issued; property subject to execution.—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (Rev., s. 1212; 1901, c. 2, s. 66.)

As to incorporation by purchaser at execution sale of railroads, see section 3462. As to execution in general, see sec. 663 et seq.

Editor's Note—Levy or Franchise.—Prior to the enactment of the Revised Code, the franchise of a corporation, such as that of a railroad or navigation company, could not be levied upon and sold under a writ of fieri facias, or any other writ of execution known either to our common or statute law. Taylor v. Jerkins, 51 N. C. 315, 318; State v. Rives, 27 N. C. 297, 306.

To this section the Revised Code added the following: "And if the judgment or decree be against a railroad or other corporation authorized to receive fares or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fares or tolls, and also all other corporate property, real or personal, may be taken on execution and sold, under rules regulating the sale of real estate." Rev. Code, ch. 26, sec. 9. See Taylor v. Jerkins. 51 N. C. 315, 317, 319; Gooch v. McGee, 83 N. C. 60, 66.

As will be seen this provision no longer constitutes a part of the section, and it is now held that the franchise and corporate property must go together. They cannot be separated. There cannot be a corporation without a franchise. James v. Western N. C. R. Co., 121 N. C. 523, 527, 28 S. E. 537.

So the real estate acquired by a public corporation in exercise of a delegated right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its incidents, so as to give the purchaser a title to the property divested of all the duties and obligations assumed by the company. Gooch v. McGee, 83 N. C. 60.

The franchise of a water company is inseparable from its plant and property. The public necessity requires that they should be sold together, for, in this case, the purchaser will take cum onere and the public will be protected. Pipe Co. v. Howland, 111 N. C. 615, 625, 16 S. E. 857.

Proceedings supplemental to execution lie against a private corporation created by a special act of the Legislature and organized for purposes of private gain for its shareholders. LaFountain v. Southern Underwriters' Asso., 79 N. C. 514.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489.

§ 1202. Agent must furnish information as to property to officer.—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (Rev., s. 1213; 1901, c. 2, s. 67.)

§ 1203. Shares of stock subject to; agent must furnish information. — Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this state, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (Rev., ss. 1214, 1215; 1901, c. 2, ss. 69, 70.)

As to shares of stock being liable to attachment, see sec. 818.

Editor's Note.—Before this section was passed it was held that shares of stock, not being goods or chattels, lands or tenements within the sense of the writ, could not be sold under a fi. fa. See Pool v. Glover, 24 N. C. 129.

§ 1204. Debts due corporation subject to; duty and liability of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation; and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable setoffs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this and the last preceding section is liable to pay to the execution creditor the amount due on the execution, with costs. (Rev., s. 1216; 1901, c. 2, s. 68.)

§ 1205. Violations of three preceding sections misdemeanor. — If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due,

or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (Rev., s. 3690; 1901, c. 2, ss. 67, 68, 70.)

§ 1206. Proceedings when custodian of corporate books is a nonresident. — When the clerk, cashier, or other officer of any corporation incorporated under the laws of this state, who has the custody of the stock-registry books, is a nonresident of the state, it is the duty of the sheriff receiving a writ of execution issued out of any court of this state against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the postoffice nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitutes a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (Rev., s. 1217; 1901, c. 2, s. 71.)

§ 1207. Duty and liability of nonresident custodian.—The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in the preceding section, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation; and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him; but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (Rev., s. 1218; 1901, c. 2, s. 72.)

Art. 10. Receivers

§ 1208. Appointment and removal.—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Rev., ss. 1219, 1223; Code, s. 668; 1901, c. 2, ss. 73, 79.)

Cross References.—As to receivers in general, see secs. 859 et seq. For powers and bonds of corporate receivers, see next section. For a full treatment of receivers, see 10 N. C. Enc. Dig. 839-877; 15 N. C. Enc. Dig. 334-349.

As to statute relating to receivers applicable to insolvent banks see § 218(e) and annotations thereunder.

Broad Powers Conferred.—This article is so broad and comprehensive in its provisions regarding the appointment of receivers that it was not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 425, 70 S. E. 820.

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are "fastened upon the property." Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526.

Discretion of Court.—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge and will not generally be reviewed unless this discretionary power has been greatly abused, and though the practice of appointing the plaintiff attorney as such receiver is not commended, he will not be removed, as a matter of law, on appeal, though, as any other receiver, he may be removed upon application to the proper judge of the superior court. Mitchell v. Realty Co., 169 N. C. 516, 86 S. E. 358; Fisher v. Trust Co., 138 N. C. 102, cited and approved. Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

Effect of Appointment.—The appointment of a receiver for a company, who is directed to take control of all the property of the company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; and they can not interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership. Lenoir v. Linville Improvement Co., 126 N. C. 922, 36 S. E. 185.

Title of Receiver Relates Back.—The courts have now, as a rule, come to the conclusion that the title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. Worth v. Bank, 122 N. C. 397, 29 S. E. 775; Pelletier v. Lumber Co., 123 N. C. 596, 31 S. E. 855; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Fisher v. Western Carolina Bank, 132 N. C. 769, 775, 44 S. E. 601.

Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young v. Rollings, 90 N. C. 125.

Directors Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and also investing him with the usual rights and powers of receivers, involves the correlative duty of delivering the same to him by the late officers of the company in whose hands the funds are, although not expressly required in the decretal order. Young v. Rollings, 90 N. C. 125.

Valid Liens Not Divested.—The title of a receiver relates only to the time of his appointment, and valid liens exist-

ing at that time are not divested thereby. Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371.

Receiver Appointed after Reorganization.—The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. Marshall v. Western N. C. R. R. Co., 92 N. C. 322.

Dissolution.—Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it as a corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. Dobson v. Simonton, 78 N. C. 63.

Fraudulent Disposal of Property.—If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. Latta v. Catawba Elect. Co., 146 N. C. 285, 59 S. E. 1028.

Cessation of Business.—Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with the provisions of the statute. Greenleaf v. Land, etc., Co., 146 N. C. 505, 60 S. E. 424.

Not Available in Federal Courts.—This section does not confer upon a stockholder or a creditor a substantive right, but merely gives a new remedy and such remedy is not available in the federal courts. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Adjudication of Bankruptcy during Insolvency Proceeding.—Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the state courts. In Re McKinnon Co., 237 Fed. 869, 872.

When Receiver Unnecessary.—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those thereunder beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. Chatham v. Mecklenburg Realty Co., 180 N. C. 500, 105 S. E. 329.

§ 1209. Powers and bond.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this article.

7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Rev., ss. 1222, 1231; Code, s. 668; 1901, c. 2, ss. 74, 84.)

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation and the receivers take possession of the corporation until further order of the court. ABM. S. See & Depew Inc. v. Fisheries Products Co., 9 Fed. (2d) 235, 237.

Power to Bring All Actions.—The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Bank, 135 N. C. 410, 415, 47 S. E. 893.

May Sue in Own Name.—The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Industrial Mfg. Co., 114 N. C. 321; 23 L. R. A. 322, 19 S. E. 371; Gray v. Lewis, 94 N. C. 392.

Receiver May Plead Usury.—The plea of usury may be made by a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N. C. 509, 510, 70 S. E. 997.

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

All Rights May Be Adjusted.—In the suit by the receivers may be adjudicated all the rights of the bank, its creditors and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendant may be entitled to. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Gray v. Lewis, 94 N. C. 392.

No Extraterritorial Power.—A receiver, appointed in a stockholder's action to sequester assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Priority of Receivers.—One receiver has no priority over another receiver previously appointed in another district on a creditors' bill. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Power after Charter Has Expired.—A receiver, appointed under the preceding section, to wind up the affairs of a corporation, can proceed to collect in the assets and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. Asheville Division v. Aston, 92 N. C. 579.

Same—Effect of Judgment.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity; and the same may be impeached by a party interested in the administration of its assets. Dobson v. Simonton, 86 N. C. 492.

Sufficiency to Pass Title.—Where, under a court order, the receiver of an insolvent has conveyed lands according to the terms of a deed of trust by which the bank held the land, applying this and the following section the deed was sufficient in law to pass title. Wachovia Bank, etc., Co. v. Hudson, 200 N. C. 688, 158 S. E. 244.

§ 1210. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at

every civil term during the continuance of the trust. (Rev., ss. 1224, 1225; 1901, c. 2, ss. 75, 80.)

Cross Reference. — As to a conveyance by a receiver of an insolvent bank, according to a deed of trust, see § 1209 and the note thereto.

Prior Liens Not Divested.—It has been held, and is a generally accepted doctrine, that the appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Lumber Co., 123 N. C. 596, 31 S. E. 855; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Fisher v. Western Carolina Bank, 132 N. C. 769, 44 S. E. 601; Garrison v. Vermont Mills, 154 N. C. 1, 69 S. E. 743; Withrell v. Murphy, 154 N. C. 82, 90, 69 S. E. 748.

Insurance Policies Not Forfeited.—The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. Southern Pants Co. v. Insurance Co., 159 N. C. 78, 74 S. E. 812.

Effect of Subsequent Judgment against Corporation.—The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Same—Does Not Relate Back. — A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under this section, who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N. C. 42, 45, 94 N. C. 526.

Receiver Made Defendant.—In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. Douglass v. Dawson, 190 N. C. 458, 463, 130 S. E. 195.

Applied in Teague v. Teague Furniture Co., 201 N. C. 803, 161 S. E. 530.

§ 1210(a). Foreclosure by receivers and trustees of corporate mortgagees or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court. (1931, c. 265, s. 1.)

Editor's Note.—This statute, which became effective April 10, 1931, excepted pending litigation. The need for the statute is not apparent, in view of §§ 1209 and 1210, as construed in Wachovia Bank and Trust Co. v. Hudson, 200 N. C. 668 decided shortly after the act was ratified, unless it was because those statutes are limited to receiverships and are inapplicable, as the new statute is, to trusteeships as well. 9 N. C. Law Rev. 401.

§ 1210(b). All sales subject to orders of court.—All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein. (1931, c. 265, s. 2.)

§ 1210(c). Validation of prior sales.—All sales of real property heretofore made by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265, s. 3.)

§ 1211. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons, and to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath of affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuse to declare the whole truth touching the subject-matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (Rev., s. 1227; 1901, c. 2, s. 78.)

§ 1212. Proof of claims; time limit.—All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (Rev., ss. 1228, 1229; 1901, c. 2, ss. 81, 82.)

Court May Extend Time for Filing.—The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hdw. Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Creditor May Assign Claim.—After the appointment of a receiver a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he can not use the assigned claim as a set-off. Davis v. Industrial Mfg. Co., 114 N. C. 321, 322, 19 S. E. 371.

§ 1213. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be

filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exception to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. (Rev., s. 1230; 1901, c. 2, s. 83.)

§ 1214. Property sold pending litigation. — When the property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular term of the Superior Court of the county in which the property is situated. (Rev., s. 1232; 1901, c. 2, s. 86; Extra Sess. 1924, s. 13.)

Editor's Note.—Previous to 1924 this section consisted of the first sentence only of the present section. The addition was made by sec. 13, Extra Sess. Public Laws of 1924.

The amendment to this section effected by the Act of 1924 is applicable to suits pending at the time it took effect. Martin v. Vanlaningham, 189 N. C. 656, 127 S. E. 695.

Applicable to Pending Litigation.—The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the Legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. Martin v. Vanlaningham, 189 N. C. 656, 127 S. E. 695, 696.

§ 1215. Compensation and expenses.—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. (Rev., s. 1226; 1901, c. 2, s. 88.)

In General.—The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 282, 63 S. E. 1048.

Commissions Limited.—A rate not exceeding 5 per cent on receipts and 5 per cent. on disbursements is the statutory limit of a receiver's commissions. Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39.

Commissions Part of Costs.—Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770.

Same—Discretion of Court.—An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below, may, in its discretion, divide it between the parties, as in case of referees' fees. Simmons v. Allison, 119 N. C. 556, 26 S. E. 171.

First Assets Applied to Costs.—Under this section the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and (except as to private corporations, Roberts v. Brown Mfg. Co., 169 N. C. 27, 33, 85 S. E. 45); receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor or torts. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 282, 63 S. E. 1048; Humphrey Bros v. Buell-Crocker Lumber Co., 174 N. C. 514, 521, 93 S. E. 971.

When Costs Prior to Mortgage.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership, but when the corporation has acquired the property subject to a valid registered mortgage then the costs of receivership are not prior to that mortgage. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971.

Work Completed First.—The allowance of commissions to receivers appointed by the court, by consent, to finish the completed water-works, is premature before the work is finished, as it can not be determined until then whether such allowance is excessive or too little. Delafield v. Mercer Constr. Co., 118 N. C. 105, 24 S. E. 10.

Appeal. — When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. Talbot v. Tyson, 147 N. C. 273, 60 S. E. 1125.

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will alter the same only when they are clearly inadequate or excessive. Graham v. Carr, 133 N. C. 449, 45 S. E. 847.

§ 1216. Debts provided for, receiver discharged. —When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (Rev., s. 1220; 1901, c. 2, s. 76.)

Discharged Receiver Not a Party.—Where the receiver of an insolvent railroad company is discharged, he is not a proper party to an action against a foreclosure purchaser to recover for personal injuries received after his discharge. Howe v. Harper, 127 N. C. 356, 37 S. E. 505.

§ 1217. Reorganization.—When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and

control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (Rev., s. 1221; 1901, c. 2, s. 77.)

As to reorganization in general, see Art. 12 this chapter.

Consent of Creditors Unnecessary.—Where a corporation engaged in business transfers its entire property rights and franchises to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Freidenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

Art. 11. Taxes and Fees

§ 1218. Taxes for filing.—On filing any certificate or paper relative to corporations in the office of the Secretary of State, the following tax shall be paid to the State Treasurer for the use of the State:

1. For certificates of incorporation, forty cents for each thousand dollars of the total amount of capital stock authorized but in no case less than forty dollars.

2. Increase of capital stock, forty cents for each thousand dollars of the total increase authorized, but in no case less than forty dollars.

3. Extension or renewal of corporate existence of any corporation, the same as required for the original certificate of incorporation by this section.

4. Change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock), decrease of capital stock, increase or decrease of par value of, or number of shares, forty dollars.

5. For filing of officers and directors, two dollars.

6. Dissolution of corporation, change of principal place of business, five dollars.

7. For certificates of incorporation for any benevolent, religious, educational, charitable or social society or association having no capital stock, fifteen dollars.

Provided, no tax shall be required by corporations created by virtue of section 1123 of the Consolidated Statutes relating to public parks and drives; and these taxes shall not be cumulative, but when two or more taxes have been incurred at the same time the tax for all shall be the largest single tax. (Rev., s. 1233; 1901, c. 2, s. 96; 1911, c. 155, s. 5; 1929, c. 36; 1935, c. 10.)

Cross References.—As to the requirements of the certificate of incorporation, see sec. 1115. As to errors or omissions in the certificate, see sec. 1120. As to amending the certificate before payment of stock, see sec. 1130.

Editor's Note.—The Act of 1929 amended this section to make it conform to Public Laws, Extra. Sess. 1920, c. 1, which increased the taxes provided for in the original section.

For an article dealing with taxation of North Carolina corporations in general, see 1 N. C. Law Rev. 203-215. This section is mentioned in the article on p. 205.

Prior to the amendment of 1935 no taxes were required of benevolent, religious, educational or charitable societies or associations having no capital stock, the same being exempted by the proviso at the end of the section. Thus subsection (7) is new.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489.

§ 1219. Fees to secretary of state and clerk of superior court.—The secretary of state shall collect and retain the following fees: For recording the certificate of incorporation, one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal one dollar; for copying, the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars. (Rev., s. 1234; Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96; 1917, c. 231, s. 84.)

§ 1220. Corporate property in receiver's hands liable for taxes. — When listed or unlisted taxes are duly assessed and charged against and are due and unpaid by a corporation with chartered rights, doing business or with property in this state, or against a person residing in, doing business, or having property in this state, it is competent for an officer or tax collector who has the tax list to levy upon, seize, and take possession of that part of the property belonging to the corporation necessary to pay such taxes, even though the property is in the hands of a receiver duly appointed; and the officer or collector need not apply to the court appointing the receiver, or with jurisdiction of the property or the receiver, for an order for the payment of said taxes. This section applies to all taxes, whether state, county, town or municipal, and shall be liberally construed in favor of and in furtherance of the collection of such taxes. (Rev., ss. 1236, 1237; Code, ss. 699, 670.)

Failure to Pay Taxes.—The State and county having, through the boards of commissioners sitting with the justices of the peace, assessed the property of a corporation for taxation and placed the tax list in the hands of the sheriff, who can not find any property of the corporation upon which to levy, are creditors holding a debt against such corporation and are entitled to bring a proceeding in the nature of a creditors' bill against such corporation, with or without proceedings for its dissolution. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10.

Attachment and Continuance of Lien.—The lien for taxes attaches to the real property taxed from the date provided in the statute, and the lien continues thereon until the taxes are paid, regardless into whose hands the property has passed, unless barred by some statute of limitations. Reichland Shale Products Co. v. Southern Steel, etc., Co., 200 N. C. 226, 156 S. E. 777.

Art. 12. Reorganization

§ 1221. Corporations whose property and franchises sold under order of court or execution.—When the property and franchises of a public-service corporation are sold under a judgment or decree of a court of this state, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the

right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchise, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates, not less than three in number, thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the state now or hereafter established with reference to trusts and contracts in restraint of trade. (Rev., s. 1238; Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; 1913, c. 25, s. 1; 1919, c. 75.)

As to reorganization, see also sec. 1217 and annotations.

Railroad Property and Franchise Must Be Together. — The property of railroads must be kept in association with their franchises to preserve their value; to give credit to such corporations; to secure creditors and keep railroads in operation for the benefit of the public, which was the primary object of the Legislature in bestowing such corporate franchises. Such legislative purpose is clearly manifested in this section. Bradley v. Ohio River, etc., Co., 119 N. C. 918, 927, 26 S. E. 169; citing Gooch v. McGee, 83 N. C. 60, 67.

Foreign Corporation Not Created.—It is neither the purpose nor effect of this section to create a foreign corporation in this State. James v. Western N. C. R. Co., 121 N. C. 523, 28 S. E. 537.

New Corporation Must Be Provided.—In order that the sale of the franchise and property of a corporation under the mortgage shall have the effect of a dissolution of such corporation as provided in this section, another corporation must be provided, as contemplated in section 3462, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. James v. Western N. C. R. Co., 121 N. C. 523, 28 S. E. 537.

Meaning of "Encumbrance."—In this section the word "encumbrance" is not restricted, as in cases of real estate alone, to claims having specific liens on the property, but is extended to include any and all claims importing a liability to sale as a whole under a judicial decree. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Construed with Other Sections.—This section and the two following should be construed with section 1186 and when thus construed, the purchaser at the sale under a decree of the court, duly entered, acquires the right to reorganize, in accordance with the term imposed by the sections referred to, and carry on the business as a new corporation, acquiring the franchise of the old corporation as an asset included in his purchase. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Effect of Sale of Railroad.—The sale of a railroad under a second mortgage and a conveyance thereunder subject to the first mortgage upon its franchise and corporate property did not extinguish the corporate existence of the company, nor release it from liability to the public for the manner in which it is operated. James v. Western N. C. R. Co., 121 N. C. 523, 28 S. E. 537.

Rights of Purchaser.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. Barker v. Railroad, 137 N. C. 214, 49 N. C. 115.

The purchaser of a railroad under this section takes the rights acquired by the former company under its charter, and also becomes liable for damages and assessments on account of the appropriation of lands for the right of way. Hendrick v. R. R., 101 N. C. 617, 8 S. E. 236.

Rights of Old Stockholders.—When the property, including the franchise, of a corporation is sold under judicial sale, conferring on the purchaser the right to reorganize, etc., the old stockholders have a right to share in the assets if there is a surplus; but the decree itself shuts off all their rights as such stockholders in the new corporation. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Debts.—The principle that a corporation taking over another by reorganization, consolidation, amalgamation, or union is subject to the debts and liabilities of such corporation, rests upon the ground that the corporation so taken over either has not been paid a consideration, that the transaction was in fraud of creditors, or upon the presumption of a trust for creditors; consequently, the principle does not apply to the bona fide sale of only a part of the assets of a corporation which continues to exist and exercise its functions under its franchise. McAlister v. Express Co., 179 N. C. 556, 103 S. E. 129.

Use of Former Name.—Where a corporation has been practically reorganized under a different name, the fact that persons in negotiating for the sale of shares of stock in the reorganized corporation used the former name is immaterial, it appearing that the purchaser received the certificates he had contracted to purchase, and held them without objection, and must have known of the fact. Pritchard v. Daily, 168 N. C. 330, 84 S. E. 392.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 528, 152 S. E. 489.

§ 1222. New owners to meet and organize. — The persons for whom the property and franchises have been purchased shall meet within thirty days after the delivery of the conveyance made by virtue of said process or decree, and organize the new corporation, ten days written notice of the time and place of the meeting having been given to each of the said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary. (Rev., ss. 1239, 1240; 1901, c. 2, ss. 100, 101, 102.)

Change of Name and Seal Not Required.—Where the purchasers of the entire property of a defunct corporation under the decree of a court have in other respects complied with the requirements of the statute as to reorganization, the fact that they have assumed to continue operations without changing the seal, or determining upon a different amount of capitalization, does not necessarily affect the fact of proper reorganization, there being no statutory requirement that they change them. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

§ 1223. Certificate to be filed with secretary of state.— It is the duty of the new corporation, within one month after its organization to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the secretary of state, to be filed and recorded in his office, and there remain of record. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence

of the new corporation. (Rev., s. 1241; 1901, c. 2, s. 103.)

Failure to File with Secretary of State.—Where the purchasers reorganize within the requirements of this article except they failed to file the certificate with the Secretary of State within one month from its reorganization (as required by this sec.) as to whether the corporation was one de jure, the purchasers having acted in good faith, Quaere? But, it became at least a corporation de facto, and the individuals cannot be held to personal liability for debts contracted in the name of the corporation, except to the extent the charter or act of incorporation provides. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

§ 1224. Effect on liens and other rights. — Nothing contained in this article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under the sale, when by the terms of the process or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person, body politic, or corporate, not a party to the action in which the decree was made, nor of the said party except as determined by the decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the right and interest of the cestui que trust are concluded by the decree. (Rev., s. 1241; 1901, c. 2, s. 103.)

Editor's Note.—As to the meaning of "encumbrance" as used in this section, see annotation, "meaning of encumbrance," under section 1221.

Art. 13. Merger

§ 1224(a). Merger, proceedings for.—Any two or more corporations organized under the provisions of this chapter, or existing under the laws of this State, for the purpose of carrying on any kind of business, may consolidate into a single corporation which may be either one of said consolidated corporations or a new corporation to be formed by means of such consolidation; the directors, or a majority of them, of such corporations as desire to consolidate, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation, the mode of carrying the same into effect, and stating such other facts as are necessary to be set out in the certificate of incorporation, as provided in this chapter, as well as the manner and basis of converting the shares of each of the old corporations into stock of the new corporation, with such other details and provisions as are deemed necessary or desirable.

Said agreement shall be submitted to the stockholders of each corporation, at a meeting thereof, called separately for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each corporation either has its principal office or conducts its business (and if there be no newspaper published in such county, then in a newspaper published in an adjoining county), and a copy of such notice shall be mailed to the last known postoffice address of each stockholder of each corporation, at least twenty days prior to the date of such meeting, and at said meeting said agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same, each share entitled to vote entitling the holder thereof to one vote; and if the votes of the stockholders of each corporation representing a majority of the outstanding shares of stock entitled to vote shall be for the adoption of the said agreement then that fact shall be certified on said agreement by the secretary of each corporation, under the seal thereof; and the agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of said corporations under the corporate seals thereof and acknowledged by the president or vice-president for each of such corporations before any officer authorized by the laws of this State to take acknowledgments of deeds to be the respective act, deed and agreement of each of said corporations, and the agreement so certified and acknowledged shall be filed in the office of the Secretary of State, and shall thence be taken and deemed to be the agreement and act of consolidation of the said corporation; and a copy of said agreement and act of consolidation, duly certified by the Secretary of State under the seal of his office, shall also be recorded in the office of the clerk of the Superior Court of the county of this State in which the principal office of the consolidated corporation is, or is to be, established, and in the offices of the clerks of the Superior Courts of the counties of this State in which the respective corporations so consolidating shall have their original charters recorded, or if any of the corporations shall have been specially created by a public act of the Legislature, then said agreement shall be recorded in the county where such corporation shall have had its principal office, and also in the office of the register of deeds of each county in which either or any of the corporations entering into the consolidation owns any real estate, and such record or a certified copy thereof, shall be evidence of the existence of the corporation created by the said agreement, and of the observance and performance of all antecedent acts and conditions necessary to the creation thereof. (1925, c. 77, s. 1.)

Editor's Note.—The North Carolina Law Review (vol. 3 page 133) has the following to say concerning this statute: "The whole enactment furnishes definite machinery for merger and consolidation, which heretofore has been lacking in our statutes. While the language in the first section, permitting any corporations, engaging in any kind of business, to merge, will have to be interpreted in its relation to competing and non-competing companies, and its relation to statutes covering trusts, monopolies, and combinations in restraint of trade under the Sherman Law, etc., the court will, perhaps, have an easier task of interpretation under the present language of the Act than would have been the case if the Legislature had attempted to define and restrict specifically."

In considering this statute in respect to the Sherman Anti-Trust Act, reference should be had to the full and comprehensive treatment of the interpretation, construction and operation of that act in 8 U. S. Encyc. Dig. (U. S. E.) 430 et seq.; 12 U. S. Encyc. Dig. (U. S. E.) 429 et seq.; 13 U. S. Encyc. Dig. (U. S. E.) 431 et seq.

As to illegal trusts and monopolies under the state law, see section 2559 et seq.

§ 1224(b). Merger; status of old and new corporations. — When the agreement is signed, acknowledged, filed and recorded, as in the preceding section is required, the separate existence of

the constituent corporations shall cease, and the consolidating corporations shall become a single corporation in accordance with the said agreement, possessing all the rights, privileges, powers and franchises, as well of a public as of a private nature and all and singular the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed and all debts due on whatever account, and all other things in action or belonging to each of such corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this State, vested in either of such corporations, shall not revert or be in any way impaired by reason of this article: Provided, that all rights of creditors and all liens upon the property of either of said former corporations shall be preserved unimpaired, limited in lien to the property affected by such liens at the time of the consolidations, and all debts, liabilities and duties of the respective former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debt, liabilities and duties had been incurred or controlled by it.

Before receiving stock in the new or consolidated corporation, the shareholders of the old corporation shall surrender to the new corporation their certificates of stock in such old corporations; and the same shall be canceled by the new corporation upon the delivery of the stock in the new corporation. If any certificate of stock in any of the old corporations shall have been lost, destroyed or misplaced, the owner thereof shall have the right to receive from the new corporation stock therein to be issued for the value of the old stock lost, destroyed or misplaced; and the new or consolidated corporation shall have the right to require from such person indemnity against loss on account of the issue of the stock so applied for, in the manner provided by law for the reissue of lost stock. If the person owning such lost, destroyed or misplaced certificate in one of the old corporations, shall be dissatisfied with the terms of the merger and shall object thereto, he shall have the same right to have the value of his stock appraised and paid for, and to appeal to the courts, as is provided herein for other dissatisfied stockholders, upon giving security and indemnifying the new corporation against loss on account of the payment for such lost, destroyed or misplaced certificate of stock. (1925, c. 77, s. 1.)

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 530, 152 S. E. 489.

§ 1224(c). Merger; payment for stock of dissatisfied stockholders. — If any stockholder entitled to vote in either corporation consolidating as aforesaid, shall vote against the same, or if any stockholder in either corporation consolidating as aforesaid, not entitled to vote therein, shall, at or prior to the taking of the vote, object thereto in writing, and if such dissenting or objecting stockholder shall, within twenty days after the agreement of consolidation has been filed and recorded as aforesaid, demand in writing from the consolidated corporation payment of his stock, such consolidated corporation shall within thirty days thereafter pay to him the value of the stock at the date of the consolidation; in case of disagreement as to the value thereof, it shall be lawful for any such stockholder or stockholders within thirty days after he has made demand in writing as aforesaid, and upon reasonable notice to the consolidated corporation, to appeal by petition to the Superior Court of the county in which the principal office of the consolidated corporation is, or is to be, established, to appoint three appraisers to appraise the value of his stock. The award of the appraiser (or a majority of them), if not opposed within ten days after the same shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive; and if opposed and excepted to, the exceptions shall be transferred to the civil issue docket of the Superior Court, and there tried in the same manner, as near as may be practicable, as is provided in section one thousand seven hundred and twenty-four, chapter thirty-three, volume one, the Consolidated Statutes, for the trial of exceptions to the appraisal of land condemned for public purposes, and with the same right of appeal to the Supreme Court as is permitted in said chapter. The court shall assess against the consolidated corporation the costs of said proceedings, including a reasonable attorney's fee to the stockholder and a reasonable fee to the appraisers as it shall deem equitable. On the making of said demand in writing as aforesaid, any such stockholder or stockholders shall cease to be stockholders in said constituent company and shall have no rights with respect to such stock except the right to receive payment therefor as aforesaid, and upon payment of the agreed value of the stock or of the value of the stock under final judgment, said stockholder or stockholders shall transfer their stock to the consolidated corporation; and in the event the consolidated corporation shall fail to pay the amount of said judgment within ten days after the same shall become final, said judgment may be collected and enforced in the manner prescribed by law for the enforcement of judgment. Each stockholder in either of the constituent corporations at the time the consolidation becomes effective, entitled to vote, who does not vote against the consolidation and each stockholder in each of the constituent corporations at the time the consolidation becomes effective, not entitled to vote, who does not object thereto in writing as aforesaid, shall cease to be a stockholder in such constituent corporation and shall be deemed to have assented to the consolidation together with the stockholders voting in favor of the consolidation in the manner and on the terms specified in the agreement of consolidation. (1925, c. 77, s. 1.)

§ 1224(d). Merger; pending action saved.—Any action or proceeding pending by or against either of the corporations consolidated may be prosecuted to judgment, as if such consolidation had not taken place or the new corporation may be substituted in its place. (1925, c. 77, s. 1.)

§ 1224(e). Liability of corporations and rights of others unimpaired by consolidation.—The lia-

bility of corporations created under this chapter or existing under the laws of this State, or the stockholders or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with such corporation, shall not in any way be lessened or impaired by the consolidation of two or more corporations under the provisions hereof. (1925, c. 77, s. 1.)

§ 1224(f). Powers of consolidated corporations.—When two or more corporations are consolidated the consolidated corporation shall, subject to all the laws of this State, have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payment it will be required to make, or obligations it will be required to assume, in order to effect such consolidation; to secure the payment of which bonds and obligations it shall be lawful to mortgage its corporate franchise, rights, privileges and property, real, personal and mixed; and may issue capital stock, with or without par value, or in classes any class of which may be with or without par value, to such an amount as may be necessary, to the stockholders of such consolidated corporation in exchange or payment in whole or part for the original shares, in the manner and on the time specified in the agreement of consolidation. Providing that the only fees that shall be collected from said merging corporations shall be office or filing fees and charter fees upon any increase in the authorized capital stock of the merged corporations in excess of that provided for in the charters of the merging corporations when the authorized capital stock of said merging corporations shall be added. (1925, c. 77, s. 1; 1931, c. 209.)

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 530, 152 S. E. 489.

§ 1224(g). Merger of charitable and other corporations not under control of state.—Any two or more charitable, educational, social, ancestral, historical, penal or reformatory corporations not under the patronage and control of the state, and any two or more corporations without capital stock organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order, whether organized under special act or general laws, may consolidate into a single corporation, which shall be deemed the successor of each and all corporations joining in such consolidation, in the following manner:

(a) When authorized to do so by the conference, synod, convention or other body owning and/or controlling such corporation, the trustees or directors of such corporation by resolution adopted by majority vote at a meeting duly called and convened in accordance with the present charter, by-laws or other regulations for the conduct of such meetings of such corporation, and in the absence of such charter provision, by-laws or other regulations upon ten days' notice to each trustee or director of the time, place and object of the meeting, may authorize such corporation to make, enter into and execute a consolidation agreement with one or more other such corporations; that such consolidation agreement shall prescribe the terms and conditions of consolidation, the mode of carrying same into effect, and shall set forth in full the certificate of incorporation of the consolidated corporation; and the consolidation agreement so authorized shall be executed in the name and behalf of each such corporation entering into the consolidation by its president or vice-president, attested by its secretary or assistant secretary and its corporate seal thereto affixed, and the due execution thereof shall be acknowledged in the manner and before a notary public or other officer required by the general laws of North Carolina for the acknowledgment of corporate deeds; and there shall be attached to such agreement of consolidation the written consent of a majority of the trustees or directors of each corporation entering into the consolidation.

(b) The agreement of consolidation, when authorized and executed as provided above and having attached thereto the aforesaid written consent, shall be filed in the office of the secretary of state. When so filed, the separate legal existence of each of the corporations joining in the consolidation thereupon shall be merged into the consolidated corporation, and thereafter there shall be only one corporation having as its charter the certificate of incorporation fully set forth in the agreement of consolidation.

(c) A copy of said agreement of consolidation, duly certified by the secretary of state under the seal of his office, shall be recorded in the office of the clerk of the superior court of the county in which the principal office of the consolidated corporation as fixed by its certificate of incorporation is located, and a like certified copy of the agreement of consolidation shall be recorded in the office of the clerk of the superior court of each county where any one or more of the corporations joining in the consolidation theretofore has had its principal office or place of business; and such certified copy shall be evidence of the existence of the consolidated corporation created by such agreement of consolidation and of the observance and performance of all antecedent acts and conditions necessary to the creation thereof. (1933, c. 408, s. 1.)

§ 1224(h). Rights and powers of consolidated corporation.—The consolidated corporation shall succeed to and be vested with all rights, privileges and powers, and all property, real, personal and mixed, tangible and intangible, and the title thereto, of each and all of the corporations joining in the consolidation as fully and effectually as the same were theretofore owned and held by each of the separate corporations, and the consolidated corporation shall be liable for the payment of all debts and liabilities of each and all of the separate corporations: Provided, such consolidation shall not affect liens or the priority of liens established against the separate property of any corporation prior to the consolidation. (1933, c. 408, s. 2.)

§ 1224(i). Property of all kinds vested in new corporation.—The consolidated corporation shall succeed to and be vested with all money, securities, property, real, personal and mixed, tangible and intangible, and the title thereto, theretofore owned, held and/or administered by each separate corporation upon the uses and trusts declared in any will, deed or other instrument, and the consolidated corporation shall handle, use and ad-

minister such trust funds upon the same uses and trusts and not otherwise; and the consolidated corporation shall be deemed to embrace each separate corporation and to constitute a continuation thereof, and no trust fund or other asset of a separate corporation shall be construed to revert and/or pass to other ownership on the ground that such separate corporation has ceased to exist for the purpose of administering such trust or otherwise. (1933, c. 408, s. 3.)

CHAPTER 23

COSTS

Art. 1. Generally

§ 1225. Items allowed as costs.—To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same. (Rev., s. 1249; Code, s. 528.)

Cross References.—For a full treatment of the subject of costs, see 3 N. C. Enc. Dig. 652 et seq.; 13 Enc. Dig. 506 et seq.; as to prosecution bonds for costs, see section 493 et seq.

Editor's Note.—In general this section states the rule that costs follow the judgment, a rule which is founded on policy and natural justice, designed to prevent the unsuccessful litigant from escaping the consequence ensuing from the unfavorable termination of a suit, and which, to a great extent, acts as deterrent to the prosecution or appeal of promiscuous and frivolous litigation. Criminal actions and civil suits alike are controlled by the principle: In State v. Horne, 119 N. C. 853, 26 S. E. 36, Clark, J., says: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. Kincaid v. Graham, 92 N. C. 154; Williams v. Hughes, 139 N. C. 17, 51 S. E. 790; Smith v. Lumber Co., 148 N. C. 334, 62 S. E 416; Kinston Cotton Mills v. Rocky Mount Hosiery Mills, 154 N. C. 462, 70 S. E. 910; Ritchie v. Ritchie, 192 N. C. 538, 541, 135 S. E. 458.

This basic rule of costs is underlying throughout and apparent from the other provisions of this chapter, and, as stated in Costin v. Baxter, 29 N. C. 111, 115, "in no instance found in the books has the losing party recovered his costs or any part of them."

Dependent upon Statutes.—At common law neither party to a civil action could recover costs. Chadwick v. Life Ins. Co., 158 N. C. 380, 74 S. E. 115; Costin v. Baxter, 29 N. C. 111; State v. Massey, 104 N. C. 877, 10 S. E. 608; Waldo v. Wilson, 177 N. C. 461, 100 S. E. 182. And it has been frequently held that costs are entirely creatures of legislation, without which they do not exist. Clerk's Office v. Commissioners, 121 N. C. 29, 30 27 S. E. 1003. See also Lowe v. Kansas, 163 U. S. 81, 41 L. Ed. 78; Day v. Woodworth, 13 How. 362, 363, 14 L. Ed. 182.

The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, etc., is and always has been within the regulation and control of the legislature. See Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666.

Jurisdiction Essential. — Where a court has no jurisdiction of a case, it cannot award costs, or order execution for them to issue. See Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462.

Costs of Witnesses.—See sections 1273 et seq., and the notes thereto.

An action upon a contract sounding in damages is one at law, and the costs are taxable under this section, and are not in the discretion of the court as an equity proceeding controlled by section 1243. Cotton Mills v. Knitting Co., 194 N. C. 80, 90, 138 S. E. 428.

Partial Recovery.—See section 1241 and the notes thereof.

§ 1226. Summary judgment for official fees.—If any officer, to whom fees are payable by any person, fails to receive them at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed. If the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term. (Rev., s. 1250; Code, s. 3760; 1868-9, c. 279, s. 561.)

Advance Fees for Docketing Transcript. — This section impliedly authorizes the clerk of the Supreme Court to refuse to docket the transcript when the prescribed fee is not paid in advance. Section 3849 specifically authorizes the refusal. Dunn v. Clerk's Office, 176 N. C. 50, 96 S. E. 738; Andrews v. Whisnant, 83 N. C. 446, 447.

When Cause Is Still Pending.—This section is not applicable to the claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report. Farmers Bank v. Merchants & Farmers Bank, 204 N. C. 378, 168 S. E. 221.

Time of Motion to Re-tax.—This section permits a motion to re-tax costs to be made in favor of any officer within one year after termination of the action. In re Smith, 105 N. C. 167, 10 S. E. 982.

Judgment Becomes a Lien.—A judgment under this section becomes a lien on the lands of the defendants. Sheppard v. Bland, 87 N. C. 163.

Where, as a condition of a continuance, the plaintiff in an action was required to pay the accrued costs and they were taxed, docketed and paid, and a judgment was subsequently entered in the action directing the repayment of such costs by the defendant, it was held, that such costs became a part of the judgment already ascertained by reference to the docket as for so much money paid by the plaintiff for the defendant's benefit, and hence, there was no necessity for a re-taxation of the costs. Owen v. Paxton, 122 N. C. 770, 30 S. E. 343.

§ 1227. Sureties on prosecution or appeal bonds liable for costs.—When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety. (Rev., s. 1251; Code, s. 543; R. C., c. 31, s. 126; 1831, c. 46; 1913, c. 189, s. 1.)

As to liability of sureties on bonds generally, see section 347 and notes thereto.

Applies to Judgment for Defendant.—The section is so broadly worded as to apply to all cases where the costs are adjudged for the defendant against the plaintiff, and not simply to those where the plaintiff appeals. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 569, 82 S. E. 849.

Applies in Supreme Court.—This section cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the superior court, or in the Supreme Court if an action is brought here against the state, or perhaps in some other cases not cognizable by a justice of the peace. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 570, 82 S. E. 849; Grimes v. Andrews, 171 N. C. 367, 88 S. E. 513.

The words "appellate court," as used by the amendment of this section in 1913, in view of the context could mean only the Supreme Court. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 571, 82 S. E. 849.

The words of this section "security for the prosecution of action," undeniably mean the prosecution bond, and, under the rule, should now have the same meaning. If the prosecution bond was not intended, the inaptness of the phraseology would hardly have escaped attention. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 571, 82 S. E. 849.

Increasing Penalty of Bond.—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to in-

crease the penalty of the bond. Kenney v. Seaboard Air Line Railway Co., 166 N. C. 566, 82 S. E. 849.

Partial New Trial.—This section does not apply where the defendant does not gain an entire reversal in the Supreme Court; where a partial new trial only is awarded the costs are in the discretion of the Supreme Court as provided in section 1256. Rayburn v. Casualty Company, 142 N. C. 376, 55 S. E. 296.

Application.—Where an action is brought to recover fees of an office, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. McCall v. Zachary, 131 N. C. 466, 42 S. E. 903.

Appeal.—Though a surety on a prosecution bond is not a party to the action yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur etc., Co., 116 N. C. 871, 874, 21 S. E. 696.

§ 1228. Execution for unpaid fees itemized bill of costs to be annexed. — The clerks of the supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the state, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words so as plainly to show each item of costs and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued. (Rev., s. 1252; Code, s. 3762; R. C., c. 102, s. 24.)

For full treatment of execution and attachments for costs, see 3 N. C. Enc. Dig. 742 et seq.

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the existence of the other. Sheppard v. Bland, 87 N. C. 163, 167.

§ 1229. Jurors' tax fees.—On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars. In every civil action in any court of record the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending the courts thereof. (Rev., s. 1253; Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249; 1905, c. 348; 1909, c. 1; 1919, c. 319.)

Not a "Tax" within Meaning of Constitution.—The tax prescribed by Rev. Code, ch. 28, sec. 4, (similar to this section) was not a tax within the meaning of the Revenue Act of 1858-'9, which repealed all taxes not therein imposed; nor was it a tax within the meaning of the Constitution, Art. V, sec. 3, which requires taxes to be equal and uniform. Such a tax was not in violation of the Constitution, Art. I, sec. 35. State v. Nutt, 79 N. C. 263.

Failure to List Taxes.—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent and meaning of this section requiring in criminal cases a tax of $4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of $5 in the civil actions should be imposed as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, is immaterial in construing the meaning of the statute. State v. Smith, 184 N. C. 728, 114 S. E. 625.

§ 1229(a). Stenographers fee in Wayne County.—No stenographer's fee and no jury fee shall be taxed in any case hereafter brought in the Superior Court of Wayne County or the County Court of Wayne County unless in such case an issue of fact is raised.

An issue of fact shall be deemed to be raised under the preceding paragraph hereof in any case where an answer is filed by the defendant or where it is necessary to offer oral testimony before a judgment is rendered by the Court. (1927, c. 156, ss. 1, 2.)

§ 1230. In criminal cases, not demandable in advance.—In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process are not entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable. (Rev., s. 1254; Code, s. 1173; 1868-9, c. 178, subch. 3, s. 40.)

§ 1231. Clerk to state in detail in entry of judgment.—The clerk shall insert in the entry of judgment the allowances of costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. When it is necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge. (Rev., s. 1255; Code, s. 532.)

In General.—In Young v. Connelly, 112 N. C. 646, 650, 17 S. E. 424, the court cites this section to the following statement: "So it seems in this view of the testimony that it was the duty of the clerk to have filled the blanks and docketed the judgment. The referee's fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor."

§ 1232. Clerk to itemize bills of criminal costs; approval of solicitor.—It is the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk and improved by the solicitor. (Rev., s. 1256; Code, s. 733; 1873-4, c. 116; 1879, c. 264.)

§ 1233. Justice required to itemize costs.—In all trials before justices of the peace any party, plaintiff or defendant, may demand of the justice of the peace before whom the trial is held an itemized statement of the costs of the action. Upon such demand it shall be the duty of the justice to furnish the statement demanded. No person shall be compelled to pay any cost in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged. It shall be the duty of the justice to insert in the entry of the judgment in every criminal action or otherwise disposed of by him a detailed statement of the different items

of cost, and to whom due. (Rev., ss. 1257, 2789; Code, s. 734; 1887, c. 297.)

§ 1234. Justice of the peace refusing to furnish bill of costs.—If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (Rev., s. 3588; Code, s. 734; 1887, c. 297.)

§ 1235. Bills of costs open to the public.—Every bill of costs shall at all times be open to the inspection of any person interested therein. (Rev., s. 1258; Code, s. 735; 1873-4, c. 116.)

§ 1235(a). Clerks to tax solicitor's fees; use of school fund.—The clerks of the superior court of the several counties in the state shall, in computing all bills of cost in criminal cases where the solicitor has heretofore received a fee, tax in the bill of costs the same fees now allowed to the solicitor, which shall be collected by the clerks and paid into the school fund of their respective counties: Provided, that no such fees which are now required by law to be paid by the county shall be taxed in said bill of costs, nor shall any such fees be taxed in said bill of costs, in cases where the defendants are assigned to work on the public roads of the county in which they were convicted. (1923, c. 157, s. 3.)

Art. 2. When State Liable for Costs

§ 1236. Civil actions by the state; joinder of private property.—In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution issued therefor against such private party and returned unsatisfied. (Rev., s. 1259; Code, s. 536.)

Constitutionality.—In Blount v. Simmons, 119 N. C. 50, 51, 25 S. E. 789, it is said: "We find nothing in the Constitution depriving the Legislature of power to enact, Code, sec. 536, (this section) and we do not think it will impair the sovereign character of the state to meet its just liabilities, whether in the form of costs or otherwise."

Dependent upon Statute. — At common law the king neither paid nor received costs, as the former was his prerogative and the latter was beneath his dignity, and the general statutes giving costs did not include the sovereign. The same principle has been applied in this country and in this state, so that the state is only liable in the event of express statutory provisions, which are now quite general in the different states. Blount v. Simmons, 120 N. C. 19, 20, 26 S. E. 649.

Judgment against State.—Upon the failure of the litigation, the state is, under this section, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the solicitor, and judgment may be rendered in such action against the state for such costs. Blount v. Simmons, 119 N. C. 50, 25 S. E. 789.

States Recover Costs.—In an action in the United States Supreme Court between states, the successful state may ask for costs or note as it sees fit. Missouri v. Illinois, 202 U. S. 598, 50 L. Ed. 1160.

Application to Legislature for Payment.—In an article, entitled Jurisdiction of The North Carolina Supreme Court, 5 N. C. Law Rev. 1, 9, the following appears: **"Costs of action as a claim.** While the State may be sued only in the Supreme Court, it may sue in any court having jurisdiction over the cause of action, and the cost of such litigation may be taxed against the state as in case of private litigants. Such costs, however, do not constitute a claim against the State as contemplated in the jurisdiction of the Supreme Court, but are only incidental to the right to sue. The court in which the action is brought adjudicates the costs, and the parties interested should apply to the Legislature for payment." Citing this section. Miller v. State, 134 N. C. 270, 46 S. E. 514; Garner v. Worth, 122 N. C. 250, 29 S. E. 364; Blount v. Simmons, supra.

Actions to Vacate Oyster-Bed Entry.—Where, in an action by the solicitor in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action. Blount v. Simmons, 118 N. C. 9, 23 S. E. 923.

Under this section the state is liable for the costs of an action instituted by the state solicitor to bring an action to vacate an oyster-bed entry. In such case, it seems that the persons making the affidavit might be held liable as relators if it should appear that the action was for their benefit at their instance. Blount v. Simmons, 120 N. C. 19, 26 S. E. 649.

Where the proceedings for disbarment of an attorney under § 214 has not been sustained the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. Committee on Grievances of Bar Ass'n v. Strickland, 201 N. C. 619, 161 S. E. 76.

§ 1237. Civil action by and against state officers.—In all actions depending, or which may be instituted, by any of the officers of the state, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the attorney-general, and the same is decided against such officers, the cost thereof shall be paid by the state treasurer upon the warrant of the auditor for the amount thereof as taxed. (Rev., s. 1260; Code, s. 3373; 1874-5, c. 154.)

§ 1238. Actions by state for private persons, etc.—In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the state. (Rev., s. 1261; Code, s. 537.)

§ 1239. Costs of county in certain bribery prosecutions to be a charge against state.—The expenses incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state. (Rev., s. 1262; Code, s. 742; 1868-9, c. 176, s. 6; 1874-5, c. 5.)

§ 1240. On appeal by state to supreme court of United States.—In all cases, whether civil or criminal, to which the state of North Carolina is a party, and which are carried from the courts of this state, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the supreme court of the United States, and the state is adjudged to pay the costs, it is the duty of the attorney-general to certify the amount of such costs to the auditor, who shall thereupon issue a warrant for the same, directed to the treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated. (Rev., s. 1263; Code, s. 538; 1871-2, c. 26.)

Art. 3. Civil Actions and Proceedings

§ 1241. Costs allowed plaintiff; limited by recovery; several suits on one instrument.—Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In actions of which a court of a justice of the peace has no jurisdiction, unless otherwise provided by law.

4. In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages.

5. When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the state and not secreted at the commencement of the previous action or actions. (Rev., s. 1264; Code, s. 525; 1874-5, c. 119; R. C., c. 31, s. 78.)

I. In General.
II. Actions for Recovery of Real Property, etc.
III. Recovery of Personalty.
IV. When Justice Has No Jurisdiction.
V. No More Recovery of Costs than Damages.

I. IN GENERAL.

Meaning of Recovery.—The recovery referred to in this section is a final determination upon the merits, and success in the Supreme Court is by no means equivalent to a recovery in the court below. Williams v. Hughes, 139 N. C. 17, 18, 51 S. E. 790.

Also a recovery within the meaning of the section cannot be predicated of anything coming to the plaintiff which was not in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title. Patterson v. Ramsey, 136 N. C. 561, 564, 48 S. E. 811.

In order to determine who should pay the costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. Patterson v. Ramsey, 136 N. C. 561, 564, 48 S. E. 811.

Partial Recovery.—There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wall v. Covington, 76 N. C. 150, it was held that no part of the costs in such actions can be taxed against the party recovering. And in Horton v. Horne, 99 N. C. 219, 5 S. E. 927, it was decided in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to costs. Wooten v. Walters. 110 N. C. 251, 258, 14 S. E. 734, 736; Ferrabow v. Green, 110 N. C. 414, 14 S. E. 973; Kinston Cotton Mills v. Rocky Mount Hosiery Co., 154 N. C. 462, 70 S. E. 910.

Where the plaintiff is entitled to nominal damages, such damages will carry with it the cost under this section. Wilson v. Forbes, 13 N. C. 30; Britton v. Ruffin, 123 N. C. 67, 70, 21 S. E. 271.

Section Qualified by Section 103.—Where the action is not of such a nature that it falls within any of the subdivisions of this section or of the following section, it comes within the terms and is included by section 1243. Parton v. Boyd, 104 N. C. 422, 10 S. E. 490; Yates v. Yates, 170 N. C. 533, 87 S. E. 317. All these sections are, however, subject to the exception as to when costs are allowed against an administrator as stated in section 103. Whitaker v. Whitaker, 138 N. C. 205, 206, 207, 50 S. E. 630.

Action by Executor.—Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs under this section. White v. Mitchell, 196 N. C. 89, 144 S. E. 526.

II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Common Law Rule.—This subdivision of the section in this respect is in affirmance of the principle established before its enactment. Moore v. Angel, 116 N. C. 843, 846, 21 S. E. 699.

Partial Recovery.—Applying the general rule as to partial recovery, which is set out under the preceding analysis line, it is held that where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff is exonerated as to costs and no part thereof should be found against him. Vanderbilt v. Johnson, 141 N. C. 370, 54 S. E. 298; Moore v. Angel, 116 N. C. 843, 21 S. E. 699; Ferrabow v. Green, 110 N. C. 414, 14 S. E. 973; Field v. Wheeler, 120 N. C. 264, 26 S. E. 812. See also Staley v. Staley, 174 N. C. 640, 94 S. E. 407.

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. Swain v. Clemons, 175 N. C. 240, 95 S. E. 489.

When There is More than One Issue.—In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of the defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. Murray v. Spencer, 92 N. C. 264.

Persons Severally Sued.—In the case of several persons, severally bound, and severally sued, until one has actually made satisfaction all are liable to make it, and costs may be allowed in all suits, though only one satisfaction can be recovered. See Larin v. Morris, 2 Dall. 115, 1 L. Ed. 312.

Actions to Recover Both Realty and Personalty.—Under this section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he only recovers the real property. Wooten v. Walters, 110 N. C. 251, 14 S. E. 734.

Equitable Defense.—One who successfully maintains an equitable defense against the recovery of land on the bare legal title is entitled to judgment for his costs. Vestal v. Sloan, 83 N. C. 555.

Necessity for Disclaimer.—A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. Swain v. Clemmons, 175 N. C. 240, 95 S. E. 489.

This rule is forcibly illustrated by the case of Moore v. Angel, 116 N. C. 843, 21 S. E. 699, where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed the plaintiff, and the plaintiff was nevertheless held entitled to costs.

But if the defendant disclaims title to all the land declared for, except that for which he proves his right, no issue as to the plaintiff's title will arise, and the findings that the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. Moore v. Angel, 116 N. C. 843, 846, 21 S. E. 699.

So in ejectment, where the defendant denies the right to possession and denies that the plaintiff holds the title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant. Patterson v. Ramsey, 136 N. C. 561, 48 S. E. 811.

It would seem that in order to escape potential liability for costs the defendant must enter his disclaimer of all the lands declared for, and that a disclaimer of half the locus in quo will not suffice to enable him to escape upon the un-

favorable adjudication of the other half. See In re Hurley, 185 N. C. 422, 117 S. E. 345.

Liability of Intervener.—Where the defendant intervenes in an action to recover real property and files a joint answer with his co-defendant, and makes a joint defense, the plaintiff is entitled to the costs under this subdivision of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. Spruill v. Arrington, 109 N. C. 192, 196, 13 S. E. 779. See also Willis v. Coleburn, 169 N. C. 670, 86 S. E. 596.

Bill of Interpleader.—The U. S. Supreme Court in Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. Ed. 614, held that on a bill of interpleader, the plaintiffs are, in general, entitled to their costs out of the fund.

III. RECOVERY OF PERSONALTY.

Partial Recovery.—There is no exception to the partial recovery rule (see ante, this note, "In General" I) when the action is for the recovery of personalty, and when the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. Wooten v. Walters, 110 N. C. 251, 258, 14 S. E. 374; Field v. Wheeler, 120 N. C. 264, 26 S. E. 812. This is not the case where some of the defendants recover judgment, in which case, of course, they recover costs. Phillips v. Little, 147 N. C. 282, 283, 61 S. E. 49.

As an example of the application of this rule to claims for personal property it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. Field v. Wheeler, 120 N. C. 264, 26 S. E. 812, and cases cited.

Claim and Delivery.—Judgment in an action of claim and delivery carries all costs under this section. Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597.

Right to Possession Determines.—Where the controversy is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon an issue of fraud, the question of taxing the cost does not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, is entitled to recover the costs, under this section. Maxton Auto Co. v. Rudd, 176 N. C. 497, 97 S. E. 477.

IV. WHEN JUSTICE HAS NO JURISDICTION.

Construed with Sections 1264 and 1266.—The meaning of this subdivision of the section when considered in connection with section 1243, is not clear, nor has it ever been fully and satisfactorily interpreted; but in many well considered decisions of the court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class of actions specified in sections 1264 and 1266, in which the plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could be awarded in the discretion of the court under the provisions of section 1267. Yates v. Yates, 170 N. C. 533, 535, 87 S. E. 317.

Application.—A justice has no cognizance of an action brought for the purpose of subjecting land to the payment of intestate's debts, Williams v. Hughs, 139 N. C. 17, 51 S. E. 790, consequently, such an action is controlled by this subdivision of the section; and a stakeholder who demurs to the complaint, has guardians ad litem appointed, etc., is liable for the costs. Van Dyke v. Ins. Co., 174 N. C. 78, 93 S. E. 444.

V. NO MORE RECOVERY OF COSTS THAN DAMAGES.

In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than fifty dollars the plaintiff, under this section, recovers no more costs than damages. Palmer v. Winston-Salem R., etc., Co., 131 N. C. 250, 251, 42 S. E. 604. The subsection was applied where the recovery for slander was less than fifty dollars in Smith v. Myers, 188 N. C. 551, 125 S. E. 178. And again when one dollar damages were sustained by the erection of a mill. See Bridgers v. Purcell, 23 N. C. 232. The former rule as to slander is stated in Coates v. Stephenson, 52 N. C. 124 where it was held that the costs of the plaintiff, under R. C. c. 31, section 78, could not be taxed against the defendant.

For a case where an instructed verdict for one penny damages and one penny costs, under this section, was held erroneous because actual and not nominal damage was shown, see Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

§ 1242. Costs allowed to defendant. — Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. (Rev., s. 1266; Code, ss. 526, 527; C. C. P., s. 277.)

Editor's Note.—As this section provides that costs shall be allowed to the defendant in the actions mentioned in the preceding section, unless the plaintiff is entitled to recover thereon, the constructions of the preceding section determining when the plaintiff is entitled to recover, are necessarily constructions of this section. Reference should be made to section 1241 in all instances.

Applications.—Where the plaintiff fails in an action upon a covenant the defendant recovers costs under this section, Britton v. Ruffin, 123 N. C. 67, 71, 31 S. E. 271.

Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed. Brisco v. Co. v. Norris, 112 N. C. 671, 16 S. E. 850.

§ 1243. Costs allowed or not, in discretion of court.—In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law. (Rev., s. 1267; Code, s. 527.)

See 8 N. C. Enc. Dig. 660.

Editor's Note.—This section as it appeared in the Code of 1883 contained a substantial repetition of the provision now appearing in section 1256 (i. e. as to costs on appeal). The cases pertaining to this subject will be found in the notes to section 1256.

The purpose of this provision is to give the court authority to allow costs, as the justice of the case may require. Gulley v. Macy, 89 N. C. 343; Parton v. Boyd, 104 N. C. 422, 423, 10 S. E. 490.

Exercise of Discretion Presumed.—Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. Gulley v. Macy, 89 N. C. 343; Wooten v. Walters, 110 N. C. 251, 259, 14 S. E. 734, 736.

In equity there was a broad discretion on the subject of costs, Little v. Lockman, 50 N. C. 433, 434, and the allowance rested with the court. Hooper v. Davis, 166 N. C. 236, 81 S. E. 1063; Worthy v. Brower, 93 N. C. 492. And even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. For example in Hare v. Hare, 183 N. C. 419, 111 S. E. 620, it was held where the jury found that each party was entitled to an undivided half in land, and the appeal was from taxing the defendant with costs, there being no element of an action in ejectment, neither party was permitted to recover cost from the other, especially as the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court.

But a consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. Highland Cotton Mills v. Ragan Knitting Co., 194 N. C. 80, 90.

New Trial.—See section 1256 and notes thereto.

Qualified by Section 103.—This provision is subject to the exception contained in section 103, relative to costs against a representative. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630.

Application—Creditor's Bill.—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection; and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. Bond v. Pickett Cotton Mills, 166 N. C. 20, 81 S. E. 936

Same—Specific Performance.—Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract, it was clearly within this section. Parton v. Boyd, 104 N. C. 422, 424, 10 S. E. 490.

Same—Setting Aside Proceedings of Probate Court.—Where the action is to set aside certain proceedings in the

probate court, the court is vested with discretion in the matter of allowing costs, under this section: each party is ordered to pay his own and each to pay one-half of the allowance to the referee. Gulley v. Macy, 89 N. C. 343.

§ 1244. Costs allowed either party or apportioned in discretion of court.—Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

1. Application for year's support, for widow or children.

2. Caveats to wills.

3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just.

5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of road supervisors or board of county commissioners may order the costs incurred before them paid in their discretion.

6. The compensation of referees and commissioners to take depositions.

7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.

8. In all proceedings under the chapter entitled Drainage, except as therein otherwise provided.

9. In proceedings for reallotment of homestead for increase in value, as provided in the chapter, Civil Procedure. (Rev., s. 1268; Code, ss. 2134, 2161, 1660, 1294, 2039, 2056, 533, 1422, 1323; 1889, c. 37; 1893, c. 149, s. 6.)

Caveats to Wills.—It is within the discretionary power of a court, under this section, before which an issue of devisavit vel non is tried, to direct the payment of the costs out of the estate. Mayo v. Jones, 78 N. C. 406. See In re Hargrove, 206 N. C. 307, 313, 173 S. E. 577, for dicta on this point.

Where certain land contiguous to the lands of other devisees are devised, without direction in the will for the survey or partition or for perfecting the title, the cost of survey and registration of deeds should be borne by the devisees of the lands, and it is not a proper charge against the estate to be paid by the executor. In re Winston, 172 N. C. 270, 90 S. E. 201.

In actions for divorce the husband, whether successful or unsucessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases in the discretion of the court. Broom v. Broom, 130 N. C. 562, 565, 41 S. E. 673.

Allowance to Referee.—Originally, under the Code of 1883, secs. 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them in its discretion. Cobb v. Rhea, 137 N. C. 295, 297, 49 S. E. 161.

Same—Analogy to Allowance to Receivers.—The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. Whether the receiver's fees should be divided is a matter in the discretion of the presiding judge, as is now the case also with referees' fees. Simmons v. Allison, 119 N. C. 556, 564, 26 S. E. 171.

Same—Not Precluded by Former Judgment.—A former judgment, Horner v. Oxford Water, etc., Co., 69 S. E. 607, (153 N. C. 535), appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" under this section. Horner v. Oxford Water & Electric Co., 156 N. C. 494, 72 S. E. 624.

Cost in Partition.—The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. Fortune v. Hunt, 152 N. C. 715, 68 S. E. 213.

In proceedings to partition lands held in common among the heirs at law of the deceased, including the question of dower and the claim of the widow to be allowed a certain fee-simple interest by contract, the court is without authority to allow attorneys' fees as a part of the costs, the same not being included in this section. The case differentiated from those wherein the employment of counsel was found necessary to protect the rights of infants represented by guardian in litigation, and other analogous cases. Regan v. Regan, 186 N. C. 461, 119 S. E. 882.

Applied in Field v. Wheeler, 120 N. C. 264, 269, 26 S. E. 812.

Stated in Perry v. Pulley, 206 N. C. 701, 704, 175 S. E. 89.

§ 1245. Petitioner to pay costs in certain cases.—The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming lowlands.

2. In petitions for condemnation of water millsites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

3. In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

4. When the petition is refused. (Rev., s. 1269; Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562.)

§ 1246. Defendant unreasonably defending after notice of no personal claim to pay costs.—In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Rev., s. 1270; Code, s. 216.)

Condemnation Proceedings.—In proceedings brought by a railroad where it was found by the jury on appeal that the defendant's benefit exceeded his damages and then found they were equal, it was held that the plaintiff was taxable with costs up to the time of appeal. Madison County R. Co. v. Gahagan, 161 N. C. 190, 76 S. E. 696.

§ 1247. Suits in forma pauperis, no costs unless recovery.—When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him. (Rev., s. 1265; Code, s. 212; 1895, c. 149; 1868-9, c. 96, s. 3.)

As to when suits in forma pauperis permitted, see section 494 and notes thereto. For full treatment of this subject, see 3 N. C. Enc. Dig. 707.

Leave to Sue.—The leave to sue as a pauper, does not extend in civil actions beyond the trial in the Superior Court. Speller v. Speller, 119 N. C. 356, 26 S. E. 160. As to appeal see sec. 649 and notes thereto.

Costs of Witnesses.—One suing in forma pauperis is not entitled to recover costs of his witnesses. Draper v. Buxton, 90 N. C. 182. Nor does the section excuse the pauper from liability for his witnesses. Bailey v. Brown, 105 N. C. 127, 129, 10 S. E. 1054.

This provision, in terms, deprives all officers of costs, and

the last clause of it is very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. Hall v. Younts, 87 N. C. 285; Booshee v. Surles, 85 N. C. 90; Draper v. Buxton, 90 N. C. 182, 185.

The Act of 1868-'69, ch. 96, sec. 3, amending the section ameliorates the rigors of the pre-existing law in regard to witnesses, who are not compelled to attend for more than one day, if the party summoning shall on presentation of the certificate of such attendance fail to pay what may be then due them. Booshee v. Surles, 85 N. C. 90, 92.

§ 1248. Party seeking recovery on usurious contracts, no costs.—No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (Rev., s. 1271; 1895, c. 69.)

As to usury generally, see sections 2305, 2306.

§ 1249. Costs in special proceedings.—The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Rev., s. 1272; Code, s. 541.)

§ 1250. Fees and disbursements in supplemental proceedings.—The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements. (Rev., s. 1273; Code, s. 499; C. C. P., s. 273.)

§ 1251. Costs of laying off homestead and exemption.—The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead. (Rev., s. 1274; Code, s. 510.)

As to appraisal and laying off homestead and personal property exemptions, see sections 731, 737.

Payment of Fees as Condition.—Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought in forma pauperis. Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 95 S. E. 38.

Applied in Beavans v. Goodrich, 98 N. C. 217, 220, 3 S. E. 516; Long v. Walker, 105 N. C. 90, 10 S. E. 658.

§ 1252. Costs of reassessment of homestead.—If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Rev., s. 1275; Code, s. 521.)

As to reassessment of homestead, see section 740.

Applied in Beavans v. Goodrich, 98 N. C. 217, 220, 3 S. E. 516.

§ 1253. Costs against infant plaintiff; guardian responsible.—When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Rev., s. 1276; Code, s. 534.)

§ 1254. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (Rev., s. 1277; Code, s. 535.)

See 3 N. C. Enc. Dig. 695 et seq.

When Fiduciary Personally Liable. — By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement, or bad faith, in such action or defense. Smith v. King, 107 N. C. 273, 278, 12 S. E. 57; Sugg v. Bernard, 122 N. C. 155, 29 S. E. 221; Lance v. Russell, 65 N. C. 626, 81 S. E. 922.

The same rule is applied to actions against administrators and executors. State v. Roberts, 106 N. C. 662, 19 S. E. 900; Varner v. Johnston, 112 N. C. 570, 577, 17 S. E. 483, with the additional limitation prescribed by section 103. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630. See section 103 and the notes thereto.

Includes Next Friend.—While "next friends" may not be embraced in the strict letter of this section, they come within its purview. Smith v. Smith, 108 N. C. 365, 369, 12 S. E. 1045, 13 S. E. 113. And it is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. Hockoday v. Lawrence, 156 N. C. 319, 322, 72 S. E. 387.

Allowance to Trustee.—A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the property. Chemical Company v. Johnson, 101 N. C. 223, 7 S. E. 770, 775.

Cited in In re Hargrove, 206 N. C. 307, 313, 173 S. E. 577.

§ 1255. Costs against assignee after action brought.—In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. (Rev., s. 1278; Code, s. 539.)

See 3 N. C. Enc. Dig. 698.

Absolute Assignments.—Cases have been decided in which it is held that the assignments contemplated by this section are only such as are absolute, and that such as are intended to be a collateral security only for a continuing obligation or claim are not within the purview of this act.

Thus, it has been held that an assignee could not be subjected to the payment of the costs incurred when the transfer was, as a collateral security, of a right to damages for an assault on the person of the assignor then in process of enforcement. Wolcott v. Holcomb, 31 N. Y. 125—of judgments. Peck v. Yorks, 75 N. Y. 421—of a demand under the mechanics' lien law; In the matter of the lien of R. H. Dowling, 52 N. Y. 658. Davis v. Higgins, 92 N. C. 203.

Art. 4. Costs on Appeal

§ 1256. Costs on appeal generally.—On an appeal from a justice of the peace to a superior court or from a superior court or a judge thereof to the supreme court, if the appellant recovers judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below had the judgment of that court been correct, and also restitution of any costs of the court ap-

pealed from which he has paid under the erroneous judgment of such court. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court. (Rev., s. 1279; Code, s. 540.)

For comprehensive treatment of this subject, see 3 N. C. Enc. Dig. 730 et seq.; 13 N. C. Enc. Dig. 513 et seq.

As to appeals from adjudications taxing costs, see the notes to section 638.

In General.—The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. Ellert v. Kelly, 4 E. D. Smith (N. Y.), 12. The trial court can not ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. What is said by the court in Dobson v. R. R., 133 N. C. 626, refers to the latter branch of this section. Williams v. Hughes, 139 N. C. 17, 19, 51 S. E. 790.

New Trial. — Where a new trial is granted, the awarding of costs is discretionary. Universal Metal Co. v. Durham R. Co., 145 N. C. 293, 299, 59 S. E. 50.

When the new trial is on the ground of newly discovered evidence, the costs of the appellate court should always fall upon the party obtaining the new trial, and unless in exceptional cases and for special reasons, since the other party is in no laches, as is shown by its having obtained the judgment below This is also a wholesome rule of practice, as new trials on this ground are outside of the regular course and are only granted, in discretion, when justice requires a departure from the usual procedure. By analogy, when a continuance is asked for on the ground of newly discovered evidence, the statute expressly forbids it to be granted except upon payment of the costs of the term. Herndon v. North Carolina R. Co., 121 N. C. 498, 500, 28 S. E. 144; Ladd v. Ladd, 121 N. C. 118, 28 S. E. 890.

When both parties are entitled to a new trial, each will pay his own costs in the Supreme Court. Ladd v. Ladd, 121 N. C. 118, 121, 28 S. E. 190.

The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. Satterthwaite v. Goodyear, 137 N. C. 302, 49 S. E. 205.

Appeal from Justice's Court. — On an appeal from the court of a justice of the peace to the superior court, the trial in the superior court is de novo, and its costs in both courts are required, by this section and section 661 applicable, to be taxed against the unsuccessful party, or, as in this case, upon a judgment in the plaintiff's favor for the difference between the amount of her demand over that allowed upon the defendant's counterclaim set up by way of answer. Ritchie v. Ritchie, 192 N. C. 538, 135 S. E. 458.

Where the subject-matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. Taylor v. Vann, 127 N. C. 243, 37 S. E. 263.

Reversal Necessary to Tax Appellant.—Unless the court upon the merit reverses the judgment below, it can not adjudge any part of the costs against the appellee. Commissioners v. Gill, 126 N. C. 86, 87, 35 S. E. 228.

Partial Affirmance and Partial Reversal. — Where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the Supreme Court may be divided so that each party pays his own costs. Smith v. Building and Loan Asssociation, 119 N. C. 249, 26 S. E. 41; Hawkins v. Cedar Works, 122 N. C. 87, 30 S. E. 13.

Under this section, where the appellant was awarded a partial new trial only, as to one issue only out of several, the costs of the appeal are in the discretion of the court. Rayburn v. Casualty Co., 142 N. C. 376, 55 S. E. 296.

In Mclean v. Breece, 113 N. C. 390, 393, 18 S. E. 694, where the judgment was modified in the Supreme Court the costs were taxed against the appellee. And where the plaintiffs recovered a part judgment on their demand, by establishing a mechanic's lien, they were entitled to costs of appeal. See Hogsed v. Lumber Co., 170 N. C. 529, 87 S. E. 337.

Case Remanded.—Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571.

Applied Kincaid v. Graham, 92 N. C. 154.

§ 1257. Costs of transcript on appeal taxed in supreme court.—When an appeal is taken from the superior court to the supreme court, the clerk of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the costs thereof shall be taxed as a part of the costs of the supreme court. (Rev., s. 1280; 1905, c. 456.)

For full treatment of expenses of record, abstracts, or transcripts, see 3 N. C. Enc. Dig. 737 et seq; 13 N. C. Enc. Dig. 515 et seq.

Former Rule.—Prior to the enactment of this section, it was held that the successful party on appeal from the superior court was entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. Dobson v. Southern R. Co., 133 N. C. 624, 45 S. E. 958.

Unnecessary Matter.—The Supreme Court has always held that the cost of printing unnecessary matter may be taxed against the party causing it to be sent up, regardless of the issue of the appeal. Wilson v. Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Finch v. Strickland, 130 N. C. 44, 40 S. E. 841. (For other cases substantiating this statement see, 13 N. C. Enc. Dig. 515.)

Especially is this so where the party has insisted on unnecessary matter being incorporated against the objection of the other party. See Roanoke R., etc., Co. v. Privette, 179 N. C. 1, 101 S. E. 489, and cases cited. This case in deciding what are necessary matters cites 3 N. C. Enc. Dig. (Michie's) pp. 739-741.

§ 1258. Costs on appeal from justices of the peace.—1. After an appeal from the judgment of a justice of the peace is filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court. (Rev., s. 1281; Code, s. 542.)

2. If, on appeal from a justice of the peace, judgment is entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same. (Rev., s. 1282; Code, s. 566; R. C., c. 31, s. 106; 1794, c. 414, s. 17.)

As to advance costs on appeal, see § 3904(d).

Applied in Kincaid v. Graham, 92 N. C. 154.

Art. 5. Liability of Counties in Criminal Actions

§ 1259. County to pay costs in certain cases; if approved, audited and adjudged.—If there is no prosecutor in a criminal action, and the defendant is acquitted, or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same is approved, audited and adjudged against the county as provided in this chapter: Provided, that in Hertford County clerks, sheriffs or constables, justices and witnesses shall in all cases receive full fees. In all criminal cases tried in Swain County where the defendant is convicted in superior court and sentenced to work upon the roads and/or imprisoned in the state prison, the county shall pay the clerk, sheriff, constable, justice of the peace and state's witnesses their full fees when same are legally taxed in the bill of costs as set out in

this section. (Rev., s. 1283; Code, ss. 733, 739; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1933, c. 68, s. 1; 1935, c. 210.)

See 3 N. C. Enc. Dig. 748; 13 N. C. Enc. Dig. 517.

Editor's Note.—The proviso in next to the last sentence, relating to Hertford county, was added by Public Laws 1933, c. 68. The last sentence of the section relating to cases tried in Swain county was added by the 1935 amendment.

In General.—This section and secs. 1283, 1284 and 1287, collated and construed together, place it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of witnesses for the State or for an acquitted defendant, in whole or in part, to be paid by the county, and from his decision no appeal can be taken. State v. Hicks, 124 N. C. 829, 32 S. E. 957; State v. Ray, 122 N. C. 1095, 29 S. E. 948.

Construed with Local Law.—Where a public-local law permits the costs of a municipal court to be recovered from a county upon conviction of a criminal offense in certain instances, this provision will be construed in pari materia with this section, and the intent and meaning of the local law will be to permit a recovery of one-half the costs only. City v. Guilford County, 191 N. C. 584, 132 S. E. 558.

Solicitors Fees.—Under this section the solicitor's fees are omitted, but, under section 3891 when the party convicted is insolvent, the solicitor shall receive fees. State v. Saunders, 146 N. C. 597, 59 S. E. 695.

Nolle Prosequi Entered.—Where a nolle prosequi is entered on an indictment for homicide as to murder in the first degree, the witnesses for the State subsequently attending the trial are entitled to only half fees. Coward v. Commissioners, 137 N. C. 299, 49 S. E. 207.

The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. State v. Johnson, 101 N. C. 711, 8 S. E. 360.

Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. State v. Shuffler, 119 N. C. 867, 26 S. E. 94.

Defendant Unable to Pay Costs.—To tax a county with the costs in a criminal action where the defendant is convicted, the trial judge must find that the defendant is unable to pay the costs. Coward v. Commissioners, 137 N. C. 299, 49 S. E. 207.

Subpoena of Witnesses.—For the attendance of a witness to be taxed as a part of the cost against the losing party to a civil action, or against the county in a criminal action, it is necessary that he should have been legally subpoenaed or lawfully recognized to attend. State v. Means, 175 N. C. 820, 95 S. E. 912.

Where Grand Jury Returns "Not a True Bill."—A county can not be taxed, under this section of the Code, with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." Guilford v. Board of Comm'rs, 120 N. C. 23, 27 S. E. 94.

Appeal without Bond.—There being no statute authorizing it, the officers of this court are not entitled to collect from a county the costs accruing in this court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal in forma pauperis and is insolvent. Clerk's Office v. Board of Comm'rs, 121 N. C. 29, 27 S. E. 1003.

Service on Public Roads.—Under this section the county (except New Hanover County under the next section) is liable for the payment of full fees where the defendant is convicted and serves out a sentence on the public roads. State v. Saunders, 146 N. C. 597, 59 S. E. 695.

Applied in State v. Horne, 119 N. C. 853, 855, 26 S. E. 36.

§ 1260. Local modification as to counties paying costs.—In the following counties the county shall pay one-half the fees specified when "not a true bill" is found: Alexander, Alleghany, Ashe, Avery, Bertie, Brunswick, Burke, Caldwell, Caswell, Catawba, Chatham, Clay, Craven, Davie, Duplin, Gaston, Granville, Greene, Guilford, Haywood, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Northampton, Onslow, Orange, Pamlico, Pender, Person, Pitt, Polk, Richmond, Robeson, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wilkes, Yadkin, Yansey. (Rev., s. 1283; Code, ss. 733, 739; 1907, cc. 94, 162, 208, 606, 627, 695; 1909, cc. 50, 107; P. L. 1911, cc. 76, 167; P. L. 1915, c. 22; 1931, cc. 135, 187; 1933, c. 366.

In Bladen County, where in a criminal proceeding before the grand jury a "true bill" is not found, the county shall pay one-half fees to clerks, sheriffs, officers, or constables who served any process in such proceeding. (1909, c. 183.)

In Brunswick and Catawba counties the county shall not be liable for any part of the costs of justices of the peace, when "not a true bill" is found. (Rev., s. 1283; 1905, c. 598; 1909, c. 107.)

In Montgomery County, in criminal cases, where the defendant is convicted in superior court, justices of the peace are entitled to full fees, if any are legally taxed in the bill of costs. (1909, c. 223.)

In New Hanover County, in a criminal action, if there is no prosecutor, and the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half fees as provided in the first sentence of this section. (Rev., s. 1283; 1905, c. 511; 1933, c. 366.)

Editor's Note.—The Acts of 1931 added the counties of Avery and Guilford to this section.

Haywood County was added to the list of counties by Public Laws 1933, c. 366. The amendment provides that that county shall only be liable for one-half of fees to clerks, sheriffs and constables serving process.

§ 1261. Liability of county when defendant acquitted in supreme court.—If, on appeal to the supreme court in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one-half of the costs of the appeal, and all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court. (Rev., s. 1284.)

§ 1262. County where offense committed liable for costs.—In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. (Rev., s. 1285; 1889, c. 354.)

§ 1263. Liability of counties, where trial removed from one county to another.—The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are impaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same is collected from him, on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county

liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justice of the peace of its own county, the amount due, with ten per cent additional, together with eight per cent interest on the sum due; and said courts of said county shall have full jurisdiction to hear, try and determine all actions and proceedings that may be brought for the purpose of enforcing the collection of the same. When the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof. (Rev., s. 1285; 1889, c. 354; 1901, c. 718.)

§ 1264. Statement of costs against county to be filed with commissioners.—In all criminal actions where the county is liable in whole or in part for costs, it is the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county. (Rev., s. 1286; Code, s. 736; 1873-4, c. 116, s. 3.)

§ 1265. Expenses in conveying prisoner to another county; provision for payment. — When a sheriff or other officer arrests a person under a capias or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer is obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried incurs any expense in going for and conveying said prisoner to his county, then in either case the sheriff or other officer shall file with the court or judge issuing the capias or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting, to be audited by them. Such sworn statement shall be received by the said board as prima facie correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county. (Rev., s. 1287; 1885, c. 262; 1901, c. 64.)

§ 1266. Cost of investigating lynchings. — In all cases of investigation and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. And whenever any solicitor goes to a county to investigate a crime of breaking or entering a jail for the purpose of lynching, the county where such crime is committed shall pay the solicitor the sum of one hundred dollars for making the investigation. (Rev., s. 1288; 1893, c. 461, s. 6.)

Editor's Note. — This section was originally a part of ch. 461 of the Laws of 1893; other sections of this Act pertaining to lynchings will be found as sections 4376, 4570, 4377, 4600 and 4571. It was held in State v. Lewis, 142 N. C. 626, 55 S. E. 600, that the Act of 1893 had lost none of its efficacy by splitting the same into sections and by placing these sections under the appropriate chapter headings of the Code.

§ 1266(a). Sums due credited on taxes due by payee.—Whenever a bill of costs in a criminal action is presented to any board of county commissioners in any county of the state for payment, as provided in chapter 23, article 5, of the consolidated statutes, and the said bill is ordered to be paid by the said county commissioners, it shall be the duty of the clerk of said board, before issuing any orders for payment of the sum set out in said bill, to ascertain whether any person to whom any amount is due on said bill of costs, is indebted to the county for taxes, and if said person to whom said order is payable is so indebted, the order shall state in its face, "Payable only on taxes due .....County," and upon presentation of such order to the sheriff or tax collector, said sheriff or tax collector shall give said taxpayer credit for the sum designated in said order, and the said sheriff or tax collector shall be entitled to receive credit for said sum so paid in his settlement for taxes.

It shall be unlawful for any board of county commissioners to pay to any person who is indebted to the county for taxes any money payable out of the revenues of the county on account of costs in a criminal case, which is payable by the county, except as provided in paragraph one above.

Upon the ratification of this section the secretary of state is hereby authorized and directed to forward to the clerk of the board of county commissioners of each of the several counties of the state a copy of this section. (1933, c. 245.)

Editor's Note.—By Public Laws of 1933, c. 501, Wilson County is exempted from the operation of this section. By Public Laws of 1933, c. 426, the same exemption is made as to Granville and Craven Counties.

The acts of 1935, Public Laws of 1935, chapter 319, sections 1 and 2, applicable only in Alamance county, directs that a provision leaving it within the discretion of the chairman of the board of commissioners as to whether or not the provisions of the section shall apply to current taxes, shall be substituted for the second paragraph of the section.

Art. 6. Liability of Defendant in Criminal Actions

§ 1267. Costs against defendant convicted, confessing, or submitting.—Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution. (Rev., s. 1291; Code, s. 1211; R. C., c. 35, s. 46.)

This section is cited in 5 N. C. Law Rev. 359, in a note on "Interest in Cost."

In General. — The right of the officers to recover costs in the name of the state is a mere incidental one arising out of the conviction under the provisions of this section, and the judgment for them vests the claim in the officers to whom they are due. State v. Crook, 115 N. C. 760, 765, 20 S. E. 513. The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to receive them. The judgment, though nominally in the name of the state, is, in effect, in favor of those performing services in the case for which the fees are given as a compensation. State v. Mooney, 74 N. C. 98, 99.

The "costs of prosecution" are those incurred in the

conduct of the prosecution, and do not include the costs incurred by the defendant in resisting the prosecution. State v. Wallin, 89 N. C. 578.

Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defence, has no right to have his ticket for attendance allowed in the bill of costs. It is a personal debt of the defendant, the payment of which the witness may enforce by suing out execution in the cause. State v. Wallin, 89 N. C. 578.

No Part of Punishment. — The order for the payment of the costs of a criminal prosecution upon a suspension of judgment does not constitute any part of the punishment; the legal effect being only to vest the right to the costs in those entitled to them. State v. Crook, 115 N. C. 760, 20 S. E. 513.

§ 1268. Defendant imprisoned not discharged until costs paid.—If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law. (Rev., s. 1292; Code, s. 905; 1868-9, c. 178.)

Costs Not Part of Punishment.—The taxing the cost in a criminal action is not a part of the punishment for the offense committed. State v. Smith, 196 N. C. 438, 146 S. E. 73.

§ 1269. Judgment confessed or bond given to secure fine and costs.—In cases where a court, mayor, or a justice of the peace permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (Rev., s. 1293; Code, s. 749; 1885, c. 364; 1879, c. 264.)

In General. — The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was made in the defendant's presence without his objection, and that its evident purpose was to save the defendant from a more grievous penalty permitted or required by law. State v. Hilton, 151 N. C. 687, 65 S. E. 1011.

Cited in State v. Smith, 196 N. C. 438, 439, 146 S. E. 73.

§ 1270. Arrest for nonpayment of fine and costs. —In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the state, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law. (Rev., s. 1294; Code, s. 750; 1885, c. 364; 1879, c. 264.)

Cited in State v. Smith, 196 U. C. 438, 146 S. E. 73.

Art. 7. Liability of Prosecutor for Costs

§ 1271. Prosecutor liable for costs in certain cases; court determines prosecutor.—In all criminal actions, if the defendant is acquitted, nolle prosequi entered, judgment against him arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice is of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record. (Rev., s. 1295; Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49.)

For full treatment of this subject, see 3 N. C. Enc. Dig. 751 etc., 13 N. C. Enc. Dig. 517.

General Consideration. — This section was intended to enlarge the power of the courts over the question of costs in criminal actions. State v. Norwood, 84 N. C. 794. Its enactment was within the power of the Legislature. State v. Cannady, 78 N. C. 539.

Certifying Witnesses as Proper for Defense. — Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by this section, judgment will be allowed to stand if the court below will make and certify the requisite finding that the said witnesses were proper for the defense. State v. Jones, 117 N. C. 768, 23 S. E. 247.

In State v. Owens, 87 N. C. 565, it was stated that the section includes such witnesses for the defense as are certified by the counsel to have been proper for the defense, and the Supreme Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. Also State v. Massey, 104 N. C. 877, 880, 10 S. E. 608. In State v. Roberts, 106 N. C. 662, 10 S. E. 900, which was also a judgment taxing the prosecutor with the costs, the judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. The Supreme Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs upon the findings of these facts. State v. Jones, 117 N. C. 768, 773, 23 S. E. 247.

See remarks of Mr. Justice Ashe upon the Act of 1875, ch. 247, and the substitution of the words 'opinion" for "certify" and "or" for "and," by the Act of 1879, in State v. Norwood, 84 N. C. 794.

Where Magistrate Has Final Jurisdiction. — As to causes of which a magistrate has final jurisdiction, when no appeal is taken from that court, it would seem, by virtue of section 3893, that the prosecutor could only have been taxed with costs when the prosecution is adjudged frivolous or malicious, while this section extended to justices' as well as other courts, the power to tax the prosecutor with costs also in cases where there was no reasonable ground for the prosecution, or it was not required by public interest. Whatever difficulty there might have been in reconciling these apparently conflicting provisions of the Code is practically removed by ch. 34, Laws of 1889, which purports to amend this section, but which, also, being later in time, must modify sec. 3893 where it conflicts with it. This Statute of 1889 applies to justices', as well as other courts, and provides that the prosecutor shall be taxed with the costs if the defendant is discharged from arrest for want of probable cause. The opinion in Merrimon v. Commissioners, 106 N. C. 369, 11 S. E. 267, must be modified by adding to the instances in which the prosecutor in a case before a magistrate can be taxed with the costs, that of the defendant being discharged for want of probable cause, though it is still only when the prosecution is adjudged frivolous or malicious that any court is empowered to imprison the prosecutor for non-payment of costs. State v. Carlton, 107 N. C. 956, 958, 12 S. E. 44.

"Not Required for Public Interests."—A finding by the trial judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." State v. Baker, 114 N. C. 812, 19 S. E. 44.

Marking Prosecutor. — Under the Code of 1854 it was held that the person to be taxed must be marked on the bill as prosecutor (see State v. Lupton, 63 N. C. 483; State

v. Darr, 63 N. C. 516) and that the court had no right to order him to be marked as such without his consent. See State v. Crosset, 81 N. C. 579, 582. But note the language of the section as it now reads, viz., "whether marked on the bill or warrant or not." Ed. Note.

Notice. — It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." State v. Collins, 169 N. C. 323, 84 S. E. 1049.

The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of the defendant's counsel or by the court of its own motion. State v. Hughes, 83 N. C. 665; State v. Hamilton, 106 N. C. 660, 10 S. E. 854. The court should find the facts, and when this is done the findings are not reviewable in this court. Id. State v. Roberts, 106 N. C. 662, 10 S. E. 900, and State v. Owens, 87 N. C. 565; State v. Jones, 117 N. C. 768, 772, 23 S. E. 247.

A notice to mark one as prosecutor under this section need not be writing. Where it was announced in open court, upon the calling and continuance of a state case, that a motion would be made at the next term to mark a witness as prosecutor (all the witnesses being present), and on the argument of the motion it was announced that all the parties were present, it was held to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor. State v. Norwood, 84 N. C. 794.

Insolvent Prosecutor—County Liable. — When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same. Pegram v. Commissioners, 75 N. C. 120.

Conclusiveness of Finding. — A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay the costs, is conclusive and not appealable. State v. Hamilton, 106 N. C. 660, 10 S. E. 854.

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned. State v. Lance, 109 N. C. 789, 14 S. E. 110.

But where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of the due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. State v. Collins, 169 N. C. 323, 84 S. E. 1049.

In this latter case it is said: "In the disposition made of this appeal we do not intend to impair or qualify our former decisions on the subject, notably State v. Hamilton, 160 N. C. 660, 10 S. E. 854, and State v. Roberts, 106 N. C. 662, 10 S. E. 900, to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but, on the facts as they appear from his honor's findings, and we think it not improper to say that he has spread them on the record with commendable candor, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside."

Applied in State v. Baker, 114 N. C. 812, 19 S. E. 145; State v. Darr, 63 N. C. 516.

§ 1272. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous. — Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the nonpayment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (Rev., s. 1297; Code, s. 738; R. C., c. 35, s. 37; 1800, c. 558; 1879, c. 49; 1881, c. 176.)

Constitutionality. — This section is held constitutional. State v. Cannady, 78 N. C. 539; State v. Hamilton, 106 N. C. 660, 661, 10 S. E. 854.

Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of Article one, section sixteen, of the Constitution, and hence the defendant may be imprisoned for non-payment of the same. See notes of this case under section 1267. State v. Wallin, 89 N. C. 578.

Where Bill Ignored. — No power is conferred by this section to tax a prosecutor with costs when the bill is ignored. State v. Horton, 89 N. C. 581; State v. Cockerham, 23 N. C. 381; State v. Gates, 107 N. C. 832, 833, 12 S. E. 319.

Art. 8. Fees of Witnesses

§ 1273. Not entitled to fees in advance.—Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the state or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance. (Rev., s. 1298; Code, s. 1368; 1868-9, c. 279, subch. 11, s. 3.)

Cross References. — For full treatment of costs of witnesses in civil cases, see 3 N. C. Enc. Dig. 722 et seq; for full treatment of costs of witnesses in criminal cases, see 3 N. C. Enc. Dig. 760.

§ 1274. Witness to prove attendance; action for fees.—Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the state and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered. (Rev., s. 1299; Code, s. 1369; R. C., c. 31, s. 73; 1777, c. 115, s. 46; 1796, c. 458; 1868-9, c. 279, subch. 11, ss. 2, 4.)

In General. — Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court in the cases, and only within the limits authorized by statute. State v. Massey, 104 N. C. 877, 879, 10 S. E. 608.

Need Not Show Assignment of Witness Tickets.—The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the Superior Court that these fees have been taxed against the party recovering the judgment, and paid by him, he is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. McClure v. Fulbright, 196 N. C. 450, 146 S. E. 74.

Witnesses Not Sworn or Tendered. — Where a trial is had and the witnesses are not sworn or tendered, their costs cannot be taxed against the party cost. Loftis v. Raxter, 66 N. C. 340. But where the defendant's witnesses are present and are not sworn or tendered because the plaintiff takes a nonsuit, the costs of such witnesses are properly taxable against the plaintiff. Henderson v. Williams, 120 N. C. 339, 27 S. E. 30.

There is no provision in our law authorizing the taxation as costs, the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been summoned but who are nonresidents of the State. Stern v. Herren, 101 N. C. 516, 8 S. E. 221.

Witnesses Subpoenaed but Not Examined. — When a cause has been tried, only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the other. Hobbs v. Atlantic, etc., R. Co., 151 N. C. 134, 136, 65 S. E. 755; Chadwick v. Life Ins. Co., 158 N. C. 380, 381, 74 S. E. 115.

It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses and prevent being taxed with an excessive number upon any single point by such witnesses being sworn and tendered to the opposite party for examination. Porter v. Durham, 79 N. C. 596. It is true that in Loftis v. Baxter, 66 N. C. 340, it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for "sworn and examined or tendered" i. e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined, that their materiality may be shown. Otherwise, a successful party may oppress the losing party by subpoenaing and swearing any number of witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of this materiality. They must be examined or tendered to the opposite party to be examined, should he so choose, and if examined by the opposite party they are to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses. Sitton v. Lumber Company, 135 N. C. 540, 541, 47 S. E. 609.

Effect of Nonsuit. — The costs of the defendant's witnesses, who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. Henderson v. Williams, 120 N. C. 339, 27 S. E. 30, citing Loftis v. Raxter, 66 N. C. 340, cited in Sutton v. Lumber Company, 135 N. C. 540, 541, 47 S. E. 609.

A pauper is not excused from liability for his witnesses. Bailey v. Brown, 105 N. C. 127, 129, 10 S. E. 1054.

Witnesses Summoned by Both Parties. — A witness summoned by each party to a suit is entitled to compensation from each. Peace v. Person, 5 N. C. 188.

§ 1275. Witness tickets to be filed; only two witnesses for single fact.—At the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact. (Rev., s. 1300; Code, s. 1370; R. C., c. 31, s. 74; 1783, c. 189, s. 3; 1796, c. 458, s. 2.)

See note under § 1274.

Editor's Note. — "Service as a witness," as stated by Justice Clark, (then Chief Justice) in State v. Wheeler, 141 N. C. 773, 777, 53 S. E. 358, "is the exaction of a public duty, like service upon a jury, grand jury, coroners inquest, special venire, military service, and the like, which men are required to render either wholly without compensation or (usually) with inadequate pay, as the sovereign may require. Originally none of these received any pay whatever (State v. Massey, 104 N. C. 877, 878, 10 S. E. 608), the duration of military service only having a time limit. And to this day witnesses, above two to each material fact, receive no pay."

Where the issue submitted is a complex one, involving the investigation of a multiplicity of single facts, material to be ascertained, to establish each of which two witnesses are allowable under this section. Ex parte Beckwith, 124 N. C. 111, 32 S. E. 393.

Four Witnesses Summoned—Two Called by Each Party.—Where there was only one issue in the case, and plaintiff summoned four witnesses, but called only two of them, and the defendant summoned the witness who did not attend, the defendant was nevertheless liable for the costs of the two witnesses not sworn, as the court could not say that they had not been summoned to contradict testimony expected from the defendant's witness. Hayle v. Cowan, 2 N. C. 21.

Against Parties Summoning Witnesses.—While not more than two witnesses, summoned by the successful party to prove a single fact, can be taxed against the party cost under this section, this does not abridge the right of all the witnesses to recover compensation against the party summoning them. State v. Massey, 104 N. C. 877, 881, 10 S. E. 608.

This section does not apply to expert witnesses, the court being allowed under § 3893 to exercise its discretion with reference to compensation for same. Connor v. Hayworth, 206 N. C. 721, 724, 175 S. E. 140.

Applied in Cureton v. Garrison, 111 N. C. 271, 16 S. E. 338.

§ 1276. Local: trafficking in witness tickets regulated.—1. Amounts Paid for Tickets to be Endorsed thereon.—Whenever any person shall prove a ticket as a witness in any criminal action, wherein any county in this state shall be adjudged to pay the cost or any part thereof, and such person shall sell or assign the same to any other person, firm or corporation, he shall state on the back of the ticket the amount which he shall receive from the assignee named for such sale or assignment, and the assignee shall make an affidavit of the truthfulness of such amount as stated in the endorsement of sale.

2. Amount Receivable by Assignee.—It shall be unlawful for any assignee of any ticket proved in a criminal action, wherein any county is or shall be adjudged to pay the costs thereof, to receive from the county any greater sum than the amount paid by such person, firm or corporation, with ten per cent added to the amount received by the person proving the ticket.

3. If Improperly Endorsed Not Taxed against County.—It shall be the duty of the clerk of the superior court, in making out the bills of cost which shall be adjudged against the county for payment, to examine carefully all witness tickets, and whenever any ticket shall fail to show the amount paid for any transfer, sale or assignment properly endorsed on said ticket, and sworn to, as above provided in subsection one, he shall not tax the same against any county for payment.

4. Collection of Greater Amount Misdemeanor.—If any person shall collect from any county in this state a sum greater than the amount received by the person proving said ticket, with ten per cent added thereto, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined double the amount so collected by him, not exceeding the sum of fifty dollars, or imprisoned not more than thirty days.

5. False Statement Perjury.—Any person purchasing any ticket in any criminal action, wherein the county shall be adjudged to pay the cost or any part thereof, who shall make a false statement of the amount paid by him for such ticket or tickets, shall be guilty of perjury, and upon conviction shall be punished as for that offense.

6. To What Counties Applicable.—This section shall apply only to the counties of Anson, Buncombe, Columbus, Forsyth, Gaston, Haywood, Richmond, Robeson, Rutherford, and Surry. (1907, c. 120; P. L. 1913, cc. 791, 793; 1915, c. 305; 1933, c. 366, s. 2.)

Editor's Note.—The section was made applicable to Haywood County by Public Laws 1933, c. 366.

§ 1277. Fees of witnesses before jury of view, commissioner, etc.,—Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning. (Rev., s. 1301; Code, s. 1365; R. C. c. 31, s. 67; 1805, c. 685; 1848, c. 66; 1850, c. 188, s. 3.)

§ 1278. Fees of witnesses before grand jury.—No witness shall receive pay for attendance in a criminal case before a grand jury, unless such witness has been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or unless he has been bound or recognized by some justice of the peace to appear before the grand jury. (Rev., s. 1302; Code, s. 743; 1879, c. 264.)

Permission to Summon. — Grand jurors have no right to summon witnesses to appear before them except by the permission of their foreman or of the solicitor as prescribed by this section. State v. Wilcox, 104 N. C. 847, 10 S. E. 453.

Endorsement of Names. — Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned endorsed thereon as sworn and sent. Lewis v. Board of Comm'rs, 74 N. C. 194.

§ 1279. Local modifications as to fees of witnesses before grand jury.—In Martin county all witnesses who are subpoenaed by the court's order to appear before the grand jury and do attend, and all other witnesses who testify for the state in open court, may prove attendance and collect one-half fees. (Rev., s. 1283; 1905, c. 134.)

In Moore county all persons subpoenaed as witnesses before the grand jury in any criminal prosecution, or subpoenaed to appear before the judge in any criminal prosecution, shall receive one dollar per day for each day attending and five cents per mile for each mile traveled to and from court one time, whether a true bill be found or not. The county commissioners shall not have power or authority to allow any less sum than the face of the juror's or witness's tickets provided herein. (1907, c. 93, ss. 4, 5.)

In Wayne county witnesses subpoenaed by the state before the grand jury shall receive one-half fees, and if the grand jury fails to find "a true bill." (1907, c. 40.)

§ 1280. Pay of witnesses in criminal cases.—All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant only upon conviction, confession or submission; and if the defendant is acquitted on any charge of an inferior nature, or a nolle prosequi be entered thereto, the court shall order the prosecution to pay the cost, if such prosecution appears to have been frivolous or malicious; but if the court is of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request. (Rev., s. 1296; Code, s. 1204; R. C., c. 35, s. 37; 1800, c. 558, s. 1; 1879, c. 49; 1879, c. 92, s. 3; 1881, c. 176.)

An appeal lies from the judgment of a justice of the peace in a criminal action taxing the prosecutor with cost. State v. Morgan, 120 N. C. 563, 21 S. E. 634, cited in Harris v. Singletary, 193 N. C. 583, 588, 137 S. E. 724.

§ 1281. County to pay state's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the state, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid. (Rev., s. 1289; Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253.)

See section 1259 and the notes thereto.

In General. — The liability of the county for the defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the court is not liable to the defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. State v. Horne, 119 N. C. 853, 26 S. E. 36; Guilford v. Comm'rs, 120 N. C. 23, 28, 27 S. E. 94.

Service out of State. — The service of a subpoena on a witness beyond the borders of the state in a criminal action is not valid; and where the trial judge has allowed a necessary nonresident witness to prove his ticket against the county with mileage to the state line, there is no authority for him to allow the witness to prove for services rendered by him outside of the state when service has been attempted there. State v. Means, 175 N. C. 820, 95 S. E. 912.

§ 1282. Local modifications as to counties paying state's witnesses.—In Durham county, when on the trial of a criminal action the costs, or any part thereof, are taxed against the county, the witness fees of a salaried officer or salaried employee of the county of Durham or the city of Durham shall not be taxed against the county in the bill of costs. (1909, c. 485.)

In Wake county, in all criminal cases and proceedings in the superior court where there is a verdict of acquittal, nolle prosequi, arrest of judgment, the return by a grand jury of "not a true bill," the county shall be liable for one-half

fees to state's witnesses. Where the defendant is convicted and judgment is suspended, or the defendant is imprisoned, the county shall be liable for full fees to state's witnesses. The clerk of the superior court, immediately upon the determination of the case or proceeding, in any one of the ways provided above, shall make out and sign a statement showing the amount of fees and mileage to which each and every state witness duly subpoenaed to attend court in that case or proceeding is entitled and when a certificate is made thereon by the sheriff of the county that the witness has paid all taxes for which he is liable, shall be presented to the treasurer of the county, who shall immediately pay the same out of the general county fund. In all cases where judgment is suspended, or the imprisoned defendant is taxed with the costs, the costs, when collected, shall be paid by the clerk to the treasurer of the county and placed in the general county fund. When on the trial of a criminal action the costs, or any part thereof, are taxed against the county, the witness fees of an all-time salaried officer or an all-time salaried employee of the County of Wake or the City of Raleigh, shall not be taxed against the county in the bill of costs. (1907, c. 204; Ex. Sess., 1908, c. 25; 1929, c. 102; 1931, c. 201.)

At least thirty days before each criminal term of the superior court of Wilkes county the clerk shall file with the board of county commissioners an estimate of the amount of money necessary to pay witnesses for the state fifty cents on the dollar of the amount due. Upon the filing of such estimate it is the duty of the commissioners to order the county treasurer to pay to the clerk an amount of money sufficient to pay state's witnesses fifty per cent of their witness fee and take receipt for same. At each term of the court, when witnesses who have been duly subpoenaed on behalf of the state are discharged upon filing their ticket with the clerk and assigning the ticket to the county, the clerk shall pay the witness fifty per cent of the face value of the ticket. The ticket shall be preserved by the clerk till the case is finally disposed of, and at the termination of the case, if the defendant is adjudged to pay the cost, the same shall be taxed in the bill of cost which, when collected, shall be paid over to the county treasurer, who shall pay the balance to the witness. Within thirty days after each criminal term of court the clerk shall pay over to the treasurer all the money so collected from defendants on witness fees, and file a sworn statement of all money so collected. It is the duty of the solicitor as each witness is discharged to give him a certificate showing the number of days he is entitled to prove as a witness, which certificate shall be filed with the clerk. If any individual purchases any witness ticket from any witness, the county shall not be liable to pay said witness, unless it shows upon the ticket the amount so paid by the purchaser, and then no greater amount than the amount paid, and in no case to exceed fifty per cent of the face value thereof. (1909, c. 38.)

§ 1283. County to pay defendant's witnesses in certain cases.—When the defendant is acquitted, a nolle prosequi entered, or judgment against him arrested, and it is made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attendance, and that they were necessary for his defense, it is the duty of the court, unless the prosecutor is adjudged to pay the costs, to make and file an order in the cause directing that said witness be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases. (Rev., s. 1290; Code, s. 747; 1879, c. 264; 1881, c. 312.)

See section 1259 and the notes thereto.

In General. — This section shows the legislative intent to restrict payment by the county of the defendant's witnesses to the cases specified, and their number and amount of compensation. State v. Massey, 104 N. C. 877, 880, 10 S. E. 608.

In this case it was said, the court below rightly held that there is no statute authorizing the court to tax defendant's witnesses against the county when the "bill is quashed." If this is a casus omissus the remedy can only be found in a legislative enactment. It would seem, however, intentional for the Statute of 1799 (Code, sec. 737), authorizing the court to tax prosecutors with costs, does not extend to cases in which the bill is quashed. In Office v. Gray, 4 N. C. 307, the court gives the reason that the bill can only be quased if the offense be not indictable, or is not set forth with legal precision, and the court could not, therefore, find that the prosecution was frivolous or malicious. It seems, from the similarity of language used in secs. 737 and 747, that the intention was to allow the defendant's witnesses to be taxed against the county only in the cases in which they could be taxed against a prosecutor. As to the state's witnesses, the language is broader, and provides for their payment in all cases in which "the defendant is discharged" (this section), subject, of course, to the restrictions above cited.

§ 1284. Fees of state witnesses; two only in misdemeanors; one fee for day's attendance. — No person shall receive pay as a witness for the state on the trial of any criminal action unless such person was summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day. (Rev., s. 1303; Code, s. 744; 1871-2, c. 186; 1879, c. 264.)

§ 1285. On appeal from justice only two witnesses bound over.—When the defendant appeals from the judgment of the justice of the peace, in any criminal action, it is the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses are summoned by order of the appellate court as provided in the preceding section. (Rev., s. 1304; Code, s. 745; 1879, c. 264.)

Where on appeal to the superior court from a judgment

of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. State v. Shuffler, 119 N. C. 867, 26 S. E. 94.

§ 1286. Discharge of witnesses for state; certificate of attendance by solicitor.—It is the duty of all solicitors prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call, in open court, and announce the discharge of witnesses for the state, either finally or otherwise as the disposition of the case may require, and thereupon the clerk of the superior court shall enter such announcement of discharge, with the names of the witnesses discharged, in his minutes. (Rev., s. 1305; Code, s. 746; 1879, c. 264; 1881, c. 312; 1935, c. 26.)

Editor's Note.—The amendment of 1935 omitted the provision as to the form of the certificate. It also requires that the discharge shall be in open court. The requirement for entry on the minutes is new.

§ 1287. Witnesses not paid without certificate; court's discretion.—No county, prosecutor or defendant shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name is certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law. The court, at any time within one year after judgment, may, order that any witness may be paid who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs. (Rev., s. 1306; Code, ss. 733, 748; 1879, c. 264; 1881, c. 312.)

The discretion conferred upon the court, in this section, in respect to regulating, or refusing to allow any compensation to the witnesses therein named, is not reviewable. State v. Massey, 104 N. C. 877, 10 S. E. 608.

It is within the discretion of the trial Court (under this section of the Code) to refuse to make an order for the payment by the county of the fees of witnesses for a defendant acquitted of a criminal charge, where no prosecutor is marked, and the exercise of such discretion is not reviewable. State v. Ray, 122 N. C. 1095, 29 S. E. 948.

Appeal.—In an appeal from defendant's motion to retax the costs in a criminal action it should appear on the record that the provisions of this and § 1284 were complied with and when it does not so appear the case will be remanded. State v. Kirby, 201 N. C. 789, 161 S. E. 483.

Art. 9. Criminal Costs before Justices, Mayors, County or Recorder's Courts

§ 1288. Liability for criminal costs before justice, mayor, county or recorder's court.—The party convicted in a criminal action or proceeding, within the jurisdiction of a justice of the peace, before any justice, mayor, county or recorder's court, shall always be adjudged to pay the costs, and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice, mayor, county or recorder's court shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding in which a justice of the peace has final jurisdiction, commenced or tried in a court of a justice of the peace, mayor, county or recorder's court shall the county be liable to pay any costs: any defendants or prosecuting witness shall have the right of appeal to the superior court: Provided, that in cases where the defendant is sentenced to prison or to work upon the public roads by any justice of the peace in Jackson county, and in case such defendant is unable to pay the costs of such action, then the county of Jackson shall be liable for the payment of the costs of the trial justices and the sheriff of said county. (Rev., 1307; Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; 1931, c. 252; 1933, c. 225, s. 1.)

Editor's Note.—The Act of 1931 repealed the former section and enacted this section in lieu thereof. The former section applied only to proceedings before a justice.

The proviso, relating to Jackson County, was added by Public Laws 1933, c. 225.

Chapter 84 of Public Laws of 1935 directs that Swain county and the town of Bryson City shall be liable in certain instances to one-half the cost in said cases where the defendant is unable to pay the same.

Public Laws of 1935, chapter 25, provides for payment in Martin county under the same circumstances as set out in the proviso of the section relating to Jackson county.

Where the justice of the peace has testified on the trial to recover damages for a false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed him. Harris v. Singletary, 193 N. C. 583, 137 S. E. 724.

Taxation of Prosecutor in Justices Court.—See section 1271 and notes thereto.

Cited in 5 N. C. Law Rev. 359, in a note on "Interest in Costs."

§ 1289. Imprisonment of defendant for nonpayment of fine and costs.—If the justice sentences the party found by him to be guilty to pay a fine and costs, and the same are not immediately paid, the justice shall commit the guilty person to the county jail until the same are paid, or until he is otherwise discharged according to law. (Rev., s. 1308; Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15.)

CHAPTER 24

COUNTIES AND COUNTY COMMISSIONERS

Art. 1. Corporate Existence and Powers of Counties

§ 1290. County as corporation; acts through commissioners.—Every county is a body politic and corporate, and has the powers prescribed by statute, and those necessarily implied by law, and no others; which powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them. (Rev., s. 1309; Code, ss. 702, 703, 1868, c. 20, ss. 1, 2; 1876-7, c. 141, s. 1.)

Cross References. — As to corporate powers of counties enumerated, see section 1291; as to powers of the board of commissioners, see section 1297.

Editor's Note. — Counties are of, and constitute a part of, the state government. Their chief purpose is to establish its political organization, and effectuate the local civil administration of its powers and authority. They are in their general nature governmental—mere instrumentalities of government—and possess corporate powers adapted to its purposes. It is not their purpose to create civil liability on their part, and become answerable to individuals civilly or otherwise. Indeed, they are not, in a strict legal sense, municipal corporations, like towns and cities organized under charters or particular statutes, and invested with more of the junctions of corporate existence, intended to serve, not so much the purpose of the state, as, subject to its general laws, the advantage of particular communities in particular localities in the promotion and regulation more or less of trade, commerce, industries, and the business transactions and business relations in some respects of the people re-

siding or going there collectively and severally—their purposes are more general, and partake more largely of the purpose and powers of government proper. Manuel v. Board, 98 N. C. 9, 10, 31 S. E. 829; White v. Commissioners, 90 N. C. 437; McCormack v. Commissioners, 90 N. C. 441.

The Legislature, subject to constitutional limitations, may confer upon counties such corporate powers to make contracts, create civil liabilities, and serve such business purposes, as it may deem expedient and wise, and make them answerable in damages for the negligence of their officers and agents in failing to properly exercise the powers with which they are charged, or for exercising them improperly, to the injury of individuals. But such corporate authority and liability must be especially created by and appear from statutory provision, expressed in terms or necessarily implied. Manuel v. Board, 98 N. C. 9, 11, 3 S. E. 829.

The county revenue is safe from seizure by creditors, or even for taxes due the Federal government, because, to admit the right to appropriate them in satisfaction of a claim would be to concede the power to destroy the state government by depriving its agencies of the means of performing their proper functions. Subject to the restrictions contained in the Federal Constitution, the state is a sovereignty, and it is essential to its preservation to give to all property held for it by such agencies as counties, the same protection as is given to that held in its own name. Vaughn v. Commissioners, 118 N. C. 636, 639, 24 S. E. 425; Hughes v. Commissioners, 107 N. C. 598, 12 S. E. 465; Meriwether v. Garnett, 102 U. S. 472, 473, 26 L. Ed. 197; United States v. Railroad Co., 17 Wall., 322, 21 L. Ed. 597.

Counties are a branch of the State government. Bell v. Commissioners, 127 N. C. 85, 37 S. E. 136.

Constitutional Power of Legislature to Create. — Under our Constitution, the legislature is given power to create special public quasi corporations for governmental purposes in certain designed portions of the state's territory subject to like control, and in the exercise of such power county lines may be disregarded. Board v. Webb, 155 N. C. 379, 71 S. E. 520.

In McCormac v. Commissioners, 90 N. C. 441, quoted with approval in Board v. Webb, 155 N. C. 379, 71 S. E. 520, Merrimon, J., said: "That it is within the power and is the province of the Legislature to subdivide the territory of the state and invest the inhabitants of such subdivisions with the corporate functions, more or less extensive and varied in their character, for the purpose of government, is too well settled to admit of any serious question. * * The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them when they apply. It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, * * * and invest them, and agencies in them, with powers, corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them unless the same shall be restricted by some constitutional limitations." Woodall v. Western Wake Highway Commission, 176 N. C. 377, 384, 97 S. E. 226; Commissioners v. Commissioners, 157 N. C. 514, 73 S. E. 195; Board v. Webb, 155 N. C. 379, 71 S. E. 520.

Counties as Municipal Corporations. — By the Constitution (1868) Art. VII, counties are regarded as municipal corporations. Winslow v. Commissioners, 64 N. C. 218, 220.

A county is a municipal corporation created by law for public and political purposes, and constitutes a part of the government of the State. Its powers are expressly defined by law, and, where they are not fixed by the Constitution, they may be enlarged or modified at any time by the Legislature. Gooch v. Gregory, 65 N. C. 142, 143.

Same—Differs from Cities and Towns.—Counties are not, in a strictly legal sense, municipal corporations, like cities and towns. Bell v. Commissioners, 127 N. C. 85, 91, 37 S. E. 136.

Powers Strictly Construed.—Corporations which exercise delegated governmental authority, such as counties, must be confined to a strict construction of the statutes granting their powers. There is nothing in the nature of their duties to give rise to the implication that the State intends to clothe them with any other power than that expressly conferred, and the further right to do what is necessary to the complete exercise of the express powers. Vaughan v. Commissioners, 118 N. C. 636, 641, 24 S. E. 425.

Functions Vary.—The functions of counties are not always the same, and they may be enlarged, abridged or modified at the will of the Legislature. White v. Commissioners, 90 N. C. 437, 438.

Legislature May Direct. — The Legislature may direct counties to perform as duties all things which it can empower them to do. State v. Board, 122 N. C. 812, 30 S. E. 352.

Body Politic and Corporate to Exercise Powers Granted. —A county is a body politic and corporate to exercise as an agent for the State only such powers as are prescribed by statute and those which are necessarily implied therefrom by law, essential to the exercise of the powers specifically conferred. O'Neal v. Wake County, 196 N. C. 184, 145 S. E. 28. See Board v. Hauchett Bond Co. 194 N. C. 137, 138 S. E. 614.

Must Act through Commissioners in Legal Session.— It is essential that a county to exercise the powers to contract must act through its county commissioners as a body convened in legal session, regular, adjourned or special, and, as a rule, authorized meetings are prerequisite to corporate action, which should be based upon deliberate conference and intelligent discussion of proposed measures. O'Neal v. Wake County, 196 N. C. 184, 145 S. E. 28.

Contract for Employment of Detective.—The commissioners of a county are without authority, constitutional or statutory, to enter into a joint meeting with other State governmental agencies functioning as entirely separate departments respectively of the county and the State, and therein make a binding corporate contract by the adoption of a joint verbal agreement to pledge the faith and credit of the county for its part in the payment for the employment of a person to render service in the capacity of a detective to determine and procure evidence against those who have committed a criminal offense. O'Neal v. Wake County, 196 N. C. 184, 145 S. E. 28.

May Issue Bonds to Make Repairs to Buildings.—This section when construed with § 1334(8) gives the county statutory power to issue bonds to repair and make additions to the county jail or public schools, the greater power to "erect" necessarily including the lesser power to "repair." Harrell v. Board of Com'rs, 206 N. C. 225, 173 S. E. 614.

§ 1291. Corporate powers of counties. — A county is authorized—

1. To sue and be sued in the name of the county.

2. To purchase and hold lands within its limits and for the use of its inhabitants, subject to the supervision of the general assembly.

3. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its powers.

4. To make such orders for the disposition or use of its property as the interests of its inhabitants require. (Rev., s. 1310; Code, s. 704; 1868, c. 20, s. 3.)

Cross References. — As to the corporate powers of a county generally, as exercised by the board of commissioners, see sec. 1297; as to the corporate powers of a municipal corporation, see sec. 2623. See also note under sec. 1290.

Editor's Note.—In Pegram v. Commissioners, 65 N. C. 114, and in Askew v. Pollock, 66 N. C. 49, it was held that all actions and proceedings, either by or against a county, in its corporate capacity, must be in the name of the board of commissioners. These decisions are based on the Acts of 1868, ch. 20, sec. 704, of the Code of 1883 provided that a county should "sue and be sued in the name of the board of commissioners." However, this was changed by the amendment, and in the Revisal of 1905, sec. 1310, a county must sue and be sued in its own name. Fountain v. Pitt, 171 N. C. 113, 114, 87 S. E. 990.

Suits in Name of County.—A county is not required in an action for mandatory injunction to bring the suit in the name of the county commissioners, but it should be brought in the name of the county. Lenoir County v. Crabtree, 158 N. C. 357, 358, 74 S. E. 105.

Liability of Counties.—Counties are not ordinarily liable to be sued civilly for the maner in which they exercise, or fail to exercise, their corporate powers. White v. Commissioners, 90 N. C. 437, 439.

A county is not liable in damages for an injury to the plaintiff, occasioned by a defective bridge forming a part of the highway across a stream, in the absence of any statutory provision. White v. Commissioners, 90 N. C. 437; Moffitt v. Ashville, 103 N. C. 237, 259, 9 S. E. 695.

Same—Torts of Agents.—It is now well settled that counties are not liable in damages for the torts of their officials,

in the absence of statutory provisions giving a right of action against them. Keenan v. Commissioners, 167 N. C. 356, 358, 83 S. E. 556.

Generally a county is not liable for damages sustained by individuals, by reason of the neglect of its officers or agents, and there is no statute in this State creating such liability. Manuel v. Board, 98 N. C. 9, 11, 3 S. E. 829.

Commissioner's Supervisory Control.—Under the Constitution and Public Laws of North Carolina the boards of county commissioners are generally given superivision and control of governmental matters in the several counties. Bunch v. Commissioners, 159 N. C. 335, 74 S. E. 1048.

Action Brought in County Sued. — Actions against a board of county commissioners must be brought in the county of such commissioners. Steele v. Commissioners, 70 N. C. 137.

Action on Treasurer's Bond.—An action upon a county treasurer's bond to recover an amount alleged to be due the county must be brought on the relation of the commissioners. State v. Thees, 89 N. C. 55, 58.

Suits against Board of Financial Control.—For the purpose of liquidating securities held by the county of Buncombe, the Board of Financial Control for Buncombe County is nothing more nor less than a liquidating agent designated by law for that purpose and is sued as provided by this section. Bourne v. Board of Financial Control, 207 N. C. 170, 177, 176 S. E. 306.

Counties may be sued only in such cases as may be allowed by statute. Bell v. Commissioners, 127 N. C. 85, 37 S. E. 136; White v. Commissioners, 90 N. C. 437, 439.

Form of Suit.—A municipal corporation may be sued in any form appropriate to the cause of action, and its liability does not differ as respects the form of the action from that of a private corporation or of an individual. Winslow v. Commissioners, 64 N. C. 218, 219.

Writ of Mandamus to Commissioners.—An order to show cause, which is in the nature of an alternative writ of mandamus, ought not to be directed to the individuals composing the board of commissioners. It is only in case of disobedience that they can be proceeded against individually. Askew v. Pollock, 66 N. C. 49.

Power to Compromise.—The power to sue and to defend suits carries with it, by necessary implication, the power to make bona fide compromise adjustments of such suits. Board v. Tollman, 145 Fed. 753, 772, citing 1 Dill Mun. Crop. (4th Ed.), sec. 477 and notes; and 15 Am. & Eng. Ency. (1st Ed.), 1050.

Power to Enter Consent Judgment.—Under this section the commissioners have the authority to assent to the entry of a consent judgment in an action pending against the ecounty, when such judgment is entered in good faith and is free from fraud, etc., a consent judgment being a contract of the parties spread upon the records with the approval and sanction of a court of competent jurisdiction. Weaver v. Hampton, 204 N. C. 42, 167 S. E. 484.

Necessary Property Not Subject to Execution.—A county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, and the principles of public policy prevent such property from being sold under execution to satisfy the debt of an individual. Hughes v. Commissioners, 107 N. C. 598, 12 S. E. 465; Gooch v. Gregory, 65 N. C. 142, 143; Bouv. Inst. 176.

What Constitutes Binding Contract of County.—In order to make a binding pecuniary obligation on the county, there must be a contract to that effect, express in its terms, or the service must be done at the express request of an officer or agent charged with the duty and having the power to make contracts concerning it. Copple v. Commissioners, 138 N. C. 127, 131, 50 S. E. 574.

When Commissioners May Not Sell Property. — County commissioners have no power to sell property held for corporate purposes, where its alienation would tend to embarrass or prevent the performance of its duties to the public. Vaughan v. Commissioners, 118 N. C. 636, 24 S. E. 425.

Cited in O'Neal v. Wake County, 196 N. C. 184, 186, 145 S. E. 28.

§ 1291 (a). Limitation on county indebtedness.—No county in this state shall incur bonded indebtedness in an amount exceeding five per cent of the assessed valuation of taxable property in the county as ascertained by the last assessment previous to the incurring of any new bonded indebtedness. [Provided, however, that any county in which the assessed valuation of taxable property, as shown by the last assessment previous to the incurring of any new bonded indebtedness, is not in excess of ten million dollars ($10,000,000) may issue bonds in an amount not exceeding eight per cent (8%) of said assessed valuation: Provided further, that any county in which the assessed valuation of taxable property in the county, as ascertained by the last assessment previous to the incurring of any new bonded indebtedness, is in excess of ten million dollars ($10,000,000) but not in excess of twenty million dollars ($20,000,000) may issue bonds in an amount not exceeding seven per cent (7%) of said assessed valuation.

The portions of this section in brackets shall not apply to Brunswick County.] (Ex. Sess. 1920, c. 3, s. 6; Ex. Sess. 1924, c. 100.)

Editor's Note.—This section, providing a limitation of five per cent of the assessed valuation of the property in a county generally, was enacted by the Legislature in 1920. The Extra Session of 1924, c. 97 added the two provisos of the section. It was also provided at the same time that the provisos should not be applicable to the county of Brunswick.

Purpose.—In Smith v. Board, 191 N. C. 775, 776, 133 S. E. 1, it is said: "It was the evident purpose of this act to limit the indebtedness of counties in order to protect the taxpayers from increasing and oppressive tax rates."

Applied in Taylor v. Board of Education, 206 N. C. 263, 265, 173 S. E. 608.

Art. 2. County Commissioners

§ 1292. Election and number of commissioners.—There shall be elected in each county of the state, at the general election to be held in the year one thousand eight hundred and ninety-six, and every two years thereafter, by the duly qualified voters thereof, three persons to be chosen from the body of the county, who shall be styled "the board of commissioners for the county of ....." and shall hold their office for two years from date of their qualification and until their successors are elected and qualified. (Rev., s. 1311.)

Cross References.—As to oaths of commissioners, see section 1313; as to acting as officers before qualifying as such, see section 4383; as to time of election of county officers, see section 5917.

Remedy in Nature of Quo Warranto.—Where a plaintiff sues for the office of county commissioner which is occupied by another, his remedy is an action in the nature of quo warranto; but if he sues to be restored to an unoccupied office, his remedy is an action for a mandamus, and he should show that he has a present clear legal right to the thing claimed, and that it is the duty of the defendant to render it to him. Lyon v. Board, 120 N. C. 237, 242, 26 S. E. 929.

Who May Try Commissioner's Title.—In an action to try the title to the office of county commissioner held by a defendant, only citizens and tax-payers of the county can be relators. State v. Taylor, 122 N. C. 141, 29 S. E. 101.

Where persons, who have been elected and qualified as county commissioners, bring an action in the nature of quo warranto against persons appointed by the judge of the district to try the defendants' title to the office, the complaint must allege that the plaintiffs are citizens and taxpayers of the county. State v. Taylor, 122 N. C. 141, 29 S. E. 101.

§ 1293. Local modifications as to term and number. — The number of commissioners shall be five instead of three in the counties of Alamance, Beaufort, Bertie, Brunswick, Buncombe, Cabarrus, Carteret, Catawba, Chowan, Columbus, Craven, Cumberland, Durham, Edgecombe, Franklin, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, Mecklenberg, Nash, New Hanover, Pasquotank, Perquimans, Pitt, Rich-

mond, Robeson, Rockingham, Rowan, Tyrrell, Vance, Warren, Wayne and Wilson.

Only one member of the board of commissioners of Brunswick County shall be from any township of said county.

In Gaston county six persons shall be elected, one of whom must be a resident of Gastonia township, one a resident of River Bend township, one a resident of South Point township, one a resident of Crowders Mountain township, one a resident of Cherryville township, and one a resident of Dallas township. If at any time the board of commissioners of Gaston county are equally divided upon any question pending before them and there is a tie vote, then the clerk of said board is authorized and empowered to cast the deciding vote and to determine such question.

In Wake county five persons shall be elected, three of whom shall compose a class whose terms of office shall be for four years on and after the first Monday in December, one thousand nine hundred and ten, and two of whom shall compose a class whose terms of office shall be for four years on and after the first Monday in December, one thousand nine hundred and twelve. (Rev., ss. 1311, 1312; Code, s. 716; 1876-7, c. 141, s. 5; 1887, c. 307; 1895, c. 135; 1899, cc. 103, 147, 153, 187, 297, 301, 346, 450, 467, 488, 609; 1901, cc. 14, 60, 328, 330, 581; 1903, cc. 4, 7, 14, 36, 46, 59, 137, 191, 203, 206, 207, 228, 265, 446, 515, 790; 1905, cc. 37, 44, 58, 73, 148, 338, 340, 346, 397, 422, 553; 1907, cc. 2, 16, 55, 61, 125, 178, 291, 350; 1909, cc. 12, 53, 213, 302, 625, 729; P. L. 1917, cc. 32, 175, 381; 1931, c. 68.)

Editor's Note.—The Act of 1931 added Brunswick county to this section.

§ 1294. Vacancies in board; how filled.—In case of a vacancy occurring in the board of commissioners of a county, the clerk of the superior court for the county shall appoint to said office for the unexpired term. (Rev., s. 1314; Code, s. 719; 1895, c. 135, s. 7; 1909, c. 490, s, 1.)

Scope of Authority of Superior Court Clerk.—A tender of resignation by a county commissioner to the clerk of the superior court is a tender to a proper authority. And while the mere filing of the resignation does not vacate the office, its acceptance by the clerk is final, and a commissioner appointed by the clerk to fill such vacancy is a de facto officer, and any action taken by him in the regular meetings of the board is binding on the county. Rockingham County v. Luten Bridge Co., 35 F. (2d) 301, 302.

§ 1295. When to qualify; oath to be filed. — The board of commissioners shall qualify and enter upon the duties of their office on the first Monday of December next succeeding their election, and they may take the oaths of office before the clerk of the superior court, or some judge, or justice of the peace or other person qualified by law to administer oaths. The oaths of office severally taken and subscribed by them shall be deposited with the clerk of the superior court. (Rev., s. 1316; Code, s. 708; 1895, c. 135, s. 4.)

As to oaths generally, see section 3188 et seq.

Powers of De Facto Board. — An old board of commissioners, holding over, as de facto officers, have the right and the duty of performing, to the fullest extent, all the appropriate functions of office. State v. Jones, 80 N. C. 127, 130.

§ 1296. Meetings of the board of commissioners.—The board of commissioners in each county shall hold a regular meeting at the courthouse, on the first Mondays in December and June. Special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days. Meetings may be held at other times for the more convenient dispatch of business at the call of the chairman, on the written request of one member of the board, but public notice of the time and place of all such called meetings shall be posted at the courthouse door for not less than six days, and published one time in a county newspaper, if there is one. The board shall receive no compensation for attending such called meetings. The board may adjourn its regular meetings in December and June from day to day until the business before it is disposed of. Every meeting shall be open to all persons. A majority of the board constitute a quorum. At each regular December meeting the board shall choose one of its members as chairman for the ensuing year; in his absence the members present shall choose a temporary chairman. (Rev., s. 1317; Code, s. 706.)

As to salary of county commissioners, see sec. 3918.

Construed as Directory.—The section is directory and is intended to forbid the commissioners from receiving compensation for attendance on other days. It does not, however, disable the commissioners from acting at other times on due notice to all concerned. People v. Green, 75 N. C. 329, 333.

Hence commissioners elected by the county commissioners at an adjourned meeting subject to the call of the chairman, they are at least de facto officers whose title cannot be collaterally attacked. Trip v. Commissioners, 158 N. C. 180, 73 S. E. 896, 897.

Cited in Rockingham County v. Luten Bridge Co., 35 F. (2d) 301.

§ 1297. Powers of board.—The boards of commissioners of the several counties have power—

As to corporate powers of counties, see section 1291. See also notes under sections 1290, 1310. As to reduction of salaries of officers and employees, see § 2648(a).

As to authority to provide erosion equipment, see § 4958(1).

Exercise of Powers by Board is Exercise by County. — The board's exercise of statutory powers is, in contemplation of law, the exercise of such powers by the county. Board v. Hanchett Bond Co., 194 N. C. 137, 138, 138 S. E. 614.

Board Has Perpetual Existence. — The board of commissioners of a county has a perpetual existence, continued by members who succeed each other, and the body remains the same, notwithstanding a change in the individuals who compose it. Pegram v. Commissioners, 65 N. C. 114, 115.

Have Only Such Powers as Statute Prescribes.—The board of commissioners in the several counties possess only those powers which have been prescribed by statute and those necessarily implied by law, and no others. This is the general rule, it has also been expressly declared by statute to be the rule which ascertains the true scope and limit of their power and authority. Fidelity, etc., Co. v. Fleming, 132 N. C. 332, 336, 43 S. E. 899.

Legislature May Change Functions at Will.—A county is entrusted with many high and important functions, which are to be exercised by its officers for the public benefit. The Legislature may, at will, enlarge or modify these functions. Winslow v. Commissioners, 64 N. C. 218, (from the dissenting opinion of Dick, J.)

What Constitutes Quorum and Majority.—A majority of the commissioners constitute the legal body, and a majority of the members of the legally organized body can exercise the powers delegated to the county, as a general rule. Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 681, 13 S. E 271.

All Duties and Powers Equally Important.—There is no grade among the duties and powers of county commissioners, and no preference is given to one over another. Long v. Commissioners, 76 N. C. 273, 278.

Personal Liability.—Where the Legislature has created certain duties to be performed by the county commissioners, and has expressly imposed a personal liability upon their failure to perform some of them, but not as to others, such

liability only attaches where it is expressly so declared. Fore v. Feimster, 171 N. C. 551, 88 S. E. 977.

Same—Ministerial Duties.—County commissioners are held to an individual liability in the negligent performance of, or negligent omission to perform, a purely ministerial duty, to a person specially injured thereby, when the means to do so are available and when it does not involve the exercise of a discretionary or judicial power conferred upon them by statute. Hipp v. Farrell, 169 N. C. 551, 86 S. E. 570.

Same—Judicial and Discretionary Acts. — Public officers are not personally liable to persons specially injured by their acts done in the exercise of judicial or discretionary powers conferred on them by statute, unless it is alleged and shown that in doing the acts complained of they did so corruptly and with malice. Hipp v. Farrell, 169 N. C. 551, 86 S. E. 570.

When Commissioners Acting Infra Vires.—A court has no power to interfere with the domestic administration of affairs of a county, so long as the board of commissioners acts infra vires. Long v. Commissioners, 76 N. C. 273.

Consideration Retained when Acting Ultra Vires.—Retaining the consideration of an ultra vires contract can impose no contractual liability upon a municipal corporation of this character. Berlin Iron Bridge Co. v. Board, 111 N. C. 317, 16 S. E. 314, citing Weir v. Page, 109 N. C. 220, 13 S. E. 773.

Mandamus to Compel Bond Issue.—Mandamus will lie against county commissioners who refuse to issue bonds, as required by an act of the Legislature. Jones v. Commissioners, 137 N. C. 579, 50 S. E. 291.

When Membership of Board Changes between Order and Service of Mandamus.—When a writ of mandamus is obtained against a board of commissioners, and there is a change in the individual members between the time when the writ is ordered and when it is served, those who compose the board at the time of service must obey it. Pegram v. Commissioners, 65 N. C. 114, 115.

Board May Correct Clerical Error in Record.—Where the record of the board of county commissioners, through a clerical error, states that a tax levy for general county purposes is 20 cents on the $100 valuation of property, this error may subsequently be corrected by the board, at its own instance, to correctly show that in fact the levy was actually made for 15 cents for general county purposes, 5 cents thereof being for the improvement of the courthouse and county home, and thus within the constitutional requirement. Norfolk Southern R. Co. v. Forbes, 188 N. C. 151, 124 S. E. 132.

Power to Protect Bridges. — The county commissioners, under the general powers granted by this section may bring an action for an injunction to restrain the use of a non-floatable stream for floatage of logs, causing damage to a county bridge over such stream. Commissioners v. Lumber Co., 115 N. C. 590, 20 S. E. 707, 847.

Cited in O'Neal v. Wake County, 196 N. C. 184, 145 S. E. 28.

Taxation and Finance

1. To Exempt from Capitation Tax.—To exempt from capitation tax in special cases, on account of poverty and infirmity. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

The Constitution does not require that a capitation tax shall be levied for ordinary state and county purposes. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69.

2. To Levy County Taxes.—To levy, in like manner with the state taxes, the necessary taxes for county purposes; but the taxes so levied shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the general assembly. All county taxes shall be levied at the regular meeting of the board on the first Monday in June. The board may extend the time for the collection and settlement of the county taxes to such time as may be deemed expedient, not beyond the first day of May next after the taxes were levied. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Cross References.—As to necessary expenses of counties, see subsections 3, 5, 6, 9, 18, 19, 22, 28, and annotations thereto, of this section. As to duty to reduce ad valorem taxes, see § 1321(j).

County Authority to Levy Taxes Subject to Limitation.—While the General Assembly may regulate the amount and methods for raising county revenues, the present system of county government contemplates that the function shall be performed by the county authorities, subject to the limitations prescribed by the Constitution. Parker v. Board, 104 N. C. 166, 10 S. E. 137.

When Commissioners May Levy. — In Herring v. Dixon, 122 N. C. 420, 424, 29 S. E. 368, the authorities are reviewed and their holdings summed up by Clark, J., as follows:

(1) For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

(2) For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority without a vote of the people. Constitution, Article V, sec. 6.

(3) For other purposes than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. Constitution, Article VII, sec. 7, approved in State v. Board, 122 N. C. 812, 815, 30 S. E. 352.

A special tax to pay indebtedness of the county incurred for its necessary expenses may be levied by the county commissioners, without special legislation, so long as such tax together with the regular taxes, does not exceed the constitutional limit; it being only in the latter case that art. 5, sec. 6, of the Constitution requires special authority. Smathers v. Commissioners, 125 N. C. 480, 34 S. E. 554.

Levy of Necessary Taxes within Commissioners Discretion.—Where it was alleged that a board of commissioners had not levied a sufficient tax to defray the ordinary expenses of the county, on account of the levy of a tax to pay for repairing the court-house, it was held to be no ground for interference by the courts. Long v. Commissioners, 76 N. C. 273.

Constitutional Limitation.—The equation and limitation of taxation established by the Constitution applies only to taxes levied for ordinary purposes of the State and counties, and, as to levies of taxes for such purposes, it must be observed. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69.

It has no application to special taxes. Wagestaff v. Central Highway Commission, 177 N. C. 354, 99 S. E. 1.

Same—Prior Debts. — The constitutional limitation and equation of taxation do not apply to debts made previous to the adoption of the Constitution; to debts contracted thereafter, they both apply. Clifton v. Wynne, 80 N. C. 146; Trull v. Board, 72 N. C. 388; Mauney v. Board, 71 N. C. 486; Uzzle v. Commissioners, 70 N. C. 564; Street v. Board, 70 N. C. 644.

Same—County Taxes. — The requirement in the Constitution, Art. V, sec. 7, that every act levying taxes shall state the objects to which they shall be appropriated, has no application to taxes levied by the county authorities for county purposes. Parker v. Board, 104 N. C. 166, 10 S. E. 137.

When Double the Statute Tax May Be Exceeded. — The commissioners of a county may exceed double the state tax when the tax is for a special purpose and has been allowed by an act of the General Assembly. Simmons v. Wilson, 66 N. C. 336; French v. Board, 74 N. C. 692.

When Tax Infra Vires and When Ultra Vires. — Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is infra vires, the taxes collected beyond the requirements of the special purpose may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a "special purpose" and partly for general purposes it is ultra vires and no part of the levy can be collected. Williams v. Commissioners, 119 N. C. 520, 26 S. E. 150.

When Commissioners May Not Exceed Restriction. — When bonds are issued by a county, by popular vote, under legislative authority, which does not further provide for a levy to exceed the constitutional limitation for the principal, interest or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction. Commissioner v. McDonald, etc., Co., 148 N. C. 125, 61 S. E. 643.

In Williams v. Commissioners, 119 N. C. 520, 26 S. E. 150, approved in Herring v. Dixon, 122 N. C. 420, 423, 29 S. E. 368, it was held that a statute authorizing a special county tax for the purpose of maintaining public ferries, building roads, and meeting other current expenses was not for a "special purpose," and that a tax levied thereunder in excess of the constitutional limitation was void. Southern R. Co. v. Cherokee County, 177 N. C. 86, 92, 97 S. E. 758.

Six Months School Term and the Constitutional Limitation. — When it becomes necessary the county commissioners are required to levy a tax sufficient to maintain the county schools for a term of six months each year, and the Constitutional limitation does not apply to defeat such a levy. Collie v. Commissioners, 145 N. C. 170, 176, 59 S. E. 44, expressly overruling Barksdale v. Commissioners, 93

N. C. 472, 473, and Board v. Board, 111 N. C. 578, 16 S. E. 621; Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758.

Tax Rate Variable. — There is no constitutional requirement that the tax rate for county purposes shall be the same everywhere. It varies in the different counties, and may vary in different townships, parts of townships, districts, towns, and cities in the same county. Jones v. Commissioners, 143 N. C. 60, 55 S. E. 427.

Property Subject to Taxation. — All of the property, including solvent credits, in the state, shall be assessed and taxed at its value in money. Caldwell Land, etc., Co. v. Smith, 146 N. C. 199, 201, 59 S. E. 653.

Same—Back Tax. — In Caldwell Land, etc., Co. v. Smith, 146 N. C. 199, 201, 59 S. E. 653, Connor, J., speaking for the court said: "We have no doubt of the power of the Legislature to provide for the listing, assessment, and taxing of personal property omitted to be listed by the owner as the law requires. Nor do we perceive any reason why it may not be taxed for five or more preceding years if it has escaped taxation so long. These questions have been settled by several decisions of this court. Kyle v. Mayor, 75 N. C. 445; North Carolina R. Co. v. Commissioners, 82 N. C. 260; Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9."

Same—When Realty of Schools and Railroads Exempt from Special Tax. — Where the act provided for the construction of a fence to inclose the whole of several districts and that the commissioners should levy a special tax on all the real estate in said district, which was taxable by the state and county, it was held, not to embrace the real estate of schools and railroads, which was not taxable for general purposes. Bradshaw v. Board, 92 N. C. 278.

Taxes Leviable Yearly. — General taxes for county purposes are leviable but once in the year. Bradshaw v. Board, 92 N. C. 278, 282.

Improperly Levied and Legitimately Used. — A tax levied professedly and improperly for one purpose can be collected and applied to any other legitimate purpose. Long v. Commissioners, 76 N. C. 273.

Same—First Monday in June. — A mandamus issued against the commissioners of a county commanding them to assess, levy and collect taxes sufficient to pay off the indebtedness of the county does not warrant them in levying taxes in any other manner or at any other time than that prescribed by law, to-wit, at their meeting on the first Monday in June. Mauney v. Board, 71 N. C. 486.

Tax Lists in Hands of Sheriff. — In Caldwell Land, etc., Co. v. Smith, 146 N. C. 199, 202, 59 S. E. 653, it was said: "While no express power is conferred upon the commissioners after making the assessment to place the list so made in the hands of the sheriff, we think that by a fair construction, in the light of the power conferred in other portions of the statute respecting the regular tax list, such power is given."

The tax list is a judgment against every person for the amount of the tax, and the copy delivered to the sheriff is an execution. State v. Georgia Co., 112 N. C. 34, 36, 17 S. E. 10; Higgins v. Hinson, 61 N. C. 126, cited and approved in Commissioners v. Piercy, 72 N. C. 181; London v. Wilmington, 78 N. C. 109; Gore v. Mastin, 66 N. C. 371; Raleigh, etc., R. Co. v. Lewis, 99 N. C. 62, 5 S. E. 82.

Act Held Not to Be "Special."—In Bennett v. Board, 173 N. C. 625, 629, 92 S. E. 603, it is held that a statute conferring on county commissioners the power to borrow money for the necessary expenses of the county and provide for its payment "neither is, nor does it purport to be, a 'special act and for a special purpose' within the meaning of the constitutional provision." Southern R. Co. v. Cherokee County, 177 N. C. 86, 92, 97 S. E. 758.

Assessment for Stock Fence. — An assessment for the building of a stock law fence is not a tax which requires a referendum note by the people. Tripp v. Commissioners, 158 N. C. 180, 73 S. E. 896, 898.

3. To Borrow Money for Necessary Expenses, Provide for Payment by Taxation.—To borrow money for the necessary expenses of the county, and to provide for its payment, with interest, in periodical installments, by taxation. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Cross References. — As to levy of necessary county taxes, see subsection 2 of this section; as to when mandamus lies to compel levy of tax, see annotations to subsection 5 of this section.

Power of Courts over Necessary Expenses. — The courts have a right to say what are necessary expenses of a county. Black v. Commissioners, 129 N. C. 121, 39 S. E. 818.

When Commissioners May Issue Bonds. — When the county commissioners have power to contract a debt or to provide for a valid debt already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation; but this may be done only in subservance of the constitutional limitation, when no special legislative authority has been given. Bennett v. Board, 173 N. C. 625, 92 S. E. 603.

The commissioners of a county have the right to issue county bonds in the place of orders previously issued for the necessary expenses of the county, without obtaining the sanction of a majority vote of the qualified voters of the county. McCless v. Meekins, 117 N. C. 35, 23 S. E. 99.

Commissioners May Superadd Personal Credit. — It is not fraudulent for a board of county commissioners to superadd their personal credit to the credit of the county in a contract concerning the necessary expenses of the county. Long v. Commissioners, 76 N. C. 273.

County Must Levy Tax. — A county, when it contracts a debt, pledges its faith, or loans its credit, as allowed by the Constitution, must levy taxes necessary to raise revenue for such purposes upon all the property in the same, except such property as is exempted from taxation. Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69.

Legislature May Authorize Bond Issue. — The Legislature has the power to pass an act authorizing a county to issue bonds for the purpose of raising funds to discharge an indebtedness incurred for necessary expenses. Commissioners v. Stafford, 138 N. C. 453, 50 S. E. 862.

Same—Need Not Be Submitted to Popular Vote. — Section 7 of Article VII of the Constitution does not require that an act of the General Assembly, authorizing a special tax to pay debts of the county contracted for necessary expenses, shall provide for the submission of the matter to a vote of the people. McCless v. Meekins, 117 N. C. 35, 23 S. E. 99.

When Commissioners May Not Set up Powers Herein Granted. — Where the Legislature has interposed its will and plainly declared it, and where it has by its act prescribed the limit of expenditure even for a necessary expense for the county, the county commissioners cannot set at naught the legislative will by setting up a general power of contracting debts for necessary expenses restrained only by the constitutional limitation of taxation. Burgin v. Smith, 151 N. C. 561, 568, 66 S. E. 607. Quoted in Pritchard v. Commissioners, 159 N. C. 636, 638, 75 S. E. 849.

Establishment of School Not "Necessary Expense." — Expenses incurred in establishing graded schools are not such "necessary expenses" as may be provided for by taxation without the assent of the qualified voters of the community subject to the burden. Trustees v. Boardhurst, 109 N. C. 228, 13 S. E. 781.

Invalid County Orders. — Invalid county orders, warrants and bonds, although transferred to an innocent purchaser for value, and without notice, are open to all defenses against the original holder, and have not the protection that attaches to merchantile paper, even when negotiable in form. McPeeters v. Blankenship, 123 N. C. 651, 652, 31 S. E. 876.

4. To Exchange County Bonds for Outstanding Notes of County.—Any county in this state which is authorized by law to sell its bonds for the purpose of funding or paying floating indebtedness now outstanding and evidenced by notes bearing interest at a higher rate than the bonds which the county proposes to issue, may, in lieu of selling such bonds, issue them in exchange for a like principal amount of such notes, provided the holders of the notes are willing to make such an exchange and to pay any interest accrued on such bonds up to the time of such exchange. When such an exchange is made, any interest accrued on such notes up to the time of such exchange may be paid out of any available funds of the county. The powers conferred by this subsection shall be exercised by the board or body authorized by law to sell the bonds herein referred to. Nothing herein shall be construed as requiring any bonds to be exchanged for notes, rather than be sold. The powers granted by this subsection are granted in addition to and not in substitution for existing powers of counties, and

are not subject to any limitation or restriction contained in any other law. (1919, c. 297.)

Legislature May Compel Bond Issue to Fund Indebtendess. —The Legislature has power to pass an act compelling a county to issue bonds to fund its existing indebtedness incurred for necessary expenses. Jones v. Commissioners, 137 N. C. 579, 50 S. E. 291. This case expressly overrules Jones v. Commissioners, 135 N. C. 218, 47 S. E. 753, and Bank v. Board, 135 N. C. 230, 47 S. E. 1016.

Same—"Authorize and Empower" Construed as Mandatory. — The terms "authorize and empower" used in an act conferring power upon a county, on the verge of bankruptcy, to issue bonds to fund its existing indebtedness incurred for necessary expenses, and providing the only feasible method by which the financial affairs of the county can be placed on a sound basis, will be construed to be mandatory. Jones v. Commissioners, 137 N. C. 579, 50 S. E. 291.

Presumption That Bonds Funded Debt for Necessary Expenses. — Where, in an action to have the funds raised by a special tax for the payment of county bonds, into which county orders had been funded, applied for that purpose, there is nothing in the pleadings to show that such county orders were not issued for the necessary expenses of the county, it cannot be urged as an objection to the complaint that it does not state that the orders were issued for such necessary expenses, the presumption being that the commissioners who issued the orders acted in good faith and within the scope of their authority under the Constitution and laws. McCless v. Meekins, 117 N. C. 35, 23 S. E. 99.

Existing Act a Part of Bond Contract. — An act of the General Assembly authorizing the levy of the requisite taxes to pay municipal bonds in force when the bonds are issued enters into and becomes a part of the contract under which the bonds are delivered and taken, and cannot be annulled by subsequent legislation. McCless v. Meekins, 117 N. C. 35, 23 S. E. 99.

Must Be Signed by Designated Officers. — In 21 Am. & Eng. Ency. (2d. Ed.) 50, it is said: "It is essential to the validity of municipal bonds that they be signed by or with the authority of the officers designated by the statutes." Quoted in Bond v. Tollman, 145 Fed. 753.

5. To Provide for Payment Existing Debts by Taxation or Otherwise.—To provide by taxation or otherwise for the prompt and regular payment, with interest, of any existing debt owing by the county. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Mandamus Lies to Compel Levy of Tax. — A plaintiff, upon a proper prayer for judgment, may have a mandamus to compel the board of commissioners to levy a tax and pay the debt of a county. Winslow v. Commissioners, 64 N. C. 218.

Same—Satisfaction of Judgment. — A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. Gooch v. Gregory, 65 N. C. 142.

Same—Ordinarily, Only Remedy. — Ordinarily, the only remedy of a judgment creditor of a county is a writ of mandamus to compel its commissioners to levy a tax to pay the debt. Hughes v. Commissioners, 107 N. C. 598, 605, 12 S. E. 465; Gooch v. Gregory, 65 N. C. 142; Pegram v. Commissioners, 64 N. C. 557; Lutterloh v. Board, 65 N. C. 403; Rogers v. Jenkins, 98 N. C. 129, 3 S. E. 821; 2 Dillon on Mun. Corp. (3 ed.), secs. 855 and 856.

Same—When Granted. — The writ of mandamus will be granted only where one demanding it shows that he "has a specific legal right and has no other specific remedy adequate to enforce it." Hughes v. Commissioners, 107 N. C. 598, 605, 12 S. E. 465; State v. Justices, 24 N. C. 430; Winslow v. Commissioners, 64 N. C. 218, 223; Ex parte Biggs, 64 N. C. 202; Topping Mand., 18.

When Mandamus Unnecessary. — An action may be maintained against the county commissioners establishing a debt against the county without asking for a writ of mandamus, where it appears that the county has property subject to trusts, or such as can be reached only by proceedings supplemental to execution. Hughes v. Commissioners, 107 N. C. 598, 12 S. E. 465.

When Public and Private Interests Conflict. — Upon the principle that where public interests conflict with private interests, if the entire fund which can be raised by taxation is required to meet the necessary expenses of an economical administration of the county government, and none can be diverted to pay its indebtedness without serious detriment to the public, none ought to be thus appropriated. Cromartie v. Commissioners, 85 N. C. 211, 216.

Bonds Issued under Unconstitutional Act. — A taxpayer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute, without restoring to the bona fide holders of the bonds the consideration paid therefor. Graves v. Board, 135 N. C. 49, 47 S. E. 134.

Notice to Holder. — A county bond stating on its face the act under which it is issued is notice to the holder, and estops him from controverting the statement. Commissioners v. Call, 123 N. C. 308, 31 S. E. 481.

6. To Submit Proposition to Contract Debt to Vote.—To submit to a vote of the qualified electors in the county, after having obtained the approval of the general assembly, any proposition to contract a debt, or loan the credit of the county, under section seven, article seven, of the Constitution; to order the time for voting upon such proposition, which shall be upon public notice thereof at one or more places in each township in the county, and publication in one or more county newspapers, if there are any, for three months next immediately preceding the time fixed on; and such election shall take place and be conducted under the laws as prescribed for the election of members of the general assembly; and the commissioners shall provide for giving effect in case of the adoption of the proposition, to the expressed will of a majority of the qualified voters in such election. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Cross References. — As to levy of county taxes, see subsection 2, and annotations thereto, of this section; as to necessary expense of counties, see subsections 3, 5, 9, 18, 19, 22, 28, and annotations thereto, of this section.

Registered Voters Only Qualified Voters. — Registered voters only are qualified voters, and no county can contract any debt, pledge its faith, or loan its credit, except for necessary expenses, unless a majority of the registered votes of the county are actually cast in favor of creating the said obligation. Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 687, 13 S. E. 271; Southerland v. Board, 96 N. C. 49, 1 S. E. 760.

When Debt Is for Necessary Expenses. — If the debt sought to be contracted is for "necessary expenses," the question need not be submitted to the qualified voters of the county, but may be at the discretion of the Legislature. Woodall v. Western Wake Highway Commission, 176 N. C. 377, 382, 97 S. E. 226; Swindell v. Belhaven, 173 N. C. 1, 91 S. E. 369.

Authority Must Conform to Constitution. — Legislation authorizing the creation of county indebtedness must conform to constitutional requirements. Commissioners v. Call, 123 N. C. 308, 31 S. E. 481.

When New Registration Unnecessary. — The provisions of a statute authorizing a county to issue bonds for highway purposes, with the approval of its voters, that "no new registration shall be required," is no prohibition on the power of the county to order a new registration, but a statement that it shall not be necessary. Guire v. Board, 177 N. C. 516, 99 S. E. 430.

Notice of Polling Places.—A requirement that a correct notice of the polling places be given is fully met when the voting places have been established and are well known to the entire electorate of the county, and the voters were fully and formally notified that the election would be held on the specified date "at the various voting precincts of the county" as they are now established. Board v. Security Trust Co., 164 N. C. 301, 80 S. E. 230.

"By a Majority of the Qualified Voters" Construed.—The words, "by a majority of the qualified voters," as an entirety, can not be interpreted as equivalent to "with the concurrence," or "with the assent of a majority." Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 684, 13 S. E. 271.

When Voters Direct Bond Issue Duty of Commissioners.—Where a majority of the qualified voters of the county vote for the subscription of county bonds to aid a railroad, it is the duty of the county commissioners to issue the bonds. Wilmington, etc., R. Co. v. Commissioners, 116 N. C. 563, 21 S. E. 205.

Conclusive Evidence of Will of Voters.—The records of a

municipality showing that a proposition to allow it to issue bonds, authorized by the Legislature was submitted after 30 days notice, and that a majority of the qualified registered electors signified their assent by their affirmative ballots, are conclusive evidence that the will of the majority was so expressed. Union Bank v. Board, 116 N. C. 339, 21 S. E. 410.

When Taxpayer May Intervene. — A taxpayer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities. Belo v. Commissioners, 76 N. C. 489.

Commissioners Have Sole Power to Determine if Conditions Met.—When authority to issue county bonds upon the performance of certain conditions precedent is conferred by statute upon the board of commissioners, such tribunal has the sole power to determine the fact whether the conditions have been performed or not. Belo v. Commissioners, 76 N. C. 489. And their finding sustained by the superior court, that a majority of all the qualified voters have given their approval of the measure, is conclusive. Norment v. Charlotte, 85 N. C. 387.

Sales at Par.—When the statute authorizing the sale of county bonds requires that they shall be sold at par, a sale below par is void. Moose v. Board, 172 N. C. 419, 439, 90 S. E. 441.

The words "par value," when so used, mean a value equal to the face of the bonds and accrued interest to date of sale. Moose v. Board, 172 N. C. 419, 439, 90 S. E. 441.

7. To Purchase County Indebtedness.—To purchase if they desire, at any price, not exceeding their par value and accumulated interest, any of the outstanding bonds or other indebtedness of the county. (Rev., s. 1320; Code, s. 718; 1868-9, c. 269, s. 2.)

As to what constitutes par value, see annotation under subdivision 6, this section.

8. To Levy Taxes for Interest and Sinking Funds for Outstanding Bonds Not Provided for. —(a) To levy, in like manner with the county taxes, the necessary taxes to pay the interest and create a sinking fund for the retirement of bonds issued and sold for the purpose of meeting necessary expenses of the county, where no other provision for such levy has been specially provided for. In making such levy the constitutional equation must be preserved, and the levy shall not exceed any constitutional limitation.

(b) To levy, in like manner with the county taxes, the necessary taxes to pay the interest and create a sinking fund for the retirement of township road improvement bonds, issued either by vote of the people or by act of the general assembly, where the amount of levy provided by the act under which the vote is held or tax levied is inadequate to pay the interest on bonds heretofore issued or authorized by acts now in force, but the constitutional equation must be observed, and the levy shall not exceed any constitutional limitation. (1917, c. 121, ss. 1, 2.)

Where taxes are levied and collected to pay coupons on bonds issued by a county, the funds so collected are impressed with a trust for the benefit of the owners of the coupons. Board v. Tollman, 145 Fed. 753, 773.

8½. Special Tax Authorized for Certain Purposes; Limit of Rate.—The boards of commissioners of the various counties in the state, for the purpose of maintaining roads, bridges, the upkeep of county buildings, the county homes for the aged and infirm and other similar institutions, and to supplement the general county fund, are hereby authorized to levy annually a tax upon all taxable property not to exceed five cents on the one hundred dollars of valuation, in addition to any tax allowed by any special statute for the above enumerated purposes and in addition to the rate allowed by the Constitution. (1923, c. 7.)

Editor's Note.—This subsection was enacted by the Legislature in 1923, ch. 7. The county commissioners of the various counties are authorized to levy a tax annually, not to exceed five cents on the one hundred dollars of valuation, on all taxable property for the maintenance of roads, bridges, the upkeep of county buildings, the county homes, etc.

Public Laws 1931, c. 436, provided that this subsection shall not apply to Madison County.

In General.—This section authorizes the boards of commissioners of the various counties to levy a tax for the purpose of maintaining county homes for the aged and infirm. This is a special purpose within the contemplation of the constitutional provision, and the words "county aid and poor relief" should be construed to be within the scope of the special purpose which is indicated in the statute. Atlantic Coast Line R. Co. v. Lenoir County, 200 N. C. 494, 496, 157 S. E. 610.

8¾. Same—In Certain Counties.—Subject to the approval of the Director of Local Government, the Boards of County Commissioners of Duplin, Avery, Dare, Tyrrell, Pender, Clay, Alleghany, Cherokee, Edgecombe, Graham, Granville, Halifax, Iredell, Jackson, Macon, Montgomery, Person, Polk, Rutherford, Swain, Watauga, Wilson, Durham, Mitchell, Burke, McDowell, Perquimans, Alamance, Henderson and Scotland Counties are hereby authorized to levy such special property taxes as may be necessary not to exceed five cents on the one hundred dollars valuation for the following special purposes respectively, in addition to any tax now allowed by law for such purposes and in addition to the rate allowed by the Constitution: (1) For the expense of the quadrennial valuation or assessment of the taxable property, (2) for the expense of holding courts in the county levying the tax and the expense of maintenance of jails and jail prisoners. (1931, c. 441; 1935, c. 330.)

Editor's Note.—The only change effected by the amendment of 1935 occurs in this subsection in which "Henderson" is added to the list of counties.

County Buildings

9. To Erect and Repair County Buildings.—To erect and repair the necessary county buildings, and to raise, by taxation, the moneys therefor. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Cross References.—As to power to borrow money for necessary county expenses, and provide for the payment thereof by taxation, see subsection 3 of this section; as to power to purchase realty for public buildings, see subsection 16 of this section; as to powers over county property generally, see subsections 14 and 15 of this section; as to duty to take contractor's bond, see section 2445.

Erection and Maintenance of Courthouse.—It is the duty of the county commissioners to provide a sufficient courthouse and keep it in repair. It is their duty both to erect and keep in repair. They are cognate duties, and failure as to them is "neglect of duty." State v. Leeper, 146 N. C. 655, 658, 61 S. E. 585.

Same—Mandamus Does Not Lie to Provide.—A mandamus will not lie against county commissioners to compel them to provide a sufficient courthouse. State v. Leeper, 146 N. C. 655, 61 S. E. 585.

Same—Remedy by Indictment.—For such neglect of duty the remedy is by indictment. State v. Leeper, 146 N. C. 655, 661, 61 S. E. 585.

Same—Need Not Allege Corrupt Intent.—It is not necessary to allege corrupt intent in a bill of indictment. State v. Leeper, 146 N. C. 655, 61 S. E. 585.

Discretion of Commissioners.—The board of commissioners have the discretionary power to issue and sell or discount the notes of the county to provide the means to pay for a courthouse, and such discretion will not be interfered with by the courts. Vaughn v. Board, 117 N. C. 432, 23 S. E. 354.

Cannot Mortgage Courthouse Site.—The county commis-

sioners have no authority to convey the land on which they propose to erect the courthouse by a mortgage deed to secure the bonds issued to build it, and thereby render the site and buildings liable to sale for the satisfaction of the debt. Vaughn v. Commissioners, 118 N. C. 636, 640, 24 S. E. 425.

Commissioners Not Individually Liable for Failure to Take Bond.—The county commissioners are not individually liable for the failure of their ministerial duty to take the bond required from a contractor for the erection of a county home, such not having been expressly declared; and the remedy is by indictment. Fore v Feimster, 171 N. C. 551, 552, 88 S. E. 977.

Prior Special Act Does Not Bar Action Hereunder.—The fact that ch. 343, Acts of 1889, authorizing the county commissioners of Forsyth County to issue bonds for a new courthouse, required the assent of a majority of the qualified voters to such issue, is no bar to the power of the commissioners conferred by a later act of the Legislature (ch. 135, Acts of 1895) to erect necessary public buildings and to raise by taxation the money therefor. Vaughn v. Board, 117 N. C. 432, 23 S. E. 354.

Necessary Expenses.—The cost of the erection of a courthouse is a necessary expense of a county, and the exercise of the discretionary power of the board of commissioners in providing to meet it is not reviewable by the courts. Vaughn v. Board, 117 N. C. 432, 23 S. E. 354.

Repairing a courthouse is also a necessary county expense. Burgin v. Smith, 151 N. C. 561, 66 S. E. 607.

A jail is a necessary county expense, and, in the absence of statutory restrictions, the county commissioners may pledge the credit of the county in order to obtain one. Haskett v. Tyrrell County, 152 N. C. 714, 68 S. E. 202.

While the county commissioners are clothed with the necessary power to erect and repair county buildings, they have no power to levy a special tax out of which to pay the interest and create a sinking fund, unless they have the special authority of the General Assembly, but construing this section with § 1290 and § 1334(8), it would seem such authority is implied. Harrell v. Board of Com'rs, 206 N. C. 225, 228, 173 S. E. 614.

County Commissioners

10. To Designate Site for County Buildings.—To remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by an unanimous vote of all the members of the board at any regular monthly meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months, next immediately preceding the monthly meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the general assembly. (Rev., s. 1318; Code, 707; 1868, c. 20, s. 8; 1925, c. 229.)

Editor's Note.—This subsection was amended by the Laws of 1925, c. 229. The amendment strikes out the words "The regular December" in line five of the subsection and in lieu thereof inserts the words "any regular monthly." In line eleven of the said subsection the word "annual" is stricken out and in lieu thereof is inserted the word "monthly."

When Partial Payments May Be Recovered Back. — Where the county commissioners and the owner of lands have agreed for the purchase of a new site for its courthouse, conditioned upon the future compliance with the statute relating thereto, which had failed of compliance, and the county had made certain payments upon the purchase price, the county may recover the partial payments it had so made, with the legal interest thereon, subject to deductions as against the interest for its reasonable rental value, while in possession and control of the county authorities. Hearne v. Stanly County, 188 N. C. 45, 123 S. E. 641.

Attempt to Validate Former Action.—Pending the continuance of an injunction against the county commissioners purchasing a new site for the county courthouse, the action of the commissioners in attempting to validate their former action is unlawful, and can have no effect; nor can proceedings under a later statute to submit the question of the change to the voters have a different effect, when this proposition has been rejected by them. Hearne v. Stanly County, 188 N. C. 45, 46, 123 S. E. 641.

County Officers

11. To Require Officers to Report.—To require from any county officer, or other person employed and paid by the county, a report under oath at any time on any matters connected with his duties (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

12. To Approve Bonds of County Officers and Induct into Office.—To qualify and induct into office at the meeting of the board, on the first Monday in the month next succeeding their election or appointment, the following named county officers, to wit: clerk of the superior court, sheriff, coroner, treasurer, register of deeds, surveyor, and constable; and to take and approve the official bonds of such officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds, for safe keeping.

If the board declares the official bonds of any of said county officers to be insufficient, or declines to receive the same, the officer may appeal to the superior court judge riding the district in which the county is, or to the resident judge of said district, as he may elect, who shall hear said appeal in chambers, at any place in said district he designates, within ten days after notice by him of the same, and if, upon the hearing of the appeal, the judge is of the opinion that the bond is sufficient, he shall issue an order to the board of commissioners to induct the officer into office, or that he shall be retained in office, as the case may be. If, upon the hearing of the appeal, the judge is of the opinion that the bond is insufficient, he shall give the appellant ten days in which to file before him an additional bond, and if the appellant within the ten days files before the judge a good and sufficient bond, in the opinion of the judge, he shall so declare and issue his order to said board directing and requiring them to induct the appellant into office, or retain him, as the case may be. If, in the opinion of the judge, both the original and the additional bonds are insufficient, he shall declare the said office vacant and notify the commissioners, who shall notify the clerk of the superior court, who shall appoint to fill the vacancy, except in cases of the clerk of the superior court, which vacancy shall be filled by the resident judge. The judgment of the superior court judge shall be final. The appeal and the finding and judgment of the superior court judge shall be recorded on the minutes of the board of commissioners. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1874-5, c. 237, s. 3.)

Cross References.—As to commissioners' duty to review official bonds, see sections 326-337; as to neglect of duty as misdemeanor, see section 1302.

This section is mandatory on the county commissioners. Moffitt v. Davis, 205 N. C. 565, 569, 172 S. E. 317.

But there is no penalty or crime prescribed by this section, for failure of county commissioners to perform the ministerial duty therein imposed upon them of qualifying and inducting into office certain county officers and approving the bonds of such officers, but § 335, makes them liable as sureties on bonds which they approve with knowledge, actual or implied, that they are insufficient in penal sum or security. Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317.

De Facto Board May Act.—If from any cause the newly

elected commissioners of a county fail to qualify at the time prescribed by law, the old board, as de facto officers, have the power to perform the functions prescribed by this section. State v. Jones, 80 N. C. 127; Buckman v. Commissioners, 80 N. C. 121.

Commissioners to Induct into Office County Officers. — The commissioners are authorized and required to qualify and induct into office the several officers of the county, and to take and approve their official bonds, which they shall cause to be registered. Fidelity, etc., Co. v. Fleming, 132 N. C. 332, 336, 43 S. E. 899, 900.

Same—When Certified by County Canvassers.—It is he duty of the county commissioners to qualify and induct into office those whose election the county canvassers have ascertained and announced. Swain v. McRea, 80 N. C. 111, 114.

Right to Examine Officers—Elect.—When a person presents himself before a board of commissioners, with a certificate of election, and asks to be inducted into office, the said commissioners have a right to inquire into his constitutional capacity to exercise the functions of the office to which he may have been chosen. Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93, 100.

The general jurisdiction to admit to county offices those who may have been chosen upon the electoral vote as counted and ascertained by the board of county canvassers is given to the board of county commissioners, and this is exercised in an examination into the regularity of the returns of the result of the election, (which, when regular, are conclusive of the election,) the sufficiency of the official bond tendered, and the administration of the required oath. Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93, 100.

In the case of a sheriff who has previously held office the board must go further, and see that he is not delinquent in the payment of the taxes of a previous term. Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93, 100.

Same—May Exclude Unfit.—If the commissioners refuse to induct one who is plainly ineligible, the courts will not compel them to do so, and thus put one into an office which he cannot constitutionally hold. State v. Somers, 96 N. C. 467, 2 S. E. 161.

An elected person not competent to hold office under the Constitution has no right to be admitted to office, nor cause of action for being excluded. Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93, 100.

Commissioners Not Liable for Error of Judgment. — And if, in the exercise of this function, the commissioners commit an error of judgment in refusing to induct the elected candidate into office they are not responsible, these functions are quasi judicial. Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93, 100.

Sheriff's Bonds.—To entitle a sheriff to be inducted into office, it is essentially necessary that three several bonds must be executed by him and approved by the county commissioners according to the requirements of the statute. Dixon v. Commissioners, 80 N. C. 118.

While it is irregular to induct a sheriff into office without his giving all three of the required bonds, yet the defect is cured when they are subsequently tendered and accepted. Worley v. Smith, 81 N. C. 304.

Cannot Release Surety.—A board of county commissioners cannot release a surety from an official bond. Fidelity, etc., Co. v. Fleming, 132 N. C. 332, 336, 43 S. E. 899. See also, State v. Clarke, 73 N. C. 255, 258; Dockery v. French, 69 N. C. 308.

May Declare Office Vacant and Fill it.—The board has the power—all the business before them being disposed of—to adjourn, and, if any officer shall fail to perfect his bond according to law before such adjournment, to declare such office vacant, and to fill it, when the power to fill such vacancy is vested by law in the board. State v. Patterson, 97 N. C. 360, 2 S. E. 262; Kilburn v. Latham, 81 N. C. 312.

13. To Fill Vacancies.—To fill by appointment a vacancy in the offices of sheriff, constable, coroner, register of deeds, county treasurer, or county surveyor. (Rev., s. 1321; Code, s. 720.)

As to commissioners' duty to declare office vacant, see section 328, and subsection 12 of this section.

Commissioners Vote and Elect Hereunder.—The commissioners of a county board vote and elect when they exercise the power to fill a vacant office. State v. Bullock, 80 N. C. 132, 136.

Failure to Perform Duty.—Only one penalty is given against each commissioner composing the board, if he fails to perform his duty under this section. Bray v. Barnard, 109 N. C. 44, 48, 13 S. E. 729.

Application.—Upon the failure of public officers, when the statutes so requires, to renew annually their official bonds, and of sheriffs to, in addition, produce receipts for the public moneys collected by them, it shall be the duty of the board of county commissioners to declare the office vacant. Bray v. Barnard, 109 N. C. 44, 13 S. E. 729.

Same—Sheriff's Office.—It is the right, and the duty of the commissioners, to declare the office of sheriff vacant, and appoint some one for the unexpired term, whenever the incumbent thereof is found to be, on a re-election, in arrears in his settlement of the public taxes; or when he takes no notice whatever of a summons by the commissioners to appear before them on a day certain and justify or renew his official bond. People v. Green, 75 N. C. 329.

A vacancy in the office of sheriff cannot be declared until the alleged delinquent shall have had due notice and a day in court, if within reach of its process. State v. Pipkin, 77 N. C. 408.

Same—Office of Treasurer.—When a vacancy exists in the office of treasurer, it can only be filled by the county commissioners. State v. Hampton, 101 N. C. 629, 633, 8 S. E. 219.

County Property

14. To Make Orders Respecting County Property.—To make such orders respecting the corporate property of the county as may be deemed expedient. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Extent of Commissioner's Duty Hereunder.—This section imposes upon the commissioners the duty of employing such agents, and raising and appropriating such moneys, as may be sufficient to keep the public buildings in repair, and maintain them in such a condition as to prevent any noxious and offensive exhalations to proceed from any of them put to the private use of the people. Threadgill v. Commissioners, 99 N. C. 352, 355, 6 S. E. 189, 191.

In Threadgill v. Commissioners, 99 N. C. 352, 355, 6 S. E. 189, it was said: "A privy is not only a convenience, but a necessity; and the only fault attributable to any one is to suffer an accumulation of night soil, until, for want of cleaning, the emanating effluvia becomes a nuisance to the public. It is nowhere charged that the board has failed to use the means at their disposal to prevent such consequences, and this is the measure and extent of official responsibility."

15. To Sell or Lease Real Property.—To sell or lease any real property of the county and to make deeds or leases for the same to any purchaser or lessee. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Commissioners Do Not Have Power to Mortgage.—Power to sell is not a power to mortgage, and hence express authority conferred upon county commissioners, to sell real estate of the county, at a fair price, does not imply power to incumber the same by a mortgage. Vaughn v. Commissioners, 99 N. C. 352, 355, 6 S. E. 189, 191.

Right of Taxpayer to Bring Action to Restrain.—Though a proposed mortgage of county land by the county commissioners to secure bonds issued to build a Courthouse would be void, and equity would enjoin foreclosure thereunder, a taxpayer may bring an action to restrain the execution of the mortgage without waiting until foreclosure is threatened. Vaughn v. Commissioners, 118 N. C. 636, 24 S. E. 425.

County Purchases

16. To Purchase for Public Buildings, and at Execution Sale.—To purchase real property necessary for any public county building, and for the support of the poor, and to determine the site thereof, where it has not already been located; and to purchase land at any execution sale, when it is deemed expedient to do so, to secure a debt due the county. The deed shall be made to the county, and the board may, in its discretion, sell any lands so purchased. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1879, c. 144, s. 1.)

Cross References. — As to site for county buildings, see subsection 10 of this section; as to sale or lease of realty, see subsection 15 of this section; as to corporate powers of county to hold realty, see section 1291.

Where a county, owning a site upon which to build its courthouse, is authorized by statute to buy, sell, and exchange real estate surrounding it upon such terms and conditions as it may deem just and proper, and for the best

interest of the county, and in pursuance of this authority, has acquired conveyance of lands from adjoining owners upon condition that they shall be used as a public square and kept open for that purpose, etc., it is held, that whether the conditions be called conditions subsequent or otherwise, they were within the purview of the authority conferred upon the county; and, coming within the intent of the parties as expressed in the conveyance, and forming a material part of the consideration for the lands, they are valid and binding upon the county. Guilford County v. Porter, 167 N. C. 366, 83 S. E. 564.

17. To Purchase or Lease a County Farm, and Work Convicts Thereon.—To lease or purchase a county farm, and where proper provisions are made for securing and caring for convicts, such of them as are subject to road duty may be worked on said farm, and, in the discretion of the board, such farms may be made experimental farms. The court, in its discretion, may sentence convicted prisoners either to said farm or to the roads. Where a farm is purchased or leased in those counties having a road system, the board may work the convicts on such farms. (1915, c. 140.)

As to amendment of this subsection, see subsection 31 and note thereto.

Highways and Bridges

18. Laying out, Alteration and Discontinuance of Highways.—To exercise authority in laying out, altering, repairing and discontinuing highways; in establishing and settling ferries; in building and keeping up bridges; in laying off or discontinuing cartways; in providing draws in all bridges, where the same may be necessary for the convenient passage of vessels; in appointing overseers of highways; in excusing persons from working on the highways; in allowing and contracting for the building of toll-bridges, and taking bond from the builders thereof; and in licensing the erection of gates across highways. This authority shall be exercised under the rules, regulations, restrictions and penalties in all respects prescribed and imposed in the chapter entitled Roads and Highways. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

As to power to borrow money for necessary expenses, and to provide for payment thereof by taxation, see subsection 3 of this section.

Roads Are a Necessary Expense. — The well ordering and maintenance of the public roads of a county are "necessary expenses" within the meaning of our Constitution and statutes. Bunch v. Commissioners, 159 N. C. 335, 74 S. E. 1048.

A county is authorized to contract an indebtedness for the maintenance of its public roads, and such indebtedness being for a necessity, under Art. VII, sec. 7, of our Constitution, it is not required that a special act be passed authorizing it under the provisions of our Constitution, Art. II, sec. 14. Pritchard v. Commissioners, 159 N. C. 636, 75 S. E. 849.

Board of Commissioners May Be Deprived of Power over Roads. — The powers given to county commissioners over public highways, Const., Art. VII, sec. 2, may be taken away from them and conferred by statute upon other political agencies of the State, and such agencies may be deprived of the discretionary powers conferred by this section. Day v. Commissioners, 191 N. C. 780, 133 S. E. 164.

When Superior Court Not to Grant Injunction. — It is not competent for a superior court to grant an injunction against an order by the county commissioners within the sphere of their general duties, laying out a public road. McArthur v. McEachin, 64 N. C. 454.

Discretionary Powers of Board over Roads. — The laying out and maintenance of the public roads or highways of a county are matters left largely within the discretion of the county commissioners, and, in the absence of express legislation to the contrary, they are not to be controlled by a vote of the localities affected, either informal or otherwise; and where it is shown that they have officially dealt with a question largely submitted to their judgment, their action may not be controlled or interferred with by the courts, unless it is established that there has been a gross or manifest abuse of their discretion, or it is made clearly to appear that they have not acted for the public interest, but in promotion of personal or private ends. Edwards v. Commissioners, 170 N. C. 448, 87 S. E. 346.

The order in which work upon the public highways is to be performed is within the sound discretion of the county commissioners, and a finding by the court that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of the people of the county, excludes any interference by the courts. Glenn v. Commissioners, 139 N. C. 412, 52 S. E. 58.

Where the county commissioners have acted within the powers conferred on them by ch. 122, Public Laws of 1913, establishing a scheme for the laying out, establishing and maintenance, etc., of roads for the different townships therein, and have accordingly issued bonds and expended most of the money on the township roads, they may not be enjoined at the suit of the taxpayer from laying out and constructing an additional road, with the use of the money remaining on hand from the sale of the bonds, upon allegation, as to this particular road, that it was not for the pubpublic convenience, or that the majority of the voters were not in favor of it. Edwards v. Commissioners, 170 N. C. 448, 87 S. E. 346.

Failure to Give Notice of Proposed Route to Landowners. —The county commissioners will not be enjoined from building a public road in a township of a county from the proceeds of the sale of bonds, at the suit of taxpayers, because notice had not been given to landowners along the route proposed. Edwards v. Commissioners, 170 N. C. 448, 449, 87 S. E. 346.

Cannot Bind County by Contract to Perpetually Maintain Road. — A board of commissioners has no power to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. Glenn v. Commissioners, 139 N. C. 412, 52 S. E. 58.

Control of Bridges and Ferries. — While county commissioners control public bridges and ferries, it is by virtue of their duties, imposed by law, in regard to public roads. Greenleaf v. Board, 123 N. C. 31, 31 S. E. 264.

Public bridges and ferries are incidental to public roads and are not to be established or assumed, or maintained, as county charges, unless as parts thereof, in actual existence or in contemplation. Greenleaf v. Commissioners, 123 N. C. 31, 31 S. E. 264.

Same—Rests Solely with Commissioners. — The county commissioners alone have the power to determine upon the necessity for the construction or repair of bridges and to contract for the same, and such power can not be delegated. McPhail v. Board, 119 N. C. 330, 25 S. E. 958.

When Injunction Will Be Refused. — A citizen is not entitled to an injunction restraining a board of commissioners from proceeding to erect a bridge across a river at a certain point, though there is no public highway leading to such point, where the court finds that the board has in contemplation the opening of a public road to such point, and that arrangements have been made for that purpose. Glenn v. Commissioners, 139 N. C. 412, 52 S. E. 58.

When Bridge Not Part of Highway. — It is ultra vires for county commissioners to accept a bridge to be maintained at the county's cost, where it appears it is not a part of a public road, in existence or in contemplation of being made —and they may be enjoined from doing so. Greenleaf v. Board, 123 N. C. 31, 31 S. E. 264.

Where a citizen, at his own expense, constructed a bridge and opened up the public roads over his lands leading to the bridge on both sides of the river, and the board of commissioners accepted said bridge as a public bridge and have kept it in repair ever since, the fact that the commissioners paid him only a part of the cost of its construction did not change its character as a part of the public highway, subject to the control of the commissioners, as all other bridges in the county. Glenn v. Commissioners, 139 N. C. 412, 52 S. E. 58.

Liability of Commissioners in Placing Drawbridge.—When county commissioner commits an honest error in placing, or refusing to place, a drawbridge, he is not liable. Staton v. Wimberly, 122 N. C. 107, 29 S. E. 63.

19. To Raise Money for Highways.—To raise by tax the necessary highway moneys, in such manner as may be prescribed by law. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Cross References. — As to levy of necessary county taxes,

see subsection 2 of this section; as to power to borrow money for necessary expenses, see subdivision 3 of this section.

This duty is obligatory. Long v. Commissioners, 76 N. C. 273, 278.

Public Roads Necessary Expense. — The building and maintenance of public roads of a county is a necessary county expense, and being authorized by statute the question is not required by the Constitution to be submitted to the voters for approval. Const., Art. VII, sec. 2; C. S., 1297(18), (19); C. S., 1325; Lassiter v. Board, 188 N. C. 379, 124 S. E. 738.

Debts Contracted for Highways Are Necessary. — Debts contracted by the county for building and maintaining its highways are for necessary expenses, not requiring legislative sanction, when not exceeding the limitation. Guire v. Board, 177 N. C. 516, 99 S. E. 430.

Specific Funds May Not Be Exceeded. — When specific funds are provided they may not be exceeded, nor may any part of the general funds of the couty be applied in payment of a contractor. Hornthall v. Commissioners, 126 N. C. 26, 35 S. E. 191.

Vote of the People Unnecessary. — The county commissioners, when authorized or commanded to do so, may levy a tax in excess of the constitutional limit for the purpose of road improvement without the sanction of a popular vote. State v. Board, 122 N. C. 812, 30 S. E. 352; Herring v. Dixon, 122 N. C. 420, 29 S. E. 368.

20. To Appoint an Inspector of Highways and Bridges.—To appoint an inspector of highways and bridges for the county, if deemed necessary; to fix and provide for his compensation and regulate his duties, not inconsistent with the laws of the state. The commissioners of two or more counties may unite in employing an inspector of highways and bridges, and apportioning his compensation between the respective counties as may be agreed upon. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

21. To Regulate Speed of Automobiles.—To regulate the speed of automobiles, motorcycles and other like vehicles on the public roads and bridges, and make such ordinances as they may deem necessary governing the same. This subsection shall not apply to the counties of Mecklenburg and New Hanover. (Rev., s. 1318; 1905, c. 331.)

22. To Construct and Repair Bridges.—To construct and repair bridges in the county, and to raise by tax the money necessary therefor, and when a bridge is necessary over a stream which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge; and the charge thereof shall be defrayed by the counties concerned, in proportion to the number of taxable polls in each. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Duty Obligatory. — The duty to raise the money to meet the costs under this section is obligatory. Long v. Commissioners, 76 N. C. 273, 278.

Special Act Unnecessary. — The cost of building and repairing bridges is a necessary expense of a county, and hence, the levy of a special tax for such purpose under the authority of an act of the General Assembly is constitutional, though not submitted to a vote of the people as required by sec. 7, Art. VII, of Constitution. Herring v. Dixon, 122 N. C. 420, 29 S. E. 368.

When Courts Will Not Review. — The courts will not review the action of county commissioners in building a bridge wholly situated in the county, where there is no evidence of fraud or oppression; such matters being entirely within the discretionary powers conferred by law upon the commissioners, when exercised in good faith. Davenport v. Commissioners, 163 N. C. 147, 79 S. E. 423.

When Order Confers No Power. — An order passed by a board of county commissioners that the repairs of a certain bridge are referred to "R. J. H. and A. McN.," conferred no power upon such persons to make a contract, but only to ascertain and report to the commissioners, for their action, the facts connected with and the cost of the repairs. McPhail v. Board, 119 N. C. 330, 25 S. E. 958.

Manner of Arriving at Installments Held Valid. — The agreement by the commissioners to pay each year a sum of money equal to the aggregate amount of the plaintiff's tax for that year till the whole cost of the bridge should be discharged, was not an unlawful appropriation of the tax devoted by law to other purposes, but simply the means of ascertaining the amount of each annual installment. Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 13 S. E. 271.

When Two Counties Share Expenses. — County bridges across county lines must be authorized by both counties and built at joint expense. McPeeters v. Blankenship, 123 N. C. 651, 31 S. E. 876.

Same—Apportionment of Cost.—And the cost is to be apportioned according to the number of taxable poles in each. Penn. Bridge Co. v. Commissioners, 151 N. C. 215, 216, 65 S. E. 895.

A statute providing that the divisional line shall run up the "middle of the stream" in question and that said line shall be "surveyed and marked," does not vary the rule of apportioning the expenses of such bridges between the counties from that prescribed by said section. Penn. Bridge Co. v. Commissioners, 151 N. C. 215, 65 S. E. 895.

When One County Refuses to Join. — Where a county bridge is a necessity to one county alone, across a boundary stream, and the adjoining county refuses to join in the construction, an enabling act of the Legislature must be obtained. McPeeters v. Blankenship, 123 N. C. 651, 31 S. E. 876.

23. To Appoint Commissioners to Open Rivers and Creeks.—To appoint a commissioner to open and clear the rivers and creeks within the county, or where such river or creek forms a county line or a part thereof. For this purpose the board is authorized to withdraw from the public roads such hands as may be deemed necessary, and allot them to such work under overseers and the direction of the commissioners. The board may impose the duties of this subsection on the inspector of highways and bridges when appointed; and shall in all respects conduct the opening and clearing of such rivers and creeks as prescribed by law. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

24. To Grant Right to Bridge Navigable Streams.—To grant, subject to the approval and permission of the war department, to any person, firm or corporation owning or occupying lands on both sides of any navigable stream or creek lying wholly within the limits of the county, the right to construct and maintain a bridge across the said navigable water between the lands owned or occupied by them upon such terms and conditions and for such time as the said board shall deem advisable and proper. Before any order allowing the construction of the same shall be made, it shall be made to appear to the board that four weeks notice of the application for such right has been given by posting a notice at the courthouse door and four other public places in the county, and also (if there be a newspaper published in the county) by publishing once a week for four consecutive weeks in some newspaper in the county. Any party aggrieved may appeal from the order of the commissioners to the superior court of the county in term time. (P. L. 1911, c. 227.)

Inspection and Licenses

25. To License Peddlers.—To license peddlers and retailers of spirituous and other liquors as prescribed by law. No license shall be good for more than one year, nor granted to two or more persons to peddle as partners in trade. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

As to prohibition, see section 3367 et seq.

Order Revocable.—An order granting license may be re-

voked at the same session of the board. State v. Voight, 90 N. C. 741.

Can Issue Only upon Application to Board.—A license to retail liquor can issue only upon the application of the party to the board of county commissioners for an order directing the sheriff to grant the same. State v. Voight, 90 N. C. 741.

Sheriff's Permission Does Not Protect.—Permission given by the sheriff to retail without such order previously made is in violation of the law and does not protect the seller from prosecution. State v. Voight, 90 N. C. 741.

Limited Legal Discretion of Commissioners.—They have a limited legal discretion, and in passing upon an application for license, they have a right to take into consideration the questions, whether the demand of the public requires an increase of such accommodations, and whether the place at which it is proposed to establish a bar-room is a suitable one. Muller & Co. v. Commissioners, 89 N. C. 171, 172; Board v. Smith, 110 N. C. 417, 14 S. E. 972.

This issuance of a license to sell liquor by a board of county commissioners is a matter of discretion, and a mandamus will not issue to compel them to do so, it not being alleged and shown that their refusal to grant a license was arbitrary. Jones v. Commissioners, 106 N. C. 436, 11 S. E. 514; Miller & Co. v. Commissioners, 89 N. C. 171.

The commissioners of a county do not possess the arbitrary power of suppressing all places for retailing spirituous liquors; nor are they bound to license an applicant though he be qualified by proof of good moral character. Muller & Co. v. Commissioners, 89 N. C. 171.

26. To License Auctioneers.—To license for the term of one year any number of persons to exercise the trade and business of auctioneers in each county, and to take their bonds as prescribed by law. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

27. To Establish Public Landings, and Places of Inspection and Inspectors.—To establish such public landings and places of inspection as the board may think proper; and to appoint such inspectors in any town or city as may be authorized by law. Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

This section does not bestow upon the commissioners the power to condemn land under eminent domain; but they are confined to lands already dedicated to a public use sufficient to embrace or include the purpose proposed by them, or they must acquire a sight by agreement or purchase. Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970.

Poor and Hospitals

28. To Provide for the Maintenance of the Poor.—To provide by tax for the maintenance, comfort and well-ordering of the poor; to employ, biennially, some competent person as overseer of the poor; to institute proceedings by the warrant of the chairman against any person coming into the county who is likely to become chargeable thereto, and cause the removal of such poor person to the county where he was last legally settled; and to recover by action in the superior court from the said county all the charges and expenses incurred for the maintenance or removal of such poor person. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

As to county poor generally, see section 1335, et seq.

No Recovery by One Officiously Providing for Pauper.—Although a person may be a proper subject of county charge, any one who officiously provides for such person cannot recover of the county the amount of his outlay. Copple v. Commissioners, 138 N. C. 127, 132, 50 S. E. 574.

Each County to Be Charged for Its Poor.—It is the manifest purpose of the law to charge each county with the support of its own poor. Commissioners v. Commissioners, 101 N. C. 520, 524, 8 S. E. 176; State v. Elam, 61 N. C. 460.

May Require Charges to Be Placed in Poorhouse.—Where the county commissioners have provided a poorhouse, they have the right to require that all persons who are cared for at their expense shall be placed in the house which they have provided for the purpose. Copple v. Commissioners, 138 N. C. 127, 132, 50 S. E. 574.

Residence or Settlement Governs.—The liability of a county for the support of a pauper does not depend upon the law of domicile or citizenship but upon that of residence or settlement, as prescribed in sec. 3544 of the Code. Commissioners v. Commissioners, 101 N. C. 520, 8 S. E. 176.

29. To Establish Public Hospitals and Tuberculosis Dispensaries.—To establish public hospitals, establish and maintain homes for indigent orphan children, for the county in cases of necessity, and to establish and maintain wholly or in part one or more tuberculosis dispensaries or sanatoria, and to make rules, regulations and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the state; and to raise by taxation the necessary moneys to defray the charges and expenses so incurred. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1923, c. 81.)

Editor's Note.—This subsection was amended by the Laws of 1923, c. 81, by writing after the word "hospital," and before the word "for", in the second line the following: "establish and maintain homes for indigent orphan children.

For a later and more detailed provision for the establishment and maintenance of homes for, not merely orphans, but all indigent and delinquent children, see subsection 43 of this section. See 1 N. C. Law Rev. 273.

Summary of Powers Granted Hereunder.—In reference to the powers conferred by law upon boards of county commissioners, by the subsection, they can establish public hospitals for their several counties in cases of necessity, and make rules, regulations and by-laws for preventing the spread of contagious and infectious diseases and for taking care of those afflicted thereby—the same not being inconsistent with the laws of the state. Prichard v. Board, 126 N. C. 908, 911, 36 S. E. 353.

Cannot Burn Infected Residence.—By no reasonable construction of the sub-section can it be held that the board of county commissioners can burn a residence-house to prevent the spread of contagious and infectious diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected. Prichard v. Commissioners, 126 N. C. 908, 911, 36 S. E. 353.

Liability of Commissioners.—County commissioners are not liable for failure to establish hospitals under this section. Bell v. Commissioners, 127 N. C. 85, 37 S. E. 136.

Obligation to Quarantine.—The obligation on municipal corporations to quarantine and care for persons afflicted with certain contagious and infectious diseases is created entirely by statute. Board v. Henderson, 163 N. C. 114, 79 S. E. 442.

Prisons and Prisoners

30. To provide for a House of Correction.—To make provisions for the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed; to regulate the employment of labor therein; to appoint a superintendent thereof, and such assistants as are deemed necessary, and to fix their compensation. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

31. To Provide for Employment of Prisoners.—To provide for the employment on the highways or public works in the county of all persons condemned to imprisonment with hard labor, and not sent to the penitentiary. All prisoners sentenced to jail for any term less than sixty days may, as a part of such sentence, by the court in which such prisoners are tried and convicted, be sentenced to work at hard labor on the public streets of any city or town, the county farm, or any other public works of the county wherein such prisoners are tried and convicted. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1931, c. 302.)

As to authority of counties and towns to hire out certain prisoners, see sec. 1356; as to county prisoners generally, see sec. 1344, et seq.

Editor's Note.—The Act of 1931, according to its title, purports to amend this and subsection 17 of this section.

Townships

32. To Divide County into Townships.—To divide each county into convenient districts, called townships, and to determine the boundaries and prescribe the names of said townships. A map and survey of said townships shall be filed in the office of the clerk of the board of commissioners, and also in the office of the secretary of state. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

Editor's Note.—The Constitution of 1868 provided for the division of the several counties of the state into convenient districts, which were designated as townships. Upon the townships thus created was bestowed corporate powers for necessary purposes of local government. A clerk and two justices, elected biennially, constituted the board of trustees for each township. This board was given control over taxes and finances of the township, subject to the supervision of the county commissioners. Const. 1868, Art. VII, secs. 3, 4, 5.

The Act of 1868-'69 (Bat. Rev. C. 112) provided that a suit by or against a township in its corporate capacity should be in the name of its board of trustees. This act was passed to give effect to the provisions of the Constitution; subsequently by c. 106 of the Acts of 1873-'74, the provisions of the Act of 1868-'69 were expressly repealed. In 1876-'77 the General Assembly, under the power given it in the amendment Constitution of 1875, enacted what is generally known as the "County Government Act," whereby all the provisions of the Constitution of 1868 in regard to township boards of trustees were abrogated, and the provisions of the act substituted in the place thereof. The substituted provisions were to the effect that the townships already established and those thereafter to be created should be distinguished by well-defined boundaries; "but that no township should have or exercise any corporate powers whatever, unless allowed by act of the General Assembly to be exercised under the supervision of the board of county commissioners."

Acting upon the authority thus given it, the General Assembly, by the said "County Government Act," repealed the clause of the Constitution which gives corporate powers to the board of trustees for the township; also that one which provided for the election of officers of the township who ex officio should constitute the board of trustees; also that one which gave such trustees the control of the taxes and finances of their township, and in lieu thereof declared that "no township should have or exercise any corporate powers whatever," unless allowed to do so by act of the Assembly.

It is true that the same act provides that the territorial limits of the townships as established should be preserved; but this was for the convenience of the citizens thereof, and because the law requires that in all general elections for the state there should be at least one polling place in each township. Wallace v. Board, 84 N. C. 164, 165. Since the Act of 1876-'77, ch. 141, was passed providing that the board of county commissioners should have and exercise the jurisdiction and powers vested in and exercised by the boards of trustees of the several counties, the question arises, "What are the jurisdiction and powers thus transferred?" As the Act of 1876-'77 abrogates sec. 5 Art. VII, of the Constitution, which authorized the creation of the boards of trustees and defined their powers and duties, when the same Act vested in the commissioners the same powers and jurisdiction that had been exercised by the board of trustees of the several township, it must be that the Legislature had reference only to the constitutional jurisdiction and powers which had been vested in the township board of trustees by sec. 5, Art. VII, of the Constitution of 1868, and did not include those duties and obligations imposed by legislative enactments. Jones etc., Co. v. Commissioners, 85 N. C. 278, 282.

With the destruction of the township as a corporate being in favor of the county, the board of township trustees could no longer be a party to a suit. The question of vested rights arose. However, in several cases it was held that a party dealing with a municipal corporation has no such vested right growing out of his contract with the same as is protected by the Federal Constitution. It is a public institution, and the state may destroy its corporate powers, leaving the party damaged to seek relief by an appeal to the Legislature. Wallace v. Board, 84 N. C. 164; Mitchell v. Board, 71 N. C. 400; Jones etc., Co. v. Commissioners, 85 N. C. 278.

33. To Erect, Divide and Alter Townships.—To erect, divide, change the names of, or alter townships in the manner following: In any county, any three freeholders of each township to be affected may, after the notice presently to be mentioned, apply by petition to the board of commissioners to erect a new township, or divide an existing township, or change the name of or alter the boundaries thereof. Notice of the application shall be posted in one or more public places in each of such townships and published in a newspaper printed in the county, if there is one, for at least four weeks preceding the meeting at which the application is made to the board. No township shall have or exercise any corporate powers whatsoever, unless authorized by an act of the general assembly, to be exercised under the supervision of the board of commissioners. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1876-7, c. 141, ss. 3, 5.)

Legislative Power to Subdivide and Bestow Corporate Functions.—It is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions. McCormac v. Commissioners, 90 N. C. 441, 444.

Townships are within the power and control of the General Assembly, just as are counties, cities, towns and other municipal corporations. It may confer upon them, or any single one of them, corporate powers, with the view to accomplish any lawful purpose. Such powers may be conferred for a single purpose as well as many. Semble, the people of localities may be incorporated into road districts, school districts and the like. Brown v. Commissioners, 100 N. C. 92, 5 S. E. 178.

Townships have a distinctive existence for specified purposes created by statute, and the Legislature may confer upon and invest them with corporate powers for a particular pertinent purpose, as to subscribe for the capital stock of a railroad company, to issue its bonds to raise money to pay for the same, to levy taxes upon the property of the taxpayers therein to pay the accruing interest upon such bonds, and to pay the same at their maturity. Jones v. Commissioners, 107 N. C. 248, 265, 12 S. E. 69.

Need Not Be Created by Direct Legislative Action.—It is not essential that such sub-divisions of territory shall always be created directly by legislative enactment. In many cases, certain existing agencies, or agencies to be provided, are required by statute to establish them, and when established, they become, by the force of law, invested with certain powers and required to discharge prescribed duties. McCormac v. Commissioners, 90 N. C. 441, 445.

County Officers May Be Charged with Township Duties.—The townships are constituent parts of the county organization, and the county officers may well be charged with duties and authority in respect to debts they may be allowed by statute to contract. Jones v. Commissioners, 107 N. C. 248, 265, 12 S. E. 69.

County Bonds Not to Be Issued upon Note of One Township.—While the building of public roads has been held a necessary expense, the application of the principle may not be extended to instances where a statute requires the county to issue its bonds for road purposes to obtain aid for a township or local taxing district therein, upon the approval of the voters of the particular district alone, and without benefit to the others. Commissioners v. Lacy, 174 N. C. 141, 142, 93 S. E. 482.

Commissioners' Power to Issue Township Bonds. — The county commissioners are not authorized to issue bonds on the credit of a township for the construction of a railroad. Graves v. Board, 135 N. C. 49, 47 S. E. 134.

Township Trustee's Liability for Torts. — A township board of trustees incorporated by the Legislature to maintain and construct the public roads of the township are clothed with duties governmental in their nature and for the public benefit; and while strictly acting in pursuance thereof they are not liable for a pure tort of their employees or agents in inflicting a personal injury upon others. Price v. Board, 172 N. C. 84, 89 S. E. 1066.

34. To Apportion Funds between Altered, Townships.—When a township has been altered, erected, or divided, to apportion, in its discretion, the public funds of such townships between the new township divisions or subdivisions, and the warrant of the board upon the treasurer for the ap-

portionment shall constitute a valid voucher for the payment thereof. In those counties where the township public roads are under the control of road trustees, the board shall appoint the requisite number of trustees to perform the duties of the office until the regular date for the appointment or election of such trustees and until their successors are elected and qualified; but this shall not apply where another method of election has been provided. (Ex. Sess. 1913, c. 44.)

Miscellaneous

35. To Authorize Chairman to Issue Subpœnas.—To authorize the chairman to issue subpoenas to compel the attendance before the board of persons, and the production of books and papers relating to the affairs of the county, for the purpose of examination on any matter within the jurisdiction of the board. The subpoena shall be served by the sheriff on any constable to whom it is delivered; and upon return of personal service thereof, who ever neglects to comply with the subpoena, or refuses to answer any proper question shall be guilty of contempt and punishable therefor by the board. A witness is bound in such cases to answer all the questions which he would be bound to answer in like case in a court of justice; but his testimony given before the board shall not be used against the witness on the trial of any criminal prosecution other than for perjury committed on the examination. The chairman of the board of county commissioners for each county is authorized in his official capacity to administer oaths in any matter coming before either of such boards. Any member of such board while temporarily acting as such chairman has and may exercise like authority. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

36. To Audit Accounts. — To audit accounts against the county, and direct the raising of the moneys necessary to defray them. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

As to neglect of duty a misdemeanor, see section 1302.

Claim Must Be Audited.—A claim against a county must be audited and approved at a regular meeting of the board of commissioners, First Nat. Bank v. Warlick, 125 N. C. 593, 594, 34 S. E. 687.

Must Be Itemized and Verified.—No account shall be audited by a board of county commissioners unless it is itemized and verified. Turner v. McKee, 137 N. C. 251, 49 S. E. 330.

Court Cannot Interfere with Discretionary Power of Commissioners.—The courts cannot interfere with the exercise of the discretion of the board of county commissioners in ordering an investigation by public accountants of the books of the various departments of the county government. Wilson v. Holding, 170 N. C. 352, 86 S. E. 1043.

Not Subject to Review.—The board of county commissioners is not such a judicial tribunal, that its decision in passing upon claims against the county can be reviewed on appeal. The proper remedy to test the validity of a rejected claim is by civil action. Jones v. Commissioners, 88 N. C. 56.

37. To Appoint Proxies.—To appoint proxies to represent in any annual or other meetings the shares or other interest held by any county in a railroad company, or other corporation, under the charter of such corporation, or under any special acts of the general assembly, authorizing county subscriptions in such cases. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

38. To Procure Weights and Measures.—To procure for each county sealed weights and measures, according to the standard prescribed by Congress; and to elect a standard keeper, who shall qualify before the board, and give bond approved by the board, as prescribed by law. (Rev., s. 1318; Code, s. 707; R. C., c. 117, s. 4; 1868, c. 20, s. 26.)

39. To Adopt a County Seal.—To adopt a seal for the county, a description and impression of which shall be filed in the office of superior court clerk and of the secretary of state. (Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.)

40. To Promote Farmers Cooperative Demonstration Work.—To cooperate with the state and national departments of agriculture to promote the farmers cooperative demonstration work, and to appropriate such sum as they may agree upon for the purpose. (1911, c. 1.)

41. To Appropriate for the National Guard.—To appropriate such sums of money to the various organizations of the national guard, and at such times, as the board may deem proper. (1915, c. 259.)

42. To Make Appropriations for Libraries. — Together with the county board of education of any county in which there is a public city or town library, in their discretion, to cooperate with the trustees of said library in extending the service of such library to the rural communities of the county, and to appropriate out of the funds under their control an amount sufficient to pay the expense of such library extension service. (1917, c. 149.)

43. Homes for Indigent and Delinquent Children.—To provide for the establishment and maintenance, with the approval of the State Board of Charities and Public Welfare, of such home or homes for indigent and delinquent children in said county, as to them may seem proper or necessary, or to co-operate with the board of county commissioners or other governing authority in any other county or counties in the establishment and maintenance, at some mutually agreeable point, of a district home for such purposes, said district to be established by agreement and said home to be established and maintained upon such terms as may be agreed upon by the boards of county commissioners of the several counties concerned. (1927, c. 248.)

Editor's Note.—The first provision we find for a home for indigent children is in the amendment, Laws of 1923, c. 81, to subsection 29 of this section. However, that merely referred to indigent and delinquent orphan children. This subsection, providing a more detailed and broad provision for the establishment and maintenance of a home for indigent and delinquent children, was added by the Acts of 1927, c. 248.

§ 1298. Local: authority to interdict certain shows.—The boards of commissioners of the several counties shall have power to direct the sheriff of the county to refuse to issue any license to any carnival company and shows of like character, moving picture and vaudeville shows, museums and menageries, merry-go-rounds and ferris-wheels, and other like amusement enterprises conducted for profit under the same management and filling week-stand engagements or in giving week-stand exhibitions, whether under canvas or not, whenever in the opinion of the board of county commissioners the public welfare will be endangered by the licensing of such companies. This section shall apply only to the

counties of Anson, Bladen, Burke, Cabarrus, Carteret, Catawba, Duplin, Forsyth, Greene, Haywood, Iredell, Lee, Madison, Mitchell, Nash, Orange, Pamlico, Pasquotank, Polk, Randolph, Robeson, Scotland, Tyrrell, Washington, Wilson, Yadkin. (1919, c. 164.)

§ 1299. To settle disputed county lines. — When there is any dispute concerning the dividing line between counties, the board of commissioners of each county interested in the adjustment of said line, a majority of the board consenting thereto, may appoint one or more commissioners, on the part of each county, to settle and fix the line in dispute; and their report, when ratified by a majority of the commissioners in each county, is conclusive of the location of the true line, and shall be recorded in the register's office of each county, and in the office of the secretary of state. If the board of commissioners of any county refuses upon request of the other county or counties to appoint one or more commissioners pursuant to this section to settle and fix the line or lines in dispute, then, and in such event, the county or counties making such request may file a verified petition before the resident judge of the district in which the said county or counties lie, or the judge holding the courts thereof for the time being, and in the event that said counties shall lie in more than one judicial district, to the resident judge or the judge holding the courts of either district, setting forth briefly the line or lines which are in dispute; the refusal of the other county or counties to settle and fix the line in dispute, pursuant to this section; whereupon, such judge before whom such petition is filed shall issue a notice to the other county or counties, returnable before him within not less than ten nor more than twenty days, and if it appear to such judge upon hearing said notice, and he shall find as a fact that there is bona fide dispute as to the true location of the boundary line or lines referred to in the petition and that the county or counties have refused to settle and fix the line in dispute as provided in this section, such judge shall thereupon appoint three (3) persons, one person from each of the counties and some disinterested person from some adjoining county, who shall go upon the ground, hear such evidence and testimony as shall be offered and make report to the said judge as to the true location of the boundary line or lines in dispute. The judge shall thereupon ratify the report and a copy thereof shall be recorded in the office of the register of deeds of each of the counties and shall be indexed and cross indexed and shall also be recorded in the office of the Secretary of State and the location so fixed shall be conclusive. If it shall appear to the judge that the services of a surveyor are necessary he shall appoint such surveyor and fix his compensation. The cost thereof shall be defrayed by two counties in proportion to the number of taxable polls in each. (Rev., s. 1332; Code, s. 721; R. C., c. 27; 1836, c. 3; 1925, c. 251.)

Editor's Note.—This section was amended by the Laws of 1925, ch. 251, by providing that in case the county commissioners refuse to appoint one or more commissioners to fix the lines in dispute the judge may appoint. If, after the issuance and return of notice, there is a bona fide dispute, the judge is to appoint three commissioners, one from each of the disputing counties, and one from a neutral county. After the said commissioners make their report, and it is confirmed by the judge, it is recorded in the office of the register of deeds, and a copy sent to the office of the secretary of state.

§ 1300. How commissioners sworn and paid.— Such commissioners, before entering on the duties assigned them, shall be sworn before a justice of the peace; and they, with all others employed, shall be allowed reasonable pay for their labors. (Rev., s. 1323; Code, s. 722.)

§ 1301. Approving insufficient bond misdemeanor.—If any county commissioner shall approve any official bond which he knows or believes to be insufficient in the penal sum, or in the security thereof, he shall be guilty of a misdemeanor, and on conviction shall be removed from office and forever disqualified from holding or enjoying any office of honor, trust or profit under the state. (Rev., s. 3573; Code, s. 1880; 1869-70, c. 169, s. 70.)

Cross Reference.—As to duty of county commissioners to take and approve sheriff's bonds, see sec. 3931; as to duty of commissioners when sheriff's bonds are insufficient, see sec. 3932.

§ 1302. Neglect of duty misdemeanor.—If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offense, to be paid to any person who shall sue for the same. (Rev. s. 3590; Code, s. 711.)

Cross References.—As to willfully failing to discharge duties see section 4384; as to failure to make reports and discharge other duties, see section 4385; as to liability of commissioners in taking bonds of a sheriff, see section 3933.

In General.—See Harrell v. Board of Com'rs, 206 N. C. 225, 173 S. E. 614, wherein this section is construed with §§ 1290, 1297 and 1317 to show implied legislative authority to levy taxes to keep county buildings in repair.

Essence of the Offense. — The essence of the offense created by the section is the "neglect to perform any duty required by law, and an indictment drawn under it cannot be sustained by proof of the act of willfully taking a greater sum as mileage than was due. State v. Norris, 111 N. C. 652, 656, 16 S. E. 2.

When the Remedy is by Mandamus.—When the county commissioners have failed in the performance of their duties, as to permit and require an interference of the court by civil process, the remedy is by mandamus. Board v. Commissioners, 150 N. C. 116, 52 S. E. 724.

Liability of Commissioners.—A county commissioner is liable to the penalty imposed when he acts corruptly or grossly, intentionally and willfully neglects or refuses to perform his duty; but where he commits an error in the honest exercise of his judgment he is not liable to the penalty. Staton v. Wimberly, 122 N. C. 107, 29 S. E. 63.

A complaint before a justice alleging the nonpayment of the penalty accrued under this section for neglect of duty as a member of the board of commissioners for his failure to require an itemized account, fully verified by the oath of the claimant, before he audited and approved such account, as required by section 1330, states a cause of action. Turner v. McKee, 137 N. C. 251, 49 S. E. 330.

Same—Failure to Declare Sheriff's Office Vacant. — A member of a board of county commissioners is liable for the penalty prescribed by this section, for failure of the board to declare the office of sheriff vacant and fill the same, when such sheriff has not complied with the requirements of the statutes, in respect to the renewal of his official bonds and accounting for public moneys received by him. Bray v. Creekmore, 109 N. C. 49, 13 S. E. 723.

Same—Six Months' School Term.—A failure on the part of the commissioners to levy taxes to finance the public schools for the minimum term of six months is an indictable offense under this section. Board v. Commissioners, 150 N. C. 116, 121, 63 S. E. 724.

When Defendant to Seek Bill of Particulars.—If a defendant desires further particulars, under an indictment

for neglect of duty as a public officer, he should ask for a bill of particulars. State v. Leeper, 146 N. C. 655, 61 S. E. 585.

Cited in Moffitt v. Davis, 205 N. C. 565, 570, 172 S. E. 317.

Art. 2A. Improved Methods of County Government

§ 1302(1). Forms of government.—Two forms of county government are recognized, to be designated as the County Commissioners Form and the Manager Form. (1927, c. 91, s. 1.)

I. County Commissioners Form.

§ 1302(2). County Comissioners form defined.—That the County Commissioners Form of county government shall be that form in which the government is administered by a board of county commissioners, without a county manager. (1927, c. 91, s. 2.)

§ 1302(3). Modifications of regular forms.—That there may be modifications of the County Commissioners Form, adopted as hereinafter provided, as follows:

(1) The number of commissioners may be increased from three to five or decreased from five to three.

(2) All commissioners may be elected for two years.

(3) At the first election, if the board is to have three members, one may be elected for two years, one for four years, and one for six years, but if the board is to have five members, two may be elected for two years, two for four years, and one for six years. (1927, c. 91, s. 3.)

§ 1302(4). How change may be made.—Upon a petition filed with the board of county commissioners, signed by voters not less in number than ten per cent of the whole number of voters who voted in the last election at which votes were cast for Governor, asking for the adoption of either of the modifications above set forth, the board of commissioners shall order an election, but may order such election without petition, which election shall be held under the general law governing elections for members of the General Assembly in the county, presenting the question of making the change asked for in the petition. If a majority of the votes cast at such election shall be in favor of the change designated, it shall go into effect at the expiration of the term of office of the then existing board of commissioners. At the general election for county commissioners next preceding the date when the said change goes into effect, the members of the board shall be elected in accordance with the plan adopted. If the members of the board are to be elected for different terms, the term for which each member is to serve shall be indicated in the election; and the members so elected shall hold office for the terms designated, and at the expiration of the term of each member, his successor shall be elected for a term of six years. (1927, c. 91, s. 4.)

II. Manager Form.

§ 1302(5). Manager appointed or designated.—The board of county commissioners may appoint a county manager who shall be the administrative head of the county government, and shall be responsible for the administration of all the departments of the county government which the board of county commissioners has the authority to control. He shall be appointed with regard to merit only, and he need not be a resident of the county at the time of his appointment. In lieu of the appointment of a county manager, the board may impose and confer upon the chairman of the board of county commissioners the duties and powers of a manager, as hereinafter set forth, and under such circumstances said chairman shall be considered a whole-time chairman. Or the board may impose and confer such powers and duties upon any other officer or agent of the county who may be sufficiently qualified to perform such duties, and the compensation paid to such officer or agent may be revised or adjusted in order that it may be adequate compensation for all the duties of his office. The term "manager" herein used shall apply to such chairman, officer, or agent in the performance of such duties. (1927, c. 91, s. 5.)

§ 1302(6). Duties of the manager.—It shall be the duty of the county manager (1) to be the administrative head of the county government for the board of commissioners; (2) to see that all the orders, resolutions, and regulations of the board of commissioners are faithfully executed; (3) to attend all the meetings of the board, and recommend such measures for adoption as he may deem expedient; (4) to make reports to the board from time to time upon the affairs of the county, and to keep the board fully advised as to the financial condition of the county and its future financial needs; (5) to appoint, with the approval of the county commissioners, such subordinate officers, agents, and employees for the general administration of county affairs as the board may consider necessary, except such officers as are required to be elected by popular vote, or whose appointment is otherwise provided by law; (6) to perform such other duties as may be required of him by the board of commissioners. (1927, c. 91, s. 6.)

§ 1302(7). Removal of officers and agents.—The county manager may remove such officers, agents, and employees as he may appoint, and upon any appointment or removal he shall report the same to the next meeting of the board of commissioners. (1927, c. 91, s. 7.)

§ 1302(8). Compensation.—The county manager shall hold his office at the will of the board of commissioners, and shall be entitled to such reasonable compensation for his services as the board of commissioners may determine. The board shall also fix the compensation of such subordinate officers, agents and employees as may be appointed by the county manager. (1927, c. 91, s. 8.)

§ 1302(9). Manager plan adopted by popular vote.—If the board of county commissioners does not exercise its discretion to appoint or designate a county manager, as above provided, a petition may be filed with the board, signed by voters not less in number than ten per cent of the whole number of voters who voted in the last election

at which votes were cast for Governor, asking for the adoption of the manager form of county government. Upon the filing of such petition, the board of commissioners shall order an election to be held under the general laws governing elections for members of the General Assembly in the county, presenting the question of the adoption of the manager form of county government. If a majority of the votes cast at such election shall be in favor of such manager form, the board of commissioners shall proceed to appoint a county manager as provided in this act. (1927, c. 91, s. 9.)

§ 1302(10). How often elections may be held.—Not more than one election may be held within any period of twenty-three months upon the question of modifying the county commissioners plan, nor more than one election in any period of twenty-three months upon the question of adopting the manager plan, whether or not any such election resulted in favor of the question submitted or against the same. (1927, c. 91, s. 10.)

III. Certain Powers and Duties of the Board.

§ 1302(11). Powers and duties of the board.—The powers and duties of the board of commissioners under the manager form, or the county commissioners form, whether modified as herein provided or not modified, shall be the same as now provided by general or local laws for the administration of the county government, and such additional powers and duties as may be given in this act. But whatever form is adopted, or shall be in use in a county, it shall be the duty of the board of county commissioners to provide, so far as possible, consistent with law, for unifying fiscal management of county affairs, for preserving the sources of revenue, for safeguarding the collection of all revenue, for guarding adequately all expenditures, for securing proper accounting of all funds, and for preserving the physical property of the county. (1927, c. 91, s. 11.)

§ 1302(12). Purchasing agent.—It shall be the duty of the board of commissioners to provide for the purchasing of supplies for the different departments of the county government in such manner as may prevent waste and duplication in purchasing, and may obtain the advantage of purchasing in larger quantities. To that end the board may designate some competent person, either a member of the board or some other officer or agent of the county, as purchasing agent, whose duty it shall be to superintend the purchasing of all material and supplies for the county, and the board may prescribe the duties of such purchasing agent. (1927, c. 91, s. 12.)

Cited in Board of Education v. Walter, 198 N. C. 325, 328, 151 S. E. 718.

§ 1302(13). Care of county property.—It shall be the duty of the board of commissioners to provide for the regular inspection of and care for all the property of the county, including buildings, machinery, and other property used for county purposes, and the board may designate some member of the board or some other officer or agent of the county, whose duties it shall be to make a regular inspection of the county property and report the condition of the same at such times as the board may direct. (1927, c. 91, s. 13.)

IV. Director of Local Government.

§ 1302(14). Director of local government to visit local units and offer aid in establishing competent administration.—The terms, 'unit,' or 'local unit,' as the same are used in this act, shall be construed to mean 'unit' as defined in § 2492(2). It shall be the duty of the Director of Local Government to visit the local units of government in the State, and to advise and assist the governing bodies and other officers of said units in providing a competent, economical and efficient administration; to suggest approved methods for levying and collecting taxes and other revenues; to suggest such changes in the organization of local units of government as will best promote the public interests, and to render assistance in carrying the same into effect. (1931, c. 100, s. 1.)

As to creation of office of director of local government, see § 2492(3). As to local government act, see §§ 2492(1)-2492(51).

§ 1302(15). Director to devise uniform accounting and recording systems; regular statements from units to director.—The Director of Local Government shall have the power to devise and prepare for use in the local units uniform and accounting and recording systems, together with blanks, books, and necessary methods; uniform classifications of revenue and expenditures, and uniform budget blanks and forms; to revise or prescribe, in his discretion, the records of any department or office of the local unit in order to conform to the orderly accounting procedure; to transfer all or any part of the financial records of any department or office of the unit, including school records, to the office of the county accountant, municipal accountant, or other similar officer, and to require said county accountant, municipal accountant, or other similar officer to furnish, at any time, monthly or annual statements to the office of the Director of Local Government in Raleigh or to any department, office, or board of the unit, showing financial conditions or budget position at any date and financial operations covering any period on forms prescribed by said Director of Local Government. The Director shall have the power to require the use of such systems, books, forms, classifications and budgets as provided herein by officers or employees of local units, and to enforce the use of the same. Where the accounting system of any unit shall in part or in whole substantially meet the requirements of uniformity as prescribed by the Director of Local Government, the Director may, in his discretion, approve or modify such system as he may deem necessary. As soon as practicable after the ratification of this act it shall be the duty of the Director of Local Government to proceed, as rapidly as possible, with the installation of uniform records and systems of accounting in each and every local unit of the State. (1931, c. 100, ss. 1, 3.)

§ 1302(16). Director to inspect and supervise the keeping of records; unlawful not to furnish director with requested information.—The Director of Local Government shall have the power to inspect or supervise the keeping of the records of any department or office of any local unit for the

purpose of determining that such records are being properly kept and that public money is being properly accounted for, and it shall be unlawful for any officer or employee to fail or refuse to turn over such records or give access to same and give such other information which may be requested of him and relating to the records of his office to the Director or his representative upon request of said Director or representative. (1931, c. 100, s. 1.)

§ 1302(17). Violation of two preceding sections misdemeanor. — Any officer or employee of any local unit who shall fail or refuse to observe the provisions of sections 1302(15) and 1302(16) shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1931, c. 100, s. 1.)

V. Codification of County Government Laws

§ 1302(18). Arrangement of county government laws.—For the purpose of bringing together and arranging the various laws relating to the administration of county government, so as to make them more readily accessible for the information of county officers, the Attorney-General, or any of his assistants designated by him, shall, upon the request of the Governor, examine the various statutes regulating the duties of county officers and arrange them in the form of a code for the direction of county officers. It shall be the duty of the person so appointed to examine thoroughly all the general laws in regard to the county government and the duties of county officers; to arrange and classify such laws with reference to the different officers and departments of the county, except those duties to be performed by the county officers as a part of the judicial system of the State. This codification shall be published by the county government advisory commission. (1927, c. 91, s. 20.)

Editor's Note.—The director of local government now has the duty of publishing the codification referred to in this section, in view of § 2492(3).

Miscellaneous

§ 1302(19). All counties affected by this article. —The powers and privileges conferred by this article, and the duties imposed thereby, are conferred and imposed upon every county within the State, whether governed wholly by general laws or governed wholly or in part by local acts. (1927, c. 91, s. 21.)

Art. 3. State Association of County Commissioners

§ 1303. Membership of association. — The State Association of County Commissioners consists of the boards of county commissioners of the several counties, and any member of the board of any county may be a member of the association, but it is not mandatory for any county to become a member. (1909, c. 870, ss. 1, 2.)

§ 1304. Purposes of association.—The purpose of the association is to promote and cultivate more intimate association and more friendly relations among the county commissioners of the state; to secure as far as possible a uniform valuation of property for taxation; to promote the cause of good roads; to propose laws for the best interests of county governments; to secure uniformity in the handling of county affairs; to propose laws for the protection of county finances, and preservation of resources and assets; and to promote the general welfare of the state. (1909, c. 870, s. 1.)

§ 1305. Powers of association.—The association has power to adopt by-laws, rules and regulations for the government of its members, for the collection of fees and dues, for the number and election of its officers and the duties thereof, for the safe keeping of its property, and the general management of its affairs, and has power to alter, modify or amend such by-laws, rules and regulations, from time to time, as it deems best. (1909, c. 870, s. 3.)

§ 1306. Officers of association.—The officers shall be a president, a vice president at large and ten other vice presidents, or one from each congressional district, a secretary and treasurer, and an executive committee. The duties of the officers shall be prescribed by the by-laws, rules and regulations. (1909, c. 870, s. 4.)

§ 1307. Dues and expenses of members. — There shall be assessed against each county an annual membership fee of five dollars, which shall be paid by the county treasurer upon the order of the board of county commissioners, but the executive committee of the association may increase the annual membership fee to a sum not to exceed ten dollars. The various boards of commissioners are authorized to pay out of the county treasury the expenses of one of its members attending the meetings of the association. (1909, c. 870, ss. 5, 7.)

§ 1308. Meetings of association.—The annual meeting of the association shall be held on Wednesday after the second Monday in August of each year, and the place of meeting shall be designated by the executive committee. Upon ten days notice, the president or a majority of the executive committee may call a called meeting, and the time and place shall be designated, together with a short statement of the object of the meeting. (1909, c. 870, s. 6.)

Art. 4. Clerk to Board of Commissioners

§ 1309. Register clerk ex officio to board; compensation.—The register of deeds is ex officio clerk of, and his compensation shall be fixed by, the board of commissioners. (Rev., s. 1324; Code, s. 710; 1895, c. 135, s. 4.)

Cited in O'Neal v. Wake County, 196 N. C. 184, 187, 145 S. E. 28.

§ 1310. Duties of clerk.—It is the clerk's duty—

1. To record in a book to be provided for the purpose all the proceedings of the board.
2. To enter every resolution or decision concerning the payment of money.
3. To record the vote of each commissioner on any question submitted to the board, if required by any member present.
4. To preserve and file in alphabetical or other due order all accounts presented or acted on by the board, and to designate upon every account audited the amount allowed and the charges for which it was allowed.

5. To keep the books and papers of the board free for the examination of all persons.

6. To administer oaths to all persons presenting claims against the county, but he shall receive no fee therefor. (Rev., s. 1325; Code, s. 712; 1905, c. 530.)

Correction of Record.—The record of a board of county commissioners may be corrected nunc pro tunc by the board itself to speak the truth. Norfolk, etc., R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534.

Where the county commissioners have exercised their statutory authority to loan county funds to the State Highway Commission, anticipating the allotment of State funds for the building of highways within the county, and have lawfully contracted for that purpose, it may not, after the passage of a later act, taking away this power, materially change the contract, but the county commissioners nunc pro tunc may correct the entries on their minutes theretofore duly passed and entered of record so as to make the entry speak the truth as to what had been regularly done, and to this end parol evidence is admissible, the time of the correction so made relating back to the time the entry should have been correctly made. Oliver v. Board of Commissioners, 194 N. C. 380, 139 S. E. 767.

§ 1311. Clerk to publish annual statement.—The clerk shall annually, on or within five days next before the first Monday of December, make out and certify, and cause to be posted at the courthouse, and published in a newspaper printed in the county, if there is one, for at least four weeks, a statement for the preceding year showing—

1. The amount, items and nature of all compensation audited by the board to the members thereof severally.

2. The number of days the board was in session, and the distance traveled by the members respectively in attending the same.

3. Whether any unverified accounts were audited, and if any, how much and for what. (Rev., s. 1326; Code, s. 713.)

Cross References. — As to willful failure to discharge duties, see sec. 4384; as to failure to make reports and discharge other duties, see sec. 4385; as to publication of receipts and disbursements, see sec. 2687.

Art. 5. Finance Committee

§ 1312. Election and duties of finance committee.—The board of commissioners may elect by ballot three discreet, intelligent tax-paying citizens, to be known as the "finance committee," whose duty it is to inquire into, investigate and report by public advertisement, at the courthouse and one public place in each township of the county, or in a newspaper, at their option, if one is published in the county, a detailed and itemized account of the condition of the county finances, together with any other information appertaining to any funds, misappropriation of county funds, or any malfeasance in office by any county officers. (Rev., s. 1389; Code, s. 758; 1897, c. 513; R. C., c. 28, s. 17; 1838, c. 31, s. 1; 1871-2, c. 71, s. 1.)

Constitutional Power to Create.—The Legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. Such a power is derived under Article VII, sec. 2, of the State Constitution, providing that the county commissioners shall have control of the county's finances "as may be prescribed by law," taken in connection with section 14 thereof, giving full power to the General Assembly to modify, etc., the provisions of this article and to substitute others, etc. Sou. Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283.

Mistake as to Amount Due.—Money paid under protest should be refunded if it should be shown that there has been a mistake in the report of the finance committee and that the sum was not in fact due. Moore v. Commissioners, 87 N. C. 209, 213.

When Mandamus Will Lie to Enforce Order.—Upon refusal of a county treasurer to pay from the public funds of a county an order made on him by a board of audit and finance for the payment of moneys authorized and prescribed by a legislative enactment, a mandamus will lie. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283.

§ 1313. Oath of members.—The members of the finance committee before entering upon their duties shall, before the clerk of the superior court, subscribe to the following oath or affirmation: I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality. So help me, God. (Rev., s. 1390; Code, s. 762; 1871-2, c. 71, s. 4.)

§ 1314. Powers of finance committee. — The finance committee has power and authority to send for persons and papers, and to administer oath; and any person failing to obey their summons, or to produce promptly any paper relating or supposed to relate to any matter appertaining to the duties of the finance committee, is guilty of a misdemeanor, and on conviction in the superior court, shall be fined and imprisoned at the discretion of the court. (Rev., s. 1391; Code, s. 759; 1831, c. 31; 1871-2, c. 71, s. 2; R. C., c. 28, s. 17; 1883, c. 252.)

§ 1315. Penalty on officer failing to settle. — If any clerk, sheriff, constable, county treasurer, register of deeds, justice of the peace, or other officer or commissioner, who holds any county money, fails duly to account for the same, the finance committee shall give such person ten days previous notice, in writing, of the time and place at which they will attend to make a settlement; and every officer receiving notice and failing to make settlement as required by this chapter shall forfeit the sum of five hundred dollars, to be sued for in the name of the state and prosecuted for the use and at the expense of the county, unless the court releases the officers from the forfeiture. (Rev., s. 1392; Code, s. 760; R. C., c. 28, s. 19; 1831, c. 31, s. 3.)

§ 1316. Annual report of finance committee.—It is the duty of the finance committee to make and publish their reports as hereinbefore directed on or before the first Monday of December in each year. (Rev., s. 1393; Code, s. 761; 1871-2, c. 71, s. 3.)

Art. 5A. Contracts

§ 1316(a). Contracts involving expenditure of $1,000 or more let after advertisement for bids.—No contract for construction or repair work, or for the purchase of apparatus, supplies, materials or equipment, involving the expenditure of public money, the estimated cost of which amounts to or exceeds one thousand ($1,000) dollars, except in cases of special emergency involving the health or safety of the people or their property, shall be awarded by any board or governing body of any county, city, town or other sub-division of

the state, unless proposals for the same shall have been invited by advertisement once in at least one newspaper having general circulation in the county, city, town or other sub-division, the publication to be at least one week before the time specified for the opening of said proposals: Provided, if there is no newspaper published in the county and the estimated cost of the contract is less than two thousand ($2,000) dollars, such advertisement may be either published in some newspaper as required herein or posted at the court house door not later than one week before the opening of the proposals in answer thereto, and in the case of a city, town or other sub-division wherein there is no newspaper published and the estimated cost of the contract is less than two thousand ($2,000) dollars, such advertisement may be either published in some newspaper as required herein or posted at the court house door of the county in which such city, town or other sub-division is situated and at least one public place in such city, town or other sub-division. Such advertisement shall state the time and place where plans and specifications of proposed work, or complete description of apparatus, supplies, materials or equipment may be had and the time and place for opening the proposals in answer to such advertisement, and shall reserve to said board or governing body the right to reject any or all such proposals. All such proposals shall be opened in public, shall be recorded on the minutes of the board or governing body and the award, if any be made, shall be made to the lowest responsible bidder, taking into consideration quality and the time specified in the proposal for performance of the contract. Each proposal shall be accompanied by a deposit with the board or governing body of cash or a certified check on some bank or trust company authorized to do business in this state, of an amount equal to not less than two per centum (2%) of the proposal; said deposit to be retained in the event of failure of the successful bidder to execute the contract within ten days after the award or to give satisfactory surety as required herein. All contracts required herein shall be executed in writing, and where the amount involved is two thousand ($2,000) dollars or more, the board or governing body shall require the person, firm or corporation to whom the award of contract is made to furnish bond in some surety company authorized to do business in this state or require a deposit of money, certified check or government securities, for the full amount of said contract for the faithful performance of the terms of said contract, and no such contract shall be altered except by written agreement of the contractor, the sureties on his bond, and the board or governing body. Such surety bond or other securities as required herein shall be deposited with the treasurer of the unit until the contract has been carried out in all respects. (1931, c. 338, s. 1; 1933, c. 50.)

See § 2830.

Editor's Note.—In the third from the last sentence of this section, Public Laws 1933, c. 50, substituted the words "authorized to do business in" for the words "organized under the laws of."

§ 1316(b). Contracts involving more than $200 let after receiving bids informally. — All contracts for construction or repair work or for the purchase of apparatus, supplies, materials or equipment made by an officer, department, board, or commission of any county, city, town or other sub-division of this State, except as otherwise required by this act when practical, and involving expenditure of public money of two hundred ($200) dollars or more shall be awarded to the lowest responsible bidder after informal bids have been secured, and it shall be the duty of such officer, department, board or commission to keep a record of all bids submitted, such record to be subject to public inspection at any time. (1931, c. 338, s. 2.)

§ 1316(c). Evasions prohibited. — No bill or contract shall be divided for the purpose of evading any provisions of this article. (1931, c. 338, s. 3.)

§ 1316(d). Local Government Act unaffected. —This article shall be administered subject to all the provisions of the Local Government Act [§§ 2492(1)-2492(51)], and nothing herein contained shall be construed as in anywise repealing, amending or affecting any of the provisions of said Local Government Act. (1931, c. 338, s. 4.)

Art. 6. Courthouse and Jail Buildings

§ 1317. Built and repaired by commissioners. —There shall be kept and maintained in good and sufficient repair in every county a courthouse and common jail, at the expense of the county wherein the same are situated. The boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building, repairing and furnishing their several courthouses and jails, in such manner as they think proper; and from time to time shall order and establish such rules and regulations for the preservation of the courthouse, and for the government and management of the prisons, as may be conducive to the interests of the public and the security and comfort of the persons confined. (Rev., s. 1335; Code, s. 782; R. C., c. 30, s. 1; 1741, c. 33, ss. 1, 2; 1795, c. 433, s. 1; 1816, c. 911, s. 1.)

As to the courthouse and jail being a necessary expense, see subsection 9 of section 1297.

Editor's Note.—By the Act of 1741, ch. 33, the tax herein provided for was to be laid for two years, and to be collected by the sheriff in the same manner with all other public and parish taxes, and to be accounted for by him to the justices of the county court on oath. Viewing the first section of this Act by itself, it would seem that this tax was only temporary, and to be laid at once for two years. But the second section of the Act removes this idea, for by that the justices were empowered to lay a tax of the same character, viz., a poll tax from time to time, as often as it might be necessary to repair or erect public buildings.

This authority was repeated and confirmed by the Act of 1795, ch. 433, by which the taxes were to be laid and collected annually. This brings us to the Act of 1808, c. 755, by which the sheriff was again authorized to collect the tax for public buildings, and was for the first time made accountable to the treasurer of public buildings. The Act of 1816, c. 911, converted this authority into a positive duty, and directed that the justices should, from time to time, lay a sufficient tax, erect and keep in repair, the public jail, courthouse and stocks, in their respective counties. In State v. Justice, 11 N. C. 194, 179, Henderson, J., in speaking of these statutes says, "The justices of our county courts are not obliged, by their own exertions, to build and repair jails; they are only to use the means to that end which the law has placed in their power; they

are to lay the tax, make the order, appoint a treasurer of public buildings, and appoint commissions to contract for the building of the jail."

The provisions of these Acts are found in a substantial form as section 1, chapter 30 of the Revised Statutes, which is likewise carried forward as section 1, chapter 30 of the Revised Code of 1854. During the upheaval of the Civil War, and the Reconstruction period, which brought about so many changes in North Carolina laws, we find this duty shifted from the old county courts to the county commissioners. The change appears for the first time as section one, chapter thirty-one, of Battle's Revisal of 1872-'73.

Constitutionality.—The power of limited taxation for the purpose of erecting and maintaining a county courthouse and its exercise is no invasion of the Bill of Rights. Lockhart v. Harrington, 8 N. C. 408.

Article XI, sec. 6, of the Constitution (1868) requires that the structure and superintendence of penal institutions of the State be such as to secure the health and comfort of the prisoners. Lewis v. Raleigh, 77 N. C. 229, 230.

Construed Strictly.—The law, imposing the responsibility on municipal corporations for the proper structure and superintendence of their prisons, must be construed strictly. Moffitt v. Asheville, 103 N. C. 237, 257, 9 S. E. 695.

A Necessary Expense.—The building and repairing of a courthouse by the county is a part of its necessary expense. Burgin v. Smith, 151 N. C. 561, 66 S. E. 607.

When Legislature Imposes a Limit.—When a special act of the Legislature has imposed a limit upon the expense of a county to be incurred in improving its courthouse, the commissioners cannot avoid the will of the Legislature as therein declared by setting up a general power of contracting debts for necessary expenses, limited only by the constitutional limitation of taxation, and thus under an entire contract made beforehand expend a larger amount for the purpose than that prescribed by the special act. Burgin v. Smith, 151 N. C. 561, 66 S. E. 607.

Commissioners' Power to Levy Special Tax.—While the county commissioners have the authority to repair the county's jail and courthouse and to erect new ones, in its discretion, it is without authority to levy a special tax to provide for the payment of interest on the bonds issued for that purpose, or to create a sinking fund therefor, for this must be provided for by proper legislation, or paid out of the general revenues and income of the county. Jackson v. Commissioners, 171 N. C. 379, 88 S. E. 521.

Levy of Taxes to Pay Interest on Bonds.—See Harrell v. Board of Com'rs, 206 N. C. 225, 173 S. E. 614, wherein this section is treated with §§ 1290, 1297, 1302 and 1334(8) to show taxpayers cannot enjoin the levy of taxes necessary to pay the principal and interest on bonds issued for repairs as designated in this section.

Action of Commissioners Not Reviewable in Absence of Mala Fides.—It is within the sound discretion of the county commissioners to have the courthouse or jail of the county repaired or to erect new ones on the same sites as a necessary county expense, which will not be reviewed in the courts in the absence of mala fides; and should a bill of indictment be drawn by the solicitor, at the request of the judge holding the courts of the county, and a true bill be found by the grand jury thereon, it is open to the commissioners to set up any available defense they may have. Jackson v. Commissioners, 171 N. C. 379, 88 S. E. 521.

Judge's Request to Solicitor to Draw Indictment Not Duress.—A request from the judge holding court in a county to the solicitor to draw an indictment against the county commissioners for failing in their duty to provide a proper courthouse and jail cannot alone be regarded as a coercion of the commissioners in regard to their discretionary powers, or duress to invalidate bonds afterwards to be issued by them in pursuance of their resolutions to build a new courthouse and jail upon the sites of the old ones; and the bonds to be so issued will not be restrained either on that ground or the want of jurisdiction of the judge making the request. Jackson v. Commissioners, 171 N. C. 379, 88 S. E. 521.

Requirements for Prisoner's Comfort.—The least that is required is that persons confined in any public prison shall have a clean place, comfortable bedding, wholesome food and drink, and necessary attendance. Lewis v. Raleigh, 77 N. C. 229.

Where a sheriff has in an emergency requested a physician to render services to a prisoner in his custody who had been badly wounded resisting arrest, and there is evidence tending to show that under the circumstances he could not have obtained in time an order from the board of county commissioners that would assume responsibility on behalf of the county to pay them, the objection of the commissioners that under such circumstances the county would not pay for them, and the liability would only attach as to those prisoners delivered at the county jail, is untenable. C. S. 1317, 1346, 1347, Spicer v. Williamson, 191 N. C. 487, 132 S. E. 291.

Same—Failure to Provide.—An action cannot be maintained against a county for damages sustained by one while imprisoned in the county jail by reason of the failure of the commissioners to provide adequate means for his health and protection. Manuel v. Commissioners, 98 N. C. 9, 3 S. E. 829.

Where A was arrested at night by a policeman for violation of an ordinance of the city of Raleigh and confined in the city guardhouse in which he died before morning, and in an action for damages instituted by his administrator against the city, the jury found that his death was "accelerated by the noxious air of the guard-house," the plaintiff is entitled to recover. Lewis v. Raleigh, 77 N. C. 229.

Same—Responsibility of Town.—A town is responsible in damages for the gross neglect of its officials in the matter of providing suitable protection for the health of persons confined in the receptacle for prisoners. Shields v. Durham, 118 N. C. 450, 24 S. E. 794.

Same—Liability of Agent of City.—The act of a city's chief of police in causing the incarceration of one violating the laws of the State, and not of the city, in the unsanitary lockup of the city, when unauthorized on the part of the city, does not make the latter responsible in damages for a consequent injury to the health of the prisoner; the right of action existing only against the chief of police. Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391.

Extent of Commissioner's Liability.—In the excellent work of Judge Dillon on Municipal Corporations, (section 963,) the author says: "A county is not liable for a nuisance to a citizen in the erection of a jail in the immediate vicinity of his residence, nor for suffering it to become so filthy and disorderly as to be a nuisance to him and his family." The doctrine is that while these corporate agencies must provide the means and employ the men to perform such duties, they are not personally and by their own labor to perform such menial services; and the default to make them liable must be in neglecting to exercise their authority in the use of labor and money for that purpose, and so must it be charged to make a cause of action against them. Threadgill v. Commissioners, 99 N. C. 352, 6 S. E. 189, 191.

§ 1317(a). Formation of district jail by contiguous counties.—Any two or more counties contiguous to one another or which lie in a continuous group may enter into an agreement for the construction and maintenance of a district jail. Such agreement shall specify the amount of the construction and maintenance cost to be borne by each county and shall fix the terms upon which such jail may thereafter be used by the counties becoming parties to the agreement.

Such counties may also by agreement establish a jail already built, as a district jail, and provide for the improvement, enlargement, maintenance cost and use thereof.

When and if such district jail has been established, all the counties in such district may then sell or dispose of their separate jails upon such terms as the board of county commissioners may decide. (1933, c. 201, s. 1.)

See 11 N. C. Law Rev., 214.

§ 1318. Jail to have five apartments.—The common jails of the several counties shall be provided with at least five separate and suitable apartments, one for the confinement of white male criminals; one for white female criminals; one for the colored male criminals; one for colored female criminals; and one for other prisoners. (Rev., s. 1336; Code, s. 783; R. C., c. 30, s. 2; 1795, c. 433, s. 4; 1816, c. 911.)

Cross References.—As to confining prisoners to improper apartments, see sec. 4408; as to separate apartments required for the Indians of the county of Robeson, see sec. 6258; as to separate apartments for tuberculous prisoners, see sec. 7207-7208.

§ 1319. To be heated.—It is the duty of the board of commissioners in every county to have the common jails so heated by furnaces, stoves, or otherwise, as to render them warm and comfortable. A failure to discharge the duty herein specified shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 1337; Code, s. 784; 1879, c. 25.)

See generally annotations under sec. 1317.

§ 1320. Bedding to be furnished.—The board of county commissioners, from time to time, as may be necessary, shall order the sheriff of the county to purchase, for the use of their jail, a certain number of good, warm blankets or other suitable bedclothing, which shall be securely preserved by the jailer, and furnished to the prisoners for their use and comfort, as the season or other circumstances may require; and the sheriff, at least once in every year, shall report to the board of commissioners the condition and number of such blankets and bedclothing. (Rev., s. 1338; Code, s. 3465; R. C., c. 87, s. 10; 1822, c. 1136.)

See generally annotations under section 1317.

Failure to Supply Bedclothing.—Where the bedclothing furnished for the inmates of the police prison has been destroyed, but the governing officers of the town are not shown to have had actual notice of the destruction, or to have been negligent in omitting to provide for such oversight of the prison as would naturally be exepcted to give them timely information of its condition, there is not such a failure in discharging the duties of superintendence as to subject the corporation to liability. Moffitt v. Asheville, 103 N. C. 237, 259, 9 S. E. 695.

§ 1321. Prison bounds.— For the preservation of the health of persons committed to jail, the board of commissioners of each county shall mark out such a parcel of the land as they think fit, not exceeding six acres, adjoining the prison, for the rules thereof; and every prisoner not committed for treason or felony, giving bond with good security to the sheriff of the county to keep within the rules, shall have liberty to walk therein, out of the prison, for the preservation of his health; and in keeping continually within the said rules, shall be deemed to be in law a true prisoner. In order that every person may know the true bounds of said rules, they shall be recorded in the county records, and the marks thereof shall be renewed as occasion may require. (Rev., s. 1339; Code, s. 3466; R. C., c. 87, s. 11; 1741, c. 33, s. 3.)

Editor's Note.—The first provision for prison bounds in this State was enacted by the Act of 1741, chap, 33, sec. 3, which is c. 90, sec. 11, of the Rev. St. It seems to be based on a known usage and regulation respecting prisons in England. There, by "rules" of the several courts, debtors and prisoners for misdemeanors have the liberty of walking in the prison yards, or within such other limits as the courts prescribe for their respective prisoners, at such hours and on such days as "the rules" may designate. The "grounds" came in time to be called the "rules of the prison."

In our Act of 1741 the court was authorized to mark off the said prison bounds, or the "rules of the prison." (For a construction of that Act, see Ex parte Bradley, 26 N. C. 543, 544.) This has been changed by making it the duty of the county commissioners to lay off the said bounds.

Purpose.—Both the words and the policy of the section show the purpose to be simply to preserve the health of those who are so unfortunate as to be in prison. Northam v. Terry, 30 N. C. 175, 176.

Application.—This section does not apply in favor of persons who have been convicted of criminal offenses and sentenced to imprisonment by the judgment of the court. It applies to prisoners who in civil cases are committed to jail on mesne process or on final judgment, and in criminal cases when the prisoner is committed to jail for lack of bail, in order to secure his presence before the appropriate court to answer the criminal charge preferred against him. State v. Pearson, 100 N. C. 414, 417, 6 S. E. 387.

Sheriff Not Guilty of Escape.—By taking a bond from a prisoner under this section, the sheriff is guilty of no escape in letting him out of the walls of the prison, for he does only what the law requires of him. Northam v. Terry, 30 N. C. 175, 176.

When Bond Void. — A bond for keeping the prison bounds, taken from a person arrested before he has been committed to close custody, is void. Northam v. Terry, 30 N. C. 175.

When Prisoner Need Not Tender Bond.—Where a prisoner, desirous of being admitted to the prison bounds, applies to the sheriff, and offers to prepare a bond with ample security, and the sheriff refuses to admit him to the rules, or to take any bond, such conduct on the part of the sheriff is a waiver of any further act to be done by the prisoner, and renders it unnecessary for the prison to prepare and tender a bond written and executed in order to maintain his action. Mann v. Vick, 8 N. C. 427.

Rights of Prisoner within Rules Again Thrown into Prison.—When a defendant in execution within the prison rules is afterwards thrown into prison by another creditor, he has a right to be discharged from the walls of the prison under the insolvent laws. And when discharged, it is for him to determine whether his bond has become vacated by such discharge; he then is at liberty to act in the same way as he was before his imprisonment. In Re Huntington, 6 N. C. 369, 370.

§ 1321(a). Bonds for building, altering and repairing courthouses; issuance authorized.— The board of commissioners of the various counties throughout the state are authorized and empowered to issue bonds or notes for the purpose of borrowing money with which to erect, build, construct, alter, repair and improve courthouses and jails, and to purchase the necessary equipment and furniture to be used therein. (1923, c. 143, s. 1.)

Editor's Note.—This act was summarized in 1 N. C. Law Rev. 273.

Issuance of Bonds to Repair Jail.—This section construed with §§ 1290, 1297, and 1302 would seem to indicate that the board can issue bonds to repair the jail of the county under § 1334(8) by implication. Harrell v. Board of Com'rs, 206 N. C. 225, 173 S. E. 614.

§ 1321(b). Serial bonds; interest; maturity; authentication.—Any bonds issued under the preceding section shall be serial bonds, payable in not less than five nor more than thirty years from the date of issue; such bonds shall be of such denomination as the board of commissioners may determine by resolution; shall bear a rate of interest not to exceed six per cent, payable semi-annually, and such interest and principal shall be payable at such time and place as the board of commissioners by resolution may determine; the bonds shall be signed by the chairman of the board of commissioners, sealed with the county seal and attested by the clerk, and the coupons attached thereto shall bear the facsimile lithographed signature of the chairman or clerk of the board. (1923, c. 143, s. 2.)

§ 1321(c). Time and place for payment of notes.—Such notes as may be issued under section 1321(a) shall be payable at such time and place as the board of commissioners shall determine, and unless payable within one year from the date thereof, shall be payable in five substantially equal annual installments; such notes shall bear the signature of the chairman of the board, to be attested by the clerk, and any interest coupons attached shall bear the facsimile litho-

graphed signature of the chairman or clerk of the board. (1923, c. 143, s. 3.)

§ 1321(d). Limitation of amount.—No board of commissioners shall, for the purposes expressed in §§ 1321(a) to 1321(i), issue bonds or notes under authority of these sections to exceed two per cent of the assessed valuation of the property in the county for the year next preceding the issuance thereof. (1923, c. 143, s. 9; 1924, c. 113.)

Editor's Note.—Prior to the 1924 amendment, this section limited the amount of the bonds and notes to one per cent of the assessed valuation of the property in the county for the preceding year. The only effect of the 1924 amendment was to raise the maximum amount to two per cent. 3 N. C. Law. Rev. 22.

§ 1321(e). Election; calling, law governing, time, ballots.—Any board of commissioners may in its discretion, before issuing the notes or bonds provided for, submit the question of issuing the same to a vote of the people of the county at an election to be called and held as nearly as may be under the same rules and regulations as elections for county officers, except as to time, which time shall be determined by the board by a resolution; but no election shall be held within less than thirty days after the passage of such resolution. At said election all those who favor the issuance of such notes or bonds shall vote a ballot upon which shall be printed or written the words "For Courthouse Improvements" and all those who are opposed to the issuance of such notes or bonds shall vote a ballot upon which shall be printed or written the words "Against Courthouse Improvements." If a majority of the qualified voters shall vote at said election "For Courthouse Improvements," the board of commissioners shall proceed to issue the bonds or notes, in accordance with the provisions of this law. (1923, c. 143, s. 5.)

§ 1321(f). Specific appropriation; payment from county fund.—The proceeds received from the sale of such notes or bonds issued under this law shall be used exclusively for the purpose of defraying the expenses of holding the election, issuing the bonds or notes and the erecting, building, constructing, altering, repairing and improving of courthouses and jails and to purchase the necessary equipment and furniture to be used therein, and for no other purpose: Provided, if at such election a majority of the qualified voters shall vote "Against Courthouse Improvements," then the expense of holding such election shall be paid from the general county fund. (1923, c. 143, s. 6.)

§ 1321(g). Special tax; notes maturing within one year.—For the purpose of paying the interest and principal of any notes or bonds issued pursuant to this law, the board of commissioners shall annually, at the time of levying other taxes, levy a sufficient tax to pay such principal and interest as it shall become due according to the tenor of such notes and bonds: Provided, however, that notes which are payable within one year after their date may be paid by means of bonds issued under this law, or from the general county fund. (1923, c. 143, s. 7.)

§ 1321(h). Sale of bonds; sales below par forbidden.—Bonds issued under this law shall be sold by the board of commissioners of the county in the manner provided for by the Municipal Finance Act for the sale of bonds; they shall not be sold for less than par and accrued interest. (1923, c. 143, s. 8.)

§ 1321(i). Powers granted by law additional.—The powers granted by this law are granted in addition to and not in substitution for existing powers of counties, and are not subject to any limitation or restriction contained in any other law. Nothing contained in this law shall prevent any county from issuing bonds under any existing laws, as well as under this law. (1923, c. 143, s. 9.)

Operation and Effect upon Existing law.—In Blair v. Commissioners, 187 N. C. 490, 122 S. E. 298, it was said by Stacy, J., speaking for the court: "It clearly appears, we think, from the 9th section of the General Act (section 1321(i) of this Code) now before us, that the authority granted under this law was to be in addition to and not in substitution of any existing powers contained in any other law. Hence no conflict was intended and none exists between the provisions of the General Act and the New Hanover Act. The present case, therefore, falls directly within the doctrine announced in Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645, and Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, to the effect that, having exhausted the powers conferred under the special act, the authorities may proceed under the general statute to the extent allowed by such law."

Art. 7. County Revenue

§ 1321(j). Unlawful for counties not to reduce ad valorem taxes; exceptions; other levies void.—It is hereby declared to be unlawful for any board of county commissioners, for the fiscal year one thousand nine hundred and thirty-one—one thousand nine hundred and thirty-two and other fiscal years succeeding to make any tax levy, which in the gross does not reflect within three per cent (3%) a reduction in the ad valorem taxes accomplished by the state highway commission act, the six months school term act and other acts tending to this result. The tax rate for one thousand nine hundred and thirty—one thousand nine hundred and thirty-one shall be the standard from which the reduction shall be made. To this prohibition there shall be the following exceptions:

A. If there should be a new assessment of the value of property for taxation and that assessment should show a reduction in the value of such taxable property, then said board of county commissioners, or any one of them, if the reduction is local, shall levy, in addition to the rate fixed hereinbefore, a rate increased sufficiently to take care of this decrease in the valuation of property in the particular county involved.

B. To prevent a current deficit and, if an emergency should arise, requiring the levy of an additional rate of taxation in a particular county, greater than that herein provided and there should be existing authority for such levy, then the board of commissioners of any county or counties in which such emergency should arise shall be permitted to increase the rate of taxation sufficiently to meet such emergency, when it is declared and the facts upon the declaration is made are entered at large upon the minutes of the board and the whole matter is referred to the Local Government Commission of the State of North Carolina, which shall have authority to pass upon the application and if, in the opinion of that Commission, a levy of the additional rate is reasonably necessary, then upon certifying this fact to any board of county commissioners, that

board shall have authority to increase the levy of the extent necessary to meet the contingency. Standard form of application shall be prescribed by the Local Government Commission.

C. Levies for debt service on outstanding valid indebtedness heretofore incurred, or hereafter permitted by the Local Government Commission.

Except as herein permitted, any levy made by any board of county commissioners, in excess of the limit herein fixed, shall be absolutely void, for whatever purposes such excess shall be levied. (1931, c. 134.)

Editor's Note.—The meaning of this enactment is not entirely clear, except as an expressed determination to have reduced ad valorem taxes. It seems to mean that, taking the tax rate for the current year as a standard and deducting the road tax and the general school tax, the rate must show an ad valorem reduction of the remainder within three per cent. 9 N. C. Law Rev. 362.

The act required the Secretary of State, to cause one thousand copies to be printed and distributed as follows: One copy to the chairman of the board of commissioners, one copy to the auditor or county accountant, and one copy to the Chairman of the Board of Education, of each and every county.

Public Laws 1931, c. 255, empowered the Board of Commissioners of Guilford County, in their discretion, to levy the full amount of the tax for the maintenance of the county tuberculosis hospital or so much of the amount duly authorized as may be necessary to maintain the hospital adequately, and to provide for as many persons afflicted with tuberculosis as it is possible to do so, notwithstanding the provisions of this section.

§ 1322. Taxes collected by sheriff.—The county taxes shall be collected by the sheriff of the county. He is entitled to the same commissions and is subject to the same rules and regulations in respect of his settlement of the said taxes with the county treasurer as he is in his settlement of the public taxes with the treasurer of the state; and he shall also settle with the county treasurer or board of commissioners for the taxes on the unlisted property in his county, under the same rules and regulations as he accounts with the auditor of the state. (Rev., s. 1376; Code, s. 723; R. C., c. 28, s. 2; 1798, c. 509, s. 2; 1811, c. 823.)

As to liability for escape under civil process, see section 3943. As to collection by treasurer-tax collector in Mitchell County, see § 1889(a) and note thereto.

County Taxes Defined.—The words "county taxes" include all amounts levied by taxation and which are to be used in the counties where they are collected, and where they are paid to the county treasurer. Board v. Commissioners, 137 N. C. 63, 49 S. E. 47.

Must Be Collected by Sheriff. — County taxes must be collected by the sheriff of the county. Board v. Commissioners, 137 N. C. 63, 65, 49 S. E. 47.

Constitutional Office.—The Legislature may, within reasonable limits, diminish the emoluments of an office by the transfer of a portion of its duties to another office, or by reducing the salary or the fees, for the incumbent takes the office subject to the power of the Legislature to make such changes as the public good may require. There are offices created by the Constitution which are placed beyond the control of the General Assembly, so that body can neither abolish the office nor reduce its compensation. Mial v. Ellington, 134 N. C. 131, 46 S. E. 961; State v. Gales, 77 N. C. 283; Mills v. Deaton, 170 N. C. 386, 388, 87 S. E. 123; Commissioners v. Steadman, 141 N. C. 448, 54 S. E. 269.

Same—Not to Be Deprived of Right.—The sheriff cannot be deprived of the right to collect taxes by an act of the Legislature, since the office is a constitutional one, and to allow it to be stripped of its more important functions at the will of the Legislature would be equivalent to destruction. King v. Hunter, 65 N. C. 603, 611.

Upon Insanity of Sheriff.—Upon the official ascertainment of the insanity of a sheriff his sureties have the right to collect the current tax list then in his hands. Somers v. Commissioners, 123 N. C. 582, 584, 31 S. E. 873.

School Taxes Included.—All the school taxes are included in the accounting to be made between the county treasurer and the sheriff. Tillery v. Candler, 118 N. C. 888, 889, 24 S. E. 709.

Commission out of School Tax.—A sheriff is entitled to commissions for the collection of the school tax. Board v. Commissioners, 137 N. C. 63, 49 S. E. 47.

Overpayment.—The State Auditor is authorized to make deduction of over-payment in the settlement for taxes collected when there is error in the "clerk's abstract of taxables," and the sheriff is "charged with more than the true amount," etc., and though the same deductions and corrections are permitted the county in making settlements under this section, these statutes are inapplicable when the credits claimed are not from either of these causes; and to allow them otherwise would be to permit an offset or counterclaim. Commissioners v. Hall, 177 N. C. 490, 99 S. E. 372.

Liable as Insurer.—The authorities are decidedly in favor of the doctrine that a tax collector is an insurer of the safety of all moneys officially received by him against loss by any means whatever, including such losses as arise from the act of God or the public enemy. In the courts of the United States this absolute liability is put mainly on public policy and the evil consequences which would follow from any less rigid rule. United States v. Doshiell, 4 Wall, 182, 18 L. Ed. 319; United States v. Prescott, 3 How., 578, 587, 11 L. Ed. 734; United States v. Keehler, 9 Wall., 83, 19 L. Ed. 574. The reasons apply with equal force to State officials who receive public money, and the same doctrine has accordingly been held in Musey v. Shattuck, 1 Denio 233. Thompson v. Trustees, 30 Ill., 99; Hancock v. Hazzard, 12 Cush. (Mass.) 112; Atkinson v. Whitehead, 66 N. C. 286; Atlantic, etc., R. Co. v. Cowles, 69 N. C. 59; State v. Clarke, 73 N. C. 255, 257.

Obligation Not a Debt in Ordinary Sense.—The obligation of a sheriff to settle for county taxes collected in accordance with "the list of taxables" furnished him, is not a debt in the ordinary sense but a charge imposed by the Legislature, or under its authority, permitting no offset or counterclaim by the sheriff claiming over-payment in his settlement for previous years, in an action to recover the amount due by him in accordance with the list furnished for him the current year. Commissioners v. Hall, 177 N. C. 490, 99 S. E. 372.

Tax Lists in Sheriff's Hands upon Expiration of Term.—While collecting the county taxes is made a part of the duties of a sheriff, it is a separate function, and exists after his term as such, for the purpose of collecting, from the tax lists in his hands, the taxes for the current year, in the absence of legislation to the contrary. Commissioners v. Bain, 173 N. C. 377, 92 S. E. 176.

Failure to Answer to Treasurer of Public Buildings. — Where the condition of a sheriff's bond was in these words, "that he shall well and truly account for and pay into the hands of the county trustee, for the time being, all such sum or sums of money as may be or shall come into his hands, or which he ought to collect for the use of the county; and in all things comply with the acts of the General Assembly in such case made and provided;" it was held, that when the sheriff had received a part of the tax laid for the repairs of public buildings, the condition of his bond was violated upon non-payment of it to the treasurer of public buildings, to whom, by the Act of 1808, the sheriff was directed to pay it. Cameron v. Campbell, 10 N. C. 285.

Change of Pay from Salary to Fee Basis. — An act of the Legislature changing the pay of the sheriff from a salary to a fee basis, where it does not direct the incumbent sheriff to deliver the tax list to his successor, will not be construed so as to deprive the incumbent sheriff of the emoluments of his term by requiring that he deliver the tax lists to his successor. Commissioners v. Bain, 173 N. C. 377, 92 S. E. 176.

The Legislature, during a sheriff's term of office, may place the sheriff on a salary and provide that the fees for collecting taxes shall go to the county. Mills v. Deaton, 170 N. C. 386, 87 S. E. 123.

Appeal from Commissioners Not Allowed. — An appeal does not lie from the refusal of the county commissioners to allow credits claimed by a sheriff in his settlement with the county. McMillan v. Commissioners, 90 N. C. 28.

Commissioners Cannot Release.—The county commissioners have no power to release the sheriff from his liability to account for and pay over the county taxes. State v. Clarke, 73 N. C. 255, 257.

§ 1323. Statement of fines kept by clerk.—It is the duty of the clerks of the several courts, and of the several justices of the peace, to enter in a

book, to be supplied by the county, an itemized and detailed statement of the respective amounts received by them in the way of fines, penalties, amercements and forfeitures and said books shall at all times be open to the inspection of the public. (Rev., s. 1377; Code, s. 725; 1873-4, c. 116, s. 4; 1879, c. 96, s. 1.)

§ 1324. Fines paid to treasurer for schools; annual report.—All fines, forfeitures, penalties and amercements collected in the several counties by any court or otherwise shall be accounted for and paid to the county treasurer by the officials receiving them within sixty days after receipt thereof, and shall be faithfully appropriated by the county board of education for the establishment and maintenance of free public schools; and the amounts collected in each county shall be annually reported to the superintendent of public instruction on or before the first Monday in January, by the board of commissioners. (Rev., s. 1378; Const., Art IX, s. 5; Code, ss. 724, 726; R. C., c. 28, s. 3; 1879, c. 96, ss. 2, 5.)

Constitutional Provision.—The Constitution, Art, IX, sec. 5, appropriates all fines for violation of the criminal laws of the State for establishing and maintaining free public schools in the several counties—whether the fines are for violation of town ordinances made misdemeanors by statute or other criminal statutes. Board v. Henderson, 126 N. C. 689, 36 S. E. 158.

Only Clear Proceeds.—Only the clear proceeds of such penalties as accrue to the State go to the school fund. State v. Maultsby, 139 N. C. 583, 51 S. E. 956.

"Clear Proceeds" Defined.—By "clear proceeds" is meant the total sum less only the sheriff's fees for collection, when the fine and costs are not collected in full. This also has been fully discussed and settled. State v. Maultsby, 139 N. C. 583, 585, 51 S. E. 956; Board v. Henderson, 126 N. C. 689, 36 S. E. 158; School Directors v. Asheville, 137 N. C. 503, 508, 50 S. E. 279.

A Fine Defined.—A fine is the sentence pronounced by the court for a violation of the criminal law of the State. Board v. Henderson, 126 N. C. 689, 36 S. E. 158.

Fines, from their nature, being punishment for violation of the criminal law, are imposed in favor of the State and belonging to the State, the Legislature can not appropriate their clear proceeds to any other purpose than the school fund. State v. Maultsby, 139 N. C. 583, 51 S. E. 956; Katzenstein v. R. R., 84 N. C. 688; State v. R. R., 108 N. C. 24, 30-32, 12 S. E. 1041; Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968, and cases there cited and reaffirmed in Goodwin v. Fertilizer Co., 119 N. C. 120, 122, 25 S. E. 795; Carter v. R. R., 126 N. C. 437, 445, 36 S. E. 14; Board v. Henderson, Id. 695; School Directors v. Asheville, 137 N. C. 503, 508, 50 S. E. 279.

Penalty Defined.—A penalty is the amount prescribed for a violation of the statute law of the State or the ordinance of a town, and is recoverable in a civil action of debt. Board v. Henderson, 126 N. C. 689, 36 S. E. 158.

Fines, Etc., of Municipality.—The section does not extend to fines, penalties or forfeitures, incurred, or arising in the enforcement of ordinances and rules adopted by a municipal corporation for local government. They do not "accrue to the state," nor are they collected in the counties for a violation of penal or military law, or by county officers upon whom this duty is devolved. Commissioners v. City, 88 N. C. 120, 122.

When Collected by Mayor of Town.—Where such fines are collected through the mayor of a town, by virtue of his authority as justice of the peace, they are to be accounted for to the board of education. It is otherwise as to penalties imposed for the violation of town ordinances, which are to be sued for. Board v. Henderson, 126 N. C. 689, 36 S. E. 158.

An action by a county board of school directors for fines and penalties collected by a city is barred within three years. School Directors v. Asheville, 128 N. C. 249, 38 S. E. 874.

Forfeited Bond of Prisoner.—Where the Governor has granted requisition for a fugitive from justice from another state, to be turned over to the agent of that state here, and the prisoner sued out the writ of habeas corpus before a judge of the superior court, and pending this proceeding he forfeits his appearance bond, payable to the State of North Carolina, the penalty on the bond falls within the provisions of this section and goes to the benefit of the public schools fund of the county, and not to the agent of the state whose requisition had been honored. In Re Wiggins, 171 N. C. 372, 88 S. E. 508.

§ 1325. Expenditures of county funds directed by commissioners.—The board of commissioners is invested with full power to direct the application of all moneys arising by virtue of this chapter for the purpose herein mentioned, and to any other good and necessary purpose for the use of the county. (Rev., s. 1379; Code, s. 753; R. C., c. 28, s. 16; 1777, c. 129, s. 4.)

As to necessary expenses, see subsections 2, 3, 5, 6, 9, 18, 19, 22 and 28 of section 1297.

Necessary Expenses Determined by Commissioners.—In Wilson v. Holding, 170 N. C. 352, 356, 86 S. E. 1043, Walker J. speaking for the court says: "We have repeatedly held, beginning with Broadnax v. Groom, 64 N. C. 244, 250, and ending with Comrs. v. Comrs., 165 N. C. 632, 81 S. E. 1001, and more recently Hargrave v. Comrs., 168 N. C. 626, 84 S. E. 1044, that what is a 'necessary expense' for a county is to be determined by the sound judgment and discretion of its board of commissioners."

It is within the province of the courts to determine what expenditures fall within the definition of the necessary expenses of a county, the authority for controlling the commissioners in incurring a debt, when the expense is necessary, is not within the purview of the judicial authority. Burgin v. Smith, 151 N. C. 561, 566, 66 S. E. 607, citing Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279; Cromartie v. Commissioners, 87 N. C. 134; Broadnax v. Groom, 64 N. C. 244.

Power to Create Necessary Debts.—The Legislature may confer upon a county the power to create debts for necessary expenses, without the approval of "a majority of the qualified voters" in the county. Evans v. Commissioners, 89 N. C. 154.

When Commissioners' Actions Not Subject to Review.—The commissioners' exercise of their discretion will not be reviewed except when mala fides is shown. Jackson v. Commissioners, 171 N. C. 379, 382, 88 S. E. 521.

Support of Convicts.—The support of the county convicts must be paid out of the general county fund. Chambers v. Walker, 120 N. C. 401, 27 S. E. 77.

Legislature to Determine upon Care of Indigent.—It is the exclusive right of the Legislature to determine how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. Board v. Commissioners, 113 N. C. 379, 388, 18 S. E. 661.

§ 1326. County officers receiving funds to report annually.—Sheriffs, treasurers, clerks of any court, registers of deeds and all other officers of the several counties, into whose hands any public funds may come by virtue or under color of their office, shall make an annual account and report of the amount and management of the same, on the first Monday of December, or oftener if required, in each year, to the board of commissioners. Such report shall give an itemized and detailed account of the public funds received and disbursed, the amount, date and source from which it was received, and the amount, date and person to whom paid. It shall be addressed to the chairman of the board of commissioners for the county, and shall be subscribed and verified by the oath of the party making the same, before any person authorized to administer oaths. (Rev., s. 1380; Code, s. 728; 1874-5, c. 151, s. 1; 1876-7, c. 276, s. 1.)

§ 1327. Board to enforce duty to report.—If any person required to make any of the reports herein provided for fails to do so, or if, after a report has been made, the board of commissioners disapprove the same, such board may take such legal steps to compel a proper report to be made,

either by suit on the bond of such officer failing to comply or otherwise, as said board may deem best. (Rev., s. 1381; Code, s. 730; 1874-5, c. 151, s. 3; 1876-7, c. 276, s. 3.)

§ 1328. Reports to be recorded in register's office.—If the board of commissioners approves of any of the said reports, it shall cause the same to be registered in the office of the register of deeds in a book to be furnished to the register of deeds by the county, which book shall be marked and styled Record of Official Reports, with a proper index of all reports recorded therein, and each official report shall, if approved, be indorsed by the chairman of the board with the word "approved," with the date of approval, and when recorded by the register of deeds he shall indorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. (Rev., s. 1382; Code, s. 729; 1874-5, c. 151, s. 2; 1876-7, c. 276, s. 2.)

§ 1329. Penalty for failure to report.—If any clerk, sheriff, justice of the peace, or other officer, fails or neglects to account for and pay over as required by law any taxes on suits, or any fines, forfeitures and amercements, as required by this chapter, or fails to make the return herein specified, he shall forfeit and pay five hundred dollars, to be recovered in the name of the board of commissioners for the use of the public schools of the county. (Rev., s. 1383; Code, s. 764; R. C., c. 28, s. 7; 1808, c. 756; 1809, c. 769; 1813, c. 864; 1830, c. 1, ss. 11-13.)

"Account" Defined.—An account is defined to be "a statement in writing of debts and credits, or of receipts and payment; a list of items of debts and credits, with their respective dates." Black's Dictionary, p. 17. In this section the word is used in this sense, and when not only an account, but payment or settlement, is intended, additional words are used to express that idea. State v. Dunn, 134 N. C. 663, 668, 46 S. E. 949.

Penalty Statute Construed Strictly.—A penalty statute must be strictly construed in accordance with the meaning of the words employed, and must not be extended by implication or construction when the act complained of does not fall clearly within the spirit and letter thereof. Alexander v. R. R., 144 N. C. 93, 56 S. E. 697.

Liability of Clerk for Taxes on Suits.—A superior court clerk, who collects taxes upon suits to an amount unauthorized by law, is nevertheless bound to account for the same to the proper county officer. Hewlett v. Nutt, 79 N. C. 263.

Same—Limitation.—An action against a clerk for a penalty, if not brought within one year, is barred by the statute of limitations. Hewlett v. Nutt, 79 N. C. 263.

Same—County Treasurer as Plaintiff.—The county treasurer is the proper plaintiff in an action on the bond of a superior court clerk to recover money collected by him as taxes on suits. Hewlett v. Nutt, 79 N. C. 263.

§ 1330. Demand before suit against municipality; complaint.—No person shall sue any city, county, town, or other municipal corporation for any debt or demand whatsoever unless the claimant has made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint is verified and contains the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so allowed and audited, and that such treasurer had notwithstanding neglected to pay it. (Rev., s. 1384; Code, s. 757.)

Demand Must Be Alleged. — This section expressly requires the demand to be alleged in the complaint. Williams v. Smith, 134 N. C. 249, 252, 46 S. E. 502. And is mandatory. R. R. v. Reidsville, 109 N. C. 494, 500, 13 S. E. 865; citing Love v. Commissioners, 64 N. C. 706.

Same—Failure Taken Advantage of by Demurrer.—It has been uniformly held that failure to allege the demand may be taken advantage of by demurrer. Williams v. Smith, 134 N. C. 249, 252, 46 S. E. 502, citing Love v. Commissioners, 64 N. C. 706; Jones v. Commissioners, 73 N. C. 182.

"Audit" only Applies to Actions Ex Contractu. — In Sheilds v. Durham, 118 N. C. 450, 452, 24 S. E. 794, Furches, J., speaking for the court, said "We find that all the law dictionaries which we have been able to consult define the word "audit" to apply only to claims ex contractu. Abbott, Bovier, Rapalje and Lawrence. And these authorities have aided us in coming to the conclusion that this section does not apply to an action for damages like this. Indeed, we do not see how such a claim as this could be audited. It might be compromised by the parties; but this is much more than auditing the same. It is the work of both parties—the agreement of minds, contract and not an ex parte process of auditing," cited, approved and followed in Sheldon v. Asheville, 119 N. C. 606, 610, 25 S. E. 781.

When Judgment Obtained Notice Unnecessary.—When a judgment has been obtained against a county or other municipal corporation, it is not necessary that notice as required in certain cases by this section should be given before bringing an action for mandamus to compel the payment of the judgment. Nicholson v. Commissioners, 121 N. C. 27, 27 S. E. 996.

Not Applicable to Actions Ex Contractu. — Neither does the section have any application to actions ex contractu, where the damages are unliquidated. Sugg v. Greenville, 169 N. C. 606, 617, 86 S. E. 695, citing Frishby v. Marshall, 119 N. C. 570, 26 S. E. 251; Neal v. Marion, 126 N. C. 412, 35 S. E. 812.

Recovery of Taxes Illegally Collected. — Where a taxpayer has paid his taxes authorized by an unconstitutional statute under protest, and has complied with the provisions of Revisal, sec. 2855, which regulates and controls actions to recover illegal taxes paid under protest, it is unnecessary to the maintenance of his action to recover them that he follow the provisions of this section, requiring that he present his claim and make his demand, etc. R. R. v. Cherokee County, 177 N. C. 86, 87, 97 S. E. 758.

§ 1331. Accounts to be itemized, verified, and audited.—No account shall be audited by the board for any services or disbursements unless it is first made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied. Each account shall state the nature of the services, and where no specific compensation is provided by law, it shall also state the time necessarily devoted to the performance thereof. The board may disallow or require further evidence of the account, notwithstanding the verification. All county commissioners acting on December first, one thousand nine hundred and thirty, or elected theretofore, are released, whether as individuals or in their corporate capacity, from any and all penalties incurred by reason of failure to comply with the provisions of this section, prior to said date. (Rev., s. 1385; Code, s. 754; 1905, c. 55; 1868, c. 20, s. 10; 1931, c. 445.)

Editor's Note.—The Act of 1931 changed the date in the last sentence of this section from January 27, 1905, to that specified.

Duty of Commissioners.—The law commits to the board of commissioners the power and duty of auditing and passing upon the validity of claims. If they refuse to audit or act upon a claim, mandamus will lie to compel them to do so. Martin v. Clark, 135 N. C. 178, 179, 47 S. E. 397; Bennett v. Comrs., 125 N. C. 468, 34 S. E. 632; Hughes v. Commissioners, 107 N. C. 598, 12 S. E. 465.

Orders Not Negotiable.—"Orders or warrants issued by a municipal corporation are not negotiable and carry with them none of the privileges of negotiable paper except to

pass by delivery upon indorsement." Daniel Neg. Inst., sec. 427; 1 Dillon Mun. Corp., sec. 487; Wright v. Kinney, 123 N. C. 618, 621, 31 S. E. 874.

In Wall v. Monroe, 103 U. S. 74, 26 L. Ed. 430, Field, J., says: "The warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain in his own name an action upon them." Wright v. Kinney, 123 N. C. 618, 621, 31 S. E. 874.

Unauthorized Indorsement. — The unauthorized indorsement of "approved" signed by the chairman of the county commissioners of a county order invalid upon its face, will not render him personally liable, in the absence of fraud and misrepresentation. Wright v. Kinney, 123 N. C. 618, 619, 31 S. E. 874.

What Claims Need Not Be Audited.—While unadjusted claims are required to be audited and ordered to be paid, absolute and unconditional obligations already ascertained and audited are in themselves and upon their face an order and authority in the financial officer, possessing the means not otherwise appropriated, to pay on presentation. Leach v. Commissioners, 84 N. C. 829, 830.

Presumption as to Warrants.—The presumption is that orders issued by county commissioners are for necessary expenses and valid. McCless v. Meekins, 117 N. C. 34, 35, 37, 23 S. E. 99.

Same—Prima Facie.—All the courts agree that municipal warrants are mere prima facie and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims. Wall v. Monroe, 103 U. S. 745; Ouachita v. Wolcott, 103 U. S. 559, and Merritt v. Monticello, 138 U. S. 673, and cases therein cited. Quoted, approved and followed in Wright v. Kinney, 123 N. C. 618, 621, 31 S. E. 874.

The allowance of a claim by a county board of commissioners is not final and conclusive, but is only prima facie evidence of the correctness of the claim. In the case of Commissioners v. Keller, 6 Kan., 510, it is held that the allowance of a claim by the county board is not final and conclusive. It may be re-examined by the board itself, and on appeal may be examined or disallowed in whole or in part by the court. Abernathy v. Phifer, 84 N. C. 712, 714.

Remedies of Holder.—The holder of a valid county warrant, who is refused payment, has two remedies against the county treasurer—either to sue him on his bond, or to apply for a mandamus—over neither of which has a justice of peace jurisdiction. Wright v. Kinney, 123 N. C. 618, 621, 31 S. E. 874.

When County Treasurer Should Refuse to Pay.—If the county treasurer deems the warrant drawn in contravention of a constitutional provision or limitation, he should refuse to pay it. Martin v. Clark, 135 N. C. 178, 180, 47 S. E. 397.

When a Mandamus Will Lie.—A mandamus will lie to compel a county treasurer to pay a warrant out of a specific fund, the warrant having been drawn by the county commissioners. Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

If, after the hearing, they refused to allow or issue a warrant for its payment, an action will lie against the commissioners to establish the debt, and for such other relief as the party may be entitled to. Martin v. Clark, 135 N. C. 178, 180, 47 S. E. 397; Hughes v. Comrs., 107 N. C. 598, 12 S. E. 465.

§ 1332. Accounts to be numbered as presented.—All accounts presented in any year, beginning at each regular meeting in December, shall be numbered from one upwards, in the order in which they are presented, and the time of presentation, the names of the persons in whose favor they are made out, and by whom presented, shall be carefully entered on the minutes of the board; and no such account shall be withdrawn from the custody of the board or its clerk, except to be used as evidence in a judicial proceeding, and after being so used it shall be promptly returned. (Rev., s. 1386; Code, s. 755; 1868, c. 20, s. 12.)

§ 1333. Claims to be numbered as allowed; copy to board annually.—The clerk of the board of commissioners, if so ordered by the board, shall number all claims, orders and certificates that may be allowed by the board in a book kept for that purpose, and he shall annually, the day before the board proceeds to lay a county tax for the ensuing year, furnish the chairman of the board with a copy of the same. (Rev., s. 1387; Code, s. 751; R. C., c. 28, s. 12; 1793, c. 387.)

§ 1334. Annual statement of claims and revenues to be published.—The board shall cause to be posted at the courthouse within five days after each regular December meeting and for at least four successive weeks, or after each regular monthly meeting, if they deem it advisable, and for one week, the name of every individual whose accounts has been audited, the amount claimed and the amount allowed; and also at the same time and in the same manner post a full statement of county revenue and charges, showing by items the income from every source and the disbursements on every account for the past year, together with the permanent debt of the county, if any, when contracted, and the interest paid or remaining unpaid thereon. The board shall also publish the said statement in some newspaper in the county: Provided that the board of county commissioners of Hertford County shall not be required to publish the statement in some newspaper in the county if, in their discretion, the cost of the publication is excessive. (Rev., s. 1388; Code, s. 752; 1901, c. 196; 1905, c. 227; 1933, c. 525, s. 1.)

Cross References.—As to publication of receipts and disbursements, see section 2687; as to annual statement of taxes, see section 2686.

For a discussion of this section, see 8 N. C. L. Rev. 471, et seq.

Editor's Note.—Public Laws 1929, c. 154, provided: "That chapter four hundred and fifty-nine of the Public-Local Laws of one thousand nine hundred and twenty-five, be and the same is hereby repealed, and all of the provisions and requirements of section one thousand three hundred and thirty-four of the Consolidated Statutes are fully re-enacted. This act shall apply to the County of Union only."

The proviso at the end of the section declared prior to the amendment by c. 525 Public Laws 1933, that the cost of publication should not exceed one-half of a cent a word.

Requirement Applies to Incoming Board.—The statement required to be published "within five days after each regular December meeting," is for the incoming board, and the statute imposing the penalty, under the strict construction required, is not applicable to members of the outgoing board. Shelton v. Moody, 146 N. C. 426, 59 S. E. 994.

Art. 7A. County Finance Act

§ 1334(1). Short title.—This article shall be known and may be cited as "The County Finance Act." (1927, c. 81, s. 1.)

As to Local Government Act, see §§ 2492(1)-2492(51). As to validation of bonds, see §§ 2492(52)-2492(61).

Validity of Passage.—This act was enacted by the General Assembly in compliance with all pertinent constitutional requirements. Frazier v. Board of Commissioners, 194 N. C. 49, 58, 138 S. E. 433.

Purpose of Act.—The purpose of the general assembly in enacting this act is manifest. It was to enable the several counties of the State not only to provide for their future needs by issuing bonds for purposes specified therein, but also to fund their valid indebtedness heretofore incurred in good faith, by issuing bonds and thus relieve the taxpayers of burdensome annual taxation. Hartsfield v. Craven County, 194 N. C. 358, 362, 139 S. E. 698.

It is the declared purpose of this act to put the various counties of the state in a position to live within their incomes. Commissioners v. Assell, 194 N. C. 412, 140 S. E. 34.

Liberally Construed.—This act should be liberally construed to effectuate its intent. Hartsfield v. Craven County, 194 N. C. 358, 139 S. E. 698.

§ 1334(2). Meaning of terms.—In this article, unless the context otherwise requires, the words—

"Governing body" means the board of county

commissioners, or the board or body in which the general legislative powers of the entire county are vested.

"Clerk" means the officer acting as clerk of the governing body.

"Necessary expenses" means the necessary expenses referred to in section seven of article seven of the Constitution of North Carolina.

"Published" means printed in a newspaper published in the county, if there be such a newspaper, but otherwise means posted at the court-house door and in at least three other public places in the county.

"Chief financial officer" means the county accountant, auditor, or other officer designated or appointed by the governing body to supervise the fiscal affairs of the county, unless such officer shall be designated by law. (1927, c. 81. s. 2.)

§ 1334(3). Application and construction of act.—This article shall apply to all counties in the State, except as otherwise provided herein. Every provision of this act shall be construed as being qualified by constitutional provisions whenever such construction shall be necessary in order to sustain the constitutionalty of any portion of this article. (1927, c. 81, s. 3.)

§ 1334(4). Revenue anticipation loans for ordinary expenses.—Counties may borrow money for the purpose of paying appropriations made for the current fiscal year in anticipation of the collection of the taxes and other revenues of such fiscal year, payable at such time or times, not later than thirty days after the expiration of the current fiscal year, as the governing board may fix. No such loan shall be made if the amount thereof, together with the amount of similar previous loans remaining unpaid, shall exceed 80 per cent of the amount of uncollected taxes and other revenue for the fiscal year in which the loan is made, as estimated by the chief financial officer and certified in writing by him to the governing body. (1927, c. 81, s. 4.)

§ 1334(5). Revenue anticipation loans for debt service.—For the purpose of paying the principal or interest of bonds or notes due or to become due within four months, and not otherwise adequately provided for, any county may borrow money in anticipation of the receipt of either the revenues of the fiscal year in which the loan is made, or the revenues of the next succeeding fiscal year, and such loan shall be payable not later than the end of such next succeeding fiscal year. For the purpose of paying or renewing notes evidencing indebtedness incurred before July first, one thousand nine hundred thirty-three, and authorized by this article as amended to be funded, any county may issue new notes from time to time until such indebtedness is paid out of revenues or funded into bonds. Such new notes may be made payable at any time or times, not later than five years after July first, one thousand nine hundred thirty-three, notwithstanding anything to the contrary in this section. (1927, c. 81, s. 5; 1931, c. 60, s. 63, c. 294; 1933, c. 259, c. 2.)

See Editor's Note to section 1334(8).

Editor's Note.—The Act of 1931 added the second and third sentences to this section.

The dates in this section were changed, by Public Laws 1933, c. 259, from March 18th 1931 to July 1st 1933.

§ 1334(6). Notes evidencing revenue anticipation loans.—Negotiable notes shall be issued for all moneys borrowed under the two preceding sections, which notes may be renewed from time to time and money may be borrowed upon new notes from time to time for the payment of any indebtedness evidenced thereby; but all such notes and loans shall mature within the time limited by said two sections for the payment of the original loan. No money shall be borrowed under said sections at a rate of interest exceeding the maximum rate permitted by law. All notes herein provided for shall be authorized by a resolution of the governing body, which shall fix the actual or maximum face amount of the notes and the actual or maximum rate of interest to be paid upon the amount borrowed. The governing body may delegate to any officer the power to fix such face amount and rate of interest within the limitations prescribed by such resolution, and the power to dispose of such notes, which shall be executed under the seal of the county by the chairman and clerk of the board, or by any two officers designated by the board for that purpose, and any interest coupons thereto attached shall be signed with the manual or facsimile signature of said clerk or of any other officer designated by the board for that purpose. (1927, c. 81, s. 6; 1931, c. 60, s. 59.)

Editor's Note.—The Act of 1931 amended this section by striking therefrom the words: "If such notes mature not more than six months after their date, they may be disposed of either by public or private negotiations, after five days' notice has been given in some newspaper having a general circulation in the county. If such notes mature more than six months after their date, they shall not be disposed of except in accordance with the provisions of this act governing the disposal of bond anticipation notes maturing more than six months from date."

§ 1334(7). Certification of revenue anticipation notes.—No revenue anticipation notes shall be valid unless there shall be written or printed on the face or the reverse thereof a statement signed by the chief financial officer of the county in the words: "This note and all other revenue anticipation notes of the county amount to less than 80 per cent of the amount of uncollected taxes and other revenue for the current year": Provided, however, that if such notes are issued under the authority given by section five of this act, said statement may be either in said words or in the words, "This note is issued under section five of the county finance act for the payment of principal or interest of bonds or notes." (1927, c. 81, s. 7.)

§ 1334(7a). Certain notes of counties validated; proceeds lost in insolvent banks.—All notes heretofore issued by counties pursuant to the provisions of the County Finance Act applicable to notes issued for money borrowed under section 1334(5) are hereby validated, notwithstanding that said notes were issued for the purpose of paying the principal or interest of notes evidencing indebtedness incurred under section 1334(4): Provided, that this act shall not be construed to validate securities issued to refund or renew notes, the proceeds from which originally were deposited in banks that have failed, causing the loss of such deposits or making them unavailable to the unit of government. (1931, c. 332.)

§ 1334(8). Purposes for which bonds may be issued and taxes levied.—The special approval of the general assembly is hereby given to the issuance by counties of bonds and notes for the special purposes named in this section, and to the levy of property taxes for the payment of such bonds and notes and interest thereon. Accordingly, authority is hereby given to all counties in the state, under the terms and conditions herein described, to issue bonds and notes, and to levy property taxes for the payment of the same, with interest thereon, for the following purposes, including therein purchase of the necessary land and, in the case of buildings, the necessary equipment:

(a) Erection and purchase of schoolhouses.

(b) Highway construction and reconstruction, including bridges and culverts.

(c) Bridge construction.

(d) Erection and purchase of court-house and jails, including a public auditorium within and as a part of a court-house.

(e) Erection and purchase of county homes for the indigent and infirm.

(f) Erection and purchase of hospitals.

(g) Erection and purchase of public auditoriums.

(h) Elimination of grade crossings over railroads and interurban railways, including approaches and damages, when not less than one-half of the cost shall be payable to the county at one time, or from time to time under contract made with a railroad or interurban railway company, the bonds herein authorized to be for the entire cost or any portion thereof.

(i) Acquisition and improvement of lands for public parks and playgrounds.

(j) Funding or refunding of valid indebtedness, if such indebtedness be payable at the time of the passage of the order authorizing the bonds or be payable within one year thereafter, or although payable more than one year thereafter, is to be cancelled prior to its maturity and simultaneously with the issuance of the funding or refunding bonds, and all debt not evidenced by bonds which was created for necessary expenses of any county and which remains outstanding at the ratification of this act is hereby validated. The term 'indebtedness' as used in this clause (j) includes all valid or enforceable indebtedness of a county, whether incurred for current expenses or for any other purpose, except indebtedness incurred in the name of a county on behalf of a school district or township and not payable by means of taxes authorized to be levied on all taxable property in the county. It also includes indebtedness incurred in the name of a county board of education for the maintenance of schools for the six months' term required by the State Constitution. It includes indebtedness evidenced by bonds, bond anticipation notes, revenue anticipation notes, judgments and unpaid interest on said indebtedness accrued to the date of the bonds issued. It also includes indebtedness assumed by a county as well as indebtedness created by a county. Bond anticipation notes evidencing indebtedness may, at the option of the governing body, be retired either by means of funding bonds issued under this subsection or by means of bonds in anticipation of the sale of which the notes were issued. Furthermore, the said word "debt" as used in this section includes the principal of and accrued interest on funding bonds, refunding bonds, and other evidences of indebtedness heretofore or hereafter issued. The above numeration of particular kinds of debt shall not be construed as limiting the word "debt" as used in this section, the intention being that said word shall include debts of every kind and character. Bonds hereafter issued to fund or refund interest may, at the option of the governing body, be named or designated as certificates of indebtedness. No interest accruing after the year one thousand nine hundred thirty-eight shall be funded or refunded.

(k) A portion to be determined by the governing body of the cost of construction of bridges at county boundaries, when an adjoining county or municipality, within or without the state, shall have agreed to pay the remaining cost of construction.

(l) A portion to be determined by the governing body of the cost of public buildings constructed or acquired in order that a part of such buildings may be used for a purpose hereinabove expressed when a municipality within the county shall agree to pay the remaining cost.

(m) Acquiring, constructing and improving airports or landing fields for the use of airplanes or other aircraft. (1927, c. 81, s. 8; 1929, c. 171, s. 1; 1931, c. 60, s. 54; 1933, c. 259, s. 2; 1935, c. 302, s. 2.)

Editor's Note.—The act of 1929 added subsection (m) to this section. The Act of 1931 changed the date in clause (j) from July 1, 1927 to that now specified and added the proviso in such clause.

Public Laws 1933, c. 259 omitted a proviso, from subsection (j), which related to refunding serial bonds and added the second sentence to the definition of the term "indebtedness" contained in that subsection. By Public Laws of 1933, c. 566 the prior Amendment of 1933 was made not applicable to bonds passed by the County Commissioners of Guilford County prior to March 15th 1933.

The amendment of 1935 omitted from subsection (j) of this section the words "incurred before July 1, 1933" as they appeared in the section twice after the word "indebtedness." The amendment also added to that subsection the last four sentences. The 1935 act, which also amended sections 1334(9), 2937 and 2938, provided that "sections one and two of chapter two hundred fifty-nine of the Public Laws of one thousand nine hundred thirty-three be and the same are hereby amended to conform to the foregoing amendments." Such section of the 1933 act, so far as the language quoted applies, amended sections 1334(5), 1334(41), and 2933.

This Section Is Constitutional.—Evans v. Mecklenburg County, 205 N. C. 560, 564, 172 S. E. 323.

The word "repair" although omitted in the rewriting of this section is "necessarily implied by law" when construed in conjunction with § 1290 and §§ 1297, 1317. See Harrell v. Board of Com'rs, 206 N. C. 225, 173 S. E. 614.

Necessity for Submission to Voters.—See note under const. Art. 7, § 7.

A bond order passed by the board of commissioners of a county in this state, under the authority and subject to the provisions of this and related sections, is subject to the approval of the voters of the county, when a petition signed by the requisite number of voters of said county has been filed with the said board of commissioners. Hemric v. Board of Com'rs, 206 N. C. 845, 847, 175 S. E. 168.

Authority is given the county under this section and § 5475 to issue without a vote bonds for sanitary improvements for its schoolhouses necessary to maintain the constitutional school term in the county, when the maturity dates of the bonds are within the limits fixed by § 1334(11). Taylor v. Board of Education, 206 N. C. 263, 173 S. E. 608.

Indebtedness Incurred for School Purposes.—Where a county under power conferred by special statute has borrowed money from time to time for the maintenance and equipment of its public schools, its bonds to refund the indebtedness so incurred are valid if issued in conformity

with the provisions of this section. Hartsfield v. Craven County, 194 N. C. 358, 139 S. E. 698.

Indebtedness for teachers' salaries held to come within the purview of subsection (j) of this act. Hampton v. Board of Education, 195 N. C. 213, 141 S. E. 744.

§ 1334(9). Order of governing body required.—Bonds of a county shall be authorized by an order of the governing body, the term "order" being here used to indicate the order, resolution, or measure which declares that bonds shall be issued, in order to differentiate the same from such subsequent resolution as may be passed in respect of details which such order is not required to contain. Such order shall state:

(a) In brief and general terms, the purpose for which the bonds are to be issued, but not more than one purpose of issue shall be stated, the purposes set forth in any one subsection of section 1334(8) to be deemed as one purpose, but, in the case of funding or refunding bonds, a brief description of the indebtedness to be funded or refunded sufficient to identify such indebtedness;

(b) The maximum aggregate principal amount of the bonds;

(c) That a tax sufficient to pay the principal and interest of the bonds when due shall be annually levied and collected, provided, in lieu of the foregoing and in the case of funding or refunding bonds, such statement with respect to an annual tax may, in the discretion of the governing body, be altered or omitted;

(d) That a statement of the county debt has been filed with the clerk, and is open to public inspection;

(e) A clause stating the conditions upon which the order will become effective, and the same shall become effective in accordance with such clause, which clause shall be as follows:

1. If the bonds are funding or refunding bonds, that the order shall take effect upon its passage, and shall not be submitted to the voters; or

2. If the bonds are for a purpose other than the payment of necessary expenses, or if the governing body, although not required to obtain the assent of the voters before issuing the bonds, deems it advisable to obtain such assent, that the order shall take effect when approved by the voters of the county at an election as provided in this article; or

3. In any other case, that the order shall take effect thirty days after the first publication thereof after final passage, unless in the meantime a petition for its submission to the voters is filed under this article, and that in such event it shall take effect when approved by the voters of the county at an election as provided in this article.

4. No restriction, limitation, or provision contained in any other law, except a law of statewide application relating to the issuance of bonds, notes or other obligations of a county, shall apply to bonds or notes issued under this article for the purpose of refunding, funding or renewing indebtedness, and no vote of the people shall be required for the issuance of bonds or notes for said purposes, unless required by the constitution of this state. The other laws here referred to include all laws enacted prior to the expiration of the regular session of the general assembly in the year one thousand nine hundred thirty-five. Nothing herein shall be construed, however, as prohibiting a county from issuing bonds or notes under any special or public-local law applicable to such county, it being intended that this act shall be cumulative and additional authority for the issuance of bonds and notes. (1927, c. 81, s. 9; 1931, c. 60, s. 55; 1933, c. 259, s. 2; 1935, c. 302, s. 2.)

For a discussion of this section, see 8 N. C. L. Rev. 471, et seq.

Editor's Note.—The last part of subsection (a) relating to description of indebtedness to be funded or refunded and the proviso to subsection (c) were added by Public Laws 1933, c. 259.

The amendment of 1935 made changes only in subsection (4) of this section. In that subsection the words "incurred before July 1, 1933" were omitted and the last two sentences of the section as it now reads were added.

Courts Cannot Supply Deficiency in Order.—In order to a valid issue of county bonds under this article, to purchase schoolhouses to comply with the mandate of our Constitution for a six months term of public schools, as a necessary county expense, without submitting the question to the vote of the people of the county, it is required that the resolution passed by the board of county commissioners so declare the fact to be, and the courts are without authority to supply the deficiency in the order. Hall v. Commissioners, 195 N. C. 367, 142 S. E. 315.

Restraint of Issuance of Bonds.—Where the taxpayers of a county file suit under this section to restrain the issuance of bonds until authorized by the qualified voters of the county, and there is a controversy as to whether the requisite 15% of qualified voters has been obtained to the petition, as set out in § 1334(21), a temporary restraining order will be continued until the sufficiency of the petition can be determined. Scruggs v. Rollins, 207 N. C. 335, 177 S. E. 180.

§ 1334(10). Order need not specify details of purpose.—In stating the purpose of a bond issue, an order need not specify the location of any improvement or property, or the material of construction. (1927, c. 81, s. 10.)

§ 1334(11). Maturities of bonds.—All bonds shall mature as hereinafter provided, and no funding or refunding bonds shall mature after the expiration of the period herein fixed for such bonds, respectively; and no other bonds shall mature after the expiration of the period estimated by the governing body as the life of the improvement for which the bonds are issued, each such period to be computed from a day not later than one year after the passage of the order. Such periods shall not exceed the following for the respective classes of bonds:

(a), (b) Funding or refunding bonds, fifty years.

(c) Bridge bonds (including retaining walls and approaches), forty years, unless constructed of wood, and in that case, ten years.

(d) Elimination of grade crossings, thirty years.

(e) Lands for public parks and playgrounds, including improvements, buildings, and equipment, forty years.

(f) Highway construction or reconstruction, including bridges and culverts, if the surface—

1. Is constructed of sand and gravel, five years;

2. Is of waterbound macadam or penetration process, ten years;

3. Is of brick, blocks, sheet asphalt, bitulithic, or bituminous concrete, laid on a solid foundation, or is of concrete, twenty years.

(g) If, in the order or subsequent resolution, the governing body should be unwilling to provide that the surface of highways to be constructed or reconstructed with the proceeds of bonds shall have any surface described above, it shall be law-

ful to provide for a different surfacing if the state highway commission or the chairman thereof shall certify, and if an order or resolution of the governing body shall recite such certification (which recital shall be conclusive for the purpose of this article), that the surfacing so provided is believed to be of at least equal durability with the surfacing described in one or the other of the three classes of surfacing above described, and in that event the bonds shall not mature later than the period hereinabove provided for such similar surfacing.

(h) Public buildings, if they are—

1. Of fireproof construction, that is, a building the walls of which are constructed of brick, stone, iron, or other hard, incombustible materials, and in which there are no wood beams or lintels, and in which the floors, roofs, stair halls, and public halls are built entirely of brick, stone, iron, or other hard, incombustible materials, and in which no woodwork or other inflammable materials are used in any of the partitions, flooring, or ceiling (but the building shall be deemed to be of fireproof construction notwithstanding that elsewhere than in the stair halls and entrance halls there is wooden flooring supported by wooden sleepers on top of the fireproof floor, and that it contains wooden handrails and treads, made of hardwood, not less than two inches thick), forty years;

2. Of non-fireproof construction, that is, a building the outer walls of which are constructed of brick, stone, iron, or other hard, incombustible materials, but which in any other respect differs from a fireproof building as defined in this section, thirty years;

3. Of other construction, twenty years.

(i) Land for airports or landing fields, including grading and drainage, forty years.

(j) Buildings, equipment and other improvements for airports or landing fields, other than grading and drainage, ten years. (1927, c. 81, s. 11; 1929, c. 171, s. 2; 1931, c. 60, s. 56; 1933, c. 259, s. 2.)

Editor's Note.—The Act of 1929 added subsections (i) and (j) to this section. The Act of 1931 struck out clauses (a) and (b) and inserted in lieu thereof clause (a), (b).

Prior to Public Laws 1933, c. 259, subsection (a) of this section provided for thirty years in case the debt was less than ten per cent of the assessed valuation of property in the county and fifty years in other cases.

§ 1334(11a). Accelerating maturity of bonds and notes of counties and municipalities. — Any municipality or county may provide that its bonds or notes shall become due and payable before maturity at the election of the holders or a representative of the holders, or a majority in amount of the holders, upon the happening of such events and upon such conditions and subject to such limitations (which may include a provision for rescission of action taken in the exercise of said election) as may be set forth in a resolution or ordinance passed before the issuance of the bonds or notes: Provided, however, that such a provision, in order to become effective, must either be set forth in the bonds or notes or incorporated therein by reference to such resolution or ordinance. The negotiability of such bonds or notes shall not be affected by the adoption of such provision or by the recital thereof in the bonds or notes. (1931, c. 418; 1933, c. 258, s. 3.)

Editor's Note.—Public Laws 1933, c. 258 inserted the words "or a majority in amount of the holders" and added the last sentence relating to negotiability.

§ 1334(12). Consolidated bond issues.—It shall be lawful to consolidate into one issue bonds authorized by two or more orders for different purposes, in which event the bonds of such consolidated issue shall mature within the average of the periods estimated as the life of the several improvements, taking into consideration the amount of bonds to be issued on account of each item for which a period shall be estimated. (1927, c. 81, s. 12.)

§ 1334(13). Sworn statement of debt, before authorization of bonds for school purposes.— After the introduction, and at least ten days before the final passage of an order for the issuance of bonds for school purposes, an officer designated by the governing body for that purpose shall file with the clerk a statement of debt incurred and to be incurred for school purposes under orders either introduced or passed, whether evidenced by bonds notes, or otherwise, and whether incurred by original creation of the debt or by assumption of debt, including debt incurred by the county board of education, and including debt to the State or any department thereof, but not including obligations incurred to meet appropriations in anticipation of revenues to an amount not exceeding the amount of the last preceding tax levy for school purpose, nor including debt incurred in anticipation of the sale of any kind of bonds except funding and refunding bonds, which statement shall show the following:

(a) The assessed valuation of property as last fixed for county taxation.

(b) Outstanding school debt.

(c) Bonded school debt to be incurred under orders either passed or introduced.

(d) The sum of items "b" and "c".

(e) School sinking funds, being money or investments thereof pledged and held for the payment of principal of outstanding school debt.

(f) School credits, being principal sums owing to the county from school districts which are pledged to and when collected will be used in the retirement of outstanding school debt.

(g) Amount of unissued funding and refunding school bonds including in gross debt.

(h) The sum of items "e" and "f" and "g".

(i) Net school debt, being the sum by which item "d" exceeds item "h".

(j) The percentage that the net school debt bears to said assessed valuation. (1927, c. 81, s. 13.)

§ 1334(14). Sworn statement of debt before authorization of bonds for other than school purposes.— After the introduction and at least ten days before the final passage of an order for the issuance of bonds for other than school purposes, an officer designated by the governing body for that purpose shall file with the clerk a statement of debt incurred and to be incurred for other than school purposes under orders either introduced or passed, whether evidenced by bonds, notes, or otherwise, and whether incurred by original creation of the debt, or by assumption of the debt, including debt to the State or any department thereof, but not including obligations incurred to

meet appropriations in anticipation of revenues to an amount not exceeding the amount of the last preceding tax levy for other than school purposes, or including debt incurred in anticipation of the sale of any kind of bonds except funding and refunding bonds, which statement shall show the following:

(a) The assessed valuation of property as last fixed for county taxation.

(b) Outstanding debt for other than school purposes.

(c) Bonded debt to be incurred for other than school purposes under orders either passed or introduced.

(d) The sum of items "b" and "c".

(e) Sinking funds (except school sinking funds), being money or investments thereof pledged and held for the payment of principal of debt outstanding for other than school purposes.

(f) Moneys payable to the county by a railroad or interurban railway company, under contract, as all or part of the cost of grade crossing elimination, if such moneys are pledged to and when collected will be used in the retirement of outstanding debt for other than school purposes.

(g) Amount of unissued funding and refunding bonds not for school purposes included in gross debt.

(h) The sum of items "e", "f" and "g".

(i) Net debt for other than school purposes, being the sum by which item "e", exceeds item "h".

(j) The percentage that the net debt for other than school purposes bears to said assessed valuation. (1927, c. 81, s. 14.)

§ 1334(15). Financial statement filed for inspection.— The sworn statement of debt shall remain on file with the clerk and be open to public inspection. In any action or proceeding in any court involving the validity of bonds, said statement shall be deemed to be true and to comply with the provisions of this act, unless it appears, in an action or proceeding commenced within the time limited by this act for actions to set aside bond orders, first, that the representations contained therein could not by any reasonable method of computation be true; or, second, that a true statement would show that the order authorizing the bonds could not be passed. (1927, c. 81, s. 15.)

§ 1334(16). Publication of bond order.— As soon as possible after the introduction of the order and the filing of the financial statement hereinabove required, the clerk shall publish the order as introduced. Before publishing the same he shall fix an hour and day for a public hearing upon the order unless the governing body shall itself have fixed such hour and day. The hour and day, if fixed by the clerk, shall be ten o'clock A. M. of the first Monday of the following month, if ten days shall elapse between such publication and the day so fixed, but otherwise shall be ten o'clock A. M. of the first Monday of the next succeeding month. In connection with the publication of the order, and immediately below the same, the clerk shall publish a statement signed by him with blanks properly filled in substantially the following form:

"The foregoing order has been introduced and a sworn statement has been filed under the county finance act showing the assessed valuation of the county to be $.....and the net debt for school purposes (substitute net debt for other than school purposes if the proposed bonds are for other than school purposes) including the proposed bonds, to be $..... A tax will be levied for the payment of the proposed bonds and interest, if the same shall be issued. Any citizen or taxpayer may protest against the issuance of such bonds at a meeting of the board of county commissioners to be held at..... o'clock .....M. ....., 19.... or an adjournment thereof.

.....

"Clerk of Board of Commissioners."

(1927, c. 81, s. 16.)

Section Mandatory. — The proper publication of the notices required by this act is mandatory, and cannot be dispensed with. Frazier v. Board of Commissioners, 194 N. C. 49, 59, 138 S. E. 433.

Sufficiency of Publication of Various Orders.—The provisions as to notice given to taxpayers, etc., required by this section, of an opportunity to be heard before the county may issue bonds for various purposes, is sufficiently complied with if the several orders of the county commissioners are published in the same advertisement and a date and place fixed for passing upon the objections made, if any, separately placed in the publication and distinctly referring to each of the separate purposes. Frazier v. Board of Commissioners, 194 N. C. 49, 138 S. E. 433.

The publication of one statement in connection with all three orders was sufficient as a compliance with this section, a statement for each order not being necessary. Frazier v. Board of Commissioners, 194 N. C. 49, 59, 138 S. E. 433.

§ 1334(17). Hearing; passage of order; debt limitations.—On the day so fixed for the public hearing, but not earlier than ten days after the first publication of the order, the governing body shall hear any and all citizens and taxpayers who may desire to protest against the issuance of the bonds, but such hearing may be adjourned from time to time. After such hearing, the governing body may pass the order in the form of its introduction, or in an amended form but the amount of bonds to be issued shall not be increased by such amendment, nor the purpose of issuance substantially changed, without due notice and hearing as above required. Provided, however, that no order for the issuance of school bonds shall be passed unless it appears from said sworn statements that the net school indebtedness does not exceed five per cent of said assessed valuation, unless the bonds to be issued are funding or refunding bonds; and no order shall be passed for the issuance of bonds other than school bonds unless it appears from said sworn statement that the net indebtedness for other than school purposes does not exceed five per cent as said assessed valuation, unless the bonds to be issued are funding or refunding bonds: Provided, however, that if the net school debt of any county shall, on the day this act is ratified, be in excess of four-fifths of the limitation above fixed therefor, such order for the issuance of school bonds may be passed, if the net debt shall not be increased thereby more than two per cent of such assessed valuation; and that if the net debt of any county for other than school purposes shall, on the day this act is ratified be in excess of four-fifths of the limitations above fixed therefor, such order may be passed if the net debt

for other than school purposes shall not be increased thereby more than two per cent of such assessed valuation: Provided, further, that if any county shall assume all outstanding indebtedness for school purposes of every city, town school district, school taxing district, township or other political subdivision therein, the limit of the net debt of such county for school purposes, including the debt so assumed, shall be eight per cent (8%) and the privilege of creating or assuming an additional gross debt of two per cent (2%) under certain circumstances shall not be allowed such county. (1927, c. 81, s. 17.)

For a discussion of this section, see 8 N. C. L. Rev. 471, et seq.

§ 1334(18). Material of construction and other details.—The statements as to kind and material of construction, so far as the same constitute conditions upon which maturities of bonds are to be determined under this act, as well as all details of bonds not required to be set forth in the order, may be set forth in resolution or resolutions to be passed on or after the passage of the order, and before the issuance of the bonds. (1927, c. 81, s. 18.)

§ 1334(19). Publication of bond order.— A bond order after final passage thereof shall be published once in each of two successive weeks after its final passage. A notice substantially in the following form (the banks being first properly filled in) with the printed or written signature of the clerk appended thereto, shall be published with the order:

"The foregoing order was finally passed on the ..... day of ....., 19..... and was first published on the ..... day of ..... 19 ..... Any action or proceeding questioning the validity of said order must be commenced within thirty days after its first publication.

.....
Clerk."

(1927, c. 81, s. 19.)

§ 1334(20). Limitation of action to set aside order.— Any action or proceeding in any court to set aside a bond order, or to obtain any other relief, upon the ground that the order is invalid, must be commenced within thirty days after the first publication of the notice aforesaid and the order or supposed order referred to in the notice. After the expiration of such period of limitations, no right of action or defense upon the validity of the order shall be asserted, nor shall the validity or the order be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1927, c. 81, s. 20.)

For a discussion of this section, see 8 N. C. L. Rev. 471, et seq.

Constitutionality.—This section has not been construed by the Supreme Court, but statutes requiring notice to be given and providing that failure to give a notice within the time specified will operate as a bar, have been frequently construed and upheld. Kirby v. Board of Commissioners, 198 N. C. 440, 443, 152 S. E. 165.

Suit to Restrain Issuance of Bonds.—Where the board of county commissioners have under ordinance duly passed and hearing thereon had are about to issue bonds for the necessary purpose of erecting a jail, etc., contrary to the restrictions of the County Finance Act limiting the amount of bonds for other than school purposes to an amount not to exceed five per cent of the property valuation, a suit to restrain the issuance of the bonds is required by the express terms of this section to be commenced within thirty days after the publication of the required notice and order of the issue, and a suit instituted after the time prescribed cannot be maintained and the validity of the bonds will be upheld. The question of whether the statute is strictly one of limitation or a condition annexed to the cause of action is immaterial. Kirby v. Board of Commissioners, 198 N. C. 440, 152 S. E. 165.

§ 1334(21). Petition for referendum of bond order.—A petition demanding that a bond order be submitted to the voters may be filed with the clerk within thirty days after the first publication of the order. The petition shall be in writing and signed by voters of the county equal in number to at least fifteen per centum of the total number of votes cast at the last preceding election for the office of Governor. The residence address of each signer shall be written after his signature. The petition need not contain the text of the order to which it refers. The petition need not be all on one sheet and if on more than one sheet, it shall be verified as to each sheet. The clerk shall investigate the sufficiency of the petition and present it to the governing body, with a certificate stating the result of his investigation. The governing body, after hearing any taxpayer who may request to be heard, shall thereupon determine the sufficiency of the petition, and the determination of the governing body shall be conclusive. (1927, c. 81, s. 21.)

Bond Order Is Valid in Absence of Petition for Referendum.—Where no petition has been filed within the time prescribed by this section, praying that a bond order duly passed by the board of commissioners of a county, be submitted to the voters of the county, in accordance with the provisions of the act, the bond order is valid and effective, without the approval of the voters of the county. Hemric v. Board of Com'rs, 206 N. C. 845, 847, 175 S. E. 168.

But It Is Otherwise if Petition Is Filed.—Where a petition is filed in accordance with the provisions of this section, praying that a bond order duly passed by the board of commissioners of a county in this state, authorizing and directing the issuance of bonds of the county for the purpose of procuring money for the purchase, construction, improvement or equipment of schoolhouses required for the maintenance of a school in each of the districts of the county as required by the Constitution of the State, be submitted to the voters of the county, such bond order is not valid or effective, until the same has been approved by the voters of the county as provided. Hemric v. Board of Com'rs, 206 N. C. 845, 847, 175 S. E. 168.

§ 1334(22). What majority required.— If a bond order provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the county, the approval of the qualified voters of the county, as required by the Constitution of North Carolina, shall be necessary in order to make the order operative. If, however, the bonds are to be issued for necessary expenses, the affirmative vote of the majority of the voters voting on the bond order shall be sufficient to make it operative, in all cases where the order is required by this act to be submitted to the voters. (1927, c. 81, s. 22.)

Lands and Equipment for Schools.—The issuance of bonds for school purposes does not require the submission of the question to the voters for the issuance of county bonds for the purchase of additional lands or equipment for established public schools, when the commissioners proceed under this act. The Constitution Art. IX, sec. 2. Art. VII, sec. 7, does not apply. Frazier v. Board of Commissioners, 194 N. C. 49, 138 S. E. 433.

§ 1334(23). When election held.— Whenever the taking effect of an order authorizing the is-

suance of bonds is dependent upon the approval of the order by the voters of a county, the governing body may submit the order to the voters at an election to be held not more than one year after the passage of the order. The governing body may call a special election for that purpose, or may submit the order to the voters at the regular election for county officers next succeeding the passage of the order, but no such special election shall be held within one month before or after a regular election for county officers. Several orders or other matters may be voted upon at the same election. (1927, c. 81, s. 23.)

§ 1334(24). New registration.—The governing body of the county in which such election is held may in their discretion, order a new registration of the voters for such election. The books for such new registration shall remain open in each precinct from 9 A. M. to 6 P. M. on each day except Sundays and holidays, for three weeks, beginning on a Saturday morning and ending on the second Saturday evening before the election. A registrar and two judges of election shall be appointed by the governing body of each precinct: Provided, that the books shall be open at the polling places on each Saturday during the registration period. Sufficient notice shall be deemed to have been given of such new registration and of the appointment of the election officers if a notice thereof be published at least thirty (30) days before the closing of the registration books stating the hours and days for registration. It shall not be necessary to specify in said notice the places for registration. In case any registrar shall fail or refuse for any cause to perform his duties, it shall be lawful for the clerk to appoint another person to perform such duties, and no notice of such appointment shall be necessary. (1927, c. 81, s. 24.)

§ 1334(25). Notice of election.—A notice of the election shall be deemed sufficiently published if published once not later [than] thirty (30) days before the election, and thereafter twice before the election, at intervals of at least one week between publications. Such notice shall state the date of the election, the maximum amount of the proposed bonds, and the purpose thereof, and the fact that a tax will be levied for the payment thereof. The notice shall state the places at which the election will be held, but without enumeration thereof may state that the election will be held at the same places at which the last preceding election was held for members of the General Assembly, with such changes as may have been ordered by the governing body. (1927, c. 81, s. 25.)

§ 1334(26). Ballots.—The form of the question as stated on the ballot or ballots shall be in substantially the words: "For the order authorizing $..... bonds (briefly stating the purpose) and a tax therefor" and "Against the order authorizing $..... bonds (briefly stating the purpose) and a tax therefor." Such affirmative and negative forms may be printed upon separate ballots, or both thereof may be printed on one ballot, containing squares opposite the affirmative and the negative forms, in one of which squares the voter may make a mark (x). Ballots so prepared shall be deemed sufficient, but the requirements of this section are not mandatory. (1927, c. 81, s. 26.)

§ 1334(27). Returns canvassed.—The officers appointed to hold the election, in making return of the result thereof, shall incorporate therein not only the number of votes cast for and against each order submitted but also the number of voters registered and qualified to vote in the election. The governing body shall canvass the returns, and shall include in their canvass the votes cast and the number of voters registered and qualified to vote in the election, and shall determine and declare the result of the election. (1927, c. 81. s. 27.)

§ 1334(28). Application of other laws.—Except as herein otherwise provided, the registration and election shall be conducted in accordance with the laws then governing elections for members of the General Assembly in said county, and governing the registration of electors for such elections, and the provisions of the Australian Ballot Law shall not apply to registrations and elections under this act. (1927, c. 81, s. 28.)

§ 1334(29). Statement of result.—The governing body shall prepare a statement showing the number of votes cast for and against each order submitted, and the number of voters qualified to vote in the election, and declaring the result of the election, which statement shall be signed by a majority of the members of the governing body and delivered to the clerk, who shall record it in the minutes of the governing body, and file the original in his office and publish it once. (1927, c. 81, s. 29.)

§ 1334(30). Limitation as to actions upon elections.—No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement of result as provided in section 29 hereof. (1927, c. 81, s. 30.)

§ 1334(31). Preparation for issuing bonds.—At any time after the final passage of a bond order, all steps preliminary to the actual issuance of bonds under the order may be taken, but the bonds shall not be actually issued unless and until the order takes effect. (1927, c. 81, s. 31.)

§ 1334(32). Within what time bonds issued.—After a bond order takes effect, bonds may be issued in conformity with its provisions at any time within three years after the order takes effect, unless the order shall have been repealed, which repeal is permitted (without the privilege referendum upon the question of repeal), unless notes, issued in anticipation of the proceeds of the bonds shall be outstanding. (1927, c. 81, s. 32.)

§ 1334(33). Bonded debt payable in installments.—Each bond issue made under this article shall mature in annual installments or series the first of which, if funding bonds, shall be made payable not more than two years, and if not funding bonds, not more than three years, after the date of

the first issued bonds of such issue and the last within the period prescribed by section 1334(11) for bonds of the class issued. No such installment or series shall be more than two and one-half times as great in amount as the smallest prior installment or series of the same bond issue. If all the bonds of an issue are not issued at the same time, the bonds at any one time outstanding shall mature as aforesaid. This section shall not apply to funding or refunding bonds. (1927, c. 81, s. 33; 1931, c. 60, s. 57; 1933, c. 259, s. 2.)

Editor's Note.—Prior to the Amendment of 1933, P. L. c. 259, the section applied to funding and refunding bonds except in cases where the debt exceeded ten per cent of the value of county property.

§ 1334(34). Medium and place of payment.—The bonds may be made payable in such kind of money and at such place or places within or without the State of North Carolina as the governing body may by resolution provide. (1927, c. 81, s. 34.)

§ 1334(35). Formal execution of bonds.—The bonds shall be issued in such forms as the officer who execute them shall adopt, except as otherwise provided by the governing body. They shall be signed by two or more officers designated by the governing body, or if the governing body makes no such designation, then by the chairman of the governing body and by the clerk, and the corporate seal of county or of the governing body shall be affixed to the bonds. The bonds may have coupons attached for the interest to be paid thereon, which coupons shall bear a facsimile signature of the clerk in office at the date of the bonds or at the date of delivery thereof. The delivery of bonds so executed shall be valid, notwithstanding any change in officers or in the seal of the county occurring after the signing and sealing of the bonds. (1927, c. 81, s. 35.)

§ 1334(36). Registration and transfer of bonds.—(a) Bonds payable to bearer. Bonds issued under this act shall be payable to the bearer, unless they are registered as provided in this section; and each coupon appertaining to a bond shall be payable to the bearer of the coupon.

(b) Registration and effect. A county may keep in the office of a county officer to be designated by the governing body, or in the office of a bank or trust company appointed by the governing body, as bond registrar a register or registers for the registration and transfer of its bonds, in which it may register any bond at any time of its issue, or, at the request of the holder, thereafter. After such registration the principal and interest of the bond shall be payable to the person in whose name it is registered except in the case of a coupon bond registered as to principal only, in which case the principal shall be payable to such person, unless the bond shall be discharged from registry by being registered as payable to bearer. After registration a bond may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompanied by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner.

(c) Registration and transfer noted on bond. Upon the registration or transfer of a bond as aforesaid, the bond registrar shall note such registration or transfer on the back of the bond. Upon the registration of a coupon bond, as to both principal and interest, he shall also cut off and cancel the coupons, and endorse upon the back of the bond a statement that such coupons have been cancelled.

(d) Agreement for registration. A county may, by recital in its bonds, agree to register the bonds as to principal only, or agree to register them either as to principal only, or as to both principal and interest, at the option of the bondholder. (1927, c. 81, s. 36.)

§ 1334(37). Repealed by Public Laws 1931, c. 60, s. 58.

§ 1334(38). Application of funds.—The proceeds of the sale of bonds and bond anticipation notes under this act shall be used only for the purposes specified in the order authorizing said bonds, and for the payment of the principal and interest of such notes issued in anticipation of the sale of bonds: Provided, however, that if for any reason any part of such proceeds are not applied to or are not necessary for such purposes, such unexpended part of the proceeds shall be applied to the payment of the principal or interest of said bonds. The cost of preparing, issuing, and marketing bonds shall be deemed to be one of the purposes for which the bonds are issued. If any notes issued in anticipation of the sale of bonds shall be outstanding and unpaid when the proceeds of the sale of bonds are received, such proceeds, or an amount thereof sufficient to retire such notes, shall be immediately, upon the receipt thereof, placed in a separate fund, which shall be held and used solely for the payment of such notes. If any member of the governing body or any county officer shall vote to apply or shall apply, or shall participate in applying any proceeds of bonds or bond anticipation notes in violation of this section, such member or such officer shall be guilty of a felony, and shall be prosecuted by the solicitor of the district in which county lies, and shall be fined not more than ten thousand dollars ($10,000) or imprisoned in the State's prison not more than twenty years, or both, at the discretion of the court, and shall forfeit and pay to any taxpayer or any holder of such bonds or notes who sues for the same the sum of two hundred dollars for each such act, and also all damages caused thereby. (1927, c. 81, s. 38.)

§ 1334(39). Bond anticipation loans.—At any time after a bond order has taken effect, as provided in section 1334(9), a county may borrow money for the purposes for which the bonds are to be issued, in anticipation of the receipts of the proceeds of the sale of bonds, and within the maximum authorized amount of the bond issue. Such loans shall be paid not later than three years after the time of taking effect of the order authorizing the bonds upon which they are predicated. The governing body may, in its discretion, retire any such loans by means of current revenues or other funds, in lieu of retiring them by means of bonds: Provided, however, that the governing body, at or before the actual retirement of any such loan by any means other than the issuance of bonds under the bond order upon which such

loans is predicated, shall amend or repeal such order so as to reduce the authorized amount of the bond issue by the amount of the loan to be so retired. Such an amendatory or repealing order shall take effect upon its passage, and need not be published. Negotiable notes shall be issued for all moneys so borrowed. Such notes may be renewed from time to time, and money may be borrowed upon notes from time to time for the payment of any indebtedness evidenced thereby, but all such notes shall mature within the time limited by this section for the payment of the original loan. No money shall be borrowed under this section at a rate of interest exceeding the maximum rate permitted by law. The said notes, if maturing not more than six months from their date, may be disposed of by public or private negotiations, after five days notice published in some newspaper having a general circulation in the county, but if maturing more than six months from date, they shall be sold after advertisement as provided in this act for advertisement and sale of bonds. The issuance of such notes shall be authorized by resolution of the governing body, which shall fix the actual or maximum face amount of the notes and the actual or maximum rate of interest to be paid upon the amount borrowed. The governing body may delegate to any officer the power to fix said face amount and rate of interest with the limitations prescribed by said resolution, and the power to dispose of said notes. All such notes shall be executed in the manner provided in section 1334-(35) for the execution of bonds. They shall be submitted to and approved by the attorney for the county before they are issued, and his written approval endorsed on the notes. (1927, c. 81, s. 39.)

§ 1334(40). Bonds and notes shall recite the authority for issuance.—All bonds and notes authorized by this act shall recite that they are issued under and pursuant to this act. (1927, c. 81, s. 40.)

§ 1334(41). Taxes levied for payment of bonds.—The full faith and credit of the county shall be deemed to be pledged for the punctual payment of the principal of and interest on every bond and note issued under this article, including bonds for which special funds are provided. The governing body shall annually levy and collect a tax ad valorem upon all the taxable property in the county sufficient to pay the principal and interest of all bonds issued under this article as such principal and interest become due: Provided, however, that such tax may be reduced by the amount of other moneys appropriated and actually available for such purpose. The powers stated in this section in respect of the levy of taxes for the payment of the principal and interest of bonds and notes shall not be subject to any limitation prescribed by law upon the amount or rate of taxes which a county may levy; the General Assembly does here give its special approval to the levy of taxes in the manner and to the extent provided by this article for the payment of obligations incurred pursuant to this article for the special purposes for which such obligations are in this article authorized. Taxes levied under this section shall be levied and collected in the same manner as other taxes are levied and collected upon property in the county. If any member of the governing body or any county officer shall vote to apply or shall apply or participate in applying any taxes in violation of this section, such member or officer shall be guilty of a felony, and shall be prosecuted by the solicitor of the district in which the county lies, and shall be fined not more than ten thousand dollars ($10,000) or imprisoned in the state prison not more than twenty years, or both, at the discretion of the court, and shall forfeit and pay to any taxpayer or any holder of such bonds or notes who sues for the same the sum of two hundred dollars for each such act, and also all damages caused thereby.

Nothing in this section shall be construed as authorizing an unlimited tax for the payment of bonds not issued for a special purpose within the meaning of section six of article five of the constitution of North Carolina. It is the intention of this article, however, to authorize the issuance of funding and refunding bonds and notes as herein provided in cases where taxes for their payment is limited by the constitution, as well as in other cases. The general assembly hereby declares that an emergency exists by reason of the present extraordinary financial condition of the counties of this state, and hereby gives it special approval to the levying of taxes to the fullest extent permitted by the constitution for the purpose of paying bonds and notes issued hereunder to fund or refund or renew indebtedness now outstanding or incurred before July first, nineteen hundred and thirty-three, and hereby declares that the payment of such bonds and notes constitutes a special purpose: Provided, in case of funding or refunding bonds which do not mature in installments as provided in section 1334(33), a tax for the payment of the principal of the said bonds need not be levied prior to the fiscal year or years said bonds mature, unless it is so provided for in an order or resolution passed before the issuance of said bonds, in which case such tax shall be levied in accordance with the provisions of such order or resolution. (1927, c. 81, s. 41; 1931, c. 60, s. 60; 1933, c. 259, s. 2.)

See Editor's Note to section 1334(8).

Editor's Note.—The Act of 1931 added the second paragraph to this section.

Public Laws 1933, c. 259, added the last proviso of this section as it now reads.

§ 1334(42). Enforcement of act.—If any boards or officer of a county shall be ordered by a court of competent jurisdiction to levy or collect a tax to pay a judgment or other debt, or to perform any duty required by this act to be performed by such board or officer, and shall fail to carry out such order, the court, in addition to all other remedies, may appoint its own officers and other persons to carry out such order and remove such board or officer who has thus refused to carry out such order. (1927, c. 81, s. 42.)

§ 1334(43). Repeals.—All acts and parts of acts, whether general, special, private or local, authorizing or limiting or prohibiting the issuance of bonds or other obligations of a county or counties, are hereby repealed: Provided, further, that the repeal shall not affect the validity of any bonds or obligations heretofore issued or incurred nor shall such repeal affect the powers, duties or obligations for providing for the payment of such

bonds or obligations or interest thereon. Provided, further, that this act shall not affect any local or private act enacted at the present session of the General Assembly, but the powers hereby conferred and the methods of procedure hereby provided shall be deemed to be conferred and provided in addition to and not in substitution for those conferred or provided by any such local or private act enacted at the present session of the General Assembly; and any county may at its option proceed under any such local or private act applicable to it enacted at the present session of the General Assembly, without regard to the restrictions imposed by this act, or may proceed under this act without regard to the restrictions imposed by such local or private act: Provided, further, that any county which prior to the ratification of this act has entered into a valid contract for permanent improvements for which, prior to the ratification of this act, such county was empowered by law to issue bonds in sufficient amount, is hereby authorized to issue such an amount of bonds as may be necessary to comply with said contract, either in the manner provided by this act or in the manner provided by law at the time such contract for permanent improvements was made: Provided, further, that nothing herein contained shall be applicable to or shall govern the method by which any county board of education may borrow money from the special building fund created by Chapter 201, Public Laws of 1925, or from any special building fund of the State created by any law enacted at the regular session of the General Assembly of 1927, but the limitations of this act upon the amount of net school debt shall apply to such borrowing.

Provided, further, that except as provided in section 1334(9) nothing herein contained shall have the effect of repealing any act now in force, or enacted by the session of the General Assembly of one thousand nine hundred twenty-seven, requiring the question of issuing bonds by any county to be submitted to a vote of the people. (1927, c. 81, s. 43; 1929, c. 110; 1931, c. 60, s. 61.)

Editor's Note.—The Act of 1931 struck out the last proviso relatiing to Rockingham and New Hanover counties formerly appearing in this section. The Act of 1929 had already omitted New Hanover from the proviso. The Act of 1931 further amended this section by inserting the reference to § 1334(9) in the last proviso.

Inconsistent Public-Local Law.—This section expressly repeals a public-local law applied to a county when inconsistent with its terms. Hartsfield v. Craven County, 194 N. C. 358, 139 S. E. 698.

§ 1334(44). Publication and mailing of copies of this article.—Immediately after the ratification of this article, the Secretary of the State shall cause to be printed in pamphlet form at least one thousand five hundred copies thereof, and shall cause a copy of such pamphlet to be mailed to the chairman of the governing body and to the clerk and county attorney and county treasurer or county financial officer of each county in this State. (1927, c. 81, s. 44.)

Art. 7B. Collection of County Taxes

§ 1334(45). Date for completion of tax lists.—On or before the first Monday in October of each year, the county commissioners of each county shall cause to be completed in duplicate two copies of the tax list for each township. Such list shall show in different columns the sum due by each taxpayer to the county, for each item for which a tax shall have been levied, and the total of all such taxes. Receipt books for taxes shall be prepared and ready for delivery on the first Monday in October of each year, said receipt books to contain a receipt and stub with the items of tax and total tax written in the receipt and stub: Provided, that carbon receipt books and cash books combined may be used for such receipt books. (1927, c. 213, s. 1.)

§ 1334(46). Tax lists and books delivered to sheriff.—On the first Monday in October of each year one tax list and the receipt books, or other books used therefor, shall be delivered to the sheriff of the county or other tax collecting officer of the county, with an order directed to the tax collecting officer to collect the taxes shown on the tax list and receipts: Provided, that the sheriff, or other tax collecting officer, has made full settlement for the taxes for the previous year as hereinafter provided, and shall have given the bond hereinafter required. If and when the tax list and receipts are delivered to the sheriff, or tax collecting officer, it shall be his duty to attend at his office in the county-town, and such other places, as he may, by fifteen days' notice, designate for the purpose of collecting the taxes due. (1927, c. 213, s. 2.)

Cited in Martin v. Swain County, 201 N. C. 68, 158 S. E. 843.

§ 1334(47). Sheriff to present full settlement for previous year and give bond. — Before the sheriff, or other tax collecting officer, shall receive any tax list, or tax receipts, for the taxes of the following year, and before the county commissioners, or other governing body, shall deliver the same, the sheriff, or other tax collecting officer, shall present a full and complete settlement for all taxes charged against him for the previous year, as settlement is hereinafter defined, and shall present a sufficient bond for the collection and accounting for said taxes, approved by the county commissioners, or other governing body, by resolution duly entered on the minutes of such body. If the sheriff, or other tax collecting officer, who was charged with the collection of the taxes for the previous year, shall not present to the county commissioners, or other governing body, such settlement in full as herein provided on or before the first Monday in October, and the bond required of such officer, it shall be the duty of the county commissioners, or other governing body, and they are hereby required, to appoint some suitable freeholder of the county, not connected with the then tax collecting officer, as a tax collector for the purpose of delivering to him the tax list and tax receipts for the following year for collection of the taxes. Such person shall give bond in the amount which would be required of the sheriff, or other tax collecting officer, conditioned upon his accounting for all taxes collected by him, and said bond shall be filed and approved as provided for the sheriff's bond. Such tax collector shall receive such compensation as may be agreed upon, but in the absence of any agreement

shall receive a commission of 2 per cent of all taxes collected: Provided, the county commissioners, or other governing body, may reduce the salary of the sheriff, or tax collector, in an amount equal to the amount paid to such special tax collector so appointed. If, and when, the sheriff, or other tax collecting officer, shall present to the county commissioners, or other governing body, a full and complete settlement of the taxes charged to him for the previous year, and the bond required by the commissioner, such specially appointed tax collector shall make a full and complete settlement as hereinafter provided for settlements, with the sheriff, or other tax collecting officer, and shall, upon order of the county commissioners, or other governing body of the county, deliver the tax list and receipt books to said sheriff, or other tax collecting officer. (1927, c. 213, s. 3.)

For amendment applicable to commissions of the tax collector of Yancey County, see Public Laws of 1933, c. 184.

§ 1334(48). Deposit of taxes; itemized statement to be submitted monthly.—Each sheriff or tax collecting officer shall deposit the taxes collected as provided by law, but at the monthly meetings of the county commissioners, or other governing body of the county, shall present to such body a full and completely itemized statement of all taxes collected since the last meeting of such body. He shall on the first Monday in May report in full the uncollected taxes for the current tax year [filing, under oath, with reference to each delinquent taxpayer, a statement as to whether or not he has made any effort to collect the taxes due from the tax-payer's personalty] and the county commissioners shall thereupon order sale of all land for taxes where the taxes have not been paid to be made on the first Monday in June, and shall also make up a list of taxes due of taxpayers who list no land for taxes. The sheriff, or other tax collecting officer, shall thereupon cause advertisement to be made for four successive weeks, as now provided by law for such advertisements, of lands to be sold for taxes and shall make effort to collect all taxes due by taxpayers who list no land for taxes. Sale of land for taxes shall be made upon the day ordered by the board, provided that the sale may be continued from day to day until completed. Provided that the part of this section in brackets shall apply to the counties of Cleveland, Haywood, Jackson, Macon and Rutherford only. (1927, c. 213, s. 4; 1928, cc. 97, 155.)

Editor's Note.—Public Laws 1929 amended this section by inserting the matter in the brackets and adding the proviso.

Cited in Lane v. Graham County, 194 N. C. 723, 725, 140 S. E. 712.

§ 1334(49). Day for report of tax sales and of collections from persons not listing land.—Upon the third Monday in June, the sheriff, or other tax collecting officer, shall report to the county commissioners, or other governing body, his action with respect to tax sales, and collections of taxes of taxpayers, who list no land for taxes under oath and shall with respect to those taxpayers who list no land for taxes, make oath that he has made diligent effort to collect such taxes out of the personal property of the taxpayer, or by other means open to him for the collection of such taxes and shall report such other facts with respect to such taxpayers as may be of information to the county commissioners, or other governing body. The county commissioners, or other governing body, shall thereupon enter upon its minutes the list of such of these taxpayers who list no land for taxes, who shall be found by such body to be insolvents and shall by resolution find and determine such list of taxpayers as the insolvent list to be deducted in the settlement with the sheriff, or other tax collecting officer, in his settlement. (1927, c. 213, s. 5.)

§ 1334(50). Final settlement day.—On the first Monday of July the sheriff, or other tax collecting officer, shall make a full and complete settlement with the county for all taxes due the county or its special sub-divisions. In such settlement, the sheriff, or other tax collecting officer, shall be charged with: (a) All sums due by the tax list for county purposes; (b) all sums due by the tax list for all other purposes; (c) all sums due for corporation excess; (d) all other sums to be collected by the said sheriff, or other tax collecting officer; and shall be allowed: (a) sums receipted for by the county treasurer, or other county fiscal agent; (b) releases allowed by the governing body as prescribed by statute; (c) tax sales for which certificates of sale in duplicate have been executed and delivered to the county; (d) insolvent list allowed as hereinbefore provided; (e) commission, if any, allowed such sheriff, or tax collector. The settlement made with such sheriff, or tax collector, shall be entered in full upon the minutes of such body. (1927, c. 213, s. 6.)

§ 1334(51). Final settlement if sheriff not re-elected.—If any sheriff, or tax collector, to whom the tax list and receipt books shall be delivered on the first Monday in October, shall fail to succeed himself as such officer on the first Monday in December of any year, he shall make a full and complete settlement of such taxes as he may have collected on or before the first Monday in December, at which his term of office may expire and the tax list and receipt books shall be delivered to his successor, who shall in his settlement be credited with the amount for which settlement was made with such officer whose term expired: Provided, however, that if the outgoing sheriff, or tax collector, shall have received the tax list and receipt books to collect the taxes due thereon, upon fees or commission based upon the collections made, it shall be his duty and he shall be charged with the collection of the taxes due for such year, and shall be charged with all the duties and responsibilities with reference to reports and other settlements, and subject to the same penalties, imposed by this act, and shall conduct the land sales and execute the certificates of sale for the same. If the officer whose term expires on the first Monday in December of any year and who does not succeed himself as such officer, shall not have received the tax books for the then tax year, the officer succeeding to such officer shall give the required bond and be charged with the collection of the balance of the taxes for the then tax year, as if he had received the tax books on the first Monday in October, less, however, the taxes col-

lected by the specially appointed tax collector. (1927, c. 213, s. 7.)

Mandamus will lie to compel a sheriff to turn over to his successor the tax books upon the termination of his term of office. Ferguson v. Martin, 197 N. C. 301, 148 S. E. 448.

§ 1334(52). Individual liability of county commissioners.—(a) Any county commissioner who shall vote to deliver the tax list and receipt books to any sheriff, or tax collector, for the succeeding year, when settlement has not been made as herein provided of the taxes for the previous year, shall be individually liable for the amount of taxes due by such sheriff, or tax collector.

(b) Any county commissioner who shall fail to vote on the first Monday in October to make provisions for the collection of the taxes for the then tax year, as herein provided, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of ten dollars for each day, failure to make provisions as herein provided shall have continued.

(c) Any county commissioner who shall fail to require a report herein required or wilfully fails to perform any duty herein imposed shall, upon conviction, be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

(d) Any sheriff, or tax collector, who shall fail to perform any duty imposed by this act shall, upon conviction, be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court and, in addition thereto, shall be liable under his bond for all damages resulting from his negligence. (1927, c. 213, s. 8(a).)

Art. 7C. County Fiscal Control

As to application of this article to municipalities, see §§ 2969(z)-2969(cc).

§ 1334(53). Title; definitions. — This article shall be known and may be cited as "The County Fiscal Control Act."

In this article unless the context otherwise requires, certain words and expressions have the following meanings:

(a) "Sub-division" means a township, school district, school taxing district, or other political corporation or subdivision within a county, including drainage and other districts, the taxes for which (taxes as here and elsewhere used in this act include special assessments) are under the law levied by the board of county commissioners of the county.

(b) "Debt service" means the payment of principal and interest of bonds and notes as such principal or interest falls due, and the payments of moneys required to be paid into sinking funds.

(c) "Constitutional school maintenance" means the maintenance of schools for the six months term required by the State Constitution.

(d) "Department" means any division of county functions or activities.

(e) "Department head" means the principal officer of any office, board, commission, institution, or branch of the county government in charge of a department.

(f) The "Fiscal year" is the annual period for the compilation of fiscal operations, and begins on the first day of July and ends on the thirtieth day of June.

(g) "Surplus revenues" means revenues in excess of the estimated revenues against which an appropriation is made, and arises when actual revenues exceed estimated revenues at the end of a fiscal year.

(h) "Unencumbered balance" means the balance of an appropriation after charging thereto all obligations for goods and services and all contracts or agreements payable from the appropriation, and all payments made from the appropriation except payments of such obligations, contracts, or agreements already charged against the appropriation.

(i) "Fund" means the separate fund or account provided for a distinct function of government, as such functions are shown in (j) below.

(j) The funds required by this act are funds for each of the following functions of government.

(1) Current operating expense of the county.

(2) Constitutional school maintenance.

(3) County-wide school expenses over and above constitutional school maintenance.

(4) County debt service.

(5) County roads.

(6) Each special purpose to which the General Assembly has given its special approval, separately stated.

(7) Debt service of each subdivision, separately stated.

(8) Maintenance of each subdivision, separately stated.

(9) Permanent improvements in each subdivision separately stated. (1927, c. 146, ss. 1, 2.)

Cited in Martin v. Swain County, 201 N. C. 68, 158 S. E. 843.

§ 1334(54). County accountant.— It shall be the duty of the board of county commissioners in each county in the State, on or before the first Monday in April one thousand nine hundred and twenty-seven, and biennially thereafter, to appoint some person of honesty and ability, who is experienced in modern methods of accounting, as county accountant, to hold such office at the will of the board, or until the appointment of his successor; but, in lieu of appointing a county accountant in counties in which there is an auditor, the board shall impose and confer upon the county auditor all the powers and duties herein imposed and conferred upon county accountants, and in any county of the State in which there is no auditor, the board may impose and confer such powers and duties upon any county officer, except the sheriff or the tax collector or the county treasurer, or any person or bank acting as county financial agent or performing the duties ordinarily performed by a county treasurer or county financial agent. If such duties and powers are imposed or conferred upon any officer of the county, the board may revise and adjust the salary or compensation of such officer in order that adequate compensation may be paid to him for the duties of his office. Wherever in this act reference is made to the county accountant, such reference shall be deemed to include either the person appointed as county accountant or the officer upon which the duties thereof are imposed. (1927, c. 146, s. 3.)

Editor's Note.—Public Laws 1931, c. 34, provided that the

County Accountant of Brunswick County shall be an appointive officer for four years, and contained provisions as to his appointment, qualification, removal, etc.

Public Laws 1933, c. 295 repeals this section insofar as it applies to Harnett County and makes other provision for that county.

Cited in Board of Education v. Walter, 198 N. C. 325, 151 S. E. 718.

§ 1334(55). Additional duties of county accountant.—In addition to the duties imposed and powers conferred upon the county accountant by this act, he shall have the following duties and powers:

(a) He shall act as accountant for the county and subdivisions in settling with all county officers.

(b) He shall keep a record of the date, source, and amount of each item of receipts, and the date, the payee or contractor, the specific purpose, and the amount of every disbursement or contract made.

(c) He shall require every officer and department receiving or disbursing money of the county or its subdivisions to keep a record of the date, source, and amount of each item of receipts, and the date, the payee or contractor, the specific purpose, and the amount of every disbursement or contract made, and shall require the officer or department to keep a copy of such contract.

(d) He shall examine once a month, and at such other times as the board may direct, all books, accounts, receipts, vouchers, and other records of all county officers and employees and departments of the county administration receiving or expending public money, including the road commission, if there is such commission in the county, the county board of education and other subdivisions.

(e) He shall require all officers and employees in the county whose duty it is to collect fines, penalties, and other money to be applied to public purposes, to file with him each month, or oftener if the board so directs, a report showing amounts collected by such officers, including a report of all fees collected for the performance of their duties, whether they are entitled to such fees as the whole or a part of their compensation or are not entitled to the same.

(f) He shall once a year, or as often as he may be directed by the board of county commissioners, file with the board a complete statement of the financial condition of the county and subdivisions, showing the receipts and expenditures of the different departments of the county and its subdivisions, including the department of public roads and the department of public schools.

(g) He shall advise with the different officers and departments of the county and with State officers as to the best and most convenient method of keeping accounts, and he shall inform himself as to the best and simplest methods of keeping accounts, so as to bring about as far as possible a simple, accurate, and uniform system of keeping accounts of the county and subdivisions. He shall not allow any bill or claim unless the same be itemized and verified as now required by law.

(h) He shall perform such other duties having relation to the purposes of this act as may be imposed upon him by the board of county commissioners. (1927, c. 146, s. 4.)

§ 1334(56). Heads of departments and officers to file statement before 1st June.—It shall be the duty of all heads of departments and officers in charge of the functions for which county money or money of subdivision is to be expended, to file with the county accountant, before the first day of June of each year (a) a complete statement of the amounts expended and estimated to be expended for each object in his department in the current fiscal year, and (b) beginning in the year one thousand nine hundred and twenty-eight, a statement of the amounts expended for each object in his department in the fiscal year preceding the then current fiscal year, and (c) an estimate of the requirements of his department for each object in the ensuing fiscal year. Such statements and estimates shall list each object of disbursement under the appropriate class of functions as defined in section two of this act. (1927, c. 146, s. 5.)

§ 1334(57). Estimates necessary for ensuing fiscal year itemized.—Upon receipt of such statements and estimates, the county accountant shall prepare (a) his estimates of the amounts necessary to be appropriated for the next ensuing fiscal year for the different objects of the county and subdivisions, listing each object of disbursement under the appropriate class of functions as defined in section two of this act, which estimate shall include the full amount of any deficit in any fund, and may include an emergency estimate for each fund not greater than five per cent in excess of other estimates for such fund, and (b) an itemized estimate of the revenue to be available during the ensuing fiscal year, separating revenue from taxation from revenue from other sources, classifying the same under proper funds as defined in section two of this act, and (c) an estimate of the amount of unencumbered and surplus revenues of the current fiscal year in each fund. Such estimates and statements of the county accountant shall be termed the "Budget Estimate," and shall be submitted to the board not later than the first Monday of July of each year. (1927, c. 146, s. 6.)

§ 1334(58). Time for filing budget estimate.—Immediately upon the submission of the budget estimate, and at least twenty days before the adoption of the appropriation resolution, the board shall: (a) file the budget estimate in the office of the clerk of the board, where it shall remain for public inspection, and (b) furnish a copy of the budget estimate to each newspaper published in the county, and (c) cause to be published in at least one newspaper published in the county a summary of the budget estimate showing at least the total appropriation recommended for each separate fund or function as defined in section two of this act: Provided, however, that if no newspaper be published in the county, such summary shall be posted at the court-house door and at least three other public places in the county at least twenty days before the passage of the appropriation resolution. (1927, c. 146, s. 7.)

§ 1334(59). Time for adoption of appropriation resolution.—It shall be the duty of the board of county commissioners, not later than the fourth Monday in July in each year, to adopt and record on its minutes an appropriation resolution, the form of which shall be prescribed by the county accountant, which resolution shall make appropriations for the several purposes of the county and subdivisions thereof, upon the basis of the estimates and statements submitted by the county accountant, such sums as the board may deem sufficient and proper, whether greater or less than the recommendations of the budget estimates: Provided, however, that (a) no appropriation recommended by the county accountant for debt service shall be reduced, and (b) the powers given by the general law to the county board of education and county commissioners jointly, in respect to the determination of the amount to be raised or expended for the maintenance of the six months school term, shall be observed by the county accountant and by the board of county commissioners, and (c) the board shall appropriate the full amount of all lawful deficits reported in the budget estimate not funded as provided by law, and (d) no appropriation shall be made in excess of the amount which may be raised under any constitutional or statutory limits of taxation. (1927, c. 146, s. 8.)

§ 1334(60). Copies of resolution filed with county treasurer and county accountant.—A copy of the appropriation resolution shall be filed with the county treasurer or other officer or agent performing the functions ordinarily assigned to the county treasurer, and another copy thereof shall be filed with the county accountant, both copies as so filed to be kept on file for their direction in the disbursement of county funds. (1927, c. 146, s. 9.)

§ 1334(61). Supplemental budget showing.—As soon as practicable after the first Monday in July, and before any levy of taxes is made, the county accountant shall submit to the board a supplemental budget showing: (a) the amount of any increase or decrease in each item of (1) deficits and (2) unencumbered balances and (3) surplus revenues as reported by him in the budget estimate, and (b) the amount of miscellaneous revenues collected in the preceding year from sources other than taxation, this amount to be separately classified as to funds and functions, and (c) an estimate of the amount of taxes for the current fiscal year which will not be collected in the same year. Upon the submission of the figures showing increase or decrease in deficits, the appropriation resolution shall be deemed automatically amended by adding such increase to or subtracting such decrease from the amount appropriated for the fund or function to which such deficit pertains, and it shall be the duty of the clerk to record the amount of increase or decrease on the margin of the recorded appropriation resolution. The figures of the supplemental budget showing increases or decreases in unencumbered balances and surplus revenues, and showing the amount of miscellaneous revenues collected in the preceding fiscal year, from sources other than taxes, and showing the estimate of taxes uncollectible in the current fiscal year, shall not affect the appropriation resolutions, but shall be taken into consideration in the levy of taxes as hereinafter provided. (1927, c. 146, s. 10; 1933, c. 191.)

Editor's Note.—Public Laws of 1933, c. 191, deleted from the end of the first sentence a clause which required a mathematical computation in determining the estimate mentioned in (c).

§ 1334(62). Publication of statement of financial condition of county.—Simultaneously with the submission of the supplemental budget, the county accountant shall prepare and cause to be published in a newspaper published in the county, or if no newspaper be published in the county, then by posting at the court-house door and at least three other public places in the county, a statement of the financial condition of the county, containing such figures and information as the county accountant may consider it advisable to publish, which statement as so published or posted shall contain the figures showing at least the following items:

(a) The assessed valuation for the current year, unless the same shall not have been finally ascertained, in which case the assessed valuation of the preceding year shall be given.

(b) An itemized statement of the debt of the county and its subdivisions.

(c) The amount and rate of the taxation levied for the preceding fiscal year, whether collected or not.

(d) Amount of taxes, including land sales, for each of the three preceding fiscal years which remained uncollected at the end of such years, respectively, and the average thereof, and the amount of such uncollected taxes which were collected by the close of the preceding fiscal year.

(e) Miscellaneous revenue other than taxation for the preceding fiscal year.

(f) Deficits, of any, in all county funds in the aggregate for the preceding fiscal year.

(g) Such deficits for each subdivision of the county.

(h) Surplus revenues of the county, and separately stated, of each of the subdivisions of the county for the preceding year.

(i) Unencumbered balances of the county and, separately stated, of each of the subdivisions of the county for the preceding year.

(j) The rate of taxation for county purposes and the rate for each subdivision which he estimates it will be necessary to levy in the current fiscal year, these rates be computed as is provided in section twelve of this act for computation of rates by the board of county commissioners. (1927, c. 146, s. 11.)

§ 1334(63). Levy of taxes.—As soon as may be practicable after the passage of the appropriation resolution and the automatic amendment thereof, which is hereinabove provided, and after the ascertainment of the assessed valuation of property for taxation, but not later than Wednesday after the third Monday in August of each year, the board of county commissioners, by resolution to be recorded in its minutes, shall levy upon all the taxable property of the county, in the case of county appropriations, and upon all the taxable property

of each subdivision in the case of appropriations for subdivisions, such rate of tax as may be necessary to produce (a) the sum appropriated, and (b) the amount of the supplemental budget estimate of taxes which will not be collectible in the current fiscal year, after taking into consideration the figures contained in the budget estimate and supplemental budget showing surplus revenues and unencumbered balances carried over from the preceding fiscal year and the estimated miscellaneous revenues from other sources than taxation; but for the purpose of this computation the board shall not estimate miscellaneous revenues at a figure greater than ten per cent (10%) more than the actual receipts from miscellaneous revenues in the preceding fiscal year, as reported by the county accountant in the supplemental budget. (1927, c. 146, s. 12.)

§ 1334(63a). Failure to raise revenue a misdemeanor; emergencies.—Any county commissioner of any county who shall fail to vote to raise sufficient revenue for the operating expenses of the county as provided for in section 1334(63) of the Code, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. Provided: that in case of emergency upon application to the County Government Advisory Commission such County Government Advisory Commission may permit the Board of Commissioners for any county to anticipate the taxes of the next fiscal year by not more than five per cent of the tax levy for the current year; provided, further, that where a contingent fund has been provided for in the county budget the County Government Advisory Commission shall not authorize such anticipation in excess of the difference between five per centum and the amount theretofore levied as a contingent fund. (1929, c. 321, s. 1.)

§ 1334(63b). Execution of notes in anticipation of taxes.—In the event of the approval of such anticipation of the taxes of the next fiscal year by the County Government Advisory Commission, the County Commissioners of any such county are authorized to execute a note or notes in an amount not in excess of the amount authorized by such County Government Advisory Commission, and such note or notes shall be payable not later than June thirtieth of the next fiscal year and shall be paid by a tax levied for such purpose. (1929, c. 321, s. 2.)

§ 1334(64). Appropriations not transferable.—No appropriation made by the appropriation resolution, except an appropriation for general county expenses, shall be transferred from one fund to another fund, and no appropriation for general county expenses shall be transferred to any fund of any subdivision of the county, or vice versa. No appropriation for general county expenses shall be transferred, except upon the passage and recording of a resolution of the board of county commissioners ordering such transfer, and copies of such resolution shall be furnished to the county accountant and to the head of each department to which or from which such transfer shall be made. (1927, c. 146, s. 13.)

§ 1334(65). Appropriations bridging interval.—In the interval between the beginning of the fiscal year and the adoption of the annual appropriation resolution, the board may make appropriations for the purpose of paying fixed salaries, the principal and interest of indebtedness, the stated compensation of officers and employees, and for the usual ordinary expenses of the county and its subdivisions, which appropriations, so made shall be chargeable to the several appropriations, respectively, thereafter made in the annual appropriation resolution for that year. (1927, c. 146, s. 14.)

§ 1334(65a). County may create special revolving fund to supplant borrowing on anticipations; withdrawals.—In order to avoid the necessity of borrowing money in anticipation of the receipts of taxes and revenues or the proceeds of the sale of bonds, a county may by resolution create a special revolving fund and with the consent of the Commission, provide for raising the same to be used in anticipation of the receipt of such moneys and to be replenished by means of such moneys when received. Withdrawals of money from said fund shall be made only for the purposes and within the amounts and for the periods and upon the conditions stated in sections 1334(4) and 1334(5) in respect to the borrowing of money. Such withdrawals shall not be made unless approved by the Local Government Commission in the same manner as loans made under said sections. No resolutions creating such a fund shall be repealed or amended so as to divert or reduce the amount of the fund without the approval of said Commission as to necessity or expediency. (1931, c. 60, s. 62.)

§ 1334(66). Provisions for payment.—No contract or agreement requiring the payment of money, or requisition for supplies or materials, shall be made, and no warrant or order for the payment of money shall be drawn upon the treasury of the county, or a subdivision, unless provision for the payment thereof has been made by (a) an appropriation resolution as provided by this act, or (b) through the means of bonds or notes duly authorized by the General Assembly and by the board of county commissioners, and further authorized, in all cases required by law or by the Constitution, by a vote of qualified voters or taxpayers, or otherwise; nor shall such contract, agreement, or requisition be made unless the unencumbered balance of such appropriation or provision remains sufficient for such payment. No contract or agreement or requisition requiring the payment of money shall be valid unless the same be in writing, and unless the same shall have printed, written, or typewritten thereon a statement signed by the county accountant, as follows: "Provision for the payment of the moneys to fall due under this agreement has been made by appropriation duly made or by bonds or notes duly authorized, as required by the 'County Fiscal Control Act.'" Such certificate shall not, however, make valid any agreement or contract made in violation of this section. Before making such certificate, the county accountant shall ascertain that a sufficient unencumbered balance of the specific appropriation remains for the payment of the obligation, or that bonds or notes

have been so authorized the proceeds of which are applicable to such payment, and the appropriation or provision so made shall thereafter be deemed unencumbered by the amount to be paid on such contract or agreement until the county is discharged therefrom. (1927, c. 146, s. 15.)

Cited in Sherrill v. Graham County, 205 N. C. 178, 179, 170 S. E. 636.

§ 1334(66a). False certificate.—If any county auditor or county accountant of any county of the State shall make any certificate as required by section 1334(66) of the Code, when there is not a sufficient unencumbered balance remaining for the payment of the obligation, he shall be guilty of a misdemeanor and punishable by fine or imprisonment, both, in the discretion of the court except as herein provided. (1929, c. 321, s. 3.)

§ 1334(67). Warrants for payment.—No claim against the county or any subdivision shall be paid except by means of a warrant or order on the county treasurer or county depository, signed by the head of the department for which the expense was incurred, nor unless the bill or claim for which the warrant or order is given shall have been presented to and approved by the county accountant, or in case of his disapproval of such claim or bill, by the board of county commissioners. The board shall not approve any claim or bill which has been disallowed by the county accountant without entering upon the minutes of the board its reason for approving the same in such detail as may show the board's reason for reversing the county accountant's disallowance. No warrant or order, except a warrant or order for payment of maturing bonds, notes, or interest coupons thereto appertaining, and except a warrant or order for the payment of any bill or claim approved by the board of county commissioners over the disallowance of the county accountant, as above provided, shall be valid unless the same shall bear the signature of the county accountant below a statement which he shall cause to be written, printed or typewritten thereon containing the words: "Provision for the payment for this warrant (or order) has been made by an appropriation duly made or a bond or note duly authorized, as required by the 'County Fiscal Control Act.'" (1927, c. 146, s. 16; 1935, c. 382.)

Editor's Note.—The amendment of 1935 added, in the last sentence of the section, the exception as to warrants or orders approved by the board after disallowance of the account.

§ 1334(68). Accounts to be kept by county accountant.—Accounts shall be kept by the county accountant for each object of appropriation, which objects shall be classified under the various funds as defined in section two of this act, and every warrant or order upon the county treasury shall state specifically against which of such funds the warrant or order is drawn; such account shall show in detail the amount appropriated thereto, the amount drawn thereupon, the unpaid obligations charged against it, and the unencumbered balance to the credit thereof. (1927, c. 146, s. 17.)

§ 1334(69). Bond of county accountant.—The county accountant shall furnish bond in some surety company authorized to do business in North Carolina, the amount to be fixed by the board of commissioners in a sum not less than five thousand dollars ($5,000), which bond shall be approved by the board of county commissioners, and shall be conditioned for the faithful performance of his duties under this act. (1927, c. 146, s. 18.)

§ 1334(70). Daily deposits by collecting or receiving officers.—Every public officer and employee whose duty it is to collect or receive any funds or money belonging to any county or subdivision thereof shall daily deposit the same with the county treasurer or in some bank, banks, or trust company, designated by the board of commissioners, in the name of the county and of the fund to which it is applied, and shall report the same daily to the county accountant by means of duplicate deposit ticket signed by the depositary. If there is no treasurer or designated depositary in the county, then the board of commissioners may allow such deposits to be made every three days in some depository outside of the county. If such officer or employee collects or receives such public moneys for a taxing district of which he is not an officer or employee, he shall, during Saturday of each week, pay to the proper officer of such district the amount so collected, or received during the current week, and take receipt therefor.

The board of commissioners is hereby authorized and empowered to select and designate annually, by recorded resolution, some bank or banks or trust company in this State as an official depository of the funds of the county, and the county commissioners shall require of such depositary North Carolina State Bonds and/or United States Government Bonds or a bond in some surety company authorized to do business in North Carolina in an amount sufficient to protect such deposits, but in no event not less than the average daily bank balance of the county for the preceding year; but the board may at any time require an additional bond, in its discretion. Provided, that a bank giving North Carolina State Bonds and/or United States Government Bonds as security for county funds may deposit said bonds with another bank which has been approved by the Corporation Commission as a Depositary Bank, said bonds to be held for the benefit of the county and subject to the order of the Board of County Commissioners of said county.

It shall be the duty of the board of commissioners to provide by recorded resolution for interest to be paid on public deposits at a rate to be determined by the board of commissioners. It shall be unlawful for any public moneys to be deposited by any officer, employee, or department, in any place, bank, or trust company other than those selected and designated as official depositories. Any person or corporation violating the provisions of this section or aiding or abetting in such violation shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, in the discretion of the court. (1927, c. 146, s. 19; 1929, c. 37.)

Editor's Note.—The Act of 1929 amended the second paragraph of this section by adding the proviso and inserting in lines seven and eight the words: "North Carolina State Bonds and/or United States Government Bonds or."

Requiring Bonds and Interest of Bank Appointed County Financial Agent.—See note under § 1389.

Applied in United States Fidelity, etc., Co. v. Hood, 206 N. C. 639, 642, 175 S. E. 135.

§ 1334(71). Conduct by county accountant constituting misdemeanor.—If a county accountant shall knowingly certify any contract, agreement, or warrant in violation of the requirements of this act, or approve any fraudulent, erroneous, or otherwise invalid claim or bill, or make any statement required by this act, knowing the same to be false, or shall wilfully fail to perform any duties imposed upon him by this act, he shall be guilty of a misdemeanor and punishable for each offense by a fine of not less than fifty dollars ($50) or imprisonment for not less than twenty (20) days, or both fine and imprisonment, in the discretion of the court, and shall be liable on his bond for all damages caused by such violation or failure. (1927, c. 146, s. 20.)

§ 1334(72). Liability for damages for violation by officer or person.—If any county officer or head of a department or other official or person of whom duties are required by this act shall wilfully violate any part of this act, or shall wilfully fail to perform any of such duties, he shall be liable for all damages caused thereby. (1927, c. 146, s. 21.)

§ 1334(73). Recovery of damages.—The recovery of all damages allowed by the act may be made in the court having jurisdiction of the suit of the county, any subdivision thereof, or any taxpayer or other person aggrieved. (1927, c. 146, s. 22.)

§ 1334(74). Chairman of county commissioners to report to solicitor.—It shall be the duty of the chairman of the board of county commissioners to report to the solicitor of the district within which the county lies all facts and circumstances showing the commission of any offense as defined herein, and it shall be the duty of the solicitor to prosecute. (1927, c. 146, s. 23.)

§ 1334(75). Purpose of article.—It is the purpose of this article to provide a uniform system for all counties of the State by which the fiscal affairs of counties and subdivisions thereof may be regulated, to the end that accumulated deficits may be made up, and future deficits prevented, either under the provisions of this article or under the provisions of other laws authorizing the funding of debts and deficits, and to the end that every county in the State may balance its budget and carry out its functions without incurring deficits. (1927, c. 146, s. 24.)

§ 1334(76). Construction and application of article.—All laws and parts of laws, whether general, local or special, which are in conflict with this act, are hereby repealed. Nothing herein contained, however, shall require any county now operating under a budget system provided by any local or special act now in force or which may be passed at the regular session of the General Assembly of 1927, to abandon any such operation or to comply with this act, but any such county may, in the discretion of its board of commissioners, elect to conduct its procedure under any one or more sections of this act as the board may deem best. All such counties shall nevertheless be subject to the requirements of certain provisions of this article, which are (a) the annual publication of financial information substantially as required by section 1334(62), (b) the adoption of an appropriation resolution which shall appropriate the full amount of all deficits not founded and the full amount required for debt service as required by section 1334(59), (c) the annual levy of taxes sufficient to meet all appropriations and the probable amount of uncollectible taxes computed as required by section 1334(63), (d) endorsement by some one county officer, who shall either be the county accountant or an officer designated for that purpose by the board, of all contracts, agreements, requisitions, warrants and orders, substantially as provided by sections 1334(66) and 1334(67), (e) compliance with all the provisions of section 1334(70), and (f) all the provisions of section 1334(71), to 1334(74), as to penalties, liability for damages and requirements for reporting offenses to the district solicitor shall apply in all such counties so far as such counties are herein required to comply with this article. (1927, c. 146, s. 25.)

§ 1334(76)a. Local units authorized to accept their bonds in payment of certain judgments and claims.—The governing bodies of the various counties, cities, towns, and other units in the state are hereby authorized in their discretion to accept their own bonds, at par, in settlement of any and all claims which it may have against any person, firm, or corporation, on account of any money of said unit held in any failed bank or on account of any judgment secured against any person, firm, or corporation on account of the funds in said bank.

Upon an order issued by the governing authorities of the county, city, town, or other unit, the treasurer of the county, city, town, or other unit is hereby authorized and empowered to accept the bonds of said unit in settlement of said claim, as set out in section 1, and to mark said claim satisfied in full, whether the same has been reduced to judgment or not. (1933, c. 376.)

Art. 7D. Requiring County, Municipal, etc., Officials to Make Contracts for Auditing and Standardizing Bookkeeping Systems

§ 1334(77). Director of local government. — At such time as any board of county commissioners, board of education or other county officials, "or the governing body or officials of any city, town, special charter district or other subdivision in the state of North Carolina proposes to employ any certified public accountants or auditors other than the official county auditor, county accountant, municipal accountant or other similar officer for making any statement or for the auditing of any books of the county, city, town, special charter district or other subdivision, the director of local government shall be notified of such purpose and it shall be the duty of a representative of the director of local government to advise with the officials with respect to the scope of such audit and the nature of same and to furnish such officials all informa-

tion available for their guidance in the making and entering into contracts or engagements for said audit or examination. (1929, c. 201, s. 1; 1931, c. 99, s. 1.)

Editor's Note.—The Act of 1931 amended this article to make it applicable to cities, towns, special charter districts or other sub-divisions, and substituted "director of local government" for "county government advisory commission" formerly appearing.

§ 1334(78). Contracts must be in writing; approval.—All contracts or engagements made shall be reduced to writing and shall include all of the terms and conditions of the contract before the same shall become legal and binding upon the county, city, town, special charter district or other subdivision officials and shall be endorsed and approved as to the terms and provisions thereof by the director of local government and such contracts shall be null and void and no payments shall be made on such contracts until the same shall have been reduced to writing and approved as aforesaid by the director of local government. Said contract when so executed shall be recorded on the minutes of the board of county commissioners, board of education or such governing body of a city, town, special charter district or other sub-division and the original filed in their records. The terms and provisions of said contracts shall not in any way be varied or changed by either party unless and until such changes shall be reduced to writing and approved by the director of local government in the same manner as the original contract and no verbal agreements made between the officials of the county and the auditors aforesaid shall affect in any way to vary the terms and conditions thereof. (1929, c. 201, s. 2; 1931, c. 99, s. 2.)

§ 1334(79). Approval of systems of accounting.—With a view of standardization and simplification of the methods of accounting in the various counties, cities, towns, special charter districts and other sub-divisions of the state, the director of local government is hereby authorized and empowered to advise with said boards as to the proper methods of accounting for such counties, cities, towns, special charter districts and other sub-divisions and no system or books shall be installed until same shall have been submitted to the director of local government. (1929, c. 201, s. 3; 1931, c. 99, s. 3.)

§ 1334(80). Copy of report to be filed with commissioners.—Any certified public accountant or auditor other than the official county auditor, county accountant, municipal accountant or other similar officer employed by any board of county commissioners, board of education, the governing body of any city, town, special charter district or other sub-division, or the officials thereof, shall upon a completion of all work performed in accordance with the terms of a contract, prepare a report embodying all statements and comments relating to his findings and shall file a copy of said report with the director of local government, said report to be either printed or typewritten. The director of local government shall have the power to prescribe or approve the form of said report. (1929, c. 201, s. 4; 1931, c. 99, s. 4.)

§ 1334(81). Approval of all claims for auditing to be approved by Director of Local Government.—All bills or claims presented to the governing body of any county, city, town or special charter district for the payment of any public or certified public accountant or auditor for the performance of any service as may be agreed upon in accordance with the provisions of this act shall be approved by the Director of Local Government, and it shall be unlawful for any of such governing bodies to pay or permit the payment of such bill or claim out of any public funds without first securing the said approval of said Director of Local Government. (1931, c. 99, s. 5.)

Art. 7E. Sinking Funds

§ 1334(82). Counties and municipalities authorized to apply sinking funds to purchase of own bonds.—The county commissioners of the several counties of the State, and all persons or officers having charge of sinking funds and the commissioners and aldermen and governing bodies of all incorporated cities and towns are authorized and directed to apply the sinking funds on hand to the purchase and retirement of the specific bonds, issued by such municipality, for the payment whereof, at maturity, such fund has been provided, notwithstanding any contrary provisions in any act, special or general, under which the said bonds have been issued: Provided, however, that where bonds have been issued and sold to run for a stated term without option of prior payment, nothing herein shall be construed to compel the owners or holders thereof to accept payment or surrender said bonds except at their option. Municipalities shall not be required to purchase such bonds for a greater sum than the face thereof, with accrued interest at the time of purchase. (1931, c. 413, s. 1.)

§ 1334(83). Investment of sinking funds under supervision of Local Government Commission.—County commissioners of the several counties and all persons or officers having charge of sinking funds and the governing bodies of all incorporated towns and cities shall keep such sinking funds as may not be applied to the purchase and retirement of bonds as required in the preceding section safely invested in such bonds or securities as are approved for such investment by the Local Government Act of nineteen hundred and thirty-one, (§§ 2492(1) et seq.) where such investment will promote the public interest or provide a greater rate of interest therefor. (1931, c. 413, s. 2.)

Editor's Note.—As to investment of bonds guaranteed by the United States government, see section 220(a)1.

§ 1334(84). Petition of tax-payers to have sinking funds applied to purchase of bonds. — Any citizen and taxpayer of a county or municipality, on behalf of himself and other citizens and taxpayers interested, who may or may not join therein, may petition the board of county commissioners or any governing board of a city or town, setting forth in said petition that said county, city or town has an amount of sinking fund provided for the payment of a certain issue or issues of bonds, that the bonds, or a portion of them, may be purchased and retired, and fully setting forth any benefit which would accrue to the county, city or town from purchasing and retirement of said bonds, and demanding the application of the sinking fund thereto.

A like petition may be made to require the in-

vestment of sinking funds as provided in section one hereof. Such petition shall fully set out the facts regarding the fund in question and the benefit to be derived from its investment. Upon receiving such petition the board of county commissioners or governing body of the city or town to which the same may be addressed, shall ascertain the facts with reference to the matters alleged, and act thereon without delay; and the petition shall be sustained and the relief granted if the facts are such that the provisions of section one hereof are applicable; and such sinking fund shall be applied to the purchase and retirement of such bonds as may be obtainable, of the class or issue to the payment whereof at maturity such fund might be applied, or shall be invested without delay, in the event such bonds are not obtainable, and such investment will be advantageous to the taxpayers interested. (1931, c. 413, s. 3.)

§ 1334(85). Appeal to Local Government Commission.—An appeal shall lie from the action of the board of county commissioners or governing body of any town or city to the Local Government Commission, who shall hear the matter de novo and determine the same. The Local Government Commission shall make such order as they may deem best in the premises, and fix therein such time as they may deem reasonable for compliance therewith.

Upon failure or delay to act upon any petition for a period of thirty days after it has been received by any board of county commissioners or governing body of any city or town, direct application may be made to the Local Government Commission, which shall, on such failure or refusal to act, have original jurisdiction in the premises and shall proceed to act, after five days' notice to such board of commissioners or governing body of a town or city to whom the petition was addressed.

The orders of the Local Government Commission may be enforced by writ of mandamus in a proceeding in the Superior Court of Wake County or of the county affected, or in which the town or city concerned, or any part thereof may be located, and such proceeding may be brought by the Local Government Commission or any petitioning taxpayer, in behalf of himself and others like interested. (1931, c. 413, s. 4.)

Art. 7F. Emergency County Bond Act.

§ 1334(86). Short title of the act.—This article may be cited as the "Emergency County Bond Act of 1935." (1935, c. 427, s. 1.)

§ 1334(87). Meaning of terms.—In this article, unless the context otherwise requires, the terms:

(a). "Undertaking" shall mean any project, undertaking or improvement referred to in section eight of County Finance Act, as amended [§ 1334-(8) of this Code], which constitutes necessary expenses and for which a county may legally appropriate money, including the erection, construction, purchase, improvement, repair and equipment of school buildings and necessary lands therefor which are necessary for the maintenance of the six months' public school term required by the constitution, the financing of which undertaking is to be aided in whole or in part by means of a loan or grant through the Federal Emergency Administrator of Public Works or through any other agency or department of the United States of America.

(b). "County" means and includes all counties in this State now or hereafter created by law.

(c). "Necessary expenses" means the necessary expenses referred to in section seven of Article VII of the Constitution of North Carolina.

(d). "Governing body" means the board of county commissioners, or board or body in which the general legislative powers of the entire county are vested.

(e). "Clerk" means the officer acting as clerk to the governing body.

(f). "Chief financial officer" means the county accountant, auditor, treasurer, or other officer designated or appointed by the governing body to supervise the fiscal affairs of the county, unless such officer shall be designated by law. (1935, c. 427, s. 2.)

§ 1334(88). Bonds authorized. — Every county in the State is hereby authorized pursuant to this law to issue its negotiable coupon bonds for the purpose of financing any of the undertakings referred to in § 1334(87). The bonds shall be issued in such form as the officers who execute them shall adopt, except as otherwise provided by the governing body; they shall be signed by two or more officers designated by the governing body, or if the governing body makes no such designation, then by the chairman of the governing body or other chief executive officer, and by the clerk, and the corporate seal of the county or of the governing body shall be affixed to the bonds. The bonds may have coupons attached for the interest to be paid thereon, which coupons shall bear a facsimile signature of the clerk in office at the date of the bonds or at the date of the delivery thereof. The delivery of bonds so executed shall be valid notwithstanding any change in the officers or in the seal of the county occurring after the signing and sealing of the bonds. The bonds shall bear such date and such rate of interest, not exceeding four per cent (4%) per annum (payable semi-annually), or such other rate of interest as may be fixed by contract between the governing body and the United States of America, or any agency or department thereof, and shall be payable at such time or times, at such place or places, and in such medium of payment and in such denomination as the governing body may by resolution determine. The bonds may be issued either all at one time or from time to time in blocks. (1935, c. 427, s. 3.)

§ 1334(89). Registration and transfer of bonds. —(a). Bonds issued under this law shall be payable to bearer, unless they are registered as provided in this section; each coupon appertaining to a bond shall be payable to the bearer of the coupon.

(b). A county may keep in the office of its chief financial officer or in the office of a bank or trust company appointed by the governing body as bond registrar or transfer agent, a register or registers for the registration and transfer of its bonds, in which it may register any bond at the time of its issue, or at the request of the holder, thereafter. After such registration the principal and interest of the bond shall be payable to the

person in whose name it is registered except in the case of a coupon bond registered as to principal only, in which case the principal shall be payable to such person, unless the bond shall be discharged from registry by being registered as payable to bearer. After registration a bond may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompained by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner.

(c). Upon the registration or transfer of a bond as aforesaid, the bond registrar shall note such registration or transfer on the back of the bond. Upon the registration of a coupon bond as to both principal and interest he shall also cut off and cancel the coupons.

(d). A county may, by recital in its bonds, agree to register the bonds as to principal only, or agree to register them either as to principal only or as to both principal and interest at the option of the bondholder. (1935, c. 427, s. 4.)

§ 1334(90). Application of funds. — The proceeds of the sale of bonds under this article shall be used only for the purposes specified in the resolution authorizing said bonds; provided, however, that if for any reason any part of such proceeds are not applied to, or are not necessary for such purposes, such unexpended part of the proceeds shall be applied to the payment of the principal or interest of said bonds. The cost of preparing, issuing, and marketing the bonds, together with the interest on the amount expended during the course of construction of any undertaking shall be deemed to be one of the purposes for which the bonds are issued and may be paid for out of the proceeds derived from the sale of the bonds. (1935, c. 427, s. 5.)

§ 1334(91). Bonds authorized by resolution shall be incontestable after delivery.—All bonds issued under this article shall be authorized by appropriate resolution of the governing body, which shall be the only proceeding necessary to evidence the legality thereof. The bonds shall recite that they are issued pursuant to this law, and shall in any action or proceeding involving their validity, be conclusively deemed to be fully authorized by this law and to have been issued, executed, sold, and delivered in conformity herewith and with all other provisions and statutes applicable thereto, and shall be incontestable, anything herein or in other statutes to the contrary, notwithstanding, unless such action or proceeding is begun prior to the delivery of such bonds. If the bonds are to be issued for the purpose of the erection, construction, purchase, improvement, repair and equipment of school buildings, or for lands therefor, or for any one or more of said purposes, the bonds and the resolution authorizing the same shall recite that such purposes are necessary for the maintenance of the six months' public school term as required by the constitution. (1935, c. 427, s. 6.)

§ 1334(92). Taxes levied for the payment of the bonds.—The full faith and credit of the county shall be deemed to be pledged for the punctual payment of the principal of and interest on every bond issued under this article. The governing body shall annually levy and collect a special tax in addition to other taxes now authorized by law, ad valorem, upon all the taxable property subject to taxation by the county, sufficient to pay the principal and interest of all bonds issued under this article as such principal and interest become due; provided, however, that such tax may be reduced by the amount of other moneys appropriated and actually available for such purposes. The levy of the taxes authorized by this section is hereby declared to be for a special purpose, and for which the special approval of the general assembly is hereby given.

The powers stated in this section in respect to the levy of taxes for the payment of principal and interest of bonds shall not be subject to any limitation prescribed by law upon the amount or rate of taxes which a county may levy. Taxes levied under this section shall be levied and collected in the same manner as other taxes are levied and collected upon property by the county. (1935, c. 427, s. 7.)

§ 1334(93). Local government act applicable.—Any county issuing bonds under the provisions of this article shall, before the issuance and delivery thereof, make application to the Local Government Commission and obtain the approval of that Commission to issue such bonds, and they shall be subject to all the provisions of the Local Government Act, as amended, but the issuance of such bonds shall not be subject to any of the provisions of the County Finance Act, as amended, and provided further that the Local Government Commission may sell any bonds issued under this law to the United States of America, or any agency or department thereof, at private sale and without advertisement. (1935, c. 427, s. 8.)

§ 1334(94). Consent of state agencies.—It shall not be necessary for any county proceeding under this article to obtain any certificate of convenience or necessity, franchise, license, permit, or other authorization from any bureau, board, commission or other like instrumentality of the State, except the approval of the State Board of Education of plans of a school building as now provided by law, except the approval of the Local Government Commission to issue such bonds as provided in the preceding section. (1935, c. 427, s. 9.)

§ 1334(95). Effect upon prior laws and proceedings taken.—This law shall not affect any acts or proceedings heretofore done or taken by a county for the issuance of bonds for any undertaking under the County Finance Act as it stood prior to the ratification of this article, or under any other law, and every county is hereby authorized to complete said acts and proceedings pursuant to the law under which they were done or taken and to issue said bonds under such acts in the same manner as if this law had not been passed; provided, however, that the governing body may at its option proceed under this law for the issuance of such bonds, except in cases where a sufficient petition has theretofore been filed pursuant to law by the voters of such county demanding a referendum on the question of the issuance of such bonds, without regard to the restrictions imposed by the said County Finance Act and other laws. (1935, c. 427, s. 10.)

§ 1334(96). Application and construction of law.—The powers conferred by this article are in addition to and not in substitution of those conferred by any other act, either general, special or local, and every municipality may proceed to issue bonds under the provisions of this law, notwithstanding any conditions, restrictions or limitations contained in any other act, whether general, special or local. Every provision of this law shall be construed as being qualified by constitutional provisions, whenever such construction shall be necessary in order to sustain the constitutionality of any portion of this law. If any portion of this law shall be declared unconstitutional, the remainder shall stand, and the portion declared unconstitutional shall be exscinded. (1935, c. 427, s. 11.)

§ 1334(97). Termination of power to issue bonds.—Except in pursuance to any contract or agreement theretofore entered into by any county, no county shall borrow any money or deliver any bonds pursuant to this article to the purchaser or purchasers thereof after June thirtieth, one thousand nine hundred thirty-seven. (1935, c. 427, s. 12.)

§ 1334(98). Local laws preserved.—Nothing in this article shall be construed as repealing any private or public-local laws in conflict with this article. (1935, c. 427, s. 13.)

§ 1334(99). Approval of local government commission necessary.—No bonds shall be issued under this article except with the express approval of the Local Government Commission. (1935, c. 427, s. 14.)

§ 1334(100). Laws compelling holding of elections unaffected. — Notwithstanding anything to the contrary contained in this article, any existing laws, general, local or special, granting rights to citizens to petition for and have the question of the issuing of bonds, or incurring of indebtedness under this article, submitted to a vote of the people, are hereby preserved in full force and effect; and all present laws relating to or requiring the approval or certificate of any state commission, or other state agency, with respect to the construction or acquiring of any property or plants, or the issuing of bonds therefor, shall remain in full force and effect. (1935, c. 427, s. 15.)

Art. 8. County Poor

§ 1335. Support of poor; superintendent of county home; paupers removing to county; hospital treatment.—The board of commissioners of each county is authorized to provide by taxation for the maintenance of the poor, and to do everything expedient for their comfort and well-ordering. They may employ biennially some competent person as superintendent of the county home for the aged and infirm, and may remove him for cause. They may institute proceedings against any person coming into the county who is likely to become chargeable thereto, and cause his removal to the county where he was last legally settled; and they may recover from such county by action all charges and expenses incurred for the maintenance or removal of such poor person.

The board of commissioners of each county, when deemed for the best interest of the county, is hereby given authority to contract for periods not to exceed thirty years with public or private hospitals or institutions located within or without the county to provide for the medical treatment and hospitalization of the sick and afflicted poor of the county upon such terms and conditions as may be agreed, provided the annual payments required under such contract shall not be in excess of ten thousand ($10,000.00) dollars. The full faith and credit of each county shall be deemed to be pledged for the payment of the amounts due under said contracts and the special approval of the general assembly is hereby given to the execution thereof and to the levy of a special ad valorem tax in addition to other taxes authorized by law for the special purpose of the payment of the amounts to become due thereunder. The contracts provided for in this act and the appropriations and taxes therefor are hereby declared to be for necessary expenses and for a special purpose within the meaning of the constitution of North Carolina and for which the special approval of the general assembly is hereby given, and shall be valid and binding without a vote of the majority of the qualified voters of the county and are expressly exempted and excepted from any limitation, condition or restriction prescribed by the county fiscal control act and acts amendatory thereof: Provided, that the county commissioners of Lincoln County shall not enter into any such contract except after a public hearing at the county court house, notice of which hearing shall be published for two successive weeks in a newspaper published in the county. The commissioners of Catawba County shall not act under this paragraph until a majority of the people of the county have voted favorably. This paragraph shall not apply to the counties of Ashe, Avery, Buncombe, Clay, Cumberland, Durham, Gates, Haywood, Henderson, Jackson, Lee, Macon, Moore, Nash, Pasquotank, Robeson, Sampson, Transylvania, Wilkes, Yadkin, Rowan, Gaston, Iredell, Surry, New Hanover, Washington, Bertie, Brunswick, Union, Stanley, Yancey, Warren, Vance, Chowan, Currituck, Forsythe, McDowell, Johnson, Halifax, Edgecombe, Pitt, Richmond, Rockingham, Columbus, Guilford and Mecklenburg. (Rev., s. 1327; Code, s. 3540; 1891, c. 138; 1935, c. 65.)

Editor's Note.—The last paragraph of this section relating to hospitalization was added by the 1935 amendment.

Extent of Relief Vested in Discretion of Commissioners.—The general duty of providing for the poor is here imposed; the place, method, and extent of relief are vested in the judgment and discretion of the county commissioners. Copple v. Commissioners, 138 N. C. 127, 132, 50 S. E. 574.

Must Be Express Contract to Bind County.—Under this section in order to make a binding pecuniary obligation on the county, there must be an express contract to that effect, or the service must be done at the express request of the proper county officer or agent. Copple v. Commissioners, 138 N. C. 127, 50 S. E. 574.

Legislative Power to Afford Direct or Indirect Relief.—The Legislature clearly has the power to delegate authority to the county officials to provide and care for one class of the indigent or unfortunate inhabitants of the State, and to disburse a part of the fund devoted by the Constitution to the support of the poor, by appropriating it more directly to another class, whose wants, in the opinion of the lawmakers, can be best supplied through public agencies of a different kind. Board v. Commissioners, 113 N. C. 379, 384, 18 S. E. 661.

It is the exclusive right of the Legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what

fund and by whom allowances for their support shall be made. Board v. Commissioners, 113 N. C. 379, 18 S. E. 661.

Wardens under Act of 1846.—Wardens of the poor, elected by the old county courts, under the provisions of the act of 1846, ch. 64, were not subjected to any penalty for refusing to accept the appointment. Smithwick v. Williams, 30 N. C. 268.

§ 1336. County home for aged and infirm.—All persons who become chargeable to any county shall be maintained at the county home for the aged and infirm, or at such place or places as the board of commissioners select or agree upon. (Rev., s. 1328; Code, s. 3541; 1891, c. 138.)

§ 1337. Records for county, how to be kept.—The keeper or superintendent in charge of each county home in North Carolina, or the board of county commissioners in each county where there is no county home, shall keep a record book showing the following: Name, age, sex, and race of each inmate; date of entrance or discharge; mental and physical condition; cause of admission; family relation and condition; date of death if in the home; cost of supplies and per capita expense of home per month; amount of crops and value, and such other information as may be required by the board of county commissioners or the state board of charities and public welfare; and give a full and accurate report to the county commissioners and to the state board of charities and public welfare. Such report to be filed annually on or before the first Monday of December of each year. (1919, c. 72.)

As to power of commissioners to require poor placed in the home, see annotations to subsection 28, section 1297.

§ 1338. Support of county home.—The board of commissioners may provide for the support of the persons admitted by them to the home for the aged and infirm by employing a superintendent at a certain sum, or by paying a specified sum for the support of such persons to any one who will take charge of the county home for the aged and infirm, as said board may deem for the best interest of the county and the cause of humanity. (Rev., s. 1329; Code, s. 3543; 1876-7, c. 277, s. 3.)

Overseer Liable to Indictment.—An overseer of the poor is a public officer and liable to indictment at common law for any neglect of his duties or abuse of his powers. State v. Hawkins, 77 N. C. 494.

Same—Defective Indictment.—Where such officer is indicted for cruel treatment of paupers, and the indictment neither sets out the names of such paupers nor states that their names are unknown, the said indictment is defective, and judgment thereon should be arrested. State v. Hawkins, 77 N. C. 494.

Evidence.—Upon the trial of an indictment against a public officer for neglect or omission of duty, evidence of acts of positive misfeasance is inadmissible. State v. Hawkins, 77 N. C. 494.

§ 1339. Property of indigent to be sold or rented.—When any indigent person who becomes chargeable to a county for maintenance and support in accordance with the provisions of this article, owns any estate, it is the duty of the board of commissioners of any county liable to pay the expenses of such indigent person to cause the same to be sold for its indemnity or reimbursement in the manner provided under article 3 of the chapter entitled Insane Persons and Incompetents, or they may take possession thereof and rent the same out and apply the rent toward the support of such indigent person. (Rev., s. 1330; Code, s. 3547; 1866, c. 49.)

§ 1340. Families of indigent militiamen to be supported.—When any citizen of the state is absent on service as a militiaman or member of the state guard, and his family are unable to support themselves during his absence, the board of commissioners of his county, on application, shall make towards their maintenance such allowance as may be deemed reasonable. (Rev., s. 1331; Code, s. 3546; R. C., c. 86, s. 14; 1779, c. 152.)

§ 1341. Paupers not to be hired out at auction.—No pauper shall be let out at public auction, but the board of commissioners may make such arrangements for the support of paupers with their friends or other persons, when not maintained at the county home for the aged and infirm, as may be deemed best. (Rev., s. 1332; Code, s. 3542; 1876-7, c. 277, s. 2.)

§ 1342. Legal settlements; how acquired.—Legal settlements may be acquired in any county, so as to entitle the party to be supported by such county, in the manner following, and not otherwise:

1. By one Year's Residence.—Every person who has resided continuously in any county for one year shall be deemed legally settled in that county.

2. Married Women to have Settlement of their Husbands.—A married woman shall always follow and have the settlement of her husband, if he have any in the state; otherwise, her own at the time of her marriage, if she then had any, shall not be lost or suspended by the marriage, but shall be that of her husband, till another is acquired by him, which shall then be the settlement of both.

3. Legitimate Children to Have Settlement of Father.—Legitimate children shall follow and have the settlement of their father, if he has any in the state, until they gain a settlement of their own; but if he has none, they shall, in like manner, follow and have the settlement of their mother, if she has any.

4. Illegitimate Children to Have Settlement of Mother.—Illegitimate children shall follow and have the settlement of their mother, at the time of their birth, if she then have any in the state. But neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein.

5. Settlement to Continue until New One Acquired.—Every legal settlement shall continue till it is lost or defeated by acquiring a new one, within or without the state; and upon acquiring such new settlement, all former settlements shall be defeated and lost.

6. No person coming into the State of North Carolina from another State shall be deemed to have a settlement in this State for the purposes of this section, until he or she has resided continuously three years within the State, unless at the time of so migrating he or she was able to maintain himself in such sense as that he or she would not be deemed a pauper within the meaning of article eight, chapter twenty-four of the Consolidated Statutes one thousand nine hundred and nineteen. (Rev., s. 1333; Code, s. 3544; R. C., c. 86, s. 12; 1777, c. 117, s. 16; 1931, c. 120.)

As to duty of commissioners to provide for the maintenance of the poor, see section 1297(28).

The legal settlement of the pauper determines the liabil-

ity. Commissioners v. Commissioners, 121 N. C. 295, 296, 28 S. E. 412.

Settlements Not Governed by Law of Domicile.—The law applicable to pauper settlements is regulated by statute, and is in no way governed by the law of the domicile or citizenship. Commissioners v. Commissioners, 101 N. C. 520, 524, 8 S. E. 176.

Settlement as at Common Law.—Since our act did not contemplate the case of foreign paupers, the question of settlement is left as at common law. State v. McQuaig, 63 N. C. 550, 551.

Purpose to Charge Each County with Its Poor.—It is the manifest purpose of the law in regard to pauper settlements to charge each county with the support of its own poor. Commissioners v. Commissioners, 101 N. C. 520, 524, 8 S. E. 176.

Loan for Care of Paupers Ultra Vires.—A contract for the loan of money made by the late county courts for the support of the paupers in their respective counties was ultra vires, and therefore void. Daniel v. Board, 74 N. C. 494.

Pauper Injured in Another County. — Where a pauper, temporarily absent from the county where he has a "legal settlement," is so disabled as to require immediate medical services and is furnished by the authorities of another county with such attention and board, the latter is entitled to recover the expenses thereof from the county where the pauper has his settlement. Commissioners v. Commissioners, 121 N. C. 295, 28 S. E. 412.

Year's Requirement.—No one shall gain a settlement in a county unless by continuous residence for one year. State v. Elam, 61 N. C. 460, 462.

Settlement Not Ipso Facto Obtained by Birth.—Neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein. State v. Elam, 61 N. C. 460, 462.

When Domicile and Settlement Different. — Although in most cases the county of domicil and the county of settlement are the same, yet they are sometimes different as in such case the county of settlement is chargeable with the maintenance of the bastard child. State v. Elam, 61 N. C. 460, 465.

County's Liability Fixed by Mother's Settlement.—The liability of the county for the maintenance of a bastard child is fixed not by its birth but by the settlement of its mother at the time of its birth. State v. Elam, 61 N. C. 460, 462.

An illegitimate child, who has not gained a new settlement by a year's residence in some other county, is, for the purpose of being apprenticed, subject to the jurisdiction of the court of that county in which its mother was settled at the time of its birth. Ferrell v. Boykin, 61 N. C. 9.

When Mother without Settlement in State.—A bastard, born in this State of a mother who has not resided in it "for twelve months", is chargeable for maintenance upon the county in which it is born. State v. McQuaig, 63 N. C. 550.

Duration of Settlement.—A legal settlement continues until a new one is acquired. Commissioners v. Commissioners, 121 N. C. 295, 296, 28 S. E. 412.

§ 1343. Removal of indigent to county of settlement; maintenance; penalties.—Upon complaint made by the chairman to the board of county commissioners, before a justice of the peace, that any person has come into the county who is likely to become chargeable thereto, the justice by his warrant shall cause such poor person to be removed to the county where he was last legally settled; but if such poor person is sick or disabled, and cannot be removed without danger of life, the board of commissioners shall provide for his maintenance and cure at the charge of the county; and after his recovery shall cause him to be removed, and pay the charges of his removal. The county wherein he was last legally settled shall repay all charges occasioned by his sickness, maintenance, cure and removal, and all charges and expenses whatever, if such person die before removal. If the board of commissioners of the county to which such poor person belongs refuses to receive and provide for him when removed as aforesaid, every commissioner so refusing shall forfeit and pay forty dollars, for the use of the county whence the removal was made; moreover, if the board of commissioners of the county where such person was legally settled refuses to pay the charges and expenses aforesaid, they shall be liable for the same. If any housekeeper entertains such poor person without giving notice thereof to the board of commissioners of his county, or one of them, within one month, the person so offending shall forfeit and pay ten dollars. (Rev., s. 1334; Code, s. 3545; R. C., c. 86, s. 13; 1777, c. 117, s. 17; 1834, c. 21.)

Cross References.—As to commissioners neglect of duty a misdemeanor, see section 1302; as to willfully failing to discharge duties, see section 4384.

It is thus provided that the board of commissioners of the county to which such poor person belongs shall receive and provide for him, under a penalty for refusal to do so, makes them liable if they refuse to pay the expenses mentioned in the section. Commissioners v. Commissioners, 101 N. C. 520, 524, 8 S. E. 176.

§ 1343(a). Burial of indigent veterans of the world war.—The county commissioners of any county in North Carolina are authorized, empowered, and directed to appropriate out of the general fund of the county a sum of not more than twenty-five dollars ($25.00) to provide for the burial of any former member of the army, navy, or marine corps, who served in the recent world war, who shall die within the boundaries of the said county and whose estate or relatives are unable to provide for the burial of said veteran, and whose burial has not otherwise been provided for. (1923, c. 119.)

Editor's Note.—This section is somewhat similar to the provision for the burial of confederate soldiers in section 5167.

This section was reviewed in 1 N. C. Law Rev. 296.

Art. 8A. District Hospital Home

§ 1343(b). Two or more adjacent counties may establish; trustees.—Any two or more adjacent counties may by action of the county commissioners in said counties, as hereafter provided, establish a district hospital-home for the aged and infirm, to be located at some suitable place within the counties composing the district, location and purchase to be controlled by a board of trustees appointed by the county commissioners of the respective counties owning and controlling said hospital-home, each county to have one representative. Where only two counties enter the district, the commissioners of the counties concerned shall jointly elect one additional trustee. (1931, c. 129, s. 1.)

Editor's Note.—This article was codified from the Act of 1931, which is very similar to and takes the place of Public Loc. Laws, 1923, c. 611, s. 1, made a public law by Public Laws 127, c. 192.

§ 1343(c). Present properties to be sold; application of proceeds.—The county commissioners of the aforesaid counties are hereby authorized and empowered to sell and convey by deed all properties held by the aforesaid counties for the care and maintenance of their county's poor, and from the proceeds of such sale appropriate so much as may be required to meet said county's proportionate part of the funds necessary to perfect the completion of said community home for the aged and infirm as provided herein. (1931, c. 129, s. 2.)

§ 1343(d). Funds raised by taxation.—Should it be deemed wisest not to sell said properties, or

should any county not have said properties in its possession, or should any counties have said properties which would not be for sale, the necessary funds shall then be raised by direct taxation within the county or counties preferring this method of raising their pro rata part. (1931, c. 129, s. 3.)

§ 1343(e). Appointment of trustees.—The several boards of county commissioners shall, as soon as they shall have agreed among themselves to establish a district hospital-home for the aged and infirm for their counties, appoint the members of the board of trustees, which board shall be known as the board of trustees of the district hospital-home for the district comprising ..... counties; the members of said board of trustees shall be appointed every two years by the boards of county commissioners, the term of office for said trustees shall be two years, and until their successors are chosen and qualified; that all vacancies shall be filled by the several boards of county commissioners and said commissioners shall provide for the expense and compensation of said board of trustees. (1931, c. 129, s. 4.)

§ 1343(f). Organization meeting; site and buildings.—This board of trustees shall, as soon as possible after appointment, assemble and organize by the election of a chairman, a secretary and a treasurer, which last officer shall be bonded. They shall proceed promptly with the purchase of a site for such hospital-home, including, if they deem it desirable, a farm of suitable size, location and fertilty, giving due consideration to sanitary surroundings and transportation facilities, and shall then cause to be erected suitable plain, substantial, comfortable and permanent buildings for the accommodation of those for whom this act is intended, giving due regard to the separation of the sexes and races, and such other plans for segregation as their judgment and existing conditions may suggest. Said buildings are to be furnished with plain, substantial furniture, and such other equipment as conditions demand. Necessary hospital facilities may be included, but provisions for such facilities and equipment shall have the approval of the State Board of Charities and Public Welfare and the State Board of Health. (1931, c. 129, s. 5.)

§ 1343(g). Apportionment of cost.—The several counties constructing, equipping, and operating a district hospital-home shall pay for the site and for the construction and equipment of the plant in proportion to the population of the individual county to the total population of the several counties comprising the district, but each county shall pay for the number of persons maintained at the hospital-home at the actual per capita cost of such maintenance. (1931, c. 129, s. 6.)

§ 1343(h). Plans and specifications for hospital-home.—The State Board of Charities and Public Welfare shall have prepared plans for such district hospital-home and shall furnish such plans on request to any board of trustees of any district hospital-home at cost; and that all such hospital-homes shall be built in accordance with plans furnished or approved by the State Board of Charities and Public Welfare. (1931, c. 129, s. 7.)

§ 1343(i). Closing of county homes.—As soon as the district hospital-home is ready for occupancy the several county homes or poorhouses, heretofore owned by the several counties, shall be closed and occupants shall be transferred and located in the district hospital-home for the aged and infirm herein provided for. (1931, c. 129, s. 8.)

§ 1343(j). Superintendent and employees.—The board of trustees of the said district hospital-home shall elect a capable superintendent or matron, preferably a woman who is a trained nurse, and such other employees as it may deem necessary to the efficient management of said district hospital-home, and shall fix their salaries with due regard to number and condition of inmates occupying said district hospital-home. (1931, c. 129, s. 9.)

§ 1343(k). Meetings of trustees.—The board of trustees shall meet at least twice a year for the transaction of such business as their provisions may require. They shall have the general conduct and management of the district hospital-home's affairs. They shall meet at the call of the chairman whenever he shall deem it necessary, or upon call issued by a majority of the board. (1931, c. 129, s. 10.)

§ 1343(l). Purpose of special meetings set out in call.—The matter to be considered at any special meeting shall be set out in the call for the special meeting, but any business may be transacted at special meetings which received a two-thirds' vote of the entire board of trustees, although not mentioned in the call. (1931, c. 129, s. 11.)

§ 1343(m). Powers of trustees.—The board is vested with all powers not already mentioned which are possessed by boards supervising State institutions. (1931, c. 129, s. 12.)

§ 1343(n). Sending of inmates to institution.—The counties constructing, operating and maintaining a district hospital-home for the aged and infirm shall, as required by law now in force for the care and maintenance of those not able to care for themselves, send such person or persons to the district hospital-home for the aged and infirm in lieu of the county home if it appears to the commissioners and the superintendent of public welfare that such persons need institutional care. (1931, c. 129, s. 13.)

§ 1343(o). Annual report on affairs of institution.—As soon after the first day of January of each year as may be practicable the board of trustees shall cause a report to be made of the hospital-home, which report shall show the number of inmates, the county admitting them, date of admission, age, condition of health, sex, color, educational acquirements, diagnosis of disease if diseased, total number of inmates received during the year, average number cared for per month, names and disposition of those dismissed, pro rata cost of maintenance, the total amount of money expended, the total amount of money received from each county, and such information as the State Board of Charities and Public Welfare and the board of trustees of the district hospital-home may request. It shall also show an inventory and appraisement of property, real and personal, and give a strict account of receipts from farm and expenditure thereon, and such other information as may be required to check up the institution from all viewpoints. (1931, c. 129, s. 14.)

§ 1343(p). Copies of report to county commissioners.—A copy of the said report of the said board of trustees shall be furnished the county commissioners of the respective counties interested in and providing said district hospital-home. (1931, c. 129, s. 15.)

Art. 9. County Prisoners

§ 1344. Bonds of prisoner in criminal case returned to court.—Every bond taken of any person confined for an offense, or otherwise than on process issuing in a civil case, shall be returned to the court by whose order or process such person is confined, or which may be entitled to cognizance of the matter, and shall be of the force and effect of a recognizance. On breach thereof it shall be forfeited and collected as a forfeiture in the name and for the use of the state, and applied as other forfeited recognizances. (Rev., s. 1340; Code, s. 3467; R. C., c. 87, s. 12.)

Bond to Keep Prison Bounds.—A bond to keep the prison bounds need not be proved by the subscribing witness, for it must be deemed a record, so far as concerns proof of its execution. Wynn v. Buckett, 1 N. C. 93.

Discharge of Insolvent Discharges Sureties. — When a prisoner is discharged upon taking the insolvent debtor's oath, the sureties upon his bond to keep the prison rules are also thereupon discharged. Howard v. Pasteur, 7 N. C. 270.

A prisoner going out of the limits of the rules, after he was discharged as an insolvent debtor was lawful, although he was in close jail at the instance of another creditor. The order of liberation extends to discharge him from all imprisonment for debt. Howard v. Pasteur, 7 N. C. 270.

When Entitled to Jury Trial.—In a summary proceeding, by motion for judgment on a bond to keep the prison bounds, if the defendant plead matters of fact in pais, he is entitled to have them tried by a jury. Whitley v. Gaylord, 48 N. C. 286.

§ 1345. Bond of prisoner committed on capias in civil action.—Every bond given by any person committed in arrest and bail, or in custody after final judgment, shall be assigned by the sheriff to the party at whose instance such person was committed to jail, and shall be returned to the office of the clerk of the court where the judgment was rendered, and shall have the force of a judgment. If any person who obtains the rules of any prison, as aforesaid, escapes out of the same before he has paid the debt or damages and costs according to the condition of his bond, the court where the bond is filed, upon motion of the assignee thereof, shall award execution against such person and his sureties for the debt or damages and costs, with interest from the time of escape till payment; and no person committed to jail on such execution shall be allowed the rules of prison: Provided, the obligors have ten days previous notice of such motion, in writing; but they shall not be admitted to deny the making of the bond in their answer, unless by affidavit they prove the truth of the plea. (Rev., s. 1341; Code, s. 3469; R. C., c. 87, s. 14; 1759, c. 65, ss. 2, 3.)

Bond Has Force of Judgment.—This section gives to the bond the force of a judgment, and authorizes the party to have execution sued out thereon, upon mere motion, and the plaintiff cannot elect to treat it as a common deed. Brown v. Frazier, 5 N. C. 421, 422.

When Action Not Maintainable.—An action cannot be maintained upon a bond given by a person arrested upon a capias ad satisfaciendum, to keep within the limits of the rules of the prison. Brown v. Frazier, 5 N. C. 421.

§ 1346. Jailer to cleanse jail, furnish food and water.—The sheriff or keeper of any jail shall, every day, cleanse the room of the prison in which any prisoner is confined, and cause all filth to be removed therefrom; and shall also furnish the prisoner plenty of good and wholesome water, three times in every day; and shall furnish each prisoner fuel, not less than one pound of wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance. (Rev., s. 1343; Code, s. 3464; R. C., c. 87, s. 9; 1816, c. 911, s. 2.)

See 11 N. C. Law Rev., 172, for comment involving this section.

Cross References.—As to injury to prisoner by jailer, see sec. 4407; as to confining prisoners in improper apartments, see sec. 4408; as to what constitutes proper apartments, see sec. 1318; see generally annotations under sec. 1317.

§ 1347. Prisoner to pay charges and prison fees.—Every person committed by lawful authority, for any criminal offense or misdemeanor, shall bear all reasonable charges for guarding and carrying him to jail, and also for his support therein until released; and all the estate which such person possessed at the time of committing the offense shall be subjected to the payment of such charges and other prison fees, in preference to all other debts and demands. If there is no visible estate whereon to levy such fees and charges, the amount shall be paid by the county. (Rev., s. 1346; Code, s. 3461; R. C., c. 87, s. 6; 1795, c. 433, s. 7.)

§ 1348. Prisoner may furnish necessaries.—Prisoners shall be allowed to purchase and procure such necessaries, in addition to the diet furnished by the jailer, as they may think proper; and to provide their own bedding, linen and clothing, without paying any perquisite to the jailer for such indulgence. (Rev., s. 1344; Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6.)

This section permits prisoners to procure such additional comforts as their circumstances allow. Wilkes v. Slaughter, 10 N. C. 211, 221.

§ 1349. United States prisoners to be kept.—When a prisoner is delivered to the keeper of any jail by the authority of the United States, such keeper shall receive the prisoner, and commit him accordingly; and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid shall be subject to the same pains and penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state. The allowance for the maintenance of any prisoner committed as aforesaid shall be equal to that made for prisoners committed under the authority of the state. (Rev., s. 1342; Code, s. 3456; R. C., c. 37, s. 1; 1790, c. 322, ss. 1, 2.)

Authority of U. S. Commissioners.—By virtue of this section United States Commissioners have authority to commit prisoners to county jails. United States v. Harden, 10 Fed. 802, 807.

The Mittimus.—The mittimus must be directed to the marshal commanding him to convey the prisoner into the custody of the jailer, and it must also direct and command the jailer to receive the prisoner and keep him in close custody until discharged, or taken from his custody by some proper process of law. United States v. Harden, 10 Fed. 802, 807.

Same—Copy to Jailer.—The marshal must deliver a copy of such mittimus to the jailer as his authority to hold the prisoner. United States v. Harden, 10 Fed. 802, 807.

Jailer Should Have Written Authority.—A jailor ought never to receive a prisoner into his custody without some written authority to detain him, issued by a person having power to grant such authority, except under the order of

a court in session. United States v. Harden, 10 Fed. 802, 807.

Commitment Not Absolute.—This is not an absolute commitment, as the marshal can take the prisoner out of the custody of the jailer when it becomes necessary for him to complete the service of the capias by producing the body of the prisoner at the ensuing term of court. United States v. Harden, 10 Fed. 802, 807.

§ 1349(a). Arrest of escaped persons from penal institutions.—Upon information received from the superintendent of any correctional or any penal institution, established by the laws of the state, that any person confined in such institution or assigned thereto by juvenile or other court under authority of law, has escaped therefrom and is still at large, it shall be the duty of sheriffs of the respective counties of the state, and of any peace officer in whose jurisdiction such person may be found, to take into his custody such escaped person, if to be found in his county, and to cause his return to the custody of the proper officer of the institution from which he has escaped. (1933, c. 105, s. 1.)

§ 1350. Guard when escape apprehended; compensation.—When the sheriff of the county, or keeper of the jail, apprehends that there is danger of a prisoner escaping, through the insufficiency of the jail or other cause, it is his duty, without delay, to make information thereof to a judge of the superior court, the attorney-general, or a solicitor, if any of those officers is in the county, and if not, then to three justices of the peace, and they are authorized, if they deem it advisable, to furnish the sheriff or keeper of the jail with an order in writing, addressed to the commanding officer of the militia of the county, setting forth the danger, and requiring him forthwith to furnish such guard as to him may appear to be suitable for the occasion. For which service the persons ordered on guard shall receive such compensation as militiamen in actual service for defense of the state; and on application for pay, the letter to the commanding officer, on which the guard was ordered, and the certificate of such officer, countersigned by the sheriff or jailer, together with the deposition of the officer of the guard, stating the time of service, and that it was faithfully performed, shall be sufficient to authorize the payment of the same. (Rev., s. 1345; Code, s. 3460; R. C., c. 87, s. 5; 1795, c. 433, s. 8.)

A payment voluntarily made, with a knowledge of all the facts, cannot be recovered back, although there was no debt. This rule applies as well to a payment made by one corporation to another as to a payment by one individual to another. Board v. Board, 75 N. C. 240.

§ 1351. What counties liable for guarding and removing prisoners.—The expense for guarding prisons shall be paid by the county where the prison is situated; and for conveying prisoners, as also the expense attending such prisoners while in jail, when the same may be chargeable on the county, shall be paid by the county from which the prisoner is removed. (Rev., s. 1347; Code, s. 3462; R. C., c. 87, s. 7; 1808, c. 757, s. 2.)

When upon proper application, the commanding officer of a county is required to furnish the jailer with such guard as may be required for the safe-keeping of prisoners, the expenses of the guard so incurred are to be paid by the county from which the prisoners are removed. Board v. Board, 75 N. C. 240.

§ 1352. Transfer of prisoners to succeeding sheriff.—The delivery of prisoners, by indenture between the late and present sheriff, or the entering on record in court the names of the several prisoners, and the causes of their commitment, delivered over to the present sheriff, shall be sufficient to discharge the late sheriff from all liability for any escape that shall happen. (Rev., s. 1348; Code, s. 3470; R. C., c. 87, s. 15; 1777, c. 118, s. 12.)

§ 1353. Where no jail, sheriff may imprison in jail of adjoining county.—The sheriffs, constables, and other ministerial officers of any county in which there is no jail have authority to confine any prisoner arrested on process, civil or criminal, and held in custody for want of bail, in the jail of any adjoining county, until bail be given or tendered. And any sheriff or jailer having a prisoner in his custody, by virtue of any mode of commitment provided in this chapter, shall be liable, civilly and criminally, for his escape, in the same manner as if such prisoner had been confined in the prison of his proper county. (Rev., s. 1349; Code, s. 3459; R. C., c. 87, s. 4; 1835, c. 2, s. 3.)

§ 1354. Where no jail, courts may commit to jail of adjoining county.—Whenever there happens to be no jail, or when there is an unfit or insecure jail, in any county, the superior court judges, justices of the peace, and all judicial officers of such county may commit all persons brought before them, whether in a criminal or civil proceeding, to the jail of any adjoining county, for the same causes and under the like regulations that they might have ordered commitments to the usual jail; and the sheriffs, constables, and other officers of such county in which there is no jail, or an unfit one, and the sheriffs or keepers of the jails of the adjoining counties, shall obey any order of commitment so made. Any officer failing to obey such order shall be guilty of a misdemeanor. (Rev., s. 1350; Code, s. 3458; R. C., c. 87, s. 3; 1835, c. 2, s. 2.)

§ 1355. When jail destroyed, transfer of prisoners provided for.—When the jail of any county is destroyed by fire or other accident, any justice of the peace of such county may cause all prisoners then confined therein to be brought before him; and upon the production of the process under which any prisoner was confined shall order his commitment to the jail of any adjacent county; and the sheriff, constable, or other officer of the county deputed for that purpose, shall obey the order; and the sheriff or keeper of the common jail of such adjacent county shall receive such prisoners upon the order aforesaid. Any officer failing to obey such order of commitment shall be guilty of a misdemeanor. (Rev., s. 1351; Code, s. 3457; R. C., c. 87, s. 2; 1835, c. 2, s. 1.)

§ 1356. Counties and towns may hire out certain prisoners.—The board of commissioners of the several counties, within their respective jurisdictions, or such other county authorities therein as may be established, and the mayor and intendant of the several cities and towns of the state, have power to provide under such rules and regulations as they may deem best for the employment on the public streets, public highways, public works, or other labor for individuals or corporations, of all persons imprisoned in the jails of their respective counties, cities and towns, upon conviction of any crime or

misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace or for good behavior, and who fail to pay all the costs which they are adjudged to pay, or to give good and sufficient security therefor: Provided, such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court. The amount realized from hiring out such persons shall be credited to them for the fine and bill of costs in all cases of conviction. It is unlawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court before whom the trial is had shall in its judgment so authorize. (Rev., s. 1352; Code, s. 3448; 1866-7, c. 30; 1872-3, c. 174, s. 10; 1874-5, c. 113; 1876-7, c. 196, s. 1; 1879, c. 218.)

Editor's Note.—Before the enactment of this section, if one in jail in default of payment of fine and costs was not provided with some mode of discharge, he would remain therein indefinitely, or take the insolvent debtor's oath. But it was felt that some other mode of discharge should be provided, and that it was a serious and unjust charge upon the public, that these prisoners should be discharged without burden to themselves, leaving the public to bear the real punishment by paying the cost of their trial and conviction, and also that it was bad policy that prisoners sentenced to the county jail for crime should lie therein in idleness, supported at the expense of the taxpayers. The Legislature, therefore, deeming it had power to so legislate, formulated public opinion in an Act originally passed in 1866-'67, chap. 30, and which, after being several times amended, is now this section. This later Act must be read in connection with sec. 2967, and is, in effect, an amendment thereto. State v. White, 125 N. C. 674, 675, 681, 34 S. E. 532.

The Act of 6 March, 1867. c. 196, was without the concluding sentence of this section, which leaves it at the discretion of the trial court as to whether or not a convict shall be farmed out. In the February Term, 1878, of the Supreme Court, Rodman, J., delivering the opinion of the court in State v. James, 78 N. C. 454, points out the possibilities of mischief and evil of a provision, unrestrain in its terms, which authorizes the employment of convict labor by individuals or corporations. He suggested that the Legislature might see fit to amend the law, by leaving it to the judge to say, in his sentence, whether the prisoner may be hired out or not; or by allowing the hiring only when the prisoner shall be in prison for the non-payment of a fine.

It seems that the Legislature was attracted by this suggestion, and realizing the opening for evil under the existing law, passed the Amendatory Act of March 13, 1879, c. 218, which added as a third proviso, the last sentence of this section, substantially complying with Justice Rodman's suggestion. See State v. James, 78 N. C. 454; State v. Sneed, 94 N. C. 806.

Constitutionality.—The section is constitutional. State v. Young, 138 N. C. 571, 573, 50 S. E. 213; State v. Weathers, 98 N. C. 685, 4 S. E. 512; State v. Palin, 63 N. C. 471.

When Must Be Released.—A prisoner cannot be held beyond the time fixed by the court. State v. Williams, 97 N. C. 414, 416, 2 S. E. 370.

Same—When Farmed Out.—A prisoner may be discharged from commitment for the fine and cost by taking the pauper's oath though he has been farmed out under the provisions of this section. State v. Williams, 97 N. C. 414, 2 S. E. 270.

Does Not Apply to Employment on Public Works.—The provisions of the section forbidding the hiring out of convicts, unless the court before which such prisoner was convicted shall so authorize in its judgment, only applies to farming out convict labor to individuals and corporations, and does not extend to cases of convicts employed on public works, and under the supervision and control of public agents. State v. Sneed, 94 N. C. 806.

Prisoner Hired to Wife.—A man imprisoned in the county jail upon a conviction for fornication and adultery, may be hired out to his wife, under this section, upon her giving bond with sureties for the price. State v. James, 78 N. C. 464.

Court Not to Designate Kind or Place of Employment.—The section does not authorize the court to designate the employment, or where it shall be performed. That matter is left to the discretion of the county commissioners, under rules and regulations prescribed by them. State v. Norwood, 93 N. C. 578, 580.

§ 1357. Person hiring may prevent escape.—The party in whose service said convicts may be may use the necessary means to hold and keep them in custody and to prevent their escape. (Rev., s. 1353; Code, s. 3454; 1876-7, c. 196, s. 3.)

§ 1358. Sheriff to have control of prisoners hired out.—All convicts hired or farmed out by the county or other municipal authorities shall at all times be under the supervision and control, as to their government and discipline, of the sheriff, or his deputy, of the county in which they were convicted and imprisoned, and the sheriff, or his deputy, shall be deemed a state officer for the purpose of this section. (Rev., s. 1354; Code, s. 3453; 1876-7, c. 196, s. 2.)

§ 1359. Convicts who may be sentenced to or worked on roads.—When any county has made provision for the working of convicts upon the public roads, or when any number of counties have jointly made provision for working convicts upon the public roads, it is lawful for and the duty of the judge holding court in such counties to sentence to imprisonment at hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jail or in the state's prison, the following classes of convicts: First, all persons convicted of offenses the punishment whereof would otherwise be wholly, or in part, imprisonment in the common jail; second, all persons convicted of crimes the punishment whereof would otherwise, wholly or in part, be imprisonment in the state's prison for a term not exceeding ten years.

In such counties there may also be worked on the public roads, in like manner, all persons sentenced to imprisonment in jail by any magistrate; and also, all insolvents imprisoned by any court in said counties for nonpayment of costs in criminal causes may be retained in imprisonment and worked on the public roads until they repay the county to the extent of the half fees charged up against the county for each person taking the insolvent oath. The rate of compensation to be allowed each insolvent for work on public roads shall be fixed by the county commissioners at a just and fair compensation, regard being had to the amount of work of which each insolvent is capable. (Rev., s. 1355; 1887, c. 355; 1889, c. 419.)

Editor's Note.—The first paragraph of this section is the Act of 1887, c. 355, and refers exclusively to persons sentenced by the judge holding the courts of the county. The second paragraph is the Amendment of 1889, c. 419, which extends the section as to include persons sentenced by a magistrate, and all insolvents imprisoned for nonpayment of costs in criminal causes.

As to prisoners sentenced to jail for less than sixty days, see § 1297, subsection 31.

Constitutionality.—A sentence to work the public roads is constitutional and valid. State v. Smith, 126 N. C. 1057, 35 S. E. 615; State v. Weathers, 98 N. C. 685, 4 S. E. 512; State v. Haynie, 118 N. C. 1265, 24 S. E. 536.

A sentence of a defendant convicted of a misdemeanor to thirty days' imprisonment and that he be assigned to the commissioners to be "worked on the public roads of the county" during said term is valid under the section and Article XI, section 1, of the Constituton. State v. Young, 138 N. C. 571, 50 S. E. 213.

Judge's Duty.—When county has made provision for working convicts upon the public roads, it is the duty of the judge holding court in such county to sentence to imprisonment at hard labor on the public roads for such terms as are prescribed by law for imprisonment in the county jail. State v. Saunders, 146 N. C. 597, 598, 59 S. E. 695.

Presumption as to Enforcement. — Where judgment has

been rendered imposing such punishment, it will be presumed the county authorities have made the proper provisions for its enforcement. State v. Hicks, 101 N. C. 747, 7 S. E. 707.

An Incident of Sentence Proper.—The order of the commissioners directing the employment of a convict upon the public roads, and committing him to the custody of a superintendent of such public works, is not an additional sentence or judgment pronounced by the commissioners but an incident to the sentence properly imposed by the court in contemplation of which the prisoner committed the offense. State v. Yandle, 119 N. C. 874, 25 S. E. 796.

To Work Roads of Another County.—A sentence to work the public roads of another county is valid when authorized by statute. State v. Hamby, 126 N. C. 1066, 35 S. E. 614.

Half Fees Charged against County.—Where persons are imprisoned for nonpayment of cost, they are to be detained only until they repay the county to the extent of the "half fees charged up against it," thus showing that the Legislature recognized the liability of the county in such cases only for half fees. State v. Saunders, 146 N. C. 597, 599, 59 S. E. 695.

Escape. — Where a prisoner confined in the public jail was used by the county authorities to work on the public roads, the person in charge of him was guilty of an escape for negligently allowing such person to make his escape. State v. Sneed, 94 N. C. 806.

Classes of Prisoners Section Not Applicable to.—This section does not include among those authorized to be worked upon the roads those "sentenced to the house of correction," nor does it include those who fail "to give bond for maintenance of a bastard," nor for "failure to pay costs," except "those imprisoned for nonpayment of costs in criminal causes." State v. Morgan, 141 N. C. 726, 53 S. E. 142.

Husband Convicted of Abandonment.—A husband convicted of abandonment under section 4447 of this code, and other offenses of like kind, may be assigned to work on the roads during his term. State v. Faulkner, 185 N. C. 635, 116 S. E. 168.

Prisoners Convicted for Affray and Assault.—In State v. Weathers, 98 N. C. 685, 4 S. E. 512, upon conviction for an affray and mutual assault, the court pronounced judgment that "the convicted defendants be put to work on the public roads by the county commissioners," and the judgment was affirmed. The court said, speaking through Smith, C. J., at p. 688: "The form of the sentence is fully warranted in the recent Act regulating the working of convicts on the public roads (Laws 1887, ch. 355), which directly warrants the judgments, and places convicts sentenced to imprisonment and hard labor on the public roads under the control of the county authorities, investing them with power to enact all useful rules and regulations for the successful working of all convicts upon said public roads." State v. Young, 138 N. C. 571, 573, 50 S. E. 213. To the same effect is State v. Pearson, 100 N. C. 414, 6 S. E. 387; State v. Haynie, 118 N. C. 1265, 24 S. E. 536.

Prisoner Convicted for Bastardy.—The Supreme Court declared in Myers v. Stafford, 114 N. C. 234, 19 S. E. 764, that bastardy having become a "petty misdemeanor," a defendant convicted of that offense may, under the authority of section 3448, be put to work on the public road until the fine and costs are paid. State v. Young, 138 N. C. 571, 573, 50 S. E. 213.

Convicted for Assualt and Battery with Deadly Weapon.—State v. Yandle, 119 N. C. 874, 25 S. E. 796, was a conviction for an assault and battery with a deadly weapon, and the Supreme Court held that one legally convicted of any crime or misdemeanor may be, under the authority of this section, sentenced to work upon the public roads. This was cited and approved in Herring v. Dixon, 122 N. C. 420, 425, 29 S. E. 368. State v. Young, 138 N. C. 571, 573, 50 S. E. 213.

§ 1360. Deductions from sentence allowed for good behavior.—When a convict has been sentenced to work upon the public roads of a county, and has faithfully performed the duties assigned to him during his term of sentence, he is entitled to a deduction from the time of his sentence of five days for each month, and he shall be discharged from the county roads when he has served his sentence, less the number of days he may be entitled to have deducted. The authorities having him in charge shall be the sole judges as to the faithful performance of the duties assigned to him. Should he escape or attempt to escape he shall forfeit and lose any deduction he may have been entitled to prior to that time. This section shall apply also to women sentenced to a county farm or county home. (1913, c. 167, s. 1.)

§ 1361. Convicts sentenced to roads to be under county control.—The convicts sentenced to hard labor upon the public roads, under second section preceding, shall be under the control of the county authorities, and the county authorities have power to enact all needful rules and regulations for the successful working of convicts upon the public roads. The county commissioners may work such convicts on the public roads or in canaling the main drains and swamps or on other public work of the county. (Rev., s. 1356; 1887, c. 355, s. 2; 1891, c. 164.)

In the absence of rules and regulations made and promulgated by the county commissioners permitting it, a guard has no legal right or authority to whip convicts in his care or custody. State v. Nipper, 166 N. C. 272, 441, 81 S. E. 462.

§ 1362. When sentenced to state's prison in lieu of roads.—In all cases where the judge presiding is satisfied that there is good reason to fear that an attempt might be made to release or to injure any person convicted of any of the offenses mentioned in the second class [section 1359] it is lawful for the judge to sentence such convicts to imprisonment in the state's prison, as is now provided by law: Provided, that no person who has been convicted and sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson, shall be assigned to county roads under this chapter. (Rev., s. 1357; 1887, c. 355, s. 4.)

§ 1363. State's prison to furnish convicts to county roads.—In addition to the convicts mentioned in section one thousand three hundred and fifty-nine, the board of directors of the state's prison is authorized and directed to furnish to the authorities of any county within the state, convicts, not exceeding twenty-five in number during any one year, for the purpose of working the public roads in said county. The said convicts shall be at all times under the supervision and control as to their government and discipline of the board of directors of the state's prison as in case of hiring convicts to railroad companies. Any county applying for convicts under this article shall erect suitable stockades for their safekeeping and protection, and shall pay the expense of their transportation from and to the state's prison. (Rev., s. 1358; 1887, c. 355, s. 5.)

§ 1364. Taxes may be levied for expenses of convicts.—The board of county commissioners of the several counties in the state taking advantage of this chapter shall levy a special tax annually as other taxes are levied for the purpose of paying the expenses of said convicts, building of stockades, etc., and the expenses shall be paid by the counties taking advantage of this article. (Rev., s. 1359; 1887, c. 355, s. 6.)

Art. 9A. District Prison Farm

§ 1364(a). Two or more adjacent counties may establish; trustees.—That any two or more adjacent counties may, by action of said commis-

sioners in said counties, as hereinafter provided, establish a district prison farm, to be located at some suitable place in the counties composing the district, location and purchase to be controlled by a board of trustees appointed by the county commissioners of the respective counties owning and controlling said district prison farm, each county to have one trustee. Where only two counties enter the district, the commissioners of the counties concerned shall jointly elect one additional trustee. (1931, c. 142, s. 1.)

§ 1364(b). Appointment of trustees; vacancies; expenses and compensation.—The several boards of county commissioners shall, as soon as they shall have agreed among themselves to establish a district prison farm for their counties, appoint the members of the board of trustees, which board shall be known as the board of trustees of the district comprising ....., ..., ... counties; the members of said boards of trustees shall be appointed every two years, and until their successors are chosen and qualified; all vacancies shall be filled by the several boards of county commissioners and said commissioners shall provide for the expense and compensation of said board of trustees. (1931, c. 142, s. 2.)

§ 1364(c). Organization meeting; purchase of site; equipment; separation of races and sexes.—The board of trustees shall, as soon as possible, and not later than sixty days after appointment, meet and organize by electing a chairman and secretary. They shall proceed promptly with the purchase of a farm of suitable size, location and fertility, giving due consideration to sanitary surroundings and transportation facilities. They shall provide for the necessary stock, tools, and farm equipment, and shall cause to be erected suitable buildings for the housing, detention and keeping the prisoners assigned to said district farm, due regard being given to the separation of the sexes and races and such other plans for segregation as their judgment and existing conditions may suggest. (1931, c. 142, s. 3.)

§ 1364(d). Proportion of payment among counties.—The several counties shall pay for the site and for the construction and equipment of the prison farm in proportion to the taxable property of the several counties, and shall own the same in the same proportion, but the operating expense shall be borne by the said counties in proportion to the population of the several counties. (1931, c. 142, s. 4.)

§ 1364(e). Election of superintendent and employees; regulations for working prisoner. — The said board of trustees of said district prison farm shall elect a capable superintendent and such other employees as it may deem necessary for the efficient management of said farm and shall make rules and regulations for the working of all prisoners sentenced to said farm to the end that the said district prison farm shall be as near self-supporting as practicable. (1931, c. 142, s. 5.)

§ 1364(f). Meetings of trustees.—The board of trustees of said district prison farm shall meet at said farm at least twice each year for the transaction of such business as may come before them. They shall meet at other times on the call of the chairman or on a call by a majority of the board of trustees. (1931, c. 142, s. 6.)

§ 1364(g). Notification to boards of commissioners and courts of readiness of farm.—That as soon as said prison farm is purchased and the necessary building erected thereon and the farm equipped with stock, tools, etc., the board of trustees of said district prison farm shall notify the boards of commissioners of the several counties, and the said boards of commissioners, upon receipt of said notice, shall promptly notify each and every court in the several counties, including superior courts, recorders' courts and all other courts which are now operating or may hereafter be established in said counties that the prison farm is ready. (1931, c. 142, s. 7.)

§ 1364(h). Assignment of prisoners to work on farm.—From and after receipt of the information set out above, it shall be the duty of the judges, recorders and other presiding officers of the several courts in said counties, to assign all prisoners sentenced by them to the county jails or to the roads, to the said district prison farm. (1931, c. 142, s. 8.)

§ 1364(i). Bonds and notes for payment for farm; maximum levy.—The several counties of said district are hereby authorized to provide for the payment of their proportionate part of said farm and equipment by the sale of notes or bonds as provided in the County Fiscal Act and to provide for payment of said bonds and notes by the levy of such tax as may be necessary for said purpose: Provided, not more than a levy of ten cents on the one hundred dollars valuation shall be levied any one year in any county. (1931, c. 142, s. 9.)

§ 1364(j). Yearly report of operations.—The said board of trustees shall cause to be made a detailed report of the operations of said district prison farm each year not later than January tenth each year and shall send a copy of said report to the several boards of county commissioners. (1931, c. 142, s. 10.)

Art. 10. Houses of Correction

§ 1365. Commissioners may establish houses of correction.—The board of commissioners may, when they deem it necessary, establish within their respective counties one or more convenient institutions to be known as houses of correction, or, in the discretion of the board of commissioners, as training schools, municipal farms, or juvenile farms, with workshops and other suitable buildings for the safekeeping, correcting, governing, and employing of offenders legally committed thereto. They may also, to that end, procure machinery and material suitable for such employment in said institutions, or on the premises; and moreover attach thereto a farm or farms; and all lands purchased for the purposes aforesaid shall vest in the directors hereinafter provided for, and their successors in office. The said board also has power to make, from time to time, such rules and regulations as it may deem proper for the kind and mode of labor and the general management of the said institutions. (Rev., s. 1360; Code, s. 786; 1866, c. 35, s. 1; 1919, c. 273, s. 1.)

When Entitled to Discharge.—A convict is entitled to be discharged from imprisonment for the nonpayment of a fine

and costs, upon taking the insolvent debtor's oath. State v. Williams, 97 N. C. 414, 2 S. E. 370.

Escape when Prisoner Illegally Committed.—It was error to quash an indictment against an officer for an escape upon the ground that the judgment against the prisoner committed to his charge was illegal. State v. Garrell, 82 N. C. 581.

§ 1366. Who must or may be committed to such institutions.—It shall be the duty of the judges of the criminal courts and other committing magistrates of such county or counties to sentence or commit thereto all youthful offenders of the age of sixteen years and under, convicted of any crime or misdemeanor whereof the punishment by statute prescribes a fine or sentence of imprisonment or working the roads. Said judges and committing magistrates may also sentence thereto any female prisoners and such other offenders convicted of misdemeanors who by reason of physical infirmities or mental deficiencies ought not to be imprisoned in the county jail or worked on the public roads. Nothing herein shall be construed to prevent the working at light labor of any partially disabled or infirm convict, or female prisoner, on or about any of the public works, buildings, or grounds in any such county, at and upon the request of the board of county commissioners, with the approval of the court or committing magistrate. (1919, c. 273, s. 1.)

As to hearing as to disposition of child, see section 5048.

§ 1367. Levy of taxes authorized; to be paid to manager.—The board of commissioners, in addition to the ordinary county taxes, shall also, at the time said taxes are laid, lay such tax as may be necessary to carry into effect this article, which shall be collected and paid to the manager at the same time as other county taxes are to be paid; for which, and such other funds as may come into his hands as manager, he shall be accountable; and he shall disburse the same under the authority of the directors. (Rev., s. 1361; Code, s. 790; 1866, c. 35, s. 5.)

§ 1368. Bonds may be issued.—The board of commissioners may, if deemed advisable by them, issue county bonds to raise money to establish the institutions herein provided for. (Rev., s. 1362; Code, s. 796; 1866, c. 35, s. 11.)

§ 1369. Governor to be notified of establishment.—When any institution is established in pursuance of this article, it is the duty of the chairman of the board of commissioners of the county wherein the same is established to certify the fact to the governor, who shall cause it to be noted in a book kept for that purpose. (Rev., s. 1363; Code, s. 797; 1866, c. 35, s. 12.)

§ 1370. Directors to be appointed; duties.—The board of commissioners shall annually appoint not less than five nor more than nine directors for each such institution hereunder established, whose duty it is to superintend and direct the manager hereinafter named in the discharge of his duties; to visit said houses at least once in every three months; to see that the laws, rules and regulations relating thereto are duly executed and enforced, and that the persons committed to his charge are properly cared for, and not abused or oppressed. The directors shall keep a journal of their proceedings, and publish annually an account of the receipts and expenditures. They shall further make a quarterly report to their respective county commissioners of the general condition of their charge, and of the receipts and expenditures of the institution. They shall also make such by-laws and regulations for the government thereof as shall be necessary, which shall be reported to, and approved by, the said commissioners. The directors shall be paid for the services rendered, by the county treasurer, each director first making it appear to the satisfaction of the board of county commissioners, by his oath, the character and extent of the services rendered for which he claims compensation; and such payment shall be made by the county treasurer out of any funds in his hands not otherwise appropriated. (Rev., s. 1364; Code, s. 787; 1866, c. 35, s. 2.)

§ 1371. Term of office of directors.—The directors shall continue in office until others are appointed; and if any vacancy happens among them, it shall be filled by the residue of the directors. (Rev., s. 1365; Code, s. 795; 1866, c. 35, s. 10.)

§ 1372. Manager to be appointed; bond; duties.—The board of commissioners shall appoint a manager for each house or establishment, who shall give a bond, with two or more solvent sureties, in such sum as may be required, payable to the state of North Carolina, conditioned for the faithful discharge of his duties. He shall, hold his office during the pleasure of the board, and be at all times under the supervision of the directors; and in case of his misconduct, of which they shall be the sole judges, he may be forthwith removed by them and a successor appointed, who shall discharge the duties of the office until another manager is appointed by the board of commissioners. It is the duty of the manager to receive all persons sent to the house of correction, to keep them during the time of their sentence, and to employ and control them according to the rules and regulations established therefor. He shall have the direction and control over the subordinate officers, assistants and servants, who may be appointed by the directors. He shall make monthly reports to the directors of his management of the institution and his receipts and expenditures. (Rev., s. 1366; Code, s. 788; 1866, c. 35, s. 3.)

§ 1373. Manager to assign employment to inmates.—The manager shall assign to each person sent to such institution the kind of work in which such person is to be employed. (Rev., s. 1367; Code, s. 794; 1866, c. 35, s. 9.)

§ 1374. Compensation of officers.—The said board of commissioners shall direct what compensation the manager and such subordinate officers, assistants and servants, as shall be appointed, shall receive, and shall provide for the payment thereof. (Rev., s. 1368; Code, s. 789; 1866, c. 35, s. 4.)

§ 1375. Sheriff to convey persons committed.—When a person is sentenced to such institution he shall forthwith be committed by the court to the custody of the sheriff, to whom the clerk shall immediately furnish a certified copy

of the sentence, in which it shall be stated (if the fact be so) that the offender is committed as a vagrant. The sheriff shall convey the offender to the institution, and deliver him to the manager with the certified copy aforesaid, and take the manager's receipt for the body; which receipt the sheriff shall return to the clerk of the board of commissioners, with his indorsement of the time when the offender was committed to him and delivered to the manager, and the clerk shall record the same in a book kept for that purpose, and file the original with the papers in the case. (Rev., s. 1369; Code, s. 793; 1866, c. 35, s. 8.)

§ 1376. Absconding offenders punished.—If any offender absconds, escapes, or departs from any such institution without license, the manager has power to pursue, retake and bring him back, and to require all necessary aid for that purpose; and when brought back, the manager may confine him to his work in such manner as he may judge necessary, or may put him in close confinement in the county jail or elsewhere, until he submits to the regulations of such institution; and for every escape each offender shall be held to labor in such institution for the term of one month in addition to the time for which he was first committed. (Rev., s. 1370; Code, s. 791; 1866, c. 35, s. 6; 1919, c. 273, s. 2.)

§ 1377. Release of vagrants.—If a person committed as a vagrant behaves well and reforms, he may, on the certificate of the manager, be released by the directors. But if otherwise committed, he may be released by the committing authority, upon the certificate of the manager and directors, upon such conditions as they may deem proper. (Rev., s. 1371; Code, s. 792; 1866, c. 35, s. 7.)

§ 1378. Suits in name of county.—All suits brought on behalf of the institution shall, unless it be otherwise prescribed, be brought in the name of the county, to the use of the directors of the institution, without designating such directors by name. (Rev., s. 1372; Code, s. 798; 1866, c. 35, s. 13.)

§ 1379. Counties may establish joint house of correction.—Any two or more counties, acting through their respective boards of commissioners, may jointly establish one or more convenient houses of correction, as is provided in the preceding sections, for the joint use of the counties so agreeing together; and the same may be established at such place or places, and be in all respects managed under such by-laws, rules and regulations as a majority of the general board of directors, to be appointed as hereinafter directed, shall determine. (Rev., s. 1373; Code, s. 799; 1866-7, c. 130, s. 1.)

§ 1380. Directors of joint house of correction.—The board of commissioners of each of the respective counties agreeing as aforesaid to the establishment of one or more houses of correction for use jointly with any other county or counties shall annually appoint not less than three nor more than five directors in behalf of their several counties, and the directors so appointed by each of such counties shall together constitute the general board of directors of any such joint establishment. (Rev., s. 1374; Code, s. 800; 1866-7, c. 130, s. 2; 1919, c. 273, s. 3.)

§ 1381. Directors to appoint manager; bond; term; duties.—Said general board of directors shall appoint a manager or superintendent for every such joint establishment, and such assistants and servants as they may deem necessary. The manager shall give bond with two or more able sureties, to be approved by said board, in such sum as may be required, payable to the state of North Carolina, and conditioned for the faithful performance of his duties. He shall hold his office during the pleasure of the general board of directors, and be, at all times, under their supervision; and of his misconduct they shall be the sole judges, and they may at any time remove him. He shall perform all such duties as may be prescribed by such general board of directors, and all such as may be incident to the office of manager by virtue of this chapter. (Rev., s. 1375; Code, s. 801; 1866-7, c. 130, s. 3.)

§ 1382. Compensation of manager and other officers.—The compensation of the manager and such subordinate officers, assistants and servants as may be appointed by the general board shall be fixed by said general board. (Rev., s. 1375; Code, s. 801; 1866-7, c. 130, s. 3.)

§§ 1382(a)-1382(i): Repealed by Acts 1925, c. 218.

Editor's Note.—Chapter 218 of the Laws of 1925 repealed Article 11, sections 1382(a)-1382(i), relating to the examination of county officers and officers by the State Auditor. These sections were all of chapter 236 of the Public Laws of 1921.

Art. 11. Consolidation, Annexation and Joint Administration of Counties

§ 1382(1). Contiguous counties may consolidate into one.—Any two or more counties which are contiguous, or which lie in a continuous boundary may, in the manner herein prescribed, consolidate so as to form a single county. Where any group of counties so situated desires to effect such consolidation, a uniform resolution to this effect, setting forth the name of the proposed new county, shall be adopted by the governing bodies thereof, which resolution shall call a special election to be held on a specified date which shall be the same in all of said counties but not less than sixty nor more than ninety days from the last date of the adoption of such resolution in any of said counties. Said resolution shall also specify what group of counties it is proposed to consolidate, the name of the new county thus to be formed, and the county seat thereof. The governing body of each of said counties shall cause said resolution to be printed in some newspaper published therein, once a week for a period of six weeks prior to the date of said election. (1933, c. 193, s. 1.)

See 11 N. C. Law Rev., 213.

§ 1382(2). Election laws applicable.—The election thus called shall be held in each of said counties and shall be conducted pursuant to the general election laws governing elections for members of the general assembly. The registration books shall be kept open in each of said counties for a period of twenty consecutive days prior to

said election, and notice of such registration shall be advertised and registrars appointed in the manner now prescribed by law governing elections for members of the general assembly. Citizens of said counties who are registered and are otherwise qualified to vote shall be entitled to vote in said election in their respective counties for the purpose of determining whether it is the will of such voters that the proposed consolidation be effected. For use in said election the county board of elections in each of said counties shall cause to be printed and provided at each polling place a sufficient number of ballots on which shall be printed the following:

☐ For Consolidation
☐ Against Consolidation

Place a cross (x) mark in the square preceding the proposition for which you desire to vote.

All such ballots shall have printed on the back thereof the facsimile of the signatures of the members of the county board of elections of the county in which they are being used, and none other than such official ballots shall be valid for use in said election. As soon as practicable the county board of elections in each of said counties shall certify the result of said election to the governing bodies of all of the counties in said group, and each governing body shall cause the complete results of said election to be spread of record upon their respective minutes. If it appear that a majority of those voting in each of said counties voted in favor of the proposed consolidation, then said consolidation shall be declared to be in effect, and thereupon, the several counties shall stand abolished except as hereinafter provided, and the new county thus created shall for all purposes be constituted one of the counties of this state with all the rights, powers, and functions incident thereto under the general laws. If it appear that a majority in any one of said counties voted against the proposed consolidation, then said consolidation shall be declared to have failed for all purposes. (1933, c. 193, s. 2.)

§ 1382(3). New county board of elections.—In case such consolidation be effected, the county boards of elections of the counties thus consolidated, acting together as one board, shall for the time being serve as a temporary county board of elections for the new county thus created, until the expiration of the terms for which they were appointed by the state board of elections. Thereafter the state board of elections shall appoint for such new county a county board of elections consisting of three members, in the manner and for the term now prescribed by law. (1933, c. 193, s. 3.)

§ 1382(4). Special election for new county officers.—In case such consolidation be effected, then said temporary county board of elections shall immediately call and shall hold a special election in such new county, on a date not less than forty-five nor more than sixty days after the date on which said consolidation was voted into effect, for the purpose of electing for said new county all constitutional and other county and township officers, except justices of the peace, as now provided by law for counties throughout the state, including a board of county commissioners consisting of five members. No elections shall be held to fill any office theretofore existing in one or more of the group of counties thus consolidated if such office did not exist in each of said counties, but all of such offices peculiar to only a part of the counties brought into said consolidation shall be deemed abolished in respect to the new county. All constitutional county and township offices, all offices created for counties and townships by general laws, and all other offices in the group of counties thus consolidated, provided they existed in each of said counties, are hereby created for the new county effected by such consolidation, with the same rights, powers, duties and functions pertaining to such offices under the existing law. In order that elections by townships may be conducted, the various township lines and names as they existed before consolidation shall continue in effect, and townships of the several counties shall be deemed townships of the new county until thereafter altered in the manner prescribed by law. (1933, c. 193, s. 4.)

§ 1382(5). Term of new officers; salaries.—All officers elected for the new county at said special election shall hold office until the next general election at which time their successors shall be elected for the regular term prescribed by law. The salaries of all officers elected for the new county at said special election shall be the same as those now fixed by law for such offices. In case the salaries of any officers in the counties thus consolidated were not uniform, then any officer elected for the new county at such special election shall be entitled to a salary equal to the highest salary paid for that particular office in any of said counties before such consolidation was effected. (1933, c. 193, s. 5.)

§ 1382(6). Retention of old officers till qualification of new.—Notwithstanding such consolidation is voted upon favorably, all the existing officers in each of said counties shall continue to function as theretofore and shall have full authority to carry on the regular business of their respective counties, receiving their regular compensation therefor, until the officers for said new county shall have been elected and are qualified, as provided in section 4 hereof; and pending said election and the organization of the government of the new county, the several counties thus consolidated shall, for the purpose of carrying on their regular business, continue to exist and to function as separate county governments as fully as if said consolidation had never been voted upon. As soon as the officers for said new county are elected and qualified, then all public offices in the separate counties thus consolidated shall stand abolished and said separate counties shall stand dissolved and shall cease to exist for any and all purposes. (1933, c. 193, s. 6.)

§ 1382(7). Powers and duties of new officers.—All officers elected for the new county shall become vested with all the rights, powers, duties, and functions which pertained to their respective offices in any one of the counties thus consolidated. It shall be the duty of all public officers theretofore serving in each of said counties forthwith to surrender and turn over to the corresponding officers of the new county all books, records,

funds, and other property held by them in their respective offices. Said new county shall become vested with title to all property of every kind and character, real, personal and mixed, theretofore belonging to each of said counties and shall have full power to collect and disburse any and all taxes, penalties, and other charges which had been assessed by or had become due to said counties prior to such consolidation. (1933, c. 193, s. 7.)

§ 1382(8). Transfer of books, records, etc.—All records, papers, files, funds, and the like held by the clerks of courts in any of said counties shall forthwith be turned over to corresponding officials in the new county, who shall docket all suits and proceedings in order that the same may be carried on under the regular legal procedure. Wherever counties thus consolidated lie in different judicial districts, the new county thus established shall become a part of that judicial district in which the larger portion of its territory lies. (1933, c. 193, s. 8.)

§ 1382(9). Liability for bonded indebtedness.—Any such new county thus established shall be liable for all of the bonded and other indebtedness of the separate counties so consolidated, and any and all rights which might have been enforced against any of said counties may be enforced against said new county as fully as though the proceeding were against the county originally liable. (1933, c. 193, s. 9.)

§ 1382(10). Justices of the peace and constables.—All justices of the peace and constables holding office at the time of such consolidation shall continue to serve as such in and for the new county thus established until the expiration of the terms for which they were elected or appointed, at which time, justices of the peace and constables may be elected and appointed for said new county in the manner now provided by law. Such consolidation shall in no wise effect the validity of any proceeding pending in the court of any justice of the peace in said counties. (1933, c. 193, s. 10.)

§ 1382(11). Representation in general assembly.—In the event such consolidation be thus effected, the consolidated county thereafter shall be entitled to the same representation in the house of representatives theretofore had by the several counties so consolidated until the next re-apportionment of the membership of the house of representatives by the general assembly. Nor shall such consolidation affect the existing lines of state senatorial or congressional districts or the representation therein. (1933, c. 193, s. 10½.)

§ 1382(12). Merging of one contiguous county with another authorized.—Wherever two counties are contiguous, and it is their mutual desire that one of said counties shall be annexed to and merged in the other, such annexation may be effected in the manner herein prescribed. The governing body of each of said counties shall adopt a uniform resolution setting forth the willingness of one of said counties to become annexed to and merged in the other pursuant to the authority of this act. Said resolution shall also call for a special election to be held on a specified date which shall be the same in both counties but not less than sixty nor more than ninety days from the last date on which said resolution was adopted in either of said counties. The governing body of each of said counties shall cause said resolution to be printed in some newspaper published therein once a week for a period of six weeks prior to the date of said election. (1933, c. 194, s. 1.)

The proceeding for annexation is the same as in consolidation, but when it is complete, the county annexed ceases to exist and becomes a part of the other county. The liability of the annexing county for the indebtedness of the annexed county is to be determined in the beginning, when the plan of annexation is submitted. 11 N. C. Law Rev., 213.

§ 1382(13). Election laws applicable. — The election thus called shall be held in each of said counties and shall be conducted pursuant to the general election laws governing elections for members of the general assembly. The registration books shall be kept open in each of said counties for a period of twenty consecutive days prior to said election, and notice of such registration shall be advertised and registrars appointed, in the manner now prescribed by law governing elections for members of the general assembly. Citizens of said counties who are registered and are otherwise qualified to vote shall be entitled to vote in said election in their respective counties for the purpose of determining whether it is the will of such voters that the proposed annexation be effected. For use in said election the county board of elections in each of said counties shall cause to be printed and provided at each polling place a sufficient number of ballots on which shall be printed the following:

☐ For Annexation
☐ Against Annexation

Place a cross (x) mark in the square preceding the proposition for which you desire to vote.

All such ballots shall have printed on the back thereof the facsimile of the signatures of the members of the county board of elections of the county in which they are being used, and none other than such official ballots shall be valid for use in said election. As soon as practicable the county board of elections in each of said counties shall certify the results of said election to the governing body of both counties, and thereupon, the governing body of each county shall cause the results of the said election in both counties to be spread of record upon their respective minutes. If it appear that a majority of those voting in each of said counties voted in favor of the proposed annexation, then said annexation shall be declared to be in effect. If it appear that a majority of those voting in either of said counties voted against the proposed annexation, then said annexation shall be declared to have failed for all purposes. (1933, c. 194, s. 2.)

§ 1382(14). Dissolution of county merged. — In the event such annexation shall be voted upon favorably in each of said counties, then the county which was voted to be annexed to the other shall thereupon stand dissolved and abolished, and its territory thereby shall be transferred to and for all purposes shall become a part of the annexing county, and townships of the annexed county shall be deemed townships of the annexing county un-

til thereafter altered in the manner prescribed by law. (1933. c. 194, s. 3.)

§ 1382(15). Abolition of offices in merged county; transfer of books, records, etc. — In the event such annexation be thus effected, all public offices except those of justice of the peace and constable, in the county so annexed, shall stand abolished, and it shall be the duty of those who held such offices before annexation to turn over to the corresponding officers of the annexing county all books, records, funds, and other property theretofore held by them in their official capacity, and said corresponding officers of the annexing county shall be vested with all the rights of said offices thus abolished, and shall be entitled to the custody and control of all books, records, funds, and other property formerly held by the incumbents of such abolished offices. (1933, c. 194, s. 4.)

§ 1382(16). Court records transferred; justices of the peace and constables hold over.—In the event such annexation be thus effected, all records, papers, files, funds, and the like held by clerks of courts in the annexed county shall forthwith be turned over to corresponding clerks in the annexing county, who shall docket all suits and proceedings in order that the same may be carried on under the regular legal procedure. All justices of the peace and constables holding office in the annexed county at the time of such annexation shall continue to serve as justices of the peace and constables of the annexing county in and for the new township, until the expiration of the terms for which they were elected or appointed, in as full a measure as if such annexation had not occurred, and the validity of proceedings pending before such justices of the peace at the time of annexation shall in no wise be affected thereby. Upon the expiration of their terms, justices of the peace and constables shall be elected or appointed in such annexed territory in the manner prescribed by law. Any other officers provided by the general law for a township shall be elected in the new territory at the next general election following such annexation. (1933, c. 194, s. 5.)

§ 1382(17). Rights of annexing county.—In the event such annexation be thus effected, the annexing county shall forthwith:

(a) Become vested with title to all property of every kind and character, real, personal and mixed, theretofore belonging to the annexed county, and shall have full power to collect and disburse any and all taxes, penalties and other charges which had been assessed by or had become due to the annexed county prior to such annexation. Said annexing county shall also be liable for all bonded and other indebtedness of the annexed county, and any and all rights which might have been enforced against said annexed county may be enforced against the annexing county as fully as though the proceeding had been against the county thus annexed;

(b) Said annexing county shall treat said annexed county as a township or division of said annexing county, and said annexing county shall forthwith be vested with title to all property of every kind and character, real, personal and mixed, belonging to said annexed county, and have full power to collect any and all taxes, penalties and other charges which have been assessed by or become due to the annexed county prior to the annexation, and shall disburse the same for the payment of obligations of said annexed county; and the bonded indebtedness of said annexed county shall be a charge only on the property of the township or division of said annexing county which was comprised in the annexed county, and taxes for the payment of same shall be levied only on property within said township or division. And the property in said township or division constituting the property in the annexed county shall not be liable for any of the bonded or other indebtedness of the county annexing it, existing prior to said annexation, and no taxes shall be levied on the property of said township for the payment of same. (1933, c. 194, s. 6.)

§ 1382(18). Plan of government.—At the time of entering the resolutions as set out in section 1382(12), the counties in said resolution shall specifically provide whether plan A or plan B, as set out in section 1382(17) shall govern the two counties as to the bonded indebtedness. (1933, c. 194, s. 7.)

§ 1382(19). Membership in general assembly.—In the event such annexation be thus effected, the annexing county thereafter shall be entitled to the same representation in the house of representatives theretofore had by the annexed and annexing counties until the next reapportionment of the membership of the house of representatives by the general assembly. Nor shall such annexation affect the existing lines of state senatorial or congressional districts or the representation therein. (1933, c. 194, s. 7½.)

§ 1382(20). Joint administrative functions of contiguous counties.—Any two or more counties which are contiguous or which lie in a continuous boundary are authorized, whenever it is deemed for their best interests, to enter into written agreements for the joint performance of any and all similar administrative functions and activities of their local governments through consolidated agencies, or by means of institutions or buildings jointly constructed, owned and operated.

Such written agreement shall set forth what functions or activities of local government shall thus be jointly carried on, and shall specify definitely the manner in which the expenses thereof shall be apportioned and how any fees or revenue derived therefrom shall be apportioned. Upon such agreement being ratified by the governing bodies of the counties subscribing thereto, it shall be spread upon their respective minutes.

Whenever any such agreement has been entered into, then the consolidated agency or institution set up to function jointly for the counties which are parties thereto, shall be vested with all the powers, rights, duties and functions theretofore existing by law in the separate agencies so consolidated.

No such agreement shall be entered into for a period of more than two years from the date thereof, but such agreements may be renewed for a period not exceeding two years at any one time.

In the same manner and subject to the same provisions as herein set out, any municipality may

enter into such an agreement with the county in which it is situated, or may join with other municipalities in the same county in making such an agreement with said county, to the end that the functions of local government may, as far as practicable, be consolidated, provided this section shall not apply to Guilford county or the municipalities in said county.

It is the purpose of this section to bring about efficiency and economy in local government through a consolidation of administrative agencies thereof, and to effectuate this purpose this section shall be liberally construed. (1933, c. 195, s. 1.)

See 11 N. C. Law Rev., 213, for a brief summary of this section.

CHAPTER 25

COUNTY SURVEYOR

§ 1383. Election and term of office.—There shall be elected in each county, by the qualified voters thereof, as provided for the election of members of the general assembly, a county surveyor, who shall hold office for the term of two years. Const., Art. 7, s. 1; Rev., s. 4296.)

Cross References. — As to induction into office by the county commissioners, see subsection 12 of section 1297; as to power of county commissioners to declare office vacant, see subsection 12 of section 1297; as to power of county commissioners to fill vacancy, see subsection 13 of section 1297; as to time of election, see sec. 5917.

§ 1384. Bond required.—The county surveyor of each county shall enter into bond in the sum of one thousand dollars, payable to the state of North Carolina, with sufficient surety, for the faithful discharge of the duties of his office. (Rev., s. 303; Code, s. 2762; R. C., c. 42, s. 5; 1777, c. 114, s. 13.)

As to actions on official bonds, see sec. 353 et seq.

A surveyor shall give bond and security for the faithful discharge of his duties. Avery v. Walker, 8 N. C. 140, 160.

§ 1385. May appoint deputies.—Every surveyor may appoint deputies, who shall, previous to entering on the duties of their office, be qualified in a similar manner with the surveyor; and the surveyor making such appointment shall be liable for the conduct of such deputies, as for his own conduct in office. (Rev., s. 1720; Code, s. 2763; R. C., c. 42, s. 6; 1779, c. 140, s. 5.)

A deputy surveyor cannot survey his own land. Avery v. Walker, 8 N. C. 140, 160.

Deputies Must Take Oath. — Surveyors are authorized to appoint deputies; but, before entering on the duties of office, they also must take an oath of office. Avery v. Walker, 8 N. C. 140, 160.

The Act. 1771, ch. 1 declares, that no surveys shall be made without chain-carriers, who shall actually measure the land surveyed, and shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor. Avery v. Walker, 8 N. C. 140, 160.

§ 1386. Power to administer oaths.—The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants. (Rev., s. 2361; Code, s. 3314; 1881, c. 144.)

As to survey of entries and grants, see sec. 7562 et seq.

The surveyor is authorized to administer the required oath to his deputies. Avery v. Walker, 8 N. C. 140, 160.

CHAPTER 26

COUNTY TREASURER

§ 1387. Election of county treasurer.—In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, a treasurer. (Rev., s. 1394; Const., Art. VII, s. 1.)

Cross References.—As to power to abolish officer of treasurer, see sec. 1389; as to sheriff acting as treasurer, see sec. 1392; as to treasurer's bond, see sec. 1388; as to duties of treasurer, see sec. 1393.

Editor's Note. — The Legislature in 1875, under authority conferred by section fourteen of Article VII, of the Constitution of 1868, amended sec. 1, of the said section VII, by providing that the boards of justices of the peace, of the several counties, might abolish the office of the county treasurer at will. The Code of 1883, sec. 768, conferred a like power upon the said boards of justices. When the justices chose to abolish the office, the duties and liabilities attaching thereunto devolved upon the sheriff, who became ex officio county treasurer. This was carried forward as sec. 1395 of the Revisal of 1905. However, the potential evil of making the vital and important office of county treasurer a plaything, dependent for its very life upon the whim and fancy of the several boards of justices, who must, by their very nature, react immediately to every manifestation of local prejudice and passion, is quite obvious to the observer. To remove and abolish a situation so pregnant with evil possibilities, and to insure stability to the office of county treasurer, the Legislature, by the Laws of 1919, ch. 141, repealed the provision empowering the justice to abolish the office.

The treasurer is a ministerial officer. Martin v. Clark, 135 N. C. 178, 179, 47 S. E. 397.

The term of office of the county treasurer is two years. State v. McKee, 65 N. C. 257.

When Commissioners Fill Vacancy. — Upon the restoration of the office of county treasurer, if there is no person to fill the office at the time of its restoration, the vacancy may be filled, until next regular election by the county commissioners. Rhodes v. Hampton, 101 N. C. 629, 8 S. E. 219.

Term of Appointee. — The term of office of a treasurer appointed by the board of commissioners in a county to fill a vacancy is only that of the unoccupied term of his predecessor. State v. McKee, 65 N. C. 257.

When Election a Nullity. — The election of a person to the office of county treasurer, which has been abolished, or when there is no vacancy, is a nullity. Rhodes v. Hampton, 101 N. C. 629, 8 S. E. 219.

§ 1388. Bond; penalty; when renewed.—The county treasurer, before entering upon the duties of his office, shall give bond with three or more sufficient sureties, to be approved by the board of commissioners, payable to the state, conditioned that he will faithfully execute the duties of his office, and pay according to law, and on the warrant of the chairman of the board of commissioners, all moneys which shall come into his hands as treasurer, and render a just and true account thereof to the board when required by law or by the board of commissioners. The penalty of his bond shall be a sum not exceeding the amount of the county and local taxes assessed during the previous year, and the board of commissioners at any time, by an order, may require him to renew, increase or strengthen his bond. A failure to do so within ten days after the service of such an order shall vacate his office, and the board shall appoint a successor: Provided, the board of commissioners may fix the bond of the treasurer of Forsyth county at such sum as they may deem best, not less than twenty thousand dollars, and may increase it at any time; and in Craven county the bond of the treasurer shall be equal to the county funds during the preceding year, but not to exceed forty thousand dollars. (Rev., s. 297; Code, s. 766; 1868-9, c. 157, s. 4;

1895, c. 270, s. 2; 1899, c. 132; 1899, c. 207, s. 4; 1903, c. 12, s. 2; 1901, c. 536; 1899, c. 54, s. 52.)

Cross References. — As to limitation of actions upon official bonds of public officers, see subsection 1 of section 439; as to approval of bonds by county commissioners, see subsection 12 of section 1297, and section 3931; as to duty of commissioners when bonds insufficient, see subsection 13 of section 1297.

Time to File Bond.—It was the duty of a county treasurer elected in August, 1878, to appear before the board of county commissioners on the first Monday in the month next succeeding his election and file his official bond; and on his failure to do so, it was competent for the board of commissioners to declare the office vacant and fill it. Kilburn v. Latham, 81 N. C. 312.

Settlement of Retiring Treasurer Does Not Discharge Bond. — A settlement had between a county and its outgoing treasurer, does not operate as a discharge of liability upon his bond; nor is it conclusive evidence of a proper accounting, but is open to proof that a mistake was made. Commissioners v. MacRae, 89 N. C. 95.

Actual Payment of Funds Alone Discharges Bond.—The actual payment of the funds remaining in a treasurer's hands will alone relieve the bond from liability, and it is his duty to know to what fund the money in hand belonged. Commissioners v. MacRae, 89 N. C. 95.

Demand Unnecessary.—Where the county treasurer collects and retains county moneys or fails to pay over to his successor, no demand is necessary before suit is brought. Commissioners v. Magnin, 86 N. C. 286.

Proper Parties Relator.—The commissioners of a county are proper parties relator to sue upon the official bond of a county treasurer to recover county school funds. Commissioners v. Magnin, 86 N. C. 286, approving Commissioners v. Magnin, 78 N. C. 181.

Limitation of Actions upon Bonds. — An action upon the official bonds of a county treasurer may be brought within six years after a breach thereof; the statute does not begin to run from the date, but only from the breach of the bond. Commissioners v. McRae, 89 N. C. 95.

Bond as Treasurer of Board of Education.—The county treasurer is required, as treasurer of the board of education, to file a separate bond with different conditions from those embraced in that given in his capacity of county treasurer, and in case of any breach an action must be brought by the county board of education; whereas for any default in accounting for the county funds proper, he must be sued by the board of county commissioners. Koonce v. Commissioners, 106 N. C. 192, 199, 10 S. E. 1038.

Protection of School Fund.—The bond of a county treasurer, conditioned "that whereas he has been appointed treasurer and become disburser of the school money, now therefore, if he shall well and truly disburse the money coming into his hands, under the requirements of law," etc., covers an illegal defalcation from the school fund. Commissioners v. Magnin, 86 N. C. 286.

Same—New Duty Not Covered by Bond.—The new statutory duty of being treasurer of the county board of education, requiring an additional and special bond, is not embraced by the bonds formerly required. State v. Bateman, 102 N. C. 52, 8 S. E. 882.

§ 1389. Local: Commissioners may abolish office and appoint bank.—In the counties of Bladen, Carteret, Chatham, Cherokee, Chowan, Craven, Edgecombe, Granville, Hyde, Madison, Mitchell, Montgomery, Martin, Moore, Onslow, Perquimans, Polk, Rowan, Stanly, Tyrrell, Transylvania, and Union, the board of county commissioners is hereby authorized and empowered, in its discretion, to abolish the office of county treasurer in the county; but the board shall, before abolishing the office of treasurer, pass a resolution to that effect at least sixty days before any primary or convention is held for the purpose of nominating county treasurer. When the office is so abolished, the board is authorized, in lieu of a county treasurer, to appoint one or more solvent banks or trust companies located in its county as financial agent for the county, which bank or trust company shall perform the duties now performed by the treasurer or the sheriff as ex officio treasurer of the county. Such bank or trust company shall not charge nor receive any compensation for its services, other than such advantages and benefit as may accrue from the deposit of the county funds in the regular course of banking, or such sum as may be agreed upon as compensation between said board of county commissioners of Transylvania county and Chatham county and such bank or banks as may be designated by said board of county commissioners. This alternative shall apply only to Chatham and Transylvania counties: Provided, in said county of Chatham the county commissioners of said county shall fix the compensation to be allowed said bank designated as said financial agent of said county which compensation shall not exceed the sum of five hundred dollars per annum and said bank is to furnish, without cost to the county, a good and sufficient bond as such financial agent.

The bank or trust company, appointed and acting as the financial agent of its county, shall be appointed for a term of two years, and shall be required to execute the same bonds for the safe keeping and proper accounting of such funds as may come into its possession and belonging to such county and for the faithful discharge of its duties, as are now required by law of county treasurers. (1913, c. 142; Ex. Sess. 1913, c. 35; P. L. 1915, cc. 67, 268, 458, 481; 1919, c. 48; 1925, c. 46; 1933, c. 63.)

Editor's Note.—This section was amended by the Laws of 1925, c. 46, by inserting the word "Transylvania" after the word "Tyrrell" and before the word "and" in line five of the said section. The said Act also amended the said section by placing a comma after the word "banking" near the end of line twenty-four of said section, and adding the following: "Or such sum as may be agreed upon as compensation between said board of county commissioners of Transylvania county and such bank or banks as may be designated by said board of county commissioners."

It might be interesting here to raise the question as to whether the bonds to be executed by the appointee bank, under this section, are the "official bonds of public officers," within the meaning of subsection 1, section 439. If they are, the limitation of actions upon them is six years, if not, the limitation will be something different. The question here but raises the point as to whether the bank designated by the commissioners, under the section, becomes ipso facto, a public officer, i. e. county treasurer. Or is it not more in accord with the express provisions of the section, to say that the office is totally abolished, and that the bank merely performs the functions of the said office? This seems to be the legislative intent.

To go back to our first question: If the office of county treasurer has been totally abolished, and the bank, instead of being a public officer, i. e. county treasurer, merely exercises the functions of the said office, how can the bonds executed by it come under the "official bonds of public officers"? Again, we must look to the legislative intent as our guiding star. The section expressly provides that the bonds executed by the bank shall be "the same bonds * * * * * as are now required by law of county treasurers." This would lead us to conclude that, while the bank is not a public officer, yet, since it performs the functions of a public office, the bonds given by it, to insure the faithful performance of a public trust, shall be deemed "the official bonds of public officers."

Public Laws 1933, c. 63, make the alternative applicable in Chatham County and inserts the proviso relative to that county. Section 2 of c. 63 validates the acts of the Bank of Pittsboro as financial agent for the County of Chatham.

Constitutionality. — A mandamus proceeding was brought to compel an ex-treasurer, whose office had been abolished, under the provision of this section, to pay over county funds in his possession to his successor the bank, designated by the commissioners. It was objected that the section was unconstitutional as an unwarranted delegation of legislative power. The court held, however, the section to be constitutional and valid. Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 377. A wide discretionary power of local self-government may be vested in municipal subdivisions of the State, without infringement upon the familiar rule that the substance of legislative power cannot be delegated. Thompson v. Floyd, 47 N. C. 313; Manly v. Raleigh, 57 N. C.

370, 377; Stoutenburgh v. Hennick, 129 U. S. 141, 1 N. C. Law Rev. 53.

Abolishing Office. — The section provides that the board of county commissioners of certain specified counties may abolish the office of county treasurer by resolution to that effect passed at least sixty days before a primary or convention held for the purpose of nominating candidates for said office, and when so abolished the board of commissioners may appoint one or more solvent banks or trust companies to perform the duties of treasurer, or sheriff acting as ex officio treasurer of the county, such designated depositaries not being allowed to charge or receive anything in compensation other than the advantages accruing to them from such a deposit. And said banks and trust companies, termed financial agents, are also required to give bond for safe keeping and proper disbursement of said funds, and for faithful performance of their duties concerning them. Tyrrell County v. Holloway, 182 N. C. 64, 67, 108 S. E. 337.

Mandamus against Treasurer. — Where, under the power of a valid statute, C. S., 1389, the county commissioners have abolished the office of county treasurer, and have vested the duties of the office in certain banks and trust companies which have qualified thereunder, mandamus will lie to compel the treasurer, seeking to hold over and denying the validity of the statute, to turn over to the proper party the moneys that he has received and attempts to hold by virtue of his former office. Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 337.

Consideration Moving to Bank. — The consideration moving to a bank when its officers without individual benefit become sureties on its indemnity bond given for a county deposit, under the requirements of the statute, is the deposit so obtained. Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795.

Officers of Bank as Sureties. — Where the officers of the bank acting without personal advantage or gain sign as sureties on an obligation of the bank executed to the commissioners of a county in the manner and form required by the section to secure a deposit for county and road purposes, the transaction is valid when unaffected by fraud, and binding upon the receiver afterwards appointed by the court for the bank, subsequently becoming insolvent. Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795.

Same—Directors Need Not Authorize. — Where the officers of a bank acting in good faith and without personal profit or advantage execute a bond of indemnity for the deposit of county funds, it is not required for the validity of the bond that the directors authorize the same by a resolution duly passed in order to protect the rights of the sureties, officers of the bank. Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795.

Sureties Entitled to Collateral. — The sureties on an indemnity bond, given by a bank to secure a deposit of county funds required by the section, are entitled to the collateral given them by the bank for their protection in becoming sureties, and is available to them in preference to that of a receiver of the bank, thereafter appointed by the court, claiming the proceeds for distribution among the general creditors of the bank, when the transaction has been made by the sureties in good faith and without personal advantage to them. Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795.

Bank Entitled to All County Funds. — Under Public Local Laws 1917, ch. 46, sec. 1, for Robeson County, the bank selected by the commissioners, upon the abolishment of the office of county treasurer, is entitled to receive all county moneys, including those derived from assessments of a drainage district. Commissioners v. Lewis, 174 N. C. 528, 94 S. E. 8.

Changing Terms of Appointment as Impairing Obligation of Contracts.—Where a bank has been appointed under this section to perform the duties of treasurer of Edgecombe County, and receive as compensation the profits of the moneys deposited by the county arising in the course of the banks business as such, the arrangement is not a contract contemplated by the provision of the Constitution prohibiting the impairment of the obligations of a contract, but the obligations arise by statutory provisions relating to public matters within legislative control. The county may at a later date, under authority of § 1334(70) require the bank to give bonds for the protection of the public funds, or to pay interest on the daily average balance. Farmers Banking, etc., Co. v. County, 196 N. C. 48, 144 S. E. 519. See note under § 1393.

§ 1389(a). Local: Treasurer-tax collector of Mitchell County. — There is hereby created the office of Treasurer-Tax Collector of Mitchell County, upon which office shall be imposed all duties relating to the office of county treasurer as now provided by law. From and after the first Monday of October, one thousand nine hundred thirty-one, all duties and powers relating to the collection of taxes shall be removed from the office of sheriff and shall be imposed and conferred upon the office of Treasurer-Tax Collector, and beginning on the first Monday of October, one thousand nine hundred thirty-one, the Treasurer-Tax Collector shall receive a salary at the rate of fifteen hundred ($1500) dollars per annum, payable in equal monthly installments out of the general fund of the county. The Treasurer-Tax Collector shall furnish good and sufficient bond in such amount as may be approved by the board of county commissioners for the faithful performance of his duties and for the proper accounting of all money received by him by virtue of his office, and the premiums on such bonds furnished by said Treasurer-Tax Collector shall be paid out of the general fund of the county. (1931, c. 53, s. 2.)

Editor's Note.—The Act of 1931 further provides in §§ 3, 4 and 5: If said office of Treasurer-Tax Collector should become vacant before the general election of one thousand nine hundred thirty-two, such vacancy shall be filled by appointment of some person by the board of county commissioners. At the primary to be held in Mitchell County in the year of one thousand nine hundred thirty-two, and at each regular primary thereafter, there shall be nominated by each political party a candidate for Treasurer-Tax Collector of Mitchell County. At the general election in the year of one thousand nine hundred thirty-two, there shall be elected a Treasurer-Tax Collector for Mitchell County in accordance with the same rules and regulations governing the election of other county officers; said Treasurer-Tax Collector to be voted for by the voters of the county at large.

The Act also provides in § 7: "Beginning with the levy of the year one thousand nine hundred thirty-one, there shall be computed a commission at the rate of one (1%) per cent of the collections of the first fifty thousand ($50,000) dollars of said taxes and a commission at the rate of three (3%) per cent on the remainder of the collections of said taxes, and such commissions shall be placed to the credit of the general fund of the county."

§ 1390. Office includes person acting as treasurer.—The office of county treasurer shall always be construed to refer to, and include, the person authorized by law to perform the duties of that office in any county, if there is no county treasurer therein. (Rev., s. 1396; Code, s. 770.)

§ 1391. Is treasurer of county board of education.—The county treasurer is ex officio treasurer of the county board of education. (Rev., s. 1396; Code, s. 770.)

As to the county treasurer as treasurer of the county school fund, see sec. 5444-5456.

Sheriff Becomes Treasurer of Board of Education.—In Koonce v. Commissioners, 106 N. C. 192, 198, 10 S. E. 1038, Avery, J., said: "The plaintiff was ex-officio treasurer of the county by virtue of his election to the office of sheriff, and became, in the same way, treasurer of the county board of education."

§ 1392. Sheriff acting as treasurer, bond liable.—In counties where the office of county treasurer is abolished, and where the sheriff is authorized to perform the duties of county treasurer, the bond he gives as sheriff shall be construed to include his liabilities and duties as such county treasurer, and may be increased to such amount by the board of commissioners as may be deemed necessary to cover the trust funds coming to his hands. (Rev., s. 1397; Code, s. 769; 1879, c. 202.)

Cross References. — As to the sheriff's bond as treasurer, see secs. 1388, 3930; as to county commissioners to take and

approve bonds, see subsection 12 of section 1297, and section 3931; as to duty of commissioners when bond insufficient, see subsection 12 of section 1297, and section 3932.

§ 1393. Duties of county treasurer.—It is the duty of the treasurer—

1. To keep county moneys. To receive all moneys belonging to the county, and all other moneys by law directed to be paid to him; to keep them separate and apart from his own affairs, and to apply them and render account of them as required by law.

2. To keep true accounts. To keep a true account of the receipts and expenditures of all such moneys, taking proper vouchers in every case in books provided for that purpose at the expense of the county; which said books shall at all times show the date, amount, and from whom he has received such moneys; the date, amount, and to whom he has paid out any of the said moneys; the total amount received and the total amount paid out during the current fiscal year for school purposes, for general county purposes, for jury fund, and for each special purpose, all separately kept, so that at all times his said books shall correctly and accurately show the condition of the said several accounts. His account of expenditure for general county purposes shall also show separately the amounts expended each year on account of the county home, indigent persons, jails, workhouses, courthouse, bridges, insolvent fees, courts, and such other special accounts as the board of commissioners of the county require, the total of said accounts being the aggregate amount expended during the fiscal year for general county purposes. He shall post at the courthouse door on the first Monday in each month a correct statement of such receipts and expenditures, showing the amount received, and from what source, and the amounts paid out, and to whom, and for what purpose, and the balance in his hands belonging to the county.

3. To call on county officers for funds in their hands. To call on the sheriff, or the clerk of the superior court, or other officer having county moneys in his hands, at least once in each month or oftener if necessary, to pay over to him, and to account for all such moneys.

4. To keep accounts of fines, etc. To enter in a book to be kept by him the exact amount of any fine, penalty or forfeiture paid over to him, giving the date of payment, the name of the clerk or other person so paying the same, the name of the party from whom such fine, penalty or forfeiture was collected, and in what case.

5. To exhibit to the board of commissioners his books and accounts as treasurer for examination. To exhibit his books and accounts and moneys once every three months, or oftener, if the board of commissioners of his county deem it necessary, to a committee to be composed of the chairman of the board of commissioners and one other person to be selected by a board of commissioners, who shall be an expert accountant. It is the duty of this committee to examine the books and accounts of his office, and to see that the accounts are correctly and properly kept, and to count the money in the hands of the treasurer, and to see that it corresponds with the amount shown by the books to be in his hands. At every such examination of the books and accounts of his office the county treasurer shall exhibit a full, perfect and itemized statement to said committee of the use he has made of every dollar of public funds in his hands since the last exhibition of his books to said committee; and if any part of said funds has been loaned out, this statement shall state to whom loaned and on what security and the amount of interest paid on said loan, and such interest shall be covered into the county treasury by the treasurer. This statement shall be sworn to and published in a county newspaper or at the courthouse door. Nothing herein contained shall be construed to authorize the county treasurer to lend any public funds.

If at any time there is a deficit in the amount of money in the hands of the treasurer, the committee shall so report to the board of commissioners, whose duty it is to institute proceedings in the superior court against said treasurer for violation of his official duties. (Rev., s. 1398; Code, ss. 96, 773; 1889, c. 242.)

Cross References. — As to duties of county treasurer as treasurer of the county school fund, see sections 1391, 5444-5456; as to action on official bonds of public officers, see section 354; as to action on the treasurer's bond, see sec. 1388; as to duty to pay no claims unless audited, see sec. 1399 and annotations thereto.

To Receive All County Funds. — It is the duty of the county treasurer to receive all moneys belonging to the county. Lewis v. Commissioners, 192 N. C. 456, 457, 135 S. E. 347.

Disburses County Funds. — The county treasurer disburses all public funds. Clifton v. Wynne, 80 N. C. 146, 152.

Warrant on Specific Fund. — It is the duty of the county treasurer to pay a warrant drawn on a specific fund by the county commissioners. Martin v. Clark, 135 N. C. 178, 179, 47 S. E. 397.

Proceeds from Highway Bonds. — Where a county has issued bonds for the purpose of lending their proceeds to the State Highway Commission, to be used for the construction of certain highways within the county, and the county commissioners have such proceeds on hand, mandamus by the county treasurer will not lie for control of the funds as a part of the general county funds coming within her control, under the provisions of the statute. Lewis v. Commissioners, 192 N. C. 456, 135 S. E. 347.

Liability for Interest.—A local bank acting under a valid appointment to perform the duties of a county treasurer, as the fiscal agent of the county, is not required by subsection 3 of this section to pay interest on the deposits of county funds thus received by it, and the surety on its bond is not liable for the failure of the special depository to charge itself interest on the deposits except when the bank has loaned the funds out to third parties. Green County v. First Nat. Bank, 194 N. C. 436, 140 S. E. 38. See note under § 1389.

§ 1394. Treasurer not to speculate in county claims; penalty.—No county treasurer purchasing a claim against the county at less than its face value is entitled to charge the county a greater sum than what he actually paid for the same; and the board of commissioners may examine him as well as any other person on oath concerning the matter. Any county treasurer who is concerned or interested in any such speculation shall forfeit his office. (Rev., s. 1399; Code, s. 772; 1868-9, c. 157, s. 8.)

§ 1395. Treasurer administers property held in trust for county.—All real and personal property held by deed, will or otherwise by any person or officer in trust for any county, or for any charitable use to be administered in and for the benefit of such county or the citizens thereof, shall be transferred to and vest in the county treasurer, to be administered and applied by him under the

direction of the board of commissioners, upon the same uses, purposes and trusts as declared by the grantor, testator or other person in the original deed, devise or other instrument of donation. (Rev., s. 1400; Code, s. 778; 1869-70, c. 85.)

Cross References. — As to treasurer's bonds, see section 1388; as to action on treasurer's bonds, see section 354; as to limitation of actions on official bonds of public officers, see subsection 1, section 439.

§ 1396. Treasurer to take charge of county trust funds; additional bonds.—It is the duty of the county treasurer to take charge of all such trust funds and property; but he shall not do so without giving a bond payable to the state, in a penalty double the estimated value of said property or funds, with three or more sureties, each of whom is worth at least the amount of the penalty of the bond over and above all his liabilities and property exempt from execution, which bond shall be taken by the board of commissioners, and recorded and otherwise treated and dealt with as the official bond of the treasurer. (Rev., s. 1401; Code, s. 779; 1869-70, c. 85, s. 2.)

§ 1397. Commissioners to keep record of trust funds.—The board of commissioners shall keep a proper record of all such trust property or charitable funds, and when necessary shall institute proceedings to recover for the treasurer all such as may be unjustly withheld. (Rev., s. 1402; Code, s. 780; 1869-70, c. 85, s. 3.)

§ 1398. Treasurer to exhibit separate statement as to trust funds.—The county treasurer, whenever he is required to exhibit to the board of commissioners the financial condition of the county, shall exhibit also distinctly and separately the amount and condition of all such trust funds and property, how invested, secured, used, and other particulars concerning the same. (Rev., s. 1403; Code, s. 781; 1869-70, c. 85, s. 4.)

§ 1399. Treasurer to pay no claim unless audited.—It is unlawful for the county treasurer to pay a claim against the county, unless the same has been audited and allowed by the board of commissioners. (Rev., s. 1404; Code, s. 777; 1868, c. 19.)

As to duties of county treasurer, see section 1399.

Claims Audited and Allowed by Commissioners. — It is the treasurer's duty to pay claims audited and allowed by the commissioners. Jones v. Commissioners, 73 N. C. 182, 184; State v. Wilkerson, 98 N. C. 696, 701, 3 S. E. 683.

Warrant or Order Drawn by Commissioners. — An order or warrant drawn by the commissioners upon the county treasurer is the appropriate method of disbursing the public moneys. State v. Wilkerson, 98 N. C. 696, 701, 3 S. E. 683.

Cannot Refuse Claim Allowed by Commissioners. — It is not within the power or duty of the treasurer of the county to refuse to pay a county order issued by the board of commissioners, because he does not think it a just or lawful claim, or for any other reason, which has been passed upon by the board and within its power to act. Martin v. Clark, 135 N. C. 178, 180, 47 S. E. 399.

§ 1400. Treasurer to deliver books, etc., to successor.—When the right of any county treasurer to his office expires, the books and papers belonging to his office, and all moneys in his hands by virtue of his office, shall, upon his oath, or, in case of his death, upon the oath of his personal representative, be delivered to his successor. (Rev., s. 1405; Code, s. 767; 1868-9, c. 157.)

Cross References. — As to action on treasurer's bonds, see sec. 1388; as to demand unnecessary, see annotations under sec. 1388.

A county treasurer going out of office is bound in contemplation of law to know what moneys he has on hand, and to what specified funds they belong, and to pay over all of the fund he has. Commissioners v. MacRae, 89 N. C. 95, 98.

§ 1401. Action on treasurer's bond to be by commissioners.—The board of commissioners shall bring an action on the treasurer's bond whenever they have knowledge or a reasonable belief of any breach of the bond. (Rev., s. 1406; Code, s. 771; 1868-9, c. 157.)

Cross References. — As to treasurer's bond, penalty, and renewal, see section 1388; as to limitation of actions on official bonds of public officers, see section 439, subsection one.

§ 1402. Officers failing to account to treasurer sued by commissioners.—In case of the failure or refusal of a sheriff, clerk, or other officer to account and pay over, when called on as directed in this article, the treasurer shall report the facts to the board of commissioners who may forthwith bring suit on the official bond of such delinquent officer, and the said board is also allowed to bring suit on the official bond of the clerk of the superior court of any adjoining county. (Rev., s. 1407; Code, s. 775; 1868-9, c. 157, s. 10.)

Cross References. — As to liability of treasurer upon his official bond, see section 1388; as to liability of sheriff upon his official bonds, see section 3930; as to liability of clerk upon his official bond, see section 928; as to liability of constable upon his official bond, see section 973; as to liability of register of deeds, see section 3545; as to actions on official bonds generally, see section 354; as to limitation of actions on official bonds, see section 439, subsection one; as to duty of county commissioners to approve official bonds of county officers, see section 1297, subsection 12.

Commissioners May, but Need Not, Necessarily, Bring Suit. — The section does not make it the imperative duty of the board of commissioners of the county to "bring suit on the official bond of the sheriff or other officer," it provides that they "may forthwith do so." It is then left to their sound discretion whether they will or not. There might be substantial reasons why they would not, and, they might be content to leave it to the county treasurer to bring suit, especially as he is the proper officer to do so. Hewlett v. Nutt, 79 N. C. 263; Bray v. Barnard, 109 N. C. 44, 48, 13 S. E. 729.

Liable as Insurer. — It is settled in this State that the bond of a public officer is liable for money that comes into his hands as an insurer, and not merely for the exercise of good faith. Presson v. Boone, 108 N. C. 78, 12 S. E. 897; State v. Bateman, 102 N. C. 52, 8 S. E. 882, 11 Am. St., 708; State v. Smith, 95 N. C. 396; Havens v. Lathene, 75 N. C. 505; Commissioners v. Clarke, 73 N. C. 255, 257, and other cases therein cited. Bonds of administrators, executors, guardians, etc., only guarantee good faith. Moore v. Eure, 101 N. C. 11, 7 S. E. 471; 9 Am. St., 17; Atkinson v. Whitehead, 66 N. C. 296; Smith v. Patton, 131 N. C. 396, 397, 42 S. E. 849.

Taxpayer May Prosecute Suit. — A taxpayer has the right to prosecute a suit against the register of deeds of the county to enforce payment of taxes collected and wrongfully withheld by him when the county commissioners have refused to institute action to recover them; and when such right of action exists, usually appertaining to the exercise of the equitable jurisdiction of the courts, this jurisdiction is not necessarily withdrawn because the Legislature has provided a legal remedy, unless the statute itself shall so direct. Waddill v. Masten, 172 N. C. 582, 90 S. E. 694.

Same—Parties.—While a taxpayer, in his suit independent of the statute, should make the proper county officials parties to his action against a register of deeds for unlawfully withholding fees collected by him, so they may be heard on the question presented, and that the funds, if recovered, should be in proper custody or control, this matter affects the remedy, and may be cured by amendment. Waddill v. Masten, 172 N. C. 582, 90 S. E. 694.

Bonds Subject to Subsequent Legislation. — A learned author says: "It has been held that all laws enacted dur-

ing the continuing contract of an official bond are also part of the contract, and that the obligors entered into the engagement in view of the possible and probable modification of their liability by the legislative branch of the government." Murfree on Official Bonds, section 193. And to the same effect is People v. Vilas, 36 N. Y. 458; also see Prarie v. Worth, 78 N. C. 159; State v. Bradshaw, 32 N. C. 229, 232; Daniel v. Grizzard, 117 N. C. 105, 106, 110, 23 S. E. 93.

CHAPTER 27

COURTS

SUBCHAPTER I. SUPREME COURT

Art. 1. Organization and Terms

§ 1403. Number of justices.—The supreme court shall consist of a chief justice and four associate justices. (Rev., s. 1532; Const., Art. 4, s. 6.)

Cross Reference. — For full treatment of the subject matter of this article, see 3 N. C. Enc. Dig. 833, 14 N. C. Enc. Dig. 537.

Historical. — "When first established, the court was composed of three justices, appointed by the general assembly to hold office during good behavior; and the justices themselves appointed one of their number as chief justice. By the Constitution of 1868 the number was increased to five, a chief justice and four associate justices, to be elected by popular vote, and to hold office for eight years and until their successors are qualified. By an amendment in 1875 the number was reduced to three, and in 1887 it was again increased to five, as the court is now constituted." 5 N. C. L. Rev. 5.

§ 1404. Election and term of office.—The justices of the supreme court shall be elected by the qualified voters of the state, as is provided for the election of members of the general assembly. They shall hold their offices for eight years. (Const., Art. 4, s. 21.)

See section 1403, and discussion thereunder.

§ 1405. Oath of office.—The justices, before they act as such, shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept. (Rev., s. 1533; Code, s. 955; R. C., c. 33, s. 3; 1818, c. 963.)

§ 1406. Name of court; where records to be kept.—The court bears the name and style of The Supreme Court of North Carolina, and is a court of record; and the papers and records belonging to the clerk's office thereof shall be constantly kept within the city of Raleigh. (Rev., s. 1536; Code, s. 954; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1884, c. 660; 1805, c. 674; 1818, c. 962; 1828, c. 13.)

A Court of Record. — "The Supreme Court is a court of record, and the clerk who is appointed by the court for a term of eight years, is required to keep the records of the court in his office in Raleigh." See 5 N. C. Law Rev. 5.

Derived from Constitution. — The Supreme Court is established by, and derives its jurisdiction from, the constitution, and its judicial powers and jurisdiction so prescribed, as well as its methods of procedure, are not subject to legislative control. Rencher v. Anderson, 93 N. C. 105.

§ 1407. Quorum.—Three justices constitute a quorum for the transaction of the business of the court. (Rev., s. 1534; Code, s. 956; 1889, c. 230.)

The court means the three (now five) judges sitting together, consulting and advising one with the other, upon the question before them for judicial decision. State v. Lane, 26 N. C. 434, 435. Upon the death of one, the remaining judges have power and authority to hold court. Id.

§ 1408. Terms of court.—There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the last Monday in August.

The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. In case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued. (Rev., s. 1535, 1536; Code, ss. 953, 954; 1901, c. 660; 1887, c. 49; 1881, c. 178; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1804, c. 660; 1805, c. 674; 1818, c. 932; 1828, c. 13; 1842, c. 15; 1846, cc. 28, 29.)

Editor's Note. — Under the law as it existed prior to 1868, the court held three terms a year, two in Raleigh and one in Morganton. See 5 N. C. Law Rev. 6.

When the Court Has Adjourned. — When the Supreme Court has finished the business of any one term and adjourned, its jurisdiction of a case decided at that term ceases, and it cannot again acquire jurisdiction of it except by petition to rehear or by a new appeal. State v. Marsh, 134 N. C. 184, 197, 47 S. E. 6.

In Ruffin v. Harrison, 91 N. C. 398, it was said, "The court has no power to amend or modify the final decree, entered at the last term, upon an application like this. After final judgment the court cannot disturb it unless upon an application to rehear or for fraud, accident or mistake alleged in an independent action, or perhaps, in some cases a party might be relieved against a 'judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect' within a year after the entry of the same..... This of course does not imply that the court has not power to correct the entry of its orders, judgments and decrees so as to make them conform to the truth or what the court did in granting them, or to set aside an irregular judgment in a proper case." State v. Marsh, 134 N. C. 184, 197, 47 S. E. 6.

Art. 2. Jurisdiction

§ 1409. Original jurisdiction.—The supreme court has original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action. (Rev., s. 1537; Const., Art. IV, s. 9.)

Editor's Note. — This section, conferring jurisdiction on the Supreme Court to render an opinion in cases wherein there are claims against the State, has for it a rather unique purpose. The principle underlying its enactment is the well established one that a sovereign state cannot be sued without its consent. Hithertofore it was questioned whether the court could lend its aid to the Legislature in disposing of important questions of law in cases to which the State was a party. Reynolds v. State, 64 N. C. 461. The realization of the necessity of having recourse to the advice of men who were experts in this particular field, and the extreme difficulty with which the Legislature, unaided, was confronted, coupled with the fact that persons who asserted that they held legal claims against the sovereign State might here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated, led to the passage of this section. However, the jurisdiction, hereby conferred, is not without its clean-cut limitations which will appear in the cases following.

Purpose. — The original jurisdiction was conferred upon the Supreme Court for the benefit only of such plaintiffs, and to be used only in such cases, as could not obtain a footing in the courts, by reason of the State's being a party against whom the claims were to be asserted. Bain v. State, 86 N. C. 49, 50.

Nature of Claim. — The claim against the State must be such as, against any other defendant, could be reduced to a judgment and enforced by an execution. Bain v. State, 86 N. C. 49, 50.

Same—Question of Law. — The Supreme Court has not

original jurisdiction to hear claims against the State in cases in which no question of law is involved. Miller v. State, 134 N. C. 270, 271, 46 S. E. 514; Cowles v. State, 115 N. C. 173, 179, 20 S. E. 384.

This section is applicable only as to the matters of law involved upon facts agreed to, or made to appear, and the Supreme Court does not pass upon conflicting evidence to determine the facts at issue. Calkins Dredging Co. v. State, 191 N. C. 243, 131 S. E. 665; Reynolds v. State, 64 N. C. 461. The adjudication is of the legal validity of the claims. Baltzer v. State, 104 N. C. 265, 10 S. E. 153.

Court Cannot Enforce Judgments. — No power to enforce its judgment is given the court; its decisions are merely recommendatory to the Legislature, which may provide for the enforcement of the claims if it see proper to do so. Baltzer v. State, 104 N. C. 265, 10 S. E. 153.

The Supreme Court renders no judgment in a proceeding in which original jurisdiction is invoked under Const. art. 4, § 9, nor has it power to enforce its decision made in such proceeding process in nature of execution. Its decision is merely recommendatory. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

Recovery of Taxes.—When nonresident executors have failed to proceed in the Superior Court, under § 7979, to recover an amount they have paid as an inheritance tax to the State of North Carolina, the method by which the Legislature has authorized the State to be sued is exclusive, and the recommendatory original jurisdiction of the Supreme Court may not be invoked. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

Transmission to General Assembly. — Upon the decision of the Supreme Court in favor of the plaintiff upon a claim preferred against the State, the proper course is for the clerk to transmit the proceedings in the cause, together with the judgment of the court, to the Governor to be communicated by him to the General Assembly. Clements v. State, 77 N. C. 142; Horne v. State, 82 N. C. 382.

State May Plead Statute of Limitations. — In proceedings under this section the State has the right to plead the bar of the statute of limitations to prevent a recommendatory decision. Cowles v. State, 115 N. C. 173, 179, 20 S. E. 384. The court said: "It is not for us here to say whether or not there is a moral obligation resting upon the Commonwealth to pay the petitioner a certain sum of money, but whether, under the law that controls such a controversy, when waged between two citizens, the State is indebted to their petitioning citizen." Id.

Set-Off and Counterclaim. — A person indebted to the State, and used on such indebtedness cannot offer as a set-off or counterclaim its indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owns. Battle v. Thompson, 65 N. C. 406, 407. It is otherwise when the claim is in the nature of a payment or credit. Id. See also, Lindsay v. King, 23 N. C. 401.

§ 1410. Procedure to enforce claims against the state.—Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request him to appear on behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term. (Rev., s. 1538; Code, s. 948.)

See notes under § 1409, const., art. 4, § 9.

Editor's Note.—This section was first enacted by the General Assembly in 1868. Lacy v. State, 195 N. C. 284, 289, 141 S. E. 886.

In General. — In these proceedings the rights of the petitioner and the liability of the State are determined by the same laws that would govern those rights and that liability if the action were against an individual debtor. Cowles v. State, 115 N. C. 173, 179, 20 S. E. 384.

The Supreme Court, as a rule, will consider only such claims as present serious questions of law and will not take the burden of passing upon those claims which involve mainly issues or questions of fact, although in proper cases the Court may order that issues of fact be tried in the Superior Court, as provided in this section. Cohoon v. State, 201 N. C. 312, 314, 160 S. E. 183.

The recommendatory or original jurisdiction of the Court is confined to claims in which it is supposed that an opinion on an important question of law would be of aid to the General Assembly in determining the merits of a claim against the State. This is true notwithstanding the broad provision of this section that any person having any claim against the State may commence the proceeding by filing his complaint. Id.

The Supreme Court is given original jurisdiction to hear claims against the State, but its decisions are merely recommendatory, and no process in the nature of execution shall issue thereon. Id.

The procedure thus authorized is prescribed by this section, but this procedure must not be construed as exceeding the power conferred upon the Supreme Court by the organic law. Id.

Construction of Section.—Insofar as this section provides for and prescribes the procedure by which a claimant may invoke the original jurisdiction of the Supreme Court, conferred by the Constitution, with respect to his claim against the State, it is valid, and enforceable in all respects; when, however, a proceeding has been duly instituted and filed in the Supreme Court, in accordance with the provisions of the statute, the procedure by which the Court will thereafter exercise its power to hear and decide upon the claim is not controlled by the statute. When it appears that an issue or question of law is presented which can be intelligently decided, without determining facts in issue, the Court will proceed to hear and decide such issue or question of law. When it appears that there is no issue or question of law involved no decision will be made and the proceeding will be dismissed. When, however, in order to decide an issue or question of law involved, the Court deems it best to have issues of fact first determined, the Court may or may not follow the provisions of the statute with respect to a trial by jury of such issues. The statute is at most, in this respect, directory. Lacey v. State, 195 N. C. 284, 290, 141 S. E. 886.

Ascertainment of Facts. — The facts are ascertained by reference to the clerk of the Supreme Court or by transferring the issue to a superior court for trial by jury, and when sufficiently informed of the facts the Supreme Court will declare the law. Bledsoe v. State, 64 N. C. 392; Clements v. State, 76 N. C. 199, 201.

The court cannot enforce its judgment, see notes of Baltzer v. State, 104 N. C. 265, 10 S. E. 153, under section 1409.

Duty of Clerk after Decision. — See note of Clements v. State, 77 N. C. 142, under section 1409.

Cited in Rotan v. State, 195 N. C. 291, 292, 141 S. E. 733.

§ 1411. Appellate jurisdiction.—The supreme court has jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" is the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight, and the court has the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. (Rev., s. 1539; Const., Art. IV, s. 8.)

I. In General.
II. Issues and Questions of Fact.
A. In General.

B. Jurisdictional Requisites.
C. The Principles Applied.
III. Jury Trial.

I. IN GENERAL.

See notes under Const. Art. 4, § 8.

Editor's Note. — The provisions of this section are, in substance, quite similar to those contained in section 638. Practically the only distinguishing feature is that this section provides for the jurisdiction of the Supreme Court over "issues of fact" and "questions of fact," making it the same as was exercised by the court prior to the adoption of the Constitution of one thousand eight hundred and sixty eight. It is thought more advisable and expedient to place the major annotations under section 638, to which reference is hereby made, and to confine the notes to this section to those cases bearing upon the last provision herein contained.

In General. — In our practice, both before and since the establishment of the Constitution of 1868, the Supreme Court has all the power which a court of errors had at common law. Rush v. Steamboat Co., 68 N. C. 72.

Ruling on Question in Lower Court Essential. — The appellate jurisdiction of the Supreme Court is limited to the correction of errors in the rulings below, and when there has been no ruling thereon below, the court cannot pass upon a question presented by the record. Tyson v. Tyson, 100 N. C. 360, 366, 6 S. E. 707.

Same—Exceptions to Referee's Report. — It is required of the trial judge to review and pass upon exceptions to a report of a referee as to the facts found and the conclusions of law thereon, and a pro forma judgment entered by him for any reason cannot be reviewed by the Supreme Court on appeal under this section for it is only **decisions** of the lower courts which may thus be considered. Overman v. Lanier, 156 N. C. 537, 72 S. E. 575.

An Appeal Essential. — The Supreme Court being strictly an appellate court, except as to claims against the State, its jurisdiction is acquired only by reason of the appeal. James v. Western, etc., R. R., 123 N. C. 299, 301, 31 S. E. 707.

Record Controlling. — On appeal, the record controls as to facts stated therein. Southerland v. Brown, 176 N. C. 187, 96 S. E. 946; Thompson v. Williams, 175 N. C. 696, 95 S. E. 100.

In case of conflict as to occurrences, at the trial, the record will prevail. Howard v. Wright, 173 N. C. 339, 345, 91 S. E. 1032; Bell v. Harrison, 179 N. C. 190, 102 S. E. 200; McDonald v. McLendon, 173 N. C. 172, 91 S. E. 1017.

Second Appeal. — The Supreme Court will not **ex mere** review a former decision upon a second appeal in the same case. Best v. British, etc., Mortgage Co., 131 N. C. 70, 71, 42 S. E. 456. But the court, on the second appeal, is not precluded under the doctrine of the law of the case from passing on a question not determined on the first appeal. Vann v. Edwards, 135 N. C. 661, 663, 47 S. E. 784.

Same—Party Harmed.—The Supreme Court will not review a ruling of its own, which does not affect injuriously the complaining party, even where the ruling is erroneous. Balk v. Harris, 132 N. C. 10, 16, 43 S. E. 477, and cases cited.

II. ISSUES AND QUESTIONS OF FACT.

A. In General.

Defined.—Issues of fact on those matters alleged on one side and denied on the other, and every question presented under these issues necessary to decide the matter in controversy, should be presented to the jury. Kirk v. Atlanta, etc., Ry. Co., 97 N. C. 82, 2 S. E. 536.

Power of Court.—"The power of the appellate court to review the facts is limited to matters exclusively of equitable cognizance under the former system, and in such cases only when the evidence is written and documentary, so that the higher court is in the same position as the court below." 5 N. C. Law Rev. 16. See also State v. Lilliston, 141 N. C. 857, 867, 54 S. E. 427.

B. Jurisdictional Requisites.

When Jurisdiction Assumed.—The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary, and in all respects the same as they were when the judge of the court below passed upon them. Worthy v. Shields, 90 N. C. 192.

Since this decision the courts have consistently followed the two foregoing propositions, and have made the two principles conditions precedent to the valid exercise of a hearing on appeal. It necessarily follows from these rules that, (1) if the question presented on appeal is not strictly of an equitable nature, or (2) if the proofs are not written and documentary and in the same form as they were presented to the lower court, then it is not a case over which the Supreme Court can exercise jurisdiction. Herein lies the principle on which the court on appeal has refused to take cognizance of "issues of fact," which were in the court below, tried by a jury, for **a fortiori** the second proposition noted above will not have been fulfilled. The basis for the exclusion of such "issues of fact" would seem to be that the jury, with all the witnesses before them, are in a better position to weigh all the material evidence and can better reach the logical solution to the issue in controversy. See Howard v. Board, 189 N. C. 675, 127 S. E. 704; Cameron v. Highway Comm'r, 188 N. C. 84, 123 S. E. 465.—Ed. Note.

C. The Principles Applied.

Judgment Must be Equitable in Nature.—The jurisdiction of the Supreme Court over "issues of fact," is restricted to interlocutory and final judgments which are exclusively equitable in their nature, and which a court of equity as a distinct and separate tribunal could alone render, under the former system. Young v. Rollins, 90 N. C. 125.

This jurisdiction does not extend to a case which under the former practice would have been an action at law, and in which only errors of law could have been corrected on appeal. State v. Scott, 84 N. C. 184.

Same—Motion for Injunction.—On a motion for an injunction, being an application for equitable relief, it is the right and duty of the Supreme Court, under this section, on an appeal from an order granting or refusing the injunction, to determine the questions of fact as well as of law upon which the propriety of the order depends. Jones v. Boyd, 80 N. C. 258.

Same—Former Acquittal.—No appeal can be taken by the State **to any court** from the action of an inferior court in sustaining a plea of former acquittal, although such plea is a mixed question of law and fact, and the court erred in not leaving it to the jury. State v. Lane, 78 N. C. 547.

Same—Action of Covenant.—Whether an action of covenant which was strictly an action at law under the former system, but to which an equitable defense can now be made under the new system, falls within the operation of this section was left undecided by the court in Gragg v. Wagner, 77 N. C. 246-7.

When there is any evidence proper to be submitted to the jury, the Supreme Court has no power to interfere with the verdict. Brown v. Power Co., 140 N. C. 333, 52 S. E. 954.

All the Evidence Must Be Sent Up.—The Supreme Court has no jurisdiction, on appeal, to review the evidence and findings of fact of the lower court in an equitable action, unless the same evidence, and the whole of it just as taken below, is sent to such court. Gatewood v. Burns, 99 N. C. 357, 6. S. E. 635.

III. JURY TRIAL.

Generally.—In Leggett v. Leggett, 88 N. C. 108, some doubt is cast upon the question whether, under the provisions of this section in reference to the jurisdiction of the court over "issues of fact" and "questions of fact," a party has the right to have a cause, heretofore cognizable only in a court of equity, tried by the court without the intervention of a jury.

Same—Estoppel.—But where, in such case, a party has of his own accord accepted a trial by jury, he cannot afterwards have the same facts passed upon by the court. Leggett v. Leggett, 88 N. C. 108.

§ 1412. Power to render judgment and issue execution.—In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided,

also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state. (Rev., s. 1542; Code, s. 957; R. C., c. 33, s. 6; 1799, c. 520; 1818, c. 963; 1830, c. 2; 1868-9, c. 962.)

I. In General.
II. Exceptions.
III. Effect of Decision.
A. In General.
B. Power of Superior Court.

Cross References.

For requisites of the transcript, see section 645.

See comment in 13 N. C. Law Rev., 343, wherein it is suggested that this section be invoked to prevent useless nonsuits.

I. IN GENERAL.

Editor's Note.—The provisions of this section are so similar to those contained is section 658 that the practitioner must necessarily take notice of this section last mentioned and the notes placed thereunder. Specific reference to that section, for the various kinds of relief and the essential requisites for each, is here made.

Affirmance as to One Defendant Dismissal as to Other. — Under the technical rules of the common law a different rule prevailed, from that prescribed by this section and section 658, but the court of equity always followed this procedure, which was adopted by this State when the distinction between law and equity was abolished. One court having taken place of both law and equity, a joint judgment may be affirmed as to one defendant, and dismissed as to another. This has been the uniform course and practice since the blending of the two forms of procedure, and is expressly authorized by the sections cited above. The same practice has been followed in the courts of the other states which have adopted the modern system of practice. Kimbrough v. Atlantic, etc., R. Co., 182 N. C. 234, 236, 109 S. E. 11.

Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of C. S., 658 and this section. Kimbrough v. Hines, 182 N. C. 234, 109 S. E. 11.

Errors in Pleadings, etc.—This section requiring the Supreme Court to give such judgment as shall appear to be proper from an "inspection of the whole record" has reference only to essential parts of the record proper, as pleadings, verdict and judgment, and not to those errors occurring during the progress of the trial. McKinnon v. Morrison, 104 N. C. 354, 360, 10 S. E. 513. See also Wyne v. Atlantic, etc., R. Co., 182 N. C. 253, 109 S. E. 19.

The Supreme Court ought not to render judgment upon an aspect of the case not presented by the pleadings. Oakley v. Noppen, 95 N. C. 60, 61, 62; Bush v. Hall, 95 N. C. 82; Morrison v. Watson, 95 N. C. 479, 481.

Except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. Hill v. R. R., 178 N. C. 612. Especially is this true where the change of part is sought to be made between the trial and appellate courts. Ingram v. Yadkin River Power Co., 181 N. C. 359, 107 S. E. 209.

Theory of Lower Court Adopted.—A case is heard and determined in the Supreme Court according to the theory on which it was tried below. Coble v. Barringer, 171 N. C. 445, 88 S. E. 518; Warren v. Susman, 168 N. C. 457, 84 S. E. 760.

Sufficiency of Record Must be Apparent.—The Supreme Court renders judgment upon an inspection of the whole record, and must therefore, be satisfied of the sufficiency of each record. State v. Daniel, 121 N. C. 574, 28 S. E. 255.

Judgment in Lower Court Essential.—When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. Boardfoot v. McKeithan, 92 N. C. 561. It must also appear that the court was lawfully organized and held, and all the proceedings had in the action arranged in an orderly manner. Id.

Proceedings to Modify Judgment.—A judgment of the superior court may be modified on appeal where the plaintiff's right to remove adverse claims as a cloud upon his title to lands has been established, so as to enjoin, upon the defendant's appeal, actions pending in the superior court involving the same equity and the same subject-matter, where the parties thereto have been made parties to the case at bar, the proceedings being in the nature of a bill of peace. Ormand Mining Co. v. Gambrill, etc., Mills Co., 181 N. C. 361, 107 S. E. 216.

Parties Not Appealing or Complaining.—Although the plaintiff does not appeal the appellate court may afford him relief upon defendant's appeal, because, by the terms of this section, it should render such judgment as "on an inspection of the whole record it shall appear to them ought in law to be rendered." Ormand Min. Co. v. Gambrill, etc., Mills Co., 181 N. C. 361, 107 S. E. 216.

Errors Which Have to Be Assigned.—Under the provisions of this section the appellate court is required to take notice of all errors appearing upon the face of the record proper, such as defects in the summons, pleadings and the judgment, even though such errors are not assigned. Wilson v. Beaufort Lumber Co., 131 N. C. 163, 164, 42 S. E. 565; Thornton v. Brady, 100 N. C. 38, 40, 5 S. E. 910. When other matters are relied upon, they must be pointed out by an exception on the trial or in the case on appeal. State v. Ashford, 120 N. C. 588, 589, 26 S. E. 915; State v. Cowan, 29 N. C. 239.

II. EXCEPTIONS.

Assignment of Error Generally.—See 1 N. C. Enc. Dig. 624.

In General.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Merchants Nat. Bank v. Howard, 188 N. C. 543, 125 S. E. 126.

Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Lupton, 193 N. C. 428, 137 S. E. 175.

The Supreme Court can not consider a question not considered by the trial court, and not affecting the verdict appealed from. Herring v. Warwick, 155 N. C. 345, 71 S. E. 462; Kennedy v. Johnson, 69 N. C. 249; Williamson Co. v. Canaday, 25 N. C. 349.

Error Apparent on Record.—The rule which forbids the hearing of an objection not taken, and which ought to have been taken, at the trial, does not embrace the case where the judge misdirects the jury upon a material question of law, injuriously to the appellant. Burton v. Wilmington, etc., R. Co., 84 N. C. 193.

Failure to State Cause of Action.—An objection that the complaint does not state a cause of action may be taken advantage of at any time, even in the Supreme Court on appeal. McDonald v. MacArthur Bros. Co., 154 N. C. 122, 69 S. E. 832; Tucker v. Baker, 86 N. C. 1; Baker v. Garris, 108 N. C. 218, 13 S. E. 2; Jackson v. Jackson, 105 N. C. 433, 11 S. E. 173.

Venue.—In an action against the board of commissioners of one county, brought to the superior court of an adjoining county, objection to the venue must be taken in the trial court, otherwise the objection will be considered as waived. Edwards v. Board, 70 N. C. 571. See, also, McMinn v. Hamilton, 77 N. C. 300.

Objections to special issues submitted to the jury, covering issues presented by pleadings, can not be made on appeal by a party who did not request the submission of other issues. Gross v. McBrayer, 159 N. C. 372, 74 S. E. 915; Graves v. Barrett, 126 N. C. 267, 35 S. E. 539.

Answer to Excluded Questions.—Assignments of error to exclusion of questions asked can not be considered, where the record does not indicate what the answers would have been. Smith v. Commissioners, 176 N. C. 466, 97 S. E. 378; Brinkley v. Norfolk Southern R. Co., 168 N. C. 428, 84 S. E. 700; Bryant Timber Co. v. Tilghman Lumber Co., 168 N. C. 154, 84 S. E. 765.

No Presumption of Error.—An assignment of error, to be considered, must be based upon an exception previously taken and appearing in the record, for the court will not presume error. Bailey v. Justice, 174 N. C. 753, 94 S. E. 518.

Where No Exceptions Appear.—No exceptions will be considered on appeal except such as appear in the record and were made in the court below. Phipps v. Pierce, 94 N. C. 514, 516; Taylor v. Plummer, 105 N. C. 56, 11 S. E. 266.

Where, by consent of the parties, the Judge frames the issue at the close of the testimony and no exception is made on the trial to such issues or to the evidence or charge, objection can not be raised on appeal that the issues submitted were not such as arose on the pleadings. Exception to the issues should be made on the trial so that the judge may, if he thinks proper, revise and correct them. Wills v. Fisher, 112 N. C. 529, 17 S. E. 73.

III. EFFECT OF DECISION.

A. In General.

Decision Fixes the Law.—The decision of the Supreme Court becomes the law of the case upon the second trial. Davis v. Hilton Lumber Co., 190 N. C. 873, 130 S. E. 156. It is the duty of the superior court to proceed with the case in accordance with this decision and the principles established by the Supreme Court. James v. Western, etc., R. R., 123 N. C. 299, 31 S. E. 707; Ray v. Veneer Co., 188 N. C. 414, 124 S. E. 756.

The Decision Certified.—The requirement of this section that the Supreme Court transmit its "decision" means the **results** reached by the court, and there is no provision requiring the clerk to certify to a court below the **opinion** of the court. State v. Ketchy, 71 N. C. 148.

Certified Opinion—Appeal from Interlocutory Orders.—See section 1413.

Final Judgment.—Final judgment may be rendered in the Supreme Court, Alspaugh v. Winstead, 79 N. C. 526. But where the case is sent back to the lower court it is within the discretion of the trial judge to permit the filing of a verified answer where there was a failure to do so in the first instance. Griffin v. Ashville Light Co., 111 N. C. 434, 438, 16 S. E. 423.

B. Power of Superior Court.

Power Limited. — The superior court has no power to modify or change a judgment or decree of the Supreme Court certified to the court below. Its powers are confined to incidental matters of detail necessary to carry the decree into effect, not inconsistent therewith. The rule that the superior courts have authority to vacate or modify decrees made in a cause, at any time before final judgment, does not apply here. Murrill v. Murrill, 90 N. C. 120.

When a final judgment is rendered in the Supreme Court upon an appeal from a final judgment in the superior court, the latter court has power to issue no other process in the case than an execution for its own costs. Grissett v. Smith, 61 N. C. 297.

Judgment for Costs.—Judgment for costs in the Supreme Court is rendered in that court, the superior court has no jurisdiction in that matter. Johnson v. Danville, etc., R. R., 109 N. C. 504, 13 S. E. 881. Midgett v. Vann, 158 N. C. 128, 73 S. E. 801. See section 1256 and the notes thereto.

Motion for New Trial.—Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the judgment has been certified to the clerk of the Superior Court, under this section and § 1417, the case is in the latter court for the purpose of the execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. State v. Casey, 201 N. C. 620, 161 S. E. 81; State v. Cox, 202 N. C. 378, 162 S. E. 907.

§ 1413. No judgment on interlocutory order; opinion certified.—When an appeal is taken to the supreme court from any interlocutory judgment, the supreme court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions. (Rev., s. 1544; Code, s. 962.)

Editor's Note.—It is to be noted that in this section it is required that the **opinion** shall be certified "with instructions" etc., whereas in the preceding section, the provision, applicable to criminal cases, only required that the **decision** be certified.

Interlocutory Order Defined. — See sec. 592 and notes thereto.

Procedure Explained.—The appeal, like a writ of error, does not disturb the interlocutory order, but suspends action on it, intended to carry it into effect, until its legality is tested in the court above, and this being decided and certified to the superior court, then, if sustained, that court is directed to proceed upon the judgment as already existing; or if declared erroneous, to reverse or modify it, in conformity to the law declared. Green v. Griffin, 95 N. C. 50, 53.

Effect of Appeal. — Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the court upon that specific point. The order of judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the court below. Green v. Griffin, 95 N. C. 50.

If the appeal is from an interlocutory order the cause does not come up to the Supreme Court, but only the **order,** which is decided and the decision certified to the superior court, to the end that the **cause** may be proceeded with. Perry v. Tupper, 71 N. C. 380, 383.

Substantial Right Affected.—Before an appeal should be taken from an interlocutory judgment or order, it should affect some substantial right of the appellant. Rogerson v. Lumber Co., 136 N. C. 266, 48 S. E. 647.

Same—Discretion of Court.—However, even though there may be some doubt as to whether an appeal will lie from the interlocutory order, the court may, in its discretion, hear and decide the matter presented. Barnes v. Fort, 169 N. C. 431, 86 S. E. 340; Best v. Best, 161 N. C. 513, 77 S. E. 762.

Motion to Dismiss.—An appeal from the refusal of a motion to dismiss an action is premature and will not lie; the proper procedure is for the movant to except, reserve exceptions and appeal from the adverse decision. Bradshaw v. Citizens Nat. Bank, 172 N. C. 632, 90 S. E. 789.

Criminal Action.—In a criminal action there is no appeal save from a **final** judgment. State v. Nash, 97 N. C. 514, 2 S. E. 645. And when the record does not show a final judgment the appeal will be dismissed. State v. Hazell, 95 N. C. 623.

Motions.—All proper motions in the action should be made in the superior court, except such motion as may be made affecting the appeal and the action of the Supreme Court therein. Stephens v. Koonce, 106 N. C. 222, 223, 10 S. E. 996.

As to the binding force of the Appellate Court's decision when certified, see note of Murrill v. Murrill, 90 N. C. 120, under section 1412.

When Error Committed by Supreme Court.—If the Supreme Court issues an irregular order, neither the judge of the Supreme Court nor the litigating parties can frustrate it; the remedy is by a petition to the Supreme Court to rehear. Perry v. Tupper, 711 N. C. 380, 382.

§ 1414. Power of amendment and to require further testimony.—The supreme court has power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment; and to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And whenever it appears necessary for the purpose of justice, the court may allow and direct the taking of further testimony in any case which may be pending in the court, under such rules as may be prescribed, or may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below. (Rev., s. 1545; Code, s. 965; R. C., c. 33, s. 17; 1777, c. 115, s. 75; 1785, c. 233; 1792, c. 360; 1831, c. 46.)

I. In General.
II. Pleading.
III. Parties.
IV. Case Remanded.

Cross Reference.

For full treatment of amendments generally, including specific cases wherein they are held allowable, see 1 N. C. Enc. Dig. 817, and see section 547 and the notes thereto.

I. IN GENERAL.

Extent of Power.—The Supreme Court can amend as fully as the superior court can do, and in the same instances. Perry v. Perry, 175 N. C. 141, 95 S. E. 98.

But the power given the court under this section is not an unlimited one, even though the provisions of the section have been given a rather liberal construction. In the exercise of the power herein provided for, the courts have allowed the amendments in the light of the primary object for which the section was enacted, namely, to further justice between the parties and not to allow an undeserving party to gain any undue advantage due to some technical

omission on the part of his adversary, which should have been pleaded or included at an earlier stage of the litigation.

Hence, where the amendment is of such nature that, to allow it would make the record not conform to or correspond with the facts developed on the trial below, and would be in contradiction of the evidence adduced, and the theory upon which the trial must have proceeded, then the amendment will not be allowed. Ed. Note, See Huyett, etc., Mfg. Co. v. Gray, 126 N. C. 108, 115, 35 S. E. 236.

Same—Facts Cannot Be Found.—Under the provisions of this section the Supreme Court cannot find the facts. All it can do is to remand the case to the end that the lower court can discover them. Bank v. Blossom, 89 N. C. 341, 342.

After Final Judgment.—The Supreme Court has no power to direct or allow amendments to the record after a final judgment therein has been rendered. Walton v. McKesson, 101 N. C. 428, 435, 7 S. E. 566.

Different Case Presented.—The power to amend will not be exercised where the amendment would, perhaps, present a case substantially different from the one tried below and raise a question of law not involved in the present appeal. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781.

Cited in Lipe v. Citizens' Bank, etc., Co., 206 N. C. 24, 29, 173 S. E. 316.

II. PLEADING.

When Nonresident Petitions for Removal.—Where a nonresident defendant claims an interest in lands, in proceedings by a municipality against a resident owner to take it for a public use, and the nonresident has been made a party and files his petition and bond for removal to the federal court for diversity of citizenship, the plaintiff may amend his pleadings on motion granted by the State court, under this section, and set up facts sufficient to show that the claim of the nonresident arose by contract that gave him no interest in the lands within the meaning of the Federal Removal Act. Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 S. E. 842.

Pleading by Guardian.—Where an infant entered a certain pleading by her next friend when it should have been made by her guardian, the objection thereto was such a technical one that it was disregarded, although the court specifically says that had the objection any force whatever, the mistake could readily be cured by allowing an amendment to be made. Hollomon v. Hollomon, 125 N. C. 29, 33, 34 S. E. 99.

Explanation by Parol Proof.—Where a description in a deed is not so uncertain and vague as to render it void, the Supreme Court, where justice requires it, may allow the uncertain part to be aided by parol proof. Allen v. Sallinger, 108 N. C. 159, 160, 12 S. E. 896.

Inadvertence of Judge.—While a judge cannot **resettle** a case on appeal, yet, where the ends of justice require it, it is his duty to correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like. People v. Teague, 106 N. C. 571, 572, 575, 11 S. E. 330.

Action on Administration Bond.—An objection in the Supreme Court that the action on an administration bond was not brought in the name of the state may be obviated by a motion to amend under this section. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707. But such an amendment will not be allowed when it would destroy a just and legal ground of the appeal which existed when the objection thereto was taken. Grant v. Rogers, 94 N. C. 756, 760.

Failure to File Replication.—Where the plaintiff, in a suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was held, a waiver by the defendant of a replication, and the court allowed an amendment under this section. Fleming v. Murphy, 59 N. C. 59.

III. PARTIES.

The Rule Stated.—A bill can be amended as to parties in the Supreme Court. Kent v. Bottoms, 56 N. C. 69, 70, 72.

Same—Guardian ad Litem.—The power to make parties includes the power to appoint a **guardian ad litem.** Perry v. Perry, 175 N. C. 141, 95 S. E. 98. It is useless to remand the case for such appointment where the interests of the children had been duly protected by this petitioner. Id.

Personal Representative.—Where a claim under the Workmen's Compensation Act has been litigated in the name of the deceased it is not permissible under this section for the personal representative of the deceased, hereafter to be appointed, to come in and make himself a party to the proceeding in the Supreme Court. Hunt v. State, 201 N. C. 37, 39, 158 S. E. 703.

Opposite Party Harmed.—While an amendment substituting parties can be allowed in the Supreme Court, it will not be allowed when it will put the opposite party to a disadvantage. Hodge v. Marietta, etc., R. R., 108 N. C. 24, 12 S. E. 1041.

IV. CASE REMANDED.

In General.—The Supreme Court has the power, in a proper case, to remand causes to the end that proper amendments may be made, or further proceedings taken in the court below. Holley v. Holley, 96 N. C. 229, 231, 1 S. E. 553.

Essentials of Transcript Lacking.—Where the transcript of the record fails to set forth facts necessary for the determination of the case on appeal, it will be remanded to the end that the same may be supplied or found by the court below, as the nature of the cause may require. Bank v. Blossom, 89 N. C. 341.

Requisites of Transcript. — See section 645 and notes thereto.

Insanity of Plaintiff.—Where after an appeal and before a hearing, the plaintiff became insane and was committed to an asylum, it was held that the case must be remanded. Jones v. Cotten, 108 N. C. 457, 13 S. E. 161.

Jury Trial.—Upon allegation of inadvertence in including a supersedeas bond in the appeal bond, an issue therein may be remanded to the superior court to be tried by jury. Burnett v. Nicholson, 86 N. C. 728, 730.

§ 1415. Proof of exhibits.—Exhibits or other documents relative to cases pending in the supreme court may be proved by the parol testimony of witnesses to be examined in the court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court, and suitors in the court may have subpœnas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: Provided, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned. (Rev., s. 1547; Code, s. 963; R. C., c. 33. s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1.)

Regular Practice Explained.—Though witnesses in some instances may be summoned, it has not been the practice. Owing both to the great addition it would make to the already large and steadily increasing volume of business in this court to examine affidavits on questions of fact, the court has adhered to its settled ruling, that it will not pass upon the facts, except as to injunctions and in similar cases, but will take the findings of fact by the judge who tried the cause below as conclusive. In re Deaton, 105 N. C. 59, 63, 11 S. E. 244.

§ 1416. Opinions and judgments to be in writing.—The justices shall deliver their opinions and judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary. (Rev., s. 1548; Code, s. 964; 1893, c. 379, s. 5; R. C., c. 33, s. 16; 1810, c. 785.)

Editor's Note.—Under the law as it stood prior to 1868, the opinions of the judges were required to be in writing, "with reasons at full length upon which they are founded," the purpose and intent of the statute being to prevent **per curiam** opinion.

Subsequently the statute was amended and the requirement of "reasons at full length, etc.," was omitted. Still later (in 1893) it was left within the discretion of the judges by the addition of the proviso to decide when the opinions were to be written. This is the situation under the law as it stands today. It has been held in at least one case

that even in the absence of the statutory provision placing their discretionary power in the court, that such power exists by force of the constitutional provision giving the court the right to make its own rules of practice. State v. Council, 129 N. C. 511, 39 S. E. 814. See also 5 N. C. Law Rev. 20.

Discretion of Court.—The filing of a written opinion in a case is discretionary with the Supreme Court. Parker v. Atlantic, etc., R. R., 133 N. C. 335, 336, 337, 45 S. E. 638.

The writing of the reason at length is discretionary with the court. Bradsher v. Cheek, 112 N. C. 838, 839, 840, 17 S. E. 533.

A judgment may be affirmed without extended opinion. Rogen v. Luff, 202 N. C. 819, 161 S. E. 924.

Applied, opinion deemed necessary, in Wootton v. McGinnis, 201 N. C. 841, 161 S. E. 926; Thrash v. Roberts, 201 N. C. 843, 161 S. E. 925.

§ 1417. Certificates to superior courts; execution for costs; penalty.—The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars. (Rev., s. 1549; Code, s. 968; 1887, c. 41; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1, s. 3.)

See notes to § 1412.

Editor's Note.—This and section 1419 are **in pari materia** and must be construed together. See Emery v. Raleigh, etc., R. R., 102 N. C. 234, 10 S. E. 141.

Generally.—By virtue of this section opinions are certified down on the first Monday in each month, provided they shall have been on file ten days. As opinions are usually filed on Tuesdays, they remain not less than thirteen days and not more than forty-two days **in fieri,** and, in that time, if there is error (and in criminal cases it should be scrutinized in that time), it can be observed and the matter called to the attention of the court, which, in such cases, on sufficient cause shown, has more than once called up the opinion for reconsideration. If this is not done, the remedy is by application to the Governor. State v. Council, 129 N. C. 511, 514, 39 S. E. 814.

Effect of Certifying Case.—When the Supreme Court has certified its decision to the court below for judgment there, this court has no further jurisdiction of the case. James v. Western, etc., R. R., 123 N. C. 299, 307, 31 S. E. 707.

Case Certified in Advance of Statutory Time.—The court in its judgment may direct an opinion certified down in advance of the statutory time. State v. Herndon, 107 N. C. 934, 939, 12 S. E. 268.

Costs.—Judgment for costs in the Supreme Court is rendered in that court; the superior court has no jurisdiction in the matter. Johnson v. Danville, etc., R. R., 109 N. C. 504, 13 S. E. 881. See section 1256 and the note thereto.

Applied in Commissioner of Banks v. Harvey, 202 N. C. 380, 162 S. E. 894.

Cited in Morris v. Cleve, 197 N. C. 253, 256, 148 S. E. 253.

§ 1418. Appeals dismissed.—Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it. (Rev., s. 1543; Code, s. 967; R. C., c. 33, s. 20; 1848, c. 28; Supm. Ct. Rules, 15, et seq.)

See 1 N. C. Enc. Dig. 643 et seq., 13 N. C. Enc. Dig. 110.

Failure to Docket Transcript.—An appeal will be dismissed upon a failure of the appellant to docket the transcript as required. Cox v. Kinston, etc., R. R., 177 N. C. 227, 98 S. E. 704.

Same—When Deemed Docketed.—An appeal is deemed docketed when the transcript is received by the clerk of the court. Brafford v. Reed, 124 N. C. 345, 32 S. E. 726.

Failure to Print Record.—The appeal will be dismissed where there is a failure to print record and brief as required. Bradshaw v. Stransberry, 164 N. C. 356, 79 S. E. 302.

Filing of Bond Gives Notice.—An appeal will not be dismissed upon the ground that no notice of appeal was given, where the record shows that an appeal bond was filed and approved by the court. The filing of the bond and its approval in open court is notice to the appellee. Capehart v. Biggs & Co., 90 N. C. 373.

Compliance with Statute Essential.—Compliance with the statutory regulation as to appeals is a **condition precedent,** without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that the negligence is negligence of counsel and not negligence of the party. Cozart v. Assurance Co., 142 N. C. 522, 55 S. E. 411.

The rules of court are not merely directory, and a failure of the appellant to prosecute his appeal in accordance therewith is sufficient ground for dismissal. Wiseman v. Comm., 104 N. C. 330, 10 S. E. 481; Davis v. Wall, 142 N. C. 450, 55 S. E. 350.

Where the appellant has failed to prosecute his appeal as required by the rule of the court, the right of the appellee to dismiss the appeal must be exercised before the appellant has complied with the particular rule in question, and if appellee's motion is made thereafter his right to dismiss at that term is barred by his own laches. McLean v. McDonald, 175 N. C. 418, 95 S. E. 769.

Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. Cross v. Williams, 91 N. C. 496. The court said: "The appellant has no right to take an appeal and bring it up, or abandon it at his will and pleasure; he must bring it up in the established course of procedure." Id.

Laches.—Where a case was remanded from the Supreme Court to the end that the appellant might have a lost record supplied by proper proceedings in the court below, which has not been done, and the record is as defective as when the order of remand was made, though three or four terms of the superior court in that county have transpired and no excuse is rendered for the laches, the case will be dismissed on motion of appellee. Cox v. Jones, 113 N. C. 276, 18 S. E. 199.

Motion to dismiss appeal must be made in writing. Brafford v. Reed, 124 N. C. 345, 32 S. E. 726.

Notice.—No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed. Jones v. Asheville, 114 N. C. 621, 19 S. E. 631.

Time for Reinstatement.—Motion to reinstate, upon notice, may be heard not later than the next term. Wiseman v. Comm., 104 N. C. 330, 10 S. E. 481.

Same—Failure to Print.—A motion to reinstate an appeal dismissed must be made at the same term, and will only then be allowed for good cause shown. Pipkin v. Green, 112 N. C. 355, 17 S. E. 534.

Same—Failure to Docket.—A motion to reinstate an appeal dismissed for failure to docket the record at the first term of the court after the trial below is fatally defective where it does not show that the delay was without laches on the part of the appellant. Pipkin v. Green, 112 N. C. 355, 17 S. E. 534.

Same—Insufficiency of Bond.—A motion to dismiss an appeal for insufficiency of bond will not be entertained, unless after written notice, as required by this section. McGee v. Fox, 107 N. C. 766, 12 S. E. 369; Jones v. Ashville, 114 N. C. 621, 19 S. E. 631.

Time.—Motion to dismiss because appellant has failed to perfect his appeal must be made at or before hearing. Hutchinson v. Rumfelt, 82 N. C. 426, 427.

§ 1419. Petition to rehear; execution restrained.—A petition to rehear may be filed during the vacation succeeding the term of the court at

which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or either of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined. (Rev., s. 1546; Code, s. 966; R. C., c. 33, s. 18; Supreme Court Rules 52, 53, 54.)

Cross References.—For full treatment of this subject, see 1 N. C. Enc. Dig. 668. See also section 1417 and notes thereto, Rules of court, 52, 53.

In General.—Petitions to rehear are confined to alleged errors of law or newly discovered evidence. Barcroft v. Roberts, 92 N. C. 250.

Not Absolute Right.—This section cannot be allowed to give the losing party an absolute right to a rehearing, and to have his petition considered by the whole court contrary to its rule governing the practice in such cases. Herndon v. Fire Ins. Co., 111 N. C. 384, 386, 16 S. E. 465.

Mistake or Error of Fact.—The Supreme Court will not rehear upon the ground of mistake or error of fact. Weathersbee v. Farrar, 98 N. C. 265, 3 S. E. 482.

Mistake and Excusable Neglect.—A party against whom a judgment has been entered by mistake, execusable neglect or surprise may make application for petition to rehear. Farrar v. Staton, 101 N. C. 78, 7 S. E. 753.

Compliance with Section Essential.—Petitions to rehear must be filed according to the requirements of this section. Strickland v. Draughan, 91 N. C. 103.

Former Decision Must Be Erroneous.—When questions of law have been considered and decided the court will not reexamine the question and reverse its former decision, unless it clearly appears that it is erroneous. School Directors v. City, 137 N. C. 503, 504, 50 S. E. 279.

Criminal Actions.—Petitions to rehear are not allowable in criminal actions. State v. Council, 129 N. C. 511, 39 S. E. 814.

Matters in Transcript Considered.—On petition to rehear a case formerly decided, the Supreme Court will not consider matters not contained in the transcript of the record. Presnell v. Garrison, 122 N. C. 595, 29 S. E. 839.

A petition to rehear must be upon the record as it was at the former hearing. Presnell v. Garrison, 122 N. C. 595, 29 S. E. 839.

Presumption.—Rehearings of decision of cases in the Supreme Court are granted only in exceptional cases and, when granted, every presumption is in favor of the judgment already rendered. Weisel v. Cobb, 122 N. C. 67, 30 S. E. 312.

Court Will Correct Errors.—When a rehearing has been ordered and a manifest error is made to appear, the court will correct it. Hodgin v. Peoples Bank, 125 N. C. 503, 34 S. E. 709, 712.

Burden of Proof.—The burden of showing error is on the petitioner. Webb v. Hicks, 125 N. C. 201, 34 S. E. 395.

Notice.—A purchaser of land, in litigation, bringing a petition to rehear before the expiration of the twenty day period allowed on this section, is conclusively fixed with notice of the fact that motion for rehearing could be applied for at any time within such period. Bird v. Gilliam, 125 N. C. 76, 79, 34 S. E. 196.

Computation of Time.—In computing the time under the provision of this section allowing a petition to rehear to be filed "within twenty days after the commencement of the succeeding term," the first day thereof must be excluded. Barcroft v. Roberts, 92 N. C. 250. The last day must also be excluded when it falls on Sunday. Id. Cited and approved in Cook v. Moore, 95 N. C. 4.

After Case Certified.—After a decision of the Supreme Court has been certified down, the court is without jurisdiction to entertain a motion to recall the mandate and judgment rendered and reconsider it, the only method for such being upon petition to rehear filed according to the rules. Davis v. Southern R. R., 176 N. C. 186, 96 S. E. 945.

Second Rehearing.—A second rehearing is permissible only when the court has reversed or materially changed the original opinion that was sought to be reheard. Nelson v. Hunter, 145 N. C. 334, 59 S. E. 116.

§ 1420. Records to be made.—The court may order the clerk to record such parts of the record of cases as it may deem necessary. (Rev., s. 1550; Code, s. 959.)

§ 1421. Power to make rules of court.—The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for such court, to be entered on the records thereof in each county. (Rev., s. 1541; Code, s. 961; R. C., c. 33, s. 13; 1818, c. 963.)

See note under const. art. 4, § 12.

Generally.—"In North Carolina, the power to prescribe rules for trial courts (superior courts and inferior courts) is vested in the Legislature by the Constitution, but the Legislature has committed it to the Supreme Court. This enables the Supreme Court to make rules for trial courts subject, in North Carolina, to legislative modification." 5 N. C. Law Rev. 275.

The General Assembly is without power to prescribe rules of practice or procedure for the Supreme Court. Lacy v. State, 195 N. C. 284, 141 S. E. 886.

Rules for Subordinate Courts.—The Supreme Court has, by this section, the power to prescribe rules of practice for the subordinate courts. Barnes v. Easton, 98 N. C. 116, 119, 3 S. E. 744.

Rules Mandatory.—The rules of practice made under the power given by this section are not merely directory, but are mandatory and must be observed. Walker v. Scott, 102 N. C. 487, 489, 9 S. E. 488.

In this State the rules of court are the sole code of practice for the Supreme Court and are to be strictly observed. Calvert v. Carstarphen, 133 N. C. 25, 27, 45 S. E. 353.

§ 1421(a). Supreme court to prescribe rules; rules to conform to law.—The supreme court is hereby vested with the power to prescribe from time to time the modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the supreme court, and in the trial of actions in the superior court, and before referees: Provided, no rule or regulation so adopted shall be in conflict with this law or any of the provisions of the Consolidated Statutes of 1919. Such rules as may be adopted by the supreme court shall be printed and distributed by the secretary of state as are the reports of the supreme court. (Ex. Sess. 1921, c. 92, s. 20.)

Art. 3. Officers of Court

§ 1422. The court may appoint acting attorney-general.—If the attorney-general should fail at any term of the supreme court to attend to the business which by law is assigned him, the court may appoint some counsel learned in the law to discharge his duties during the term. (Rev., s. 1551; Code, s. 969; R. C., c. 33, s. 22; 1846, c. 29.)

§ 1423. Reporter.—The supreme court may employ a reporter of its decisions. (Rev., s. 1552; Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 429.)

§ 1424. Clerk.—The clerk of the supreme court shall be appointed by the court, and shall hold his office for eight years. (Rev., s. 1553; Const., Art. IV, s. 15.)

§ 1425. Clerk's bond and oath of office.—Before undertaking his duties, the clerk of the supreme court shall enter into bond with sufficient surety payable to the state of North Carolina, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with the secretary of state; and he shall also before said jus-

tices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh. (Rev., s. 290; Code, s. 958; R. C., c. 33, s. 9; 1812, c. 829, s. 2; 1818, c. 963, s. 5; 1846, c. 28, s. 3; 1799, c. 520, s. 2.)

Action on official bonds. see section 354 and notes thereto.

§ 1426. Clerk to report money on hand.—The clerk of the supreme court shall, at the beginning of each fall term, produce to the court a statement on oath of all moneys remaining in his hands which have been paid into his office three years or more previous thereto, whether received directly from parties or from his predecessor in office, and is not detained in his hands by special order of the court, specifying therein the name of the person to whom the same is payable, and his address, if known; a copy of which report shall be transmitted to the state treasurer and to the auditor. (Rev., s. 1554; Code, s. 1864; R. C., c. 73; 1823, c. 1186; 1831, c. 3.)

§ 1427. Marshal appointed.—The supreme court may appoint an officer to be styled Marshal of the Supreme Court, removable at will, who shall attend upon the court during its sessions. (Rev., s. 1555; Code, s. 950; 1873-4, c. 34; 1881, c. 306.)

§ 1428. Librarian appointed.—The justices of the supreme court have charge of the law library and may, in their discretion, employ a librarian, who shall perform his duties under such rules and regulations as may be prescribed by the court. (Rev., s. 5084; Code, s. 3606; 1889, c. 482; 1883, c. 100.)

SUBCHAPTER II. SUPERIOR COURTS

Art. 4. Organization

§ 1429. Number of judges and solicitors.—The state shall be divided into twenty superior court judicial districts, for each of which a judge and a solicitor shall be chosen in the manner now prescribed by law. (1913, cc. 9, 63; Const., Art. 4, s. 10.)

Judge Appointed Prior to Creation of District.—Appointment of a judge of the superior court prior to the date when the act creating the judicial district takes effect is invalid. State v. Shuford, 128 N. C. 588, 38 S. E. 808.

§ 1430. Election and term of office of judges.—The judges of the superior courts shall be elected in like manner as is provided for justices of the supreme court, and shall hold their offices for eight years. (Const., Art. 4, s. 21.)

See section 1403 and note thereto.

§ 1431. Election and term of office of solicitors.—A solicitor shall be elected for each judicial district by the qualified voters thereof, as is prescribed for members of the general assembly, who shall hold office for the term of four years, and prosecute on behalf of the state in all criminal actions in the superior courts, and advise the officers of justice in his district. (Const., Art. 4, s. 23.)

§ 1431(a). Assistant prosecuting attorney in Forsyth County.—The board of County Commissioners of Forsyth County are hereby authorized and empowered to employ a competent attorney of Forsyth County to assist in the prosecution of the criminal docket of the Superior Court of Forsyth County.

The selection of an attorney of Forsyth County to assist the solicitor of the district in the prosecution of the criminal docket of the Superior Court of Forsyth County, the duration of the employment, and the salary to be paid such attorney, shall be entirely within the discretion of the Board of County Commissioners of Forsyth County.

The salary to be paid the attorney for assisting the solicitor of the district in the prosecution of the criminal docket of Forsyth County shall be paid from the general funds of the County of Forsyth, and shall be paid in such manner as shall be prescribed by the Board of County Commissioners of Forsyth County. (1927, c. 129.)

§ 1432. Residence and rotation of judges.—Every judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years, but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts of the said district. (Const., Art. 4, s. 11.)

See notes under Const., Art. 4, § 11, Code of 1927.

De Facto Judges.—A judge of a superior court who presides in another district by appointment of the Governor, is a de facto judge, and his acts in that capacity are valid. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 100; State v. Turner, 119 N. C. 841, 25 S. E. 810.

§ 1433. Oath of office.—Every judge before he shall act as such shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, take the oath appointed for public officers, and also an oath of office. The officer or court before whom the judge shall qualify shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return the oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one-half to the use of the state and the other half to the person who shall sue for the same. (Rev., s. 1497; Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45.)

§ 1434. Vacancies filled.—All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such com-

mission. (Rev., s. 1498; 1899, c. 613; Const., Art. 4, s. 25.)

§ 1435. When judge may discharge solicitor.—When any state solicitor, authorized by election or appointment to act as prosecuting attorney for or in behalf of the state of North Carolina, in any of the courts of said state, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor whose duty it is to represent the state at such court is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some competent attorney to act as state solicitor for the term. The appointee shall be allowed all the fees and compensation belonging to the solicitor for such term. (Rev., s. 1499; 1901, c. 717.)

Editor's Note.—Jurisdiction of the special or emergency judges of matters of mandamus was provided for by the Acts of 1925.

§ 1435(a). Special or emergency judges; jurisdiction; compensation; expenses.—The persons embraced within the provisions of section 3884(a) are hereby constituted special or emergency judges of the superior court under article four (4), section eleven (11), of the constitution of this state, and are authorized to hold the superior courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and to hold special terms when commissioned so to do by the governor, and as compensation for holding such special terms shall receive their actual expenses and in addition thereto fifty dollars per week, to be paid by the county in which such special term is held.

In case of emergency arising as provided in said section, the governor shall designate the person to act as emergency judge who shall receive his actual expenses only incurred while so acting, to be paid by the treasurer upon warrant of the auditor, upon certificate of the judge: Provided, that the county asking the governor for an emergency judge shall have the privilege of requesting the assignment of a particular judge. Such emergency judges shall be subject to all the regulations respecting superior court judges except as otherwise provided in this law. (1921, c. 125, ss. 2, 3; Ex. Sess. 1921, c. 20, s. 3.)

Editor's Note.—The Acts of 1927, ch. 205, § 3, provided that if the judge regularly assigned to the district in which Orange County is situated be unable, because of another regular term of court in the said district, or for other causes, to hold any term of court provided in section 1443 then the Governor shall assign another judge to hold said term.

This section was discussed in 3 N. C. Law Rev. 131.

§ 1435(b). Jurisdiction in injunction, receivership, and habeas corpus matters.—The special or emergency judges provided for in the preceding section shall at all times have the same jurisdiction in matters of injunction, mandamus, receivership, and habeas corpus as any other superior court judge. (Ex. Sess. 1921, c. 94, s. 1; 1925, c. 8.)

Editor's Note.—At the fall term of 1923 the Supreme Court held in Dunn v. Taylor, 186 N. C. 254, 119 S. E. 495, that by omitting to include mandamus in the enumeration the Legislature intended to limit the jurisdiction of emergency judges as to mandamus so that such judges could not issue the writ except when holding regular terms. The 1925 amendment inserted the word mandamus so as to overcome this decision and give such judges the power in chambers.

§ 1435(c). Order for hearing; notice to attorneys.—If any special or emergency judge has made any matters returnable before him, and subsequent thereto he should be called upon by the governor to hold court elsewhere, said judge shall make an order directing said matter to be heard before some other judge, setting forth in said order the time and place same is to be heard, and send a copy of said order to the attorney or attorneys representing the parties plaintiff and defendant in such matter. (Ex. Sess. 1921, c. 94 s. 2.)

§ 1435(d). Governor to make appointment of four special judges.—The governor of North Carolina may appoint four persons who shall possess the requirements and qualifications of special judges as prescribed by article four, section eleven of the constitution, and who shall take the same oath of office, and otherwise be subject to the same requirements and disabilities as are or may be prescribed by law for judges of the superior court, save the requirements of residence in a particular district, to be special judges of the superior courts of the state of North Carolina. Two of the said judges shall be appointed from the Western Judicial Division and two from the Eastern Judicial Division, as now established. The governor shall issue a commission to each of said judges so appointed for a term to begin July first, nineteen hundred thirty-five, and to end June thirtieth, nineteen hundred thirty-seven, and the said commission shall constitute his authority to perform the duties of the office of a special judge of the superior courts during the time named therein. (1927, c. 206, s. 1; 1929, c. 137, s. 1; 1931, c. 29, s. 1; 1933, c. 217, s. 1; 1935, c. 97, s. 1.)

For a discussion of this statute, see Jerome on Civil Procedure, p. 37.

Editor's Note.—Prior to the amendment of 1933, this section was mandatory. It required that the governor shall appoint, etc.

Judicial Notice of Appointment as Special Judge.—The Supreme Court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of this chapter. Greene v. Stadiem, 197 N. C. 472, 149 S. E. 685.

When necessary for the determination of a case on appeal, the Supreme Court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor under the authority of this chapter. Reid v. Reid, 199 N. C. 740, 155 S. E. 719.

Cited in Bohannon v. Virginia Trust Co., 198 N. C. 702, 153 S. E. 263.

§ 1435(e). Time for appointment.—Each special judge shall be appointed by the governor on or before July first, nineteen hundred and thirty-five, and shall be subject to removal from office for the same causes and in the same manner as regular judges of the superior court; and vacancies occuring in the offices created by this act shall be filled by the governor in like manner for the unexpired term thereof. (1927, c. 206, s. 2; 1929, c. 137, s. 2; 1931, c. 29, s. 2; 1933, c. 217, s. 2; 1935, c. 97, s. 2.)

§ 1435(f). Further appointments. — The governor is further authorized and empowered, if in his judgment the necessity exists therefor, to appoint at such time as he may determine, not exceeding two additional judges, one of whom shall be a resident of the Eastern Judicial Division, and one of whom shall be a resident of Western Judicial Division, whose term of office shall begin from his or their appointment and qualification and to end June thirtieth, nineteen hundred and thirty-seven. That all the provisions of this act applicable to the four special judges directed and appointed shall be applicable to the two special judges authorized to be appointed under this section, except as to the provisions that the appointment shall be made on or before July first, nineteen hundred and thirty-five. (1927, c. 206, s. 3; 1929, c. 137, s. 3; 1931, c. 29, s. 3; 1933, c. 217, s. 3; 1935, c. 97, s. 3.)

§ 1435(g). Extent of authority.—The authority herein pursuant to article four, section eleven, of the constitution of North Carolina, conferred upon the governor to appoint such special judges shall extend to regular as well as special terms of the superior court, with either civil or criminal jurisdiction, or both, as may be designated by the statutes or by the governor pursuant to law. (1927, c. 206, s. 4; 1929, c. 137, s. 4; 1931, c. 29, s. 4; 1933, c. 217, s. 4; 1935, c. 97, s. 4.)

Editor's Note.—This section was re-enacted by the amendment of 1935 without change.

§ 1435(h). Jurisdiction as of regular judges.—Such special judges during the time noted in their commission shall have all the jurisdiction which is now or may be hereafter lawfully exercised by the regular judges of the superior courts in the courts which they are appointed or assigned by the governor to hold, and shall have power to determine all matters and injunctions, receiverships, motions, habeas corpus proceedings and special proceedings or an appeal otherwise properly before them; but writs of injunction, orders to show cause, and other remedial or amendatory writs, orders and notices shall be returnable before them only in the county where the suit, proceeding or other cause is pending unless such judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge of the superior court; and the same, when issued by any such special judge, may always be made returnable by him before the resident or presiding superior court judge of each district to the same extent and in the same manner as any superior court judge might do in like case. (1927, c. 206, s. 5; 1929, c. 137, s. 5; 1931, c. 29, s. 5; 1933, c. 217, s. 5; 1935, c. 97, s. 5.)

Editor's Note.—This section was re-enacted without change by the 1935 amendment.

Special Judge to Hold Single Term—Motion for Alimony. —Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce a vinculo, continued to be heard before a judge regularly holding the terms of court in that district and this being determinative of the appeal the question is not presented as to whether it was required that the appellant should make it appear by the Governor's commission, or otherwise, that the regular judge assigned was unable to attend and hold courts, etc. N. C. Const. Art. IV, §§ 10 and 11. Reid v. Reid, 199 N. C. 740, 155 S. E. 719.

§ 1435(i). Salary; expenses; terms; practice of law.—The special judges so appointed shall receive the same salary and traveling expenses as now are, or may hereafter be, paid or allowd to judges of the superior court for holding their regularly assigned courts, and they shall hold all such regular and special terms of court as they may be directed and assigned by the governor to hold, without additional compensation; Provided, that no person appointed under this act shall engage in the private practice of law. (1927, c. 206, s. 6; 1929, c. 137, s. 6; 1931, c. 29, s. 6; 1933, c. 217, s. 6; 1935, c. 97, s. 6.)

Editor's Note.—This section was re-enacted without change by the 1935 amendment.

§ 1435(j). Authority to settle case on appeal.—Nothing herein shall be construed to prohibit such special judges from setting cases on appeal and making all proper orders in regard thereto after the time for which they were commissioned has expired. (1927, c. 206, s. 7; 1929, c. 137, s. 7; 1931, c. 29, s. 7; 1933, c. 217, s. 7; 1935, c. 97, s. 7.)

Editor's Note.—This section was re-enacted without change by the 1935 amendment.

§ 1435(k). Conflicting law repealed.—All laws and clauses of laws which may be in conflict with the seven preceding sections, to the extent of such conflict, are hereby repealed: Provided, that nothing herein shall in any manner affect sections 1435(a) and 3884(a) of the Consolidated Statutes. (1929, c. 137, s. 8; 1931, c. 29, s. 8; 1931, c. 217, s. 8; 1935, c. 97, s. 8.)

Editor's Note.—This section was re-enacted without change by the 1935 amendment.

Art. 5. Jurisdiction

§ 1436. Original jurisdiction. — The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof. (Rev., s. 1500; Code, s. 922; 1899, c. 504, s. 2; Const., Art. IV, ss. 12, 27; 1879, c. 92, s. 11; 1881, c. 210.)

I. In General.
II. Actions Ex Contractu.
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Cross References.

For full treatment of this subject, see 3 N. C. Enc. Dig. 833 et seq., 15 N. C. Enc. Dig. 537 et seq. See section 1473 and notes thereto.

I. IN GENERAL.

Constitutionality of Section.—The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV, sec. 12; Williams v. Williams, 188 N. C. 728, 125 S. E. 482.

The constitutional jurisdiction of the superior court, generally, may be stated as intermediate between the Supreme Court and the courts of justices of the peace. Mott v. Board, 126 N. C. 866, 36 S. E. 330.

Construction with Other Sections. — This section defining the jurisdiction of the superior court, means only the jurisdiction which is necessary to be set out in good faith to confer original jurisdiction on that court of the action, and must be construed in connection with section 507, authorizing a joinder of additional causes of action, which may be of "any" amount, and sec. 519, par. 2, and sec. 521, pars. 1 and 2, authorizing counterclaims also, without any limitation as to the amount. Either of these three sections is as valid as the other, and all three must be construed together. There is no conflict between them. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

Distribution of Jurisdiction Question of Procedure.—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

General Jurisdiction of Superior Court.—The jurisdiction of the superior court is general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving it, either exclusively or concurrently, to other courts. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

The superior court, under the provisions of this section, has exclusive original jurisdiction in all cases when it is not given to some other court. State v. Waldrop, 63 N. C. 507, 508.

The superior court is a court of general common-law jurisdiction, with power to try all actions founded on contract, where the principal sum demanded is above $200, and such other actions which have been or may be allotted to it by the General Assembly, within the limits of the constitution. Walton v. Walton, 80 N. C. 26.

The superior court is one of general jurisdiction, being the highest court of original jurisdiction in the State, and it may take cognizance of all suits, which are not taken from it by statute. State v. Garland, 29 N. C. 48, 49.

A nonresident plaintiff may maintain an action against the initial and nonresident carrier, the cause being transitory. McGovern v. Atlantic Coast Line R. Co., 180 N. C. 219, 104 S. E. 534.

Power to Give Complete Relief.—Where superior court acquires jurisdiction of any part of the matter involved in a suit it will proceed to determine the whole. Baker v. Carter, 127 N. C. 92, 37 S. E. 81.

Action Wrongfully Instituted.—Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. Springs v. Scott, 132 N. C. 548, 44 S. E. 116; Smith v. Gudger, 133 N. C. 627, 45 S. E. 955; In re Anderson, 132 N. C. 243, 43 S. E. 649.

Whether Action in Tort or on Contract.—To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the complaint alleges the wrongful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort within the original jurisdiction of the superior court under const. art. 4, § 27, and this and section 1474, and not an action on contract within the jurisdiction of a justice of the peace under § 1473. Roebuck v. Short, 196 N. C. 61, 144 S. E. 515.

Demurrer for Lack of Jurisdiction. — Where it appears from the complaint in an action brought in the superior court that a good cause of action is alleged in the amount cognizable only in the court of the justice of the peace, and recovery cannot be had for the difference in amount necessary to sustain the jurisdiction of the superior court, a demurrer should be sustained. Williams v. Williams, 188 N. C. 728, 125 S. E. 482.

Construction of Complaint.—Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the superior court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is **ex contractu** or **ex delicto**, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. Mitchem v. Pasour, 173 N. C. 487, 92 S. E. 322.

Quoted in Albertson v. Albertson, 207 N. C. 547, 549, 178 S. E. 352.

II. ACTIONS EX CONTRACTU.

A. Jurisdiction Generally.

Editor's Note.—Reference must be had to section 1473 wherein exclusive original jurisdiction of all civil actions founded on contract, subject to two exceptions therein mentioned, is given to the justices of the peace.

When Jurisdiction Assumed. — By this section exclusive original jurisdiction is conferred on courts of a justice of the peace in actions ex contractu where the amount demanded does not exceed the sum of two hundred dollars, and in the superior court where the demand exceeds that sum, the jurisdiction of the latter court depending upon whether from the pleadings it may be seen that it was made in good faith, and whether the allegations of the complaint sufficiently allege a good cause of action to sustain the jurisdiction sought. Williams v. Williams, 188 N. C. 728, 125 S. E. 482.

Test.—The aggregate sum demanded in good faith is the test of jurisdiction. Boyd v. Roanoke, etc., R. R., 132 N. C. 184, 186, 43 S. E. 631; Martin v. Goode, 111 N. C. 288, 289, 16 S. E. 232.

Amendment after Verdict.—Where a complaint does not state the sum demanded, and a verdict is rendered for less than $200, the trial court may allow the complaint to be amended after verdict so as to make the claim more than $200, and the superior court has jurisdiction if the claim was made in good faith. Boyd v. Roanoke R., etc., Co., 132 N. C. 184, 43 S. E. 631.

B. Essentials.

1. The Amount.

a. In General.

Separate Items.—Where the items of an account are incurred under **different** contracts, an action may be brought on each item before a justice of the peace, the separate item being less than $200. Copland v. Tel. Co., 136 N. C. 11, 48 S. E. 501.

Under Single Contract.—Where a **single** contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to "split up" the account and recover upon each item. Jarrett v. Self, 90 N. C. 478.

Action to Recover Loan.—The superior court has not original jurisdiction of an action by a stockholder in an insurance company doing business as a building and loan association, against the company, to recover an overpayment of interest on a loan, where the amount sought to be recovered is less than $200. Gillam v. Life Ins. Co., 121 N. C. 369, 28 S. E. 470.

Waiver of Tort.—The superior court possesses no jurisdiction in actions in which a tort is waived and suit is brought on an implied contract for a claim less than $200. Winslow v. Weith, 66 N. C. 432.

Less Than Statutory Amount.—In an action, founded on an implied contract, by the sheriff against his deputy for a misfeasance in office, the superior court has no jurisdiction where the amount demanded is less than $200. Latham v. Rollins, 72 N. C. 454.

Where Recovery of Jurisdictional Amount Impossible.—The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as $200. Howard v. Mutual, etc., Life Ins. Ass'n, 125 N. C. 49, 34 S. E. 199; Sloan v. Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21.

b. Previous Remission.

The fact that plaintiff has remitted damages in excess of $200 in his action sued on in the justice's court does not necessarily oust the jurisdiction of the superior court in an action brought on the same contract there. Brock v. Scott, 159 N. C. 513, 75 S. E. 724.

But the superior court has no jurisdiction of an action to recover upon a running account of $312, where it is shown that from time to time the defendant had reduced the amount by sundry payments to a sum under $200 at the time the action is brought. Wiserman v. Witherow, 90 N. C. 140.

2. Good Faith.

Generally.—It is the amount demanded in good faith (definable as an honest purpose plus relation to the facts alleged in the complaint as a whole which reasonably tend to support it), that fixes the jurisdiction of the court.

Thompson v. Southern Express Co., 144 N. C. 389, 57 S. E. 18; Wooten v. Biggs Drug Co., 169 N. C. 64, 85 S. E. 140.

While the sum demanded ordinarily determines the jurisdiction, yet the plaintiff must make his demand in good faith and not for the purpose of giving the court jurisdiction. Wiserman v. Witherow, 90 N. C. 140, and cases cited under analysis line "Essentials" II, B.

Bona Fide Contention.—In an action involving the construction of a contract, where it is apparent that there was a bona fide contention for more than $200, the superior court has jurisdiction. Horner School v. Westcott, 124 N. C. 518, 32 S. E. 885.

III. ACTIONS EX DELICTO.

For full treatment of subject matter, see 3 N. C. Enc. Dig. 895.

Constitution and Statute.—Under our Constitution and Statute jurisdiction is conferred upon a justice of the peace concurrent with that of the superior court of all actions of tort wherein the plaintiff, in good faith, states or limits his demand at fifty dollars, or less. Houser v. Bonsal & Co., 149 N. C. 51, 62 S. E. 776, and cases cited.

Failure to Prove Allegation in Entirety.—Where a cause of action within the jurisdiction of the superior court is alleged in good faith, jurisdiction is not lost by failure to prove the allegation in its entirety, and in an action in tort the superior court has jurisdiction though the sum demanded is less than $200. Fields v. Brown, 160 N. C. 295, 76 S. E. 8.

Conversion.—The superior court has jurisdiction of an action for damages for the conversion of property where the amount claimed is one hundred and twenty-five dollars. Asher v. Reizenstein, 105 N. C. 213, 10 S. E. 889.

Deceit and False Warranty.—An action for deceit and false warranty, in the sale of a horse, is cognizable in the superior court, though the damages claimed amount only to fifty dollars. Asher v. Gray, 88 N. C. 190.

In Long v. Fields, 104 N. C. 221, 10 S. E. 253, it was said: "It has been settled by a line of decisions in this court, and manifestly upon mature consideration, that where there is a warranty of soundness in the sale of a horse, the vendee may declare in tort for a false warranty and add a count in deceit, or, under the new procedure, a second cause of action in the nature of deceit, and though the sum demanded be less than $200 the action will not be deemed one founded on contract, and the superior court will have jurisdiction." Bullinger v. Marshall, 70 N. C. 520; Ashe v. Gray, 88 N. C. 190; S. C., 90 N. C. 137; Harvey v. Hambright, 98 N. C. 446, 4 S. E. 187.

Same—Proof of Guilty Knowledge.—The complaint being for a tort, sustains the jurisdiction, though the charge of a guilty knowledge of the falsity of the representations which influenced the plaintiff in making the contract of exchange may not have been proved, and for the want of which no issue was asked to be made up. Fields v. Brown, 160 N. C. 295, 300, 76 S. E. 8.

Waiver of Tort.—Plaintiff may waive the tort and sue in contract. Bullinger v. Marshall, 70 N. C. 520; McDonald v. Cannon, etc., Co., 82 N. C. 245, but where this course is pursued, it is incumbent upon the plaintiff to allege in good faith a claim amounting to more than $200. Winslow v. Weith, 66 N. C. 432.

Where, in an action for damages in the sum of $125, for the conversion of certain cotton, the complaint alleged that the plaintiff sold to the defendants two bales of cotton at a certain price per pound on the terms that the price was to be paid down and no title to pass until the price was paid, and the defendants, on getting possession of the cotton, refused to pay the price, it was held, that the superior court had jurisdiction. McDonald v. Cannon, etc., Co., 82 N. C. 245. In such case the plaintiffs might have affirmed the contract and sued for the price agreed to be paid (less than $200), and then a justice of the peace would have had jurisdiction of the action. Id.

IV. CRIMINAL ACTIONS.

A. Generally.

The superior court has original jurisdiction of assaults and batteries; 1st, when a deadly weapon is used; 2nd, when serious damage is done; 3rd, when the offense was committed six months (now twelve months) before the indictment was found, and no justice of the peace has taken cognizance of the offense. State v. Cunningham, 94 N. C. 824. See also, State v. Phillips, 104 N. C. 786, 10 S. E. 463.

As to assault with dangerous or deadly weapon, see 2 N. C. Enc. Dig. 21 et seq., 13 N. C. Enc. Dig. 187 et seq.

Jurisdiction Attaches for All Crimes Included.—Having acquired cognizance of an imputed crime, which was assault with intent to commit rape, the court may proceed to dispose of the subordinate misdemeanor, of which it could not have taken jurisdiction as a distinct substantive offense until after the lapse of the specified time without judicial action commenced before a justice, it being not the purpose of the legislation to arrest further proceedings when the assumed jurisdiction was rightful, and neither offense is outside of that jurisdiction ultimately. State v. Reaves, 85 N. C. 553, 554.

Charge Different from Case Made Out.—Where the indictment charges an assault with a deadly weapon, but the proof shows a simple assault, committed within less than six (now twelve) months since the finding of the bill, the jurisdiction of the superior court is not ousted, as the cases in which this would happen are limited to those in which the charge in itself is of a simple assault. State v. Fesperman, 108 N. C. 770, 771, 13 S. E. 14.

Manner of Excepting to Jurisdiction.—Exception to the jurisdiction of the superior court, for that six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instructions to the jury to acquit. State v. Earnest, 98 N. C. 740, 4 S. E. 495.

Misdemeanors.—The superior court has exclusive jurisdiction of misdemeanor where the punishment is not limited to a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. Washington v. Hammond, 76 N. C. 33.

B. Essentials of Indictment.

Twelve Month Period.—An indictment for an affray need not aver that the offense was committed more than six months (now twelve) before the finding of the bill and that no justice has taken jurisdiction. State v. Moore, 82 N. C. 660.

Failure of Justice of Peace to Assume Jurisdiction. — When the superior court takes cognizance of such cases as the justice of the peace fail to assume jurisdiction of, it is not necessary to aver the fact of their omission in the indictment in order to confer jurisdiction on the superior court. State v. Porter, 101 N. C. 713, 714, 7 S. E. 902. Nor is it material that the offense is alleged to have been committed on a day more than six months (now twelve) before the finding of the indictment, in the indictment itself, or the date is not traversable and is not fixed on the verdict. Id.

Use of Deadly Weapon.—This section does not render it necessary that a bill found by the grand jury of the superior court for an assault and battery should aver that a deadly weapon was used, that any serious damage was done, that six months had elapsed before the finding of the bill, or that the offense was committed within one mile of the court during the session thereof. The defendant, under the plea of not guilty, may negative the existence of the jurisdictional facts. State v. Taylor, 83 N. C. 602.

Matter of Defense. — Upon the trial of an indictment for simple assault, the superior court **prima facie** has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N. C. 740, 4 S. E. 495.

V. EQUITABLE JURISDICTION.

Generally.—The superior court possesses the same equitable jurisdiction, when not limited by statute, formerly exercised by courts of equity. Seattle v. Seattle, 141 N. C. 553, 54 S. E. 445.

Interpleader.—Where the controversy involves an action in the nature of a bill of interpleader to determine the right of two adverse claimants to a fund, jurisdiction of the superior court attached upon the ground that it is an exercise of the powers of the court enforceable by will in equity under the old system. Timber Co. v. Wells, 171 N. C. 262, 88 S. E. 327.

Foreclosure of Mortgages.—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction when the amount secured is for a less sum than two hundred dollars. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

Subrogation.—The superior court has jurisdiction of an action by a creditor seeking to be subrogated to the rights of other creditors of the same debtor whose claims he had paid. Fidelity Co. v. Jordan, 134 N. C. 236, 46 S. E. 496.

To Establish Claim against Married Woman.—A proceeding to establish a claim against a feme covert and to have a lien declared for materials furnished, etc., must be brought before a justice, if the amount claimed is under $200. It is when the proceeding is not under the statute, but is a civil action, that the superior court has jurisdiction. Smaw v. Cohen, 95 N. C. 85.

Debtor a Lunatic.—The superior court has jurisdiction to

hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy. Blake v. Respass, 77 N. C. 193.

§ 1437. Concurrent jurisdiction.—In all cases in which by any statute original jurisdiction of criminal actions has been taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. Appeals shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided, that this section shall not apply to the counties of Cabarrus, Forsyth, Gaston, Mecklenburg, Surry, and Union. (1919, c. 299; 1923, c. 98.)

Editor's Note.—By the Public Laws of 1923 the county of Union was added to those to which the provisions of this section are not to apply.

Only One Prosecution.—Where two courts have concurrent jurisdiction of an offense, the judgment of that one which first passes judgment is a good defense against a prosecution in the other court for the same offense. State v. Bowers, 94 N. C. 910.

Prisoner Bound Over to Superior Court.—Where a recorder's court and the superior courts have concurrent jurisdiction of a criminal offense and the judge of the former court acts within his powers of committing magistrate, and binds the prisoner over to the superior court, objection that the recorder's court had thereby taken jurisdiction of the offense is untenable, and neither will a motion to quash the indictment, nor a plea in abatement be sustained. State v. Shemwell, 180 N. C. 718, 104 S. E. 885.

Applied in State v. Everhardt, 203 N. C. 610, 166 S. E. 738.

§ 1438. Jurisdiction in vacation or at term.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. (Rev., s. 1501; Code, c. 10, s. 230; 1871-2, c. 3.)

As to proceedings in vacation. see 3 N. C. Enc. Dig. 865.

Motions.—After leaving the bench for a term of the superior court to expire by limitation, the juage cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. May v. Nat. Fire Ins. Co., 172 N. C. 795, 90 S. E. 890.

Interlocutory Order.—It seems that the superior court has power to make an amendment to an interlocutory order in an ancillary proceeding out of term. Coater Bros. v. Wilkes, 94 N. C. 174, 175.

Consent of Parties.—A judge has no power to render judgment after the expiration of the term of court without the consent of parties. Hardin v. Ray, 89 N. C. 364.

Same—Civil Actions.—By consent, the superior court can grant judgment in civil cases in vacation. Coater Bros. v. Wilkes, 94 N. C. 174, 175.

The Resident Judge.—The resident judge of a district has no other power within such district in vacation than any other judge of the superior court. State v. Ray, 97 N. C. 510, 1 S. E. 876.

§ 1439. Appellate jurisdiction.—The superior court has appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided by law. (Rev., s. 1502; Const., Art. IV, ss. 12, 27; Code, s. 923.)

Cross References.—As to jurisdiction in general, see 3 N. C. Enc. Dig. 833 et seq., 13 N. C. Enc. Dig. et seq. As to appeal from clerk to judge, see section 633-637 and notes there placed. As to appeals from justices of the peace, see section 1528 and notes thereto. As to appeal from corporation commission, see section 1097 and notes thereto. As to appeal from recorder's court, see section 1546 and notes thereto.

General Appellate Power.—The Constitution and statutes vest in the superior court general appellate and supervisory powers over the judicial action of all the inferior courts of the State. Taylor v. Johnson, 171 N. C. 84, 87 S. E. 987.

Appeals from Justice of Peace. — In cases where bills are found in the superior court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the superior court has none. Page v. Page, 167 N. C. 350, 353, 83 S. E. 627.

§ 1440. Cases transferred from former courts.—All suits, petitions and other proceedings pending in the late courts of equity, and in the late courts of pleas and quarter sessions, and not determined by final judgment or decree, and all such cases wherein any act was decreed to be done or deed to be executed, and said act was not done or deed executed, may be transferred to the superior court of the county in which they were pending, at the instance of any person interested. And the superior court shall have power to make all orders, judgments and decrees that shall be necessary for finally adjudicating and settling the same. (Rev., s. 1503; Code, s. 944; 1871-2, c. 161; 1873-4, c. 183; 1874-5, c. 81; 1876-7, c. 9.)

Who May Transfer.—"Any party interested" has, under this section, the right to have proceedings lately pending in the courts of equity and pleas and quarter sessions, and not determined in final judgment, transferred to the superior court. Herman v. Watts, 107 N C. 646, 651, 12 S. E. 437.

Waiver of Review.—Where, in a suit instituted in the late court of equity, and transferred to the superior court docket under the provisions of this section parties agreed that the judge should find the facts, and that he should examine witnesses orally, and only the substance of the oral evidence was sent up with the record; it was held, that the right to have the findings of fact reviewed by the Supreme Court was waived. Runnion v. Ramsay, 93 N. C. 410.

Art. 6. Judicial Districts and Terms of Court

§ 1441. Number of districts.—The state shall be divided into twenty superior court judicial districts, numbered first to twentieth, composed of the counties hereafter designated in this chapter. (1913, c. 63; 1913, c. 196.)

§ 1442. Eastern and western judicial divisions.—The state shall be divided into two judicial divisions, the Eastern and Western Judicial Divisions. The counties which are now or may hereafter be included in the judicial districts from one to ten, both inclusive, shall constitute the Eastern Division, and the counties which are now or may hereafter be included in the judicial districts from eleven to twenty, both inclusive, shall constitute the Western Division. The judicial districts shall retain their numbers from one up to twenty, and all such other districts as may from time to time be added by the creation of new districts shall be numbered consecutively. (1915, c. 15.)

§ 1443. Terms of court.—A superior court shall be held by a judge thereof at the courthouse in each county. The twenty judicial districts of the state shall be composed of the counties designated in this section, and the superior courts in the several counties shall be opened and held in each year at the times herein set forth. Each court shall continue in session one week, and be for the trial of criminal and civil cases, except as otherwise provided, unless the business thereof shall be sooner disposed of. Each county shall have the number of regular weeks of superior

court as set out in this section. (1913, cc. 63, 196.)

Eastern Division

First District

The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Currituck—Eighth Monday after the first Monday in March, for civil cases only; first Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2.)

Camden—First Monday after the first Monday in March, and the third Monday after the first Monday in September. (1913, c. 196; 1921, c. 105.)

Pasquotank—Eighth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only; second Monday after the first Monday in March for the trial of civil cases only; ninth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in September for the trial of civil cases only; fifth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only. (1913, c. 196; Ex. Sess., 1913, c. 51; 1921, c. 105; 1923, c. 232; 1929, c. 167; 1933, c. 129.)

Perquimans—Seventh Monday before the first Monday in March, for civil cases only, for which term a special judge to be assigned by the governor; sixth Monday after the first Monday in March; eighth Monday after the first Monday in September. 1913, c. 196; Ex. Sess., 1913, c. 51; 1931, c. 6; 1933, c. 286.)

Chowan—Fourth Monday after the first Monday in March; first Monday after the first Monday in September; fifteenth Monday after the first Monday in September. (1913, c. 196; 1931, c. 87; 1933, c. 456.)

Gates—Third Monday after the first Monday in March; eleventh Monday after the first Monday in September. (1913, c. 196; 1935, c. 70.)

Dare—Twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51.)

Tyrrell—Seventh Monday after the first Monday in March; fourth Monday after the first Monday in September, and for this term a special Judge may be assigned; fourth Monday before the first Monday in March, for civil cases only. Upon recommendation of the local bar, the board of commissioners for the county of Tyrrell, at their option, may abolish and suspend the opening and holding, in any year, of the term above provided for the week commencing on the fourth Monday before the first Monday in March, by notifying the governor and the judge scheduled to hold said term, at least thirty days prior to the date for opening same, that such term of court is not desired. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 1; Ex. Sess. 1920, c. 23, s. 1; 1921, c. 83; Ex. Sess. 1921, c. 19; 1923, c. 124; 1927, c. 23; 1931, c. 92; 1933, c. 126.)

Hyde—Eleventh Monday after the first Monday in March; sixth Monday after the first Monday in September. (1913, c. 196.)

In addition to the terms of court now provided by law to be held in Hyde County, the following term of court shall be opened and held in each year, except as hereinafter provided, in the manner and at the time herein set forth, to-wit: To convene on the third Monday in August of each year and to continue for one week for the trial of civil cases only. If the judge regularly assigned to the district in which said court is situate be unable because of another regular term of court in said district, or for other causes, to hold any term of court provided in section one hereof, the Governor may appoint a judge to hold such term from among the regular or emergency judges. If in the opinion of the local bar of Hyde County, as attested by a written agreement signed by each and every member thereof, it is not advisable or necessary to hold said additional term of court, and such opinion being attested by a written agreement furnished to and filed with the board of county commissioners of Hyde County on or before the first Monday in August next preceding the day for the convening of said additional term, then such additional term may not be held on the third Monday in August of that year as provided by this act. When said agreement has been signed by each and every member of the local bar as herein provided, then the chairman of the board of county commissioners shall immediately notify the judge who has been assigned to hold said term of said court that said term will not be held and no jury for said term shall be drawn; but, if no such agreement shall be filed on or before the first Monday in August, then it shall be the duty of the board of county commissioners to cause the jury to be drawn in the way and manner now prescribed by law for the drawing of a jury for the trial of civil cases in regular terms of superior court. (1913, c. 196; 1935, c. 191.)

Beaufort—Seventh Monday before the first Monday in March for two weeks, the first week for criminal cases only, and the second week for criminal and civil cases; second Monday before the first Monday in March for two weeks for civil cases only; second Monday after the first Monday in March for criminal cases only, no grand jury to be drawn for this term; fifth Monday after the first Monday in March for civil cases only; ninth Monday after the first Monday in March for two weeks; the first week for the year one thousand nine hundred and thirty-five for the trial of civil cases only; the second week to be a mixed term with the criminal docket having precedence, with a grand jury. After the year one thousand nine hundred and thirty-five both weeks of said term for the trial of civil cases only. Second Monday after the first Monday in September for the trial of criminal cases with a grand jury in attendance, fourth Monday after the first Monday in September to continue for

two weeks for civil cases only; ninth Monday after the first Monday in September for criminal cases and consent trials and decrees in civil cases; thirteenth Monday after the first Monday in September for civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, ss. 3, 4; 1927, c. 111; 1931, cc. 4, 8, 87; 1933, c. 3; c. 456, s. 2; 1935, c. 176.)

Second District

The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Washington—Eighth Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; seventh Monday after the first Monday in September, for civil cases only. (1913, cc. 63, 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 2; c. 133; 1923, c. 227; 1929, c. 4.)

Martin—Second Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March; second Monday after the first Monday in September, to continue for two weeks; fourteenth Monday after the first Monday in September; sixth Monday after the first Monday in March and eleventh Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases only. For the last two terms of court the Governor is hereby directed to appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; 1919, c. 133; 1924, c. 12; 1929, c. 124.)

Edgecombe—Sixth Monday before the first Monday in March; first Monday in March; fourth Monday after the first Monday in March, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, for civil cases only; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

The grand jury drawn by the commissioners of Edgecombe county for the term of court beginning on the sixth Monday before the first Monday in March of each year shall also serve as the grand jury for the term beginning on the first Monday in March and on the thirteenth Monday after the first Monday in March, and shall be charged with the same duties and clothed with the same power at each of said terms and shall receive for each term such mileage and compensation as now provided by law. (1913, c. 196; Ex. Sess. 1913, c. 17; 1915, c. 107; 1917, c. 12; 1919, c. 133; Ex. Sess. 1921, c. 108, s. 1; 1923, c. 246; 1927, c. 128.)

Nash—Fifth Monday before the first Monday in March; second Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; first Monday after the first Monday in March; seventh Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; twelfth Monday after the first Monday in March; first Monday before the first Monday in September; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for the term of court the governor is hereby directed to appoint a judge, other than the judge holding courts of the second judicial district, to hold the same from among the regular, special or emergency superior court judges; fifth Monday after the first Monday in September, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of criminal cases and the second week for the trial of civil cases only. The court shall have jurisdiction to try and determine civil actions and civil matters at any term of superior court held in Nash county, whether said term is designated above as a civil term or not. (1913, c. 196; 1915, c. 63; 1919, c. 133; Ex. Sess. 1921, c. 108; 1923, c. 237; 1924, c. 46; 1933, c. 145; 1935, c. 201.)

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; tenth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; sixteenth Monday after the first Monday in March, for civil cases only; first Monday in September; fourth Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, for civil cases only; fifteenth Monday after the first Monday in September. (1913, c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133; 1921, c. 10.)

Third District

The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Hertford—First Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; sixth Monday after the first Monday in March to continue for two weeks for the trial of civil cases and only such criminals as are confined in the common jail or otherwise imprisoned; last Monday in July for a period of one week for the trial of criminal and civil cases; sixth Monday after the first Monday in September to continue for two weeks, the first week for the trial of criminal cases only, and the second week for the trial of civil cases only. (1913, c. 196; 1915, c. 282; 1919, c. 142; 1923, c. 113; 1924, c. 9; 1927, c. 118; 1929, c. 217; 1931, c. 200; 1935, cc. 102, 276.)

Bertie—Third Monday before the first Monday in March, to continue for one week for the trial of both criminal and civil cases; ninth Monday after the first Monday in March, to continue for two weeks, for trial of both criminal and civil cases; first Monday before the first Monday in September, to continue for one week, for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; Ex. Sess. 1921, c. 45; 1923, c. 185; 1931, cc. 192, 247.)

Northhampton—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in September, each to continue for two weeks; fourth Monday before the first Monday in

September to continue for one week. (1913, c. 196; 1929, cc. 123, 244; 1933, c. 409; 1935, c. 148.)

Halifax—Fifth Monday before the first Monday in March, to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, for the trial of criminal cases only, to continue for one week, and for this term of court the governor is hereby directed to appoint a judge to hold same from among the regular or emergency judges; thirteenth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for trial of civil cases exclusively; third Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; fourth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for this term of court the governor is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; seventh Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, and for this term of court the governor is hereby directed to appoint a judge to hold the same from among the regular, special or emergency judges; twelfth Monday after the first Monday in September, for the trial of civil and criminal cases, to continue for two weeks. (1913, c. 196; Ex. Sess., 1913, c. 2; 1915, c. 78; 1924, c. 87; 1925, c. 36; 1929, c. 160.)

Warren—Seventh Monday before the first Monday in March; eleventh Monday after the first Monday in March; second Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1917, c. 256.)

Vance—Eighth Monday before the first Monday in March for criminal cases only; first Monday in March for criminal cases only; second Monday in March for civil cases only; fifteenth Monday after the first Monday in March for criminal cases only; sixteenth Monday after the first Monday in March for civil cases only; fourth Monday after the first Monday in September for criminal cases only; fifth Monday after the first Monday in September for civil cases only, each to continue one week. At any term for the trial of criminal cases, civil cases may be tried by consent. (1927, c. 169, § 1.)

Fourth District

The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wayne—Sixth Monday before first Monday in March, fifth Monday after the first Monday in March, twelfth Monday after the first Monday in March, second Monday before the first Monday in September, each to continue for one week; twelfth Monday after the first Monday in September, to continue for two weeks; fifth Monday before the first Monday in March, sixth Monday after the first Monday in March, thirteenth Monday after the first Monday in March, first Monday before the first Monday in September, each to continue for one week, for civil cases only; first Monday in March, and fifth Monday after the first Monday in September, each to continue for two weeks, for civil cases only. If no regular judge is available for the two weeks' term of Court beginning on the first Monday in March, the Governor may assign a special judge to hold said Court. (1913, c. 196; 1927, c. 77; 1929, c. 132, s. 1.)

Johnston—First Monday after the first Monday in March; third Monday before the first Monday in September, for criminal cases only; also the first Monday in March; the third Monday before the first Monday in March; sixth Monday after the first Monday in March; and sixth Monday after the first Monday in September, each for one week for criminal and civil cases; and the eighth Monday before the first Monday in March, two weeks for civil cases; and ninth Monday after the first Monday in September, two weeks for civil cases; fourteenth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in March; seventh Monday after the first Monday in March; and third Monday after the first Monday in September, each to continue for two weeks; and the last three terms for civil cases only; sixth Monday after the first Monday in March for the trial of criminal cases only. (1913, c. 196; 1927, c. 190; 1929, c. 208; 1933, c. 81.)

Harnett—Eighth Monday before the first Monday in March, one week, for the trial of criminal cases only; fourth Monday before the first Monday in March to continue for two weeks, for the trial of civil cases only; fourth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in March for the trial of civil cases only; eleventh Monday after the first Monday in March, one week, for the trial of criminal cases only; fourteenth Monday after the first Monday in March, two weeks, for the trial of civil cases only; first Monday in September for criminal cases only; second Monday after the first Monday in September for the trial of civil cases only; fourth Monday after the first Monday in September to continue for two weeks, civil cases only; tenth Monday after the first Monday in September to continue for two weeks, for the trial of criminal cases only. (1913, c. 196; 1927, c. 161, c. 212; 1931, c. 147.)

Chatham—Seventh Monday before the first Monday in March, to continue one week for the trial of criminal and civil cases; the first Monday in March to continue one week for the trial of civil cases only; the second Monday after the first Monday in March to continue one week for the trial of civil cases only; tenth Monday after the first Monday in March to continue for one week for the trial of civil and criminal cases; fifth Monday before the first Monday in September to continue for two weeks for the trial of civil cases only; seventh Monday after the first Monday in September to continue for one week for the trial of criminal and civil cases. (1913, c. 196; 1917, c. 228; 1919, c. 35; 1929, c. 169.)

Lee — Third Monday after the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in September, to continue for two weeks, the first week for criminal and civil cases and the second for civil cases only; seventh Monday before the first Monday in September, to continue

for two weeks. Fifth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; provided, that for the said term the Governor shall assign a judge to hold the same from among the regular or emergency judges. When any party has been duly served with summons and a copy of the complaint thirty days before the commencement of any term of the court of Lee county, the case shall stand for trial at said term. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228; 1929, c. 162; 1931, c. 86.)

Fifth District

The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt—Seventh Monday before the first Monday in March, for civil cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March, for civil cases only; second Monday after the first Monday in March to continue for two weeks; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March to constitute one term for the trial of criminal and civil cases; ninth Monday after the first Monday in March to continue for one week for the trial of civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases only; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September for civil cases only; third Monday after the first Monday in September, for civil cases only; seventh Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, to continue for one week for the trial of civil cases. For the terms beginning the ninth Monday after the first Monday in March and the eleventh Monday after the first Monday in September the governor may appoint a judge to hold the same from among the regular or emergency judges. (1931, c. 94; 1935, c. 73.)

Craven—Eighth Monday before the first Monday in March; thirteenth Monday after the first Monday in March, and the first Monday in September for criminal cases only; fifth Monday after the first Monday in March, for civil cases and jail cases on the criminal docket; fifth Monday before the first Monday in March to continue for three weeks for the trial of civil cases only; fourth Monday after the first Monday in September; eleventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March, for civil cases only. (1913, c. 196; 1915, c. 111; 1917, c. 217; 1929, c. 166.)

Pamlico—Eighth Monday after the first Monday in March, and ninth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1921, c. 159.)

Jones—Fourth Monday after the first Monday in March; and second Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 19; P. L. 1915, c. 363; 1921, c. 159.)

Carteret—Fourteenth Monday after the first Monday in March, to continue for two weeks, first Monday after the first Monday in March, and sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; 1921, c. 159; 1929, c. 166, s. 2.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks; thirteenth Monday after the first Monday in September to continue for one week for the trial of both criminal and civil cases. And for this last mentioned term of court the governor shall assign a judge from among the regular, special or emergency judges. (1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139; 1935, c. 109.)

Sixth District

The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Lenoir—Sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; second Monday before first Monday in March to continue for two weeks, for the trial of civil cases only; fifth Monday after first Monday in March for the trial of criminal cases or civil cases, or both, to continue for one week; tenth Monday after first Monday in March, to continue for two weeks for the trial of civil cases only; fourteenth Monday after first Monday in March, to continue for two weeks for the trial of civil cases only; sixteenth Monday after first Monday in March for the trial of criminal cases only; second Monday before first Monday in September, to continue for one week for the trial of criminal or civil cases, or both; third Monday after first Monday in September, to continue for one week for trial of civil cases only; sixth Monday after first Monday in September, for the trial of civil or criminal cases, or both, to continue for one week; ninth Monday after first Monday in September, to continue for two weeks for the trial of civil cases only; fourteenth Monday after first Monday in September, to continue for one week for the trial of criminal or civil cases, or both, and for this term of court, the governor is hereby directed to appoint a judge to hold the same from among the regular or special judges. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13; 1931, c. 271; 1933, c. 234, s. 1.)

Duplin—Eighth Monday before first Monday in March, to continue for two weeks, for the trial of civil cases only; fifth Monday before first Monday in March, to continue for one week, for the trial of criminal cases; first Monday after first the trial of civil cases only; sixth Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; first Monday before first Monday in September, to continue for two weeks, for the trial of civil cases only; fourth Monday after first Monday in September, to continue for one week, for the trial of criminal cases; thirteenth Monday after first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for trial of civil cases exclusively.

At criminal terms of the superior court in the county of Duplin, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters, not requiring a jury trial, and make any order, judgment, or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240; Ex. Sess. 1920, c. 81; Ex. Sess. 1921, cc. 78, 79; 1931, c. 271; 1933, c. 234, s. 1; 1935, cc. 157, 289.)

Onslow—First Monday in March, to continue for one week, for the trial of criminal cases, or civil cases, or both; sixth Monday after first Monday in March, to continue for two weeks, for the trial of civil cases only; seventh Monday before first Monday in September, to continue for one week, for the trial of civil cases and jail cases, in accordance with chapter three hundred forty-one of the Public Laws of one thousand nine hundred thirty-one; fifth Monday after the first Monday in September, to continue for one week, for the trial of criminal and civil cases; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases. (Ex. Sess. 1913, c. 75; 1915, c. 240; Ex. Sess. 1921, c. 78, s. 1; 1927, c. 179, s. 1; 1933, c. 234, s. 1.)

The July term of the superior court for Onslow County, is hereby authorized, in the discretion of the board of county commissioners signified by resolution duly adopted in apt time, to try any or all state cases which involve defendants or witnesses confined in jail to await trial. In the event such trials are ordered, by such resolution, the board of county commissioners shall cause to be drawn and summoned in the usual manner sufficient jurors to provide for the empaneling of a grand jury and to also provide for a trial jury or juries. (1931, c. 341.)

Sampson County—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal or civil cases, or both; third Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal or civil cases, or both; first Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; seventh Monday after the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; Ex. Sess. 1921, c. 79, s. 2; 1927, c. 179, s. 1(b); 1933, c. 234, s. 1; 1935, c. 283.)

At criminal terms of superior court in the sixth judicial district, civil actions which do not require a jury may be heard by consent; and at criminal terms in the county of Lenoir uncontested divorce cases may be tried by the court and a jury in all respects as at civil terms, and any order, judgment or decree may be entered in a civil action not requiring a jury trial. (1915, c. 240, s. 3; 1917, c. 13; 1933, c. 234, s. 2.)

Seventh District

The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wake—Criminal courts: Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March; first Monday in March; fifth Monday after the first Monday in March; ninth Monday after the first Monday in March; thirteenth Monday after the first Monin March; eighth Monday before the first Monday in September; first Monday after the first Monday in September; fifth Monday after the first Monday in September; ninth Monday after the first Monday in September; fourteenth Monday after the first Monday in September. These terms shall be for criminal cases only.

Civil courts: Fifth Monday before the first Monday in March; third Monday before the first Monday in March; first Monday after the first Monday in March, to continue for two weeks; third Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March, to continue for two weeks; fourteenth Monday after the first Monday in March, to continue for two weeks; second Monday after the first Monday in September, to continue for two weeks; fourth Monday after the first Monday in September; seventh Monday after the first Monday in September, to continue for two weeks; twelfth Monday after the first Monday in September, to continue for two weeks. These terms shall be for civil cases only, and no criminal process shall be returnable to such terms. Provided, that the term beginning on the second Monday after the first Monday in September shall be a mixed term for the trial of both civil and criminal cases, and that the term for trial of criminal cases beginning on the fourteenth Monday after the first Monday in September shall continue for two weeks. (1913, c. 196; 1917, c. 116; 1919, c. 113; 1924, c. 77.)

Franklin—Seventh Monday before the first Monday in March, to continue for two weeks; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March; first Monday before the first Monday in September, to continue for two weeks, for civil cases only; sixth Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only. (1913, c. 196; 1917, c. 116.)

Eighth District

The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

New Hanover—Seventh Monday before the first Monday in March, to continue one week, for the trial of criminal cases only; fourth Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; first Monday in March, to continue two weeks, for the trial of civil cases only; second Monday after the first Monday in March, to continue one week for the trial of criminal cases only; sixth Monday after the first Monday in March, to continue for

two weeks, for the trial of civil cases only; tenth Monday after the first Monday in March, to continue one week, for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue two weeks, for the trial of civil cases only; fourteenth Monday after the first Monday in March, to continue one week, for the trial of criminal cases only; first Monday after the first Monday in September, to continue one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue one week, for the trial of civil cases only; sixth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue one week, for the trial of criminal cases only; thirteenth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; sixth Monday before the first Monday in September, to continue one week, for the trial of criminal cases only. (1913, c. 196; 1915, c. 60; 1919, c. 167; 1921, c. 14.)

Pender—Eighth Monday after the first Monday in September to continue two weeks for the trial of civil and criminal cases; third Monday after the first Monday in March to continue two weeks for the trial of civil and criminal cases; the seventh Monday before the first Monday in September, to continue one week for the trial of civil and criminal cases. (1913, c. 196; 1921, c. 14; 1933, c. 153.)

Columbus—Second Monday before the first Monday in September, to continue two weeks, for the trial of criminal and civil cases; eleventh Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; fifth Monday before the first Monday in March, to continue one week, for the trial of criminal and civil cases; second Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue two weeks, for the trial of criminal and civil cases; sixteenth Monday after the first Monday in March, to continue one week, for the trial of criminal cases. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40; 1931, c. 246.)

Brunswick—First Monday in September, to continue one week, for the trial of civil cases only; fourth Monday after the first Monday in September, to continue one week, for the trial of criminal and civil cases; eighth Monday before the first Monday in March, to continue one week, for the trial of civil cases only; fifth Monday after the first Monday in March, to continue one week, for the trial of criminal and civil cases; fifteenth Monday after the first Monday in March, to continue one week, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; 1921, c. 14.)

All motions and orders, applications for injunctions, receiverships, etc., may be heard at criminal terms upon five days notice. Divorce cases may be tried at any term of court, civil or criminal. (1921, c. 14.)

That portion of section one, chapter forty, Public Laws of one thousand nine hundred and eleven, requiring the superior court of Brunswick County not to convene until noon on Monday of the several terms, is hereby repealed. (1931, c. 18.)

Ninth District

The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Bladen—Eighth Monday before the first Monday in March for the trial of civil cases, and the trial of criminal cases where bills have been found, and cases on appeal from the recorder's court and courts of justices of the peace; the first Monday after the first Monday in March for the trial of criminal cases only; the eighth Monday after the first Monday in March for the trial of civil cases only; the fourth Monday before the first Monday in September for the trial of civil cases only; the second Monday after the first Monday in September for the trial of criminal cases only. Said courts to continue for one week unless the business is sooner disposed of, and grand juries to be summoned only for the March and September terms of court: Provided, that if the necessity should arise, and the county commissioners of Bladen County should so determine and order, a grand jury may be summoned by said commissioners for the January terms of court; and such grand jury so summoned shall have, perform and exercise all of the powers and duties of regular grand juries herein provided for the March and September terms of court. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1915, c. 110; 1927, c. 166, s. 1; 1929, c. 27, s. 1; 1931, c. 96; 1933, c. 77.)

If it shall appear to the board of county commissioners of Bladen County at any time before the jury is summoned for a term of superior court of Bladen County that there is not sufficient business to justify a term of such court or that there are no cases of sufficient importance to warrant the expense of a term of such court, the said board of commissioners are authorized to order that the jury for such term be not summoned, and all cases which would come on for trial at such term shall be continued. In case of the continuance of a term of superior court of Bladen County as herein provided the board of commissioners of Bladen County shall notify, or cause to be notified, the solicitor of the district, the judge holding the courts of the district and the court stenographer of their action. (1933, c. 119.)

Cumberland—Seventh Monday before the first Monday in March; first Monday in March (judge to be assigned); thirteenth Monday after the first Monday in March; first Monday before the first Monday in September; eleventh Monday after the first Monday in September, each for criminal cases only. Third Monday before the first Monday in March; third Monday after the first Monday in March; ninth Monday after the first Monday in March; third Monday after the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. At all criminal terms of court civil trials which do not require a jury may be heard by consent of the parties, and motions may be heard upon ten days notice to the adverse party prior to said term. (1913, c. 196; Ex. Sess. 1913, c. 23; 1931, c. 96.)

Hoke—Sixth Monday before the first Monday in March; seventh Monday after the first Monday in March; second Monday before the first Monday in September, to continue for one week; and tenth Monday after the first Monday in September. The commissioners of Hoke County, whenever in their discretion the best interests of the county demand it, shall have and are hereby granted the power and authority, by order, to abrogate, in any year, the holding of any one of the above set forth terms of court, and when said term is so abrogated, thirty days' notice of the same shall be given by said commissioners by the publication of same in a newspaper published in said county and at the court house door: Provided, that in the event the regular term at which the grand jury is selected shall be the term abrogated then the grand jury shall continue to serve until the following term of court at which time a new grand jury shall be selected. (1913, c. 196; 1917, c. 233; Ex. Sess. 1921, c. 81; 1927, c. 155; 1931, c. 96; 1933, c. 333.)

Robeson—Fifth Monday before the first Monday in March; two weeks for trial of criminal cases; first Monday before the first Monday in March, for trial of civil cases, two weeks; fifth Monday after the first Monday in March, one week for trial of civil cases; sixth Monday after the first Monday in March, one week for the trial of criminal cases in which the defendants are in jail; eleventh Monday after the first Monday in March, one week for the trial of civil cases; twelfth Monday after the first Monday in March, one week for the trial of criminal cases; fourteenth Monday after the first Monday in March, one week for the trial of civil cases; fifteenth Monday after the first Monday in March for the trial of criminal cases in which the defendants are in jail; eighth Monday before the first Monday in September, one week for the trial of civil cases; third Monday before the first Monday in September, one week for the trial of criminal cases; first Monday in September, one week for the trial of civil cases; second Monday in September, one week for the trial of criminal cases; fifth Monday after the first Monday in September, one week for the trial of criminal cases; sixth Monday after the first Monday in September, one week for the trial of civil cases; ninth Monday after the first Monday in September, one week for the trial of criminal cases; thirteenth Monday after the first Monday in September, two weeks for the trial of civil cases; fifteenth Monday after the first Monday in September, one week for the trial of criminal cases. At all criminal terms all motions and divorce cases may be heard, and jury trials in all civil cases may be heard by consent. The grand jury will not convene at any criminal term of said courts after the January term of each year, unless the solicitor of the Ninth Judicial District shall prior to said court notify the sheriff of Robeson County to assemble the grand jury for the next succeeding term. (1913, c. 196; 1915, c. 208; 1919, c. 105; 1923, c. 209; 1927, c. 84; 1931, c. 96; 1935, c. 132.)

Tenth District

The tenth district shall be composed of the following counties, and the superior courts thereof shall be held in each year at the following times, to-wit:

Alamance—First Monday before the first Monday in March, tenth Monday after the first Monday in March, third Monday before the first Monday in September and twelfth Monday after the first Monday in September, each for one week, for the trial of criminal cases only; fifth Monday before the first Monday in March, fourth Monday after the first Monday in March, each for one week, twelfth Monday after the first Monday in March, two weeks, fifth Monday before the first Monday in September, one week, first Monday in September and tenth Monday after the first Monday in September each for two weeks, all for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms, and the governor may assign a special or emergency judge to hold said terms of the superior court of Alamance County when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; 1915, c. 53; 1921, c. 134; Ex. Sess. 1921, c. 36; 1929, c. 172; 1931, c. 228.)

Durham—Second Monday before the first Monday in March, third Monday after the first Monday in March, eleventh Monday after the first Monday in March, sixteenth Monday after the first Monday in March, seventh Monday before the first Monday in September, first Monday in September, fifth Monday after the first Monday in September, and the thirteenth Monday after the first Monday in September, each for the trial of criminal cases only; eighth Monday before the first Monday in March (for a term of three weeks), first Monday before the first Monday in March, four weeks, seventh Monday after the first Monday in March, three weeks, twelfth Monday after the first Monday in March, three weeks, first Monday after the first Monday in September, three weeks, seventh Monday after the first Monday in September, three weeks, each for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms, and the governor may assign a special or emergency judge to hold said terms of the superior court of Durham County when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; 1915, c. 68; Ex. Sess. 1921, c. 36; 1924, c. 39; 1929, c. 243; 1931, cc. 224, 419.)

Granville—Fourth Monday before the first Monday in March, fifth Monday after the first Monday in March, tenth Monday after the first Monday in September, each term for two weeks; sixth Monday before the first Monday in September, one week; seventh Monday after the first Monday in September, one week, for civil cases only. (1913, c. 196; 1915, c. 7; Ex. Sess. 1921, c. 36; 1923, c. 131.)

Orange—Tenth Monday after the first Monday in March, fifteenth Monday after the first Monday in March, fourth Monday after the first Monday in September, for civil cases only; second Monday after the first Monday in March, first

Monday before the first Monday in September, fourteenth Monday after the first Monday in September.

The fourteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The second Monday before the first Monday in September to continue for one week for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The first Monday before the first Monday in September to continue for one week for the trial of civil cases only. (1913, c. 196; 1915, cc. 33, 64; 1917, c. 52; Ex. Sess. 1921, c. 36; 1927, c. 205; 1929, c. 172, s. 2.)

Person—Sixth Monday before the first Monday in March, fifth Monday before the first Monday in March, seventh Monday after the first Monday in March, fourth Monday before the first Monday in September, sixth Monday after the first Monday in September. All of said terms shall be for the trial of both criminal and civil cases, except the term beginning on the fifth Monday before the first Monday in March, which shall be for the trial of civil cases only. (1913, c. 196; 1915, c. 54; Ex. Sess. 1921, c. 36; 1929, c. 23.)

Western Division

Eleventh District

The eleventh district will be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Alleghany—Eighth Monday after the first Monday in March, and third Monday after the first Monday in September (both by regular judge) for the trial of criminal and civil cases. (1913, c. 196; 1935, c. 246.)

Ashe—Sixth Monday after the first Monday in March, and seventh Monday after the first Monday in September (both by regular judge) for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; sixth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only (regular judge). Provided that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 32; 1935, c. 246.)

Caswell—Second Monday after the first Monday in March (regular judge); ninth Monday before the first Monday in September; the board of commissioners of Caswell county, whenever in its discretion the best interest of the county demand it, may by order abrogate in any year the holding of that term of court, which convenes on the ninth Monday before the first Monday in September; and when this term is so abrogated, fifteen (15) days notice of the same shall be given by the said commissioners by publication in some newspaper published in Caswell county and at the court house door and four other public places in said county: Provided, however, that all process, both criminal and civil, made returnable at said term of court shall be continued until the next term of superior court when said court is abrogated by order of the board of commissioners, as herein provided; eleventh Monday after the first Monday in September (regular judge) for the trial of criminal and civil cases. (1913, c. 196; 1919, c. 289; 1927, c. 202; 1933, c. 45, s. 1; 1935, c. 246.)

Forsyth—Eighth Monday before the first Monday in March (regular judge); fourth Monday before the first Monday in March (regular judge); first Monday in March; Fourth Monday after the first Monday in March (regular judge); ninth Monday after the first Monday in March (regular judge); fourteenth Monday after the first Monday in March; eighth Monday before the first Monday in September (regular judge); first Monday in September (regular judge); fifth Monday after the first Monday in September (regular judge); ninth Monday after the first Monday in September (regular judge); thirteenth Monday after the first Monday in September (regular judge for second week only), each of the said terms to continue for two weeks, for the trial of criminal and civil cases.

Sixth Monday before the first Monday in March; second Monday before the first Monday in March (regular judge); second Monday after the first Monday in March (regular judge for second week only); sixth Monday after the first Monday in March; Twelfth Monday after the first Monday in March (regular judge); Sixteenth Monday after the first Monday in March, continued into the ninth Monday before the first Monday in September (both weeks regular judge); second Monday after the first Monday in September (regular judge for the first week only); seventh Monday after the first Monday in September; eleventh Monday after the first Monday in September. Each term to continue for two weeks, for the trial of civil cases only. (1913, c. 196; 1917, c. 169; 1919, c. 87; 1923, c. 151; 1927, c. 197; 1929, c. 131; 1933, cc. 231, 306; 1935, c. 246. P. L. 1917, c. 375, provides for a criminal calendar.)

Rockingham—Sixth Monday before the first Monday in March, to continue for two weeks (regular judge); eleventh Monday after the first Monday in March (regular judge); fourth Monday in September, to continue for two weeks (regular judge); eighth Monday after the first Monday in September (regular judge) for the trial of criminal cases only.

First Monday in March (regular judge); ninth Monday after the first Monday in March; fourteenth Monday after the first Monday in March (regular judge); first Monday in September; twelfth Monday after the first Monday in September (regular judge). Each to continue for two weeks, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107; 1933, cc. 45, 264; 1935, c. 246. P. L. 1915, c. 60, provides for a calendar in Rockingham county.)

Surry—Second Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; seventh Monday after the first Monday in March (regular judge) for the trial of criminal and civil cases to continue for two weeks; eighth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only; fourth Monday after the first Monday in September (regular judge) for the trial of criminal cases only; fifth Monday

after the first Monday in September, for the trial of civil cases only.

The regular judge assigned to hold courts in the district shall hold the courts hereinbefore designated to be held by the regular judge. The governor shall assign an emergency or any other judge to hold the other terms for the said district which are not designated to be held by the regular judge. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 9; 1931, c. 251; 1933, cc. 180, 413; 1935, c. 246.)

Twelfth District

The twelfth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Guilford—Sixth Monday before the first Monday in March, one week; first Monday in March, two weeks, eighth Monday after the first Monday in March, one week; fifteenth Monday after the first Monday in March, one week; fifth Monday before the first Monday in September, one week; second Monday after the first Monday in September, two weeks; tenth Monday after the first Monday in September, one week; fifteenth Monday after the first Monday in September, one week, for the trial of criminal cases only.

Eighth Monday before the first Monday in March, two weeks; fourth Monday before the first Monday in March, two weeks; second Monday after the first Monday in March, two weeks; sixth Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; thirteenth Monday after the first Monday in March, two weeks; fourth Monday before the first Monday in September, two weeks; first Monday before the first Monday in September, two weeks; second Monday after the first Monday in September, two weeks; fourth Monday after the first Monday in September, two weeks; eighth Monday after the first Monday in September, two weeks; for the trial of civil cases only. In addition to the terms of court now provided by law to be held in Guilford County, the following terms of court shall be opened and held in each year in the manner and at the times herein set forth, to-wit:

Second Monday before the first Monday in March to continue for two weeks for the trial of civil cases.

Fourth Monday after the first Monday in March to continue for two weeks for the trial of civil cases.

Eighth Monday before the first Monday in September to continue for one week for the trial of criminal cases.

Seventh Monday after the first Monday in September to continue for one week for the trial of criminal cases.

Eleventh Monday after the first Monday in September to continue for two weeks for the trial of civil cases. The commissioners of Guilford County are authorized and empowered in their discretion to pay the solicitor prosecuting the docket for the two criminal terms above provided, or other extra terms of criminal court of said county, not exceeding one hundred and fifty ($150.00) dollars a week for such terms, or to designate some other competent attorney to prosecute at any such terms on behalf of the State and to pay him not exceeding said sum for each such week of work by him. (1913, c. 196; 1921, c. 22; 1923, c. 169; 1927, c. 211; 1935, c. 184.)

Davidson—Fifth Monday before the first Monday in March, one week; ninth Monday after the first Monday in March, one week; sixteenth Monday after the first Monday in March, one week; second Monday before the first Monday in September, one week, for the trial of criminal cases only.

Second Monday before the first Monday in March, two weeks; twelfth Monday after the first Monday in March, two weeks; first Monday after the first Monday in September, two weeks; eleventh Monday after the first Monday in September, two weeks mixed; for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 14; 1921, c. 42; 1923, c. 169; 1933, cc. 14, 404.)

In addition to the terms of court now provided by law to be held in Davidson County, the following terms of court shall be opened and held in each year in the manner and at the times herein set forth, to-wit: To convene on the first Monday in April of each year and to continue for two weeks for the trial of civil cases only. To convene on the first Monday in October of each year and to continue for two weeks for the trial of civil cases only. If the judge regularly assigned to the district in which said county is situate be unable because of another regular term of court in said district, or for other cause, to hold any term of court provided in section one hereof, the governor may appoint a judge to hold such term from among the regular or emergency judges. (1931, c. 114.)

Stokes—Fourth Monday after the first Monday in March, one week; sixth Monday after the first Monday in September, one week, for the trial of criminal cases only.

Fifth Monday after the first Monday in March, one week; ninth Monday before the first Monday in September, to continue for two weeks, the first week for the trial of criminal cases and the second week for the trial of civil cases only; seventh Monday after the first Monday in September, one week, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 1; 1921, c. 142; 1923, c. 196; 1929, c. 158.)

Thirteenth District

The thirteenth district shall be composed of the following counties, and the superior courts shall be held at the following times, to-wit:

Union—Fifth Monday before the first Monday in March, for criminal cases; third Monday after the first Monday in March, for civil cases; fifth Monday before the first Monday in September, for criminal cases. Sixth Monday after the first Monday in September, to continue for two weeks, the second week for civil cases only; second Monday before the first Monday in March, and second Monday before the first Monday in September, each to continue for two weeks; ninth Monday after the first Monday in March; the last three terms for civil cases only.

In the first two terms of court for Union County for the trial of criminal cases, if it shall appear to the clerk of the superior court that the criminal docket will not be sufficient to take up the entire term, he may make or cause to be made a calendar of civil cases as is made at other terms,

and such cases shall be tried at such term in the same manner as if it were a civil term.

If it shall appear to the county commissioners for the county of Union, prior to the drawing of a jury or grand jury for any criminal term of court, that there is no prisoner in jail in the county or that the criminal docket at such term is not sufficient to justify the holding of the term, then the clerk is not to make or cause to be made a calendar of civil cases to be tried at said term, and the county commissioners, within their discretion, may not draw a jury or grand jury for such term, and notice shall be given immediately to the judge not to hold said court.

If it shall appear to the board of commissioners of Union County, thirty days before the beginning of the term held the third Monday after the first Monday in March that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, then said board of commissioners are hereby authorized and empowered within their discretion to draw a grand jury for said term, and to give thirty days' notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. (1913, c. 196; Ex. Sess. 1913, c. 22; 1915, c. 72; 1917, cc. 28, 117; 1921, c. 55.)

If it shall appear to the county commissioners for the county of Union, prior to the drawing of a jury for the civil term of court to be held the third Monday after the first Monday in March, and/or the civil term to be held on the ninth Monday after the first Monday in March, that the condition of the civil docket does not justify holding said term, then the clerk shall not make, or cause to be made, a calendar of civil cases to be tried at the said term and the county commissioners may not draw a jury for such term and notice shall be given immediately to the judge not to hold said court. (1933, c. 112.)

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March for civil cases only; sixth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; Ex. Sess. 1921, c. 16; 1923, c. 112; 1927, c. 181; 1929, c. 157.)

Scotland—First Monday after the first Monday in March, for one week for the trial of both criminal and civil cases; eighth Monday after the first Monday in March for one week for the trial of civil cases only; thirteenth Monday after the first Monday in March for one week for the trial of criminal and civil cases; eighth Monday after the first Monday in September for one week for the trial of civil cases only; twelfth Monday after first Monday in September for two weeks for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 22; 1917, c. 105; 1923, c. 178; 1933, c. 116.)

Moore—Sixth Monday before the first Monday in March, for the trial of criminal cases only, to continue for one week; third Monday before the first Monday in March, for the trial of civil cases only, to continue for one week; third Monday after the first Monday in March, for the trial of civil cases only, to continue for two weeks; eleventh Monday after the first Monday in March, to continue for two weeks, the first week for the trial of criminal cases only and the second week for the trial of civil cases only; third Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only.

Each of the terms designated for the trial of criminal cases shall also have jurisdiction to hear motions in civil actions on notice; and civil cases requiring a jury may, by consent of parties thereto, be tried at such terms. (1913, c. 196; Ex. Sess. 1913, c. 30; 1915, c. 64; 1929, c. 229.)

Richmond — Eighth Monday before the first Monday in March to continue for one week; fifth Monday after the first Monday in March to continue for one week; sixth Monday before the first Monday in September to continue for one week; fourth Monday after the first Monday in September to continue for one week, all for the trial of criminal cases; fourth Monday before the first Monday in March to continue for one week; second Monday after the first Monday in March to continue for one week; twelfth Monday after the first Monday in March to continue for one week; fifteenth Monday after the first Monday in March to continue for one week; seventh Monday before the first Monday in September to continue for one week; first Monday in September to continue for one week; ninth Monday after the first Monday in September to continue for one week, all for the trial of civil cases.

Each of the terms designated for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term, and for the hearing of motions in civil actions; and civil cases requiring a jury, may, by consent of the parties thereto, be tried at such criminal terms.

The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Richmond County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; 1915, c. 72; 1917, s. 117; 1919, c. 98; 1921, c. 77; Ex. Sess. 1921, c. 16; 1923, cc. 112, 184; 1925, c. 241; 1931, c. 82; 1935, c. 3.)

Stanly—Fourth Monday before the first Monday in March to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March; tenth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; first Monday in September to continue for two weeks, for civil cases only; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September.

Each of the terms set for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term; and for the

hearing of motions in civil actions; and for the trial of civil cases requiring a jury where issues are drawn by consent of the parties thereto; and for the trial of actions for divorce and other actions in which no answer has been filed when the time for filing the answer has expired.

The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Stanly County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; 1933, c. 240.)

Fourteenth District

The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Gaston — Seventh Monday before the first Monday in March; first Monday after the first Monday in March; seventh Monday after the first Monday in March; thirteenth Monday after the first Monday in March; sixth Monday before the first Monday in September; first Monday after the first Monday in September; seventh Monday after the first Monday in September; twelfth Monday after the first Monday in September, each to continue for one week, for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; eleventh Monday after the first Monday in March; fifth Monday before the first Monday in September; second Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively: Provided, that where there is a conflict in any of the above courts with the terms of court prescribed for Mecklenburg County, a special or emergency judge shall be assigned by the Governor to hold said court in Gaston County, and such special or emergency judge shall have all the powers conferred upon any resident or presiding judge.

At all criminal terms of said court civil trials which do not require a jury may be heard by consent of the parties; and at all criminal terms of said court upon five days notice to the adverse party any order, application for injunction, receivership, motions, etc., may be heard in same manner as at civil terms. (1913, c. 196; Ex. Sess. 1913, c. 12; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1925, c. 237; 1931, c. 242.)

Mecklenburg—Eighth Monday before the first Monday in March; first Monday before the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; eighth Monday before the first Monday in September, which last named term only is to continue two weeks; first Monday before the first Monday in September; fourth Monday after the first Monday in September; tenth Monday after the first Monday in September, which eight terms are for the trial of criminal cases exclusively; fourth Monday before the first Monday in March, to continue three weeks; the first Monday in March; fourth Monday after the first Monday in March; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March; the first Monday in September; fifth Monday after the first Monday in September; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, which last named eight terms are to continue for two weeks; fifteenth Monday after the first Monday in March, and all of the last named ten terms are for the trial of civil cases exclusively: Provided, that the board of county commissioners of Mecklenburg county may in their discretion, by order of their regular meeting held on the first Monday in March in any year, provide for the holding of a term of court for the seventh Monday after the first Monday in March, and for the trial of civil and criminal cases, either or both, at said term.

No process nor other writ of any kind pertaining to civil actions shall be made returnable to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Mecklenburg county. In addition to the courts above set out for Mecklenburg county the following terms of superior court for the trial of civil cases in Mecklenburg county shall be held, as follows: April first, April fifteenth, April twenty-ninth, May thirteenth, May twenty-seventh, June tenth, June twenty-fourth, September second, September sixteenth, September thirtieth, October fourteenth, October twenty-eighth, November eleventh, November twenty-fifth, and December ninth, one thousand nine hundred and thirty-five; and January sixth, January twentieth, February third, February seventeenth, March second, March sixteenth, March thirtieth, April thirteenth, April twenty-seventh, May eleventh, May twenty-fifth, June eighth, June twenty-second, August thirty-first, September fourteenth, September twenty-eighth, October twenty-sixth, November ninth, November twenty-third, and December seventh, one thousand nine hundred and thirty-six; and January eleventh, January twenty-fifth, February eighth, February twenty-second, March eighth, and March twenty-second, one thousand nine hundred and thirty-seven, which said terms of court may be held contemporaneously with other courts in said county. Said terms shall be for two weeks each, shall be for the trial of civil cases only, and shall be held by regular and/or special or emergency judges who shall be assigned by the governor. (1913, c. 196; Ex. Sess. 1913, cc. 11, 18; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1935, c. 48.)

Fifteenth District

The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Iredell—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday after the first Monday in March, to continue for one week, for civil cases only; eleventh Monday after the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; fifth Monday before the first Monday in September, to continue for two weeks for criminal and civil cases; ninth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases. (1913, c. 196; 1921, c. 121, s. 2; 1923, c. 129.)

Randolph—Second Monday after the first

Monday in March, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March, for criminal cases; seventh Monday before the first Monday in September, to continue for two weeks for civil cases only; the first Monday in September for criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 31; 1921, c. 121, s. 3; Ex. Sess. 1921, c. 22; 1923, c. 229; 1924, c. 23; 1925, c. 156.)

Rowan—Third Monday before the first Monday in March, to continue for two weeks; first Monday in March, to continue for one week, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 5; 1921, c. 31.)

There shall be held in Rowan County two additional terms of the superior court as follows, to-wit: On the sixth Monday after the first Monday in September to continue for one week for the trial of civil cases only; on the first Monday after the first Monday in March to continue for one week for the trial of civil cases only. This act shall not be construed to repeal or abolish any terms of court now provided for the fifteenth judicial district, but in case of conflict of any of the regularly established terms of the courts of the fifteenth judicial district with the terms above set out, the said terms of the court herein established shall be considered special terms and the governor may assign a special or emergency judge to hold said terms of superior court of Rowan County when the judge holding the regular terms of court in the district is unable to hold said terms. (1933, c. 274.)

Cabarrus—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for two weeks, for civil cases only; seventh Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; fourteenth Monday after the first Monday in March, to continue for two weeks, for civil cases only; second Monday before the first Monday in September, to continue for one week, for criminal cases only; first Monday before the first Monday in September, to continue for one week, for civil cases only; sixth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases.

The governor shall assign an emergency or any other judge to hold any of the terms of the superior court of Cabarrus county when the judge holding courts in said district is unable to hold said terms. (1913, c. 196; 1921, c. 121, s. 2; 1933, c. 76; 1935, c. 177.)

Montgomery—Sixth Monday before the first Monday in March, for criminal cases: Provided, said term shall be a return term for such civil process as may be returnable at term and for hearing motions on the civil docket, and civil cases requiring a jury may also be tried at said term by consent of the parties thereto. Fifth Monday after the first Monday in March, to continue for two weeks, for civil cases only. Eighth Monday before the first Monday in September; third Monday after the first Monday in September, and eighth Monday after the first Monday in September, for civil cases; fourth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 183; 1917, c. 122; 1921, c. 121, s. 3; 1927, c. 193, s. 1.)

Alexander—Sixteenth Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in September to continue for one week, both terms for the trial of civil and criminal cases. (1913, c. 196; 1921, c. 166; 1933, c. 250, s. 4; 1935, cc. 101, 252, s. 2.)

Sixteenth District

The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cleveland—Third Monday after the first Monday in March; eleventh Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September; first Monday after the first Monday in September to continue for one week for the trial of civil cases only; [second Monday after the first Monday in September, one week, for the trial of civil cases only;] eighth Monday after the first Monday in September; each to continue for two weeks; eighth Monday after the first Monday in March, for one week.

For the second and fourth terms first mentioned above the governor may assign a judge to hold such terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 173; 1917, c. 245; 1927, c. 154; 1931, cc. 240, 456; 1935, cc. 194, 195.)

Lincoln—Sixth Monday before the first Monday in March to continue for two weeks, the second week for civil cases only; seventh Monday before the first Monday in September; sixth Monday after the first Monday in September; the last term to continue for two weeks, the second week for civil cases only. (1913, c. 196; 1915, c. 210; 1925, c. 25.)

Burke—Second Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; third Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases only; fourteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases: Provided, however, that the board of commissioners of Burke County, in any year, upon the written petition of a majority of the practicing attorneys resident in said county, may, by resolution duly adopted, dispense with and abrogate the holding of that term of said court which by the provisions of this act commences on the thirteenth Monday after the first Monday

in March. (1913, c. 196; 1915, c. 67; Ex. Sess. 1920, c. 5; Ex. Sess. 1921, c. 90, s. 3; 1931, c. 343.)

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks; eleventh Monday after the first Monday in March, to continue two weeks, for civil cases only; twelfth Monday after the first Monday in September, to continue two weeks, for the trial of civil and criminal cases. (1923, c. 196; 1915, c. 35; Ex. Sess. 1921, c. 90, s. 2.)

Catawba—Seventh Monday before the first Monday in March, to continue for two weeks and for the trial of civil cases only, fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; ninth Monday before the first Monday in September, to continue for two weeks; first Monday in September, to continue for two weeks, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only; thirteenth Monday after the first Monday in September to continue for one week and for the trial of civil cases only. Fifth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eleventh Monday after the first Monday in September, to continue for one week, for the trial of civil cases only: Provided, that the board of county commissioners may by resolution, adopted not less than 30 days prior to the convening of either of the last two courts, determine that the holding of such court is not necessary and cancel the same, in which case notice of such action shall immediately be given to the governor to the end that the judge assigned to said court may be relieved from such assignment. (1913, c. 196; Ex. Sess. 1913, c. 7; Ex. Sess. 1921, c. 47; c. 90, s. 1; 1923, c. 18; 1925, c. 13, ss. 1, 2; 1933, c. 311.)

Watauga—Seventh Monday after the first Monday in March, to continue for two weeks; second Monday after the first Monday in September, to continue for one week; fourteenth Monday after the first Monday in March to continue for a term of two weeks, for the trial of civil cases only. (1913, c. 196; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274.)

Seventeenth District

The seventeenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Yadkin—First Monday before the first Monday in March; second Monday before the first Monday in September, each for the trial of criminal cases only; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, the last two terms each to continue for two weeks for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1920, c. 42; 1921, c. 166; 1925, c. 65.)

Wilkes—First Monday in March; eighth Monday after the first Monday in March; thirteenth Monday after the first Monday in March, for the trial of civil cases only; fourth Monday before the first Monday in September; fourth Monday after the first Monday in September, for the trial of civil and criminal cases; tenth Monday after the first Monday in September; each of the above terms to continue for two weeks. (1913, c. 196; 1919, c. 165; 1921, c. 166; 1935, c. 105, s. 1, c. 192.)

Davie—Second Monday after the first Monday in March twelfth Monday after the first Monday in March, for civil cases only; first Monday before the first Monday in September; and thirteenth Monday after the first Monday in September, last term for civil cases only. (1916, c. 196; 1921, cc. 31, 121, 166; 1935, c. 5, s. 2.)

Mitchell—Third Monday after the first Monday in March, two weeks; sixth Monday before the first Monday in September, two weeks for civil cases only; second Monday after the first Monday in September for two weeks. (1913, c. 196; 1921, c. 166; Ex. Sess. 1921, c. 33; 1927, c. 168; 1929, c. 10; 1933, c. 250, s. 3; 1935, c. 1.)

Avery—Fifth Monday after the first Monday in March, for two weeks, the first week for the trial of criminal cases only and the last two weeks for civil cases only; ninth Monday before the first Monday in September, three weeks for civil cases only; sixth Monday after the first Monday in September, for two weeks, the first week for the trial of criminal cases only and the second week for civil cases only. (1913, c. 196; 1915, c. 169; 1921, c. 166; Ex. Sess. 1921, c. 33; 1923, c. 90; 1931, c. 84; 1933, cc. 152, 250, s. 1.)

Eighteenth District

The eighteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Henderson—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; the eighth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only, and the twelfth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; the fifth Monday after the first Monday in September to continue for two weeks for the trial of both criminal and/or civil cases or both; eleventh Monday after the first Monday in September to continue for two weeks for the trial of civil cases only. (1913, c. 196; 1917, c. 115; 1919, c. 162; Ex. Sess. 1921, c. 24; 1923, c. 204; 1927, c. 207, s. 1; 1933, c. 117; 1935, c. 127.)

McDowell—Ninth Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; the third Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; the fourteenth Monday after the first Monday in March, to continue for three weeks for the trial of both criminal and civil cases; eighth Monday before the first Monday in September, to continue two weeks for the trial of civil cases only; the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1921, c. 24; 1923, c. 219; 1927, c. 207, s. 1; 1935, c. 127.)

Polk—The fifth Monday before the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; second Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and

civil cases. (1913, c. 196; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1933, c. 232, s. 2; 1935, c. 127.)

Rutherford—Sixth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; third Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 116; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1933, c. 232, s. 1; 1935, c. 127.)

Transylvania—Fourth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixth Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 66; Ex. Sess. 1920, c. 19; Ex. Sess. 1921, c. 24; 1925, c. 63; 1927, c. 207, s. 1; 1929, c. 173, s. 2; 1935, c. 127.)

Yancey—Sixth Monday before the first Monday in March, to continue for one week for the trial of civil cases only; second Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; fourth Monday before the first Monday in September, to continue for two weeks for the trial of criminal and civil cases; seventh Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 38; 1915, c. 71; Ex. Sess. 1920, c. 4; Ex. Sess. 1921, c. 24; 1923, c. 222; 1927, c. 207, s. 1; 1929, c. 173; 1933, c. 478; 1935, c. 127.)

In all criminal terms of court in the eighteenth judicial district, civil actions and proceedings, which do not require a jury, may be heard by consent and any order, judgment or decree therein may be entered. (1935, c. 127.)

Nineteenth District

The nineteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombe—The second Monday in January, the first Monday in February, the first Monday in March, the first Monday in April, the first Monday in May, the first Monday in June, the second Monday in July, the first Monday in August, the first Monday in September, the first Monday in October, the first Monday in November, and the first Monday in December, each to continue for two weeks, for the trial of civil cases exclusively, the fourth Monday in January, the third Monday in February, the third Monday in March, the third Monday in April, the third Monday in May, the fourth Monday in July, the third Monday in August, the third Monday in September, the third Monday in October, the third Monday in November, and the third Monday in December, each to continue for one week, for the trial of both criminal and civil cases; the third Monday in June, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1923, c. 31.)

Upon written request of the commissioners of Buncombe County and the solicitor of the Nineteenth Judicial District, the governor of North Carolina may order a special term of the superior court for the trial of criminal cases, said term of court to be of such duration as may be specified in said written request. (1929, c. 213.)

Madison—The fourth Monday in February, the fourth Monday in March, the fourth Monday in April, the fourth Monday in May, the fourth Monday in August, the fourth Monday in September, the fourth Monday in October, the fourth Monday in November. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1929, c. 205; 1931, c. 25.)

Twentieth District

The twentieth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cherokee—Sixth Monday before the first Monday in March for civil cases only, fourth Monday after the first Monday in March; fifteenth Monday after the first Monday in March, for the trial of civil causes only: Provided, that upon request of the bar of Cherokee county the board of county commissioners need not draw a jury for this term; fourth Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue two weeks. (1913, c. 196; Ex. Sess. 1913, c. 21; 1917, c. 114; 1923, c. 51; 1925, c. 30.)

Graham—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; second Monday after the first Monday in March; thirteenth Monday after the first Monday in March, to be held for civil cases only; first Monday in September, each to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 28; 1917, c. 54; 1927, c. 245, s. 1.)

Swain—Seventh Monday before the first Monday in March, for the trial of civil cases only, to continue for two weeks; a special judge to be assigned for this court; first Monday in March; sixth Monday before the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks: Provided, that the board of commissioners of Swain County may, when the public interest requires it, decline to draw a grand jury for the July term. (1913, c. 196; 1933, c. 125.)

Haywood—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; eighth Monday before the first Monday in September, to continue for two weeks; second Monday after the first Monday in September, for civil cases only and the twelfh Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1917, cc. 7, 114; 1923, c. 35, s. 2; 1924, c. 27.)

Jackson—Second Monday before the first Monday in March; eleventh Monday after the first Monday in March, fifth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1933, c. 107.)

Macon—Sixth Monday after the first Monday in March; second Monday before the first Mon-

day in September, and eleventh Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this chapter. (1913, c. 196; 1923, c. 35, s. 1; 1927, c. 245, s. 1.)

Clay—Eighth Monday after the first Monday in March, and third Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1927, c. 254, s. 1.)

Editor's Note.—Public Laws 1931, c. 240, as amended by c. 456, directed that its provision adding a new term for Cleveland County should be inserted where it appears in brackets. It seems that such added words should have been placed at the end of the paragraph. This new term conflicts with a term of Wautauga County, which was transferred to the Sixteenth Judicial District by Public Laws 1931, c. 424, effective on the same date as c. 456.

When Term Ends.—The term of court ends when the business is disposed of and the judge leaves the bench, and does not necessarily extend to the end of the period prescribed. May v. National etc. Co., 172 N. C. 795, 90 S. E. 890.

When the Term Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week," (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875. A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Id.

Session at Scene of Crime.—Where at the requests of defendants, a view of the scene of a crime is granted and a short session of the court held there, no prejudicial error is committed under this section. State v. Stewart, 189 N. C. 340, 127 S. E. 260.

Applied in State v. Dalton, 206 N. C. 507, 510, 174 S. E. 422, with reference to Henderson County.

§ 1444. Civil cases at criminal terms.—At criminal terms of court, all civil process may be returned and pleadings filed which may be returned and filed at civil terms; motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Also motions for confirmation or rejection of referees' reports may be heard upon ten days notice and judgment entered on said reports. (Rev., s. 1507; 1901, c. 28; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; 1931, c. 394.)

At the criminal terms of court in the counties of Anson, Bladen and Robeson, all civil process may be returned and pleadings filed which may be returned and filed at civil terms; civil actions which do not require a jury, motions and divorce cases, including jury trials in divorce cases, may be heard, and other civil actions may be heard by consent of parties. (1913, c. 28; 1915, c. 110; 1917, c. 15.)

At the criminal terms of court in the counties of Anson, Bladen, Cumberland, Durham, Gaston and Robeson, judgments by default final and by default and inquiry may be rendered in civil actions without further notice than that contained in the summons. (1913, c. 28; Ex. Sess. 1913, c. 23; 1915, cc. 68, 110, 114; 1917, c. 15; 1919, c. 187; Ex. Sess. 1920, c. 39.)

The term "return" means that the process must be brought back and produced in the court whence it issued with such indorsements as the law requires. Watson v. Mitchell, 108 N. C. 364, 12 S. E. 836.

Failure to Give Notice.—It is required by the provisions of this section that due notice be given of motions in civil action to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the superior court has ordered a dismissal of the action, the judgment will be reversed on appeal. Dawkins v. Phillips, 185 N. C. 608, 116 S. E. 723.

§ 1445. No criminal business at civil terms.—No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend nor be entitled to their certificates for attendance upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated for the trial of civil actions alone. (Rev., s. 1508; 1901, c. 28, ss. 3, 7; 1913, c. 196.)

§ 1446. Rotation of judges.—The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judges resident in the Eastern Judicial Division shall hold the courts for the fall term, one thousand nine hundred and fifteen, as follows: The judge of the first district shall hold the courts of the fifth district; the judge of the second, the courts of the sixth; the judge of the third, the courts of the seventh; the judge of the fourth, the courts of the eighth; the judge of the fifth, the courts of the ninth; the judge of the sixth, the courts of the tenth; the judge of the seventh, the courts of the first, the judge of the eighth, the courts of the second; the judge of the ninth, the courts of the third; the judge of the tenth, the courts of the fourth; and the judges of the Eastern Judicial Division shall thereafter successively hold the courts of this division, but may make exchange of the courts as now provided by law.

The judges resident in the Western Judicial Division shall hold the courts for the fall term one thousand nine hundred and fifteen, as follows: The judge of the seventeenth district shall hold the courts of the eleventh; the judge of the eighteenth, the courts of the twelfth; the judge of the nineteenth, the courts of the thirteenth, the judge of the twentieth, the courts of the fourteenth; the judge of the eleventh, the courts of the fifteenth; the judge of the twelfth, the courts of the sixteenth; the judge of the thirteenth, the courts of the seventeenth; the judge of the fourteenth, the courts of the eighteenth; the judge of the fifteenth, the courts of the nineteenth; the judge of the sixteenth, the courts of the twentieth; and the judges resident in the Western Judicial Division shall thereafter successively hold the courts of this division, subject to such exchanges of courts as are now provided by law.

The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit shall hold all the courts which fall between July and December both inclusive. (Rev., s. 1509; Code, s. 1911; 1913, c. 196, ss. 4, 5, 6, 9; 1915, c. 15, ss. 3, 4; 1901, c. 28, ss. 4, 9; R. C., c. 31, s. 20; 1876-7, c. 27; 1879, c. 11; 1885, c. 180; Const. Art. 4, s. 11.)

Validity of acts de facto judge, see sec. 1432 and note.

Constitutional Provisions.—Sec. 22 of Art. IV of the Constitution, requiring the courts to be always open, must be construed in connection with sec. 11 of the same article, and does not apply to the terms of court and matters connected therewith. Delafield v. Mercer Construction Co., 115 N. C. 21, 20 S. E. 167.

A Judge Is Essential.—There can be no session of a court

without a judge; hence, when the judge leaves the bench for the term, although no notice is given of the final adjournment, or it is ordered to expire by limitation, the term ends and the judge cannot hear any matters out of the courthouse, except by consent, unless it is "chambers" business. Delafield v. Mercer Construction Co., 115 N. C. 21, 20 S. E. 167.

Injunction—Failure of Judge to Hear Order.—If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding by exchange the courts of some adjoining district may hear it upon giving ten days notice to the parties interested. Hamilton v. Icard, 112 N. C. 589, 591, 17 S. E. 519.

A judge assigned to a district is the judge thereof for six months, beginning either January or July first, and where a restraining order was made returnable before such judge at a place outside of the district, and after the courts were over, but before the end of the term of assignment to the district, such judge had jurisdiction to hear the application and grant the injunction until the hearing. Hamilton v. Icard, 112 N. C. 589, 17 S. E. 519.

§ 1447. Exchange of courts.—By consent of the governor the judges may exchange the courts of a particular county or counties; and the judges resident in the western division and the judges resident in the eastern division may exchange courts or circuits with the consent of the governor; but no judge shall hold all the courts in one district oftener than once every four years. When a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor. (Rev., s. 1511; Code, s. 913; R. C., c. 31, s. 20; 1879, c. 11; 1915, c. 15, s. 4; Const., Art. 4, s. 11.)

Under Prior Law.—Before the Act of 1879, assigning the judges to the different districts, an exchange of circuits with the consent of the Governor under the Act of 1877 was not in violation of section 11, Art. IV, of the amended Constitution. State v. McGimsey, 80 N. C. 377.

A partial exchange of circuits between two of the judges of the superior court, with the approval of the Governor, is legal. State v. Graham, 75 N. C. 256.

Power of Legislature. — Neither does this prohibitory clause restrict the Legislature from creating an extra term of the superior court of a county and designating the resident judge to hold the same. State v. Monroe, 80 N. C. 373, 374.

Governor's Power.—When the Constitution (and this section) has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must of necessity be the judge, and the Governor issues a commission, the Supreme Court will assume that, in fact, the emergency had arisen which would sanction the issuing of the commission, and the same will be recognized as valid if the Governor could, for any reason, have lawfully issued it. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Governor's Authority a Command.—The Governor can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such court, expressing in the commission that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command. State v. Watson, 75 N. C. 136.

De Facto Judge.—Where the Governor issues a commission to one of the judges of the superior courts, authorizing him to hold certain terms of the superior courts, and the judge undertakes to discharge the duties required of him, he is, so far as the public and third persons are concerned a de facto judge so long as he assumes to act in that capacity, and this is so although the commission was issued without authority of law. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Upon Death of Judge.—Upon the death of one of the judges of the superior courts, the Governor has the authority under this section to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Prohibitory Clause Considered.—The inhibition contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor, nor to the holding of special terms under section 1450. State v. Turner, 119 N. C. 841, 845, 25 S. E. 810.

Same—Applies to Series of Courts.—The provision that "no judge (of the superior courts) shall hold the courts in the same district oftener than once in four years," is held to apply only to the series of courts forming a district over which a judge, in his riding, is to preside, and has no reference to the courts separately considered. State v. Speaks, 95 N. C. 689, 691.

§ 1448. Court adjourned by sheriff when judge not present.—If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the term and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term. (Rev., s. 1510; Code, s. 926; 1901, c. 269; 1887, c. 13.)

Presumption of Adjournment.—Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it will be presumed that the sheriff had duly opened the court and adjourned it from day to day as provided in this section. State v. Weaver, 104 N. C. 758, 763, 10 S. E. 486.

Duty of Defendant to Attend Special Term.—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. State v. Horton, 123 N. C. 695, 31 S. E. 218.

Implied Power of Judge to Order Adjournment.—The provision in this section that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done "unless the sheriff shall be sooner informed that the judge, from any cause cannot hold the term," which implies the power of the judge to order an adjournment to a later day in the term. State v. Wood, 175 N. C. 809, 95 S. E. 1050.

Failure of Sheriff to Adjourn Court.—The provision in this section that where the judge fails to appear at any term until the fourth day thereof, inclusive, the sheriff shall adjourn the court until the next term, does not avoid the acts of any term where, upon the non-appearance of the judge, the sheriff did not in fact adjourn the court, and the judge afterwards actually appeared and held court. Norwood v. Thorp., 64 N. C. 682.

Where the sheriff has not continued a term of the superior court for the absence of the judge to hold the same, the judge may appear at any day within the term, and the proceedings thereafter will be valid. State v. Wood, 175 N. C. 809, 95 S. E. 1050.

All Matters Carried Over.—This section by operation of law carries all matters over to the next term, in the same plight and condition. State v. Horton, 123 N. C. 695, 31 S. E. 218.

Newly Elected Judge.—Where a newly elected judge, as successor to one who was to have held the term of a court commencing on the 30th of December, continuing for several weeks, and designated by the statute as a Spring Term, has ordered the sheriff to adjourn the court from day to day, not exceeding four days, to enable him to take the oath of office and preside, and accordingly he qualifies and holds the court, those of his acts are valid, as an officer de jure. And if not, they are valid as those of an officer de facto, and an exception to the validity of a trial of an action on that ground is untenable. State v. Harden, 177 N. C. 580, 98 S. E. 782.

Adjournment from Day to Day.—Stated in State v. McGinsey, 80 N. C. 377.

Art. 7. Special Terms of Court

§ 1449. Governor may designate judge.—The governor has the power to appoint any judge to hold special terms of the superior court in any county. (Rev., s. 1511; Code, s. 913; 1879, c. 11; Const., Art. 4, s. 11.)

See sections 1447, 1450 and notes placed thereunder.

§ 1450. Governor may order special terms.—Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the court of his district, and hold for such time as he may designate, unless the business be earlier disposed of. The Governor may order a special term of court to be held in any county or district during the holding of a regular term of the Superior Court in such county or district, either by a judge of the Superior Court or by any emergency judge if the dispatch of business requires it. (Rev., s. 1512; Code, s. 914, R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Ex. Sess. 1924, c. 100.)

Editor's Note.—The last provision in this section, which was made a part hereof by the Ex. Sess. of 1924, was, at first, placed by amendment in the Ex. Sess. 1921, under section 1435(a).

In reference to this amendment it is said in 3 N. C. Law Rev. 23 "The purpose of the amendment is not entirely clear, since the original statutes already authorized the Governor to order a special term to be held in any county when necessary, and to designate a judge, including the emergency judges to hold the court."

Section Constitutional. — This section is constitutional. State v. Ketchey, 70 N. C. 621.

Particular Class of Cases.—In appointing special terms the Governor is not bound by the certificate of the judge, so far as to confine such terms to the trial of a particular class of cases. State v. Ketchey, 70 N. C. 621.

Regular Order Presumed.—When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order for holding it was duly made, and that it was duly held. Sparkman v. Daughtry, 35 N. C. 168.

The power of the governor to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited or a reason in the commission is the power of the judge restricted to the trial of indictment found before that term. State v. Register, 133 N. C. 746, 749, 46 S. E. 21. See also note of State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, under section 1447.

No reason need be assigned by the Governer for calling special terms. State v. Watson, 75 N. C. 136, 139. He is the sole judge of the evidence necessitating such action. State v. Lewis, 107 N. C. 977, 12 S. E. 457, 13 S. E. 247.

Must Appoint Judge.—When the governor has ordered such term as provided in this section to be held in any county of this State, it is the duty of the Governor to appoint one of the judges of the Superior Court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. State v. Baxter, 208 N. C. 90, 94, 179 S. E. 450.

Plea Denying Existence of Court.—A plea of the defendant that the court was unlawfully called because the Governor was absent from the State when he attempted to order the holding of the court is properly overruled. State v. Hall, 142 N. C. 710, 55 S. E. 806.

Arraignment at Former Term.—It in not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State v. Ketchey, 70 N. C. 621.

§ 1451. Compensation of judge.—The judge appointed to hold a special term of court shall attend and hold such court, and shall be paid as compensation therefor at the rate of one hundred dollars per week by the county in which the special term is held. But any judge who is in a district having fewer than twenty regular weeks of court for the six months shall hold without extra compensation, if directed by the governor, enough extra weeks of court to make out twenty weeks for the six months. (Rev., s. 1512; Code, s. 914; 1913, c. 63; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; 1909, c. 85, s. 1.)

Reduction of Salary.—The Constitution provides that the salaries of the judges shall not be disminished during their continuance in office. The additional compensation of one hundred dollars given to a superior court judge, by this section, for services in holding a special term, is a part of his salary, hence, any statutory provision providing for a reduction thereof is void as being unconstitutional. Buxton v. Comm., 82 N. C. 92.

§ 1452. Notice of special terms.—Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement. (Rev., s. 1513; Code, s. 915; 1868-9, c. 273.)

The certificate forwarded to the executive officer for the notice sent down to the county commissioners constitutes an essential part of the record of the term. State v. Lewis, 107 N. C. 967, 975, 12 S. E. 457, 13 S. E. 247.

Cited in State v. Baxter, 208 N. C. 90, 92, 179 S. E. 450.

§ 1453. Certificate of attendance.—The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive from the commissioners of the county in which the court is held the compensation provided by law. (Rev., s. 1514; Code, s. 918; 1901, c. 167; 1868-9, c. 273; 1909, c. 85, s. 1; 1913, c. 63.)

§ 1454. Grand juries at special terms.—There shall be no grand jury at any special term, unless the same shall be ordered by the governor. (Rev., s. 1515; Code, s. 921; 1868-9, c. 273.)

In the absence of any order of the Governor that a grand jury be drawn at a special term, as provided by this section the indictment returned at said time is void. State v. Baxter, 208 N. C. 90, 94, 179 S. E. 450.

§ 1455. Jurisdiction.—The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have. (Rev., s. 1516; Code, s. 916; 1868-9, c. 273.)

See note of State v. Ketchey, 70 N. C. 621, 625, section 1450.

Removal of Cause.—A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. Sparkman v. Daughtry, 35 N. C. 168.

Judgment by Default.—Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. Reynolds v. Greensboro, etc., Co., 153 N. C. 342, 69 S. E. 248.

Court Held outside Judge's District.—A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties, Henry v. Hilliard, 120 N. C. 479, 27 S. E. 130.

§ 1456. Attendance and process at special terms.—All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. But no process shall be made returnable thereto except subpœnas, or other process for the attendance of witnesses. (Rev., s. 1517; Code, s. 919; R. C., c. 31, s. 23; 1844, c. 10; 1848, c. 29.)

Duty of defendant to appear, see note of State v. Horton, 123 N. C. 695, 31 S. E. 218, section 1448.

§ 1457. Subpœnas returnable.—Subpœnas may issue returnable on any day of any special term. (Rev., s. 1518; Code, s. 920; 1868-9, c. 273.)

Art. 8. Special Regulations

§ 1458. Reading the minutes.—Every morning during the term the judge presiding shall order the reading of the minutes of the court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of the term. (Rev., s. 1519, Code, s. 925; 1861, c. 3.)

§ 1459. Officer attending juries sworn.—When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court, the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury that he may be called to attend during that term. (Rev., s. 1527; Code, s. 927; R. C., c. 31, s. 36; 1801, c. 592.)

§ 1460. Quakers may wear hats in court.—The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect. (Rev., s. 1528; Code, s. 943; R. C., c. 31, s. 131; 1784, c. 209.)

§ 1461. Court stenographers.—Upon the request of a judge holding a superior court in any county in the state, the board of county commissioners in such county shall employ a competent stenographer to take down the proceedings of the court, at a compensation not to exceed five dollars per day and actual expenses, to be paid by the county in which the court is held: Provided, that the compensation of said stenographers in counties composing the sixteenth judicial district shall not exceed ten dollars per day.

The judge is authorized to tax a reasonable fee against the losing party in every action, civil and criminal, to be turned into the county treasury towards reimbursing the county, but no fee shall be taxed against a losing party suing in forma pauperis.

Every stenographer so employed shall make three copies of the proceedings in every case appealed to the supreme court, without extra charge, and shall furnish one copy to the attorneys on each side and file one copy with the clerk of the superior court of the county in which any such case is tried, and shall obey all orders of the judge relative to the time in which any such work shall be done: Provided, that the restrictions herein against an extra charge for making copies of the proceedings in cases appealed to the supreme court shall not apply to counties composing the sixteenth judicial district, except Burke, Lincoln and Catawba counties: Provided, that in the counties of Burke, Lincoln and Catawba the court stenographer shall make three copies of the proceedings in every case appealed to the supreme court at a charge of not more than fifteen cents per page for the original copy, which shall be paid by the appellant, and one copy shall be furnished to the clerk of the superior court and one copy to the appellee, without extra charge, and the original to the appellant. (1929, cc. 53, 260, s. 1.)

Every stenographer so employed shall, before entering upon the discharge of his duties, be duly sworn to well, truly and correctly take down and transcribe the proceedings of the court, except the argument of counsel, and the charge of the court thus taken down and transcribed shall be held to be a compliance with the law requiring the judge to put his instructions to the jury in writing.

This section shall not apply to any county which has a court stenographer authorized by law: Provided, that the board of county commissioners of Mecklenburg county may, by resolution approving this law, bring said county within the provisions of the same: Provided further, that this law shall not apply to the following counties: Alleghany, Brunswick, Caldwell, Camden, Carteret, Caswell, Chatham, Currituck, Dare, Davidson, Davie, Forsyth, Greene, Harnett, Haywood, Hoke, New Hanover, Orange, Pender, Perquimans, Person, Transylvania, Union, Watauga. (Ex. Sess. 1913, c. 69; Ex. Sess. 1921, c. 57; 1927, c. 268; 1933, c. 75, s. 2. Alamance county: See Public Laws, Ex. Sess. 1921, c. 2; 1935, c. 474.)

Editor's Note.—The provisionary clauses applicable to the sixteenth district were placed herein by the Public Laws, Ex. Sess., 1921.

By the Acts of 1927 the county of Surry was stricken from the list of counties to which this section is not to apply. In the same amendment "the compensation of each stenographer so employed shall be not exceeding ten dollars per day and two and one half dollars per day expenses, etc.," but this provision is made to apply to Surry County only.

Public Laws 1929, ch. 45, § 5, authorized the county commissioners of Halifax County to employ a court stenographer. Public Laws 1931, c. 11, s. 5, gave such authority to the commissioners of Northampton county.

Public Laws 1933, c. 75 inserted Harnett County in the list of counties appearing in the last paragraph. For an amendment of this section applicable in McDowell County only, see Acts of 1933, c. 85.

§ 1461(1). Official court reporter for second judicial district.—The resident judge of the second judicial district be, and he is hereby authorized and empowered, to appoint an official court reporter for one or more or all of the counties in said district who shall serve at the will of the resident judge, and whose appointment may be terminated by thirty days' written notice thereof.

The appointment of such reporter or reporters shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same, or a certified copy thereof, shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe an oath in words substantially as follows: "I, ..., do solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the county of ..... in the second judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me, God." Said oath shall be filed in the office of each of the clerks of the superior courts of the counties in which said reporter is to officiate, and recorded and indexed on the minute dockets of said courts.

If on account of sickness, or for other cause, said reporter is unable to attend upon any of the regular courts of said district, and for conflict and special terms, the resident judge may appoint a reporter pro tem for said court or courts, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above which oath shall be filed with the clerk. In lieu of appointing a reporter pro tem for each of said courts, the resident judge may, in his discretion, appoint a reporter pro tem for a stated period whose duty it shall be to report any and all courts in the county or counties designated in the appointment, which the regular court reporter is for any cause unable to report.

The resident judge shall likewise fix the compensation to be received by such reporter and such reporter pro tem: Provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

The testimony taken and transcribed by said court reporter or said court reporter pro tem, as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this state as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rule governing the introduction of depositions in civil actions. (1933, c. 335.)

§ 1461(2). Official court reporter for fifth judicial district.—The resident judge of the fifth judicial district is hereby authorized and empowered to appoint an official court reporter for all of the counties in said district, who shall serve at the will of the resident judge, and whose appointment may be terminated at thirty days written notice thereof.

The appointment of such reporter shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same or a certified copy thereof shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe an oath in words substantially as follows: "I ....., do solemnly swear that I will to the best of my ability discharge the duties of the office of court reporter in and for the counties of the fifth judicial district and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct or as I may be required to do under the law, so help me, God." Said oath shall be filed in the office of each of the clerks of the superior courts of the counties of said district and recorded and indexed on the minute dockets of said courts.

If on account of sickness or for other cause said reporter is unable to attend upon any regular courts of said district, and for conflict of special terms, the resident judge may appoint a reporter pro tem for said court or courts and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above which oath shall be filed with the clerk. In lieu of appointing a reporter pro tem for said district the resident judge may, in his discretion, appoint a reporter pro tem for a stated period, whose duty it shall be to report any and all of the courts designated in the appointment which the regular court reporter is for any cause unable to report.

The resident judge shall likewise fix the compensation to be received by said reporter and said reporter pro tem, provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter or said reporter pro tem as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any civil action in any of the courts in this state as the deposition of the witness whose testimony is so taken and transcribed in the same manner and under the same rules governing the introduction of depositions in civil actions: Provided, however, that such transcript of testimony shall be admissible in evidence only in the cause in which same was taken. (1935, c. 128.)

§ 1461(3). Official court reporter for sixth judicial district. — The resident judge of the sixth judicial district is hereby authorized and empowered, to appoint an official court reporter for one or more, or all of the counties in said district, whose term of office shall be for a period of five years from and after qualification: Provided, however, that said judge shall have the right to remove said reporter for cause at any time.

The appointment of such reporter or reporters shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same, or a certified copy thereof shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the du-

ties of said office, said reporter shall take and subscribe the oath provided by law for public officers, and shall in addition thereto take and subscribe an oath in words substantially as follows: "I, ..., ..., do furthermore solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the sixth judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me God." Said oath shall be filed in the office of the clerk of the superior court of the county in which said reporter resides, and recorded and indexed by him on the minute docket of said court.

In case of sickness, or for other cause, if said reporter fails to attend upon any of the courts of said district, the presiding judge may appoint a reporter pro tem, for said court, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to in section three hereof, which oath shall be filed with the clerk.

The resident judge shall likewise fix the compensation to be received, by said reporter, and said reporter pro tem, provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions. (1931, c. 154, s. 5; 1935, c. 420.)

§ 1461(4). Official court reporter for Robeson county. — The court reporter for the superior courts of Robeson county shall be appointed by the resident judge of the ninth judicial district, upon recommendation of the Robeson County Bar Association, to serve for terms of two years, the first such term beginning July first, nineteen hundred thirty-five. (1935, c. 9.)

§ 1461(5). Calendar in Orange County. — Ten days before the convening of any civil or criminal term of the Superior Court of Orange County the clerk of said court shall make out a calendar for the first five days of a one-week term and the first ten days of a two weeks term; said cases shall be placed upon the calendar in the following order: (1) Cases in which the defendants have been bound over by inferior courts and are in jail in default of bail; (2) all other cases in which the defendants are in jail; (3) all cases in which defendants are not in jail; (4) sci fa docket and forfeited recognizances; immediately upon the completion of the calendar the clerk shall have the same printed, giving the name of the defendant, the offense charged and the day of the week and month upon which the case is set for trial, and shall mail a copy of said printed calendar to the solicitor of the district, and upon request, deliver a copy each to the officers of the court, and to the attorneys practicing at the Orange County bar.

It shall be the duty of the solicitor of the district to have all bills for each day's calendar prepared and present the same to the grand jury upon the opening of court each day of the term except Monday of the first week of the term, when they shall be prepared and presented to the grand jury immediately upon the completion of the charge of the court.

The grand jury shall be required to be in attendance at each term of the criminal court, until they have finished all matters presented to them by the solicitor and the court.

Cases shall be tried in the order in which they are on the calendar. If for sufficient reason the State or defendant is not ready for trial at the time the case is reached, the same shall be continued for the term unless otherwise set for trial by the court.

The defendants and witnesses recognized to appear at any criminal term shall in the recognizance be ordered to appear on the first day of the term, as now provided by law, but, in fact shall not be required to appear until the day on which the case is set for trial, and no witness shall prove for attendance prior to the day on which the case is set on the calendar, and the State's witnesses shall receive one dollar and a half per day and mileage at the rate of ten cents per mile one way from the day the case is set for trial on the calendar until discharged: Provided, that should the case be nol prossed or not a true bill found by the grand jury, then the said State's witnesses shall be allowed to prove their attendance and shall be paid for their services by the county: Provided, further, that all witnesses summoned in a civil action shall be required to appear on the day on which the case is set for trial and shall receive pay for each day thereafter as provided herein, to be paid as now provided by law for the paying of witnesses in civil actions.

The provisions in this section shall not apply to capital felonies except as to the attendance of witnesses.

The cases docketed in the Superior Court after the formation of the calendar shall stand for trial at the next term and all civil cases shall be docketed as filed and be heard as filed, or, if for good cause shown to the court such cases cannot be tried then other cases may be tried which have been filed thereafter, in the discretion of the court.

All justices of the peace of Orange County shall within fifteen days after the trial of any cause, either civil or criminal, forward the original papers, with their judgments, to the clerk of the Superior Court.

The County Commissioners of Orange County shall pay all expenses incurred by the clerk in carrying out the provisions of this section. (1927, c. 112.)

§ 1461(6). Calendar in Caswell County.—Ten days before convening of any civil or criminal

term of the Superior Court of Caswell County the clerk of said court shall make out a calendar for the first five days of a one-week term and the first ten days of a two-weeks term; said cases shall be placed upon the calendar in the following order: (1) Cases in which the defendants have been bound over by inferior courts and are in jail in default of bail; (2) all other cases in which the defendants are in jail; (3) all cases in which the defendants are not in jail; (4) sci fa docket and forfeited recognizances; immediately upon the completion of the calendar the clerk shall have the same printed, giving the name of the defendant, the offense charged and the day of the week and month upon which the case is set for trial, and shall mail a copy of said printed calendar to the solicitor of the district, and, upon request, deliver a copy each to the officers of the court, and to the attorneys practicing at the Caswell County bar.

It shall be the duty of the solicitor of the district to have all bills for each day's calendar prepared and present the same to the grand jury upon the opening of court each day of the term except Monday of the first week of the term, when they shall be prepared and presented to the grand jury immediately upon the completion of the charge of the court.

The grand jury shall be required to be in attendance at each term of the criminal court, until they have finished all matters presented to them by the solicitor and the court.

Cases shall be tried in the order in which they are on the calendar. If for sufficient reason the State or defendant is not ready for trial at the time the case is reached, the same shall be continued for the term unless otherwise set for trial by the court.

The defendants and witnesses recognized to appear at any criminal term shall in the recognizance be ordered to appear on the first day of the term, as now provided by law, but in fact shall not be required to appear until the day on which the case is set for trial, and no witness shall prove for attendance prior to the day on which the case is set on the calendar.

The provisions of this section shall not apply to capital felonies except as to the attendance of witnesses.

The cases docketed in the Superior Court after the formation of the calendar shall stand for trial at the next term and all civil cases shall be docketed as filed and be heard as filed, or, if for good cause shown to the court such cases cannot be tried then other cases may be tried which have been filed thereafter, in the discretion of the court.

All justices of the peace of Caswell County shall within fifteen days after the trial of any cause, either civil or criminal, forward the original papers, with their judgments, to the clerk of the Superior Court, provided, that the clerk of the Superior Court shall notify the justices of the peace of Caswell County of the provision of this act after its ratification.

The County Commissioners of Caswell County shall pay all expenses incurred by the clerk in carrying out the provisions of this section. (1927, c. 105.)

SUBCHAPTER IIA. COMMISSION FOR IMPROVEMENT OF LAWS.

Art. 8(A). Commission for Improvement of Laws

§ 1461(a). Commission established. — A commission to be known as the commission for the Improvement of the Laws is hereby established. (1931, c. 98, s. 1.)

Editor's Note.—The duties of the commission created by this section are similar to those heretofore conferred on the Judicial Conference by c. 244 of the Public Laws 1925, which was repealed by Public Laws 1931, c. 451. The Act of 1925 was amended by Public Laws 1927, c. 39.

§ 1461(b). Members of commission. — Said commission shall consist of the attorney-general, the chairman of each of the committees on Judiciary of the Senate and the House of Representatives of the General Assembly, and the following additional members to be appointed by the Governor on the basis of their interest in and competency for the study of law reform: two members who shall be appointed from the Justices of the Supreme Court and/or the Judges of the Superior Courts; two members who shall be active practitioners in the trial and appellate courts; three members who shall be appointed from the faculties of law in the various universities in this State; and two members, not attorneys at law, who shall be men of proven ability in other occupations. (1931, c. 98, s. 2.)

§ 1461(c). Terms of office.—The attorney-general shall be a member of the commission during such time as he shall serve as attorney-general. The respective chairmen of the committees on judiciary shall hold office as members of the commission from their appointment as chairmen during the session of the General Assembly at which they were appointed and continuously thereafter until their successors as chairmen shall be appointed by the presiding officers of the next General Assembly, which successors shall in like manner become ex officio members of said commission. The other members of said commission shall serve from the dates of their appointment until the conclusion of the term of office of the Governor appointing them, or until their successors shall be appointed and qualified. (1931, c. 98, s 3.)

§ 1461(d). Chairman and executive secretary. —The Governor shall designate one of the members of such commission as the chairman and another as the executive secretary of the commission. (1931, c. 98, s. 4.)

§ 1461(e). Vacancy appointments. — The Governor shall have power to fill vacancies among the unofficial members occasioned by death, resignation or otherwise. (1931, c. 98, s. 5.)

§ 1461(e1). Meetings of commission. — It shall be the duty of such commission to meet twice annually, or more often at the call of the chairman, to consider proposals for the betterment of the law, both substantive and procedural, to conduct such research and investigation as may be appropriate therefor, and to recommend to the General Assembly such specific changes in the existing law as it deems expedient. (1931, c. 98, s. 6.)

§ 1461(e2). Report and recommendations to general assembly. — In advance of each regular session of the general assembly, the commission shall prepare a report and shall embody the recommendation of the commission with drafts of proposed bills, and the reasons for the same, and copies of such report shall be sent to each member of the general assembly not less than thirty days before the beginning of such session. (1931, c. 98, s. 7.)

§ 1461(e3). Compensation. — The members of the commission shall serve without compensation. (1931, c. 98, s. 8.)

SUBCHAPTER IIB. DOMESTIC RELATIONS COURTS.

Art. 8(B). Counties of at Least Twenty-Five Thousand Inhabitants

§ 1461(f). May be established by county commissioners.—That the Board of County Commissioners in the various counties having a county seat with twenty-five thousand or more inhabitants of the State, or the governing authorities in cities of twenty-five thousand or more inhabitants shall have authority to establish a "Domestic Relations Court," which court may be a joint county and city court, as provided in section two of this act or a court for the county or city as may be determined by the governing authorities. (1929, c. 343, s. 1.)

§ 1461(g). Vote on establishment of court; any other city in county with required population may have such court.—In case the Board of County Commissioners and governing authorities of a particular city decide to establish a joint city and county Domestic Relations Court—they voting as separate bodies shall determine whether or not such Domestic Relations Court shall be established. If both bodies shall vote for its establishment, each of them shall record the resolutions in their minutes and upon such consent by both boards, the court shall be established. In counties in which the said joint court is thus established by the Board of County Commissioners and the governing authorities of the county and city such establishment of the court shall not prevent any other city within the territorial limits of the county and having more than twenty-five thousand inhabitants, establishing its own court under section one of this chapter. (1929, c. 343, s. 2.)

§ 1461(h). Jurisdiction.—Said Domestic Relations Court shall have, and is hereby vested with all the power, authority, and jurisdiction heretofore vested by law in the juvenile courts of North Carolina, and said power, authority, and jurisdiction being as fully vested in the Domestic Relations Court as if herein particularly set forth in detail; and in addition thereto the said Domestic Relations Court shall have exclusive original jurisdiction over the following classes of cases:

(a) All cases where any adult is charged with abandonment, non-support, or desertion of any juvenile, or where either spouse is charged with abandonment, non-support, or desertion of the other.

(b) All cases involving desertion of any juvenile by its mother.

(c) All cases involving the custody of juveniles, except where the case is tried in Superior Court as a part of any divorce proceeding.

(d) All cases where assault, or assault and battery, on a juvenile is charged against an adult, or where husband or wife is charged with assault, or assault and battery, upon the other.

(e) All cases in which an adult is charged with causing or being responsible for delinquency, dependency, or neglect of a juvenile.

(f) All bastardy cases within said county.

(g) All cases where adoption of juveniles is sought shall first be brought before the said Domestic Relations Court for full investigation, and such petition and other papers as are now required to be filed with the Clerk of the Superior Court shall be filed with the Clerk of the Domestic Relations Court; and the results of said investigation shall be reported to the Clerk of the Superior Court, together with such recommendation as the Judge of the Domestic Relations Court may make on the question of the adoption, and when such adoption is acted upon by the Clerk of the Superior Court, a copy of all records in the case shall be furnished to the Clerk of the Domestic Relations Court, to be kept as a permanent record of such court.

(h) All cases wherein any person is charged with receiving stolen goods from any juvenile, knowing them to be stolen.

(i) All cases involving violation of the North Carolina School Attendance Law as set forth in Public Laws of North Carolina, one thousand nine hundred and nineteen, chapter one hundred, and Public Laws of North Carolina, one thousand nine hundred and twenty-three, chapter one hundred and thirty-six; and in Consolidated Statutes five thousand seven hundred and fifty-seven and five thousand seven hundred and seventy-four, inclusive; and such other laws relative to school attendance as may hereafter be enacted.

(j) In either case where either parent institutes a divorce action when there is a minor child or children, it shall be the duty of the Clerk of the Superior Court to refer the case for investigation as to the child, or children, to the Domestic Relations Court, and the Judge of the Domestic Relations Court shall make his recommendations to the Judge of the Superior Court as to the disposition of the child, or children, for the consideration of the Judge of the Superior Court in disposing of the custody of the said child or children. (1929, c. 343, s. 3.)

§ 1461(i). Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile Court officers may be declared officers of new Court.—It shall be the duty of the Board of Commissioners of any county and the governing board of any city, in which a joint Court of Domestic Relations is established, as hereinbefore provided, or of the governing authorities of any city or county in which an independent Domestic Relations Court shall be established, as hereinbefore provided, acting jointly, in the first instance, or independently, in the second instance, to elect [on or before the second Monday in July, nineteen hundred and twenty-nine, the term to commence at that time and upon the same date every two years thereafter, a Judge

of the Domestic Relations Court and to fix his salary and provide for payment of the same]. If any vacancy should occur in said office during the two years' term, for any cause, it shall be filled for the unexpired term in the same manner and by the same bodies as provided for the election of said Judge.

It shall be the duty of the Judge of the Domestic Relations Court to appoint a Clerk for said court, the salary of said Clerk to be fixed, provided for, and paid by the Board of County Commissioners of any of such counties and the governing board of any of such cities, acting jointly, or independently, when a joint county and city court is not established.

And the officers of the Juvenile Court of any of such cities and of any of such counties, as now constituted by law may be declared to be officers of the Domestic Relations Court.

The probation officers of Domestic Relations Court and their method of appointment shall be the same as now provided for in Consolidated Statutes, five thousand and forty-nine, for probation officers of the Juvenile Court. The salaries of said probation officers, and the necessary equipment for the proper maintenance and functioning of said court, shall be a charge upon such county and such city jointly, or upon the county or city, if it is an independent court. (1929, c. 343, s. 4.)

Editor's Note.—Public Laws 1931, c. 221, s. 1, amending this section so as to provide for a Domestic Relations Court in Forsyth County, struck out the words in brackets and inserted in lieu thereof the following: "A judge of the Domestic Relations Court and to fix his salary and provide for the payment of same, his term of office to run from the time of his election to the second Monday in July in each odd numbered year and until his successor shall have been elected and qualified. The regular term of office shall be for a term of two years and until his successor is elected and qualified."

§ 1461(j). Co-operation of all peace officers.—It shall be the duty of all officers of the counties and of the cities to assist the Domestic Relations Court in any and all ways in the line of their official duty as fully and to the same extent and in the same manner as they heretofore have been authorized and required to do in the case of all other courts. (1929, c. 343, s. 5.)

§ 1461(k). Procedure, practice and punishments.—The procedure, practice, and punishments imposed in the Domestic Relations Court as herein established shall be the same as now provided by law in courts now having original jurisdiction of the various offenses or causes hereinabove enumerated, and the Judge of the said Domestic Relations Court is hereby granted the power to prescribe such rules and fix such modes of procedure, as, in his discretion, will best effect the purposes for which said court is created. (1929, c. 343, s. 6.)

§ 1461(l). Right of appeal to Superior Court; trial de novo.—Wherever in this act criminal jurisdiction is conferred upon the Domestic Relations Court there shall be the same right of appeal from this court as from Recorders' Courts or other inferior criminal courts to the Superior Court, and the same rules and regulations of such appeals from inferior courts shall apply to appeals from this court, and in the Superior Court the trial shall be de novo. This provision shall apply also to the trials in bastardy cases. (1929, c. 343, s. 7.)

§ 1461(m). Offenses before Court to be petty misdemeanors; demand for jury trial; appearance bonds.—All the offenses for the trial of which the Domestic Relations Court is given jurisdiction are hereby declared to be petty misdemeanors punishable as now prescribed by law. On the trial before such Domestic Relations Court, if a jury trial is demanded, the cause shall be therewith transferred for trial to some criminal term of the Superior Court of the counties in which the Domestic Relations Court is situated. The defendant or defendants shall be held under an adequate bond to secure his or their attendance at the criminal term of the Superior Court to which the record is transferred. If in the exercise of the jurisdiction hereinbefore conferred upon the Domestic Relations Court, it should appear that a felony has been committed, said court shall have jurisdiction and authority upon proper investigation to bind over the alleged felon in all cases in which probable cause is found, to the Superior Court of the county, under proper bond and recognizances. (1929, c. 343, s. 8.)

§ 1461(n). Pending cases in Juvenile Court transferred to new Court.—All causes pending in the Juvenile Court of the county or city at the time that the organization of any Domestic Relations Court within said county or city, shall be transferred to the Domestic Relations Court for final adjudication. (1929, c. 343, s. 9.)

§ 1461(o). Valid sections of article upheld; counties excepted.—The sections of this article and every part thereof are severable one from the others, and the holding of any section thereof to be invalid or void shall not affect any other section or part thereof: Provided, that this article shall not apply to the counties of Buncombe, Guilford, Durham, Wake, Gaston, New Hanover, Pitt, Wayne, Nash and Edgecombe. (1929, c. 343, s. 10; 1931, c. 221, s. 2.)

Editor's Note.—The Act of 1931 struck Forsyth from the list of counties in this section.

SUBCHAPTER III. JUSTICES OF THE PEACE.

Art. 9. Election and Qualification

§ 1462. Constitution, article seven, abrogated; exceptions. — All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven, nine and thirteen, are hereby abrogated, and the provisions of this article substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this article, and to substitute others in their stead, as provided in section fourteen of article seven of the constitution. (Rev., s. 1408; Code, s. 818; 1876-7, c. 141, s. 7.)

For full treatment of this subject, see 8 N. C. Enc. Dig. 372.

§ 1463. Election and number of justices. — At every general election held for members of the general assembly there shall be elected in each township three justices of the peace, and for each township in which any city or incorporated town

is situated, one justice of the peace for every one thousand inhabitants in such city or town, who shall hold office for a term of two years from and after the first Monday in December next after their election. (Rev., s. 1409; Code, s. 819; 1876-7, c. 141; 1895, c. 157; 1905, cc. 35, 44, 148; 1907, c. 225; 1909, ss. 177; 716.)

Editor's Note.—Public Laws 1931, c. 321, appointed justices of the peace for the several counties in the state. Certain acts of such justices were validated by Public Laws 1931, c. 334.

Number Elected.—Under the legislation of 1895, since continued, each township is entitled to elect three justices of the peace on one ballot, and no more, unless the township shall contain a city or incorporated town with as much as 1,000 inhabitants, in that case one additional justice for every 1,000 inhabitants. Mitchell v. Alley, 126 N. C. 84, 35 S. E. 231. A ticket containing more names than the elector has a right to vote for, is to be void, and not counted. Id.

§ 1464. Local modifications as to number and election of justices.—In the city of Wilmington in the county of New Hanover there shall be elected five justices of the peace; and in the counties of Bertie, Caswell, Chowan, Franklin, and Granville the justices of the peace shall be elected by the general assembly, to hold office for the term of two years as provided in the preceding section. In Gastonia Township, in the County of Gaston, there shall be elected five (5) Justices of the Peace; in South Point Township in the County of Gaston, there shall be elected four (4) Justices of the Peace; in River Bend Township, in Dallas Township, in Cherryville Township, and in Crowders Mountain Township, in the County of Gaston, there shall be elected in each township three (3) Justices of the Peace. (Rev., s. 1409; Code, s. 819; 1899, c. 392; 1903, cc. 191, 207, 790; 1905, c. 447; 1907, c. 293; P. L., 1913, c. 771; P. L., 1919, c. 106; 1929, c. 211; 1931, c. 256.)

Editor's Note.—The act of 1929 struck out the provision relating to Edgecombe County. The Act of 1931 added the provision as to Gaston County.

§ 1465. Warren county; election of justices.—Upon a petition of two-thirds of the qualified electors in any township in Warren county, the board of commissioners of the county shall call an election at the time and in the manner appointed for the election of members of the general assembly, for the election of not more than five nor less than three justices of the peace, as the petition shall designate, to be voted for and elected by the voters of the township in which they reside, and who shall hold their office for two years and until their successors are elected and qualified. (Rev., s. 1410; 1905, c. 73, s. 2.)

§ 1466. Vance county; election of justices.—Upon petition of a majority of the qualified voters of any township in Vance county, the board of county commissioners shall call an election, at the time and in the manner appointed for the election of members of the general assembly, for the election of not more than five nor less than two justices of the peace, to be voted for and elected by the voters of the township in which they reside. The justices of the peace so elected shall hold office for a term of two years and until their successors are elected and qualify. (P. L. 1915, c. 648.)

§ 1467. Oath of office; vacancies filled. — Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oath of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the general assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the offices of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the governor. All other vacancies shall be filled by the clerk of the superior court. (Rev., s. 1411; Code, s. 821; 1901, c. 37.)

Section Constitutional.—This section is not unconstitutional. Gilmer v. Holton, 98 N. C. 26, 3 S. E. 812.

Duty of Clerk.—It is the duty of the clerk to administer the oath to the justices elected or appointed. Gilmer v. Holton, 98 N. C. 26, 3 S. E. 812.

Appointed by Clerk.—The authority of the clerks of the superior courts to appoint justices of the peace is confined to vacancies caused by death, resignation or other causes during the term. Gilmer v. Holton, 98 N. C. 26, 3 S. E. 812.

Misbehavior in Office.—If one elected to an office takes possession of the same and engages in the exercise of its duties and misbehaves by taking unlawful and extortionate fees, he will be liable for such misbehavior, and may be indicted therefor, notwithstanding the fact he had failed to take the oath of office. State v. Cansler, 75 N. C. 442.

§ 1468. Governor may appoint justices. — The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as justices of the peace, who shall hold their office for four years from and after the date of their appointment; and, on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for other officers. The governor shall issue to each justice of the peace so appointed a commission, a certificate of which shall be deposited with the clerk of the court and filed among the records, and he shall note on his minutes the qualifications of the justice of the peace. (1917, c. 40; 1927, c. 116.)

Any commission so issued by the Governor or his predecessor shall be revokable by him in his discretion upon complaint being made against such justice of the peace and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any justice of the peace appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such justice of the peace a copy of said order and mail a copy of same to said justice of the peace.

Any person holding himself out to the public as a justice of the peace, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (1927, c. 116.)

§ 1469. Forfeiture of office. — When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office; and any such justice presuming to act thereafter, contrary to this section, unless reelected or reappointed, shall be guilty of a misdemeanor. (Rev., ss. 1412, 3589; Code, s. 822.)

§ 1470. Resignation. — Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same. (Rev., s. 1413; Code, s. 823.)

§ 1471. Removal and disqualification for crime. —Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state. (Rev., s. 1414; Code, s. 826.)

Criminal Liability. — The functions of a justice of the peace are ministerial, in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for trial, and in the exercise of such functions, if he act corruptly, oppressively or from any other bad motive, he is liable to indictment. State v. Sneed, 84 N. C. 817.

§ 1472. Justice may hold other office.—Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident. (Rev., s. 1415; Code, s. 825; Const., Art. 14, s. 7.)

Art. 10. Jurisdiction

See annotations under Const. Art. 14, sec. 7.

§ 1473. Jurisdiction in actions on contract. — Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—

1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.

2. Wherein the title to real estate is in controversy. (Rev., s. 1419; Const., Art. 4, s. 27; Code, s. 834.)

I. Actions Ex Contractu.
II. Title to Land in Controversy.

Cross Reference.

For full treatment of this subject, see 8 N. C. Enc. Dig. 378 et seq., 14 N. C. Enc. Dig. 609 et seq. See sections 1436, 1476 and notes thereto.

I. ACTIONS EX CONTRACTU.

In General.—Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by this section to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

Test of jurisdiction, see notes to section 1436, analysis line "Essentials" II, B.

Judgment a Contract.—A judgment is a contract within the meaning of this section. Moore v. Nowell, 94 N. C. 268.

Counterclaims in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of set-off and recoupment as a bar to the plaintiff's demand. Singer Sewing Machine Co. v. Burger, 184 N. C. 241, 107 S. E. 14.

In an action before a justice of the peace for a sum due by note and within his jurisdiction, it was held, that a counterclaim consisting of an alleged indebtedness arising out of unadjusted partnership dealings between the parties, could not be allowed; the jurisdiction to settle such matters being in a court of equity. Love v. Rhyne, 86 N. C. 576.

Misjoinder of Causes. — Where two causes are set out and jurisdiction can be attached on only one, the justice of the peace may try that one, rejecting the other. Railroad v. Hardware Co., 135 N. C. 73, 47 S. E. 234.

Waiver of Tort. — Where property is tortiously taken and sold, the owner may waive the tort and maintain an action to recover the proceeds. Brittain v. Payne, 118 N. C. 989, 24 S. E. 711, and cases cited. See also note to section 1436. See note of Winslow v. Weitt, 66 N. C. 432, under section 1436, analysis line "In General, II, B, 1(a).

Same—Construction. — When the plaintiff can bring his action either in tort or upon contract, the courts, in favor of jurisdiction, will sustain the election of the plaintiff. White v. Eley, 145 N. C. 36, 58 S. E. 437.

To sustain jurisdiction over the subject-matter of an action, the court will liberally construe the pleadings in the pleader's favor, and where the question is whether a justice of the peace had jurisdiction in contract, and the movant contends the case was ex delicto, and that it was beyond the jurisdiction of the justice of the peace, the court will sustain its jurisdiction if it reasonably appears from the pleadings that it was tried as ex contractu in the justice's court. Furniture Co. v. Clark, 191 N. C. 369, 131 S. E. 731.

Indivisible Cause. — An indivisible cause of action can not be split in order that separate suits may be brought for the various parts before a justice of the peace. Norvell v. Mecke, 127 N. C. 401, 402, 37 S. E. 452.

Same—Different Contracts. — Where the items of an account are incurred under different contracts an action may be brought on each item before a justice of the peace, the separate items being less than $200. Copeland v. Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501.

A creditor whose account consists of several items, either for goods sold or labor done at different times, each of which is for less than $200, although the aggregate of the account exceeds $200, may sue before a justice for any number of such items not exceeding $200. Boyle v. Robbins, 71 N. C. 130.

Want of Jurisdiction. — The court will ex mero meto take notice of the want of jurisdiction. Hannah v. Richmond etc., R. R., 87 N. C. 351, 352.

Objection on Appeal. — When the pleadings before a justice of the peace, in an action on contract, did not show a want of jurisdiction and no objection was made thereto, such objection cannot be made or appeal to the superior court. Cromer Bros. v. Marsha, 122 N. C. 563, 29 S. E. 836.

Amount Demanded Controlling.—The justice of the peace has jurisdiction of an action upon contract where the summons used as a complaint demands, in good faith, a recovery of $200 or less, though a greater sum could have been demanded. Shoe Co. v. Wiseman, 174 N. C. 716, 94 S. E. 452; Knight v. Taylor, 131 N. C. 84, 42 S. E. 537. The aggregate sum demanded in good faith is the test of the jurisdiction of the court, though this aggregate is made up of several causes of action. Martin v. Goode, 111 N. C. 288, 16 S. E. 232. For treatment of the amount as fixing jurisdiction, and the good faith etc., required, see notes under section 1436, analysis line, "Essentials," II, B.

In an action on contract it is the sum demanded in the summons or complaint that fixes the jurisdiction. Cromer Bros. v. Marsha, 122 N. C. 563, 29 S. E. 836.

Principal and Interest. — The Constitution and this section limit the jurisdiction of justices of the peace in actions upon contract, to where the sum demanded does not exceed two hundred dollars, exclusive of interest; and a justice of the peace has no jurisdiction in an action to recover the balance of the principal due upon a note when it and the interest on the original amount thereof exceeded the sum named. Riddle v. Bridgewater Milling Co., 150 N. C. 689, 64 S. E. 782.

Equitable Causes. — A justice of the peace has no jurisdiction to administer or enforce an equitable cause of action. Wilson v. Life Ins. Co., 155 N. C. 173, 71 S. E. 79.

A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

Same—Appeal. — When the plaintiff seeks only equitable relief in a court of a justice of the peace, no jurisdiction can be acquired over the subject matter by the superior court on appeal, the proceedings being void ab initio. Wilson v. Life Ins. Co., 155 N. C. 173, 71 S. E. 79.

Applied in Miles Co. v. Powell, 205 N. C. 30, 31, 169 S. E. 828.

II. TITLE TO LAND IN CONTROVERSY.

See section 1476 and sections following and notes thereto.

Jurisdiction. — Justices of the peace can take no jurisdiction over a cause in which title to land is in controversy. Brown v. Southerland, 142 N. C. 225, 55 S. E. 108. They are prohibited by the Constitution as well as impliedly by by this section. Forsythe v. Bullock, 74 N. C. 135, 137.

Mere allegation of the defendant that title is in controversy will not oust justices' jurisdiction. The matter must appear from the evidence or admission of the parties. Hann v. Fletcher, 189 N. C. 729, 128 S. E. 326, 328.

Title Must Be between Parties to Action.—The question of title, which arrests further proceedings before the justice must be one between the original parties to the action; and jurisdiction once acquired can not be divested by the intervention of a stranger to the suit, ascertaining a paramount title in himself. Davis v. Davis, 83 N. C. 71.

Action Dismissed Judgment for Costs.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. Pasterfield v. Sawyer, 132 N. C. 258, 260, 43 S. E. 799; Edwards v. Cowper, 99 N. C. 421, 6 S. E. 792, 793.

Notes Given for Purchase Price of Land.—A justice of the peace has jurisdiction of an action to recover a balance due on a note given for the purchase money of land. McPeters v. English, 141 N. C. 491, 54 S. E. 417.

Notes on Contract to Convey Land.—A justice of the peace has jurisdiction of an action on a note given for a contract to convey land, the only defense being payment. Patterson v. Freeman, 132 N. C. 357, 43 S. E. 904.

Recovery of Portion Crop as Rent.—In an action to recover one third of the crops due as rent under an alleged contract of lease, which the jury found to exist, a justice of the peace had jurisdiction, as the title to land was not involved. Durant v. Taylor, 89 N. C. 351.

Where, under a will devising all of testator's land to his wife, remainder to his nephew (the plaintiff) in fee, except fifty acres in some suitable place and on certain conditions to defendant, and defendant who was a tenant of the wife, during her life, of 50 acres on which testator had settled, claims title thereto as being in a suitable place and on conditions performed, an action by plaintiff for possession involves the title to land and is not within the jurisdiction of a justice of the peace. Wright v. Harris, 116 N. C. 460, 21 S. E. 693.

Action between Mortgagor and Mortgagee.—In an action to to recover land the jurisdiction of the justice is excluded where the relation is that of mortgagor and mortgagee or vendor and vendee. Hughes v. Mason, 84 N. C. 473.

Foreclosure of Mortgage.—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 141.

Landlord and Tenant Act.—A court of a justice of the peace has no jurisdiction under the landlord and tenant act to try title to land. And where it appears that title is involved or that there are equities involved as to the land a justice of the peace has no jurisdiction. Parker v. Allen, 84 N. C. 466.

That the vendee, in a contract for the sale of land, remained silent, when the contract was mutilated under the direction of the vendor, is not sufficient evidence of a change of the relations from vendo and vendee to landlord and tenant, to give a justice of the peace jurisdiction of an action to summarily eject the defendant vendee. Boone v. Drake, 109 N. C. 79, 13 S. E. 724.

In an action by a purchaser of land with warranty to recover a sum of money paid by him to free the land from a lien, the deed will be introduced to prove the covenants, the title to realty will be involved, and a justice would not have jurisdiction. Hann v. Fletcher, 189 N. C. 729, 128 S. E. 328.

Rule of Estoppel Gives Justice Jurisdiction.—The rule which estops a tenant to deny his landlord's title precludes all controversy as to the title in summary proceedings by the landlord, and thus gives a justice of the peace jurisdiction. Credle v. Gibbs, 65 N. C. 192; Davis v. Davis, 83 N. C. 71.

In a proceeding before a justice of the peace under the Landlord and Tenant Act, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. Heyer v. Beatty, 76 N. C. 28.

Penalty.—The title to land is not in controversy in a proceeding to recover a penalty prescribed by a town charter for obstructing a street. Henderson v. Davis, 106 N. C. 88, 11 S. E. 573.

§ 1474. Jurisdiction in actions not on contract.—Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars. (Rev., s. 1420; Const., Art. 4, s. 27; Code, s. 887.)

Cross References. — For discussion of subject generally, see 8 N. C. Enc. Dig. 378 et seq., 14 N. C. Enc. Dig. 609 et seq. See notes under sections 1436, 1473.

Editor's Note.—Section 1436 sets out the limits wherein the superior court exercises its original jurisdiction. This section gives the justices of the peace concurrent jurisdiction over certain classes of cases. These cases are also cognizable in the superior court since the jurisdiction herein given to the justices of the peace is not exclusive, and hence they fall within what may be termed the residuary clause contained in section 1436.

Generally.—In actions ex contractu justices of the peace have jurisdiction, when the sum demanded does not exceed two hundred dollars, but in actions ex delicto, their jurisdiction is limited to cases wherein the value of the property does not exceed fifty dollars. Noville v. Dew, 94 N. C. 43.

Justices of the peace have concurrent jurisdiction with the superior courts of actions for torts where the value of the property in controversy does not exceed fifty dollars. Harvey v. Hambright, 98 N. C. 446, 4 S. E. 187.

It is said in Duckworth v. Mull, 143 N. C. 461, 55 S. E. 850, "We think that the decisions of this court, already made, lead necessarily to the conclusion that the clause of this section, comprehends, and was intended to comprehend, all actions ex delicto; that the term, 'property in controversy, here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and where a plaintiff, in good faith, states or limits his demand in actions of this character at fifty dollars or less, the justice, as provided by the statute, has jurisdiction concurrent with the superior court to hear and determine the matter."

Damages.—A justice of the peace has jurisdiction of an action for damages not exceeding fifty dollars, and for injury to personal property, though such property be of greater value than fifty dollars. Malloy v. City, 122 N. C. 480, 29 S. E. 880.

Jurisdiction Essential.—A judgment rendered by a justice of the peace in an action in which he has no jurisdiction is void. Noville v. Dew, 94 N. C. 43.

Remittance of Excess Will Not Give Jurisdiction.—Where, in an action of claim and delivery, it appears that the value of the property exceeds fifty dollars, it at least ousts the jurisdiction of the justice, and the plaintiff cannot confer jurisdiction by a remitter. Noville v. Dew, 94 N. C. 43. See section 1436, analysis line II, B, 1, b.

Priority of Proceedings as Determining Jurisdiction. — Where two or more courts have equal and concurrent jurisdiction of a case, that court in which suit is first brought acquires jurisdiction of it, which excludes the jurisdiction of the other courts. Childs v. Martin, 69 N. C. 126.

Irregular Proceedings.—Where jurisdiction is concurrent, and a case is carried by appeal to the superior court, and the appellant, as in this case, files an answer under leave of the court and goes to trial without objection, the court will have cognizance of the matter by virtue of its original jurisdiction of the subject matter of the action, and by the consent the parties thus manifested, however irregular the proceedings may have been in the justice's court. Boing v. Raleigh & Gaston R. Co., 87 N. C. 360, 364.

Waiver of Court on Appeal.—Plaintiff brought suit in the court of a justice of the peace claiming a debt of fifty dollars, and also possession of a horse and wagon, under a certain mortgage. On appeal from the justice's judgment to the superior court plaintiff offered to remit his claim for the personal property and declare only for the debt. It was held, that he had a right to take such a course in his discretion, and that his honor erred in denying him that privilege. Jones v. Palmer, 83 N. C. 303.

Affidavit of Justice Not Conclusive.—Where the record of the justice of the peace has been lost, and only the judgment showing a recovery of the jurisdictional amount ex contractu appears in the trial on appeal, upon defendant's motion to dismiss for want of jurisdiction, and affidavit of the justice to the effect that the action was in tort is not conclusive. Furniture Co. v. Clark, 191 N. C. 369, 131 S. E. 731.

§ 1475. Action dismissed for want of jurisdiction; remitter.—Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, to-

gether with the interest on said excess." (Rev., s. 1421; Code, s. 835; 1868-9, c. 159, s. 3; 1876, c. 63.)

Excess Remitted.—Where the amount recovered exceeds $200, the justice has jurisdiction if the plaintiff remits the excess. Cromer v. Marsha, 122 N. C. 563, 29 S. E. 836. Brock v. Scott, 159 N. C. 513, 75 S. E. 724.

It is only when the principal sum demanded exceeds $200, that the plaintiff is required to remit the excess above that amount in order to give the justice jurisdiction. Brantley v. Finch, 97 N. C. 91, 92, 1 S. E. 535.

Effect of Remittitur Where Jurisdiction Entirely Derivative.—Where a counterclaim, filed to an action brought before a justice, amounted to more than $200.00, the want of jurisdiction as provided by this section could not be cured by entering a remittitur for the excess in the Superior Court, as the jurisdiction of the Superior Court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the Superior Court can derive none by amendment. Perry v. Pulley, 206 N. C. 701, 703, 175 S. E. 89.

Failure to Use Statutory Formula.—Objection to a failure to use the formula provided in this section should be made in the justice's court. Cromer v. Marsha, 122 N. C. 563, 565, 29 S. E. 836.

Waiver. — The plaintiff having remitted the amount of damages arising on contract in excess of $200, so as to confer jurisdiction on the court of a justice of the peace, and having taken a voluntary nonsuit in the superior court on defendant's appeal, is deemed to have waived the excess so remitted in his action on the same contract brought in the superior court, and his recovery is limited to the amount sued for in the justice's court. Brook v. Scott, 159 N. C. 513, 75 S. E. 724.

Remittance of Counterclaim on Appeal.—The jurisdiction of the superior court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the superior court can derive none by amendment. So, where a counterclaim, filed to an action brought before a justice, amounted to more than $200, the want of jurisdiction could not be cured by entering a remittitur for the excess in the superior court. Ijames v. McClamroch, 92 N. C. 362.

§ 1476. Title to real estate in controversy as a defense.—In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. (Rev., s. 1422; Code, s. 836.)

See section 1473 and notes thereto.

Answer in Writing Necessary.—The title to real estate cannot be drawn into controversy by the defendant on a trial in a justice's court except by delivering to the justice an answer in writing that such title will come in question. Evans v. Williamson, 79 N. C. 87.

The evidence at the trial must tend to show that the title is in issue. Pasterfield v. Sawyer, 132 N. C. 258, 260, 43 S. E. 799. And the trial will proceed until it is apparent that this is true. McDonald v. Ingram, 124 N. C. 272, 32 S. E. 677.

Mere allegation of defendant that title is in controversy, see note of Hann v. Fletcher, 189 N. C. 729, 128 S. E. 326, section 1473 analysis line II.

Judgment in Action in Which Defenses Should Have Been Set Up as Bar to Subsequent Action Thereon.—A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, and in the Superior Court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action. Ogburn v. Booker, 197 N. C. 687, 150 S. E. 330.

§ 1477. Title to real estate in controversy, action dismissed.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. (Rev., s. 1423; Code, s. 837.)

See section 1473, 1476 and notes thereto.

"Real Estate" Defined.—The words "real estate" in this section mean freehold estate. Foster v. Penry, 77 N. C. 160, 162.

Allegation in Writing Not Required.—It is not necessary that an allegation in writing that the title to real estate in controversy be made. Edwards v. Cowper, 99 N. C. 421, 423, 6 S. E. 792. But the trial will proceed until it is apparent from the evidence that the question of title is involved. McDonald v. Ingram, 124 N. C. 272, 32 S. E. 677.

Duty of Justice to Dismiss Action.—When it appears on the trial that the title to real estate is in controversy, it is the duty of the justice to dismiss the action. Hudson v. Hodge, 139 N. C. 308, 51 S. E. 955.

Stated in Nesbitt v. Turrentine, 83 N. C. 536, 537, Wright v. Harris, 116 N. C. 460, 462, 21 S. E. 693.

§ 1478. Another action in superior court. — When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court. (Rev., s. 1424; Code, s. 838.)

Purpose of Section.—The last clause of this section was passed to prevent the hardship, which would necessarily arise if a defendant could have an action dismissed by a magistrate on his plea that title to real estate is in question, and then, when suit is brought by the same plaintiff for the same cause of action in the superior court, he should be allowed to plead that title to the land did not come in controversy, and have the cause dismissed there. To prevent such absurdity this statute was passed, so that if, on defendant's motion, it is adjudged in the magistrate's court that title to real estate will come in controversy, such finding shall be conclusive between same parties in the new action. Peck v. Culberson, 104 N. C. 425, 427, 10 S. E. 511.

Dismissal upon Answer Essential.—Recourse may not be had to the provisions of this section where it does not appear that the action before the justice was dismissed upon answer and proof by defendant that the title to real estate was in controversy. Brown v. Southerland, 142 N. C. 225, 55 S. E. 108. See also, note of Evans v. Williamson, 79 N. C. 87, under section 1476.

Where, however there is a failure to file the written answer with the justice, the defendant is not estopped from filing such answer in the superior court and denying jurisdiction. Evans v. Williamson, 79 N. C. 87, 88.

§ 1479. Justice may act anywhere in county.— A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed. (Rev., s. 1425; Code, s. 824.)

§ 1480. Punishment for contempt in certain cases.—If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars. (Rev., s. 1426; Code, s. 848; R. C. c. 115; 1741, c. 30.)

§ 1481. Jurisdiction in criminal actions.—Justices of the peace have exclusive original jurisdiction of all assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law does not exceed a fine of fifty dollars or imprisonment for thirty days: Provided, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: Provided further, that nothing in this section

shall prevent the superior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given to justices of the peace if some justice of the peace, within twelve months after the commission of the offense, shall not have proceeded to take official cognizance of the same. (Rev., s. 1427; Const., Art. 4, s. 27; Code, s. 892; 1889, c. 504, s. 2.)

For full treatment of the subject, see 4 N. C. Enc. Dig. 39 et seq., 13 N. C. Enc. Dig. 583 et seq.

Editor's Note.—This section must be construed in connection with section 1436 which defines the jurisdiction of the superior court in criminal matter. See State v. Cunningham, 94 N. C. 824, 826, see also note of this case under section referred to (1436), analysis line, "Criminal Actions," IV.

Generally. — Until the expiration of six months (now twelve) from the commission of the offense justices of the peace have exclusive jurisdiction of all misdemeanors where the punishment can not exceed a fifty dollar fine or thirty days imprisonment; after the expiration of the six months (twelve) their jurisdiction is concurrent with that of the superior court. State v. Roberts, 98 N. C. 756, 3 S. E. 682.

Constitutionality. — This section is constitutional. State v. Johnson, 64 N. C. 581.

Legislative Power.—It is not competent for the Legislature to confer jurisdiction upon magistrates of any offense of which the punishment by law may exceed the limit as fixed by this section (and the Constitution). State v. Fesperman, 108 N. C. 770, 13 S. E. 14.

Where Punishment Unlimited.—Where the punishment under the particular statutes which the defendant is being tried is unlimited or is not limited to a fine of $50, or imprisonment for thirty days, it is not a case within the jurisdiction of a justice of the peace. State v. Addington, 121 N. C. 538, 27 S. E. 988.

Pleading.—In the case falling within the provisions of this section the pleadings must show affirmatively everything necessary to confer the jurisdiction relied upon. State v. Johnson, 64 N. C. 581.

Same—When Jurisdiction Concurrent.—It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the superior court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission" for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. State v. Smith, 157 N. C. 578, 72 S. E. 853.

Variance between indictment and proof as affecting jurisdiction, see note to State v. Fesperman, 108 N. C. 770, 13 S. E. 14, section 1436, analysis line, "Criminal Action," IV.

"Deadly Weapon."—A deadly weapon is not one that must, kill or that may kill, but is is one which would likely produce death or great bodily harm, used by the defendant in the manner in which it was used. State v. Sinclair, 120 N. C. 603, 27 S. E. 77. For other illustrative cases showing what is held to be, a deadly weapon, see 2 N. C. Enc. Dig. 21 et seq., 13 N. C. Enc. Dig. 187 et seq.

It is material to show whether or not a deadly weapon was used because it is a determining factor in deciding which court has jurisdiction. State v. Murphy, 101 N. C. 697, 701, 8 S. E. 142.

Same—Where Question of Law or Fact.—Whether the weapon used is a deadly weapon is a question of law, where there is no dispute about the facts. State v. Sinclair, 120 N. C. 603, 27 S. E. 77. But where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it was used, it is proper and necessary, to submit the matter to the jury with proper instructions. State v. Archbell, 139 N. C. 537, 51 S. E. 801.

"Serious Damage."—The serious injury as used in this section must be such physical injury as gives rise to great bodily pain, mental anguish alone is not serious injury within the meaning of this provision. State v. Nash, 109 N. C. 824, 13 S. E. 874.

Where it was shown that the defendant assaulted the prosecuting witness with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and badly injuring his eyes, but it did not appear that the injuries were permanent, it was held, that this was "serious damage," and a justice of the peace and no jurisdiction of the offense. State v. Shelly, 98 N. C. 673, 4 S. E. 530.

Same—Manner of Excepting.—Exception to the jurisdiction of the superior court, or that no serious damage was done, or no deadly weapon was used, and six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instruction to the jury to acquit. State v. Earnest, 98 N. C. 740, 4 S. E. 495. And it may be also taken advantage of under a plea of not guilty. State v. Reaves, 85 N. C. 553; State v. Berry, 83 N. C. 604.

Simple Assault.—In a case of simple assault where no deadly weapon is used and no serious damages inflicted, a justice of the peace has jurisdiction. State v. Johnson, 94 N. C. 863.

Upon the trial of an indictment for simple assault, the superior court prima facie has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N. C. 740, 4 S. E. 495.

Same — Former Conviction and Acquittal. — A plea of former conviction or acquittal before a justice of the peace for a simple assault is a complete defense on a trial for the same offense in the superior court, unless it should appear in the latter that the defendant making the plea had, in fact, used a deadly weapon or inflicted serious injury, in which case, the justice not having jurisdiction, the proceedings before him would be a nullity. State v. Albertson, 113 N. C. 633, 18 S. E. 321.

Under this section a magistrate has original jurisdiction of simple assault and on appeal from an acquittal a plea of former jeopardy is good. State v. Myrick, 202 N. C. 688, 163 S. E. 803.

Affray.—See 1 N. C. Enc. Dig. 300 et seq.

Cited in State v. Hefner, 199 N. C. 778, 781, 155 S. E. 879.

Art. 11. Dockets

§ 1482. Justice shall keep docket.—A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice. (Rev., s. 1416; Code, s. 831.)

Not One of Record. — A justice's court is not a court of record. Smith Building, etc., Co. v. Pender, 173 N. C. 55, 91 S. E. 524; Williams v. Bowling, 111 N. C. 295, 16 S. E. 176.

This has been the ruling in a great number of cases but in at least one recent case, Harris v. Singletary, 193 N. C. 583, 587, 137 S. E. 724, it is intimated that under the requirements of this section, a justice's court is partly one of record.—Ed. Note.

While the court of a justice of the peace is not a court of record, nevertheless, its judgments are conclusive until reversed, modified or vacated in some proceeding instituted for that purpose; and such court has the same jurisdiction to hear applications to vacate judgments rendered by it as superior courts possess over judgments rendered by them. Whitehurst v. Transportation Co., 109 N. C. 342, 13 S. E. 937.

They may exercise many of the powers of courts of record tribunals. Bailey v. Hester, 101 N. C. 538, 540, 8 S. E. 164.

§ 1483. Entries to be made.—The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings, or on any other paper in the cause. (Rev., s. 1470, Rule 14; Code, s. 840, Rule 13.)

Time of Docketing. — A judgment of a justice of the peace, not docketed within a year from the date of its rendition, is dormant and its lost validity can not be restored by docketing the same in the superior court, but only by a new action upon it. Cowen v. Withrow, 114 N. C. 558, 559, 19 S. E. 675.

§ 1484. Dockets filed with clerk.—Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county. (Rev., s. 1417; Code, s. 827.)

§ 1485. Dockets, papers, and books delivered to successor.—When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor. (Rev., s. 1418; Code, s. 828; 1885, c. 372.)

Art. 12. Process

§ 1486. Action begun by summons.—Civil actions in these courts shall be commenced by the issuing of a summons. (Rev., s. 1444; Code, s. 830; 1868-9, c. 159, s. 9.)

As to summons and process, see § 475 et seq. and the notes thereto.

Service by Publication. — In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required. Mills v. Hansel, 168 N. C. 651, 85 S. E. 17. As to service by publication generally, see § 484 and the notes thereto.

§ 1487. Issuance and contents of summons.—The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum demanded by the plaintiff or the value of the property sued for, where specific property is claimed. (Rev., s. 1445; Code, s. 832; 1874-5, c. 234.)

As to issuance and contents of summons, generally, see § 476 and notes thereto.

To Whom Directed. — The summons in a civil action before a justice of the peace must be directed to "any constable or other lawful officer." McKee v. Angel, 90 N. C. 60, 62.

Special Officer. — A special officer may be deputized to serve the summons issued by a justice of the peace, where the sheriff and coroner are interested. Baker v. Brem, 127 N. C. 322, 37 S. E. 454.

Amount Must Be Stated. — In an action before a justice of the peace, if on contract, the summons should state the amount demanded, if for a tort, it should state the amount of damages claimed, and if for the recovery of specific property, the value of the property and such statement in the summons gives the justice prima facie jurisdiction. Noville v. Dew, 94 N. C. 43, 44. A defect in this particular will not be cured by the insertion of the necessary averment in the pleadings or other process. Leathers v. Morris, 101 N. C. 184, 187, 7 S. E. 783.

Same—Omission by Inadvertence.—Where it is made to appear that the court would have jurisdiction if the summons had contained the proper allegation, but it was omitted by mistake or inadvertance, it may, pending the action, permit the necessary amendment. Leathers v. Morris, 101 N. C. 184, 187, 7 S. E. 783.

Same—Conclusiveness as Fixing Jurisdiction.—Where the amount claimed in the summons issued by a justice was $200, and no other complaint was filed, and the amount offered in evidence amounted to $242, but the plaintiff stated that he remitted the excess over $200, it was held that the justice had jurisdiction. Cromer v. Marsh, 122 N. C. 563, 29 S. E. 836. See section 1436, analysis line, "Previous Remission," II, B, 1, b.

Failure to Serve Summons. — Where a justice issued a summons and warrant of attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of summons. Ditmore v. Goins, 128 N. C. 325, 39 S. E. 61.

After Thirty Days.—When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days subsequent to service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. Mills v. Hansel, 168 N. C. 651, 85 S. E. 17.

Presumption as to True Date. — A summons is presumed to bear the true date of its issue, but is competent to show that it was not in fact then issued. Currie v. Hawhive, 118 N. C. 593, 594, 24 S. E. 476.

§ 1488. Service and return of summons.—The officer to whom the summons is delivered shall execute the same within five days after its receipts by him or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same. (Rev., s. 1446; Code, s. 833.)

See sections 1486, 1487 and notes thereto. As to summons and process generally, see § 475 et seq., and notes thereto.

In General.—The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace, must be observed by the process officer as from the superior court, section 1500, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid, and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in the court of the justice of the peace. Pass v. Elias, 192 N. C. 497, 135 S. E. 291.

To Whom Returnable.—A summons issued by one justice of the peace cannot be made returnable before another (except in cases of bastardy). Williams v. Bowling, 111 N. C. 295, 296, 16 S. E. 176.

§ 1489. Process issued to another county.—No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides. (Rev., s. 1447; Code, s. 871; 1876-7, c. 287.)

In General. — This section being a restricted legislative grant of power when exercised, must be strictly pursued. Durham, etc., Co. v. Marshburn, 122 N. C. 411, 414, 29 S. E. 411. See also, Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799.

The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defendants as parties. In certain cases, perhaps, it may be so plain that the plaintiff has no real or bona fide claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. Marler v. Wadesborro Clothing Co., 150 N. C. 519, 64 S. E. 366.

Amendment as to Resident Defendant.—Where the summons was issued against a resident of a county and a nonresident of the county, and on the trial the summons was amended on striking out the name of the resident defendant, it was held, that the justice should dismiss the action. Wooten v. Maultsby, 69 N. C. 462.

To Whom Addressed.—When a justice of the peace issues process for nonresident defendants, it must be issued (addressed) to the officer of the county where it is to be served. Durham, etc., Co. v. Marshburn, 122 N. C. 411, 414, 29 S. E. 411.

Section Not Applicable to Foreign Corporations.—The provisions of this section do not apply to foreign corporations. Fleming Co. v. Southern R. R., 145 N. C. 37, 58 S. E. 793.

The Municipal Court of the city of Greensboro has no jurisdiction under chapter 126, Private Laws of 1931, to determine a cause upon a contract, involving less than $200.00, when the sole defendant is not a resident of Guilford County and summons is served in Lee county as this section and

§ 1490 are applicable. Miles Co. v. Powell, 205 N. C. 30, 169 S. E. 828.

§ 1490. Civil process in inferior courts. — The process of any recorder's court, county court, or other court inferior to the superior courts of the state when such court is exercising the jurisdiction of a justice of the peace in civil matters, shall run only as does the process of the court of a justice of the peace for the county in which such court is located. (1915, c. 19.)

As to uniform practice in inferior courts where summons issued to run outside of county, see § 478(a).

§ 1491. Endorsement of process to another county.—In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to endorse his name on the same, or a duplicate thereof, and such process so endorsed shall be executed in like manner as if it had been originally issued by the justice endorsing it. (Rev., s. 1449; Code, s. 872.)

To whom addressed, see note of Durham, etc., Co. v. Marshburn, 122 N. C. 411, 29 S. E. 411, under section 1489.

§ 1492. Certificate of clerk on process for another county. — In all cases referred to in the preceding section it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued. (Rev., s. 1450; Code, s. 873; 1870-1, c. 60, s. 2.)

See sections 1489, 1491 and notes placed thereunder.

§ 1493. Judgment against defendant in another county.—No justice of the peace shall enter a judgment under the two preceding sections against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same. (Rev., s. 1451; Code, s. 874; 1876-7, c. 57.)

Section Not Jurisdictional.—The provision of this section, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the purpose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed. Bank v. Carlile, 174 N. C. 624, 94 S. E. 297.

Time of Service on Corporation.—A summons issued by a justice of the peace against a nonresident corporation need not be served ten days before the trial, where served on the secretary of the State Corporation Commission, the nonresident corporation not having appointed an agent in this State upon whom service could be made. Williams v. Iron Belt, etc., Association, 131 N. C. 267, 42 S. E. 607.

§ 1494. Service on foreign corporation.—Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to mention a process agent in the state, the summons may be issued to the sheriff of the county in which such process agent reside, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served: Provided, that any foreign corporation having no process agent in this state, but having an agent who collects money for it, said agent shall be deemed a process agent within the terms of this section, and that this proviso shall apply to existing claims as well as those arising hereafter. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides in this state, or when it cannot be made personally within the state upon the president, treasurer, or secretary thereof. (Rev., s. 1448; 1907, c. 473; Ex. Sess. 1920, c. 28.)

As to agents on whom service can be had, see section 483 and note thereto. See also sections 1137, 6414 and notes there placed.

Editor's Note.—The last provision of this section is new with the Ex. Sess. of 1920.

Service on Agent Valid.—Under the provision of this section, a summons issued to a foreign corporation in another county where it has a process agent, properly certified under seal of the clerk of the superior court, served on such corporation or the agent more than twenty days before the return day, is valid. Fleming Co. v. Southern R. R., 145 N. C. 37, 40, 58 S. E. 793.

Time of Service.—See note of Williams v. Iron Belt, etc., Association, 131 N. C. 267, 42 S. E. 607 under § 1493.

§ 1495. Attendance of witnesses.—The justice, on application of either party, shall, by a subpoena or by an order in writing, on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness failing to appear shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend. (Rev., s. 1452; Code, s. 847.)

In General.—The power to punish for contempt is inherent in all courts and is essential to their existence. State v. Aiken, 113 N. C. 651, 653, 18 S. E. 690.

Duty to Attend Court.—The duty of attending court in obedience to a subpoena is incident to citizenship. State v. Massey, 104 N. C. 877, 879, 10 S. E. 608.

No Bond Authorized.—A justice of the peace is not authorized to put a witness under bond to appear at a subsequent trial before the justice. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

§ 1496. Subpoena issued to another county. — Justices of the peace, in all civil cases, may issue subpoenas to counties other than their own; such subpoenas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpoena they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpoenas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of the witness to and returning from place of trial, which amount shall be paid to the witness on his attendance and taxed against the party cast in the trial. (Rev., s. 1453; 1893, c. 436.)

§ 1497. Subpoena duces tecum in case against railroad.—When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpoena to any county within the limits of the state, commanding the president or any officer, director, agent, or any one in the employment of such company, to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper, and to give evidence in said cause; and each witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 1454; 1885, c. 221, s. 2.)

Art. 13. Pleading and Practice

§ 1498. Removal of case. — In all proceedings and trials both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable shall, upon written request made by either party to the action before evidence is introduced, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township; but no cause shall be more than once removed. (Rev., s. 1455; Code, s. 907; 1880, c. 15; 1883, c. 66; 1917, c. 48.)

Editor's Note.—For a proviso applicable in Mecklenburg County only, see Public Laws 1933, c. 278.

Duty of Justice.—It is the duty of a justice of the peace, upon affidavit and motion (now a written request) for a removal being filed, to remove the case to another justice residing in the same township, State v. Ivie, 118 N. C. 1227, 24 S. E. 539; and if there be no other justice in the same township he can remove the case to the justice of a neighboring township.

Same—Removal to Improper Justice.—If the case is removed to a justice of a neighboring township when there is another justice in the same township in which the action is commenced, the justice to whom the case is thus removed has no jurisdiction, and his judgment is void. State v. Ivie, 118 N. C. 1227-8, 24 S. E. 539; State v. Warren, 100 N. C. 489, 490, 492, 5 S. E. 662.

Not Applicable to Mayor's Court.—The provisions of this section apply only to courts of justice of the peace and in a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal. State v. Joyner, 127 N. C. 541, 37 S. E. 201.

§ 1499. Removal in case of death or incapacity. —If any justice of the peace dies or becomes incapacitated by removal, registration or other cause, having any action, civil or criminal, pending before him, which has not been finally determined, such action shall not abate or be discontinued, but the plaintiff in such civil action, or any one on behalf of the state in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the same is removed and by giving ten days notice to the defendant of such removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the plaintiff; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice. The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or costs which have heretofore been properly advanced by any party to such action. After such removal either party shall be entitled to all the rights given in the preceding section. (Rev., s. 1456; 1905, c. 121.)

§ 1500. Rules of practice:

Rule 1, Pleadings. The pleadings in these courts are—

1. The complaint of the plaintiff.

2. The answer of the defendant. (Rev., s. 1457; Code, s. 840.)

Rule 2, Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action. (Rev., 1459; Code, s. 840, Rule 3.)

Generally.—When the parties come to trial in a justice's court, the justice should require the plaintiff to state "in a plain and direct manner the facts constituting the cause of action" and a denial by defendant or other facts constituting a defense. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234.

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234.

Where Description in Complaint Vague.—In the complaint filed the land was described as adjoining the lands of John P. Liverman, John H. Liverman and Isaac J. Snipes, and containing fifty acres: Held, that the description in the complaint was too vague to be explained by parol testimony, and if the transcript was correctly copied in the complaint, the action might have been dismissed for failure to state facts sufficient to constitute a cause of action, or after the evidence was heard the jury might have been told that there was a fatal variance between the allegations and the proof. Blow v. Vaughan, 105 N. C. 198, 10 S. E. 891.

Rule 3, Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim. (Rev., s. 1460; Code, s. 840, Rule 4.)

The pendency of another action for the same cause, may be set up in the answer, with other defenses, and any issue arising thereon may be submitted at the same time as the

others growing out of the pleadings, with instructions to the jury that, if found for the defendant, the others need not be considered. Montague v. Brown, 104 N. C. 161, 10 S. E. 186.

Same—Waiver.—Unless this defense is set up in the answer or in some way insisted on, before the trial on the merits, it will be considered as waived. Blackwell v. Dibbrell Bros. & Co., 103 N. C. 270, 9 S. E. 192.

Rule 4, Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true. (Rev., s. 1461; Code, s. 840, Rule 11.)

Rule 5, Order on demurrer. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded. (Rev., s. 1462; Code, s. 840, Rule 12.)

Rule 6, Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket. (Rev., s. 1458; Code, s. 840, Rule 2.)

In General.—While we liberally construe pleadings filed in the court of a justice of the peace, they must substantially conform to the statutory requirements, i. e., there shall be a complaint and answer; if oral, the justice may enter the substance on his docket, and, if written, the pleadings may be filed and reference made to them on the docket; the complaint must state the facts constituting a defense or counterclaim. Baxter v. Irvine, 138 N. C. 277, 73 S. E. 882.

Written Pleadings.—Where the parties to an action before a justice of the peace have elected to file written pleadings, the pleadings are subject to the rule that material allegations in the complaint not denied by the answer stand admitted. Parker v. Horton, 176 N. C. 143, 96 S. E. 904.

Oral Pleadings.—In actions before justices of the peace the pleadings may be oral, but if so, the substance of them must be entered on the docket, and contain, in a plain and distinct manner, the ground of the action; and if the facts relied on as a defense be new matter, notice of that, also, must be given on the docket, in a plain and direct manner. Montague v. Brown, 104 N. C. 161, 10 S. E. 186.

Applied in Home Bldg., etc., Ass'n v. Moore, 207 N. C. 515, 177 S. E. 633.

Rule 7, No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant. (Rev., s. 1463; Code, s. 840, Rule 5.)

Technical Accuracy Not Required.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the Court to amend either in substance or form, at any time before or after judgment in furtherance of justice. Aman v. Dover, etc., R. Co., 179 N. C. 310, 102 S. E. 392.

Informality or Irregularity.—Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where this section expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." Wilson v. Batchelor, 182 N. C. 92, 108 S. E. 355.

Rule 8, No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover. (Rev., s. 1464; Code, s. 840, Rule 6.)

Rule 9, Action on account or note. In an action or defense, founded on an account, or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off. (Rev., s. 1465; Code, s. 840, Rule 7.)

Note for Purchase of Land.—Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his jurisdiction is not ousted by reason of the note having been executed for the purchase of land. Parker v. Horton, 176 N. C. 143, 96 S. E. 904.

Rule 10, Account or demand exhibited. The justice may at the joining of issue require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated. (Rev., s. 1469; Code, s. 840, Rule 10.)

Rule 11, Variance. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby. (Rev., s. 1466; Code, s. 840, Rule 8.)

Rule 12, No process quashed for want of form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment. (Rev., s. 1467; Code, s. 908; R. C., cc. 3, 62, s. 22; 1794, c. 414.)

Docket Incomplete.—In bastardy proceedings the justice of the peace before whom the trial is had should take the denial of the defendant under oath, before trying the case, so as to make up the issue, and should regularly note it on his docket and in his return; and if the docket is incomplete in this respect the Superior Court judge on appeal should allow the denial to be entered nunc pro tunc. State v. Currie, 161 N. C. 275, 76 S. E. 694.

In State v. Mills, 181 N. C. 530, 533, 106 S. E. 677, the court said: "A clear analysis of this section (which was sec. 908 of the Code) is made by Justice Ashe in State v. Vaughan, 91 N. C. 532, showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions."

Applicable to Final Judgments Only.—Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., this section rule 12, and 1530, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court. Graves v. Reidsville Lodge, 182 N. C. 330, 109 S. E. 29.

Rule 13, Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of

costs to the adverse party. (Rev., s. 1468; Code, s. 840, Rule 9.)

Power Not Reviewable. — The discretionary power to amend a complaint conferred upon a justice of the peace is not reviewable on appeal. State v. Taylor, 118 N. C. 1262, 1264, 24 S. E. 526.

Nature of Amendment Allowable.—The superior court has the power to amend a justice warrant in a criminal action, in form or substance, but the amendment must not change the nature of the offence intended to be charged. State v. Vaughan, 91 N. C. 532; State v. Taylor, 118 N. C. 1262, 24 S. E. 526.

Amendment of Indictment.—An indictment before a justice of the peace may be amended by the trial judge upon the trial in the Superior Court on appeal. State v. Holt, 195 N. C. 240, 141 S. E. 585.

The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. State v. Poythress, 174 N. C. 809, 93 S. E. 919.

Words Omitted.—Where a warrant was defective due to the omission of certain words, it was held to be within the discretion of the court to permit an amendment inserting the necessary words. Laney v. Mackey, 144 N. C. 630, 631, 57 S. E. 386.

Allegation of Value Omitted.—Where, in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the Justice of the Peace properly allowed a motion to amend by filling in the blank left for such allegation. Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.

Equitable Proceedings.—On the trial of an appeal from a justice of the peace, of an action that sought to recover for a breach of contract, and also to enforce an equity, the trial judge properly allowed an amendment discarding the equitable proceeding. Starke v. Cotton, 115 N. C. 81, 20 S. E. 184.

Rule 14, Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer. (Rev., s. 1471; Code, s. 840, Rule 16.)

In General.—The tender, made under the provision of this section must be a proposition (made before any defence is set up) to pay a specified sum in discharge of the plaintiff's claim, and not a sum in excess of a counterclaim. Rand v. Harris, 83 N. C. 486.

Money Paid into Court.—Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs, if withdrawn by plaintiffs, pending the litigation, amounts to a satisfaction of their claim, and subjects the plaintiffs to all subsequently accruing costs." Cline v. Rudisill, 126 N. C. 523, 36 S. E. 36.

Rule 15, Continuance. Any justice before whom an action is brought may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days. (Rev., s. 1472; Code, s. 840, Rule 17.)

When a justice of the peace continues a criminal action for malicious prosecution upon a request of the prosecuting witness, and more than thirty days has passed without a trial, in which the prosecutor has remained inactive, the criminal proceeding is terminated under rule 15 of this section. Winkler v. Lenoir, etc., Rock Lines, 195 N. C. 673, 143 S. E. 213.

Rule 16, Chapter on civil procedure applicable. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts. (Rev., s. 1473; Code, s. 840, Rule 15.)

Cross References.—See section 1486 et seq.; and notes placed thereunder.

Appointment of Next Friend.—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a Justice's court, the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required, by the Clerk, in actions properly brought in the Superior Court. Houser v. Bonsal & Co., 149 N. C. 51, 62 S. E. 776.

Rule 17, Attachment proceedings. The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy. (Rev., s. 1474; Code, s. 853.)

Cross Reference.—See section 798 et seq.

Purpose.—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the state, and is only incidental to the relief sought in the original action, sec. 819, and the warrant in garnishment may run beyond the limits of the county wherein the action was brought. Mohn v. Cressey, 193 N. C. 568, 137 S. E. 718.

Remedy for Wrongful Issue.—An attachment wrongfully issued from the Justice's Court against a citizen of the State, transiently absent, is remedied by recordari. Merrill v. McHone, 126 N. C. 528, 529, 36 S. E. 35.

Rule 18, Claim and delivery and arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words, "justice of the peace" for "judge," "clerk" or "clerk of the court," and inserting the words, "or constable" after "sheriff," whenever they occur. (Rev., s. 1475; Code, ss. 849; 889; 1876-7, c. 251.)

Arrest and Bail, see section 767 et seq.
Claim and Delivery, see section 830 et seq.

Rule 19, Actions for damages and for conversion. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court. (Rev., s. 1476; Code, s. 888; 1876-7, c. 251.)

Damages Limited to Fifty Dollars. — A Justice of the Peace under this section has jurisdiction of an action for damages, not exceeding fifty dollars, for injury to personal property, though such property be of greater value than fifty dollars. Malloy v. Fayetteville, 122 N. C. 480, 29 S. E. 880.

An action for damages for converting a crop of greater value than fifty dollars is not founded on an implied contract, and hence is not within the cognizance of a justice's court. Womble v. Leach, 83 N. C. 84.

Rule 20, Action on former judgment. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made. (Rev., s. 1477; Code, s. 844.)

Rule 21, Rehearing of case. When a judgment

has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer, to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be reheard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith. (Rev., s. 1478; Code, s. 845.)

In General.—A new trial cannot be allowed in a justice's court, but the party dissatisfied with the judgment has his remedy only by appeal. But where the judgment is rendered in the absence of either party and such absence is occasioned by sickness of excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. Gambill v. Gambill, 89 N. C. 201.

This and the other sections of the Code regulating procedure before justices of the peace, which makes the general provisions of the chapter applicable, do not confer on a nonresident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is appeal, so that the action may be heard de novo in the superior court, where he will be permitted to interpose his defense. Thompson v. Lynchburg Notion Co., 160 N. C. 519, 76 S. E. 470.

Inexcusable Neglect.—Where the local agent of an incorporated company appears on the return day of a summons, before a justice of the peace, and procured a continuance for ten days, within which time it had an opportunity to employ counsel to represent it, but it neglected to do so until the day of the trial, when, because of delay in the mail, the counsel was not able to appear until after the trial. It was held, to be inexcusable neglect. Finlayson v. American Accident Co., 109 N. C. 196, 13 S. E. 739.

Justices of the peace have power to rehear cases decided by them, when mistaken, surprise or excusable negligence is shown, and the application is made in ten days after the date of the judgment. After the lapse of that time, they can not rehear their judgments for such cause. Navassa Guano Co. v. Bridgers, 93 N. C. 439.

Statute of Limitations.—Where a judgment was rendered by a Justice of the Peace and upon a rehearing granted by him a similar judgment was rendered, the Statute of Limitations began to run from the date of the latter, the first judgment having been vacated. Salmon v. McLean, 116 N. C. 209, 21 S. E. 178.

Art. 14. Jury Trial

§ 1501. Parties entitled to a jury trial.—When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same. (Const., Art. 4, s. 27.)

§ 1502. Jury trial waived. — A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury. (Rev., s. 1431; Code, s. 857.)

The "Due Process" Clause.—The requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the state courts affecting property must be by jury, but it is met if the trial be had according to the settled course of judicial proceedings. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

Rights Preserved on Appeal. — When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors and prescribes an appeal to the superior court, the constitutional right of trial by jury is preserved. State v. Shine, 149 N. C. 480, 62 S. E. 1080.

Waiver.—If the defendant, after having been duly summoned, fails to appear and answer before a justice of the peace he thereby waivers and loses the right to demand a trial by jury. Durham v. Wilson, 104 N. C. 595, 598, 10 S. E. 683.

§ 1503. Number constituting the jury. — Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it. (Rev., s. 1440; Code, s. 866.)

§ 1504. Jury list furnished.—The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed. (Rev., s. 1428; Code, s. 854.)

§ 1505. Names kept in jury box.—Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice. He shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law. (Rev., ss. 1429, 1430; Code, ss. 855, 856.)

Cross Reference.—See section 2313 and notes thereto.

§ 1506. Fees deposited for jury trial. — Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve, as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend. (Rev., s. 1432; Code, s. 869.)

§ 1507. Jury drawn and trial postponed. — When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice. (Rev., s. 1433; Code, s. 858.)

Constitutional Provisions.—The method by which jurors are to be selected and summoned is not provided for in the constitution, and no limitation therein upon the power of the General Assembly to regulate it. State v. Brittain, 143 N. C. 668, 57 S. E. 352.

§ 1508. Summoning the jury. — A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summonded by him, for

which he shall receive the fee allowed by law for summoning jurors. (Rev., s. 1434; Code, s. 859; 1935, c. 309.)

Editor's Note.—The words "for which he shall receive the fee allowed by law for summoning jurors," at the end of this section were added by Public Laws 1935, chapter 309, which provides: "That this act shall not apply to Beaufort, Brunswick, Cabarrus, Edgecombe, Forsyth, Gaston, Gates, Guilford, Halifax, Martin, McDowell, Orange, Pasquotank, Rowan, Transylvania and Wake Counties."

§ 1509. Selection of jury. — At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue. (Rev., s. 1435; Code, s. 860.)

§ 1510. Challenges. — Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors. (Rev., s. 1436; Code, s. 861.)

§ 1511. Names returned to the jury box.—The scrolls containing the names of jurors not summoned, if any, and of those summoned but not drawn, and of those drawn but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable or legally qualified to serve as jurors shall be destroyed. (Rev., s. 1437; Code, s. 862.)

§ 1512. Names of jurors serving.—The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance. (Rev., s. 1441; Code, s. 868.)

§ 1513. Tales jurors summoned.—If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury. (Rev., s. 1438; Code, s. 863.)

§ 1514. No juror to serve out of township.—No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman. (Rev., s. 1439; Code, s. 867.)

§ 1515. Additional deposit for jury fees on adjournment. — No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice in the beginning, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto. (Rev., s. 1442; Code, s. 870.)

§ 1516. Jury sworn and impaneled; verdict; judgment.—The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict. (Rev., s. 1443; Code, s. 864.)

Art. 15. Judgment and Execution

§ 1517. Justice's judgment docketed; lien and execution.—A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court; but in case a stay of execution upon such judgment shall be granted, as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. (Rev., s. 1479; Code, s. 839.)

Generally.—A judgment in a justice's court does not create a lien upon the property of the defendant. To have this effect a transcript of the judgment must be filed and docketed in the office of the superior court clerk of the county wherein the judgment is rendered. Ledbetter v. Osborne, 66 N. C. 379, 380.

Judgment Conclusive.—Where a judgment was obtained before a justice of the peace and docketed in the office of the superior court clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. Ledbetter v. Osborne, 66 N. C. 379.

Amendments of the judgment before the magistrate, or of the transcript, can be made only before the tribunal which gave it, rendered the one or issued the other. McAden v. Banister, 63 N. C. 479.

Presumed Regular.—Though the signature of the justice of the peace is not attached to the judgment, it is presumed from the term of the certificate of authentication that it was entered up regularly and in proper form. Surratt v. Crawford, 87 N. C. 372, 374.

Priorities.—If a number of justice's judgment be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. Perry v. Morris, 65 N. C. 221.

Same—Fractional Parts of a Day.—The law takes notice of the fractional part of a day when there is a conflict between creditors arising as to the application of money re-

ceived on justice's judgment filed and docketed on the same day. Bates v. Hnsdale, 65 N. C. 423.

Where Docketed.—A judgment given by a magistrate in one county cannot be docketed in another, unless previously docketed in the former county; and what is allowed to be docketed in the latter county is the transcript of judgment as docketed in the former. McAden v. Banister, 63 N. C. 479.

Docketing in different counties, see section 1520.

Same—Its Nature in Superior Court.—If the judgment has been docketed in the superior court and subsequently vacated by the justice of the peace, the defendant may, upon motion, have the judgment therein set aside; such docketing, however, only operates as a judgment of the superior court for the purposes of lien. Whitehurst v. Merchants, etc., Co., 109 N. C. 342, 13 S. E. 937.

A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court, and may be enforced by execution at any time within ten years from the date of such docketing. McIlhenny v Wilmington, Sav., etc., Co., 108 N. C. 311, 12 S. E. 100. See also section 614 and notes thereto.

The judgment as actually docketed is the only authority for the execution named; the form of the docketed judgment depends upon that of the transcript actually sent. McAden v. Banister, 63 N. C. 479.

Effect of Appeals, see section 1518.

§ 1518. Effect of judgment on appeal.—In cases of appeal to the superior court from a justice's judgment docketed in such court, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of such justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment, except prior attachment liens and judgment on the same. The clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. When the judgment of the superior court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall note such satisfaction on the record of the justice's judgment. (Rev., s. 1479; 1903, c. 179.)

Effect of Appeal.—An appeal from a judgment of the justice of the peace does not deprive the plaintiff of the right to have the judgment docketed, nor does it take away the lien of the judgment. Durham v. Anders, 128 N. C. 207, 208, 212, 38 S. E. 832.

§ 1519. Entries made by clerk when judgment is rendered.—Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word "reversed," "modified," or "affirmed," as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying, or affirming the former judgment. Any clerk failing to perform such duties as are required of him in this section shall pay to any person all such damages as he may have sustained by such failure. (Rev., s. 1479; 1907, c. 880.)

§ 1520. Justice's judgment removed to another county.—Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of the county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed. (Rev., s. 1480; Code, s. 846.)

Docketing in Different Counties.—The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant's land in the first county. Perry v. Morris, 65 N. C. 221.

Docketing in the county where the judgment was rendered is necessary before the same can be docketed in another county. McAden v. Banister, 63 N. C. 479.

Same—The Transcript Docketed.—The transcript is what is allowed, by this section, to be docketed in the county other than that where the judgment was rendered. McAden v. Banister, 63 N. C. 479.

§ 1521. Issue and return of execution.—Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same. (Rev., s. 1481; Code, s. 840, Rule 14.)

Failure to Docket.—The lost vitality of a judgment not docketed within one year from its rendition cannot be restored by placing it on the docket of the superior court. Cowen v. Withrow, 114 N. C. 558, 19 S. E. 645; Woodard v. Paxton, 101 N. C. 26, 28, 7 S. E. 469, nor will such docketing in the superior court arrest the running of the statute of limitation. Daniel v. Laughlin, 87 N. C. 433, 434.

Same—Rights Purchaser.—A purchaser under an execution on a judgment of a justice of the peace docketed after the lapse of one year acquires no title although he be a stranger to the judgment and without notice. Cowen v. Withrow, 114 N. C. 558, 19 S. E. 645.

Execution may be issued by the justice of the peace unless the cause has been removed to the superior court. Bailey v. Hester, 101 N. C. 538, 8 S. E. 164, and he may likewise recall the execution where it is improvidently issued. Id.

Application of Proceeds.—A justice of the peace has no jurisdiction to direct the application on a sheriff, of the proceeds of an execution issued by another justice of the peace upon the ground that the latter was null and void. Cary v. Allegood, 121 N. C. 54, 28 S. E. 61.

§ 1522. Levy and lien of execution.—Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court. (Rev., s. 1482; Code, s. 841; 1868-9, c. 159, s. 5.)

To Whom Directed. — Execution from a justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. McGloughan v. Mitchell, 126 N. C. 681, 682. 36 S. E. 164, but a constable cannot serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. Id.

Same—Appraisers.—A constable to whom an execution from the court of a justice of the peace has been delivered

may summons appraisers and administer to them the prescribed oaths. McAuley v. Morris, 101 N. C. 369, 7 S. E. 883.

Personal Property.—It is not necessary, under this section, that the judgment be docketed in the superior court, to entitle the judgment creditor to an execution against personal property. McAuley v. Morris, 101 N. C. 369, 373, 7 S. E. 883.

Real Property.—A judgment of a justice of the peace, **when duly docketed** in the office of the superior court clerk, becomes a judgment of that court to all intents and purposes, and is a lien upon all of the real estate of the defendant in the county. Dysart v. Brandreth, 118 N. C. 968, 23 S. E. 966.

§ 1523. Stay of execution. — In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars, and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace. (Rev., s. 1483; Code, s. 842; 1868-9, c. 272.)

§ 1524. Security on stay of execution. — The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both. (Rev., s. 1484; Code, s. 843.)

Generally. — An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to a suit, that he should sign the undertaking. Walker v. Williams, 88 N. C. 7.

Judgment Remains Unimpaired.—Although the execution on the judgment may be stayed on giving it undertaking as herein provided for, the force and effect of the judgment remains unchanged. Dunham v. Andres, 128 N. C. 207, 208, 212, 38 S. E. 832.

§ 1525. Stay of execution on appeal.—In all cases of appeal from justices' courts, if the appellant desires a stay of execution of the judgment, he may, at any time, apply to the clerk of the appellate court for leave to give the undertaking as provided in a subsequent section; and the clerk, upon the undertaking being given, shall make an order that all proceedings on the judgment be stayed. Instead of before the clerk of the appllate court, the appellant may give the undertaking before the justice who tried the cause, who shall indorse his approval thereon. (Rev., ss. 1485, 1486; Code, ss. 882, 883; 1869-70, c. 187.)

Mortgage as Substitute for Undertaking.—There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of the undertaking on appeal from a justice's judgment, required by this section. Comron v. Standland, 103 N. C. 207, 9 S. E. 317. Yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. Id.

Judgment Remains Unimpaired.—See note of Dunham v. Anders, 128 N. C. 207, 38 S. E. 832, section 1524.

Action on Bond.—In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff has sustained damage on account of the appeal. McMinn v. Patton, 92 N. C. 371, 375.

§ 1526. Nature of undertaking.—The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties. And in the event that said defendant shall prior to entry of the final judgment be adjudicated a bankrupt, then and in that event, the surety or sureties on said bond shall remain bound as if they were co-debtors with the defendant and the plaintiff may continue the prosecution of the action against said sureties, as if they were co-defendants in the cause. (Rev., s. 1487; Code, s. 884; 1879, c. 68; 1933, c. 251, s. 1.)

Editor's Note.—By Public Laws 1933, c. 251, was added the sentence, appearing at the end of this section, which provides for liability of sureties in case defendant is adjudicated a bankrupt.

Substantial Compliance Sufficient.—A literal compliance with the provisions of this section is unnecessary—a substantial compliance is sufficient. McMinn v. Patton, 92 N. C. 371, 375.

Surety's Liability Attaches When Final Judgment Rendered against Principal.—The liability of a surety on a bond given in accordance with this section to stay execution of a judgment of the justice of the peace pending appeal, as provided by § 1525, attaches when or if final judgment is rendered against the principal, and where the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule in bankruptcy, no final judgment is rendered against the principal, and the surety may not be held liable on the stay bond. Note, this decision was given on the basis that chapter 251, Public Laws of 1933, amending this section, is prospective in effect and does not apply to bonds executed prior to its effect. Sutton v. Davis, 205 N. C. 464, 171 S. E. 738.

Mortgage as substitute for undertaking, see note of Common v. Standland, 103 N. C. 207, 9 S. E. 317, section 1525.

Effect of Bankruptcy.—Where a judgment was rendered against the defendant before a justice of the peace, and an undertaking filed as provided for by this section, and pending the appeal be obtained a discharge in bankruptcy, it was held, that the sureties were not liable. Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

The Laffoon case, supra, was decided prior to the 1933 amendment to this section and must be read in the light of the law as it existed prior to the amendment. For a discussion of the Laffoon case and the change effected by the 1933 amendment, see 11 N. C. Law Rev., 221.

§ 1527. Execution stayed upon order given. — A delivery of a certified copy of the order, hereinbefore mentioned, to the justice of the peace shall stay the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof. (Rev., s. 1488; Code, s. 885.)

Art. 16. Appeal

§ 1528. No new trial; either party may appeal.—A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed. (Rev., s. 1489; Code, s. 865.)

New Trial Not Allowed.—When both parties to an action are present at the trial in a justice court, and the case is heard and judgment rendered, a new trial cannot be allowed. The party dissatisfied must appeal to the superior court. Froneburger v. Lee, 66 N. C. 333.

Strict compliance with the requirements for perfecting the appeal given by this section is required. Green v. Hobgood, 74 N. C. 234.

Time for Taking.—See note of Hahn v. Guilford, 87 N. C. 172, section 1530.

Rehearing.—See note of Sallmon v. McLean, 116 N. C. 209, 21 S. E. 178, section 1500, Rule 21.

Bastardy Proceeding.—A bastardy proceeding, being a civil action is subject to appeal by either party. State v. Liles, 134 N. C. 735, 736, 742, 47 S. E. 750.

Cited in State v. Goff, 205 N. C. 545, 550, 172 S. E. 407.

§ 1529. Appeal does not stay execution.—No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution. (Rev., s. 1490; Code, s. 875; 1876-7, c. 251, s. 6.)

An appeal from a justice of the peace does not vacate the judgment nor does it suspend its operation. Dunham v. Anders, 128 N. C. 207, 211, 38 S. E. 832.

§ 1530. Manner of taking appeal.—The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for. (Rev., s. 1491; Code, s. 876; 1876-7, c. 251, s. 7.)

This section contemplates and applies to causes of which the court has acquired jurisdiction, and does not affect a case which enables one to obtain relief from a judgment entered against him when the court for lack of service was without jurisdiction to make any orders in any way affecting the rights of person or property. Graves v. Reidsville Lodge, 182 N. C. 330, 332, 109 S. E. 29.

Justice of Peace Included.—The principal both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justice of the peace as well as to those of more extensive jurisdiction. Graves v. Reidsville Lodge, 182 N. C. 330, 109 S. E. 29.

Duty of Justice.—A justice of the peace who takes a case under advisement and later renders judgment must notify the parties thereof to afford them opportunity to appeal in accordance with the provisions of the statute. Blacker v. Bullard, 196 N. C. 696, 146 S. E. 807.

Time.—An appeal must be taken to the next term of the appellate court. Hahn v. Guilford, 87 N. C. 172.

From the decision of a Justice of the Peace in a bastardy proceeding either the woman or the defendant may appeal to the Superior Court, but the appeal must be taken to the next term. The Superior Court has no right to dispense with this requirement. Helsabeck v. Grubbs, 171 N. C. 377, 88 S. E. 473. The "next term" means any term, civil or criminal, which begins after the expiration of the ten days allowed for serving the notice of appeal. State v. Fleming, 204 N. C. 40, 42, 167 S. E. 483.

The carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant is not notice of appeal as herein contemplated and cannot be construed as a compliance with this section and § 1531. Higdon v. Nantahala Power, etc., Co., 207 N. C. 39, 41, 175 S. E. 710.

Service of Notice.—Where judgment is given on process not personally served, but served by publication, and the defendant does not appear at the trial, the defendant is entitled to take fifteen days notice of judgment in which to serve notice of his appeal. Thompson v. Lynchburg Notion Co., 160 N. C. 519, 76 S. E. 470.

Same—Discretion.—Although, where an appeal from a justice of the peace is regularly docketed in due time in the superior court, and proper notice of the appeal has not been given, a judge may, in his discretion, permit notice of appeal to be given, yet he has no discretion to revive an appeal lost by delay and to permit the same to be docketed at a subsequent term to the one to which it should have been returned. Davenport v. Grisson, 113 N. C. 38, 39, 18 S. E. 78.

Same—Time of Service.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days both upon the justice who tried the case and upon the appellee, and upon failure to give such notice, unless the judge, in his discretion, permits the notice to be given at the trial, the appeal should be dismissed. State v. Johnson, 109 N. C. 852, 13 S. E. 843.

Same—Excusable Neglect.—Where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. Gambill v. Gambill, 89 N. C. 201. See also, Dunn v. Patrich, 156 N. C. 248, 72 S. E. 220.

Actual Service.—Where the defendant is actually served with notice of summons he is bound to take notice of the rendition of judgment. Spaugh v. Boner, 85 N. C. 208, 209.

Service by Officer.—The notice of an appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. Clark v. Deloatch Mills Mfg. Co., 110 N. C. 111, 14 S. E. 518.

§ 1531. No written notice of appeal in open court.—Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party. (Rev., s. 1492; Code, s. 877; 1869-70, c. 187; 1876-7, c. 251, s. 8.)

Party Present.—Where the party is present when the appeal is prayed for, no written notice is required. State v. Crouse, 86 N. C. 617, 620.

Applicability of Estoppel. — Where the defendant upon judgment being rendered against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers, who thereupon delayed so doing, and thereafter the defendant changed his mind and filed with the clerk of the superior court a bond sufficient to cover the plaintiff's claim and costs: Held, that it was not error in the court below to refuse to dismiss the appeal. Suttle v. Green, 78 N. C. 76.

§ 1532. Justice's return on appeal.—The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for his service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed. (Rev., s. 1493; Code, s. 878.)

Payment of Fees Necessary.—Officers of the court are not complied to perform their duties until fees prescribed by law are paid or tendered them, but they must be demanded by them before laches can be imputed to litigants. West v. Reynolds, 94 N. C. 333, 334, 335.

Statement of Evidence Not Sent Up.—The requirement of this section that the justice file with the clerk, "the papers, proceedings and judgment in the case," does not include a statement of the evidence, unless there was an exception by one of the parties. London v. Headen, 76 N. C. 72, 74.

Liability of Justice.—The sending up an appeal to the superior court by the justice of the peace upon the payment

of the cost is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. Simonds v. Carson, 182 N. C. 82, 108 S. E. 353.

Power of Justice Ends upon Transmission of Appeal.—After a justice of the peace has transmitted an appeal from his judgment and all the papers to the superior court, he has no power to grant a motion to set aside his judgment for want of jurisdiction. Forbes v. McGuire, 116 N. C. 449, 21 S. E. 178.

Remedy Where Justice Fails in His Duty.—A motion in the superior court for a recordari or an attachment under this section is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appellant would thus make the justice his agent and for his neglect he would be responsible. MacKenzie v. Davidson County Develop. Co., 151 N. C. 276, 65 S. E. 1003.

Failure to Sign Return.—The failure of a justice of the peace to sign the return of notice of appeal does not vitiate the proceedings in the superior court, where the appellant had given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the superior court at the trial in person and by attorney. Hawks v. Hall, 139 N. C. 176, 51 S. E. 857.

§ 1533. Defective return amended.—If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment. (Rev., s. 1494; Code, s. 879.)

Defective Return.—If the justice's return is defective, the judge may direct a further or amended return. Hawks v. Hall, 139 N. C. 176, 51 S. E. 857.

§ 1534. Restitution ordered upon reversal of judgment.—If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment. (Rev., s. 1495; Code, s. 886.)

Involuntary Payments.—This section only applies where there has been an involuntary payment of or on the judgment. Cowell v. Gregory, 130 N. C. 80, 81, 40 S. E. 849. See the dissenting opinion, holding that payment of a collectible judgment rendered by a court of competent jurisdiction is involuntary.

Art. 17. Forms.

§ 1535. Forms to be used in justice's court.—The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this article:

[No. 1]

Summons

North Carolina, ... County,.....Township.

A.....B..... } Before, ...
against
C.....D..... } Justice of the Peace.

State of North Carolina, to any constable or other lawful officer of .....County—Greeting:

We command you to summon C. D. to appear before G. W. H. Esq., one of the justices of the peace for the county of....., on the ....day of ....., 19...., at his office (or elsewhere, as the justice may appoint the place of trial), in ..... Township, to answer A. B. in a civil action for the recovery of.....dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this .....day of....., 19....

G. W. H.....
Justice of the Peace.

[No. 2]

Summons on Allowing Application to Rehear

(Title, etc., as in No. 1)

Whereas, A. B., plaintiff above named (or C. D., defendant above named), has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the .... day of ....., 19....; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of ..... on the .... day of ....., 19...., at ....., in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this .... day of ....., 19....

G. W. H.....
Justice of the Peace.

[No. 3]

Affidavit to Obtain Attachment

(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of ..... dollars (state any cause of action founded on contract, specifying the amount of the claim and the grounds thereof).

2. That the said defendant (state any fact or facts, so as to bring the case within one of the classes in which an attachment may issue. The facts must be stated positively and affirmatively, not merely upon information and belief, except where a fact is alleged with a particular intent. The intent in such case may be stated as on information and belief. See No. 4.)

A.....B.....

Sworn to and subscribed before me, this..... day of ....., 19....

G. W. H.....
Justice of the Peace.

[No. 4]

Another Form of Affidavit to Obtain Attachment

(Title, etc., as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to plaintiff in the sum of .... dollars for goods sold and delivered to said defendant by the plaintiff on or about the .... day of ....., 19....

2. That the said defendant has departed from this state, or keeps himself concealed therein, with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, etc., to defraud defendant's creditors).

A. B.....

(Sworn to, etc., as in No. 3.)

[No. 5]

Affidavit against a Foreign Corporation

North Carolina, ... County.

A.....B.....
against
The Highland Mining Co. } Before....., Justice of the Peace.

A. B., the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum of ..... dollars, for the use and occupation of certain premises, by permission of plaintiff, from the ..... day of ....., 19...., until the ..... day of ....., 19....

2. That the defendant is a foreign corporation, created under the laws of the state of .....

3. That the cause of action above stated arose in this state.

A. B.....

(Sworn to, etc., as in No. 3.)

[No. 6]

Undertaking upon Attachment

(Title as in No. 1 or No. 5)

Whereas, the plaintiff above named is about to apply for a warrant of attachment against the property of the above-named defendant:

Now, therefore, we, J. W. B., of ..... County, and W. D. M., of ..... County, undertake in the sum of ..... dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B.....
W. D. M.....

Signed and delivered in the presence of G. W. H., Esq., this ....day of ...., 19....

G. W. H.....
Justice of the Peace.

[No. 7]

Warrant of Attachment

(Title as in No. 1 or No. 5)

State of North Carolina, to any constable or other lawful officer of ..... County—Greeting:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of ....dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having given the undertaking as required by law:

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the said defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the .... day of ....., 19.., with your proceedings hereon.

Witness our said justice, this ..... day of ....., 19.....

G. W. H.....
Justice of the Peace.

[No. 8]

Officer's Return to be Indorsed on Attachment

I, O. P. M., constable (or sheriff) of ..... County, do hereby return that, by virtue of the within attachment, I have seized and taken into my possession the tangible personal property (or, have levied on the real estate, as the case may be) of the defendant within named, specified in the inventory hereto annexed.

Dated this ..... day of ....., 19....

O. P. M.....
Constable (or Sheriff).

[No. 9]

Inventory of Property Attached to Above Return

(Title as in No. 1 or No. 5)

I do hereby certify that the following is a true and just inventory of all the property seized or levied on by me under a warrant of attachment, issued in the above-entitled action by G. W. H., Esq., with a statement of the books, vouchers, papers, rights and credits taken into my custody by virtue of said warrant. (Insert list of property by items.) I do further certify that the following property mentioned in the above inventory is perishable, and that the expense of keeping the same until the termination of the suit would exceed one-fifth of its value; and I do hereby apply to this court for authority to sell the same. (Insert a list of perishable property.)

Dated this ..... day of ....., 19....

O. P. M.....
Constable (or Sheriff.)

[No. 10]

Order Directing Sale of Perishable Property

(Title as in No. 1 or No. 5)

It appearing by the inventory returned by O. P. M., constable (or sheriff), under the warrant of attachment granted in this action, that the following property mentioned in said inventory is perishable, to wit: (Insert here the list of perishable property.)

It is therefore ordered that the said property be sold by the said officer at public auction, at such time and place as he shall deem advisable, and that the said officer give notice of such sale as the sale of personal property on execution.

It is further ordered that the proceeds of such sale be retained by said officer, and disposed of in the same manner as the property itself, if the same had not been sold.

Dated this .... day of ....., 19....

G. W. H.....
Justice of the Peace.

[No. 11]

Notice of Levy on Property not Capable of Manual Delivery

To H. B.....:

Take notice that by warrant of attachment issued in this action, a certified copy of which is herewith served upon you, I have levied upon, and do hereby levy upon, your indebtedness, amounting to ..... dollars or thereabouts, to the defendant above named. (Describe as particularly as possible the shares, debts or property levied upon.)

Dated this ..... day of ....., 19 ....

O. P. M.....
Constable (or Sheriff.)

The officer will indorse on the copy of the attachment served with the above notice the following certificate:

I do hereby certify that the within is a true copy of the warrant of attachment in my possession, issued in this action, and of the whole thereof.

Dated this ..... day of ....., 19....

O. P. M.....
Constable (or Sheriff.)

[No. 12]

Order Directing Third Person (H. B.) to Appear and be Examined

(Title as in No. 1 or No. 5)

It appearing to me by the certificate of O. P. M., constable (or sheriff) of said county, that the said officer, with a warrant of attachment against the property of C. D., the defendant in this action, has applied to H. B. for the purpose of levying upon a debt owing to the defendant by said H. B. (or upon property of said defendant held by said H. B., or otherwise), and that the said H. B. refuses to furnish said officers with a certificate designating the amount of the debt owing by said H. B. to the defendant, or the amount and description of the property held by said H. B. for the benefit of the defendant:

Now, therefore, I do order and require the said H. B. to attend before me at my office on the .... day of ....., 19.... and be examined on oath concerning the same.

Dated this .... day of ....., 19.....

G. W. H.....
Justice of the Peace.

[No. 13]

Attachment to Enforce Obedience to Above Order

(Title as in No. 1 or No. 5)

State of North Carolina, to any constable or other lawful officer of .....County — Greeting:

Whereas, it appears that H. B. was duly served on the ..... day of ....., 19....., with an order issued by G. W. H., Esq., one of our justices of the peace for said county, requiring said H. B. to attend before said justice at his office, in said county, on the .... day of ....., 19 ...., and be examined on oath concerning a certain debt owing to the defendant, named in the above action, by the said H. B. (or property held by the said H. B. for the benefit of the defendant, or otherwise, as the case may be);

And whereas, the said H. B., in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath, as in said order he is required to do:

Now, therefore, we command you that you forthwith attach the said H. B., so as to have his body before G. W. H., Esq., one of our justices of the peace for your county, on the .....day of....., 19 ...., at his office, in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in this behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not, at your peril.

Witness, our said justice, this .... day of ..... 19 .....

G. W. H.....
Justice of the Peace.

[No. 14]

Undertaking on Discharge of Attachment

(Title of the cause as in No. 1)

Whereas, the property of the above-named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law:

Now, therefore, we, B. B., of ..... County, and D. D., of ..... County, undertake in the sum of ..... dollars (the sum named must be at least double the amount claimed by plaintiff), that if the said attachment be discharged we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this .... day of ....., 19....

(Signed) B. B.....
D. D.....

Signed and delivered in the presence of G. W. H., Esq., this .... day of .....,

G. W. H.....
Justice of the Peace.

Acknowledgment and Affidavit of Sureties

North Carolina, ... County.

On this .... day of ....., 19...., before me personally appeared the above named B. B. and D. D., known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the State of North Carolina and a householder (or freeholder) therein.

B. B.....
D. D.....

Sworn and subscribed before me the day above written.

G. W. H.....
Justice of the Peace.

[No. 15]

Order Vacating Attachment on Security being Given

(Title as in No. 1 or No. 5)

The defendant having appeared in this action

and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court:

It is ordered that the attachment issued in this action on the .... day of ....., 19...., be and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered that any and all proceeds of sales and money collected by O. P. M., constable (or sheriff), and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this .... day of ....., 19....

G. W. H.....
Justice of the Peace.

[No. 16]

Form of Publication to be Made by Plaintiff in Attachment

(Title as in No. 1)

[Amount sued for] due by note (or otherwise as the fact may be). Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for ..... County, North Carolina, at his office (or otherwise as the case may be), on the .... day of ....., 19...., when and where the defendant is required to appear and answer the complaint.

Dated this .... day of ....., 19.....

A. B....., Plaintiff.

[No. 17]

Affidavit for Arrest on Debt Fraudulently Contracted

(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of ..... dollars on an inland bill of exchange, drawn on the .... day of ....., 19..... by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the .... day of ....., 19...., the defendant applied to the plaintiff to purchase a bill of goods amounting to ..... dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to ..... dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the .... day of ....., 19...., the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B. .....

Sworn to and subscribed before me, this.... day of ....., 19....

G. W. H.....
Justice of the Peace.

[No. 18]

Undertaking on Arrest

(Title as in No. 1)

Whereas, the plaintiff above named is about to apply (or has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of ..... County, and P. P., of ..... County, undertake, in the sum of ..... dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J. .....
P. P. .....

Signed in my presence, this .... day of ....., 19....

G. W. H.....
Justice of the Peace

[No. 19]

Order of Arrest

(Title as in No. 1)

North Carolina, ... County, ... Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of ..... dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the .... day of ....., 19....; of which return you will give notice to plaintiff or his attorney.

Dated this .... day ....., 19....

G. W. H. .....
Justice of the Peace.

[No. 20]

Undertaking of Bail on Arrest

(Title as in No. 1)

Whereas, the above named defendant, C. D., has been arrested in this action;

Now, therefore, we, B. B., of ..... County, and D. D., of ..... County, undertake, in the sum of ..... dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B.....
D. D.....

Signed in my presence, this .... day of ....., 19....

G. W. H.....
Justice of the Peace.

[No. 21]

Notice of Exception to Bail

(Title as in No. 1)

To O. P. M., constable (or sheriff) of the county of.....:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also) and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B....., Plaintiff.

(or M. W. N. ....., Attorney for Plaintiff.)

Dated this .... day of ....., 19....

[No. 22]

Notice of Justification of Bail

(Title as in No. 1)

To A. B., Plaintiff (or M. W. N., attorney for plaintiff):

Take notice that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the .... day of ....., 19.....

Dated this ..... day of ....., 19....

C. D.....

(or, M. W. N....., Attorney for C. D.), Defendant.

[No. 23]

Notice of Other Bail

(Title as in No. 1)

Take notice that R. S., of ..... County (physician), and Y. Y., of ..... County (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, etc.

[No. 24]

Justification of Bail

(Title as in No. 1)

On this ..... day of ....., 19 ...., before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this state;

2. That he is worth the sum of .....dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

(Signatures of bail.)

Examination taken and sworn to before me, this ..... day of ....., 19....

G. W. H.....

Justice of the Peace.

[No. 25]

Allowance of Bail

(Title as in No. 1)

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient, and allow the same.

Dated this ..... day of ....., 19....

G. W. H.....

Justice of the Peace.

[No. 26]

Subpoena to Testify

State of North Carolina, ... County.

To S. T. ....., greeting: (the justice may insert any number of necessary names.)

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the ..... day of ....., 19....., to give evidence of a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).* Herein fail not, under the penalty prescribed by law. Witness our said justice, this ..... day of ....., 19 .....

G. W. H.....

Justice of the Peace

[No. 27]

N. B.—The justice may, instead of a formal subpœna, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff: .....; and the following as witnesses for the defendant: .....; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this ..... day of ....., 19 ....

G. W. H.....

Justice of the Peace.

[No. 28]

Subpoena Duces Tecum

If any witness has a paper or document which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk (*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

[No. 29]

Form of Oath of Witness

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30]

Proceedings against Defaulting Witness

When a witness, under subpoena, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1)

To R. P.:

Take notice, that on the .... day of ....., 19 ....., the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the..... day of ....., 19 ...., for judgment against you for the sum of ..... dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this ..... day of ....., 19 ....
A. B ....., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A ..... B ..... against C ..... D ..... } Justice's Court. Motion for penalty against R. P., defaulting witness.

..... day of ....., 19, ..., A. B., above named, appears, and according to a notice filed and duly served on R. P., moved for the penalty of ..... dollars forfeited by the said R. P., by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the .... day of ....., 19 ....., as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who, being duly sworn, testifies that, (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of ..... dollars, penalty forfeited by reason of the premises, and the further sum of ..... dollars, costs of this motion.

[No. 31]

Form of a Venire

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of ..... County:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the ..... day of ....., 19 ...., for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this ..... day of ....., 19.....
G. W. H.....
Justice of the Peace.

[No. 32]

Form of Juror's Oath

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33]

Form of Oath to Constable in Charge of the Jury

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34]

Summons against Defaulting Juror to Show Cause

State of North Carolina, to any constable or other lawful officer of ..... County—Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the ..... day of ....., 19 ...., to show cause why he the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the .... day of ....., 19...., in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this .... day of ....., 19 .....

G. W. H.....
Justice of the Peace.

[No. 35]

Demurrer to Complaint

(Title as in No 1.)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it.)

(Signature of defendant or defendant's attorney.)

[No. 36]

Demurrer to Answer

(Title as in No. 1 or No. 5)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or, for that the said answer is not sufficiently explicit to make this plaintiff understand it.)

(Signature of plaintiff or plaintiff's attorney.)

[No. 37]

Judgment upon Demurrer

NOTE.— If the justice thinks the objection

raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be).

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of ..... dollars, costs of this action (or that the plaintiff recover of the defendant the sum of ..... dollars, damages, and the further sum of ..... dollars, costs of this action.)

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows:

Demurrer to the complaint (or to the answer) filed, heard and overruled, and he will then proceed to the evidence in the cause.

NOTE.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

[No. 38]

(Title as in No. 1)

....., 19 ..... Summons issued; returnable on the .... instant at my office.

....., 19 ..... Summons returned, served on defendant by O. P. M., constable, on the ....instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated ....., 19...., payable one day after date, for $....., and also for goods sold and delivered to the defendant, and claims damages for $ .....

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of $..... for wood sold and delivered to the plaintiff, and also of $..... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the ..... instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

....., 19..... The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground), and rejected.

Having heard the evidence (and the arguments of a counsel, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for $..... damages; whereupon, I adjudged that the plaintiff do recover of the defendant—

Damages, - - - - - $.....
Costs, - - - - - - .....

....., 19 ..... Execution issued for above judgment to O. P. M., constable.

....., 19 ..... Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

[No. 39]

Form of Notice of Appeal to the Superior Court, Where a New Trial on the Whole Matter is to be Had

(Title as in No. 1)

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the ..... day of ....., 19...., in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this ..... day of ....., 19....

W. W. .....
Attorney for Appellant.

[No. 40]

Return to Notice of Appeal

A..... B..... } County of .....
against
C..... D..... }

To the Superior Court of ..... County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of $75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, ... dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of $85 for board and lodging furnished to plaintiff and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for $.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for $65 damages, and for the further sum of $3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of $1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause. Dated this 15th day of February, 1904.

G. W. H.....
Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41]

Where the Sum Demanded Exceeds Two Hundred Dollars

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of ..... dollars, costs.

(Date and sign.)

[No. 42]

Where the Title to Real Estate is in Question

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

Answer of Title

(Title as in No. 1)

The defendant answers to the complaint:

1. That no allegation thereof is true.

2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this ..... day of ....., 19....

C. D....., Defendant

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for ..... dollars, costs.

[No. 43]

Tender of Judgment

(Title as in No. 1)

To C. D.....:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this ..... day of ....., 19....

C. D....., Defendant.

[No. 44]

Acceptance of Tender of Judgment

(Title as in No. 1)

To A. B.....:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this ..... day of ....., 19....

A. B....., Plaintiff.

[No. 45]

Form of Judgment on Tender

(Title as in No. 1)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proof and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46]

General Form—Execution

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of ..... County—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D, in favor of A. B., for the sum of.... dollars damages, and the further sum of ..... dollars costs, on the ....day of ....., 19....;

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this ....day of .....,19....

G. W. H.....
Justice of the Peace.

[No. 47]

Execution in Attachment

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of.....county—Greeting:

Whereas, in pursuance of a warrant of attachment, dated the.....day of.....19...., issued by G. W. H., Esq., a justice of the peace of said county, in an action wherein A. B. was plaintiff and C. D. defendant, the following property of defendant was, on the.....day of....., 19 ....., duly levied on and attached.

(Here insert a list of property)

And whereas, judgment was rendered in said action, on the.....day of....., in favor of said plaintiff, and against the said defendant in the sum of.....dollars:

Therefore, we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this.....day of ....., 19....

G. W. H.....
Justice of the Peace

[No. 48]

Record of Conviction of a Contempt

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas on the.....day of....., 19....., while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in.....County, M. B. did willfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used): and whereas when immediately called upon by me to answer for the said contempt said M. B. did not make any defence thereto, nor excuse himself therefrom: the said M. B. is therefor convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H.....
Justice of the Peace

[No. 49]

Warrant of Commitment for a Contempt

(Title as in No. 1)

State of North Carolina, to the keeper of the common jail of .....County—Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefor, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law.

Herein fail not.

Dated this.....day of.....,19....

G. W. H.....
Justice of the Peace.

SUBCHAPTER IV. RECORDERS' COURTS

Art. 18. Municipal Recorders' Courts

§ 1536. In what cities and towns established; court of record.—In each city and town in the state, which has acquired a population of one thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter. (1919, c. 277, ss. 1, 2; 1925, c. 32.)

Constitutionality. — Where the question of the constitutionality of this section establishing recorders' courts by a general act is the subject of the action, and pending the appeal the Legislature has withdrawn the effect or operation of the statute from a certain county (Caldwell) wherein the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. Coffey v. Rader, 182 N. C. 689, 110 S. E. 106.

§ 1537. Recorder's election and qualification; term of office and salary.—The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the muncipality, either at the time of the establishment of the court or within

thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occur in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality; Provided, that the governing body of such city or town is hereby authorized to provide a schedule of fees to be charged by said recorder; Provided further, that the recorder may also be the mayor of the municipality. (1919, c. 277, s. 2; 1925, c. 32, s. 2.)

Editor's Note.—The act of 1925 added the two provisos to the section.

Mandamus to Compel Appointment.—When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of the statute that they elect a recorder in the manner specified therein, a mandamus will issue, in view of the public interests involved. Battle v. Rocky Mount, 156 N. C. 329, 72 S. E. 354.

Constitutional Provisions.—It is held in State v. Bateman, 162 N. C. 588, 77 S. E. 768, that a former requirement that the recorder must be "a licensed attorney at law" is unconstitutional, on the ground that it does not lie within the power of the legislature to add to the constitutional disqualifications to hold office.

§ 1538. Time and place of holding court. — The court shall be opened for the trial of criminal cases at least one day of each week, to be fixed by the governing body of the municipality, and shall continue its session from day to day until all business is legally disposed of. The court shall be held in the city or town hall, or other place provided therefor, and other sessions of the court may be called by the recorder, as necessity may require. (1919, c. 277, s. 3.)

§ 1539. No subsequent change of judgment.— When a case have been finally disposed of and judgment pronounced therein, it shall not thereafter be reopened or the judgment or sentence rendered therein be modified, changed or stricken out by the recorder after the adjournment of the regular weekly term or after the adjournment of any special term called by the recorder. (1919, c. 277, s. 3.)

§ 1540. Procedure in the court.—The recorder shall preside over the court and try and determine all criminal actions coming before him, the jurisdiction of which is conferred by this article, and the proceedings of the court shall be the same as are now prescribed for courts of justices of the peace and for the superior court so far as the same may reasonably apply. (1919, c. 277, s. 9.)

§ 1541. Criminal jurisdiction.—The court shall have the following jurisdiction within the following named territory:

1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which the mayor or other municipal court now has jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of five miles thereof, which is now or may hereafter be given to justices of the peace under the constitution and general laws of the state.

3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of five miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.

4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction.

5. All jurisdiction given by the general laws of the state to justices of the peace, or to the superior court, to punish for contempt, to issue writs ad testificandum, and other process to require the attendance of witnesses and to enforce the orders and judgments of the courts. (1919, c. 277, s. 4; 1925, c. 32, s. 3.)

Editor's Note.—In the second and third provisions of this section, the five mile radius is new with the acts of 1925, heretofore the jurisdictional limits herein mentioned was confined to a radius of two miles of the corporate limits of the municipality.

§ 1542. Jurisdiction to recover penalties.—The recorder's court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within five miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality. (1919, c. 277, s. 10; 1925, c. 32, s. 4.)

Editor's Note.—The acts of 1925 extended the radius to five miles of the corporate limits, while under the statute as it formerly stood, the limits was two miles outside the corporate limits.

§ 1543. Disposition of cases when jurisdiction not final. — In all cases heard by the recorder against any person for any offense whereof the court has not final jurisdiction and in which probable cause of guilt is found, such person shall be bound in a bond or recognizance with sufficient surety to appear at the next succeeding term of the superior court of the county for the trial of criminal cases and in default of such bond or recognizance he shall be committed to the common jail of the county to await trial; but in capital cases such person shall be committed to the common jail of the county without bail. (1919, c. 5.)

§ 1544. Disposition of cases when jurisdiction final.—All persons pleading guilty or convicted in the court of any offense of which the court has final jurisdiction shall be fined or imprisoned, according to law, and any person entering a plea of guilty, or who may be convicted of any such offense, shall also pay the costs of the prosecution. (1919, c. 277, s. 7.)

§ 1545. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, and assign him to work on the public roads of the county as provided by law; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or state reformatory, or other penal institution provided by law for such purposes. If there is no chain-gang in the county in which the court is held, the recorder may sentence the person to work upon the public roads of any other county provided with a chain-gang for the working of public roads, as authorized by the general laws of the state. (1919, c. 277, s. 8.)

§ 1546. Appeal to superior court. —Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9.)

§ 1547. Costs paid to the municipality.—All cost incurred in issuing warrants and serving the same in cases where the recorder has not final jurisdiction, and for the service of process arising in such case when the process is served by the officer of the municipality, except as hereinafter provided, shall be paid to the municipality; and officers serving process issued from said court shall be allowed the same fees as are now allowed sheriffs in like cases, the same, when collected, to be paid over as herein provided. Where such officer is not an officer of a municipality such costs shall be dealt with as is now provided by law. (1919, c. 277, s. 6.)

§ 1548. Seal of court.—The recorder's court shall have a seal with the impression, "The Recorder's Court of the City of ————," which seal shall be used in the attestation of writs, warrants, or other process, acts, judgments, or decrees of the court, in the same manner and to the same effect as the seal of other courts in the state; but no process issuing from the court, to be executed within the county in which court is held, shall require attestation by seal. (1919, c. 277, s. 11.)

§ 1549. Issuance and service of process.—The recorder may issue process to the chief of police of the municipality in which the court is held, or to the sheriff, constable, or other lawful officer of the county in which the municipality is located, or to any other county in the state; and such process, when attested by the seal of the court, shall run anywhere in the state, and shall be executed by all public officers authorized to execute process, and be returned by them according to law.

The summons, warrant of arrest, and every other writ, process, or precept issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy. (1919, c. 277, s. 12; 1919, c. 157.)

§ 1550. Vice recorder; election and duties.—The governing body of the municipality shall, at the same time and in the same manner as is provided herein for the election of the first recorder, elect a vice recorder, who shall have the jurisdiction and authority conferred upon the recorder when the recorder shall be prevented from attending to his duties on account of sickness or other temporary disability or by reason of his temporary absence. The vice recorder shall receive the compensation allowed to the recorder for such services for the time that he may render such service, the compensation of the vice recorder to be deducted from the salary of the recorder, and the vice recorder shall be thereafter elected by the governing body of the municipality for the same term as the recorder is elected, and any vacancy occurring in the office of vice recorder shall be filled in the same manner as is provided for the filling of vacancies in the office of recorder. (1919, c. 277, s. 13.)

§ 1551. Clerk of court; election and duties; removal; fees.—The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the state, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall ex officio discharge the duties of the clerk of the court, unless the governing body shall elect some other person to discharge the duties. The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore provided. Provided, that the governing body of

the municipality is hereby authorized to provide a schedule of fees to be charged by the clerk of said court. (1919, c. 277, ss. 15, 18; 1925, c. 32, s. 5.)

Editor's Note.—The last provision of this section is new with the Acts of 1925.

§ 1552. Clerk to keep records.—It shall be the duty of the clerk of the court to keep an accurate and true record of all costs, fines, penalties, forfeitures, and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing of the trial, and the punishment imposed, which record shall at all times be open to inspection by any of the city authorities, or other person having business relating to the court. The clerk shall keep a permanent docket for recording all the processes issued by the court, which shall conform to the dockets kept by the clerk of the superior court. He shall also keep in proper files, to be provided by the city, a record of all cases which shall be disposed of in the court and the disposition made thereof. (1919, c. 277, s. 17.)

§ 1553. Clerk to issue process.—The clerk of the court shall have all the power and authority now conferred upon justices of the peace to issue warrants for the arrest of all persons charged with the commission of offenses within the territory hereinbefore fixed, which warrants, however, shall be made returnable before the recorder of said court at the next sitting thereof, and shall be issued only upon affidavit made as now required by law to support warrants issued by justices of the peace. The clerk shall also have all power and authority of justices of the peace or clerk of the superior court to issue subpœnas or other process, to run anywhere within the state; and when such subpœnas or other process shall run beyond the county in which the court is located the same shall be attested by the seal of the court, and shall also be signed by the recorder. (1919, c. 277, s. 18.)

§ 1554. Prosecuting attorney; duties and salary.—There shall be a prosecuting attorney in the court, who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality: Provided, that the governing body of any such municipality is hereby authorized to provide a schedule of fees to be charged by said prosecuting attorney. (1919, c. 277, s. 16; 1925, c. 32, s. 6.)

Editor's Note.—The last provision of this section is new with the Acts of 1925.

§ 1555. Jury trial, as in justice's court.—In all trials in the court, upon demand for a jury by the defendant or the prosecuting attorney representing the state, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply: Provided, however, that the compensation allowed jurors in all cases wherein the superior court has heretofore had final jurisdiction shall be the same as is allowed jurors in the superior court of the county in which the recorder's court is established. (1919, c. 277, s. 24.)

Editorial Note.—Public Laws 1929, c. 115, s. 1, provides that this section shall not apply to the county court of Craven County.

§ 1556. Continuances, recognizances, and transcripts.—The recorder's court shall have the same authority to grant continuances, take bonds and recognizances, and render judgments on forfeited bonds and recognizances, as is now vested by law in the superior courts, and the procedure regulating the issuing and service of notices against defendants and their sureties upon bonds and recognizances, and all other proceedings by taking and enforcing judgments in such cases, shall be the same as in the superior court in like cases. Transcripts of any judgments rendered may be docketed in the superior court of the county in which such court is held, in the same manner and with the same effect as judgments of other courts docketed as provided by law. (1919, c. 277, s. 21.)

§ 1557. Officers' fees; fines and penalties paid.—In each case disposed of by the recorder where the defendant is convicted or pleads guilty, there shall, in addition to other lawful costs, be allowed the following fees, to be taxed as a part of the costs against the defendant, viz: For recorder, one dollar in each case involving the breach of a municipal ordinance and any crime or offense of which a justice of the peace has final jurisdiction, and a fee of two dollars in all other cases; for the prosecuting attorney, one dollar in all cases of violation of municipal ordinances, and of any crime or offense of which a justice of the peace has final jurisdiction, and in all other cases a fee as now provided by law for solicitors prosecuting in the superior court; and for the clerk of such court the same fees as are now allowed to clerks of the superior court in similar cases; but in all cases of the breach of municipal ordinances and cases of which a justice of the peace has final jurisdiction and in which the defendant pleads guilty, the fee herein allowed a prosecuting attorney may be remitted by the recorder in his discretion. All costs recovered and collected in the court, except as herein otherwise provided, shall belong to the municipality and be paid into the treasury thereof. All fines and penalties collected shall be paid by the clerk of the court to the county treasurer as provided by law, and all fees allowed by law for an arrest or serving other process in a criminal action, when the same shall have been made by the chief of police or other officer who shall be on a salary, shall be paid over to the treasurer of the municipality for the use of the same, and to reimburse it for the expense of maintaining and supporting the court. (1919, c. 277, s. 14.)

§ 1558. County to pay for offenders' work on roads.—Whenever, under any judgment of the

court, any defendant is sentenced to work upon the public roads or other public work in the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon the public roads or other public works, as aforesaid, then the county shall be liable for and shall pay to the treasurer of the municipality one-half the amount of the costs taxed in the cause: Provided, the sentence imposed shall be of sufficient length to reimburse the county for one-half of such costs. (1919, c. 277, s. 19.)

§ 1559. Prosecutor may be taxed with costs.—The recorder shall have full power, in any case in which he shall adjudge that the prosecution was not required by the public interests, to tax the prosecutor with the costs of such action; and in the event the recorder shall adjudge that prosecution is frivolous or malicious, he may imprison the prosecutor for the nonpayment of such costs, as provided by law for similar cases in other courts. When the costs are paid, they shall belong to the city. (1919, c. 277, s. 20.)

§ 1560. Justice of the peace to bind defendants to recorder's court; procedure thereon.—In case any justice of the peace residing within the territory above mentioned shall bind any person over for any offense committed within said territory, of which the justice has committing, but not final, jurisdiction, but of which the recorder's court has final jurisdiction, then such justice of the peace, instead of binding the defendant over to the superior court of the county, shall bind him to appear at the recorder's court on the day succeeding the trial before the justice, at ten o'clock a. m. The justice of the peace shall at once turn over the case to the clerk of said court, and the clerk shall, upon receipt of the same, enter the case upon the docket of the court, and the recorder shall try such person either upon the original warrant under which he was bound over or upon a new warrant to be issued by him for such offense. In all cases the recorder shall have the right to amend any warrant issued by him or by the clerk of the court, or sent up by any justice of the peace as hereinbefore provided, in the same manner and to the same extent as justices of the peace are now authorized by law to make amendments to warrants in justices' courts. (1919, c. 277, s. 22.)

§ 1561. Transfer of certain cases to recorder's court.—All cases which shall be pending in any recorder's, police, mayor's, or other municipal court in the counties where the courts herein provided for shall be established shall, after the election and qualification of recorder and other officers authorized and required by this article, be transferred to the recorders' courts of the respective municipalities, to be tried in the manner and in accordance with the procedure provided; but no case pending in the superior court of any county at the time this article takes effect shall be transferred to the recorder's court, except by order of the presiding judge thereof. No cause shall be removed from the recorder's court as is now provided for the removal of cases from one justice of the peace to another. (1919, c. 277, s. 23.)

§ 1562. Jurisdiction of justice of the peace after three months delay.—If any criminal offense committed within the jurisdiction of any recorder's court of which said court is given original, exclusive and final jurisdiction, is not prosecuted to a final termination within three months after the commission of the offense, any justice of the peace within the territory shall acquire jurisdiction to issue his warrant, apprehend the offender, and dispose of such warrant as is now provided by law. (1919, c. 277, s. 23.)

§ 1562(a). Extension of jurisdiction.—In any city or town within the state of North Carolina, having a population of five thousand inhabitants or more, where there is now maintained a recorder's court under and by virtue of the law, or in which a recorder's court may be hereafter established and maintained, it shall be lawful for the governing body of any such city or town, and the board of county commissioners of the county in which such city or town shall be located, to extend the jurisdiction of the recorder's court in such city or town to the township in which such city or town is located, in the manner described in the following sections. (1921, c. 216, s. 1.)

§ 1562(b). Meeting of town and county authorities; election. — Whenever the governing body of any city or town, as described in the foregoing section, and the board of county commissioners of the county in which the same shall be located, shall desire to extend the jurisdiction of the recorder's court in such city or town to include the whole township, as set forth in the foregoing section, the mayor of such city or town and the chairman of such board of county commissioners shall call a joint meeting of the two boards, to be held at any place within such township as they may agree upon, and if a majority of each of such boards, at such meeting, shall by a joint resolution vote in favor of the extension of the jurisdiction of the recorder's court as herein described, then at such joint meeting the governing body of the town or city, and the board of county commissioners of the county, shall pass a joint resolution calling an election, submitting to the voters of the entire township the question of the extension of said municipal court, and that election shall be conducted by the county commissioners as in the case of county recorder's courts; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the town or city; that the form of the ballot shall be "For extension of municipal court," and "Against municipal court," and if by such election such resolution is adopted it shall have the effect of conferring upon the recorder's court in such city or town the same powers, authority, and jurisdiction as to offenses or crimes committed within the township in which such city or town is located as such court would have had if the same had been committed in such city or town: Provided, however, that the extension of the jurisdiction of such recorder's court as herein described shall not have the effect of in any way

extending or affecting in any manner whatsoever any ordinance or other law pertaining exclusively to such city or town. (1921, c. 216, s. 2.)

§ 1562(c). Police powers.—Whenever the jurisdiction of any recorder's court shall have been extended as described in this law, such action shall thereupon confer upon the police officers of such city or town the same powers and authority in making arrests for crimes and offenses committed anywhere within the township in which such city or town the same powers and authority may hereafter be conferred upon sheriffs or their deputies within their respective counties. (1921, c. 216, s. 3.)

§ 1562(d). Resolution for extension filed with each board as records.—Whenever the governing board of any city or town and the county commissioners of the county shall have adopted the resolution extending the jurisdiction of the recorder's court as described in this law, a copy of such resolution duly signed by the mayor and clerk of such city or town, and the chairman and clerk of such board of county commissioners, shall be duly filed with each board, and shall be kept and maintained as a part of their official records. (1921, c. 216, s. 4.)

§ 1562(e). Jurisdiction not to extend to other municipalities.—No court hereafter established by the governing body of any city or town shall have jurisdiction over the territory within the corporate limits of any other incorporated city or town, or outside the county in which the city or town establishing such court is located: Provided, that this act shall not apply to the counties of Robeson, Craven, Nash and Edgecombe. (1925, c. 280.)

Art. 19. County Recorders' Courts

§ 1563. Established by county commissioners.— In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county-seat, the board of commissioners may, in their discretion, establish a recorder's court for the entire county, which shall be a court of record and shall be held at the county-seat. (1919, c. 277, s. 25; 1921, c. 110, s. 1.)

Stated in State v. Norris, 206 N. C. 191, 195, 173 S. E. 14.

§ 1564. Recorder's election, qualification, and term of office. — The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be fixed in advance by the board of commissioners, and paid out of the county funds upon vouchers, and shall not be increased or decreased during his term. [Provided, that the county commissioners of any county wherein has been established, or shall be established, a county recorder's court may provide for the compensation of the judge or solicitor of the said court by salary or fees; and in case the said officers are compensated by fees, the same fees fixed by law for services in like cases in the Superior Court shall be paid; and in the case of solicitors those fees which were in force for services in like cases at the time that the solicitors were put upon a salary basis: Provided, that no change be made in the manner of compensating said officers during their term of office. But the part of this section in brackets shall apply to Scotland county only.] (1919, c. 277, s. 25; 1925, c. 171.)

Editor's Note.—The last two provisions of this section are new with the acts of 1925.

§ 1565. Time and place for holding court. — The court shall be open for the trial of all criminal causes of which it has jurisdiction at least one day of each week, to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance, or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of commissioners for that purpose. Special sessions of the court may be called by the recorder as the necessities may require. (1919, c. 277, s. 26.)

§ 1566. No subsequent change of judgment. — When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the regular weekly term of court or after the adjournment of any special term of court by the recorder. (1919, c. 277, s. 26.)

§ 1567. Criminal jurisdiction.—The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendments to the constitution in reference thereto,

then the county recorder's court, as herein established, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere with or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject-matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1919, c. 277, s. 27.)

§ 1568. Jurisdiction and powers as in municipal court.—The recorders of county courts herein provided for shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specifically in this section set forth, in so far as such jurisdiction and authority are applicable to such courts, and the provisions of this subchapter relative to municipal recorders' courts shall in all things apply to the county recorders' courts where same are not inconsistent and in so far as same are practically applicable: Provided, this section shall not take away the jurisdiction of a mayor to try breaches of ordinance when such city has no other municipal court. (1919, c. 277, s. 34.)

§ 1569. Removal of cases from justices' courts.—When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the recorder's court of the county. (1919, c. 277, s. 28; 1921, c. 110, s. 3.)

Editor's Note.—Prior to Public Laws of 1921 this section read "upon affidavit, etc.," instead of "upon written request, etc.," as it now stands.

Public Laws 1933, c. 277, makes the removal mandatory but applies only in Mecklenburg County.

§ 1570. Defendants bound by justice to recorder's court.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the recorder's court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the recorder's court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the county recorder's court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the recorder's court, and the case shall then stand for trial at the next succeeding term of said recorder's court as if the defendant had been bound over to the recorder's court in the first instance: and Provided further, that in the event any justice of the peace or other committing magistrate shall bind over to the recorder's court any person charged with an offense beyond the jurisdiction of said court, the said recorder shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1919, c. 277, s. 29; 1921, c. 110, s. 4.)

§ 1570(a). Notice to accused of transfer; trial obligation of bond.—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a county recorder's court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring accused person to appear at the next succeeding term of said recorder's court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the recorder's court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said recorder's court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the recorder's court, then the case shall not be tried without the consent of the accused person until the following term of the recorder's court. (1921, c. 110, s. 5.)

§ 1571. Trials upon warrants; by whom warrants issued. — All trials of criminal causes in said court shall be upon warrant issued by the clerk of the superior court or deputy clerk herein provided for or by the recorder or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the recorder shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1919, c. 277, s. 30; 1921, c. 110, s. 6.)

§ 1572. Jury trial as in municipal court.—In all trials in county recorders' courts, upon demand for a jury by the defendant or the prosecuting attorney representing the state, a jury shall be had in the same manner and under the same provisions as are set forth in this subchapter in reference to municipal courts, so far as the same may be practically applicable to a county court: Provided, that this section shall not apply to Henderson County. (1919, c. 277, s. 40; 1933, c. 316.)

Editor's Note.—Public Laws 1929, c. 115, s. 1 provides that this section shall not apply to the county court of Craven County. Public Laws 1929 c. 25, applicable only to Perquimans County provides that this section be amended by adding at the end the following: "Provided, however, that in all cases wherein the Superior Court has heretofore had final jurisdiction, the Recorder may, upon his own motion, transfer the case for trial to the Superior Court of the County."

Public Laws of 1933, c. 316, added the proviso exempting Henderson county from the operation of the section and providing for jury trials in said county. See § 1572(b).

§ 1572(a). Demand for jury trial in Recorder's Court in Craven county.—In all trials in the Recorder's Court for Craven County, upon de-

mand for a jury by the defendant or the Prosecuting Attorney representing the State, the Recorder shall transfer said trial to the Superior Court of Craven County, and the defendant shall execute a new bond in such amount as named by the Recorder for his appearance at the next term of the Superior Court for Craven County. If a jury trial is demanded by either plaintiff or defendant in a civil action pending in the Recorder's Court of Craven County, the Recorder of such court shall immediately transfer said case to the Superior Court of Craven County. (1929, c. 115, ss. 2, 3.)

This section amends the law in regard to the recorder's court of Craven County and provides, inter alia, that upon demand being made for a jury trial in the recorder's court of said county, the cause shall be transferred to the Superior Court of Craven County, to the end that it may there be heard before a jury. State v. Rooks, 207 N. C. 275, 176 S. E. 752.

§ 1572(b). Jury trials in Henderson County recorder's court.—Jury trials may be had in the county court of Henderson County upon demand of any defendant and upon depositing the sum of six ($6.00) dollars to cover jury fees; and the jury shall consist of six men who shall receive one ($1.00) dollar each for their services in each case. Upon demand of any defendant for a jury trial, and depositing the sum required, the jury shall be summoned in the same manner as provided by juries in the courts of justices of the peace. (1933, c. 316, s. 2.)

§ 1573. Sentence imposed; fines and costs paid.—Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the recorder may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads of the county where provision has been made therefor; but if no provision has been made for working convicts upon the public roads in the county, then the recorder may sentence such person to be worked upon the public roads of any other county within the judicial district or any county within any adjoining judical district which has made such provision: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof on the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; 1925, c. 308.)

Editor's Note.—With the Acts of 1925 the convict may be worked in any county within any adjoining judicial district.

§ 1574. Appeals to superior court.—Any person convicted of any offense of which the county recorder has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the recorder for any offense of which the court has not final jurisdiction shall, upon the recorder's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1919, c. 277, s. 33.)

§ 1575. Clerk of superior court ex officio clerk of county recorder's court.—The clerk of the superior court of any county in which a county recorder's court shall be established shall be ex officio clerk of such court. Provided that the clerk of the Superior Court of Columbus county shall be paid a salary of twenty-five dollars per month for his services as clerk of Columbus County recorder's court. He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto. Whenever the clerk of the Superior Court acts ex-officio as clerk of the Recorder's Court or General County Court, any assistant clerk or deputy clerk of the Superior Court in his office shall have power and authority to take affidavits, issue warrants and other process, administer oaths to witnesses and to perform any other duty in connection with said court under the direction of the clerk of the Superior Court, and for the acts of said assistant or deputy clerk, the clerk of the Superior Court shall be liable on his official bond to the same extent that he would have been liable if he had done the act himself. (1919, c. 277, s. 36; 1925, c. 232; 1935, c. 345.)

Editor's Note.—The last sentence in above section was added by Public Laws 1935, chapter 345, which provides: "This act shall not apply to Recorder's Courts in Bladen, Brunswick, Camden, Gates, Halifax, Martin, Moore, Orange, Perquimans, Forsyth and Vance Counties."

§ 1576. Deputy Clerk may be appointed. — Instead of having the clerk of the Superior Court to act ex-officio as clerk of the Recorder's Court or General County Court, the board of commissioners of any county wherein a county Recorder's Court or General County Court may be established may, at the time of the establishment of said court or at the time of fixing the county budget for any succeeding year, call upon the clerk of the Superior Court to appoint a special deputy to act as clerk of the Recorder's Court or General County Court, and the clerk of the Superior Court shall within sixty days thereafter appoint a special deputy to act as clerk of the Recorder's Court or General County Court, unless the time for good cause shall be extended by the Board of County Commissioners. Said special deputy clerk shall assist the clerk of the Superior Court with the duties of his office and shall have all the power and authority in reference to the county Recorder's Court or General County Court conferred upon the clerk of the Superior Court by the preceding section, and he shall do all things in reference to said Recorder's Court or General County Court under the direction of the clerk of the Superior

Court of the county as fully as the clerk of the Superior Court would otherwise be authorized to do. The Board of Commissioners may require and fix the official bond of said special deputy clerk for the faithful performance of his duties and fix his salary, which shall be fixed before he enters upon his duties and shall not be lowered during his term of office. His term of office shall be for the same time as the term of the recorder of said court, unless he shall be sooner removed by the clerk of the Superior Court for cause, and shall cease at any time that the court itself shall cease to exist. (1919, c. 277, s. 36; 1935, c. 346.)

Editor's Note.—The amendment of 1935 changed this section in such a manner that a comparison is necessary in order to determine its effect. Section 2 of the amendatory act provides: "That this act shall not apply to Bladen, Brunswick, Camden, Gates, Guilford, Halifax, Lee, Martin, Moore, Orange, Perquimans, Forsyth and Vance Counties."

§ 1577. Compensation of clerk when no deputy appointed.—When no deputy clerk is appointed or elected by the board of commissioners, they are authorized to pay annually to the clerk of superior court an amount fixed by the board, which shall be in addition to any salary or fees theretofore allowed by law to the clerk of superior court, and which shall be in compensation for the services rendered by him as clerk of the county recorder's court. Such compensation shall be paid to the clerk of superior court so long as he shall perform the duties of clerk ex officio of the county recorder's court. (1919, c. 277, s. 36.)

§ 1578. Deputy clerk to take oath of office.—If any deputy clerk shall be appointed as provided in this article he shall take the oath required of deputy clerks under the general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article, both of which oaths shall be recorded in the office of the clerk of the superior court, and such deputy clerk is further authorized to perform all duties of deputy clerk under the general law in addition to the duties set forth in this article. (1919, c. 277, s. 38.)

§ 1579. Prosecuting attorney may be elected.—The board of commissioners of any county availing itself of the provisions of this article may elect, at the same time, in the same manner, and for the same term as herein provided for the election of a deputy clerk, a prosecuting attorney for said court, and fix his compensation in such amount as they may deem suitable for the services to be rendered: Provided, that the board may require the county attorney to discharge the duties of prosecuting attorney in said court, and fix his compensation accordingly. (1919, c. 277, s. 38.)

Editor's Note.—Public Laws 1929, c. 112, applicable only to Montgomery County amended this section by adding at the end the following: "Such Prosecuting Attorney when requested by the Solicitor of the District may assist the Solicitor of the District in preparing and prosecuting the criminal cases going up on appeal from such Recorders' Courts to the Superior Court."

§ 1580. Fees for issuing and serving process.—All justices of the peace, constable and sheriffs issuing or serving warrants or other process returnable to the recorder's court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1919, c. 277, s. 31.)

§ 1581. Costs and fees taxed as in municipal court.—There shall be taxed in the county recorder's court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1919, c. 277, s. 39.)

§ 1582. Courts may be discontinued after two years. — The board of commissioners of any county which has established a county recorder's court under the provisions of this article are authorized, after two years trial of the court, to discontinue the same at any time thereafter if in their judgment the public interest shall require it. If any such court shall be so discontinued, the action or resolution must be taken or adopted at least six months prior to the next general election, and shall not go into effect until the term of office of the recorder shall expire. The governing body of any municipality shall have the same power, to be exercised in the same manner, subject to the same limitations, to abolish municipal recorders' courts. (1919, c. 277, s. 35.)

§ 1582(a). Abolition of Cherokee county court.—The recorder's court for Cherokee county is hereby abolished. (1923, c. 40, s. 2.)

§ 1582(b). Subchapter applies to Henderson county.—The county of Henderson shall come under and be subject to the provisions of this subchapter: Provided, however, that no recorder's court for the County of Henderson shall be established unless and until the same shall be established upon an election held in said county under the provisions of article twenty-three of this subchapter, which election shall not be held at the same time as any general election in said county or in the town of Hendersonville, and provided further that no new registration shall be ordered for said election. (1927, c. 103.)

§ 1582(c). Burke County; transfer of criminal action to superior court upon demand for jury trial.—In all trials of criminal actions in the Recorder's Court for Burke County, upon demand for a trial by jury by the defendant or the Solicitor representing the State, the recorder shall transfer said trial to the superior court of Burke County, and the defendant shall execute a new bond in such amount as named by the recorder for his appearance at the next term of the superior court for Burke County held for the trial of criminal cases. (1931, c. 335, s. 2.)

Art. 20. Municipal-County Courts

§ 1583. Established for entire county. — The governing body of any municipality possessing a population of two thousand or over, as hereinbefore provided, in which the county courthouse is located, and the board of commissioners of the county, shall have the power, at a joint meeting of the two bodies, by joint resolution, in the manner hereinafter provided, to establish a recorder's court so as to include the entire county, outside

of other municipalities therein possessing a population of two thousand or over. After the adoption of such joint resolution such municipal recorder's court shall possess all the powers and functions and exercise all the territorial jurisdiction in this subchapter conferred upon both municipal and county recorder's court under the procedure herein provided for, and subject to the provisions herein in reference to concurrent jurisdiction where a special or recorder's court exists under prior special acts in any portion of the county. (1919, c. 277, s. 41.)

§ 1584. Election of recorder.—If the territorial jurisdiction of such municipal recorder's court is extended to the entire county, as set forth in the preceding section, then the first recorder [and the first solicitor] shall be selected for the term and in the manner hereinbefore set forth, by a joint meeting of the governing body of such municipality and the board of commissioners of the county, and such recorder [and such solicitor] shall be thereafter nominated and elected as is provided for herein for the nomination and election of a county recorder. Such recorder shall be a resident of the municipality, and in all other respects the court shall be conducted under the proceedings herein provided for municipal courts [except as hereinafter provided for; provided that the words of this section in brackets shall apply to Lenoir, Onslow and Sampson counties only]. (1919, c. 277, s. 42; 1925, c. 233, s. 1.)

§ 1585. Mayor's jurisdiction continued, when. —In case the jurisdiction of the recorder's court of any municipality in any county shall not be extended in the manner authorized in this article, and no county recorder's court shall be established therein, then the mayors of the various cities and towns in such county shall continue to have all the powers and functions and exercise all the jurisdiction now conferred upon such officials by the general law for municipal corporations. (1919, c. 277, s. 43.)

§ 1585(a). Establishment of municipal county courts in certain counties. — The establishment of the municipal county court herein provided for under this article shall be effected by a joint resolution of the said board of commissioners and the governing body of any such municipality wherein there shall be a concurrent majority voting in favor of such resolution of both said bodies, and such resolution shall be recorded in the minutes of each of the said bodies and shall be in form substantially providing that there shall be established a municipal county court under the provisions of article twenty of chapter twenty-seven of Consolidated Statutes of North Carolina, from and after the date to be named therein, and that no further procedure shall be necessary, nor shall any election be necessary prior to the establishment of such court, but same shall be established and continue to exist under the provisions of this article from and after the passage of such joint resolution in accordance with the terms herein provided for. That such municipal county court may be abolished after it has been in existence for two years, either by a joint resolution of the county board of commissioners and the governing body of such municipality, or at the unanimous request of either such body. (1925, c. 233, s. 2.)

§ 1585(b). Jurisdiction conferred. — The governing body of any such municipality and the board of county commissioners shall, by joint resolution and by a concurrent majority of each board, have the power to confer upon such municipal county court jurisdiction to try and determine civil actions, to the same extent and by the same procedure and practice as is fully set out and contained in article twenty-two of chapter twenty-seven of Consolidated Statutes of North Carolina, and each section contained in said article twenty-two shall be in all respects applicable to the civil jurisdiction of such municipal county courts as fully as if each said section were here written word for word: Provided, however, that the conditions set forth in section one thousand five hundred eighty-nine of article twenty-two, providing that the city or town shall have a population of not less than ten thousand (10,000) shall not apply to the establishment of municipal county courts herein provided for. (1925, c. 233, s. 3.)

§ 1585(c). Salaries of officers; costs; to what counties applicable. — The board of county commissioners and the governing body of any such municipality shall, by joint resolution wherein there shall be a concurrent majorty of each said board voting in favor of such resolution, provide for the salaries of all officers of such municipal county courts who under the law are entitled to receive salaries, and shall fix the amount of each such salary in advance of the entry of such officers upon their duties, and that such salaries shall not be reduced during the term to which said officers are selected or elected, and the proportionate portion of such salaries to be paid by such municipality and by such county shall be fixed and determined by such joint resolution. That all resolutions provided for hereunder shall be recorded in the minutes of each such body as is hereinbefore set forth. That all costs collected in criminal causes arising within such municipalities, of which the said court has original, exclusive and concurrent jurisdiction as set forth in section one thousand five hundred forty-one of Consolidated Statutes, shall be paid into the treasury of such municipality, and all other costs shall be paid into the treasury of the county to be dealt with as is provided by law. This section and the two preceding shall apply only to Lenoir, Onslow and Sampson counties. (1925, c. 233, s. 4.)

§ 1585(d). Election of clerk.—The governing body of any municipality and the board of commissioners of any county wherein a municipal county court shall be established and ordained under the terms the three preceding sections shall by joint resolution and by a concurrent majority of each board elect a clerk of such court and shall in like manner fill any vacancy in the office of such clerk, and such office of clerk of said court shall be entirely separate and apart from the office of the clerk of the Superior Court in such county and such clerk of the Superior Court of any such county shall be liable to none of the duties, and responsible for none of the penalties attached to such office. Before entering upon the duties of his office, the clerk of such municipal county court

shall enter into a bond with sufficient sureties in a sum to be fixed by the joint action of the governing body of any such municipality, and the commissioners of any such county affected, not to exceed five thousand dollars payable to the State, conditioned upon the true and faithful performance of his duties as such clerk, and the faithful accounting and paying over all moneys which shall come into his hands by virtue of said office. Such bond shall be approved by said joint action of the governing body of such municipality, and the board of commissioners of such county affected, and shall be filed with the clerk of the Superior Court of such county. The clerk shall make monthly settlements with the county and city treasurers for all moneys which come into his hands belonging to either. The governing body of any such municipality and the board of commissioners shall have the full power, right and authority to remove such clerk either for incapacity, malfeasance, or neglect of the duties of his office, by joint resolution and by concurrent majority of each board. Both the first clerk of any such court, and every succeeding clerk shall be elected by the method herein provided for, and every such clerk so elected shall hold his office for the same term as the office of the recorder is held, or until his successor shall have been elected and qualified. (1927, c. 170, s. 1.)

§ 1585(e). Duties of clerk.—The duties of such clerk shall be in all respects as are contained and set out as the duties of a clerk of a municipal recorders' court in article eighteen, chapter twenty-seven, Consolidated Statutes of North Carolina, save and except that such duties as are contained in said article in said chapter shall be rendered to and made applicable to such municipal county court. The two preceding sections shall apply only to Lenoir, Onslow and Sampson Counties. (1927, c. 170, s. 102.)

Art. 21. Provisions Applicable to All Recorders' Courts

§ 1586. Offenders may be sentenced to city chain-gang. — In case any municipality possessing a population of two thousand or over, as provided for herein, in which a recorder's court shall be established pursuant to the provisions of this subchapter, shall now or hereafter establish and maintain a city chain-gang, or workhouse or other penal institutions for the imprisonment and working of city prisoners, any recorder may sentence any person convicted of any offense committed within said municipality and punishable by imprisonment, to be imprisoned and worked on such city chain-gang, or in such workhouse or other penal institutions, for such time as the recorder may in his discretion determine in accordance with the law. (1919, c. 277, s. 44.)

§ 1587. Recorders' courts substituted for other special courts. — Whenever there has been established in any county, city, or town a recorder's court or other special court, which, under the provisions of this subchapter, might have been established hereunder, whether it shall possess exactly the same jurisdiction and functions or not, the board of commissioners of the county or the governing body of such city or town, or the governing body of such city or town and the board of commissioners of the county acting jointly, may abolish such existing court and adopt any one of the courts herein provided for by appropriate resolution of such boards. (1919, c. 277, s. 45.)

§ 1588. Reports to attorney-general. — The recorder or clerk of any court authorized to be adopted by this subchapter shall make reports to the attorney-general of all criminal actions disposed of by such court in the same manner and to the same extent as is now required by law of the clerks of the superior courts of this state. (1919, c. 277, s. 46.)

Art. 22. Civil Jurisdiction of Recorders' Courts

§ 1589. Civil jurisdiction may be conferred.— The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand inhabitants, in which there has been established a recorder's court, under the provisions of this subchapter, or in which there is a recorder's court established by law, may confer upon such recorder's court jurisdiction to try and determine civil actions, as hereinafter provided, wherein the party plaintiff or defendant is a resident of such county, or is doing business in the county. Such jurisdiction may be conferred by resolution by the board of county commissioners of any county, entered upon their minutes, and the board of county commissioners of any county may likewise confer civil jurisdiction on the county recorder's court to try and determine civil actions as hereinafter provided wherein one or more of the parties, plaintiff or defendant, is a resident of said county or is doing business therein. (1919, c. 277, s. 47; 1921, c. 110, s. 7; 1933, c. 166.)

Editor's Note.—Prior to the Amendment of 1933, Public Laws 1933, c. 166, this section applied in cities or towns of not less than 10,000 "nor more than 25,000" inhabitants. The quoted clause was omitted by the amendment. For act applicable in Carteret County only, see P. L. 1933, c. 379.

§ 1590. Extent of jurisdiction.—The jurisdiction of such municipal and county recorders' courts in civil actions shall be as follows: (a) Jurisdiction concurrent with that of the justices of the peace within the county; (b) jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars; (c) jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and costs does not exceed the sum of five hundred dollars. (1919, c. 277, s. 48; 1921, c. 110, s. 8.)

Editor's Note.—Public Laws 1933, c. 174 increased the jurisdictional amounts here specified from one to three thousand and from five hundred to two thousand dollars respectively, but the act applies only in Mecklenburg county.

For act applicable in Carteret County only, see P. L. 1933, c. 379.

§ 1591. Procedure in civil actions.—The rules of practice, issuing and serving process, and filing pleadings shall conform, as near as may be, to the practice in the superior court: Provided, it shall not be necessary to file written pleadings in any action of which justices of the peace now have jurisdiction. The process

shall be returnable directly to the court; and no civil process shall be issued by any recorder's court to any county other than that in which the court is located. (1919, c. 277, s. 56; 1921, c. 110, s. 9.)

Editor's Note.—Prior to the amendment in 1921, it was necessary to file written pleadings in an action of which the justice of the peace had jurisdiction.

For act applicable in Carteret County only, see P. L. 1933, c. 379.

§ 1592. Trial by jury in civil actions.—In all civil actions the parties shall be deemed to have waived a trial by jury unless demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of five dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. (1919, c. 277, s. 49; 1921, c. 110, s. 10.)

Editor's Note.—The amendment in 1921 changed the amount of the deposit from three to five dollars.

Public Laws 1929, c. 115, s. 1 provides that this and the following three sections shall not apply to the county court of Craven County.

§ 1593. Jurors drawn and summoned.—If a trial by jury is demanded, the recorder shall continue the cause until a day to be set, and the recorder, together with the attorneys for all parties, shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen, observing as nearly as may be the rule for drawing a jury for the superior court. The recorder shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. (1919, c. 277, s. 50.)

See note under preceding section.

§ 1594. Talesmen and challenges.—The recorder shall have the right to call in bystanders according to the practice in the superior court as nearly as the same is applicable, and each party shall have the same causes of challenge as in the superior court. (1919, c. 277, s. 51.)

See note under § 1592.

§ 1595. Jury as in superior court.—The jury shall be a jury of twelve, and the trial shall be conducted as nearly as possible as in the superior court. (1919, c. 277, s. 52.)

See note under § 1592.

§ 1596. Appeals to superior court.—Appeals may be taken from the recorder's court to the superior court of the county in term time, for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the supreme court, with the exception that the record may be typewritten instead of printed, and only one copy thereof shall be required. The time for taking and perfecting appeals shall be counted from the end of the term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder's court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the supreme court: Provided, that appeals from a county recorder's court to the superior court of the said county shall be tried de novo in the superior court. (1919, c. 277, ss. 53, 54; 1921, c. 110, s. 11.)

Editor's Note.—The last provision contained in this section is new with the Acts of 1921.

§ 1597. Appeals from justices of the peace.—In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court. (1919, c. 277, s. 54½.)

One of the objects of this and related sections was to relieve the congested dockets of the Superior Court. State v. Baldwin, 205 N. C. 174, 175, 170 S. E. 645.

Under the general provisions of this section, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act. Id.

§ 1598. Enforcement of judgments.—Orders to stay execution shall be the same as in appeals from the superior court to the supreme court. Judgments of the recorder's court may be enforced by executions issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court, as now provided for judgments of justices of the peace; and the judgment, when docketed, shall in all respects be a judgment of the superior court as if rendered by such court, and shall be subject to the same statute of limitations and the statutes relating to revival of executions: Provided, that a judgment of the recorder's court shall not be a lien upon real estate until docketed in the superior court. (1919, c. 277, s. 55; 1921, c. 110, s. 12.)

Editor's Note.—The last provision, herein contained, providing docketing in the superior court before the judgment shall be a lien upon real estate, is new with the Acts of 1921.

§ 1598(a). Fees taxed when county officer on salary; Recorders' court fund.—In cases in which the recorder or judge and the solicitor of the county recorders' court shall be paid salaries, in lieu of fees for such recorder or judge or solicitor, the clerk of the recorder's court shall tax against the defendant who is convicted, or who confesses his guilt, or upon whom judgment is suspended in said court in cases originally within the jurisdiction of the justice of the peace a tax fee of three dollars in each case, and in all other cases within the jurisdiction of the said recorder's court a tax fee of six dollars, and these several sums when collected shall be paid over by said clerk to the treasurer or financial agent of the county, to be kept by him as a separate and distinct fund to be known as the recorder's court fund. This fund shall be used only in paying the salary of the recorder and prosecuting attorney of said court, and the other expenses of the court. In all civil actions the clerk shall tax against the losing party the sum of three dollars in cases originally within the jurisdiction of the justice of the peace, and the sum of six dollars in all other cases, and all sums so collected shall be disposed of as above provided for tax fees in criminal actions. (1921, c. 110, s. 13.)

Art. 23. Elections to Establish Recorders' Courts

§ 1599. Election required.—The courts provided for in this subchapter shall be established upon elections held as set forth in this article, except county recorders' courts which may be established by the county commissioners of any county without a popular vote. (1919, c. 277, s. 58; 1921, c. 110, s. 14.)

Editor's Note.—The excepting clause in this section was placed herein by the Acts of 1921.

§ 1600. Municipal recorder's court.—The governing body of any city or town which may, under the terms of this subchapter, establish a court, prior to its establishment shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall not be less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the city the question of establishing such court. At such election all qualified voters favoring the establishment of such court shall vote a ballot upon which shall be printed or written the words, "For Recorder's Court of the City of ----------," and those opposing the establishing of such court a ballot upon which shall be printed or written, "Against Recorder's Court of the City of----------." (1919, c. 277, s. 58.)

§ 1601. Notice of election.—Notice of such election shall be given, signed by the clerk of the city or town or the mayor thereof, containing in substance the resolution, the date of the election, and a reference to this subchapter, which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the city or town. (1919, c. 277, s. 59.)

§ 1602. New registration may be ordered.—The governing body of such city or town may in its discretion order a new registration of the voters for any election authorized hereunder. (1919, c. 277, s. 60.)

§ 1603. Manner of holding election.—The election shall be held, reported, and recorded in the city or town, under the laws governing general elections as near as may be applicable to the city or town. The result of the election shall be reported to, canvassed and declared by the governing body of the city or town, and recorded upon the minutes thereof. If the majority of the votes cast is declared in favor of such court, it shall be established, and not otherwise. (1919, c. 277, s. 61.)

§ 1604. Another election after two years.—If the majority of the votes cast at such election is against the court, another election for the same purpose may thereafter be called, but not within less than two years from the first or any succeeding election in reference thereto. (1919, c. 277, s. 62.)

§ 1605. County recorders' courts.—(Repealed by Public Laws 1921, Chapter 110, section 15.)

§ 1606. Municipal courts with jurisdiction over the entire county.—The courts provided for in article twenty of this subchapter shall be established in the following manner: The governing body of the city and the board of county commissioners of the county, at a joint meeting, shall pass a joint resolution calling an election submitting to the voters of the entire county the question of the establishment of said court. The election shall be conducted by the county commissioners as in the case of county recorders' courts; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the city. The form of the ballot shall be, "For Municipal-County Court of ..... County," and "Against Municipal-County Court of ------- County." (1919, c. 277, s. 62.)

§ 1607. Expense of elections paid.—The expense of conducting the elections for "municipal courts" and "municipal-county courts" shall be borne by the city or municipality concerned, and the expense of conducting the election for "county recorders' courts" shall be borne by the county concerned. (1919, c. 277, s. 63.)

§ 1608. Certain districts and counties not included.—This subchapter shall not apply to the tenth, except as Granville and Orange counties, [fifteenth], except as to Iredell and Montgomery counties, [sixteenth], except as to Lincoln and Catawba counties, seventeenth, except as to Alexander county, eighteenth, nineteenth, and twentieth judicial districts, except as to Buncombe, Cherokee, Jackson, Haywood, and Swain counties, nor to the eleventh district, except to the county of Caswell; nor shall it apply to the counties of Chatham, Columbus, Johnston, New Hanover, Polk, Madison, and Robeson. (1919, c. 277, s. 64; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162, s. 1; Pub. Loc. 1927, c. 85, s. 24; 1929, cc. 17, 111, 114, 130, 340; 1931, c. 3, c. 19, s. 2; 1933, c. 142, s. 1.)

Editor's Note.—By the act of 1925, Pitt County was stricken from this section so that the subchapter is now applicable thereto.

Public Laws 1929 added Alexander, Burke, Catawba, Montgomery and Orange Counties to this section, and struck out Anson County. The first 1931 amendment struck out Halifax County and provided: "Upon the establishment of a County Recorder's Court in the County of Halifax under the general law it shall be the duty of the Clerk of the Superior Court of Halifax County to transfer from the docket of the Superior Court of said county to the docket of the Recorder's Court for trial all causes pending in the Superior Court in the jurisdiction of said Recorder's Court." The second amendment of 1931 struck out the words in brackets, but made no reference to the counties excepted.

Public Laws 1933, c. 142, s. 1, repealed Public Laws 1929, c. 17 which added Burke to this section.

By the amendment of 1935 Hyde county was stricken from the list of excepted counties. Sections 2-9 of the amendatory act provided for the establishment of a county recorder's court in Hyde county.

SUBCHAPTER V. GENERAL COUNTY COURTS

Art. 24. Establishment, Organization and Jurisdiction

§ 1608(f). Establishment authorized; official entitlement; jurisdiction.—In each county of this

state there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this subchapter and which court shall be called the general county court and shall have jurisdiction over the entire county in which said court may be established. In any county in the state in which there is situated a city which has or may have in the future a population, according to any enumeration by the United States census bureau, of more than twenty thousand inhabitants, the commissioners of such county or counties are authorized hereby to establish general county courts as hereinafter provided without first submitting the question of establishing such court to a vote of the people: Provided, that the said enumeration need not be made at a regular decennial census: Provided further, that in the event that the second sentence of this section is acted upon by the commissioners of any county in establishing a general county court, as is herein provided, the said commissioners may make such provisions for holding such courts in such city. (1923, c. 216, s. 1; 1925, c. 242; 1927, c. 74; 1931, c. 17; 1933, c. 405.)

Editor's Note.—The Act of 1931 inserted an exception as to Caswell County. This was struck out by the Act of 1933.

In General.—Under this section the Legislature may create courts inferior to Superior Court if provision is made for appeal to the Superior Court. Jones v. Standard Oil Co., 202 N. C. 328, 162 S. E. 741.

The establishment of a General County Court by the board of commissioners of a county under the provisions of this and related sections, will not be held invalid as being an unlawful exercise of legislative power, the jurisdiction of such courts being prescribed by the Legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the Legislature. State v. Thomas, 205 N. C. 142, 170 S. E. 110.

Enactment of Acts of Commissioners in Creating Courts.—The acts of the county commissioners in the organization of general county courts, heretofore organized, as provided by ch. 216 of the Public Laws of 1923 and ch. 85 of the Public Laws, extra session 1924, and all amendments thereto, were ratified and declared to be the acts of the General Assembly of North Carolina by the Acts 1927, ch. 232, sec. 1.

§ 1608 (f) 1. Creation by resolution of board of commissioners.—If in the opinion of the board of commissioners of any county, the public interests will be best promoted by so doing, they may establish a general county court under this article, by resolution which shall, in brief recite the reasons for the establishment thereof, and further recite that, in the opinion of the board of commissioners, it is not necessary that an election be called upon the establishment of such court as herein provided for, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (1924, c. 85, s. 24-a.)

Editor's Note.—Public Laws 1929, c. 246 provided that notwithstanding the provisions of § 1608(f) the Board of County Commissioners of Person County is authorized to establish a County Court for said County in the manner authorized by this section. Said County Court, when so established, shall have the jurisdiction conferred by, and shall in all respects be governed by the provisions of this subchapter.

§ 1608(f) 2. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution reciting in brief the reasons therefor, abolish said court: Provided, no such court shall be abolished except at the end of the terms of office of the judge and solicitor, unless such judge and solicitor shall voluntarily tender their resignations, setting forth, in brief, that in their opinion the existence of the said court is no longer necessary, in which event the board of commissioners may forthwith abolish the same. (1924, c. 85, s. 24-b.)

§ 1608(f) 3. Transfer of criminal cases.—Upon the establishment of the general county court, as in this article authorized, the clerk of the Superior Court shall immediately transfer from the Superior Court to such general county court all criminal actions pending in the Superior Court of which the general county court has jurisdiction, as in this act conferred, and the general county court shall immediately proceed to try and dispose of such criminal actions. (1924, c. 85, s. 24-c.)

This and related sections modify § 4647. See State v. Baldwin, 205 N. C. 174, 170 S. E. 645.

§ 1608(f) 3 (a). Court of Henderson County abolished.—The General County Court of Henderson County is hereby abolished, effective on and after the first day of September, one thousand nine hundred and twenty-seven. (1927, c. 103.)

Editor's Note.—It was further provided in the act from which this section is taken that all cases pending in the General County Court of Henderson County when this act goes into effect shall be transferred to such court as may have jurisdiction, and shall be tried in said court as though the said cases had been originally brought therein.

That no bond or undertaking heretofore entered into conditioned upon the appearance of any defendant before the General County Court of Henderson County shall be invalidated by this act, but the same shall remain in full force and effect and shall require the appearance of the defendant named therein before such court having jurisdiction as the case shall be transferred to for trial under the terms of this act.

That no order, judgment, verdict or decree of the General County Court of Henderson County or ancillary writ issued by said court shall be invalidated by reason of this act, but all papers in all of said cases shall be transferred as hereinbefore provided and shall have the same force and effect as if the same had been rendered and issued in the courts to which said cases are transferred for trial.

§ 1608(f) 3(b). Court of Transylvania County abolished.—The General County Court of Transylvania County, North Carolina, is hereby abolished. (1931, c. 1.)

Editor's Note.—The act from which this section was taken repealed §§ 1608(f)-1608(dd) and all acts amendatory thereto insofar as they related to Transylvania County. The act which went into effect on January 13, 1931, further provided: "The Clerk of the Superior Court shall immediately transfer and docket into the proper docket or record of the Superior Court of Transylvania County, each and every case remaining upon either the Civil or Criminal Docket of said General County Court at the date of the ratification of this act and said criminal and civil cases shall take their places on the docket of said Superior Court in their regular order and shall be duly tried in said Superior Court when reached for trial. Any salary or salaries due to the judge, prosecuting officer or clerk of the said General County Court at the ratification of this act, shall be reported and paid to said judge, prosecuting officer or other officer of said court at the salary provided for by the Board of County Commissioners of Transylvania County at their regular meeting on the first Monday in December, one thousand nine hundred and thirty."

§ 1608(f) 3(c): Repealed by Public Laws 1933, c. 405.

§ 1608(f) 4. Transfer of civil cases.—Transfers may be made in term of any civil action in the superior court to the general county court, and from the general county court to the superior court by the presiding judge of said respective courts, by consent, or upon motion of which due notice has been given, when, in the opinion of the presiding judge of the court from which the transfer is to be made, the ends of justice will be best served and promoted by such transfer. (1924, c. 85, s. 24-d; 1933, c. 127.)

Editor's Note.—This section was rewritten by Public Laws 1933, c. 127. Many changes were effected for a determination of which a comparison with the old section is necessary.

Referring to this section, 11 N. C. Law Rev., 216, says the 1933 amendment amends the Act of 1924, ch. 85, which authorized the judge of the Superior Court to transfer civil actions to the General County Court for trial. The amendment allows the judge of either the Superior Court or the General County Court to transfer cases to the other court for trial, either by consent or by motion upon notice.

§ 1608(f) 5. Costs.—Cost in both criminal and civil actions shall be taxed and collected as now provided by law. (1924, c. 85, s. 24-e.)

Editor's Note.—Public Laws 1931, c. 422, s. 2, applicable only to Burke County, provided: "In criminal cases in the General County Court there shall be taxed against each defendant who is convicted or who confesses his guilt the following tax fees, to-wit: (1) a tax fee of three dollars ($3.00) in each case for the violation of a town ordinance; (2) a tax fee of eight dollars ($8.00) in each case for the violation of the prohibition laws; and (3) a tax fee of six dollars ($6.00) in all other cases within the jurisdiction of said General County Court. The foregoing tax fees shall be in addition to other costs and the same when collected shall be paid into a separate fund to be known as the court fund and this fund shall be used to pay the salary of the prosecutor and the other expenses of the court and to supplement the salary of the judge. In all civil cases in the General County Court there shall be taxed against the losing party the sum of three dollars ($3.00) in cases originally within the jurisdiction of a justice of the peace and the sum of six dollars ($6.00) in all other cases, and all sums so collected shall be paid into the court fund and shall be disposed of as above provided for tax fees in criminal actions."

§ 1608(g). Judge; election, term of office, vacancy in office, qualification, salary, office.—The court shall be presided over by the judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in the county. The first judge of the court upon the establishment of said court shall be elected by the board of county commissioners within thirty days after the establishment of said court, and he shall hold his office until January first, following the next general election of county officers and until his successor is elected and qualified. If a vacancy occurs in the office of judge of said court, the same shall be filled by the election of a successor for the unexpired term by the board of county commissioners. After the first elected judge by the board of county commissioners, each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office and when other county officers are elected, and shall hold his office for a term of four years beginning January first following his election, and until his successor is elected and qualified. Before entering upon the duties of his office, the judge shall take and subscribe an oath of office, as is now provided by law for justices of the peace, and he shall file the same with the clerk of the superior court of the county. The salary of said judge shall be fixed by the board of commissioners of the county, and (shall not be) decreased during the term of office, and it shall be paid monthly out of the funds of the county. The judge shall reside in the county and shall be provided by the county commissioners with an office at the county-seat. The terms of said court shall be held in the courthouse, but they shall at no time inconvenience or discommode the superior court of the county while the superior court in term is using the courthouse. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 2; 1924, c. 85, s. 1.)

Editor's Note.—This section was amended in 1924 by striking out a provision fixing the salary at not less than $3600 not to be increased; by striking the provision denying the judge the power to practice law in other courts, and by adding the last sentence.

§ 1608(h). Terms of court.—The court shall open for the transaction of business and trial of causes the first Monday of each month and continue until all matters before the court are disposed of. (1923, c. 216, s. 2.)

Editor's Note.—Public Laws 1931, c. 422, s. 3, applicable only to Burke County amended this section by adding at the end thereof the following : "Provided, however, that special terms of said court may be held at such other times as the judge thereof may designate."

§ 1608(i). Prosecuting officer; duties, election, salary, etc.—There shall be a prosecuting attorney of the general county court, to be known officially as prosecutor, who shall appear for the state and prosecute in all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of county commissioners. He shall be elected by the board of county commissioners for the first term as herein provided for the election of the judge, and thereafter by the qualified electors of the county in the same manner as is provided herein for the election of the judge; and vacancies in the office of the prosecutor shall be filled by the board of county commissioners as they are herein authorized to fill vacancies in the office of judge. If requested to do so by the judge, the prosecutor shall represent the county in prosecution of criminal appeals from this court in the superior court. The salary of the prosecutor shall be paid monthly out of the county funds. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such solicitor, fixing his term of office, in which event the solicitor so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 3; 1924, c. 85, s. 1; 1925, c. 250, s. 1.)

Editor's Note.—This section was amended in 1924 by striking out a provision limiting the salary to a minimum of $1,000. The last sentence was also added by that amendment.

The 1925 amendment struck the word judge in the last sentence and substituted the word solicitor.

§ 1608(j). Superior court clerk as clerk ex officio; salary, bond, etc.—The clerk of the superior court of the county shall be ex officio clerk of the general county court, herein provided for, and in addition to the salary and fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix, to be paid monthly out of the county funds. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him to the same extent as he is bound as clerk of the superior court. The Clerk of said Court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said Court and make the same returnable before the Judge thereof, at any time or times designated for the trial of criminal cases. (1923, c. 216, s. 4; 1931, c. 233.)

Editor's Note.—The Act of 1931, which added the last sentence to this section, provided: "This act shall apply to all District County Courts created or permitted to be created or established by the law passed at this session of the General Assembly. This act shall not apply to the following counties: New Hanover, Caldwell, Henderson, Ashe, Hoke, Lincoln, Wayne, Wilkes, Nash, Edgecombe, Alexander, Rockingham, Duplin, Union, Alleghany, Halifax, Alamance, Clay, Yancey, Dare, Wake, Hertford, Jackson, Mecklenburg, Craven, Vance, Person, Robeson, Johnston, Yadkin, Davidson, Haywood, Pitt, Tyrrell, Hyde, Watauga, Durham, Scotland, Forsyth and Camden."

Same—Deputy Clerk in Burke County.—Public Laws 1931, c. 422, s. 4, applicable only to Burke County, provided: "The Board of Commissioners of any county wherein a General County Court may be established shall have the power to appoint a special deputy clerk, who shall assist the clerk of the Superior Court and shall have all the power and authority in reference to the General County Court conferred upon the clerk of the Superior Court, and shall do all things in reference to said General County Court under the direction of the clerk of the Superior Court of the county as fully as the clerk of the Superior Court is authorized to do. The Board of Commissioners may require and fix the official bond of the said deputy clerk for the faithful performance of his duties and fix his salary, which salary shall be fixed before he enters upon his duties and shall not be raised or lowered during his term of office. His term of office shall be for the same time as the term of the judge of said court, and shall cease at any time that the court itself shall cease to exist. If any deputy clerk shall be appointed as provided in this section he shall take the oath required of deputy clerks under the General Law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this section, both of which oaths shall be recorded in the office of the clerk of the Superior Court, and such deputy clerk is further authorized to perform all duties of deputy clerk under the General Law in addition to the duties set forth in this section."

§ 1608(k). Sheriff; duties; additional allowance.—The sheriff of the county or his deputy appointed shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior courts of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services in addition to his salary and fees fixed by law. (1923, c. 216, s. 5.)

§ 1608(k) 1. Fees of clerk and sheriff; local provision.—In those counties in which the clerk of the Superior Court and sheriff are paid fees, and not salaries, such clerk and sheriff shall receive the same fees for services rendered in the general county as they would have received had such services been rendered in the Superior Court. [The county commissioners of any county wherein a county court has been established may, upon such investigation as may show the same to be proper, and by resolution at any regular meeting, provide that the judges of said court and the solicitors thereof, or either of them, may receive compensation either by way of salary or fees, as the said board of commissioners may deem best; and in case of said judge or solicitor, or either of them, is compensated for services by fees, the said fees shall be the same as are now established by law, and which are paid in like cases in the Superior Court; and in the case of solicitors those fees which were paid to solicitors of the Superior Court in like cases at the time that the solicitors of the said Superior Court were put on a salary basis: Provided, however, that the manner of compensating the said judges and solicitors, either by salary or fees, shall not be changed during their term of office. Provided further, that the portion of this section in brackets shall apply to Scotland county only.] (1924, c. 85, s. 5½; 1925, c. 172.)

Editor's Note.—The part of this section in brackets was added by Public Laws 1925.

§ 1608(l). Separate records to be kept by clerk; blanks, books and stationery.—The clerk of the said general county court shall keep separate records, criminal and civil, for the use of said court, to be furnished by the county commissioners, and they shall also provide all such necessary blanks, forms, books and stationery as may be needed by said court. And the said clerk shall keep the same in his office of clerk of the superior court. (1923, c. 216, s. 6.)

§ 1608(m). Criminal jurisdiction, extent.—The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

1. Original, exclusive and concurrent jurisdiction, as the case may be, of all offenses within said county which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which mayors of towns or other municipal courts now have jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime within the territory of the general county court, and of which said court is not herein given final jurisdiction.

3. To punish for contempt to the same extent and in the manner allowed by law to the superior courts of this state; to issue writs ad testificandum and other process to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this state.

4. The general county court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition thereto shall have exclusive original jurisdiction of all other criminal offenses committed in the county be-

low the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the general county court, as herein provided for, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance, or surety, to appear at the next first Monday of the month next succeeding before the general county court for trial, and in default of surety such person shall be committed to the county jail to await trial.

5. In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred upon such special courts. (1923, c. 216, s. 13; 1924, c. 85, s. 1.)

Editor's Note.—The fifth paragraph was added by the 1924 amendment.

In General.—This section as enacted was one of many general provisions applicable to the several courts provided by the act. The last clause has reference to the jurisdiction exercised by the statutory courts in all criminal matters arising in the county which are given to justices of the peace. State v. Baldwin, 205 N. C. 174, 175, 170 S. E. 645.

§ 1608(n). Civil jurisdiction, extent. — The jurisdiction of the general county court in civil actions shall be as follows:

1. Jurisdiction concurrent with that of the justices of the peace of the county;

2. Jurisdiction concurrent with the superior court in all actions founded on contract;

3. Jurisdiction concurrent with the superior court in all actions not founded upon contract;

4. Jurisdiction concurrent with the superior court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

5. Jurisdiction concurrent with the superior court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions. (1923, c. 216, s. 14.)

6. Jurisdiction concurrent with the superior court of all actions and proceedings for divorce and alimony, or either. (1923, c. 216, s. 14; 1935, c. 171.)

See 12 N. C. Law Rev., 39.

Editor's Note.—The amendment of 1935 adds subsection (6) to this section.

Chapter 179 of the Public Laws 1935 provided that a subdivision "6. Jurisdiction concurrent with the superior court in all actions for divorce" should be added. The act further provided that it should be applicable in Bertie county only and specified that prior divorces granted by the general court of the county should be validated.

§ 1608(o). Election, requirement of. — The general county court, herein provided for, shall be established upon elections as set forth in this article. (1923, c. 216, s. 20.)

Cited in State v. Thomas, 205 N. C. 142, 145, 170 S. E. 110.

§ 1608(p). Resolution by county commissioners; time for election; ballots. — The board of commissioners of the county shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall not be less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the county the question of establishing such court. At such election all qualified voters favoring the establishment of such court shall vote a ballot upon which shall be printed or written the words "For General County Court for-------County," and those opposing the establishment of such court shall vote a ballot upon which shall be printed or written the words "Against General County Court for ..... County." (1923, c. 216, s. 21.)

§ 1608(q). Notice of election; publication.— Notice of such election shall be given at least thirty days prior to the day of election, signed by the chairman of the board of county commissioners and containing in substance the resolution passed by the board, the date of the election and a reference to the act creating the court, and which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the county and a copy thereof shall be posted at the courthouse door. (1923, c. 216, s. 22.)

§ 1608(r). Law governing elections; election officers; registration.—Any election held under the provisions of this law shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the members of the general assembly, except as herein otherwise stated. The board of county commissioners shall appoint the registrars and judges of election and any other election officers necessary for holding said election, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for election of the members of the general assembly, except as herein set forth. The said board of county commissioners may or may not, in their discretion, order a new registration for any election held under this law. In case no new registration is ordered the registration books of each voting precinct shall be kept open for twenty days prior to the election for the purpose of allowing electors to register who have not theretofore registered in the township or voting precinct, of their residence, and who are entitled to register for said election; and the registration books shall close on Saturday next preceding the election and the registrar shall transcribe the names of all persons who have registered for former elections in their township, or voting precincts, and are otherwise qualified electors at said election upon a new registration book. The registrars are authorized and directed to register any person legally qualified and entitled to vote in their respective townships or voting precincts who apply for such purpose, in the same manner and under the same rules and regulations now or hereafter may be provided for registering electors for the general election in said county. (1923, c. 216, s. 23.)

§ 1608(s). Count and return of votes; canvass of returns; effect; expense.—The vote cast at said election shall be counted at the close of the polls by the election officers and returned to the clerk of the said board of county commissioners of said county by a member of said election officers on

the second day next succeeding the day of said election; and the said board of county commissioners, at their next regular meeting, or at a called meeting, shall tabulate and declare the result of the election, all of which shall be recorded in the minutes of said board of county commissioners, and no other recording and declaring of the result of said election shall be necessary. If a majority of the votes cast at said election is declared in favor of such court, it shall be established, and not otherwise. The expenses of said election shall be paid by the county commissioners out of the county fund. (1923, c. 216, s. 24.)

§ 1608(s) 1. Application of article.—This article shall not apply to any county in which there has been established a court, inferior to the superior court, by whatever name called, by a special act, nor shall this act apply to the following counties: Granville, Henderson, Iredell, New Hanover, Pasquotank, Randolph and Wake, [nor shall it apply to the counties in the sixteenth (16th)], seventeenth (17th), and nineteenth (19th) Judicial Districts, except Buncombe county. (1924, c. 85, s. 24, f; 1925, c. 9; 1927, c. 103, ss. 1, 2; 1929, c. 159, s. 1.)

Editor's Note.—The county of Randolph was added to the list of counties to which this article does not apply by the 1925 amendment. The 1927 amendment made an exception in the case of Henderson County.

The Act of 1931 struck out the words in brackets.

§ 1608(s)2. Court of Wilson County. — (a) Summons in civil actions shall issue out of the General County Court and be returnable thereto, as summons is issued out of and returnable to the Superior Court.

(b) If the amount in controversy exceeds the sum of two hundred dollars ($200.00), summons may issue out of the General County Court to any County in the State under the seal of the said Court.

(c) Complaints shall be filed as is provided for the filing of the complaints in the Superior Court; answers shall be filed as is provided in the filing of answers in the Superior Court; provided, the judge shall not extend the time in which to answer, except upon an affidavit from the defendant or defendants showing good cause and such time shall not exceed twenty days from the time allowed by law, and only one extension shall be granted.

(d) If a demurrer shall be filed to the complaint or to the answer or to any other pleadings, the same shall be heard and determined by the judge within ten days from the filing thereof. If the demurrer is overruled, the party demurring shall have thirty days thereafter within which to plead to the pleadings to which the demurrer was filed.

(e) The judge shall of his own motion and as a matter of course enter judgment by default, final or inquiry, as may be proper, upon the expiration of the time within which to answer, demur, or otherwise plead if no demurrer, answer or other pleading has been filed.

(f) Either party shall be entitled to a trial by jury in civil cases upon demand made in his pleadings. If the plaintiff fails to demand a trial by jury in the complaint, it shall be deemed a waiver by the plaintiff of the right of trial by jury. If the defendant fails to demand a trial by jury in his answer, the defendant shall be deemed to have waived his right of trial by jury. If either party demands a trial by jury, it shall not be necessary for the other party to make demand, and failure to make a demand in such case shall not be deemed a waiver by said party, and the other party cannot thereafter waive the right of trial by jury without the consent of the adversary party. If neither party demands a trial by jury, or if trial by jury is waived by both parties, the judge shall hear the case, find the facts and render the judgment thereon.

(g) Civil actions shall stand for trial at the second term next succeeding the filing of the answer, and shall be tried during that term unless good and sufficient cause shall be shown by affidavit for a continuance. The judge shall at such term call the cases for trial in their order and if the plaintiff is not ready for trial in the absence of good cause shown by affidavit, the action shall be dismissed as of non-suit, according to the course and practice of the Superior Court.

(h) The General County Court shall have jurisdiction to try actions for divorces, according to the course and practice of the Superior Court in such actions.

(i) The judge of the court shall appoint a court reporter who shall be a competent stenographer, said appointment may be made for a term or may be made from court to court. The court shall fix the compensation of the reporter and at the end of the court shall issue an order on the general fund of the county for the payment of such compensation to be paid to said reporter. In the event of an appeal from the judgment rendered by said General County Court to the Superior Court, the reporter shall make and file a transcript in triplicate of said proceedings of the General County Court had in said case, which transcript shall be filed with the record and for such services the said reporter shall not be paid nor receive any extra compensation. The plaintiff and the defendant in said action shall each be entitled to the use of one copy of such transcript, and the other copy shall be for the use of the judge of the Superior Court.

(j) The judge of the General County Court of Wilson County shall not practice in matters, either civil or criminal, in which said court has jurisdiction either concurrent or final.

This Act shall only apply to the General County Court of Wilson County. (1931, c. 61; 1935, c. 29, c. 149, s. 1.)

Editor's Note.—Under this section Wilson County now has a general county court whose powers and jurisdiction are practically equivalent to (and in respect to jurisdictional amount greater than) the Superior Court of the same county. The situation is still more anomalous in that under the present law, appeals must be taken from this general county court to the Superior Court and thence to the Supreme Court instead of directly to the latter court, since it has been held that under the Constitution the Superior Court is the head of the inferior court system of the state, and as such has appellate jurisdiction over all matters arising in the courts below it. The possibility of double appeals in Wilson County, with the further delay and expense in the administration of justice consequent on such double appeals, is obvious. This needless complication of our present Superior Court system by the creation of these county courts, to say nothing of the resulting absurdities and inconsistencies in our judicial system, could be obviated by the adoption of a constitutional amendment providing for solicitorial districts separate and distinct from

the judicial districts, which would make possible the expansion of the Superior Court system along logical, horizontal lines in the effort to relieve congested dockets. The result would be more judicial districts with more Superior Courts and more judges to try cases, instead of more new separate courts with new jurisdictional limits pregnant with many difficulties for the lawyer and the litigant.

It is important to note that the amendment gives to this county court jurisdiction to try divorces, according to the course and practice of the Superior Court in such actions. Hitherto the legislature had conferred the sole original jurisdiction in all applications for divorce and alimony upon the Superior Court. § 1655; Williamson v. Williamson, 56 N. C. 446; Barringer v. Barringer, 69 N. C. 179, 9 N. C. Law Rev. 366.

The amendments of 1935 substituted new provisions (i) and (j) for the former subsections. Public Laws 1935, chapter 149, also provided "as a part of the bill of cost taxed by the clerk of said court against the party adjudged to pay the cost of such action, there shall be taxed therein the sum of two dollars and fifty cents, to be paid to and collected by said clerk and when so collected shall be by said clerk paid over to and into the general funds of the county for the use and benefit of said county. Any and all funds and sums of money which are now in the hands of the clerk of said court and now held by him which were received and collected by him as deposits by plaintiffs bringing actions in said court and which have not been expended as provided for in said act shall be by said clerk paid into the general fund of Wilson county."

Art. 25. Practice and Procedure

§ 1608(t). Procedure in civil actions; return of process.—The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the superior courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the state: Provided, that civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.

Motions for the change of venue or removal of cases from the general county courts to the superior courts of counties other than the one in which said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the superior courts.

The provisions of the chapters of the consolidated statutes on civil procedure and criminal procedure, and all amendments thereof, shall apply as nearly as may be to the general county courts, and the judges and the clerks of said courts, in all causes pending in said courts, shall have rights, privileges, powers and immunities similar in all respects to those conferred by law on the judges and clerks of the superior courts of the state, and shall be subject to similar duties and liabilities: Provided, that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the superior courts, except as provided in articles twenty-four and twenty-five of this chapter: Provided, that in any civil action instituted in said general county court, where one or more bona fide defendants reside in said county and one or more bona fide defendants reside out of said county, then in such case summons may be issued out of said general county court against the defendants residing outside of said county as well as those residing in said county, and the said general county court shall have jurisdiction to try the action as against all of said defendants.

All motions and petitions for removal of actions from the general county court to the district court of the United States shall be presented to, be heard and determined by the judge of the general county court, with the right of appeal from any order or ruling of said judge to the superior court. (1923, c. 216, s. 7; 1925, c. 242, s. 2; 1925, c. 250, s. 2; 1933, c. 128, s. 1.)

Editor's Note.—The Public Laws of 1925, ch. 242, struck this section as it then read and substituted the section as it now reads except that the proviso at the end of the third paragraph was added by ch. 250 of the Acts of 1925.

The last sentence of this section as it now reads, relating to removal from a General Court to the United States District Court, was added by Public Laws 1933, c. 128.

§ 1608(u). Trial by jury; waiver; deposit for jury fee.—In all civil actions the parties shall be deemed to have waived a jury trial unless demand shall be made therefor before the trial begins. The demand shall be in writing and signed by the party making it, or by his attorney, and accompanied by a deposit of three dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. Any defendant in a criminal action may demand a trial by jury, in which event such defendant shall not be required to deposit the sum of three dollars. Such jury shall be drawn as herein otherwise provided for. (1923, c. 216, s. 8; 1924, c. 85, s. 1.)

Editor's Note.—The last two sentences of this section were added by the 1924 amendment.

Cited in Crafford v. Lafayette Life Ins. Co., 198 N. C. 269, 151 S. E. 249.

§ 1608(v). Continuance if jury demanded; drawing of jury list.—If a jury trial is demanded, the judge shall continue the case until a day to be set, and the judge, together with the attorneys for all parties, shall proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen men, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. It shall be the duty of the register of deeds to prepare a list of jurors for this the general county court identical with the list prepared for the superior court, and the jury shall be drawn out of the box containing such list. Provided, that the Judge of said Court may in his discretion, if and when a sufficient number of cases are at issue in which jury trial has been demanded to warrant such action, cause a jury of not less than eighteen, not more than twenty-four men to be drawn for a certain week of a term, setting such cases for trial during such time, and in such cases the juries shall be drawn in the same manner as now provided for the drawing of juries for the Superior Court. (1923, c. 216, s. 9; 1931, c. 233, s. 2.)

Editor's Note.—The Act of 1931, which added the proviso to this section, provided: "This act shall apply to all District County Courts created or permitted to be created or established by the law passed at this session of the General Assembly. This act shall not apply to the following counties: New Hanover, Caldwell, Henderson, Ashe, Hoke, Lincoln, Wayne, Wilkes, Nash, Edgecombe, Alexander, Rockingham, Duplin, Union, Alleghany, Halifax, Alamance, Clay, Yancey, Dare, Wake, Hertford, Jackson, Mecklenburg, Craven, Vance, Person, Robeson, Johnston, Yadkin, Davidson, Haywood, Pitt, Tyrrell, Hyde, Watauga, Durham, Scotland, Forsyth and Camden."

§ 1608(w). Talesmen; challenges.—The judge shall have the right to call in talesmen to serve as jurors according to the practice of the superior court as nearly as the same is applicable, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1923, c. 216, s. 10.)

§ 1608(x). Process; authentication; service; return.—All civil summons in actions begun in the general county court shall be served at least ten days before the return day named therein, and shall be returnable on the first Monday of the month next succeeding the issue thereof, unless the same be issued within less than ten days before the first Monday of the month next succeeding its issuing, in which event it shall be made returnable on the first Monday of the second succeeding month next after the date of the issue thereof; and when the summons shall be issued more than ten days before the first Monday of the month next succeeding its issuing, and shall be executed by the proper officer within less than ten days of the return day named therein, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the first Monday of the month next succeeding the return day thereof, at which time it shall be treated in all respects as if that had been the return day named therein. The summons shall run in the name of the state, be signed by the clerk of the court in which the action is brought, and shall be directed to the sheriff or other proper officer of the county. (1923, c. 216, s. 11.)

§ 1608(y). Pleadings; time for filing.—The complaint shall be filed by the return day named in the summons and the answer, demurrer or other pleadings on the part of the defendant shall be filed within twenty (20) days thereafter: Provided, if a copy of the complaint be served on the defendant at the time of the service of the summons, then the defendant shall have only twenty (20) days from the date of such service to file an answer, demurrer or otherwise plead. If the answer contains a counterclaim against the plaintiff or plaintiffs or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is pleaded or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be pleaded shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim. If such counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served as herein provided for, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer. For good cause shown and found by the judge, the judge may extend the time for the filing of any of the pleadings provided for in this act on the part of the plaintiff or on the part of the defendant. (1923, c. 216, s. 12; 1925, c. 250, s. 3.)

Editor's Note.—This section was amended in 1925, the changes making it conform to sections 509, 524 as amended.

§ 1608(z). Appeal to superior court; cases bound over to superior court.—Any person convicted of any offense of which the general county court has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the court in the same manner as is now provided for appeals from justices of the peace; and any person tried before the general county court for any offense of which said court has not final jurisdiction shall, if probable cause be found, be bound over to the superior court in the same manner as is provided by law in similar cases before a justice of the peace. The judge may, upon proper affidavit, issue criminal warrants returnable before him in or out of term. All persons convicted in said court may be sentenced to the roads, or county farms, or jail, as the judge may determine. (1923, c. 216, s. 15.)

§ 1608(aa). Amendments in pleadings and warrants.—The judge shall have power in his discretion to allow amendments in pleadings and warrants, to the same extent as is allowed in the superior courts of the state. (1923, c. 216, s. 16.)

§ 1608(bb). Jury trials, conduct of.—The jury in the general county court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. (1923, c. 216, s. 17.)

§ 1608(cc). Appeals to superior court in civil actions; time; record; judgment; appeal to supreme court.—Appeals in civil actions may be taken from the general county court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the supreme court except that appellant shall file in duplicate statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the general county court to the superior court, as the complete record on appeal in said court; that briefs shall not be required to be filed on said appeal, by either party, unless requested by the judge of the superior court. The time for taking and perfecting appeals shall be counted from the end of the term of the general county court at which such trial is had. Upon such appeal the superior court may either affirm or modify the judgment of the general county court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the supreme court as is now provided by law. (1923, c. 216, s. 18; 1933, c. 109.)

Editor's Note.—Prior to Public Laws 1933, c. 109, the exception at the end of the first sentence of this section merely provided that the record might be typewritten and that only two copies should be required. This was omitted and the present exception inserted in lieu thereof.

Assignment of Error.—In the absence of assignments of error appearing in the transcript on an appeal to this Court, the appeal will ordinarily be dismissed on the motion of the appellee. Smith v. The Texas Co., 200 N. C. 39, 41, 156 S. E. 160.

In the exercise of its appellate jurisdiction under this section, the Supreme Court may consider and pass only on the contention of the appellant that there was error in matters of law at the hearing in the Superior Court. This contention must, however, be presented to this Court by assignments of error based on exceptions to specific rulings of the judge of the Superior Court, on the assignments of error appearing in the case on appeal filed in the Superior Court. Id.

Sending Record Up.—Where an appeal is taken from a county court under this section it is not desirable that the entire record in the Superior Court be sent up, but only such parts as relate to the questions to be reviewed with only material exceptions, properly stated, grouped and sufficiently compiled to enable the court to understand them without searching through the record. Baker v. Clayton, 202 N. C. 741, 164 S. E. 233.

See 11 N. C. Law Rev., 217, where it is pointed out that the 1933 amendment amends this section, so that instead of following the practice in appeals from the Superior Court to the Supreme Court, the appellant may file in duplicate the statement of the case on appeal, and this with the original records in the case shall be transmitted to the clerk of the Superior Court as the complete record on appeal. Briefs are not required to be filed by either party, unless requested by the judge of the Superior Court.

§ 1608(dd). Enforcement of judgments; stay of execution, etc.—Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the superior court to the supreme court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to same extent as if rendered by the superior court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1923, c. 216, s. 19.)

Art. 25A. District County Courts

§ 1608(dd) 1. May be established in two or more contiguous counties in same judicial district; jurisdiction. — In any two or more contiguous and adjoining counties of any judicial district of this State there may be established, under the general powers and authority contained in sub-chapter five, articles twenty-four and twenty-five, and the several sections of each article [§§ 1608(f)-1608(dd)], except as herein otherwise provided, a court of civil and criminal jurisdiction, maintained pursuant to this sub-chapter and the said articles twenty-four and twenty-five, not inconsistent herewith, a court of record, to be known as and designated a district county court, and containing all the authority, jurisdiction, rights, powers and duties, compensations and fees, as provided in the articles aforesaid, except as herein otherwise provided. (1931, c. 70.)

§ 1608(dd) 2. Judge of court; election; term of office; oath of office and salary. — The court shall be presided over by a judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in one of the counties composing the said district county court.

The first judge of said court, upon its establishment as hereinafter provided, shall be elected by the several boards of commissioners of the counties establishing the said district courts, each board being entitled to one vote to be cast in accordance with the majority vote of each board, at any joint meeting of said boards of commissioners, as hereinafter provided, within sixty days after the establishment, and he shall hold his office until January first, following the next general election of county officers, and until his successor is elected and qualified. Any vacancy arising in the office of judge of said court shall be filled by the several boards of commissioners of the counties establishing the said district court, in joint meeting assembled, which shall be called by the chairman of the board of commissioners of the county in which such judge resided at the time of his death or removal, or resignation.

At the joint meeting of said boards of commissioners when an election of the judge of said court is made, the said commissioners shall also fix the salary of said judge, which salary together with the salary of the prosecuting attorney hereinafter provided for shall be paid from the costs taxed and collected in the trial of all actions in said court to which costs provided for there shall be added a trial fee of five dollars and if there be a deficiency in the payment of said salaries from said costs as herein provided for, the said deficiency shall be proportionately paid by the several counties composing the said district county court, in proportion as the population of each county shall bear to the whole of the counties creating said court, on the basis of the one thousand nine hundred thirty census.

The judge shall reside in one of the counties of said district; he shall take the oath of office prescribed in section 1608(g); hold his terms of court in the county courthouse in each county of his district, and shall not be permitted to practice law during his tenure of office in any of the courts of the State.

His successor shall be nominated and elected by a vote of the qualified electors of the several counties embraced within the jurisdiction of said district at the next general election before the expiration of the term of office and when other county officers are elected, in the same manner, and as provided by law for the nomination and election of judges of the Superior Court, and he shall hold his office for a term of four years beginning January first next following his election, and until his successor is elected and qualified; except, however, in instances of an appointment to fill a vacancy, in which case he shall hold through the unexpired term of his predecessor in office, and until his successor is elected and qualified. (1931, c. 70.)

§ 1608(dd) 3. Present county courts may be changed to district courts. — That in any county where a county court has been heretofore created and now exists under and by virtue of article twenty-four, sub-chapter five of chapter twenty-seven [§§1608(f)-1608(s)1], where it is desired to change said court from a county court to a district county court, under the provisions of this article, its board of commissioners may, by proper resolution, reciting in brief the reasons therefor, abolish the said county court and establish for said county, in the manner provided in this article, a district county court; and in such event, the judge and solicitor of the said county court shall thereupon be named and elected as judge and solicitor of said district county court until the expiration of the time for which they were elected as officers of the said county court, and until their successors are duly elected and qualified. (1931, c. 70.)

§ 1608(dd)4. When court to be held. — The court shall be open for the transaction of business and trial of cases at least once a week in each county in each month in districts composed of four counties, or less, and at least once in every eight weeks in districts composed of more than four counties, which week or the time of holding said court for each of said counties shall be determined and declared by said joint meeting of said commissioners upon recommendation of the bars of the several counties composing said district, or majority of the resident lawyers of said counties, and certified by said commissioners to each Superior Court clerk of the several counties within the district. (1931, c. 70.)

§ 1608(dd)5. Prosecuting attorneys. — There shall be a prosecuting attorney of the said district court, known officially as the prosecuting attorney, and he shall appear for the State and prosecute all criminal actions in said county courts of his district; and for his services he shall be paid such salary as may be fixed by the boards of county commissioners of the several counties composing the district.

The said prosecuting attorney shall be elected by the respective boards of commissioners in the same manner as hereinbefore provided for the election of a judge thereof. He shall hold his office until January first next following the first general election for county officers, and at the said first general election following his election by the said boards of commissioners, and thereafter at each subsequent general election for county officers, he shall be nominated and elected by the duly qualified electors of the counties composing said district, under the general laws governing the nomination and election of district officers, or solicitors of the several judicial districts.

Any vacancy arising in the said office of prosecuting attorney shall be filled by the board of commissioners of the counties composing the district, in the same manner as hereinbefore provided for the election of the judge thereof; and the compensation or salary of the said prosecuting attorney shall be paid by the several counties composing the district in the same proportion, or basis provided for payment of the salary of the judge, and shall be payable monthly out of the funds of the counties composing said district court. If requested to do so by the judge, the prosecuting attorney shall represent the county in prosecuting any appeal of a criminal action from said district court in the Superior Court. (1931, c. 70.)

§ 1608(dd) 6. Clerks; duties and compensation. —The several clerks of the Superior Court in the several counties of said district court shall ex-officio be clerk of said district court of each and all terms held within the respective counties of each, and subject to all the rights, duties and liabilities provided for in sections 1608(j) and 1608(l). (1931, c. 70, s. 1.)

§ 1608(dd)7. Sheriffs; duties and compensation.—The several sheriffs of the several counties of said district court, or their duly constituted deputies, shall attend upon each term of this court within their respective counties, and be subject to and possess the same power and authority and additional compensation as authorized under § 1608(k). (1931, c. 70.)

§ 1608(dd)8. Jurisdiction. — The said county district courts shall have the same criminal and civil jurisdiction as that of the general county court, and as fixed and defined in §§ 1608(m) and 1608(n). (1931, c. 70.)

§ 1608(dd) 9. How established and abolished. —The general county district court, herein provided for, shall be established and abolished as provided in this article. (1931, c. 70.)

§ 1608(dd)10. Procedure to establish. — Upon a petition signed by a majority of the resident licensed attorneys at law, of not less than two counties of the State within any one judicial district, and duly verified to that effect, addressed to and filed with the Governor, praying the establishment of a general county district court for any two or more of the counties named in the petition, the Governor shall transmit a copy of the petition to each of the respective boards of county commissioners, and at the same time he shall issue an order to each of said boards directing a joint meeting of the same at the courthouse of one of the said counties at such time and place as he may designate in said order.

The several boards of commissioners, or any two or more of them, if in their judgment the said court shall be established, shall, at such meeting, or at such later meeting within thirty days thereafter to which they may adjourn, pass a resolution reciting the petition for said court, and declaring the same to be established in and for each of the respective counties thus approving and voting for the said resolution.

A majority vote of two or more of the several boards of commissioners participating in the said proceedings for the passage of the said resolution shall be sufficient for the establishment of said court, and it shall thereupon become an established court in and for the counties voting for the resolution; and thereupon a certified copy of the minutes of said meeting, the said petition and resolution, executed by any one of the commissioners present, attested by one member of each of the several boards participating in the said proceedings and voting for said court, shall be transmitted to the clerk of the Superior Court of the several counties participating and adopting the resolution, and also recorded in the minutes of said commissioners' meetings of the several counties composing the district. (1931, c. 70.)

§ 1608(dd)11. Practice and procedure. — That practice and procedure of the said county district courts shall be the same as that of the general county court, and as prescribed in §§ 1608(t)-1608(dd). (1931, c. 70,)

§ 1608(dd)12. Abolishing the court. — Whenever in the opinion of the board of commissioners of any county in which a court has been established under the provisions of this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution, reciting in brief the reasons therefor, duly certify the same to the chairman of the board of com-

missioners of each other county composing, forming and creating the said district court; whereupon the respective boards of commissioners of the several counties embraced in said district court, shall meet at the courthouse of the county in which the judge resides on the third Monday of the month next following the receipt of the certified copy of the resolution aforesaid, or the subsequent and next folowing Monday first and abolish the said county court for the county having adopted the resolution aforesaid, which shall go into effect as to the county abolishing said court at the end of the term to which the judge has been elected. If, upon the abolition of the said county court, as to the county adopting the resolution aforesaid, as many as two other counties forming, composing and making up the said district court, desire the same continued in full force and effect within their respective counties the said commissioners shall readjust the salary and compensation of the judge and prosecuting attorney of said court on the basis hereinbefore provided to take effect at the end of the term to which the said judge has been elected, and the said county court shall continue in full force and effect within the other counties remaining, forming and composing the same, with no impairment of the rights, powers, duties, and authorities conferred by this article. But said court may, at any time, at a meeting held pursuant to a resolution, certified as aforesaid, subject to the provisions hereinbefore recited, abolish the said court in each, all or any of the counties in the districts; and in such event the Clerk of Court shall transfer all cases pending therein to the Superior Court of his respective county. (1931, c. 70.)

SUBCHAPTER VI. CIVIL COUNTY COURTS

Art. 26. Under Chapter 135, Acts of 1925

§ 1608(ee). Establishment.—An inferior court with civil jurisdiction only as hereinafter provided may be established by the board of county commissioners of any county in this State upon the petition of a majority of the resident practicing attorneys within the county. (1925, c. 135, s. 1.)

§ 1608(ff). Jurisdiction.—The said court shall have exclusive original jurisdiction in all civil actions, matters, and proceedings, including all proceedings whatever ancillary, provisional and remedial to civil actions founded on contract or tort, wherein the Superior Court now has exclusive original jurisdiction: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000).

Said court shall have jurisdiction concurrent with the Superior Court in all actions to try title to land and to prevent trespass thereon and to restrain waste thereof: Provided, the sum demanded or the value of property in controversy shall not exceed three thousand dollars ($3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars ($3,000). (1925, c. 135, s. 2.)

§ 1608(gg). Juries in such court; drawing jury; challenges.—In the trial of civil actions in said court either the plaintiff at the time of filing the complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the Superior Court; failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury. The judge of said court, when in his opinion the ends of justice would be best served by submitting the issues as to the jury, may have a jury called of his own motion and submit to it such issue as he may deem material.

Jurors shall receive the same compensation as is now provided by law for jurors serving in the Superior Court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court; the clerk of said court shall tax the sum of three dollars as cost of jury in all jury cases and the same shall be collected by said clerks and paid into the county treasury of said county.

The commissioners of said county at their regular meeting on the first Monday of April, in the year nineteen hundred and twenty-five, and each two years thereafter, shall cause names of their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose which must have two divisions marked "No. 1" and "No. 2," respectively, and two locks to same, the keys of one to be kept by the sheriff of said county and the other to be kept by the chairman of the board of commissioners of said county, the box to be kept by the clerk of said board, which box shall be marked "County Court." The names in this box shall be drawn for juries acting as jurors in the said county court and when a jury is demanded in said court the sheriff shall cause to be drawn from said box out of partition "No. 1," by a child not more than ten years of age fifteen scrolls and the scrolls so drawn to make the jury shall be put into partition marked "No. 2," and in all other respects the jury shall be drawn as juries are drawn in the Superior Court. The jurors of this court shall have the same qualifications as provided for jurors in the trial of causes in the Superior Court. The said jurors shall be summoned to attend under the mandate from the clerk of said county court directed to the sheriff of said county: Provided, that for sufficient cause the judge of this court may issue an order to the board of county commissioners that no jury be drawn for such term or terms of this court, as may seem best to him.

The challenges allowed in the trial of causes in said county court shall be the same in number and for the same causes as are allowed in the trial of causes in the Superior Court; all jurors drawn from the box shall be regular jurors. The said court shall have the same power to summon tales jurors as the Superior Court now has and when a jury trial is had the jury shall be twelve in number. (1925, c. 135, s. 3.)

§ 1608(hh). Terms; docket.—The judge and clerk of said county court are hereby authorized to fix the terms of said court and to make up the docket of said court upon consulting with the bar association of said county. (1925, c. 135, s. 4.)

§ 1608(ii). Witnesses; how summoned.—Witnesses shall be summoned by subpœna issued by the clerk of said court as now provided for the summoning of witnesses for the trial of causes in the Superior Court and shall be allowed the same compensation to be taxed as cost by the clerk of this court. (1925, c. 135, s. 5.)

§ 1608(jj). Appeals.—Appeals may be taken by either the plaintiff or the defendant from the said county court to the Superior Court of said county in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed and only one copy thereof shall be required. The time for taking and perfecting the appeals shall be counted from the end of the term. Upon appeals from said county court the Superior Court may either affirm, modify and affirm the judgment of said county court or remand the cause to the county court for a new trial.

The bonds to stay executions shall be the same as now required for appeals from the Superior Court to the Supreme Court. The judgment of the Superior Court shall be certified to said county court; final judgment may be rendered unless there is an appeal to the Supreme Court. In case of appeal to the Supreme Court upon filing of the certificate from the Supreme Court to the Superior Court said certificate shall be transmitted by the clerk thereof to the clerk of this court. (1925, c. 135, s. 6.)

An appeal to the Superior Court from the granting or refusal of a restraining order by the county court may be taken to the next term of the Superior Court without the necessity of serving statement of case on appeal, countercase or exceptions, etc., the case having been heard on the pleadings and the record in the Superior Court consisting of the summons, complaint, answer, orders, judgment and assignment of errors. Thomason v. Swenson, 204 N. C. 759, 169 S. E. 620.

§ 1608(kk). How actions commenced.—All actions shall be commenced in said court by summons running in the name of the State and issued by the clerk of said county court and shall be returnable as is provided by law for summons in the Superior Court. The plaintiff shall file and retain complaint on or before the return day of such summons; the defendant shall file a written answer or demurrer and shall make his motion in writing during the term to which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7.)

§ 1608(ll). Judgments.—The judgments of said court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of said judgment shall be docketed in the Superior Court of said county and become judgments of the Superior Court as now provided for executions and transcripts of judgments from the courts of justices of the peace with the same limitations as are now provided for judgments of justices of the peace. (1925, c. 135, s. 8.)

§ 1608(mm). Process of the court.—The process of said court while exercising the jurisdiction of a justice of the peace shall not run outside of said county. In all other cases these processes shall run as processes issue out of the Superior Court. (1925, c. 135, s. 9.)

§ 1608(nn). Removal of cause before justice.—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace in said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause may be removed for trial of the said county court. (1925, c. 135, s. 10.)

For an amendment applicable in Mecklenburg County only, see Public Laws 1933, c. 279.

§ 1608(oo). Rules of practice. — The rules of practice as prescribed by law for the Superior Court for the trial of all causes shall apply in this court, supplemented, however, by such rules and regulations as may be prescribed by the judge of this court relating to causes pending therein. (1925, c. 135, s. 11.)

§ 1608(pp). Bonds for costs; duties of clerk.—The statutes about bonds for costs and about suits without bonds for costs that now apply to the Superior Court shall also apply to this court. Wherever the statute provides for a thing to be done by the clerk of the Superior Court or by the judge of the Superior Court or by either, the same thing shall be performed by the clerk of said county court or by the judge of said county court in causes in said county court; this provision shall apply especially to all provisional remedies as now provided by statute except special proceedings. (1925, c. 135, s. 12.)

§ 1608(qq). Costs.—In all causes removed to or brought into the said county court the cost shall be the same as in the Superior Court. All cost shall be paid to or collected by the clerk of said county court in the same manner as in the Superior Court and be paid by the said clerk of said county court into the treasury of said county: Provided, that for the service of process the fees shall be paid to the officer serving the process. The officers shall perform all the duties in said county court as provided in the Superior Court and receive therefor the same fees as allowed for the same service performed in the Superior Court. (1925, c. 135, s. 13.)

§ 1608(rr). Appointment and compensation of judge; substitute; vacancies.—After the ratification of this act and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor who shall appoint a judge to preside over such court, and each fourth year thereafter it shall be the duty of the Governor to appoint the judge of each such county court who shall preside over said court, who shall be learned in the law, of good moral character, and who shall at the time of his appointment and qualification be an elector in and for said county; that the said judge shall

hold office for a term of four years and until his successor is appointed and qualified. And before entering upon the duties of his office the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the Superior Court and file the same with the clerk of the Superior Court of said county; and the said clerk shall record the same. Said judge shall receive a salary of one hundred dollars ($100) a week for each week that he is engaged in holding court, payable in equal weekly installments out of the treasury of said county.

The said judge shall not by reason of his office be prohibited from practicing the profession of attorney at law in other courts of this State except as to matters pending in connection with or growing out of said county court.

When the said judge is unable to preside over said court on account of sickness or absence for other cause he shall appoint some other person learned in the law who shall take the same oath and possess the same qualifications as provided for the judge, to act as a substitute judge with all the powers and duties of the judge, and the compensation of said substitute judge shall be paid by the said judge.

Any vacancy occurring in the office of judge shall be filed by the Governor of the State. (1925, c. 135, s. 14.)

§ 1608(ss). Compensation of clerk; vacancy; files, books, stationery, etc.—The clerk of the Superior Court of said county by himself or his deputies shall ex officio perform the duties of clerk of said county court and shall be paid a sum not less than one thousand dollars ($1,000) annually, the amount to be determined by the board of commissioners of said county and paid out of the treasury of said county as full compensation for his duties as clerk of said county court. Upon the failure of the clerk of the Superior Court of said county to qualify under this act or in case of any vacancy in the office of clerk of the said county court such vacancy shall be filled by the board of commissioners of said county. The necessary files, books, stationery and other material of that nature shall be furnished to the clerk of said county court by said county. (1925, c. 135, s. 15.)

§ 1608(tt). Stenographer; fees.—There shall be an official stenographer of this court whose duty shall be the same as the official stenographer of the Superior Court of said county. Said stenographer fees shall be the same in amount as the fees of the official stenographer of the Superior Court of said county and shall be taxed as cost. (1925, c. 135, s. 16.)

§ 1608(uu). Procedure.—The procedure of said county court, except that hereinbefore provided, shall follow the rules and principles laid down in the chapter on civil procedure in the Consolidated Statutes and amendments thereto in so far as the same may be adopted to the needs and requirements of the said county court. (1925, c. 135, s. 17.)

§ 1608(vv). Records.—There shall be dockets, files, and records kept of all proceedings in the said county court, conforming as nearly as possible to the records of the Superior Court. (1925, c. 135, s. 18.)

§ 1608(ww). To be court of record.—The said county court shall be a court of record and the clerk thereof shall be provided with a seal of said court. (1925, c. 135, s. 19.)

§ 1608(xx). Pending cases.—All cases pending in the Superior Court of said county and in the courts of the justice of the peace of said county on the date the court is established shall be tried in the courts wherein they are pending. (1925, c. 135, s. 20.)

§ 1608(yy). First session.—The presiding judge of said county court shall hold the first session of said county court within thirty days after his appointment by the Governor, and other sessions shall be held as provided in this article. (1925, c. 135, s. 21.)

§ 1608(zz). Discontinuance of court.—The board of commissioners of any county may discontinue such court on written petition signed by the majority of the practicing attorneys of such county. (1925, c. 135, s. 22.)

§ 1608(aaa). Existing laws not repealed.—The article shall not be construed to repeal chapter twenty-seven of the Consolidated Statutes; chapter two hundred and sixteen of the Public Laws of one thousand nine hundred and twenty-three or any amendments thereto, (Articles 24 and 25 of this chapter) nor shall it repeal or affect any act establishing any inferior court now existing or that may hereafter be created under the existing law but shall be construed to be supplemental to the existing law and a method by which county courts have been established. (1925, c. 135, s. 23.)

§ 1608(bbb). Article not applicable to certain counties.—The provisions of this article shall not apply to the following counties: Burke, Hyde, Avery, Alexander, Clay, Catawba, Mitchell, Madison, Graham, Swain, Henderson, Dublin, Jackson, Davie, Cherokee, Stockes, Lincoln, Wilkes, Johnston, Person, Pamlico, Wataugu, Haywood, Vance, Robeson, Craven, Caldwell, Hoke, Yancey, Anson, Pender, Macon, Onslow, Bladen, Alleghany and Scotland: Provided, this bill shall not apply to any of the counties of the present Sixteenth and Seventeenth Judicial Districts. (1925, c. 135, s. 24.)

Art. 27. Under Chapter 167, Acts of 1925

§ 1608(ccc). Establishment. — In addition to the plan for a general county court, provided for in chapter two hundred sixteen, Public Laws, session of one thousand nine hundred and twenty-three, (Articles 24 and 25 of this chapter) and amendments thereto, there may be established by the board of county commissioners in any county, a court of civil jurisdiction, which shall be a court of record and which shall be maintained pursuant to this act, and which court shall be called the county civil court, and shall have civil jurisdiction as herein provided. (1925, c. 167, s. 1.)

§ 1608(ddd). Qualification, election, and term of judge; office.—The county civil court shall be presided over by a judge, who may be an attorney

at law, and shall reside and be qualified elector in the county during his term of office, and shall be permitted to practice law during his term of office. The first judge of the county civil court shall be elected by the board of county commissioners at the time of the establishment of said court, and he shall hold his office until January first, following the next general election of county officers within said county, and until his successor is elected and qualified, and if a vacancy occurs in the office of judge, it shall be filled by the election of a successor for the unexpired term by the board of county commissioners. Each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office in the same manner as other county officers are nominated and elected, and shall hold office for a term of four years, beginning January first, following his election and until his successor is elected and qualified, unless said court is abolished. The judge shall qualify by taking and subscribing an oath of office as is now provided by law for a judge of the Superior Court, which shall be filed with the clerk. The salary of said judge shall be fixed by the board of commissioners of the county, which shall not be decreased during the term of office; to be paid in monthly installments by the county. The judge shall be provided by the county board of commissioners with an office and a suitable and convenient room for holding court at the county seat. (1925, c. 167, s. 2.)

§ 1608(eee). Substitute judge. — When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification, or other cause, he shall appoint some other person learned in the law, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge, and his compensation during his appointment shall be paid by the said judge. (1925, c. 167, s. 3.)

§ 1608(fff). Terms of court; calendar.—The court shall open for the transaction of business and trial of cases on the first Monday of each month and continue until the matters of the court are disposed of, and it shall be the duty of the judge to prepare a calendar of cases for trial, on which jury cases shall have precedence. (1925, c. 167, s. 4.)

§ 1608(ggg). Clerk of court.—The clerk of the Superior Court of the county shall be ex officio clerk of the court, and in addition to the salary or fees paid him as clerk of the Superior Court, he shall be paid such additional compensation as the county commissioners of the county may fix to be paid monthly out of the county funds, and the board of county commissioners be and are hereby authorized and empowered to provide for salary or fees for such additional deputies as he may need. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk, to the same extent as he is bound as clerk of the Superior Court. (1925, c. 167, s. 5.)

§ 1608(hhh). Sheriff. — The sheriff of the county, or his deputies, appointed, shall attend upon the same terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the Superior Court of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services, in addition to his salary or fees fixed by law. (1925, c. 167, s. 6.)

§ 1608(iii). Records; blanks, forms, books, stationery.—The clerk of the court shall keep separate records for the use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery as may be needed by the court, and the clerk shall keep the same in the office of the clerk of the Superior Court. (1925, c. 167, s. 7.)

§ 1608(jjj). Juries.—The jury in said court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the Superior Court. In all actions the parties shall be deemed to have waived a jury trial, unless demand shall be made therefor, as hereinafter provided in writing. The plaintiff in filing the complaint, or the defendant at the time of filing answer, may in the pleadings demand a jury trial, or in cases transferred from the Superior Court to the said court, either party may demand jury trial, in writing, signed by the party making it or his attorney, which must be made at the time of such transfer. Any demand for a jury trial shall be accompanied by a deposit of five dollars ($5.00), to insure the payment of the jury tax, except in cases brought in forma pauperis, provided such demand shall not be used to the prejudice of the party making it. (1925, c. 167, s. 8.)

§ 1608(kkk). Jury list; summons.—It shall be the duty of the board of county commissioners, upon the establishment of a court as herein provided, and every two years thereafter, to prepare a list of jurors, identical with the list prepared for the Superior Court and subject to the same rules and regulations, and mark said jury box as the county civil court box, from which the jury shall be drawn. The judge of the court shall issue the proper writ to the sheriff of the county to summons the jurors for the court in the same manner as juries are ordered and drawn in the Superior Court. (1925, c. 167, s. 9.)

§ 1608(lll). Talesmen.—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the Superior Court, and to direct the sheriff to summons a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1925, c. 167, s. 10.)

§ 1608(mmm). Procedure, process, pleadings, etc.—The procedure, practice, processes, pleadings and procuring evidence and judgments shall conform as near as may be to the courts having concurrent jurisdiction with this court. (1925, c. 167, s. 11.)

§ 1608(nnn). Appeals.—Appeals in all actions may be taken from the court to the Superior Court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the Superior

Court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only two copies shall be required; one for the court and the other for the opposing counsel. The time for taking and prosecuting appeals shall be counted from the end of the calendar month of the court at which such trial is had. It shall be the duty of any judge of the Superior Court holding the courts in any county, where a court is established under the provisions of this act, to allot sufficient and adequate time during each regular term of the Superior Court held in such county for the hearing of appeals from the county civil court of such county. Upon such appeal the Superior Court may either affirm or modify and affirm the judgment of the county civil court or remand the cause for a new trial. From the judgment of the Superior Court an appeal may be taken to the Supreme Court, as is now provided by law. Orders to stay execution on judgments entered in the court shall be the same as in appeals from the Superior Court to the Supreme Court, and judgments of said court may be enforced by execution by the clerk thereof, returnable within twenty days, and transcripts of such judgments may be docketed in the Superior Court and become judgments of the Superior Court as is now provided. Transcripts may be docketed in the Superior Court as now provided for judgments of justices of the peace, and when docketed shall in all respects be judgments in the same manner and to the same extent as if rendered by the Superior Court. (1925, c. 167, s. 12.)

§ 1608(ooo). Jurisdiction.—The county civil court shall have jurisdiction only in civil matters, and as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county;

(2) Jurisdiction concurrent with the Superior Court in all actions founded on contract; wherein the amount demanded shall not exceed the sum of five thousand dollars ($5,000), exclusive of interest and cost;

(3) Jurisdiction concurrent with the Superior Court in all actions not founded upon contract; wherein the amount demanded shall not exceed the sum of five thousand dollars ($5,000), exclusive of interest and cost;

(4) Jurisdiction concurrent with the Superior Court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

(5) Jurisdiction concurrent with the Superior Court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions. (1925, c. 167, s. 13.)

§ 1608(ppp). Stenographer; fees.—There shall be an official stenographer of the court whose duties and fees shall be the same and taxed as those of the official stenographer of the Superior Court. (1925, c. 167, s. 14.)

§ 1608(qqq). Disqualification of judge.—Where the judge is disqualified to try any case, it shall be removed for trial to the Superior Court of the county, in which the court is located or ore tenus by the substitute judge. (1925, c. 167, s. 15.)

§ 1608(rrr). Pending cases, transfer.—By consent of plaintiff and defendant any case, within the jurisdiction of the court, pending in the Superior Court may be transferred to the docket of the county civil court, and there tried. (1925, c. 167, s. 16.)

§ 1608(sss). Abolishing court.—This court may be abolished by resolution of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and, in case of the abolition of the court, cases then pending shall be transferred to the Superior Court. (1925, c. 167, s. 17.)

§ 1608(ttt). Existing laws not repealed.—This act shall not be construed to repeal any existing laws by which a county court may be created or to effect or repeal any court now or hereafter created under existing laws and shall only be construed to be an additional method by which a county court may be established. (1925, c. 167, s. 18.)

§ 1608(uuu). Article inapplicable to certain counties.—This article shall not apply to the counties of Bladen, Jones, Bertie, Caldwell, Craven, Columbus, Gaston, Henderson, Mitchell, Vance. (1925, c. 167, s. 19.)

SUBCHAPTER VII. COUNTY CRIMINAL COURTS.

§ 1608(1). Counties authorized to establish county criminal courts.—In each county in this State there may be established a court of criminal jurisdiction, which shall be a court of record, and it shall be maintained pursuant to the provisions of this act, and said court shall be called the county criminal court, and shall have jurisdiction over the entire county in which said court shall be established. (1931, c. 89, s. 1.)

§ 1608(2). Established by resolution of county commissioners.—If, in the opinion of the board of commissioners of any county, the public interest will be best promoted by so doing, they may establish a County Court under the provisions of this act, by resolution which shall in brief recite the reasons for the establishment thereof, and further recite that in the opinion of the board of commissioners it is not necessary that an election be called for the establishment of said court, as herein provided, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (1931, c. 89, s. 2.)

§ 1608(3). Court may be abolished by resolution.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this act, the conditions prevailing in such county are such as to no longer require the said court, such board of commissioners may, by proper resolution, reciting in brief the reasons therefore, abolish said court. (1931, c. 89, s. 3.)

§ 1608(4). Transfer of cases from docket of Superior Court.—Upon the establishment of the County Court, as in this act authorized, the Clerk of the Superior Court shall immediately transfer

from the Superior Court to such County Court all criminal actions pending in the Superior Court of which the County Court has jurisdiction, as in this act conferred, and the County Court shall immediately proceed to try and dispose of such criminal actions. (1931, c. 89, s. 4.)

§ 1608(5). Appointment of judge; associate judge. — The court shall be presided over by a judge, who may be licensed to practice law, and who, at the time of his election or appointment, shall be a qualified elector in the county. The board of commissioners of the county shall appoint such judge, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided. In the event of a vacancy by death or resignation, appointment shall be for the unexpired term of the previous judge. The salary of said judge shall be fixed by the board of commissioners of the county, and the same shall be paid monthly out of the general county fund. In each county in which the court is established, under the provisions of this act, there shall be appointed by the board of commissioners of said county an associate judge, who shall preside as judge of the county court, and with like authority of the regular judge, in the event of sickness or absence from the county of the regular judge, or in the event that the regular judge should be disqualified by relationship to the parties in interest, or from other cause. The associate judge shall take the same oath of office required by the judge of the county court, and shall be paid such compensation for his services as may be provided by the board of commissioners. The compensation which shall be paid to the associate judge shall be deducted from the salary to be paid to the regular county judge as herein provided. He shall be appointed at the time fixed for the appointment of the judge of the County Court, and for the same term as herein provided for a regular judge of the county, with the authority on the part of the board of commissioners to fill the vacancy in the event of death or resignation. (1931, c. 89, s. 5.)

§ 1608(6). Appointment of prosecuting attorney. — There shall be a prosecuting attorney of said County Court, to be known as the prosecuting attorney, who shall appear for the State and prosecute all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of commissioners, to be paid monthly from the general county fund. The board of commissioners shall appoint such prosecuting attorney, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided, except in the event of a vacancy in the office of prosecuting attorney, either by death or resignation, the appointment to fill such vacancy shall be for the unexpired term of the previous prosecuting attorney. (1931, c. 89, s. 6.)

§ 1608(7). Clerk of the Superior Court ex-officio clerk of the County Court unless on salary; term of office; fees; bond. — In those counties in which the Clerk of the Superior Court and sheriff are paid fees and not salaries, such clerks and sheriffs shall receive the same fees for services rendered in a County Court as they would have received had such services been rendered in the Superior Court.

The Clerk of the Superior Court shall, ex-officio, be Clerk of the County Court, and in all counties in which the Clerk of the Superior Court is paid fees, the Clerk of the Superior Court shall have the right and privilege to resign as Clerk of the County Court, and in the event of such resignation the board of commissioners shall have the authority to appoint a Clerk of the County Court, whose term of office shall be two (2) years, and whose term of office shall expire at the time fixed for the termination of the office of the judge of said court, and the appointment of the Clerk of the County Court shall thereafter be made by the board of commissioners at the same time when the appointment of the judge of said is made by said board of commissioners. He will receive the same fees for services rendered as clerks of the Superior Courts. In all counties in which the Clerks of the Superior Court are paid salaries the board of commissioners are authorized, in their discretion, to provide additional compensation to such clerks for their services rendered as Clerk of the County Court.

In the event that the Clerk of the Superior Court shall resign as Clerk of the County Court as herein provided, upon the appointment of a Clerk to the County Court, he shall be required to enter into a bond in such sum as may be fixed by the board of commissioners for the faithful performance of the duties of his office. (1931, c. 89, s. 7.)

§ 1608(8). Oath of judge; prosecuting attorney.—The judge of the County Court, before entering upon the duties of his office, shall take the prescribed oath required of judges of the Superior Court, and such oath shall be recorded by the Clerk of the Superior Court of the county. The prosecuting attorney, before entering upon the duties of his office, shall take the prescribed oath required of solicitors of the Superior Court, and said oath shall be recorded by the Clerk of the Superior Court of the county. (1931, c. 89, s. 8.)

§ 1608(9). Court seal.—The County Criminal Court shall have a seal with the impression "County Court of.....County," which shall be used in attestation of all writs, warrants, or other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the State of North Carolina. (1931, c. 89, s. 9.)

§ 1608(10). Jurisdiction; Appeal; judgment docket. — The jurisdiction of the County Court shall be as follows:

(a) Said court shall have final exclusive and original jurisdiction of all criminal offenses committed in the county below the grade of a felony, as now defined by law, except as to offenses over which justices of the peace have final jurisdiction, and all such offenses whereof said court is given

jurisdiction are hereby declared to be petty misdemeanors.

(b) To punish for contempt to the same extent and in the same manner allowed by law to the Superior Court of this State; to issue writs ad testificandum and other processes to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the Superior Courts of this State.

(c) The judge of the County Court shall have all the power and jurisdiction and authority now conferred by law upon the Superior Court to sentence any person who pleads guilty or who is convicted in said court of a misdemeanor for which the punishment prescribed by law is imprisonment, to be imprisoned in the common jail of the county and to be assigned to work on the public roads of any county, as now provided by law, and the clerk of said court shall issue commitments therefor in the same manner as now provided by law for the Clerks of the Superior Court.

(d) Any person convicted in said court shall have the right of appeal to the Superior Court of said county, and upon such appeal the trial in the Superior Court shall be de novo.

(e) The County Court shall have exclusive preliminary jurisdiction over all offenses whereof exclusive jurisdiction is not given to said court, and shall hear and determine all warrants charging such offenses, and in the event that the court finds probable cause, shall bind the defendant over to the Superior Court, requiring such bond as the court may fix for the appearance of the defendant at the next ensuing term of the Superior Court of said county for the trial of criminal causes; and all justices of the peace issuing warrants wherein the defendant or defendants are charged with the commission of an offense whereof the Superior Court has jurisdiction, shall make said warrants returnable before the said County Court.

(f) The judge of the County Court shall have the same authority as the judge of the Superior Court to render judgments upon all appearance bonds, and such other bonds as are authorized by law, when default has been made. All such judgments shall be certified to and docketed upon the civil judgment docket in the Superior Court of the county in which the court is held, and shall be cross-indexed as other judgments, and shall, from the time of docketing, have the same force and effect as judgments of the Superior Court. (1931, c. 89, s. 10.)

Editor's Note.—Civil Jurisdiction of Gates County Court.— Public Laws 1931, c. 241, provided that if the Board of Commissioners of the County of Gates should within six months establish a County Court under the act from which this section is taken, there "shall be conferred upon said County Court civil jurisdiction to try and determine civil actions wherein the party plaintiff or defendant is a resident of that County;" and that §§ 1591-1596 and 1598, shall be applicable to said court when established.

The act further provided: "The jurisdiction of such courts in civil actions shall be as follows:

(a) Jurisdiction concurrent with that of justices of the peace within the County;

(b) Jurisdiction concurrent with the Superior Court in all actions founded on contract, wherein the amount involved, exclusive of interest and costs, does not exceed five hundred dollars.

(c) Jurisdiction concurrent with the Superior Court in actions not founded upon contract wherein the amount involved, exclusive of interest and costs, does not exceed the sum of five hundred dollars."

By the acts of 1935 it is directed that a new subsection (g), giving concurrent jurisdiction with justices of the peace and applicable only in Burke county be added.

§ 1608(11). Jury trials. — In all cases coming before the said County Court a jury may be demanded by either the State or the defendant, or the court may, upon its own motion, order a jury trial in any case where, in the judgment of the court, the ends of justice would be better met by submitting the case to a jury. The board of commissioners of the county in which said County Court is established are hereby required to furnish the clerk of said County Court with a list of jurors of said county, and in any case where a jury trial is to be had a jury of twelve (12) shall be drawn from the said list of jurors so furnished by the board of commissioners. The names of the jurors shall be drawn from the box as now provided in cases in the Superior Court in drawing a special venire: Provided, however, the defendant may waive a jury drawn from the box, in which event the court shall direct the sheriff to summons bystanders or talis jurors to serve as jurors in said cases, and the judge of the County Court shall have like authority as is now existing by the judge of the Superior Court to order the summons of talis jurors to serve in said court where the jurors drawn from the box shall be legally challenged or shall be otherwise disqualified to serve as such jurors. The causes of challenge of jurors in the County Court shall be the same as now provided for challenges of jurors in the Superior Court. The fees of jurors shall be the same as now paid jurors in the Superior Court, and shall be paid from the general county fund, and a jury tax of fifteen ($15.00) dollars in such cases shall be taxed in the bill of costs. (1931, c. 89, s. 11.)

§ 1608(12). Process. — The warrants, subpoenas, and other processes of law issued by said court shall be directed to the sheriff or other unlawful officer of the county to which said process is directed, and service thereof shall be lawfully made when made by the sheriff, deputy sheriff, of the county, or any other constable of said county, or by any rural policeman of said county, or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of said county, when attested by the seal of said county, shall run anywhere in the State of North Carolina, and shall be executed by all officers in the same manner and way as processes now issued by the Superior Court. (1931, c. 89, s. 12.)

§ 1608(13). Duties of judge; bond required on being bound over. — The judge of the County Court shall preside over said court and shall direct and determine all actions coming before him, the jurisdiction of which is conferred by this Act, and in all cases where the defendant or defendants shall crave an appeal to the Superior Court, and in cases where the court has preliminary jurisdiction, and probable cause is found, the defendant shall be required to give bond, with sufficient surety, to be fixed by the court, conditioned upon the defendant's appearance at the next ensuing term of the Superior Court of said county for the trial of criminal causes, and in default there-

of the court shall commit the defendant to the common jail of said county until said defendant shall have given bond or otherwise discharged according to law, except in capital cases, when the court shall find probable cause, he shall bind the defendant over to the Superior Court without bond. (1931, c. 89, s. 13.)

§ 1608(14). When prosecuting attorney's fee taxed in bill of costs.—In all cases where the defendant shall plead guilty, or shall be convicted, there shall be taxed in the bill of costs a fee of eight dollars ($8.00) in lieu of prosecuting attorney's fee, which shall be paid by the defendant, and shall be paid into the general county fund. In the event the defendant is confined to jail or confined to jail and assigned to work on the public roads of a county, such fee shall not be taxed as a part of the cost. (1931, c. 89, s. 14.)

§ 1608(15). Complete record to be kept by clerk; docket.—It shall be the duty of the clerk of said court to keep an accurate account and true record of all costs, fines, penalties, forfeitures, and punishments of said court imposed under the provisions of this Act, and said record shall show the name of each offender, the name of the offense, the date of the hearing of the trial, and the punishment imposed, and the board of commissioners shall provide dockets for recording all of the processes issued by said court, which shall conform to the docket kept by the clerk of the Superior Court, and shall also provide proper files to properly keep a record of all cases which shall be disposed of in said court, and the disposition that has been made of the same. (1931, c. 89, s. 15.)

§ 1608(16). Warrants returnable to court. — All warrants for crimes whereof the County Court shall have jurisdiction may be issued by any Justice of the Peace of said county, or mayor of any incorporated town, as provided by law, and shall be made returnable before the County Court at the next ensuing term thereof. (1931, c. 89, s. 16.)

§ 1608(17). Service fees to officers except where they are on salary. — The cost of issuing and serving warrants, subpoenas, and other processes of law by said court shall be payable to the officers issuing or serving them, and shall be payable to the clerk of said court as is now done in cases determined by the Superior Court, except in those counties where officials are paid salaries and are not allowed fees, in which cases the costs so taxed shall be paid into the office of the clerk of said court, to be paid by him to the county treasurer or depository of said county, in the same manner and way as is now provided for similar fees in the Superior Court. (1931, c. 89, s. 17.)

§ 1608(18). Regular and specal terms; place of sessions.—There shall be held a regular term of the County Court established under the provisions of this Act on the second Tuesday in each month: Provided, however, special terms may be held at any time by order of the judge of said court for the purpose of disposing of cases where pleas of guilty shall be entered and for the trial of cases where the defendants are confined to prison. At all regular terms the court shall continue in session until all cases are tried, continued, or otherwise disposed of according to law: Provided, however, the board of county commissioners in any county in which a County Court is established under the provisions of this Act by proper resolution duly entered upon the minutes of said board, may, in the exercise of their discretion, fix other days than the days provided in this Act on which regular terms of said court may be held: Provided, further, when a regular term of the County Court to be held under the terms fixed by this Act shall conflict with a term of the Superior Court in said county, the regular term of the County Court shall be held on the first Tuesday following the termination of said term of the Superior Court, as fixed by law. All sessions of said County Court shall be held in the court house of the county in which said court is established. (1931, c. 89, s. 18.)

§ 1608(19). Judge and prosecuting attorney may practice law in other courts. — In the event of the appointment of a licensed lawyer as judge or prosecuting attorney of said County Court, nothing in this Act shall prevent the said judge or the prosecuting attorney appointed under the provisions of this Act from practicing law in matters in which he is no way connected by reason of his said office, or in courts in the State in matters which have not been heard or will not be heard in the County Court of which he is an officer. (1931, c. 89, s. 19.)

§ 1608(20). General County Court Acts not affected.—Nothing in this Act shall be construed to appeal, alter, or amend any law heretofore enacted authorizing the establishment of county courts in the several counties of the State, but this Act shall be construed to be in addition to and supplemental to such acts, and any court established under the provisions of this Act shall be restricted and limited to all the provisions herein contained. (1931, c. 89, s. 20.)

§ 1608(21). Certain counties excepted from provisions of statute.—This Act shall not apply to the counties of Alexander, Alleghany, Ashe, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Caswell, Catawba, Chowan, Clay, Cleveland, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Franklin, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Lincoln, Macon, Madison, Montgomery, New Hanover, Northampton, Orange, Pamlico, Pasquotank, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Surry, Swain, Transylvania, Vance, Wake, Warren, Watauga, Wayne, Wilkes, Yadkin, Yancey and Richmond. (1931, c. 89, s. 21, c. 270; 1935, c. 8.)

Editor's Note.—Cabarrus county was omitted by the amendment of 1935.

CHAPTER 28

DEBTOR AND CREDITOR

Art. 1. Assignments for Benefit of Creditors

§ 1609. Debts mature on execution of assign-

ment; no preferences.—Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preference of one creditor over another, except as hereinafter stated. (Rev., s. 967; 1893, c. 453; 1909, c. 918, s. 1.)

Cross References.—As to assignments for the benefit of creditors, see 2 N. C. Enc. Dig. 64-98; 13 N. C. Enc. Dig. 193-195. As to homestead and exemptions, see sections 728 and notes. As to preferences in the absence of assignment, see notes to section 1005—analysis line "Rights and Remedies of Creditors."

Definition.—An assignment for the benefit of creditors has been defined by the U. S. Supreme Court as "an assignment whereby a debtor, generally an insolvent, transfers to another his property, in trust to pay his debts or apply the property upon their payment." Black Law Dict.

What Constitutes an Assignment.—The Supreme Court has held that where a person, who is insolvent, makes an assignment of practically all his property to secure a pre-existing debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and neither the omission of a small part of the debtor's property nor a defeasanse clause in the instrument will change this result. Bank v. Tobacco Co., 188 N. C. 177, 178, 124 S. E. 158; Powell Brothers v. Lumber Company, 153 N. C. 52, 57, 68 S. E. 926; Nat'l Bank v. Gilmer, 116 N. C. 684, 22 S. E. 2; Nat'l Bank v. Gilmer, 117 N. C. 416, 23 S. E. 333; Glauton v. Jacobs, 117 N. C. 427, 23 S. E. 335; Cooper v. McKinnon, 122 N. C. 447, 29 S. E. 417; Pearre v. Folb, 123 N. C. 239, 31 S. E. 475; Brown v. Nimocks, 124 N. C. 417, 32 S. E. 743; Taylor v. Lauer, 127 N. C. 157, 37 S. E. 197; Odom v. Clark, 146 N. C. 544, 60 S. E. 513.

Same—Deed to Secure Advancements. — Where the purpose of a deed is to secure payment not only of pre-existing debts but also of debts to be contracted for advancements to aid grantors in carrying on their business then said deed is not a voluntary deed of assignment for the benefit of creditors, within the meaning of this and the following section. Commissioner of Banks v. Turnage, 202 N. C. 485, 486, 163 S. E. 451.

Same—Mortgage.—Where a mortgage is made of the entirety of a large estate for pre-existing debts (omitting only an insignificant remnant of property) the mortgage is in effect an assignment for the benefit of creditors secured therein. National Bank v. Gilmer, 117 N. C. 416, 23 S. E. 333; Nat'l Bank v. Gilmer, 116 N. C. 684, 22 S. E. 2.

Same—Chattel Mortgages.—A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a pre-existing debt on practically all of its property, will be treated as an assignment and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. Banking, etc., Co. v. Tobacco Co., 188 N. C. 177, 124 S. E. 158.

But a chattel mortgage on a stock of goods, securing the purchase price, can not be deemed an assignment for the benefit of creditors where the secured debt is contemporaneous with the contract of purchase, as a part of one continuous transaction. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155.

A chattel mortgage of an insolvent corporation, executed and registered before the appointment of a receiver for it, will not be construed under the provisions of this section as in effect an assignment for the benefit of creditors in the absence of the fact that the property covered by the mortgage constitutes practically all of the property of the insolvent. Vanderwal v. Vanco Dairy Co., 200 N. C. 314, 315, 156 S. E. 512.

By Whom Made—Corporations.—A corporation, it is held in the U. S. Supreme Court, through its proper officers, may make an assignment for the benefit of creditors. Potts v. Wallace, 146 U. S. 689, 36 L. Ed. 1135.

Same—Partnership.—In Tracy v. Tuffly, 134 U. S. 206, 33 L. Ed. 879, it is held that a partnership, whether general or limited, may, through its proper officers, make an assignment for the benefit of creditors.

Same—Trustees.—In accordance with the rule that trustees must unite to pass any title to property jointly held by them, where there are two or more trustees of the property of insolvents, all should join therein. Wilber v. Almy, 12 How. 180, 13 L. Ed. 944.

Applies to Sureties.—The provision that all debts of the maker become due at once applies to the sureties upon a note of the assignor. Pritchard v. Mitchell, 139 N. C. 54, 51 S. E. 783.

Effect of Void Assignment.—If a deed of assignment for the benefit of creditors becomes void as to creditors its primary and essential purpose is defeated, and it is totally invalid. The assignee does not take the property for his own benefit, but for the benefit of the creditors, and while he holds the legal title they are really the equitable owners to the extent of their claims. Whatever defeats their interest defeats the object of the trust and, consequently, the trust itself. Cooper v. McKinnon, 122 N. C. 447, 450, 29 S. E. 417.

Same—Fraud Need Not Be Shown.—A voluntary conveyance, declared invalid for not complying with the provisions of this and the following sections, is not only void as to bona fide unsecured creditors, but inter partes; and hence it would be unnecessary for such creditors to show fraud in its procurement in order to set it aside. Powell Brothers v. Lumber Company, 153 N. C. 52, 68 S. E. 926.

What Constitutes a Preference.—No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors, §§ 859, 860, 1113, par. 6, and no permissible interpretation in favor of such a preference can be derived by analogy to this section and section 1618, applying to a voluntary assignment for the benefit of creditors, or the other sections of chapter 28. Mascot Stove Mfg. Co. v. Turnage, 183 N. C. 137, 110 S. E. 779.

Same—When Certain Creditors Omitted.—An assignment for the benefit of creditors omitting certain other creditors is invalid as a preference. Taylor v. Lauer, 127 N. C. 157, 37 S. E. 197.

Effect of Subsequent Bankruptcy.—Where an assignment for the benefit of creditors was made under this section more than four months before the debtor was adjudged a bankrupt under the federal law, the assignment was valid and whatever was done under it was valid. The court of bankruptcy cannot take retroactive cognizance of trusts beyond four months and hence will merely administer the estate as it exists at the time of the adjudication. In re Carver, 113 Fed. 138, 139.

Assignment Irrevocable.—It has been held in Brings v. Dabney, 19 Wall. 1, 22 L. Ed. 90, that a voluntary assignment for the benefit of creditors, if assented to by the creditors, or a considerable portion of them, becomes irrevocable.

Former Provisions.—This section formerly contained the following paragraph: "A schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the superior court of the county in which such assignment is made, stating the names of the preferred creditors, the amount due each, when the debt was made, and the circumstances under which the said debt was contracted, and the said schedule shall be filed within five days of the registration of such deed of assignment."

The object of the act was to give the creditors a convenient opportunity of ascertaining the nature of the preferences, and to put such information, verified by the oath of the assignor, in such form and place as to be equally accessible to all. The provision was construed as mandatory. Brown & Co. v. Nimocks, 124 N. C. 417, 420, 32 S. E. 743; Frank v. Heiner, 117 N. C. 79, 23 S. E. 42; Glanton v. Jacobs, 117 N. C. 427, 23 S. E. 335; National Bank v. Gilmer, 117 N. C. 416, 424, 23 S. E. 333.

For other cases construing this provision, see Cooper v. McKinnon, 122 N. C. 447, 29 S. E. 417; Brannock v. Brannock, 32 N. C. 428, 429.

§ 1610. Trustee to file schedule of debts.—Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, an inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or to the hands of any person for him, by virtue of such deed of trust, and when further property of any kind not included in any previous return comes to the hands or knowledge of such trustee he shall return the same as hereinbefore prescribed

within ten days after the possession or discovery thereof. (Rev., s. 968; 1893, c. 453, s. 2.)

Section Mandatory.—An assignment for the benefit of creditors is void unless the formalities of this section are complied with as to filing an inventory of the property, and will be set aside at the suit of a creditor whose debt is not therein provided for. Odom v. Clark, 146 N. C. 544, 60 S. E. 513.

If the provisions of this section are not complied with, the deeds of trust are void. Virginia Trust Co. v. Pharr Estates, 206 N. C. 894, 175 S. E. 186.

Cited in Flowers v. American, etc., Chemical Co., 199 N. C. 456, 154 S. E. 736.

§ 1611. Trustee to recover property conveyed fraudulently or in preference.—It is the duty of the trustee to recover, for the benefit of the estate, property which was conveyed by the grantor or assignor in fraud of his creditors, or which was conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a pre-existing debt, when the grantee or transferee of such property knows or has reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer. (1909, c. 918, s. 2.)

For a discussion of preference under the Bankruptcy Act, see Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286.

General Effect of Section.—On proper consideration of this section, its terms and purpose, it is clear that the Legislature intended to prohibit and avoid, as a wrongful preference, any and every disposition of real or personal property, absolute or conditional, by which a creditor, in consideration of an existent or antecedent debt and within four months of a general assignment by his debtor, acquires title to such debtor's property or any interest therein or lien thereon, when he knew or had reasonable ground to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. Wooten v. Taylor, 159 N. C. 604, 76 S. E. 11; Teague v. Howard Grocery Co., 175 N. C. 195, 198, 95 S. E. 173.

Preferences Valid at Common Law.—A debtor unable to pay his indebtedness in full, has an undoubted right, in the absence of a statute, to make preferences in the distribution of his property among the creditors, when the appropriation is absolute and with no reservation for his own benefit to the injury of creditors unprovided for. Guggenheimer v. Brookfield, 90 N. C. 232, 234.

At common law a debtor may, in the exercise of the power arising from the ownership of property, if acting conscientiously and without collusion, prefer certain of his creditors to the detriment or exclusion of the others. United States Rubber Co. v. American, etc., Co., 181 U. S. 434, 45 L. Ed. 938.

Real and Personal Property Included.—This section requiring the trustee in a general assignment for creditors to recover property "conveyed or transferred by the grantor or assignor" in preference, within the four months period, includes within their meaning both real and personal property, and the general methods by which the title is passed or interest therein created and extends to an executed contract of sale. Teague v. Howard Grocery Co., 175 N. C. 195, 95 S. E. 173.

The Four Months' Period.—The four months' period mentioned in this section is to be counted from the time the transfer or conveyance was made, and not from the time of its registration. Wooten v. Taylor, 159 N. C. 604, 76 S. E. 11.

Effect of Preference in Deed.—A deed of general assignment for the benefit of creditors, by expressly making a prior mortgage of the grantor's property, wherein an unlawful preference is given, subject thereto, will not, of itself, prevent a recovery of the property conveyed in the mortgage by the trustee in the deed in trust for the general creditors. Wooten v. Taylor, 159 N. C. 604, 76 S. E. 11.

A chattel mortgage on a stock of goods to secure the purchase price, the mortgagor retaining possession is not a preference within this section. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155.

Meaning of Insolvent.—Insolvent means unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. Silver Valley Mining Company v. North Carolina Smelting Company, 119 N. C. 417, 418, 25 S. E. 954.

Same—Applied to Corporation.—A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property sufficient, if converted into money at market prices, to meet its liabilities. Silver Valley Mining Company v. North Carolina Smelting Company, 119 N. C. 417, 25 S. E. 954.

Debtor Whose Assets Exceed His Indebtedness.—Where a solvent debtor conveys practically all of his property to secure a pre-existing debt, having other creditors at the time, it does not create a preference within the intent and meaning of this section. Flowers v. American, etc., Chemical Co., 199 N. C. 456, 154 S. E. 736.

Right and Duty to Defend Suits.—It is the duty of assignees for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction and the facts and circumstances of the case will admit or warrant, to defend suits to set aside the assignments. Chittenden v. Brewster, 2 Wall. 191, 17 L. Ed. 839.

§ 1612. Substitute for incompetent trustee appointed in special proceeding.—When a trustee named in a deed of assignment for the benefit of creditors has died or resigned or has in any way become incompetent to execute the trust, the clerk of the superior court of the county wherein said deed of assignment has been registered is authorized and empowered, in a special proceeding in which all persons interested have been made parties, to appoint some discreet and competent person to act as such trustee and to execute all the trusts created in the original deed of assignment, according to its true intent and as fully as if originally appointed trustee therein. (1915, c. 176, s. 1.)

See generally as to appointment of successor to incompetent trustee, section 2582.

§ 1613. Insolvent trustee removed unless bond given; substitute appointed.—Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging under oath that the trustee named therein is insolvent, and asking that he be required to give bond or be removed, it is the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear the complaint. If upon such hearing the clerk is satisfied that such trustee is insolvent, he shall remove such trustee and appoint some competent person to execute the provisions of such deed of trust, unless such insolvent trustee shall file with the clerk a good and sufficient bond, to be approved by him, in a sum double the value of the property in the deed of trust, payable to the state of North Carolina, and conditioned that such trustee shall faithfully execute and carry into effect the provisions of said deed of trust. (Rev., s. 969; 1893, c. 453, s. 3.)

In General.—While formerly it was entirely competent for a debtor to assign his property to an insolvent person who was otherwise qualified to execute the provisions of the deed of trust for the benefit of creditors, the policy of the law has since been declared by this section to throw greater safeguards around such transactions by requiring every trustee of this kind to give bond when proper application for that purpose is made to the clerk. Preiss v. Cohen, 112 N. C. 278, 282, 17 S. E. 520.

§ 1614. Trustee removed on petition of creditors; substitute appointed.—Upon the written petition of one-fourth of the number of the creditors of the grantor or assignor whose claims

aggregate more than fifty per cent of the total indebtedness of said grantor or assignor, the clerk of the superior court of the county in which said deed of trust or deed of assignment is registered, upon a notice of not more than ten days to said trustee of said petition, shall remove said trustee and appoint some competent person to execute the provisions of such deed of trust or deed of assignment. (1909, c. 918, s. 3.)

§ 1615. Substituted trustee to give bond.—Upon the removal or resignation of any trustee it is the duty of the clerk to require the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by him in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust. (Rev., s. 970; 1893, c. 453, s. 3; 1909, c. 918, s. 4; 1915, c. 176, s. 2.)

§ 1616. Only perishable property sold within ten days of registration.—It is unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust. (Rev., s. 971; 1893, c. 453, s. 4.)

§ 1617. Creditors to file verified claims with clerk; false swearing misdemeanor.—All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file with the clerk of the superior court a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief. Any creditor who shall knowingly swear falsely in such statement shall be guilty of a misdemeanor. (Rev., ss. 972, 3617; 1893, c. 453, ss. 6, 7.)

Creditors Claiming Estoppel.—Creditors, who claim under a deed of trust and file their claims to share in the proceeds of sale, cannot be heard to impeach its provisions. Chard v. Warren, 122 N. C. 75, 29 S. E. 373.

§ 1618. Priority of payments by trustee.—The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salemen, or servants, which have been earned within three months before registration of said deed of trust or deed of assignment, and (3) all other debts equally ratable. (1909, c. 918, s. 5.)

No Discrimination Except as Provided.—Except for the two classes mentioned in this section all discrimination among creditors is forbidden. Wooten v. Taylor, 159 N. C. 604, 608, 76 S. E. 11.

§ 1619. Trustee to account quarterly; final account in twelve months.—The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, and at each succeeding period of three months, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and within twelve months he shall file his final account of his administration of his trust. The clerk may upon good cause shown extend the time within which the quarterly and final account herein provided for are to be filed. (Rev., s. 973; 1893, c. 453, s. 5.)

§ 1620. Trustee violating duties guilty of misdemeanor.—If any trustee in a deed of trust for the benefit of creditors shall fail to file his inventory, as required by law, or shall knowingly make any false statement in such inventory, or shall knowingly fail to include any property therein, or shall sell any part of the property described in the deed of trust within ten days unless such property so sold be perishable, or shall fail to file either of the quarterly accounts or the final accounts as required by law, or shall knowingly make any false statement in such quarterly or final accounts, or shall knowingly fail to include any property, money or disbursement in such quarterly or final account, he shall, in either case, be guilty of a misdemeanor. (Rev., s. 3689; 1893, c. 453, s. 8.)

Art. 2. Petition of Insolvent for Assignment for Creditors

§ 1621. Petition; schedule; inventory; affidavit.—Every insolvent debtor may present a petition in the superior court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment on account of any judgment previously rendered or of any debts previously contracted. On presenting such petition every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account, or otherwise.

2. A full and true inventory of his estate, real and personal, with the encumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale under execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of the superior court, and must be certified by such officer:

I, ..., do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should

abstain or desist from opposing my discharge: so help me, God. (Rev., s. 1930; Code, ss. 2942, 2943, 2944; 1868-9, c. 162, ss. 1, 2, 3.)

See generally on the subject of insolvency 7 N. C. Enc. Dig. 756-764; 14 N. C. Enc. Dig. 442.

Constitutional Provisions.—The Constitution gives, in express terms, to the Legislature the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debts. Crain v. Long, 14 N. C. 371.

When Debtor Not under Arrest.—A petitioner not under arrest must show that he has complied with the provisions of this section and obtain an order of discharge under sections 1622 and 1623. Howie v. Spittle, 156 N. C. 180, 72 S. E. 207.

Facts Set Out.—Defendant having filed the schedule of his property, it was not only proper, but necessary, that he should set out the facts showing what right, title, estate and interest he held in the real estate. Edwards v. Sorrell, 150 N. C. 712, 716, 64 S. E. 898.

Defendant in Alienation Suit.—A suit by one charging the defendant with alienating the affections of his wife, and arresting and holding him for bail under the affidavits required, is one entitling the defendant to the benefit of this section for the relief of insolvent debtors. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 898.

§ 1622. Clerk to give notice of petition.—On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within thirty days after publication of the order, why the prayer of the petition should not be granted, and shall post a notice of the contents of the order at the courthouse door and three other public places in the county where the application is made for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county. (Rev., s. 1931; Code, ss. 2945, 2946; 1868-9, c. 162, ss. 4, 5.)

§ 1623. Order of discharge and appointment of trustee.—If no creditor oppose the discharge of the insolvent, the clerk of the superior court before whom the hearing of the petition is had shall enter an order of discharge and appoint a trustee of all the estate of such insolvent. (Rev., s. 1932; Code, s. 2947; 1868-9, c. 162, s. 6.)

§ 1624. Terms and effect of order of discharge.—The order of discharge shall declare that the person of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner affected by such discharge. (Rev., s. 1933; Code, s. 2950; 1868-9, c. 162, s. 9.)

Property Subsequently Acquired Liable. — This section protects from future arrests for the same debt such as have surrendered their property; though after-acquired property may be subject to execution and sale, in proper cases. Burgwyn v. Hall, 108 N. C. 489, 13 S. E. 222. See also Brown v. Long, 22 N. C. 138 which holds that the subsequently acquired property of a discharged debtor may be reached in equity.

§ 1625. Suggestion of fraud by opposing creditor.—Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath; but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases. (Rev., s. 1934; Code, s. 2948; 1868-9, c. 162, s. 7.)

In Bastardy Proceeding.—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. State v. Parsons, 115 N. C. 730, 20 S. E. 511. As to bastardy proceedings generally, see §§ 265 et seq., and the notes thereto.

Same—As to Fine and Costs.—When defendant in bastardy proceedings has been ordered to pay a fine and costs and allowance to the mother, only the State can suggest fraud as to the fine and costs. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Answer Does Not Suggest Fraud.—One who has another arrested and held to bail for alienating the affections of his wife does not raise an issue or suggestion of fraud under this section by answering the petition for discharge, and denying a statement therein made by petitioner that he is advised by counsel that, owing to the condition of the title to certain lands scheduled, an execution could not issue against it, as such statement is surplusage. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 898.

All Creditors Notified May Be Joined.—Where a debtor is arrested under different ca. as's at the instance of several creditors, if he applies for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, he has a right to require that all the creditors he may notify shall join in the trial of one ssue and the court will so direct. Williams v. Floyd, 27 N. C. 649.

Same—Where Privilege Waived. — But this is for the case of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from the responsibility in the case of another creditor. Williams v. Floyd, 27 N. C. 649.

Art. 3. Trustee for Estate of Debtor Imprisoned for Crime

§ 1626. Persons who may apply for trustee for imprisoned debtor.—When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than twelve months, application by petition may be made by any creditor, the debtor, or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor. (Rev., s. 1943; Code, s. 2974; 1868-9, c. 162, s. 40.)

§ 1627. Superior court appoints; copy of sentence to be produced.—The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned under such sentence, and is indebted in any sum, the clerk or the judge may immediately appoint a trustee of the estate of such debtor. (Rev., s. 1944; Code, s. 2975; 1868-9, c. 162, ss. 41, 42.)

§ 1628. Duties of trustee; accounting; oath.—The trustee of the imprisoned debtor shall pay his debts pro rata. After paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of the debtor, under the direction of the superior court. When the imprisoned debtor is lawfully discharged from his imprisonment, the trustee shall deliver to him all the estate, real and personal, of

such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor. The trustee shall make his returns and have his accounts audited and settled by the clerk of the superior court of the county where the proceeding was had, in like manner as provided for personal representatives. Before proceeding to the discharge of his duty, the trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding. The oath must be filed with the clerk of the superior court. (Rev., ss. 1945, 1946, 1947; Code, ss. 2976, 2978, 2979; 1868-9, c. 162, ss. 43, 45, 46.)

§ 1629. Court may appoint several trustees.—The court has power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law. (Rev., s. 1948; Code, s. 2980; 1868-9, c. 162, s. 47.)

§ 1630. Court may remove trustee and appoint successor.—In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance. (Rev., s. 1949; Code, s. 2981; 1868-9, c. 162, s. 48.

Art. 4. Discharge of Insolvent Debtors

§ 1631. Insolvent debtor's oath.—Prisoners in order to be entitled to discharge from imprisonment under the provisions of this article shall take the following oath:

I, ..., do solemnly swear (or affirm) that I have not the worth of fifty dollars in any worldly substance, in debts, money or otherwise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit, or to defraud any of my creditors: so help me, God. (Rev., s. 1918a; Code, s. 2972; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 31; 1881, c. 76.)

Constitutional.—This section does not contravene the constitutional provision in regard to homestead and personal property exemptions as the prisioner can discharge himself from custody by paying the fine and costs, or, by complying with the provisions of this article and taking the oath prescribed. State v. Williams, 97 N. C. 414, 416, 2 S. E. 370.

Liberal Construction.—In Wood v. Wood, 61 N. C. 538 it is stated that ch. 59 of the Rev. Code (the provisions of which are contained in this and the following sections) has always received a liberal interpretation.

Debtor Must Follow Provisions.—The Constitution gives, in express terms, to the Legislature, the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debts. Crain v. Long, 14 N. C. 371. Griffin v. Simmons, 50 N. C. 145, 148.

Cited in Moorefield v. Roseman, 198 N. C. 805, 806, 153 S. E. 399.

§ 1632. Persons imprisoned for nonpayment of costs in criminal cases.—The following persons may be discharged from imprisonment upon complying with this article:

Every person committed for the fine and costs of any criminal prosecution. (Rev., s. 1915; Code, s. 2967; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26; 1933, c. 228, s. 9.)

As to bastardy proceedings, see sections 265-279.

Editor's Note.—Prior to Public Laws 1933, c. 228, sec. 9, this section contained a provision which read as follows: "Every putative father of a bastard committed for failure to give bond, or to pay any sum of money ordered to be paid for its maintenance." This provision was omitted by the amendment.

Purpose.—This section was manifestly intended to be construed as permitting a defendant convicted in a criminal proceeding, or found to be the father of a bastard child, to file a petition before the clerk designating the time when he wished to apply for a discharge. State v. Parsons, 115 N. C. 730, 733, 20 S. E. 511.

Construed with Sections 1356 and 1359.—This section does not repeal those enacted much later, (sections 1356, 1359,) but the latter modify it. State v. Manuel, 20 N. C. 144, 146. All three sections being reenacted into the Revisal at the same time, they must be construed together. State v. Morgan, 141 N. C. 726, 729, 53 S. E. 142.

Where Workhouse Established.—One committed for the fine and costs of a criminal prosecution, after remaining in jail twenty days, may be discharged upon complying with provisions of the next section. State v. Davis, 82 N. C. 610; State v. Williams, 97 N. C. 414, 2 S. E. 370, and this is so, although a workhouse has been established by the county commissioners in accordance with the provisions of sec. 1365. State v. Williams, 97 N. C. 414, 2 S. E. 370.

Where Three Indictments Exist.—There were three indictments against a prisoner, to one of which he pleaded guilty, and judgment was suspended on the payment of costs, and he was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed and applied for his discharge; it was held, that he was entitled to his discharge in all three cases. State v. McNeely, 92 N. C. 829.

Not Imprisonment for Debt.—See note to section 276.

Placed in Custody of Sheriff.—An order in bastardy proceedings, placing the defendant in custody of the sheriff was, by necessary implication, an order to imprison upon failure to pay the fine, allowance and costs; and the defendant was properly discharged under this section. State v. Burton, 113 N. C. 655, 18 S. E. 657.

§ 1633. Petition; before whom; notice; service.—Every such person, having remained in prison for twenty days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause ten days notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner. (Rev., s. 1916; Code, ss. 2968, 2969; 1891, c. 195; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 28; 1874-5, c. 11; 1868-9, c. 162, s. 27; 1873-4, c. 90.)

A Proceeding in the Cause.—The application of an insolvent confined for the nonpayment of costs is a proceeding in the cause in which he was convicted, and should be made by petition to the court wherein the judgment against him was entered. State v. Miller, 97 N. C. 451, 1 S. E. 776.

Where Clerk Refuses to Give Oath.—If the clerk should refuse to allow the prisoner to take the oath, the remedy is by an appeal to the judge holding the courts of that district, and it is intimated that it is irregular for the judge of an adjoining district to release the prisoner on a writ of habeas corpus. State v. Miller, 97 N. C. 451, 1 S. E. 776.

Twenty Day Provision Mandatory.—Whether a defendant has property or not, he must remain in jail the twenty days, or pay the fine and costs, since the officers could not waive the imprisonment, nor had the judge the power to dispense with it. State v. Davis, 82 N. C. 610, 613.

Neither the judge nor solicitor has the right to allow a defendant in bastardy proceedings to take the insolvent's oath and obtain his discharge without remaining in prison for twenty days. State v. Bryan, 83 N. C. 611.

Effect of Discharge. — The discharge of a debtor from prison, under this section, does not protect the debtor from arrest at the instance of any other creditor than the one at whose suit he was in prison, though such other creditor had notice of the debtor's application to be discharged. Griffin v. Simmons, 50 N. C. 145.

§ 1634. Warrant issued for prisoner.—The clerk of the superior court, or justice of the peace, before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey. (Rev., s. 1917; Code, s. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29.)

§ 1635. Proceeding on application. — At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this article, the clerk of the superior court, or justice of the peace, before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment; of which an entry shall be made in the docket of the court, and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed. (Rev., s. 1918; Code, s. 2971; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 30.)

See generally the annotations under section 1632.

Improperly Discharged. — Where a debtor arrested and imprisoned for fraud did not tender the oath required by section 1631, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by section 1633, he was improperly discharged upon an affidavit that he had theretofore made an assignment of all his property for the benefit of creditors and that he was at the date of the affidavit insolvent and not worth more than the exemptions allowed him by law as set apart to him. Raisin Fertilizer Co. v. Grubbs, 114 N. C. 470, 19 S. E. 597.

§ 1636. Suggestion of fraud.—The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the insolvent debtor's oath above prescribed, and file particulars of the suggestion in writing, in the court where the same shall stand for trial as prescribed in this chapter in other cases of fraud or concealment. (Rev., s. 1919; Code, s. 2973; 1868-9, c. 162, s. 32.)

§ 1637. Persons taken in arrest and bail proceedings, or in execution.—The following persons also are entitled to the benefit of this article as hereinafter provided:

1. Every person taken or charged on any order of arrest for default or bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (Rev., s. 1920; Code, s. 2951; 1868-9, c. 162, s. 10.)

As to arrest and bail, see sections 767-797.

Construed with Sections 775 and 777.—This section should be construed with sections 775 and 777, and, so construed, the remedies given by this section are in addition to those given by the other sections mentioned. Edwards v. Sorrell, 150 N. C. 712, 64 S. E. 898.

Broad Terms. — The terms of this section are as broad and sweeping as they well can be. They do not, in any view of them as to the purpose intended, imply limitation or discrimination. They plainly embrace "every person" taken or charged to be arrested by virtue of "any order of arrest," not specially for a tort, or for fraud, or other particular cause of action as to which a person may be arrested, but for any cause of action, no matter what may be its nature, if the person is arrested in a case wherein he may lawfully be so arrested. They, in plain, strong terms, embrace any such arrest made or ordered to be made in any action whatever—that is, and action in which a person—a party—may be so arrested. Burgwyn v. Hall, 108 N. C. 489, 492, 13 S. E. 222.

Same—Tort Actions Included. — The benefits of the statute extend as well to those arrested for torts as for debt, and the debt growing out of one is no more a debt and no more entitled to an extraordinary process for its collection than the other. Burgwyn v. Hall, 108 N. C. 489, 13 S. E. 222.

Any Cause Specified in Section 768. — The provisions of this section extend to and embrace every person arrested or to be arrested in a civil action on account of any cause of action specified in sec. 768. Burgwyn v. Hall, 108 N. C. 489, 496, 13 S. E. 222.

Nonresidents Included. — The benefits of the section are not confined to residents of this State. There is no provision in it, or any other statute, within our knowledge, that in terms or by reasonable implication declares that a nonresident shall not be discharged from arrest in a civil action, if he makes the complete surrender of his estate as prescribed. Burgwyn v. Hall, 108 N. C. 489, 496, 13 S. E. 222.

Where Motion to Vacate Denied.—Where a party is under arrest in a civil action and his motion to vacate the arrest has been denied, he may seek his discharge under the provisions of this section. Wingo v. Hooper, 98 N. C. 482, 4 S. E. 463.

Effect on Exemptions.—A judgment debtor against whose person execution has been issued cannot be discharged except by payment, or giving notice and surrender of all property in excess of $50, and the effect of the execution against the person is to deprive him of his homestead and his personal property exemption over and above $50. Oakley v. Lasater, 172 N. C. 96, 89 S. E. 1063.

Meaning of "Debtor and Creditor."—The term "debtor and creditor," employed generally and without precision in the statute as to persons arrested in civil actions, must be taken as meaning and applying to the plaintiff and defendant in the action in which the defendant shall be so arrested. They imply the plaintiff's claiming and suing for damages for which the defendant is liable to him. Such interpretation is allowable and reasonable, with a view to effectuate the intention of the statute as to persons so arrested. Burgwyn v. Hall, 108 N. C. 489, 494, 13 S. E. 222.

§ 1638. When petition may be filed.—Every person taken or charged as in the preceding section specified may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter. (Rev., s. 1921; Code, s. 2952; R. C., c. 59, s. 3; 1868-9, c. 162, s. 11.)

Persons Included. — This section in broadest terms embraces "every person taken or charged as in the preceding section specified." Burgwyn v. Hall, 108 N. C. 489, 493, 13 S. E. 222.

Cause of Action Immaterial. — The debtor is entitled to be discharged upon the honest surrender of his property in the way prescribed, whether the cause of action on account of which he was arrested was a fraudulent debt, or a tort, or of other nature as to which he might be arrested. Burgwyn v. Hall, 108 N. C. 489, 493, 13 S. E. 222.

§ 1639. Petition; contents; verification.—The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on

which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it an oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I, ..., the within named petitioner, do swear (or affirm) that the within petition and account of my estate, and of the charges thereon, are, in all respects, just and true; and that I have not at any time or in any manner disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors: so help me, God. (Rev., s. 1922; Code, ss. 2953, 2954; R. C., c. 59, s. 3; 1868-9, c. 162, ss. 12, 13.)

§ 1640. Notice; length of notice and to whom given.—Twenty days notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys. If the person to be notified reside out of the state, and has no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state. (Rev., s. 1923; Code, s. 2955; R. C., c. 59, ss. 3, 20; 1773, c. 100, s. 8; 1868-9, c. 162, s. 14.)

Effect of Notice.—The party arrested and so seeking relief must notify the creditors or plaintiff at whose suit he is arrested, but he may or may not notify other creditors of his application to surrender his property and be discharged from arrest, and only such creditors as may be so notified will be affected by his discharge. Burgwyn v. Hall, 108 N. C. 489, 492, 13 S. E. 222.

§ 1641. Who may suggest fraud.—Every creditor upon whom the notice directed in the preceding section is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases. (Rev., s. 1924; Code, s. 2956; R. C., c. 59, s. 13; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 15.)

Petitioner May Demand Oath and Jury Trial. — A petitioner is entitled to insist that suggestions of fraud, made by a creditor, shall be verified by the oath of the creditor and tried by a jury; and it is error in a judge to decide upon such suggestions, without submitting them in an issue to a jury. Purvis v. Robinson & Co., 49 N. C. 96. See also, State v. Carroll, 51 N. C. 458, 459.

§ 1642. Where no suggestion of fraud, discharge granted.—If no creditor suggests fraud or opposes the discharge of the debtor, the justice of the peace or the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed. (Rev., s. 1925; Code, s. 2957; R. C., c. 59, s. 1; 1773, c. 100; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 16.)

Proper Remedy to Secure Damages.—The proper remedy of the party seeking to establish and secure his damages for tort is to have a trustee appointed, under this section, to hold and distribute among creditors when and as soon as all debts are ascertained. Burgwyn v. Hall, 108 N. C. 489, 13 S. E. 222.

§ 1643. Continuance granted for cause.—When it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime, his bond shall be discharged. (Rev., s. 1926; Code, s. 2959; R. C., c. 59, s. 10; 1822, c. 1131, s. 1; 1868-9, c. 162, s. 18.)

As to the insolvent's bond, see section 1648 and annotations.

When Sickness Excuses.—The extreme sickness of the principal would excuse his nonappearance, and entitle him and his surety to a continuance if that appeared to the court. But where it was not made to appear, the court could not properly continue it. Buis v. Arnold, 53 N. C. 233, 234.

Sickness of Surety No Excuse. — Under this section the sickness of the surety is no excuse for the default of the principal. Speight v. Wooten, 14 N. C. 327.

§ 1644. Where fraud in issue, discharge only after trial.—After an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue, except by trial and verdict in the same, or by a discharge by consent. (Rev., s. 1927; Code, s. 2962; R. C., c. 59, s. 17; 1868-9, c. 162, s. 21.)

When Applicable. — The provisions of this section only apply to cases where the defendant is in lawful custody and by virtue of an authority competent to order it. Houston & Co. v. Walsh, 79 N. C. 35, 36.

§ 1645. If fraud found, debtor imprisoned.—If, on the trial, the jury finds that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until a full and fair disclosure and account of all his money, property or effects be made by the debtor. (Rev., s. 1928; Code, s. 2961; R. C., c. 59, s. 14; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 20.)

Must Surrender Whole Property. — An insolvent debtor included in his schedule "all his interest in certain property assigned to S. C." On an issue found, the jury found the deed assigning such property fraudulent. It was held, that the debtor should be imprisoned until he should make a surrender of the whole of such property. Hutton v. Self, 28 N. C. 285.

Not in Execution as to Others.—A debtor convicted of fraudulent concealment of his effects, upon an issue between him and A, and ordered into custody thereupon, according to this section, is not in execution at the suit of B, another creditor, in whose case no such concealment was found or suggested. Folsom v. Gregory, 12 N. C. 233.

§ 1646. Effect of order of discharge.—The order of discharge under the last four articles of this chapter, whether granted upon a nonsuggestion of fraud, upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in section 1624;

except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor, and as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk. (Rev., s. 1929; Code, s. 2960; R. C., c. 59, s. 11; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 19.)

Debt Not Discharged.—The discharge of the principal, under the insolvent debtor's law, is not a discharge of the debt. Norment v. Alexander, 32 N. C. 71.

Protects against Those Notified.—The discharge of an insolvent protects him from arrest by those creditors only who had notice of his intention to apply for a discharge. Crain v. Long, 14 N. C., 371; Norment v. Alexander, 32 N. C. 71; Rountree v. Waddill, 52 N. C. 309, 312.

Art. 5. General Provisions Under Articles 2, 3, and 4

§ 1647. Superior court tries issue of fraud.—In every case where an issue of fraud is made up as provided in this chapter, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure. (Rev., s. 1935; Code, s. 2949; 1868-9, c. 162, s. 8.)

In General.—Upon the suggestion of fraud an issue is raised which should be entered upon the trial docket of the superior court and stand for trial as other causes. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

When Issue Can Be Made up.—When one sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors and surrender all his interests in the property mentioned in such deed, it is still competent for the opposing creditors to have an issue made up whether the said deed is not fraudulent and to cause the debtor to be imprisoned, until he surrenders the property itself. Adams v. Alexander, 23 N. C. 501.

When Jury Finds Deed Fraudulent.—Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property, conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed. Hutton v. Self, 28 N. C. 285.

§ 1648. Insolvent released on giving bond.—Every debtor entitled under the provisions of this chapter to discharge as an insolvent may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody. (Rev., s. 1936; Code, s. 2958; R. C., c. 59, s. 27; 1868-9, c. 162, s. 17.)

As to giving bond in surety company, see section 339.

When Bond May Be Given. — The insolvent may give bond during the pendency of and until the final determination of the proceedings. Howie v. Spittle, 156 N. C. 180, 182, 72 S. E. 207.

Sufficient Compliance. — A condition "to appear and claim the benefit of the act, etc., and not depart without leave," is substantially the same as that prescribed by the act. Mooring v. James, 13 N. C. 254.

Who Prepares Bond.—Whether it is the duty of the officer or the defendant to prepare the bond to be given for the defendant's appearance. Quere? Winslow v. Anderson, 20 N. C. 2.

Return Day Must Be Certain. — The bond for the defendant's appearance, under this section connected with the execution, is in the nature of process to compel an appearance, and the return day thereof must be certain. Winslow v. Anderson, 20 N. C. 2.

Where Date in Bond Erroneous.—Where a bond was conditioned for the defendant's appearace at the next term of court to be held upon a stated day, and, at the next term which sat at a date earlier than that mentioned in the bond, the defendant did not appear, it was error to take a judgment against him and his surety for default since there was no default of appearance according to the bond. Winslow v. Anderson, 20 N. C. 2.

Amount of Bond.—A bond given under this section for the appearance of an insolvent to court, is good if it is for double the original debt, exclusive of interest and costs, and judgment, on motion, may be rendered on it. Williams v. Yarbrough, 13 N. C. 12.

Defendant Cannot Object to Bond.—A defendant who has given bond under this section cannot object to the informality of the bond, and pray a discharge on account thereof. Page v. Winningham, 18 N. C. 113.

Where Ca. Sa. Voidable.—Where a defendant gave bond under the insolvent act, and while he is at large by virtue thereof, he is not entitled to his discharge on account of the fact that the ca. sa. is voidable; nor can he move, under such circumstances, to quash the proceedings on that account. Bryan v. Brooks, 51 N. C. 580.

Defendant Bound to Attend.—The defendant in a ca. sa. bond, given under this section is bound to attend at every term until the cause is finally disposed of. Arrington v. Bass, 14 N. C. 95.

When Condition in Bond Broken. — Where the defendant in the ca. sa. appeared at the return day of the writ, and upon an issue being made up, the cause was continued, and afterwards the defendant made a default; it was held, that the condition of the bond was broken, and the plaintiff entitled to judgment. Mooring v. James, 13 N. C. 254.

§ 1649. Surety in bond may surrender principal.—The surety in any bond conditioned for the appearance of any person under this chapter may surrender the principal, or such principal may surrender himself, in discharge of the bond, to the sheriff or other officer of any court where such principal is bound to appear, in the manner provided in the chapter entitled Civil Procedure, article Arrest and Bail. (Rev., s. 1937; Code, s. 2963; R. C., c. 59, s. 23; 1793, c. 100, s. 7; 1793, c. 380, s. 1; 1822, c. 1131, s. 3; 1868-9, c. 162, s. 22.)

Cross References.—As to exoneration of bail in arrest and bail, see section 791. As to arrest of defendant by bail, see section 793. As to surrender of defendant by bail, see section 792.

Right of Person Surrendered.—A person who is surrendered in discharge of his bail is entitled to the benefit of this chapter for the relief of insolvent debtors. Smallwood v. Wood, 19 N. C. 356.

Where Surrender to Be Made. — Sureties to a ca. sa. bond taken under this section to protect themselves by a surrender of their principal, must make it in the court to which the ca. sa. is returnable, or to the sheriff of that county; where the writ issues to another county, a surrender to the sheriff of it is a nullity. Mooring v. James, 13 N. C. 254.

Invalid Surrender.—Where a prisoner was brought into open court by his bail, and it was announced, publicly, that he was surrendered, but such was unknown to the sheriff, to the plaintiff, and to the plaintiff's counsel, and he was a stranger to all present, except to the bail and the presiding judge, and upon being ordered in custody, he fled from the court-room and escaped, without having been in the custody of the sheriff, it was held that these facts did not amount to a valid surrender. Roundtree v. Waddill, 52 N. C. 309.

Effect of Judgment against Surety.—When the principal obligor in a bond is regularly called at court, and, failing to appear, judgment is rendered against him and his surety, the surety has no right ex debito justiciae to come in on a subsequent day of the term and have the judgment set aside, in order to allow him to make a surrender of his principal. Reynolds v. Boyd, 23 N. C. 106.

§ 1650. Creditor liable for jail fees.—When any debtor is actually confined within the walls of a prison, on an order of arrest in default of bail or otherwise, the jailer must furnish him with necessary food during his confinement, if the

prisoner requires it, for which the jailer shall have the same fees as for keeping other prisoners. If the debtor is unable to discharge such fees, the jailer may recover them from the party at whose instance the debtor was confined. And at any time after the arrest, the sheriff or jailer may give notice thereof to the plaintiff, his agent or attorney, and demand security of him for the prison fees that accrue after such notice, and if the plaintiff fails to give such security then the sheriff may discharge the debtor out of custody. (Rev., s. 1938; Code, s. 2965; R. C., c. 69, s. 5; 1773, c. 100, ss. 8, 9; 1821, c. 1103; 1868-9, c. 162, s. 24.)

Common Law Provision.—By the common law an imprisoned debtor was obliged to support himself, and, if unable to do so, was dependent upon the humanity of the jailer or of others. Veal v. Flake, 32 N. C. 417, 420.

Effect of Section.—Where a man has been arrested and the issue has been continued from term to term, and his sureties have from time to time surrendered him and the issue has been decided against him and he has been committed to prison in all these cases, at the instance of the creditor, it was held, that under this section the creditor is responsible to the jailer for his fees or allowance for the food furnished to the prisoner during the whole time he was confined in jail. Veal v. Flake. 32 N. C. 417.

Where Prison Bounds Allowed.—When a debtor is committed to prison, and is permitted to take the prison bounds, the jailor is not under any obligation, while he continues in the bounds, to furnish him provisions for his support, nor, of course, can the creditor, at whose suit he is confined, be compelled to reimburse the jailor for any sum so expended. Phillips v. Allen, 35 N. C. 10.

Sheriff Cannot Bring Action.—The action against the creditor for the jail fees of an insolvent debtor, given by this section to the jailor, can not be maintained by the sheriff as the jailor's principal. Bunting v. McIlhenny, 61 N. C. 579.

§ 1651. False swearing; penalty.—If any insolvent or imprisoned debtor takes any oath prescribed in this chapter falsely and corruptly, and upon indictment for perjury is convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged. (Rev., ss. 1940, 3614; Code, s. 2964; R. C., c. 59, s. 25; 1793, c. 100, s. 10; 1868-9, c. 162, s. 23.)

As to punishment for perjury, see section 4364.

§ 1652. Powers of trustees hereunder.—Any trustee appointed under the last four articles of this chapter, as therein contemplated, is hereby declared a trustee of the estate of the debtor, in respect to whose property such trustee is appointed for the benefit of creditors, and is invested from the time of appointment with all the powers and authority, and subject to the control, obligations and responsibilities prescribed by law in relation to personal representatives over the estates of deceased persons; but all debts shall be paid by the trustees pro rata. (Rev., s. 1941; Code, s. 2977; R. C., c. 59, ss. 21, 22; 1773, c. 100, ss. 5, 6; 1827, c. 44; 1830, c. 26, s. 2; 1868-9, c. 162, s. 44.)

§ 1653. Jail bounds.—Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.

2. Any debtor who for other cause, is adjudged to be imprisoned until he makes a full and fair disclosure or account of his property. (Rev., s. 1942; Code, s. 2966; R. C., c. 59, s. 27; 1818, c. 964; 1868-9, c. 162, s. 25.)

As to regulations regarding prison bounds, see section 1321.

Art. 6. Practice in Insolvency and Certain Other Proceedings

§ 1653(a). Unlawful to solicit claims of creditors in proceedings. — It shall be unlawful for any individual, corporation, or firm or other association of persons, to solicit of any creditor any claim of such creditor in order that such individual, corporation, firm or association may represent such creditor or present or vote such claim, in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors. (1931, c. 208, s. 1.)

Editor's Note.—As to unauthorized appearance for creditor in insolvency, etc., proceedings, see § 199(f).

It would seem that as applied to claims and proceedings in bankruptcy (which cover the great majority of claims and proceedings involving insolvent estates) the prohibition is ineffectual and unconstitutional as being an attempt on the part of the State to regulate the prosecution of claims of the United States. 9 N. C. Law Rev. 348.

§ 1653(b). Violation of preceding section a misdemeanor. — Any individual corporation, or firm or other association of persons violating any provision of the preceding section shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

CHAPTER 29

DESCENTS

§ 1654. Rules of descent. — When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules: (Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1.)

Cross References.—As to descent and distribution in general, see 4 N. C. Enc. Dig. 710-769; 13 N. C. Enc. Dig. 745, 751. As to the right of aliens to take by descent, see section 192.

See 11 N. C. Law Rev., 276, for suggested revisal of this section.

Editor's Note.—The English canons of descent were brought to this country by the early colonists and were established and prevailed here in the provincial governments. In North Carolina they survived the Revolution and remained in force until 1784. Certain principles found in the English Act, such as the males inheriting before the females, the eldest son only inheriting, and the half blood being excluded from the inheritance, seemed repugnant to the republican principles of the new land and thus the Legislature was led to make the changes which now distinguish this section from the English Act. For a detailed discussion of this subject, see Clement v. Cauble, 55 N. C. 82.

For cases dealing with the former provision governing descent to aliens, see Campbell v. Campbell, 58 N. C. 246; Rutherford's Heirs v. Wolfe, 10 N. C. 272.

Definition.—Descent is the devolution of real property to the heir or heirs of one who dies intestate, the transmission by succession or inheritance. See Bonvier's Law Dict., vol. 1, p. 550.

Kinds of Descent.—Descents are of two sorts lineal, as from father to son, or grandfather to son or grandson; and collateral, as from brother to brother, and cousin to cousin, etc. See Levy v. McCarter, 6 Pet. 102, 8 L. Ed. 34.

A descent may be said to be mediate or immediate, in regard to mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigree or degree of consanguinity. Id.

Descent Regulated by Statute.—Descents in this State are regulated, not by the common law, but by statutes. Uni-

versity v. Markham, 174 N. C. 338, 340, 93 S. E. 845. And thus are regulated entirely by the Legislature. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19.

By virtue of this section an heir takes only the undevised inheritance of which the ancestor was seized at the time of his death. Gosney v. McCullers, 202 N. C. 326, 327, 162 S. E. 746.

Title Vests Immediately.—Upon the death of an intestate ancestor, the title to his estate descends and vests at once in his heirs; it cannot stand in abeyance and vest in the future like an executory devise. Harris v. Russell, 124 N. C. 547, 32 S. E. 958.

"Lawful Heirs" as Used In Will.—The expression "lawful heirs" in a will, applied to describe those who are to take a bequest of personalty, means such as take that sort of property in cases of intestacy. Nelson v. Blue, 63 N. C. 659. As to wills, see chapter 81.

Rule 1, Lineal descent. Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 1.)

As to seizin, see notes under rule 12.

Actual or Legal Seizin Unnecessary.—By the terms of this paragraph and paragraph 12, neither actual nor legal seizin is necessary to make the stock in the devolution of estates. Sears v. McBride, 70 N. C. 152; Early v. Early, 134 N. C. 258, 267, 46 S. E. 503.

Descent of Remainders.—Where a remainderman dies before the life tenant, upon the death of the life tenant the remainder descends to the heirs at law of the original remainderman. Early v. Early, 134 N. C. 258, 46 S. E. 503. Distinguishing Lawrence v. Pitt, 46 N. C. 344 and King v. Scoggin, 92 N. C. 99, which cases were decided under the former provisions.

Rule 2, Females inherit with males, younger with older children; advancements. Females shall inherit equally with males, and younger with older children: Provided, that when a parent dies intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children has been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children has been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1, Rule 2; 1784, c. 204, s. 2, 1808, c. 739; 1844, c. 51, ss. 1, 2.)

Cross References.—As to advancements generally, see annotations under section 138. As to inventory of property by children advanced, see section 139. As to the right of adopted children to inherit, see section 185.

Priority Abolished.—This rule abolishes the priority of the male over the female line, and places them upon a perfect equality, both as to collateral and lineal descents. Bell v. Dozier, 12 N. C. 333, 334.

Provides for Equality.—This section was never intended to interfere in any case where the parent himself had by his will produced an inequality by giving to one of his children either land or chattels and not to the others. But where he dies totally intestate as to all his property of every kind, then the act provides for an equality, as near as it can, by directing that such of the children as have been advanced by the intestate in his lifetime, in either realty or personalty, shall account for the advancement in the division of both. Jerkins v. Mitchell, 57 N. C. 207, 212.

Owner's Wishes Respected.—This section contains nothing to exclude the intent and circumstances of the case, but leaves in force the ancient principle that the owner of property may dispose of it according to his own desire. Kiger v. Terry, 119 N. C. 46, 458, 26 S. E. 38; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010.

Where the deceased leaves a will disposing of his estate the doctrine of advancements to his child or children has no application. Prevette v. Prevette, 203 N. C. 89, 164 S. E. 623.

Advancements Regulated Early by Statute. — The doctrine of advancements was the subject of statutory enactments in England as early as the reign of Charles II (22 and 23 Car. II., 1682-83). Nobles v. Davenport, 183 N. C. 207, 209, 111 S. E. 180.

Definitions of Advancement.—An advancement is said to be an irrevocable gift in presenti of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift. 14 Cyc., 162. Thompson v. Smith, 160 N. C. 256, 257, 75 S. E. 1010; Noble v. Davenport, 183 N. C. 207, 111 S. E. 180. For further definition of advancement, see Hollister v. Attmore, 58 N. C. 373; Meadows v. Meadows, 33 N. C. 148; Southern Distributing Co. v. Carraway, 189 N. C. 420, 127 S. E. 427.

An advancement is a gift in praesenti by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement. Paschal v. Paschal, 197 N. C. 40, 147 S. E. 680.

Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise. Paschal v. Paschal, 197 N. C. 40, 147 S. E. 680.

Same—Small Presents Not Included.—An advancement is a gift of money or property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child. The latter are the natural duties of the parent which he is required to perform. Meadows v. Meadows, 33 N. C. 148; Bradsher v. Cannady, 76 N. C. 445; Kiger v. Terry, 119 N. C. 456, 25 S. E. 38.

Applies Only in Case of Total Intestacy.—Under the English statute of distributions, as well as under our act on that subject, it has always been held that no advancements were to be accounted for except in cases of total intestacy. Brown v. Brown, 37 N. C. 309; Jenkins v. Mitchell, 57 N. C. 207, 210.

Hence advancements in land by a father are not to be brought into hotchpot and accounted for in the division among his children of his real estate, unless the father dies totally intestate. Jenkins v. Mitchell, 57 N. C. 207.

Presumption and Burden of Proof.—The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of division among their children; hence a gift of property or money is prima facie an advancement, that is, property transferred or money paid in anticipation of a distribution of his estate. Ex parte, Griffin, 142 N. C. 116, 54 S. E. 1007; James v. James, 76 N. C. 331; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010; Noble v. Davenport, 183 N. C. 207, 111 S. E. 180.

Same—Nominal Consideration.—If land is conveyed by a deed reciting a nominal consideration or natural affection an advancement is presumed, and the burden of proof is then on the grantee or donee to show that an advancement was not intended. Kiger v. Terry, 119 N. C. 456, 459, 26 S. E. 38.

Same—Valuable Consideration.—But when the deed recites a valuable and substantial consideration, especially when it is near the full value of the land or other property, the burden then to prove it an advancement is upon the person claiming it to be such. Kiger v. Terry, 119 N. C. 156, 459, 26 S. E. 38.

Same—Intention of Parent Governs.—Making proper allowance for the burden of proof, as fixed by the presumption arising out of the nature or circumstances of the gift, the question of whether there was a clear gift, a loan, or an advancement, is to be settled by ascertaining what was the intention of the parent. Melvin v. Bullard, 82 N. C. 34, 40; Harper v. Harper, 92 N. C. 300; Kiger v. Teery, 119 N. C. 456; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010.

Same — Parol Evidence. — And in the determination of whether a loan, a gift or an advancement was intended parol evidence is admissible. Kiger v. Terry, 119 N. C. 456, 458, 26 S. E. 38.

Value Determined.—Ordinarily the value of an advancement is to be determined as of the date of its making, and on an accounting no interest is to be charged against an advancement prior to the death of the testator or intestate, or the time fixed for division, where by will it is extended beyond the death of the parent or testator. Southern Distributing Co. v. Carraway, 189 N. C. 420, 127 S. E. 427. See also, Stallings v. Stallings, 16 N. C. 298, 301; Lamb v. Carroll, 28 N. C. 4.

Where an intestate had put slaves into the possession of his child, and afterwards made a deed of gift of them, the advancement must take effect and be estimated as of the date of the deed and not of the commencement of the possession. Shiver v. Brock, 55 N. C. 137; Ward v. Riddick, 57 N. C. 22.

Examples of Advancement.—Property put into the possession of a child on his setting out in life, suitable to housekeeping and family purposes, is not to be considered as a present but as an advancement. Shiver v. Brock, 55 N. C. 137.

Under this paragraph an estate, pur autre vie, given to a child by an intestate father, is subject to be brought into hotchpot as an advancement in the division of other lands. Dixon v. Coward, 57 N. C. 354.

One-half an estate in land given by an intestate by deed to his daughter and her husband is subject to be brought into hotchpot. Dixon v. Coward, 57 N. C. 354.

Application to Grandchildren.—Grandchildren are bound to bring in the gift to their parents, but not those to themselves. This rule being restricted to gifts from a parent to a child, and not including donations to grandchildren. Headen v. Headen, 42 N. C. 159, 161. See Shiven v. Brock, 55 N. C. 137.

Rule 3, Lineal descendant represents ancestor. The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 3; 1808, c. 739.)

As to the distribution of estates, see section 137 and annotations.

A Copy of English Canon.—This section is an almost verbatim copy of the English canon and should receive the same constructions which have been given to that rule. Clement v. Cauble, 55 N. C. 82, 91.

Right of Representation Indefinite.—In rules of the descent of real estate, the right of representation is indefinite, as well among collateral as lineal kindred. Johnston v. Chesson, 59 N. C. 146, 147.

Realty Descends Per Stirpes.—In the descent of real estate, the next collateral relations of the person last seized, who are of equal degree, take per stirpes, and not per capita. Clement v. Cauble, 55 N. C. 82; Haynes v. Johnson, 58 N. C. 124; Crump v. Fawcett, 70 N. C. 345.

Personalty Distributed Per Capita.—Where a fund consists solely of personalty, and the claimants at the time of the intestate's death were and are now all in equal degree, the next of kin of the intestate, section 137 requires that the fund shall be distributed per capita. Ellis v. Harrison, 140 N. C. 444, 53 S. E. 299.

Heirs of Trustee Take Nothing.—Where a trustee, in accordance with a provision of the trust, passes his bare legal title to another, there was nothing to descend to his heirs at his death. Fleming v. Barden, 126 N. C. 450, 36 S. E. 17.

Rule 4, Collateral descent of estate derived from ancestor. On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 4; 1808, c. 739.)

Editor's Note.—Under rule 5, purchased estates—in the popular sense of the term purchase—descend to the nearest relations of the propositus whether of the paternal or maternal line. While under this rule descended estates and certain excepted purchased estates descend to the nearest relations of the propositus, who were of the blood of the ancestors from whom the estate moved. The purchased estates excepted, including those derived by gift, devise or settlement, are those where the purchaser would have been an heir in case of the ancestor's death, that is, these excepted purchasers are put on the same footing with a descent. The question whether the purchaser or donee would have been an heir is determined as of the time of the purchase. And thus where a purchaser at the time of the purchase would not have been an heir had the ancestor died, rule 5 applies and collateral relations of both paternal and maternal lines inherit, even though a subsequent act of the Legislature made such purchaser an heir. See Burgwyn v. Devereux, 23 N. C. 583.

This fourth rule has for its principal object the securing to the family of the man, by whose industry the property was acquired, the enjoyment of such property in preference to those who have no consanguinity with him. Poisson v. Pettaway, 159 N. C. 650, 652, 75 S. E. 930; Wilkerson v. Bracken, 24 N. C. 315.

In General.—When an estate goes to a person through a series of descents or settlements, and that person dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. Wilkerson v. Bracken, 24 N. C. 315; Poisson v. Pettaway, 159 N. C. 650, 632, 75 S. E. 930.

Construed with Rule 6.—This rule and rule 6 are in pari materia and should be construed together, and it was clearly intended that they should be. Paul v. Carter, 153 N. C. 26, 27, 68 S. E. 905.

Under Rules 4, 5 and 6 of this section a grandson of the devisor of lands does not take lands by descent from him when his father is living at the time of his grandfather's death, even though he takes the same lands and interest under the devise that he would have taken under the descent had his father not been living, and he acquires a new estate by purchase, descendible to his heirs at law under the cannons of descent. Peel v. Corey, 196 N. C. 79, 144 S. E. 559.

Applies When There Is no Will.—This rule is confined to cases where there is no other disposition of the land by the will which would interfere with the prescribed course of descent. Kirkman v. Smith, 174 N. C. 603, 606, 94 S. E. 423.

Blood of Ancestor Necessary.—In order for a collateral relation of the half blood to inherit under this paragraph, he must be of the blood of the purchasing ancestor from whom the lands descend. Poisson v. Pettaway, 159 N. C. 650, 75 S. E. 930; Little v. Buie, 58 N. C. 10; McMichal v. Moore, 56 N. C. 471; Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Collateral Relations Take Per Stirpes.—When lands descend to collateral relations under this section the collateral relations of equal degree take per stirpes and not per capita. Cromartie v. Kemp, 66 N. C. 382; Clement v. Cauble, 55 N. C. 82; Haynes v. Johnson, 58 N. C. 124.

Where Contingency Happens.—Under a deed of gift of lands from a father to his son with contingent limitation over to the issue of another son, in the event the former should die without issue, the limitation over is not to the heirs general, but to the children who take on the happening of the contingency which would divest the title of the first taker, and where this contingency has happened and the estate goes over to the contingent remainderman, the latter takes from the grantor under the deed. Stevens v. Wooten, 190 N. C. 378, 130 S. E. 13.

Failure of Contingency.—Where lands were devised to be sold upon the happening of a certain event which failed to happen, it was held that the land was never converted into personalty but remained realty and belonged to the heirs at

law of the blood of the testator. Elliott v. Loftin, 160 N. C. 361, 76 S. E. 236.

Examples. — Where a person died intestate and without lineal descendants, the real estate inherited by him from his father descended to his brother, who was his next collateral relation capable of inheriting of the blood of his father. Jones v. Hoggard, 108 N. C. 178, 181, 12 S. E. 906, 907.

Where land was devised to a grandson by his paternal grandfather, and the devisee died in the lifetime of his father, it was held that, the devisee not being an heir or one of the heirs of the devisor, the estate passed to his uncles and aunts on the mother's side as well as those on the side of the father. Osborne v. Widenhouse, 56 N. C. 238.

Rule 5, Collateral descent of estate not derived from ancestor. On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules. Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 5; 1808, c. 739.

See editor's note under the preceding rule.

Descended Estate.—Where an estate has been transmitted by descent, and the blood of the acquiring ancestor has become extinct, upon the death of the person last seized intestate and without issue, the estate descends to the nearest collateral relations. University v. Brown, 23 N. C. 387.

Necessary Qualification.—In the descent of acquired estates the only qualifications necessary to a collateral is that he be the nearest relation of the person last seized. Bell v. Dozier, 12 N. C. 333.

Illegitimate Children.—A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. Battle v. Shore, 197 N. C. 449, 149 S. E. 590.

Illegitimate Not Included.—An illegitimate child is not a collateral relation of, and capable of inheriting from, a legitimate child of the same mother, under this section. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181, 182.

Whether of Whole or Half Blood.—Where a son acquires land by deed from his father and pays a valuable consideration therefor, and dies without lineal descendants prior to his father's death intestate, the land descends to the collateral relations of the son whether of the whole or half-blood, and the inheritance is not limited to the collateral relations of the son who are also of the blood of the father, the grantor. Ex parte Barefoot, 201 N. C. 393, 394, 160 S. E. 365.

Rule 6, Half blood inherits with whole; parents from child. Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided that in cases where the person last seized leaves no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father, and mother, as tenants in common if both are living, and if only one of them is living, then in such survivor. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule, 6; 1808, c. 739; 1915, c. 9, s. 1.)

In General.—The court, in McMichal v. Moore, 56 N. C. 471, said: "This general provision in favor of the father and mother expressly departs from the principle of keeping the inheritance in the blood of the first purchaser, which, for feudal reasons was strictly adhered to by the common law, and which is retained in our statutes in regard to collateral relations, except for the purpose of preventing an escheat. The parents are by the statute looked upon as lineal relations in the ascending line, and in respect to them the common-law principle is put entirely out of the way." Weeks v. Quinn, 135 N. C. 425, 426, 47 S. E. 596.

Construed with Rule 4.—This rule and rule 4 are in pari materia, and should be construed together and harmonized; and thus construed, the collateral relations of the half blood inherit equally with those of the whole blood, under the provisions of this rule, where, under the requirements of canon 4, they are of the blood of the ancestor from whom the estate was derived. Paul v. Carter, 153 N. C. 26, 68 S. E. 905; Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Personal Property.—Under this rule, claimants of the half blood are entitled to share equally with claimants of the whole blood in the distribution of personal property. In re Skinner's Estate, 173 N. C. 706, 707, 100 S. E. 882.

When Blood of Ancestor Immaterial.—The surviving father or mother of one seized of land, who dies without leaving issue capable of inheriting, or brothers, or sisters, or the issue of such, will take the inheritance under the proviso in the 6th rule without regard to the question whether such parent is of the blood of the purchasing ancestor. McMichal v. Moore, 56 N. C. 471.

Natural Parent Prevails.—Where a child by adoption dies seized of realty, without leaving a brother or sister, and the property is claimed by both the adopted and natural father, this section confers it upon the latter. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19.

Proviso Conditional.—The word "if" as used in the proviso to this rule is one of condition, and the estate will not vest if it is not complied with, it being, in this case, a condition precedent. University v. Markham, 174 N. C. 338, 342, 93 S. E. 845.

Thus the fact that the mother was living at the death of her child is made a condition precedent to the vesting of the estate, and the claimant cannot recover should the propositus have outlived the mother. University v. Markham, 174 N. C. 338, 93 S. E. 845.

Widow's Heirs Inherit.—Where one is survived by his daughter and widow, and the daughter inherits an estate from him and dies before the widow, the heirs of the widow, and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow were in possession. Weeks v. Quinn, 135 N. C. 425, 47 S. E. 596.

Effect of Amendment of 1915.—Upon the death of a minor child who takes an estate in remainder as a new propositus after the death of his mother, under his grandfather's will, without a brother or sister or issue of such, the inheritance is cast, under this rule of the canons of descent before the amendment of 1915, upon the father if living, the amendment having the effect of making the father and mother tenants in common, with the right of survivorship. Semble, under the amendment the devise of these lands of the wife vests her interest in the husband. Allen v. Parker, 187 N. C. 376, 121 S. E. 665.

Rule 7, Unborn infant may be heir. No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 7; 1823, c. 1210.)

When Rule Applies.—This rule applies only where the person last seized has died since the passage of the rule. Rutherford v. Green, 37 N. C. 121.

Inheritance Vests Immediately.—Upon the death of the father seized of lands, his wife then being enciente, the inheritance will immediately vest in the child en ventre sa mere. Deal v. Sexton, 144 N. C. 157, 56 S. E. 691.

Child Born after Ten Months.—An estate is not divested out of one upon whom it has devolved by the birth of a child, more than ten lunar months after the death of the propositus. Britton v. Miller, 63 N. C. 268.

Rule 8, Widow or husband may take as heir. When any person dies intestate leaving none who can claim as heir to such deceased person, but leaving surviving a widow or husband, such widow or husband shall be deemed his heir, and as such shall inherit his estate. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 8; 1801, c. 575, s. 1; 1925, c. 7.)

Editor's Note.—Previous to the amendment of this rule by ch. 7, Pub. Laws 1925, it was provided that a widow should be deemed an heir of her husband when he died leaving none other who could claim as an heir. The amendment makes the rule mutual between husband and wife.

The word "intestate" is inserted in the first line. Construing the original rule before this word was added the Supreme Court held that the rule could only apply to property not devised by the husband. Hence, if the husband's will gave a life estate to the widow, with remainder over

to his "legal heirs," and the widow failed to dissent to the will, the rule would not apply. Therefore, in such case, if the husband had no legal heirs, the property, at the death of the wife, would escheat instead of going to the wife's heirs. See Grantham v. Jinnette, 177 N. C. 229, 98 S. E. 724. The addition of the word intestate seems to codify the Grantham v. Jinnette decision. Undoubtedly such terms will be construed to cover a partial, as well as a total, intestacy. See 4 N. C. Law Rev. 15.

When Rule Applies.—In express terms this paragraph provides that the widow shall be heir only when there is no one else who can claim as heir. University v. Markham, 174 N. C. 338, 93 S. E. 845; Powers v. Kite, 83 N. C. 156. Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Same—No Will.—This paragraph applies only if there is no will, or a will not disposing of the entire estate. Grantham v. Jinnette, 177 N. C. 229, 232, 98 S. E. 724.

Widow Prevails Over Illegitimate Half-Brother. — Decedent left a wife and no descendants or collateral relatives except an illegitimate half-brother. The wife and not the half-brother is the heir in such case. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181.

Rule 9, Illegitimate children inherit from mother. Every illegitimate child of the mother and the descendants of any such child deceased shall be considered an heir: Provided, however, that where the mother leaves legitimate and illegitimate children such illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children; but such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral. (Rev., s. 1556, Rule 9; Code, s. 1281; R. C., c. 38, Rule 10; 1799, c. 522; 1913, c. 71.)

As to illegitimates, see also next section and notes.

In General.—This rule breaks the connection at the mother in the ascending line when it is necessary to pursue that in order to reach the propositus, and expressly prohibits any direct lineal or collateral descent but that mentioned in the first clause, namely, from the mother herself to the illegitimate child or the descendant of any such child deceased, and the descent provided for in rule 10 as between illegitimates themselves and from them or their issue, as therein specially provided. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

Rule Applies Only in Case of Illegitimates.—This rule provides only for descents from a mother who leaves surviving an illegitimate child or descendants of such child. Such a child is an heir of the mother, without regard to whether she leaves or does not leave a legitimate child. Wilson v. Wilson, 189 N. C. 85, 88, 126 S. E. 181. See also Paul v. Willoughby, 204 N. C. 595, 598, 169 S. E. 226.

Same—And only to Inheritance from Mother.—This rule applies only to inheritance from the mother and not to the inheritance from a legitimate half-brother. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181.

Estate of Kindred Excluded.—This rule excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

Inheritance under Will.—Where a testator by his will gave property to a son and three daughters with a provision that, on the death of either of them intestate, or without heirs of his or her body, his or her share should go over, it was held that the intention was not that it should go over on the death of the mother of an illegitimate child, but that the latter was entitled to his mother's share. Fairly v. Priest, 56 N. C. 383.

Rule 10, Heirs of illegitimate. Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: Provided, that when any illegitimate child dies without issue, his inheritance shall vest in the mother in the same manner as is provided in rule six of this chapter. Provided, further, that when any illegitimate child dies without issue and his mother shall have predeceased said child and left legitimate children, his inheritance shall vest in the legitimate children of his mother in the same manner as provided in rule six of this chapter, but nothing herein shall be construed to allow such illegitimates to inherit from legitimates of the same mother: Provided, further, that when any illegitimate child dies without any of the foregoing but his mother left brothers and sisters, his inheritance shall vest in said brothers and sisters of his mother, or their legal representatives. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 11; 1935, c. 256.)

Editor's Note.—The 1935 act which added the last two provisos to Rule 10 provided: "That this act shall be in full force and effect from and after its ratification (29th April 1935) and shall apply to all estates which have not been actually distributed prior thereto."

Common Law Provision.—At common law there is no collateral descent to or from a bastard. Flintham v. Holder, 16 N. C. 345, 347.

General Effect of Rule.—There is nothing dubious about the rule, but on the contrary its language is plain, direct, and perfectly intelligible. University v. Markham, 174 N. C. 338, 341, 93 S. E. 845.

The construction given to this rule is, that if an illegitimate or natural-born child shall die intestate without leaving any child or children, his or her estate shall descend to and be equally divided among his or her brothers and sisters, born of the body of the same mother, and their representatives, whether legitimate or illegitimate, in the same manner and under the same regulations and restrictions as if they had been born in wedlock. Powers v. Kite, 83 N. C. 156, 157.

The illegitimates mentioned in this rule are those who are the children of the same mother, and they inherit as between themselves and their representatives, as if they were legitimate. Bettis v. Avery, 140 N. C. 184, 189, 52 S. E. 584.

Representatives Must Be Legitimate.—This rule was construed in Powers v. Kite, 83 N. C. 156. In considering that construction it will be noted that the words "whether legitimate or illegitimate" follow the words "and their representatives." But in Tucker v. Tucker, 108 N. C. 235, 236, 13 S. E. 5, Clark, J., held that while the rule allows illegitimate children to be legitimate as between themselves and their representatives, it contemplates that such representatives shall themselves be legitimate representatives of the illegitimate child. Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Bastards Cannot Inherit from Legitimate.—The rule does not apply to descents from a legitimate child, and the law in this State, with respects to such descents, is the same now as it was when the opinion in Flintham v. Holder, 16 N. C. 345, 351, was delivered at December Term, 1829. It was then held to be the law that "bastards can never inherit but from the mother and from each other," thus the law remains. Wilson v. Wilson, 189 N. C. 85, 88, 126 S. E. 181.

Legitimates May Inherit from Bastards. — Where there are children of the same mother, some born in wedlock and some illegitimate, the former class may inherit from the latter. Flintham v. Holder, 16 N. C. 345. Thus where an illegitimate brother died intestate and without issue, his legitimate brothers and sisters shared in the inheritance. McBryde v. Patterson, 78 N. C. 412.

Law Ignores the Father.—There is no half blood between illegitimates; they are treated as children without a father of any kind. The law takes no notice of him, for they trace only through the mother. Ashe v. Camp Mfg. Co., 154 N. C. 241, 243, 70 S. E. 295.

Must Claim through Brother.—A legitimate, who does not claim directly from a brother or sister, or from the issue or heirs of either, but from an illegitimate first cousin, comes within neither the latter nor the reason of this paragraph. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

As between Surviving Brothers and Widow.—Under this rule where an illegitimate son has married, leaving surviving illegitimate brothers and sisters of the same mother, they may collaterally inherit the estate and the inheritance cannot be cast upon his surviving widow, as his heir. Bryant v. Bryant, 190 N. C. 372, 130 S. E. 21.

Rule Applies to Issue of Slaves.—Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, have the rights of illegitimates between themselves. Hence, when there are two brothers coming under this description, and one dies leaving no issue or mother, the other brother inherits, and is the next in title. (Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34, and Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907, distinguished). Tucker v. Tucker, 108 N. C. 235, 13 S. E. 5.

Rule 11, Estate for life of another, not devised, deemed inheritance. Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner within the meaning and operation of this chapter. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 12.)

Rule Differs from Older Statutes.—This section was a departure from the English law as settled by 29 Charles II, which enacts (according to the ancient rule of law) that where there is no special occupant in whom the estate may vest, the tenant per autre vie may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; and the other, that of 14 Geo. II, c. 20, which enacts that the surplus of such estate per autre vie, after payment of debts, shall go in a course of distribution like a chattel interest. Brown v. Brown, 168 N. C. 4, 13, 84 S. E. 25.

Rule 12, Seizin defined. Every person in whom a seizin of the provisions of the chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 13.)

See also as to seizin under rule 1.

Seizin at Common Law.—At the common law, seizin signified the possession or occupation of the soil by a freeholder, one who has at least a life estate in the land. This seizin was of two kinds—seizin in deed or in fact, which was when the person had the actual seizin or possession or occupation of the land with the intent, as is sometimes said, to claim a freehold interest and seizin in law, which was a bare right to possess or occupy the land or freehold, or, as otherwise defined, a right of immediate possession according to the nature of the estate. Early v. Early, 134 N. C. 258, 264, 46 S. E. 503.

Same—Compared with Seizin under Rule.—The seizin, either in law or in deed, of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while all that is required under the present section to constitute a sufficient seizin for the creation of a new stock of inheritance or stirpes of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title or interest in the inheritance, whether vested in possession or not; for the language of the statute is explicit that a person having any such right, title or interest shall be deemed to have been seized thereof. Early v. Early, 134 N. C. 258, 267, 46 S. E. 503.

Trust for Wife Descends to Her Heirs. — The resulting trust in favor of the wife in lands the title to which has been acquired by her husband by deed is now descendible to her heirs under this rule, though she may not have been in separate possession thereof during her life. Barrett v. Brewer, 153 N. C. 547, 69 S. E. 614, cited and distinguished. Tyndall v. Tyndall, 186 N. C. 272, 119 S. E. 354.

New Propositus Created by Will.—A devise of land to testator's two daughters for life, and at the death of either or both of them, then said land shall go to the child or children of each, the child or children representing the mother in interest, it was held, upon the marriage of one of them, and having issue born alive, the issue so born takes by purchase under the will, and is a new propositus for the purpose of descent. Allen v. Parker, 187 N. C. 376, 121 S. E. 665.

Issue of Contingent Remainderman Inherent.—Under the provisions of rule 1 and this rule, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency. Hines v. Reynolds, 181 N. C. 343, 107 S. E. 144.

Upon an estate to W. during his life, and at his death to his eldest son, not then in esse, with residuary clause to the testator's children; upon the happening of the contingency of the birth to W. of a son, it was held that the son takes upon his birth a vested interest, not depending upon his living longer than his father, and upon the falling-in of the life estate it descends, under our present canons of descent, to his next of kin, and does not fall within the residuary clause. Carolina Power Co. v. Haywood, 186 N. C. 313, 119 S. E. 500.

Rule 13, Issue of certain colored persons to inherit. The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead, their issue shall represent them with all the rights of heirs at law and next of kin provided by this section for their deceased parents or either of them if they had been living; and the provision of this section shall apply to the estates of such children as are now deceased or otherwise. (Rev., s. 1556; Code, s. 1281; 1897, c. 153; 1879, c. 73.)

As to marriages between slaves validated, see section 2497 and notes.

Prior to Statute Children Where Illegitimate.—Prior to the passage of this paragraph children born prior to 1868 of colored parents who lived together as man and wife had only the rights of other illegitimates, and could only inherit from their mother, when there was no legitimate child, and from one another. Tucker v. Tucker, 108 N. C. 235, 238, 13 S. E. 5.

Relation to Section 2497.—There is this marked distinction between this section and section 2497, which is important in dealing with the competency of the declarations of a parent. Section 2497 deals with marriage, and it is because the relationship of husband and wife is established that the children born in wedlock are legitimate, while this rule does not validate the cohabitation, but simply confers the right to inherit, and this right is limited to the estates of the parents. Bettis v. Avery, 140 N. C. 184, 187, 52 S. E. 584; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

All Colored Parents Included.—This rule is a valid law as to descents after its passage, and renders legitimate the children of all colored parents living together as man and wife, born before 1 January, 1868, even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. Woodard v. Blue, 103 N. C. 109, 9 S. E. 492.

Rule Legitimates Children Only as to Inheritance.—Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, are not legitimated by this paragraph, except to the extent of inheriting from their parents. Tucker v. Tucker, 108 N. C. 235, 13 S. E. 5.

Applies to Estate of Parents Only.—This paragraph conveys the right of inheritance upon the children only as to the estate of their parents, not as to collaterals. Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34; Tucker v. Tucker, 108 N. C. 235, 236, 13 S. E. 5; Bettis v. Avery, 140 N. C. 184, 52 S. E. 584; Croom v. Whitehead, 174 N. C. 305, 93 S. E. 854; Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Operates Only Prospectively.—This rule operates only prospectively and can not divest any estate theretofore acquired. Tucker v. Bellamy, 98 N. C. 31, 33; Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907.

No Rights Conferred on Collaterals.—This paragraph legitimates the children of colored parents, who were born before the first day of January, 1868, and merely extends the children's right of inheritance to the estate of the father, which was before that restricted to the estate of the mother, but it does not transmit any title to the plaintiff, who is claiming the land in dispute as heirs of an illegitimate first cousin. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

Illegitimates Excluded.—Where a man and woman, both slaves, cohabited as husband and wife for several years, but separated prior to emancipation and children were born while this relation existed and after the separation the woman entered into a similar relation with another slave, which continued until after the end of the war, when the parties duly acknowledged and had recorded the fact of cohabitation, the children of the last union were legitimate

and inherited the lands of which their father died seized and they also inherited the lands of which their mother died seized, to the exclusion of her children born of the first union. Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907.

Two Conditions Essential.—The two essential conditions necessary to give effect to this paragraph are cohabitation existing at the birth of the child, and the paternity of the party from whom the property claimed is derived. Woodard v. Blue, 103 N. C. 109, 116, 9 S. E. 492; Woodard v. Blue, 107 N. C. 407, 410, 12 S. E. 453; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854; Spaugh v. Hartman, 150 N. C. 454, 64 S. E. 198.

Cohabitation Is a Presumption Only. — The cohabiting does not alone confer legitimacy, though it furnishes presumptive evidence that the child is the issue of the persons thus living and indicating their relations; but the presumed fact is open to disproof, and to be determined, as other facts, upon the force of the evidence adduced, which may be sufficient to overcome the presumption. Woodard v. Blue, 103 N. C. 109, 116 9 S. E. 492.

Cohabitation Must Have Been Exclusive.—In order to come within the provision of this paragraph, legitimatizing the children of colored parents living together as man and wife, etc., and thus giving them the rights of inheritance, an exclusive cohabitation must be shown, as signified by the expression, "living together as man and wife," and not casual sexual intercourse. Spaugh v. Hartman, 150 N. C. 454, 54 S. E. 198.

The cohabitation must be exclusive in the sense that it must show a single, not a polygamous, relation. Branch v. Walker, 102 N. C. 34, 40, 8 S. E. 896; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

Same—Effect of Single Act of Infidelity.—It was not intended to require that living together as husband and wife should be "enduring or in strict personal fidelity while it continued," Hall v. Fleming, 174 N. C. 167, 93 S. E. 728; or that a single act of infidelity on the part of the parents should have the effect of destroying the provisions of the statutes, primarily enacted to legitimate the offspring. Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

Evidence.—The quasi marriage relation necessary to legitimatize the children of colored parents, under the provision of this paragraph may be shown in evidence by reputation, cohabitation, declarations and conduct, under the same general rule of evidence applicable to establish the fact of marriage. Nelson v. Hunter, 140 N. C. 598, 599, 53 S. E. 439, cited and approved; Spaugh v. Hartman, 150 N. C. 454, 64 S. E. 198.

Same—Rule Less Strict Than Where Legal Marriage.—To repeal the inference of paternity, drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when, to bastardize the issue, there must be full, affirmative, repelling proof, such as impotency, nonaccess and the like, or the presumption of legitimacy will stand. Woodard v. Blue, 103 N. C. 109, 116, 9 S. E. 492.

CHAPTER 30

DIVORCE AND ALIMONY

§ 1655. Jurisdiction.—The superior court shall have jurisdiction of complaints for divorce and alimony, or either. (Rev., s. 1557; Code, s. 1282; 1868-9, c. 93, s. 45.)

On the general question of jurisdiction in divorce, see 1 N. C. L. Rev. 95.

Editor's Note.—Divorces have been granted from the earliest time. In England, at the time our government was founded, the question of divorce was handled entirely by the ecclesiastical courts and there seems to have been no common law action of divorce. Since we have never established ecclesiastical courts in this country, the power has been conferred entirely by statute and is one of the powers which is exclusively reserved to the state governments.

The granting of alimony is based upon the duty of support which the husband owes to the wife.

Definition.—Divorce is the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties. Black's Law Dict. p. 382.

Power of Federal Courts to Grant Divorces.—All governments possess inherent power over the dissolution of marriages. Haddock v. Haddock, 201 U. S. 562, 569, 50 L. Ed. 867. See, also, Maynard v. Hill, 125 U. S. 190, 31 L. Ed. 654.

But in the United States the authority rests with the states entirely, and not with the federal government. Id.

The courts of the United States have no jurisdiction upon the subject of divorce, either as an original proceeding in chancery, or an incident of a divorce or separation, except the Supreme Court in the exercise of its appellate jurisdiction. De La Roma v. De La Roma, 201 U. S. 303, 308, 50 L. Ed. 765.

Superior Court Has Sole Original Jurisdiction.—The Legislature has conferred the sole original jurisdiction in all applications for divorce upon the superior courts. Williamson v. Williamson, 56 N. C. 446, 448; Barringer v. Barringer, 69 N. C. 179.

Faith and Credit Given to Decree.—No faith and credit should be given to a decree of divorce obtained in a state by service of publication in another state, where neither of the parties reside in the state where the decree is rendered, Bell v. Bell, 181 U. S. 175, 177, 45 L. Ed. 804; Atherton v. Atherton, 181 U. S. 155, 45 L. Ed. 794.

§ 1656. Bond for costs unnecessary.—It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover. (Rev., s. 1558; Code, s. 1924; 1871-2, c. 193, s. 41.)

Husband Liable for Own Costs.—In actions for divorce the husband, whether successful, or unsuccessful is liable for his own costs, and whether he shall pay the wife's costs is in all cases left to the discretion of the court. Broom v. Broom, 130 N. C. 562, 565, 41 S. E. 673.

§ 1657. Venue.—In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides. (Rev., s. 1559; Code, s. 1289; 1871-2, c. 193, s. 40; 1915, c. 229, s. 1.)

Section Not Jurisdictional — Waiver.—The provisions of this section is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss. Davis v. Davis, 179 N. C. 185, 102 S. E. 270.

Change in Common-Law Rule.—The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, as amended by chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendants reside. Wood v. Wood, 181 N. C. 227, 106 S. E. 753.

Where Wife Resides.—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made returnable to the county of his residence, is bad. Wood v. Wood, 181 N. C. 227, 106 S. E. 753.

Same—Forced Residence.—When the acts and conduct of the husband make the wife's condition so intolerable and burdensome as to compel her to leave home, she may maintain her action in the county wherein she has been forced to reside by the conduct of her husband, under the provisions, sec. 1667, and this section. Rector v. Rector, 186 N. C. 618, 120 S. E. 195.

§ 1658. What marriages may be declared void on application of either party.—The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter. (Rev., s. 1560; Code, s. 1283; 1871-2, c. 193, s. 33.)

See generally as to void and voidable marriages, section 2495 and annotations.

Editor's Note.—It should be noted that the word "divorce" is frequently used in referring to a decree of nullity in cases where the parties were never validly married as well as in cases where the decree is granted to dissolve a valid marriage. At common law no divorce a vinculo could be granted except for cause existing previous to the marriage —causes which rendered the marriage a nullity. Thus the word divorce was regularly used in cases where there had never really been a marriage.

In Johnson v. Kincade, 37 N. C. 470, the marriage of the parties was declared a nullity because of the mental in-

capacity of one of the parties at the time of the marriage. (See section 2495). In that decision the court declared that the "plaintiff ought to be, and is divorced from the defendant." See Lea v. Lea, 104 N. C. 603, 10 S. E. 488; Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Procedure Similar to Divorce Action.—An action, under this section, to have a marriage declared void, so far as procedure is concerned, is an action for divorce. Johnson v. Johnson, 141 N. C. 91, 94, 53 S. E. 623; Lea v. Lea, 104 N. C. 603, 607, 10 S. E. 488.

While not technically actions for divorce they come under that heading, in a general way, in that alimony pendente lite may be allowed. Taylor v. White, 160 N. C. 38, 75 S. E. 941; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

Affidavit Not Necessary.—Actions for annulment under this section will not be dismissed because of each affidavit prescribed in section 1661. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Marriage Not Void Until So Declared by Court. — The court has jurisdiction to declare a marriage in proper cases void ab initio, but they are not so ipso facto, and must be so declared by a decree of the court, for only in the instances set out in the second proviso to section 2495 can they be treated as void in a collateral proceeding. Watters v. Watters, 168 N. C. 411, 414, 84 S. E. 703; State v. Setzer, 97 N. C. 252, 1 S. E. 558.

Formal Decree When Marriage Originally Void.—Though the marriage of a lunatic is absolutely void, without being so declared, yet the court will formally decree its nullity, as well for the sake of the good order of society as the quiet and relief of the party seeking the relief. Johnson v. Kincade, 37 N. C. 470, cited in notes in 40 L. R. A. 737, 744; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

What Marriages Absolutely Void.—The only marriages (under section 2495) which are absolutely void are those between a white person and one of negro or Indian blood (or descent to the third generation, inclusive,) and bigamous marriages. The others need to be "declared void." State v. Parker, 106 N. C. 711, 712, 11 S. E. 517.

Same—Ground of Mental Incapacity.—Where one of the contracting parties to a marriage is mentally incapable in law, at the time, to make the contract, it does not ipso facto render the ceremony void, but it is only voidable until set aside by an appropriate action, which will not be decreed when it appears that the party seeking the relief has not been misled or in any manner deceived at the time and has knowingly continued the relationship for years, resulting in the birth of several children of the marriage, for therein he will be held to have ratified the contract of marriage. Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

Same—Same—How Action Brought.—A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic, by her guardian, or in the name of the guardian, though the former is, for some reasons, the preferable course. Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447.

Same—Effect of Twenty Years Ratification.—Where a marriage is entered into by one under the legal age, but is followed by a cohabitation of twenty years, the parties acknowledging each other and being recognized as husband and wife, though such marriage in its inception is invalid, by reasons of such ratification by the parties, it will not be declared void. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Former Void Marriage.—A former marriage, which has been decreed to have been void because induced by duress, was void ab initio, and hence does not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Subsequent Insanity.—Insanity afterwards afflicting a party to a contract of marriage is not a ground for annulment. Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

Suit by Nonresident.—Under this section the courts of this State have jurisdiction of a suit to annul a marriage performed here, although the plaintiff was a nonresident of this State at the time of the commencement of the suit. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864.

License Issued upon Fraudulent Representations as to Age—Suit by Parent or Register of Deeds.—Where the register of deeds has been induced by fraudulent representations to issue a license for the marriage of a female between the ages of fourteen and sixteen without conforming with § 2494, as to the written consent of her parent, the marriage is voidable only at the suit of the female, and neither the parent nor the register of deeds may maintain a suit to declare the marriage void, though the latter may at most maintain an action to revoke and cancel the license issued by him before the solemnization of the marriage. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864.

Effect of Decree.—A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights of property as before the marriage. Taylor v. White, 160 N. C. 38, 41, 75 S. E. 941, 26 Cyc. 920.

Same—Children Legitimate.—The children of a marriage which is subsequently annuled are made legitimate by section 1663. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Appeal from Judgment.—If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party, and notice to counsel of record in the original action is not sufficient. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

Same Counsel Cannot Represent Both Parties.—A proceeding to set aside a judgment in an action of annulment will be dismissed where the same counsel jointly make the motion representing both parties to the action. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

§ 1659. Grounds for absolute divorce.—

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

For full treatment of divorce, see 4 Enc. Dig. 826 et seq; 13 N. C. Enc. Dig. 763 et seq.

Divorce Is Entirely Statutory.—It has always been the policy of this state to regard marriage as indissoluble except for the causes named in the statute. Long v. Long, 77 N. C. 304. See also Alexander v. Alexander, 165 N. C. 45, 80 S. E. 890, citing many cases.

Legislative Control.— Subject to the constitutional restriction that "it may not grant a divorce nor secure alimony in any individual case," the question of divorce is a matter exclusively of legislative cognizance. Cooke v. Cooke, 164 N. C. 272, 274, 80 S. E. 178.

When Legislature Will Grant a Divorce.—In some states in the absence of constitutional prohibition, when the object of the marriage relation has been defeated by any cause physical, moral or intellectual, and no jurisdiction is vested in the judicial tribunals to grant a divorce, the legislature itself may put an end to the relation in the interest of the parties as well as of society. Maynard v. Hill, 125 U. S. 190, 205, 31 L. Ed. 654.

Facts Must Be Pleaded and Proved.—Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. Steel v. Steel, 104 N. C. 631, 634, 10 S. E. 707; McQueen v. McQueen, 82 N. C. 471.

Decree a Mensa Not a Bar.—Decree of divorce a mensa does not bar subsequent action for absolute divorce under this section. Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178.

Recrimination.—The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce. House v. House, 131 N. C. 140, 142, 42 S. E. 546.

Condonation.—See notes to the section immediately following. See also 4 N. C. Enc. Dig. 439, 440.

1. If the husband or wife commits adultery.

Plaintiff Need Not Set Up His Innocence.—A party seeking divorce is not bound to set forth or prove that he has not himself been guilty of adultery or is not in fault. Steel v. Steel, 104 N. C. 631, 637, 10 S. E. 707; Edwards v. Edwards, 61 N. C. 534; Toms v. Fite, 93 N. C. 274.

Adultery Even after Abandonment Sufficient Cause.— Adultery by the wife committed after her husband had wrongfully abandoned her is ground for divorce. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861. This case overrules Tew v. Tew, 80 N. C. 316.

Both Parties Guilty.—Where both parties are found guilty of adultery and no condonation is proven, the petition will be dismissed. Horne v. Horne, 72 N. C. 530.

Effect of Plaintiff's Death Pending Trial.—Where the plaintiff in a suit for divorce on the ground of adultery dies pending the trial, after it has been entered upon and before the retirement of the jury, if all issues are found by the jury in favor of the plaintiff, judgment of divorce will be entered as of the first day of the term, while the plaintiff was still alive. Webber v. Webber, 83 N. C. 280.

2. If either party at the time of the marriage was and still is naturally impotent.

Editor's Note.—Since the passage of section 2495 impotency of either of the contracting parties renders the marriage void, and prior to the passage of that section it was a ground for annulment of the marriage. Smith v. Morehead, 59 N. C. 360.

Husband Competent Witness.—The husband is a competent witness to prove the impotency of his wife. Barringer v. Barringer, 69 N. C. 179.

3. If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

Pregnancy Must Result.—Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize a decree for divorce under this section unless pregnancy resulted. Steel v. Steel, 104 N. C. 631, 10 S. E. 707.

False Representations.—Where a man is induced to marry a woman by her false representation that she is pregnant by him, he cannot secure a divorce under this section. Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147.

4. If there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceedings, and they have lived separate and apart for two successive years, and the plaintiff in the suit for divorce has resided in this state for one year. (Rev., s. 1561; Code, s. 1285; 1871-2, c. 193, s. 35; 1879, c. 132; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1905, c. 499; 1907, c. 89; 1911, c. 117; 1913, c. 165; 1917, cc. 25, 57; 1921, c. 63; 1929, c. 6; 1931, c. 397; 1933, c. 71, s. 1.)

Editor's Note.—In the case Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178 the court held that this subsection, which was first added to the cause for divorce in 1907, was a new and independent cause and should not be construed in connection with the main part of the section which provides that the suit can only be brought by the injured party. In Sanderson v. Sanderson, 178 N. C. 339, 100 S. E. 590 the court practically overrules this part of the Cooke case, supra, and construes this subsection to mean that one who has caused the separation by his own misconduct cannot later use that separation to obtain a divorce. And this construction was refuted in the recent case of Lee v. Lee, 182 N. C. 61, 108 S. E. 352.

The five year provision was put in by chapter 63, Public Laws 1921 the original paragraph providing for ten years.

The Act of 1929 inserted the following words in subsection 4 of this section: "Whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by defendant prior to such divorce proceedings."

In subsection 4 of this section, the period of required living apart for five successive years was changed to two successive years and the requirement that the plaintiff has resided in the state for five successive years was changed to one year. The changes were effected by Public Laws of 1933, c. 71.

In General.—Referring to this and related sections, 11 N. C. Law Rev., 223, says reading the enactments literally, divorces for separation for two years under this section as amended may be had without waiting an additional six months; divorces under the 1931 act as amended may not. See same for further discussion.

Mutual Consent Unnecessary.—It is not necessary to a divorce under this section that the separation between husband and wife should have been by mutual consent. Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178.

The word "separation" as used in matrimonial law is defined in Black's Law Dictionary 1073 as "a cessation of cohabitation of husband and wife by mutual agreement" or in the case of a judicial separation "under decree of court." This statute contemplates the addition of "separation" caused by desertion or abandonment, or other wrongful act of the party sued. It certainly does not intend to give an action to one for driving the other from home or who has voluntarily deserted it for the specified period. Lee v. Lee, 182 N. C. 61, 108 S. E. 352.

An action can be maintained under this section only by the party injured. Reeves v. Reeves, 203 N. C. 792, 794, 167 S. E. 129.

Imprisonment Does Not Constitute Separation.—A separation by the husband from his wife or the wife from the husband for a period of five years by reason of incarceration in a hospital for the insane or in a prison for the commission of a crime, under sentence of a court, is not sufficient to obtain a divorce a vinculo, under our statute. Sitterson v. Sitterson, 191 N. C. 319, 131 S. E. 641; Lee v. Lee, 182 N. C. 61, 108 S. E. 352.

Abandonment Not Implied.—In an action for divorce a vinculo brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

Abandonment as Defense Must Be Set up in Answer.—In an action for divorce a vinculo brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

Necessary Residence Must Be Established.—For the granting of a divorce for the separation of husband and wife under the provisions of this section, there must not only be evidence but a determinative issue answered in the affirmative as to the necessary period of residence, and a judgment rendered upon an issue establishing a lesser period of residence in this State by the plaintiff is insufficient, and a judgment signed thereon is improvidently rendered. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.

Allegation of Separation Works Estoppel.—If a wife petitions for a divorce from the bonds of matrimony, and alleges in her petition that she separated herself from her husband she is estopped by this averment, and a verdict, that her husband separated himself from her, will not be regarded by the court, unless, upon a proper issue, circumstances of outrage or violence, justifying such separation, be found by a jury. Wood v. Wood, 27 N. C. 674.

Appeal and Error. — Where a husband appeals from a judgment under this section in favor of his wife and assigns error, only in the court's refusing his motion to nonsuit upon the evidence, on the ground that he was insane for a part of the time, it is necessary that the evidence should appear in the record and not in the assignment merely. Brown v. Brown, 182 N. C. 42, 108 S. E. 380.

Where a judgment has been entered granting a divorce under this section, in the absence of finding of the necessary issue as to the plaintiff's residence, a motion in the cause to correct this error or omission is proper, and where such appears to be the only and unrelated error committed, the case will be remanded for the submission of this issue only. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.

Separation without Fault.—It certainly was not intended that this statute should apply to cases where the separation was without fault on either side. While it is in the power of the Legislature to make the misfortune of either party a ground for divorce it has not done so, and the court cannot by judicial construction extend the grounds of divorce beyond the statute. The misconduct of the parties and not their misfortunes are the causes which will justify a divorce. Lee v. Lee, 182 N. C. 61, 63, 64, 108 S. E. 352.

Cited in Keys v. Tuten, 199 N. C. 368, 369, 154 S. E. 631; Nelson v. Nelson, 197 N. C. 465, 466, 149 S. E. 585.

5. If any person shall commit the abominable and detestable crime against nature, with mankind, or beast.

It shall not be necessary to set forth in the affidavit filed with the complaint in suits brought under subsection four of this section that the grounds for divorce have existed at least six months prior to the filing of the complaint, nor to allege or prove such fact. (1933, c. 71, s. 2.)

Editor's Note.—The Act of 1931 added the first paragraph of this subsection. The last paragraph was added by Public Laws of 1933, c. 71.

§ 1659(a). Divorce after separation of two years on application of either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under deed of

separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the state for a period of one year. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorces. (1931, c. 72; 1933, c. 163.)

Editor's Note.—This section is not made an amendment to § 1659, which gives the right of action to the injured party, but either party may maintain the action without regard to the cause for separation. 9 N. C. Law Rev. 368.

By Public Laws of 1933, c. 163, the time of living apart was changed from five to "two" years, and the required residence of the defendant in the State was changed from five years to "one" year. The 1933 amendment also struck out the provision "and no children having been born to the marriage," formerly appearing in this section.

Either party may secure an absolute divorce under this section even though the applicant is the party who commits the wrong, as granting divorces is exclusively statutory and this is an independent act of the General Assembly. Long v. Long, 206 N. C. 706, 708, 175 S. E. 85.

This section automatically reduces the time from ten to two years, in § 1663; the two are cognate statutes dealing with similar questions and are to be construed in pari materia. Howell v. Howell, 206 N. C. 672, 675, 174 S. E. 921.

Jurisdictional Averments.—In an action for divorce on the ground of two years separation, brought by either party under this section, as amended, it is not required that the jurisdictional affidavit, required by § 1661, contain the averment that the facts set forth in the complaint, as grounds for divorce, have existed to the knowledge of plaintiff at least six months prior to the filing of the complaint, the legislative intent to this effect being apparent from the proviso in § 1661, dispensing with the necessity that the cause of action should have existed for six months when the grounds for divorce is separation, the period of separation then being prescribed as five years, which was reduced to two years by this section. Smithdeal v. Smithdeal, 206 N. C. 397, 174 S. E. 118.

Allegation and Proof That There Are no Children.—Requisite to an action under this section are both allegation and proof that "no children have been born to the marriage." Reeves v. Reeves, 203 N. C. 792, 794, 167 S. E. 129. This case was decided prior to the change effected by the 1933 amendment.—Ed. Note.

Cited in State v. Henderson, 207 N. C. 258, 259, 176 S. E. 758; Teasley v. Teasley, 205 N. C. 604, 605, 172 S. E. 197.

§ 1660. Grounds for divorce from bed and board.—The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

For effect of divorce a mensa or right to administer, see section 12.

Evidence of Acts Occurring "More than Ten Years Ago."—Where the wife sues the husband for divorce a mensa et thoro, under this section, it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to "within six months of the beginning of the action." Page v. Page, 167 N. C. 346, 347, 83 S. E. 625.

Plaintiff Must Petition for Divorce a Mensa.—A decree of divorce a mensa will not be granted in an action where plaintiff petitioned for absolute divorce. Morris v. Morris, 75 N. C. 168.

Effect of Delay in Bringing Action.—An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. Whittington v. Whittington, 19 N. C. 64.

But a delay of seven years in filing a petition is sufficiently accounted for by the allegations that at the happening of the matters relied upon for divorce, the petitioner was a nonresident of the State, and is now a pauper. Schonwald v. Schonwald, 62 N. C. 215.

Condonation.—Evidence merely of forgiveness by the plaintiff, in her action for divorce against her husband a mensa et thoro, is insufficient to establish condonation. Page v. Page, 167 N. C. 346, 347, 83 S. E. 625; Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

For condonation is forgiveness upon condition, and the condition is, that the party forgiving will abstain from like offenses afterwards. If the condition is violated, the original offense is revived. Lassiter v. Lassiter, 92 N. C. 130.

Repetition of the offence nullifies the previous condonation. Collier v. Collier, 16 N. C. 352; Gordon v. Gordon, 88 N. C. 45; Page v. Page, 167 N. C. 346, 83 S. E. 625.

Grounds Available to Husband as Well as Wife.—The grounds for divorce a mensa given by this section are available to the husband as well as to the wife, or as stated by the express language of the statute to "the injured party." Brewer v. Brewer, 198 N. C. 669, 153 S. E. 163.

Only the party injured is entitled to a divorce from bed and board under this section. Carnes v. Carnes, 204 N. C. 636, 637, 169 S. E. 222.

Cited in Brown v. Brown, 205 N. C. 64, 70, 169 S. E. 818.

1. If either party abandons his or her family.

As to abandonment as ground for a divorce a vinculo, see notes to paragraph 4 of the section immediately preceding.

Acts Constituting Abandonment.—Where husband drives his wife from his house, or obtains her removal by stratagem or withholds from her support while there, he is deemed to have abandoned her. Setzer v. Setzer, 128 N. C. 170, 172, 38 S. E. 731.

To constitute abandonment it is not necessary that the husband should leave the state. Witty v. Barham, 147 N. C. 479, 61 S. E. 372.

2. Maliciously turns the other out of doors.

This Section an Instance of Aba..donment in Sec. 1.—The ground for divorce a mensa given the wife under this section, because of being maliciously turned out of doors by her husband, is but an instance of wrongful abandonment provided by subsection 1, and the basic facts of these two suits are the same. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857.

Adverse Ruling in Previous Action.—A denial of alimony in an independent action under sec. 1667 brought by the wife, on the ground that her husband maliciously turned her out of doors, will conclude her upon her cross-bill setting up the same matter in an action thereafter brought by her husband against her for divorce a vinculo. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857.

3. By cruel or barbarous treatment endangers the life of the other.

Revival of Cause.—Much less cruelty or indignity is sufficient to revive a transaction occurring before the condonation, than to support an original suit for divorce. Lassiter v. Lassiter, 92 N. C. 130.

Whipping wife, held cause for divorce in Taylor v. Taylor, 76 N. C. 433. For further examples, see Jackson v. Jackson, 105 N. C. 433, 11 S. E. 173; Griffith v. Griffith, 89 N. C. 113.

False Charges of Adultery.—A persistive charge of adultery against a virtuous woman, accompanied by a contemptuous declaration that she was no longer his wife, and by an abandonment of her bed, is such an indignity to her person as would entitle her to a partial divorce and to alimony. Everton v. Everton, 50 N. C. 202, 210.

Communication of Disease.—The communication of an infectious disease by the husband to the wife is not sufficient ground under this subsection. Long v. Long, 9 N. C. 189.

Acts Committed More Than Ten Years before.—A divorce will not be granted for cruel and barbarous treatment where it appears the acts complained of were committed more than ten years before the commencement of the action, and in the meanwhile the parties had continued to reside together. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887.

Causes within Six Months.—Nor will a divorce be granted under this section for causes arising within six months before the commencement of the action. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887; Green v. Green, 131 N. C. 533, 42 S. E. 954. See section immediately following.

4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

This Section Remedial.—It would seem that the Legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute. Sanders v. Sanders, 157 N. C. 229, 234, 72 S. E. 876; Taylor v. Taylor, 76 N. C. 433, 437.

Facts in Each Case Determined.—The acts of the husband which will render the wife's condition intolerable and her life burdensome so as to entitle her to a divorce a mensa

are largely dependant on the facts in each particular case, such as the station in life, temperament, state of health, habits and feelings of the plaintiff. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

Complaint Must Show Plaintiff's Innocence.—The complaint must aver, and facts must be found upon which it can be seen, that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. Garsed v. Garsed, 170 N. C. 672, 673, 87 S. E. 45; White v. White, 84 N. C. 340.

Same—General Allegation Insufficient.—It is essential that the plaintiff shall specifically set forth in her complaint the circumstances under which the violence was committed, what her conduct was, and especially what she had done to provoke such conduct on the part of her husband. A general allegation that such conduct was "without cause or provocation on her part" is sufficient. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887; Martin v. Martin, 130 N. C. 27, 40 S. E. 822; Everton v. Everton, 50 N. C. 202, 212.

Examples of Sufficient Cause.—Where a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bedside of a dying child, and seek safety and protection at a distance of several miles, this is sufficient cause for divorce under this section. Scoggins v. Scoggins, 85 N. C. 348.

To entitle a wife to a divorce from bed and board under this section, the indignity offered by the husband must be such as may be expected seriously to annoy a woman of ordinary sense and temper, and must be repeated, or continued, so that it may appear to have been done willfully and intentionally or at least consciously by the husband to the annoyance of the wife. Miller v. Miller, 78 N. C. 102.

When in an action by the wife for divorce a mensa there is evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant's conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the cause within the words of this section, that he had offered "such indignities to her person as to render her condition intolerable and her life burdensome." Sanders v. Sanders, 157 N. C. 229, 230, 72 S. E. 876.

Where a petitioner, alleges that her husband had become jealous of her without cause, had shook his fist in her face and threatened her, and declared to her face and published to the neighborhood that the child with which she was pregnant was not his; that her condition had from such treatment become intolerable and her life burdensome, and that she had been compelled to quit his house and seek the protection of her father, it was held that she had set out enough to entitle her to alimony pendente lite. Erwin v. Erwin, 57 N. C. 82.

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, and refused to bed with her and denied that she was his wife. Green v. Green, 131 N. C. 533, 42 S. E. 954.

5. Becomes an habitual drunkard. (Rev., s. 1562; Code, s. 1286; 1871-2, c. 193, s. 36.)

§ 1661. Affidavit to be filed with complaint; affidavit of intention to file complaint.—The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the state for one year next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove, his property and effects from the state, whereby she may be disappointed in her alimony: Provided, however, that if the cause for divorce is five [two] years separation then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of the section to permit a divorce after a separation of five [two] years without waiting an additional six months for filing the complaint. If any wife files in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which the petition or action will be based for six months, she may reside separate and apart from her husband, and may secure for her own use the wages of her own labor during the time she remains separate and apart from him. If she fails to file her petition or bring her action for divorce within ninety days after the six months have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section. (Rev., s. 1563; Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184; 1907, c. 1008, s. 1; 1925, c. 93; 1933, c. 71, ss. 2, 3.)

Editor's Note.—The requirement that the complainant has been a resident of the state for "two years" was changed to "one year" by Public Laws 1933, c. 71. It would seem that the word "two" appearing in the brackets in the section is correct in view of the changes made in sections 1659 and 1659(a).

Purpose of Section.—The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and application, and, if it is wanting, there is no jurisdiction in the courts. Holloman v. Holloman, 127 N. C. 15, 16, 37 S. E. 68.

Requirements Mandatory.—All the requisites mentioned in the affidavit required by this section are mandatory and a failure to set out these averments in the affidavit prevents the superior court from having jurisdiction. Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296; Johnson v. Johnson, 141 N. C. 91, 94, 53 S. E. 623.

General Terms Permitted.—The matters in the jurisdictional affidavit in an action for divorce a mensa brought by the wife may be stated in general terms following the language of the statute. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876. Jones v. Jones, 173 N. C. 279, 285, 91 S. E. 960.

Verification According to Statute.—In an application for alimony pendente lite the affidavit and petition must be verified as required by this section. Clark v. Clark, 133 N. C. 28, 45 S. E. 342. Hopkins v. Hopkins, 132 N. C. 22, 43 S. E. 508. And verification of a pleading that it was "sworn and subscribed to" is not sufficient. Martin v. Martin, 130 N. C. 27, 40 S. E. 822.

Six Months Prior Knowledge.—By chapter 93 Pub. Laws of 1925, this section, was amended so that in cases where the cause for divorce is five years (now two years) separation, then the six months prior knowledge need not be alleged in the affidavit, it being the purpose of sec. 1659, par. 4 to permit a divorce after a separation of five years (now two years) without waiting an additional six months for filing the complaint. Ellis v. Ellis, 190 N. C. 418, 422, 130 S. E. 7.

In all other cases the affidavit must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts stated therein. Clark v. Clark, 133 N. C. 28, 45 S. E. 342.

And unless so stated the divorce will not be granted. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887; Green v. Green, 131 N. C. 533, 42 S. E. 954.

But this need not be alleged in the complaint. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

As to six months period in case of affidavit showing husband about to remove effects, see post, this note, catchline "Removal of Property of Husband."

The proviso, in this section, eliminating the necessity of waiting six months after the expiration of the requisite period of separation, when the ground for divorce is that of separation, still applies with the reduction in time from five to two years. Smithdeal v. Smithdeal, 206 N. C. 397, 398, 174 S. E. 118.

Actual Residence.—The residence means actual residence, and a nonresident wife in suing for divorce cannot avail herself of the maxim that "her domicile is that of her husband" where she has not actually satisfied the residence requirement. Schonwald v. Schonwald, 55 N. C. 367.

Where husband and wife establish a residence in the State, the wife, by leaving the State for a temporary purpose, without any intention of changing her residence, does not thereby lose her citizenship. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

It is not required that the two years (now one year) residence in the State of the plaintiff in an action for absolute divorce be alleged in the complaint to confer jurisdiction, but it is sufficient if it is set out in the accompanying affidavit. Williams v. Williams, 180 N. C. 273, 104 S. E. 561.

Removal of Property by Husband.—In an action by the wife for divorce a mensa, when the allegations are necessary that the defendant is about to remove himself and property from the State to jeopardize the plaintiff's right to alimony, it is not presumed that the wife would have personal knowledge of her husband's plans or purpose in this regard, and an averment thereof in positive terms and of her personal knowledge is not required. Sanders v. Sanders, 157 N. C. 229, 230, 72 S. E. 876. White v. White, 179 N. C. 592, 103 S. E. 216.

Where the necessary affidavit is made under this section, in reference to the husband's removal of his property from the State, it is not necessary, in order to get a decree for such separation, to file another complaint six months after the time the facts (upon which alone the decree could be made) are alleged to have occurred. Scoggins v. Scoggins, 85 N. C. 348; Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

Supplementary Affidavits.—No order should be made to deprive the defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and it is proper and sufficient to show such facts in supplementary or additional affidavits. Sanders v. Sanders, 157 N. C. 229, 230, 72 S. E. 876.

Amendment to Affidavit.—It is discretionary with the trial judge to allow an amendment to the affidavit in an action for divorce. Moore v. Moore, 130 N. C. 333, 41 S. E. 943. When allowed the facts shown in the amendment must be verified. Foy v. Foy, 35 N. C. 90.

Proof Must Correspond to Allegations.—As the allegations in a petition for a divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise the court cannot decree a divorce. Foy v. Foy, 35 N. C. 90.

Action to Annul Marriage.—The affidavit required under this section is not necessary in an action to annul a marriage upon statutory grounds. Sawyer v. Slack, 196 N. C. 697, 699, 146 S. E. 864.

Cited in Keys v. Tuten, 199 N. C. 368, 369, 154 S. E. 631.

§ 1661(a). Effect of answer of summons by defendant.—In all cases upon an action for a divorce absolute, where the plaintiff had caused to be served upon the defendant in person a legal summons, and such defendant answered such summons, whether by verified complaint or unverified complaint, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a Judge of the Superior Court upon issues answered by a judge and jury, in accordance with law, be and the same are hereby declared to have the same force and effect as any judgment upon an action for divorce otherwise had legally and regularly. (1929, c. 290, s. 1.)

§ 1662. Material facts found by jury; parties cannot testify to adultery.—The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. (Rev., s. 1564; Code, s. 1288; 1868-9, c. 93, s. 47.)

Purpose of Section.—The object of this section was to prevent a judgment from being taken by default, or by collusion, and to require the facts to be found by a jury. Campbell v. Campbell, 179 N. C. 413, 415, 102 S. E. 737; Moss v. Moss, 24 N. C. 55, 58; Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933.

Presumption of Denial.—The provisions of this section that the allegation of the complaint in an action for divorce "are deemed to be denied," applies only to the trial upon the merits, since the facts must be found by a jury. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

The denial by the statute of the plaintiff's allegations in an action for divorce, presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. Campbell v. Campbell, 179 N. C. 413, 102 S. E. 737.

Same—Applies to Cross Action.—The defendant in an action for divorce a vinculo, may file a cross action for the same relief, and where no reply has been filed by the plaintiff, and no evidence offered by him, an issue is raised by our statute, and upon a verdict on the required issues, a judgment may be rendered upon the cross action if the pleadings and the evidence are sufficient. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.

Same—Time for Answering Not Affected.—The provision of this section, putting in a denial of the plaintiff's allegations in an action for divorce, does not affect the defendant's right to twenty days after completion of the service of summons by publication, in which to answer or demur, etc. Campbell v. Campbell, 179 N. C. 413, 102 S. E. 737.

Applies to Cross-Action.—This section is applicable to a defendant who files a cross-action, and prays for divorce therein from the plaintiff. Saunderson v. Saunderson, 195 N. C. 169, 172, 141 S. E. 572; citing Cook v. Cook, 159 N. C. 46, 47, 74 S. E. 639.

Where the wife's cross-action for divorce a mensa is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a divorce absolute upon consent of the parties, the judgment is a nullity. Saunderson v. Saunderson, 195 N. C. 169, 141 S. E. 572.

Verdict of Jury.—In a proceeding for a divorce the issues submitted and the verdict found should be as specific and certain as the facts alleged in the petition. Wood v. Wood, 27 N. C. 674.

Same—Eleven Jurors.—In an action for divorce, a verdict by eleven jurors, consented to by both parties, is valid if for the defendant, but invalid if for plaintiff. Hall v. Hall, 131 N. C. 185, 42 S. E. 562.

Witnesses in Actions on Ground of Adultery.—The statutory inhibition that the husband and wife will not be permitted to testify for or against each other prevails whether under the circumstances of any particular case it would seemingly appear that there was no collusion or otherwise; and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933.

It is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men. Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933.

Instruction Not at Variance with Section.—In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of this section. Nelson v. Nelson, 197 N. C. 465, 149 S. E. 585.

Evidence.—In an action for divorce on the ground of adultery of the wife, evidence that she offered to pay the cost of a criminal prosecution against her alleged paramour was competent, not in any sense as a confession of her guilt, but was tending to show interest in and association with him, and as corroborating other testimony as to adulterous intercourse between the parties. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

In Vickers v. Vickers, 188 N. C. 448, 450, 124 S. E. 737, the court said:—"On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is submitted as part of her evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter."

Declaration—Presence of Third Person.—A declaration

made by a husband to his wife in the presence of a third party is not such a confidential communication, as is privileged. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

Same—Of Alleged Paramour.—The declarations of an alleged paramour, made to or in the presence of a party to a suit for divorce a vinculo matrimonii, tending to show that improper familiarities had been or were about to be indulged in between them, and such party's reply to the declarations is admissible as evidence and does not come within the prohibition of this section. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

§ 1663. Effects of absolute divorce. — After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, Provided further, that a decree of absolute divorce upon the ground of separation for ten successive years as provided in section 1659 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce. (Rev., s. 1569; Code, s. 1295; 1871-2, c. 193, s. 43; 1919, c. 204.)

As to effect of void marriage upon issue, see notes to sec. 1658.

Time Reduced to Two Years.—Section 1659(a) as amended reduces the time in this section from ten to two years. Howell v. Howell, 206 N. C. 672, 174 S. E. 921.

No Permanent Alimony.—Upon the granting of an absolute divorce all rights arising out of the marriage cease and determine and hence the court has no power in such cases to allow permanent alimony. Duffy v. Duffy, 120 N. C. 346, 27 S. E. 28.

Consent Judgment Not Affected.—Where a consent judgment has been entered, a condition of which is that the wife remain unmarried, the subsequent decreeing of a divorce a vinculo to the wife, will have no effect on the judgment. Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12.

For effect of an absolute divorce on the right to administer, see sec. 10. For effect on property rights, see sec. 2522.

§ 1664. Custody of children in divorce.—After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court. (Rev., s. 1570; Code, ss. 1296, 1570; 1871-2, c. 193, s. 46.)

For effect of abandonment, see sec. 189. As to habeas corpus to determine custody of children, see secs. 2241 and 2242 and annotations.

In General.—The superior court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, by this section, and though by proceedings in habeas corpus under the provisions of sec. 2241, the custody of a child of the marriage may be awarded as between parents each of whom claim it. This applies only when the parents are living in a state of separation, without being divorced, or are suing for a decree of divorcement, and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. Quere, whether the statute relating to the juvenile courts, secs. 5039 et seq. confer jurisdiction in such instances. In re Blake, 184 N. C. 278, 114 S. E. 294.

Court May Disregard Agreement between Husband and Wife Regarding Custody of Child.—A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with this section. In re Albertson, 205 N. C. 742, 172 S. E. 411.

Father Primarily Liable for Support.—The liability of the father primarily to support the children remains after the divorce, as well as before such divorce, and even where the custody of the children has been awarded to the mother. Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490. And the order may be made a lien on his land. Ibid. Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

Consent Judgments.—Where consent judgment in a suit a mensa et thoro has been entered in the action, without providing for the children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489.

Same—Award of Custody Does Not Affect.—Where consent judgment in an action for a divorce a mensa operates as a gift to the wife of an estate in the husband's land, the fact that the court awards custody of the children does not affect it. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25.

Without the consent of the parties to vacate or moderate a properly entered consent judgment, the court is without power to do so. Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12.

Consent Judgment on Issue of Divorce Does Not Divest Jurisdiction as to Custody of Child.—Upon the institution of an action for divorce from bed and board the court acquires jurisdiction of the minor children of the parties which is not divested by a consent judgment on the issue of divorce entered in the cause with approval of the court, especially where such consent judgment expressly provides that either party might thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children under this section. Tyner v. Tyner, 206 N. C. 776, 175 S. E. 144.

Judgment out of Term.—Where an absolute divorce has been decreed in an action and a motion is made respecting the custody of a minor child, and the parties agree that the judge should render judgment on the motion out of term and outside the county of trial, the judgment rendered under the terms of the agreement is valid, the judge having authority under this section to render such judgment. Pate v. Pate, 201 N. C. 402, 160 S. E. 450.

Modification of Decree.—Where, in a decree of divorce the father is ordered to pay a certain sum monthly for the support of his infant daughter, and by its first order the court has retained the cause subject to the right of either party at any time to apply for a modification of the order, and pursuant to this provision the court later, upon the father's insolvency, made the sums assessed a charge on the plaintiff's homestead and personal property exemptions when allotted, the modification is authorized by this section as well as by the order of the courts. Walker v. Walker, 204 N. C. 210, 212, 167 S. E. 818.

Appeals by Both Wife and Children.—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489.

§ 1665. Alimony on divorce from bed and board. —When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application

such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered. (Rev., s. 1565; Code, s. 1290; 1871-2, c. 193, s. 37.)

Alimony Defined.—See Rogers v. Vines, 28 N. C. 293, 294; Taylor v. Taylor, 93 N. C. 418.

Nature of Alimony.—A decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. Witmore v. Markol, 196 U. S. 68, 74, 49 L. Ed. 390.

But alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money. Barber v. Barber, 21 How. 582, 595, 16 L. Ed. 226.

Not Permanent.—Alimony is in its nature a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party. Rogers v. Vines, 28 N. C. 293, 297.

Effect of Decree upon Defendant's Property.—The order of a court for alimony operates in personam, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate unless allowed that effect by the law of the place in which the real estate is situated. Barrett v. Failing, 111 U. S. 523, 525, 28 L. Ed. 505.

One-Third of Husband's Estate.—Decree of divorce à mensa may assign one-third of husband's estate to the wife. Davis v. Davis, 68 N. C. 180.

Effect of Wife's Abandonment.—The voluntary abandonment by the wife of her husband without legal justification will not entitle her to alimony in her suit for divorce from bed and board. McManus v. McManus, 191 N. C. 740, 133 S. E. 9.

Appeal.—Whether the wife is entitled to alimony is a question of law upon the facts found and is reviewable upon the appeal by either party. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

§ 1666. Alimony pendente lite; notice to husband.—If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony pendente lite under this or the succeeding section, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the state or is in parts unknown, or is about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice is necessary. (Rev., s. 1566; Code, s. 1291; 1871-2, c. 193, s. 38; 1883, c. 67.)

I. In General.
II. Application and Proceedings Thereon.
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I. IN GENERAL.

Editor's Note.—It was formerly held that alimony pendente lite could not be awarded in the absence of a statute conferring this power. Wilson v. Wilson, 19 N. C. 377; Reeves v. Reeves, 82 N. C. 348. In 1852 the Legislature passed an act authorizing the courts upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. See Everton v. Everton, 50 N. C. 202, 206. In the recent case of Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857, the court overrules the former doctrine mentioned supra, and states that the courts possessed the right to grant alimony pendente lite by virtue of the comon law—the practice having come down from the English Ecclesiastical Courts.

This holding has an important bearing on the construction of this statute, making it remedial in its nature, affirmative in its terms and cumulative in its effect and not abrogating the common law existent on the subject nor withdrawing from the court any powers already possessed by them in administering its principles. Medlin v. Medlin, supra, overruling Reeves v. Reeves, supra on this point.

Purpose of the Section.—The purpose of this section is to afford the wife present pecuniary relief pending the progress of the action and to afford the husband some measure of protection in a motion so important, which is made and to be determined before the merits of the controversy are ascertained and the rights of the parties settled regularly by final judgment. Morris v. Morris, 89 N. C. 109, 111.

Alimony When the Wife Is Defendant.—When the wife is the defendant she has a right to claim alimony pendente lite under this section. Webber v. Webber, 79 N. C. 572; Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

And this is true although she may be concluded by the judgment against her in her former and independent action for divorce à mesna under the provisions of the statute. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857.

II. APPLICATION AND PROCEEDINGS THEREON.

An application for alimony pendente lite can be made by motion in the cause. Reeves v. Reeves, 82 N. C. 348.

A motion for alimony pendente lite may be heard anywhere in the judicial district. Moore v. Moore, 130 N. C. 333, 41 S. E. 943. Also a motion to reduce alimony. Moore v. Moore, 131 N. C. 371, 42 S. E. 822.

But a resident judge holding court in another district can not hear a motion to reduce alimony pendente lite in a suit pending in the district in which he resides. Moore v. Moore, 131 N. C. 371, 42 S. E. 822.

Kind of Divorce Warranted Immaterial.—Upon an application for alimony pendente lite, it is unnecessary to decide whether the petition warrants a divorce a vinculo, or only a divorce à mensa et thoro. Little v. Little, 63 N. C. 22.

III. PREREQUISITES TO AWARD.

A. Entitled to Relief.

Prima Facie Case.—Under this section a petitioner for divorce is entitled to alimony pendente lite upon making out a prima facie case. Sparks v. Sparks, 69 N. C. 319.

Finding Facts as Alleged Sufficient.—Upon a motion for alimony it is sufficient for the court to find that the facts are as alleged in the answer and the affidavits field in support of the motion. Barker v. Barker, 136 N. C. 316, 48 S. E. 733; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

In an application for alimony it need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife. Lassiter v. Lassiter, 92 N. C. 130.

Where the wife's action is for a divorce à mensa on the ground of abandonment, stating that she was compelled to leave home by the conduct of her husband, the judge, in allowing alimony pendente lite, must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. Horton v. Horton, 186 N. C. 332, 119 S. E. 490.

In an application for alimony pendente lite under this section, it is required that the court find the facts in determining whether the wife is entitled to alimony, her

right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application. Caudle v. Caudle, 206 N. C. 484, 174 S. E. 304.

Superior Judge May Leave Charges Open.—Where the allegations of the complaint are sufficient under the terms of this section, and are found to be true and sufficient by the judge of the superior court, in the wife's action for a divorce, à mensa et thoro, the court may leave open the charges made by each of the parties against the other, and award alimony pendente lite, including a reasonable attorney's fee, taking into consideration the circumstances of the case. Hennis v. Hennis, 180 N. C. 606, 105 S. E. 274.

Sufficient Grounds.—Following will be found a few instances in which the courts have passed upon the specific question as to whether certain conduct constituted grounds for divorce and consequently justified the grant of alimony pendente lite. The preceding sections of this article and the notes thereto will furnish many illustrations of sufficient or insufficient facts as grounds for divorce, and will, of course, be valuable in ascertaining when alimony will be granted under this section.—Editor's Note.

Where the facts as found by the judge would, if found by the jury on the final hearing, warrant a divorce from bed and board, they per se constitute sufficient ground to award alimony pendente lite. Lassiter v. Lassiter, 92 N. C. 130.

In an action by a wife for a divorce a mensa, where acts of cruelty were alleged as the ground of separation, and also an estimate was made of the value of the defendant's estate, it was held to be sufficient evidence to decree alimony and fix the amount. Pain v. Pain, 80 N. C. 322. Also where acts were alleged which were well calculated to make her condition intolerable and her life burdensome and the bill set forth an estimate of the amount of the defendant's property. Gaylord v. Gaylord, 57 N. C. 74.

B. Necessity for Alimony.

Where the complaint of a feme plaintiff seeking a divorce alleges facts which, if believed, entitled her to the relief demanded, and is supplemented by an affidavit that the husband is trying to dispose of his property and has offered his land for sale with the avowed purpose of leaving the State, and that the children are small and need the mother's care, it is proper to grant an order for alimony pendente lite, and it is also competent for the court to award to the mother the custody of the younger children. Scroggins v. Scroggins, 80 N. C. 319.

Whether the wife, is entitled to alimony, is a question of law, upon the facts found, and reviewable on appeal by either party. Morris v. Morris, 89 N. C. 109; Moore v. Moore, 130 N. C. 333, 41 S. E. 943; Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

A married woman is entitled to alimony pendente lite from her husband's estate, when the income from her separate estate is not sufficient for her support and to defray the necessary expenses in prosecuting her suit. Miller v. Miller, 75 N. C. 70.

IV. NOTICE.

Sufficiency.—An order of court continuing the motion for alimony to a future term of court made in the presence of counsel for both parties, is sufficient notice, under the statute, of such motion. Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

Time of Hearing Not Specified.—The fact that a notice of a motion for alimony pendente lite, duly served upon the defendant, did not specify the time of hearing, will not invalidate the order allowing the same, it having been heard at a term of court at which the cause stood regularly for trial. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

When Five Days Required.—The provision requiring five days' notice applies only when the motion is heard out of term and parties are fixed with notice of all motions or orders made during the term of the court. Coor v. Smith, 107 N. C. 431, 11 S. E. 1089; Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

When Dispensed with.—An affidavit of the wife that husband had left the State the day after the filing of the complaint, and that she had good reason to believe that he had left to defeat her claim for alimony, having been selling his property for several months with that purpose in view, dispenses with the necessity for notice. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

Before Return Term.—Alimony pendente lite may be allowed before the return term if the complaint has been filed. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

V. THE ORDER.

A. In General.

Effect of Insufficient Finding.—An order allowing the wife alimony pendente lite her action for divorce may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void. White v. White, 179 N. C. 592, 103 S. E. 216; Moody v. Moody, 118 N. C. 926, 23 S. E. 933.

If Allegations Not Controverted.—If the allegations in the complaint are not controverted, it is sufficient if the judge finds that no answer was filed and adjudges alimony to be paid. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

Enforcement.—An order to pay alimony may be enforced by imprisonment for contempt. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334; Pain v. Pain, 80 N. C. 322.

B. Amount.

Discretion of Court.—While the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682, 683; Schonwald v. Schonwald, 62 N. C. 215; Barker v. Barker, 136 N. C. 316, 48 S. E. 733. Subject to the limitation that it is not in excess of the net income of the defendant. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682.

Usually One-Third Net Income.—Excepting attorney's fees and expenses, the amount ordinarily allowed pendente lite under this section is not in excess of the amount prescribed by sec. 1665 upon a final judgment for divorce from bed and board; that is, one-third part of the net annual income from the estate and occupation or labor of the party against whom the judgment is rendered. 19 C. J. 222 (532). But this rule is not inflexible, and the amount to be allowed is not arbitrarily fixed by the statute. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682, 683.

Amount May Be Altered by Court.—Alimony regularly ordered to be paid a wife pendente lite her action for divorce may be increased or reduced in amount by the court from time to time, but that which she has already received in the course and practice of the courts may not be ordered to be given up by her. White v. White, 179 N. C. 592, 103 S. E. 216.

Allowance for Children.—Where in passing upon a motion of feme plaintiff in her action for divorce à mensa for alimony, etc., pendente lite, if the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody. Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

Not Reviewable Unless Abuse Shown.—The question of the amount allowed, in proper instances, by the superior court judge to the wife, in her action for divorce à mensa et thoro, is addressed to his sound judgment and discretion, and not reviewable on appeal, unless his discretion is abused. Hennis v. Hennis, 180 N. C. 606, 105 S. E. 274; Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

VI. PLEADING AND PRACTICE.

In application for alimony pendente lite, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer. Lassiter v. Lassiter, 92 N. C. 130; Easeley v. Easeley, 173 N. C. 530, 92 S. E. 353; Griffith v. Griffith, 89 N. C. 113.

Where Husband Appeals, Injunction Should Issue.—Where alimony pendente lite is allowed the wife, and the husband appeals from such order, an injunction should be granted to stay execution against the property of the husband pending the appeal. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

Alimony May Be a Lien.—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situated here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. White v. White, 179 N. C. 592, 103 S. E. 216; Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

When Husband Denies Having Property.—Where the husband denies having any property but admits that he is an able-bodied man, the court may order an allowance without inquiry into the value of his property. Muse v. Muse, 84 N. C. 35.

Deed of Separation May Be Bar.—A deed of separation, in conformity with §§ 2515, 2516, 2529, approved by a consent judgment, may be pleaded as complete bar to the

wife's application for alimony pendente lite and for reasonable counsel fees, as provided by this section. Brown v. Brown, 205 N. C. 64, 169 S. E. 818.

New Motion After Failure of Original.—Where a motion to reduce alimony pendente lite has been disallowed, another motion for the same purpose should not be heard unless a different state of facts is shown and a receipt exhibited for a reasonable proportion of the allowance made at the former hearing. Moore v. Moore, 131 N. C. 371, 42 S. E. 822.

Appeal and Error.—The superior court judge, in allowing alimony to the wife pendente lite, under the provisions of this section, must find the essential and issuable facts and set them out in full for the purpose of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient. Horton v. Horton, 186 N. C. 332, 119 S. E. 490; Easeley v. Easeley, 173 N. C. 530, 92 S. E. 353; Morris v. Morris, 89 N. C. 109.

Same—Effect of Demurrer.—In an action for divorce a vinculo, although the admissions of parties are not competent evidence, a demurrer to the petition for divorce admits that facts were alleged and can and will be proved, so as to secure the verdict of a jury. Steel v. Steel, 104 N. C. 631, 10 S. E. 707.

§ 1667. Alimony without divorce.—If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days notice thereof; but if the husband shall have abandoned his wife and left the state, or shall be in parts unknown, or shall be about to remove or disposed of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in section 1661, but shall verify her complaint as prescribed in the case of ordinary civil actions: Provided, that the allowances for counsel fees shall not apply to litigation pending March 4, 1921: Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees. (Rev., s. 1567; Code, s. 1292; 1919, c. 24; 1871-2, c. 193, s. 39; 1921, c. 123; 1923, c. 52.)

Editor's Note.—Prior to the year 1872 there was no statute regulating the question of alimony without divorce and in this state it was held that this relief in proper cases could be granted by courts of equity. See Crews v. Crews, 175 N. C. 168, 170, 95 S. E. 149. By ch. 193, Laws 1872 the Legislature provided for this relief but in that act there was no provision whereby the wife could obtain alimony during the determination of the issues involved in her suit. In 1919 however an amendment was added whereby the wife might apply for an allowance for her subsistence during the pendency of her main action. Laws of 1919, ch. 24.

In considering this section therefore it must be noted that two distinct remedies are therein provided—first the action for alimony without divorce—second the application for an allowance for subsistence pendente lite.

Chapter 24, Laws of 1919 made other radical changes in this section. In addition to adding the last four sentences in toto, this amendment added the clauses allowing subsistence for failure to support the children of the marriage or for guilty conduct which would constitute grounds for divorce.

The two sentences which precede the last two sentences of the section as it now reads (the provisions as to notice to the husband) are similar to the requirements of sec. 1666, and the construction of these particular clauses as found in the note to sec. 1666 should be referred to.

Chapter 52, Laws of 1923 amended this section by allowing the husband to plead the adultery of the wife in bar of her right to such alimony. This amendment is certainly a proper one and protects the husband who abandons his wife because of her adultery. 1 N. C. L. Rev. 294.

Independent Suits.—This section only applies to independent suits for alimony. Reeves v. Reeves, 82 N. C. 348, 352; Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851.

The phrase "may institute an action" as used in this section is permissive and not mandatory. Miller v. Miller, 205 N. C. 753, 754, 172 S. E. 493.

Section 1665, may be considered in an action under this section, in determining the allowance of reasonable subsistence to the wife and children and the allowance of counsel fees based on the defendant's means and condition in life. Kiser v. Kiser, 203 N. C. 428, 166 S. E. 304.

Jurisdiction Not Affected.—The fact that the summons, in a proceeding under this section, of which a judge of the superior court has jurisdiction, was made returnable at term, does not affect the jurisdiction of the judge to hear and determine the matter. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Venue of Action.—A wife who has been forced by her husband to leave his home at night and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right under the provisions of this section and §§ 1657, 469. Miller v. Miller, 205 N. C. 753, 172 S. E. 493.

What Facts Material.—Under this section the only material facts at issue in the action for alimony without divorce are the questions of the existence of the marriage relation and whether the husband abandoned the wife. Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851; Hooper v. Hooper, 164 N. C. 1, 80 S. E. 64.

But it is not required that an issue involving the validity of the marriage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issue relating to the validity of the marriage. Barbee v. Barbee, 187 N. C. 538, 122 S. E. 177.

Issue of Fact for Jury.—In actions under this section, when there are issues of fact raised, they should be found by a jury. Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

And the trial judge may not pass upon the issuable facts in proceedings for alimony without divorce, under this section, upon evidence introduced before him theretofore upon a trial of the husband for criminal abandonment, etc., of which he was acquitted, when the witnesses are present and ready to testify. Crews v. Crews, 175 N. C. 168, 95 S. E. 149; Cooper v. R. R., 170 N. C. 490, 87 S. E. 322, cited and distinguished.

Finding of Facts by Judge Unnecessary.—In the wife's application for alimony without divorce, it is not required that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite (sec. 1666), although it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. Price v. Price, 188 N. C. 640, 125 S. E. 264; Vincent v. Vincent, 193 N. C. 492, 137 S. E. 426.

Complaint Must Allege Good Cause.—The complaint must allege facts sufficient to constitute a good cause of action under the provision of this section, when the wife proceeds thereunder, for the court to allow her from the estate or earnings of her husband a reasonable support and counsel fees, and when the wife alleges only that she has left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. McManus v. McManus, 191 N. C. 740, 133 S. E. 9.

Indefinite Allegations in Answer.—Vague and indefinite allegations of infidelity on the part of a wife made by a husband in his answer to her complaint in a proceeding for support and maintenance, will not be allowed to affect the question of the husband's liability in such proceedings. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Counter Charges Immaterial.—Under the provisions of ch. 24, Laws of 1919, amending this section, it is immaterial what counter charges the defendant makes against the plaintiff, his wife, in her application for necessary "subsistence" pendente lite, for if he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of his wife, until the issue has been submitted to the jury. Allen v. Allen, 180 N. C. 465, 105 S. E. 11.

Previous Contract of Separation.—Where the defendant resists his wife's application for alimony without divorce under this section, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the written contract of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statute requires. Moore v. Moore, 185 N. C. 332, 117 S. E. 12.

Where, by an agreement for a separation between husband and wife, the former agreed to pay a certain monthly allowance, and the husband, after paying several installments discontinued the payments, he cannot set up the agreement in bar of her action for a support under this section even though he discontinued the payments because she demanded that the allowance be increased. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Where the parties by reason of this section entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate, and the husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment, it was held that plaintiff's rights were remitted to the prior judgment. Turner v. Turner, 205 N. C. 197, 170 S. E. 646.

Validity of Separation Agreement Need Not Be First Determined.—Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under this section it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issues." Taylor v. Taylor, 197 N. C. 197, 148 S. E. 171.

Wrongful Abandonment of Husband.—This section does not contemplate that a wife who wrongfully abandons and separates herself from her husband should be awarded subsistence and counsel fees. Byerly v. Byerly, 194 N. C. 532, 533, 140 S. E. 158.

Same—Presumption on Appeal.—Where in an action by the wife under this section, she has duly moved the court for alimony pendente lite and an allowance for counsel fees, and the husband has answered and offered evidence to the effect that the plaintiff had abandond him, and that he had not abandoned her, and the record on appeal does not disclose any findings of fact upon the question but only that the trial judge had refused the plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as to the fact. Byerly v. Byerly, 194 N. C. 532, 140 S. E. 158.

Effect of Prior Divorce in Another State.—No action will lie under this section where it appears that the court of a state having jurisdiction over the parties has declared them not husband and wife. Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55.

Does Not Affect Prior Order for Alimony.—A decree of absolute divorce on the ground of separation as provided in § 1659(a) will not affect a prior order for alimony without divorce rendered under this section. Howell v. Howell, 206 N. C. 672, 174 S. E. 921.

Effect of Sec. 4447.—Section 4447 requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, does not deprive the wife of her civil remedies under the provisions of this section. State v. Falkner, 182 N. C. 793, 108 S. E. 756.

Amount.—The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in her proceedings against her husband under the provisions of this section, is within the sound discretion of the judge hearing the same and having jurisdiction thereof. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

And the limitation to one-third of the net annual income from the estate, (provided by sec. 1665) which applies when the court adjudges the parties divorced from bed and board, does not apply when the wife institutes the proper proceeding for alimony pendente lite under sec. 1666 nor when she applies for a reasonable subsistence under this section. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Hodges v. Hodges, 82 N. C. 122, 124.

The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. Anderson v. Anderson, 183 N. C. 139, 143, 110 S. E. 863.

Allowance for Attorney's Fees.—Chapter 24, Laws of 1919 amended this section in regard to "subsistence" of the wife pendente lite. The effect of this amendment was held to be that it superseded the allowance for alimony and hence no allowance for attorney's fees was permissible. Allen v. Allen, 180 N. C. 465, 105 S. E. 11.

By chapter 123, Laws of 1921 the section was further amended. And now, while the allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorney's fees, by this amendment the court may now allow her attorney's fees. Moore v. Moore, 185 N. C. 332, 117 S. E. 12.

Modification or Vacation of Order.—Where, within the exercise of his sound discretion, the superior court judge, having jurisdiction, has allowed the wife a reasonable subsistence, attorney's fees, etc., in her proceedings under the provisions of this section, the order of allowance may be thereafter modified or vacated as the statute provides upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

The amounts allowed for reasonable subsistence and counsel fees upon application for alimony pendente lite are determined by the trial court in his discretion and are not reviewable, although either party may apply for a modification before trial. Tiedmann v. Tiedmann, 204 N. C. 682, 169 S. E. 422.

The husband's "estate," from which the court may secure its order allowing a reasonable subsistence, etc., to the wife in her proceedings under the provisions of this section, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

Technical alimony is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of this section, where a divorce is not contemplated, and where, in accordance with this section, the order allowing her such subsistence may secure the same out of the husband's estate. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

"Alimony without Divorce."—While as to technical alimony the ordinary rule is that the title to the property designated, to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of this section, and the words used in

the beginning of this section, "alimony without divorce," will not be construed to give the word "reasonable subsistence" for the wife, the meaning of technical alimony. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

Husband's Interest in Estate by Entireties Chargeable.—Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of this section, and for her counsel fees by chapter 123, Public Laws of 1921, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue (sec. 1668) to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee simple title for the purpose of paying the allowance is erroneous. Holton v. Holton, 186 N. C. 355, 119 S. E. 751.

Defeasible Fee in Part of Husband's Land.—Where the judge, in the proceedings of the wife for an allowance of reasonable subsistence has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee, cannot prejudice him, and his exception on that ground cannot be sustained. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

Attachment Will Lie.—An attachment against the husband's land will lie in favor of the wife, abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract, that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

Wife's Claim Prior.—The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of her abandonment, which puts every one on notice of her claim and her priority over other creditors of her husband. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

Statutes of Limitations.—The common law rule that there is no statute of limitations barring an action for divorce obtains in this jurisdiction, applying the rule that the proceedings, as a matter for the court, should have been commenced without unreasonable delay, except in so far as it may have been modified by this section, barring all actions not otherwise provided for in ten years. Garris v. Garris, 188 N. C. 321 124 S. E. 314.

Intervenor in Another Jurisdiction.—Where the wife has obtained an order for support from her husband, declared a lien on his property, under this section, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal concurrent jurisdiction. Quaere? Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

No Decree before Final Hearing.—When the application is for alimony without divorce it cannot be decreed before the final hearing. Hodges v. Hodges, 82 N. C. 122.

No Final Judgment under Section.—A final judgment cannot be entered under this section as the necessity of such provisions for the wife and children will cease if the parties resume the marriage relation, and cannot properly be continued if the husband procures a divorce for the fault of the wife. Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851; Hooper v. Hooper, 164 N. C. 1, 80 S. E. 64; Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

Infant's Guardian May Subsequently Attack Consent Judgment.—Where the court in proceedings under this section approves a consent judgment, providing for the support and subsistence of the defendant's wife and child, the validity of such consent judgment may be later attacked by the child's authorized guardians on the ground of irregularity and that it is not binding on the minor. In re Reynolds, 206 N. C. 276, 173 S. E. 789.

Contempt.—In Little v. Little, 203 N. C. 694, 166 S. E. 809, the defendant was held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under this section.

Cited in Jeffreys v. Hocutt, 195 N. C. 339, 343, 142 S. E. 226; Rodman v. Rodman, 198 N. C. 137, 150 S. E. 874; fees based on the deefndant's means and condition in life. Black v. Black, 198 N. C. 809, 810, 150 S. E. 925; Brown v. Brown, 205 N. C. 4, 169 S. E. 818; Caudle v. Caudle, 206 N. C. 484, 485, 174 S. E. 304.

§ 1668. Alimony in real estate, writ of possession issued. — In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so. (Rev., s. 1568; Code, s. 1293; 1868-9, c. 123, s. 1.)

Effect of Award of Custody of Children.—Where consent judgment in an action for divorce a mensa operates as a gift to the wife of an estate in her husband's land, the court by awarding custody of the children does not affect it. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25.

Title to Specific Property Remains in Husband.—Where alimony is alloted to the wife in specific property of the husband, the title to such property remains in him, and will revert at the death of the wife or upon a reconciliation. Taylor v. Taylor, 93 N. C. 418.

CHAPTER 31

DOGS

Art. 1. Owner's Liability

§ 1669. Liability for injury to livestock or fowls.—If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit. (1911, c. 3, s. 31.)

Editor's Note.—By the ancient common law dogs were considered as of too base a nature to be the subject of larceny. But now they are deemed property for which an action will lie for wrongful injury. As to liability for wrongfully killing a dog, see Beasley v. Byrum, 163 N. C. 3, 79 S. E. 270; State v. Smith, 156 N. C. 628, 72 S. E. 321.

Property in dogs is recognized by the law and they are protected against wanton and needless injury for which a civil action for damages may be maintained by the owner. Dodson v. Mock, 20 N. C. 282; Mowery v. Salisbury, 82 N. C. 175.

The property in dogs therefore, is not of the same character as that of ordinary domestic animals, in which the right of property is absolute, but it is of an imperfect or qualified nature. Sintell v. New Orleans, etc., R. Co., 166 U. S. 698, 701, 41 L. Ed. 1169.

The law authorizes the killing of a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. Parrott v. Hartsfield, 20 N. C. 242; State v. Smith, 156 N. C. 628, 72 S. E. 321.

As to owner's liability for injury by his dog to other persons, see Harris v. Fisher, 115 N. C. 318, 20 S. E. 461; Perry v. Phipps, 32 N. C. 259. See also, 1 Enc. Dig. 347 et seq.

§ 1670. Permitting bitch at large.—If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3303; Code, s. 2501; 1862-3, c. 41, s. 2.)

§ 1671. Sheep-killing dogs to be killed. — If any person owning or having any dog that kills sheep or other domestic animal, upon satisfactory evidence of the same being made before any justice of the peace of the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and the dog may be killed by any one if found going at large. (Rev., s. 3304; Code, s. 2500; 1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2.)

This section is mentioned in Daniels v. Homer, 139 N. C.

219, 252, 51 S. E. 922; Parrott v. Hartsfield, 20 N. C. 242. As to what dogs may be killed, see secs. 1682, 1693.

§ 1672. Failing to kill mad dog.—If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3305; Code, s. 2499; R. C., c. 67.)

Actual Knowledge Unnecessary.—In an action under this section it is not necessary to prove that the biting dog was in fact mad. The words "good reason to believe" apply both to the condition of the biting dog and to the fact that the dog was bitten by a mad dog. Wallace v. Douglas, 32 N. C. 79.

Dog Can Be Destroyed.—If owner refuses to destroy a dog, which is mad or is bitten by a mad dog, he subjects himself to the possibility of a fine and imprisonment and the dog can be destroyed by order of the justice issuing the warrant under this section. Beasley v. Byrum, 163 N. C. 3, 4, 79 S. E. 270.

For the effect of contributory negligence on the part of the person bitten by a mad dog, see Holton v. Moore, 165 N. C. 549, 81 S. E. 779.

As to killing a mad dog, see secs. 1682, 1693.

Art. 2. License Taxes on Dogs

§ 1673. Amount of tax. — Any person owning or keeping about him any open female dog of the age of six months or older shall pay annually a license or privilege tax of two dollars. Any person owning or keeping any male dog, or female dog other than an open female dog of the age of six months or older, shall pay annually on each dog so owned or kept a license or privilege tax of one dollar. (1919, c. 116, ss. 1, 2.)

Editor's Note.—Public Laws 1931, c. 35, provided that this section shall not apply to Graham County.

Public Laws 1933, c. 90 provided that this section should not apply to Cherokee. Chapter 90 was amended by Public Laws, 1933, c. 301 so as to exempt Macon and Clay counties. Public Laws, 1933, c. 149, repealed §§ 1673-1684, insofar as they apply to Swain County.

Constitutional Exercise of Police Power.—A statute imposing a specified tax upon all persons owning or keeping a dog within a certain county is for the privilege of keeping the dog therein and comes under the police regulations of the county. It is therefore constitutional and valid and will not be restrained. Newall v. Green, 169 N. C. 462, 86 S. E. 291.

§ 1674. License tags; optional with county commissioners.—To every person paying the license or privilege tax prescribed in the preceding section there shall be issued by the sheriff a metal tag bearing county name, a serial number, and expiration date, which shall be attached by owner to a collar to always be worn by any dog when not on premises of the owner or when engaged in hunting. The superintendent of public instruction shall at all times keep on hand a supply of tags to be furnished the sheriffs of the several counties. Provided, that the county commissioners of each county shall, by order duly made in regular session, make an order determining whether the collar and tag shall be applied to that county. (1919, c. 116, s. 2½; Ex. Sess. 1920, c. 37.)

Editor's Note.—This section was amended by ch. 37, Ex. Sess. 1920 by having the metal tags kept by the superintendent of public instruction. They were formerly kept by the commissioner of agriculture.

§ 1675. Dogs to be listed; penalty for failure to list.—It shall be the duty of every owner or keeper of a dog to list the same for taxes at the same time and place that other personal property is listed, and the various tax listers in the state shall have proper abstracts furnished them for listing dogs for taxation, and any person failing or refusing to list such dog or dogs shall be guilty of misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The owner of the home or lessee of such owner shall be responsible for listing of any dog belonging to any member of his family. (1919, c. 116, s. 3.)

§ 1676. When tax due; penalty for failure to pay.—The license of privilege tax herein imposed shall be due and payable on the first day of October of each and every year, and all persons after December first, thereafter who own or keep a dog or dogs upon which the license or privilege tax is not paid, whether said dog or dogs have been listed or not, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or be imprisoned not more than thirty days. (1919, c. 116, s. 3.)

§ 1677. Receipt for tax a license. — Upon the payment to the sheriff or tax collector of the license or privilege tax aforesaid, such sheriff or tax collector shall give the owner or keeper of such dog or dogs a receipt for the same which shall constitute a license under the provisions of this article. (1919, c. 116, s. 3.)

§ 1678. Tax listers to make inquiry, compile reports; compensation.—The tax listers for each township, town, and city in this state shall annually, at the time of listing property as required by law, make diligent inquiry as to the number of dogs owned, harbored, or kept by any person subject to taxation. The list-takers shall on or before the first day of July in each year, make a complete report to the sheriff or tax collector on a blank form furnished them by the proper authority, setting forth the name of every owner of any dog or dogs, how many of each and the sex owned or kept by such person. The county commissioners may pay the tax listers for such services such amounts as may be just out of the money arising under this article. (1919, c. 116, ss. 4, 6.)

§ 1679. Purchasers to ascertain listing. — Any person coming in possession of any dog or dogs after listing time shall immediately ascertain whether such dog or dogs have been listed for taxes or not, and if not so listed, it is hereby made the duty of such owner or keeper of such dog or dogs to go to the sheriff or tax collector of his county and list such dog or dogs for taxes, and it is made the duty of the owner or keeper of such dog or dogs to pay the privilege or license tax as is herein provided for in other cases. (1919, c. 116, s. 4.)

§ 1680. Permitting dogs to run at large at night; penalty; liability for damage. — No person shall allow his dog over six months old to run at large in the night time unaccompanied by the owner or by some member of the owner's family,

or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and shall also be liable in damages to any person injured or suffering loss to his property or chattels. (1919, c. 116, s. 5.)

Valid Exercise of Police Power.—A city ordinance which prohibits the owner from allowing dogs to run at large without muzzles is a valid exercise of the police power. State v. Clifton, 152 N. C. 800, 67 S. E. 751.

For local act applicable to Buncombe. New Hanover, Halifax and Wake counties, see Acts 1925, c. 314.

§ 1681. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner.—The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article; Provided, that before appointing a jury or making any payment, the commissioners shall satisfy themselves that the claimant listed said property for taxation at the last listing time, if said property was then owned by him. This proviso shall apply only to Chowan county. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same.

Provided, however, no amount shall be paid out under the terms of this article, except upon the findings of three freeholders appointed to ascertain the amount of damages done, expense of treatment, and necessary expenses incurred, and in no event shall the amount allowed be more than the doctor's bill, including medicine and treatment, and the actual loss of time based upon the earning capacity of the person injured, including reasonable expense of travel to the place of treatment, and if injury to property, the actual damage suffered; but this proviso will apply only to Rockingham county: Provided further that this section shall not apply to Davidson, Cumberland, Mecklenburg and Stanly counties. And provided also that all that portion of this section after the word "collected" in line three thereof, shall not apply to Lincoln and Bladen counties. (1919, c. 116, s. 7; 1925, cc. 15, 25, 79; 1933, c. 28; 1935, cc. 30, 361, 402.)

Editor's Note.—This section was amended by chaps. 15, 25, 79, Public Laws of 1925 by the addition of the three last provisos.

Public Laws 1929, Chapters 31, 79, provides that all that portion of this section beginning with the first "provided" in line five shall not apply to Currituck and Gates Counties. But see § 1684(b).

Public Laws 1931 c. 283, applicable only to McDowell, Forsyth, Orange, Randolph, Watauga and Avery Counties, amended this section by adding at the end thereof the following: "Provided further, that the Board of County Commissioners may adjust and settle claim or claims for such damage without submitting the question to a jury; and: Provided, further, that in no event shall the owner be paid an amount greater than the tax valuation of the property for the then current tax year as shown by the tax list of such owner."

Public Laws 1931, c. 37, applicable only to Wilson County, provided that no part of the taxes paid on dogs pursuant to Public Laws 1919, c. 77 (identical with c. 116), and no part of any taxes collected in such county "shall be liable or used to pay for depredation, damage or injury to persons or property by dogs."

The proviso at the end of this section, relating to Lincoln county, was added by Public Laws of 1933, c. 28. For an act repealing all of the provisos of this section insofar as they relate to Duplin county, see Public Laws 1933, c. 477; for repealing act as to Mitchell and Avery counties, see Public Laws 1933, c. 273. For act applicable to Guilford and Forsyth counties only, see Public Laws 1933, c. 547. For act applicable to Moore county only, see Public Laws 1933, c. 526. For Columbus county, see Public Laws 1933, c. 387, and for act applicable in Pitt only, see Public Laws 1933, c. 561. Public Laws 1933, c. 200 made the local amendment of 1931, applicable also in Onslow county.

The amendments of 1935 added Cumberland, Mecklenburg and Stanly to the list of counties to which the section does not apply. Bladen county was added to the counties to which the section is only partly applicable. The act excepting Cumberland county also provides: "That the proceeds of the direct tax as provided for under chapter one hundred and sixteen, Public Laws of one thousand, nine hundred and nineteen, shall be applied one-half to the general fund of the county, and one-half to the School Fund."

Chapter 50 of the Public Laws of 1935 directs that a proviso be added relating to efforts to determine the ownership of dogs doing damage to live stock, etc., and containing special provisions as to payment. The proviso is applicable only in Alamance county.

Chapter 188 of the Public Laws of 1935 provides for the appointment of three freeholders to ascertain damages done. This act applies only in Caswell county.

Chapter 412 of the Public Laws of 1935 contains a similar provision for appointment of freeholders applicable only in Madison county.

In General.—This section is a police regulation not estopping the defendant in the county's action from establishing any defense available to him under the pleadings, nor does it change the method of procedure as to the burden of proof, or otherwise, except that it limits recovery of the injured person, electing to proceed under this statute, to a sum not exceeding the amount thereunder ascertained. Board v. George, 182 N. C. 414, 109 S. E. 77.

Constitutional.—This section does not deprive the defendant of a jury trial, and it is constitutional. Board v. George, 182 N. C. 414, 109 S. E. 77.

Testimony of Non-Expert Witness.—Admission of judgment of a non-expert witness upon the personal observation of the carcass of the sheep, as to the length of time it had been killed, is not erroneous as the expression of a theoretical or scientific opinion. Board v. George, 182 N. C. 414, 109 S. E. 77.

Right to Trial by Jury.—The ascertainment of damages by three disinterested freeholders, and the payment thereof by county commissioners from the dog taxes, with the right of the county to sue to recover the amount so paid from the owner of the dog if known or discovered, as provided by this section, reserves to such owner the right to a trial by jury in the action of the commissioners, and does not permit recovery in excess of the sum awarded for the damages caused as ascertained under the provisions of the statute. Board v. George, 182 N. C. 414, 109 S. E. 77.

Cost of Assessment.—In an action by the county to recover damages to the person or property sustained by the dog of another, under this section, the reasonable cost of the services of the persons chosen to make the assessment, which is paid by the county, is a part of the money paid on account of the injury or destruction caused by the dog, and defendant's exception thereto will not be sustained. Semble, the question of the reasonableness of this amount is a question for the jury, when aptly and properly raised and presented. Board v. George, 182 N. C. 414, 109 S. E. 77.

§ 1682. Mad dogs, dogs killing sheep, etc., may be killed.—Any person may kill any mad dog,

and also any dog if he is killing sheep, cattle, hogs, goats, or poultry. (1919, c. 116; s. 8.)

As to liability of owner who fails to kill sheep-killing dog, see sec. 1671; mad dog, see sec. 1672. As to protected dogs, see sec. 1693.

§ 1683. Dogs, when listed, personal property; larceny of dog a misdemeanor. — All dogs, when listed for taxes, become personal property and shall be governed by the laws governing other personal property: Provided, the larceny of any dog upon which aforesaid tax has been paid shall be a misdemeanor. (1919, c. 116, s. 9.)

Not Larceny.—In the absence of a statute, stealing a dog is not larceny in this State. State v. Holder, 81 N. C. 527. See note to sec. 1669. See also, secs. 1693, 4263.

§ 1684. Failure to discharge duties imposed under this article. — Any person failing to discharge any duty imposed upon him under this article shall be guilty of a misdemeanor, and upon conviction shall pay a fine not exceeding fifty dollars or be imprisoned not more than thirty days. (1919, c. 116, s. 10.)

§ 1684(a). Counties excepted from operation of article. — This article shall not apply to the counties of Yancey, Alexander, Cherokee, Madison and Jackson. All dog taxes collected in said counties and not disbursed on February 27, 1923, shall be probated among those having bona fide claims against said fund, and the balance, if any, paid over to the school fund of the county. (1923, c. 84, ss. 2, 3; 1924, c. 14; 1931, c. 27.)

Editor's Note.—The Act of 1931 amended this section by striking out "Haywood" so as to place that county under the operation of this article known as the State-Wide Dog Law. It had been thought that § 1684(b) repealed this section. However, it seems that the amendment is legislative recognition that this section has not been suspended.

§ 1684(b). This article is hereby made applicable to every county in the State of North Carolina, notwithstanding any provisions in local, special or private acts exempting any county or any township or municipality from the provisions of the same enacted at any General Assembly commencing at the General Assembly of nineteen hundred and twenty-nine: Provided, this act shall not apply to counties that do not participate in the Equalization Fund. All laws and parts of laws, whether general, local, special or private, enacted at any session of the Legislature, as set out above, in conflict with this act are hereby repealed. (1929, c. 318.)

See note to § 1684(a).

As to damages done by dogs in Surrey county, see Public Laws 1933, c. 310.

Art. 3. Special License Tax on Dogs

§ 1685. Nothing in this article abrogated by Art. 2; special tax an additional tax. — Nothing contained in Article 2 of this chapter shall have the effect of abrogating any of the provisions of this article, and the special license tax on dogs provided for under this article shall be in addition to the license tax on dogs provided for under Article 2 of this chapter: Provided that Article 2 shall not be construed as repealing any existing ordinance of any city or town or any ordinance of any city or town hereafter enacted, regulating the keeping or use of dogs in cities and towns. (1919, c. 116, s. 11, Ex. Sess. 1920, c. 53.)

Editor's Note.—The proviso to this section was added by ch. 53, Ex. Sess. 1920.

§ 1686. Special dog tax submitted to voters on petition. — Upon the written application of one-third of the qualified voters of any county in this state made to the board of commissioners of such county, asking that an election be held in said county to adopt the provisions of this article for levying and collecting a special dog tax in said county, it shall be the duty of said board of commissioners from time to time to submit the question of "special dog tax" or "no special dog tax" to the qualified voters of said county; and if at any such election a majority of the votes cast shall be in favor of said special dog tax, then the provisions of this article shall be in full force and effect over the whole of said county, special dog tax hereinafter provided for shall be levied and collected in said county; but if a majority of the votes cast at such election shall be against said special dog tax, then the provisions of this article shall not apply to any part of said county. (1917, c. 206, s. 1.)

§ 1687. Conduct of elections. — Every election held under the provisions of this article shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, that no such election shall be held in any county oftener than once in two years. (1917, c. 206, s. 3.)

§ 1688. Commissioners to provide for registration; ballots and machinery. — The board of commissioners of any county in this state in which an election is to be held under the provisions of this article may provide for a new registration of voters in said county if they deem necessary, or they may provide for the use of the registration of voters in effect at the general election for county officers in said county next preceding the holding of the election hereunder, and they shall appoint such officers as may be necessary to properly hold such election and shall designate the time and places for holding such elections, and make all rules, regulations, and do all other things necessary to carry into effect the provisions of this article; they shall provide ballots without device for all qualified voters in said county, on which shall be written or printed the words "For special dog tax," and also shall provide like ballots on which shall be printed or written the words "Against special dog tax." (1917, c. 206, s. 4.)

§ 1689. Canvass of votes and returns.—At the close of said election the officers holding same shall canvass the vote and certify the returns to the said board of commissioners of said county, and the said board of commissioners shall canvass the said returns and declare the results of said election in the manner now provided by law for holding special-tax school elections. (1917, c. 206, s. 4.)

§ 1690. Contents and record of petition; notice of election. — The qualified voters of any county who shall make written application to the board of commissioners of said county asking that an

election be held under the provisions of this article shall designate and insert in said application the amount of special dog tax to be levied and collected in said county, which tax shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog, whether male or female, and the board of commissioners shall have said written application, specifying the amount of said special dog tax to be voted for in said county, recorded in the records of their proceedings, and shall cause to be published in some newspaper published or circulated in said county, and posted at the courthouse door and five other public places in said county, a notice of the time and places for holding said election and specifying the amount of tax to be voted for in said county. (1917, c. 206, s. 5.)

§ 1691. License tax.—Any person or persons, firm or corporation, owning or keeping any dog or dogs, whether male or female, in any county which shall adopt the provisions of this article for the levy and collection of said special dog tax shall pay annually a license or privilege tax on each dog, whether male or female, such sum or sums as may be designated and inserted in the written application of the qualified voters of said county asking for said election and as recorded in the proceedings of the board of county commissioners of said county, which shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog: Provided, the tax voted for and levied on female dogs may be greater than the tax on male dogs, but in no event shall said special tax exceed the sum of five dollars, nor be less than the sum of one dollar for any dog, whether male or female. (1917, c. 206, s. 6.)

Local Tax Valid.—The Legislature may empower the authorities of a town to regulate the manner in which dogs may be kept in the said town. Hence a tax levied under this authority is constitutional and valid. Mowery v. Salisbury, 82 N. C. 175.

§ 1692. Collection and application of tax. — The special dog tax voted for under the provisions of this article shall be due and collectible at the same time and in the same manner as provided by law for the collection of taxes on other personal property in said county, and shall be collected by the collector of other taxes in said county in the same manner and under the same penalties provided by law for collection of taxes on other personal property in said county, and shall be applied to the road fund, or school fund, of said county, as may be directed by the board of commissioners of said county. (1917, c. 206, s. 8.)

As to application of the proceeds of the general dog tax, see sec. 1681.

§ 1693. Listed dogs protected; exceptions. — Any person who shall steal any dog which has been listed for taxation as herein provided shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court; and any person who shall kill any dog the property of another, after the same has been listed as herein provided, shall be liable to the owner in damages for the value of such dog. Nothing in this act shall prevent the killing of a mad dog, sheepkilling dog, or egg-sucking dog on sight, when off the premises of its owner, and the owner shall not recover any damages for the loss of such dog. (1917, c. 206, s. 9.)

As to liability for wrongfully killing a dog, see note to sec. 1669. As to listed dogs becoming personal property, see secs. 1683, 4263.

§ 1694. Application of article to counties having dog tax.—Any county in this state which now has a local law taxing dogs may, by election in the manner herein provided for, accept the provisions of this article, and if adopted by a majority of the qualified voters of said county at such election, the local law taxing dogs in such county shall thereby be repealed and annulled, and the provisions of this article shall be in full force and effect in such county. (1917, c. 206, s. 10.)

CHAPTER 31A.

ELECTRIFICATION.

Art. 1. Rural Electrification Authority.

§ 1694(1). Rural Electrification Authority created; appointment; terms of members. — An agency to be known as the North Carolina Rural Electrification Authority is hereby created as an agency of the State of North Carolina, such authority to consist of six members to be appointed by the governor of North Carolina; two appointed for the term of two years; two for a term of four years and two for a term of six years, and their successors shall be appointed for a term of four years. (1935, c. 288, s. 1.)

§ 1694(2). Powers.—The purpose of said North Carolina Rural Electrification Authority is to secure electrical service for the rural districts of the State where service is not now being rendered, and it is hereby empowered to do the following in order to accomplish that purpose:

(a) To investigate all applications from communities unserved, or inadequately served, with electrical energy in North Carolina, and to determine the feasibility of obtaining such service therefor.

(b) To employ such personnel as shall be necessary to conduct surveys, assist the several communities to organize and finance extensions of rural distribution lines; to negotiate with power companies and other agencies for the supply of electric energy for and on behalf of the rural communities that desire service.

(c) To contact the power companies and other agencies contiguous to the area and areas desiring service, for the purpose of arranging for the extension by said companies, or other agencies, of service in that community for such extension as may be feasible for the power company, or other agency, contiguous to the area to finance itself.

(d) To make estimates of costs of extension which the power company would not be willing to finance and report such findings to the citizens of the community desiring service or to the corporations organized under this bill, to be known as "electric membership corporations."

(e) To estimate the service charges which said community would have to set up in addition to the rates for energy as may be found necessary in order to make extension self liquidating.

(f) To have authority to call upon the utilities commission of the State to fix such rates and

service charges as will be necessary to accomplish the purpose, and the right to petition the utilities commission to require extension of lines by the power companies when, in its opinion, it is proper and feasible.

(g) To have the power of eminent domain for the purpose of condemning rights of way for the erection of transmission and distribution lines, either in its own name, or in its own name on behalf of the electric membership corporations to be formed as provided by law.

(h) To have such right and authority to secure for said local communities or electric membership corporations as may be set up assistance from any agency of the United States government, either by gift or loan, as may be possible to aid said local community in securing electric energy for said community.

(i) To investigate all applications from communities for the formation of electric membership corporations and determine and pass upon the question of granting the authority to form such corporations to provide forms for making such applications; and to do all things necessary to a proper determination of the question of establishment of the local electric membership corporations.

(j) To act as agent for any electric membership corporations formed under direction or permission of the North Carolina Rural Electrification Authority in securing loans or grants from any agency of the United States government.

(k) To prescribe rules and regulations and the necessary blanks for the electric membership corporations in making applications for grant or loan from any agency of the United States government.

(l) To do all other acts and things which may be necessary to aid the rural communities in North Carolina secure electric energy. (1935, c. 288, s. 2.)

§ 1694(3). Authority not granted power to fix rates or order line extensions; right of suggestion and petition.—The authority itself shall not be a rate making body, and shall have no power to fix the rates or service charges, or to order the extension of lines by the power companies. The function of making rates and service charges and orders for the extension of lines shall remain in the utilities commission of North Carolina, and the authority shall only have the right of suggestion and petition to the utilities commission of its opinion as to the proper rates and service charges and line extensions, and no rate recommended or suggested by the authority shall be effective until approved by the utilities commission: Provided, that if the utilities commission of North Carolina does not have the right under the existing law to fix service charges in addition to the rates prescribed for electrical energy, and the power to order line extensions, such power and authority is hereby granted the utilities commission of North Carolina to fix and promulgate service charges in addition to rates in any community which avails itself of this article, and form a corporation authorized hereunder to be known as electric membership corporation, and to order line extensions when it shall determine that the same is proper and feasible. (1935, c. 288, p. 3.)

§ 1694(4). Organization meeting of authority; chairman and secretary.—Promptly after their appointment the authority shall meet and organize at such meeting, and at the first meeting of each year thereafter, the members shall choose from their number a chairman. They shall also choose a secretary, who shall be a competent engineer and shall fix his salary subject to the approval as provided in chapter two hundred and seventy-seven of the Public Laws of nineteen hundred and thirty-one, as amended by chapter forty-six of the Public Laws of nineteen hundred and thirty-three, codified as section 7521(k) et seq. (1935, c. 288, s. 4.)

§ 1694(5). Compensation and expenses. — All members of the authority, except the chairman and secretary, shall serve without compensation, except for their actual expenses incurred with the performance of their duties. (1935, c. 288, s. 5.)

§ 1694(6). Annual appropriation.—For the purpose of defraying expenses and salaries of the electrical authority as hereby created, there is hereby appropriated from the general fund of the State the sum of ten thousand ($10,000) dollars annually. (1935, c. 288, s. 6.)

Art. 2. Electric Membership Corporations.

§ 1694(7). Title of article.—This article, may be cited as the "Electric Membership Corporation Act." (1935, c. 291, s. 1.)

§ 1694(8). Definitions. — The following terms, whenever used or referred to in this article, shall have the following meanings, unless a different meaning clearly appears from the context:

(a) "Corporation" shall mean a corporation formed under this article.

(b) "Person" shall mean and include natural persons, firms, associations, corporations, business trusts, partnerships and bodies politic.

(c) "Acquire" shall mean acquire by purchase, lease, devise, gift or other mode of acquisition.

(d) "Law" shall mean any act or statute, general, special or local of this State.

(e) "Federal agency" shall mean and include the United States of America, the president of the United States of America, the federal emergency administrator of public works and any and all other authorities, agencies, and instrumentalities of the United States of America, heretofore or hereafter created.

(f) "Board" shall mean the board of directors of a corporation formed under this article. (1935, c. 291, s. 2.)

§ 1694(9). Formation in unserved communities; filing application with rural electrification authority.—When any number of persons residing in the community not served, or inadequately served, with electrical energy desire to secure electrical energy for their community and desire to form corporations to be known as electric membership corporations for said purpose, they shall file application with the North Carolina Rural Electrification Authority for permission to form such corporation. (1935, c. 291, s. 3.)

§ 1694(10). Issuance of privilege for formation of such corporation.—Whenever any such application is made by as many as five members of

the community, the North Carolina Rural Electrification Authority shall cause a survey of said territory to be made and if, in its opinion, the proposal is feasible, shall issue to said community a privilege for the formation of a corporation as hereinafter set out. Whenever an application has been filed by any community with the North Carolina Rural Electrification Authority, and its application for formation of an electric membership corporation has been approved, the same may be formed as hereinafter provided. (1935, c. 291, s. 4.)

§ 1694(11). Formation authorized; holding property.—Any number of natural persons not less than three may, by executing, filing and recording a certificate as hereinafter provided, form a corporation not organized for pecuniary profit for the purpose of promoting and encouraging the fullest possible use of electric energy in the rural section of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management of the business of such corporations. Whenever an electric membership corporation is formed in the manner herein provided, all property owned by said corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State, so long as said property is owned by said electric membership corporation and is used for the purpose for which the corporation was formed. (1935, c. 291, s. 5.)

§ 1694(12). Contents of certificate of incorporation.—The certificate of incorporation shall be entitled and endorsed "Certificate of Incorporation of .....Electric Membership Corporation" (the blank space being filled in with the name of the corporation), and shall state:

(a) The name of the corporation, which name shall be such as to distinguish it from any other corporation.

(b) A reasonable description of the territory in which its operations are principally to be conducted.

(c) The location of its principal office and the post office address thereof.

(d) The maximum number of directors, not less than three.

(e) The names and post-office addresses of the directors, not less than three, who are to manage the affairs of the corporation for the first year of its existence, or until their successors are chosen.

(f) The period, if any, limited for the duration of the corporation. If the duration of the corporation is to be perpetual, this fact should be stated.

(g) The terms and conditions upon which members of the corporation shall be admitted.

(h) The certificate of incorporation of a corporation may also contain any provision not contrary to law which the incorporators may choose to insert for the regulation of its business, and for the conduct of the affairs of the corporation; and any provisions, creating, defining, limiting or regulating the powers of the corporation, its directors and members. (1935, c. 291, s. 6.)

§ 1694(13). Execution and filing of certificate of incorporation by residents of territory to be served.—The natural persons executing the certificate of incorporation shall be residents of the territory in which the principal operations of the corporation are to be conducted who are desirous of using electric energy to be furnished by the corporation. The certificate of incorporation shall be acknowledged by the subscribers before an officer qualified to administer oaths. When so acknowledged, the certificate may be filed in the office of the secretary of state, who shall forthwith prepare a certified copy or copies thereof and forward one to the clerk of the superior court in each county in which a portion of the territory of the corporation is located, who shall forthwith file such certified copy or copies in their respective offices and record the same as other certificates of incorporation are recorded. As soon as the provisions of this section have been complied with, the proposed corporation described in the certificate so filed, under its designated name, shall be and constitute a body corporate. (1935, c. 291, s. 7.)

§ 1694(14). Board of directors; compensation; president and secretary. — Each corporation formed hereunder shall have a board of directors and the powers of a corporation shall be vested in and exercised by a majority of the directors in office. The directors of the corporation, other than those named in its certificate of incorporation, shall be elected annually by the members entitled to vote. The directors must be members and shall not be entitled to compensation for their services. The board shall elect annually from its own number a president and a secretary. (1935, c. 291, s. 8.)

§ 1694(15). Powers of board.—The board shall have power to do all things necessary or convenient in conducting the business of a corporation, including, but not limited to:

(a) The power to adopt and amend by-laws for the management and regulation of the affairs of the corporation. The by-laws of a corporation may make provisions, not inconsistent with law or its certificate of incorporation, regulating the admission, withdrawal, suspension or expulsion of members; the transfer of membership; the fees and dues of members and the termination of memberships on non-payment of dues or otherwise; the number, times and manner of choosing, qualifications, terms of office, official designations, powers, duties and compensation of its officers; defining a vacancy in the board or in any office and the manner of filling it; the number of members, not less than a majority, to constitute a quorum at meetings, the date of the annual meeting and the giving of notice thereof, and the holding of special meetings and the giving of notice thereof; the terms and conditions upon which the corporation is to render service to its members, the disposition of the revenues and receipts of the corporation; regular and special meetings of the board and the giving of notice thereof.

(b) To appoint agents and employees and to fix their compensation and the compensation of the officers of the corporation.

(c) To execute instruments.

(d) To delegate to one or more of the directors

or to the agents and employees of a corporation such powers and duties as it may deem proper.

(e) To make its own rules and regulations as to its procedure. (1935, c. 291, s. 9.)

§ 1694(16). Certificates of membership. — A corporation may issue to its members certificates of membership and each member shall be entitled to only one vote at the meetings of the corporation. (1935, c. 291, s. 10.)

§ 1694(17). Corporate purpose.—The corporate purpose of each corporation formed hereunder shall be to render service to its members only, and no person shall become or remain a member unless such person shall use energy supplied by such corporation and shall have complied with the terms and conditions in respect to membership contained in the by-laws of such corporation. (1935, c. 291, s. 11.)

§ 1694(18). General grant of powers. — Each corporation formed under this article is hereby vested with all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class as those so enumerated. (1935, c. 291, s. 12.)

§ 1694(19). Specific grant of powers.—Subject to the Constitution of the State, a corporation created under the provisions of this article shall have power to do any and all acts or things necessary or convenient for carrying out the purpose for which it was formed, including, but not limited to:

(a) To sue and be sued.

(b) To have a seal and alter the same at pleasure.

(c) To acquire, hold and dispose of property, real and personal, tangible and intangible, or interests therein, and to pay therefor in cash or on credit, and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as the board shall determine.

(d) To render service and to acquire, own, operate, maintain and improve a system or systems.

(e) To pledge all or any part of its revenue or mortgage or otherwise encumber all or any part of its property for the purpose of securing the payment of the principal of and interest on any of its obligations.

(f) The right to apply to the North Carolina Rural Electrification Authority for permission to construct or place any parts of its system or lines in and along any state highway or over any lands which now, or may be, the property of this State, or any political subdivision thereof. In all questions involving the right of way, or the right of eminent domain, the rulings of the North Carolina Electrification Authority shall be final.

(g) To accept gifts or grants of money, property, real or personal, from any person or federal agency, and to accept voluntary and uncompensated services.

(h) To make any and all contracts necessary or convenient for the full exercise of the powers in this article granted, including, but not limited to, contracts with any person or federal agency, for the purchase or sale of energy; for the management and conduct of the business of the corporation, including the regulation, of the rates, fees or charges for service rendered by the corporation.

(i) To sell, lease, mortgage or otherwise encumber or dispose of all or any part of its property, as hereinafter provided.

(j) To contract debts, borrow money, and to issue or assume the payment of bonds.

(k) To fix, maintain and collect fees, rents, tolls and other charges for service rendered.

(l) To perform any and all of the foregoing acts and to do any and all of the foregoing things under, through or by means of its own officers, agents and employees, or by contracts with any person or federal agency. (1935, c. 291, s. 13.)

§ 1694(20). Declared public agency of state; taxes and assessments. — Whenever an electric membership corporation is formed in the manner herein provided, the same shall, and is hereby declared to be a public agency, and shall have within its limits for which it was formed the same rights as any other political subdivision of the State, and all property owned by said corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State so long as said property is owned by said electric membership corporation and is used for the purposes for which the corporation was formed. (1935, c. 291, s. 14)

§ 1694(21). Sale of property.—No corporation may sell, mortgage, lease or otherwise encumber or dispose of any of its property (other than merchandise and property, which in the judgment of the board, is not necessary or useful in operating the corporation) unless authorized so to do (a) by the votes of at least a majority of its members, and (b) the consent of the holders of seventy-five per centum (75%) in amount of the bonds of such corporation then outstanding is obtained. (1935, c. 291, s. 15.)

§ 1694(22). Issuance of bonds.—A corporation formed hereunder shall have power and is hereby authorized, from time to time, to issue its bonds in anticipation of its revenue for any corporate purpose. Said bonds may be authorized by resolution or resolutions of the board, and may bear such date or dates, mature at such time or times, not exceeding forty years from their respective dates, bear interest at such rate or rates, not exceeding six per centum per annum, payable semi-annually, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption, not exceeding par and accrued interest, as such resolution or resolutions may provide. Such bonds may be sold in such manner and upon such terms as the board may determine at not less than par and accrued interest. Any provision of law to the contrary notwithstanding, any bonds and the interest coupons appertaining thereto, if any, issued pursuant to this article shall possess all of the qualities of negotiable instruments. (1935, c. 291, s. 16.)

§ 1694(23). Covenants or agreements for security of bonds.—In connection with the issuance of any bonds, a corporation may make covenants or agreements and do any and all acts or things that a business corporation can make or do under the laws of the State in order to secure its obligations or which, in the absolute discretion of the board, tend to make the obligations more marketable, notwithstanding that such covenants, agreements, acts and things may constitute limitations on the exercise of the powers herein granted. (1935, c. 291, s. 17.)

§ 1694(24). Purchase and cancellation of bonds.—A corporation shall have power out of any funds available therefor to purchase any bonds issued by it at a price not exceeding the principal amount thereof and accrued interest thereon. All bonds so purchased shall be cancelled. (1935, c. 291, s. 18.)

§ 1694(25). Dissolution. — Any corporation created hereunder may be dissolved by filing, as hereinafter provided, a certificate which shall be entitled and endorsed "Certificate of Dissolution of....." (the blank space being filled in with the name of the corporation) and shall state:

(a) Name of the corporation, and if such corporation is a corporation resulting from a consolidation as herein provided, the names of the original corporations.

(b) The date of filing of the certificate of incorporation, and if such corporation is a corporation resulting from a consolidation as herein provided, the dates on which the certificates of incorporation of the original corporations were filed.

(c) That the corporation elects to dissolve.

(d) The name and post-office address of each of its directors, and the name, title and post-office address of each of its officers.

Such certificate shall be subscribed and acknowledged in the same manner as an original certificate of incorporation by the president or a vice-president, and the secretary or an assistant secretary, who shall make and annex an affidavit, stating that they have been authorized to execute and file such certificate by the votes cast in person or by proxy by a majority of the members of the corporation entitled to vote.

A certificate of dissolution and a certified copy or copies thereof shall be filed in the same place as an original certificate of corporation and thereupon the corporation shall be deemed to be dissolved.

Such corporation shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations and collecting or liquidating its assets, and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name. Any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall pass to and become the property of the State. (1935, c. 291, s. 19.)

§ 1694(26). Amendment of certificate of incorporation.—A corporation created hereunder may amend its certificate of incorporation to change its corporate name, to increase or reduce the number of its directors or change any other provision therein: Provided, however, that no corporation shall amend its certificate of incorporation to embody therein any purpose, power or provisions which would not be authorized if its original certificate, including such additional or changed purpose, power or provisions, were offered for filing at the time a certificate under this section is offered. Such amendment may be accomplished by filing a certificate which shall be entitled and endorsed "Certificate of Amendment of..... Electric Membership Corporation" and state:

(a) The name of the corporation, and if it has been changed, the name under which it was originally incorporated.

(b) The date of filing the certificate of incorporation in each public office where filed.

(c) The purposes, powers, or provisions, if any, to be amended or eliminated, and the purposes, powers or provisions, if any, to be added or substituted. Such certificate shall be subscribed in the same manner as an original certificate of incorporation hereunder by the president or a vice-president, by the secretary or the assistant secretary, who shall make and annex an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by proxy by a majority of the members of the corporation entitled to vote. Such certificate shall be filed in the same places as an original certificate of incorporation and thereupon the amendment shall be deemed to have been effected. (1935, c. 291, s. 20.)

§ 1694(27). Application for grant or loan from governmental agency.—Whenever any corporation organized hereunder desires to secure a grant or loan from any agency of the United States government now in existence or hereafter authorized, they shall apply through the North Carolina Rural Electrification Authority and not direct to the United States agency, and the said North Carolina Rural Electrification Authority alone shall have the authority to make applications for grants or loans to any corporations created hereunder. (1935, c. 291, s. 21.)

§ 1694(28). Article complete in itself and controlling. — This article is complete in itself and shall be controlling. The provisions of any other law, general, special, or local, except as provided in this article, shall not apply to a corporation formed under this article. (1935, c. 291, s. 23.)

CHAPTER 32

ELECTRIC, TELEGRAPH, AND POWER COMPANIES

Art. 1. Acquisition and Condemnation of Property

§ 1695. Use of public highways.—Any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, has the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway. (Rev., s. 1571; Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; 1874-5, c. 203, s. 2.)

Constitutionality.—The provisions of secs. 1695-1703, em-

powering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, are constitutional and valid. Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460.

Application to Foreign Companies.—The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right of way therefor by a condemnatory proceeding, is expressly conferred upon any telegraph company incorporated by this or by any other State. North Carolina, etc., R. Co. v. Carolina Cent., etc., R. Co., 83 N. C. 489, 496; Yadkin River Power Co. v. Wissler, 160 N. C. 269, 271, 76 S. E. 267.

No Rights over Private Land.—This section applies to constructing lines along the highway and not to constructing the lines over private land. Wade v. Carolina Tel., etc., Co., 147 N. C. 219, 60 S. E. 987.

An Additional Burden.—A telegraph line along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022; Query v. Postal Tel. Cable Co., 178 N. C. 639, 101 S. E. 390; Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 and cases cited. For right of telegraph company to condemn railroad right of way, see sec. 1700. The same rule applies to electric light wires placed along the street. Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62. But the construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. Hester v. Traction Co., 138 N. C. 288, 50 S. E. 411 and cases cited.

§ 1696. Electric and hydro-electric power companies may appropriate highways; conditions.—Every electric power or hydro-electric power corporation which may exercise the right of eminent domain under the chapter Eminent Domain, where in the development of electric or hydro-electric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the board of county commissioners of the county in which such public highway is situate, shall have power to appropriate said public highway for the development of electric or hydro-electric power: Provided, that said electric power or hydro-electric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the board of county commissioners of the county in which said public highway is situated: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114.)

Where under the provisions of this section, a hydro-electric power company has appropriated a section of a public highway and built another section in lieu thereof, the provisions of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. Crowell v. Tallassee Power Co., 200 N. C. 208, 156 S. E. 493.

§ 1697. Acquisition of right of way by contract.—Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (Rev., s. 1572; Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; 1874-5, c. 203, s. 3.)

For general provisions as to eminent domain, see sec. 1698 et seq.

Owner Must Grant Easement.—A railroad company, not being the owner of the soil, can not grant an easement to a telegraph company. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572. See also Narron v. Wilmington etc., R. Co., 122 N. C. 856, 29 S. E. 356.

Easement by Adverse Possession.—Right of easement may be acquired by adverse and continuous user for the period of twenty years. Teeter v. Postal Tel. Cable Co., 172 N. C. 783, 90 S. E. 941.

§ 1698. Grant of eminent domain; exception as to mills and water-powers.—Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right of way over the lands, privileges and easements of other persons and corporations, and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or power-houses, with the right to divert the water from such ponds or reservoirs and conduct the same by flume, ditch, conduit, waterway or pipe line, or in any other manner, to the point of use for the generation of power at its said power-houses, returning said water to its proper channel after being so used: Provided, that the provision as to erection of towers shall not apply to any suit pending March 4, 1921, in any of the courts within the state of North Carolina. Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water-powers, developed or undeveloped with the land adjacent thereto necessary for their development: Provided, however, that if the court, upon filing of the petition by such electric power or lighting company, shall find that any mill, excepting cotton mills now in operation, whether operated by water-power or otherwise, together with the lands and easements adjacent thereto or used in connection therewith, or that any water-power, developed or undeveloped, with land adjacent thereto necessary for its development, excepting any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public where such water-power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public, is necessary for the development of any hydro-electric power plant which is to be operated for the purpose of generating electric power for sale to the general public, and that said electric power or lighting company is unable to agree for the purchase of such property with the owners thereof, and that the failure to acquire such property will affect the ability of such electric power or lighting company to supply power to the general public, and that the taking of such mill or water-power will be greatly more to the benefit of the public than the continued existence of such mill or the continuation of the existing ownership of such water-power, then the court, upon such finding, shall make an order authorizing the condemnation of such property and ease-

ments in all respects as in the case of other property referred to in this section: Any provisions in conflict with this chapter in any special chapters granted before January thirty-first, one thousand nine hundred and seven, in respect to the right of eminent domain are repealed. (Rev., s. 1733; Code, s. 2009; 1874-5, c. 203, s. 4; 1899, c. 64; 1903, c. 562; 1907, c. 74; 1921, c. 115; 1923, c. 60; 1925, c. 175.)

As to right of eminent domain in general as granted to railroads, school boards, etc., see the following chapter.

Editor's Note.—This section as it stood in 1919 expressly prohibited interference with any mill or power plant actually in process of construction or operation, also the taking of water powers, developed or undeveloped with the necessary adjacent land.

By ch. 60, Laws of 1923 the provision for condemning mills, when to the best interests of the public, was added. Cotton mills are excepted.

Ch. 175, Laws of 1925 added the power to condemn any waterpower developed or undeveloped which is not being held for use or actually used in the furnishing of power to the public.

Thus by these two amendments the Legislature has practically abolished the restrictions which existed in the section in 1919. See 1 N. C. Law Rev. 290; 3 N. C. Law Rev. 144.

The General Assembly originally inserted the proviso "water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken," for the purpose of preventing the acquisition of all of the water powers by one or more of the great aggregations of capital. Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 169 N. C. 471, 86 S. E. 296.

Right Granted for Public Benefit.—This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. Wissler v. Yadkin River Power Co., 158 N. C. 465, 466, 74 S. E. 460.

Limitation of Right of Eminent Domain.—This section limits the right of eminent domain and any special power claimed by the charter must clearly appear. Yadkin River Power Co. v. Whitney Co., 150 N. C. 31, 63 S. E. 188. See Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 169 N. C. 471, 86 S. E. 296.

A Continuing Right.—The right of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 273, 76 S. E. 267; Thomason v. Railroad, 142 N. C. 318, 55 S. E. 205.

Effect of Federal Statute.—The Act of Congress, entitled "An act to aid in the construction of telegraphs and to secure to the government the use of the same for postal, military and other purposes," approved 24 July, 1866, does not give authority to enter private property without consent of the owner, but provides that where consent is obtained, no State legislation shall prevent the use of such postroads for telegraph purposes by such corporations as avail themselves of its privileges. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

Quasi-Public Corporations Have Power.—Where a charter is granted a corporation, conferring quasi-public as well as private powers, the corporation may proceed to condemn lands when so empowered, in pursuance of its business of a quasi-public nature, and this will not be denied it because it was authorized to conduct a business of a private character. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Compensation Essential.—Private property may not be taken for public use, directly or indirectly, without just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022. See secs. 1720, 1721 as to fixing compensation.

Conflict of Claims.—Where the claims of two companies conflict the prior right belongs to that company which first defines and marks its route. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Effect of Subsequent Charter.—Where a legislative charter has been granted since this section was passed, the powers given therein are not subject to the restriction of this section. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Extent of Rights Usually Determined by Companies.—The extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive or manifest abuse of their discretion. Love v. R. R., 81 N. C. 432, cited and distinguished. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Burden of Proof on Defendant.—Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statute excepting them. Blue Ridge Interurban, R. Co. v. Hendersonville Light, etc., Co., 171 N. C. 314, 88 S. E. 245.

§ 1699. Residences, etc., may be taken under certain cases.—Residence property of vacant lots adjacent thereto in towns or cities, or other residences, gardens, orchards, graveyards or cemeteries, may be taken under the preceding section only when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five per cent of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the corporation commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section. (1907, c. 74; 1917, c. 108.)

§ 1700. Condemnation on petition; parties' interests only taken; no survey required.—When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it is lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their places of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends.

It is not necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any

certificate of the location of its line by its board of directors. (Rev., s. 1574; Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; 1874-5, c. 203, s. 5.)

For the right of condemnation in general, see notes to sec. 1706.

The Petition.—Under this section it is not necessary that a petition asking for the condemnation of a right of way over the right of way of a railroad should state by what tenure the railroad company holds. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Same—Company Alone Can File.—The company alone has the right to file petition in condemnation proceedings. The landowner is not given such right. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022.

Condemnation Not Confined to Right of Way.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 275, 76 S. E. 267.

No Entry Until Damage Paid.—Under this section a telegraph company seeking to condemn a right of way for its line cannot be authorized to enter into possession and construct its line until the damages have been assessed and paid into court. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Subsequent Purchaser May Recover.—A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022.

Permanent Damage Awarded.—Permanent damages may be awarded a landowner who is injured by telegraph poles placed on his land. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022; Lamberth v. Southern Power Co., 152 N. C. 371, 372, 67 S. E. 921. And the company then acquires an easement. Ibid.

Limitation of City Authority.—Authority granted by a city to the defendant electric company to remove a shade tree in front of the plaintiff's home in order to put up its poles and wires does not justify the act of the defendant in removing the tree, the city has no power to deprive the plaintiff of his property for such purpose without compensation. Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62.

When Jury Trial Necessary.—While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question as to whether the character of the lands is such as to be embraced within the right conferred, or within an exception to that right under the terms of a statute. Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167, 80 S. E. 398.

Judgment under Prior Act Necessary.—In order to acquire a vested right under a statute to condemn lands, which has subsequently been repealed, it is necessary to show a finality by judgment in the proceedings before the later act has become effective. Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167, 80 S. E. 398.

Condemnation of Railroad Right of Way.—The words "right of way," as used in the second paragraph of this section, are not used as synonymous with "easement," but, as applied to railroads, they include in their meaning the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owes only an easement therein or the title in fee. Postal Tel. Cable Co. v. Southern R. Co., 90 Fed. 30.

Same—Proceeding against Railroad Does Not Affect Owner.—Condemnation proceedings by a telegraph company against a railroad company to condemn the right of way, to which the landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022.

Same—Limitation of Federal Statute.—Rev. St. sec. 5263, authorizing telegraph companies to construct their lines over and along any military or post roads of the United States, does not give such companies the right to build their lines over the right of way of a railroad or other private property without the consent of the owner, or the condemnation of the right of way over such property in accordance with the laws of the state where situated. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Same—Additional Burden.—See notes to sec. 1695.

§ 1701. Copy of petition to be served.—A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. (Rev., s. 1575; Code, s. 2011; 1874-5, c. 203, s. 6; 1899, c. 64, s. 3.)

Failure to Give Prosecution Bond.—Where it appears that the summons was served in time, but that the prosecution bond, made a prerequisite by sec. 493, was not, no vested right in the former statute can be acquired by the further prosecution of the condemnation proceedings. Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167, 80 S. E. 398.

§ 1702. Proceedings as under Eminent Domain.—The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2, entitled "Condemnation Proceedings," of the chapter Eminent Domain. (Rev., s. 1576; Code, s. 2012; 1899, c. 64; 1903, c. 562.)

Subsequent Provisions Not Incorporated.—The reference in this section to article 2 of eminent domain incorporates into the telegraph statute the provisions of the railroad statute referred to, only as they existed at the time of the enactment, and not as thereafter amended. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Proceedings Subsequent to Filing.—This section evidently refers to the proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings after the parties are all before the court. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 525, 41 S. E. 1022. Hence sec. 1716, as to filing and service, does not apply. Id.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 408, 151 S. E. 871.

§ 1703. Commissioners to inspect premises.—In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory. (Rev., s. 1577; Code s. 2013; 1874-5, c. 203, s. 9.)

Art. 2. Intrastate Telegraph Messages

§ 1704. Penalty for nondelivery of intrastate telegraph message.—Any telegraph company doing business in this state shall fail to transmit and deliver any intrastate message within a reasonable time shall forfeit and pay to any one who may sue for same a penalty of twenty-five dollars. Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this state to another point in this state shall be prima facie evidence that it is an intrastate message. (1919, c. 175.)

Editor's Note.—Statutes in other states, similar to this section, have been held highly penal and not capable of being extended by implication to cases which do not come plainly within their terms.

It is generally held that "cipher" messages must be transmitted promptly, but that a regulation requesting that messages delivered for transmission must be in writing is

reasonable. However, the sender is not bound by regulations to which he has not consented.

Ordinary Diligence Required.—Telegraph companies are only bound to the exercise of that degree of diligence which a man of ordinary prudence would use under like or similar circumstances. Betts v. Western Union Tel. Co., 167 N. C. 75, 83 S. E. 164; Barnes v. Postal Tel.-Cable Co., 156 N. C. 150, 72 S. E. 78 and cases cited.

Form of Action.—A party entitled to recover damages from a telegraph company for its failure in its duty to transmit and deliver a message may bring his action either in contract or in tort. Penn v. Western Union Tel. Co., 159 N. C. 306, 307, 75 S. E. 16.

Mental Anguish.—Mental anguish caused by the negligent delay or failure to deliver a telegram is allowed in intrastate messages, as an element of damage. Betts v. Western Union Tel. Co., 167 N. C. 75, 83 S. E. 164; Lawrence v. Western Union Tel. Co., 171 N. C. 240, 88 S. E. 226 and cases cited. And formerly mental anguish was allowed in interstate messages. Penn v. Western Union Tel. Co., 159 N. C. 306, 75 S. E. 16. But, by Act of Congress, 18th June 1910, no recovery is allowed for mental anguish alone in interstate messages whether the negligence occurred in the State or elsewhere. Norris v. Western Union Tel. Co., 174 N. C. 92, 93 S. E. 465.

Sending Message Through Another State Does Not Avoid Liability.—A telegraph company accepting a telegram to be transmitted between points in this State, where a recovery for mental anguish is allowed, may not avoid such liability under the federal decisions by unnecessarily sending the message through another state, when it could have reasonably been otherwise transmitted. Speight v. Western Union Tel. Co., 178 N. C. 146, 100 S. E. 351.

Same—Burden of Proof.—Where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the state, and relays it at offices in another state, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the state court. Speight v. Western Union Tel. Co., 178 N. C. 146, 100 S. E. 351.

Validity of Company's Regulation.—A stipulation on the back of the message that in the case of unrepeated messages the sender cannot recover more than $50 is invalid in this state. Young v. Western Union Tel. Co., 168 N. C. 36, 84 S. E. 45; Brown v. Postal Tel. Co., 111 N. C. 187, 16 S. E. 179, citing numerous cases and text books.

Same—Sixty Day Limitation.—The regulations of a telegraph company requiring presentation of claims for damages within sixty days, etc., are valid, and enforceable. Penn v. Western Union Tel. Co., 159 N. C. 306, 75 S. E. 16. Since this is not an attempt to restrict the liability of the company for negligence. Sherrill v. Western Union Tel. Co., 109 N. C. 527, 531, 14 S. E. 94.

CHAPTER 33

EMINENT DOMAIN

Art. 1. Right of Eminent Domain

§ 1705. Corporation in this chapter defined.—For the purposes of this chapter, unless the context clearly indicates the contrary, the word "corporation" includes the bodies politic and natural persons, enumerated in the following section, which possess the power of eminent domain.

§ 1706. By whom right may be exercised.—The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

2. Municipalities operating water systems and sewer systems and all water companies, operating under charter from the state or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.

3. Persons operating or desiring to operate electric light plants, for the purpose of constructing and erecting wires or other necessary things.

4. Public institutions of the state for the purpose of providing water supplies, or for other necessary purposes of such institutions.

5. School committees of public school districts, public school committees of townships, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.

6. North Carolina Fisheries Commission.

7. Any educational, penal, hospital or other institution incorporated or chartered by the state of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the state for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a side-track for railroads, necessary for the proper operations and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter. (Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; 1923, c. 205; 1924, c. 118.)

I. Source of Power.
II. Strict Construction.
III. Nature and Purpose.
IV. Extent of Power.
V. To Whom Granted.
VI. Compensation Essential.

Cross Reference.

As to power of municipal corporations to acquire property by eminent domain, see sections 2791, 2792. As to power of street and interurban railways to condemn land for water power plants, see section 3535. As to powers of electric, telegraph and power companies to acquire property, see the preceding chapter. As to condemning land for water supply, see sections 7119, 7120. As to condemning land for hospitals, see section 7265. As to condemming land for roads, see chapter 70 "Roads and Highways." As to condemning land for a mill where land on one side of a stream is owned, see Article 2 of ch. 52 on Mills. As to condemnation for races, waterways, etc., by owner of a mill or millsite, see Article 3 of ch. 52 on Mills. As to condemning land for drainage ditches, see sections 5260 et seq. As to condemning land for school buildings, see section 5469. As to power of state institutions to condemn land for water supplies etc., see sections 7522, 7523. As to power of railroads to condemn land see section 3444 par. 2. For further material upon the general subject of eminent domain, see 5 Enc. Dig. 130-201 and 14 Enc. Dig. 11-36.

I. SOURCE OF POWER.

Editor's Note.—The phrase "eminent domain" was first used by Hugo Grotius, celebrated writer and publicist, in 1625. Grotius says, "The property of subjects is under the eminent domain of the State, so that the state or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which

even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way." Grotius De Jure Belli et Pacis, Lib., 3, c. 20.

Thus the right to take private property for public use is one of the inherent attributes of every sovereign state. It lies dormant in the state until the right to exercise it is granted by the state to some public or quasi public corporation or until it is exercised by the state itself. Foltz v. St. Louis, etc., R. Co., 60 Fed. 316, 317. See also Adirondack R. Co. v. New York State, 176 U. S. 335, 346, 44 L. Ed. 492.

As adopted in 1919 this section contained but five subsections. Subsection 6 was added by ch. 118 Laws of 1924 and subsection 7 by ch. 205 Laws 1923.

Definitions.—Eminent domain is the power of a government to take private property for public uses upon payment of a just compensation. Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, 583, 49 L. Ed. 312. It has also been defined to be the right of disposing in case of necessity and for the public safety of all of the wealth of the country. See United States v. Jones, 109 U. S. 513, 519, 27 L. Ed. 1015.

Founded on Necessity.—This power, or right of eminent domain is possessed by the government, and may be exercised by the Legislature or under its authority. Unless vested there, it can not be called into action, and without it neither the government nor the state could hold together. It is peculiarly fit to be wielded by the Legislature—it is a power founded on necessity. Raleigh, etc., R. Co. v. Davis, 19 N. C. 451, 458.

It was a right at common law and is not a right in equity or the creature of a statute. And while the time of its exercise may be prescribed by statute, the right itself is superior to any statute. Kohl v. United States, 91 U. S. 367, 377, 23 L. Ed. 449.

All private property is held subject to the necessities of the government, which may take personal or real property whenever its necessities or the exigencies of the occasion demand. United States v. Lynch, 188 U. S. 445, 465, 47 L. Ed. 539.

All property is held by tenure for the state, and all contracts are made subject to the right of eminent domain. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 692, 41 L. Ed. 1165.

Legislature Has Exclusive Control.—The method of taking land for a public use is within the exclusive control of the Legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

A public service corporation has no power to condemn land by reasons of its being a riparian proprietor, but only under authority given by a valid statute to do so. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S E. 99.

II. STRICT CONSTRUCTION.

In General.—In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the Government, is in derogation of the ordinary rights of private ownership and control which the owner usually had of his property. Carolina, etc., R. Co. v. Pennearden Lumber, etc., Co., 132 N. C. 644, 652, 44 S. E. 358; Board v. Forrest, 193 N. C. 519, 137 S. E. 431.

The exercise of the power is in derogation of common right, and all laws conferring such power must be strictly construed. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 25, 10 S. E. 1041. And the right can be exercised only in the mode pointed out in the statute conferring it. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

For example, it has been held that the statutory authority given the county board of education to condemn land for school purposes is in derogation of a common-law right, and its terms will be strictly construed as to the extent or limit of the power given. Board v. Forrest, 193 N. C. 519, 137 S. E. 431.

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of this section, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure. Crisp v. Nanthala Power, etc., Co., 201 N. C. 46, 158 S. E. 845.

Power Not Implied.—The power of eminent domain cannot be implied or inferred from vague or doubtful language, unless the necessity would defeat the grant. Commissioners v. Bonner, 153 N. C. 66, 69, 68 S. E. 970.

If the ligislative act is silent on the subject it is to be presumed that the Legislature intended that the necessary property should be obtained by contract. Commissioners v. v. Bonner, 153 N. C. 66, 69, 68 S. E. 970.

General Act Governs.—The provisions of the general railroad act prevail over provisions in the charter of a railroad company, unless the charter specifically designates and repeals these provisions of the general act. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

III. NATURE AND PURPOSE.

Purpose of Grant.—The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

The right of eminent domain can only be exercised where the property taken is to be used for the benefit of the public, and under no circumstances can it be taken for a private use, as the taking of the property of one man for the benefit of another is not a constitutional exercise of this power. Strickley v. Highland Bay Gold Min. Co., 200 U. S. 527, 530, 50 L. Ed. 581.

The taking of private lands for turnpike or toll-road purposes is for a public use, and may be acquired for such purposes by proper proceedings before the clerk of the court of the appropriate county under the provisions of this section et seq., when the corporation has been organized under the provisions of our general incorporation law, sec. 4113 et seq., and, has express charter powers to do so. Mountain Retreat Ass'n v. Mt. Mitchell Develop. Co., 183 N. C. 43, 110 S. E. 524.

Draining Public Road.—Digging a ditch across private land for the purpose of draining a public road, amounts to a taking of private property for a public use. State v. New, 130 N. C. 731, 41 S. E. 1033.

Remedy for Abuse.—If, after acquiring the land under condemnation for a public use, a company should devote it to private purposes, there is a remedy by quo warranto and otherwise. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 315, 78 S. E. 297.

IV. EXTENT OF POWER.

Discretion of Grantees.—A perusal of this entire chapter will clearly disclose that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 274, 76 S. E. 267.

A railroad company may use and occupy a right of way acquired by it under condemnation proceedings when, in its own judgment, the proper management and business necessities of the road may require it Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

In Selma v. Nobles, 183 N. C. 322, 325, 111 S. E. 543, the court said:—"In construing this legislation, the court has held that where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law.

A Continuing Power.—The power of eminent domain conferred on electric public service corporations by this section is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Rights Acquired.—Only an easement in lands passes from the owner to a railroad company under condemnation proceedings, divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company, but allowing them to use and occupy the right of way in any manner not inconsistent with the easement acquired. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

Same—As to Part Not Needed.—To the extent that the right of way is not presently required for the purpose of the road it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C.

254, 35 S. E. 458; Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

Unless the land is needed for some such use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. Ward v. Wilmington, etc., R. Co., 113 N. C. 566, 18 S. E. 211, and Ward v. Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926; Blue v. Aberdeen, etc., R. Co., 117 N. C. 644, 649, 23 S. E. 275.

Land acquired by one railroad company under a legislative grant of the right of eminent domain, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina, etc., R. Co., v. Carolina Cent. R. Co., 83 N. C. 489.

V. TO WHOM GRANTED.

Editor's Note.—The cross references above should be referred to for a list of the various corporations to which the right of eminent domain is especially granted by statute.

Public Service Corporations.—Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights of way and lands for its dams and the ponding of water, such corporation is a public-service corporation and has the power of eminent domain, as provided by this section, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, nor does the fact that such public-service corporation also engages in private enterprises not connected with its public service alter this result. Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 175 S. E. 698.

Quasi-Public Corporations.—Where a corporation is authorized to conduct the quasi-public business of operating a street railway, it may exercise the right of eminent domain, in respect to this business given to it by its charter and by this section, notwithstanding it is also authorized to conduct business of a private nature. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 78 S. E. 297.

The right of a corporation to condemn lands for a public use, having the statutory powers, is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach. Mountain Retreat Ass'n v. Mt. Mitchell Develop. Co., 183 N. C. 43, 110 S. E. 524.

The use of the word "commercial railway" in a petition does not indicate that the land is to be used for private purposes, for the company engages in commerce when it carries articles of merchandise for the public Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 78 S. E. 297.

Stockholders of Railroad.—The Legislature may by the exercise of the power of eminent domain authorize the consolidation of railroads and, in effect, condemn the shares of dissenting stockholders. Spencer v. Railroad, 137 N. C. 107, 49 S. E. 96.

Overseer of Roads.—Sec. 3669 giving power to overseers of roads to cut poles on adjacent land is an instance of the exercise on the part of the sovereign of the right to take private property for the use of the public, making compensation. Collins v. Creecy, 53 N. C. 333, cited in note in 42 L. R. A., N. S., 1046.

VI. COMPENSATION ESSENTIAL.

As to determining compensation, see note to section 1721.

Definition of Compensation. — The word compensation imports that a wrong or injury has been inflicted, which must be expressed in money. Money must be paid to the extent of the injury, whether more or less than the value of the property. Bauman v. Ross, 167 U. S. 548, 591, 42 L. Ed. 270.

Necessity for Compensation. — By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for the public use. See Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557.

This qualification founded on justice and a due regard for basic property rights is applied in North Carolina. Bennett v. Winston-Salem South-Bound R. Co., 170 N. C. 389, 87 S. E. 133.

In Johnston v. Rankin, 70 N. C. 550, the court said, on page 555: "Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the State, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." See Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 520, 41 S. E. 1022.

A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public. Stamey v. Brunsville, 189 N. C. , 126 S. E. 103, 105.

Unconstitutional Unless Compensation Provided.—A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public or any other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid. Watts v. Lenoir, etc., Turnpike Co., 81 N. C. 129, 130, 106 S. E. 497.

Where a statute makes no provision for compensation, it is to be presumed that the Legislature did not intend that the power of eminent domain should be exercised. Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970.

When Implied.—Whenever the government in the exercise of its governmental rights takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Lloyd v. Venable, 168 N. C. 534, 84 S. E. 855, 857.

§ 1707. Right to enter on and purchase lands.—Such bodies politic, corporation, or persons, may at any time enter upon the lands through which they may desire to conduct the roads or works authorized under the preceding section and lay out the same, and they may also enter upon such contiguous land along the route as may be necessary for depots, warehouses, engine sheds, workshops, water stations, tool-houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land entered on such sum as may be agreed on between them. (Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92; s. 1; 1874-5, c. 83.)

Nature of the Right.—The right of entry granted a railroad company under this section, is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price. State v. Wells, 142 N. C. 590, 55 S. E. And without the consent of the owner the company cannot enter by virtue of this section, for the purpose of building its road. Id.

Company Not a Trespasser.—A railroad company, having the right of eminent domain, entering upon and occupying lands for building its tracks, is not a trespasser. Abernathy v. South., R. Co., 150 N. C. 97, 63 S. E. 180.

§ 1708. Power of railroad companies to condemn land for union depots, double-tracking, etc.—Any railroad company operating a line of railroad in North Carolina whenever it shall find it necessary to occupy any land for the purpose of getting a union depot which has been ordered by the commission, or for the purpose of maintaining, operating, improving, or of straightening its line, or of altering its location, or of constructing double tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, shall have the power to condemn such lands needed for such purpose under the provisions of this chapter. More than two acres may be condemned for yard or terminal facilities required for due operation of the

railroad. No lands in any incorporated towns shall be condemned under this section until approved by the corporation commission, nor shall any yard, garden or dwelling-house be condemned, unless the corporation commission, upon petition filed by the railroad seeking to condemn, shall, after due inquiry, find that the railroad company cannot make the desired improvement without condemning the yard, garden or dwelling-house, except at an excessive cost. The power to condemn land under this section shall be enforceable and matters arising in regard thereto shall be tried only in the courts created by or under the constitution of this state. No rights granted or acquired under the provisions of this section shall in any way destroy or abridge the rights of the state to regulate or control such railroad company or to exclude foreign corporations from doing business in this state. (1907, c. 458, ss. 1, 2, 3.)

As to when corporation commission may order depots, etc., to be built, see section 1040 et seq.

In General.—This section confers on the roads the incidental right to make such changes in their line and route as are necessary to accomplish the purpose designed and to make the depot available and accessible to the traveling public as contemplated by the act. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

And it was intended to apply to all the cities and towns in the State, where, in the legal discretion of the commissioners, the move is practicable. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

Right of Access to Union Depot. — This section confers upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Corporation Commission to be built. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Section 3455 Does Not Apply. — Section 3455, requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the alderman, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission, acting under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

Injunction Will Not Issue.—Where the Corporation Commission, acting under this section, has selected a site after due inquiry, the railroads will not be enjoined, at the instance of citizens and property owners, from erecting the depot, either on the ground that the city is being sidetracked or that their property will be damaged by the proposed change. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

§ 1709. Condemning land for industrial sidings.—Any railroad company doing business in this state, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the corporation commission to construct an industrial siding as provided in chapter 21, section 1044, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right of way as may be necessary to carry out the orders of the corporation commission. Whenever it is necessary for any railroad company doing business in this state to cross the street or streets in a town or city in order to carry out the orders of the corporation commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the state: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 203.)

Cited in State v. Allen, 197 N. C. 684, 150 S. E. 337.

§ 1710. Condemnation by schools for water supply.—If the school authorities mentioned in subsection 5 of section 1706 shall be unable to agree with the owners of any lands which, or the use of which, it is necessary to appropriate in obtaining a pure and adequate water supply for the school, they shall file a petition for the condemnation of such lands in conformity with the provisions of this chapter. In addition to the particulars required to be set out in section 1716, the petition shall state whether the water supply is desired to be obtained from a spring, from a stream, or by digging artesian wells. The proceedings for such condemnation shall conform to the requirements of this chapter. No greater amount of land in area or width shall be condemned under this section than is necessary to obtain a pure and adequate water supply.

Any person holding title to land upon which any school, public or private, is located is empowered to obtain water supplies from the springs, streams or artesian wells the use of which is acquired under this section by building intakes, reservoirs, digging ditches, laying pipes or doing such other things as may be needful to obtain the water supply. (1907, c. 671.)

As to condemning land for school buildings, see section 5469.

§ 1711. Condemnation for steamboat wharves and warehouses.—Upon the order of the corporation commission that any steamboat company provide wharf and warehouse facilities as may be deemed reasonable and just, at any particular point, such company shall have power to condemn land for such purpose in accordance with the provisions of this chapter. (Ex. Sess. 1913, c. 52.)

§ 1712. May take material from adjacent lands.—For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, water or earth, which may be deemed necessary: Provided, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees. (Rev., s. 2576; Code, s. 1702; R. C., c. 61, s. 22; 1874-5, c. 83; 1907, c. 39, s. 2.)

In General.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 275, 76 S. E. 267.

Liability to Adjacent Owners.—A corporation damaging adjacent property while constructing a railroad is liable in damages just as a private individual would be. Staton v. Norfolk, etc., Railroad, 111 N. C. 278, 16 S. E. 181.

Compensation Granted.—The owner of the land is entitled to compensatory damages for the cutting of cross-ties on land not included in the right-of-way, and the negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

§ 1713. How material paid for.—If for the value of the damages done to the owner by reason of the acts in the preceding section mentioned the parties may be unable to agree, the same shall be valued in the manner hereinafter provided. (Rev., s. 2577; Code, s. 1703; R. C., c. 61, s. 23; 1874-5, 83.)

§ 1714. Dwelling-houses and burial grounds cannot be condemned.—No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of the Consolidated Statutes. (Rev., s. 2578.)

As to power of electric and telegraph companies to take residences, see section 1699.

Exercise of Discretion Not Permitted.—The principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. Selma v. Nobles, 183 N. C. 822, 111 S. E. 543.

No Application to Tenant Houses.—This section does not apply to tenant houses, but only to the dwellings of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwellings to its tenants. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 169, 82 S. E. 5.

Subsequent Use by Owner Not Protected.—When a provision in a charter of a railroad company or a deed granting it a right of way prohibited it from entering upon the yard, garden, burial ground, etc., of the defendants, but no portion of the right of way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact that it has since been appropriated to such use. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263; Dargan v. Carolina Cent. R. Co., 131 N. C. 623, 625, 42 S. E. 979.

Nuisance a Taking under Section. — The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in this section, withdrawing dwellings from the effect of the statute. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Municipal Corporations.—Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by this section. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

House Not Property of Railroad. — A house standing on the right of way does not become the property of the company. Shields v. Norfolk, etc., R. Co., 129 N. C. 1, 6, 39 S. E. 582; Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168, 82 S. E. 5.

The North Carolina National Park Commission created by Public Acts 1927, c. 48, is an agency of the State created by statute, vested with the power of eminent domain, and is not subject to the limitations provided in this section and § 1715. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Art. 2. Condemnation Proceedings

§ 1715. Proceedings when parties cannot agree.—If any corporation, enumerated in section 1706 of this chapter, possessing by law the right of eminent domain in this state, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire title to the same in the manner and by the special proceedings herein prescribed. (Rev., s. 2579; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1901, cc. 6, 41, s. 2; 1899, c. 64; 1903, cc. 562, 159, s. 16; 1871-2, c. 138, s. 13.)

As to proceedings when land is condemned for a road, see section 3667. See also note under § 1714.

Not Exclusive Remedy.—It has been held formerly that this statutory remedy, modifying the charters of the railroad companies, is the only one open to one whose land is appropriated as a right of way. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4; McIntire v. Western, etc., Co., 67 N. C. 278.

This doctrine has been limited however as only applying to the preliminary entry upon land and the acquisition of the same for such purposes. And where a railroad or other public service corporation has made the entry, appropriated the right of way, constructed its road and is operating the same, and neither party has seen fit to resort to the statutory method, the owner of the land has the right at his election to sue for permanent damages and on payment of the same the easement will pass to the defendant. Mason v. Durham County, 175 N. C. 638, 641, 96 S. E. 110, citing numerous cases.

Applies to all Railroads.—The method of proceeding, for the condemnation of land by railroad corporations, prescribed by this section, is applicable to all railroads, whether formed under the general law or special act of incorporation. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Prior Attempt to Agree Mandatory. — The statutory method of condemning a right of way can be exercised only when the parties are unable to agree upon the terms of acquirement. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Attempt to Acquire Title. — The clause, "the corporation had not been able to acquire title thereto" has no reference to the pecuniary resources of the corporation; it may apply to the owner's refusal to sell except at a price which in the judgment of the corporation is excessive, to cases in which the owner by reason of some disability cannot convey his title, and likewise in other instances. Western Power Co. v. Moses, 191 N. C. 744, 746, 133 S. E. 5.

Thus it is not required of a quasi public-service corporation authorized to condemn land under the provisions of section 1706, that its first endeavor to agree with the owners, when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in this way. Western Power Co. v. Moses, 191 N. C. 744, 133 S. E. 5.

No Right of Entry Until Payment.—In case the parties cannot agree, then the company may proceed to condemn the land, and the company does not acquire the right to enter for the purpose of constructing the road until the amount of the appraisement has been paid into court. State v. Wells, 142 N. C. 590, 55 S. E. 210.

No Application to Trespasser.—The provisions of this section only apply to the mode of acquiring title to real estate and getting a right of way, but it has no application to trespasses committed outside of the right of way in building the road, and for such trespasses the corporations are liable in a civil action. Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767.

Condemnation by Board of Education.—Sections 1715-1723 apply only to those corporations enumerated in section 1706, and have no application to a county board of education condemning land for school buildings, such proceedings are controlled by section 5469. Board v. Forrest, 193 N. C. 519, 520, 137 S. E. 431.

Cited in Winston-Salem v. Ashby, 194 N. C. 388, 139 S. E. 764.

§ 1716. Petition filed; contains what; copy served.—For the purpose of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of

the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court. (Rev., s. 2580; Code, s. 1944; 1893, c. 396; 1871-2, c. 138, s. 14; 1907, c. 783, s. 3.)

Editor's Note.—In Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 23, 10 S. E. 1041 the court states that the reasons for the requirements which are found in this section are based upon past experience. Before this section was passed the roads could locate their route according to their discretion, and they could not be controlled by the courts unless they abused their discretion. The remedy was usually by injunction which caused a great deal of litigation and delay both to the road and to the landowner. It was therefore deemed necessary, so that the landowner might know what land was intended to be appropriated and could have his grievances adjusted, to require the filing of maps, profiles, etc.

Strict Compliance.—This section stating the requisites of a petition in condemnation proceedings, must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683. See also, Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041.

Summons Should Issue. — The proceeding authorized by this section is a special proceeding and a summons should issue as in all other cases. R. R. v. Lumber Co., 132 N. C. 644, 653, 44 S. E. 358.

General Language Permitted.—It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

What Petition Must Allege.—It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and the reason of the failure to do so. In the absence of proof thereof the petition should be dismissed. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683; Power Co. v. Moses, 191 N. C. 744, 746, 133 S. E. 5.

And the petition, whether filed by an answer or by the company, should state the names of all persons interested, and all of them should be in court before the Commissioners are appointed. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171.

Same—Where Landowner Files.—It is not necessary that the petition filed by a landowner in proceedings for the assessment of damages for land taken by a railroad company for a right of way, shall state that the petitioners and the company have failed to come to an agreement as to the sum to be paid, such averment being necessary only when the railroad company is the actor in such proceedings. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171; Durham v. Rigsbee, 141 N. C. 128, 130, 53 S. E. 531.

Map and Profile.—The filing of a proper profile is a condition precedent before an order of condemnation shall be granted. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 414, 43 S. E. 913; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549. But the failure to so file the map and profile may be cured by amendment. R. R. v. Newton, supra; State v. Wells, 142 N. C. 590, 55 S. E. 210. As to map and profile, see section 3471.

Fraudulent Deed May Be Set Aside.—Where a deed for a right of way was obtained from a landowner by fraud on the part of a railroad company, the superior court has jurisdiction to set aside the conveyance, but cannot go further in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Co-tenant Can File Petition.—The fact that a co-tenant of land has granted a right of way to a railroad company will not prevent another owner from instituting proceedings for the assessment of damages sustained by him, nor will such facts prevent the co-tenant, who has made such grant, from becoming a party to the proceedings and having his rights adjusted thereunder, upon a claim that the company had forfeited its right under the grant by failure to comply with the conditions thereof, and this, although such forfeiture did not occur until after the petition was first filed by his co-tenant. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171.

Clerk Has Jurisdiction.—The charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common law jurisdiction; it was held, that the clerk of a superior court has jurisdiction of such proceeding. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041.

In condemnation proceedings, the statement required by this section, that the plaintiff has not been able to acquire title to the land, and the reason of such inability, is the allegation of a preliminary jurisdictional fact, not triable by the jury and a question of fact for the decision of the clerk in the first instance, and perhaps subject to review by the judge on appeal. Durham v. Rigsbee, 141 N. C. 728, 53 S. E. 531.

Clerk's Finding of Facts Not Final.—The finding of the fact of the clerk upon preliminary allegations, under this section, in condemnation proceedings are not final and may be appealed from. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Section Does Not Apply to Telegraph Companies.—Inasmuch as section 1700 sets forth all the necessary statements for the petition of the telegraph company, and section 1701 provides for its service, only so much of the railroad law as directs proceedings after the petition is before the court is made applicable to telegraph companies, and section 1716 cannot be made to apply to telegraph companies. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 525, 41 S. E. 1022.

Waiver of Preliminary Hearing.—Where it is stipulated by the parties in condemnation proceedings that a hearing before commissioners apppointed by the clerk under the provisions of this section, should be waived, and judgment is rendered determining the amount of damages, and on appeal the Supreme Court affirms the judgment as to the compensation allowed and remands the cause for error in the exclusion of another element of compensation to which defendants are entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing will not be sustained. State v. Wilmington-Wrightsville Beach Causeway Co., 205 N. C. 508, 171 S. E. 859.

What Constitutes Waiver.—Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipe land is upon the state's highway over the plaintiff's land, the plaintiff, s the dominant owner, may maintain his action, and the denial of this title or right by the defendant is a waiver of its right that the plaintiff should have proceeded before the clerk under this section; and the plaintiff may maintain his action of trespass in the superior court. Rouse v. Kinston, 188 N. C. 1, 123 S. E. 482.

Cited in State v. Suncrest Lumber Co., 199 N. C. 199, 201, 154 S. E. 72.

§ 1717. How process served.—The summons and a copy of the petition shall be served in the same manner as in special proceedings. (Rev., s. 2581; Code, s. 1944; 1871-2, c. 138, s. 14.)

Editor's Note.—In the case of Click v. Western, etc. R. Co., 98 N. C. 390, 4 S. E. 183, referring to a proceeding instituted against a railroad company by the owner of land the court said "This is neither a special proceeding nor a civil action as defined by the code. It is a summary proceeding."

This construction is overruled in Carolina, etc., R. Co. v. Permearden Lumber, etc., Co., 132 N. C. 644, 653, 44 S. E. 358, where the court decides, that the Legislature has correctly called this a special proceeding and therefore a summons should issue as in all other cases.

§ 1718. Service where parties unknown.—If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situated, once in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in such county, then in a newspaper printed in the city of Raleigh. (Rev., s. 2582; Code, s. 1944, subsec. 5.)

As to appointment of attorney to represent unknown parties, see section 1728.

§ 1719. When court may direct how papers to be served.—In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings. (Rev., s. 2583; Code, s. 1944, subsec. 7.)

§ 1720. Answer to petition; hearing; commissioners appointed.—On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estate or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners. (Rev., s. 2584; Code, s. 1945; 1871-2, c. 138, s. 15.)

Finding of Facts Conclusive. — In condemnation proceedings, when it is proper for the lower court to find the facts, his findings upon competent supporting evidence are conclusive. Johnson City, etc. R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Collateral Attack by Landowner.—The court will not sustain a collateral attack, and deny the right of condemnation, upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 317, 78 S. E. 297.

Same—Charter Cannot Be Attacked. — The charter of a corporation cannot be collaterally attacked, and a direct proceeding must be brought to annul it. But if the charter were on its face inoperative and void, a court would so declare it in any proceedings to condemn lands by virtue of the right of eminent domain claimed thereunder. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 414, 43 S. E. 913; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Same—Advisability of Project.—The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither the defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

Same—Denial That Land Necessary.—A railroad company is entitled to so much of the right of way as may be necessary for the purpose of the company, and the denial by a person in the possession of a portion of the right of way that the portion in controversy is necessary for the purposes of the company does not raise an issue of fact to be determined by a jury, as the company is the judge of the necessity and extent of such use. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263.

What Matters Issuable.—A perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. Carolina Cent R. Co. v. Love, 81 N. C. 434, cited and distinguished. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Where issuable matters are raised before the clerk under this section he should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions to raise any question of law or fact issuable or otherwise to be considered on appeal to the superior court from his award of damages, as provided by law. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Rights Protected by Injunction. — And the rights of the parties may be protected in the meantime from interference by an injunction issued by the judge on application made in the cause, and in instances properly calling for such course. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Appointment of Appraisers.—The judge of the court may appoint the appraisers either in term or vacation, while the clerk can do so only in vacation, and then only as representing the court. Click v. Western, etc., R. Co., 98 N. C. 390, 4 S. E. 183.

No Appeal from Order Appointing Commissioners. — An order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners. Telegraph Co. v. R. R., 83 N. C. 420; Commissioners v. Cook, 86 N. C. 18; Norfolk, etc., R. Co. v. Warren, 92 N. C. 620; Hendrick v. Carolina Cent. R. Co., 98 N. C. 431, 4 S. E. 184, and cases cited.

§ 1721. Powers and duties of commissioners.—The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpœnas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceedings to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days. (Rev., s. 2585; Code, s. 1946; 1871-2, c. 138, ss. 16-18; 1891, c. 160.)

As to compensation, see further 5 Enc. Dig. 147 et seq. 14 Enc. Dig. 18 et seq.

Editor's Note.—In the published Acts of 1871-72, ch. 138 a large part of section 18 was erroneously printed under section 16. This error was repeated in the Revisal, ch. 99. See note to American Union Tel. Co. v. Wilmington, etc., Railroad, 83 N. C. 420, 424. In the Code of 1883 section 1946 included sections 16-18 of ch. 138 supra. In the present Code sections 1721 and 1723 both contain a part of section 1946 of the Code of 1883.

Just Compensation.—It seems to be the general rule in this jurisdiction that the compensation which ought justly to be made "just compensation," under our general statute, is such compensation after special benefits peculiar to the land are set off against damages. "The value of the land subject to such special benefits as may accrue to the re-

mainder of the tract." Stamey v. Burnsville, 189 N. C. 39, 126 S. E. 103, 104.

Not an Interference with Right to Jury Trial.—It seems to have been settled in the case of Raleigh, etc., R. Co. v. Davis, 19 N. C. 451, that the Constitution (Art. 1, Sec. 19), guarantees the right to trial by jury in controversies respecting property, only in cases where, under the common law, the demand that the facts should be so found could not have been refused, and that in fixing the quantum of compensation to the landowner for the right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged peculiarly and exclusively to the jury. The Chowan, etc., R. Co. v. Parker, 105 N. C. 246, 248, 11 S. E. 328.

Basis of Award.—The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. Blue v. Aberdeen, etc., R. Co., 117 N. C. 644, 649, 23 S. E. 275.

Measure of Damages.—In condemnation proceedings the measure of damages is not the difference between the value of the owner's property before and after the taking, but the fair value of the land taken reduced by any special benefits received. Stamey v. Burnsville, 189 N. C. 39, 126 S. E. 103.

The owner of lands, through which a railroad has acquired a right of way by condemnation, is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits of advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

Same—Market Value. — In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right of way, subject to modification under special circumstances, as where there is a mineral deposit of the use of which the easement does not interfere. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

Same—General Benefits. — Prior to 1872 in estimating damages the jury were not allowed to deduct any benefits, arising from the railroad under construction, which were common to the owner and all other persons in the vicinity but could set off any benefits peculiar to the particular tract involved. Freedle v. North Carolina R. Co., 49 N. C. 89. At the session of 1871-2 the Legislature changed this rule so that no benefits whatever could be deducted. Code section 1946. This latter provision was repealed in 1891, Laws 1891, ch. 160. The courts have subsequently construed this repeal to mean a restoration of the old rule as stated in Freedle's Case, supra. Southpart, etc., R. Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589.

The Legislature has the power to allow municipal corporations to have the general benefits assessed as offsets against damages in an action to acquire land for a public purpose. But the power or authority must be given either by special charter or general state act. Stamey v. Brunsville, 189 N. C. 39, 126 S. E. 103, 104.

Date When Taken Governs.—For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and the land is taken within the meaning of this principle when the proceeding is begun. Western Carolina Power Co. v. Hayes, 193 N. C. 104, 107, 136 S. E. 353.

Only Actual and Direct Damage Considered. — In estimating damages of any kind to lands taken by a railroad company it is only proper to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property. Madison County R. Co. v. Galligan, 161 N. C. 190, 194, 76 S. E. 696.

The owner is entitled to compensation for the actual and direct damages which he may sustain by being deprived of his property. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

Evidence Admissible.—In a proceeding to condemn land for a right of way, evidence to show the value of the land by its location and surroundings is admissible. Railroad v. Land Co., 137 N. C. 330, 49 S. E. 350. But a tax list is not admissible for that purpose. Id.

Damage to Adjoining Land.—The landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which the railroad is constructed. Hendrick v. Carolina Cent. R. Co., 101 N. C. 617, 8 S. E. 236.

The owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. Western Carolina Power Co. v. Hayes, 193 N. C. 104, 107, 136 S. E. 353.

These damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

Additional Burden.—When a railroad company puts additional burdens upon a right of way which it has acquired by condemnation not properly embraced in the general purpose for which it was obtained, the owner is entitled, to compensation for them. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

See further on this subject notes to section 1695.

If plaintiff does not own the land upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. Abernathy v. South, etc., R. Co., 150 N. C. 97, 104, 63 S. E. 180.

Diversion of Water.—Damages caused by diversion of water are not covered by the statute, providing for the equipment of a right of way by railroad companies. Ward v. Albermarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921.

Finding of Commissioners Conclusive.—The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. Southport, etc., Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589.

Cited in Ayden v. Lancaster, 197 N. C. 556, 560, 150 S. E. 40.

§ 1722. Form of commissioners' report.—When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of ..... County:

We, ..., commissioners appointed by the court to assess the damages that have been and will be sustained by ....., the owner of certain land lying in the county of ....., which the ..... corporation proposes to condemn for its use, do hereby certify that we met on ..... (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the work of the corporation, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of $.....

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of $.....

Given under our hands, the ..... day of ....., A. D. 19..... (Rev., s. 2586; Code, s. 1700; R. C., c. 61, s. 17; 1874-5, c. 83.)

Editor's Note.—It was formerly provided that the report of the commissioners should be under seal. In Hanes v. North Carolina R. Co., 109 N. C. 490, 13 S. E. 896 the court held that this provision was not mandatory but directory only and the omission of the seal was not a fatal defect.

Report Need Not State Particulars.—The report of the commissioners will not be set aside because it fails to show in what the benefits assessed consist, where no objection was made when the report was submitted. Wilmington, etc., R. Co. v. Smith, 99 N. C. 131, 5 S. E. 237.

Description of Land Not Essential.—A report of the commissioners is not invalid because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right of way. Hanes v. North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

But as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, it seems that the said easement should be described therein as fully and

correctly as it would be in a grant. Railroad v. Land Co., 137 N. C. 330, 336, 49 S. E. 350.

Cited in Ayden v. Lancaster, 197 N. C. 556, 560, 150 S. E. 40.

§ 1723. Exceptions to report; hearing; appeal; when title vests; restitution.—Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid. A certified copy of such judgment under the seal of the court shall be registered in the county where the land is situated, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Rev., s. 2587; Code, s. 1946; 1893, c. 148; 1915, c. 207.)

Exceptions May Be General.—Upon proper denial of the matters alleged in the petition, exceptions to the clerk's order appointing commissioners in condemnation proceedings may be of a general character, and, upon appeal, will present any question appearing upon the record. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Upon Exception Clerk May Fix Compensation. — When the parties except to the report and the clerk sets aside the award he may fix the amount of compensation. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

No Appeal to Judge at Chambers.—No appeal lies to the judge at chambers under this section. R. R. v. Stewart, 132 N. C. 248, 43 S. E. 638.

Effect of Appeal.—The appeal, provided by this section, from a judgment by the clerk of the superior court in condemnation proceedings, under sec. 1716, takes the entire record up for review upon questions of fact to be tried by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Same—By Both Parties.—On appeal by both parties in proceedings to condemn land to the superior court in term, the trial is de novo; and where the defendant has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. Durham v. Davis, 171 N. C. 305, 88 S. E. 433.

Power of Judge.—The judge has authority unquestionably to set aside the report, and to direct a new appraisement by the same commissioners or others appointed in their stead, on the ground that the damage assessed was excessive, but he can no more modify the findings of the commissioners in that respect by substituting a smaller sum, than he could make the same change in the verdict of the jury. Hance v. North Carolina R. Co., 109 N. C. 490, 492, 13 S. E. 896.

Same—No Appeal from Remanding Order.—An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom. Cape Fear, etc., R. Co. v. King, 125 N. C. 454, 34 S. E. 541. This is true though a plea in bar was filed by the defendant. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Payment before Entry.—Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right of way, nor was the compensation required to be paid before entry. This section changed this as to railroads by requiring the company to pay into court the sum assessed before entry. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 134, 45 S. E. 549; State v. Jones, 139 N. C. 613, 620, 52 S. E. 240.

But Injunction Will Not Issue.—Where a railroad company, seeking to condemn land for its right of way, has given ample bond to cover any damages resulting from its wrongful entry upon the land, an injunction will not issue to restrain such company from entering upon the land before the appraisal of damages and the payment thereof into court. Wellington, etc., R. Co. v. Cashie, etc., R. Co., 116 N. C. 924, 20 S. E. 964; Hally Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Charter May Grant Power to Enter before Condemnation.—The Legislature may by charter empower a railroad company to enter land and construct their road before instituting condemnation proceedings. State v. Jones, 170 N. C. 753, 87 S. E. 235; Watauga, etc., R. Co. v. Ferguson, 169 N. C. 70, 85 S. E. 156; State v. Lyle, 100 N. C. 497, 5 S. E. 379. Compensation must be provided to warrant the taking, but it need not precede the taking and the owner is confined to the special remedy given him by the statute under which his property is seized. R. R. v. Ferguson, supra; State v. Lyle, supra.

Same—Power Must Be Express.—When the Legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms in the charters. State v. Jones, 139 N. C. 613, 631, 52 S. E. 240.

When Counsel Fees Allowed.—The counsel fees authorized to be taxed in proceedings to condemn lands for railway uses under this section, can only be allowed and taxed in those cases where the court, under section 1728, is directed to appoint an attorney to represent a party in interest who is unknown or whose residence is unknown. North Carolina R. Co. v. Goodwin, 110 N. C. 175, 14 S. E. 687; Durham v. Davis, 171 N. C. 305, 88 S. E. 433.

Judgment Should Fix Boundaries.—In an action for damages for the location of a railroad the judgment should definitely fix the land over which the road is located and the width of the right of way. Beal v. Railroad Co., 136 N. C. 298, 48 S. E. 674.

Section 2309 Applies.—Damages given in proceedings under

this section fall directly under section 2309 and the law gives interest only from the rendition of the judgment. Hence a judgment allowing interest from the date of condemnation would be erroneous. Durham v. Davis, 171 N. C. 305, 308, 88 S. E. 433.

Effect of Judgment.—A railroad company by condemnation proceedings acquires an easement upon the land condemned with the right to actual possession of so much only thereof as is necessary for the operation of its road and to protect it against contingent damages. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 524, 41 S. E. 1022. And hence a house situated on the right of way at the time of the condemnation proceedings does not become the absolute property of the company. Shields v. Norfolk, etc., R. Co., 129 N. C. 1, 39 S. E. 582 and cases cited.

No Nonsuit after Order of Ejectment.—In proceedings by one railroad company to condemn a right of way upon which another has lawfully constructed its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after having obtained an order, in the progress of the case, giving it exclusive possession and ejecting the defendant from the locus in quo. Johnson City, etc., Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 408, 151 S. E. 871.

§ 1724. Provision for jury trial on exceptions to report.—In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded. (Rev., s. 2588; 1893, c. 148.)

Editor's Note.—Previous to 1893 if the parties did not demand trial by jury before the appointment of the commissioners they were deemed to have waived it and it would not be thereafter granted. This section however specifically grants the right of trial by jury upon an appeal from the report of the commissioners. Chowan, etc., R. Co. v. Parker, 105 N. C. 246, 11 S. E. 328; Durham v. Rigsbee, 141 N. C. 128, 133, 53 S. E. 531; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 134, 45 S. E. 549.

Limits Right to Jury Trial.—This section is a limitation upon the right to demand trial by jury and clearly excludes the idea that any such right is given in respect to the questions of the fact to be decided preliminary to the question of damages. Madison County R. Co. v. Gahagan, 161 N. C. 190, 193, 76 S. E. 696.

Thus a landowner is not entitled at the hearing before the clerk to have issues tried by a jury. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Municipal Corporations.—Where the charter of a city or town provides for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without specific provision for appeal in conformity with the constitutional due-process clause, under the general statute (this section), applying to municipal corporations, this right of appeal is preserved, and the charter provisions of the city or town will not be declared for that reason unconstitutional by the courts. Long v. Rockingham, 187 N. C. 199, 121 S. E. 461.

In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by jury in the Superior Court to determine his damages when he has duly preserved it by his exceptions and proper proceduce, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. Ayden v. Lancaster, 195 N. C. 297, 142 S. E. 18.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 405, 151 S. E. 871.

§ 1725. When benefits exceed damage, corporation pays costs.—In any case where the benefits to the land caused by the erection of the railroad, street, railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant or other structure, are ascertained to exceed the damages to the land, then the corporation acquiring the same by right of eminent domain shall pay the costs of the proceeding except as provided by law, and shall not have a judgment for the excess of benefits over the damage. (Rev., s. 2589; 1891, c. 160.)

As to costs in condemnation proceedings, see section 1245.

Costs upon Appeal.—When it is decided by the superior court that the defendant's benefit equals the damages, the plaintiff corporation pays the costs, but if the defendant appeals and the decision of the lower court is affirmed then the cost of the appeal falls upon the defendant. Madison County R. Co. v. Gahagan, 161 N. C. 190, 76 S. E. 696.

§ 1726. Title of infants, persons non compos, and trustees without power of sale, acquired.—In case any title or interest in real estate required by any corporation for its purposes shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot, or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such corporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same. (Rev., s. 2590; Code, s. 1956; 1871-2, c. 138, s. 28.)

As to special proceedings to sell ward's estate, see sections 2180, 2182. As to proceedings to sell lands of joint tenants and tenants in common, see section 3238.

§ 1727. Rights of claimants of fund determined.—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (Rev., s. 2591; Code, s. 1947; 1871-2, c. 138, s. 19.)

Editor's Note.—The purpose of this section is to prevent a corporation, having the right of eminent domain, from being indefinitely postponed in acquiring title and going on with its work or from being subjected to a succession of suits for compensation. Under the provisions of the section the company acquires the right of way and the court distributes the compensation. See Abernathy v. South, etc., R. Co., 150 N. C. 97, 104, 63 S. E. 180.

Rights to Fund Not Raised in Action for Land.—Where

such proceedings are infra vires the condemnation and appropriation to the public use must stand, the question as to who is entitled to the damages awarded cannot be raised in an action for the land itself. Harkins v. Ashville, 123 N. C. 636, 31 S. E. 853.

§ 1728. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.—The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (Rev., s. 5292; Code, s. 1948; 1871-2, c. 138, s. 20.)

Counsel fees for attorneys appointed under this section are provided for in section 1723. See Durham v. Davis, 171 N. C. 305, 88 S. E. 433; North Carolina R. Co. v. Goodwin, 110 N. C. 175, 14 S. E. 687.

§ 1729. Court may make rules of procedure in.—In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts. (Rev., s. 2593; Code, s. 1949; 1871-2, c. 138, s. 21.)

In General.—The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure, and the Legislature, recognizing the difficulty of doing more than outlining the practice so as to safeguard the rights of the parties, has conferred upon the court the power to make rules of procedure when they are not expressly provided by the statute. Abernathy v. South, etc., R. Co., 150 N. C. 97, 103, 63 S. E. 180.

§ 1730. Change of ownership pending proceeding.—When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject-matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (Rev., s. 2594; Code, s. 1950; 1871-2, c. 138, s. 22.)

Subsequent Purchaser May Recover.—An owner of land who acquires title subsequent to the location by a railroad company is not barred of his remedy for compensation where the road was not finished more than two years before he begins his action. Hendrick v. Carolina Cent. R. Co., 101 N. C. 617, 8 S. E. 236; Beattie v. Carolina Cent. R. Co., 108 N. C. 425, 429, 12 S. E. 913.

The purchaser of land subsequent to the location thereon of a railroad may recover permanent damages for the easement taken. Beal v. Railroad Co., 136 N. C. 298, 48 S. E. 674; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

Until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

Action for Unlawful Entry Personal.—The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land and do not pass by his subsequent conveyance of the premises. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

The purchaser at the mortgage sale, while not entitled to the damages incident to the act of entry, might recover compensation for the land appropriated to the use of the company. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

§ 1731. Defective title; how cured.—If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the corporation may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the corporation on account thereof, on such corporation paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same. (Rev., s. 2595; Code, s. 1951; 1871-2, c. 138, s. 23.)

§ 1732. Title to state lands acquired.—The secretary of state shall have power to grant to any railroad company any land belonging to the people of this state which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as if the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon. (Rev., s. 2596; Code, s. 1955; 1871-2, c. 138, s. 27.)

§ 1733. Quantity which may be condemned for certain purposes:

1. Right of way of railroad.—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. Plankroads, etc.—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike; or greater width than sixteen feet for the use of any flume.

3. Depot or station.—No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike, flume, or canal, shall be condemned at one place for a depot or station. (Rev., s. 2597; Code, ss. 1707, 1708,

1709; R. C., c. 61, ss. 27, 28, 29; 1852, c. 92; 1874-5, c. 83; 1907, c. 39.)

As to when more than two acres may be condemned for yard or terminal facilities, see section 1708.

In General.—"It is universally held in this jurisdiction that a railroad corporation acquires by condemnation an easement over that portion of its right of way not actually occupied by its roadbed, tracks, drains and side ditches. Ward v. R. R., 109 N. C. 358; Blue v. R. R., 117 N. C. 644; R. R. v. Sturgeon, 120 N. C. 225; Neal v. R. R., 128 N. C. 143; Shields v. R. R., 129 N. C. 1; McCullock v. R. R., 146 N. C. 316; R. R. v. McLean, 158 N. C. 498; Hendrix v. R. R., 162 N. C. 9; R. R. v. Bunting, 168 N. C. 579; Tighe v. R. R., 176 N. C. 239." Griffith v. Southerland Ry. Co., 191 N. C. 84, 87, 131 S. E. 413.

When Section Applies.—If the charter prescribes no maximum or minimum width of the right of way, then paragraph 1 of this section applies, and the law presumes the width therein specified subject to the right of the owner to recover compensation by compliance with section 440, paragraphs 1 and 2. Griffith v. R. R., 191 N. C. 84, 88, 131 S. E. 413.

Company May Use Entire Right of Way. — A railroad company may occupy its right of way to its full extent whenever the proper management and business necessities of the road, in its own judgment, may require it, though the owner of the land can use and occupy a part of the right of way not used by the railroad in a manner not inconsistent with its full enjoyment of the easement. Atlantic Coast Line R. Co. v. Bunting, 168 N. C. 579, 84 S. E. 1009; Tighe v. Seaboard Air Line R. Co., 176 N. C. 239, 244, 97 S. E. 164.

A right of way of specified width must be located and constructed in order to be exclusive. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458.

Owner's Right to Use.—To the extent that the land covered by the right of way is not presently required for the purposes of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461; Earnhardt v. Southern R. Co., 157 N. C. 358, 72 S. E. 1062; Railroad v. Olive, 142 N. C. 257, 273, 55 S. E. 263; Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458; Railroad Co. v. Sturgeon, 120 N. C. 225, 26 S. E. 779; Coit v. Owenby-Wofford Co., 166 N. C. 136, 138, 81 S. E. 1067.

Same—Permitting Others to Use.—The grant of a right of way of a specified width does not preclude the grantor from such use of his land himself or permitting the same to others, which is not in conflict therewith. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458.

Crop Raised Must Not Endanger Company's Business.—While land included in the right of way of a railroad company, not necessary for the purposes of the company, may be cultivated by the servient owner, the crop must not be of such inflammable or combustible nature when matured or maturing, as to endanger the safety of the company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from the company's engines, for, in such case, the company would have the right to enter and remove such crops. Raleigh, etc., R. Co. v. Sturgeon, 120 N. C. 225, 26 S. E. 779.

Duty of Company to Clear Right of Way. — A railroad company is not negligent in failing to cut down bushes or weeds on the right of way beyond the portion over which it is exercising actual control for corporate purposes; but is required to keep the right of way clear of such growth to the outside of the side ditches on either side of the track. Ward v. Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926.

Same—Negligence. — Where a railroad company permits dry grass or leaves or other combustible rubbish to remain near its track, and the same take fire from ignited sparks emitted from one of its locomotives which had no spark-arrester, and the fire is thereby communicated to the plaintiff's adjoining land, destroying timber, etc.; Held, that the injury resulted from the negligence of the defendant company. Aycock v. Raleigh, etc., Railroad, 89 N. C. 321.

Cited in Dowling v. So. Ry. Co., 194 N. C. 488, 490, 140 S. E. 213.

Art. 3. Public Works Eminent Domain Law.

§ 1733(1). Title of article.—This article may be referred to as the "Public Works Eminent Domain Law." (1935, c. 470, s. 1.)

§ 1733(2). Finding and declaration of necessity. —(a) It is hereby declared that widespread unemployment exists throughout the State, making it impossible for many people in the State to support themselves and their families; that these conditions create a public emergency and constitute a menace to the health, safety, morals and welfare of the people of the State; that it is essential that public works projects, financed in whole or in part by the United States of America or by the State be commenced as soon as possible in order to reduce and relieve this unemployment and prevent irreparable injury to the people of the State; that to this end, it is necessary to provide a method for the expeditious acquisition of any lands necessary for such public works projects; that such public works projects are hereby declared to be in furtherance of the public welfare and to be public uses and purposes for which public money may be spent and private property acquired; and the necessity in the public interest for the provision hereinafter enacted is hereby declared as a matter of legislative determination.

(b) Without limitation upon the generality of the foregoing paragraph hereof, it is hereby declared that unsanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside therein; that these conditions cause an increase in and spread of disease and crime, constitute a menace to the health, safety, morals and welfare of the citizens of the State, impair economic values and are not being, and cannot within a reasonable time be, corrected by the investment of private capital available for profit-making enterprises; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe conditions exist and the provision of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired. (1935, c. 470, s. 2.)

§ 1733(3). Definitions. — The following terms whenever used or referred to in this article shall have the following respective meanings unless a different meaning clearly appears from the context:

(a) "Public works project" shall mean any work or undertaking which is financed in whole or in part by a federal agency, as herein defined, or by a state public body, as herein defined.

(b) "Federal agency" shall mean the United States of America, the federal emergency administration of public works, or any other agency or instrumentality, corporate or otherwise, of the United States of America.

(c) "State public body" shall mean this State or any county, city, town, municipal corporation, authority, or any other subdivision, agency, or instrumentality, corporate or otherwise, thereof.

(d) "Authorized corporation" shall mean any corporation or association engaged or about to engage in any public works project, as herein defined, for a public use: Provided, that the construction of said public works project and its conduct thereafter by the corporation or association shall be subject to regulation or supervision by a federal agency, as heretofore defined, or a state public body, as herein defined, whether by virtue of an agreement, provision of law, or otherwise.

(e) "Real property" or "property" or "land"

shall include all lands, including improvements and fixtures thereon, lands under water, all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and all rights, interests, privileges, easements, encumbrances, and franchises relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.

(f) "Court" shall mean the court in which jurisdiction over proceedings hereunder is vested by the provisions of section 1733(4).

(g) "Petitioner" shall mean the one by whom proceedings for the acquisition of real property, as herein defined, are instituted hereunder pursuant to the provisions of section 1733(4). (1935, c. 470, s. 3.)

§ 1733(4). Filing of petition; jurisdiction of court; entry upon land by petitioner.—Any federal agency, state public body or authorized corporation may institute proceedings hereunder for the acquisition of any real property necessary for any public works project.

Such proceedings may be instituted in the superior court in any county in which any part of the real property or of the proposed public works project is situate. The court, whether during a term or during a vacation, shall cause said proceedings to be heard and determined without delay. All condemnation proceedings shall be preferred cases, and shall be entitled to precedence over all other civil cases.

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which is required by this article: Provided, that such survey and posting of notice shall be done in such manner as will cause the least possible inconvenience to the owners of the real property. (1935, c. 470, s. 4.)

§ 1733(5). Form of petition. — A proceeding may be instituted hereunder by the filing of a petition which shall be sufficient if it sets forth:

(a) The name of the petitioner.

(b) A description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof.

(c) A statement that the acquisition of such property by the petitioner is necessary for a public works project and a brief general description of said public works project.

(d) A statement that the proceedings are being instituted under this article.

(e) A suitable prayer for relief. (1935, c. 470, s. 5.)

§ 1733(6). Inclusion of several parcels. — Any number of parcels of land, whether owned by the same or different persons and whether contiguous or not, may be included and condemned in one proceeding: Provided, such parcels are to be used for a single public works project. (1935, c. 470, s. 6.)

§ 1733(7). Notice of proceedings. — Notice of such proceedings shall be given by one publication in a newspaper having a general circulation in each county in which any part of the property sought to be condemned is located. Such publication shall be at least twenty days and not more than thirty days prior to the date set for the hearing of the validity of the proceedings. Such notice shall be in substantially the following form (the blanks being appropriately filled):

TO WHOM IT MAY CONCERN:

Notice is hereby given that..... (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for ..... (here give brief general description of the public works project for which the land is sought to be acquired) the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

Notice is further given that on.....(here insert date of hearing, which must be at least twenty days and not more than thirty days after the date of publication) there will be a hearing in this court, at the opening thereof, for (1) determining the validity of said proceedings and the right of the petitioner, if it so elects, to take title to and possession of such property prior to final judgment, as authorized by section sixteen of said Public Works Eminent Domain Law, and any persons having any interest in or lien upon the above described property shall be deemed to have waived their rights thereafter to object to the court's decision with respect to such issues, unless prior to said date they shall have filed in writing with the clerk of said court their objections thereto; (2) the appointment of a special master to determine the compensation to be awarded for such property and the persons entitled thereto; (3) the fixing of the date and place at which said special master shall hear and determine the compensation to be paid for such property and the person entitled thereto.

Notice is further given that all claims or demands for compensation because of the taking and condemnation of such property must be filed with the above court before.....(here insert date fifteen days after the date above specified for the court hearing), or the same shall be deemed waived.

Dated, the.....day of....., A. D., ...

.....
Clerk of said Court.

Notice of such proceedings shall also be given (a) by posting a copy of the above notice in conspicuous places on the real property sought to be condemned, (b) by filing a copy thereof in the office of the clerk of the court in which such proceedings are pending, and (c) by filing a copy thereof in the proper office or offices for the filing of lis pendens in each county in which any part of the real property is situated.

Such publication, posting and filing shall constitute a legal and sufficient notice to all persons having any interest in or lien upon the property described in said notice. The filing of such notice in the aforesaid county office shall also be a constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the petitioner shall take all property condemned under this article free of the claims of any such person. (1935, c. 470, s. 7.)

§ 1733(8). Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.—All persons who have not filed written objections with the court prior to the time of the hearing specified in the notice prescribed by section 1733(7) shall be deemed to have waived the right to file objections as to the sufficiency and validity of the petition, the proceedings and the relief sought thereby, and as to the right of the petitioner to take title and possession prior to final judgment, as authorized by section 1733(16).

The court, at the time specified in said notice, after hearing and determining all issues of fact and law raised by the objections which have been filed, if any there be, shall enter a final judgment with respect to such issues, and thereafter there shall remain for determination only the amount of the compensation to be paid and the persons entitled thereto.

If any infant or other person under a legal disability shall not have appeared in the proceedings by his duly authorized legal representative, the court shall appoint a guardian ad litem to represent such person's interest in the proceedings before the special master. (1935, c. 470, s. 8.)

§ 1733(9). Appointment of special master.—The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to any one having an interest in or lien upon the property sought to be condemned. The compensation of said special master shall not exceed fifteen ($15.00) dollars per day plus travel and subsistence expenses. The special master immediately after his appointment shall subscribe to an oath that to the best of his ability he will truly find and return the compensation for the taking and condemnation of the property and the persons entitled thereto. (1935, c. 470, s. 9.)

§ 1733(10). Notice of hearing by special master.—Immediately after his appointment and taking of oath, the special master shall cause notice to be sent by registered mail to all persons who have appeared in the proceedings or to their attorneys of record and to all others having any interest in or lien upon the property sought to be condemned, as shown by the record of the proper county office or offices for the recording of documents pertaining to such real estate, and to all guardians ad litem appointed pursuant to the provisions of section 1733(8), such notice to be addressed to such persons at their respective last known addresses. Such notice shall be substantially in the following form (with the blanks appropriately filled):

IN THE.....COURT OF THE.....
OF.....

TO WHOM IT MAY CONCERN:

Notice is hereby given that..... (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for ..... (here give brief general description of the public works project for which the land is sought to be acquired), the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

All persons having an interest in or lien upon the above described property, for which compensation will be demanded, are hereby notified that all claims or demands for compensation by reason of the taking and condemnation of such property shall be filed in writing with said court before ..... (here insert date at least fifteen days after the date set for the court hearing in the notice specified in section seven hereof), and shall be deemed waived unless so filed, and that on.....a hearing will be held by the special master at..... (insert time and place fixed by the court for such hearing in blanks) with respect to (1) the amount of compensation to be paid for the property sought to be condemned, and (2) the persons entitled to such compensation.

Dated.....day of ....., A. D.,
.....

.....
Special master appointed by said Court.

The special master shall also cause a copy of said notice to be posted in conspicuous places on the property sought to be condemned.

After such notice by mailing and posting, the special master, on the date for hearing specified in the aforesaid notice, shall proceed immediately to hear and determine the question of just compensation for the taking and condemnation of the property and the persons entitled to such compensation. To this end, the special master may issue subpoenas, administer oaths to witnesses, and receive evidence and cause same to be recorded. (1935, c. 470, s. 10.)

§ 1733(11). Evidence admissible; increase in value; improvements.—For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefor, the following evidence (in addition to other evidence which is relevant, material and competent) shall be relevant, material and competent and shall be admitted and considered by the special master:

(a) Evidence that a building or improvement is unsafe or unsanitary or a public nuisance, or is in a state of disrepair, and of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy any such condition.

(b) Evidence that any state public body, charged with the duty of abating or requiring the correction of nuisances or like conditions or demolishing unsafe or unsanitary structures, issued an order directing the abatement or correction of any conditions existing with respect to said building or improvement or the demolition of said building or improvement, and of the cost which compliance with any such order would entail.

(c) Evidence of the last assessed valuation of the property for purposes of taxation and of any affidavits or tax returns made by the owner in connection with such assessment which state the value of such property and of any income tax returns of the owner showing sums deducted on ac-

count of obsolescence or depreciation of such property.

(d) Evidence that such buildings and improvements are being used for illegal purposes or are being so overcrowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefrom are enhanced by reason of such use.

(e) Evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to such property or to any similar property in the vicinity when the sale or leasing occurred or the tenancy existed within a reasonable time of the hearing.

The award of compensation shall not be increased by reason of any increase in the value of the property resulting from the public works project to be placed thereon.

No allowance shall be made for improvements begun on property after the publication of the notice specified in section 1733(7), except upon good cause being shown. (1935, c. 470, s. 11.)

§ 1733(12). Report of special master.—The report of the special master must be filed with the clerk of the court in which said proceeding is pending within thirty days after the date of the taking of the oath, unless further time is granted by the court. The court shall grant additional time for the filing of the report only on a showing that the report cannot, with all due diligence, be prepared within the time fixed. (1935, c. 470, s. 12.)

§ 1733(13). Notice of report.—Upon the filing of such report by the special master, the court, without delay, shall fix a date for the hearing of any objections filed thereto. Notice that said report has been filed, that all objections thereto must be filed with the court within ten days after the date of the mailing of such notice and that the court has fixed a certain date (which shall be stated therein) for the hearing of such objections, shall be given by sending a copy of such notice by registered mail to all persons who have appeared in the proceeding or their attorneys of record at their last known addresses. Upon the expiration of ten days after the mailing of such notice, all objections to the report shall be deemed waived by all persons who have not filed written objections with the court. (1935, c. 470, s. 13.)

§ 1733(14). Hearing of objections by the court.—If no objections are filed to the special master's report, the court (but only on motion of the petitioner unless title to the property has vested in the petitioner) shall enter a final judgment fixing the compensation to be paid for the property and the persons entitled to such compensation. If any objections are filed to the special master's report, the court on the date specified in the aforesaid order shall hear and determine such questions of law and fact as are raised by such exceptions and may approve, disapprove or modify the special master's findings or may reject the special master's report in toto. In the event the special master's report is rejected in toto, the court shall at once appoint another special master in the same manner that the first special master was appointed, and such special master shall have the same powers and duties as the special master first appointed, except that notice of the time for filing claims and of the hearing of the special master may be given by registered mail to all persons who have appeared in the proceedings or their attorneys of record at their last known addresses, and no other notice shall be necessary. If the court shall approve the special master's report, with or without modification, the court (but only on motion of the petitioner unless title to the property has previously vested in the petitioner) shall enter a final judgment, fixing the compensation to be paid for such property and the persons entitled to such compensation.

If title to said property has not previously been vested in the petitioner, the title and right to possession of said property shall vest in the petitioner immediately upon the entry of such final judgment and upon the deposit in court by the petitioner of the amount of the judgment fixed by the court as the compensation for such property. Upon the entry of such judgment and the vesting of title aforesaid, the court shall designate the day (not exceeding thirty days thereafter, except upon good cause shown) on which the parties in possession of said property shall be required to surrender possession to the petitioner. (1935, c. 470, s. 14.)

§ 1733(15). Certified copy of judgment.—Upon the rendition of the final judgment vesting title in the petitioner, the clerk of the court shall make and certify, under the seal of the court, a copy or copies of such judgment, which shall be filed or recorded in the proper county office or offices for the recording of documents pertaining to the real property described therein, and such filing or recording shall constitute notice to all persons of the contents thereof. A copy of the judgment certified by the clerk of the court as aforesaid shall be competent and admissible evidence in any proceedings at law or in equity. (1935, c. 470, s. 15.)

§ 1733(16). Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award.—At any time at or after the filing of the petition referred to in section 1733(5), and before the entry of final judgment, the petitioner may file with the clerk of the court a declaration of taking signed by the duly authorized officer or agent of the petitioner declaring that all or any part of the property described in said petition is to be taken for the use of the petitioner.

Said declaration of taking shall be sufficient if it sets forth: (1) a description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof; (2) a statement of the estate or interest in said property being taken; and (3) a statement of the sum of money estimated by the petitioner to be just compensation for the property taken.

Upon the filing of said declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the property specified in said declaration shall vest in the petitioner and said property shall be deemed to be condemned and taken for the use of the petitioner, and the right to just compensation for the same shall vest in the persons entitled thereto.

Upon the filing of the declaration of taking, the court shall designate a day (not exceeding thirty days after such filing, except upon good cause shown) on which the parties in possession shall be required to surrender possession to the petitioner. In the event that the petitioner is an authorized corporation, the court, prior to directing surrender of possession to the petitioner, shall require such security to be given, in addition to the amount deposited in court, as will reasonably assure the payment of any amount ultimately determined as the compensation to be paid.

The ultimate amount of compensation shall be fixed in the manner heretofore specified. If the amount so fixed shall exceed the amount so deposited in court by the petitioner, the court shall enter judgment against the petitioner in the amount of such deficiency, together with interest at the rate of six per centum per annum on such deficiency from the date of the vesting of title to the date of the entry of the final judgment (subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the petitioner) and the court shall order the petitioner to deposit the amount of such deficiency in court. (1935, c. 470, s. 16.)

§ 1733(17). Right to dismiss petition.—At any time prior to the vesting of title to the property in the petitioner, the petitioner may withdraw or dismiss its petition with respect to any or all of the property therein described. (1935, c. 470, s. 17.)

§ 1733(18). Divesting title of owner. — Upon vesting of title to any property in the petitioner, all the right, title and interest of all persons having any interest therein or lien thereupon shall be divested immediately, and such persons thereafter shall be entitled only to receive compensations for such property. (1935, c. 470, s. 18.)

§ 1733(19). Payment of award into court and disbursement thereof.—The payment into court by the petitioner of the amount of any award or the deposit into court by the petitioner of the amount of any award or the deposit in court of the amount estimated by the petitioner to be the just compensation for the property taken or condemned shall be deemed to be a payment or deposit of money for the use of the persons entitled thereto. Such payment or deposit shall constitute a payment to the persons entitled thereto to the extent of the moneys so paid or deposited into court.

Any such payment shall be as valid and effectual in all respects as if it were made by the petitioner directly to the person entitled thereto or, in the case of a person under legal disability, to his guardian, whether or not (a) such person or his whereabouts is known or unknown, (b) such person is under a legal disability, or (c) there are adverse or conflicting claims to such awards.

The money paid into court shall be secured in such manner as may be directed by the court and shall be paid out by the special master to the persons found to be entitled thereto by the final judgment of the court. (1935, c. 470, s. 19.)

§ 1733(20). Recovery of award. — If an award shall be paid to a person not entitled thereto, the sole recourse of the person to whom it should have been paid shall be against the person to whom it shall have been paid. In such event the person entitled to the award may sue for and recover the same, with lawful interest and costs of suit, as such money had and received to his use by the person to whom the same shall have been paid. (1935, c. 470, s. 20.)

§ 1733(21). Appeal. — Any time within thirty days from the filing of any interlocutory or final order or judgment by the court, any person or persons of record in the proceedings, who shall have filed exceptions at any stage of the proceedings within the time and in the manner specified, may appeal therefrom, but only with respect to those questions or issues which were raised by such exceptions.

The taking of an appeal shall not operate to stay the proceedings under this article except when the person or persons appealing shall have obtained a stay of the execution of the judgment or order appealed from, in which event the proceedings shall be stayed only with respect to the person or persons appealing and their respective interests in the proceedings. Upon the taking of an appeal the proceedings shall be deemed severed as to the person or persons appealing and their respective interests in the proceedings.

Any interlocutory or final order or judgment shall be final and conclusive upon all persons affected thereby who have not appealed within the time herein prescribed.

Any petitioner, other than an authorized corporation, may appeal without giving bond; but any other person or persons appealing shall give bond, with good and sufficient surety, to be approved by the court, conditioned to pay all costs taxed against appellant on such appeal. (1935, c. 470, s. 21.)

§ 1733(22). Costs.—If the petitioner, prior to the making of the award, shall have tendered to an interested person for his property or deposited in court for such property an amount which such interested person refused to accept or agree to as just compensation, all costs shall be assessed against such person in the event that the aforesaid amount tendered or deposited is equal to or in excess of the award fixed or confirmed by the court with respect to such parcel. (1935, c. 470, s. 22.)

§ 1733(23). Powers conferred are supplemental.—The powers conferred by this article shall be in addition and supplemental to and not in substitution for the power conferred by any other law. The power of eminent domain may be exercised hereunder, notwithstanding that any other law may provide for the exercise of said power for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law.

Procedure hereunder, which is not prescribed herein, shall be that which is otherwise prescribed by the law of the State. (1935, c. 470, s. 23.)

§ 1733(24). Necessity for certificate of public convenience and necessity from utilities commission.—Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and un-

til a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the utilities commission of North Carolina, the said utilities commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 470, s. 25.)

CHAPTER 34
ESTATES

§ 1734. Fee tail converted into fee simple.—Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple; and all sales and conveyances, made bona fide and for valuable consideration, since the first day of January, one thousand seven hundred and seventy-seven, by any tenant in tail in actual possession of any real estate where such estate has been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder of and from all claim, action, and right of entry whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple. (Rev., s. 1578; Code, s. 1325; R. C., c. 43, s. 1; 1784, c. 204, s. 5.)

I. General Considerations.
II. Rule in Shelley's Case.
III. Application and Illustrative Cases.

Cross References.

For full treatment, see 5 Enc. Dig. 345.

As to fee presumed, though word "heirs" omitted from instrument of conveyance, see sec. 991.

I. GENERAL CONSIDERATIONS.

Editor's Note.—Estates are now held in the British Isles granted by William, the Conqueror (1085), and by Bruce, after the battle of Bannockburn, (1314), estates tail general or special, estates tail male and estates tail female. This system, one of the last relics of the feudal system, is so pregnant with involved technical problems, and so potent with possibilities of fraud, as to have no place in our present economic and social order. The heavy tax brought about by the World War has forced many of the estates to be divided and sold. Thus the land is gradually coming into the possession of the masses.

The system gained a foot-hold in America during Colonial days, but, with the advent of Independence, this hierarchy, under our conception of freedom, could not exist. So it was that primogeniture, which existed under the Mosaic as well as the English Law, never took root in the states of the American Union. Estates tail were soon abolished. Of these estates it is only necessary to say that they existed in this State in Colonial days; that by section 43 of the Constitution of 1776 it was provided that, "The future Legislature of this State shall regulate entails in such a manner as to prevent perpetuities;" that in 1784 the Legislature passed the act by which all estates tail then in existence were converted into fee-simple estates, and it was enacted that all such estates as should be thereafter created should be deemed to be in fee simple. Mordecai's Law Lectures, vol. 1, p. 498. Walter v. Trollinger, 192 N. C. 744, 747, 135 S. E. 871.

Under our form of government the law favors the early vesting of estates to the end that property may be kept in the channels of trade and commerce. This policy of the law is clearly indicated by Article 1. Secs. 30 and 31, of our constitution, which bars hereditary emoluments and perpetuities, and section 4162 of this Code, providing that a devise shall be presumed to be in fee simple.

The word "estate" in its true legal significance embraces an interest in anything that is the subject of property, especially in lands. Preston defines it to be "the interest which any one has in lands or in any other subject of property." 1 Prest. Est., 20; 2 Blk. Com., 10; 2 Crabb Real Prop., p. 2, § 942. To the same effect are Coke and all other English authorities. Coke Litt., 345. In the American courts the word "estate" is a word of the greatest extension and broadest significance. It comprehends every species of property, real and personal. Glascock v. Gray, 148 N. C. 346, 349, 62 S. E. 433.

"'Estate' is derived from status, and in its most general sense means position or standing in respect to the things and concerns of this world. In this sense it includes choses in action. Webb v. Bowler, 50 N. C. 362; Pippin v. Ellison, 34 N. C. 61; Hurdle v. Outlaw, 55 N. C. 75, 76. But it is also used in a much more restricted sense, and is then put in opposition to a chose in action, or mere right, to signify something which one has in possession, or a vested remainder, or reversion without dispute or adverse possession. Thus, we say, the estate is divested and put to a mere right by a disseisin or discontinuance; and so, in equity, where the trust is by agreement of the parties, we say the cestui qui trust has the estate, but where a decree is necessary, in order to convert one into a trustee against his consent, the party has a mere right." Taylor v. Dawson, 56 N. C. 87, 91.

The word "estate" was used in this later sense by the Rev. Stat., ch. 43, § 2, which enacted: "In all estates, real or personal, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors or administrators of the tenant so dying, in the same manner as estates held by tenancy in common," etc. Bond v. Hilton, 51 N. C. 180, 181.

Remainder Dependent upon Estate Tail.—The section will bar a remainder dependant upon an estate tail, in possession of tenant in tail, at the time of passing the section. Lane v. Davis, 2 N. C. 277.

Estates Tail Converted.—The section converted by one stroke of the legislative pen estates tail into fee simple. Hodges v. Lipscomb, 128 N. C. 57, 63, 38 S. E. 281.

"Heirs of their bodies" are equivalent to the words "heirs general." Revis v. Murphy, 172 N. C. 579, 90 S. E. 573; Cohoon v. Upton, 174 N. C. 88, 91, 93 S. E. 446.

Form of Acquisition Not Changed.—The Act of 1784, which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase. Ballard v. Griffin, 4 N. C. 237.

Confirmation of Alienation in Fee.—The section converted no estates tail into estates in fee, but such whereof there was a person "seized and possessed," and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. Wells v. Newbolt, 1 N. C. 537, 538.

II. RULE IN SHELLEY'S CASE.

Editor's Note.—The question has been raised as to the effect of this section upon the application of the Rule in Shelley's Case. It would be well to quote here from the excellent discussion of the subject in 1 N. C. Law Rev., 110, 111. "A disposition of property of frequent occurrence especially in wills, is (a) a life estate to A, who is usually a near relative, say son or daughter of the testator, settler or grantor, followed by (b) an estate tail to the heirs of A's body, with (c) on failure of such heirs of the body or issue or the like, a limitation over in fee simple to the heirs general of A.

"The statute of 1784, C. S. sec. 1734, changed an estate tail to a fee simple in the first taker under the entail. The Rule in Shelley's Case by its very terms unites the life estate, (a) above, with the remainder in tail, (b) above, into a fee tail in the ancestor, which the statute of 1784 thereupon converts to a fee simple. The limitation over, (c) above, can no longer be a remainder after a fee tail, as at common law, upon which the Rule could operate, but becomes instantly a limitation over after a fee simple, that is, an executory limitation, which is not within the operation of the Rule.

"There were two freeholds which the ancestor might take under the limitation within the Rule, an estate for life and an estate tail. But in North Carolina since the statute of 1784, sec. 1734, there is left only a life estate which the ancestor may take under the limitation and which satisfies

the conditions for the Rule. We might with a gain in simplicity and exactness embody this statutory result in our statement of the Rule, so as to make it, if Coke's language is adopted, read: 'When by any gift or conveyance the ancestor takes a life estate,' etc., or if Preston and Kent's statement is preferred, it could read: 'When a person takes a life estate legally or equitably....., etc.' " See the statements of the Rule in the words of Coke and Kent, who follows Preston, in Smith v. Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (n. s.) 172 (1905). See also, Walter v. Trollinger, 192 N. C. 744, 135 S. E. 871.

For further consideration including a resume of the rule, see the Editor's Note to § 1739.

Force of Rule in North Carolina.—The common-law doctrine known as the rule in Shelley's case is in force in this state. Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459. It has never been abolished in North Carolina. Dawson v. Quinnerly, 118 N. C. 188, 24 S. E. 483. And this section does not affect that principle of law. Dawson v. Quinnerly, 118, N. C. 188, 24 S. E. 483.

Statement of Rule.—"A good definition of the rule (in Shelley's case), and the most general, is as follows: 'That when the ancestors by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word "heirs" is a word of limitation of the estate and not a word of purchase.' " Nichols v. Gladden, 117 N. C. 497, 500, 23 S. E. 459.

Nature and Operation of Rule.—The rule in Shelley's case is a rule of law and not of construction, and, no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs or "heirs of his body," and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies and the whole estate vests in the first taker. Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459.

"Heirs" or "Heirs of Body."—In order to an application of the rule in Shelley's case appreciation of the words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument. Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501.

Fee Simple.—A limitation coming within the rule in Shelley's case, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501.

A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in Shelley's case, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee-simple title. Harrington v. Grimes, 163 N. C. 76, 79 S. E. 301, cited and applied. Merchants Nat. Bank v. Dortch, 186 N. C. 510, 120 S. E. 60.

Where a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in Shelley's case, converted into a fee simple absolute by this section. Morehead v. Montague, 200 N. C. 497, 157 S. E. 793.

III. APPLICATION AND ILLUSTRATIVE CASES.

Deed Sufficient Formerly to Convey Fee Tail.—A deed, which was sufficient under the old law to confer a fee tail, is sufficient under this section, where a contrary intent may not be gathered from the instrument construed as a whole to convey an estate in a fee simple, but must be distinguished from cases in which the words "bodily heirs" are used in a conveyance as descriptio personarum, which merely conveys to them an estate in remainder and as purchasers from the grantor. Harrington v. Grimes, 163 N. C. 76, 79 S. E. 301. Decisions in support of this construction of deeds will be found in Perrett v. Bird, 152 N. C. 220, 67 S. E. 507; Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687; Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842; Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904, and many others. The well considered cases of Acker v. Pridgon, 158 N. C. 337, 74 S. E. 335, and Puckett v. Morgan, 158 N. C. 344, 74 S. E. 15, in no way militate against this position.

Same—Life Estate with Limitation over to Bodily Heirs.—A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under this section. Keziah v. Medlin, 173 N. C. 237, 91 S. E. 836.

Where land is devised to a person for life at her death to vest in the children of the testator during their natural lives and at their death to vest in their lawful heirs, such children take a fee on the death of the life tenant. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785.

Same—Conveyance to One and Heirs of the Body.—A conveyance of land to A. and "her heirs by the body of R. (her husband) and assigns forever" was a fee at common law, but under our statute, Revisal, sec. 1578, now this section, it is converted into a fee-simple absolute, unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted. Revis v. Murphy, 172 N. C. 579, 90 S. E. 573.

A conveyance to a granddaughter and the heirs of her own body passed an estate in fee tail, which by this section was converted into a fee simple, defeasible if no child was born to her, but which became absolute upon the birth of a child. Sharpe v. Brown, 177 N. C. 294, 298, 98 S. E. 825.

Where a deed is executed to "M. and the heirs of her body by her husband S. begotten, or upon failure thereafter her death to the nearest heirs of S.," and at the date of the execution of the deed M. has children living, the deed conveys a fee tail special to M. which is converted to a fee simple by this section, defeasible upon her dying without surviving children by S., and her children do not take as tenants in common with her, § 1739, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M. without surviving children and not to the birth of issue, there being issue born at the date of the execution of the deed, and the ulterior limitation is not barred by the birth of such issue. Sharpe v. Brown, 177 N. C. 294, 98 S. E. 825, cited and distinguished. Paul v. Paul, 199 N. C. 522, 154 S. E. 825.

Same—Heiresses.—A devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body," vested in P an absolute estate in fee simple. Leathers v. Gray, 101 N. C. 162, 7 S. E. 657.

Same—Devise to One and Lawful Heirs of the Body.—A devise to S. and the lawful heirs of his body forever confers an estate fee tail, converted into a fee simple under the section. Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687.

Same—Conveyance a Defeasible Fee.—The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee-simple title, under the section does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her. Smith v. Parke, 176 N. C. 406, 97 S. E. 209.

Where a testator devises realty to a grandson, and in the event of the death of the grandson without children, then the realty to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body. Whitefield v. Garris, 134 N. C. 24, 45 S. E. 904.

An estate in remainder to the testator's son "and to his children or issue," there being no child or children of the son until long after the testator's death, it was held, that to create an estate tail at common law, which is converted into a fee-simple by this section and where there is an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue cannot convey a fee-simple title. Ziegler v. Love, 185 N. C. 40, 115 S. E. 887.

An estate to H. during his life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can not convey a good fee-simple title. Chamblee v. Broughton, 120 N. C. 170, 27 S. E. 111; Leathers v. Gray, 101 N. C. 162, 7 S. E. 657, cited and distinguished. Howard v. Edwards, 185 N. C. 604, 116 S. E. 1.

Illustrative Case.—A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies, constitutes an estate tail, converted by this section into a fee simple. Washburn v. Biggerstaff, 195 N. C. 624, 143 S. E. 210.

§ 1735. Survivorship in joint tenancy abolished; proviso as to partnership.— In all estates,

real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. (Rev., s. 1579; Code, s. 1326; R. C., c. 43, s. 2; 1784, c. 204, s. 6.)

I. General Considerations.
II. Estates of Husband and Wife.
III. Joint Tenancy in Partnership Property.
IV. Actions by, against and between Joint Tenants.

Cross References.

As to conveyances by husband and wife, see sections 997 to 1004 inclusive. As to a similar statute in Tennessee, and cases construing same, see note by Hammond, J., to Logan v. Greenlaw, 25 Fed. 299, 313.

See 13 N. C. Law Rev., 93.

I. GENERAL CONSIDERATIONS.

Editor's Note.—Joint tenancy is a child of the common law, wholly without a statutory basis. It has long been looked upon by the Courts, especially in America, with marked disfavor. As a result of being singled out by the questioning eye of the judiciary, it has fallen easy prey to the Legislative knife. In most of the American States it has been abolished, either wholly or in part, by statutory enactment. The right of survivorship, its chief distinguishing feature, has been the one most disliked by Court and Legislature. This right has been very generally abolished by the statutes, being spared only when the instrument conveying the estate expressly, or by necessary implication, shows that the intention is to create such an estate.

A joint tenancy and a tenancy in common are similar in that in both cases the cotenants hold by unity of possession; but in the case of tenancy in common, the parties hold by separate rights and titles, or by separate rights under a single title, while in joint tenancy the cotenants hold by a single joint right and a single joint title. The difference is the basis of the right of survivorship in a joint tenancy, which, in the absence of a statute abolishing it, is an additional difference.

At common law the right of survivorship differentiated the joint tenancy from the partnership. In the case of the partnership the survivors held in the nature of trustees, until the deceased's interests were placed in the hands of those entitled thereto by law. This section, abolishing survivorship, accomplishes practically the same result in the case of joint tenancy in this state.

In the ancient language of the law joint tenants were said to hold "per my et per tout." The true interpretation of this being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation, each had only a particular part of the interest.

Scope of Section.—The section abolishes survivorship, where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. Taylor v. Smith, 116 N. C. 531, 535, 21 S. E. 202.

Joint tenancies are not abolished by the section, it abolishes the right of survivorship, only in joint tenancies in fee, but does not affect joint estates for life or estates by entirety. Vass v. Freeman, 56 N. C. 221; Powell v. Allen, 75 N. C. 450; Blair v. Osborne, 84 N. C. 417; Powell v. Morisey, 84 N. C. 421; Burton v. Cahill, 192 N. C. 505, 508, 135 S. E. 332.

Same—Joint Tenants for Life.—In Powell v. Allen, 75 N. C. 450, 452, in construing the act of 1784, now this section, Chief Justice Pearson says: "It is obvious that these words cannot be made to apply to joint tenants for life." Burton v. Cahill, 192 N. C. 505, 508, 135 S. E. 332.

Same—Estates of Inheritance.—Acts 1784, converting joint tenancies into estates in common, applies only to estates of inheritance. Blair v. Osborne, 84 N. C. 417; Powell v. Morisey, 84 N. C. 421.

Creation and Existence—Four Unities.—"When two or more acquire land by purchase, as distinguished from descent, and the four unities exist, to-wit: 'time, title, estate and possession,' they take as joint tenants unless there be an express provision that they shall take as tenants in common, and not as joint tenants. In devises, the rule has been further released by allowing such words, 'to take, share and share alike,' or 'to be equally divided between them,' to have the effect of making the devisees take as tenants in common and not as joint tenants, because of an inference from the use of these words that the devisor so intended. 2 Black Com." Powell v. Allen, 75 N. C. 450, 452.

Same—Verbal Agreement.—A verbal agreement between two parties owning a note, payable to them jointly, that upon the death of either without issue it shall belong to the survivor is valid. Taylor v. Smith, 116 N. C. 531, 21 S. E. 202.

Same—Act of Parties.—"The estate of joint tenancy is purely conventional, i. e., created by act of the parties—and never arises by operation of law." 2 Black 180; Modecai's Law Lectures, vol. 1, 60; Burton v. Cahill, 192 N. C. 505, 507, 135 S. E. 332.

Same—Gift without Explanatory Words.—A deed to five grandchildren, without the use of any restrictive, exclusive, or explanatory words, conveys an estate for life in joint tenancy. Powell v. Morisey, 84 N. C. 421.

Same—Premises Enlarged by Habendum.—Where in the premises of a deed a life estate is given to a mother alone, and in the habendum the estate is given to her and her children, such deed operates to convey an estate for life to the mother and an estate for life in joint tenancy in remainder to her children. Blair v. Osborne, 84 N. C. 417.

Severance—By Marriage and Act of 1784.—A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that between the children, by the act of 1784. (See Rev. Code, ch. 43, § 2 now this section.) And in a suit in trover by one of the children he was allowed to recover only one-third part of the value. Witherington v. Williams, 1 N. C. 89.

Equal Rights to Possession.—Joint tenants of a chattel have equal rights to its possession. Cole v. Terry, 19 N. C. 252; Lucas v. Wasson, 14 N. C. 398.

Same—Division and Sale.—If one joint-owner of a crop sells to the other his share of it to pay a debt, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner removing the property, though forbidden by the other. Warbritton v. Savage, 49 N. C. 382.

Same—Same—Title of Purchaser.—If one joint owner of a crop sells to the other his share of it, to pay a debt he owed him, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, the title passes to the purchaser, whether the agreement for the sale was made before or after the division of the crop. Warbritton v. Savage, 49 N. C. 382.

Legatees May Hold as Joint Tenant.—The legatees may still hold by a joint tenancy in North Carolina, though the incident of survivorship was abolished by the Act of 1784, now this section. Vass v. Freeman, 56 N. C. 221, 227.

When Remaindermen Take as Tenants in Common.—A deed of gift, executed by W B to his son J B, "during his natural life only, and then to return to the male children of the said J B, lawfully begotten of his body, for the want of such to return to the male children of my other sons W and B, their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," vested a life estate in J B, with remainder in fee to his sons as tenants in common under the section. Brown v. Ward, 103 N. C. 173, 9 S. E. 300.

II. ESTATES OF HUSBAND AND WIFE.

Conveyance to Husband and Wife.—The section abolishing survivorship, in joint tenancies, does not apply to convey-

ances, to husband and wife. Phillips v. Hodges, 109 N. C. 248, 13 S. E. 769, cited in notes in 30 L. R. A. 328, 329, 1 L. R. A., N. S., 312.

The act of 1784, now this section, abolishing survivorship in joint tenancies does not apply to conveyanecs to husband and wife, for the reason assigned by Gaston, J., in Motley v. Whitemore, 19 N. C. 537, that "being in law but one person they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." Long v. Barnes, 87 N. C. 329; Phillips v. Hodges, 109 N. C. 248, 250, 13 S. E. 769.

In construing this statute, the Supreme Court held that it had no application to an estate granted to husband and wife, on the ground that it is not an estate in joint tenancy, but an entirety estate. Motley v. Whitemore, 19 N. C. 537; Gray v. Bailey, 117 N. C. 439, 443, 23 S. E. 318.

The right of survivorship applies to estates in land conveyed jointly to husband and wife, and vests in the heirs of the one surviving the other. Murchison v. Fogleman, 165 N. C. 397, 81 S. E. 627.

Joint Tenancy or Entirety.—Where the husband and wife purchase property, each furnishing a portion of the purchase money, an estate in entirety and not a joint estate is created which they hold per tout et non per my. Ray v. Long, 132 N. C. 891, 44 S. E. 652, cited in note in 9 L. R. A., N. S., 1029.

Same—Creation.—Where, in a conveyance to a husband and wife, it appears that no such estate was intended, but the parties were to take and hold their interests as tenants in common, the intent as expressed in the deed must be allowed to prevail. (Isley v. Sellars, 153 N. C. 374, 69 S. E. 279; Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210), * * * and that this intent must be arrived at from a perusal of the entire instrument. Hendricks v. Mocksville Furniture Co., 156 N. C. 569, 72 S. E. 592; Triplett v. Williams, 149 N. C. 394, 63 S. E. 79; Highsmith v. Page, 158 N. C. 226, 229, 73 S. E. 998.

In construing a deed to a husband and wife as a whole, to arrive at its intent, it is held that in a conveyance of land to them, "each a one-half interest," creates a tenancy in common, and the right of survivorship does not apply; and when the wife is dead, the husband remarries and then dies, leaving a widow, the widow is only entitled to dower in the undivided one-half interest in the lands. Eason v. Eason, 159 N. C. 439, 75 S. E. 797.

Same—Not Abolished.—It has been held in several well considered decisions of the Supreme Court that our constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a conveyance to a husband and wife. Jones v. Smith & Co., 149 N. C. 318, 62 S. E. 1092; West v. Railroad, 140 N. C. 620, 53 S. E. 477; Bynum v. Wicker, 141 N. C. 95, 53 S. E. 478; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790; Ray v. Long, 132 N. C. 891, 44 S. E. 652; McKinnon, etc., Co. v. Caulk, 167 N. C. 411, 412, 83 S. E. 559.

This estate by entirety is an anomaly, and it is perhaps an oversight that the legislature has not changed it into a cotenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law. Long v. Barnes, 87 N. C. 329; West v. Railroad, 140 N. C. 620, 53 S. E. 477; Bynum v. Wicker, 141 N. C. 95, 96, 53 S. E. 478.

The estate by entireties was not created, either in England or in this State, by any statute, and it has been contended that it was abolished by our statute in 1784, now this section, convening all joint estates into tenancy in common, and still more so by the constitutional change (Article X, sec. 6), conferring upon a married woman the same rights in her property "as if she had remained single." By reason of similar statutes, or statutes especially repealing the estate by entireties, that anomalous estate has disappeared in all but a very few states in this country, and in them, as above said, there is no case to be found which does not hold that upon a joint judgment against husband and wife the estate by entirety can be sold. Martin v. Lewis, 187 N. C. 473, 476, 122 S. E. 180.

Incidents of Estate by Entireties.—"Where land is conveyed to 'husband and wife jointly, they will take and hold an estate by entireties, and that, on the death of one, the whole belongs to the survivor.'" Morton v. Blades Lumber Co., 154 N. C. 278, 70 S. E. 467; Hood v. Mercer, 150 N. C. 699, 64 S. E. 897; Jones v. Smith & Co., 149 N. C. 318, 62 S. E. 1092; West v. Railroad, 140 N. C. 620, 53 S. E. 477. Highsmith v. Page, 158 N. C. 226, 228, 73 S. E. 998.

Where a conveyance of land is made to husband and wife, they do not take interests, either as joint tenants or tenants in common, but they take estates in fee by entireties, and not by moieties. The husband can not, by his own conveyance, divest the wife's estate, and, on her surviving him, she is entitled to the whole estate. Needham v. Branson, 27 N. C. 426.

A conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole. Needham v. Branson, 27 N. C. 426; Todd v. Zachary, 45 N. C. 286, cited in note to 30 L. R. A. 324; Woodford v. Highly, 60 N. C. 234; Long v. Barnes, 87 N. C. 329.

III. JOINT TENANCY IN PARTNERSHIP PROPERTY.

Joint Tenancy of Partnership in Land.—This section provides that land jointly purchased for partnership purposes shall, upon the death of one partner, survive the others for the purpose of paying the partnership debts. And when the partnership debts are satisfied, if there is any remainder, such share as would have fallen to the deceased partner, shall be delivered over to the heirs, executors, administrators or assigns; and real estate held and sued for partnership purposes is subject to partnership debts, to the exclusion of the heir or widow of the deceased. Stroud v. Stroud, 61 N. C. 525, 526.

Upon Settlement Descends as Real Estate.—Where land is purchased in fee by partnership funds and for partnership purposes, and one partner dies, upon the settlement of the partnership debts his share of the land descends to his heir as real estate. Summey v. Patton, 60 N. C. 601.

When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Immaterial Whether Claim Is by Deed or Inheritance.—When the rule applies that lands purchased by partnership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Heir Claiming by Deed.—The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

IV. ACTIONS BY, AGAINST, AND BETWEEN JOINT TENANTS.

Actions by and against Joint Tenants.—It seems to be well settled that joint tenants must sue jointly, differing in that respect from tenants in common. Mr. Freeman says: "Whenever the title of the cotenants, as in the case of joint tenancy and coparcenary, is joint, the action must also be joint, and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be separately and distinctly pursued. Joint tenants being seized per my et per tout and deriving but one and the same title, must jointly interplead and be interpleaded. If twenty joint tenants be, and they be disseized, they shall have, in all their names, but one assize, because they have but one joint title." Cotenancy, 329. To the same effect is Sedgwick and Wait Trials, etc., sec. 302. Cameron v. Hicks, 141 N. C. 21, 34, 53 S. E. 728.

"It was at one time held in this State that two tenants in common could not join in one demise, because there was no unity of title—one might recover and the other fail. It was afterwards held, for the reason set out by Ruffin, J., in Hoyle v. Stowe, 13 N. C. 318, that they could join in one demise. He says: 'It is the universal rule that the title must be truly stated in the declaration. A joint demise, therefore, can only be supported by showing a title in each to demise the whole. If one of the lessors has no title, the plaintiff must fail.' He says that this is 'common learning.' An examination of the opinion shows the ground upon which tenants in common are permitted to make a joint demise and recover in respect to their interests. Allred v. Smith, 135 N. C. 443, 47 S. E. 597. The difference is in this: Joint tenants must join in one demise because of the essential unities; tenants in common may join, or, if they prefer, may sue separately, because there is no unity of title. It would seem to follow that joint tenants must recover in respect to their title, and if they fail in that, they

cannot recover at all." Cameron v. Hicks, 141 N. C. 21, 35, 53 S. E. 728.

Actions between Joint Tenants—Trover.—The exclusive possession of a chattel by one joint tenant will not entitle the other to maintain trover against him for it. Cole v. Terry, 19 N. C. 252.

A person claiming under a joint tenancy, which was severed, can recover only his proper proportion. Witherington v. Williams, 1 N. C. 89.

§ 1736. Survivorship among trustees.—In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four. (Rev., s. 1580; 1885, c. 327, s. 1.)

Cross References.—As to limitation on action by cotenants, see sec. 419. As to survivorship among donees, in a mortgage, or power of sale, see sec. 2582. As to Executors and Administrators holding as joint tenants, see sec. 172.

The trustees of a trust estate hold as joint tenants, and not as tenants in common. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728; Webb v. Borden, 145 N. C. 188, 58 S. E. 1083.

Loss of Right to Trustee Is Loss to Cestui Que Trust.—When the right of entry is barred and the right of action lost by the trustee, through an adverse occupation, the cestui que trust is also concluded from asserting claim to the land. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.

Cotrustee Barred.—When a trustee is barred the cotrustees are likewise barred. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.

§ 1737. Limitations on failure of issue.—Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight. (Rev., s. 1581; Code, s. 1327; R. C., c. 43, s. 3; 1827, c. 7.)

Purpose.—This section was enacted for the primary purpose of making contingent limitations good by fixing a definite time when the estate of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent appears on the face of the instrument. Kirkman v. Smith, 174 N. C. 603, 94 S. E. 423; Harrell v. Hagan, 147 N. C. 111, 60 S. E. 909; Sain v. Baker, 128 N. C. 256, 138 S. E. 858; Bell v. Kessler, 175 N. C. 525, 528, 95 S. E. 881.

Provision Is Obligatory.—The rule laid down by the statute is obligatory on the courts and must be observed in all cases except, as provided by the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." Patterson v. McCormick, 177 N. C. 448, 452, 99 S. E. 401.

Does Not Interfere with Rule in Shelley's Case.—The section does not interfere with the application of the principle laid down in Shelley's Case in determining the nature and extent of the precedent estate. This is declared in Sanderlin v. Deford, 47 N. C. 75, in construing a will executed in 1838. King v. Utley, 85 N. C. 59, 61. See under analysis line II, "Rule in Shelley's Case" section 1734.

Provisions of Section Prevail over Rule of Stare Decisis.—A vested interest in lands cannot be established under the doctrine of stare decisis in direct conflict with the expressions of a statutory change of the rule to the contrary, nor where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves, are upon prior executed instruments excepted by the statute, or without express reference thereto; and this section, changing the rule of construction as to the vesting of an interest contingent upon a death with issue, cannot be affected by the rule laid down in Hilliard v. Kearney, 45 N. C. 221, and subsequent decisions on the subject. Patterson v. McCormick, 177 N. C. 448, 99 S. E. 401.

Common Law Rule Superseded.—Where there was a devise of lands for life, then to J. and C. equally, and in case "they or either of them die without issue," then to the heirs of certain others and the survivor of J. and C. equally, it was held, the common-law doctrine that a limitation contingent upon death and an indefinite failure of issue is void for remoteness, gives place to the new rule of construction enacted by our statute, Rev., sec. 1581, now this section, made applicable since 15 January, 1928, without restriction as to immediate estates, and a contrary intent, not expressly and plainly declared in the face of the instrument, presently construed, the death without issue refers to the death of J. and C.; and it appearing that J. died without issue after the death of the first taker, and C. survives, with issue, the absolute fee-simple title to the lands is in C. and the other ulterior remaindermen, and their deed, otherwise sufficient, is valid. Patterson v. McCormick, 177 N. C. 448, 99 S. E. 401.

Rule in Hilliard v. Kearney.—Under the rule at common law a limitation contingent upon death without issue was void for remoteness because it referred to an indefinite failure of issue; and in order to give effect to the testator's intention the courts began to look for some intermediate time, such as the termination of the life estate, or some other designated period, and held that the phrase "dying without issue" was to be referred to this intermediate period. Hilliard v. Kearney, 45 N. C. 221; American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

Same—Changed.—This principle was entirely changed by the act of 1827, which is now this section. American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

In the following cases the court had under consideration the construction of a limitation in a will executed since 15 January, 1828, and which therefore came under the act of 1827, now this section. In each of these cases the court expressly referred to the Act of 1827 and construed the limitation in accordance with the plain words of that act and not according to the rule stated in Hilliard v. Kearney, 45 N. C. 221; Clapp v. Fogleman, 21 N. C. 467; Tillman v. Sinclair, 23 N. C. 183; Moore v. Barrow, 24 N. C. 436; Garland v. Watt, 26 N. C. 287; Jones v. Oliver, 38 N. C. 369, 370; Weeks v. Weeks, 40 N. C. 111, 115; Spruill v. Moore, 40 N. C. 284; Holton v. McAllister, 51 N. C. 12, cited in Patterson v. McCormick, 177 N. C. 448, 453, 99 S. E. 401.

To those cases cited in Patterson v. McCormick may be added Love v. Love, 179 N. C. 115, 101 S. E. 562; Willis v. Mutual Loan, etc., Co., 183 N. C. 267, 111 S. E. 163; Vinson v. Gardner, 185 N. C. 193, 116 S. E. 412; Alexander v. Fleming, 190 N. C. 815, 130 S. E. 867; American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 125, 133 S. E. 407.

Dying without Heirs Or Issue Construed.—The section has been construed by the Supreme Court at least twenty-six times, and in every case in which it has come before the court for construction it has uniformly been held that "Dying without heirs or issue," upon which a limitation overtakes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. See Patterson v. McCormick, 177 N. C. 448, 455, 99 S. E. 401, which lists the twenty-six decisions supporting the same holding.

As was said by Mr. Justice Hoke in Harrell v. Hogan, 147 N. C. 113, "the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir." Williams v. Lewis, 100 N. C. 142, 5 S. E. 435.

Same—Dependent upon Death of Donee without Issue.—A contingent remainder dependent upon the death of a cer-

tain donee without issue means, under the terms of this section, a dying without having issue living at the time of death. Lee v. Oates, 171 N. C. 717, 88 S. E. 889.

Devise to One for Life with Limitation over.—As a general rule where a devise is made to one for life and after his death to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer the description at the death of the first taker. Jenkins v. Lambeth, 172 N. C. 466, 90 S. E. 513; Goode v. Hearne, 180 N. C. 475, 105 S. E. 5; Witty v. Witty, 184 N. C. 375, 114 S. E. 482; Dupree v. Daughtridge, 188 N. C. 193, 124 S. E. 148. It is otherwise, however, where it appears from the terms of the will that some intervening time is indicated. Citizens Bank v. Murray, 175 N. C. 62, 94 S. E. 665; American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

"Ordinarily a devise to the survivors of a class will take effect at the testator's death, but not if a particular estate is created and the remainder is given to those who survive the life tenant. Mercer v. Downs, 191 N. C. 203, 131 S. E. 575." American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

Intervening Life Estate.—The more recent cases where there were intervening life estates, in which the Supreme Court has held that the statute applies, are as follows: Cowand v. Meyers, 99 N. C. 198, 199, 6 S. E. 82; Dunning v. Burden, 114 N. C. 33, 34, 18 S. E. 969; Kornegay v. Morris, 122 N. C. 199, 29 S. E. 875; Harrell v. Hagan, 147 N. C. 111, 60 S. E. 909; Dawson v. Ennett, 151 N. C. 543, 544, 66 S. E. 566; Perrett v. Bird, 152 N. C. 220, 67 S. E. 507; Elkins v. Seigler, 154 N. C. 374, 70 S. E. 636; Hobgood v. Hobgood, 169 N. C. 485, 486, 86 S. E. 189; Vinson v. Wise, 159 N. C. 653, 75 S. E. 732; Whichard v. Craft, 175 N. C. 128, 95 S. E. 94; Kirkman v. Smith, 175 N. C. 579, 96 S. E. 51. The case of Vinson v. Wise construed the will of the late Chief Justice Smith, in which there were two intervening life estates, notwithstanding which the court held that:

"Under numerous decisions of the Court in a devise of this character, and unless a contrary intent appears from the will, the event by which the estate must be determined will be referred not to the death of the devisor, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till 'the event occurs by which same is to be determined, or the estate becomes absolute.' " Patterson v. McCormick, 177 N. C. 448, 456, 99 S. E. 401.

Rule When Ambiguity in Will.—Where there is ambiguity in a will as to the vesting of an estate devised for life with contingent limitation over, shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that was the intent of the testatrix, it will not be affected by the section, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person. Westfeldt v. Reynolds, 191 N. C. 802, 133 S. E. 168.

Doctrine of Shifting Uses and Executory Devises.—The section is a rule of construction upholding the second and contingent estate upon the death of the first taker without heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate. Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687.

Same—Estate Created Direct to Second Taker.—When by the operation of the statute a fee tail is converted into a fee simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate is created direct from the testator to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker, or too remote since the enactment of the section. Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687.

"Children" Does Not Extend to Grandchildren.—A devise to the "wife and children" of the testator will not include therein his grandchildren, unless the contrary intent is shown by necessary implication from the terms or expressions used in the will. Thompson v. Batts, 168 N. C. 530, 84 S. E. 858.

A Base and Unqualified Fee.—O. devised his lands to certain of his children S., D., and J. By item 3 of the will a certain tract was devised to D. and "the lawful heirs of his body lawfully begotten"; by item 9 it was provided that in case of death of either of the children, his portion should revert to the surviving one, with further contingent limitations. It was held, that these items should be construed together, and that the estate devised to D. was not in fee simple, but a base and qualified fee, defeasible on the death of D. without leaving living lineal descendants. Perrett v. Bird, 152 N. C. 220, 67 S. E. 507.

Illustrative Cases.—An estate to M. and her bodily heirs is converted into a fee simple under our statute, C. S., 1734, without further limitation, but followed by the words "if no heirs, said lands shall go back to my estate," the estate will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event as a shifting use under the statute of uses, 27 Henry VIII, ch. 10; 1740, whereunder a fee may be limited after a fee, by deed, and under the provisions of this section that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. Willis v. Mutual Loan, etc., Co., 183 N. C. 267, 111 S. E. 163.

When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son dying without children, can not by will give his wife a life estate with the remainder to a third party. Sain v. Baker, 128 N. C. 256, 38 S. E. 858.

A devise of lands to B. in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devise a fee-simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself; and upon his death and nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. Burden v. Lipsitz, 166 N. C. 523, 82 S. E. 863.

A devise of land to L. with limitation that if she "shall die leaving issue surviving her, then to such issue and their heirs forever," but if she "die without issue surviving her, then the property to return to my eldest daughter," the vesting of the estate in remainder depends upon the contingency of the death of L. without leaving "issue" surviving her, and not upon the death of the testatrix. Rees v. Williams, 164 N. C. 128, 80 S. E. 247.

On devise of an estate to M. for life, then to G. and K., and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not, of itself, affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue to affect the same till the death of the first takers in remainder. Kirkman v. Smith, 175 N. C. 579, 96 S. E. 51.

Same.—Where an estate is granted to M., and the heirs of her body in the premises, with warranty to her and the heirs of her body, it was held, that the intent of the grantor by proper construction was to limit over the estate to M. in case she should die without issue or bodily heirs. Willis v. Mutual Loan, etc., Co., 183 N. C. 267, 111 S. E. 163.

Same.—An estate to testator's daughter N. for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G. family," gives N. a fee defeasible upon her death without issue, children, etc., under this section and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. Vinson v. Gardner, 185 N. C. 193, 116 S. E. 412.

Cases Where Wills Executed before 1828.—In the following cases the wills were executed before 15 January, 1828, but the Court, in delivering the opinions, adverts to the Act of 1827, and states that the law since the will was executed had been materially changed and that the construction of the limitation would be different under the act. Rice v. Satterwhite, 21 N. C. 69, opinion by Gaston, J.; Brown v. Brown, 25 N. C. 131, opinion by Ruffin, C. J.; Gibson v. Gibson, 49 N. C. 425, opinion by Battle, J. This last case was decided in 1857. Patterson v. McCormick, 177 N. C. 448, 453, 99 S. E. 401.

Cited in West v. Murphy, 197 N. C. 488, 149 S. E. 731.

§ 1738. Unborn infant may take by deed or writing.—An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born. (Rev., s. 1582; Code, s. 1328; R. C., c. 43, s. 4.)

When Applicable.—In 13 Cyc., page 663, it is declared: "Where property is conveyed to a certain person and his children it has been determined that no title will pass to after-born children. But where a deed creates an estate

for life with remainder over to the children, the remainder will vest in children already born, subject to be opened at the birth of each succeeding child." See, also, Adams v. Ross, 30 N. J. L. 505; Coursey v. Davis, 46 Pa. St. 25, to the same effect. Quoted with approval in Powell v. Powell, 168 N. C. 561, 563, 84 S. E. 860.

Under a deed to a woman "and her children" a child en ventre sa mere at the date of the conveyance will take, but children born more than a year thereafter will not. Heath v. Heath, 114 N. C. 547, 19 S. E. 155.

Remainder after Freehold Conveyed — Children Not in Esse. — Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then in esse, the first taker holds the legal title until the birth of children after his marriage, at which time such estate becomes vested, such remainder being contingent until the birth of a child during the existence of the freehold estate, and then vests in such child or children who would then take and hold the interest. Johnson Bros. v. Lee, 187 N. C. 753, 122 S. E. 839.

Takes as Tenant in Common.—By virtue of this section a child if en ventre sa mere at the time the deed is executed takes as tenant in common with the living children. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201, 202.

Grant Directly to Children of Living Person.—A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then en ventre sa mere. Powell v. Powell, 168 N. C. 561, 84 S. E. 860.

Life Estate to Parent with Limitation Over.—Where there is a reservation of a life estate in the parent or another, with limitation over to the children and all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. Powell v. Powell, 168 N. C. 561, 84 S. E. 860.

§ 1739. "Heirs" construed "children" in certain limitations.—A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will. (Rev., s. 1583; Code, s. 1329; R. C., c. 43, s. 5.)

Editor's Note.—In many of the cases dealing with estates the rule in Shelley's Case is referred to and the question is raised as to whether or not the rule is abrogated by this section, and answered in the negative in the splendid opinion of Shepherd, C. J., in Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011. For the purpose of showing the relation of the rule to this section, it will be fitting to give a brief resume of the rule.

The rule takes its name from an early case decided in the reign of Queen Elizabeth (Shelley's Case, 1 Rep. 94), though even at that time the principle it enunciated was looked upon as an ancient dogma of the common law. Indeed Justice Blackstone traced it to a case decided in the reign of Edward II. However, be that as it may, what is probably the earliest intelligible decision on the subject is the case of the Provost of Beverly, in the time of Edward III., and reported in the Year Books. Numerous theories have been suggested as furnishing a reason for the rule in the first instance, some respectable authorities with a show of much plausability tracing it to the same principle which applied originally to "heirs" when used in a conveyance. "It was at first understood that, in case of such a limitation, the estate was in fact to go to the heirs of the grantee named; that though he had a right to enjoy it during life, he had no right to cut off the descent by alienation, and that when, therefore, the word heirs in the progress of estates came to be regarded as a mere term of limitation, giving the grantee a complete ownership with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and after his death to his heirs, the effect at common law being the same in both forms of limitation." 2 Wash. Real Prop., 647; Williams Real Prop., 254.

Nor does it seem that this result worked any particular hardship to the heir, as in those days ready money was extremely scarce and the alienation of lands assumed the form of perpetual lease, granted in consideration of certain services or rents reserved to the grantor and his heirs, and, as such services or rents descended to the heir, it was not so great a disadvantage to him as at first might be supposed. Williams Real Prop., 39.

It is not to be doubted that this construction was aided and greatly strengthened by other considerations such as the prevention of frauds upon feudal lords and specially creditors (2 Fearne, ch. 12, sec. 3), the prevention of the inheritance from being, as was supposed, in abeyance (Justice Blackstone's argument in Perrin v. Blake, 1 Ex. Chamber, 4 Burr., 2,579), and to preserve the marked distinction between title by descent and purchase. Hargrave Law Tracts. "But whatever may have been the grounds of the rule in its origin, another reason subsequently existed as an inducement to the preservation of the rule from legislative abolition and judicial discouragements, after the feudal reason had ceased with the feudal system itself, and that subsequent reason is the desire to faciliate alienation by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." 2 Fearne, sec. 421.

In Perrin v. Blake, 1 Ex. Chamber, 4 Burr., 2,579, Justice Blackstone said: "Another foundation of the rule probably was laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to show it into the track of commerce one generation sooner by vesting the inheritance in the ancestor." See, also, Rawle's Note, Williams Real Prop., 253.

In Polk v. Farris, 30 Am. Dec., 400, Reese, J., in a very able opinion in vindication of the rule, uses this language: "It is a rule or canon of property, which, so far from being at war with the genius of our institutions or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance that the rule, a gothic column, found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system." In Hillman v. Bauslaugh, 53 Am. Dec., 474, the distinguished Chief Gibson says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. * * * It has other than feudal objects, to wit, the unfettering of estates, by vesting the inheritance in the ancestor and making it alienable a generation sooner than it otherwise would be."

That this result accords most thoroughly with the general tendency of judicial evolution is apparent from the progress of the law and the gradual falling away of entails and other restraints on alienation from the times of Henry I to the present. It seems clear that in a highly complex state of society, with greatly diversified industries and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property, and that such has been the spirit of the legislation in this State is manifest from a perusal of the various statutes enacted upon the subject. Starnes v. Hill, 112 N. C. 1, 2, 15, 16 S. E. 1011.

The existence of this ancient rule has for many years been unquestionably recognized in the courts of this State as one of the "ligaments of property," the only doubt upon the subject having been suggested by dicta in a few cases. This section seems clearly not to abolish the rule. It would seem to be the opinion of many of the ablest law writers that the said rule is not abolished. Thus Mr. Washburn, in the fourth edition of his work on Real Property (Vol. 2, 607), undertakes to give a list of the states with reference to the acts which have abolished the rule, and he does not include North Carolina, although he was familiar with our act, as is shown by a reference to section 3, chapter 43, of the Revised Code. The same observation applies to Mr. Rawle, the learned editor of Williams on Real Property. He also gives a list of the states which have abolished the rule, without including North Carolina. The same may be said of Mr. Freeman, the very able and discriminating editor of the American Decisions, in a note to 30 Am. Dec., 415, and also of the editors of Jarman on Wills and Lawson R. & R.

It seems that the main object of the section is to convert a contingent into a vested remainder under certain circumstances. It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless there was something in the deed which indicated "that by 'the heirs' was meant the children of the person named." 3 Washburn Real Prop., 282. The act in question provides that in such a case the word "heirs" shall be construed to mean "children" and the limitation therefore would be good. By this construction of the section it does not affect the rule in Shelley's case. Starnes v. Hill, 112 N. C. 1, 2, 23, 16 S. E. 1011; Hartman v. Flynn, 189 N. C. 452, 127 S. E. 517.

For further discussion of the rule, see the Editor's note to sec. 1734.

Common-Law Rule Changed.—While as a general common-law rule, subject to some exceptions, a conveyance

of an estate for life in lands to another, with remainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that nemo est haeres viventis, this does not prevail under the provisions of this section. Thompson v. Batts, 168 N. C. 333, 84 S. E. 347.

Same—Construed to Be Limitation.—A deed to "the heirs" of John A. Barrett, he being still alive, although void at common law, is good under the section, and is construed to be a limitation to the children of John A. Barrett, and includes after-born children. Graves v. Barrett, 126 N. C. 267, 35 S. E. 539.

Limitation Explained.—The word limitation has two-fold meaning. To quote the language of Mr. Fearne: "Great confusion has frequently arisen from not observing that the word limitation is used in two different senses; the one of which may, for the sake of convenience of distinction, be termed the original sense; namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate; and the other, the derivative sense; namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate." 2 Fearne on Remainders (4 Am. Ed.), sec. 24, marg. page 10. In our statute, the word is manifestly used in its derivative or secondary sense, which is made very clear to us by the learned, able and elaborate opinion of Chief Justice Shepherd in the leading case of Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011; Campbell v. Everhart, 139 N. C. 503, 510, 52 S. E. 201.

Same—Applies Only When No Precedent Estate.—The Code of 1883, sec. 1329, now this section, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person. Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842.

If it were not true that the section applies only when there is no precedent estate conveyed to said living person, it would not only repeal the rule in Shelley's case, but would pervert every conveyance to "A and his heirs" into something entirely different from what those words have always been understood to mean. Marsh v. Griffin, 136 N. C. 333, 334, 48 S. E. 735.

When Not Applicable—Intent.—Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon his dying without issue, this section has no application. Massengill v. Abell, 192 N. C. 240, 134 S. E. 641.

Conveyance Directly to Heirs of Living Person.—By virtue of the section a deed conveying land directly to the "heirs" of a living person, passes whatever title the grantor had to the children of such person. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

Limitation to Heirs of Living Person.—A limitation to the heirs of a living person, if no contrary intention appear in the deed or will, will be construed to be to the children of such person. Massengill v. Abell, 192 N. C. 240, 242, 134 S. E. 641.

An estate granted to D. for life and then to the heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, sec. 1583, now this section, which construes the word "heirs" to mean children, in such instances. Condor v. Secrest, 149 N. C. 201, 62 S. E. 921.

Lawfully Begotten Heirs of the Body.—In Lockman v. Hobbs, 98 N. C. 541, 544, 4 S. E. 627, it was held "that the lawfully begotten heirs of her body" in a will referred most obviously to the children of the devisee for life, of whom there were only two, and was construed to mean "the children of such person" since contrary intention did not appear from the will.

Bodily Heirs.—"The words 'bodily heirs' have the same meaning as 'heirs of the body,' and are words of limitation and not words of purchase." Marsh v. Griffin, 136 N. C. 333, 335, 48 S. E. 735.

Child Born during Life of Life Tenant.—A devise of lands to the widow of the testator for life, then to the heirs of his son J., and it appears that the son was living at the time and had living children at the death of the testator and one born thereafter, during the continuance of the life estate; it was held that the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it will include all who are members of the class and fill the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, takes his share with the other children of J. Revisal, sec. 1583; Cooley v. Lee, 170 N. C. 18, 86 S. E. 720.

Devise to One with Conditional Limitation over.—Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." Sain v Baker, 128 N. C. 256, 38 S. E. 858.

A conveyance of land in contemplation of marriage, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, the "reverter" to his heirs, under the section meant to his children after the death of his wife and the nonhappening of the stated contingency. Thompson v. Batts, 168 N. C. 333, 84 S. E. 347.

Limitation to Heirs of One with Conditional Limitation over.—Where an estate was devised to A "and the heirs of his body, but if he die without heirs living at the time of his death, then to the heirs of B," "heirs" was construed to mean children. Smith v. Brisson, 90 N. C. 284.

Devise to "Heirs of His Children."—By his will, the testator devised the vacant lot to the trustees for twenty years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them, per stirpes." The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under this section the word "heirs," used in item 11 of the will, must be construed to mean "children." Lide v. Wells, 190 N. C. 37, 128 S. E. 477, 480.

Application.—Where a testator, by separate devises, gives to each of his three daughters, who are his only heirs at law, a certain tract of his land, with provision in each item, "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs," by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters. Kornegay v. Cunningham, 174 N. C. 209, 93 S. E. 754.

Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." Sain v. Baker, 128 N. C. 256, 38 S. E. 858.

Same—When Children Illegitimates.—Where a bequest is immediate—not dependent upon a preceding limited estate—to the heirs of a living person, and the children of such person are illegitimate, they have the right to take under the section which declares that a limitation to the "heirs" shall be construed to be the "children" of such person, unless a contrary intention appears. Howell v. Tyler, 91 N. C. 207, 208.

§ 1740. Possession transferred to use in certain conveyances.—By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenantor shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant. (Rev., s. 1584; Code, s. 1330; R. C., c. 43, s. 6; 27 Hen. VIII, c. 10.)

Editor's Note.—After the Statute of Wills, 32 Hen. 8, a question was made, whether 27 Hen. 8, applied where one was seized to the use of another by force of a devise. The question, however, has long been at rest. Mr. Blackstone, in his learned commentaries, classifies the exceptions to the operation of the statute under three heads, and does not allude to the fact, that the question referred to, had ever been started, but passes it over as one of "the refinements and niceties suggested by the ingenuity of the times." 2 Black, 336. See also Broughton v. Langley, Salk 679, where Lord Holt treats the question as settled. The curious reader will find the subject treated of in Powell on Devises, 211, 13-14.

It is conceded, on all hands, that the Statute of Uses, 27 Hen. 8, chap. 10, was in force and in use, in this State, up to the passage of the Revised Statutes (1836). Indeed, all of the conveyances of land, adopted and used in this State, are based on, and take effect by, the operation of that statute. In the Rev. Stat., chap. 43, sec. 4, and the Rev. Code, ch. 43, sec. 6, the words used in 27 Hen. 8, chap. 10—i. e., "When one person or persons stand, or be seized, or at any

time thereafter shall happen to be seized of land, etc., to the use of any other person, persons, or body politic, by reason of any bargain, sale, feoffment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having the use, shall have the legal estate, etc.," are omitted and the provision is simply "By deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainee, releasee, covenantee, etc." Substantially in this form the section is carried through all the various codes up to this one. The tendency, while no material change, has been to make the section all inclusive by extending its application to every possible case involving the principle. Wilder v. Irelland, 53 N. C. 85, 90.

Necessity of Consideration.—A deed of bargain and sale is governed in this State by the same principles which were applied to it in England. It must have a pecuniary, or other valuable consideration. Blount v. Blount, 4 N. C. 389; Brocket v. Foscue, 8 N. C. 64; Bruce v. Faucett, 49 N. C. 391, 393.

If no consideration, either good or valuable, appear on the face of the instrument, or can be proved aliunde, it will be void. Springs v. Hanks, 27 N. C. 30; Jackson v. Hampton, 30 N. C. 457; Bruce v. Faucett, 49 N. C. 391, 393.

Same—Love and Affection.—Though in form, a deed of bargain and sale, yet if the only consideration is that of love and affection, it will operate as a covenant to stand seized. Slade v. Smith, 2 N. C. 248; Hatch v. Thompson, 14 N. C. 411; Cobb v. Hines, 44 N. C. 343; Bruce v. Faucett, 49 N. C. 391, 393.

Same Footing with Feoffments at Common Law.—Deeds of bargain and sale and covenants to stand seized to uses, are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. Love v. Harbin, 87 N. C. 249, and Ivey v. Granberry, 66 N. C. 224. A use may be limited on a use. Rowland v. Rowland, 93 N. C. 214, 221.

Common Law Rule.—At common law, where there was no consideration, the use would result to the feoffor, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title. Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61.

When Legal and Equitable Title United.—In Lee v. Oates, 171 N. C. 717, 726, 88 S. E. 889, it was said: "As to Mrs. Lee's life estate, so long as her husband lived, it was necessary that the trust for her separate use and maintenance should continue, as it was then active; but when her husband died, and the disability of coverture was removed, and there was no longer any necessity for a trustee to protect her interest, and as the trust then became passive, the statute executed the use and united the legal and equitable estates in her." Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728; Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 541; Springs v. Hopkins, 171 N. C. 486, 88 S. E. 774. See also Security Nat. Bank v. Sternberger, 207 N. C. 817, 819, 178 S. E. 595.

Same—Merger. — In Peacock v. Scott, 101 N. C. 149, Smith, C. J., said: "Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter, and numerous decisions elsewhere are to the same effect." Wills v. Cooper, 25 N. J. L., 137; Swisher v. Swisher, 157 Iowa, 55; Greene v. Greene, 125 N. Y. 506; Clark v. Listers, etc., 82 Neb. 85; Weeks v. Weeks, 197 N. Y. 304; Langley v. Conlan, 212 Mass. 135; Perry on Trusts (6 Ed.), sec. 347; 39 Cyc., 248; 2 Pomeroy's Equity, sec. 788. Quoted with approval in Odom v. Morgan, 17 N. C. 367, 369, 99 S. E. 195.

When Legal Title Passes to Trustee.—"Where the use is executed by the statute, the trustee takes no estate or interest, both the legal and equitable estates vesting in the cestui que trust; but where the use is not executed, the legal title passes to the trustee." 39 Cyc., 207, quoted with approval in Lee v. Oates, 171 N. C. 717, 88 S. E. 889.

Proceeds of Sale of Equitable Life Estate. — A deed in trust for the purpose of allowing the grantor's daughter to enjoy the "proceeds, rents, and income" during her natural life, with limitation over, creates an equitable estate for life, but upon a sale, the daughter would not be entitled to have the value of her life estate turned over to her. Braddy v. Dail, 156 N. C. 30, 72 S. E. 88.

Shifting Use to Take Effect.—"Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use." Perry on Trusts, (5 Ed.), sec. 378; Lee v. Oates, 171 N. C. 717, 727, 88 S. E. 889.

Future Contingent Use.—In the case of Smith v. Smith, 46 N. C. 135, other incidents, which attached to deeds of bargain and sale in England were held to apply to them in this State. Thus, the Court said "it is settled that, a future contingent use to one unknown, or not in esse, cannot be raised by a deed of bargain and sale. It is also settled that a use cannot be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger." Bruce v. Faucett, 49 N. C. 391, 393.

Estates of Freehold to Commence in Futuro.—As estate of freehold to commence in futuro can be conveyed by a deed of bargain and sale operating under the section or by executory devise; therefore, an estate to H. for life and at her death to her children in fee, reserving a life estate to the grantor, is good. Savage v. Lee, 90 N. C. 320.

Life Estate to Woman with Limitation Over to Children.—Where one devised, in 1828, to a trustee, to the use and benefit of a woman, for her life, remainder to the use of all her children, it was held that the legal estate in the remainder, by force of the same statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have. Wilder v. Ireland, 53 N. C. 85.

Fee Simple Limited after a Fee Simple.—A fee-simple may be limited after a fee-simple either by a deed or will by operation of the statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise. Smith v. Brisson, 90 N. C. 284.

Possession Transferred. — The statute of uses, substituted for 27 Hen. VIII. (The Code, sec. 1330), now this section, provides that the possession of the bargainee shall be transferred to the bargainee as perfectly as if the bargainee "had been enfeoffed at common law with the livery of seizin of the land intended to be conveyed, etc." Kirby v. Boyette, 118 N. C. 244, 263, 24 S. E. 18.

When One Seized to the Use of Another.—It was said in Wilder v. Ireland, 53 N. C. 85: "Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operations, i. e., (1) where a use is limited on a use, (2) where a trustee is not seized but only possessed of a chattel interest, and (3) where the purposes of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed for the separate use and maintenance of a married woman. Kirby v. Boyette, 118 N. C. 244, 263, 24 S. E. 18. See Black Com.

"Sole and Separate Use" Construed.—The words "for the sole and separate use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created. Kirby v. Boyette, 118 N. C. 244, 24 S. E. 18.

Covenant to Stand Seized to Use of Another.—"In Davenport v. Wynne, 28 N. C. 128, where there was a conveyance of real property upon the consideration of love and affection, reserving a life estate to the donor, it was held by this court that the conveyance was good; that it was a conveyance to stand seized to the use of the vendee on his death. To the same effect is Hodges v. Spicer, 79 N. C. 223. And in Sasser v. Blyth, 2 N. C. 259, overruling Ward v. Ward, 1 N. C. 59, a similar construction was given to an instrument of life import. In the note to that case Judge Battle says: 'There cannot be the least doubt but that a covenant to stand seized to the use of another, after his own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the meantime to support the future estate. This has been decided in a vast number of instances. There is no point better established by the authorities.' And he cites in support of the position, besides Coke, a number of English authorities." Savage v. Lee, 90 N. C. 320, 323.

§ 1741. Collateral warranties abolished; warranties by life tenants deemed covenants.—All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenanter in like manner as other obligations. (Rev., s. 1587; Code, s. 1334; R. C., c. 43, s. 10; 4 Anne, c. 16, s. 21; 1852, c. 16.)

Editor's Note. — The section is a re-enactment of the Statute of 4 Ann, c. 16, s. 21 made first because estates tail were converted into estates in fee simple. The last clause in the section was inserted to qualify the words "abolished" and "void," used in the two preceding clauses. By it such warranties, that is, collateral warranties, and all warranties descending upon an heir, entitled to a remainder or

reversion, is allowed the effect of a personal covenant of quiet enjoyment, by which the heir if he receives real assets, is bound to pay a purchaser damages to the amount of the consideration paid for the land, in case of eviction by title paramount, in lieu of "other land of equal value," so as to put such warranties upon the same footing as lineal warranties which the Court had been forced after the action of ejectment was substituted for real actions, for the sake of giving a remedy, to treat as personal covenants for quiet enjoyment. This was by reason of the fact that there could not be "a vouchee" upon a covenant real or the old warranty, except in real actions. Rickets v. Dickens, 5 N. C. 342, 343; Williams v. Beeman, 13 N. C. 483; Southerland v. Stout, 68 N. C. 446, 449; Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Estoppel and Rebutter by Warranty. — Mr. Mordecai in his instructive and valuable law lectures, volume 2, p. 858, says: "I shall take 'Estoppel by Warranty' to mean the effect which such covenants have in passing, so to speak, any title to the land which the bargainor in a deed may acquire after the execution of the deed; and 'Rebutter by Warranty, to mean the effect which such modern covenants have in barring, estopping, or rebutting the heirs of the covenantor, should they assert title to the land conveyed by the covenanting ancestor." Olds v. Richmond Cedar Works, 173 N. C. 161, 164, 91 S. E. 846.

Where land is devised to a person for life, and at her death to her children, the children are not estopped by a deed with covenant of warranty executed by the life tenant. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756.

Same—Warranty by Tenant by Curtesy.—Where a tenant by the curtesy, sells land belonging to his wife, by deed or bargain and sale, in fee, with general warranty the right of the heir of the wife to the land is not rebutted by the warranty. Johnson v. Bradley, 31 N. C. 362.

Same—Remainder Not Defeated by Warranty. — A warranty in a deed of a life tenant cannot defeat the remainder of the heirs by way of rebutter. Moore v. Parker, 34 N. C. 123; Starnes v. Hill, 112 N. C. 1, 13, 16 S. E. 1011.

Warranty to Grantee but Not to Assigns.—Where a deed contains a warranty to the grantee, but not to his assigns, such assignees can neither maintain an action on such covenant nor defend under it against the grantor. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Burden of Proof.—Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it, it was held, that the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. Olds v. Richmond Cedar Works, 173 N. C. 161, 91 S. E. 846.

§ 1742. Spendthrift trusts.—It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant. (Rev., s. 1588; Code, s. 1335; 1871-2, c. 204, s. 1.)

Substantial Compliance Necessary. — The provisions of the section should be at least substantially met and complied with to create the trust with its incidents contemplated by the statute. Gray v. Hawkins, 133 N. C. 1, 6, 45 S. E. 363.

Same—Mere Declaration.—A mere declaration that it is the object of this deed, in part, to do so, and failing to appoint a trustee, does not create such a trust as the court would enforce by the appointment of a trustee. Gray v. Hawkins, 133 N. C. 1, 6, 45 S. E. 363.

Restricted as to Amount and Duration. — In Bank v. Heath, 187 N. C. 54, 64, 121 S. E. 24, the court said: "A perusal of the law will disclose that such trusts are only permissible for a restricted amount, 'an annual income not to exceed $500 net', and by correct interpretation to be applied to the support of the beneficiary for his life only."

Not a Passive Trust Subject to Debts.—A devise creating a spendthrift trust, under the section for the trustee to receive and pay the profits, annually, or oftener for the support and maintenance of the testator's named son, is not a passive trust either as to the principal or income, or one executed under the statute of uses, and is not subject, as to either, to the payment of the debts created by the cestui que trust, though he be a nonresident of the State. Fowler v. Webster, 173 N. C. 442, 92 S. E. 157.

"The courts cannot, without violating the right of property possessed by the trustor, and the proper discharge of the trust by the trustee, condemn any part of the income for the foreign purpose of paying the debts of the cestui que trust, since the whole idea and purpose of this trust is that the beneficiary is unfit to handle the income of the fund." Fowler v. Webster, 173 N. C. 442, 445, 92 S. E. 157.

Not Personal Property Exemption. — The effect of the spendthrift trust, Revisal, sec. 1588, now this section, is not to create a personal property exemption in favor of a nonresident cestui que trust in the income from the trust estate. Fowler v. Webster, 173 N. C. 442, 92 S. E. 157.

Not Subject to Alienation.—"In a spendthrift trust the beneficiary cannot 'exercise the highest right of property, namely, alienation' as to the income, nor will it 'upon his death undoubtedly be assets.' In spendthrift trusts authorized by the statute the beneficiary acquires no interest or property in the income any more than he does in the principal of the fund. He cannot alienate the income, he cannot direct its application in the purchase of any article whatever, or its disposal for any purpose." Fowler v. Webster, 173 N. C. 442, 444, 92 S. E. 157.

Trustee Makes All Disbursements.—The trustee holds the income just as he holds the principal, to be applied for the designated purposes. It is his duty to make the disbursement, whether for board or clothing or in any other method in his judgment required for the support of the beneficiary. Fowler v. Webster, 173 N. C. 442, 445, 92 S. E. 157.

Same—Not to Pay over Income to Cestui Que Trust.—The trustee is not authorized to pay over any part of the income to the beneficiary that he may spend it or use it or disburse it. The cardinal idea is that the cestui que trust is "incompetent and cannot be trusted with the handling of the income," (Beach on Trusts. § 554), which duty is to be discharged by the trustee. Fowler v. Webster, 173 N. C. 442, 445, 92 S. E. 157.

Trust Limitations Defeated by Fee Simple Devise.—In a fee simple devise with a subsequent provision that during the life of the devisee the property is to be "'managed" by the trustees, paying to him the income and exempting the property from liability for his debts, the provision is repugnant to the fee, and the limitations imposed are void; and at the suit of a purchaser for value under a deed from the devisee and the trustee, judgment against the latter and in favor of the plaintiff for possession should be granted. Vaughan v. Wise, 152 N. C. 31, 67 S. E. 33.

§ 1743. Titles quieted.—An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims; and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, that no such relief shall be granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is

claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section. (Rev., s. 1589; 1893, c. 6; 1903, c. 763; 1907, c. 888.)

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I. GENERAL CONSIDERATIONS.

Editor's Note.—The modern trend of Legislative enactments has been to remove, before sale, and as quickly and efficiently as possible, all defects of title to property sold under judicial process. The courts have been liberal in the construction of all such remedial legislation. In Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213. Mr. Justice Conner, in an able and elaborate opinion, reviews the policy and effect of this legislation and the decisions of many courts, and says: "The wisdom of enlarging the power of the court to deal with the subject is manifest. It is highly important to private right and public interest that titles shall be rendered secure and certain.....The unanimity with which judges have recognized the wisdom of the legislation, giving it a liberal construction, has made it effective." The first legislative act of this state looking to this end was the act of 1893 (chapter 6). Under this act, the court held, in Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635, "as to the fifth ground of demurrer, there is an allegation that the defendants claim that S. H. Fowler, made a deed of trust, that what purports to be such is on record, and that defendants are holding under it. This is sufficient, under Laws 1893, ch. 6, to proceed to have the cloud removed, though the plaintiffs are not in possession." And in McLean v. Shaw, 125 N. C. 491, 34 S. E. 634, it was said: "Under a line of decisions of this Court, culminating with McNamee v. Alexander, 109 N. C. 242, 13 S. E. 777, it was held that a plaintiff could not maintain an action to remove a cloud upon his title unless it appeared affirmatively that he was rightfully in possession of the land. The act of 1893 (chapter 6) extended such relief to those who were not in possession. Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635. It is not in contemplation of the act that a judgment lien should be included in the terms 'estate' and 'interest,' as they are used in the act." This case was decided at September Term, 1899. The Legislature, at its session in 1903, by chapter 763, amended the Public Laws 1893, ch. 6, sec. 1, by adding thereto the last sentence of the present section. Crockett v. Bray, 151 N. C. 615, 617, 66 S. E. 666.

This Section Is Highly Remedial.—Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541. This is a remedial statute which has been liberally construed quieting land titles, more comprehensive than the old suit in equity to remove a cloud from title. Jacobi Hdw. Co. v. Jones Cotton Co., 188 N. C. 442, 445, 124 S. E. 756.

This section and the amendatory acts thereto being remedial in nature, should have a liberal construction in order to execute fully the legislative intention and will. Stocks v. Stocks, 179 N. C. 285, 289, 102 S. E. 306. And to advance the remedy and permit the courts to bring the parties to an issue. Asheville Land Co. v. Lange, 150 N. C. 26, 30, 63 S. E. 164.

Does Not Deprive Defendant of Right.—The section deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on his pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. Jersey City v. Lembeck, 31 N. J. Eq., 265; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Restraining Sale under Execution.—Under this section the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands. Mizell v. Bazemore, 194 N. C. 324, 139 S. E. 453.

An usurious charge of interest on notes does not affect the validity of the mortgage or deed of trust securing them, under § 2306, and a suit brought to remove a cloud upon title to the lands under this section to the extent of the usurious charge of interest on the notes cannot be maintained. Briggs v. Industrial Bank, 197 N. C. 120, 147 S. E. 815.

Cited in Johnson v. Fry, 195 N. C. 832, 834, 143 S. E. 857; Sears v. Braswell, 197 N. C. 515, 526, 149 S. E. 846; Bechtel v. Bohannan, 198 N. C. 730, 731, 153 S. E. 316.

II. NATURE AND SCOPE.

A. Purpose.

General Observations. — In a recent case the Supreme Court gave the section a broad interpretation in order to carry out the evident purpose of its enactment, and said: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs." Satterwhite v. Gallagher, 173 N. C. 525, 528, 92 S. E. 369, citing Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Referring to a similar statute of Nebraska, Mr. Justice Field said, in Holland v. Challen, 110 U. S. 15, 28 L. Ed. 52, 3 S. Ct. 495, (cited in Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949): "Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate in it for the purpose of determining such estate and quieting his title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed, for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. It is manifestly to the interest of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character, statutes like the one in Nebraska have been passed by several states, and they accomplish a most useful purpose." Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Includes Any Adverse Interest. — The language of this section is broad and liberal, showing the purpose of General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541.

To Leave Lands Unfettered.—In Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541, the court said: "Walker, J., in Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949, speaking of the statute, says: 'The beneficial purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion.'"

"The beneficial purpose of the statute is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative." Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Effect of Busbee Cases.—In Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541, the Court further said: "In Rumbo v. Gay Mfg. Co., 129 N. C. 9, 10, 39 S. E.

591, Clark, C. J., says: It was because the General Assembly thought the equitable doctrines (as laid down in Busbee v. Macy, 85 N. C. 329, and Busbee v. Lewis, 85 N. C. 332, and like cases) inconvenient or unjust that the act of 1893 (this section) was passed."

To Broaden the Equitable Remedy.—This section giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. Southern State Bank v. Sumner, 187 N. C. 762, 122 S. E. 848.

It was said of this statute in Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949.

"The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources. It is highly remedial and beneficial in its nature, and should therefore be construed liberally. It is also a statute of repose, and also for that reason is entitled to favorable consideration. Adler v. Sullivan, 115 Ala., 582; Walton v. Perkins, 33 Minn., 357; Holmes v. Chester, 26 N. J. Eq., 81." Quoted with approval in Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 683, 96 S. E. 99.

B. Interest Necessary to Bring Action.

Editor's Note.—In Burnett v. Lyman, 141 N. C. 500, 54 S. E. 412, Clark, C. J., quotes with approval the language of Burwell, J., in Arrington v. Arrington, 114 N. C. 116, 120, 19 S. E. 278, as follows: "In an action to recover land the rule is that the plaintiff must have the right to the possession not only at the institution of the suit, but at the time of the trial also." And in the late case of Rutherford v. Ray, 147 N. C. 253, 61 S. E. 57, it was held that suit may be instituted by any person against any other person claiming an interest adverse to his title.

In Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541, it was held that "the contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him." It would seem that, in this case, the court lays down a much more liberal rule than had been formulated by any of the previous cases on the subject. It is interesting to note here the holding of a Federal Case, arising in North Carolina, Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741, involving an interpretation of this statute, and decided prior to Platkin v. Bank, supra, in which it was held that the plaintiff could maintain his action provided he had the legal title to either the whole or an undivided interest in the land. This holding was in perfect concord with the decided cases up to Plotkin v. Bank, supra, but is out of harmony with that case.

In Dick v. Faraker, 155 U. S. 404, 415, 39 L. Ed. 201, 15 S. Ct. 124, it was said: "A statute of Nebraska authorizes an action to be brought by any person of persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate. Nebraska Statute February 24, 1873; Rev. Statute 1873, p. 882. The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills. Under that statute, as under the general jurisdiction in equity, it is the title, that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In State v. Sioux City & Pacific Railroad, the Supreme Court of Nebraska said: 'Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title, in order to maintain the action.' 7 Nebraska 357, 376, and in Holland v. Challen, 110 U. S. 15, 28 L. Ed. 52, 3 S. Ct. 495, this Court said: "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises. The necessary conclusion is, that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title." Note the similarity of the Nebraska statute and our own, and compare the rule laid down by the Federal Courts with that laid down by the North Carolina Supreme Court.

Apparent Invalidity of Defendant's Title.—The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635; Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581; Beck v. Meroney, 135 N. C. 532, 47 S. E. 613; Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Remedy Given Whether in or out of Possession.—This section affords the remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, whether by way of claim of an enforceable parol trust, leases not required to be in writing, existent records or written instruments, that are reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affording a remedy by disclaimer when the party does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369.

Same—Former Law. — The authorities to the effect that only one in possession may maintain an action to remove a cloud from title, were decisions rendered prior to the act of 1893. Chapter 6; Revisal, sec. 1589. Since that statute, it is held that the action is maintainable, though plaintiff is not in the present possession or control of the property. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213; Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635; Speas v. Woodhouse, 162 N. C. 66, 69, 77 S. E. 1000.

Adverse Claimant to Execution Debtor.—If, real estate levied upon should be claimed by one other than the execution debtor, then nothing can more quickly bring up for trial the plaintiff's prayer to have the cloud removed from his title than to allow the execution sale to take place. If the purchaser should delay to commence suit for recovery of possession, then the claimant can commence proceedings under the section. McLean v. Shaw, 125 N. C. 491, 492, 34 S. E. 634.

Correction of Life Estate into Fee Simple. — Defendants have a right, in order to avoid multiplicity of suits, to ask for the correction of a life estate deed, under which they claim, into a fee simple deed, by way of counterclaim, not merely as a matter of defense, but to remove a cloud upon the title, under the section. McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.

Obscure Contingent Limitations.—The section enlarges the power of the courts to entertain suits to quiet titles, where the conditions were formerly such that a possessory action could not be brought; and this statute is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213.

When Land Conveyed Pendente Lite.—Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest, § 446, without claim of the right to the possession, under the provisions of this section; and where issue has been joined, he may, if successful, recover his costs. Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 125 S. E. 541.

Judgment Lien.—It is not in contemplation of the act that a judgment lien should be included in the terms "estate" and "interest" as they are used in the section. McLean v. Shaw, 125 N. C. 491, 492, 34 S. E. 634. This was changed by the Laws of 1903, C. 763. "Estate" and "Interest" now expressly embrace a judgment lien. See Editor's Note under Analysis line I, "General Considerations," of this section.

Action Lies to Prevent Creation of Cloud.—An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created (Thomas v. Simmons, 103 Ind. 538), and where the object is merely preventive an injunction is the proper remedy to restrain the doing of the wrongful act. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 686, 96 S. E. 99.

C. What Constitutes Cloud.

Deed without Feme Court's Privy Examination.—A contract to convey the lands of the wife, signed by her and her husband, but without having taken her privy examination, when recorded is a cloud upon her title to the lands and subject to her suit to remove the same, as such, within the intent and meaning of the section; though she be and remain in possession of the land. Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369.

Invalid Judgment as Cloud.—A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it,

as to fall within the provisions of this section. Stocks v. Stocks, 179 N. C. 285, 289, 102 S. E. 306.

Same—Judgment Obtained by Fraud.—The complaint in this suit alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right, it is held, sufficient for her to maintain an independent action to set aside the former judgment upon the issue of fraud, and also our statute to remove the former judgment as a cloud upon her title. Stocks v. Stocks, 179 N. C. 285, 102 S. E. 306.

Where a judgment entered in favor of the county in an action against the owner for taxes has been set aside upon motion after notice to the parties the owner, in an action to remove cloud upon title, is entitled to judgment canceling the tax deed. Galer v. Auburn-Asheville Co., 204 N. C. 683, 169 S. E. 642.

Tax Deed as Cloud upon Title.—Where a judgment entered in favor of the county in an action against the owner for taxes has been set aside upon motion after notice to the parties the owner, in an action to remove cloud upon title, is entitled to judgment canceling the tax deed. Galer v. Auburn-Asheville Co., 204 N. C. 683, 169 S. E. 642.

Proof Required of Plaintiff.—In a suit to remove a cloud upon the plaintiff's title, this section, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. It was held, that the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the information or correction of a conveyance of land. Ricks v. Brooks, 179 N. C. 204, 102 S. E. 207. See notes of this case under section 687.

III. ACTIONS.

A. In General.

Treated as Suit in Ejectment.—A suit instituted to determine conflicting claims to real property, under Act of 1893, chap. 6, may be properly treated as an action of ejectment, when the complaint alleges ownership in the plaintiff and possession in the defendant. Hines v. Moye, 125 N. C. 8, 34 S. E. 103.

When Adverse Claim Invalid.—Under Laws 1893, ch. 6, where, in an action to determine conflicting claims to real property, plaintiff being in possession, the court finds the claim of defendant to be invalid, the action should not be dismissed. Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581.

But the court should enter its decree removing the cloud upon the title. Rumbo v. Gay Mfg. Co., 129 N. C. 9, 10, 39 S. E. 581.

A judgment binds parties and privies only. Hines v. Moye, 125 N. C. 8, 34 S. E. 103.

When Court Will Hear and Determine without Action.—The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein the vendee has refused to accept the title on the ground of its being doubtful, either in its equitable jurisdiction as treating the controversy as a bill for specific performance or under the provisions of the section, for the purpose of removing clouds upon obscure titles. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213.

Costs.—Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable, with the costs under the express provisions of this section. Clemmons v. Jackson, 183 N. C. 382, 111 S. E. 609.

In an action for trespass and for damages the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. Clemmons v. Jackson, 183 N. C. 382, 111 S. E. 609.

B. Pleadings.

Sufficiency of Bill of Complaint.—Where a bill asserts that the complainant is the owner of certain designated lands, sets forth the chain of title, and alleges that the defendant claims an adverse interest in the said lands, which said claim renders sale impossible and otherwise casts a cloud over complainant's title, it sufficiently states a cause of action to quiet title under this section. North Carolina Min. Co. v. Westfieldt, 151 Fed. 290.

Defendant Need Only Be Claimant.—It is true that under the act of the Legislature, 1893, ch. 6, now this section, a plaintiff may maintain an action to remove a cloud from his title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. Duncan v. Hall, 117 N. C. 443, 446, 23 S. E. 362.

Same—Unnecessary to Allege Possession. — This section removed the necessity for alleging the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim the plaintiff pays the cost, and the title as between them is settled. Asheville Land Co. v. Lange, 150 N. C. 26, 30, 63 S. E. 164.

When Occupation Is Alleged.—But where he alleges an occupation as the cause of action, not only must the allegation and proof correspond, but the testimony offered to show possession is open to objection and exception on the ground of competency. Duncan v. Hall, 117 N. C. 443, 447, 23 S. E. 362.

Allegation of Nonpayment of Taxes. — In a suit to remove a cloud on the title to lands, the suggestion that plaintiff's ancestors have not, for many years, paid the tax on the land, is immaterial because to do so does not, under any statute in force in this state, work a forfeiture of title, otherwise than by a sale conducted in conformity with the law. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Sufficient to Raise Issue.—Where the complaint in a suit to remove a cloud upon plaintiff's title to land, alleges that the plaintiff is the owner of the locus in quo, and asks for a reformation of his deed to the lands to show that by mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed, is sufficient to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. Brinson v. Morris, 192 N. C. 214, 134 S. E. 453.

Issue as to Delivery of Deed.—Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery under this section the court's refusal to submit an issue thereon entitles appellant to a new trial. Ferguson v. Ferguson, 206 N. C. 483, 174 S. E. 304.

C. Jurisdiction of Courts.

Advisory Jurisdiction of Courts.—The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. Such is not sustained under this section, when not brought by the plaintiff against some person claiming an adverse estate or interest. Heptinstall v. Newsome, 146 N. C. 503, 60 S. E. 416.

Concurrent Jurisdiction.—Where there is an action pending in the State Courts to try the title to lands under this section, the State Courts have thereby acquired jurisdiction over the property, and the Federal Courts will not entertain a suit in equity on the same facts and for the same relief. Westfeldt v. North Carolina Min. Co., 166 Fed. 706.

Diverse Citizenship.—The Circuit Court of the United States for the Eastern District of Arkansas has jurisdiction of a suit in equity, brought by a citizen of Ohio against a citizen of Illinois, to remove a cloud from the title to real estate situated in that district. Dick v. Foraker, 155 U. S. 404, 39 L. Ed. 201, 15 S. Ct. 124.

The remedy given by statutes of this character may be enforced in the federal court when the parties are inhabitants of different states. Holland v. Challen, 110 U. S. 15, 28 L. Ed. 52, 3 Sup. Ct. 495. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Equity Jurisdiction of Federal Courts.—In an action under this section, while it is true that a federal court of equity lacks jurisdiction of a suit brought against a number of defendants claiming severally different portions of the land in dispute, on the ground of avoiding a multiplicity of suits, that ground may oust the court's jurisdiction in respect to those defendants who raise the objection, and, where title and possession in the complainant is sufficiently alleged, it is error to dismiss it as to those defendants who have made no defense, but submitted themselves and their interests to the jurisdiction of the court. New Jersey, etc., Co. v. Gardner-Lacy Lumber Co., 178 Fed. 772.

This section does not enlarge the jurisdiction of federal courts of equity, as it merely regulates procedure and does not create any substantive right. And, even if it could be considered as creating an equitable right, it would not authorize the trial by a federal court of equity of what is in essence an action of ejectment, for the reason that in such action the defendant is entitled under the federal constitution to a trial by jury. Wood v. Phillips, 50 F. (2d) 714, 716.

§ 1744. Remainders to uncertain persons; procedure for sale; proceeds secured.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale or mortgage of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other civil actions, as provided by section 479, and service of summons upon nonresidents, or persons whose names and residences are unknown, by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being whose names and residence are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenants' share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other non-productive and unimproved real estate so as to make the same profit bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. This provision (as to sale of unproductive lands) being remedial shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage—1927: Provided that the provision shall not affect pending litigation.

The clerk of the superior court is authorized to make all orders for the sale or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in coupon or registered bonds of the United States of America (commonly called liberty bonds) issued incident to the late war between the United States and the imperial German government or bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestments, and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in liberty bonds or state bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such terms and on such conditions as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage to be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interests of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said reports to be audited in the same manner as provided for the auditing of

guardian's accounts. The owner of vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said persons uses or occupies said premises he or she shall pay the said taxes, interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interest and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word mortgage whenever used herein shall be construed to include deeds in trust. (Rev., s. 1590; 1903, c. 99; 1905, c. 548; 1907, cc. 956, 980; 1919, c. 17; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299.)

I. General Constructions.
II. Actions in Superior Court for Sale.
III. Sale and Reinvestment.
A. General Rules and Incidents Governing.
B. Powers of Clerk of Superior Court.
C. Application.

Cross References.

As to vagueness of description in instrument of conveyance not to invalidate, see sec. 992. As to vagueness of description in pleadings, see sec. 1783. As to life tenant as party to partition sale, see sec. 3235. As to shares of persons not known or not sui juris secured in partition sale, see sec. 3245. As to constitutional provision against perpetuities, see N. C. Const. Art. I, § 31.

I. GENERAL CONSIDERATIONS.

Editor's Note.—This section was amended by the Laws of 1925, ch. 281 by inserting, in the third line of the fourth paragraph after the word "coupon" and before the word "bonds" the words "or registered;" by striking out in the fourth paragraph "and evidenced by the coupons attached to;" by inserting in line seven after the words "Imperial German Government" and before the word "but", the words "or bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two;" and by inserting in line twenty, of the said fourth paragraph, after the words "liberty bonds," and before the word "heretofore", the words "or State bonds."

The section was further amended by the Laws 1927, ch. 124, so as to permit a life tenant to bring an action for sale and reinvestment without joinder of remaindermen or reversioners. The rights of persons not sui juris are to be protected by a disinterested attorney appointed by the court. The amendment, being remedial in its nature, is made applicable to all cases where any title or interest in such lands was acquired before, as well as after, its enactment, with a proviso exempting pending litigation from its effect.

The only change effected by the 1933 amendment occurs in the second paragraph of the section. In the next to the last sentence of that paragraph, Public Laws of 1933, c. 123 inserted, following the word "property" and preceding the word "reinvestment", the words "for the purpose of obtaining funds for improving other non-productive," etc.

The amendment of 1935 inserted the provision at the end of the second sentence of the fifth paragraph relating to existing liens.

Constitutionality and Validity.—Revisal, sec. 1590, now this section, providing for the sale of contingent remainders, is constitutional and valid. Smith v. Miller, 151 N. C. 620, 66 S. E. 671.

This section does not interfere with the essential rights of ownership but operating in addition to those already possessed, is constitutional and valid. Pendlen v. Williams, 175 N. C. 248, 95 S. E. 500.

Retroactive Effect.—In Springs v. Scott, 132 N. C. 548, 44 S. E. 116, Mr. Justice Connor, speaking for the Court as to the validity of chapter 99, Laws 1903 (Rev., sec. 1509), now this section, in respect to its retrospective operation upon the will considered in that case and the estates that were created thereby, demonstrates by reason and authority that the act is valid, even when allowed to reach back and affect estates already created by will, so far though only as it is permitted to apply to interests not yet vested. Anderson v. Wilkins, 142 N. C. 154, 159, 55 S. E. 272.

The decision in Springs v. Scott was approved in Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556, a case in which it appeared that the will was made prior to the passage of the Act of 1903. It was there held that the Act of 1903 operated retrospectively, so as to apply to contingent interest created by a will which had already taken effect by the death of the testator. Anderson v. Wilkins, 142 N. C. 154, 160, 55 S. E. 272.

Purpose of Section.—It was not the purpose of this section to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

It will be noted that the statute does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment and subject to the right to use a reasonable portion of the amount for the improvement of remainder, a case presented in Smith v. Miller, 151 N. C. 620, 66 S. E. 671, and approved, when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. Dawson v. Wood, 177 N. C. 158, 163, 98 S. E. 459.

To prevent any possible doubt of the existence of the power of the Court, upon the application of all the parties in interest, the trustee representing contingent remaindermen, to provide for its exercise and protect the interest of all parties in remainder, whether in esse or not, the Act of 1903, being section 1590, Rev., now this section was passed. McAfee v. Green, 143 N. C. 411, 417, 55 S. E. 828.

When Applicable.—This section and § 1745 apply only to a sale of property in which there are or have been contingent interests. Waddell v. United Cigar Stores, 195 N. C. 434, 142 S. E. 585.

A lease authorized by the decree of a court of chancery may be binding upon beneficiaries not in esse, when their interests are same as those of persons in being who are subjected by due process to the jurisdiction of the court. Waddell v. United Cigar Stores, 195 N. C. 434, 142 S. E. 585, containing illustration of lease of trust property held valid over the objection that it may extend beyond the term of the trust.

Status of Remainders.—"Contingent remainders are no longer considered mere possibilities which cannot be transferred, but a remainder-man whose estate is contingent may convey it." 2 N. C. Law Rev. 126; Beacon v. Amos, 161 N. C. 357, 77 S. E. 407.

Cited in Greene v. Stadiem, 198 N. C. 445, 448, 152 S. E. 398; Hines v. Williams, 198 N. C. 420, 152 S. E. 39.

II. ACTIONS IN SUPERIOR COURT FOR SALE.

General Requirements for Sale. — Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of Revisal, 1590, now this section, under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so require, those living and in present interest are represented in persons, and unborn children by guardian ad litem. McLean v. Caldwell, 178 N. C. 424, 100 S. E. 888.

Power of Court to Order Sale.—It is within the power of the court, having jurisdiction, to order the private sale of lands for the purpose of dividing the proceeds among tenants in common. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there was "a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine whom the remaindermen are," under the procedure therein laid down. Dawson v. Wood, 177 N. C. 158, 98 S. E. 459.

The court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons all or some of

whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse, and a party to the proceeding, to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse. Springs v. Scott, 132 N. C. 548, 44 S. E. 116.

The court has the power to order the private sale of lands affected with contingent interests under the provisions of this section under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto. DeLaney v. Clark, 196 N. C. 282, 145 S. E. 398.

Failure to Serve Summons on Infant—Setting Aside Sale. —Where in proceedings to sell lands affected with contingent interests the provisions of § 1744, have been observed, and the clerk has appointed a guardian ad litem for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity within § 451 that will not render the sale void and a nullity. However, on a proper showing the sale may be set aside as to all the parties except an innocent purchaser without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. Welch v. Welch, 194 N. C. 633, 140 S. E. 436.

Appeal from Proceedings Improperly Brought before Clerk. — Lands subject to contingent limitations may be sold by order of the judge of the superior court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. Springs v. Scott, 132 N. C. 548, 44 S. E. 116.

When No Appeal Taken Parties Estopped. — Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee to make sale of the lands as fully as the executor under the will was therein authorized to make. Hayden v. Hayden, 178 N. C. 259, 100 S. E. 515.

Same—Payment of Betterments. — Where a preliminary judgment in proceedings to sell lands with contingent interests provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon the parties as an estoppel. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500.

Who May Institute Suit. — Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. Dawson v. Wood, 177 N. C. 158, 98 S. E. 459.

Necessary Parties.—Where a devisee and her living children and grandchildren have brought proceedings to have the timber on the lands affected with contingent interest sold for reinvestment, pursuant to this section, valid objection that no one having a vested interest in the lands had been made a party cannot be sustained. Thompson v. Humphrey, 179 N. C. 44, 101 S. E. 738; Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

In proceedings under the section certain contingent interest in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired, under the original deed in trust, by the trustee had become passive in him, and it is held that as, under the statute of uses, the legal and equitable title had merged in the same person neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent interests were represented by some of the parties to the suit. Lee v. Oates, 171 N. C. 717, 718, 88 S. E. 889.

Same—Defendants.—Construing the statute as amended in the carefully considered case of Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556, the court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and as to others more remotely interested they could have their interest represented and protected by a guardian ad litem as the statute provides. Dawson v. Wood, 177 N. C. 158, 163, 98 S. E. 459; Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556.

Judgment under Former Law Does Not Work an Estoppel.—A former action determined before the enactment on the subject by the Legislature, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possibility be interested, united in such decree, cannot estop the parties to proceedings thereafter brought under the provisions of the section authorizing the judicial sale of property, or portions thereof, when there is a vested interest with remainder over to persons not in being, or when the contingency has not yet happened, etc. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500.

III. SALE AND REINVESTMENT.

A. General Rules and Incidents Governing.

Effect of Invalid Decree for Sale and Reinvestment.—In an action brought under the provisions of the section, to sell certain lands devised to E. for life and a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the city lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but only having funds sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a desirable investment, especially in the unfurnished condition in which it then would be left. It was held, (1) the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interest involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived to a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or material men of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner sell the hotel lot and report to the court, and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of material men, etc. Smith v. Miller, 151 N. C. 620, 66 S. E. 671.

Effect of Omitting Bond.—In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by the amendatory act of 1919, chapter 17 and 259, that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the superior court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Public or Private Sale Permissible.—The sale of estates affected, with contingent interests, made under the provision of this section, may, in the sound discretion of the trial judge, and subject to the approval, be sold either at public auction or by private negotiation, as the best interests of the parties may require. Middleton v. Rigsbee, 179 N. C. 437, 102 S. E. 780; McAfee v. Green, 143 N. C. 411, 55 S. E. 828.

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of this section, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Where the provisions of this section, have been observed in the sale of lands affected with contingent interests, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

Decree Must Provide for Reinvestment. — Where real estate is sold under order of the court, the decree must

provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests. Springs v. Scott, 132 N. C. 548, 44 S. E. 116.

Discretion of Court and Clerk in Reinvestment. — The preservation of the proceeds of the sale of lands, affected with contingent interests, under this section is referred to the sound discretion of the trial judge and in this case no error is found to the order requiring the funds to be paid into the office of the clerk of the superior court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, whether the estate, under correct interpretation of the deed, be one for life to be enlarged into a fee, or a fee simple, determinable on their death without issue, it appearing that they were given the usufruct of the land. Pendleton v. Williams, 175 N. C. 248, 249, 95 S. E. 500. It would seem that by amendment of 1923, the question of reinstatement rests within the discretion of the clerk.

Same—Time of Reinvestment. — In Laws of 1905, ch. 548, this reinvestment in realty was required to be within two years, but such requirement was removed by the later Acts of 1907, chs. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered. Dawson v. Wood, 177 N. C. 158, 163, 98 S. E. 459.

Applied to Charitable and Other Trusts.—Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estate in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. Middleton v. Rigsbee, 179 N. C. 437, 441, 102 S. E. 780.

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. Middleton v. Rigsbee, 179 N. C. 437, 441, 102 S. E. 780.

Applied to Sale of Growing Timber.—The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, is affected by the contingencies contemplated by this section. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

Same—Supplementary Decree. — Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc. (Laws 1919, ch. 259); but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

Purchaser's Liability Ends When Money Paid into Court.—A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of Revisal, 1590, now this section, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it. McLean v. Caldwell, 178 N. C. 424, 100 S. E. 888.

Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the funds, its safety being taken care of by the court in its final decree. DeLaney v. Clark, 196 N. C. 282, 145 S. E. 398.

Same—Takes Fee Simple Title.—A purchaser at a sale of land with contingent interests allowed under the provisions of the section acquires a fee simple title, upon payment of purchase price to the court or person authorized to receive it, without being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 550.

Sale for Reinvestment.—A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds under § 3235, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of this section. Smith v. Suitt, 199 N. C. 5, 153 S. E. 602.

Interests of Persons Non Sui Juris Protected by Attorney.—Where a suit brought to sell this property complies in every particular with the requirements of the Torrens System, and the title deed by the commissioner would cut off the rights of any other person in being or hereafter to come into being, as an attorney was appointed by the court to represent such possible or contingent interests. Ryder v. Oates, 173 N. C. 569, 572, 92 S. E. 508; Hayden v. Hayden, 178 N. C. 259, 264, 100 S. E. 515.

B. Powers of Clerk of Superior Court.

Authority of Clerk.—It was not contemplated by this section that the rights of parties should be entrusted to the clerks of the superior court in ordinary special proceedings without approval or confirmation by a judge of the superior court. The section prescribes the method in which there shall be a sale decreed when there is a contingent remainder and requires a decree for proper investment of the funds of remaindermen. Ray v. Poole, 187 N. C. 749, 751, 123 S. E. 5.

Sales of Contingent Interests of Persons Non Sui Juris.—The clerks of courts do not have jurisdiction to order the sale of contingent interests of persons not sui juris in lands, and suits to sell such interest, when the circumstances of the ward require it, should be determined in the Superior Court, in its equitable jurisdiction, which is required to order an investment of the funds in proper instances in accordance with the terms and conditions imposed by the conveyance, in order that the lawful intent of the donor may not be defeated. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

The order of sale by the clerk of the court of the contingent interest of a lunatic in lands approved by the judge, in proceedings brought for the purpose, is void for the lack of jurisdiction, and deed thereto of the guardian conveys nothing to his grantee. Smith v. Witter, 174 N. C. 616, 94 S. E. 402. It would seem that the amendment of 1923 extended the jurisdiction of the clerk to cover this situation. It will be noted that this case was decided in the Fall Term, 1917.

Proceedings Brought Under Section 3215.—A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of C. S., 3215, and these proceedings so brought cannot be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally brought in the later jurisdiction, with certain requirements for the protection of contingent remaindermen, which must be strictly followed; and, though under C. S., 3234, 3235, a sale is provided when the land is affected with contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. Ray v. Poole, 187 N. C. 749, 123 S. E. 5.

C. Application.

General Illustrations.—Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of this section, and have those remotely interested represented by guardian ad litem for the protection of their interests; and where it is made to appear that the interest of all parties require, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of this section, having

made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part to a purchaser she had secured for a certain price would meet the demands of the town for conformity with its certain health regulations as to the removal of surface privies, should enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purpose, etc.; that the property as it stood was rapidly depreciating, and there were no available funds, otherwise, to meet the necessary and insistent demands. Held, a demurrer was bad, and properly overruled. Middleton v. Rigsbee, 179 N. C. 437, 102 S. E. 780.

Where the grantors in a deed have erroneously assumed that they had title to the lands they conveyed in fee, but which was affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, which authorizes the sale of land affected by such contingencies, and in these proceedings have protected the interest of the remote remainderman by the appointment for them of a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment properly authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. Myer v. Thompson, 183 N. C. 543, 112 S. E. 328.

This proceeding in which the order for the sale of the said lot has been made was not instituted and has not been conducted in accordance with this section. The power of sale has not been exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors are not represented by guardian ad litem appointed by the judge, but by a next friend appointed by the clerk. The order of sale was signed, not during the term of the superior court in Haywood county, but by the judge holding the courts of the twentieth district (which includes Haywood county) at Sylva, in Jackson county, in said district. The order of sale cannot therefore be held valid, because made under the power conferred upon the superior court. Lide v. Wells, 190 N. C. 37, 128 S. E. 477, 480.

Where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold in accordance with this section, the demurrer of the vested remaindermen is improperly sustained, the complaint alleging at least one good cause of action. Stepp v. Stepp, 200 N. C. 237, 156 S. E. 804.

In a suit regarding the management of the trust estate where the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented by a guardian ad litem, who also represents as a class the other grandchildren not in esse, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. Spencer v. McCleneghan, 202 N. C. 662, 163 S. E. 753.

When Trustee May Not Sell.—Where the testator gives the discretionary power of sale to his trustees of certain of his lands, reserving therefrom a designated vacant lot, the lot so excepted cannot be sold by virtue of the provisions of the section, but the Court, in the exercise of its equitable jurisdiction, may order a sale, and the purchaser, upon complying with his bid, will get a good title. Lide v. Wells, 190 N. C. 37, 38, 128 S. E. 477.

§ 1745. Sales or mortgages of contingent remainders validated.—In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitations, where a judgment of a superior court has been rendered authorizing the sale or mortgaging, including execution of deeds of trust, of such property discharged of such contingent remainder, executory devise, or other limitations in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon other persons not then in being or whose estates had not then vested: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate. (Rev., s. 1591; 1905, c. 93; 1923, c. 64; 1935, c. 36.

As to revocation of deeds of future interests made to persons not in esse, see sec. 996.

Editor's Note.—By the amendment of 1935 this section was made to apply to mortgages and deeds of trust. The amendment also added the clause just preceding the proviso reading "or whose estates had not then vested."

Constitutionality and Validity.—The section is a valid exercise of legislative power. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272.

The section, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. Bullock v. Planters Cotton-Seed Oil, 165 N. C. 63, 80 S. E. 972.

"So long as the interest remains contingent only, the Legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an uncertain event is within its control, not being a vested right which is protected by constitutional guaranties." Anderson v. Wilkins, 142 N. C. 154, 158, 55 S. E. 272.

Partition Sale Not Authorized.—The section does not authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children. Ray v. Poole, 187 N. C. 749, 751, 123 S. E. 5.

Application. — A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: It was held, that the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591 now this section.) Bullock v. Planters Cotton-Seed Oil Co., 165 N. C. 63, 80 S. E. 972.

Same—Extended to 1923.—"C. 64 Laws 1923 re-enacts section 1745, validating sales of property under a judgment of the superior court, where the property has been conveyed by deed or devised by will, upon contingent remainder, executory devise, or other limitation, and the judgment has authorized a sale of the property discharged of the contingent remainder or other limitation. This section was enacted in 1905, validating such sales made before that date, and the present statute extends to such sales made since 1905 and up to March 6, 1923." 1 N. C. Law Rev. 285.

Cited in Hines v. Williams, 198 N. C. 420, 152 S. E. 39.

§ 1746. Freeholders in petition for special taxes defined.—In all cases where a petition by a specific number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of taxes upon realty, all residents of legal age owning realty for life or longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement. (1915, c. 22.)

Former Law.—The word "freeholders," used in chapter 135, sec. 1, Public Laws of 1911, amending revisal, sec. 4115, section 5526 of this code as to who are required to sign the petition for the laying off special school districts and levying a tax therein, did not include females. Gill v. Board, 160 N. C. 176, 76 S. E. 203.

Women Now Included. — In ascertaining the necessary number of resident freeholders for a petition in a proposed new school district, women freeholders must be counted, under the provisions of this section. Chitty v. Parker, 172 N. C. 126, 90 S. E. 17.

CHAPTER 35

EVIDENCE

Art. 1. Statutes

§ 1747. Printed statutes and certified copies evidence.—All statutes, or joint resolutions, passed

by the general assembly may be read in evidence from the printed statute book; or a copy of any act of the general assembly certified by the secretary of state shall be received in evidence in every court. (Rev., ss. 1592, 1593; Code, ss. 1339, 1340; R. C., c. 44, ss. 4, 5; 1826, c. 7.)

Public Statute Admissible.—Where the public printer has published a certain act with other public acts of the general assembly, it is made, presumptively at least, a part of the public laws of the State and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. Wrught Iron, etc., Co. v. Carver, 118 N. C. 328, 337, 24 S. E. 352.

Private Statute Not Admissible.—The statute incorporating the North Carolina Railroad Company is a private act; and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence. Durham v. Richmond, etc., R. Co., 108 N. C. 399, 400, 402, 12 S. E. 1040, 13 S. E. 1.

Same—Question of Law.—Whether the statute, or some enactment in it, is public or private, is a question of law, which the court must determine, in the absence of statutory enactment declaring and settling its nature. Durham v. Richmond, etc., R. Co., 108 N. C. 399, 400, 12 S. E. 1040; 13 S. E. 1.

Journal of Legislature.—A copy of the journal of the Legislature deposited with the Secretary of State is not evidence for any purpose. Wilson v. Markley, 133 N. C. 616, 623, 45 S. E. 1023. The court said: "It is the journal, which we understand to be the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence." Id.

§ 1748. Martin's collection of private acts.—Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court. (Rev., s. 1593; Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2.)

§ 1749. Laws of other states or foreign countries.—A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a printed volume of the laws of such state, territory or country, on file in the state or supreme court library, or in the offices of the governor or secretary of state. (Rev., s. 1594; Code, s. 1338; R. C., c. 44, s. 3; 1823, c. 1193, ss. 1, 3; C. C. P., s. 360.)

Cross References.—For full treatment of this subject, see 5 N. C. Enc. Dig. 419, et seq.; 14 N. C. Enc. Dig. 78 et seq. See also the general treatment of the subject of judicial notice in Greenleaf on Evidence, at page 8. As to when court may determine whether partition statutes exist in another state, see sec. 3552.

Foreign Laws Must Be Proved.—The courts will not take judicial notice of the statutes and laws in the different states which may have changed the common law. Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838.

Same—Question of Fact.—What is the statute law of another state is a question of fact to be proved like any other fact. Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362. See also Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838.

Same—Burden of Proof.—The proof of the laws of another state must be shown in evidence by the party relying on them, in the manner prescribed by the provisions of this section. Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838.

Where a party to an action contends that the law of the forum in another state controls the disposition of the issues involved, he is required, under this section, to show statute or written law or controlling decisions thereon, or such facts as would make the laws of that state applicable. Kelly v. Springfield Tire Co. v. Lester, 192 N. C. 642, 135 S. E. 778.

Instructions to Jury.—Where the foreign law has been proved it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case at hand, and its effect on the case, and it is error to refer the whole case to the jury without instructions. Hooper v. Moore, 50 N. C. 130.

Publication of Foreign Laws Admissible.—A book purporting to be the publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. Balk v. Harris, 122 N. C. 64, 30 S. E. 318; Copeland v. Collins, 122 N. C. 619, 621, 30 S. E. 315.

Same—Printed Copy Admissible.—By the terms of this section, a printed copy of the acts of the legislature of another state, is admissible in our courts to prove the statute law of such other state. State v. Behrman, 114 N. C. 797, 804, 19 S. E. 220. Under the law as it stood prior to the enactment of this section, a printed copy of the acts of the legislature of a foreign state was not admissible in evidence. Id.

United States Agricultural Regulations Judicially Noticed.—The regulations of the United States Agricultural Department, concerning the transportation of cattle, are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. State v. Railroad, 141 N. C. 846, 54 S. E. 294.

Presumption as Regards Common Law.—In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those states whose jurisprudence is not founded on the common law. Miller v. Atlantic, etc., R. Co., 154 N. C. 441, 70 S. E. 838. See also the luminous treatment of the subject generally in Chamberlayne on Evidence, vol. I, sec. 584 et seq.

Same—Question for Jury.—Where the common law of another state is proved, the court must leave the evidence of what that law is to the jury and cannot inform them what the law is. Moore v. Gwynn, 27 N. C. 187.

Witnesses.—Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. State v. Behrman, 114 N. C. 797, 802, 19 S. E. 220.

An examination of the cases will show that an attempt to prevent the admission of the testimony of a party who professes to know the state of the unwritten law of a foreign state, has quite frequently been made by the litigating parties. The basis of this attempt, and the reasons given in support thereof, has been different in a large number of the decided cases. One of the grounds, frequently resorted to as a means for the exclusion of this evidence, is the fact that the particular witness has not been shown to be and perhaps could not be an expert. This point, however, has been of little avail to the party contesting the admissibility of the evidence, since the construction placed on this section has been that it is not the legislative intent that expert evidence be required in such a case. In reaching this conclusion much weight has been attached to the wording that the common law of another state may be proved as "a fact."—Ed. Note.

The law of another State may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other State, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. Howard v. Howard, 200 N. C. 574, 158 S. E. 101.

A transcript of a statute, once duly certified by the Secretary of State in the manner prescribed by our law, is evidence at all times of its being in force according to its terms unless a repeal is shown. State v. Cheek, 35 N. C. 114, 116.

Same—Applicable to Criminal and Civil Cases.—The certificate of the Secretary of State, in relation to the statutes

of another state, given in pursuance of this section is evidence in criminal and civil cases. State v. Patterson, 24 N. C. 346.

§ 1749(a). Judicial notice of laws of United States, other States and foreign countries. — When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

As to judicial notice of private statutes, see § 541.

Editor's Note.—The act from which this section was codified provided that it should not apply in the trial of any cause of action which accrued prior to its ratification on February 16, 1931.

§ 1750. Town ordinances certified.—In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance. (Rev., s. 1595; 1899, c. 277, s. 2.)

When Certification Unnecessary.—The certification of a town ordinance as required by this section, is only prima facie evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage. State v. Razook, 179 N. C. 708, 103 S. E. 67.

Evidence Insufficient to Rebut Prima Facie Case.—When the defendant, convicted of the violation of a city ordinance, on appeal introduces in evidence the minutes of the meeting of the governing authorities of the town held on the date when the purported ordinance was alleged to have been adopted, which does not show its passage on that date, it is not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction. State v. Gill, 195 N. C. 425, 142 S. E. 328.

Art. 2. Grants, Deeds and Wills

§ 1751. Copies certified by secretary of state.—Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original. (Rev., s. 1596; Code, s. 1341; R. C., c. 44, s. 6; 1822, c. 1154.)

In General.—This section does not make the copies better evidence than the registration of the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. Richards v. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485.

Certification by Clerk of Secretary of State.—See sec. 1754.

Abstract Competent to Show Title.—Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the State. Marshall v. Corbett, 137 N. C. 555, 50 S. E. 210.

§ 1752. Certified copies of grants and abstracts.—For the purpose of showing title from the state of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the secretary of state, given in abstract or in full, and with or without the signature of the governor and the great seal of the state appearing upon such record, shall be competent evidence in the courts of this state or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the state to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 1.)

Section Constitutional.—This section is constitutional and valid. Howell v. Hurley, 170 N. C. 401, 87 S. E. 107.

Copy Conclusive as to Regularity of Original.—An abstract of a grant of the State's land by the Secretary of State imports the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. Howell v. Hurley, 110 N. C. 401, 87 S. E. 107.

§ 1753. Certified copies of grants and abstracts recorded.—Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the state of North Carolina to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2.)

§ 1754. Copies of grants certified by clerk of secretary of state validated. — All copies of grants heretofore issued from the office of the secretary of state, duly certified under the great seal of the state, and to which the name of the secretary has been written or affixed by the clerk of the said secretary of state, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this state when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the secretary of state in person and duly registered. (Rev., s. 1597; 1901, c. 613.)

Editor's Note.—Prior to the enactment of this section it was consistently held that the clerk of the Secretary of State had no power to certify and affix the great seal of the state to copies of grants and other papers from the Secretary of State's office. Beam v. Jennings, 96 N. C. 82, 2 S. E. 245, but such acts on the part of the clerk are now validated by the provisions of this section.

§ 1755. Copies of grants in Burke.—Copies of grants issued by the state within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (Rev., s. 1610; 1901, c. 513.)

§ 1756. Copies of grants in Moore.—Copies of grants for land situated in Moore county and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the secretary of state, shall have the force and effect of the originals and be evidence in all courts. (Rev., s. 1613; 1903, c. 214.)

§ 1757. Copies of grants in Onslow.—The copies of grants made by the register of deeds of Onslow county under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow county issued prior to the year one thousand eight hundred, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said chapter 434 of the laws of one thousand nine hundred and seven, shall be received as evidence in all courts of the state, and certified copies therefrom shall be received as evidence. (1907, c. 434.)

§ 1758. Certain deeds dated before 1835 evidence of due execution.—In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the state of North Carolina are grantees and bearing date prior to the year one thousand eight hundred and thirty-five and purporting to have been filed and recorded in the office of the secretary of state of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the general assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. But this shall not apply to actions pending on March 3, 1915. (1915, c. 75.)

§ 1759. Certified copies of maps of Cherokee lands.—Certified copies by the secretary of state of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in chapter one hundred and seventy-five of the laws of one thousand nine hundred and eleven, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps. (1911, c. 175.)

§ 1760. Certified copies of certain surveys and maps obtained from the state of Tennessee.—A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the state of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the secretary of state under the provisions of chapter one hundred and sixty-two of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the secretary of state, be competent evidence in the trial of any action in the courts of the state. (1913, s. 162.)

§ 1761. Evidence of title under H. E. McCulloch grants.—In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (Rev., s. 1600; Code, s. 1336; R. C., c. 44, s. 1; 1819, c. 1021.)

§ 1762. Conveyances or certified copies evidence of title under McCulloch.—In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (Rev., s. 1601; Code, s. 1337; R. C., c. 44, s. 2; 1807, c. 724.)

§ 1763. Certified copies of registered instruments evidence.—A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (Rev., s. 1598; Code, s. 1251; 1893, c. 119, s. 2; R. C., c. 37, s. 16; 1846, c. 68, s. 1.)

Editor's Note.—The provisions of this section permitting the reception of the copies herein mentioned as evidence, constitute a statutory exception to the rule of the best evidence. Under this rule it is well established that a party is required to introduce that kind of proof which affords the greatest certainty of the fact in question. In other words he will not be permitted to offer evidence of little

weight when he is in possession of much better evidence. However this rule is not without its numerous exceptions, the foundation of which is that the primary object of all rules of evidence is to promote the administration of justice, and wherever general convenience requires it, the general rule will be bent or construed so as to meet the exigency.

The limitation placed on the exception contained in this section must be noted. The certified copies are admissible in evidence "unless by rule or order of the court, * * * such party shall have been previously required to produce the original * * *," in which case the general rule again becomes applicable and the original must be produced or its absence accounted for.

Certified Copy as Evidence.—The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued. Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887.

Copy of Registered Bond.—The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed has been made by the administrator of said obligor, is within the spirit and meaning of this section, and is admissible without accounting for the absence of the original. Doe v. Shelton, 46 N. C. 370.

Same—Official Bond.—Inasmuch as the duly certified copy of the record of any instrument required to be registered is admissible as full and sufficient evidence of such instrument, and as the register of deeds is required to register and keep the bond of the superior court clerk, a duly certified copy of the record of such bond is competent evidence of its provisions. State v. Baird, 118 N. C. 854, 24 S. E. 668.

Lack of Seal No Effect.—A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the state, is admissible in evidence, though the registry does not show the impress of the seal, or scroll to indicate it. Aycock v. Raleigh, etc., Railroad, 89 N. C. 321. And while the seal may be necessary to authenticate the grant, it will be presumed to have been affixed as required by law. Id.

Signature of Clerk Essential.—The failure of the clerk to sign his name to the certificate for registration, a requirement found in the provisions of sec. 3305, renders the instrument inadmissible as evidence under this section. Woodlieff v. Woodlieff, 192 N. C. 634, 135 S. E. 612.

Production of Original to Correct Mistakes.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Parol Evidence to Explain Variance.—Where the original deed was lost, and it was contended that there was a material variance between the certified copy and the original deed, parol evidence to prove the correct description contained in the original instrument was rejected, this section being construed as to have no application to such a case. Hooper v. Justice, 111 N. C. 418, 422, 16 S. E. 626.

Time and Manner of Objecting.—A party against whom the registry of a deed (or other instrument), or a copy thereof has been introduced in evidence, can not then raise the objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required the production of the original in the way provided by this section. Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902.

§ 1764. Common survey of contiguous tracts evident.—Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner. (Rev., s. 1505; Code, s. 1277; 1869-70, c. 34, ss. 1, 2.)

When Possession of Part Equivalent to Whole.—Under the provisions of this section, by recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries, as if the whole territory had been covered by one tract, a possession at any one point on either of the separate tracts will become equivalent to a possession of "the whole and every part." McNamee v. Alexander, 109 N. C. 242, 244, 13 S. E. 777.

Sufficiency of Proof.—The surveyor's testimony that the map is correct is sufficient to make it competent. Greenleaf v. Bartlett, 146 N. C. 495, 60 S. E. 419.

§ 1765. Certified copies registered in another county and used in evidence.—A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (Rev., s. 1599; Code, s. 1253; 1893; c. 119, s. 3; R. C., c. 37, s. 16; 1846, c. 68.)

As to variance between original and copy, see note of Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, under section 1763.

§ 1766. Deeds and records thereof lost, presumed to be in due form.—Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that the copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance, and that it was made upon sufficient consideration. (Rev., s. 1602; Code, s. 1348; R. C., c. 44, s. 14; 1854, c. 17.)

As to proof of contents, see 5 N. C. Enc. Dig. 510 et seq.

Presumption of Regularity.—The registration of a deed is presumed to be correct. Cochran v. Linville Imp. Co., 127 N. C. 386, 394, 37 S. E. 496.

§ 1767. Local: recitals in tax deeds in Haywood and Henderson.—In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having

remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (Rev., s. 1606; Code, s. 1346; R. C., c. 44, s. 11.)

§ 1768. Local: copies of records from Tyrrell.—Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the superior court of Tyrrell county as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington county, shall be treated in all respects as original records and received as evidence in all courts of Washington county. (Rev., s. 1612; 1903, c. 199.)

§ 1769. Local: records of partition in Duplin.—The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4.)

§ 1770. Local: records of wills in Duplin.—The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the county court of Duplin county, one thousand eight hundred and thirty, and entered in a book designated as Record of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2.)

§ 1771. Local: records of deeds and wills in Anson.—The copies of the deeds and deed books and of the wills and will books made in Anson county under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpœna or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books. (Rev., s. 1615; 1905, c. 663, s. 3.)

§ 1772. Local: records of wills in Brunswick.—Under the provisions of chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the superior court of Brunswick county, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the book of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s 106.)

§ 1773. Copies of wills.—Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (Rev., s. 1603; Code, s. 2175; R. C., c. 119, s. 21; 1784, c. 225, s. 6.)

As to probate of copy of lost will, see sec. 368.

Certified Copy as Evidence.—Under this section a certified copy of a will is competent evidence in any case wherein the contents of the will would be competent evidence. Hampton v. Hardin, 88 N. C. 592, 594.

Copy of Will Made in Another State.—See note of Knight v. Wall, 19 N. C. 125, under sec. 1777.

§ 1774. Copies of wills in secretary of state's office.—Copies of wills filed or recorded in the office of the secretary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (Rev., s. 1607; Code, s. 2181; R. C., c. 44, s. 12; 1852, c. 172; 1856-7, c. 22.)

§ 1775. Copies of wills recorded in wrong county.—Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state. (Rev., s. 1608; Code, s. 2182; 1858-9, c. 18.)

§ 1776. Copy of will proved and lost before recorded.—When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence when-

ever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in the chapter entitled Burnt and Lost Records. (Rev., s. 1609; Code, s. 2183; 1866-7, c. 127.)

§ 1777. Certified copies of deeds and wills from other states.—In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be read as evidence. (Rev., s. 1619; Code, s. 1344; R. C., c. 44, s. 9; 1802, c. 623.)

In General.—Records of other states, to be used in evidence of this state, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. Riley v. Carter, 158 N. C. 484, 487, 74 S. E. 463; Kinseley v. Rumborgh, 96 N. C. 193, 2 S. E. 174; Hunter v. Kelly, 92 N. C. 285.

Test for Admission under Section.—The copy, to be admissible in evidence, must be of such a will as would be admitted to record in North Carolina; hence where a will was executed in Tennessee and from the certificate of probate on the exemplified copy produced here, it appears that but one witness swore that he subscribed the will as witness in the presence of the testator and the other witness to the will did not appear to have been sworn at all, it was held that such a will should not be read in evidence. Blount v. Patton, 9 N. C. 237.

Properly Authenticated Copy Admissible.—A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will to authorize its reception as evidence in our courts. Knight v. Wall, 19 N. C. 125.

Incomplete Authentication.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. Hunter v. Kelly, 92 N. C. 285, 287.

§ 1778. Copies of lost records in Bladen.—The clerk of the superior court of Bladen county shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (Rev., s. 1611; 1895, c. 415; 1903, c. 65.)

Art. 3. Public Records

§ 1779. Copies of official writings.—Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county. (Rev., s. 1616; Code, ss. 715, 1342; R. C., c. 44, s. 8; 1792, c. 368, s. 11; 1871-2, c. 91; 1868-9, c. 20, s. 21.)

Copy Defined.—A copy, within the meaning of this section is a transcript of the original—a writing exactly like another writing. State v. Champion, 116 N. C. 987, 989, 21 S. E. 700. See also Wiggins v. Rogers, 175 N. C. 67, 94 S. E. 685.

The Copy Certified. — The power of an officer, who is the keeper of certain public records, to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a date, appears on them. Wiggins v. Rogers, 175 N. C. 67, 94 S. E. 685.

A "Copy" of the Instrument Required.—This section makes competent only the "copies" of official records, etc., and a mere certified statement from the register's office is only evidence of the correctness of the record, and can not be admitted in evidence in place of the original record. State v. Champion, 116 N. C. 987, 989, 21 S. E. 700. (Cited and approved in Wiggins v. Rogers, 175 N. C. 67, 94 S. E. 685.)

Original Record Admitted.—This section does not prevent the admission in evidence of the original record itself. State v. Voight, 90 N. C. 741, 745; State v. Abernathy, 94 N. C. 545. See also, Riley & Co. v. Carter, 165 N. C. 334, 81 S. E. 414; State v. Hunter, 94 N. C. 829.

Some hesitancy was at first shown by the court in reaching this conclusion, due to a contrary ruling in the earlier cases. However, it is now well settled that it would be little less than an absurdity to exclude the best possible evidence, when adduced, merely because an inferior evidence, by copy, is made admissible (by statute or otherwise).

On this point, it is said by Mr. Greenleaf: "As to the proof of records, this is done by the mere production of the records, without more, or by copy." Again in the same section, "Where a record is the gist of the issue, if it is not in the same court, it should be proved by an exemplification." Greenleaf on Evidence, sec. 501.

In reference to these clauses it is said in Gray v. Davis, 27 Conn. 447, cited and approved in State v. Voight, supra: "But he (the author) does not say, and it is obvious he does not mean, that the contents of a record can not in any court be proved by the original record itself, if it can be produced, but only to state the manner in which proof may be and usually is made."

There can be no doubt as to the soundness of this ruling, but it would seem that the conclusion would best be placed on the actual wording of this section instead of dealing in such broad inferences. The Legislature has specifically said that the copies, herein made admissible, "shall be as competent evidence as the originals." From the very phraseology of this section it does not seem plausible to say it was intended that the admission of the copies should serve to exclude the original record itself.—Ed. Note.

Original Record Lost.—A certified copy of a petition in a suit is admissible in evidence upon proof of the loss of the original records. Weeks v. McPhail, 128 N. C. 130, 132, 38 S. E. 472. See also 5 N. C. Enc. Dig. 511 et seq.

Where a superior court record is lost, a certified copy of the transcript of the same in the Supreme Court is sufficient evidence of the record. Aiken v. Lyon, 127 N. C. 171, 175, 37 S. E. 199.

Incriminating Evidence Contained in Document.—Where the document admitted under the provisions of this section contains incriminating evidence, the defense often interposed by the accused is that to admit such paper would be in violation of the constitutional right of the defendant on trial for crime to have opportunity to confront his accusers and the witnesses offered to sustain the charge. It is settled, however, that this section is not violative of this constitutional right, since these provisions constitute a well-recognized exception to the privilege given by the constitution. State v. Dowdy, 145 N.

C. 432, 436, 58 S. E. 1002; State v. Behrman, 114 N. C. 797, 804, 19 S. E. 220. In reference to this point Mr. Greenleaf says: "The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation, but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future. The Constitution indorsed the general principle, subject to these exceptions, merely naming and describing it sufficiently to indicate the principle intended." Greenleaf on Evidence, section 163.—Ed. Note.

§ 1780. Authenticated copies of public records.—All copies of bonds, contracts, or other papers relating to or connected with the settlement of any account or any part thereof between the United States and an individual, or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the state or the United States, shall be received in evidence and entitled to full faith and credit in any of the courts of this state when certified to by the chief officer in said office or department to be true copies and authenticated under the seal of said office or department. (Rev., s. 1617; 1891, c. 501.)

Cross References.—See section 1779 and notes thereto. As to records judicially noticed, see sec. 1749 and notes thereto.

The matters appearing in transcript of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence by virtue of the provisions of this section. Wallace Bros. v. Douglas, 114 N. C. 450, 19 S. E. 668. See also, Hinton v. Lake Drummond Canal Co., 166 N. C. 484, 82 S. E. 844.

Authentication Essential. — Proper authentication is essential to the admission in evidence of the copies of the original records, and papers purporting to be exemplification from the treasury department of the United States, not authenticated, will not be admitted. Mott v. Ramsay, 92 N. C. 152.

Parol Evidence Inadmissible. — The contents of the original record may not be proved by parol evidence under this section, but must be shown by a certified copy. National Surety Co. v. Brock, 176 N. C. 507, 97 S. E. 417.

Admitted if duly certified and authenticated, see note of Riley v. Carter, 158 N. C. 484, 74 S. E. 463, under sec. 1777.

§ 1781. Authenticated copy of record of administration.—When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of such state or territory, shall be allowed as evidence. (Rev. s. 1618; Code, s. 1343; R. C., c. 44, s. 7; 1834, c. 4; U. S. Rev. Stat., ss. 905, 906.)

§ 1781(a). Certificate of Commissioner of Revenue as to ownership of automobile. — In all civil actions, arising out of an injury to person or property by reason of the operation of a motor vehicle of any kind, evidence as to the display numbers on a particular car, a copy of the record kept by the Commissioner of Revenue of such display numbers and the person who obtained them, certified under the hand and seal of said Commissioner of Revenue, shall be competent evidence of the ownership of the motor vehicle inflicting the injury or doing the damage. (1931, c. 88, s. 1.)

Editor's Note.—It is stated in 9 N. C. Law Rev. 373, that this section is probably declaratory of existing law.

Art. 4. Other Writings in Evidence

§ 1782. Proof by attesting witness not required.—It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration. (Rev., s. 1604; 1905, c. 204.)

Essentials of Registration.—See sec. 3293 et seq., and notes thereunder.

§ 1783. Parol evidence to identify land described.—In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such paper-writing is in all other respects sufficient to pass such title or interest. (Rev., s. 1605; 1891, c. 465, s. 1.)

As to vagueness of description in deeds, see sec. 992 and notes thereto.

As to admissibility of parol evidence as to deeds generally, see 5 N. C. Enc. Dig. 702 et seq.; 13 N. C. Enc. Dig. 138.

In General.—A deed which fails to describe any land is as void now as it was before the passage of this section. Moore v. Fowle, 139 N. C. 51, 53, 51 S. E. 796. But a description by name, where lands have a known name, is sufficient. Id.

This section applies only where there is a description which can be aided by parol, but not when there is no description. Harris v. Woodward, 130 N. C. 580, 41 S. E. 790; Hemphill v. Annis, 119 N. C. 514, 26 S. E. 152; Lowe v. Harris, 112 N. C. 473, 17 S. E. 539.

This rule has been sanctioned by the courts, not only upon the idea that there must be a certain subject matter, but because its observance is essential to a proper enforcement of the statute of frauds. Blow v. Vaughan, 105 N. C. 198, 10 S. E. 891.

Ambiguous or Indefinite Terms.—Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written. Ward v. Gay, 137 N. C. 399, 49 S. E. 884.

Not Retroactive in Operation.—There is a general presumption against the retroactive operation of a statute where it would impair vested rights, therefore this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of the section. Lowe v. Harris, 112 N. C. 473, 17 S. E. 539. Shepherd, C. J., concurs, but further holds that the word "description" used in this section imports such description as can be aided by parol proof. Id.

When Description Sufficient.—A description of land in a deed, all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land, etc., Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630.

While parol evidence is competent to "fit the descrip-

tion to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to find but not to make a corner. Holmes v. Sapphire Valley Co., 121 N. C. 410, 28 S. E. 545.

§ 1784. Proof of handwriting by comparison.—In all trials in this state, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913. (1913, c. 52.)

In General.—The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven to be that of the party, has been changed by this section, and where the disputed writing has been rendered competent under this principle, it may now be submitted to the jury, together with that admitted or proven since 5th March, 1913. Newton v. Newton, 182 N. C. 54, 108 S. E. 336.

Rule under Prior Law.—Before the passage of this section it was incompetent for a handwriting expert to testify to the genuineness, or otherwise, of the signature of a party to a writing based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. Boyd v. Leatherwood, 165 N. C. 614, 81 S. E. 1025.

Same—Reasons.—In the cases decided under the prior law three reasons are given for excluding as incompetent a comparison by an expert witness of a signature or writing, not admitted to be genuine or connected with the case on trial, with a signature or writing which has been offered in writing, where the genuineness of the latter is drawn in question: (1) There is danger of fraud in the selecting of writings offered as specimens for the occasion. (2) The genuineness of specimens offered may be contested, and thus numberless collateral issues may be raised to confuse the jury and divert their attention from the real issue. (3) The opposing party may be surprised by the introduction of specimens, not admitted to be genuine, and for want of notice may fail to produce and offer evidence within his reach, tending to show their spurious character. 1 Greenleaf on Ev., secs. 578 to 580; Fuller v. Fox, 101 N. C. 119, 7 S. E. 589; Outlaw v. Hurdle, 46 N. C. 150; Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475; Pope v. Askew, 23 N. C. 16. This rule was recognized in the more recent cases. Martin v. Knight, 147 N. C. 564, 61 S. E. 447; Nicholson v. Eureka Lumber Co., 156 N. C. 59; Boyd v. Leatherwood, 165 N. C. 614, 616, 81 S. E. 1025.

Expert and Non-Expert Distinguished.—A comparison of handwriting is in some states permitted to be made by the jury or experts, and in others only by experts in the presence of the jury. Where a witness has acquired a knowledge of the person's writing, he compares a disputed signature or writing with an examplar in his own mind. But when he testifies as an expert he must first be furnished, as the basis of his testimony, with some specimen the genuineness of which may be insisted on before the jury. Tunstall v. Cobb, 109 N. C. 316, 320, 14 S. E. 28.

A witness who has qualified himself as an expert may, in the presence of the jury, be allowed to compare a paper, whose genuineness is questioned, with another paper executed by the party who alleges the falsity of the first, and express an opinion thereon, provided the instrument so proposed to be made the basis of comparison is not denied, or the person by whom it is alleged to have been made is estopped to deny it; but where the paper offered as such basis requires proof to establish its authenticity, it is erroneous to admit it in evidence. Tunstall v. Cobb, 109 N. C. 316, 14 S. E. 28.

Not Essential to See Person Write.—When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. Universal Oil, etc., Co. v. Burney, 174 N. C. 382, 93 S. E. 912.

Comparison by Jury.—Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting has given his opinion upon comparing with a magnifying glass the disputed signature with the genuine one, it is not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of this section, quære? Gooding v. Pope, 194 N. C. 403, 140 S. E. 21.

Analogy to Proof of Agency.—In Newton v. Newton, 182 N. C. 54, 55, 108 S. E. 336, the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is prima facie evidence of agency or of the genuineness of the writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writing' (in the plural) themselves are submitted to the jury. It is fair to the presiding judge to say that this statute was not called to his attention. It was adverted to by Walker, J., in Fourth Nat. Bank v. McArthur, 168 N. C. 48, 55, 84 S. E. 39, though the disputed writing in that case did not come within the statute.

Handwriting Irrelevant—Exclusion Harmless Error.—In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was a harmless error. Newton v. Newton, 182 N. C. 54, 108 S. E. 336.

Cited in In re Will of Shemwell, 197 N. C. 332, 333, 148 S. E. 469.

§ 1785. Bills of lading in evidence.—In all actions by or against common carriers in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the state, and twenty days when the point of shipment is without the state. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287.)

§ 1786. Book accounts under sixty dollars.—When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by

himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars. (Rev., s. 1622; Code, s. 591; R. C., c. 15, s. 1; 1756, c. 57, ss. 2, 6, 7; C. C. P., s. 343a.)

Terms Construed.—In an early case, the words "to make out on his oath" and "to prove," used in this section, are construed to be synonymous terms. Kitchen v. Tyson, 7 N. C. 314.

Other Sections.—Notwithstanding the restrictions contained in sec. 1795, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under this section. Leggett v. Glover, 71 N. C. 211. See also, Nall v. Kelly, 169 N. C. 717, 86 S. E. 627 and cases cited.

This section is applicable only to actions brought under the "boob-debt law," hence in an action on a contract for sawing timber, it is not necessary to set out the items in the pleadings. McPhail v. Johnson, 115 N. C. 298, 302, 20 S. E. 373.

Swearing as to Price of Goods.—It is competent for a party under this section to swear to the price, as well as to the delivery of the articles stated in his account. Colbert v. Piercy, 25 N. C. 77.

Same—Cross-Examination.—It is competent for the opposite party to cross-examine the party, taking his oath as required by this section, both as to the article and the prices charged, with a view to contradict or discredit him, as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause. Colbert v. Piercy, 25 N. C. 77.

Where Original Account Exceeds Sixty Dollars.—Under this section, a plaintiff may prove by his own oath a balance of sixty dollars, due to him, although his account produced appears to have been originally for more than sixty dollars, but is reduced by credits below that amount. McWilliams v. Cosby, 26 N. C. 110.

Same—Dismissal of Part for Jurisdictional Purposes.—Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars, the plaintiff can omit, or give credit for any item he may choose, so as to bring the case within the jurisdiction of a single magistrate. Waldo & Co. v. Jolly, 49 N. C. 173, 174. But after thus obtaining jurisdiction the plaintiff can not prove the account under this section for he is required to swear that the account rendered contains a true account of all the dealings. Id.

Proof of Set-Off Allowed. — The defendant may, under this section, prove a set-off. Webber v. Webber, 79 N. C. 572, 573, 575.

Same—Book and Oath Not Exclusive Evidence.—The book and the oath under this section are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party. Alexander v. Smoot, 35 N. C. 461.

Books of Decedent Admissible.—Under this section it is admissible to the amount of sixty dollars to offer the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N. C. 372.

Unverified Entries on Own Book.—A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of this section and secs. 1787, 1788, especially when it has not been made to appear that the person having made them is dead or can not be had to give his sworn statement of the transaction. Branch v. Ayscue, 186 N. C. 219, 119 S. E. 201.

§ 1787. Book accounts proved by personal representative.—In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suits shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (Rev., s. 1623; Code, s. 592; R. C., c. 15, s. 2; 1756, c. 57, s. 2; 1796, c. 465; C. C. P., s. 343b.)

See sec. 1786 and notes thereto.

An administrator may, under this section, offer in evidence the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N. C. 372.

§ 1788. Copies of book accounts in evidence.—A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence. (Rev., s. 1624; Code, s. 593; R. C., c. 15, s. 3; 1756, c. 57, s. 3; C. C. P., s. 343c.)

Production of Original after Notice.—In all cases under this and the two preceding sections, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by the other party. Coxe v. Skeen, 25 N. C. 443, 445.

A voluntary destruction of the original will not authorize the introduction of a copy. Coxe v. Skeen, 25 N. C. 443, 445.

§ 1789. Itemized and verified accounts.—In any actions instituted in any court of this state upon an account for goods sold and delivered, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (Rev., s. 1625; 1897, c. 480; 1917, c. 32.)

Editor's Note.—Prior to the amendment in 1917 (ratified February 12, 1917) this section was applicable only to accounts for goods sold and delivered. See La Salle Extension University v. Ogburn, 174 N. C. 427, 93 S. E. 986; Nall v. Kelly, 169 N. C. 717, 86 S. E. 627. Even before the amendment of this section, where the case was not instituted "upon an account for goods sold and delivered," which fact took the proceedings beyond the operative force of this section, the case was not necessarily dismissed on this account, when the additional evidence offered served to enable the jury to determine the amount of damages to which the plaintiff was entitled. See Gainesville, etc., Hospital Ass'n v. Hobbs, 153 N. C. 188, 195, 69 S. E. 79.

Purpose.—This section was designed to facilitate the col-

lection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627.

Verification Essential.—An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to show an indebtedness. Knight v. Taylor, 131 N. C. 84, 42 S. E. 537.

Competency of Witness Required.—Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and when it appears on the face of the account that he has not personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the ex parte account so verified should not be received in evidence. Nall v. Kelly, 169 N. C. 717, 720, 86 S. E. 627. And it must appear that he is not excluded under the provision of sec. 1795. See Lloyd & Co. v. Poythress, 185 N. C. 180, 116 S. E. 584.

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627, cited and distinguished. Endicott-Johnson Corp. v. Schochet, 198 N. C. 769, 153 S. E. 403.

Subordinate to Section 1795.—In Lloyd & Co. v. Poythress, 185 N. C. 180, 184, 116 S. E. 584, the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, under the principal announced in Cecil v. High Point, 165 N. C. 431, 81 S. E. 616." See also, Nall v. Kelly, 169 N. C. 717, 86 S. E. 627.

Prima Facie Case.—In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. Claus v. Lee, 140 N. C. 552, 53 S. E. 433; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820.

Same—Nonsuit.—Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case, under the provision of this section, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. Nall v. Kelly, 169 N. C. 717, 86 S. E. 627.

Same—Burden of Proof.—Where a prima facie case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness. Carr v. Alexander, 169 N. C. 665, 86 S. E. 613.

Account of Mercantile Corporation.—This section applied in Wright Co. v. Green, 196 N. C. 197, 145 S. E. 16.

Art. 5. Life Tables

§ 1790. Mortuary tables as evidence.—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "Completed age" and "expectation" respectively:

Completed Age	Expectation
10	43.7
11	48.1
12	47.4
13	46.8
14	46.2
15	45.5
16	44.9
17	44.2
18	43.5
19	42.9
20	42.2
21	41.5
22	40.9
23	40.2
24	39.5
25	38.8
26	38.1
27	37.4
28	36.7
29	36.0
30	35.3
31	34.6
32	33.9
33	33.2
34	32.5
35	31.8
36	31.1
37	30.4
38	29.6
39	28.9
40	28.2
41	27.5
42	26.7
43	26.0
44	25.3
45	24.5
46	23.8
47	23.1
48	22.4
49	21.6
50	20.9
51	20.2
52	19.5
53	18.8
54	18.1
55	17.4
56	16.7
57	16.1
58	15.4
59	14.7
60	14.1
61	13.5
62	12.9
63	12.3
64	11.7
65	11.1
66	10.5
67	10.0
68	9.5
69	9.0
70	8.5
71	8.0
72	7.6
73	7.1
74	6.7

Completed Age	Expectation
75	6.3
76	5.9
77	5.5
78	5.1
79	4.8
80	4.4
81	4.1
82	3.7
83	3.4
84	3.1
85	2.8
86	2.5
87	2.2
88	1.9
89	1.7
90	1.4
91	1.2
92	1.0
93	.8
94	.6
95	.5

(Rev., s. 1626; Code, s. 1352, 1883, c. 225.)

Need Not Be Put in Evidence.—This section being a public act, the tables herein contained are competent as evidence without being specially put in evidence. Coley v. Statesville, 121 N. C. 301, 317, 28 S. E. 482.

Tables Not Conclusive.—In an action to recover damages for a personal injury, the expectation of life tables contained in this section are not conclusive but merely evidential on the issue as to damages. Odom v. Canfield Lumber Co., 173 N. C. 134, 91 S. E. 716; Sledge v. Lumber Co., 140 N. C. 459, 461, 53 S. E. 295; Young v. Wood, 196 N. C. 435, 146 S. E. 70. The tables must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. Russell v. Windsor Steamboat Co., 126 N. C. 961, 967, 36 S. E. 191.

Cited in Farris v. Hendricks, 196 N. C. 439, 442, 146 S. E. 77; Waddell v. United Cigar Stores, 195 N. C. 434, 437, 142 S. E. 585.

§ 1791. Present worth of annuities.—Whenever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
1	$0.943
2	1.833
3	2.673
4	3.465
5	4.212
6	4.917
7	5.582
8	6.209
9	6.801
10	7.360
11	7.886
12	8.383
13	8.852
14	9.295
15	9.712
16	10.106
17	10.477
18	10.827
19	11.158
20	11.469
21	11.764
22	12.042
23	12.304
24	12.550
25	12.783
26	13.003
27	13.211
28	13.406
29	13.591
30	13.765
31	13.929
32	14.084
33	14.230
34	14.368
35	14.498
36	14.621
37	14.737
38	14.846
39	14.949
40	15.046
41	15.135
42	15.219
43	15.299
44	15.374
45	15.445
46	15.514
47	15.579
48	15.641
49	15.699
50	15.754

The present cash value of the annuity for a fraction of a year may be ascertained as follows: multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year may, computed at four and one-half per cent, be considered as an annuity and the present cash value be ascertained as herein provided. (Rev., s. 1627, 1905, c. 347, 1927, c. 215.)

Editor's Note.—The words "computed at four and one-half per cent." after the word "year" and before the word "may" near the end of the section were placed herein by the Act of 1927, which provided that it "shall apply only to estate hereafter created." This act became effective March 9, 1927.

Applicable Only to Annuities.—This section is intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it is error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. Poe v. Railroad, 141 N. C. 525, 526, 54 S. E. 406.

Cited in American Blower Co. v. Mackenzie, 197 N. C. 152, 154, 147 S. E. 829.

Art. 6. Competency of Witnesses

§ 1792. Witness not excluded by interest or crime.—No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the

court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills. (Rev., ss. 1628, 1629; Code, ss. 589, 1350; C. C. P., c. 342, 1866, c. 43, ss. 1, 4; 1869-70, c. 177; 1871-2, c. 4.)

Cross References.—See secs. 1793, 1795, 1799, 1801, and notes thereto. For general treatment of application of rule herein contained, see specially sec. 1795 and notes. See "Witnesses," 12 N. C. Enc. Dig. 725 et seq., 15 N. C. Enc. Dig. 829 et seq.

Editor's Note.—This section abolishes the common law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the codes of practically all the states.

A great number of varying constructions have been given to this section, and the decisions of the cases falling hereunder are not altogether harmonious. However, it seems settled that its provisions must be considered in the light of those contained in sec. 1795 which place certain restrictions on the general rule embodied in this section. In other words, the provisions of sec. 1795 form exceptions to this section, and take them from the operation of its principle, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See Charlotte Oil, etc., Co. v. Rippy, 124 N. C. 643, 645, 32 S. E. 980.

The construction of this section should also be in connection with the provisions of secs. 1793, 1801, since they all relate to the same subject—the competency of witnesses. Powell v. Strickland, 163 N. C. 393, 397, 79 S. E. 872. This being true, a portion of the notes found under each section will necessarily have some bearing on and may prove helpful to the practitioner in construing one or more of the other sections. A few of the decided cases are placed under this section simply to show that the general rule contained in its provisions constitutes the foundation for the decisions under the following sections.

Legatee under Will as Witness.—Under this section removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, is a competent witness to prove the fact that the script propounded was found among the papers of the deceased. Cornelius v. Brawley, 109 N. C. 542, 548, 14 S. E. 78. Nor would the last provision of the section prevent the widow in this case from testifying, since this provision applies only to attesting witnesses to the execution of a will. Id.

Beneficiary under Holograph Will.—Under this and the following section, one who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

Executor as Witness.—An executor, named in a will, is a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section and is not disqualified by sec. 1795, as to transactions occurring after the death of the testator, as they can in no sense be considered as transactions between the witness and the testator. Cox v. Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381.

The widow of a deceased vendor, who was present at the sale of a mule by her husband to the plaintiff, is a competent witness under this section, and was not excluded under sec. 1795, as she was not a party to the action and had no interest in the same. Little v. Ratliff, 126 N. C. 262, 35 S. E. 469.

Mortgagee.—Where he is not excluded under the provisions of sec. 1795, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. Clark v. Hodge, 116 N. C. 761, 21 S. E. 562.

Fornication and Adultery.—In a trial for fornication and adultery a former defendant as to whom a nolle prosequi has been entered is a competent witness against the other defendant. State v. Phipps, 76 N. C. 203.

Party Testifying in Own Behalf.—The provisions of this section make it permissible for a party to testify in his own behalf. Autry v. Floyd, 127 N. C. 186, 37 S. E. 208; State v. McIntosh, 64 N. C. 607.

§ 1793. Parties Competent as witnesses.—On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation. (Rev., s. 1630; Code, s. 1351; 1866, c. 43, ss. 2, 3.)

See secs. 1792, 1795, 1801 and notes thereto.

In General.—This, and secs. 1792 and 1795 should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. Powell v. Strickland, 163 N. C. 393, 79 S. E. 872.

At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. Boykin v. Boykin, 70 N. C. 262; King v. Lourton, 31 Eng. C. L. 312.

Testifying against Co-Defendant.—A defendant in a criminal case is, under this section, competent and compellable to testify for or against a co-defendant, provided his testimony does not criminate himself. State v. Medley, 178 N. C. 710, 100 S. E. 591; State v. Smith, 86 N. C. 705.

Same—Practice Not Commendable.—The practice of sending co-defendants to the grand jury to testify against each other, while allowable, is not commended. State v. Frizell, 111 N. C. 722, 16 S. E. 409.

Instructions Not to Incriminate Himself.—In an indictment for an affray, it is not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examines him, that he need not tell anything to incriminate himself. State v. Weaver, 93 N. C. 595, 600.

§ 1794. Parties competent as witnesses in certain cases.—No person who is or shall be a party to an action founded on a judgment rendered before the first day of August, one thousand eight hundred and sixty-eight, or on any bond executed prior to said date, or the assignor, endorser or any person who has at the time of the trial, or ever has had any interest in such judgment or bond, shall be a competent witness on the trial of such action; but this section shall not apply to the trial of any action commenced before the first day of August, one thousand eight hundred and sixty-eight, nor to the trial of any action in which the defendant therein relies upon the plea of payment in fact, or pleads a counterclaim and also introduces himself as a witness to establish the truth of such plea, but in all such cases the rules of evidence shall prevail as in other cases. (Rev.,

s. 1633; Code, s. 580; C. C. P., s. 333; 1879, c. 183; 1883, c. 310, ss. 1, 2.)

Editor's Note.—This section is probably of little practical value today, since its provisions were made to apply only to bonds executed prior to the date of August 1, 1868. Therefore references alone to the cases construing the sections are here given. See Morgan v. Bunting, 86 N. C. 67; Coggins v. Flythe, 113 N. C. 102, 103, 18 S. E. 96; Waddell v. Swann, 91 N. C. 105, 108; Brown v. Cooper, 89 N. C. 237; Cannon v. Morris, 81 N. C. 139; Ex parte Macay, 84 N. C. 64; Borden v. Gulley, 92 N. C. 127; Clanton v. Price, 90 N. C. 96; Grant v. Hughes, 96 N. C. 177, 2 S. E. 339.

§ 1795. A party to a transaction excluded, when the other party is dead.—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. (Rev., s. 1631; Code, s. 590; C. C P., s. 343.)

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For comprehensive treatment of this subject, see 12 N. C. Enc. Dig. 754 et seq.; 15 N. C. Enc. Dig. 832 et seq.

I. GENERAL CONSIDERATION.

Editor's Note.—Mr. Justice Clark in Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043, gives the following analytical treatment to this section, which has been cited and approved in many of the cases coming within the principles of this section, and has proved to be a helpful guide-post for the courts in deciding as to the admissibility of the particular evidence involved in the case. It is submitted that if the practitioner, in passing upon the exclusion or non-exclusion of the evidence in the cases bearing upon this section, will carefully compare the point at issue with the clauses of the following out-line, then much time will have been saved, in addition to having the assurance that he more than likely will be correct in his conclusion since, as has been said, the substantive part of this resume has been accepted by the great majority (if not all) of the courts. See Fidelity Bank v. Wysong, etc., Co., 177 N. C. 28, 98 S. E. 769; Seals v. Seals, 165 N. C. 409, 81 S. E. 613.

It disqualifies—

WHOM—1. Parties to the action.
2. Persons interested in the event of the action.
3. Persons through or under whom the persons in the first two classes derive their title or interest.

A witness, although belonging to one of these three classes, is incompetent only in the following cases:

WHEN—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative or a deceased person, or committee of a lunatic, or any one deriving his title of interest through them.

And the disqualification of such person, and in even such cases, is restricted to the following:

SUBJECT-MATTER.—As to a personal transaction or communication between the witness and the person since diseased or a lunatic.

And even as to those persons and in those cases there are the following:

EXCEPTIONS.—When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. Burnett v. Savage, 92 N. C. 10; Sumner v. Candler, 92 N. C. 634.

The editor has deemed it expedient to use this excellent outline as the basis of his analysis of the section, and, wherever possible, has adhered to the same, making no departures but only continuing the treatment by breaking the lines into further ramifications of the same subjects in order to show the component parts thereof.

Purpose of Section.—The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are sealed in death. Abernathy v. Skidmore, 190 N. C. 66, 128 S. E. 475, 476.

The purpose of this section is to exclude evidence of a personal transaction or communication between the witness and a person who by reason of death or lunacy cannot be heard. White v. Mitchell, 196 N. C. 89, 92, 144 S. E. 526.

This section applies to actions in tort as well as actions on contract. Boyd v. Williams, 207 N. C. 30, 175 S. E. 832.

Reasons for Exclusion.—The exclusion of such testimony rests not merely upon the ground that the dead man can not have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action. In re Will of Mann, 192 N. C. 248, 134 S. E. 649. For other cases substantiating this statement, see 12 N. C. Enc. Dig. 754.

Testimony Not Within Section.—Where a widow is entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and has died devising the total amount of the deposit: Held, testimony as to her receipt of the money from the crops is competent, not falling within the provisions of this section, and does not affect the title to other money owned by her husband at his death and given to her for life by his will. White v. Mitchell, 196 N. C. 89, 144 S. E. 526.

Same—Conversations with Living Persons. — Where the widow under the terms of the will of her husband may only dispose of the moneys in the bank to her credit, and not such as may at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under this section based upon conversations with other living parties interested under the husband's will. White v. Mitchell, 196 N. C. 89, 144 S. E. 526.

General Rule Applicable in Other States.—The decisions in other jurisdictions are equally emphatic in the rejection of such evidence, the statutes being the same as this one, relating to personal transactions or communications. See Comstock v. Comstock, 76 Minn. 396, where it is said: "A party to an action, or interested in the result thereof, can not give evidence as to conversations with a deceased person, even though the witness took no part in the conversation." See also, Holland v. Holland, 98 Appellate Div. (N. Y.) 366; Matthews v. Hoagland, 48 N. J. Eq. 455.—Ed. Note.

Rehearsal of Conversation Admissible.—Direct evidence of a conversation and understanding with the plaintiff's testator is, under this section, incompetent, but a rehearsal of that conversation is a part of the res gestae, and admissible. Gilmer v. McNairy, 69 N. C. 335.

Itemized and Verified Accounts.—Section 1789 relating to itemized and verified accounts is subordinate to this section. See note of Lloyd & Co. v. Poythress, 185 N. C. 180, 184, 116 S. E. 584, placed under sec. 1789.

The provisions of this section may be waived by the adversary party. Andrews v. Smith, 198 N. C. 34, 150 S. E. 670.

Where an administrator brings proceedings under the provisions of §§ 900, et seq., to examine a defendant to discover assets of the estate of the deceased, the administrator waives the provisions of this section and the testimony thus taken may be introduced by the defendant in his own behalf. Andrews v. Smith, 198 N. C. 34, 150 S. E. 670.

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Editor's Note.—The general rule is that a party is not competent to testify as to a transaction with persons since deceased; e converso, a person not a party nor interested in the event of the suit may testify as to such transaction or communication.

It will be noticed that this section excludes the testimony of "a party or person interested;" in regard to parties, however, interest is not a necessary prerequisite to the exclusion of the evidence and it was not the legislative purpose so to make it. It is immaterial whether a "party" is interested or not but a "person," of course because of the context of the section, must be interested.

The following cases under this analysis line will demonstrate when persons are considered or are not considered parties within the meaning of this section.

A "next friend" is not a party to the suit. Mason v. McCormick, 75 N. C. 263. But his liability for costs renders him incompetent to testify to the transactions or conversations here under consideration. Id. See also McLeary v. Norment, 84 N. C. 235.

Testimony of Guardian.—Testimony of a guardian, suing an executor to establish a gift made by a testatrix to the guardian's ward, as to what occurred between the testatrix and executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix. Zollicoffer v. Zollicoffer, 168 N. C. 326, 84 S. E. 349.

Testimony of Tenant.—In an action for goods sold and delivered to the intestate, a tenant of the intestate who was furnished with goods from the plaintiff's store, and who settled with the intestate, is competent to testify in the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness is not a party to the action. Sorrell v. McGhee, 178 N. C. 279, 100 S. E. 434.

Probate of Will.—In a proceeding for the probate of a will, both propounders and caveators are parties within the meaning and spirit of this section. In re Will of Brown, 194 N. C. 583, 595, 140 S. E. 192.

Under this section the beneficiary under a will may not testify to transactions and communications with the deceased, but he may in proceedings of devisavit vel non give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. In re Will of Brown, 194 N. C. 583, 140 S. E. 192.

A defendant executor can not testify concerning a land transaction between himself and the intestate, in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to the defendant by the intestate. Grier v. Cagle, 87 N. C. 377; State v. Morris, 69 N. C. 444.

A member of the board of county commissioners is not a competent witness as to transactions with the defendant's intestate in a suit by the board. Commissioners v. Lash, 89 N. C. 159.

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with a defendant. Benedict v. Jones, 129 N. C. 475, 40 S. E. 223.

Party Acting in Corporate Capacity.—One who is a party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased. Commissioners v. Lash, 89 N. C. 159, 164.

In an action to recover for services rendered deceased testimony by the plaintiff, that plaintiff boarded deceased is incompetent under the provisions of this section. Price v. Pyatt, 203 N. C. 799, 167 S. E. 69.

Time and Place of Signing Receipt.—The defendant in an action for money demanded is disqualified by this section, to testify as to the time and place of signing a receipt by the plaintiff's intestate, in support of his plea of satisfaction. Sumner v. Candler, 86 N. C. 71.

B. Persons Interested in the Event of the Action.

1. General Consideration.

Cross Reference.—For a comprehensive treatment of this subject with many illustrations, see 12 N. C. Enc. Dig. 757 et seq; 15 N. C. Enc. Dig. 834 et seq.

The Rule Stated.—To be incompetent under this section a witness must be either a party to the action or interested in the event thereof. Having discussed the question of "parties" under the preceding analysis line, it next becomes pertinent to examine the subject of "interest" of witnesses and other persons not parties.

To determine when such interest exists so as to render the person incompetent, the following rule should be applied: The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action if not he is not disqualified. Jones v. Emory, 115 N. C. 158, 20 S. E. 206; Henderson v. McLain, 146 N. C. 329, 59 S. E. 873.

Nature of Interest Involved.—This section does not disqualify every witness who, in the broadest sense of the term, is interested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. Jones v. Emory, 115 N. C. 158, 163, 20 S. E. 206; Helsabeck v. Doub, 167 N. C. 205, 83 S. E. 241; In re Gorham, 177 N. C. 271, 98 S. E. 717.

It follows that a mere sentimental interest will not suffice. Sutton v. Walters, 118 N. C. 496, 24 S. E. 357. And it has been held that relationship of the parties alone does not constitute the direct, legal, pecuniary interest required. See Bennett v. Best, 142 N. C. 168, 55 S. E. 84; Sutton v. Walters, 118 N. C. 495, 24 S. E. 357; Porter v. White, 128 N. C. 42, 38 S. E. 24.

Present Interest.—In Isler v. Dewey, 67 N. C. 93, 96, the court intimates that the interest necessary to disqualify is a present interest; that is, one retained by the party at the time of examination. In reaching this conclusion it was said: "Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies unknown to the common law and opposed to its principles."

In Bunn v. Todd, 107 N. C. 266, 268, 11 S. E. 1043, it is said: "Originally this section disqualified a fourth class of persons, i. e. those who have had an interest in the subject matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section of the Code of 1883, except in the cases in which such persons still came under the third class of disqualified persons above [see the Editor's Note and analysis line I of this note] stated.

Witness Must Be Party in Interest.—The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, is not incompetent as falling within the provisions of this section, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. Ft. Worth, etc., R. Co. v. Hegwood, 198 N. C. 309, 151 S. E. 641.

In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted. Hager v. Whitener, 204 N. C. 747, 169 S. E. 645.

Not Confined to Parties to Action.—The provisions of this section are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action. Honeycutt v. Burleson, 198 N. C. 37, 150 S. E. 634.

2. Applications.

No Interest in Recovery—Interest in Subject Matter.—In an action against an insane person for damages for breach of warranty in a deed, a witness who is not interested in the recovery is not disqualified by this section, though he may have an interest in the land. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of this section and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial. Pitman v. Hunt, 197 N. C. 574, 150 S. E. 13.

Interest of Wife in Compensation Due Husband.—In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no interest in the event which would bar her testimony as to a transaction with the deceased, and it is competent for her to testify to the contract relied upon by her husband the plaintiff. Helsabeck v. Doub, 167 N. C. 205, 83 S. E. 241.

In Linebarger v. Linebarger, 143 N. C. 229, 55 S. E. 709, the court had held that on an issue of **devisavit vel non** it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action. This and the foregoing case are distinguishable, however, upon the ground that in the Linebarger case the property in controversy was land, and the wife's inchoate dower attached immediately upon the recovery by her husband.—Ed. Note.

The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of this section, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. Honeycutt v. Burleson, 198 N. C. 37, 150 S. E. 634.

The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisoins of this section. Conley v. Cabe, 198 N. C. 298, 299, 151 S. E. 645.

Husband as Interested Party in Deed Drawn by Wife.—The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment, his evidence, to the effect that his wife said to him she would give him a horse if he would leave, was incompetent. Whitty v. Barham, 147 N. C. 479, 61 S. E. 372. The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent. Id.

Husband as Interested Party in Check Given Wife. — When a check made payable to one of the intestate's daughters and signed by the intestate was introduced in evidence to show an advancement, the daughter's husband was held competent under this section to testify over objection that the check was given his wife as a wedding present, he having no interest in the event of the action. Likewise another daughter was permitted to testify for her sister, the transaction testified to not being between the witness and deceased, but between the witness's sister and deceased father. Vannoy v. Green, 206 N. C. 80, 173 S. E. 275.

Interest of Depositor's Son in Action to Recover Moneys Deposited.—In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. Donoho v. Wachovia Bank & Trust Co., 198 N. C. 765, 153 S. E. 451.

Sheriff as Witness.—A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected; it was held, in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under this section. Allen v. Gilkey, 86 N. C. 65.

Testimony as to Partnership Transaction by Nonmember of Firm. — Where the defendant's liability depends upon whether he was a member of the defendant partnership at the time the firm contracted a debt with the plaintiff, the subject of the action, who has since died and his administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by the deceased of the partnership debts. Herring v. Ipock, 187 N. C. 459, 121 S. E. 758.

Stockholder's Interest in Recovery on Contract of Sale.—Where defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase their respective holdings, in an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. It was held the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent under this section. Winborne v. McMahan, 206 N. C. 30, 31, 173 S. E. 278.

In caveat proceedings propounders and caveators are "parties interested in the event" within the meaning of this section. In re Brown, 203 N. C. 347, 166 S. E. 72.

The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. Dill-Cramer-Truitt Corp. v. Downs, 201 N. C. 478, 160 S. E. 492.

In this case, testimony of an endorser of a note, as to conversations with the payee's agent, now dead, showing the consideration which induced the endorsement, is not excluded under this section the agent not being a party interested in the event within the meaning of the statute for, although the agent guaranteed all notes to the payee, if there was a failure of consideration the payee could hold neither of the guarantors and had the endorser been liable he could not have recovered from the agent. American Agr. Chemical Co. v. Griffin, 204 N. C. 559, 169 S. E. 152.

Effect of Insolvency of Deceased.—In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under this section is removed by the insolvency of his father's estate, for there is nothing for the children in any event of the action. Gidney v. Logan, 79 N. C. 214.

Holder of Insurance Policy.—A policy holder in a mutual life insurance company is not disqualified as "interested in the event of the action" to testify for the company suing to cancel another policy. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574. See also Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925, 44 S. E. 659; Gwaltney v. Provident Sav. Life Assur. Soc., 134 N. C. 552, 47 S. E. 122.

Agreement to Bequeath Property in Consideration of Services.—Where the plaintiff, in her own right and as administratrix of her mother, seeks to recover upon an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompetent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she is a party interested, within the contemplation of the statute. Brown v. Adams, 174 N. C. 490, 93 S. E. 989.

Agreement as to Disputed Boundary.—Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication prohibited by this section. Poole v. Russell, 197 N. C. 246, 148 S. E. 242.

C. Persons Deriving Title or Interest Through Two Preceding Classes.

In General.—The words of this section "derives its interest or title by assignment or otherwise" mean—gets from a source—some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other manner. Carey v. Carey, 104 N. C. 171, 10 S. E. 156.

It should be noted, however, that interest must be present and not speculative. So it has been held that a husband is not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote. McCurry v. Purgason, 170 N. C. 463, 87 S. E. 244.

When deceased has had no interest in lands, but was simply an assignee, evidence of his declarations is admissible as no claim of title is made under him. Condor v. Secrest, 149 N. C. 201, 62 S. E. 921.

Attorney.—The fact that an attorney has had an interest in the event of a suit on account of the fee taxed does not disqualify him under this section. Syme v. Broughton, 85 N. C. 367. Nor is an attorney of one of the parties pre-

cluded from testifying for his client concerning the agreement. Propst v. Fisher, 104 N. C. 214, 10 S. E. 295, cited in note in 49 L. R. A. 426.

Testimony of Grantee of Deceased Debtor.—In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. Sutton v. Wells, 175 N. C. 1, 94 S. E. 688.

Suits by Plaintiff against Surety.—See post, this note, "When the Disqualification Exists," III.

III. WHEN THE DISQUALIFICATION EXISTS.

Editor's Note.—Continuing the treatment as based upon Mr. Justice Clark's resume of this section, it is proper at this place to consider the circumstances which render incompetent the testimony of the witness who comes within one or more of the three classes of persons who are disqualified by the provision of this section. It will be seen from the outline given under the analysis line "General Consideration," that the testimony of such witness is excluded in two cases, (1) when he testifies in behalf of himself, or the person succeeding to his title or interest, and (2) when the testimony is against the representative of a deceased person, or any one deriving his title or interest through him. The following cases will illustrate the principles upon which the exclusion of the testimony falling within one or both of these two subdivisions is founded. They appear in the order as stated in the outline.

Party Testifying against Interest.—Under this section a witness may testify against his own interest, even if thereby other parties to the suit are injuriously affected and the disqualification applies only when a witness testifies in his own behalf. In re Worth's Will, 129 N. C. 223, 39 S. E. 956.

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by this section. In re will of Fowler, 159 N. C. 203, 74 S. E. 117; In re Worth's Will, 129 N. C. 223, 39 S. E. 956.

In an action to declare a deed void on the ground that it was never delivered to the grantee since deceased, testimony offered by the grantor tending to show that the deed had not been delivered is not incompetent under this section. Gulley v. Smith, 203 N. C. 274, 165 S. E. 710.

Contradicting Former Witness.—A defendant having an interest in the event of an action is not permitted under this section to testify in his own behalf, for the purpose of contradicting a former witness whose testimony tended to show that the defendant fraudulently procured an assignment from a person deceased. Bushee v. Surles, 77 N. C. 62.

Testifying in Favor of Representative.—Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, it was held that such testimony does not fall within the inhibition of this section of the Code, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781.

Representative Not a Party.—It is competent for a plaintiff, as a witness for himself, to testify where the representative of the deceased was not a party to the suit. Thomas v. Kelly, 74 N. C. 174.

Trustor as Witness.—Where a deed of trust was attacked for fraud, the trustee having died, and the property having been conveyed by a substituted trustee to the defendants, the trustor is not excluded by this section from being a witness for the plaintiff, who also claimed title through him. Isler v. Dewey, 67 N. C. 93.

Suits against Sureties.—Where the plaintiff sues the surety, and proposes to testify as to transactions between himself and the deceased principal of the surety, an interesting question arises which has been answered by the courts of North Carolina in a masterful manner. Is this testimony to be excluded and if so upon what grounds? In order to render the witness incompetent, the testimony must be against "the executor, administrator or survivor of a deceased person or a person deriving his title or interest from" such deceased person. From a cursory view of this problem it would seem that the testimony is not against the principal or his executor, administrator, etc., but when the rule of law, which gives the surety an action over against the representative of the principal, is recalled this view must be abandoned. It would seem that where the testimony affects the estate either directly or indirectly (i. e. giving rise to a right of subrogation against it) such testimony must be excluded.

In McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27, Mr. Justice Walker in an illuminating opinion discussing this subject, says: "The rule to be deduced from these authorities is that the surety, who comes not within the letter but within the intendment of the law, stands in the same position and is entitled to the same protection under section 590 (this section) of the Code as the representative of his deceased principal when sued."

Conversation before Death of One of Contracting Parties Admissible.—A witness is not incompetent, under this section, to testify to a conversation had with two persons, one of whom is dead at the time of the trial, in reference to a contract made between them and the witness. Peacock v. Stott, 90 N. C. 518.

Partnership.—The death of one of the partners in a firm will not incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, is living. Peacock v. Stott, 90 N. C. 518.

Where the conversation is not strictly with the intestate, but is one held with him and two others who were associated with him in the transaction, then the provisions of this section do not incapacitate the party from testifying. Johnson v. Towsend, 117 N. C. 338, 340, 23 S. E. 271.

Testimony of Third Parties Present.—This section makes no exception where other parties are present but leaves these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit is unaffected by the testimony of the interested party. Isenhour v. Isenhour, 64 N. C. 640; McRae v. Molley, 90 N. C. 521, 524.

The administrator of a deceased guardian is a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person. Thompson v. Humphrey, 83 N. C. 416.

IV. SUBJECT MATTER OF THE TRANSACTION.

Cross Reference. — For full treatment, see 12 N. C. Enc. Dig. 769, et seq.; 15 N. C. Enc. Dig. 835 et seq.

Not Applicable unless Transaction Is Personal. — Under this section the parties in interest are disqualified from testifying only as to personal transactions with the deceased. For instance, such party could testify that a paper writing was in the handwriting of the deceased, as will be seen from the catchline "Proof of Handwriting" following in this note, or as to any independent fact which was neither a transaction nor communication with the testator. McCall v. Wilson, 101 N. C. 598, 600, 8 S. E. 225; Cox v. Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381; Davidson v. Bardin, 139 N. C. 1, 51 S. E. 779.

Test as to When Transaction Is "Personal."—A fair test in undertaking to ascertain what is a "personal transaction of communication" with the deceased is to inquire whether, in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge. Sherrill v. Wilhelm, 182 N. C. 673, 675, 110 S. E. 95.

Driving of Car Is "Transaction" within Meaning of Statute.—Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under this section, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. Boyd v. Williams, 207 N. C. 30, 175 S. E. 832.

Transaction Must Be Exclusive Source of Knowledge.—In order to exclude the testimony under this provision, it must be made to appear that the only source of the witnesses' information is a "personal transaction between her and the deceased." Thompson v. Onley, 96 N. C. 9, 1 S. E. 620. And it is proper to show whether the witness had knowledge of the fact testified to, from sources extraneous to his personal communications or relations with the deceased. Charlotte Oil, etc., Co. v. Rippy, 123 N. C. 626, 31 S. E. 879.

Facts Occurring Out of Presence of Deceased.—A witness offered to prove a fact which occurred out of the presence of, and in no sense a transaction with, a deceased person is not incompetent under this section. It is only when the transaction is between the deceased and the living party that the

statute prohibits the latter from testifying. Lockhart v. Bell, 86 N. C. 443.

Substantive Facts.—In an action in the nature of a creditor's bill, testimony of the deceased debtor's grantee that the deceased grantor occupied the building part of the time after she got her deed to the land in litigation, it was held admissible as being to a substantive fact of which she had knowledge independently of any statement by the deceased. Sutton v. Wells, 175 N. C. 1, 94 S. E. 688.

The rule may be deduced, therefore, that a party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased or is based upon independent knowledge not derived from such source. Sutton v. Wells, 175 N. C. 1, 94 S. E. 688. See also In re Will of Saunders, 177 N. C. 156, 98 S. E. 378; Price Real Estate, etc., 191 N. C. 176, 131 S. E. 587.

Conversation of Deceased with Living Defendant.—This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony "concerning a personal transaction." Abernathy v. Skidmore, 190 N. C. 66, 128 S. E. 475.

Testimony Given in Former Trial.—It is competent for the plaintiff's witness to testify what the deceased maker of the note sued upon testified on a former trial as to its payment, such being not a personal transaction within the meaning of the provisions of this section. Worth v. Wrenn, 144 N. C. 656, 657, 57 S. E. 388; Costen v. McDowell, 107 N. C. 546, 12 S. E. 432.

Proof of Handwriting.—A party interested in the event of a suit is not an incompetent witness, under this section, to prove the handwriting of the deceased person. Rush v. Steed, 91 N. C. 226; Hussey v. Kirkman, 95 N. C. 63, 65; Armfield v. Colvert, 103 N. C. 147, 9 S. E. 461; Sawyer v. Grady, 113 N. C. 42, 18 S. E. 79.

These decisions are based on the distinction which is drawn between proving the handwriting and proving the actual signing of the paper, the latter being held to be a transaction within the meaning of this section while the former is not. A similar distinction was drawn in the case of State v. Maxwell, 64 N. C. 313, the case having been decided prior to the insertion of the word "personal" before the word "transaction." In the Rush Case the court regards this amendment as the legislative recognition of the soundness of this distinction and says that it (the amendment) was "probably induced by the decision in State v. Maxwell."—Ed. Note.

Will Cases.—In Cox v. Beaufort County Lumber Co., 124 N. C. 78, 82, 32 S. E. 381, it is held that this section does not apply to wills, but that they are governed by sections 4137 and 4138; this was placed on the ground that this section applies where there is necessarily a contract or agreement between the parties, and in the case of a will there is ordinarily no transaction between the parties.

By the same reasoning it is held that attesting a will is not a "personal transaction," the witness being of the law and not of the party. Vester v. Collins, 101 N. C. 114, 7 S. E. 687. Again, a beneficiary may testify as to the leaving of a holograph will with her for safe keeping. McEvan v. Brown, 176 N. C. 249, 97 S. E. 20. Or to the fact that when a will was opened it contained certain erasures and that they were not made by him. In re Will of Saunders, 177 N. C. 156, 98 S. E. 378.

Circumstances may arise, however, in which the person interested as a beneficiary may attempt to testify as to personal transactions or conversations with the deceased and this testimony would, of course, be excluded. But the rule of exclusion does not apply, as may be inferred from the preceding cases, as to facts of which the witness had knowledge by means other than by personal transactions with the deceased. So the rule does exclude the witness from testifying as to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. In re Will of Mann, 192 N. C. 248, 134 S. E. 649.

Mental Capacity of Deceased Formed from Conversation.—Where a witness testifies to the want of mental capacity in a grantor to take a deed, and that his opinion was formed from conversation and communication between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded, the provisions of this section not applying as the subject was not a "transaction" within its meaning. McLeary v. Norment, 84 N. C. 235; Bakestraw v. Pratt, 160 N. C. 436, 76 S. E. 259.

Services of Physician.—Testimony by a physician, the plaintiff, that he attended the deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., is incompetent as being "personal" transactions with the deceased, prohibited by this section. Knight v. Everett, 152 N. C. 118, 67 S. E. 328; Dunn v. Currie, 141 N. C. 123, 53 S. E. 533.

Sale of Property by Guardian.—It is competent for the plaintiff to prove the sale of his property by his guardian as this is not a personal transaction within the meaning of this section. State v. Osborne, 67 N. C. 259.

Testimony as to Placement of Deed.—This section does not exclude testimony that the witness saw the decedent place the deed, under which the witness claims, in a trunk as it does not involve a communication or transaction with him. Carroll v. Smith, 163 N. C. 204, 79 S. E. 497; Cornelius v. Brawley, 109 N. C. 542, 548, 14 S. E. 78.

In a proceeding for dower, the decision of the question whether the plaintiff left her husband's home of her own volition or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under this section. Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106.

Claim That Intestate was Holder in Due Course.—Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate's possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. Price Real Estate, etc., Co. v. Jones, 191 N. C. 176, 131 S. E. 587.

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon balance on account was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by this section. Walston v. Coppersmith, 197 N. C. 407, 149 S. E. 381.

Sale of Interest in Partnership.—This section does not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the decedent was the other partner. Brantley v. Marshbourn, 166 N. C. 527, 82 S. E. 959.

V. EXCEPTIONS.

Similar Evidence Previously Introduced.—This section does not apply where evidence, similar to that which is being introduced, has previously been introduced and the door has been opened to the objecting party. Davidson v. West Oxford Land Co., 126 N. C. 704, 708, 36 S. E. 162. For other cases substantiating this statement, see 12 N. C. Enc. Dig. 784.

Grounds for Exceptions. — The rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified. Pope v. Pope, 176 N. C. 283, 287, 96 S. E. 1034. Where the testimony, of a deceased adverse party has been given and is available, the reason for the exclusion rule ceases. Phillips v. Intestate Land Co., 174 N. C. 542, 94 S. E. 12.

In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence must relate to the particular subject-matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. Walston v. Coppersmith, 197 N. C. 407, 149 S. E. 381.

Limitation of the Exception.—Where the door is opened to the opposing party to testify for himself, he can testify only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. Summer v. Candler, 92 N. C. 634.

Illustrations.—Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased which liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person, does not apply. Herring v. Ipock, 187 N. C. 459, 121 S. E. 758.

It is incompetent as a transaction with a deceased person in an action against his estate to recover for services ren-

dered him under a contract, for the plaintiff to testify as to personal services rendered by her as coming within her demand for damages. Pulliam v. Hoge, 192 N. C. 459, 135 S. E. 288. The court said: "We do not think the defendant 'opened the door' by asking the plaintiff for an explanation as to why she had changed the amount at her demand." Id.

VI. PLEADING AND PRACTICE.

Effect of Failure to Object.—Objections to the competency of testimony must be taken in due time; if not, they are waived. Therefore, where a party was allowed to testify, upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination the defendant objected to the competency of such testimony and asked that it might be excluded, it was held that, although incompetent, the objection to its reception came too late. Meroney v. Avery, 64 N. C. 312. Where a general objection as to witnesses, competency was overruled, and afterwards no specific objection was made to his testimony as to transactions with the decedent, the objection will be deemed waived. Norris v. Stewart, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917.

The objection will not be considered unless so specific as to show that the evidence is objectionable. Perkins v. Berry, 103 N. C. 131, 9 S. E. 621. The incompetency must appear at the time of the objection to the evidence, so that the court may pass intelligently upon the objection. Harris v. Harris, 178 N. C. 7, 100 S. E. 125.

When Admission of Evidence Harmless. — The erroneous admission of evidence of transactions with deceased persons prohibited by this section, becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. Ray v. Ray, 175 N. C. 290, 95 S. E. 550. For a treatment of harmless error generally see section 688, analysis line II, Band C, and the notes thereto.

Determination on Appeal of Relevancy of Testimony. — Where testimony of transactions or communication with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under this section will not be determined on appeal. Pendleton v. Spencer, 205 N. C. 179, 170 S. E. 637.

§ 1796. Executors may testify as to estates in their hands.—In all actions now pending or which may be hereafter instituted upon judgments rendered before the first day of August, one thousand eight hundred and sixty-eight, or upon any bond or promissory note under seal executed prior to said date, wherein a reference has been or may be ordered by the court to ascertain the condition or state of the assets belonging to the estate of any deceased debtor in the hands of his administrator or executor, who is or may be defendant in such actions, it shall be competent for the defendant administrator or executor of such deceased debtor to testify and be examined as a witness in his own behalf concerning his administration upon the estate of his intestate or decedent. When in such cases the defendant administrator or executor testifies or is examined as a witness in his own behalf, it shall also be competent for the plaintiff to testify and be examined in the same in regard to such administration. (Rev., s. 1632; 1885, c. 361.)

For history of section, see Coggins v. Flythe, 113 N. C. 102, 18 S. E. 96.

§ 1797. Communications between attorney and client.—In cases where fraud upon the state is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same. (Rev., s. 1620; Code, s. 1349; 1874-5, c. 213.)

Statutory Exception.—This section, providing that communications to counsel, in cases of fraud where the State is concerned, are not privileged, constitutes a statutory exception to the general rule privileging communications made to an attorney where the relation of attorney and client exists. Hughes v. Boone, 102 N. C. 137, 159, 9 S. E. 286.

§ 1798. Communications between physician and patient.—No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (Rev., s. 1621; 1885, c. 159.)

See 13 N. C. Law Rev., 326.

In General.—The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. State v. Martin, 182 N. C. 846, 109 S. E. 74. See notes of this case under section 4426.

If the statements were privileged under this section, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. Sawyer v. Weskett, 201 N. C. 500, 501, 160 S. E. 575.

What Information Included.—It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. Smith v. Roper Lumber Co., 147 N. C. 62, 64, 60 S. E. 717; Gartside v. Ins. Co., 76 Mo. 446; Dilleber v. Ins. Co., 69 N. Y. 256.

Relationship of Physician and Patient Must Exist.—The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and this section is not applicable. State v. Newsome, 195 N. C. 552, 143 S. E. 187.

Privilege May Be Waived.—The privilege given by this section is for the benefit of the patient alone, and it may be insisted on or waived at his discretion, subject to the exceptions included in the section. Smith v. Roper Lumber Co., 147 N. C. 62, 64, 60 S. E. 717; Fuller v. Knights of Pythias, 129 N. C. 318, 40 S. E. 65.

Judge's Finding of Record that Testimony Necessary.—Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. Metropolitan Life Ins. Co. v. Boddie, 194 N. C. 199, 139 S. E. 228

Cited in State v. Wade, 197 N. C. 571, 150 S. E. 32.

§ 1799. Defendant in criminal action competent but not compellable to testify.—In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so

charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself. (Rev., ss. 1634, 1635; Code, ss. 1353, 1354; 1881, c. 89, s. 3; 1881, c. 110, ss. 2, 3; 1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4.)

Cross Reference.—See 12 N. C. Enc. Dig. 809 et seq.; 15 N. C. Enc. Dig. 849 et seq.

Privilege and Not a Duty.—A defendant in a criminal matter can only be examined as a witness by his own request. State v. Ellis, 97 N. C. 447, 2 S. E. 525.

Treated as Other Witnesses.—When the defendant exercises this privilege he is treated just as any other witness and thereby subjects himself to all the disadvantages of that position. State v. Efler, 85 N. C. 585; State v. Hawkins, 115 N. C. 712, 715, 20 S. E. 623.

Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. State v. Griffin, 201 N. C. 541, 160 S. E. 826.

Extent of Cross Examination Permitted.—Cross examination of a defendant under this section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. State v. Dickerson, 189 N. C. 327, 127 S. E. 256.

Testimony May Be Used in Subsequent Trial.—Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. State v. Simpson, 133 N. C. 676, 45 S. E. 567.

Failure to Take Stand.—The failure of the prisoner charged with homicide to take the witness-stand voluntarily will not create a presumption against him. State v. Bynum, 175 N. C. 777, 95 S. E. 101.

Same—How Far Subject to Comment.—The introduction or non-introduction of a party as a witness in his own behalf should be the subject of comment only as the introduction or non-introduction of any other witness might be. Goodman v. Sapp, 102 N. C. 477, 9 S. E. 483.

On this point the court in Gragg v. Wagner, 77 N. C. 246, said: "It is the privilege and not the duty of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all; certainly not, unless under very peculiar circumstances, which must necessarily be passed upon by the judge presiding at the trial, as a matter of sound discretion." Goodman v. Sapp, 102 N. C. 477, 483, 9 S. E. 483.

General Character Can Be Shown.—When a prosecutor or defendant in a criminal action goes upon the stand as a witness he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. State v. Spurling, 118 N. C. 1250, 24 S. E. 533.

Same—Not in Issue unless So Placed.—Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. State v. Cloninger, 149 N. C. 567, 63 S. E. 154; State v. Foster, 130 N. C. 666, 41 S. E. 284.

Same—Where Introduced by Defendant.—When the defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such. State v. Cloninger, 149 N. C. 567, 63 S. E. 154.

The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. State v. Hice, 117 N. C. 782, 23 S. E. 357.

The court in State v. Efler, 85 N. C. 585 said: "In declaring him to be 'a competent witness' we understand the statute (this section) to mean that he shall occupy the same position with any other witness, be under obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited * * * But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness." State v. Traylor, 121 N. C. 674, 676, 28 S. E. 493. (Parenthesis supplied).

Same—Put in Issue by State.—Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad, it was held that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. State v. Traylor, 121 N. C. 674, 28 S. E. 493.

Where There Are Two or More Defendants.—Even prior to the enactment of this section on a trial for an affray one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. State v. Hamlet, 85 N. C. 520.

Testifying as to Confessions.—The defendant in a criminal action is competent as a witness in his own defense upon the preliminary hearing of the trial judge, as to whether confessions he had made to the officers of the law were voluntarily made or induced from him contrary to law. State v. Whitener, 191 N. C. 659, 132 S. E. 603.

Admission before Magistrate.—Where a prisoner made certain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committing magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were not true, it was held, that his evidence given before the magistrate was admissible against him, and it was for the jury to say whether they believed the confession, or that part of his evidence declaring that the confessions were not true. State v. Ellis, 97 N. C. 447, 2 S. E. 525.

Weight Given Testimony Is for Jury.—While the interpretations of this section require defendant's testimony to be scrutinized, it is the province of the jury to determine from his demeanor and the attending circumstances the weight which they will accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., is held to impose a burden and cast a shadow upon his testimony greater than the law requires and to constitute reversible error. State v. Wilcox, 206 N. C. 691, 175 S. E. 122.

Constitutional Provision as to Self-Incrimination.—See N. C. Const., Art. I, Sec. 11, and notes thereto.

Cited in State v. Colson, 194 N. C. 206, 139 S. E. 230; State v. Spivey, 198 N. C. 655, 656, 153 S. E. 255; State v. McLeod, 198 N. C. 649, 650, 152 S. E. 895.

§ 1800. Testimony enforced in certain criminal investigations; immunity.—If any justice of the peace, magistrate of police, mayor of a town, or judge of the supreme or superior courts shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro-bank, faro-table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof an oath, then it shall be lawful for such justice of the peace, magistrate, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such faro-bank, faro-table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a subpœna, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, mayor or judge and give evidence on oath

as to what he may know touching the existence, establishment and whereabouts of such faro-bank, faro-table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate, mayor or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (Rev., ss. 3721, 1637; Code, ss. 1215, 1050; R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; 1889, c. 355; 1913, c. 141.)

Section Constitutional.—This section is not unconstitutional by reason of the Fifth Amendment to Constitution of the United States, because it does not apply to the State; nor does it violate Article I, section 11, Constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. In re Briggs, 135 N. C. 118, 47 S. E. 403.

Witness Compellable to Testify.—In a prosecution for gaming a witness may be compelled to testify, although his answer tends to criminate him, since he is pardoned for the offense. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

Sufficiency of Indictment.—In an indictment for keeping a common gaming-house the use of the word "gaming" is sufficient. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

§ 1801. Husband and wife as witnesses in civil actions.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any actions or proceedings in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage); or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (Rev., s. 1636; Code, s. 588; C. C. P., s. 341; 1866, c. 43, ss. 3, 4; 1919, c. 18.)

Cross References.—See full discussion of subject in 12 N. C. Enc. Dig. 733 et seq. As to competency in criminal actions, see section 1802 and notes thereto.

In General.—Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. Barringer v. Barringer, 69 N. C. 179, 181.

The provisions of this section are quite clear and self-explanatory. The legislative intent is apparent and little room is left for a judicial construction of the clauses herein contained. A few of the leading cases are sufficient to show that the decisions of the various cases arising hereunder have been predicated upon the section as actually worded, without any judicial inferences being drawn by the courts. —Ed. Note.

Divorce for Adultery.—In divorce for alleged adultery, neither the husband nor the wife is a competent witness. Perkins v. Perkins, 88 N. C. 41; Horne v. Horne, 75 N. C. 101, 103.

Contradiction by Wife.—Under this section, a wife, sued for divorce for adultery, is competent to deny the evidence of witnesses that she was guilty of adultery with them. Broom v. Broom, 130 N. C. 562, 41 S. E. 673.

Same—Criminal Conversation.—In an action by the husband for damages for criminal conversation with his wife, the evidence of the wife in behalf of the defendant to rebut the evidence of the plaintiff is incompetent under this section. Grant v. Mitchell, 156 N. C. 15, 71 S. E. 1087. But since the amendment of 1919 the wife is competent to rebut charges where her character is assailed which would seem to include all actions for criminal conversation.—Ed. Note.

In an action for criminal conversation wherein the husband has testified to immoral relations between his wife and the defendant, the wife is a competent witness for the defendant for the purpose of refuting the charges made against her character. Chestnut v. Sutton, 204 N. C. 476, 168 S. E. 680.

Confidential Communications Defined.—The confidential communications made between husband and wife which neither will be compelled to disclose, are those which are communicated "during their marriage." Whitford v. North State Life Ins. Co., 163 N. C. 223, 79 S. E. 501.

Same—Protected.—The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N. C. 783, 23 S. E. 433.

In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action are properly excluded when the letters are obtained by a third party with the consent of the wife, the letters being privileged communications and inadmissible against either the husband or the wife. McCoy v. Justice, 199 N. C. 602, 603, 155 S. E. 452.

Where a witness has written a letter to his wife the asserted right of the defendant to cross examine the witness on the letter to produce evidence tending to show bias or prejudice of the witness is excluded by the inhibitions of this section when the letter is procured by the defendant with the consent and privity of the wife alone. State v. Banks, 204 N. C. 233, 167 S. E. 851.

Applied, in action by husband for criminal conversation, in Rouse v. Creech, 203 N. C. 378, 166 S. E. 174.

Cited in Nelson v. Nelson, 197 N. C. 465, 466, 149 S. E. 585.

§ 1802. Husband and wife as witnesses in criminal actions.—The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife and/or his children, or for neglecting to provide for her support and/or the support of his children, it shall be lawful to examine the wife in behalf of the state against the husband. (Rev., ss. 1634, 1635, 1636; Code, ss. 588, 1353, 1354; 1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; 1933, c. 13, s. 1; c. 361.)

Cross References.—See 12 N. C. Enc. Dig. 733 et seq.; 15 N. C. Enc. Dig. 831 et seq. See section 1801 and notes thereto. As to definition of and protection given to confidential communications between husband and wife, see note of State v. Brittain, 117 N. C. 783, 23 S. E. 433, under

section 1801, see also 12 N. C. Enc. Dig. 788 et seq.; as to proof of fact of marriage, see note of State v. Chester, 172 N. C. 946, 90 S. E. 697, under section 1801.

See 11 N. C. Law Rev., 231, for brief criticism of the 1933 amendment to this section.

Editor's Note.—Public Laws of 1933, cc. 13 and 361, added, near the end of this section, the words "and/or his children" following the word "wife" and the words "and/or the support of his children" following the word "support."

In General.—Under this section the husband or wife is a competent witness for the defendant in all criminal actions or proceedings. State v. Harbison, 94 N. C. 885. But neither is competent or compellable to give evidence against the other in any criminal proceeding. Id.

Under this section a wife is neither competent nor compellable to testify against her husband in a criminal proceeding, hence hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, is inadmissible. State v. Reid, 178 N. C. 745, 101 S. E. 104.

Discretion of Trial Judge.—Where the defendant husband is alleged to have stolen certain property it is competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduces her in proper time it rests within the discretion of the trial judge whether her testimony will be received. State v. Lemon, 92 N. C. 791, 793.

Confidential Communication.—Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of this section and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case. State v. Freeman, 197 N. C. 376, 148 S. E. 450.

The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N. C. 783, 23 S. E. 433.

Husband May Testify against Wife in Assault.—Conversely to the rule enunciated in this section, that a wife may testify against her husband in actions for assault against her, it appears that a husband may testify in assaults by the wife against him, and this was so held. State v. Davidson, 77 N. C. 522; State v. Alderman, 182 N. C. 917, 919, 110 S. E. 59.

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of this section, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. State v. Alderman, 182 N. C. 917, 110 S. E. 59.

The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. State v. French, 203 N. C. 632, 166 S. E. 747.

A wife under this section is not competent to testify against her husband in a prosecution for felonious burning and the admission of her testimony entitles him to a new trial. State v. Kluttz, 206 N. C. 726, 175 S. E. 81.

Failure of Wife to Appear and Testify.—The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by this section, though she is competent to testify. State v. Harris, 181 N. C. 600, 107 S. E. 466.

Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. State v. Harris, 181 N. C. 600, 107 S. E. 466.

Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of this section by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed. State v. Harris, 181 N. C. 600, 107 S. E. 466.

Abandonment of Children.—The wife is not competent to testify against her husband in a criminal action, unless the action comes within the exceptions enumerated in this section, and upon the trial of the husband for wilfully abandoning and failing to support his minor children, the admission of the wife's testimony against him is reversible error. State v. Brigman, 201 N. C. 793, 161 S. E. 727.

Abandonment of Wife.—Under this section the wife is a competent witness against her husband as to the fact of abandonment, or neglect to provide adequate support. State v. Brown, 67 N. C. 470.

Proof of Marriage. — The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment. State v. Chester, 172 N. C. 946, 90 S. E. 697. The holding was otherwise under a former wording of the statute. State v. Brown, 67 N. C. 470.

Same—Bigamy.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. State v. Melton, 120 N. C. 591, 26 S. E. 933. See also State v. McDuffie, 107 N. C. 885, 890, 12 S. E. 83.

Adultery Prior to Marriage.—Where a man and woman are indicted for fornication and adultery, and a nol. pros. is entered as to the feme defendant, the husband of the woman is a competent witness to show adultery between the defendants committed before the marriage of the woman and the witness. State v. Wiseman, 130 N. C. 726, 41 S. E. 884.

Competency of Divorced Parties. — A divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. State v. Raby, 121 N. C. 682, 28 S. E. 490.

§ 1802(a). Wife may testify in applications for peace warrants.—The wife shall be competent to make affidavit and testify in application for peace warrants against the husband. (1933, c. 13, s. 2.)

Art. 7. Attendance of Witness

§ 1803. Issue and service of subpoena.—In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to wit:

In suits where witnesses are to appear at any court, the clerk at the instance of a party shall issue a subpoena, directed to the sheriff or other officer of the county where such witnesses reside, naming the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned. Every subpoena made returnable immediately shall be issued only in term time, and shall be personally served on the witness therein named. A copy of every subpoena issued by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy certified by the sheriff or other officer, and left as aforesaid, shall be deemed a legal summons, and the person therein named shall be bound to appear in the same manner as if personally summoned. (Rev., s. 1639; Code, s. 1355; R. C., c. 31, s. 59; 1777, c. 115, s. 36.)

§ 1804. Attendance before referee or commissioners.—In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referee, order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, naming the day and place when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned. (Rev., s. 1640;

Code, s. 1366; R. C., c. 31, s. 68; 1805, c. 685, ss. 1, 2.)

§ 1805. Subpœna duces tecum issued.—In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the state, or in any office of any court, shall become necessary, the court may issue the process of subpœna duces tecum, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpœna to testify. (Rev., s. 1641; Code, s. 1372; R. C., c. 31, s. 81; 1797, c. 476.)

§ 1806. Subpœnas and depositions upon removal of cause.—When any cause shall be removed from the superior court of one county to that of another, after the order of removal, depositions may be taken in the cause, and subpœnas for the attendance of witnesses and commissions to take depositions may issue from either of said courts, under the same rules as if the cause had been originally commenced in the court from which the subpoenas or commissions issued. (Rev., s. 1642; Code, s. 1371; R. C., c. 31, s. 72; 1810, c. 787; 1832, c. 8.)

In General.—Until the transcript is deposited the removal is not consummated and the cause is not constituted so as to give full jurisdiction to the court to which the removal is ordered, hence to meet this situation the provision of this section gives to the clerk of either court the power to issue subpoenas for witnesses. Commissioners v. Lemly, 85 N. C. 342, 346.

Upon removal jurisdiction of the court from which the cause is removed ceases, unless otherwise provided in the order of removal, or by consent of the parties in writing, duly filed. Fisher v. Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055.

This section, however, makes one exception to the general rule by allowing the subpoena to be issued from either court. Fisher v. Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055.

Time for Depositing Transcript.—The party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. Fisher v. Cid Copper Min. Co., 105 N. C. 123, 10 S. E. 1055.

§ 1807. Witnesses attend until discharged; effect of nonattendance.—Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (Rev., s. 1643; Code, s. 1356; R. C., c. 31, ss. 60, 61, 62; 1777, c. 115, ss. 37, 38, 43; 1799, c. 528; 1801, c. 591.)

Cross References.—See 12 N. C. Enc. Dig. 725 et seq.; 15 N. C. Enc. Dig. 829 et seq.; as to fees and mileage of witnesses, see section 3893 and notes thereto; as to recovery of costs, see sections 1273, 1274.

Duty to Attend.—When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. State v. Gwynn, 61 N. C. 445.

Non-Attendance Need Not Be Wilful.—This section does not require that the failure of the witness to attend should be "wilful." In re Pierce, 163 N. C. 247, 79 S. E. 507.

When Witness May Elect.—Where two subpoenas are served upon a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. Icehour v. Martin, 44 N. C. 478.

Test of Inability to Attend.—In an early case, Eller v. Roberts, 25 N. C. 11, it was held that where a witness alleges that he was unable to attend court, this inability must be decided by reference to the modes of travelling which are in use in the community.

Where Service Had on Transient.—A witness, who is summoned in this State, while casually here, but who resides in another state, cannot be required to pay a forfeiture for non-attendance, if he has returned to his own state and is there at his domicile. Kinzey v. King, 28 N. C. 76.

Attorney Not Exempt.—A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In re Pierce, 163 N. C. 247, 79 S. E. 507.

An issue in bastardy is not a "criminal prosecution" so as to subject a defaulting witness to the fine of eighty dollars, prescribed by this section. Ward v. Bell, 52 N. C. 79.

§ 1808. Witnesses exempt from civil arrest.—Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence. (Rev., s. 1644; Code, s. 1367; R. C., c. 31, s. 70; 1777, c. 115, s. 44.)

Common Law Rule Not Repealed.—This section does not serve to repeal the common law rule of exemption of witnesses from civil arrest. Cooper v. Wyman, 122 N. C. 784, 787, 29 S. E. 947.

Not Applicable to Criminal Proceeding.—The exemption of witnesses from civil arrest accorded by this section, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to

parties arrested in criminal proceedings. White v. Underwood, 125 N. C. 26, 34 S. E. 104.

Procedure for Claiming Exemption.—Where a party has not been granted the exemption from service of summons (which the courts seem to have placed on the same plane as the exemption from civil arrest), his remedy is not a motion to dismiss the action, but a motion, on special appearance, to set aside the return of service. Dell School v. Pierce, 163 N. C. 424, 79 S. E. 687. This is because the service is not void but voidable. Cooper v. Wyman, 122 N. C. 784, 29 S. E. 947.

Nonresident Attorney.—This section does not prevent service of summons on a nonresident attorney in this State to represent his clients in a matter pending in the federal court. Greenleaf v. Peoples Bank, 133 N. C. 292, 45 S. E. 638.

Art. 8. Depositions

§ 1809. Manner of taking depositions in civil actions.—Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this state or of any other state or foreign country, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys no less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent. (Rev., s. 1652; Code, s. 1357; 1911, c. 158; R. C., c. 31, s: 63; 1893, c. 360; 1881, c. 279.)

Cross Reference.—For full treatment of this subject, see 4 N. C. Enc. Dig. 686 et seq.; 13 N. C. Enc. Dig. 742 et seq. See sections 1810, 1819, 1820 and notes there placed.

Editor's Note.—This section now corresponds in substance with similar provisions found in the codes of most of the states. As it originally stood, it contained many restrictive clauses which no longer appear.

Purpose of Section.—The purpose of this section is to save the inconvenience and cost of taking witnesses to the court, unless the party desiring the testimony of the witness sees fit to summon him to attend the court and testify in person. Sparrow v. Blount, 90 N. C. 514, 516.

Optional with Party Desiring the Evidence.—A party may take the deposition; he is not obliged to do so and it is optional with him whether he will or not. Sparrow v. Blount, 90 N. C. 514, 516.

Right of Cross Examination.—Where a cause has been referred and regularly proceeded with before a commissioner to take deposition therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. Sugg v. St. Mary's Oil Engine Co., 193 N. C. 814, 138 S. E. 169.

Presumed Regular.—The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place. Younce v. Broad River Lumber Co., 155 N. C. 239, 71 S. E. 329.

May Be Taken in Place of Business.—It is not error to take a deposition in the place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby. Bank v. Carr, 130 N. C. 479, 41 S. E. 876.

May Be Taken before Answer.—The plaintiff is not required to delay taking the deposition of a witness in a cause until after the answer is filed. Freeman v. Brown, 151 N. C. 111, 65 S. E. 743.

Leading Question.—It is discretionary with the trial judge whether or not answers to leading questions shall be stricken out of the deposition. Bank v. Carr, 130 N. C. 479, 41 S. E. 876.

Necessity of Sealing.—A deposition must be sealed up by the commissioners, so as to prevent inspection and alteration; it need not be certified under the seal of the commissioners. Ward v. Ely, 12 N. C. 372.

Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open, it was held, that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner, and therefore, that the clerk had done right in passing upon and allowing such deposition to be read. Hill v. Bell, 61 N. C. 122.

Name of Witness in Commission Not Essential.—It is not necessary that the commission issued for taking depositions name the particular witness to whose depositions exceptions are taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. Jeffords v. Albemarle Waterworks, 157 N. C. 10, 72 S. E. 624.

Signature of Witness Unnecessary.—Where a deposition is otherwise regular and identified, it should not be refused as evidence because it has not been signed by the witness whose testimony was being taken, this not being required by our statute. Boggs v. Cullowhee Min. Co., 162 N. C. 393, 78 S. E. 274. And the fact that it was signed when neither party was present is not ground for refusing to admit it. Riff v. Yadkin, etc., Co., 189 N. C. 585, 127 S. E. 588.

Question Need Not Be Written.—In the taking of a deposition, interrogatories are not required to be in writing, and when there is nothing to indicate that the deposition does not contain the whole of the deponent's testimony or that it was not written down at the time and in the presence of the witness, a motion to quash should be refused. Chippewa Valley Bank v. National Bank, 116 N. C. 815, 21 S. E. 688.

Attachment or Identification of the Papers.—While it is customary, and the better practice, to attach to a deposition a paper-writing therein referred to, or, if there are more than one deposition, to attach it to one and identify it by reference in the others, and in case the writing is a matter of record or in the custody of the court, over which the parties have no control, to attach an exemplified copy; it is not required by our statutes that the writing be so attached, and when this has not been done, the fact of identity may be proved as any other fact in evidence. In re Will of Clodfelter, 171 N. C. 528, 88 S. E. 625.

As to waiver of formal defects, see note of McArter v. Rhea, 122 N. C. 614, 30 S. E. 128, under section 1819.

Notice to Adverse Party Required.—A party offering to read a deposition as evidence must prove that he has given the notice of the opening of the deposition before the clerk prescribed by this section, or show facts that would amount to a waiver by the opposite party of the statutory requirement. Berry v. Hall, 105 N. C. 154, 10 S. E. 903. See section 1810 and notes thereto.

Power of Clerk.—This section allowing the clerk to pass upon depositions, only applies to the depositions of competent witnesses; where, therefore, he passed upon and allowed one to be read which was taken out of the county, under a commission without a seal, it was held, that such action of his might well be disregarded by the court trying the cause. Sehorn v. Williams, 51 N. C. 575.

An Appeal Essential for Review by Court.—The superior court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision. Hix v. Fisher, 60 N. C. 474.

Qualification of Commissioner Presumed.—A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown. Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936.

Mistake in Name.—Where the notice to take depositions correctly states the name of the commissioner appointed to take them, and is otherwise regular, it is error for the trial judge to exclude the depositions, as evidence, on account of a slight error in the spelling of the commissioner's name. Hardy v. Phoenix Mut. Life Ins. Co., 167 N. C. 22, 83 S. E. 5.

Commissioner Related to Parties.—The commissioner should not be related to either of the parties, but the burden of proving this relationship rests upon the movant.

Younce v. Broad River Lumber Co., 155 N. C. 239, 71 S. E. 329.

Same—Objection.—An objection that a commissioner to take depositions is related to one of the parties must be taken at the time of opening such depositions before the clerk. Kerr v. Hicks, 131 N. C. 90, 42 S. E. 532.

Duty of Witness to Answer.—The commissioner acts for the court and it is the duty of the witness to answer proper questions propounded by him, just as though the examination is conducted before the judge or clerk. Bradley, etc., Co. v. Taylor, 112 N. C. 141, 146, 17 S. E. 69.

Delay of Commission Insufficient for Continuance.—Commissions to take testimony are issued at the instance, and for the benefit, of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience. But if through laches or from a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance. Duncan v. Hill, 19 N. C. 291.

§ 1810. Notice required for taking depositions.—In taking depositions in civil actions or special proceedings, written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party of his attorney. The time for serving such notice shall be as follows: Three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the state, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the state, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be taken. When a deposition is to be taken beyond the state, ten days notice of the taking thereof shall be given, when the person whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon the party objecting to satisfy the court of the truth of his allegation. (Rev., s. 1652; Code, s. 1357; 1881, c. 279.)

Cross Reference.—See full treatment of this subject in 4 N. C. Enc. Dig. 686 et seq.; 13 N. C. Enc. Dig. 742 et seq.; as to form and sufficiency in general, see 4 N. C. Enc. 692; as to certainty of time and place, see 4 N. C. Enc. Dig. 693 et seq.

In General.—The object of the notice is to give the party an opportunity to attend and cross-examine; and, while on the one hand, a party will not be forced to attend on Sunday, or on a day when his presence is required at another place for the purpose of that very suit, so, on the other, it is held that the principle is complied with substantially, if the notice describes the place with reasonable certainty. Owens v. Kinsey, 51 N. C. 38, 40.

Variance between Notice and Certificate.—A deposition certified to have been taken at the house of J. E. was objected to because the notice was to take it at the house of J. A. E., it was held, that it would be presumed that the notice and certificate referred to the same person. Ellmore v. Mills, 2 N. C. 359.

Alternative Days.—A notice to take a deposition on "the 5th or 6th" of a certain month was held sufficient. Kenedy v. Alexander, 2 N. C. 25.

On a Particular Day for Several Successive Weeks.—Notice to take a deposition on a particular day of every week for three successive months is not good. Bedell v. State Bank, 12 N. C. 483.

Conflicting Dates.—Where notice is served that depositions will be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed, but where he elects to appeal by counsel and cross-examines the witnesses without making any objection at the time, this is a waiver as to any defect in the notice. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613.

Certainty of Place.—A misdescription of a place, in one small particular, in a notice to take depositions will not be fatal, if there be other descriptive terms used in the notice, less liable to mistake, by which such place may be identified. Pursell v. Long, 52 N. C. 102.

Reasonableness as to Time.—Where the statute required three days' notice of the taking of a deposition, and only two days' notice was given and the opposite party appeared and objected to the shortness of notice, and declined to cross-examine the deponent, the deposition was rejected. In such cases one day should be counted inclusive, and the other exclusive. Beasley v. Downey, 32 N. C. 284.

Where Parties Specially Mentioned.—Where notice was given to take the deposition of certain parties, specifically mentioned, "and others," and depositions of those particularly mentioned were not taken, it was held to be no ground for exception. McDugald v. Smith, 33 N. C. 576.

The notice directing the commissioner to take the depositions of persons named "and others," depositions taken of others than those named are admissible. In re Will of Rawlings, 170 N. C. 58, 86 S. E. 794.

Notice to One of Joint Defendants.—Upon a bill against joint administrators relative to the acts of the intestate, of which the administrators put in a joint answer, a deposition taken by the plaintiff upon notice to one of the defendants only was excluded, though it was the deposition of the plaintiff's only witness, who had since died. Cox v. Smitherman, 37 N. C. 66.

Served at Residence of Party.—Notice of taking a deposition is sufficient, if left at a party's residence. Kennedy & Co. v. Fairman, 2 N. C. 404.

As to service by publication, see section 1811.

Service by Constable.—A town constable cannot serve a notice to take depositions in an action pending in the superior court. Cullen v. Absher, 119 N. C. 441, 26 S. E. 33.

Notice by Guardian Appointed after Person Released as Sane.—Where a party to an action has become insane and placed in a State institution therefor, and is thereafter released therefrom as sane, § 6214, the court is without authority, after his regaining his sanity, to appoint a guardian ad litem for him, § 451, and notice to the guardian so appointed as to the taking of depositions of witnesses does not comply with the requirements of this section, and upon objection, the depositions so taken should be excluded. Orr v. Beachboard, 199 N. C. 276, 154 S. E. 311.

Proof of Service.—The practice permits the person, who has served the notice that a deposition will be taken, to appear before the commissioners and swear to that fact and if it be shown by the certificate of the commissioners, the deposition may be read. Sawrey v. Murrell, 3 N. C. 397. As to service and proof, see 4 N. C. Enc. Dig. 695 et seq.

Absent Party or Attorney.—In taking depositions where a party lives out of the State, notice may be given to the absent party, or to his attorney in court. Savage v. Rice, 1 N. C. 19.

§ 1811. Publication of notice in case of nonresident.—Instead of the notice served upon the adverse party or his attorney in taking depositions in civil actions or special proceedings, when the adverse party is a nonresident and has no attorney of record, it shall be sufficient to publish notice to the adverse party in some newspaper published in the county where the action is pending, or if no newspaper is published in such county, then in some newspaper in the judicial district, for three consecutive weeks, giving the time and place of taking the deposition and specifying the name of the witness. And when the adverse party is a nonresident and service of notice cannot be had upon him or his attorney in this state, then one publication of notice to

open such deposition shall be sufficient notice. (1913, c. 137.)

Where the defendant had left for parts unknown, and his attorney in the case had died, and none other been substituted, and plaintiff was desirous of taking a deposition in New England, an order was made directing publication for three successive weeks in a newspaper, of notice that the deposition would be taken at a certain place and day three months after publication. Maxwell v. Holland, 2 N. C. 302.

§ 1812. Depositions for defendant in criminal actions.—In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this state, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, county or town in which such action is pending have ten days notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. This section shall not apply to the taking of depositions in courts of justices of the peace. (Rev., s. 1652; Code, s. 1357; 1891, c. 522; 1893, c. 80; 1915, c. 251.)

For full treatment of admissibility in evidence, see 4 N. C. Enc. Dig. 699 et seq.; 13 N. C. Enc. Dig. 743.

Not Applicable to State Witnesses.—In State v. Harris, 181 N. C. 600, 107 S. E. 466, Stacy, J., commenting on an offer of a trial judge to allow the defense to take depositions of State's witnesses, in a dissenting opinion said: "This section provides that the defendant, in all criminal actions, may take the depositions of witnesses to be used as evidence in his behalf. But this applies to his own witnesses and not to those who testify against him. It would be strange, indeed, to say that a statute, intended to grant, as it does, a privilege to the defendant, could be used to deprive him of his constitutional guarantees. As to the witnesses offered by the State, he has the right to demand their presence in the courtroom, and to confront them with other witnesses, and to subject them to the test of a cross-examination. State v. Mitchell, 119 N. C. 784, 25 S. E. 783, 1020. The prisoner may not be required to examine the State's witnesses in the absence of the jury; and the contrary suggestion of his Honor, though unintentional, was prejudicial to the defendant."

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf. State v. Finley, 118 N. C. 1162, 24 S. E. 495.

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it. State v. Finley, 118 N. C. 1162, 24 S. E. 495.

§ 1813. Depositions in justices' courts.—Any party in a civil action before a justice of the peace may take the deposition of all persons whose evidence he may desire to use in the action; and to do so he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justices of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (Rev., s. 1646; Code, s. 1359; 1872-3, c. 33.)

§ 1814. Depositions before municipal authorities.—Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission; and the notice and proceeding upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this state, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court. (Rev., s. 1653; 1889, c. 151.)

§ 1815. Depositions in quo warranto proceedings.—In all actions for the purpose of trying the title to the officer of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such depositions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination, by either party on the trial, of such witnesses as they may summon in their behalf. (Rev., s. 1654; 1889, c. 428.)

§ 1816. Commissioner may subpoena witness and punish for contempt. — Commissioners to take depositions appointed by the courts of this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are

hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue subpœnas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (Rev., s. 1649; Code, s. 1362; R. C., c. 31, s. 64; 1777, c. 115, s. 42; 1805, c. 685, ss. 1, 2; 1848, c. 66; 1850, c. 188.)

Power Not Exclusively in Commissioner.—The power to commit to jail a person refusing to testify before a commissioner, as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defied. Bradley, etc., Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

§ 1817. Attendance before commissioner enforced.—The sheriff of the county where the witness may be shall execute all such subpœnas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpœnaed five days before the time of his required attendance, and shall fail to appear according to the subpœna and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the state, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpœnaed fifty dollars, and on the trial for such penalty the subpœna issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpœna, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended. (Rev., s. 1650; Code, s. 1363; R. C., c. 31, s. 65; 1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2.)

§ 1818. Remedies against defaulting witness before commissioner.—But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this state, then the same shall be certified under his hand, and returned with the subpœna of the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof. (Rev., s. 1651; Code, s. 1364; R. C., c. 31, s. 66; 1850, c. 188, s. 2.)

§ 1819. Objection to deposition before trial.—At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a depositions for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing. (Rev., s. 1648; Code, s. 1361; 1895, c. 312; 1903, c. 132; 1869-70, c. 277, ss. 13, 17.)

Cross References.—See 4 N. C. Enc. Dig. 703 et seq.; 13 N. C. Enc. Dig. 744; see section 1820 and notes thereto; as to formal defects in general, see 4 N. C. Enc. Dig. 704; as to motion to quash, see section 1820 and notes thereto.

Purpose of Section.—The purpose of this section is to settle the depositions as evidence before the trial or hearing and thus prevent surprise, misapprehension, confusion and delay on the trial. Carroll v. Hodges, 98 N. C. 418, 420, 4 S. E. 199.

Time and Manner of Objection.—As stated by the section exceptions to a deposition, especially those which relate to its regularity, should be disposed of; at the latest, before the trial is entered upon. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 197, 55 S. E. 613; Barnhardt v. Smith, 86 N. C. 473, 480; Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199. Such objection must be made in writing. Brittain v. Hitchcock, 127 N. C. 400, 37 S. E. 474.

Same—When Allowed at Trial.—Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, it was held that an objection to its reception might be taken on the trial of the action. Bryan v. Jeffreys, 104 N. C. 242, 10 S. E. 167.

Waiver of Formal Defects.—Where a party attends upon and takes part in taking depositions, he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudiced to third parties. McArter v. Rhea, 122 N. C. 614, 30 S. E. 128.

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun. Womack v. Gross, 135 N. C. 378, 47 S. E. 464; Tomlison Chair Mfg. Co. v. Townsend, 153 N. C. 244, 69 S. E. 145.

Where the provision of this section as to making the objection before trial and in writing are not complied with, the objection to the deposition is waived Woodley v. Hassell, 94 N. C. 157.

For discussion of waiver in general, see 4 N. C. Enc. Dig. 706; as to cross-examination of witnesses, see 4 N. C. Enc. Dig. 707.

Cited in Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 779, 172 S. E. 360.

§ 1820. Deposition not quashed after trial begun.—No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (Rev., s. 1647; Code, s. 1360; 1869-70, c. 227, s. 12.)

Cross References.—See 4 N. C. Enc. Dig. 703 et seq.; 13 N. C. Enc. Dig. 744; as to rights to suppress in general, see 4 N. C. Enc. Dig. 698 et seq.; 13 N. C. Enc. Dig. 743; see also section 1819 and notes thereto; as to waiver of former defects, see note of McArter v. Rhea, 122 N. C. 614, 30 S. E. 128, under section 1819 and references there made.

Opportunity to Object before Trial.—Where a deposition was open and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. Morgan v. Royal Fraternal Ass'n, 170 N. C. 75, 81, 86 S. E. 975; citing Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55

S. E. 613. And this is true whether the motion is to quash the deposition in whole or in part. Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199.

Filing as Notice.—Where the deposition had been on file for two or three months before the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199.

As to failure to give notice to adverse party, see note of Bryan v. Jeffreys, 104 N. C. 242, 10 S. E. 167, under section 1819. See also, Notice, 4 N. C. Enc. Dig. 704.

Preservation of Exception.—Where a commissioner to take depositions has, over the objection and exceptions of a party litigant, denied him the right of cross-examination of a witness of his opponent, and has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. Sugg v. St. Mary's Oil Engine Co., 193 N. C. 814, 138 S. E. 169.

Incompetent Questions. — Since a deposition can be quashed only for irregularities in the taking or the incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. Jeffords v. Albemarle Waterworks, 157 N. C. 10, 72 S. E. 624.

Stated in Gulf States Steel Co. v. Ford, 173 N. C. 195, 91 S. E. 844.

§ 1821. When deposition may be read on the trial.—Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.

2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.

3. If the witness is confined in a prison outside the county in which the trial takes place.

4. If the witness is so old, sick or infirm as to be unable to attend court.

5. If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or the head of any other incorporated college in the state, or the superintendent or any physician in the employ of any of the hospitals for the insane for the state.

7. If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

8. If the witness is a member of the congress of the United States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member.

9. If the witness has been duly summoned, and at the time of the trial is out of the state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

10. If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting. (Rev., s. 1645; Code, s. 1358; R. C., c. 31, s. 63; 1777, c. 115, ss. 39, 40, 41; 1803, c. 633; 1828, c. 24, ss. 1, 2; 1836, c. 30; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; 1905, c. 366; 1919, c. 324.)

Cross References.—For full treatment of admissibility, see 4 N. C. Enc. Dig. 699 et seq.; 13 N. C. Enc. Dig. 743. As to manner, form, and time of taking exceptions, see sections, 1819, 1820 and notes thereto; as to grounds of taking, see 4 N. C. Enc. Dig. 687 et seq.; 13 N. C. Enc. Dig. 742; as to depositions in criminal actions, see section 1812 and notes thereto, together with references there made; as to parties entitled to use depositions, see 4 N. C. Enc. Dig. 703.

Witnesses Must Be Summoned. — As this section originally stood it was not required of the plaintiff to summon the witnesses. Barnhardt v. Smith, 86 N. C. 473. But since the addition of the words "if the witness has been duly summoned," the witness must be under subpoena at the time the depositions are taken. Sparrow v. Blount, 90 N. C. 514, 515.

Right of Rebuttal.—The party contesting the admissibility of the deposition may show that the witness lives within seventy-five miles of the court, in which case the deposition cannot be read. Sparrow v. Blount, 90 N. C. 514.

Selected Parts.—It is not permissible to introduce selected portions of depositions without offering the whole. Sternberg v. Crockon, etc., Co., 172 N. C. 731, 90 S. E. 935.

Witness Unable to Talk.—The deposition of a witness adjudged to be unable to talk or remain in court is admissible in evidence under this section. Willeford v. Bailey, 132 N. C. 402, 43 S. E. 928.

Where Admissible in Subsequent Action.—In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence. Hartis v. Charlotte Elect. R. Co., 162 N. C. 236, 78 S. E. 164. It may be introduced whether the deponent was examined as a witness in the case being tried or not. Mabe v. Mabe, 122 N. C. 552, 29 S. E. 843.

The difference between hearsay evidence and that obtained by deposition, as pointed out by the court in the Hartis case, lies in the fact that in the latter instance the testimony is taken before one who is empowered to administer oaths, and the adverse party is given full opportunity to cross-examine.—Ed. Note.

Same—Where Action Survives.—Where the deposition de bene esse of the plaintiff in an action has been taken in accordance with law, who has since died, but the cause of action survives, it may properly be read in evidence in behalf of those who survive him in interest, and have properly been made parties to the original action. Barbee v. Cannady, 191 N. C. 529, 132 S. E. 572.

Meaning of "Duly Summoned."—By reasonable construction the ninth sub-division of this section means that where the deposition has been regularly taken, and where the witness is more than seventy-five miles from the place of trial without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpoena has been duly issued—not necessarily served. Tomlinson Chair Mfg. Co. v. Townsend, 153 N. C. 244, 69 S. E. 145.

Stated in Jeffords v. Albemarle Waterworks, 157 N. C. 10, 72 S. E. 624; Barnhardt v. Smith, 86 N. C. 473. Section cited in Stern & Co. v. Herren, 101 N. C. 517, 8 S. E. 221.

§ 1822. Depositions taken in the state to be used in another state:

1. By whom obtained. In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or any of the possessions thereof, or any foreign country, may obtain, by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of books and papers within the state to be used in the action, suit or special proceeding.

2. Application filed. Where a commission to take testimony within the state has been issued from the court in which the action, suit or special

proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the state pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, the person desiring such testimony, or the production of papers and documents, may present a verified petition to any justice of the supreme court or judge of the superior court, stating generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and he shall set forth the substance of or have annexed to his petition a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpœna to compel the production of books or papers, the petition shall specify the particular books or papers, the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken.

3. Subpœna issued. Upon the filing of such petition, if the justice of the supreme court or judge of the superior court is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall issue a subpœna to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the state, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper, by his title or office, at a time and place specified in the subpœna, to testify in the action, suit or special proceeding. Where the subpœna directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but such books and original papers shall not be taken from the witness. This subpœna must be served upon the witness at least two days, or, in case of a subpœna requiring the production of books or papers, at least five days before the day on which the witness is commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken or a witness subpœnaed to attend and give his testimony, may apply to the court issuing such subpœna to vacate or modify the same.

4. Witness compelled to attend and testify. If the witness shall fail to obey the subpœna, or refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpœna, or to subscribe his deposition, the justice or judge issuing the subpœna shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. Upon proof by affidavit that a person to whom a subpœna was issued has failed or refused to obey such subpœna, to be duly sworn or affirmed, to testify or answer a question propounded to him, to produce a book or paper which he has been subpœnaed to produce, or to subscribe to his deposition when correctly taken down, the justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed, testify, answer a question propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the justice or judge shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such person should be required to appear, be sworn or affirmed, testify, answer the question propounded, produce the books or papers, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause, the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, he shall enforce the order and prescribe the punishment as hereinbefore provided.

5. Deposit for costs required. The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this state for attendance upon the superior courts. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (Rev., s. 1655; 1903, c. 608.)

Art. 8A. Perpetuation of Testimony

§ 1822(1). Relief afforded by superior courts.— The relief afforded in courts of equity by what is known as a "bill to perpetuate testimony" shall be afforded by the superior courts of this State. (1935, c. 254, s. 1.)

§ 1822(2). How to obtain relief. — Such relief may be obtained either by a special proceeding before the clerk of the superior court, or by a civil action brought to the superior court in term. (1935, c. 254, s. 2.)

§ 1822(3). Rules of procedure; admissibility of

testimony taken.—Such special proceedings and civil actions shall be governed by the same rules of procedure that govern other special proceedings and civil actions; and the testimony taken therein shall be admissible in the trial of any controversy, under the same regulations and restrictions which govern depositions taken in other cases in which the taking of depositions is provided for by the laws of this State: Provided, however, the evidence so perpetuated shall not be competent against any person who was not served with notice now provided by law for the taking of depositions in civil causes to be present and cross examine said witnesses. (1935, c. 254, s. 3.)

§ 1822(4). Taxing costs. — The costs of such special proceedings and civil actions shall be taxed against the party at whose instance the proceeding is instituted. (1935, c. 254, s. 4.)

Art. 9. Inspection and Production of Writings

§ 1823. Inspection of writings.—The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both. (Rev., s. 1656; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; C. C. P., s. 331; 1828, c. 7.)

Cross References.—For full discussion of subject, see 5 N. C. Enc. Dig. 673 et seq.; 14 N. C. Enc. Dig. 120 et seq.; see section 1824 and notes thereto; as to vacation of order, see 5 N. C. Enc. Dig. 674; as to examination of adverse party, see section 900 and notes there placed.

Editor's Note.—This section is quite similar to the provisions of section 1824 and must be construed therewith. In many of the cases the courts have used the term "production" when more properly the term "inspection" should be used, as the case was decided primarily under the provisions of section 1823. The reasoning used by the courts would indicate that this use of language has not been through inadvertence, but on the other hand would seem to furnish an additional support to the statement that the two sections are kindred in their nature and substance.

Liberally Construed.—This section is remedial, and should be liberally construed to advance the remedy intended thereby to be afforded. Abbitt v. Gregory, 196 N. C. 9, 11, 144 S. E. 297.

Discretion of Court.—Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in his sound discretion. Dunlap v. London Guaranty, etc., Co., 202 N. C. 651, 163 S. E. 750.

Application for Order.—While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. Bell v. Murchison National Bank, 196 N. C. 233, 145 S. E. 241.

Substitute for Bill of Discovery.—This section is primarily designed and intended to afford the facilities for the ascertainment of truths that were formerly supplied by a bill of discovery. Girard Nat. Bank v. McArthur, 165 N. C. 374, 81 S. E. 327.

Must Be Pertinent to Issue.—Upon motion to allow inspection or copy of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. Evans v. Seaboard Air Line R. Co., 167 N. C. 415, 83 S. E. 617.

Where No Information Could Be Gained.—Under this section, a person will not be ordered to allow an inspection of the paper-writing if the party making the request knows the contents thereof. Sheek v. Sain, 127 N. C. 266, 37 S. E. 334. The court said: "The object of this section is to enable a party to get information that he did not have, or to give him more definite information, or data, than he already had." Id.

Inspection within Specified Time.—This section only authorizes the judge to order one party to exhibit the writing to the other and require a copy to be given him or permit him to take a copy of the same, within a specified time. Sheek v. Sain, 127 N. C. 266, 272, 37 S. E. 334. It was not intended that there should be an investigation of the controversies—a kind of inferior court or petty trial—with witnesses and lawyers on both sides. Id.

An examination of an adverse party, under § 900 et seq., may be joined with an order under this section for an inspection of writings, in the possession or under the control of the party to be examined. Abbitt v. Gregory, 196 N. C. 9, 11, 144 S. E. 297.

Due Notice Required.—The inspection as provided for in this section can only be had upon the order of the court, made after due notice. Vann v. Lawrence, 111 N. C. 32, 34, 15 S. E. 1031.

Same—Duration of Notice.—A notice to produce papers, etc., "on a trial to be had this day," is not confined to a trial on that day, but extends to a trial at a subsequent term. State v. Kimbrough, 13 N. C. 431.

As an Aid to Frame Complaint.—In an action by a stockholder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff is entitled under this section to inspect the records and books of the corporation in order to obtain information upon which to frame his complaint. Holt v. Southern Finishing, etc., Co., 116 N. C. 480, 487, 21 S. E. 919. This is true even though their evidence may result in pecuniary injury. Id.

Depositing the Papers Not Required.—This section does not authorize the judge or clerk to issue an order that the respondent be required to deposit the papers in the clerk's office. Mills v. Biscoe Lumber Co., 139 N. C. 524, 52 S. E. 200.

Extent of Admission.—The papers, when produced by the method herein prescribed, are competent evidence for all legitimate purposes. Austin v. Secrest, 91 N. C. 214, 218.

Applicability of Res Judicata.—An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not res judicata and the motion can be renewed and a new order obtained. Mills v. Biscoe Lumber Co., 139 N. C. 524, 52 S. E. 200.

Motion to Nonsuit.—A motion to nonsuit a plaintiff for not producing books or papers, cannot be made unless a previous order of the court has been obtained for the production of such books or papers. Graham v. Hamilton, 25 N. C. 381.

Where Inspection Refused.—Where the judge refuses an inspection which is of the character authorized by this section, it still rests within his discretion to compel the production of the writing later or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. Evans v. Seaboard Air Line R. Co., 167 N. C. 415, 83 S. E. 617.

The affidavit supporting an order for inspection of writings must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient the order based thereon is invalid. Dunlap v. London Guaranty, etc., Co., 202 N. C. 651, 163 S. E. 750.

Review. — Where the trial court, within its discretion, has ordered a party to give to the other an inspection and copy of certain books, papers or documents containing material evidence, and the order is supported by sufficient findings of fact, and there is no evidence of abuse of such discretion, the order is not reviewable on appeal, and the appeal will be dismissed. Abbitt v. Gregory, 196 N. C. 9, 144 S. E. 297.

Reviewal by Supreme Court.—The Supreme Court will not pass upon the propriety of discharging a rule for the production of papers under this section unless the facts are stated upon which the application is based. Maxwell v. McDowell, 50 N. C. 391.

Appeal Allowed.—An appeal lies from an order requiring a person to allow an inspection of paper writings. Sheek v. Sain, 127 N. C. 266, 37 S. E. 334.

Applied to note for purpose of taking photographic copy thereof, in Girard Nat. Bank v. McArthur, 165 N. C. 374, 81 S. E. 327. Applied in Long v. Oxford, 104 N. C. 408, 10 S. E. 525, to determine the genuineness of a new promise on

an indebtedness set up by the plaintiff to defendant's plea of the statute of limitations.

Stated in McDonald v. Carson, 94 N. C. 497; Whitten v. Western Union Tel. Co., 141 N. C. 361, 54 S. E. 289; Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161.

§ 1824. Production of writings.—The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default. (Rev., s. 1657; Code, s. 1373; R. C., c. 31, s. 25; 1821, c. 1095; 1828, c. 7.)

Cross Reference.—See full treatment in 5 N. C. Enc. Dig. 673 et seq.; 14 N. C. Enc. Dig. 120 et seq., see section 1823 and notes thereto.

As to requirement of pertinence to issue, see note of Evans v. Seaboard Air Line R. Co., 167 N. C. 415, 83 S. E. 617, under section 1823.

Complaint Essential.—A court cannot under this section order the production of papers by the defendant where no complaint has been filed, so that, in case the papers are not produced, the court can render judgment for the plaintiff, according to the provision of the section. Branson v. Fentress, 35 N. C. 165.

Where No Answer Filed.—Where no answer has been filed, the defendant is not entitled to an order to inspect a check in possession of the plaintiff, under this section. Sheek v. Sain, 127 N. C. 266, 37 S. E. 334.

Proof by Parol.—The contents of a paper writing cannot be proved by parol, unless notice has been given to the adverse party, who has it in possession to produce it on trial. Murchison v. McLeod, 47 N. C. 239.

As to requirement of notice, see note of Vann v. Lawrence, 111 N. C. 32, 15 S. E. 1031, under section 1823.

Due notice is notice sufficient to enable the party to have the document when called for. McDonald v. Carson, 95 N. C. 377.

Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend court, to produce papers, is not sufficient. Beard v. Southern R. Co., 143 N. C. 136, 55 S. E. 505.

As to extent of admission, see note of Austin v. Secrest, 91 N. C. 214, under section 1823.

Affidavit for Non-Production.—Where the plaintiff's affidavit stated that he had not seen the letter (ordered produced) since he first sent it, that he had not knowingly destroyed it, and had made diligent search for it and could not find it, thus it was held to be sufficient cause shown for a discharge of the rule for its production. Fuller v. McMillan, 44 N. C. 206.

Stated in McDonald v. Carson, 94 N. C. 497.

§ 1825. Admission of genuineness.—Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. (Rev., s. 1658; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; 1828, c. 7; C. C. P., s. 331.)

Comments by Counsel.—Counsel may comment as to the truth of the contents of an instrument as suggested by its appearance, even after the admission in writing under this section that the instrument is genuine. Knight v. Houghtalling, 85 N. C. 17.

Art. 10. Confederate Currency

§ 1826. Scale of depreciation.—Contracts solvable in Confederate currency may be discharged according to the following scale of depreciation of Confederate currency, the gold dollar being the unit and measure of value, from November first, one thousand eight hundred and sixty-one, to May first, one thousand eight hundred and sixty-five:

Months	1861	1862	1863	1864	1865
January	$....	$1.20	$ 3.00	$21.00	$ 50.00
February	....	1.30	3.00	21.00	50.00
March	....	1.50	4.00	23.00	60.00
April	....	1.50	5.00	20.00	100.00
May	....	1.50	5.50	19.00	
June	....	1.50	6.50	18.00	
July	....	1.50	9.00	21.00	
August	....	1.50	14.00	23.00	
September	....	2.00	14.00	25.00	
October	....	2.00	14.00	26.00	
November	1.10	2.50	15.00	30.00	
December	1.15	2.50	20.00	.....	
December 1st to 10th, inclusive	....	....	.....	35.00	
December 10th to 20th, inclusive	....	....	.....	42.00	
December 20th to 30th, inclusive	....	....	.....	49.00	

This scale applies to the time of contracting and not to the times said debts become due. (Rev., s. 1659; Code ss. 2495, 2496; 1866, c. 39, s. 1; 1866-7, c. 44.)

CHAPTER 36

FENCES AND STOCK LAW

Art. 1. Lawful Fences

§ 1827. Fences to be five feet high.—Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided in this chapter, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county township or district wherein the stock law may be in force. (Rev., s. 1660; Code, s. 2799; R. C., c. 48, s. 1; 1777, c. 121, s. 2; 1791, c. 354, s. 1.)

For full treatment of fences, see 6 N. C. Enc. Dig. 441; as to defective fences, see 1 N. C. Enc. Dig. 372.

Requirements Mandatory.—Proof that plaintiff's fence is a "good ordinary one" such as the neighbors have, does not dispense with the obligation imposed by this section. Runyan v. Patterson, 87 N. C. 343.

A pasture field is not "ground under cultivation," within the meaning of this section, irrespective of whether it is woods pasture or cleared pasture. State v. Perry, 64 N. C. 305, 306.

The word "planter" as used in this section does not include hirelings, laborers or employees who have no discretion as to the plans for fencing. State v. Taylor, 69 N. C. 543.

Effect of Failure to Comply with Section.—If the statutory requirement is not complied with one cannot recover damages caused by animals of another, although the animal may be vicious and the fences are "good ordinary ones" such as the plaintiff's neighbors have. Runyan v. Patterson, 87 N. C. 343.

Cited in State v. Anderson, 123 N. C. 705, 31 S. E. 219.

§ 1828. Local: Four and a half feet in certain counties.—A fence four and one half feet high is a lawful fence in the counties of Alleghany, Bladen, Brunswick, Burke, Caldwell, Cherokee, Craven,

Cumberland, Currituck, Davie, Davidson, Duplin, Harnett, Henderson, Jackson, Lenoir, Perquimans, Randolph, Richmond, Robeson, Rutherford, Sampson, Tyrrell, Yancey, Wake, Washington and Wilkes. This section does not apply to stock-law fences, nor in Tyrrell county to wire fences which are lawful fences if four feet high. (Rev., s. 1661; 1889, c. 175; 1891, c. 36; 1905, c. 3, 333; 1909, cc. 55, 94; P. L. 1911, c. 15.)

§ 1829. Local: Four feet in certain counties.—A fence four feet high is a lawful fence in the counties of Bertie, Buncombe, Carteret, Hyde, Madison, McDowell, New Hanover, Northampton and Pamlico. (Rev., s. 1662; 1885, c. 304; 1887, c. 66; 1889, c. 390; 1903, cc. 66, 211; 1909, c. 178, s. 2; P. L. Ex. Sess. 1913, c. 48.)

§ 1830. Watercourse made lawful fence by county commissioners.—Any five electors, residents of the same county, may apply to the board of commissioners of the county, at any regular meeting of the same, by written petition praying that any watercourse, or any part of any watercourse, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board, before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any watercourse, or any part of any watercourse to which the petition applies, a lawful fence. And the several acts of the general assembly, declaring certain watercourses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any such acts, or parts thereof, to be null and void in said county. Any order made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting. (Rev., s. 1663; Code, ss. 2808, 2809, 2810; 1872-3, c. 98.)

§ 1831. Injury to wire fence forbidden. — If any person shall willfully destroy, cut or injure any part of wire fence or a fence composed partly of wire and partly of wood situated on the land of another, he shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars. (Rev., s. 3413; 1889, c. 516.)

Purpose of Section.—This section is not in conflict with section 4317, as that section was meant to protect the inclosure while this one was meant to protect the fences irrespective of whether or not they enclosed any field. State v. Biggers, 108 N. C. 760, 12 S. E. 1024.

Art. 2. Division Fences

§ 1832. Division fences maintainable jointly.—Where two or more persons have lands adjoining, which are either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line. (Rev., s. 1664; Code, s. 2800; 1868-9, c. 275, s. 1.)

§ 1833. Remedy against delinquent owner.—If any person who is liable to build or keep up a part of any division fence fails at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction. (Rev., s. 1670; Code, s. 2807; 1868-9, c. 275, s. 7.)

Only Civil Liability.—A violation of this section does not subject the wrongdoer to indictment. His liability is civil only. State v. Watson, 86 N. C. 626.

§ 1834. Fence erected because of changed use of land.—If the owner of a tract of land, who chooses neither to cultivate it, to use it as a pasture, nor to permit his stock to run on it, afterwards uses it in either of these ways and does not so enclose his stock that they cannot enter on the lands of an adjoining owner, he shall refund to such owner one-half the value of any fence erected by the latter on the dividing line. (Rev., s. 1665; Code, s. 2801; 1868-9, c. 275, s. 2.)

§ 1835. When owner may remove his part of division fence.—If any owner of land liable to contribute for the keeping up of a division fence determines neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months notice of his determination; and in that case, at any time after the expiration of such notice and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same. (Rev., s. 1671; Code, s. 2802; 1903, c. 20; 1868-9, c. 275, s. 8; 1883, c. 111.)

Counties Not Subject to Stock Law.—In counties where the "stock law" is applicable, this section will not be applied and a division fence may be dispensed with at any time without notice. State v. Edmonds, 121 N. C. 679, 28 S. E. 545.

Liability for Violating.—A violation of this section will not subject one to indictment. State v. Watson, 86 N. C. 626.

§ 1836. Proceeding to value division fence.—The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situate; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to act as a juror of the township, and if the complainant refuses the justice shall name one for him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence on the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice

and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments. (Rev., s. 166; Code, s. 2803; 1868-9, c. 275, s. 3.)

§ 1837. Contents of jurors' report.—The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up. (Rev., s. 1667; Code, s. 2804; 1868-9, c. 275, s. 4.)

§ 1838. Register to record report.—The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him. (Rev., s. 1668; Code, s. 2805; 1868-9, c. 275, s. 5.)

§ 1839. Final judgment on report; effect.—The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed. (Rev., s. 1669; Code, s. 2806; 1868-9, c. 275, s. 6.)

§ 1840. Removal of common fence misdemeanor.—If any person owning, occupying, cultivating or being in possession of any lands under a common fence protecting the lands, crops or property of others, shall remove such fence or any part thereof during the time in which any crops are growing or being actually cultivated thereon, or property is protected by such fence, and before such crops are harvested, without the consent and permission of such person or persons whose crop or property is protected by such common fence, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that the provisions of this section shall not apply when ninety days notice of such removal shall have been given to all persons owning, cultivating or in possession of lands surrounded by such common fence, or having property protected thereby, and when thereafter such fence shall be removed between the first day of January and the first day of March following such notice of intended removal. (Rev., s. 3412; Code, s. 2820; 1903, c. 20.)

As to liability for removal in general, see 6 N. C. Enc. Dig. 453.

Editor's Note.—When a fence is altogether on the land of a person, although used as a common fence he has the right to move it and he is not subject to criminal prosecution, but a civil right might arise under sec. 1835. State v. Watson, 86 N. C. 626. Neither will an indictment lie for removing a fence when the party removing the fence has possession of the land on both sides of the fence although title may be in the prosecutor, and the defendant is only a tenant by curtesy. State v. Williams, 44 N. C. 197.

Cited in State v. Dunn, 95 N. C. 697.

Art. 3. Stock Law

§ 1841. Term "stock" defined.—The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese. (Rev., s. 1681; Code, s. 2822.)

Editor's Note.—For an act to place certain portions of Dare county under the statewide stock law, see Public Laws of 1935, chapter 263.

Dogs.—A dog is not "stock" within the meaning of the section, but is nevertheless subject to larceny. Meekins v. Simpson, 176 N. C. 130, 96 S. E. 894.

§ 1842. County elections.—Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of the commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast is in favor of "stock law," then the provisions of this chapter relating to the stock law shall be in force over the whole of said county. (Rev., s. 1672; Code, s. 2812.)

As to proceedings in general, see 6 N. C. Enc. Dig. 449; as to "majority of qualified voters," see N. C. Const. Art. VII, sec. 7.

In General.—In a county where only a part of the townships have stock laws, an election covering the whole county is held valid, and it does not interfere with the principles of local self-government. Smalley v. Board, 122 N. C. 607, 29 S. E. 904; Perry v. Board, 130 N. C. 558, 41 S. E. 787.

Mandamus to Compel Election.—When a petition duly signed by the required number of voters is filed with the commissioners, and they refuse to call an election, mandamus may be brought to compel them to grant the petition. Perry v. Board, 130 N. C. 558, 41 S. E. 787.

§ 1843. Township elections.—Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein the township is situated, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the township; and if at any such township election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force in said township. (Rev., s. 1673; Code. s. 2813.)

In General.—The fact that a township has "stock laws" does not bar the voters in that township from voting in a county election. Smalley v. Board, 122 N. C. 607, 29 S. E. 904.

§ 1844. District elections.—Upon the written application of one-fifth of the qualified voters of any district or any territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners at any time, and setting forth well-defined boundaries of the district, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the district, and if at any such election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force over the whole of said district. (Rev., s. 1674; Code, s. 2814.)

"Well Defined Boundaries."—The words are not too indefinite to admit of proof to locate the boundaries where the beginning is "at a certain tract of land," and the difficulty as to the uncertainty of the point of beginning is removed where there is a call for the boundaries of lands of successive proprietors, thence to a certain point. Newsom v. Earnheart, 86 N. C. 391.

Right to Join Districts.—The commissioners have no power when several districts adjoin each other to unite them into one territory, provide for the construction of one boundary fence, and assess a uniform tax on all the real property in the several districts so united to meet the expense of the fence. Bradshaw v. Board, 92 N. C. 278.

§ 1845. Local: How territory released from stock law.—Upon the written application of a majority of the qualified voters in any district, territory or well defined boundary, made to the board of county commissioners, at any time, setting forth that the citizens of said district, territory or boundary are within the stock-law bound-

ary, and are desirous of being released from the laws governing stock-law territory, it shall be the duty of the commissioners to submit the question of "no stock law" or "stock law" to the qualified voters of said district or territory, and if at any such election a majority of the votes cast is against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock-law fence: Provided, that in any territory where stock law now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" nor "no stock law" shall take effect during crop season.

This section applies only to the counties of Cherokee, Clay, Graham, Jackson, Macon, Mitchell, Pender, Randolph, Swain, and to Hogback Township in Transylvania County. (Rev., s. 1675; 1895, c. 35; 1897, cc. 461, 516; 1903, c. 60; 1907, c. 874, s. 3; P. L. 1911, cc. 265, 469; P. L. 1915, c. 379; P. L. 1917, c. 662.)

Editor's Note.—It was at one time the public policy of the State to allow stock to run at large. Jones v. Witherspoon, 52 N. C. 555. A land holder was required to inclose his fields to protect his crops. But this policy has now been changed and except in cases of a petition and majority vote by the residents of a county or district for "no stock-law" the stock must be kept within the close of the owner.

When a "no stock-law" is duly passed, before the stock can be turned out to run at large the district or county passing such law must be inclosed so that the stock will not range out of "no stock-law" territory and on the crops of others, not in the "no stock-law" territory. Marsburn v. Jones, 176 N. C. 516, 97 S. E. 422.

This section provides that the expense incurred in building such a fence shall be paid by a tax on the property holders of the district or county. This certainly does not authorize a tax solely upon the real estate in the county or district. Hawes v. Commissioners, 175 N. C. 268, 95 S. E. 482. Therefore, to raise this fund an election must be held and authority granted by the majority of the voters. Marsburn v. Jones, 176 N. C. 516, 97 S. E. 422.

Section 1860 provides for a tax on the real property of a district or county, but that section is applicable only to districts or counties that pass the "stock-law" and cannot be applied to those passing "no stock-law."

For an act to place certain portions of Dare county under the statewide stock law, see Public Laws of 1935, chapter 263.

§ 1846. How election conducted.—Every election under this chapter shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same. (Rev., s. 1676; Code, s. 2815.)

§ 1847. Powers and duties of county commissioners.—The board of commissioners of the county may provide for a new registration of voters, designate places for holding elections, and make all regulations, and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law. (Rev., s. 1677; Code, s. 2826.)

Building and Repairing Fences.—County commissioners are not required by the stock-law to personally superintend the fence around the no fence territory; they discharge their duty under the statute when they levy the necessary taxes, appoint the committees, etc., to keep the fence in repair. State v. Commissioners, 97 N. C. 388, 1 S. E. 641.

But an owner of stock, however, who resides outside of such territory, is not liable to have his stock impounded within such territory, unless the county commissioners have kept the fence in good repair. In such case the presumption is that the fence is in good order, and the burden of showing the contrary on the party alleging it. Coor v. Rogers, 97 N. C. 143, 1 S. E. 613.

§ 1848. Admission of lands adjoining stock-law territory.—Any person, or any number of persons, owning land in a county, district or township which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to livestock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of landowners, whose lands are contiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no livestock shall run at large within any such enclosure, under the pains and penalties prescribed in this chapter. (Rev., s. 1678; Code, s. 2821.)

Cited in Edwards v. Supervisors, 127 N. C. 62, 37 S. E. 73.

§ 1849. Allowing stock at large in stock-law territory forbidden.—If any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3319; Code, s. 2811; 1889, c. 504.)

Cited in State v. Brigman, 94 N. C. 888; dissenting opinion, Daniels v. Homer, 139 N. C. 219, 252, 51 S. E. 992.

§ 1850. Impounding stock at large in territory.—Any person may take up any livestock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the same, with the right to use it under proper care, until all legal charges for impounding said stock and for damages caused by the same are paid, the damages to be ascertained by two disinterested freeholders, to be selected by the owner and the impounder, the freeholders to select an umpire, if they cannot agree, and their decision to be final. (Rev., s. 1679; Code, s. 2816.)

As to right to impound, see 1 N. C. Enc. Dig. 368; as to larceny of stock and malicious injury to, see secs. 4264, 4265.

Constitutionality. — This and the following sections are constitutional. Hogan v. Brown, 125 N. C. 251, 34 S. E. 411. And resident owners may be required to pay a higher

penalty than non-resident owners. Broadfoot v. Fayetteville, 121 N. C. 418, 28 S. E. 515.

Not Applicable to Stock in Control.—This section does not authorize the taking up and impounding of livestock unless running at large, and does not apply to cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forceable trespass to take them away over the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings. Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602. See also, State v. Hunter, 118 N. C. 1196, 24 S. E. 708.

Strays from No Fence Territory.—In State v. Mathis, 149 N. C. 546, 548, 63 S. E. 99, Connor, J., said: "While it is usual for the counties or townships which adopt a 'stock law' to build a common fence, it is not necessary that they do so." In State v. Garner, 158 N. C. 630, 74 S. E. 458, the court held that the owner of cattle who permits them to run at large in fence territory, but they stray across the line into a no-fence territory, is liable, though he does not turn them out for that purpose. Owen v. Williamson, 171 N. C. 57, 59, 87 S. E. 959.

Liability for Killing Strayers.—Under this section one has the power to take up a stray, and the law requires that he do so in preference to killing or injuring it. If he wantonly kills such stray, he is guilty of a misdemeanor. State v. Brigman, 94 N. C. 888. See sec. 4494.

§ 1851. Owner notified; sale of stock; application of proceeds.—If the owner of such stock be known to the impounder he shall immediately inform the owner where his stock is impounded, and if the owner shall for two days after such notice willfully refuse or neglect to redeem his stock, then the impounder, after ten days written notice posted at three or more public places within the township where the stock is impounded, and describing the stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the preceding and succeeding sections, and the balance he shall turn over to the owner if known, and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner. (Rev., s. 1680; Code, s. 2817.)

As to notice and how given, see 1 N. C. Enc. Dig. 368.

Constitutional.—See notes to preceding section.

Cited in dissenting opinion, Daniels v. Homer, 139 N. C. 219, 252, 51 S. E. 992.

§ 1852. Impounding unlawfully misdemeanor.—If any person shall willfully and unlawfully toll, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat, or dog, from the range or elsewhere, into any stock-law district, or into the limits of any city or town having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, he shall be guilty of a misdemeanor. If any person shall unlawfully and willfully remove any animal above named from any lawful inclosure, with intent to injure the owner, he shall be guilty of a misdemeanor. (Rev., s. 3309; 1895, c. 141, s. 1.)

§ 1853. Illegally releasing or receiving impounded stock misdemeanor.—If any person unlawfully receives or releases any impounded stock, or unlawfully attempts to do so, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3310; Code, s. 2819; 1889, c. 504.)

§ 1854. Impounded stock to be fed and watered.—If any person shall impound, or cause to be impounded in any pound or other place, any animals, and shall fail to supply to the same during such confinement a sufficient quantity of good and wholesome food and water, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3311; Code, s. 2484; 1891, c. 65; 1881, c. 368, s. 3.)

§ 1855. Right to feed impounded stock; owner liable.—In case any animal is at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place in which any animal shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal. (Rev., s. 1682; Code, s. 2485; 1881, c. 368, s. 4.)

In General.—The law recognizes the difference between an impounding fee and a charge for food; for sec. 1850 prescribes the impounding fees for taking up stock running at large, and this section prescribes for payment of feeding such stock when taken up. The former fees go to the officer or the town or county, and the latter is a humane provision without which the stock might suffer for want of food and water. Owen v. Williamston, 171 N. C. 57, 60, 87 S. E. 959.

§ 1856. Injuring lands in stock-law territory by riding or driving.—If any person, by riding or driving upon the lands of another without permission, or while driving livestock along any roadway, public or private, shall willfully, deliberately or recklessly do or permit to be done any actual injury to said land, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. But no such offender shall be proceeded against unless the party injured, or some one in his behalf, shall cause a warrant to be issued or an indictment to be found against the party offending, within fifteen days after the commission of the offense. (Rev., s. 3321; Code, s. 2828; 1889, c. 118.)

§ 1857. Owner in stock-law territory allowing stock outside.—If any person having stock within the limits of a stock-law territory shall allow the same to run at large beyond the boundaries of said territory, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that a person owning or renting land outside of the stock-law territory may turn his stock upon the said land outside of the stock-law district. (Rev., s. 3322; Code, s. 2827; 1889, c. 266; 1885, c. 371.)

§ 1858. Stock-law territory to be fenced around.—The stock authorized by this chapter shall not be enforced until a fence has been erected around

any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, that all streams which are or may be declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township or district where a stock law prevails. (Rev., s. 1683; Code, s. 2823.)

§ 1859. Commissioners may declare natural barrier sufficient fence.—In any county in the state in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any watercourse, mountain, mountain range or parts of same, and also other natural and sufficient obstruction along the line of said stock-law territory to be and constitute a sufficient stock-law fence, and in that event such watercourse, mountain, mountain range or part thereof and obstructions so declared by said commissioners shall be and constitute a lawful fence to all intents and purposes. (Rev., s. 1684; 1901, c. 542.)

In General.—It is competent for the county commissioners to forbid stock from running at large within the county, and declare a mountain range, a creek, or other natural line, a fence as the limit within which the law shall operate, and it is not a valid defence that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line when one is prosecuted for allowing his stock to run at large. State v. Mathis, 149 N. C. 546, 63 S. E. 99.

§ 1860. Assessment of landowners for fence.—For the purpose of building stock-law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the state and county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property. (Rev., s. 1685; Code, s. 2824.)

As to tax for no stock-law fence, see notes to sec. 1845; As to taxation in general, see 6 N. C. Enc. Dig. 449.

In General.—In Busbee v. Commissioners, 93 N. C. 143, Smith, C. J., says: "But these local assessments are not under all the restraints put upon the taxing power. They stand upon a different footing and rest upon the equitable and just consideration that lands rendered more valuable by the improvements ought to contribute to the expense of making the improvements, and that these expenses ought not to fall upon the entire body of the taxpayers. The advantage is to the land, and to the persons only as owners of the land."

This section does not authorize the imposition of the assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners. Harper v. Commissioners Co., 133 N. C. 106, 45 S. E. 526.

Constitutionality.—This section does not come within the prohibition of the State Constitution providing for uniform tax, as this is not of the nature of a tax, but is an assessment to defray expenses of local improvements, although called a tax by the Legislature. Shuford v. Commissioners, 86 N. C. 552; Cain v. Commissioners, 86 N. C. 8.

When Applicable.—The provisions of this section, apply both to the cases where the adoption of the stock law is dependent on a popular vote, and where it is made absolute by an act of the General Assembly. Busbee v. Commissioners, 93 N. C. 143.

District in Two Counties.—If the district organized lies in two counties the assessment shall be as if it was all in one county. Commissioners v. Commissioners, 92 N. C. 180.

Railroad's Liability.—The roadbed and right of way of a railroad are liable to an assessment for local improvements. Commissioners v. Seaboard Air Line R. Co., 133 N. C. 216, 45 S. E. 566.

Assessment Must be for Stock-Law Fences Only.—An assessment by a county upon the real estate to build a fence for the purpose of keeping the stock in anti-stock-law territory from trespassing is unauthorized by law. Hawes v. Commissioners, 175 N. C. 268, 95 S. E. 482.

§ 1861. Condemnation of land for fence.—If the owner of any land objects to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway in accordance with the procedure specified in the article Condemnation Proceedings under the chapter Eminent Domain. (Rev., s. 1686; Code, s. 2825.)

§ 1862. Injury to stock-law fences misdemeanor in stock-law territory.—If any person willfully tears down, or in any manner breaks a fence or gate, or leaves open a gate erected around a stock-law territory, or willfully breaks any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape therefrom, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3411; Code, s. 2820; 1889, c. 504.)

As to criminal liability in general, see 6 N. C. Enc. Dig. 453.

Cited in State v. Dunn, 95 N. C. 697, 698.

§ 1863. Impounder violating stock law misdemeanor.— If any impounder willfully misappropriates money that he may receive from sale of stock impounded, or in any manner willfully violates any provisions of the law in regard thereto, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3312; Code, s. 2820; 1889, c. 504.)

Cited in State v. Dunn, 95 N. C. 697, 698.

§ 1864. Local: Depredations of domestic fowls in certain counties.—In the counties and parts of counties hereafter enumerated, where the stock law prevails, it shall be unlawful for any person to permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large, after being notified as provided in this section, on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff, or while being used for gardens or ornamental purposes.

Any person so permitting his fowls to run at large, after having been notified to keep them up, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five dollars or imprisoned not exceeding five days, or if it shall appear to any justice of the peace that after two days notice any person persists in allowing his fowls to run at large and fails or refuses to keep them upon his own premises, then the said justice of the peace may, in his discretion, order any sheriff, constable or other officer to kill said fowls when so depredating.

Alamance, 1901, c. 645.
Avery, P. L. 1935, c. 77.
Bladen, 1901, c. 645.
Buncombe, 1907, c. 508.
Burke, 1907, c. 508.
Cabarrus, 1901, c. 645.
Caldwell, P. L. 1911, c. 244.
Clay, P. L. 1935, c. 51.
Cleveland, 1901, c. 645.

Columbus, 1933, c. 308.
Currituck, 1901, c. 645.
Davidson, P. L. 1911, c. 244.
Duplin, 1908, c. 73.
Edgecombe, 1901, c. 645.
Gaston, P. L. 1919, c. 31.
Gates, P. L. 1935, c. 77.
Graham, 1901, c. 645.
Granville, P. L. 1911, c. 244.
Guilford, 1901, c. 645.
Harnett, P. L. 1931, c. 443.
Henderson, P. L. 1911, c. 636.
Iredell, P. L. 1935, c. 170.
Jackson, P. L. 1919, c. 31.
Johnston, P. L. 1935, c. 78.
Lee, P. L. 1913, c. 725.
Lenoir, P. L. 1911, c. 244.
Macon, P. L. 1919, c. 31.
Martin, P. L. 1935, c. 77.
Mecklenburg, 1901, c. 645.
Moore, P. L. 1935, c. 77.
Onslow, P. L. 1911, c. 244.
Orange, 1903, c. 115.
Pasquotank, 1901, c. 645.
Rockingham, P. L. 1931, c. 434.
Rowan, 1909, c. 847.
Sampson, 1935, c. 196.
Stokes, P. L. 1931, c. 22.
Surry, 1901, c. 645.
Swain, P. L. 1911, c. 244.
Transylvania, P. L. 1911, c. 244.
Tyrrell, P. L. Ex. Sess. 1921, c. 41.
Union, P. L. 1935, c. 77.
Vance, 1909, c. 619.
Wayne, P. L. 1911, c. 244.

Note.—Statutes more or less similar to the above exist in the following counties:

Catawba, 1903, c. 482.
Chatham, 1903, c. 482.
Davie, P. L. 1915, c. 167.
Forsyth, P. L. 1915, c. 39.
Green, 1907, c. 917; 1908, c. 78.
Lincoln, P. L. 1915, c. 312.
McDowell, P. L. 1917, c. 328.
Pitt, P. L. 1915, c. 462.
Randolph, P. L. 1913, c. 645.
Robeson, P. L. 1917, c. 662.
Scotland, P. L. 1915, c. 714.
Wake, P. L. 1915, c. 378.
Yadkin, P. L. 1915, c. 39; P. L. 1917, c. 321 (Deep Creek Township excepted).
Yancy, P. L. 1913, c. 739.

Editor's Note.—"Columbus" was added to the list of counties by Public Laws 1933, c. 308. For act, applicable only to Duplin County, making this section over land used for cultivation of strawberries or other truck crop, see Public Laws 1933, c. 186.

Public Laws of 1935, chapter 77 added Avery, Gates, Martin, Moore and Union to the list of counties. Public Laws of 1935, chapter 51 added Clay. Public Laws of 1935, chapter 78 added Johnston. Public Laws of 1935, chapter 170 made the section applicable in all of Iredell. Public Laws of 1935, chapter 196 added Sampson.

§ 1864(a). Eastern North Carolina, territory placed under stock law.—From and after January first, one thousand nine hundred and twenty-two, all of that part of eastern North Carolina lying east of that branch of the Atlantic Coast Line Railroad running from Wilmington, North Carolina, northerly to the Virginia line and passing through Goldsboro, Wilson, and Weldon (formerly known as the Wilmington and Weldon Railroad), shall be and is hereby declared to be "stock law territory," and shall be subject to all of the provisions of sections one thousand eight hundred and forty-one to one thousand eight hundred and sixty-four, inclusive: Provided, that that portion of North Carolina which borders the Atlantic Ocean and which is separated from the mainland by a body of water such as an inlet or sound, shall not be considered to fall within the provisions of this law. (1921, c. 50, s. 1.)

As to stock law territory in Onsloy County, see Public Laws 1933, c. 151.

§ 1864(b). Counties divided by railroad. — Wherever the railroad referred to in section 1864(a) shall divide a county so that a part of the county lies east and a part west of the said railroad, then the whole of said county shall be "stock law territory," and under the provisions of this article from and after January first, one thousand nine hundred and twenty-two. (1921, c. 50, s. 2.)

§ 1864(c). Repeal of local laws or regulations. —Sections 1864(a) and 1864(b) shall not be construed to repeal or charge local laws or regulations regarding the subject-matter covered by those sections except so far as said local laws and regulations actually conflict with the provisions thereof and prevent the proper enforcement of said provisions, and the said local laws, rules, and regulations on the subject-matter similar to that covered by said sections shall remain in full force and effect, except as they do and until they do actually interfere with the enforcement of the said provisions. (1921, c. 230.)

CHAPTER 36(A)
FIDUCIARIES

§ 1864(d). Short title.—This law may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14.)

Editor's Note.—This and the following sections constitute the Uniform Fiduciaries Act which was recommended by the national conference of commissioners on uniform state laws in 1922.

The general purpose is to establish uniform and definite rules in place of divers and indefinite rules now prevailing as to constructive notice or breaches of fiduciary obligations, and to facilitate the performance by fiduciaries of their obligations, rather than to favor any particular class of persons dealing with them. In order to prevent occasional breaches of trusts, the courts have sometimes adopted rules which can nevertheless be evaded by dishonest fiduciaries but at the same time seriously hamper honest fiduciaries in the performance of their obligations. Hence the need for regulations overcoming these difficulties and establishing uniformity.

With this general purpose in mind the law is framed so that its application is restricted to the liabilities of the persons dealing with fiduciaries and does not deal with the liabilities of the fiduciaries themselves. It contemplates only situations where the persons dealing with a fiduciary know him to be such so that questions relating to actual or constructive notice of the existence of the trust or other fiduciary obligations are not within the scope of the act. It was suggested by the commissioners that fear that inadequate protection to beneficiaries will result is partially dissipated by the fact that the English courts have adopted similar rules which work well in practice.

It should be observed that in none of the situations dealt with in this act is the standard of due care or negligence made the test of liability. While the act recognizes that there are instances when the person dealing with the fiduciary should be held liable, it proceeds upon the theory that this is true only when acting with actual knowledge or

in bad faith, and in such instances only does the person deal with a fiduciary at his own peril.

Same—Prior Law.—Under the law of this State prior to this statute, the law as to the various class of fiduciaries has varied just a little but it was held very generally that where one accepted the assets of the estate held in trust by the fiduciary in payment of an individual debt, he was charged with notice and considered a party to the wrong, and thus a dealer at his peril. So it has been held that in equity (in the early cases the rule at law was otherwise) the executor or administrator can make no valid sale or pledge of the assets as a security for or in payment of his own debt on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication. Powell v. Jones, 36 N. C. 337, 338; Bradshaw v. Simpson, 41 N. C. 243, 246. Although the purchaser in good faith at a sale was protected. Gray v. Armistead, 41 N. C. 74. But it was the rule with respect to trustees that the purchaser must put himself on the footing of having an equal equity with the cestui que trust, and this he cannot do if he has notice, actual or constructive, of the trust; for, as the trustee has no right to sell, the sale amounts to a breach of duty, in which the purchaser, of necessity, participates, without reference to the application of the fund. Gray v. Armistead, 41 N. C. 74, 78. And where a party unites with a trustee in a breach of trust, or there were circumstances to put him on guard and awaken suspicion, he was required to repay to the trust fund any of its assets which he received in consequence of the breach of trust. Dancy v. Duncan, 96 N. C. 111, 1 S. E. 455.

To make the purchaser of a legal title trustee for the cestui que trust, it was not necessary that he should have notice of the particular trust. It was sufficient if he had notice that the person, from whom he bought, was but a naked trustee. He ought to have inquired and searched out the cestui que trust. Maples v. Medlin, 5 N. C. 220.

So it was, of course, held that where a guardian transferred a note, payable to him as guardian, without indorsement, to one of his creditors as security for his own debt, and became insolvent, the assignee, though he paid a valuable consideration for the note, having had notice of the trust, was, at the suit of the ward, restrained from collecting the note. Lockhart v. Phillips, 36 N. C. 342.

And where a bond was, on its face, payable to a guardian for the benefit of his ward, this was prima facie notice to one, who took an assignment of it, that it was the property of the ward and subject to his equities. More especially was this the case, where the bond was taken in payment of the personal debt of the guardian, and where it was taken at an oppressive discount. Exum v. Bowden, 39 N. C. 281.

It was settled law, therefore, that when a person got from an administrator, or other person acting in a fiduciary capacity, the trust fund or any part of it as payment of the trustee's own debt, that person could not hold the fund from the cestui que trust any more than the original trustee could have done. Gray v. Armistead, 41 N. C. 74; Wilson v. Doster, 42 N. C. 231; Hendrick v. Gidney, 114 N. C. 543, 546, 19 S. E. 598.

The purchasers from fiduciaries who had no right to sell were not protected even though they had no actual or constructive knowledge of the trust, it would seem, because the purchase itself was presumed to make them parties to the wrong and charge them with notice. And even when the fiduciary had a right generally to sell, much less than actual or particular knowledge in detail was sufficient to convert a person, who co-operated with a dishonest trustee in an act amounting to a breach of trust into a trustee. Constructive notice from the possession of the means of knowledge, had that effect, although the party was actually ignorant, but ignorant merely because he did not investigate. It was well settled, that if anything appeared to a party calculated to attract attention or stimulate inquiry, the person was affected with knowledge of all that the inquiry would have disclosed. Buning v. Ricks, 22 N. C. 130, 134.

From what has been said in this note, it is evident that the law in this State was materially modified, although in the instance of a person dealing with a fiduciary known to be violating his trust or in bad faith the rule is not changed.

§ 1864(e). Definition of terms.—1. In this law unless the context or subject-matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

2. A thing is done "in good faith" within the meaning of this law when it is in fact done honestly, whether it be done negligently or not. (1923, c. 85, s. 1.)

Origin of Definitions—"Bank."—The definition of "banks" contained in this section was taken from the Uniform Negotiable Instruments Act, section 2976 of this Code. As to what constitutes the business of banking, see section 216 (a).

Same—"Persons."—The word "persons" as here defined is a combination of the definitions in the N. I. L., section 2976 of this Code; section 76 of the Uniform Sales Acts; the Uniform Warehouse Receipt Act, section 4037 of this Code; section 22 of the Uniform Stock Transfer Act; and section 2 of the Uniform Partnership Act.

Same—"Fiduciary" and "Principal."—The definitions of "fiduciary" and "principal" are both new with this act. However, it is well to observe that two classes of fiduciaries are contemplated: (1) Those holding property in their own name, and (2) those dealing with property which is held in the name of the principal. Different provisions are necessarily made in some of the following sections in regard to these two classes of fiduciaries.

Same—"Good Faith." — The definition of "good faith" is taken verbatim from section 76 of the Uniform Sales Act; the Uniform Warehouse Receipt Act, section 4037 of this Code; section 52 of the Uniform Bills of Lading Act; section 22 of Uniform Stock Transfer Act. "Good Faith" is not defined in the N. I. L. sections 2976 of this Code, et seq.

It will probably be of interest to point out that in the tentative draft of this section by the National Commissioners it ended with a definition of "bad faith" in the following language: "And a thing is done in the bad faith when it is in fact done dishonestly." This was omitted by a vote of the National Conference. The N. I. L. contains no definition of "bad faith."

The courts have held that the test of good faith is the subjective test of honesty, and not the objective test of due care. See Branman's Neg. Inst. Laws, pp. 187 et seq.

§ 1864(f). Application of payments made to fiduciaries.—A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. (1923, c. 85, s. 2.)

Editor's Note.—It was pointed out by the commissioners drafting this act in submitting it to the conference that it applies only when the fiduciaries are authorized to receive the property or money transferred. Under such circumstances it applies to all transfers and not to payments of money only. It also applies to all fiduciaries and not merely trustees.

This section is based upon statutes existing in England, Alabama, Colorado, Delaware, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, Ohio, Rhode Island, South Dakota, and Wisconsin.

It was stated in 1 N. C. Law Rev. 291 that this section accords with the North Carolina decisions, Tyrrell v. Morris, 21 N. C. 559; Gray v. Armistead, 41 N. C. 74; Kadis v. Weil, 164 N. C. 84, 80 S. E. 229, unless a change results from the elimination by the definition of "fiduciary" in section 1864(e) of certain distinctions hitherto recognized between some classes of fiduciaries. Exum v. Bowden, 39 N. C. 281; Gray v. Armistead, supra.

§ 1864(g). Registration of transfer of securities

held by fiduciaries.—If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith. (1923, c. 85, s. 3.)

Editor's Note.—This section is based upon a Massachusetts statute which was passed in 1918 and amended in 1926 relating to trustees. See Gen. Laws, ch. 203, section 21, Cum. St. ch. 203, section 21. There are similar statutes in Delaware (R. C. 1915, section 3396); Kentucky (St. 1909, section 4169); Pennsylvania (Purdon's Dig. 13 ed. 4850, section 7), and a very recent statute in Illinois.

This section applies only when the stock or securities are registered in the name of the fiduciary and has no application when it is in the name of the principal; nor where registered in the name of the decedent and the executor or administrator wishes to transfer it to his own name or that of a third person. It does not, therefore, interfere with the provisions of the inheritance tax laws.

In submitting this section, the framers called attention to the various practices with respect to the manner of registering stock on the corporation registers. It was pointed out that in England by statute no notice of the trust is registered upon the books of the corporation, that similar provisions are often made in charters, and in the United States provisions are made especially in instruments creating trusts. The commission also denounced the practice of trustees registering stock held in trust in their own names without disclosing the relation, or registering it in the name of the broker to facilitate the transfer.

In cases where it is desirable to make a transfer of securities more difficult in order to reduce the amount of the fiduciaries' bond, it may be done by giving notice to the corporation that the stock shall be transferrable only upon proof of certain facts, or only upon an order of the court. After such notice the corporation would be liable if it should improperly register the transfer.

This section appears to change the rule of Baker v. Railroad, 173 N. C. 365, 92 S. E. 170, which required a corporation before registering a transfer of stock held in the name of a fiduciary as such, to inquire whether the fiduciary was committing a breach of trust in making the transfer. 1 N. C. Law Rev. 291.

§ 1864(h). Transfer of negotiable instrument by fiduciary.—If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by a fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument. (1923, c. 85, s. 4.)

Editor's Note.—This and the two following sections deal with paper drawn or indorsed by fiduciaries.

One of the primary purposes of this section is to bring the rule as to instruments negotiated by or to fiduciaries as to notice of a defect in harmony with the N. I. L., section 3037. Notwithstanding that section 3037 provides that, to constitute notice of an infirmity in an instrument or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the defect or infirmity or knowledge of such facts as to make the taking amount to bad faith, the courts generally have ignored the N. I. L. and held that where the fiduciary relation is shown on its face, the payee or indorsee is bound to make inquiry. But if there is nothing upon the face of the instrument to indicate the relation one may be holder in due course whether negligent or not unless he acted in bad faith. So courts unconsciously substituted the objective test of negligence for the subjective test of the N. I. L. Thus it may be seen that instead of contradicting the N. I. L., these sections supplement it.

North Carolina has followed the uniform application of the N. I. L. See Smathers v. Toxaway Hotel Co., 162 N. C. 346, 78 S. E. 224; 167 N. C. 469, 83 S. E. 844; Setzer v. Deal, 135 N. C. 428, 47 S. E. 466; Ford v. Brown, 114 Tenn. 467, 88 S. W. 1036. And see 1 N. C. L. Rev. 291.

It is worth noting that these sections cover two situations requiring different rules. (1). Where the instrument is given in a transaction not known by the taker to be for the personal benefit of the fiduciary. Under such circumstances the taker is not bound to inquire but the transaction is presumed to be proper and is rebutted, only by proof of actual knowledge that it is improper, or proof of bad faith. Under the last two circumstances the taker is liable in either case. To illustrate, if the taker suspects that the fiduciary's action is improper but refrains from investigating, he acts at his own peril. The test should be that of subjective test of bad faith and not that of objective test of negligence. (2). The next situation is where the taker knows the instrument to be given for the personal benefit of the fiduciary. Distinction is made between (a) cases where the instrument is made payable to the principal, or to the fiduciary in his representative capacity, and as such is indorsed in payment of or as security for a personal debt of the fiduciary [this is the case covered by section 1864(h)]; (b) where the instrument is made or drawn by the fiduciary as such, payable to the personal creditors of the fiduciary, and delivered to such creditors in payment of or as security for the personal debt of the fiduciary on the one hand [this is the situation covered by section 1864(i)], and (c) cases where the instrument is drawn by the fiduciary on behalf of the principal payable to the fiduciary personally, or by the fiduciary as such to himself personally, and by the fiduciary indorsed to his personal debtor in payment of his personal debt [this is the situation covered by section 1864(j)]. In (a) and (b) there is strong presumption of improper action, but in (c) it is plausible that the instrument was given to the fiduciary in payment of a just debt owed by the principal, such as salary, commission, reimbursement for expenses, dividends or the like. Therefore in (c) the person taking the instrument in payment is liable only in case he had actual knowledge of the improper action, but in (a) and (b) he is liable unless the fiduciary in fact acted properly. See the discussion in 34 Harv. Law Rev. 454, note 25.

The language of these sections as to bad faith is made to conform to the similar language of bad faith in the N. I. L.

§ 1864(i). Check drawn by fiduciary payable to third person.—If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in

taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument. (1923, c. 85, s. 5.)

See note under section 1864(h).

§ 1864(j). Check drawn by and payable to fiduciary.—If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowlege of such breach or with knowlege of such facts that his action in taking the instrument amounts to bad faith. (1923, c. 85, s. 6.)

See note under section 1864(h).

§ 1864(k). Deposit in name of fiduciary as such.—If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 7.)

Editor's Note.—This and the three following sections deal with depositories of the funds of fiduciaries.

The purpose of these sections is to lay down uniform rules making banks acting solely as depositories liable only when they have actual knowledge of the fiduciary's breach of duty or when acting in bad faith. Where the bank acts as creditor, however, it is made liable to the same extent as other creditors.

The weight of authority has been to the effect that depositories are not bound to inquire into the fiduciary's authority to make deposits even though made as the fiduciary's personal account. Nor have depositories as a general rule been required to inquire into the purpose for which withdrawals have been made, whether payable to the fiduciary personally or as fiduciary, or to third persons. But a depository has been bound to make inquiry where the fiduciary pays a personal debt out of fiduciary funds deposited in the bank.

This and the two following sections are in accord with the tendency of the North Carolina decisions as indicated in Bank v. Clapp, 76 N. C. 482; Bank v. Insurance Co., 150 N. C. 770, 774, 64 S. E. 902; Miller v. Bank, 176 N. C. 152, 96 S. E. 977. They are also in accord with the general weight of authority. U. S. Fidelity, etc., Co. v. Bank, 77 W. Va. 665, 88 S. E. 109; Duckett v. Natl. Mechanics Bank. 86 Md. 400, 38 Atl. 983. See also 1 N. C. Law Rev. 291.

§ 1864(l). Deposit in name of principal.—If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 8.)

See note under section 1864(k).

§ 1864(m). Deposit in fiduciary's personal account.—If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of checks payable to him as fiduciary or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. (1923, c. 85, s. 9.)

See note under section 1864(k).

§ 1864(n). Deposit in names of two or more trustees.—When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith. (1923, c. 85, s. 10.)

Editor's Note.—This section is limited in its application to trustees. It is a general rule that one trustee cannot bind his cotrustee unless authorized by him to do so, and that a trustee can delegate only such of his duties as are ministerial. It is questionable whether or not the drawing of a check is a ministerial duty as a general rule. Probably as to the principal it is, but not as to income. But be that as it may, neither the bank nor payees or other holders are put upon inquiry as to the authority.

This section applies only to trustees and not to other

classes of fiduciaries, and its application is limited to checks according to the opinion of the drafters.
See 1 N. C. L. Rev. 292, to the same effect.

§ 1864(o). Law not retroactive. — The provisions of this law shall not apply to transactions taking place prior to the time when it takes effect. (1923, c. 85, s. 11.)

§ 1864(p). Cases not provided for in law. — In any case not provided for in this act the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12.)

§ 1864(q). Uniformity of interpretation. — This law shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13.)

CHAPTER 37

FISH AND FISHERIES

SUBCHAPTER I. FISHERIES COMMISSION BOARD ACT.

Art. 1. Definitions and General Provisions

§ 1865. Fish, fishing, fisheries, defined. — Wherever the word "fish" or "fishes", as a substantive, occurs in this subchapter, it shall be construed to include porpoises and other marine mammals, fishes, mollusca, and crustaceans, and wherever the word "fishing," or "fisheries" occurs it shall be construed to include all operations involved in using, setting or operating apparatus employed in killing or taking the said animals or in transporting and preparing them for market. (1915, c. 84, s. 24.)

Editor's Note.—Public Laws 1935, chapter 35 reinvested the Department of Conservation and Development Board with all the rights, powers and duties conferred upon Fisheries Commission Board by section 1878. See note to section 1878. See also, sections 1901(a) et seq., 2078(q) et seq.

§ 1866. Administrative agencies under former laws conformed to present law.—All acts relating to the fisheries of North Carolina are hereby amended so that the words "shellfish commissioner," "oyster commissioner," or "fish commissioner" shall read "fisheries commissioner," and the words "shellfish commission" shall read "fisheries commission." (1915, c. 84, s. 25; 1917, c. 290, s. 9.)

§ 1867. State jurisdiction over fisheries.—The state of North Carolina shall have exclusive jurisdiction and control over all the fisheries of the state wherever located. (1915, c. 84, s. 18; 1917, c. 290, s. 9.)

§ 1868. Edible fish used only as food. — Any person, firm or corporation who catches or causes to be caught any edible fish in the waters of the state of North Carolina for any other purpose than as food, and any person, firm or corporation who shall use any edible fish for fertilizing purposes shall be guilty of a misdemeanor and fined not less than fifty dollars or imprisoned not less than thirty days. (1915, c. 84, s. 23.)

Art. 2. Fisheries Commission Board; Organization, Officers, Support

§ 1869. Creation and organization of board. — For the purpose of enforcing laws relating to all fish, there is hereby created a fisheries commission, which shall consist of eleven members appointed by the governor and confirmed by the senate, at least six of whom shall be from the several fishing districts of the state, and shall have a practical knowledge of or be familiar with the fishing industry, who shall be denominated the fisheries commission board. Four of said members shall be appointed for a term of two years from April first, one thousand nine hundred and twenty-three, four for a term of four years from said date, and three for a term of six years from said date, and shall be so designated by the governor in his message to the senate appointing them. Any commissioner appointed by the governor under this law may be removed by him for cause. In the case of death, resignation, removal from the state, removal by the governor for cause, or mental disability of any commissioner during his term of office, his successor shall be appointed by the governor to fill out the unexpired term, and such appointment shall be reported to the next session of the senate for its action. If the senate shall refuse to confirm any appointee of the governor, then it shall be his duty to appoint another and send his name to the senate for its action. At the expiration of the term of office of any of said commissioners, his successor shall be appointed in a like manner by the governor for a term of six years.

The eleven members shall receive four dollars per day each and traveling expenses while attending meetings of the board; Provided, the per diem and expenses shall not exceed two hundred and fifty dollars ($250.00) each per annum: Provided further, that the chairman shall receive such compensation as the board may allow. (1915, c. 84, s. 1; 1917, c. 290, s. 1; Ex. Sess. 1921, c. 42, s. 1; 1923, c. 168, s. 1.)

See note to section 1878.

Editor's Note.—This section was amended by Public Laws of 1923, ch. 168, sec. 1. In 1 N. C. Law Rev. 301 it is stated that the effect of the amendment was "to increase the membership of the Fisheries Commission Board from five to eleven and regulate the manner of their appointment, transfer to it the property held by the former board and confer upon it the same powers and duties, with the idea of infusing new life into the work."

§ 1870. Fish commissioner and assistant commissioners.—Said board shall appoint a fisheries commissioner within thirty days after the passage of this act, and the said commissioner shall be responsible to the fisheries commission board for carrying out the duties of his office, and shall make semiannual reports to them at such time as they may require. The term of office of said commissioner and his successor in office shall be four years or until his successor is appointed and qualified, and in case of vacancy in the office the appointment shall be to fill the vacancy. The said commissioner may appoint three assistants by and with the consent of the fisheries commission board, who shall hold said officers at the pleasure of the fisheries commissioner and the board, whose duties shall be prescribed by the fisheries commissioner. The aforesaid commissioner and assistant commissioners shall receive

such pay as the fisheries commission board shall determine. During the absence of the commissioner, or his inability to act, the fisheries commission board shall appoint one of the assistant commissioners to have and exercise all the powers of the commissioner. The commissioner and assistant commissioners shall each execute and file with the secretary of state a bond, payable to the state of North Carolina, in the sum of five thousand dollars for the commissioner and twenty-five hundred dollars each for each of the assistant commissioners, with sureties to be approved by the secretary of state, conditioned for the faithful performance of their duties and to account for and pay over, pursuant to law, all moneys received by them in their office. The fisheries commissioner and assistant commissioners shall take and subscribe an oath to support the constitution, and for the faithful performance of the duties of his office, which oaths shall be filed with their bonds. The assistant commissioners may be removed for cause by the commissioner, who may appoint their successors. (1915, c. 84, s. 1; 1917, c. 290, s. 1; 1925, c. 310.)

Editor's Note.—By the amendment of 1925 three assistants were allowed the commissioner, where prior to this he was allowed only two.

§ 1871. Fish inspectors.—The fisheries commissioner may appoint, with the approval of the fisheries commission board, inspectors in each county having fisheries under his jurisdiction, who will assist him at such times as he may require. The said inspector shall serve under the direction of the commissioner, receiving compensation not to exceed three dollars per day and necessary expenses while in actual service. (1915, c. 84, s. 2.)

§ 1872. Board and officers to be free from financial interest in fisheries.—The fisheries commissioner, assistant commissioners, and inspectors shall not be financially interested in any fishing industry in North Carolina. (1915, c. 84, s. 8; 1921, c. 194, s. 1.)

Editor's Note.—By the amendment of 1921 the provision that "The members of the fisheries commission board" shall not be interested was omitted.

§ 1873. Clerical force and office.—The fisheries commissioner shall rent and equip an office, which will be adequate for the business of the commission, in some town conveniently located to the maritime fisheries, and he is authorized to employ such clerks and other employees as may be necessary for the proper carrying on of the work of his office, by and with the consent of the fisheries commission board. (1915, c. 84, s. 3.)

§ 1874. Boats and equipment. — The fisheries commissioner is authorized, by and with the consent of the fisheries commission board, to purchase or rent such boats, nets, and other equipment as may be necessary to enable him and his assistants to fulfill the duties specified in this chapter. (1915, c. 84, s. 4.)

§ 1875. "Fisheries commission fund" derived from imposts.—All license fees, taxes, rentals, of bottoms for oyster or clam cultivation and other imposts upon the fisheries, in whatever manner collected, shall, except as otherwise provided in this chapter, be deposited with the state treasurer to the credit of the fisheries commission fund, to be drawn upon as directed by the fisheries commission board. (1915, c. 84, s. 9.)

§ 1876. Temporary and annual appropriations.—There is hereby appropriated out of the general treasury as a supplementary fund the sum of ten thousand dollars annually for two years, or as much thereof as may be needed, to the fisheries commission to carry out the work of the commission in the protection and promotion of the fisheries of the state, this sum to be repaid to the general treasury by the fisheries commission when it shall be on a self-sustaining basis; said sum to be used and expended as directed by the fisheries commission board, and any part of it that may be required may be used for purchasing boats and other equipment necessary to carry out the work of the commission.

The sum of ten thousand dollars is appropriated annually for the support and maintenance of the fisheries commission. (1915, c. 84, s. 16; 1917, c. 193, s. 26.)

§ 1877. Succeeds fish commission and oyster commission as to funds, property, and debts. — Any money that may be in the state treasury to the credit of the fish commission and oyster commission fund on May first, 1915, shall be transferred by the state treasurer to the credit of the fisheries commission fund, and the fisheries commission board is authorized to pay out of the fisheries commission fund all just claims that may be oustanding against the fish or oyster commissions.

All boats, fishing and oyster tackle, office supplies, stationery, and all other supplies of whatever character belonging to the fish commission and oyster commission shall be transferred to the fisheries commissioner for the use of the fisheries commission. (1915, c. 84, ss. 16, 17.)

§ 1877(a). Moneys credited to fisheries commission board; transfer equipment and supplies.—Any money that may be in the state treasury on April first, one thousand nine hundred and twenty-three, to the credit of the present fisheries commission board shall be held by the state treasurer to the credit of the fisheries commission board created by act of March 6, 1923 (Sec. 1869, C. S.), and said board is authorized to pay out of the fisheries commission fund all just claims that may be outstanding against the present fisheries commission board. All boats, fishing and oyster tackle, office supplies, stationery, and all other supplies of whatever character belonging to the present fisheries commission board shall be transferred to the fisheries commission board created by said act of March 6, 1923, on or before April first, one thousand nine hundred and twenty-three. (1923, c. 168, s. 2.)

Editor's Note.—The effect of this and the following section is summarized in 1 N. C. Law Rev. 301.

§ 1877(b). Powers and duties conferred.—All powers and duties imposed by chapter thirty-seven of the Consolidated Statutes, and the amendments heretofore or hereafter made to the same, upon the present fisheries commission board are hereby conferred upon the fisheries commission board created by act of March 6, 1923. (See Sec. 1869.) (1923, c. 168, s. 3.)

Art. 3. Powers and Duties of Board and Officers

§ 1878. Regulations as to fish, fishing, and fisheries made by board.—The fisheries commission board is hereby authorized to regulate, prohibit, or restrict in time, place, character, or dimensions, the use of nets, appliances, apparatus, or means employed in taking or killing fish; to regulate the seasons at which the various species of fish may be taken in the several waters of the State, and to prescribe the minimun sizes of fish which may be taken in the said several waters of the State, or which may be bought, sold, or held in possession by any person, firm, or corporation in the State; and to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, escallops, and other water products as it may deem necessary; and all regulations, prohibitions, restrictions and prescriptions, after due publication, which shall be construed to be once a week for four consecutive weeks in some newspaper published in North Carolina, shall be of equal force and effect with the provisions of this act; and any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (1915, c. 84, s. 21; 1917, c. 290, s. 7; 1925, c. 168, s. 2.)

Editor's Note.—The proviso for regulation and transportation of fish, etc., is new with Public Laws of 1925.

At the end of section 2 of this act amending this section there appears a clause headed "subsec." (d) and providing for a tax on clams. This clause was evidently intended as subsection (d) of section 3 of the act amending section 1893, and has been included in that section.

Public Laws 1935, chapter 35 provides: "Section one thousand eight hundred seventy-eight of the Consolidated Statutes of North Carolina relating to 'regulations as to fish, fishing and fisheries made by board' is hereby reenacted and the Department of Conservation and Development Board is hereby re-invested with all the rights, powers and duties conferred upon the Fisheries Commission Board by said section, and the said Department of Conservation and Development Board is authorized to exercise the said powers and duties, notwithstanding any statute amending or in any way affecting the said law since the ratification thereof, and all laws and clauses of laws in conflict with the said section are hereby repealed to the extent that they may have affected the same." See also, sections 1901(a) et seq., 2078(q) et seq.

Jurisdiction.—The jurisdiction of the board extends to all the public waters of the State or over which it has control. "The several waters of the State" is the precise language of the section referred to, and the numerous portions of the law in which places are expressly mentioned are not in restriction of the general words of the principal section, but these places are only mentioned because special provision is made as being desirable or necessary for those places. State v. Dudley, 182 N. C. 822, 825, 109 S. E. 63.

The Taking of Escallops.—Under the powers so conferred and in promotion of the general purposes of the statute, the Fisheries Commission Board may establish a formal rule or regulation, which prohibited the taking of escallops with drags or scrapes in certain waters, and a violation of this rule will warrant conviction. State v. Dudley, 182 N. C. 822, 824, 109 S. E. 63.

§ 1879. Regulations affecting existing interests not effective for two years.—In making regulations the fisheries commission board shall give due weight and consideration to all factors which will affect the value of the present investment in the fisheries, and no changes in the existing laws which, if they should go into effect immediately, would tend to cause fishermen to lose their property shall go into effect until two years from the date that the change has been made by the fisheries commission board. (1915, c. 84, s. 21; 1917, c. 290, s. 7.)

§ 1880. Hearing before changes as to certain regulations.—If, however, a petition signed by five or more voters of the district or community which will be affected by the proposed changes is filed with the fisheries commission board through the fisheries commissioner, assistant commissioners or inspectors, asking that they have a hearing before any proposed change in the territory, size of mesh, length of net, or time of fishing shall go into effect, petitioning that they be heard regarding such change, the fisheries commission board shall in that event designate by advertisement for a period of thirty days at the courthouse and three other public places in the county affected, and also by publication in a newspaper of the county, if such is published in said county, once a week for two consecutive weeks, a place at which said board will meet and hear argument for and against said change, and may ratify, rescind, or alter this previous order of change as may seem just in the premises. (1915, c. 84, s. 21; 1917, c. 290, s. 7.)

§ 1881. Regulation of shipment of water products.—The fisheries commission board shall have power and authority to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, escallops, and other water products as it may deem necessary. (1919, c. 333, s. 4.)

§ 1882. Reports of board to legislature; publication.—The fisheries commission board shall cause to be prepared and submitted to each legislature a report showing the operations, collections and expenditures of the fisheries commission; and it shall also cause to be prepared for publication such other reports, with necessary illustrations and maps, as will adequately set forth the results of the work and the investigations of the fisheries commission, all such reports, illustrations, and maps to be printed and distributed at the expense of the state, as are other public documents, as the fisheries commission board may direct. (1915, c. 84, s. 15.)

§ 1883. Duties of commissioner.—It is the duty of the commissioner: To enforce all acts relating to the fish and fisheries of North Carolina.

By and with the advice and consent of the fisheries commission board, to make such regulations as shall maintain open for the passage of fishes all inlets and not less than one-third of the width of all sounds and streams, or such greater proportions of their width as may be necessary.

To collect and compile statistics showing the annual product of the fisheries of the state, the capital invested, and the apparatus employed, and any fisherman refusing to give these statistics shall be refused a license for the next year.

To prepare and have on file in his office maps based on the charts of the United States coast and geodetic survey, of the largest scale published, showing as closely as may be the location of all fixed apparatus employed during each fishing season.

To have surveyed and marked in a prominent manner those areas of waters of the state in which the use of any or all fishing appliances are prohibited by law or regulation, and those areas

of water in the state in which oyster tonging or dredging is prohibited by law.

To prosecute all violations of the fish laws, and wherever necessary he may employ counsel for this purpose.

To remove pending trial nets or other appliances he finds being fished or used in violation of the fisheries laws of the state.

To carry on investigations relating to the migrations and habits of the fish in the waters of the state, also investigations relating to the cultivation of the oyster, clam and other mollusca, and of the terrapin and crab, and for this purpose he may employ such scientific assistance as may be authorized by the fisheries commission board.

The commissioner shall be responsible for the collection of all license taxes, fees, rentals, or other imposts on the fisheries, and shall pay same into the state treasury to the credit of the fisheries commission fund. He shall on or before the twenty-fifth day of each month mail to the treasurer of the state a consolidated statement showing the amount of taxes and license fees collected during the preceding month, and by and from whom collected.

He shall, in an official capacity, have power to administer oaths and to send for and examine persons and papers.

If any fisherman fail or refuse to give statistics as required in this section, the board may extend the time of his operations, and the fisheries commission board is empowered to make such rules and regulations as they think proper to procure statistics as to the annual products of the fisheries of the state. (1915, c. 84, s. 5; 1917, c. 290, s. 10.)

§ 1884. Violations of law to be investigated; nets seized and sold; bond of commissioner liable. —It is the duty of the fisheries commissioner, or any of his assistants or deputies, whenever a complaint is made to him, either orally or in writing, stating that any of the laws relating to fish or fisheries are being violated at any particular place, to go himself or send a deputy to such place and investigate same, and he shall seize and remove all nets or other appliances set or being used in violation of the fisheries laws of the state, sell same at public auction after advertisement for twenty days at the courthouse and three other public places in the county in which the seizure was made, and apply the proceeds of sale to the payment of costs and expenses of such removal, and pay any balance remaining to the school fund of the county nearest to where the offense is committed. And the failure of the fisheries commissioner or his deputies to perform the above prescribed duty shall render his bond liable to a penalty of five hundred dollars, one-half to go to the informant and the other half to be paid to the school fund of the county in which the action is brought. (1911, c. 18.)

In General.—In Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385, 14 S. Ct. 499, the court holding that the authority to summarily destroy nets used in violation of the law for the protection of fish, "is a lawful exercise of the police power of the State and does not deprive the citizen of his property without due process of law." Daniels v. Homer, 139 N. C. 219, 224, 51 S. E. 992.

§ 1885. Arrests without warrant; investigation of unlawful transportation of seafood.—The fisheries commissioner, assistant commissioners and inspectors shall have power, without warrant, to arrest any person or persons violating any of the fishery laws in their presence, who shall be carried before a magistrate for trial as is required by law in case of persons arrested without warrant. Authority also expressly is vested in the fisheries commissioner, assistant commissioners, and inspectors when they or either of them has reason to believe that any seafood products are unlawfully possessed, or are being transported unlawfully, or are about to be transported unlawfully, without the license tax therefor and thereon having been paid, to stop, or cause to be stopped, any vehicle or conveyance of transportation, of whatsoever kind, for the purpose of investigation and examination; and if upon such investigation and examination it appears that any seafood products are unlawfully possessed, or that the license tax therefor and thereon has not been paid, the said fisheries commissioner, assistant commissioner, or inspector making such investigation and examination shall have the power and authority, without first having applied for and obtained warrant so to do, to arrest the person or persons owning and/or having in his or their possession for transportation and actually engaged in the transportation of the said seafood products on which said license taxes have not been paid, and take him, or them, for trial before some magistrate in the county where such arrest is made; and it shall not be obligatory upon the said commissioner, assistant commissioner, or inspector first to apply for and obtain warrant before making such investigation and inspection. (1915, c. 84, s. 6; 1917, c. 290, s. 2; 1935, c. 118.)

Editor's Note.—The last sentence of this section relating to the authority to investigate unlawful transportation of seafood was added by the amendment of 1935.

§ 1886. Taking fish for scientific purposes. —The fisheries commissioner and the United States bureau of fisheries may take and cause to be taken for scientific purposes or for fish culture any fish or other marine organism at any time from the waters of North Carolina, any law to the contrary notwithstanding; and may cause or permit to be sold such fishes or parts of fishes so taken as may not be necessary for purposes of scientific investigations or fish culture: Provided, that in taking fish for fish culture in the hatcheries of this state the fish shall only be taken while the hatcheries are in operation and only between the hours of four and eleven p. m. (1915, c. 84, s. 7.)

Art. 4. Taxes and Regulations

§ 1887. Licenses to fish; issuance, terms, and enforcement.—Each and every person, firm, or corporation, before commencing or engaging in any kind of fishing in the state, shall file with an inspector of the county in which he desires to fish, or with the fisheries commissioner or any of his assistant commissioners, a sworn statement as to the number and kind of nets, seines, or other apparatus intended to be used for fishing. Upon filing this sworn statement on oath the fisheries commissioner shall issue or cause to be issued to the said party or parties a license as prescribed by law; said applicant shall pay a license fee equal in amount to the fee or tax prescribed by law for fishing different kinds of apparatus in the waters of the State of North Carolina, or for tonging or

dredging for oysters, as the case may be. The fisheries commissioner shall keep in a book especially prepared for the purpose an exact record of all licenses, to whom issued, the number and kind of nets, boats, and other apparatus licensed, and the license fees received. He shall furnish to each person, firm, or corporation in whose favor a license is issued a special tag which will show the license number and number of pound nets, or yards of seine, or yards of gill net that the licensee is authorized to use, and the licensee shall attach said tag to the net in a conspicuous manner satisfactory to the fisheries commissioner. All boats or vessels licensed to scoop, scrape, or dredge oysters shall display on the port side of the jib, above the reef and bonnet and on the opposite side of mainsail, above all reef points, in black letters not less than twenty inches long, the initial letter of the county granting the license and the number of said license, the number to be painted on canvas and furnished by the fisheries commissioner, for which he shall receive the sum of fifty cents. Any boat or vessel used in catching oysters without having complied with the provisions of this section may be seized, forfeited, advertised for twenty days at the courthouse and two other public places in the county where seized, and sold at some public place designated in the advertisement, and the proceeds, less the cost of the proceedings, shall be paid into the school fund. The licenses to fish with nets shall all terminate on December thirty-first. Any person who shall willfully use for fishing purposes any kind of net whatever, without having first complied with the provisions of this section, shall be guilty of a misdemeanor and, upon conviction, shall be fined twenty-five dollars for each and every offense. (1915, c. 84, s. 10; 1917, c. 290, s. 9.)

Editor's Note.—See note to section 1878.

In General.—Fishing in waters when prohibited by law is a public nuisance, and the general assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets subject to the right of their owner to contest the fact of his violation of the law by a proceeding of claim and delivery, or by injunction to prevent sale, or by action to recover the proceeds of sale and damages. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992.

§ 1888. Resident may catch shellfish for own use.—No tax shall be levied or collected from bona fide residents or citizens of this state who take fish, oysters, clams, escallops, or crabs other than with dredges for his own personal or family's use and consumption. But if any person shall sell or offer for sale any such products without having first procured a license, he shall be guilty of a misdemeanor and shall be fined not less than five dollars or imprisoned not exceeding thirty days. (1917, c. 290, s. 6.)

§ 1889. Licenses for oyster boats; schedule.—The fisheries commissioner, assistant commissioner, or inspector, may grant license for a boat to be used in catching oysters upon application made, according to law, and the payment of a license tax as follows: On any boat or vessel without cabin or deck, and under custom-house tonnage, using scrapes or dredges, measuring over all twenty-five feet and under thirty, a tax of two dollars and fifty cents; fifteen feet and under twenty-five feet, a tax of one dollar and fifty cents; on any boat or vessel with cabin or deck and under custom-house tonnage, using scrapes or dredges, measuring over all thirty feet or under, a tax of four dollars; over thirty feet, a tax of five dollars; on any boat or vessel using scoops, scrapes, or dredges required to be registered or enrolled in the custom house, a tax of seventy-five cents a ton on gross tonnage. No vessel propelled by steam, gas or electricity, and no boat or vessel not the property absolutely of a citizen or citizens of this state, shall receive license or be permitted in any manner to engage in the catching of oysters anywhere in the waters of this state. (1915, c. 84, s. 11; 1933, c. 106.)

Editor's Note.—Prior to Public Laws of 1933, c. 106, the fees required by this section were: $3, $2, $5, $6, and $1.50. The substantial reductions were effected by the amendment.

§ 1890. Boats using purse seines or shirred nets; tax.—All boats or vessels of any kind used in operating purse seines or shirred nets shall pay a license fee of seventy-five cents per ton on gross tonnage, custom-house measurement, which shall be independent of and separate from the seine or net tax on the seines or nets used on said boats. This license fee shall be for one year from January 1st, and shall not be issued for any period less than one year. It shall be issued by the fisheries commission. (1915, c. 84, s. 12; 1917, c. 290, s. 3; 1919, c. 333, s. 3; 1933, c. 106, s. 2.)

Editor's Note.—Prior to Public Laws 1933, c. 106, the fee required was $2 per ton instead of $.75 per ton.

§ 1891. Licenses for various appliances and their users; schedule.—The following license tax is hereby levied annually upon the different fishing appliances used in the waters of North Carolina:

Anchor gill nets, fifty cents for each hundred yards or fraction thereof.

Stake gill nets, fifty cents for each hundred yards or fraction thereof: Provided, that when any person uses more than one such net the tax shall be imposed upon the total length of all nets used and not upon each net separately.

Drift gill nets, twenty-five cents for each hundred yards or fraction thereof.

Pound nets, one dollar and fifty cents on each pound; the pound is construed to apply to that part of net which holds and from which the fish are taken.

Submarine pounds, or submerged trap nets, one dollar and fifty cents for each trap or pound.

Seines, drag nets and mullet nets under one hundred yards, fifty cents each.

Seines, drag nets and mullet nets over one hundred yards and under three hundred yards, fifty cents per hundred yards or fraction thereof.

Seines, drag nets and mullet nets over three hundred yards and under one thousand yards, seventy-five cents per one hundred yards or fraction thereof.

Seines, drag nets and mullet nets over one thousand yards, one dollar per one hundred yards or fraction thereof.

Fyke nets, twenty-five cents each.

For each trot line used in taking hard crabs, one dollar and fifty cents.

[Nonresident motor boats chartered by residents of the state and used in taking shrimp, ten dollars ($10.00) for each boat, and on each non-

resident person acting as principal or employed in taking shrimp, a license tax of ten dollars ($10.00) for each year.]

Resident motor boats used in taking shrimp, three dollars ($3.00) for each boat.

Motor boats used in hauling nets, two dollars and fifty cents ($2.50) for each boat.

Motor boats used in dredging crabs or escallops, three dollars ($3.00) for each boat.

For each trawl used in taking fish or shrimp, one dollar ($1.00).

Nonresident angler's license to fish with rod and reel anywhere in the fresh waters of the State during the open season, five dollars ($5.00) each; that nothing herein contained shall be construed so as to require an angler's license of any one to fish on his own land or on any privately owned lake or pond.

And for other apparatus used in fishing, the license shall be the same as that for the apparatus or appliance which it most resembles for the purpose used.

In addition to the officers now empowered by law, the clerks of the superior courts in the state are authorized to issue nonresident angler's license under chapter thirty-seven, consolidated statutes of North Carolina, in accordance with rules and regulations to be prescribed by the state fisheries commission board. (1915, c. 84, s. 14; 1917, c. 290, s. 5; 1919, c. 333, s. 3; 1925, c. 168, s. 1; 1927, c. 59, ss. 5, 7; 1931, c. 117; 1933, c. 106, s. 3; c. 433.)

Editor's Note.—The Act of 1931 repealed the words in brackets in this section. However, this act was amended by Public Laws 1931, c. 331, which made its provisions regulating the taking of shrimp in the public waters of the State, subject to the approval and supervision of the Department of Conservation and Development under the general law theretofore existing.

Public Laws of 1933, cc. 106 and 443, made substantial changes in the fees required by this section.

§ 1892. License tax on dealers and packers.—An annual license tax, for the year beginning January 1st in each year, to be collected by the fisheries commission board, is imposed on all persons or dealers who purchase or carry on the business of canning, packing, shucking, or shipping the sea products enumerated below, as follows: On—

oysters, two dollars and fifty cents;

escallops, two dollars and fifty cents;

clams, two dollars and fifty cents;

crabs, for shipment out of the state, two dollars and fifty cents;

fish, two dollars and fifty cents;

shrimp, two dollars and fifty cents: Provided, no license tax shall be imposed on fishermen who pay a license on nets to catch fish or shrimp, and who ship only the fish or shrimp caught in such licensed nets. (1917, c. 290, s. 5; 1919, c. 333, ss. 1, 2; 1933, c. 106, s. 4.)

Editor's Note.—Public Laws of 1933, c. 106, reduced the fees on oysters, scallops and clams, from $5 to $2.50. The amendment also omitted the former provision requiring a license of fifty cents a year for shucking or selling oysters and clams on local market by retail.

§ 1893. Purchase tax on dealers; schedule; collection.—All dealers in and all persons who purchase, catch, or take for canning, packing, shucking, or shipping the sea products enumerated below shall be liable to a tax to be collected by the fisheries commission board as follows: On—

Oysters, two cents a bushel, except coon oysters, one cent a bushel; escallops, five cents a gallon; clams, four cents a bushel; soft crafts, one and one-quarter cents a dozen; hard crabs, four cents a bushel; shrimp, cooked or green, fifteen cents per one hundred pounds: Provided, however, no license tax shall be imposed or required for trot lines used for taking hard crabs from public grounds: Provided, further, that no license tax shall be imposed or required for power boats used for dredging escallops or crabs: Provided, further, that no license shall be required of any person who takes oysters for shucking and sells such oysters at retail on local markets.

But none of these products shall be twice taxed, and no tax shall be imposed on oysters, escallops, or clams taken from private beds or gardens. Upon failure to pay said tax, the license provided in the preceding section shall at once be null and void and no further license shall be granted during the current year; and it shall be the duty of the commissioner, assistant commissioner, or inspector to institute suit for the collection of said tax. Such suit shall be in the name of the state of North Carolina on relation of the commissioner or inspector at whose instance such suit is instituted, and the recovery shall be for the benefit and for the use of the general fisheries commission fund. Any person failing or refusing to pay said tax shall be guilty of a misdemeanor. (1915, c. 84, s. 13; 1917, c. 290, s. 4; 1919, c. 333, s. 1; 1921, c. 194, s. 2; Ex. Sess. 1921, c. 42, ss. 2-4; 1923, c. 170; 1925, c. 168, s. 3; 1927, c. 59; 1929, c. 113; 1933, c. 106, s. 5; 1935, c. 151.)

Editor's Note.—The Public Laws of 1927, ch. 59, sec. 2, calls for the amendment of subsection (b) of the Act of 1925. There is no subsection (b) and it is obvious that subsection (d) is referred to; this last subsection is out of place (probably through a printer's error) in the Laws of 1925.

The Act of 1929 struck out the line of this section relating to the tax on crab meat, it being the intention of the act to repeal all laws providing for a tax on crab meat.

Public Laws 1933, c. 106, changed the fees and added the three provisos appearing at the end of the first paragraph.

The tax of four cents a bushel on hard crabs was added by the amendment of 1935.

§ 1893(a). License tax on trawl boats.—There shall be levied annually upon each trawl boat, or boat used for trawling purposes, documented in the customs house, a license tax of twenty-five cents per gross ton, and on each trawl boat, or boat used for trawling purposes, not documented in the customs house a license tax of two dollars, and a tax of one dollar for each net. (1933, c. 106, s. 6.)

§ 1894. Printed regulations furnished dealers.—It is the duty of the fisheries commission board, upon issuing any license under the provisions of this subchapter to furnish with said license the printed regulations controlling the waters in which such fisherman applying therefor proposes to fish. (1917, c. 290, s. 12.)

§ 1895. Dealers to keep and furnish statistics.—All persons, firms, or corporations engaged in buying, packing, canning, or shipping oysters, escallops, clams, crabs, shrimp, and fish taken from the public grounds or natural beds of the state, or the natural waters or streams of the state, shall keep a permanent record of all such

products, showing the quantity of each of said products so purchased, packed, canned, or shipped, the kind of fish, from whom each of said species of fish, mollusca, or crustaceans were purchased, that a statement of all these facts shall be made whenever required by the fisheries commissioner, but shall be at least at the end of each month. That all such records shall be open at all times to the fisheries commissioner, assistant commissioner, or any one under the direction of the fisheries commissioner. (1917, c. 290, s. 11.)

§ 1896. Disturbing marks or property of commission prohibited.—Any person or persons removing, injuring, defacing, or in any way disturbing the posts, buoys, or any other appliances used by the fisheries commission in marking the restricted areas relating to any and all fishing, or marking other areas in which oyster tonging or dredging is prohibited by law, and those marking oyster bottoms that are leased for oyster cultivation, or shall injure or destroy any boat or other property of any kind used by the fisheries commission board or any officer or employee thereof, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court; and any person anchoring or mooring a boat to any of these buoys or posts shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars and imprisoned thirty days in jail, at the discretion of the court. (1915, c. 84, s. 22; 1917, c. 290, s. 8.)

§ 1897. Explosives, drugs, and poisons prohibited.—It shall be unlawful to place in any of the waters of this state any dynamite, giant or electric powder, or any explosive substance whatever, or any drug or poisoned bait, for the purpose of taking, killing or injuring fish. And any one violating this section shall, upon conviction, be fined not less than one hundred dollars and imprisoned not less than thirty days. (1915, c. 84, s. 19.)

§ 1898. Possession of fish killed by explosives as evidence.—The possession of fish killed by explosive agencies shall be prima facie evidence that explosives were used for the purpose of killing fish. (Rev., s. 2466; Code, s. 3405; 1889, c. 312; 1911, c. 170.)

§ 1899. Discharge of deleterious matter into waters prohibited.—It shall be unlawful to discharge or to cause or permit to be discharged into the waters of the state any deleterious or poisonous substance or substances inimical to the fishes inhabiting the said water; and any person, persons or corporation violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, be fined or imprisoned in the discretion of the court: Provided, this section shall not apply to corporations chartered either by general law or special act before the 4th day of March, 1915. (1915, c. 84, s. 20.)

§ 1900. Operation of boats in violation of rules and laws forfeits boats and apparatus.—If any person, firm or corporation shall use or operate any boat or vessel of any kind, in violation of any rule of the fisheries commission board, or any of the fish laws, it shall be the duty of the fisheries commissioner to revoke any license issued and seize such boat or vessel and any apparatus or appliance so used or operated; but the fisheries commission board shall have authority to compromise by agreement with the owner of such boat or appliance for any such violation, and may return such boat or appliance so seized to the owner and reinstate license. (1919, c. 333, s. 5.)

See note to secs. 1884 and 1887.

§ 1901. Violations of fisheries law misdemeanor; licenses forfeited.—Upon failure of any person, firm or corporation to comply with any of the provisions of this article, or any of the fisheries laws, any license issued to any such person, firm or corporation may be revoked by the fisheries commission, and upon satisfactory settlement may be reinstated, with the consent of the board. All such persons violating the provisions of this article or of the fisheries law shall be guilty of a misdemeanor. (1917, c. 290, s. 11; 1919, c. 333, s. 4.)

SUBCHAPTER IA. CONSOLIDATION OF FISHERIES COMMISSION WITH DEPARTMENT OF CONSERVATION AND DEVELOPMENT.

§ 1901(a). Duties and powers transferred.—The duties and powers now and heretofore exercised by the Fisheries Commission of North Carolina under and by virtue of chapter thirty-seven of Consolidated Statutes of one thousand nine hundred and nineteen (1919) and all amendments thereto shall be transferred to and assumed by the Department of Conservation and Development. (1927, c. 57, s. 1.)

§ 1901(b). Expiration of office. — The term of office of the present eleven members of the Fisheries Commission and the term of office of the present six members of the Board of Conservation and Development shall expire on April first, one thousand nine hundred and twenty-seven. (1927, c. 57, s. 2.)

§ 1901(c). Board of conservation and development; powers, duties and responsibilities.—The Governor is authorized and directed by and with the consent of the Senate to appoint a board of twelve members to be known as the Board of Conservation and Development for North Carolina, which Board shall succeed to and be clothed with all the powers, duties and responsibilities heretofore exercised by the Fisheries Commission of North Carolina and by the North Carolina Department of Conservation and Development.

The term of office for the said Board members shall be six years, but the first appointment of said members shall be: Four of them for two years, four of them for four years and the remaining four for six years and the Governor shall designate the term of office to be held by each member.

The said board shall be required to meet at least twice per year; once in January and once in July, the exact time and place to be designated by the Chairman of the Board, and the Board may hold such other meetings at different times and places as may be deemed by the Board necessary to the proper conduct of the business of the Department. The members of the Board shall receive not more than four dollars per diem and actual expenses

while in attendance on Board meetings. (1927, c. 57, s. 3.)

§ 1901(d). Transfer of funds.— All moneys in the State treasury on April first, one thousand nine hundred and twenty-seven, to the credit of the Fisheries Commission Board shall be transferred by the State Treasurer to the credit of the Department of Conservation and Development, and the new Board created hereby is authorized to pay out of the Fisheries Commission fund all just claims that may be outstanding against the present Fisheries Commission Board. (1927, c. 57, s. 4.)

§ 1901(e). Titles transferred and vested.—The title to all property, both real and personal, now and heretofore vested in the present Fisheries Commission Board, is hereby transferred and vested in the Board of Conservation and Development, including the fish hatcheries, boats, fishing and oyster tackle, automobiles, trucks, equipment, office supplies, stationary, and all other supplies and property of whatever character belonging to the present Fisheries Commission Board shall be transferred to the Board of Conservation and Development as provided for herein, such transfer and vesting of title to be effective from and after April first, one thousand nine hundred and twenty-seven. (1927, c. 57, s. 5.)

§ 1901(f). Laws amended; fishing laws retained.—Chapter thirty-seven of the Consolidated Statutes of one thousand nine hundred and nineteen and the amendments thereto are changed and altered only so far as the consolidation of the Fisheries Commission with the Department of Conservation and Development as provided herein is concerned. Otherwise all of the fishing laws now on the statute books of North Carolina shall remain in full force and effect. (1927, c. 57, s. 6.)

§ 1901(g). Law continued in force.— Chapter one hundred and twenty-two, Public Laws of one thousand nine hundred and twenty-five § 6122(c) et seq. of this Code, which provides for the creation of the Department of Conservation and Development shall remain in full force and effect, except wherein the said act is altered and changed by this act so as to provide for the consolidation of the two departments. (1927, c. 57, s. 7.)

SUBCHAPTER II. SHELLFISH

Art. 5. Shellfish; General Laws

Part 1. Definition of Natural Oyster Bed

§ 1902. Oyster bed defined.—A natural oyster or clam bed, as distinguished from an artificial oyster or clam bed, shall be one not planted by man, and is any shoal, reef or bottom where oysters are to be found growing in sufficient quantities to be valuable to the public. (Rev., s. 2371; 1893, c. 287, s. 1.)

Part 2. Leases of Bottoms

§ 1903. Fisheries commissioner to lease.—The fisheries commissioner shall have power to lease to any duly qualified person, firm or corporation, for purposes of oyster or clam culture, any bottom of the waters of the state not a natural oyster bed, as defined in this article, nor a clam reservation, as defined in this article, in accordance with the provisions of this part of this article. (1909, c. 871, ss. 1, 9; 1919, c. 333, s. 6.)

§ 1904. Lessee to be citizen.—Any citizen of North Carolina, or firm or corporation organized under the laws of the state and doing business within its limits, shall be granted the privilege of taking up bottoms for purposes of oyster or clam culture, under the provisions of this article. (1909, c. 871, ss. 2, 9; 1919, c. 333, s. 6.)

§ 1905. Areas leased in different waters.—The area which may be taken up for purposes of oyster or clam culture shall be not less than one acre nor more than fifty acres, with the exception of the open waters of Pamlico sound (and for the purposes of this article open waters of Pamlico sound shall mean the waters that are outside of two miles of the shore line), in which the minimum limit shall be five acres and the maximum shall be two hundred acres: Provided that the limit of entry in Core sound, North river, Newport river, Bogue sound, and all bays and creeks bordering on these waters, and in Jones bay, Rose bay, Abels bay, Swan Quarter bay, Middle bay, Bay river, Deep bay, Juniper bay, West and East Bluff bays, Wysocking bay, Fire creek, Stumpy Point bay, Mouse Harbor bay, Maw bay and Broad creek, tributaries of Pamlico sound, shall be one acre as a minimum and ten acres as a maximun: Provided further, however, that after March 9, 1910, the minimum area in Core sound, North river, Newport river, Bogue sound, and all bays and creeks bordering on these waters, and in Jones bay, Rose bay, Abels bay, Swan Quarter bay, Middle bay, Bay river, Deep bay, Juniper bay, West and East Bluff bays, Wysocking bay, Fire creek, Stumpy Point bay, Mouse Harbor bay, Maw bay and Broad creek, tributaries of Pamlico sound, shall be one acre and the maximum fifty acres; but no person, firm, corporation or association shall severally or collectively hold any interest in any lease or leases aggregating an area of greater than fifty acres, except in the open waters of Pamlico sound, where the aggregate area shall be two hundred acres.

The fisheries commission board shall have authority to specify the acreage any one person may lease in the counties of Pender, New Hanover and Brunswick. (1909, c. 871, ss. 2, 9; 1919, c. 333, s. 6; Ex. Sess. 1921, c. 46, s. 1.)

§ 1906. Prerequisites for lease; application; deposit; survey; location.—Such persons, firms or corporations desiring to avail themselves of the privileges of this article shall make written application, on a form to be prepared by the fisheries commissioner, setting forth the name and address of the applicant, describing as definitely as may be the location and extent of the bottom for which application is made, and requesting the survey and leasing to the applicant of said bottom. As soon as possible after the application is received, the fisheries commissioner shall cause to be made a survey and map of said bottom at the expense of the applicant. The fisheries commissioner shall also thoroughly examine said bottoms by sounding and by dragging thereover a chain to detect the presence of natural

oysters. Should any natural oysters be found, the commissioner shall cause examination to be made to ascertain the area and density of oysters on said bottom or bed, to determine whether the same is a natural bed, under the definition contained in this article. He shall be assisted in this examination on tonging ground by an expert tonger, to be appointed by the board of county commissioners of the county in which said bottom or the greater portion thereof is located, and the question as to whether the oyster growth is sufficiently dense to fall within the definition of the natural bed shall be determined by the quantity of oysters which the said expert tonger may be able to take in a specified time; and on dredging ground the commissioner shall be assisted by an expert dredger, appointed by the board of county commissioners of the county in which said bottom or the greater portion thereof is located, and the question as to whether the oyster growth is sufficiently dense to fall within the definition of the natural bed shall be determined by the quantity of oysters which the said expert dredger may be able to take in a specified time. The fisheries commissioner shall require the bodies of bottoms applied for to be as compact as possible, taking into consideration the shape of the body of water and the consistency of the bottom. No application shall be entertained nor lease granted for a piece of bottom within two hundred yards of a known natural bottom, bed or reef. A deposit of ten dollars will be required of each applicant at the time of making his application, said sum to be credited to the cost of the survey of the bottom applied for. (1909, c. 871, ss. 3, 9; 1919, c. 333, s. 6.)

§ 1907. Execution of lease; notice and filing; marking and planting.—Immediately upon the completion of the survey and the mapping thereof, and the payment by the applicant of the cost of said survey and map, the fisheries commissioner shall execute to the applicant, upon a form approved by the attorney-general of the state, a lease for the bottom applied for. A copy of the lease, map of the survey and a description of the bottom, defining its position, shall be filed in the office of the fisheries commissioner. After the execution of said lease, the lessee shall have the sole right and use of said bottoms, and all shells, oysters and culls thereon or placed thereon shall be his exclusive property so long as he complies with the provisions of this law. The lessee shall stake off and mark the bottoms leased in the manner prescribed by the fisheries commissioner, and failure to do so within a period of thirty days of an order so to do issued by the commissioner shall subject said lessee to a fine of five dollars per acre for each sixty days default in compliance with said order. The corner stakes, at least, of each lease shall be marked with signs plainly displaying the number of the lease and the name of the lessee. The lessee shall, within two years of the commencement of his lease, have planted upon his holdings a quantity of shells equal to an average of fifty bushels of seed oysters or shells per acre of holdings, and within four years from the commencement of his lease a quantity of oysters or shells equal to an average of not less than one hundred and twenty-five bushels per acre. The fisheries commissioner shall, upon granting any lease, publish a notice of the granting of same in a newspaper of general circulation in the county wherein the bottom leased is located. (1909, c. 871, ss. 4, 9; 1919, c. 333, s. 6.)

§ 1908. Term and rental.—All leases made under the provisions of this article shall begin upon the issuance of the lease, and shall expire on the first day of April of the twentieth year thereafter. The rental shall be at the rate of fifty cents per acre for the first ten years and one dollar per acre per year for the next ten years of the lease, payable annually in advance on the first day of April of each year: Provided, that in the open waters of Pamlico Sound (and for the purposes of this article the open waters of Pamlico Sound shall mean the waters that are outside the four miles of the shore line) the rental shall be at the rate of fifty cents per acre per year for the first three years, one dollar per acre per year for the next seven years, and two dollars per acre per year for the next ten years, of the lease. This rental shall be in lieu of all other taxes and imposts whatever, and shall be considered as all and the only taxation which can be imposed by the state, counties, municipalities or other subordinate political bodies. The rental for the first year shall be paid in advance, to an amount proportional to the unexpired part of the year to the first of April next succeeding. (1909, c. 871, ss. 5, 9; 1919, c. 333, s. 6; 1933, c. 346.)

Editor's Note.—The rental fees were reduced, by Public Laws 1933, c. 346, from $1 and $2, to $.50 and $1, respectively.

§ 1909. Nature of lessee's rights; assignment and inheritance.—The said lease shall be heritable and transferable, in whole or in part, provided the qualifications of the heirs and transferees are such as are described by this article. Nonresidents, acquiring by inheritance or process sale, or persons already holding the maximum area permitted by this article, shall within a period of twelve months from the time of acquisition dispose of said prohibited or excess of holding to some qualified person, firm or corporation, under penalty of forfeiture. The lease shall be subject to mortgage, pledge, seizure for debt and the same other transactions as are other property rights in North Carolina. No transfer shall be of effect unless of court record, until entered on the books of the fisheries commissioner. (1909, c. 871, ss. 6, 9; 1919, c. 333, s. 6.)

§ 1910. Renewal of lease.—The term of each lease granted under the provisions of this article shall be for a period of twenty years from the first day of April preceding the date of granting of said lease. At the expiration of the first lease, the lessee, upon making written application on the prescribed form, shall be entitled to successive leases on the same terms as applied to the last ten years of the first lease, for a period not exceeding ten years each. (1909, c. 871, ss. 7, 9; 1919, c. 333, s. 6.)

§ 1911. Forfeiture of lease for nonpayment.—The failure to pay the rental of bottoms leased for each year in advance on or before the first day of April, or within thirty days thereafter, shall ipso facto cancel said lease and shall forfeit to the state the said leased bottoms and all oysters thereon, and upon said forfeiture the fisheries

commissioner is hereby authorized to lease the said bottoms to any qualified applicant therefor: Provided, that no forfeiture shall be valid, however, under the provisions of this section, unless there shall have been mailed by the fisheries commissioner to the last address of the lessee upon the books of the commissioner a thirty days notice of the maturity of said rental. (1909, c. 871, ss. 8, 9; 1919, c. 333, s. 6.)

§ 1912. Contest over grant of lease; time for contest; decision; appeal.—If any person, within four months of the publication of the notice of granting of any lease, make claim that a natural oyster bottom, bed or reef exists within the boundaries of said lease, he shall, under oath, state his claim, and request the fisheries commissioner to cancel said lease: Provided, however, that each such claim and petition shall be accompanied by a deposit of twenty-five dollars. No petition unaccompanied by said deposit shall be considered by the commissioner. The fisheries commissioner shall, in person, examine into said claim, and if the decision should be against the claimant, the deposit of twenty-five dollars shall be forfeited to the state and deposited to the credit of the fisheries commission fund. Should, however, the claim be sustained and a natural bed be found within the boundary of the lease, the said natural bed shall be surveyed and marked with stakes or buoys, at the expense of the lessee, and the said natural bed be thrown open to the public fishery. If no such claim be presented within a period of four months, or if when so presented it fail of substantiation, as provided, the lessee shall thereafter be secure from attack on such account, and his lease shall be incontestable so long as he complies with the other provisions of this article. In each and every such case the decision of the fisheries commissioner shall be subject to review and appeal before a judge of the superior court, who shall render a decision without the aid of a jury, and his decision shall be final. (1909, c. 871, s. 9; 1919, c. 333, s. 6.)

Part 3. Licenses and Taxes

§ 1913. License to catch oysters; oath of applicant. — Any person desiring to catch oysters from the public grounds and natural oyster beds shall make and subscribe to the following oath, before some officer qualified to administer oaths:

I, ... (state if owner, lessee, master, captain, mate, foreman, or agent of any boat used, or that may be used, in dredging oysters from the public grounds of the state), being an applicant for oyster license, do solemnly swear that I am a citizen of North Carolina, and have been a resident of the state for the two years next preceding this day; that my place of residence is now in .... County; that I will not, if granted license, employ any nonresident or unlicensed person as an assistant or serve as an assistant to any nonresident who is owner, lessee, master, captain, mate or foreman, or who has any interest in, or in the profits derived from, any boat that is used or that may be used in dredging oysters from the public grounds of the state, or unlicensed person, nor will I transfer, assign, or otherwise dispose of my license to any person, firm or corporation that I will not knowingly or willfully violate or evade any of the laws or regulations of the state relating to oyster industry: so help me, God.

He shall then present to and file said oath with the fisheries commissioner, assistant commissioner or inspector, who, if satisfied with the truth of the statement made in the oath of application, shall issue to him an oysterman's license in the following form:

State of North Carolina, ... County.

....., a resident of ..... County, having this day made application to me for an oysterman's license, and having filed with me the oath prescribed by law, I do hereby grant to him license to catch oysters from the public grounds of this state from the fifteenth day of October, ..., until the first day of next April.

Witness my hand and official seal, this the .... day of ....., 19.... .....,

Fisheries Commissioner, Assistant Fisheries Commissioner, or Inspector (as the case may be).

(Rev., s. 2409; 1903, c. 516, s. 7; 1905, c. 525, ss. 4, 6.)

§ 1914. Filing oath; recording license; fees. — The oath and a record of the license shall be kept by the fisheries commissioner, assistant commissioner or inspector, and for issuing and recording the same he shall receive from the applicant a fee of twenty-five cents, which, together with all other license fees collected under this chapter, shall be paid over to the state treasurer and constitute part of the fisheries commission fund. No fee shall be charged by the clerk for administering the oath. (Rev., s. 2409; 1903, c. 516, s. 7; 1905, c. 525, ss. 4, 6.)

§ 1915. Licensee to be resident, not interested in oyster boat.—No person shall be licensed to catch oysters from the public grounds of the state who is owner, lessee, master, captain, mate or foreman, or who owns an interest in or who is an agent for any boat that is used or that may be used in dredging oysters from the public grounds of the state, who is not a bona fide resident of this state and who has not continuously resided therein for two years next preceding the date of his application for license, and no nonresident shall be employed as a laborer on any boat licensed to dredge oysters under this subchapter who has an interest in or who receives any profit from the oysters caught by any boat permitted to dredge oysters on the public grounds of the state. Any person, firm or corporation employing any nonresident laborer forbidden by this section, upon conviction shall be fined not less than fifty dollars nor more than five hundred dollars. (Rev., s. 2408; 1903, c. 516, s. 6; 1905, c. 525, s. 3.)

§ 1916. Tax on oysters exported from state.— All oysters going out of the state in any boat or vessel shall pay a tax of two cents per tub. (1907, c. 969, s. 11; Ex. Sess. 1913, c. 42, s. 3.)

Constitutionality.—An act levying a tax upon all claims and oysters shipped out of a county is constitutional. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

§ 1917. Oyster dealer's license. — The fisheries commissioner, assistant commissioner or inspector shall, upon application and the payment of a fee of fifty cents, grant to the applicant a dealer's license, authorizing the applicant to en-

gage in the business of buying, purchasing, canning, packing, shucking or shipping oysters. Such license shall not be issued prior to the fifteenth day of November of any year and shall expire on the fifteenth day of March following. The assistant fisheries commissioner or inspector granting the license shall at once mail a duplicate to the fisheries commissioner. Nothing contained in this section (except as to New Hanover, Onslow and Pender counties) shall be deemed to require any license of persons engaged in the business of buying, purchasing, canning, packing, shucking or shipping oysters which were not taken or caught from the public grounds or natural oyster beds of the state: Provided, that in New Hanover, Onslow and Pender counties such license shall not be issued prior to the fifteenth day of October in any year and shall expire on the first day of April following. (Rev., s. 2411; 1903, c. 516, s. 9; 1905, c. 525, s. 6; 1907, c. 969, ss. 7, 13; 1915, c. 136, s. 3.)

In General.—It is fully established that fish, including oysters and other shellfish, as well as game, being a valued source of food supply, come well within the police power of the State and are subject to rules and regulations reasonably designed to protect them and promote their increase and growth, and that such rules and regulations may not be set aside or ignored because they indirectly affect or trench upon some private rights that are, or would be, ordinarily recognized. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992; Rea v. Hampton, 101 N. C. 51, 7 S. E. 649; Patsone v. Commonwealth, 232 U. S. 138, 58 L. Ed. 539, 34 S. Ct. 281; New York v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75, 29 S. Ct. 10; Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385. 14 S. Ct. 499; State v. Sermons, 169 N. C. 285, 84 S. E. 337.

License by Mandamus.—If one applies for a license and the oyster commissioners refuse to grant it, he must apply for mandamus to compel an issuance, for he will not be excused for a violation on the ground that the commissioner would not issue a license when applied for. State v. Snipes, 161 N. C. 242, 76 S. E. 243; State v. Sermons, 169 N. C. 285, 84 S. E. 337.

§ 1918. Monthly report of licenses to be filed.—The fisheries commissioner, assistant commissioner or inspector who are authorized to issue license or to collect a license tax shall, on or before the fifteenth day of each month, mail to the fisheries commissioner a statement, showing all licenses issued during the preceding month, to whom issued and for what purpose, and the amount of tax collected by them from all sources under the oyster laws, and shall at the same time remit said amount direct to the state treasurer. They shall at the same time mail to each inspector asking for the same a list of all persons to whom license has been issued and of all boats or vessels licensed, and for what purpose. (Rev., s. 2412; 1903, c. 516, s. 4; 1905, c. 525, s. 6.)

§ 1919. Oyster beds real property for taxation, etc.—All grounds taken up or held for the purpose of cultivating shellfish shall be subject to taxation as real estate, and shall be so considered in the settlement of the estates of deceased or insolvent persons. (Rev., s. 2380; 1887, c. 119, s. 9.)

Part 4. Catching and Dealing in Oysters Regulated

§ 1920. Close season for oysters; exceptions.—If any person shall buy or sell oysters in the shell which have been taken from the public grounds or natural oyster beds of this state between the fifteenth day of April and the fifteenth day of October in any year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that oysters may be taken with hand-tongs from March fifteenth to May first and with dredges from March fifteenth to April fifth, in any year, to be used for planting on private grounds entered and held under the laws of this state, upon the condition further that they shall not be removed from said private grounds within a period of three months from time of planting: Provided further, that oysters may be taken with hand-tongs only for home consumption: Provided further, that coon oysters may be taken from November first to May first of each year in the waters of Onslow and Carteret counties.

This section, except as specifically provided, is inapplicable to New Hanover, Onslow and Pender counties. (Rev., s. 2383; 1907, c. 969, ss. 4, 13; 1913, c. 85; 1915, c. 120.)

In General.—This section and section 1935 cannot be construed together with the effect that the license is not required when oysters are shown to have been procured from private owners, there being no necessary or essential connection between the two, the first applying to all citizens of the State, and forbidding them to buy or sell oysters taken from public grounds or natural beds during a closed season, etc., and the other being a law referring only to regular dealers, requiring that they shall be licensed, and designed to render more effective the legislation in protection of the fish and oyster industries of the State. State v. Sermons, 169 N. C. 285, 84 S. E. 337.

§ 1921. Oyster dealers to keep records.—All persons engaged in buying, packing, canning, shucking or shipping oysters shall keep a permanent record of all oysters either bought or caught by them, or by persons for them, when and from whom bought, the number of bushels and the price paid therefor. All these records shall at all times be open to the examination and inspection of the fisheries commissioner, assistant commissioner and inspector, and upon request shall be verified by the parties making them. If any person engaged in buying, packing, canning, shucking or shipping oysters taken or caught from the public grounds or natural oyster beds of the state shall fail to keep a permanent record of all oysters bought by him or caught by him, or by persons for him, when and from whom bought, the number of bushels and the price paid therefor, or shall fail upon demand to exhibit such record as required by law, or shall fail to verify the same, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., ss. 2396, 2418; 1903, c. 516, s. 5; 1915, c. 136, s. 2.)

§ 1922. Oyster measure.—All oysters measured in the shell shall be measured in a circular tub with straight sides and straight, solid bottom, with holes in the bottom not more than one-half inch in diameter. The said measures shall have the following dimensions: A bushel tub shall measure eighteen inches from inside to inside across the top, sixteen inches from inside to inside chimb to the bottom and twenty-one inches diagonal from inside chimb to top. All measures found in the possession of any dealer not meeting the requirements of this section shall be destroyed by said fisheries commissioners, assistant commissioner or inspector. Any person using an unlawful measure for the sale or purchase of oysters shall be guilty of a misdemeanor. (Rev.,

s. 2417; 1903, c. 510, s. 12; 1907, c. 969, s. 10; Ex. Sess. 1913, c. 42, s. 2.)

§ 1923. Local modification as to oyster measures in New Hanover, Onslow and Pender counties.—In New Hanover, Onslow and Pender counties all measures used for buying or selling oysters shall have a brand, to be adopted by the fisheries commissioner, stamped therein by said commissioner, assistant commissioner, or his lawful inspectors. (Rev., s. 2417; 1903, c. 516, s. 12; 1907, c. 969, s. 13.)

§ 1924. Illegal measures prohibited.—If any person shall in buying or selling oysters use any measure other than that prescribed by law for the measurement of oysters, or if any dealer in oysters shall have in his possession any measure for measuring oysters other than that prescribed by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 2399; 1903, c. 516, s. 12.)

§ 1925. Dredging regulated as to territory and season.—Any bona fide resident of the state duly licensed according to law and using a licensed boat or vessel may use scoops, scrapes or dredges in catching or taking oysters from the fifteenth day of November in each year to the first day in April following, from the public grounds and natural oyster beds in the broad open waters of Pamlico sound, Pamlico river, Neuse river and Shoal river, except in those portions of said sound and rivers in which the use of such instruments and implements is prohibited as herein provided. No person shall use any implement or instrument except hand-tongs in catching oysters in any bay, river, creek, strait, or any tributary of such, which borders upon or empties into Pamlico sound, Pamlico river, or Long Shoal river, except as hereinafter provided; and any point inside of a line drawn from the farthest or extreme outward point of land or marsh on the one side to the farthest or extreme outward point of land or marsh on the opposite side of any creek, strait or bay shall be construed to be within the said creek, strait or bay for the purpose of this section. Nor shall any person use any implement or instrument except hand-tongs in the waters of Pamlico sound from what is known as the reef or reefs in the eastern portion of said sound to the line of banks bordering its eastern shores; nor along the shores of Pamlico county inside of a line beginning at Maw point and running to the west end of Brant island, thence to Pamlico point; nor in the waters of Pamlico sound north of a line running from Long Shoal light to Gull Shoal life-saving station, from the first day of February of each year to the fifteenth day of November, nor in any of the waters of Carteret county. And for the purpose of this section, the northern boundary of said county shall be a line extending from Swan point to Harbor island light, thence a line to Southwest Straddle light, thence a line to Northwest point light, thence a line to the middle of Ocracoke inlet; nor in the waters of Neuse river above a line in said river running from Carbacon buoy to the western point of land at Pierce's creek. (Rev., 2413; 1903, c. 516, ss. 13, 14, 15; 1905, c. 507, s. 2.)

§ 1926. Illegal dredging prohibited; evidence.—If any person shall use any scoops, scrapes or dredges for catching oysters except at the times and in the places in this chapter expressly authorized, or shall between the fifth day of April and the fifteenth day of November of any year carry on any boat or vessel any scoops, scrapes, dredges or winders, such as are usually or can be used for taking oysters, he shall be guilty of a misdemeanor.

If any boat or vessel shall be seen sailing on any of the waters of this state during the season when the dredging of oysters is prohibited by law in the same manner in which they sail to take or catch oysters with scoops, scrapes or dredges, the said boat or vessel shall be pursued by any officer authorized to make arrests, and if said boat or vessel apprehended by said officer shall be found to have on board any wet oysters or the scoops, scrapes, dredges or lines, or deck wet, indicating the taking or catching of oysters at said time, and properly equipped for catching or taking oysters with scoops, scrapes or dredges, such facts shall be prima facie evidence that said boat or vessel has been used in violation of the provisions of the law prohibiting the taking or catching of oysters with scoops, scrapes or dredges in prohibited territory or at a season when the taking or catching of oysters with scoops, scrapes or dredges is prohibited by law, as the case may be. (Rev., ss. 2385, 2397; 1903, c. 516, ss. 13, 14, 15, 28.)

§ 1927. Dredging prohibited in certain waters of Pamlico sound; exception.—It shall be unlawful for any person to use any rakes, scrapes, scoops or dredges, or any other instrument or implement other than ordinary hand-tongs, for the purpose of taking or catching oysters from the public oyster grounds or natural oyster beds in any of the waters of Pamlico sound or its tributaries north of a line running from West Bluff bay to the center of Ocracoke inlet; any person found guilty of the violation of this prohibition shall be punished by a fine not less than twenty-five dollars or imprisoned not less than thirty days. (1909, c. 559.)

§ 1928. Culling required; size limit. — All oysters taken from the public grounds of this state, with whatsoever instrument or implement, shall be culled, and all oysters whose shells measure less than two and one-half inches in longest diameter, except such as are attached to a large oyster and cannot be removed without destroying the small oyster, and all shells taken with the said oysters shall be returned to the public ground when and where taken, and no oysters shall be allowed by the inspectors to be marketed which shall consist of more than ten per cent of such small oysters and shells, except "coon" oysters and oysters largely covered with mussels: Provided, these musseled oysters must not contain more than five per cent of shells or small oysters under regulation size. (Rev., s. 2415; 1903, c. 516, s. 11; 1905, c. 525; 1907, c. 969, s. 8; Ex. Sess. 1913, c. 42, s. 1.)

§ 1929. Local modification as to culling oysters in New Hanover, Onslow and Pender counties.—In New Hanover, Onslow and Pender counties

the preceding section is in force, except that the oysters shall be measured "from hinge to mouth," instead of in longest diameter. (Rev., s. 2415; 1903, c. 516, s. 11; 1905, c. 525; 1907, c. 969, s. 13.)

§ 1930. Taking unculled oysters for planting permitted to residents.—Residents of the state of North Carolina shall be permitted to take oysters without culling from natural rocks at any time during the year for planting purposes only, in the waters of North Carolina. (1917, c. 153.)

§ 1931. Unculled oysters seized and scattered on public grounds.—Whenever oysters are offered for sale or loaded upon any vessel, car or train, without having been properly culled according to law, the commissioner, assistant commissioner, or inspector shall seize the boat, vessel, car or train containing the same and shall cause the said oysters to be scattered upon the public grounds, and the costs and expenses of said seizure and transportation shall be a prior lien to all liens on said boat, vessel, car or train, and if not paid on demand the officers making the seizure shall, after advertisement for twenty days, sell the same and make title to the purchaser, and after paying expenses as aforesaid pay the balance, if any, into the oyster fund. For the towing of said boat, a charge of three dollars and fifty cents per hour shall be charged against said boat for towage.

The last sentence is not applicable in New Hanover, Onslow, and Pender counties. (Rev., s. 2416; 1903, c. 516, s. 3; 1907, c. 969, ss. 9, 13.)

§ 1932. Shells to be bought and scattered on public beds.—The fisheries commissioner is hereby empowered to expend one-half of the balance to the credit of the oyster fund on the fifteenth day of April in each year for the purpose of buying oyster shells and scattering the same on the natural oyster grounds of the state during the months of April and May. (Rev., s. 2421; 1903, c. 516, s. 20.)

Part 5. Criminal Offenses Connected with Oyster Industry

§ 1933. Perjury in application for oyster license.—If any person shall make any false statement for the purpose of procuring any license, which may be required by law, to catch oysters, or to engage in the oyster industry, he shall be guilty of perjury and punished as provided by law. (Rev., s. 2390; 1903, c. 516, s. 17.)

§ 1934. Catching oysters without license.—If any person shall catch oysters from the public grounds of the state without having first obtained a license according to law, or shall employ any person as agent or assistant, or shall as the agent or assistant of any person catch oysters from the public grounds, without all of said persons having first obtained a license according to law, he shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 2386; 1903, c. 516, s. 6.)

§ 1935. Oyster dealing without license.—If any person shall engage in the business of buying, canning, packing, shipping or shucking oysters taken or caught from the public grounds, or natural oyster beds of the state, without having first obtained a license as required by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 2395; 1903, c. 516, s. 9; 1915, c. 136, s. 1.)

See note to sec. 1920, sec. 1917.

§ 1936. Use of unlicensed boat in catching oysters.—If any person shall use any boat or vessel in catching oysters, which boat has not been licensed according to law, and which is not in all respects complying with the law regulating the use of such vessels, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars or imprisoned not more than thirty nor less than ten days for the first offense, but for the second or subsequent offense he shall be guilty of a misdemeanor and punished at the discretion of the court. (Rev., s. 2387; 1903, c. 516, s. 8.)

§ 1937. Failure to stop and show license.—If any person using a boat or vessel for the purpose of catching oysters shall refuse to stop and exhibit his license when commanded to do so by the fisheries commissioner, assistant commissioner or any inspector, he shall be guilty of a misdemeanor and be fined not less than twenty-five dollars nor more than fifty dollars. (Rev., s. 2389; 1903, c. 516, s. 26.)

§ 1938. Displaying false number on boat.—If any person shall display any other number on the sail than the one specified in their license or display a number when the boat or vessel has not been licensed, he shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars. (Rev., s. 2388; 1903, c. 516, s. 27.)

§ 1939. Catching oysters for lime.—If any person shall take or catch any live oysters to be burned for lime or for any agricultural or mechanical purpose, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that shells may be taken which do not contain more than five per cent of live oysters.

In New Hanover, Onslow and Pender counties the proviso to this section is not in force. (Rev., s. 2400; Code, s. 3389; 1885, c. 182; 1907, c. 969, ss. 12, 13.)

§ 1940. Catching oysters Sunday or at night.—If any person shall catch or take any oysters from any of the public grounds or natural oyster beds of the state at night or on Sunday, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 2384; 1903, c. 516, s. 16.)

§ 1941. Unloading at factory Sunday or at night.—If any person shall unload any oysters from any boat, vessel or car at any factory or house for shipping, shucking or canning oysters on Sunday, or after sunset or before sunrise, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, whenever any boat or vessel shall have partially unloaded or discharged its cargo before sunset, the remainder of said load or cargo may be discharged in the

presence of an inspector. (Rev., s. 2394; 1903, c. 516, s. 16.)

§ 1942. Oyster-laden boats in canals regulated.—No boat or vessel loaded with oysters shall be permitted by the inspectors of South Mills and Coinjock to pass through the canals, which does not have a certificate showing that the cargo has been inspected and the tax paid thereon. (Rev., s. 2420; 1903, c. 516, s. 17.)

§ 1943. Sale or purchase of unculled oysters.—If any person shall sell or offer for sale, transport or offer to transport out of the state, or from one point in the state to another, or have in his possession any oysters which have not been properly culled according to law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. It is unlawful for any person, firm or corporation to purchase oysters which have not been properly culled according to law, and for each violation shall upon conviction be fined two hundred dollars or be imprisoned in the discretion of the court.

In New Hanover, Onslow and Pender counties the purchase of unculled oysters is not forbidden. (Rev., s. 2392; 1903, c. 516, s. 3; 1907, c. 969, ss. 5, 13.)

§ 1944. Boat captain's purchase of unculled oysters.—The captain of any run or buy boat who shall purchase oysters which have not been properly culled according to law shall upon conviction be fined two hundred dollars or imprisoned in the discretion of the court, and the having of unculled oysters aboard of his boat shall be prima facie evidence of his having purchased them. When any person, firm or corporation shall furnish the captain of any run or buy boat with funds with which to purchase oysters, they shall not be held responsible for his acts and shall not be deemed the purchaser of such oysters.

This section is inapplicable to New Hanover, Onslow and Pender counties. (1907, c. 969, ss. 5, 13.)

§ 1945. Larceny from private grounds.—Any person who shall feloniously take, catch or capture or carry away any shellfish from the bed or ground of another shall be guilty of larceny and punished accordingly. (Rev., s. 2401; 1887, c. 119, s. 15.)

§ 1946. Injury to private grounds; work at night.—If any person shall willfully commit any trespass or injury with any instrument or implement upon any ground upon which shellfish are being raised or cultivated, or shall remove, destroy or deface any mark or monument lawfully set up for the purpose of making any grounds, or who shall work on any oyster ground at night, he shall be guilty of a misdemeanor. But nothing in the provisions of this section shall be construed as authorizing interference with the capture of migratory fishes or free navigation or the right to use on any private grounds any method or implement for the taking, growing or cultivation of shellfish. (Rev., s. 2402; 1887, c. 119, s. 11.)

Art. 6. Shellfish; Local Laws

§ 1947. New Hanover, Onslow and Pender: Close season for oysters.—If any person shall buy or sell oysters in the shell which have been taken from the public grounds or natural oyster beds of this state between the first day of April and the first day of October in any year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that oysters may be taken with hand-tongs only during the month of April in any year, to be used for planting on private grounds, entered and held under the laws of this state: Provided further, that oysters may be taken with hand-tongs only for home consumption: Provided further, that coon oysters may be taken from October first to May first of each year in the waters of Onslow and Carteret counties: Provided also, that it shall be lawful to take or catch oysters on public oyster grounds north of the line running from Point Peter to Duck island, except between a line running from the east end of Hog island to the beach and from Ballast point to the beach in Dare county, to be sold to residents or nonresidents, from April first to May fifteenth of each year, upon the payment by the purchaser of a tax of one and one-half cents per tub.

This section applies only to the counties of New Hanover, Onslow and Pender. (Rev., s. 2383; 1903, c. 516, s. 22; 1905, c. 525, ss. 5, 8; 1907, c. 936, s. 4.)

See note to sec. 1920.

§ 1948. Brunswick, New Hanover and Pender: Clams protected.—It shall be unlawful for any person, firm or corporation to take clams in the counties of Brunswick, New Hanover or Pender, from any of the waters thereof, for the purpose of bedding, for market, or for shipment from the said counties, from the twenty-fifth day of March to the fifteenth day of December of each year: Provided, however, that citizens of the said counties shall have the privilege at all times of the year to catch clams for selling in any of the said counties, in small quantities, for table use only. It shall be unlawful for any person, firm or corporation to purchase clams in the counties of New Hanover or Pender for the purpose of shipping from the said counties, or for any person, firm or corporation to ship from the said counties of Brunswick, New Hanover or Pender any clams at any time from the twenty-fifth day of March to the fifteenth day of December of every year, and in Brunswick county from the first day of March to the first day of December of every year. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined for each offense not exceeding fifty dollars or imprisoned not more than thirty days, in the discretion of the court. (1909, c. 879; P. L. 1913, c. 805.)

§ 1949. Brunswick: Clams; size limit.—It shall be unlawful for any person or persons to catch any clams for use or for sale under one and one-half inches in diameter in the waters of Brunswick county; and upon conviction shall be guilty of a misdemeanor. (P. L. 1913, c. 805.)

§ 1950. Brunswick: Fire on oyster beds; raking.—In Brunswick county it shall be unlawful

for any person or persons to build a fire upon any natural oyster bed or rock at a place where oysters are in a state of growth. It shall be unlawful for any person or persons to rake with clam rake any oyster bed or oyster rock. Any person violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1915, c. 138.)

§ 1951. Carteret: Clams in Newport River.—It shall be unlawful for any person or persons, firm or corporation, between the fifteenth day of April and the fifteenth day of October of any year, to take any clams from the waters of Newport river and its tributaries, for the purpose of shipping, selling, marketing or bedding the same. Any person or persons, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars for each offense, or imprisoned not exceeding thirty days, or both, in the discretion of the court. (1907, c. 840.)

§ 1952. New Hanover: Catching oysters in Myrtle Grove Sound.—If any person shall take or catch any oysters from Myrtle Grove sound, from Perrine's or Whitaker's creek to the headwaters of said sound in New Hanover county, from the first day of May until the first day of September, except for his own consumption, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than twenty days. (Rev., s. 2426; Code, s. 3423; 1883, c. 358, ss. 1, 2.)

§ 1953. New Hanover: Clams in Masonboro sound.—It shall be unlawful for any person or persons to use any rake or other instrument with more than two prongs for the purpose of taking clams from any natural oyster rock or the other[s] waters of Masonboro sound, in the county of New Hanover, between what is known as Fowler's landing to Cockle Shell point, in said county, a distance of about one mile. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1909, c. 521.)

Editor's Note.—Although the "s" in brackets appeared in the consolidated statute, it was apparently a typographical error.

§ 1954. Onslow: Catching oysters and clams in certain waters.—It shall be unlawful for any person to take or catch any oysters or clams from the natural oyster beds heretofore staked off and defined by the shellfish commissioners of Onslow county, or from any ground, between the first days of April and October of each year, lying north of the following lines, to wit: Beginning at triangulation point "Mount Millow," on the western shore of New river, and running thence eastwardly to triangulation point "pond," the eastern shore of New river. It shall be unlawful for any person during the months of May, June and July of each year to take or catch oysters or clams from the natural oyster beds within the grounds lying south of the line mentioned above. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction or confession in open court shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. It shall be the duty of the fisheries commissioner to keep the lines marking the natural oyster beds in said waters properly marked and staked off. (1907, c. 949.)

§ 1955. Onslow: Catching oysters in Stump sound.—It shal be unlawful for any person, firm or corporation to catch, take or carry away from the oyster beds in the waters of Stump sound, in Onslow county, between Alligator bay and the Pender county line, any oysters except for home consumption between the first day of March and the twenty-fifth day of October in any year. Any person, firm or corporation violating this section shall, upon conviction, be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. (1915, c. 130.)

§ 1956. Onslow: Clams in Brown sound and Queen's creek.—It shall be unlawful for any person, firm or corporation to catch or take any clams from the waters herein described between the first day of April and the first day of October. Said territory shall be as follows: Beginning at the mouth of Queen's creek, in Onslow county, and running the various courses of the said Queen's creek channel to Bogue inlet, including all the waters south of said channel to the Horse ford, between Brown sound and New river: Provided, this shall not be so construed as to prohibit any one from catching clams for their own table use only. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1909, c. 514.)

Art. 7. Terrapin

§ 1957. Drag-nets prohibited to nonresidents.—If any person who is not a citizen and who has not resided in the state continuously for the preceding two years shall use a drag-net or other instrument for catching terrapin he shall be guilty of a misdemeanor. (Rev., s. 2369; Code, ss. 3375, 3376.)

§ 1958. Diamond-back terrapin protected.—If any person shall take or catch any diamond-back terrapin between the fifteenth day of April and the fifteenth day of August of any year, or any diamond-back terrapin at any time, of less size than five inches in length upon the bottom shell, or shall interfere with, or in any manner destroy any eggs of the diamond-back terrapin, he shall be guilty of a misdemeanor, and shall be fined not less than five dollars nor more than ten dollars for each and every diamond-back terrapin so taken or caught, and a like sum for each and every egg interfered with or destroyed: Provided, this section shall not apply to parties empowered by the state to propagate the said diamond-back terrapin; and the possession of any diamond-back terrapin between the fifteenth days of April and August shall be prima facie evidence that the person having the same has violated this section. It shall be the duty of all sheriffs and constables to give immediate information to some justice of the peace of any viola-

tion of this section. (Rev., s. 2370; Code, s. 3377; 1899, c. 582; 1881, c. 115, ss. 1, 6.)

§ 1959. Local—Carteret: Diamond-back terrapin.—Any bona fide citizen of Carteret county is empowered to cultivate and propagate the diamond-back terrapin at one place in the waters of Carteret county: Provided, that he shall not interfere with the eggs laid by the wild diamond-back terrapin in its natural haunts, and that no undersized terrapin shall be taken for any purpose during the closed season prescribed by law in regard to catching terrapin.

The grantee of the privilege conferred by this section shall cultivate and propagate the diamond-back terrapin in a manner approved by the United Staes bureau of fisheries. If at any time the said grantee violates any of the laws of North Carolina regarding diamond-back terrapin the privilege hereby conferred shall cease and he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (Pr. 1913, c. 402; P. L. Ex. Sess. 1913, c. 58.)

Art. 7(A). Propagation of Oysters

§ 1959(a). Fisheries commission to plant natural oyster beds; material; selection of planting ground.—The fisheries commission board of North Carolina, hereinafter referred to as the board, is authorized, empowered, and directed to make all necessary and proper arrangements and to take the necessary steps to provide for the planting in the natural oyster beds of the public waters of North Carolina all shells, "coon oysters," or "seed oysters," or such other material as is well adapted for the propagation of oysters. The said board shall select such territory or planting ground in the public waters of North Carolina as is best adapted to the culture of oysters, and is most conveniently located with reference to existing beds or shells, "coon oysters," or "seed oysters," or other material well adapted for the propagation of oysters. (1921, c. 132, s. 1.)

§ 1959(b). Location and boundaries of planting; propogating material; manner and time of planting; supervision of work.—The said board may designate the location and boundaries of said territory for such planting, and may further designate what oyster propagating materials shall be planted in said territory, the manner and time of said planting, and from what territory the said materials can be secured. The said board shall carefully supervise or cause to be carefully supervised by its properly designated agents, the planting of such beds and the distribution of said oyster propagating materials in said territory or beds. (1921, c. 132, s. 2.)

§ 1959(c). Purchase of material; pay for work; contracts; limit of cost.—The said board may purchase the necessary shells, "coon oyters," "seed oysters," or other propagating materials, and may cause same to be distributed in a designated territory or territories, and the said board may provide proper compensation for any work or labor connected with the procuring of said materials, or the planting or distributing of said materials; or the said board may let out by private contract any part of the said procuring or distributing materials, or both: Provided, that the complete and entire cost of planting any of said propagating materials shall not exceed the sum of ten cents per bushel of said material so distributed, and the said board may not make any contract which will result in making the cost of planting of any quantity of said material exceed ten cents per bushel. (1921, c. 132, s. 3.)

§ 1959(d). Appropriation; warrant for payment; limit of annual expense.—In order to provide funds sufficient to enable the said board to carry out the purposes of this article, there is hereby appropriated out of the general funds of the state the sum of twenty thousand dollars ($20,000), which shall be used by the said board for the purpose of planting or distributing oyster propagating material in the oyster beds of the state in accordance with the provisions of this article, and for no other purpose whatsoever. The auditor of the state is hereby authorized and directed to issue his warrants upon the treasurer of the state upon the written order of the said board, signed by the secretary of the said board and countersigned by the chairman; and the said treasurer is hereby authorized and directed to meet and pay the aforesaid warrants: Provided, that the total amount of all warrants so issued and paid under the authority of this act shall not exceed the sum of twenty thousand dollars ($20,000); and provided further, that the total amount of all warrants so issued and paid under the authority of this article in any one fiscal year shall not exceed the sum of ten thousand dollars ($10,000). (1921, c. 132, s. 4.)

§ 1959(e). Marking boundary of planted grounds; protection.—It shall be the duty of the said board to plainly and clearly mark and define the limits and boundaries of any territory which may be planted with oyster propagating materials under the provisions of this article. The said board may prohibit the taking of any oysters from any such territory or area for such length of time as the board may determine, and the said board may regulate the manner of such taking as the said board may determine: Provided, that the said board shall prohibit any taking oysters from any territory or area so planted for at least two years after such planting. (1921, c. 132, s. 5.)

§ 1959(f). Acts violative of law constituting misdemeanor.—Any person violating any proper regulations or prohibitions of said board may, under the authority of section 1959(e), or any person who shall take oysters from any territory or area within two years after the planting of oyster propagating material in such territory or area under the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, in the discretion of the court. (1921, c. 132, s. 6.)

§ 1959(g). Enforcement of law.—It shall be the duty of the said board and its assistants to enforce the provisions of this article, and the regulations and prohibitions of said board may, under the authority of this article, be enforced in the same manner as is provided for enforcing

the fishing laws of this state, and the regulations of said board adopted under the authority of said laws, and the said board and its assistants shall have the same powers and duties and obligations with respect to the enforcement of this article as said board and its assistants have with respect to other fishing laws of this state. (1921, c. 132, s. 7.)

§ 1959(h). Planting of certain kinds of oysters prohibited.—It shall be unlawful for any person, persons, firm or corporation to plant, store, distribute or in any way deposit the Japanese, Portugese or Mongolian oysters in any of the waters of North Carolina. Any person, persons, firm or corporation violating or attempting to violate this section shall be guilty of a felony, and, upon conviction, shall be fined not less than one thousand ($1,000.00) dollars or imprisoned not less than one (1) year, or both, in the discretion of the court. (1933, c. 235.)

SUBCHAPTER III. FISH OTHER THAN SHELLFISH

Art. 8. Salt Fish and Fish Scrap

§ 1960. Inspectors for salt fish; duties; fees.—The board of county commissioners of every county where fish are packed for sale or shipment shall appoint and qualify one or more sworn inspectors of fish at or near all packing localities, whose duty it shall be to inspect all salt fish packed for sale or shipment; and all barrels, half-barrels and packages of fish inspected and approved by them shall be branded with the word "inspected" and the name of the inspector. Said board shall regulate and prescribe the duties, powers and fees of said inspector, which fees shall not exceed five cents per barrel of two hundred pounds net and two and one-half cents per half-barrel of one hundred pounds net and smaller packages, to be paid by the shipper. This section shall not apply to fishermen who may sell their fish to packers and shippers by weight or otherwise, as they may agree: Provided, that in any county where the board of county commissioners have not already appointed an inspector as is provided in this section, upon a petition of two or more persons it shall be mandatory upon the said board of county commissioners to immediately appoint an inspector in accordance with the provisions above. Upon failure to do so for five days after said petition has been filed, said board shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than fifty dollars for each member or be imprisoned not more than thirty days: Provided, said petition be filed with the clerk of the board of commissioners five days before regular meeting of said board. (1909, c. 663, s. 1; 1911, c. 171.)

§ 1961. Salt fish sold by weight; marked on package.—All salt fish packed for market shall be sold at their net weight, which shall be marked on every package; and any person packing or offering for sale salt fish, fraudulently marking the net weight on the package, shall for each offense be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days, or both, at the discretion of the court. (1909, c. 663, s. 2.)

§ 1962. Salt mullet; special marking.—Each package of salt mullets packed and offered for sale shall be marked or stamped "large," "medium" or "small," and all packages containing any other kind of fish shall be marked plainly the name of the fish contained, and any person who shall pack as principal or shall have the same done by others for him shall be deemed the packer and shall stamp his name and place of packing, together with net weight and size of fish, as prescribed in this section, on the head of each package before offering for sale or shipment, and on failure to pack and stamp as herein prescribed, or to pack or stamp said package falsely, so as to misrepresent the weight or size of the fish in said package, shall be guilty of a misdemeanor and fined not less than five nor more than fifty dollars for each offense, and may be imprisoned at the discretion of the court, not to exceed thirty days: Provided, this section shall not apply to packages containing less than fifty pounds net fish: Provided further, this section shall not apply to fishermen themselves, but shall apply only to merchants and others who may be classed as packers or brokers, within the proper meaning of the term. (1909, c. 663, s. 3.)

§ 1963. Measures for fish scrap and oil.—For the purpose of uniformity in the trade of manufacturing fish scrap and oil in the state of North Carolina, there is hereby established a standard measure of twenty-two thousand cubic inches for every one thousand fish. Any person, firm, corporation or syndicate buying or selling menhaden fish for the purpose of manufacturing within the borders of this state, who shall measure the fish by any other standard (more or less) than is prescribed in this section, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not to exceed thirty days. Each day said measure is unlawfully used shall constitute a separate and distinct offense. (1911, c. 101.)

Art. 9. Commercial Fishing; General Regulations

§ 1964. Right of fishing in grantee of land under water.—Whenever any person acquires title to lands covered by navigable water under the subchapter Entries and Grants of the chapter entitled State Lands, the owner or person so acquiring title has the right to establish fisheries upon said lands; and whenever the owner of such lands improves the same by clearing off and cutting therefrom logs, roots, stumps, or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drifting or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines

thereon. This section shall apply where the owner of such lands shall erect platforms or structures of any kind thereon to be used in fishing with nets and seines. Every person who shall willfully destroy or injure the said platforms or structures, or shall interfere with or molest the owner in the use of such lands as aforesaid, or in any other manner shall violate this section, shall be guilty of a misdemeanor. This section shall not relieve any person from punishment for the obstruction of navigation. (Rev., s. 2460; Code, s. 3384; 1874-5, c. 183, ss. 1-6.)

As to license to fish, see sec. 1887; as to entry of land covered by water, for wharves, see sec. 7543; as to injuries to nets by boats, see sec. 1972.

In General. — The right to fish in navigable waters is open to all, and the proprietorship of the adjacent beach gives no exclusive right of fishing in the navigable waters in front thereof; nor does the fact that the plaintiff as owner of the adjacent beach has been in the habit of drawing a seine up to her beach at that point give her such exclusive fishery, no matter for how many years she has exercised or enjoyed such privilege. No title to land under navigable waters can be acquired by user, since even an express grant of land covered by navigable waters is void by the terms of the statute. Bell v. Smith, 171 N. C. 116, 117, 87 S. E. 987.

The right of fishing in a navigable river is subordinate to the right of navigation. Lewis v. Keeling, 46 N. C. 299.

§ 1965. Seines prohibited to nonresidents; exceptions.—If any person who has not resided in the state continuously for at least twelve months next preceding the day on which he shall begin to take fish shall use, or cause to be used, in any of the waters of the state, any weir, hedge, net, or seine, for the purpose of taking fish for sale or exportation, or if any person shall assist in using, or be interested in using or causing to be used, in any such waters for the purpose aforesaid, any weir, hedge, net, seine or tongs in the use of which any such nonresident person may have an interest, he shall be guilty of a misdemeanor. Nothing herein shall prevent any person from fishing with seines hauled to the shore at any fishery, the title to which fishery or any interest therein having been acquired by such person by lease, purchase or inheritance. This section shall not extend to servants employed to fish by any persons allowed to fish in the navigable waters of the state. No nonresident of the state shall make any sale, assignment or transfer of any fishery, weir, or other fishing apparatus, or privilege mentioned in this section, to any citizen of the state for the purpose of operating and working said fishery, weir, or other fishing apparatus as aforesaid, under the name and ownership of such citizen, or as the servant or employee of any citizen; and any sale, transfer or assignment not made bona fide and for a full consideration shall be null and void.

Upon affidavit founded upon information and belief that any nonresident of the state is operating any such fishery, weir, or other fishing apparatus as aforesaid in the waters of the state, under such sale, assignment or transfer, as the pretended servant or employee of any citizen of the state, it shall be the duty of the justice of the peace before whom said affidavit is made to issue a warrant against the said nonresident and citizen under whose name said fishery is operated, and upon conviction the said offenders shall be guilty of a misdemeanor, and shall, for every offense, be fined not more than fifty dollars, or imprisoned not more than thirty days. Upon the said trial, the burden of proof shall be on the defendants to prove the bona fides and full consideration of said sale or transfer. (Rev., s. 2467; Code, ss. 3379, 3380; R. C., c. 81, s. 5; 1844, c. 40, s. 1; 1876-7, c. 33; 1883, c. 171; 1931, c. 81.)

Editor's Note.—The Act of 1931 inserted the word "lease" in the second sentence of this section.

In General.—The defendants were indicted for unlawfully taking oysters. It was proved that they were residents of the State of Virginia, but were in the employment of one W., who was a resident of North Carolina. It was held that the defendants were not guilty if they, in good faith, were acting as servants of W. State v. Conner, 107 N. C. 931, 11 S. E. 992.

§ 1965(a). Fishing with nets, etc., by non-residents prohibited. — It shall be unlawful for any person, firm or corporation, which has not been a bona fide resident of the State for twelve months continuously, next preceding the date on which the fishing shall commence, to use or cause to be used in the waters of the State, which shall include the distance of three nautical miles, measured from the outer beaches or shores of the State of North Carolina out and into the waters of the Atlantic Ocean, any seines, trawls or nets of any kind for the purpose of taking fish for sale or exportation. Any person, firm or corporation violating this section shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the court.

It shall be the duty of the Fisheries Commissioner whenever he has reasonable grounds to believe that this section is being violated in any particular place, to go himself or send a duly authorized deputy to such place and such officer finding that the provisions of this section are being violated is hereby authorized and empowered to seize and remove all nets, machinery, or other appliances or paraphernalia being used in violation of this section, and to sell the same at public auction, after advertisement for ten days at the Court House door in the county in which the seizure was made, or in which the seized property is taken under the provisions of this section, and apply the proceeds from said sale, first to payment of costs and expenses of such sale and removal, and pay the balance of said proceeds remaining, if any, to the school fund of the county in which or nearest to where the offense is committed.

Such Fisheries Commissioner, or his authorized deputy, is further authorized and empowered to seize any boat, vessel or ship of any kind or nature, used in thus violating the law, and to bring the same into the nearest port in said State having sufficient depth of water to properly accommodate such boat, vessel or ship so seized. Such boat, vessel or ship so found being used contrary to the provisions of this Statute, shall be forfeited to the State and the said Fisheries Commissioner is hereby authorized, empowered and directed to institute proceedings for the purpose of condemning and selling such boat, vessel or ship, in the name of the State, in the Superior Court in the County in which such seized boat, vessel or ship is taken under the provisions of this act. The said Fisheries Commissioner, however, with the approval of the Director of the Department of Conservation and Development,

shall have authority to compromise, by agreement with the owner of such boat, vessel or ship, for any such violation, and upon such compromise and the payment of the sum of money agreed upon, he may release such boat, vessel or ship to the owner thereof, without further proceedings being taken. If, however, no such compromise, thus authorized, shall be made between the Fisheries Commissioner, with the approval of the Director of the Board of Conservation and Development, then the owner of such boat may execute and deliver to the Fisheries Commissioner a bond, with adequate security, not less than the value of such boat, conditioned to return said boat to the custody of said Fisheries Commissioner, if upon the trial of the cause in the Superior Court as aforesaid it should be determined that the said boat was forfeited.

This authority to seize the said boat, under the circumstances hereinbefore detailed, shall in no way affect the liability of the owners and those operating the boat and thus using it in fishing, to be prosecuted for the misdemeanor hereinbefore defined. Provided, nothing contained in this section shall be construed to prevent any person, firm or corporation, which has been a bona fide resident of the State of North Carolina for twelve months continuously next preceding the date on which the fishing shall commence from employing non-resident employees in connection with fishing as authorized by law. (1931, c. 36, s. 1.)

Editor's Note.—This section empowers the Fisheries Commissioner or his deputies to seize nets and appliances used in violation of law and sell the same at public auction, after advertisement for ten days, or to seize any boat engaged in violation of the law and institute proceedings for condemnation in the name of the state. Such power in administrative agencies is held to be due process (Daniels v. Homer, 139 N. C. 219, 51 S. E. 992. See 3 N. C. L. Rev. 27), since the owner has recourse to the courts to recover his property before condemnation by injunction or by claim and delivery proceedings and may maintain an action for damages for the value of the property against the officials who seized it, if such taking prove to be wrongful. 9 N. C. Law Rev. 389.

§ 1965(b). Fishing within three-mile limit permitted with pound nets.—It shall be lawful to set pound nets of not less than one and one-quarter inch bar, when fished, in the Atlantic ocean within the three-mile limit and between Cape Hatteras and the Virginia line, but not nearer to any inlet than three miles nor nearer the beach or ocean shore than four hundred yards. (1931, c. 118, s. 1.)

§ 1965(c). Permission to set up apparatus to be granted by department of conservation and development and federal government; license fee. —Application for entry for the purpose of constructing permanent and semi-permanent, or stationary fishing apparatus within the three-mile limit under the provisions of this Act shall be made to the department of conservation and development. Permits for the erection of such fishing apparatus, nets, wires or devices, may be granted by the department of conservation and development if such construction are deemed to not be a menace to public safety or navigation. No construction, or any part of a construction, to be erected under the authority of this section shall be made until permission is secured from the department of conservation and development and from the federal government. The license fee for the erection of fishing apparatus, nets, wires, or other construction which is an integral part of such fishing device, under the authority of this section, shall be at the rate of twenty-five dollars per pocket per year, and said license shall expire each year on December thirty-one: Provided, however, the license fee herein levied shall not apply where the investment for such apparatus does not exceed the sum of one thousand dollars. (1931, c. 118, s. 2.)

§ 1965(d). Taking of shrimp by non-residents prohibited. — It shall be unlawful for a person, who has not in good faith resided in the State of North Carolina for a period of twelve months to take shrimp within the territorial waters of the State. (1931, c. 117, s. 2.)

Editor's Note.—The act from which this and the succeeding section were taken was amended by Public Laws 1931, c. 331, which made its provisions, regulating the taking of shrimp in the public waters of the State, subject to the approval and supervision of the department of conservation and development under the general law theretofore existing.

Such restrictions against non-residents taking shrimp and fish are justified under the police power which may be exercised in favor of residents as to the state's natural resources. Corfield v. Coryell, Fed. Cas. No. 3230, 4 Wash. C. C. 371. 9 N. C. Law Rev. 389.

§ 1965(e). Closed season for residents taking shrimp. — It shall be unlawful for any resident of the State of North Carolina to take shrimp for commercial purposes in any of the waters of said State between the fifteenth day of May and the fifteenth day of August in any year: Provided, however, that any such resident may take such shrimp to be used as bait only, but not exceeding one bushel per day per boat. (1931, c. 117, s. 3.)

See note under preceding section.

§ 1965(f). Violation of two preceding sections made misdemeanor.—Any person, firm or corporation offending against the provisions of sections 1965(d) and 1965(e) shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1931, c. 117, s. 4.)

§ 1966. Menhaden fishing forbidden to non-residents.—It is unlawful for any person, firm, or corporation, not a citizen or resident of the state of North Carolina, to catch, capture, or otherwise take any menhaden or fatbacks within the waters of the state of North Carolina to the extreme limits of the state's jurisdiction in and over said waters; and for the purpose of this law the following boundaries are hereby declared to be the boundaries to which the waters of the said state extend, to wit: a distance of three nautical miles, measured from the outer beach or shore of the state of North Carolina out and into the waters of the Atlantic ocean; and any portions or portion of any water within a distance of three nautical miles from said waters of the Atlantic ocean to any beach or shore of said state shall be deemed, for the purpose of this act, within the waters of said state: Provided, that any citizen or resident of the state of North Carolina, whether person, firm, or corporation, may take, capture, or catch any menhaden or fatbacks at any time, subject to existing laws; provided, it shall be lawful for non-residents of the State to

catch, or capture menhaden (fat-backs) from the waters of North Carolina, North of Cape Hatteras, on the payment to the State Fisheries Commissioner of seventy-five cents per ton on gross tonnage of such boats as they may operate, licenses issued under this proviso to expire December thirty-first of each year.

It is unlawful for any nonresident person, persons, firm, or corporation knowingly to buy, cook, or manufacture into fertilizer any menhaden or fatbacks caught, taken, or captured contrary to the provisions of the above.

Any person, persons, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction in any county opposite the place at which said act is done, shall be fined not less than twenty-five hundred dollars or imprisoned for two years, or both, in the discretion of the court: Provided, that each catch, or taking, or purchase, or act of manufacture, shall constitute a distinct and separate offense.

It is the duty of the fisheries commissioner or assistant commissioner, whenever an affidavit is delivered to him stating that the affiant is informed and believes that said act is being violated at any particular place, to go himself or send a duly authorized deputy to such place, to investigate the same, and such officer shall seize and remove all nets, machinery, or other appliances and paraphernalia setting or being used in violation of this section, sell same at public auction and apply the proceeds of such sale to the payment of costs and expenses of such removal, and pay any balance remaining into the school fund of the county nearest to the place where the offense is committed. (1911, c. 102; 1923, c. 154, ss. 2, 3.)

§ 1967. Menhaden fishing with nets regulated.—If any person shall catch any menhaden or fatbacks within the waters of the state of North Carolina, to the extreme limits of the state's jurisdiction as defined in the preceding section, in any purse net or purse seine with a bar of less than one inch and with a mesh of less than two inches, or shall knowingly cook or manufacture for fertilizer any menhaden or fatbacks caught in any net or seine having bars of less than one inch or having meshes of less than two inches, at any place within the state of North Carolina, he shall be guilty of a misdemeanor, and for each and every offense shall be fined not less than five hundred dollars or imprisoned for one year, or both, in the discretion of the court. Every person found fishing for menhaden or fatbacks within three miles of the shore of any county shall be presumed to have violated this section. And all such persons, firms or corporations shall be subject to all the pains and penalties denounced in this section, and they may be prosecuted in the courts of any county in this state. All persons aiding and abetting shall be guilty as principals.

This section is inapplicable to the counties of Dare, Brunswick, Pender, and New Hanover. (Rev., s. 2438; 1905, cc. 274, 508.)

§ 1968. Poisoning streams.—If any person shall put any poisonous substance for the purpose of catching, killing or driving off any fish in any of the waters of a creek or river, he shall be guilty of a misdemeanor. (Rev., s. 3417; Code, s. 1094; 1883, c. 290.)

§ 1968(a). Putting explosives in waters forbidden.—No person, firm or corporation shall put or place in any waters within or on the boundaries of this State any electricity, explosives or poisonous substances whatsoever for the purpose of catching, injuring or killing fish. No person, firm or corporation shall allow substances, poisonous to fish to be turned into or allowed to run, flow, wash or be emptied into any waters within this commonwealth, designated by Fisheries Commission Board as fish producing waters, unless it be shown to the satisfaction of the Fisheries Commission Board or to the proper court that every reasonable and practicable means has been used to abate and prevent the pollution of waters in question by emptying into same any deleterious or poisonous substances: Provided this section shall not apply to dyestuffs or sewage discharged from cotton mills.

In prosecutions under this section for pollution of water by substances known to be injurious to fish or fish food, it shall not be necessary to prove that such substances have actually caused the death of any particular fish.

No person shall fish or trespass with intent to fish in or upon any waters or bed or banks of any water, or any land controlled or owned, or occupied by the State Fisheries Commission. No person shall wilfully or maliciously destroy or damage any ponds, property or appliance whatsoever of the commission, nor interfere, obstruct, pollute or diminish the natural flow of water into or through any State fish hatchery.

Any person violating any of the provisions of this section shall, on conviction, be fined not less than one hundred dollars for each and every offense: Provided, further, that this act shall apply only to such fish producing streams designated as such by the Fisheries Commission Board, and that no prosecution under this act shall be instituted except by said Fisheries Commission Board. (1927, c. 107.)

§ 1969. Fish offal in navigable waters.—If any person shall throw, or cause to be thrown, into the channel of any of the navigable waters of the state, any fish offal, in any quantity that shall be likely to hinder or prevent the passage of fish along such channel, or if any person shall throw or cause to be thrown into the waters known as the Frying Pan, tributary to the Great Alligator river, in Tyrrell county, any fish offal in any quantities whatsoever, he shall be guilty of a misdemeanor. (Rev., s. 2444; Code, ss. 3386, 3389, 3407.)

§ 1970. Sunday fishing.—If any person fish on Sunday with a seine, drag-net or other kind of net, he shall be guilty of a misdemeanor, and fined not less than two hundred nor more than five hundred dollars or imprisoned not more than twelve months. (Rev., s. 3841; Code, s. 1116; 1883, c. 338; 1933, c. 438.)

Editor's Note.—By amendment of 1927, ch. 59, sec. 3, of Public Laws this section was made applicable to all the

counties, and the provision that exempted Onslow County was repealed.

Public Laws 1933, c. 438, omitted the exception as to nets fastened to stakes.

For act exempting stationary fisheries in Onslow County from operation of section, see Public Laws 1933, c. 51.

§ 1971. Robbing nets.—If any person shall, without authority of the owner, take any fish from any nets of any kind, he shall be guilty of a misdemeanor. (Rev., s. 2478; Code, s. 3418; 1883, c. 137, s. 5.)

§ 1972. Vessel injuring nets.—If any master or other person having the management or control of a vessel or boat of any kind, in the navigable waters of the state, shall willfully, wantonly, and unnecessarily do injury to any seine or net which may be lawfully hauled, set or fixed in said waters for the purpose of taking fish, he shall forfeit and pay to the owner of such seine or net, or other person injured by such act, one hundred dollars, and shall be guilty of a misdemeanor. (Rev., s. 2465; Code, ss. 3385, 3389.)

In General.—The right of navigation is paramount but not exclusive. If nets are across the channel of a river, or are in any other way a bar to navigation, they may be run over with impunity by any vessels that may find it reasonably necessary to do so. Lewis v. Keeling, 46 N. C. 299, 62 Am. Dec. 168; State v. Baum, 128 N. C. 600, 38 S. E. 900. But there must be some such necessity. As was said by the court in Lewis v. Keeling, supra, "There must be no wantonness or malice, no unnecessary damage, but a bona fide exercise of the paramount right of navigation." Hopkins v. Norfolk, etc., R. Co., 131 N. C. 463, 465, 42 S. E. 902.

§ 1973. Injury to fishing structures.—If any person shall willfully destroy or injure any platform or structure on any land covered by navigable waters, which land has been duly entered and granted and over which the owner has, according to law, acquired a prior right of fishery, or shall interfere with or molest the owner in the use thereof or of said prior right of fishery, he shall be guilty of a misdemeanor. If any person shall willfully destroy or injure any platform or structure erected in any navigable waters by the owner of the adjoining land for the purpose of drawing or hauling nets or seines thereon, or shall interfere with or molest the owner in the use of any such lands, he shall be guilty of a misdemeanor. (Rev., ss. 3414, 3415; Code, s. 2753; 1874-5, c. 183, ss. 2-4.)

§ 1974. Obstructing passage of fish in streams.—If any person shall set a net of any description across the main channel of any river or creek, or shall erect, so as to extend more than three-fourths of the distance, across any such river or creek any stand, dam, weir, hedge or other obstruction to the passage of fish, or shall erect any stand, dam, weir, or hedge, in any part of any river or creek that may be left open for the passage of fish, or who, having erected any dam where the same was allowed, and shall not make and keep open such slope or fishway as may be required by law to be kept open for the free passage of fish, he shall be guilty of a misdemeanor; Provided, that this section shall not apply to the creeks in the sound between Bogue inlet and Brown inlet, in Onslow county, except the main channel thereof. (Rev., s. 2457; Code, ss. 3387, 3388, 3389; 1909, c. 466, s. 1.)

§ 1975. Dams for mills and factories regulated; sluiceways.—No person shall place or allow to remain any dam for mill or factory purposes in the Chowan river between Holliday's island and the Virginia line; in the Meherrin river between its mouth and the Virginia line; in the Roanoke river from the mouth of the Cashie river to the Virginia line; in the Dan river from the crossing of the state line to a point nearest Danbury; in the Neuse river from New Bern to Neuse station in Wake county; in Contentnea creek from its junction with the Neuse to the junction of Turkey and Moccasin creeks; in the Cape Fear river from Wilmington to the junction of Haw and Deep rivers and thence in Haw river to the line of Chatham and Alamance counties, and also in Deep river to the Randolph and Chatham line; in Rocky river from its mouth to the crossing of the Pittsboro and Ashboro road; in the New Hope river from its mouth to the Orange county line; in Northeast Cape Fear river from Wilmington to South Washington; in Black river from its mouth to the junction of the Coharie; in the South river from its junction with the Black river to the crossing of the Fayetteville and Warsaw public road; in Lumber river from the state line to the northern boundary of Robeson county; in the Yadkin river from the state line to Patterson's factory; in Elk creek, a tributary of the Yadkin river, from its mouth to Daniel Wheeler's in Watauga county; in Stony Fork creek, a tributary of the Yadkin river, from its mouth to John Jones's old store; in Ararat river from its mouth to the bridge at Mount Airy; in North Fork of Catawba from its mouth to Turkey Cove; in Broad river from the state line to Reedy Patch creek; in Green river from its mouth to its junction with North Pacolet; in the Tennessee river from the state line to its junction with the Nantahala; in Pigeon river from the state line to the Forks of Pigeon; in the French Broad river from the state line to Brevard and in the Swannanoa river; in Toe river from the state line to the confluence of the North and South Forks of Toe; in New River from the state line to the point of divergence from the western boundary line of Alleghany county; in Little river in Johnston county from its junction with Neuse river in Wayne county to the Wake county line; in Cane river from the mouth of same to mouth of Bolling creek in Yancey county, also Old Fields of Toe on North Toe river in Mitchell county; Johns river from its mouth to the forks of said river near Carrell Moore's in Caldwell county; Catawba river from the South Carolina line to the town of Old Fort in McDowell county, unless the owner thereof shall construct thereon at his own expense a sluiceway for the free passage of fish, of a width not less than three feet nor more than ten feet: Provided, such sluiceway shall be constructed according to plans and specifications to be furnished by the board of agriculture, and shall not injure the water-power of such owner: Provided further, in order to ascertain whether sluiceways will or will not injure the water-power aforesaid, the owner of such dam may select two disinterested persons and the board of agriculture two others, who may select the fifth person to aid in the arbitration and settlement of such complaint: Provided further, this section shall not

apply to Pigeon river in Haywood county: Provided also, it shall be lawful for any person to remove any obstruction in the main channel of the Cape Fear river to the width of one hundred feet, for the free passage of fish in the county of Harnett. This proviso, however, shall not apply to any dam or obstruction placed or kept upon said river by the Cape Fear iron and steel company. (Rev., s. 2462; Code, s. 3410; 1901, c. 208; 1880, c. 34; 1881, cc. 21, 32, 250, 320; 1905, c. 278; P. L. 1913, c. 758.)

Cited in regard to obstructions in Finch Broad River in Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 550, 16 S. E. 692.

§ 1976. Sluiceways and fish passages; regulation and enforcement.—The sluiceways referred to in the preceding section shall be so constructed and placed upon such dams by the owner thereof within sixty days after notice has been given by the board of agriculture, under a penalty of one hundred dollars per day for each day thereafter that such dam shall remain without such sluiceway, and shall be kept open by him during the months of February, March, April, May, June, October and November, and at all other times when there is sufficient water to supply both the water-power and the sluiceway, a fine of fifty dollars per day for each day said sluiceway shall be allowed to remain closed, and any person who shall fish with net, trap, hook and line, or who shall take in any way whatsoever any fish within two hundred feet of said sluiceway, shall be subject to a fine of one dollar for each fish so taken, or a fine of fifty dollars for each offense, or imprisonment for thirty days.

No other obstruction to the passage of fish shall exist or be built between the designated points in the streams mentioned in this and the preceding section unless an opening of not less than twenty-five feet, and not more than seventy-five feet, embracing the main channel of said streams, shall be made by the owner of such obstructions within twenty days after notice from the board of agriculture to make such opening under penalty of fifty dollars per day for each day such obstruction shall remain unopened. Said notice shall be served by the sheriff of the county, and his return shall be prima facie evidence of notice in any suit for such penalty. (Rev., ss. 2463, 2464; Code, ss. 3411, 3412; 1880, c. 34, ss. 2, 3.)

Art. 10. Commercial Fishing; Local Regulations

Part 1. Sounds and Inlets

§ 1977. Inlets; nets in, regulated. — If any person shall set any pound net, dutch net or hedge net within two miles of Oregon inlet or Hatteras inlet or within ten miles of New inlet in Dare county, or shall between the first day of January and the first day of May following of any year, set or operate any seine or stationary nets of any kind in the main channels within three miles of the inside mouths of Ocracoke, Hatteras, Oregon, or any other inlet north of Ocracoke inlet, connecting the waters of the Atlantic ocean with any of the sounds or other inland waters, or shall fish with seines or nets of any description in the waters of Bear inlet or Brown's inlet or within one mile of Bear inlet or Brown's inlet, on the eastern or western beach of said inlets, except as regularly established fisheries on said Bear or Brown's inlet beaches, or shall fish with seines or nets on the inside of said Bear or Brown's inlet within one-fourth mile of said inlets between the first day of October and the first day of April, he shall be guilty of a misdemeanor. (Rev., s. 2450; 1893, c. 216; 1903, c. 724; 1903, c. 416.)

Held not applicable in Bell v. Smith, 171 N. C. 116, 87 S. E. 987.

§ 1978. Pamlico and sounds to the north: Net stakes to be removed. — Every person who shall set or use any net in the waters of Pamlico, Croatan, Currituck or Albemarle sounds or their tributaries, except Perquimans river, shall be required to pull up and remove their broken, decayed and abandoned net stakes within thirty days from the day the nets were taken from them, and not later than the first day of June, and any person failing to pull up and remove their stakes, as required by this section, shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 2448; Code, ss. 3382, 3414; 1883, c. 69; R. C., c. 81, s. 1844, c. 40, s. 7; 1852, c. 13; 1893, c. 147; Ex. Sess. 1908, c. 19, s. 1.)

Pod-Nets Interfering with Seines.—When stakes of pod-net fishermen interfere with the use of Albemarle sound for seining they may be removed by any party with whom they interfere. Hettrick & Bro. v. Page, 82 N. C. 65.

§ 1979. Pamlico, Croatan, and Albemarle sounds and inlets: Fishing regulated. — If any person shall set or fish any net, seine or appliance of any kind for catching fish at any place within a radius of two and one-half miles either way from Roanoke marshes lighthouse, at a distance more than five hundred yards from the shore of Roanoke island or the mainland on the western side of Croatan and Pamlico sounds, except that on the western side of Pamlico and Croatan sounds fishing shall be permitted in that territory extending one thousand yards from the shore, beginning at the two-and-one-half-mile limit heretofore defined and extending to the southern end of the Roanoke marshes, on the Pamlico sound side, and to the north end of the same marshes of the Croatan side, but in neither case shall the nets within this one-thousand-yard limit be within one and one-quarter miles in any direction from the Roanoke marshes lighthouse; or shall set or fish any pound or dutch net on the eastern side of Pamlico sound within ten miles of the Roanoke marshes lighthouse, except such as shall be fished within one thousand yards of Roanoke island or Hog island shores; or shall set or fish any dutch or pound net on the eastern side of Pamlico sound more than two thousand yards west of a line running south-southeast (magnetic) from Big island to a point on the twelve-foot curve westerly of Chicamacomico or south of said point more than two thousand yards from the twelve-foot curve, as marked on the chart of the coast and geodetic survey, corrected from data obtained to November twenty-second, one thousand nine hundred and four; or shall set or fish any dutch or pound net on the west side of Pamlico sound, in said sound, extending into the water more than two thousand

yards from the shore; or shall set or fish any pound or dutch net in Croatan sound farther from the shore than one-fifth of the width of said sound at that point; or shall set or fish any net, seine or appliance of any kind for catching fish at any place within the area of one-sixth the width of the sound or river on either side of a line passing through the middle of the channel of Croatan sound and the middle of Albemarle sound, up Chowan river as far as Cannon's ferry, and other tributaries of Albemarle sound (provided, this clause does not apply to seines used on the rivers); or shall set or fish any pound or dutch net in the Albemarle sound more than two thousand yards from the shore of the mainland, or in Chowan river farther from the shore than one-third of the width of said river, at the place where said nets are fished or set, or within one-fourth mile of any wharf used by a steamer on said river; or shall set or fish any net or appliance of any kind for catching fish within one mile on either side of a line running westerly or southwesterly from the center of New inlet to an intersection with the line extending from Big island southwest (magnetic), or within one mile on either side of a line six miles long running southwesterly from the center of Oregon inlet to a point two thousand yards west of the continuation of the said line running from Big island south-southeast (magnetic), or within one mile on either side of a line six miles long running from the center of Hatteras inlet in a northwesterly direction, these restricted areas to include the channels extending from Oregon, New Hatteras inlets, respectively, he shall be guilty of a misdemeanor and be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. The provisions of this section shall apply only to that part of each year in which shad and herring fishing are permitted by law in the several waters, except that in Albemarle and Croatan sounds the provisions of this section shall apply for the entire year, as far as it relates to pound nets. The fisheries commissioner is authorized, in determining the boundaries of the restricted areas on either side of Roanoke marshes, to run straight lines from the stake two thousand yards from the shore in the two-and-one-half-mile radius from Roanoke marshes lighthouse to the stake five hundred yards eastward from the point of Roanoke marshes, and shall run straight lines from the stake one-fifth the width of Croatan sound in the two-and-one-half-mile radius from Roanoke marshes lighthouse south to the stake five hundred yards from the eastward point of Roanoke marshes; that the boundary lines marking the restricted areas in these sounds shall be run in straight lines from stake to stake, located at certain points, but said stakes not to be in any case more than three miles apart. The place of trial for offenses under this section shall be the county opposite where the act was committed. (1909, c. 540, s. 3.)

§ 1980. Albemarle and Croatan sounds and inlets: Drift nets.—If any person shall drift or fish any drift nets between the first day of February and the first day of May of any year, within two miles of the mouth of any river emptying into Albemarle sound, or within three miles of any seine-beach on the Albemarle or Croatan sounds while being fished, or within ten miles of Ocracoke, Hatteras, Oregon or New inlets, or within ten miles of the Roanoke marshes, he shall be guilty of a misdemeanor, and be fined not less than fifty dollars or imprisoned not less than thirty days: Provided, the people of Dare county shall be allowed to use drift nets for herring. (Rev., s. 2446; Code, s. 3396; 1881, c. 274, ss. 1, 2; 1883, c. 145.)

§ 1981. Albemarle sound and tributaries: Nets and net stakes.—No person shall set or fish any dutch net or pound net in Roanoke river, Cashie or Middle and Eastmost rivers, or within two miles of the mouth of said rivers, or within one mile of the mouth of any other river emptying into Albemarle sound, or less than two miles in width at its mouth, and any such net within one mile of the mouth of any other river emptying into said sound shall not extend into the main channel at its mouth. No person shall set or fish with a dutch net or pod net within half a mile to the eastward or westward of the outside windlasses or snatch-blocks of any seine fishery in operation on said sound; and any such net set or fished within one mile of such windlasses or snatch-blocks of any seine fishery in operation shall run at right angles to the shore from the shore, and shall not extend farther into the sound from the water's edge than the distance from such windlasses or snatch-blocks to the line of such net; and all persons who shall set or fish any such net in said sound shall pull up and remove the stakes used for the same by the first day of June next succeeding the fishing season, and if any person shall set or fish any dutch net or pod net in said sound in violation of this section he shall be guilty of a misdemeanor, and be subject to a penalty of three hundred dollars: Provided, that dutch nets may be used in Cashie river two and one-half miles from its mouth, if they do not extend more than one-third the width of said river from the shore, and such nets may be along the sound shore on the Bertie county side between the following points along said shore, to wit: commencing at the mouth of Cherry Tree Cut branch, Kentrock field and Landing field, and running around the shore to the mouth of Morgan swamp, thence to Rock Spring branch, and that any nets set or fished within that line shall not extend from the shore in any direction a greater distance than six hundred and fifty yards measured at high water, and within this distance of six hundred and fifty yards is to be included the nets, hedges and all parts thereof. (Rev., s. 2439; Code, s. 3383; 1889, c. 122; 1891, c. 322; 1895, c. 245; 1899, c. 310; 1899, c. 412; 1909, c. 540, s. 2; 1911, c. 23.)

§ 1982. Albemarle sound in certain parts: Gill nets.—It is unlawful to set, fish or use any gill nets of any description, either stake, anchor or drift, for commercial purposes in the Albemarle sound west of a line drawn straight from Batt's island on northern side of Albemarle sound to mouth of Scuppernong river on south side of said sound, except between the hours of four o'clock and eleven o'clock p. m., and then said nets or combinations of such nets shall not be more than six hundred yards in length, and there shall not

be allowed to any boat more than six hundred yards of such gill nets.

It is the duty of the fisheries commissioner or other persons entrusted with the enforcement of the fishery laws of the state to seize and remove any gill net of any description being set, setting or being used in violation of this article, or which is more than six hundred yards in length, and to dispose of the same as provided by law.

It is the duty of the fisheries commissioner to keep a deputy, assistant or inspector on the waters of Albemarle sound to enforce this section and the other fish laws applicable to Albemarle sound, and the failure of the fisheries commissioner to perform this duty shall render his official bond liable to the penalty prescribed in the third preceding section which regulates fishing in Pamlico, Croatan and Albemarle sounds and inlets.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars (one-half to go to the informant and the other half to the school fund), or imprisoned in the discretion of the court. (1911, c. 18; 1913, c. 43.)

§ 1983. Albemarle sound off Tyrrell county: Gill nets.—It is unlawful for any person, firm or corporation to set or use for catching fish any anchor gill net within fourteen hundred yards of any stake gill net of from four and one-half inch to five and one-half inch mesh in that part of the Albemarle sound embraced in the following area: Commencing on the east shore of the Scuppernong river where said river empties into the Albemarle sound, thence north to the middle of the Albemarle sound, thence along the middle of the Albemarle sound to a point in the sound opposite Newberry pier, thence to the shore at Newberry pier, and along the sound shore to the beginning. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or be imprisoned for not more than thirty days. (1915, c. 112.)

§ 1984. Albemarle sound in certain parts: Anchor, drift, and stake nets.—If any person shall set or fish an anchor, drift or staked gill net in the waters of Albemarle sound or its tributaries west of a line running from Skinner's point buoy to Roanoke lighthouse, or if any person shall east of said line set or fish in the waters of said sound or its tributaries any anchor, drift or staked gill net longer than one thousand yards, or combination of such nets longer than one thousand yards; or shall set or fish any anchor, drift or staked gill nets within one and one-half miles of any seine grounds on the said sound or rivers emptying therein or within one-half mile of any dutch net stand where the same is now located in said sound or rivers unless said seine ground or dutch-net stand is owned by the person setting such nets; or shall set or fish any line or row of anchor, drift or staked gill nets anywhere in said sound or rivers nearer to any other row of such nets than half the length of the longer of said row he shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or be imprisoned not more than thirty days. And any person who shall willfully violate the provisions of this section shall forfeit and pay for each violation of the same the sum of one hundred dollars, to be recovered in a civil action by any one who will sue therefor; one-half of said recovery shall inure to the benefit of the public school fund: Provided, that nothing in this section shall prevent the setting of gill nets in the Chowan river or its tributaries above Holliday's island: Provided further, that one-third of said stream, along the channel, shall be kept free from any class of net: Provided further, that no pound net shall be set within one hundred yards of any other pound net set by another person in Chowan river, north of Holliday's island. (Rev., s. 2451; 1897, c. 51; 1899, c. 41; 1899, c. 130; 1911, c. 104.)

§ 1985. Albemarle sound: Nets near wharves or Norfolk Southern railroad bridge.—It is unlawful to set any pound or dutch nets in Albemarle sound nearer to either side of the Norfolk Southern railroad bridge across said sound than three hundred yards, or to set any stake, drift, or anchor gill nets nearer to either side of said bridge than one-half mile. It is unlawful to set any net of any description in front of a wharf, that is, between the pier of any wharf now used as a landing for any steamboat and the middle of the stream on which the wharf is built. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined not less than one hundred dollars or imprisoned in the discretion of the court. (1911, c. 163.)

§ 1986. Croatan marshes: Nets and fishing apparatus near.—If any person, for the purpose of taking fish, shall between the first day of February and the first day of May, of the same year, use or cause to be used, at or within half a mile of the marshes separating the waters of Croatan and Pamlico sounds, any weir, hedge, net or seine, he shall be guilty of a misdemeanor. (Rev., s. 2424; Code, s. 3378; R. C., c. 81, s. 4; 1844, c. 40, s. 3.)

§ 1987. Currituck sound: Nets used regulated.—It is unlawful for any person or persons, firm or corporation to fish in the waters of Currituck sound with a drag, haul, seine or any other kind of net of whatsoever kind with a bar of less than one and three-eighths inches, or a mesh of less than two and three-quarters inches. Any person or persons, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned more than thirty days, in the discretion of the court. (1913, c. 29.)

§ 1988. Pamlico sound: Nets to be set north and south. — Every net (unless the same be a drag-net and hauled to the shore) which may be used for catching shad in that portion of the waters of Pamlico sound lying between a line drawn eastwardly from Stumpy Point and Mount Pleasant in Hyde county to a point ten miles south of Hatteras inlet in said sound, shall be set and fixed in said waters in a direction from north to south, and shall not be used in any other manner; and any person offending against this section shall, for every offense, forfeit five dollars. (Rev., s. 2433; Code, s. 3381; 1889, c. 261; R. C., c. 81, s. 7; 1844, c. 40, s. 6.)

§ 1989. Pamlico sound; tributaries, rivers, and waters of Carteret county: Nets regulated. — There shall be no pound or other tarred nets with a mesh smaller than one and one-half inches bar, before tarring, fished in Pamlico, Tar, and Neuse rivers, Pamlico sound and the waters of Carteret county, and there shall be no pound or stake nets fished within three miles of the inside mouths of Ocracoke inlet nor in the principal channel or channels of said inlet nor within one mile of said channel or channels until the said channel or channels reach deep water, at any time, and the other inlets north of it shall be left under section 1979 of this chapter. No stake or pound net which shall be fished in any of the waters mentioned in this section, without being tarred, shall have a mesh of less than one and three-eighths inches bar. The bunt, which must not be longer than thirty yards, of all seines and haul-nets fished in the waters of Pamlico, Tar and Neuse rivers and Pamlico sound shall not be smaller than one and one-eighth inches bar net, but nothing herein shall apply to nets fishing for menhaden. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall be fined not less than one hundred dollars and imprisoned at the discretion of the court: Provided, this section shall apply only to that part of the year beginning January fifteenth and ending May fifteenth. (1907, c. 948, ss. 1-4; 1909, c. 540, s. 4.)

§ 1990. Pamlico sound; waters of Pamlico county: Nets regulated.—It is unlawful for any person or association of persons or corporation to set or cause to be set, fish or cause to be fished in Pamlico sound from the mouth of Bay river to Neuse river and in Neuse river, more than four pound, pod or dutch nets in any one string, with leads of more than two hundred yards in length for each pound or net, or at a greater distance than one and one-half miles from the shore at right angles or thereabouts from the place opposite where such net may be set; and it is unlawful for any person, association of persons or corporation to set or cause to be set any pound, pod, or dutch net or string of nets of any kind, or fish any such nets nearer to a net or string of nets already set and being fished than five hundred yards, and no pound, pod, or dutch net nor any lead thereto shall be set other than at right angles or thereabouts from the shore. It is unlawful for any person or persons, firm or corporation to use, set or fish any drag or haul net in the waters of Smith's Creek or its tributaries in Pamlico county.

It is unlawful for any person or persons or corporation to set or fish or cause to be set or fished any pound, pod, or dutch net in the waters of Pamlico county on the south or east side thereof, or in Neuse river, of a size smaller than one and one-quarter mesh or bar measure or two and one-half inches string measure.

Any person, persons or corporation who shall violate any of the above provisions shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court, and shall also forfeit such net or nets any portion of which may be set beyond such distance from the shore or set in any manner or place forbidden in this section.

It is the duty of the sheriff of Pamlico county, upon reliable information that any person or persons or corporation has set or caused to be set any pound or dutch net, or that any portion of any such net has been set at a greater distance than one and one-half miles from the shore from the mouth of Bay river to Neuse river and from Neuse river to Baird's creek, or nearer than five hundred yards to any nets already set, to ascertain the truth thereof, and if such report be correct, take into possession at once any such net so set, and after ten days public notice at three public places in his county sell the same at public sale, and from the proceeds he shall retain the actual cost of taking such net, and a fee for services of two and one-half dollars and the remainder of said proceeds he shall pay one-half to the informer and the other to be paid to the county treasurer, who shall place the same to the credit of the public school fund of the county.

It is lawful for any person or persons to set pound, pod, or dutch nets in the manner prescribed in this section in the waters of Pamlico county and in the Neuse river upon the north side thereof from its mouth to Baird's creek, at any time during the year, and from the northern end of outer Swan island to Adams creek on the south side of Neuse river, from the first day of January to the first day of May. (P. L. 1913, c. 752, s. 5.)

§ 1991. Roanoke sound: Nets in. — It is unlawful for any person or persons to set any pound nets or any other kind of nets east of a line beginning at a point one thousand yards east of Hog Island point and running direct to a point two hundred yards east of Broad Creek point; thence following the east shore of Roanoke island to Ballast point; or set or fish any pound or dutch nets or any other kind of net in that portion of Roanoke sound north of a line extending from Ballast point east ten degrees north farther from the shore than one-fifth of the width of said sound. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court. This section shall not prevent the setting of pound nets inside of Shallow Bag bay, and shall apply only to that part of each year in which shad and herring fishing is permitted by law in the several waters. (1911, c. 26.)

Part 2. Streams

§ 1992. Black river: Fishing regulated. — It is unlawful for any person or persons to catch or take fish, either by rod or hook, seines, nets, striking, muddying the pools or lagoons, feeling by hand, gigging or in any other method or in any manner whatsoever, during the months of May, June, July and August, excepting Tuesday and Friday of each week in each year, in the waters of Black river and its tributaries, in the counties of Pender and Bladen. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction fined not less than five dollars nor more than ten dollars or imprisoned not more than thirty days,

one-half of the fine to be paid to the informer and one-half to the school fund. (1909, c. 478.)

§ 1993. Black river and Mingo creek: Only hook and line.—If any person shall fish in that part of Black river in Sampson and Cumberland counties and below the Atlantic coast line railway bridge, or Mingo creek in said counties below the Averasboro and Clinton road otherwise than with a hook and line, he shall be guilty of a misdemeanor. (Rev., s. 2471; 1895, c. 276.)

§ 1994. Black river in Bladen, Cumberland and Sampson: Close season.—It is unlawful for any person to catch with hook and line, seine, or destroy with gun or any gig or striking iron the fish in the waters of Black river and its tributaries in the counties of Bladen, Cumberland and Sampson from the fifteenth of May until the fifteenth of August in each year. Any person violating this section shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than twenty-five dollars, or imprisoned in the county jail not more than thirty days, for each and every offense. (P. L. 1913, c. 623, s. 1.)

§ 1995. Black river and Six Runs; Obstructing channel; lay days.—It is unlawful for any person or persons to fish in that part of Black river from the Cape Fear river to the mouth of Great Coharie, and in that part of Six Runs river from its mouth to where it is crossed by the Atlantic coast line railroad, with any wire trap, net or contrivance whatever that will obstruct the free passage of fish in said waters, from the first day of March to the fifteenth day of June of each year, except from six o'clock p. m., to six o'clock a. m. on Tuesday, Thursday and Saturday nights. It is unlawful for any person or persons fishing as permitted in the foregoing to leave, or permit being left, in the parts of the said streams defined in the foregoing, any wire trap, net or contrivance whatever that will obstruct the free passage of fish, or any parts of any such wire trap, net or contrivance, at any time during which such fishing is prohibited. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 169.)

§ 1996. Cape Fear river: Nonresidents may not fish.—If any person who is a nonresident of the state shall catch fish, for marketable purposes, in the waters of the Cape Fear river, or any of its tributaries, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court. (Rev., s. 3416; 1895, c. 230.)

§ 1997. Cape Fear river: Nets and seines regulated.—If any person shall use any net for catching sturgeon in the waters of New Hanover county, the bars of the meshes of which net shall be less than ten inches in the diamond; or shall haul a seine or nets or pod fish within three hundred yards of any established fishery, except with the nets of such fishery; or shall set or fish any stationary nets in the waters of the Cape Fear river, except on the east side thereof and in New Hanover county; or shall set any net in said river otherwise than east or west; or shall own or control more than one line of nets; or shall operate or fish any shad nets in Cape Fear river below the mouth of Brunswick river between the twentieth day of April and the fifteenth day of January; or shall set any set net or stationary net of any kind in the Cape Fear river north of the mouth of the Brunswick river, or in the Brunswick river; or shall operate any drift net in the Cape Fear river of more than three hundred yards in length, or shall catch shad in said river with seines or nets from the twentieth of April to the fifteenth of January, he shall be guilty of a misdemeanor. The possession of a sturgeon net with meshes of a size smaller than allowed by this section shall be prima facie evidence of having fished the same. In setting nets in Cape Fear river as allowed by this section the following rules shall prevail: They shall begin at a point one hundred yards from the edge of the channel on the east side of said river and running thence due east one hundred and twenty yards, then leaving a gap of one hundred and twenty yards. Then from the east end of said gap another net may be set one hundred and twenty yards only, and to continue in the same proportion, always requiring a gap of one hundred and twenty yards to intervene between each one hundred and twenty yards of nets so set, and no net or sets of any kind shall be placed opposite said gaps, within a distance of a half mile of same, and none of the nets so set shall be nearer than a half-mile of the west shore of said Cape Fear river. An established fishery in the meaning of this section is one where there is a camp for the use of the hands, and where the seine or nets and boats used by the said fishery are kept, and where the said fishery was established prior to the first day of January, one thousand eight hundred and ninety-nine. (Rev., s. 2468; Code, s. 3403; 1901, c. 173; 1899, c. 440; 1881, c. 280; 1907, c. 752.)

§ 1998. Cape Fear river: Fish traps regulated.—If any person shall construct, operate or maintain any fish traps in the Cape Fear river, or shall fail to remove all traps now in the channel of said river within sixty days from the first day of March, one thousand nine hundred and five; or shall fail on the first day of June of each year to remove the slats or fingers from any fish trap allowed to be operated in said river under this section, he shall be guilty of a misdemeanor. This section shall not apply to Brunswick or New Hanover counties or to a fish trap which extends to not more than one-third the channel of said river. (Rev., s. 2483; 1905, c. 500.)

§ 1999. Cape Fear and Northeast rivers: Nets in.—It is unlawful to fish with dutch, pod, fyke or other pound nets, or stake or stationary nets, or nets of like kind, in the waters of the Cape Fear river below the mouth of Black river, twelve miles above Wilmington, or in the waters of Northeast river below the Castle Hayne bridge. Drift nets shall be permitted in the waters of the Cape Fear river within the territory as above described in this section, and its tributaries, between February first and May first of each year. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined not less than fifty dollars or imprisoned not less than thirty days. (1909, c. 841; P. L. 1911, c. 278.)

§ 2000. Cape Fear, Northeast, and Black rivers: Obstructing fish; fishing between Saturday evening and Monday evening.—If any person shall with seines or nets of any kind catch any fish in the waters of the Cape Fear river from its mouth to the Bladen county line, or in the waters of the Northeast Cape Fear or Black rivers in Pender county between six o'clock p. m., on Saturday and six o'clock p. m. on Monday, or shall obstruct the free passage of fish in the waters of said rivers, he shall be guilty of a misdemeanor. (Rev., s. 2470; 1885, c. 226; 1887, c. 71; 1907, c. 811.)

§ 2001. Cape Fear river, northeast branch: Seines, nets and traps.—If any person shall fish in the northeast branch of the Cape Fear river with seine, net or trap, from the twenty-third day of February to the first day of July of any year, between the hours of six o'clock p. m. on Saturday and six o'clock p. m. on Monday of each week, or shall at any time use more than one seine at a time in any fishing hole in said river, or use, set or place in said river any hedge, trap or other obstruction which will prevent the free passage of fish up said river, which said hedge, trap or other obstruction shall extend more than one-third across the main channel of the said river, he shall be guilty of a misdemeanor. This section shall not apply to that portion of said river which lies between the city of Wilmington and a point on said river known as The Three Cypresses, twelve miles distant from said city of Wilmington. (Rev., s. 2469; 1889, c. 182; 1891, c. 198.)

§ 2002. Goose and Oyster creeks: Drag or haul nets unlawful.—It is unlawful for any person or persons to fish with a drag or haul net of any description in the waters of Oyster creek and its tributaries and Goose creek or its tributaries (said creek being a dividing line between the counties of Pamlico and Beaufort). Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1907, c. 222; P. L. 1911, c. 381.)

§ 2003. Little river: Obstructions in.—If any person shall place any obstruction in Little river, dividing the counties of Pasquotank and Perquimans, and allow it to remain for a longer time than ten days, he shall be guilty of a misdemeanor, and fined not less than five dollars nor more than ten dollars: Provided, nothing in this section shall be so construed as to prohibit citizens from fishing with dip-nets in said river during the months of March and April in each year. (Rev., s. 2443; Code, s. 3400; 1881, c. 18.)

§ 2004. Lumber river: Close season for traps in.—It is unlawful for any person to set any trap for the purpose of catching fish in Lumber river or its tributaries in Columbus and Robeson counties, between the first day of April and the first day of September in any year. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 608.)

§ 2005. Lumber river and waters of Robeson, Columbus, Hoke, and Scotland: Fishing regulated.—It is unlawful for any person, firm or corporation to fish with seine, trap, nets, or by gigging, muddying, striking, dynamiting, shooting, or using lime or other chemicals by which fish may be killed, in Lumber river or any of its tributaries, or other rivers, lakes, ponds, or swamps of Robeson, Columbus, Hoke and Scotland counties: Provided, that gill nets may be set in these waters during six months in each year, beginning with October and ending with March: and Provided further, that in Robeson and Hoke counties owners of private lakes and ponds may fish therein with seines, nets or traps from July first to September thirtieth.

Any person, firm, or corporation violating this section shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars nor less than ten dollars, the fine to be paid to the school fund of the county in which the offense was committed, or imprisoned not more than thirty days nor less than ten days in the county jail, the county commissioners of said counties having the privilege of sending the said person or persons so convicted to the chain-gang of their respective counties or to hire them out in case there is no chain-gang. The police force of said counties have full power and authority to arrest, without warrant, any and all persons violating this section. (P. L. 1915, c. 358; P. L. 1917, cc. 368, 415.)

§ 2006. Moccasin river and Big and Little Contentnea creeks: Obstructions and nets in.—It is unlawful for any person or persons to hedge or otherwise obstruct the free passage of water, fish, timber, rafts or boats in the run of Moccasin river or Big Contentnea creek, from Rountree's bridge in Wilson county to the mouth of said river or creek, or to make any like obstruction in the run of Little Contentnea creek. It is unlawful for any person or persons to fish with traps of any description in the waters of either of said streams, except from Rountree's bridge to Barefoot's mill: Provided, no hedge or trap shall obstruct more than one-third of the waters of Contentnea creek. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars and not more than fifty dollars or imprisoned not more than thirty days; and one-half of the fine so imposed shall be paid to the person who reports such offenses to the proper lawful officer, and the other half to the common school fund of the county in which the misdemeanor is committed. (1907, c. 615; Ex. Sess. P. L. 1913, c. 252.)

§ 2007. Neuse and Trent rivers: Stationary, set, or dutch nets.—No person or association of persons shall set or place or cause to be set or placed any stationary, set or dutch nets in either Neuse or Trent rivers above the point of conflux of the said Neuse and Trent rivers. That no person or association of persons or corporation shall set, cause to be set, fish or cause to be fished, use or cause to be used any dutch net, pound net or other stationary trap net or seine of similar description, by whatever name known, in the waters of Neuse river above Wilkinson's point, on Pamlico side. Any person

or association of persons setting or placing any nets, as described above, on any day or part of a day, above the point of conflux of the said Neuse and Trent rivers, shall be guilty of a misdemeanor. Any person or association of persons or corporation setting or placing or causing to be set or placed any nets, as described above, on any day or part of a day, above Wilkinson's point, in Neuse river, shall be guilty of a misdemeanor. Any person or association of persons or corporation violating the provisions of this section shall upon conviction be fined fifty dollars or imprisoned thirty days for each and every violation. Any party who is the informant against any one violating this section shall, upon conviction of such person so violating the section, receive one-half of the fine prescribed. (1909, c. 801; P. L. 1911, c. 616.)

§ 2008. Neuse and Trent rivers: Size of seine bars regulated.—If any person shall use any drag-net or seine with bars of less size than one and a quarter inch in the Neuse and Trent rivers, or in any of the tributaries thereof, except for the purpose of catching herring, from the fifteenth day of January to the fifteenth day of May of each year, he shall be guilty of a misdemeanor, and fined not less than five nor more than fifty dollars for every offense. This section shall not apply to the waters of the Neuse and its tributaries above the Wayne and Johnston county line. (Rev., s. 2454; Code, s. 3395; 1881, c. 146, ss. 1, 2.)

§ 2009. Neuse river: Obstructions in, by dams, nets, etc.—Any person who shall construct a dam, put in traps, dutch net, wire seine, or anything else in Neuse river between its mouth and the Falls of Neuse in Wake county, for the purpose of obstructing the passage of fish in said river, shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this section shall not apply to seines, set nets, running or skimming nets: Provided, this section shall not prevent the use of traps in Wayne county, where the trap and its wings do not extend more than one-third across the stream. (Rev., s. 2474; Code, s. 3422; 1885, c. 391; 1893, c. 354; 1883, c. 301, ss. 1, 2; 1895, c. 403; 1901, c. 395.)

§ 2010. Neuse river: Certain nets regulated.—If any person shall use or cause to be used any dutch net, pound net, or other stationary trap net, or seine of similar description, by whatever name known, in the waters of Neuse river for the purpose of taking fish therefrom, except the ordinary set net in use in said river prior to the first day of January, one thousand eight hundred and ninety-seven, he shall for each day's use thereof as aforesaid forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by warrant before any justice of the peace in the counties of Carteret, Craven and Pamlico or Lenoir, and shall be applied to the use of the public schools of said counties, and such offender, in addition to the penalties contained in this section, shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, that a resident and citizen of the state may fish with dutch, trap or pound nets in the waters of Neuse river on the Pamlico side of said river between the mouth of said river and Upper Broad creek not more than five hundred yards from the shore. (Rev., s. 2453; Code, s. 3397; 1897, c. 145; 1899, cc. 299, 422, 435; 1901, c. 74; 1903, c. 704; 1905, c. 817.)

§ 2010(a). Neuse, Trent, Moccasin, White Oak and New Rivers; perch traps prohibited, minimum size of other traps.—It shall be unlawful for any person, firm or corporation to place perch traps in the commercial waters of Neuse River, Trent River, Moccasin River, White Oak River and New River or any of the tributaries thereof and it shall be unlawful to place any fish traps in the commercial waters of said streams with a mesh smaller than five inches. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1931, c. 333.)

§ 2011. Pamlico and Tar rivers: Dutch, etc., nets prohibited.—If any person shall set down or fish any dutch, pod, fyke or pound net or net of like kind in the waters of Pamlico or Tar rivers or their tributaries except in the manner, and in the part, and during the time, which such nets are by law allowed to be fished, he shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than one hundred dollars, and shall be imprisoned in the county jail not less than thirty and not more than sixty days. (Rev., s. 2428; Code, s. 3417; 1903, c. 52.)

§ 2012. Pamlico and Tar rivers: Lay days.—If any person, from the fifteenth day of February to the tenth day of May of every year, from twelve o'clock meridian of Saturday until sunrise Monday morning of each week, shall fish any seine, set net, drift net, or any other net of any name or kind whatever, in the waters of Pamlico or Tar rivers and tributaries, except bow or skim nets, he shall be guilty of a misdemeanor. (Rev., s. 2427; Code, s. 3416; 1883, c. 137, s. 3.)

§ 2013. Pamlico river: Dutch, etc., nets allowed under regulation. — It shall be lawful to fish with dutch, pod, fyke or other pound nets, or nets of like kind, in the waters of Pamlico river below a line beginning on the southern shore of Pamlico river at Maule's point, and running due north to a point on the northern shore of said river: Provided, that no dutch, pod, fyke or pound net, or other net of like kind, shall extend out in said river more than one-fourth of the distance across said river from the shore, and that none of said dutch, pod, fyke or pound nets shall be set, placed down or fished nearer to each other than five hundred yards, measuring up and down the river; nor shall they be placed, set down or fished within five hundred yards of any seine beach in actual use for hauling a seine, nor within one mile of the mouth of Bath creek: Provided, no nets of the kind enumerated in this section, or other nets of like kind, shall be placed down, set or fished in said rivers between the tenth day of May and the first day of July in any year. Any person violating the provisions of

this section shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than one hundred dollars, in the discretion of the court. (Rev., s. 2429; Code, s. 3417; 1903, c. 52; 1909, c. 540, s. 1; 1909, c. 700.)

§ 2014. Perquimans river: Nets in, regulated. —If any person shall fish with any seine, or set any dutch net or hedge within one mile of a straight line commencing at Stephenson's point on the north side of Perquimans river and running in a southwesterly direction to the nearest point of land on the south side of said river known as Belgrade bluff, or shall haul any seine or set any dutch net or other kind of net so as to extend beyond the middle of said river at any part thereof, he shall be guilty of a misdemeanor. (Rev., s. 2441; 1893, c. 147, ss. 1, 2, 4.)

§ 2015. Roanoke river: Drift nets in, regulated. —It is unlawful to fish any drift nets in the Roanoke river over twenty yards in length, and no net shall drift within three hundred yards of another net and no two nets shall drift abreast of each other. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined not less than one hundred dollars or imprisoned in the discretion of the court: Provided, it shall be lawful on the Roanoke River from Halifax to the Power Dam at Roanoke Rapids to fish from January 1st to June 1st of each year with skim nets, dip nets, and fish traps with or without wings or hedgings. (1911, c. 163, s. 3; 1933, c. 336.)

Editor's Note.—Public Laws 1933, c. 336, added the proviso at the end of this section.

§ 2016. Scuppernong river and Lake Phelps: Nets in, regulated. — It is unlawful for any person, firm or corporation to set or in any manner fish with more than one hundred yards of gill nets within the waters of Lake Phelps or Scuppernong in Tyrrell and Washington counties, or to set or in any manner fish with more than one pound, pod, or dutch net, and shall be restricted to the months of February, March, and April of each year. Any person, firm, or corporation violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1909, c. 378; 1911, c. 129.)

§ 2017. Scuppernong river: Nets obstructing channel or near bridges. — If any person shall set any kind of a fish weir or pod net, gill net or net of any kind in the Scuppernong river using more than one-half of the channel of said river, or within one hundred yards of the public bridges at Columbia and the Cross landing, crossing said river, he shall be guilty of a misdemeanor, and fined a sum not to exceed fifty dollars, or imprisoned not to exceed thirty days: Provided, this section shall not apply to the hauling of seines. (Rev., s. 2445; Code, s. 3408; 1885, c. 18; 1903, c. 91.)

§ 2018. Scuppernong river and tributaries; Obstructions and nets in. — It shall be unlawful for any person, firm or corporation to set or fish any net or place any other obstruction of any kind within one hundred and fifty yards of the mouth of any creek or drainway emptying into Scuppernong river; or for any person, firm or corporation to set or fish any net or place any obstruction more than one-third of the total width of Scuppernong river at the point of setting the same: Provided, this section shall not apply below Cross Landing bridge. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor. (P. L. 1919, c. 88.)

§ 2019. Scuppernong river: Nets near Norfolk and Southern railroad bridge. — It is unlawful for any person to fish any pound or dutch nets within fifty yards of the Norfolk and Southern railroad bridge across Scuppernong river. Any person violating this section shall be guilty of a misdemeanor and punished by a fine of not more than one-hundred dollars nor less than twenty-five dollars, in the discretion of the court. (Ex. Sess. 1908, c. 82; 1909, c. 119.)

§ 2020. Trent river: Use of nets regulated. — If any person shall set any trap, dutch, pound or pod net of any description whatever in Trent river, or shall at any time extend his set nets more than one-third the distance across the Trent river from either side, or shall set any net nearer to any other net than one hundred yards either on the same or on the opposite side of the river, or shall fish with seines or set nets of any description in Trent river from its mouth to upper Tucker bridge, between the hours of twelve o'clock noon on Saturday and twelve o'clock noon on Monday of each week, or shall set or haul a net or seine of any description between the town of Trenton and Brown's mill on said river from the sixteenth day of May to the first day of August in each year, he shall be guilty of a misdemeanor and shall be fined not less than five dollars nor more than ten dollars or be imprisoned not less than ten nor more than thirty days. (Rev., s. 2455; Code, s. 3397; 1893, c. 447; 1897, c. 294.)

Part 3. Counties

§ 2021. Counties on Pamlico sound: Size of fish caught or sold.—It is unlawful for any person to buy, sell, offer for sale, or to have in his possession any blue fish, trout or drum under eight inches in length, or any mullet under six inches in length, or any croakers, spots and hogfish under five inches in length, or sea mullet, flounders, mackeral and hickory shad less than eight inches long, or butterfish and steerfish less than four and one-half inches long, at any time during the year. Any person or persons violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars. This section shall only apply to the counties of Beaufort, Carteret, Dare, Hyde, and Pamlico. (1909, c. 474, ss. 3, 4; 1909, c. 906.)

§ 2022. Brunswick, New Hanover and Pender: Size of bars in nets.—If any person shall use in any of the waters of Brunswick, New Hanover and Pender counties any nets, seines, set-downs, fish traps or any other nets of any description for the purpose of taking fish, the bars of the meshes of which nets, seines, set-downs, or fish traps shall be less than one and one eighth inches in length,

he shall be guilty of a misdemeanor. (Rev., s. 2470; 1885, c. 226; 1887, c. 71.)

§ 2023. Brunswick, Cumberland, New Hanover, Sampson, and Harnett: Close season for fish.—If any person shall catch or destroy with seines, nets, firearms, bows and arrows, or by muddying or stirring the waters, or by striking any fish of any kind in the waters of Black or South rivers, or the waters of Big Coharie, Little Coharie, Bear Skin and Big swamps in the counties of New Hanover, Sampson, Cumberland and Harnett, and of the waters of Six Runs in the counties of New Hanover and Sampson, and of the waters of the Cape Fear river in the counties of New Hanover and Brunswick, and of the northeast branch of the Cape Fear river in the county of New Hanover, between the fifteenth days of May and August of each year, he shall be guilty of a misdemeanor, and fined not to exceed five dollars. (Rev., s. 2472; Code, s. 3409; 1889, c. 414; 1871-2, c. 152; 1879, c. 283; 1881, c. 369.)

§ 2024. New Hanover, Onslow, and Pender: Purse nets and seines for food fish.—It is unlawful for any person, firm, or corporation to catch any food fish in a purse seine or purse net in any waters within the limits of New Hanover, Onslow and Pender counties, extending to the extreme limits of the state's jurisdiction in and over such waters, making the boundaries of said counties to which said waters shall extend to be the distance of three nautical miles, measured from the outer beach or shores of said counties out into the waters of the Atlantic ocean. Any waters within a distance of three miles of any beach or shore of said counties shall be deemed the waters of said counties for the purpose of this section. It is unlawful for any person, firm, or corporation to purchase, trade for, or deal in, or sell any food fish caught as is set forth above. Any person, firm, corporation, partnership, or association who knowingly rents, leases or permits to be used any purse seine or purse net, rents or leases any vessel, boat or steamer upon which is used a purse seine or purse net in the catching of food fish in the waters of said counties shall be guilty of a misdemeanor. Any person who furnishes information upon which any person, firm, or corporation shall be convicted of a violation of any of the provisions of this section shall be entitled to one-half of the fine imposed therefor. (P. L. 1913, c. 717.)

§ 2025. Beaufort: Nets regulated in certain creeks.—It is unlawful for any person or persons to use or fish with any drag nets, purse nets, drop nets, fyke nets, thrash nets or any set or gill nets longer than thirty yards on top line, in the waters of Bath creek, Blount's creek, Jordan's creek, Pungo creek, Wright's creek, or their tributaries, in Beaufort county, during the months of March, April, May, June and July of each and every year. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars or imprisoned not more than thirty days for each offense. (1909, c. 586.)

§ 2026. Beaufort: Fishing by residents in Bath creek.—It is lawful for any person or persons who are resident citizens of Beaufort county to fish with any kind of nets, except pound nets or purse nets, in the waters of Bath creek from Bath creek bridge to the mouth of said creek. (P. L. 1911, c. 547.)

§ 2027. Beaufort: Certain nets in Blount's creek.—It is unlawful for any person or persons to use or fish with any drag net or slash net in the waters of Blount's creek or its tributaries. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days for each offense. (P. L. 1911, c. 120.)

§ 2028. Beaufort: Certain nets in Durham and Lee's creeks.—It is unlawful for any person to catch fish with seine, drag nets, purse nets, thrash nets or hauling nets of any description in the waters of Durham creek, Lee's creek, or their tributaries, in Beaufort county. Any person violating this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than five nor more than ten dollars for each and every offense. (1907, c. 439.)

§ 2029. Beaufort: Certain nets in Nixon's creek.—It is unlawful for any person or persons to use or fish with any drag nets, purse nets, or pound nets in the waters of Nixon's creek in Beaufort county. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction fined not exceeding thirty dollars or imprisoned not more than twenty days for each offense. (P. L. 1911, c. 525.)

§ 2030. Beaufort: Certain nets in North creek.—It is unlawful for any person or persons to use or fish with any drag nets, purse nets, drop nets or fyke nets in the waters of North creek and its tributaries in Beaufort county. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not more than thirty days for each offense. (1907, c. 629.)

§ 2031. Bladen: Manner of fishing in Brown Marsh and Horseshoe swamps.—It is unlawful for any person to fish with a seine or by muddying the water or by means of any lime, dynamite, or any other such material or substance in Brown Marsh and Horseshoe swamps in Bladen county. Any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned for thirty days. This section shall apply only to Brown Marsh township in Bladen county. (P. L. 1915, c. 187.)

§ 2032. Bladen: White lake; hook and line only.—It is unlawful to catch, kill, or destroy fish in White lake in Bladen county by means of nets, traps, by gigging, by shooting, or by any other means or methods, except by hook and line: Provided, that set hooks, bobs, and trolls shall be construed as being hooks and lines. Any person violating the provisions of this section shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (P. L. 1913, c. 295.)

§ 2033. Brunswick: Mullet fishing; purse nets.—If any person, firm or corporation shall fish for

and catch any mullets with any purse seine or purse net in the waters within the limits of Brunswick county, extending to the extreme limits of the state's jurisdiction in and over said waters—and for the purpose of this section, any portion of any water within a distance of three nautical miles from the outer shores of said county shall be deemed the waters of said county—or if the master or any employee on any steamboat engaged in fishing for menhaden or fatbacks shall discharge from said boat fish offal, blood or slime within a distance of one-half of a mile of any established mullet fishery on the Brunswick county coast between the first of August and the thirty-first of December of each year, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court. For the purposes of this section an established fishery is declared to be that point on the beach occupied by the surfboat and seine in regular use. (Rev., s. 2481; 1905, c. 748.)

§ 2034. Brunswick: Nonresidents must have license. — It is unlawful for any nonresident of this state to engage in the business of gathering oysters, clams and terrapins for gain, or for market, within the limits of Brunswick county without first obtaining from the county commissioners of said county a license to carry on such business, which license may be granted by the county commissioners of said county upon paying to the treasurer of said county, to be used for county purposes, the sum of fifty dollars for each nonresident engaged in such business, and twenty-five dollars for each nonresident hand employed: Provided, that such license so granted shall be for one year and shall expire on the first day of October of each year. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor. (1907, c. 68.)

§ 2035. Carteret: Cedar Island township; hauling nets with power.—It is unlawful for any person or persons, firm or corporation to pull any haul net within the waters of Cedar Island township, Carteret county with steam, gasoline or any other motor power. Any person or persons, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and be fined or imprisoned, or both, in the discretion of the court. (1915, c. 281.)

§ 2036. Carteret: Use of dutch nets.—If any person shall use or cause to be used any dutch net, pound net or other stationary trap, net or seine of similar description, by whatever name known, in the waters of Carteret county for the purpose of taking fish therefrom, he shall for each day's use thereof forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by a warrant before any justice of the peace in the county of Carteret, and shall be applied to the use of the public schools of said county; and such offender, in addition to the penalties contained in this section, shall be guilty of a misdemeanor, and fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, this section shall not apply to the ordinary set nets heretofore in use in the waters of said county. (Rev., s. 2435; Code, s. 3420; 1883, c. 199.)

§ 2037. Carteret: Size of seine mesh.—If any person shall catch mullets in the waters of Carteret county with a seine or net having a mesh of less than one and one-eighth inch, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 2434; 1895, c. 25; 1903, c. 508.)

§ 2038. Carteret: Length of nets; joining together.—It is unlawful for any person, firm, corporation, or syndicate, to fish any net or seine in the waters of the state of North Carolina within the boundaries of Carteret county more than two hundred and seventy-five yards in length: Provided, this length shall not apply to purse seines used for the purpose of catching menhaden (fatbacks) only. Any person, firm, corporation, or syndicate violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or be imprisoned not more than thirty days, in the discretion of the court. Each day said nets or seines are fished shall constitute a separate offense under this section. (1911, c. 130, s. 1.)

§ 2039. Carteret: Joining nets together.—When a condition arises that a crew of fishermen find it advantageous to join two or three nets together for the purpose of temporary fishing, it shall be lawful under this section to do so under the following rules and regulations, namely: Provided: (a) The total length of nets joined together shall not exceed eight hundred and twenty-five yards. (b) That not more than one of the nets, whose length shall not exceed two hundred and seventy-five yards, as provided in the preceding section, shall be owned by any one person, firm, corporation, or syndicate thus fishing. (c) That not less than two men shall be permitted to fish with each net thus joined together. (d) That no position or haul shall be held by anchoring boat (except when occupied by men fishing same), buoys, stakes, or any other device. (e) That no seines or nets shall be hauled by capstans. (f) That no nets of smaller mesh than 1⅜ inch bar or 2 6/8 inch stretched measure shall be joined together for the purpose of fishing under this section. (g) That each net thus joined shall have two staffs. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars or imprisoned not less than six months.

This section applies only to the waters of the state within the boundaries of Carteret county, and within such waters it does not authorize the fishing of nets joined as specified at any stationary fishery, or where the said waters are of less width than one and one-fourth miles. (1911, c. 130, s. 2.)

§ 2040. Carteret: Obstructions to fish prohibited.—If any person shall obstruct any navigable water or passageway for fish in Carteret county by placing bushes, posts or any stationary material or fixtures in such a manner as to pre-

vent the free passage of fish, he shall be guilty of a misdemeanor and fined not less than one hundred dollars. Nothing in this section shall be construed to prohibit any person from using a lawful net or seine in any way or manner except as a stop net or seine. This section shall not apply to any net that the fish can pass freely by one end. (Rev., s. 2436; 1903, c. 520.)

§ 2041. Carteret: Pound nets in Neuse river.—It is lawful to fish pound nets from January first to May fifteenth of each year within the waters of that portion of Carteret county with a line beginning at the northwest point of outward Swan island, running a due north course; from such line running up the Neuse river to the spar buoy at the entrance of Adams creek: Provided, that not more than five nets shall be set in any one stand: Provided further, that not more than one-fourth of the river in width shall be used for the purpose of fishing under this section. Any person, firm, corporation, or syndicate fishing with pound nets in the waters of Carteret county at any other time except as prescribed in this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars or imprisoned not less than six months, in the discretion of the court. It is expressly enacted that every day such fishing is done in violation of this section shall constitute a separate offense. (1911, c. 128.)

§ 2042. Carteret: Purse nets for mullet prohibited.—If any person shall fish for or catch any mullets with any purse seine or purse net in any waters within the limits of Carteret county, extending to the extreme limits of the state's jurisdiction in and over such waters, he shall be guilty of a misdemeanor and be fined not less than five hundred dollars or imprisoned not less than one year. For the purposes of this section the following boundaries are hereby declared to be the boundaries to which the waters of said county extend, to wit: A distance of three nautical miles, measured from the outer beach or shores of Carteret county out and into the waters of the Atlantic ocean; and any portions of any water within a distance of three miles from said waters of the Atlantic ocean to any beach or shore of said county shall be deemed the waters of said county for the purposes of this section. (Rev., s. 2437; 1903, c. 583; 1905, cc. 274, 508.)

§ 2043. Carteret and Onslow: Purse nets prohibited for food fish.—It is unlawful for any person, firm or corporation to catch any food fish in a purse seine or purse net in any waters within the limits of Carteret and Onslow counties extending to the extreme limits of the state's jurisdiction in and over such waters, making the boundaries of said county to which said waters shall extend to be the distance of three nautical miles, measured from the outer beach or shores of Carteret and Onslow counties out into the waters of the Atlantic ocean. Any waters within a distance of three miles of any beach or shore of said counties shall be deemed the waters of said county for the purpose of this section. It is unlawful for any person, firm or corporation to purchase, buy, or trade for, or deal in, or sell any food fish caught as is set forth in this section. Any person, firm or corporation violating any provision of this section shall be deemed guilty of a misdemeanor, and shall be fined not less than three hundred dollars nor more than five hundred dollars, or imprisoned, in the discretion of the court. Any person who shall furnish information upon which any person, firm or corporation shall be convicted of a violation of any of the provisions of this section shall be entitled to one-half of the fine imposed therefor. (1907, c. 857; 1911, cc. 126, 204.)

§ 2044. Chatham: Fishways in Haw river.—All persons maintaining dams across Haw river in the county of Chatham shall, upon thirty days notice from the board of commissioners of said county, establish fishways in said dams; and if said fishways shall not be made within three months from the service of the notice, said persons so offending shall be guilty of a misdemeanor, and fined at the discretion of the court. (Rev., s. 2476; Code, s. 3402; 1881, c. 343, ss. 1, 2.)

§ 2045. Clay: Fishing regulated.—It is unlawful for any person or persons to fish the waters of Clay county in any other manner than hook and line. Any violator of this section shall be guilty of a misdemeanor and fined not less than twenty-five dollars, or imprisoned not less than thirty days. (P. L. 1919, c. 407.)

§ 2046. Repealed by Public Laws, 1931, c. 365.

Editor's Note.—This section related to fishing with seines, etc., in Lumber River and tributaries in Columbus County.

§ 2047. Columbus: Traps and nets in Porter swamp.—It is unlawful for any person or persons to set any fish traps or nets in the waters of Porter swamp in Columbus county in such manner as to prevent the free passage of fish. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than twenty-five dollars, or imprisoned not less than ten days nor more than thirty days for each offense. (P. L. 1911, c. 748.)

§ 2048. Currituck county: Fishing in Atlantic township.—It is unlawful for any person or persons to catch fish with seine or set net, or nets of any kind, in the waters of Atlantic township between the fifteenth day of April and the twentieth day of October in each year, within the following boundaries in said township: Beginning at a cedar stump standing on the beach north of Caffie's inlet life-saving station and extending a west course five hundred yards from the shore; thence paralleling the shore a southerly course to the Dare county line. It is unlawful to set any pound or dutch nets in the waters of said township. Nothing herein shall prevent the catching or selling of twenty-five pounds of fish on any one day for home consumption; nor prevent the catching of eels, mullets and herrings at any time during each year; nor prohibit fishing at night. Any person violating the provisions of this section or any part thereof shall be guilty of a misdemeanor for each and every offense, and upon conviction shall be fined not more than fifty dollars nor less than twenty dollars or imprisoned not more than thirty days. (1909, c. 619.)

§ 2049. Currituck county: Dutch nets in Currituck sound.—If any firm, company or corporation shall operate or cause to be operated in the waters of Currituck county, or be interested in any manner whatsoever in more than six pound or dutch nets, or use more than one hundred yards of hedging to a net, or set a stand of such nets exceeding eight hundred yards in length from land to the extreme outward end; or if any person shall set any pound or dutch nets to the east of the center of Currituck sound, except that part from the west point of Mackey's island north of the Virginia line; or if any person shall leave any landing or anchorage before sunrise for the purpose of fishing in Currituck sound or tributaries, or shall continue to fish after dark, he shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than fifty dollars. This section shall not prohibit fishing after dark in that part of said sound west of a line beginning at the north point of Bell's island, thence north not more than one thousand yards from the mainland to the mouth or entrance of Tull's creek, nor night fishing between the thirty-first day of March and the twentieth day of October five hundred yards from the shore from Martin's point to Kitty Hawk bay. (Rev., s. 2430; 1905, c. 273, ss. 3-7.)

§ 2050. Currituck county: Shipping or selling fish.—If any person shall catch or capture any fish with nets or other appliances in the waters of Currituck county between the fifteenth day of April and the twentieth day of October of each year, or shall sell or ship out of the county or state any fresh fish between said dates; or if any person shall be found with more than twenty-five pounds of freshwater fish in his possession between the thirty-first day of March and the twentieth day of October of each year, herrings, mullets, shad and eels excepted; or if any person shall in said county catch eels for market between the thirtieth day of April and the twentieth day of September following in each year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars and not less than twenty-five dollars. Any citizen may catch not to exceed twenty-five pounds at any time for home consumption, and sell or give not more than ten pounds to any one person in one day. (Rev., s. 2431; 1905, c. 273, s. 1; 1907, c. 520.)

§ 2051. Currituck county: Right of search. — If any constable, game warden or justice of the peace of Currituck county shall be informed, or have cause to suspect, that either of the two preceding sections is being violated, he is hereby authorized and empowered to examine the contents of any fishing boat, or packages in transit, and any person or common carrier refusing to exhibit the contents of any fishing boat or package to such officer shall be guilty of a misdemeanor, and shall be fined not less than twenty-five and not more than fifty dollars. (Rev., s. 2432; 1905, c. 273, ss. 2, 7.)

§ 2052. Dare: Dutch and pound nets prohibited.—It is unlawful for any person, firm or corporation to set any dutch or pound net within the space or area of water bounder and described as follows: Beginning at Hollowell's wharf, at Nag's Head, and running thence a due west course to the channel in Roanoke sound; thence northwest to the Currituck county line; thence with said Currituck county line to the shore.

Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined fifty dollars or imprisoned thirty days in the discretion of the court. (1913, c. 113.)

§ 2053. Dare: Fishing in Kitty Hawk bay regulated.—If any person shall take, catch or capture any fish with nets or other appliances in that part of the waters of Kitty Hawk bay and its tributaries lying in Dare county, between the thirtieth day of April and the fifteenth day of October of each year, or shall sell or ship out of the county any chub or perch between said dates, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. Nothing in this section shall prevent any citizen from catching fish at any time for home consumption. (Rev., s. 2484; 1905, c. 363.)

§ 2054. Greene: Size of mesh; fishing on another's land.—It is unlawful for any person or persons to fish with or set any nets with less meshes than one and one-fourth inches square. No person or persons shall fish with nets of any kind on another person's land without first getting permission from the owner of the lands to do so, except in navigable streams, as rivers or large creeks. Any person or persons violating this section shall be guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than five dollars nor more than twenty dollars for each offense. This section shall apply to Greene county only. (P. L. 1915, c. 494.)

§ 2055. Hertford and Northampton: Fish in Potecasi creek protected.—It is unlawful for any person to use, set or in any manner to fish with any fish trap, fyke net, seine or drag net in the waters of Potecasi creek, in Hertford and Northampton counties, from its mouth to the Creeksville mill, in Northampton county. Any person violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1909, c. 662.)

§ 2056. Hyde: Pound and dutch nets prohibited.—It is unlawful for any person to set or use any pound or dutch net south of the dividing line between Dare and Hyde counties on the west side of Pamlico sound along the shores of Hyde county, more than two thousand yards from a line drawn from point to point along said shore. Any person violating this section shall be deemed guilty of a misdemeanor and upon conviction shall remove said nets at once: Provided, that any person failing to remove said nets after conviction shall be subject to a fine of not less than ten nor more than fifty dollars. (1915, c. 59.)

§ 2057. Hyde: Drag nets prohibited in Rose bay.—It is unlawful for any person to use or take fish from the waters of Rose bay, or any of its tributaries, in Hyde county, with drag nets or drop nets. Any person violating this section shall be guilty of a misdemeanor and fined not less than twenty-five dollars nor more than fifty dol-

lars. (P. L. Ex. Sess. 1913, c. 264; P. L. 1915, c. 349.)

§ 2058. Hyde: Drag nets prohibited in Slade's river and Fortescue creek.—The name of Slade's creek in Hyde county is hereby changed to Slade's river, and by such name the said water-course shall in future be designated in all official maps, records, laws and other official documents authorized by the state of North Carolina. Fishing with drag nets is prohibited in said river and tributaries and in the waters of Fortescue's creek, in said county. Any violation of the provisions of this section relating to the manner of fishing shall be a misdemeanor, and shall be punished by a fine of not exceeding fifty dollars or imprisonment not exceeding thirty days, in the discretion of the court. (1909, c. 520.)

§ 2059. Hyde: Slade's river; nets in.—The mouth of Slade's river in Hyde county is hereby fixed and located by running a straight line from Aquillas point on Pungo river to Sandy point on said Pungo river. It is unlawful for any person, firm or corporation to set, fish, or use any kind of net except stake gill nets on the east of said line. Any one violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars, or imprisoned not more than thirty days, in the discretion of the court. (1911, c. 59.)

§ 2060. New Hanover: Certain handnets allowed.—(Repealed by Public Laws. Extra Session 1921, Chapter 42, Section 5.)

§ 2061. New Hanover: Nets in Masonboro and Myrtle Grove sounds. — If any person shall use any fyke nets or set down seines, or place any fish trap for the purpose of catching fish in the waters of Masonboro and Myrtle Grove sounds in New Hanover county, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than twenty days. (Rev., s. 2425; Code, s. 3421; 1883, c. 288, ss. 1, 2.)

§ 2062. New Hanover: Seines in Atlantic ocean.—It is unlawful for any person, firm or corporation to fish with seines, purse, pod or pound nets, or with any kind of nets, except cast nets, in the waters of the Atlantic ocean in New Hanover county within the following limits:

Beginning at a point on the beach on the north side of the mouth of Moore's inlet and extending southwardly along the strand of the Atlantic ocean to a point on the north of the mouth of Masonboro inlet, and extending one mile out from the shore line. The above shall not apply to the use of set nets between the first day of November and the first day of May next following. Any person violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one hundred dollars and imprisoned not more than sixty days. (1915, c. 104.)

§ 2063. Onslow: Obstructions in Cypress swamp and Haws run.—It is unlawful for any person, firm or corporation to fell any trees in or in any way obstruct the natural flow of the waters of Cypress swamp and Haws run in Onslow county. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 772.)

§ 2064. Onslow: Stop nets prohibited. — It is unlawful for any person, firm or corporation to set, place, fix, establish or operate any stop net that will prevent or interrupt the passage of any fish in the water of any creek or sound in Onslow county, between New river and the Carteret county line in said county. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1915, c. 133.)

§ 2065. Onslow: Nets and seines in ocean regulated.—It is unlawful for any person, firm or corporation to set any net or seine on the coast of Onslow county for a longer time than one hour at any one time. Any person violating this provision shall, upon conviction, be fined not less than one hundred dollars or imprisoned not less than three months. One-half of said fine shall go to the party or parties reporting such offenses and furnishing sufficient evidence to convict. In the event any offender shall be unable to pay fine, that his boats, nets and other fishing paraphernalia shall be forfeited and sold to the highest bidder for cash at courthouse door after twenty days notice, and proceeds of said sale be applied to cost and fine and any surplus paid to the defendant: Provided, however, this section shall not tend to convict any party who shall catch more fish than can be taken up in one hour. (1915, c. 184.)

§ 2066. Onslow: Seines and nets in New river.—It is unlawful for any person, firm, corporation or association to catch fish with haul seine, purse net, or drop net in the waters of New river in the main channel between Hatche's Rock and New River inlet, or within one-half mile of said inlet in the Atlantic ocean. Any person, firm, corporation or association violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned, in the discretion of the court; fifty dollars of said fine to be paid to the person or persons furnishing evidence sufficient to convict. (P. L. 1913, c. 707.)

§ 2066(a). Onslow County: Ban on use of haul nets and seines in New River.—It shall be unlawful to haul or drag seines or nets of any size, length or description by any means whatsoever within the waters of New River and its tributaries in Onslow County: Provided, that this section shall not be construed to prevent the transportation of seines or nets by boat: Provided further, that this section shall not apply to shrimp seines not over one hundred and fifty yards in length operated exclusively by hand and for the purpose of catching shrimp only as now provided by law or regulation.

Any person violating the provisions of this section shall be guilty of a misdemeanor and

upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 253.)

§ 2067. Pamlico county: Use of nets regulated.—If any person shall set or fish any dutch or pound nets in the waters of Pamlico county, or shall use any seine or drag net in the waters of said county, including the north side of Neuse river from the mouth of the river to the mouth of upper Broad creek, from the first day of May to the first day of January next ensuing, or shall at any time catch fish with a seine or drag net along the shores of said county on any day of the week except Monday, Wednesday and Friday, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 2452; 1885, c. 198; 1889, c. 544; 1893, c. 334.)

§ 2068. Pamlico county: Nets in Dawson's creek.—It is unlawful for any person to fish with drag or haul net of any description in the waters of Dawson's creek, in Pamlico county. Any person violating this section shall be deemed guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court. (P. L. 1911, c. 470.)

§ 2069. Pamlico county: Drag nets prohibited in certain streams.—It is unlawful for any person to haul or use any drag net in the waters of Vandemere creek and its tributaries, Smith's creek, Chappel's creek, and its tributaries, Trent creek and its tributaries, and Bay river and its tributaries, from the mouth of Trent creek to the head of both its northwest and southwest prongs, for the purpose of catching or taking fish from said waters. Any person violating this section shall be guilty of a misdemeanor and shall be fined not less than five dollars nor more than ten dollars or imprisoned not less than five days nor more than ten days for each and every offense. (1909, c. 692.)

§ 2070. Pasquotank county: Pound or fyke nets in Pasquotank river.—It is unlawful for any person, firm or corporation to fish in Pasquotank river above Stinking Gut on either side of said river with pound or fyke nets, or any other kind of net with mudge or leads: Provided, this section shall not be construed to prohibit fishing in said territory with gill nets. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days, in the discretion of the court. (P. L. 1913, c. 752, s. 6.)

§ 2071. Pasquotank county: Nets in Hatley creek.—If any person shall haul or fish with a drag net, or set a pound net in Big Hatley creek, or Little Hatley creek, within two hundred yards of the mouth of either of said creeks, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 2442; 1895, c. 389; 1903, c. 497; 1911, c. 127.)

§ 2072. Pasquotank and Perquimans: Gill nets allowed.—It is lawful for fishermen fishing in the Albemarle sound lying opposite to Perquimans and Pasquotank counties, and its tributaries lying and being in said counties, to set gill nets as near as one hundred and fifty yards of any pound or dutch nets fished in said waters: Provided, that any net shall not be set beyond the line now prohibited in said waters. (1911, c. 138.)

§ 2073. Robeson: Fishing in Lumber river.—It is unlawful for any person to fish with seine, nets, traps, gigging, or by muddying, striking or dynamiting, in Lumber river or the other rivers, creeks, lakes or ponds in Robeson county: Provided, that this does not apply to persons fishing on their own premises. Any person violating this section shall be guilty of a misdemeanor and on conviction shall be fined not more than fifty dollars nor less than ten dollars, one-half to go to the informant, or imprisoned not more than thirty days nor less than ten days in jail, with privilege to county commissioners of Robeson county, or adjacent county, to hire out. (P. L. 1911, c. 529; P. L. Ex. Sess. 1913, c. 272.)

§ 2074. Robeson: Nets and traps; close season; limit catch.—It is unlawful for any person to set any trap or net for the purpose of catching fish in Lumber river or any of its tributaries in Robeson county between the first day of April and the first day of September in any year. It is unlawful at all times for any person to catch or take more than twelve of the fish known as "red breasts" and trout from Lumber river or any of its tributaries in Robeson county, in any one day, whether said fish be caught with hook and line, net, trap or in any other manner. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (P. L. 1911, c. 703.)

§ 2075. Sampson: Fishing regulated.—It is unlawful for any person to fish in any of the rivers, creeks, or other streams of Sampson county by means of lime, dynamite, pod nets, bag nets, traps, or by any means or contrivance whereby the free passage of fish is obstructed. Any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (P. L. 1915, c. 464, ss. 2, 3.)

§ 2076. Tyrrell: Alligator river and Frying Pan creek; nets in.—If any person shall fish any pound net, gill nets, seine or nets of any kind in Alligator river within one mile of the mouth of Frying Pan creek in Tyrrell county, or shall set any weir or fish net of any kind or any other obstruction that prevents the passage of fish in said creek from its mouth to Jarmin's point, at the two pines and low cypress, he shall be guilty of a misdemeanor. If any person shall set any pound net or dutch net in Alligator river within one-half mile of the mouth of Frying Pan creek in Tyrrell county, or in Frying Pan creek within three miles of where it enters into Alligator river, he shall be guilty of a misdemeanor and shall be fined fifty dollars or imprisoned thirty days, or both, at the discretion of the

court. (Rev., ss. 2447, 2449; 1889, c. 105; 1899, c. 465; 1905, c. 282.)

§ 2077. Wayne: Nets and traps in Neuse and Little rivers.—The citizens of Wayne county are hereby permitted to put in fish traps and gill stick nets in Neuse and Little rivers, within the limits of Wayne county. (P. L. 1911, c. 465.)

Part 4. Atlantic Ocean

§ 2077(1). Taking shad prohibited in certain area.—It shall be unlawful for any person, firm or corporation to take shad fish from the waters of the Atlantic Ocean anywhere within five miles of the Cape Fear river bar. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, for the first offense shall be fined not less than one hundred dollars or imprisoned not less than sixty days; for the second offense shall be fined not less than five hundred dollars or imprisoned not less than four months, for each and every offense. (1935, c. 137.)

SUBCHAPTER IV. NONCOMMERCIAL FISHING

Art. 11. General Regulations

§ 2078. Trout protected; close season.—If any person shall catch mountain trout by seining at any time, or shall take them by shooting or otherwise between the fifteenth day of October and the thirtieth day of December, he shall be guilty of a misdemeanor. (Rev., s. 3418; Code, s. 1122; 1869-70, c. 142.)

Art. 12. Propagation and Protection of Game Fish

§ 2078(a). Fishing without license prohibited.—It shall be unlawful in the State of North Carolina for any person either resident or non-resident of the State to fish in any of the public fresh-water streams, ponds or lakes of the State with reel or jointed rod, or both, or by casting with line and rod of any description, without first procuring a license as hereinafter provided. (1927, c. 60, s. 1.)

Editor's Note.—It seems that the sections under this article are superseded by Sections 2078(p)-2078(dd).

§ 2078(b). Definition of terms.—For the purpose of this article any reference to fishing or to those who fish under and by virtue of this chapter shall be held to apply only to those who fish with reel or jointed rod or both or by casting with line or rod of any description. (1927, c. 60, s. 2.)

§ 2078(c). Application for license.—For the purpose of this article any person upon application to any clerk of the Superior Court in any county within the State of North Carolina, all of whom are hereby authorized to issue fishing licenses as provided for by this article, or to be the State Fisheries Commissioner, Assistant Commissioners, or any Warden or Inspector authorized by the State Fisheries Commissioner to issue fishing licenses, and the presentation of satisfactory proof that he is a bona fide resident of the State of North Carolina, shall, upon the payment of a license fee of one dollar ($1.00) for the use of the State Fisheries Commission and a fee of ten cents for the use of the Clerk of the Superior Court, Inspector or Warden, be entitled to the license herein referred to as a "resident county fishing license" which will permit the licensee to fish in the county in which he permanently resides. (1927, c. 60, s. 3.)

§ 2078(d). Application for State license.—For the purpose of this article any person, upon application to any clerk of Superior Court in any county in the State of North Carolina, or to the State Fisheries Commissioner, Assistant Commissioners or any Inspector or Warden authorized by the Commissioner to issue fishing licenses and the presentation of satisfactory proof that he is a bona fide resident of the State of North Carolina shall, upon a payment of a license fee of two dollars, for the use of the State Fisheries Commission and a fee of ten cents for the use of Clerk of Superior Court, Inspector or Warden, be entitled to a license herein referred to as a "resident State fishing license" which will permit the licensee to fish in any of the public fresh-water fishing streams, ponds or lakes of the State. (1927, c. 60, s. 4.)

§ 2078(e). Application by non-residents.—For the purpose of this article every person without regard to age, upon application to any clerk of Superior Court in the State, the State Fisheries Commissioner, Assistant Commissioners, or any Warden or Inspector authorized by the Fisheries Commissioner to issue fishing license, and the presentation of satisfactory proof that he is a non-resident of the State shall, upon the payment of three dollars for the use of the State Fisheries Commissioner, and ten cents for the use of the Clerk of the Superior Court, Inspector or Warden, who may issue such license, be entitled to a license herein referred to as a "non-resident State fishing license" which will permit the licensee to fish in any of the public fresh-water fishing streams, ponds or lakes in the State. (1927, c. 60, s. 5.)

§ 2078(f). Forms; details of license.—All licenses shall be issued on forms prepared and supplied by the State Fisheries Commission, the cost of which shall be paid from any funds, that may come into the hands of the State Fisheries Commissioner from the sale of fishing licenses authorized by this act. The license shall show the name, age, occupation and residence of the licensee and the date of its issuance. It shall also contain the signature of the licensee and shall authorize the person named therein in all cases where a resident county license is bought to fish in any of the public fresh-water streams, ponds or lakes of the county in which the applicant permanently resides, or in waters bounding or adjacent thereto, under the restrictions and requirements of existing laws or the rules and regulations of the Fisheries Commission during the year, the date of which is inscribed thereon. In all cases where either a resident or a non-resident State fishing license is bought, the license shall also contain the signature of the licensee and shall authorize the person named therein to fish in any of the public fresh-water streams, ponds or lakes of the State, or in the waters abounding or adjacent thereto, under the restrictions and re-

quirements of existing laws and rules and regulations of the State Fisheries Commission, during the date of which is inscribed thereon. All licenses issued under and by virtue of this act shall become void the thirty-first day of December next following the date of issuance. The licenses may contain such other information as the Fisheries Commission may require. There shall also be issued with each license a license button bearing the license number which must be worn in plain view at all times when fishing. The license button should be furnished by the State Fisheries Commission and paid for out of funds that may come into the hands of the Fisheries Commission from the sale of fishing licenses required under this act. (1927, c. 60, s. 6.)

§ 2078(g). Records.—All clerks of Superior Court in the various counties of the State, also Wardens and Inspectors or Assistant Commissioners who issue fishing licenses, shall keep in a book to be supplied by the State Fisheries Commission, a correct and complete record of all nonresident and resident State and county fishing licenses issued by them. The name and place of residence of each individual to whom a license shall have been issued and the amount collected from each must be entered in this book. Such record book shall be opened at reasonable hours for the inspection of any official, or anyone connected with the State Fisheries Commission. (1927, c. 60, s. 7.)

§ 2078(h). Monthly reports.—Every Clerk of Superior Court in North Carolina or any official connected with the State Fisheries Commission, who issues fishing licenses under and by virtue of this act shall, on the first day of each month, forward to the State Fisheries Commissioner a complete list of the fishing licenses issued by him during the preceding month showing the names and addresses of the licensees and the amount collected from each on blanks to be furnished by the State Fisheries Commission. The full amount collected by each, less the ten cents fee for each license issued, must accompany each report. (1927, c. 60, s. 8.)

§ 2078(i). Deposit of collections.—All moneys collected and received under and by virtue of this article except the fees allowed the Clerk of Superior Court and other officials hereinbefore mentioned for issuing licenses, shall be deposited in the name of the State Treasurer as provided by chapter one hundred twenty-eight, Public Laws of one thousand nine hundred and twenty-five, and shall be used by the State Fisheries Commission in the important work of propagating and protecting game fish in the State of North Carolina and carrying out the provision of this article. (1927, c. 60, s. 9.)

§ 2078(j). License to be carried on person.— No person shall fish as provided herein in any of the public fresh-water streams, ponds or lakes within the State or abounding or adjacent thereto, unless the license hereinbefore provided for be kept about the person of the licensee or exhibited upon the request of any official charged with the duty and responsibility of issuing licenses and enforcing the fishing law. No person shall fish as provided in this article in any of the public fresh-water streams, ponds or lakes of the State unless the license button be at such time continually displayed on the outer garment in such manner that the license figures are plainly visible. Provided, this section shall not prevent any owner or tenant of lands in Guilford County, or any person when accompanied by the owner, or having in his possession the written permission of the owner, from fishing in streams at such points as the streams may run through or along said lands. (1927, c. 60, s. 10.)

§ 2078(k). License not transferable. — No person shall alter, loan or transfer any license authorized by this article, nor give any false or misleading information to any official authorized to issue licenses in the application therefor. (1927, c. 60, s. 11.)

§ 2078(l). Laws not repealed.—This article shall not be construed to repeal other laws not in conflict herewith for the protection of fish. (1927, c. 60, s. 12.)

§ 2078(m). Power to extend article.—The State Fisheries Commission shall have the power on petition of the County Commissioners from any county for good cause shown to extend the provisions of this section to other methods of taking fish, including the power to require a license fee therefor; provided, this section shall apply only to trout streams. (1927, c. 60, s. 13.)

§ 2078(n). Violation of Article. — Any person violating any of the provisions of this article shall be guilty of a misdemeanor and shall on conviction be fined or imprisoned in the discretion of the court. The provisions of this article shall not be construed to apply to the old method of hook and line fishing: that is, to those who fish only with ordinary reel or wood pole and line with single baited hook attached. (1927, c. 60, s. 14.)

§ 2078(o). Exceptions. — The provisions of this article shall not apply to persons who fish only in privately owned ponds or lakes; or to any such sounds and other waters and streams anyone who fishes only on his own land; or to of the state as do not, in the judgment of the State Fisheries Commission, require to be stocked or replenished. (1927, c. 60, s. 15.)

Art. 13. Cooperation with United States Bureau of Fisheries

§ 2078(o) 1. Fish cultural operations by U. S. Commissioner of Fisheries.—The United States Commissioner of Fisheries and his duly authorized agents are hereby granted the right to conduct fish cultural operations and scientific investigations in the several waters of North Carolina and to erect such fish hatcheries and fish propagating plants as are duly authorized by the Congress of the United States at such times as may be considered necessary and proper by said commissioner and his agents, any laws of the State to the contrary notwithstanding. (1931, c. 268.)

Art. 14. Licenses under Public Laws 1929.

§ 2078 (p). Fishing licenses for persons above 16 years of age.—In order to raise revenue with

which to maintain and operate the State Fish Hatcheries, provide additional nurseries and administer the Inland Fishing Laws, a license is hereby required of all persons above the age of sixteen (16) years to fish by any and all methods of hook and line or rod and reel fishing in the waters of North Carolina, other than in waters of the county in which such person permanently resides or in waters abutting thereto, as hereinafter provided. (1929, c. 335, s. 1.)

See editor's note under § 2078(a).

§ 2078 (q). Resident State License.—Any person, upon application to the Director of the Department of Conservation and Development, his assistants, wardens, or agents, authorized in writing to issue licenses, and the presentation of satisfactory proof that he is a bona fide resident of the State of North Carolina, shall, upon the payment of a license fee of two ($2.00) dollars for the use of the Department of Conservation and Development and a fee of ten ($.10) cents for the use of the official authorized to issue licenses, be entitled to a "resident State license" which will authorize the licensee to fish in any of the waters of North Carolina as provided under section one. (1929, c. 335, s. 2.)

§ 2078(r). Non-resident state license.—Any person, without regard to age or sex, upon application to the director of the department of conservation and development, his assistants, wardens or agents authorized in writing to issue licenses, and the presentation of satisfactory proof that he is a non-resident of the state, shall, upon the payment of five ($5.00) dollars for the use of the department of conservation and development and ten ($.10) cents for the use of the official authorized in writing to issue licenses, be entitled to a "non-resident state fishing license" which will authorize the licensee to fish in any of the waters of North Carolina as provided under section one: Provided that any non-resident of the state desiring to fish for one day or more in the waters of the state of North Carolina may do so upon payment to the clerk of the court or game warden of the county in which the non-resident desires to fish the sum of one dollar and ten cents ($1.10) for each day, the sum of ten cents (10c) of said sum to go to the selling agent of said license or permit, and upon the payment of said sum of one dollar and ten cents ($1.10) the clerk of the court or game warden shall issue a permit allowing said nonresident to fish. Provided further, that any resident of the State desiring to fish for one day or more in the waters of any county in the State of North Carolina other than the county within which he resides may do so upon payment to the clerk of the court or game warden of a county in which he desires to fish the sum of sixty cents (60c) for each day, the sum of ten cents (10c) of said sum to go to the selling agent of said license or permit, and upon the payment of said sum of sixty cents (60c), the clerk of the court or game warden shall issue a permit allowing said non-resident to fish. (1929, c. 335, s. 3; 1931, c. 351; 1933, c. 236; 1935, c. 478.)

Editor's Note.—The Act of 1931 substituted five for three dollars formerly appearing in this section.

Public Laws of 1933, c. 236, added the proviso relating to short time licenses for nonresidents.

The amendment of 1935 increased the licenses for one day from sixty cents to one dollar and ten cents. It also added the proviso, at the end of the section, relating to this subject.

§ 2078 (s). County licenses and daily permits.—The Board of County Commissioners in any of the counties of the State of North Carolina may, by resolution entered upon its minutes, require a resident county license or daily fishing permit. If any of said boards shall adopt this resolution, then the resident county license shall be one dollar and ten cents ($1.10) for each year, or fifty ($.50) cents for a daily fishing permit. Whenever any such resolution is adopted the Board of County Commissioners shall at once notify the Department of Conservation and Development enclosing therein a copy of said resolution, and the said county license and daily fishing permit shall be issued in the same manner and by the same agent, and the proceeds thereof shall be remitted to the Department of Conservation and Development in the same manner as herein provided for State resident licenses and for non-resident fishing licenses. (1929, c. 335, s. 4.)

§ 2078 (t). Clerk of Superior Courts may sell licenses and account for same to Department.—In addition to the wardens and agents of the Department of Conservation and Development authorized to sell fishing licenses as hereinbefore provided, upon written application, any Clerk of Superior Court of North Carolina shall also be authorized and empowered to sell fishing licenses and shall account therefor to the Department of Conservation and Development in the same manner as wardens, and the handling of said licenses shall then become an official duty of such Clerk of Superior Court. (1929, c. 335, s. 5.)

§ 2078(u). Department to furnish forms; what licenses must show; signature of licensee; licenses to become void on December 31 of year issued; license button to be worn in plain view.—All licenses shall be issued on forms prepared and supplied by the Department of Conservation and Development, the cost of which shall be paid from any funds that may come into its hands from the sale of fishing licenses. The license shall show the name, age, occupation and residence of the licensee and the date of its issuance. It shall also contain the signature of the licensee and shall authorize the person named therein, in all cases where a resident county license is bought, to fish in any of the waters within the county in which the applicant permanently resides, under the restrictions and requirements of existing laws and the rules and regulations of the Department of Conservation and Development during the year, the date of which is inscribed thereon. In all cases where either resident or non-resident State fishing licenses are bought, they shall also contain the signature of the licensee and shall authorize the person named therein to fish in any of the waters of the State of North Carolina under the restrictions and requirements of existing laws and regulations of the Department of Conservation and Development during the year, the date of which is inscribed thereon. All licenses issued under and by virtue of this act shall become void on the thirty-first day of December next following the date of issuance. The licenses may contain such other information as the Department of

Conservation and Development may require. There shall also be issued with each license a license button bearing the serial number of the license which must be worn in plain view at all times by licensee when fishing. Such buttons to be furnished by the Department of Conservation and Development and paid for out of funds coming into its hands from the sale of fishing licenses as required under this act. (1929, c. 335, s. 6.)

§ 2078 (v). Record of all licenses issued to be kept.—All Clerks of Superior Court in various counties of the State who make application as hereinbefore provided, also assistants, wardens or agents who are authorized to issue fishing licenses shall keep such record of licenses issued by them as the Department of Conservation and Development may require and same shall be open at all times for inspection by any official charged with the enforcement of the fishing laws. (1929, c. 335, s. 7.)

§ 2078 (w). Reports.—Every Clerk of Superior Court who issues fishing licenses under and by virtue of this act shall, on the first of each month forward to the Department of Conservation and Development a report covering the sale of licenses issued by them, on forms furnished by the Department of Conservation and Development and shall attach thereto check for amount due said Department. All assistants, wardens or agents authorized by the Department to issue fishing licenses shall make full and complete report of their sales as required by the Department. The full amount collected by each issuing officer, less the ten-cent fee on each license issued, must accompany each report. (1929, c. 335, s. 8.)

§ 2078 (x). Deposit of proceeds of licenses with State Treasurer; use of, by Department. — All moneys collected and received under and by virtue of this act, except the issuing fees, shall be deposited in the name of the State Treasurer as provided by chapter one hundred and twenty-eight, Public Laws of one thousand nine hundred and twenty-five, and shall be used by the Department of Conservation and Development in the work of propagating and protecting game fish in North Carolina and in the administration of the Inland Fishing Laws and for no other purpose. (1929, c. 335, s. 9.)

§ 2078 (y). Licenses to be kept about person of licensees; license button to be worn on outside. —No person shall fish as provided herein in any of the waters of North Carolina unless the license hereinbefore provided for be kept about the person of the licensee or exhibited upon the request of any official charged with the duty and responsibility of issuing licenses and enforcing the fishing law. No person shall fish, as provided in this act, in any of the waters of North Carolina unless license button provided for herein be at such time continually displayed on the outer garment in such manner that the license figures are plainly visible. (1929, c. 335, s. 10.)

§ 2078 (z). Transfer of licenses forbidden. — No person shall alter, loan or transfer any license authorized by this act, or give false or misleading information to any official authorized to issue licenses, in the application therefor. (1929, c. 335, s. 11.)

§ 2078 (aa). Other laws not in conflict herewith preserved.—This act shall not be construed to repeal other laws not in conflict herewith for the protection of fish. (1929, c. 335, s. 12.)

§ 2078 (bb). Licenses not additional to propagation license; to what waters applicable. — No person required by law to procure a license to propagate fish for sale, shall be required in addition to secure a license provided by this act in order to enable such person to exercise the rights conferred by the license. The provisions of this act shall not apply to the Atlantic Ocean, the sounds or other large bodies of water near the sea coast which do not, in the judgment of the Department of Conservation and Development, need to be stocked or protected; nor shall they prevent the owner of any land or members of his family under twenty-one years of age from fishing thereon without a license. (1929, c. 335, s. 13.)

§ 2078 (cc). Persons having resided in State for six months presumed to be residents.—All persons who have lived in this State for at least six months immediately preceding the date of making application for a license, shall be deemed a resident citizen for the purpose of this act. (1929, c. 335, s. 14.)

§ 2078 (dd). Violation made misdemeanor; punishment.—Any person violating the provisions of this act shall be guilty of a misdemeanor and on conviction shall be fined not exceeding fifty ($50.00) dollars or imprisoned not exceeding thirty days in the discretion of the court. (1929, c. 335, s. 15.)

SUBCHAPTER V. LICENSES FOR THE ARTIFICIAL PROPAGATION OF FISH

Art. 15. Licenses in General

§ 2078(ee). By whom issued.—The department of conservation and development is authorized to issue an artificial propagation license for the propagation of all species of trout and all species of bass, upon written application therefor signed by the applicant and upon the payment to said department the sum of five dollars; for all other species of fish, the sum of fifty cents: Provided, that any commercial fisherman who has paid the required license or licenses upon his fishing nets, devices or gear shall not be required to pay an additional license to deal in live fish for propagation purposes. (1929, c. 198, s. 1; 1933, c. 430, s. 1.)

Editor's Note.—Public Laws 1933, c. 430, added the proviso at the end of this section relating to payment of license by commercial fisherman.

§ 2078 (ff). Applications; when licenses expire. —Applications shall be made on blanks prepared by the Department of Conservation and Development and shall show the size, character and purpose of the propagation plant and such other matters as the Department may require. All licenses issued under this article shall expire on the first day of January next following the date of issue. (1929, c. 198, s. 2.)

§ 2078 (gg). Erection of dams, ponds, etc.— No dams, ponds, or other devices which will prevent the free migration of fish shall be erected or

placed by a person licensed under this article, in any stream, flowing over his property. No person shall use the ponds so licensed for any purpose other than for commercial fish purposes. (1929, c. 198, s. 3.)

§ 2078 (hh). What license authorizes.—The license issued by this article authorizes the licensee to carry on the business of propagation and sale of the species of fish authorized by the license, or the eggs thereof, during the year for which the license is issued. The license authorizes the licensee to catch and kill the fish authorized by the license from the licensed ponds in any manner whatsoever except with explosives or poisonous substances. The license further authorizes the licensee to sell or dispose of in any manner whatsoever the fish authorized by the license, or the eggs thereof, at any time of the year, and it authorizes express and railroad companies to receive and transport same. (1929, c. 198, s. 4.)

§ 2078 (ii). Catching fish from streams.—The license issued under this article does not authorize the catching of fish out of any stream flowing over the property of the licensee. (1929, c. 198, s. 5.)

§ 2078 (jj). Certificate or invoice of sale. — A person selling fish under the license provided by this article shall furnish the purchaser with a certificate or invoice of the sale, bearing the date of sale, the number of the license under which sold, the number of fish, and number of pounds sold. The certificate or invoice must be shown by the holder on demand of any Fish or Game Warden or any other person authorized to enforce the fishing laws. The certificate or invoice shall authorize the sale of the fish so purchased for a period of six days after its date of issue. (1929, c. 198, s. 6.)

§ 2078 (kk). Annual reports of transactions.—A person holding an artificial propagation license under this article shall annually on the first day of January file with the Department of Conservation and Development a written statement duly sworn to, showing the number, value, and number of pounds of fish or the eggs thereof sold or disposed of during the year. The books and property of the person licensed under this article shall be open to the Department of Conservation and Development or its agents for inspection at all reasonable times. (1929, c. 198, s. 7.)

§ 2078 (ll). From what waters stock taken. — No person licensed under this article shall in any manner stock or maintain his establishments with any species of fish or eggs thereof taken from any waters within this State not owned, occupied or controlled by them. This section does not prohibit the exchange of fish eggs or the fry of any species of fish with the Department of Conservation and Development. (1929, c. 198, s. 8.)

§ 2078 (mm). Killing domestic and predatory birds and animals.—A license issued under this article authorizes the licensee or his agent to kill, after five days' notice to their owner if known, any domestic bird or fowl trespassing on the waters or lands controlled, used, or occupied entirely for the artificial propagation of fish. Such license also authorizes the licensee or his agent to kill any wild birds or wild animals destructive to fish life whenever found on such waters or lands. (1929, c. 198, s. 9.)

§ 2078 (nn). Necessity for license; trespassing upon licensees' property.—No person shall artificially propagate any species of fish without first procuring the license provided by this article. No person receiving a license, as provided by this article, shall operate a propagating plant different from that designated in the license. No person operating a propagating plant for which a license has been issued for the operation of such a plant shall catch fish out of any stream flowing over the property of the licensee. No person shall fish or trespass with intent to fish in or upon any waters, or ponds or banks of any waters, or any banks owned, controlled or occupied by persons licensed by this article. No person shall wilfully or maliciously destroy or damage any ponds, property, or appliances whatever of a propagating plant licensed under this article. No person shall interfere or obstruct, pollute or diminish the natural flow of water into or through a propagation plant licensed under this article. (1929, c. 198, s. 10.)

§ 2078 (oo). Punishment for violation.—Any person violating any provisions of this article shall on conviction be sentenced to pay a fine of not less than one hundred dollars or imprisoned in the discretion of the court. (1929, c. 198, s. 11.)

CHAPTER 38

GAME LAWS

Art. 1. Administration of Game Laws

Part 1. County Administrative System and County Licenses

§ 2079. Application of county game law system.—In the following counties the game laws are administered through the county game protection commission as provided in the following eight sections of this chapter, and in these counties licenses of the Audubon society shall not be good: Beaufort, Bertie, Carbarrus, Camden, Carteret, Caswell, Catawba, Cherokee, Chowan, Cleveland, Craven, Dare, Davie, Duplin, Forsyth, Franklin, Gaston, Gates, Halifax, Harnett, Hertford, Hyde, Jackson, Johnson, Jones, Lincoln, Macon, Madison, Martin, Mitchell, Montgomery, Nash, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Richmond, Robeson, Sampson, Stanly, Stokes, Swain, Transylvania, Tyrrell, Union, Vance, Washington, Wayne, Wilkes, Wilson, Yadkin. (1909, c. 840, s. 12; 1909, c. 824; P. L. 1911, cc. 413, 468, 589, 608, 664, 683; P. L. 1913, c. 384.)

For local laws regulating game protection and licensing in the following counties, see the laws cited: Alexander, P. L. 1917, c. 250; Anson. P. L. 1917, c. 474; P. L. 1919, c. 165; Clay, P. L. 1913, c. 206; 1919, c. 260; Craven, P. L. 1911, c. 589; P. L. 1913, c. 384; Currituck, P. L. 1917, c. 24; 1909, c. 708; Dare, P. L. 1919, c. 33; Davidson, Ex. Sess., P. L. 1913, cc. 53, 257; Graham, P. L. 1917, c. 125; Granville, P. L. 1911, c. 408; Guilford, P. L. 1917, c. 649; Haywood, P. L. 1915, c. 566; Henderson, P. L. 1911, c. 184; Hoke, P. L. 1915, c.

459; Iredell, P. L. 1917, c. 459; Jackson (Sylva township), 1909, c. 534; Lincoln, 1909, c. 840; Mitchell, P. L. 1913, c. 70; Northampton, P. L. 1911, c. 760; Onslow, P. L. 1913, c. 591; Pender, P. L. 1915, c. 150; Robeson, P. L. 1917, c. 376; Scotland, P. L. 1917, c. 57; Surry, P. L. 1919, c. 168; Warren, P. L. 1915, c. 137; Yancey, P. L. 1915, c. 136.

The effect of the North Carolina Game Law is to make county game commissions subordinate to the State Commission, the powers of the former being merely advisory or recommendatory until approved by the State Commission, and to this extent §§ 2079-2086 are amended thereby. State v. Sizemore, 199 N. C. 687, 688, 155 S. E. 724.

§ 2080. Game protection commission; creation and objects.—The boards of county commissioners for the several counties named in the preceding section are hereby constituted game protection commissioners for their respective counties, for the better protection and preservation of game in the said counties and to secure the better enforcement of the game laws of said counties. (1909, c. 840, s. 1.)

§ 2081. Chief county game warden; appointment, term, duty.—The board of county commissioners of each of such counties, on the first Monday in May, one thousand nine hundred and nine, and biennially thereafter, shall appoint a chief game warden for their respective counties, who shall hold his office for a term of two years, and whose duty it shall be diligently to enforce the game laws of their counties, as hereinafter set forth. (1909, c. 840, s. 5.)

§ 2082. Deputy township game wardens.—For more thorough enforcement of the game laws of said counties it shall be the duty of the chief game warden, upon the petition of three freeholders of any township in said county, to appoint deputy game wardens in said township. (1909, c. 840, s. 6.)

§ 2083. Qualification of wardens; clerk's fee for record.—Every warden so appointed shall, before entering upon the duties of his office, take and subscribe before the clerk of the superior court of the county wherein he is appointed an oath to perform the duties of his office, together with other oaths prescribed for police officers, and execute a bond in the sum of fifty dollars for the faithful discharge of his duty, and the oath and bond shall be recorded by the clerk in his office. The clerk shall not charge more than fifty cents for taking and recording said oath. (1909, c. 840, s. 7.)

§ 2084. Deputy warden's fees.—The deputy game warden shall receive the sum of two and one half dollars for each nonresident license procured for nonresident hunters, and for each conviction for the said game laws he shall receive the sum of two and one-half dollars, in addition to fees allowed by law for serving process and other acts as constable. The moneys paid out to the chief game warden or his deputies for convictions as herein provided shall be paid out of the fund for the enforcement of the game law by the treasurer of the county, in the same manner as the county funds are disbursed; and the amount due said wardens and deputies for collecting license taxes shall be retained by them when remitting license taxes to the clerk of the court. (1909, c. 840, ss. 8, 9.)

§ 2085. County license for hunters.—Any nonresident of the state of North Carolina who desires to hunt, shoot or trap birds or other animals in any part of the said counties shall make application to the clerk of the superior court of the county where the applicant desires to hunt, shoot or trap, who shall issue such a license upon payment of a tax of ten dollars and the clerk's fees, amounting to fifty cents. The license shall expire on the termination of the hunting season, as fixed for the said counties. The license shall be of such form as the game protection commission of the county shall prescribe, and shall entitle the owner to hunt in any county enumerated in the first section of this chapter, in the manner provided by law for hunting in such county. Any license granted hereunder shall entitle the holder to hunt only in the county issuing the same.

Licenses under this section shall issue only in the counties enumerated in the first section of this chapter. ["Provided, that in Randolph County any nonresident of the State of North Carolina who desires to hunt, shoot or trap birds or other animals in Randolph County shall pay a license fee of twenty-five dollars; and any resident of North Carolina, nonresident of Randolph County, shall pay a license fee of fifteen dollars: Provided further, it shall be unlawful for any person to kill in any one day more than fifteen quail or partridge in Randolph County."

Provided, that nothing in the part of this section in brackets shall prevent a person or persons residing in or out of Randolph County from hunting game on his or their own land.

That any person violating the provisions of the part of this section in brackets shall be guilty of a misdemeanor and upon conviction fined not more than fifty dollars or imprisoned not exceeding thirty days.] (1909, c. 840, s. 3; 1925, c. 208.)

Editor's Note.—The part of this section providing different regulations for Randolph County was added by the amendment of 1925.

§ 2086. Disposition of license fees from county licenses.—The funds received by the clerk of the superior court or other person from the sale of hunters' licenses shall be turned over to the county treasurer, and one-half thereof shall be turned into the school fund of said county and the other half be set apart as a fund for the enforcement of the game law in said county. (1909, c. 840, s. 4.)

Part 2. Administration Through Audubon Society

§§ 2087 to 2097: Repealed by Act 1927 c. 51, s. 39, herein codified as s. 2141 (pp.)

Part 3. Common Provisions as to Wardens and Licenses

§ 2098. Nonresidents hunting without license.—If any nonresident shall hunt in the state without license, as required by law, or shall hunt upon the lands of another without his written consent, or shall fail to carry his license with him in hunting, or shall fail upon demand to exhibit it to any game warden or police officer, he shall be guilty of a misdemeanor. Each day's hunting without license shall be a separate offense. (Rev., s. 3469; 1903 (Pr.), c. 337, s. 10.)

Art. 2. Protection of Game and Birds; General Provisions

§ 2099. Legislative consent to federal regulations on certain federal lands.—The consent of the general assembly of North Carolina is hereby given to the making of the congress of the United States, or under its authority, of all such rules and regulations as the federal government shall determine to be needful in respect to game animals, game and nongame birds, and fish on such lands in the western part of North Carolina as shall have been, or may hereafter be, purchased by the United States under the terms of the act of congress of March first, one thousand nine hundred and eleven, entitled "An act to enable any state to cooperate with any other state or states, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purposes of conserving the navigability of navigable rivers" (36 U. S. Stat. at Large, p. 961), and acts of congress supplementary thereto and amendatory thereof, and in or on the waters thereon. (1915, c. 205.)

§ 2100. Protection of buffalo and elk.—It shall be unlawful for any person or persons to shoot, kill, capture, destroy, or run with dogs, or in any other manner interfere with any buffalo or elk in North Carolina. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court. (1917, c. 240.)

§ 2101. Game birds defined.—Under the laws of this state, the following only shall be considered game birds: loons, and grebes, swans, geese, brant, river, fish and sea ducks, rails, coots, marshhens and gallinules, plovers, shore and surf birds, snipe, woodcock, sandpipers, yellow legs, chewink or tohee and curlews, and the wild turkey, grouse, partridge, pheasant, quail, dove, robin and meadow lark. (Rev., s. 1875; 1903 (Pr.), c. 337, s. 4.)

§ 2102. Illegal killing of game and birds prohibited.—If any person shall at any time hunt, capture or kill any nongame bird, or shall during the close season, or time in each year in which the hunting or killing is prohibited, chase with dogs, hunt, kill, or wound, or in any manner take or capture any game bird, or any deer, opossum, rabbit or squirrel, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not exceeding thirty days. This section shall not apply to birds caught or killed by authority of the Audubon society for scientific purposes only. This section shall not apply to the English or European housesparrow, owls, hawks, crows, blackbirds, jackdaws, turkey buzzards, vultures and rice birds. (Rev., s. 3466; 1903 (Pr.), c. 337, s. 14; 1915, c. 182, s. 1.)

§ 2103. Birds kept as pets or for breeding.—It shall be lawful to keep any wild bird in a cage as a domestic pet, or for the purposes of breeding, raising and domesticating. (Rev., s. 1876; 1903 (Pr.), c. 337, ss. 6, 7.)

§ 2104. Certificates to take birds, nests, or eggs.—The Audubon society of North Carolina may issue a certificate to any properly accredited persons of the age of twelve years and upward, permitting the holder thereof to collect birds, their nests or eggs for strictly scientific purposes; said certificate shall be in force only during the calendar year in which issued, and shall not be transferable. In order to obtain such certificates the applicant for same must present to the persons having authority to grant such certificates written testimonials from two well-known scientific men, certifying to the good character and fitness of said applicant to be intrusted with such privilege, and must pay the society one dollar to defray the necessary expenses attending the granting of such certificate. On satisfactory proof that the holder of such certificate has killed any bird or taken the nests or eggs of any birds other than for scientific purposes, his certificate shall become void, and he shall be further subject for each offense to the penalty provided for such violation of the law. (Rev., s. 1866; 1903 (Pr.), c. 337, s. 5.)

§ 2105. Destroying nests or eggs of birds.—If any person shall take or needlessly destroy the nest or eggs of any wild birds, except those of the English or European housesparrow, owls, hawks, crows, blackbirds, jackdaws and rice birds, he shall be guilty of a misdemeanor and be fined one dollar for each nest or egg destroyed or taken, or be imprisoned not less than five nor more than ten days for each offense. This section shall not apply to any person taking eggs or nests for scientific purposes only, by authority of the Audubon society of North Carolina. (Rev., s. 3464; Code, s. 2836; 1903 (Pr.), c. 337, s. 4.)

§ 2105(a). Bird sanctuary on Grandfather Mountain established. — Part of Grandfather Mountain situate in the counties of Avery, Caldwell and above the Yonahlossee Road on one side, and above the elevation of four thousand feet on the other side, be established as a sanctuary for the preservation and protection of deer, squirrels and other wild animals (except wildcats), and wild turkey, pheasants, eagles, hawks, ravens and all other bird life. (1923, c. 191, s. 1; 1925, c. 212.)

Editor's Note.—Prior to the 1925 amendment this and the following section did not apply to Watauga County.

§ 2105 (b). Molestation of game within sanctuary.—It shall be unlawful to trap, hunt, shoot, or otherwise kill, within the sanctuary established by the preceding section, any deer, squirrels, or other wild animals, except wild-cats, any wild turkeys, pheasants, eagles, hawks, ravens, or any kind of bird life. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1923, c. 191, ss. 2, 3; 1925, c. 212.)

§ 2105(c). Protection of waterfowl food growing in public waters.—The director of the state department of conservation and development shall have absolute control and authority over all the aquatic plant foods or other waterfowl food growing in the public waters of North Carolina. None of same shall be sold, transported or shipped from the State except by permission in writing obtained from the director of the state department of conservation and development. Any violations of the provisions of this section shall constitute a

misdemeanor, punishable by a fine or imprisonment or both, in the discretion of the court. (1935, c. 135.)

Art. 3. Shipment or Possession of Game

§ 2106. Shipment of live quail or partridges out of state prohibited.—No person shall catch, net, or trap any quail or partridges for the purpose of shipping or transporting the same out of the state. No person, firm or corporation shall transport, or cause to be transported or have possession of with intent to transport or to secure the transportation of, any live quail or partridges beyond the limits of the state. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction fined or imprisoned in the discretion of the court.

All authority given to the Audubon society of North Carolina to grant permits to stop a transport of live quail or partridges beyond the limits of the state is revoked. (1911, c. 2.)

§ 2107. Exportation from state prohibited. — If any person shall knowingly receive for transportation, or shall transport or cause to be transported, or have in his possession with the intent to transport, or to secure the transportation of, or shall in any manner carry or convey, beyond the limits of this state, except for purposes of propagation under permits issued by the Audubon society of North Carolina, any partridge, pheasant, grouse, shore or beach birds, quail, wild turkey, snipe, woodcock, or nongame bird which have been killed or captured within this state, he shall be guilty of a misdemeanor; and each bird so killed or taken or had in possession, received for transportation or transported contrary to the provisions of this section shall constitute a separate offense. The reception by any person or corporation within this state of any such birds or game for shipment to a point beyond the limits of this state, shall be prima facie evidence that said birds or game were killed within the state for the purpose of conveying same beyond its limits; but the provisions of this section shall not apply to the common carriers into whose possessions any of the birds mentioned in this section shall come in the regular course of their business for transportation while they are in transit through the state from any place without the state. (Rev., s. 3471; 1903 (Pr.), c. 337, s. 7; Code, s. 2835.)

§ 2108. Packages of game to be marked.—If any person shall deliver or knowingly receive for transportation any receptacle or package containing birds or game, unless the same shall be labeled on the address of the owner and consignor, name and address of the owner and consignor, and with the kind or kinds of birds which the said package or receptacle contains, or shall falsely label the same, he shall be guilty of a misdemeanor. (Rev., s. 3470; 1903 (Pr.), c. 337, s. 8.)

Art. 4. Close Season for Game

§ 2109. Deer.—The close season of each year during which deer shall not be hunted with gun, chased with dogs, killed, trapped, or destroyed, shall, as to the several counties or parts of counties specified, be as follows:

Alamance .....Feb. 1 to Oct. 1
(Rev., s. 1881.)
Alexander .....Feb. 1 to Oct. 1
(Rev., s. 1881.)
Alleghany .....Feb. 1 to Oct. 1
(Rev., s. 1881.)
Anson .....no open season before 1922
Afterward .....Jan. 20 to Nov. 20
(P. L. 1917, c. 474; P. L. 1919, c. 165.)
Ashe .....except Nov. 1 to Nov. 15
(1907, c. 358.)
Avery .....no open season before 1922
(P. L. 1917, c. 469.)
Beaufort .....Feb. 1 to Nov. 1
(P. L. 1917, c. 573.)
Bertie .....Jan. 1 to Oct. 1
(P. L. 1919, c. 375.)
Bladen .....Dec. 31 to Sept. 30
(P. L. 1911, c. 123.)
Brunswick .....Jan. 1 to Oct. 1
(P. L. 1915, c. 568.)
Buncombe .....Jan. 15 to Oct. 15
(P. L. 1917, c. 658.)
Bertie .....Jan. 1 to Oct. 1
(Rev., s. 1881.)
Cabarrus .....Feb. 1 to Oct. 1
(Rev., s. 1881.)
Caldwell .....no open season before 1922
(P. L. 1917, c. 469.)
Carteret .....Feb. 1 to Sept. 1
(P. L. 1915, c. 682.)
Caswell .....except Nov. 15 to Dec. 15
(P. L. 1915, c. 129.)
Catawba ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Chatham ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Cherokee ..... Jan. 1 to Oct. 1
(1907, c. 452.)
Clay ..... no open season before 1929
Thereafter ..... Nov. 1 to Jan. 1
(P. L. 1919, c. 260.)
Cleveland .....Feb. 1 to Oct. 1
(Rev., s. 1881.)
Columbus ..... Jan. 1 to Oct. 1
(P. L. 1917, c. 394.)
Craven ..... Jan. 1 to Sept. 1
(P. L. 1917, c. 443.)
Cumberland ..... except Nov. 15 to Dec. 1
(See P. L. 1919, c. 142.)
Currituck ....
On North Poplar branch township, March 1 to September 20. Rev., s. 1881. Atlantic township, no open season. (1909, c. 380.)
Dare ..... Feb. 1 to Oct. 1
(P. L. 1911, c. 187.)
Davidson ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Davie ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Duplin ..... Jan. 1 to Oct. 1
(P. L. 1917, c. 668.)
Durham ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Forsyth ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Franklin ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)

Gaston ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Gates ..... Feb. 1 to Oct. 1
(P. L. Ex. Sess. 1913, c. 170.)
Graham ..... no open season
Bucks ..... except Oct. 1 to Dec. 1
(P. L. 1917, c. 125.)
Granville ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 598.)
Guilford ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Harnett ..... except Nov. 1 to Nov. 15
(P. L. 1915, c. 127; P. L. 1917, c. 205.)
Haywood ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 566.)
Henderson ..... except Nov. 1 to Dec. 15
(1909, c. 471; P. L. 1919, c. 404.)
Hertford ..... Jan. 1 to Sept. 1
(P. L. 1913, c. 591.)
Hoke ..... except Nov. 1 to Dec. 1
(P. L. 1915, c. 459; P. L. 1917, c. 100.)
Hyde ..... see statute
Currituck township.
(P. L. 1911, c. 131; P. L. 1913, c. 560.)
Iredell ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Jackson ..... see statute
(1909, c. 471.)
Johnston ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Jones ..... Jan. 1 to Sept. 1
(P. L. 1917, c. 443.)
Lee ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Lincoln ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L. Ex. Sess., 1913, c. 75; P. L. 1915, c. 92.)
McDowell ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Macon ..... no open season until 1924
(P. L. 1919, c. 45.)
Madison ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Mecklenburg ..... Jan. 20 to Dec. 1
(P. L. 1915, c. 562.)
Mitchell ..... except Oct. 15 to Nov. 1
(1907, c. 242.)
Montgomery ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Moore ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Nash ..... except Sept. 1 to Nov. 1
(1907, c. 109.)
New Hanover ..... Jan. 1 to Sept. 1
(Rev., s. 1881.)
Northhampton ..... Feb. 1 to Sept. 15
(P. L. 1915, c. 272.)
Onslow ..... Mar. 15 to Oct. 15
(P. L. 1913, c. 591.)
Orange ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Pamlico ..... Feb. 1 to July 15
(1909, c. 710; P. L. 1913, c. 560.)
Pasquotank ..... Feb. 1 to Oct. 1
(P. L., Ex. Sess. 1913, c. 170.)
Pender ..... Feb. 1 to Oct. 1
(P. L. 1919, cc. 163, 285.)
Perquimans ..... Feb. 1 to Oct. 1
(P. L., Ex. Sess. 1913, c. 170.)
Person ..... Jan. 15 to Sept. 1
(Rev., s. 1881.)
Polk ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Randolph ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Richmond ..... except Nov. 1 to Nov. 15
(P. L. 1915, c. 569.)
Robeson ..... Jan. 1 to Nov. 1
(Rev., s. 1881.)
Rockingham ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Rowan ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Rutherford ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Sampson ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Scotland ..... except Nov. 1 to Dec. 1
(P. L. 1915, c. 57.)
Stanly ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Stokes .....except Nov. 1 to Nov. 15
(1907, c. 358.)
Surry ..... Jan. 1 to Nov. 1
(1907, c. 358; P. L. 1919, c. 168.)
Swain ..... Jan. 15 to Oct. 15
(P. L. 1915, c. 772.)
Transylvania ..... see statute
(P. L. 1911, c. 348.)
Tyrrell ..... Feb. 1 to Oct. 15
(Rev., s. 1881.)
Union ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Vance ..... Mar. 1 to Nov. 15
(P. L. 1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 1
(1909, c. 723.)
Warren ..... Feb. 1 to Oct. 1
(Rev., s. 1881.)
Washington ..... Jan. 15 to Oct. 1
(P. L. 1911, c. 216.)
Watauga ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Wilkes ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Yadkin ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Yancey ..... except Oct. 1 to Nov. 30
(Rev., s. 1881.)

Editor's Note.—This and the following sections under this article should be read in connection with §§ 2141(ii), 2141(ss).

§ 2109(a). Killing deer forbidden for five years.— It shall be unlawful for any person or persons to hunt or kill any doe (deer) in North Carolina for a period of five years from the ratification of this section.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. That twenty-five dollars shall be paid to the person or persons procuring evidence sufficient to secure the conviction of any person violating the provisions of this act to be taxed as a part of the costs. (1927, c. 92.)

§ 2110. Foxes.—The close season of each year during which foxes shall not be hunted with gun, chased with dogs, killed, trapped or destroyed, shall, as to the several counties or parts of counties specified, be as follows:

Alamance ..... Feb. 1 to Oct. 1
(P. L. 1911, c. 654.)
Alleghany ..... Mar. 1 to Oct. 1
(P. L. 1915, c. 274.)
Buncombe ..... Mar. 1 to Sept. 1
(P. L. 1917, c. 658.)
Burke ..... Mar. 1 to Dec. 1
South of Catawba river
(1907, c. 388.)
Chatham ..... Feb. 1 to Sept. 1
(1909, c. 174; P. L. 1911, c. 135.)
Clay .....Mar. 1 to Nov. 15
(P. L. 1919, c. 260.)
Cleveland ..... Mar. 1 to Dec. 1
(1907, c. 388.)
Duplin ..... Feb. 15 to Sept. 15
(P. L. 1911, c. 407.)
Franklin ..... Mar. 1 to Oct. 15
(P. L., Ex. Sess. 1913, c. 169.)
Granville ..... Mar. 1 to Sept. 1
(P. L. 1919, c. 282.)
Halifax ..... Mar. 1 to Sept. 15
(P. L. 1913, c. 591.)
Harnett ..... April 1 to Sept. 1
(1909, c. 667.)
Hoke ..... Mar. 2 to Sept. 15
(P. L. 1915, c. 459.)
Lee ..... Apr. 1 to Aug. 15
(P. L., Ex. Sess. 1913, c. 111.)
Lincoln ..... Feb. 1 to Nov. 15
(P. L. 1913, c. 659.)
Montgomery ..... Jan. 15 to Oct. 15
(P. L. 1911, c. 400.)
Moore .....Mar. 1 to Oct. 1
(P. L. 1911, c. 291.)
New Hanover ..... Feb. 15 to Sept. 15
(P. L. 1917, c. 673.)
Onslow ..... Feb. 15 to Sept. 15
(P. L. 1917, c. 673.)
Pender ..... Feb. 15 to Sept. 15
(P. L. 1911, c. 407.)
Randolph ..... Jan. 15 to Nov. 1
(P. L. 1919, c. 76.)
Richmond ..... Mar. 15 to Sept. 1
(P. L. 1911, c. 382.)
Sampson ..... Feb. 15 to Sept. 15
(P. L. 1917, c. 673.)
Scotland ..... Mar. 2 to Aug. 15
(P. L. 1917, c. 57.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Wayne ..... Feb. 15 to Sept. 15
(P. L. 1917, c. 673.)
Wilkes ..... Feb. 15 to Oct. 1
(P. L. 1913, c. 77.)

Editor's Note.—Public Laws 1929, chapter 176, applicable only to Stanly County, amended this section to read as follows: "It shall be unlawful to shoot, trap or catch in any way a fox, or destroy their young, except taken by dog or dogs. The open season for catching with dog or dogs, September the first—March first. Except a fox turned loose by an individual and chased by his dog or dogs, or by those under his direction. A violation of this act in any manner, shall constitute a misdemeanor, punished by fine or imprisonment, or both in the discretion of the court."

Section 2135(a) by implication struck out Lenoir County from this section.

§ 2111. Opossum.—The close season of each year during which no opossum shall be shot, killed, hunted or in any way captured shall be, as to the several counties specified, as follows:

Alamance ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Alexander ..... Mar. 1 to Nov. 1
(P. L. 1917, c. 250.)
Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474.)
Ashe ..... Feb. 1 to Nov. 1
(P. L. 1913, c. 560.)
Bertie ..... Feb. 1 to Nov. 1
French's creek township, Cypress creek township, Turnbull township, Colly township.
(1911, c. 123.)
Bladen ..... Feb. 1 to Dec. 1
(1909, c. 418.)
Cabarrus ..... Feb. 1 to Oct. 1
(P. L. 1919, c. 396.)
Caswell ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Graham ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Clay ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 395; 1919, c. 260.)
Currituck ..... Apr. 1 to Nov. 1
(P. L. 1911, c. 378; P. L. 1913, c. 560.)
Durham ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Edgecombe ..... Jan. 1 to Oct. 1
(P. L. 1911, c. 189.)
Forsyth ..... Feb. 1 to Oct. 1
(P. L. 1913, c. 560.)
Franklin ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Gaston ..... Jan. 1 to Oct. 15
(P. L. 1919, c. 286.)
Graham ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Greene ..... Feb. 1 to Sept. 1
(Rev., s. 1883.)
Guilford ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Halifax ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Harnett ..... Jan. 1 to Oct. 1
(Rev., s. 1883.)
Iredell ..... Mar. 1 to Oct. 1
(P. L. 1917, c. 459; 1919, c. 480.)
Johnston ..... Mar. 1 to Nov. 1
(P. L. 1913, c. 648.)
Lee ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Lincoln ..... Jan. 1 to Oct. 1
(Rev., s. 1883.)
Mecklenburg ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Montgomery ..... Jan. to Oct. 1
(P. L. 1911, c. 102.)
McDowell ..... Mar. 1 to Oct. 1
(1907, c. 886.)
Moore ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Orange ..... Feb. 1 to Oct. 1
(Rev., s. 1883.)
Pamlico ..... Feb. 1 to Nov. 1
(P. L. 1919, c. 354.)

Pasquotank ..... Apr. 1 to Nov. 1
(P. L. 1913, c. 369.)
Polk ..... Feb. 1 to Oct. 1
(P. L. 1915, c. 454.)
Randolph ..... Jan. 1 to Oct. 1
(P. L. 1911, c. 24.)
Robeson ..... Mar. 1 to Oct. 1
(P. L. 1917, c. 537.)
Rockingham ..... Feb. 1 to Oct. 1
(P. L. 1911, c. 756.)
Sampson ..... Mar. 1 to Oct. 1
(P. L. 1911, c. 19.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Swain ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 772.)
Union ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 51.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Feb. 1 to Oct. 1
(P. L. 1913, c. 225.)
Warren ..... Jan. 1 to Oct. 1
(P. L. 1913, c. 560.)
Watauga ..... Mar. 15 to Nov. 1
(P. L. 1913, c. 533.)
Wilkes ..... Mar. 1 to Oct. 15
(P. L. 1913, c. 77.)
Yadkin ..... Mar. 1 to Oct. 1
(1909, c. 612.)
Yancey ..... Jan. 1 to Nov. 1
(P. L. 1913, c. 136.)

§ 2112. Rabbit.—The close season of each year during which no rabbits shall be hunted with a gun shall be, as to the several counties specified as follows:

Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474.)
Cabarrus ..... Mar. 1 to Thanksgiving Day
(P. L. 1913, c. 560.)
Durham ..... Feb. 1 to Nov. 15
(P. L. 1917, c. 400.)
Forsyth ..... Feb. 1 to Oct. 1
(P. L. 1913, c. 560.)
Gaston ..... Feb. 1 to Nov. 25
(P. L. 1919, c. 286.)
Granville ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 598.)
Orange ..... Feb. 1 to Nov. 15
(P. L. 1919, c. 216.)
Rockingham ..... Feb. 1 to Oct. 1
(P. L. 1911, c. 756.)
Rowan ..... May 1 to Sept. 1
(P. L. 1911, c. 445.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Warren ..... Mar. 1 to Dec. 1
(P. L. 1917, c. 348. See P. L. 1919, c. 169.)

§ 2113. Raccoon. — The close season of each year during which no raccoons shall be shot, killed, hunted or in any other way captured, shall be, as to the several counties specified, as follows:

Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474.)
Ashe ..... Feb. 1 to Nov. 1
(P. L. 1913, c. 560.)
Bladen ..... Feb. 1 to Dec. 1
Colly, Cypress creek, French's creek and Turnbull townships.
(1919, c. 418.)
Clay ..... Mar. 1 to Nov. 15
(P. L. 1919, c. 260.)
Craven ..... Apr. 1 to Dec. 1
(P. L. 1915, c. 37.)
Currituck ..... Apr. 1 to Nov. 1
(P. L. 1913, c. 560.)
McDowell ..... Nov. 1 to Oct. 15
(1907, c. 886.)
Pasquotank ..... Apr. 1 to Nov. 1
(P. L. 1913, c. 369.)
Robeson ..... Mar. 1 to Oct. 1
(P. L. 1917, c. 537.)
Swain ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 772.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Wake ..... Feb. 1 to Oct. 1
(P. L. 1913, c. 225.)
Watauga ..... Mar. 15 to Nov. 1
(P. L. 1913, c. 533.)
Yadkin ..... Feb. 1 to Nov. 1
(1909, c. 612.)
Yancey ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 136.)

§ 2114. Squirrel.—The close season of each year during which no squirrel shall be hunted, killed, or in any way captured, shall be, as to the several counties specified, as follows:

Alleghany ..... Mar. 1 to Aug. 1
(P. L. 1913, c. 560.)
Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474.)
Avery ..... except Sept. 15 to Oct. 31
(P. L. 1917, c. 555.)
Beaufort ..... April 1 to Oct. 1
(P. L. 1913, c. 430.)
Pungo Precinct, ... no close season.
(P. L. 1911, c. 766.)
Bertie ..... Jan. 1 to Oct. 1
(P. L. 1915, c. 555; P. L. 1917, c. 53; P. L. 1919, c. 375.)
Bladen ..... Mar. 1 to Oct. 1
White Oak township
(1909, c. 163.)
French's creek, Colly Cypress creek and Turnbull townships; Feb. 1 to Nov. 1
(1909, c. 418.)
Central and Elizabethtown townships; Mar. 1 to Nov. 1
(1909, c. 181.)
Brunswick ..... Jan. 15 to Sept. 15
(P. L. 1915, c. 568.)
Buncombe ..... except Sept. 14 to Jan. 15
(P. L. 1919, c. 184.)
Camden ..... Feb. 1 to Oct. 15
(P. L. 1919, c. 526.)
Carteret ..... Mar. 1 to Nov. 1
(1907, c. 895; 1909, c. 475.)
Catawba ..... Feb. 1 to Nov. 25
(P. L. 1911, c. 563; P. L. 1913, c. 560; P. L. 1917, c. 412.)
Chowan ..... Mar. 1 to Dec. 1
(1909, c. 13; P. L. 1913, c. 591.)

Clay ..... Feb. 15 to Nov. 25
(P. L. 1913, c. 206; P. L. 1915, c. 271; P. L. 1917, c. 417.)
Cleveland ..... Mar. 1 to Nov. 1
(Rev., s. 1882.)
Craven ..... Mar. 1 to Oct. 1
(P. L. 1905, c. 77.)
Cumberland ..... Mar. 1, 1919-Nov. 1, 1921
(P. L. 1919, c. 416.)
Currituck ..... Apr. 1 to Oct. 1
(1909, c. 351.)
Dare ..... Mar. 1 to Nov. 1
(Rev., s. 1882.)
Duplin ..... Mar. 1 to Oct. 15
(P. L. 1913, c. 560.)
Edgecombe ..... Mar. 1 to Oct. 1
(1909, c. 512.)
Forsyth ..... Feb. 1 to Sept. 1
(P. L. 1913, c. 560.)
Franklin ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 560.)
Gaston ..... Jan. 25 to Nov. 25
(P. L. 1919, c. 286.)
Gates ..... Mar. 1 to Nov. 1
(Rev., s. 1882.)
Granville ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 598.)
Greene ..... Feb. 1 to Oct. 1
(1907, c. 598.)
Guilford ..... Feb. 1 to Aug. 1
(1909, c. 338; P. L. 1911, c. 125.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Harnett ..... Feb. 1 to Oct. 15
(P. L. 1917, c. 398.)
Haywood ..... Jan. 1 to Sept. 1
(P. L. 1915, c. 566.)
Hertford ..... Jan. 15 to Sept. 15
(P. L. 1917, c. 544.)
Hoke ..... except Nov. 1 to Dec. 1
(P. L. 1915, c. 459; P. L. 1917, c. 100.)
Hyde ..... Feb. 1 to Nov. 1
Currituck township.
(P. L. 1911, c. 131.)
Iredell ..... except May and Sept.
(P. L. 1919, c. 480.)
Johnston ..... Mar. 1 to Nov. 1
(P. L. 1913, c. 648; P. L. 1917, c. 520.)
Jones ..... Mar. 1 to Oct. 1
(Rev., s. 1882.)
Lenoir ..... Mar. 1 to Sept. 15
(1909, c. 614.)
Lincoln ..... Feb. 1 to Sept. 1
(P. L. 1913, c. 659; P. L. 1917, c. 607.)
Macon ..... except Sept. 1 to Feb. 15
(P. L. 1919, c. 45.)
Madison ..... Mar. 1 to Oct. 1
(Rev., s. 1882.)
Martin ..... Mar. 1 to Sept. 1
(1909, c. 602; 1924, c. 89.)
Mecklenburg ..... Mar. 1 to Nov. 1
(Rev., s. 1882.)
Mitchell ..... except Sept. 15 to Nov. 1
(P. L. 1917, c. 555.)
Montgomery ..... Apr. 1 to Sept. 1
(Rev., s. 1882.)
Nash ..... Mar. 1 to Oct. 1
(1909, c. 512.)
New Hanover ..... Feb. 15 to Nov. 15
(P. L. 1913, c. 558.)
Onslow ..... Mar. 15 to Oct. 15
(P. L. 1913, c. 591.)
Orange ..... Feb. 1 to July 1
(P. L. 1919, c. 216.)
Pamlico ..... Feb. 1 to Nov. 1
(P. L. 1919, c. 354.)
Pasquotank till Dec. 1, 1920; thereafter except Dec.-Jan.
Pender ..... Apr. 1 to Oct. 1
(1907, c. 50.)
Rocky Point township, Jan. 1 to Dec. 1.
(P. L. 1915, c. 150.)
Perquimans ..... Feb. 1 to Oct. 15
(P. L. 1919, c. 526.)
Pitt ..... Feb. 1 to Sept. 1
(P. L. 1913, c. 606.)
Polk ..... Feb. 1 to Aug. 15
(P. L. 1915, c. 454.)
Robeson ..... Mar. 1 to Oct. 1
(P. L. 1917, c. 537.)
Rockingham ..... Feb. 1 to Aug. 1
(P. L. 1911, c. 756.)
Sampson ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 521.)
Scotland ..... except Nov. 1 to Dec. 1
(P. L. 1917, c. 168.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Swain ..... Jan. 15 to Oct. 15
(P. L. 1915, c. 772.)
Transylvania ..... Apr. 1 to Sept. 1
(1907, c. 842.)
Tyrrell ..... Mar. 1 to Oct. 1
(Rev., s. 1882.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516, P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 1
(P. L. 1913, c. 225.)
Warren ..... Mar. 1 to Dec. 1
(P. L. 1917, c. 348. See P. L. 1919, c. 169.)
Washington ..... Mar. 1 to Dec. 1
(P. L. 1911, c. 26; P. L. 1913, c. 560.)
Wayne ..... Mar. 1 to Nov. 1
(1909, c. 196; P. L. Ex. Sess. 1913, c. 203.)

Editor's Note. — By the amendment of 1924 the closed season in Martin County was changed from March 1st. to October 1st, to March 1st, to September 1st.

§ 2115. Furbearing animals.— The close season of each year during which no furbearing animals shall be hunted, killed, or in any way captured, shall be, as to the several counties specified, as follows:

Ashe ..... Feb. 1 to Nov. 1
(P. L. 1913, c. 560.)
Clay ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 395; 1919, c. 260.)
Craven ..... Apr. 1 to Nov. 30
(P. L. 1915, c. 37.)
Currituck ..... Apr. 1 to Nov. 1
(P. L. 1913, c. 560.)
Gates ..... Apr. 1 to Nov. 15
(P. L. 1911, c. 745.)
Henderson ..... Jan. 1 to Oct. 15
Except wildcats, opossum and moles.
(P. L. 1911, c. 522; P. L. 1913, c. 560; 1919, c. 404.)
Macon ..... Feb. 15 to Nov. 15
(P. L. 1917, c. 395.)

Pasquotank ..... Apr. 1 to Nov. 1
(P. L. 1913, c. 369.)
Robeson ..... Mar. 1 to Oct. 1
(P. L. 1917, c. 537.)
Stokes ..... Jan. 15 to Sept. 1
(P. L. 1917, c. 588.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Swain ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 772.)
Watauga ..... Mar. 15 to Nov. 1
(P. L. 1915, c. 533.)

§ 2116. Quail or partridge.—The close season of each year during which no quail or partridges shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be, as to the several counties specified, as follows:

Alamance ..... Mar. 1 to Nov. 15
(1909, c. 715; P. L. 1911, c. 85.)
Alexander ..... Jan. 1 to Nov. 20
(P. L. 1911, c. 754; P. L. 1917, c. 250.)
Alleghany ..... Mar. 1 to Oct. 15
(P. L. 1913, c. 560.)
Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474; P. L. 1919, c. 165.)
Ashe ..... Mar. 1 to Nov. 1
(Rev., s. 1884.)
Avery ..... No open season
(P. L. 1917, c. 555.)
Beaufort ..... Mar. 1 to Nov. 1
(P. L. 1917, c. 573.)
Bertie ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 555; P. L. 1917, c. 53; P. L. 1919, c. 375.)
Bladen ..... Mar. 1 to Nov. 1
(P. L. 1913, c. 457; P. L. 1915, c. 273.)
Brunswick ..... Mar. 1 to Nov. 1
(Rev., s. 1884.)
Buncombe ..... Jan. 15 to Nov. 14
(P. L. 1917, c. 658.)
Burke ..... Feb. 1 to Nov. 15
(1909, c. 675.)
Cabarrus ..... Jan. 15 to Dec. 1
(P. L. 1911, c. 664.)
Caldwell ..... Jan. 20 to Nov. 20
(P. L. 1911, c. 8.)
Camden ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 544.)
Carteret ..... Mar. 1 to Nov. 1
(P. L. 1915, c. 682.)
Caswell ..... Feb. 1 to Nov. 15
(P. L. 1919, c. 149.)
Catawba ..... Feb. 1 to Nov. 25
(P. L. 1911, c. 563; P. L. 1917, c. 412.)
Chatham ..... Mar. 1 to Nov. 15
(P. L. 1911, c. 129.)
Cherokee ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.)
Chowan ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 544.)
Clay ..... Feb. 15 to Nov. 15
(P. L. 1917, c. 395.)
Cleveland ..... Jan. 10 to Dec. 1
(P. L. 1917, c. 426; P. L. 1919, c. 500.)
Columbus ..... Apr. 1 to Nov. 1
(P. L. 1917, c. 394.)
Craven ..... Feb. 15 to Nov. 15
(P. L. 1917, c. 443.)
Cumberland ..... Mar. 1 to Nov. 15
(P. L. 1919, c. 142.)
Currituck ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 560; P. L. 1917, c. 544.)
Dare ..... Mar. 1 to Oct. 15
(Rev., s. 1884.)
Davidson ..... Mar. 1 to Nov. 15
(1907, c. 422.)
Davie ..... Feb. 20 to Nov. 20
(P. L. 1917, c. 422.)
Duplin ..... Mar. 1 to Nov. 15
(Rev., s. 1884.)
Durham ..... Feb. 1 to Nov. 15
(P. L. 1917, c. 400.)
Edgecombe ..... Feb. 15 to Nov. 15
(1907, c. 823.)
Forsyth ..... Jan. 1 to Nov. 20
(1909, c. 551.)
Kernersville and Abbott's creek townships, Feb. 15 to Nov. 15.
(P. L. 1911, c. 134.)
Franklin ..... Mar. 1 to Nov. 15
(1907, c. 986.)
Gaston ..... Jan. 15 to Thanksgiving Day
(1907, c. 417.)
Gates ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 544.)
Graham ..... Mar. 1 to Nov. 1
(P. L. 1917, c. 125.)
Granville ..... Feb. 1 to Nov. 15
(P. L. 1919, c. 458.)
Greene ..... Feb. 1 to Nov. 20
(Ex. Sess. 1908, c. 108; 1909, c. 829.)
Guilford ..... Mar. 1 to Nov. 15
(1907, c. 345.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Harnett ..... Mar. 1 to Dec. 1
(P. L. 1917, cc. 209, 379.)
Haywood ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 566.)
Henderson ..... Jan. 15 to Nov. 15
(P. L. 1919, c. 404.)
Hertford ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 544.)
Hoke ..... Feb. 16 to Nov. 15
(P. L. 1915, c. 459; P. L. 1917, c. 100.)
Hyde ..... Mar. 20 to Oct. 15
(Rev., s. 1884.)
Iredell ..... Jan. 10 to Dec. 1
(P. L. 1917, c. 459.)
Jackson ..... Mar. 1 to Nov. 1
(Rev., s. 1884.)
Johnston ..... Mar. 1 to Nov. 1
(Rev., s. 1884.)
Jones ..... Feb. 15 to Nov. 15
(P. L. 1917, c. 443.)
Lee ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 612.)
Lenoir ..... Feb. 20 to Nov. 20
(P. L. 1913, c. 588.)
Lincoln ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.)
McDowell ..... Feb. 1 to Nov. 15
(1909, c. 518; P. L. 1911, c. 128.)
Macon ..... except Dec. 1 to Feb. 1
(P. L. 1919, c. 45.)

Madison ..... Feb. 1 to Nov. 15
(1907, c. 104.)
Martin ..... Mar. 1 to Nov. 15
(Rev., s. 1884; 1924, c. 90.)
Mecklenburg ..... Jan. 20 to Dec. 1
(P. L. 1915, c. 562.)
Mitchell ..... no open season
(P. L. 1917, c. 555.)
Montgomery ..... Feb. 15 to Nov. 25
(P. L. 1919, c. 413.)
Moore ..... Mar. 1 to Nov. 30
(P. L. 1919, c. 533.)
Nash ..... Feb. 15 to Nov. 15
(1907, c. 823.)
New Hanover ..... Feb. 15 to Nov. 15
(P. L. 1913, c. 558.)
Northampton ..... Mar. 1 to Nov. 15
(P. L. 1915, c. 272.)
Onslow ..... Mar. 15 to Oct. 15
(P. L. 1913, c. 591.)
Orange ..... Feb. 1 to Nov. 15
(P. L. 1919, c. 216.)
Pamlico ..... Feb. 14 to Dec. 1
(P. L. 1919, c. 354.)
Pasquotank ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 544.)
Pender ..... Mar. 1 to Nov. 1
(Rev., s. 1884.)
Rocky Point township, Jan. 1 to Dec. 1
(P. L. 1915, c. 150.)
Perquimans ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 544.)
Person ..... Feb. 1 to Nov. 15
(P. L. 1915, c. 586.)
Pitt ..... Mar. 1 to Nov. 20
(P. L. 1917, c. 155.)
Polk ..... Feb. 15 to Dec. 1
(P. L. 1915, c. 454.)
Randolph ..... Mar. 1 to Nov. 15
(P. L. 1911, c. 198.)
Richmond ..... Jan. 25 to Nov. 25
(P. L. 1915, c. 564.)
Robeson ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 376.)
Rockingham ..... Feb. 1 to Nov. 15
(P. L. 1911, c. 756; P. L. 1913. c. 560.)
Rowan ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 591.)
Rutherford ..... Feb. 15 to Dec. 1
(1909, c. 204; P. L. 1911, c. 182.)
Sampson ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 521.)
Scotland ..... Feb. 15 to Nov. 15
(P. L. 1917, c. 57.)
Stanly ..... Feb. 1 to Dec. 1
(1909, c. 630.)
Stokes ..... Jan. 15 to Dec. 15
(P. L. 1917, c. 588.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Swain ..... Mar. 1 to Nov. 15
(1907, c. 54.)
Transylvania ..... Feb. 1 to Nov. 15
(P. L. 1911, c. 677.)
Tyrrell ..... Mar. 1 to Oct. 15
(Rev., s. 1884.)
Union ..... Jan. 1 to Dec. 15
(P. L. 1919, c. 555.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 225; P. L. 1917, c. 552.)
Warren ..... Mar. 1 to Dec. 1
(P. L. 1915, c. 137; P. L. 1917, cc. 298, 348.)
Washington ..... Mar. 1 to Oct. 1
(P. L. 1911, c. 26; P. L. 1912, c. 560.)
Watauga ..... Mar. 1 to Sept. 1
(1907, c. 851.)
Wayne ..... Mar. 1 to Nov. 1
(Rev., s. 1884.)
Wilkes ..... Feb. 10 to Dec. 1
Except on Thanksgiving Day.
(P. L. 1913, c. 77; P. L. 1917, c. 157.)
Wilson ..... Mar. 1 to Nov. 15
(Rev., s. 1884.)
Yadkin ..... Feb. 1 to Dec. 1
(1907, c. 607.)
Yancey ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 136.)

Editor's Note.—By the amendment of 1924, the closed season for Martin County was changed from March 1st to November 1st to March 1st to November 15th.
As to Alexander County, see § 2135(c).

§ 2117. Wild turkey.— The close season for each year during which no wild turkey shall be shot, killed, wounded or in any manner hunted, taken or captured, shall be, as to the several counties specified, as follows:

Alamance ..... Mar. 1 to Nov. 15
(1909, c. 715; P. L. 1911, c. 85.)
Alexander ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Alleghany ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Anson ..... no open season before 1922
afterward Jan. 20 to Nov. 20
(P. L. 1917, c. 474.)
Ashe ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Avery ..... no open season
(P. L. 1917, c. 555.)
Beaufort ..... Mar. 1 to Nov. 1
(P. L. 1917, c. 573.)
Bertie ..... Feb. 10 to Nov. 15
(P. L. 1915, c. 555; P. L. 1917, c. 53; P. L. 1919, c. 375.)
Bladen ..... Jan. 1 to Nov. 1
(P. L. 1913, c. 457; P. L. 1915, c. 273.)
Brunswick ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Buncombe ..... Jan. 15 to Nov. 15
(P. L. 1917, c. 658.)
Burke ..... Feb. 15 to Dec. 1
(1909, c. 675.)
Cabarrus ..... Mar. 1 to Dec. 1
(Rev., s. 1885.)
Caldwell ..... Jan. 20. to Nov. 20
(P. L. 1911, c. 8.)
Camden ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Carteret ..... Mar. 1 to Nov. 1
(P. L. 1915, c. 682.)
Caswell ..... Feb. 1 to Nov. 15
(P. L. 1915, c. 129; P. L. 1919, c. 149.)
Catawba ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)

Chatham ..... Mar. 1 to Nov. 15
(P. L. 1911, c. 129.)
Cherokee ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.)
Chowan ..... Mar. 1 to Dec. 1
(P. L. 1913, c. 591.)
Clay ..... Feb. 1 to Nov. 15
(P. L. 1917, c. 395.)
Cleveland ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Columbus ..... Apr. 1 to Nov. 1
(P. L. 1917, c. 394.)
Craven ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Cumberland ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
No open season in 71st township.
(P. L. 1915, c. 671.)
Currituck ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Davidson ..... Mar. 1 to Nov. 15
(Rev., s. 1885.)
Davie ..... no open season
(P. L. 1917, c. 422.)
Duplin ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Durham ..... Feb. 1 to Nov. 15
(P. L. 1917, c. 400.)
Edgecombe ..... Feb. 15 to Nov. 15
(1907, c. 823.)
Forsyth ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Franklin ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Gaston ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Gates ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Graham ..... Mar. 1 to Nov. 1
(P. L. 1917, c. 125.)
Granville ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 598.)
Green ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Guilford ..... Mar. 1 to Nov. 15
(1907, c. 345.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Harnett ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Haywood ..... Jan. 1 to Nov. 1
(P. L. 1915, c 566.)
Henderson ..... Jan. 15 to Nov. 15
(Rev., s. 1885; P. L. 1919, c. 404.)
Hertford ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Hoke ..... except Nov. 1 to Dec. 1
(P. L. 1915, c. 459; P. L. 1917, c. 100.)
Hyde ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Iredell ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Jackson ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Johnston ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Jones ..... Mar. 1 to Nov. 1
(1905, c. 77.)
Lee ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Lenoir ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Lincoln ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.)
Macon ..... except Dec. 1 to Feb. 1
(P. L. 1919, c. 45.)
Madison ..... Feb. 1 to Nov. 15
(1907, c. 104.)
Martin ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Mecklenburg ..... Jan. 20 to Dec. 1
(P. L. 1915, c. 562.)
Mitchell ..... Feb. 1 to Oct. 15
(P. L. 1913, c. 70.)
Montgomery ..... Jan. 25 to Nov. 25
(P. L. 1915, c. 564.)
Moore ..... Jan. 1 to Dec. 1
(P. L. 1911, c. 130.)
Nash ..... Feb. 15 to Nov. 15
(1907, c. 823.)
New Hanover ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Northampton ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Onslow ..... Mar. 15 to Oct. 15
(P. L. 1913, c. 591.)
Orange ..... Feb. 1 to Nov. 15
(P. L. 1919, c. 216.)
Pamlico ..... Jan. 20 to Nov. 20
(P. L. 1919, c. 354.)
Pasquotank ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Pender ..... Mar. 1 to Dec. 1
(P. L. 1919, c. 163.)
Perquimans ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Person ..... Feb. 1 to Nov. 15
(P. L. 1915, c. 586; P. L. 1917, c. 355.)
Pitt ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Polk ..... Feb. 15 to Dec. 1
(1909, c. 590; P. L. 1915, c. 454.)
Randolph ..... Mar. 1 to Nov. 15
(P. L. 1911, c. 198.)
Richmond ..... except Nov. 1 to Nov. 15
(P. L. 1915, c. 569.)
Robeson ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 376.)
Rockingham ..... Feb. 1 to Nov. 15
(P. L. 1911, c. 756; P. L. 1915, c. 560.)
Rowan ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 591.)
Rutherford ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Sampson ..... Feb. 1 to Nov. 1
(P. L. 1917, c. 521.)
Scotland ..... except Nov. 1 to Dec. 1
(P. L. 1917, c. 57.)
Stanly ..... Feb. 1 to Dec. 1
(1909, c. 630.)
Stokes ..... Feb. 15 to Dec. 15
(P. L. 1917, c. 588.)
Surry ..... closed until Jan. 15, 1922
(P. L. 1917, c. 47.)
Swain ..... Jan. 15 to Oct. 15
(P. L. 1915, c. 772.)
Transylvania ..... Feb. 1 to Nov. 15
(P. L. 1911, c. 677.)

Union ..... Jan. 15 to Dec. 15
(1907, c. 703.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 225; P. L. 1917, c. 552.)
Warren ..... Mar. 1 to Dec. 1
(P. L. 1915, c. 137; P. L. 1917, cc. 298, 348.)
Washington ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Watauga ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Wayne ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Wilkes ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Wilson ..... Mar. 1 to Nov. 15
(Rev., s. 1885.)
Yadkin ..... Mar. 1 to Nov. 1
(Rev., s. 1885.)
Yancey ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 136.)

§ 2118. Dove, robin, and lark.—The close season for each year during which no dove, robin, or lark shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be, as to the several counties specified, as follows:

Alamance .....Dove..... Mar. 1 to Nov. 15
(1909, c. 715; P. L. 1911, c. 85.)
Robin ..... Apr. 1 to Nov. 15
(P. L. 1913, c. 560.)
Lark ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Alexander ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Alleghany .. Dove and lark .. Mar. 1 to Nov. 1
(Rev., s. 1886.)
Robin ..... Mar. 1 to Oct. 15
(P. L. 1913, c. 560.)
Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474; P. L. 1919, c. 165.)
Ashe ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Avery ..... No open season
(P. L. 1917, c. 555.)
Beaufort ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Bertie ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Bladen ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Brunswick ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Buncombe ..... Jan. 15 to Nov. 1
(P. L. 1917, c. 658.)
No open season for robin.
(P. L. 1913, c. 816.)
Burke ..... Feb. 15 to Dec. 1
(1909, c. 675.)
Cabarrus ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Caldwell ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Camden ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Carteret ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Caswell ..... Mar. 1 to Nov. 15
(P. L. 1915, c. 129.)
Catawba ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Chatham ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Cherokee ..Dove and robin ..Feb. 15 to Nov. 15
(P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.)
Lark ..... Mar. 1 to Nov. 15
(Rev., s. 1886.)
Chowan ..... Mar. 1 to Dec. 1
(P. L. 1913, c. 591.)
Clay ..... Feb. 15 to Nov. 25
(P. L. 1913, c. 206; P. L. 1917, c. 417.)
Cleveland ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Columbus ..Dove ..... Apr. 1 to Nov. 1
(P. L. 1917, c. 394.)
Robin and lark ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Craven ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Cumberland ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Currituck ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Dare ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Davidson ..... Apr. 1 to Oct. 15
(Rev., s. 1886.)
Davie ..... Feb. 20 to Nov. 20
(P. L. 1917, c. 422.)
Durham ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Edgecombe ..Dove ..... Jan. 1 to July 15
(1909, c. 511.)
Robin and lark ..... Mar. 1 to Nov. 15
(Rev., s. 1886.)
Forsyth ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Franklin ..Dove and lark .... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Robin ..... No open season
(P. L. 1913, c. 816.)
Gaston ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Gates ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Granville ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Greene ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Guilford ..... Mar. 1 to Nov. 15
(1907, c. 345.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Robin ..... No open season
(P. L. 1913, c. 816.)
Harnett ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Haywood ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Henderson ..... Apr. 1 to Nov. 15
(Rev., s. 1886.)
Hertford ..Dove and lark .... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Robin ..... No open season
(P. L. 1913, c. 816.)
Hoke ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)

Hyde ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Iredell ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Jackson ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Johnston ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Jones ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Lee ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Lenoir ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Lincoln ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L., Ex. Sess, 1913, c. 75; P. L. 1915, c. 92.)
McDowell ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Macon ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Madison ..... Feb. 1 to Nov. 15
(1907, c. 104.)
Martin ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Mecklenburg ..... Jan. 20 to Dec. 1
(P. L. 1915, c. 562.)
Robin ..... No open season
(P. L. 1913, c. 816.)
Mitchell ..... No open season
(P. L. 1917, c. 555.)
Montgomery ..... Jan. 26 to Nov. 25
(P. L. 1915, c. 564.)
Nash ..Dove and lark ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Robin ..... No open season
(P. L. 1913, c. 591.)
New Hanover ..... Feb. 15 to Nov. 15
(P. L. 1913, c. 558.)
Northampton ..Dove and lark Feb. 15 to Nov. 1
(Rev., s. 1886.)
Robin ..... Apr. 1 to Nov. 1
(P. L. 1913, s. 816.)
Onslow ..Dove and robin .. Mar. 15 to Oct. 15
(P. L. 1915, c. 272.)
Lark ..... No close season
(Rev. s. 1886.)
Orange ..Robin and lark .... Feb. 1 to Nov. 15
(P. L. 1919, c. 216.)
Pamlico ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Pasquotank ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Pender ..... Lark ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Dove and robin ..... Jan. 1 to Dec. 1
(P. L. 1915, c. 150.)
Perquimans ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Person ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Pitt ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Polk ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Randolph ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Richmond ..... Jan. 26 to Nov. 25
(P. L. 1915, c. 564.)
Robeson ..... Mar. 2 to Nov. 15
(P. L. 1917, c. 376.)
Rockingham ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Rowan ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 591.)
Rutherford ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Sampson ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Scotland ..... Dove ..... Feb. 15 to Nov. 20
(P. L. 1913, c. 610; P. L. Ex. Sess. 1913, c. 175.)
Robin and lark ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Stanly ..... Feb. 1 to Dec. 1
(1909, c. 630.)
Stokes ..... Jan. 15 to Dec. 15
(P. L. 1917, c. 588.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Transylvania ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Tyrrell ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Union .... Dove and lark.... Jan. 15 to Dec. 15
(1907, c. 703.)
Robin ..... no open season
(P. L. 1913, c. 816.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake.... Dove and lark .... Mar. 1 to Nov. 15
(P. L. 1913, c. 225; P. L. 1917, c. 552.)
Robin ..... Mar. 1 to Nov. 15
(1909, c. 688.)
Warren ..... Feb. 1 to Aug. 1
(Rev., s. 1886.)
Washington ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Watauga ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Wayne ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Wilkes ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Yadkin ..... Mar. 1 to Nov. 1
(Rev., s. 1886.)
Yancey ....Mar. 1 to Nov. 1
(Rev., s. 1886.)

§ 2119. Pheasant.—The close season for each year during which no pheasant shall be shot, killed, wounded, or in any manner captured or taken, shall be, as to the several counties specified, as follows:

Alleghany ..... Mar. 1 to Oct. 15
(P. L. 1913, c. 560.)
Ashe ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Avery ..... No open season
(P. L. 1917, c. 555.)
Buncombe ..... Jan. 15 to Nov. 14
(P. L. 1917, c. 658.)
Burke ..... Feb. 15 to Dec. 1
(1909, c. 675.)
Caldwell ..... Jan. 20 to Nov. 20
(P. L. 1911, c. 8.)
Caswell ..... Mar. 1 to Nov. 15
(P. L. 1915, c. 129.)

Chatham ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Cherokee ..... Feb. 15 to Nov. 15
(P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.)
Chowan ..... Mar. 1 to Dec. 1
(P. L. 1913, c. 591.)
Clay ..... Feb. 15 to Nov. 25
(P. L. 1913. c. 206; P. L. 1917, c. 417.)
Davidson ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Davie ..... Feb. 20 to Nov. 20
(P. L. 1917, c. 422.)
Forsyth ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Franklin ..... No open season
(P. L. 1917, c. 399.)
Guilford ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Haywood ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 566.)
Henderson ..... Jan. 1 to Nov. 1
(Rev., s. 1887; P. L. 1919, c. 404.)
Iredell ..... No open season
(1917, c. 82.)
Lincoln ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 22.)
Macon ..... except Dec. 1 to Feb. 1
(P. L. 1919, c. 45.)
Madison ..... Feb. 1 to Nov. 15
(1907, c. 104.)
Mecklenburg ..... Jan. 20 to Dec. 1
(P. L. 1915, cc. 562. 758; P. L. 1917, c. 495.)
Mitchell ..... No open season
(P. L. 1917, c. 555.)
Montgomery ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Moore ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Orange ..... No open season
(1917, c. 82.)
Polk ..... Feb. 15 to Dec. 1
(1909, c. 590.)
Randolph ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Richmond ..... Mar. 1 to Nov. 20
(1913, c. 610.)
Robeson ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 376.)
Rockingham ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Rowan ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 591.)
Scotland ..... Feb. 15 to Nov. 20
(P. L. 1913, c. 610; P. L., Ex. Sess. 1913, c. 175.)
Stanly ..... Feb. 1 to Dec. 1
(1909, c. 630.)
Stokes ..... Jan. 15 to Dec. 15
(P. L. 1917, c. 588.)
Surry ..... Closed until Jan. 15, 1922
(P. L. 1917, c. 47.)
Swain ..... Jan. 15 to Oct. 15
(P. L. 1915, c. 772.)
Transylvania ..... Mar. 1 to Nov. 1
(1907, c. 679.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 1
(1909, c. 723.)
Warren ..... Mar. 1 to Nov. 1
(P. L. 1911, c. 61; P. L. 1913, c. 560; P. L., Ex. Sess. 1913, c. 256.)
Watauga ..... Closed until 1922
(P. L. 1917, c. 469.)
Wilkes except Thanksgiving Day .....
..... Feb. 10 to Dec. 1
(P. L. 1913, c. 77; P. L. 1917, c. 157.)
Yadkin ..... except Nov. 1 to Nov. 15
(1907, c. 358.)
Yancey ..... Jan. 1 to Nov. 1
(P. L. 1915, c. 136.)

§ 2120. Woodcock.—The close season for each year during which no woodcock shall be shot, killed, wounded, or in any manner captured or taken, shall be, as to the several counties specified, as follows:

Alamance ..... Mar. 1 to Nov. 15
(1909, c. 715; P. L. 1911, c. 85.)
Anson ..... Jan. 20 to Nov. 20
(P. L. 1917, c. 474; P. L. 1919, c. 165.)
Avery ..... No open season
(P. L. 1917, c. 555.)
Bladen ..... Feb. 1 to Nov. 1
(P. L. 1911, c. 123.)
Brunswick ..... Jan. 1 to Sept. 1
(Rev., s. 1888.)
Carteret ..... Mar. 1 to Nov. 1
(P. L. 1915. c. 682.)
White Oak township .... Feb. 1 to Aug. 1
(P. L. 1915, c. 682.)
Caswell ..... Mar. 1 to Nov. 15
(P. L. 1915, c. 129.)
Chatham ..... Mar. 1 to Nov. 15
(P. L. 1911, c. 129.)
Cherokee ..... Mar. 1 to Nov. 1
(Rev., s. 1888.)
Chowan ..... Mar. 1 to Dec. 1
(P. L. 1913, c. 591.)
Clay ..... Feb. 15 to Nov. 25
(P. L. 1913, c. 206; P. L. 1917, c. 417.)
Craven ..... Feb. 1 to Nov. 1
(1905, c. 183.)
Davie ..... Feb. 1 to Nov. 20
(P. L. 1917, c. 422.)
Edgecombe ..... Mar. 1 to Nov. 1
(Rev., s. 1888.)
Halifax ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Henderson ..... No open season
(Rev., s. 1888.)
Jones ..... Feb. 1 to Nov. 1
(1905, c. 183.)
Lincoln ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L. Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.)
Mecklenburg ..... Jan. 20 to Dec. 1
(P. L. 1915, c. 562.)
Mitchell ..... No open season
(P. L. 1917, c. 555.)
Montgomery ..... Jan. 25 to Nov. 25
(P. L. 1917, c. 564.)
Orange ..... Feb. 1 to Nov. 15
(1909, c. 543; P. L. 1919, c. 216.)
Pender ..... Jan. 1 to Dec. 1
(P. L. 1915, c. 150.)

Randolph ..... Mar. 1 to Nov. 15
(P. L. 1911, c. 198.)
Richmond ..... Jan. 25 to Nov. 25
(P. L. 1915, c. 564.)
Robeson ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 376.)
Rowan ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 591.)
Stanly ..... Feb. 1 to Dec. 1
(1909, c. 630.)
Stokes ..... Jan. 15 to Dec. 15
(P. L. 1917, c. 588.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 1
(P. L. 1913, c. 225; P. L. 1917. c. 552.)
Warren ..... Mar. 1 to Dec. 1
(P. L. 1915, c. 137; P. L. 1917, cc. 298, 348.)

§ 2121. Snipe, shore birds, other game birds.—The close season for each year during which no snipe, shore birds, or other game birds as indicated shall be shot, killed, wounded, or in any manner captured or taken, shall be, as to the several counties specified, as follows:

Alamance ....Ducks ..... Apr. 1 to Nov. 15
(P. L. 1913, c. 560.)
Other game birds ..... Mar. 1 to Nov. 15
(1909, c. 715; P. L. 1911, c. 85.)
Anson ....Any game bird, i. e., quail, snipe, woodcock, dove, robin and meadow lark ..... Jan. 20 to Nov. 20
(P. L. 1919, c. 165.)
Avery ..... No open season
(P. L. 1917, c. 555.)
Beaufort ....Summer duck .. Feb. 1 to Sept. 15
(1907, c. 384.)
Bladen ....Wild duck—Colly, Cypress creek, French creek and Turnbull townships ..... Feb. 1 to Dec. 1
(1909, c. 418.)
Brunswick .....Snipe and shore birds ..... Feb. 1 to Aug. 1
(1909, c. 757.)
Carteret ....Snipe ..... Mar. 1 to Dec. 1
(P. L. 1915, c. 688.)
Other game birds ..... Apr. 1 to Oct. 1
(1907, c. 895; 1909, c. 475.)
Caswell ....Any game birds .. Feb. 1 to Nov. 15
(P. L. 1915, c. 129; 1919, c. 149.)
Cherokee ..... Mar. 1 to Nov. 15
(Rev., s. 1889.)
Chowan ....Any game birds .. Mar. 1 to Dec. 1
(P. L. 1913, c. 591.)
Clay ....Any game birds .... Feb. 15 to Nov. 25
(P. L. 1913, c. 206; P. L. 1917, c. 417.)
Craven ....Wild duck and other water fowl ..... Mar. 1 to Nov. 1
(Rev., s. 1889.)
Summer duck ..... Mar. 1 to Sept. 1
(1909, c. 519.)
Davie ....Any game birds .... Feb. 1 to Nov. 20
(P. L. 1917, c. 422.)
Edgecombe ....Any game birds, not otherwise regulated ..... Mar. 1 to Nov. 15
(Rev., s. 1889.)
Gaston ....Any game birds .. Jan. 25 to Nov. 25
(P. L. 1919, c. 286.)
No open season for mockingbird and bluebird.
(1907, c. 823.)
Granville ....Snipe and other game birds, not otherwise regulated ..... Mar. 1 to Nov. 1
(Rev., s. 1889.)
Guilford ....Snipe duck ..... No open season
(1909, c. 338.)
Any species of duck ..... Mar. 1 to Aug. 1
(P. L. 1911, c. 125.)
Halifax ....Snipe ..... May 1 to Feb. 1
(Rev., s. 1889.)
Any game birds ..... Mar. 1 to Nov. 15
(P. L. 1913, c. 591.)
Henderson ....Any game birds
(Rev., s. 1889; P. L. 1919, c. 404.)
Iredell .....Snipes, ducks and doves ..... Mar. 1 to Nov. 1
(P. L. 1919, c. 480.)
Jones .....Wild duck and other water fowls .....Mar. 1 to Nov. 1
(Rev., s. 1889.)
Lincoln ....Any game birds .. Feb. 1 to Dec. 1
(P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.)
Mecklenburg .....Any game birds ..... Jan. 20 to Dec. 1
(P. L. 1915, c. 562.)
Mitchell ..... No open season
(P. L. 1917, c. 555.)
Montgomery .....Any game birds ..... Feb. 15 to Nov. 25
(P. L. 1919, c. 413.)
Nash ..... Mockingbird and bluebird ..... No open season
(1907, c. 823.)
New Hanover ..... Feb. 1 to Aug. 1
(1909, c. 757.)
Orange ....Any game bird .. Feb. 1 to Nov. 30
(1909, c. 543; P. L. 1919, c. 216.)
Pender ..... Feb. 1 to Aug. 1
(1909, c. 757.)
Richmond ..... Jan. 25 to Nov. 25
(P. L. 1915, c. 564.)
Robeson ..... Mar. 1 to Nov. 15
(P. L. 1917, c. 376.)
Rowan ..... Feb. 1 to Dec. 1
(P. L. 1913, c. 591.)
Stanly ..... Feb. 1 to Dec. 1
(1909, c. 630.)
Stokes ..... Jan. 15 to Dec. 15
(P. L. 1917, c. 588.)
Surry ..... Jan. 1 to Nov. 1
(P. L. 1919, c. 168.)
Vance ..... Mar. 1 to Nov. 15
(1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.)
Wake ..... Mar. 1 to Nov. 1
(P. L. 1913, c. 225; P. L. 1917, c. 552.)
Warren ....Snipe ..... May 1 to Feb. 1
(Rev., s. 1889.)

Art. 5. General Hunting Laws

§ 2122. Hunting on Sunday or at night.—If any person shall hunt or shoot any wild fowl, or game bird, on any day after the hour of sunset, or before the hour of daylight, or shall use any gun other than can be fired from the shoulder, or shall

hunt or shoot wild fowl, birds or game of any kind on Sunday, he shall be guilty of a misdemeanor: Provided, that wild fowl may be hunted after sunset and before daylight and by firelight in that part of Bogue sound in Carteret county west of Sally Bell's shoal. (Rev., s. 3459; Code, s. 2837; 1903, c. 346.)

§ 2123. Hunting wild fowls with aeroplane.—It shall be unlawful to make use of any aeroplane, seaplane, or other kind of air machine in shooting, chasing, pursuing, or harassing wild ducks, geese, swan, or other wild waterfowl in and upon the sounds, rivers, creeks, or bays of the state of North Carolina. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not less than sixty days nor more than six months. (1917, c. 85, s. 12.)

§ 2124. Hunting game birds with fire.—If any person shall hunt wild fowl, or game birds of any kind, with fire, he shall be guilty of a misdemeanor, and upon conviction be fined not less than twenty and not more than fifty dollars, or imprisoned not less than ten days and not more than thirty days. (Rev., s. 3479; Code, s. 2839.)

§ 2125. Hunting deer by firelight.—If any person shall hunt for deer with a gun in the woods in the night-time, by firelight, electric light, flashlight, lantern, torch, or any other artificial light whatsoever or shall kill or catch any wild deer while swimming streams or other bodies of water, the person so offending shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. When more persons than one are engaged in committing the offense of fire-hunting, any one may be compelled to give evidence against all others concerned; and the witness, upon giving such information, shall be acquitted and held discharged from all penalties and pains to which he was subject by his participation in the offense.

This section shall not apply to Currituck county. (Rev., s. 3462; Code, ss. 1058, 1059; R. C., c. 34, ss. 95, 96; 1774, c. 103; 1784, c. 212, ss. 1, 3; 1801, c. 595; 1856-7, c. 24; 1879, c. 92; 1905, c. 388; 1925, c. 194.)

Editor's Note.—By the amendment of 1925 it was made an offense to hunt by "electric light, flash light, lantern, torch, or any other artificial light." It was also provided that the offender should "be fined or imprisoned in the discretion or the court, where the former punishment was from one hundred to five hundred dollars, or imprisonment from sixty days to six months.

§ 2126. Nonresidents hunting otter, muskrats, or mink.—If any person who has not resided within the state two years shall hunt or trap otters, muskrats or minks, or shall sell the hides or skins from these animals in or out of the state, he shall be guilty of a misdemeanor and shall for each offense be fined not less than thirty dollars nor more than fifty dollars. (Rev., s. 3467; 1905, c. 394.)

§ 2127. Hunting without landowner's permission.—If any person shall, without having first obtained permission of the owner, hunt with gun or dogs on the land of another, or if he shall fish or attempt to catch fish from said lands after being forbidden, either personally or by notices written or printed, posted at the courthouse door and at three places on said land, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3480; Code, s. 2831; 1895, c. 147; 1915, c. 271, s. 1.)

Art. 6. Local Hunting Laws

§ 2128. Local by counties: Written permission of landowners required.—In the counties and localities enumerated below, if any person shall hunt with dog or gun upon the land of another without the written consent of the owner of the land he shall be guilty of a misdemeanor and punishable as indicated:

Alexander, fine not more than fifty dollars, or imprisoned not to exceed thirty days.

(P. L. 1911, c. 754.)

Anson, fine not less than ten dollars or not more than fifty dollars, or imprisoned not less than ten days or more than four months.

(P. L. 1917, c. 474; P. L. 1919, c. 165.)

Carteret, Beaufort, Merrimon, Morehead City, Newport townships. In Beaufort and Merrimon, fine not more than ten dollars, or worked on the roads of these townships not more than ten days. In Newport township, fine not more than twenty-five dollars or imprisoned not more than fifteen days.

(1907, c. 747; P. L. 1911, c. 386; P. L. 1913, c. 738.)

Catawba, fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.

Cherokee, forfeit twenty-five dollars and fine or imprisonment in the discretion of the court. Does not apply to hunting foxes or wolves.

(P. L. 1907, c. 452.)

Chowan, in Edentown township, fine not less than one dollar nor more than ten dollars or imprisoned not less than one or more than ten days.

(P. L. 1913, c. 591.)

Clay, fine not less than twenty-five dollars nor more than fifty dollars, or both, at the discretion of the court.

(P. L. 1907, c. 51; P. L. 1919, c. 260.)

Cleveland, fine not more than twenty dollars, or imprisoned not more than thirty days.

(P. L. 1917, c. 426.)

Craven, fine not less than five dollars or more than twenty-five dollars, or imprisoned not more than thirty days.

(Rev., s. 3481.)

Cumberland, punishment as in Craven.

(Rev., s. 3481.)

Currituck, fine not more than ten dollars, or imprisoned not more than ten days.

(Rev., s. 3481.)

Davidson, fine five dollars for each offense.

(P. L. 1907, c. 348.)

Guilford, fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.

(P. L. 1915, c. 578.)

Harnett, fine or imprisonment at discretion of court.

(1907, c. 699; 1909, c. 746.)

Haywood, fine not less than five dollars, or imprisoned, in the discretion of the court.
(P. L. 1915, c. 566.)

Henderson, fine not less than two dollars nor more than twenty-five dollars, or imprisoned not less than five nor more than ten days.
(1907, c. 453.)

Hertford, punishment as in Craven.
(Rev., s. 3481.)

Hoke, penalty of twenty-five dollars or imprisoned not to exceed twenty days.
(P. L. 1915, c. 459.)

Jackson, in Sylva township, fine ten dollars or imprisoned not more than thirty days.
(1909, c. 534.)

Iredell, violation a misdemeanor.
(P. L. 1919, c. 480.)

Jones, punishment as in Craven.
(Rev., s. 3481.)

Lee, Cape Fear township, for nonresident. Fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.
(P. L. 1919, c. 546.)

Lincoln, fine not more than fifty dollars, or imprisoned not more than thirty days.
(P. L. 1913, c. 659.)

Macon, fine not more than ten dollars, or imprisoned in discretion of court, or both.
(P. L. 1915, c. 565.)

Madison, fine not more than fifty dollars, or imprisoned not more than thirty days.
(P. L. 1915, c. 559.)

Martin, Goose Nest, Poplar Point, and Hamilton townships, fine not over five dollars, or imprisonment not over ten days. Cross Roads township, fine or imprisonment in discretion of the court.
(Rev., s. 3481; 1907, c. 338.)

Mecklenburg, fine not more than fifty dollars, or imprisoned not more than thirty days.
(P. L. 1911, c. 543.)

Montgomery, fine not less than ten dollars nor more than fifty dollars, or imprisoned not more than thirty days.
(Rev., s. 3481.)

Nash, fine not less than five dollars nor more than twenty-five.
(Rev., s. 3481.)

Pamlico, fine not less than twenty-five dollars, or imprisoned not more than thirty days, or both, in the discretion of the court.
(P. L. 1919, c. 354.)

Pender, fine not less than five dollars nor more than ten dollars, or imprisoned not more than ten days.
(1909, c. 170.)

Polk, fine not more than fifty dollars, or imprisoned not more than thirty days.
(1909, c. 590.)

Randolph, quail, whole county, fine not more than fifty dollars or imprisoned not over thirty days. Any game, Asheboro and Cedar Grove townships, fine not less than five dollars nor more than ten dollars, imprisoned not more than ten days. Back Bay township, any game, fine not over five dollars, or imprisonment not over ten days.
(Rev., s. 3481; P. L. 1913, c. 379; P. L. 1911, c. 693.)

Richmond in Mineral Springs, Steele and Wolf Pit townships, fine not less than five dollars nor more than fifty, or imprisoned not more than twenty days.
(Rev., s. 3481; 1909, c. 766.)

Robeson, fine not less than five dollars nor more than ten dollars.
(Rev., s. 3481.)

Rowan, punishment as in Craven.
(Rev., s. 3481.)

Rutherford, quail, whole county, fine not more than fifty dollars or imprisoned not more than thirty days. Rutherford township, any game, fine five dollars.
(Rev., s. 3481; P. L. 1917, c. 413.)

Scotland, penalty of twenty-five dollars, or imprisoned not more than twenty days. Does not apply to hunting rabbits.
(P. L. 1917, c. 57.)

Stokes, fine not less than five dollars nor more than twenty-five dollars for each offense.
(P. L. 1917, c. 588.)

Swain, for quail, fine not less than five dollars nor more than ten dollars, or imprisoned not exceeding ten days for each offense.
(P. L. 1915, c. 772.)

Transylvania, fine not less than five dollars nor more than one hundred dollars, or imprisoned in the discretion of the court.
(1907, c. 842.)

Union, fine not more than fifty dollars, or imprisoned not more than thirty days for each offense.
(1907, c. 703.)

Wayne, fine not less than five dollars nor more than ten dollars for each offense.
(Rev., s. 3481.)

Wilkes, in certain sections south of Wilkesboro, fine not less than one dollar nor more than twenty-five dollars, or imprisoned not more than thirty days, or both, in the discretion of the court.
(P. L. 1913, c. 591.)

Yadkin, fine not more than five dollars or less than two dollars, or imprisoned not more than ten days or less than five days.
(1909, c. 612.)

Yancey, fine not less than twenty-five dollars nor more than fifty dollars for each offense, or imprisoned at the discretion of the court.
(P. L. 1915, c. 136; 1919, c. 412.)

§ 2129. Local by counties: Bag limit.—In the counties enumerated below the various kinds of game and birds specified allowed to a hunter are as follows:

Beaufort, quail, partridges, ruffed grouse, pheasant, fifteen a day combined. Fine not more than twenty-five dollars, or imprisoned not more than twenty-five days. (1913, c. 430.)

Bertie, quail, ten a day; wild turkeys, three a day. Fine or imprisoned in the discretion of the court. (P. L. 1919, c. 375.)

Brunswick, marsh hens, fifteen a day. Fine five dollars for each offense or imprisoned ten days. (1909, c. 757.)

Buncombe, deer, two a season. Partridges, pheasants or wild doves, twenty-five a day. Fine not exceeding fifty dollars, or imprisoned not more than thirty days. (1907, c. 877; 1909, c. 570.)

Cabarrus, quail, fifteen a day. Fine not less than ten dollars nor more than fifty dollars for each offense. (1907, c. 586.),

Clay, quail, ten per day; three wild gobblers and two turkey hens a season. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1915, c. 271; P. L. 1917, c. 417.)

Cleveland, quail, fifteen a day. Fine not exceeding twenty dollars, or imprisoned not more than thirty days. (P. L. 1917, c. 426.)

Dare, deer, five a season. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1911, c. 187.)

Haywood, deer, two a season; pheasants, one; wild turkeys, one; other birds, fifteen a day. Fine not less than five dollars, or imprisonment, in the discretion of the court. (P. L. 1915, c. 566.)

Henderson, bucks, two a season. First offense, fined twenty-five dollars, or imprisoned in the discretion of the court; second offense, fine of fifty dollars or imprisoned in the discretion of the court, or both. (1909, c. 471; P. L. 1919, c. 404.)

Jackson, bucks, two a season. Fine same as Henderson. (1909, c. 471.)

Jones, quail, twelve a day; deer, one a day. Fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1917, c. 443.)

Lenoir, quail, twenty-five a day for individual or party. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1913, c. 588.)

Lincoln, quail, ten a day. Fine not over fifty dollars, or imprisoned not over thirty days. (P. L. 1913, c. 659.)

Madison, quail, pheasant, grouse, wild turkeys or doves, twenty-five a day. Fine not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 104.)

Mecklenburg, quail, partridge, fifteen a day. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1911, c. 543.)

New Hanover, marsh hens, fifteen a day. Fine five dollars for each offense, or imprisoned for ten days. (1909, c. 757.)

Pamlico, quail, ten a day. Fine not less than twenty-five dollars, or imprisoned not more than thirty days, or both, at the discretion of the court. (P. L. 1919, c. 354.)

Pender, marsh hens, fifteen a day. Fine five dollars, or imprisoned ten days. (1909, c. 757.)

Robeson, fifteen game birds a day; squirrels, ten a day. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1917, cc. 376, 537.)

Surry, quail, ten a day; squirrel, rabbit, woodcock, dove, robin, four a day of each; opossum, two a day. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1919, c. 168.)

Transylvania, deer, three a season; squirrels, five; quail, partridge, twenty a day. Deer, fine not less than twenty-five dollars, or imprisoned, in the discretion of the court. Squirrels and partridges, fine not less than five dollars or more than one hundred dollars, or imprisoned, in the discretion of the court. (P. L. 1911, c. 348; 1907, c. 842.)

Vance, game birds, fifteen a day. Fine not less than five dollars or not more than ten dollars, or imprisoned not less than ten nor more than thirty days. (P. L. 1915, c. 670.)

§ 2130. Local by counties: Exportation of game.—Any person who shall export game and birds of the kinds indicated from the counties specified below shall be guilty of a misdemeanor, punishable by fine not to exceed fifty dollars, or imprisonment not to exceed thirty days, except as otherwise indicated:

Alamance, quail, for sale, until March 8, 1919. (P. L. 1915, c. 563; P. L. 1917, c. 388.)

Alexander, quail, for sale. (P. L. 1911, c. 754.)

Anson, quail, for sale. (P. L. 1915, c. 162.)

Avery, pine or gray squirrel, or any game bird. Fine not more than sixty dollars, or imprisoned not more than thirty days, or both, in the discretion of the court. (P. L. 1913, c. 560.)

Bladen, quail, or wild turkey, for sale. (P. L. 1913, c. 457.)

Catawba, quail, misdemeanor; punished in the discretion of the court. (Rev., s. 3472.)

Chatham, quail, for sale. (P. L. 1915, c. 162.)

Cherokee, quail, pheasant, partridge, dove, robin, snipe, woodcock, or deer. Penalty of twenty dollars; also fined or imprisoned in the discretion of the court. (1907, c. 452.)

Clay, quail, not over twenty-five a season; game birds, not over twenty, to be open to view. (P. L. 1915, c. 271; P. L. 1919, c. 260.)

Craven, deer, woodcock, snipe, dove, wild turkey, or squirrels, until March 6, 1923. Fine not less than twenty-five dollars nor more than fifty, or imprisoned not more than thirty days. (P. L. 1911, c. 589; P. L. 1913, c. 384.)

Cumberland, quail, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not more than twenty days. (P. L. 1915, c. 171.)

Davidson, quail. (P. L. 1915, c. 162.)

Davie, quail, Fine or imprisoned in the discretion of the court. (P. L. 1915, c. 140.)

Duplin, quail, for sale. Fine not less than five dollars nor more than ten dollars for each offense. (P. L. 1917, c. 668.)

Guilford, quail, for sale. (P. L. 1915, c. 162.)

Harnett, quail, Fined, or imprisoned, in the discretion of the court. (1907, c. 699.)

Henderson, quail. Fined, or imprisoned, in the discretion of the court. (P. L. 1911, c. 184.)

Hoke, quail, except nonresident landowner, may carry away quail killed on own land. Penalty twenty-five dollars or imprisonment not to exceed twenty days. (P. L. 1915, c. 459.)

Hyde, Currituck township, deer. Fine not less than ten dollars or more than fifty. (P. L. 1911, c. 131.)

Iredell, quail. Fined or imprisoned in the discretion of the court. (P. L. 1917, c. 459; 1919, c. 480.)

Jackson, quail. Fine ten dollars, or imprisoned not more than thirty days. (1909, c. 534.)

Macon, quail. (P. L. 1915, c. 162.)

Madison, quail, partridge, squirrel, or pheasant. (P. L. 1915, c. 559.)

Mecklenburg, quail. (P. L. 1917, c. 414.)

Montgomery, quail, partridge, pheasant, wild turkey, grouse, or dove, outside of county. Fine not more than twenty-five dollars, or imprisoned

not more than thirty days for each offense. (1907, c. 689.)

Pamlico, fine not less than fifty dollars or imprisoned not more than thirty days, or both, in the discretion of the court. (P. L. 1919, c. 354.)

Pitt, quail. (P. L. 1917, c. 155.)

Randolph, quail. (P. L. 1915, c. 162.)

Robeson, any game bird. (P. L. 1917, c. 376.)

Rockingham, quail. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1919, c. 276.)

Sampson, quail, except nonresident taking away quail killed on his own land. Fine not exceeding ten dollars. (P. L. 1913, c. 245.)

Scotland, quail, except landowners. Penalty of not more than twenty-five dollars, or imprisoned not more than twenty days. (P. L. 1917, c. 57.)

Stanly, any game birds. Fine not less than ten dollars or more than fifty dollars for each offense, or imprisoned not more than thirty days. (P. L. 1911, c. 359.)

Stokes, any game bird, for sale. Fine not less than five dollars nor more than twenty-five dollars. (P. L. 1917, c. 588.)

Surry, any game. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1919, c. 168.)

Union, lark, dove, quail, or partridge. (1907, c. 703; P. L. 1917, c. 416.)

Warren, quail, partridge, wild turkey, woodcock, rabbits, squirrels; except nonresident hunters, allowed to take out twenty-five quail and one wild turkey during one season. Fine not less than ten dollars nor more than fifty dollars, or not more than thirty days imprisonment. (P. L. 1915, c. 137.)

Wayne, bob-white, quail, partridge, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not exceeding twenty days. (P. L. 1915, c. 171.)

Wilson, quail, except nonresident, may carry out of county game killed on own land. Fine not less than five dollars nor more than fifty dollars for each offense. (P. L. 1915, c. 738.)

Yadkin, quail, for sale. Fine not less than five dollars nor nore than ten dollars, or imprisoned not less than ten or more than twenty days for each offense. (1909, c. 698.)

§ 2131. Local by counties: Sale of game.—Any person who shall sell, offer for sale, or have in his possession for sale, any game or birds as indicated in the counties enumerated, shall be guilty of a misdemeanor and punishable by a fine not to exceed fifty dollars, or imprisonment not to exceed thirty days, unless another punishment is specified. (P. L. 1915, c. 563.)

Alamance, quail. (P. L. 1917, c. 388; 1919, c. 423.)

Alexander, quail, except to resident of county for own use. (P. L. 1911, c. 754.)

Anson, quail. (P. L. 1915, c. 162.)

Avery, pine, or gray squirrels, or any game birds. Fine not more than sixty dollars, or imprisoned not over thirty days. (P. L. 1913, c. 560, s. 24.)

Beaufort, quail, or pheasant. Fine not to exceed twenty-five dollars, or imprisoned not more than twenty-five days. (P. L. 1913, c. 430.)

Bladen, quail, or wild turkey. (P. L. 1913, c. 457.)

Brunswick, snipe, woodcock, or summer duck; any wild fowl. (Rev., s. 3479; 1909, c. 577.)

Buncombe, quail, pheasant, wild turkey, or dove. (Rev., s. 3472.)

Catawba, quail, or squirrel, during close season. Fined, or imprisoned, in the discretion of the court. (P. L. 1913, c. 412.)

Chatham, quail. (P. L. 1915, c. 162.)

Cherokee, quail, pheasant, partridge, dove, robin, snipe, woodcock, or deer. Penalty of twenty dollars; also fined or imprisoned, in the discretion of the court. (1907, c. 452.)

Clay, quail. (P. L. 1915, c. 271.)

Craven, deer, woodcock, snipe, dove, wild turkey, or squirrels. Fine not less than twenty-five dollars nor more than fifty dollars, or imprisoned more than thirty days. (P. L. 1911, c. 589; P. L. 1913, c. 384.)

Cumberland, quail, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not more than twenty days. (P. L. 1915, c. 171.)

Dare, wild fowl. (Rev., s. 3477.)

Davidson, quail. (P. L. 1915, c. 162.)

Davie, quail. Fined or imprisoned, in the discretion of the court. (P. L. 1915, c. 140.)

Durham, quail, except landowner. (P. L. 1913, c. 292.)

Forsyth, quail, partridge, bob-white, snipe, woodcock, or other game birds. (P. L. 1917, c. 677.)

Granville, quail, or partridge. Fine not less than five dollars nor more than twenty dollars. (P. L. 1917, c. 598.)

Guilford, quail. (P. L. 1915, c. 162.)

Harnett, quail. Fine or imprisonment, in the discretion of the court. (1907, c. 699.)

Haywood, deer, or hide of deer. Fine not less than five dollars, or imprisoned, in the discretion of the court. (P. L. 1915, c. 566.)

Henderson, any game, misdemeanor. (P. L. 1919, c. 404.)

Iredell, quail. Fine or imprisonment, in the discretion of the court. (P. L. 1917, c. 459; P. L. 1919, c. 480.)

Macon, quail. (P. L. 1915, c. 162.)

Madison, quail, partridge, squirrel, rabbit, or pheasant. (P. L. 1915, c. 559.)

Mecklenburg, quail. (P. L. 1917, c. 414.)

Montgomery, quail, partridge, pheasant, wild turkey, goose, or dove, outside of county. Fine of not more than twenty-five dollars or imprisoned not more than thirty days for each offense. (1907, c. 689.)

Moore, quail, or wild turkey. Fine of not more than thirty dollars and also a penalty of twenty dollars. (P. L. 1911, c. 130.)

New Hanover, any game bird and squirrel. (Rev., s. 3477; P. L. 1913, c. 558; P. L. 1917, c. 677.)

Orange, quail, except landowner, killed on his own land. (P. L. 1913, c. 292.)

Pamlico, out of county, fine not less than twenty-five dollars, or imprisoned not more than thirty days, or both, in the discretion of the court. (P. L. 1919, c. 354.)

Pasquotank, quail. Fine not less than five dollars nor more than ten for each offense. (P. L. 1913, c. 560.)

Pender, Rockypoint township, partridge, quail, woodcock, robins, doves, wild turkeys, or squirrels. Fine not more than ten dollars, or imprisoned not more than twenty days. (P. L. 1915, c. 150.)

Pitt, quail. (P. L. 1917, c. 155.)

Randolph, quail. (P. L. 1915, c. 162.)

Robeson, any game birds. (P. L. 1917, c. 376.)

Rockingham, quail. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1919, c. 276.)

Rowan, quail. (P. L. 1913, c. 591.)

Rutherford, quail. (P. L. 1913, c. 556.)

Sampson, quail. Fine not exceeding ten dollars. (P. L. 1913, c. 245.)

Stanly, quail. Fine not less than ten dollars nor more than fifty for each offense. (P. L. 1917, c. 516.)

Surry, any game. Fine not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1919, c. 168.)

Swain, quail, squirrels. Fine not less than five nor more than ten dollars. (Rev., s. 3472; P. L. 1919, c. 381.)

Transylvania, squirrels, not more than two a day. Fine not less than five nor more than one hundred dollars, or imprisoned, in the discretion of the court. (1907, c. 842; P. L. 1911, c. 193.)

Union, lark, dove, quail, or partridge. (1907, c. 703; P. L. 1917, c. 416.)

Vance, quail, woodcock, wild turkey, any game bird of market value. Fine of not less than five dollars nor more than ten, or imprisoned not more than thirty days. (P. L. 1915, c. 670.)

Wake, quail, partridge, or wild turkey. (P. L. 1913, c. 225.)

Warren, quail, partridge, or woodcock, wild turkeys, rabbits, or squirrels, except nonresident hunters, may take away twenty-five quail and one turkey each season. (P. L. 1915, c. 137.)

Wayne, bob-white, quail, partridge, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not to exceed twenty days. (P. L. 1915, c. 171.)

Wilkes, quail, partridge, pheasant, or goose. Penalty of ten dollars. (P. L. 1913, c. 77.)

Wilson, quail, except nonresident may carry out of county game killed on own land. Fine not less than five dollars nor more than fifty. (P. L. 1915, c. 738.)

Yadkin, quail. (P. L. 1917, c. 132.)

Editor's Note.—For an act prohibiting sale of squirrels in Swain, Jackson, Clay, Cherokee, Graham, Buncombe, Haywood, Henderson and Transylvania, see Public Laws of 1935, chapter 107.

§ 2132. Local by counties: Bird dogs running at large.—It shall be unlawful for the owner or any person having the care of any pointer or setter dog to permit the same to run at large unmuzzled during the breeding season of quail, namely, from April the first to September first of any year. When any pointer or setter dog shall be found ranging unmuzzled in the field or woods it shall be prima facie evidence that the owner of such pointer or setter dog has violated the provisions of this section, and upon conviction such owner or his agent shall be deemed guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not longer than thirty days.

This section shall apply only to the counties of Davidson, Durham, Greene, Guilford, Forsyth, Iredell, Johnston, Moore, Transylvania and Yancey. (1909, c. 775.)

§ 2133. Local by counties: Netting quail.—Any person who shall net or trap any quail or partridge in the counties specified below, shall be guilty of a misdemeanor, and punishable as indicated:

Brunswick, except on own land. Punished in the discretion of the court. (Rev., s. 3468.)

Burke, except on own land. Punished in the discretion of the court. (Rev., s. 3468.)

Davie, fined or imprisoned, in the discretion of the court. (P. L. 1917, c. 422.)

Granville, fined not less than five dollars nor more than twenty dollars. (P. L. 1917, c. 598.)

Guilford, fined not more than five dollars for each bird captured in violation of law. (1907, c. 345.)

Lincoln, fined not more than fifty dollars, or imprisoned not more than thirty days. (P. L. 1913, c. 659.)

Madison, except on own land. Punishable in the discretion of the court. (Rev., s. 3468.)

McDowell, fined or imprisoned, in the discretion of the court. (1907, c. 886.)

New Hanover, punishable in the discretion of the court. (P. L. 1913, c. 400.)

Randolph, except on own land. Punishable in the discretion of the court. (Rev., s. 3468.)

Richmond, except on own land. Punishable in the discretion of the court. (Rev., s. 3468.)

Stokes, except on own land. Punishable in the discretion of the court. (Rev., s. 3468.)

Surry, fined not less than ten nor more than fifty dollars for each offense, or imprisoned not less than ten nor more than thirty days. (P. L. 1917, c. 47.)

§ 2134. Local by counties: Chasing deer.—If any person shall chase deer with dogs in Clay, Graham, Macon, or Swain counties, or in French's Creek, Cypress Creek, Colly, and Turnbull townships, in Bladen county, he shall be guilty of a misdemeanor. In any and all counties of the State, west of Person, Orange, Chatham, Moore, Richmond and Scotland it shall be unlawful to hunt or drive deer with dogs during the open or closed season. (Rev., s. 3460; 1903, c. 591; 1909, c. 418, s. 1; 1931, c. 143, s. 6.)

Editor's Note.—The second sentence of this section is taken from the Act of 1931. Punishment for its violation is provided for in § 2141(qq).

§ 2135. Local by counties: Killing wild fowl for sale.—If any person shall kill, for sale, any wild fowls in the waters of Dare, New Hanover or Brunswick counties between the tenth days of March and November of any year, or ship out of the state between said dates any wild fowl killed in the waters aforesaid, or if any nonresident shall in said counties, or in Currituck county, shoot any wild fowl from any blind, box or battery or float, not on land at the time, he shall be guilty of a misdemeanor and be fined not more than fifty dollars, or imprisoned not more than thirty days. (Rev., s. 3477; Code, s. 2840; 1889, c. 59.)

§ 2135(a) Local by counties; no closed season on foxes in certain counties.—It shall be lawful to hunt, take or kill foxes at any time in Ashe, Avery, Iredell, Lenoir, Henderson and Watauga counties. (1931, c. 143, s. 5; 1933, c. 428.)

Editor's Note.—Public Laws 1933, c. 428, added Henderson to the list of the counties.

§ 2135(b). Local by counties; no closed season on rabbits in certain counties.—It shall be lawful to take, hunt or kill rabbits in Duplin and Bertie counties at any time. (1931, c. 143, s. 5.)

§ 2135(c). Alexander: Killing or taking quail.—It shall be unlawful for any person to shoot, trap, net or in any other way to kill, take or destroy any quail in Miller's Township, Alexander county, for a period of ten years from April 16, 1931.

Any person violating the provisions of section one of this act shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty nor more than seventy-five dollars, or imprisoned in the discretion of the court. (1931, c. 280.)

§ 2136. Brunswick: Killing deer in water.—If any person shall kill by shooting or drowning or knocking in the head any deer while swimming in any waters of Brunswick county, he shall be guilty of a misdemeanor, and be fined not less than five nor more than twenty dollars. (Rev., s. 3463; 1905, c. 413.)

§ 2137. Carteret: Hunting wild fowl at night.—If any person shall hunt or shoot wild fowl by firelight after the hour of sunset and before the hour of sunrise in Carteret county, except in that part of Bogue sound west of Sally Bell shoal, or use for such shooting any other gun than one that can be fired from the shoulder; or if any person shall hunt or shoot wild fowl in Carteret county with or from batteries or sneak boats from the first day of April to the first day of December of any year; or if any person shall hunt wild fowl with batteries or sneak boats, or shoot them therefrom in that part of Bogue sound, Carteret county, west of Sally Bell shoal, at any season, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than two hundred dollars for each offense. Lanterns and other equipment used in fire lighting and found in the possession of persons in the act of going hunting or returning from hunting shall be prima facie evidence that the persons have violated this section. (Rev., s. 3473; 1903, c. 346; 1907, c. 895.)

§ 2138. Currituck: Wild fowl hunting regulated.—If any person shall put bushes or blinds of any kind on their boats or floats of any kind with the intent to decoy or pursue ducks, or shall sail or row or propel a boat in any way after wild fowl in the waters of Currituck sound, for the purpose of forcing them on the wing, or shoot them with rifle or shotgun from any boat while sailing, or shall place any sail, flag or other device upon any land bordering on the water to frighten any wild fowl, or shall leave more than one stationary bush or blind standing in the water between the hours of sunset and sunrise, or shall fail to anchor any decked boat or floathouse or house built over the water and used to live in for the purpose of fishing or hunting wild fowl, in shoal water not more than three hundred yards from the mainland on the west side of Currituck sound, or at some public landing on the east side between the north end of Church's island and the south end of Powell's point, at dark, or shall at sunset fail to take up his decoy and proceed to go to some landing as aforesaid, or shall leave any landing or anchorage before sunrise in the morning for the purpose of hunting or fishing, or shall before sunrise put out any decoys of any kind, or nets, or shall continue to hunt or fish after sunset, or shall between the thirty-first day of March and the first day of November of any year shoot or capture any wild fowl over decoys, or shall between the first day of November of any year and the thirty-first day of March of the next year, on any Wednesday, Saturday or Sunday, hunt, take, kill or capture any wild fowl, or on any of said days shall disturb or rout any raft of wild fowl unless the same be unavoidable in the usual course of navigation, or shall between the first day of November and the fifteenth day of February skiff or ring-shoot any boobies or ruddy duck, or shall between the thirty-first day of March and the first day of November ship out of the county any wild fowl, or shall sail or propel a boat on Sunday for the purpose of locating wild fowl, or if any hired or employed person shall sail or lay around anywhere near any person who may be gunning or fishing to damage his shooting or keep him from shooting, he shall be guilty of a misdemeanor: Provided, that nothing in this section shall prevent any person tending a battery or any person shooting from a bush blind from shooting winged or crippled fowls from his boat while sailing or in motion.

This section shall only apply to Currituck county. (1907, c. 376.)

Editor's Note.—For act excepting law relating to protection of migratory waterfowl in Currituck sound, see note to section 2141(l). For act regulating hunting of migratory waterfowl in Currituck County and creating county game commission, see Public Laws of 1935, c. 160.

§ 2139. Dare: Hunting wild fowl; license and regulation.—In the waters of Dare county north of a line running east and west through the northern end of Roanoke island, shooting wild fowl by a nonresident of the state from blind, battery, box or float is subject to a license tax of twenty-five dollars a year. In waters of county lying south of said line, a license fee of twenty-five dollars a year is required to be paid by each club house, shooting resort or other place of resort for sportsmen, the members and guests of which, without further taxation, shall be entitled to shoot wild fowl afloat within four miles of the club, lodge or resort. In waters south of said line, nonresidents not more than two at a time may shoot wild fowl from a blind, battery, box or float, which is the property of a resident of Dare county and upon which a tax of five dollars a year has been paid.

The license above provided for shall be issued by the clerk of the court of Dare county, and the license taxes imposed shall be paid to him, and he shall pay them to the county treasurer for the benefit of the school fund. Any nonresident shooting wild fowl contrary to the provisions of

this section and any person hunting wild fowl in any manner not authorized by law shall be guilty of a misdemeanor. (Rev., ss. 1877, 1878, 1879, 1880, 3475, 3476; 1897, c. 415; 1899, c. 133, ss. 2, 3; 1901, c. 157.)

§ 2140. Hyde, Pamlico sound: Wild fowl hunting regulated.—If any person shall shoot any wild fowl in the waters of Pamlico sound, in Hyde county, from any box, battery or float, not on land at the time, he shall be guilty of a misdemeanor: Provided, residents of the state may shoot from batteries not on land on Monday, Tuesday, Thursday and Friday of each week, and on no other days. (Rev., s. 3478; 1897, c. 484.)

§ 2141. New Hanover: Selling game evidence of illegal hunting.—If any person shall offer for sale on the market, in New Hanover county, any quail, wild turkeys or ducks between the first day of March and the first day of September it shall be prima facie evidence of his having killed such game out of season. (Rev., s. 3465; 1905, c. 409.)

§ 2141(a). Protection of game in certain parks or reservations.—It shall be unlawful for any person or persons to hunt, trap, capture, willfully disturb, or kill any animal or bird of any kind whatever, or take the eggs of any bird within the limits of any park or reservation in that part of the state of North Carolina situated west of the main line of the Southern Railway running from Danville, Virginia, by Greensboro, Salisbury, Charlotte, and Atlanta, Georgia, for the protection, breeding, or keeping of any animals, game, or other birds, including buffalo, elk, deer, and such other animals or birds as may be kept in the aforesaid park or reservation, by any person or persons either in connection with the government of the United States, or any department thereof, or held or owned by any private person or corporation without the permission or authority of the owner or manager of such association. (Ex. Sess. 1921, c. 6, ss. 1, 4; 1925, c. 193, s. 1.)

Editor's Note.—All of this section beginning with the word "without" in the next to the last line of this section was added by the amendment of 1925. This was the only change effected.

§ 2141(b). Violation of law a misdemeanor.—Any person or persons who without the permission or authority of the owner or manager of such park or reservation shall hunt, trap, capture, willfully disturb, or kill any animal or bird. or take the eggs of any bird of any kind or description in any park or reservation as described in section 2141(a), at any time during the year, shall be guilty of a misdemeanor, and shall be fined or imprisoned in the discretion of the court for each and every offense. (Ex. Sess. 1921, c. 6, s. 2; 1925, c. 193, s. 2.)

Editor's Note.—All of this section beginning with the word "without" in the second line and ending with the word "reservation" in the fourth line was inserted by the 1925 amendment. This was the only change effected.

§ 2141(c). Carrying weapons in parks or reservations.—Any person who shall carry a pistol, revolver, or gun in any park or reservation such as is described in section 2141(a), without having first obtained the written permission of the owner or manager of said park or reservation, shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court, for each and every offense. (Ex. Sess. 1921, c. 6, s. 3.)

Art. 7. North Carolina Game Law of 1927 as Amended

§ 2141(d). Title of Article.—This article shall be known by the short title of "The North Carolina Game Law." (1927, c. 51, s. 1.)

Editor's Note.—This article is apparently superseded by sections 2141(1) et seq., however several of its sections have been amended by Acts 1935.

§ 2141(e). Definitions.—For the purpose of this article the following shall be construed, respectively, to mean:

Commission. State Game Commission.

Warden. State Game Warden.

Person. The plural or the singular as the case demands, including individuals, associations, partnerships and corporations, unless the context otherwise requires.

Take. Whenever it is made lawful to "take" birds or animals, or parts thereof, or birds' nests or eggs, it shall mean the pursuit, hunting, capture or killing of birds or animals or collecting of birds' nests or eggs in the manner, at the time, and by means specifically permitted. Whenever it is made unlawful to "take" birds or animals or parts thereof, or birds' nests or eggs, the word "take" shall include pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting birds or animals, collecting birds' nests or eggs, and all lesser acts, such as disturbing or annoying birds or animals or placing or using any net or other device for the purpose of taking birds or animals, whether or not they result in taking such birds or animals, except that this shall not be construed to prevent field trials and the training of dogs.

Open Season. The time during which birds or animals may be lawfully taken. Each period of time prescribed as an open season shall be construed to include the first and last days thereof.

Closed Season. The time during which birds or animals may not be taken.

Transport. Shipping, transporting, carrying, importing, exporting, receiving or delivering for shipment, transportation, carriage or export.

Common Carrier. Railroad companies, boat lines, express companies, bus lines, and any person transporting persons or property for hire.

Game Animals. Deer, bear, fox, squirrels, and rabbits.

Fur-bearing Animals. Skunk, muskrat, raccoon, opossum, beaver, mink, otter, and wild cat.

Non-Game Animals. All wild animals except game and fur-bearing animals.

Upland Game Birds. Quail, commonly known as bob white or partridge, wild turkey, grouse, and pheasants of all kinds.

Migratory Wild Water Fowl. Anatidae or waterfowl, including brant, wild duck, geese, and swans; migratory wild birds, gruiae or cranes, including little brown, sandhill and whooping cranes, rallidae or rails, including coots, gallinules, sora and other rails, limicolae or shore birds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, plovers,

sand-pipers, snipe, stilts, surf birds, turnstones, willet, woodcock and yellow legs; columbidae or pigeons, including doves and wild pigeons.

Non-Game Birds. All wild birds except upland game birds and migratory game birds. (1927, c. 51, s. 2; 1931, c. 143, s. 9.)

Editor's Note.—The Act of 1931 added the words "of all kinds" at the end of the clause relating to upland game birds.

§ 2141(f). Validity of provisions of this act.—The provisions of this act shall be severally, and if any of its provisions shall be held to be unconstitutional, the decision of the court shall not affect the validity of the remaining provisions of this act. It is hereby declared a legislative intent that this act would have been adopted by the General Assembly had such unconstitutional provisions not been included therein. (1927, c. 51, s. 3.)

§ 2141(g). Creation of State Game Commission.—The Governor, with the advice and consent of the Senate, shall appoint four competent citizens of this state to be and act, with the Director of the Department of Conservation and Development, who is hereby constituted a member ex officio with all the rights and powers of the other members, as a commission to be known as the State Game Commission. The members other than the Director of the Department of Conservation and Development shall be chosen from the geographical divisions of the State and shall hold office for the term of six years. They shall serve without compensation except that they shall be allowed per diem expenses when attending meetings of the commission or when administering the provisions of this act. Of the first members of the commission appointed under this act, two members shall be appointed for terms expiring the thirty-first day of March, one thousand nine hundred and thirty, and two members for terms expiring the thirty-first day of March, one thousand nine hundred and thirty-three. Thereafter such appointments of members shall be for terms of six years. (1927, c. 51, s. 4.)

§ 2141(h). Appointment to fill vacancies.—Upon the death, resignation or removal from office of any person so appointed as aforesaid, the Governor shall appoint a competent person to serve the unexpired term. (1927, c. 51, s. 5.)

§ 2141(i). Place of commission's offices.—The commission shall have its office at the capital and shall hold meetings at such office at such times as the commission may determine, and at its first meeting in each year shall elect one of its members as chairman and another as vice-chairman. (1927, c. 51, s. 6.)

§ 2141(j). Appointment of State Game Warden.—The commission shall appoint a State Game Warden who shall receive a salary fixed by the commission, not exceeding five thousand dollars per annum, payable monthly upon his own requisition. The Warden shall be reimbursed for his actual and necessary traveling expenses not to exceed one thousand five hundred dollars per annum, incurred in the discharge of his official duties when he is away from the place where his office is located, to be paid by proper vouchers. The Warden shall give bond in the sum of ten thousand dollars to be approved by the State Treasurer, conditioned upon his faithful performance of the duties imposed upon him by the provisions of this act. The bond shall be filed with the State Treasurer and the premiums paid from the State game fund. The Warden shall have his office in the offices of the commission at the capital and shall act as secretary of the commission, but shall have no vote in the commission's deliberations. (1927, c. 51, s. 7.)

Editor's Note.—As to abolition of office, see section 2141(j)1.

§ 2141(j)1. Offices of state game warden and fisheries commissioner abolished; new office created.—The office of state game warden and the office of the commissioner of inland fisheries are hereby abolished. The board of conservation and development may appoint a person of scientific training and experience in the propagation and preservation of fish and game, who shall carry out the duties now prescribed for the state game warden and commissioner of inland fisheries, and whose salary shall not exceed three thousand dollars ($3,000.00) per year. (1933, c. 357.)

See 11 N. C. Law Rev., 251.

§ 2141(k). Purposes and duties of commission.—The purposes and duties of the commission are to protect, propagate and preserve the game, fur-bearing animals and protected birds of the State, and to enforce by proper action and proceedings the provisions of this act and of other acts relating to the protection of game. The commission shall collect, classify and preserve all such statistics, data and information as in its judgment will tend to promote the objects of this act, to take charge of and keep all reports, books, papers and documents which shall in the discharge of its duties hereunder, come into its possession or under its control. On the first day of January, one thousand nine hundred and twenty-eight, and each year thereafter, the commission shall make a report to the Governor covering all its transactions including the number and classes of licenses issued in each county, the amount of money received therefrom, and from all other sources, the total amount of money received from all licenses issued and all other sources, of funds on hand to the credit of the State game fund, and such other information as will give a complete report of the enforcement of this act for the two fiscal years immediately preceding the making of such report. (1927, c. 51, s. 8.)

§ 2141(l). Powers of commission; to acquire land.—The commission may acquire, in the name of the State, title to or control of lands within the State which are suitable for the protection and propagation of game and for hunting purposes to be used as hereinafter provided, by purchase, lease, gift, or otherwise, to be known as State Game Lands. The commission may purchase or lease lands from which the ownership of mineral, oil or gas, and the right to mine or drill for the same have been excepted. All purchases or leases shall be made only with the consent of a majority of the commission and any moneys payable as purchase price, consideration or concession therefor, shall be paid from the State game fund. The title to any land so acquired shall be approved

by the Attorney-General and shall be taken in the name of the State, but the entire control of such lands shall be under the direction of the commission. (1927, c. 51, s. 9.)

Editor's Note.—Public Laws of 1935, chapter 486 repealed all inconsistent acts except Public Laws of 1935, chapter 160, relating to the protection of migratory waterfowl in Currituck sound in Currituck county.

§ 2141(m). Establishment of refuges.—Lands to which title has been acquired by the commission or which have been leased, or any part thereof, may be used for the purpose of creating and maintaining State game refuges and hunting grounds, either or both, or for the propagation of game. The commission may also with and by the consent of the State Forester locate State game refuges on State forests. No State game refuge shall be established within ten miles of another State game refuge nor shall a refuge exceed ten miles at its greatest transverse dimension. Each State game refuge shall be surrounded by a well defined fire line, road or other clear strip of land, and by at least one wire at the boundary thereof. On the boundary of each State game refuge shall be posted in conspicuous places not more than one hundred and fifty yards apart notices bearing the following: "State Game Refuge—Hunting Unlawful" and such other information or rules and regulations as the commission may deem advisable. (1927, c. 51, s. 10.)

§ 2141(n). Establishment of auxiliary refuges.—The commission may establish and maintain auxiliary State game refuges for the protection and propagation of game, and maintain public hunting grounds, or lands or waters suitable for purposes where considered advisable by the commission. Suitable lands or waters owned or controlled by individuals, corporations, associations, municipalities, or by State or National government may be used for such purposes, subject to the permission of the proper authorities owning or controlling the same. The hunting rights to such lands or waters shall be conveyed in the form of a lease, by the person or persons having control, to the commission for a period of not less than ten years: Provided, that the commission may at any time upon sixty days' notice to the lessor cancel any lease for auxiliary refuge lands, when in the judgment of the commission the use of such lands or waters is no longer needed or desired: And be it further provided, that in case the owner or owners desire to sell such property, and such sale cannot be consummated subject to said lease of the hunting rights, the lease shall be cancelled by the commission within sixty days after request for such cancellation is filed with the commission, if the principal object of such sale is not to convert to private use the hunting or fishing rights made more valuable through the use of such property as an auxiliary State game refuge. (1927, c. 51, s. 11.)

§ 2141(o). Powers of commission: To make regulations.—The commission may formulate, adopt and post such rules and regulations for the government of lands and waters under its control, and for the protection and propagation of game thereon, as it may deem necessary for their proper use and administration, or as may be established pursuant to agreements with the State Forester and Department of Conservation and Development, or Federal authority, or lessors. Such rules and regulations shall be the law of this State controlling such lands or waters, and a violation of any of the provisions of such rules and regulations shall subject the offender to the payment of fines or to imprisonment as provided for the violation of the provisions of this act. (1927, c. 51, s. 12.)

§ 2141(p). Entry upon refuges.—Any citizen may go upon a State game refuge or an auxiliary State game refuge without firearms or traps or dogs, except during the months of October, November and December: Provided, however, that persons regularly residing on lands included within an auxiliary game refuge may be granted a special written permit by the commission or warden, which may be revoked at any time, to have traps, dogs, or guns in his or her possession on such refuges. In connection with their official duties it is lawful for any member or employee or a duly appointed agent of the commission or the Department of Conservation and Development, or the Federal Forest Service, to go upon a game refuge at any time and in any manner, with or without firearms or traps or dogs. (1927, c. 51, s. 13.)

§ 2141(q). Duty of commission to disseminate information.—The commission shall collect, and disseminate as widely as possible among the farmers and other interested citizenship of the State, all possible information regarding the insectivorous birds and other wild birds and animals of the State, and the Warden shall, to the best of his power, assist farmers and other persons suffering from depredations of wild birds and animals. (1927, c. 51, s. 14.)

§ 2141 (r). Powers of commission: To change open seasons.—The commission shall have and is hereby given full power and authority; to change any open season, within the first and last dates of such open seasons provided by this act for any game bird, game animal or fur-bearing animal, for the State or for any county or district, when special circumstances may make such change desirable; to change the bag limits within those provided in this act when special circumstances may make such changes desirable; to open any county or district to the taking of foxes for their fur by other means than by hunting with dogs; to establish "lay days" or certain days in each week on which migatory wild fowl may not be taken; to change the open season for rabbits and bears in any and all counties and districts of the state to hunting with guns and dogs, or for any other mode of taking irrespective of the first and last dates of such open seasons for bears and rabbits as are herein fixed; but no such change or changes may be made by the commission except upon the written petition of twenty-five (25) or more reputable citizens of this State, or of the county or district to be affected by such change, and after a public hearing, of which notice shall be given by at least two (2) publications, once a week for two (2) weeks, in a daily paper published in each of the cities of Raleigh, Ashville, Charlotte, Elizabeth City, Greensboro, New

Bern, Wilmington and Winston-Salem, where said change affects the entire State; and ten (10) days' notice posted at the court-house door of the county in which such change is asked, and two (2) publications in a newspaper of such county, if a newspaper is published therein, when such change is local. The commission after such public hearing shall act upon such petition as it may deem advisable under the circumstances. When any such change is made the commission shall make an order covering the same, and the order of such change shall be given equal publicity as the above public notice required. The commission shall have the power to close, entirely in the territory affected, the open season for any game bird or game animal in case of a forest fire, the freezing up of most of the open waters frequented by wild fowl, an earthquake or any other natural calamity by reason of which such action may seem desirable, and to reopen such seasons when the conditions warrant such action. (1927, c. 51, s. 15; 1929, c. 278, s. 1.)

Editor's Note.—The Act of 1929 inserted in lines 16 to 21 of this section the words "to change the open season for rabbits and bears in any and all counties and districts of the state to hunting with guns and dogs, or for any other mode of taking irrespective of the first and last dates of such open seasons for bears and rabbits as are herein fixed."

§ 2141(r)1. Department of Conservation and Development may extend closed season on doe deer.—For the necessary protection and propagation of deer the Board of Directors of the Department of Conservation and Development shall have power and authority to extend the closed season on doe deer as provided for in section 2141(ii). Said Board of Directors shall also have power and authority to permit the taking of one doe deer in the bag limit of four in any county where in its opinion the ratio of doe deer to buck deer shall be such as to effect injuriously their progeny: Provided, fifty reputable citizens of the county affected have so petitioned the Department of Conservation and Development and after said Department has fully complied with the terms and provisions as to a public hearing and advertising as required by section 2141(r). (1931, c. 143, s. 3.)

§ 2141(s). Powers of commission: To propagate game.—The commission may acquire, by gift, purchase or capture, wild birds or animals for propagation purposes or for restocking the forests and covers of this State. It may establish and maintain refuges and sanctuaries on lands owned by the State or leased by the commission and propagate wild birds or animals thereon and distribute such birds and animals in the covers of the State, or to private land owners in such sections of the State as show the need of restocking, at its discretion. (1927, c. 51, s. 16.)

§ 2141(t). Powers of commission: To permit killing of game when injurious to agriculture.—The commission shall have power to issue permits to kill any species of birds or animals which may become seriously injurious to the agriculture or other interests in any particular community, or such birds or animals may be captured alive by it or under its direction and planted in other sections of the State for restocking, or may be disposed of in such other manner as it may determine. Any permit issued pursuant to this section shall expire within four (4) months after the date of issuance. (1927, c. 51, s. 17.)

§ 2141(u). Powers of county game commission.—This article shall not be construed to dissolve any game commissions now existing in the several counties, nor to prohibit the creation of game commissions in the several counties, and such commissions now existing and such as may be created shall exist, but supervision of the provisions of this article and the direction of the policies and administration of this article and other acts which may exist for the same purposes as this shall be vested in and abide with the state game commission, and the powers of such county commissions as may exist or may be created shall be of a nature advisory and recommendatory to the state game commission and the exercise of any powers by them shall require the approval of the state game commission. In counties where game commissions are not created by legislative act the game commission of said county shall be composed of the chairman of the board of county commissioners, the clerk of the superior court, and the duly appointed and bonded county game warden as authorized in section 2141(w). (1927, c. 51, s. 18; 1933, c. 422, s. 1.)

Editor's Note.—Public Laws 1933, c. 422, added, as the last sentence of the section, the provision applicable in counties where commissions are not created by legislative act.

§ 2141(v). Powers of Warden: To issue permits.—The Warden may issue a permit, revocable for cause, to any person, authorizing the holder to collect and possess wild animals or wild birds or birds' nests or eggs for scientific, propagation, or exhibition purposes. Before such a permit to take for scientific purposes is issued, the applicant must file written testimonials from two well known ornithologists or zoölogists and pay the sum of one dollar ($1.00) for the permit; but duly accredited representatives of public educational or scientific institutions, or governmental departments of the United States engaged in the scientific study of birds and animals, may be granted such a permit without endorsements or charge or without being required to obtain a hunting license. If the Warden is satisfied of the good faith of the applicant, he shall issue to him a permit which shall fix the date of its expiration and may fix a restriction upon the number and kinds of animals, birds, or birds' nests or eggs to be taken thereunder, but no such permit shall be valid after the last day of the calendar year in which it is issued. Permits to take game animals or game birds during the close season shall not be issued except to a duly accredited representative of a school, college, university, public museum, or other institution of learning, or a representative of the Federal Government engaged in the scientific study of birds and animals or to a duly accredited representative of a State game department or commission to restock the covers of the State which he represents. Specimens of birds or animals legally taken and birds and animals reared in domestication pursuant to the provisions of this act and to regulations of the commission may be bought, sold and transported at

any time by any person holding a valid permit issued in accordance with the provisions of this section. When transported by common carrier or contained in a package, said specimens of any package in which the same are transported shall have clearly and conspicuously marked on the outside the name and address of the consignor and consignee, and an accurate statement of the numbers and kinds of birds or animals, specimens or parts thereof or birds' nests or eggs contained therein, and that such specimens are for scientific or propagation purposes. Each person receiving a permit under this section must file, at the expiration of his permit, with the Warden a report of his operations under the permit, which report shall set forth the name and address of the permittee, the number of his permit, the number of each species of birds, animals, or birds' nests or eggs taken thereunder or otherwise acquired, disposition of the same, names and addresses of persons acquiring the same from the permittee, and number of each species on hand for propagation purposes at the expiration of the permit. The commission is hereby authorized to prescribe from time to time rules and regulations governing the possession, purchase, sale and transportation of birds and animals raised in domestication pursuant to the provisions of this act. (1927, c. 51, s. 19.)

§ 2141(w). Powers of Warden: To employ deputies.—With the approval of the commission, the Warden may employ such Deputy Wardens, refuge keepers, employees and agents as shall be necessary for the proper carrying out of the provisions of this act and with the approval of the commission shall arrange the compensation of such Deputy Wardens, refuge keepers, employees and agents. The Warden shall have general supervision and control over all such Deputy Wardens, refuge keepers and employees, and, under the supervision and direction of the commission, shall enforce all the provisions of this act and any other laws now in force or hereafter enacted for the protection of wild birds and animals, and shall exercise all necessary powers incident thereto. It shall be the duty of the Deputy Wardens, refuge keepers and employees to obey and carry out the instructions and directions of the Warden for the enforcement of this act. (1927, c. 51, s. 20.)

Although a man may have been duly appointed under this section he is not an employee of the State before he has received word of his appointment and accepted it. Birchfield v. Department of Conservation, etc., 204 N. C. 217, 167 S. E. 855.

§ 2141(x). Powers of Warden: To prepare form of license and to execute warrants.—It shall be the duty of the Warden, immediately after his appointment, to prepare forms of hunting licenses and other forms necessary for the use in the administration of the provisions of this act and to properly distribute them to the officers and persons required to issue licenses or use such forms. The Warden shall cause the hunting license accounts of officers and persons issuing licenses to be examined and audited at least once during each year and shall require such officers or persons promptly to pay to him in accordance with the provisions of this act all moneys received by them from the sales of hunting licenses.

The Warden and each of his deputies shall have power to execute all warrants issued for violation of this act and to serve subpœnas issued for examination, investigations, or trial of offenders against any of the provisions of this act: to make search after having first obtained proper warrant therefor, of any place or thing which such Warden has cause to believe contains wild birds or animals or any parts thereof, or the nests or eggs of birds possessed in violation of law; to seize wild birds or animals or parts thereof, or nests, or eggs of birds killed, captured, or possessed in violation of law, or showing evidence of illegal killing; to seize and confiscate all instruments or devices illegally used in taking wild birds or animals and to hold the same to be disposed of as provided in this act; to arrest without warrant any person committing a violation of this act in his presence, and to take such person immediately before a court having jurisdiction for trial or hearing; and to exercise such other powers of peace officers in the enforcement of the provisions of this act, or of judgments obtained for violation thereof, as are not herein specifically conferred. (1927, c. 51, s. 21.)

§ 2141(y). Powers of Warden: To dispose of seized game and devices.—All game birds and the edible portions of game animals seized under the provisions of this act shall be disposed of by the Warden or under his direction, by gift to hospitals, charitable institutions, or almhouses within the State. Non-game birds or parts thereof and the plumes or skins of wild birds or birds of foreign species shall be disposed of by the Warden by gift to scientific and educational institutions within the State, or may be retained by him for use of the commission, or in his discretion they may be destroyed. The Warden shall take a receipt from the donee for any such gift and file such receipt in his office, and he shall keep a permanent record of such gifts. The heads, antlers, horns, hides, skins, or feet, or parts of any game or fur-bearing animal, seized under the provisions of this act, if the person from whom the same were seized is convicted of violating any of the provisions of this act, or if the owner thereof is unknown, may be sold for cash by the Warden, or under his direction, at public auction to the highest bidder. Notice of the time and place of such sale, together with a description of the articles to be sold, shall be given by the Warden or under his direction in such manner as he may determine to be best calculated to bring the best price therefor: Provided, that if the property seized is perishable that same may be disposed of by the Warden immediately. The Warden or his deputies authorized to make the sale shall issue to the purchaser a certificate stating that the purchaser has the legal right to be in possession of the articles bought, and any one so acquiring said article or articles from the State, other than the person from whom they were seized, shall have the right to possess the same. If the person from whom any of said articles were seized be acquitted of the charge of violating any of the provisions of this act the article so seized, unless it be an instrument or device the use of

which is prohibited by this act, or money derived from the sale thereof if it was perishable property, shall be returned to him. No officer shall be liable for any damage on account of any search, examination, seizure, or sale as herein provided. It shall be, and is hereby made, the duty of each deputy game warden to make a full and complete report to the Warden of all property by him confiscated because of a violation of the game laws of this State, showing in detail a description of the property, the person from whom it was confiscated, the price received therefor upon public sale, and the disposition of the money. The Warden shall keep in his office a permanent record showing all property confiscated by him or any of his deputies, and the disposition made thereof under the provisions of this act. (1927, c. 51, s. 22.)

§ 2141(z). Officers constituted deputy game wardens.—All sheriffs, deputy sheriffs, police officers, forest wardens, park patrolmen, refuge keepers and constables are hereby made ex officio deputy game wardens, and it shall be their duty to aid in the enforcement of this law. In addition to fees to which he may be entitled under the general law of this State any ex officio deputy game warden shall receive the sum of five dollars ($5.00) in any case involving a violation of this act in which he secures the evidence upon which the conviction was obtained, which shall be assessed against the defendant and paid by such defendant as a part of the cost in case of conviction; if no conviction is procured, no fee shall be taxed against the county or State. (1927, c. 51, s. 23.)

§ 2141(z)1. Police powers of wardens and ex officio wardens. — All game wardens duly appointed by the Department of Conservation and Development and all ex officio game wardens named in the North Carolina Game Law shall be authorized and empowered as fully as is the sheriff and other local officers to enforce local and county laws relating to the open and closed seasons to hunt or protect red and grey foxes. (1931, c. 143, s. 5.)

§ 2141(aa). Warden, deputies and refuge keepers constituted special forest wardens.—The Warden, deputy wardens and refuge keepers are hereby made ex officio Special Forest Wardens and charged with the duty of reporting to Forest Wardens, all infractions of the forest fire laws and to assist Forest Wardens in extinguishing forest fires, and generally enforcing the laws and regulations for the preservation of the forests. (1927, c. 51, s. 24.)

§ 2141(bb). Payment to state treasurer of license fees.—The warden shall promptly pay to the state treasurer all moneys received by him from the sale of hunting licenses or from any other source arising through the administration of this article, and the state treasurer shall deposit all such moneys in a special fund to be known as the state game fund and which is hereby reserved, set aside, appropriated and made available until expended as may be directed by the commission in the enforcement of this article, for the purposes of this article, and shall be used for no other purpose. (1927, c. 51, s. 25; 1933, c. 422, s. 2; 1935, c. 374.)

Editor's Note.—The amendment of 1935 omitted the proviso which formerly appeared at the end of this section relating to payment of percentage to the county game commission.

§ 2141(cc). Initial expenses; department of conservation and development authorized to advance funds.—In order to pay the initial expenses, including the purchase of supplies, printing and distribution of licenses and for all other necessary expenses for the enforcement of this act pending receipt of the first year's hunting licenses, the State Treasurer is hereby authorized and directed to advance out of the State appropriation allotted by the General Assembly of nineteen hundred and twenty-seven to the Department of Conservation and Development a sum not to exceed ten thousand dollars. This amount shall be refunded to the account of the Department of Conservation and Development out of the first monies received under "The North Carolina Game Law." All vouchers involving expenditures and the amount so advanced by the Department of Conservation and Development shall be approved by the director of said department. (1927, c. 51, s. 26; 250, s. 4.)

Editor's Note.—While the Act of 1927, ch. 250, sec. 4, purported to repeal § 27 of ch. 51 [2141(dd)], it was obvious that § 26, which corresponds to this section, was the section intended to be replaced. Public Laws 1929 c. 278, s. 2, amended Public Laws 1927, ch. 250, s. 4 to make it conform to this obvious intent.

§ 2141 (dd). License required. — No person shall at any time take any wild animals or birds without first having procured a license as provided by this act, which license shall authorize him to hunt or trap only during the periods of the year when it shall be lawful. The applicant for a license shall fill out a blank application in the form prescribed and furnished by the Warden. Said application shall be subscribed and sworn to by the applicant before an officer authorized to administer oaths in this State, and the persons hereby authorized to issue licenses are hereby authorized to administer oaths to applicants for such licenses. Licenses must be issued by the Clerk of the Superior Court of each county, the Warden, deputy wardens and such other persons as the Warden may authorize in writing. Said applicant, if a resident of this State, shall pay to the officer or person issuing the license the sum of one dollar ($1.00) as a license fee, and the sum of twenty-five cents (25c.) as a fee to the officer or person other than the State Game Warden, for issuing the same, and shall obtain a Resident Hunting License, which shall entitle him to take game birds and animals in the county of his residence, or shall pay to the officer or person issuing the license, the sum of three dollars ($3.00), as a license fee, and the sum of twenty-five cents ($.25) as a fee to the officer or other person other than the State Game Warden, for issuing the same, and shall obtain a resident State hunting license, which shall entitle him to take game birds and animals in counties other than the county of his residence, and in the State at large, as authorized by this act. All persons who have lived in this State for at least six months immediately preceding the making of such application shall be deemed a resident citizen for the purpose

of this act. Said applicant, if a non-resident of this State, or a resident for less than six months, or an alien, shall pay to the officer or person issuing the license fifteen dollars ($15.00) as a license fee and the sum of twenty-five cents (25c.) as a fee to the officer or person other than the State Game Warden for issuing the license, and shall obtain a Non-resident Hunting License which shall entitle him to take game birds and game animals as authorized by this act: Provided, that a non-resident who holds fee simple title to lands in North Carolina, may hunt on such lands by payment of a license fee of five dollars ($5.00) plus twenty-five cents ($.25) for the issuing officer. Such non-resident must make a sworn application to the State Game Warden on forms provided by said Wardens, setting forth the location of such lands, the non-resident's title thereto, and such other information as may be required by the Warden, and if such non-resident be a corporation, then only the non-resident president, the vice-president, the secretary-treasurer, and the directors, not to exceed seven in number, of such corporation, shall be permitted to take out a non-resident landowners hunting license, as herein provided. On and after the first day of August one thousand nine hundred and twenty-nine, any person who shall at any time take fur-bearing animals by trapping, shall take out and shall annually procure a trapper's license, and shall pay therefor the sum of two dollars ($2.00) as a license fee, and the sum of twenty-five cents ($.25) as a fee to the officer or person other than the State Game Warden, for issuing the same, and shall obtain a license which shall permit him to trap in the county of his residence, or, shall pay the sum of three dollars ($3.00) as a license fee and the sum of twenty-five cents ($.25) as a fee to the officer or person other than the State Game Warden, for issuing the same, and shall obtain a license which shall entitle him to trap in the counties other than that of his residence and in the State at large. Said applicant, if a nonresident of this State, or a resident of less than six months, or an alien, shall pay to the officer or person issuing the license, the sum of twenty-five dollars ($25.00) as a license fee, and the sum of twenty-five cents ($.25) as a fee to the officer or person, other than the State Game Warden, for issuing the license, and shall obtain a non-resident trapper's license, which shall entitle him to trap in the State at large. Trapping licenses shall be issued on forms to be provided by the State Game Warden, and shall be distinguished from the general hunting licenses above provided. The manner of taking fur-bearing animals by trapping, shall be as provided in the said North Carolina Game Law, as amended, and the proceeds from the sale of trapping licenses shall be subject to the disposition made in said law, as amended. Any person acting for hire as a hunting guide shall obtain a guide's license, and shall pay therefor a license fee in an amount not to exceed the sum of ten dollars ($10.00), the Board of Conservation and Development being hereby authorized and empowered to provide classifications, and to fix fees within said limit as to class. The Board of Conservation and Development is hereby authorized and empowered to prescribe rules and regulations respecting the duties of guides, to require that guides take an oath to abide by the game laws of the State, and to rescind the license of any guide convicted of violating the game law of the State. The Board of Conservation is hereby authorized and empowered to issue combination licenses for hunting and trapping, and for hunting and fishing, which said combination license may be for an amount less than the total of the trapping and hunting, or hunting and fishing, licenses when purchased separately. Such combination licenses shall show upon the face thereof the amount allocated to hunting and the amount to trapping or fishing, as the case may be, and the amount shown as allocated to fishing, shall be disposed of as by law provided for the funds derived from the sale of fishing licenses, and the amounts shown for hunting and trapping shall be disposed of according to the provisions of this act, as amended. Provided, that the Warden may, upon request, issue a Non-resident License to any Game Warden of the United States or of a State of the United States without the payment of any fees, which license may be used by such warden of the United States, or of a State of the United States, only in the discharge of his official business: provided, that nothing herein shall be construed so as to prevent or prohibit the Boards of County Commissioners in the several counties of the State from levying license fees upon non-resident hunters in addition to the fees prescribed by this act and such moneys as are received from said additional license fees levied in the several counties shall be paid to the treasurers of the respective counties and shall be appropriated and disbursed by said counties for any purposes. Whenever an additional fee is levied by the several counties it shall be the duty of the Warden and those acting under and through him to collect said fees and to pay the same to the Treasurer of the said counties and the issuance of the State hunting license shall in all such cases be evidence of the payment of both State and County fees. (1927, c. 51, s. 27; 1929, c. 278, ss. 3, 7.)

Editor's Note.—Public Laws 1931, c. 315, applicable only to Alleghany County, amended this section by adding thereto: "Provided, no license be required to chase foxes when no game is bagged and the hunting is not done on horseback."

For an act fixing licenses for the seasons of '33-'34 and '34-'35, see Public Laws 1933, c. 422, § 3. Public Laws 1933, c. 157 fixed the law in regard to hunting foxes with dogs in Northampton County. However, this act was repealed by Public Laws 1935, chapter 211.

§ 2141(ee). Form of license.—The form of licenses shall be determined and the license blanks prepared by the Warden and furnished by him to the officers or persons authorized to issue licenses. Each license shall be issued in the name of the Warden and countersigned by the officer or person issuing it. Each licensee shall sign his name in ink on the license issued to him. (1927, c. 51, s. 28.)

§ 2141 (ff). Term and use of license.—Each license shall be void after the first day of August next succeeding the date of its issuance. Each licensee shall have his license on his person at all times when he is taking game animals or birds and shall exhibit the same for inspection to any warden or officer requesting to see it. No person shall alter or loan, change or transfer any li-

cense issued pursuant to the provisions of this act, nor shall any person other than the person to whom it is issued, use the same. (1927, c. 51, s. 29; 1929, c. 278, s. 4.)

§ 2141(gg). Exemption.—Any person who is a resident of this State, and any dependent member of his family under twenty-one years of age, may take game birds and wild animals in the open season for the same, and not contrary to the provisions of this act, on lands owned by such resident, without a license; and a minor member of a family resident of this State, under sixteen years of age, may hunt under the license of his parent or guardian; but such minor must carry said license when so hunting, unless accompanied by said parent or guardian; and a non-resident minor child of any resident of this State may lawfully procure and use the same license required of a resident, when such non-resident child is actually visiting such resident parent: Provided, that a party who leases a farm for cultivation shall not be required to obtain a license to hunt thereon. (1927, c. 51, s. 30.)

§ 2141(gg)1. Non-resident may hunt on own lands without license.—Any non-resident owning in his own right and in severalty one hundred acres or more of land in the State of North Carolina may hunt upon such lands, subject to the provisions and restrictions of the North Carolina Game Law, without being required to purchase a hunting license. (1931, c. 143, s. 8.)

§ 2141(hh). Disposition of license fees.—The license fees provided to be paid in this act shall be remitted by the officers or persons issuing the license on the first Tuesday of each month to the Warden, with a schedule setting forth the name and address of each licensee, the serial number and classification of the license, and the amount paid for each license issued, except that the officer or person issuing licenses shall, before making such remittance, deduct and retain as his fee the amount of fees provided to be paid to him by the provisions of this act for issuing licenses. On or before the first day of May of each year, each officer or person authorized to issue license shall forward to the Warden the stubs of licenses issued by him and all unused licenses, together with a report covering the number of licenses issued and the amount of license money received by him; the Warden shall tabulate the total number of licenses of all kinds issued in the State and the fees received therefor, and he shall include such data in his biennial report. (1927, c. 51, s. 31.)

§ 2141(ii). Open seasons.—For the purpose of fixing the open seasons the state shall be divided into three zones: the western, the central, and the eastern. The western zone shall be composed of the counties of Alleghany, Ashe, Watauga, Avery, Mitchell, Yancy, Buncombe, and Henderson and all other counties lying west of said counties; the central zone shall begin at the eastern boundary of the western zone, extend to and include the counties of Warren, Franklin, Wake, Chatham, Lee, Moore and Richmond; the eastern zone shall begin on the eastern boundary of the central zone and include all counties to the Atlantic Ocean. The open season for taking game animals and game birds, excepting opossum, raccoon, bear, buffalo, elk, squirrel and deer, shall be as follows:

Western Zone—November 15 to January 1.
Central Zone—November 20 to February 20.
Eastern Zone—November 20 to February 1.

The open season on deer as follows:

Western and Central Zones—October 15 to December 15.
Eastern Zone—September 1 to December 15.

The open season on squirrel as follows:

Western Zone—October 1 to November 30.
Central and Eastern Zones—October 1 to December 31.

The open season on opossum and raccoons as follows:

All Zones—November 1 to January 31.

The open season on bear as follows:

Western and Central Zones—October 1 to January 15.
Eastern Zone—Outlawed for 1933.

Provided, that the open seasons in the counties of Halifax, Northampton, Hertford, Person, Martin, Bertie, and Washington shall be as follows:

squirrel—September 15 to February 1.
deer—September 1 to January 1.
quail—November 20 to February 20.
turkey—November 20 to February 20.
raccoon—October 1 to February 1.

No open seasons on the following game animals and birds: beaver, buffalo, elk, doe deer, pheasants and ruffed grouse.

The open and closed season on all migratory wildfowl shall conform with the United States biological survey legislation, irrespective of season as set for them by the North Carolina game laws. (1927, c. 51, s. 32; 1929, c. 278, s. 5; 1931, c. 143, ss. 1, 2, 7, c. 282, s. 1; 1933, c. 422, s. 4.)

Editor's Note.—Public Laws of 1933, c. 422, struck out the section as it formerly appeared and substituted the present section. A comparison of the old with the new is necessary to ascertain the changes. For act closing season on turkey in Guilford County for period of five years, see Public Laws of 1933, c. 169. This act was later repealed by Public Laws 1933, c. 378.

For act fixing open season on squirrel, rabbits and quail in Swain, Jackson, Clay, Cherokee, Graham, Buncombe, Haywood, Henderson and Transylvania and making it unlawful to hunt foxes with dogs only, except during the open season, see Public Laws 1935, chapter 107, as amended by Public Laws 1935, chapter 238.

For local acts and acts applicable only for the latter part of the 1935 season, see Public Laws 1935, chapters 7, 11, 14, 16, 21, 27, 28.

This section should be read in connection with articles 4 and 6 of this Chapter in the light of § 2141(ss).

§ 2141(ii)1. No closed season on skunks. — There shall be no closed season on skunks, and it shall be lawful to hunt, take, kill or destroy them at any time in all counties. (1931, c. 143, s. 5.)

§ 2141(jj). Bag limits.—It shall be unlawful to take in the period of time set opposite each individual name of species in the following table a greater number of each species of bird or animal than is enumerated in the column of the said table headed "Bag Limit."

Name of Species	Period of Time	Bag Limit
Squirrel	In one day	10
Rabbit	.....	....
Deer	In one day	2
Deer	In one season.	4

Name of Species	Period of Time	Bag Limit
Quail	In one day	10
Wild turkey	In one day	2
Wild turkey	In one season	5
Ruffed grouse, mongolian, Chinese and ring-necked pheasants in the aggregate of all kinds	In one day	25
Rails, coots, gallinules in the aggregate of all kinds	In one day	25
Wilson snipe or jack snipe	In one day	25
Dove	In one day	25
Woodcock	In one day	6

Migratory wild fowl:

Ducks—in one day 15

And no person shall have more than thirty in his possession at any one time.

Geese—in one day 4

And no person shall have more than eight in his possession at any one time.

Brant—in one day 8

Sora—in one day 25

The bag limit and open season on dove and all other migratory birds and wild fowl shall be the same as that prescribed by the United States Biological Survey Legislation.

Provided, that no person shall take any squirrel at any time in any public park; that rabbits and squirrels lawfully taken may be bought and sold during the open season and may be possessed for the first five days next succeeding the close of such season; that rabbits may be trapped or hunted without gun at any time; that all animals other than game and fur-bearing animals may be taken in any number at any time; that one female deer shall be lawfully included in the seasons' bag limit of four deer of all kinds; that the setting of steel traps for bear is unlawful; that birds and animals committing depredations may be taken at any time while committing or about to commit such depredations; that the skins of fur-bearing animals lawfully taken may be bought, sold, possessed, and transported at any time; that foxes may be taken with dogs only, except during the open season when they may be taken in any manner; that "Lay Days," or certain days in each week on which migratory wild fowl may not be taken, already established under the laws of the State, shall not be affected by this act; that it shall be unlawful at any time to take any wild deer while swimming or in water to its knees. Game animals and game birds lawfully taken may be possessed during the open season thereof, and the first ten (10) days next succeeding the close of such open season, but a person may not have in possession in any one day more than two deer, two turkeys, and three days' bag limit of other game animals and game birds. Provided, that the bag limits on all migratory wild fowl shall conform with the United States Biological Survey Legislation, irrespective of bag limits as set forth by the present State Game Law. (1927, c. 51, s. 33; 1931, c. 282, ss. 2, 3.)

§ 2141(jj)1. Protection of public hunting grounds by department of conservation and development.—In order to improve hunting, to open to the hunting public lands well stocked with game, and to give landowners some income through game protection and propagation, the state of North Carolina through the department of conservation and development is authorized to recognize, list, and assist the owners in protecting their lands which are a part of public hunting grounds organized under this section of the North Carolina game law subject to the following conditions, stipulations, and such rules as the conservation board may adopt for the regulation of said hunting grounds:

(1) The minimum area recognized under this act is one thousand (1,000) acres;

(2) Owners of lands included in a hunting ground formed under this act must organize, adopt rules and regulations for the operation of said hunting ground, and be recognized by the department of conservation and development before such hunting grounds are put into operation under this section.

(3) The department of conservation and development will list and assist in advertising such public hunting grounds as are formed under this section, subject to such rules and regulations as may be adopted by the board from time to time and in accordance with the North Carolina game law and this section. The department of conservation and development will furnish at cost to the owners of public hunting grounds posters to be used in posting such lands, such poster to state that the lands are posted under this section of the North Carolina game law and in case of withdrawal of recognition by the department such posters shall be removed from the lands effected within ten days after notice to owner or owners;

(4) Owners of public hunting grounds shall require of each and every hunter the prescribed hunting licenses as set forth elsewhere in the North Carolina game law;

(5) The owners of public hunting grounds may require of each and every hunter a per day rate for hunting, rates to be approved by the department of conservation and development, said rates not to exceed four dollars ($4.00). In addition to charges for the privilege of shooting game, landowners may charge a dog hire when landowners furnish dogs, dogs to be furnished only by request of the hunter;

(6) When any group of owners of a public hunting ground organized under this section decide to promote the hunting of certain kinds of game, said kinds of game used for stocking to be propagated in game breeding plants organized and operated under the game and other laws of North Carolina, the owners shall be permitted to charge hunters such fees and rates as are approved by the board of conservation and development;

(7) No hunter is allowed to quit the hunting grounds at the end of the day's or part of a day's hunting without seeing the authority who gave him permission to hunt on said hunting grounds and paying all accounts due said authority;

(8) No construction or interpretation shall be put on this section or any part thereof as to permit the sale of dead game killed in accordance with this section, abrogate the bag limits, time of hunting, open and closed seasons as prescribed elsewhere in the North Carolina game law;

(9) No person shall hunt or discharge firearms

upon any public hunting grounds organized under this section without being accompanied by one of the landowners or a personal representative of one landowner or after securing, on the day of the hunt or day preceding the hunt, written permission to hunt under the authority of this act, said written permission to bear the name in full, age, and address of the hunter, under the penalty of being fined in the courts, upon conviction, not less than twenty-five dollars for each and every offense;

(10) When hunting grounds, or any part thereof, organized and operated under this section, are used for purposes not consistent with the federal, state, and local laws, the department of conservation and development shall withdraw recognition from the area or such parts thereof as are deemed advisable, and report the case to the proper civil officials. (1931, c. 159; 1933, c. 422, s. 5.)

Editor's Note.—The only change effected by the 1933 amendment appears in clause (1). Public Laws 1933, c. 422, changed the minimum area recognized from 3,000 acres to 1,000 acres.

§ 2141(jj)2. Consent in writing to hunt upon another's lands.—It shall be unlawful for any person or persons to hunt with guns or dogs upon the lands of another without first having obtained permission from the owner or owners of such lands, and said permission so obtained may be continuous for one open hunting season only. (1933, c. 422, s. 6.)

This section does not repeal c. 210, Public Laws 1931 relating to Bladen County Game Laws.

§ 2141(kk). Unprotected birds. — English sparrows, great horned owl, Cooper's hawk, sharp-shinned hawk, crows, jays, blackbirds, and buzzards and their nests and eggs may be taken, possessed, bought and sold and transported at any time and in any manner, but such birds may not be killed by the use of poison except under a permit issued by the Warden. (1927, c. 51, s. 34.)

§ 2141(ll). Unlawful possession.—The possession, transportation, purchase or sale of any dead game animals, dead game birds or any parts thereof during the closed season in North Carolina, though said animals, birds, or any parts thereof were taken or killed without the State in the open season in such State, shall be unlawful: Provided, said animals or birds or parts thereof belong to anyone of the families or classes protected by the North Carolina Game Law as amended to date. (1931, c. 143, s. 4.)

§ 2141 (mm). Manner of taking game.—No person shall at any time of the year take in any manner, number, or quantity, any wild bird or wild animal, or take the nest or eggs of any wild bird, or possess, buy, sell, offer or expose for sale, or transport at any time or in any manner any such bird, animals, or part thereof, or any birds' nest or egg, except as permitted by this act; the possession of any game animals, except squirrels and rabbits; or game birds or part of such animals, or game birds in any hotel, restaurant, cafe, market or store, or by any produce dealer in this State shall be prima facie evidence of the possession thereof for the purpose of sale in violation of the provisions of this act; but this provision shall not be construed to prohibit the person lawfully obtaining game from having it prepared in a public eating place and served to himself and guests: Provided, however, that for the purpose of this act any person hiring another to kill aforesaid game animals or game birds and receiving same, shall be deemed buying same, and subject to the penalties of this act. Game birds and game animals shall be taken only in the day time, between half an hour before sunrise and sunset, with a shotgun not larger than number ten (10) gauge, or a rifle, unless otherwise specifically permitted by this act. No person shall take any game animals or game birds or migratory game birds from any automobile, or by aid of or with the use of any jack-light, or other artificial light, net, trap, salt-lick, or poison; nor shall any such jack-light, net, trap, snare, salt-lick or poison be used or set to take any animals or birds; nor shall birds or animals be taken from an airplane, power-boat, sailboat, or any boat under sail, or any floating device towed by a power-boat or sailboat; nor shall any person take any dove, wild turkey or upland game bird on any field or in any cover in which corn, wheat, or other grain has been deposited for the purpose of drawing such birds thereto. A person may take game and wild animals during the open season therefor, with the aid of dogs, unless specifically prohibited by this act. It shall be lawful for organized field trial clubs, or associations for the protection of game, to run trials for dogs at any time: Provided, that no game birds or game animals shall be taken during the closed season by reason thereof. The Board of Conservation and Development shall have, and is hereby given, full power and authority to make regulations defining the manner of taking fur-bearing animals by steel traps, and to prohibit the use of steel traps in any county or districts of the State when it shall appear necessary and advisable by the said Board so to do, after petition and hearing, as provided in section 2141 (r) of the Code. Any person who shall cut down den trees in taking game or fur-bearing animals shall be guilty of a misdemeanor. (1927, c. 51, s. 36; 1929, c. 278, s. 6.)

§ 2141(mm)1. Board of Conservation and Development may license business of propagating game. — Any person desiring to engage in the business of propagating in captivity upland game birds, ducks, and geese or any of them on land of which he is the owner or lessee and selling same pursuant to the provisions of this section, may make application in writing to the Board of Conservation and Development for a license to do so. The Board when it shall appear that such application is made in good faith shall upon the payment of a fee of two dollars, issue to each applicant a license permitting such licensee to propagate such game birds on land of which he is the owner or lessee, the location of which shall be stated in such application and such license; to sell and ship such propagated game birds in the State and from the State alive at any time for breeding or stocking purposes and to take such propagated game birds except quail and wild turkey in any manner and at any time and sell the carcasses for food as hereinafter prescribed: Provided, that propagated upland game birds may be killed by shooting only from November twen-

tieth to February fifteenth, inclusive; and, Provided further, that propagated migratory game birds may be killed by shooting only during the open season for migratory game birds. Each such license shall expire on the thirty-first day of December of the year in which it is issued. Each holder of a game bird propagating license shall keep such license prominently displayed at the place of business specified therein.

Every person holding a game bird propogating license issued by the Board shall keep accurate written records showing the number of game birds of each species propagated, bought, or sold, and the disposition thereof. These records shall be kept permanently on the premises stated in such license and shall be open for inspection by any duly authorized representative of the Board at all reasonable times.

Migratory game birds propagated in accordance with this section shall not be bought or sold for food unless each bird before attaining the age of four weeks shall have had removed from the web of one foot a portion thereof in the form of a "V" large enough to make a well defined mark which shall be sufficient to identify it as a bird propagated in accordance with this section of the North Carolina Game Law. Game birds propagated in accordance with this section may be bought, sold or offered for sale for food only after being tagged with an indestructible metal tag which shall be supplied by the Board.

Common carriers shall receive and transport game birds tagged as aforesaid but to every package containing such propagated game birds shall be affixed a tag or label upon which shall be plainly printed or written the name, address and license number of the person by whom such propagated game birds are shipped and the name and address of the person to whom such propagated game birds are to be transported and number of each kind contained therein. The Board shall be entitled to receive and shall collect for each tag to be affixed to the carcass of each game bird propagated, in accordance with this section, the sum of five cents. The said tags shall remain affixed as aforesaid until the carcasses of such propagated game birds shall be finally prepared for consumption: Provided, that the owner or proprietor of a hotel, restaurant, boarding house, or the manager of a club, may sell a portion of a tagged game bird to a guest, customer, or member, for consumption on the premises.

The proprietor or keeper of a hotel, restaurant or cafe, boarding-house or club, desiring to serve game to his patrons, may make application to the Department of Conservation and Development for a license to do so. The Department, when it shall appear that such application is made in good faith, shall upon the payment of a fee of ten dollars ($10.00) issue to each such applicant a license permitting the holder thereof to buy and possess game birds lawfully tagged, and to serve such game to his patrons for consumption at any time, but only on the premises, the location of which shall be definitely stated in such license and the application therefor. Each such license to serve game birds shall expire on the thirty-first day of December in the year in which it is issued. Each person holding a license to serve game birds shall keep such license prominently displayed at the place of business specified therein. The holder of a license to serve game birds may purchase only game birds tagged in accordance with law. Each holder of a license to serve game birds shall keep accurate written records of each and every purchase, which records shall contain the name and address of the person or corporation from whom such game birds were purchased, the date of each transaction and the number and kind of game birds included in each purchase. These records shall be kept permanently at the place of business specified in the license and shall be open for inspection by any duly authorized representative of the Department at all reasonable times. Each holder of a license to serve game birds shall send a certified copy of these records for the previous calendar year to the Department not later than January fifteenth. The Department shall furnish the forms on which these records are to be kept. (1931, c. 320.)

§ 2141(nn). Unlawful transportation.—No common carrier or employee of such carrier shall, while engaged in such business, transport for the owner any wild animals or birds or any part thereof, or nest or eggs of any bird, nor shall any such carrier or employee knowingly receive or possess the same for shipment for another, unless the person offering the same for shipment is in possession of valid hunting license or collecting permit. A person who is a resident of this State may transport within the State, otherwise than by parcel post, during the open season therefor, game birds and game animals lawfully taken. A person who is a non-resident of the State and a holder of a valid non-resident hunting license, may under a permit issued by the Warden, transport within this State, or from a point within to a point without, otherwise than by parcel post, during the open season therefor, game birds and game animals lawfully taken by him or parts thereof, but he shall not transport out of the State during any one open season more than two male deer and two wild turkeys, or during one calendar week more than two days' bag limit of other game animals and game birds. A person may transport, buy or sell at any time and in any manner non-game animals and the fur of a fur-bearing animal lawfully taken. A person may transport, except by parcel post, and possess at any time and in any manner, the head, antlers, hide, feet or skin, of game animals or game birds lawfully taken. A person may buy and sell at any time the mounted specimens of heads, antlers, hides, and feet of game animals, and the skins of game birds lawfully taken and possessed: Provided, the person selling such specimens has a written permit, issued by the Warden, authorizing him to do so. The State Game Warden, all District Game Wardens, County Game Wardens and Refuge Wardens shall have the power to enter and search any refrigerating plants, refrigerators and ice boxes of all public refrigerating storage plants, meat shops, hotels, restaurants or other public eating places in which such officer, making such search, has reasonable grounds to believe that game taken, killed or stored in violation of the North Carolina Game Law has been

concealed or stored and which will furnish evidence of a violation of such law; and such search may be made without warrant except that no dwelling may be searched without a warrant. (1927, c. 51, s. 37; 1931, c. 143, s. 10, c. 282, s. 4.)

Editor's Note.—This section was amended twice in 1931. The first amendment inserted the words "buy or sell" in the fourth sentence. The other amendment added the last sentence. This amendment seems to be contrary to the constitutional provision prohibiting searches without a warrant (N. C. Const., Art. 1, § 15) and goes much further than provisions for enforcing the Prohibition Law [§ 3411(l)] and the Narcotic Act (§ 6682), both of which require a warrant before seizure. It is conceded that, in the exercise of the police power, a state may regulate such businesses as meat packing, barber shops, etc., and provide for regular inspection of such places to bring about the enforcement of the law. Likewise, health officers may make inspections of places where food is sold to see that requirements of sanitation and cleanliness are observed. But no such inspection is involved in the present amendment, the sole purpose of which seems to be to assist in the enforcement of the game laws. Consequently, the exemption of dwellings from search without a warrant does not save the constitutionality of the amendment, as other buildings are included in the protection against unreasonable searches. See Carroll v. U. S., 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543, 9 N. C. Law Rev. 389, 390.

§ 2141 (nn)1. Transportation of rabbits.—The State-wide Game Law of one thousand nine hundred and twenty-seven is hereby amended so as to permit the shipment of rabbits out of the State during the open season for hunting rabbits. (1929, c. 46, s. 1.)

§ 2141(oo). Packages to be marked.—Any package in which any wild animal or bird or part thereof, or egg or nest of any wild bird, is transported shall have clearly and conspicuously marked on the outside thereof the names and addresses of the consignor and consignee, together with an accurate statement of the number and kinds of animals or birds, or parts thereof, or eggs or nests, contained therein. (1927, c. 51, s. 38.)

§ 2141(pp). Audubon Society dissolved.—The Audubon Society of North Carolina as incorporated originally in chapter three hundred and thirty-seven (337) of the Private Laws of one thousand nine hundred and three, and subsequently in sections one thousand eight hundred and sixty-two to one thousand eight hundred and seventy-four inclusive of the Revisal of one thousand nine hundred and five, and in sections two thousand and eighty-seven to two thousand and ninety-seven inclusive of the Consolidated Statutes of North Carolina of one thousand nine hundred and nineteen, is hereby dissolved and the said acts relating to its incorporation are hereby repealed. Within thirty days (30) after the passage of this act, the Governor shall cause the books and accounts of the said Audubon Society of North Carolina to be audited; immediately thereafter, all of the office supplies, furniture and fixtures, together with all documents, records, accounts, moneys, real estate and other properties belonging to said Audubon Society shall become the property of the commission and the title thereto shall immediately vest in and abide with the commission: Provided, however, that the commission shall pay out of the funds received from the said Audubon Society all sums and fees then due the agents and wardens of said society and shall pay such other indebtedness of the said society as shall be established. (1927, c. 51, s. 39.)

§ 2141(qq). Punishment for violation of article.—Any person who takes, possesses, transports, buys, sells, offers for sale or has in possession for sale or transportation any wild bird, animal or part thereof, or nest or egg of any bird, in violation of any of the provisions of this article, or who violates any other of the provisions of this article, or who fails to perform any duty imposed upon him by this article, or who violates any lawful order, rule or regulation adopted by the commission, shall be guilty of a misdemeanor and upon the first offense and conviction thereof, shall be fined not more than fifty dollars ($50.00) or imprisoned for not more than thirty days, and upon the second offense and conviction thereof, shall be fined not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00), or by imprisonment for not more than six months, or both, in the discretion of the Court, and in all cases the commission may revoke the license of any offender convicted under this section. Any person who shall swear or affirm to any false statement in any application for a hunting license shall be deemed guilty of perjury and on conviction shall be subject to the punishment provided for in the crime of perjury. (1927, c. 51, s. 40.)

Editor's Note.—Public Laws, 1931, c. 143, ss. 12, 13, amending this article to make this section applicable to all of its provisions, provided: "All general laws or parts of general laws in conflict with this act are hereby repealed or modified, but only to the extent to which they conflict."

Public Laws of 1933, c. 422, § 7, provides: "Any person or persons violating any of the provisions of this act [amending §§ 2141(u), 2141(bb), 2141(ii), 2141(jj) 1, and adding § 2141(jj) 2,] shall be guilty of a misdemeanor and fined not to exceed fifty dollars or imprisoned for not more than thirty days for each offense."

§ 2141(rr). Exception.—Whereas the hunting of certain migratory wild fowl is regulated by the act of Congress through the United States Biological Survey, the said migratory wild fowl, on waters of certain sounds, to wit: Currituck, Albemarle, Pamlico, Croatan, Bogue, Core and Roanoke, are hereby exempted from the provisions of this article: Provided, however, that all other game in the said territory except the said migratory wild fowl shall come within the provisions of this article, and, provided further, that nothing in this article shall be construed as applying to local measures looking to the regulation and licensing of the hunting of such migratory wild fowl. (1927, c. 51, s. 41.)

§ 2141(ss). Continuation of existing laws; conflicting laws repealed.—The provisions of this article so far as they are the same as those of existing laws and are not in conflict therewith or with other laws relating to the protection of game, shall be construed as a continuation of such laws. Wherever the provisions of this article are in conflict with the provisions of laws now existing, this article shall be construed to repeal such provisions of existing laws as are conflicting or inconsistent with the provisions and purposes, of this article, and, for all intents and purposes, to vest in the State Game Commission the supervision of game conservation and the administration of all laws related thereto. (1927, c. 51, s. 42.)

Editor's Note.—Public Laws of 1929 chapter 278, amendatory of this article, in section 9 provides: "this act shall in no way alter, change or affect any local or Public-Local

Game Act passed at this session of the General Assembly, but all such acts shall remain in full force and effect."

§ 2141(tt). Department of Conservation and Development.—The duties and powers now vested in the "State Game Commission" under and by virtue of the North Carolina game law of 1927, are transferred to and shall be assumed by the Department of Conservation and Development. (Acts 1927, c. 250, s. 1.)

Purpose of Act.—The purpose of this and the following sections is to transfer all the powers, privileges, functions, duties and administration of "The North Carolina Game Law" to the Department of Conservation and Development in the interest of economy of administration and the unification of the agencies of conservation in the State.

§ 2141(uu). Department clothed with powers.—The Department of Conservation and Development shall be clothed with all the powers, duties, privileges and authority now vested in the "State Game Commission." The said "State Game Commission" shall by virtue of this section cease to be. (1927, c. 250, s. 2.)

§ 2141(vv). Administration of game law.—The Department of Conservation and Development is hereby empowered to assume and administer in all respects and to the same degree "The North Carolina Game Law" as is now provided for in this article, known as "The North Carolina Game Law." (1927, c. 250, s. 3.)

§ 2141(ww). Game law funds kept separate.—All funds derived from the administration of "The North Carolina Game Law" shall be kept separate and distinct from any other funds in the said department of Conservation and Development. Not exceeding ten per cent of the annual gross proceeds from the sale of hunting license and fishing license under the North Carolina Game Law shall be appropriated, or in any wise allocated, to forest fire suppression and prevention work. (1927, c. 250, s. 5; 1931, c. 282, s. 5.)

§ 2141(xx). Employees of department used in administration of game law.—The Director of the Department of Conservation and Development is authorized and empowered in the interest of economy and the better administration of the different functions of the department to utilize the services of any one or more of the employees or appointees of said department in the administration of "The North Carolina Game Law" and the administration of any work connected with said department—and is authorized to charge to the separate accounts provided for the service being done a reasonable and fair proportion of the expenses and salary of any of such employees or appointees that may function in more than one capacity. (1927, c. 250, s. 6.)

§ 2141(yy). Construction of acts.—Nothing contained in any public, public-local or private act, passed in the session of 1927 of the General Assembly, shall be construed as repealing, abrogating, modifying or changing any of the sections, provisions, terms or powers contained on the day of its ratification in an act entitled and known as Senate bill seven hundred and thirty-two, House bill two hundred and one, "to provide for the protection and conservation of wild birds and animals, to create a State Game Commission and the office of the State Game Warden," and any and all such acts in conflict therewith are hereby repealed. (1927, c. 253.)

§ 2141(zz). Dealers in fur required to take out license from Department of Conservation and Development.—Every person, firm or corporation who buys raw furs, pelts or skins of fur bearing animals shall take out a license from the Department of Conservation and Development on forms prescribed by said Department and before engaging in such business shall pay the amounts of license set forth in this act. The funds so received by the Department of Conservation and Development for fur dealer's license shall be deposited with the State Treasurer as provided by law to the credit of the Department of Conservation and Development and shall be expended by the said Department for the protection and promotion of the fur bearing industry in North Carolina, including the administration and enforcement of this law and for no other purpose. (1929, c. 333, s. 1.)

§ 2141(aaa). Amount of license; license to be good only in county of residence.—Such licenses must be taken out before any person, firm or corporation in any manner engages in the business of buying and selling furs, and the amount of said licenses shall be as follows: For a resident state-wide license the sum of twenty-five dollars, which will entitle the holder to buy and sell furs in any or all of the counties of North Carolina; for a resident county license the sum of ten dollars, which will entitle the holder to buy or deal in furs only in the county designated in the license, and for each additional county the sum of ten dollars; for a non-resident of the state of North Carolina before he shall be permitted to engage in the business of buying or selling furs or dealing in same, any such person, firm or corporation shall annually take out a fur dealer's license and shall pay therefor the sum of one hundred dollars for a state-wide license. These licenses shall be issued through the wardens or agents of the department of conservation and development as a part of their official duties. An annual license shall be issued for the sum of five dollars per annum: Provided, such license shall be issued only to a dealer buying only in the county of his residence, at a fixed place of business. (1929, c. 333, s. 2; 1933, c. 337, s. 1.)

Editor's Note.—Prior to Public Laws 1933, c. 337, the state-wide license for a resident was $75, instead of $25. The license for a non-resident was $400, instead of $100, and counties were permitted to collect an additional $50 from such resident. The next to the last sentence formerly provided for an annual local license of $5, instead of $1, with the limitation that the buying should not exceed $500 worth of furs per annum.

§ 2141(bbb). Dealers to report annually to department total amount of furs bought.—Every person, firm or corporation who takes out a fur dealer's license shall report to the Department of Conservation and Development on April first of each year and every year the total amount of furs bought by such dealer, including the species of fur bearing animals and the number of each, and such other information as required by the Department of Conservation and Development. (1929, c. 333, s. 3.)

§ 2141(ccc). What counties may levy tax.—No county, city or town shall have the right to levy

any license on resident fur dealers except that the county in which such dealers or buyers maintain a place of business or residence may charge and collect from such dealers a license tax of not more than five dollars per annum. (1929, c. 333, s. 4; 1933, c. 337, s. 2.)

Editor's Note.—Ten dollars, instead of five dollars, was the amount permitted to be collected prior to Public Laws 1933, c. 337.

§ 2141(ddd). Permits may be issued to non-resident dealers.—It shall be lawful for the department of conservation and development to issue permits to non-resident dealers for the purchase of raw furs from only statewide licensed fur dealers in North Carolina. (1929, c. 333, s. 5; 1933, c. 337, s. 3; 1935, c. 471, s. 1.)

Editor's Note.—Prior to Public Laws 1933, c. 337, this section contained the proviso limiting permits to the purchase of furs from dealers who had taken out the $75 license.

The amendment of 1935 inserted the word "statewide" preceding the word "licensed," near the end of this section.

§ 2141(eee). Licenses for each employee of dealer; fees; applicants must be residents. — All bona fide members of a resident firm or corporation and their bona fide regular employees, all such members and employees being residents of North Carolina, shall be required to take out a license showing their employment and shall pay therefor the sum of twenty-five dollars each. Provided that the employees of a resident firm or corporation operating under a county resident fur dealer's license shall be required to pay only the sum of ten dollars ($10.00). Applicants for resident fur dealers license must have actually resided in the state for six months next before making application for such license. (1929, c. 333, s. 6; 1933, c. 337, s. 4; 1935, c. 471, s. 3.)

Editor's Note.—In the first sentence of this section, Public Laws of 1933, c. 337, struck out the word "duplicate" before the word license. It also increased the sum from $10 to $25.

The amendment of 1935 added the proviso at the end of the section.

§ 2141(fff). Non-resident buying furs in state personally or through agent classed as non-resident fur dealer.—Any non-resident person, firm or corporation or any agent or person acting as agent therefor, who in any manner, purchases or solicits to purchase furs in North Carolina, except as provided in section 2141(ddd), shall be subject to and shall procure from the department of conservation and development a non-resident fur dealer's license before he shall be entitled to purchase or solicit to purchase furs as above set out in this section. (1929, c. 333, s. 7; 1935, c. 471, s. 2.)

§ 2141 (ggg). Violation a misdemeanor.—Any person, firm or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars or imprisoned not more than sixty days for the first offense, and on conviction of second violation of this law such person, firm or corporation shall pay not less than two hundred dollars or be imprisoned not more than six months or both in the discretion of the court. (1929, c. 333, s. 8.)

Art. 8. North Carolina Game Law of 1935

§ 2141(1). Title of article.—This article shall be known by the short title of "The North Carolina Game Law." (1935, c. 486, s. 1.)

§ 2141(2). Definitions.—For the purpose of this article the following shall be construed, respectively, to mean.

Board—Board of conservation and development.

Commissioner—Commissioner of game and inland fisheries.

Person—The plural or singular as the case demands, including individuals, associations, partnerships, and corporations, unless the context otherwise requires.

Take—Whenever it is made lawful to "take" birds or animals, or parts thereof, or birds' nests or eggs, it shall mean the pursuit, hunting, capture or killing of birds or animals, or collecting of birds' nests or eggs in the manner, at the time, and by means specifically permitted. Whenever it is made unlawful to "take" birds or animals or parts thereof, or birds' nests or eggs, the word "take" shall include pursuing, shooting, hunting, killing, capturing, trapping, snaring, and netting birds or animals, collecting birds' nests or eggs, and all lesser acts, such as disturbing or annoying birds or animals, or placing or using any net or other device for the purpose of taking birds or animals, whether or not they result in the taking of such birds or animals.

Open Season—The time during which birds or animals may be lawfully taken. Each period of time prescribed as an open season shall be construed to include the first and last days thereof.

Closed Season—The time during which birds or animals may not be taken.

Transport — Shipping, transporting, carrying, importing, exporting, receiving or delivering for shipment, transportation, carriage, or export.

Common Carrier — Railroad companies, boat lines, express companies, bus lines, and any person transporting persons or property for hire.

Game Animals—Deer, bear, fox, squirrels and rabbits.

Fur Bearing Animals — Skunk, muskrat, raccoon, opossum, beaver, mink, otter and wildcat.

Non-Game Animals—All wild animals except game and fur bearing animals.

Upland Game Birds—Quail, commonly known as Bob White or Partridge, Wild turkey, grouse, and pheasants of all kinds.

Migratory Wild Waterfowl—Anatidaw or waterfowl, including brant, wild duck, geese and swans; migratory wild birds, gruiae or cranes, including little brown, sandhill, and whooping cranes, rallidae, or rails, including coots, gallinules, sora, and other rails; limicolae, or shore birds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, sand pipers, snipes, stilts, surf birds, turnstones, willet, woodcock, and yellow legs; columbidae or pigeons, including doves and wild pigeons.

Non-Game Birds—All wild birds except upland game birds and migratory game birds.

Game—All game animals and game birds. (1935, c. 486, s. 2.)

§ 2141(3). Powers and duties of the board of conservation and development.—It shall be unlawful to take or pursue any of the wild life of the State at any time or in any manner, except at such times and in such manner as the supply of

said wild life may justify, and the said board is hereby directed to make adequate investigations as to the said supply and thereupon shall, by appropriate rules and regulations:

1. Fix seasons and bag limits or close seasons on any species of game, bird, or fur-bearing animal, in any specified locality or localities, or the entire State, when it shall find, after said investigation, that such action is necessary to assure the maintenance of an adequate supply thereof. The statutes now governing such subjects shall continue in full force and effect, except as altered or modified by rules and regulations promulgated by the board.

2. Establish and close to hunting or trapping, game or bird refuges on public lands and, with the consent of the owner, on private lands; and close streams and lakes, or parts thereof to hunting or trapping.

3. Acquire by purchase, grant, condemnation, lease, agreement, gift, or devise, lands or waters suitable for the purposes hereinafter enumerated, and develop, operate and maintain the same for said purposes:

(a) Game farms or game refuges.

(b) Lands or waters suitable for game, bird, or fur-bearing animal restoration, propagation or protection.

(c) For public hunting or trapping areas to provide places where the public may hunt or trap in accordance with the provisions of law or the regulations of the board.

(d) To extend and consolidate by exchange lands or waters suitable for the above purposes.

(e) To capture, propagate, transport, buy, sell, or exchange, any species of game, bird or fur-bearing animal, needed for propagation or stocking purposes, or to exercise control measures of undesirable species.

4. Enter into coöperative agreements with educational institutions and state, federal, or other agencies, to promote wild life research and to train men for wild life management.

5. Enter into coöperative agreements with federal agencies, municipalities, corporations, organized groups of landowners, associations and individuals, for the development of game, bird or fur-bearing animal management and demonstration projects. (1935, c. 486, s. 4.)

§ 2141(4). Limitations on powers.—Nothing in this article, however, shall be construed to authorize the board to change any penalty prescribed by law for a violation of its provisions, or to change the amount of license fees or the authority conferred by licenses prescribed by law. (1935, c. 486, s. 4.)

§ 2141(5). Organization of work. — The board shall establish such departmental bureaus or divisions and shall authorize the commissioner to employ such experts, clerks, or other employees as it may deem necessary for the conduct of the work of the board, and it shall fix their salaries or other compensation, which shall be paid out of the game and fish fund. The board shall authorize such scientific and other studies as may be deemed necessary to its work, and shall collect, classify and disseminate such statistics, data and information as in its discretion will tend to promote the objects of this article. (1935, c. 486, s. 4.)

§ 2141(6). Permits to kill game injurious to agriculture.—The board shall have power to issue permits to kill any species of birds or animals which may become seriously injurious to agriculture or other interests in any particular community, or such birds or animals may be captured alive by it or under its discretion and planted in other sections of the State for re-stocking, or may be disposed of in such other manner as it may determine: Provided, that birds and animals committing depredations may be taken at any time without a permit while committing, or about to commit, such depredations. Any permit issued pursuant to this section shall expire within four (4) months after the date of issuance. (1935, c. 486, s. 4.)

§ 2141(7). Publication of rules and regulations of board.—Rules, regulations and orders of the board shall be published in the following manner: Those having general application throughout the State shall be published at least once in some newspaper published in and having general circulation throughout the State and at each county court house door; those of special character having local application only shall be published at least once in some newspaper published in and having general circulation in the locality wherein such rules, regulations and orders are applicable and at the county court house door; but, if no such newspaper is so published and circulated, copies of such rules, regulations and orders shall be posted in at least three conspicuous places in the locality in which they are applicable and at the county court house door. Such rules, regulations and orders may also be given such other publicity as the board may deem desirable. (1935, c. 486, s. 5.)

§ 2141(8). County game commissions. — This article shall not be construed to dissolve any game commissions now existing in the several counties, nor to prohibit the creation of game commissions in the several counties and such commissions now existing and such as may be created shall exist, but supervision of the provisions of this article and the direction of the policies and administration of this article and other laws which may exist for the same purpose as this shall be vested in and abide with the board and the powers of such county commissions as may exist or may be created shall be of a nature advisory and recommendatory to the board and the exercise of any powers by them shall require the approval of the board of conservation and development. (1935, c. 486, s. 6.)

§ 2141(9). Appointment of commissioner; salary; expenses; bond; office. — The director with the approval of the board shall appoint a commissioner, who shall receive a salary fixed by the board, not exceeding five thousand dollars per annum, payable monthly upon his own requisition. The commissioner shall be reimbursed for his actual and necessary traveling expenses, not to exceed one thousand five hundred dollars per annum, incurred in the discharge of his official business when he is away from the place where his office is located, to be paid by proper voucher. The commissioner shall give bond in the sum of ten thousand dollars, to be approved by the state

treasurer, conditioned upon his faithful performance of the duties imposed upon him by the provisions of this article. The bond shall be filed with the state treasurer and the premiums paid from the state game fund. The commissioner shall have his office in the offices of the board at the Capitol. (1935, c. 486, s. 7.)

§ 2141(10). Powers of commissioner. — In accordance with, and subject to, such rules and regulations as may from time to time be adopted by the board relating thereto, the commissioner shall have the following powers:

(a) To Issue Permits. The commissioner may issue a permit, revocable for cause, to any person, authorizing the holder to collect and possess wild animals or wild birds or birds' nests or eggs for scientific, propagation, or exhibition purposes. Before such a permit to take for scientific purposes is issued, the applicant must file written testimonials from two well known ornithologists or zoologists and pay the sum of two dollars ($2.00) for the permit, but duly accredited representatives of public educational or scientific institutions, or governmental departments of the United States engaged in the scientific study of birds and animals, may be granted such a permit without endorsements or charge or without being required to obtain a hunting license. If the commissioner is satisfied of the good faith of the applicant, he shall issue to him a permit, which shall fix the date of its expiration, and may fix a restriction upon the number and kinds of animals, birds, or birds' nests or eggs to be taken thereunder, but no such permit shall be valid after the last day of the calendar year in which it is issued. Permits to take game animals or game birds during the closed season shall not be issued except to a duly accredited representative of a school, college, university, public museum or other institution of learning, or a representative of the federal government engaged in the scientific study of birds and animals or to a duly accredited representative of a state game department or commission to re-stock the covers of the State which he represents. Specimens of birds or animals legally taken and birds and animals reared in domestication pursuant to the provisions of this article and to the regulations of the board may be bought, sold, and transported at any time by any person holding a valid permit issued in accordance with the provisions of this section. When transported by common carrier or contained in a package, said specimens of any package in which the same are transported shall have clearly and conspicuously marked on the outside the name and address of the consignor and consignee, and an accurate statement of the numbers and kinds of birds and animals, specimens or parts thereof, or birds' nests or eggs contained therein, and that such specimens are for scientific or propagation purposes. Each person receiving a permit under this section must file, at the expiration of his permit, with the commissioner a report of his operations under the permit, which report shall set forth the name and address of the permittee, the number of his permit, the number of each species of birds, animals or birds' nests or eggs taken thereunder or otherwise acquired, disposition of the same, names and addresses of persons acquiring the same from the permittee, and number of each species on hand for propagation purposes at the expiration of the permit. The board is hereby authorized to prescribe from time to time rules and regulations governing the possession, purchase, sale and transportation of birds and animals raised in domestication pursuant to the provisions of this article.

(b) To Employ Deputies. The commissioner may employ such game protectors, deputy game protectors, refuge keepers, employees, and agents as shall be necessary for the proper carrying out of the provisions of this article, and with the approval of the board shall arrange the compensation for such protectors, deputy protectors, refuge keepers, employees and agents. Qualifications for the office of game protector shall be considered in the appointment of all game and fish protectors who shall be required to pass an examination showing their knowledge of provisions of the game and fish laws, the purposes of the protection of wild life, and essential matters of administration of these statutes. Said examination shall be prepared under the supervision of the commissioner and given in the county or district in which the said protector will serve and shall be conducted under the direction of the commissioner or some suitable person designated by him. The commissioner shall have general supervision and control over all such protectors, deputy protectors, refuge keepers, and employees, and shall enforce all the provisions of this article and any other laws now in force or hereafter enacted for the protection of wild birds and animals, and shall exercise all necessary powers incident thereto. It shall be the duty of the protectors, deputy protectors, refuge keepers, and employees to obey and carry out the instructions and directions of the commissioner for the enforcement of this article.

(c) To Prepare Form of License. It shall be the duty of the commissioner to prepare forms of licenses and other forms necessary for use in the administration of the provisions of this article and to properly distribute them to the officers and persons required to issue licenses or use such forms. Each license shall be issued in the name of the commissioner and countersigned by the officer or person issuing it. Each licensee shall sign his name in ink on the license issued him. The commissioner shall cause the license accounts of officers and persons issuing licenses to be examined and audited at least once during each year, and shall require such officers and persons promptly to pay him, in accordance with the provisions of this article, all monies received by them from the sales of licenses.

(d) To Execute Warrants. The commissioner and each of his deputies shall have power to execute all warrants issued for violation of this article, and to serve subpoenas issued for examination, investigation, or trial of offenders against any of the provisions of this article; to make search, after having first obtained proper warrant therefor, of any place or thing which such deputies have cause to believe contains wild birds or animals, or any part thereof, or the nest or eggs of birds possessed in violation of law; to seize wild birds or animals, or parts thereof, or nests, or eggs of birds killed, captured, or possessed in violation of law or showing evidence of illegal killing; to seize and confiscate all instruments or devices illegally used in

taking wild birds or animals, and to hold the same to be disposed of as provided in this article; to arrest without warrant any persons committing a violation of this article in his presence, and to take such person immediately before a court having jurisdiction for trial or hearing; and to exercise such other powers of peace officers in the enforcement of the provisions of this article, or of judgments obtained for violation thereof, as are not herein specifically conferred.

(e) To Dispose of Seized Game and Devices. All game birds and the edible portions of game animals seized under the provisions of this article shall be disposed of by the commissioner, or under his direction, by gift to hospitals, charitable institutions or almshouses in the county taken within the State. Non-game birds or parts thereof and the plumes or skins of wild birds or birds of foreign species shall be disposed of by the commissioner by gift to scientific educational institutions within the State, or may be retained by him for use of the board, or in his discretion they may be destroyed. The commissioner shall take a receipt from the donee for any such gift, and file such receipt in his office, and he shall keep a permanent record of such gifts. The heads, antlers, horns, hides, skins, or feet, or parts of any game or fur-bearing animal, seized under the provisions of this article, if the person from whom the same were seized, is convicted of violating any of the provisions of this article, or if the owner thereof is unknown, may be sold for cash by the commissioner, or under his direction, at public auction to the highest bidder. Notice of the time and place of such sale, together with a description of the articles to be sold, shall be given by the commissioner or under his direction in such manner as he may determine to be best calculated to bring the best price therefor: Provided, that if the property seized is perishable, that same may be disposed of by the commissioner immediately. The commissioner or his deputies authorized to make the sale shall issue to the purchaser a certificate stating that the purchaser has the legal right to be in possession of the articles bought, and anyone so acquiring said article or articles from the State, other than the person from whom they were seized, shall have the right to possess the same. If the person from whom any of said articles were seized be acquitted of the charge of violating any of the provisions of this article, the article so seized, unless it be an instrument or device, the use of which is prohibited by this article, or money derived from the sale thereof if it was perishable property, shall be returned to him. It shall be, and is hereby made, the duty of each deputy to make a full and complete report to the commissioner of all property by him confiscated because of a violation of the game laws of this State, showing in detail a description of the property, the person from whom it was confiscated, the price received therefor upon public sale, and the disposition of the money. The commissioner shall keep in his office a permanent record showing all property confiscated by him or any of his deputies, and the disposition made thereof under the provisions of this article. (1935, c. 486, s. 8.)

§ 2141(11). Officers constituted deputy game protectors. — All sheriffs, deputy sheriffs, police officers, forest wardens, park patrolmen, refuge keepers, constables and all other peace officers are hereby made deputy game protectors, and it shall be made their duty to aid in the enforcement of this law. In addition to fees to which he may be entitled under the general law of this State, any deputy game protector not on salary as such shall receive the sum of five dollars ($5.00) in any case involving a violation of this article in which he secures the evidence upon which the conviction was obtained, which shall be assessed against the defendant and paid by such defendant as a part of the costs in case of conviction; if no conviction is procured, no fee shall be taxed against the county or State. (1935, c. 486, s. 9.)

§ 2141(12). Protectors, deputy protectors, and refuge keepers constituted special forest wardens. —The commissioner, protectors, deputy protectors and refuge keepers are hereby made ex-officio special forest wardens and charged with the duty of reporting to the forest wardens, all infractions of the forest fire law and to assist forest wardens in extinguishing forest fires and generally enforcing the laws and regulations for the preservation of the forests. (1935, c. 486, s. 10.)

§ 2141(13). Payment to state treasurer of license fees. — The commissioner shall promptly pay to the state treasurer all monies received by him from the sale of hunting licenses or from any other source arising through the administration of this article, and the state treasurer shall deposit all such money in a special fund, to be known as the state game fund and which is hereby reserved, set aside, appropriated and made available until expended as may be directed by the board in the enforcement of this article and for the purposes of this article. (1935, c. 486, s. 11.)

§ 2141(14). Licenses required.—No person shall at any time take any wild animals or birds without first having procured a license as provided by this article, which license shall authorize him to take game only during the periods of the year when it shall be lawful. The applicant for a license shall fill out a blank application in the form prescribed and furnished by the commissioner. Said application shall be subscribed and sworn to by the applicant before an officer authorized to administer oaths in this State, and the persons hereby authorized to issue licenses are hereby authorized to administer oaths to applicants for such licenses. Licenses may be issued by the clerk of the superior court for each county, the commissioner, game protectors and such other persons as the commissioner may authorize in writing:

License Fees

Non-resident hunting license	$15.25
State resident hunting license	2.10
Combination hunting and fishing license	3.10
County hunting license	1.10

Said applicant if a resident of this State, shall pay to the officer or person issuing the license the sum of one ($1.00) dollar as a license fee, and the sum of ten (10c) cents as a fee to the officer or person, other than the commissioner, for issuing the same, and shall obtain a county resident hunting license, which shall entitle him to take game birds and animals in the county of his residence,

or shall pay to the officer or person issuing the license the sum of two dollars ($2.00) as a license fee and the sum of ten (10c) cents as a fee to the officer or person other than the commissioner for issuing the same and shall obtain a resident state hunting license, which shall entitle him to take game birds and animals in counties other than the county of his residence, and in the State at large, as authorized by this article. All persons who have lived in this State for at least six months immediately preceding the making of such application shall be deemed a resident citizen for the purposes of this article. Said applicant, if a non-resident of this State, or a resident for less than six months, or an alien, shall pay to the officer or person issuing the license fifteen ($15.00) dollars as a license fee and the sum of twenty-five (25c) cents as a fee to the officer or person other than the commissioner for issuing the same and shall obtain a non-resident hunting license, which shall entitle him to take game birds and game animals as authorized by this article. The commissioner is hereby authorized and empowered to issue combination licenses for hunting and fishing which said combination license may be for an amount less than the total of the hunting and fishing license when purchased separately. For a state resident hunting and fishing license the applicant shall pay to the officer or person issuing the license the sum of three ($3.00) dollars as a license fee and ten (10c) cents as a fee for issuing same, which shall entitle him to hunt and fish in the counties other than the county of his residence and in the State at large according to the law.

Any person acting for hire as a hunting guide shall obtain a guide's license, and shall pay therefor a license fee in an amount not to exceed the sum of ten dollars ($10.00), the board being hereby authorized and empowered to provide classifications, and to fix fees within said limit as to class. The commissioner is hereby authorized and empowered to prescribe rules and make regulations respecting the duties of guides, to require that guides take an oath to abide by the game laws of the State, and to rescind the license of any guide who violates the regulations or is convicted of violating the game laws of the State: Provided, that the Commissioner may, upon request, issue a non-resident license to any game agent of the United States or of a state of the United States without payment of any fees, which license may be used by such agent of the United States or of a state of the United States only in the discharge of his official business: Provided, that a non-resident who holds fee simple title to lands in North Carolina may hunt on such lands by payment of a license fee of five ($5.00) dollars plus twenty-five (25c) cents for the issuing officer. Such non-resident must make a sworn application to the commissioner, on forms provided by said commissioner, setting forth the location of such lands, the non-resident's title thereto, and such other information as may be required by the commissioner, and if such non-resident be a corporation, then only the non-resident president, the vice-president, the secretary-treasurer, and the directors, not to exceed seven in number, of such corporation, shall be permitted to take out a non-resident landowner's hunting license, as herein provided.

Any non-resident owning in his own right and in severalty one hundred acres or more of land in the State of North Carolina may hunt upon such lands, subject to the provisions and restrictions of the North Carolina Game Law, without being required to purchase a hunting license. (1935, c. 486, s. 12.)

§ 2141(15). Term and use of license.—Each license shall be void after the first day of August next succeeding the date of its issuance. Each licensee shall have his license on his person at all times when he is taking game animals or game birds, and shall exhibit the same for inspection to any game protector or other officer requesting to see it. No person shall alter or loan, change, or transfer any license issued pursuant to the provisions of this article, nor shall any person other than the person to whom it is issued use the same. (1935, c. 486, s. 13.)

§ 2141(16). Exemption.—Any person who is a resident of this State, and any dependent member of his family under twenty-one years of age, may take game birds and wild animals in the open season for the same, and not contrary to the provisions of this article, on lands owned by such resident without a license; and a minor member of a family resident of this State, under sixteen years of age, may hunt under the license of his parent or guardian; but such minor must carry such license when so hunting, unless accompanied by such parent or guardian; and a non-resident minor child of any resident of this State may lawfully procure and use the same license required of a resident, when such non-resident child is actually visiting such resident parent: Provided, that a party who leases a farm for cultivation shall not be required to obtain a license to hunt thereon. (1935, c. 486, s. 14.)

§ 2141(17). Disposition of license fees. — The license fees provided to be paid in this article shall be remitted by the officers or persons issuing the license on the first and fifteenth of each month to the commissioner with a schedule setting forth the name and address of each licensee, the serial number and classification of the license, and the amount paid for each license issued, except that the officer or person issuing licenses shall, before making such remittance, deduct and retain as his fee the amount of fees provided to be paid to him by the provisions of this article for issuing license. On or before the first day of April of each year, each officer or person authorized to issue license shall forward to the commissioner the stubs of licenses issued by him and all unused licenses, together with a report covering the number of licenses issued and the amount of license money received by him; the commissioner shall tabulate the total number of licenses of all kinds issued in the State and the fees received therefor, and he shall include such data in his biennial report. (1935, c. 486, s. 15.)

§ 2141(18). Open season.—The open season for taking game animals and game birds, subject to changes by the board of conservation and development from time to time as the supply of wild life shall justify, are as follows:

Bear .....October 1 to January 1
Deer (male) .....October 1 to January 1

Mink, Muskrat, Otter .....November 1 to February 15
Opossum, Raccoon (with gun or dogs) .....October 1 to February 1
Opossum, Raccoon (trapping) .....November 1 to February 15
Quail .....Thanksgiving Day of each year to February 15
Rabbit .....Thanksgiving Day of each year to February 15
Squirrel .....September 15 to January 15
Turkey .....Thanksgiving Day of each year to February 1
Woodcock .....December 1 to December 31
Ruffed Grouse ....November 20 to December 15
Wildcat, Weasel, Skunk .....No closed season
Beaver, Bufflalo, Elk, Doe Deer and Pheasants .....No open season
Dove, Ducks, Geese, Brant and other migatory waterfowl ....Federal regulations
Snipe, Sora, Marsh Hens, Rails, Gallinules .....Federal regulations
Fox .....County regulations

The open and closed season on all migratory wild fowl shall conform with the United States biological survey legislation, irrespective of seasons as set forth by the North Carolina Game Law. (1935, c. 486, s. 16.)

As to closed season in Anson County, as to hunting foxes, see Pub. Loc. Laws 1929, c. 244.

§ 2141(19). Bag Limits.—It shall be unlawful to take in the period of time set opposite such individual name of species in the following table a greater number of each species of birds or animals than is enumerated in the column of the said table headed "Bag Limits," which shall be fixed by the board of conservation and development, subject to changes as the supply of wild life shall justify.

	Per Day	Per Season
Bear	No limit	No limit
Deer	1	3
Mink, Muskrat, Otter	No limit	No limit
Opossum, Raccoons	No limit	No limit
Quail	10	150
Rabbit	No limit	No limit
Squirrel	10	No limit
Turkey	1	3
Ruffed Grouse	2	10

Woodcock—Federal regulations.
Dove, Ducks, Geese, Brant and other migratory waterfowl—Federal regulations.
Snipe, Sora, Marsh Hens, Rails, Gallinules—Federal regulations.
Wildcat, Weasel and Skunk—No limit.
Fox—County regulations.

Game birds and game animals lawfully taken may be possessed during the open season therefor and the first ten (10) days next succeeding the close of such open season, but a person may not have in possession at any one time more than two (2) deer, two (2) wild turkeys and two days' bag limit of other game animals or game birds.

The bag limit, possession limit and open seasons on dove and all other migratory birds and wild fowl shall be the same as that prescribed by the United States biological survey legislation irrespective of bag limits, possession limits and seasons set forth by the North Carolina Game law. (1935, c. 486, s. 17.)

§ 2141(20). Protected and unprotected game.—Birds and animals for which no open season is provided shall be classed as protected and shall be unlawful to take or possess at any time. Unprotected birds and animals may be taken, possessed, bought, sold and transported at any time in any manner.

1. Unprotected Birds: English Sparrows, Great Horned Owls, Cooper's Hawks, Sharp-Shinned Hawks, Crows, Jays, Blackbirds, Starlings and Buzzards and their nests and eggs.

2. Unprotected Animals: Wildcats, Weasels and Skunks: Provided, that unprotected birds and animals may not be killed by the use of poison or dynamite except under permit issued by the commissioner.

3. No person shall take squirrels at any time in any public park. Rabbits and squirrels lawfully taken may be bought and sold during the open season and may be possessed for the first five days next succeeding the close of such season except that the board shall have the power to prohibit the sale of rabbits and squirrels at such times as conditions require. Rabbits may be box-trapped or hunted without gun at any time. The setting of steel traps for bear is unlawful. Foxes may be taken with dogs only, except during the open season, when they may be taken in any manner. It shall be unlawful at any time to take any wild deer while swimming or in water to its knees. (1935, c. 486, s. 18.)

§ 2141(21). Unlawful possession.—The possession, transportation, purchase or sale of any dead game animals, dead game birds, or parts thereof during the closed season in North Carolina, though said animals, birds, or any parts thereof were taken or killed without the State in the open season in such State, shall be unlawful; and the possession of same shall be prima facie evidence of the violation thereof: Provided, said animals or birds or parts thereof belong to any one of the family or classes protected by the North Carolina Game Law as amended to date.

The commissioner, all game protectors, deputy game protectors and refuge keepers shall have the power to enter and search any refrigeration plant, refrigerators and ice boxes of all public refrigerating storage plants, meat shops, hotels, restaurants, or other public eating places, in which such officer, making such search, has reasonable grounds to believe that game taken, killed or stored in violation of the North Carolina Game Law has been concealed or stored, and which will furnish evidence of a violation of such laws; and such search may be made without warrant, except that no dwelling may be searched without a warrant. (1935, c. 486, s. 19.)

§ 2141(22). Manner of taking game.—No person shall at any time of the year, take in any manner, number, or quantity, any wild bird or wild animal, or take the nests or eggs of any wild bird, or possess, buy, sell, offer or expose for sale, or transport at any time or in any manner any such bird, animal, or part thereof, or any birds' nests or eggs, except as permitted by this article; the possession of any game animals, or game birds or part of such animals or game birds, except those expressly permitted by the board, in any hotel, restaurant, café, market or store, or by any

produce dealer in this State shall be prima facie evidence of the possession thereof for the purpose of sale in violation of the provisions of this article; but this provision shall not be construed to prohibit the person lawfully obtaining game from having it prepared in a public eating place and served to himself and guest: Provided, however, that for the purpose of this article any person hiring another to kill aforesaid game animals or game birds and receiving same shall be deemed buying same, and subject to the penalties of this article. Game birds and game animals shall be taken only in the daytime, between sunrise and sunset with a shot gun not larger than number ten (10) gauge, or a rifle, unlesss otherwise specifically permitted by this article. No person shall take any game animals or game birds or migratory game birds from any automobile, or by aid of or with the use of any jack-light, or other artifical light, net, trap, snare, salt-lick or poison; nor shall any such jack-light, net, trap, snare, salt-lick or poison, be used or set to take any animals or birds; nor shall birds or animals be taken from an airplane, power boat, sail boat, or any boat under sail, or any floating device towed by a power boat or sail boat; nor shall any person take any dove, wild turkey, or upland game bird on any field, or in any cover in which corn, wheat, or other grain has been deposited for the purpose of drawing such birds thereto. A person may take game birds and wild animals during the open season therefor with the aid of dogs, unless specifically prohibited by this article. It shall be lawful for individuals and organized field trial clubs or associations for the protection of game, to run trials or train dogs at any time: Provided, that no shot gun be used and that no game birds or game animals shall be taken during the closed season by reason hereof. The board shall have, and is hereby given, full power and authority to make regulations defining the manner of taking fur-bearing animals and to prohibit the use of steel traps in any county or districts of the State when it shall appear necessary and advisable by the said board. Any person who shall cut down den trees in taking game or fur-bearing animals shall be guilty of a misdemeanor.

It shall be unlawful for any person or persons to hunt with guns or dogs upon the lands of another without first having obtained permission from the owner or owners of such lands, and said permission so obtained may be continuous for one open hunting season only. (1935, c. 486, s. 20.)

§ 2141(23). License to engage in business of game propagation; sale and transportation regulated.—Any person desiring to engage in the business of propagating in captivity upland game birds, ducks and geese, or any of them on land of which he is the owner or lessee and selling same pursuant to the provisions of this section, may make application in writing to the commissioner for a license to do so. The commissioner, when it shall appear that such application is made in good faith, shall upon the payment of a fee of two dollars ($2.00), issue to each applicant a license permitting such licensee to propagate such game birds on land of which he is the owner or lessee, the location of which shall be stated in such application and such license; to sell and ship such propagated game birds in the State from the State alive at any time for breeding or stocking purposes and take such propagated game birds except quail and wild turkey in any manner and at any time and sell the carcasses for food as hereinafter prescribed: Provided, that propagated upland game birds may be killed by shooting only during the open season as established by the board; and, provided further, that propagated migratory game birds may be killed by shooting only during the open season for migratory game birds. Each such license shall expire on the thirty-first day of December of the year in which it is issued. Each holder of a game bird propagating license shall keep such license prominently displayed at the place of business specified therein.

Every person holding a game bird propagating license issued by the commissioner shall keep accurate, written records, showing the number of game birds of each species propagated, bought, or sold, and the disposition thereof. These records shall be kept permanently on the premises stated in such license and shall be open for inspection by any duly authorized representative of the commissioner at all reasonable times.

Migratory game birds propagated in accordance with this section shall not be bought or sold for food, unless each bird before attaining the age of four weeks, shall have had removed from the web of one foot a portion thereof in the form of a "V" large enough to make a well defined mark, which shall be sufficient to identify it as a bird propagated in accordance with this section of the North Carolina Game Law. Migratory game birds propagated in accordance with this section may be bought, sold or offered for sale for food only after being tagged with an indestructible metal tag which shall be supplied by the board.

Common carriers shall receive and transport game birds tagged as aforesaid but to every package containing such propagated game birds shall be affixed a tag or label upon which shall plainly be printed or written the name, address and license number of the person by whom such propagated game birds are shipped and the name and address of the person to whom such propogated game birds are to be transported and number of each kind contained therein. The board shall be entitled to receive and shall collect for each tag to be affixed to the carcass of each game bird propagated, in accordance with this section, the sum of five cents. The said tags shall remain affixed as aforesaid until the carcasses of such propagated game birds shall be finally prepared for consumption: Provided, that the owner or proprietor of a hotel, restaurant, boarding house, or the manager of a club, may sell a portion of a tagged game bird to a guest, customer, or member, for consumption on the premises.

The proprietor or keeper of a hotel, restaurant or café, boarding house or club, desiring to serve game to his patrons, may make application to the department of conservation and development for a license to do so. The department, when it shall appear that such application is made in good faith, shall upon the payment of a fee of ten dollars ($10.00) issue to each such applicant a license permitting the holder thereof to buy and possess game birds lawfully tagged, and to serve such game to his patrons for consumption at any time,

but only on the premises, the location of which shall be definitely stated in such license and the application therefor. Each such license to serve game birds shall expire on the thirty-first day of December in the year in which it is issued. Each person holding a license to serve game birds shall keep such license prominently displayed at the place of business specified therein. The holder of a license to serve game birds may purchase only game birds tagged in accordance with law. Each holder of a license to serve game birds shall keep accurate written records of each and every purchase, which records shall contain the name and address of the person or corporation from whom such game birds were purchased, the date of each transaction and the number and kind of game birds included in each purchase. These records shall be kept permanently at the place of business specified in the license and shall be open for inspection by any duly authorized representative of the department at all reasonable times. Each holder of a license to serve game birds shall send a certified copy of these records for the previous calendar year to the department not later than January fifteenth. The department shall furnish the forms on which these records are to be kept. The board is hereby authorized to prescribe from time to time rules and regulations governing the possession, purchase, sale and transportation of birds raised in domestication pursuant to the provisions of this article. (1935, c. 486, s. 29.)

§ 2141(24). Unlawful transportation.—No common carrier or employee of such carrier shall, while engaged in such business, transport for the owner any wild animals or birds or any part thereof, or nest or eggs of any bird, nor any such carrier or employee knowingly receive or possess the same for shipment for another, unless the person offering the same for shipment is in possession of valid hunting license or collecting permit. A person who is a resident of this State may transport within the State otherwise than by parcel post, during the open season therefor, game birds and game animals lawfully taken. A person who is a non-resident of the State and a holder of a valid non-resident hunting license, may, under a permit issued by the commissioner, transport within this State, or from a point within to a point without, otherwise than by parcel post, during the open season therefor, game birds and game animals lawfully taken by him or parts thereof, but he shall not transport out of the State during any one open season more than two male deer and two wild turkeys, or during one calendar week more than two days' bag limit of other game animals and game birds. A person may transport, buy, or sell at any time or in any manner, non-game animals and the fur of fur-bearing animals lawfully taken and tagged. A person may transport, except by parcel post, and possess at any time and in any manner the head, antlers, hides, feet or skin of game animals or game birds lawfully taken. A person may buy and sell at any time the mounted specimens of heads, antlers, hides and feet of game animals, and the skins of game birds lawfully taken and possessed: Provided, the person selling such specimens has a written permit issued by the commissioner, authorizing him to do so. (1935, c. 486, s. 22.)

§ 2141(25). Marking packages in which game transported. — Any package in which any wild animal or bird or parts thereof or egg or nest of any wild bird is transported shall have clearly and conspicuously marked on the outside thereof, the names and addresses of the consignor and consignee, together with an accurate statement of the number and kinds of animals or birds or parts thereof, or eggs or nests, contained therein. (1935, c. 486, s. 23.)

§ 2141(26). Privately owned public hunting grounds.—In order to improve hunting, to open to the hunting public lands well stocked with game, and to give landowners some income through game protection and propagation, the State of North Carolina, through the department of conservation and development, is authorized to recognize, list, and assist the owners in protecting their lands which are a part of public hunting grounds organized under this section of the North Carolina Game Law, subject to the following conditions, stipulations, and such rules as the conservation board may adopt for the regulation of said hunting grounds:

(1) The minimum area recognized under this article is one thousand (1,000) acres;

(2) Owners of land included in a hunting ground formed under this article must organize, adopt rules and regulations for the operation of said hunting grounds, and be recognized by the department of conservation and development before such hunting grounds are put into operation under this article;

(3) The department of conservation and development will list and assist in advertising such public hunting grounds as are formed under this article, subject to such rules and regulations as may be adopted by the board from time to time, and in accordance with the North Carolina Game Law and this article. The department of conservation and development will furnish at cost to the owners of public hunting grounds posters to be used in posting such lands, such posters to state that the lands are posted under this section of the North Carolina Game Law and in case of withdrawal of recognition by the department such posters shall be removed from the land affected within ten days after notice to owner or owners;

(4) Owners of public hunting grounds shall require of each and every hunter the prescribed hunting licenses as set forth elsewhere in the North Carolina Game Law;

(5) The owners of public hunting grounds may require of each and every hunter a per day rate for hunting, rates to be approved by the department of conservation and development, said rates not to exceed four dollars ($4.00). In addition to charges for privileges of shooting game, landowners may charge a dog hire when landowners furnish dogs, dogs to be furnished only by request of the hunter;

(6) When any group of owners of a public hunting ground, organized under this article, decide to promote the hunting of certain kinds of game, said kinds of game used for stocking to be propagated in game breeding plants organized and operated under the game and other laws of North Carolina, the owner shall be permitted to charge hunters such fees and rates as are approved

by the board of conservation and development;

(7) No hunter is allowed to quit the hunting grounds at the end of the day or part of a day's hunting without seeing the authority who gave him permission to hunt on said hunting grounds and paying all accounts due said authority;

(8) No construction or interpretation shall be put on this section or any part thereof as to permit the sale of dead game killed in accordance with this article, abrogate the bag limits, time of hunting, open and closed seasons as prescribed elsewhere in the North Carolina Game Law;

(9) No person shall hunt or discharge firearms upon any public hunting grounds organized under this section without being accompanied by one of the landowners or a personal representative of one landowner, or after securing, on the day of the hunt, or day preceding the hunt, written permission to hunt under the authority of this article, said written permission to bear the name in full, age, and address of the hunter, under the penalty of being fined in the courts, upon conviction, not less than twenty-five dollars ($25.00) for each and every offense;

(10) When hunting grounds or any part thereof, organized and operated under this article are used for purposes not consistent with the federal, state and local laws, the department of conservation and development shall withdraw recognition from the area of such parts thereof as are deemed advisable, and report the case to the proper civil officials. (1935, c. 486, s. 24.)

§ 2141(27). Punishment for violation of article. —Any person who takes, possesses, transports, buys, sells, offers for sale or has in possession for sale or transportation any wild bird, animal, or part thereof, or nest or egg of any bird, in violation of any of the provisions of this article, or who violates any other provisions of this article, or fails to perform any duty imposed upon him by this article, or who violates any lawful order, rule or regulation promulgated by the board, shall be guilty of a misdemeanor and upon the first offense and conviction thereof, shall be fined not more than fifty dollars ($50.00) or imprisoned for not more than thirty days, and upon the second offense and conviction thereof shall be fined not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars, or by imprisonment for not more than six months or both, in the discretion of the court, and in all cases the board may revoke the license of any offender convicted under this section. Any person who shall swear or affirm to any false statement in any application for a hunting license shall be deemed guilty of perjury and on conviction shall be subject to the punishment provided for in the crime of perjury. (1935, c. 486, s. 25.)

CHAPTER 39

GAMING CONTRACTS AND FUTURES

Art. 1. Gaming Contracts

§ 2142. Gaming and betting contracts void. — All wages, bets or stakes made to depend upon any race or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void. (Rev., s. 1687; Code, ss. 2841, 2842; R. C., c. 51, ss. 1, 2; 1810, c. 796.)

Cross References.—For full treatment of gaming, see 6 N. C. Dig. 797-818; 14 N. C. Enc. Dig. 264-265. As to criminal laws regarding gambling, see secs. 4430-4437.

In General.—A gaming contract or wager is a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event. Bouv. Law Dict.

At common law all gambling contracts were void. And generally in this country, all wagering contracts are held to be illegal and void as against public policy. Irwin v. Williar, 110 U. S. 499, 510, 28 L. Ed. 225.

Liberal Construction.—This section is construed liberally. Turner v. Peacock, 13 N. C. 303.

Gambling contracts are void, because they are so declared by this section. Morehead Banking Co. v. Tate, 122 N. C. 313, 317, 30 S. E. 341.

Judgments in Invitum Not Included.—This section does not include judgments taken in invitum, but only such as are confessed or taken by consent. Teague v. Perry, 64 N. C. 39.

No Recovery Where Game Fair.—It is settled that money, or a horse, or a judgment, won at cards and actually paid and delivered, can not be recovered back, the game being fairly played. Hudspath v. Wilson, 13 N. C. 372; Warden v. Plummer, 49 N. C. 524; Teague v. Perry, 64 N. C. 39, 41; Hodges v. Pitman, 4 N. C. 276.

Unfair Gaming Always Illegal.—Unfair gaming was not only illegal by force of the state against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law. Webb v. Fulchire, 25 N. C. 485; Warden v. Plummer, 49 N. C. 524, 526.

Same—Recovery.—Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. Webb v. Fulchire, 25 N. C. 485, cited in note in 5 L. R. A., N. S., 907.

No Recovery on Bond Unfairly Won.—Where A., at a game of cards unfairly played, won a justice's judgment from B., and took from the defendants in the judgment a bond payable to himself for the amount, on which he brought suit, to which the statute against gaming was pleaded, it was held that he could not recover. Warden v. Plummer, 49 N. C. 524.

Subsequent Note Valid.—A note given subsequently, in purchase of a magistrate's judgment which had been won at cards by the payee from the maker, is not void under this section against gaming. Teague v. Perry, 64 N. C. 39.

Rights of Innocent Holder of Gambling Note.—This section applicable to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well considered authorities elsewhere. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. Wachovia Bank, etc., Co. v. Crafton, 181 N. C. 404, 405, 107 S. E. 316.

Intent of Parties.—Where the transaction is legitimate on its face, one party can not avoid it by claiming that it was a gambling contract where the proof shows that the other party did not so understand it, but believed it to be a valid agreement. Bibb v. Allen, 149 U. S. 481, 492, 37 L. Ed. 817.

Money Loaned for Gaming.—Money lent to play with at gaming, or to play at the time of loss, is not recoverable. Mooring v. Stanton, 1 N. C. 70.

When Stakeholder Liable.—Where money is deposited with a stakeholder, to be delivered to the winner, and the stakeholder pays over the money, after notice from the loser not to do so, the loser may recover the money from the stakeholder. Wood v. Wood, 7 N. C. 172; Forrest v. Hart, 7 N. C. 458.

Note Given in Foreign State Unenforceable.—A note given in consideration of a bet won on a horse race can not be enforced in this State although given in a state where

wagering contracts are not invalid. Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362. See Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11.

Cards a Game of Chance.—It is a matter of common knowledge that a game of cards is a game of chance. State v. Taylor, 111 N. C. 680, 16 S. E. 168.

The game of tenpins is not a "game of chance." State v. Gupton, 30 N. C. 271; State v. King, 113 N. C. 631, 18 S. E. 169.

"Shuffleboard."—The keeping of a gaming table called "a shuffleboard" is not indictable, as the game is not one of chance, but of skill. State v. Bishop, 30 N. C. 266.

"Shooting for Beef" and other similar trials of skill, for which the participants pays for the "chance" or privilege of shooting, is not a game of chance there being no "chance" in the sense of the acts against gambling. State v. DeBoy, 117 N. C. 702, 23 S. E. 167.

Cited in Moore v. Schwartz, 195 N. C. 549, 550, 142 S. E. 772.

§ 2143. Players and betters competent witnesses. — No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking. (Rev., s. 1688; Code, s. 2843; R. C., c. 51, s. 3.)

For criminal statutes regarding gambling, see secs. 4430-4437.

Art. 2. Contracts for "Futures"

§ 2144. Certain contracts as to "futures" void. — Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this state have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any persons, firm or corporation or his or their agents, engaged in the business of manufacturing or wholesale merchandising in the purchase and/or sale of the necessary commodities required in the ordinary course of their business; nor shall this section be construed so as to apply to any contract with respect to the purchase and/or sale for future delivery of any of the articles or things mentioned and referred to in this section, where such purchase and/or sale is made on any exchange on which any such article or things are regularly bought and sold, or contracts therefor regularly entered into, and the rules and regulations of such exchange are such that either party to such contract may require delivery thereof: Provided, such contract is made in accordance with such rules and regulations. (Rev., s. 1689; 1889, c. 221, s. 1; 1905, c. 538, s. 7; 1909, c. 853, s. 1; 1931, c. 236, s. 1.)

For complete treatment of "futures" contracts, see 6 N. C. Enc. Dig. 797-818; 14 N. C. Enc. Dig. 264-265.

Editor's Note.—On examination of the original statute, it appears that the Act, defining and declaring contracts in "futures" unlawful, was passed in 1889, chapter 221. In 1905, chapter 538, the Legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in sections 1 and 2, the statute contains several additional sections relating to the statute of 1889 and all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The Law of 1905 then, in its closing section, provided: "That this act shall not be construed so as to apply to any person, firm, or corporation, etc.," This is the first time these words appear in our legislation on this subject, and, so far as they had reference to the law of 1889, it is clear that the Legislature, in the original statutes, only intended that they should affect questions of proof. See Rodgers, etc., Co. v. Bell, 156 N. C. 378, 384, 72 S. E. 817.

From these considerations, it seems clear that the last sentence of this section was inserted "unnecessarily and out of abundance of caution"—and it does not confer any exclusive right or privilege upon manufacturers or wholesale merchants; nor does it authorize them to engage in any business prohibited by the section. It simply provides that the courts shall not construe the section to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business. See State v. McGinnis, 138 N. C. 724; State v. Clayton, 138 N. C. 732; Rodgers, etc., Co. v. Bell, 156 N. C. 378, 385, 72 S. E. 817.

Same—Act of 1931.—This act amended the "Bucket Shop Act" of 1889, now this section, so as to exempt contracts with respect to the purchase or sale where they are made on and in accordance with the regulations of any exchange, and where the rules of the exchange permit either party to require delivery. It was intended to re-

move the ban of illegality from transactions on legitimate exchanges, as distinguished from "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." Gatewood v. North Carolina, 203 U. S. 431, 27 S. Ct. 167, 51 L. Ed. 305. The amendment of 1905, adding the last sentence to what is now this section, proved abortive. That sentence, substantially retained by the 1931 amendment, which added the rest of the last sentence, reads: "This section shall not be construed to apply to any person, firm, corporation or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business." The court held, in Rodgers, McCabe & Co. v. Bell, 156 N. C. 378, 72 S. E. 817, that this sentence should not be regarded as an exemption from the prohibition against speculation in futures, but as a qualification of what was formerly § 2146, relating to the burden of proof. See State v. McGinnis, 138 N. C. 734, 51 S. E. 50; Wills v. Satterfield, 190 N. C. 89, 129 S. E. 177.

The act expressly repealed §§ 2145 and 2146. The first made non-delivery and the putting up of "margin" prima facie evidence of illegality under this section. The other shifted the burden of proof of illegality. Apparently the last case decided thereunder is Martin v. Bush, 199 N. C. 93, 154 S. E. 43. It is understood that the General Assembly acted upon evidence that the evils aimed at by the original statute, namely, those incident to the operation of "bucket shops" for gambling purposes had largely disappeared, and that its restrictions as construed and applied by the courts, had embarrassed the operation of bona-fide exchange-brokerage business. 9 N. C. Law Rev. 358, 359.

Section Constitutional.—This section is in furtherance of our declared public policy, and is constitutional and valid. Randolph v. Heath, 171 N. C. 383, 88 S. E. 731; S. v. McGinnis, 138 N. C. 724; S. v. Clayton, 138 N. C. 732; Garsed v. Sternberger, 135 N. C. 501; Rankin v. Mitchem, 141 N. C. 277.

The Legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be prima facie evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a prima facie case that such purchases were void, and other circumstances shall not constitute such prima facie evidence, is not a discrimination forbidden by the Fourteenth Amendment. State v. McGinnis, 138 N. C. 724, 51 S. E. 50. This case was decided under what formerly constituted § 2145.

Within Police Power.—This section forbidding the business of running a "bucket shop," is clearly within the police power of the State. State v. McGinnis, 138 N. C. 724, 51 S. E. 50. For several definitions of "bucket shop" see the same case at page 727.

Defines Illegal Contract.—This section clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of the differences in the prices of the commodity at the time fixed. Ovis Bros. & Co. v. Holt-Morgan Mills, 173 N. C. 231, 233, 91 S. E. 948.

Not Contrary to Federal Constitution.—When, in an action pending in the courts of this State to recover on a judgment in a sister state, the Legislature amended this section by adding thereto: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that it impairs the obligation of contracts, and it would seem that no such objection can be made under Art. IV, secs. 1 and 2 of the Federal Constitution, "the full faith and credit clause," etc., if it is admitted or clearly appears that the judgment sued on was rendered in a transaction expressly forbidden by our statute on gaming, and that the question was not raised, investigated or determined in the courts of the State in which the judgment was originally rendered. Mottu v. Davis, 151 N. C. 237, 65 S. E. 969.

Example of "Margin."—A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbroker's parlance as a "margin." McClain v. Fleshman, 106 Fed. 880, 882. Welles & Co. v. Satterfield, 190 N. C. 89, 94, 129 S. E. 177. This case was decided under what formerly constituted § 2145.

Contract Made in Foreign State.—An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another State where it is lawful. Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11.

Bucket Shop.—A "bucket shop" has been defined as "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with. Gatewood v. North Carolina, 203 U. S. 531, 51 L. Ed. 305. For other definitions, see State v. McGinnis, 138 N. C. 724, 51 S. E. 50.

Contracts for Future Delivery.—It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. Bibb v. Allen, 149 U. S. 481, 493, 37 L. Ed. 817.

And the fact that it is the practice of persons making sales for future delivery to settle the same by setting off one sale against another, will not render it invalid. Board v. Christie Grain, etc., Co., 198 U. S. 236, 247, 49 L. Ed. 1031.

Test of Validity under Section.—The test of the validity of a contract for "future" which this section requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract. Rodgers, etc., & Co. v. Bell, 156 N. C. 378, 383, 72 S. E. 817. State v. Clayton, 138 N. C. 732.

When there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done—nothing is bought or sold or contracted for, there is only a bet. Ovis Bros. & Co. v. Holt-Morgan Mills, 173 N. C. 231, 233, 91 S. E. 948.

Same—Intention of Parties.—The true test of validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties, citing 20 Cyc. 930; Williams v. Carr, 80 N. C. 295; State v. McGinnis, 138 N. C. 724, State v. Clayton, 138 N. C. 732. Welles & Co. v. Satterfield, 190 N. C. 89, 95, 129 S. E. 177.

The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it in the intention of both parties that the cotton should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? Edgerton v. Edgerton, 153 N. C. 167; Harvey v. Pettaway, 156 N. C. 375; Rodgers v. Bell, 156 N. C. 378; Burns v. Tomlinson, 147 N. C. 645; Rankin v. Mitchem, 141 N. C. 277. Hold v. Wellons, 163 N. C. 124, 129, 79 S. E. 450.

Same—Same—Parol Evidence. — This section rendering void and unenforceable in our courts a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for the loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. Welles & Co. v. Satterfield, 190 N. C. 89, 129 S. E. 177.

Contracts to Which This Section Applies.—Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased, it was held, that the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and this section, relating to gambling, etc., is not available to the defendant as a defense. Gladstone v. Swain, 187 N. C. 712, 122 S. E. 755.

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cot-

ton, cannot be collected by suit in our courts, and the promisor's repeated promise to pay it cannot impart any validity to it. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N. C. 231, 91 S. E. 948. Cobb v. Guthrie, 160 N. C. 313; Garseed v. Sternberger, 135 N. C. 502; Burns v. Tomlison, 147 N. C. 645; Burrus v. Witcover, 158 N. C. 384.

Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained. Martin v. Bush, 199 N. C. 93, 154 S. E. 43.

Both Parties Must Have Intent.—It was never held that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both. Rodgers, etc., Co. v. Bell, 156 N. C. 378, 383, 72 S. E. 817.

Parties Included.—The owner of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. Burrus v. Witcover, 158 N. C. 384, 74 S. E. 11.

Subsequent Promise Void.—A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void. Burns v. Tomlinson, 147 N. C. 645, 61 S. E. 614.

Unauthorized Act of Agent.—A bona fide wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of this section, is bound by the acts and statements of his agents in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may not recover on the contract merely because he was a bona fide wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one. Alex., etc., & Sons v. May, 156 N. C. 388, 72 S. E. 821.

Agents Right to Recover.—An agent for a principal to a contract made in violation of this section, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of section 2147, making it a misdemeanor. Burns v. Tomlinson, 147 N. C. 645, 61 S. E. 614.

If agents have no knowledge that it was the intention of their principals to enter into a wagering or gambling contract, they are entitled to recover, not only their commissions, but any sums of money which they have advanced to carry out purposes for their principals. Embrey v. Jemison, 131 U. S. 336, 346, 33 L. Ed. 172.

Burden of Proof.—Where in an action by an assignee and trustees under §§ 1609, et seq., it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the defense that the contracts were void under this section, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. Martin v. Bush, 199 N. C. 93, 154 S. E. 43.

Former section 2145 has been considered in several decisions, and it has been held without exception that when it is alleged that a contract sued on is a gambling contract within the provisions of section 2144 and the pleading is duly verified, that the burden is on the party seeking to recover upon the contract to prove that it is a lawful contract. (Holt v. Wellons, 163 N. C. 129.) Heath v. Heath, 175 N. C. 457, 459, 95 S. E. 916; Cobb v. Guthrie, 160 N. C. 313. These cases were decided under what formerly constituted § 2146.

When the defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon the plaintiff to show that it was a lawful one, i. e., that actual delivery was intended by the parties, and not merely that either had the privilege of calling therefor. Burns v. Tomlinson, 147 N. C. 645, 61 S. E. 614. This case was decided under what formerly constituted § 2146.

Burden Not upon Administrator.—Where an administrator paid certain notes and it was later alleged by the legatees that the notes were given for a gambling contract which should not have been paid, it was held that former § 2146 did not apply so as to put the burden of proving that the notes were given for a valid contract upon the administrator. Overman v. Lanier, 157 N. C. 544, 73 S. E. 192. This case was decided under what formerly constituted § 2146.

Evidence Sufficient.—The purchaser makes out a prima facie case upon evidence that the contract was founded upon a gambling or wagering consideration in violation of this section. Welles & Co. v. Satterfield, 190 N. C. 89, 129 S. E. 177. This case was decided under what formerly constituted § 2145.

Where the plaintiff himself testified that he did not buy certain cotton in the ordinary course of his business as a cotton manufacturer for use in his mill, this was prima facie a "future contract." Burns v. Tomlinson, 147 N. C. 634, 636, 61 S. E. 615. This case was decided under what formerly constituted § 2145.

When Question for Jury.—Where the contract is not a gambling one on its face the underlying purpose and intent of the parties should be left to the jury. Harvey v. Pettaway, 156 N. C. 375, 377, 72 S. E. 364.

Upon conflicting evidence as to whether or not the contract is a gambling contract, it becomes a question for the jury under proper instructions from the court. Welles & Co. v. Satterfield, 190 N. C. 89, 129 S. E. 177. This case was decided under what formerly constituted § 2146.

Same—Example.—Where there was evidence offered by the plaintiffs tending to show that they were wholesale dealers in cotton as a commodity, and that they purchased certain cotton as a commodity and sold it to manufacturers and exporters, and dealt in actual spot cotton and were in no wise dealers in futures, they were entitled to have this issue submitted to a jury. Eure v. Sabiston, 195 Fed. 721, 724.

Judgment by Default Void.—A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by our statute, which also declares that actions thereon may not be maintained in the courts of our State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc. Randolph v. Heath, 171 N. C. 383, 88 S. E. 731.

Cited in Meyer v. Fenner, 196 N. C. 476, 146 S. E. 82.

§ 2145. Repealed by Public Laws 1931, c. 236, s. 2.

§ 2146. Repealed by Public Laws 1931, c. 236, s. 2.

§ 2147. Entering into or aiding contract for "futures" misdemeanor.—If any person shall become a party to any contract declared void in this article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

If any person shall, while in this state, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any such contract made in another state, or in this state do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court. (Rev., ss. 3823, 3824; 1889, c. 221, ss. 3, 4.)

See generally the annotations under section 2144.

This Section Is Constitutional.—State v. McGinnis, 138 N.

C. 742; State v. Clayton, 138 N. C. 732; Carsey v. Sternberger, 135 N. C. 501; Rankin v. Mitchem, 141 N. C. 277; Randolph v. Heath, 171 N. C. 383, 88 S. E. 731.

§ 2148. Opening office for sales of "futures" misdemeanor.—If any person, corporation or other association of persons, either as principals or agents, shall establish or open an office or place of business in this state for the purpose of carrying on or engaging in making such contracts as are forbidden in this article, he shall be guilty of a misdemeanor, and shall on conviction be fined and imprisoned in the discretion of the court. (Rev., s. 3825; 1905, c. 538, ss. 1, 2.)

See generally the annotations under section 2144.

§ 2149. Evidence in prosecutions under this article.—No person shall be excused on any prosecution under the provisions of this article from testifying touching anything done by himself or others contrary to the provisions thereof, but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association or person in making, furthering or effectuting the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principals or agents, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this article. (Rev., s. 3826; 1905, ss. 3, 4, 5.)

See generally the annotations under section 2144.

CHAPTER 40
GUARDIAN AND WARD

Art. 1. Jurisdiction in Matter of Guardianship

§ 2150. Jurisdiction in clerk of superior court.—The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell training school: Provided that guardians may be appointed either by the clerk of the superior court in the county in which the infants, idiots, lunatics or inebriates reside, or if the guardian be the next of kin of the infant or a person designated by him or her in writing filed with the clerk, by the clerk of the superior court in any county in which is located a substantial part of the estate belonging to such infants, idiots, lunatics, or inebriates. (Rev., s. 1766; Code, s. 1566; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 7; 1868-9, c. 201, s. 4; 1917, c. 41, c. 1; 1935, c. 467.

Cross References.—For complete treatment of guardian and ward, see 6 N. C. Enc. Dig. 911-981; 14 N. C. Enc. Dig. 278-281. As to guardianship of insane persons, see sections 2285 et seq.

Editor's Note.—The amendment of 1935 added the proviso at the end of this section.

In General.—The powers which the court of equity formerly had and exercised in regard to orphans and their estates are now conferred upon the clerk of the superior court by this section and section 2155. Duffy v. Williams, 133 N. C. 195, 197, 45 S. E. 548.

Place of Appointment.—The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate, although, for the protection of either, a guardian may be appointed in any state where the person or any property of the infant may be found. Clarke v. Clarke, 178 U. S. 186, 193, 44 L. Ed. 1028.

The decision in the foregoing case seems to have formed the basis for the change effected in this section by the 1935 amendment.—Ed. Note.

Appointment by Legislature.—An act of the Legislature authorizing a certain person "to act as guardian" of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk. Henderson v. Bowd, 116 N. C. 795, 21 S. E. 692.

Matter of Discretion.—The appointment of a guardian is a matter of discretion, the exercise of which cannot be reviewable by the Supreme Court. Battle v. Vick, 15 N. C. 294.

Same—Choice of Infant.—The county court in appointing a guardian was not bound by the choice of the minor, but could appoint the person, who, in his discretion, would best perform the duty. Wynne v. Always, 5 N. C. 38; Grant v. Whitaker, 5 N. C. 231.

Person Related to Ward.—Courts are empowered to appoint as guardians such person as they may think proper, without regard to the kinship of the guardian to the ward. Mills v. McAllister, 2 N. C. 303.

Custody of Child.—The jurisdiction of clerks of the superior court in the appointment of guardians of infants, etc., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. In re Lewis, 88 N. C. 31.

Removal of Guardian.—A ward may not bring an action in the Superior Court by her next friend to remove her guardian appointed by the clerk under this section. Moses v. Moses, 204 N. C. 657, 169 S. E. 273.

Art. 2. Creation and Termination of Guardianship

§ 2151. Appointment by parents; effect; powers and duties of guardian.—Any father, though he be a minor, may, by deed executed in his lifetime and with the written consent and privy examination of the mother, if she be living, or by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and whether born at his death or in ventre sa mere, for such time as the children may remain under twenty-one years of age, or for any less time. Or in case the father is dead and has not exercised his said right of appointment, or has willfully abandoned his wife, then the mother, whether of full age or minor, may do so. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by deed or will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians. (Rev., ss. 1762, 1763, 1764; Code, ss. 1562, 1563, 1564; R. C., c. 54; 1762, c. 69; 1868-9, c. 201; 1881, c. 64; 1911, c. 120; Ex. Sess. 1920, c. 21.)

As to habeas corpus for custody of children, see section 2241 and notes.

Editor's Note.—In the second sentence of this section the words "or has willfully abandoned his wife" were added by

Public Laws, Ex. Sess. 1920, ch. 21. As to abandonment as forfeiture of custody of child, see section 189 and notes thereto.

Rights of Both Parents Recognized.—In this section and in others, the Legislature has recognized the human as well as the relation between parent and child, the paramour and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have adequate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. Truelove v. Parker, 191 N. C. 430, 436, 132 S. E. 295.

Persons Entitled to Custody.—The father is, in the first instance, entitled to the custody of his children. In re Lewis, 88 N. C. 31. Newsome v. Bunch, 144 N. C. 15, 56 S. E. 509. See also, In re Turner, 151 N. C. 474, 66 S. E. 431.

And this right is superior to the claims of every one, except those to whom he may have committed their custody and tuition by deed, or unless he is found to be unfitted for their care and custody. Latham v. Ellis, 116 N. C. 30, 20 S. E. 1012.

The parents have prima facie the right to the custody and control of their infant children as a natural and substantive right not lightly to be denied or interfered with by action of the courts; but this right is not universal and absolute, and may be modified and disregarded by the court when it is made to appear that the welfare of the children clearly requires it. Brickell v. Hines, 179 N. C. 254, 102 S. E. 309; In re Warren, 178 N. C. 43, 100 S. E. 76; Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487; In re Means, 176 N. C. 307, 97 S. E. 39; State v. Burnett, 179 N. C. 735, 102 S. E. 711.

Appointment by Deed or Will.—A father can not appoint a guardian for his children, nor impose on any one the duties and obligations of that office, except, pursuant to this section, "by deed executed in his life time, or by his last will and testament, in writing." Peyton v. Smith, 22 N. C. 325.

No one has a right to the guardianship of an infant, except as testamentary guardian or as appointed by the father by deed or by the court. Long v. Rhymes, 6 N. C. 122.

Same—Interpretation.—Where it can clearly be collected from the will of a father, that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. Peyton v. Smith, 22 N. C. 325.

Applies Only to Own Children.—A testator cannot appoint a testamentary guardian except to his own children. Camp v. Pittman, 90 N. C. 615.

Same—Grandchildren.—This section, allowing a father to appoint a guardian by deed or will to his children, does not authorize a grandfather so to appoint a guardian for his grandchildren. Williamson v. Jordan, 45 N. C. 46.

§ 2152. Natural guardianship on death of father.—In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and to the appointment of guardians. (Rev., s. 1765; Code, s. 1565; 1883, c. 364.)

Mother Entitled to Custody.—If a child's mother is a suitable person she is entitled to its custody even though some other person may be more suitable. Ashby v. Page, 106 N. C. 328, 11 S. E. 283, citing Mitchell v. Mitchell, 67 S. E. 307.

Same—Cannot Dispose of Child.—It may be questioned, whether in this State a mother can at all make a disposition of her child, though a minor, so as to confer upon another the right to have the custody and control thereof. In re Lewis, 88 N. C. 31, 33.

§ 2153. Appointment on divorce of parents.—When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother. (Rev., s. 1770; Code, s. 1571; R. C., c. 54, s. 4; 1838, c. 16; 1868-9, c. 201, s. 9.)

§ 2154. Appointment when father living.—The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor, be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor. (Rev., s. 1771; Code, s. 1572; R. C., c. 54, ss. 4, 7; 1806, c. 707; 1868-9, c. 201, s. 10.)

§ 2155. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.—Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever and at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's inebriate's, idiot's, or lunatic's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provision shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (Rev., ss. 1767, 1768, 1769; Code, ss. 1567, 1568, 1569; R. C., c. 54, s. 3; 1840, c. 31; 1868-9, c. 201, ss. 6, 7.)

As to expenses and disbursements credited to guardian, see section 2189. As to commissions, see section 2190.

§ 2156. Proceedings on application for guardianship.—On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, and the value of the rents and profits of the

real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school. (Rev., s. 1772; Code, s. 1620; C. C. P., s. 474; 1917, c. 41, s. 2.)

In General.—When a guardian is appointed he must assert his right to the custody of his ward by a civil action against the persons in charge of him, while they in turn, if so advised, can take appropriate steps to set aside the guardianship. In re Parker, 144 N. C. 170, 172, 56 S. E. 878.

Habeas Corpus Not Proper.—Except as between parents, under section 2241, the right of the custody of a child cannot be determined under the writ of habeas corpus, the object of that writ is to remove an illegal restraint. In re Parker, 144 N. C. 170, 56 S. E. 878.

Application Should Be in Writing.—The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the next friend or guardian ad litem be appointed upon due consideration of an application in writing, and not upon a simple suggestion. Morris v. Gentry, 89 N. C. 248, 249.

Effect of Failure of Notice.—Failure to notify the relative in custody of the child of proceedings to appoint a guardian is an irregularity, under this section, which does not render the appointment of the guardian void, though not conclusive upon such relative. In re Parker, 144 N. C. 170, 56 S. E. 878.

§ 2157. Letters of guardianship.—The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office. (Rev., s. 1773; Code, s. 1621; C. C. P., c. 475.)

§ 2158. Removal by clerk.—The clerks of the superior court have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it is their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.

2. Where the guardian in any manner mismanages the estate.

3. Where the guardian is about or intends to marry any ward in disparagement.

4. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.

5. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.

6. Where the guardian or his sureties are likely to become insolvent or nonresidents of the state. (Rev., s. 1774; Code, s. 1583; R. C., c. 54, ss. 2, 13; 1762, c. 69; 1868-9, c. 201, s. 20; C. C. P., ss. 470, 476.)

Cross References.—As to disqualifications to act as administrator (referred to in par. 5, this section), see section 8. As to removal of an administrator, see section 31 and annotations.

Discretion of Clerk.—The choosing by orphans of a guardian in court does not necessarily destroy the authority of a former guardian; but the clerk may at any time, remove a guardian upon proper cause shown, and in the appointment of a successor has entire discretion. Bray v. Brumsey, 5 N. C. 227.

Removal without Cause Error.—An order by a superior court clerk in a cause pending before him for the removal of a testamentary guardian, where none of the provisions of this section are alleged nor found as a fact by the clerk is improperly made, and will be set aside upon proceedings properly instituted to that end. Sanderson v. Sanderson, 79 N. C. 369.

Personal Use of Ward's Funds.—The use by a guardian of the funds of his ward for his own use is sufficient to warrant his removal. Ury v. Brown, 129 N. C. 270, 40 S. E. 4.

Funds in Jeopardy.—A testamentary guardian ought not to be removed without a showing of such waste, insolvency, or misconduct that the ward will be unable to recover the balance due on the final settlement. Sanderson v. Sanderson, 79 N. C. 369.

Marriage "in Disparagement."—Where a guardian married his female ward to a man of slender fortune, the inequality between the fortune of herself and husband does not constitute a "disparagement" for which the guardian is liable. Shutt v. Carloss, 36 N. C. 232.

A guardian is not answerable in pecuniary damages for marrying his female ward "in disparagement." Shutt v. Carloss, 36 N. C. 232.

Inequality of fortune never constituted "disparagement." Thereby was contemplated some personal or social defect or disqualification, etc. Shutt v. Carloss, 36 N. C. 232.

A ward may not bring an action in the Superior Court by her next friend to remove her guardian and appoint another, the Superior Court in such instance being without jurisdiction. Moses v. Moses, 204 N. C. 657, 169 S. E. 273.

Removal beyond State.—Where a guardian to an infant, appointed by a county court in this State, removed to another state, taking with him a part of the property of the infant, the court which made the appointment had the right to remove him without notice, and appoint another in his place. Cooke v. Beale, 33 N. C. 36.

§ 2159. Interlocutory orders on revocation.—In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation. (Rev., s. 1775; Code, s. 1607; 1868-9, c. 201, s. 44.)

§ 2160. Resignation; effect; accounting on resignation.—Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, or the clerk of the superior court may be appointed receiver of the estate of the ward, and if so appointed the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation. (Rev., s. 1776; Code, s. 1608; 1868-9, c. 201, s. 45; 1921, c. 95.)

Editor's Note.—In the second sentence of this section the words "or the clerk of the superior court may be appointed receiver of the estate of the ward and if so appointed" were added by Public Laws, 1921, ch. 95.

Liability Continues.—Where permission is given to a guardian by the judge of probate to file an ex-parte final account and turn over his guardianship to another, he is not thereby discharged from liabilities connected with his trust and arising before such resignation. He is still bound to account with the ward, or the succeeding guardian, when so required. Luton v. Wilcox, 83 N. C. 21.

Art. 3. Guardian's Bond

§ 2161. Bond to be given before receiving property.—No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court. (Rev., s. 1777; Code, s. 1573; C. C. P., s. 355.)

Cross References.—As to giving bond in surety company,

see section 339. As to giving mortgage in lieu of bond, see section 346. For terms and conditions of bond, see next section.

As to the liability of a bank and its surety for mingling funds while acting as guardian, see § 2162 and the note thereto. As to corporation acting as guardian without giving bond, see §§ 6376 and 6377.

Presumption of Giving of Bond.—When the fact that a guardian was appointed is admitted, a presumption arises that a guardian bond was given, since such a bond is a prerequisite to the appointment. Kello v. Maget, 18 N. C. 414.

Same—No Denial Permissible.—Where there is evidence that one had been appointed and had acted as guardian, neither he nor his administrators can deny that he was guardian on the ground that he had not given bond. Latham v. Wilcox, 99 N. C. 367, 6 S. E. 711.

Omission by the clerk to take the bond required on the appointment of a guardian does not destroy the efficacy of the appointment. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148, cited in note in 33 L. R. A., N. S., 762.

Liability. — A guardian and his bondsmen are liable for all moneys due his wards which he has collected or ought to have collected. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Same—Guardian's Administrator Appointed.—Where the administrator of a former guardian himself becomes guardian, he and his guardian bondsmen become liable for any balance due from the solvent estate of the former guardian. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Demand for Account and Settlement.—Whether upon the wards' coming to full age, a suit might be sustained upon the guardian bond in question, before a demand made for an account and settlement, Query? Barrett v. Munroe, 20 N. C. 334.

Necessary Parties to Action on Bond.—Where an assistant clerk of the Superior Court has been appointed guardian of the estate of a minor by the clerk and has given bond and has defaulted, causing loss to the estate of the minor, upon the minor's coming of age he and the new guardian appointed may sue upon the guardianship bond and where he does so neither the clerk of the Superior Court nor his sureties on his bond is a necessary party, so far as his action is concerned. Phipps v. Royal Indemnity Co., 201 N. C. 561, 161 S. E. 69.

§ 2162. Terms and conditions of bond; increased on sale of realty. — Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all personal property and the rents and profits issuing from the real estate of the ward. Provided, however, the clerk of the superior court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten per cent of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-forth times the amount of said real property so sold. (Rev., ss. 323, 1778; Code, s. 1574; R. C., c. 54, s. 5; 1792, c. 69, s. 7; 1835, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214; 1925, c. 131; 1935, c. 385.)

Cross References.—As to statute of limitations on a guardian's bond, see section 439, par. 2. As to renewal of bond, see section 2165. As to action on bond, see annotations under the following section.

Editor's Note.—The proviso in regard to bonds where the value of all personal property and rents and profits exceeds one hundred thousand dollars was added by ch. 131, Laws 1925.

Chapter 385 of the Public Laws of 1935 changed the penalty as specified in the second sentence in this section and added the exception appearing at the end of the section relating to cases where bond is executed by surety company.

For an act applicable only in Craven county adding a proviso to the section, see Public Laws 1935, chapter 147.

This section contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. Cheshire v. Howard, 207 N. C. 566, 571, 178 S. E. 348.

Not Strictly a Record.—A guardian's bond is not strictly a record of the court, although the fact that it was made and accepted may be. An action may therefore be brought on the bond after its loss or destruction, without any previous application to the court to restore it as a record. Harrell v. Hare, 70 N. C. 658, 660.

Failure to Insert Penalty.—A guardian's bond is not binding on the sureties thereto where it did not state the amount of the penalty at the time it was signed, and they did not afterwards authorize any one to insert the amount. Rollins v. Ebbs, 137 N. C. 355, 49 S. E. 341.

Failure to Collect Money.—Where a guardian ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in place of the money, he and his sureties are liable. Avent v. Womack, 72 N. C. 397.

Bank Intermingling Trust Funds.—If a bank, as guardian, in not investing the funds of its ward, but intermingling it with other funds of its bank, it is faithless to the trust reposed in it; under the terms of this section, then its bondsman, must suffer the loss for such faithlessness. Roebuck v. National Surety Co., 200 N. C. 196, 202, 156 S. E. 531.

Responsible for Laches.—A guardian is responsible on his bond for any loss resulting from his laches in failing to sue. Cross v. Craven, 120 N. C. 331, 333, 26 S. E. 940.

Limit of Liability.—The guardian's bond is not responsible in any way for the realty beyond the rents and profits. Cross v. Craven, 120 N. C. 331, 333, 26 S. E. 940.

Same—Sureties Not Responsible.—The sureties on a guardian's bond are not responsible for the nonpayment of a note given by the guardian, and signed by him as guardian, for the board and tuition of his ward. McKinnon v. McKinnon, 81 N. C. 201.

Cited in Pierce v. Pierce, 197 N. C. 348, 349, 148 S. E. 438.

§ 2163. To be recorded in clerk's office; action on bond.—The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions. (Rev., s. 1779; Code, s. 1575; R. C., c. 54, s. 5; 1868-9, c. 201, s. 12.)

Acceptance without Guardian's Signature Is Irregularity.—The acceptance and approval of the bond by the clerk of the Superior Court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the principal or as to his sureties. Cheshire v. Howard, 207 N. C. 566, 571, 178 S. E. 348.

In Name of State.—An action on a guardian's bond should be in the name of the State, for the benefit of the plaintiff, and not in the name of the plaintiff. Carmichael v. Moore,

88 N. C. 29; Williams v. McNair, 98 N. C. 332, 4 S. E. 131, 133; Norman v. Walker, 101 N. C. 24, 25, 7 S. E. 468.

Jurisdiction.—The clerk has no jurisdiction of a suit on a guardian's bond. Such suit must be brought in the superior court. Rowland v. Thompson, 65 N. C. 110.

Proper Relator.—Under the old system, a trustee appointed by the court of equity was a proper relator in an action on a guardian's bond to recover a trust fund. Jones v. Brown, 67 N. C. 475, distinguishing State v. Lightfoot, 24 N. C. 306; Governor v. Deaver, 25 N. C. 56; Waugh v. Miller, 33 N. C. 235.

The share of an infant in an estate in the hands of his guardian is capable of being assigned; and, when so assigned, the assignee, and not the infant, is the proper relator in an action on the guardian's bond. Petty v. Rousseau, 94 N. C. 355.

A creditor of a guardian is not the proper relator in an action upon the guardian's bond. McKinnon v. McKinnon, 81 N. C. 201.

Condition Set Out.—In an action on a guardian's bond, it is necessary that conditions of the bond which are alleged to have been broken should be set forth in the complaint. McKinnon v. McKinnon, 81 N. C. 201.

Evidence.—Under sec. 345, evidence of a balance in the hands of a guardian as shown of his annual account was admissible against a surety. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Same—Bond Must Be Proved.—A guardian's bond is not a record, and, before it can be read in evidence in any case, it must be proved like all other bonds. Butler v. Durham, 38 N. C. 589.

Defenses.—The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the guardian's bond. Clark v. Cordon, 30 N. C. 179.

Same—Prior Settlement.—A full settlement of a suit brought by a ward on a guardian's bond, made after the ward becomes of age, in the presence of the ward's mother, and by the advice of her counsel, and a final judgment thereon, is a bar to a subsequent action on the bond. Dean v. Ragsdale, 80 N. C. 215.

Same—Statute of Limitations.—An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. Self v. Shugart, 135 N. C. 185, 47 S. E. 484. See dissenting opinion.

Amount of Recovery.—In an action upon a guardian's bond, the recovery against either the principal or the surety can not exceed the penalty thereof, but should be for the penal sum of the bond, and to be discharged on payment of the damages sustained. Anthony v. Estes, 101 N. C. 541, 8 S. E. 347.

Same—Measure of Damages.—The measure of damages in an action upon a guardian's bond for a failure to perform any duty required of him is the amount of the principal received, with compound interest at six per cent until the ward arrives at full age. Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

§ 2164. Where several wards with estate in common, one bond sufficient. — When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (Rev., s. 1780; Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13.)

§ 2165. Renewal of bond every three years; enforcing renewal. — Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor. (Rev., ss. 324, 1781, 1782; Code, ss. 1581, 1582; R. C., c. 54, s. 10; 1762, c. 69, s. 15; 1868-9, c. 201, ss. 18, 19.)

As to liability of clerk for taking an insufficient bond, see section 2167.

Editor's Note—Clerk's Liability.—The question of the clerk's liability for failure to enforce the renewal of the guardian's bond has caused some conflicting decisions. In Lee v. Watson, 29 N. C. 289, it was decided by a divided court that, "The clerk and his sureties are responsible for neglect in failing to enforce renewal of the bond, and were bound to make compensation to the orphans for any loss they sustained thereby." Later in Jones v. Biggs, 46 N. C. 364, on the same question a divided court decided that the clerk was not liable. That the clerk and his sureties are not liable was again decided in Sullivan v. Lowe, 64 N. C. 500, the opinion being per curiam, and this is the law today.

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of co-sureties to the sureties on every other bond; the only qualification to the rule being, that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. Jones v. Hays, 38 N. C. 502.

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of cosureties to the sureties on every other bond; the only qualification to the rule being, that the sureties are bound to contribution only according to the amount of the penalty of the bond, in which each class is bound. Thornton v. Barbour, 204 N. C. 583, 585, 169 S. E. 153.

§ 2166. Relief of endangered sureties. — Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease. (Rev., s. 1783; Code, s. 1606; R. C., c. 54, s. 35; 1762, c. 69, ss. 21, 22; 1868-9, c. 201, s. 43.)

Giving New Bond with Other Sureties.—A surety to a guardian's bond is not discharged from his liability by the guardian giving a new bond with other sureties. Jones v. Blanton, 41 N. C. 115.

Liability of New Sureties.—When, under this section, new sureties are ordered to be given, the obligation of the bond given by the new sureties extends to the entire guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward. Bell v. Jasper, 37 N. C. 597.

Where Counter Security Given.—Where the sureties of a guardian obtained an order for counter security, and at such time the guardian owed his ward, and never afterwards returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arose from the fact that he was then able to pay the sum he owed: and the sureties on the first bond were liable for it, though the order for counter security expressly released them. Foye v. Bell, 18 N. C. 475.

The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, certainly at a time when the principal is in default, this section provides a remedy for dissatisfied sureties upon guardian bonds, but release is not one of the remedies therein contemplated. Thornton v. Barbour, 204 N. C. 583, 587, 169 S. E. 153.

§ 2167. Liability of clerk for taking insufficient bond. — If any clerk of the superior court

shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable. (Rev., s. 1784; Code, s. 1614; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 6; 1868-9, c. 201, s. 51.)

In General.—Clerks, and the sureties on their official bonds, are now liable, as the justices were under the old system, for any loss or damages resulting from a failure to take good bonds, and the record of the appointment of the guardian is sufficient evidence of such appointment. Topping v. Windley, 99 N. C. 4, 5 S. E. 14, 17.

Effect of Failure.—The giving of the bonds required of guardians and administrators is not essential to the validity of the appointment itself; the failure to take the bond, however, subjects the officer whose duty it is to see that it is made to the consequences of such omission. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148.

When Action Lies.—No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there has been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. Jones v. Briggs, 46 N. C. 364.

§ 2168. Liability of clerk for other defaults. — If any clerk of the superior court shall willfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as directed in the preceding section. (Rev., s. 1785; Code, s. 1615; 1868-9, c. 201, s. 52.)

Editor's Note—Former Provision.—Formerly the clerk was required to make a record of and enter at large on the docket the names of the justices who were present at the granting of a guardianship; and he was also required to make the same entry on the guardian's bond. The purpose of this requirement was to furnish an easy means of proving which of the justices were on the bench in the event that they have been guilty of such negligence in respect to the sureties taken on the bond as to be liable to the action of the infant according to the provisions of the statute. State v. Koonce, 51 N. C. 379, 380.

It was not the intention of the Legislature in the statute, Revised Code, chapter 54, section 6, to make it a breach of the clerk's official bond to omit entering the names of the justices present in the court appointing a guardian, either on the docket, or on the bond, or both; but that in these particulars the act is merely directory. State v. Koonce, 51 N. C. 379.

Art. 4. Powers and Duties of Guardian

§ 2169. To take charge of estate. — Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor. (Rev., s. 1786; Code, s. 1588; R. C., c. 54, s. 21; 1762, c. 69, s. 3; 1868-9, c. 201, s. 25.)

In General.—The rule of diligence established by the decided cases is, that a guardian in the management of his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs. Covington v. Leak, 67 N. C. 363; Freeman v. Wilson, 74 N. C. 368, 369; State v. Mebane, 63 N. C. 315; Luton v. Wilcox, 83 N. C. 21, 26.

The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other states. Lamar v. Micou, 112 U. S. 452, 470, 28 L. E. 751.

Payment of funds to a guardian by Veterans' Bureau under War Risk Insurance Act vests title in the ward and operates to discharge the obligation of the United States. Hence the deposit of the funds in a bank which was duly appointed guardian and which later became insolvent does not belong to the United States and, as indebtedness to the United States is essential to priority under 31 U. S. C. A., § 191, the claim of the surety on the guardian's bond is without merit. In re Home Savings Bank, 204 N. C. 454, 168 S. E. 688.

Power to Bind Ward by Contract.—A contract made by a guardian within his authority, will be binding upon his ward upon his attaining full age. United States Mortgage Co. v. Sperry, 138 U. S. 313, 34 L. Ed. 969.

Recovery of Realty.—A guardian having no title to the land of his ward, it is not his duty to sue for the recovery of realty. Cross v. Craven, 120 N. C. 331, 26 S. E. 940.

Guardian May Exchange Property. — A guardian, having personal surety for a debt due to his ward, may exchange that personal for real security; and, if he does it bona fide, he is not responsible to his ward. Christman v. Wright, 38 N. C. 549.

Compromise of Claim.—A ward is not bound by a compromise of his general guardian of the former's claim for damages for a personal injury, unless made with the sanction of the court to which the guardian should account; and in no event when the compromise is due to the gross negligence of the guardian, or in bad faith, is manifestly unfair to the ward, and for a grossly inadequate consideration; and when such are found to be the facts, legal fraud will be inferred and the compromise will be set aside without a specific finding of actual fraud. Bunch v. Foreman Blades Lumber Co., 174 N. C. 8, 93 S. E. 374.

§ 2170. To sell perishable goods on order of clerk. — Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale. (Rev., s. 1787; Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1868-9, c. 201, s. 26.)

§ 2171. How sales and rentals made. — All sales and rentings by guardians shall be publicly made, between the hours of ten o'clock a. m. and four o'clock p. m., after twenty days notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. In cases where guardians have heretofore rented their ward's land at private rentings in good faith and for the benefit of the ward's estate, they shall not be liable to the penalty heretofore prescribed by law. The proceeds of all sales of personal estate and rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security. (Rev., s. 1788; Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391.)

Public Renting Required.—This section impliedly declares it to be the interest of the wards to rent the lands publicly. Duffy v. Williams, 133 N. C. 195, 198, 45 S. E. 548.

Same—Not Discretionary with Guardian.—The provisions of this section that all sales or renting of personal and real property by a guardian shall be made publicly, and, upon the terms therein prescribed, are peremptory and leave no discretion to such guardians. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188.

Same—Purpose of Provision.—The purpose of these precise and stringent regulations is to give notice to the public of the time, place and terms of such "sales and rentings," and

thus encourage and promote competition and obtain better prices and higher rents for the property sold or let, and, also, to prevent the exercise of possible bad judgment, imprudence, lack of caution, collusion and fraud on the part of guardians. Pate v. Kennedy, 104 N. C. 234, 236, 10 S. E. 188.

Same—Effect of Violation.—Where a lease by the guardian of his ward's lands was not publicly made, as required by this section, nor approved by the clerk of the superior court, as required by section 2172, the lessee may not hold the ward's estate liable for the false representation of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. Coxe v. Whitmire Motor Sales Co., 190 N. C. 833, 130 S. E. 841.

Same—Application.—This section, requiring sales by guardians to be publicly made, does not apply to sales made under directions of the superior court in exercise of its general jurisdiction in equity. Barcello v. Hopgood, 118 N. C. 712, 24 S. E. 124. The section restricts the guardian and not the court. Id.

Court May Order Private Renting.—It is not irregular or erroneous to order the sale of an infant's land to be made privately by the guardian. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124.

§ 2172. When lands may be leased. — The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall become of age, or die in nonage. But no guardian, without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land. (Rev., s. 1789; Code, s. 1591; R. C., c. 54, s. 25; 1762, c. 69, s. 13; 1794, c. 413, s. 2.)

See note of Coxe v. Whitmire Motor Sales Co., 190 N. C. 838, 130 S. E. 841, under section 2171.

§ 2173. When guardians to cultivate lands of wards. — Where any parent of a minor child qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situate for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate. (1909, c. 57.)

§ 2173(1). Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business.—In addition to the powers given to guardians under the general laws of the State, all guardians may, upon presentation of satisfactory evidence, with approval of the clerk of superior court, which approval must be concurred in by the resident judge or other regular or special judge holding courts in the district, cause lands to be cultivated and make such contracts with reference thereto as said guardian may deem to the best interest of his ward's estate, and under the direction of the clerk of superior court, with the approval of the resident judge or other regular or special judge holding courts in the district, continue to operate any business or business enterprise of his ward and make such contract, agreements, and settlements with reference thereto as the clerk of superior court, with the approval of said resident judge or other regular or special judge holding courts in the district, may determine necessary or find to be the best interest of the estate. (1935, c. 24.)

Editor's Note.—Section 1-A of Public Laws of 1935, chapter 24 provides "that this act shall not affect pending litigation."

§ 2174. When timber may be sold. — In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. (Rev., s. 1790; Code, s. 1596; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 33.)

Sale without Order of Court.—Where a guardian sold timber on the land of his ward without an order of the court, as required by this section, and took a note for the purchase money, the maker of such note cannot when sued on the same by the guardian and ward (the latter thereby ratifying the contract) set up the failure of the guardian to observe the statutory mandate. Evans v. Williamson, 79 N. C. 86.

§ 2174(1). Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.—On application of the guardian or other fiduciary of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed, by petition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the re-payment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over twenty-one years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156.)

§ 2175. Plate and jewelry to be kept. — All

plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity. (Rev., s. 1791; Code, s. 1597; 1895, c. 74; 1868-9, c. 201, s. 34.)

§ 2176. Personal representative of guardian to pay over to clerk.—In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (Rev., s. 1794; Code, s. 1622; 1881, c. 301, s. 2.)

No Action between Administrators.—The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. Allison v. Robinson, 78 N. C. 222.

§ 2177. Collection of claims; duty and liability.—Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same. (Rev., s. 1795; Code, s. 1593; R. C., c. 54, s. 23; 1762, c. 69, s. 10; 1868-9, c. 201, s. 30.)

Cross References.—As to compound interest on obligations due to guardians, see section 2308.

General Liability.—A guardian is liable not only for what he does receive, but for what he ought to receive; and if he ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable. Avent v. Womack, 72 N. C. 397.

Same—Diligence and Good Faith.—A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. Armfield v. Brown, 73 N. C. 81.

A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to be responsible for omitting to collect a note during the late war, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. Love v. Logan, 69 N. C. 70.

Need Not Resort to Extraordinary Remedies.—Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. White v. Robinson, 64 N. C. 698.

Accepting Unsecured Note.—A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable to his ward for the amount of such note. Covington v. Leak, 65 N. C. 594.

Power to Collect and Compromise Debts.—It is held in the U. S. Supreme Court that a guardian, unless restricted by statute, may collect or compromise and release debts due to the ward, subject to the liability to be called to account if he has acted without due regard to the ward's interest. Maclay v. Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 528.

Accepting Smaller Sum.—Where a guardian accepts from an administrator a smaller sum than the ward's share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121.

Failure to Ascertain Amount Due. — Where a guardian carelessly and without deliberation accepts for his wards from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for what he failed to collect. Culp v. Stanford, 112 N. C. 664, 16 S. E. 761, distinguishing Luton v. Wilcox, 83 N. C. 21, and other decisions cited.

Failure to Sue before Insolvency.—Where a guardian fails to sue a note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence. Coggins v. Flythe, 113 N. C. 102, 18 S. E. 96.

Failure to Sue Surety Knowing of Obligor's Insolvency.—Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the guardian having opportunity all the time of knowing the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. Williamson v. Williams, 59 N. C. 62, distinguishing Deberry v. Ivey, 55 N. C. 370; Davis v. Marcum, 57 N. C. 189.

§ 2178. Liability for lands sold for taxes. — If any guardian suffer his ward's lands to lapse or become forfeited or be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward. (Rev., s. 1796; Code, s. 1595; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 32.)

§ 2179. Liability for costs.—All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults shall be paid by the party found in default. (Rev., s. 1797; Code, s. 1611; 1868-9, c. 201, s. 48.)

As to compound interest on obligations due guardians, see section 2308. As to owelty to be by guardian, see section 3224.

Art. 5. Sales of Ward's Estate

§ 2180. Special proceedings to sell; judge's approval required.—On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale or mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (Rev., s. 1798; Code, s. 1602; R. C., c. 54, ss. 32, 33; 1827, c. 33 1868-9, c. 201, s. 39; 1917, c. 258, s. 1; 1923, c. 67, s. 1.)

Editor's Note.—In the next to the last sentence in this section a change was made by Public Laws 1923, ch. 67, section 1. The former provision was that a guardian could not mortgage his ward's property for a term of years "exceeding the minority of the ward." This limitation was stricken out and the term made dependent upon the decree of the court.

Not Applicable to Settlement or Partition.—This section does not apply either to the settlement of estates or to partition. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 26.

Jurisdiction.—The previous court of equity had authority upon the ex-parte petition of the plaintiffs, while they were infants, suing by their mother as next friend, to order and make a valid sale of their land mentioned for partition, and to pass the title thereto through its commissioner appointed for the purpose. Dodd, Ex-parte, 62 N. C. 97; Rowland v.

Thompson, 73 N. C. 504; George v. High, 85 N. C. 113; Ivey v. McKinnon, 84 N. C. 651; Morris v. Gentry, 89 N. C. 248, 252.

Under the prevailing system of judicature in this State, the superior courts have succeeded to and possess the jurisdiction and power of the late courts of equity in respect to infants and their property; and there can be no question that these courts have authority in all proper cases to direct a sale of their property, both real and personal, for their benefit and advantage. Williams v. Harrington, 33 N. C. 616; Ex parte Dodd, 62 N. C. 97; Sutton v. Schonwald, 86 N. C. 198; Morris v. Gentry, 89 N. C. 248; Tate v. Mott, 96 N. C. 19, 22 2 S. E. 176.

Same—Clerk.—By this section the clerk and court in term have concurrent jurisdiction in the manner of ordering a sale of infants' lands upon petition of their guardians. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124.

Same—Contingent Interests.—This section does not confer jurisdiction on the clerks of courts to order the sale of contingent interests in lands, and suits to sell such interests, when the circumstances of the ward require it, should be determined in the superior court, in its equitable jurisdiction, which is required to order an investment of the funds in proper instances in accordance with the terms and conditions imposed by the conveyance, in order that the lawful intent of the donor may not be defeated. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

And a sale of such interests is void for the lack of jurisdiction, and the deed thereto of the guardian conveys nothing to his grantee. Smith v. Witter, 174 N. C. 616, 94 S. E. 402. As to procedure for the sale of contingent interests see section 1744.

Must Be Represented.—The court may sell the land of minors for better investment, when they are properly represented before the court. Hutchinson v. Hutchinson, 126 N. C. 671, 36 S. E. 149.

Appointed by Court.—The next friend of an infant ought always to be appointed by the court, and really he is an officer of the court, and under its supervision and control. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Removal.—The court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Power of Representative.—The power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed execept on petition filed, and the order must in all cases have the supervision and approval of the judge. Morton v. Lumber Co., 178 N. C. 163, 166, 100 S. E. 322.

Representative Not a Party.—The guardian or next friend of an infant is not, properly speaking, a party to the action, although his name appears in the record. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Notice to Infant Unnecessary.—It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Sale May Be Private.—The sale by order of the court may be either public or private. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124. Section 2171 does not apply when the sale is by order of court. Id.

Guardian Cannot Purchase. — It is well settled that a guardian can not purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. Lee v. Howell, 69 N. C. 200, 203; Patton v. Thompson, 55 N. C. 285.

When Guardian Liable.—Where a guardian obtains a decree of a court of equity for the sale of his ward's land, it must appear, in order to make him liable for any loss in consequence of such sale, that he willfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. Harrison v. Bradley, 40 N. C. 136.

Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, and the sum received in cash is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, under § 962, the sale was not void. Ex parte Huffstetler, 203 N. C. 796, 167 S. E. 65.

Where Order Violated.—It is proper for the court, before intervening rights have accrued, upon affidavit of one who has been adjudged an idiot in proceedings before the clerk, and guardian appointed, to grant a temporary restraining order, with notice to show cause, and at the hearing thereof to continue the order to the final hearing, when it appears that the guardian has sold the interest in lands of his ward and made title thereto, without having received the purchase price, contrary to the provisions of the order of sale. In re Propst, 144 N. C. 562, 57 S. E. 342.

Proof Required.—This section, contemplates that, in addition to the verified petition of the guardian, the clerk shall require other satisfactory proof of the truth of the matter alleged. The judge, exercising the functions of a chancellor, where sales of this character were made pursuant to proceedings in courts of equity, always referred the petition to the clerk and master, who took evidence and reported their conclusions to the court. It is usual, since these large and important equitable functions are conferred upon the clerks, to accompany the petition with affidavits showing the necessity for the sale. The practice is to be commended, and should not, without good cause, be departed from. In re Propst, 144 N. C. 562, 567, 57 S. E. 342.

Same—Sale May Be Set Aside.—Where the court, without taking any means to ascertain the necessity for a sale, directed it to be made, and that it should be "first advertised at the court house and three other public places," and no bid be received less than $125, and that the guardian should make conveyance, it was held, that it was not error to set aside the sale and direct another. In re Dickerson, 111 N. C. 108, 15 S. E. 1025.

Judgment.—Where an infant sues by his next friend he is as much bound by the judgment as an adult, and this rule applies to nonresident as much as to resident infants. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Same—When Voidable.—A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Confirmation of Sale.—While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with. In re Dickerson, 111 N. C. 108, 114, 15 S. E. 1025.

An emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency judge is not holding court in the county. This result is not affected by the provisions of § 766(b). Ipock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 175 S. E. 127.

Approval Nunc Pro Tunc.—Where a guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge, and the judge later approved the order nunc pro tunc, the defect was cured so as to come within this section. Powell v. Armour Fertilizer Works, 205 N. C. 311, 170 S. E. 916; Ipock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 797, 175 S. E. 127.

Title Acquired.—Where land of an infant was sold under a decree of the court upon petition of a guardian, the title acquired is not rendered invalid by the reversal of the decree on account of irregularity in the proceeding of which the purchaser had no notice. Sutton v. Schonwald, 86 N. C. 198.

Same—Unauthorized Private Sale.—A guardian, having offered at public sale the land of his wards in accordance with an order of the court, and having failed to sell for want of a bid at a fair price, subsequently sold the land at private sale upon terms approved by the court: it was held, that the purchaser at such private sale obtained a good title. Rowland v. Thompson, 73 N. C. 504.

When Foreign Guardian May Sell.—Where a foreign guardian has complied with the provisions of sections 2195, 2196, which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of this section, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. Cilley v. Geitner, 183 N. C. 528, 11 S. E. 866.

Stated in Ex parte Quick, 206 N. C. 627, 630, 175 S. E. 119.

§ 2181. Fund from sale has character of estate sold and subject to same trusts. — Whenever, in consequence of any sale under the preceding section, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all such cases of sale,

whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper. (Rev., s. 1799; Code, s. 1603; R. C., c. 54, s. 33; 1827, c. 33; s. 2; 1868-9, c. 201, s. 40.)

In General.—Although it is the duty of a court, when the real estate of an infant is sold under its decree, to direct the proceeds to be held as real estate, yet a husband of such infant, who has received the proceeds from his wife's guardian, has no right to complain that such course has not been adopted. Harrison v. Bradley, 40 N. C. 136.

Application.—Where a female infant's land was sold for the benefit of the infant and she married and died before becoming of age, it was held that the money retained the character of real property. Wood v. Reeves, 58 N. C. 271.

§ 2182. Sale of ward's estate to make assets. — When a guardian has notice of a debt or demand against the estate of his ward he may apply by petition, setting forth the facts, to the clerk of the superior court wherein the guardianship was granted, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases. (Rev., ss. 1800, 1801; Code, ss. 1604, 1605; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, ss. 41, 42.)

Ascertaining That Debts Are Due. — The court should first ascertain that there are debts due from the ward, which render the sale of the property expedient, and they should also select the part or parts of his property which can be disposed of with least injury to the ward. Leary v. Fletcher, 23 N. C. 259.

An order authorizing a guardian, under certain circumstances, to sell the land of his ward, must first show that it was adjudged that there were debts due from the ward, and then specify what particular land is to be sold for their payment. Spruill v. Davenport, 48 N. C. 42.

Same—Amount Need Not Be Shown.—The amount of the debts, or to whom due, need not be set forth in the order. Pendleton v. Trueblood, 48 N. C. 96; Spruill v. Davenport, 48 N. C. 42.

Same—Sale Void Where Debt Not Shown.—A sale of a ward's land on petition of the guardian to pay debts is void, where it is not made to appear that the court passed on and ascertained the fact that there was a debt against the ward's estate. Coffield v. McLean, 49 N. C. 15.

Specifying Land to Be Sold.—An order that the guardian sell the land of his ward, or so much thereof as will be sufficient to discharge his debts, is fatally defective and void, and vests no title in those who bought at the sale. Ducket v. Skinner, 33 N. C. 431; Leary v. Fletcher, 23 N. C. 259.

Where the order "to sell the land of the ward named in the petition, adjoining the lands of A., B., and others, containing about 110 acres," it not appearing that the ward had other land, this is a sufficient specification of the land under the statute. Pendleton v. Trueblood, 48 N. C. 96.

Mortgagee Not a Party.—In a petition to sell lands for assets to pay debts, a mortgagee of the interest of one of the heirs-at-law was improperly admitted a party defendant. Such claims cannot be set up in this proceeding. Battle v. Duncan, 90 N. C. 546.

Proceed's Subject to Attachment.—Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale. Leroy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

Priority in Payment.—When a guardian of an infant, under an order of court, sells his ward's land for payment of the debts of the ancestor, he is bound to observe the same priority in the payment of the debts as an administrator or executor in applying the personal assets. Merchant v. Sanderlin, 25 N. C. 501.

Sale of Lunatic's Property.—A guardian of a lunatic may, by order of the court, rightfully sell the personal property of his ward for the payment of his debts, provided there be no fraud in the proceeding. Howard v. Thompson, 30 N. C. 367. As to sale or renting of lunatics' estates, see sec. 2291 et seq.

Art. 6. Returns and Accounting

§ 2183. Return within three months.—Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months. (Rev., s. 1802; Code, s. 1577; R. C., c. 54, s. 11; 1762, c. 69, s. 9; 1868-9, c. 201, s. 14.)

In General.—It is the duty of the guardian within three months after his appointment to exhibit an account, upon oath, of the estate of his ward to the clerk of the superior court, and to make an annual return. Norman v. Walker, 101 N. C. 24, 26, 7 S. E. 468.

In the administration of the estate in behalf of the lunatic, the guardian is subject to the orders of the clerk by whom he was appointed and to whom he is required by this and following sections to account. Read v. Turner, 200 N. C. 773, 777, 158 S. E. 475.

§ 2184. Procedure to compel return.—In cases of default to exhibit the return required by the preceding section, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county till he files such return. (Rev., s. 1803; Code, s. 1578; R. C., c. 54, s. 12; 1762, c. 69, s. 15; 1868-9, c. 201, s. 15.)

§ 2185. Additional assets to be returned.—Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in the preceding section. (Rev., s. 1804; Code, s. 1579; 1868-9, c. 201, s. 16.)

§ 2186. Annual accounts.—Every guardian shall, within twelve months from the date of this qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such account-

ing party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed prima facie evidence of correctness. (Rev., s. 1805; Code, s. 1617; R. C., c. 54, ss. 11, 12; 1762, c. 69, ss. 9, 15; 1871-2, c. 46.)

Definition of "Account."—An account is defined to be "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits with their respective dates." Black's Dictionary, p. 17. In this section the word is used in this sense, and when not only an account, but payment or settlement is intended, additional words are used to express that idea. State v. Dunn, 134 N. C. 663, 664, 668, 46 S. E. 949.

Good Faith Essential.—There is no trust known to the law which so urgently calls for good faith as that which subsists between the guardian and his ward; and no higher evidence can be offered of that good faith than perfect candor, full information, and minute, detailed accounts. Moore v. Askew, 85 N. C. 199, 202.

What Set out.—It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Accounts Prima Facie Correct.—The ex parte settlement made by guardians, executors and administrators with the courts having jurisdiction of such matters, are, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific assignment of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking them to establish, by a preponderance of testimony, their incorrectness. State v. Turner, 104 N. C. 566, 10 S. E. 606.

Ward Can Demand Annual Statement.—A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate. Moore v. Askew, 85 N. C. 199.

Account as Evidence.— The annual account of a guardian is competent evidence against him, and presumptive evidence against his sureties. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

§ 2187. Procedure to compel accounting.—If any guardian omit to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office. And in all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceeding, including the costs of service of all notices or writs incidental to, or thereby accruing, or the amount of the costs of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate. Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for said corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of said corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may also be fined and/or removed as such guardian for such failure or omission. (Rev., s. 1806; Code, s. 1618; C. C. P., s. 479; 1929, c. 9, s. 2; 1933, c. 317, § 1.)

See 11 N. C. Law Rev., 232.

Editor's Note.—The Act of 1929 added the third sentence to this section.

Public Laws 1933, c. 317, inserted the last sentence of this section relating to compelling corporate guardians to account.

Ground for Removal.—Under this section authorizing the clerk of the superior court to remove a guardian from office upon his failure to account, pursuant to the order of the clerk, a guardian's refusal to account for rents and profits of a ward's land, and his improper claim to the rent adverse to the ward, was ground for his removal. In re Dixon, 156 N. C. 26, 72 S. E. 71.

For this omission to make their quarterly and annual returns, it is the duty of the clerk to require them to be made, and on failure to do so attach and remove the defendants from their office. Sanderson v. Sanderson, 79 N. C. 369, 371.

§ 2188. Final account.—A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court. (Rev., s. 1807; Code, s. 1619; C. C. P., s. 481.)

That a guardian in his final settlement must account for compound interest upon obligations. See section 2308.

In General.—This section is not intended to bestow upon the guardian the ward's moneys and properties for six months after he becomes of age, nor to deprive him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months, and after its lapse the clerk can call on the guardian to file his final account, with the receipts of the ward, in full settlement, to complete the record in his office, for the section states that such return shall be "audited and recorded." Self v. Shugart, 135 N. C. 185, 189, 47 S. E. 484.

"Audit" Explained.—When the section directs that the clerk shall "audit" the account, it implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Rowland v. Thompson, 64 N. C. 714, 717.

Jurisdiction.—The clerk of the superior court has jurisdiction of settlements between guardian and ward, and, of course, between the guardian and ward's personal representative. McLean v. Breece, 113 N. C. 390, 18 S. E. 694; McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265; Rowland v. Thompson, 65 N. C. 110.

The superior court had no original jurisdiction of an action for an account by an existing guardian of infant children against their former guardian; such action should have been brought in the court of probate (now the clerk). Sudderth v. McCombs, 65 N. C. 186.

Same—Appeal.—From the judgment of the clerk an appeal will lie to the judge of the superior court, who having thus obtained jurisdiction of the cause will retain it until it is finally disposed of. Rowland v. Thompson, 65 N. C. 110.

Settlement as Defense. — Where in a suit on a guardian bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt: Held, that this was a sufficient defense to the suit on the guardian bond. State v. Cordon, 30 N. C. 179.

Action Barred in Ten Years.—Ten years after the ward becomes of age bars an action by him against his guardian for settlement. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

When Action Barred as to Sureties.—An action for breach of the guardianship bond based upon this section is barred as to the sureties after three years from the date the guardian should have made payment, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. State v. Fountain, 205 N. C. 217, 171 S. E. 85.

Judgment Is an Estoppel.—The clerk of the superior court, having jurisdiction of proceedings against a guardian for a

settlement, a judgment rendered therein is an estoppel to an action in the superior court between the same parties and upon the same question, and can not be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose. Donnelly v. Wilcox, 113 N. C. 408, 18 S. E. 339.

Distributees May Have Accounting.—The express trust existing between the guardian and ward terminates at death of the latter, and the ward's distributees may have letters of administration taken out and call for an accounting. Lowder v. Hathcock, 150 N. C. 438, 439, 64 S. E. 194.

Effect of Wrongful Settlement.—Where a guardian surrendered his office in March, to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith; it was held, that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom. Jennings v. Copeland, 90 N. C. 572.

§ 2189. Expenses and disbursements credited to guardian.—Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (Rev., s. 1808; Code, s. 1612; R. C., c. 54, s. 28; 1762; c. 69, ss. 18, 19; 1799, c. 536, s. 2; 1868-9, c. 201, s. 49.)

Cross References.—As to payments allowed in accounting, see section 2155. As to commissions, see next section.

In General.—A guardian should be charged with what he receives, and credited with what he pays out, when it does not appear that he collected anything prematurely, or kept on hand any unreasonable sum. Freeman v. Wilson, 74 N. C. 368.

Paying Debts Due. — When the guardian in good faith pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respects. McLean v. Breece, 113 N. C. 390, 392, 18 S. E. 694; Adams v. Thomas, 83 N. C. 521.

Exceeding Income of Estate.—In paying the accounts of a guardian, he can not, except under rare circumstances, be allowed disbursements beyond the income of his ward. Caffey v. McMichael, 64 N. C. 507; Johnston v. Haynes, 68 N. C. 514.

A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and education of the ward, except with the sanction of the court, or in extreme cases of urgent necessity. Tharington v. Tharington, 99 N. C. 118, 5 S. E. 414.

Same—Clerk May Allow.—The clerk of the superior court may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk of the court. Duffy v. Williams, 133 N. C. 195, 45 S. E. 548.

Same—Lunatic's Debts.—Where, in the settlement of the guardian's account, the lunatic is dead and his only child is of age, and it appears that the guardian, in good faith, paid debts without prejudice to the estate, the disbursement would be allowed. McLean v. Breece, 113 N. C. 390, 18 S. E. 694.

Setting Ward up in Business.—A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the court for leave, is not entitled to charge the ward with it. Shaw v. Coble, 63 N. C. 377.

Counsel Fees.—A guardian should be allowed reasonable attorney's fees paid in good faith. Burke v. Turner, 85 N. C. 500, citing Whitford v. Foy, 65 N. C. 265.

But fees paid by a guardian to the counsel for services rendered in obtaining an unfair settlement with the ward, and in aiding the guardian to cover up the fraud, can not be allowed the latter in his settlement. Johnston v. Haynes, 68 N. C. 509.

Father as Guardian.—A father, or his trustee, in settling his accounts as guardian for his children, has no right to charge the children with the amount expended for their education. Walker v. Crowder, 37 N. C. 478.

A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must, before applying any of his ward's income to that end, procure the sanction of the proper court. Burke v. Turner, 85 N. C. 500.

Stepfather as Guardian.—Where a stepfather becomes guardian to his stepchild, he is not entitled to charge for board and other necessaries furnished to his ward antecedently to his appointment as guardian; the infant being incompetent to contract therefor. Barnes v. Ward, 45 N. C. 93.

Payments to Mother for Board of Wards after Majority.—A guardian is not chargeable with moneys paid to the mother of his wards for their board after their arrival at full age; no objection being urged against the propriety or justness of the claim, or of the price paid. McNeill v. Hodges, 83 N. C. 505.

Gift by Ward to Guardian.—In the U. S. Supreme Court it is held that if after the ward comes of age, and into possession of his estate he thinks fit, when sui juris, and at liberty, he may make any reasonable grant by way of award for care and trouble. When done with his eyes open, the court will never set it aside. Ralston v. Turpin, 129 U. S. 663, 672, 22 L. Ed. 747.

Same—Limitation to Rule. — The courts guard against gifts by a ward to his guardian if made at the very time of accounting and delivering up the estate. Ralston v. Turpin, 129 U. S. 663, 673, 32 L. Ed. 747.

§ 2190. Commissions.—The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors. (Rev., s. 1809; Code, s. 1613; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1868-9, c. 201, s. 50.)

As to commissions of executors and administrators, see section 2190.

A Compensation to Guardian. — Commissions are only a compensation to the guardian for his time and trouble in managing his ward's estate. Walton v. Erwin, 36 N. C. 136.

The time spent by a guardian in the management of his ward's estate may be considered in fixing his commissions, but cannot be separately charged. Shutt v. Carloss, 36 N. C. 232.

Securities Delivered at Majority.—Commissions should be allowed a guardian, on the amount of the notes and other securities for debt delivered to the ward upon the termination of the guardianship. Whitford v. Foy, 65 N. C. 265.

After Ward's Majority. — A guardian is not entitled to commissions upon any disbursement made after his ward arrives at full age. McNeill v. Hodges, 83 N. C. 505.

Failure to Keep Accounts. — A guardian is entitled to commissions, although he omitted to keep and render regular accounts, where no imputation is cast upon his integrity by reason of the neglect. McNeill v. Hodges, 83 N. C. 505. But where he is grossly negligent it is otherwise. Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

Using Ward's Money in Own Business.—A guardian will be allowed commissions, although he uses his ward's money in his business, if he makes regular returns, so as to show at all times what amount is due his ward. Carr v. Askew, 94 N. C. 194, distinguishing Burke v. Turner, 85 N. C. 500, 504. See also, Fisher v. Brown, 135 N. C. 198, 47 S. E. 398.

Same—Gross Negligence.—A guardian is not entitled to commissions on money collected and used by him in his own business where he was guilty of gross negligence in not making his returns. Burke v. Turner, 85 N. C. 500.

When Ward Boards with Guardian.—A guardian is entitled to commissions on payments made for his ward for goods brought of a firm of which the guardian was a member, but not on charges for board while the ward lived in his family. Williamson v. Williams, 59 N. C. 62.

Rate of Commissions. — Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counsel for assisting him in the management, the last of which will lessen it. Whitford v. Foy, 65 N. C. 265.

Same—Two and One-half Per Cent.—Two and one-half per cent was ample commission to a guardian receiving most of the ward's property, without litigation or difficulty, in the shape of notes payable to himself, which he retained 6 years collecting but little interest, when he voluntarily

resigned and delivered the notes to his successor. Walton v. Erwin, 36 N. C. 136.

Same—Five Per Cent.—Five per cent was not an unreasonable allowance to a guardian as commissions on his receipts and disbursements, when these were numerous, and extended over a period of fourteen years. Covington v. Leak, 65 N. C. 594.

Same—Ten Per Cent.—A commission of ten per cent, the highest allowed by the statute, will be allowed to a guardian only in a case of the greatest merit, as where his duties have been troublesome and of long continuance. Walton v. Erwin, 36 N. C. 136.

Referee's Decision Adopted. — The amount of allowance of commissions to a guardian by a referee is usually adopted by the court, unless it is shown to be excessive. Johnston v. Haynes, 68 N. C. 514; Whitford v. Foy, 71 N. C. 527.

An appellate court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous. Whitford v. Foy, 71 N. C. 527.

Art. 7. Public Guardians

§ 2191. Appointment; term; oath.—There may be in every county a public guardian, to be appointed by the clerk of the superior court for a term of eight years. The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court. (Rev., ss. 1758, 1759; Code, ss. 1556, 1560; 1874-5, c. 221, ss. 1, 5.)

§ 2192. Bond of public guardian; increasing bond.—The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (Rev., ss. 321, 322; Code, ss. 1557, 1558; 1874-5, c. 221, ss. 2, 3.)

§ 2193. Powers, duties, liabilities, compensation.—The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (Rev., s. 1761; Code, s. 1561; 1874-5, c. 221, ss. 6, 7.)

§ 2194. When letters issue to public guardian.—The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (Rev., s. 1760; Code, s. 1561; 1874-5, c. 221, ss. 6, 7.)

Art. 8. Foreign Guardians

§ 2195. Right to removal of ward's personalty from state.—Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, may apply to have such estate removed to the residence of the ward, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings. (Rev., s. 1816; Code, ss. 1598, 1601; R. C., c. 54, s. 29; 1820, c. 1044; 1842, c. 38; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; 1913, c. 86, s. 1.)

In General.—Where it appeared that the property in this State of a ward residing in another state consisted of good bonds at interest in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other state. Douglas v. Caldwell, 59 N. C. 20.

Local Guardian Not Necessary.—Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with this section and section 2196, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. Ciley v. Geitner, 183 N. C. 528, 111 S. E. 866.

Foreign Guardian as Next Friend.—A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were their next friend. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

When Guardian Must Be Resident.—Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, under this section and section 2196; and the law of this State governs the interpretation of the will when the testator died domiciled here. Ciley v. Geitiner, 182 N. C. 714, 110 S. E. 61.

A guardian in another State of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of this section; § 4021, relating to property in the hands of a trustee residing in this State, is not applicable. Fidelity Trust Co. v. Walton, 198 N. C. 790, 153 S. E. 401.

§ 2196. Contents of petition; parties defendant.—The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated. Any person may be made a party defendant

to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure. (Rev., ss. 1817, 1818; Code, ss. 1599, 1600; R. C., c. 54, s. 30; 1820, c. 1044, s. 2; 1842, c. 38; 1868-9, c. 201, ss. 36, 37.)

Art 9. Estates Without Guardian

§ 2197. Duty of grand jury as to orphans and guardians.—The grand jury of every county is charged with and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him. (Rev., s. 1810; Code, s. 1609; R. C., c. 54, s. 18; 1762, c. 69, s. 17; 1868-9, c. 201, s. 46.)

§ 2198. Solicitor to apply for receiver for orphans' estates.—Whenever an orphan, having any estate, is presented by a grand jury, for whom no suitable person will become guardian, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed. (Rev., s. 1811; Code, s. 1610; R. C., c. 54, s. 19; 1846, c. 43; 1868-9, c. 201, s. 47.)

§ 2199. Solicitor to prosecute bond of guardian removed without a successor.—Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward. (Rev., s. 1812; Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21.)

Infant Not a Party.—The action required by this section to be taken by the solicitor, in the cases provided for, is properly an action brought by him for the benefit of the ward when the guardian has been removed, and the infant is not a necessary, perhaps not a proper, party to it. Becton v. Becton, 56 N. C. 419; Temple v. Williams, 91 N. C. 82, 89.

Allowance Pendente Lite.—During the pendency of an action under this section against a guardian and the sureties on his bond by his ward for an account and settlement, and while the same is under reference and before the report of the referee is complete and finally acted on, and before any of the ward's estate is in possession of the court, the superior court has no power to order the guardian and his sureties to pay a certain sum into court for the ward's maintenance and support pendente lite, and a further sum for her attorney. State v. Harrison, 75 N. C. 432.

Same—Contempt.—If it is made to appear to the court, pending an action under this section, that a fund belonging to the ward is in possession of the guardian removed, the judge may, by process of contempt, compel its payment into court, where it will be subject to such orders and disposition as the necessities of the ward may require. State v. Harrison, 75 N. C. 432, 434.

§ 2200. Judge to appoint receiver; his rights and duties.—The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, land, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship. (Rev., s. 1813; Code, s. 1585; R. C., c. 54, s. 15; 1844, c. 41, s. 2; 1868-9, c. 201, s. 22.)

Cross References.—As to receivers, see sections 859-862 and annotations. For a full treatment of receivers, see 10 N. C. Enc. Dig. 839-877; 15 N. C. Enc. Dig. 344-349.

When Appointed.—The mere poverty of the executor does not authorize the court, against the will of the testator, to remove him by placing a receiver in his place. There must be, in addition, some maladministration, or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency. Camp v. Pittman, 90 N. C. 615, 617; Fairbain v. Fisher, 57 N. C. 395.

The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. In re Hybart, 119 N. C. 359, 25 S. E. 963.

Clerk Appointed.—Under this section the court has authority to appoint a clerk of the superior court receiver of the infants' estate. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same—The Order.—Where, in an order of court appointing "J. A. M., clerk of the superior court," receiver of the infants' estate, the word "as" was omitted before the words "clerk of the superior court"; it was held, that the intention of the court to appoint M. as receiver in his official capacity was sufficiently indicated. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Does Not Have Guardian's Power.—A receiver appointed to take charge of a ward's estate when the guardian is removed, is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed. Temple v. Williams, 91 N. C. 82.

General Liability. — As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts in entire good faith. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Same—Similar to Guardian's.—When a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Failure of Bank.—A receiver may keep money in a bank as a safe place of deposit, or may use the bank as a means of transmitting money to distant places, and if he uses reasonable diligence, he will not be held liable if the bank fails. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, it was held, that the receiver was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Official Bond Liable—Former Provisions.—The liability of a clerk as receiver arising under statutory provisions was not formerly embraced by his official bonds, because, his office and duties as such clerk did not embrace the receivership and the duties and liabilities incident thereto. The receivership and its incidents were outside of and beyond his official duties as clerk, and hence not embraced by his official bond and its purposes. Kerr v. Brandon, 84 N. C. 128; State v. Odom, 86 N. C. 432; Syme v. Bunting, 91 N. C. 48, 52; State v. Boone, 108 N. C. 78, 83, 12 S. E. 897.

Same—Same—Sureties.—But now when the clerk of the superior court is appointed receiver of a minor's estate under this section, he takes and holds the funds by virtue of his office as clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. State v. Upchurch, 110 N. C. 62, 14 S. E. 642.

The sureties on the clerk's official bond are liable for any breach of his duties as receiver. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Action against Receiver.—It is not necessary to obtain leave of the court before commencing an action for failure of the clerk to fulfill his duty when appointed receiver under this section. State v. Upchurch, 110 N. C. 62, 14 S. E. 642.

Same—Burden of Proof.—The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same—Present Law.—Where the appointment of receiver is conferred upon the clerk under the statute authorizing the court to commit the estate of an infant to "some discreet person," it was held, that the same is protected by his bond as clerk. State v. Odom, 86 N. C. 432.

§ 2201. Receiver to pay over estate to infant or guardian.—When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the ward, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver. (Rev., s. 1814; Code, s. 1587; R. C., c. 54, s. 17; 1844, c. 41, s. 4; 1868-9, c. 201, s. 24.)

Settlement Not Conclusive.—A settlement made with a receiver, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct. Such presumption may be disproved. Temple v. Williams, 91 N. C. 82.

§ 2202. Duties and compensation of solicitor.—The solicitor shall prosecute the action and take all necessary orders therein, and for his services shall be allowed such reasonable compensation as may be just, not to exceed ten dollars; in passing on the returns of receivers, where the estate of the infant does not exceed five hundred dollars, not to exceed five dollars; and where the estate exceeds five hundred dollars, not to exceed ten dollars. The amount in each case to be fixed by the judge. (Rev., s. 1815; Code, s. 1586; 1895, c. 14; R. C., c. 54, s. 16; 1844, c. 41, s. 3; 1868-9, c. 201, s. 23.)

Art. 10. Guardians of Estates of Missing Persons

§ 2202(a). Appointment.—When it shall be made to appear to the satisfaction of the clerk of the superior court, or a judge of the superior court having jurisdiction of the appointment of guardians, that any person has disappeared from the community of his residence, and his whereabouts remains unknown in such community for a period of three (3) months, and cannot, after diligent inquiry, be ascertained; and that such person has property in the state and property rights within its jurisdiction which may be affected by his absence, or may need protection and administration; and that such person has made no provision for the management of his affairs; such clerk of the superior court or judge of the superior court may appoint a guardian of the estate and property of such person as may, by law be done in the case of minors and persons non compos mentis, and with the like powers and duties with respect to such estate. (1933, c. 49, s. 1.)

See 11 N. C. Law Rev., 231, for discussion and review of this section.

§ 2202(b). Jurisdiction.—The clerk of the superior court of the county of the last residence of such absent person shall have prior right to jurisdiction of such appointment, but the appointment may be made by the clerk of the superior court of any county in the state where such person has property, after the expiration of six months from the time of such disappearance, if no prior appointment has been made. (1933, c. 49, s. 2.)

§ 2202(c). Powers and duties; bond. — The guardian, so appointed, shall have all the powers and duties with respect to the property and estate of such absent person as are now, or may be hereafter, conferred by law upon guardians generally; and before entering into the discharge of the duties of his guardianship, he shall be required to enter into such bond as is now required by law in such cases, for the faithful performance of his trust and for the accounting of the property, moneys and assets of the estate coming into his hands as guardian. (1933, c. 49, s. 3.)

§ 2202(d). General laws applicable.—The public laws relating to guardianships, and particularly chapter forty (40), consolidated statutes of North Carolina, entitled "guardian and ward," as far as by their terms may be applicable, and as far as they are not modified by this article shall apply to guardians so appointed. (1933, c. 49, s. 3.)

§ 2202(e). Other managerial powers conferred.—In addition to the powers given to guardians under the general laws of the state, such guardians may, by approval of the court, apply funds in his hands to the satisfaction of obligations of such absent person, renew notes and other obligations, pledge property for loans necessary in carrying on or liquidation of the affairs of such absent person; cause lands to be cultivated, where such business was previously carried on, and make such contracts with reference thereto as he may deem to the best interest of the estate, and, under the direction of the court and with its approval, continue to operate any business or business enterprise of such person, and make such contracts, agreements and settlements in reference thereto as may be necessary, or to the best interests of the estate. (1933, c. 49, s. 4.)

§ 2202(f). Discharge of guardian upon return of missing person.—Upon the return of such absent person, and within six months from the filing of the petition by such person to be restored to his property and to the management of his estate, the clerk of the superior court having jurisdiction of the said guardianship shall require a settlement of the estate by the guardian so appointed, and shall cause to be turned over to him all of the said estate then in the hands of the said guardian, after the payment of such reasonable costs and commissions as may be authorized by law, and, upon the filing of a financial account by the said guardian, he shall be discharged. (1933, c. 49, s. 5.)

§ 2202(g). Guardian not liable except for misconduct.—No action shall be maintained against such guardian, or the sureties on his bond, by reason of his appointment, taking over and managing the property of such absent person, or any of his acts with respect to the said estate, where it appears that they were done under authority of this article, but only for recovery because of the misconduct in office or bad faith of such guardian, or the waste of the assets of the estate through mismanagement, amounting to gross carelessness or in violation of the law. (1933, c. 49, s. 6.)

CHAPTER 40A

VETERANS' GUARDIANSHIP ACT

§ 2202 (1). Title.—This chapter shall be known as "The Veterans' Guardianship Act." (1929, c. 33, s. 1.)

§ 2202 (2). Definitions.—In this chapter:

The term "person" includes a partnership, corporation or an association.

The term "Bureau" means the United States Veterans' Bureau or its successor.

The terms "estate" and "income" shall include only moneys received by the guardian from the Bureau and all earnings, interests and profits derived therefrom.

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

The term "State Service Officer" means such appointee of the North Carolina Commissioner of Labor and Printing as provided by [Code s. 7312 (b) subsection (c)].

The term "ward" means a beneficiary of the Bureau.

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. (1929, c. 33, s. 2.)

§ 2202 (3). Appointment of guardian for wards entitled to benefits from United States Veterans Bureau.—Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. (1929, c. 33, s. 3.)

§ 2202 (4). Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.—Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. If any case, upon presentation of a petition by an attorney of the Bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the wards' estates only. An individual may be a guardian of more than five wards if they are all members of the same family. (1929, c. 33, s. 4.)

§ 2202 (5). Petition for appointment of guardian.—A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person indicating the necessity for the same, a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this State.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the Bureau and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the Bureau in accordance with the laws and regulations governing the Bureau. (1929, c. 33, s. 5.)

§ 2202(6). Certificate of Director prima facie evidence of necessity for appointment.—Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the Director, or his representative, setting forth the age of such minor as shown by the records of the Bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 6.)

§ 2202(7). Same in regard to guardianship of mentally incompetent wards.—Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 7.)

§ 2202(8). Notice of filing of petition.—Upon the filing of a petition for the appointment of a guardian, under the provisions of this act, the court shall cause such notice to be given as provided by law. (1929, c. 33, s. 8.)

§ 2202(9). Qualifications of guardian; surety bond.—Before making an appointment under the provisions of this chapter the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian

shall execute and file a surety bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under the guardianship laws of this state. The court shall have power from time to time to require the guardian to file an additional bond.

No bond shall be required of the banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 9.)

§ 2202(10). Guardian's accounts to be filed; hearing on accounts.—Every guardian who shall receive on account of his ward any moneys from the bureau, shall file with the court annually on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of superior court shall certify on the original account and the certified copy which the guardian sends the bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid bureau office and state service officer by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262, s. 1.)

See 11 N. C. Law Rev., 232, for summary of this section.

Editor's Note.—Public Laws of 1933, c. 262, omitted the last two sentences of this section as it formerly read and inserted the last three sentences of the present section in lieu thereof. The next to the last and the last sentence as they now read are practically the same as the omitted provision. The third from the last sentence is new with the amendment.

§ 2202(11). Failure to file account cause for removal.—If any guardian shall fail to file any account of the moneys received by him from the Bureau on account of his ward within thirty days after such account is required by either the court or the Bureau, or shall fail to furnish the Bureau a copy of his accounts as required by this chapter, such failure shall be grounds for removal. (1929, c. 33, s. 11.)

§ 2202(12). Compensation at 5 per cent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed 5 per cent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the State Service Officer in the manner provided in section ten. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12.)

§ 2202(13). Investment of funds.—Every guardian shall invest the funds of the estate in any of the following securities:

(a) United States government bonds.

(b) State of North Carolina bonds issued since the year one thousand eight hundred seventy-two.

(c) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty per cent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said bureau before consideration thereof by said court.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the state or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 14; 1933, c. 262, s. 2.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 262, this section merely provided that the guardian should invest the funds as allowed by the law or approved by the court.

§ 2202(14). Application of ward's estate.—A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the State Service Officer in the manner provided in section 2202(10). (1929, c. 33, s. 14.)

§ 2202(15). Certified copy of record required by Bureau to be furnished without charge.—When-

ever a copy of any public record is required by the Bureau or State Service Officer to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or State Service Officer with a certified copy of such record. (1929, c. 33, s. 15.)

§ 2202(16). Provision for commitment into Government hospital of any veteran needing treatment.—Whenever it appears that a veteran of any war, military occupation or expedition is eligible for treatment in a United States Veterans' Bureau Hospital and commitment to such hospital is necessary for the proper care and treatment of such veteran, the courts of this state are hereby authorized to communicate with the Director or his representative with reference to available facilities in the United States Veterans' Hospitals and the eligibility of the veteran, and upon receipt of a certificate of admission from the Director or his representative the court may then direct such veteran's commitment to such United States Veterans' Hospital in or without the State of North Carolina. Thereafter such veteran upon admission shall be subject to the rules and regulation of such hospital and the officials of such hospital shall be vested with the same powers now exercised by superintendents of state hospitals for mental diseases within this state with reference to the retention of custody of the veteran so committed. Notice of such pending proceedings shall be furnished the person to be committed and his right to appear and defend shall not be denied. (1929, c. 33, s. 16.)

§ 2202(17). Discharge of guardian.—When a minor ward for whom a guardian has been appointed under the provisions of this act or other laws of this state shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. (1929, c. 33, s. 17.)

§ 2202(18). Construction of chapter.—This chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau. (1929, c. 33, s. 18.)

§ 2202(19). Invalid parts of chapter not to effect valid parts.—The invalidity of any portion of this chapter shall not affect the validity of any other portion thereof which can be given effect without such invalid part. (1929, c. 33, s. 19.)

CHAPTER 41

HABEAS CORPUS

Art. 1. Constitutional Provisions

§ 2203. Remedy without delay for restraint of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Rev., s. 1819; Const., Art. I, s. 18.)

Cross References.—For a full treatment of habeas corpus, sec. 6 N. C. Enc. Dig. 982-1014; 14 N. C. Enc. Dig. 281-286. As to costs in habeas corpus, see section 1244 paragraph 3.

Editor's Note.—"By the Habeas Corpus Act passed in 1679 the liberty of every Englishman was made as certain as law could make it; it being guaranteed to him that if accused of crime, he, instead of languishing in prison, as had often been the case, should be brought to a fair and speedy trial." Buckle, History of Civilization In England, Vol. I. p. 385.

Macaulay in speaking of the prorogation of the Parliament of 1679 says: "The day of that prorogation, the twenty-six of May, 1679, is a great era in our history. For on that day the Habeas Corpus Act received the royal assent. From the time of the Great Charter, the substantive law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied." See Macaulay's History of England, Vol. I, Popular Edition, p. 122.

Definition. — The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. In pursuance to its command, the body of the petitioner is brought before the court, that it may inquire into the legality of his detention. United States v. Ju Toy, 198 U. S. 253, 272, 49 L. Ed. 1040, 25 S. Ct. 644.

Nature.—The writ of habeas corpus is a high prerogative writ, known to the common law, similar in nature to the writs of quo warranto, mandamus, certiorari and prohibition, and the proceedings thereunder are regarded as appellate in character, but it cannot be made to perform the office of a writ of error on appeal. Ex Parte Virginia, 100 U. S. 339, 350, 25 L. Ed. 676.

The proceeding is, in its nature, civil rather than criminal, legal rather than equitable, appellate rather than original, collateral rather than direct, and summary rather than cumbersome. Perrine v. Slack, 164 U. S. 452, 41 L. Ed. 510, 17 S. Ct. 79.

Object.—The object of the proceeding by a writ of habeas corpus is to inquire into the legality of the detention of the petitioner. United States v. McBratney, 104 U. S. 621, 624, 26 L. Ed. 869.

§ 2204. Habeas corpus not to be suspended.—The privileges of the writ of habeas corpus shall not be suspended. (Rev., s. 1820; Const., Art. I, s. 21.)

As to suspension of the remedy of habeas corpus, see 6 N. C. Enc. Dig. 1012-1014.

Can Not Be Abrogated.—This section is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each, and prevent conflict. This is done by giving to Art. XII, sec. 3, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons to be made by military authority, but requiring, by force of Art. 1, sec. 21, the persons arrested to be surrendered for trial to the civil authorities, on habeas corpus, should they not be delivered over without the writ. Ex parte Moore, 64 N. C. appx., 802, 808.

Art. 2. Application

§ 2205. Who may prosecute writ. — Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (Rev., s. 1821; Code, s. 1623; 1868-9, c. 116, s. 1.)

Prisoner under Illegal Sentence.—Where a defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny," and was sentenced to imprisonment in the

penitentiary, a writ of habeas corpus will issue, in order that he may be taken from the penitentiary and held to answer the charge in the court below. State v. Queen, 91 N. C. 659.

Denial of Due Process of Law.—A person convicted without due process of law may be discharged on habeas corpus. In re Frederick, 149 U. S. 70, 37 L. Ed. 653, 13 S. Ct. 793.

Voluntary Custody.—If the prisoner is in custody by his own voluntary act, the writ will not issue for his release. McElvaine v. Brush, 142 U. S. 155, 35 L. Ed. 971, 12 S. Ct. 156.

Where one is actually confined in the State prison for a longer term of imprisonment than is legal, a writ of habeas corpus will issue to the end that a proper sentence may be imposed. State v. Green, 85 N. C. 600, 601.

There must be actual confinement, or the present means of enforcing it, in order to justify the issuance of the writ of habeas corpus and granting a release therefrom. Wales v. Whitney, 114 U. S. 564, 572, 29 L. Ed. 277, 5 S. Ct. 1050.

One Imprisoned for Contempt.—Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by habeas corpus proceedings, taken to the Supreme Court, if necessary, by writ of certiorari. State v. Little, 175 N. C. 743, 744, 94 S. E. 680.

Relief of Soldier in Army.—A soldier actually and rightfully in the army can have no relief by the writ of habeas corpus against any abuse of military authority, and if he be wrongfully held as a soldier he is not entitled to a habeas corpus while he is undergoing punishment or awaiting trial for a military offense. Cox v. Gee, 60 N. C. Appx., 516.

§ 2206. When application denied.—Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has willfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application. (Rev., s. 1822; Code, s. 1624; 1868-9, c. 116, s. 2.)

In General.—In construing this term, "final judgment or decree of a competent tribunal," it has come to be well understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the cause and was manifestly without power to enter the judgment or impose the sentence in question, in such case there would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. State v. Queen, 91 N. C. 659; In re Holley, 154 N. C. 163, 167, 69 S. E. 872.

Presumption of Validity.—Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not appear, they are not subject to review in habeas corpus proceedings. State v. Burnette, 173 N. C. 734, 91 S. E. 364.

Meaning of "Competent Jurisdiction."—The term, "competent jurisdiction," used by this section in making an exception to the power of this court to review a judgment in habeas corpus proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. In re Holley, 154 N. C. 163, 69 S. E. 872.

Cannot Be Used as Writ of Error.—The writ of habeas corpus cannot be used in the nature of a writ of error. State v. Dunn, 159 N. C. 470, 74 S. E. 1014.

Habeas corpus is in the nature of a wirt of error to the extent of examining into the legality of a person's detention, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. State v. Edwards, 192 N. C. 321, 135 S. E. 37; In re Chase, 193 N. C. 450, 452, 137 S. E. 305.

Process by United States Judge.—The petitioner in habeas corpus proceedings adjudged in contempt of court shall, under the provisions of this section, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction. State v. Hooker, 183 N. C. 763, 111 S. E. 351.

Remedy Denied to One Imprisoned by Final Judgment. — Where one is imprisoned under the final process of a court of competent jurisdiction the writ of habeas corpus may not successfully be sued out since this section expressly forbids it. Howie v. Spittle, 156 N. C. 180, 182, 72 S. E. 207; Ledford v. Emerson, 143 N. C. 527, 536, 55 S. E. 969; In re Holley, 154 N. C. 163, 69 S. E. 872.

Same—Where Sentence Erroneous.—The application must be refused, even where it appears that the applicant is imprisoned in the State's prison, and the sentence of the court is erroneous, and the applicant, in default of appeal, must be left to his remedy by writ of certiorari. In re Schenck, 74 N. C. 607.

Same—Reasons for Rule.—Without reference to the positive prohibition of this section, it is otherwise clear that the power cannot extend to cases where the person is confined on final process. For if so, this unseemly and discordant result would follow, that one superior court judge might try and sentence a person to death or the penitentiary, and another might issue the writ of habeas corpus and discharge the prisoner. Results so disgraceful and destructive to the orderly and harmonious administration of justice were never contemplated by the farmers of our judicial system; on the contrary, they were carefully guarded against, both by the Constitution and legislation. In re Schenck, 74 N. C. 607, 610.

Examples.—Where the petitioner in habeas corpus proceedings directed to a superior court judge has previously been convicted in that court of an offense of which it had jurisdiction, and accordingly sentenced to imprisonment under a final order, the judgment imports verity, and evidence to collaterally impeach it is incompetent, and the application to prosecute the writ will be denied. In the matter of Croom, 175 N. C. 455, 95 S. E. 903.

An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an uncontitutional statute, may not be passed upon in habeas corpus proceedings, for such would be to permit one superior court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. State v. Dunn, 159 N. C. 470, 74 S. E. 1014.

§ 2207. By whom application is made.—Application for the writ may be made either by the party for whose relief it is intended or by any person in his behalf. (Rev., s. 1823; Code, s. 1625; 1868-9, c. 116, s. 3.)

Application May Be Withdrawn.—One who has petitioned for a writ of habeas corpus may withdraw his application whenever he choses. State v. Wiley, 64 N. C. appx., 821, 823.

§ 2208. To judge of supreme or superior court; in writing.—Application for the writ shall be made in writing, signed by the applicant—

1. To any one of the justices of the supreme court.

2. To any one of the superior court judges, either at term time or in vacation. (Rev., s. 1824; Code, s. 1626; 1868-9, c. 116, s. 4.)

In General.—The Constitution required the Legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right to "prosecute a writ of habeas corpus", it followed ex vi termini, that they were entitled to demand this remedy before any judge of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before the Magna Charta,

and was only reaffirmed, like many other cardinal principles, in that instrument and those that followed reaffirming it. Harkins v. Cathey, 119 N. C. 649, 663, 26 S. E. 136.

Concurrent Jurisdiction in State and Federal Courts.—On habeas corpus, the state court have concurrent jurisdiction with the federal courts of all cases of imprisonment within their territorial jurisdiction, except in the case where the petitioner is in custody under the authority, or claim of authority, of the United States. Robb v. Connolly, 111 U. S. 624, 633, 28 L. Ed. 542, 4 S. Ct. 544.

The federal and state courts have concurrent jurisdiction to inquire into the legality of detention under a governor's warrant in interstate extradition cases. United States v. Jung Ah Lung, 124 U. S. 621, 626, 31 L. Ed. 591, 8 S. Ct. 663.

Source from Which Authority of State Judges Emanates.—It is to be observed that the authority of the state judges in cases of habeas corpus emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States have given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. In the matter of Bryon, 60 N. C. 1.

Jurisdiction of Courts.—The courts of this State, as well as the individual judges, have jurisdiction to issue writs of habeas corpus, returnable to them in term time, and as a court. In the matter of Bryon, 60 N. C. 1.

Judges Mentioned Have Equal Powers.—A single judge of the Supreme Court has the same and no other jurisdiction to issue the writ than a judge of the superior court, and the same limitation of power to issue the writ in certain cases extends equally to the two classes of judges. In re Schenck, 74 N. C. 607, 608.

Extent of Jurisdiction.—The habeas corpus jurisdiction of every court, and of every judge, extends to every possible case of privation of liberty to the National Constitution, treaties and laws. In re Burrus, 136 U. S. 586, 592, 34 L. Ed. 500, 10 S. Ct. 850.

Obtaining Jurisdiction.—Presenting a petition to a judge for a writ of habeas corpus gives him jurisdiction of the subject. State v. Edney, 60 N. C. appx., 463.

§ 2209. Contents of application. — The application must state, in substance, as follows:

1. That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (Rev., s. 1825; Code, s. 1627; 1868-9, c. 116, s. 5.)

Waiver of Errors.—The parties may waive all errors and dispense with all forms in the proceedings on the petition. State v. Edney, 60 N. C. appx., 463.

Necessary Allegation.—A petition for habeas corpus must allege that the imprisonment has not been already adjudged upon a prior writ of habeas corpus. In the matter of Brittain, 93 N. C. 587.

Where Other Remedies Exist.—The writ of habeas corpus will be refused where the prisoner can be otherwise discharged. In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88, 15 S. Ct. 987.

§ 2210. Issuance of writ without application.—When the supreme or superior court, or any judge of either, has evidence from any judicial proceeding before such court or judge that any person within this state is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (Rev., s. 1826; Code, s. 1632; 1868-9, c. 116, s. 10.)

When Illegal Imprisonment Appears.—If a case comes before the Supreme Court by appeal, or by certiorari, and upon the trial it appears that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of this section, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of habeas corpus, even of its own motion, and discharge the prisoner. In re Schenck, 74 N. C. 607, 610.

Art. 3. Writ

§ 2211. Writ granted without delay.—Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ. (Rev., s. 1827; Code, s. 1628; 1868-9, c. 116, s. 6.)

As to the hearing, see annotations under section 2234.

Duty of Court to Issue.—There can be no doubt of the duty and power of the court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. In re Boyett, 136 N. C. 415, 424, 48 S. E. 789.

§ 2212. Penalty for refusal to grant.—If any judge authorized by this chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars. (Rev., s. 1828; Code, s. 1631; 1868-9, c. 116, s. 9.)

Writ Always Issues.—The writ of habeas corpus always issues when legally applied for, because this section subjects a judge who refuses to entertain the petition to a penalty of $2,500. In the matter of Croom, 175 N. C. 455, 456, 95 S. E. 903.

§ 2213. Sufficiency of writ; defects of form immaterial.—No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it maybe directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended. (Rev., s. 1829; Code, ss. 1629, 1630; 1868-9, c. 116, ss. 7, 8.)

§ 2214. Service of writ.—The writ of habeas

corpus may be served by any qualified elector of this state thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (Rev., s. 1833; Code, s. 1657; 1868-9, c. 116, s. 32.)

To Whom Issued. — The writ should be issued to the person who has the immediate custody of the petitioner with the power to produce the body of such party before the court or judge. Wales v. Whitney, 114 U. S. 564, 574, 29 L. Ed. 277, 5 S. Ct. 1050.

Art. 4. Return

§ 2215. When writ returnable. — Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (Rev., s. 1830; Code, s. 1656; 1868-9, c. 116, s. 31.)

§ 2216. Contents of return; verification.— The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

1. Whether he has or has not the party in his custody or under his power or restraint.
2. If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.
3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.
4. If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (Rev., s. 1831; Code, s. 1633; 1868-9, c. 116, s. 11.)

§ 2217. Production of body if required.—If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (Rev., s. 1832; Code, s. 1636; 1868-9, c. 116, s. 14.)

Art. 5. Enforcement of Writ

§ 2218. Attachment for failure to obey.—If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (Rev., s. 1834; Code, s. 1637; 1868-9, c. 116, s. 15.)

In General. — The attachment warranted by this section does not rest on the idea of punishing for a contempt of the judge, or court, but of compelling a return to the writ and a production of a body. It is a substitute for the provision in the old habeas corpus act, which punished the officer or person refusing or neglecting to make due return, "upon conviction by indictment," with a fine of $500 for the first offense, and of $1,000, and incapacity to hold office, for the second. Ex parte Moore, 64 N. C. appx., 802, 809. See also, Ex parte Kerr, 64 N. C. appx., 816.

No Power to Arrest Governor.—Under the habeas corpus act, a judge has no power to order the arrest of the Governor of the State. Ex parte Moore, 64 N. C. appx., 802, 813.

Excuse for Refusal to Make Return.—Where a military officer detaining persons arrested in counties declared by the Governor to be in a state of insurrection, answered to a writ of habeas corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ: it was held, that such return was a sufficient excuse, under this section, and, therefore, that such officer was not liable to be attached. Ex parte Moore, 64 N. C. appx., 802, 815.

§ 2219. Liability of judge refusing attachment.—If any judge willfully refuses to grant the writ of attachment, as provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1835; Code, s. 1638; 1870-1, c. 221, s. 2.)

§ 2220. Attachment against sheriff to be directed to coroner; procedure.— If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (Rev., s. 1836; Code, s. 1639; 1868-9, c. 116, s. 16.)

§ 2221. Precept to bring up party detained.— The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found,

for whose benefit the writ of habeas corpus has been granted. (Rev., s. 1837, Code, s. 1640; 1868-9, c. 116, s. 17.)

§ 2222. Liability of judge refusing precept.—If any judge refuses to grant the precept provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1838; Code, s. 1641; 1870-1, c. 221, s. 3.)

§ 2223. Liability of judge conniving at insufficient return.—If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law, or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1839; Code, s. 1642; 1870-1, c. 221, s. 4.)

§ 2224. Power of county to aid service.—In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases. (Rev., s. 1840; Code, s. 1643; 1868-9, c. 116, s. 18.)

Editor's Note. — The posse comitatus is discussed in Worth v. Craven County Com'rs, 118 N. C. 112, 24 S. E. 778. In the dissenting opinion to that case by Judge Clark, this section is mentioned on page 125.

Means "Men of the County."—The power of the county, or "posse comitatus," means the men of the county in which the writ is to be executed. Ex Parte Moore, 64 N. C. appx., 802, 812.

§ 2225. Obedience to order of discharge compelled.—Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained. (Rev., s. 1841; Code, s. 1649; 1868-9, c. 116, s. 24.)

§ 2226. No civil liability for obedience.—No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (Rev., s. 1842; Code, s. 1650; 1868-9, c. 116, s. 25.)

§ 2227. Recommittal after discharge; penalty.—If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor. (Rev., s. 3581; Code, s. 1651; 1868-9, c. 116, s. 26.)

See also section 2240 and notes.

When Rearrest Valid.—A party, set at large by writ of habeas corpus, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction. State v. Weatherspoon, 88 N. C. 19.

§ 2228. Disobedience to writ or refusing copy of process; penalty.—If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office. (Rev., s. 3597; Code, s. 1652; 1868-9, c. 116, s. 27.)

§ 2229. Penalty for false return.—If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor. (Rev., s. 3582; Code, s. 1653; 1868-9, c. 116, s. 28.)

§ 2230. Penalty for concealing party entitled to writ.—If any one having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor. (Rev., s. 3583; Code, ss. 1654, 1655; 1868-9, c. 116, ss. 29, 30.)

Art. 6. Proceedings and Judgment

§ 2231. Notice to interested parties.—When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (Rev., s. 1843; Code, s. 1634; 1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1.)

§ 2232. Notice to solicitor.—When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the solicitor of the county in which the person prosecuting the writ is detained. (Rev., s. 1844; Code, s. 1635; 1868-9, c. 116, s. 13.)

Hearing May Be Continued.—If it appear from the return on a writ of habeas corpus that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor an opportunity to examine into the case. State v. Jones, 113 N. C. 669, 18 S. E. 249.

§ 2233. Subpœnas to witnesses.—Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any su-

perior court, under the same rules, regulations and penalties prescribed by law in other cases. (Rev., s. 1845; Code, s. 1659; 1868-9, c. 116, s. 34.)

§ 2234. Proceedings on return; facts examined; summary hearing of issues.—The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is enitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (Rev., s. 1846; Code, s. 1644; 1868-9, c. 116, s. 19.)

Proceedings Must Be Summary.—Proceedings under the writ of habeas corpus, which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if an action could be arrested by an appeal, they would lose many of their most beneficial results. State v. Miller, 97 N. C. 451, 454, 1 S. E. 776.

Hearing Not Perfunctory.—The words "if issue be taken upon the material facts . . . the judge shall proceed in a summary way to hear the allegations and proofs of both sides," preclude the idea that such hearing shall be perfunctory and merely formal. In re Bailey, 203 N. C. 362, 365, 166 S. E. 165.

Hearing Confined to Record.—The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere. Ex parte McCown, 139 N. C. 95, 51 S. E. 957; In re Schenck, 74 N. C. 607; In re Swan, 150 U. S. 637, 37 L. Ed. 1207, 14 S. Ct. 225; In re Coy, 127 N. C. 731, 32 L. Ed. 274, 8 S. Ct. 1263; In the matter of Croom, 175 N. C. 455, 457, 95 S. E. 903.

Same—Questions Open to Inquiry.—Where the petitioner in habeas corpus proceedings is held under a final sentence of a court, a commitment of contempt or order, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. State v. Hooker, 183 N. C. 763, 111 S. E. 351.

Evidence Not Reviewable. — As was held in Ex parte Dunn, 159 N. C. 470, the Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked. State v. Burnette, 173 N. C. 734, 91 S. E. 364.

Question of Insanity Determined.—When the petitioner in habeas corpus has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the superior court in this State by whom the proceedings of habeas corpus are heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded. In re Chase, 193 N. C. 450, 137 S. E. 305.

Discretion of Judge.—The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. State v. Herndon, 107 N. C. 934, 935, 12 S. E. 268. See also In re Bailey, 203 N. C. 362, 367, 166 S. E. 165.

Presumption of Innocence. — The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction. State v. Jones, 113 N. C. 669, 18 S. E. 249.

Burden of Proof.—Where, upon the return of a sheriff to a writ of habeas corpus, it appeared that the petitioners were in custody on a mittimus, regular in every way, from a justice of the peace, for failure to give bond for their appearances at the next term of the superior court to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was upon the petitioner to show wherein it was illegal, and not upon the State to show that they were lawfully in custody. State v. Jones, 113 N. C. 669, 18 S. E. 249.

No Appeal Lies.—Appeal to the Supreme Court will not lie from the refusal of a superior court judge to discharge the defendant from custody in proceedings in habeas corpus, the remedy being by a petition for a writ of certiorari which is addressed to the sound discretion of the Supreme Court. In the matter of Croom, 175 N. C. 455, 95 S. E. 903; State v. Burnette, 173 N. C. 734, 91 S. E. 364.

Constitutional Provision. — In habeas corpus proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the Constitution, Art. IV, sec. 8, under the power given to the court "to issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts." In re Holley, 154 N. C. 163, 69 S. E. 872.

Writ of Certiorari Proper Remedy. — Where it appears that, upon the return of the writ, the judge declined to hear evidence or investigate the charge, the writ of certiorari should issue. Walton v. Gatlin, 60 N. C. 318; Ex parte Biggs, 64 N. C. 202; State v. Jefferson, 66 N. C. 309; State v. Herndon, 107 N. C. 934, 935, 12 S. E. 268.

The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in habeas corpus proceedings in matters not involving the care and custody of children, Constitution, Art. IV, sec. 8, shall only be exercised by certiorari. In re Holley, 154 N. C. 163, 69 S. E. 872.

Same—When Denied. — A petition for certiorari in the Supreme Court will be denied in habeas corpus proceedings when it appears therefrom that the prisoner is not entitled to his discharge. In the matter of Croom, 175 N. C. 455, 95 S. E. 903.

If the judge, upon the investigation of the evidence on a petition for habeas corpus, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies, either in favor of the State or the petitioner. Walton v. Gatlin, 60 N. C. 310, 318; State v. Miller, 97 N. C. 451, 1 S. E. 776; State v. Herndon, 107 N. C. 934, 935, 12 S. E. 268.

In habeas corpus proceedings, where it appears from the application for certiorari in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court. In re Holley, 154 N. C. 163, 69 S. E. 872.

Proceeding Where Judgment Reversed.—If, upon certiorari, the court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no procedendo issues to any particular judge, but the petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ of habeas corpus. State v. Herndon, 107 N. C. 934, 12 S. E. 268.

Judicial Review of Questions of Law.—In deciding questions which arise under writs of habeas corpus the judiciary may review and control the action of the Governor in reguard to points of law, involving an extradition proceeding. In the matter of Hughes, 61 N. C. 56.

§ 2235. When party discharged.—If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

3. Where the process is defective in some mat-

ter of substance required by law, rendering such process void.

4. Where the process, though in proper form, has been issued in a case not allowed by law.

5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (Rev., s. 1847; Code, s. 1645; 1868-9, c. 116, s. 20.)

See generally notes under section 2234.

Where Imprisonment for Contempt.—It was held in Ex parte Summers, 27 N. C. 149, that in a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a reviewing tribunal may, on a habeas corpus, discharge the party if it appears plainly that the facts do not amount to a contempt. State v. Queen, 91 N. C. 659, 662.

Sentence Partly Valid and Partly Void.—Where a prisoner is detained by virtue of a sentence in part valid and part otherwise, he may not be liberated on habeas corpus until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired. State v. Hooker, 183 N. C. 763, 111 S. E. 351.

State Cannot Appeal.—The State can not appeal from an

State Cannot Appeal.—The State cannot appeal from an order in habeas corpus proceedings discharging from imprisonment one convicted of crime. Proceedings in habeas corpus, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results. In the matter of Williams, 149 N. C. 436, 437, 63 S. E. 108; State v. Miller, 97 N. C. 451, 1 S. E. 776.

§ 2236. When party remanded.—It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

4. That the time during which such party may be legally detained has not expired. (Rev., s. 1848; Code, s. 1646; 1868-9, c. 116, s. 21.)

Paragraph Three Peremptory.—The provision of paragraph three of this section is as peremptory as that in paragraph two of section 2206.

Judgment Imports Verity.—A judgment in habeas corpus imports verity, and it can not be collaterally impeached. In the matter of Croom, 175 N. C. 455, 95 S. E. 903.

§ 2237. When the party bailed or remanded.—If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto. (Rev., s. 1849; Code, s. 1647; 1868-9, c. 116, s. 22.)

Judge May Admit to Bail.—Any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ of habeas corpus, adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. State v. Herndon, 107 N. C. 934, 937, 12 S. E. 268. And although a sentence is not valid the defendant may not be unconditionally released, as the court may hold him to bail. State v. Burnette, 173 N. C. 734, 91 S. E. 364.

No Discharge After Indictment.—Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court. State v. Herndon, 107 N. C. 934, 938, 12 S. E. 268.

§ 2238. Party held in execution not to be discharged.—When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail but shall be presently remanded, where he shall remain until discharged in due course of law. (Rev., s. 1850; Code, s. 937; R. C., c. 31, s. 111; 2 Hen. V, c. 2.)

§ 2239. When party ill, cause determined in his absence.—When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced. (Rev., s. 1851; Code, s. 1648; 1868-9, c. 116, s. 23.)

§ 2240. No second committal after discharged; penalty.—No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby. (Rev., s. 1852; Code, s. 1651; 1868-9, c. 116, s. 26.)

As to recommittal after discharge, see section 2227 and note.

Surrender by Sureties.—Where the defendant was not originally liable to arrest and had been discharged upon habeas corpus, he cannot be held upon a surrender by his sureties. Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969.

When Rearrest Permissible. — According to the express terms of this section, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. State v. Weatherspoon, 88 N. C. 19, 21.

Art. 7. Habeas Corpus for Custody of Children in Certain Cases

§ 2241. Custody as between parents in certain cases; modification of order.—When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge of custody of the child or children so brought be-

fore it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same; provided, that where the father is a non-resident of North Carolina and the custody of the child has been awarded, by an order of a court of this State, to the mother who is a resident of North Carolina, no motion on the part of such non-resident father may be heard or entertained by the court for a modification of the order of the court, unless such father has first shown under oath that, since the making of the original order, he has regularly contributed to the support of said child according to his means and according to the needs of the child, and, if said motion is heard and at said hearing such fact is not established to the satisfaction of the court, the motion for a modification of the order shall be denied, unless the court shall find that, at the time of said hearing the mother is not a fit and proper person to have the custody of said child. Provided, that this act shall only apply after the case has been reopened on time. (Rev., s. 1853; Code, s. 1661; 1858-9, c. 53; 1868-9, c. 116, s. 36; 1929, c. 270, s. 1.)

Cross References.—As to custody of children in divorce, see section 1664 and notes. As to persons entitled to custody of children in general, see notes under section 2151. As to restoration of parents' rights after adoption, see section 190 and note thereto.

Editor's Note.—The Act of 1929 added the two provisos to this section.

Broad Powers Conferred.—This section confers upon the court very large powers to "promote the interest and welfare of the children." Holley v. Holley, 96 N. C. 229, 1 S. E. 553; Knott v. Taylor, 96 N. C. 553, 2 S. E. 680; Jones v. Cotten, 108 N. C. 457, 458, 13 S. E. 161.

When Section Applies. — When without being divorced parents are living apart, the question concerning the disposition of their offspring must be decided under the provisions of this section. In re Habeas Corpus of Jones, 153 N. C. 312, 69 S. E. 217.

It is essential that the parents must be living in a state of separation "without being divorced" before the court has power in a habeas corpus proceeding to determine the custody of the children. In the matter of Blake, 184 N. C. 278, 280, 114 S. E. 294.

Except as between parents, the right of custody of a child can not be determined by writ of habeas corpus. In re Parker, 144 N. C. 170, 56 S. E. 878.

When Parents Divorced Section 1664 Applies.—When this section is considered in connection with section 1664, it becomes apparent that the Legislature intended that the custody of children shall be determined by the court in which the divorce was granted, and, where there is no divorce, by proceedings in habeas corpus. Jurisdiction of the court in which a divorce is granted to award the custody of a child is excluded and continuing. In the matter of Blake, 184 N. C. 278, 281, 114 S. E. 294.

But where the parties have been divorced and the decree does not award the custody of the children, the procedure to determine the right to their custody is by motion in the cause, and habeas corpus will not lie, and where in habeas corpus proceedings a decree for absolute divorce between the parties is introduced in the record without objection, but the court makes no finding as to whether the parties had been divorced, but awards the custody of the child to its mother, on appeal the case will be remanded for a finding as to whether the parties had been divorced. In re Albertson, 205 N. C. 742, 172 S. E. 411.

Jurisdiction of Juvenile Court.—In the matter of Blake, 184 N. C. 278, 114 S. E. 294, it was suggested on the argument, and the court said with some show of reason, that if jurisdiction to pass upon the divorce decree is not exclusively in the court in which the divorce decree was granted, it would appear to reside in the juvenile court under the provisions of section 5039 et seq. This point, however was not decided in the Case. And in Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824, it was held that the jurisdiction of the superior court or judge thereof in habeas corpus proceedings between husband and wife, living apart without divorce, where the custody of the minor children of their marriage is claimed by each of them, is not ousted or interfered with by the jurisdiction given by statute to the juvenile court.

Where Foreign Decree Invalid.—When, under an invalid decree of divorce rendered in favor of the wife in another state, in which the custody of a child was awarded to the wife, it is sought by habeas corpus proceeding in this State to obtain the custody of the child domiciled with its father in this State, the proceeding will be regarded as one between husband and wife living in separation without being divorced. And the custody of the child rests in the sound discretion of the judge, subject to review, on appeal, upon the facts found. Harris v. Harris, 115 N. C. 587, 20 S. E. 187.

Possession by Order of Court.—Where defendant had possession of infant child under order of the court, in accordance with sections, 2235, 2236, an attempted habeas corpus proceeding was held to be irregular. Ashby v. Page, 108 N. C. 6, 8, 13 S. E. 90.

Parents Have Prima Facie Right to Custody.—In habeas corpus proceedings for the possession of a nine-year old child, the parents of the child, who are living together as lawful man and wife, have prima facie the right to its control and custody. In re Habeas Corpus of Jones, 153 N. C. 312, 69 S. E. 217.

Where the father of an infant upon the death of its mother told the grandparents of the child that the latter should always remain with them, but subsequently desired the custody of the child and upon refusal brought habeas corpus proceedings, and it appeared that the father was of good moral character, industrious and kind and in every way fitted to care for and educate the child, the custody was properly awarded to him. Latham v. Ellis, 116 N. C. 30, 20 S. E. 1012.

Same—Welfare of Child First Consideration. — In habeas corpus for the custody of a child the welfare of the child is the first consideration but the father has a natural right of such custody. To lose this right it must be shown that he is not fit to exercise it. In re Fain, 172 N. C. 790, 90 S. E. 928.

The right of the parent is not absolute and yields to the welfare of the child when so required. In re Hamilton, 182 N. C. 44, 108 S. E. 385.

Same—Same—Custody Awarded to Mother.—The mother, in habeas corpus proceedings against her husband, may be allowed the superior claim when both are equally worthy and it is shown that the welfare of their children requires it. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824. In the opinion of this case, written by Judge Clarke, there is a comprehensive and able discussion and review of the authorities relating to the custody of children. Ed. Note.

But the court will not award the custody of a child to a nonresident mother if it does not appear that the child desires to go to her or that the husband is not a proper person to have it, or that the child will be benefitted by the change. Harris v. Harris, 115 N. C. 587, 20 S. E. 187.

Same—Illegitimates.—In the care of illegitimate children, the same prima facie right of the parent to the custody of the offspring exists as in case of legitimacy, perhaps to a lesser degree, in the mother, where she evinces a capacity and disposition to properly care for her children. In re Habeas Corpus of Jones, 153 N. C. 312, 69 S. E. 217.

Action by Father against Grandmother.—Where the father of a child brings a writ of habeas corpus against the grandmother for the custody of the child but the contest is to all intents and purposes between the husband and wife for the custody of the child the writ comes within the spirit and letter of this section. In re Ten Hoopen, 202 N. C. 223, 162 S. E. 619.

Award Not Necessarily Final with Changed Conditions.—An award in habeas corpus proceedings does not finally determine the rights of the parties to the custody of the child sought in habeas corpus proceedings; and where, in our courts, the award has been in favor of a nonresident mother against the father of the child, the courts, properly established and having jurisdiction at the domicile of the mother, may further hear and determine the matter touching the care and control of the child on such changed conditions, properly established, that would require it. In re Means, 176 N. C. 307, 97 S. E. 39.

§ 2242. Appeal to supreme court. — In all cases of habeas corpus, where a contest arises in respect to the custody of minor children, either party may appeal to the supreme court

from the final judgment. (Rev., s. 1854; Code, s. 1662; 1858-9, c. 53, s. 2.)

No Appeal Except under This Section.—There is no provision for appeal from a judgment in habeas corpus proceedings, except in cases concerning the care and custody of children under this section. In re Holley, 154 N. C. 163, 166, 69 S. E. 872.

It is a significant indication of the legislative intent in giving an appeal in this case only, not to recognize it in other cases. State v. Miller, 97 N. C. 451, 454, 1 S. E. 776.

Death of Party Pending Appeal. — Where in a habeas corpus proceeding brought to secure the custody of infant children, the respondent (in whose favor judgment had been rendered below) died pending appeal, it was held, that the proceeding abated, and could not be revived against the personal representative. Brown v. Rainor, 108 N. C. 204, 12 S. E. 1028.

Judgment of Superior Court Stayed Pending Appeal. — Upon appeal to the Supreme Court an order of the judge of the superior court in habeas corpus proceedings between husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, it is within the power of the Supreme Court, upon notification to the adverse party to appear before one of the Justices, and after a regular hearing, for the Justice to allow a supersedeas bond in a fixed amount, to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824.

Discretion in Supreme Court.—When the superior court judge has entered judgment in habeas corpus proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment, and affirm, reverse or modify it. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824; Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487.

What Reviewed.—Upon an appeal from a judgment upon a writ of habeas corpus awarding the custody of a minor child, the court will not only review errors of "law or legal inference." Constitution, Art. IV, Section 8, and not the findings of fact made by the lower court upon competent evidence; and this section allowing an appeal in such cases, does not affect the matter. Stokes v. Cogdell, 153 N. C. 181, 69 S. E. 65.

Applied in In re Albertson, 205 N. C. 742, 172 S. E. 411.

Art. 8. Habeas Corpus Ad Testificandum

§ 2243. Authority to issue the writ.—Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the state, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any justice of the peace or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person is confined in a county in which such justice or clerk does not reside, application for habeas corpus to testify may be made to any judge of the supreme or superior court. (Rev., ss. 1855, 1856; Code, ss. 1663, 1664; 1868-9, c. 116, ss. 37, 38.)

An Inherent Power.—The right to bring persons before a court, whose presence is necessary in order to the exercise of its powers, is inherent in every court of general jurisdiction, and its exercise is essential to the preservation of its power and dignity. State v. Haskins, 77 N. C. 530, 534, Harkins v. Cathey, 119 N. C. 649, 664, 26 S. E. 136.

No Application to State. — This section applies only to parties strictly so called, and not to the State. Ex parte Harris, 73 N. C. 65, citing State v. Adair, 68 N. C. 68.

Murderer Is Competent Witness.—One who has been convicted of murder, and is under sentence of death, is a competent witness; and the solicitor for the State is entitled to a habeas corpus to bring such condemned prisoner into court for the purpose of testifying before the grand jury. Ex parte Harris, 73 N. C. 65.

Same—Objection Untenable.—When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of habeas corpus, ad testificandum under this section, is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead, in the eye of the law, could not testify, the witness having been present and having testified. State v. Jones, 176 N. C. 702, 97 S. E. 32.

§ 2244. Contents of application.—The application for the writ shall be made by the party to the suit of proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (Rev., s. 1857; Code, s. 1665; 1868-9, c. 116, s. 39.)

§ 2245. Service of writ.—The writ of habeas corpus to testify shall be served by the same person, and in like maner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus cum causa. (Rev., s. 1858; Code, s. 1666; 1868-9, c. 116, s. 40.)

§ 2246. Applicant to pay expenses and give bond to return.—The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (Rev., s. 1859; Code, s. 1667; 1868-9, c. 116, s. 41.)

§ 2247. Duty of officer to whom writ delivered or on whom served.—It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars. (Rev., s. 1860; Code, s. 1668; 1868-9, c. 116, s. 42.)

§ 2248. Prisoner to be remanded.—After having testified, the prisoner shall be remanded to the prison from which he was taken. (Rev., s. 1861; Code, s. 1669; 1868-9, c. 116, s. 43.)

CHAPTER 42

INNS, HOTELS AND RESTAURANTS

Art. 1. Innkeepers

§ 2249. Must furnish accommodations.—Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel. (Rev., s. 1909; 1903, c. 563.)

Cross References.—As to innkeepers in general, see 7 N. C. Enc. Dig. 728-735; 11 N. C. Enc. Dig. 436-437. As to innkeeper's lien on baggage, see secs. 2461-2463. As to obtaining entertainment at hotels and boarding houses without paying therefor, see sec. 4284.

What Constitutes an Inn Generally.—A public inn or hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or a watering place, or by taking some as boarders by a special contract or for a definite time. Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037.

Sleeping Car Not an Inn.—Though a "sleeping car" is a place for the reception of travelers, it is not an "inn." Garrett v. Southern R. Co., 172 N. C. 737, 90 S. E. 903.

Boarding House.—A boarding house is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept. State v. McRae, 170 N. C. 712, 713, 86 S. E. 1039.

Distinction Between Inn and Boarding House.—It is the publicly holding a place out, as one where all transient persons who may choose to come will be received as guests for compensation, that is the principal distinction between a hotel and a boarding house. Holstein v. Phillips, 146 N. C. 366, 370, 59 S. E. 1037. For distinctions between "boarder" and "guest," see notes of this case under the following section.

When Guest Can Be Ejected.—Guests of a hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, can not be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or pleasure of his patrons. State v. Steele, 106 N. C. 766, 782, 11 S. E. 478.

Same—Obedience to Rules.—A guest's right of occupancy of a hotel is dependent upon proper behavior and decent conduct and obedience to reasonable rules and regulations of the proprietors; for a breach of such implied conditions they may be summarily removed. Hutchins v. Durham, 118 N. C. 457, 24 S. E. 723.

Same—Remedy.—Guests at a hotel can not maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. Hutchins v. Durham, 118 N. C. 457, 24 S. E. 723.

One Not a Guest Is a Licensee.—One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct. Money v. Travelers Hotel Co., 174 N. C. 508, 93 S. E. 964.

Same—Can Be Expelled.—When persons, unobjectionable on account of character or race, enter a hotel not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time, because barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling house, from which he may expel all who have not acquired rights growing out of the relation of guests, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. State v. Steele, 106 N. C. 766, 782, 11 S. E. 478.

Same—Same—Force Allowable.—The broad rule laid down by Wharton (1 Cr. L., sec. 625), is that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guests, to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery. State v. Steele, 106 N. C. 766, 784, 11 S. E. 478.

Other Rights of Innkeeper.—An innkeeper has, unquestionably, the right to establish a news stand or a barber shop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or an innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such contracts, the innkeeper may make, and, after personal notice to violators, enforce a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests. State v. Steele, 106 N. C. 766, 783, 11 S. E. 478.

§ 2250. Liability for loss of baggage.—Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property; in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper. (Rev., s. 1910; 1903, c. 563, s. 2.)

What Constitutes Boarding House Keeper.—The keeper of a boarding house is one who reserves the right to select and choose his patrons and takes them in only by special arrangement, and usually for a definite time. Holstein v. Phillips, 146 N. C. 366, 370, 59 S. E. 1037.

Same—Not an Innkeeper.—One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N. C. 424. See notes to preceding sections.

Boarder and Guest Distinguished.—In 16 A. and E. Enc. (2 Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes, that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." Holstein v. Phillips, 146 N. C. 366, 371, 59 S. E. 1037.

Liability Extends to Guest.—When one is received at a public inn or hotel and entered as a guest, without any prearrangement as to terms or time, but on the implied invi-

tation held out to the public generally, he is a transient only—a guest and not a boarder—and entitled to recover of the defendant innkeeper as such. Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037.

Same—Common Law Liability.—The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed infra hospitum and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 146; Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

The exacting requirement of the common law, established in a ruder time, from reasons of public policy, in many instances and under modern conditions may operate with great harshness, and the matter has been very generally made the subject of legislation by which the landlord's obligations have been limited, both in kind and amount. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

Ordinary Care Now Required.—Even at a public inn or hotel, one who holds the position as a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employees. Holstein v. Phillips, 146 N. C. 366, 370, 59 S. E. 1037.

Liability for Personal Injuries.—The innkeeper is not insurer of his guest's personal safety, but his liability does extend to injuries received by the guest from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. Ten Broeck v. Wells, 47 Fed. 679; Patrick v. Springs, 154 N. C. 270, 272, 70 S. E. 395.

Same—Negligence of Guest.—The guest must use reasonable care on his part to protect himself, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. Patrick v. Springs, 154 N. C. 270, 273, 70 S. E. 395.

§ 2251. Safekeeping of valuables.—It is the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars; and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars: Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited. (Rev., s. 1911; 1903, c. 563, s. 3.)

§ 2252. Loss by fire.—No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections. (Rev., s. 1912; 1903, c. 563, s. 4.)

§ 2253. Negligence of guest.—Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn. (Rev., s. 1914; 1903, c. 563, s. 7.)

As to liability for personal injuries and effect of negligence of guest, see notes under sec. 2250; as to innkeeper's lien on baggage, see secs. 2461-2463.

§ 2254. Copies of this chapter to be posted.—Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this article and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted. (Rev., s. 1913; 1903, c. 563, ss. 5, 6.)

Effect of Noncompliance with Section.—Where the provision of this section is not complied with the principle of the common law obtains and the keeper is liable as at common law. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

§ 2254(a). Admittance of dogs to bedrooms.—It shall be unlawful for any innkeeper or guest owning, keeping, or who has in care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars or be imprisoned not more than thirty days. (1927, c. 67.)

Art. 2. Sanitary Inspection and Conduct

§§ 2255-2276. Repealed by Public Laws 1921, c. 186, s. 22.

§ 2277. Annual inspection and certificate by state board of health.—For the purpose of carrying out the provisions of this article the state board of health is authorized and required to inspect, through its officers or agents, without cost to the hotels or hospitals, all hotels and restaurants, hospitals and sanitariums, public and private, in the state once a year. If upon inspection of any hotel or restaurant, hospital or sanitarium, it shall be found that this article has been fully complied with, the secretary of the state board of health shall issue a certificate to that effect to the person operating the same, and such certificate shall be kept posted in plain view in some conspicuous place in said hotel or restaurant, hospital or sanitarium. (1917, c. 66, s. 23; 1923, c. 173.)

Editor's Note.—This section originally passed in 1917 was repealed along with secs. 2255 to 2283 inclusive, by Public Laws 1921, Chapter 186, sec. 22. However in 1923 this section was amended and reinstated in the Code, Public Laws, 1923, Chapter 173. The effect of the amendment was to include hospitals and sanitariums, public and private, under the provision for inspection by the State Board of Health.

§§ 2278-2283. Repealed by Public Laws 1921, c. 186, s. 22.

§ 2283(a). Definitions; "hotel"; "transient guest"; "restaurant".—A "hotel" within the meaning of this law is any inn or public lodging-house where transient guests are lodged for pay. The term "transient guest" within the meaning of this law shall mean one who puts up for less than one week at a time at such hotel. The term "restaurant" as used in this law shall include lunch counters, cafes and all other establishments whatsoever where lunches, meals or food in any form are prepared for and/or served to the public for immediate consumption. Nothing in this law shall be construed as affecting private boarding houses where the majority of the patrons receive boarding accommodations for periods of a week or longer at a time. (1921, c. 186, s. 1; 1935, c. 169.)

Editor's Note.—This section was so changed by the amend-

ment that a comparison of the old with the new is necessary to determine the full extent.

§ 2283(b). Charges for rooms; posting.—Every transient hotel shall keep posted in a conspicuous place in the office a list of its charges for rooms, with or without meals, in accordance with the plan or plans on which the hotel is operated, giving the exact transient rate, and shall also keep posted in each room the rate for that room, with or without meals, in accordance with its plan as stated above, giving the transient rate per day and week, and the rate for each person in the room. (1921, c. 186, s. 2.)

§ 2283(c). Water-closets, bathrooms, and wash-bowls.—In all cities, towns, or villages where a system of water-works and sewerage is maintained for public use, every hotel therein accessible to water main and sewer main shall be equipped, within six months after March 8, 1921, with suitable water closets for the accomodation of its guests, which water-closets shall be connected and tapped by proper plumbing with such water and sewerage systems, and there shall be some adequate means of flushing said water-closets with the water in such manner as to prevent sewer gas from arising therefrom. The water-closets and bathrooms must be sufficiently lighted to permit the reading of ordinary newspaper type (18) inches from the normal eye. The washbowls of the main wash-room of such hotel must be connected and tapped and equipped in similar manner, both as to method and time; all such equipment to be paid for by the owner. (1921, c. 186, s. 3.)

§ 2283(d). Receptacles holding water screened. "Standing water" defined.—The proprietor of every hotel and restaurant shall keep all cisterns, tanks, and other receptacles containing standing water screened or otherwise so covered as to prevent the entrance of flies, mosquitoes, and other disease-carrying insects. The term "standing water" as used in this law shall mean water that remains for ten days or more in a cistern, tank, or other receptacle. (1921, c. 186, s. 4.)

§ 2283(e). Water to be analyzed. Discontinuance of use.—A sample of water used in every hotel and restaurant, except in cases where the water is derived from some public water supply, shall be sent by the proprietor to the state laboratory of hygiene for analysis twice each year, with a certificate that it is the water used in such hotel or restaurant, and if the sample is found by said laboratory to be unfit for the use that is made of the water in the hotel or restaurant, the further use of such water shall be discontinued until permission is granted by the state board of health to resume the use of such water. (1921, c. 186, s. 5.)

§ 2283(f). Door and window screens. Mosquito bar for beds. Fly paper and fly traps.—The proprietor or keeper of every hotel or restaurant shall keep screened the doors, windows, and all openings of the kitchen and dining-room with suitable mesh-wire gauze from the first of April to the first of December. Every hotel shall have all bedroom windows screened, or else provide each bed with a mosquito bar for the use of its patrons for protection against flies, mosquitoes and other insects, and it shall be the duty of the proprietor or keeper of every hotel and restaurant to use such other means, as fly-paper, fly-traps, etc., as may be necessary to keep the restaurant, kitchen, and dining-room reasonably free from flies. (1921, c. 186, s. 6.)

§ 2283(g). Minimum floor and air space. Beds.—In every sleeping room the minimum floor area shall be sixty (60) square feet per bed, and under no circumstances shall there be provided less than five hundred (500) cubic feet of air space per bed. There shall always be space in each room, and the arrangement of each room shall be such that there may be a space of two feet between any beds in the room. All beds shall be so arranged that the air shall circulate freely under each. In no hotel shall beds or bunks in the same room or apartment be placed one above another: Provided, that this section shall not apply in cases of emergency. (1921, c. 186, s. 7.)

§ 2283(h). Lighting of rooms. Window space. Blinds or shades.—Each room in every hotel hereafter constructed shall be well lighted, with outside window space not less than one-eighth (⅛) the floor space. Each window in every hotel now existing or thereafter constructed shall be provided with either blinds having hinges and shutters or slats freely movable and in good working order, or with a movable shade which effectively excludes the light when drawn. (1921, c. 186, s. 8.)

§ 2283(i). Pillow-slips and sheets; clean sets.—All hotels shall hereafter provide each bed, bunk, cot, or other sleeping place for the use of guests with pillow-slips, under and top sheets to be of sufficient width to cover the mattress thereof, and to be at least ninety (90) inches long. All pillow-slips and sheets, after being used by one guest, must be washed and ironed before used by another guest, a clean set being furnished each succeeding guest. (1921, c. 186, s. 9.)

§ 2283(j). Beds and furnishings to be kept clean and free from vermin.—All beds, bedclothing, mattresses, and pillows shall always be kept clean and free from vermin. (1921, c. 186, s. 10.)

§ 2283(k). Rooms to be disinfected and aired.—Every room, after being occupied by any one known or suspected to be suffering from tuberculosis, diphtheria, or any contagious disease, must be thoroughly disinfected as prescribed by the state board of health before further occupancy; and every room, after being occupied by any one known or suspected to be suffering from measles or whooping-cough, must be thoroughly aired for twenty-four (24) hours before subsequent occupancy. (1921, c. 186, s. 11.)

§ 2283(l). Towels.—All hotels shall furnish each guest with a clean towel; and the use of the roller or other towels used in common is prohibited in all hotels and restaurants. (1921, c. 186, s. 12.)

§ 2283(m). Refrigerators, ice boxes, and cold storage rooms. Kitchens.—The refrigerator, ice boxes, and cold-storage rooms of all hotels or restaurants must be kept free from foul and un-

pleasant odors, mold, and slime. The kitchen must be well lighted and ventilated, the floor clean, and the side walls and ceilings free from cobwebs and accumulated dirt. (1921, c. 186, s. 13.)

§ 2283(n). Tableware and kitchen utensils. Reservice of food.—All dishes, tableware, and kitchen utensils must be thoroughly washed and rinsed with clean water after using; food served to customers when part of same has been used must not again be served to other customers. (1921, c. 186, s. 14.)

§ 2283(o). Protection and removal of garbage. —All garbage must be kept covered and protected from flies, in barrels or galvanized iron cans, and removed at least twice a week. (1921, c. 186, s. 15.)

§ 2283(p). Requirements for lodging-houses.— Every lodging-house accepting transient guests shall at all times be kept free from filth and rubbish in or on the premises belonging to or connected with the same. All water-closets, washbasins, baths, windows, fixtures, fittings, and painted surface shall at all times be kept clean and in good repair. The floors, walls, and ceilings of all rooms, passages, and stairways must at all times be clean and in good repair. (1921, c. 186, s. 16.)

§ 2283(q). Rules prescribed by state board of health. Inspections. Rating. — For the purpose of carrying out the provisions of this law the state board of health is authorized and required to prepare reasonable rules and regulations, and an official score card for showing numerically the rating of hotels and restaurants that come within the meaning of this law. The state board of health, through its officers or agents, shall inspect all hotels and restaurants coming within the meaning of this law at least once a year, and give to every hotel and restaurant inspected a rating in accordance with the aforementioned score card. It shall be the duty of the inspector to leave with the management of said hotel or restaurant at the time of inspection a copy of his report. The said board shall publish at various times the ratings given to the various hotels and restaurants that have been inspected by its officers or agents, and shall furnish to each hotel and restaurant a certificate with the rating given to the hotel stated thereon. The proprietor or manager of the hotel or restaurant, upon the receipt of the aforesaid certificate, shall post it in a conspicuous place where it may be easily observed by guests, and shall remove and destroy the said certificate one year after the date written thereon, or sooner when called upon to do so by an officer or agent of the state board of health. (1921, c. 186, s. 17.)

§ 2283(r). Annual inspections. Certificates. — No inspection of any hotel or restaurant shall be required oftener than once a year, unless there is a change of proprietors, or unless it shall appear to the state board of health that additional inspections are advisable, or upon complaint from two or more persons setting forth facts indicating that such hotel or restaurant is in an unsanitary condition and not maintained in accordance with the requirements of this law: Provided, however, upon request on the part of the management or proprietor a reinspection may be had within a period of thirty (30) days. When more than one inspection of a hotel or restaurant is made within any one year, the state board of health shall issue a new certificate of inspection, and upon the receipt of the new certificate the proprietor or manager of the hotel or restaurant shall remove and destroy the certificate previously issued and replace it with the later certificate. (1921, c. 186, s. 18.)

Editor's Note.—This section would seem to supersede sec. 2277 which was repealed by this act. But see note to sec. 2277.

§ 2283(s). Authority of inspectors. Privacy of guests.—The inspectors, officers, or agents of the state board of health are empowered and authorized to enter any hotel or restaurant at all reasonable hours to make such inspection; and it is the duty of every person in the management or control of such hotel or restaurant to afford free access to every part of the hotel or restaurant and render all aid and assistance necessary to enable the inspector to make a full, thorough, and complete examination thereof; but no inspector shall violate the privacy of any guest without his or her consent. (1921, c. 186, s. 19.)

§ 2283(t). Acts and omissions constituting misdemeanor; punishment. — Any owner, manager, agent, or person in charge of a hotel or restaurant, or any other person who shall willfully obstruct, hinder, or interfere with any officer or agent of the state board of health in the proper discharge of his duty, or who shall willfully fail or neglect to comply with any of the provisions of this law, or who shall maintain or operate a hotel or restaurant which, under the requirements and provisions of this law, shall be found to have a rating of less than 70 shall be guilty of a misdemeanor, and upon conviction fined not less than $10 nor more than $50 for each offense, and each day that he shall fail to comply with this law or maintain his hotel or restaurant with a rating of more than 70 points shall be a separate offense. (1921, c. 186, s. 20.)

§ 2283(u). Inspector to swear out warrants.— It shall be the duty of the inspector, in case he shall have knowledge of any violation of this law, to swear out a warrant against the person offending. (1921, c. 186, s. 21.)

Art. 3. Immoral Practices of Guests of Hotels and Lodging-houses

§ 2283(v). Registration to be in true name; addresses; peace officers.—No person shall write, or cause to be written, or if in charge of a register knowingly permit to be written, in any register in any lodging-house or hotel any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein. Any person occupying any room or rooms in any lodging-house or hotel shall register or cause himself to be registered where registration is required by such lodging-house or hotel. Any person registering or causing himself to be registered at any lodging-house or hotel, shall write, or cause to be written, in the register of such lodging-house or hotel the correct address of the

person registering, or causing himself to be registered. Any person violating any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding two hundred dollars ($200). This section shall not apply to any peace officer of this state who shall privately give his true name to the clerk or proprietor of such hotel or lodging-house. (1921, c. 111.)

CHAPTER 43

INSANE PERSONS AND INCOMPETENTS

Art. 1. Inebriates

§ 2284. Inebriates defined. — Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing. (Rev., s. 1892; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; 1879, c. 329.)

Cited in In re Anderson, 132 N. C. 243, 246, 43 S. E. 649.

Art. 2. Guardianship and Management of Estates of Incompetents

§ 2285. Inquisition of lunacy; appointment of guardian.—Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or incompetent person by inquisition of a jury, as in cases of orphans.

Either the applicant or the supposed idiot, inebriate, lunatic, or incompetent person may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said supposed idiot, inebriate, lunatic, or incompetent person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic or incompetent person by inquisition of a jury, as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of section two thousand two hundred and eighty-four, the clerk shall proceed to commit said inebriate to the department for inebriates at the state hospital in Raleigh for treatment and cure. He shall forward to the superintendent of said state hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for and cure said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses, the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee appointed shall be subject to the laws now or which hereinafter may be enacted for the control and handling of estates by guardians. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (Rev., s. 1890; Code, s. 1670; C. C. P., s. 473; 1919, c. 54; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192.)

Cross References.—For a general discussion of this subject, see 7 Enc. Dig. 737 et seq., 14 Enc. Dig. 438, et seq.; as to the appointment and duties of guardians, see section 2150 et seq., 6 Enc. Dig. 911 et seq., 14 Enc. Dig. 278 et seq.

Editor's Note.—In 1784 (Laws 1784, ch. 228) the county courts were authorized and required to appoint guardians for any idiot or lunatic possessed of property, either real or personal, upon the finding of a jury of idiocy or lunacy; and later other classes of persons than idiots and lunatics were added, for whom guardians may be appointed. Those added classes are "inebriates and those who are incompetent for want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause." These additions were made originally in the Code of Civil Procedure, and have been brought forward in subsequent codes.

This section was amended in 1919, Acts 1919, ch. 54, and the right of appeal given to the parties.

In 1921, Acts 1921, ch. 156, sec. 1, this section was again amended and the latter portion, regarding the commitment of inebriates to the State hospital, was added.

The Act of 1929 added the proviso to this section.

Public Laws 1933, c. 192, added the last two sentences abolishing advanced fees of sheriffs and juries.

General Consideration.—This section clearly makes four classes of persons for whom guardians may be appointed, namely, idiots, lunatics, inebriates, and those who are incompetent from want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause.

(1) An idiot or natural fool is one that has no understanding from his nativity.

(2) A lunatic is one who has possessed reason, but through disease, grief, or other cause has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of the law recover his reason.

(3) An inebriate is defined in sec. 2284.

(4) The fourth class of persons mentioned in this section must really be embraced under the head of lunatics, that is, their want of understanding in order to render them incompetent to manage their own affairs must be complete. As in lunacy, there must be a total privation of understanding; mere weakness of mind will not be sufficient to place a person in the list of those described in the fourth class mentioned in the statute. In re Anderson, 132 N. C. 243, 246, 43 S. E. 649.

Distribution as to Jurisdiction.—The effect of this action has been to confer upon the clerks original and exclusive jurisdiction to issue writs from time to time, as may be necessary, for the purpose of ascertaining, by the inquisition of a jury, whether a party be an idiot or a lunatic, or, if he had been once found to be a lunatic, whether he had become of sound mind again; and to make all orders that may be necessary upon the return of the inquisition. After an idiot or lunatic has been thus found to be such, and put under guardianship, a court of equity has jurisdiction over his estate, both real and personal, and has power to direct the sale of the same, or any part thereof, and to make all needful orders for the application of the proceeds to the necessities of the idiot or lunatic and his family. Dowell v. Jacks, 58 N. C. 417, 419.

An affidavit filed in accordance with this section, confers jurisdiction upon the clerk, and although the clerk's order of commitment be without warrant of law, the Superior Court obtains jurisdiction upon appeal from the denial of the motion before the clerk to strike out the order, which motion expressly requested that the cause "be reinstated upon the docket." In re Dewey, 206 N. C. 714, 175 S. E. 161.

Presence of Party.—The alleged lunatic has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. But where an inquisition, taken by order of a court of competent jurisdiction, is returned to and confirmed by the court, it is to be respected like other judgments of a court, until it be reversed or superseded. Bethea v. McLennon, 23 N. C. 523, cited in note in 23 L. R. A. 742.

A finding of the jury that a person, the subject of an inquisition of lunacy, is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, whatever the cause may be. In re Denny, 150 N. C. 423, 64 S. E. 187. And this is true even where the jury finds that the defendant is not a lunatic or idiot. In re Anderson, 132 N. C. 243, 43 S. E. 649, or that defendant was not wholly deprived of reason. In re Denny, 150 N. C. 423, 64 S. W. 187; In re Anderson, 132 N. C. 243, 43 S. E. 649.

Confirmation of Finding.—The report of the jury need not be formally "confirmed" by the clerk as the statute only requires it to be "filed and recorded." Sims v. Sims, 121 N. C. 297, 28 S. E. 407.

Conclusiveness of Adjudication.—An inquisition of lunacy finding a person a lunatic, is only prima facie evidence of the fact, and may be rebutted by proof. Christmas v. Mitchell, 38 N. C. 535.

§ 2286. Guardian appointed on certificate from hospital for insane — If any person is confined in any hospital for insane persons in any State, territorial or Governmental asylum or hospital, in this State, or in any other state or territory, or in the District of Columbia, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the Superior Court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize to appoint a guardian for such idiot, lunatic or insane person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War Veterans' Act of nineteen hundred and twenty-four as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veterans of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said Acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, inebriates, lunatics, and incompetent persons in this State. (Rev., ss. 1891, 4609; Code, s. 1673; 1860-1, c. 22; 1907, c. 232; 1927, c. 160, s. 1.)

Editor's Note.—This section was amended in 1927, Public Laws 1927, ch. 160, and the latter part of the section, relating to appointment of guardians for World War veterans, was added.

Certificate Must Be from Superintendent of Government Hospital.—The certificates of the superintendents of hospitals for the insane, which are to be received as sufficient evidence for the clerk to appoint a guardian for an insane person, relate to the superintendents of such hospitals under governmental control, and do not include within the meaning of the statute superintendents of private institutions of this character, and the appointment by the clerk of guardians ad litem on their certificates is void. Groves v. Ware, 182 N. C. 553, 109 S. E. 568.

Cited in Somers v. Board of Commissioners, 123 N. C. 582, 585, 31 S. E. 873.

§ 2287. Restoration to sanity or sobriety; effect; how determined. — When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence, setting forth the facts, duly verified by the oath of the petitioner, whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate. (Rev., s. 1893; Code, s. 1672; 1901, c. 191; 1903, c. 80; 1879, c. 324, s. 4.)

Constitutionality of Section.—The constitutional provision preserving the right to a trial by jury applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted, and this section, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane,

is constitutional, not requiring a jury of twelve. Groves v. Ware, 182 N. C. 553, 109 S. E. 568.

Removal of Guardian.—Ex parte proceedings to remove a guardian of an insane person, without notice to such guardian, are void. Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665.

§ 2288. Legal rights restored upon certificate of sanity by superintendent of hospital. — Any person who has been declared of unsound mind and memory under the section 2286, and for whom a guardian has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory. This certificate shall be sworn to and subscribed before the clerk of the superior court or notary public for the county in which the hospital wherein such person has been confined is located, and certified under the seal of said court to the clerk of the superior court of the county wherein said person has his legal residence immediately before being declared of unsound mind and memory. The clerk of such resident county shall record the certificate and immediately issue a notice to the guardian of such person, requiring him to file his final account within sixty days from the date of service of the notice. From the date of docketing the record of such certificate the person formerly of unsound mind and memory shall be restored to all his legal rights. (1909, c. 176.)

§ 2289. Estates without guardian managed by clerk. — When any person is declared to be of non-sane mind or inebriate, and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed. (Rev., s. 1894; Code, s. 1676; R. C., c. 57, s. 6; 1846, c. 43, s. 1.)

As to prosecution of Guardian's bond, see sec. 2199; as to judge's appointment of clerk to manage ward's estate, see sec. 2200.

How Receiver Appointed.—The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. In re Hybart, 119 N. C. 359, 25 S. E. 963.

Cited in Smith v. Smith, 106 N. C. 498, 11 S. E. 188.

§ 2290. Allowance to abandoned insane wife. —When any insane wife is abandoned by her husband, she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband. (Rev., s. 1895; Code, s. 1686; 1858-9, c. 52, s. 1.)

§ 2290(a). Renewal of obligations. — In all cases where an inebriate, lunatic, or incompetent, from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicating drinks or other causes, and such inebriate, lunatic, or incompetent has been so judicially declared and pursuant to such judicial finding such inebriate, lunatic, or incompetent has had a guardian appointed, is the maker or one of the makers, a surety, or one of the sureties, an endorser or one of the endorsers of any note, bond or other obligation, for the payment of money which is due or past due at the time of the appointment of said guardian, or shall thereafter become due prior to the settlement of the estate of the said ward, the guardian of said ward's estate is hereby authorized and empowered to execute as such guardian a new note, bond or other obligation for the payment of money, in the same capacity as ward was obligated for the same amount or less, but not greater than the sum due on the original obligation which shall be in lieu of the original obligation of the ward, whether made payable to the original holder or another, and is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time, and said note, bond or other obligation for the payment of money so executed by said guardian shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original note, bond or other obligation for the payment of money so executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1.)

§ 2290(b). Guardian not liable.—The execution of any note, bond or other obligation for the payment of money mentioned in the preceding section of this act by the guardian of the inebriate, lunatic, or incompetent, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2.)

Art. 3. Sales of Estates

§ 2291. Clerk may order sale, renting or mortgage.—When it appears to any clerk of the superior court by report of the guardian of any idiot, inebriate or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, or mortgage, and shall be entered at length on the records of the court; and all sales and rentings and conveyances by mortgages or deeds of trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed of trust, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose. (Rev., s. 1896; Code, s. 1674; R. C., c. 57, s. 4; 1801, c. 589; 1931, c. 184, s. 1.)

Cross References.—See annotations under the succeeding section. As to powers and duties of receivers appointed by the court, see sec. 2200 and annotations thereunder.

Editor's Note.—The Act of 1931 amended this and § 2292 to permit the mortgaging, under order of the Clerk of the Superior Court, of the personal or real estate of any idiot, inebriate, or lunatic in order that such incompetent may be adequately supported, his debts paid, or his property disposed of if such disposal be to his best interests. Under

the former law his property could only be sold or rented. 9 N. C. Law Rev. 392.

Judicial Character of Sales.—Sales of real property of a lunatic in proceedings before the proper probate judge or clerk of the superior court of North Carolina acting as a probate court are judicial sales. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

§ 2292. Purposes for which estate sold or mortgaged; parties; disposition of proceeds. — When it appears to the clerk, upon the petition of the guardian of any idiot, inebriate or lunatic, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardians. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (Rev., s. 1897; Code s. 1675; R. C., c. 57, s. 5; 1931, c. 184, s. 2.)

See note under § 2291.

Jurisdiction of Superior Court as to Prior Debts.—The superior courts have jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy. Blake v. Respass, 77 N. C. 193.

Clerk Has Power to Pay Prior Debts of Lunatic.—This section confers no power upon the clerk to provide for the payment of the debts of a lunatic contracted prior to the lunacy. Blake v. Respass, 77 N. C. 193.

How Property Sold for Pre-Existing Debt.—Property of a lunatic in the hands of a committee is to be regarded as in custodia legis, and no creditor can reach it for a debt pre-existing the inquisition of lunacy, except through the order of the superior court; and that order is never made until a sufficiency for the support of the lunatic and that of his family, if minors, is first ascertained and set apart. Adams v. Thomas, 81 N. C. 296.

Sale of Lunatic's Contingent Interest.—This section does not confer jurisdiction on the clerks of courts to order the sale of contingent interests of lunatics, in lands; and suits to sell such interests, when the circumstances of the lunatic require it, should be determined in the superior court, in its equitable jurisdiction. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

Clerk's Jurisdiction Not Affected by Petition for Sale.—The probate court having jurisdiction of a petition for the allottment of a maintenance for a lunatic and his family, to discharge debts unavoidably incurred for that purpose, and to direct sales of real estate to provide a fund therefor, and also to make provision for the care and preservation of the lunatic's estate, it was not ousted of jurisdiction because the guardian's petition also prayed for a sale to provide for the payment of pre-existing debts. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

Title of Purchaser.—A purchaser of real property at a sale held by a lunatic's commissioner under a probate order is not chargeable with errors or irregularities in the proceedings; it is sufficient, if the court had jurisdiction of the parties and subject-matter, that the commissioner acted under a decree purporting to confer power of sale. Rexford v. Brunswick Balke-Collender Co., 181 Fed. 462.

How Judgment against Lunatic Satisfied.—If the lunatic has property which cannot be reached by execution, the court will ascertain its character and value, and then direct the guardian to apply to the clerk to ascertain and set apart a sufficiency for the support of the lunatic, out of the fund, and, in the meantime, stay further proceedings, and then apply the excess, if any, in satisfaction of the judgment. Blake v. Respass, 77 N. C. 193, 196.

§ 2293. Sale of land of wife of lunatic upon petition.—Where the wife of a lunatic owns real estate in her own right the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition of the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic. (Rev., s. 1898; Code, s. 1687; 1881, c. 361.)

See sec. 2529 and annotations thereunder.

Section Not Mandatory.—The remedies given by this section and sec. 2529 are in the alternative, and optional by the wife as to which may be pursued. Lancaster v. Lancaster, 178 N. C. 22, 100 S. E. 120.

§ 2294. Wife of insane person entitled to special proceeding for sale of his property. — Every woman whose husband is a lunatic or insane and is confined in an asylum in this state, and who was living with her husband at the time he was committed to such asylum, if she be in needy circumstances, shall have the right to bring a special proceeding before the clerk of the superior court to sell the property of her insane husband, or so much thereof as is deemed expedient, and have the proceeds applied to her support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the insane husband is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1911, c. 142, ss. 1, 2.)

Art. 3A. Mortgage or Sale of Estates Held by the Entireties

§ 2294(1). Where one spouse or both incompetent; special proceeding before clerk.—In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advanage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. (1935, c. 59, s. 1.)

§ 2294(2). General law applicable; approved by judge.—The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by the resident judge or the judge holding the courts in the judicial district wherein the property is located. (1935, c. 59, s. 2.)

§ 2294(3). Proceeding valid in passing title. — Any mortgage, deed, or deed of trust executed under authority of this article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3.)

§ 2294(4). Clerk may direct application of funds; purchasers and mortgages protected. — In all cases conducted under this article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4.)

§ 2294(5). Prior sales and mortgages validated. — Any and all special proceedings under which estates by the entireties have been heretofore sold or mortgaged under circumstances contemplated in this article are hereby in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5.)

Art. 4. Surplus Income and Advancements

§ 2295. Income of insane widowed mother used for children's support.—When a father dies leaving his surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance and education of such minor children, and the mother is or becomes insane and is so declared according to law, and such insanity continues for twelve months thereafter, and she has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such insane mother shall in such cases as are provided for in the succeeding section be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder. (Rev., s. 1899; 1905, c. 546.)

§ 2295(a). Advancement to adult child or grandchild.—When such non-sane person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (Rev., s. 1899, 1905, c. 546; 1925, c. 136, s. 1.)

§ 2296. Advancement of surplus income to next of kin.—When any non-sane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any non-sane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the Superior Court for the county in which such person resided prior to insanity to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his insanity, he contributed in whole or in part. (Rev., s. 1900; Code, s. 1677; R. C., c. 57, s. 9; 1924, c. 93.)

§ 2297. For what purpose and to whom advanced. — Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (Rev., s. 1901; Code, s. 1678; R. C., c. 57, s. 10.)

§ 2298. Distributees to be parties to proceeding for advancement.—In every application for such advancements, the guardian of the non-sane person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (Rev., s. 1902; Code, s. 1679; R. C., c. 57, s. 11.)

§ 2299. Advancements to be equal; accounted for on death.—The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the non-sane person, his estate shall be distributed among his

distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (Rev., s. 1903; Code, s. 1680; R. C., c. 57, s. 12.)

§ 2300. Clerk may select those to advance.—When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (Rev., s. 1904; Code, s. 1681; R. C., c. 57, s. 13; 1925, c. 136, s. 2.)

§ 2301. Advancements to be secured against waste.—It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (Rev., s. 1905; Code, s. 1682; R. C., c. 57, s. 14.)

§ 2302. Appeal: removal to superior court.—Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (Rev., s. 1906; Code, s. 1683; R. C., c. 57, s. 15.)

§ 2303. Advancements only when insanity permanent. — No such application shall be allowed under this chapter but in cases of such permanent and continued insanity as that the nonsane person shall be judged by the clerk to be incapable, not withstanding any lucid intervals, to make advancements with prudence and discretion. (Rev., s. 1907; Code, s. 1684; R. C., c. 57, s. 16.)

§ 2304. Decrees suspended upon restoration of sanity.—Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (Rev., s. 1908; Code, s. 1685; R. C., c. 57, s. 17.)

Art. 5. Detention, Treatment, and Cure of Inebriates

§ 2304(a). "Inebriate" defined.—For the purposes of this law, the word "inebriate" is defined to be a person habitually so addicted to alcoholic drinks or narcotic drugs as to be a proper subject for restraint, care, and treatment. (1921, c. 156, s. 2.)

§ 2304(b). Petition for examination. Warrant for hearing. Action without petition. Evidence.—Upon petition of two citizens, who shall be either the wife, husband, parent, child, committee of the estate of an inebriate, or next friends of such person, the clerk of the superior court of the county in which said alleged inebriate resides shall issue his warrant requiring the inebriate, on a day fixed, to be brought into court for hearing. The petition shall not be considered unless it sets forth that the person named therein is an inebriate within the scope of this law, and unless it be accompanied by the affidavit or affidavits of at least two reputable physicians, stating that they have examined the alleged inebriate, and that he is a proper subject for restraint, care, and treatment, or the clerk may, on his own initiative, where he has information and reasonable grounds to believe that a particular person is an inebriate and is a fit subject for restraint, care, and treatment, cause such person to be brought before him and proceed to hear and try the question of whether or not he is an inebriate within the definition of the preceding section. If two reputable physicians shall certify before him that such person is an inebriate, he may commit such an inebriate as herein provided to the department of the state hospital at Raleigh provided for the care and treatment of such inebriate. (1921, c. 156, s. 3.)

§ 2304(c). Commitment for treatment; discharge.—If after such hearing the clerk is satisfied that the alleged inebriate is a proper subject for restraint, care, and treatment, he shall commit the inebriate to the department for inebriates at the state hospital in Raleigh, where he shall be treated, subject to the same rules and regulations as provided for the treatment and cure of curable insane persons, and he shall be discharged therefrom under the same rules and regulations. (1921, c. 156, s. 4.)

§ 2304(d). Inquiry as to estate of inebriate. Minors. Costs. Expenses.—After the clerk shall determine that an inebriate is a fit subject to be committed to the department for inebriates as aforesaid, he shall go further and inquire as to whether said inebriate is indigent or not in such way that he has not in his own right sufficient estate or property to bear the cost and expense of his restraint, care, and treatment while in the institution. If he is so indigent, then he shall inquire further whether or not the petitioning wife or husband has sufficient estate to pay such costs. If the inebriate is a minor he shall determine whether his particular guardian or parent has sufficient estate of the inebriate or his own, if a parent, to pay such costs. In any of these instances, if sufficient estate or property is found to pay such costs, the clerk shall adjudge the payment from such estate, and in all cases, if the petitioning parent has property sufficient to pay, he shall be adjudged to pay costs of the treatment of his minor child. But if in none of these cases sufficient property is found to pay such costs and expenses, the inebriate shall be declared indigent and the actual cost and expense of restraint, care, and treatment of indigent inebriates as herein defined shall be borne and paid by the county from which the inebriate is committed: Provided, that there shall not be included in such costs and expense any charge except for board and clothing. (1921, c. 156, s. 5.)

§ 2304(e). Inebriate submitting himself for treatment.—Any inebriate within the definition of section 2304(a) who wishes to submit himself for care and treatment in the department for inebriates at the state hospital in Raleigh, may be received therein as a patient upon his presentation of himself personally at the institution and making arrangements with the superintendent for the actual cost of his detention and treatment. He shall signify his desire in writing, and promise

therein to submit himself to the rules and regulations for the government of the institution. When this is done he shall be detained therein and given adequate care and attention. After he has been so detained for thirty days he may secure his release and discharge by ten days notice in writing to the superintendent, or to any one of the assistant physicians in charge of such institution: Provided, said physician or physicians are satisfied that said inebriate has sufficiently recovered to return to his home and not become a menace or charge to society. (1921, c. 156, s. 6.)

§ 2304(f). Department for inebriates.—It shall be the duty of trustees and superintendent of the state hospital at Raleigh to prepare and set apart a department for such inebriates on or before the first day of May, one thousand nine hundred and twenty-two: Provided that, if in the course of care and treatment of said inebriates it developes that they have criminal, mental, or other symptoms indicating they can not be properly taken care of in this department, the superintendent of the hospital is hereby authorized to transfer such patients to any other department under his care, that, in his opinion, the circumstances may justify. (1921, c. 156, s. 7; 1933, c. 341.)

Editor's Note.—Public Laws of 1933, c. 341, added the proviso relating to inebriates in the state hospital at Raleigh.

§ 2304(g). Law effective, when. — This law shall be in force and effect on and after March 8, 1921, but as the state hospital at Raleigh is not prepared with a department for the care and treatment of inebriates, the provisions of this law shall not be made mandatory until after the first day of May, one thousand nine hundred and twenty-two. (1921, c. 156, s. 8).

Art. 6. Sterilization of Persons Mentally Defective

§ 2304(h)-2304(l): Repealed by Public Laws 1933, c. 224, codified as § 2304(m) et seq.

§ 2304(m). State institutions authorized to sterilize mental defectives.—The governing body or responsible head of any penal or charitable institution supported wholly or in part by the state of North Carolina, or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased, feebleminded or epileptic inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with. (1933, c. 224, s. 1.)

See 11 N. C. Law Rev., 254, for full review of this and following sections.

Constitutionality.—The Act of 1929, c. 34, appearing in the Code of 1931 as §§ 2304(h) to 2304(l), was held unconstitutional, being in violation of the provisions of the Fourteenth Amendment, § 1, of the Constitution of the United States, and of the State Constitution, Art. I, § 17, there being no provision in the statute giving a person ordered to be sterilized notice and a hearing or affording him the right to appeal to the courts. Brewer v. Valk, 204 N. C. 186, 167 S. E. 638. The defect does not exist in the present statute. See § 2304(y).

§ 2304(n). Operations on mental defectives not in institutions.—It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in section 2304(m), performed upon any mentally diseased, feebleminded or epileptic resident of the county, not an inmate of any public institution, upon the request and petition of the superintendent of public welfare or other similar public official performing in whole or in part the functions of such superintendent, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2.)

§ 2304(o). Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this act by the responsible executive head of the institution or board, or the superintendent of public welfare, or other similar official performing in whole or in part the functions of such superintendent, or the next of kin or legal guardian having custody or charge of the feebleminded, mentally defective or epileptic inmate, patient or non-institutional individual. (1933, c. 224, s. 3.)

§ 2304(p). Prosecutors designated; duties. — If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in section 2304(m), the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. If the person upon whom the operation is to be performed is an inmate, or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the eugenics board. If the person to be operated upon is not an inmate of any such public institution, then the superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county of which said inmate, patient, or non-institutional individual to be sterilized is a resident, shall be the prosecutor. It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any or all of the following circumstances:

1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or non-institutional individual, that he or she be operated upon.

2. When in his opinion it is for the public good that such patient, inmate or non-institutional individual be operated upon.

3. When in his opinion such patient, inmate, or non-institutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

4. When requested to do so in writing by the

next of kin or legal guardian of such patient, inmate or non-institutional individual.

5. In all cases as provided for in section 2304(ff). (1933, c. 224, s. 4; 1935, c. 463, s. 1.)

Editor's Note.—The amendment of 1935 inserted the second sentence of this section.

§ 2304(q). Eugenics board of N. C. created.—There is hereby created the eugenics board of North Carolina. All proceedings under this article shall be begun before the said eugenics board. This board shall consist of five members and shall be composed of: (1) the commissioner of public welfare of North Carolina, (2) the secretary of the state board of health of North Carolina, (3) the chief medical officer of an institution for the feebleminded or insane of the state of North Carolina, not located in Raleigh, (4) the chief medical officer of the state hospital at Raleigh, (5) the attorney general of the state of North Carolina. Any one of these officials may for the purpose of a single hearing delegate his power to act as a member of said board to an assistant: Provided, said delegation is made in writing, to be included as a part of the permanent record in said case. The said board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time to time select the member of the said board designated above as the chief medical officer of an institution for the feebleminded or insane of the state of North Carolina not located in Raleigh. (1933, c. 224, s. 5.)

§ 2304(r). Quarterly meetings.—The board of eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services. (1933, c. 224, s. 6.)

§ 2304(s). Secretary of board and duties.—The board shall appoint a secretary not a member of the board who shall conduct the business of the board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said board in such matters as may be delegated to him by said board. (1933, c. 224, s. 7.)

§ 2304(t). Proceedings before board.—Proceedings under this article shall be instituted by petition of said petitioner to the eugenics board. Such petition shall be in writing, signed by the petitioner and duly verfied by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verfied by the affidavit of at least one physician who has had actual knowledge of the case and who in the cases of inmates or patients of institutions described in section 2304(m) may be a member of the medical staff of said institution. The eugenics board may require that the petitioner submit additional social and medical history in regard to the inmate, patient or individual resident and his family. The prayer of said petition shall be that an order be entered by said board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon to be designated by him in the petition or by said board in its order upon said inmate, patient or individual resident named in said petition in its discretion that the operation of sterilization or asexualization as specified in section 2304(m) which shall be best suited to the interests of the said inmate or patient or to the public good. (1933, c. 224, s. 8; 1935, c. 463, s. 2.)

Editor's Note.—This section was so changed by the amendment that a comparison is necessary to determine the full extent.

§ 2304(u). Copy of petition served on patient.—A copy of said petition, duly certified by the secretary of the said board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the secretary of the said board designating the time and place not less than fifteen days before the presentation of such petition to said board when and where said board will hear and act upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above mentioned document to said patient, inmate or individual resident.

A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian and next of kin of the inmate, patient or individual resident. If no near relative is known, the copy and notice shall be sent to the solicitor of the county in which the inmate, patient or individual resident resides, and it shall be his duty to protect the rights and best interests of the said inmate, patient or individual resident.

If there is no next of kin and no solicitor in said county, or if there is no known guardian of said inmate, patient, or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall apply to the superior court of the county in which the inmate, patient or individual resident resides or to the judge thereof in vacation, who shall appoint some suitable person to act as guardian of the said inmate during and for the purposes of proceedings under this act, to defend the rights and interests of the said inmate, patient or individual resident. And such guardian shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least fifteen days' notice of said hearing. Such guardian may be removed or discharged at any time by the said court or the judge thereof in vacation and a new guardian appointed and substituted in his place.

If the said inmate or patient be under twenty-one years of age and have a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least fifteen days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the case of

any operation for sterilization or asexualization provided for in this law if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or non-institutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate or to the superintendent of public welfare of the county in which the subject is residing regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or non-institutional individual, provided the other provisions of this law are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the eugenics board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6.)

Editor's Note.—Public Laws 1935, chapter 463, section 6 added the proviso at the end of this section. Section 3 of the same act added the last sentence to the first paragraph.

§ 2304(v). Consideration of matter by board.—The said board at the time and place named in said notice, with such reasonable continuances from time to time and from place to place as the said board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or next of kin, or the solicitor, shall be made and preserved as part of the records of the case. (1933, c. 224, s. 10.)

§ 2304(w). Board may deny or approve petition.—The said board may deny the prayer of the said petition or if, in the judgment of the board, the case falls within the intent and meaning of one or more of the circumstances mentioned in section 2304(p), and an operation of asexualization or sterilization seems to said board to be for the best interest of the mental, moral or physical improvement of the said patient, inmate or individual resident or for the public good, it shall be the duty of the board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this act shall be construed to empower or authorize the board to interfere in any manner with the right of the patient, inmate, or individual resident, or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense. (1933, c. 224, s. 11.)

§ 2304(x). Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing but not before, shall consent in writing to the operation as ordered by the board, such operation shall take place at such time as the said prosecutor petitioning shall designate. (1933, c. 224, s. 12.)

§ 2304(y). Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident, he or she may within fifteen days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the non-institutional individual resides. This appeal may be taken by giving notice in writing to any member of the board and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within fifteen days thereafter shall cause a copy of the petition, notice, evidence and orders of the said board certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The presiding judge of said superior court may hear the appeal upon affidavit or oral evidence and in determining such an appeal may consider the record of the proceedings before the eugenics board, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said board appealed from and may enter such order as it deems just and right and which it shall certify to the said board.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said board until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the board to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the board, then, if no notice of appeal to the supreme court is filed within ten days after such decision, said board's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant. (1933, c. 224, s. 13; 1935, c. 463, s. 4.)

See note to § 2304(m).

Editor's Note.—The second paragraph of this section was changed by the 1935 amendment. The amendment also inserted in the second sentence of the fourth paragraph the words "unless appealed from."

§ 2304(z). Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county. (1933, c. 224, s. 14; 1935, c. 463, s. 5.)

Editor's Note.—The amendment of 1935 omitted the paragraph of this section which provided that the record before the board was conclusive as to facts.

§ 2304(aa). Appeal to supreme court. — Any party to such appeal to the superior court may, within ten days after the date of the final order therein, apply for an appeal to the supreme court, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the supreme court shall operate as a stay of proceedings under any orders of the said board and the superior court until the appeal be determined by the said supreme court. (1933, c. 224, s. 15.)

§ 2304(bb). Civil or criminal liability of parties limited. — Neither the said petitioner nor any other person legally participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation. (1933, c. 224, s. 16.)

§ 2304(cc). Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this state, by a physician or surgeon licensed in this state, which treatment may incidentally involve the nullification or destruction of the reproductive functions. (1933, c. 224, s. 17.)

§ 2304(dd). Permanent records of proceedings before board.—Records in all cases arising under this article shall be filed permanently with the secretary of the said eugenics board. Such records shall not be open to public inspection except for such purposes as the court may from time to time approve. (1933, c. 224, s. 18.)

§ 2304(ee). Valid parts of act upheld; definitions.—This article is severable in its provisions; and the validity of any part, section, or provision of the same shall not be construed to affect the validity of any other part which may be given practical operation and effect without the invalid part, section or provision.

Where the inmates, patients or non-institutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean non-institutional individual. (1933, c. 224, s. 19.)

§ 2304(ff). Discharge of patient from institution.—Before any inmate or patient designated in sections 2304(m) and 2304(p), shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the asexualization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to the date of said parole or discharge. Upon the receipt of the signed approval of the eugenics board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient. (1933, c. 224, s. 20.)

§ 2304(ff1). Existing rights of surgeons unaffected.—Nothing in this law [amendatory of §§ 2304(p), 2304(t), 2304(u), 2304(y) and 2304(z)] shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient. (1935, c. 463, s. 7.)

Art. 7. Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane

§ 2304(gg). Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.—The superintendent, manager, or owner of any public or private hospital, sanatorium, or institution, upon the written request of two duly licensed physicians, not connected with any hospital, public or private, and the husband, wife, guardian, or in the case of an unmarried person having no guardian, by some one of the next of kin, may receive, care for and restrain in such hospital, sanatorium, or institution, as a patient, for a period not exceeding twenty days, any insane person needing immediate care and treatment; or any person needing immediate care, restraint and treatment because such person has become addicted to the intemperate use of narcotics, hypnotic drugs or alcoholic drinks, to such an extent that he has lost the power of self control. Such request for the admission of such patient shall be in writing and filed at such hospital, sanatorium, or institution, at the time of the reception of such patient, or within twenty-four hours thereafter, and such written request shall be held and considered as a commitment of such patient or person to said hospital, sanatorium, or institution, for a period of not exceeding twenty days. The superintendent, manager, or owner of such hospital, sanatorium, or institution shall not detain or restrain any person received as above provided for more than twenty days and shall not be liable in damages to such person or his personal representative or guardian on account of such restraint: Provided, the same is exercised and administered in a humane manner, without violence or personal injury. (1933, c. 213, s. 1.)

§ 2304(hh). Use of restraining devices limited. — No restraint in the form of muffs or mitts with lock buckles, or waist straps, wristlets, anklets, or camisoles, head-straps, protection sheets or simple sheets when used for restraint or other device interfering with freedom shall be imposed upon any patient in such hospital, sanatorium, or institution, unless applied in the presence of the superintendent, or of the physician, or of an assistant physician of such hospital, sanatorium, or institution. Such device shall be applied only in cases of extreme violence, active homicidal or suicidal intent, physical exhaustion, infectious disease, or following an operation, or accident which has caused serious bodily injury, or to prevent injury to such patient or others, except that in cases if emergency restraint may be imposed without the presence of the superintendent, physician or assistant physician; that every such emergency case, after the imposition of such restraint, shall immediately be reported to the superintendent, or manager, physician, or assistant physician of such hospital, sanatorium or institution, who shall immediately investigate the case and approve or disapprove the restraint imposed. (1933, c. 213, s. 2.)

§ 2304(ii). Civil liability for corrupt admissions. —Nothing contained in this article shall be held or construed to relieve from liability in any suit or action, instituted in the courts of this state, any husband, wife, guardian, physician, or assistant physician, to such person or patient on account of collusion of such husband, wife, guardian, physician or assistant physician to unlawfully, wrongfully and corruptly commit any such person or patient to such hospital, sanatorium, or institution, under the provisions of this article: Provided, that the provisions of this article shall not apply to pending litigation. (1933, c. 213, s. 3.)

CHAPTER 44

INTEREST

§ 2305. Legal rate is six per cent.—The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more. (Rev., s. 1950; Code, s. 3385; 1895, c. 69; 1876-7, c. 91.)

Editor's Note.—The distinction between the "legal rate" of interest, and the "lawful rate" of interest, which is maintained in some states, and which appears in some of the older cases of this State, Burwell v. Burgwyn, 100 N. C. 389, 392, 6 S. E. 409, has not been preserved. Legal rate of interest implied the maximum rate at which interest could be charged upon an obligation in the absence of stipulation as to the rate; and a lawful rate of interest implied that rate of interest which could be lawfully stipulated without incurring the penalty of law. The former was six per cent, the latter eight. See Burwell v. Burgwyn, 100 N. C. 389, 392, 6 S. E. 409. This distinction is now abolished; as the maximum rate at which interest may be charged, with or without stipulation of the rate, cannot exceed six per centum per annum, under the provisions of this and the succeeding section.

Definition.—Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, as damages for its detention. Brown v. Hialts, 15 Wall. 177, 185, 21 L. Ed. 128.

Interest is not costs in any sense, and, when allowed, it should be decreed as damages, and be added to the damages awarded. The "Wanata," 95 U. S. 600, 615, 24 L. Ed. 461.

Within the Province of Legislature.—It is within the exclusive province of the lawmaking power to prescribe upon what conditions and at what rate interest can be allowed or contracted for, and what shall be a forfeiture of the right to collect it. Moore v. Beaman, 112 N. C. 558, 564, 17 S. E. 676.

Where Interest Rate Not Specified.—Where the statute providing for recovery of taxes does not specify the rate of interest to be employed, it is likely that the "legal rate," six per cent per annum, applies. See 12 N. C. Law Rev., 39.

A contract will be declared usurious when it appears that it was the purpose and intent of the lender to charge and receive a greater rate of interest than that allowed by law under this section. Polikoff v. Finance Service Co., 205 N. C. 631, 172 S. E. 356.

Applied in Hackney v. Hood, 203 N. C. 486, 166 S. E. 323.

§ 2306. Penalty for usury; corporate bonds may be sold below par.—The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid, in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. Nothing contained in the foregoing section, how-

ever, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. This section shall not apply to contracts executed prior to February twenty-first, one thousand eight hundred and ninety-five. (Rev., s. 1951; Code, s. 3836; 1895, c. 69; 1903, c. 154; 1876-7, c. 91.)

I. General Considerations.
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Cross References.

For an exhaustive treatment of usury laws, see 12 N. C. Enc. Dig. 134, 15 N. C. Enc. Dig. 693. See also note under § 1743.

See 12 N. C. Law Rev., 279, for note in reference to this section.

I. GENERAL CONSIDERATION.

At Common Law and in This Country.—At common law the taking of any interest was an indictable offense (11 Am. & Eng. Enc., 379); hence, interest is now purely statutory, being chargeable in such cases and to such extent only as is expressly allowed by statute. The penalties for usury were formerly much severer in this State, and are still so in some other jurisdictions, notably in New York, where in certain cases the charging of interest above six per cent has been recently made indictable. The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will. Smith v. Building, etc., Association, 119 N. C. 249, 255, 26 S. E. 41.

Effect of Usury Formerly and Now.—By the former law, the taint of usury made the contract void both as to principal and interest into whose hands it might come, and so likewise any appearance, shift or device whereupon or whereby an illegal rate of interest was received or taken was declared to be void. By the preceding section six per cent. is fixed as the legal rate of interest, and in case more than the rate allowed is taken, received, or reserved or charged, the contract is not invalidated as to the principal, but the entire interest carried by the note or other evidence of debt, or otherwise agreed to be paid thereon, is, under this section, forfeited; and in case such greater rate has been paid, a remedy is given to the party paying the same to recover by action of debt twice the amount of the interest paid. Moore v. Woodward, 83 N. C. 531, 532.

The forfeiture provided by this section will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt. C. S. 2306. Sloan v. Ins. Co., 189 N. C. 690, 128 S. E. 2; Waters v. Garris, 188 N. C. 305, 124 S. E. 334; Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 425, 137 S. E. 156.

In Moore v. Beaman, 111 N. C. 328, 332, 16 S. E. 177, it was said the provisions of the law forbidding usury are very clear and explicit. No one can possibly misunderstand them. If moved by avarice a party deliberately violates this law, he has no ground to complain that his punishment has been in the very respect which caused him to sin, and that in grasping after illegitimate interest he has lost also the legitimate interest which the law would have given a law-abiding citizen.

Contrary to Public Policy.—An agreement by the parties for the payment of interest in excess of the legal rate, made in this State and to be performed therein, is unlawful; such an agreement is in violation of the statute and is contrary to the public policy of this State. No cause of action founded upon such an agreement can be maintained in the courts of this state. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

The usury statute will be strictly construed, and usury must be pleaded. Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

Purpose of Statute—Distinction between the New and the Old Statute.—Both the former and the present statutes were enacted in restraint of excessive interest for the same general policy, and especially on the idea of protecting the borrower against the oppression of the lender, the chief difference being that a violation under the old statute invalidated the contract, working a forfeiture of the sum lent as well as of the interest, whereas the present law leaves the contract valid for the principal, but makes the interest forfeitable. Moore v. Woodward, 83 N. C. 531, 533.

Created for the Benefit of Borrower.—Statutes prohibiting charging usury or an illegal rate of interest are enacted for the benefit of the borrower. Ector v. Osborne, 179 N. C. 667, 103 S. E. 388.

Duty of Court to Carry out Legislative Intent.—The forfeiture of the entire unpaid interest and recovery back of twice the interest paid is in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent. Moore v. Woodward, 83 N. C. 531, 533.

Enforceability in the Absence of Penalty.—Even in the absence of a penalty on charging usurious interest, such as contained in this section, a rate of interest above the one prescribed by law would not be enforceable. Hughes v. Boones, 102 N. C. 137, 9 S. E. 286.

Four Requisites of Usurious Transaction.—In order to constitute a usurious transaction, four requisites must appear: (1) there must be a loan, express or implied; (2) there must be an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. * * * A profit greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may may assume. Doster v. English, 152 N. C. 339, 341, 67 S. E. 754, approved in Monk v. Goldstein, 172 N. C. 516, 519, 90 S. E. 519; Loan, etc., Co. v. Yokley, 174 N. C. 573, 575, 94 S. E. 102; Ector v. Osborne, 179 N. C. 667, 103 S. E. 388.

Forbearance of Indebtedness or Loan of Money Essential.—It is universally held that in order that a transaction shall fall within the prohibition of the statutes against usury it is essential that there should be a contract for the forbearance of an existing indebtedness or a loan of money. Struthers v. Drexel, 122 U. S. 487. See 29 Am. and Eng. Enc., p. 464, sec. 4, and note 5, where a large number of cases are cited in support of the text. There is no exception to this universal rule, that there must be an extension of credit and an illegal compensation for it, knowingly taken, in order to constitute usury. This is recognized in the earliest cases on the subject up to the present time. Smithwick v. Whitley, 152 N. C. 366, 367, 67 S. E. 914.

Intent to Charge Usurious Interest.—When the lender of money intentionally charges the borrower a greater rate of interest than the law allows, and his purpose stands clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. Riley v. Sears, 154 N. C. 509, 70 S. E. 997.

Effect of Charging and Collecting Usury.—Where an usurious rate of interest on money has been paid by the borrower of money, the statutory penalty is double the amount of the usury, but where it is only charged, and not collected, the statute eliminates the usury and forfeits the interest on the amount of the loan. Ragan v. Stephens, 178 N. C. 101, 100 S. E. 196.

Payment Necessary for Recovery.—It is well settled that the penalty is not incurred by the charging of usurious interest; it is by the taking the usury that the party incurs the penalty, and that no action lies therefor until it is paid. Godfrey v. Leigh, 28 N. C. 390; Stedman v. Bland, 26 N. C. 296; Rushing v. Bivens, 132 N. C. 273, 275, 43 S. E. 798.

Same—Payment by Renewal of Note.—Before the plaintiff can maintain the action he must pay the usury in money or money's worth. It is well settled that the penalty is not incurred by the charging of usurious interest; it is by taking the usury that the party incurs the penalty,

and no action lies therefor until it is paid. Godfrey v. Leigh, 28 N. C. 390; Stedman v. Bland, 26 N. C. 296. A renewal of the note does not constitute such payment of the original debt. Ragan v. Stephens, 178 N. C. 101, 100 S. E. 196.

Recovery after Payment—Former Rule.—Formerly, the debtor although he could defeat the claim of the creditor to recover usurious interest, he could not, after having paid it, recover it back. Merchant Bank v. Lutterloh, 81 N. C. 143, 149. But this doctrine is now changed by the express terms of this section. Ed. Note.

See also, Ward v. Sugg, 113 N. C. 489, 495, 18 S. E. 717.

Recovery of Double the Entire Interest.—Under the clear terms of this section the plaintiff is entitled to recover back double the entire interest paid, not merely double the usurious excess. Tayloe v. Parker, 137 N. C. 418, 419, 49 S. E. 921.

Waiver.—The borrower may waive his rights under this section. Ector v. Osborne, 179 N. C. 667, 103 S. E. 388.

Same—Consent Judgment.—By consent judgment entered in an action upon a note, wherein usury was set up by the defendant, and the parties have agreed upon a compromise in a certain sum, signed and entered by the court, the defendant waives his right under our usury law, and may not thereafter maintain the defense that a note he had given the plaintiff, in the amount of the judgment, was tainted with the usury of the first transaction. Ector v. Osborne, 179 N. C. 667, 103 S. E. 388.

Entire Interest Declared a Forfeiture.—The statute makes the "taking, receiving, reserving or charging usury," when knowingly done, i. e., intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, or which has been agreed to be paid thereon. Ward v. Sugg, 113 N. C. 489, 494, 18 S. E. 717.

Mere Entry Does Not Constitute Charging.—The mere entry on account and subsequent presentation of an usurious claim is not a "charging" within the meaning of that statute. Grant v. Morris & Sons, 81 N. C. 150.

Recovery of Penalty Where Plaintiff in Pari Delicto.—A borrower who has paid usurious interest may, under this section recover of the lender twice the amount of usurious interest so paid, notwithstanding that he is in pari delicto in the transaction. Hollowell v. Building, etc., Association, 120 N. C. 286, 26 S. E. 781.

Overpayment by Mistake.—In an action to recover for overpayment of interest, made by mistake, recovery can not be had for the forfeiture of double the interest as a penalty for usury, since, upon the allegation of such overpayment by mistake, no legal implications arise that the plaintiff is suing for the forfeiture. Gillam v. Life Insurance Company, 121 N. C. 369, 28 S. E. 470.

Usurious Interest Accrued upon Bonds Other Than the One Sued upon.—In an action of claim and delivery for certain property conveyed by a chattel mortgage, the defendant can set up the defense of usury upon the allegation that the sole consideration of the bond secured by the mortgage was usurious interest, which had accrued upon certain other bonds executed by the defendant to the plaintiff. Moore v. Woodward, 83 N. C. 531.

Promise of Interest Void—Note Valid.—A note executed and delivered as evidence of the promise of the maker to pay to the payee or his order a sum of money which has been loaned by the payee to the maker, is not void, although the payee has, knowingly, taken, received, reserved, or charged interest on the note at a greater rate than six per cent per annum, which is the legal rate in this State; only the promise, in such case, to pay interest is void. Federal Reserve Bank v. Jones, 205 N. C. 648, 650, 172 S. E. 185.

Identity with Provisions of National Bank Act.—Our penalties for usury are identical with those prescribed in the National Bank Act, U. S. Rev. St., sec. 5198. Smith v. Building and Loan Association, 119 N. C. 249, 255, 26 S. E. 41.

Effect of Repeal of Old Law.—A contract absolutely void under the old law for being usurious, is not validated by the repeal of that law and the enactment of this section which does not invalidate the principal of a usurious contract. Pond v. Horne, 65 N. C. 84.

Cited in Bundy v. Commercial Credit Company, 198 N. C. 339, 341, 151 S. E. 626; McNeill v. Suggs, 199 N. C. 477, 154 S. E. 729; Fletcher v. Parlier, 206 N. C. 904, 905, 173 S. E. 343.

II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

A. The General Doctrine.

Form of Transaction Can Not Conceal Its Usurious Nature.—An express or implied loan, upon the understanding that the money shall be returned at a greater interest rate than the statute allows, whatever the form of the transaction, and with corrupt intent on the part of the lender, is usury under this section, the corrupt intent consisting in "taking, receiving, reserving, or charging" a greater rate than that allowed by law. Revisal, sec. 1951. Loan & Trust Co. v. Yokley, 174 N. C. 573, 94 S. E. 102.

Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

The courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and in reality usurious. In Bank v. Wysong, 177 N. C. 380, 99 S. E. 199, Justice Walker, speaking of a transaction alleged to be usurious, says: "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its tendency and effect, when the purpose and intent of the lender is unmistakable." Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 424, 137 S. E. 156.

Where there is negotiation for a loan of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; and however the transaction may be shaped or disguised, if a profit or return beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious. McRackan v. Bank, 164 N. C. 24, 26, 80 S. E. 184; Loan Co. v. Yokley, 174 N. C. 573, 576, 94 S. E. 102.

The nature and terms of the contract determine its character and purpose, and if usurious in itself it must be so understood to have been intended by the parties, and they can not be heard to the contrary. So the parties to a contract usurious upon its face, understandingly entered into, must be deemed to have intended to provide for the payment of a rate of interest in excess of that allowed by law, and that is itself a usurious contract. Burwell v. Burgwyn, 100 N. C. 389, 392, 6 S. E. 409.

In construing a transaction with regard to our usury statutes the courts will look to its substance and not to its form. Pratt v. Mortgage Company, 196 N. C. 294, 145 S. E. 396.

B. Specific Instances.

Between Bank and Its Customer.—Where the bank has followed an arrangement made by its depositor that the latter keep a certain per cent. of the money borrowed upon his own paper and paper of its customers upon which he remains responsible, and which is good and collectible by the bank without trouble to it, and thus collects on the series of transactions a rate of interest in excess of the legal rate, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding it. English Lumber Co. v. Wachovia Bank & Trust Co., 179 N. C. 211, 102 S. E. 205.

Where an association charges a stockholder certain fines under § 5178, such fines cannot be alleged as interest paid on the loan from the corporation. Moore v. Mutual Building, etc., Ass'n, 203 N. C. 592, 166 S. E. 597.

Sum Deducted Must Be Reserved as Interest.—Where the borrower executed notes for the principal sum borrowed and notes for the interest on the principal notes from the time of their execution until their respective maturities, and the lender paid the borrower the principal sum borrowed less an amount deducted and retained by the lender, in the absence of an agreed fact or a finding by the court that the sum deducted was reserved by the lender as interest, the transaction did not constitute usury, and therefore the notes were not tainted with usury in the hands of the purchaser. Ray v. Atlantic Life Ins. Co., 207 N. C. 654, 178 S. E. 89.

Loan by Finance Corporation for Purchase of Automobiles.—Where a finance corporation loans money for the purchase of automobiles sold in this State to be paid for herein at a greater rate of interest than six per cent., the transaction is an usurious one coming within the inhibition of our statute and the penalty it imposes, though the contract is couched in the language of bargain and sale in

order to evade our usury law. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 137 S. E. 156.

Name of Charge Immaterial.—Any charges made by a building and loan association against a borrowing member, in excess of the legal rate of interest, whether such charges are called "fines," "dues" or "interest," are usurious. Hollowell v. Building, etc., Association, 120 N. C. 286, 26 S. E. 781.

Stipulation That Laws of Another State Should Apply.—Where the court finds that the stipulation in a contract that the laws of another state should apply was made in bad faith for the purpose of evading the usury laws of this State, and that defendant charged and received payment of usurious interest, the findings are sufficient to support a judgment in plaintiff's favor that he recover of defendant twice the amount of usurious interest paid as determined by this section. Polikoff v. Finance Service Co., 205 N. C. 631, 172 S. E. 356.

Usury in Fact Made Payable in This State.—Where in fact a contract for the payment of usurious interest in violation of section 2305 was made payable in this State, the fact that it appeared from the face of the contract that it was payable in another state, does not relieve it of its usurious charge of interest contrary to the statute of this State. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 137 S. E. 156.

Building and Loan Associations.—See section 5183 and notes thereto.

III. EQUITABLE DOCTRINES AS AFFECTING RIGHTS OF PARTIES.

A. Summary of Law and Conclusions.

Editor's Note.—The operation of the equitable doctrines whose primary purpose is to attenuate the hardships of technical rules of law, among which doctrines the relief granted by the equity courts against the enforcements of forfeitures occupies a foremost ground, and the effect upon the prevailing usury laws of the changes made in the essence of this section, have created no little diversity of opinion as to the determination of the rights of parties to a usurious transaction in proceedings of equitable nature.

The legal situation may be presented from two different angles: (a) where the lender seeks to enforce the usurious contract in an equitable proceeding, as where he seeks to foreclose a mortgage, (1) under the former law which made both the principal and the interest of a usurious transaction absolutely void, (2) under the present law, which declares only the interest void; (b) where the borrower seeks the aid of the court in the nature of an equitable interposition, as where he seeks to prevent the foreclosure of a usurious mortgage, (1) under the former law, (2) under the present law.

Under situation (a), (1) the cases are uniform that the lender can enforce neither the principal nor the interest of his usurious claim. McBrayer v. Roberts, 17 N. C. 75. This it is believed, on the ground that the law invalidating the principal and the interest of a usurious transaction is a positive statutory law which takes precedence over the equitable doctrine of relief against forfeitures, and also on the ground that a court of equity will not give its aid to a person who has exacted an unconscionable usurious bargain.

Situation (a), (2), also presents no difficulty. Here, as in the preceding situation, the court in equitable proceedings follows the exact terms of the statute, and allows the lender the recovery of his principal and disallows that of his interest.

Situation (b) is the one which presents the most difficulty. Under situation (b), (1), the court affected by the established equitable maxim that "he who seeks equity must do equity" declared that a borrower as a condition to the grant to him of equitable relief, must pay not only the principal but also the legal rate of interest thus saving harmless the lender from the terms of a positive statutory penalty. This conclusion has also been reached by many cases under the present law, with the result of abrogating a statutory rule which in no ambiguous terms declares the entire interest void and forfeited, by the operation of a mere equitable maxim. And this is the law in this state at the present. Miller v. Dunn, 188 N. C. 397, 124 S. E. 746, being the latest judicial utterance upon the subject. The justification of the holding seems to lie in the fact that the remedy to recover under this section is an independent action at law. It is submitted, (1) that the whole spirit of code procedure is to prevent unnecessary delays, and a circuity of action to which the doctrine of the case would lead would frustrate that spirit; (2) that an equitable maxim can not supersede a statutory rule which, in unequivocal terms, declares that the debtor shall not be compelled to pay any interest when usury has been exacted. These conclusions are supported by adjudicated cases, see Moore v. Beaman, 112 N. C. 558, 564, 17 S. E. 676; Ward v. Sugg, 113 N. C. 489, 18 S. E. 717; and seem sound upon principle and policy.

Under the following headline will appear the state of authorities upon the subject, which will exemplify the classification of situations presented above, and will indicate the diversity of opinions which the court has entertained upon the point at different times.

B. Exposition of Authorities.

Lender Precluded Even in Equity.—A court of equity is bound by the statute of usury, and, although upon the bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose an usurious mortgage will be dismissed. McBrayer v. Roberts, 17 N. C. 75.

Same—Borrower in Equity.—When the borrower comes in equity, he will be made to do equity, by paying the sum borrowed and the lawful interest, as the price of assistance. But when the lender asks aid of equity, he must ask it on a contract not tainted by an unlawful and corrupt ingredient. McBrayer v. Roberts, 17 N. C. 75, 77.

One who goes into a court of equity to seek relief from a usurious contract, will be required to pay legal interest. Cook v. Patterson, 103 N. C. 127, 9 S. E. 402.

It is well settled that the penalty for usury, provided for in this section, is not applicable in injunction proceedings—equitable in nature, the principle being that he who seeks equity must do equity. Jonas v. Home Mtg. Co., 205 N. C. 89, 92, 170 S. E. 127, citing Waters v. Garris, 188 N. C. 305, 308, 124 S. E. 334.

Where in a legal action the defendant, a borrower of money, seeks an equitable relief and alleges usury, it is required that he pay the principal sum due with the legal rate of interest, the only forfeiture which he can enforce being the interest in excess of the legal interest rate. North Carolina Mtg. Corp. v. Wilson, 205 N. C. 493, 171 S. E. 783.

Equitable Principle Not Applicable in Legal Proceedings.—The principle that a court of equity will eliminate an usurious rate of interest from the debt when the suit is brought by the debtor for the penalty, upon his paying the principal sum and the legal rate of interest, does not apply to an action at law involving no equitable principle. Cuthbertson v. Bank, 170 N. C. 531, 87 S. E. 333; Cheek v. Iron Belt Building, etc., Association, 127 N. C. 121, 37 S. E. 150.

The principle of equity that a debtor, seeking the aid of a court of equity, will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate (Churchill v. Turnage, 122 N. C. 426, 30 S. E. 122; Owens v. Wright, 161 N. C. 127, 76 S. E. 735; Simonton v. Lanier, 71 N. C. 498,) such as in a case to enjoin the foreclosure of a mortgage or to grant other equitable relief, does not apply when the plaintiff is seeking legal relief. Cuthbertson v. Peoples Bank, 170 N. C. 531, 532, 87 S. E. 333.

Tender and Payment of Correct Interest.—Upon the principle that "he who seeks equity must do equity," the plaintiff in his suit to enjoin the foreclosure of a mortgage upon the ground of usury, must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. Miller v. Dunn, 188 N. C. 397, 124 S. E. 746.

Where the plaintiff seeks an injunction relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law under this section, he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, under the equitable principle that "he who asks equity must do equity," and he may not resist the foreclosure of the mortgage on the sole ground that he has been charged a usurious rate of interest, contrary to the provisions of the statute on the subject. Waters v. Garris, 188 N. C. 305, 124 S. E. 334.

Equitable Maxim Can Not Change the Statutory Rule.—It is entirely immaterial whether the plaintiff creditor has sought his relief by a proceeding which formerly would have been termed a suit in equity or an action at law. The distinction between these modes of procedure is expressly abolished. The plaintiff can not, by skillfully selecting one prayer for relief instead of another, avoid the penalty which the law imposes upon the transaction, which is the basis of his action. Moore v. Beaman, 112 N. C. 558, 560, 17 S. E. 676.

There are some authorities to the effect that when the debtor brings the action and invokes the equitable jurisdiction of the court, as by an injunction to prevent a sale under a mortgage, the court will only grant relief upon payment of the principal with legal interest. This is put upon the principle "who asks equity must do equity," but the principle "he who asks equity must do equity," has no application to a case where the right is conferred by statute, that the debtor shall be compelled to pay no interest when usury has been contracted for. Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

Under the usury act in force up to 1866 whenever usury was reserved the entire contract was void, and neither principal nor interest could be recovered. Ehringhaus v. Ford, 25 N. C. 522. In Ballinger v. Edwards, 39 N. C. 449, this was construed to apply only on the law side of the docket, and when the debtor had to seek the aid of a court of equity he was compelled to pay the principal with legal interest. This section, while reducing the penalty to the loss of interest, seems to have expressly intended to change the doctrine laid down in Ballinger v. Edwards. Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

An usurious contract is regarded by the settled law of every court as an oppression, practiced or attempted by the lender upon the borrower. A court of equity can not therefore be invoked to aid such a contract in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression can not demand help even against fraud. The court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honor or morality. Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

That this section may work a hardship in any case gives the courts no authority to disregard the statute or explain it away. When, the Legislature has constitutional authority to make the statute and its meaning is plain, with no limitation making it apply only when the action is brought by the creditor, the courts have not the power to restrict it. Moore v. Beaman, 112 N. C. 558, 565, 17 S. E. 676.

There is no exception in the statute, and, equity as a separate jurisdiction being abolished, there is no ground upon which the court can interpolate any exception. Indeed, it will be a virtual repeal of the usury law if a creditor, by dexterously securing himself by a mortgage with power of sale, can secure himself against the "forfeiture of all interest" which the statute law visits, without exception, upon every "note or other evidence of debt" which is in any way tainted with usury. Ward v. Sugg, 113 N. C. 489, 18 S. E. 717; Smith v. Bldg., etc., Asso., 119 N. C. 249, 255, 26 S. E. 41. It would be an anomaly under this statute for the court to rule that the debtor must pay the principal debt, "with interest," when the statute provides that, if he does, the debtor can immediately sue to "recover back double the interest so paid." Roberts v. Ins. Co., 118 N. C. 429, 24 S. E. 780. Churchill v. Turnage, 122 N. C. 426, 432, 30 S. E. 122.

Where the payee withholds from the borrower a part of the face amount of the note, the same being a device to evade the usury laws, the borrower is entitled in equity to have the note credited with the amount so withheld upon the maturity of the note as against the payee under this section. Federal Reserve Bank v. Jones, 205 N. C. 648, 172 S. E. 185.

IV. RIGHTS OF SUBSEQUENT PURCHASERS.

A. Summary of Law

Editor's Note.—In this connection two important principles of law clash in the determination of the rights of the bona fide subsequent purchasers for value without notice of a negotiable instrument. The criterion of negotiability of an instrument presupposes that it shall be transferable free from all defenses which may exist between the original parties to the instrument, and is adhered to upon the consideration of promoting mediums of credit, commerce and industry. On the other hand public policy demands that debtors should enjoy full immunity from the imposition of usurious transactions. Should the doctrine of negotiability prevail, that policy and the statute by which it is given expression would be frustrated by a transfer of the obligation to a holder in due course. To this end the impregnability of the incidents of negotiability have been lenified by an exception to the effect that where the evidence of obligation is void in itself or is made so by statute, the defenses which are available against the payee are also available against the holder. And since both the principal and the interest of a usurious obligation were rendered void in this State by the express terms of this section, the case presented no difficulty, and the judicial decisions invariably declared that the holder in due course was in no better position than the payee of the obligation, and that his recourse was against the usurious lender. See Faison v. Grandy & Sons, 126 N. C. 827, 829, 36 S. E. 276; Ward v. Sugg, 113 N. C. 489, 492, 18 S. E. 717.

Since the establishment of the rule that usury does not render void the principal of the obligation but merely avoids the interest, there has been some question as to the applicability of the old rule to the new situation. See the dissenting opinion of Mr. Justice Burwell, in Ward v. Sugg, 113 N. C. 489, 496, 18 S. E. 717. But the holding of the cases, as will be illustrated by the succeeding citations, have been decidedly uniform in declaring that the statute makes void the entire interest, and hence the transferee of the instrument can recover only that which his transferor (the lender) could have recovered, viz., the principal without the interest.

B. Exposition of Authorities.

Holder in Due Course Occupies No Better Position than the Lender.—As to usurious contracts, the law regards the maker, not as in pari delicto, but as acting "in chains" (1 Story Eq. Juris., sec. 302), and to permit his contract, which is deemed exacted under duress, to come under the general rule in favor of innocent holders for value of commercial paper, would be to nullify the protecting statute. The recourse of the holder is against the payee and endorser, who is more likely by far to be able to respond than the maker. Ward v. Sugg, 113 N. C. 489, 494, 18 S. E. 717.

Prior to this section, a usurious contract worked a forfeiture of both the interest and the debt, and it was stated in Coor v. Spicer, 65 N. C. 401, that under the operation of such a statute, innocent and meritorious holders were obliged to suffer. Faison v. Grandy & Sons, 126 N. C. 827, 829, 36 S. E. 276. Same rule applies now. Ed. Note.

A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of the law. Faison v. Grandy, 126 N. C. 827, 36 S. E. 276.

In Glenn v. Farmer's Bank, 70 N. C. 191, 205, Rodman, J., says: "It is admitted law that notes vitiated by an usurious or gaming consideration can not be enforced in the most innocent hands, but are always and under all circumstances void." Ward v. Sugg, 113 N. C. 489, 492, 18 S. E. 717.

Same—Contrary Rule Would Render Statute Nugatory—Remedy of Holder against Lender.—If, by passing the note off before maturity and for value, the endorsee may recover on it, the statute is useless, as the protection intended and the penalty and prohibition are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law which had declared the "entire interest forfeited" ab initio, by the fact of "charging or reserving" it. On the other hand, the innocent endorsee has his recourse against the payee who has endorsed the note to him (Daniel on Neg. Inst., sec. 807), a recourse which would more surely protect him, being against the party who has money to loan, instead of borrowing. Ward v. Sugg, 113 N. C. 489, 493, 18 S. E. 717.

Same—Principle as Applied to Mortgage Obligations.—The only case that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is Coor v. Spicer, 65 N. C. 401, which holds that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of sec. 1010. Aside from the fact that this is held expressly otherwise in the latter case of Moore v. Woodward, 83 N. C. 531, an examination of sec. 1010 will show that Coor v. Spicer, was a palpable inadvertence. The statute cited (the Code, sec. 1549) in fact does not purport to protect the innocent holder of a mortgage note which is tainted with usury but the "purchaser of the estate or property" at sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice usually to the assignee of the note. Ward v. Sugg, 113 N. C. 489, 493, 18 S. E. 717.

"Shall Be a Forfeiture" Construed.—In two cases the Supreme Court has expressly held that the words, "shall be a forfeiture," in this section make void the agreement

as to interest. Ward v. Sugg, 113 N. C. 489, 491, 18 S. E. 717.

But see the dissenting opinion of Judge Burwell, in Ward v. Sugg, 113 N. C. 489, 496, 18 S. E. 717, to the effect that the statute does not render the usurious interest void as to prevent an innocent purchaser of the obligation from recovering from the obligor the interest at the legal rate.

V. USURY LAWS AS AFFECTING CORPORATIONS.

Corporation Embraced within Usury Laws.—In the absence of special legislation, corporations are embraced in the usury laws just as natural persons are, and there is no special legislation affecting this point. Commissioners v. Atlantic, etc., R. Co., 77 N. C. 289, 292.

Same—Conflict of Laws.—The statute of the State of New York, forbidding corporations to plead usury as a defense, can not govern a corporation of this State sued in this State, although the bonds in question were delivered in New York and made payable there. Commissioners v. Atlantic, etc., R. Co., 77 N. C. 289.

Where such bonds express a rate of interest illegal in this State, and also in New York, and were issued in payment of a precedent debt and secured by a mortgage on the corporation's property, they could legally bear no greater rate of interest than that allowed in this State. Commissioners v. Atlantic and N. C. R. R. Co., 77 N. C. 289.

Same—Exception.—In Commissioners v. Atlantic, etc., Co., 77 N. C. 289, it was held that a corporation can not legally sell its bonds, bearing the highest legal rate of interest, at a discount for the purpose of borrowing money. Such a sale is in effect a loan, and is usurious. But the doctrine of this case is abrogated by the latter part of this section which allows such a course. Ed. Note.

Provisions of Corporate Charter Construed.—In Simonton v. Lanier, 71 N. C. 498, 502, the plaintiff contended that the following language in his alleged act of incorporation, to-wit, "May discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," confers the right to exact the rate of interest here agreed upon, although greater than the legal rate. It was held that the statute nowhere confers an express power to exceed the legal rate of interest and that the operative words, "any rate of interest that may be agreed on," mean any rate of interest not greater than the legal rate.

Building and Loan Associations.—See section 5183 and notes thereto.

VI. PLEADING AND PRACTICE.

Reference.—See 12 N. C. Enc. Dig. 169, 15 N. C. Enc. Dig. 697, where an exhaustive treatment of the rules of pleading as affecting usury is given.

As to what law governs, whether a contract is usurious or not, see 12 N. C. Enc. Dig. 139 et seq.

Definiteness of Allegations.—In an action brought to recover money alleged to be due on a contract entered into between the parties, wherein the plea of usury is set up in the answer and a recovery is sought under this section double the amount of the interest paid, the recovery sought is in the nature of a penalty; and when the facts are known or readily obtainable the law requires a definite statement in the pleading as to the time and amount, before allegations in such action are held to be sufficient, and when such statement is not made no amendment to the pleadings should be allowed. Riley v. Sears, 154 N. C. 509, 70 S. E. 997.

Borrower May Use Lender as Witness.—To the end that the defense may be ample and complete, if the borrower in his discretion should resort to his remedy under this section he is authorized to examine the lender as a witness. Merchants Bank of Fayetteville v. Lutterloh, 81 N. C. 143, 148.

Statute of Limitations.—The statute of limitations to recover the penalty provided by this section is two years, by the clause 2 of sec. 442.—Ed. Note.

An action to recover the penalty for usury, under this section, is barred after the lapse of two years from the accrual of the cause of action in the absence of disability or nonresidence affecting the running of the statute. Smith v. Finance Co., 207 N. C. 367, 177 S. E. 183.

Same—Nonresident Creditor.—An action against a nonresident creditor for the statutory penalty for charging usury, who has no agent here upon whom process may be served, is not barred by the statute of limitations, nor does the fact in this case that one of the plaintiffs is a nonresident and the other has changed his residence affect the matter. Cuthberton v. Peoples Bank, 170 N. C. 531, 87 S. E. 333.

Statute of Limitations a Part of Plaintiff's Case.—Under sec. 442, a period of two years is allowed for the exercise of the right of the plaintiff to recover usurious interest paid by him; and under that provision it was held that it was a part of the plaintiff's right to allege and prove that the usury was paid within two years, and that the defendant need not specially plead the limitations as in the case of the ordinary statute of limitation. See Roberts v. Insurance Co., 118 N. C. 429, 24 S. E. 780; Rogers v. Bank, 108 N. C. 574, 13 S. E. 245.

When Counterclaim Available.—While a counterclaim for usury may be set up in an action on a note under this section, such counterclaim may not be set up in an action in ejectment based on title to the property under foreclosure of the deed of trust securing the note. North Carolina Mtg. Corp. v. Wilson, 205 N. C. 493, 171 S. E. 783.

Usury Question of Law When Facts Not in Dispute.—What constitutes usury is a question of law to be determined by the court when the facts are not in dispute. Grant v. Morris & Sons, 81 N. C. 150.

When Question for Jury.—Where, in an action upon a note, the defendant pleads the usury statute, and the evidence is sufficient to sustain a verdict that the excess of interest was a proper charge made for negotiating the loan, the question should be submitted to the jury. Loan, etc., Co. v. Yokley, 174 N. C. 573, 574, 94 S. E. 102.

Where the plea of the usury under this section is made by the plaintiff in the action to enjoin the defendant from the sale of land securing a mortgage note, and there is a dispute as to whether the charge made was usurious, and as to the amount due under the mortgage, it is reversible error for the trial judge to assume the correctness of the plaintiff's contentions as a fact, and take the case from the jury accordingly. Miller v. Dunn, 188 N. C. 397, 124 S. E. 746.

The fact that a sum borrowed was made payable to the borrowers and an attorney with allegations and evidence that the attorney under instructions from the lender deducted a certain sum therefrom before the borrowers could obtain the money, together with the "item of expense" set out in the deed of trust securing the loan, is held sufficient to have been submitted to the jury on the question of usury. Jonas v. Home Mtg. Co., 205 N. C. 89, 170 S. E. 127.

By Whom May Be Pleaded.—The plea of usury is open to the parties and their privies, and may be made when by the transaction the debtor's estate is wrongfully depleted, and ordinarily by one having the legal right to protect the estate, as a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N. C. 509, 70 S. E. 997.

Same—Rights of Trustee in Bankruptcy.—A right of action to recover the penalty for a usury charge is in the nature of an action for debt, and is a wrongful detention of, or injury to the estate of the bankrupt which passes to his trustee in bankruptcy. Ripple v. Mortgage, etc., Corp., 193 N. C. 422, 137 S. E. 156.

As a Defense.—Where the payee of a promissory note or bond brings action thereon and the defendant sets up a deduction on account of usury, within the plain intent and meaning of this section the plaintiff will not be entitled to recover the usurious charge. Pugh v. Scarboro, 200 N. C. 59, 156 S. E. 149.

Restraining Foreclosure.—The holder of a second mortgage, able and willing to pay the amount of the debt secured by the first mortgage, but alleging usury, under this section, is entitled to have a restraining order against foreclosure continued until determination of the issue of usury. Wilson v. Union Trust Co., 200 N. C. 788, 158 S. E. 479.

Effect of Consent Judgment.—Where a controversy between the parties as to the amount of the debt has been settled by a consent judgment such judgment is conclusive and final as to any matter determined and cannot be impeached collaterally in another proceeding under this section. Rector v. Suncrest Lbr. Co., 52 F. (2d) 946.

Failure to Instruct as to Double Recovery Is Prejudicial.—The plaintiff in his action to recover for usurious rate of interest paid and received by the lender is entitled under this section to recover double the amount of the interest so paid and received, and an instruction to the jury that fails to give him this right is prejudicial to him and is reversible error. Bundy v. Commercial Credit Co., 200 N. C. 511, 512, 157 S. E. 860.

§ 2307. Time from which interest runs.—Interest is due and payable on instruments, as follows:

1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the

debtor, unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

2. All bills, bonds, or notes payable on demand shall be held and deemed to be due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

3. All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

4. Bills of exchange drawn or indorsed in the state, and which have been protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned. (Rev., s. 1952; Code, ss. 44, 45, 46, 47; R. C., c. 13; 1786, c. 248; 1828, c.. 2.)

See 7 N. C. Enc. Dig. 912; 14 N. C. Enc. Dig. 492. See sec. 2998, ch. 2, as to rules of construction where the instrument is ambiguous as to payment of interest.

Debts Payable on Demand.—Where money is payable on demand, interest does not accrue until a demand is made; but, when no time is appointed, the money is payable immediately without a demand, and hence interest accrues immediately. Freeland v. Edwards, 3 N. C. 49, 2 Am. Dec. 620; Lewis v. Lewis, 3 N. C. 32.

Same—Interest Payable from Time Principal Demanded.—In the absence of a special agreement as to interest or as to time of payment, interest is payable on a debt from the time the principal is demanded. Crawford v. Bank, 61 N. C. 136; Bank v. Hart, 67 N. C. 264; McRae v. Malloy, 87 N. C. 196.

Same—Necessity of Demand.—A person holding money belonging to another is not liable for interest thereon, except from the date of demand. Hyman v. Gray, 49 N. C. 155; Neal v. Freeman, 85 N. C. 441.

Same—Coupons or Installments of Interest Demand.—Coupons or installments of interest bear interest from the time of a demand of payment made after their maturity. Burroughs v. Commissioners, 65 N. C. 234.

Same—Commencement of Action.—Where interest runs from the date of demand, and no demand has been made, interest will be allowed from the date of commencement of suit. Porter v. Grimsley, 98 N. C. 550, 4 S. E. 529.

Bond Payable without Interest.—Where a note or bond is made payable without interest at a certain date, interest does not run thereon except from the time when it should have been paid. Dowd v. Railroad, 70 N. C. 468.

Coupons, when detached from the bond to which they were annexed, bear interest from the time when they were due and payable. Burroughs v. Commissioners, 65 N. C. 234.

A premium note for life insurance at six per cent. interest draws that rate from its date unless otherwise specified. Owens v. Insurance Co., 173 N. C. 373, 92 S. E. 168.

Order of County Treasurer for Payment of Money.—Where A brought an action upon an order of a county treasurer, signed by the chairman of the board of county commissioners, it was held under this section that he was entitled to recover interest upon the amount of the order from the time of the demand of payment. Yellowly v. Commissioners, 73 N. C. 164.

Unliquidated Demands.—Unliquidated damages as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained. Tilghman v. Proctor, 125 U. S. 136, 160, 31 L. Ed. 664.

When interest is recoverable on amount of verdict, it will run from the date of the verdict, unless it can be legally determined before then. Ludford v. Combs, 195 N. C. 851, 141 S. E. 541.

§ 2308. Obligations due guardians to bear compound interest.—Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him. (Rev., s. 1953; Code, s. 1592; R. C., c. 54, s. 23; 1762, c. 69; 1816, c. 925; 1868-9, c. 201, s. 29.)

References.—For an exhaustive treatment of the law regulating the relation of guardian and ward, see 6 N. C. Enc. Dig. 911, 14 N. C. Enc. Dig. 278.

Security in Addition to That of Borrower.—The policy of this section is to require an investment by a guardian to be secured by the bond or note of some person in addition to the borrower. Watson v. Holton, 115 N. C. 36, 20 S. E. 183.

This in Boyett v. Hurst, 54 N. C. 167, where the guardian lends the money of his ward to a trading firm composed of two partners, who both became insolvent at the same time, and from the same causes, no security having been taken besides the names of the two partners, it was held, that the guardian was accountable for the money thus loaned, notwithstanding at the time of this loan the partners were considered as entirely solvent and their failure was sudden and unexpected.

A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. Bane v. Nicholson, 203 N. C. 104, 106, 164 S. E. 750.

A guardian's primary duty is to invest the trust fund, and he will be chargeable with interest in the absence of proof that it remained in his hands unemployed without his fault. Wilson v. Lineberger, 88 N. C. 416.

Guardian Accountable for Loss.—A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. Collins v. Gooch, 97 N. C. 186, 1 S. E. 653.

Compound Interest Defined.—Compound interest is interest upon interest, where accrued interest is added to the principal sum, and that whole treated as a new principal, for the calculation of the interest for the next period. Black Law Dict., p. 636.

Calculation of Compound Interest.—The rule for compounding interest on notes due guardians is to make annual rests, making the aggregate of principal and interest due at the end of a particular year a new principal, bearing interest thenceforward for another year. Little v. Anderson, 71 N. C. 190; Ford v. Vandyke, 33 N. C. 227.

Bonds in Settlement with the Ward.—The bonds, upon which the guardian has lent the ward's money, may by him be transferred to the ward in settlement with him, and the guardian does not have to pay the ward in money. Cobb v. Fountain, 187 N. C. 335, 337, 121 S. E. 614.

§ 2309. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.—All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section. (Rev., s. 1954; Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 157, s. 4; 1807, c. 721.

Correction of Punctuation in the Caption.—The caption of this section was incorrectly punctuated prior to the Consolidated Statutes, and gave rise to at least one litigation. The comma which now appears after the word "bonds" did not then exist, consequently, the excepting clause embraced "judgments" as, well as parol bonds. But the court in In re Chisholm's Will, 176 N. C. 211, 96 S. E. 1031, disregarded the error and held that though the caption of a statute may be called in aid of construction, it can not control the text when it is clear, and gave expression to the contents of the section. This error was subsequently corrected in the Consolidated Statutes.—Ed. Note.

At common law a judgment did not carry interest when an execution of sci. fa. was issued upon it. In an action upon the judgment the plaintiff could recover interest by way of damages for the detention of the money. The statute was passed for the purpose of amending the law in this

respect. Collais v. McLeod, 30 N. C. 221. The intent was that the principal should bear interest because it was just and right that it should, and that the technical rule of the common law should not longer stand in the way. McNeill v. Railroad, 138 N. C. 1, 4, 50 S. E. 458.

Application to Liquidated Demands Only.—The rule that all moneys due by contract except due on penal bonds shall bear interest applies whenever a recovery is had for the breach of a contract, and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it. Bond v. Pickett Cotton Mills, 166 N. C. 20, 81 S. E. 936.

Interest from the Time Money Should Have Been Paid.—In an action equitable in its character and founded upon the theory that in good conscience the defendant should repay the money wrongfully received from the plaintiff. The law implied a promise to repay; and it will allow interest thereon from the time it should have been paid. This differs from an action of tort wherein the jury may or may not allow interest as they see proper; in this lies the distinction. Lumber Co. v. Railroad, 141 N. C. 171, 192, 53 S. E. 823.

From Time Due.—When a real estate man is entitled to recover a reasonable amount for his services rendered in securing a tenant for a building, the sum fixed by the verdict will, as a matter of law, draw interest from the time the same was due and payable. Thomas v. Piedmont Realty, etc., Co., 195 N. C. 591, 143 S. E. 144.

After demand by a depositor or creditor of a bank for the payment of the amount due and refusal of the bank to make payment, the bank is liable for the amount of the claim plus interest at the rate of six per centum per annum. Hackney v. Hood, 203 N. C. 486, 166 S. E. 323.

Purpose of Requiring Jury to Distinguish Principal and Interest.—The evident design of this section is to allow the plaintiff interest on the principal sum recovered in a judgment from the time of its rendition; and the direction to the jury to distinguish between the principal and interest was intended to provide for those cases in which the whole sum is assessed in damages, so as to enable the clerk or the sheriff to compute the interest on the principal sum. But where the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal sum was, it is equally within the spirit of the act that interest should be calculated on that. Deloach v. Worke, 10 N. C. 36, 40.

Judgment Bears Interest from First Day of Term.—Where a consent judgment for a recovery of a certain sum is made a lien on lands, and by its terms payable ninety days from its rendition, it bears interest from the first day of the term, the time given being merely for the purpose of raising the money for its payment; and where the only question submitted to the court is whether interest is chargeable from the date it was payable to a further period beyond, interest for such extended period at the rate of 6 per cent should be allowed. In re Chisholm's Will, 176 N. C. 211, 96 S. E. 1031.

Verdict or Contract—Judgment Should Include Interest.—Where the controversy is made to depend upon whether a written agreement of a certain date to subscribe to plaintiff's enterprise in a sum certain was binding upon the defendant corporation, the affirmative answer of the jury to the issue carries with it interest on the subscription from the date it was due, as a matter of law, and judgment should be rendered accordingly, and not from the date of its rendition as in tort. Chatham v. Mecklenburg Realty Co., 174 N. C. 671, 94 S. E. 447.

Interest on Value of Permanent Improvements on Land.—Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover of the defendant the value of permanent improvements he has put upon the defendant's land under a parol agreement that the latter would convey a part of the lands in consideration thereof, void under the statute of frauds, to the extent that the improvements have enhanced the value of the land, interest is properly allowed in the judgment from the time of the defendant's breach, on the amount ascertained to be due at that time; and objection that the jury may have included the interest in their verdict is untenable when it appears that nothing was said by counsel or court in respect to it, the presumption being to the contrary. Perry v. Norton, 182 N. C. 585, 586, 109 S. E. 641.

Interest on Contracts and Torts Distinguished.—Where a verdict is given in an action on contract in plaintiff's favor for moneys due by the defendant to his intestate, interest is also given the plaintiff on the amount of the recovery as a matter of law, when not incorporated in the verdict. When in tort the matter of interest is awarded or not according as the jury may find. Thomas v. Watkins, 193 N. C. 630, 137 S. E. 818.

In Tort Actions Judgment for Damages Bears Interest.—Although the allowance of interest, in an action for damages for conversion of property, is discretionary with the jury, yet, after the verdict, the judgment for the damages assessed bears interest by virtue of this section, and this is so, although the verdict is for a certain sum "without interest." Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315.

Interest is not allowable as a matter of law in case of tort. Its allowance as damages rests in the discretion of the jury. Lincoln v. Claflin, 7 Wall, 132, 19 L. Ed. 106.

Conversion of Funds.—In an action for damages for conversion, the verdict being for the value of the property at the time of the conversion, interest can only begin from the time of the judgment. Lance v. Butler, 135 N. C. 419, 47 S. E. 488.

Although the jury may allow interest on the amount of the damages from the time of the conversion. Lance v. Butler, 135 N. C. 419, 47 S. E. 488.

The rule in this State is that interest, as interest, is allowed only when expressly given by statute, or by the express or implied agreement of the parties. Devereux v. Burgwin, 33 N. C. 490; Lewis v. Rountree, 79 N. C. 122. The only statute upon the subject is that contained in this section, which provides that all sums of money due by contract of any kind whatsoever, excepting such as may be due on penal bonds, shall bear interest, etc., but there is no provision made for actions of trover or trespass de bonis asportatis. In such cases, in order to compel the wrongdoer to make full compensation to the injured party, the jury may, in their discretion, and as damages, allow interest upon the value of the property from the time of its conversion or seizure, and it has been usual for them to do so. But there is no rule which gives it as a matter of law and right. Patapsco v. Magee, 86 N. C. 350, 355.

Judgment Bears Interest Though Nothing Is Said.—By virtue of this section a judgment bears interest from the time of its rendition until paid, though nothing is said therein about interest. McNeill v. Railroad, 138 N. C. 1, 50 S. E. 458.

Statement in Judgment That It Shall Bear Interest.—It is best always that the court in its judgment should state fully the amount to be raised by the execution, both principal and interest; but the plaintiff will not forfeit his right to interest by the failure to do this, when enough appears on the face of the judgment to enable the officer to compute the amount justly due. All he is required to know is the amount of the principal, and then the statute makes that amount bear interest to the time of payment. McNeill v. Railroad, 138 N. C. 1, 3, 50 S. E. 458.

This section was held directory so far as it formerly provided that the judgment must itself state that it shall bear interest from the date of rendition until it is paid. It is perfectly clear that such a statement in the judgment is not essential to effectuate the intent of the Legislature, which is to allow interest on judgments. McNeill v. Railroad, 138 N. C. 1, 3, 50 S. E. 458.

Compromise Judgment in a Will Contest Case.—Where, in a will contest, a compromise judgment was entered whereby legatees named in the will were to receive certain amounts in settlement of their legacies which were ordered to be paid by the administrator cum testamento thereafter to be appointed, the judgment was not such a judgment as, under this section would draw interest from its date. Moore v. Pullen, 116 N. C. 284, 21 S. E. 195.

Interest on Damages in Condemnation Proceedings.—Interest is not allowed on a judgment rendered in the superior court for damages awarded by the jury to the owner for taking his lands in condemnation; for while the jury may award interest in their verdict, the owner may not complain when such has not been done, in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it. Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168, 82 S. E. 5.

On Declared Dividend.—Where a receiver declares a dividend which he wrongfully withholds, interest should run from the time the dividend is declared. Armstrong v. American Exchange Nat. Bank, 133 U. S. 433, 470, 33 L. Ed. 747.

Interest on Surety Bond.—The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6

per cent interest from the time of notice given it, except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. Lee v. Martin, 188 N. C. 119, 123 S. E. 631.

Where a bank gives a bond to an agency of the State to protect such agency's deposit, upon the insolvency of the bank with assets insufficient to pay depositors in full, the State agency may not hold the surety liable for interest from the time action on the bond is instituted, since in such circumstances the bank is not liable for interest, but the surety is liable for interest only from date of judgment against it on the bond on the amount for which the bank is liable to the State agency as of that date. State v. United States Guarantee Co., 207 N. C. 725, 178 S. E. 550.

Cited in Bell v. Danzer, 187 N. C. 224, 232, 121 S. E. 448.

§ 2310. Judgment by default final, clerk ascertains.—When a suit is instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant does not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by the preceding section. (Rev., s. 1956; Code, s. 531; R. C., c. 31, s. 91; 1797, c. 475.)

This section dispenses with a jury and directs the clerk to compute the interest preparatory to a final judgment by default in suits "instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account," contemplating the rendition of such judgment upon written instruments which themselves specify the precise sum to be paid, and need only an estimate of accrued interest. Rogers v. Moore, 86 N. C. 86, 87.

Courts' Power to Correct Mistake in Calculation.—A judgment by default upon a speciality, for the want of a plea, entered by the clerk in court, upon his calculation of interest, was held to be an office judgment, and that the court possessed the power to correct a mistake in the clerk's calculation of interest at any time upon motion. Griffin v. Hinson, 51 N. C. 154.

§ 2311. Interest from verdict to judgment added as costs.—When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto (Rev., s. 1955; Code, s. 529.)

CHAPTER 45

JURORS

Art. 1. Jury List and Drawing of Original Panel

§ 2312. Jury list from taxpayers of good character. — The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such. (Rev., s. 1957; Code, ss. 1722, 1723; 1806, c. 694; 1889, c. 559; 1899, c. 729; 1897, cc. 117, 539; 1899, c. 729.)

Cross References.—As to the jury generally, see 8 Enc. Dig. 315 et seq.; 14 Enc. Dig. 596 et seq. For an excellent article on women as jurors in North Carolina, see 1 N. C. L. R. 194.

Editor's Note.—Public Laws of 1929, chapters 57 and 65 amended this section by adding at the end thereof the following: "The Board of Commissioners of Yancey County shall make the jury list and revision thereof as required by this section on or before the first Monday in March, one thousand nine hundred and twenty-nine and every two years thereafter."

For act providing that nonpayment of taxes does not disqualify a juror in Macon County, see Public Laws, 1933, c. 62.

Section Directory.—The regulations contained in this section, relative to the revision of the jury lists, are directory only and, while they should be observed, the failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. State v. Smarr, 121 N. C. 669, 28 S. E. 549; State v. Perry, 122 N. C. 1018, 29 S. E. 384; State v. Bonner, 149 N. C. 519, 63 S. E. 84.

Special Statute Allowing Other Method.—Where a statute creating a special criminal court for certain counties allows every facility to the accused of getting a fair and impartial jury, it is not unconstitutional because it does not follow the same methods of drawing the jury which are provided for by the superior courts. State v. Jones, 97 N. C. 469, 1 S. E. 680.

Alienage.—Alienage is disqualification of a juror. Hinton v. Hinton, 196 N. C. 341, 145 S. E. 615.

Omission of Negroes.—The omission of negroes from the jury list, when not excluded on account of their race, is not of itself grounds for quashing an indictment. State v. Daniels, 134 N. C. 641, 46 S. E. 743.

Names of Qualified Persons Not on Jury List.—Where the county commissioners, while drawing the jurors, laid aside the names of several persons, otherwise qualified, for the reason that they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons, if there was any irregularity it did not affect the action of the jurors so drawn and summoned. State v. Wilcox, 104 N. C. 847, 10 S. E. 453.

Merely Purging Jury List.—Merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. State v. Dixon, 131 N. C. 808, 42 S. E. 944.

Section Does Not Abolish Challenge.—This section providing that good and lawful men, required by the Constitution to serve on juries, shall be men found by the county commissioners to have paid taxes for the preceding year, and of good moral character and of sufficient intelligence, did not abolish challenges to jurors, in particular actions, for bias, interest, kinship, etc. State v. Vick, 132 N. C. 995, 43 S. E. 626.

Juror Having Served within Two Years.—A juror of the original panel is not subject to be challenged upon the ground that he had served upon a jury in the same court within two years; only tales-jurors who have thus served are disqualified by the statute. State v. Brittain, 89 N. C. 481.

Payment of Taxes—Motion to Quash Indictments.—Under this section only such person as have paid all of their taxes for the preceding year are competent to serve as jurors or grand jurors. Breese v. United States, 143 Fed. 250. But there are many defenses to the failure to pay. For example nonpayment of taxes due to failure to put name on list of taxpayers does not of itself disqualify the juror. Breese v. United States, 203 Fed. 824. Nor does this section disqualify where the juror owned no taxable property above the exemption. U. S. v. Breese, 172 Fed. 761. To disqualify the failure to pay must be for the fiscal year preceding the annual revision at which the juror's name was drawn. State v. Davis, 109 N. C. 780, 14 S. E. 780; State v. Hargrove, 100 N. C. 484, 6 S. E. 185; Sellers v. Sellers, 98 N. C. 13, 3 S. E. 917; State v. Carland, 90 N. C. 668. And a juror is not disqualified when the sheriff has been enjoined from collecting his taxes. State v. Heaton, 77 N. C. 505.

The findings of the judge in the trial court as to whether a juror has paid his taxes is not reviewable on appeal. State v. Carland, 90 N. C. 668.

Formerly it was held that an indictment could be quashed if one of the members of the grand jury had not paid his

taxes but this was changed by legislative enactment. See sec. 2335 and note thereto.

Cited in Haney v. Lincolnton, 207 N. C. 282, 292, 176 S. E. 573.

§ 2313. Names on list put in box.—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board. (Rev., s. 1958; Code, s. 1726; 1868-9, c. 9, s. 5.)

Boxes Improperly Marked.—Where the partitions of the jury box, instead of being marked "No. 1" and "No. 2," were marked "Jurors Drawn" and "Jurors Not Drawn"; there was a lock on each partition, but one key unlocked both; there was but one key and that was placed in the custody of the register and ex officio clerk to the board of county commissioners by the chairman of the board, it was held that a special venire drawn under the directions of the presiding judge from such boxes was legal. State v. Potts, 100 N. C. 457, 6 S. E. 657.

Middle Letter Entered Erroneously.—The entering on the scroll of the name J. L. B. summoned as a juror, as J. S. B. is immaterial, since the use of a middle letter forms no part of the name. State v. Mills, 91 N. C. 581.

§ 2314. Manner of drawing panel for term from box.—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined: Provided, that regular jurors drawn, summoned, and the attendance upon any term of a superior court, regular or special, in any county, or upon any terms of a general county court or civil county court when not serving upon the trial of any case in the court to which he was summoned, may be ordered by the judge presiding in such court to attend and serve as a juror in the trial of any case pending in any other of said courts in such county, and shall be competent to serve as a regular juror in such other court under the law applicable to trials by jury.

This proviso shall only apply to the counties of Guilford, Wake, Forsyth, Buncombe, Catawba, Cabarrus, Iredell and Haywood. (Rev., s. 1959; Code, ss. 1727, 1731; 1889, c. 559; 1897, c. 117; 1868-9, c. 175; 1868-9, c. 9, s. 6; 1806, c. 694; 1901, c. 636; 1901, c. 28, s. 3; 1903, c. 11; 1905, cc. 38, 76, s. 4; 1905, c. 285; 1933, c. 89.)

Editor's Note.—Public Laws 1933, c. 89, added the proviso, applicable in the eight counties enumerated, relating to service in the courts of another county.

Section Partly Mandatory.—The portion of this section, requiring persons named on the scrolls drawn from the jury box to constitute the jury, is mandatory. Moore v. Navassa Guano Co., 130 N. C. 229, 41 S. E. 293.

But the section is directory merely so far as it relates to the action of the commissioners as to the time and place of drawing the jury. State v. Banner, 149 N. C. 519, 521, 63 S. E. 84; State v. Perry, 122 N. C. 1018, 29 S. E. 384.

While the provisions of the statutes fixing the number of jurors to be drawn by the county commissioners is directory, yet they are very essential to the impartial administration of justice, and their non-observance is the subject of censure, if not punishment. State v. Watson, 104 N. C. 735, 10 S. E. 705.

Findings That Section Complied with Conclusive.—The findings of the trial court, after hearing evidence, that the jurors were drawn, sworn and empanelled in accordance with this section, and that there was no discrimination against persons of the negro race in making up the jury lists, are conclusive on appeal when supported by sufficient evidence, in the absence of gross abuse. State v. Cooper, 205 N. C. 657, 172 S. E. 199.

Cited in State v. Barkley, 198 N. C. 349, 151 S. E. 733; State v. Dalton, 206 N. C. 507, 174 S. E. 422.

§ 2315. Local modifications as to drawing panel.—In Buncombe county forty-eight jurors shall be drawn to serve the first week and twenty-four to serve the second week.

In Cumberland county the commissioners may, in their discretion, cause an additional twelve scrolls to be drawn, to serve as the jury for the first week.

In Forsyth county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned.

For the second week thirty jurors shall be drawn and summoned.

In Hertford county fifteen extra jurors shall be drawn and summoned for the second week.

In Iredell county twenty-four jurors shall be drawn and summoned for the second week.

In McDowell county the board of county commissioners is authorized and empowered to draw as jurors from the box an additional number of jurors to those now provided by law. At each term when grand jury is to be selected, for the first week, forty-eight jurors shall be drawn and summoned, and for each subsequent week of such terms and at all other terms, both civil and criminal, or mixed, regular or special, for each week, thirty jurors shall be drawn and summoned.

In Randolph county forty-two scrolls shall be drawn for the first week and twenty-four for the second week. The commissioners may at the same time and in the same manner draw the names of twenty-four other persons who shall serve as petit jurors for the week for which they are drawn and summoned.

In Rockingham county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned, for the second week twenty-four jurors shall be drawn and summoned.

In Rowan county twenty-four jurors shall be drawn and summoned for the second week.

In Stokes county the commissioners shall draw for each term of the superior court, in accordance with law, twenty-four jurors, to be summoned by the sheriff of Stokes county.

In Wayne, Robeson and Granville counties the board of commissioners for the first week of each term of the superior court of said counties for the trial of civil and criminal causes shall cause to be drawn from the jury box forty-two scrolls, and for each additional week or for any court for the trial of civil causes only, said board of commissioners shall draw twenty-four scrolls. (Rev., s. 1959; 1907, c. 239; Ex. Sess. 1913, c. 4; P. L. 1915, cc. 233, 744, 764; 1921, c. 142; 1923, c. 107, s. 2; 1923, c. 117.)

Editor's Note.—By Public Laws 1921, ch. 142, the paragraph relating to Stokes County was added. In 1923 the paragraphs relating to Wayne, Robeson, Granville and McDowell Counties were added.

§ 2316. Jurors having suits pending.—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box. (Rev., s. 1960; Code, s. 1728; 1868-9, c. 9, s. 7; 1806, c. 694.)

Fundamental Objection.—The circumstances described by this section is a fundamental objection to the juror, whenever it is made to appear, and is a cause of challenge, although the county commissioners may have allowed his name to go upon the venire. Hodges Bros. v. Lassiter, 96 N. C. 351, 2 S. E. 923.

Such juror is incompetent, and the defendant in a criminal action is not required to show affirmatively that the juror was present and participated in the deliberations of the grand jury when the bill was found. State v. Smith, 80 N. C. 410.

When Suit Not Triable at Same Term.—This section disqualifies only one who has a suit to be tried at the same term at which he is drawn to serve as a juror, and does not disqualify a party to a suit in which the summons is issued and made returnable to the term at which he is drawn to serve, but no pleadings are filed, so that it, even if thereafter brought to issue at that term, is not triable till the next term. State v. Spivey, 132 N. C. 989, 43 S. E. 475.

Suit Pending but Not at Issue.—A juror who has a suit "pending" but not "at issue" at the term of the court at which he has been drawn to serve, is not disqualified under this section. State v. Smarr, 121 N. C. 669, 28 S. E. 549.

Indictment Quashed When Section Violated.—An indictment was properly quashed where one of the grand jurors who found the bill was a party to an action pending and at issue in the superior court. State v. Liles, 77 N. C. 496; State v. Smith, 80 N. C. 410.

Applied in State v. Parish, 104 N. C. 679, 10 S. E. 457.

§ 2317. Disqualified persons drawn.—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead. (Rev., s. 1961; Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; 1806, c. 694.)

§ 2318. How drawing to continue. — The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed. (Rev., s. 1962; Code, s. 1730; 1868-9, c. 9, s. 9; 1806, c. 6, s. 94.)

See sec. 2314 and notes thereto.

§ 2319. Drawing when commissioners fail to draw.—If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners, in the presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed; and if a special term continues for more than two weeks, then for the weeks exceeding two a jury or juries may be drawn as in this section provided. (Rev., s. 1963; Code, s. 1732; 1868-9, c. 9, s. 11.)

Time When Names Must Be Drawn.—This section does not require a jury to be drawn twenty days or more before the term but when considered with the preceding sections it is evident that the drawing must be done within the twenty days. Even if the twenty days were required as a time limited it would be regarded as directory only. Lanier v. Greenville, 74 N. C. 311, 93 S. E. 850.

Deputy Sheriff Included.—The provision of this section refers to sheriffs in the generic sense, including deputies within its meaning to perform a duty of a ministerial nature in the sheriff's name; and where the deputy thus acts at the request of the sheriff, a challenge to the panel on that account alone will not be sustained. Lanier v. Greenville, 174 N. C. 311, 93 S. E. 850.

Court May Order Jury Drawn.—Where, upon failure of the commissioners to draw a jury for a third week of court, the court orders the same to be drawn as prescribed by this section, such jury is legal. Leach v. Linde, 108 N. C. 547, 13 S. E. 212.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges

§ 2320. Summons to jurors drawn; to attend until discharged. — The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court. The summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned. Jurors shall appear and give their attendance until duly discharged. (Rev., s. 1976; Code, s. 1733; 1868-9, c. 9, s. 12; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6.)

As to summons and attendance of jurors generally, see 8 Enc. Dig. 338 et seq., 14 Enc. Dig. 603 et seq.

§ 2321. Summons to talesmen; their disqualifications. — That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to

serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court. (Rev., s. 1967; Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 156, s. 69; 1911, c. 15; 1915, c. 210.)

As to tales jurors in general, see 8 Enc. Dig. 343 et seq., 14 Enc. Dig. 603 et seq.

See 11 N. C. Law Rev., 218.

Tales Jurors Defined.—A tales is a supply of such men as are summoned on the first panel in order to make up the deficiency. Boyer v. Teague, 106 N. C. 576, 621, 11 S. E. 665.

Qualifications of Tales Juror.—A tales juror must have the same qualification as a regular juror, with the additional one of being a freeholder. State v. Sherman, 115 N. C. 773, 20 S. E. 711. This includes the requirement as to being a taxpayer. State v. Hargrove, 100 N. C. 484, 6 S. E. 185; State v. Sherman, 115 N. C. 773, 20 S. E. 711. But it is not a disqualification of such a juror that his name does not appear on the list of the county commissioners. Lee v. Lee, 71 N. C. 139.

Duty of Selection—Notice.—The primary duty of selecting tales jurors for the trial of a cause is with sheriffs, and their deputies acting for them, under the control and supervision of the court; permitting these exclusive officers so acting to go outside for the purpose, or notify them in advance when such course is best promotive of the ends of justice. Lupton v. Spencer, 173 N. C. 126, 91 S. E. 718.

None of Original Panel Necessary.—The trial judge, in his discretion, may discharge any jurors or jury, and is not required to reserve one juror of the original panel to "build to," before directing the sheriff to summons tales jurors as authorized by this section. State v. Manship, 174 N. C. 798, 94 S. E. 2.

"Freeholders".—A freeholder is one who owns land in fee, or for life, or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds. State v. Ragland, 75 N. C. 12. The realty must be situated in the county where the court is held. State v. Cooper, 83 N. C. 671. A mortgagor in possession is a freeholder, within the meaning of this section. State v. Ragland, 75 N. C. 12. But not so with the holder of a license to lay off an oyster bed. State v. Young, 138 N. C. 571, 50 S. E. 213.

A finding by the trial judge that persons drawn were not freeholders is conclusive on appeal. State v. Register, 133 N. C. 746, 46 S. E. 21.

Regular Jurors Discharged.—Where the regular jurors have been discharged by the trial judge for the term, evidently under the impression that the business of the court was over, and on the following day there remains a criminal case regularly coming up for trial on a defect of jurors, the judge, within his discretion, is authorized to direct the sheriff to summons "other jurors, being freeholders within the county," whether within or without the courthouse. State v. Manship, 174 N. C. 798, 94 S. E. 2.

§ 2322. How talesmen summoned when sheriff interested.—When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff. (Rev., s. 1968; 1889, c. 441.)

Stated and applied in Boyer v. Teague, 106 N. C. 577, 11 S. E. 665; Lupton v. Spencer, 173 N. C. 126, 91 S. E. 718.

§ 2323. Penalty for disobeying summons.—Every person on the original venire summoned to appear as a juror who fails to give his attendance until duly discharged shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court; but each delinquent juryman shall have until the next succeeding term to make his excuse for his nonattendance, and, if he renders an excuse deemed sufficient by the court, he shall be discharged without costs. Every person summoned of the bystanders who shall not appear and serve during the day as a juror shall be fined in the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs. (Rev., s. 1977; Code, ss. 1734, 405; R. C., c. 31, s. 30; 1779, c. 157, s. 4; 1783, c. 189; 1806, c. 694.)

§ 2324. Jury sworn; judge decides competency.—The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be sworn. The petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror is withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors. The judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions. (Rev., s. 1966; Code, s. 405; R. C., c. 31, s. 34; 1790, c. 321; 1822, c. 1133, s. 1.)

Cross References.—As to competency of jurors generally, see 8 Enc. Dig. 347 et seq., 14 Enc. Dig. 604. As to oaths, see secs. 3188 et seq. of the code.

Challenges to the Array.—See 8 N. C. Enc. Dig. 356, 357, 14 N. C. Enc. Dig. 605.

Challenges for Cause.—The cause of challenge to the favor are so numerous as to be described by Lord Coke as "infinite." It has been held in many cases that the right is given to afford a litigant fair opportunity to remove objectionable jurors, and was not intended to enable them to select a jury of his own choosing. See Blevins v. Mills, 150 N. C. 493, 64 S. E. 428. A few of the most common grounds for challenge will be set out. Chief of these, perhaps, is expression of opinion. This is sometimes ground for challenge, but not if the juror states that the opinion could be eliminated and a fair and impartial verdict rendered. State v. Bailey, 179 N. C. 724, 102 S. E. 406; State v. Winder, 183 N. C. 776, 111 S. E. 530. The challenge for this cause can be made only by that party against whom the opinion was formed and expressed. State v. Benton, 19 N. C. 196.

A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself. State v. Benton, 19 N. C. 196; State v. Mills, 91 N. C. 581.

Other grounds for challenge, briefly enumerated, are relation within the ninth degree of affinity (State v. Potts, 100 N. C. 457, 6 S. E. 657); opposition to capital punishment (State v. Vick, 132 N. C. 995, 43 S. E. 626); nonresidence (State v. Bullock, 63 N. C. 570; State v. Upton, 170 N. C. 769, 87 S. E. 328); employment by party (Oliphant v. Ry. Co., 171 N. C. 303, 88 S. E. 425.) But in an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant. State v. Sultan, 142 N. C. 569, 54 S. E. 84.

Time of Challenge. — The court may, in its discretion,

permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is impaneled. State v. Green, 95 N. C. 611.

Excusing Unchallenged Juror.—The trial judge may excuse a juror, before the jury is impaneled, although the solicitor has passed him to the prisoner and has not challenged him for cause. State v. Vick, 132 N. C. 995, 43 S. E. 626.

Method of Taking Advantage of Error.—The action of a trial judge in determining the qualifications of a juryman, if erroneous, is ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant can not be allowed to take advantage of the alleged error after trial and judgment. State v. Moore, 120 N. C. 570, 26 S. E. 697.

Peremptory Challenges.—See secs. 2331, 4633, 4634, and the notes thereto.

§ 2325. Questioning jurors without challenge.—The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury to make inquiry as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged. (1913, c. 31, s. 6.)

§ 2326. Causes of challenge to juror drawn from box.—It shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder or has served upon the jury within two years prior to the court at which the case is tried, or has not paid the taxes assessed against him during the preceding two years. In other respects the cause of challenge shall be the same as now provided by law, and nothing herein shall modify any law authorizing jurors to be summoned from counties other than the county trial. (1913, c. 31, ss. 5, 7; 1933, c. 130.)

See 11 N. C. Law Rev., 218, for discussion as to effect of the 1933 amendment to this section.

Editor's Note.—Public Laws 1933, c. 130, inserted, at the end of the first sentence of this section, the clause "or has not paid the taxes assessed against him during the preceding two years."

§ 2327. Jurors impaneled to try case furnished with accommodations.—When a jury, impaneled to try any cause, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of the court. (Rev., s. 1978; Code, s. 1736; 1876-7, c. 173; 1889, c. 44.)

Effect on Verdict of Refusal to Furnish Refreshments.—Where a jury retired at 11 a. m., to consider their verdict, which was returned at 3 p. m. such verdict can not be impeached because the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. Gaither v. Generator Co., 121 N. C. 384, 28 S. E. 546.

§ 2328. Exemption from civil arrest.—No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged. (Rev., s. 1979; Code, s. 1735; R. C., c. 31, s. 31; 1779, c. 157, s. 10.)

Section Does Not Repeal Common Law Exemption.—This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attendance in court either as witnesses or as suitors. Cooper v. Wyman, 122 N. C. 784, 29 S. E. 947. See, also, Greenlief v. Peoples Bank, 133 N. C. 292, 45 S. E. 638.

§ 2329. Exemptions from jury duty.—1. All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, and all members of the National guard of North Carolina who comply with and perform all duties required of them as members of said national guard, shall be exempt from service as jurors. (Rev., s. 1980; Code ss. 1723, 2269; 1885, c. 289; 1889, c. 255; 1897, c. 32; 1901, c. 118; 1909, cc. 333, 868; 1913, c. 38, s. 1; 1915, c. 260; 1931, c. 410.)

2. On the first day of January and July of each year the commanding officer of each company, troop, battery or division of the national guard of North Carolina shall file with the clerk of the superior court of the county in which said company, troop, battery or division is located a statement giving the names and rank of each member of his organization who has performed all military duties required of such member during the preceding six months, and any member of such military organization whose name shall not appear upon the statement shall not receive the benefit of the exemption provided above during the six months immediately following the filing of said statement. (1913, c. 38, s. 2.)

3. The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-confederate soldier in their county from jury duty who shall apply to them for exemption. (1915, c. 229.)

Editor's Note.—The Act of 1931 added "brakemen" to the first paragraph of this section.

Exemption Not a Contract.—Exemption from jury duty is not a contract, but a mere privilege, and may be revoked by the Legislature at any time. State v. Cantwell, 142 N. C. 604, 55 S. E. 820.

§ 2330. Clerk to keep record of jurors.—The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talesmen who serve in his court, with the term at which they serve. (Rev., s. 1981; 1893, c. 52, s. 3.)

§ 2330(a). Extra or alternate juror; challenges; compensation and duties. — In the trial in the Superior Court of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been duly impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected, but each party shall be entitled to two peremptory challenges as to such alternate juror; such additional or alternate juror shall likewise be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to

the jury and, when the jurors are ordered kept together in any case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as hereinafter provided shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror. (1931, c. 103.)

Editor's Note.—In 9 N. C. Law Rev. 378, in referring to this section, it is said that the obvious remedy would be a statute which should provide that if any juror should die or become incapacitated during the trial, the remaining members of the jury should be empowered to render the verdict.

Constitutional. — The essential attributes of trial by jury guaranteed by Art. I, sec. 13, are the number of jurors, their impartiality and a unanimous verdict, and this section does not infringe upon same, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of twelve good and lawful men. State v. Dalton, 206 N. C. 507, 174 S. E. 422.

Art. 3. Peremptory Challenges in Civil Cases

§ 2331. Six peremptory challenges on each side.—The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily six jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court. (Rev., s. 1964; Code, s. 406; R. C., c. 31, s. 35; 1796, c. 452, s. 2; 1812, c. 833; 1935, c. 475, s .1.)

As to challenge of alternate juror, see § 2330(a).

Editor's Note.—In prior codes it has been the custom to cite state cases in the annotations to this section. While many of the same principles apply in both civil and criminal cases, secs. 4633 and 4634 prescribe specifically for the latter class—the editors have consequently deemed it expedient to place all state causes under the sections mentioned, to which reference should be made.

By the amendment of 1935 the number of peremptory challenges was increased from four to six.

In General.—As in the case of challenges for cause, the the right is given to challenge but such right does not constitute the right to select jurors. Ives v. Railroad, 142 N. C. 131, 137, 55 S. E. 74; Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24.

Reasons for Challenge Need Not Be Given.—A party's reason for peremptorily challenging can not be inquired into. Dupree v. Ins. Co., 92 N. C. 418.

More Parties than One.—Whether there are one or more plaintiffs or defendants, only four peremptory challenges to the jury on either side are allowable. Bryan v. Harrison, 76 N. C. 360.

After Acceptance.—Where a juror has been accepted it is error to permit a peremptory challenge. Dunn v. Railroad, 141 N. C. 446, 42 S. E. 862.

Cited in Ramsey v. Carolina-Tennessee Power Co., 195 N. C. 788, 143 S. E. 861.

§ 2332. Where several defendants; challenges apportioned; discretion of judge.—When there are two or more defendants in a civil action the judge presiding at the trial, if it appears to the court that there are divers and antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law to defendants, or he may increase the number of challenges to not exceeding four to each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final. (Rev., s. 1965; 1905, c. 357.)

Cited in Ramsey v. Carolina-Tennessee Power Co., 195 N. C. 788, 143 S. E. 861.

Art. 4. Grand Jurors

§ 2333. How grand jury drawn.—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court. (Rev., s. 1969; Code, s. 404; R. C., c. 31, s. 33; 1779, c. 157, s. 11.)

As to grand jury generally, see 6 Enc. Dig. 864 et seq., 14 Enc. Dig. 273 et seq.

Twelve Jurors Sufficient.—Eighteen jurors are not necessary to the finding of an indictment, but twelve are sufficient in North Carolina as at common law. State v. Stewart, 189 N. C. 340, 127 S. E. 260.

Cited in State v. Barkley, 198 N. C. 349, 351, 151 S. E. 733.

§ 2334. Grand juries in certain counties.—At the first fall and spring terms of the criminal courts held for the counties of Gaston, Guilford, Mecklenburg, Moore, Pitt, Richmond, New Hanover, McDowell, Durham, Cumberland, Columbus, Nash, Johnston, Vance, Wayne, Iredell, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively. In the event of vacancies occurring in the grand jury of Pitt county, the judge holding the court of said county, may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring therein.

At any time the judge of the superior court presiding over either the criminal or civil court of New Hanover, McDowell, Durham, and Cumberland counties may call said grand jury to assemble and may deliver unto said grand jury an additional charge. The said judge presiding over either the criminal or civil court of New Hanover, McDowell, Durham, or Cumberland counties may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the grand jury chosen at the first term of the superior court of Cumberland county for the trial of criminal cases in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year.

At any time the judge of the superior court

presiding over the criminal court of Columbus county may call said grand jury to assemble and may deliver unto said jury an additional charge. The said judge presiding over the criminal court of Columbus county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said fall and spring term.

Every grand juror drawn and summoned in Robeson county shall serve for a period of twelve months.

At the spring term of the criminal court held for the county of Gates, and for the county of Henderson, grand jury shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve for twelve (12) months: Provided, that at any time the judge of the superior court presiding over the criminal courts of Gates county or Henderson county may call said jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over the criminal courts of Gates county and of Henderson county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said twelve (12) months.

At the April term of superior court held for the county of Hoke a grand jury shall be drawn, the presiding judge shall charge it as provided by law, and it shall serve until the following April term, Hoke superior court: Provided, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over either criminal or civil court in said county may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn, which shall serve out the unfinished year.

If it should appear to the board of commissioners of Union county, thirty days before the beginning of the term of superior court that begins on the third Monday after the first Monday in March, that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, the said board of commissioners are authorized and empowered within their discretion to draw a grand jury for said term, and to give thirty days' notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. A grand jury for Union county shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection. (1913, c. 196; 1917, cc. 116, 118; 1919, cc. 113, 187; Ex. Sess. 1920, c. 39; 1921, cc. 18, 55, 69, 72; Ex. Sess. 1921, c. 15; 1923, cc. 11, 15, 104, 115; 1925, c. 24; 1929, c. 52, ss. 1, 2; 1931, cc. 43, 97, 130, 131, 237; 1933, cc. 29, 92.)

Editor's Note.—From time to time the legislature has amended this section (the citations of the amendments are given above) by adding other counties to which its provisions are applicable.

The Act of 1929 added Pitt County to the first paragraph of this section, and the Acts of 1931 added Henderson, Johnston, Iredell, Vance and Wayne Counties. See §§ 2334(a) and 2334(b).

Public Laws of 1933, cc. 29, 92, made the fourth paragraph of this section, formerly applicable in Gates county only, applicable to Henderson county. The provision, at the end of this section, relating to the grand jury and Union county, was also inserted. For act relating to fees of grand jurors applicable in Scotland county only, see Public Laws 1924, Ex. Sess., c. 28 as amended by Public Laws 1933, c. 138.

For an act providing for the selection of grand jury for the January term of superior court and providing for service of such jury for one year in Cabarrus county, see Public Laws 1935, chapter 5. The act also provides for selection at the April term of the year 1935.

For an act providing for the selection of a grand jury of Macon county at each April term, see Public Laws 1935, chapter 4.

For an act providing for the selection of a grand jury at each July term for Montgomery county, see Public Laws 1935, chapter 41.

When 1933 Amendment Effective.—The 1933 amendment went into effect subsequent to the first spring term of Henderson county, and the "spring term" referred to in the act meaning the first spring term, the amendment is not effective for the year 1933. State v. Dalton, 206 N. C. 507, 174 S. E. 422.

§ 2334(a). Same—In Bertie County.—In the selection of a grand jury for Bertie County for the fall term of one thousand nine hundred and twenty-seven and annually thereafter, there shall be drawn and summoned forty men, in the same manner as now provided by law, from which a grand jury of eighteen shall be selected by the presiding judge of the Superior Court, which said grand jury shall serve for a period of one year from the time of their selection.

The persons drawn for service in the grand jury at the term at which said grand jury is selected, and who are not selected to serve on the grand jury, shall serve on the petit jury for the week of the term at which the grand jury is selected: Provided, that at other terms of the Superior Court of Bertie County, both civil and criminal, there shall be drawn and summoned, in the manner now provided by law, twenty persons from which the jury for the term of court for which they are drawn shall be selected. (1927, c. 78.)

§ 2334(b). Same—In Durham County.—At the first term of court for the trial of criminal cases in Durham County after the first day of July, one thousand nine hundred and twenty-nine, there shall be chosen a grand jury as now provided by law, and the first nine members of said grand jury chosen at said term shall serve for a term of one year, and the second nine members of said grand jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year. (1929, c. 122, s. 1.)

§ 2334(c). Same—In Davidson County.—The grand jurors for Davidson County shall be drawn at the first fall and spring terms of the criminal courts held in the County of Davidson, and the judge shall charge them as provided by law, and the jurors so drawn shall serve during the remaining fall and spring terms respectively; provided that the grand jurors drawn at the next criminal term in said County, following the rati-

fication of this act shall serve during the remaining spring term. (1929, c. 133, s. 1.)

§ 2334(d). Same — In Johnston, Wayne and Iredell Counties. — In the event of any vacancy occurring in the grand jury of Johnston, Wayne or Iredell County by death, removal from the county, sickness, or otherwise, the presiding judge may in his discretion, order such vacancy, or vacancies, filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so drawn shall take the oath prescribed by law and shall fill out the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power, in his discretion, to appoint an assistant-foreman of the grand jury in the counties of Johnston, Wayne and Iredell and said assistant-foreman so appointed shall, in the absence or disqualification of the foreman, discharge the duties of the foreman of said grand jury. (1931, c. 43, s. 2, c. 130, s. 2.)

§ 2335. Exceptions for disqualifications.—All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (Rev., s. 1970; Code, s. 1741; 1907, c. 36, s. 1.)

For full treatment of grand jurors, see 6 Enc. Dig. 880 et seq., 14 Enc. Dig. 274.

Grand Jury of Twelve Men.—An indictment found by a grand jury of twelve men is good, provided all of the twelve concur in finding the bill. State v. Perry, 122 N. C. 1018, 29 S. E. 384.

Duty of Grand Jurors.—It is not only the right but it is the duty of grand jurors, of their own motion, to originate prosecutions by making presentments of all violations of law which have come under the personal observation or knowledge of each juror, or of which they have credible information. State v. Wilcox, 104 N. C. 847, 10 S. E. 453.

Grand Juror also Member of Petit Jury.—The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tries the issues, in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. State v. Wilcox, 104 N. C. 847, 19 S. E. 433.

Grand Juror Having Suit Pending.—The fact that one of the grand jurors who found a true bill had at that time a suit pending and at issue in the same court is sufficient ground to support a motion to quash the indictment, if the motion is made in apt time. State v. Gardner, 104 N. C. 739, 10 S. E. 146.

Son of Prosecutor Member of Grand Jury.—The fact that the son of the prosecutor, in an indictment for larceny, was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground. State v. Sharp, 110 N. C. 604, 14 S. E. 504.

Absence of Negroes from Grand Jury.—It is no ground to quash an indictment because it was found by a grand jury drawn from a venire in which there were no colored freeholders. The jury list, as constituted by the county court in accordance with the law in force at the time of its constitution, did not contain the names of such colored freeholders. State v. Taylor, 61 N. C. 508. See also State v. Daniels, 134 N. C. 641, 46 S. E. 743.

The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitution of the United States. State v. Peoples, 131 N. C. 784, 42 S. E. 814.

Indictment Not Quashed for Failure to Pay Taxes.—Formerly, it was discretionary with the trial judge to allow or refuse a motion to quash because a grand juryman had not paid his taxes after entry of plea until the petit jury was sworn and impaneled, and a motion to quash after entry of plea was made too late as a matter of right. This is changed by the amendment of 1907 adding the last sentence of this section. State v. Banner, 149 N. C. 519, 63 S. E. 84.

The passage of this section, immediately following the decision of this court in Breese v. United States, 143 F. 250, was evidently for the purpose of removing the disqualification of grand jurors, based upon failure to pay taxes for the preceding year, in case where they actually serve upon the grand jury and pass upon bills of indictment; and there is no reason why it should not be given this interpretation. Davis v. United States, 49 F. (2d) 269, 270.

Members of Grand Jury Summoned by Mistake. — While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake. State v. Paramore, 146 N. C. 604, 60 S. E. 502.

When Competency of Grand Jury Excepted to.—Matters which go to the incompetency of a grand jury may be excepted to after the bill is found, if it is done at the earliest opportunity afterwards, which clearly is upon the arraignment, when the defendant is first called upon to answer. State v. Griffice, 74 N. C. 316.

A motion to quash an indictment, made upon arraignment and before pleading, for that the grand jury was improperly constituted, is in apt time. State v. Paramore, 146 N. C. 604, 60 S. E. 502.

Qualifications Judged at Time of Service.—The fact that a grand juror was a minor when his name was put on the the jury list is immaterial if he was of age at the time he served. State v. Perry, 122 N. C. 1018, 29 S. E. 384.

Cited in State v. Barkley, 198 N. C. 349, 151 S. E. 733.

§ 2336. Foreman may administer oaths to witnesses.—The foreman of every grand jury duly sworn and impaneled in any of the courts has power to administer oaths and affirmations to persons to be examined before it as witnesses: Provided, that the said foreman shall not administer such oath or affirmation to any person except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court. The foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury. In case of the absence of the foreman, or in case of his inability to serve, the presiding Judge shall appoint an acting foreman, who shall have all powers vested by law in the foreman. (Rev., s. 1971; Code, s. 1742; 1879, c. 12; 1929, c. 228.)

Editor's Note.—The Act of 1929 added the last sentence to this section.

Section Not Exclusive.—This section, authorizing the foreman of the grand jury to swear witnesses to be examined before the jury, is directory merely, and the omisclerk of the court. State v. Allen, 83 N. C. 680; State v. White, 88 N. C. 698.

Section Directory Merely.—The provision of the section, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. State v. Hines, 84 N. C. 810. See State v. Avant, 202 N. C. 680, 163 S. E. 806.

This section is directory, and the fact that it does not appear by indorsement on a bill and that the only witness had been sworn and examined is no ground for quashing the indictment or arresting the judgment. State v. Hollingsworth, 100 N. C. 535, 6 S. E. 417.

No Indorsement Necessary.—No indorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. Sultan, 142 N, C. 569, 54 S. E. 841, overruling State v. McBroom, 127 N. C. 528, 37 S. E. 193.

Witnesses Not Re-Examined.—Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court, "a true bill," without a re-examination of the witnesses upon this bill should be quashed. State v. Ivey, 100 N. C. 539, 5 S. E. 407.

§ 2337. Grand jury to visit jail and county home.—Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties. (Rev., s. 1972; Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3.)

Art. 5. Special Venire

§ 2338. Special venire to sheriff in capital cases.—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned. (Rev., s. 1973; Code, s. 1738; R. C., c. 35, s. 30; 1830, c. 27; 1913, c. 31, s. 1.)

Discretion of Judge.—It is in the discretion of the trial judge to order a special venire in capital cases and determine its number, which he may likewise change by another order. State v. Brodgen, 111 N. C. 656, 16 S. E. 170.

An objection by a prisoner charged with capital offense, that the special venire was summoned by the sheriff as prescribed by this section instead of being drawn from the jury box as prescribed by section 2339, is untenable since the latter method is purely discretionary. State v. Smarr, 121 N. C. 669, 28 S. E. 549.

The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under this section, or drawn from the box under section 2339, are both discretionary with the judge of the superior court, and unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challange to the array, unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. State v. Levy, 187 N. C. 581, 122 S. E. 386.

Juror May Have Served Within Two Years.—A juror summoned on a special venire is not rendered incompetent because he has served on the jury in the same court within two years. Only tales jurors come within the proviso of sec. 2321 and, in order that they may be disqualified, it must appear that they have not only been summoned, but have acted as jurors within that time. State v. Whitfield, 92 N. C. 831.

Special Venire Selected without Regard to Color.—It is no ground of exception that a special venire was selected from the freeholders of the county without regard to color, no reference having been had to the jury list constituted by the county court. State v. Taylor, 61 N. C. 508.

Accessory May Be Tried by Special Venire.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. State v. Register, 133 N. C. 746, 46 S. E. 21.

Challenge for Cause.—Under this section where a special venire has been ordered by the court for the trial of a capital felony, such venire, is selected by the sheriff in his discretion, not from the jury box, and by § 4635 are subject to the same challenges for cause as tales jurors. State v. Avant, 202 N. C. 680, 163 S. E. 806.

§ 2339. Drawn from jury box in court by judge's order.—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken. (Rev., s. 1974; Code, s. 1739; 1897, c. 364; 1913, c. 31, s. 2.)

As to qualification of jurors, see section 2312 and annotations thereunder.

See 11 N. C. Law Rev., 219.

Editor's Note.—Formerly special veniremen were required to be freeholders, but in 1913, Laws 1913, ch. 31, this section was revised and this requirement omitted. The only qualification now seems to be those required for members of the original panel.

For cases decided under the former rule, see State v. Moore, 120 N. C. 565, 26 S. E. 629; State v. Kilgore, 93 N. C. 533. See, also, State v. Freeman, 100 N. C. 429, 5 S. E. 921.

Method of Drawing Directory.—The regulations as to drawing a special venire may be directory, but they should be strictly observed. However, failure to follow the directions of the statute will not invalidate the panel in the absence of bad faith or other adequate cause. State v. Parker, 132 N. C. 1014, 43 S. E. 830.

The practice of drawing the venire from the box is commended. State v. Brogden, 111 N. C. 656, 16 S. E. 170.

The drawing of the jury from the box is authorized by this section, and is favored by the courts, though the requirement is not mandatory. State v. Whitson, 111 N. C. 695, 697, 16 S. E. 332.

Discretion of Judge.—See notes to preceding section.

How Jurors Drawn.—On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the tales jurors are put in and drawn; and the jurors summoned under a special venire facias are in this respect to be regarded as talesmen. State v. Benton, 19 N. C. 196.

Special Venire Exhausted.—When a special venire is exhausted without completing the jury, the court may order a further venire to be summoned at once from the bystanders. State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

Matters Affecting Entire Panel.—In the absence of any allegation that the sheriff acted corruptly or with partiality in summoning the venire, or that anything had been done affecting "the integrity and fairness of the entire panel," it is not a ground of challenge to the array that the sheriff failed to summon several of the special venire, drawn from the jury box or that the jury box was not revised by the county commissioners. State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

The integrity and fairness of the entire panel of jurors summoned in obedience to a writ of special venire are not affected by the fact that one man named in the writ had removed from the county and that another named therein was dead when the jury list was revised by the commissioners. Neither are they affected by the fact that one of these named on the venire was not summoned, nor by the fact that the Sheriff in copying the list of the venire fur-

nished him omitted, by mistake, the name of one who in consequence was not summoned. State v. Whitt, 113 N. C. 716, 18 S. E. 715.

§ 2340. Penalty on sheriff not executing writ or jurors not attending.—If any sheriff fails duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars. All jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors. (Rev., ss. 1975, 3602; Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2.)

Amendment of Return on Writ.—Where a sheriff, in making his return on a writ and list of special venire, endorsed thereon, "Received October 15, 1893, executed October 30, 1893, by summoning one hundred and fifty men," it was within the discretion of the court, at the term to which the writ was returnable, to permit an amendment of the return so as to show those of the list furnished him by the clerk who were actually summoned, and those not summoned, with the reasons why they were not. State v. Whitt, 113 N. C. 716, 18 S. E. 715.

CHAPTER 46

LANDLORD AND TENANT

Art. 1. General Provisions

§ 2341. Lessor and lessee not partners.—No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee. (Rev., s. 1982; Code, s. 1744; 1868-9, c. 156, s. 3.)

For full treatment of landlord and tenant, see 8 N. C. Enc. Dig. 505-612; 14 N. C. Enc. Dig. 622-637.

In General.—The lessor and lessee are not partners. State v. Keith, 126 N. C. 1114, 1115, 36 S. E. 169. Thus, where B. was to furnish land, farming implements, feed and team and W. was to do the work, and the crops were to be equally divided, it was held that this was not an agricultural partnership. Lawrence v. Week, 107 N. C. 119, 12 S. E. 120. See also Day v. Stevens, 88 N. C. 83, explaining and correcting. Curtis v. Cash, 84 N. C. 41.

Duration.—A demise may be for a day as well as for a year, and may be terminable at the will of the lessor. It is not ended until the property is returned to the owner. United States v. Shea, 152 U. S. 178, 189, 190, 38 L. Ed. 403.

The legal understanding of a lease for years is a contract for the possession and profits of land, for a determinate period, with the compensation of rent. Thomas v. Railroad Co., 101 U. S. 71, 78, 25 L. Ed. 950.

Effect of Words "Grant" and "Demise."—In a United State's Supreme Court case it was held that the words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant of quiet enjoyment. See Scott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486.

§ 2342. Attornment unnecessary on conveyance of reversions, etc.—Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance. (Rev., s. 947; Code, s. 1764; 4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17.)

§ 2343. Term forfeited for non-payment of rent.—In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease. (1919, c. 34.)

Purpose of Section.—This section was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for reentry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate and stay on until his term expired. Ryan v. Reynolds, 190 N. C. 563, 565, 130 S. E. 156.

Lease or Contract of Rental.—No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control. United States v. Shea, 152 U. S. 178, 189, 38 L. Ed. 403.

Written into Leases.—The section writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Forfeiture for Benefit of Lessor.—The forfeiture implied by this section is for the benefit of the lessor, and to be declared only at his application. Monger v. Lutterloh, 195 N. C. 274, 142 S. E. 12, holding section not applicable to facts of the case.

Forfeiture Denied upon Tender of Rent and Costs.—See note under § 2372.

Reentry after Forfeiture.—It was held in the Supreme Court of the United States in Ewell v. Daggs, 108 U. S. 143, 149, 27 L. Ed. 682, that leases which contain a forfeiture of lessee's estate for nonpayment of rent, or breach of other conditions, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by reentry at the option of the lessor.

Construed with Section 2372.—This section and section 2372, are in pari materia, and should be construed together. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

§ 2344. Recovery for use and occupation.—When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation (Rev., s. 1986; Code, s. 1746; 1868-9, c. 156, s. 5.)

Where Lease Void under Statute of Frauds.—Where a lease was void under the statute of frauds, the lessors could only recover for the time the premises were occupied. Harty v. Harris, 120 N. C. 408, 411, 27 S. E. 90.

§ 2345. Rent apportioned, where lease terminated by death.—If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner. (Rev., s. 1987; Code, s. 1747; 1868-9, c. 156, s. 6.)

§ 2346. Rents apportioned, where right to payment terminated by death.—In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is termi-

nable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event. (Rev., s. 1988; Code, s. 1748; 1868-9, c. 156, s. 7.)

§ 2347. In lieu of emblements, farm lessee holds out year, with rents apportioned.—When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, or by a sale of said land under any mortgage or deed of trust, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession. (Rev., s. 1990; Code, s. 1749; 1868-9, 156, s. 8; 1931, c. 173.)

Editor's Note.—Under the common law a tenant for an uncertain time was entitled to the annual production of his annual labor although his tenancy was terminated by the happening of some contingent event, and the remainderman might be deprived of his rent for a part of the current year. This section was passed to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. See Hayes v. Wrenn, 167 N. C. 229, 231, 83 S. E. 356.

The Act of 1931, which amended this section to permit an agricultural tenant for years, in case the tenancy is terminated by the sale of the land under any mortgage or deed of trust, to continue his occupation to the end of the current year and to apportion the rent, excepted pending litigation. The act became effective March 23, 1931. See 9 N. C. Law Rev. 379.

Section Reasonable and Constitutional.—This section is but a reasonable legislative regulation of the method and means whereby the remainderman, or succeeding owner, comes into possession and complete enjoyment of his estate and is constitutional. King v. Foscue, 91 N. C. 116, 120.

When No Limitation Exists.—Wherever the relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it unless by a regular notice. Stedman v. McIntosh, 26 N. C. 291.

Lease Continued.—A lease of land made by a tenant for life terminates at his death, but by this section the lease is continued to the end of the current lease-year that the tenant's representatives may gather his crop. King v. Foscue, 91 N. C. 116.

The common law being in force in this jurisdiction and the representatives of the life tenant upon his uncertain tenure from death being entitled to the emblements, this section was passed. This was done to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate to the surrendering of possession to the remainderman. See King v. Foscue, 91 N. C. 116; Collins v. Bass, 198 N. C. 99, 102, 150 S. E. 706.

Lease for One Year Included.—The phrase employed in this section, "a lease for years," is used in a technical sense, like the similar phrase, "an estate for years," by which is meant, an estate for a definite period of time, and it embraces a lease for a single year. King v. Foscue, 91 N. C. 116, 119.

Amount Remainderman Entitled to.—Under this section the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate to the surrendering of possession to the remainderman. King v. Foscue, 91 N. C. 116; Hayes v. Wrenn, 167 N. C. 229, 83 S. E. 356.

§ 2348. Grantees of reversion and assigns of lease have reciprocal rights under covenants.—The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (Rev., s. 1989; Code, s. 1765; 32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18.)

§ 2349. Agreement to rebuild, how construed in case of fire.—An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half of its value, by accidental fire not occurring from the want of ordinary diligence on his part. (Rev., s. 1985; Code, s. 1752; 1868-9, c. 156, s. 11.)

Common Law Rule.—In 24 Cyc., 1089 the common law rule is stated as follows: "According to the common law rule, which has been followed generally in this country, a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire or other casuality, even where he is without fault," citing a large number of cases. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

Same—Examples.—"In Pasteur v. Jones, 1 N. C., 393, the court held that where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire the court of equity would compel him either to rebuild or pay the value of the buildings." Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The lessee's covenant to maintain the leased premises in its present condition is equivalent to a general covenant to repair and leave in repair under the common law, and unless otherwise stated in the lease or provided by statute this duty is not affected by the lessee's negligence or the fact that the property had been destroyed during the continuance of the lease by the act of God or the public enemy. Chambers v. North River Line, 179 N. C. 199, 102 S. E. 198.

Changes Made by Section.—This section was enacted to change the rule, formerly existing, but limits its application to the destruction of a house by accidental fire, and only then where it is damaged to more than half its value. It does not apply to a case where the destruction is not by fire, but by ice and flood. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The word "maintain" is practically the same thing as repair, which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction. Chambers v. North River Line, 179 N. C. 199, 102 S. E. 198.

§ 2350. Tenant not liable for accidental damage.—A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract. (Rev., s. 1991; Code, s. 1751; 1868-9, c. 156, s. 10.)

Duty of Landlord and Tenant Distinguished.—I Jaggard Torts, 223, thus sums up the law: "Normally, the occupant and not the owner or landlord is liable to third persons for

injuries caused by the failure to keep the premises in repair. The liability may, however, be extended to the landlord or owner; (a) when he contracts to repair; (b) where he knowingly demises the premises in a ruinous condition or in a state of nuisance; (c) where he authorizes a wrong." Knight v. Foster, 163 N. C. 329, 330, 79 S. E. 614.

Covenant against Accident from External Causes.—It was held in the United States Supreme Court that the law does not imply a warranty that no accident shall befall the tenant from external forces, such as storms, tornadoes, earthquakes or snowslides. Doyle v. Union Pac. R. Co., 147 U. S 413, 423, 37 L. Ed. 223.

When Lessor Liable for Injuries.—While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by the failure to keep the premises in repair, the liability may be extended to the owner, where the condition existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it at the solicitation of the tenant. Knight v. Foster, 163 N. C. 329, 79 S. E. 614.

No Implied Obligation on Lessor to Make Repairs.—It was held in the United States Supreme Court that a covenant is never implied that the lessor will make any repairs. Sheets v. Selden, 7 Wall. 416, 423, 19 L. Ed. 166.

Lessor and Lessee Both Liable.—Where under the terms of his lease the landlord has assumed the responsibility of making repairs of the leased premises with diligence and has charge thereof, through his employee or janitors, and has rented an office over a store therein, with a defective or choked drain pipe, to a dentist, which he had for years failed to inspect, in an action by the lessee of the store against him and the lessee of the office, evidence that the dentist had approved an insufficient outlet for the water flowing from his cuspidor, and that he had permitted the overflow from the cuspidor to continue all night, and from this and the choked condition of the drain the water overflowed and went through the floor and injured plaintiff's stock of goods, is sufficient to sustain a verdict against both defendants jointly, the negligence of each, if established, being the proximate cause of the injury. Rucker v. Willey, 174 N. C. 42, 93 S. E. 379.

Lessee's Duty to Repair or Rebuild.—It was held in a United States Supreme Court case that in the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild, if the buildings are accidentally destroyed by fire or otherwise. United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65.

Mismanagement of Ferry.—Where the owner of land, to which a ferry is annexed as a franchise, leases the land together with the ferry, he is not responsible for any damage sustained by a third person, from the mismanagement of the ferry while in possession of the lessee. Biggs v. Ferrell, 34 N. C. 1.

§ 2351. Willful destruction by tenant misdemeanor.—If any tenant shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall wilfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor. (Rev., s. 3686; Code, s. 1761; 1883, c. 224.)

Meaning of "Willful."—The word willful as used in this section means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one can not be brought within the meaning of a criminal statute. State v. Whitener, 93 N. C. 590, 592.

Same—Where Acts Bona Fide.—If the defendants reasonably and bona fide believe that they have the right to remove the buildings, etc., they are not guilty of removing them "willfully" so as to bring their act within the meaning of this section. State v. Rowland Lumber Co., 153 N. C. 610, 614, 69 S. E. 58.

Right to Remove Certain Fixtures.—It is intimated that an away-going tenant has the right to remove fixtures put on the premises by himself for his own convenience. State v. Whitener, 93 N. C. 950. Approved in State v. Morgan, 136 N. C. 628, 630, 48 S. E. 670.

Houses Covered by Section.—For meaning of "tenement house," "uninhabited house" and "outhouse" as used in this section, see State v. Rowland Lumber Co., 153 N. C. 610, 612, 613, 69 S. E. 58.

Corporation Liable.—A corporation is indictable for the acts of its officers and agents under this section. State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58.

The Indictment.—An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within this section. State v. Graham, 121 N. C. 623, 28 S. E. 409.

Burden of Proof.—In an indictment under this section the burden of proof is upon the State to establish, first, that the landlord and tenant existed, and, second, that during the tenant's term or after its expiration he did willfully and unlawfully injure the tenement-house. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

Evidence.—In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence is inadmissible. State v. Graham, 121 N. C. 623, 28 S. E. 409.

§ 2352. Lessee may surrender, where building destroyed or damaged.—If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage occur without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage, proportionate to the time between the last period of payment and the occurrence of the damage, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease. (Rev., s. 1992; Code, s. 1753; 1868-9, c. 156, s. 12.)

In General.—An inspection of this section will show that not only is it in terms confined to a demised house or other building but that it expressly excepts from its provisions those leases in which there is an "agreement respecting repairs." Also by its express terms it requires, as a condition precedent to its application, that a lessee "surrender his estate in the demised premises by a writing to that effect, delivered or tendered to the landlord within ten days from the damages." Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The modification of the common law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by this section, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease. Miles v. Walker, 179 N. C. 479, 102 S. E. 884.

When Landlord Restores Building.—Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for a breach the landlord may be held responsible. Miles v. Walker, 179 N. C. 479, 102 S. E. 884.

Crack in Swimming Pool.—Where a swimming pool is

leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use, it was held, that a crack in the walls thereof by which the pool was drained of water, and repaired by the lessor at an inappreciable sum, is not sufficient to give the lessee the right to cancel the lease when repair was made under a parol agreement within a reasonable time. Archibald v. Swaringen, 192 N. C. 756, 135 S. E. 849.

Time Allowed for Repairs.—Where a monthly rental to be paid by the lessee of a building, and an obligation to make certain repairs by him, is specified as the consideration for the lease, with forfeiture of the lease upon the non-payment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if none is stated in the lease. Miles v. Walker, 179 N. C. 497, 102 S. E. 884.

Reasonable Time.—Where the controversy is made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time, when the extent of the damage is insufficient to terminate the lease under its written terms, in this case the repair of walls of a dam to a swimming pool, evidence that three days had elapsed between the time the lessor and lessee had agreed upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time. Archibald v. Swaringen, 192 N. C. 756, 135 S. E. 849.

Where the terms of a lease fully provide for the rights of the parties upon destruction of the property by fire such rights will be determined in accordance with the written agreement, without reference to this section, or the common law. Grant v. Borden, 204 N. C. 415, 168 S. E. 492.

§ 2353. Wrongful surrender to other than landlord misdemeanor.—Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor. (Rev., s. 3682; Code, s. 1760; 1883, c. 138.)

§ 2354. Notice to quit in certain tenancies.—A tenancy from year to year may be terminated by notice to quit given one month or more before the end of the current year of tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. [And any tenant or lessee terminating any such tenancy shall notify the landlord the day the premises are vacated and deliver to such landlord or his agent the keys to the buildings thereon, and any tenant or lessee violating this provision shall be guilty of a misdemeanor and fined not more than fifty dollars ($50) or imprisoned not more than thirty days. Provided that the portion of this section in brackets shall apply only to Pitt, Randolph, Montgomery, Wake, Forsyth and Perquimans counties.] (Rev., 1894; Code, s. 1750; 1891, c. 227; 1868-9, c. 156, s. 9; 1925, c. 196; 1931, c. 20; 1935, cc. 119, 472.)

Editor's Note.—Previous to 1925 this section contained only the first sentence of the present section. The last two sentences were added by ch. 196. Public Laws of 1925.

The Act of 1931 added Wake County to this section.

Public Laws of 1935, chapter 472 adds Perquimans county; Public Laws of 1935, chapter 119 adds Forsyth county.

For an act increasing the notice from two to seven days in case of tenancy from week to week, applicable only in Halifax county, see Public Laws of 1935, chapter 22.

Notice Must Be Given.—A tenant from year to year is entitled to a written or verbal notice to quit, and a mere demand for possession is insufficient. Vincent v. Corbin, 85 N. C. 108, cited in note in 25 L. R. A., N. S., 103.

A landlord has no right to dispossess his tenant from year to year, without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the wants of legal notice. Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343, 348, 25 S. E. 960.

Effect of Notice.—On May 18, 1897, a landlord gave a tenant from month to month notice "to get out within 30 days." The landlord had received the rent for May. It was held, that such notice was invalid as to May, as the rent had been paid, and as to June, because not ending with the month. Simmons v. Jarman, 122 N. C. 195, 29 S. E. 332, cited in notes in 25 L. R. A., N. S., 857, 858.

Verbal Notice Sufficient.—A verbal notice by landlord to tenant is sufficient. Section 914 applies to a different class of notices. Poindexter v. Call, 182 N. C. 366, 109 S. E. 26.

Tenancies at Will.—Where a person is put in possession of land by the owner, without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but strictly a tenant at will, and is not entitled to notice to quit as provided in this section. Humphries v. Humphries, 25 N. C. 362, cited in notes in 35 L. R. A., N. S., 708; 41 L. R. A., N. S, 405.

Where a tenancy is from year to year, and, after the commencement of a year, there is an express lease for a certain time and an agreement to quit at the end of that time, no notice is necessary in order to terminate the tenancy after such time. Williams v. Bennett, 26 N. C. 122.

Where one occupied land claiming it as his own, and when possession was demanded refused to deliver it up, it was held that he could not afterwards insist upon the statutory notice. Head v. Head, 52 N. C. 620, cited in note in 25 L. R. A., N. S., 105.

Effect of Holding Over.—When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions. Murrill v. Palmer, 164 N. C. 50, 80 S. E. 55; Holton v. Andrews, 151 N. C. 340, 66 S. E. 212; Harty v. Harris, 120 N. C. 408, 27 S. E. 90; Scheelky v. Koch, 119 N. C. 80, 25 S. E. 713; Stedman v. McIntosh, 26 N. C. 291. But it is competent to rebut the presumption that he is a tenant from year to year by proof of a special agreement. Harty v. Harris, 120 N. C. 408, 27 S. E. 90.

Same Tenant Entitled to Notice. — It was not error to charge the jury that, if the tenant leased the premises at five dollars per month and had held over several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen days' (now seven days') notice to quit. Branton v. O'Briant, 93 N. C. 99.

But the fact that a tenant, who entered into the occupation of premises under an express lease from month to month, continued the occupation for more than two years, is no reason why he should be considered a tenant from year to year, and entitled to the one month's notice to quit. Jones v. Willis, 53 N. C. 430.

Effect of Leaving Premises after Waiver of Notice.—A tenant from year to year, who waives his right to notice to quit, and goes out of possession, has no right to go back on the premises. Torrans v. Stricklin, 52 N. C. 50.

Art. 2. Agricultural Tenancies

§ 2355. Landlord's lien on crops for rents, advances, etc., enforcement. — When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. A landlord to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article Agricultural Liens, in the chapter Liens.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from

the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances. (Rev., s. 1993; Code, s. 1754; 1896-7, 283; 1917, c. 134; 1933, c. 219.)

I. In General.
II. Lien of Lessor.
III. Possession and Title to Crop.
IV. Advancements.
V. Remedy of Lessor to Enforce Lien.

Cross References.

As to agricultural liens for advances, see sections 2480-2492. As to date of laborer's crop lien, see section 2472.

See 11 N. C. Law Rev., 265, summarizing the 1933 amendment to this section.

I. IN GENERAL.

Editor's Note.—Public Laws 1933, c. 219, added the proviso now appearing at the end of this section.

A Statutory Remedy.—In Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173, the court held that the common-law remedy of lessors by distress does not obtain in this State; and that, except as specifically given by statute, a landlord has no lien on the product of the leased property for rent. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871.

Applies Only to Agriculture.—This statutory lien is only given when lands are rented or leased for agricultural purposes. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871.

What "Crops" Include.—The words "crop raised" mean simply the crop grown or gathered during the year. The word "raised" appears nowhere else in the section, nor in succeeding sections, only the word "crops" is used. The Legislature had in mind no distinction between fructus industriales (products obtained by labor and cultivation) and fructus naturales (products which emanate from the power of nature alone), and there was no need of any. State v. Crook, 132 N. C. 1053, 1056, 44 S. E. 32.

The section gives the landlord a lien for his rent "on any and all crops," that is, on all that is "cropped, cut or gathered" in that season from his land. State v. Crook, 132 N. C. 1053, 1057, 44 S. E. 32.

The operations of a mortgage or agricultural lien in respect to crops are confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. Wooten v. Hill, 98 N. C. 49, 3 S. E. 846.

Same—Hay.—Hay is ordinarily embraced in the word "crop" as used in this section. But not, it seems, when it is merely a spontaneous growth, as crab-grass, which sprung up after another crop is housed. State v. Crook, 132 N. C. 1053, 44 S. E. 32.

What Constitutes One a Cropper.—An agreement by him who cultivates land that the owner who advances "guano, seed-wheat," etc., shall out of the crop be repaid in wheat for such advancements, constitutes the former a cropper, and not a tenant. State v. Burwell, 63 N. C. 661.

Cropper Has No Estate.—A cropper has no estate in the land, and his possession is that of the landlord. State v. Austin, 123 N. C. 749, 31 S. E. 731.

When Lessee Has Lien.—When a lessee sublets a part of the farm he becomes lessor to his sublessee and is entitled to the same lien on his crop which the statute gives a lessor. Moore v. Faison, 97 N. C. 322, 2 S. E. 169; Perry v. Perry, 127 N. C. 23, 37 S. E. 71; and therefore holds a prior lien to a mortgagor of the crops. Perry v. Perry, 127 N. C. 23, 37 S. E. 71. The lien of the original landlord is not, however, impaired. See note under the succeeding analysis line, catchline "Effect of Subrenting."

Agreements between Tenants.—Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon, it was held, that although this was valid as an agreement for a year, it did not constitute a lease, so as to create the relation of landlord and tenant between the parties. Medlin v. Steele, 75 N. C. 154.

Cited in Jennings v. Keel, 196 N. C. 675, 679, 146 S. E. 716. Never Fail Land Co. v. Cole, 197 N. C. 452, 457, 149 S. E. 585.

II. LIEN OF LESSOR.

Landlord's Lien Superior.—The landlord's lien, where the same attaches, by the express terms of the statute is made superior to all other liens. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871; Wooten v. Hill, 98 N. C. 49, 3 S. E. 846; Ledbetter v. Quick, 90 N. C. 276; Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670. Including the right of the purchaser of a crop. Burwell v. Coopers Co-op. Warehouse Co., 172 N. C. 79, 89 S. E. 1064.

The lien of a landlord takes precedence to that of a third party for advances, notwithstanding the priority of the latter in time. Spruill v. Arrington, 109 N. C. 192, 13 S. E. 779; Crinkley v. Egerton, 113 N. C. 444, 18 S. E. 669. And this precedence is to the extent of the advances made. Wooten v. Hill, 98 N. C. 49, 3 S. E. 846. See Supply Co. v. Davis, 194 N. C. 328.

A contract expressed and purporting to be a lease of lands for agricultural purposes, does not change the relationship of landlord and tenant between the parties upon the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and the landlord or one to whom the contract has been validly assigned may enforce his lien under this section in priority to the lien, under § 2480, of one furnishing advancements for the cultivation of the crop. Wise Supply Co. v. Davis, 194 N. C. 328, 139 S. E. 599.

The landlord's lien under this section does not attach to a crop made entirely in a year subsequent to that in which the advancements are furnished to the tenant. Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486.

The statutory landlord's lien under this section is superior to that of one furnishing supplies to the cropper under § 2480, but where the cropper under a separate contract with the landlord raises a certain crop, the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord. Glover v. Dail, 199 N. C. 659, 155 S. E. 575.

Third Person Charged with Notice. — Every person who makes advancements to a tenant or cropper of another does so with notice of the rights of the landlord, and that any lien that he may have on the tenant's crop is preferred to all others, and the risk is his if the tenant does not satisfy the preferred lien by complying with the contract and all stipulations in regard thereto. Thigpen v. Leigh, 93 N. C. 47. Thigppen v. Maget, 107 N. C. 39, 46, 12 S. E. 272.

Same—Caveat Emptor.—This section gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to a judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord's claim. The rule caveat emptor applies. Belcher v. Grimsley, 83 N. C. 88.

Liability to Other Lienholders.—A landlord is liable to account to persons who have a lien for supplies furnished for the value of the crops in excess of his lien. Crinkley v. Egerton, 113 N. C. 142, 146, 18 S. E. 341.

Liability of Landlord for Marketing of Tenant's Tobacco. —The landlord and tenant act (this section) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Co-operative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. Tobacco Growers Co-op. Ass'n v. Bissett, 187 N. C. 180, 121 S. E. 446. For an article discussing the effect of the landlord's lien upon cooperative marketing in North Carolina and citing the above case, see 2 N. C. Law Rev. 188.

Effect of Subrenting.—The landlord's right to the crop to secure payment of rent is not impaired by the sub-letting of his tenant. The sub-tenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. Montague v. Mial, 89 N. C. 137. Moore v. Faison,

97 N. C. 322, 324, 2 S. E. 169; State v. Crook, 132 N. C. 1053, 1054, 44 S. E. 32.

Antecedent Debts Not Included.—It was not intended to confer a lien upon the landlord for antecedent debts which the lessee might stipulate to pay, and give them a preference over the agricultural lienee, whose money and supplies materially assisted in the production of the crops. This view is assumed to be correct in Thigpen v. Maget, 107 N. C. 39, 12 S. E. 272, and is undoubtedly in harmony with the policy of the law in securing the landlord his rent, and at the same time enabling the tenant to obtain advances from third parties. Ballard Co. v. Johnson, 114 N. C. 141, 144, 19 S. E. 98.

Although under this section and section 2480 and 2488 the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. Ballard v. Johnson, 114 N. C. 141, 19 S. E. 98.

Assignee of Tenant's Rent Note.—The assignee of a note, given by a tenant for rent, has a landlord's lien on the crop. Avera v. McNeill, 77 N. C. 50, 52.

Where a landlord furnishes advancements for the making of crops, the lien for the rent and for advancements are in equal degree, and now attach, since the amendment of § 2480, by chapter 302, Public Laws 1925, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next. Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486.

Conferred Upon Mortgagee.—An agreement after default, between mortgagor and mortgagee, that the mortgagor was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. Cooper v. Kimbell, 123 N. C. 120, 31 S. E. 346.

Vendor after Default.—After default by a vendee of land to pay the purchase money, the vendor may by contract become landlord of the vendee so as to avail himself of the landlord's lien given by this section. Jones v. Jones, 117 N. C. 254, 23 S. E. 214; Ford v. Green, 121 N. C. 70, 73, 28 S. E. 132.

Certain Costs Included.—The landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and, as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption as against such costs. Slaughter v. Winfrey, 85 N. C. 159.

Judgment for Rent.—This section makes a judgment for rent a lien on the crop. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

III. POSSESSION AND TITLE TO CROP.

Common Law Provision.—Before this section was passed, the title to the whole of the crop was, in contemplation of law, vested in the tenant (even where the parties had agreed upon the payment as rent of a certain portion of the crop) until a division had been made and the share of the landlord had been set apart to him in severalty. Deaver v. Rice, 20 N. C. 567; Gordon v. Armstrong, 27 N. C. 409; Biggs v. Ferrell, 34 N. C. 1; Ross v. Swaringer, 31 N. C. 481. Howland v. Forlaw, 108 N. C. 567, 569, 13 S. E. 173.

Section Applies Only to Landlord and Tenant.—Except in the case of landlord and tenant provided for specifically by this section, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to third persons before the rent is ascertained and set apart conveys a good title. Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173.

Where the occupant of land is a vendee or mortgagor in default, although he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under the provisions of this section, is vested in the landlord. Taylor v. Taylor, 112 N. C. 27, 16 S. E. 924.

Vested in Lessor.—All crops raised on the land, whether by tenant or cropper, are by this section deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid. State v. Austin, 123 N. C. 749, 31 S. E. 731; State v. Keith, 126 N. C. 1114, 1115, 36 S. E. 169; Durham v. Speeke, 82 N. C. 87; Smith v. Tindall, 107 N. C. 88, 12 S. E. 121; Batts v. Sullivan, 182 N. C. 129, 108 S. E. 511.

Same—For His Protection.—For the lessor's protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor. State v. Higgins, 126 N. C. 1112, 36 S. E. 113.

Lessor May Use Force.—An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. State v. Austin, 123 N. C. 749, 31 S. E. 731.

Actual Possession in Tenant.—Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had. Jordan v. Bryant, 103 N. C. 59, 9 S. E. 135.

The whole tenor of this and the following sections contemplates the right of the lessee or cropper to hold the actual possession, until such time as a division shall be made. State v. Copeland, 86 N. C. 692, 694.

Same—May Maintain Action.—As against third parties the tenant is entitled to the possession both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto. Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767. And the ownership of the crop is well charged as his in the indictment. State v. Higgins, 126 N. C. 1112, 36 S. E. 113.

But in Desert Salt Co. v. Tarpy, 142 U. S. 241, 245, 35 L. Ed. 999, it was stated, as follows: "The lessee can of course, as against strangers, have no greater right of possession than his lessor."

Tenant Has Insurable Interest.—That the possession and title to the crop are deemed vested in the landlord does not divest the tenant of an insurable interest in the crops before division. "It is well settled that any person has an insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." Harrison v. Fostlage, 161 U. S. 57; Batts v. Sullivan, 182 N. C. 129, 131, 108 S. E. 511.

When Crop Divided.—Unless otherwise provided by an agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time. Smith v. Tindall, 107 N. C. 88, 91, 12 S. E. 121.

Crop Left in Field.—A crop cultivated by a tenant and left standing in the field after the expiration of this term, becomes the property of the landlord. And this is so, whether or not the tenant has assigned the crop. Sanders v. Ellington, 77 N. C. 255.

IV. ADVANCEMENTS.

Purchaser Takes with Knowledge.—A purchaser or mortgagee of a crop takes with a full knowledge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be preferred lien upon the crop, made by reason of such advances, and that this preference shall extend to "existing" liens. Wooten v. Hill, 98 N. C. 49, 53, 3 S. E. 846.

What Included.—The "advancements" referred to in this section embraces anything of value supplied by the landlord to the tenant, or cropper, in good faith, directly or indirectly, for the purpose of making and saving the crop. Brown v. Brown, 109 N. C. 124, 13 S. E. 797.

Where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances. Powell v. Perry, 127 N. C. 22, 37 S. E. 276.

Supplies necessary to make and save a crop are such articles as are in good faith furnished to and received by the tenant for that purpose. Ledbetter v. Quick, 90 N. C. 176.

Where a landlord advanced certain cotton-seed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to retain parts of the undivided cotton-seed and crops by way of advancement, it was held that the plaintiff had a landlord's lien on such seed and crops. Thigpen v. Maget, 107 N. C. 39, 12 S. E. 272.

Same—Board.—Where the landlord supplied the tenant and his family with board, to the end that he might make and save the crop, nothing to the contrary appearing, the reasonable value of such board would constitute an advancement within the meaning of this section. Brown v. Brown, 109 N. C. 124, 13 S. E. 797.

Same—Presumption.—When advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, e. g. farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary—e. g., dry goods and groceries—whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop. Brown v. Brown, 109 N. C. 124, 13 S. E. 797.

Same—Question for Jury. — It was proper in the court

to leave it to the jury to find whether upon the evidence a mule and wagon, etc., were treated as advancements. Ledbetter v. Quick, 90 N. C. 276.

Where Diverted.—That the lessee diverts the advancements from the purpose contemplated cannot change their nature and the purpose of them. Womble v. Leach, 83 N. C. 84; Ledbetter v. Quick, 90 N. C. 276; Brown v. Brown, 109 N. C. 124, 127, 13 S. E. 797.

Collusion and Fraud.—Where landlord and tenants undertake by collusion and fraud to create an indebtedness to the former, under color of "advancements," to the prejudice of creditors of the tenant, such a transaction will not be sustained. Ledbetter, v. Quick, 90 N. C. 276.

Crop of Sublessee.—The original lessor, after his lessee has paid him in full, has no lien under the statute on the crop of the sublessee for advances made by him to the sublessee. Moore v. Faison, 97 N. C. 322, 2 S. E. 169.

V. REMEDY OF LESSOR TO ENFORCE LIEN.

In General.—The landlord may bring claim and delivery to recover possession of crops raised by the tenant of cropper, where his right of possession under this section is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made. Livingston v. Farish, 89 N. C. 140.

Tenant's Liability.—If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. Jordan v. Bryan, 103 N. C. 59, 9 S. E. 135.

When Action Lies.—The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. Livingston v. Farish, 89 N. C. 140.

The remedy of claim and delivery was designated for the landlord's protection, and it can not, either by the terms of the statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute will permit this. Jordan v. Bryan, 103 N. C. 59, 65, 9 S. E. 135.

Same—When No Time for Division Fixed.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crop, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. Rich v. Hobson, 112 N. C. 79, 16 S. E. 931; Smith v. Tindall, 107 N. C. 88, 12 S. E. 121.

Action for Undivided Portion.—The lessor can maintain an action for recovery of an undivided portion of a crop, and it is not necessary that he shall specifically designate in his complaint or, affidavit in claim and delivery, such undivided part. Boone v. Darden, 109 N. C. 74, 13 S. E. 728.

Denial of Landlord's Title.—Where in his answer in an action of claim and delivery, the defendant tenant denies that the crop, for the possession of which the action is brought, is vested in the plaintiff landlord, such denial avoids the necessity of proving a demand before the commencement of the action. Rich v. Hobson, 112 N. C. 79, 16 S. E. 931.

Not a Personal Property Exemption.—The right to enforce the landlord's lien cannot be defeated by the lessee's claiming the crop as a part of his personal property exemption. Durham v. Speeke, 82 N. C. 87.

Action against Tenant by Third Party.—In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, is not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request. Lee v. Melton, 173 N. C. 704, 91 S. E. 697.

§ 2356. Rights of tenant.—When the lessor or his assigns gets the actual possession of the crop or any part thereof otherwise than by the mode prescribed in the preceding section, and refuses or neglects, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either is entitled to the remedies against the lessor or his assigns given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action. (Rev., s. 1994; Code, s. 1755; 1876-7, c. 283, s. 2.)

In General.—The action allowed to a cropper by this section is given against the lessor or employer, and, also, against any person to whom he may assign, or sell, the crop, or any interest therein as, for example, the person who might have an "agricultural lien" upon it, acquired subsequently to the making of the contract with the cropper. Rouse v. Wooten, 104 N. C. 229, 232, 10 S. E. 190.

Purpose.—This section intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, and that he shall certainly reap the just benefit of his toil. Rouse v. Wooten, 104 N. C. 229, 233, 10 S. E. 190.

Same—Creates a Lien.—While one who labors in the cultivation of a crop, under a contract that he shall receive his compensation from the crops when matured and gathered, has no estate or interest in the land, but is simply a laborer—at most, a cropper—his right to receive his share is protected by this section, which for certain purposes creates a lien in his favor, and which will be enforced against the employer or landlord, or his assigns, and which has precedence over agricultural liens made subsequent to his contract, but before the crop is harvested. Rouse v. Wooten, 104 N. C. 229, 10 S. E. 190.

Lessor Cannot Seize Crop.—The lessor has no right, when there is no agreement to that effect, to take the actual possession from the lessee or cropper, and can never do so, except when he obtains the same by an action of claim and delivery, upon the removal of the crop by the lessee or cropper. State v. Copeland, 86 N. C. 692, 694.

Lessee Left to Civil Remedy.—When the lessee is wrongfully deprived of the actual possession of his crop by the lessor, he is left to his civil remedy, under this section for the breach of trust, should the lessor refuse to account. State v. Keith, 126 N. C. 1114, 36 S. E. 169.

Same—Claim and Delivery.—Where a lessor gets possession of the crop by his own act, the remedy of the lessee to recover his part thereof is by claim and delivery. Wilson v. Respass, 86 N. C. 112.

Same—Trover Not Proper.—Where a landlord took the crop into his sole possession, and refused to divide when it was demanded, on the ground that the crop was not then in condition for a division, but he did not deny the tenant's right to a division, and while in his possession the crop was destroyed by fire; it was held, that this did not amount to a conversion, and an action in the nature of trover could not be maintained. Shearin v. Riggsbee, 97 N. C. 216, 1 S. E. 770.

Lessee's Right to Bring Trespass.—In the U. S. Supreme Court, Van Allen v. Assessors, 3 Wall. 573, 598, 18 L. Ed. 229, it was held, that a man who has leased a farm has no right to possession or control during the lease, and if he wrongfully enters upon the building, or land, and retains wrongful possession of it, he may be liable to the tenant in an action of trespass quare clausum fregit.

Where Lessor Seizes Too Much.—If a lessor seizes more than enough to satisfy his lien, and refuses "to make a fair division of the crop," the defendant can compel him to do so in the manner prescribed in this section. Boone v. Darden, 109 N. C. 74, 78, 13 S. E. 728.

When Cropper Dies.—Where a cropper dies before harvesting his crop, his personal representatives are entitled to recover his share of the crop. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

§ 2357. Action to settle disputes between parties. — When any controversy arises between the parties, and neither party avails himself of the provisions of this chapter, it is competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed is two hundred dollars or less, and in the superior court of the county where the property is situate if the

amount so claimed is more than two hundred dollars. (Rev., s. 1995; Code, s. 1756; 1876-7, c. 293, s. 3.)

Editor's Note.—This and the following section were formerly part of the same section and should be read together. This should be noted in considering the following annotations.

In General.—It is quite apparent that this and the following section contemplate an action to determine a dispute growing out of the agreement, and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either, and this intent is very clearly expressed in the terms used in the enactment. It is a method of settling a controversy without resort to the possessory actions authorized in the antecedent sections. Wilson v. Repass, 86 N. C. 112, 115.

Purpose.—The purpose of the section is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the lessee, as a condition of his remaining in possession of the property, an adequate undertaking for the payment of what may be recovered. Deloatch v. Coman, 90 N. C. 186, 188.

No Application to Vendee.—This and the following section, like section 2355, are plainly inapplicable where the occupant of land is a vendee or mortgagor. Taylor v. Taylor, 112 N. C. 27, 31, 16 S. E. 924.

Jurisdiction of Justice.—An action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding two hundred dollars, is an action upon the contract of lease and cognizable in the court of a justice of the peace. Deloatch v. Coman, 90 N. C. 186.

In an action by a landlord to recover the rent, when neither the sum demanded nor the amount ascertained to be due exceeds two hundred dollars; it was held, that the superior court has no jurisdiction. Foster v. Penny, 76 N. C. 131.

Same—Tort Actions.—The special jurisdiction of justices of the peace under this section does not extend to torts, but is confined to actions for enforcing contracts. Montague v. Mial, 89 N. C. 137.

Action by Tenant's Widow.—The widow of a tenant cultivating land on shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against the landlord. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

Same—Recovery.—And she was not compelled to resort to the remedy prescribed by this section. She may pursue her remedy by a civil action to recover the value of the crops, subject to such deductions as the lessor was entitled to by reason of advancements, costs of housing, and such damage as he may have sustained by reason of the inability of the lessee to perform his contract. Parker v. Brown, 136 N. C. 280, 287, 48 S. E. 657.

§ 2358. Tenant's undertaking on continuance or appeal.—In case there is a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action. (Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3.)

See the notes to the preceding section.

§ 2359. Crops delivered to landlord on his undertaking. — In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in the preceding section, fails to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in the preceding section, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (Rev., s. 1996; Code, s. 1757; 1876-7, c. 283, s. 4.)

Court Will Not Restrain Lessor.—Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. Wilson v. Respass, 86 N. C. 112. In such a case it seems that the tenant cannot regain possession of the crop under the provisions of section 2358 since that section contemplates non-intervention on the part of the court and not a removal of possession from one party to another. Id.

The tenant could of course proceed under section 2356 to get possession of "such part as he may be entitled to." Ed. Note.

§ 2360. Crops sold, if neither party gives undertaking.—If neither party gives the undertaking described in the two preceding sections, it is the duty of the justice of the peace or the clerk of the superior court to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties. (Rev., s. 1997; Code, s. 1758; 1876-7, c. 283, s. 5.)

As to landlord's lien covering costs, see under section 2355, analysis line "Lien of Lessor," the annotation "Certain Costs Included."

§ 2361. Tenant's crop not subject to execution against landlord.—Whenever servants and laborers in agriculture shall by their contracts orally or in writing be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated. (Rev., s. 1998; Code, s. 1796.)

§ 2362. Unlawful seizure by landlord or removal by tenant misdemeanor.—If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a misdemeanor. (Rev., ss. 3664, 3665; Code, s. 1759; 1876-7, c. 283, s. 6; 1883, c. 83.)

I. In General.
II. The Wrongful Act.
III. The Intent.
IV. Notice.
V. The Indictment.

I. IN GENERAL.

Purpose of Section.—The leading and material part of the purpose is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by removing them from the land to any distance. State v. Williams, 106 N. C. 646, 648, 10 S. E. 901.

The purpose of this section is to render the statutory

provisions and regulations of the preceding sections more effective, and this penal provision must be interpreted in that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed. State v. Ewing, 108 N. C. 755, 757, 13 S. E. 10.

Applies Only to Specified Liens.—It will be observed that the section does not extend to, and embrace, all liens the lessor may have on any property of the tenants, but only "all the liens held by the lessor or his assigns on the crop." State v. Turner, 106 N. C. 691, 693, 19 S. E. 1026.

Extends to Receivers.—This section extends to and protects receivers charged with the management of lands. State v. Turner, 106 N. C. 691, 693, 10 S. E. 1026.

The lessor's rights cannot be abridged by any subordinate contracts of the lessee. Montague v. Mial, 89 N. C. 137, 139.

Cited in Never Fail Land Co. v. Cole, 197 N. C. 452, 457, 149 S. E. 585.

II. THE WRONGFUL ACT.

A Misdemeanor Only.—The offense of removing crops, without payment, or giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the penitentiary. State v. Powell, 94 N. C. 921.

Actual Seizure Unnecessary.—To constitute the offense of an unlawful seizure of crops by the landlord, under this section, it is not essential that the landlord should take forcible or even manual possession of them; the offense will be complete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner. State v. Ewing, 108 N. C. 755, 13 S. E. 10.

Possession Important.—An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop, to his own use, even if done with a felonious intent, where he is in the actual possession of the same. State v. Copeland, 86 N. C. 692.

An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. State v. Webb, 87 N. C. 558.

If the crop is in the actual possession of the landlord, though undivided, the tenant may be convicted of larceny for feloniously taking and carrying it away; and the ownership of the property will be laid properly in the name of the landlord. State v. King, 98 N. C. 648, 4 S. E. 44.

Gathering the Crop.—How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protection to them has been doubtful, but it has been held that he may do so in good faith for such purpose; he may not go beyond that. Varner v. Spencer, 72 N. C. 381; State v. Williams, 106 N. C. 646, 648, 10 S. E. 901.

The gathering and preservation of crops was not the evil intended to be remedied by this section, but the wrongful appropriation, whether by carrying them off the premises or consuming them on the premises, was the evil. Varner v. Spencer, 72 N. C. 381, 383.

Feeding Crop to Stock.—Where a lessee after putting a crop in the crib converted a portion thereof to his own use by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and indictable. Varner v. Spencer, 72 N. C. 381.

Removal from Premises.—Where a tenant without the consent of, or notice to, his landlord, and before satisfying the latter's lien, removed a portion of the crop from the land upon which it was produced and stored it in a building upon his (the tenant's) own land; it was held that he was guilty of unlawfully removing crops, notwithstanding he made the removal for the purpose of sheltering the crop, and kept it separate from others. State v. Williams, 106 N. C. 646, 10 S. E. 901.

Where Tenant Aids Subtenant.—If a tenant aids and abets a subtenant in removing a crop, before paying the lien of the landlord, he is guilty of a misdemeanor. State v. Crook, 132 N. C. 1053, 44 S. E. 32.

Damages by Landlord No Defense.—A tenant indicted for removal of crops without giving the landlord five days' notice cannot show in defense that he had sustained damage by the failure of the landlord to comply with the contract to the amount of the rents due. State v. Bell, 136 N. C. 674, 49 S. E. 163; State v. Neal, 129 N. C. 692, 40 S. E. 205, overruled.

III. THE INTENT.

Need Not Be Shown.—While the obvious purpose of this section is the protection of the lessor's interest against a fraudulent disposition or appropriation of the property, inconsistent with his right and tending to defeat the lien for rent, the wrongful intent is not a constituent of the criminal act described, and the offense is sufficiently charged in the substantial words of the act. State v. Pender, 83 N. C. 651, 653.

The intent in making the removal is immaterial. State v. Williams, 106 N. C. 646, 10 S. E. 901; State v. Crook, 132 N. C. 1053, 1055, 44 S. E. 32.

Implied from the Act.—The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal implies the intent to commit the offense. State v. Williams, 106 N. C. 646, 649, 10 S. E. 901.

IV. NOTICE.

Removal of Crops.—If it shall be necessary, in possible cases, to remove crops from the land for their protection, this should be done on notice, or legal steps taken as contemplated and allowed by the statute. State v. Williams, 106 N. C. 646, 649, 10 S. E. 901.

A Part of the Offense.—The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the five days' notice, for if the notice is given, removing the crop is not an offense. State v. Crowder, 97 N. C. 432, 1 S. E. 690.

"Without Any Notice" Sufficient in Indictment. — An averment in an indictment for removing a crop, "without having given any notice of such intended removal" is equivalent to the averment that the removal was made without giving "five days' notice." State v. Powell, 94 N. C. 921.

Burden of Proof.—In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days' previous notice before the crop had been removed. State v. Harris, 161 N. C. 267, 76 S. E. 683.

How Proven.—The want of such notice may be proved by any competent evidence, and it is not necessary that it should be proved by the landlord or his agent or assignee. State v. Crowder, 97 N. C. 432, 1 S. E. 690.

V. THE INDICTMENT.

Statute Must Be Followed.—An indictment under this section charging the defendant with removing the crop "without satisfying all liens on said crop," is defective. The words of the statute, "before satisfying all liens held by the lessor or his assigns on said crop," should have been followed. State v. Merritt, 89 N. C. 506; State v. Rose, 90 N. C. 712.

Sufficient Averment.—In an indictment under this section, it is sufficient to aver, in the words of the statute, that the act was done, "willfully and unlawfully," leaving it to the defendant to show in excuse, if he can, that such removal was made in good faith and for the preservation of the crop. State v. Pender, 83 N. C. 651.

Where an indictment for removing a crop alleged that the defendant did "rent from B," and subsequently, that he did "remove the crop without satisfying all liens held by said B"; it was held that this, in effect, sufficiently charged the relation of landlord and tenant, and that the "liens held by the lessor" were unpaid at the time of the alleged unlawful removal. State v. Turner, 106 N. C. 691, 10 S. E. 1026.

In this section the word "crop" includes those ungathered as well as those gathered, and an indictment that the landlord seized the "crop growing and unmatured in the field," etc., charges an indictable offense, when it is otherwise sufficient. State v. Townsend, 170 N. C. 696, 86 S. E. 718.

Lien Implied.—It is not necessary to allege, in an indictment under this section, that the lessor or landlord had a lien on the crop, where the bill contains an averment of the lease and of the relation of landlord and tenant, or cropper. By virtue of the statute the law implies a lien, and of this the courts will take notice. State v. Rose, 90 N. C. 712; State v. Merritt, 89 N. C. 506, distinguished. State v. Smith, 106 N. C. 653, 11 S. E. 166.

In an indictment for removing a crop, it is not necessary to negative the fact that, by agreement between the parties, it was stipulated that the crops should not be subjected to the statutory liens. State v. Turner, 106 N. C. 691, 10 S. E. 1026.

Variance.—Where an indictment for removal of crops without notice to the landlord charged an agreement by the defendant to raise a crop on the land of G., and on the trial the proof showed the title to be in another, who rented the land to G; it was held that there was no variance. State v. Foushee, 117 N. C. 766, 767, 23 S. E. 247.

Judgment Arrested.—When on the trial it was proved that the defendants had a license from the tenant, and such fact is

not charged in the indictment, the judgment will be arrested. State v. Sears, 71 N. C. 295.

§ 2363. Turpentine and lightwood leases.—This chapter shall not apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter. (Rev., s. 1999; Code, s. 1762; 1893, c. 517; 1876-7, c. 283, s. 7.)

Extension of Preceding Section.—This section extends section 2362 to "all leases or contracts to lease turpentine trees," and thus it is made a misdemeanor for the lessee of turpentine trees to remove any part of the turpentine crop in the like case as when the removal of the crop by an agricultural tenant is made such offense. State v. Turner, 106 N. C. 691, 692, 10 S. E. 1026.

Cited in Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

§ 2364. Mining and timber land leases.—If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent is reserved, and if it is agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter. (Rev., s. 2000; Code, s. s. 1762; 1893, 517; 1876-7, c. 283, s. 7.)

Not a Lease.—Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be extended upon payment of a certain sum, this is not a leasehold interest but an estate in fee. Carolina Timber Co. v. Wells, 171 N. C. 262, 88 S. E. 327.

Art. 3. Summary Ejectment

§ 2365. Tenant holding over may be dispossessed in certain cases.—Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases:

1. When a tenant in possession of real estate holds over after his term has expired.

2. When the tenant or lessee, or other person under him, has done or omitted any act by which according to the stipulations of the lease, his estate has ceased.

3. When any tenant or lessee of lands or tenements, who is in arrear for rent, or has agreed to cultivate the demised premises and to pay a a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (Rev., s. 2001; Code, ss. 1766, 1777; 4 Geo. II, c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820.)

I. Application and Scope.
II. Holding Over.
III. Breach of a Provision of Lease.
IV. Rights of the Parties.
V. The Action.

I. APPLICATION AND SCOPE.

For an act, applicable in Johnson county only, providing that the landlord shall pay all just set-offs and counterclaims before execution, see Public Laws 1933, c. 390.

Relation of Landlord and Tenant Necessary.—The summary remedy in ejectment provided by this section for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. Hauser v. Morrison, 146 N. C. 248, 59 S. E. 693; McCombs v. Wallace, 66 N. C. 481; Hughes v. Mason, 84 N. C. 473; McIver v Seaboard Airline R. Co., 163 N. C. 544, 545, 79 S. E. 1107.

This section applies only where the conventional relationship of landlord and tenant exists, and when title to the property is in issue, the jurisdiction of the justice of the peace is ousted, and the proceeding is properly dismissed as in case of nonsuit upon appeal to the Superior Court. Prudential Ins. Co. v. Totten, 203 N. C. 431, 166 S. E. 316.

Not Coextensive with Doctrine of Estoppel.—The remedy by summary proceedings in ejectment given by this section, is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the case where the relation between the parties is simply that of landlord and tenant. McLaurin v. McIntyre, 167 N. C. 350, 352, 83 S. E. 627; Hauser v. Morrison, 146 N. C. 248, 249, 59 S. E. 693.

Some Contract or Lease Required.—This section was only intended to apply to a case in which the tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. McCombs v. Wallace, 66 N. C. 481.

Where Purchase Changed to Lease.—Where one unconditionally surrenders his rights under the contract of purchase, and enters into a contract of lease, he may be evicted by summary proceeding under this section; and it is not necessary that he should actually surrender the possession of the land and receive it again at the hands of the lessor. Riley v. Jordan, 75 N. C. 180.

Two Classes Excluded.—The construction of this section excludes from the operation of the act two classes, viz.: vendees in possession under a contract for title and vendors retaining possession after a sale, though such persons are certainly tenants at will or sufferance for some purposes, and frequently so styled. McCombs v. Wallace, 66 N. C. 481.

When Section Does Not Apply. — The remedy by summary ejectment before a justice of the peace, under this section et seq., is not available when there is a relation of mortgagor and mortgagee, or vendor and vendee. McLaurin v. McIntyre, 167 N. C. 350, 83 S. E. 627.

Where a controversy involved the disputed title to real property, out of which certain equities arose, this section does not apply. McLaurin v. McIntyre, 167 N. C. 350, 83 S. E. 627.

Where the adverse contentions of the parties, supported by evidence, put the title to the property in issue, the jurisdiction of the justice of the peace is ousted, and on appeal in the Superior Court the action is properly dismissed. Home Bldg., etc., Ass'n v. Moore, 207 N. C. 515, 177 S. E. 633.

Same—Bargainor in Deed of Trust.—A bargainor in a deed of trust containing a stipulation for the retention of the possession of the land conveyed until sold under the terms of the trust, and who holds possession after a sale of the premises by a trustee, is not such a tenant as comes within the purview of this section, and hence proceedings cannot be taken under that act to evict him. McCombs v. Wallace, 66 N. C. 481.

Same—Entry as Vendee.—Where a party entered land under a contract of purchase, while so possessed a justice of the peace has no jurisdiction to oust him under this section. McCombs v. Wallace, 66 N. C. 481; McMillan v. Love, 72 N. C. 18; Riley v. Jordan, 75 N. C. 180, 183.

Consideration of Equitable Defenses. — A justice of the peace has jurisdiction of a summary action in ejectment, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in summary ejectment in so far as they relate to the issue of tenancy. Farmville Oil, etc., Co. v. Bowen, 204 N. C. 375, 168 S. E. 211.

II. HOLDING OVER.

Constitutional.—Paragraph one of this section, as to a tenant holding over was declared constitutional in Credle v. Gibbs, 65 N. C. 192, 193.

In General.—It is a principle fully recognized in this State, that when a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. Holton v. Andrews, 151 N. C. 340, 66 S. E. 212;

Harty v. Harris, 120 N. C. 408, 27 S. E. 90; Scheelky v. Koch, 119 N. C. 80, 25 S. E. 713; Stedman v. McIntosh, 26 N. C. 191; Murrill v. Palmer, 164 N. C. 50, 53, 80 S. E. 55.

But a mere acceptance of the rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery of possession. In an action to recover the possession, as the plaintiff is entitled to damages for the occupation of the premises, the plaintiff can accept voluntary payments without thereby ratifying the tenant's possession. Mauney v. Norvell, 179 N. C. 628, 630, 103 S. E. 372; Vanderford v. Foreman, 129 N. C. 217, 39 S. E. 839.

Effect of Recognition.—The landlord may treat his tenant, who holds over, as a trespasser and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. Murrill v. Palmer, 164 N. C. 50, 54, 80 S. E. 55.

When Holding Over Allowed.—It seems that it is not a wrongful holding over when the tenant has been compelled to continue his occupation of necessity; for instance, when he has remained in possession solely by reason of the sickness of the tenant or some member of his family, and of such a character that removal could not be presently made without serious danger to the patient. Murrill v. Palmer, 164 N. C. 50, 54, 80 S. E. 55.

Issue as to Holding Over.—The only question the court can try under paragraph one in this proceeding is, "Was the defendant the tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" McIver v. Seaboard Airline R. Co., 163 N. C. 544, 545, 79 S. E. 1107; McDonald v. Ingram, 124 N. C. 272, 274, 32 S. E. 677.

Applied in Stadiem v. Harvell, 208 N. C. 103, 179 S. E. 448.

Cited in Texas Co. v. Beaufort Oil & Fuel Co., 199 N. C. 492, 494, 154 S. E. 829.

III. BREACH OF A PROVISION OF LEASE.

Condition Must Be in Lease.—A summary proceeding in ejectment under the landlord and tenant act begun during the lessee's term can not be maintained where the contract of lease contained no condition, the breach of which would authorize a re-entry by the lessor. The mere failure to pay rent upon "a lease at ..... dollars a year, payable monthly," does not warrant such re-entry. Meroney v. Wright, 81 N. C. 390.

Suit for Rescission Cannot Be Substituted on Appeal. — Where a verbal lease does not provide for its termination or reserve the right of re-entry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, and issues of fraud in procuring the lease and wilful breach of the conditions are erroneously submitted in the Superior Court upon appeal in such action, it not being permissible for a party to substitute on appeal a suit for rescission. Dees v. Apple, 207 N. C. 763, 178 S. E. 557.

When Breach Waived.—After the breach of the tenant of his contract, acceptance of rent by the landlord which has accrued thereafter, will prevent the landlord from insisting on the forfeiture. Winder v. Martin, 183 N. C. 410, 111 S. E. 708.

Defense of Partial Eviction.—Where a defendant has been partially evicted in order for him, in a summary action of ejectment, to retain possession of the leased premises by paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law. Blomberg v. Evans, 194 N. C. 113, 138 S. E. 593.

IV. RIGHTS OF THE PARTIES.

Tenant May Dispute Assignment.—A tenant cannot dispute the title of his landlord but where an action of ejectment is brought by one claiming to be an assignee of the landlord, the tenant may dispute the assignment. Steadman v. Jones, 65 N. C. 388, 391.

Not Entitled to Renewal.—Tenant, in the absence of an agreement, has neither a legal nor an equitable right to a renewal of the lease. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

Same—Consideration.—An option in the original lease to renew would not be without consideration, but landlord's agreement during the lease, and not constituting part of the lease, not to lease the property without first giving the tenant an opportunity to renew the lease was unenforcible, being without consideration. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

Estoppel to Deny Landlord's Title.—It is an undoubted principle of law, fully recognized by the Federal Supreme Court, that a tenant cannot dispute the title of his landlord, either by setting up a title, in himself, or a third person, during the existence of the lease or tenancy. Rector v. Gibbon, 111 U. S. 276, 284, 28 L. Ed. 427, 4 S. Ct. 605. And the same rule is applied by the North Carolina courts. Lawrence v. Eller, 169 N. C. 211, 85 S. E. 291.

Neither the tenant of land nor any person claiming title by or through him can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. Callender v. Sherman, 27 N. C. 711.

Where the relation of landlord and tenant is established, and the latter is in possession, the tenant will not be permitted to dispute the title of the landlord during the continuance of the lease. Hobby v. Freeman, 183 N. C. 240, 111 S. E. 1. Before disputing his landlord's title, the tenant must restore possession. Buckhorne Land, etc., Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630.

Same—Slave at Time of Entry.—See Wilson v. James, 79 N. C. 349, cited in notes in 7 L. R. A., N. S., 222, 52 L. R. A., N. S., 976, 977, 978.

Subtenant.—Not only the tenant but his sublessee is estopped to deny the title of his immediate landlord. Bonds v. Smith, 106 N. C. 553, 11 S. E. 322, cited in note in 7 L. R. A., N. S., 931.

V. THE ACTION.

Landlord Proper Party to Bring.—The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejection (authorized by this section) to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the proceedings in ejectment, is untenable. Shelton v. Clinard, 187 N. C. 664, 122 S. E. 477.

Third Party Let in.—When, in an action for the recovery of real estate, both the plaintiff and a third party claim to be the landlord of the defendant, the latter has a right, upon affidavit, to be let in as a party defendant to the action. Rollins v. Rollins, 76 N. C. 264.

Estoppel.—In a proceeding before a justice of the peace under this section, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. Heyer v. Beatty, 76 N. C. 28.

A suit to restrain execution on a judgment in summary ejectment by a justice of the peace, on the ground that the justice had no jurisdiction, is properly dismissed where it appears that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. Shuford v. Greensboro Joint-Stock Land Bank, 207 N. C. 428, 177 S. E. 408.

Provision for Renewal as Defense.—While a provision of renewal of a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. While the court allows this equitable defense to the summary proceedings, the defendants must pay the accrued rent. McAdoo v. Callum Bro. & Co., 86 N. C. 419.

Burden of Proof.—In an action of ejectment, the burden of proving that the tenancy has terminated is on the plaintiff. Poindexter v. Call, 182 N. C. 366, 109 S. E. 26.

Evidence.—See Hargrove v. Cox, 180 N. C. 360, 104 S. E. 757.

§ 2366. Local: Refusal to perform contract ground for dispossession.—When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alleghany, Anson, Beaufort, Bertie, Bladen, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hyde, Jackson, Johnston, Jones, Lenoir, Martin, Mecklenburg, Montgomery, Nash, Northampton,

Onslow, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Swain, Tyrrell, Union, Wake, Wayne, Washington, Wilson, Yadkin, Moore, Surry, Stokes and Pasquotank. (Rev., s. 2001, subsec. 4; Code, ss. 1766, 1777; 4 Geo. II, c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820; 1907, cc. 43, 153; 1909, cc. 40, 550; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39.)

Editor's Note.—The Acts of 1931 added Moore, Rutherford, Stokes and Surry Counties to this section.

Public Laws 1933, cc. 86, 485, added Polk and Pasquotank counties to this section.

Public Laws 1935, chapter 39 added Guilford to the list of counties to which the section is applicable.

§ 2367. Summons issued by justice on verified complaint.—When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the above cases described, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (Rev., s. 2002; Code, s. 1767; 1868-9, c. 156, s. 20; 1869-70, c. 212.)

When Defendant Denies Tenancy.—In a proceeding before a justice of the peace under this section, where the defendant denies the alleged tenancy, it is the duty of the justice to proceed and try the issue of tenancy. Foster v. Penry, 77 N. C. 160.

Question of Jurisdiction.—The question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of tenancy, and if the same be found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy. Hahn v. Latham, 87 N. C. 172.

If the defense involved the title to real estate, a justice of the peace has no jurisdiction thereof, and should dismiss the proceeding. Forsythe v. Bullock, 74 N. C. 135.

Defense.—The tenant may set up in his answer any equitable defense which he may have to his landlord's claim. Forsythe v. Bullock, 74 N. C. 135.

Same—Effect of Failure to Set up Defense.—Where a defendant failed to set up the defense that he was not a tenant, but held under an agreement to purchase, and it was decided that he was a tenant he cannot be heard to question the validity of the judgment nor can he restrain its execution except in a direct proceeding to set it aside for fraud, etc. Isler v. Hart, 161 N. C. 499, 500, 77 S. E. 681.

Effect of Provision for Renewal.—A provision for renewal in a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. McAdoo v. Callum Bros. & Co., 86 N. C. 419.

§ 2368. Service of summons.—The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (Rev., s. 2003; Code, s. 1768; 1868-9, c. 156, s. 21.)

§ 2369. Judgment by default or confession.—The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment, that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (Rev., s. 2004; Code, s. 1769; 1868-9, c. 156, s. 22.)

Tenant May Hold after Adverse Judgment.—Where both plaintiff and an interpleading third party claim to be landlords of the defendant, if a judgment by default is taken against the tenant, no writ of possession can issue until the determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Rollins, 76 N. C. 264.

Same—When Evicted.—If in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he is entitled to be restored to possession until the determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Bishop, 76 N. C. 268.

Same—Appeal.—Upon an appeal when the appeal is dismissed as to the tenant defendant, no writ of possession can issue from the justice's court until the determination of the controversy between the plaintiff and interpleading defendant. Rollins v. Henry, 76 N. C. 269.

§ 2370. Trial by justice; jury trial; judgment; execution.—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (Rev., s. 2005; Code, s. 1770; 1868-9, c. 156, s. 23.)

Where Injunction Issues.—Where a person has been enjoined from bringing actions on each installment of rent as vexatious, such person is not precluded by such injunction from issuing execution on a judgment taken in a summary action in ejectment for the recovery of the property after the expiration of the lease. Featherstone v. Carr, 134 N. C. 66, 46 S. E. 15.

Effect of Judgment.—A judgment for a tenant in summary proceedings is not an estoppel on the landlord to the extent of precluding him from showing in a subsequent action advancements made prior to eviction to which he was entitled. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Same—Matter Is Res Judicata as to Tenancy.—Where in proceedings in summary ejectment on final judgment entered in the superior court it has been adjudicated that A was the tenant of B, which judgment was not appealed from, the matter is res judicata, and A cannot maintain a suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings. Isler v. Hart, 161 N. C. 499, 77 S. E. 681.

§ 2371. Damages assessed to trial.—On appeal to the superior court, the jury trying the issue

joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (Rev., s. 2006; Code, s. 1775; 1868-9, c. 156, s. 28.)

Damages upon Appeal.—Where there is an appeal from the justice of the peace in ejectment, the jury shall assess all damages of the plaintiff which he is entitled thereto from the time of the unlawful detention to the time of the trial in the superior court, and upon the defendant's tendering the amount sued for and the costs to the time, a judgment as of nonsuit is properly allowed. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Same—Surety Liable.—The surety on a bond to stay execution on appeal from judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the superior court. Dunn v. Patrick, 156 N. C. 248, 72 S. E. 220.

§ 2372. Rent and costs tendered by tenant.—If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed. (Rev., s. 2007; Code, s. 1773; 4 Geo. II, c. 28, s. 4; 1868-9, c. 156, s. 26.)

To Protect Tenant.—This section was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and cost before judgment or get out. This section was to protect the tenant from hasty eviction, at the same time the landlord obtained his rent and costs. Ryan v. Reynolds, 190 N. C. 563, 566, 130 S. E. 156.

Only Rents Due Included.—Under the provisions of this section the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed; and the exception of the lessor that all rents, whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, is untenable. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Same—Cannot Demand Other Debts.—Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the sand he may thus have used, under the provision of this section, as a part of the rental due by him, the contract being construed separately as to the two provisions. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Effect of Tender by Tenant.—A tender by the tenant of rent accrued after termination of the lease does not preclude the landlord from recovering possession. Vanderford v. Foreman, 129 N. C. 217, 39 S. E. 839.

Effect of Tender upon Proceedings for Forfeiture.—Where during the hearing and before judgment on a petition under § 2343 for the forfeiture of a lease held by an insolvent corporation in the hands of a receiver, the receiver tendered to the petitioner all rents due, together with all costs lawfully incurred, as provided in this section, it was held that petition was properly denied. Coleman v. Carolina Theatres, 195 N. C. 607, 143 S. E. 7.

Effect of Acceptance of Rent.—Acceptance by the landlord of rent accruing after termination of lease, after suit for possession, does not create a tenancy from year to year, and does not preclude the landlord from recovery. Vanderford v. Foreman, 129 N. C. 217, 39 S. E. 839.

§ 2373. Undertaking on appeal; when to be increased.—Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; except in the counties of Iredell, Mecklenburg, Craven, Granville, Watauga, Davie, and Swain, upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except the cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided, further, that the presiding judge, in his discretion, may take up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (Rev., s. 2008; Code, s. 1772; 1868-9, c. 156, s. 25; 1883, c. 316; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154.)

Editor's Note.—This section was amended by the Public Laws of 1921, ch. 90, and Ex. Sess. ch. 17. The exception in certain specified counties and the two following provisos were added by the chapter mentioned.

Public Laws 1933, c. 154, struck out Cabarrus county from the list of counties excepted.

Justice Has Discretion as to Surety.—On an application to a justice of the peace for a suspension of execution after a recovery by a landlord against his tenant, the justice has a discretion as to the sufficiency of the surety, which a judge will not review, in the absence of any suggestion that the justice acted dishonestly or capriciously. Steadman v. Jones, 65 N. C. 388.

Power to Increase Bond.—If the bonds should become impaired or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then under this section the superior court can require additional security. Featherstone v. Carr, 132 N. C. 800, 802, 44 S. E. 592.

Not only is it within the jurisdiction and power of the superior courts to have the bonds increased or strengthened, but under their general powers in equity, outside of that statute or any other statute, they would have the right to take such action. Featherstone v. Carr, 132 N. C. 800, 802, 44 S. E. 592.

Judgment Prior to Action on Bond.—A bond, with sureties, conditioned upon the payment of any judgment given in summary proceedings in ejectment, makes the obtaining of the judgment a condition precedent to a recovery thereon against the sureties; and the obtaining of such a judgment must be shown by proper averment and proof, or an action against the sureties willl be premature. Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874.

§ 2374. Restitution of tenant, if case quashed, etc., on appeal.—If the proceedings before the justice are brought before a superior court and quashed, or judgment is given against the plaintiff, the superior or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose. (Rev., s. 2009; Code, s. 1774; 1868-9, c. 156, s. 27.)

In General.—The writ of restitution lies to restore a party to the possession of property of which he has been deprived by some erroneous process; but it will not be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation, but not by virtue of any order, judgment or process therein. Durham, etc., R. Co. v. North Carolina R. C., 108 N. C. 304, 12 S. E. 983.

When Writ Given.—When a party is put out of possession of land, or compelled to pay money, under a judgment which is afterwards reversed or set aside, the court will restore the party to the possession of the land, and give him a remedy for the money thus paid. Lytle v. Lytle, 94 N. C. 522.

A Part of the Judgment.—Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment. Perry v. Tupper, 70 N. C. 538; Meroney v. Wright, 84 N. C. 336, 339.

Where on trial of summary ejectment before a justice of peace, judgment was rendered for the plaintiff, who was put into possession and on appeal, the superior court decided against the plaintiff, upon the ground that the lease had not terminated, the defendant is entitled to a writ of restitution as a part of the judgment in his favor. Meroney v. Wright, 84 N. C. 336.

§ 2375. Damages to tenant for dispossession, if proceedings quashed, etc.—If, by order of the justice, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (Rev., s. 2010; Code, s. 1776; 1868-9, c. 156, s. 30.)

Sufficient Allegation.—A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof the plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Assessment of Damages.—Under this section a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Recovery by Landlord.—Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction but not for labor performed by himself after the eviction. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Art. 4. Forms

§ 2376. Forms sufficient.—The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

Oath of Plaintiff

North Carolina, ... County.

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the....day of.....19.... (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims.....dollars for rent of the premises from the.....day of ..... 19....to the.....day of.....19...., and also.....dollars for the occupation of the premises since the ..... day of ..... 19.... to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this..... day of .....19....

J. K., J. P.

Summons

North Carolina,.....County.

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the....day of.....,19...., at....., then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this ..... day of....., 19.....

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them to the officer, and makes the following entry on his docket, or varies it according to the facts:

Docket Entries

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment for (describe the premises.)

Oath of plaintiff (his agent or attorney) filed on the....day of.....19....

Plaintiff claims.....dollars for rent from .....to....., and.....dollars for occupation from.....to.....

Summons issued the....day of....., 19...., to....., constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

Return of Officer

On this day I served the within summons on the defendant, C. D., by delivering him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and the oath of A. B. at the usual place of residence of the defendant C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons

and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

The....day of ....., 19.....

Record to Be Entered on Docket

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant.....dollars for rent from the ..... day of ....., 19.....to the .... day of....., 19...., and..... dollars for damages for occupation of the premises from the....day of....., 19...., to this day, and.....dollars for his costs; the....day of....., 19.....

If the defendant admits part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas both parties waived a trial by jury, I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so on from the asterisk (*). If either party demands a jury, the record will proceed from the asterisk (*) as follows:

And whereas the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to wit; (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to wit: (here state the names of the six jurors impaneled), who find (here state the verdict of the jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5, from asterisk (*).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

Record of Appeal

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

Execution on Judgment for Plaintiff

A. B., plaintiff, against C. D., defendant. } ..... County.

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out the goods and chattels, lands and tenements, of said defendant ..... dollars, with interest from the ..... day of ....., 19....., to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of ..... dollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal, this ..... day of ....., 19....

..... (Seal.)

Bond to Stay Execution

We, the undersigned, ... and ....., acknowledge ourselves indebted to ..... in the sum of ..... dollars:

Witness our hands and seals, this the ..... day of ....., A. D. 19....

Whereas on the .... day of ....., A. D. 19...., before ..... a justice of the peace for ..... county, A. B. recovered a judgment against C. D. for ..... and for..... dollars damages for the detention of said real estate from the ..... day of ....., A. D. 19...., to the ..... day of ....., A. D. 19....; and whereas the said ..... ha.... prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said ..... shall pay any judgment which, in this or in any other action, the said ..... may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

..... (Seal.)
..... (Seal.)
..... (Seal.)

Stay of Execution

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff,

v. C. D., defendant, in a summary proceeding in ejectment, signed by .....

The defendant having given bond to me, as required by law, on his appeal to the superior court of ..... county, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this .... day of ....., 19....

C. D., defendant ....., J. P. (Seal.)

Certificate on Return of Appeal

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant. .....J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.)

(All the papers must be attached.) (Rev., s. 2011; Code, s. 1780.)

CHAPTER 47
LAND REGISTRATION

Art. 1. Nature of Proceeding

§ 2377. Jurisdiction in superior court.—For the purpose of enabling all persons owning real estate within this state to have the title thereto settled and registered, as prescribed by the provisions of this chapter, the superior court of the county in which the land lies in the state shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided. (1913, c. 90, s. 1.)

Editor's Note.—This chapter is known generally as the Torren's Law. The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. Like the Drainage Act, this Torrens system was adopted at the wish of the landowners of the State, as evidenced by the proceedings of the Farmer's Union, the Chamber of Commerce of many cities, and other organizations. See Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

Chapter to Be Liberally Construed.—This statute is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3; Dillon v. Brocker, 178 N. C. 65, 100 S. E. 191.

Amendment of Pleadings and Parties.—Under the provisions of this section, the clerk as well as the judge of the superior court is given authority over the whole proceedings before the clerk, and to require reformation of the process, pleadings or decrees or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file answers. Empire Mfg. Co. v. Spruill, 169 N. C. 618, 86 S. E. 522.

§ 2378. Proceedings in rem; vests title.—The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this chapter. (1913, c. 90, s. 2.)

See note under § 2423.

Consolidation of Proceedings.—A proceeding for the purpose of registering title and an injunction to prevent trespass, involving the same land and the same parties may be consolidated. Blount v. Sawyer, 189 N. C. 210, 126 S. E. 512.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 2379. Rules of practice prescribed by attorney-general.—The attorney-general, with the approval of the supreme court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the attorney-general, who, with the approval of the supreme court, shall prescribe a rule covering such case. (1913, c. 90, s. 31.)

Art. 2. Officers and Fees

§ 2380. Examiners appointed by clerk.—The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys at law, residing in the state of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this chapter, and they shall be subject to removal at will by such clerk or judge of the superior court. (1913, c. 90, s. 3; 1917, c. 63.)

§ 2381. Fees of officers.—The fees to be allowed the clerks and sheriffs in this proceeding shall be the same as now allowed by law to clerks and sheriffs in other special proceedings. The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars or less; for each additional thousand dollars of assessed value of property so examined he shall receive fifty cents; for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book one dollar; for issuing the certificate and new certificates under this chapter, fifty cents for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this chapter shall not be allowed to charge more than forty cents per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner: Provided, however, that a minimum fee of two dollars in any case may be allowed.

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30.)

Art. 3. Procedure for Registration

§ 2382. Who may institute proceedings.—Any person, being in the peaceable possession of land within the state and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and

vest an indefeasible title thereto. Any person in like possession of lands within the state, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4.)

See note under § 2423.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 2383. Land lying in two or more counties.—In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts situated in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject-matter as fully as if said land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this state for registration of title, as in this chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor. (1919, c. 82, s. 1.)

§ 2384. Petition filed; contents.—Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but the person in whose behalf the petition is made shall always be named as petitioner. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interest, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey. (1913, c. 90, s. 5.)

See note under § 2423.

Attaching Proceedings under Torrens Act Because Clerk Did Not Sign Jurat.—Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of this section upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside. Morgan v. Beaufort, etc., R. Co., 197 N. C. 568, 150 S. E. 30.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 2385. Summons issued and served; disclaimer.—The clerk of the court shall issue a summons directed to the sheriff of every county in which persons named as interested may reside, such persons being made defendants, and the summons shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the state of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6.)

Cited in Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

§ 2386. Notice of petition published.—In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief de-

manded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. The clerk of the court shall also record a copy of said notice in the lis pendens docket of his office and cross-index same as other notices of lis pendens and shall also certify a copy thereof to the Superior Court of each county in which any part of said land lies, and the clerk thereof shall record and cross index same in the lis pendens records of his office as other notices of lis pendens are recorded and cross-indexed. (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; 1925, c. 287.)

See note under § 2423.

Editor's Note.—The last sentence of the section was added in 1925, by the Public Laws of 1925, ch. 287.

Sufficiency of Publication.—Where the summons in proceedings to register lands has been issued and served under the provisions of section 2385, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for four successive weeks, as directed by section thereof. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

Waiver of Objection to Publication.—In proceedings to register a title to lands, a party claiming an interest in the lands waives his rights to object on the grounds of the irregularity in the publication of notice by appearing and answering the petition. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 2387. Hearing and decree:

1. Referred to Examiner.—Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

2. Examiner's Report.—The examiner shall, within thirty days after such hearing, unless for good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

3. Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the supreme court, as in other special proceedings.

4. No Judgment by Default.—No judgment in any proceeding under this chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner's claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the same to the examiner of titles, who shall, after notice to the petitioner, proceed to examine the title, together with all liens or encumbrances set forth or referred to in the petition and exhibits, and shall examine the registry of deeds, mortgages, wills, judgments, mechanic liens and other records of the county, and upon such examination he shall, as hereinbefore provided, report to the clerk the condition of the title, with a notice of liens or encumbrances thereon. The examiner shall have power to take and call for evidence in such case as fully as if the application were being contested. If the title shall be found to be in the petitioner, the clerk shall enter a decree to that effect and declaring the land entitled to registration, with entry of any limitations, liens, etc., and shall certify the same for registration, as hereinbefore provided, after approval by the judge of the superior court. (1913, c. 90, s. 8.)

§ 2388. Effect of decree; approval of judge.—

Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern;" and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this state of his or its right or title thereto.

It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Such decrees shall not be binding on and include the State of North Carolina or the State of Education unless notice of said proceeding and copy of petition, etc., as provided in this chapter, are served on the Governor and on the State Board of Education severally and personally. Such decree shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; 1925, c. 263.)

See note under § 2423.

Editor's Note.—The provision of this section requiring services of notice on the Governor and the Board of Education was added by the Public Laws of 1925, ch. 263.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

Art. 4. Registration and Effect

§ 2389. Manner of registration.—The county commissioners of each county shall provide for the register of deeds in the county a book, to be called Registration of Titles, in which the register shall enroll, register and index, as hereinafter provided, the decree of title before mentioned and the copy of the plot contained in the petition, and all subsequent transfers of title, and note all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon. If the title be subject to trust condition, encumbrance or the like, the words "in trust," "upon condition," "subject to encumbrance," or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction. (1913, c. 90, s. 10; 1919, c. 236, s. 1.)

§ 2389(a). Cross-indexing of lands by registers of deeds. — Where any land is brought into the Torrens' System and under said system is registered in the public records of the register's office, said register shall cross-index the registration in the general cross-index for deeds in his office. (1931, c. 286, s. 2.)

§ 2390. Certificate issued.—Upon the registration of such decree the register of deeds shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

State of North Carolina—County of .....

The certificate of .....

I hereby certify that the title is registered in the name of ..... to and situate in said county and state, described as follows: (Here describe land as in decree.)

Estate ..... (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to incumbrance, and the like).

Under decree of the land court of ..... county, entitled ..... Registered No. ...., Book No. ....., page .....

Witness my hand and seal, at office at ....., this ..... day of ..... A. D. 19..... (Seal) ..... Register of Deeds. (1913, c. 90, s. 10.)

§ 2391. Certificates numbered; entries thereon.—All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner's certificate, under any of the provisions of this chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book. (1913, c. 90, s. 11.)

§ 2392. New certificate issued, if original lost.—Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper, and noted upon the registry of titles, and upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed the court may direct the issuance of a new certificate, which shall be approximately designated and take the place of the original, but at least thirty full days shall elapse between the filing of the petition and making the decree for such new certificate. (1913, c. 90, s. 24.)

§ 2393. Registered owner's estate free from adverse claims; exceptions.—Every registered owner of any estate or interest in land bought under this chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except (1) liens, claims or rights arising or existing under the laws or constitution of the United States which the statutes of this state cannot require to appear of record under registry laws; (2) taxes and assessments thereon due the state or any county, city or town therein, but not delinquent; (3) any lease for a term not exceeding three years, under which the land is actually occupied. (1913, c. 90, s. 25.)

§ 2394. Adverse claims existing at initial registry; affidavit; limitation of action.—Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the reg-

istry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby. (1913, c. 90, s. 25.)

§ 2395. Decree and registration run with the land.—The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this chapter and all amendments thereof. (1913, c. 90, s. 26.)

§ 2396. No right by adverse possession.—No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. (1913, c. 90, s. 27.)

§ 2397. Jurisdiction of courts; registered land affected only by registration.—Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered. (1913, c. 90, s. 28.)

No Distinction between Original Parties and Purchasers.—The statute draws no distinction between the original parties to deeds or contracts affecting title of lands registered under its provisions and creditors or purchasers, and in respect to such registration they stand upon the same footing. Dillon v. Brooker, 178 N. C. 65, 100 S. E. 191.

§ 2398. Priority of right. — In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail. (1913, c. 90, s. 29.)

§ 2399. Compliance with this chapter due registration. — When the provisions of this chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner heretofore provided by law for the registration of conveyances. (1913, c. 90, s. 32.)

§ 2399(a). Release from registration. — Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of chapter forty-seven of the Consolidated Statutes, desires to have such estate released from the provisions of said chapter in so far as said chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said chapter, such owner may present his owner's certificate of this title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we), ..., being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of chapter forty-seven of the Consolidated Statutes of North Carolina in so far as said chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said chapter, and in the same manner as if said estate had never been registered." Which said memorandum or statement shall further state that it is made pursuant to the provisions of this act, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the registration of titles book in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (1924, c. 40.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

Art. 5. Adverse Claims and Corrections after Registration

§ 2400. Limitations. — No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within twelve months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within twelve months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date of such decree. (1919, c. 236, s. 1.)

§ 2401. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation. — Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the county in which such decree was rendered or certificate of title thereon was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his post-office address, and, if a nonresident, he shall designate or appoint the said register of deeds to receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof. (1919, c. 236, s. 1.)

§ 2402. Suit to enforce adverse claim; summons and notice necessary. — Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this state.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel upon the registry the adverse claim so filed and make a memorandum setting out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this state. (1919, c. 236, s. 1.)

§ 2403. Judgment in suit to enforce adverse claim; register to file. — The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall make such entry upon the registry and upon the owner's certificate of title as may be directed by the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon. (1919, c. 236, s. 1.)

§ 2404. Correction of registered title; limitation of adverse claims. — Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved,

without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this section shall be construed to authorize any such court to open any original decree of registration which was entered more than twelve months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section. (1919, c. 236, s. 1.)

Art. 6. Method of Transfer

§ 2405. When whole of land conveyed. — Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance upon or attached to the certificate substantially as follows:

A B and wife (giving the names of the parties owning land described in the certificate and their wives) hereby, in consideration of ..... dollars, sell and convey to C D (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached.

The same shall be signed and properly acknowledged by the parties and their wives and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the deed, and shall be entered upon the registration of titles book as hereinafter provided; that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this chapter, and certificate of title so presented shall be cancelled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled. (1913, c. 90, s. 12.)

Necessity of Affidavit and Notation.—A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by this section. Dillon v. Broeker, 178 N. C. 65, 100 S. E. 191.

§ 2406. Conveyance of part of registered land. —The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the transfer of the whole of any registered estate, to which shall be attached the certificate of title of such registered estate. In case of the transfer of an undivided interest in a registered estate, such instrument or transfer or conveyance shall accurately specify and describe the extent and amount of the interest transferred and of the interest retained, respectively. In case of a transfer of a separate lot or parcel of a registered estate, such instrument of transfer or conveyance shall describe the lot or parcel transferred either by metes and bounds or by reference to the map or plat attached thereto, and shall in every case be accompanied by a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate and of the lot or parcel to be transferred. (1919, c. 82, s. 4.)

§ 2407. Duty of register of deeds upon part conveyance. — Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of the title attached thereto and to issue to each owner a new certificate of title bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat thereto attached. (1919, c. 82, s. 4.)

§ 2408. Subdivision of registered estate. — Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to such owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4.)

§ 2409. References and cross-references entered on register. — In all cases the register of deeds shall place upon the registry of title books and upon the certificate of title of such registered estate therein, references and cross-references to the new certificates issued as above provided, in accordance with the provisions of this article, and the new certificates issued shall fully refer by number and by name of the holder to the

canceled certificate in place of which they are issued. (1919, c. 82, s. 4.)

§ 2410. When land conveyed as security. — 1. Whole land conveyed. Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A B and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C. D. the tract or lot of land described as No. ..... in registration of titles book for ..... county, a certificate for the title for same being hereto attached, to secure a debt of ..... dollars, due to ....., of ..... county and state, on the day of ....., 19...., evidenced by bond (or otherwise as the case may be) dated the .... day of ....., 19..... In case of default in payment of said debt with accrued interest, ... days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the registration of titles book the name of the trustee, the amount of debt, and the date of maturity of same.

2. Part of land conveyed. When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the book and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

3. Effect of transfer. All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjourning county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

4. Other encumbrances noted. All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this article.

5. Other forms of conveyance may be used. Nothing in this section nor this chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the registration of titles book. (1913, c. 90, s. 14; 1915, c. 245.)

6. Sale under lien; new certification. Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1919, c. 82, s. 5.)

§ 2411. Owner's certificate presented with transfer. — In voluntary transactions the owner's certificate of title must be presented along with the writing or instrument conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto. (1913, c. 90, s. 15.)

§ 2412. Transfers probated; partitions; contracts. — All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the registration of titles book and upon the owner's certificate within thirty days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32.)

§ 2413. Certified copy of order of court noted. —In voluntary transactions a certificate from the proper state, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the registration of titles book, and for

the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16.)

§ 2414. Production of owner's certificate required. — Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpœna duces tecum or by other process of the court, if necessary. (1913, c. 90, s. 17.)

§ 2415. Registration notice to all persons. — Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this chapter, upon any registered land in the county of such registration. (1913, c. 90, s. 18.)

§ 2416. Conveyance of registered land in trust. —Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the book and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19.)

§ 2417. Authorized transfer of equitable interests registered. — No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered. (1913, c. 90, s. 20.)

§ 2417(a). Validating conveyance by entry on margin of certificate. — In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of chapter forty-seven of the Consolidated Statutes, has heretofore and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the registration of titles book a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by registration of titles book showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has heretofore been made, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered: Provided, however, that the provisions of this section shall not affect any pending action or special proceeding. (1924, c. 41.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

Art. 7. Liens upon Registered Lands

§ 2418. Docketed judgments. — Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor. (1913, c. 90, s. 22.)

§ 2419. Notice of delinquent taxes filed. — It shall be the duty of the sheriff or other collector of taxes or assessments of each county and town, not later than the first day of March in each year, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including the penalty therefor, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and such sheriff or other collector of taxes and his sureties shall be liable for the payment of the taxes and assessments with the penalty and interest thereon. (1913, c. 90, s. 21.)

§ 2420. Sale of land for taxes; redemption.— Whenever any sale of registered land is made for

delinquent taxes or levies, it shall be the duty of the sheriff or other officer to make such sale forthwith, to file a memorandum thereof for registration in the office of the register of deeds; and thereupon the registered owner shall be required to produce his certificate for cancellation, and a new owner's certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full within ninety days after date of such sale; but a note shall be entered upon the certificate of title and also upon any such new owner's certificate, reserving the privilege of redemption in accordance with the law. In case of any redemption under this section of land sold for taxes, a note of the fact shall be duly registered, and if an owner's certificate has been issued to any purchaser, the same shall be canceled and a new one shall be issued to the person who has redeemed. (1913, c. 90, ss. 22, 23.)

§ 2421. Sale of unredeemed land; application of proceeds. — If there be no redemption of land under the preceding section, in accordance with the law, it shall be the duty of the sheriff or other collector of taxes in the county or town in which the land lies to sell the same at public auction for cash, first giving such notice of the time and place of sale as is prescribed for execution sales, and the proceeds of sale shall be applied, first, to the payment of all taxes and assessments then due to the state, county and town, with interest, penalty and costs; second, to the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of five dollars; third, to the payment of a commission to the officer making the sale of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds; fourth, to the satisfaction of any liens other than the taxes and assessments registered against the land in the order of their priorities; fifth, and the surplus, if any, to the person in whose name the land was previous to sale for taxes, subject to redemption as provided herein, his heirs, personal representatives or assigns. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon. (1913, c. 90, s. 23.)

Art. 8. Assurance Fund

§ 2422. Assurance fund provided; investment. —Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one-tenth of one per cent of the assessed value of the land for taxes, as an assurance fund, which shall be paid over to the state treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this state, or of counties and other municipalities within the state. Such investment shall be made upon the advice and concurrence of the governor and council of state, and he shall make report of such funds and the investment thereof to the general assembly biennially. (1913, c. 90, s. 33.)

As to investment in bonds guaranteed by United States, see section 220(a)1.

§ 2423. Action for indemnity.—Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any error, omission, mistake, misfeasance, or misdescription in any certificate of title or in any entry or memorandum in the registration book, and who, by the provisions of this chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the state treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action or other remedy for the recovery of the land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 34.)

Negligence of Plaintiff Barring Recovery.—A Torrens proceedings under this chapter duly commenced prior to the enactment of Public Laws 1919, c. 31 (Code §§ 501, 502), constituted a "lis pendens." So such proceedings while pending was notice to a mortgagee of the land without the necessity of the filing of a formal lis pendens, and where the mortgagee failed to protect himself under the provisions of the statute, and the title to the land was assured by the State, and a holder thereof by proper transfer acquired the title, the negligence of the mortgagee was a complete defense in the mortgagee's action to recover damages against the State thereunder. Brinson v. Lacy, 195 N. C. 394, 142 S. E. 317.

§ 2424. Satisfaction by third person or by treasurer.—If there are defendants other than the state treasurer, and judgment is rendered in favor of the plaintiff and against the treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the treasurer only, the clerk of the court shall certify the amount due on the execution to the state auditor, who shall issue his warrant therefor upon the state treasurer, and the same shall be paid. In all such cases the treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35.)

§ 2425. Payment by treasurer, if assurance fund insufficient.—If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the treasurer shall

pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid. (1913, c. 90, s. 36.)

§ 2426. Treasurer subrogated to right of claimant.—In every case of payment by the treasurer from the assurance funds under the provisions of this chapter the treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund. (1913, c. 90, s. 37.)

§ 2427. Assurance fund not liable for breach of trust; limit of recovery. — The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as compensation under the provisions of this chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof. (1913, c. 90, s. 38.)

§ 2428. Statute of limitation as to assurance fund.—Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action. (1913, c. 90, s. 39.)

Art. 9. Removal of Land from Operation of Torrens Law

§ 2428(a). Proceedings. — Any land heretofore brought under the provisions and operation of this chapter may be removed and excluded therefrom by a motion in writing filed in the original cause wherein said land was brought under the provisions and operation of said chapter, and upon the filing of a petition therein showing the names of all persons owning an interest in said land and of all lien holders, mortgagees and trustees of record, and the description of said land. Upon the filing of said petition the Clerk of the Superior Court shall issue a citation to all parties interested and named in the petition, and upon the return date of said citation and upon the hearing of said motion, the said Clerk of the Superior Court may enter a decree in said cause removing and excluding said land from the provisions and operation of this chapter, and transfer and conveyance of said land may be made thereafter as other common law conveyances. (1931, c. 286, s. 1.)

Editor's Note.—No procedure is provided for in case the petition should be contested. And while the legislature rather loosely provides that the clerk, upon rendering his decree excluding the land, also may decree that subsequent transfers of said land may be made "as other common law conveyances," it obviously means that such transfers should be effectuated by deeds duly probated and registered under our present laws. The amendment makes no specific provision for the recordation of the Clerk's decree as notice that the particular tract of land is no longer registered under the Torrens Act.

The Torrens system of land registration, though highly desirable from many points of view, has never been extensively used in North Carolina. Since 1913, when the Act was passed, scarcely five hundred titles have been registered under it. The present amendment now makes possible the "unregistering" of these titles. 9 N. C. Law Rev. 392.

§ 2428(b). Existing liens unaffected. — Nothing in § 2428(a) shall be construed to impair or remove any lien or encumbrance existing against said land. (1931, c. 286, s. 3.)

CHAPTER 48

LIBEL AND SLANDER

§ 2429. Libel against newspaper; notice before action.—Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory. (Rev., s. 2012; 1901, c. 557.)

Cross References.—As to pleadings in libel and slander, see sec. 542. As to criminal libel, see sec. 4229. For general treatment of libel and slander, see 8 N. C. Enc. Dig. 651-699; 14 N. C. Enc. Dig. 647-658.

Definition.—The accepted definition of a libel is expressed, in White v. Nicholls, 3 How. 266, 11 L. Ed. 591 as follows: "Every publication, either by writing, printing or pictures, which charges upon or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous or odious, or ridiculous is prima facie a libel."

Constitutionality.—This and the two following sections providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Pentuff v. Park, 194 N. C. 146.

Complaint Must Allege Notice.—Under this section a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements therein alleged to be false. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

Same—Failure Demurrable.—In an action against a newspaper for libel, the failure of the complaint to allege the five days' notice renders it demurrable. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

Same—Same—Amendment.—Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

When Notice Unnecessary.—In an action for libel, where the newspaper publishes a retraction, no notice need be given. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

As to whether this section and the following sections of this chapter, as to notice to the defendant in an action for libel, looking to retraction and apology, applies to individuals having no connection with a newspaper publishing the libel, Query? Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881.

Failure of Notice.—In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. Osborne v. Leach, 135 N. C. 628, 47 S. E. 811.

Compensatory Damages.—This section and the following sections in this chapter, having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881.

§ 2430. Effect of publication in good faith and retraction.— If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and

that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more. (Rev., s. 2013; 1901, c. 557.)

Section Constitutional.—This section taking away from a person the right to recover punitive damages in case of libel is constitutional. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

A recovery of actual damages does not abridge the freedom of the press, as inhibited by our Constitution, Art. 1, sec. 20. Pentuff v. Park, 194 N. C. 146.

Same—Applies Equally to All.—Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

"Actual Damages." — The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraxit, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience. Pentuff v. Park, 194 N. C. 146. Actual damages also include mental suffering and injury to reputation. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

Damages When Defendants Do Not Comply.—Where the defendants did not avail themselves of the privilege given them under this section, the damages that may be awarded would include punitive as well as actual damages. Pentuff v. Park, 194 N. C. 146, 158.

Damages as "Property."—The right to have punitive damages assessed is not property, but the right to recover actual or compensatory damages is property. Osborn v. Leach, 135 N. C. 628, 633, 47 S. E. 811.

Defendant's Pleading.—In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

§ 2431. Anonymous communications.—The two preceding sections shall not apply to anonymous communications and publications. (Rev., s. 2014; 1901, c. 557, s. 3.)

An article signed "Smith" is not an anonymous publication under this section. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

§ 2432. Charging innocent woman with incontinency.—Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable. (Rev., s. 2015; Code, s. 3763; R. C., c. 106; 1808, c. 478.)

See 12 N. C. Law Rev., 120.

Positive Terms.—This section in the operative part is explicit and positive. Bowden v. Bailes, 101 N. C. 612, 616, 8 S. E. 342.

Meaning of "Innocent Woman."—There is a manifest reason why the words "an innocent woman," in sec. 4230 and "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of those sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters if a "slip has been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their characters. State v. Ferguson, 107 N. C. 841, 849, 12 S. E. 574; State v. Johnson, 182 N. C. 883, 886, 109 S. E. 786.

Must Charge Adultery or Fornication.—Words which impute to a female, a wanton and lascivious disposition only, are not actionable. Lucas v. Nichols, 52 N. C. 32.

The words, which amount to a charge of incontinency, must import not merely a lascivious disposition, but the criminal act of adultery or fornication. McBrayer v. Hill, 26 N. C. 136.

Same—May Be Question for Jury.—When the words are ambiguous and admit of a slanderous interpretation, it becomes a question for the jury to determine whether they amounted to the slanderous charge of the reasonable apprehension of the hearers. State v. Howard, 169 N. C. 312, 84 S. E. 807.

Complaint.—It is not necessary that the complaint should allege that the words were "wantonly and maliciously" uttered. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

Action by Husband.—An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed on motion of the defendant, or ex mero motu, for failure of the complaint to state a cause of action. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161.

Damages.—In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the absence of proof of actual special damages, recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was marked by gross and wilful wrong, or was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

As under this section the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is per se actionable, their utterance must be followed by the same consequence as to damages as the publishing of other defamatory imputations. Bowden v. Bailes, 101 N. C. 612, 616, 8 S. E. 342.

Examples.—Sec. 4230 is the criminal statute making it a misdemeanor to slander an innocent woman. The wording is similar to this section and the following expressions which were held to amount to a charge of incontinency, though decided in criminal cases, apply equally here.—Ed. Note.

Charging a woman with having had sexual intercourse with a male dog amounts to a charge of incontinency. State v. Hewlin, 128 N. C. 571, 37 S. E. 952.

The words: "If the plaintiff (an unmarried woman) did not give birth to a child, she missed a good chance of having it," themselves imply an illicit sexual intercourse. Sowers v. Sowers, 87 N. C. 303.

Calling an innocent woman "a d—d whore," in a loud and angry manner in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute. State v. Shoemaker, 101 N. C. 690, 8 S. E. 332.

To say of a woman, that "she was kept by a man" is actionable as a slander under our act of assembly. McBrayer v. Hill, 26 N. C. 136.

Same—Not Sufficient.—The words that a woman "looked like a woman who had miscarried," do not, per se imply a charge of incontinence. State v. Benton, 117 N. C. 788, 790, 23 S. E. 432.

Calling a woman a "damned bitch" held not a charge of incontinency. State v. Harwell, 129 N. C. 550, 553, 40 S. E. 48.

CHAPTER 49

LIENS

Art. 1. Mechanics', Laborers' and Materialmen's Liens

§ 2433. On buildings and property, real and personal.—Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished.

(Rev., 2016; Code, s. 1781; 1901, c. 617; 1869-70, c. 206, s. 1.)

I. General Considerations.
II. Materials and Services Contracted.
III. Persons Entitled to Lien.
IV. Property Covered.
V. Application to Public Constructions.
VI. Application to Railroads.
VII. Waiver of Lien, Homestead, and Miscellaneous Matters.

Cross References.

For complete treatment of mechanics' lien laws, see 9 N. C. Enc. Dig. 180; 14 N. C. Enc. Dig. 818.

I. GENERAL CONSIDERATIONS.

In General.—The Constitution requires the General Assembly to "provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Art. 14, sec. 4. And the statute gives the lien "for the payment of all debts contracted for work done on the same or material furnished." In the construction of this section it is declared, in Wilkie v. Bray, 71 N. C. 205, that "in order to create the lien, the circumstances must be such as first to create the relation of debtor and creditor; and then it is for the debt that he has the lien." The effect of this ruling, which makes the statutory lien an incident to and the offspring of the contract out of which the indebtedness springs, and confines it to the party to the contract, was followed by the enactment of article 2 of this chapter which was not intended to supersede the lien of the contractor for it in direct terms gives the lien in favor of subcontractors, laborers and materialmen a preference over "the mechanics' lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. Lester v. Houston, 101 N. C. 605, 609, 8 S. E. 366.

The debt contracted becomes a lien, a charge upon the land, and that land may, if need be, be sold, or in some appropriate way applied to the payment of the debt secured by and constituting the ground of the lien. It makes no difference as to the ownership of the land if the debt for such considerations was lawfully contracted, because the land is benefited by the labor so done on or about it, or by the materials furnished. The intention is that the land shall be charged by a lien with the costs of the benefits so extended to it, whether the benefits arise from labor done in building or repairing houses, in cultivating the land, building fences, ditching, felling trees, or the like, or from the erection of mills of any kind on it, or from supplying machinery, fixtures or any "material furnished" for such purpose. This is a just and reasonable interpretation of the statute. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 619, 16 S. E. 857.

This and the following sections under the topic of liens are remedial, and their clear purpose is to give contractors, subcontractors and laborers liens upon property as therein prescribed and provided, to secure the payment of money due for labor done or material supplied on or about the same. To that end its language, phraseology, and scope are broad and comprehensive. There are few, if any, express exceptive provisions in it, and, in the absence of them, exceptions and limitations affecting such liens can not be allowed unless by necessary implication. The object is to give a lien on particular property deriving particular benefit in favor of classes of persons whose claims are supposed to have particular merit. Chadbourn v. Williams, 71 N. C. 444; Wooten v. Hill, 98 N. C. 48, 3 S. E. 846; Burr v. Maultsby, 99 N. C. 263, 6 S. E. 108; McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 617, 16 S. E. 857.

A mechanic's lien may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as the buildings erected thereon. Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 128, 136, 35 L. Ed. 961.

Origin of Lien.—Mechanics' liens were unknown in common law and equity jurisprudence both of England and of this county. They were clearly defined and regulated in the civil law. Where they exist in this country they are creatures of local legislation. Canal Co. v. Gordon, 6 Wall 561, 571, 18 L. Ed. 894.

Priority of the Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 660, 14 S. E. 35.

"Mechanics'" and "Laborers'" Liens Distinguished.—When the contractor undertakes to put up a building and complete the same, the contract is indivisible and his "mechanic's lien" embraces the entire outlay, whether in labor or material, being for "work done on the premises," i. e., for betterments on it. The "laborer's lien" is solely for labor performed. The mechanic's lien is broader and includes the "work done," i. e., the "building built" or superstructure placed on the premises. Broyhill v. Gaither, 119 N. C. 443, 445, 26 S. E. 31.

Contractor Need Not Himself Perform the Labor.—The constitutional provision for giving to mechanics and laborers liens for their work, and the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors, who do not themselves perform the labor or furnish the materials used, but procure it to be done through the agency of others. Lester v. Houston, 101 N. C. 605, 8 S. E. 366.

Mere Knowledge Not Sufficient.—"Mere knowledge that work is being done or materials furnished on one's property does not enable the person furnishing the labor or materials to obtain a lien, since there is no privity between the owner and the person furnishing the labor or materials." 3 N. C. Law Rev. 65.

Property Subject to the Lien Must Be Sold First.—The property to which the lien attaches is specially devoted to the satisfaction of the plaintiff's claim, and hence it must be sold before other property may be resorted to. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 621, 16 S. E. 857.

When Itemized Statement Unnecessary.—Where a materialman's lien under this section, is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Sufficiency of Itemized Statement.—Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material which he has furnished the owner of the building upon which he claims his lien under this section, showing on several specific dates "money advanced for payroll," "furnace contract, etc., each in stated amounts, it is held a sufficient itemization of his claims as required by the statute. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Statement Presumed Correct.—Where a lien filed under the provisions of this section gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Affidavit.—An affidavit to a lien filed under this section that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract"; Held, sufficient to show a complete contract for the furnace at the price itemized in the statement. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Priority of the Lien.—The lien for labor and material furnished to the owner of a building under the provisions of this section and notice filed as required by § 2469, and action for its enforcement brought as required by § 2470, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Finding that Contract Entire.—Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building his finding that the contract was "to do certain work and furnish certain materials for a stated amount" under the evidence in the case is interpreted to mean that the contract referred to was entire. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Cited in Atlas Supply Co. v. McCurry, 199 N. C. 799, 156 S. E. 91.

II. MATERIALS AND SERVICES CONTRACTED.

Meaning of "Materials Furnished."—The lien arises in favor of and to secure the payment of "any and all debts contracted for work done on the same or materials furnished." By the term "materials furnished," is meant something furnished to be appropriated, used and pertinently applied on the land, devoted to some purpose no matter what, so that the purpose be lawful. The purpose is to secure the debt contracted for materials furnished on or about or connected with the land in connection with the purpose to which it is devoted in whole or in part. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 619, 16 S. E. 857.

Plans and specifications of the architect are not "material" within the meaning of this section. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

No Lien upon the Materials as Distinct from the Building.—Several of the states have lien laws very similar in phraseology to this section, and the construction put upon them has not been uniform. In some of them it has been held that there is a lien on the building, etc., for materials furnished for the purpose or with the understanding that they were to be used in the erection or repairing of a building, whether so used or not; in others, that the materialman had a lien for the materials furnished, with the understanding that they were to be used in the construction of a building, although they were not used for such a purpose; and in others, with lien laws more resembling our own, that no lien can be acquired upon materials furnished for a building, etc., as distinct from the building, but only upon the building, etc., in the construction or repairing of which they are used. The latter is the proper construction of this section. Lanier v. Bell, 81 N. C. 337, 338.

But in the case of construction of a municipal building, in order for the subcontractor or materialman to have a claim against the bond of the contractor, it is not necessary that the materials furnished should have been actually used in such building; it is sufficient if they were contracted for that purpose. See Annotations to sec. 2445.

Under this section the "material furnished," must be such material as enters into and becomes a part of the property and adds to its value. Pocahontas Coal Co. v. Henderson Elect. Light, etc., Co., 118 N. C. 232, 235, 24 S. E. 22.

Service or Materials Must Have Bettered the Property.—This section is construed in Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 714, as meaning that the "Legislature has provided a lien only when the service or labor is for the betterment of property on which it is bestowed, leaving the laborer in all other cases to secure himself as at common law"—i. e., by retaining in his possession same. Glazener v. Gloucester Lumber Co., 167 N. C. 676, any property on which he makes repairs until paid for the 679, 83 S. E. 696.

Meaning of Term "Contracted."—The lien is given for the amount due upon debts contracted. But in this connection it is permissible to give the term "contracted" the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. Ball v. Paquin, 140 N. C. 83, 95, 52 S. E. 410.

III. PERSONS ENTITLED TO LIEN.

Lien to "Laborers and Mechanics," Excusive.—In Whitaker v. Smith, 81 N. C. 340, it was held that this section gave a lien to "Mechanics and Laborers" exclusively, and that an "overseer" was not a laborer, and reference made to 8 Pa. St. 168, where it is held that an engineer is not a laborer. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433.

Whatever may be the law, as declared in other jurisdictions, it is the settled principal in this State, that a mechanic or laborer, within the meaning of the lien laws, is one who performs manual labor—one regularly employed at some hard work, or one who does work that requires little skill, as distinguished from an artisan. Whitaker v. Smith, 81 N. C. 340; Stephens v. Hicks, 156 N. C. 239, 240, 72 S. E. 313.

The provision of the Constitution requiring the General Assembly to provide liens for mechanics and laborers, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers. Whitaker v. Smith, 81 N. C. 340, 341. See Lester v. Houston, 101 N. C. 605, 8 S. E. 366, where it is held that the contractor or materialmen need not himself furnish the labor or the materials.

An overseer is not a mechanic or laborer under the lien law, and is not entitled to a lien on the building and premises, where his work is done or labor performed, for the price or value of his services. The case of Cook v. Ross, 117 N. C. 193, is also to the same effect. There it was held that one who, under a contract, assists the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so as to put it in proper condition for the manufacture of yarns, was in no view justified by our statute, a mechanic or laborer. Stephens v. Hicks, 156 N. C. 239, 241, 72 S. E. 313.

Architect Not a Laborer or Mechanic.—An architect who furnishes plans and specifications for a building is not a mechanic or laborer within the meaning of this article and he has no lien thereon for the same. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

IV. PROPERTY COVERED.

Any Real Property.—The phraseology of this section and the purpose of it are comprehensive. The lien prescribed attaches, in the case provided for, to any real property, whether it be denominated "a lot or farm," or a storehouse site, a mill site, a water reservoir site, or the like. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 619, 16 S. E. 857.

House and Lot.—Where a house is built by a contractor for the owner upon an undivided tract of 80 acres in the country, the mechanic's lien attaches to the whole tract, especially where it appears that the house alone, apart from the tract of land, would be of comparatively little value. The fact that a house and improvements, built by a contractor upon a tract of 80 acres belonging to the owner, are enclosed by a fence including about three acres is not a segregation or division of the house from the tract so as to confine the mechanic's lien to the enclosure. In such case, though the lien is upon the whole tract, it should be divided, if practicable and desired by the defendant, in making the sale, and the parts sold in such order as he may elect, so that, if possible, the lien may be discharged without exhausting the entire tract. Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31.

V. APPLICATION TO PUBLIC CONSTRUCTIONS.

Not Applicable to Public Buildings, etc.—The lien laws were not intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the sovereign State of any public or quasi public corporation in the exercise of its delegated sovereign powers. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 627, 16 S. E. 857.

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon, and material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed for its enforcement; and where the property is not subject to this lien, such as public buildings, etc., no duty or obligation is imposed upon the owner in respect to such claimants. Noland Co. v. Board, 190 N. C. 250, 129 S. E. 577.

Same—Courthouse.—A courthouse can not be made subject to any lien for labor materials. Snow v. Board, 112 N. C. 335, 17 S. E. 176; Pratt Lumber Co. v. Gill Co., 278 Fed. 783, 787.

Same—Schools.—A building used for graded school purposes is a public building upon which no lien can be acquired, except with legislative sanction. Gastonia v. McEntie-Peterson, etc., Co., 131 N. C. 363, 42 S. E. 858; Snow v. Board, 112 N. C. 335, 17 S. E. 176; Morgantown Hardware Co. v. Morgantown Graded Schools, 151 N. C. 507, 66 S. E. 583.

Same—Highways.—One contracting to construct a highway has, under this section, no lien on the highway; nor have the subcontractors, laborers or materialmen. Pratt Lumber Co. v. Gill Co., 278 Fed. 783.

Same—Reason of the Rule.—The reason upon which the courts hold that the statutory lien given contractors, subcontractors, materialmen, and laborers upon buildings or other improvements upon real property for work, material, and labor does not extend or apply to public buildings is that such buildings, being held for public governmental purposes, can not be sold under execution or other final process, and applies with peculiar force to materials furnished or labor performed in the construction or repair of public highways. Pratt Lumber Co. v. Gill Co., 278 Fed. 783, 788.

VI. APPLICATION TO RAILROADS.

Not Applicable to Railroads.—This section does not apply to railroads. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433. This conclusion is supported by the intimation of the Supreme Court in Whitaker v. Smith, 81 N. C. 340. Id. But see Dunavant v. Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837, where it was held that where a contractor, who does work or furnishes materials for the construction of a railroad, is entitled to file a lien on the property of the company. See also sec. 2444 as to the remedy of a laborer for a railroad contractor.

The Supreme Court of Iowa in Nelson v. R. R. Co. * * * construing a statute which resembles this section held that a railway was not a building within the meaning of their mechanic's lien law. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433.

VII. WAIVER OF LIEN, HOMESTEAD, AND MISCELLANEOUS MATTERS.

Waiver of the Lien.—In an action brought to subject a

vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale which was made to third parties and agreed to accept three notes secured by a second mortgage on the vessel as security, it was held that such agreement was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser. Kornegay v. Styron, 105 N. C. 14, 11 S. E. 153.

As to whether one furnishing coal to a corporation used in the manufacture of its cotton products can claim his lien on the facts of this case, under the provisions of this section is a quere. But his failure to enforce his asserted lien under the provisions of sec. 2474, deprives him of whatever right thereto he may have had. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

The homestead right is not affected by a lien for materials furnished and used in improvements upon land covered by homestead, and a statute which gives such lien is unconstitutional. Cumming v. Bloodworth, 87 N. C. 83. See also, Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31.

Priority of Homestead over Material Lien.—The "material lien" is by virtue of the statute only, and does not come under the constitutional priority given to the "mechanic's lien for work done on the premises" over the homestead exemption. Cumming v. Bloodworth, 87 N. C. 83; Broyhill v. Gaither, 119 N. C. 443, 445, 26 S. E. 31.

Contractor Agent of Owner—Rights of Materialman.—Where one has furnished the owner at the request of the contractor, materials to be used in his building, and by the terms of the written contract, the contractor is the agent of the owner for that purpose, the one so furnishing the material may acquire and enforce his lien upon the building, under the provisions of this section and secs. 2469, 2470. North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 135 S. E. 115.

Supervision by an architect of work done upon a building is not the character of work which falls within the intent of this section. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

Work Done, Materials Furnished under the Same Contract.—Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount. Isler v. Dixon, 140 N. C. 529, 53 S. E. 348.

Claim of Contractor to Proceeds of Insurance Policy.—The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

§ 2434. Buildings on married woman's land.—The preceding section applies to the property of a married woman when it appears that such building was built or repaired on her land with her consent or procurement. In such case she shall be deemed to have contracted for such improvements. (Rev., s. 2016; Code, s. 1781; 1868-70, c. 206; 1901, c. 617.)

Editor's Note.—Formerly, a married woman could not be bound by any contract affecting her real or personal estate, unless it was executed in the manner prescribed by law. The requirements for such a contract, with certain exceptions, were the written consent of the husband and privy examination of the wife. If these formalites were lacking, the contract, as affecting her estate, was invalid. Flaum v. Wallace Bros. (1889), 103 N. C. 296, 9 S. E. 567; Farthing v. Shields (1890), 106 N. C. 289, 10 S. E. 998; Loan Ass'n v. Black (1896), 119 N. C. 323, 24 S. E. 481; Ball v. Paquin (1905), 140 N. C. 83, 52 S. E. 410. Consequently there was no valid debt upon which a lien could be based. The court in numerous cases emphasized the language of the lien statute, which provides for a "lien for the payment of all debts contracted for work done or materials furnished." Section 2433. Since the married woman was incapable of contracting in such cases, there could be no debt to support a lien. In Farthing v. Shields, 106 N. C. 289, 10 S. E. 998, the court held that the power of a married woman to charge her real estate is measured by her power to dispose of the same; hence, if she had expressly charged the debt on her lands with the written assent of her husband, it would be of no avail without her privy examination. A thorough discussion of this may be found in Ball v. Paquin, 140 N. C. 83, 52 S. E. 410, and the cases there cited by Judge Connor.

The law was changed, and these cases were overruled, by the adoption of this section. The section was held to be constitutional in Finger v. Hunter, 130 N. C. 529, 41 S. E. 890, thus making it possible to charge a married woman's property with a lien for labor or materials furnished for improvements to her real estate without any of the formalities previously required. The law was further changed by the Martin Act (sec. 2507) in 1911, which conferred upon married women a complete capacity to contract with third persons. Since then, she is as free to deal with third persons for improvements to her land, as if she were unmarried. Further, it is no longer necessary for a husband to join with his wife in contracting for such improvements. The fact that the owner of land is a married woman does not make any difference, when she is dealing with third parties, as far as the imposition of mechanics' or materialmen's liens is concerned.

But in order for a husband to subject the separate property of his wife to a lien for improvements placed thereon by him, there must be a contract executed according to the formalities of sec. 2515. While the Martin Act and this section abrogated the above formalities in the cases when a married woman contracts with persons other than her husband, they did not change the law with respect to the requirements of section 2515, in the case where a married woman contracts with her husband for improvements to her separate property, and the husband seeks a lien for himself.

From the reasoning of Kearney v. Vann, 154 N. C. 311, 70 S. E. 747, it would seem to follow that the husband might obtain a lien on his wife's land in the situation where the wife has contracted with a third party for the improvement of her land, and such third party has secured materials or labor from the husband. The husband, as a subcontractor, would be in a better position than the husband, as a principal contractor. Although no case involving these identical facts has been found, it would seem that section 2515 applies only to contracts entered into directly between husband and wife, and that the husband, as a subcontractor, is entitled to a lien under the provisions of the lien statutes.

Conversely where the husband contracts with the wife, but not in compliance with the requirements of section 2515, as a result of which he acquires no lien upon the wife's property, the question arises whether a subcontractor or materialman, who furnishes labor or material to the husband as contractor, has a lien upon the wife's property. Looking at the statutes and the cases in North Carolina, the conclusion in answer to this question seems to be that section 2515 has nothing to do with the case where a third party is seeking to impose a lien on the wife's land, but embraces only contracts between husband and wife. Payne, etc., Bros. v. Flack, 152 N. C. 600, 68 S. E. 16; Rose v. Davis, 188 N. C. 355, 124 S. E. 576; C. S. sections 2433, 2434. As already discussed, no formal contract is necessary between a land owner and contractor, to make improvements on the land, in order that a subcontractor may get a lien. The essential thing is that the land owner and contractor be in a principal-agent relation.

The reason why the subcontractor is put in a better position than the husband, in the above instance, is due to the fact that the wife may consent or procure improvements on her property through her husband as her agent with or without a formal contract. From article in 3 N. C. L. Rev. 65.

Prior to the enactment of this section the court in Thompson v. Taylor, 110 N. C. 70, 14 S. E. 513, said that the lien, given by the Constitution and statute for work and labor done and material furnished, was predicted upon a valid contract, and, as a married woman had no capacity to make such a contract, her property could not be subjected to such lien. Ball v. Paquin, 140 N. C. 83, 95, 52 S. E. 410.

Presumption of Gift between Husband and Wife.—The construction that the husband can acquire a lien upon his wife's property under this section is not in accordance with the relationship existing between husband and wife, as recognized by law, and would convert every gift of money used in improving her property into a liability. The presumption of law arising from the relationship of the parties is that improvements placed on the land of the wife by the husband are a gift. Arrington v. Arrington, 114 N. C. 116, 119, 19 S. E. 278. This view is further strengthened by the language, "she shall be deemed to have contracted for such improvements." The Legislature inserted this language because of the decisions of the court, "that there must be a debt due from the owner of the property before there can be a lien." Baker v. Robbins, 119 N. C. 289, 25 S. E. 876; Weathers v. Borders, 124 N. C. 610, 32 S. E. 881, and in order to sustain the

position of the plaintiff it must be held, not only that the husband has a lien, but that the relation of creditor and debtor exists between him and his wife. Kearney v. Vann, 154 N. C. 311, 315, 70 S. E. 747.

Not Applicable to Lien Filed by Husband.—This section giving a lien on the property of a married woman for work done on her land, does not include a lien on the wife's land filed by her husband for work done, etc.; and that the husband having no lien, his heirs can acquire none after his death. Kearney v. Vann, 154 N. C. 311, 70 S. E. 747.

Implied Contract Arising by Estoppel.—In a case of a married woman standing silent when improvements are being placed upon her house, receiving the benefit, and then defying the contractor because she had made no valid express contract; this section now makes her property subject to lien, upon the implied contract arising upon her conduct, as it would in regard to any one else under the same circumstances. Payne, etc., Bros. v. Flack, 152 N. C. 600, 601, 68 S. E. 16.

Payment by W to H, before Notice from Subcontractor.—In an action to enforce a lien for material furnished for the house of feme covert, being repaired on her land with her assent, it may be shown in defense that she had contracted with her husband for the repairs; and when there is evidence tending to show that plaintiff furnished the husband with the materials, the plaintiff is a subcontractor, and her payments to the husband in full before notice given by the materialmen frees her from liability to them, under section 2438. Payne, etc., Bros. v. Flack, 152 N. C. 600, 68 S. E. 16.

Lien against Tenants by Entireties.—Under the decisions of the Supreme Court of this State which establish a rule of property controlling in the federal courts in that state, a conveyance of land to a husband and wife vests them with an estate by entireties, which cannot be aliened, burdened, or otherwise affected except by their joint action, and a mechanic's lien cannot be acquired thereon through a contract with the husband alone. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

Where the wife and her husband held the title to lands by entireties and they contract for materials used in a building thereon, those furnishing the material may acquire a lien on the property by complying with the provisions of this chapter. Finch v. Cecil, 170 N. C. 72, 86 S. E. 992.

More than Mere Knowledge by Wife Is Necessary As to Husband.—Under this section by which the lands of a wife become subject to a mechanic's lien only for improvements made with her "consent or procurement," something more than mere knowledge that her husband is making the improvement is required. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

No Express Contract Necessary.—This section does not even require an express contract by her, but provides that when she "consents or procures" the building to be erected or material furnished she shall be deemed to have contracted for such improvement, and her property thereupon becomes subject to liens if filed. Finch v. Cecil, 170 N. C. 72, 73, 86 S. E. 992.

§ 2435. On personal property repaired.—Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof. (Rev., s. 2017; Code, s. 1783; 1869-70, c. 206, s. 3.)

In General.—This section, is within the police power of the State and in addition to the common-law lien given artisans on personal property repaired by them, while in their possession, for the reasonable value of the repairs, provides for its enforcement by foreclosure in accordance with its stated terms. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

To Whom Section Applies.—The requirement of this section, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

Same—Vendee of Car with Mortgage to Vendor.—Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at his instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. Johnson v. Yates, 183 N. C. 24, 110 S. E. 630.

Retention of Possession Essential—At Common Law.—At common law where a laborer repaired a wagon and surrendered it to the owner before payment, the laborer has no lien. Possession is absolutely necessary to the existence of the lien. McDougall v. Crapon, 95 N. C. 292. Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 714; McDougall v. Crapon, 95 N. C. 292.

Same—Under this Section.—The lien on personal property given by this section applies when possession is retained by the mechanic. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 83 S. E. 696. If the mechanic or artisan surrenders possession of the property, he loses his lien. Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 344, 32 S. E. 714; Block v. Dowd, 120 N. C. 402, 27 S. E. 129; McDougall v. Crapon, 95 N. C. 292. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 678, 83 S. E. 696.

Thus where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, it was held that the laborer had no lien on the wagon, either at common law or under the statute for his work done and materials furnished in making the repairs. McDougall v. Crapon, 95 N. C. 292.

The mechanic or artisan may exercise his common law right to retain the property, and this section, recognizing the right, authorizes him to advertise and sell and pay himself, after the specified period of possession. It is a necessary consequence that the lien is lost when possession is given up to the owner, as well as the statutory method of enforcing it, since these rights are incident to and dependent on possession, both at common law and under the provisions of this section. "The pledgee," in the words of a recent author, "certainly loses the benefit of his security, whenever, by a complete out and out delivering back to the pledgor, he voluntarily places the property beyond his own reach." Schou. Pers. Prop., 515; McDougall v. Crapon, 95 N. C. 292, 296.

Where a mechanic repairs certain personal property at the request of the lessee, and without request or knowledge on the part of the owner, and the mechanic never has possession of the property, but possession is returned to the owner by the lessee upon the termination of the lease, the mechanic may not hold the owner liable for the reasonable value of the repairs, this section being applicable only where the mechanic retains possession of the property. Broadfoot Iron Works v. Bugg, 208 N. C. 284, 180 S. E. 62.

Where the purchaser of an automobile gives the seller a title-retaining contract to secure the balance of the purchase price, and thereafter gives a second lien on the car to another, and later the second lienor takes possession from the purchaser without legal process and has the car repaired, the second lienor is not the owner or legal possessor of the car within the intent and meaning of this section, and the one making the repairs obtains no lien therefor under the statute and is not entitled to possession as against the first lienor. Willis v. Taylor, 201 N. C. 467, 160 S. E. 487.

Possession of Automobile Obtained from Mechanic by Fraudulent Representations.—Under the common law and the provisions of this section, one who repairs personal

property loses his lien thereon by voluntarily surrendering possession to the owner, but where an automobile has been repaired and the artisan or mechanic is induced to part with possession upon false and fraudulent representations made by the owner that his check for the payment of the repairs was good and that he had sufficient funds in the bank for its payment, and the mechanic relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally within the intent and meaning of the statute, and the mechanic does not lose his lien for the value of the repairs done by him. Reich v. Triplett, 199 N. C. 678, 155 S. E. 573.

Filing Notice Not Required.—This section is a self-executing enactment, conferring upon the mechanic artisan the means of making his debt out of the property by his own act, in selling after thirty days' retention without the intervention of judicial proceeding, either in the superior court or that of a justice of the peace; and section 2470, which, for the preservation of the lien, requires notice of it to be filed within six months after completing the labor, cannot have been intended for a case in which as under this section a resort to any court is unnecessary, and a complete and efficient measure of relief is committed to, and may be obtained by, the party's own act. McDougall v. Crapon, 95 N. C. 292, 295.

The enactments as to filing notice must have been intended for cases where possession is not in the mechanic or artisan, and where an action is necessary for his relief. Id.

Lien on Timber Manufactured into Lumber, etc.—Under this section, one who cuts timber and manufactures it into lumber for a corporation before a receiver is appointed therefor has the right to retain the possession of such lumber until his lien is discharged by payment. Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838. See next section.

One who enters into a contract to cut, haul and raft logs after the standing timber upon lands has been felled for the purpose, has, while the logs are in his possession, a lien thereon for the services thus performed, under the provisions of this section, the timber after its severance from the land being regarded as personalty. Thomas v. Merrill, 169 N. C. 623, 86 S. E. 593. See next section.

Sale Restrained Where Mechanic's Claim Controverted.—Where one, who has the right under this section of the Code to retain possession of and to sell personal property for the purpose of defraying his charges, is made a party to an action in the nature of a creditor's bill against the owner in which the nature and amount of claimant's debt are in dispute, he will be restrained from making a sale of the property until such contentions are settled. Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838.

Priority of Lien.—The lien created by this section is superior to a vendor's lien, or to a mortgage lien. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

A mechanic's lien is given preference under this section to a mortgage lien though the latter be prior in point of time. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603. For a note upon this case, see 1 N. C. Law Rev. 127 where the reasons of holding are discussed.

This conclusion arrived at by the court is analogous to liens in admiralty where every hypothecation of the vessel which is effected to preserve it from deterioration or loss is held to be superior to other liens prior in point of time, on the theory that except for such preservation the prior lien would be worthless. Ed. Note.

§ 2436. Laborer's lien on lumber and its products.—Every person doing the work of logging, or of cutting, or sawing logs into lumber, getting out wood pulp, acid wood or tan bark, has a lien upon the said logs or lumber for the amount of wages due them, and the said lien shall have priority over all other claims or liens upon said lumber, except as against a purchaser for full value and without notice thereof: Provided, any such laborer whose wages for thirty or less number of days performed are due and unpaid shall file notice of such claim before the nearest justice of the peace in the county in which said work has been done, stating the number of days of labor performed, the price per day, and the place where the lumber is situate, and the person for whom said labor was performed, which said statement shall be signed by the said laborer or his attorney, and the said laborer shall also give to the owner thereof, within five days after the lien has been filed with the justice of the peace, as aforesaid, a copy of said notice as filed with the said justice of the peace. If the owner cannot be located, then notice shall be given by attaching said notice on the logs or lumber, wood pulp, acid wood or tan bark upon which the labor sued for was performed, and any person buying said lumber or logs, wood pulp, acid wood or tan bark after such notice has been filed with the nearest justice of the peace, shall be deemed to have bought the same with notice thereof, but no action shall be maintained against the owner of said logs or lumber, wood pulp, acid wood or tan bark or the purchaser thereof under the provisions of this section unless same is commenced within thirty days after notice is filed with the justice of the peace by such laborer, as above provided. (1913, c. 150, s. 6; 1929, c. 69.)

Editor's Note.—The Act of 1929 added the word "logging" in the second line and "logs" in the third line of this section.

Under the provision of this section, prior to the amendment of 1929, persons who cut and log timber to a mill under a contract to do so at a fixed price are not entitled to a lien for such services, this interpretation of this section being strengthened by the fact that the amendment of 1929 included within the meaning of the statute those who were engaged in logging to the mill. Graves v. Dockery, 200 N. C. 317, 156 S. E. 506.

Work Done Directly by Claimant and in Betterment of Property.—Under this section the work must have been done directly by the claimant in betterment of the property upon which the lien is alleged to rest, thus one who aided in making the lumber by taking the boards from the saw as they were cut, is entitled to a lien, but one who is employed in the blacksmith shop as repairer of cars used as part of the plant, and one, who worked on the car track and repaired the bridges are not so entitled. Thomas v. Merrill, 169 N. C. 623, 627, 86 S. E. 593.

Compliance with Statutory Requirements Necessary. — In an action to establish a laborers lien upon manufactured lumber, under the provisions of this section, the plaintiff must show compliance with the various statutory requisites; and a charge as to notice that the jury should return a verdict for the plaintiff should they find that he attached "the notice to the lumber" on the defendant's yard, is deficient and erroneous in leaving out the question as to whether the defendant had been served with a copy of the claim within five days after filing the lien with the justice of the peace, or that he could not be found. Bryson v. Gennett Lumber Co., 171 N. C. 700, 89 S. E. 26.

Right of Employee of Contractor against the Owner. — Where a laborer in the manufacture of lumber employs another laborer to assist him in his work, and the latter seeks to enforce the lien given by this section, for the value of the work he has done, it must be made to appear that the owner owed his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who while indebted to his contractor, and insolvent, might otherwise pass the title to a bona fide purchaser for value, without notice of the lien. Bryson v. Gennett Lumber Co., 171 N. C. 700, 89 S. E. 26.

Repairing Railroad Track or Equipment. — Under contract, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. It was held that work done in repairing the track, equipment, etc., was not in contemplation of this section, so as to give those preforming these services a lien on the logs and lumber used or manufactured by the plant; nor was a lien upon the plant held, for the material had not been used in its construction as betterments. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 83 S. E. 696.

Priority of Lien.—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by this section is superior to the lien given to the contractor there-

for, or any other person. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 83 S. E. 696.

§ 2436(a). Lien for processing certain goods. —All persons, firms, partnerships and corporations engaged in the business of finishing, bleaching, mercerizing, manufacturing, dyeing, weighing and printing or otherwise processing cotton, wool, silk, artificial silk or goods of which cotton, wool, silk, artificial silk forms a component part, shall be entitled to a lien upon the property and goods of others, which may come into their possession for work, labor, and materials furnished in any of said processing and said lien shall extend to any unpaid balance on account for work, labor and materials furnished in the course of any of said processing in respect to any of said goods of the same owner whereof the lienor's possession is terminated. The word "owner," as used in this and the following section shall include a factor, consignee or other agent intrusted with the possession of the goods held under said lien or the bill of lading consigning the same to him with authority to sell the same, to deliver to said factor, agent or consignee to the lienor for the purposes processed. (1931, c. 48, s. 1.)

§ 2436(b). Sale of goods at public auction. — If any part of the amount for which goods are held under said lien remains unpaid for a period of sixty days after the earliest item of said amount became due and payable the lienor may sell such goods at public auction first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the town, if any, otherwise in the county, in which the said goods are situated and at the court house door, the last publication not to be less than five days prior to the sale, and also giving five days' notice of said sale by posting in five or more public places in said county, one whereof shall be in the town or city ward in which said goods are situated, and, if the residence or past address of owner of said goods is known or can be established, sending by registered mail a copy of said notice to said owner at said address at least five days before the date of sale: Now, provided, that if said goods are readily divisible no more therefor shall be so sold than is necessary to discharge the underlying indebtedness to cover the expenses of the sale. The proceeds of sale shall be applied to payment of said indebtedness and said expenses, and the balance, if any, shall be paid to the owner or person entitled thereto. The remedy herein provided to enforce said lien shall be in addition to any other provided by law. (1931, c. 48, s. 2.)

Art. 2. Subcontractors', etc., Liens and Rights against Owners

§ 2437. Lien given subcontractors, etc., on real estate.—All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given. (Rev., s. 2019; Code, ss. 1801, 1803; 1880, c. 44, ss. 1, 3.)

In General.—Soon after the enactment of section 2433 et seq., it was held by the Supreme Court that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor (Wilkie v. Bray, 71 N. C. 205), and as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of this and the following sections relative to the subcontractor's lien. Morganton Mfg. etc., Co. v. Andrews, 165 N. C. 285, 292, 81 S. E. 418.

The injustice of permitting the labor and material of one man to be used to enhance the value of the property of another without compensation, and also that the owner ought not to be required to pay the contractor and then have to pay for labor and material when he had not agreed to do so, led to the enactment of this and the following sections in an effort to adjust the rights of the parties along lines that would be just to both. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 706, 90 S. E. 923.

Definition of Subcontractor. — Mr. Phillips in his book on Mechanics' Liens, sec. 44, describes a subcontractor: "One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." And Mr. Kalland in his book on the same subject, sec. 3, uses language of similar import, and says: "Although the original contractor may sub-let his entire contract, and neither himself performs labor or furnishes materials in a literal sense, yet he will be entitled to a lien, for each subcontractor is an agent for the performance of a portion of the entire contract, and the act of the agent is in law the act of his principal." Lester v. Houston, 101 N. C. 605, 611, 8 S. E. 366.

Persons employed by an agent of the principal contractor to perform certain work on the premises may not under this section recover of the owner for the value of such labor merely upon a showing that they performed the work and that the owner received the benefit thereof. Price v. Asheville Gas Co., 207 N. C. 796, 178 S. E. 567.

Contractor's Lien Though Subordinated, Not Lost. — It is quite manifest that our statute gives to the contractor, under whom his employees and agents work, the lien provided in section 2433 and though subordinated to the lien of the latter under this section, and only displaced when its enforcement would be prejudicial to them, when these are paid the contractor's lien becomes absolute and unconditional. Lester v. Houston, 101 N. C. 605, 610, 8 S. E. 366.

Contractor's Lien Not Superseded.—The lien given by this section was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers, and materialmen a preference, "the mechanic's lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. The legislation is intended to extend the remedy to those who work or furnish materials from which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enables them to secure the payment of what is due them, indebtedness due from the debtor to the contractor. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 293, 81 S. E. 418; Lester v. Houston, 101 N. C. 605, 8 S. E. 366.

Relation of Debtor and Creditor between the Owner and the Subcontractor.—It is declared in many cases that the basis for mechanics' liens is the relation of creditor and debtor between the owner and sub-contractor and materialmen, Boone v. Chatfield, 118 N. C. 916, 24 S. E. 745; Weathers v. Borders, 124 N. C. 610, 32 S. E. 881; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923, and that the general principle of the lien laws is that the relation of debtor and creditor must exist and that there can be no lien without a debt.

It is evident that the statute does not in express terms create this relation between these parties and that such a relation must be inferred by implication. The basis of such implication may be traced to the fact that the contractor is obliged or intended to deal with the subcontractor and materialmen in doing work and securing ma-

terials, and that the principal contractor is an agent of the owner for the purpose of creating valid debts. 3 N. C. Law Rev. 64.

Whatever may be the basis of the inference that there exists the relation of debtor and creditor between the owner and the subcontractor, it is apparent that this section does not, even by implication, create a relationship of debtor and creditor except as to the extent of liens acquired in accordance with its provisions. Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583. Ed. Note.

No privity of contract between the owner and the subcontractor is established by this section, so as to enable the former to sue the latter for a debt; but it merely confers upon the materialman a lien upon the property, if the property is subject to lien, but not if he fails to acquire a lien by the laches of himself or of the contractor, whose negligence will be imputed to him when he fails to protect his own interests in the way prescribed by the statute. Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 511, 66 S. E. 583.

Statute Furnishes Double Security. — The statute (this section and section 2442) furnishes a double security to those furnishing material, etc., to the contractor and who give the statutory notice to the owner in giving them a lien upon the property if enforced by suit within six months, and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among the claimants thereto entitled, the latter security not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Subcontractor Substituted to the Rights of Contractor. — Where the lien arises under the provisions of this section, it does so by substituting the claimant to the rights of the contractor, enforcible, as stated, against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well-considered cases it is said to amount to an assignment pro tanto of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant. Atlas Powder Co. v. Denton, 176 N. C. 426, 432, 97 S. E. 372.

Lien Enforceable though Principal Contractors' Contract Not Completed.—A subcontractor may enforce his lien for labor or materials, as prescribed by this and the following sections, against the owner of the property though the contract with the principal contractor has not been completed, or even if it has been abandoned. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

Where the furnisher of material to a subcontractor has notified the owner and perfected his lien as required by this section and section 2438 and it appears by admission in the pleadings in an action to enforce the lien that the owner of the building is still indebted, to the principal contractor in a sufficient sum, this sum is applicable to the plaintiff's demand regardless of the state of accounts between the contractor and the subcontractor. Borden Brick, etc., Co. v. Pulley, 168 N. C. 371, 84 S. E. 513; Powell v. King Lumber Co., 168 N. C. 632, 84 S. E. 1032.

Time and How Subcontractors' Right Determined.—The right of one, who furnishes materials to a subcontractor, to a lien upon the building does not depend upon the state of the account between the contractor and the subcontractor, but upon the amount due the contractor by the owner at the time of the proper filing of the notice in the manner and form required. Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Amount Due from Owner a Trust Fund for Subcontractor. —The amount due the contractor and subject to the claims of materialmen who have filed their statutory notice is not a debt due by the owner to the material men in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the materialmen have not filed the required notice or acquired their lien accordingly. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Priority over Subsequent Liens.—The lien of the subcontractor, when duly filed, has precedence over all other liens attaching to the property subsequent to the time the work was commenced or the material furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

The principal contractor is a necessary party to an action to enforce the lien of a subcontractor, but a trustee in a conveyance subject to the lien, is not an essential party. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

No Lien on Public Buildings.—Neither by the enforcement of a lien, nor by anything in the nature of an equitable proceeding, nor directly by sale under execution, was it the intent of this section to subject one of its public corporations, organized as necessary to the administration of its governmental affairs, to the privation or loss of its buildings for public school purposes. Morgantown Hdw. Co. v. Morgantown Graded Schools, 151 N. C. 507, 66 S. E. 583.

No Lien on Highway.—Under this section subcontractors and materialmen have no lien upon a highway they have constructed. Pratt Lumber Co. v. Gill Co., 278 Fed. 783.

Liability of Municipality—No Lien against It.—Though no lien can be filed against a municipality, yet it will be liable to laborers and materialmen, and, for labor done and material furnished to the extent of any balance due the contractor and unpaid at the time of the notice. Scheflow v. Pierce, 176 N. C. 91, 93, 97 S. E. 167. See section 2445.

Cited in Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858.

§ 2438. Notice to owner; liability. — Any subcontractor, laborer or material man, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee refuses or neglects to retain out of the amount due the said contractor under the contract as much as is due or claimed by the subcontractor, laborer or material man may proceed to enforce his lien, and after such notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided. (Rev., s. 2020; Code, s. 1802; 1880, c. 44, s. 2.)

Notice to Be Given before Settlement with Contractor.— It is necessary, to enforce a lien on a building for materials furnished the contractor, that he file with the owner an itemized statement of the amounts due for materials, or that the materialman give notice to the owner of the amount due him before the owner settled with the contractor, and then only to the extent of the amount then due. Orinoco Supply Co. v. Masonic, etc., Home, 163 N. C. 513, 79 S. E. 964.

Same—Rule Not Affected by § 2439. — This rule is not affected by section 2439. That section is directed against the contractor, and is intended to compel him to furnish to the owner of the premises the statement necessary to give notice of claims of subcontractors and others. But if the contractor shall furnish the itemized statement, the laborer's lien will arise and be affectual. Pinkston v. Young, 104 N. C. 102, 106, 10 S. E. 133.

Same—Otherwise No Lien Attaches.—When the required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner in completing the building has paid out the balance of the contract price, no lien attaches. Orinoco Supply Co. v. Masonic, etc., Home, 163 N. C. 513, 79 S. E. 964. And the owner is justified in making payment to the contractor. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Same—Even Though Payment in Full Is Made in Advance. —In Rose v. Davis, 188 N. C. 355, 124 S. E. 576, it was held that a furnisher of material, used in the building by a contractor, acquired no lien on the building, under this section, by notice to the owner filed after the owner had paid to the contractor the full contract price; and that it was immaterial that payment in full had been made in advance, in accordance with the contract between the owner and contractor. North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 383, 135 S. E. 115.

Same—Right Statutory and Dependent upon Notice. — To share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants is a statutory right, and is dependent upon acquiring a lien on the property by giving the notice to the owner. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 90 S. E. 923.

The liens given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory and no lien can be acquired therefor unless notice has been given nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. Rose v. Davis, 188 N. C. 355, 124 S. E. 576.

Purpose of Notice—Liability of Owner for Disregarding It.—The notice required by this section is intended to charge the owner or lessee of the land to withhold so much of the money due to the contractor as will pay the subcontractor's claim. If he fails to do so, he cannot avoid his liability of paying the contractor. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35.

Where the owner of a building being erected pays according to the contract his contractor a sum of money in excess of the amount due a materialman after he has received notice, and later the contractor abandons his contract and the owner finishes the building at his loss, the materialman's lien attaches to thte building as an obligation of the owner under the provisions of this section. Blue Pearl Granite Co. v. Merchants' Bank, 172 N. C. 354, 90 S. E. 312, cited and applied; Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858, cited and distinguished. Beeson Hardware Co. v. Burtner, 199 N. C. 743, 155 S. E. 733.

That Laborers Are Working on Building Is Not of Itself Notice.—The mere fact that laborers and subcontractors are working on a building is not notice to the owner not to pay out to the contractor until it is ascertained how much is due by the latter to each and every subcontractor, laborer, materialman, etc. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Mere knowledge of the owner that certain laborers are at work on his building, or that certain persons or firms have supplied materials, is insufficient as notice to him, under this section, of any claim of lien thereon. Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146.

Unpaid Balance at Time of Notice Subject to Lien.—Where the owner of the building has paid his contractor to the time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien. Blue Pearl Granite Co. v. Merchants' Bank, 172 N. C. 354, 90 S. E. 312.

Lien Only to the Extent of Unpaid Balance at Date of Notice. — A subcontractor can enforce his right of lien against the owner of property only to the extent of any unpaid sums due the contractor at the date of giving notice to the owner of his, the subscontractor's, claim. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Notice of Lien to Justice or Clerk Not Necessary. — The lien of the subcontractor is acquired by notice to the owner, and a filing of the notice of the lien with a justice or a clerk is not necessary, this being expressly provided by section 2441. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 294, 81 S. E. 418; Porter v. Case, 187 N. C. 629, 639, 122 S. E. 483; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 706, 90 S. E. 823.

Notice to Owner's Architects Not Notice to the Owner.—The object of the notice required by the statute to be given the owner, and upon which the statutory lien for labor, material, etc., depends, is to apprize the owner of the amounts then due to those who have done labor upon or furnished materials for the building; and a statement of the materials used in the building, given by the contractor to the architect upon which the former is to be allowed a payment of a certain per cent. under the terms of the contract as the building progresses, does not meet the statutory requirements, and is insufficient to create the lien. Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146.

Owner Entitled to Deduct Damages Caused by Contractor.—Where there is an agreement for damages to the owner for delay by the contractor in the completion of the building, the owner is entitled to his damages before the distribution of the funds to the subcontractor, etc., who may not successfully contend that his damage was a personal charge against the contractor, and that it should not be allowed in preference to their claims. West v. Laughinghouse, 174 N. C. 214, 93 S. E. 719.

Remedy of Subcontractors.—The subcontractor and material furnisher having given the owner an itemized statement of material furnished by them, acquire a lien for the payment of their claims and may maintain a civil action thereon against the owner under the provisions of this section and §§ 2440, 2441, without being required to file their liens within six months, etc., under the provisions of C. S., 2469, or bring suit within six months thereafter, under those of C. S., 2474. Campbell v. Hall, 187 N. C. 464, 121 S. E. 761.

Applied in Brown v. Burlington Hotel Corp., 202 N. C. 82, 161 S. E. 735.

§ 2439. Statement of contractor's indebtedness to be furnished to owner; effect. — When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair to a railroad, with the owner thereof, it is his duty to furnish to the owner or his agent before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. (Rev., s. 2021; 1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478.)

Purpose of Section—Owner Cannot Force Contractor to Supply Statement.—The purpose of the section is to compel the contractor to supply the itemized statement, so that the laborer may be benefited, have his right faciliated, and the owner of the property may be reasonably protected. There is no liability created on the part of the owner if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that he has not paid the laborer or mechanic, or that he owes him any particular sum. Pinkston v. Young, 104 N. C. 102, 106, 10 S. E. 133.

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Statement of Contractor Issues to Benefit of Materialmen, etc.—When the contractor furnishes the owner with statements of the amounts due the materialmen, according to this section, a direct obligation of the owner to the materialmen may be created, upon which the latter may sue in their own names. Perry v. Swanner, 150 N. C. 141, 63 S. E. 611. See annotations to the next section.

Owner Liable for Paying Contractor after Receipt of Latter's Statement.—Where the owner voluntarily pays to the contractor, after the completion and acceptance of his building, the full balance of the contract price, having received the contractor's statement of persons and materials still owed by him thereon, his conduct in so doing is wrongful to the materialmen, of which he will not be permitted to take advantage to the loss of the surety on the contractor's indemnifying bond, in his action to recover thereon. Guilford Lumber Mfg. Co. v. Holladay 178 N. C. 417, 100 S. E. 597.

Personal Action by Materialmen against Owner.—A personal action against the debtor for not retaining a sum to pay the subcontractor, when the contractor has furnished him a statement of indebtedness, can be maintained against the owner, where the lien acquired has been lost by delay to enforce it. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 90 S. E. 923.

Duty of Owner to Reserve Funds to Pay Materialmen, etc.—The requirement of this section that the contractor furnish the owner of the building a statement of the persons and amounts he owes for materials, when complied with, makes it the duty of the owner to retain from the amount then due the contractor, so far as it extends, the amounts due by the latter to the materialmen, and pay it to them, and under section 2440, no payment to the contractor after such notice shall be a credit on or discharge

of the lien provided for the materialmen. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Section Not Repealed by Later Act Nor in Conflict with § 2444.—This and the following two sections are not repealed by c. 150, Laws 1913, the later act expressly purporting to be an amendment, and there is no conflict between the two acts that will fall within the repealing clause of that act; nor is there conflict between this section, and section 2444 as amended, it is the legislative intent to extend their provisions to those who furnish materials to the subcontractors of railroads; and, construing the above sections in connection with section 2028 as amended, the furnisher of materials to the contractor on an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when commenced within six months thereafter. Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Effect of Mortgages Subsequent to Notice.—Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due by the owner to the contractor relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice take cum onore, and subject to the contractor's or subcontractor's lien so acquired. Porter v. Case, 187 N. C. 629, 122 S. E. 483.

Cited in Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858.

§ 2440. Laborer, etc., may furnish statement of claim to owner; effect. — Any laborer, mechanic, artisan or person furnishing materials may furnish to such owner or his agents before he shall have paid the contractor an itemized statement of the amount owing to such laborer, mechanic or artisan employed by said contractor, architect or other person for work or labor on such building, vessel or railroad, and any person may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes. Upon the delivery of such notice to such owner or his agent the person giving such notice is entitled to all the liens and benefits conferred by law in as full and ample a manner as though the statement was furnished by the contractor, architect or such other person. And after the notice herein provided is given, no payment to the contractor shall be a credit or a discharge of the lien herein provided. (Rev., s. 2021; 1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478; 1913, c. 150, s. 4.)

Construction with Other Sections.—A letter to the owner setting forth the amount of the account for materials furnished the contractor and stating that other items were being purchased on the account, and offering to furnish an itemized statement upon request is not a sufficient notice upon which to base a materialman's lien, under this section, requiring that an itemized statement be furnished the owner manifestly, §§ 2438, 2439, 2440, 2441, and 2442 must be construed together. Huske Hardware House v. Percival, 203 N. C. 6, 164 S. E. 334.

Contractor's Statement without Laborer's Statement.—In regard to the lien arising from the contractor's giving the proper notice, it was said, in Pinkston v. Young, 104 N. C. 102, 10 S. E. 133. That if the contractor shall furnish the itemized statement under the preceding section the laborer's lien will arise and be effectual as prescribed even though the laborer or materialman has not himself furnished the statement under this section. Norfolk Bldg. Supplies Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 89, S. E. 146. And to the same effect is Butler etc. v. Gain, 128 Ill., 23.

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, it is also for the protection of the owner and the surety on the contractor's bond. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Assignment of Lien.—The statutory lien of a laborer or materialman under the provisions of this section, is assignable as in case of ordinary business contracts. Horne-Wilson v. Wiggins Bros., 203 N. C. 85, 164 S. E. 365.

§ 2441. Sums due by statement to constitute lien. — The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court. (Rev., s. 2022; 1887, c. 67, s. 2.)

Acquisition of Lien without Filing Notice.—By virtue of section 2470, the lien of a contractor must be filed in six months, but by this section, the lien of the laborer, mechanic or artisan can be acquired without filing if a statement of the amount due is rendered the owner. See annotations to § 2438. However acquired, the lien is lost under section 2474 if action thereon is not begun in six months. Hildebrand v. Vanderbilt, 147 N. C. 639, 641, 61 S. E. 620.

Same—Personal Action When Lien Lost.—But when the lien acquired is lost by not bringing suit within six months, an action can be maintained against the owner personally for his failure in his "duty to retain from the money due the contractor a sum not exceeding the price contracted for," etc. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

§ 2442. Where sums due contractor from owner insufficient; payment pro rata. — If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant. (Rev., s. 2023; 1887, c. 67, s. 3; 1913, c. 150, s. 5.)

Provisions of Section 2471 Does Not Affect Distribution under This Section.—Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed by the owner among the several claimants under the provisions of this section; and construing this section with other relevant sections of the code, it is held that it does not conflict with section 2471 requiring that liens shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk, for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 81 S. E. 418.

Remedy by Accounting.—A right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor, are incidents of the rights given the subcontractor by the provisions of this section. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 706, 90 S. E. 923.

Priority of Claims.—One who has furnished material to a contractor, and who, with others, has given the statutory notice to the owner by enforcing his lien by action within the six months, acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Preceding Three Sections Not Repealed.—This section does not repeal the three preceding section. Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Cited in Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858.

§ 2443. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor. — If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor

shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3663; 1887, c. 67, s. 4; 1913, c. 150, s. 8.)

§ 2444. Laborer for railroad contractor may sue company; conditions of action. — As often as any contractor for the construction of any part of a railroad which is in progress of construction is indebted to any laborer for thirty or less number of days labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laborer or material man may give notice of such indebtedness to said company in a manner herein provided, and said company shall thereupon become liable to pay such laborer or material man the amount so due for labor or material, and action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days labor for which the claim is made, and such notice shall be given by the material man to said company within thirty days after the materials have been furnished. Such notice to be given by the laborer shall be in writing and shall state the amount and the number of days labor and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney; and such notice of the material man shall be in writing and shall state the amount of material furnished and when furnished, and the name of the contractor to whom furnished and by whom due, and shall be signed by such material man or his attorney. The notice shall be served on an engineer, agent or superintendent employed by said company having charge of the section of road on which such labor was performed or material furnished, personally or by leaving the same at the office or usual place of business of said engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within ninety days after notice is given to the company by such laborer or material man as above provided. (Rev., s. 2018; Code, s. 1942; 1871-2, c. 138, s. 12; 1913, c. 150, s. 1.)

No Conflict between This and Section 2439.—There is no conflict between section 2439 and this section as amended; it is the legislative intent to extend the provisions of law relative to materialmen and subcontractors of railroads Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Application to Laborers Constructing Railroads. — This section applies only to laborers "constructing railroads." Glazener v. Gloucester Lumber Co., 167 N. C. 676, 678, 83 S. E. 696.

A Logging Railroad within This Section.—A logging road operated by the use of steam is a railroad within the meaning of this section, and by following the requirements of that section a lien may be obtained for work done in its construction, though under an independent contractor. Carter v. Coharie Lumber Co., 160 N. C. 8, 75 S. E. 1074.

Substantial Compliance with Statute Necessary. — The right to look beyond the contract of employment to an artificial responsibility that may be thrust upon the company under the provisions of this section is a creature of the statute, and one who claims the benefit of it must, like a mechanic seeking to enforce a lien, and upon the same principle, show a substantial compliance with the requirements of this section. Wray v. Harris, 77 N. C. 77; Cook v. Cobb, 101 N. C. 68, 7 S. E. 700; Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Where, in an action by the assignee of a number of claims due laborers by the contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account, it was held that a demurrer to the complaint was properly sustained. Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Assignment of Claim after Compliance with Statute. — After complying with the requirements of this section a laborer can assign his claim as a debt either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor. Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Time of Filing Lien and Its Precedence.—A contractor or subcontractor who does work or furnishes material for the construction of a railroad is entitled to file a lien on the property of the company within six months from the time of doing such work or furnishing materials, and when filed the lien has precedence over a mortgage registered after the work has been commenced. Dunavant v. Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837.

Misjoinder of Parties Not Fatal.—Where there were intermediate contractors for the construction of a railroad, and the assignee of claims due by the last of such contractors to laborers brought his action against the railroad company and the first contractor, it was held, that conceding that the plaintiff could in no event recover from any but the railroad company itself, under this section, yet the addition of the first contractor as a party would not be a fatal misjoinder. Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

§ 2445. Contractor on municipal building to give bond; action on bond. — Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work, under a contract or agreement made directly with the principal contractor or subcontractor. The amount of the said bond to be given by said contractor shall be equal to the contract price up to two thousand dollars, and when the contract price is between two and ten thousand dollars the amount of said bond shall be two thousand dollars plus thirty-five per cent of the excess of the contract price over two thousand dollars and under ten thousand; when the contract is over ten thousand dollars the amount of the said bond shall be two thousand dollars plus twenty-five per cent of the excess of the contract price over the sum of two thousand dollars. If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given he is guilty of a misdemeanor. Any laborer doing work on said building and material man furnishing material therefor and used therein, under a contract or agreement between said laborer or material man and the principal contractor or subcontractor, has the right to sue on said bond, the principal and sureties thereof, in the courts of this state having jurisdiction of the amount of said bond, and any number or laborers or material men whose claims are unpaid for work

done and material furnished in said building have the right to join in one suit upon said bond for the recovery of the amounts due them respectively. [Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section, shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given. Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the county in which the building, road, or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action upon the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within six months from the bringing of the action, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant pro rata of the amount of the recovery. The surety on such bond may pay into court for distribution among the claimants the full amount of his liability, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved from further liability.] (1913, c. 150, s. 2; 1915, c. 191, s. 1; 1923, c. 100; 1927, c. 151; 1935, c. 55.)

See 13 N. C. Law Rev., 100, for relation of this section to the law of contracts.

Editor's Note.—The policy underlying this section is the manifestation of that settled principle of law which aims to protect governmental agencies from undue interferences which tend to mitigate the efficient operation of the governmental mechanism. Should such agencies be subject to the general provision of law relating to mechanics' liens, public purposes would be defeated for private claims. But as the remuneration of those who bestow their labor and money upon public buildings is also an important consideration, this section adopts a middle ground by requiring that a bond be taken of the contractor conditioned for the payment of subcontractors', materialmen's and laborers' claims.

The part of this section which appears in brackets was added by the Act of 1923, c. 100. The phrase "under a contract or agreement made directly with the principal contractor or sub-contractor," at the end of the first sentence, and the phrase "under a contract or agreement between said laborer or materialman and the principal contractor or subcontractor," about the middle of the fourth sentence, were inserted by the Laws of 1927, c. 151. As to the effect of the first amendment, see 1 N. C. Law Rev. 270.

In the third from the last sentence the time for intervening was decreased from twelve to six months. Section two of the amendatory act provides that it shall not affect pending litigation. Section three of the amendatory act provides that it shall be in effect from and after November 1, 1935.

No Lien on Public School—Bond in Lieu of Lien.—Laborers and material furnishers can acquire no liens upon a public school building erected by a municipal corporation, and the contractor's bond, given under the provisions of this section is given for their benefit in lieu of the right to acquire a lien thereon. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

A material furnisher to a subcontractor, who has used the material in the construction of a public school building, can acquire no lien on the building, and where the contractor has been found by the verdict of the jury not to be liable, the materialman cannot recover the amount withheld by the schoolboard in settlement with the contractor on account of the pendency of the litigation, on the ground that the material was so used. Griffin Mfg. Co. v. Bray, 193 N. C. 350, 137 S. E. 151.

Section for Protection of Counties.—This section, requiring municipal corporations to take a bond from contractors for county buildings, is for the protection of the counties, and subcontractors and materialmen acquire no rights thereunder. Fore v. Feimster, 171 N. C. 551, 88 S. E. 977.

Not Applicable to Highway Commission.—This section does not apply to the State Highway Commission. John L. Roper Lumber Co. v. Lawson, 195 N. C. 840, 844, 143 S. E. 847.

Not Applicable to East Carolina Teachers' College. — While the board of trustees of the East Carolina Teachers' College is made a body corporate, it is not a municipal corporation within the meaning of this section. Hunt Mfg. Co. v. Hudson, 200 N. C. 541, 542, 157 S. E. 799.

Section Not Applicable to Bonds Given to State Highway Commission.—This section providing that only one action shall be brought on bonds required by said statute, and that such action shall be brought in the county in which the building, road or street is located and not elsewhere, does not apply to a bond given by a contractor to the State Highway Commission. It applies only to bonds given to a county, city, town or other municipal corporation, as required therein. Independence Trust Co. v. Porter, 190 N. C. 680, 683, 130 S. E. 547.

Purpose of 1923 Amendment.—The amendment of this section by the act of 1923 was enacted so as to protect laborers and materialmen, where the bond does not make provisions to pay them. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 635, 143 S. E. 248.

Civil Liability of Municipal Officers. — No civil liability will attach to municipal and county officers in their capacity for failure to take the bond required by this section. Warner v. Talyburton, 187 N. C. 414, 416, 121 S. E. 756. Whether they individually would be held liable civilly was left undecided in the case just cited.

Same—In Their Official or Individual Capacity.—A civil action for damages will not lie against special road supervisors of a county, either as an obligation of the county or against the supervisors individually, for failing to take the bond required for material furnishers or laborers under this section, the remedy prescribed being by indictment of the latter in their individual capacity. Hunter v. Allman, 192 N. C. 483, 135 S. E. 291; Noland Co. v. Board, 190 N. C. 250, 129 S. E. 577.

Liability of Municipality to the Extent of Unpaid Balance. —Though no lien can be filed against a municipality, yet, it will be liable to laborers and materialmen, and for labor done and material furnished, to the extent of any balance due the contractor and unpaid at the time of the notice. Scheflow v. Pierce, 176 N. C. 91, 93, 97 S. E. 167. But this holding was disapproved in Noland Co. v. Board, 190 N. C. 250, 129 S. E. 577; See Robinson Mfg. v. Blaylock, 192 N. C. 407, 412, 135 S. E. 136. Ed. Note.

Whether Materials Were Actually Used or Not Immaterial.—The materialmen have a claim against the surety on the bond required by this section, whether the materials were actually used in the building or not; for otherwise the materialmen would be compelled to stand over and compel the contractor to incorporate them in the work, and the result of such a ruling would destroy business confidence and security. Standard Land, etc., Co. v. Fidelity, etc., Co., 191 N. C. 313, 131 S. E. 754. See Moore v. Builders Material Co., 192 N. C. 418, 420, 135 S. E. 113.

Municipality May Not Withhold Funds of Contractor.— Unlike the provisions of law governing the subcontractors' and materialmen's liens on private buildings, etc., this section passed as a partial substitute for the lien statutes in an effort to place public construction somewhat on a parity with private work of a similar kind, does not contain any provision whereby the owner may withhold funds belonging to the contractor upon notice from a laborer or materialman that the work done or material furnished by him to the contractor has not been paid for; nor would the owner be justified in withholding funds due the contractor upon receipt of such notice. The contract of the laborer or materialman is

with the contractor, and in the absence of agreement or statutory provision allowing it, the owner would not be relieved, even pro tanto, of its obligation to the contractor by paying one or more of those who work for or furnish materials to the contractor. An obiter suggestion to the contrary, made in Scheflow v. Pierce, 176 N. C. 91, 97 S. E. 167, was disapproved in Noland Co. v. Board, 190 N. C. 250, 253, 129 S. E. 577; Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 412, 135 S. E. 136.

Bond Held Void.—In Maryland Casualty Co. v. Fowler, 31 Fed. (2d) 881, affirming 27 Fed. (2d) 421 it was held that under this section a school building contractor's bond, which provided that no right of action thereon should accrue to any person other than the obligee, was void in so far is affected the claims of laborers and materialmen protected by the bond.

Liability of Sureties.—Under this section the sureties on a contractor's bond for the erection of a municipal building are liable for the payment of those who furnish material used in the construction, and those doing labor therein, irrespective of the terms of the contract of indemnity, except the surety is not liable for an amount in excess of the penalty of the bond, and a judgment against the surety for an amount in excess of the penalty of the bond given is erroneous, and the surety may relieve himself from liability by paying the amount for which he is legally liable into the court for distribution. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Right of Surety as to Application of Payments.—See Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Money Loaned to Contractors.—A bank loaning money to a contractor to build a public highway may not recover against the surety on the contractor's bond on the ground that the money was used for the payment of laborers and materialmen furnishing labor and materials used upon the highway, without having thereupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the loan was for this purpose. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

And money advanced by a foreman to the "petty cash account" of the contractor to build a public highway, and used in making repairs to the machinery from time to time, purchasing materials, and paying freight thereon, where the foreman took no assignments for the purchase made from said account, were held not covered by the contractor's bond. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

The compensation for the services of a foreman necessary to the construction of a county highway is recoverable by him against the surety of the contractor's bond where the bond is given in conformity with the statute. Snelton v. Hill, 196 N. C. 494, 146 S. E. 135.

Extent of Surety's Liability.—The surety on the contractor's bond for the erection of a public building is only liable for the amount of the penalty of the bond, and upon notification of the contractor's default or demand of payment by special contract, this amount so fixed may inure to the benefit of the surety, though the amount of the penalty may be inadequate to pay the claims of laborers and material furnishers for the building. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Same—Determined in the Light of Contract and Bond.—To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond for which it is given must be construed together to effectuate its intent and purpose. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Bond Covers Claims of Materialmen under Subcontractor.—When according to the terms of its undertaking the surety on a contractor's bond for the erection of a municipal building is liable to those doing labor thereon or furnishing material therefor, this liability not only extends to such as may have furnished the material directly to the original contractor, but to those who have done so to his subcontractors. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808.

Construction of Bond and Contract Together, to Determine Liability on Bond.—The indemnity bond given by a contractor for the erection of a municipal building and the contract itself, are to be construed together upon the question as to whether provision is made for the nonpayment by the original contractor of the laborers on and material furnished for the erection of the building, the subject of the contract. Ideal Brick Co. v. Gentry, 191 N. C. 636, 132 S. E. 800; Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808. But this holding now loses much of its significance in view of the amendment which renders the bond self executory, viz., its provisions are to be construed so as to indemnify the laborers and materialmen, etc., even though there is no specific and express provision to that effect in the bond. Ed. Note.

Liability of Bond to Materialmen, etc., Conclusive Regardless of Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808.

Same—Prior to the Amendment Contrary Rule Prevailed.—Where the contractor's bond for the erection of a public building used in connection with the contract does not create a liability on the surety to pay for the materials furnished for the erection of the building, but only the municipality against loss, there is no presumption prior to the amendment of this section by Acts of 1923, chapter 100, that the bond incorporated this provision, and no liability to the surety will be thereunder created. Page Trust Co. v. Carolina Const. Co., 191 N. C. 664, 132 S. E. 804.

This section does not expressly or by implication provide that a bond taken omitting this provision shall be available to the materialmen; and where the bond fails in this respect, no liability attaches to the sureties thereon. McCausland & Co. v. Brown Const. Co., 172 N. C. 708, 90 S. E. 1010.

This section before its amendment by Laws of 1923, imposed no liability upon the surety in favor of those furnishing material, etc., unless that could be construed from the terms expressed in the bond, and in the building contract to which the bond referred. Ideal Brick Co. v. Gentry, 191 N. C. 636, 132 S. E. 800.

Conditions Taking Away Right of Indemnification Void as Contrary to Public Policy.—The policy of law with respect to mechanics' and laborers' liens, as evidenced by this section and decisions thereon, is to give protection to creditors of this class by expressly providing for laborers and materialmen a right of action against the surety on the contractor's bond for the erection of a municipal building; and hence any provision incorporated in bonds of this character that takes away this right is contrary to our public policy and the express provisions of this section and void. Ingold v. Hickory, 178 N. C. 614, 101 S. E. 525. "A person may lawfully waive by agreement the benefit of a statutory provision. But there is an imputed exception to this general rule in the case of a statutory provision, whose waiver would violate public policy expressed therein, or where rights of third parties, which the statute was intended to protect, are involved." 9 Cyc., 480, quoted with approval in Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 49, 97 S. E. 732.

Application of Section to Existing Suits.—The provisions of this section that its requirements as to the liability of the contractor's bond for the construction of a county highway shall not affect existing suits, applies to the remedy, and does not relate to those who have furnished material for the constructing of the highway before the enactment of the statute but have no action pending at that time. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Effect of Taking Note of Contractor.—The bond required by this section insures to the benefit of a materialman, even though he took the note of the contractor for the materials he furnished. Moore v. Builders Material Co., 192 N. C. 418, 135 S. E. 113; Standard Elec. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808.

Sureties Right of Subrogation to Moneys Reserved by Municipality.—Where the municipality has in hand a certain per cent. reserve of the cost of construction, and the surety bond, given in accordance with this section construed together with the contract, provides that the principal surety will be subrogated to the rights of the principal in the event of the contractor's default, the surety is entitled to the money thus reserved as against the laborers and materialmen, whose claims remain unpaid after the pro rata distribution of the money to the extent of the penalty of the bond which the surety has paid into court under the statutory provision. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Limitation of Action upon the Bond.—Under this section the legislative intent was not to bar the rights of materialmen after three years from the time the materials were furnished, but from the time of the completion of the entire contract, and the principle, that suit upon the surety bond (under seal) is limited as to its commencement by the limitation of the right of action against the principal, does not apply. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Provision That Action Must Be within Reasonable Time.—Under this section the provision in a bond for public construction that action thereon should be brought within reasonable time is valid. Horne-Wilson v. National Surety Co., 202 N. C. 73, 161 S. E. 726.

Feed for Teams as Materials Furnished.—Feed for teams

working on a public highway come within the contemplation of this section as material furnished, making a surety upon the contractor's bond for the building of a county highway liable. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Payments for Machinery Parts Used to Replace Borrowed Parts.—Where certain parts of a steam shovel used in connection with the construction of a county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

Misdemeanor Provision Still Applicable.—The provision of this section that any of the public agencies mentioned that fails to require the bond as fixed by the statute, is still applicable notwithstanding the amendment of 1923. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Local Law Requiring Provision of Section Be Read in Bonds.—A local statute providing that the provisions of this section should be read into private construction bonds is invalid. Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688.

Not Applicable When Surety Takes over Contract.—A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with the materialmen upon its own credit changes its liability as a surety on the bond, and this section is not applicable. Hunt Mfg. Co. v. Hudson, 200 N. C. 541, 157 S. E. 799.

Cited in Asheville Supply & Foundry Co. v. Catawba Construction Co., 198 N. C. 177, 178, 151 S. E. 93; Becker, etc., Supply Co. v. Board of Education, 199 N. C. 575, 155 S. E. 252.

Art. 3. Liens on Vessels

§ 2446. For towage and for supplies at home port. — Every vessel, boat, scow, lighter, flat, raft or other water craft is subject to a lien for the payment of towage done by any steamboat or tugboat; and every vessel and boat is subject to a lien for debts due for materials and supplies furnished to such vessel or boat in her home port. These liens shall be filed and enforced as is provided for other liens. (Rev., s. 2040; 1893, c. 357; 1909, c. 147.)

Engine as "Material Furnished." — Under this section, which gives a lien on a vessel for all debts contracted for work done on the same or material furnished, one who furnished an engine to be installed in a gas boat, relying on the credit of the vessel, is entitled to a lien therefor as "material," on compliance with the statute as to recording; and it is immaterial that by the contract it reserved title to the engine until paid for. The Pearl, 189 Fed. 540.

§ 2447. For labor in loading and unloading. — Every vessel, her tackle, apparel and furniture, is subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel. (Rev., s. 2041; Code, s. 1804; 1881, c. 356, s. 1.)

§ 2448. Filing lien; laborer's notice to master. —The liens provided for in the preceding sections shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him. It shall then be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract as much as is due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided. (Rev., s. 2042; Code, s. 1805; 1881, c. 356, s. 2.)

§ 2449. Enforcement of lien. — The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace. (Rev., s. 1043; Code, s. 1806; 1881, c. 356, s. 3.)

Enforcement of Lien in Court of Admiralty.—A lien given by a state statute for materials or supplies furnished to a vessel in her home port in the state is enforceable by suit in rem in a court of admiralty. The Pearle, 189 Fed. 540.

§ 2450. Judgment against contractor binds master and vessel. — The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment. (Rev., s. 2044; Code, s. 1807; 1881, c. 356, s. 4.)

§ 2451. Liens not to exceed amount due contractor. — The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to the contractor or stevedore at the time of notice given to the owner, agent or master, or the amount due to the contractor or stevedore at the time of the service of summons upon the master, agent or owner, when no notice has been given. (Rev., s. 2045; Code, s. 1808; 1881, c. 356, s. 5.)

§ 2452. Owner to see laborers paid. — In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same employ laborers to assist or do the work by the hour, day, week or month, it is the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or "boss stevedore" are fully paid the wages that may be due such laborer before he makes final settlement with the contractor, stevedore or "boss stevedore." (Rev., s. 2046; 1887, c. 145, s. 1.)

§ 2453. Owner may refuse to settle with contractor till laborers paid.—Any owner or agent referred to in the preceding section may refuse final settlement with the "boss stevedore" or contractor until he or they satisfy the said owner or agent, by written oath if necessary, that the same has been done. (Rev., s. 2047; 1887, c. 145, s. 2.)

§ 2454. Owner may pay orders for wages.—It is lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price. (Rev., s. 2048; 1887, c. 145, s. 3.)

§ 2455. Laborer's right of action against owner. —Any owner or agent of such vessel who neg-

lects or refuses to comply with the preceding provisions is liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or "boss stevedore." (Rev., s. 2049; 1887, c. 145, s. 4.)

§ 2456. Stevedore's false oath punishable as perjury.—If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer in violation of the four preceding sections, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished as is now prescribed by law for perjury. (Rev., s. 3613; 1887, c. 145, s. 5.)

§ 2457. Stevedores to be licensed; ommission misdemeanor.—No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 2050, 3791; 1891, c. 450; 1899, c. 595.)

§ 2458. Tax and bond on procuring license.—Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the state of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained. (Rev., s. 2051; 1891, c. 450.)

Art. 4. Warehouse Storage Liens

§ 2459. Liens on goods stored for charges.—Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid. (1913, c. 192, s. 1; 1915, c. 190, s. 1.)

Application of Section.—Under this section the persons, firms or corporations entitled to the possession and lien on property stored in warehouses applies to such as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674.

This section applies to such persons, firms or corporations as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674.

§ 2460. Enforcement by public sale.—If such charges are not paid within ten days after they become due, then such person, firm or corporation is authorized to sell said furniture, tobacco, goods, wares or merchandise at the county courthouse door, after first advertising such sale for ten days at said courthouse door and three other public places in said county, or in some newspaper published in said county where the goods or tobacco are stored, and out of the proceeds of such sale to pay the costs and expenses of sale and all costs and charges due for storage, and the surplus, if any, pay to the owner of such furniture, tobacco, goods, wares or merchandise. (1913, c. 192, s. 2; 1915, c. 190, s. 2.)

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

Art. 5. Liens of Hotel, Boarding and Lodging-House Keeper

§ 2461. Lien on baggage.—Every hotel, boarding-house keeper and lodging-house keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boarding-house or lodging-house, until all reasonable charges for such room, bed and board are paid. (Rev., s. 2037; 1899, c. 645, s. 1; 1917, c. 26, s. 1.)

Upon Property of a Third Party Stranger.—An innkeeper has a lien even upon the goods of a third person held by the guest and brought to the inn, with the qualification however, that if he knew that they belonged to such third person he has no lien upon them. Covington v. Newberger, 99 N. C. 523, 6 S. E. 205.

A hotel keeper's lien for charges, under this section, will not attach to a chattel belonging to a third person which is brought to the hotel by the guest under given circumstances. Pate Hotel Co. v. Blair, 207 N. C. 464, 177 S. E. 330.

Occasional Entertainment of Strangers Not Innkeeping.—One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N. C. 424.

§ 2462. Baggage may be sold.—If such charges are not paid within ten days after they become due, then the hotel, boarding-house or lodging-house keeper is authorized to sell said baggage or other property at the courthouse door, or in front of any public building in the town in which the lien attaches, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, pay to the owner of said baggage or other property. (Rev., s. 2038; 1899, c. 645, s. 2; 1917, c. 26, s. 2; 1935, c. 364.)

Editor's Note.—The amendment of 1935 adds the provision permitting sale in the front of any public building.

§ 2463. Notice of sale.—Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he is a resident of the state; but if he is a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same. (Rev., s. 2039; 1887, c. 645, s. 3.)

Art. 6. Liens of Livery-Stable Keepers

§ 2464. Lien for ninety days keep on animals in possession. — Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person

contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable. (1911, c. 141, s. 1.)

§ 2465. Enforcement by public sale.—If such charges are not paid within fifteen days after they become due and demand is made for the same, then the keeper of such livery, sale or boarding stable is authorized to sell the property at the county courthouse door, after first advertising said sale for ten days at the county courthouse door and three other public places in said county, and out of the proceeds of such sale to pay the costs and charges due for the board and keep of said horse, mule, or other animal, including the charges for keeping said animal until said sale, and the surplus, if any, pay to the owner of said animal. (1911, c. 141, s. 2.)

§ 2466. Notice of sale to owner.—Written notice of such sale shall be served on the owner of such horse, mule, or other animal ten days before such sale, if he is a resident of the state; but if he be a nonresident of the state; or if his residence is unknown, the publication of such notice for ten days at the county courthouse door and three other public places in the county shall be sufficient service of the same. (1911, c. 141, s. 3.)

Art. 7. Liens on Colts, Calves and Pigs

§ 2467. Season of sire a lien.—In all cases where the owner, or any agent for or employee of the owner, of any mare, jennet, cow or sow, turns the same to a studhorse, jack, bull, or boar, for the purpose of raising colts, calves, or pigs, the price charged for the season of the studhorse, jack, bull, or boar constitutes a lien on the colt, calf, or pigs until the price so charged for the season is paid. (Rev., s. 2024; Code, s. 1797; 1885, c. 72; 1887, c. 14; 1872-3, c. 94, s. 1915, c. 18, s. 1.)

§ 2468. Colts, etc., not exempt from execution for season price.—The colt, calf, or pigs shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, the person claiming such lien institutes action to enforce the same within twelve months from the foaling of the colt, dropping the calf, or farrowing of the pigs. (Rev., s. 2025; Code, s. 1798; 1885, c. 72; 1872-3, c. 94, s. 2; 1879, c. 47; 1915, c. 18; 1917, c. 229.)

Art. 8. Perfecting, Enforcing and Discharging Liens

§ 2469. Claim of lien to be filed; place of filing.—All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (Rev., s. 2026; Code, s. 1784; 1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1.)

See note under § 2433.

The purpose of filing mechanics', etc., claims for liens under this section, is to give public notice of the claims, the amount, the material supplied or the labor done, and when done, on what property, specified with such details as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached. Fulp v. Kernersville Light, etc., Co., 157 N. C. 157, 72 S. E. 867.

Where to Be Filed.—The notice of a lien required to be filed, since the Act of 1869-70, chap. 206, sec. 4, should be filed in the office of the clerk of the superior court, although the materials began to be furnished before that Act went into effect when the law of 1868-69 was in force. Chadbourn v. Williams, 71 N. C. 444.

Same.—Prior to the Act of 1869-70, the notice required by this section was to be filed with the register of deeds. Chadbourn v. Williams, 71 N. C. 444, 448.

Particularity of Claim Filed.—A claim of lien, filed under the provisions of the section must comply with the requirements of the statute. Therefore, when the plaintiff's claim failed to specify in detail the material furnished and labor performed, or the time when the material was furnished and the labor performed, it was irregular and void. Wray v. Harris, 77 N. C. 77.

The obvious purpose of this requirement is to give public notice, in the offices designated, of the plaintiff's "claim," his debt, the amount of it, the materials supplied or the labor done, and when done, on what property, on what farm or crop, and when, specified with such detail and certainty as will give reasonable notice to all persons of the character of the "claim," and the property to which the lien, on account of the same, attaches, and of the lien thereby established. It is to give the laborer an important advantage as to his debt due on account of his labor done on the property to which the lien attaches over the ordinary creditor, but to obtain that advantage, he must comply strictly, certainly substantially, in all material respects, with the requirement of the statute, and it is but reasonable and just that he should do so. Cook v. Cobb, 101 N. C. 68, 70, 7 S. E. 700.

While a substantial compliance with this section is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. Jefferson & Bros. v. Bryant, 161 N. C. 404, 77 S. E. 341.

Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and when the claim as filed is defective, as filed with the clerk, in not stating the time the house was completed, as required by this section, it cannot be cured by amendment allowed in the superior court at the trial. Jefferson & Bros. v. Bryant, 161 N. C. 404, 77 S. E. 341.

Same—Instances of Sufficiency.—When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with this section. Fulp v. Kernersville Light, etc., Co., 157 N. C. 157, 72 S. E. 867.

Under this section requiring the claim for a laborer's lien to be filed in detail, specifying the labor performed and the time thereof, the plaintiff filed his claim as follows before a justice of the peace: "J. S. C., owner and possessor, to D. A. C., 22 October, 1894. To 122½ days of labor as sawyer at his sawmill, on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, $127.24. (Signed) D. A. C., claimant," which was sworn to; it was held that the claim as filed was a reasonable and substantial compliance with the statute. Cameron v. Consolidated Lumber Co., 118 N. C. 266, 24 S. E. 7.

The lien of a plaintiff who furnished materials for a

building is not avoided because in the notice thereof filed with the clerk it is made to attach on two distinct lots separated by a street. Chadbourn v. Williams, 71 N. C. 444.

In this case claim, or notice of lien, was not made out in sufficient detail, "specifying the . . . labor performed, and the time thereof," the wages he was to receive, how and when payable, etc. And further, it was not made to appear that said purported notice of claim was filed "in the office of the nearest justice of peace" as required by this section. Gainey v. Gainey, 203 N. C. 190, 191, 165 S. E. 547.

When Necessity of Filing Lien Dispensed.—With sums due to the laborer, mechanic or artisan for labor done, or due to a person furnishing materials, as shown in the itemized statement rendered to the owner, constitute a lien on the building, etc., without any lien being filed. Section 2441.

As to the duty of clerk to record, see section 952, subsection 23.

§ 2470. Time of filing notice.—Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops. (Rev., s. 2028; Code, s. 1789; 1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101; 1909, c. 32; 1913, c. 150, s. 7.)

Lien Relates Back.—When the notice is filed the lien is at once established, and relates back to and is effective from the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35.

Where the material furnisher for a building files notice of claim under this section, the lien against the building of the owner relates back to the time the delivery was completed, and action must be commenced within six months after the filing of the above notice, and in that event the lien is preserved from the furnishing of the material and is superior to a deed of trust registered since that time, and where the evidence is conflicting the question is for the jury under proper instructions from the court. Atlas Supply Co. v. McCurry, 199 N. C. 799, 156 S. E. 91. See also note under § 2433.

Same—Otherwise Statutes Would Be Defeated.—It must be clear that unless the claim when filed has relation back to the commencement of the furnishing of the materials, the object of the act would be liable to be defeated at the pleasure of the vendee of the materials, by his selling or mortgaging his estate. The act would be idle and inefficacious against the very mischief it was intended to (cause) prevent. By allowing the notice to be filed after the whole has been delivered, it has put on a purchaser while the delivery is in progress the duty of informing himself whether the materials have been delivered or not, and under what sort of contract. This is in conformity to the construction which has been put on similar statutes in other states. Phillips Mechanics' Liens, sec. 215. Nibble v. Brawhn, 24 Ill. 268; Chadbourn v. Williams, 71 N. C. 444, 449.

Same—But Lien Good Only for the Amount Due.—While, under this section, a mechanic's or laborer's lien, or lien for material, when filed, relates back and takes priority over all liens attaching, or purchases for value made subsequent to the beginning of the work or of furnishing the first material, yet it is good only for the amount due the contractor, laborer or materialman. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Lien Attaches from What Time.—A lien attaches from the time the materials began to be furnished, and the notice relates back to that time. Chadbourn v. Williams, 71 N. C. 444.

The certain purposes is to protect the subcontractor or laborer as to his claim against the owner of the property and all liens of whatever character that may attach to the property subsequently, not simply subsequently to the filing of the notice of claim in the office of the superior court clerk, but as well subsequently to the time when the work was commenced or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35.

And this is so, although the subsequent incumbrancer had no notice of the lien thus relating back. McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 618, 16 S. E. 857.

Where the claim is filed within the time and in the manner prescribed the lien relates back to the time of the beginning of the work or furnishing of the materials, and is effective against any subsequent incumbrances or purchasers. Bankers' Trust Co. v. Gillespie Co., 181 Fed. 448.

Filing in Six Months after Moneys Are Due.—In Porter v. Case, 187 N. C. 629, 122 S. E. 483, it was held that the notice must be filed within six months from the time moneys are due the contractor, under the terms of the contract.

Question for Jury.—Whether the notice of claim of a lien was filed within the time prescribed by this section is a question for the jury where it appears from the evidence that later work was done under the original contract. Beaman v. Elizabeth City Hotel Corp., 202 N. C. 418, 163 S. E. 117.

Taking Note Not a Waiver.—One furnishing material used in the construction of a building does not waive his right of lien by accepting a note for the amount due him therefor, when the note matured before the expiration of the statutory time wherein he is required to file notice of his lien, and he has perfected his right as the statutes require. Raeford Lumber Co. v. Rockfish Trading Co., 163 N. C. 314, 79 N. C. 627.

Only Bona Fide Purchasers Protected.—The requirement that one furnishing materials for a building must file his lien in six months, applies only as to the rights of a purchaser for value without notice, and where this notice of lien has been filed after the six months' period and within twelve months, and the purchaser has acquired the property against which the lien was filed, with actual or constructive notice thereof, he takes subject to the rights of the lienor, Raeford Lumber Company v. Rockfish Trading Co., 163 N. C. 314, 79 S. E. 627. This was held under this section when its terms were somewhat different; but it is believed that the principle applies under the section as it now reads. Ed. Note.

The "shorter time" herein referred to evidently refers to the notice required to be given by section 2444, and it was intended to provide for a longer time within which to give notice, that is, six months, where the transaction has been completed by the "final furnishing" of the materials. Atlas Powder Co. v. Denton, 176 N. C. 426, 431, 97 S. E. 372.

Filing of Claim against Railroad Company.—Under this section a contractor or subcontractor who does work on or furnishes material for the construction of a railroad, is entitled to file a lien on the property of the company within one year, (now six months) from the time of doing such work or furnishing such material and, when filed, the lien has precedence over a mortgage registered after the work has been commenced. Dunavant v. Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837.

Validity of Section.—In McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 623, 16 S. E. 857, this section was held to be valid.

Cited in White v. Riddle, 198 N. C. 511, 152 S. E. 501.

§ 2471. Date of filing fixes priority.—The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the the clerk. (Rev., s. 2035; Code, s. 1792; 1868-9, c. 117, s. 11.)

In General.—Liens of materialmen and laborers are statutory, and by the clear provisions of this section and § 2473 the liens of parties furnishing labor and material under direct contract with the owner have priority in accordance with the time of filing notice of lien with the justice of the peace or clerk. The right of pro rata payment on liens of subcontractors is distinguished on the basis of the statutory provisions, § 2442, no notice of lien being required to be filed with the justice of the peace or clerk in the case of subcontractors, notice to the owner being sufficient under the statute. Boykin v. Logan, 203 N. C. 196, 165 S. E. 680.

Application of Section to Liens of Subcontractors, etc.—This section relates to the lien filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. This is not only in accordance with law, but also with justice and equity, for when persons have put their money and labor in a building, and the balance due is insufficient to pay all, it is not right for one to have the whole fund, in the absence of negligence, because he gets to the clerk's office first. Morgantown Mfg., etc., Co. v. Andrews, 165 N. C. 285, 295, 81 S. E. 418. See also White v. Riddle, 198 N. C. 511, 514, 152 S. E. 501.

§ 2472. Laborer's crop lien dates from work begun.—The lien for work on crops given by this chapter shall be preferred to every other lien or

encumbrance which attached to the crops subsequent to the time at which the work was commenced. (Rev., s. 2034; Code, s. 1782; 1869-70, c. 206, s. 2.)

As to landlord's liens on crops for rates, advances, etc., see section 2355, et seq.; as to agricultural liens, see sec. 2480, et seq.

Lien Prior to Other Subsequent Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 660, 14 S. E. 35.

Breach of Contract—Lien for Claim.—The liens provided for by this section arise out of the simple relation of debtor and creditor for labor done or materials furnished, and where there is no other security than the personal obligation of the debtor. Therefore, where the plaintiff, having abandoned a contract made with the defendant to cultivate a crop upon shares, upon the ground that the defendant had failed to furnish the necessary stock, etc., as agreed, and attempted to assert a lien for the labor he had bestowed upon the crop, it was held that the statute did not embrace his case. Grissom v. Pickett, 98 N. C. 54, 3 S. E. 921.

Cited in White v. Riddle, 198 N. C. 511, 152 S. E. 501.

§ 2473. Duly filed claims of prior creditors not affected.—Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer. (Rev., s. 2036; Code, s. 1786; 1869-70, c. 206, s. 6.)

Cross Reference.—As to priority between corporate mortgages and claims for labor, see sec. 1140.

§ 2474. Action to enforce lien.—Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due. (Rev., s. 2027; Code, ss. 1785, 1790; 1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, c. 250; 1876-7, c. 251.)

When Section Not Applicable.—This section cannot have been intended for a case in which a resort to any court is necessary, and a complete and efficient measure of relief is committed to and may be obtained by the parties' own act. McDougall v. Crapon, 95 N. C. 292, 293, 295.

Jurisdiction of Circuit Court of U. S.—While this section gives a right of action at law, for the enforcement of a mechanic's lien, a circuit court of the United States sitting in equity has jurisdiction to entertain a bill for that purpose, especially where there are conflicting liens to be adjusted. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

Jurisdiction of Justice—Jurisdictional Amounts.—A proceeding under this section to establish a claim against a feme covert, and to have a lien declared for materials furnished, and work and labor done, in erecting a house on her land, must be brought before a justice of the peace, if the amount claimed is under two hundred dollars. Smaw v. Cohen, 95 N. C. 85.

Same—Against Married Woman.—An action against a married woman for less than $200 for materials used in building a house must be brought before a justice of the peace. Finger v. Hunter, 130 N. C. 529, 41 S. E. 890.

Jurisdiction of Superior Court, though Amount Less than $200.—Where the proceeding against a married woman is not to have a lien declared for materials furnished, and work and labor done in erecting a house on her land, but a civil action to coerce payment out of the separate estate of a feme covert for his contracts, the superior court alone has jurisdiction, although the amount be less than two hundred dollars. Smaw v. Cohen, 95 N. C. 85.

Loss of Lien by Delay to Enforce—Personal Action under Section 2439.—If the plaintiff does not begin his action within the time prescribed by this section after giving the statement of his claim to the owner, he loses his lien; but having acquired and lost the lien he can maintain an action against the owner, personally, under sec. 2439, which makes it the "duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for," to be paid to the laborer, mechanic, or materialman whenever an itemized statement of the amount due him is furnished by either of such parties or the contractor. Hildebrand v. Vanderbilt, 147 N. C. 639, 641, 61 S. E. 620; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 90 S. E. 923.

Owners Liability Pro Rata to the Extent of Sum Due.—The laborer or materialman can only recover of the owner his pro rata part of that sum which the owner is required to "retain from the contractor then due." This pro rata to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc., and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

Possession by Justice of the Notice of Lien.—It is not necessary that the justice before whom application is made to enforce the lien should be in possession of the original notice of the lien; a copy from the magistrate with whom it was filed must be sufficient. There can be no reason why a copy of a notice properly filed with the clerk will not also suffice. The only reason why the justice who is to enforce the lien must have a copy of the notice is because he is required to state in his judgment the date of the lien and also what property it binds. Boyle v. Robbins, 71 N. C. 130, 133.

Limitation of Actions Pleaded by Owner for Contractor.—When the owner is sued by a laborer or materialman in time, and subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea being personal to the contractor. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

Waiver of Lien by Failure to Enforce.—Failure to enforce the lien under this section within the time prescribed constitutes a waiver of the lien. Norfleet v. Tarbaro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Defects in Claim Filed Not Cured by Pleading.—It is not sufficient to allege in the pleadings the time of the labor, and that it was done on a particular crop which the plaintiff seeks to charge with a lien. This must appear substantially in some way in the claim filed. Cook v. Cobb, 101 N. C. 68, 71, 7 S. E. 700.

Cited in Atlas Supply Co. v. McCurry, 199 N. C. 799, 800, 156 S. E. 91.

§ 2475. When attachment available to plaintiff.—In all cases where the owner or employer attempts to remove the crop, house or appurtenances from the premises, without the permission, or with the intent to defraud the lienee of his lien, the claimant may have a remedy by attachment. (Rev., s. 2031; Code, s. 1795; 1868-9, c. 117, s. 14.)

Sufficiency of Affidavit for Attachment.—Under this section, giving a remedy by attachment to enforce a laborer's lien, an affidavit that the defendant has removed and is removing and disposing of the cotton crop without regard to the lien, is insufficient to justify the issuing of the warrant, in the absence or allegation that the removal is with the intent to defraud the laborer. Brogden v. Privett, 67 N. C. 45. To this effect Mr. Justice Reade in the opinion of that case says: "The affidavit for the attachment in this case sets forth that the defendant 'has removed and is removing and disposing of the cotton crop,' etc., 'without regard to the lien,' etc. There is no allegation that the removal is 'with the intent to defraud the laborer,' and, therefore, in view of the fact that the usual way for a farmer to raise money to pay for laborers is by selling his crop, it ought not to be presumed, but must be averred, that the removal is with a fraudulent intent. It is insisted, however, that the words of the statute are in the alternative, 'without his permission, or, with intent to defraud.' That is true, but still it is not necessary for us to decide whether 'or' ought not to be construed 'and,' because the affidavit does not use either alternative in the language of the statute, but substitutes his own language, 'without regard to the lien,' etc. We are not informed why the plaintiff evaded the language of the statute; and we are of opinion that to favor his experiment would be an inconvenient and dangerous construction of the statute."

Note that the syllabus of the cases expresses a rule just the opposite of that established by the opinion of the case. Ed. Note. Brogden v. Privett, 67 N. C. 45.

§ 2476. Defendant entitled to counterclaim. — The defendant in any suit to enforce the lien is entitled to any set off arising between the contractors during the performance of the contract, or counterclaim allowed by law. (Rev., s. 2032; Code, s. 1788; 1869-70, c. 206, s. 8.)

§ 2477. Execution.—Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant. (Rev., s. 2029; Code, s. 1791; 1868-9, c. 117, s. 9.)

Descriptions in the Judgment.—In Boyle v. Robbins, 71 N. C. 130, 133, this section was construed to require, at least by implication, that the justice of the peace should set forth in the judgment the date of the lien, and that it should also embody a general description of the property which the plaintiff seeks to subject to primary liability under it. If only personal property be bound by the lien, the justice must insert in his execution a requirement that the specific property, subject to the lien, shall be first sold before seizing other goods or chattels, while, if the property described in the notice be land, the justice's judgment must be docketed in the superior court, and the clerk must incorporate in the execution similar direction as to the order of selling. So that the judgment cannot be enforced in strict compliance with the law unless the officer, whose duty it is to issue execution, has gotten such information from the record in his court as will satisfy him that some property, described with reasonable certainty, is subject to the lien and consequently to a primary liability for the debt. The most convenient method of recording the date of the lien and the description of the property bound by it, is to embody it in the judgment, which will constitute a part of the record in either court, no matter which officer may find it necessary to insert the date and description in the execution. McMillan v. Williams, 109 N. C. 252, 255, 13 S. E. 764.

A judgment to enforce a mechanic's lien upon specific property for its satisfaction, must contain a general description of such property, and an execution thereon must direct that such property shall first be sold to satisfy the judgment. McMillan v. Williams, 109 N. C. 252, 13 S. E. 764.

§ 2478. No justice's execution against land.— No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of superior court for the purpose of selling such estate or any interest therein. (Rev., s. 2030; Code, s. 1794; 1868-9, c. 117, s. 13.)

§ 2479. Discharge of liens.—All liens created by this chapter may be discharged as follows:

1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

2. By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

3. By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (Rev., s. 2033; Code, s. 1793; 1868-9, c. 117, s. 12.)

Failure to Enforce as Discharge.—Failure of claimant to enforce his lien within six months as prescribed by section 2474 operates as a discharge of the lien. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Art. 8A. Liens upon Recoveries for Personal Injuries in Favor of Sums Due for Medical Attention, etc.

§ 2479(1). Lien created; applicable to persons non sui juris.—From and after the ratification of this article there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully and effectively as if the said person were sui juris. (1935, c. 121, s. 1.)

§ 2479(2). Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—A like lien shall attach to all funds paid to any person in compensation for settlement of the said injuries, whether in litigation or otherwise; and shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services; Provided further that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty per cent of the amount of damages recovered. (1935, c. 121, s. 2.)

§ 2479(3). Disputed claims to be settled before payments.—Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when such sums are in dispute the amount of the judgment against which the lien shall lie shall in no case exceed the amount of the bills in dispute. (1935, c. 121, s. 3.)

Art. 9. Agricultural Liens for Advances

§ 2480. Lien on crops for advances. — If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advances is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except the laborer's and landlord's

liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county or counties where the land is situated on which the crops of the person advanced are to be grown: Provided, that where a county line divides a farm the crop lien may be recorded in the county where the owner of said farm resides; Provided, he resides on said farm; Provided further, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year. (Rev., s. 2052; Code, 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205.)

I. In General.
II. Priority of Liens.
III. The Written Agreement.
  A. Form and Execution.
  B. Registration.
IV. Description of Land.
V. Evidence.

Cross References.

As to landlord's lien on crops for rates, advance rents, etc., see section 2355; as to laborer's crops, see section 2472.

For a discussion of liens given by members of association, see 2 N. C. Law Rev. 191.

I. IN GENERAL.

Editor's Note.—This section was amended in 1925, whereby the phrase "within one year from the date of the agreement in writing herein required" was substituted for the phrase "during the year," and the proviso appearing at the end of the section was added. Prior to the amendment the registration of the writing was required to be effected within thirty days after date.

As to the effect of the amendment of 1925 upon this section, and upon the various aspects of its doctrine as interpreted by adjudicated cases, see 4 N. C. Law Rev. 4.

In lieu of the clause "where the person advanced resides" the amendment of 1935 inserts the clause "or counties where the land is situated on which the crops of the person advanced are to be grown" and the two provisos which immediately follow this clause.

Prerequisites of the Lien Enumerated.—From this section it is clear, (1) that the advances must be in money or supplies; (2) to the person engaged or about to engage in the cultivation of the soil; (3) after the agreement is made; (4) to be expended in the cultivation of the crop made during that year; (5) and the lien must be on the crop of that year, made by reason of the advances so made. Clark v. Farrar, 74 N. C. 686, 690.

Conditions to Render the Lien Effectual—Registration Unnecessary between Parties.—The prescribed conditions upon which the lien of this section becomes effectual are the previous reduction of the contract for it to writing, setting out its terms, and registration; these provisions are manifestly for the security of creditors and others who may have dealings with the debtor and otherwise might not know of the encumbrances upon the crop. And so it has been held that registration is not essential to the validity of the instrument as between the parties to it. Gay v. Nash, 78 N. C. 100; Reese & Co. v. Cole, 93 N. C. 87, 89.

Compliance with Requirements Prerequisite. — The lien can only be by force of the statute and by a compliance with its requirements. Where the section has not been followed, to sustain the agreement as an agricultural lien would utterly defeat the letter and the public policy embraced by the statute. The agreement, as an agricultural lien, contains a falsehood and a fraud upon its face. Not a dollar was advanced or intended to be, though it was promised in the agreement. The real purpose was to secure an antecedent debt due to the defendant, which was created the year previous. Clark v. Farrar, 74 N. C. 686, 690.

Strict Construction—Lienee Not Bound to See Materials Are Used on the Land.—This section was not intended simply to permit a person to give a lien upon his crop for advances; but also to give such a lien a preference to all other liens existing or otherwise to the extent of such advance. Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the lienor must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the lienee was not bound to see that the property was used on the farm, his duty is discharged by furnishing it. Womble v. Leach, 83 N. C. 84; Nichols & Bros. v. Speller, 120 N. C. 75, 78, 26 S. E. 632; Collins v. Bass, 198 N. C. 99, 102, 150 S. E. 706.

An instrument which gives a lien on a crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with the ordinary powers of sale, is valid both as a chattel mortgage and an agricultural lien, and, as between the parties, in the absence of fraud and compulsion, the lien attaches for dry goods, shoes, tobacco, powders, snuff and candy, without a showing that such articles were actually used in making the crop. Nichols & Bros. v. Speller, 120 N. C. 75, 26 S. E. 632.

Not Retroactive.—This section has no retroactive effect so as to impair laborers' liens under section 2472. Warren v. Woodard, 70 N. C. 382.

Estopped to Deny Articles Received as "Supplies."—One who gives a lien on a crop to obtain supplies, under the provisions of this section, is estopped from asserting that articles which he receives as a compliance with the contract are not "supplies" within the meaning of the statute; and a second mortgagee, who acquires an interest in the crop after such advances are made, stands in no better plight, and is likewise bound by such admission. Womble v. Leach, 83 N. C. 84.

Crops Covered by Lien.—The operations of a mortgage or agricultural lien in respect to crops are confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. Wooten v. Hill, 98 N. C. 48, 3 S. E. 846.

Power of Sale in Instrument Does Not Invalidate It. — A power of sale upon default in paying advances, inserted in an instrument giving a lien upon crops, does not invalidate the instrument, though prescribing a different remedy from that allowed by the statute. Crinkley v. Egerton, 113 N. C. 142, 18 S. E. 341.

Mortgage on Crops as Agricultural Lien.—A mortgagee, under a mortgage on a crop not expressed to be for advances to be made and not recorded after its execution, has no rights as an agricultural lienee by virtue of this section. Cooper v. Kimball, 123 N. C. 120, 31 S. E. 346.

Cited in Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486. White v. Riddle, 198 N. C. 511, 152 S. E. 501.

II. PRIORITY OF LIENS.

Lien Preferred to All Others Save the Executions Specified.—An agricultural lien, given by this section, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by this section to all others, the only exception being that in favor of the landlord or laborer contained in section 2488, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed of trust on the same crop, to the extent of the amount advanced thereunder. Williams v. Davis, 183 N. C. 90, 110 S. E. 577.

Same—Not Subordinate to Marketing Agreement.—In view of the policy of the State as manifested in the statutes to favor agricultural liens, such a lien for advances will not be held subordinate to a marketing agreement. Tobacco Growers' Co-Op. Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

Precedence Over a Prior Mortgage Lien.—An agricultural lien duly executed and registered takes precedence over a mortgage of prior date and registration upon the "crops" therein subjected to the extent of the advances made. Wooten v. Hill, 98 N. C. 48, 3 S. E. 846. Killebrew v. Hines, 104 N. C. 182, 193, 10 S. E. 159, 251.

But see Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670, where it was held that an agricultural lien, created to secure advances made to one who is in possession of the land as mortgagor, in the absence of any agreement to the contrary with the mortgagee, is subject to the mortgage, and the mortgagor may take the crops to the exclusion of the holder of the lien. Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670.

A statutory agricultural lien for supplies and advancements during the current crop year, conforming to the requirements of this section both as to context and registration, is superior to a prior registered chattel mortgage given to secure an antecedent debt, the chattel mortgage not being in the required form to constitute a crop lien for supplies as contemplated by the section. Eastern Cotton Oil Co. v. Powell, 201 N. C. 351, 160 S. E. 292.

Priority of the Lien of Landlord.—The lien of the landlord for rents and advancements in the lien first preferred above all others. Brewer v. Chappell, 101 N. C. 251, 254, 7 S. E. 670.

Where a mortgagor has surrendered his land to the mortgagee, but continues thereon as tenant of the mortgagee in making the crop, and a third person makes advancements, holding a lien therefor, under this section, and the lienor knows of the surrender at the time he had made the advancements, his lien is secondary to that of the landlord's for rent, and a paper-writing of the agreement of surrender between the landlord and tenant was not necessary. Section 2481 is not applicable to such case. Montague v. Thorpe, 196 N. C. 163, 144 S. E. 691. See note under § 2355.

Same—Extent of Priority. — Although under this section the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. Ballard & Co. v. Johnson, 114 N. C. 141, 19 S. E. 98.

III. THE WRITTEN AGREEMENT.

A. Form and Execution.

No Particular Form of Agreement Required.—To create an agricultural lien under this section no particular form of agreement is required. If the requisite prescribed by the statutes are embodied in the agreement, and the intent of the parties to create the lien is apparent, the agreement will be upheld as a valid agricultural lien though it be in the form of a chattel mortgage. Meekins v. Walker, 119 N. C. 46, 25 S. E. 706.

Furnishing Supplies and Executing the Instruments Contemporaneously.—When furnishing the supplies and making the securing instruments are contemporaneous, constituting one transaction of which these acts are parts, it is not material which precedes in actual time, for in contemplation of law both are done at one and the same time. This view is suggested in the opinion in Womble v. Leach, 83 N. C. 84, as a reasonable construction which accomplishes the substantial purposes intended. Reese & Co. v. Cole, 93 N. C. 87, 91.

Same—It is Immaterial Which Act is Done First.—The agreement is a single transaction between the parties, executed by one in making the advances, and by the other in providing the statutory security for their payment. In such a case it is indifferent which act is first done, if both are done at the same time and in execution of their contract and understanding. The purpose is to enable the former to obtain the means of making his crop by creating a lien upon it when made, and the requirement for writing and registration is for the protection of others who may deal with him. Reese & Co. v. Cole, 93 N. C. 87, 90.

B. Registration.

Registration Not Necessary Inter Partes.—A crop lien to secure agricultural advances executed under this section is valid inter partes, although not registered within thirty days, as required by the section. Gay v. Nash, 78 N. C. 100.

Time of Registration Subsequent to Amendment—Effect.—In 4 N. C. Law Rev. 5, it is said: "The statute as amended fails to require registration within any specified time before the harvesting of the crop. What would be the effect of two persons making advances on the same crop, when the latter advance, in point of time, was the first registered? It has been held that a mortgage on a crop, not expressed to be for advances, and not registered within 30 days after execution, has no rights as an agricultural lien under sec. 2480. Cooper v. Kimball, 123 N. C. 120, 31 S. E. 346. This would hardly give a basis for a decision in the case put above, as the thirty day provision is omitted by the present law, but the first lien registered should prevail. It would be a race for the register's office."

IV. DESCRIPTION OF LAND.

Identification of the Land by Sufficient Description.—The land on which the crops are to be grown must be sufficiently identified at the time the lien is executed. Within this ruling land is sufficiently identified when described as "a field or farm in possession of the mortgagor or seller." Weil v. Flowers, 109 N. C. 212, 13 S. E. 761; Gwathney v. Etheridge, 99 N. C. 571, 6 S. E. 411.

An instrument giving a lien upon crops raised "upon Opossum Quarter tract of land in Warren County, known as the tract M. W. is buying from Egerton, or any other lands he may cultivate during the present year," sufficiently described the lands upon which the crops were to be raised, and was effective as to the crops raised on the land described, but void as to those raised on "any other lands." Crinkley v. Egerton, 113 N. C. 142, 18 S. E. 341.

V. EVIDENCE.

Extraneous Evidence to Show Time of Furnishing Materials.—Where an instrument intended to operate as an agricultural lien contains, on its face, the statutory requisites, except that it does not show that the money or supplies were furnished after the agreement, it is competent to show, dehors such instrument, that the supplies were furnished after the making of the agreement. Meekins v. Walker, 119 N. C. 46, 25 S. E. 706. Such evidence would not contradict the written instrument. Id.

§ 2481. Contract for advances by mortgagor in possession. — The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors, their tenants, lessees or croppers, who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not. (Rev., s. 2053; 1889, c. 476; 1931, c. 173, ss. 2, 3.)

See annotations to the preceding section.

Editor's Note.—This section, which gives a lien for advances by mortgagors or trustors was amended by Acts 1931, to give the same protection to "their tenants, lessees or croppers." The amendment, which excepted pending litigation, became effective March 23, 1931. 9 N. C. Law Rev. 383.

Cited in Slade Rhodes & Co. v. James, 194 N. C. 240, 139 S. E. 240.

§ 2482. Price to be charged for articles advanced limited. — In order to be entitled to the benefits of the lien on crops in favor of landlords and other persons advancing supplies under the article, Agricultural Tenancies, of the chapter, Landlord and Tenant, and under the present article, or on a chattel mortgage on crops, such landlord or person shall charge for such supplies a price or prices of not more than ten per cent over the retail cash price or prices of the article or articles advanced, and the said ten per cent shall be in lieu of interest on the debt for such advances: Provided, however, that coupon books and trade checks commonly used by time merchants shall be considered as supplies advanced, when sold by merchants to customers, and charged for in the same manner. If more than ten per cent over the retail cash price is charged on any advances made under the lien or mortgage given on the crop, then the lien or mortgage shall be null and void as to the article or articles upon which such overcharge is made. At the time of each sale there shall be delivered to the purchaser a memorandum showing the cash prices of the articles advanced. (1917, c. 134, s. 1; 1921, c. 89.)

Editor's Note.—The proviso to the first sentence of this section was added by the amendment of 1921.

Public Laws 1929, cc. 20 and 262, repealed this section as to Robeson and Lenoir Counties, and Public Laws 1931, c. 95, repealed it as to Scotland and Columbus Counties.

Evidence Insufficient to Sustain Finding as to Price Charged.—In an action to recover the balance due a cropper for advancements made for the cultivation of the crop and to establish the lien provided by § 2480, the referee found as a fact, that the advancements were in money, merchandise and fertilizer, that the plaintiffs had charged more than 10 per cent above the retail cash price for fertilizer of the same kind, and declared the statutory lien void under the provisions of this section: Held, the action of the trial judge in confirming the report of the referee was erroneous, in view of § 2483, in the absence of evidence that such advance price had been charged for the fertilizer, or that if otherwise the

lien would necessarily be void as to the other merchandise sold. Slade Rhodes & Co. v. James, 194 N. C. 240, 139 S. E. 240.

§ 2483. "Cash prices" defined and determined. —In the case of retail merchants, the retail cash price or prices shall be the regular cash price or prices charged by the same merchant to cash customers for the same article or articles in like quantities at the same time. In the case of advances of supplies by landlords or other persons not engaged in business as retail merchants, or by retail merchants who have no regular cash prices, if the prices charged are called into question by the purchaser the retail cash price or prices of the supplies advanced may be determined by taking the average between the cash price or prices for the same class or classes of goods of two neighboring merchants, one selected by the landlord or other person making the advance and the other by the one to whom the advance is made. (1917, c. 134, s. 2.)

See note under § 2482.

Editor's Note.—Public Laws 1929, cc. 20 and 262, repealed this section as to Robeson and Lenoir Counties, and Public Laws 1931, c. 95, repealed it as to Scotland and Columbus Counties.

§ 2484. Person advanced not estopped by agreement. — No agreement or understanding between the parties as to the price or prices to be charged shall work an estoppel against the person to whom supplies have been advanced from showing that the price or prices charged were in fact more than ten per cent over the average retail cash price or prices in that locality at the time the advance or advances were made. If the price or prices charged by the merchants or landlord were in fact more than ten per cent, then the lien shall be null and void as to the article or articles upon which such overcharge is made. (1917, c. 134, s. 2.)

Editor's Note.—Public Laws 1929, cc. 20 and 262, repealed this section as to Robeson and Lenoir Counties, and Public Laws 1931, c. 95, repealed it as to Scotland and Columbus Counties.

§ 2485. Commission in lieu of interest, where advance in money. — Any person, firm, or corporation, including any bank or credit union, making any advancement in money to any person for the purpose of enabling such person to cultivate a crop, and taking as sole security for the advance so made a lien or mortgage on the crops to be cultivated and the personal property of the person to whom the advances are made, may charge, in lieu of interest, a commission of not more than ten per cent of the amount of money actually advanced: Provided, that money advanced under the provisions of this section shall be advanced in installments agreed upon at the time of the contract, and the ten per cent commission herein allowed shall not be deducted, but shall be added to the amount of money agreed to be advanced. (1917, c. 134, s. 3.)

Editor's Note.—Public Laws 1929, cc. 20, 262, repealed this and the two following sections as to Robeson and Lenoir Counties.

Applied in Ransom v. Eastern Cotton Oil Co., 203 N. C. 193, 165 S. E. 350.

§ 2486. Disposition of commission, where advanced by credit union. — In case the money is advanced by a credit union, the funds derived from the ten per cent commission allowed in the preceding section shall be used to pay such interest as the union may pay for the money borrowed by it for the benefit of its members, and to cover losses sustained by the union on account of loans made to members, and to further cover any reasonable expenses incurred by the union in connection with the loans made to members, and the balance of said fund shall be returned to the borrowers at the end of each year. (1917, c. 134, s. 4.)

See note under § 2485.

§ 2487. Purchasers for value protected. — All liens or mortgages made under the provisions of this article shall be valid for their face value in the hands of purchasers for value and before maturity, even though the charges made are in excess of those allowed herein; but in such cases the party to whom the advances are made has the right to recover from the party making the advances any sum he may be compelled to pay a third party in excess of the charges allowed by this article. (1917, c. 134, ss. 5, 6.)

See note under § 2485.

§ 2488. Crop seized and sold to preserve lien. —If the person making such advances makes an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it is lawful for him to issue his warrant, directed to any of the sheriffs of this state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers. (Rev., s. 2054; Code, s. 1800; 1893, c. 9; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88.)

Purpose of Section—Remedy of Cultivator.—The purpose of the section is to give a summary remedy, where there is reason to believe that the cultivator is attempting to commit a fraud upon the lien of the party who has made the advances. It is clear from a perusal of the statute that in order to prevent an attempted fraud it was the intent of the law-making power to dispense with a summons to the next term of the superior court, and to allow the crop or so much thereof as was necessary to satisfy the debt, which is required to be set out in the affidavit, to be seized and sold by summary process, leaving the cultivator to his remedy by civil action in case he was not in default, and also by indictment against the party who makes the affidavit in case it be false in regard to the fraud charged or in regard to the amount alleged to be due. Thomas v. Campbell, 74 N. C. 787, 789.

Procedure in General.—The remedy given under this section is summary and prompt, and as a special proceeding has for its object the appropriation of the encumbered crops to the satisfaction of the debt created in making them. When this appropriation has been made the proceeding is exhausted and comes to an end. If the debt is disputed, and notice thereof given to the officer, accompanied with the defendant's affidavit denying the indebtedness claimed, he is required to hold the proceeds of sale until the issue of the controverted indebtedness can be tried in the superior court. If the warrant is revoked, the goods or the proceeds of sale must be returned, as must be the excess when they are more than sufficient to meet the plaintiff's demand and costs, as stated by himself, or as reduced by the verdict of the jury. The statute in direct terms makes no other pro-

vision for the intervention of the debtor to stop the progress of the proceeding. Gay v. Nash, 84 N. C. 334; Cottingham & Bros. v. McKay, 86 N. C. 241, 243.

No Summons to Defendant Is Necessary.—It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien under this section that a summons should be issued to the defendant. Thomas v. Campbell, 74 N. C. 787.

Effect of Verdict Failing to Assess Damages.—Where in a proceeding to enforce an agricultural lien under this section the crop was sold by the sheriff, and on trial before a jury the defendant admitted the execution of the lien, but denied that anything was due for advances thereunder, there was a general verdict for the plaintiff, and the court refused judgment because the jury failed to assess the damages. It was held error; the verdict established the "lien debt" in excess of the proceeds of sale, entitling the plaintiff to judgment. Gay v. Nash, 84 N. C. 334.

Return of Moneys in Court's Custody to Defendant.—Where in a proceeding under this section, the money arising from the sale of the crop has been paid into court and the proceeding dismissed, the court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and files an affidavit that the defendant is insolvent. Cottingham & Bro. v. McKay, 86 N. C. 241.

Revocation of Warrant by Clerk.—There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.

Cited in White v. Riddle, 198 N. C. 511, 152 S. E. 501.

§ 2489. Lienor's claim disputed; proceeds of sale held; issue made for trial. — If the person to whom the advances have been made, or who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made up and set for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides. (Rev., s. 2054; Code, s. 1800; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; 1893, c. 9.)

§ 2490. Local: Short form of liens.—For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, and also to constitute a valid chattel mortgage as additional security thereto, and to secure a pre-existing debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson, Ashe, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davie, Davidson, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hyde, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pender, Pamlico, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrell, Union, Vance, Wake, Watauga, Washington, Wayne and Wilson: North Carolina, ... County.

Whereas, ... ha .... agreed to make advances to ..... for the purpose of enabling said ..... to cultivate the lands hereinafter described during the year 19.., the amount of said advances not to exceed ..... dollars; and,

Whereas, said ..... is indebted to said ..... in the further sum of ..... dollars now due; now, therefore, in order to secure the payment of the same the said ..... does hereby convey to said ..... all the crops of every description which may be raised during the year 19.. on the following lands in ..... County, North Carolina, ... Township, adjoining the lands of ..... and also the following other property, viz.: ....

And if by the ..... day of ....., 19.., said ..... fail ..... to pay said indebtedness, then said ..... may foreclose this lien as provided in section two thousand four hundred and eighty-eight of the consolidated statutes or otherwise, and may sell said crops and other property after ten days' notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said ....., and the said ..... hereby represents that said crops and other property are the absolute property of ..... and free from encumbrance .....

Witness ..... hand ..... and seal, ... this the ..... day of ....., 19...

Witness: .....

....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do ..... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said .....

This the ..... day of .....

Witness: .....

..... (Seal.)

North Carolina, ... County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of ....., the subscribing witness thereto.

This the ..... day of ....., 19...

..... (Seal.)

North Carolina, ... County.

The foregoing certificate of ....., a ..... of ..... County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the ..... day of ....., 19...

....., Clerk Superior Court.

(Rev., s. 2055; 1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6.)

Editor's Note.—By the amendments of 1925 and 1931 Randolph and Franklin Counties were brought within the scope of this section.

Public Laws 1933, c. 101, struck out Beaufort from the list of counties, and provided a standard form of agricultural lien and title note in that county, fixing fees for recording same.

No Particular Form Required.—This section requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that therein prescribed, and the courts in construing it will look to the substance rather than the form and regard the entire writing with the view of ascertaining and effectuating the intention of the parties; and an instrument expressing itself to be an agricultural lien, and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. Jones-Phillips Co. v. McCormick, 174 N. C. 82, 93 S. E. 449.

§ 2491. Local: Rights on lienee's failure to cultivate. — If any person in the counties mentioned

in the preceding section, after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days notice published at the courthouse door and three other public places in said county. (Rev., s. 2056; 1899, c. 17, s. 3; 1901, c. 329, s. 3.)

§ 2492. Local: Commissioners to furnish blank records.—The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds. (Rev., s. 2057; 1899, c. 17, s. 4; 1901, c. 329, s. 4.)

Cross References Having Bearing to This Chapter.—For provisions as to fees of probating and registering lien bonds, see sections 3903 et seq; for laborer's lien on corporate assets, see sec. 1197; for power to take crops, see secs. 830, 2488; for landlord's lien, see sec. 2355; for lien of docketed judgment, see sec. 614; for lien of docketed judgments of justice of the peace, see sec. 1517; for lien upon land for improvements, see sec. 703; for debts lien on decedent's property, see sec. 93.

Art. 10. Liens for Internal Revenue

§ 2492(a). Filing notice of lien.—Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated. (1924, c. 44, s. 1.)

§ 2492(b). Duty of register of deeds.—When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical Federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numerical order in a file or files to be provided by the board of county commissioners and designated Federal tax lien notices. This service shall be performed without fee. (1924, c. 44, s. 2.)

§ 2492(c). Certificate of discharge.—When a certificate of discharge of any tax lien, issued by the collector of internal revenue or other proper officer, is filed in the office of the register of deeds where the original notice of lien is filed, said register of deeds shall enter the same with date of filing in said Federal tax lien index on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien. This service shall be performed without fee. (1924, c. 44, s. 3.)

§ 2492(d). Purpose of article.—This article is passed for the purpose of authorizing the filing of notices of liens in accordance with the provisions of section three thousand one hundred eighty-six of the Revised Statutes of the United States, as amended by the act of March fourth, one thousand nine hundred thirteen, thirty-seven Statutes at Large, page one thousand sixteen. (1924, c. 44, s. 4.)

CHAPTER 49 (A)

LOCAL DEVELOPMENT

§ 2492(e). Purposes of chapter.—The mayor and board of aldermen, or other governing body of any city, or the governing body of any incorporated town, or the county commissioners of any county, may annually set apart and appropriate from the funds derived annually from the general taxes levied and collected in such city, incorporated town, or county, an amount not less than one-fortieth of one per cent, nor more than one-tenth of one per cent, upon the assessed valuation of all real and personal property taxable in any such city, incorporated town, or county, which funds shall be used and expended under the direction and control of the mayor and board of aldermen, or other governing body of such city, or the governing body of any incorporated town, or the county commissioners of any county, under such rules and regulations or through such agencies as they shall prescribe, for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city, or incorporated town or in such county; encouraging the building of railroads thereto, and for such other purposes as will, in the discretion of the mayor and board of aldermen, or other governing body of any city, or the governing body of any incorporated town, or the county commissioners of any county, increase the population, taxable property, agricultural industries and business prospects of any city, incorporated town, or any county. (1925, c. 33, s. 1.)

§ 2492(f). Ratification or petition of voters required.—No city, incorporated town, or county, shall raise or appropriate money under this chapter unless and until this act shall have been approved by a majority of the qualified voters of such city, incorporated town, or county, at an election as provided in this chapter; or by a petition of the registered voters in any town of less than three thousand inhabitants, as provided in this chapter. (1925, c. 33, s. 2.)

§ 2492(g). Election to adopt chapter.—The mayor and board of aldermen, or other governing body of any city, or the governing body of any incorporated town, or the county commissioners of any county, may at any time by ordinance call a special election for the purpose of submitting the question of the approval of this chapter to the voters of such city, incorporated town, or county. In said ordinance said board of

aldermen, or other governing body of any city, or town, or said county commissioners, shall specify the time of holding the election and determine and set forth whether or not there shall be a new registration of the voters for such election. Notice of the registration of the voters and of the election shall be given, the voters shall be registered, the election shall be held, the returns shall be canvassed, and the results shall be determined, declared and published under and pursuant to the provisions of section two thousand nine hundred and forty-eight of chapter one hundred and six, extra session, one thousand nine hundred and twenty-one, known as the Municipal Finance Act, and as therein provided for an election upon a bond ordinance providing for the issuance of bonds for a purpose other than the payment of necessary expenses of a municipality. A ballot or ballots shall be furnished to each qualified voter at said election. The ballots for those who vote in favor of this chapter shall contain the words "for the act to aid in the development of any city, incorporated town, or county," and the ballots for those who vote against this chapter shall contain the words "against the act to aid in the development of any city, incorporated town, or county." Except as otherwise provided in said section two thousand nine hundred and forty-eight, chapter one hundred and six, Public Laws, extra session, one thousand nine hundred and twenty-one, the registration and election shall be conducted in accordance with the laws then governing elections for municipal or county officers in such municipality or county, and governing the registration of the electors for such election of officers. (1925, c. 33, s. 3.)

§ 2492(h). Action to invalidate election; limitation.—No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of the statement showing the result of the election. (1925, c. 33, s. 4.)

§ 2492(i). Petition to adopt chapter in certain towns.—In any incorporated town of less than three thousand inhabitants, in lieu of an election as herein provided, the will of the voters may be determined by a petition in writing giving approval of this chapter, which petition shall be signed by at least three-fourths of all the registered voters of said municipality whose names appeared upon the registration books of the municipality for the election of municipal officers next preceding the time of the filing of said petition: Provided, that such three-fourths of the voters shall be the owners of at least seventy-five per cent of the total taxable property of said town, as shown by the assessed valuation, and the tax lists of such town as last fixed for municipal taxation. The residence address of each signer shall be written after his signature; each signature to the petition shall be verified by a statement (which may relate to a number of signatures) made by some adult resident freeholder of the municipality, under oath before an officer competent to administer oaths to the effect that the signature was made in his presence, and is the genuine signature of the person whose name it purports to be. The petition need not be all on one sheet, and if on more than one sheet, it shall be verified as to each sheet. The board of aldermen or other governing body of said town shall canvass said petition and shall include in their canvass the voters signing the petition, and the number of voters upon the registration books and qualified to sign the petition, and the assessed valuation at last fixed for municipal taxation of the property owned by the voters signing the petition, and the entire assessed valuation of property within the town, and shall judiciously determine and declare the result of the canvass of said petition, and shall prepare and publish a statement of the result, and publish the same as required in the case of an election by ballot under this chapter. The same limitation upon the right of action or defense founded upon the invalidity of the petition shall apply in the case of an election by ballot under this chapter. (1925, c. 33, s. 5.)

§ 2492(j). Effect of adoption of chapter.—If and when this chapter shall have been approved by the voters of any city, incorporated town, or county, at an election or by petition as provided by this chapter, then and thereafter the governing body of such city, or incorporated town, or the county commissioners of such county, may raise by taxation and appropriate money within the limits and for the purposes specified in this chapter. (1925, c. 33, s. 6.)

§ 2492(k). Constitutionality; application. — If any clause, sentence, paragraph or part of this chapter shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this chapter, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which said judgment shall have been rendered: Provided, that Pamlico County be exempted from the provisions of this chapter. (1925, c. 33, s. 7.)

CHAPTER 49(B).

LOCAL GOVERNMENT ACT — VALIDATION OF INDEBTEDNESS OF UNIT.

Art. 1. Local Government Commission and Director of Local Government.

§ 2492 (1). Official title. — This act shall be known and may be cited as the Local Government Act. (1931, c. 60, s. 1.)

§ 2492(2). Definitions.—The word commission will herein be used to refer to the Local Government Commission created by this act; the word Director will refer to the Director of Local Government; the word unit will be used to refer to a county, city, town, incorporated village, township, school district, school taxing district or other district or political sub-division of government of the State; and where bonds or notes are mentioned reference shall be deemed made to any obligations to pay money issued by or in behalf of any unit unless otherwise indicated or specified. (1931, c. 60, s. 2.)

§ 2492(3). County Government Advisory Commission abolished; surrender of books, etc.; functions, etc., transferred to Director of Local Government. — The County Government Advisory Commission, created under the provisions of chapter ninety-one, Public Laws of nineteen hundred and twenty-seven, is hereby abolished and all books, records, documents and files of said Commission shall forthwith be turned over to the Commission created by this act by the Executive Secretary thereof and by any member or officer having in his possession or custody any of such books, records, documents and files. All the functions, powers and duties of said County Government Advisory Commission under said chapter ninety-one and other laws, including acts of the present session of the General Assembly, are hereby transferred to and shall be the functions, powers and duties of the Director whose office is created by this act. (1931, c. 60, s. 3.)

Editor's Note.—Public Laws 1927, c. 91, s. 16, provided: "The duties of the commission shall be to take under consideration the whole subject of county administration; to advise with the county commissioners as to the best methods of administering the county business; to prepare and recommend to the governing authorities of the various counties simple and efficient methods of accounting, together with blanks, books, and other necessary improvements; to suggest such changes in the organization of the departments of the county government as will best promote the public interests, and to render assistance in carrying the same into operation. They may make such recommendations to the Governor from time to time as they may deem advisable as to changes in the general laws controlling county government, and such recommendations may be submitted by the Governor, upon his approval, to the next meeting of the General Assembly."

As to other duties of the director of local government, see §§ 1302(14)-1302(16).

§ 2492(4). Surrender to new Commission of books and records of State Sinking Fund Commission.—The State Auditor and the State Sinking Fund Commission are hereby directed to turn over to the Commission created by this act all books, records, documents and files of said State Auditor or said State Sinking Fund Commission made or filed with either thereof under the provisions of Public Laws 1927, c. 214, or Public Laws 1929, c. 277, or, in the discretion of the Commission created by this act, to retain the same or any part thereof for the inspection and use of the last mentioned Commission. (1931, c. 60, s. 6.)

§ 2492(5). Creation of local government commission.—There is hereby created a commission to be known as the local government commission, consisting of nine members of whom the state auditor and the state treasurer and the secretary of state and the commissioner of revenue shall be members ex-officio and of whom six members shall be appointed by the governor to hold office during his pleasure. One of such appointees shall have had experience as the chief executive officer or a member of the governing body of a city or town and one thereof shall have had experience as a member of the governing body of a county at the time of their appointment. The members of the commission, both ex-officio members and appointed members, shall be required to give such bond, if any, as the governor may require. The state treasurer shall be ex-officio director of local government and shall also be the treasurer and chairman of the commission. The board shall elect a vice-chairman from its members who shall hold office at the will of the commission. The appointed members of the commission shall be entitled to ten dollars for each day actually spent in the service of the commission, but shall receive no salary or other compensation, and all members shall be entitled to their necessary traveling and other expenses. The director shall appoint some competent person as secretary of the commission and assistant to the director and may appoint such assistants as may be necessary, who shall be responsible to the director, and may fix their compensation subject to the approval of the governor. The commission shall have power to adopt such rules and regulations as may be necessary for carrying out its duties under this act. The commission shall hold quarterly regular meetings in the city of Raleigh at such place and times as may be designated by the commission, and may hold special meetings at any time upon notice to each member personally given or sent by mail or telegraph not later than the fifth day before the meeting, which notice need not state the purpose of the meeting. It shall have the right to call upon the attorney general or any assistant thereof or upon the executive counsel for legal advice in relation to its powers and duties. The functions of the local government commission and of the director of local government shall be maintained and operated as a separate and distinct division of the department of the state treasurer. (1931, c. 60, s. 7; c. 296, s. 8; 1933, c. 31, s. 1.)

See 11 N. C. Law Rev., 251, for comment on this section as amended in 1933.

Editor's Note.—Public Laws 1933, c. 31, made the secretary of state an ex officio member of the commission, made the treasurer ex officio director, and provided for the appointment by the director of the secretary of the commission and assistant to the director; deleted a provision which excepted the director from the $10 remuneration, and added the last sentence as to maintenance and operation as separate and distinct division. Section 3 of c. 31 of the Amendatory Act of 1933 provides for the transfer of the records to the state treasurer.

§ 2492(6). Executive committee; powers; quorum.—The state auditor and state treasurer, the commissioner of revenue and secretary of state shall constitute the executive committee of the commission and shall be vested with all the powers of the commission except when the commission is in session and except as otherwise provided in this act. Action of the commission as a whole and of the executive committee shall be taken by resolution which shall be in effect upon passage by a majority of the members of the commission or the committee present at the meeting at which such resolution is passed. A majority of the commission shall be a quorum. (1931, c. 60, s. 8; 1933, c. 31, s. 2.)

Editor's Note.—Public Laws 1933, c. 31, substituted secretary of state for the director as a member of the committee.

§ 2492(7). Executive Committee may act for Commission; bond for expenses for attending special meetings.—All action herein required or permitted to be taken by the Commission may be taken by the Executive Committee and shall be regarded as action by the Commission unless otherwise herein expressly provided, but the Committee shall not overrule or reverse any action of the Commission as a whole.

The Commission shall not be required to meet as a whole except at the times fixed for quarterly sessions, and may demand that any application for a special meeting may be accompanied by a bond or other security for the costs and expenses of such special meeting to be given by the unit or person at whose request the special meeting is called. (1931, c. 60, s. 9.)

§ 2492(8). Review by Commission of actions of Executive Committee. — Action of the Commission taken by the Executive Committee, except approval of notes maturing not more than six months from their date, shall be subject to review by the Commission as a whole upon the application of any aggrieved party, including any tax-payer or citizen, and including any member of the Executive Committee, if the aggrieved party shall within five days after such action by the Executive Committee file with the Commission a request for such review. (1931, c. 60, s. 10.)

§ 2492(9). Application to Commission for issuance of bonds or notes.—Before any bonds or notes are issued by or in behalf of any unit and before the question of such issuance shall be submitted at an election, except bonds or notes whose issuance has heretofore been approved by the State Sinking Fund Commission under the provisions of Public Laws 1929, c. 277, the board authorized by law to issue the same or an officer thereof shall make application to the Commission (either before or after such authorization) for its approval of the proposed bonds or notes and shall state such facts in such application or by exhibits annexed thereto in regard to such bonds or notes and such unit and its financial condition as may be required by the Commission. The Commission shall consider such application and shall determine whether the issuance of such bonds or notes is necessary or expedient. (1931, c. 60, s. 11.)

§ 2492(10). Determining advisability of proposed issues.—In determining whether a proposed issue of bonds or notes shall be approved, the Commission may consider the necessity for any improvement to be made from the proceeds of any of such bonds or notes, the amount of indebtedness of the unit then outstanding, the fact that sinking funds for existing debts have been adequately maintained or have not been adequately maintained, the percentage of collections of taxes for the preceding fiscal year, the fact of compliance or non-compliance with the law in the matter of budgetary control, the question of whether the unit is in default in the payment of any of its indebtedness or interest thereon, the existing tax rates, the increase of tax rate, if any, necessary to maintain such sinking funds adequately, the assessed value of taxable property, and the reasonable ability of the unit to sustain the additional tax levy, if any, necessary, to pay the interest and principal of the proposed obligations, as the same become payable. If the proposed issue is for a public improvement in the nature of establishing or enlarging a revenue producing enterprise, the Commission shall take into consideration the probable earnings of the improvement and the extent to which such earnings will be sufficient to pay the interest and principal when due of the proposed obligations or that part thereof to be devoted to such improvement. The Commission shall also consider the adequacy or inadequacy of the amount of the proposed issue for the accomplishment of the purpose for which the obligations are to be issued, and whether such amount is excessive. The Commission shall have authority to inquire into and to give consideration to any other matters which it may believe to have a bearing on the question presented. (1931, c. 60, s. 12.)

§ 2492(11). Commission to order issue if satisfied of certain points enumerated; public hearing on refusal. — If, upon the information and evidence received the Commission is of the opinion (a) that issuance of the proposed obligations is necessary or expedient and (b) that the amount proposed is adequate and not excessive and, except as to funding and refunding bonds, (c) either that adequate sinking funds have been maintained or that reasonable assurance has been given that thenceforth they will be maintained to the extent required by or under the authority of law, and (d) that the increase in tax rate, if any, that will be necessitated for the proper maintenance of sinking funds as so required will not be unduly burdensome and (e) that the unit is not in default in the payment of the principal or interest of any of its indebtedness and (f) that the requirements of law for budgetary control have been substantially complied with and (g) that at least eighty (80%) per cent of the general taxes of the unit for the preceding fiscal year have been collected, then and in such event the Commission shall make its order approving such issuance. If upon the information presented the Commission is not of such opinion or is in doubt as to any facts or as to any conclusions to be drawn therefrom, it shall so notify the officer or board making the application, and if such officer or board so request, shall give notice that the Commission will hold a public hearing on the application at a time and place to be specified in such notice, at which public hearing the officers and citizens and tax-payers of the unit may be heard. The Commission may designate its Secretary or any other suitable person to conduct any such hearing and to prepare a digest of testimony and submit the same and his recommendations for the consideration of the Commission. (1931, c. 60, s. 13.)

§ 2492(12). Order of refusal after hearing; vote of unit to veto action of Commission. — If after any such hearing the Commission should not be of such opinion, it shall enter an order giving its reasons for not holding such opinion and in that event the proposed obligations shall not be issued except in such amount and in such manner, if any, as the Commission may approve, or unless, and until, the proposed indebtedness shall have been submitted to and approved by a vote of the voters of the local unit for which such indebtedness is proposed, such election to be held in the manner, if any, provided by law for the holding of elections on the question of issuing such bonds, and otherwise in such manner as

may be required by the Commission (1931, c. 60, s. 14.)

§ 2492(13). Review by Commission of approval or refusal of Executive Committee. — An order of the Commission made by the Executive Committee approving such issuance shall not be reviewable by the Commission as a whole unless request for such review shall be filed with the Commission within five days, Sundays excepted, after such order shall be given (except an order passed by unanimous vote of members present approving notes running not more than six months, which shall not be reviewable) but orders of the Commission by the Executive Committee declining to approve issuance may be reviewed by the Commission as a whole if application therefor shall be filed with the Commission within thirty days after such order. New evidence and information may be considered upon any such review, and the Commission as a whole shall not be bound by the evidence or information considered by the Executive Committee. (1931, c. 60, s. 15.)

§ 2492(14). Legality of bonds and notes not involved. — The approval by the Commission of bonds or notes shall not extend to or be regarded as an approval of the legality of the bonds or notes in any respect. (1931, c. 60, s. 16.)

§ 2492(15). Sale of bonds and notes. — All bonds and notes of a unit, unless sold pursuant to a call for bids heretofore legally given, shall be sold by the commission at its office in the city of Raleigh, but the commission shall not be required to make any such sale or to call for bids for any bonds or notes until it shall have approved the issuance thereof as hereinabove provided nor until it shall have received such transcripts, certificates and documents as it may in its discretion require as a condition precedent to the sale or advertisement. Before any such sale is conducted the commission shall cause a notice of the proposed sale to be published at least once at least ten days before the date fixed for the receipt of bids (a) in a newspaper published in the unit having the largest or next largest circulation in the unit or if no newspaper is there published, then in a newspaper published in the county in which the unit is located, if any, and if there be no such newspaper such notice shall be posted at the door of the court house, and (b) such notice, in the discretion of the commission, may be published also in some other newspaper of greater general circulation published in the state. The commission may in its discretion cause such notice to be published in a journal approved by the commission and published in New York City, devoted primarily to the subject of state, county and municipal bonds; provided, however, that notes maturing not more than six months from their date may be disposed of either by private or public negotiation, after five days notice has been given in the manner specified in clause (a) of this section; and provided, further, that upon request of the board or body authorizing any of such bonds or notes for the purpose of refunding, funding, or renewing indebtedness, and with the consent of the holder of any such indebtedness so to be refunded, funded or renewed, the commission through the state treasurer may exchange any such bonds or notes for a like or greater amount of such indebtedness, and make such adjustment of accrued interest as may be requested by said board or body, in which event the publication of notice as hereinabove provided shall not be required. The notice published shall state that the bonds or notes are to be sold upon sealed bids and that there will be no auction, and shall give the amount of the bonds or notes, the place of sale, the time of sale or the time limit for the receipt of proposals and that bidders must present with their bids a certified check upon an incorporated bank or trust company payable unconditionally to the order of the state treasurer for two per cent of the face value of the bonds and one-half of one per cent on notes bid for, drawn on some bank or trust company, the purpose of such check being to secure the unit against any loss resulting from the failure of the bidder to comply with the terms of his bid. The commission shall keep a record of the names and addresses of all who request information as to the time for receipt of bids for such bonds or notes, and shall mail or send a copy of such notice of sale and a descriptive circular in relation thereto to all such names and addresses, but failure so to do shall not affect the legality of the bonds or notes. (1931, c. 60, s. 17, c. 296, s. 1; 1933, c. 258, s. 1.)

Cross References.—See 12 N. C. Law Rev., 325, where it is suggested that this agency would hold in check bond issues for erecting and extending electric systems.

See 11 N. C. Law Rev., 215, for comment on this section as amended in 1933.

Editor's Note. — This section formerly provided that the bonds or notes might be exchanged for a like or greater face amount and interest on the exchanged notes collected. The section now provides for exchange of a like or greater "amount of such indebtedness and make such adjustment of accrued interest as may be requested by the said board or body." The change was effected by Public Laws 1933, c. 258.

§ 2492(16). Proposals opened in public; award; rejection of bids.—All proposals shall be opened in public and the bonds or notes shall be awarded to the highest legal bidder, if a fixed rate of interest is named in the notice, or shall be awarded to the highest bidder for the lowest interest rate upon which a legal offer is made if the notice states that bidders may specify the rate of interest, or, if a notice of sale of bonds states that bidders may name one rate for part of the bonds of an issue and another rate or rates for the balance, to the bidder offering to purchase the bonds at the lowest interest cost to the unit, such cost to be determined by deducting the total amount of the premium bid from the aggregate amount of interest upon all of the bonds until their respective maturities. No legal bids may be rejected unless all bids are rejected. If the bids rejected contain any legal bid which is legally acceptable under the advertisement, the bonds or notes shall not be sold until after further advertisement and under the conditions herein prescribed for the first advertisement. (1931, c. 60, s. 18; 1935, c. 356, s. 1.)

Editor's Note.—The amendment of 1935 adds the latter part of the first sentence relating to cases in which the bidders may name different rates for different parts of an issue.

§ 2492(17). Minimum price; private sale in event of no bids. — No bonds or notes shall be sold at less than par and accrued interest, nor ex-

cept as herein otherwise provided or permitted shall any bonds or notes be sold except upon sealed proposals, after publication of notice as hereinabove provided, unless no bid is received upon such notice which is a legal bid and legally acceptable under such notice, in which event the bonds or notes may be sold at private sale at any time within thirty days after the date for receiving bids given in such notice. (1931, c. 60, s. 19.)

§ 2492(18). Rejection in event of objection by unit. — If after the receipt of bids and before an award of the bonds or notes an authorized representative of the unit shall object to any award which the Commission may be about to make pursuant to the foregoing provisions and shall not withdraw such objection, the Commission shall reject all bids and shall make no award until after further advertisement as herein provided. (1931, c. 60, s. 20.)

§ 2492(19). Make-up of bonds or notes. — No such bond or note shall be engraved, lithographed, printed, typewritten or written upon more than one sheet of paper (but a separate sheet or sheets may be used for interest coupons), and the Commission may in its discretion require the use of a protectograph or other means to prevent the raising of the amount thereof or limitation of such bonds or notes. (1931, c. 60, s. 21.)

§ 2492(20). Obligations of units must be certified by Commission.—No bonds or notes or other obligations of any unit hereafter issued shall be valid unless on the face or reverse thereof there be a certificate signed by the Secretary of the Commission or an assistant designated by him either (a) that the issuance of the same has been approved, under the provisions of the Local Government Act, or (b) that the bond or note is not required by law to be approved by the Commission. Such certificate shall be conclusive evidence that the requirements of this act as to approval by the Commission, advertisement and sale have been observed, and shall also be conclusive evidence that the requirements of sections 2492(21) and 2492(22) have been complied with. (1931, c. 60, s. 22, c. 296, s. 2.)

§ 2492(21). Detailed record of all issues to be kept by Commission.—Prior to the execution of such certificate the Commission shall cause to be entered of record in its office a description of such bonds or notes, giving their amount, date, the times fixed for payment of principal and interest, the rate of interest, the place or places at which the principal and interest will be payable, the denomination or denominations and the purpose of issuance, together with the name of the board in which is vested the authority and power to levy taxes for the payment of the principal and interest of such bonds or notes and a reference to the law under which it is claimed such bonds or notes are issued, and shall require to be filed with the Commission a statement of the recording officer of the unit that all proceedings of the board in authorizing the bonds or notes have theretofore been and remain correctly recorded in a bound book of the minutes and proceedings of the board, giving in such statement the designation of the book and the pages or other identification of the exact portion of the book in which such record was made. (1931, c. 60, s. 23.)

§ 2492(22). Contract for services must be approved by Commission.—All contracts and agreements made by any unit with any person, firm or corporation for services to be rendered in the drafting of forms of proceedings for a proposed bond or note issue, except contracts and agreements with attorneys at law licensed to practice before the courts of the State within which they have their residence or regular place of business, which involve no agreement, express or implied, except for legal services, shall be void unless approved by the Commission, whose duty it shall be before causing the certificate of its approval to be endorsed or placed on any such bonds or notes to satisfy itself, by such evidence as it may deem sufficient, that no such contract not so approved by the Commission is in effect in relation to such bonds or notes. Provided, this shall not apply to contracts existing at the time of the ratification of this Act. (1931, c. 60, s. 24.)

Editor's Note.—The Act was ratified on March 3, 1931.

§ 2492(23). State Treasurer to deliver bonds or notes to purchaser; application of proceeds. — When the bonds or notes are executed by the proper officers they shall be turned over to the State Treasurer and after the certificate of the Commission hereinabove required shall be placed thereon, he shall deliver them to the purchaser or order, collect the purchase price or proceeds and before the close of the following day remit the same to the lawful custodian of funds of the unit or, in his discretion, to the properly designated depositary or depositaries of the unit, after assurance that the safe-guarding of such proceeds has been provided as required by law and after deducting all necessary expense including the expense of advertising, selling, shipping and delivering the bonds or notes; nevertheless in the case of bonds or notes sold for refunding or funding purposes the Treasurer may provide that such proceeds shall be deposited at the place of payment of the indebtedness to be refunded or funded for use solely in the payment of such indebtedness or under the conditions hereinabove provided he may provide for the exchange of such bonds or notes for the evidences of indebtedness to be refunded or funded thereby, or, if such indebtedness is not evidenced by bonds, notes, coupons or similar instruments, he may provide for the delivery of said new bonds or notes against a receipt or release from the creditor to whom or to which the indebtedness to be funded or refunded is owing. Coupons or notes issued in exchange for outstanding coupons shall be deemed to be notes issued for refunding or funding purposes, within the meaning of this section. (1931, c. 60, s. 25; 1935, c. 356, s. 2.)

Editor's Note.—The amendment of 1935 adds the latter part of the first sentence beginning with the phraseology "or, if such indebtedness is not evidence by bonds, notes, coupons, etc." It also adds the last sentence.

§ 2492(24). Suit on behalf of unit for fulfillment of contracts of sale. — The Commission shall have power to enforce by action or suit in Superior Court of the county or unit affected or in the Federal Court of the District, for and in

behalf of the State or the unit affected, any contract or agreement made by the Commission for the sale of any bonds or notes of a unit. (1931, c. 60, s. 26.)

§ 2492(25). Unit must remit interest and principal as they fall due; cancellation of obligations paid. — It shall be the duty of every officer of a unit upon whom is imposed by law the duty of remitting funds for the payment of bonds, notes and interest coupons of the unit to remit to the place at which the same are payable sufficient funds for the payment of such bonds, notes and coupons in sufficient time for the payment thereof as the same fall due, and at the same time to remit to such place of payment the necessary fiscal agency fees of the disbursing bank or trust company at which such bonds, notes or coupons are payable. Upon surrender of the bonds, notes or coupons so paid the same shall be cancelled. It shall be the duties of the officers remitting said funds to report to the Director, simultaneously with making the remittance, upon forms to be provided by the Director. (1931, c. 60, s. 27.)

§ 2492(26). Records of unit sinking funds. — It shall be the duty of the Director to ascertain by reports which he is hereby authorized to require made to him by any financial officer of any unit and by such other means as he may determine upon, the amounts of sinking funds collected for the payment of bonds of each unit not maturing in annual series and the investments of such sinking funds and the rate of taxation levied to provide for such sinking funds. It shall be his further duty to determine from such information whether the provisions of law for the raising and maintenance and preservation of such sinking funds have been observed and if he shall find that in any respect such provisions of law have not been observed he shall issue an order to the officers and/or board members of such unit in charge of such matters who have failed to observe such provisions, requiring them to comply therewith and stating the amount or amounts to be raised annually by taxation for such purpose, and in other respects requiring such officers and/or board members fully to comply with such laws. Within five days after the issuance of any such order, unless the Commission in its discretion shall extend such time, any officer or board member receiving the same shall be entitled to apply to the Commission for a modification of such order, and unless modified by the Commission, and if so modified, to the extent of the order as so modified, it shall be the duty of all officers and board members to whom such order is directed to comply with the same. (1931, c. 60, s. 28.)

§ 2492(27). Investment of unit sinking funds. —It shall be the duty of all officers having charge of the investment of sinking funds of each unit either to deposit such funds under security therefor as provided by this act, or to invest the same (or deposit in part and invest in part) in bonds or notes of the United States or of the state of North Carolina, or in bonds or notes of such unit, or in such bonds or notes of North Carolina municipalities, counties and school districts as are eligible for investment of the sinking funds of the state under any law in force at the time of investment of such local sinking funds, provided, however, that no investment shall be made in any bonds or notes of any city, county or school district except with the approval of the commission, which is hereby directed to scrutinize with great care any applications for any such investment and to refrain from approving the same unless such investment is prudent and is safe in the opinion of the commission and unless the legality thereof has been approved by an attorney believed by the commission to be competent as an authority upon the law of public securities. No such securities shall be purchased at more than the market price thereof, nor sold at less than the market price thereof. The interest and revenues received upon securities held for any sinking fund and any profit made on the resale thereof shall become and be a part of such sinking fund. (1931, c. 60, s. 29; 1933, cc. 143, 436.)

Editor's Note.—Public Laws 1933, cc. 143, 436, deleted two clauses from this section, one qualifying the deposit in bonds of a unit by the words "if such sinking funds are applicable to the payment of such bonds or notes" and the other limiting the approval to cases where the unit is not in duplicate of any payment of principal or interest.

The 1933 Amendment amends this section by striking out the limitation that in the investment in securities of a governmental unit, such unit should not be in default in the payment of principal or interest of its indebtedness. See 11 N. C. Law Rev., 216.

§ 2492(28). Notification to unit officers of unfavorable state of sinking funds; sale of unsafe investments. — If it shall appear to the Director at any time that the sinking funds of any unit are not deposited under security or invested in securities as required by this act, it shall be his duty to notify the officer or officers in charge of such sinking funds of such failure to comply with law, and thereupon it shall be the duty of such officer or officers to comply therewith within thirty days, except as to the sale of investments held by any such sinking fund which are not eligible for the investment thereof, and as to such investments it shall be the duty of such officer or officers to sell the same within nine months after such notification of the Director is received, at a price approved by the Director, provided, however, that the Commission in its discretion may extend from time to time the time for sale of any such investments, but no one extension shall be made to cover a period of more than one year from the time the extension is made: Provided further, that the Director in his discretion may extend for a period not exceeding ninety days the time for securing funds deposited in banks prior to March eighteenth, one thousand nine hundred and thirty-one, and the Commission may, in its discretion, further extend said time, but no such extension or extensions of the time for securing such funds shall be made for a period ending later than October first, one thousand nine hundred and thirty-one, without the approval of the Commissioner of Banks. (1931, c. 60, s. 30, c. 296, s. 6.)

§ 2492(29). Reports to Director of present sinking funds.—It shall be the duty of all officers in charge of the sinking funds of units to report on forms to be furnished by the Director to the Director on the first day of July, one thousand nine hundred thirty-one, and on the first day of

each January and July thereafter, a statement of the amounts of the sinking funds of such unit, and whether the same are on deposit, and if so, how the same are secured, or whether the same are invested, and if so, a description of the investments with the respective amounts thereof, in order that the Commission and the Director may be kept informed in regard to such sinking funds; but the Commission or the Director may at any other times require such reports to be made and it shall be the duty of the officers in charge of the sinking funds of any unit to make such reports as herein provided. (1931, c. 60, s. 31.)

§ 2492(30). Sinking funds on deposit must be secured by corporate surety bonds.—It shall be the duty of each officer having charge or custody of funds of a unit, of whatever kind or nature or for whatever purpose the same has been raised or shall be held, to keep them safely and to deposit the same in the depository or depositories designated in the manner provided by law, but before making such deposit he shall require of said depository or depositories that such deposit shall be secured by a surety bond or bonds, issued by a surety company or companies authorized to transact business in the State of North Carolina, the form of such surety bonds to be approved by the Commission in an amount sufficient to protect such deposits, but the Commission may, at any time, in its discretion require an additional bond; Provided, however, that in lieu of a surety bond both as to all or any part of such deposits it shall be lawful to secure the same by lodging with the proper custodian hereinafter provided for such securities as are by this act made eligible for investment of sinking funds of local units, such securities to be selected under the terms and conditions of investments of such sinking funds, including approval of certain classes of securities by the Commission. Any bank or trust company furnishing United States Government bonds, North Carolina State bonds, county or municipal bonds as security for such deposits shall deposit said bonds with another bank which has been approved by the commission as a depository bank for such purposes, the State Treasurer or the Federal Reserve Bank and said bonds when so deposited shall be held for the benefit of the unit and subject to the order of the governing body or board of such unit and subject to inspection at any time by a representative of the governing body or board of such unit and by a representative of the Commission. Provided further, that the director or commission may in his or its discretion permit the current funds of a unit to be secured by notes or bonds of said unit.

Each such officer having charge or custody of the funds of a unit and the surety or sureties on his official bond, after a deposit of said funds has been secured by him in the manner hereinabove required, shall not be liable for any losses sustained by the unit by reason of the default or the insolvency of the said depository or depositories. No security shall be required for the protection of funds of a unit remitted to and received by any bank or trust company within or without the State of North Carolina for the sole and exclusive purpose of paying the maturing principal of or interest on bonds or notes of the unit, when such bank or trust company is the agreed place of payment of such principal or interest and when such funds are remitted within sixty days prior to the maturity of such principal or interest. (1931, c. 60, s. 32, c. 296, s. 7; 1935, c. 375, s. 1.)

Editor's Note.—The amendment of 1935 transposed the word "designated" which preceded "depository" and placed it after the word "depository." It also omitted the clause that the bonds should be "in no event less than the average daily bank balance of the unit for the preceding year." It omitted another provision that units may buy bonds for their own benefit and deposit same as directed, and it added the last paragraph of the section as it now reads.

Section 2 of the amendatory act provides: "that nothing in this act shall be construed as to repeal any Public-Local Law of Ashe, Rockingham, and Alleghany counties relative to depositing public funds."

§ 2492(31). Semi-annual reports to Director on status of unit funds.—It shall be the duty of all officers having the charge or custody of any funds of any unit to report to the Director on the first days of January and July of each year (or such other semi-annual dates as may be fixed by the Director) and at other times upon direction of the Commission or the Director the amounts of funds of the unit then in their charge or custody, and the amounts of deposits of such funds in any depositary or depositaries, and a description of the surety bonds or collateral securities deposited to secure the same. It shall be the duty of the Director to require such reports to be made and to see that the provisions of this section are complied with. (1931, c. 60, s. 33.)

§ 2492(32). Officers of local units relieved of personal liability when bank deposits are insured.—If it shall be impossible or impracticable to safeguard any funds of the unit in the manner required by this article, if deposited in any depository within the unit, the officer having charge or custody of such funds may deposit the same without personal responsibility in any bank or trust company organized under the laws of the United States of America, or of any state within said country, either within or without the boundaries of said unit in which deposits are insured by the federal deposit insurance corporation, in accordance with the acts of Congress: Provided, that without the approval of the local government commission, the sum on deposit in any such bank, at any time, shall not exceed the amount insured by the said federal deposit insurance corporation. (1931, c. 60, s. 34; 1935, c. 424.)

Editor's Note.—The amendment of 1935 added the phrase "without personal responsibility" and also added the phrase "either within or without the boundaries of said unit," etc. It also added the proviso at the end of the section.

Section 2 of the amendatory act provides: "nothing in this act shall be construed to repeal any Public-Local Law of Ashe County, relative to deposits of public funds."

§ 2492(33). Appointment of unit administrator of finance in event of default.—If funds sufficient for the payment of the principal and interest due at any time upon any valid indebtedness of any unit shall not be remitted for the payment thereof in sufficient time to pay the same when due the director may appoint a qualified person of good repute and ability as administrator of finance of such unit, at such compensation as may be determined by the director, but not in excess of three hundred dollars monthly nor for a period of more than one year except with the approval of the governor. It shall be the duty

of such administrator of finance to take full charge of the collection of taxes in such unit and the charge and custody of all funds of the unit and the safeguarding thereof, and of the disbursement of moneys for all purposes, or to take charge of such part of any or all such duties as the director may determine. The administrator may retain under his supervision and control any city or county officers or employees for the performance of any part of such duties falling within the lines of their customary office or employment or may remove any tax collector or accountant or other officer having connection with the collection and disbursement of funds of the unit in his discretion. The administrator shall comply, on behalf of such units, with all the requirements of law applicable to such unit, officers and employees. Any questions or disputes arising out of the appointment of such administrator or his assumption of duties hereunder or as to his powers, may be presented to the commission on the application of any officer, taxpayer or citizen of the unit or on the application of the director, and the commission shall be empowered to determine the same. The compensation and expenses of the administrator, and the expenses of the director and the commission, arising out of the provisions of this section, shall be a charge against the unit and shall be paid by it and shall be deemed a special purpose for the payment of which this special provision of law is made, and the amount thereof shall be included in the budget of the unit for the following fiscal year.

One year after any unit shall have failed to remit the principal and/or interest due upon any valid indebtedness then outstanding, upon petition of the holders of fifty-one per centum of the indebtedness of the unit, the director shall appoint an administrator of finance, by and with the consent of the resident judge of the district in which the unit is located, who, upon his appointment, shall have the authority hereinbefore in this section conferred upon the administrator of finance.

The petition shall disclose all facts and circumstances available in connection with the issue in default, including the names and addresses of all known holders of such issue, and, insofar as the petitioning holders, shall contain a consent to the filing of the petition.

The order shall be in such form as the director and judge may determine, to include, however, such facts as may appear from the petition to be the facts with respect to the issue in default. It shall show the consent of the resident judge to the appointment of the administrator of finance named in the order.

Immediately upon the filing of the petition and the entry of the order, which shall be done within ten days after the date the petition is filed with the director, the director shall certify, over his hand and the seal of the treasurer, the petition and order to the superior court of the county where the unit is located, if it be a unit other than the county, and to the superior court of the county, if the unit be a county. Upon receipt of the certified petition and order, it shall be the duty of the clerk of the superior court to which certified to issue such notice as may be prescribed by the director, and cause the same to be published in a newspaper of general circulation published in the state and in a journal approved by the commission for "notice of sale" of evidences of indebtedness, once a week for four weeks, and issue a copy of such notice to all holders of the issue in default named in the petition. Such notice shall contain a provision requiring all holders of such issue to appear in person or through attorney, and disclose their name, address and amount of the issue held.

Upon the expiration of the period of publication hereinbefore prescribed, the cause shall be transferred by the clerk of the superior court to the civil issue docket of the court, and the same shall thereafter stand upon such docket to be proceeded with as in other civil actions, but shall be placed upon the trial calendar at each term of the court thereafter for the trial of civil actions until final action is entered by the court at term.

Any action taken in the cause shall be after notice issued and published as hereinbefore provided, but from any order entered, unless the holders of all of the issue in default shall have responded, shall remain open for a period of thirty days after the publication of the order as hereinbefore prescribed for publication of notice. If the holder of any amount of such issue in default shall, during said thirty-day period, file a petition for a modification or revocation of the order, said order shall not become effective until the petitioning holder or holders shall have been heard by the court. If the order shall be, on such petition, modified or revoked, the order modifying or revoking the order shall become the order of the court in the cause.

Upon the notice hereinbefore prescribed and in the manner herein provided, the court shall have authority to enter any order which shall be for the interest of the unit and the holders of the issue in default, but no order entered shall become finally operative until the expiration of the time hereinbefore provided for the filing of petitions for modification or revocation. Any order which is agreed to by the unit and the holders of the issue in default may be entered at any time, but such order shall be likewise published, and unless agreed to by the holders of the entire issue in default, shall become operative only after the expiration of the period hereinbefore provided for the filing of petitions for modification or revocation, and the court shall have authority, upon the filing of such a petition, to modify or revoke the order entered by agreement, which order then entered, shall thereupon become effective and operative.

The costs of all publications and of the issuance of all notices shall be paid by the administrator of finance: Provided, however, that the holders of the issue in default filing the original petition shall advance the necessary cost, but shall be reimbursed by the administrator of finance upon the docketing of the cause upon the civil issue docket of the superior court to which certified.

The court, with the consent of the director, for good cause shown, shall have the right to remove the administrator of finance appointed, and, with the consent of the director, appoint another administrator of finance in his place. The administrator of finance appointed upon the institution of the cause or thereafter by the court

shall give such bond as shall be prescribed by the director and the resident judge of the district. The compensation shall be fixed for the administrator of finance by the director and the resident judge of the district and all costs shall be paid as provided in the first paragraph of this section. Until the final determination of the cause and the entry of an order finally discharging an administrator of finance, the administrator of finance shall have such powers and perform such duties as prescribed in the first paragraph of this section. (1931, c. 60, s. 36; 1933, c. 374.)

Editor's Note.—Public Laws of 1933, c. 374, added all the paragraphs of this section except the first paragraph. The first paragraph formerly comprised the whole section.

This section was amended, 1933, by providing an additional method for the adjustment of the indebtedness of local government units, and the proceeding so authorized seems to be in the nature of a creditors' bill, with a very general power in the court to make orders. The duties and powers of the Administrator of Finance are not defined, but they would probably be similar to those of a receiver in a creditors' suit. See 11 N. C. Law Rev., 215.

§ 2492(34). Director to inform unit of amount of taxes to be levied.—At least thirty days before the time for the levy of taxes in each unit of the State for the payment of the principal or interest of its obligations, if the Director shall have sufficient information available therefor, it shall be his duty to mail to the recording officer of each board having power to levy such taxes, a statement of the amount to be provided by taxation or otherwise for the payment of the interest and sinking fund requirements upon such obligations within the fiscal year and for the payment of the obligations maturing in such year. (1931, c. 60, s. 36.)

§ 2492(35). Director to notify due dates of obligation.—At least thirty days before the date upon which the principal or interest of any obligation of any unit shall be payable, if the Director shall have sufficient information available therefor, it shall be his duty to mail to the recording officer of such unit a statement of the amount of principal and interest so payable and a statement of the requirement of this act that such amount shall be remitted to the place at which the same are payable. (1931, c. 60, s. 37.)

§ 2492(36). Unit must levy sufficient taxes to provide for maturing obligations.—Any board whose duty it shall be to provide for the payment by taxation or otherwise of the principal or interest of any valid obligations of the unit shall make provision for such payment by the levy of such taxes as are authorized to be levied therefor at or before the time provided for such tax levy, or to make other legal provision for such payment, and every member thereof who shall be present at the time for such levy or provision shall vote in favor thereof and shall cause his request that such tax levy or provision be made to be recorded in the minutes of the meeting: Provided, in making such levy any such board may determine and make allowance for moneys due to it and receipt of which may be reasonably anticipated by such unit. (1931, c. 60, s. 36; 1933, c. 332.)

Editor's Note.—Public Laws of 1933, c. 332, added the proviso appearing at the end of this section.

§ 2492(37). Failure to meet obligations when due if funds are in hand a misdemeanor.—If the officer of any unit whose duty it shall be to pay any of the principal or interest of valid obligations of the unit or to remit the same to the place of payment as provided in this act, shall have funds for such payment at his disposal but shall fail or refuse so to do within the time required hereby and in sufficient amount for such payment, whether or not such payment or remission for payment shall have been ordered or forbidden by any board or officer of the unit, the officer so failing or refusing shall be guilty of a misdemeanor and upon conviction shall be fined and/or imprisoned in the discretion of the court, and shall be liable in a civil action for all damages on the suit of any one aggrieved thereby. (1931, c. 60, s. 39.)

§ 2492(38). Voting for appropriation for other purposes than obligations or application of funds otherwise a misdemeanor. — Every member of any board of a local unit who shall knowingly vote for any appropriation to any purpose other than the payment of the interest or principal or sinking fund of any bonds or notes of the unit any money raised by taxation or otherwise for such purpose, until all of such principal and interest shall have been paid, and any disbursing officer who shall knowingly pay out any of such money for any other purpose than the payment of such interest or principal or sinking fund until all of such principal and interest shall have been paid, whether or not such payment shall have been ordered or forbidden by any board or officer of the unit, shall be guilty of a misdemeanor and upon conviction shall be fined and/or imprisoned in the discretion of the court, and shall be liable in a civil action for all damages on the suit of any one aggrieved thereby. (1931, c. 60, s. 40.)

§ 2492(39). False statement a misdemeanor.— If any officer or any member of any board upon whom duties are imposed by this act shall knowingly make or certify any false statement in any certificate or statement required or permitted by this act, he shall be guilty of a misdemeanor and upon conviction shall be fined and/or imprisoned in the discretion of the court, and shall be liable in a civil action for all damages on the suit of any one aggrieved thereby. (1931, c. 60, s. 41.)

§ 2492(40.) Wilful failure to perform duty a misdemeanor.—If any officer or any member of any board of any local unit upon whom duties are imposed by this act or of whom duties are required pursuant to the provisions of this act shall knowingly and wilfully fail or refuse to perform any such duty, he shall be guilty of a misdemeanor and upon conviction shall be fined and/or imprisoned in the discretion of the court, and shall be liable in a civil action for all damages on the suit of any aggrieved person. (1931, c. 60, s. 42.)

§ 2492(41). Other violations misdemeanor. — Notwithstanding the declarations of this act that certain specific offenses shall constitute misdemeanors and be punishable, the wilful violation by the Director or by any member of the Commission or any officer or member of a board of a unit of any duty whatsoever imposed upon him

by or under the provisions of this act, or his wilful failure, neglect or refusal to perform any such duty, shall be, and is hereby declared to be a misdemeanor, and shall be punishable by fine and/or imprisonment in the discretion of the court, and shall render the offender liable for damages at the suit of any aggrieved party. (1931, c. 60, s. 43.)

§ 2492(42). Prosecution by Attorney General; investigation of charges. — In case of the violation of any criminal provisions of this act, the Attorney General of the State of North Carolina upon complaint of the Director, whose duty it shall be to make such complaint in case of any such violation, shall investigate the charges preferred and if in his judgment the law has been violated he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending person or persons. Upon request of the Governor, the Attorney General shall take charge of such prosecution and, at the request of the Governor, special counsel may be employed to assist the Attorney General or the Solicitor. (1931, c. 60, s. 44.)

§ 2492(43.) Removal by Governor of offending persons.—Without abating any of the provisions of this act for criminal and civil actions, and for penalties and damages, it shall be the duty of the Director in the case of any breach of the provisions of this act or any failure or refusal to comply with any requirement made herein or permitted to be imposed hereby, by any member of the Commission or by any officer or member of a board of any unit (but in case of any such non-compliance, failure or refusal by the Director himself, it shall be the duty of the Attorney General through the Solicitor of the proper district) to bring the offense to the attention of the Governor, who shall consider the same and may in his judgment remove from office the offending officer or member and appoint a successor, subject to other provisions of law as to the appointment or election of successors of officers or members so removed. Such order of removal, however, shall not be effective until after a hearing before the Commission, which shall set a time therefor and shall give due notice thereof to the offending officer or member, and the order of the Commission after such hearing, whether such order shall confirm or refuse to confirm the removal, shall be final. In the event the Commission shall refuse to confirm the order of removal such officer or member shall continue his duties as such officer or member, but otherwise shall be removed from office pursuant to the order of removal issued by the Governor. (1931, c. 60, s. 45.)

§ 2492(44). Accountant for each city and town required.—It shall be the duty of the governing body of every city and town in this State on or before the first day of June, one thousand nine hundred thirty-one, and biennially thereafter before the first day of June in each odd year, to appoint some person of honesty and ability whose experience, training and qualifications have been approved by the Commission, as accountant for the municipality (or city accountant or town accountant or municipality accountant), to hold such office, or position at the will of the governing body or until such approval has been revoked by the Commission or until the appointment of his successor. The governing body in lieu of appointing an accountant as hereinabove required may impose and confer upon any municipal officer all the powers and duties herein imposed and conferred upon the municipal accountant and may revise and adjust the salary or compensation of any such officer upon whom such duties and powers are imposed or conferred: Provided, however, that if such officer upon whom such duties and powers are imposed or conferred should be a tax collecting officer of the unit, it shall be the duty of the governing body to require all his books and accounts to be audited semi-annually by a certified public accountant or a public accountant, registered under sections 7024(a)-7024(n): Provided further, that in towns of less than one thousand inhabitants, according to the census of one thousand nine hundred thirty, such books and accounts shall not be required to be audited more often than once each year. (1931, c. 60, s. 70, c. 269, c. 296, s. 9.)

§ 2492(45). Bond of accountant.—The municipal accountant may be required to furnish bond in some surety company authorized to do business in North Carolina, the amount to be fixed by the governing body, which bond shall be approved by the governing body and by the Commission and shall be conditioned for the faithful performance of his duties under this act. (1931, c. 60, s. 71.)

§ 2492(46.) Appropriations to former Commissions allotted to new Commission. — All moneys heretofore appropriated or set aside for the use of the County Government Advisory Commission and for the use of the Sinking Fund Commission in the performance of duties imposed upon the last two mentioned Commissions or either of them which are imposed by this act upon the Director or the Local Government Commission are hereby appropriated to the use of the Director in the performance of the duties imposed upon him by this act. (1931, c. 60, s. 73.)

§ 2492(47). Law applicable to all counties, cities and towns.—The provisions of this chapter shall apply to all counties, cities and towns in this State regardless of any provisions to the contrary in any special or local act enacted before the adjournment of the regular session of the general assembly in one thousand nine hundred thirty-five. (1931, c. 60, s. 74; 1935, c. 356, s. 3.)

Editor's Note.—The amendment of 1935 adds the clause at the end of the section reading "before the adjournment of the regular session," etc.

§ 2492(48). Temporary loans and notes for. — In the issuance of notes for temporary loans as provided by the County Finance Act [§§ 1334(1) et seq.], the Municipal Finance Act [§§ 2918 et seq.] and this act, the governing body may delegate to any officer of the unit the power to fix the face amount, the rate of interest, the time of maturity and the place of payment of principal and interest within and under the limitations, if any, established by the resolution authorizing the issue of such notes and the limitations fixed by

this act and other laws. (1931, c. 60, s. 75, c. 296, s. 4.)

§ 2492(49). Notes and bonds of units redeemable before maturity.—Any notes or bonds of a unit may (but need not) be made subject to call for redemption before maturity at the option of the unit issuing them, but no such bond or note shall be redeemed before maturity without the consent of the holder thereof, unless such bond or note states on its face that the unit reserves the right to redeem the same before maturity. There may also be incorporated in or endorsed upon notes, bonds or coupons of a unit provisions reserving to the unit the right to extend the time for payment thereof to a fixed or determinable future time, specified in such provisions. The word "determinable" is here used in the same sense that it is used in the Negotiable Instruments Law of North Carolina (chapter fifty-eight of the Consolidated Statutes). The negotiability of bonds, notes and coupons of a unit shall not be affected by the reservation therein of a right of redemption or extension pursuant to this section. (1931, c. 60, c. 296, s. 3; 1931, c. 258, s. 2; 1935, c. 356, s. 4.)

Editor's Note.—Public Laws 1933, c. 258, made this section applicable to all units instead of the bonds issued "pursuant to the county or municipal finance act." The quoted words were omitted by the amendment.

The amendment of 1935 added the last three sentences of this section.

§ 2492(50). Special levies to supplant money tied up in defunct banks.—In order to provide for the present emergency caused by recent failures of banks having deposits of unit funds, special approval and authority are hereby given for the levy of property taxes by any unit for the special purpose of replacing funds of the unit deposited in a bank, which the unit has lost or is unable to withdraw by reason of failure or closing of such bank before March first, one thousand nine hundred thirty-one. Such taxes shall be applied solely to the payment of valid or enforceable indebtedness now outstanding which the unit could have lawfully paid from said deposited funds or which the General Assembly could have authorized the unit to pay from said funds, and which was incurred for necessary expenses of the unit. Special approval and authority are also given for the levy of property taxes by such unit at such rate as may be necessary for the special purpose of paying interest on said outstanding indebtedness, as such interest becomes due, including interest on any bonds or notes hereafter issued to pay or extend the time of payment of said indebtedness. The taxes hereby authorized may be levied in excess of any constitutional or statutory limit on tax rates notwithstanding that the said indebtedness was or may have been incurred for current or general expenses. The powers conferred by this section are conferred in addition to and not in substitution for the powers now possessed by units. (1931, c. 296, s. 3.)

§ 2492(50)a. Plans or agreements for funding or refunding; exchange for outstanding coupons or interest notes.—The board or body authorized to issue funding and refunding bonds of a unit is hereby invested with all powers necessary for the execution and fulfillment of any plan or agreement for the settlement, adjustment, funding, or refunding of the indebtedness of the unit, not inconsistent with general laws relating to the issuance of funding and refunding bonds. Such plan or agreement may provide among other things for the issuance of funding bonds and refunding bonds; for the issuance of new coupons or notes in exchange for outstanding coupons, for the purpose of enabling the unit to reserve the right to extend the time for payment of the whole or a part of the interest represented by such outstanding coupons; for the endorsement or stamping of bonds, notes or coupons, for the purpose of extending the time for payment of the principal thereof or interest thereon or for the purpose of reserving the right to extend said time; and for the doing of any other thing authorized by law with respect to outstanding indebtedness of the unit. All such plans or agreements heretofore made or entered into and approved by the local government commission are hereby ratified and validated. New coupons or interest notes issued in exchange for outstanding coupons as aforesaid shall be executed in such manner as may be determined by said board or body, and approval thereof by the local government commission need not be noted thereon. A certificate signed by the secretary of the local government commission or by an assistant designated by him, stating that such new coupons or interest notes have been approved by the local government commission or under the provisions of the local government Act, shall be conclusive evidence that the requirements of this law with respect to approval by said commission have been complied with. All provisions of law relating to the means of payment of coupons surrendered in exchange for new coupons or interest notes as aforesaid shall apply to the payment of such new coupons or interest notes. The powers conferred by this section with respect to the issuance of new coupons or interest notes in exchange for outstanding coupons, and with respect to the endorsement or stamping of bonds, notes or coupons, may be exercised by resolution of the board or body authorized by law to issue funding bonds or refunding bonds of a unit, and any such resolution shall be in force and effect from and after its passage, and need not be submitted to the voters of the unit.

The State of North Carolina hereby gives its assent to the act of Congress approved May twenty-fourth, one thousand nine hundred and thirty-four, entitled "An Act to amend an act entitled 'an act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplemented thereto," and hereby authorizes all units, after approval has been given thereto by the local government commission, to proceed under the provisions of said act for the readjustment of their debts. (1933, c. 258, s. 4; 1935, c. 356, s. 5.)

Editor's Note.—The amendment of 1935 added all but the first sentence of this section.

§ 2492(50)b. Provisions in bond resolutions set out.—In any ordinance, order or resolution authorizing or providing for the issuance of bonds or notes of a unit for the purpose of refunding, funding or renewing indebtedness incurred before July 1, 1933, it shall be lawful to incorporate any or all of the following provisions, which shall have the force of contract between the unit and

the holders of said bonds or notes, and every board or body authorized to issue such bonds or notes or to levy taxes for their payment shall have power to do all things necessary or convenient for the purpose of carrying out such provisions, viz.:

(a) Provisions for the creation of a special fund or funds to be used for the purchase of said bonds or notes at market prices less than par and accrued interest, or for the payment of the bonds or notes at par and accrued interest at or before maturity. All bonds or notes so purchased or paid shall be cancelled and shall not be reissued.

(b) Provisions for levying a tax annually or otherwise for the payment of the principal of the bonds or notes or for the said retirement fund.

(c) Provisions pledging any taxes, special assessments, or other revenues or moneys of the unit to the payment of said bonds or notes or to said retirement fund.

(d) Provisions whereby, so long as any of said bonds or notes are outstanding, the unit will not pledge any particular revenues or moneys, except special property taxes, without securing such bonds or notes equally and ratably with the other obligations to be secured by such pledge.

(e) Provisions whereby any special fund aforesaid may be a revolving fund, and used temporarily for other purposes, and thereafter replenished, upon such terms and conditions as may be set forth in said ordinance, resolution or order.

(f) Provisions for the custody of any such special fund by a bank or trust company in this or any other state or by the state treasurer.

(g) Provisions for the allocation and payment daily or periodically of moneys payable to any of said special funds.

(h) Provisions for the determination by arbitration of any question arising under any of the foregoing provisions.

(i) Provisions whereby the holders of said bonds or notes, whether such bonds or notes shall have been delivered in exchange for the indebtedness refunded or funded thereby or shall have been sold and the proceeds thereof applied to the retirement of such indebtedness, shall be subrogated to all the rights and powers of the holders of such indebtedness.

(j) Provisions whereby bonds and notes, together with the matured and unmatured interest thereon, may be deposited with the state treasurer as trustee, or some bank or trust company designated as trustee by the governing body of the unit with the approval of the local government commission, and bonds issued from time to time or at specified intervals of time for the funding or refunding of all or any part of the indebtedness so deposited; the indebtedness of any depositor to be cancelled and extinguished at such time or times as the plan or agreement for the settlement, adjustment, funding or refunding of the indebtedness of the unit may specify, and need not be cancelled and extinguished simultaneously with the issuance of bonds for funding or refunding a part of such indebtedness: Provided, that the ordinance, order, or resolution authorizing the issuance of funding or refunding bonds referred to in this clause may be adopted, or passed at such times as the plan or agreement may designate.

No such provisions shall become effective without the approval of the local government commission, or under the provision of an act passed at this session of the general assembly to provide a method for the readjustment of the indebtedness of counties and municipalities with creditors and holders of securities. (1933, c. 258, s. 4; 1935, c. 356, s. 6.)

Editor's Note.—The amendment of 1935 inserts subsection (i) and (j) of this section.

§ 2492(51). State not liable for debts of units nor units for obligation of each other.—Nothing herein contained shall be construed to bind the State of North Carolina to pay any part of any debt due by any county, municipality or other unit of government, nor shall it be construed that any county or other unit shall be liable for the debts of any other county or unit. (1931, c. 60, s. 77.)

Art. 2. Validation of Bonds, Notes and Indebtedness of Unit

§ 2492(52). "Unit" defined.—In this article the word "unit" means a county, city, town, township, school district, school taxing district, or other district or political subdivision of government of the State. (1931, c. 186, s. 1.)

§ 2492(53). Validation of bond and note issues by units. — In all cases where a unit has heretofore issued its bonds or notes, and has received for the bonds or notes an amount of money not less than the face amount of the bonds or notes, and has expended said money for public purposes, said bonds or notes are hereby validated, and all bonds or notes subsequently issued to pay or renew said bonds or notes are also hereby validated, notwithstanding any lack of statutory authority or failure to observe any statutory provision concerning the issuance of such bonds or notes. This section shall not be construed as validating any bonds or notes, the proceeds of which have been lost by reason of the failure of any bank. (1931, c. 186, s. 2.)

§ 2492(54). Cities authorized to issue bonds already ordered; anticipation notes validated. — In all cases where a city has by ordinance adopted on or before July first, one thousand nine hundred and twenty-nine, authorized the issuance of bonds for local improvements as defined in The Municipal Finance Act, one thousand nine hundred and twenty-one, as amended [§§ 2918 et seq.], and the bonds have heretofore been approved by the State Sinking Fund Commission, it shall be lawful for such city to issue said bonds pursuant to said ordinance and pursuant to The Municipal Finance Act, one thousand nine hundred and twenty-one, and the Local Government Act [§§ 2492(1) et seq.], without regard to the requirements of section 2941 concerning the making of petitions for local improvements before the issuance of bonds or bond anticipation notes; and all notes heretofore issued in anticipation of the issuance of said bonds are hereby validated, notwithstanding any failure to observe the requirements of said section 2941. (1931, c. 186, s. 3.)

§ 2492(55). Test cases testing validity of funding bonds.—At any time after the adoption of an ordinance, resolution, or order for the issuance of refunding or funding bonds of a unit by the board authorized by law to issue the same, and following the approval of the issuance of such bonds by the local government commission, and prior to the issuance of any such bonds, such board may cause to be instituted in the name of the unit an action in the superior court of any county in which all or any part of the unit lies, to determine the validity of such bonds and the validity of the means of payment provided therefor. Such action shall be in the nature of a proceeding in rem, and shall be against each and all the owners of taxable property within the unit and each and all the citizens residing in the unit, but without any requirement that the name of any such owner or citizen be stated in the complaint or in the summons. Jurisdiction of all parties defendant may be had by publication of a summons once a week for three successive weeks in some newspaper of general circulation published in each county in which any part of the unit lies, and jurisdiction shall be complete within twenty days after the full publication of such summons in the manner herein provided. Any interested person may become a party to such action, and the defendants and all others interested may at any time before the expiration of such twenty days appear and by proper proceedings contest the validity of the indebtedness to be refunded or funded or the validity of such refunding or funding bonds or the validity of the means of payment provided therefor. The complaint shall set forth briefly by allegations, references, or exhibits the proceedings taken by such board in relation to such bonds and the means of payment provided therefor, and, if an election was held to authorize such issuance, a statement of that fact, together with a copy of the election notice and of the official canvass of votes and declaration of the result. There shall similarly be set forth in the complaint a statement of the amount, purpose, and character of the indebtedness to be refunded or funded, and such other allegations as may be relevant. The prayer of the complaint shall be that the court find and determine as against the defendants the validity of such bonds and the validity of the means of payment so provided. (1931, c. 186, s. 4; 1935, c. 290, s. 1.)

Editor's Note.—This section was so changed by the amendment of 1935 that a comparison is necessary to determine its full extent.

§ 2492(56). Rules of pleading and practice. — The trial of such action shall be in accordance with the Constitution and laws of the State; and the rules of pleading and practice provided by the Consolidated Statutes and court rules for civil actions, including the procedure for appeals, which are not inconsistent with the provisions of this act, are hereby declared applicable to all actions herein provided for: Provided, however, that an appeal from a decree in such action must be taken within thirty days from the date of rendition of such decree. The court shall render a decree either validating such bonds and the means of payment provided therefor, or adjudging that such bonds and the means of payment provided therefor are, in whole or in part, invalid and illegal. (1931, c. 186, s. 5; 1935, c. 290, s. 2.)

Editor's Note.—The amendment of 1935 inserts the proviso at the end of the first sentence of the section. It also substitutes the words "a decree" for the word "judgment" near the beginning of the second sentence.

§ 2492(57). Judgment establishing validity of issue.—If (a) the superior court shall render a decree validating such bonds and the means of payment provided therefor and no appeal shall be taken within the time prescribed herein, or (b) if taken, the decree validating such bonds and the means of payment provided therefor shall be affirmed by the supreme court, or (c) if the superior court shall render a decree adjudging that such bonds and the means of payment provided therefor are, in whole or in part, invalid and illegal, and on appeal the supreme court shall reverse such decree and sustain the validity of such bonds and the means of payment provided therefor (in which case the supreme court shall issue its mandate to the superior court requiring it to render a decree validating such bonds and the means of payment provided therefor), the decree of the superior court validating such bonds and the means of payment provided therefor shall be forever conclusive as to the validity of such bonds and the validity of the means of payment provided therefor as against the unit and as against all taxpayers and citizens thereof, to the extent of matters and things pleaded or which might have been pleaded, and to such extent the validity of said bonds and means of payment thereof shall never be called in question in any court in this State. (1931, c. 186, s. 6; 1935, c. 290, s. 3.)

Editor's Note.—This section is so changed by the amendment of 1935 that a comparison is necessary in order to determine its full extent.

§ 2492(58). Taxing costs. — The costs in any action brought under this article may be allowed and apportioned between the parties or taxed to the losing party, in the discretion of the court. (1931, c. 186, s. 7.)

§ 2492(59). Levying special tax for proposed issues.—If the complaint in any action brought under this article, or an exhibit attached to such complaint shows that an ordinance or resolution has been adopted by the unit providing that a tax sufficient to pay the principal and interest of the bonds or notes involved in such action is to be levied and collected, such ordinance or resolution shall be construed as meaning that such tax is to be levied without regard to any constitutional or statutory limitation of the rate or amount of taxes, unless such ordinance or resolution declares that such limitation is to be observed in levying of such tax. (1931, c. 186, s. 8.)

§ 2492(60). Notice of proposed issue to be published by unit.—Any unit may by resolution of the official board of such unit, authorized by law to issue bonds or notes, cause to be published a notice of the intention of said board to issue bonds or notes of the unit for the purpose of funding, refunding or renewing outstanding obligations or alleged obligations issued prior to passage of such resolution. Such notice shall describe said obligations or alleged obligations in a manner sufficient to identify them. It shall also state, either in general or specific terms, the purpose or purposes for

which said outstanding obligations were incurred or issued, as determined by said official board of said unit prior to the publication of said notice. Said notice shall further state that a tax is to be levied on all taxable property in the unit sufficient to pay the bonds or notes proposed to be issued, or any bonds or notes that may be subsequently issued for the purpose of refunding, funding, renewing or paying said bonds or notes. Said notice shall be published once in each of three successive weeks in a newspaper published in the unit having the largest or next largest circulation in the unit, or if no newspaper is there published, then in a newspaper published in the county in which the unit is located, if any, and if there be no such newspaper such notice shall be posted at the door of the court house or building where said official board usually holds its meetings, and published in some newspaper published in the State of North Carolina and circulating in said unit. Such notice shall contain a statement that it is being published under the provisions of this section. After the issuance of any bonds or notes in accordance with the intention expressed in said notice, the validity of said bonds or notes and/or of any subsequently issued instruments evidencing the same indebtedness, shall not be open to question in any court upon the ground that any of the obligations or alleged obligations for the funding or renewal of which such bonds or notes were issued, were or are invalid, nor shall the power of the unit to levy a sufficient tax on all taxable property in the unit for the payment of the principal and interest of said bonds or notes, or of any subsequently issued instruments evidencing the same indebtedness, be open to question in any court upon the ground that the obligations or alleged obligations for the funding or renewal of which said bonds or notes were issued were invalid, or upon the ground that said original obligations or alleged obligations were not issued for a purpose for which such tax can be levied, except in an action or proceeding commenced within thirty days after the first publication of said notice of intention. The date of such first publication shall be stated in said notice. (1931, c. 186, s. 9; 1935, c. 290, s. 4.)

Editor's Note.—Prior to the amendment of 1935 this section applied only until July, 1932, and the outstanding obligations were those issued since March 1, 1929. The amendment makes the section general and permanent in its application. Prior to the amendment, it was required that a copy of the section be posted with the notice. Now a statement that notice is being published according to the section is all that is required. Prior to the amendment the purposes of levy could be attacked by an action "commenced at least two days prior to the issuance of said bonds or notes." The quoted passage was omitted by the amendment.

§ 2492(61). Invalid issues and pending litigation unaffected.—This article shall not apply to any bonds or notes that have been held invalid by any court of competent jurisdiction, nor shall it affect any litigation now pending. (1931, c. 186, s. 11.)

§ 2492(62). Validation of certain funding and refunding bonds. — Funding or refunding bonds authorized by a bond ordinance adopted under the municipal finance act, or by a bond order adopted under the county finance act, when such ordinance or order was adopted before the eleventh day of April, nineteen hundred and thirty-three, may be delivered notwithstanding such ordinance or order may not contain a description of the indebtedness to be funded or refunded: Provided, all funding, refunding or readjustment bonds authorized to be issued after the eleventh day of April, nineteen hundred and thirty-three, must conform to the requirements of all laws enacted for the purpose of funding, refunding and readjusting such indebtedness. (1933, c. 500, s. 1.)

Public Laws of 1933, c. 288, exempts Forsyth county from the operation of this and the following sections of the prior Act of 1933.

Art. 3. Readjustment of Indebtedness of Counties and Municipalities.

§ 2492(63). County readjustment commission created. — There is hereby created a commission to be known as the county readjustment commission, which shall consist of three (3) freeholders and taxpayers resident in the state of North Carolina, to be appointed by the governor immediately following the ratification of this article, no two of which shall be of the same business or profession, in the appointment of which the governor shall name the chairman and fix the compensation of such commissioners, which shall be paid as hereinafter provided, and said commission shall proceed to organization by electing a secretary and providing such other expert legal and clerical assistance as may be necessary for the purposes hereinafter enumerated. (1933, c. 205, s. 1.)

See 11 N. C. Law Rev., 214.

§ 2492(64). Assistance to local units in readjustment plan; notice of hearing; findings as to ability to pay; negotiations with bondholders. — Upon call, and at the request of any county or municipality of the state which may desire to have the services of the aforesaid readjustment commission in ascertaining and assisting such county, governmental unit, or municipality in working out a plan of readjustment, the aforesaid commission, with such aid and assistance as it may require, and after said county, governmental unit, or municipality has advertised in a local newspaper in said county once a week for four successive weeks of the time, place and hearing of said readjustment commission in order that the bondholders may have notice thereof, shall forthwith proceed to investigate the resources and available revenue of such county or municipality, its tax burdens and its valid obligations and securities outstanding and permit and allow any bondholder, county, governmental unit, or municipality to offer evidence or information in order that it may make such study of an analysis of the debts and obligations of such county, governmental unit, or municipality and its resources to meet the same and to fix the valuation of said county, governmental unit, or municipality and find the ability of said county, governmental unit or municipality to pay, and recommend and report to the authorities their suggestions and methods of such readjustment and the ability of such county, governmental unit, or municipality to meet the same. Findings by said readjustment commission as to the value of the securities and the ability of the county, governmental unit, or municipality to pay, if supported by competent evidence shall be prima facie and presumptive evidence of the valuation of the securities and of the ability of the county, govern-

mental unit, or municipality to meet the same. And the said authorities of all such counties, municipalities, and governmental units shall be further authorized and empowered in their discretion to request the services of the aforesaid county readjustment commission to enter into negotiations with the holder or holders of all such securities for the purpose of readjusting the same upon such basis as the said commission and the holders of such obligations may agree upon, and shall report their recommendations as to the readjustment of such indebtedness to the authorities of such counties, municipalities, or other governmental units for their final decision. (1933, c. 205, s. 2.)

§ 2492(65). Conference with creditors to agree upon readjustment; consent of two-thirds of creditors. — Upon the coming in of the aforesaid report, the authorities of such county, municipality, or governmental unit shall be authorized to call the holders of its securities or obligations in conference for discussion of a basis of such readjustment and may make such adjustment of its obligations with the holders of its securities as may be mutually acceptable and agreeable, and whenever the holders of at least two-thirds of the total obligations of such county, governmental unit, or municipality shall agree upon a basis of readjustment, then such county, governmental unit, or municipality shall be authorized to proceed therewith and to issue new securities or refunding securities to the amount of the readjustment basis of its obligations for such extended period of time and at such rate of interest as may be mutually acceptable unless an election shall be called as hereinafter provided. (1933, c. 205, s. 3.)

§ 2492(66). Tender of agreed adjustment to minority third of creditors; minority may seek redress in courts; investigation by courts into affairs of local unit. — Whenever two-thirds in amount of the holders of the securities of such county or municipality have agreed with such county, municipality, or governmental unit upon the readjustment of its obligations, the same adjustment shall be tendered to all holders of the securities on the same basis proposed and agreed to, and upon the failure of such minority holders to accept such settlement and readjustment upon the basis assented to by two-thirds in amount of the holders of the total obligations of such county, governmental unit, or municipality, then thereafter the holders of such securities declining to accept the adjustment aforesaid may proceed to seek redress for relief by an action in the superior court in said county, but no mandamus shall lie until eighteen months after final judgment establishing the claims of such minority holder or holders and upon application for said mandamus. The court shall have power and authority to investigate and determine the ability of the county, governmental unit, or municipality to pay out of its present and probable income its accrued and accruing indebtedness and when the money which may reasonably be expected to be raised by the levy of and collection of taxes in the said county, governmental unit, or municipality within its current fiscal year, together with such other sources of income of the county, governmental unit, or municipal corporation as may exist, shall be insufficient to pay the reasonable, necessary and economical operating expenses of such municipal corporation, its probable requirements for welfare relief and the service of its debts, the court may upon the facts so found by it issue said mandamus upon such terms and conditions as in the judgment of the court may seem just and equitable. (1933, c. 205, s. 4.)

§ 2492(67). Expense of investigation borne by units affected.—All of the costs of investigation, salaries of the commission, and its expenses in making the report herein provided for shall be borne by and paid by the county, municipality, or governmental unit calling upon such commission for its assistance and report, and the salaries of the aforesaid commissioners and the general expense thereof shall be apportioned by the commission in a just and equitable manner and paid by the county, municipality, or governmental unit calling for this service. (1933, c. 205, s. 5.)

§ 2492(68). Findings of commission and readjustments filed with secretary of state; debt service levies reducible in proportion to terms of readjustment.—The commission herein appointed, after making the investigation and report as herein provided for, shall make a copy of its findings and recommendations in condensed form and file the same in the office of the secretary of state at Raleigh, which shall be by him recorded in a book to be provided for that purpose, and the county, governmental unit, or municipality shall make and file with the secretary of state, to be likewise recorded in his office, a copy of any adjustment or settlement which may be or may have been reached with the holders of such securities and obligations as herein provided, and thereafter the aforesaid county, municipality, or governmental unit shall not make or levy any tax or assessment concerning the aforesaid bonds and obligations or provide any debt service or sinking fund beyond the amount of such settlement and adjustment agreed upon and adopted by such readjustment as herein provided. (1933, c. 205, s. 6.)

§ 2492(69). Local units may borrow money to purchase their own bonds at discounts; R. F. C. loans authorized.—Said county readjustment commission is hereby authorized and empowered, subject to the approval of the governing body of any political sub-division of the state, and at its request, to negotiate for a loan to be made to any county, city, town or other political sub-division, if such loan, or the money derived therefrom, can be used to purchase the outstanding bonds or notes, or other evidences of indebtedness of such political subdivision at a discount of 40 per cent or more. If congress shall provide that the reconstruction finance corporation may make such loans to counties, cities, towns or other political sub-divisions of North Carolina, then the governing bodies of such counties, cities, towns or other political subdivisions of North Carolina, are hereby authorized and empowered to borrow money from such reconstruction finance corporation for such purpose, and such governing bodies are hereby authorized and empowered to issue bonds or other evidence of indebtedness to the reconstruction finance corporation, or any other lender, under like circumstances, in such amounts and in such denominations, at such rate of interest and for such term of years, and otherwise, as may be

agreed upon between the governing body of any such county, city, town or other political sub-division of North Carolina, and the reconstruction finance corporation. Said obligations to the reconstruction finance corporation or other lender are hereby declared to be obligations issued for a necessary purpose and to be binding upon the county, city, town or other political sub-division, and a sufficient special tax shall be levied and collected each year by the governing body of such county, city, town or other political sub-division as may be necessary to pay the interest and retire the principal of such bonds, according to the terms and provisions contained in the issue. It is further provided that any portion of the total of the outstanding indebtedness of any county, town, city or other political subdivision may be discounted as herein provided. (1933, c. 205, s. 7.)

§ 2492(70). Agreement as to readjustment tentative; publication of proposed plan; if no election petition filed, then agreement may be put into effect.—In any case where any county, city, town or other political sub-division shall have reached an agreement with its creditors upon a debt settlement plan, as provided in this article, such agreement shall be tentative to the following extent: That is, the proposed debt settlement plan shall first be published in some newspaper in the county affected by the debt settlement plan, or within which the county, city or town is situated, once a week for four successive weeks, or for thirty days. If, at the end of said thirty days, no petition as hereinafter provided shall have been presented to the governing body of any such political sub-division requesting an election upon the proposed debt settlement plan, then the governing body thereof is hereby authorized and empowered to enter into a contract with its creditors for a readjustment of its indebtedness, and to issue bonds of any nature, and in any denominations, maturing within such period of time and at such rates of interest, as may be proposed in the debt settlement plan; and it is further authorized and empowered to do everything necessary in order to fully carry out the terms and conditions embodied in the proposed or tentative debt settlement plan. Such bonds, issued for a total refunding of the indebtedness of such political sub-division, or issued as partial refunding of indebtedness of such political sub-division, are hereby declared to be issued for necessary purposes within the contemplation of the constitution; and such political sub-division, through its proper governing body, is hereby directed to levy sufficient taxes annually to pay such obligations in accordance with the tenor and terms as same may be provided in such debt settlement plan. However, if within such period of thirty days publication, a petition shall be filed with the governing body of any such political sub-division signed by a number of qualified voters equal to 10 per cent of the votes cast for governor of North Carolina at the last preceding election in such political unit, then it shall be the duty of such governing body to call an election to be held within sixty days after the expiration of the said thirty day period at which time the election shall be conducted in accordance with the general law of North Carolina as now provided for voting for propositions. A ballot shall be provided having thereon the phrase "for debt settlement plan," and also the phrase "against debt settlement plan." Those desiring to vote for the debt settlement plan shall make a cross mark in the square at the left of the following: "for debt settlement plan," and those desiring to vote against proposed debt settlement plan shall make a cross mark in the square at the left of the following: "against debt settlement plan." If the majority of the votes cast at such an election shall be in favor of the proposed debt settlement plan, then the governing body of such county, city, town or other political sub-division shall proceed to sign the debt settlement contract with the creditors, and to issue such bonds as may be provided in said debt settlement plan, at such rate of interest and in such denominations and for such length of time as may be provided for in the debt settlement contract; and the said governing body is hereby fully authorized and empowered to do everything necessary to carry out the provisions of any such proposed debt settlement. If, at such election, a majority of the votes cast are against the proposed debt settlement plan, then the tentative agreement shall become null and void; however, such failure of a majority of the people to ratify any tentative debt settlement plan shall not be deemed to prohibit the governing body of any county, city or town from proceeding to negotiate any other plan of debt settlement with its creditors, and, after the expiration of one year from the date of such an election, a second election may be held upon any other or different debt settlement plan. (1933, c. 205, s. 8, c. 348.)

§ 2492(71). Supplemental to existing laws.—This section shall be deemed to provide an additional and alternative method for the doing of the things authorized hereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of or as a limitation on or as affecting any powers for the issuance of bonds or notes under the provisions of other laws, or as affecting the proceedings or as requiring any additional proceedings for the issuance of bonds or notes under such other laws. Before any of the provisions of this act shall be applicable to any county, city, town or political subdivision the governing body thereof shall pass a resolution requesting the services of said readjustment commission and shall file with its secretary a certified copy of such resolution. (1933, c. 312, s. 1.)

Art. 4. Funding and Refunding of Debts of Local Units Other than Counties, Cities and Towns.

§ 2492(72). Local units, other than counties, cities and towns, authorized to fund outstanding debts.—Any unit other than a county, city or town may issue bonds as provided in this article for the purpose of funding or refunding any or all of its matured or unmatured notes or bonds, or the interest accrued thereon, provided the indebtedness evidenced by said notes or bonds was incurred before July 1, 1933. The word unit as here used means a township, school district, school taxing district, road district, drainage district, sanitary district, water district, or other district, political sub-division or local governmental agency. The notes and bonds

hereby authorized to be funded or refunded include notes and bonds issued in the name of a county, but payable from taxes levied in a township, school district or other unit embracing only a part of the territory of the county. (1933, c. 257, s. 1.)

§ 2492(73). General law applicable. — Bonds issued pursuant to this article shall be issued in accordance with the provisions of the county finance act, as amended, relating to the issuance of funding and refunding bonds under that act, except in the following respects, viz.:

(a) They shall be issued in the name of the obligor named in the obligations to be funded or refunded, or in the name of the successor to the obligor named in the obligation to be refunded or funded.

(b) They shall be issued by or on behalf of the unit by the same board or body which issued the obligations to be funded or refunded, or its successor, or, if said board or body is no longer in existence, by the board of county commissioners or other governing body of the county in which the unit, or the major portion of the unit, is situated;

(c) It shall not be necessary to include in the order or resolution authorizing the bonds, or in the notice required to be published prior to final passage of the order or resolution, any statement concerning the filing of a debt statement, or the contents thereof; and, as applied to said bonds, sections 9, 13, 14, 15, 16, and 17, of the county finance act, as amended [§§ 1334(9), 1334(13)-1334(17) of this code], shall be read and understood as if they contained no requirements in respect to such matters;

(d) The bonds shall mature at such time or times, not later than forty years after their date, as may be fixed or provided for in the resolutions under which they are issued;

(e) The bonds shall be issued in exchange for the obligations to be funded or refunded thereby, and the aggregate principal amount of the bonds shall not exceed the aggregate amount of unpaid principal and accrued interest of the obligations for which they are exchanged. (1933, c. 257, s. 2; 1935, c. 484.)

Editor's Note.—The clause at the end of subsection (a) reading: "or the name of the successor to the obligor" was added by the amendment of 1935.

§ 2492(74). Taxes to pay new obligations authorized.—Taxes for the payment of the principal and interest of bonds issued pursuant to this act shall be levied by the board or body authorized by existing law to levy taxes for the payment of the obligations funded or refunded by said bonds, and shall be levied only in the territory subject to taxation for the payment of the obligations so funded or refunded. (1933, c. 257, s. 3.)

§ 2492(75). County finance act applicable.— Except where they are inconsistent with the provisions of this article; all of the provisions of the county finance act, as amended, applicable to bonds issued under that article for the funding or refunding of indebtedness incurred before July 1, 1933, shall be applicable to bonds issued under this article. For the purpose of applying the provisions of said act to bonds issued under this article, the following words and phrases in said act shall be deemed to have the following meanings when applied to said bonds, viz.: "Governing body" means the board or body authorized by this article to issue bonds, except the words "governing body" in section 41 of the county finance act, where said words mean the board or body authorized by this act to levy taxes; "county" means the unit by or on behalf of which the bonds are to be issued under this article; "published" means published in a newspaper published in a county in which such unit is situated, if there be such a newspaper, but otherwise means posted at the courthouse door of said county and at least three other public places; "clerk of board of commissioners" means the clerk or secretary of the board or body authorized by this act to issue bonds; "this act" means this article. (1933, c. 257, s. 4.)

Art. 5. Assistance for Defaulting Local Government Units in the Preparation of Workable Refinancing Plans.

§ 2492(76). Aid of director of local government to defaulting local units.—Whenever it shall appear that any county, city, town, or other local government unit of this State has defaulted for a period of six months in the payment of the principal or interest of any of its outstanding notes or bonds, the director of local government is hereby given the authority to prepare and certify to the governing body of such local government unit a plan for refinancing, readjustment, or compromising said debt in order to remove the default and prevent its recurrence. (1935, c. 124, s. 1.)

Editor's Note.—Section 6 of chapter 124, Public Laws of 1935, from whence the above section was derived, reads as follows: "All laws and clauses of laws in conflict with this act are hereby repealed: Provided, however, nothing in this act shall be construed to repeal any Public-Local or Private Act passed by the General Assembly of one thousand nine hundred and thirty-five, relative to the readjustment or refunding of the bonded indebtedness of any local governmental unit in North Carolina, except and until an agreement has been reached between the bondholders and the governing body of said unit, and when said agreement has been reached and certified to the Director of the Local Government Commission by both contracting parties, then and in that event the provisions of said act shall apply to such defaulting local governmental units."

§ 2492(77). Investigating fiscal affairs of units; negotiations with creditors; plans for refinancing or readjustment.—For the purpose of determining the financial position, the director of local government may make or cause to be made an investigation of the fiscal affairs of such units which are in default in the payment of principal or interest for a period of six months, and advise with the governing body of such unit regarding the refinancing and/or readjustment of its debts, and is authorized to negotiate with the creditors of such units for the purpose of reaching an agreement with them. Whenever a plan of refinancing and/or readjustment, whether prepared by the director, by a private refunding agency, or by the officials of the unit, appears to the director of local government as being fair and equitable and reasonably within the ability of such unit to meet, it shall be submitted by him to the local government commission for its approval, and upon such approval, the governing body of such local government unit shall adopt same and pass the necessary orders or or-

dinances for the purpose of carrying said plan into effect. (1935, c. 124, s. 2.)

§ 2492(78). Power of director to accept or reject budget of local units.—In order to conserve the financial resources of any local government unit of this State and to provide a means of constant advisory services, the director of local government is hereby given authority to approve or disapprove the budget of any unit which has accepted the plan and put same into effect, and the governing body of such unit shall first obtain the approval of the said director before passing any order or ordinance adopting said budget. (1935, c. 124, s. 3.)

§ 2492(79). Annual statements from units.—The director of local government shall have authority to require of the local units in which he functions under this article annual statements showing the collection of revenues and the disbursements for expenses, both divided as between general operating fund, debt service fund, and special funds, if any, and it shall be his duty to require the proper allocation of all collected revenues to the funds for which said revenues were levied, in accordance with the budget, and to require that disbursements shall be made only from appropriations duly made. (1935, c. 124, s. 4.)

§ 2492(80). Extent and time limit of director's authority.—The authority hereby granted to the director of local government shall continue in force in such local government units until, in the discretion of the director of local government, said local government unit has performed the duties required of it or has satisfied the director that it will do so, until the agreements made with the creditors have been discharged in accordance with the plan of refinancing and/or readjustment of its debt. (1935, c. 124, s. 5.)

CHAPTER 50
MARRIAGE

Art. 1. General Provisions

§ 2493. Requisites of marriage; solemnization.—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (Rev., s. 2081; Code, s. 1812; 1871-2, c. 193, s. 3; 1908, c. 47; 1909, c. 704, s. 2; 1909, c. 897.)

Cross References.—For a full treatment of marriage, see 8 N. C. Enc. Dig. 1016-1040; 14 N. C. Enc. Dig. 742-746; as to divorce and alimony, see section 1655 et seq.

History of Marriage Laws in the State.—In State v. Bray, 35 N. C. 290, Ruffin C. J., in an interesting discussion tracing our marriage law shows that, originally in this colony, valid marriages could only be solemnized by ministers of the Church of England (with the result, as we now know from the "Colonial Records," that a large part of the population were not legally married, owing to the scarcity of such ministers. See State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

In 1715, ch. 1 of the Colonial Records, reciting the inconvenience from scarcity of ministers of the established Church, authorized the Governor of the colony to solemnize marriages, then in 1741, Chapter 1, empowered justices of the peace to perform the ceremony. In 1766 by ch. 9, the privilege was extended to ministers of the Presbyterian Church, and at last, in 1778, ch. 7, to ministers of all other denominations and marriages according to the custom of the Society of Friends were also made valid. This list, made a little broader, is now in this section. See State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Common Law Marriage Invalid.—"There is no such thing as marriage simply by consent in this State," said Ruffin, C. J., in State v. Samuel, 19 N. C. 177, and State v. Bray, 35 N. C. 290; Gaston, J., in State v. Patterson, 24 N. C. 346; Pearson, C. J., in Cooke v. Cook, 61 N. C. 583. And the same is recognized as the law in the more recent cases of State v. Parker, 106 N. C. 711, 11 S. E. 517; and State v. Melton, 120 N. C. 591, 26 S. E. 933; State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Celebration Essential.—No celebration was required by the Cannon Law prior to the Council of Trent, nor by the Civil Law, nor by the law in Scotland, nor in many states in this Union. In some states the question has never been decided. In other states celebration before some person authorized by law is held essential, as (after some hesitation) has been held to be the common law in England. Stewart Marriage and Div., section 90; 14 Am. & Eng. Enc. 515. In the latter class is North Carolina. State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Same—Section Must Be Followed.—While consent is essential to marriage in this State, it is not the only essential, but it must be acknowledged in the manner and before some person prescribed by this section. State v. Wilson, 121 N. C. 650, 28 S. E. 416.

When Marriage Complete.—Marriage is in law complete, when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. State v. Patterson, 24 N. C. 346.

Elder in Colored Church Can Celebrate.—An elder in the colored Methodist Church is "an ordained minister" of the Gospel within the meaning of the statute, and, as such, can celebrate the rites of matrimony. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Indian Custom Not Valid Marriage.—There is but one law of marriage for all the residents of this State. Hence cohabitation between an Indian man and woman according to the customs of their tribe, by which the parties are at liberty to dissolve the connection at pleasure, does not constitute a marriage. State v. Ta-cha-na-tah, 64 N. C. 614, cited in notes in L. R. A. 1915E, 67; 57 L. R. A. 160.

"'A marriage procured by force or fraud is void ab initio, and may be treated as null by every court in which its validity may be incidently drawn in question.' 2 Kent Com., 66." Scroggins v. Scroggins, 14 N. C. 535, 538.

Marriage during Seduction Proceedings Valid.—A marriage contracted while one is under arrest for seduction is not contracted under duress. State v. Davis, 79 N. C. 603, cited in note in 43 L. R. A. 816.

Sham Marriage a Nullity.—A marriage pretendedly celebrated before an unauthorized person is a nullity and not capable of being legalized by consent. State v. Wilson, 121 N. C. 650, 28 S. E. 416.

Personating a Minister Not Criminal.—A private citizen who personates an ordained minister, and with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offense known to the common or statute law. State v. Brown, 119 N. C. 825, 25 S. E. 820.

Evidence of Marriage.—It is sufficient evidence of a marriage that it was solemnized by one in the known enjoyment of the office of justice of the peace, and acting as such. His commission need not be produced. State v. Robbins, 28 N. C. 23, 44 Am. Dec. 64, cited in note in 14 L. R. A. 541.

Retroactive Legislation.—It is competent for the Legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the non-observance of some solemnity required by statute, aliter, where such marriage is a nullity. Cook v. Cook, 61 N. C. 583, cited in note in L. R. A. 1915E, 18.

§ 2494. Capacity to marry.—All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of sixteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden: Provided, that females over fourteen years of age and under sixteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of the female or signed by that person standing in loco parentis to such female, and the fact of the filing of such written consent shall be set out in said special license: Provided, that all couples resident of the state of North Carolina who marry in another state must file a copy of their marriage certificate in the office of the register of deeds of the home county of the groom within thirty days from the date of their return to the state, as residents, which certificate shall be indexed on the marriage license record of the office of the register of deeds and filed with marriage license in his office; that the fee for the filing and indexing said certificate shall be fifty cents: Provided, the failure to file said certificate shall not invalidate the marriage. (Rev., s. 2082; Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193; 1923, c. 75; 1933, c. 269, s. 1.)

As to penalty for marrying female under fourteen, see section 4444.

Editor's Note.—Formerly, the legal age of marriage for males are placed at sixteen and for females at fourteen. This is amended by c. 75 Public Laws, 1923, which changes the legal age of marriage for females to sixteen, thus making it lawful for a female at sixteen to marry, but making it unlawful for a female under sixteen and over fourteen to marry, unless a special license shall be issued upon filing with the register of deeds a written consent to such marriage by one of the parents of the female or by one standing in loco parentis. Since the amendment provides for the marriage of female minors over fourteen and under sixteen, it looks as if the Legislature did not intend to change the age of consent to sixteen in section 2495, which provides that the marriage of a female under fourteen and any male shall be void. See 1 N. C. L. R. 295.

Public Laws of 1933, c. 269, added the proviso, at the end of this section, relating to filing certificates by those marrying in another state.

Effect of Lack of Special License.—The marriage of a female between the ages of fourteen and sixteen without the written consent of her parent and without the special license required by this section is not void but voidable. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864.

Male of Marriageable Age Indictable for Seduction.—A male at the marriageable age of eighteen years is indictable for seduction. State v. Creed, 171 N. C. 837, 88 S. E. 511.

§ 2495. Want of capacity; void and voidable marriages.—All marriages between a white person and a negro or indian, or between a white person and person of negro or indian descent to the third generation, inclusive, or between a Cherokee indian of Robeson county and a negro, or between a Cherokee indian of Robeson county and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and Provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or indian, or of negro or indian descent to the third generation, inclusive, and for bigamy. (Rev., s. 2083; Code, s. 1810; R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; 1887, c. 245; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135.)

Cross References.—As to suits to nullify marriages which were entered into contrary to the provisions of this section, see sec. 1658 and annotations; as to Cherokee Indians of Robeson County, see section 6257; as to penal provisions for miscegenation, see secs. 4340, 4341; as to penal provision for bigamy, see sec. 4342; as to penal provision for incest, see §§ 4337, 4338.

Editor's Note.—Chapter 215, Laws 1911, amended this section by striking out the words "Croatan Indians" wherever those words occurred in the section, and inserting in lieu thereof the words "Indians of Robeson County." Chapter 223, Laws 1913, amended the last named act by striking out the words "Indians of Robeson County" and inserting in lieu thereof the words "Cherokee Indians of Robeson County." See Goins v. Trustees, 169 N. C. 736, 738, 86 S. E. 629.

Power of Legislature.—The competency of the General Assembly to impose, implies the right to remove, the restraints and conditions incident to the formation of the marriage relation and the contract which creates it. Baity v. Cranfill, 91 N. C. 293, 297.

Section Expresses Public Policy.—During the existence of slavery, no marriage was recognized as binding when had between slaves, and marriage was prohibited by positive law when had between whites and free persons of color, who are within the specified degrees, and between the latter and slaves, and this in pursuance of a general public policy growing out of the slavery of a part of the population owned by masters. This policy still prevails in this section and inhibits the intermarriage of white and free persons of color into which the slave population had been immerged. Woodard v. Blue, 103 N. C. 109, 113, 9 S. E. 492.

Section Not Repugnant to U. S. Constitution. — This interdict is held not to be repugnant to the Constitution of the United States, or legislation under it. State v. Hairston, 63 N. C. 451.

Foreign Marriages Valid Here.—The relation, if legally created elsewhere, is recognized as a valid subsisting relation, when the parties come into this State from that of their former residence. State v. Rose, 76 N. C. 242; Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

Attempt to Evade Provisions of Section.—The validity of a foreign marriage is not recognized here when parties having their domicile here, to evade our laws, go to a State which allows such marriage, with intent to return and keep up their domicile. State v. Kennedy, 76 N. C. 251. Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

What Marriages Void Ab Initio.—Construing this section and section 1658 together, it is held that the only marriages that are void ab initio are those within the last proviso of this section i. e., where one of the parties was a white person and the other a negro or an Indian or of negro or Indian descent to the third generation, inclusive, or bigamous marriages. And any other marriage need to be "declared void." Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

Effect of Attempted Marriage between White and Negro.—A white person and a person of color cannot intermarry in North Carolina, and if an invalid marriage is contracted between persons of the two races and the parties cohabit together they are guilty of fornication. State v. Reinhardt, 63 N. C. 547; State v. Hairston, 63 N. C. 451.

What "Negro Descent" Includes.—In order to have a marriage annulled on the ground that it is "between a white person and a person of negro descent to the third generation inclusive," etc., it must be shown the ancestor of the generation stated must have been of pure negro blood. Ferrall v. Ferrall, 153 N. C. 174, 69 S. E. 60.

Bigamous Marriages Always Void.—The fact that a presumption which had arisen at the death of a woman's husband shields her from prosecution for bigamy upon marrying another, does not render the last marriage any the less bigamous or void if the first husband be, in fact, alive. Ward v. Bailey, 118 N. C. 55, 23 S. E. 926. For full treatment of bigamy, see sec. 4342 and notes thereto.

Where a wife attempts to marry again when no valid divorce a vinculo has been obtained from her living husband, such second attempted marriage is absolutely void and may

be annulled by the husband of the second attempted marriage in an action instituted for that purpose. Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591.

Impotency Renders Marriage Voidable.—Impotency in a husband does not render a marriage by him void ab initio, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting. Smith v. Morehead, 59 N. C. 360.

Marriage of Female under Fourteen Voidable.—This section provides that a marriage by a female under fourteen years of age, or a male person under sixteen, is void, but the proviso speaks of its being "declared void," and the construction of the statute by the courts has always been that the meaning is that such marriages are voidable. State v. Parker, 106 N. C. 711, 712, 11 S. E. 517.

Same—Ratification.—"If the parties, after arriving at the specified age of consent, continue to cohabit and live together as man and wife, this is a ratification." Coke on Littleton, 79; 1 Black. Com., 436; 1 Bish. Marriages and Divorce, 150 (4th Ed.), and Pearson, C. J., in Koonce v. Wallace, 52 N. C. 194; State v. Parker, 106 N. C. 711, 713, 11 S. E. 517.

The Proviso as to Death of Party.—The last proviso is broad and comprehensive in its declaration. Baity v. Cranfill, 91 N. C. 293, 300. It applies to marriages contracted before its enactment as well as those contracted thereafter. Baity v. Cranfill, 91 N. C. 293, 49 Am. Rep. 641. It has been applied to an incestuous marriage between an uncle and a niece. Baity v. Cranfill, 91 N. C. 293.

Same—Purpose.—The intention of the Legislature was to confine the power conferred upon the court in section 1658, to declare void, or in a judicial proceeding to treat as void, except where the intermarriage is between the specified races or involves the offense of bigamy, to cases, whenever the power is exercised, during the lifetime of the parties, or after death, only when there has been no issue born to them. That is, after the death of one of the parties, a marriage must then stand with all its legal consequences, and its validity no longer open to controversy. Baity v. Cranfill, 91 N. C. 293, 300.

Same—Effect of Proviso.—The effect of the proviso is in the nature of a statute of limitation upon the delegated or recognized judicial power, confining its exercise with a single exception to the lifetime of the parties, and, if cohabitation and offspring followed, withholding it afterwards, so as not to operate as a posthumous bastardizing of children born to them. Baity v. Cranfill, 91 N. C. 293, 297.

Same—What Must Be Proven.—To bring a case of unlawful marriage within the last proviso to this section, it must be shown not only that one of the parties is dead but that cohabitation and the birth of issue followed the unlawful marriage. Ward v. Bailey, 118 N. C. 55, 23 S. E. 926.

§ 2496. Prohibited degrees of kinship.—When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood. (Rev., s. 2084; Code, s. 1811; 1879, c. 78.)

§ 2497. Marriages between slaves validated.—Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the general assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married. (Rev., s. 2085; Code, s. 1842; 1866, c. 40, s. 5.)

As to the children of certain colored persons inheriting, see section 1654, Rule 13.

Section Is Valid.—The validity of this section in creating retroactively a legal marriage relation between slaves is upheld in Cooke v. Cooke, 61 N. C. 583; State v. Harris, 63 N. C. 1; State v. Adams, 65 N. C. 537; State v. Whitford, 86 N. C. 636; Long v. Barnes, 87 N. C. 329; Baity v. Cranfill, 91 N. C. 293, 298.

Provisions of the Act of 1866.—Sections 5, c. 40, 1866, reads: "That in all cases where man and woman, both or one of whom were lately slaves and are now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married, as man and wife, at the time of the commencement of such cohabitation, although they may not have been married in due form of law." State v. Whitford, 86 N. C. 636, 637.

Power of Legislature.—The substance of marriage, the consent of the parties, existing, it was as clearly within the power of the Legislature to dispense with any particular formality as it was to prescribe such. State v. Whitford, 86 N. C. 636, 639; citing State v. Harris, 63 N. C. 1.

Relation Made Legal from Beginning.—This section legalized a cohabitation among those who were lately slaves, when still continued, and validates the relation as a marriage from its commencement; and, to give the act full force, directs the parties to go before the clerk or justice in acknowledgment of assent, and to state the time when it began. Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

Continuing Cohabitation Supplies Consent.—The necessary consent to marriage thereto is supplied under this section by continuing cohabitation. Battis v. Avery, 140 N. C. 184, 186, 52 S. E. 584; State v. Whitford, 86 N. C. 636, 639.

By force of the original consent of the parties while they were slaves, renewed after they became free, and by the performance of what was required by the statute, they became to all intents and purposes man and wife. State v. Harris, 63 N. C. 1, 5.

Same—Old Rule Adopted.—Our statute of 1866, owing to the peculiar status of slave marriages, adopted as to such marriages the rule which has long prevailed in Scotland, New York and several other states (and which was the rule of the civil law and of the Canon law till the Council of Trent), that consent, followed by cohabitation, constitutes a legal marriage. State v. Melton, 120 N. C. 591, 595, 26 S. E. 933.

Provision for Recordation.—Section 6 made the failure to have the acknowledgment recorded, in a specified time, a misdemeanor punishable at the discretion of the court. State v. Whitford, 86 N. C. 636, 638.

Same—Directory Only.—The provision as to acknowledgment was considered to be directory, so that a failure to comply with it, though a misdemeanor, did not affect the validity of the marriage. Bettis v. Avery, 140 N. C. 184, 186, 52 S. E. 584.

Same—Noncompliance Does Not Effect Marriage. — It has been held that an entry of the acknowledgment is not essential to the consummation of the marriage, and that a marriage constituted by operation of the act can not be avoided by a failure to have the acknowledgment entered of record. State v. Adams, 65 N. C. 537, 539; State v. Whitford, 86 N. C. 636, 639.

Art. 2. Marriage License

§ 2498. Solemnization without license unlawful.—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy. (Rev., s. 2086; Code, s. 1813; 1871-2, c. 193, s. 4.)

Actual Delivery Required.—This section requires an actual delivery, and constructive delivery will not suffice. So performance of the ceremony by a justice after a telephone communication informing him that the license has been mailed subjects him to the penalty prescribed by the next section. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Marriage without License Valid.—The failure to procure a license to marry will not invalidate a marriage otherwise good. State v. Parker, 106 N. C. 711, 11 S. E. 517; Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919; Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Effect of Illegal License.—A marriage is not invalid because solemnized under an illegal license. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919; Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Same—Officer Penalized.—The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200 prescribed by the next section. State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Robbins, 28 N. C. 23; Maggett v. Roberts, 112 N. C. 71, 74, 16 S. E. 919.

§ 2499. Penalty for solemnizing without license.—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (Rev., ss. 2087, 3372; Code, s. 1817; R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8.)

See notes under the preceding section; as to personating minister and sham marriage, see notes under section 2493.

In General.—The failure to comply with the requirements as to the license subjects the officer or minister to the penalty under this section, but the marriage is, notwithstanding, good to every intent and purpose. State v. Robbins, 28 N. C. 23; State v. Parker, 106 N. C. 711, 713, 11 S. E. 517.

Statute of Limitations.—A summons was issued to recover the penalty against a justice of the peace, under this section for performing the marriage ceremony without the delivery of the license therefor to him, required by this section, within less than a year from the time he had performed it, it was held, that the plea of the statute of limitations, sec. 443, par. 2, could not be sustained. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

§ 2500. License issued by register of deeds.—Every register of deeds shall, upon application, issue a license for the marriage of any two persons, if it appears to him probable that there is no legal impediment to such marriage. Where either party to the proposed marriage is under eighteen years of age, and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, or resides at a school, or is an orphan and resides with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, is delivered to him, and such written consent shall be filed and preserved by the register. When it appears to the register of deeds that it is probable there is a legal impediment to the marriage of any person for whom a license is applied, he has power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage. (Rev., s. 2088; Code, s. 1814; 1887, c. 331; 1871-2, c. 193, s. 5.)

Editor's Note.—Section 2503 which provides the penalty for violation of the provisions of this section should be read along with this section and the annotations under the two sections should be considered together.

The two sections are in pari materia and should be construed together. Joyner v. Harris, 157 N. C. 295, 297, 72 S. E. 970; Bowles v. Cochran, 93 N. C. 398. The editor has deemed it expedient to place all constructions of the two sections under section 2503.

§ 2500(a). Certificates of health for applicants for license.—No license to marry shall be issued by the register of deeds of any county to a male applicant therefor except upon the presentation by the said male applicant of a certificate executed within seven days from the time of the presentation of said certificate to the register of deeds as hereinafter provided, showing the nonexistence of any venereal disease, the nonexistence of tuberculosis in the infectious stages, and that the applicant has not been adjudged by a court of competent jurisdiction an idiot, imbecile, or of unsound mind. No license shall be issued to any female applicant who shall not present a certificate showing the nonexistence of tuberculosis in the infectious stages, and that she has not been adjudged by a court of competent jurisdiction to be of unsound mind. (1921, c. 129, s. 1.)

Chapter 256, Public Laws 1933, purports in the caption to repeal §§ 2500(a) to 2500(e) but no mention is made of the sections in the context of the act, which is codified here as § 2500(g).

§ 2500(b). Certificates executed by what physician.—The certificate referred to in the preceding section shall be executed by any reputable physician licensed to practice medicine and surgery in the State and who shall reside within the county in which said license to marry shall be applied for; or by the county health officer of such county, whose duty it shall be to examine such applicants and issue such certificates without charge: Provided, where a city or town is located in two or more counties, then a physician who practices medicine and surgery in the State and lives in said city may examine applicants and execute such certificates in either county in which said city may be located. Such physician residing without the county in which the marriage is to take place may issue such certificate when the Clerk of the Superior Court of the county in which such physician resides certifies under his hand and seal that the person who signs such certificate is a reputable physician and surgeon, actually engaged in the practice of his profession. This clause, however, shall not be interpreted as applying to physicians residing in the town or city located in two counties: Provided, further, that any physician who practices medicine and surgery in the State and lives within a radius of three miles of the county line in which the license is applied for may examine and execute such certificate. (1921, c. 129, s. 2; 1923, c. 101; 1925, c. 296, s. 2; 1927, c. 240, s. 2.)

Editor's Note.—The effect of this section is summarized in 1 N. C. Law Rev. 294.

§ 2500(c). Issuing license without certificate a misdemeanor.—Any register of deeds who issues a license to marry without the presentation of the certificate provided for in the preceding sections, or contrary to the provisions of this law, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars or imprisoned for thirty days in the discretion of the court. (1921, c. 129, s. 3.)

§ 2500(d). False statement by a physician a misdemeanor.—Any physician who shall knowingly and willfully make any false statement in the certificate hereinabove provided for shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars, or imprisoned for not more than six months. (1921, c. 129, s. 4.)

§ 2500(e). Laws affected or repealed.—No laws in force March 5, 1921, relating to the issuance of licenses to marry shall be repealed or abridged by this law, except such as may be in conflict herewith. (Rev., s. 2105; Code, s. 1833; 1871-2, c. 193, s. 25; 1921, c. 129, s. 5.)

§ 2500(f): Repealed by Public Laws 1933, c. 12.

§ 2500(g). Affidavit of groom as to physical

condition when applying for marriage license.—The register of deeds of the several counties of the state shall require, before issuing a marriage license, that the groom shall file with him an affidavit setting forth that he does not have active tuberculosis or any venereal disease, and has not had either of said diseases for a period of two years prior thereto. The affidavit must be signed by the maker and sworn to before the register of deeds or any other person authorized to administer oaths: Provided, however, that when the affidavit is made before the register of deeds, he shall not make any charge therefor.

The applicant, in lieu of making affidavit as herein set out, may file a certificate of health as provided by law before a passage of this section.

Upon the applicant complying with either of the provisions of the foregoing section the register of deeds may issue a license to marry: Provided the contracting parties are otherwise qualified to marry according to law: Provided further, that the bride shall not be required to stand a physical examination. (1933, c. 256, s. 1.)

Editor's Note.—This section probably offers an alternative to the present requirement of a health certificate from the groom in order to obtain a marriage license. Nothing is said as to the bride except "the bride shall not be required to stand a physical examination." Apparently this eliminates as to her requirement of a health certificate, without the necessity of making an affidavit of health in lieu thereof. See 11 N. C. Law Rev., 223.

§ 2501. Obtaining license by false representation misdemeanor.—If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (Rev., s. 3371; 1885, c. 346.)

As to false pretenses, see sections 4277 et seq.

§ 2502. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for.....county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged .....years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged.....years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within sixty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this .... day of ....., 19.. L. M.,
Register of Deeds of.....County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the ..... day of ....., 19...., at the house of P. R., in (here name the town, if any, the township and county), according to law.

Witness present at the marriage: .....N. O.
S. T., of (here give residence). (Rev., 2089; Code, s. 1815; 1899. c. 541. ss. 1, 2; 1871-2, c. 193, s. 6; 1909, c. 704, s. 3; 1917, c. 38.)

License Not Issued Until Filled Out.—A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to the person who is to be married, or to some one for him, and, if at the time of such issuance the register has become functus officio, the failure to record it does not render him liable to the penalty imposed by sections 2504 and 2505, for failure to record the substance of each marriage license issued. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

§ 2503. Penalty for issuing license unlawfully.—Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same. (Rev., s. 2090; Code, s. 1816; 1895, c. 387; 1901, c. 722; R. C., c. 68, s. 13; 1871-2. c. 193, s. 7.)

I. In General.
II. Duties of Register.
III. Diligence Required.
IV. Consent of Parent.
V. The Action.
A. In General.
B. Pleading and Practice.

Cross References.
See in connection with this section, section 2500.

I. IN GENERAL.

Object of Section.—This section is a wise and beneficient one, the object being to protect the parties themselves, and the community as well, from hasty and improvident matrimonial alliances, which eventually produce discord and unhappiness in the family—one of the essential units of our republican household—and are hurtful to society in many ways. Joyner v. Harris, 157 N. C. 295, 297, 72 S. E. 970. See also, Trolinger v. Boroughs, 133 N. C. 312, 315, 45 S. E. 662; Gray v. Lentz, 173 N. C. 346, 350, 91 S. E. 1024.

The section is remedial in its nature. Gray v. Lentz, 173 N. C. 346, 350, 91 S. E. 1024.

Construed with Section 2500.—This section and section 2500 are in pari materia and should be construed together. Joyner v. Harris, 157 N. C. 295, 297, 72 S. E. 970; Bowles v. Cochran, 93 N. C. 398; Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

II. DUTIES OF REGISTER.

Duty Highly Important.—To all persons who believe that the welfare of human society depends largely upon the family relation, and that the contract of marriage should be defended by careful and just laws for the purpose of guarding against legal impediments and to prevent the marriage of those under a certain age, when the parties are presumed not to be able to contract, the duty of the register of deeds, the officer in our State charged with the duty of issuing marriage licenses, seems most important and most solemn. That officer must exercise his duties carefully and conscientiously, and not as a mere matter of form. Trolinger v. Boroughs, 133 N. C. 312, 315, 45 S. E. 662; Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Julian v. Daniels, 175 N. C. 549, 555, 95 S. E. 907.

Cannot Be Delegated.—A register of deeds can not delegate to another the duty of making the required reasonable inquiry into the legal competency of persons applying for a license to marry. Cole v. Laws, 108 N. C. 185, 12 S. E. 985.

Delivery to Third Party Prohibited.—This section prohibits the register from permitting the completed license to pass from the office and beyond his control into the hands of any applicant acting for a party to the proposed marriage. Coley v. Lewis, 91 N. C. 21, 24.

Therefore, where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given and it was never presented to the mother or her consent obtained, but the marriage ceremony was performed under it, it was held that the register is liable to the penalty. Coley v. Lewis, 91 N. C. 21.

Inquiry by Deputy Will Not Excuse Register.—If a party to a marriage is under the age authorized by law, the register can not excuse himself from liability, because his deputy or agent made proper inquiry, if he did not make the inquiry himself. The trust is personal to him. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 9, 919.

III. DILIGENCE REQUIRED.

Reasonable Inquiry.—The register violating these requirements is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Cole v. Laws, 104 N. C. 651, 656, 10 S. E. 172; Williams v. Hodges, 101 N. C. 300, 303, 7 S. E. 786; Laney v. Mackey, 144 N. C. 630, 633, 57 S. E. 386; Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

Same—Not a Mere Formality.—The requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them. Julian v. Daniels, 175 N. C. 549, 555, 95 S. E. 907.

Same—What Required.—By reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists. Bowles v. Cochran, 93 N. C. 398.

It would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care. Trolinger v. Boroughs, 133 N. C. 312, 317, 45 S. E. 662; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Same—Register Not Required to Examine Witnesses.—The section, that is section 2500, does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Same—Sworn Statement of Stranger Insufficient.—It is not sufficient that he takes the sworn statement of the parties or their friends not known to him. Snipes v. Wood, 179 N. C. 349, 102 S. E. 619, citing Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

Same—Question for Jury.—See post this note, "Pleading and Practice," V, B.

Illustrations of Reasonable Inquiry.—When a man of good character and reliable applied for a license, and produced to the register a written statement purporting to give the age of the female as over eighteen years, and also the name and residence of the parents and the person producing the statement said it was true, though no name was signed to it, it was held that the register had made such inquiry as was required of him, and was not liable for the penalty. Bowles v. Cochran, 93 N. C. 398. For other cases where the inquiry was held reasonable, see Walker v. Adams, 109 N. C. 481, 13 S. E. 907; Harcum v. Marsh, 130 N. C. 154, 41 S. E. 6.

But when a register of deeds issues a license for the marriage of a woman under 18 years of age without the assent of her parents, upon the application of one whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, it was held, that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect. Cole v. Daws, 104 N. C. 651, 10 S. E. 172. Again where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew the same rule applies. To the same effect are the following cases: Williams v. Hodges, 101 N. C. 300, 7 S. E. 786; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Laney v. Mackey, 144 N. C. 630, 57 S. E. 386; Morrison v. Teague, 143 N. C. 186, 55 S. E. 521; Joyner v. Harris, 157 N. C. 295, 301, 72 S. E. 970; Julian v. Daniels, 175 N. C. 549, 95 S. E. 907; Snipes v. Wood, 179 N. C. 349, 102 S. E. 619.

IV. CONSENT OF PARENT.

Must Be Written.—According to the terms of section 2500, where one of the parties is under eighteen years of age, the written consent is a condition precedent to its issue. Coley v. Lewis, 91 N. C. 21.

Section Prescribes Order.—Section 2500 fixes the order in importance of those from whom the register of deeds should obtain the written consent for the marriage of minors under eighteen years of age. Littleton v. Haar, 158 N. C. 566, 74 S. E. 12.

Same—Father's Consent if Possible.—If anything, the language of our statute more clearly and strongly calls for the same interpretation and requires the written consent of the father, if living and not unable or disqualified in some way to give it. Littleton v. Haar, 158 N. C. 566, 570, 74 S. E. 12.

Thus when a minor resides with the father, which the register could reasonably have ascertained, the written consent of the mother only indicates that the subject of the application for the license is under the age specified, and does not preclude her father from suing the register of deeds for the penalty provided for issuing a license without his consent. Littleton v. Haar, 158 N. C. 566, 74 S. E. 12.

Same—Stepfather Not Included.—The word "father" used in the section does not include stepfather, and the written consent of the mother, the father being dead, authorizes the issuing of the license. Owens v. Munden, 168 N. C. 266, 267, 84 S. E. 257.

Same—When Mother's Consent Sufficient.—It was held in Littleton v. Haar, 158 N. C. 566, 74 S. E. 12, that the consent of the persons named in section 2500 and in the order named should be obtained, the effect of the decision being that if the child is living with father and mother, the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient. Owens v. Munden, 168 N. C. 266, 267, 84 S. E. 257.

V. THE ACTION.

A. In General.

Jurisdiction.—A justice of the peace has jurisdiction of an action against a register of deeds for unlawfully issuing a marriage license. Dixon v. Haar, 158 N. C. 341, 74 S. E. 1.

When the action under this section is against the register and his sureties, it is therefore for the amount of the bond ($10,000) to be discharged upon payment of $200, and the superior court has jurisdiction. Joyner v. Roberts, 112 N. C. 111, 114, 16 S. E. 917.

Venue.—An action for the penalty against a register of deeds under this section should be tried in the county wherein the cause of action arises. Dixon v. Haar, 158 N. C. 341, 74 S. E. 1. And if brought in the wrong county, it should be removed and not dismissed. Id. As to venue, see section 464, par. 2 and 470, par. 1.

Action Abates upon Register's Death.—Under section 461, an action for a penalty, against a register of deeds and the surety on his official bond, abates on the death of the officer. Wallace v. McPherson, 139 N. C. 297, 51 S. E. 897.

Register Not Indictable.—The issuing of a marriage license by a register of deeds in violation of the section is not an indictable offense, unless the illegal act be done mala fide. State v. Snuggs, 85 N. C. 542.

B. Pleading and Practice.

Allegations in Complaint.—In an action under this section it is essential that the complaint should allege that the register issued the license knowingly or without reasonable

inquiry. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Presumption as to Time of Issuance.—The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office. The burden of proving the contrary is on the party asserting it. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

Burden of Proof.—The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Question for Jury as to Reasonable Inquiry. — Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instructions. Joyner v. Roberts, 114 N. C. 389, 19 S. E. 645; Harcum v. Marsh, 130 N. C. 154, 41 S. E. 6; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664.

The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider. Gray v. Lentz, 173 N. C. 346, 354, 91 S. E. 1024.

Same—Nonsuit Erroneous.—If the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. Lemmons v. Sigman, 181 N. C. 238, 106 S. E. 764.

Reasonable Inquiry Question of Law When Facts Admitted.—It is well settled that the facts being admitted or found by the jury, the question as to what is "reasonable inquiry" is one of law for the court. Joyner v. Roberts, 114 N. C. 389, 19 S. E. 645; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Snipes v. Wood, 179 N. C. 349, 102 S. E. 619; Julian v. Daniels, 175 N. C. 549, 95 S. E. 907.

Same—Instructions to Jury.—If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. Spencer v. Saunders, 189 N. C. 183, 126 S. E. 420.

Evidence.—In a civil suit against a register evidence of nolo contendere pleaded by the husband in a criminal action is not admissible. Snipes v. Wood, 179 N. C. 349, 102 S. E. 619.

Proof of the officer's failure to administer the oath to the applicant for the license is admissible to show a lack of reasonable inquiry. Laney v. Mackey, 144 N. C. 630, 57 S. E. 386.

The testimony of a witness as to the age of the woman depending solely upon her statements to him, which he repeated to the register when the license was applied for, is not substantive evidence of her age. Joyner v. Harris, 157 N. C. 295, 72 S. E. 970.

§ 2504. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of ....., from the ..... day of ....., 19...., to the ..... day of 19...., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (Rev., s. 2091; Code, s. 1818; 1899, c. 541, s. 3; 1871-2, c. 193, s. 9.)

§ 2505. Penalty for failure to record.—Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who sues for the same. (Rev., s. 2092; Code, s. 1819; 1871-2, c. 193, s. 10.)

Legislature May Relieve.—An act of the Legislature relieving the register from the penalty for failure to record passed after an action was brought to recover the penalty, but before judgment, is constitutional. Bray v. Williams, 137 N. C. 387, 49 S. E. 887.

Penalty Is in Alternative. — The penalty given by this section is in the alternative, either for the failure to record the substance of the license issued or for failure to record the substance of the return. Maggett v. Roberts, 108 N. C. 175, 178, 12 S. E. 890.

Jurisdiction.—Notwithstanding the penalties imposed do not exceed $200 (and if only one was sought to be recovered a justice of the peace would have jurisdiction), a plaintiff may unite several causes of action for several penalties against same party, in same complaint, and if the aggregate amount thereof exceeds $200 the superior court will have jurisdiction. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Prosecution in Nature of Person. — An action against a register of deeds to recover the penalties imposed for a failure to comply with the provisions of the statute in relation to issuing marriage licenses under this section must be prosecuted in the name of the person who sues thereof, and not in the name of the State. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Where Register Functus Officio.—If the filling up and handing the paper previously signed to the party proposing to be married was done, not by the register but by an agent, and at the time the register was functus officio, the paper would be equally invalid because lacking the signature of a de facto register, and there could be no penalty for not recording it. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

CHAPTER 51

MARRIED WOMEN

Art. 1. Powers and Liabilities of Married Women

§ 2506. Property of married woman secured to her.—The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Rev., s. 2093; Const., Art. X, s. 6.)

Cross References.—For a full treatment of the subject of Married Women, see under Husband and Wife, 7 N. C. Enc. Dig. 286—445; 14 N. C. Enc. Dig. 360—387; as to conveyances by husband and wife, see section 997 et seq; as to dower, see section 4099 et seq.

Editor's Note.—For a discussion of the history of this legislation and of many of the earlier cases construing it, see Ball v. Paquin, 140 N. C. 83, 52 S. E. 410. For a discussion of the early law regarding married women's contracts, see the notes under the following section.

It will be noted that this section is identical with the con-

stitution, art. 10, sec. 6 and the annotations under that section should be referred to.

Common Law Rules.—At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the chose in action of the wife, which became the husband's absolutely upon his reduction of the same into possession, during the coverture, with the right in case the wife die to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to any one. O'Connor v. Harris, 81 N. C. 279, 282.

It was also competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. O'Connor v. Harris, 81 N. C. 279, 282.

When Provision Took Effect.—The Constitution of 1868, Art. 10, sec. 6, took effect for purposes of domestic policy, in April, 1868, and not when Congress approved it. Freeman v. Lide, 176 N. C. 434, 435, 97 S. E. 402, and cases cited.

Power of Legislature.—The Legislature may abolish all the incapacities of married women, and give them full power to contract as feme sole. Pippen v. Wesson, 74 N. C. 437, 445.

A Broad and Comprehensive Provision.—This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property, as if she were unmarried, except in the single respect of conveying it. Walker v. Long, 109 N. C. 510, 512, 14 S. E. 299.

Effect of Section.—A married woman holds her separate and real and personal property free from any debts, obligations, or engagements of her husband, according to the provisions of our constitution and this section. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

The real property of the wife, whether acquired before or after marriage, remains her sole and separate property (N. C. Const., Art. X, sec. 6), and therein the husband has no vested interest, but merely the power to refuse his written assent to her conveyance thereof. Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988; Vann v. Edwards, 135 N. C. 661, 666, 47 S. E. 784.

In construing section six of article 10 of our Constitution and statutes passed on the subject, it has been held that neither the constitutional provision nor the statutes referred to had the effect of enabling a married woman living with her husband to bind herself by contracts strictly in personam, but that the constitutional provision declaring her property, real and personal, to be her sole and separate estate was intended and operated to enable her to charge her personal estate by contracts on the principle by which, under recognized equitable principles, she was formerly allowed to charge her separate estate in the hands of a trustee and her real estate also by contract in which her husband joined and the wife's privy examination taken. Ball v. Paquin, 140 N. C. 83, 52 S. E. 410; Farthing v. Shields, 106 N. C. 289, 10 S. E. 998; Flaum v. Wallace, 103 N. C. 296, 9 S. E. 567; Pippen v. Wesson, 74 N. C. 437; Warren v. Dail, 170 N. C. 406, 409, 87 S. E. 126.

Same—Wife's Obligations. — The purpose of this section was to protect the estate of the wife from liability for her husband's debts arising under the common law by reason of the coverture, but it was not intended to protect the property from her own obligations. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Brinkley v. Baleance, 126 N. C. 393, 35 S. E. 631; Royal v. Southerland, 168 N. C. 405, 406, 84 S. E. 708.

Applies to Property Not Otherwise Secured.—This section does not apply to cases where the property is secured to the wife by marriage settlement, or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the act is to secure the property to the wife by act of law when it has not been done by act of the parties, who may make restrictions and limitations over. Cooper v. Landis, 75 N. C. 526, 533.

Acquisition of Property Not Affected. — It is settled law in North Carolina that this section imposes no limit upon the wife's power to acquire property by contracting with her husband or any other person, but only operates to restrain her from, or protect her in, disposing of property already acquired by her. Osbourne v. Wilkes, 108 N. C. 661, 667, 13 S. E. 285, and cases cited.

Meaning of "Convey."—The word "convey" must be restricted in its operation to such property as is by law required to be transferred by a written instrument. The word "convey and devise" are technical terms, relating to the disposition of interests in real property. It would not be technically or legally correct to speak of conveying personal property by a verbal sale of it, or even by a writing, any more than it would be to speak of devising it by last will and testament. Vann v. Edwards, 135 N. C. 661, 669, 47 S. E. 784.

Conveyances of Personalty.—A married woman has the absolute power to dispose of her property by will, and she can convey it "with the written assent of her husband," which does not restrict her freedom in the disposition of her personal property, as conveyances apply only to realty. Everett v. Ballard, 174 N. C. 16, 17, 93 S. E. 385.

There is no restriction whatever upon the right of a married woman to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Ball v. Paquin, 140 N. C. 83, 91, 52 S. E. 410; Rea v. Rea, 156 N. C. 529, 532, 72 S. E. 873.

May Devise and Bequeath Property.—See notes under section 2511.

Statute of Limitations.—Since section 408 removes the disability of marriage, and section 454 allows a wife to maintain an action without the joinder of her husband, when it concerns her separate property, and against her husband, when it is between the husband and wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

Money from Sale of Wife's Realty.—Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way. Kirpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037.

But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her. Kirpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037.

Vested Rights Protected.—The husband's right to receive and appropriate to his own use his wife's distributive share in her mother's estate was vested, under the law then in force, of which no subsequent legislation could deprive him, without his consent. Morris v. Morris, 94 N. C. 613, 616.

Separate Estate.—Prior to the adoption of the Constitution of 1868 it was held that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, become vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in Walker v. Long, 109 N. C. 510, 14 S. E. 299, the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. So that it was no longer necessary to invoke the fiction of the law in order to protect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution. Freeman v. Lide, 176 N. C. 434, 438, 97 S. E. 402. See also Pippen v. Wesson, 74 N. C. 437, 443.

Since the adoption of the Constitution of 1868, she has or can have the legal as well as the equitable estate, but this of itself does not give her the unrestricted disposition of her property. Its only effect was to do away with the necessary concurrence of the trustee by vesting in her the legal title. Her common law disabilities still continue. Sanderlin v. Sanderlin, 122 N. C. 1, 3, 29 S. E. 55.

Lien on Married Woman's Property.—By construing sections 6 and 3 of Article X of the Constitution in connection with section 2433 of the Code, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. Ball v. Paquin, 140 N. C. 83, 95, 52 S. E. 410.

Presumption as to Property Delivered to Husband.—Under the change made in the law of married women's property rights by this section and const. art. 10, § 6 where she receives checks from her parents as personal gifts to her which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative. Etheredge v. Cochran, 196 N. C. 618, 146 S. E. 711.

§ 2507. Capacity to contract.—Subject to the provisions of section 2515 of this chapter, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the constitution, and her privy examination as to the execution of the same taken and certified as now required by law. (Rev., s. 2094; Code, s. 1826; 1871-2, c. 193, s. 17; 1911, c. 109.)

I. In General.
II. Powers Conferred.
III. Liabilities Incurred.
IV. The Action for Breach.

I. IN GENERAL.

See 13 N. C. Law Rev., 62.

Editor's Note.—The common law, by which the contract of a married woman was void, continued to be the law in court of law in this State until the adoption of the Constitution of 1868. Pippen v. Wesson, 74 N. C. 437. 441,

At common law the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate use, and, that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contracts, in order to create a charge must refer expressly, or by necessary implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. Knox v. Jordan, 58 N. C. 175; Frazier v. Brownlow, 38 N. C. 237; Sanderlin v. Sanderlin, 122 N. C. 1, 3, 29 S. E. 55; Pippen v. Wesson, 74 N. C. 437, 441.

Ch. 193, sec. 17. Public Laws 1871-2, known as the Marriage Act was the first legislation directly regulating the power of a married woman to make contracts. It seems that the only change made by this act was that the consent of the husband in writing was required in order to allow her to change her separate estate. See Arrington v. Bell, 94 N. C. 247. This Marriage Act was in effect for about forty years and was frequently construed by the courts.

The present section known as the Martin Act was passed March 6, 1911 and has entirely changed the law. This renders obsolete the numerous constructions of the previous legislation. The general effect of these former provisions is discussed by Rodman, J., in Pippin v. Wesson, 74 N. C. 437. Other cases can be found under the title Husband and Wife in 7 N. C. Enc. Dig. 286 et seq.

Section Constitutional.—This section is constitutional and valid. Warren v. Dial, 170 N. C. 406, 87 S. E. 126.

The effect of this section is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. This section is held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by § 2515, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married women can now make any and all contracts so far as "to affect her real and personal property," in the same manner and to the same effect as if she were unmarried. Taft v. Covington, 199 N. C. 51, 55, 153 S. E. 597.

Operates Prospectively. — This section operates prospectively and does not apply to contracts made prior to its adoption. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

Section Does Not Apply to Estates in Entirety.—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed, in Jones v. Smith, 149 N. C. 318, 62 S. E. 1092, as not affecting estates held by husband and wife as tenants by the entirety. Davis v. Bass, 188 N. C. 200, 124 S. E. 566.

Cited in Etheredge v. Cochran, 196 N. C. 681, 146 S. E. 711.

II. POWERS CONFERRED.

Legislature Has Power to Remove Restraints.—The restraints upon a married woman's power to "contract" rest upon the statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the Legislature to do so, and indeed the court in many instances has indicated to the Legislature that justice might be facilitated by more liberal legislation in that regard. Finger v. Hunter, 130 N. C. 529, 530, 41 S. E. 890.

Effect of Section.—The effect of the Martin Act (this section) is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. Dorsey v. Corbett, 190 N. C. 783, 130 S. E. 842; Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369; Thrash v. Ould, 172 N. C. 728, 90 S. E. 915; Warren v. Dail, 170 N. C. 406, 87 S. E. 126; Royall v. Southerland, 168 N. C. 405, 84 S. E. 708; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Tise v. Hicks, 191 N. C. 609, 612, 132 S. E. 560.

This section should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by sec. 2515, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any and "all contracts so far as to effect her real and personal property," in the same manner and to the same effect as if she were unmarried. Warren v. Dail, 170 N. C. 406, 410, 87 S. E. 126; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

Same—Practically Makes Free Traders.—This section practically constitutes married women free traders as to all their ordinary dealings. Price v. Charlotte Electric Railway Co., 160 N. C. 450, 452, 76 S. E. 502; Croom v. Goldsboro Lumber Co., 182 N. C. 217, 219, 108 S. E. 735. For the statutory provisions as to free traders, see sections 2525 et seq.

Conveyances of Personalty.—This section does not extend to conveyances of personalty by the wife to the husband, and certainly when it would lead to an absurd conclusion, as in instances of a gift from the wife to her husband. Rea v. Rea, 156 N. C. 529, 72 S. E. 573, 873.

Section 2515 Not Effected.—This section does not alter the effect of section 2515, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly, is void. Singleton v. Cherry, 168 N. C. 402, 84 S. E. 698; Butler v. Butler, 169 N. C. 584, 86 S. E. 507.

III. LIABILITIES INCURRED.

Liable for Breach of Contract.—When the Legislature authorized a married woman "to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried," it authorized contracts for breach of which they would be liable as fully as if they had remained unmarried. Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

Same—Contract to Convey Realty.—On a breach of a married woman's contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. Warren v. Dail, 170 N. C. 406, 410, 87 S. E. 126. Though the contract to convey is made without the written consent of the husband. Everett v. Ballard, 174 N. C. 16, 93 S. E. 385.

Same—No Specific Performance.—This section means that when a married woman makes an executory contract to convey land and her privy examination is not taken she can only be held in damages, and that specific performance may not, as formerly, be enforced. Warren v. Dail, 170 N. C. 406, 410, 87 S. E. 126.

Liability of Wife Where Husband Agent.—Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence that, while acting as her agent, he proximately caused an injury to a child who found explosive caps negligently left by him while causing her lot to be blasted and excavated on a bordering street. Krachanake v. Mfg. Co., 175 N. C. 435, 95 S. E. 851; Barnett v. Cotton Mills, 167 N. C. 580, 83 S. E. 826, cited and applied in Richardson v. Libes, 188 N. C. 112, 123 S. E. 306.

Where Husband Is Alien.—A married woman whose husband is an alien and never visited or resided in the United States is personally liable on her contracts. Levi v. Marsha, 122 N. C. 656, 29 S. E. 832.

Liable When Partner or Surety.—Since the passage of the Martin Act, a wife has been held liable jointly and severally on her contracts whenever a partner or a surety. Bristol Grocery Co. v. Bails, 177 N. C. 298, 299, 98 S. E. 768.

A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband. Royal v. Southerland, 168 N. C. 405, 84 S. E. 708.

Assessments on Stock.—In Robinson v. Turrentine, 59 Fed. 554, construing the former provisions of this section, it was held that the purchase of stock by a married woman was not a "contract" within the terms of the section and that the wife was liable upon an assessment although the stock was purchased without the written consent of her husband.

Husband Still Liable for Funeral Expenses.—The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of indebitatus assumpsit. Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265.

IV. THE ACTION FOR BREACH.

Inability to Get Husband's Consent Immaterial.—The rule that a married woman is liable in damages for failure to specifically perform her contract to convey her lands under the Martin Act may not be successfully defeated upon the ground that she may be unable to get the consent of her husband to the conveyance, in the absence of any bad faith. Warren v. Dail, 170 N. C. 406, 87 S. E. 126.

Wife May Claim Personal Property Exemption.—Under the provisions of Article X, section 1 of our Constitution, and of this section the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned by them under the provisions of section 2515, and each has consented that such exemption should be allowed to the other therefrom. Bristol Grocery Co. v. Bails, 177 N. C. 298, 98 S. E. 768.

Estoppel of Wife.—As to the doctrine of title by estoppel applying to a married woman under the provisions of this section, who has joined with her husband in a deed to his lands with warranty, the wife's interest not appearing on the face of the instrument, but which title the wife afterwards acquired. Quere? Builders, etc., Co. v. Joyner, 182 N. C. 518, 109 S. E. 259.

Judgment against Wife as Surety.—In Royal v. Southerland, 168 N. C. 405, 81 S. E. 708, it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. Thrash v. Ould, 172 N. C. 728, 731, 90 S. E. 915.

Judgment Enforced by Execution.—It was held in Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820, Brown, J., construing this section, that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not specifically charged her property with payment thereof. Thrash v. Ould, 172 N. C. 728, 730, 90 S. E. 915.

§ 2508. Capacity to draw checks.—Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her check, receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof. (Rev., s. 2095; 1891, c. 221, s. 30; 1893, c. 344.)

§ 2509. Conveyance or lease of wife's land requires husband's joinder.—No lease or agreement for a lease or sublease or assignment by any married woman, not a free trader, of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto appear on her examination separate from her husband, as is now or may be required by law in the probate of deeds of femes covert. (Rev., s. 2096; Code, s. 1834; 1871-2, c. 193, s. 26.)

As to the formalities necessary in married women's conveyances, see section 997 and notes.

Written Assent of Husband Required.—The power of a married woman to convey her property is regulated by the Constitution, Art. X, sec. 6, and must be exercised by the written assent of her husband. Walton v. Bristol, 125 N. C. 419, 34 S. E. 544; Stallings v. Walker, 176 N. C. 321, 97 S. E. 25; Kilpatrick v. Kitpatrick, 176 N. C. 182, 96 S. E. 988.

Same—How Expressed.—His assent need not be by deed, for he has nothing to convey; and his joining with her in the instrument is sufficient. Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, and cases there cited. His signing the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187. A letter written by him is also sufficient. Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631; Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

Husband's Indorsement Does Not Validate Deed. — The written assent of her husband indorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance. Council v. Pridgren, 153 N. C. 443, 69 S. E. 404; Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6.

Privy Examination Required.—In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6.

Deed Made in Foreign State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this State, without privy examination of the wife, as required by section 997, is void. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Conveyance as Executrix.—It is not necessary that a married woman should be privily examined as to the execution by her of a lease for land, as executrix under the will of a former husband, and when she was a feme sole. Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Action for Damages for Breach.—A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, though her husband has not joined therein or given his written consent thereto. Miles v. Walker, 179 N. C. 479, 102 S. E. 884. The opinion in this case draws the distinction between suits for specific performance on the leases mentioned in this section and actions for damages on same. Ed. Note.

§ 2510. Husband cannot convey, etc., wife's land without her consent; not liable for his debts.—No real estate belonging at the time of marriage to females, married since the third Monday of November, one thousand eight hundred and forty-eight, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, one thousand eight hundred and forty-nine, by femes covert, who were such on the said third Monday of November, one thousand eight hundred and forty-eight, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to femes covert. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void. (Rev., s. 2097; Code, s. 1840; R. C., c. 56; 1848, c. 41.)

See 8 N. C. Law Rev. 478.

Formerly Husband Could Lease and Convey.—At common law the husband, upon the marriage, was seized in right of his wife of a freehold interest in her lands during their joint lives. After the birth of issue he was seized of an estate in his own right, called tenancy by the curtesy initiate. Coke Lit., 67 A. This estate, if he survived his wife, was called tenancy by the curtesy consummate, and insured to his benefit for life. Either as tenant by marital right or as tenant by curtesy initiate, the husband was entitled to the rents and profits and might lease or convey his estate, and it might be sold under execution against him. Taylor v. Taylor, 112 N. C. 134, 135, 16 S. E. 1019.

Former Right to Rents and Profits. — Where a man was married, and the land was acquired by his wife before the adoption of the Constitution of 1868, and the act called the "Marriage Act," he was a tenant by the curtesy initiate,

notwithstanding the Act of 1848. Houston v. Brown, 52 N. C. 161. If he was the tenant by the curtesy initiate, he was necessarily entitled to the possession. Wilson v. Arentz, 70 N. C. 670. And if entitled to the possession, he had a right to the permanency of the rents and profits, etc. Morris v. Morris, 94 N. C. 613, 618.

In General.—This section expressly provides that a husband shall not have power to dispose of his wife's land for his own life or any less term of years without her assent, nor can the same be subject to sale to satisfy any execution obtained against him. Bruce v. Nicholson, 109 N. C. 202, 206, 13 S. E. 790.

Purpose and Effect of Section.—Neither this section nor the Constitution of 1868 abolished tenancy by the curtesy initiate, but since the passage of this section such tenancy confers no right which the husband can assert against the wife as respects her real estate acquired after that act took effect—the intention and effect of the act being to provide for the wife a home which she can not be deprived of either by her husband or his creditors. Taylor v. Taylor, 112 N. C. 134, 16 S. E. 1019.

Same—Tenancy by Curtesy Limited.—It has been decided that neither this section nor the Constitution of 1868 destroyed such tenancy, although the husband was stripped almost entirely of his common law rights therein during the coverture. Walker v. Long, 109 N. C. 510, 14 S. E. 299; Taylor v. Taylor, 112 N. C. 134, 137, 16 S. E. 1019.

The tenancy by the curtesy initiate is stripped of its common law attributes till there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (Manning v. Manning, 79 N. C. 293), and the right to the curtesy consummate contingent upon his surviving her. * * * The husband is still seized in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. * * * He has by the curtesy initiate, a freehold interest, but not an estate in the property. Taylor v. Taylor, 112 N. C. 134, 137, 16 S. E. 1019. See Walker v. Long, 109 N. C. 510, 14 S. E. 299.

Vested Rights Not Impaired.—By this section the husband's vested rights as tenant by the curtesy initiate to the rents and profits were not impaired. Cobb v. Rasberry, 116 N. C. 137, 21 S. E. 176.

Same—Sufficient Complaint.—A complaint by a husband which states that he was married to his wife in 1841, that he had by her several living children, and that she acquired the land in question by a deed executed to her in 1864, is sufficient to show his title as tenant by the courtesy initiate of the land. Wilson v. Arentz, 70 N. C. 670. And where this curtesy exists the fact that this section deprives the husband of the power to lease the land without the consent of his wife, will not prevent his recovery of the land by an action without joining his wife as a party. Wilson v. Arentz, 70 N. C. 670.

Curtesy Consummate Can Be Sold.—A tenant by the curtesy consummate may sell his estate, notwithstanding this section. Long v. Graeber, 64 N. C. 431.

Lease Not Complying with Section Is Void.—A written lease of land for a term of five years, made subsequent to the passage of this section without the privy examination of the wife, is void as to the wife and passes no interest to the husband in the rents and profits thereof. Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510.

Who Can Sue to Recover Possession.—A tenant, by the curtesy initiate, could have sued alone for and recovered possession of the lands and the rents and profits, in this State, before the adoption of the present constitution. Walker v. Long, 109 N. C. 510, 511, 14 S. E. 299. But since the passage of the section the husband cannot maintain an action in his name alone to recover lands of which he is tenant by the curtesy initiate, but the wife can maintain such action, either by joining her husband or suing alone. Walker v. Long, 109 N. C. 510, 14 S. E. 299; Thompson v. Wiggins, 109 N. C. 508, 14 S. E. 301.

Same—Where Husband Conveys Land to Wife.—A conveyance of land from husband to wife will pass the legal estate of the vendor and enable the vendee to sustain an action to declare title and recover possession. Walker v. Long, 109 N. C. 510, 14 S. E. 299.

Statute of Limitations Not Applicable.—A tenant by the curtesy initiate has not such estate in the land of his wife that will put in operation the statute of limitations against either the husband or wife in favor of one claiming title by adverse possession. Jones v. Coffey, 109 N. C. 515, 14 S. E. 84.

Husband Can Surrender Curtesy.—Since the section was enacted a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband may sell the same and receive the whole of the purchase money. Teague v. Downs, 69 N. C. 280.

Land Purchased with Wife's Money.—Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband with notice stands affected by the same trust. Lyon v. Akin, 78 N. C. 258.

§ 2511. Capacity to make will.—Every married woman has power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills. (Rev., s. 2098; Code, s. 1839; 1871-2, c. 193, s. 31.)

May Defeat Curtesy by Will.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Freeman v. Lide, 176 N. C. 434, 97 S. E. 402; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. And she can so devise her separate estate whether the trust is active or passive. Freeman v. Lide, supra.

§ 2512. May insure husband's life.—Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture. (Rev., s. 2099.)

§ 2513. Earning and damages from personal injury are wife's property.—The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried. (1913, c. 13, s. 1.)

Editor's Note.—In the concurring opinion in Patterson v. Franklin, 168 N. C. 75, 79, 84 S. E. 18, Clark, C. J. states that this section was passed as a result of the decision in Price v. Charlotte Electric Co., 160 N. C. 450, 76 S. E. 502. The same is mentioned in Kirkpatrick v. Crutchfield, 178 N. C. 348, 352, 100 S. E. 602.

Former Provisions.—The law formerly prevailing allowed the husband the earnings of his wife and the proceeds of her labor but the husband could confer upon the wife the right to her earnings, upon which they became her separate estate, giving her a right of action to recover them in her own name. Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18.

In General.—This section and section 454 give to a married woman the fullest and most untrammeled power to bring actions even against her husband and in all cases whatever. Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206; In re Will of Witherington, 186 N. C. 162, 153, 119 S. E. 11. And her right to sue her husband extends to tort actions. Crowell v. Crowell, 181 N. C. 66, 106 S. E. 149.

Recovery for Loss of Consortium.—It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. Brown v. Brown, 124 N. C. 19, 32 S. E. 320. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. Id. 3 N. C. Law Rev. 100.

Effect on Rights of Husband.—By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in her property and choses in action. Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307.

Joinder of Husband Unnecessary.—Since the passage of this section a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted. Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602.

Same—Not Improper.—While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause

with direction that the allegations of the complaint as to the statement of the husband's cause to be stricken out and the action of the wife proceeded with. Shore v. Holt, 185 N. C. 312, 117 S. E. 165.

Action against Seducer.—Under the provisions of this section, a married woman who has been seduced may, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. Hyatt v. McCoy, 194 N. C. 25, 138 S. E. 405.

Action of Wife for Tort to Husband.—In Hipp v. Dupont, 182 N. C. 9, 13, 108 S. E. 318, the court said: "It follows therefore (from this section) that the husband cannot sue to recover his wife's earnings, or damages for tort committed on her and there is no reason why she can sue for tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband."

Husband and Wife Employed Together.—Since the passage of the Martin Act, section 2507 and this section the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay a husband and wife each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. Croom v. Goldsboro Lumber Co., 182 N. C. 217, 108 S. E. 735.

Services Rendered to Husband.—For wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living together under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to do so. Dorsett v. Dorsett, 183 N. C. 354, 111 S. E. 541.

Cited in Earle v. Earle, 198 N. C. 411, 151 S. E. 884.

§ 2514. Savings from separate property; liability of husband for income.—The savings from the income of the separate estate of the wife are her separate property. But no husband who, during the coverture (the wife not being a free trader under this chapter), has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next preceding her death. (Rev., s. 2100; Code, s. 1837; 1871-2, c. 193, s. 29.)

Wife Entitled to Income.—A wife is entitled, under this section, to recover and hold to her own use her separate property, and also the income derived from it. And agents appointed by her, whether before or after marriage, must account with and pay to her what they have received, either before or after marriage. Manning v. Manning, 79 N. C. 293, 300; State v. Lanier, 89 N. C. 517, 521.

An instruction that if the husband bought bonds with money derived from crops grown on his wife's lands the bonds would belong to the wife in the absence of evidence that he had rented the lands from his wife is not reversible error, there being evidence that the wife had repeatedly claimed title to the bonds, and there being no evidence that the husband had bought the bonds except that they were thereafter in his possession. Dail v. Heath, 206 N. C. 453, 174 S. E. 318.

Husband Acquires No Property Rights.—The exclusive receipt by the husband of the income of the wife, even during the entire period of the coverture, does not confer upon him any rights in her property, nor take away his liability to account for its income for at least twelve months preceding a demand. Wells v. Batts, 112 N. C. 283, 288, 17 S. E. 417.

Husband Liable When Agent.—A husband who, without objection by the wife, receives the income from her separate estate is liable only for the receipts for one year preceding the action brought to recover such receipts, although they were received as agent. Faircloth v. Borden, 130 N. C. 263, 41 S. E. 381.

Effect of Agreement to Pay Rent.—The agreement of the husband to pay rent precludes the possibility of assent, and implies objection on the part of the wife to her husband applying the rents to his own use, and such agreement removes the restriction, as to husband's liability to account for rents, imposed by this section. Battle v. Mayo, 102 N. C. 413, 9 S. E. 384.

Evidence of Surrender Must Be Positive.—Evidence of the surrender of the rights of the wife to the husband during their joint occupancy of land must be positive and unequivocal in order to confer proprietary control upon him. Wells v. Batts, 112 N. C. 283, 17 S. E. 417. And mere silence on the part of the wife is insufficient. See Branch v. Ward, 114 N. C. 148, 19 S. E. 104.

§ 2515. Contracts of wife with husband affecting corpus or income of estate.—No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be. (Rev., s. 2107; Code, s. 1835; 1871-2, c. 193, s. 27.)

I. In General.
II. Transactions Included.
III. The Certificate.
IV. Effect of Non-Compliance.

Cross References.

See in connection with this section, section 2507 and notes. As to liens on a married woman's property and the effect of this section thereon, see Editor's Note under section 2434; as to conveyances by married woman, see section 997; as to fraudulent conveyances, see section 1005 et seq.

I. IN GENERAL.

Editor's Note.—All transactions of the wife with her husband in regard to her separate property were held void at common law. Sims v. Ray, 96 N. C. 87, 2 S. E. 443. This was because at common law the husband and wife were deemed one person, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other. Sydnor v. Boyd, 119 N. C. 481, 485, 25 S. E. 92.

Section Passed to Protect Wife.—This section was passed to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation. Sims v. Ray, 96 N. C. 87, 89, 2 S. E. 443. The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify, and we do not think it was the purpose of the Legislature to abrogate these requirements. Kearney v. Vann, 154 N. C. 311, 319, 70 S. E. 747; Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578.

The purpose of this section was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. Sims v. Ray, 96 N. C. 87, 2 S. E. 433; Long v. Rankin, 108 N. C. 338, 12 S. E. 987; Stout v. Perry, 152 N. C. 312, 313, 67 S. E. 757.

Section Constitutional.—This section has been held to be constitutional and valid in Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Long v. Rankin, 108 N. C. 338, 12 S. E. 987; Kearney v. Vann, 154 N. C. 311, 319, 70 S. E. 747; Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Strict Construction.—This section is an enabling statute and must be strictly construed. Caldwell v. Blount, 193 N. C. 560, 137 S. E. 578.

It is necessary that it should affirmatively appear that the provisions of this section have been strictly complied with. Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Same—Requirements Necessary.—No deed from a wife to her husband, conveying her land to him, is valid, unless the officer who certifies that he privately examined the wife, as required by statute, shall also state in his certificate his conclusions that said deed is not unreasonable or injurious to her. The statute requires that both conclusions, to-wit, that the deed is reasonable and not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. Caldwell v. Blount, 193 N. C. 560, 563, 137 S. E. 578.

Section 3351 Not Applicable.—Section 3351 does not affect this section, requiring the additional certificate in the deed of the wife of her separate realty to her husband. Foster v. Williams, 182 N. C. 632, 109 S. E. 834.

II. TRANSACTIONS INCLUDED.

Parol Transfer for Less Than Three Years Valid.—A wife can upon a fair consideration give land by parol to the husband for a period less than three years under this section. Wells v. Batts, 112 N. C. 283, 289, 17 S. E. 417.

Section Applies to Contracts Only.—An examination of this section shows that it applies solely to contracts and not to conveyances; indeed, the word "contract" is used five times. The object of the Legislature was clearly to prevent the wife from making any contract with her husband whereby she should incur a liability against her estate which in the future might prove a burden or charge upon it, or cause a change or impairment of her income or personalty. Rea v. Rea, 156 N. C. 529, 531, 72 S. E. 573, 873.

If this section extended to conveyances, it would be a violation of that provision of the Constitution by adding the requirement that some third party, a magistrate or other official, must give his wise approval before she can do what the Constitution guarantees that she may do "with the approval of her husband." Concurring opinion Clark, C. J. in Frisbee v. Cole, 179 N. C. 469, 475, 102 S. E. 890.

Same—Personalty.—As to conveyances of personalty there is no restriction whatever upon the right of a wife to dispose of her personalty as fully and as freely as if she had remained unmarried. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Deese v. Deese, 176 N. C. 527, 528, 97 S. E. 475.

Same—Conveyance in Trust is an Exception.—This section however applies to conveyances by the wife of her land in trust to another for her husband. Best v. Utley, 189 N. C. 356, 361, 127 S. E. 337; Davis v. Bass, 188 N. C. 200, 124 S. E. 566; Garner v. Horner, 191 N. C. 539, 540, 132 S. E. 290.

Notes Payable to Husband and Wife Jointly.—Where the wife has conveyed her lands with her husband's written consent, and with the consent of all parties, takes a mortgage back on the same day and as a part of the same transaction to secure notes given in part payment of the purchase price, payable to herself and husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of this section. Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988.

Conveyance by Entirety.—When land is purchased by the wife with money belonging to her separate estate, with conveyance to the husband and wife by entirety, it is not a gift by the wife to her husband, of her personal property and though thus conveyed at her request creates a resulting trust in the lands in her favor. Deese v. Deese, 176 N. C. 527, 97 S. E. 475.

Deeds of separation though not favored by law, are under certain circumstances recognized by this section and §§ 2516 and 2529, when signed in conformity thereto. Taylor v. Taylor, 197 N. C. 197, 148 S. E. 171. See also Brown v. Brown, 205 N. C. 64, 169 S. E. 818.

Consent Judgment Must Conform.—A consent judgment, that transfers the wife's title in her separate realty to her husband, must be in conformity with this section. Ellis v. Ellis, 193 N. C. 216, 136 S. E. 350.

Applicable to Wife's Interest in Estates by Entireties. — During the continuance of the joint lives of the husband and wife, who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by this section and where the estate has been conveyed to one in trust for them both, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify, that the instrument was not unreasonable or injurious to her, the instrument itself is void, and he may not, by will or otherwise, dispose of her interest thereunder. Davis v. Bass, 188 N. C. 200, 124 S. E. 566.

Policy on Husband's Life Included.—An insurance policy on the life of her husband, payable to a married woman, being a vested interest, is embraced in the word "body" as used in this section, which requires all contracts between husband and wife affecting "the body or capital" of the latter's estate to be in writing and accompanied by the privy examination of the wife. Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92.

III. THE CERTIFICATE.

Certificate Must Be Annexed to Deed.—It has been uniformerly held that the deed of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to said deed the certificate of the probate officer as required by statute. Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578, and numerous cases cited.

Certificate Conclusively Presumed to Be True.—This section only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it was upon sufficient evidence, and where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be" so attacked. Frisbee v. Cole, 179 N. C. 469, 102 S. E. 890.

Amendment of Defective Certificate.—Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. Best v. Utley, 189 N. C. 356, 127 S. E. 337.

Same—Evidence.—Where the defendants allege that certain of the requirements were observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time is competent in rebuttal of the defendant's evidence, if he had introduced any, and immaterial if he did not do so. Anderson v. Anderson, 177 N. C. 401, 99 S. E. 106.

Evidence is not admissible to show that the facts stated in the certificate are not true. Best v. Utley, 189 N. C. 356, 127 N. C. 337.

Probate or Acknowledgment—Proof of Deed.—Where the husband joins with his wife in the execution of a deed to her lands, and it is certified that he had assented thereto at that time, the objection to the probate of the husband that it was taken after his wife's death is untenable, for the probate or acknowledgment is not the execution of the deed, but the proof thereof. Frisbee v. Cole, 179 N. C. 469, 102 S. E. 890.

Where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of this section, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void. Butler v. Butler, 169 N. C. 584, 86 S. E. 507.

IV. EFFECT OF NONCOMPLIANCE.

Noncompliance Renders Deed Void.—The failure on the part of the probate officer to observe the requirements of the statute renders a deed absolutely void. Davis v. Bass, 188 N. C. 200, 124 S. E. 566; Wallin v. Rice, 170 N. C. 417, 89 S. E. 239; Barbee v. Bumpass, 191 N. C. 521, 522, 132 S. E. 275; Best v. Utley, 189 N. C. 356, 361, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571; Garner v. Horner, 191 N. C. 539, 540, 132 S. E. 290; Foster v. Williams, 182 N. C. 632, 109 S. E. 834.

Where the husband has conveyed to his wife his title to lands held by them by the entireties, and the wife thereafter conveys her title by deed to the husband and herself, which deed is not probated under the requirements of this section, with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Capps v. Massey, 199 N. C. 196, 154 S. E. 52.

The failure of the certificate of a deed to lands from a wife to her husband to state that the conveyance was "not unreasonable or injurious to her" renders the instrument void. Farmers Bank v. McCullers, 201 N. C. 440, 160 S. E. 494.

Same—Partial Omission.—The deed of a wife to her husband, duly acknowledged and with private examination properly certified, was held invalid in Singleton v. Cherry, 168 N. C. 402, 84 S. E. 698, by the unanimous opinion of the

court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable and not injurious to the wife. Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Same—Oral Declarations Incompetent.—Oral declarations of the wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with this section. Shermer v. Dobbins, 176 N. C. 547, 97 S. E. 510.

Under Void Deed Husband Takes Only Curtesy.—Where the husband has had children by the wife of her first marriage, and he has received an invalid deed from her of her separate lands, after her death he has only an estate for life therein as tenant by the curtesy, and under foreclosure sale under a mortgage given by himself and his second wife, only such life estate may be conveyed to the purchaser. Caldwell v. Blount, 193 N. C. 560, 137 S. E. 578.

Defective Paper Good as Color of Title.—A paper writing void for failure of compliance with this section is good as color of title. Best v. Utley, 189 N. C. 356, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571.

Same—Title by Adverse Possession.—The possession of lands by the husband under a deed made to him by his wife, void for compliance with this section, is for the benefit of the wife, and during the continuance of the marriage relation during her life cannot be considered as adverse to her and vest title in him by sufficient adverse possession. Semble, after her death his possession would be adverse possession against heirs; and quaere as to whether it would be such before demand is made for possession. Kernegay v. Price, 178 N. C. 441, 100 S. E. 883. See Norwood v. Totten, 166 N. C. 648, 82 S. E. 951.

§ 2516. Contracts between husband and wife generally; releases.—Contracts between husband and wife not forbidden by the preceding section and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to the preceding section, any married person, may release and quitclaim dower, tenancy by the curtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released. (Rev., s. 2108; Code, s. 1836; 1871-2, c. 193, s. 28.)

See note under § 2515.

At the common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with or suing one another, but in equity, it was always otherwise, and there, many of their contracts with each other were recognized and enforced. George v. High, 85 N. C. 99, 101.

What Contracts Included.—This section clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect the contracts between the husband and the wife and third parties. Jackson v. Beard, 162 N. C. 105, 110, 78 S. E. 6.

Separation Agreement Valid.—A deed of separation executed by the husband and wife is not against our policy, when properly made in accordance with section 2515. Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327. As to separation agreements, see Editor's note under section 2529.

Mutual Releases Do Not Bar Wife's Right to Alimony.—Mutual releases between husband and wife of their interests in the separate property of one another does not bar the wife from making application for temporary alimony and attorney's fee in a subsequent suit for divorce. Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

Rent Notes Given Wife by Husband Valid.—Where a husband occupies his wife's land for nine years, during the whole of which period he received the rents therefrom, under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent, it was held that the notes constitute a valid indebtedness on the part of the husband to his wife. Battle v. Mayo, 120 N. C. 413, 9 S. E. 384.

Money Lent to Husband Recoverable.—In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place since the adoption of the Constitution of 1868, it was held that the contract between them was not inconsistent with public policy, and was, therefore, valid. George v. High, 85 N. C. 99.

§ 2517. Wife's antenuptial contracts and torts.—The liability of a feme sole for any debts owing, or contracts made or damages incurred by her before her marriage shall not be impaired or altered by such marriage. No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage. (Rev., ss. 2101, 2106; Code, ss. 1822, 1823; 1871-2, c. 193, ss. 13, 14.)

Justice Has Jurisdiction.—A justice of the peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. Hodges v. Hill, 105 N. C. 130, 10 S. E. 916; Neville v. Pope, 95 N. C. 346; Beville v. Cox, 109 N. C. 265, 13 S. E. 800. And the justice also has jurisdiction where the action is on a contract made or a wrong done by her before the marriage. Neville v. Pope, 95 N. C. 346, 348.

Wife May Appoint Husband as Agent.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of section 2515 is not necessary. Stout v. Perry, 152 N. C. 312, 67 S. E. 757.

Where prior to their marriage the wife incurs liability for a negligent injury to the husband the subsequent marriage does not affect her liability. Shirley v. Ayers, 201 N. C. 51, 158 S. E. 840.

§ 2518. For wife's torts, husband not liable.—No husband shall be liable for damages accruing from any tort committed by his wife, or for any costs or fines incurred in any criminal proceeding against her. (Rev., s. 2105; Code, s. 1833; 1871-2, c. 193, s. 25; 1921, c. 102.)

Editor's Note.—The present section, abolishing the husband's liability for the torts of his wife was substituted for the former provision by ch. 102, Public Laws, 1921.

At common law the husband was liable for the tort of his wife, although committed without his knowledge or consent and in his absence, and although living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsibility the injured party would be without redress." Roberts v. Lisenbee, 86 N. C. 136. This principle was modified by the Act of 1871-2, (this section as it was formerly) so that the husband could only be held liable for torts committed while the husband was living with the wife. Young v. Newsome, 180 N. C. 315, 316, 104 S. E. 660. The case of Roberts v. Lisenbee, 86 N. C. 136, supra, gives a good discussion of the common law and statutory liability of the husband for the contracts and torts of the wife, by Ashe, J. The following cases were decided under the former provision.

Liability for Slander.—Under the former provisions of this section it has been held that "a husband is liable for slanderous words spoken by his wife in his absence and without his knowledge or consent." Presnell v. Moore, 120 N. C. 390, 27 S. E. 27; Young v. Newsome, 180 N. C. 315, 316, 104 S. E. 660.

Negligence of Clerk in Wife's Store.—The husband living with his wife is jointly liable with her for damages resulting from an injury received by a customer through the negligence of a clerk in her store, if she is liable therefor. Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128.

Upon Death of Wife Action Abated.—Where husband and wife are jointly sued for the wrong of the wife and the wife die, the action abates. Roberts v. Lisenbee, 86 N. C. 136.

§ 2519. Estate by the curtesy.—Every man who has married or shall marry a woman, and by her has issue born alive, shall, after her death intestate as to the lands, tenements and hereditaments hereinafter mentioned, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife has obtained a divorce a mensa et thoro, and is not living with her hus-

band at her death, or when the husband has abandoned his wife, or has maliciously turned her out of doors, and they are not living together at her death; or if the husband has separated himself from his wife, and is living in adultery at her death, he shall not be tenant by the curtesy of her lands, tenements and hereditaments. (Rev., s. 2102; Code, s. 1838; 1871-2, c. 193, s. 30.)

As to husband's curtesy, see also the notes under section 2510.

This section retains curtesy in practically its common law form (certainly as to curtesy consummate), but the rights of the husband in his wife's property have been so cut down by the Constitution, by statutes, and by pronouncements of the court, that his estate by curtesy initiate is of little value. See 11 N. C. Law Rev., 273.

Actual Seizure Necessary at Common Law.—At the common law, it is essential that the wife, or the husband in the right of the wife, shall have seizin in deed—that is, actual seizin—actual possession of the estate, to entitle the husband as tenant by the curtesy. Nixon v. Williams, 95 N. C. 103, 104. By this section it makes no difference whether the seizin is of a legal or of an equitable nature. Ed. Note.

Common Law Curtesy Abolished.—The common law estate of the husband as tenant by the curtesy initiate in the lands of his wife was abolished by sec. 6, Art. X, of the Constitution, and now, by virtue of that provision and the statutes passed in pursuance thereof, while the husband has an interest, the right to enter upon and occupy the land with the wife, he has no estate therein until her death. Walker v. Long, 109 N. C. 510, 14 S. E. 299.

When Right Attaches.—After a child of the marriage has been born alive and capable of inheriting, the husband is tenant by curtesy initiate in his wife's lands, and as such has a valuable right. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6.

Husband Has a Freehold Interest.—A husband has, by the curtesy initiate, a freehold interest, but not an estate, in the property. Thompson v. Wiggins, 109 N. C. 508, 510, 14 S. E. 301.

A Bare Right of Occupancy.—The only right attaching to tenancy by the curtesy initiate in the wife's real estate is the bare right of joint occupancy with the wife with the right of ingress and egress. Thompson v. Wiggins, 109 N. C. 508, 14 S. E. 301.

Curtesy Consummate Is Not Changed.—Tenancy by the curtesy consummate, remains as at common law. The husband may sell such interest, Long v. Graeber, 64 N. C. 431. And it is liable to sale under execution against him after his wife's death. McCaskill v. McCormac, 99 N. C. 548, 6 S. E. 423; Thompson v. Wiggins, 109 N. C. 508, 509, 14 S. E. 301.

Husband a Necessary Party.—A husband, tenant by curtesy, has an interest in his wife's land and is a necessary party to a suit concerning it. Jackson v. Beard, 162 N. C. 105, 110, 78 S. E. 6; McGlennery v. Miller, 90 N. C. 215.

Joinder of Minor Husband.—When the husband, being a minor, joins in the deed to lands of his wife, the conveyance is voidable, subject to his affirmance or ratification when he becomes of age; and where the deed has been disapproved in apt time by him, the conveyance, requiring his valid or statutory consent, is void. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6.

Effect of Divorce a Mensa.—Where a wife has obtained a divorce a mensa et thoro, whatever rights the husband had in her lands are suspended until a reconciliation shall be effected, or until by her death he may become tenant by the curtesy consummate, and therefore she is entitled to recover from him the possession and use of her lands. Taylor v. Taylor, 112 N. C. 134, 16 S. E. 1019.

§ 2520. In actions against wife, husband served and may defend.—In all actions brought against a married woman, who is not a free trader (as hereinafter provided for), the summons shall be served upon the husband also, and on motion to the court in which the action is pending, he may be allowed, with her consent, to defend the same in her name and behalf, but no judgment shall be given against him upon any liability claimed against her arising before the marriage or upon any contract made by her alone after her marriage. (Rev., s. 2103; Code, s. 1824; 1871-2, c. 193, s. 15.)

As to when married woman may sue or be sued alone, see section 454.

Since Martin Act Married Woman Can Sue or Be Sued Alone.—In conferring on married women the absolute freedom of contract the right carries with it the privilege and liability of suing and being sued alone. Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Royal v. Southerland, 168 N. C. 405, 407, 84 S. E. 708.

Where a married woman is sued alone upon her executory contract, her husband is not a necessary party. Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820.

Effect of Acceptance of Service.—The acceptance of service of summons by a married woman gives the court jurisdiction of the person, and authorizes further proceedings according to the course and practice of the court. Nicholson v. Cox, 83 N. C. 44.

Under Section 454 No Judgment against Husband.—No judgment can be rendered against a husband who is joined with his wife in an action under section 454. Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644.

Failure of Husband to Make Proper Defense.—Where a feme covert is sued with her husband, whom she instructed to make a proper defense to the action, which he fails to do, is no ground for an injunction to restrain the collection of the judgment in the absence of fraud. Neville v. Pope, 95 N. C. 346.

Where husband and wife are sued together on their joint obligation, it is the duty of the husband to defend for both, and to set up the wife's inability in a proper case; and if he fail to do so, the wife can not have the judgment against her set aside on the ground of her incompetency to contract. Vick v. Pope, 81 N. C. 22.

Where a feme covert, sued with her husband and others as surety to an official bond, accepts service of the summons at the husband's instance, relying upon him to employ counsel and defend the suit, and because of such reliance on her husband takes no steps in the matter personally, and judgment goes by default, a case or surprise and excusable neglect is presented which entitles her to have such judgment set aside. Nicholson v. Cox, 83 N. C. 48.

Where Husband Selects Counsel.—A judgment against a married woman, appearing in the suit by counsel of her husband's selection, is as binding as one against any other person, unless it be obtained by the fraudulent combination of the husband with the adverse litigant. Vick v. Pope, 81 N. C. 22.

Power of Attorney Need Not Be Registered.—A power of attorney, given by a married woman to dismiss an action concerning her land, need not be registered to give it validity. Hollingsworth v. Harman, 83 N. C. 153.

§ 2521. Discharge of husband from defense; liability for costs.—When a husband is allowed to defend for his wife, he may be ordered to pay costs for any misconduct, and may be discharged from the conduct of her defense, if it shall appear to the court that his defense is not bona fide in her interest. (Rev., s. 2104; Code, s. 1825; 1871-2, c. 193, s. 16.)

Art. 2. Acts Barring Reciprocal Property Rights of Husband and Wife.

§ 2522. Divorce a vinculo and felonious slaying a bar.—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other or of being accessory before the fact of such felonious slaying, the party so convicted, shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only. (Rev., s. 2109; Code, s. 1843; 1871-2, c. 193, s. 42.)

Editor's Note.—In the case of Owens v. Owens, 100 N. C.

240, 6 S. E. 794, a wife who murdered her husband was held to be entitled to her right of dower irrespective of her crime. The Legislature the following year adopted this section.

It is questionable whether an estate by the entirety is included in this statute. Conceding that it is not, a just result can be reached by the application of the recognized principle of equity that where one acquires title to property under circumstances which renders it unconscionable that he retain the beneficial interest, a constructive trust will be declared in favor of those entitled to the benefit and enjoyment. 5 N. C. Law Rev. 374.

No Application to Estates by Entireties.—This and the following section deal with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like, and has no application to estate by entireties. McKinnon, etc., Co. v. Caulk, 167 N. C. 411, 83 S. E. 559.

In Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188, it was held that where husband and wife hold estate by entireties, and the husband has murdered the wife, and her expectancy of life has been legally determined to have been longer than his own, equity will decree that he hold the legal title to lands held by them in entireties in trust for her heirs at law until his death, subject to his right of management and the use of the rents and profits for his own life. As this decision was based upon equitable principles, it was not necessary to determine whether the provision of this section, in reference to the felonious slaying of the husband or wife, which was enacted after the decision in Owens v. Owens, 100 N. C. 240, 6 S. E. 954, embraces estates held by entireties.

Husband's Rights Terminated by Divorce. — Personal choses in action which belong to the wife, reduced into possession by the husband, in the words of a recent author, "remain his, but as to rights dependent on marriage, and not actually vested, a full divorce or the legal annihilation ends them." Schouler's Dom. Rel., section 221, and authorities cited in the notes; Arrington v. Arrington, 102 N. C. 491, 514, 9 S. E. 200.

Effect of Valid Foreign Divorce.—Where a wife who had resided here, bona fide removed to Illinois, and instituted an action for divorce in one of the courts of that state and the husband, in this State appeared by attorney and defended the action there, it was held that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminated from its date. Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200.

When a spouse is beneficiary, the effect of a subsequent divorce on his right to take might be controlled by this section. See 12 N. C. Law Rev., 376.

When Homicide Is Admitted.—The provisions of this section do not require a conviction of the offense where it is admitted that the homicide had been committed. Parker v. Potter, 200 N. C. 348, 349, 157 S. E. 68.

§ 2523. Wife's elopement or divorce a mensa at husband's suit a bar.—If a married woman elopes with an adulterer, or willfully an without just cause abandons her husband and refuses to live with him, and is not living with her husband at his death, or if a divorce from bed and board is granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopement may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates; and in case of such elopement, abandonment, or divorce, the husband may sell and convey his real estate as if he were unmarried, and the wife shall thereafter be barred of all claim and right of dower therein. (Rev., s. 2110; Code, s. 1844; 1893, c. 153, ss. 1, 2, 3; 1871-2, c. 193, s. 44.)

Wife Deprived of Dower.—A wife who commits adultery and is not living with her husband at the time of his death is thereby deprived of her dower. Phillips v. Wiseman, 131 N. C. 402, 42 S. E. 861.

§ 2524. Husband's living in adultery, etc., or divorce a mensa at wife's suit a bar.—If a husband separates from his wife and lives in adultery, or willfully and without just cause abandons his wife and refuses to live with her, and such conduct on his part is not condoned by her, or if a divorce from bed and board is granted on the application of the wife, he shall thereby lose all right to curtesy in the real property of the wife, and also all right and estate of whatever character in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of the wife which may have been settled upon him solely in consideration of the marriage by any settlement before or after marriage, and in case of such adultery and abandonment or divorce, the wife may sell and convey her real property as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall thereafter be barred of all claim and right to curtesy in such real property. (Rev., s. 2111; Code, s. 1845; 1893, c. 153, s. 4; 1871-2, c. 193, s. 45.)

Possibility of Condonation Recognized.—This section recognizes the possibilites of condonation and the resumption of the marriage relation. Joyner v. Joyner, 151 N. C. 181, 183, 65 S. E. 896.

Art. 3. Free Traders.

§ 2525. Requisites of writing to make her free trader.— Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

1. By antenuptial contract, proved and registered, as hereinafter required; or,

2. By her and her husband signing a writing in the following or some equivalent form:

A. B., of the age of twenty-one years or upwards, wife of C. D., of ..... county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed)

A. B.
C. D.

Witness: E. F.

Registered this ..... day of ....., 19....

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business. (Rev., s. 2112; Code, s. 1827; 1871-2, c. 193, ss. 18, 19.)

Effect of Martin Act.—That the Martin Act practically constitutes a married woman a free trader, see under section 2507, analysis line, "Powers Conferred," catchline, "Practically Makes Free Traders."

Legislature Has Broad Powers.—In Hall v. Walker, 118 N. C. 377, 380, 24 S. E. 6, the court said: "There is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader. Const., Art. X, sec. 6, was not intended to disable but to protect her." Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

Section for Benefit of Married Women.—This section was passed for the benefit of married women who wish to engage in business, in order to give them credit, and it was not intended for the benefit of their debtors. Wilkes v. Allen, 131 N. C. 279, 281, 42 S. E. 616.

Does Not Make Wife Free to Convey.—By becoming a registered free-trader, a married woman is not enabled to

convey her real property, without joinder of her husband and without her privy examination. Council v. Pridgen, 153 N. C. 443, 449, 69 S. E. 404.

Compared with Section 2514.—By a proper construction of section 2514, where the wife is not a free trader, the husband's liability is limited, but where she is a free trader, his liability to account for her income received by him is unlimited except by the general law applicable to agents and other persons. Manning v. Manning, 79 N. C. 293, 300, 302.

§ 2526. Writing effective from registration. — From the time of the registration of the writing mentioned in the preceding section, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a feme sole. (Rev., s. 2113; Code, s. 1828; 1871-2, c. 193, s. 20.)

Section Does Not Include Conveyance.—The words "free-trader," "contract" and "deal," refer to contracts and trades in some business enterprises, and are restricted under this section to the dealings of the wife as a free-trader with reference to her contracts in the pursuit of the business she is engaged in; and the word "deal," taken in its legal significance, does not enlarge this meaning so as to confer upon a married woman power to convey her real estate. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404.

Justice Has Jurisdiction.—A justice of the peace has jurisdiction of an action against a married woman in regard to liabilities incurred by her while she is a free trader. Hodges v. Hill, 105 N. C. 130, 131, 10 S. E. 916; Neville v. Pope, 95 N. C. 346.

§ 2527. Certified copy as evidence.—A copy of such writing, duly proved and registered and certified by the register of the county in which the same is registered, is admissible in evidence as certified copies of registered deeds are or may be allowed to be. (Rev., s. 2114; Code, s. 1829; 1871-2, c. 193, s. 21.)

Evidence of Being Free Trader.—Where it is averred, and not denied, that a married woman is a free trader, and the judgment fastens no personal liability upon her it was held that she was bound by the judgment. Roseman v. Roseman, 127 N. C. 494, 497, 37 S. E. 518. In this case Montgomery, J. dissented holding that the only evidence competent to prove that a married woman is a free trader is the registered writing or a duly certified copy. Ed. Note.

§ 2528. Revocation by entry on record and publication.—The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there is none so published, then in any other convenient newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader. (Rev., s. 2115; Code, s. 1830; 1871-2, c. 193, s. 22.)

§ 2529. Separation by divorce or deed; husband non compos.—Every woman who is living separate from her husband, either under a judgment of divorce by a competent court or under a deed of separation executed by said husband and wife and registered in the county in which she resides, or whose husband has been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and may convey her personal estate and her real estate without the assent of her husband. (Rev., s. 2116; Code, s. 1831; 1871-2, c. 193, s. 23; 1880, c. 35.)

See note under § 2515.

Editor's Note on Separation Agreements.—Separation deeds have been rare in this State, and, for a long period of time, they were declared absolutely void in North Carolina, as they were in England. This was the conclusion reached in Collins v. Collins, (1866) 62 N. C. 153. The decision was based upon the intention expressed in the Code to regard man and wife as one, upon the decisions of the English courts regarding the marital bond as inseparable, and upon the general grounds of public policy in preserving the marriage bond.

After the case of Collins v. Collins, supra, decided in 1866, and before the next case involving separation agreements, decided twenty years later, Sparks v. Sparks (1886) 94 N. C. 527, the legislature had enacted, in furtherance of the constitutional provisions guaranteeing married women's rights, this section.

In the Sparks case, supra, on page 532 the court says: "This section, passed in February, 1872, in furtherance of the constitutional provision, by which the property of the woman, on her marriage, is secured to her as separate estate, implies a possible legal separation of the parties, by voluntary agreements, and defines her condition and rights resulting therefrom."

Later in Smith v. King, (1890) 107 N. C. 273, 12 S. E. 57, the court states that separation deeds are not regarded with favor in North Carolina. In that case, the deed had been rescinded by a subsequent cohabitation, and therefore the court did not decide what the effect of that deed would have been, if not so rescinded. In a subsequent case, Cram v. Cram (1895) 116 N. C. 288, 21 S. E. 197, there is an intimation that separation deeds are not looked upon with favor.

The leading case in North Carolina, Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327, was decided in 1912. Although the separation deed in that case was held to be void because of an invalid certificate of the probate officer, Justice Hoke said, that due to the "distinct recognition of deeds of this character . . . we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law."

From these decisions it clearly appears that separation deeds are valid "under certain conditions." In North Carolina, there is no direct decisions which would show these necessary "certain conditions." However there is general agreement as to requisites in practically all jurisdictions. As stated in the Archbell case, 158 N. C. 408, 74 S. E. 327, supra, these requisites are as follows: (1) That there must be a separation already existing or immediately to follow the execution of the deed; (2) that the separation deed must be made for an adequate reason, of such a kind that it is necessary for the health or happiness of one or the other; (3) that it must be reasonable and fair to the wife, considering the condition of the parties. In North Carolina, in addition, the separation deed must conform to the statutory requirements, concerning deeds between husband and wife. See 2 N. C. L. R. 193, 194.

Section Constitutional.—This section is a valid exercise of the legislative power. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

When Husband's Assent Unnecessary.—The husband's assent cannot be required when either by reason of mental incapacity he is unable to give assent, or by his conduct in abandoning his wife or maliciously turning her out of doors he has practically emancipated her, for in both cases she must rely upon her property or her labor for her support. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

This section has been referred to in a number of cases as an exception to the constitutional provision which requires the assent of the husband, though not directly construed. In these cases it is stated that the husband's assent to the conveyance of the realty is required "except in cases under secs. 2116 and 2117." Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644; Sanderlin v. Sanderlin, 122 N. C. 1, 29 S. E. 55; Moore v. Wolfe, ib., 711, 715, 30 S. E. 120; Fathing v. Shields, 106 N. C. 289, 295, 10 S. E. 998; Hodges v. Hill, 105 N. C. 130, 10 S. E. 916; Flaum v. Wallace, 103 N. C. 296, 304, 9 S. E. 567; Sparks v. Sparks, 94 N. C. 527; Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

Declaration of Insanity Necessary.—In order for a wife to become a free trader because of insanity of her husband it is necessary that he shall be declared insane. Abbott v. Hancock, 123 N. C. 99, 102, 31 S. E. 268.

Section 2293 an Alternative Method.—Section 2293 is not in contradiction of this section, but is an optional alternative method to which the wife can resort if for any reason it should be desirable that in future the record of the deed should show that at the time of the conveyance the husband had been adjudged a lunatic. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

§ 2530. Abandonment by husband.— Every woman whose husband abandons her, or maliciously turns her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired. She may also convey her personal estate and her real estate without the assent of her husband. (Rev., s. 2117; Code, s. 1832; 1871-2, c. 193, s. 24.)

Section Constitutional.—This section was held constitutional in Hall v. Walker, 118 N. C. 377, 24 S. E. 6; Brown v. Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; Finger v. Hunter, 130 N. C. 529, 531, 41 S. E. 890.

There is no constitutional inhibition on the Legislature to declare by statute when and how a wife may become a free trader, and notwithstanding the provisions of Article X, § 6, to the effect that a married woman may convey her separate realty with the written consent of her husband, the provision of this section is valid, and in such cases, § 2509, requiring the execution of her deed by her husband and her separate examination taken, does not apply. Keys v. Tuten, 199 N. C. 368, 154 S. E. 631.

When Husband an Alien.—In Troughton v. Hill, 3 N. C. 406, it was held that when the husband became an alien the wife became a feme sole for the purpose of contracting, and might acquire and transfer property. Hall v. Walker, 118 N. C. 377, 381, 24 S. E. 6.

An action to recover possession of land may be sustained against a married woman alone, whose husband is an alien, resides abroad, or has abandoned his wife. Finley v. Saunders, 98 N. C. 462, 4 S. E. 516.

Where Husband Fugitive from Justice.—In an action against a married woman where the husband is a nonresident and a fugitive from justice, the husband is not a necessary party. Heath, etc., Co. v. Morgan, 117 N. C. 504, 23 S. E. 489.

Departure from State Not Required.—This section does not require the departure of the husband from the State to enable the wife to use her property for her support. Vandiford v. Humphrey, 139 N. C. 65, 51 S. E. 893.

Abandonment Sufficient.—Abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder. Bachelor v. Norris, 166 N. C. 506, 82 S. E. 839; Pardon v. Paschal, 142 N. C. 538, 55 S. E. 365.

Same—Tort Actions.—Under a reasonable construction of the Constitution and this section, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. Brown v. Brown, 121 N. C. 8, 27 S. E. 998.

Same—Wife Need Not Wait Six Months.—Under this section a wife is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. Vandiford v. Humphrey, 139 N. C. 65, 51 S. E. 893.

Evidence of Abandonment to Be Submitted to Jury.—In order for a wife abandoned by her husband to become a free trader under this section, it is not necessary that the wife be abandoned for the statutory time necessary to constitute grounds for divorce, and where, in an action by her to set aside her deed executed without the written consent of her husband, the defense is set up that at the time of its execution she had been abandoned by her husband, and pleadings in her action for divorce alleging abandonment at the time are introduced in evidence, the issue of abandonment should be submitted to the jury even though abandonment was not an issue in the divorce proceedings, and the granting of a judgment on the pleadings in her favor is error. Keys v. Tuten, 199 N. C. 368, 154 S. E. 631.

CHAPTER 52.

MILLS.

Art. 1. Public Mills

§ 2531. Public mills defined. — Every water grist-mill, steam mill, or wind-mill, that grinds for toll, is a public mill. (Rev., s. 2119; Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1.)

Cited in Hyatt v. Myers, 73 N. C. 232, 240; Branch v. Wilmington, etc., R. Co., 77 N. C. 347, 349.

§ 2532. Miller to grind according to turn; tolls regulated.—All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the indian corn and wheat and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time: Provided further that this shall not apply to Lenoir and Cleveland counties: Provided, further, that in Northampton and Franklin counties it shall be lawful for water mills to take for toll for grinding one-sixth of the indian corn and wheat, and one-twelfth part for chopping grain of any kind: Provided, further that this section shall not apply to Hertford, Bertie and Hyde counties. (Rev., s. 2120; Code, s. 1847; R. C., c. 71, s. 6; 1777, c. 122, s. 10; 1793, c. 402; 1905, c. 694; 1907, c. 367; 1929, cc. 129, 139; 1933, cc. 150, 158.)

Editor's Note.—The amendments of 1929 above cited added the last two provisos to this section. Public Laws 1929 ch. 311, applicable only to Pamlico and Robeson Counties, changed the maximum toll for grinding Indian corn from one-eighth to one-sixth.

Public Laws 1933, cc. 150, 158, exempted Cleveland, Hertford, Bertie and Hyde counties from the operation of this section. For act increasing the toll from one-eighth to one-sixth in Pender county, see P. L. 1933, c. 298.

§ 2533. Measures to be kept; tolls by weight or measure.—All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer. (Rev., s. 2121; Code, s. 1848; 1885, c. 202; R. C., c. 71, s. 7; 1777, c. 122, s. 11.)

§ 2534. Keeping false toll-dishes misdemeanor. —If any owner, by himself or servant, keeping any mill, shall keep any false toll-dishes, he shall be guilty of a misdemeanor. (Rev., s. 3679; Code, s. 1848; R. C., c. 71, s. 7; 1777, c. 122, s. 11.)

"False Toll Dishes" Defined.—The words "false toll dish," as used in the statute, mean a toll dish measuring more than one-eighth of a half bushel. State v. Perry, 50 N. C. 252. The measure kept need not be averred in the indictment. Id.

Sufficiency of Evidence.—An indictment for keeping false toll dishes was sufficiently supported by proving measures of one-seventh and one-sixth of a half bushel were kept. State v. Perry, 50 N. C. 252.

But an indictment for keeping a false toll dish is not sustained by proof that the mill owner took one-sixth part of each half bushel with a half gallon toll dish. State v. Nixon, 50 N. C. 257.

Art. 2. Condemnation for Mill by Owner of One Bank of Stream

§ 2535. Special proceedings; parties; summons. —Any person wishing to build a water mill, who has land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite

side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter. (Rev., s. 2122; Code, s. 1849; 1868-9, c. 158, s. 1.)

For full treatment of eminent domain proceedings, see §§ 1705 et seq.

Corporation That Erects Mills Generally.—The Legislature, in providing for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoys a prerogative franchise because of some powers or duties, which it is to perform for the public, and to that extent is quasi public. Bass v. Roanoke Nav., etc., Co., 111 N. C. 439, 454, 16 S. E. 402.

Withdrawal of Verbal Consent to Maintain Dam.—Where the plaintiff built a mill, and, with the verbal consent of the defendant, constructed a dam across a stream upon land of the latter; and after the mill had been in operation for several years, the defendant withdrew his consent to the further use of the land for this purpose, and notified the plaintiff to level the dam, which he failed to do; thereupon the defendant caused the obstruction to be removed. In an action by the plaintiff for damages, it was held that the plaintiff should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes. Kivett v. McKeithan, 90 N. C. 106.

Cited in Benbow v. Robbins, 71 N. C. 338; Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 550, 564, 16 S. E. 692.

§ 2536. Commissioners to be appointed.—If no just cause is shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown. (Rev., s. 2123; Code, s. 1850; 1868-9, c. 158, s. 2.)

Right of Appeal.—Defendants have a right to appeal from an interlocutory order of the court appointing freeholders to view, lay off and value land for a mill site. Minor v. Harris, 61 N. C. 322.

§ 2537. Meeting to be appointed and commissioners notified; witnesses examined.—The third commissioner shall cause the other to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner. Any commissioner named by or for either of the parties who, without just cause, fails to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president, in like manner, unreasonably delays to notify the other commissioners of a meeting, or fails to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum. (Rev., s. 2124; Code, s. 1851; 1868-9, c. 158, s. 3.)

§ 2538. Oath and duty of commissioners.—The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days. (Rev., s. 2125; Code, s. 1852; 1868-9, c. 158, s. 4.)

§ 2539. Contents of commissioners' report. — The report of the commissioners shall set forth:

1. The location, quantities and value of the several areas laid off by them.

2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.

3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.

4. Any other matter upon which they have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties. (Rev., s. 2126; Code, s. 1853; 1868-9, c. 158, s. 5.)

§ 2540. When building not to be allowed.—If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built. (Rev., s. 2127; Code, s. 1854; 1868-9, c. 158, s. 6.)

See sec. 1714.

In General.—The court is forbidden to confirm a report which takes away houses, etc., even though erected before the proceedings are commenced. Burgess v. Clark, 35 N. C. 109.

Denial of Injunction.—An injunction will not be granted to restrain the erection of a dam when money damages will suffice. Burnett v. Nicholson, 72 N. C. 334.

§ 2541. Power of court on return of report. — If the report is in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave is granted; and upon such payment, the party to whom such leave is granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto. (Rev., s. 2128; Code, s. 1855; 1868-9, c. 158, s. 7.)

§ 2542. Time for beginning and building mill; to be kept up.— The person to whom leave is granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of its customers, or such as shall be customers, to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged. (Rev., s. 2129; Code, s. 1856; 1868-9, c. 158, s. 8.)

§ 2543. Rebuilding mill after destruction.—If a water mill belonging to a married woman, or a minor, a person of unsound mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid shall have three years from the removal of the disability. (Rev., s. 2130; Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9.)

Art. 3. Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite

§ 2544. Special proceedings; summons.— Any person who has land on one or both sides of a stream and wishes to build a water mill, or has a water-mill already built and may fine it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, waterway, drain, mill-race, or tail-race or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, may make application by petition in writing to the clerk of the superior court of the county in which the said lands to be affected, or a greater part thereof, are situated, for the right to so convey the said water or pond the same by the erection of a dam or the raising of any dam already built; and the procedure shall be as in other special proceedings. (Rev., s. 2131; 1905, c. 534, s. 1a, k.)

§ 2545. Contents of petition. — The petition shall specify the lands to be affected, the name of the owner of said lands, and the character of the ditch, race, waterway or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, waterway or drain to be constructed or erected, and not more than thirty feet from each bank can be condemned. (Rev., s. 2132; 1905, c. 534, s. 1b.)

§ 2546. Commissioners to be appointed. — Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed ten days from the date of said notice. (Rev., s. 2133; 1905, c. 534, s. 1c.)

§ 2547. Oath and duty of commissioners.—The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have power to confirm the same. (Rev., s. 2134; 1905, c. 534, s. 1d.)

§ 2548. Assessment of damages.—In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such waterway, ditch, drain or dam, they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such waterway, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said mill-owner. The damage assessed by the appraisers under this article shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said waterways, races, ditches or dams. (Rev., s. 2135; 1905, c. 534, s. 1e, m.)

§ 2549. When commissioners' report not to be affirmed.—If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill of pond water within two hundred feet of another mill, or will overflow or pond water within two hundred feet of the millsite or premises of a person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction, or if the mill create a nuisance in the neighborhood, the court shall not allow the report of the appraisers to be affirmed. (Rev., s. 2136; 1905, c. 534, s. 1g.)

§ 2550. When petitioner may enter on lands.— After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, waterways, drains, races or other necessary works and construct such dams: Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this state. If the owner is a nonresident and has no known agent in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided further, that the mill-owner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam. (Rev., s. 2137; 1905, c. 534, s. 11.)

§ 2551. Owner of mills and millsites protected. —No other person shall have the right to erect or maintain any dam, ditch, waterway, drain or race that will overflow or pond water within two hundred feet of the millsite or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this chapter, or of any millsite owned by any person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction. When any person violates the provisions of this section the owner of said mill or millsite shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances. (Rev., s. 2138; 1905, c. 534, s. 1h.)

§ 2552. Report to be registered.—The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk, and shall pay the register the usual legal fees for registering such instruments in his office. (Rev., s. 2139; 1905, c. 534, s. 1i.)

§ 2553. Fees of appraisers. — Each appraiser shall be entitled to a fee of one dollar for each day actually employed in making said assessment, to be paid by the petitioner. (Rev., s. 2140; 1905, c. 534, s. 1j.)

§ 2554. Obstructing mill races or dams a misdemeanor.—Any person who shall obstruct any drain, ditch or dam constructed under this article shall be guilty of a misdemeanor. (Rev., 3381; 1905, c. 534, s. 11.)

Art. 4. Recovery of Damages for Erection of Mill

§ 2555. Action in superior court; procedure.—Any person conceiving himself injured by the erection of any grist-mill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions. (Rev., s. 2141; Code, s. 1858; 1876-7, c. 197, s. 1.)

For full treatment of this subject, see 12 N. C. Enc. Dig. 334 et seq., 15 N. C. Enc. Dig. 736 et seq.

Exclusiveness of Remedy.—Ordinarily, in cases to which this section applies, the remedy given must be pursued. Kinsland v. Kinsland, 186 N. C. 760, 120 S. E. 358.

Section Does Not Apply to Trespass.—The remedy under this section does not apply to an action for damages for a trespass committed on the plaintiff's land. Henley v. Wilson, 77 N. C. 216.

Sufficiency of Description.—A petition for damages, caused by the erection of a mill upon the stream below, which described it as a "grist-mill" without calling it a public mill, or a grist-mill grinding for toll, was sufficient. Little v. Stanback, 63 N. C. 285.

Proper Issue.—In an action for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's milldam, on issue involving the amount of annual damage done thereby is the proper one to be submitted to the jury. Hester v. Broach, 84 N. C. 252.

Procedure to Assess Damages.—In a petition for damages for ponding water back, where, in the county court the plaintiff's right to relief is denied, the proper course is to impanel a jury to try the allegations made in bar of such right, and if such allegations are found for the plaintiff, the proper course is then to order a jury on the premises to assess the damages, but in all cases where there is an appeal to the superior court, the facts are to be ascertained by a jury at bar, but in that court, those pertaining to the question of relief, and those as to that of damages, are to be separately submitted. Jones v. Clarke, 52 N. C. 418.

Easement Limited to Mill Purposes.—Where the lower proprietor has acquired an easement in the lands of the upper proprietor to pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the upper proprietor to an action for damages that will start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. Thomas v. Morris, 190 N. C. 244, 129 S. E. 623.

Liability for Defect in Bridge.—Where water was thrown, by the erection of a mill dam, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present proprietor, who did no other work on the roads, it was held that the present proprietor was answerable in damages to an individual who sustained an injury by reason of a defect in one of the bridges. Mulholland v. Brownrigg, 9 N. C. 349.

Proof of Ownership.—In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. Yeargain v. Johnston, 1 N. C. 180, cited in notes in 41 L. R. A. 749; 59 L. R. A. 901.

Plaintiff Entitled to Nominal Damage.—Instructions to a jury, that if a plaintiff sustains no injury from the ponding of water upon his mill wheel, still he is entitled to nominal damages, are correct. Little v. Stanback, 63 N. C. 285, cited in note in 59 L. R. A. 819.

A motion for a new trial for failure of the court to instruct the jury to return at least nominal damages, because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done, was properly refused in the discretion of the court. McGee v. Fox, 107 N. C. 766, 12 S. E. 369.

Same—Injury Unnecessary.—In an action for damages for the maintenance of a dam across a stream, the plaintiff is entitled to recover nominal damages, without showing an injury capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage; for the mere fact of ponding back the water on plaintiff's premises is sufficient to entitle him to nominal damages. Chaffin v. Fries Mfg. Co., 135 N. C. 95, 47 S. E. 226, rehearing denied in 136 N. C. 364, 48 S. E. 770.

If the water be ponded back on the land of another by the erection of a milldam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. Wright v. Stowe, 49 N. C. 516.

Measure of Damages.—The measure of damages for backing water on land by means of a dam is the difference in the value of the land before and after the injury complained of. Borden v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 442.

Permanent Damages.—In an action for backing water on plaintiff's land by means of a dam, the plaintiff is entitled to permanent damages, past, present, and prospective. Borden v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 424.

Damages to Health.—Damages may be given for injury to health as well as to land by overflowing. Gillet v. Jones, 18 N. C. 339. See also, Waddy v. Johnson, 27 N. C. 333.

Exemplary Damages.—In an action for overflowing plaintiff's land by the erection of a milldam, where a recovery has been had before, and the nuisance was not abated, plaintiff can recover sufficient exemplary damages to compel an abatement of the nuisance. Carruthers v. Tillman, 2 N. C. 501, cited in 59 L. R. A. 881.

Damage Only When Stream is Swollen.—Where the erection of a mill on a stream causes the water to overnow the land of a proprietor above only when the stream is swollen, that circumstance will not excuse such party from damages altogether, but will only diminish the quantum of such damages. Pugh v. Wheeler, 19 N. C. 50, cited in notes in 30 L. R. A. 667; 41 L. R. A. 749; 59 L. R. A. 819, 877.

Decrease of Custom.—Where, in suit for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream, the measure of damages was the value of the injury actually sustained by plaintiff up to the time of trial; and, in estimating the same, the decrease of custom (in the matter of toll) could not be considered. Burnett v. Nicholson, 86 N. C. 99, cited in note in 59 L. R. A. 896.

Counterclaim Inadmissible.—In an action for damages for ponding water back on plaintiffs' land, it was no error for the judge to charge that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby, and add that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage. McGee v. Fox, 107 N. C. 766, 12 S. E. 369.

Action May Be Brought at Any Time.—Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not before cover, gives him a good cause of action at any time when he may wish to use his land, unless he has granted the easement, either actually, or by presumption of law from the length of time he has permitted the easement to be enjoyed. Pugh v. Wheeler, 19 N. C. 50.

Easement Not Granted by Payment of Judgment.—The payment of a judgment for ponding water by a milldam does not amount to the purchase by defendant of an easement to pond back water on plaintiff's land. Candler v. Asheville Elect. Co., 135 N. C. 12, 47 S. E. 114.

§ 2556. When dams abated as nuisances. — When damages are recovered in final judgment in such civil actions, and execution issues and is returned unsatisfied, and the plaintiff is not able to collect the same either because of the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of

the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose. (Rev., s. 2142; Code, s. 1859; 1876-7, c. 197, s. 3.)

When Applicable.—This section, applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession. Kinsland v. Kinsland, 188 N. C. 810, 811, 125 S. E. 625.

Denial of Injunction.—An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded so as to become useless. Burnett v. Nicholson, 72 N. C. 334.

For such an injury damages will adequately compensate, and should the annual damage exceed twenty dollars the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance. Burnett v. Nicholson, 72 N. C. 334.

Where the owner of land adjoining an old mill site sought to enjoin the erection of a new mill, and it was ascertained by a verdict, that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased. Eason v. Perkins, 17 N. C. 38.

When Injunction Granted.—In the case of the erection of a milldam, a court of equity will not interfere by injunction, unless it be shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears, that so great a difference will exist between the injury to the individual and the public convenience as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief. Bradsher v. Lea, 38 N. C. 301.

Existence of Another Remedy.—On application for an injunction to restrain the defendant from building a new mill, on the ground that the construction of the dam would injure the land of the plaintiff and the health of his family, testimony being heard, the court held that it is not every slight or doubtful injury that will justify the use of the extraordinary power of injunction to restrain a man from using his property as his interests may demand, especially as, if the injury apprehended should result, the complainant may resort to law for damages. Wilder v. Strickland, 55 N. C. 386, cited in note in 59 L. R. A. 851.

When Demand and Allegation of Insolvency Unnecessary.—The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor required by this section, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary. Kinsland v. Kinsland, 188 N. C. 810, 125 S. E. 625.

Cited in Hester v. Broach, 84 N. C. 252.

§ 2557. Judgment for annual sum as damages.—A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars, nothing contained in this chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons. (Rev., ss. 2143, 2144; Code, ss. 1860, 1861; 1868-9, c. 158, ss. 12, 14.)

See annotations under sections 2555 and 2556.

Assessment Cannot Be Beyond Preceding Year.—In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the court only giving judgment for one year preceding the issuing of the summons. Goodson v. Mullen, 92 N. C. 207.

Judgment May Be for Sum in Gross.—Where, in an action for damages to land by ponding water on it, the jury found that the land was damaged eighty dollars per year, it was not erroneous for the court to give judgment for a sum in gross, and not for each year's damages. Goodson v. Mullen, 92 N. C. 207, 211.

Recurring Causes of Action.—Case for nuisance in erecting a mill will lie for every fresh continuance after action brought; heavy damages are not usual in the first verdict, but in a second action the damages should be high to compel an abatement of the nuisance. —— v. Deberry, 2 N. C. 248, cited in note in 59 L. R. A. 836.

Conclusiveness of Damages.—In a proceeding to recover damages for ponding water by a milldam, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. Beatty v. Conner, 34 N. C. 341.

Judgment Not Res Judicata.—Where an action to abate a dam and for damages to land caused by the ponding back of water was submitted to arbitrators to find whether plaintiffs were entitled to damages, and, if so, distinguishing in finding the same between those from permanent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plaintiffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years. Judgment was entered on the award, the judgment providing that the execution should be subject to the provisions of section 2556, the judgment was not res judicata of plaintiff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years. Candler v. Asheville Elect. Co., 135 N. C. 12, 47 S. E. 114.

§ 2558. Final judgment; costs and execution.—If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid. (Rev., s. 2145; Code, s. 1862; 1868-9, c. 158, s. 15.)

CHAPTER 53

MONOPOLIES AND TRUSTS

§ 2559. Combinations in restraint of trade illegal.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the state of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the

court not less than one thousand dollars. (1913, c. 41, s. 1.)

History of Chapter.—See Shute v. Shute, 176 N. C. 462, 465, 97 S. E. 392.

Agreement Not to Compete May Be Forbidden.—Persons and corporations cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete. State v. Craft, 168 N. C. 208, 213, 83 S. E. 772.

A general averment without allegation of specific facts is insufficient to constitute a cause of action, under this and following sections. State v. Standard Oil Co., 205 N. C. 123, 124, 170 S. E. 134.

§ 2560. Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of the preceding section of this chapter. (1913, c. 41, s. 2.)

Distinction between Common Law and Modern Rules.—Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 331, 97 S. E. 169. The distinction may now be made between "general restraint" and "partial restraint." Morehead Sea Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603. For illustrations of these kinds of restraint, see the notes to sec. 2563.

§ 2561. Burden of proof as to reasonableness on defendant.— All contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in the two preceding sections of this chapter are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of the preceding sections of this chapter that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce. (1913, c. 41. s. 3.)

§ 2562. Contracts to be in writing.—No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the state of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the state of North Carolina, or at any point in the state of North Carolina, which contract is now illegal or which contract is made illegal by any other section of this chapter. (1913, c. 41, s. 4.)

§ 2563. Particular acts defined.—In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

1. To agree or conspire with any other person, firm, corporation or association to put down or keep down the price of any article produced in this state by the labor of others, which article the person, firm, corporation or association intends, plans or desires to buy.

2. To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales.

3. To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.

4. Who directly or indirectly buys or sells within the state, through himself or itself, or through any agent of any kind or as agent or principal, or together with or through any allied, subsiduary or dependant person, firm, corporation or association, any article or thing of value which is sold or brought in the state to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low, or by raising the price of any article or thing of value brought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured.

5. Who deals in any thing of value within the state of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

6. Who is engaged in buying or selling any thing of value in North Carolina, to make or have any agreement or understanding, express or implied, with any other person, firm, corporation or association, not to buy or sell such things of value within certain territorial limits within the state, with intention of preventing competition in selling or to fix the price or prevent competition in buying of such things of value within these limits: Provided, nothing herein shall be construed to prevent an agent from representing more than one principal. But nothing in this proviso shall be construed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or lowering prices: Provided, further, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter

the business in competition with the purchaser in a limited territory, as is now allowed under the common law: Provided, such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter. (1913, c. 41, s. 5.)

For digest treatment of this subject, see 3 N. C. Enc. Dig. 423 et seq., 13 N. C. Enc. Dig. 447 et seq.

Restrictive Stipulations in Sale.—Transactions involving the sale and disposition of a business trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 97 S. E. 169.

Test as to Reasonableness.—A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by enhancing the value of the good-will and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller. Morehead Sea Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603.

Contract Not to Engage in Competing Business.—A provision of an agreement for the sale of a partner's interest that he would not again engage in the mercantile business in a certain town or near enough thereto to interfere with plaintiff's business was not in violation of this section. Wooten v. Harris, 153 N. C. 43, 68 S. E. 898.

An exchange of the defendant's fish business for stock in the plaintiff company, with an agreement not to engage in similar business for ten years within 100 miles is valid, and not in violation of this section. Morehead Sea Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603.

Reasonableness of Agreement to Raise Price Immaterial.—An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and evidence that dealers controlling a large part of the supply of milk in a town having by agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. State v. Craft, 168 N. C. 208, 83 S. E. 772.

Same—Intent Immaterial. — The intent of milk dealers combining to raise the price of milk is immaterial. State v. Craft, 168 N. C. 208, 83 S. E. 772.

Illegal Division of Territory.—Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, etc., the plaintiff sold the defendant a cotton ginning plant, the latter agreeing to remove the plant and not to again operate one there, the intent of the agreement was a division of territory, with the object to eliminate competition therein, and the agreement will not be enforced. Shute v. Shute, 176 N. C. 462, 97 S. E. 392.

Exclusive Sale for Specified Period.—A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of this chapter; and in vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect. Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 97 S. E. 169.

Contract to Sell at Label Price.—A contract of sale of merchandise for resale by the buyer, which stipulates that the buyer will not sell the merchandise except at label prices and will not sell or permit the sale of any other similar merchandise, is violative of this section. Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606.

A contract for sale of cafe and good will for a period of five years does not affect the interest of the public or fall within the terms of subsection 6 of this section. Hill v. Davenport, 195 N. C. 271, 141 S. E. 752.

Discrimination Not Allowed.—Where a public-service corporation has acquired the exclusive right to furnish hydro-electric power and light to municipalities, and to other public-service corporations, for distribution to consumers, including subsidiary companies that it controls, it may not discriminate among its patrons under the same or substantially similar conditions as to the rate charged, or select its customers. North Carolina Public Serv. Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

Attempt to Drive Competitor out of Business.—An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law. State v. Dalton, 168 N. C. 204, 83 S. E. 693.

Grant of Municipal Franchise.—A private sale of public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise does not create or tend towards a monopoly. Allen v. Reidsville, 178 N. C. 513, 101 S. E. 267.

Ordinance Restricting Sale of Commodity.—A municipal ordinance prohibiting the sale of milk within the city without a permit, is not invalid as tending to create a monopoly although the permit "may be suspended or revoked at any time for cause. State v. Kirkpatrick, 179 N. C. 747, 103 S. E. 65.

Contract in Violation of Section Unenforceable.—A contract made in violation of the terms of this section will not be enforced. Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606; Shute v. Shute, 176 N. C. 462, 465, 97 S. E. 392.

Threats to Retaliate unless Competition Withdrawn.—Threats by one ice company that it would sell ice in the town of a second ice company, if that company continued to supply ice to a rival of the first company are not prohibited by this section. Smith v. Morganton Ice Co., 159 N. C. 151, 74 S. E. 961.

The refusal by wholesalers of ice to sell a retailer on the same terms as those offered to other retailers in the city is not a violation of this section, it not appearing that the parties were business competitors. Rice v. Ashville Ice, etc., Co., 204 N. C. 768.

Cited in Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11.

§ 2564. Violation a misdemeanor; punishment.—Any corporation, either as agent or principal, violating any of the provisions of preceding section shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 41, s. 5.)

§ 2565. Persons encourging violation guilty.—Any person, being either within or without the state, who encourages or wilfully allows or permits any agent or associates in business in this state to violate any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in the preceding section. (1913, c. 41, s. 6.)

§ 2566. Continuous violations separate offenses.—Where the things prohibited in this chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense. (1913, c. 41, s. 7.)

§ 2567. Duty of attorney-general to investigate.—The attorney-general of the state of North Carolina shall have power, and it shall be his duty, to

investigate, from time to time, the affairs of all corporations doing business in this state, which are or may be embraced within the meaning of the statutes of this state defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations in North Carolina doing business in violation of law; and all other corporations of every character engaged in this state in the business of transporting property or passengers, or transmitting messages and all other public-service corporations of any kind or nature whatever which are doing business in the state for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the North Carolina corporation commission is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, s. 8.)

§ 2568. Power to compel examination.—In performing the duty required in the preceding section, the attorney-general shall have power, at any and all times, to require the officers, agents or employees of any such corporation, and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; and the attorney-general is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any judge of the supreme or superior court, after five days notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, s. 9.)

§ 2569. Person examined exempt from prosecution.—No person examined, as provided in the preceding section shall be subject to indictment, prosecution, punishment or penalty by reason or on account of anything disclosed by him upon such examination, and full immunity from prosecution and punishment by reason or on account of anything so disclosed is hereby extended to all persons so examined. (1913, c. 41, s. 9.)

§ 2570. Refusal to furnish information; false swearing.—Any corporation unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: Provided, that if any corporation shall in writing notify the attorney-general that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to a judge of the supreme or superior court, who shall fix an appropriate time and place for such examination or inspection, and such corporation shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provision of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury. (1913, c. 41, s. 10.)

§ 2571. Criminal prosecution; solicitors to assist; expenses.—The attorney-general in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the solicitors in the state, who shall, upon being required to do so by the attorney-general, send bills of indictment and assist him in the performance of the duties of his office: Provided, that the state shall pay the actual and necessary expenses of the solicitor incurred while performing such duties and not over one hundred dollars as an extra fee when the expense account is approved by the attorney-general and governor and duly audited, and the amount of the fee is fixed by them.

The necessary expenses incident to carrying out the provisions of this chapter shall, when approved by the governor and audited, be paid out of any money in the state treasury not otherwise appropriated. (1913, c. 41, s. 13.)

§ 2572. Remedy by civil action.—If it shall become necessary to do so, the attorney-general may prosecute civil actions in the name of the state on relation of the attorney-general to obtain a mandatory order to carry out the provisions of this chapter, and the venue shall be in any county as selected by the attorney-general. (1913, c. 41, s. 11.)

§ 2573. In what name civil action prosecuted.—It shall be the duty of the attorney-general, upon his ascertaining that the laws have been violated by any trust or public-service-corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the state, or any officer or department thereof, as provided by law, or in the name of the state on relation of the attorney-general, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, s. 12.)

§ 2574. Civil action by person injured; treble damages.—If the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff

and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14.)

Causal Relation Between Violation and Injury Must Be Shown.—Section 2563 condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of this section, he must show a violation of the statute and a causal relation between the violation and injury to his business. Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11.

CHAPTER 54

MORTGAGES AND DEEDS OF TRUST

Art. 1. Chattel Mortgages: Form and Sufficiency

§ 2575. Form of chattel mortgage.—Any person indebted to another in a sum to be secured may execute a chattel mortgage in form substantially as follows:

I, ..., of the county of ..... in the state of North Carolina, am indebted to ....., of ..... county, in said state, in the sum of ..... dollars, for which he holds my note to be due the .... of ....., A. D. 19...., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to wit: ..... but on this special trust, that if I fail to pay said debt and interest on or before the .... day of ....., A. D. 19...., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal this .... day of ....., A. D. 19.....

..... (Seal).

(Rev., s. 1039; Code, s. 1273; 1870-1, c. 277; 1911, c. 69, s. 1.)

Cross References.—For the entire law of mortgages in general, see 9 N. C. Enc. Dig. 236 et seq.; 15 N. C. Enc. Dig. 1 et seq.; For the law of chattel mortgages, see 3 N. C. Enc. Dig. 18 et seq.; 13 N. C. Enc. Dig. 371 et seq. For cases in which some transactions were and others were not held to be mortgages, see 3 N. C. Enc. Dig. 24, et seq.; 15 N. C. Enc. Dig. 5.

Essential Elements.—No particular form is essential to the validity of a chattel mortgage; mere informality will not vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed. A power of sale is not essential. Comron v. Standland, 103 N. C. 207, 9 S. E. 317.

While no particular form is necessary to constitute a mortgage, yet the words must "clearly indicate the creation of a lien, specify the debts to secure which it is given, and upon the satisfaction of which the lien is to be discharged and the property upon which it is to take effect." The statement that the creditor is to have a lien, and that on default he may take possession and sell, * * * sufficiently discloses the intent. Harris v. Jones, 83 N. C. 318; Britt v. Harrell, 105 N. C. 10, 12, 10 S. E. 902.

If a security for money is intended, that security is a mortgage; though not having on its face the form of a mortgage. McCoy v. Lassiter, 95 N. C. 88, 92.

§ 2576. Registration.—Chattel mortgages substantially in the form provided in the last section are good to all intents and purposes when the same are duly registered according to law. (Rev., s. 1040; Code, ss. 1273, 1274; 1870-1, c. 277, ss. 1, 2.)

Cross References.—As to place of registration, see sec. 3211; for further provisions as to registration of mortgages, see Probate and Registration, sec. 3311; for fees of probate and registration, see sec. 2490.

As to offense of disposing mortgaged or otherwise incumbered property, and the punishment therefor, see section 4287.

In General.—The lien of the chattel mortgage is created by registering the original instrument, and such registration is notice to the world of the existence of the lien. It is not material to the public whether the debt and property were transferred by the mortgagee. The purpose of the Legislature in passing the statute in reference to registration was to prevent the creation of secret liens which embarrass trade and tend to encourage fraud. Hodges v. Wilkinson, 111 N. C. 56, 65, 15 S. E. 941.

Necessity of Registration Between the Parties.—Registration is not essential between the parties to the mortgage. Thomas v. Cooksey, 130 N. C. 148, 151, 41 S. E. 2; William v. Jones, 95 N. C. 504.

Registration Prior Attachment Gives Priority.—The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. Williamson v. Bitting, 159 N. C. 321, 74 S. E. 808.

No Special Statutory Mode of Registration.—There is no special statutory mode presented for the registration of a chattel mortgage. The provisions of section 3311 relates merely to inexpensive form of mortgage. Williamson v. Bitting, 159 N. C. 321, 322, 74 S. E. 808.

Assignment of Mortgage Not Required to Be Registered.—There is no provision which requires assignments of chattel mortgages or the debts secured by them to be proven or registered; nor is there any good reason for enacting such a law, though it has been done in other states. The mortgage is declared "good to all intents and purposes" when registered according to law. No matter how often they be assigned, they are still good to protect the interest of the holder of the debt. Hodges v. Atkinson, 111 N. C. 56, 65, 15 S. E. 941.

Delivery to Register in His Office Necessary.—It is required for a valid filing of a mortgage that it be delivered at the office of the register of deeds, and until then it can acquire no priority over one theretofore executed; and where two mortgages given to different persons on the same subject-matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are regarded as being simultaneous, and the mortgage first executed will have priority of lien. McHan v. Dorsey, 173 N. C. 694, 92 S. E. 598.

Registry after Death of Mortgagor.—A mortgage both of land and personal property may be registered after the death of the mortgagor. William v. Jones, 95 N. C. 504.

Registry after Bankruptcy—Priority over Assignee. — The registration of a mortgage after a commission in bankruptcy is good against the assignee. William v. Jones, 95 N. C. 504.

§ 2577. Mortgage of household and kitchen furniture.—All conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other things of value, are void, unless the wife joins therein and her privy examination is taken in the manner prescribed by law in conveyances of real estate, except when said mortgage or conveyance is executed for the purchase money thereof. (Rev., s. 1041; 1891, c. 91; 1931, c. 211.)

Editor's Note.—The Act of 1931 added the exception as to purchase money mortgage. The amendment does not contravene the policy of the law designed for the protection of the home. Kelly v. Fleming, 113 N. C. 133, 18 S. E. 81; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028. It is also consistent with the law which permits the husband to execute a purchase money mortgage or deed of trust on his real estate that will be valid as against his wife without her joinder in the instrument. See § 1003. 9 N. C. Law Rev. 392.

Provisions within Police Power of State.—The provisions of the sections are in exercise of the police power of a State and promotive of its economic welfare and public convenience and comfort, and designed for the protection of the home, and is a constitutional and valid enactment. Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028.

Doctrine of Section Public Policy.—The requirements that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty, are all of a piece as a declaration of public policy. Thomas v. Sanderlin, 173 N. C. 329, 336, 91 S. E. 1028.

Section Applies to Liens Conferred by Writing—Property of Wife and Husband.—This section could not apply to those methods of conveyance of personal property by sale and delivery where no writing was used, for then the privy examination of the wife would have been impracticable. Nor to the sale by the husband of the personal property of which he was the sole owner, because, in this instance it was not necessary that the wife should join. But it was intended to prevent the conveyance by chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without a writing signed by husband and wife, and the privy examination of the wife, as in sale of real estate; and this may be applicable to such property whether it belong to the husband or to the wife. Kelly v. Fleming, 113 N. C. 133, 139, 18 S. E. 81.

The word "convey," in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities. Rapalje & Lawrence Law Dict., "Convey, Conveyance." According to Webster a conveyance is "an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another." The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. Smithdeal v. Wilkerson, 100 N. C. 52, 6 S. E. 71; Kelly v. Fleming, 113 N. C. 133, 138, 18 S. E. 81.

Applies Only to Conveyances of Furniture by Husband—Privy Examination.—This section applies only to conveyances by the husband of the household and kitchen furniture, and the requirement of the privy examination of the wife in giving her assent thereto is within the power of the General Assembly and is in line with the same requirement in the Constitution, as to the joinder of the wife in the conveyance of the allotted homestead—the only instance in which the Constitution recognizes such a requirement. Thomas v. Sanderlin, 173 N. C. 329, 337, 91 S. E. 1028.

Mischief Sought to Be Overcome.—The evident mischief sought to be overcome by this section is the facility with which these necessary articles for the comfort and convenience of every household, however humble—the household and kitchen furniture—may be conveyed away, notwithstanding the protection which the law throws around them by the personal property exemption, at least, during the life of the husband, by the chattel mortgage, or other lien, now almost the only basis of credit for the poor man. Kelly v. Fleming, 113 N. C. 133, 139, 18 S. E. 81.

Liberal Construction—Goods for Sale in Shop Not Covered.—The words "household and kitchen furniture" may comprise not only that species of property which is in actual use, but also that which is on sale in shops, yet no one will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class. Kelly v. Fleming, 113 N. C. 133, 138, 18 S. E. 81.

Distinguished from § 4103—Constitutionality.—A distinction between this section and § 4103 should be noted. In this section the conveyance without the joinder of the wife is declared to be void; while in the latter statute, such conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. If the former statute is constitutional, as held by this Court, it seems that there can be no question as to the constitutionality of § 4103. Boyd v. Brooks, 197 N. C. 644, 652, 150 S. E. 178.

Husband's Own Property before Passage of Section.—Whether the provisions of the act could be made to apply in case of a chattel mortgage, etc., by a husband, of his own household and kitchen furniture, at any rate, of such as was owned by him before the passage of the act, a quaere. Kelly v. Fleming, 113 N. C. 133, 18 S. E. 81.

Phrase "Household Furniture" Covers a Piano.—A piano owned by the husband and placed in his home for the use of his wife and daughters, and so used by them, is included under the statutory terms "Household and kitchen furniture" as used in this section, and a chattel mortgage thereof by the husband is invalid unless the wife signs as directed by the statute. Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028.

Application to Joint Note of H. and W. to Bind Separate Estate.—This section requiring a private examination of a married woman to a chattel mortgage on household and kitchen furniture, does not apply to a note signed by husband and wife binding her separate personal estate. Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644.

Art. 2. Right to Foreclose or Sell under Power

§ 2578. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.—When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator or collector of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this state as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto. (Rev., s. 1031; 1901, c. 186; 1887, c. 147; 1895, c. 431; 1905, c. 425; 1933, c. 199.)

Editor's Note.—Public Laws of 1933, c. 199, inserted the words "or collector" following the words "executor or administrator."

Power of Sale Vests in Executor of Mortgagee.—When a power of sale in a mortgage is given to the mortgagee, "his executors," etc., upon default, and the mortgagee dies leaving a will under which his executors qualify, the power of sale vests in the executors by virtue of this section and the contract in the mortgage. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548.

Same—Even in the Absence of Stipulation to That Effect.—The executor of a mortgagee may exercise the power of sale contained in the mortgage, when the deed in terms confers such power upon the mortgagee and his executors. This section was intended to confer the power of sale upon executors and administrators when such power is not given in the deed. Yount v. Morrison, 109 N. C. 520, 13 S. E. 892.

Cited in Allred v. Trexler Lumber Co., 194 N. C. 547, 548, 140 S. E. 157.

§ 2579. Foreclosures by representatives validated. — In all actions which were brought or prosecuted prior to the fourth day of March, one thousand nine hundred and five, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgage were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (Rev., s. 1032; 1905, c. 425, s. 2.)

§ 2580. Renunciation by representative; clerk appoints trustee.—The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at

the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall enter the name of the substituted trustee or mortgagee on the margin of the deed in trust or the mortgage in the book of the office of the register of deeds of said county. (Rev., s. 1038; 1905, c. 128.)

See section 2583 and annotations thereunder.

§ 2581. Agent to sell under power may be appointed by parol.—All sales of property, real or personal, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, by such mortgagee or trustee, appointed orally or in writing, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (Rev., s. 1035; 1895, c. 117.)

Recitals in Deed Prima Facie Correct.—Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct. Hayes v. Ferguson, 206 N. C. 414, 174 S. E. 121.

§ 2582. Survivorship among donees of power of sale.—In all mortgages and deeds of trust wherein two or more persons, as trustees, or other wise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (Rev., s. 1033; 1885, c. 327, s. 2.)

See 13 N. C. Law Rev., 93.

Execution of Power by Survivor Trustee in Mortgage.—Where one or two trustees in a power of sale mortgage dies, the survivor may execute the trust, this being a trust coupled with an interest. Cawfiel v. Owens, 129 N. C. 286, 40 S. E. 62.

§ 2583. Clerk appoints successor to incompetent trustee.—When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and/or recorded and from the state, or in any way becomes incompetent to execute the said trust, or is a nonresident of this state, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months and cannot, after diligent inquiry be ascertained, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed and/or recorded is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings. (Rev., s. 1037; Code, s. 1276; 1869-70, c. 183; 1873-4, c. 126; 1901, c. 576; 1933, c. 493.)

Editor's Note. — Public Laws 1933, c. 493, inserted the words "and/or recorded" following the word "executed." It also inserted the clause relating to instances where the trustee has disappeared.

Section Becomes Part of Contract.—Where a deed of trust is executed after the effective date of this section the provisions of the section enter into and become a part of the contract, and a later statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the cestui que trust, are not injuriously affected, does not violate the constitutional provisions. Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14.

Appointment of New Trustee upon the Death of the Old.—Upon the death of a trustee, the clerk of the superior court may appoint another under this section who may proceed to execute the trust according to the terms of the deed. Wright v. Fort, 126 N. C. 615, 36 S. E. 113.

Appointment of Trustee upon the Death of the Last Survivor.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors will be appointed under this section, by the clerk of the court. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Appointment upon Appeal.—Where clerk of superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. Roseman v. Roseman, 127 N. C. 494, 37 S. E. 518.

Petition for Appointment of New Trustee—Title of New Trustee.—Under this section, when a trustee dies, all of the parties in interest may join in a petition to the superior court to have a new trustee appointed, and upon the passing of the decree the substituted trustee holds the legal title upon the same trusts as the original trustee, so far as it is competent for the court to confer them. McAfee v. Green, 143 N. C. 411, 55 S. E. 828.

Necessity of Bond for Substituted Trustee.—It is not necessary in substituting one trustee for another in pursuance of this section, to require a bond of the substituted trustee. Strayhorn v. Green, 92 N. C. 119.

Personal Powers of Old Trustee Cannot Be Transferred upon the New.—Where the powers to be exercised by the original trustee are of a personal nature depending upon his discretion, such powers cannot be conferred upon the appointed trustee. See Young v. Young, 97 N. C. 132, 2 S. E. 78.

Administrator C. T. A. Taking Place of Executor Trustee.—Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator cum testamento annexo appointed in his stead succeeds to the trusteeship, and hence an appointment by the clerk of the court, under this section, of a trustee in place of the executor is void and clothes the appointee with no power. State v. Peebles, 120 N. C. 31, 26 S. E. 924.

All Persons Interested Must Be Made Parties.—The appointment of a trustee in cases where the former trustee has died, removed from the county, or become incompetent cannot be done on an ex parte motion or petition. The application for such appointment is in the nature of a

civil action, and all persons interested must be made parties, and have full time and opportunity to set up their respective claims. Guion v. Melvin, 69 N. C. 242.

Section Not Applicable.—Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method expressed for this purpose is contractual and does not arise under this section requiring certain proceedings to be taken in the courts; and a deed made by a substituted trustee in accordance with the agreement passes the title to the purchaser at the foreclosure sale. Raleigh Real Estate, etc., Co. v. Padgett, 194 N. C. 727, 140 S. E. 714.

§ 2583(a). Substitution of trustees in mortgages and deeds of trust. — In addition to the rights and remedies now provided by law, the holder and/or owners of all or a majority, in amount, of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real or personal property, or creating a lien thereon, may exercise the following powers:

(1) To substitute a trustee by the execution of a paper writing whenever it shall appear that the trustee then named in such mortgage, deed of trust, or other instrument, securing the payment of money, whether such then named trustee shall be the original trustee named therein or a substituted trustee, has removed from the State, become incompetent to act mentally or physically, or has been committed to any institution, private or public, on account of inebriacy, or conviction of a criminal offense, or has refused to accept such appointment as trustee or refuses to act or has been declared a bankrupt, or against whom a petition in involuntary bankruptcy has been filed, or against whom a suit has been instituted in any court of this State in which relief is asked against him on account of insolvency, or a cause of action has been asserted against him on account of fraud against his creditors, or has died, and if such named [trustee] in such mortgage, deed of trust or other instrument as aforesaid, is a corporation and such corporation has ceased to do business, or has ceased to exercise trust powers, or has excluded from its regular business the performance of such trusts, or has been declared a bankrupt, or has been placed in the hands of a receiver, or insolvency proceedings have been instituted in any court of this State or in any court of the United States against it, or any action has been instituted in either of said courts against it in which relief is asked on the ground of insolvency or fraud against its creditors, or when any officer or commission of this State, or any employee of such commission or officer, has taken charge of its affairs for the purpose of liquidation pursuant to any statute, or when it is a foreign corporation, or the trustee is not a resident of this State or cannot be found in this State, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months or more. (1931, c. 78, s. 1; 1935, c. 227.)

Editor's Note.—The title of the act from which this section is taken purports to amend § 2583. The body is, however, an independent statute, in effect, supplementary to such section. No similar statute has been found, but in the belief that decisions under substitution powers conferred in deeds of trust will be helpful by way of analogy, collections of these are referred to. 4 Cook, Corporations 3672-3673; Wiltsie, Mortgage Foreclosure (4th ed.) § 831; Ettlinger v. Persian Rug Co., 142 N. Y. 189, 36 N. E. 1055 (1894) (trustee beyond jurisdiction and insane, bondholders allowed to foreclose without service on trustee or appointment of a new trustee). 9 N. C. Law Rev. 403.

The provision at the end of the section reading "or when it is a foreign corporation, or the trustee is not a resident," etc., was added by the 1935 amendment.

§ 2583(b). Powers in preceding section cumulative and optional. — The powers recited in the sub-section of the foregoing section shall be construed and held to be cumulative and optional. (1931, c. 78, s. 2.)

§ 2583(c). Certificate by Clerk of Superior Court.—Whenever the powers set out in sub-section one of section 2583(a) shall be exercised the Clerk of the Superior Court shall certify that the instrument has been executed by the owner or owners of a majority in amount of the indebtedness, notes, bonds or other instruments secured therein, have executed the same, and that it has been made to appear to him that the cause of substitution as set forth therein is true and that the substituted trustee is a fit and proper person or corporation to perform the duties of said trust, and unless such certificate is attached to said instrument before registration and registered therewith the same shall be invalid and of no effect. (1931, c. 78, s. 3.)

§ 2583(d). Right of appeal by any person interested; judge to review findings of Clerk de novo. — Whenever the power contained in subsection one of section 2583(a) is exercised in respect to any deed of trust, mortgage or other instrument creating the lien which was executed prior to the ratification of this act, then, at any time within twelve months from its registration but within thirty days from actual knowledge of the same, any person interested therein may appeal from the findings of the Clerk of the Superior Court pursuant to section 2583(c), and such appeal shall be duly constituted when a written notice signed by, or on behalf of such person, shall have been served in any of the methods of service of summons provided by law on all other parties interested therein, including the said substituted trustee, in which notice it shall be stated that a motion will be made before the Judge of the Superior Court of the county of the clerk who made such certificate at the next regular term of such Superior Court beginning more than ten days after the service of said notice on all interested parties, and the docketing of such notices on the civil issue docket of said county. On the hearing of said motion it shall be open to all parties to contest and defend the findings of said clerk, and the judge shall review said findings de novo and make such findings in respect thereof as shall appear to him from the evidence to be true, and if the said substituted trustee shall be removed at said hearing another trustee shall be substituted in his stead by the court upon a finding that he or it is a proper person or corporation to perform the functions of said trusteeship, but only one such appeal shall be allowed as to each appointment. (1931, c. 78, s. 4.)

§ 2583(e). Acts of trustee prior to removal not invalidated. — If any such trustee who has been substituted as provided in sub-section one of section 2583(a) shall have performed any functions

as such trustee and shall thereafter be removed as herein provided, such removal shall not invalidate or affect the validity of such acts in so far as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such hearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5.)

§ 2583(f). Registration of substitution constructive notice.—The registration of such paper writing designating a new trustee under sub-section one of section 2583(a) shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6.)

§ 2583(g). Register of Deeds to make marginal entry of substituted trustee.—Whenever any substituted trustee shall be appointed as herein provided and such designation of such substituted trustee shall have been registered, together with the certificates herein required, then it shall be the duty of the Register of Deeds to make an appropriate notation on the margin of the registration of the said mortgage, deed of trust, or other instrument securing the payment of money, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as herein provided for, and it shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in section "2583(a)" sub-section one, and in said instrument reciting and naming the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration; and this may be done as many times as a trustee may be substituted as herein provided for, and in which cases the Register of Deeds shall make, as to each recited instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7.)

§ 2583(h). Substitution made as often as justifiable. — The powers set out in section 2583(a) may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as herein set out shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8.)

§ 2584. Mortgage to guardian; powers pass to succeeding guardian.—When a guardian to whom a mortgage has been extended dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian. (Rev., s. 1034; 1905, c. 433.)

§ 2584(a). Sales by mortgagees and trustees confirmed.—All sales of real property made prior to February tenth, nineteen hundred and five, by mortgagees and trustees under powers of sale contained in any mortgage or deed of trust in compliance with the powers, terms, conditions and advertisement set forth and required in any such mortgage or deed of trust, are hereby in all respects ratified and confirmed: Provided, this section shall not apply to litigation pending August 25, 1920. (Ex. Sess. 1920, c. 27.)

Art. 3. Mortgage Sales

§ 2585. Personal property; notice and place of sale.—All personal property sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract. (Rev., s. 1042; 1889, c. 70; 1909, c. 49, s. 1.)

Cross References.—For advertisement of execution sales of personalty, see Civil Procedure, Art. 28.

Strict Compliance with Statute.—In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument, not inconsistent with the statute in respect to notice and other terms on which the power may be exercised, shall be strictly complied with; and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Same—Notice of Postponement.—But this applies when a postponement is had by reason of the sale being enjoined or for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient. Feebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Place of Sale Not Affected by This Section.—The place of sale designated in the mortgage controls at what place the sale is to be affected. This rule is not affected by this section which merely provides for the place of notice, and makes no mention of the place of sale. Palmer v. Latham, 173 N. C. 60, 61, 91 S. E. 525.

Section 687 Does Not Affect Mortgages under This Section.—Section 687 requiring notice under mortgage, etc., for thirty days is, by express terms, prospective in effect and is amended by the Laws of 1909, ch. 705, prescribing publication in a newspaper "once a week for four weeks"; therefore it does not affect mortgages made prior thereto, coming under the provisions of this section requiring that whether advertised in a newspaper or otherwise, the sale "shall be advertised by posting a notice at some conspicuous place at the courthouse door," etc., for twenty days, etc. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166.

Presumption of Regularity.—While powers of sale under mortgage are closely scrutinized by the courts and held to the letter of the contract, the law presumes the regularity of the sale in the execution of such powers and places the burden of proof on the party claiming a failure of proper notice or advertisement to show it. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166; Cowfield v. Owens, 129 N. C. 286, 288, 40 S. E. 62.

§ 2586. Charges for legal advertising. — The publication of all advertising required by law to be made in newspapers in this state shall be paid for at not to exceed the local commercial rate of the newspaper selected. Any public or municipal officer or board created by or existing under the laws of this state that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates. Nothing herein shall apply to contracts or agreements for legal advertising in this state existing at the time this section takes effect.

No newspaper in this state shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commerical rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2.)

§ 2587. Foreclosure of conditional sales.—In all sales of personal property wherein the title is retained by the seller to secure the purchase money, or any part thereof, and no power of sale is conferred, and default is made in the payment of said obligation by the purchaser, then in all such cases it is lawful for the owner of such debt thereby secured, without an order of court, to sell such property, or so much thereof as may be necessary to pay off said indebtedness, at public auction for cash, after first giving twenty days notice at three or more public places in the county wherein the sale is to be made, and apply the proceeds of such sale to the discharge of said debt, interest on the same, and costs of foreclosure, and pay any surplus to the person legally entitled thereto. Before making any such sale, in addition to the advertisement above required, the owner of said debt shall, at least ten days before the day of sale, mail a copy of the notice of sale to the last known postoffice address of the original purchaser or his assigns. (1913, c. 60, s. 1.)

For other provisions on conditional sales, see section 3312.

A contract for the sale of personal property, retaining title in the vendor until the purchase price has been paid, without express power of sale therein, comes under the provisions of this section, as if written in the contract, and gives to the vendor the right to sell the property in default of payment of the purchase price, or part thereof, without the consent of court, upon certain advertisement specified in the statute; and it is reversible error for the court to charge the jury that the vendor could not sell the property without the consent of the purchaser. House v. Parker, 181 N. C. 40, 106 S. E. 137.

§ 2588. Real property; notice of sale must describe premises.—In sales of real estate under deeds of trust or mortgages it is the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law substantially as the same is described in the deed of authority under which said trustee or mortgagee makes such sale. (Rev., s. 1043; 1895, c. 294.)

The purpose and intent of this section was to give complete and full notice to the public of the land to be sold, so that the public generally would know and understand from the advertisement the exact property offered for sale. Douglas v. Rhodes, 188 N. C. 580, 583, 125 S. E. 261.

The Word "Substantially."—In Douglas v. Rhodes, 188 N. C. 580, 583, 125 S. E. 261, the court said: "If the Legislature had intended that the real estate (set forth by metes and bounds in the deed of trust in the present case) in a deed of trust or mortgage should be described by metes and bounds when advertised for sale under the terms of the deed of trust or mortgage, it could have easily said so in the statute, but on the contrary it used the word 'substantially.' The word 'substantially,' Webster defines to mean: 'In a substantial manner, in substance, essentially.' It does not mean an accurate or exact copy."

Same—Sufficient Description. — Advertisements for the sale of land under foreclosure of mortgage or deed of trust are required by this section to describe the lands "substantially" as in the conveyance thereof; and while it may be more advisable to give the exact description, the deed made in pursuance thereof is not necessarily void for lack of such description, as where the land is designated as a well-known and certain tract, or place of business, or manufacturing plant, with reference to the book in the office of the register of deeds where the description is given, with number of page, etc., for a more particular description, it is a sufficient description of the land and will convey the title if the notice of such has been published in accordance with the terms of a mortgage or deed in trust. Douglas v. Rhodes, 188 N. C. 580, 125 S. E. 261.

Applicable to Deed of Trust or Mortgage.—Under a fair construction of this section, it is applicable to a sale under the power in a deed of trust or mortgage. The notice required by law under the statute would be the notice in the deed of trust or mortgage. Douglas v. Rhodes, 188 N. C. 580, 582, 125 S. E. 261.

§ 2589. Real property; power of sale barred when foreclosure barred.—The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations. (Rev., s. 1044.)

As to statute of limitation on foreclosure, see section 437(3).

Applicable to Contracts in Existence at Enactment.—This section is applicable to those contracts which existed at the time of its becoming operative; but, as to those, it only affected an existing remedy, which does not impair the obligations of the contract, when a reasonable time has elapsed thereafter within which the action could have been instituted. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

Subject to Ten-Year Limitation.—While formerly there was no bar to the execution of a power of sale contained in a mortgage of lands, mortgages then executed are made subject to the ten-year statute, by this section. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166.

The power of sale may be exercised at any time within ten years after maturity of any note secured. E. H. & J. A. Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487.

Where notes secured by a mortgage are barred by the statute of limitations, and the power of sale contained in the instrument is barred by the lapse of over ten years from the date of the last payment on the notes, the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure on the principle that he who seeks equity must do equity, is unavailing. Serls v. Gibbs, 205 N. C. 246, 171 S. E. 56.

Where notes are given in series, secured by a mortgage on lands providing that upon the nonpayment at maturity of each as they became due all of them were to become due and payable, it is at the option of the mortgagee to enforce the sale upon the happening of the event specified, and when the mortgagee has not exercised his option, the statute of limitations would apply as from the due date of each note in the series, as if the provision for the acceleration of the payment had not been incorporated in the mortgage. And where more than ten years had elapsed since the maturity of some of the notes recovery therein was barred under this section and § 437, subsection, 3. E. H. & J. A. Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487.

When it does not appear that the mortgagee in a mortgage on lands securing the payment of notes in series has exercised his option to foreclose under a provision making all the notes payable upon the failure of the maker to pay any of them at maturity, the presumption is that he has waived his right to do so, but will not be held, on that account, to bar his right to foreclose under the power of sale therein contained. E. H. & J. A. Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487.

Running of Statute on Installment Debts.—Where a debt is made payable in two installments, maturing at different times, the creditor may elect to wait to sue till the second installment is due, and the statute of limitations will not begin to run until that time. Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678.

Limitation When Power of Sale for Default of Interest Optional.—The statute of limitations does not begin to run upon default in payment of annual interest upon the principal, when the power of sale contained in the mortgage is optional with the mortgagee upon default of either interest or principal of the debt. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548.

Statute Does Not Commence Running until Debt Due.—The statute of limitations does not begin to run against the principal of a mortgage of lands until it is due, and the

power of sale contained in the mortgage may be exercised within ten years after the maturity of the principal. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548.

Doctrine of Cone v. Hyatt, Changed by Section. — The holding in Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678, that the power of sale in a deed of trust or mortgage is not barred by the statute of limitation, though an action for foreclosure thereon is barred, is changed by this secton. See also Lester Piano Co. v. Loven, 207 N. C. 96, 101, 176 S. E. 290.

Applied in In re Gibbs, 205 N. C. 312, 171 S. E. 55.

§ 2590. Land lying in two or more counties; place of sale.—When a mortgage or deed in trust conveying lands lying partly in two or more counties confers upon the mortgagee or mortgagees, trustee or trustees, therein named, any power for the sale of such lands, without naming the place of sale, or conferring upon such mortgagees, trustee or trustees, the right to select the same, in the exercise of such power, any sale thereunder may be made at the courthouse door of any one of the counties in which such lands are situate, and at no other place except as hereinafter provided; but when such lands consist of two or more detached parcels, lying wholly within the limits of different counties, the sale of each and every one of such parcels shall be made at the courthouse door of the county in which the same is situate. (1911, c. 165, s. 1.)

§ 2591. Reopening judicial sales, etc., on advanced bid.—In the foreclosure of mortgages or deeds of trust on real estate, or by order of court in foreclosure proceedings either in the superior court or in actions at law, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, or sale under execution duly issued the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the superior court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. It shall only be required to give fifteen days' notice of a resale. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nineteen hundred and fifteen. (1915, c. 146; 1917, c. 127, ss. 3, 4; 1919, c. 124; 1929, c. 16; 1931, c. 69; 1933, c. 482.)

See 13 N. C. Law Rev., 15, 300.

Editor's Note.—The meaning of the 1931 amendment is not entirely clear. The act of 1929 inserted the words "or by order of court in foreclosure proceedings in the Superior Court." The 1931 amendment repeals the former and inserts the words "or by order of court in foreclosure proceedings either in the Superior Court or in actions at law." While a proceeding for foreclosure must be in the Superior Court and is an equitable remedy under the former practice, the distinction between actions at law and suits in equity is abolished, and the remedy is by a civil action. The provision for resale upon an advanced bid has been held not to apply to a sale of land under execution (Weir v. Weir, 196 N. C. 268, 145 S. E. 281), and to make the provision apply to such sales, or to other than foreclosure sales under order of court, would seem to be adding something to the meaning of the words employed. 9 N. C. Law Rev. 383.

Public Laws of 1933, c. 482, inserted, near the end of the first sentence, the words "or sale under execution duly issued."

Liberal Construction—Time of Making Deposit on Advanced Bid.—While the clerk of the Superior Court is without authority to order a resale of lands foreclosed under mortgage without an increase bid filed with him under the provisions of this section, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor, and when within the statutory time limit the offerer has communicated with the clerk of the court by phone and offered to come from an adjacent town and make a sufficient deposit, and is informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check is accordingly mailed, a substantial compliance with the statute has been made, though the check was received by the clerk after the expiration of the time limit of the statute. Clayton Banking Co. v. Green, 197 N. C. 534, 149 S. E. 689.

Deposit to Secure Bid within Court's Discretion.—In a suit to foreclose a mortgage an order of the trial court that the bidder at the sale or resales be required to secure his bid before acceptance of the same, is within the sound discretion of the trial court, and is not affected by this section. Koonce v. Fort, 205 N. C. 413, 171 S. E. 367.

Purpose of Deposit on Advanced Bid.—The deposit required by this section is to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the Superior Court has required of a person placing an advance bid a deposit representing a five per cent increase bid, and in addition a deposit to guarantee compliance with the bid, under the statute, and the lands are resold and bought in by the one making the advance bid, and he refuses to pay the amount because of threatened litigation, and the lands are again resold and bring a surplus over that of the prior resale, there has been no loss occasioned by the first resale, and the person making the deposit therefor is entitled to receive it back as against the claim therefor of one holding a note secured by a junior mortgage on the same property. Harris v. American Bank & Trust Co., 198 N. C. 605, 152 S. E. 802.

Estoppel to Set up Irregularities in Foreclosure Proceedings.—Where the trustee in a deed of trust proceeds to advertise and foreclose the land under the terms of the instrument, and upon request of the trustor, continues the sale from day to day for about a month in order to give the trustor time in which to raise the money to pay off the lien, and the trustor is present at the time of the first continuance of the sale and at the time of the actual sale, and made no objection thereto, and failed to raise the bid within ten days, and thereafter the purchaser at the sale transfers to a bona fide purchaser without notice, the trustor is estopped as against the bona fide purchaser without notice to set up his claim to the land on the grounds of alleged irregularity in the foreclosure proceedings. Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721.

Confirmation of Sale Not Subject to Collateral Attack.—In an action to recover the balance due on mortgage notes after foreclosure, confirmation of the sale by the clerk, under this section, and application of the proceeds to the notes, cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure. First Carolina's Joint-Stock Land Bank v. Stewart, 208 N. C. 139, 179 S. E. 463.

Execution Sales.—This section is not applicable to execution sales. Weir v. Weir, 196 N. C. 268, 269, 145 S. E. 281.

Authority of Clerk—Exception to Distribution or Proceeds.—The only authority conferred by this section on the

clerk is to order a resale of the property where the bid has been raised as therein prescribed, and where there are a first and second mortgage upon such lands, foreclosed under the second, an exception to the distribution of the proceeds is untenable, the remedy, if any, being by independent action. In re Bauguess, 196 N. C. 278, 145 S. E. 395.

Same—Amount of Commission Allowed.—Where lands have been sold under a power of sale in a deed of trust, and under this section the amount it brought at the sale has been raised, it is within the authority of the clerk of the court to allow the commission provided for in the deed to the extent of the advanced price, when reasonable, against the claim of subsequent lienors or claimants. In re Hollowell Land, 194 N. C. 222, 139 S. E. 769.

Power and Authority of Clerk.—This section, does not require that all sales of land under mortgage or deed in trust be reported to the clerk of the court, but only when an advanced bid has been made and is properly safeguarded or paid into the office of the clerk of the court. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914. See also In re Sermon's Land, 182 N. C. 122, 128, 108 S. E. 497.

While under the provisions of this section, it is required that the clerk order title to be conveyed to the purchaser at the final resale, semble, this order is merely ministerial when the resale has been made in accordance with the statute in other respects, and the omission may be supplied by the clerk making the order nunc pro tunc, and the deed accordingly made will convey the title to the purchaser. Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424.

The supervisory powers invested in the clerk of the court over sales under a mortgage, deed of trust, etc., are not those of general control as exercised by the courts in case of an ordinary judicial sale, but confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424.

The supervisory powers given the clerks of the Superior Courts by this section apply to sales and resales under the power of sale contained in mortgages and deeds of trust and not to ordinary judicial sales, and the statute must be strictly complied with. Redfern v. McGrady, 199 N. C. 128, 154 S. E. 3.

Notwithstanding ten days have elapsed from the date of the sale, at the time the increased bid was made, the clerk has the power, in his discretion, to order a resale, without waiting for the expiration of twenty days within which parties to the proceeding might file exceptions to the sale. Vance v. Vance, 203 N. C. 667, 668, 166 S. E. 901.

The order of the clerk to deliver title required by this section is, however, merely ministerial in its nature, and its omission, when in fact the trustee has, after complying with all the terms of the power of sale contained in the deed of trust, made title to the purchaser, does not invalidate the foreclosure, or render the title acquired by the purchaser as grantee in the deed of the trustee void, solely for that reason. Cheek v. Squires, 200 N. C. 661, 668, 158 S. E. 198.

By this section, the clerk has the power to make an allowance to the mortgagee or trustee for his services in making the sale, to be retained by him from the proceeds of the sale. From an order making such allowance, a party interested in the land or in the proceeds of the sale, may appeal to the judge, who upon such appeal may affirm, reverse or modify the order of the clerk; in the absence of such appeal, the order of the clerk is final and conclusive. Tidewater Brokerage Co. v. Southern Trust Co., 203 N. C. 182, 183, 165 S. E. 353.

Where appellant raised the bid within ten days after the sale under foreclosure, and the property was resold, and knocked down to him at the advanced bid, it was held that if he failed to pay the purchase price the clerk has no power under this section to attach him for contempt or force him to take his wife's rents, the lands belonging to the separate estate of his wife, and after foreclosure the rents being paid to her. In re Longley, 205 N. C. 488, 489, 171 S. E. 788.

Same—Effect of Cash Stipulated at First Sale.—Under the provisions of this section, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale of a mortgage, when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law. In re Mortgage Sale of Ware Property, 178 N. C. 693, 122 S. E. 660.

Same—Where Property Injured within Ten Day Period.—This section controls as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and confers no power on the clerk to make such order, unless within the ten days allowed there shall be an increased bid, etc., and does not extend to instances wherein a material loss has been sustained by destruction of a house on the lands, within the stated period. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Where the mortgage premises has been materially diminished in value by the loss by fire of a house thereon, which has been sold under a power contained in the instrument, the bidder at such sale having no title or right of possession, or control over the property for its preservation or protection, within ten days provided by this section, the loss occurring within that time falls on the owner, and the preferred bidder is not chargeable therewith, or required by law to take the property at the price he had bid therefor. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Same—When Supervisory Power Begins. — The clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, under the provisions of this section, which continues until after the final sale under foreclosure. Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424.

Same—Order Accepting Mortgagor's Deed.—Where a resale of lands under mortgage has been made under the provisions of this section, the clerk may enter an order accepting the mortgagor's deed nunc pro tunc as to the time it should have been tendered, when otherwise the observance of the statute had been made. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Section Incorporated in Mortgages and Deeds of Trust.—The provisions of this section, concerning the sale of land under a power thereof contained in a mortgage or deed of trust, enter into and control the sale under such instruments. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Status Under Section of Mortgage and Deeds of Trust Sales.—Under this section a sale of land under the power in a mortgage or deed of trust is given the same status as if made under a judgment or decree of court. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914.

Purpose of Section as to Mortgagors.—This section was intended for the protection of mortgagors where sales are made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10 per cent. had been deposited in court. There being no such protection as to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale when there has been an increased bill of 10 per cent. when the bid at the first sale did not exceed $500, and of 5 per cent. when the bid of the first sale was more than $500. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 317, 108 S. E. 914.

Irregularity in Conveyance—Time to Keep Sale Open. — Where a trust deed to secure money loaned on lands has been foreclosed, this section requires the sale to be kept open for ten days for the tender of increased bids, etc., but where it appears that an irregularity in conveying the land before the expiration of the statutory time could not have prejudiced any of the parties, they are concluded by the judgment upholding the validity of the transaction. Wise v. Short, 181 N. C. 320, 107 S. E. 134.

No Specific Performance When Sale Reopened.—The principle upon which specific performance of a binding contract to convey lands is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the ten days allowed by this section, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Title of the Bidder.—Under the provisions of this section, the bidder at the sale during the period of ten days acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Rights of Highest Bidder—Payment of Mortgage within Ten Days Period.—The last highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under this section acquiring no right until the statutory provision of ten days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. In such case no recovery of damages can be had by the bidder against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed. Cherry v. Gilliam, 195 N. C. 233, 141 S. E. 594.

The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a

proposed purchaser within the ten days before confirmation, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. Davis v. Central Life Ins. Co., 197 N. C. 617, 150 S. E. 120.

Same—Revocation of Order for Deed.—Under this section it is the duty of the clerk of the Superior Court to readvertise and resell the mortgaged property as often as the statute is complied with, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. Hanna v. Carolina Mortgage Co., 197 N. C. 184, 148 S. E. 31.

Rights of Owner of Equity of Redemption.—Where lands have been many times resold under this section and the owner of the equity of redemption has not protected himself at the sales, he may not have the deed at the final foreclosure sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith. Brown v. Sheets, 197 N. C. 268, 148 S. E. 233.

Deposit of Advanced Bid with Clerk.—Under the facts of this case presenting the question of a valid resale of mortgaged land under the provisions of this section, objection that only two per cent. of the proposed advanced bid was deposited with the clerk was untenable. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Keeping Open for Ten Days—Purchasers Title.—Under the provisions of this section as to resale of mortgaged lands upon a raised bid, it is required that the matter be kept open by the clerk for ten days thereafter, in order that the purchaser thereof may acquire title. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Recitals in Deed as to Compliance with Section Prima Facie.—Where the question in controversy in a suit for specific performance against the purchaser, is whether there has been a compliance with this section as to a resale under a mortgage upon the raise of a bid at a prior sale, the recitals relating thereto in the deed tendered by the mortgagor are only prima facie evidence of such facts, and alone are insufficient to sustain the judgment. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Striking Out Order for Resale.—Where, on account of an upset bid, an order for a resale has been entered, it is error, eleven days thereafter to strike out such order and declare the sale final in prejudice of further rights of mortgagers. Va. Trust Co. v. Powell, 187 N. C. 372, 127 S. E. 242.

There is nothing in the statute which deprives the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees. Koonce v. Fort, 204 N. C. 426, 430, 168 S. E. 672.

Deposit When No Upset Bid Is Made.—Under the provisions of this section the last and highest bidder at a foreclosure sale obtains no interest in the land until the elapse of the ten-day period for the filing of an increased bid, and although the mortgagee or trustee may, in fixing the terms of the sale, require a reasonable cash deposit to cover the cost of the sale and insure completion of the sale by the purchaser if no upset bid is made, the reasonableness of such deposit may be determined by analogy to the deposit required for an upset bid, and a demand for a cash deposit at the sale amounting to twenty-five per cent of the bid is unreasonable. Alexander v. Boyd, 204 N. C. 103, 167 S. E. 462.

Recovery of Deposit.—Where the last and highest bidder at a sale of lands under decree of foreclosure has been required under order of court to deposit a certain per cent of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the entering of an order of resale by the clerk under the provisions of this section, upon the placing of an advanced bid and cash deposit by another. Koonce v. Fort, 204 N. C. 426, 168 S. E. 672.

Commissions Allowed.—Upon the ordering by the clerk of a resale pursuant to this section, the original sale, under the power, becomes a nullity, and that part of the instrument providing a certain per cent as selling commission to the mortgagee or trustee is inoperative; and in lieu thereof he is entitled only to the costs and expenses of the sale and such sum to compensate him for his services actually rendered as may be approved by the clerk, subject to review on appeal, or by the court direct where a restraining order has issued. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914.

Appeal will be dismissed when the clerk has not complied with the provisions of this section. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Jurisdiction of Judge on Appeal.—The discretion vested in the superior court judge on appeal from the clerk, sec. 637, to hear and determine the matter in controversy, unless it appear to him that justice would be more cheaply or speedily administered by remanding it to the clerk, can not confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under this section, to further pass thereon in the absence of an increased bid. In re Mortgage Sale of Ware Property, 187 N. C. 693, 122 S. E. 660.

Cited in Hayes v. Ferguson, 206 N. C. 414, 416, 174 S. E. 121; Miller v. Shore, 206 N. C. 732, 733, 175 S. E. 133.

§ 2592. Surplus after sale to be paid to clerk, in certain cases.—It is competent for any trustee or mortgagee who sells any real, personal or mixed property under the power of sale contained in any deed of trust or mortgage of any kind and who has in his hands any surplus money, after paying the debt or debts secured by such deed of trust or mortgage and costs and expenses of such sale, to pay into the office of the clerk of the superior court of the county where the sale was had, any surplus moneys in his hands as aforesaid in all cases where the grantor in such deed of trust or mortgage is dead and there is no executor or administrator of his estate, and in all other cases where such trustee or mortgage is, for any cause, in doubt as to who is the proper party or parties to whom to pay such surplus moneys. Such payment to the clerk shall have the effect to discharge such trustee or mortgagee from all liability to the extent of the amount so paid. The clerk shall receive such money from such trustee or mortgagee and execute a receipt for the same under the seal of his office. The failure of any clerk, however, to place his seal upon such receipt shall not invalidate the receipt if it bears the genuine signature of the clerk. The official bond of such clerk shall be responsible for the safe keeping of such moneys until the same shall be paid to the party or parties entitled thereto, or be paid out under the order of a court of competent jurisdiction. (1913, c. 15, ss. 1, 2.)

See note under § 2591.

Alternatives of Mortgagee.—Where the owner of lands has mortgaged the same during his life as tracts numbered 1 and 2, and has later conveyed tract No. 2 to a purchaser in fee simple, and has devised tract No. 1 for life with remainder over. It was held, that the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who may determine whether the surplus be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of sec. 1791, or the mortgagee may relieve of liability by paying the fund into court pursuant to this section. Brown v. Jennings, 188 N. C. 155, 124 S. E. 150.

Statute of Limitations Need Not Be Pleaded.—Section 405 applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale under this section and § 2593, the rights of the parties being determined in accordance with the admitted facts. In re Gibbs, 205 N. C. 312, 171 S. E. 55.

Cited in Edwards v. Nunn, 194 N. C. 492, 493, 140 S. E. 84; American Agricultural Chemical Co. v. Brock, 198 N. C. 342, 344, 151 S. E. 869.

§ 2593. Special proceedings to determine ownership of surplus.—Special proceedings may be instituted before the clerk of the superior court to determine who is the rightful party to whom any fund paid into his office under the preceding section shall be paid. All persons claiming an interest in such funds shall be made parties, and if

an answer is filed raising issues as to the ownership of said moneys, the case shall be transferred to the civil issue docket of the superior court for trial. Any party in interest may appeal to the judge of the superior court from any order made by the clerk. The clerk may require bond of parties when action is transferred to civil issue docket, as in other civil actions. The court may, in its discretion, order the costs and a reasonable attorney's fee to be paid out of the funds in controversy. (1913, c. 15, s. 3; 1919, c. 111, ss. 1, 2.)

See notes under §§ 2591, 2592.

Cited in Edwards v. Nunn, 194 N. C. 492, 493, 140 S. E. 84; Am. Agr. Chemical Co. v. Brock, 198 N. C. 342, 151 S. E. 869.

§ 2593(a). Orders signed on days other than first and third Mondays validated; force and effect of deeds.—In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, Wherein the judgment confirming the sale, made by the commissioner appointed in said action, and ordering the said commissioner to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than a first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month: Provided, that this section shall not affect litigation pending February 22, 1923. (1923, c. 53, s. 1.)

See note under § 536.

§ 2593(b). Injunction of mortgage sales on equitable grounds.—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the supreme court from any such order or injunction. (1933, c. 275, s. 1.)

See 11 N. C. Law Rev., 420, for review of this section.

Constitutionality.—This section does not violate any provision of the Constitution of the United States or of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to a mortgage or deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 242, 173 S. E. 587.

This section is constitutional and valid. Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

This section is remedial only, and is valid for that purpose. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 242, 173 S. E. 587.

Retroactive Effect.—This section is applicable to a sale made since its enactment, although the sale was made under the power of sale contained in a mortgage or deed of trust executed prior to its enactment. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 242, 173 S. E. 587.

Requiring Bond within Court's Discretion.—The condition that plaintiff file bond to indemnify defendant against any loss by reason of the delay is within the court's discretionary equitable power, the provisions of this section being constitutional and valid. Whitaker v. Chase, 206 N. C. 335, 174 S. E. 225.

Where the mortgagee or cestui que trust is not satisfied with the bond given by the mortgagor or trustor, as provided by this section, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation of the sale upon the ground that the bond is inadequate. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 173 S. E. 587.

Where the parties expressly waive a jury trial, and the trial court finds that the amount bid at the sale represented the fair market value of the lands, and that there was no assurance that a larger sum would be offered if the lands were resold, the findings support his judgment dissolving the temporary order restraining the consummation of the sale. Barringer v. Wilmington Sav., etc., Co., 207 N. C. 505, 177 S. E. 795.

When Foreclosure May Not Be Restrained.—An executor may not restrain the foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee is authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of this and the following sections. Miller v. Shore, 206 N. C. 732, 175 S. E. 133.

This and following sections have no application after a foreclosure sale under power contained in the instrument has been confirmed. Whitford v. North Carolina Joint-Stock Land Bank, 207 N. C. 229, 230, 176 S. E. 740.

Granting Resale after Action for Specific Performance.—Where the last and highest bidder at the sale instituted action for specific performance, and the personal representative of the deceased mortgagee gave notice in apt time that he would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by him under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court had authority to hear the motion. Hopkins v. Swain, 206 N. C. 439, 440, 174 S. E. 409.

§ 2593(c). Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the prop-

erty or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the supreme court in all cases. (1933, c. 275, s. 2.)

See annotations under § 2593(b).

§ 2593(d). Right of mortgagee to prove in deficiency suits reasonable value of property by way of defense.—When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed. (1933, c. 275, s. 3.)

See 12 N. C. Law Rev., 366, for note on "Relief During the Depression."

§ 2593(e). Conflicting laws repealed; not applicable to tax suits. — All laws and clauses of laws in conflict herewith, to the extent of such conflict only, are hereby repealed, but this act [§§ 2593(b)-2593(e)] shall not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4.)

§ 2593(f). Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this section to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out. (1933, c. 36.)

Editor's Note.—The effect of this section is to limit the creditor to the property conveyed, when for the purchase money, changing in that respect section 507. This applies only to such contracts as are made after the ratification of the Act, Feb. 6, 1933. See 11 N. C. Law Rev., 219.

Art. 4. Discharge and Release

§ 2594. Discharge of record of mortgages and deeds of trust.—Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner.

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

2. Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the state of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: Provided, that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone to the register of deeds or his deputy, with endorsement of payment and satisfaction, shall be sufficient. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled.

3. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

Upon the presentation of any deed of trust given to secure the bearer or holder of any negotiable in-

struments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the register of deeds or his deputy of the county in which same is recorded, the said register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons: Provided that prior to such presentation and cancellation, any person rightfully entitled to any such deed of trust, or evidences of indebtedness, which have been lost or stolen, may notify the register of deeds, or his deputy, in writing of such loss or theft, and said register, or his deputy, shall make a marginal entry in writing thereof, together with the date such notice is given, upon the record of the deed of trust concerned, and thereafter same shall not be cancelled as above provided until the ownership of said instruments shall have been lawfully determined; Provided further that nothing herein shall be construed so as to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

4. Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

5. The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds. Provided, however, that this subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of other personal property. (Rev., s. 1046; Code, s. 1271; 1870-1, c. 217, 1891, c. 180; 1893, c. 36; 1901, c. 46; 1917, c. 49, s. 1; 1917, c. 50, s. 1; 1923, c. 192, s. 1; 1923, c. 195; 1935, c. 47.)

Editor's Note.—The proviso contained in the second clause of this section, and the entire fifth clause were added by the amendment of 1923.

The second paragraph of subsection 3 was added by the amendment of 1935.

Modes of Release.—A mortgage can only be released so as to affect purchasers at a sale under the mortgage by a cancellation on the margin of the registration thereof under this section, or by a reconveyance of the mortgaged property duly recorded. Barber v. Wadsworth, 115 N. C. 29, 32, 20 S. E. 178.

Construed as a Whole.—This section will be construed to effectuate the legislative intent as gathered from its language, and by harmonizing its various parts when this can reasonably be done. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663.

Not Retroactive.—This section has no application to a mortgage given prior to the passage of the section nor does it wipe out a valid debt existing at the time the statute took effect. Dixie Grocery Co. v. Hoyle, 204 N. C. 109, 113, 167 S. E. 469. And it is not a ground for setting aside a foreclosure of a mortgage given before the passage of the act in an action by a subsequent mortgagee. Roberson v. Matthews, 200 N. C. 241, 156 S. E. 496.

Procedure of Cancellation and Effect.—Regularly, the mortgagee acknowledges the satisfaction and discharge of the mortgage in the presence of the register of deeds, and he enters satisfaction on the margin of the record of the mortgage, and this entry is signed by the mortgagee; and this, done as required by this section, will operate as a deed of release, or reconveyance of the land, embraced by the mortgage. Otherwise the mortgagee must reconvey the land by proper deed. Walker v. Mebane, 90 N. C. 259, 266.

Application Only to Deeds of Trust and Mortgages.—This section giving to the marginal entry of satisfaction the effect of reconveyance applies only to discharge of trust deeds and mortgages. Smith v. King, 107 N. C. 273, 277, 12 S. E. 57.

Subsection 2—Applies to Deeds of Trust.—Subsection 2, of this section does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663. It was contended in this case that the omission of words "deed of trust" from the provision near the end of the subsection, namely, "that the register or his deputy shall cancel the mortgage or other instrument," conclusively shows that a register is not given power to cancel a deed of trust. However, the court did not assent to this rather ingenious argument, the gist of their conclusions being as follows: Considering this section as a whole the natural and reasonable interpretation of the language must refer the words "mortgage or other instrument" in the clause quoted above to the words of the first line of the subsection "mortgage, deed of trust or other instrument."

Marginal Satisfaction Not Necessary as Between Parties.—When a mortgage debt has been discharged, the mortgage is no longer operative, between the parties, though not marked "satisfied of record." Blake v. Broughton, 107 N. C. 220, 12 S. E. 127.

Form and Validity of Cancellation.—This section must be strictly complied with in order to secure the grantee in a subsequent conveyance of the locus in quo against the prior encumbrance, and where this is done upon exhibit of the canceled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. Mills v. Kemp, 196 N. C. 309, 145 S. E. 577.

Same—Notice to Subsequent Mortgagee.—Where an entry of cancellation is made of record by the register of deeds in canceling a mortgage under this section reciting another name as mortgageee, trustee or cestui que trust than that appearing in the registration of the instrument, and that the "bond" was marked paid, when the instrument recited four bonds maturing in series, it is sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds has made a mistake in cancelling the mortgage, and fix him with notice of all facts a reasonable inquiry would have revealed. Mills v. Kemp, 196 N. C. 309, 145 S. E. 557.

Mortgagee Alone May Cancel.—Only the mortgagee is en-

titled to have his mortgage canceled on the book in the office of the register of deeds, either in person, by subsection 1, of this section, or by the register of deeds upon the exhibition of the mortgage and note properly indorsed by him, by subsection 2 and 3; and when the mortgagee cancels the instrument in person, under subsec. 1, it is a complete release and discharge of the mortgage, under subsec. 4, for in such case the statute does not require the exhibition of the mortgage and the note it secures. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Where a note, secured by a mortgagee, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but which was only left with the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Under this section there is no authority given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. Faircloth v. Johnson, 198 N. C. 429, 127 S. E. 346.

Effect of Forged Cancellation.—When the attorney for the owner of the land agreed to have a mortgage canceled of record, and thereafter surreptitiously obtained the cancellation stamp of the register of deeds and forged his signature so that apparently the mortgage was canceled under the provisions of this section, subsection 2, and relying thereon the proposed purchaser accepted the deed and paid the consideration: It was held that the supposed cancellation of the mortgage was void as against the mortgagee who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void. Union Central Life Ins. Co. v. Cates, 193 N. C. 456, 137 S. E. 324.

Same—Upon Rights of Third Mortgagee.—As against the mortgagee of a third mortgage given on the same lands, the wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been canceled of record. Swindell v. Stephens, 193 N. C. 474, 137 S. E. 420.

Effect of Prior Fraud.—Where the register of deeds has entered "satisfaction" of a deed of trust, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the canceled instrument will not affect their rights when they were unaware thereof or had not participated in the fraud. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663.

Cancellation by Attorney—Ratification Thereof.—While an attorney at law has no power to cancel or discharge a deed of mortgage, without authority conferred by his client, yet where such attorney informs his client that he is unable to complete an arrangement agreed upon with the debtor for obtaining a new mortgage and the sale of a stock of goods, upon which the creditor has a lien, unless a cancellation of an old mortgage was made, and that he would cancel the old mortgage by a day named, unless directed not to do so; the attorney receiving no such direction, cancelled the old mortgage, and forwarded to his client the new mortgage and power of sale, and the new mortgage was returned without objection to be registered: It was held to be a ratification by the client of the act of cancellation of the old mortgage. Christian v. Yarborough, 124 N. C. 72, 32 S. E. 383.

Authority of Trustee to Release Part of Property without Satisfaction.—This section only empowers the trustee to "acknowledge satisfaction of the provisions of such trust, etc.," the entry operating as a reconveyance. As was said in Browne v. Davis, 109 N. C. 23, 13 S. E. 703; "It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land." We do not mean to say however that the creditor might not be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if done with the creditor's consent and authority properly shown. Woodcock v. Merrimon, 122 N. C. 731, 736, 30 S. E. 321.

Even if an attempted release is under seal it is ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of the property conveyed, and especially where the secured debt remained unsatisfied. Browne v. Davis, 109 N. C. 23, 13 S. E. 703.

Effect of Cancellation by First Mortgagee.—The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Entry of "Satisfied" as Evidence of Payment of Debt.—It is competent to introduce as evidence of payment of an indebtedness secured by mortgage the entry of "satisfied" on the margin of the record signed by the mortgagee and witnessed by the register of deeds. Robinson v. Sampson, 121 N. C. 99, 100, 28 S. E. 189.

Not Retroactive in Effect.—Subsection five is not to be construed retroactively so as to effect those who became creditors prior to its passage. Hicks v. Kearney, 127 N. C. 205, 127 S. E. 205.

The conclusive presumption of payment of a note secured by mortgages or deeds of trust of land after fifteen years, etc., is prospective in effect, and inapplicable to such instruments theretofore executed. Const. of N. C., Art. 1, § 17; Humphrey v. Stephens, 191 N. C. 101, 131 S. E. 883; Hicks v. Kearney, 189 N. C. 316, 127 S. E. 205.

Payee or Mortgagee Must Be Sui Juris.—In order to constitute a valid cancellation under subsection 2, this section clearly contemplated a payee or mortgagee who is sui juris. Faircloth v. Johnson, 189 N. C. 429, 127 S. E. 346.

§ 2594(a). Entry of foreclosure.— In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact of such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. (1923, c. 192, s. 2.)

Failure of Trustee to Comply Does Not Affect Purchaser.—The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply with the provisions of this or the following section. Cheek v. Squires, 200 N. C. 661, 662, 158 S. E. 198.

Cancellation without Knowledge of Cestui.—Where the trustor paid the trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records under this section, without the knowledge of the cestui que trust, the cancellation was held valid. Parham v. Hinnant, 206 N. C. 200, 173 S. E. 26.

§ 2594(b). Trustees or mortgagees to file reports of sales.—It shall be the duty of any trustee or mortgagee making sale under the provisions of any power to file an account with the clerk of the superior court in the county where the land lies as is required by commissioners making sales for partition, and for the auditing and recording of said account the clerk shall be allowed the same fees as are provided for auditing accounts of such commissioners. (1923, c. 192, s. 3.)

§ 2594(c). Copies of law to be sent registers; posting and publishing copies.—The secretary of state shall certify copies of this law to every register of deeds in the state, whose duty it shall be to post such copies in a conspicuous place in his office and cause the same to be published for one month in some newspaper in the county. The expense of such publications shall be borne by the county. (1923, c. 192, s. 4.)

§ 2595. Register to enter satisfaction on index.—When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the

register of deeds or his deputy shall enter upon the alphabetical indexes kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfaction has been acknowledged or entered is a deed of trust. (1909, c. 658, s. 1.)

§ 2596. Recorded deed of release of mortgagee's representative. — The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this state may discharge and release the same and all property thereby conveyed by deed of quit claim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this state. (1909, c. 283, s. 1.)

§ 2597. Release of corporate mortgages by corporate officers.—All mortgages and deeds in trust executed to a corporation may be satisfied and so marked of record, as by law provided for the satisfaction of mortgages and deeds in trust, by the president, any vice-president, cashier, assistant cashier, secretary, assistant secretary, treasurer, assistant treasurer, trust officer or assistant trust officer of such corporation signing the name of such corporation by him as such officer. Where mortgages or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded: Provided, however, this validating provision shall not apply to any suits pending in the courts of the state on February 23, 1909. (1909, c. 283, ss. 2, 3; 1935, c. 271.)

Editor's Note.—By the amendment of 1935, vice-president, assistant cashier, assistant secretary, assistant treasurer, trust officer and assistant trust officer, were added to the list of officers enumerated in the first sentence of the section.

CHAPTER 55

MOTOR VEHICLES

Art. 1. General Provisions

§ 2598. Terms defined.—The term and words "motor vehicles" used in this chapter shall be construed to mean all vehicles propelled by any power other than muscular power, except traction engines, road rollers, fire wagons, engines, police patrol wagons, ambulances, and such vehicles as run only upon rails or tracks. The term "owner" shall include any person, firm, association, or corporation owning a motor vehicle or renting a motor vehicle, or having the exclusive use thereof under a lease or otherwise. The term "public highway" or "highways" shall be construed to mean any public highway, township, county, or state road, or any country road, any public street, alley, park, parkway, drive or public place in any city, village, or town. The term and words "business portion of any city or village" shall be construed to mean the territory of a city or incorporated village contiguous to a public highway which is at that point either wholly or partially built up with structures devoted to business. (1917, c. 140, s. 1.)

Editor's Note to Chapter.—Since 1920 the motor vehicle law has undergone radical changes in its development. In this process of evolution as many as two and three statutes have been passed at various times covering, in a general way, the same subject-matter but in no way referring to each other or expressing the effect upon the existing legislation. To illustrate there are now two statutes purporting to regulate the issuance of titles to automobiles, three the registration thereof, and three regulating the operation of them.

The result of this legislation has been to impliedly amend, modify and even repeal many of the older provisions. But in its present state no agency other than the supreme court through interpretation as cases arise thereunder can determine with accuracy which of the provisions exclusively control a given proposition where there are more than one provision purporting to control the situation. To say that all the prior law respecting subjects regulated by the more recent statutes, are repealed would be somewhat presumptive. However, it is possible to cross refer to cognate sections and indicate in a general way under each section the probable effect of the similar sections when taken together, and this has been the policy throughout the chapter.

As to evidence of violation in prosecutions for other crimes, such as murder, see note to § 2601.

Editor's Note to Section.—Although this section purports to define the enumerated terms as used in this chapter, it is probable that it defines only those terms as used in the sections appearing in the Consolidated Statutes of 1920, as subsequently amended, and does not apply to the terms as used in the new statutes passed since that time. This is especially true where the same terms are defined in the new statutes.

As to definition of the terms used in the Motor Vehicle Act of 1927, see § 2621(1); the Uniform Act regulating the operation of vehicles, see § 2621(43); the act regulating motor busses, see § 2613(j); the gasoline tax act, § 2613(il); and the title protection act, § 2621(i).

A "motor vehicle" under the Motor Vehicle Act, §§ 2621(1)-2621(42) is every device for transportation of persons and property upon the public highways that is self-propelled. The same definition is given in the Uniform Act regulation the operation of vehicles, § 2621(43). The term "highway" in the Motor Vehicle Act, §§ 2621(1)-2621(42), is defined as any place lawfully used by the public for vehicular travel, but does not include a driveway upon the grounds of a university, college, other institutions or private persons. The same definition is given in the Uniform Act regulating the operation of vehicles, § 2621(43). For the definition of "highways," and "motor vehicles" as used in the Motor Bus Act, see § 2613(j); the Gasoline Tax Act, § 2613(il); and the title Protection Act, § 2621(i).

"Auto Truck" Defined as Automobile.—See Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

Cited in Goss v. Williams, 196 N. C. 213, 145 S. E. 169.

§ 2599. Violation a misdemeanor.—Any person violating any provision of this chapter shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and any person violating any provision of this chapter, where serious damage is done, shall be guilty of a misdemeanor. (1917, c. 140, s. 21; 1921, c. 141.)

Editor's Note.—This section as amended at the regular session of 1921 is applicable to a violation of the sections appearing in this chapter in the Consolidated Statutes of 1920, as subsequently amended; and notwithstanding that it purports to prescribe the punishment for a violation of any of the provisions of the chapter, it would seem that it does not apply to the new sections which have been inserted since the publication of the Consolidated Statutes. An inspection will disclose that in most, if not all, the

new statutes, special provisions fixing the penalty for violation of the particular statute have been enacted.

Thus it will be seen that the application of this section has been greatly limited by the more recent enactments which supersede portions of the chapter as existing in the Consolidated Statutes and enact new penalties for violation. This section, then, applies in those cases only where the sections of the Consolidated Statutes of 1920 as subsequently amended have not been repealed or superseded. It may be that portions only of certain sections remain in force and that to such portions of such sections does this section apply.

To determine whether this section fixes the penalty in a given case it is necessary to ascertain if the statute violated is a new statute and if so, the section will probably not apply.

In addition to being liable to punishment under these statutes, it is possible for a person to be so negligent in the violation in disregarding the rights of others as to be guilty of other crimes at the same time. For example, although it is a misdemeanor to violate the statute regulating the law of the road as to speed under the motor vehicle law one may also be guilty of murder, manslaughter or assault and battery if he is so reckless in the violation that he runs down and kills or injures another if the elements essential to constitute such crimes are present in the violation. See State v. Gush, 177 N. C. 595, 99 S. E. 337; State v. McIver, 175 N. C. 761, 94 S. E. 682. And evidence of violation of this chapter is admissible upon such trials. State v. Suddeth, 184 N. C. 753, 114 S. E. 828.

Where a prior statute fixed the penalty at $50 fine or imprisonment not exceeding twenty days, or both, the justice's court had no jurisdiction to try a case thereunder because the words "or both" made the jurisdictional amount exceed the justice's jurisdiction as fixed by the Constitution. State v. McArden, 162 N. C. 575, 77 S. E. 298. Thus Article IV, § 27 of the Constitution, fixing the jurisdiction of justices' courts, does not deprive the justice of jurisdiction under this section.

The 1921 amendment added all the latter part of the section beginning with the semicolon.

Cited in State v. Mickle, 194 N. C. 808, 140 S. E. 150

§ 2600. Duty of officer; manner of enforcement.—For the purpose of enforcing the provisions of this chapter it is hereby made the duty of every police officer, every marshal, deputy marshal, or watchman of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county, and every constable of any township, to arrest, within the limits of their jurisdiction, any person known personally to any such officer, or upon the sworn information of a credible witness, to have violated any of the provisions of this chapter, and to immediately bring such offender before any justice of the peace or officer having jurisdiction; and any such person so arrested shall have the right of immediate trial, and all other rights given to any person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or refuse to carry out the duties imposed by this chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases. (1917, c. 140, s. 22.)

Cross References.—As to duty of peace officers to cooperate with the automobile inspector, see sec. 2621(h); as to report of stolen vehicles to peace officers, see sec. 2621(u); as to appointment of deputies to assist peace officers in enforcement, see sec. 2621(w); as to duty of peace officers to weigh loads and require removal of excessive portion, see secs. 2621(6) and (79).

As to power of local authorities under the Uniform Act, see secs. 2621(46), (63), and (73).

§ 2601. No municipal ordinance in conflict.—No governing board of any city or town shall pass or have in effect or in force any ordinance contrary to the provisions of this chapter. (1917, c. 140, s. 23.)

Section applied in State v. Freshwater, 183 N. C. 762, 111 S. E. 161.

§ 2601(a). Unlawful display of emblem or insignia.—It shall be unlawful for any person to display on his motor vehicle, or to allow to be displayed on his motor vehicle, any emblem or insignia of any organization, association, club, lodge, order, or fraternity, unless such person be a member of the organization, association, club, lodge, order, or fraternity, the emblem or insignia of which is so displayed.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine not exceeding fifty dollars ($50) or imprisonment for a period not exceeding thirty days. (1924, c. 63.)

Editor's Note.—The effect of this act was summarized in 3 N. C. Law Rev. 25.

Art. 2. Registration of Vehicles

§ 2602. Application for registration.—Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state either by himself, his chauffeur, or another by his authority, shall, for each motor vehicle owned, except as herein otherwise expressly provided, cause to be filed in the office of the secretary of state an application for registration on a blank to be furnished by the secretary of state for that purpose, containing a brief description of the motor vehicle to be registered, including the name, maker's or manufacturer's serial number, style of machine, and horsepower, the name and address of the owner, and such other information as the secretary of state may deem necessary. (1917, c. 140, s. 2.)

Editor's Note.—As pointed out in the editor's note under sec. 2598, the Legislature at its 1927 session passed the Motor Vehicle Act, secs. 2621(1)-2621(42), to provide for a department of motor vehicles under the Commissioner of the Revenue, and prescribed new regulations concerning the registration of vehicles. Thus it will be seen that the Secretary of State is relieved of all the duties imposed upon him by this article such that every reference to him in the sections should be changed to the Commissioner of Vehicles. See sec. 7979(c) of this Code. Since the Motor Vehicle Act apparently covers the entire subject of registration, establishing new, and different regulations in many instances, it would seem that the purpose was to supersede all the prior law upon the subject for certainly the procedure prescribed by both laws was not intended to be followed. But the Legislature failed to state the purpose in this respect so that the matter is left to judicial interpretation and construction. It is possible that portions of the sections of this article, or even whole sections, may be held to be of force and not in conflict with or covered by the new act, and for this reason this article is not omitted. The editor's note under each section will point out the corresponding section in the new law.

The corresponding provisions of the Motor Vehicle Act which probably supersede this section are secs. 2621(6)-2621(8).

§ 2603. Registered by secretary of state.—Upon receipt of an application for registration of a motor vehicle as provided in this chapter, the secretary of state shall file such application in his office and register such motor vehicle, with the name and residence of the owner, together with the facts stated in such application, in a book or index to be kept for that purpose, under the distinctive number assigned to such motor vehicle by the secretary of state, which book or index shall be open to inspection during reasonable business hours. (1917, c. 140, s. 3.)

Editor's Note.—This section is probably superseded by secs. 2621(2)-(5). See note to preceding section.

Every reference to the Secretary of State in this section

should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2604. Repealed by Public Laws of 1921, c. 209.

§ 2605. Number and certificate given; expiration of certificate.—Upon the filing of such application and the payment of fees provided in this chapter, the secretary of state shall assign to such motor vehicle a distinctive number, and, without expense to the applicant, issue and deliver to the owner a certificate of registration in such form as the secretary of state may determine, and shall also furnish to such applicant one display number as hereinafter provided for. All certificates of registration shall expire on December thirty-first, following the date of issue. (1917, c. 140, ss. 4, 5; 1927, c. 27.)

Editor's Note.—With the exception of the reference to the expirations of registration, this section is superseded by secs. 2621(9) and (11). The portion of this section referring to the expiration of licenses is still applicable it would seem.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

The 1927 amendment to this section and sec. 2612 take effect from and after December thirty-first, one thousand nine hundred and twenty-seven.

All licenses issued by the Department of Revenue on motor vehicles on and after June thirtieth, one thousand nine hundred and twenty-seven, expire on December thirty-first, one thousand nine hundred and twenty-seven, and the fee therefor is one-half the full annual fee, plus twenty-five cents.

The foregoing amendments, in no particular, affect or modify sec. 7979(c), transferring the duties herein imposed upon the Secretary of State to the Commissioner of the Revenue. Secs. 3, 4 and 5 of the Acts of 1927, ch. 27.

§ 2606. Dealers to report sales.—The secretary of state shall require from each wholesale and retail dealer in automobiles in the state once each month a list of all retail sales, and it shall be the duty of each of the aforesaid dealers to furnish this information to the secretary of state within the first ten days of each month of such sales made during the preceding month. (1917, c. 140, s. 5.)

Editor's Note.—The corresponding section of the new law will be found under sec. 2621(18). See the editor's note under sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2607. Cancellation and transfer of certificate.—Upon the sale of a motor vehicle registered under the provisions of this chapter, the registered owner shall within ten days from the date of such sale return to the secretary of state his certificate of registration furnished him as hereinbefore provided for, which certificate of registration shall be canceled: Provided, that such registered owner may, at the time of returning such certificate, upon proper application for transfer filed in the office of the secretary of state and the payment of a transfer fee of fifty cents, have a new certificate of registration issued to him, containing the original registration number, for a motor vehicle owned by him of not greater tax horsepower, such certificate to remain in force until June thirtieth following date of issue. In case the machine for which a transfer license is desired is of greater tax horsepower, the difference between the amount paid for the original license and the annual fee for the machine for which transfer license is desired shall be paid at the time such application for transfer is filed, but nothing herein contained shall be construed as authorizing the secretary of state to make a rebate in case the transfer license is issued for a machine of less tax horsepower than the one originally registered. A license cannot be transferred from one person to another. (1917, c. 140, s. 8.)

Editor's Note.—The corresponding section of the new law will be found under sec. 2621(16). See the editor's note under sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2608. Display numbers required.—In addition to the certificate of registration, the secretary of state shall furnish to each registered owner two display numbers, which shall at all times be conspicuously displayed by such owner, one on the front and one on the rear of the registered motor vehicle for which the display numbers are issued. The display numbers shall be rigidly fastened in a horizontal position, and the lower edges thereof shall be at least fifteen inches from the ground, and during the times when a motor vehicle is required to display lights the rear registered number shall be so illuminated as to be legible at a distance of fifty feet. In case of the loss or destruction of a display number, the secretary of state, upon proper proof thereof filed with him, and the payment of one dollar, shall secure for such owner a duplicate number, and the secretary of state may in his discretion authorize the applicant for duplicate number and to have prepared for use a temporary number until the duplicate can be made and furnished. It shall be deemed a violation of this chapter for any person to display a fictitious number or more than two display numbers on any motor vehicle operated on the highways of this state. From and after July 1, 1920, the secretary of state shall furnish but one display number with certificate of registration, and the one display number issued shall be conspicuously displayed on the rear of the registered motor vehicle for which it was issued. (1917, c. 140, s. 9; 1919, c. 258.)

Editor's Note.—Section 2621(14) is the section of the new law which seems to correspond to this section as to the furnishing of plates and section 2621(15) as to the display of them. See the editor's note under sec. 2602. As to the duplication of lost plates, the corresponding section of the new law is sec. 2621(26). See the editor's note under sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2609. Nature of display numbers.—The display numbers shall be made of suitable metal, in such size and form as the secretary of state may prescribe, and shall be of a distinctive different color or shade each year. (1917, c. 140, s. 10.)

Editor's Note.—This section is superseded by sec. 2621(14) it would seem. See the editor's note to sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2610. Special numbers to dealers.—Every person, firm, association or corporation manufacturing or dealing in motor vehicles may, in-

stead of registering such motor vehicles so manufactured or dealt in, make application upon a blank to be furnished by the secretary of state for a general distinctive number for all motor vehicles owned or controlled for purposes of sale by such manufacturer or dealer, such application to contain such information as to name, style, and class of cars manufactured or dealt in by such person, firm, association or corporation as the secretary of state may require; and upon the payment of the registration fee hereinafter provided for, such person, firm, association, or corporation shall be assigned a distinctive number, together with a certificate of registration, made in such form and containing such information as the secretary of state shall determine; and every motor vehicle owned or controlled by such manufacturer or dealer, except as hereinafter provided, shall be regarded as registered under and having assigned to it such general distinguishing number until sold or otherwise disposed of. No manufacturer or dealer shall operate any motor vehicle so registered for any other purpose than the trial or adjustment of such motor vehicle or for its demonstration to a prospective buyer, or for some purpose incidental to the legitimate business of manufacturing, purchasing, exhibiting, selling or repairing motor vehicles by such manufacturer or dealer. No motor vehicle registered under the provisions of this section shall be rented for hire or used for the purpose of conveying passengers or freight for hire. No person other than a bona fide manufacturer or dealer shall obtain or use a registration certificate or the corresponding number plate issued by authority of the provisions of this section; and no person who shall have registered a motor vehicle under the provisions of this section shall loan his number plate to any person. No registration of any manufacturer or dealer shall be transferable. The secretary of state may at any time require that a manufacturer or dealer in motor vehicles shall prove that he is a bona fide manufacturer or dealer, and failure to so prove shall be sufficient cause for cancellation of the registration of such manufacturer or dealer, and the secretary of state shall take possession of and cancel the display numbers issued. No manufacturer or dealer, or any employee of such manufacturer or dealer, shall cause or permit the display or other use of any number plate or certificate of registration which may have been furnished to such manufacturer or dealer under the distinctive number herein provided for, except upon motor vehicles owned by such manufacturer or dealer within the meaning and intent of this section, and no person shall display or otherwise use or have in his possession for the purpose of using any registration certificate or display number, except such manufacturer or dealer, or his employees: Provided that if the secretary of state, upon receiving from any manufacturer or dealer an application for the issuance for the ensuing registration year of a certificate of registration and general distinguishing number provided for in this section, shall determine, upon due cause, that such manufacturer or dealer during the previous registration year has failed to comply with the requirements of this section respecting the use of numbers or filing of reports required by section 2606, the secretary of state may refuse such application. Any person violating any provision of this section shall be guilty of a misdemeanor. (1917, c. 140, s. 11; 1919, c. 189, s. 6; Ex. Sess. 1921, c. 97, s. 11.)

Editor's Note.—This section seems to be superseded at least in part by sec. 2621(17). See the editor's note to sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2611. Nonresident owners of vehicles.—Nonresident owners or operators of motor vehicles shall be subject to the same requirements and laws as resident owners or operators: Provided, that the nonresident owner of a motor vehicle which is properly registered under the laws of another state, district, or territory shall be exempt from the registration provisions of this chapter for the same period that a properly registered owner of this state is exempt from the registration provisions of the state in which such nonresident resides, not exceeding sixty days: Provided, that nothing herein contained shall be construed to exempt any motor vehicles used for hire by a nonresident. (1917, c. 140, s. 12.)

This section seems to be superseded by sec. 2621(19). See the editor's note to sec. 2602.

§ 2611(a). Display numbers property of state; seizure for improper use.—All display numbers issued by the secretary of state under this chapter shall be and remain the property of the state, and it shall be lawful for the secretary of state or his agent to summarily take possession of any number which he has reason to believe is being illegally used, and to keep in his possession such number pending investigation and legal disposition of the same. (Ex. Sess. 1921, c. 97, s. 5.)

Editor's Note.—This section seems to be superseded by sec. 2621(14). See note to sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2611(b). Fraud in securing registration and misuse of number plates.—Any person who shall apply for the registration of a motor vehicle to the secretary of state, and who shall willfully give or cause to be given a worthless check in payment therefor, or a fictitious, incomplete, or assumed name on the application for registration; or shall make any statement in connection with the application for registration with the intent to defraud the state, or who shall knowingly give a wrong postoffice address or any other information for the purpose of willfully hindering identification, or who shall knowingly use or allow to be used unlawfully any license number plate issued by the secretary of state, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (Ex. Sess. 1921, c. 97, s. 6.)

Editor's Note.—This section seems to be superseded by 2621(27). See editor's note to sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2611(c). Preservation and cleaning of display number plates.—It shall be the duty of each and every registered owner of a motor vehicle to keep the display number plate assigned to such motor vehicle reasonably clean and free from

dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer immediately clean such display plate so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a display number plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Ex. Sess. 1921, c. 97, s. 7.)

§ 2611(d). Operating with false numbers.—Any person who shall willfully and with intent to defraud the state of registration fees due, operate a motor vehicle with a display number plate which has been repainted, or altered, or forged, or which was issued by the secretary of state for a motor vehicle other than the one on which used, shall be guilty of a misdemeanor. (Ex. Sess. 1921, c. 97, s. 8.)

Editor's Note.—This section seems to be superseded by sec. 2621(27). See editor's note under sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2611(e). Alteration, disguise, or concealment of numbers.—Any operator of a motor vehicle who shall willfully and with the intent to conceal the identity of such motor vehicle, or the identity of the registered owner thereof, mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire-rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a display number plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such display number plate for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a misdemeanor. (Ex. Sess. 1921, c. 97, s. 9.)

Editor's Note.—This section seems to be superseded by sec. 2621(27). See editor's note under sec. 2602.

§ 2611(f). Exchange of number plates. — Any registered owner of a motor vehicle who shall knowingly allow or permit the use of a display number plate issued to him to be taken from the motor vehicle for which it was issued and used on another motor vehicle by another person, shall be guilty of a misdemeanor. (Ex. Sess. 1921, c. 97, s. 10.)

Editor's Note.—Very similar provisions to this section will be found in sec. 2621(27). See the editor's note under sec. 2602.

§ 2611(g). All vehicles to be registered; fees as to vehicles operated by public officials.—It shall be unlawful for any motor vehicle owned by the state of North Carolina or any department thereof, by any county, township, city or town, or by any board of education to be operated on the public highways of this state from and after June 30, 1922, without having first been duly registered in the office of the secretary of state as required by this chapter: Provided, that the secretary of state, upon proper proof being filed with him that any motor vehicle for which license is herein required is owned by the state or any department thereof, or by any county, township, city, or town, or by any board of education, may collect not exceeding one dollar for the registration and numbering of such motor vehicle: Provided further, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the state or some department thereof, or of the county, township, city, or town, or of the board of education, and no motor vehicle which is the property of any officer of employee of any department named herein shall be construed as being "owned" by such department. Any person operating a motor vehicle in violation of any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $50 or imprisoned not more than 30 days. (Ex. Sess. 1921, c. 97, s. 13.)

Editor's Note.—The portion of this section fixing the fees for official vehicles is probably superseded by sec. 2621(30). See note to sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

Art. 3. License Fees

§ 2612. Amount of license fees.—The fees for the registration and licensing of vehicles as herein required shall be according to the following schedules:

Rates for Automobiles

24 h.p. or less	$12.50 per year
Over 24 h.p. and not more than 30 h.p.	20.00 per year
More than 30 h.p. and less than 35 h.p.	30.00 per year
35 h.p. or more	40.00 per year

Motor vehicles used for the transportation of passengers for hire shall pay fifty per cent more than the above rates.

Horsepower shall be computed according to the N. A. C. C. formula of rating for all motor vehicles equipped with internal combustion engines. On motor vehicles operated by steam or electricity the horsepower rating shall be computed according to the rating by the manufacturer of such vehicle.

Rates for Motor Trucks

Trucks with carrying capacity less than 1,000 pounds	$ 12.50
1,000 pounds and under one ton	15.00
One ton and under two tons	25.00
Two tons and under three tons	75.00
Three tons and under four tons	200.00
Four tons and over	300.00

On all trailers, $15 per ton carrying capacity.

Motorcycles

$5 on each motorcycle, and $5 for each motorcycle side-car.

Dealers in Motor Vehicles

Registration fee and first plate	$25.00
Each additional plate	1.00

The fiscal year for the collection of automobile licenses shall terminate December thirty-first. The fee for licenses issued after July first of each year, and before September thirtieth, for the

quarter ending September thirtieth, shall be one-half the annual fee; the fee for licenses issued October first of each year and before December thirty-first, for the quarter ending December thirty-first, shall be one-fourth the annual fee.

The foregoing schedule of license fees on motor vehicles shall become effective July first, one thousand nine hundred and twenty-one, and the present schedule of license fees shall remain in force until said date. The fiscal year for the payment of said license fees shall begin January first of each year. (1921, c. 2, s. 28; Ex. Sess. 1921, c. 97, s. 12, 1927, c. 27; 1929, c. 18.)

Editor's Note.—The act of 1929 amended the next to the last paragraph of this section as to when less than full fee charged. It would seem that this section is superseded by § 2621(29) in so far as they are in conflict. See Editor's Note to § 2602.

1917 Provision Repealed.—Section 6, chapter 140, Laws 1917, was repealed by chapter 189, Laws of 1919. State v. Fink, 179 N. C. 712, 103 S. E. 16.

§ 2612(a). Payment of fees to secretary of state; items covered by fee.—The fees provided for in section 2612 shall be paid to the secretary of state at the time of issuance of said registration certificates, permits, or licenses. They shall include all costs of registration, issuance of permits, licenses, and certificates, and the furnishing of registration plates, and shall be in lieu of all other state or local taxes (except ad valorem), registration, or license fees, privilege taxes, or other charges: Provided, however, a county, city, or town may charge a license or registration fee on motor vehicles in the sum of one dollar ($1) per annum: Provided further, that no county, city, or town shall charge or collect an additional fee for the privilege of operating a motor vehicle, either as chauffeur's or driver's license: Provided, nothing herein shall prevent the governing authorities of any city from regulating, licensing, controlling of chauffeurs and drivers of any such car or vehicle, and charging a reasonable fee: Provided further, that any city or town may charge a license not to exceed fifty dollars ($50) for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees, and licenses now charged. (1921, c. 2, s. 29.)

Editor's Note.—While the reference to the Secretary of State should be changed to the State Vehicle Commission, to conform to the more recent acts, sec. 2621(2) et seq.; it would seem that there are no provisions in the Motor Vehicle Act, corresponding to this section.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

The effect of this act was summarized in 1 N. C. Law Rev. 298.

Validity of Section.—A statute permitting a municipal corporation to impose a tax on all express companies alike for delivering goods by trucks to consignees in a city, is uniform in its application, comes within the police powers of the State, and is not contrary to the Constitution in relation to either intrastate or interstate commerce, and the imposition of a tax therefor not to exceed $50 on each motor truck is reasonable. Southeastern Exp. Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475.

Tax upon Privilege.—This section imposes a privilege tax for operating motor vehicles for the private use and for carrying passengers for hire, restricting the imposition of a privilege tax in excess of one dollar a year by a municipality upon each class alike. State v. Fink, 179 N. C. 712, 103 S. E. 16.

Repeals Local Law.—The particular intent expressed by this section forbidding counties, cities and towns from imposing a license tax in excess of one dollar a year on those running motor vehicles for hire, controls a general power conferred prior thereto in a municipal charter, to levy a franchise or license tax thereon. State v. Fink, 179 N. C. 712, 103 S. E. 16.

Since the passage of this section a city ordinance imposing a license tax of over one dollar a year for those running motor vehicles for hire, is void, though authorized by the city's charter, and where the person so operating them has complied with the statute, he may not be convicted of the offense imposed by the ordinance. State v. Fink, 179 N. C. 712, 103 S. E. 16.

Section 2787 is not inconsistent with this section. State v. Jones, 191 N. C. 371, 131 S. E. 734.

Second and Third Provisos Construed.—The second proviso of this section refers to the privilege of operating a motor vehicle, and the third for regulating, licensing and controlling chauffeurs and drivers; and the words "any such car" in the third priviso do not restrict the drivers' license to the cars on which the privilege tax is laid; and an ordinance imposing a chauffeur's tax upon those driving cars within the corporate limits of the town is authorized by the statute. State v. Denson, 189 N. C. 173, 126 S. E. 517.

Fees Chargeable by City.—The fees for the registration and licensing of motor vehicles contemplated by this section include the cost of registration, permits, licenses, certificates, and plates, and exclude all other State and local taxes except an ad valorem tax and a license or registration fee of $1, which may be charged by a county, city, or town. But no county, city, or town shall charge or collect an additional fee under the guise of a chauffeur's license for the privilege of operating a motor vehicle, although the governing authorities may regulate, license, and control chauffeurs and drivers, and charge therefor a reasonable fee. State v. Jones, 191 N. C. 371, 131 S. E. 734, 735.

Effect of Revenue Act upon Section.—The tax imposed upon express companies by the provisions of secs. 79, 79a, chapter 34, of the Revenue Act of 1921, payable to the State upon a percentage of their mileage, and in certain sums of money to municipal corporations according to population, and also a privilege tax to the latter, prohibiting municipalities from collecting additional taxes thereon, did not include within its intent and meaning the tax imposed by this section in favor of municipal corporations for the privilege of operating a motor vehicle therein and in transporting property for hire. Southeastern Exp. Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475.

Application to Express Company Truck.—Where an express company delivers goods to the consignee in cities, this service is in addition to that in smaller places, where deliveries are not so made, for which additional service compensation is included in its general express charges, and comes within the intent and meaning of this section, authorizing a tax of not exceeding $50 for each motor truck operated within the municipality. Southeastern Exp. Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475.

Same—Judicial Knowledge of Damage to Streets.—The courts will take judicial notice that express companies do not deliver freight to the consignees in small places as they do in larger cities, and that in the latter the large express trucks employed in this service are damaging to the streets, which the municipality is obliged by statute to keep in proper repair for the benefit of its citizens. Southeastern Exp. Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475.

§ 2612(b). Repeal of laws permitting county, etc., to levy license tax.—Any statute enacted at the 1923 session of the general assembly which permits any county, city or town to levy any license tax on any motor vehicle, other than that provided in section 2612(a), is hereby repealed in so far as it permits such excess tax. (1923, c. 241, s. 2.)

§ 2613. Application of funds by state highway commission.—All funds collected by the secretary of state under the provisions of this chapter, or amendments thereto, shall be paid to the state treasurer monthly, to be kept as a separate fund to be known as the "state highway fund," which shall be drawn upon and expended as directed by the state highway commission for the construction and maintenance of a system of state highways as authorized by article 1, entitled State Highway Commission and State Highway Fund, of the chapter Roads and Highways, or by this chapter. Nothing in this chapter shall

prevent the state highway commission and the local road authorities to make agreements as to the method or the amount required for the maintenance of roads and bridges to be maintained under the provisions of this chapter. (1917, c. 140, s. 7; 1917, c. 141; 1913, c. 107, s. 7.)

Editor's Note.—This section seems to be superseded by sec. 2621(31). See the editor's note under sec. 2602.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2613(a). Operation of vehicle without license a misdemeanor.—Any person, firm, or corporation that shall operate any motor vehicle upon any highway of the state, without license, as is required under this article, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1921, c. 2, s. 30.)

Editor's Note.—Similar provisions in the new act will be found in secs. 2621(6) and 2621(40).

§ 2613(b). State highway fund; payment out of upon vouchers.—For the purpose of carrying out the provisions of this article the funds collected hereunder shall be kept by the state treasurer in a separate fund to be known and designated as "State Highway Fund," and all moneys directed to be paid out under this article shall be paid by the state treasurer upon voucher issued by the state highway commission, and charged to the state highway fund. (1921, c. 2, s. 31.)

Editor's Note.—This section seems to be superseded by sec. 2621(31). See editor's note to sec. 2602.

Art. 3A. Gasoline Tax

§§ 2613(c) to 2613(i).—Superseded by §§ 2613(i1) et seq.

§ 2613(i1). Definitions; "motor fuels," "distributor". — The following words, terms, and phrases hereinafter used for the purpose of this act are defined as follows:

(a) "Motor Fuels" are such fuels known as gasoline, benzine, naptha, liberty fuel, benzol, and such other volatile and inflammable liquids produced and compounded for the purpose of operating internal combustion engines, except the product commonly known as kerosene oil.

(b) "Distributor" is any person, firm, association of persons, corporation, municipality, county, or other political subdivision or agency that has on hand or in his or its possession in this State, or that produces, refines, manufactures, or compounds such motor fuels in this State for sale, distribution, or use herein. (1927, c. 93, s. 1; 1931, c. 145, s. 24.)

Editor's Note.—Sections 2613(c)-(i) as passed in 1921 were repealed by the Act of 1927 and reenacted.

The Act of 1931 amended these sections as amended by the act of 1927 and Public Laws 1929, c. 40, to read as appearing in §§ 2613(i1)-2613(i15).

The term motor vehicle is defined by §§ 2598, 2621(1), and 2621(44).

A county purchasing gasoline for use by it in trucks and automobiles in the discharge of its governmental function of maintenance of its highways is not a "distributor" within the purview of this chapter, imposing an excise tax upon distributors of gasoline, since general statutes do not bind the sovereign unless the sovereign is expressly mentioned, and under the express language of the statute the Legislature could not have intended to include counties thereunder since counties could not be subject to the procedure for its enforcement nor liable for the penalty for its evasion. As to whether Article V, § 5, of the State Constitution prohibits the General Assembly from levying such a tax on a county, quare, but not decided, the question not being necessary to the determination of the case. O'Berry, State Treasurer v. Mecklenburg County, 198 N. C. 357, 151 S. E. 880.

§ 2613(i2). Purpose of article; double taxation not intended.—The purpose of this article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuel manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors. (1927, c. 93, s. 2; 1931, c. 145, s. 24.)

§ 2613(i3). Sales in tank car shipments.—In the administration of this article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel shall be levied against and paid by such licensed distributor. (1927, c. 93, s. 2½; 1931, c. 145, s. 24.)

§ 2613(i4). Application for license as distributor.—Any distributor engaged in business when this article becomes effective shall, within thirty days thereafter, and any other distributor, prior to the commencement of doing business, file a duly acknowledged application for a license with the Commissioner of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and if a corporation, the names and addresses of the principal officers and such other information as the Commissioner of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding twenty thousand dollars ($20,000) in such form and with such surety or sureties as may be required by the Commissioner of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. Upon approval of the application and bond, the Commissioner of Revenue shall issue to the distributor a non-assignable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or cancelled. No distributor shall, after thirty days from the effective date of this article, sell, offer for sale, or use any motor fuels within this State until such license has been issued; nor shall any distributor engaging in such business subsequent to the passage of this article commence said business without first procuring a license. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00), nor more than five thousand dollars ($5,000.00), or imprisoned for not more than twenty-four months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24.)

§ 2613(i5). Gallon tax.—There is hereby lev-

ied and imposed a tax of six cents per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political sub-division shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of one per cent (1%) in lieu of the quantity sold, distributed or used. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24.)

Editor's Note.—This section was also amended by Public Laws of 1929, ch. 125, which added a proviso relating to Guilford County.

Our state gasoline tax is an excise and not a property tax. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813.

And It May Be Levied on Municipality.—Under the provisions of our Constitution, Art. V, sec. 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of this section, a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813.

§ 2613(i6). Payment of tax.—Every distributor, at the time of making the report required by section 2613(i5), shall pay to the Commissioner of Revenue, the amount of tax due for the month covered by such report. The tax so paid shall be transferred promptly by the said commissioner to the State Treasurer as other receipts of his office and the State Treasurer shall place the same to the credit of the "State Highway Fund." (1927, c. 93, s. 5; 1931, c. 145, s. 24.)

§ 2613(i7). Action by commissioner of revenue if distributor fail to report.—If any distributor shall wilfully fail, neglect or refuse to make the reports required by section 2613(i5) within the time therein provided, the Commissioner of Revenue shall immediately inform himself as best he may as to all matters and things required to be set forth in such reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent distributor for the period covering the delinquency, adding to the tax so determined and as a part thereof, an amount equal to twenty-five per cent (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per cent and transmit the same in the manner provided in section 2613(6) for the disposition of other taxes. (1927, c. 93, s. 6; 1931, c. 145, s. 24.)

§ 2613(i8). Record of transactions. — Every distributor of motor fuels shall keep a record of all such fuels purchased, received, sold, delivered or used by him, which shall include the number of gallons so purchased, received, sold, delivered, or used, and the dates of such purchases and sales, which records shall be preserved for a period of two years and shall at all times during the business hours of the day be subject to inspection by the Commissioner of Revenue or his deputies, or such other officers as may be duly authorized by said Commissioner. (1927, c. 93, s. 8; 1931, c. 145, s. 24.)

§ 2613(i9). Rebates for fuels sold to U. S. Government or for use in aircraft. — The Commissioner of Revenue is authorized under such rules and regulations as he may adopt for that purpose, to relieve any distributor from the payment of the tax herein levied for any motor fuels sold to the United States Government, and/or gasoline of such quality that it is not adapted for use in ordinary automotive vehicles, but is designed for and sold and used exclusively in aircraft motors, when it appears to the satisfaction of the Commissioner of Revenue that the tax herein imposed has not been added to the sale price of such motor fuel, and the Commissioner of Revenue is likewise authorized to refund by warrant drawn upon the State Treasurer to the person paying the same, any tax paid under the provisions of this article which constitutes an unlawful burden upon interstate commerce, in conflict with the provisions of the Constitution of the United States: Provided, that any claims for such rebate which are not filed with the Commissioner of Revenue in accordance with forms to be provided by the Commissioner of Revenue within sixty days after the payment of said tax shall be deemed to have been waived. (1931, c. 145, s. 24.)

§ 2613(i10). Penalty for making false claim for rebate.—Any person who shall wilfully make any false or fraudulent report as the basis for claim for rebate or deduction under the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined and imprisoned in the discretion of the court. (1927, c. 93, s. 10; 1931, c. 145, s. 24.)

§ 2613(i11). Enumeration of acts constituting misdemeanor.—Any distributor who shall fail, neglect, or refuse to make the reports herein required or pay the taxes herein imposed, or who shall refuse to permit the Commissioner of Revenue or any agent appointed by him, to examine the books and records of such distributor pertaining to the motor fuels made taxable by this act or who shall make any false, or fraudulent report or statement hereunder, or who does, or attempts to do, anything whatsoever to avoid a full disclosure of the quantity of motor fuels sold, distributed or used within this State shall be guilty of a misdemeanor, and, on conviction, shall be

fined not less than one hundred dollars ($100.00) and not more than five thousand dollars ($5,000.00) or, in the case of an individual or the officer or employee charged with the duty of making such report for a corporation, to be imprisoned not exceeding twenty-four months or both, and the license of such distributor may be revoked. (1927, c. 93, s. 11; 1931, c. 145, s. 24.)

§ 2613(i12). Actions for tax; double liability.—If any person, firm or corporation shall fail to pay the amount of tax levied in section 2613(i5) within the time specified in section 2613(i6) of this act, it shall be the duty of the commissioner of revenue to proceed at once to enforce the payment of said tax, and to this end the commissioner of revenue shall have and may exercise all the remedies provided in the revenue laws of the state for enforcing payment of other taxes, including the right of execution through the sheriffs of the several counties of the state upon any property of the delinquent taxpayer, and shall with the assistance of the attorney general whenever necessary bring appropriate action in the courts of the state for the recovery of such tax. If it shall be found as a fact that such failure to pay was willful on the part of such person, firm or corporation, judgment shall be rendered against such person, firm or corporation for double the amount of tax found to be due, together with interest, and the amount of taxes and penalties shall be paid into the state treasury to the credit of the state highway fund. All remedies which now or may hereafter be given by the laws of the state of North Carolina for the collection of taxes are expressly given herein for the collection of taxes levied in this article or of judgment recovered under authority of this article. It shall also be the duty of the commissioner of revenue to revoke the license of any licensed distributor who shall refuse, fail or neglect to pay the taxes levied in section 2613(i5) within the time specified in section 2613(i6), and whose account shall remain delinquent for any part of said tax for ten days thereafter: Provided, that in consideration of the reduction by thirty days of time previously allowed before enforcing payment of this tax the commissioner of revenue may find the correct amount of accrued tax liability for the last thirty days next preceding the effective date of this act, and may permit the said sum of delinquency to be divided into twelve equal monthly payments to be paid on the twentieth day of each succeeding twelve months, plus interest at the rate of six per cent per annum on deferred payments and upon failure of any distributor to meet any such deferred payment at the time specified or within ten days thereafter, together with the current monthly liability, it shall be the duty of the commissioner of revenue to revoke the license of any such distributor and to proceed to enforce payment of the whole amount that may be due by said distributor. (1927, c. 93, s. 12; 1931, c. 145, s. 24; 1933, c. 137, s. 1.)

Editor's Note.—Public Laws of 1933, c. 137, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 2613(i12)a. Auditing books of licensed distributors.—It shall be the duty of the commissioner of revenue, by competent auditors, to have the books and records of every licensed distributor in the state examined at least twice each year to determine if such distributor is keeping complete records as provided in section 2613(i8), and to determine if correct reports have been made to the state department of revenue by every such distributor covering the total amount of tax liability of such licensed distributor. It shall also be the duty of such auditors to check the records of each distributor with the records of shipment by railroad companies, or by boats or trucks, or other available sources of information, and also to check the records covering the receipt and distribution of any other liquid petroleum products handled by each distributor. (1933, c. 137, s. 1.)

§ 2613(i12)b. License constitutes distributor trust officer of state for collection of tax.—The licensing of any person, firm or corporation as a wholesale distributor of gasoline shall constitute such distributor an agent or trust officer of the state for the purpose of collecting the tax on the sale of gasoline imposed in this article, and the failure of any such person, firm or corporation who adds the amount of the tax levied in this article to the customary market price for gasoline and collects the same and who shall fail to remit the gasoline tax to the commissioner of revenue upon the terms and as provided herein, such failure shall constitute embezzlement of state funds, and upon conviction under this section any individual, partner or officer or agent of any association, partnership or corporation shall be guilty of a felony, and upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 137, s. 1.)

§ 2613(i12)c. Boats and vehicles transporting motor fuels must register.—The owner or operator of any motor vehicle using the highways of this state, or the owner or operator of any boat using the waters of this state, transporting into, out of, or between points in this state, any gasoline or liquid motor fuel taxable in this state, or any liquid petroleum product that is, or may be hereafter made, subject to the inspection laws of this state, shall, as a prerequisite to the transportation of such products over the highways or waters of this state, register such intention with the commissioner of revenue in advance of such transportation, with notice of the kind and character of such products to be transported, and if by motor vehicle the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of this article, the commissioner of revenue shall, without any charge therefor, issue a numbered certificate to such owner or operator for each motor vehicle intended to be used for such transportation, which numbered certificate shall be prominently displayed on the motor vehicle or boat used in transporting the products named in this section. Every person hauling, transporting, or conveying gasoline over any of the public highways of this state shall, during the entire time he is so engaged, have in his possession an invoice, or bill of sale, or other record evidence showing the true name and address of the person from whom he has received the gasoline, and the number of gallons so originally received by him from said person, and the

true name and address of every person to whom he has made deliveries of said gasoline, or any part thereof, and the number of gallons so delivered to each of said persons. The person hauling, transporting or conveying such gasoline shall, at the request of any representative of the commissioner of revenue, produce and offer for inspection said invoice or bill of sale, or record evidence. If said person fails to produce the invoice or bill of sale, or record evidence, or if, when produced, it fails to clearly disclose said information, the same shall be prima facie evidence of a violation of this section. No person shall haul, transport or convey gasoline over any of the public highways of the state except in vehicles plainly and visibly marked on the rear thereof with the word "gasoline" or other name of the motor fuel being transported, in letters at least four inches high and of corresponding appropriate width, together with the name or trade mark of the owner of the vehicle in which such gasoline is contained displayed in a conspicuous place on the vehicle. Any person guilty of violating any of the provisions of this sub-section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 137, s. 1.)

§ 2613(i13). Rebates to counties penalize road allowance.—If the tax herein levied shall be held by the Supreme Court uncollectible as against any county purchasing motor fuel from a source other than a licensed distributor, the Commissioner of Revenue shall determine the amount of motor fuel purchased by any county upon which no tax has been paid, and certify such amount to the State Highway Commission; and, thereupon, the State Highway Commission shall deduct from the allocation of County Road Fund to such county the equivalent of six (6) cents per gallon, according to the finding of the Commissioner of Revenue. (1931, c. 145, s. 24.)

§ 2613(i14). Application of proceeds of gasoline tax. — The fund derived from the tax herein levied shall be for the exclusive uses of the purposes set out in this article, and disbursed on vouchers drawn by the State Highway Commission in accordance with the acts of the General Assembly dealing with the subject matter herein referred to. (1931, c. 145, s. 24.)

§ 2613(i15). Fuels purchased for farm tractors, motor boats and manufacturing processes entitled to rebates.—Any person, association, firm, or corporation, who shall buy in quantities of ten gallons or more at any one time any motor fuels as defined in this article for the purpose of use, and the same is actually used, for a purpose other than the operation of a motor vehicle designed for use upon the highways, on which motor fuels the tax imposed by this article shall have been paid, shall be reimbursed at the rate of five cents per gallon of the amount of such tax or taxes paid under this article, upon the following conditions and in the following manner:

(a) Before using such motor fuels the person, association, firm, or corporation proposing to use the same shall apply to the commissioner of revenue, upon blanks to be furnished by him, for a refund permit. Such application shall state the use for which the motor fuels for which taxes are to be refunded are to be used. If such motor fuels are to be used in a gasoline motor or engine, the application shall state the make and kind of such motor, the serial number thereof, and the purpose for which it is proposed to use the same. If such motor fuels are to be used for some purpose other than the operation of an engine, the application shall state the nature and kind of process in which such motor fuels are to be used, and the method and manner in which such motor fuels are to be used, stored and kept. In all cases such application shall state the approximate number of gallons of such motor fuels to be used per month, and shall give such other information as the commissioner of revenue shall require. In making application for refund permit, the person making application may combine one or more of the uses above specified in the same application. Dealers in motor fuel engaged in selling such fuel to motor boats owned by non-residents, and which boats are not documented in this state, may apply to the commissioner of revenue for a permit on forms to be prescribed by the commissioner of revenue, which permit shall entitle the said dealer to be furnished with blanks by the commissioner of revenue in such form as may be prescribed by him, for the use of such non-resident boat owners to file applications for refunds as provided in this article, and said non-resident boat owners shall not be required to secure permits. Such application for refund shall be filed in the name of the non-resident boat owner on blanks furnished by dealers holding permits. Said applications must be accompanied by an invoice of the dealer holding permit, showing the number of gallons of motor fuel delivered into the tanks of said boats and shall furnish such other information as the commissioner of revenue shall require. Applications must be sworn to before a notary public of this state and filed with the commissioner of revenue. Upon approval of said applications by the commissioner of revenue, said applications shall be paid as other applications for refund are paid: Provided, however, that such non-residents must file applications with the commissioner of revenue within thirty days from the date of purchase of said gasoline and that said applications may be paid immediately upon approval. The application shall be accompanied by a fee of one dollar, to be returned if the refund permit is not issued. Such fees, if retained, shall be paid by the commissioner of revenue to the state treasurer, to be credited by him to the state highway fund.

(b) If, upon the filing of such application, the commissioner of revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which the said tax refund is requested are to be used exclusively for one of the purposes set forth above and specified in said application, he shall issue to said applicant a refund permit specifying the terms and conditions under which refunds on such motor fuels will be made, which refund permits will expire with the fiscal year in which it is issued. Refund permits issued under this article shall state the name of the person, association, firm, or corporation to whom and for whose benefit it is issued, the purposes for which the motor fuels upon which tax refunds are to be made under

the provisions thereof are to be used and the approximate number of gallons expected to be used per month for such purposes, and the commissioner of revenue shall determine such amount. Such refund permits shall bear serial numbers and shall not be transferable, nor shall any right or claim for refund under the same be transferable: Provided, however, that the commissioner of revenue shall not be required to issue any refund permit for use of motor fuels unless and until the applicant therefor shall have satisfied the commissioner of revenue that provisions have been made for the storage of such motor fuels in a manner prescribed by the commissioner of revenue, so as to segregate the same from motor fuels for use in vehicles upon the highways.

(c) All claims for refunds for tax or taxes for motor fuels under the provisions of this article shall be filed with the commissioner of revenue on forms to be prescribed by him, between the first and the fifteenth day of January, April, July, and/or October of each year, and at such periods only, and shall cover only the motor fuels so used during the three months immediately preceding the filing of such application. Such application shall be accompanied by ticket, invoice, or other document from the retail dealer or distributor for motor fuels, issued at the time of purchase of such motor fuel and showing the purchase of the number of gallons of motor fuels on which said refund is requested, and upon which shall be written or stamped at the time of purchase appropriate words showing the purpose for which the said motor fuel is purchased and that refund will be requested. The application shall be sworn to before the clerk of the superior court or a notary public of the county in which the applicant resides or has his place of business, and such attesting officer is authorized to charge therefor a fee of not exceeding twenty-five cents.

(d) If the commissioner of revenue shall be satisfied that the motor fuels specified in such application for refund have been legitimately used for the purpose specified in the refund permit issued to such applicant, he shall issue to such applicant a warrant upon the state treasurer for the said taxes paid on such motor fuels under this article.

(e) No refund of tax or taxes shall be paid on motor fuels except under a refund permit and to the person, association, firm, or corporation named in said refund permit in the manner herein provided for.

(f) If the commissioner of revenue shall be satisfied that the holder of any refund permit issued under the provisions of this act has violated the conditions thereof, or has collected or sought to collect any refund of tax or taxes thereunder upon any motor fuels not used in strict accordance with said refund permit, he shall issue notice to the holder of such refund permit to show cause why the refund permit should not be cancelled, which notice shall state a time and place of hearing upon said notice. If upon such hearing the commissioner shall find as a fact that the permit holder has violated the terms of his permit, he shall cancel such refund permit and the holder thereof shall be required to repay all tax or taxes which have been refunded to him under such permit.

(g) Any applicant for a refund permit or any holder of a refund permit may appeal from the decision of the commissioner of revenue upon any matters arising under this section to the state board of assessment, who shall hear the matters presented on such appeal at a time and place to be fixed by said state board of assessment. Such state board of assessment shall have authority to cause the attendance of witnesses in behalf of such applicant or of the commissioner of revenue, and shall have authority to administer oaths and take testimony.

(h) The commissioner of revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund, to refer the matter to any agent of the department of revenue or to any member of the state highway patrol, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuel therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the commissioner of revenue.

(i) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the general assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this article shall be so construed.

Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00), or imprisoned not exceeding two years, in the discretion of the court. 1931, c. 145, s. 24, c. 304; 1933, c. 211, s. 1.)

Editor's Note.—Public Laws of 1933, c. 211, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 2613(i16). Reports of carriers.—Every person, firm or corporation engaged in the business of, or transporting motor fuel, whether common carrier or otherwise, and whether by rail, water, pipe line or over public highways, either in interstate or in intrastate commerce, to points within the state of North Carolina, and every person, firm or corporation transporting motor fuel by whatever manner to a point in the state of North Carolina from any point outside of said state shall be required to keep for a period of two years from the date of each delivery records on forms prescribed by, or satisfactory to, the commissioner of revenue of all receipts and deliveries of motor fuel so received or delivered to points within the state of North Carolina, including duplicate original copies of delivery tickets or invoices covering such receipts and deliveries, showing the date of the receipt or delivery, the name and address of the party to whom each delivery is made, and the amount of each delivery; and shall report, under oath, to the commissioner of revenue, on forms prescribed by said commissioner of revenue, all

deliveries of motor fuel so made to points within the state of North Carolina. Such reports shall cover monthly periods, shall be submitted within the first ten days of each month covering all shipments transported and delivered for the previous month, shall show the name and address of the person to whom the deliveries of motor fuel have actually and in fact been made, the name and address of the originally named consignee if motor fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each tank car, and the number of gallons contained therein if shipped by rail; the name of the boat, barge or vessel, and the number of gallons contained therein, and the consignor and consignee if shipped by water; the license number of each tank truck and the number of gallons contained therein, and the consignor and consignee if transported by motor truck; if delivered by other means the manner in which such delivery is made; and such other additional information relative to shipments of motor fuel as the commissioner of revenue may require: Provided, that the commissioner of revenue may modify or suspend the provisions of this section with regard to reports of interstate or intrastate shipments or deliveries upon application of any licensed distributor: Provided, also, that the commissioner of revenue shall have full power to require any distributor to make additional reports and to produce for examination duplicate originals of delivery tickets or invoices covering both receipts and deliveries of products as herein provided. The reports herein provided for shall cover specifically gasoline, kerosene, benzine, naphtha, crude oil, or any distillates from crude petroleum. Any person, firm or corporation refusing, failing or neglecting to make such report shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1929, c. 230, s. 1; 1933, c. 137, s. 1.)

Editor's Note.—Public Laws 1931, c. 145, s. 24, amended this article as amended by Public Laws 1927, c. 93 and Public Laws 1929, c. 40, to read as is set out in §§ 2613(i1)-2613(i15). However, the 1931 Act made no reference to Public Laws 1929, c. 230, which had amended the Act of 1927, and it is assumed that the legislature intended for it to remain in force.

Public Laws of 1933, c. 137, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 2613(i17). Forwarding of information to other states.—The commissioner of revenue of the state of North Carolina shall, upon request duly received from the officials to whom are intrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel. (1933, c 137, s. 1.)

Art. 3B. Motor Busses

§ 2613(j). Definitions. — In all matters relating to the administration of this act, whenever and wherever the following terms are used they shall be construed and defined as follows:

(a) The term "act" means this act.

(b) The term "state" means the State of North Carolina.

(c) The term "person" means an individual, a firm or a co-partnership.

(d) The term "corporation" means a corporation, a company, an association or a joint-stock association.

(e) The term "commission" means the Corporation Commission of North Carolina.

(f) The term "certificate" means the franchise certificate, granting authority to a motor vehicle carrier to operate motor vehicle service over a specific route.

(g) The term "driver's permit" means the permit issued, after examination, authorizing a person to drive a motor vehicle operating under the act.

(h) The term "vehicle permit" means the card, or other marker, bearing the identification of the motor vehicle and the highway routing.

(i) The term "motor vehicles" means vehicles driven by gas, oil, electric or steam motors and not operated on rails.

(j) The term "trailer" means a vehicle without attached motor, designed for carrying property wholly on its own structure and for being drawn by a motor vehicle.

(k) The term "motor vehicle carrier" means every corporation or person, as the term "corporation" and the term "person" are hereinbefore defined, or their lessees, trustees or receivers owning, controlling, operating or managing any motor vehicle used in the business of transporting persons or property for compensation between cities, or between towns, or between cities and towns over the public highways of the State, as public highways are defined herein.

(l) The term "city" means any collection of people incorporated pursuant to the provisions of section four, article eight, of the Constitution of North Carolina.

(m) The term "town" means any unincorporated community, point, or collection of people having a geographical name by which it may be generally known and is so generally designated.

(n) The term "service" means that motor vehicle service which is held out to the public and of which the public may avail itself at will for transportation over the public highways between cities or between towns, or between cities and towns, irrespective of whether the service is upon regular schedule or otherwise.

(o) The term "public highway" means every street, road or highway in this State, whether within or without the corporate limits of any municipality.

(p) The term "between fixed termini or over a regular route" means the termini or route, respectively, between or over which any motor vehicle carrier usually or ordinarily operates any motor vehicle, even though there may be periodical or irregular departures from such termini or route.

(q) The term "casual trip" means a trip on call for the purpose of transporting passengers or property to a given destination and return, or either. (1925, c. 50, s. 1; 1927, c. 136, s. 1; 1929, c. 193, s. 1.)

Editor's Note.—The Bus Law of 1925 was repealed,

amended, and re-enacted by the Act of 1927, as now appearing in this and the following sections.

The Act of 1929 amended subsection (q) of this section by striking out the words "under contract or" following the word "trip."

The Motor Vehicle Act, secs. 2621(1) et seq., does not apply to busses regulated under this article. See sec. 2621(39).

Several of the terms defined in this section are also defined in secs. 2598, 2621(1), and 2621(44).

For the regulation of motor vehicle carriers pursuant to this article, see 33 Rept. of Corp. Comm. (1925-6) pp. 21 et seq., pp. 59, 114.

Purpose of Article.—It was the intent of this statute, to regulate the public service of automobiles on the highways of the State between cities and towns through classifications of the Corporation Commission requiring a license therefor, and making a violation thereof indictable as a criminal offense. State v. Andrews, 191 N. C. 545, 132 S. E. 568.

Article Contemplates a Continuous Business.—This statute contemplates a continuous business. The "service" rendered in contemplation of this statute construed with the classifications made by the Corporation Commission, does not include within the intent and meaning thereof an occasional service rendered at the request of the passenger, and not constituting a regular business or practice of a public service between or at the termini of designated or fixed routes, and an indictment under it will not be upheld. State v. Andrews, 191 N. C. 545, 132 S. E. 568.

Report of Carriers Ordered.—The order, docket number 6376, of the commission of Jan. 2, 1926, requires that the report of the motor vehicle carriers shall report as of December the first each year its assets, liabilities and revenues, on forms furnished by the commission and that it must be filed in the office of the commission in Raleigh on or before March the fifteenth of each year. See Corp. Comm. Report for 1925-1926.

Regulations of Business.—For the regulations passed by the commission as to the size, etc., of vehicle used, and the regulation of the business, see the Biannual Rept. of the Corp. Comm. for 1925-1926.

Union Stations for Carriers.—Pursuant to the power vested in it by this section, the North Carolina Corporation Commission ordered that on or before Aug. 1, 1925, the motor vehicle carriers should erect union stations in the principal cities named in the order to and from which all carriers should operate. Regulation was also made for the management and control of such stations. See Biannual Rept. of Corp. Comm. for 1925-1926.

§ 2613(k). To whom applicable.—No corporation or person, their lessees, trustees, or receivers shall operate over the public highways in this State any motor vehicle or motor vehicle with trailer, as hereinbefore defined as a motor vehicle carrier, for the transportation of persons or property between cities, or between towns, or between cities and towns, for compensation, except in accordance with the provisions of this act, and said operation shall be subject to control, supervision, and regulation by the commission in the manner provided by this act: Provided, that where the corporate limits of two or more cities join, they shall be treated as one for purposes of administering this act: provided, further, that nothing in this act shall prohibit a motor vehicle carrier under this act, nor any motor vehicle on which the franchise tax has been paid as provided in the current revenue act from making casual trips on call over routes established hereunder; provided, that on said casual trips no one shall be allowed to pick up any passenger or property along the route, nor be permitted on the return trip to carry any passengers or property other than those or that included in the original trip; nor shall it apply to motor vehicles used exclusively for transporting school students from and to their homes; nor to motor vehicles used exclusively for transporting persons to or from religious services; nor to motor vehicles used exclusively in carrying the United States mail; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors; nor to motor vehicles used exclusively in the transportation of bona fide employees of an industrial plant to and from the places of their operator shall furnish such transportation facilities regular employment: Provided, that if a franchise to such mill or factory maintaining a residential unit of one thousand inhabitants or more, the foregoing exception shall not be operative: Provided, further, that this shall not repeal chapter three hundred and seventy-five, Public Laws, one thousand nine hundred and thirty-one. (1925, c. 50, s. 2; 1927, c. 136, s. 2; 1929, cc. 193, s. 1, 254, s. 1; 1935, c. 111.)

Editor's Note.—This section was twice amended by Public Laws of 1929. Chapter 193 struck out the words "under contract or" following the word "trips" in line 20. Chapter 254 inserted in lines 17 to 19 the words "on which the franchise tax has been paid as provided in the current revenue act" in lieu of the words formerly appearing.

The amendment of 1935 adds the two provisos at the end of the section and the clause immediately preceding such provisos reading: "nor to motor vehicles used exclusively," etc.

The Act of 1931 referred to near the end of this section provided that Acts 1929, chapter 345, section 165, taxing motor vehicles for hire, should not apply to motor vehicles operated by the owner thereof who may use such motor vehicles only for private use and the transportation of fellow-workmen between their homes and places of regular employment.

A person transporting persons or property by motor vehicle for hire between cities and towns as a business, accepting all persons for the transportation who properly present themselves, must obtain the franchise required by this and the following section, unless he becomes within the exception specifically pointed out, regardless whether or not any other person or corporation holds a valid franchise covering that section of highway, while persons operating motor vehicles for hire without regard to fixed termini are required to obtain only the "for hire" license in § 7880(96). Winborne v. Mackey, 206 N. C. 554, 174 S. E. 577; Winborne v. Browning, 206 N. C. 557, 174 S. E. 579.

The requirement of a franchise under this and following section, for hire between fixed termini which are cities or towns, is not affected by the fact that no other person or corporation has a valid franchise covering the same section of highway, nor does the exception relating to U. S. mail apply unless the motor vehicle is used exclusively for carrying mail. Winborne v. Sutton, 206 N. C. 559, 174 S. E. 580.

Motor vehicles are not "used exclusively in carrying United States mail," where they also carry passengers and property for compensation, and such operation does not come within the exception relating to United States mail under this section. Winborne v. Browning, 206 N. C. 557, 559, 174 S. E. 579.

§ 2613(l). Application for franchise certificate.—Every corporation or person, their lessees, trustees, or receivers, before operating any motor vehicle upon the public highways of the State for the transportation of persons or property for compensation, within the purview of this act, shall apply to the commission and obtain a franchise certificate authorizing such operation, and such franchise certificate shall be secured in the manner following:

(a) Application for such certificate shall be made by such corporation or person, their lessees, trustees, or receivers, to the commission in the manner prescribed, and on forms furnished, by the commission.

(b) Upon the filing of said application, the commission may, in its discretion, fix a time and

place for the hearing of said application. When the time and place for the hearing has been fixed, the applicant shall, at least ten days prior to said hearing, cause to be published in a newspaper of general circulation in the territory to be served a notice reciting the fact of the filing of said application together with a statement of the time and place for the hearing of said application.

(c) At the time specified in said notice, or at such time as may be fixed by the commission, a public hearing upon said application shall be held by said commission: Provided, that in passing upon applications for certificates, the commission may take into consideration the reliability of the applicant, his court record, and any other matters tending to qualify or disqualify him as a carrier. After such hearing, the commission may issue the license certificate, or refuse to issue it, or may issue it with modifications and upon such terms and conditions as in its judgment the public convenience and necessity may require.

(d) Before granting the franchise certificate to an applicant for operation of passenger or freight motor vehicles over the public highways of the State, the commission shall request and the Highway Commission of the State shall furnish to the commission its recommendations as to the size and weight of the motor vehicles and the type of tires with which said motor vehicles may be equipped, which may be safely operated over said highways and may be operated over the same without greatly damaging them, and such recommendations made by the Highway Commission shall in all cases be observed by the commission in granting franchise certificates to applicants for operation over said highways.

(e) No license certificates shall be issued for the operation on any highway in the State of any motor propelled vehicles of greater width than eighty-six (86) inches and greater loaded weight than fifteen thousand (15,000) pounds for passenger traffic, and greater width than eight-six (86) inches and greater loaded weight than nine (9) tons for freight traffic, and the commission shall have power at any time, when in its judgment the public convenience or safety requires, or upon request of the Highway Commission, to reduce the size and weight of motor vehicles operated upon the public highways under this act, whether upon hard-surfaced or other types of highway construction.

(f) The commission may refuse to grant any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized similar class of service, unless it is shown to the satisfaction of the commission that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity and the existing operators, after thirty days' notice, fail to provide the service required by the commission: Provided, that where two or more highways intersect within less than twenty-five miles of any incorporated city and the business of such lines transacted at such intersection is insufficient to warrant the maintenance of a bus station, then the commission may in its discretion route all operators to the next city in which a bus station is established and maintained.

(g) All applications not acted upon by the commission within sixty days from date same were filed because of request of applicant shall become null and void.

(h) No license certificate shall be issued to two or more persons until such persons have executed a partnership agreement and registered the same in each county in which they propose to operate.

(i) Applications may be tentatively granted pending purchase of equipment and equipment specifications and insurance, or bond; but no franchise certificate shall be issued until equipment has been purchased and equipment specifications and insurance, or bond, have been filed and approved. (1925, c. 50, s. 3; c. 137; 1927, c. 136, s. 3; 1931, c. 182; 1933, c. 440, § 1.)

Editor's Note.—The Act of 1931 added the proviso to subsection (f) of this section.

Prior to the 1933 amendment subsection (f) of this section provided that the commission could not refuse to grant the certificate because of the multiplicity of operators over the proposed route.

Quoted in Love v. Queen City Lines, 206 N. C. 575, 577, 174 S. E. 514.

§ 2613(m). Franchise certificate.—Upon granting a franchise under this act, the commission shall issue to such applicant a franchise certificate which shall expire automatically three years from the date thereof and shall contain the following matters:

(a) The name and post office address of the grantee.

(b) The public highway or highways over which, and the fixed termini between which, the grantee is permitted to operate.

(c) The kind of transportation, whether passenger or freight, in which the grantee is permitted to engage.

(d) Such additional matters as said commission may deem necessary or proper. (1927, c. 136, s. 4.)

§ 2613(n). Sale or other disposition of franchise.—No franchise certificate, issued under the provisions of this act, may be assigned or transferred, or pledged, or hypothecated in any way without the written consent of the commission. (1927, c. 136, s. 5.)

§ 2613(o). Insurance.—The commission shall in granting a franchise certificate, require the applicant to procure and file with the commission acceptable liability and property damage insurance in a company licensed to do business in the State; or, in lieu of such insurance may accept bond with solvent surety, on such motor vehicles to be used in such service, in such amount as the commission may determine, insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by the applicant upon the public highways of the State, and for damage to baggage in the custody of the assured and for loss of baggage when checked by the assured; and insuring the passengers and the public receiving personal injury by reason of any act of negligence arising from the operation of any motor vehicle by the applicant upon the route designated in the applicant's franchise certifi-

cate, whether such motor vehicle shall be specifically named, numbered or designated in the insurance policy or bond, or not, and whether such motor vehicle be in regular or temporary use by the applicant. Such policy, or bond, to contain such other conditions, provisions and limitations as the commission may prescribe, and shall be kept in full force and effect. Property carriers may, in the discretion of the commission, be required to secure and file acceptable cargo insurance, or bond, which shall cover damage to or loss of property only when listed on a duly prescribed and authorized bill of lading and receipted for by the assured or his agent. Before final judgment has been rendered by a competent court of jurisdiction, in any cause arising from the operation under any franchise certificate, no attachment shall lie against motor vehicles used in such operation by any motor vehicle carrier, who has filed with the commission such damage liability policy, or bond, so long as such policy or bond is in full force and effect. In any action in the courts arising out of damage to person or property, the assurer shall not be joined in the action against the assured; but upon final judgment against the assured, the assurer shall be liable within the limitations of the policy for the amount recovered and all court costs. (1927, c. 136, s. 6.)

See 13 N. C. Law Rev., 101.

Purpose of Section.—It seems that the Legislature enacted this section to meet the decision in Harrison v. Transit Co., 192 N. C. 545, 135 S. E. 460; Williams v. Frederickson Motor Express Lines, 195 N. C. 682, 684, 143 S. E. 256; Brown v. Brevard Auto Service Co., 195 N. C. 647, 143 N. C. 258.

Joinder of Assurer Forbidden.—The provision of this section prohibiting the joinder of the assurer in an action against the assured, relates to the remedy, and its enforcement does not impair the obligations of a continuing contract of indemnity when the injury in suit occurs after the time the act went into effect. Williams v. Frederickson Motor Express Lines, 195 N. C. 682, 143 S. E. 256; Brown v. Brevard Auto Service Co., 195 N. C. 647, 143 S. E. 258.

And where an assurer was joined in such action the complaint was properly dismissed upon demurrer. Williams v. Frederickson Motor Express Lines, 195 N. C. 682, 143 S. E. 256.

Cited in Virginia Beach Bus Line v. Campbell, 73 F. (2d) 97, 98.

§ 2613(p). Regulatory powers of commission; separation of races.—The commission is hereby vested with power and authority to supervise and regulate every motor vehicle carrier under this article; to make or approve the rates, fares, charges, classifications, rules and regulations for service and safety of operation and the checking of baggage of each such motor vehicle carrier; to supervise the operation of union passenger stations in any manner necessary to promote harmony among the operators and efficiency of service to the traveling public; to fix and prescribe the speed limit, which may be less but shall not be greater than that prescribed by law; to regulate the accounts and to require the filing of annual and other reports and of other data by such motor vehicle carriers; to require the increase of equipment capacity to meet public convenience and necessity; and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers, and the said commission is authorized, directed and empowered, whenever the public convenience and necessity may require, to increase, or decrease, or suspend temporarily the service upon any route for which a franchise certificate has been issued; and is hereby authorized, empowered, and directed to see that such rules and regulations and all, and singularly, the provisions of this article are enforced. The Commission shall require any motor vehicle carrier operating on a franchise granted by the Corporation Commission and coming within the provisions of this act, if engaged in the transportation of both white and colored passengers for hire, to provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races and/or on all busses or motor vehicles operating on a route or routes over which such carrier transports passengers of both races. Such accommodations may be furnished either by separate motor vehicles or by equal accommodations in motor vehicles. Provided that any requirement as to separate accommodation for the races shall not apply to specially chartered motor vehicles or to negro servants and attendants on their employers, or to officers or guards transporting prisoners; and provided that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of one race only shall not be required to provide any accommodations for the other race, and provided that an operator shall not be required to furnish any accommodations to the other race over a line or route where he has undertaken and is engaged in the transportation of passengers of only one race, and provided, further, that nothing contained in this act or the law amended hereby shall be construed to declare operators of busses and/or taxicabs common carriers. (1925, c. 50, s. 4; 1927, c. 136, s. 7; 1929, c. 216, s. 1.)

Editor's Note.—The Act of 1929 added all of this section beginning with the word "the" in line 34.

In Corporation Commission v. Interracial Commission, 198 N. C. 317, 151 S. E. 648 (1930), the Interracial Commission petitioned the Corporation Commission to make regulations to insure the negro traveling public separate but equal accommodations on the busses and in the passenger stations of the respondent bus companies. The petition was dismissed by the Corporation Commission on the ground that it had no power to interpret carriers by bus to be common carriers within the terms of the 1927 statute. On appeal to the Supreme Court it was held, (1) That bus lines operating within the state are common carriers, and (2) That the Corporation Commission has plenary power under the 1927 statute to require bus lines operating between points within the state in carrying passengers for hire to provide separate bus and station accommodations for white and negro passengers.

The legislature has authority to provide reasonable rules and regulations for the supervision of common carriers and to prevent unjust discriminations and preferences. This authority may be delegated to an administrative board or commission. The Corporation Commission is specifically vested by the 1927 statute with power to supervise and regulate motor vehicle carriers in matters affecting the relationship between such carriers and the traveling public. It seems clear from the language of this statute, without necessity of construction by the Corporation Commission, that the motor vehicle carriers provided for were common carriers. In accord with the policy of the state with regard to separation of races in public conveyances, the Commissoin should have issued orders for segregation upon the petition of the Interracial Commission.

Since the above litigation began, chapter 216, Public Laws of 1929 has gone into effect, but not being necessarily involved in the case was not thereby construed, al-

though the Court discussed it. The statute provides that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of one race only shall not be required to provide any accommodations for the other race. A state statute which requires the separation of the races, with equal accommodations, is not a denial of equal protection of the laws. But no one can be excluded by a common carrier on account of color, and a state law which authorizes race discrimination by a public carrier of passengers is unconstitutional. It is submitted therefore that the portion of the 1929 statute above set out is contrary to the equal protection clause of the fourteenth amendment.

The statute also provides that nothing contained in this act or the law amended hereby shall be construed to declare operators of busses and/or taxicabs common carriers. This provision appears to be superfluous. Whether a carrier is private or public depends upon the service it renders and not on legislation. Whether the service rendered is public or private depends on the facts, and the fourteenth amendment prevents the legislature from declaring a carrier private or public unless there is a reasonable basis of fact for so doing. 8 N. C. L. Rev. 455.

§ 2613(q). General powers of commission.— The commission may at any time, upon complaint or upon its own motion, that any motor vehicle carrier is violating the provisions of this act, or any of the rules or regulations prescribed by the commission, or is violating any of the laws of the State or any requirement of his franchise certificate, issue its order to the said motor vehicle carrier, notifying him to appear before the commission at a fixed time and place, at which time and place, the commission shall investigate the complaint made; and, if it shall be satisfied, after such hearing, that the said motor vehicle carrier holding a franchise certificate has wilfully violated or refused to observe the laws of this State touching motor vehicle carriers, or any of the terms of his certificate, or any of the commission's orders, rules or regulations, the said commission may suspend, revoke, alter, or amend any certificate issued under the provisions of this act; but the holder of such certificate shall have the right to appeal to the Superior Court as is now provided for appeals from orders of the commission: Provided, that in all cases of appeal from the decision of the commission, the commission may permit the certificate holder to operate pending such appeal if, in the judgment of the commission, the public convenience and necessity require such service; but no certificate holder may operate pending such appeal unless permitted to do so by the commission. (1927, c. 136, s. 8.)

§ 2613(r). Drivers' permits. — No person shall drive nor be permitted by any motor vehicle carrier to drive any motor vehicle operated for the transportation of persons or property as provided in this act, until such person has been granted a driver's permit by the commission. Any person desiring to drive any such motor vehicle, or to be employed by any carrier to drive such motor vehicle, shall make application to the commission in the manner prescribed, and on forms furnished, by the commission. Such application shall contain such information as will enable the commission to ascertain the applicant's moral character and physical and mental ability to operate safely such motor vehicle; and the applicant shall take such examinations and furnish such certificates from physicians as to eyesight or defects or diseases as the commission may require. If the result of the examination or investigation be unsatisfactory, the permit shall be refused. If the result be satisfactory and the permit be granted and issued, it shall be subject to cancellation for violation of any of the general rules and regulations which may be prescribed by the commission for the conduct of such drivers when operating such vehicles. Such permits shall be numbered serially and the commission shall keep a roster of the names of all persons to whom permits are granted and whose permits have been cancelled and publish the same from time to time for the information of the public. Each person to whom a permit is issued shall be given a badge bearing the same serial number as his permit, which shall be worn in a conspicuous place on the left breast of the outer garment at all times when driving or when on duty at a station or otherwise in charge of a motor vehicle authorized to be operated under the act. When in the interest of the public safety it becomes necessary to cancel any such permit, the badge and all certificates issued to such driver shall be returned to the commission. All such permits shall expire on June thirtieth following their date of issue and shall be renewable only upon the payment of the tax provided in the revenue act. All permits issued under chapter fifty, Public Laws, of one thousand nine hundred and twenty-five, and amendments thereto, shall expire at midnight June thirtieth, one thousand nine hundred and twenty-seven, and drivers holding such driver's permits may, in the discretion of the commission, have the same renewed upon the payment of the fees provided in the revenue act without further examination.

Each driver shall keep posted on the inside front of each motor vehicle operated by him under the act a card bearing his photograph, name, and the number of his permit. Any person to whom a permit has not been issued, or any person to whom a permit has been issued, but which has been cancelled for cause, who wears or displays a driver's badge or displays a driver's permit or in any other manner attempts to, or does, deceive any person or persons or attempts to, or does, impersonate a properly certified driver, or who drives a motor vehicle operating under this act without first having obtained such permit, shall be guilty of a misdemeanor and upon conviction shall be punishable in the discretion of the court. (1927, c. 136, s. 9.)

Regulations for Examination.—Pursuant to the corresponding section of the Act of 1925, the commission passed in 1925 an order regulating the examination of drivers. A series of these orders and circulars pertaining thereto will be found in the Biannual Corp. Comm. Rept. for 1925-1926.

§ 2613(s). Cancellation of franchise certificates.

(a) That franchise certificates issued under this act shall become null and void for the following causes:

(1) For failure for thirty days to pay the franchise tax as provided by law.

(2) For abandonment of authorized operation for a period of thirty days without the written consent of the commission.

(3) For failure to begin operation within thirty days after the issuance of certificate.

(b) That such franchise certificates may be

cancelled in the discretion of the commission after ten days' notice for the following causes:

(1) For failure to pay station rent where a station has been designated and the expense apportioned among the operators by the commission.

(2) For failure to provide tickets for sale at the several stations designated by the commission.

(3) For failure to check baggage as provided by this act and the commission's regulations.

(4) For failure to keep equipment in safe and sanitary condition.

(5) For operating a motor vehicle over a route established hereunder without first obtaining a motor vehicle permit therefor.

(6) For operating a motor vehicle over a route established hereunder without having insurance, or bond, as provided in section six, hereof, on file with the commission and in full force and effect at the time of the operation of such motor vehicle.

(7) For failure to observe and comply with schedules and tariffs made or approved by and on file with the commission.

(8) For removing a number plate from a motor vehicle designated by the commission for such motor vehicle, or for attaching or placing on a motor vehicle a number plate not authorized or designated therefor.

(9) For the violation of any other provision of this act, or the commission's regulations, or the wilful or negligent violation of any other statute of this State, relating to the use or operation of motor vehicles on the public highways.

(10) For the violation and conviction of the criminal laws of this State, or for such other acts or conduct that may, in the opinion of the commission, disqualify such operator for rendering the public service contemplated by this act.

Sufficient notice shall be deemed to have been given under this act when notice in writing shall have been addressed to an operator and posted by registered mail to the address contained in the certificate with return receipt requested, or when such written notice has been delivered by a duly authorized agent of the commission or by any officer authorized by law to serve process in this State. (1927, c. 136, s. 10.)

§ 2613(t). Depots and stations.—The commission shall designate the towns and cities in which stations shall be maintained by passenger carriers and shall prescribe the rules and regulations under which the expense shall be born by the respective carriers using such stations and may prescribe rules and regulations governing the maintenance and operation thereof. (1927, c. 136, s. 11.)

§ 2613(u). Baggage, express, loading, etc.—The amount of express or baggage that may be carried in any motor vehicle with passengers shall not be greater than can be safely and conveniently carried, without causing discomfort to the passengers; and that no motor vehicle shall be operated with any baggage, trunk, crate, or other article extending beyond the running board on the left side of such motor vehicle; doorways and aisles of passenger motor vehicles shall be kept clear of all obstruction, and the front seat of all motor vehicles of greater passenger capacity than seven shall be considered an emergency seat, and no passenger shall be allowed to occupy the same unless all other seats of such vehicle are fully occupied. (1927, c. 136, s. 12.)

§ 2613(v). Fares, charges, and free transportation.—No motor vehicle carrier shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such carrier as specified in its tariffs filed with and approved by the commission and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, employees, and members of their immediate families, and such persons as the commission may designate in its employ for the inspection of equipment and supervision of traffic upon the highways of the State: Provided, that motor vehicle carriers under the act may exchange free transportation within the limits of this section. Provided, that any motor vehicle carrier may carry free any blind preacher within the State of North Carolina upon its busses or motor vehicles operating in the State of North Carolina, under the condition that said preacher shall carry or present to such motor vehicle carrier a certificate showing what church or sect he may represent and that he is in good and regular standing with that denomination or sect. (1927, c. 136, s. 13; 1929, c. 58, s. 1.)

Editor's Note.—The act of 1929 added the last proviso to this section.

§ 2613(w). Renewal of franchise certificates.—Any holder of a franchise certificate granted under chapter fifty, Public Laws of one thousand nine hundred and twenty-five, and amendments thereto, which is in force and effect on the date that such certificate expires automatically under the law, who makes application for the renewal thereof, other qualifications of applicants in the discretion of the commission being equal, shall be given preference over other applicants. (1927, c. 136, s. 14.)

§ 2613(x). Foreign and interstate commerce.—Neither this article nor any provisions thereof shall apply or be construed to apply to commerce with foreign nations, or commerce among the several states of this Union, or business conducted for the United States Government, except insofar as the same may be permitted under the Constitution of the United States and the acts of Congress, as construed by the United States Supreme Court. (1927, c. 136, s. 15.)

§ 2613(y). Violations.—Every corporation and every officer, agent, or employee of any corporation, and every other person who wilfully vio-

lates or fails to comply with, or who procures, aids or abets the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction or requirement of the commission, made under the provisions of this act, or any part or provision thereof, or who operates any motor vehicle for the transportation of persons or property for compensation while under the influence of intoxicating liquors or drugs or in such a reckless manner or at such a rate of speed as would endanger the safety of the passengers or any other person along such highway, shall be guilty of a misdemeanor, and upon conviction shall be punishable by fine of not less than fifty dollars nor more than five hundred dollars, or imprisonment, in the discretion of the court, or both fine and imprisonment, in the discretion of the court. (1927, c. 136, s. 16.)

§ 2613(z): Repealed by Public Laws 1933, c. 440.

§ 2613(aa). Maintenance of actions.—The commission shall have the right and authority to enforce by injunction or other ancillary remedy the provisions of this act or the rules and regulations made under this article. (1927, c. 136, s. 18.)

§ 2613(bb). Inconsistent acts.—All acts or parts of acts in conflict with or inconsistent herewith are hereby repealed to the extent of said conflict or inconsistency; but nothing herein contained shall be construed to relieve any motor vehicle carrier, as herein defined, from any regulation otherwise imposed by law or lawful authority; neither shall this article be construed to affect any obligation arising under duty imposed by nor right of action accruing under chapter fifty, Public Laws of one thousand nine hundred and twenty-five, and amendments thereto. (1927, c. 136, s. 20.)

§ 2613(cc). Enforcement employees.—The commission shall have authority to employ such persons as may be necessary to enforce the provisions of this article, and their compensation shall be fixed in the manner now provided by law. (1927, c. 136, s. 21.)

§ 2613(dd). Appropriation.—A sum not exceeding ten thousand dollars ($10,000) per annum is hereby appropriated to cover necessary expenses of the Corporation Commission in administering and enforcing the provisions of this article. (1925, c. 316.)

§ 2613(ee). Disposition of proceeds.—All funds collected under the provisions of this article shall be when collected paid to the State Treasurer and shall be credited by the State Treasurer to the general fund of the State and used as are other general funds of the State. (1925, c. 231, s. 1.)

Art. 4. Operation of Vehicles

§ 2614. By incompetent person; racing.—No person shall operate a motor vehicle upon the public highways of this state who is under the age of sixteen years and who is not competent physically and mentally, and no person shall operate a motor vehicle when intoxicated, or in a race, or on a bet or wager, or for the purpose of making a speed record: Provided, nothing herein contained shall prevent racing on private race courses or tracks. (1917, c. 140, s. 13.)

Editor's Note.—The Legislature at its 1927 session enacted the Uniform Act regulating the use and operation of motor vehicles, and it is here inserted as secs. 2621(43) et seq. In the main the regulations of the Uniform Act supersede and replace the present law, this article, but it would seem that any of the provisions of this article not covered by the Uniform Act, and not inconsistent with it, are still in force.

Thus, while the provisions of this section prohibiting the driving of a motor vehicle while under the influence of intoxicating liquor are covered by the Uniform Act, sec. 2621(44), there seems to be no provisions in the Uniform Act fixing the age limits of persons who may drive and such provisions seem to be unaffected by the Uniform Act. It is applicable to motor bus drivers, see 23 Rept. of Corp. Comm. for 1925-6, p. 25.

As to an assault and battery with an automobile, see 1 N. C. Law Rev. 235.

Violation of Age Limit as Negligence.—Where a person within the age prohibited by the statute runs an automobile upon and injures a pedestrian, the violation of the statute is negligence per se, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

Same—Liability for Injuries.—While it is negligence per se for one within the prohibited age to run an automobile, it is necessary that such negligence proximately cause the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the preponderance of the evidence. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

Same—Jury Question.—It is for the jury to determine whether a competent and careful chauffeur of maturer years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was running it at the time. Taylor v. Stewart, 172 N. C. 203, 204, 90 S. E. 134.

Same—Liability of Father.—While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 13 year-old son to run his automobile. Taylor v. Stewart, 172 N. C. 203, 204, 90 S. E. 134.

Liability of Owner for Torts of Driver.—See Cates v. Hall, 171 N. C. 360, 88 S. E. 524; Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; Williams v. May, 173 N. C. 78, 91 S. E. 604; Wilson v. Polk, 175 N. C. 490, 95 S. E. 849. Only a few of the cases are here cited. For a complete treatment, see 2 N. C. Law Rev. 181 et seq.

Same—Where Driver Is Son.—Clark v. Sweaney, 176 N. C. 529, 97 S. E. 474; Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096. Only a few of the cases are here cited. For a complete treatment, see 2 N. C. Law Rev. 181 et seq.

Proof of Violation in Criminal Prosecutions.—Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. State v. Sudderth, 184 N. C. 753, 114 S. E. 828.

§ 2615. Brakes, horns, and lights required. — Every motor vehicle operated or driven upon the public highways of this state shall be provided with adequate brakes in good working order and sufficient to control such vehicle at all times, when same is in use, and a suitable and adequate bell, horn, or other device for signaling, and shall during the period from one-half hour after sunset to one-half hour before sunrise, display at least two lighted lamps on the front, and shall also display a red light visible from the rear, which may be in combination with the light illuminating the display number on the rear, as heretofore provided in this chapter: Provided, that the lamps on such vehicle need not be lighted

when the vehicle is standing under the rays of a light and can be plainly seen, and that one light displayed on the front of a motorcycle shall be deemed a compliance with this section. A motor vehicle of any kind operated on the public highways of the state shall not use any lighting device equipped with a reflector, unless the same shall be so designed, deflected, or arranged that no portion of the beam or reflected light, when measured seventy-five feet or more ahead of the lamps, shall rise above forty-two inches from the level surface on which the vehicle stands under all conditions of load. (1917, c. 140, ss. 14, 16; 1919, c. 292.)

Editor's Note.—The provisions of this section seem to be covered by the Uniform Act, secs. 2621(84), 2621(85) and 2621(89). See note to sec. 2621(14).

As to requirement of all vehicles to carry light, see sec. 3794(a). As to compliance by motor vehicle carriers, see 23 Rept. of Corp. Comm. 1926, 27, p. 26.

Effect of Violation in Civil Action.—Negligence in not having a light on the rear of a truck will not preclude recovery against one who drove his car into the truck, unless it contributed to the injury. Hughes v. Luther, 189 N. C. 841, 128 S. E. 145.

Cited in Davis v. Jeffreys, 197 N. C. 712, 150 S. E. 488; Lee v. Caveness Produce Co., 197 N. C. 714, 717, 150 S. E. 363; Cook v. Horne, 198 N. C. 739, 153 S. E. 315.

§ 2616. Driving regulations; frightened animals; crossings. — A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading, or driving a horse or horses or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or other animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or other animal: Provided, that in case such horse or other animal appears badly frightened, and the person operating such motor vehicle is so signaled to do, such person shall cause the motor of the motor vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others; and it shall also be the duty of any male chauffeur or driver of any motor vehicle and other male occupants thereof over the age of sixteen years while passing any horse, horses or other draft animals which appear frightened, upon the request of the person in charge thereof and driving such horse or horses or other draft animals, to give such assistance as would be reasonable to insure the safety of all persons concerned and to prevent accident. In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and shall bring said vehicle to a full stop when going in the same direction as the street car. Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling. Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, and also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public. (1917, c. 140, s. 15.)

Cross Reference.—As to submitting evidence of violation of this and other sections to show reckless driving, in a prosecution for manslaughter, see § 2621 and the note thereto.

Editor's Note.—Provisions similar to a portion of the regulations of this section are found in the Uniform Act, and in such instances seem to be superseded thereby. Regulations for passing street cars, sec. 2621(64); intersecting highways, secs. 2621(63), 2621(52), 2621(60), 2621(61), and 2621(46); and pedestrians, sec. 2621(60). Otherwise the terms of this section do not seem to be covered by the Uniform Act.

As to compliance by motor vehicle carriers, see 23 Rept. of Corp. Comm. for 1926, 27, p. 26.

Passing Animals.—The laws with respect to passing animals with the exception of establishing a speed limit, are to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. Gaskins v. Hancock, 156 N. C. 56, 72 S. E. 80; Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015, cited and applied; Curry v. Fleer, 157 N. C. 16, 72 S. E. 626.

When the law prescribed a maximum speed limit for the running of motor vehicles upon the highways in approaching animals it did not contemplate or intend that the specified limits were always permissible; for one driving a machine of this character was charged with notice of things which he observed or could have observed in the exercise of proper care, having regard to the nature of the vehicle he was operating and its tendency to frighten animals; and not infrequently it might have become his duty to move at a much slower speed, or stop altogether if conditions so require. Curry v. Fleer, 157 N. C. 16, 72 S. E. 626.

Intersecting Streets.—The word "intersecting" has been construed as synonymous with "joining" or "touching" or "entering into." Manly v. Abernathy, 167 N. C. 220, 83 S. E. 343; Fowler v. Underwood, 193 N. C. 402, 403, 137 S. E. 155.

The words "intersecting highways" include all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond it. Manly v. Abernathy, 167 N. C. 220, 83 S. E. 343.

Same—Effect of Exercising Judgment Where Speed Exceeded.—Where one recklessly drives an automobile without signal or warning, in excess of the speed limit fixed by ordinance and the general statute, and thereby injures or kills another at a street intersection of the town, his violating the law in this manner makes him criminally liable for the injury without regard to the exercise of his judgment at the time in endeavoring to avoid the injury or contributory negligence on the part of the one injured or killed. State v. McIver, 175 N. C. 761, 94 S. E. 682.

Same—Criminal Liability.—A reckless approach and traverse of an intersection may render one criminally liable for the consequences of his acts in addition to liability under this section. State v. Gash, 177 N. C. 595, 597, 99 S. E. 337.

Same—Application to Railroads.—The prior law, similar in phraseology to this section, was held to include railroads within its provisions, and it was therefore a misdemeanor to run an automobile at a greater speed than permitted at intersections while approaching a railroad crossing in a town. Hinton v. Southern R. Co., 172 N. C. 587, 90 S. E. 756.

Same—Effect of Violation upon Recovery from Railroad.—The mere fact that the speed of an automobile exceeded that allowed by law, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury. Shepard v. Norfolk Southern Railroad, 169 N. C. 239, 84 S. E. 277.

Application to Approach from Private Drive.—In approaching a highway from a yard the driver of an automobile must have his car under control, and not exceed a speed of ten miles an hour, and also give timely signals of its approach, and evidence of his failure to do so causing an accident to another car being properly driven on the highway, is sufficient actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the

application of the rule. Fowler v. Underwood, 193 N. C. 402, 137 S. E. 155.

Care as to Children.—The law under this section requires more than ordinary care in regard to children. Moore v. Powell, 205 N. C. 636, 172 S. E. 327.

Effect of Violation in Civil Suit for Damages.—There seems to have been a great contrasting of opinion upon the question as to what effect the violation of one of these statutes will have in a civil suit to recover damages for injury resulting from accidents. It is true that to recover in such cases negligence must be shown and there seems to have been some doubt in this State as to how much weight the violation should have in establishing negligence. However, they may be grouped into three general classes for discussion, viz., (1) those holding that a violation is negligence, per se, (2) those holding that it is only evidence of negligence, and (3) those holding that it is only some evidence of negligence.

Concerning this subject the Supreme Court has had the following to say:

"The negligence which affords the ground of a civil action includes two distinct elements—negligence and damage—both of which must concur in order to form the ground of an action, just as fraud and damage must concur to sustain an action on fraud. The two elements are, however, distinct; and the result of mingling them too closely has been to introduce that confusion of ideas under which the same courts at one time hold that a clear violation of law is negligence per se, and at another time that it is only 'evidence,' or even only 'some evidence,' of negligence. The truth is that every breach of duty to observe the degree of care required by law is negligence, and not merely evidence of it, but that damage caused to the plaintiff being an indispensable element in his cause of action, the clearest proof of negligence, standing by itself, is only 'some evidence' of his right to recover." Ledbetter v. English, 166 N. C. 125, 129, 81 S. E. 1066.

When this decision is taken in conjunction with the others upon the subject it is clearly evident that the proof, a mere violation, is insufficient to support a judgment for damages. However, proof of a violation together with a showing that the violation is the proximate cause of the injury complained of is sufficient to sustain such a judgment. In the words of the Supreme Court, "While the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate—that the injury was the proximate cause; and this requirement is fundamental in the law of negligence. Rich v. Ashville Elect. Co., 152 N. C. 689, 694, 68 S. E. 232; Ledbetter v. English, 166 N. C. 125, 129, 81 S. E. 1066. The latter case holding is to the negligence per se but laying down the same rule as to proximate cause.

And in a later case it was held that the breach of sec. 2617, in failing to turn to the right to allow passage of mules, is negligence entitling the owner of the mule to recover if it was the proximate cause of the injury thereto. Goodrich v. Matthews, 177 N. C. 198, 98 S. E. 529.

The court has also held that the violation of sec. 2618 is evidence of negligence per se, and sufficient to deny a motion as of nonsuit thereon. Fleming v. Holleman, 190 N. C. 449, 130 S. E. 171. See also Davis v. Long, 189 N. C. 129, 126 S. E. 321.

Duty to Charge Sections in Civil Actions.—It is the duty of the court to charge the duty of drivers to pedestrians, imposed by this and the following sections, in an action for damages for a violation of those dates, and this error is not cured by a general charge as to the use of necessary prudence, and is reversible in the absence of a prayer for more specific instructions. Bowen v. Schnibben, 184 N. C. 248, 114 S. E. 170.

Effect of Using Prudence after Violation.—A reckless violation which put a driver in such position that he could not avoid an injury though attempting to do so after the danger became apparent, is not excused by the subsequent attempt. State v. Gray, 180 N. C. 697, 104 S. E. 647.

Liability of Owner for Torts of Driver.—See note to sec. 2614.

Cited in Goss v. Williams, 196 N. C. 213, 145 S. E. 169.

§ 2617. Rule of the road in passing.—Whenever a person operating a motor vehicle shall meet on the public highway any other person riding or driving a horse or horses or other draft animals, or any other vehicle, the person so operating such motor vehicle and the person so riding or driving a horse, horses, or other draft animals, shall reasonably turn the same to the right of the center of such highway so as to pass without interference. Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal, or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any person so operating a motor vehicle shall, at the intersection of a public highway, keep to the right of the intersection of the center of such highway when turning to the right and pass to the right of such intersection when turning to the left, and shall signal with the outstretched hand the direction in which turn is to be made. a. All operators of motor vehicles on the public roads, in meeting a motor vehicle in operation, shall pass on the right of the road in such a manner that all of said vehicles, and the load thereof, shall be on the right of the center of the road. b. All operators of motor vehicles on the public roads shall permit all motor vehicles approaching from the rear to proceed, either by turning to the right so that every part of the said vehicle and load thereof shall be on the right of the center of the road, or by proceeding at a rate of speed not in excess of the legal limit, as will allow said following vehicle to proceed without hindrance or obstruction. c. Any person violating any provision of subsections a and b shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50) or imprisoned not exceeding thirty days. (1917, c. 140, s. 6; 1924, c. 61.)

Editor's Note.—While the provisions of this section seem to be superseded by the more recent enactment, the Uniform Act., secs. 2621(53)-2621(59), the case law and editorial opinions concerning this section are here set out because there is much similarity between this and the more recent enactment.

An excellent discussion of the civil liability of the violators of these statutes will be found in 2 N. C. Law Rev. 178 et seq., where the North Carolina cases are analyzed.

Same—Case Law upon Subject.—A treatment of the subject matter covered by this section in his article in 5 N. C. Law Rev. 248 et seq., by J. C. Kesler is of sufficient merit to quote from it at length. "Although the statute [this section] deals with motor vehicles, the provisions are very general, requiring that only the approaching driver shall pass to the left and that the driver in front shall turn to the right. There is no provision for signals by the approaching driver, nor does it clearly provide when it becomes the duty of the driver ahead to turn to the right to allow those approaching from the rear to pass. Must he turn to the right when approaching from the rear? If so, it is his duty to know of the approach of vehicles from the rear. The court in deciding the principal case applied the statute only in a general way and used the principles of negligence as laid down by many jurisdictions to decide the specific phases.

"The law of the road is a set of rules for the protection of the rights of all who travel upon the highways, regardless of the nature of the vehicle or the speed at which they travel. Common law principles of negligence are used in framing statutes to regulate modern traffic, conditions, but since new situations are constantly developing, it is clear that statutory rules may be insufficient and that recourse to common law principles is necessary. There are two chief divisions of the rules of the road as laid down by statutes and judicial decisions: (1) rules which must be observed by drivers going in the same direction when it becomes necessary or desirable for one to pass the other, and (2) those which must be observed by drivers going in opposite direction to prevent collisions and obstructing of the highways.

"1. A driver who is traveling along the highway has the duty of due care in the use of the road, but does not have to maintain a look-out for traffic from the rear. (Strever v. Woodard, 160 Iowa 332, 141 N. W. 931; Delfs v. Dunshee, 143 Iowa 381, 122 N. W. 236.) When one driver approaches another from the rear he is required to use due care under the circumstances in an attempt to pass (Moore

v. Hart, 171 Ky. 725, 188 S. W. 861) and, where the driver ahead is not otherwise apprised of the desire to pass, the driver wishing to pass must give a signal indicating his desire. (Dunkelbeck v. Meyer, 140 Minn. 283, 167 N. W. 1034; Young v. Cowden, 98 Tenn. 577, 40 S. W. 1088.) Where such signal is given, the driver in front is not required to turn to the right if there is sufficient space on the left to permit the approaching driver to pass; (Savoy v. McLeod, 111 Me. 234, 88 Alt. 721) but where the road is wide enough to allow passage only by his turning to the right he is required to do so when he has heard the signal. (Dunkelbeck v. Meyer, 140 Minn. 283, 167 N. W. 1034). Before the rear driver attempts to pass he must by request, or 'equivalent notice,' acquaint the driver ahead of his intention to pass; and he must be reasonably assured that the driver ahead heard the request, and has accorded him right of way. (Lumber Co. v. Ollinger, 18 Ala. App. 518, 94 So. 177.) Where a driver upon request refuses to yield the road it is the duty of the driver approaching from the rear to bring his machine to full stop if necessary to avoid a collision. (Ware v. Saufley, 194 Ky. 53, 237 S. W. 1060.) Under exceptional circumstances it may become the duty of the forward driver to stop in order to permit the driver of a faster vehicle to pass from the rear (Mark v. Fritsch, 195 N. Y. 282, 88 N. E. 38), but under ordinary circumstances no such duty exists. The highway must be protected, and a driver who approaches from the rear must use due care. When by failure to do so he inflicts an injury upon another who was not guilty of contributory negligence he is liable for the damages caused by the breach of this common law duty. (Potter v. Glarsell, 146 La. 687, 83 So. 898.)

"2. Customs and statutes have made it a rule in all of the United States that persons traveling in opposite directions must pass on the right. Each is entitled to half the road under ordinary circumstances, but there may be conditions which may require a driver to yield more than half the road, or justify him in yielding less than half. The law of the road does not require a traveler to keep always to the right while using the road. He may use any part thereof that suits his convenience, [This has been changed in some instances by the Uniform Act, see sec. 2621(51)] but upon meeting and passing it is his duty to keep to the right, (Sims v. Eleager, 116 S. C. 41, 106 S. E. 854) and failure to turn to the right has been held negligence. (Goodrich v. Matthews, 177 N. C. 198, 98 S. E. 529.) The mere fact that a driver is driving to the right of the center of the highway does not relieve him of the duty of exercising due care to avoid collisions. (Walker v. Lee, 115 S. C. 495, 106 S. E. 682.)

"The driver of an automobile has the right to presume that an automobile coming from the opposite direction will keep to the right as required by the rules of the road (C. S. 2617. John v. Pierce, 172 Wis. 44, 178 N. W. 297), but there may be circumstances under which the exercise of due care to protect the life and property of others may require a driver to go to the left in order to avoid a collision. (King v. Holliday, 116 S. C. 463, 108 S. E. 18.) Where a driver reasonably believes that a collision can be avoided by his turning to the left he is required to do so, notwithstanding a statute requiring him to keep to the right. (Walker v. Lee, 115 S. C. 495, 106 S. E. 682.) Such situations have given rise to differences of opinion in several jurisdictions. For example: A, who was driving to the right of the center of the road, was approached by B, who was driving to the left of the center. A believed that by turning to the left a collision could be avoided. A turned to the left and at the same time B turned to the right to allow free passage on his left, and collided with A, who was on the left of the center of the road. What rights have the parties? Some jurisdictions hold that A as a reasonably prudent man was forced by the negligence of B to turn to the left, and, in so doing, he was not negligent and should be allowed to recover. (Hubbard v. Bartholomew, 163 Iowa 58, 144 N. W. 13; Molin v. Wark, 113 Minn. 190, 129 N. W. 383.) Other courts hold that the accident was caused by the mistaken belief of an excited driver that the approaching driver did not intend to yield the road, and that his act in turning across the road was negligent and he can not recover. (Lloyd v. Calhoun, 82 Wash. 35, 143 Pac. 458; Cupples Mfg. Co. v. Bow, 32 Idaho 774, 189 Pac. 48.)

"When a driver overtakes another on a hill and attempts to pass, and, in doing so, collides with an automobile coming from the opposite direction, the driver so attempting to pass is held liable on the theory that he should have made the attempt to pass only when it was safe for him to do so. He was negligent in attempting to pass when he could not see enough road clear for a safe passage. (183 App. Div. (N. Y.) 816.) The same principle is involved where a driver attempts to pass another on a curve. He must not place himself in such a position as to be unable to yield the road to one coming from the opposite direction.

"The following case presents an unusual situation: D was driving in front of P, who blew his horn as a signal that he intended to pass. D did not hear the signal, but pulled to the right preparatory to making a left turn at an intersection. P believed D had accorded him the right of way and attempted to pass. D suddenly turned to the left at the intersection and a collision occurred. The court held that neither party could recover, that D owed no duty to P to indicate that he intended to turn left when he had not heard P's signal, and that P was justified in acting upon the assumption that D had heard the signal and yielded the right of way. (Lumber Co. v. Ollinger, 18 Ala. App. 518, 94 So. 177.)"

Same Effect of Uniform Act.—A comparison of the law laid down in the preceding discussion and the law of this section with the regulations in the Uniform Act, secs. 2621(53)-2621(57), will indicate that the rules of many of the cases have been changed by the more recent enactment.

Effect of Violation in Fixing Liability for Damages.—See note under sec. 2616 where the cases are collected.

Degree of Care in Observing Traffic in Rear.—The driver of an auto-truck along a public highway is not held to the same degree of care in observing those who may wish to pass him coming from the rear, as in front, and is not required to turn to the right for such purpose, unless he is appraised by the one who wishes to pass, by proper signal, of his intention to do so. Dreher v. Divine, 192 N. C. 325, 135 S. E. 29.

Duty to Turn to Right.—The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably safe to permit the other to pass. Dreher v. Divine, 192 N. C. 325, 135 S. E. 29.

When Question One of Reasonable Prudence.—Where the driver of an automobile violates the statute by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is conflicting as to whether the motorcycle was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful and unexpected act of the one on the motorcycle. Cooke v. Jerome, 172 N. C. 626, 90 S. E. 767.

Duty of Passer from Rear.—The driver of an automobile who wishes to pass another ahead of him, must keep his automobile under control, so as to avoid a collision if the driver ahead of him apparently does not hear his signals or is not aware of his intention to pass, or the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction. Dreher v. Divine, 192 N. C. 325, 135 S. E. 29.

Proof of Violation in Trial for Resulting Crime.—See note to sec. 2601. And see State v. Jessup, 183 N. C. 771, 111 S. E. 523; State v. Rountree, 181 N. C. 535, 106 S. E. 669, 676.

Same—Violation as Evidence of Intent to Assault.—Since the intentional driving of a motor vehicle on the wrong side of the road in disregard of the statute is malum prohibitum, not malum in se; the performance of this unlawful act is not evidence of a specific intent to commit an assault. State v. Rawlings, 191 N. C. 265, 267, 131 S. E. 632.

Act Must Have Been Likely to Cause Harm.—One who violated the provisions of this section or § 2618, not intentionally or recklessly, but merely through a failure to exercise due care and thereby proximately caused the death he would not be culpably negligent unless in the light of the attendant circumstances his negligent act was likely to result in death or bodily harm. State v. Stansell, 203 N. C. 69, 74, 164 S. E. 580.

Liability of Owner for Torts of Driver.—See note to sec. 2614.

Questions for Jury.—Where there was evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck heard the signal, but instead of driving to the right of the center of the road to allow the plaintiff to pass on the left, drove to the left and stopped or came almost to a stop, that the plaintiff, thinking that the truck was going to stop, and having his car under control, attempted to pass on the right, when the truck suddenly turned to the right, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff's car to run off the em-

bankment on the right of the road, resulting in the injury in suit: Held, the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. Stevens v. Rostan, 196 N. C. 314, 145 S. E. 555.

§ 2617(a). Full stop at highway crossing.—No person operating any motor vehicle upon any path, private or public road shall cross or attempt to cross, enter upon, or attempt to enter upon any hard-surfaced or improved highway intersecting the said path or road without first coming to a full stop; provided, that this shall not apply to any road entering upon or crossing such hard-surfaced or improved highway unless the road governing authority (whether State or county) controlling such highway shall erect on such road at a point one hundred or more feet from the point of entrance into said highway, a signboard not less than four feet from the ground on the right side of the road, twenty-four inches by twenty-four inches outside measurement, which shall be painted of yellow background with word "Stop" in black letters eight inches high, to insure warning of the proximity of the crossing and notice to stop said motor vehicle.

This section shall not interfere with the regulations prescribed by towns and cities.

No failure so to stop, shall be considered contributory negligence per se in any action for injury to person or property; but the facts relating to such failure to stop may be considered with other facts in determining negligence.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days or both in the discretion of the court. (Acts 1927, c. 120.)

Applied in Jones v. Bagwell, 207 N. C. 378, 382, 177 S. E. 170.

§ 2618. Speed regulations; mufflers.—No person shall operate a motor vehicle upon the public highways of this state recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: Provided, That no person shall operate a motor vehicle on any public highway, road or street of this State at a rate of speed in excess of:

(A) Twenty miles per hour in the built-up residential section of any village, town or city: Provided, that on any highway, road or street entering any city, town or village the built-up residential section shall be construed to begin at the first point, between which point and a point one thousand feet away on said street, road or highway there are as many as eight residences.

(B) Twelve miles per hour in the business portion of any town, or city.

(C) Fifteen miles per hour while passing any church or school when people are leaving or entering.

(D) Fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view upon all of the highways entering such intersection for a distance of two hundred feet from such intersection.

(E) Fifteen miles per hour in traversing or going around corners of a highway or at apex or verticle curves when the driver's view is obstructed within a distance of three hundred feet along such highway in the direction of travel, and at places where the road is under repair or construction.

(F) Thirty-five miles per hour on all highways beyond the built-up residential section of incorporated cities or towns; except at points described in subsections C, D, and E of this section.

The governing body of every incorporated city or town shall have authority by ordinance to make reasonable street crossing regulations.

No person shall operate upon the public highways or streets a motor vehicle with muffler cut-out open, or with exhaust whistle or other objectionable signal devices. This section shall not be construed as repealing any Public-Local Law providing for a greater rate of speed than herein specified, or a different penalty for the violation thereof. (1917, c. 140, s. 17; Ex. Sess. 1921, c. 98; 1925, c. 272.)

As to duty of motor vehicle carriers to obey, see 33 Rept. of Corp. Comm. (1925-6), p. 25.

Editor's Note.—This section is probably superseded by the provisions of the more recent Uniform Act, secs. 2621(46), 2621(88). However, the following annotations are inserted here because they are thought to be of value in interpreting the Uniform Act.

This section states several offenses each of which is a separate crime independently of the others. State v. Mills, 181 N. C. 530, 106 S. E. 677. See also State v. Rountree, 181 N. C. 535, 106 S. E. 669.

The limits fixed by the proviso does not exclude a conviction for violating the preceding provisions at a less speed. State v. Mills, supra.

Limitation upon Privilege of Driving at Maximum Rate.—The speed limit prescribed by statute at which an automobile driver may go at various places, does not alone excuse those who drive within that specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given. State v. Whaley, 191 N. C. 387, 132 S. E. 6.

Right of Civil Action for Violation.—This section gives a cumulative right of action to the common law remedy of damages and in itself can confer no right of action to recover of a master for a violation by the servant while in the scope of employment. The only remedy under this section is indictment. James v. Charlotte, 183 N. C. 630, 112 S. E. 423.

Effect of Violation in Fixing Liability for Damages.—See note to sec. 2616 where all the cases are collected.

Violation as Constituting Negligence.—It is negligence per se to drive an automobile upon a public highway at a speed greater than that permitted by statute, and where in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied. Albritton v. Hill, 190 N. C. 429, 130 S. E. 5. For a general treatment of this question of negligence, see note to sec. 2616.

As to the culpable negligence of one violating the provisions of this section, see annotations under § 2617.

When Negligence not Imputed to Passenger.—The negligent driving of the owner of the car or his agent, is not attributable to a passenger therein who has no authority over him or control over the car or the manner in which it was being driven at the time his injury was caused, the subject of his action for damages, nor will the principles of law applicable to those engaged in a common purpose apply from the fact that the injured party and the driver of the car were riding together to the same destination. Albritton v. Hill, 190 N. C. 429, 130 S. E. 5.

Liability of Owner for Torts of Driver.—See note to sec. 2614.

Criminal Liability for Violation.—The violation of this statute may render one criminally liable for the consequences of his acts in addition to liability under this section. State v. Gash, 177 N. C. 595, 597, 99 S. E. 337.

Same—Necessity for Criminal Negligence.—Under an indictment with three counts: assault with a deadly weapon, an automobile; operating a motor vehicle on a public highway while under the influence of intoxicating liquor; and

recklessly, and in breach of this section, wherein it was admitted by the State that there was no evidence of intentional assault, and the jury having returned for their verdict that defendant "was guilty of an assault, but not with reckless driving," the admission and the verdict on the last two counts dispelled the element of criminal negligence and criminal intent, and a conviction on the first count will not be sustained. State v. Rawlings, 191 N. C. 265, 131 S. E. 632. See also State v. Rountree, 181 N. E. 535, 106 S. E. 669. It would seem that criminal negligence is submitted for criminal intent.—Ed. Note.

When Violation Amounts to Manslaughter.—Where one drives his automobile in violation of the statutory requirements, and thus directly, or without an independent intervening sole proximate cause, the death of another results, he is guilty of manslaughter, though the death was unintentionally caused by his act. State v. Whaley, 191 N. C. 387, 132 S. E. 6. But the violation also is insufficient unless it was the proximate cause of the death, and a charge disregarding the element of proximate cause is error. Ibid.

Ordinance Held in Conflict.—Where one is permitted by the State law to enter upon and go across an intersecting highway at a speed not exceeding ten miles an hour unless due regard to the traffic or to the safety of the public requires a reduction of the speed; but the ordinance in question deprives him of this right by prescribing an arbitrary rule that he shall always and under all circumstances stop his vehicle before entering certain streets, the ordinance is inconsistent with the statute and therefore not enforceable. State v. Stallings, 189 N. C. 104, 106, 126 S. E. 187.

Circumstantial Evidence May Be Sufficient.—Though the evidence on the part of plaintiff is not direct, but circumstantial, yet it may be sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit contrary to the law of this section. Jones v. Bagwell, 207 N. C. 378, 382, 177 S. E. 170.

Proof of Residential District or Section.—Where there is no definite evidence as to the number of residences at the scene of the action so as to bring the place within the definition of "residential section," as provided by this section, or "residential district," as set out in § 2621(43), and no evidence that the speed of the car was a proximate cause of the accident in suit, the evidence is insufficient to be submitted to the jury on the question of defendant's negligence in exceeding the speed limit prescribed in residential districts, there being no evidence that defendant exceeded the speed limit prescribed for highway travel generally. Fox v. Barlow, 206 N. C. 66, 173 S. E. 43.

Applied in Moore v. Powell, 205 N. C. 636, 172 S. E. 327.
Cited in State v. Mickle, 194 N. C. 808, 140 S. E. 150; Burke v. Carolina Coach Co., 198 N. C. 8, 150 S. E. 636.

§ 2618(a). Steel tired vehicles with cleats prohibited.—It shall be unlawful for any person, firm or corporation to drive any motor vehicle upon the hard surface highways of the State, said motor vehicle having iron or steel tires with spikes or cleats in said tires, without first attaching some smooth surface on said tires so that the spikes or cleats will not damage said highway.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars or more than one hundred dollars, in the discretion of the court. (1925, c. 294, ss 1, 2.)

§ 2618(b). Duty of driver passing school bus.—No person operating any motor vehicle on the public roads shall pass, or attempt to pass, any public school bus, while the same is standing on the said public road taking on or putting off school children, without first bringing said motor vehicle to a full stop at a distance of not less than fifty feet from said school bus.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. (1925, c. 265.)

§ 2618(c). Speed of school bus.—Any person operating a bus carrying school children to or from the schools in this State who shall travel at a greater rate of speed than twenty-five miles per hour along any public street or public highway in the State of North Carolina shall be guilty of a misdemeanor and shall be punished by a fine not in excess of the sum of fifty dollars. (1925, c 297, s. 1.)

§ 2619. Obstructions in road.—No person shall throw, place or deposit any glass or other sharp or cutting substance or any injurious obstruction in or upon any of the public highways of this state. (1917, c. 140, s. 18.)

Editor's Note.—There is no section in the Uniform Act, secs. 2621(1) et seq., corresponding to this section.

§ 2620. Stopping motors; standing near fire plug.—No person shall permit the motor of a motor vehicle to remain running when such motor vehicle is unoccupied on the public highways of this state for a longer period than five minutes: Provided, that no motor vehicle shall be left standing within fifteen feet of a fire plug upon the public highways of this state unless in charge of a person who can immediately move such vehicle in case of necessity. (1917, c. 140, s. 19.)

Editor's Note.—This section is probably superseded by the more recent Uniform Act, secs. 2621(67), 2621(68).

§ 2621. Use of vehicle without owner's consent.—No person shall use or operate any motor vehicle owned by another without the knowledge or consent, expressed or implied, of such owner, on any public highway or elsewhere in this state: Provided, this section shall not be construed to repeal or in any way affect any law making the unlawful taking of such vehicle for temporary use a criminal offense. (1917, c. 140, s. 20.)

Editor's Note.—This section seems to be superseded by the more recent Uniform Act, sec. 2621(32).

As to duty of bus drivers to observe this section, see 33 Rept. Corp. Comm. (1925-6) p. 26.

Civil Liability of Owner for Injuries.—The owner is not liable for an injury caused by his automobile while it is operated by another without his consent. This applies to parent and child and where the father forbade his child from taking his car he is not liable. Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096.

§ 2621(a). Maximum weight of motor vehicle or trailer.—No motor vehicle or trailer which has a greater rated weight of both vehicle and load exceeding seven and one-half (7½) tons shall go over or be operated upon any state highway. Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor. (1921, c. 2, s. 30.)

Editor's Note.—There is a section in the more recent Uniform Act, sec. 2621 (78), limiting the weight of vehicle and load to a maximum of 10 tons which seems to supersede this section. While that section does not mention trailers it would seem that in view of the definition of "vehicles" in sec. 2621 (43), it applies to trailers also.

§ 2621(b). Full stop at grade crossings.—No person operating any motor vehicle upon a public road shall cross or attempt to cross, any railroad or interurban track intersecting the road at grade, other than a crossing at which there is a gate or a watchman (except an electric railway track in a city, town, or village), without first bringing said motor vehicle to a full stop at a distance not exceeding fifty (50) feet from the nearest rail. No failure so to stop, however, shall be considered contributory negligence per se in any action against the rail-

road or interurban company for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence. (1923, c. 255, s. 1.)

Editor's Note.—This section seems to be superseded by sec. 2621(48), a more recent enactment covering the same subject-matter.

There is a section in the Uniform Act, sec. 2621(47), requiring an obedience to warning signals of approaching trains.

Necessity for Section.—Although a railroad is a highway (Hinton v. Southern R. Co., 172 N. C. 587, 90 S. E. 756), an amendment of the statute (Acts of 1923) was necessary in order to compel the operator of a motor vehicle to bring it to a full stop before crossing or attempting to cross a railroad track. State v. Stallings, 189 N. C. 104, 106, 126 S. E. 187.

Failure to Stop as Negligence Per Se.—The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by this section, "at a distance not exceeding fifty feet from the nearest rail," does not constitute contributory negligence per se in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. Weston v. Southern R. Co., 194 N. C. 210.

Contributory Negligence.—The failure to stop an automobile at a grade crossing as directed by this section does not constitute contributory negligence per se in an action to recover damages to the car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. Weston v. Southern R. Co., 194 N. C. 210, 139 S. E. 237.

§ 2621(c). Warning signs; dimensions and inscription.—Every railroad or interurban company operating or leasing any track intersecting a public road at grade shall place a sign-board, not less than ten feet from the ground on the right side of the road, forty inches by fifty inches, one hundred feet from said crossing, which shall be painted with red lettering, to insure warning of the proximity of the crossing and notice to stop said motor vehicle, with the following: "N. C. Law. Stop:" Provided, this law shall not interfere with the regulations prescribed by towns and cities. (1923, c. 255, s. 2.)

Editor's Note.—There is a section in the Uniform Act, sec. 2621(47), requiring an obedience to signals given by approaching trains.

§ 2621(d). Violation of two preceding sections a misdemeanor.—Any person violating the provisions of the two preceding sections shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than ten dollars or imprisoned not more than ten days, or both, in the discretion of the court. (1923, c. 255, s. 3.)

Art. 5. Automobile Inspectors

§ 2621(e). Appointment, powers, and jurisdiction.—The secretary of state is authorized to appoint, in his discretion, one or more discreet persons who shall be known as "Automobile Inspectors," and who, when commissioned and qualified, shall have the same police power in cases of the violations of the automobile laws as are conferred on sheriffs, police, marshals, and other officers under this chapter, and such powers shall run in all counties within the state. (Ex. Sess. 1921, c. 97, s. 1.)

Editor's Note.—Every reference to the Secretary of State in this section should be changed to the Commissioner of Revenue. See sec. 7979(c).

§ 2621(f). Commission; qualification.—Each inspector, before assuming his duties, shall be commissioned by the governor and shall qualify before the clerk of the superior court of his county by taking the oath prescribed by law for justices of the peace. (Ex. Sess. 1921, c. 97, s. 2.)

§ 2621(g). Compensation of inspectors.—Such inspectors may serve without compensation, or may receive such compensation as the secretary of state may deem necessary, to be paid from the automobile fund provided for under chapter 2, Public Laws of 1921, by warrant of the auditor on the treasurer: Provided, said compensation shall be approved by the governor and council of state. (Ex. Sess. 1921, c. 97, s. 3.)

Editor's Note.—Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(h). County and municipal officers; cooperation and duties.—It shall be the duty of all sheriffs, police officers, deputy sheriffs, deputy police officers, and all other officers within the state to co-operate with and render all assistance in their power to the inspectors herein provided for, and nothing in this law shall be construed as relieving said sheriffs, police officers, deputy sheriffs, deputy police officers, and other officers of the duties imposed on them by this chapter. (Ex. Sess. 1921, c. 97, s. 4.)

As to the duty of peace officers in enforcing law, see sec. 2600.

Art. 6. Protection of Title of Motor Vehicles

§ 2621(i). Definitions.—The words and phrases used in this article shall be construed as follows, unless the context may otherwise require:

(a) The term "motor vehicles" shall include all vehicles propelled by power other than muscular power, except motorcycles operated by policemen or firemen when on official business, traction engines when not run on rubber tires, road rollers, fire wagons, fire engines, police patrol wagons, and also such vehicles that run only upon rails or tracks.

(b) The term "state," except where otherwise expressly provided, shall also include the territories and the federal districts of the United States.

(c) The term "owner" shall also include any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days. As between contract vendor and contract vendee, the term "owner" shall refer to the contract vendee unless the contrary shall clearly appear from the context of this article.

(d) The term "manufacturer" shall include a person, firm, corporation or association engaged in the manufacture of new motor vehicles, as a regular business.

(e) The term "used vehicles" covers a motor vehicle which has been sold, bargained, exchanged, given away or title transferred from the

persons who first took out title to it from the manufacturer or importer, and so used as to have become what is commonly known as "second hand" within the ordinary meaning thereof.

(f) The term "dealer" shall embrace any person, firm or corporation or association engaged in the purchase and sale of motor vehicles, or in the leasing of the same for a period of thirty or more successive days. (1923, c. 236, s. 1; 1925, c. 124, s. 1.)

See note under § 3312.

Editor's Note.—The sections appearing in this article were undoubtedly intended to supersede the provisions of the sections appearing under article two of this chapter. In turn it would seem that a large portion of this article was intended to be superseded by the more recent act appearing in article seven which provides a system of registration of titles and vehicles. However, that is such a variance between the two that it is very difficult to ascertain in every particular how much of the old law is superseded by the new. There are also provisions in each not common to the other. At best it is possible to point out under the various sections the corresponding sections in the other law, indicating where possible the probable effect.

For the definition of terms used in the more recent act, see sec. 2621(1).

Caption Broader Than Sections. — When the sections of this article are examined, they do not go as far as the caption of the act from which they were taken would indicate a purpose to go. The caption of the act cannot be considered in constraining the clear, unambiguous terms of the sections. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 159, 129 S. E. 414.

§ 2621(j). Certificate of title for motor vehicles. — After October first, nineteen hundred and twenty-three, no certificate of the registration of any vehicle or number plates therefor, whether original issues or duplicates, shall be issued or furnished by the secretary of state, or any other officer with such duty, unless the applicant therefor shall at the same time make application for an official certificate of title of such motor vehicle, or shall present satisfactory evidence that such a certificate covering such motor vehicle has been previously issued to the applicant. Said application shall be upon a blank form to be furnished by the secretary of state and shall contain a full description of the motor vehicle, which said description shall contain the manufacturer's number, the motor number, and any distinguishing marks, together with a statement of the applicant's title and of any liens or encumbrances upon said motor vehicle and such other information as the secretary of state may require.

The secretary of state, if satisfied that the applicant is the owner of such motor vehicle, or otherwise entitled to have the same registered in his name, shall thereupon issue to the applicant an appropriate certificate of title over his signature, authenticated by a seal to be procured and used for such purpose. Said certificates shall be numbered consecutively, beginning with number one, and shall contain such description and other evidence of identification of said motor vehicle as the secretary of state may deem proper, together with a statement of any liens or encumbrances which the application may show to be thereon. The charge for each original certificate of title so issued shall be fifty cents, which charge shall be in addition to the charge for the registration of such motor vehicle. Said certificate shall be good for the life of the car so long as the same is owned or held by the original holder of such certificate, and need not be renewed annually, or at any other time except as herein provided. On or before September first, one thousand nine hundred and twenty-three, it shall be the duty of the secretary of state to cause to be printed copies of this article and to mail to every person to whom the secretary of state, or other officer having the duty of registration of motor vehicles has issued a certificate of registration for the year nineteen hundred twenty-three, one of such printed copies, accompanied by a blank form of application for a certificate of title. The provision of this article shall apply to all dealers in motor vehicles as above defined upon receipt of such motor vehicles for sale in the State of North Carolina. They shall likewise apply to all motor vehicles owned and operated by municipalities or by the State or by any political subdivision thereof or by any State institution, subject, however, as to the latter class, to what is hereafter provided in this article. (1923, c. 236, s. 2; 1923, c. 124, s. 2.)

As to certificate being prerequisite to passing title, see note to sec 2621(k).

Editor's Note.—The section of the more recent law requiring a certificate of title and making certain exceptions will be found as sec. 2621(6). The provisions requiring an application and prescribing the form and contents thereof is sec. 2621(8). The provisions fixing the length of time for which a certificate is good will also be found in sec. 2621(8). A comparison of the corresponding provision will reveal that the evident intent of the Legislature was to substitute the more recent provisions for those of this section.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

Purpose as Compared with Mortgage Registration Statute.—This statute is a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. The registration statute, secs. 3311, 3312, specifically protects mortgagees. Carolina Discount Corp. v. Landis Mortor Co., 190 N. C. 157, 160, 129 S. E. 414.

Effect upon Mortgage Registration Statute.—The provisions of secs. 3311, 3312 are not affected or repealed by this article as amended. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

Necessity of Registering Conditional Sale Contracts. — All chattel mortgages and conditional-sale contracts on motor vehicles must be registered in the county in which the mortgagor resides, and in case the mortgagor resides out of the State, then in the county where the said motor vehicle is situated, in order to obtain immunity against the creditors and purchasers for value, from the mortgagor. The conditional-sale contract, purchased by the plaintiff, never having been registered, is invalid as against the defendant, a purchaser for full value. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

§ 2621(j) 1. Vehicles owned by state, state institutions and municipalities. — All motor vehicles owned and operated by municipalities or by the State or by any political subdivision thereof or by any State institution shall have certificates of title issued for them to said governmental agency free of any cost to such government or agency thereof. (1925, c. 124, s. 3.)

Editor's Note.—It will be observed that formerly this article did not apply to vehicles owned by political subdivisions of the State. See the preceding section. This section was passed to change that rule. The more recent act contains a provision similar to this section as to registration but not as to title, except that a fee of one dollar is charged for the registration. See sec. 2621(30). It would seem that under the more recent law, secs. 2621(1) et seq., no exception is made as to such vehicles respecting titles.

§ 2621(k). New certificate required after sale or transfer. — In the event of the sale or other

transfer in this state after October first, nineteen hundred twenty-three, of the ownership of a motor vehicle for which a certificate of title has been issued as aforesaid, the holder of such certificate shall indorse on the back of same an assignment thereof, with warranty of title, in form printed thereon, with a statement of all liens or encumbrances on said motor vehicle, and deliver the same to the purchaser or transferee at the time of the delivery to him of such motor vehicle. The purchaser or transferee shall within ten days thereafter present such certificate, assigned as aforesaid, to the secretary of state, accompanied by a fee of fifty cents, whereupon a new certificate of title shall be issued to the assignee. Said certificate, when so assigned and returned to the secretary of state, together with any subsequent assignments or reissues thereof, shall be retained by the secretary of state and appropriately filed and indexed, so that at all times it will be practicable to trace title to the motor vehicles designated therein. (1923, c. 236, s. 3.)

As to necesssity of registering conditional sale contract or mortgage under secs. 3311, 3312, see note to sec. 2621(j).

Editor's Note.—It would seem that this section is superseded by the more recent enactment, sec. 2621(16). See editor's note under sec. 2621(j).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

Transfer of Certificate as Prerequisite to Passing of Title.—A careful perusal of this article fails to disclose any provision prohibiting a sale or transfer of the title of a motor vehicle without a transfer and delivery of a certificate of registration of title, and there is no provision that a sale so made is either fraudulent or void. Its provisions operate upon the parties who make a sale or a purchase without complying with its terms. Its penal provisions are clear. They are directed against those who violate after the sale, or transfer, has been made. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

Necessity for Writing to Pass Title.—"A sale of personal property is not required to be evidenced by any written instrument in order to be valid. This rule had been of such long standing prior to the enactment of the Motor Vehicle Registration Act, we cannot assume that the Legislature intended to change this rule, unless it says so." Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

§ 2621(l). Certificate of title required to operate motor vehicles.—The owner or any person, without consent of the owner being first obtained, who shall operate a motor vehicle in this state under a registration number of this state after October first, one thousand nine hundred and twenty-three, without first having made application for a certificate of title as in this article provided, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars; and from and after October first, one thousand nine hundred and twenty-three, any person who sells a motor vehicle without complying with the requirements of section 2621(k) shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 236, s. 4.)

Editor's Note.—A very similar provision in a more recent enactment is found in sec. 2621(6). As to probable effect, see note to sec. 2621(i).

§ 2621(m). Certificates of registration for motor vehicles.—The secretary of state shall furnish with each number plate issued a receipt of registration, which shall contain upon the face thereof the following data: The name of the registered owner of the motorcycle or motor vehicle, the owner's postoffice address, the make of the vehicle, the registered horsepower, the registration or license number and date of issue of the receipt of registration. Such receipt of registration shall contain a blank space for the signature of the registered owner and shall be signed with ink by such owner immediately upon receipt. Said receipt of registration shall, at all times, while the motor vehicle for which it was issued is being operated within the state, be in the possession of the operator thereof, and shall be subject to inspection by any peace officer at any time. (1923, c. 236, s. 5.)

Editor's Note.—A more recent statute makes much more specific regulation as to the issuance, etc., of certificates of registration and probably supersedes this section. See secs. 2621(6) et seq.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(n). Old certificates to be returned to secretary of state.—Upon transfer of ownership of any motor vehicle or motorcycle registered under this article, the person in whose name such motor vehicle or motorcycle is registered shall forthwith deliver, or forward by registered mail, the receipt of registration to the secretary of state, with a statement of the name and postoffice address of the transferee, and the date of transfer. For failure to comply with this provision within ten days after the date of transfer, the transferee, upon conviction, shall be fined not less than five dollars nor more than fifty dollars. (1923, c. 236, s. 6.)

Editor's Note.—This section is probably superseded at least in part by a more recent regulation of this subject. See sec. 2621(16).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(o). Transfer of ownership file to be kept by secretary of state; transferee of title required to make application for new certificate.—Upon receipt of such old certificate it shall be the duty of the secretary of state to file such receipt of registration in a file to be known as "the transfer of ownership file." Unless the transferee, as shown by the indorsement on the back of the receipt of registration, applies by mail, or otherwise, within ten days after the date of transfer of the motor vehicle for certificate of registration and title, the secretary of state shall notify said transferee at once to do so. Unless said transferee then makes application within five days after receipt of such notice from the secretary of state for such certificate, he shall be considered to be driving a motor vehicle without registration, and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars. (1923, c. 236, s. 7.)

Editor's Note.—This section seems to be superseded by the more recent provisions, secs. 2621(16) and 2621(9). See editor's note to sec. 2621(i).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(p). Secretary of state may refuse to issue certificate, or revoke same if issued.—If the secretary of state shall determine at any time that an applicant for a certificate of title of a

motor vehicle is not entitled thereto, he may refuse to issue such certificate or to register such vehicle, and may for a like reason, and after notice and hearing, revoke registration already acquired on any outstanding certificate of title. (1923, c. 236, s. 8.)

Editor's Note.—There seems to be no exact provision in the more recent law, secs. 2621(l) et seq., sufficiently similar to this section to replace it in every particular. However it is modified to some extent by secs. 2621(25) and 2621(26), providing for a refusal to issue a certificate of title or registration, and the rescission of registration. No provision is made, it would seem, for the revocation of certificates of title in the new law.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(q). Penalty for false statement in application, and possession of stolen motor vehicle, etc.—Any person who shall knowingly make any false statement of a material fact, either in his application for the certificate of title or in any assignment thereof, or who, with intent to procure or pass title to a motor vehicle which he knows or has reason to believe has been stolen, shall receive or transfer possession of the same from or to another, or who shall have in his possession any motor vehicle which he knows or has reason to believe has been stolen, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, shall be deemed guilty of a felony, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars or by imprisonment in any penal institution within this state for not less than one year nor more than five years, or both, in the discretion of the court. This provision shall not be exclusive of any other penalties prescribed by any existing or future laws for the larceny or unauthorized taking of motor vehicles, but shall be deemed supplementary thereto. (1923, c. 236, s. 9.)

Editor's Note.—Several sections of the more recent statute seem to refer to portions of the subject-matter of this section. As to receiving or transferring stolen vehicles, see sec. 2621(33), violation of registration provisions, sec. 2621(27), and making false affidavits, sec. 2621(28). Quaere, as to whether this section is entirely superseded. See Editor's Note to sec. 2621(i).

§ 2621(r). Certificates for dealers and manufacturers.—In the case of dealers in motor vehicles, motorcycles, including manufacturers who sell to others than dealers, all of whom are intended to be covered by this and all other provisions of this law, a separate certificate of title, either of such dealer's immediate vendor or of the dealer himself, shall be required in the case of each motor vehicle in his possession, and the secretary of state shall determine the form in which application for such certificates of title and assignments thereof shall be made: Provided, however, that no such certificate shall be required in the case of new motor vehicles, sold by manufacturers to dealers as the term "dealers" is defined in section 2621(i). (1923, c. 236, s. 10.)

Editor's Note.—The provisions of this section seem to be covered by a more recent enactment, sec. 2621(17).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(s). Duplicate certificates where original is lost.—In the case of lost certificates of title or registration, the loss of which is accounted for to the satisfaction of the secretary of state, duplicates may be issued, the charge therefor to be fifty cents each. (1923, c. 236, s. 11.)

Editor's Note.—The provisions of this section seem to be covered by a more recent enactment, sec. 2621(20). See editor's note to sec. 2621(i).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(t). Alteration or forgery of certificate of title, and penalty thereof.—Any person who shall alter or forge, or cause to be altered or forged, any certificate of title issued by the secretary of state pursuant to the provisions of this law, or any assignment thereof, or who shall hold or use any such certificate or assignment knowing the same to have been altered or forged, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to pay a fine of not less than one hundred dollars nor more than five thousand dollars, or to imprisonment in any penal institution in this state for a period of not less than one year nor more than five years, or both, in the discretion of the court. (1923, c. 236, s. 12.)

Editor's Note.—The provisions of this section seem to be covered by a more recent enactment, sec. 2621(24).

§ 2621(u). Report of stolen and recovered motor vehicles.—It shall be the duty of the sheriff of every county of the state and of the chief of police or commissioner of police of every city having a population of more than ten thousand to make immediate report to the secretary of state of all motor vehicles reported to him as stolen or recovered, upon forms provided by the secretary of state. Upon receipt of such information the secretary of state shall file the same in an index to be known as the "stolen and recovered motor vehicle index." It shall also be the duty of the secretary of state to file reports of stolen and recovered motor vehicles reported to him from other states. The secretary of state shall publish once a month a list of all motor vehicles stolen or recovered during the previous month, and forward a copy of the same to every sheriff, and all police departments in cities with over ten thousand inhabitants. Such list shall also be forwarded to the secretary of state, or other proper official, in each state of the United States. Before issuing a certificate of title, as heretofore provided, the secretary of the state shall check the motor and serial number on the motor vehicle to be registered against the "stolen and recovered motor vehicle index." (1923, c. 236, s. 13.)

Editor's Note.—There is a section in a more recent enactment which seems to cover the terms of this section. See sec. 2621(37).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Rev. enue. See sec. 7979(c).

§ 2621(v). Licenses required of second-hand dealers.—After the first day of January, nineteen hundred twenty-four, it shall be unlawful for any person to carry on or conduct in this state the business of buying, selling or dealing in used vehicles, unless and until he shall have received a license from the secretary of state authorizing the carrying on or conducting of such business;

Provided, however, that any manufacturer or importer of vehicles or his subsidiaries or selling agents may buy or take in trade and sell any used vehicle of his own make without such license. Such license shall be furnished annually by the secretary of state and shall run from the first day of January, nineteen hundred and twenty-four, and annually thereafter for each year, beginning on the first day of January. The application for said license shall be in such form as may be prescribed by the said secretary of state and subject to such rules and regulations with respect thereto as may be so prescribed by him. Such application shall be verified by oath or affirmation and shall contain a full statement of the name or names of the person or persons applying therefor, the name of the firm or copartnership with the names and places of residence of all the members thereof, if such applicant be a firm or copartnership, the name and residence of the principal officers, if the applicant be a body corporate or other artificial body, the name of the state under whose laws the corporation is organized, the location of the place or places at which such business is to be carried on and conducted, and said application shall contain such other relevant information as may be required by the secretary of state. It shall be accompanied by a sworn statement of two reputable persons of the community in which the principal place of business is to be located, certifying to the good moral character of the person or persons applying for such license. Upon making such application the person applying therefor shall pay to the secretary of state a fee of five dollars ($5.00) in addition to any other fees now required by law. A license certificate shall be issued by the secretary of state in accordance with such application when the same shall be regular in form and in compliance with the provisions of this section, and such license, when so issued, shall entitle the licensee to carry on and conduct the business of buying and selling and dealing in used vehicles for a period of one year from the first day of January of the current year. The secretary of state shall have the power to make suitable rules and regulations for the issuance of such licenses to expire upon the first day of January of the succeeding year, when the application therefor shall be made during the current year, and upon payment of a license fee of three dollars ($3.00): Provided, application is made after July first of any year. Any person conducting the business of buying, selling or dealing in used vehicles and having received a license therefor, shall, before removing any one or more of his places of business, or shall, before opening any additional places of business, apply to the secretary of state for and obtain a supplemental license, for which no fee shall be charged. Every such licensee shall keep a book or record in such form as may be prescribed or approved by the secretary of state, in which he shall keep a record of the purchase, sale or exchange, or receipt for the purpose of sale, of any second-hand vehicle, a description of such vehicles, together with the name and address of the seller, or the purchaser, and of the alleged owner or other person from whom such vehicle was purchased or received, to whom it was sold or delivered, as the case may be. Such description shall also include the engine number, if any, the maker's number, if any, chassis number, if any, and such other numbers or identification marks as may be thereon, and shall also include a statement that a number has been obliterated, defaced or changed, if such is the fact. He shall also have in his possession a duly assigned certificate of title from the owner of said motor vehicle in accordance with the provisions of this article from the time when the motor vehicle is delivered to him until it has been disposed of by him. Any person guilty of violating any of the provisions of this section shall be deemed guilty of a felony and shall be punished by a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in any penal institution in this state for not less than six months nor more than three years, or both, in the discretion of the court. (1923, c. 236, s. 14.)

Editor's Note.—There seems to be no provisions in the more recent statute, secs. 2621(1) et seq., corresponding to this section.

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(w). Appointment of deputies, their duties, etc.—The secretary of state, with the approval in writing of the governor, is hereby given power to appoint all necessary deputies, in addition to the present officers of the law, to carry out the provisions of this article and to incur any additional expense in the enforcement of this article as may be first approved by the governor in writing, and the secretary of state, together with such deputies, employees and the existing officers of the law, are hereby given police power and authority throughout the state, to arrest without writ, rule, order or process, any person in the act of violating or attempting to violate in his presence any of the provisions of this article, and are hereby made peace officers of this state for that purpose. All deputies and inspectors heretofore or hereafter appointed and commissioned under chapter fifty-five, Consolidated Statutes, and laws supplemental thereto or amendatory thereof, are hereby expressly granted the police powers given in this section. With the permission and consent of the sheriff of any county, or the chief of police of any city, the secretary of state is hereby authorized to employ temporarily and deputize any deputy sheriff or police officer to investigate any auto theft matters or other violations of this article, and any such officer so employed or deputized shall have all the authority of peace officers as heretofore provided. Any officer, or deputy of the secretary of state, shall have the authority and is hereby required to use reasonable diligence in ascertaining whether the owners and operators of motor vehicles are complying with the provisions of this article. All expenditures under the provisions of this section shall be paid from the fund hereafter designated as the "auto theft fund." (1923, c. 236, s. 15.)

Editor's Note.—There is no provision in the more recent statute, secs. 2621(1) et seq., which corresponds to this section.

As to duty of peace officers with respect to the motor

vehicle law, see sec. 2600; as to report of stolen vehicles to peace officer, see secs. 2621(u), 2621(37); as to duty of peace officers to weigh loads and remove excess, see secs. 2621(6), 2621(79).

Every reference to the Secretary of State in this section should be changed to the Commissioner of the Revenue. See sec. 7979(c).

§ 2621(x). Auto-theft fund, how used. — All moneys received by the Commissioner of Revenue under the provisions of this article shall be paid into the state treasury under the provisions of the Daily Deposit Act, and when so paid shall be placed by the state Treasurer to the credit of the State Highway Fund. (1923, c. 236, s. 16; 1927, c. 79, s. 23.)

Editor's Note.—There seems to be no similar provision in the more recent enactment, secs. 2621(1) et seq.

Prior to the 1927 amendment the money had to be paid in before the tenth of each month and was set aside as a separate fund to meet the expenses incurred under this article and in the enforcement of other vehicle laws.

§ 2621(y). False statements shall constitute perjury.—Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this article to be sworn or affirmed to, shall be guilty of perjury, and, upon conviction, shall be punishable by a fine and imprisonment as other persons committing perjury are punishable. (1923, c. 236, s. 17.)

Editor's Note.—The terms of this section seem to be covered by the more recent enactment, sec. 2621(28).

Strict Construction of Penal Provisions.—Inasmuch as this article contains provisions of a highly penal nature, and, although it is within the police power, the courts will not, by construction, extend its penal provisions unless the case comes within the letter of the law, and within its meaning and palpable design. Security Finance Co. v. Hendry, 189 N. C. 549, 553, 127 S. E. 629; Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 160, 129 S. E. 414.

§ 2621(z). Any part declared unconstitutional shall not render remainder of law invalid. —If any provision of this law shall be held by any court of competent jurisdiction to be unconstitutional, such provision so declared to be unconstitutional shall not affect the validity of the remainder of the law but shall only affect the clause or provision so held to be unconstitutional, and the remainder of the law shall be valid. (1923, c. 236, s. 18.)

Art. 7. The Motor Vehicle Act; Department of Motor Vehicles; Registration

§ 2621(1). Definitions. — The following words and phrases when used in this act shall for the purpose of this act have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

(a) "Vehicle." Device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

(b) "Motor Vehicles." Every vehicle, as herein defined, which is self-propelled.

(c) "Motorcycle." Every motor vehicle designed to travel on not more than three wheels in contact with the ground, except any such vehicle as may be included within the term "tractor" as herein defined.

(d) "Truck Tractor." Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

(e) "Farm Tractor." Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry.

(f) "Road Tractor." Every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon independently or any part of the weight of a vehicle or load so drawn.

(g) "Trailer." Every vehicle without motive power designed to carry property or passengers wholly on its own structure and to be drawn by a motor vehicle.

(h) "Semi-trailer." Every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle.

(i) "Specially constructed vehicle." Any vehicle which shall not have been originally constructed under a distinctive name, make, model or type by a generally recognized manufacturer of vehicles.

(j) "Essential parts." All integral parts and body parts, the removal, alteration or substitution of which will tend to conceal the identity or substantially alter the appearance of the vehicle.

(k) "Reconstructed vehicle." Any vehicle which shall have been assembled or constructed largely by means of essential parts, new or used, derived from other vehicles or makes of vehicles of various names, models and types, or which, if originally otherwise constructed, shall have been materially altered by the removal of essential parts or by the addition or substitution of essential parts, new or used, derived from other vehicles or makes of vehicles.

(l) "Foreign vehicle." Every motor vehicle, trailer or semi-trailer which shall be brought into this state otherwise than in the ordinary course of business by or through a manufacturer or dealer and which has not been registered in this State.

(m) "Pneumatic tires." All tires inflated with compressed air.

(n) "Solid rubber tire." Every tire made of rubber other than a pneumatic tire.

(o) "Metal tires." All tires the surface of which in contract with the highway are wholly or partly of metal or other hard, non-resilient material.

(p) "Motor vehicle fuels" are such fuels known as gasoline, benzine, naphtha, liberty fuel and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles, except the product commonly known as kerosene oil.

(q) "Person." Every natural person, firm, copartnership, association or corporation.

(r) "Owner." A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in

the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act.

(s) "Non-resident." Every person who is not a resident of this State.

(t) "Manufacturer." Every person engaged in business of manufacturing motor vehicles, trailers or semi-trailers.

(u) "Dealer." Every person engaged in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semi-trailers in this State and having an established place of business in this State.

(v) The term of "dealer in motor vehicle fuels" is hereby defined as any person or corporation who has in his, its, or their possession, for sale to the consumer, any gasoline, benzine, naphtha, liberty fuel, and such other volatile or inflammable liquids produced or compounded for operating or propelling motor vehicles as herein defined for use, distribution or sale in the State.

(w) "Highway." Every way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel. The term "highway" shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions.

(x) "Department." The vehicle department of this State acting directly or through its duly authorized officers and agents.

(y) "Commissioner." The vehicle commissioner of this State. (1927, c. 122, s. 1.)

For similar definitions under other kindred acts, see secs. 2598, 2621(i) and 2621(43).

Editor's Note.—As stated in the editor's note under sec. 2621(i), this article in the main covers the subject-matter of article six and to such extent apparently supersedes it. However, as pointed out in the notes under the appropriate sections, some of the provisions of the preceding article are not covered by this article.

While this act is not a verbatim enactment, by any means, it is patterned after, and follows to a large extent, the Uniform Motor Vehicle Registration Act which was proposed by the Commissioners on Uniform Law at their 1925 meeting.

The commissioners also proposed an act for the protection of the titles of motor vehicles, and this act seems to have been combined with the Uniform Registration Act and adopted by the Legislature of this State. The principal variances between this act and the Uniform Act other than mentioned above will be noted under the appropriate sections. However, no attempt is made to point all of them out.

There is a section appearing in the Uniform Act between what is here secs. 2621(4) and 2621(5), providing for the publication and posting of a record of the licenses revoked, and of cars stolen and recovered. This was omitted in North Carolina.

While the sections appearing under article two of this chapter are probably superseded, the annotations thereunder will probably be of value in construing the corresponding sections of this article.

An "owner" under the law in force prior to this section or the Act of 1923, sec. 2621(i), was every person owning, renting, or having exclusive use by lease or otherwise of a motor vehicle. For a definition under the corresponding section of the Act of 1923, see sec. 2621(i).

"Motor vehicles" as defined in the prior law included all vehicles not propelled by muscular power, except traction engines, road rollers, fire wagons, police patrol wagons, ambulances, and such vehicles as run upon rails or tracks. For other definitions, see secs. 2621(i) and 2621(43).

The term "highway" is defined in the prior law (sec. 2598) as any way used by the public whether it be maintained by a state, county, or municipality. It included alleys, parks, drive or public place in any city or town. For other definitions, see secs. 2621(i) and 2621(43).

Vehicle Commissioner

§ 2621(2). The Commissioner of Revenue shall perform the duties of Vehicle Commissioner.—The Commissioner of Revenue is hereby designated as the Vehicle Commissioner of this State; and he shall have all powers and perform such duties as are herein imposed upon the Vehicle Commissioner. (1927, c. 122, s. 2.)

Editor's Note.—Prior to 1925 [see sec. 7979(c)] the duties relative to the motor vehicle law devolved upon the Secretary of State.

§ 2621(3). Duties of department and vehicle commissioner.—(a) It shall be the duty of the department and all officers thereof to enforce the provisions of this act.

(b) The vehicle commissioner is hereby authorized to adopt and enforce such administrative rules and regulations and to designate and appoint such agents and deputies as may be necessary to carry out the provisions of this act and such agents and deputies are hereby given police power and authority throughout the state, to arrest without writ, rule, order or process any person in the act of violating or attempting to violate in his presence any of the provisions of this act, and are hereby made peace officers of this state for that purpose. He shall also provide suitable forms for applications, certificates of title and registration cards, license number plates, certificate holders, and all other forms requisite for the purpose of this act, and shall prepay all transportation charges thereon. (1927, c. 122, s. 3; 1933, c. 214, s. 10; 1935, c. 324, s. 7.)

Editor's Note.—Prior to the amendment of 1935 agents and deputies were limited to six in number and patrolmen to sixty-seven.

§ 2621(4). Office of department.—The Vehicle Commissioner shall maintain an office in Raleigh, North Carolina, and in such places in the State as he shall deem necessary properly to carry out the provisions of the act. (1927, c. 122, s. 4.)

§ 2621(5). Accident statistics and reports.—(a) The Department shall prepare and may supply to police and sheriff's offices and other suitable agencies forms for accident report calling for sufficiently detailed information to disclose with reference to a highway accident the cause, conditions then existing and the persons and vehicles involved. (b) The department shall receive accident reports required to be made by law and shall tabulate and analyze such reports. (1927, c. 122, s. 5.)

Editor's Note.—The Uniform Act contained a provision as subsection (b) requiring the posting of information about accidents and a subsection (c) requiring reports of accidents by the persons involved.

As to the duty of peace officers generally, see sec. 2600 and sections referred to thereunder.

Registration and Certificates of Titles of Motor Vehicles, Trailers and Semi-Trailers.

§ 2621(6). Owners to secure registration and certificate of title.—Every owner of a motor vehicle, intended to be operated upon any highway in this State, shall, before the same is so operated, apply to the Department for and obtain the registration thereof a certificate of title therefor, except as otherwise provided in this section and except the owner of any vehicle which is exempted by section seven and excepting also

when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and non-residents contained in sections sixteen and eighteen of this act.

Provided, that nothing herein contained shall require the application for or the issuance of a certificate of title for a trailer or semi-trailer, though before operating a trailer or semi-trailer upon the highways of the State, the owner thereof must obtain the registration thereof and pay the registration fees as now provided by article five, section twenty-eight of this act. (1927, c. 122, s. 6; 1929, c. 272, s. 1.)

Editor's Note.—The act of 1929 struck out the former section and inserted the above in lieu thereof.

As to provision in earlier law requiring certificate as prerequisite to operation, see sec. 2621(l). For prior law requiring registration, see secs. 2602 and 2621(j), which was probably superseded by this section.

§ 2621(7). Exempt from registration.— Farm tractors, road rollers and road machinery temporarily operated or moved upon the highways need not be registered under this act. (1927, c. 122, s. 7.)

§ 2621(8). Application for registration and certificate of title.—(a) An owner shall make application upon the appropriate forms furnished or approved by the department for registration, also for a certificate of title, except that upon annual renewal of registration by an owner in possession of a certificate of title previously issued to him for such vehicle, no application need be made for a renewal of such certificate of title. The owner shall verify every application for a certificate of title before a person authorized to administer oath, and officers and employees of the department designated by the commissioner are hereby authorized to administer oaths and it is their duty to do so without fee, for the purpose of this act.

(b) Every application for a certificate of title shall contain a statement of the applicant's title and of all liens or encumbrances upon said vehicle and the names and addresses of all persons having any interest therein and the nature of every such interest, and shall include the name and address of the person to whom the certificate of title shall be delivered by the department.

(c) Every application for registration or for a certificate of title shall obtain a brief description of the vehicle to be registered, including the name of the maker, the engine and serial number, whether new or used, and the last license number, if known and state issuing same, and upon the registration of a new vehicle the date of sales by the manufacturer or dealer to the person first operating such vehicle. The application shall contain such other information as may be required by the department.

(d) In the event that the vehicle for which registration or a certificate of title is applied is a specially constructed, re-constructed or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered theretofore outside of this State, the owner shall surrender to the department the certificate of title and registration card or other evidence of such former registration as may be in the applicant's possession or control or such other evidence as will satisfy the department that the applicant is the lawful owner or possessor of the vehicle. (1927, c. 122, s. 8.)

As to necessity of registering mortgage or constitutional sale in county of mortgager's, etc., residence, see note to sec. 2621(k).

Editor's Note.—The prior law which is probably superseded by this section will be found under secs. 2621(j), 2602.

§ 2621(9). Register of applicants to be kept by department.—The department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled thereto, shall register the vehicle therein described and the owner thereof in suitable books or on index cards as follows:

1. Under the distinctive registration number assigned to the vehicle and to the owner thereof hereinafter referred to as the registration number.

2. Alphabetically under the name of the owner.

3. Numerically and alphabetically under the engine and serial number and name of the vehicle. (1927, c. 122, s. 9.)

For similar provisions in the prior law, see sec. 2603. See sec. 2621(o) for a somewhat similar provision in an earlier law.

§ 2621(10). Records to be kept for three years.—The Commissioner of Revenue is hereby required to keep for three years and no longer all records pertaining to licenses issued for motor vehicles so that the same may be accessible for inspection at any time within three years from the issuance of same. (1927, c. 198, s. 1.)

§ 2621(11). Registration cards and certificates of title.—(a) The department upon registering a vehicle and receiving an application for a certificate of title therefor shall issue to the owner a registration card and a certificate of title therefor as separate documents, but shall deliver the certificate of title to the person designated for that purpose in the application. An owner upon receiving a registration card shall sign the usual signature or name of such owner with pen and ink in the space provided upon the face of such card.

(b) The certificate of title shall contain upon the face thereof the date issued, the registration number assigned to the owner and to the vehicle, the name and address of the owner, also a description of the registered vehicle, including with reference to every new vehicle hereafter sold in this State the date of sale by the manufacturer or dealer to the person first operating such vehicle and such other statement of facts as may be determined by the department.

(c) The registration card shall contain upon the face thereof the date issued, the registration number assigned to the owner and to the vehicle, the name and address of the owner, also a description of the registered vehicle, and upon the reverse side a form for endorsement of notice to the department upon transfer of the vehicle.

(d) The certificate of title shall contain a statement of the owner's title and of all liens or encumbrances upon the vehicle therein described and whether possession is held by the owner under a lease, contract of conditional sale or other like agreement. The certificate of title shall also contain upon the reverse side forms of assignment of title or interest and warranty thereof

with space for notation of liens and encumbrances upon such vehicle at the time of a transfer. The charge for each certificate of title so issued shall be fifty cents.

(e) Every certificate of title issued hereunder shall be valid for the life of the vehicle so long as the owner to whom the same issued shall retain legal title or right of possession of or to such vehicle, and such certificate need not be renewed annually or at any other time except upon a transfer of title or interest of the owner. (1927, c. 122, s. 10.)

Editor's Note.—This section probably supersedes the corresponding provision of secs. 2621(j), 2621(l) and 2605.

§ 2621(12). Release of lien or encumbrance shown on certificate of title.—An owner securing the release of any lien or encumbrance upon vehicle and shown upon the certificate of title issued therefor may exhibit the documents, evidencing such release and the certificate of title to the department, and the latter, when satisfied as to the genuineness and regularity thereof, shall issue to such owner either a new certificate of title in proper form or certify upon the face of the outstanding certificate of title as to the release of such lien or encumbrance. (1927, c. 122, s. 11.)

Editor's Note.—There was no corresponding section in the prior law.

§ 2621(13). Registration cards.—The Commissioner of Motor Vehicles shall furnish with each number plate a registration card, which shall contain upon its face the following data: The name of the registered owner of the motorcycle, the motor vehicle, the trailer or semi-trailer, the owner's postoffice address, the make of the vehicle, the registered horsepower, the registration or license number and title number and date of issue of the registration card. Such registration card shall contain a blank space for the signature of the registered owner and shall be signed with ink by such owner immediately upon receipt of same. Said registration card shall, at all times, while the motor vehicle, motorcycle, trailer or semi-trailer, for which it was issued, is being operated within the State, be in possession of the operator thereof and shall be subject to inspection by any peace officer at any time. (1927, c. 122, s. 12; 1929, c. 272, § 2.)

Editor's Note.—The Act of 1929 repealed the former section and inserted the above in lieu thereof.

§ 2621(14). Number plates to be furnished by department.—(a) The department shall also furnish to every owner whose vehicle shall be registered one number plate for motorcycle or semi-trailer and two number plates for every other motor vehicle and trailer. The number plates so furnished shall be the property of the State of North Carolina and the commissioner shall have authority to require the return to the department of all number plates upon termination of the local use thereof by the owner under this act.

(b) Every number plate shall have displayed upon it the registration number assigned to the vehicle and to the owner thereof, also the name of this State, which may be abbreviated, and the year number for which it is issued. Such plate and the required letters and numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred feet during daylight.

(c) A number plate when issued shall not be transferred from one vehicle to another and shall not be used by any person or upon any motor vehicle other than the motor vehicle to which it is assigned, and any use of said number plate by any person or persons in any manner not provided for in this act shall be a violation of the provisions of this act: Provided, however, that where a motor vehicle has been duly registered in the office of the commissioner, and the number plate assigned to said motor vehicle for the year, the owner of said motor vehicle to which said number plate has been assigned may, upon the sale or exchange of said motor vehicle, transfer and assign the number plate assigned to said motor vehicle to the purchaser of said machine by registering such transfer in the office of the commissioner and by the payment of one ($1.00) dollar which shall accompany said transfer of registration and upon said transfer the assignee of said number plate shall stand in the position of the original person in whose name such number plates were recorded. Provided, therefore, that motor vehicles owned and operated by the State or any department thereof, or by any county, city or town, school district, or other political sub-division of the State, and duly licensed by the department and by such owner and operator transferred, the number plate issued to such owner shall not be thereby assigned or transferred to the transferee of such car, but shall be retained by the original owner and may be used by such owner upon another vehicle; provided, that the holder of such registration number shall make application to the Department for certificate of title to the car upon which he desires to place said registration number and upon the payment of the transfer fee as is now provided for a new certificate of registration issued to such owner containing the original registration number.

Provided, however, that motor vehicles licensed to operate for hire shall be subject to the same transfer provision of motor vehicles owned by the State or any department thereof, as above set forth. (1927, c. 122, s. 13; 1929, cc. 240, s. 1, 272, s. 3.)

Editor's Note.—This section supersedes sec. 2608, the prior law, as to the furnishing of plates, sec. 2609 as to the nature of the plates, and sec. 2611(a) as to the ownership of plates in the state.

This section was twice amended by Public Laws of 1929. Chapter 240 increased the number plates in line five to two. Chapter 272 added the last two provisos.

§ 2621(15). Display of plates.—(a) Number plates assigned to a trailer and to a motor vehicle other than a motorcycle shall be attached thereto, one in front and the other in the rear. The number plate assigned to motorcycle or semi-trailer shall be attached to the rear thereof. Number plates shall be so displayed during the current registration year to determine whether plate belongs to car.

(b) Every number plate shall at all times be securely fastened to the vehicle to which it is assigned so as to prevent the plate from swinging and at a height not less than twelve inches from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible,

and shall be maintained free from foreign material and in a condition to be clearly legible. (1927, c. 122, s. 14; 1929, c. 240, s. 2.)

Editor's Note.—This section supersedes sec. 2608 as to the display of plates.

The Act of 1929 amended this section to provide that one number plate be placed in front of a motor vehicle other than a motorcycle.

§ 2621(16). Transfer of title or interest.—(a) The owner of a vehicle registered under the foregoing provisions of this act, transferring or assigning his title or interest thereto, shall endorse an assignment and warranty of title in form approved by the department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle with a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where a deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price, or otherwise, the lien holder shall forward such certificate of title papers with said deed of trust, mortgage, conditional sale or title retaining contract, to the department within ten days: Provided, that the said commissioner of revenue shall, upon and after inspection of said chattel mortgages, notes, deeds of trust, etc., return same to the owner or owners thereof, within ten days after such inspection.

(b) The transferee shall thereupon write his name and address with pen and ink upon the certificate of title or assignment, and except as provided in the next subdivision of this section shall forward such certificate and assignment to the department with an application for the registration of such vehicle and for a certificate of title within ten days after the date of purchase.

(c) When the transferee of a vehicle is a dealer who holds the same for resale and operates the same only for purposes of demonstration under a dealer's number plates, such transferee shall not be required to register such vehicle nor forward the certificate of title to the department as provided in the preceding paragraph, but such transferee upon transferring his title or interest to another person shall give notice of such transfer to the department and shall execute and acknowledge an assignment and warranty of title in form approved by the department and deliver the same to the person to whom such transfer is made.

(d) The department, upon receipt of a certificate of title properly assigned and acknowledged, accompanied by an application for registration and necessary fees, shall register the vehicle, therein described and shall issue to the person entitled thereto by reason of such transfer, a new registration card and certificate of title in the manner and form hereinbefore provided for original registration, except that where there is a lien upon such vehicle, the certificate of title when issued shall be mailed to the lien holder.

(e) Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the department is hereby authorized to receive such application and to examine into the circumstances of the case and may require the filing of affidavits or other information, and when the department is satisfied that the applicant is entitled thereto, is hereby authorized to register such vehicle and issue a new registration card number plate or plates and certificate of title to the person entitled thereto.

(f) In the event of the transfer by operation of law of the title or interest of an owner in and to a vehicle registered under the provisions of this act, order in bankruptcy or insolvency, execution sale, repossession upon default in performing the terms of a lease or executory sales contract or otherwise than by the voluntary act of the person whose title or interest is so transferred, the transferee or his legal representative shall make application to the department for a certificate of title therefor, giving the name and address of the person entitled thereto, and accompanying such application with the registration card and certificate of title previously issued for the vehicle, if available, together with such instruments or documents of authority, or certified copies thereof, as may be required by law to evidence or effect a transfer of title or interest in or to chattels in such case, together with the number plate originally issued. The department, when satisfied of the genuineness and regularity of such transfer, shall cancel the registration and license of such vehicle and issue a new certificate of title and license therefor to the person entitled thereto, upon payment of necessary fees. The transferee may also apply for and obtain the registration of such vehicle. In the event of transfer, as upon inheritance, devise or bequest, the department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as a part of her year's support, transfer both title and license as provided in sub-section (d). (1927, c. 122, s. 15; 1929, c. 72, s. 4, c. 272, s. 5; 1933, c. 344.)

As to transfer of certificate of title being prerequisite to passing title to motor vehicle under prior law, see secs. 2621(j), (k)

Editor's Note.—This section seems to supersede sec. 2607, at least in part, and also the corresponding provisions of secs. 2621(k), 2621(n), and 2621(o).

The Act of 1929 added the last line to subsection (b) of this section, amended subsection (d) by striking out the words "holder therefor and" after the word "card" in line 7, and struck out the words "and holder therefor" after the word "card" in line 13 of subsection (e).

Public Laws 1933, c. 344, inserted the last sentence of this section relating to transfer to heirs, legatees, or devisees.

The law, as amended in 1933, transfers the title of the decedent to the new owner and obviates the latter's purchase of a new license plate. See 11 N. C. Law Rev., 263.

§ 2621(17). Registration by manufacturers and dealers.—(a) A manufacturer of or dealer in motor vehicles, trailers or semi-trailers, owning or operating any such vehicle or any vehicle known as a wrecker and owned by a dealer upon any highway in lieu of registering each such vehicle may obtain from the department upon application therefore upon the proper official form and payment of the fees required by law and attach to each such vehicle one number plate, which plate shall each bear thereon a distinctive number, also

the name of this state, which may be abbreviated, and the year for which issued, together with the word "dealer" or a distinguishing symbol indicating that such plate or plates are issued to a manufacturer or dealer, and any such plates so issued may, during the calendar year for which issued, be transferred from one such vehicle to another owned and operated by such manufacturer or dealer.

(b) Every manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall obtain and have in possession a certificate of title issued by the department to such manufacturer or dealer, or to the immediate vendor of such manufacturer or dealer for each motor vehicle, trailer and semi-trailer owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required for any new vehicle to be sold as such by a manufacturer or dealer, prior to the sale of such vehicle by the manufacturer or dealer; except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semi-trailer the property of the dealer for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semi-trailers, of collecting accounts, contracting prospective customers and generally carrying on routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in; Provided, further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business: Provided, that said person shall at all times while operating a motor vehicle under the provisions of this section have in their possession a certificate on such form as approved by the commissioner from the dealer, which shall be valid for not more than forty-eight (48) hours. And, provided, further, that motor vehicles, trailers and semi-trailers sold by dealers may be operated for a period not exceeding ten (10) days from the date of sale by the purchaser thereof with dealer's demonstration plates, provided, the purchasers have in their possession receipts from the dealers upon which the dealer has certified that the necessary amount of money to pay for titles and licenses has been paid by the purchasers to the dealers to be forwarded to the motor vehicle bureau, either direct or through one of its branch offices on such form as approved by the commissioner.

(c) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person to be operated or moved upon a public highway without there being displayed upon such vehicle a number plate or plates issued to such person, either under section thirteen or under this section.

(d) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person or by any person in his employ which is in the personal use of such person or employee to be operated or moved upon a public highway with a "dealer" plate attached to such vehicle. (1927, c. 122, s. 16; 1933, c. 360; 1935, c. 183.)

Editor's Note.—This section seems to cover the provisions of the similar former enactments, secs. 2621(r) and 2610 at least in part.

Public Laws 1933, c. 360, inserted, near the beginning of this section, the word "or any vehicle known as a wrecker and owned by a dealer."

The amendment of 1935 adds to subsection (b), all of that subsection beginning with the words "except that any dealer or employer of any dealer may operate," etc., and including all of the provisos.

§ 2621(18). Manufacturer to give notice of sale or transfer.—Every manufacturer or dealer, upon transferring a motor vehicle, trailer or semi-trailer, whether by sale, lease or otherwise to any person other than the manufacturer or dealer shall, on or before the tenth of each month, give written report of all such transfers made during the preceding calendar month to the department upon the official form provided by the department. Every such report shall contain the date of such transfer, the names and addresses of the transferer and transferee and such description of the vehicle as may be called for in such official form. Every manufacturer or dealer shall keep a record of all vehicles received or sold containing such information regarding same as the department may require. (1927, c. 122, s. 17.)

Editor's Note.—This section seems to supersede sec. 2606.

§ 2621(19). Registration by non-resident.—(a) Non-residents of this State, except as otherwise provided in this act, will be exempt from the provisions of this act, as to the registration of motor vehicles for the same time and to the same extent as like exemptions are granted residents of this State under laws of another state, district or territory: Provided, that they shall have complied with the provisions of the law of the State, district or territory of their residence relative to the registration and equipment of their motor vehicles, and shall conspicuously display the registration plates, as required thereby, and have in their possession the registration certificate issued for such motor vehicles, and that nothing herein contained shall be construed to exempt any motor vehicle used for hire by a non-resident, or to permit a bona fide resident of this State to use any registration plate or plates from a foreign State, district or territory, under the provisions of this section.

Every non-resident, including any foreign corporation carrying on business within this State and owning and regularly operating in such business any motor vehicle, trailer or semi-trailer within this State, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State.

(b) The State Highway Commission shall determine what exemptions the non-resident automobile operators of the several States, districts, or territories, are entitled to under the provisions of this act, and ordain and publish rules and regulations for making effective the provisions of this act, which rules and regulations shall be observed and enforced by all the officers of this State whose duties require the enforcement of the automobile registration laws, and any violation of such rules and regulations shall constitute

a misdemeanor. (1927, c. 122, s. 18; 1929, c. 258, s. 1; 1931, cc. 300, 439.)

Editor's Note.—The Act of 1929 struck out the first two paragraphs of the former section as taken from the Act of 1927, and inserted the first paragraph above in lieu thereof. The first 1931 amendment added subsection (b) to this section, and the other struck out a proviso formerly appearing at the end of the first paragraph of subsection (a) which provided that all persons operating cars in the State of North Carolina with foreign license tags thereon, whose respective States do not grant the reciprocity, shall be required to register said automobiles and obtain licenses within sixty days from the time of entering this State, and shall pay the fee prescribed therefor.

This section seems to supersede § 2611.

§ 2621(20). Lost certificates or number plates; duplicates to be obtained.—In the event that any certificate of title is lost, erased, mutilated or shall become illegible, the person who is entitled thereto shall make application for and obtain a duplicate therefor upon furnishing information of such fact satisfactory to the department and upon payment of a fee of fifty cents.

In the event that any number plate shall be lost, mutilated, stolen or become illegible, the person who is entitled thereto shall make immediate application for and obtain a replacement therefor upon furnishing information of such fact satisfactory to the department and upon the payment of a fee of one dollar. (1927, c. 122, s. 19; 1929, c. 272, s. 6; 1931, c. 148.)

Editor's Note.—This section seems to cover the provisions of older enactments, sec. 2621(s) and the portion of sec. 2608 pertaining to the same subject-matter. By the Act of 1927 the fee for all duplicates was one dollar. This was changed to two by the Act of 1929. The Act of 1931 fixed the fees as now stated in this section.

§ 2621(21). Department authorized to assign new engine number.—The owner of a motor vehicle upon which the engine number or serial number has become illegible or has been removed or obliterated shall immediately make application to the department for a new engine or serial number for such motor vehicle. The department, when satisfied that the applicant is the lawful owner or possessor of the vehicle referred to in such application, is hereby authorized to assign a new engine or serial number thereto and shall require that such number, together with the name of this State or a symbol indicating this State, and the date of such assignment be stamped upon the engine or in the event such number is a serial number then upon such portion of the motor vehicle as shall be designated by the department. Whenever a new engine or serial number has been assigned to and stamped upon a motor vehicle as provided in this section the department shall insert such number upon the registration card and certificate of title issued for such motor vehicle. (1927, c. 122, s. 20.)

Editor's Note.—This provision seems to be new with this section.

§ 2621(22). Department to be notified when another engine is installed.—Whenever a motor vehicle registered hereunder is altered by the installation of another engine in place of an engine, the number of which is shown in the registration records, the owner of such motor vehicle shall immediately give notice to the department in writing on a form prepared by it, which shall state the number of the former engine and the number of the newly installed engine, the registration number of the motor vehicle, the name of the owner, and any other information which the department may require. Whenever another engine has been substituted as provided in this section and the notice given as required hereunder, the department shall insert the number of the newly installed engine upon the registration card and certificate of title issued for such motor vehicle. (1927, c. 122, s. 21.)

Editor's Note.—This provision seems to be new with this section.

§ 2621(23). Department to suspend registration upon notice of theft or embezzlement. — Whenever the owner of any motor vehicle, trailer or semi-trailer which is stolen or embezzled files an affidavit alleging either said fact with the department it shall immediately suspend the registration of such vehicle until such time as it shall be notified that the owner has recovered such vehicle, but notices given as heretofore provided shall be effective only during the current registration year in which given, but if during such year such vehicle is not recovered, a new affidavit may be filed with like effect during the ensuing year. Every owner who has filed an affidavit of theft or embezzlement must immediately notify the department of the recovery of such vehicle. (1927, c. 122, s. 22.)

Editor's Note.—This provision seems to be new with this section.

§ 2621(24). Altering or forging certificates of title a felony.—Any person who shall alter with fraudulent intent any certificate of title or registration card issued by the department, or forge or counterfeit any certificate of title or registration card purporting to have been issued by the department under the provisions of this act or who shall alter or falsify with fraudulent intent or forge any assignment thereof, or who shall hold or use any such certificate, registration card or assignment knowing the same to have been altered, forged or falsified, shall be guilty of a felony, and upon conviction thereof shall be punished as provided in section forty of this act. (1927, c. 122, s. 23.)

Editor's Note.—This section seems to cover the provisions of a former enactment, see sec. 2621(t).

Refusal or Cancellation of Registration and Certificates of Title and Violations of Provisions Relating Thereto.

§ 2621(25). When registration or certificate of title shall be refused.—The department shall not grant an application for the registration of a vehicle or a certificate of title therefor in any of the following events:

(a) When the applicant therefor is not entitled thereto under the provisions of this act.

(b) When the applicant has neglected or refused to furnish the department with the information required in the appropriate official form or reasonable additional information required by the department.

(c) When the fees required therefor by law have not been paid. (1927, c. 122, s. 24.)

Editor's Note. — While this section supersedes sec. 2621(p), at least in part, it would seem that it fails to cover the entire subject-matter of that section. A provision is there found for a revocation of a certificate of title but this section makes no such provision.

§ 2621(26). When registration shall be rescinded. — (a) The department shall rescind and cancel the registration of any vehicle which the department shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The department shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the same or permit the use thereof by a person not entitled thereto.

(c) The department shall rescind and cancel the license of any dealer to whom such license has been issued when such dealer allows his registration number plates to be used for other than demonstration purposes, fails to carry out the provisions of section 2621(17) subsection (b) and section 2621(18), or is convicted of a felony. (1927, c. 122, s. 25.)

Editor's Note.—While this section seems to supersede sec. 2621(p) as to the rescission of registration, it does not affect that section as to the revocation of the certificate of title.

§ 2621(27). Violations of registration provisions.—It shall be unlawful for any person to commit any of the following acts:

First. To operate or for the owner thereof knowingly to permit the operation upon a highway of any motor vehicle, trailer, or semi-trailer which is not registered or for which a certificate of title has not been issued, or which does not have attached thereto and displayed thereon the registration card in an unmutilated condition in the holder or container herein provided for, and the number plate or plates assigned thereto by the department for the current registration year, subject to the exemption mentioned in section sixteen of this act.

Second. To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

Third. To lend or knowingly permit the use by one not entitled thereto any registration card or registration number plate issued to the person so lending or permitting the use thereof.

Fourth. To fail or refuse to surrender to the department, upon demand, any registration card or registration number plate which has been suspended, cancelled or revoked as in this act provided.

Fifth. To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. (1927, c. 122, s. 26; 1929, c. 272, s. 6.)

Editor's Note.—The act of 1929 struck out the words "or holder therefor" formerly appearing after the word "card" in the second and fourth subsections of this section. This section seems to cover a part of the subject matter of § 2621(q).

§ 2621(28). Making false affidavit perjury. — Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this act to be sworn or affirmed or shall be guilty of perjury and upon conviction shall be punishable by a fine and imprisoned as other persons committing perjury are punishable. (1927, c. 122, s. 27.)

Editor's Note.—This section seems to cover a part of the subject-matter of an older enactment, see sec. 2621(q).

§ 2621(29). Registration fees.—It shall be unlawful to operate upon the public highways of this state any motor vehicles, except the same shall be duly licensed according to the following schedules and classifications:

(a) Passenger Vehicles

There shall be paid to the department of revenue annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(1) Franchise Bus Carriers. — Passenger motor vehicles operating under a franchise certificate issued by the corporation commission under chapter fifty of the public laws of one thousand nine hundred and twenty-five, and amendments thereto, for operation on the public highways of this state between fixed termini or over a regular route for the transportation of persons or property for compensation shall be classified as "franchise bus carriers."

(2) "U-Drive-It" Passenger Vehicles. — Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee shall be classified as "'u-drive-it' passenger vehicles."

(3) "For Hire" Passenger Vehicles.—Passenger motor vehicles engaged in the business of transporting passengers for compensation shall be classified as "'for hire' passenger vehicles"; but this classification shall not include motor vehicles of seven-passenger capacity or less operated by the owner where the cost of operation is shared by a neighbor fellow-workman between their homes and the place of regular daily employment.

(4) Excursion Passenger Vehicles. — Passenger vehicles kept and used for the purpose of transporting persons on sightseeing or travel tours shall be classified as "excursion passenger vehicles."

(5) Private Passenger Vehicles. — All other passenger vehicles not included in the above definitions shall be classified as "private passenger vehicles."

Schedule of Rates

(6) Franchise Bus Carriers. — Franchise bus carriers shall pay an annual license tax of ninety cents per hundred pounds weight of each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operation: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax of ninety cents per hundred pounds; and provided further, that franchise bus carriers operated between point or points within this state and point or points without this state shall be required to account as compensation for the use of the highways of this state and the special privileges extended such carriers by this state, in computing the six per cent tax, only on that pro-

portion of the gross earnings which correspond to the proportion of mileage in this state as compared with the total mileage, but in no event shall the tax paid by such franchise bus carriers be less than ninety cents per hundred pounds weight for each vehicle. In computing said gross earnings, revenue derived from transportation of United States mail, or other United States Government services, shall not be included, and amounts expended for tolls in using toll bridges shall be deducted from gross revenues. All revenue, except as hereinbefore provided, collected by such franchise bus carriers, whether on fixed schedule routes or by special trips, shall be included in the gross income upon which said tax is based.

(7) "U-Drive-It" Passenger Vehicles. — "U-Drive-It" passenger vehicles shall pay the following tax:

Motorcycles:

1 passenger capacity	$12.00
2 passenger capacity	15.00
3 passenger capacity	18.00

Automobiles:

One dollar and ninety cents per hundred pounds weight of each such vehicle.

(8) "For Hire" Passenger Vehicles.—"For hire" passenger vehicles shall be taxed at a rate of one dollar and ninety cents per hundred pounds of weight.

(9) Excursion Passenger Vehicles. — Excursion passenger vehicles shall be taxed at the rate of eight dollars per passenger capacity, with a minimum charge of twenty-five dollars.

(10) Private Passenger Vehicles.—Private passenger vehicles shall be taxed at forty cents per hundred pounds of weight or major fraction thereof, according to the manufacturer's shipping weight: Provided, that no fee for any private passenger vehice shall be less than eight dollars. Private passenger motorcycles shall pay for each motorcycle five dollars, and for each side-car five dollars.

(11) Motor Vehicle Dealers.—Dealers in motor vehicles for demonstration tags shall pay as a registration fee and for one set of plates, twenty-five dollars, and for each additional set of plates one dollar.

(12) Licensees Protected.—No person, partnership, association or corporation shall maintain an office or place of business in which or through which persons desiring transportation for themselves or their baggage are brought into contact by advertisement or otherwise with persons owning or operating motor vehicles and willing to transport other persons, or baggage, for compensation, or on a division of expense basis, unless the owner or operator of such motor vehicle furnishing the transportation has qualified under the tax provisions of this act for the class of service he holds himself out to perform.

(b) Property Hauling Vehicles

There shall be paid to the department of revenue annually, as of the first day of January, for the registration and licensing of trucks, truck-tractors, trailers, and semi-trailers, fees according to the following classifications and schedules:

The term "for hire" as used in these classifications shall include every arrangement by which the owner of a motor vehicle for compensation permits such vehicle to be used for the transportation of the property of another: Provided, it shall not be construed to include an arrangement by which two or more farmers share in the cost of transporting their farm produce or livestock from the farm to the first or primary market, whether the truck be jointly or severally owned.

(1) Contract Hauler Vehicles. — Motor vehicles used for the transportation of property for hire, but not licensed as common carriers under the provisions of chapter one hundred thirty-six of the public laws of one thousand nine hundred and twenty-seven, and amendments thereof, shall be classified as "contract hauler vehicles": Provided, this classification shall not include persons distributing goods of another on consignment, on conditional sale, or on commission basis.

(2) Franchise Hauler Vehicles. — Motor vehicles used for the transportation of property on specified routes between fixed termini, with the right to make occasional trips off said route, as provided in chapter one hundred and thirty-six of the public laws of one thousand nine hundred and twenty-seven, and amendments thereof, shall be classified as "franchise hauler vehicles"; Provided, only such vehicles shall be so classified as the corporation commission shall determine to be reasonably necessary for the proper handling of the business on the said route, and the determination so arrived at duly certified by the corporation commission to the motor vehicle department.

(3) Private Hauler Vehicles. — All motor vehicles used for the transportation of property not falling within the above defined classification shall be classified as "private hauler vehicles."

(4) Determination of Weight. — For the purpose of licensing, the weight of the several classes of motor vehicles used for transportation of property shall be gross weight and load, to be determined by the manufacturer's gross weight capacity as shown in an authorized national publication, such as commercial car journal or the statistical issue of automotive industries, all such weights subject to verification by the commissioner of revenue or his authorized deputy, and if no such gross weight on any vehicle is available in such publication, then the gross weight shall be determined by the commissioner of revenue or his authorized agent, but such calculation shall be made only in units of one thousand pounds or major fractions thereof, weights of less than five hundred pounds being disregarded and weights of five hundred pounds or over being counted as one thousand. Semi-trailers, licensed for use in connection with a truck-tractor, shall in no case be licensed for less gross weight capacity than the truck-tractor with which it is to be operated.

Schedule of Rates

(5) Rate Per Hundred Pounds Gross Weight:

	Private Hauler	Contract Hauler	Franchise Hauler (Deposit)
Gross weight under 8,000 pounds	$ .40	$ .85	$ .60
8,000 pounds to 12,500, inclusive	.50	1.00	.60
Over 12,500 pounds to 16,000, inclusive	.60	1.15	.60
Over 16,000 pounds	.70	1.30	.60

The minimum rate for any vehicle licensed under this section shall be fifteen dollars.

The rate on trucks wholly or partially equipped with solid tires shall be double the above schedule.

(6) Franchise Haulers. — Franchise haulers shall pay an annual license tax as per the above schedule of weight of each vehicle unit (except on trucks licensed for inter-state routes and used exclusively for inter-state business, where more than fifty per cent of the designated route lies outside of the state of North Carolina, the required deposit may be reduced by the commissioner of revenue to fifty per cent of the schedule rate), and in addition thereto six per cent of the gross revenue derived from such operation: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax per the above schedule; and provided further, that franchise haulers operated between point or points within this state and point or points without this state shall be required to account as compensation for the use of the highways of this state and the special privileges extended such carriers by this state in computing the six percent tax only on that proportion of the gross earnings which correspond to the proportion of the mileage in this state as compared with the total mileage, but in no event shall the tax paid by such franchise haulers be less than the license tax shown on the above schedule. In computing said gross earnings, revenue derived from transportation of United States mail, or other United States government services, shall not be included. All revenue, except as hereinbefore provided, collected by such franchise haulers, whether on fixed schedule routes or by special trips, shall be included in the gross income upon which said tax is based. All motor vehicles licensed as contract hauler vehicles, and franchise hauler vehicles, shall have printed on the side thereof in letters not less than three inches in height the name and home address of the owner. Before issuing any license plates to a franchise hauler, it shall be the duty of the commissioner of revenue to either satisfy himself of the financial responsibility of such licensee or to require a bond or deposit in such amount as he may deem necessary to insure the collection of the tax imposed by this section.

(7) Identification of Trailers. — The application for license for any trailer or semi-trailer shall show the manufacturer's serial number; and if such vehicle has no identifying serial number, the commissioner of revenue shall assign to such vehicle a distinguishing serial number, which number shall be permanently affixed to such vehicle in a manner to be prescribed by rules and regulations issued by the commissioner of revenue, and it shall be unlawful to use the license issued for such vehicle upon any other vehicle.

(8) Partial Payments. — In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars, half of such payment may be deferred until April first in any calendar year upon the execution to the commissioner of revenue of a draft upon any bank or trust company upon forms to be provided by the commissioner of revenue in an amount equivalent to one-half of such tax, plus a carrying charge of two per cent; Provided, that any person using any tag so purchased after the first day of April in any such year, without having first provided for the payment of such draft, shall be guilty of a misdemeanor. Any such drafts being dishonored and not paid shall be immediately turned over by the commissioner of revenue to his duly authorized agents and/or the state highway patrol, to the end that this provision may be enforced.

(9) Overloading. — The commissioner of revenue, or his authorized agent, may allow any owner of a motor vehicle for transportation of property to overload said vehicle by paying the fee at the rate per hundred pounds which would be assessed against such vehicle if its rated capacity provided for such load; but such calculation shall be made only in units of one thousand pounds or major fractions thereof, excessive weights of less than five hundred pounds being disregarded and weights of five hundred pounds or over being counted as one thousand.

(10) Foreign Vehicles. — Motor vehicles engaged in the transportation of persons or property and duly licensed in any other state or territory, desiring to make occasional trips into or through the state of North Carolina, may be permitted the same use and privileges of the highways of this state as provided for similar vehicles regularly licensed in this state by procuring from the commissioner of revenue trip licenses upon forms and under rules and regulations to be adopted by the commissioner of revenue, good for use for a period of thirty days, upon the payment of a fee in compensation for said privileges equivalent to one-tenth of the annual fee which would be chargeable against said vehicle if regularly licensed in this state: Provided, however, that nothing in this provision shall prevent the extension of the privileges of the use of the roads of this state to vehicles of other states under the reciprocity provisions now provided by law; and provided further, that nothing herein contained shall prevent the owners of vehicles from other states from licensing such vehicles in the state of North Carolina under the same terms and the same fees as like vehicles are licensed by owners resident in this state. (1927, c. 122, s. 28; 1929, c. 272, s. 7; 1931, cc. 336, 362; 1933, c. 375, s. 1, c. 533; 1935, c. 403.)

Editor's Note.—This section seems to supersede sec. 2612.

For another provision requiring peace officers to weigh and remove excessive loads, see sec. 2621(79).

Public Laws of 1933, c. 375, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

Under (a) Passenger Vehicles, subsection (10) Private Passenger Vehicles, the amendment of 1935 reduced the tax from fifty-five cents per hundred weight to forty cents per hundred weight, and reduced the minimum fee from twelve dollars and fifty cents to eight dollars.

§ 2621(29)a. License fee for semi-trailers towed by passenger cars.—No fee for any truck, or truck-tractor shall be less than fifteen dollars ($15.00): Provided, the license fee for a semi-trailer with gross weight of vehicle and load not exceeding 1,500 pounds and towed by a passenger car shall be two dollars ($2.00) for any part of the license year for which said license is issued, and the license fee for a semi-trailer with the gross

weight for vehicle and load of more than 1,500 pounds but not more than 2,500 pounds and towed by a passenger car shall be ten dollars ($10.00) for the entire year, subject to the provision for quarterly license as provided for other vehicles. (1933, c. 73, s. 1; 1935, c. 405.)

Editor's Note.—The proviso relating to license fees for semi-trailers was changed by the 1935 amendment.

Quoted in Love v. Queen City Lines, 206 N. C. 575, 578, 174 S. E. 514.

§ 2621(30). Exempt from registration fees.—The department, upon proper proof being filed with it that any motor vehicle for which license is herein required is owned by the state or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage, shall collect one dollar for the registration and numbering of such motor vehicles: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the state or some department thereof, or of the county, township, city or town, or of the board of education, or orphanage, and no motor vehicle which is the property of any officer or employee of any department or orphanage named herein shall be construed as being "owned" by such department or orphanage. Provided, that the above exemption from registration fees shall also apply to a church-owned bus used exclusively for transporting children and parents to Sunday school and church services and for no other purpose.

The word "orphanage" shall be construed to mean only those institutions that are recognized by the state board of charities and public welfare as charitable institutions for the care of children. (1927, c. 122, s. 29; 1929, c. 209, s. 1; 1933, c. 221, s. 1, c. 375, s. 1; 1935, c. 425.

Editor's Note.—For a corresponding provision in former law, see sec. 2621(j) 1.

This section seems to supersede sec. 2611(g) as to exemptions, etc.

Public Laws 1933, c. 375, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes. Public Laws 1933, c. 221, amended the former section by inserting the words "or orphanages."

The amendment of 1935 struck out the word "orphanages" in the sixth line of the sentence and substituted "by any orphanage." It also changed "orphanages" to "orphanage" as that word appears subsequently in the section. And, finally, it added the words "for the care of children" at the end of the section in place of the words "child caring" which formerly preceded the word "institutions."

§ 2621(31). Collection of delinquent taxes by duress.—Whenever any tax imposed by this act shall be in default for a period of ten days, it shall be the duty of the commissioner of revenue to certify the same to the sheriff of any county of this state in which such delinquent motor vehicle operator is operating, which said certificate to said sheriff shall have all the force and effect of a judgment and execution, and the said sheriff is hereby authorized and directed to levy upon any property in said county owned by the said delinquent motor vehicle operator, and to sell the same for the payment of said tax as other property is sold in the state for the non-payment of taxes; and for such services the sheriff shall be allowed the fees now prescribed by law for sales under execution, and the cost in such cases shall be paid by the delinquent taxpayer or out of the proceeds of the said property; and upon the filing of said certificate with the sheriff, in the event the delinquent taxpayer shall be the operator of any franchise bus carrier or franchise hauler vehicle, the franchise certificate issued to such operator shall become null and void and shall be canceled by the corporation commission, and it shall be unlawful for any such franchise bus carrier or the operator of any franchise hauler vehicle to continue the operation under said franchise. (1927, c. 122, s. 30; 1929, c. 272, s. 8; 1933, c. 375, s. 1.)

Editor's Note.—This section seems to supersede § 2613(b). Public Laws 1933, c. 375, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 2621(31)a. Transfer of license.—Upon the legal transfer of the title of any vehicle licensed under the provisions of this act by foreclosure sale under chattel mortgage or retained title contract, the purchaser of said vehicle at such sale shall acquire the right to operate such vehicle for the remainder of the license period under the license plates issued for said vehicle, upon complying with the provisions of law with reference to the transfer of title; but this provision, insofar as it may relate to franchise bus carriers or franchise hauler vehicles, is subject to the regulations now in effect or hereafter established by the corporation commission with respect to the regulation of such vehicles. Upon satisfactory proof to the commissioner of revenue that any motor vehicle, duly licensed, has been completely destroyed by fire or collision, the owner of such vehicle may be allowed on the purchase of a new license for another vehicle a credit equivalent to the unexpired proportion of the cost of the original license, dating from the first day of the next month after the date of such destruction. (1933, c. 375, s. 1.)

§ 2621(31)b. Quarterly payments.—Licenses issued on or after April first of each year and before July first shall be three-fourths of the annual fee, licenses issued on or after July first and before October first shall be one-half of the annual fee; and licenses issued on or after October first shall be one-fourth of the annual fee. (1933, c. 375, s. 1.)

§ 2621(31)c. Taxes compensatory.—All taxes levied under the provisions of this act are intended as compensatory taxes for the use and privileges of the public highways of this state, and shall be paid by the commissioner of revenue to the state treasurer, to be credited by him to the state highway fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the state of North Carolina, except that cities and towns may levy not more than one dollar per year upon any such vehicle resident therein. (1933, c. 375, s. 1.)

§ 2621(31)d. No other state license taxes imposed.—No additional franchise tax, license tax, or other fee shall be imposed by the state against any franchised motor vehicle carrier taxed under this act, nor shall any county, city or town impose a franchise tax, or other fee upon them. (1933, c. 375, s. 1.)

§ 2621(31)e. Effect on existing law; current license unaffected.—This act [§§ 2621(29), 2621(30), 2621(31) of this Code Supplement] is in-

tended to take the place of and be a substitute for sections one hundred and sixty-five and two hundred and nine of the revenue act one thousand nine hundred and thirty-one [§§ 7880(96) and 7880(117) of the Code of 1931]. Nothing in this act shall be construed to repeal or amend the act of 1933, c. 73, herein codified as section 2621(29)a. This act shall be in full force and effect from and after July first, one thousand nine hundred and thirty-three, but it shall not have the effect of cancelling or annulling any motor vehicle license for the year one thousand nine hundred and thirty-three which shall have been issued and paid for prior to that date. (1933, c. 375, ss. 2, 3, 5.)

Unlawful Taking, Transfer of or Injury to Vehicle

§ 2621(32). Driving vehicle without owner's consent.—Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to temporarily deprive the owner thereof of his possession of such vehicle, without intent to steal the same, shall be guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to, or an accomplice in, any such unauthorized taking or driving, shall also be guilty of a misdemeanor. (1927, c. 122, s. 31.)

Editor's Note.—This section seems to replace sec. 2621 of the prior law.

An indictment charging larceny and receiving does not include a charge of driving a motor vehicle without the knowledge or consent of the owner, and a defendant charged in the indictment only with larceny and receiving may not be convicted under this section. State v. Stinnett, 203 N. C. 829, 167 S. E. 63.

§ 2621(33). Receiving or transferring stolen vehicle.—Any person who with intent to procure or pass title to a motor vehicle which he knows or has reason to believe has been stolen shall receive or transfer possession of the same from or to another, or who shall have in his possession any motor vehicle which he knows or has reason to believe has been stolen, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, shall be guilty of a felony and upon conviction shall be punished as provided in section fifty of this act. (1927, c. 122, s. 32.)

Editor's Note.—This section seems to supersede sec. 2621(q) as to the transfer of stolen motor vehicles.

§ 2621(34). Injuring vehicle.—Any person who shall individually, or in association with one or more others, wilfully break, injure, tamper with or remove any part or parts of any vehicle for the purpose of injuring, defacing or destroying such vehicle, or temporarily or permanently preventing its useful operation, or for any purpose against the will or without the consent of the owner of such vehicle, or who shall in any other manner wilfully or maliciously interfere with or prevent the running or operation of such vehicle, shall be guilty of a misdemeanor. (1927, c. 122, s. 33.)

Editor's Note.—This provision seems to be new with this section.

§ 2621(35). Removal of serial number.—Every person within this State is hereby prohibited from knowingly buying, selling, receiving, disposing of or concealing any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motor car, or motor vehicle. Every person within this State is hereby prohibited from mutilating or removing manufacturer's serial number or other distinguishing number or identification mark for the purpose of concealing or misrepresenting the identity of said automobile, motor car or motor vehicle. Any person violating the provisions of this section, and any person who shall knowingly buy, sell, receive, dispose of, or conceal any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, for the purpose of concealment or misrepresenting the identity of said automobile, motor car, or motor vehicle, shall be guilty of a misdemeanor. This section shall not apply to automobiles in the possession of innocent purchaser who acquired title or possession prior to March fourth, one thousand nine hundred and nineteen. (1927, c. 122, s. 34.)

Editor's Note.—This provision seems to be new with this section.

§ 2621(36). Tampering with vehicle. — Any person who shall without the consent of the owner or person in charge of a vehicle climb into or upon such vehicle with the intent to commit any crime, malicious mischief, or injury thereto, or who while a vehicle is at rest and unattended shall attempt to manipulate any of the levers, starting crank or other starting device, brakes or other mechanism thereof, or to set said vehicle in motion, shall be guilty of a misdemeanor, except that the foregoing provisions shall not apply when any such act is done in an emergency in furtherance of public safety or convenience or by or under the direction of officer in the regulation of traffic or performance of any other official duty. (1927, c. 122, s. 35.)

Editor's Note.—This provision seems to be new with this enactment.

§ 2621(37). Report of stolen and recovered motor vehicles.—It shall be the duty of the sheriff of every county of the State and of the chief of police or commissioner of police of every city or incorporated town to make immediate report to the commissioner of all motor vehicles reported to him as stolen or recovered upon forms provided by the commissioner. Upon receipt of such information the commissioner shall file the same in an index to be known as the "stolen and recovered motor vehicle index." It shall also be the duty of the commissioner to file reports of stolen and recovered motor vehicles reported to him from other states. The commissioner shall publish once a month a list of all motor vehicles stolen or recovered during the previous month, and forward a copy of the same to every sheriff, and all police departments in cities with over ten

thousand inhabitants. Such list shall also be forwarded to the commissioner or other proper official in each state of the United States. Before issuing a certificate of title, as heretofore provided, the commissioner shall check the motor and serial number on the motor vehicle to be registered against the "stolen and recovered motor vehicle index." It shall also be the duty of every Sheriff of every county of the State and of every police or peace officer of the State to make immediate report to the Commissioner of all motor vehicles reported to him as abandoned or that are seized by him for being used for illegal transportation of intoxicating liquors or other unlawful purposes, and no motor vehicle shall be sold by any Sheriff, police or peace officer, or by any person, firm or corporation claiming a mechanic's or storage lien, or under judicial proceedings, until notice shall have been given the Commissioner at least thirty days before the date of such sale.

No person, firm or corporation, except the registered owner, as herein defined, shall dissemble any motor vehicle without first giving due notice to the Department of such intention to dissemble, said notice setting out in detail a full description of vehicle to be dissembled, including all identifying numbers and source of said vehicle. (1927, c. 122, s. 36; 1929, c. 272, s. 9.)

Editor's Note.—This section seems to cover the terms of a prior enactment and supersedes it. See sec. 2621(u). The Act of 1929 added the last two sentences to this section.

§ 2621(38). Used as evidence. — The registry or duly certified copy of any deed of trust, mortgage, conditional sale or title retaining contract on any motor vehicle when recorded as herein provided for may be given as evidence in any court of this State. (1927, c. 122, s. 37.)

Editor's Note.—This provision was new with this enactment.

Exemption of Busses from Operation of Motor Vehicle Act

§ 2621(39). Exemption. — This act shall in no way apply to automobiles, trucks or buses operated under and by virtue of a license certificate granted by the Corporation Commission of North Carolina under authority of chapter fifty, Public Laws of one thousand nine hundred and twenty-five, and amendments thereto. (1927, c. 122, s. 38.)

Penalties

§ 2621(40). Penalty for misdemeanor.—(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this act unless such violation is by this act or other law of this State declared to be a felony.

(b) Unless another penalty is in this act or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this act shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county or municipal jail for not more than six months, or by both such fine and imprisonment. Provided, that upon conviction for the following offenses: Operating motor vehicles without displaying a number plate issued therefor, or who shall make or permit to be made any unlawful use of the same, or permit the use thereof to a person not entitled thereto, the punishment therefor shall be a fine not to exceed fifty dollars ($50.00) and not less than ten dollars ($10.00) or imprisonment not to exceed thirty days for each offense. (1927, c. 122, s. 39; 1929, c. 272, s. 10.)

Editor's Note.—This and the following section seem to supersede, at least in part, section 2599.

The Act of 1929 added the proviso to this section.

§ 2621(41). Penalty for felony. — Any person who shall be convicted of a violation of any of the provisions of this article herein or by the laws of this State declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this state, be punished by imprisonment in the State prison for a term not less than one year nor more than five years, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. (1927, c. 122, s. 40.)

§ 2621(42). Short title. — This article may be cited as the Motor Vehicle Act. (1927, c. 122, s. 41.)

Art. 8. Uniform Act Regulating Operation of Vehicles on Highways

§ 2621(43). Definitions.—The following words and phrases when used in this article shall for the purpose of this act have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(a) "Vehicle." Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails, or tracks; provided, that for the purpose of this act, a bicycle or a ridden animal shall be deemed a vehicle.

(b) "Motor Vehicle." Every vehicle, as herein defined, which is self-propelled, and every vehicle which is propelled by electric power obtained from trolley wires but not not operated upon rails.

(c) "Motorcycle." Every motor vehicle designed to travel on not more than three wheels in contact with the ground except any such vehicle as may be included within the term "tractor" as herein defined.

(d) "Truck Tractor." Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

(e) "Farm Tractor." Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry.

(f) "Road Tractor." Every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently of any part of the weight of a vehicle or load so drawn.

(g) "Trailer." Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle.

(h) "Semi-trailer." Every vehicle of the trailer type so designed and used in conjunction with a

motor vehicle that some part of its own weight or that of its own load rests upon or is carried by another vehicle.

(i) "Pneumatic Tires." All tires inflated with compressed air.

(j) "Solid Rubber Tire." Every tire made of rubber other than pneumatic tire.

(k) "Metal Tires." All tires the surface of which in contact with the highway is wholly or partly of metal or other hard, non-resilient material.

(l) "Person." Every natural person, firm, copartnership, association or corporation.

(m) "Owner." A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event of mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act.

(n) "Street or Highway." The entire width between property lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic.

(o) "Private Road or Driveway." Every road or driveway not open to the use of the public for purposes of vehicular travel.

(p) "Intersection." The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other.

(q) "Safety Zone." The area or space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(r) "Right of Way." The privilege of the immediate use of the highway.

(s) "Business District." The territory contiguous to a highway when fifty per cent or more of frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business.

(t) "Residence District." The territory contiguous to a highway not comprising a business district when the frontage on such highway for a distance of three hundred feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business.

(u) "Commission." The State Highway Commission of this State acting directly or through its duly authorized officers and agents.

(v) "Commissioner." The Chairman of the State Highway Commission of this State.

(w) "Local Authorities." Every county, municipal and other local board or body having authority to adopt local police regulations under the constitution and laws of this State.

(x) "Explosives." Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by a detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(y) "Flammable liquid." Any liquid which has a flash point of seventy degrees Fahrenheit, or less, as determined by a tabliabue or equivalent closed cuptest device. (1927, c. 148, s. 1; 1935, c. 311, s. 1.)

For the definitions of terms, many of which are here defined, used in the other acts regulating the use, etc., of motor vehicles, see section 2598, 2613(i), 2613(j), 2621(i) and 2621(1).

See annotations to § 2618(a).

Editor's Note.—The act codified under this article is the Uniform Act proposed by the Commissioners on Uniform State Laws appointed by the American Bar Association. The Act was proposed in 1925, North Carolina being one of the first States to adopt it.

Although the Uniform Act has been adopted with modifications and the changes made will be pointed out under the appropriate sections. It is to be presumed that this act was intended to supersede the prior law, article four of this chapter, sections 2614-2621. However, the Legislature did not express this purpose and it will probably be held to supersede it only to the extent that they conflict or the Uniform Act makes specific regulations which would exclude the operation of the old law. The probable effect of each section will be pointed out in the editor's notes thereunder. Although the statutes are in most, if not all instances superseded, the cases construing them have been inserted in the notes thereunder, because, since the new law generally follows the old such cases will be of value in construing this act.

The Uniform Act contains two sections, the first requiring a report of the accident by the driver of any vehicle involved in accident resulting in injury or death to any person or property damage to the extent of $10 within 24 hours to certain designated officials, and the second requiring garage keepers or repair shops, to report any motor vehicle which shows evidence of accident or of having been struct by a bullet. Neither section was incorporated in this act. They are placed in the Uniform Acts between sections here appearing as sections 2621 (17)-2621 (72).

It also contains a section which appears between what is here sections 2621 (92), 2621 (93) a provision requiring the testing and approval of lights and provided the method. This section is omitted from the law of this State and the section in the Uniform Act on appearances upon arrest for misdemeanors was also omitted. It would appear between sections 2621 (104)-(105) if inserted.

The amendment of 1935 added the clause to subsection (b) reading "and every vehicle propelled by electric power," etc. It struck out subsection (n) which defined "highway" and substituted the present (n) defining "street or highway," and finally it added subsections (x) and (y).

Motorcycle. — Statutory definition cited in Anderson v. Life, etc., Ins. Co., 197 N. C. 72, 76, 147 S. E. 693, holding that the expression "motor driven car" in an insurance policy excludes a motorcycle.

Intersection.—Under this section where one public highway joins another but does not cross it, the point where they join is an intersection of public highways. Goss v. Williams, 196 N. C. 213, 145 S. E. 169, citing Vartanian, Law of Automobiles, Part II, chapter 1, p. 414, note.

Operation of Vehicles; and Rules of the Road

§ 2621(44). Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful and punishable as provided in section 2621(101) of this act for any person whether licensed or not who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon the highway within this state. (1927, c. 148, s. 2.)

Editor's Note.—Substantially the same prohibition as contained in this section appears in the law of a great majority of the United States. The similar provision in the former

law of this State is to be found in section 2614, although under that section the prohibition was against driving while intoxicated and not merely under the influence of intoxicating liquors. There was no specific provision against driving under the influence of narcotic drugs.

See the annotation under section 2614.

Death caused by a violation of this section may be manslaughter but a condition precedent to conviction is that the violation of the law in this respect must have caused the wreck and the death of deceased. State v. Dills, 204 N. C. 33, 167 S. E. 459.

One who drives his automobile, in violation of § 2621(43) or this section, and runs into another car and thereby proximately causes the death of one of the occupants, is guilty of manslaughter at least. State v. Stansell, 203 N. C. 69, 74, 164 S. E. 580.

Circumstantial Evidence May Suffice.—Though the evidence on the part of the State as to violation of this and the following section is circumstantial, it may be sufficient to be submitted to a jury. State v. Newton, 207 N. C. 323, 326, 177 S. E. 184.

Cited in State v. Palmer, 197 N. C. 135, 147 S. E. 817.

§ 2621(45). Reckless driving.—Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished as provided in section 2621(102). (1927, c. 148, s. 3.)

See the note to § 2621(44).

Editor's Note.—Prior to this enactment there was no specific provision similar to this section, except there was a general reference in section 2618.

It was pointed out by the commissioners that the statutes of the various states define reckless driving according to two theories; (1) Wilfully and wantonly driving a vehicle in a reckless manner so as to endanger the life, limb or property of others. Such provisions carry severe minimum and maximum punishments. (2) Reckless driving has been defined by the other class of statutes to include simple negligence and practically every violation of the law of the road. Thus defined a charge of reckless driving is made in most all violation of traffic laws which do not involve actual danger to life, limb or property. Such statutes carry mild penalties.

It will be observed that this section classifies under (1) above and does not refer to the violations mentioned under (2).

See the annotations under section 2614.

As to general powers of local authorities with respect to regulation, see section 2621(73), 2621(63) and 2601.

Surrounding Circumstances Govern Case.—Driving an automobile with tires which are known to be worn out and slick, on a highway which is wet and slippery, at a rate of speed not ordinarily unlawful, under this section may be unlawful under all the circumstances shown by the evidence. Waller v. Hipp, 208 N. C. 117, 120, 179 S. E. 428.

Care Required in Emergency.—While the operator of a public automobile is obligated to exercise a high degree of care, he is not charged with the necessity, either of possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. Love v. Queen City Lines, 206 N. C. 575, 579, 174 S. E. 514.

Violation of Traffic Ordinance.—Under this definition, the simple violation of a traffic regulation, which does not involve actual danger to life, limb or property, while importing civil liability if damage or injury ensue, would not perforce constitute the criminal offense of reckless driving. State v. Cope, 204 N. C. 28, 31, 167 S. E. 456.

Proximate Cause is Question for Jury.—The violation of this and succeeding sections enacted for the safety of those driving upon the highway is negligence per se, and when such violation is admitted or established the question of proximate cause is ordinarily for the jury. King v. Pope, 202 N. C. 554, 163 S. E. 447; Godfrey v. Queen City Coach Co., 201 N. C. 264, 267, 159 S. E. 412.

Sufficiency of Evidence for Jury. — Evidence that the individual defendant drove his car in a negligent manner in violation of this section and §§ 2621(51), (54), (55), and (71a) and that such negligence proximately caused injury to the plaintiff is held sufficient to have been submitted to the jury. Puckett v. Dyer, 203 N. C. 684, 167 S. E. 43.

The better rule under this and the following section is that except where the evidence is so conclusive that there could be, in the minds of reasonable men, no doubt as to the plaintiff's negligence contributing to the injury, the question should be left to the jury. Morris v. Sells-Floto Circus, 65 F. (2d) 782, 784.

§ 2621(46). Speed Restrictions.—

(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Twenty miles per hour in any business district;

2. Twenty-five miles per hour in any residence district;

3. Thirty-five miles per hour for motor vehicle designed, equipped for, or engaged in transporting property; and thirty miles per hour for such motor vehicle to which a trailer is attached;

4. Forty-five miles per hour under other conditions.

(c) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(d) Whenever the state highway and public works commission shall determine upon the basis of an engineering and traffic investigation that any prima facie speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe prima facie speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway.

(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(f) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that the prima facie speed permitted under this section at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe prima facie speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.

(g) Local authorities in their respective jurisdictions may in their discretion authorize by ordinance higher prima facie speeds than those stated in subsection (b) herein upon through highways or upon highways or portions thereof where there are no intersections or between

widely spaced intersections, provided signs are erected giving notice of the authorized speed, but local authorities shall not have authority to modify or alter the basic rule set forth in subsection (a) herein or in any event to authorize by ordinance a speed in excess of forty-five miles per hour.

(h) No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law. Police officers are hereby authorized to enforce this provision by directions to drivers, and in the event of apparent wilful disobedience to this provision and refusal to comply with direction of an officer in accordance herewith the continued slow operation by a driver shall be a misdemeanor. (1927, c. 148, s. 4; 1935, c. 311, s. 2.)

Editor's Note.—This section supersedes sections 2616 and 2618 as to regulation of speed.

See the annotations under section 2617.

The amendment of 1935 changed this section so radically that a comparison is necessary to determine the full extent.

For a law amending a former section applicable only in the city of Wilmington, see Public Laws of 1935, chapter 432.

This section applies to criminal actions only and not to civil actions for damages. Piner v. Richter, 202 N. C. 573, 163 S. E. 561.

The violation of the statutory speed limit under this section, is negligence per se, and an instruction that it is only evidence of negligence entitles defendant to a new trial on its exception based upon plaintiff's contributory negligence in exceeding the speed limit, but such violation must be a proximate cause of the injury in suit in order to constitute a defense to the action. James v. Carolina Coach Co., 207 N. C. 742, 178 S. E. 607.

Regulation of Speed at Night.—The motorist upon a public highway on a dark, misty and foggy night, is required to regulate the speed of his car with a view to his own safety according to the distance the light from his headlights is thrown in front of him upon the highway, and to observe the rule of the ordinary prudent man. Weston v. Southern R. Co., 194 N. C. 210.

Under §§ 2616, 2618, it is negligence per se for one to drive his automobile more than fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed for one hundred feet therefrom, and damages may be recovered for its violation when the proximate cause of the injury. The amendment by this section, reducing the distance from 100 feet to 50 feet has no retroactive effect. Goss v. Williams, 196 N. C. 213, 145 S. E. 169. This case was decided prior to the 1935 amendment to this section and must be read in the light of the old law.—Ed. Note.

Contributory Negligence at Crossing. — Failure of a driver to keep his car under such control as will enable him to observe the restrictions imposed by this section as to grade crossings is contributory negligence sufficient to bar recovery against the railroad. Hinnant v. Atlantic Coast Line R. Co., 202 N. C. 489, 163 S. E. 555.

Charge as to Speed in Entering Intersection.—Evidence that driver's view was obstructed by a four-foot hedge on top of a three-foot embankment is sufficient to support an instruction that if the jury should find from the greater weight of the evidence that defendant operated his car in the intersection when his view was obstructed, as defined by the court, at a speed in excess of 15 miles an hour he would be guilty of negligence, under this section. Gaffney v. Phelps, 207 N. C. 553, 554, 178 S. E. 231. This case was decided under the law as it existed prior to the 1935 amendment and must be read in the light of the old law.—Ed. Note.

Proximate Cause Is for Jury.—Where there is evidence that defendant was driving his automobile on the highway at a speed of sixty-five miles per hour and that the injury in suit was proximately caused by such excessive speed, it is sufficient to be submitted to the jury on the issue of actionable negligence, since such speed, being in violation of this section, is negligence per se, regardless of the condition of the road, the weather or traffic. Norfleet v. Hall, 204 N. C. 573, 169 S. E. 143.

Cited in State v. Palmer, 197 N. C. 135, 147 S. E. 817; Rudd v. Holmes, 198 N. C. 640, 152 S. E. 894; Lancaster v. B. & H. Coach Line, 198 N. C. 107, 109, 150 S. E. 716; Burke v. Carolina Coach Co., 198 N. C. 8, 12, 150 S. E. 636; Jones v. Bagwell, 207 N. C. 378, 382, 177 S. E. 170.

§ 2621(46a). Restrictions on speed of trucks.—No motor vehicle designed, equipped for, or engaged in transporting property shall be operated over the highways of the State at a greater rate of speed than thirty-five (35) miles an hour, and no such motor vehicle to which a trailer is attached shall be operated over such highways at a greater rate of speed than thirty (30) miles an hour. (1931, c. 235, s. 2.)

See annotations to § 2621(45).

§ 2621(47). Railroad warning signals must be obeyed.—Whenever any person driving a vehicle approaches a highway and interurban or steam railway grade crossing and a clearly visible and positive signal gives warning of the immediate approach of a railway train or car, it shall be unlawful for the driver of the vehicle to fail to bring the vehicle to a complete stop before traversing such grade crossing. (1927, c. 148, s. 5.)

Editor's Note.—Section 2621(c) requires warning signs of certain dimensions, and inscriptions to be constructed one hundred feet from railroads.

§ 2621(48). Vehicles must stop at certain railway grade crossings.—The road governing body (whether State or county) is hereby authorized to designate grade crossings of steam or interurban railways by State and county highways, at which vehicles are required to stop, respectively, and such railways are required to erect signs thereat notifying drivers of vehicles upon any such highway to come to a complete stop before crossing such railway tracks, and whenever any such crossing is so designated and signposted it shall be unlawful for the driver of any vehicle to fail to stop within fifty feet but not closer than ten feet from such railway tracks, before traversing such crossing. That no failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad or interurban company for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence. Provided, that all school trucks and all other trucks engaged in transporting gas and kerosene or other inflammables and passenger busses be required to come to a complete stop at all railroad crossings. (1927, c. 148, s. 6; 1929, c. 222, s. 1.)

Editor's Note.—This section seems to supersede section 2621(b), a similar statute which was in force at the time this statute was adopted.

As to whether a failure to stop is negligence per se, see the note under section 2621(b).

The Act of 1929 inserted the words "and all trucks engaged in transporting gas and kerosene or other inflammables" in the proviso of this section.

Duty to Stop May Be Mixed Question of Law and Fact.—A driver of an automobile is not required by this section under all circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court. Keller v. Southern R. Co., 205 N. C. 269, 171 S. E. 73.

§ 2621(49). Special speed limitation on bridges.—It shall be unlawful to drive any vehicle upon any public bridge, causeway or viaduct at a speed

which is greater than the maximum speed which can with safety to such structure be maintained thereon, when such structure is signposted as provided in this section.

(a) The State Highway Commission upon request from any local authorities shall, or upon its own initiative may conduct an investigation of any public bridge, causeway or viaduct, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this article the Commission shall determine and declare the maximum speed of vehicles which such structure can withstand and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of one hundred feet beyond each end of such structure. The findings and determination of the Commission shall be conclusive evidence of the maximum speed which can with safety to any such structure be maintained thereon. (1927, c. 148, s. 7.)

Editor's Note.—There was no corresponding section in the prior law except as found in section 2616.

§ 2621(49a). Signs showing safe speed and carrying capacity of bridges.—The State Highway Commission, or other governmental agency having control over any bridge constituting a part of the highways of the State, may, by suitable signs or markers at each end of such bridge, post the safe speed and carrying capacity for such bridge, and no motor vehicle or trailer shall be operated over such bridge at a greater speed or with a total gross weight of vehicle and load greater than posted speed or carrying capacity. (1931, c. 235, s. 2.)

§ 2621(50). When speed limit not applicable.—The speed limitations set forth in this act shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies. This exemption shall not however protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1927, c. 148, s. 8.)

§ 2621(51). Drive on right side of highway.—Upon all highways of sufficient width, except upon one way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitation applicable in overtaking and passing set forth in sections 2621(54) and 2621(55). (1927, c. 148, s. 9.)

Editor's Note.—There was no corresponding provision in the prior law.

Charging Section on Trial for Manslaughter.—This section went into effect 1 July, 1927, and upon a trial for manslaughter for the negligent killing of a pedestrian occurring prior to that time, it is reversible error for the judge to instruct the jury as to this requirement for their consideration in reaching a verdict under evidence tending to show the defendant's violation thereof. State v. Toler, 195 N. C. 481, 142 S. E. 715.

Proximate Cause.—A violation of this section is negligence per se, but such negligence is not actionable unless there is a causal relation between the breach and the injury. Grimes v. Carolina Coach Co., 203 N. C. 605, 608, 166 S. E. 599.

Question for Jury.—Evidence tending to show violations of this section and §§ 2616, 2621(46) is sufficient evidence that the defendant was driving unlawfully in several respects in violation of our statutes and in disregard of the safety of others who might then be upon the highway, and is properly submitted to the jury in a prosecution for manslaughter. State v. Durham, 201 N. C. 724, 725, 161 S. E. 398.

Quoted in State v. Newton, 207 N. C. 323, 325, 177 S. E. 184.

Cited in Burke v. Carolina Coach Co., 198 N. C. 8, 22, 150 S. E. 636.

§ 2621(52). Keep to the right in crossing intersections or railroads.—In crossing an intersection of highways on the intersection of a highway by a railroad right of way, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable. (1927, c. 148, s. 10.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2616.

§ 2621(53). Meeting of vehicles.—Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible. (1927, c. 148, s. 11.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2616.

See annotations under section 2616.

Assumption that Vehicle Will Turn to Right. — When the driver of one of the automobiles is not observing the rule, of this section, as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. Shirley v. Ayers, 201 N. C. 51, 53, 158 S. E. 840. See also James v. Carolina Coach Co., 207 N. C. 742, 178 S. E. 607.

§ 2621(54). Overtaking a vehicle.

(a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.

(b) The driver of an overtaking motor vehicle not within a business or residence district as herein defined shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. (1927, c. 148, s. 12.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2617.

See annotations under section 2616.

Purpose of Section.—This section was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence per se entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of. Wolfe v. Independent Coach Line, 198 N. C. 140, 150 S. E. 876.

Cited in Hobbs v. Mann, 199 N. C. 532, 155 S. E. 163.

§ 2621(55). Limitations on privilege of overtaking and passing.

(a) The driver of a vehicle shall not drive to the left side of the center of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

(b) The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve

in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet.

(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highways unless permitted so to do by a traffic or police officer.

(d) The driver of a vehicle shall not drive to the left side of the center line of a highway upon the crest of a grade or upon a curve in the highway where such center line has been placed upon such highway by the State Highway Commission, and is visible. (1927, c. 148, s. 13.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2617.

Cited in State v. Palmer, 197 N. C. 135, 147 S. E. 817; Cook v. Horne, 198 N. C. 739, 153 S. E. 315.

§ 2621(56). Driver to give way to overtaking vehicle.—The driver of a vehicle upon a highway about to be overtaken and passed by another vehicle approaching from the rear shall give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle, and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. (1927, c. 148, s. 14.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2617.

§ 2621(57). Following too closely.

(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway.

(b) The driver of any motor truck when traveling upon a highway outside of a business or residence district shall not follow another motor truck within one hundred feet, but this shall not be construed to prevent one motor truck overtaking and passing another. (1927, c. 148, s. 15.)

Editor's Note.—The purpose of this section is to prevent truck trains from following each other so closely as to make it difficult for faster moving cars to pass with safety in the face of oncoming traffic.

There seems to be no similar provision in the prior law except as to overtaking and passing other vehicles which prior law will be found in section 2617.

Charge to Jury.—Where the court, in its charge on contributory negligence, does not call attention to this section, an exception to the charge will not be sustained in the absence of a special request for such instructions. Alexander v. Southern Public Utilities Co., 207 N. C. 438, 441, 177 S. E. 427.

Cited in Hobbs v. Mann, 199 N. C. 532, 155 S. E. 163.

§ 2621(58). Turning at intersections.

(a) Except as otherwise provided in this section, the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway, and when intending to turn to the left shall approach such intersection in the lane for traffic to the right of and nearest to the center of the highway, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.

For the purpose of this section, the center of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another.

(b) Local authorities in their respective jurisdictions may modify the foregoing method of turning at intersections by clearly indicating by button markers or other direction signs within an intersection the course to be followed by vehicles turning thereat, and it shall be unlawful for any driver to fail to turn in a manner as so directed when such direction signs are authorized by local authorities. (1927, c. 148, s. 16.)

Editor's Note.—This section supersedes the corresponding provisions of section 2617.

See the annotations under section 2616.

§ 2621(59). Signals on starting, stopping or turning.

(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle of the intention to make such movement.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, "or by any approved mechanical or electrical signal device except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible both to the front and rear the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All signals to be given from left side of vehicles during last fifty feet traveled. (1927, c. 148, s. 17; 1931, c. 337.)

Editor's Note.—The prior law which is superseded by this section, section 2617, required an indication by the hand of the direction the vehicle was turning. The Uniform Act provides for the outstretched hand regardless of the direction of turn thus having a single signal for all. But the three way hand and arm signal has been adopted by California, Idaho, Indiana, Kentucky, Missouri, Oregon, Utah, Virginia, Washington, West Virginia and probably other states, notwithstanding the difficulty of remembering these signals. North Carolina followed this rather than the recommendation of the commission of a single signal for all.

The Act of 1931 added all of the first sentence of subsection (b) after the comma.

In General.—One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured. Murphy v. Ashville-Knoxville Coach Co., 200 N. C. 92, 93, 156 S. E. 550.

§ 2621(60). Right of way.

(a) When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right

of way to the vehicle on the right except as otherwise provided in section 2621(61). The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder.

(b) The driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in section 2621(59).

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. (1927, c. 148, s. 18.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2616.

See the annotations under sections 2616, 2617.

Instruction.—Under this section where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed and did not slow up before the happening of the collision with another car; an instruction correctly charging the rule of the right of way if both cars approached the intersection simultaneously and the rule that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. Piner v. Richter, 202 N. C. 573, 163 S. E. 561.

§ 2621(61). Exceptions to the right of way rule.

(a) The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway.

(b) The driver of a vehicle upon a highway shall yield the right of way to police and fire department vehicles and public and private ambulances when the latter are operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance from the duty to drive with due regard for the safety of all persons using the highway nor shall it protect the driver of any such vehicle from the consequence of any arbitrary exercise of such right of way. (1927, c. 148, s. 19.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2616.

§ 2621(62). What to do on approach of police or fire department vehicles.

(a) Upon the approach of any police or fire department vehicle giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right hand edge or curb, clear of any intersection of highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until the police or fire department vehicle shall have passed.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within the block where fire apparatus has stopped in answer to a fire alarm. (1927, c. 148, s. 20.)

Editor's Note.—There seems to be no corresponding provision in the prior law.

§ 2621(63). Vehicles must stop at certain through highways.—The State Highway Commission with reference to State highways and local authorities with reference to highways under their jurisdictions are hereby authorized to designate main traveled or through highways by erecting at the entrances thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. That no failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence. (1927, c. 148, s. 21.)

As to general powers of local authorities with respect to regulations, see sections 2621(73), 2621(46) and 2601.

Editor's Note.—This section seems to supersede the corresponding provisions of section 2616.

See annotations to sections 2616, 2617, 2618.

Proximate Cause Must Be Shown Beyond a Mere Chance.—Where a conviction of involuntary manslaughter is sought for the failure to observe a positive duty imposed by statute with reference to the driving of automobiles upon the State highways, the question of proximate cause must be shown beyond a mere chance or casualty. State v. Satterfield, 198 N. C. 682, 153 S. E. 155.

The manifest object of this section is to protect the public by requiring the driver of an automobile upon the public highways of the State to stop and ascertain the circumstances and conditions at highway intersections particularly with reference to traffic, with a view of determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others, and where the defendant in a prosecution for manslaughter fails to stop, but has knowledge of the conditions and has an unobstructed view of the highway for a long distance, and there is no evidence tending to show that he had violated any other statute or that he was negligent in any other respect, the evidence alone that he had violated the statute in the respect stated is insufficient to take the case to the jury, there being no evidence that the violation of the statute was a proximate cause of the death or in causal relation thereto, and defendant's motion as of nonsuit, made in apt time, should have been granted. State v. Satterfield, 198 N. C. 682, 153 S. E. 155.

§ 2621(64). Passing street cars.

(a) The driver of a vehicle shall not overtake and pass upon the left any street car proceeding in the same direction, whether actually in motion or temporarily at rest, when a travelable portion of the highway exists to the right of such street car.

(b) The driver of a vehicle overtaking any railway, interurban or street car stopped or about to stop for the purpose of receiving or discharging any passenger shall bring such vehicle to a full stop not closer than ten feet to the nearest exit of such street car and remain standing until any such passenger has boarded such car or reached the adjacent sidewalk except that where a safety zone has been established, then a vehicle may be driven past any such railway, interurban or street car at a speed not greater than ten miles per hour and

with due caution for the safety of pedestrians. (1927, c. 148, s. 22.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2616.

§ 2621(65.) Driving through saftey zone prohibited.—The driver of a vehicle shall not at any time drive through or over a safety zone as defined in section 2621(43). (1927, c. 148, s. 23.)

§ 2621(66). Stopping on highway.

(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred (200) feet in both directions upon such highway: Provided, further, that in no event shall any person park or leave standing any vehicle whether attended or unattended upon any highway bridge.

(b) Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

(c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. (1927, c. 148, s. 24.)

Editor's Note.—There was no section corresponding to this in the prior law, but see section 2618 as to leaving motor running.

The word "park" means the permitting of such vehicles to remain standing on a public highway or street, while not in use. Archer-Daniels-Midland Co. v. Southern Paint, etc., Co., 205 N. C. 763, 172 S. E. 359.

To Be Actionable Negligence Must Be Proximate Cause of Injury.—Negligence in parking an automobile on a public highway in violation of this section, to be actionable, must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed. Burke v. Carolina Coach Company, 198 N. C. 8, 150 S. E. 636.

The parking of a car on the hard surface of a highway at night without a tail light in violation of this section and §§ 2621(89), (94), is sufficient to sustain the jury's affirmative answer upon the issue of actionable negligence, and the question of contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision, is also properly submitted to the jury. Lambert v. Caronna, 206 N. C. 616, 175 S. E. 303.

Exception in Subsection (c) Is Question for Jury. — Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of this section, resulting in injury to the plaintiff, and the defendant claims that under the facts it came within the exception, subsection (c); under the statute and the facts disclosed by the record the matter should have been submitted to the jury under proper instructions, and the granting of defendant's motion as of non-suit was error. Smithwick v. Colonial Pine Co., 200 N. C. 519, 157 S. E. 612.

Charge to Jury.—The charge of the court as to subsection (a) of this section, will not be held for error for the failure to instruct the jury upon the provision in subsection (c), where the defendant's only evidence in excuse of parking was that he had a flat tire, such evidence being insufficient to bring defendant within the exception. Lambert v. Caronna, 206 N. C. 616, 175 S. E. 303.

§ 2621(67). Parking in front of fire hydrant, fire station or private driveway.—No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within fifteen feet in either direction of a fire hydrant or the entrance to a fire station nor within twenty-five feet from the intersection of curb lines or if none then within fifteen feet of the intersection of property lines at an intersection of highways. (1927, c. 148, s. 25.)

Editor's Note.—The corresponding section of the prior law is section 2620, the corresponding provisions of which are repealed.

§ 2621(68). Motor vehicle left unattended; brakes to be set and engine stopped.—No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor of said vehicle and when standing upon any grade without turning the front wheels of such vehicle to the curb or side of the highway. (1927, c. 148, s. 26.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2620.

§ 2621(69). Driving on mountain highways.—The driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right hand side of the highway as reasonably possible and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway shall give audible warning with a horn or other warning device. (1927, c. 148, s. 27.)

§ 2621(70). Coasting prohibited.—The driver of a motor vehicle when traveling upon a down grade upon any highway shall not coast with the gears of such vehicle in neutral. (1927, c. 148, s. 28.)

§ 2621(71). Duty to stop in event of accident.

(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section 2621(103).

(b) The driver of any vehicle involved in an accident resulting in damage to property shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section 2621(100).

(c) The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with and shall render to any person injured in such accident reasonable assistance including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such

treatment is necessary or is requested by the injured person and it shall be unlawful for any person to violate this provision. (1927, c. 148, s. 29.)

Editor's Note.—There was no corresponding provision in the prior law.

Stated in State v. Newton, 207 N. C. 323, 325, 177 S. E. 184.

§ 2621(71)a. Vehicles transporting explosives. — Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

(a) Said vehicle shall be marked or placarded on each side and the rear with the word "explosives" in letters not less than eight inches high, or there shall be displayed on the rear of such vehicle a red flag not less than twenty-four inches square marked with the word "danger" in white letters six inches high.

(b) Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used.

(c) The commissioner is hereby authorized and directed to promulgate such additional regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highways as he shall deem advisable for the protection of the public. (1935, c. 311, s. 5.)

§ 2621(72). Drivers of State, county and city vehicles subject to provisions of the act.—The provisions of this act applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by this State or any political subdivisions thereof or of any city, town or district, except persons, teams, motor vehicles and other equipment while actually engaged in work on the surface of the road, but not when traveling to or from such work. (1927, c. 148, s. 30)

Editor's Note.—In the Uniform Act this provision in paragraph (b) was included under (a) and the penalty the same as (a).

These are similar to provisions found in most all statutes which prescribe heavy penalty.

Cited in Babbs v. Eury, 206 N. C. 679, 682, 175 S. E. 100.

§ 2621(73). Powers of local authorities.—Local authorities except as expressly authorized by sections 2621(46) (c) and 2621(63) shall have no power or authority to alter any speed limitations declared in this act or to enact or enforce any rule or regulations contrary to the provisions of this act, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signalling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. (1927, c. 148, s. 31.)

As to power of local authorities under prior law, see section 2601.

§ 2621(74). This act not to interfere with rights of owners of real property with reference thereto. —Nothing in this act shall be construed to prevent the owner of real property used by the public for purpose of vehicular travel by permission of the owner and not as matter of right from prohibiting such use nor from requiring other or different or additional conditions than those specified in this article or otherwise regulating such use as may seem best to such owner. (1927, c. 148, s. 32.)

The Size, Weight, Construction and Equipment of Vehicles

§ 2621(75). Scope and effect of regulations in this title.—It shall be unlawful and constitute a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title or any vehicle or vehicles which are not so constructed or equipped as required in this title or the rules and regulations of the Commission adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this State, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this act. (1927, c. 148, s. 33.)

§ 2621(76). Size of vehicles and loads.—(a) The total outside width of any vehicle or the load thereon shall not exceed ninety-six inches, except as otherwise provided in this section.

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle unladen or with load shall exceed a height of twelve feet, six inches.

(d) No vehicle shall exceed a length of thirty-five feet extreme over-all dimension, inclusive of front and rear bumpers. A truck tractor and semi-trailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of forty-five feet exclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the day time when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at night time by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of any projecting load to clearly mark the dimensions of such load: Provided, the reduction in total length of combination of vehicles provided for in this section shall not operate to make unlawful any vehicle now lawfully licensed in North Carolina prior to

December thirty-first, one thousand nine hundred and thirty-six: Provided, that the state highway and public works commission shall have authority to designate any highways upon the State system as light-traffic roads, when, in the opinion of the commission, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or busses, using such roads, as herein provided for; and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. The operation of any vehicle whose gross load, size and/or width exceeds the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than eighteen feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty per cent of the standard weight unless there shall be available an alternate improved route of not more than twenty per cent increase in the distance.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle, if it is equipped with such a bumper.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway. (1927, c. 148, 34; 1931, c. 235; 1935, c. 311, s. 3.)

Editor's Note.—The Uniform Act fixes the width at 8 feet, except that farm tractors of 9 feet width might be moved over the roads. The height allowed in the Uniform Act is fourteen feet and six inches. The length of a single vehicle is 33 feet or a combination of vehicles of a length of eighty five feet is permitted under the Uniform Act.

This section was so changed by the amendment of 1935 that a comparison is necessary to determine the full extent.

§ 2621(77). Flag or light at end of load.—Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load in such position as to be clearly visible at all times from the rear of such load a red flag not less than twenty inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle. (1927, c. 148, s. 35.)

Violation Is Negligence Per Se.—The parking of a truck on a public highway at night without lights in violation of this section and § 2691(94) is negligence per se, and the question of proximate cause is for the determination of the jury. Barrier v. Thomas, etc., Co., 205 N. C. 425, 171 S. E. 626.

Cited in Williams v. Frederickson Motor Express Lines, 198 N. C. 193, 151 S. E. 197.

§ 2621(78). Weight of vehicles and loads. — No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(a) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, eight thousand pounds.

(b) When the wheel is equipped with low-pressure pneumatic tire, nine thousand pounds.

(c) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, sixteen thousand pounds.

(d) When the wheels attached to said axle are equipped with low-pressure pneumatic tires, eighteen thousand pounds.

(e) For the purposes of this section an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than forty inches apart.

(f) For purposes of this section every pneumatic tire designed for use and used when inflated with air to less than one hundred pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to one hundred pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(g) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds six hundred pounds upon any inch of tire roller or other support.

(h) Subject to the foregoing limitations, the gross weight of any vehicle having two axles shall not exceed twenty thousand pounds.

(i) Subject to the foregoing limitations, the gross weight of any vehicle or combination of vehicles having three or more axles shall not exceed forty thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes. (1927, c. 148, s. 36; 1931, c. 235; 1935, c. 311, s. 4.)

Editor's Note.—This section seems to supersede section 2621(a) which is an older provision applying to the same subject-matter.

This section was so changed by the amendment of 1935 that a comparison is necessary to determine the full extent.

§ 2621(79). Peace officer may weigh vehicle and require removal of excess load.—Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this act. (1927, c. 148, s. 37.)

Editor's Note.—A similar provision is found in section 2621(29), fixing the rates of taxes for vehicles.

§ 2621(80). Permits for excessive size and weight.—The State Highway Commission, may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant

for seasonal operations to operate or move a vehicle of a size or weight exceeding the maximum specified in this act, upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or width exceeding the maximum expressed in this act. (1927, c. 148, s. 38; 1931, c. 235.)

Editor's Note.—The Act of 1931 added the proviso to this section.

§ 2621(81). When authorities may restrict right to use highways. — The State Highway Commission or local authorities may prohibit the operation of vehicles upon or impose restrictions as to the weight thereof, for a total period not to exceed ninety days in any one calendar year, when operated upon any highway under the jurisdiction of and for the maintenance of which the body adopting the ordinance is responsible whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be damaged unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The local authority enacting any such ordinance shall erect or cause to be erected and maintained, signs designating the provisions of the ordinance at each end of that portion of any highway to which the ordinance is applicable and the ordinance shall not be effective until or unless such signs are erected and maintained. (1927, c. 148, s. 39.)

§ 2621(82). Restriction as to tire equipment.

(a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one and a half inches thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat or spike or any other protuberance of any material other than rubber which projects beyond the tread of the traction surface of the tire except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway and except also that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid.

(c) The State Highway Commission or local authorities in their respective jurisdiction may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with traverse corrugations upon the periphery of such movable tracks or farm tractors or other farm machinery. (1927, c. 148, s. 40.)

Editor's Note.—One inch of rubber above the flange of the entire periphery is all that is required by the Uniform Act.

§ 2621(83). Trailers and towed vehicles.

(a) No motor vehicle shall be driven upon any highway drawing and having attached thereto more than one trailer or semi-trailer.

(b) No trailer or semi-trailer shall be operated over the highways of the state unless such trailer or semi-trailer be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not snake, but will travel in the path of the wheels of the vehicle drawing such trailer or semi-trailer, which equipped shall at all times be kept in good condition. (1927, c. 148, s. 41; 1931, cc. 235, 322; 1933, c. 484.)

Editor's Note.—Public Laws 1933, c. 484, changed the word "or" to "and" in the second line of the section, and changed the word "and" to "or", in the third line of the section.

§ 2621(84). Brakes.—Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movement of and stop and to hold such vehicle, including two separate means of applying the brakes each of which means shall be effective to apply the brakes to at least two wheels and so constructed that no part which is liable to failure shall be common to the two, except that motorcycles need be equipped with only one brake. All such brakes shall be maintained in good working order and shall conform to regulations not inconsistent with this section to be promulgated by the Commissioner. (1927, c. 148, s. 42.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2615.

§ 2621(84a). Brakes on trailers.—Every trailer or semi-trailer of two tons or over shall be equipped with adequate brakes, that can be effectively operated while the trailer is in motion: Provided, that until January first, one thousand nine hundred and thirty-two, this section shall not apply to trailers or semi-trailers licensed or in use on the highways of the State at the time of the passage of this act. (1931, c. 235, s. 2.)

Editor's Note.—The act from which this section was taken was ratified on April 2, 1931.

§ 2621(85). Horns and warning devices.

(a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet, and it shall be unlawful, except as otherwise provided in this section, for any vehicle to be equipped with or for any person to use upon a vehicle any siren, compression or spark plug whistle or for any person at any time to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonable loud or harsh sound by means of a horn or other warning device.

(b) Every police and fire department and fire patrol vehicle and every ambulance used for emergency calls shall be equipped with a bell, siren or exhaust whistle of a type approved by the Commissioner. (1927, c. 148, s. 43.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2615.

§ 2621(86). Mirrors.— No person shall drive a motor vehicle on a highway which motor vehicle is so constructed or loaded as to prevent the driver from obtaining a view of the highway to

the rear by looking backward from the driver's position, unless such vehicle is equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle. (1927, c. 148, s. 44.)

Editor's Note.—There seems to be no corresponding provision in the prior law.

§ 2621(87). Windshields must be unobstructed.

(a) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other non-transparent material upon the front windshield, side wings, side or rear windows of such motor vehicle other than a certificate or other paper required to be so displayed by law. (1927, c. 148, s. 45.)

Editor's Note.—The Uniform Act contains a paragraph (b) requiring windshield wipers which may be operated by driver.

§ 2621(88). Prevention of noise, smoke, etc., muffler cut-outs regulated.

(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens.

(b) It shall be unlawful to use a "muffler cut-out" or any motor vehicle upon a highway.

(c) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent its contents from dropping, sifting, leaking, or otherwise escaping therefrom (1927, c. 148, s. 46.)

For prior provisions, see section 2618.

§ 2621(89). Required lighting equipment of vehicles.

(a) When vehicles must be equipped.

Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles and subject to exemption with reference to lights on parked vehicles as declared in section 2621(94).

(b) Head lamps on motor vehicles.

Every motor vehicle other than a motorcycle, road-roller, road machinery, or farm tractor shall be equipped with two head lamps, no more and no less, at the front of and on opposite sides of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in section 2621(91) and section 2621(92).

(c) Head lamps on motorcycles.

Every motorcycle shall be equipped with at least one and not more than two head lamps which shall comply with the requirements and limitations set forth in section 2621(91) or section 2621(92).

(d) Rear lamps.

Every motor vehicle and every trailer or semi-trailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which has been approved by the Commissioner and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle and so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be so illuminated by a white light as to be read from a distance of fifty feet to the rear of such vehicle, and every trailer or semi-trailer shall carry at the rear in addition to a rear lamp as above specified a red reflector of a type which has been approved by the Commissioner and which is so designed, located as to height and maintained as to be visible for at least five hundred (500) feet when opposed by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway. Such reflector shall be placed at the extreme end of the load.

(e) Clearance lamps.

Every motor vehicle having a width at any part in excess of eighty inches shall carry two clearance lamps on the left side of such vehicle, one located at the front and displaying a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle, and the other located at the rear of the vehicle and displaying a red light visible under like conditions from a distance of five hundred feet to the rear of the vehicle.

(f) Lamps on bicycles.

Every bicycle shall be equipped with a lighted lamp on the front thereof visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle and shall also be equipped with a reflex mirror or lamp on the rear exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle.

(g) Lights on other vehicles.

All vehicles not heretofore in this section required to be equipped with specified lighted lamps shall carry on the left side one or more lighted lamps or lanterns projecting a white light, visible under normal atmospheric conditions from a distance of not less than five hundred feet to the front of such vehicle and visible under like conditions from a distance of not less than five hundred feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which is approved by the State Highway Commission. (1927, c. 148, s. 47.)

See annotations to § 2621(66).

Editor's Note.—This section of the Uniform Act contains a provision in paragraph (b) permitting acetylene lamps to be regulated by the commission. This provision will be found in section 2621(92). It also required that lamps be twenty-four inches from the ground.

Subdivision (g) of the Uniform Act permits either yellow or red lights in the rear but does not expressly permit reflex mirrors.

There is a paragraph in the Uniform Act regulating signal lamps which may be substituted for giving signals with the hand.

This section supersedes the corresponding provisions of section 2615.

As to requirement that all vehicles carry lights, see section 3794 (a).

Whether Obstruction Should Have Been Seen Is Jury Question.—Generally speaking, where the statutes, as this section, or the decisions of the courts require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights. Morris v. Sells-Floto Circus, 65 F. (2d) 783, 785.

§ 2621(90). Additional permissible lights on vehicles.

(a) Spot lamps.

Any motor vehicle may be equipped with not to exceed two spot lamps, except that a motorcycle shall not be equipped with more than one spot lamp, and every lighted spot lamp shall be so aimed and used upon approaching another vehicle that no part of the beam will be directed to the left of the center of the highway nor more than one hundred feet ahead of the vehicle. No spot lamp shall be used on the rear of any vehicles.

(b) Auxiliary driving lamps.

Any motor vehicle may be equipped with not to exceed two auxiliary driving lamps mounted on the front, and every such auxiliary driving lamp or lamps shall meet the requirements and limitations set forth in section 2621(91) (c).

(c) Restrictions on lamps.

Any device, other than head lamps, spot lamps or auxiliary driving lamps, which projects a beam of light of an intensity greater than twenty-five candle power, shall be so directed that no part of the beam will strike the level of the surface on which the vehicle stands at a distance of more than fifty feet from the vehicle. (1927, c. 148, s. 48.)

Editor's Note.—This section seems to supersede the corresponding provisions of section 2615.

§ 2621(91). Requirements as to head lamps and auxiliary driving lamps.

(a) The head lamps or motor vehicles shall be so constructed, arranged, and adjusted that, except as provided in subsection (c) of this section, they will at all times mentioned in section 2621(89) and under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but shall not project a glaring or dazzling light to persons in front of such head lamp.

(b) Head lamps shall be deemed to comply with the foregoing provisions prohibiting glaring and dazzling lights if none of the main bright portion of the head lamp beams rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

(c) Whenever a motor vehicle is being operated upon a highway, or a portion thereof, which is sufficiently lighted to reveal a person on the highway at a distance of two hundred feet ahead of the vehicle, it shall be permissible to dim the head lamps or to tilt the beams downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps, subject to the restrictions as to tilted beams and auxiliary driving lamps set forth in this subsection.

(d) Whenever a motor vehicle meets another vehicle on any highway it shall be permissible to tilt the beams of the head lamps downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps subject to the requirement that the tilted head lamps or auxiliary lamp or lamps shall give sufficient illumination under normal atmospheric conditions and on a level road to render clearly discernible a person seventy-five feet ahead, but shall not project a glaring or dazzling light to persons in front of the vehicle, provided that at all times required in section 2621(89) at least two lights shall be displayed on the front of and on opposite sides of every motor vehicle other than a motorcycle, road roller, road machinery, or farm tractor.

(e) No city or town shall enact an ordinance in conflict with this section. (1927, c. 148, s. 49.)

Editor's Note.—Subsection (e) does not appear in the Uniform Act.

§ 2621(92). Acetylene lights. — Motor vehicles may be equipped with two acetylene head lamps of approximately equal candle power when equipped with clear plane glass fronts, bright six-inch speherical mirrors and standard acetylene five-eights foot burners not more and not less and which do not project a glaring or dazzling light into the eyes of approaching drivers. (1927, c. 148, s. 50.)

§ 2621(93). Enforcement of provisions.

(a) The Commissioner is authorized to designate, furnish instructions to and to supervise official stations for adjusting head lamps and auxiliary driving lamps to conform with the provisions of section 2621(89). When head lamps and auxiliary driving lamps have been adjusted in conformity with the instructions issued by the Commissioner a certificate of adjustment shall be issued to the driver of the motor vehicle on forms issued in duplicate by the Commissioner and showing date of issue, registration number of the motor vehicle, owner's name, make of vehicle and official designation of the adjusting station.

(b) The driver of any motor vehicle equipped with approved head lamps, auxiliary driving lamps, rear lamps or signal lamps, who is arrested upon a charge that such lamps are improperly adjusted or are equipped with bulbs of a candlepower not approved for use therewith, shall be allowed forty-eight hours within which to bring such lamps into conformance with the requirements of this article. It shall be a defense to any such charge that the person arrested produce in court or submit to the prosecuting attorney a certificate from an official adjusting station showing that within forty-eight hours after such arrest such lamps have been made to conform with the requirements of this article. (1927, c. 148, s. 51.)

§ 2621(94). Lights on parked vehicles.—Whenever a vehicle is parked or stopped upon a highway whether attended or unattended during the times mentioned in section 2621(89) there shall be displayed upon such vehicle one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicles when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person

within a distance of two hundred feet upon such highways. (1927, c. 148, s. 52.)

See note to § 2621(66), and § 2621(77).

Cited in Williams v. Frederickson Motor Express Lines, 198 N. C. 193, 151 S. E. 197.

§ 2621(95). Red or green light visible from in front of vehicle prohibited.—It shall be unlawful for any person to drive or move any vehicle upon highway with any red or green light thereon visible from directly in front thereof. This section shall not apply to police or fire department or fire patrol vehicles. (1927, c. 148, s. 53.)

Highway Traffic Signs

§ 2621(96). Uniform marking of and erection of signs on highways.—The State Highway Commission is hereby authorized to classify, designate and mark both intrastate and interstate highways lying within the boundaries of this State and to provide a system of marking and signing such highways under the jurisdiction of this State, and such system of marking and signing shall correlate with and so far as possible conform to the system adopted in other States. (1927, c. 148, s. 54.)

§ 2621(97). Local traffic signs.—Local authorities in their respective jurisdictions shall cause appropriate signs to be erected and maintained, designating residence and business districts, highway and steam or interurban railway grade crossings and such other signs as may be deemed necessary to carry out the provisions of this article. Local authorities shall erect appropriate signs giving notice of special local parking and other regulations. (1927, c. 148, s. 55.)

§ 2621(98). Other than official signs prohibited.—No unauthorized person shall erect or maintain upon any highway any warning or direction sign, marker, signal or light in imitation of any official sign, marker, signal or light erected under the provisions of this article, and no person shall erect or maintain upon any highway any traffic or highway sign or signal bearing thereon any commercial advertising, provided nothing in this section shall be construed to prohibit the erection or maintenance of signs, markers, or signals bearing thereon the name of an organization authorized to erect the same by the State Highway Commission or by any local authority as defined in this article. (1927, c. 148, s. 56.)

§ 2621(99). Injuring signs. — Any person who shall deface, injure, knock down or remove any sign posted as provided in this article shall be guilty of a misdemeanor. (1927, c. 148, s. 57.)

Offenses, Penalties and Enforcement
Pedestrians' Rights and Duties.

§ 2621(99a). Pedestrians subject to traffic control signals.—Pedestrians shall be subject to traffic control signals at intersections as heretofore declared in this article, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in this article. (1935, c. 311, s. 6.)

§ 2621(99b). Pedestrians' right-of-way at crosswalks.—(a) Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this article.

(b) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle. (1935, c. 311, s. 6.)

§ 2621(99c). Crossing at other than crosswalks.—(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

(c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.

(d) It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left hand side thereof, and such pedestrians shall yield the right-of-way to approaching traffic.

(e) Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway. (1935, c. 311, s. 6.)

§ 2621(99d). Pedestrians to use right half of crosswalks. — Pedestrians shall move, whenever practicable, upon the right half of crosswalks. (1935, c. 311, s. 6.)

§ 2621(99e). Pedestrians soliciting rides. — No person shall stand in the travel portion of the highway for the purpose of soliciting a ride from the driver of any private vehicle. (1935, c. 311, s. 6.)

§ 2621(99f). Violation of statute a misdemeanor. — Any person, firm or corporation violating any of the provisions of this act shall be deemed to be guilty of a misdemeanor, and punished by fine or imprisonment in the discretion of the court as for other misdemeanors. Each violation shall be deemed a separate offense. (1931, c. 235, s. 2.)

Editor's Note.—The act from which this section was taken amended the Act of 1927, constituting this article, by adding this and §§ 2621(46a), 2621(49a), 2621(84a) and 2621(104a). As to provisions where offense declared a felony, see §§ 2621(100) and 2621(104).

§ 2621(100). Penalties for misdemeanors.

(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this article unless such violation is by this article or other law of this State declared to be a felony.

(b) Every person convicted of a misdemeanor for a violation of any of the provisions of this article for which another penalty is not provided

shall for a first conviction thereof within one year be punished by a fine of not more than one hundred dollars or by imprisonment in the county or municipal jail for not more than ten days; for a second such conviction within one year such person shall be punished by a fine of not more than two hundred dollars or by imprisonment in the county or municipal jail for not more than twenty days or by both such fine and imprisonment; upon a third or subsequent conviction within one year such person shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county or municipal jail for not more than six months or by both such fine and imprisonment. (1927, c. 148, s. 58.)

See § 2621(99f) and note.

Cited in Lancaster v. B. & H. Coach Line, 198 N. C. 107, 109, 150 S. E. 716.

§ 2621(101). Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.—Every person who is convicted of a violation of section 2621(44) relating to habitual users of narcotic drugs and driving while under the influence of intoxicating liquor or narcotic drugs shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more than one year or by fine of not less then one hundred dollars nor more than one thousand dollars or by both such fine and imprisonment. On a second or subsequent conviction for the same offense he shall be punished by imprisonment for not less than ninety days nor more than one year, and, in the discretion of the court, a fine of not more than one thousand dollars. In the case of a first or subsequent conviction the court shall have no power to suspend judgment upon payment of cost. (1927, c. 148, s. 59.)

§ 2621(102). Penalty for reckless driving.—Every person convicted of reckless driving under section 2621(45) shall be punished by imprisonment in the county or municipal jail for a period of not less than five days nor more than ninety days or by fine of not less than twenty-five dollars nor more than five hundred dollars or by both such fine and imprisonment, and on a second or subsequent offense shall be punished by imprisonment for not less than ten days nor more than six months or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment. In no case shall the court have power to suspend judgment upon payment of cost. (1927, c. 148, s. 60.)

§ 2621(103). Penalty for failure to stop in event of accident involving injury or death to a person.—Every person convicted of violating section 2621(71) (a) of this article relative to the duty to stop in the event of certain accidents shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more than one year or in the State prison for not less than one nor more than five years or by fine of not less than one hundred dollars nor more than five thousand dollars or by both such fine and imprisonment. The Commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1927, c. 148, s. 61.)

§ 2621(104). Penalty for felony.—Any person who shall be convicted of a violation of any of the provisions of this act herein or by the laws of this State declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this State, be punished by imprisonment in the State prison for a term not less than one year nor more than five years, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. (1927, c. 148, s. 62.)

§ 2621(104a). Enforcement. — It shall be the duty of the law enforcement officers of the State and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State, for the purpose of determining whether the same is being operated in violation of any of the provisions of this article. (1931, c. 235, s. 2.)

Procedure upon Arrest, Reports, Disposition of Fines and Forfeitures

§ 2621(105). Report of convictions to be sent to commission.

(a) Every justice of the peace or police judge or clerk of a court of record in this State shall keep a full record of every case in which a person is charged with violation of any provision of this article, and in the event that such person is convicted or that his bail is forfeited, an abstract of such record shall be sent forthwith by the justice of the peace or police judge or court of record to the commission but this requirement shall not be deemed to make such court a court of record. For such abstract the clerk shall receive a fee of fifty cents to be taxed as costs against such person so convicted.

(b) Abstracts required by this section shall be made up on forms prepared by the Commission and shall include all necessary information as to the parties to the case, the nature of the offense, the date of hearing, the plea, the judgment, the amount of the fine or forfeiture, as the case may be, and every such abstract shall be certified by the justice of the peace, police judge or clerk of such police court as a true abstract of the record of the court.

(c) Each clerk of any court of record of this State shall also, within ten days after any final judgment of conviction of any violation of any of the provisions of this act, send to the commission a certified copy of such judgment of conviction. Certified copies of the judgment shall also be forwarded to the commission upon conviction of any person of manslaughter or other felony in the commission of which a vehicle was used. The said commission shall keep such records in its office, and they shall be open to the inspection of any person during reasonable business hours. For such certified copy of the judgment the clerk shall receive a fee of fifty cents to be taxed as

costs against the convicted person. (1927, c. 148, s. 63.)

§ 2621(106). Fines and forfeitures.—All fines or forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor, shall be disposed of as now required by law. (1927, c. 148, s. 64.)

§ 2621(106a). Refund to counties of costs of prosecuting theft cases.—Whenever the Motor Vehicle Department of the State has caused to be instituted criminal prosecutions in the Superior Court of any county of the State for violation of the automobile theft laws, and the county wherein such case was tried has incurred court costs incident thereto, upon certificate of the Clerk of the Superior Court of said county showing an itemized statement thereof, and that the same has been paid, upon the approval of the Commissioner of Revenue and the Attorney General, the sum or sums so paid shall be refunded to said county, the same to be paid from the highway maintenance fund from receipts from the motor vehicle registration title fees.

This section shall apply to costs incurred in the prosecution of automobile theft cases only. (1929, c. 275, s. 1.)

Title of Article

§ 2621(107). Short title.—This article may be cited as the Uniform Act Regulating the Operation of Vehicles on Highways. (1927, c. 148, s. 65.)

Art. 8A. Safety Glass

§ 2621(107a). Safety glass required on motor vehicles; exception.—On and after January first, one thousand nine hundred and thirty-six, and except as hereinafter otherwise provided, it shall be unlawful to operate knowingly on any public highway or street in this State any motor vehicle which is registered in the State of North Carolina and which shall have been manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, unless such motor vehicle be equipped with safety glass wherever glass is used in doors, windows, windshields, wings or partitions; or for a dealer to sell a motor vehicle manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, for operation upon the said highways or streets unless it be so equipped. The provisions of this article shall not apply to any motor vehicle if such motor vehicle shall have been registered previously in another state by the owner while the owner was a bona fide resident of said other state. (1935, c. 394, s. 1.)

§ 2621(107b). "Safety glass" defined. — The term "safety glass," as used in this article, shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by glass when the glass is cracked or broken. (1935, c. 394, s. 2.)

§ 2621(107c). Motor vehicle bureau to approve types of glass.—The motor vehicle bureau of the revenue department shall approve and maintain a list of the approved types of glass, conforming to the specifications and requirements for safety glass as set forth in this article and in accordance with standards recognized by the United States bureau of standards, and shall not issue a license for or relicense any motor vehicle subject to the provisions of this article, unless such motor vehicle be equipped as herein provided with such approved type of glass. (1935, c. 394, s. 3.)

§ 2621(107d). Certificate of kind of glass used required.—All bills of sale or certification of title for motor vehicles subject to the provisions of this article shall contain a certification as to the kind of glass in doors, windows, windshields, wings and partitions. Provided that the failure to make such certification shall not have the effect to invalidate such sale or contract. (1935, c. 394, s. 4.)

§ 2621(107e). Violation made misdemeanor. — The owner of any motor vehicle which is operated knowingly or any dealer who sells a motor vehicle in violation of the provisions of this article shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five dollars ($25.00) or be imprisoned not more than thirty days, or both, in the discretion of the court. (1935, c. 394, s. 5.)

Art. 9. Giving Publicity to Highway Traffic Laws through the Public Schools

§ 2621(108). State highway commission to prepare digest. — The State Highway Commission shall cause to be prepared a digest of the traffic of the State suitable for use in the public schools of the State and have the same published in pamphlet form and delivered on or before the first day of August, one thousand nine hundred and twenty-seven, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1.)

§ 2621(109). State superintendent of public instruction to distribute pamphlet. — The State Superintendent of Public Instruction shall cause to be delivered to the superintendents or principals of the various high schools of the State sufficient number of said pamphlets to supply one to each of the teachers engaged for said schools. (1927, c. 242, s. 2.)

§ 2621(110). Pamphlets brought to attention of children. — The superintendents or principals, or other persons in charge of the public high schools of the State shall cause the contents of said pamphlets to be brought to the attention of all the children in attendance upon the said high schools in the form of lessons of at least one each week until the entire contents of said pamphlet have been read and explained. (1927, c. 242, s. 3.)

§ 2621(111). Practice to be continued; highway commission to supply additional copies yearly.—This practice shall be continued during each school year and the State Highway Commission is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet, having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the State

Highway Commission to be necessary. (1927, c. 242, s. 4.)

Art. 10. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles

§ 2621(112). Suspension of driver's license and registration certificates for failure to pay tort judgment. — In the event of the failure of any person, firm or corporation, to satisfy any judgment which shall have hereafter become final, by expiration, without appeal, of the time within which appeal might have been perfected, or by final affirmance, on appeal, rendered against him, by a court of competent jurisdiction in this State, within thirty days thereafter for damages on account of personal injuries, or deaths, or damage to property in excess of one hundred dollars ($100.00) resulting from the ownership, maintenance, use or operation of a motor vehicle, the said operator's license and all of the registration certificates of the said person, firm or corporation shall be forthwith suspended by the Commissioner of Revenue of North Carolina, upon receiving a certified copy or transcript of such final judgment, from the court in which the same was rendered, showing such judgment or judgments to have been still unsatisfied more than thirty days after the same became final, as aforesaid, and shall remain so suspended and shall not be renewed, nor shall any motor vehicle be thereafter registered in the name of the said person, firm or corporation while any such judgment remains unstayed, unsatisfied and subsisting and until every such judgment is satisfied or discharged, or until the said person gives proof of his ability to respond in damages, as hereinafter required, for future accidents. It shall be the duty of the Clerk of the Superior Court in any county in which any such judgment is rendered, to forward immediately after the expiration of said thirty days, as aforesaid, to the Commissioner of Revenue, a certified copy of such judgment or a transcript thereof as aforesaid. (1931, c. 116, s. 1.)

See 13 N. C. Law Rev., 223.

§ 2621(113). Proof of ability to respond in damages; surety bond; withdrawal of license to operate automobile.—The proof of the ability of any person, firm or corporation to respond in damages for any liability incurred may be established by the execution of a bond of a surety company, duly authorized to transact business within this State or a bond, with at least two individual sureties, each owning real estate within this State, which real estate shall be scheduled in the bond and which bond shall be approved by a Clerk of the Superior Court. The said bond to be conditioned for any liability thereafter incurred resulting from the ownership, maintenance, use or operation thereafter of a motor vehicle for personal injury to or death of any one person in the amount of at least five thousand dollars ($5,000.00) and, subject to the aforesaid limit for any one person injured or killed, of at least ten thousand dollars ($10,000.00) for personal injury to or the death of two or more persons in any one accident, and for damages to property in the amount of at least one thousand dollars ($1,000.00) resulting from any one accident. Additional evidence of ability to respond in damages, as required by this act, shall be furnished the Commissioner of Revenue at any time upon his demand.

Provided, however, anything in this act to be contrary notwithstanding, that

(1) When five thousand dollars ($5,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of one person as the result of any one accident; or

(2) When, subject to the limit of five thousand dollars ($5,000.00) for any one person so injured or killed, the sum of ten thousand dollars ($10,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of more than one person as the result of any one accident; or

(3) When one thousand dollars ($1,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for damage to property as the result of any one accident; resulting from the ownership, maintenance, use or operation of a motor vehicle, then and in such event, such payment or payments shall be deemed a satisfaction of such judgment or judgments for the purpose of this act only.

If any such motor vehicle owner or operator shall not be a resident of this State, the privilege of operating any motor vehicle in this State and the privilege of operation within the State of any motor vehicle owned by him shall be withdrawn while any final judgment against him as aforesaid, shall be unstayed, unsatisfied and subsisting for more than thirty (30) days, as aforesaid, and shall not be renewed, nor shall any operator's or chauffeur's license be issued to him or any motor vehicle registered in his name until every such judgment shall be stayed, satisfied or discharged as herein provided, and until such person shall have given proof of his ability to respond in damages for future accidents. (1931, c. 116, s. 2.)

Editor's Note.—The discrimination against non-residents provided for in the last paragraph of this section presents a constitutional problem which will undoubtedly come before the courts, but much authority would sustain it. See La Tourette v. McMaster, 248 U. S. 465, 39 S. Ct. 160, 63 L. Ed. 362, upholding discrimination between residents and non-residents in granting licenses to act as insurance brokers. The practical difficulty is to understand what the non-resident would be doing with a North Carolina automobile license unless he sojourned in the state for some substantial part of each year. 9 N. C. Law Rev. 385.

Individual Sureties May Be Given.—The provision made in this section for the bond of a surety company, "or a bond with at least two individual sureties," etc., indicates the legislative intent as to giving individual sureties in certain cases. State v. Sasseen, 206 N. C. 644, 648, 175 S. E. 142.

Cited in State v. Gulledge, 208 N. C. 204, 209, 179 S. E. 883.

§ 2621(114). Proof of ability by insurance carrier's certificate.—Proof of ability to respond in damages, when required by this act, may be evidenced by the written certificate or certificates of any insurance carriers duly authorized to do business within the State, that it has issued to or for the benefit of the person named therein a motor vehicle liability policy or policies in the form hereinafter prescribed, which, at the date of

the certificate or certificates, is or are in full force and effect, and designating therein by explicit description or by other adequate reference, all motor vehicles to which the policy or policies apply. The Commissioner of Revenue shall not accept any certificate or certificates unless the same shall cover all motor vehicles then registered in this State in the name of the person furnishing such proof. Additional certificates, as aforesaid, shall be required as a condition precedent to the registration of any additional motor vehicle or motor vehicles in the name of such person required to furnish proof as aforesaid. Said certificate or certificates shall certify that the motor vehicle liability policies therein cited shall not be cancelled or expire except as hereinafter provided. If such person be a non-resident, a certificate, as aforesaid, of an insurance carrier authorized to transact business in the State in which the motor vehicle or motor vehicles described in such certificate is registered, or if none be described, then in the State in which the insured resides, shall be excepted if such carrier shall (a) execute a power of attorney authorizing the Commissioner of Revenue to accept service of notice or process in any action arising out of a motor vehicle accident in this State, and (b) its governing executive authority shall duly adopt a resolution providing that its policies shall be deemed to be varied to comply with the law of this State relating to the terms of motor vehicle liability policies issued therein, and (c) agree to accept as final and binding any final judgment duly rendered in any action arising out of a motor vehicle accident in any court of competent jurisdiction in this State: Provided, however, that the provisions of this section shall be operative as to such insurance carriers (organized and existing under the laws of such State and not licensed to transact business in this State) only to the extent and under the same terms and conditions that under the laws of such State where such motor vehicle is registered or in which the insured resides, like recognition, if a law of like effect is in force and effect, is granted to certificates of insurance carriers, organized and existing under and by virtue of the laws of this State. If, under the laws of such State, in which a law of like effect is in force and effect, certificates of insurance carriers organized and existing under or by virtue of the laws of this State are not accepted, the certificates of insurance carriers of such State shall not be accepted under the provisions of this act.

The Commissioner of Revenue shall be notified by the insurance carrier or sureties of the cancellation or expiration of any motor vehicle liability policy or bond certified under the provisions of the act at least ten (10) days before the effective date of such cancellation or expiration and until such notice is duly given, such policy shall continue in full force and effect.

The Commissioner of Revenue shall require proof of ability to respond in damages, within the limits herein specified, from and after the effective date of this bill, of all taxicab, jitney and for-hire operators not covered or embraced within the provisions of the present law or such laws as may be enacted at this session of the General Assembly affecting other motor vehicle operators transporting passengers or property upon the highways for compensation. (1931, c. 116, s. 3.)

§ 2621(115). Bond to satisfy execution. — A bond, filed by or on behalf of any person under the provisions of this act shall be held by the Commissioner of Revenue to satisfy, in accordance with the provisions of this act, any execution issued against such person on a judgment for damages, as aforesaid, arising out of the ownership, maintenance, use or operation of a motor vehicle, as aforesaid. If such a judgment rendered against the principal on the surety company bond or real estate individual bond, given under the provisions of this act, shall not be satisfied within thirty (30) days after it has become final as hereinbefore provided, the judgment creditor may, for his own use and benefit and at his sole expense, bring an action or actions in the name of the State against the company or persons executing such bond. (1931, c. 116, s. 4.)

§ 2621(116). Abstracts of operating record furnished on request.—The Commissioner of Revenue shall upon request furnish any insurance carrier, person, or surety a certified abstract of the operating record of any person subject to the provisions of this act, which abstract shall fully designate the motor vehicles (if any), registered in the name of such person, and if there shall be no record of any conviction of such person of a violation of any provision of any statute relating to the operating of a motor vehicle or of any injury or damage caused by such person as herein provided, the Commissioner of Revenue shall so certify. The Commissioner of Revenue shall collect for each such certificate the sum of one dollar. (1931, c. 116, s. 5.)

§ 2621(117). Commissioner to furnish other information on request.—The Commissioner of Revenue shall furnish any person who may have been injured in person or property by any motor vehicle, upon written request, with all information of record in his office pertaining to the evidence of the ability of any operator or owner of any motor vehicle to respond in damages. (1931, c. 116, s. 6.)

§ 2621(118). Return by operator of licenses, number plates upon request of Commissioner. — Any operator or any owner, whose operator's license or certificate of registration shall have been suspended as herein provided, or whose policy of insurance or surety bond shall have been cancelled or terminated, or who shall neglect to furnish additional evidence of ability to respond in damages upon request of the Commissioner of Revenue shall immediately return to the Commissioner of Revenue his operator's license, certificate of registration and the number plates issued thereunder. If any person shall wilfully fail to return to the Commissioner of Revenue the operator's license, certificate or certificates of registration and the number plates issued thereunder as provided herein, the Commissioner of Revenue shall forthwith direct any State policeman or other police officer to secure possession thereof and to return the same to the office of the

Commissioner of Revenue. Any person wilfully failing to return such operator's license or such certificate or certificates and number plates shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and such penalty shall be in addition to any penalty imposed for any violation of the Motor Vehicle Laws of North Carolina. (1931, c. 116, s. 7.)

§ 2621(119). Cancellation or return of bond by Commissioner.—The Commissioner of Revenue shall cancel such bond or return such proof of insurance to the person furnishing the same at any time after three years shall have elapsed since the filing of such bond or proof or the making of such deposit: Provided, that no suit or judgment against him for damages as aforesaid arising from the ownership, maintenance, use or operation hereafter of a motor vehicle shall then be pending or outstanding and unstayed or unsatisfied, as aforesaid; and the affidavit of such person, showing fulfillment of these requirements shall be sufficient proof thereof in the absence of evidence to the contrary before the Commissioner. (1931, c. 116, s. 8.)

§ 2621(120). Fraudulent transfer of registration certificate. — If any owner's certificate of registration has been suspended under the provisions of this act, such certificate shall not be transferred nor the motor vehicle in respect of which such certificate was issued, registered in another name, where the Commissioner of Revenue has reasonable grounds to believe that such transfer or registration is proposed for the purpose or will have the effect of defeating the purpose of this act. Provided, however, that such transfer of registration shall be permitted upon the furnishing of proof of financial responsibility to the Commissioner of Revenue by such transferee whenever the Commissioner shall deem it necessary in furtherance of the purpose of this section. (1931, c. 116, s. 9.)

§ 2621(121). Present policies of automobile insurance unaffected.—Nothing in this act contained shall be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by special act, and such policies, if endorsed to conform to the requirements of this act, shall be accepted as proof of financial responsibility when required under this act; nor shall anything in this act contained be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance, operation or use by other persons in the insured's employ or in his behalf of motor vehicles not owned by the insured. (1931, c. 116, s. 10.)

§ 2621(122). Fraudulent proof of ability to respond in damages.—Any person who shall forge, or without authority, sign any evidence of ability to respond in damages as required by the Commissioner of Revenue in the administration of this act and any non-resident who shall operate a motor vehicle in this State from whom the privilege of operating any motor vehicle has been withdrawn as provided in section two hereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or imprisoned not more than thirty days, or both. (1931, c. 116, s. 11.)

§ 2621(123). Motor vehicle liability policy. — "Motor vehicle liability policy," as used in this act, shall be taken to mean a policy of liability insurance issued by an insurance carrier authorized to transact business in this State or issued by an insurance carrier authorized to transact business in the State in which the motor vehicle or motor vehicles therein described is registered, or if none be described, then in the State in which the insured resides to the person therein named as insured, which policy shall either (1) designate, by explicit description or other adequate reference, all motor vehicles with respect to which coverage is intended to be granted by said policy, and shall insure the insured named therein and any other person using or responsible for the use of any such motor vehicle with the consent, express or implied, of such insured against loss from the liability imposed by law upon such insured or upon such other person for injury to or death of any person, other than such insured and such person or persons as may be covered, as respects such injury or death by any workmen's compensation law, and/or for damage to property, except property of others in charge of the insured or of his employees or other agents growing out of the ownership, maintenance, use or operation of any such motor vehicle within the continental limits of the United States of America; or which policy shall, in the alternative, (2) insure the person therein named as insured against loss from the liability imposed by law upon such insured for injury to or death of any person, other than such insured and such person or persons as may be covered as respects such injury or death by any workmen's compensation law, and/or for damage to property, except property of others in charge of the insured or of his employees or other agents growing out of the maintenance, operation or use by such insured of any motor vehicle, except a motor vehicle registered in the name of such insured, and occurring while such insured is personally in control, as driver or occupant, of such motor vehicle within the continental limits of the United States of America to the amount or limit of five thousand dollars ($5,000.00), exclusive of interest and costs, on account of injury to or death of any one person, and, subject to the same limit as respects injury to or death of any one person, of ten thousand dollars ($10,000.00), exclusive of interest and costs, on account of any one accident resulting in injury to or death of more than one person; and of one thousand dollars ($1,000.00) for damage to property of others, as herein provided, resulting from any one accident; or a binder pending the issuance of any such policy, or an endorsement to an existing policy both as hereinafter provided: Provided, however, that this section shall not be construed as preventing an insurance carrier from granting in a "motor vehicle liability policy" any lawful coverage in excess of or in addition to the coverage herein provided for or from embodying in such policy and agreements, provisions or stipulations not contrary to the provisions of this act and not otherwise contrary to law. And: Provided,

further, that separate concurrent policies, whether issued by one or several carriers, covering, respectively, (a) personal injury or death, as aforesaid, and (b) property damage, as aforesaid, shall be termed "a motor vehicle liability policy," within the meaning of this act.

Except as in section 2621(121) provided, no motor vehicle liability policy shall be issued or delivered in this State until a copy of the form of policy shall have been on file with the Commissioner of Insurance for at least thirty (30) days, unless sooner approved in writing by such Commissioner, nor if within said period of thirty (30) days such Commissioner shall have notified the carrier in writing that in his opinion, specifying the reasons therefor, the form of policy does not comply with the provisions of this act. The Commissioner of Insurance shall approve any form of policy which specifies the name, address and business, if any, of the insured, the coverage afforded by the policy, the premium charged therefor, the policy period, and the limits of liability, and contains an agreement that the insurance thereunder is provided in accordance with the coverage defined in this section, as respects personal injury and death or property damage or both, and is subject to all the provisions of this act.

Every such motor vehicle liability policy shall be subject to the following provisions, whether or not contained therein:

(a) The liability of the insurance carrier under a motor vehicle liability policy shall become absolute whenever loss or damage covered by such policy occurs, and the satisfaction by the assured of a final judgment for such loss or damage shall not be a condition precedent to the right or obligation of the carrier to make payment on account of such loss or damage. No such policy shall be cancelled or annulled as respects any loss or damage, by any agreement between the carrier and the insured after the said insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

The policy may provide that the insured, or any other person covered by the policy, shall reimburse the insurance carrier for payments made on account of any loss or damage claim or suit involving a breach of the terms, provisions or conditions of the policy; and further, if the policy shall provide for limits in excess of the limits specified in this section, the insurance carrier may plead against any plaintiff, with respect to the amount of such excess limits of liability, and defenses which it may be entitled to plead against the insured, and any such policy may further provide for the prorating of the insurance thereunder with other applicable valid and collectible insurance.

(b) The policy, the written application therefor, if any, and any rider or endorsement which shall not conflict with the provisions of this act shall constitute the entire contract between the parties.

(c) The insurance carrier shall, upon the request of the insured, deliver to the insured for filing, or at the request of the insured shall file direct, with the Commissioner of Revenue an appropriate certificate in conformity with the provisions of section three, of this act.

(d) Any carrier authorized to issue motor vehicle liability policies may, pending the issue of such a policy, execute an agreement, to be known as a "binder;" or may, in lieu of such a policy, issue an endorsement to an existing policy. Every such binder or endorsement shall be subject to the provisions of this section and shall be construed to provide indemnity or insurance in like manner and to the same extent as a motor vehicle liability policy. (1931, c. 116, s. 12.)

§ 2621(124). Certain words defined.—The following words, as used in this act, shall have the following meanings:

(a) The singular shall include the plural; the masculine shall include the feminine and neuter, as requisite.

(b) "Person" shall include individuals, partnerships, corporations, receivers, referees, trustees, executors and administrators; and shall also include the owner of any motor vehicle as requisite; but shall not include the State or any political subdivisions thereof.

(c) "Motor Vehicle" shall include trailers, motorcycles and tractors. (1931, c. 116, s. 13.)

§ 2621(125). Rules and regulations.—The commissioner of Revenue shall make rules and regulations necessary for the administration of this act. (1931, c. 116, s. 14.)

§ 2621(126). Reliance on other security unaffected. — Nothing herein shall be construed as preventing the plaintiff in any action at law from relying for security upon the other processes provided by law. (1931, c. 116, s. 15.)

Art. 11. Consolidation of Activities under the Motor Vehicle Bureau

§ 2621(127). Motor vehicle bureau set up in department of revenue; deputy commissioner.—The commissioner of revenue shall set up in the department of revenue a motor vehicle bureau and appoint as administrative head of said bureau a deputy motor vehicle commissioner, which deputy motor vehicle commissioner shall at all times be under the authority and control of the commissioner of revenue. There shall be transferred and organized under the motor vehicle bureau all such activities as are now provided by law in the department of revenue for the registration and licensing of motor vehicles, for the collection of gasoline taxes, and likewise all duties and authority now conferred by law upon the department of agriculture with respect to the inspection and analysis of kerosene, gasoline, and lubricating oils; and likewise all duties and authority now conferred by law upon the state highway commission with respect to the enforcement of the motor vehicle laws and control and direction of the state highway patrol; and such other additional duties as are hereinafter provided for. (1933, c. 544, s. 1.)

§ 2621(128). Motor vehicle and inspection board created.—In order to more fully carry out the purposes of this act, there is hereby created a motor vehicle and inspection board, to be composed of the governor, or such person as he may designate to serve in his stead, the commissioner of revenue,

and the chairman of the state highway commission, who shall serve without additional compensation. (1933, c. 544, s. 2.)

§ 2621(129). Minimum standards for articles inspected.—It shall be the duty of the motor vehicle and inspection board, after public notice and provision for the hearing of all interested parties within sixty days after the ratification of this act, to adopt minimum standards for each of the articles for which inspection is provided in consolidated statutes, section four thousand eight hundred and fifty-two, and to cause such standards to be published throughout the state and made available for all dealers in such products. After the adoption and publication of said standards, it shall be unlawful to sell or offer or expose for sale or exchange or to use in this state any of such products which fail to comply with the standards so adopted. The said motor vehicle and inspection board shall from time to time, after a public hearing, have a right to amend, alter, or change said standards. (1933, c. 544, s. 3.)

§ 2621(130). Adulteration of articles prohibited.—It shall be unlawful for any person, firm, corporation or association who has purchased gasoline or other liquid motor fuel upon which a road tax has been paid, or which has been designated gasoline of legal standard, to in any wise adulterate or lower the standard of same by the addition thereto of kerosene, or any other liquid or substance, and sell or offer for sale the same. (1933, c. 544, s. 4.)

§ 2621(131). Board to sample articles to be inspected.—For the purpose of protecting the state's revenues, and for the purpose of preventing frauds, substitutions, adulterations, and other reprehensible practices, sections four thousand eight hundred fifty and four thousand eight hundred and fifty-one of the consolidated statutes be, and the same are hereby so amended as to authorize and empower said department, or its agents, to examine, investigate, inspect and take samples of all kerosene, gasoline, benzine, naphtha, petroleum solvents, distillates, gas oil, furnace or fuel oil, and all other volatile and inflammable liquids by whatever name known or sold and produced, manufactured, refined, prepared, distilled, compounded or blended for the purpose of generating power in motor vehicles for the propulsion thereof by means of internal combustion, or which are sold or used for such purposes, and any and all substances or liquids or commodities which, in themselves, or by reasonable combinations with others, might be used for, or as substitutes for, motor fuels. But, it is not the purpose of this statute to impose any inspection tax upon commodities except kerosene oil, gasoline, and other products of petroleum used as motor fuels, as provided in section four thousand eight hundred fifty-six of the consolidated statutes. The inspection tax shall be due and payable upon the total quantity of kerosene, gasoline, or other motor fuels sold or used as required by the laws imposing tax under the gasoline road tax; and payment of same shall be made concurrent therewith, unless the commissioner of revenue shall by rule and regulation prescribe other methods for the collection of such tax; and the said commissioner is hereby expressly given authority to make and provide for the enforcement of such rules and regulations as the said commissioner may find necessary to secure the inspection of all gasoline and kerosene, and to collect the inspection fee therefor. To this end the laws requiring transportation agencies to report to the department of revenue the delivery in this state of gasoline and/or kerosene are hereby amended so as to authorize the said commissioner of revenue to require said transportation agencies to likewise report any of the other articles mentioned in this section which, in the opinion of the commissioner, may be necessary or useful in preventing the adulteration of gasoline or kerosene. (1933, c. 544, § 5.)

§ 2621(132). Laboratory analysis.—The commissioner of revenue be authorized to provide for laboratory analysis of samples of the inspected articles by continuing said work in the department of agriculture as heretofore, upon such arrangements as may be mutually agreed upon between the commissioner of revenue and the commissioner of agriculture, or by transferring said laboratory analysis to the division of laboratory and tests in the department of the state highway commission, as he may find most advantageous and economical. (1933, c. 544, s. 6.)

§ 2621(133). Analysis certificate admissible in evidence.—A certified copy of the official test of the analysis of any petroleum product made under the provisions of this article, under the seal of the commissioner of revenue, shall be admissible as evidence of the fact therein stated in any of the courts of this state on the trial of any issue involving the qualities of said product. (1933, c. 544, s. 7.)

§ 2621(134). Inspection duties of highway patrol.—In addition to the duties now imposed by law upon the state highway patrol, the deputy motor vehicle commissioner shall direct the members of the state highway patrol to perform the duties now imposed by law upon the inspectors as authorized by consolidated statutes, section four thousand eight hundred fifty-four, and they shall be invested with all the authority of such inspectors. The deputy motor vehicle commissioner may likewise direct any employee of the motor vehicle bureau to collect samples of the articles to be inspected, and they shall, upon such designation, have all the authority now conferred by law upon inspectors for this purpose. (1933, c. 544, s. 8.)

§ 2621(135). Samples taken of bulk shipments and from retail distributors.—The deputy motor vehicle commissioner shall cause samples to be taken not only of bulk shipments and in original packages, but likewise at the various retail distributing points throughout the state, to the end that the public may be protected in the quality of petroleum products purchased, and that the mixing and blending of other products with gasoline to avoid the tax thereon may be prevented. (1933, c. 544, s. 9.)

§ 2621(136). Violation of act by distributors cause of revocation of license; power of commissioner of revenue to cancel license and surrender bond.—If any licensee shall at any time file a false report of the data or information re-

quired by law, or shall fail or refuse or neglect to file any report required by law, or to pay the full amount of the tax as required by law, the commissioner of revenue may forthwith cancel the license of such licensee and notify such licensee in writing of such cancellation by registered mail to the last known address of such licensee appearing in the files of the commissioner of revenue. In the event that the license of any licensee shall be cancelled by the commissioner of revenue as hereinbefore provided in this section, and in the event such licensee shall have paid to the state of North Carolina all the taxes due and payable by it under this article, together with any and all penalties accruing under any of the provisions of this article, then the commissioner of revenue shall cancel and surrender the bond theretofore filed by said licensee. (1933, c. 544, s. 10.)

§ 2621(137). Penalty for failure to report or to pay taxes promptly.—When any licensee shall fail to file reports with the commissioner of revenue, as required by this article, or shall fail to pay to the commissioner of revenue the amount of inspection tax due to the state of North Carolina when the same shall be payable, a penalty of one hundred per cent (100%) shall be added to the amount of the tax due, and said penalty of one hundred per cent (100%) shall immediately accrue, and thereafter said tax and penalty shall bear interest at the rate of one per cent (1%) per month until the same is paid. (1933, c. 544, s. 11.)

§ 2621(138). The commissioner of revenue may estimate motor fuel received.—Whenever any licensee shall neglect or refuse to make and file any report as required by this article, or shall file an incorrect or fraudulent report, the commissioner of revenue shall determine after an investigation the number of gallons of kerosene oil and motor fuel with respect to which the licensee has incurred liability under the tax laws of the state of North Carolina, and shall fix the amount of the taxes and penalties payable by the licensee under this article accordingly. In any action or proceeding for the collection of the inspection tax for kerosene oil or motor fuel and/or any penalties or interest imposed in connection therewith, an assessment by the commissioner of revenue of the amount of tax due, and/or interest and/or penalties due to the state, shall constitute prima facie evidence of the claim of the state; and the burden of proof shall be upon the licensee to show that the assessment was incorrect and contrary to law; and the commissioner of revenue may institute action therefor in the superior court of Wake county, regardless of the residence of such licensee or the place where the default occurred. (1933, c. 544, s. 12.)

§ 2621(139). "Licensee" defined.—The word "licensee" as used in this article is hereby defined and declared to include and embrace not only the person, firm or corporation to which the license is issued, but all its agents, servants, and employees. (1933, c. 544, s. 13.)

§ 2621(140). Measuring equipment to be inspected.—The agents of the deputy motor vehicle commissioner shall be required to investigate and inspect the equipment for measuring gasoline, lubricating oil, and illuminating oil, and other petroleum products, and make report of such inspection to the deputy motor vehicle commissioner. In all cases where it is found, after inspection, that the measuring equipment used in connection with the distribution of such products is inaccurate, and if the owner, within five days after the notice of such inaccuracy, fails to correct the same and continues to use it, he shall be guilty of a misdemeanor, and the deputy motor vehicle commissioner is authorized to condemn and confiscate such equipment: Provided, that the owner of any such equipment, before the same is confiscated, shall have a right to a hearing before the motor vehicle and inspection board hereinbefore provided. (1933, c. 544, s. 14.)

§ 2621(141). Field force limited.—In addition to the members of the state highway patrol, the deputy motor vehicle commissioner shall not be allowed a field force of more than six men, other than the auditors provided in house bill number three hundred and eighty (380), providing for the auditing of the accounts of gasoline distributors. (1933, c. 544, s. 15.)

§ 2621(142). Vehicles for hire regulated.—The commissioner of revenue shall have authority and it shall be his duty to pass reasonable rules and regulations to require all operators of motor vehicles for hire to have such vehicles properly equipped with brakes and lights, in accordance with the requirements of law, and to require satisfactory evidence of liability insurance where same is required by law, prior to the issuance of annual license therefor, and to have the same inspected periodically during the period of said license; and the commissioner of revenue is authorized and directed to take all necessary steps to enforce such rules and regulations. (1933, c. 544, s. 16.)

§ 2621(143). Compensation of members of new department.—The salary of the deputy motor vehicle commissioner and the number and salaries of the various clerks and assistants assigned to him by the commissioner of revenue shall be fixed by the budget bureau, and all appropriations made under the several departments for the various activities here consolidated, or so much thereof as may be necessary, shall, with the approval of the budget bureau, be made available for carrying out the purposes of this article. (1933, c. 544, s. 17.)

§ 2621(144). Abolishing inspection appropriation.—Item no. 20 in house bill no. 125, enacted at the present session of the general assembly, appropriating to the department of agriculture for gasoline and oil inspection the sum of fifteen thousand six hundred and sixty dollars ($15,660.00) for each of the fiscal years of the next ensuing bi-ennium, is hereby repealed. It shall be the duty of the department of revenue to utilize as far as practical its general organization, and including the services of the highway patrol, to carry out the provisions of this article and of senate bill no. 238, enacted at the present session of the general assembly, in so far as can reasonably be done without additional or specific appropriation for such service. For the necessary laboratory work in connection with an efficient administration of the inspection laws by either the laboratories of the department of agriculture or of the state highway commission, as either of these agencies may

be utilized under the provisions of this act, and for any other services necessary to be performed in carrying out the provisions of this article, there shall from time to time be allotted by the budget bureau from the inspection fees collected under authority of the inspection laws of this state such sums as the budget bureau may find to be necessary for the efficient administration of the inspection laws. (1933, c. 544, s. 18.)

§ 2621(145). Laws amended.—All laws relating to the subject matter of this article are hereby amended to such extent as may be necessary to make them conform to this article, and as thus amended continued in full force and effect; and all laws or clauses of laws inconsistent with the provisions of this article, to the extent of such inconsistency and conflict, but no further, are hereby repealed. (1933, c. 544, s. 19.)

Art. 12. Regulation of Automobile Liability Insurance Rates.

§ 2621(146). Approval by insurance commissioner of automobile liability insurance rates.—Every person, association or corporation authorized to transact automobile liability and/or property damage and/or collision insurance business within this state shall file with the insurance commissioner on or before their effective date, the classification of risks, rules, rates, and rating plans, for writing such insurance, approved or made by such insurer or by any rating organization of which it is a member, none of which shall become effective until approved by the insurance commissioner. The insurance commissioner shall within fifteen days after the filing of each classification of risks, rules, rates and rating plans indicate in writing his approval or disapproval thereof with his reasons therefor. Such filing may be made on behalf of an insurer by the rating organization of which it is a member. Any bureau organized in this state for making and/or administering automobile rates and rating plans shall provide for equal representation of stock and non-stock insurers upon its governing and all other committees and shall admit to membership any insurer applying therefor. (1933, c. 283, s. 1.)

The most important feature of this legislation is the authorization of rate regulation by the Insurance Commissioner. Insurance premium rate regulation has been generally upheld as an exercise of the police power, since insurance is a business affected with a public interest. See 11 N. C. Law Rev., 233.

§ 2621(147). Compliance with fixed rates mandatory.—Every person, association, or corporation authorized to transact the aforesaid insurance business within this state shall comply with the rates and rules affecting such rates of the rating organization in which it has membership or whose rates it adopts as its standard, or with the rates and rules which such insurer has filed with the insurance commissioner. (1933, c. 283, s. 2.)

§ 2621(148). Adjustment of unreasonable rates.—It shall be the duty of the insurance commissioner, after due notice and a hearing before him, to order an adjustment of rates on any such risks or classes of risks whenever it shall be found by him that such rates are excessive or unreasonable or that any insurer is discriminating unfairly between its policyholders whose risks are of essentially the same hazard. The findings, determinations and orders of the insurance commissioner shall be subject to review on their merits by appeal to the superior court of Wake county. (1933, c. 283, s. 3.)

§ 2621(149). Refunds by mutuals and exchanges unaffected.—Nothing in this article shall be construed to limit the method of determining rates, or plan of operation of any mutual insurance company or inter-insurance exchange in this state, or prevent refund to all policyholders of the same class any portion of the annual premium not required to defray the expenses of such insurance. (1933, c. 283, s. 4.)

Art. 13. Licensing of Motor Vehicle Operators and Chauffeurs.

§ 2621(150). Definitions.—Terms used in this article shall be construed as follows, unless another meaning is clearly apparent from the language or context or unless such construction is inconsistent with the manifest intention of the legislature.

"Highway" shall include any trunk line highway, state aid road or other public highway, road, street, avenue, alley, driveway, parkway, or place, under the control of the state or any political subdivision thereof, dedicated, appropriated or opened to public travel or other use.

"Motor vehicle" shall mean any rubber-tired vehicle propelled or drawn by any power other than muscular, except aircraft, road rollers, street sprinklers, ambulances owned by municipalities, baggage trucks, and tractors used about railroad stations and yards, agricultural tractors, industrial tractors used in and around warehouses and yards, and such vehicles as run only upon rails or tracks.

"Non-resident" shall mean any person whose legal residence is in some state other than North Carolina or in a foreign country.

"Operator" shall mean any person other than a "chauffeur" who shall operate a motor vehicle or who shall be in the driver's seat of a motor vehicle when the engine is running or who shall steer or direct the course of a motor vehicle which is being towed or pushed by another motor vehicle.

"Chauffeur" shall mean every person who is employed for the principle purpose of operating a passenger motor vehicle, except school busses, and every person who drives any motor vehicle while in use as a public or common carrier for persons or property, and this shall apply to city delivery motor vehicles.

"Person" shall include any individual, corporation, association, co-partnership, company, firm or other aggregation of individuals.

"Vehicle" shall include any device suitable for use on the highways for the conveyance, drawing or other transportation of persons or property, except those propelled or drawn by muscular power or those used exclusively upon tracks.

"Department" shall mean the same agency that may by law have control of the state highway patrol of this State acting directly or through its duly authorized officers and agents. (1935, c. 52, s. 1.)

Editor's Note.—Section 35 of chapter 52 of Public Laws of 1935, from whence the above section was codified provides: "This act shall take effect from and after the first day of November, one thousand nine hundred and thirty-

five, but the operators' and chauffeurs' licenses shall be made available ninety (90) days after its ratification."

§ 2621(151). Operators and chauffeurs must be licensed.—(a) No person except those expressly exempted under section 2621(152) shall operate a motor vehicle upon any highway in this State unless such person upon application has been licensed as an operator or chauffeur by the department under the provisions of this article. Provided, that any person over sixteen (16) years of age who has not been refused such license or who has not had such license suspended or revoked may, for a period not exceeding thirty days, operate a motor vehicle, during daylight hours, while under the instruction of and accompanied by a licensed operator or chauffeur, who shall have full controll of and responsibility for the motor vehicle as provided by law.

(b) Every application for an operator's or chauffeur's license shall be made upon the approved form furnished by the department and shall be verified by the applicant before a person authorized to administer oaths. All members of the state highway patrol are hereby authorized and directed to administer oaths in the administration of this article, and no fee shall be charged by them for such service.

(c) Before granting an operator's or chauffeur's license to any applicant who has not had previous experience in the operation of a motor vehicle, the department shall require such applicant to demonstrate personally in such manner and to such person or persons as the department may direct, that such applicant is a proper person to operate a motor vehicle, has sufficient knowledge of the mechanism of motor vehicles to insure their safe operation by him, and a satisfactory knowledge of the laws concerning motor vehicles and the rules of the road pertaining to same. Provided that when such applicant shall have held a license from a state where a similar examination is required, the department may waive part or all of such examination, in its discretion. Provided, further, that until November first, one thousand nine hundred and thirty-five, one year's driving experience and freedom from conviction of traffic violations during such year shall be considered prima facie qualification for license as operator.

(d) When the department is satisfied as to the ability and competency of any applicant, it shall issue to him a license, either unlimited or containing such limitations as the department shall deem advisable. If any applicant shall suffer from physical defect or from disease which might affect the operation by him of a motor vehicle, the department may require a certificate of such applicant's condition signed by medical authority designated by the department, which certificate shall in all cases be treated as confidential. A license containing such limitations as the department shall deem advisable may be issued in any case, but nothing in this section shall be construed to prevent the department from refusing a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public. Provided nothing herein shall prohibit deaf persons from operating a motor vehicle who in every other way meet the requirements.

(e) Every operator's or chauffeur's license issued by the department shall bear thereon the distinguishing number assigned to the licensee and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(f) Every chauffeur before operating a motor vehicle as a public or common carrier of persons or property shall apply for and receive from the department a chauffeur's badge and at all times, while so operating a motor vehicle, shall display the same upon his person where it will be plainly visible. Such badges shall be furnished by the department, each bearing thereon the distinguishing number assigned to the licensee.

(g) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. (1935, c. 52, s. 2.)

§ 2621(152). Persons exempt from license.—The following are exempt from license hereunder:

(a) Any person while operating a motor vehicle the property of, and in the service of the Army, Navy or Marine Corps of the United States. This shall not be construed to exempt any chauffeurs or operators of the United States Civilian Conservation Corps motor vehicles;

(b) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(c) A non-resident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this state only as an operator;

(d) A non-resident who is at least eighteen (18) years of age and who has in his immediate possession of valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;

(e) Any non-resident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such non-resident;

(f) Any non-resident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of chauffeurs may operate a motor vehicle as a chauffeur for a period of not more than ten days in any calendar year if the motor vehicle so operated is duly registered in

the home state or country of such non-resident. (1935, c. 52, s. 3.)

§ 2621(153). What persons shall not be licensed. —(a) An operator's license shall not be issued to any person under the age of sixteen (16) years, and no chauffeur's license shall be issued to any person under the age of eighteen (18) years.

(b) The department shall not issue an operator's or chauffeur's license to any person whose license, either as operator or chauffeur, has been suspended, during the period for which license was suspended; nor to any person whose license, either as operator or chauffeur, has been revoked under the provisions of this article, until the expiration of one year after such license was revoked.

(c) The department shall not issue an operator's or chauffeur's license to any person whom it has determined is an habitual drunkard or is addicted to the use of narcotic drugs.

(d) No operator's or chauffeur's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, grand mal epileptic, or feeble-minded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feeble-minded upon a certificate of the superintendent that such person is competent, nor then unless the department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The department shall not issue an operator's or chauffeur's license to any person when in the opinion of the department such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs. (1935, c. 52, s. 4.)

§ 2621(154). Age limits for drivers of public passenger-carrying vehicles.—It shall be unlawful for any person, whether licensed under this article or not, who is under the age of twenty-one years to drive a motor vehicle while in use as a public passenger-carrying vehicle. (1935, c. 52, s. 5.)

§ 2621(155). Application of minor.—The department shall not grant the application of any minor between the ages of sixteen (16) and eighteen (18) years for an operator's license unless such application is signed by the father of the applicant, if the father is living and has custody of the applicant, otherwise by the mother or guardian having the custody of such minor, or in the event a minor under the age of eighteen years has no mother, father, or guardian, then the operator's license shall not be granted to the minor unless his application therefor is signed by his employer. (1935, c. 52, s. 6.)

§ 2621(156). Instruction.—Any licensed operator or chauffeur may instruct a person who is sixteen or more years of age, during daylight hours, in the operation of a motor vehicle. Any person so instructing another shall be seated as to be within reach of the controls of the motor vehicle and shall be responsible for the operation thereof. (1935, c. 52, s. 7.)

§ 2621(157). Expiration of license. — (a) Every operator's license issued hereunder shall be valid until suspended or revoked as provided in this article except that the department shall hereafter, but not more often than once every three years and after public notice, cancel all outstanding operators' licenses and issue in lieu thereof new operators' licenses to persons applying therefor and entitled thereto under the provision of this article. Such licenses shall be issued without fee and without examination except in those instances when the department has reason to believe that the applicant may not be qualified to hold an operator's license under this article.

(b) Every chauffeur's license shall expire June thirtieth each year and shall be renewed annually upon application and payment of fees required by law, provided that the department may in its discretion waive the examination of any such applicant previously licensed as a chauffeur under this article. (1935, c. 52, s. 8.)

§ 2621(158). Duplicate certificates and chauffeurs' badges.—In the event that an operator's or chauffeur's license or badge issued under the provisions of this article is lost or destroyed, the person to whom the same was issued may, upon payment of a fee of fifty cents ($.50), obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the department that such license or badge has been lost or destroyed. (1935, c. 52, s. 9.)

§ 2621(159). Authority of department to cancel license.—(a) The department shall have authorty to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required or correct information in his application, or committed fraud in making such application.

(b) Upon such cancellation, the licensee must surrender the license so cancelled, together with chauffeur's badge, if any, to the department. (1935, c. 52, s. 10.

§ 2621(160). Authority of department to suspend license.—(a) The department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;

2. Has been involved as a driver in any accident resultng in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver;

3. Is an habitually reckless or negligent driver of a motor vehicle;

4. Is incompetent to drive a motor vehicle;

5. Is an habitual violator of the traffic laws;

6. Has permitted an unlawful or fraudulent use of such license;

7. Has committed an offense in another state, which if committed in this state would be grounds for suspension or revocation; or

8. Has been convicted of illegal transportation of intoxicating liquors.

(b) Upon suspending the license of any person as hereinbefore in this section authorized, the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the duly authorized agents of the department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon such hearing the department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license or revoke such license. (1935, c. 52, s. 11.)

§ 2621(161). Mandatory revocation of license by department. — (a) The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.

2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.

3. Any felony in the commission of which a motor vehicle is used.

4. Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.

5. Perjury or the making of a false affidavit or statement under oath to the department under this article or under any other law relating to the ownership of motor vehicles.

6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.

7. Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.

(b) The department, upon receiving a record of the conviction of any person upon a charge of operating a motor vehicle while the license of such person is suspended or revoked, shall immediately extend the period of such first suspension or revocation for an additional like period. (1935, c. 52, s. 12.)

§ 2621(162). Period of suspension or revocation. —The department shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year. (1935, c. 52, s. 13.)

§ 2621(163). Surrender and return of license and badge.—The department upon suspending or revoking a license shall require that such license and the badge of any chauffeur whose license is suspended or revoked shall be surrendered to and be retained by the department except that at the end of a period of suspension such license and any chauffeur's badge so surrendered shall be returned to the licensee. (1935, c. 52, s. 14.)

§ 2621(164). No operation under foreign license during suspension or revocation in this state. — Any resident or non-resident whose operator's or chauffeur's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this article. (1935, c. 52, s. 15.)

§ 2621(165). Suspending privileges of non-residents and reporting convictions.—(a) The privilege of driving a motor vehicle on the highways of this State given to a non-resident hereunder shall be subject to suspension or revocation by the department in like manner and for like cause as an operator's or chauffeur's license issued hereunder may be suspended or revoked.

(b) The department is further authorized, upon receiving a record of the conviction in this State of a non-resident driver of a motor vehicle of any offense under the motor vehicle laws of this State, to forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident. (1935, c. 52, s. 16.)

§ 2621(166). Suspending resident's license upon conviction in another state.—The department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. (1935, c. 52, s. 17.)

§ 2621(167). When court to forward license to department and record convictions.—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the department.

(b) Every court having jurisdiction over offenses committed under this article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purpose of this article the term "conviction" shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) Pending an appeal, the court from which the appeal is taken shall make such recommendation to the department relative to suspension of license until the appeal shall have been finally determined, as to it may seem just and proper under the circumstances.

(e) That after the effective date of this article, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this article. (1935, c. 52, s. 18.)

§ 2621(168). Right of appeal to court.—Any person denied a license or whose license has been cancelled, suspended or revoked by the department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon thirty (30) days written notice to the department, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article. (1935, c. 52, s. 19.)

§ 2621(169). Records.—The department shall keep a record of proceedings and orders pertaining to all licenses granted, refused, suspended or revoked by the department. It shall furnish without charge, for official use only, certified copies of certificates and licenses and documents relating thereto, to officials of the State, counties and municipalities or to any court in this State. A charge not to exceed one dollar ($1.00) shall be made by the department for copies furnished for other than official use. (1935, c. 52, s. 20.)

§ 2621(170). Availability of records.—All records of the department pertaining to application and to operator's and chauffeur's license, except the confidential medical report referred to in section 2621(151), of the current or previous five years shall be open to public inspection at any reasonable time during office hours. (1935, c. 52, s. 21.)

§ 2621(171). Unlawful to drive while license suspended or revoked.—Any person whose operator's or chauffeur's license has been suspended or revoked, as provided in this article, and who shall drive any motor vehicle upon the highways of this State while such license is suspended or revoked, may be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not more than six months, and there may be imposed in addition thereto a fine of not more than five hundred dollars. (1935, c. 52, s. 22.)

§ 2621(172). Surrender of license.—Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the department, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. (1935, c. 52, s. 23.)

§ 2621(173). Violations of license provisions. — It shall be unlawful for any person to commit any of the following acts:

(a) To display or cause to be displayed or to have in possession of any operator's or chauffeur's license, knowing the same to be fictitious or to have been cancelled, revoked, suspended or altered.

(b) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, any operator's or chauffeur's license.

(c) To display or to represent as one's own a license not issued to the person so displaying same.

(d) To fail or refuse to surrender to the department upon demand any license or the badge of any chauffeur whose license has been suspended, cancelled or revoked as provided by law.

(e) To use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application. Any license procured as aforesaid shall be void from the issuance thereof, and any monies paid therefor shall be forfeited to the State. (1935, c. 52, s. 24.)

§ 2621(174). Making false affidavits perjury. — Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this article to be sworn to or affirmed shall be guilty of perjury and upon conviction shall be punished by fine or imprisonment as other persons committing perjury are punishable under the laws of this State. (1935, c. 52, s. 25.)

§ 2621(175). Unlawful to permit unlicensed minor to drive motor vehicle.—It shall be unlawful for any person to cause or knowingly permit any minor over sixteen and under the age of eighteen years to drive a motor vehicle upon a highway as an operator, unless such minor shall have first obtained a license to so drive a motor vehicle under the provisions of this article. (1935, c. 52, s. 26.)

§ 2621(176). Unlawful to employ unlicensed chauffeur.—No person shall employ any chauffeur to operate a motor vehicle who is not licensed as provided by this article. (1935, c. 52, s. 27.)

§ 2621(177). Unlawful to permit violations of this article.—No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this article. (1935, c. 52, s. 28.)

§ 2621(178). Penalties for misdemeanor. — (a) It shall be a misdemeanor to violate any of the proivsions of this article unless such violation is by this article or other law of this State declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than five hundred ($500.00) dollars or by imprisonment for not more than six (6) months. (1935, c. 52, s. 29.)

§ 2621(179), Fees.—(a) The fees charged for the licenses herein provided for shall be as follows:

For an operator's license the sum of one ($1.00) dollar, which shall continue the license in effect until revoked or cancelled; chauffeur's license two ($2.00) dollars annually, or until revoked: Provided, that no charge shall be made for any private operator's license which shall be applied for prior to November first, one thousand nine hundred and thirty-five.

(b) All fees collected under the provisions of this article shall be paid by the commissioner of revenue to the state treasurer to be credited by him to the state highway fund. (1935, c. 52, s. 30.)

§ 2621(180). Title of article.—This article may be cited as the Uniform Driver's License Act. (1935, c. 52, s. 31.)

§ 2621(181). Limitations on issuance of licenses. —There shall be no operator's or chauffeur's license issued within this State other than that provided for in this article, nor shall there be any other examination required. (1935, c. 52, s. 34.)

Art. 14. License Plates for Officers of National Guard

§ 2621(182). Distinctive automobile license plates provided for officers of national guard. — The commissioner of revenue shall cause to be made each year a sufficient number of automobile license plates to furnish each officer of the North Carolina National Guard with a set thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this State, except that such license plates shall bear on the face thereof the following words, "National Guard." The said letters forming the words "National Guard" shall be arranged in vertical lines, one word on each side of said license plates. (1935, c. 218, s. 1.)

Editor's Note.—Section 5 of chapter 218, Public Laws of 1935, from whence the above law was codified provides: "The provisions of this Act shall not apply to the issuance of license plates for the calendar year one thousand nine hundred and thirty-five."

§ 2621(183). Issuance restricted; fees for.—The said license plates shall be issued only to officers of the North Carolina National Guard, and for which license plates the commissioner of revenue shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. (1935, c. 218, s. 2.)

§ 2621(184). Furnishing commissioner of revenue list of officers of national guard; numbering of plates.—The adjutant general of North Carolina shall furnish to the commissioner of revenue each year prior to the date that licenses are issued a list of the officers of the North Carolina National Guard, which said list shall contain the rank of each officer listed in the order of his seniority in the service, and the said license plates shall be numbered, beginning with the number of two hundred and one (201) and in numerical sequence thereafter up to and including the number five hundred (500), according to seniority, the number officer being issued the license bearing the numerals two hundred and one. (1935, c. 218, s. 3.)

§ 2621(185). Cancellation where officer's car is transferred; reissuance to officer.—Upon transfer of the ownership of a private passenger vehicle upon which there is a license plate bearing the words National Guard, said plates shall be removed and the authority to use the same shall thereby be cancelled, however, upon application to the commissioner of revenue, he shall reissue the said plates to the officer of the National Guard, to whom the same were originally issued, and upon said re-issue the commissioner of revenue shall collect fees in an amount equal to the fees collected for the original licensing and registering of said private passenger vehicle as is now or may be prescribed by law. (1935, c. 218, s. 4.)

CHAPTER 56

MUNICIPAL CORPORATIONS

SUBCHAPTER I. REGULATIONS INDEPENDENT OF ACT OF 1917

Art. 1. General Powers

§ 2622. Body politic.—Every incorporated city or town is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no other. (Rev., s. 2915; Code, s. 702.)

Cross Reference.—For full treatment of Municipal Corporations, see 9 N. C. Dig. 376, 628. As to power to make ordinances, see section 2673 et seq.

§ 2623. Corporate powers.—A city or town is authorized:

1. To sue and be sued in its corporate name.

Cross Reference.—As to liability for injuries because of defective streets, see section 2675. As to liability for injuries from police, see section 2642. In general see 9 N. C. Enc. Dig. Pg. 624-628. As to right of citizen to recover from delinquent officer, see section 3206.

In General.—A town must be sued by its corporate name and not in the name of its officers. Young v. Barden, 90 N. C. 424.

How Served with Summons.—A summons against a city may be served on the mayor and on the secretary of the board of aldermen. Loughran v. Hickory, 129 N. C. 281, 40 S. E. 46.

Form of Action. — As a general rule, whenever a good cause of action exists against a municipal corporation, it may be prosecuted by an action in whatever form would be appropriate against an individual. The creditor is not limited to an action by mandamus. Winslow v. Commissioners, 64 N. C. 218.

Venue in County Where Municipality Located.—Cities and towns must be sued in the county in which they are located, and if suit is brought in another county, they have the right to have it removed. Jones v. Statesville, 97 N. C. 86, 2 S. E. 346, cited in note in 25 L. R. A., N. S., 711. See section 464 and the notes thereto.

Action in Name of all the Citizens against a City.—In an action against a municipal corporation to enjoin the collection of an illegal tax, it is not error to allow all citizens

other than the original plaintiff to be made parties plaintiff. Cobb v. Elizabeth City, 75 N. C. 1.

2. Out of any funds on hand, and without creating any debt, to purchase and hold real estate for the use of its inhabitants.

Cross Reference.—As to power to dispose of property, see 9 N. C. Enc. Dig. pp. 427-430, sections 2688-2690. As to power to establish markets, see sections 2674, 2794. As to power to acquire property, see sections 2791-2792.

Erection of a Public Building.—The erection by a city of a public building with funds for the purpose on hand, for governmental offices, academy of music, public meetings, etc., if for a governmental purpose, and within the exercise of the discretionary powers conferred upon the governing body of the municipality, and where no further expense may be incurred such as to pledge the credit of the city, or therein impose an obligation upon it, there is no violation of our Constitution, Art. VII, sec. 7. Adams v. Durham, 189 N. C. 232, 126 S. E. 611.

3. To purchase and hold land, within or without its limits, not exceeding fifty acres (in cities or towns having a population of more than twenty thousand the number of acres shall be in the discretion of said city), for the purpose of a cemetery, and to prohibit burial of persons at any other place in town, and to regulate the manner of burial in such cemetery. All municipal corporations purchasing real property at any trustee's, mortgagee's, or commissioner's sale or execution or tax sale shall be entitled to a conveyance therefor from the trustee, mortgagee or other person or officer conducting such sale, and deeds to such municipal corporations or their assigns shall have the same force and effect as conveyances to private purchasers. The provisions of this subsection shall apply to such sales and conveyances as may have been heretofore made by the persons and officers herein mentioned.

Editor's Note.—Prior to the amendment of 1927 there was no provision for towns or cities having over twenty thousand inhabitants. The limit of fifty acres applied to all.

City's Power Over Interment.—The ownership of a lot in a cemetery, or license to inter therein, is subject to the police power of the state, and interments may be forbidden, and bodies already interred removed, by ordinance of the city, if authorized by act of the legislature. Humphrey v. Board, 109 N. C. 132, 13 S. E. 793, cited in note in 38 L. R. A. 329. See the titles Cemeteries, vol. 2 N. C. Enc. Dig. 918; Dead Bodies, vol. 4, N. C. Enc. Dig. 393; post sec. 4322.

Relief to Taxpayers when Section Violated.—Where the proper authorities of a city have purchased lands for a Negro cemetery in excess of the fifty acres allowed by this section, in good faith, to meet a necessary need therefor, and at a reasonable price, and have paid therefor and accepted a deed from the owners, injunctive relief at the suit of the taxpayers will be denied. Harrison v. New Bern, 193 N. C. 555, 137 S. E. 582.

The title of the purchaser at a tax foreclosure sale may not be challenged by the listed owner upon the purchaser's motion for a writ of assistance, and such purchaser may be a municipality where it does not appear of record that the purchase of the land was ultra vires, a municipality having the power to purchase land for certain purposes under this section. Wake County v. Johnson, 206 N. C. 478, 174 S. E. 303.

4. To make such contracts, and purchase and hold such personal property as may be necessary to the exercise of its powers.

Cross Reference.—As to power to establish a public library, see section 2694 et seq. As to sewerage, see sections 2805-2806. As to water and lights, see sections 2807-2809.

5. To make such orders for the disposition or use of its property as the interest of the town requires.

As to sale at public out-cry, see section 2688. As to private sale, see following sub-section and note.

Power to Cede Away, or Control Public Affairs. — Municipal corporations may make authorized contracts, but they have no power under this section to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. The receipt of $600 from a citizen in consideration of locating certain public buildings near his property so as to enhance the value is such a contract. Edwards v. Goldsboro, 141 N. C. 60, 64, 53 S. E. 652.

6. To grant upon reasonable terms franchises for public utilities, such grants not to exceed the period of sixty years, unless renewed at the end of the period granted; also to sell or lease, upon such conditions and with such terms of payment as the city or town may prescribe, any water-works, lighting plants, gas or electric, or any other public utility which may be owned by any city or town: Provided, that in the event of such sale or lease it shall be approved by a majority of the qualified voters of such city or town; and also to make contracts, for a period not exceeding thirty years, for the supply of light, water or other public commodity.

Editor's Note.—By amendment. Ex. Sess. 1921, the provision for conditions and terms was inserted.

The provision of section 2688 in regard to sale at public out-cry is not applicable to sales under this section, and when the approval of the voters is had there may be a private sale of such property as is included in the provision of this section. Section 2688 is not applicable to property held in trust, Church v. Dula, 148 N. C. 262, 266, 61 S. E. 639, and it was for a sale of such property that this section was especially intended. See Allen v. Reidsville, 178 N. C. 513, 101 S. E. 267.

Public Laws 1933, c. 69, omitted a provision that the section should not apply to Cumberland county.

In General.—Although the Utilities Commission is the principal agency for regulation of electricity rates in North Carolina, the municipalities still can, if they will, play an important part in view of this section. See 12 N. C. Law Rev., 294.

Franchises for Use of Streets Must Be Expressly Conferred.—"The law is well settled that the title either of the fee in the soil or an easement is vested in the municipality, in trust for the use of the people as and for a public highway, and that it cannot, without legislative authority, divert them from this use." Therefore a grant by a city of a franchise allowing gas pipes to be laid in its streets is void unless allowed by express legislation. Elizabeth City v. Banks, 150 N. C. 407, 64 S. E. 189.

Duty Imposed with Franchise to Water Company.—The acceptance of a municipal franchise by a water company carries with it the duty of supplying water to all persons along the lines of its mains without discrimination and at uniform rates. Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319.

Same—Power to Repudiate.—A water company operating under a franchise-contract from a city or town, and receiving the benefits and advantages arising thereunder, may not repudiate the duty of supplying water free to public schools, etc., which it had expressly contracted to do in accepting the franchise containing such provision, and collect for water it had furnished them upon a quantum meruit or otherwise. Henderson Water Co. v. Trustees, 151 N. C. 171, 65 S. E. 927.

Franchise Does not Abridge Rights of Abutting Owners.—As against the rights of abutting owners the municipal authorities have no power to grant to a railroad company an easement to lay its track upon and operate its trains over the streets of a town, even though the title to the streets be in the town. Staton v. Atlantic Coast Line R. Co., 147 N. C. 428, 61 S. E. 455.

Exclusive Privilege Unconstitutional. — Those provisions of an ordinance granting the exclusive privilege to construct and maintain water-works within the corporate limits of a town, and the exclusive use of its streets, alleys, sidewalks, public grounds, streams and bridges, come within the confirmation of sec. 31, of Art. I, of the Constitution of this State, which declares that "perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed." Thrift v. Elizabeth City, 122 N. C. 31, 35, 30 S. E. 349.

License Not a Permanent Easement.—A license granted by a city to a railroad company to lay a track upon and to that extent use the streets, in the absence of an express power in the charter to do so, such license cannot be construed into a grant of a permanent easement. State v. Atlantic & N. C. R. Co., 141 N. C. 736, 53 S. E. 290.

Power to Annul a License to a Street Railroad.—After a

city, by ordinance, has granted a street railroad a right to construct its line over certain streets it cannot by subsequent ordinance arbitrarily annul such license. Ry. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316.

7. To provide for the municipal government of its inhabitants in the manner required by law.

Cited in State v. Vanhook, 182 N. C. 831, 833, 109 S. E. 65.

8. To levy and collect such taxes as are authorized by law.

As to taxation, see sections 2677-2687. As to general powers under Act of 1917, see section 2787.

9. To do and perform all other duties and powers authorized by law. (Rev., s. 2916; Code, ss. 704, 3817; 1901, c. 283; 1905, c. 526; 1907, c. 978; P. L. 1917, c. 223; Ex. Sess. 1921, c. 58; 1927, c. 14; 1933, c. 69.)

For full treatment of powers and duties, see 9 N. C. Enc. Dig. 376, 628.

Can Only Exercise Conferred Power. — A municipality has no inherent police powers, but can exercise only those conferred by the state, and any reasonable doubt concerning such powers is resolved against it. State v. Dannenberg, 150 N. C. 799, 63 S. E 946.

§ 2624. How corporate powers exercised.—The corporate powers can be exercised only by the board of commissioners, or in pursuance of resolutions adopted by them, unless otherwise specially provided by law. (Rev., s. 2917; Code, ss. 703.)

As to removal of officers, see section 2885; As to exercise of power under Act of 1917, see sections 2820-2839.

Majority of Those Present Validate an Ordinance.—If an act is to be done by an incorporated body, the law, resolution or ordinance authorizing it to be done is valid if passed by a majority of those present at a legal meeting. Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 13 S. E. 271; LeRoy v. Elizabeth City, 166 N. C. 93, 81 S. E. 1072.

§ 2625. Application and meaning of terms.—This subchapter shall apply to all incorporated cities and towns where the same shall not be inconsistent with special acts of incorporation, or special laws in reference thereto, and the word "commissioners" shall also be construed to mean "aldermen," or other governing municipal authorities. The sections relating to municipal or town elections shall apply to all cities and towns not expressly excepted by law. (Rev., s. 2918; Code, s. 3827; R. C., c. 111, s. 23.)

As to change made by Act of 1917, see sections 2778-2786.

What General Law Applies to.—A general law applies to all towns and cities in the state if it is not inconsistent with some special law or the charter of a town or city. State v. Smith, 103 N. C. 403, 407, 9 S. E. 435.

Inconsistent Laws—Which Prevails. — The general law holds in the absence of special laws. In case of special laws the general law is repealed only to the extent of a conflict. If there is no conflict the two may be construed in pari materia. Raleigh v. Peace, 110 N. C. 32, 45, 14 S. E. 521.

General Law Covers Poll Tax.—In the absence of power especially conferred upon a town to levy taxes for its purposes on polls, the statutory provision extended to and embraced it. State v. Atkinson, 107 N. C. 317, 320, 12 S. E. 202.

Cited in dissenting opinion in Redmond v. Commissioners, 106 N. C. 122, 151, 10 S. E. 845.

Art. 2. Municipal Officers

Part 1. Commissioners

§ 2626. Number and election.—The board of commissioners of each town shall consist of not less than three nor more than seven commissioners, who shall be biennially elected by the qualified voters of the town, at the time and in the manner prescribed by law. (Rev., ss. 2917, 2919; Code, s. 3787; R. C., c. 111, s. 1.)

As to number of commissioners under the different plans, of Act of 1917, see sections 2782, 2861, 2868, 2889.

§ 2627. Number may be changed.—After the first election the voters of any town may, whenever and as often as they choose, at the time of electing commissioners, and after due notice given thereof by the commissioners then in authority, by a majority of all the votes cast, alter the number of commissioners, so that the number be not more than seven nor less than three; and thenceforth the number of commissioners agreed on shall be chosen. (Rev., s. 2922; Code, s. 3791; R. C., c. 111, s. 7.)

§ 2628. Oath of office.—The commissioners shall take and subscribe an oath before some person authorized by law to administer oaths that they will faithfully and impartially discharge the duties of their office, and such oaths shall be filed with the mayor of such town and entered in a book kept for that purpose. (Rev., s. 2920; Code, s. 3799, R. C., c. 111, s. 12.)

§ 2629. Vacancies filled.—In case of a vacancy after election in the office of commissioner the others may fill it until the next election. (Rev., s. 2921; Code, s. 3793; R. C., c. 111, s. 9.)

§ 2630. Commissioners appoint other officers and fix salaries.—The board of commissioners may appoint a town constable, and such other officers and agents as may be necessary to enforce their ordinances and regulations, keep their records, and conduct their affairs; may determine the amount of their salaries or compensation; and also the compensation or salary of the mayor; may impose oaths of office upon them, and require bonds from them payable to the state, in proper penalties for the faithful discharge of their duties. (Rev., s. 2925; Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51.)

As to health officer, see § 7076 et seq.

Power to Appoint a Special Tax Collector.—Whenever the authorities of a town shall be commanded to levy and collect taxes they may appoint a special tax-collector to collect the same. But this power to appoint such a collector is additional, and does not abridge their right to require the collection to be made by the regular officer appointed for that purpose. Webb v. Beaufort, 88 N. C. 496.

Compensation When no Salary Specified.—Where a municipal corporation engages a commissioner of its sinking fund under the provisions of its charter, by which the incumbent was employed for a term of years continuously, his employment is that of a public officer, which precludes compensation based upon a quantum meruit, and he may not recover for his services in the absence of express statutory provision. Borden v. Goldsboro, 173 N. C. 661, 92 S. E. 694.

Applied in Wadesboro v. Atkinson, 107 N. C. 317, 12 S. E. 202.

Part 2. Mayor

§ 2631. How elected; vacancy.—At the same time when commissioners are elected, the voters may by ballot, under the inspection of the same persons and under the same rules and regulations, elect a mayor of the town; and the person having the highest number of votes shall be declared elected. In case of vacancy in the office, the commissioners may fill the same. (Rev., s. 2931; Code, s. 3794; R. C., c. 111, s. 10).

As to registration of voters, see section 2654. As to mayor pro tem, see section 2633.

In General.—"The word 'mayor' first occurs in English history in 1189, when Richard I, substituted a mayor for the

two bailiffs of London. The Romans styled such officer 'prefectus urbi,' and originally the English title for such officer was either 'bailiff' or 'portreeve,' just as the sheriff (who had, however, far greater functions than our officer of that title) was 'shirereeve,' i. e., sheriff. In 5 Words and Phrases, 4450, it is said that the word mayor comes from an old English word 'maier,' which means 'power,' 'authority,' and not from the Latin 'major'—granter. He represents the power and authority of the town, and the duty of presiding at meetings of the town commissioners is only one of the duties he exercises. While the power and duties of the mayor may vary according to the charter of the town or the laws of the state, it is probably without any exception his duty to execute the laws and local regulations of his city and to supervise the discharge of their duties by the subordinate officers of the city government. Such an office could not be left vacant, without public inconvenience, during the illness or absence of the incumbent, and hence our statute provides a mode of selecting a substitute a pro tem. mayor, who shall 'exercise his duties'—meaning all his duties (for there is no restriction) and as fully as he could have done." State v. Thomas, 141 N. C. 791, 793, 53 S. E. 522.

§ 2632. Oath of office.—The mayor, before some justice of the peace, or other person authorized by law to administer oaths, shall take and subscribe the oaths prescribed for public officers, and an oath that he will faithfully and impartially discharge the duties imposed upon him by law, which said oath shall be filed with the records of the town and be entered on the same book with the oaths of the commissioners. (Rev., s. 2932; Code, s. 3798; R. C., c. 111, s. 11.)

§ 2633. Presides at commissioners' meeting; mayor pro tem.—The mayor shall preside at the meetings of the commissioners, but shall have no vote except in case of a tie; and in the event of his absence or sickness, the board of commissioners may appoint one of their number pro tempore, to exercise his duties. (Rev., s. 2933; Code, s. 3794; R. C., c. 111, s. 10.)

Cross Reference.—As tho veto power of mayor under the plans as provided for by the Act of 1917, see sections 2865, 2872. As to mayors in general, see 9 N. C. Enc. Dig. 419.

Mayor's Power to Vote.—Ordinarily the office of mayor is of an executive or administrative character, and he is not permitted to vote except in cases where it is especially provided. Markham v. Simpson, 175 N. C. 135, 95 S. E. 106.

Powers of Mayor Pro Tem.—The appointment of a mayor pro tem vests him with all the powers of the mayor, including that of issuing warrants in criminal actions. State v. Thomas, 141 N. C. 791, 53 S. E. 522.

§ 2634. Mayor's jurisdiction as a court.—The mayor of every city or incorporated town is hereby constituted an inferior court, and as such court such mayor shall be a magistrate and conservator of the peace, and within the corporate limits of his city or town shall have the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the state, or under the ordinances of such city or town. The rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor, and he shall be entitled to the same fees which are allowed to justices of the peace. (Rev., s. 2934; Code, s. 3818; 1871-2, c. 195; 1876-7, c. 243.)

Jurisdiction of Mayor.—The legislature has power to grant to the chief officers of cities and towns all the jurisdiction which it could grant to judges of special courts under the constitution. State v. Pender, 66 N. C. 314.

"The duties of a mayor are to cause the laws of the city to be enforced, and to superintend inferior officers." State v. Thomas, 141 N. C. 791, 792, 53 S. E. 522.

The mayors of towns and cities have jurisdiction of the offense of violating town or city ordinances. State v. Wilson, 106 N. C. 718, 11 S. E. 254. They also have the same criminal jurisdiction within the corporate limits as a justice of the peace. Greensboro v. Shields, 78 N. C. 417. They occasionally have concurrent jurisdiction in such matters. State v. Cainan, 94 N. C. 880.

Jurisdiction as to Establishing Streets. — The Mayor's Court has jurisdiction of a case in which the controversy is whether or not a public street has been established, and whether or not a certain party obstructed it in violation of an ordinance. Such a controversy is not as to title to the land for if the street is established title is not material. Henderson v. Davis, 106 N. C. 88, 11 S. E. 573.

Proceedings in Mayor's Court Not a Bar to Prosecution in Higher Courts. — A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the own by fighting is not a bar to a prosecution by the State for an assault. State v. Taylor, 133 N. C. 755, 46 S. E. 5.

Statute Must Be Set Out.—In a trial before a mayor the statute or ordinance that the accused is prosecuted under, must be set out, and the one he is prosecuted under conformed to, a failure to do this will not warrant a conviction. Greensboro v. Shields, 78 N. C. 417.

Punishment for Contempt.—In In re Deaton, 105 N. C. 59, 11 S. E. 244, (on page 65) it is decided that the power given justices of the peace by sec. 983, is extended to mayors by this section. But, in fact, the power to punish for contempt is inherent in all courts and essential to their existence. State v. Aiken, 113 N. C. 651, 652, 18 S. E. 690.

Every court inherently possesses power to fine for contempt. As the Mayor's Courts is "an inferior court" it possesses this power. In re Denton, 105 N. C. 59, 11 S. E. 244.

Warrant Must Set Forth Ordinance.—A warrant for violating a town ordinance, held bad for omitting to set forth the act of assembly by virtue of which the ordinance was passed, may be amended after verdict on payment of costs. Commissioners v. Frank, 46 N. C. 436, cited in notes in 35 L. R. A. 594; 39 L. R. A. 673.

Right of Removal.—One prosecuted before a mayor for violating a town ordinance is not entitled to a removal under section 1498, for that section is applicable only to Justice of the Peace. Although the two officers exercise concurrent jurisdiction in some matters, they are distinct. State v. Joyner, 127 N. C. 541, 37 S. E. 201.

Applied in State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Cainan, 94 N. C. 879, 882; State v. Smith, 103 N. C. 403, 9 S. E. 435.

Cited in Paul v. Washington, 134 N. C. 363, 47 S. E. 793; Board v. Henderson, 126 N. C. 689, 36 S. E. 158; School Directors v. Asheville, 137 N. C. 503, 509, 50 S. E. 279; Barnes v. Cherry, 190 N. C. 772, 130 S. E. 611.

§ 2635. Enforce ordinances and penalties.—As such court the mayor shall have authority to hear and determine all cases that may arise upon the ordinances of the city or town; to enforce penalties by issuing execution upon any adjudged violation thereof, and to execute the laws and rules that may be made and provided by the board of commissioners of the city or town for the government and regulation of the city or town; but in all cases any person dissatisfied with the judgment of the mayor may appeal to the superior court as in case of a judgment rendered by a justice of the peace. (Rev., s. 2935; Code, s. 3819; 1876-7, c. 243, s. 2.)

Cross Reference.—As to power to make ordinances, see section 2673, and see notes to preceding section. As to punishment for violation of ordinance, see section 4174.

Superior Court's Jurisdiction Over Ordinances. — An offense against a city must be punished under the ordinances of the city, and the superior court has no jurisdiction. State v. White, 76 N. C. 15; State v. Threadgill, 76 N. C. 17. Provided the city ordinance does not conflict with the general law. When there is a conflict the general law prevails, and the superior court has jurisdiction. Washington v. Hammond, 76 N. C. 33. The right of appeal to the superior court preserves the constitutional rights of one convicted in a mayor's court. State v. Brittain, 143 N. C. 668.

Cited in Guano Co. v. Tarboro, 126 N. C. 68, 70, 35 S. E. 231.

§ 2636. May sentence to work on streets.—In all cases where judgments may be entered up against any person for fines, according to the laws and ordinances of any incorporated town, and the person against whom the same is so adjudged

refuses or is unable to pay such judgment, the mayor before whom such judgment is entered may order and require such person, so convicted, to work on the streets or other public works until, at fair rates of wages, such person shall have worked out the full amount of the judgment and costs of the prosecution; and all sums received for such fines shall be paid into the treasury. No woman shall be worked on the streets. (Rev., s. 2937; Code, s. 3806; 1897, c. 270; 1899, c. 128; 1866-7, c. 13.)

A Fine is Treated as a Debt.—A fine or penalty imposed by a municipal ordinance is treated as a debt, and, under Art. 1, sec. 16, of the Constitution, a person from whom it is attempted to be collected is exempt from arrest, but he may be indicted and punished for the criminal offense of violation of the ordinance for which it is imposed, under the statute. State v. Earnhardt, 107 N. C. 789, 12 S. E. 426.

§ 2637. Mayor certifies ordinances on appeal.—In all cases of appeal from a mayor's court to the superior or other court of appeal, when the offense charged is the violation of a town ordinance the mayor shall send with the papers in the case a true copy of the ordinance alleged to have been violated, and shall certify under his hand and seal that said ordinance was in force at the time of the alleged violation of the same. (Rev., s. 2936; 1899, c. 277.)

In General.—This section is construed with section 1750 and a certificate or affidavit stating that the attached paper is a copy of the ordinance is sufficient to admit it in evidence, although it is not certified that it was in force at the time of the alleged violation. But anything other than strict compliance with this section is not commended. State v. Abernethy, 190 N. C. 768, 130 S. E. 619.

Place of Signature.—"The failure of the mayor to sign the certificate at the bottom does not render it invalid, for the place of the signature is not material. It may be at the top, or in the body, of the instrument, as well as at the foot. Burriss v. Starr, 165 N. C. 657, 81 S. E. 929. 'It is well settled in this State that when a signature is essential to the validity of an instrument, it is not necessary that the signature appear at the end, unless the statute uses the word "subscribe." Richards v. Lumber Co., 158 N. C. 54, 56, 73 S. E. 485; Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902; Boger v. Lumber Co., 165 N. C. 557, 81 S. E. 784.'" State v. Abernethy, 190 N. C. 768, 770, 130 S. E. 619.

Records Kept by Clerk Evidence of Ordinance.—The records of the proceedings of the Board of Aldermen, kept by the town clerk, is competent evidence of town ordinances. State v. Irvin, 126 N. C. 89, 35 S. E. 430.

Part 3. Constable and Policeman

§ 2638. Constable to take oath of office.—The town constable shall, before some person authorized to administer oaths, take and subscribe to the oaths prescribed for public officers, and an oath that he will faithfully and impartially discharge the duties of his office according to law, which said oath shall be filed with the mayor and entered in a book with the oaths of the commissioners. (Rev., s. 2938; Code, s. 3808; R. C., c. 111, s. 20.)

As to special constables, see section 974.

Applied in Wadesboro v. Atkinson, 107 N. C. 317, 320, 12 S. E. 202.

Cited in Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

§ 2639. Power and duties of constable.—As a peace officer, the constable shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have power to serve all civil and criminal process that may be directed to him by any court within his county, under the same regulations and penalties as prescribed by law in the case of other constables, and to enforce the ordinances and regulations of the board of commissioners as the board may direct. Whenever any process or other notice is so directed as to authorize a township constable to execute the same a town constable in that county may execute the same without any more specific direction: Provided, such town constable shall be required to give bond for performance of his duties such as is required of township constables who execute civil process. (Rev., s. 2939; Code, ss. 3808, 3810; R. C., c. 111, s. 20; 1879, c. 266; 1897, c. 519; 1899, c. 168; 1907, c. 52, s. 1.)

Cross References.—As to police officers, see section 2642. As to powers and duties of constable in general, see section 976. As to service of notice, see sections 914, 977. As to powers conferred by ordinance, see section 2673 and note.

Process Must Be Directed to Constable.—The Court held in Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815, that process could not be served by a constable outside of his town or city, where the process was directed to "any constable or other lawful officer of said county," and that to enable a constable of a city or town to serve court process, such process must be directed (addressed) to him, as required, not necessarily by name, but officially as the constable of his city or town. And the law is the same if a constable undertakes to execute process within the limits of the town or city. In all cases where constables undertake to execute process under this section they can do so only in those cases where the process is directed (addressed) to them as constables of such city or town. Forte v. Boone, 114 N. C. 176, 19 S. E. 632; Baker v. Brem, 126 N. C. 367, 370, 35 S. E. 630; Upper Appomattox Co. v. Buffalo, 121 N. C. 37, 27 S. E. 999.

Authority to Serve for Superior Court.—A constable has no authority to serve any paper for the superior court that is not process. Forte v. Boone, 114 N. C. 176, 19 S. E. 632.

Power to Arrest Restricted.—The powers conferred upon city and town constables are limited, in respect to arrests without warrant, to the territory embraced within the corporate boundaries; but when the constable is acting under a valid warrant from duly authorized officer, he may make arrests at any place within the county in which such city or town is situated. State v. Sigman, 106 N. C. 728, 11 S. E. 520.

Same—Failure to Carry Prisoner before Magistrate for Investigation.—A town constable who fails to carry a drunk arrested without warrant before magistrate for investigation of charge but instead releases him from "lockup" upon his becoming sober is guilty of assault and battery. State v. Parker, 75 N. C. 249.

§ 2640. Constable as tax collector.—The constable shall have the same power to collect the taxes imposed by the commissioners as sheriffs have to collect the taxes imposed by the county commissioners, and he may be required by the commissioners to give bond, with sufficient surety, payable to the state of North Carolina, in such sum as the commissioners may prescribe, to account for the same; upon which suit may be brought by the commissioners as upon the bonds of other officers. The bond of the constable shall be duly proved, before the mayor and commissioners, and registered in the office of the register of deeds. (Rev., s. 2940; Code, s. 3809; R. C., c. 111, s. 21).

Special Tax Collector Does not Effect Duty of Constable.—An act providing for the appointment of a special tax collector to collect taxes to pay a judgment against a town does not abridge the authority of the city to require the constable to collect the taxes, but only affords increased facilities for fulfilling the orders of the court without overtaxing existing collecting officers. Webb v. Beaufort, 88 N. C. 496.

Liable for Failure to Perform Duty.—A constable of a town appointed to collect taxes is liable for his failure to perform his duty. He cannot take advantage of any irregularity of form to avoid liability. Wadesboro v. Atkinson, 107 N. C. 317, 12 S. E. 202.

§ 2641. Policemen appointed.—The board of commissioners may appoint town watch or police,

to be regulated by such rules as the board may prescribe. (Rev., s. 2926; Code, s. 3803; R. C., c. 111, s. 16.)

As to action of quo warranto to try title of office of chief of police, see section 870.

§ 2642. Policemen execute criminal process.—A policeman shall have the same authority to make arrests and to execute criminal process, within the town limits, as is vested by law in a sheriff. (Rev., s. 2927; Code, s. 3811.)

As to powers of constables to exercise criminal process, see section 2639 and note. As to arrest in general, see section 4542-4548.

In General.—Where a town charter provides for the appointment of a chief of police or marshal and declares that, in the execution of process, he shall have the same power, etc., which sheriffs and constables have, the service by such officer of a summons directed to "the sheriff of W. county or town constable of W. town" is valid. Lowe v. Harris, 121 N. C. 287, 28 S. E. 535.

Power to Arrest Limited.—The power of a police to arrest without a warrant is restricted to the corporate limits of the city, and an arrest out of the limits without a warrant for the breach of an ordinance is an assault. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

Arrests without a Warrant.—A police officer may arrest without warrant for violation of municipal ordinances, committed in his presence; but the offender must be taken before the mayor as soon as practicable, a warrant obtained and trial had. State v. Freeman, 86 N. C. 683, but to make an arrest out of the town limits he must do so under a warrant or by virtue of sections 4543, 4544. Martin v. Houck, 141 N. C. 317, 54 S. E. 291, otherwise the arrest will be an assault. Sossamon v. Cruse, 133 N. C. 470.

Force Allowed in Making Arrests.—If an officer is resisted in making an arrest, he may use that degree of force which is necessary to the proper performance of his duty; and, after an accused person is arrested, the officer is justified in the use of such force as may be necessary, even to taking life, to prevent his escape, whether the offense charged is a felony or misdemeanor. He may take such precautions as handcuffing or tying the prisoner. State v. Sigman, 106 N. C. 728, 11 S. E. 520.

Authority Does Not Give Right to Kill or Injure One Charged of Misdemeanor.—When a person charged with a misdemeanor is fleeing and an officer shoots him, such officer is guilty of assault. If death results the officer is guilty of murder if he intended to kill; manslaughter is unintentional. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757; State v. Sigman, 106 N. C. 728, 732, 11 S. E. 520.

Cited in Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

Part 4. Planning Boards

§ 2643. Creation and duties.—Every city and town in the state is authorized to create a board to be known as the Planning Board, whose duty it shall be to make careful study of the resources, possibilities and needs of the city or town, particularly with respect to the conditions which may be injurious to the public welfare or otherwise injurious, and to make plans for the development of the municipality. The governing body of such city or town desiring to establish such local planning board shall appoint not less than three nor more than five on said board. (1919, c. 23, s. 1.)

Editor's Note.—In North Carolina, the beginning of municipal zoning is seen in the statute of 1919 authorizing cities and towns to create planning boards. This was followed in 1923 by the general zoning law. Pub. Laws, 1923, ch. 250; § 2776, r-aa of this Code. See 5 N. C. Law Rev. 240.

§ 2644. Board to make reports.—The board shall make a report at least annually to the governing body of the city or town, giving information regarding the condition of the city or town, and any plans or proposals for the development of the city or town and estimates of the cost thereof. (1919, c. 23, s. 2.)

§ 2645. Expenses provided for.—The governing body of such city or town may appropriate to such local planning board such amount as they may deem necessary to carry out the purposes of its creation, and for the improvement of the municipality, and shall provide what sums, if any, shall be paid to said board as compensation. (1919, c. 23, s. 3.)

Part 5. General Qualification of Officers

§ 2646. Must be voters in town or city.—No person shall be mayor, commissioner, intendant of police, alderman or other chief officer of any city or town unless he shall be a qualified voter therein. (Rev., s. 2941; Code, s. 3796; 1870-1, c. 24, s. 3.)

Cross Reference.—As to recall of officers, see section 2885. As to removal by mayor, see sections 2864, 2970. As to removal by quo warranto, see section 870.

Effect of Statute after Election.—"Since the case of Rex v. Richardson, 1 Burr., 539, decided by Lord Mansfield and followed by numerous others, there has been no precedent for depriving a member of his place by the action of a municipal body of which he is a member for any pre-existing impediment affecting his capacity to hold the office." Ellison v. Raleigh, 89 N. C. 125, 127.

Applied in Foard v. Hall, 111 N. C. 369, 16 S. E. 420.

§ 2647. Refusal to qualify and act.—Every person elected or appointed commissioner, mayor, or town constable, who, after being duly notified, shall neglect or refuse to qualify and perform the duties of his office or appointment, shall pay twenty-five dollars, one-half to the use of the town and the other half to the use of any person who will sue for the same. (Rev., s. 2942; Code, s. 3812; R. C., c. 111, s. 22.)

Constitutionality.—The provisions of this section are not in conflict with Art. 1, sec. 17, of the Constitution. London v. Headen, 76 N. C. 72.

§ 2648. Hold office until successor qualified.—Whenever the day of election shall be altered, the officers of the corporation elected or appointed before that day shall hold their places till the day of election, and until other officers shall be elected or appointed and qualified. And they shall hold their offices in like manner when there is any failure to make the annual election. (Rev., s. 2943; Code, s. 3792; R. C., c. 111, s. 8.)

Part 6. Reduction of Salaries

§ 2648(a). Of officers and employees notwithstanding legislative enactment. — Whenever the salary of any officer or employee of any county, city, town, or other municipality has been fixed by legislative enactment, the governing body of such county, city, town, or other municipality may reduce such salary by an amount not to exceed ten per cent of the salary as so fixed: Provided, this section shall not apply to salaries of teachers or other officers in the public schools. (1931, c. 429, s. 21.)

Art. 3. Elections Regulated

§ 2649. Application of law, and exceptions.—All elections held in any city or town shall be held under the following rules and regulations, except in the cities of Charlotte, Fayetteville and Greensboro, and in the town of Graham, and in the towns in the counties of Bertie, Cabarrus, Caldwell, Catawba, Chowan, Davidson, Edgecombe, Gaston, Lenoir, Nash, Pitt, Robeson, Stokes, Surry, Vance, Wayne and Wilson. (Rev., s. 2944; 1901, c. 750, ss. 1, 21; 1903, cc. 184, 218,

626, 769, 777; 1907, c. 165; Ex. Sess. 1908, c. 63; 1909, c. 365; 1931, c. 369; 1933, c. 102; 1935, c. 215, s. 1, c. 353.)

Editor's Note.—The Act of 1931 struck out Columbus County formerly appearing in this section.

Public Laws 1933, c. 102, omitted the town of Shelby, from the list of excepted places.

Public Laws of 1935, chapter 215, omitted "Mitchell" from the list of counties. Chapter 253 added the town of "Graham" to the excepted list.

For a provision relating to elections held in the town of Belmont, Gaston county, see Public Laws 1935, chapter 161.

Cited in Hendersonville v. Jordan, 150 N. C. 35, 63 S. E. 167.

§ 2650. When election held.—In all cities and towns an election shall be held on Tuesday after the first Monday of May, one thousand nine hundred and five, and biennally thereafter: Provided, that the provisions of this section shall not be construed so as to change, alter or amend any clause or provision in any charter of any town or city in Harnett county providing for an annual election of the officers of such town or city. Provided further that the provisions of this section shall apply to the town of Dunn, in Harnett county. (Rev., s. 2945; 1901, c. 750, s. 19; 1907, c. 165; 1925, c. 67.)

Editor's Note.—By the amendment of 1925 the last sentence to this section was added.

For a provision applicable to an election in the town of Spruce Pine in Mitchell County, see Public Laws 1935, chapter 215.

Applied in Hendersonville v. Jordan, 150 N. C. 35, 63 S. E. 167.

§ 2651. Polling places. — There shall be at least one polling place in each ward in the town or city, if the said town or city is divided into wards; and if not divided into wards, then there shall be as many polling places as may be established by the governing body of said town or city. (Rev., s. 2946; 1901, c. 750, s. 2.)

In General.—The general law clearly contemplates that the polling place should be fixed by the governing authorities of the city or town; and these places are, as a rule, of the substance (McCrary on Elections, sec. 141) and should be established and fully advertised. Hendersonville v. Jordan, 150 N. C. 35, 38, 63 S. E. 167.

§ 2652. Registrars appointed.—The board of commissioners shall select, at least thirty days before any city or town election, one person for each election precinct, who shall act as registrar of voters for such precinct; and shall make publication of the names of the persons so selected, and of the time of election, at the town or city hall, or at the usual place of holding the mayor's court, immediately after such appointment, and shall cause a notice to be served upon the registrars by the sheriff of the county or the township constable. If any registrar shall die or neglect to perform his duties, said governing body may appoint another in his place. (Rev., s. 2947; 1901, c. 750, s. 5; 1903, c. 613.)

Editor's Note. — For a provision substituting "county board of elections" for "board of commissioners" applicable only in the town of Graham in Alamance county, see Public Laws of 1935, chapter 353.

§ 2653. Registrars take oath of office.—Before entering upon the duties of his office each registrar shall take an oath before some person authorized by law to administer oaths to faithfully perform the duties of his office as registrar. (Rev., s. 2948; 1901, c. 750, s. 6.)

In General. — Even if no oath is administered to the elector or the registrar, the registration must be accepted as the act of a public officer. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Freeholders Not Required.—The registrars are not required to be freeholders. Hendersonville v. Jordan, 150 N. C. 35, 63 S. E. 167.

§ 2654. Registration of voters.—It shall be the duty of the board of commissioners of every city and town to cause a registration to be made of all the qualified voters residing therein, under the rules and regulations prescribed for the registration of voters for general elections. And where there has been a registration of voters, the board of commissioners may, in its discretion, order a new registration of voters; and unless such new registration shall be ordered, the election shall be held under the existing registration, with such revision as is herein provided. (Rev., s. 2949; Code, s. 3795; 1901, c. 750, s. 3.)

As to qualification and registration of voters, see Art. VI, sections 2 and 3 of the Constitution and notes thereto.

Editor's Note.—A "qualified voter" is one duly registered. Southerland v. Goldsboro, 96 N. C. 49, 1 S. E. 760.

When a town charter provides for registration biennially, one registering as required by the charter answers the requirement, and should be allowed to vote in all city elections. In case a registration is called for by the corporate authorities notice must be given as provided by the preceding section and failure to give such notice will not give the city authorities power to deprive one of the right to vote under his regular registration. Smith v. Wilmington, 98 N. C. 343, 4 S. E. 489.

For a provision substituting "county board of elections" for "board of commissioners" applicable only in the town of Graham in Alamance county, see Public Laws of 1935, chapter 353.

In General.—The words "general elections" refer not to an election purely local, but to one held throughout the State, when the books are required to be kept open for twenty days. If it was intended to refer to municipal elections, the Legislature would not have used the word "general," but the word "regular," the former word being chosen as having a definite and well understood meaning and as contradistinguished from "local" or "municipal." Hardee v. Henderson, 170 N. C. 572, 574, 87 S. E. 498.

Under this statute voters at municipal elections must have the same qualifications as are required in general elections, i. e., in elections for state and county. State v. Viele, 164 N. C. 122, 124, 80 S. E. 408.

How Notice Given.—"In the case of Lawson v. Ry. Co., 30 Wis., 597, it was held: 'Under a statute requiring the notice of election to be given by the board of supervisors of a town, it may be given by order of the board signed only by the clerk.'" Briggs v. Raleigh, 166 N. C. 149, 154, 81 S. E. 1084.

Cited in Gower v. Carter, 195 N. C. 697, 143 S. E. 513.

§ 2655. Notice of new registration.—In the event a new registration is ordered the board of commissioners shall give thirty days notice thereof by advertisement in some newspaper, if there be one published in the town or city, and if there be none so published, then in three public places in the city or town. (Rev., s. 2950; 1901, c. 750, s. 4.)

Editor's Note.—For a provision substituting "county board of elections" for "board of commissioners" applicable only in the town of Graham in Alamance county, see Public Laws of 1935, chapter 353.

§ 2656. Registration books revised.—Each registrar shall be furnished with registration books, and it shall be his duty to revise the registration book of his precinct in such manner that said books shall show an accurate list of the electors previously registered in such ward or precinct and still residing therein, without requiring such electors to be registered anew. (Rev., s. 2951; 1901, c. 750, s. 6.)

§ 2657. Time for registration.—Each regis-

trar shall, between the hours of nine o'clock a. m. and five o'clock p. m. on each day (Sunday excepted) for seven days preceding the day for closing the registration books, as hereinafter provided, keep open said books for the registration of any new electors residing in the precinct, and entitled to register, whose names have never before been registered in such precinct, or do not appear in the revised list. Such books shall be open until nine o'clock p. m. of each Saturday during such registration period and shall be closed for registration on the second Saturday before each election. (Rev., s. 2952; 1901, c. 750, s. 6.)

Editor's Note.—This section was intended for the registration of new voters and not for the registration of all the voters. Section 5947 provides for registration of all the voters. Hardee v. Henderson, 170 N. C. 572, 87 S. E. 498.

Section Only Directory.—"The fact that the registration book was not kept open during the whole prescribed period, on the Saturday before the election, cannot be allowed to render the election void, when it was kept open for inspection up to 2 p. m., and no one was denied the opportunity of examining it or sought it afterwards. This does not vitiate the election." State v. Nicholson, 102 N. C. 465, 476, 9 S. E. 545.

The two propositions settled by Hill v. Skinner, 169 N. C. 405, 86 S. E. 351, were these:

1. While the law providing for notices of election and the registration of voters is mandatory as to the officers required to give such notice, it is only directory where a fair election has been held and voters were not deprived of their right of suffrage, in which case the failure to give notice is not ground for disturbing the election where the result could not have been otherwise.

2. Though registration books which by law should have been kept open twenty days were kept open only for eight days, the election will not be set aside where there was an extremely large registration and it did not appear that any voters were deprived of their rights or that a longer period of registration would in any way have affected the result. Hardee v. Henderson, 170 N. C. 572, 574, 87 S. E. 498.

§ 2658. Registration on election day.—No registration shall be allowed on the day of election, but if any person shall give satisfactory evidence to the registrar and judges of election that he has become of the age of twenty-one years or otherwise has become qualified to register and vote since the registration books were closed for registration, he shall be allowed to register and vote. (Rev., s. 2953; 1901, c. 750, s. 8.)

§ 2659. Books open for challenge.—On the second Saturday before the election the registration books shall be kept open at the polling place in the precinct for the inspection of the electors of the precinct, and any of such electors shall be allowed to object to the name of any person appearing on said books. (Rev., s. 2955; 1901, c. 750, s. 7.)

§ 2660. Practice in challenges.—When a person is challenged the registrar shall enter upon his books opposite the name of the person objected to the word "Challenged," and the registrar shall appoint a time and place, on or before the Monday immediately preceding election day, when he, together with the judges of election, shall hear and decide the objection, giving personal notice to the voter so objected to; and if for any cause personal notice cannot be given, then it shall be sufficient to leave a copy thereof at his residence. If any person challenged shall be found not duly qualified, the registrar shall erase his name from the books. They shall hear and determine the cause of challenge under the rules and regulations prescribed by the general law regulating elections for members of the general assembly. (Rev., s. 2956; 1901, c. 750, ss. 7, 9.)

§ 2661. Judges of election.—The board of commissioners shall appoint, at least thirty days before any city or town election, two judges of election, who shall be of different political parties where possible, and shall be men of good character, able to read and write, at each place of holding election in said city or town, who, before entering upon the discharge of their duties, shall take an oath, before some person authorized by law to administer oaths, to conduct the election fairly and impartially, according to the constitution and laws of the state. (Rev., s. 2958; 1901, c. 750, s. 7.)

Editor's Note.—For a provision substituting "county board of elections" for "board of commissioners" applicable only in the town of Graham in Alamance county, see Public Laws of 1935, chapter 353.

Applied in Hendersonville v. Jordan, 150 N. C. 35, 63 S. E. 167.

§ 2662. Vacancies on election day.—If any vacancy shall occur on the day of election, in the office of registrar, the same shall be filled by the judges of election, and if any vacancy shall occur on that day in the office of judge the same shall be filled by the registrar; vacancies occurring at any other time shall be filled by the board of commissioners. (Rev., s. 2954; 1901, c. 750, s. 20.)

§ 2663. Judges superintend election. — The judges of election shall open the polls and superintend the same until the close of election; they shall keep poll books in which shall be entered the name of every person who shall vote, and at the close of the election they shall certify the same over their proper signatures and deposit them with the board of commissioners. (Rev., s. 2959; 1901, c. 750, s. 7.)

§ 2664. When polls open and close.—The polls shall be open on the day of election from eight o'clock a. m. till sunset, and no longer; and each person whose name may be registered shall be entitled to vote. (Rev., s. 2960; 1901, c. 750, s. 10.)

§ 2665. Who may vote.—All qualified electors, who shall have resided for four months immediately preceding an election within the limits of any voting precinct of a city or town, and not otherwise, shall have the right to vote in such precinct for mayor and other city or town officers. (Rev., s. 2961; 1901, c. 750, s. 9.)

See notes to section 2654; Art VI, sections 2, 3, of the Constitution, and notes thereunder.

§ 2666. Ballots and ballot boxes.—All ballots shall be printed or written upon white paper and shall be of the same size, without device, mutilation or ornamentation, the size of ballots to be fixed by board of commissioners at the same meeting the registrar is appointed. The governing body of the city or town shall provide for each election precinct in their respective cities or towns necessary ballot boxes in which to deposit the ballots; each of such boxes shall have an opening through the lid to admit a single folded ballot, and no more. The ballot boxes shall be kept by the judges of election for the use of the election precincts respectively; and the registrar

and judges of election, before the voting begins, shall carefully examine the ballot boxes and see that there is nothing in them, and they shall be sealed or securely fastened and not be opened until the polls are closed. (Rev., s. 2962; 1901, c. 750, s. 12; 1903, c. 613, s. 2.)

§ 2667. Ballots counted.—When the election shall be finished the registrar and judges of election shall open the boxes and count the ballots, reading aloud the names of the persons which shall appear on each ballot; and if there shall be two or more ballots rolled up together, or any ballot shall contain the names of more persons than the elector has the right to vote for, or shall have a device or ornament upon it, in either of these cases such ballots shall not be numbered in taking the ballots, but shall be void; and the counting of votes shall be continued without adjournment until completed, and the result thereof declared. (Rev., s. 2963; 1901, c. 750, s. 13.)

§ 2668. Registration books, where deposited.—Immediately after any election the registrars shall deposit the registration books for the respective precincts with the board of commissioners. (Rev., s. 2957; 1901, c. 750, s. 11.)

§ 2669. Board of canvassers. — The registrar and judges of election in each voting precinct shall appoint one of their number to attend the meeting of the board of canvassers as a member thereof, and shall deliver to the member who shall have been so appointed the original returns of the result of the election in such precinct; and the members of the board of canvassers who shall have been so appointed shall attend the meeting of the board of canvassers, and shall constitute the board of town canvassers for such election, and a majority of them shall constitute a quorum. In towns where there is only one voting precinct, the registrar and judges of election shall, at the close of the election, declare the result thereof. (Rev., s. 2964; 1901, c. 750, ss. 13, 14.)

§ 2670. Meeting of board of canvassers.—The board of canvassers shall meet on the next day after the election at twelve o'clock m., at the mayors office, and they shall each take the oath prescribed in the general law governing elections for members of the board of county canvassers. (Rev., s. 2965; 1901, c. 750, s. 15.)

§ 2671. Board determines result; tie vote.—The board of canvassers shall, at their meeting, in the presence of such electors as choose to attend, open, canvass and judicially determine the result, and shall make abstracts, stating the number of legal ballots cast in each precinct for each office, the name of each person voted for and the number of votes given to each person for each different office, and shall sign the same. It shall have power and authority to pass upon judicially all the votes relative to the election and judicially determine and declare the result of the same, and shall have power and authority to send for papers and persons and examine the latter upon oath; and in case of a tie between two opposing candidates, the result shall be determined by lot. In all other respects all elections held in any town or city shall be conducted as prescribed for the election of members of the general assembly. (Rev., s. 2966; 1901, c. 750, ss. 16, 17.)

As to county elections. see section 5991.

In General.—In an action in quo warranto to try title to an office the burden of proof is on the plaintiff to show that the holder of the office has not been duly elected by qualified voters. This is not shown when after rejecting certain votes there is a tie. See State v. Carter, 194 N. C. 293.

§ 2672. Notice of special election.—No special election shall be held for any purpose in any county, township, city or town unless at least thirty days notice shall have been given of the same by advertisement in some newspaper published in said county, city or town, or by advertisement posted at the courthouse of the county and four other public places in such county, city or town. (Rev., s. 2967; 1901, c. 750, s. 24.)

In General.—Where the election for the issue of bonds by a township for road purposes has been held in all respects in accordance with the provisions of a statute, at the usual polling places, etc., they will not be declared invalid at the instance of a purchaser, on the ground that the full period of the thirty-day notice of the time and place of the election had not been advertised as set out in this section when there is no suggestion of fraud and full publicity had been given by newspapers of large local circulation, the election had been broadly discussed beforehand, and it does not appear that any voter is objecting to the bonds or has been deprived of his right to vote. Board v. Malone, 179 N. C. 10, 101 S. E. 500.

Art. 4. Ordinances and Regulations

§ 2673. General power to make ordinances.—The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, as they may deem necessary; and may enforce them by imposing penalties on such as violate them; and may compel the performance of the duties imposed upon others, by suitable penalties. (Rev., s. 2923; Code, ss. 3799, 3804; R. C., c. 111, ss. 12, 17.)

Cross References.—As to reasonableness of ordinances, see 9 N. C. Enc. Dig. 405, 415. As to powers under act of 1917, see section 2787. As to enforcement, see §§ 2634, 2635, 2639 and 2642.

Editor's Note.—To exhaust all the illustrations of the general application of the principle of this section which are found in the reports would be too extensive for a work of this kind, but many and varied illustrations are given in this note with no attempt to exhaust them. Reference should be had to digest citations for complete treatment.

In General.—"In construing this and similar legislation elsewhere, the courts have very generally held that the established municipal authorities may enact such ordinances as are promotive of the peace and good order of the town, the limitation being that the regulations may not be unreasonable or unduly discriminative nor manifestly oppressive and in 'derogation of common right.'" State v. Burbage, 172 N. C. 876, 878, 89 S. E. 795.

It is not necessary now to aver an authority to pass the ordinance conferred by a general and public law, as it was when that authority was derived under a special act of incorporation. State v. Merritt, 83 N. C. 677, 679.

Construction against City.—A doubt as to whether an ordinance is invalid, as conflicting with individual rights, should be resolved against the city. Slaughter v. O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

Courts Slow to Question Discretion of Ordinance. — By this section discretionary power is vested in the city authorities, and the courts will be slow to interfere when the ordinance is not contrary to laws of the state and no fraud, dishonesty or oppression is charged. State v. Austin, 114 N. C. 855, 19 S. E. 919. Or unless their action is so clearly unreasonable as to amount to oppression and manifest abuse of their discretion, and then the power of the court will be exercised with great caution and only in a clear case. Jones v. North Wilkesboro, 150 N. C. 646, 64 S. E. 866.

Ordinances Operative until Repealed.—Succeeding boards

of commissioners are deemed to act subject to the provisions of ordinances passed by their predecessors in authority, until they see fit to repeal them. Hutchins v. Durham, 118 N. C. 457, 24 S. E. 723.

General Laws Prevail over Ordinances. — "The true principle is that municipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws the by-laws and ordinances must give way." Washington v. Hammond, 76 N. C. 33, 36; State v. Stevens, 114 N. C. 873, 19 S. E. 861.

Classification of Occupations. — The general question of the right of classification was very fully considered by the Supreme Court in State v. Davis, 157 N. C. 648, 73 S. E. 130, and Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168, and the doctrine was approved that the General Assembly or municipal corporation has the power to classify the different occupations, provided the classification is not unreasonable and oppressive, and that usually the extent to which the power will be exercised is for the General Assembly or the governing body of the municipality. State v. Davis, 171 N. C. 809, 813, 89 S. E. 40.

An ordinance of a town, authorized by statute, imposing a fine of $25 upon drug stores for selling cigars, etc., on Sunday, and a fine of $5 for the same offense upon restaurants, cafés, and lunch stands, declaring the same to be a misdemeanor, relates to distinct and easily several occupations, and in the absence of any finding that those engaged in them come in competition with each other, the ordinance will not be declared unconstitutional and invalid upon the ground that it is discriminatory against the owners of drug stores. State v. Davis, 171 N. C. 809, 89 S. E. 40.

Closing Business on Sundays.—"It is against the public policy of the State that one should pursue his ordinary business calling on Sunday, and, where this is the case, it is very generally understood not only that ordinary business pursuits may be regulated, but altogether prohibited on Sunday." S. v. Medlin, 170 N. C. 682, 86 S. E. 597; State v. Burbage, 172 N. C. 876, 878, 89 S. E. 795.

An ordinance of a town may, under the provisions of this section prohibit the opening of all places of business on Sunday, except drug stores; and it is not an unreasonable regulation, under the police power of the town, inasmuch as drug stores are open all day Sunday, for the governing authorities to further provide that they may sell articles of common use which are quasi necessities to many, such as mineral waters, soft drinks, cigars and tobacco only, between certain hours of that day. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

Power to Close Business at Certain Hours.—The right of a city to restrict hours of business is restricted to cases when it is for the protection and benefit of the public. It has no power to require a merchant to close his store at an early hour because other merchants so desire to close all stores at a regular early hour. State v. Ray, 131 N. C. 814, 42 S. E. 960.

A city has power to restrict the use of property in so far as it may injure others, but it has no power to provide against a person sitting in his place of business after a time prescribed for closing it. State v. Thomas, 118 N. C. 1221, 24 S. E. 535.

Regulation of Gasoline Stations.—That the regulation of gasoline filling or gasoline storage stations comes within the police power of the State is freely conceded; and that such power is specifically conferred upon the plaintiff is likewise conceded. Wake Forest v. Medlin, 199 N. C. 83, 85, 154 S. E. 29.

Power that May Be Conferred on Constable.—An ordinance could not constitutionally confer, upon a constable, a ministerial officer, the power to arrest and imprison for a penalty incurred or for any other violation of law, except it may be for safe custody. Men may not be arrested, imprisoned and released upon the judgment or at the discretion of a constable or any one else. State v. Parker, 75 N. C. 249, 250.

Insulting an Officer.—The commissioners of a town have no authority to make it unlawful for one to insult an officer or police while in the discharge of his duty, nor to provide a fine for one convicted of such offense. State v. Clay, 118 N. C. 1234, 24 S. E. 492.

Ordinance against Hogs at Large. — A town ordinance declaring that "all hogs, etc., found running at large within the town" shall be taken up or impounded, is valid, whether the owner resides within the corporate limits of such town or not. Rose v. Hardie, 98 N. C. 44, 4 S. E. 41. See sec. 1850 and notes.

Scope of Power to "Regulate" Vehicles for Hire.—Neither the authority "to license and regulate all vehicles operated for hire," as provided by § 2787, nor the "power to make . . . regulations for the better government" conferred by this section, can justly be construed as intended by the Legislature to authorize the adoption of an ordinance requiring operators of vehicles for hire to furnish personal injury and property damage insurance or bond with solvent surety. To place such a construction upon these provisions would be to give to the words "regulate" and "regulations" a far more extended and unrestricted scope than we apprehend the Legislature ever had in contemplation. State v. Gulledge, 208 N. C. 204, 208, 179 S. E. 883.

Applied in State v. Stevens, 114 N. C. 873, 876, 19 S. E. 861.

§ 2674. Power to establish and regulate markets.—The board of commissioners may establish and regulate their markets, and prescribe at what place, within the corporation, shall be sold marketable things; in what manner, whether by weight or measure, may be sold grain, meal or flour (if flour be not packed in barrels), fodder, hay, or oats in straw; may erect scales for the purpose of weighing the same, appoint a weigher, fix his fees, and direct by whom they shall be paid. But it shall not be lawful for the commissioners or other authorities of any town to impose any tax whatever on wagons or carts selling farm products, garden truck, fish and oysters on the public streets thereof. (Rev., s. 2928; Code, s. 3801; R. C., c. 111, s. 14; 1879, c. 176.)

As to markets and slaughter places under act of 1917, see section 2794.

Section Liberally Construed.—"The courts have been disposed to construe much more liberally grants to municipalities of authority to exercise a limited control over the markets by prescribing reasonable regulations either for the protection of the health or the comfort or convenience of its people, than laws that purport to invest such corporations with more extraordinary powers." State v. Summerfield, 107 N. C. 895, 898, 12 S. E. 114.

Contract for Erection of Market.—A contract between a city and individuals for the erection by the individuals of a market house, which shall be under the control of the city, and which provides for a maximum rental for stalls therein, and which declares that the city shall pay a rental equal to the taxes on the property, until the enterprise is on a paying basis, and which permits the city, at its option, to purchase the property, is not in conflict with the Constitution, and does not violate any principle of public policy. State v. Perry, 151 N. C. 661, 65 S. E. 915.

Lease of Building for Market Purposes.—If a municipal corporation has power under its charter to build a market house, it has power also to lease a building for market purposes. Wade v. New Bern, 77 N. C. 460.

Prohibiting Sale of Merchandise outside of Market.—A town or city having the power under its charter to regulate its markets, and prescribe at what places and in what manner in the town market things shall be sold, may prohibit by an ordinance the sale of fresh meats within the corporate limits outside of the market house, and may impose a penalty for a violation of the ordinance. State v. Pendergrass, 106 N. C. 664, 10 S. E. 1002, cited in notes in 24 L. R. A. 586; 38 L. R. A. 312; Angels v. Winston-Salem, 193 N. C. 207, 136 S. E. 489.

Extent of Control over Market when Leased.—The occupant of a market stall, under a license subject to revocation under the provision of the city ordinances, acquires no right in the soil, as under a lease, and no additional right of possession, from the fact that he has been allowed to hold over because there was no annual renting of stalls on the day prescribed by the ordinance; but he is an occupant at the absolute pleasure and discretion of the licensor. Hutchins v. Durham, 118 N. C. 457, 24 S. E. 273, 32 L. R. A. 706.

Power to Require Weighing of Oats. — An ordinance adopted by the intendant and commissioners of the city of Raleigh, requiring oats to be weighed by the public weighmaster before being offered for sale, and imposing a penalty for its violation, is not unconstitutional, but valid. Raleigh v. Sorrell, 46 N. C. 49.

Requirement that Cotton Be Weighed—Fee.—A town ordinance providing that the commissioners shall elect a cotton-weigher who shall receive eight cents compensation for every bale weighed by him, one-half to be paid by the buyer and the other by the seller, and prescribing a penalty for buying or selling in the corporate limits without having it weighed by such cotton-weigher, is a valid and

reasonable regulation. State v. Tyson, 111 N. C. 687, 16 S. E. 238.

Cited in State v. Austin, 114 N. C. 855, 864, 19 S. E. 919 by Avery, J., dissenting.

§ 2675. Repair streets and bridges.—The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary, and may apportion the same equally among the inhabitants, by assessments of labor or otherwise, and the citizens shall not be liable to work on the public roads without the limits of the town. When they determine to repair or improve by labor, they may appoint an overseer and compel such persons as are liable to perform duty on the public roads to work on the streets, in the manner and under the penalties provided in the general law for the reparation of the public roads. (Rev., s. 2930; Code, s. 3803; R. C., c. 111, s. 16.)

I. Editor's Note.
II. Use, Repair and Improvement.
  A. Use.
  B. Duty to Repair.
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III. Grade Crossings, Viaducts, etc.
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Cross References.

As to power of corporation commissioners to abolish grade crossings, see section 1048. As to power of city to take land for the purpose of widening its streets, see section 2791 and section 2792. As to Act of 1917, see section 2793. As to regulating streets in general, see 9 N. C. Enc. Dig. 488-511.

See the note to § 2787.

I. EDITOR'S NOTE.

This section is so general and the subject so vast that it would be impracticable to include within the annotations all the decisions that might fairly be said to be general applications. However, a considerable number of the illustrative cases are included, and reference should be had to the digest citations for a complete and comprehensive treatment of all the cases.

II. USE, REPAIR AND IMPROVEMENT.

A. Use.

Use for Other Purposes.—"While it is the duty of a municipal corporation to use reasonable care to keep its streets in a safe condition to drive upon, it has the right to devote the sides of the streets to other useful public purposes, provided it leaves an unobstructed driveway of ample width for the passage of teams. It may construct sidewalks of a higher grade and gutters of a lower grade than the driveway, place curbing on the line of the gutters, erect hydrants and authorize the erection of hitching posts and stepping stones as well as poles to support the wires of telegraph and telephone lines." Daugherty v. Horseheads, 159 N. Y. 154: Rollins v. Winston-Salem, 176 N. C. 411, 413, 97 S. E. 211.

B. Duty to Repair.

For a complete digest treatment, see 9 Enc. Dig. [section 91] 433.

Rule Stated.—The duty of keeping the streets repaired devolves upon the city functioning through the proper officials.

In Bunch v. Edenton, 90 N. C. 531, the court said that it is the positive duty of the corporate authorities of a town to keep the streets, including the sidewalks, in 'proper repair," that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed and safety. And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous things very near and adjoining the streets, shall be guarded against by proper railings and barriers. Positive nuisances on or near the streets should be forbidden under proper penalties, and, when they exist, should be abated. Fitzgerald v. Concord, 140 N. C. 110, 112, 52 S. E. 309.

Thus the rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street (Tate v. Greensboro, 114 N. C. 392, 19 S. E. 767); and towns and cities are held to the same degree of liability for failure to repair sidewalks as to repair the other part of the street. Bunch v. Edenton, 90 N. C. 431; Russell v. Monroe, 116 N. C. 720, 726, 21 S. E. 550; Neal v. Marion, 129 N. C. 345, 40 S. E. 116; Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264; Hester v. Traction Co., 138 N. C. 288, 291, 50 S. E. 711.

This duty extends to streets dedicated and excepted by the city but not to streets or portions of streets not accepted by the city although dedicated by some individual. Hughes v. Clark, 134 N. C. 457, 46 S. E. 956, 47 S. E. 462.

Persons by Whom Made.—This section does not impose on the commissioners the duty to personally work the streets but it does impose on them a duty to keep them in repair. Although the power allows discretion, the commissioners are subject to indictment for neglecting to keep public streets in repair. State v. Dickson, 124 N. C. 871, 32 S. E. 961.

Citizens Required to Work.—All towns, by virtue of this section can require its inhabitants to work the streets unless specially provided otherwise by its charter. State v. Smith, 103 N. C. 403, 9 S. E. 435.

Contracts with and Duties of Public Service Companies to Repair.—A city may by contract with a street railroad provide for the repair of the street between the tracks, as a consideration for the franchise, and the railroad will be required to repair and keep its part in the same condition as the rest of the street. New Bern v. Atlantic, etc., R. Co., 159 N. C. 542, 75 S. E. 807.

Pipes, conduits, rails, and structures erected or constructed in the city streets under a general grant of authority to use the streets therefor are subject to the paramount power and duty of the city to repair, alter, and improve the streets, as the city, in its discretion, may deem proper, and to construct therein sewers and other improvements for the public benefit. Raleigh v. Carolina Power Co., 180 N. C. 234, 236, 104 S. E. 462.

Assessments on Property to Pay for Repairs.—See section 2720 and note. Cities and towns can levy assessments with which to pay for the repair and improvements of streets. But to do this they must have direct authority from the Legislature. Thus it has been held that local assessment for street improvement must be allowed by direct statute, and that statute must be strictly complied with. Greensboro v. McAdoo, 112 N. C. 362, 17 S. E. 178. This does not limit the authority so as to exclude necessary incidents to the principal power, provided such power is clearly conferred. Raleigh v. Pearce, 110 N. C. 32, 33, 14 S. E. 521.

Assessments for street improvements do not come under the head of eminent domain, but are taxes in a general sense, and for that reason authority to levy them must be derived from the Legislature. They are not taxes falling in the restraints imposed by the Constitution Art. V, section 3. Although the principle of uniformity governs both. Raleigh v. Pearce, 110 N. C. 32, 33, 14 S. E. 521.

In case of assessments against abutting land for street improvements the assessment must be against the land and cannot be in the form of a personal judgment against the owner. Raleigh v. Pearce, 110 N. C. 32, 14 S. E. 521.

Meaning of Apportionment.—The provision for apportionment by assessment is construed to mean apportionment and assessment according to benefits. Therefore in the case of paving the assessments should be against abutting owners on a footage basis, and when so made are valid. Raleigh v. Pearce, 110 N. C. 32, 14 S. E. 521.

C. Liability for Damage to Property.

For complete digest treatment, see 9 Enc. Dig. [sections 111-121] 441-446.

General Rule.—The question was first considered by the Supreme Court in 1848 and exhaustively discussed by Judge Pearson, and the conclusion reached that where a municipal corporation has authority to grade its streets it is not liable for consequential damage, unless the work was done in an unskillful and incautious manner. Meares v. Wilmington, 31 N. C. 73. This case has been approved and followed in many adjudications of this court in more recent years. Salisbury v. Western North Carolina Railroad, 91 N. C. 490; Wolfe v. Pearson, 114 N. C. 621, 628, 19 S. E. 264; Wright v. Wilmington, 92 N. C. 160; Tate v. Greensboro, 114 N. C. 392, 397, 19 S. E. 767; Frown v. Electric Co., 138 N. C. 533, 537, 51 S. E. 62; Jones v. Henderson, 60 S. E. 894; Ward v. Commissioners, 146 N. C. 534, 538, 60 S. E. 418; Small v. Edenton, 146 N. C. 527, 60 S. E. 413. In Thomason v. Seaboard, etc., R. Co., 142 N. C. 300, 307, 55 S. E. 198, the subject is referred to as "the settled doctrine of this State." Dorsey v. Henderson, 148 N. C. 423, 425, 62 S. E. 547.

A discretionary power is conferred by this section and will not be interferred with unless abused. "In numerous and repeated decisions the principle has been announced and sustained that the courts may not interfere with discretionary powers conferred on these local administrative boards for

the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." Munday v. Newton, 167 N. C. 656, 658, 83 S. E. 695.

Right of Abutting Owner to Remove Nuisance.—When a street is repaired or changed by a city so as to damage an owner of the fee in the street or to cause a nuisance the owner has no right to change the condition of the street so as to remove the nuisance or lesson the damage, and such act will subject him to indictment. State v. Wilson, 107 N. C. 865, 12 S. E. 320.

However, it may be pointed out incidentally that when an unauthorized person does an act of repair to streets that might have been done by a city, a ratification by the city will relieve him of any liability as a trespasser. Wolfe v. Pearson, 114 N. C. 621, 628, 19 S. E. 264.

Shade Trees Cut While Grading.—The discretionary power of repairing and maintaining a street is vested in the commissioners of a city, and an action for damages caused by cutting of trees in the street, by them, will not lie in favor of an abutting property owner, in the absence of negligence, malice or wantonness. Tate v. Greensboro, 114 N. C. 392, 19 S. E. 767.

Incidental Damage to Land Not Abutting on Street.—No provision is made in the general road laws, or in railroad charters or in acts incorporating towns, as a rule, for compensating landowners who are not owners of the fee simple title to any part of the highway, railroad or street, or whose lands do not abut immediately on them, because of injuries inflicted incidentally on land other than that appropriated or contiguous to it, the corporation can not, ordinarily, be made to answer in damages. State v. Wilson, 107 N. C. 865, 871, 12 S. E. 320.

III. GRADE CROSSINGS, VIADUCTS, ETC.

Power to Regulate.—The right of the city government, both under its police powers and the several statutes applicable to require railroads to construct bridges or viaducts, along streets running over their tracks, is fully established in this jurisdiction and is recognized in well-considered cases elsewhere. Atlantic, etc., R. Co. v. Goldsboro, 155 N. C. 356, 71 S. E. 514; S. v. City of Minneapolis, 98 Mich., 380; Cleveland v. Augusta, 102 Ga. 233, 29 S. E. 584; Northern Pac. R. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341. Powell v. Seaboard Air Line R. Co., 178 N. C. 243, 245, 100 S. E. 424.

In fact it is apparent that municipalities through the power delegated to them by the State may make such regulations respecting railroad crossings as in their discretion may be necessary so long as they proceed in accordance with the law, and this discretion will not be interferred with unless manifestly abused.

It was held by the court in Durham v. Southern R. Co., 185 N. C. 240, 117 S. E. 17, that a city has both inherent power and authority by general statute over its streets for the protection of its citizens, which is not taken from it by section 1048, conferring like powers upon the Corporation Commission. Durham v. Southern R. Co., 185 N. C. 240, 117 S. E. 17.

The exercise by the State of its power to provide for the safety of its citizens with respect to grade crossings of its streets by a railroad company is within its police powers, and may be exercised by municipal corporations under authority conferred on them, and not being delegated to the National Government, it is not affected by Federal legislation upon Interstate Commerce or the Federal Transportation Act. Durham v. Southern R. Co., 185 N. C. 240, 117 S. E. 17.

This holding was affirmed in 266 U. S. 178, 45 S. Ct. 51.

A city charter giving a city specific authority to erect gates at a railroad crossing, or to require the railroad company to place a flagman there to warn pedestrains, with provision that such authority shall not be exclusive, does not limit the authority of the city therein, or take from it the inherent and statutory right to require that the railroad company construct an underpass for the protection of the public. Durham v. Southern R. Co., 185 N. C. 240, 117 S. E. 17.

In 2 N. C. Law Rev. 104, referring to the case immediately preceding it was said: "The result of the decision, so far as the question of substantive law is concerned, is that a municipal corporation may, under its charter or by general law, by proper ordinance, require a railroad company to construct, at its own expense, such crossings for the streets as will best promote the public safety in the use of the streets; that the nature of the crossing to be constructed is within the reasonable discretion of the municipal authorities, and that the presumption is in favor of the validity of the city ordinance."

Same—Not Effected by Prior Regulations.—"The question is one of considerable public importance, not only for the cities where the congestion of traffic increases the danger, but also upon the highways in the State where travel has greatly increased by reason of the use of automobiles. This has been avoided to a certain extent by the regulation which requires drivers of automobiles to "stop, look and listen" at a crossing, thus necessarily giving the right of way to the railway train by reason of its greater size and speed and its inflexible line. The railroads have made some changes by relocating their lines, and the State highway commission has done much to eliminate this danger in the construction of the State highways by relocating the roads so as to avoid the crossings. This has been done at the public expense, which is compensated for by the greater safety and convenience. But this does not settle the right of railroads to maintain grade crossings nor how such crossings may be generally regulated." 2 N. C. Law Rev. 104.

Cited in Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695.

IV. LIABILITY FOR DEFECTS OR OBSTRUCTIONS CAUSING INJURY.

For full treatment of notice of defects, see 9 N. C. Enc. Dig. 532 et seq.

Warranty of Condition of Streets.—While it is the duty of the city to keep its streets in such repair that they are reasonably safe for public travel, it is not an insurer of such condition nor warrants that they shall at all times be absolutely safe. A city is only responsible for a negligent breach of duty. Fitzgerald v. Concord, 140 N. C. 110, 113, 5 S. E. 309.

This liability does not exist merely because of the defect but because the defect which was the result of the negligent performance of duty cause an injury to a person, or his property, to whom the city owed the duty of repair. Ed. Note.

Necessity for Notice of Defect.—Since the liability depends upon the negligence of the city, it is evident that before such negligence can exist the city must have had notice of the defect or with the exercise of reasonable diligence would have had notice of it. Jones v. Greensboro, 124 N. C. 310, 32 S. E. 675.

Plaintiff Must Prove Notice.—So in order to establish responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town "knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." Fitzgerald v. Concord, 140 N. C. 110, 113, 52 S. E. 309; Jones v. Greensboro, 124 N. C. 310, 32 S. E. 675.

Implied Notice.—When observable defects in a highway have existed for a time so long that they ought to have been observed, notice of them is implied. Fitzgerald v. Concord, 140 N. C. 110, 113, 52 S. E. 309.

Same—Question for Jury.—On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required and it is usually a question for the jury on the facts and circumstances of each particular case. Fitzgerald v. Concord, 140 N. C. 110, 114, 52 S. E. 309.

Notice of Latent Defects.—Notice of latent defects should not be so readily presumed from their continuance as open and obvious defects. Fitzgerald v. Concord, 140 N. C. 110, 113, 52 S. E. 309.

Obstructions.—A city does not have discretionary power to put obstructions in its streets, and it is liable for its negligence in puting or leaving obstructions in the street to one injured by such obstruction. Graham v. Charlotte, 186 N. C. 649, 120 S. E. 466.

Same—Bridges Must Be as Wide as Street.—A city under the authority of this section in building and repairing streets has no right in building a bridge to obstruct the street with concrete pilasters, and for injuries caused by such obstruction it is liable. Graham v. Charlotte, 186 N. C. 649, 120 S. E. 466.

Same—Joint Liability with Private Individual.—If any person shall unlawfully erect an obstruction or nuisance in the streets of a city, and the town authorities shall permit it to remain an unreasonable length of time, the town and the tort-feasor are jointly and severally liable to the traveler for an injury resulting therefrom, without any fault on his part. The question of primary and secondary liability is for the offending parties to adjust between themselves. Dillon v. Raleigh, 124 N. C. 184, 187, 32 S. E. 548.

Independent Contributory Cause.—When two causes combine to produce an injury to a traveler on a highway, both of which are in their nature proximate—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect. Ring v. Cohoes, 77 N. Y. 83; Dillon v. Raleigh, 124 N. C. 184, 188, 32 S. E. 548.

Contributory Negligence.—It follows from what has been said under the preceding analysis line that the city cannot be held liable when the injury resulted solely from the negligence of the injured, for the city is held liable solely for its own negligence. However there is a class of cases where the injury is the direct result of the city's negligence but the negligence of the injured was a contributing cause. In such cases the amount of damages is diminished in proportion to the contribution made by the negligence of the injured, and this is a jury question. The burden of proving contributory negligence is upon the city. Russell v. Monroe, 116 N. C. 720, 21 S. E. 550; Mason v. Richmond, etc., Railroad, 111 N. C. 482, 16 S. E. 698; Emry v. Raleigh, etc., R. Co., 109 N. C. 589, 14 S. E. 352; McAdoo v. Richmond, etc., R. Co., 105 N. C. 140, 11 S. E. 316.

§ 2676. May abate nuisances.—The board of commissioners may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens. (Rev., s. 2929; Code, s. 3802; R. C., c. 111, s. 15.)

For full treatment of powers see 9 N. C. Enc. Dig. 466, 479. As to zoning laws, see sections 2776 (r) et seq. As to water protection, see sections 7116 et seq. As to privies, see sections 7129 et seq.

Liberal Construction of Authority.—Authority to abate nuisances is liberally construed by the courts for the benefit of the citizens. State v. Beacham, 125 N. C. 652, 654, 34 S. E. 447.

Encroachment on Street by Buildings.—Any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se, and may be abated, notwithstanding space is left for the passage of the public, and a failure on the part of a city to abate it in a reasonable time will make it liable as a joint tortfeasor. Graham v. Charlotte, 186 N. C. 649, 663, 120 S. E. 466.

Health Ordinances.—A city has power to require that a dealer in second-hand clothing turn them over to the city to be disinfected and the exercise of the power can not be considered as a restriction of an owner over his property, but is only the proper and lawful use of authority to protect the health of its citizens from diseases. Rosenbaum v. New Bern, 118 N. C. 83, 24 S. E. 1.

Hog Pens.—"The Board of Town Commissioners could forbid the keeping of hog pens in the town to such an extent as they might deem necessary to prevent nuisances to the public, and, indeed, they could have done so without the express authority. 2 Kent. Com., 340; 1 Dillon Mun. Corp. (4 Ed.), sec. 369." State v. Hord, 122 N. C. 1092, 1094, 29 S. E. 952.

Indecent Language or Cursing.—An ordinance which forbids the use of "abusive or indecent language, cursing, swearing or any loud or boisterous talking, hollowing or any other disorderly conduct within the corporate limits of a town, and imposes a fine of twenty-five dollars for a violation of it, may be enacted by its proper authorities under the powers granted, to them in the general law, especially under this section and such an ordinance is reasonable. State v. Cainan, 94 N. C. 880, 883; State v. McNinch, 87 N. C. 567; State v. Merritt, 83 N. C. 677." State v. Earnhardt, 107 N. C. 789, 790, 12 S. E. 426.

Liability for Failure to Abate.—In Hull v. Roxboro, 142 N. C. 453, 55 S. E. 351, it was held: "A municipal corporation is not civilly liable for the failure to pass ordinances to preserve the public health or otherwise promote the public good nor for any omission to enforce the ordinances enacted under the legislative powers granted in its charter, or to see that they are properly observed by its citizens, or those who may be resident within the corporate limits." Harrington v. Greenville, 159 N. C. 632, 635, 75 S. E. 849; Bunch v. Edenton, 90 N. C. 431.

But a city is liable in damages for failure to abate in a reasonable time a nuisance that amounts to an obstruction in a street. Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548.

Cited in State v. Austin, 114 N. C. 855, 864, 19 S. E. 919 by Avery, J., dissenting; Jones v. Greensboro, 124 N. C. 310, 311, 32 S. E. 675.

Art. 5. Municipal Taxation

§ 2677. Commissioners may levy taxes.—The board of commissioners may annually levy and cause to be collected for municipal purposes a tax not exceeding fifty cents on the hundred dollars, and one dollar and fifty cents on each poll, on all persons and property within the corporation, which may be liable to taxation for state and county purposes; and may annually lay a tax on all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law; and may lay a tax on all such shows and exhibitions for reward as are taxed by the general assembly; and on all dogs, and on swine, horses and cattle, running at large within the town. (Rev., s. 2924; Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51.)

Cross References.—For full treatment of municipal taxes, see 9 N. C. Enc. Dig. 608, 622. As to dog tax, see section 2683. As to impounding stock, see sections 1850 et seq. As to taxes not for necessary expenses, see section 2691.

See 12 N. C. Law Rev., 23.

Application Where Charter Indefinite.—Since this section is applicable to all cities and towns except where their charters otherwise provide, a town whose powers to tax as other cities and towns is indefinite will be presumed to have the power under this section. Wadesboro v. Atkinson, 107 N. C. 317, 12 S. E. 202.

Same—When Only Restrictive.—Where a town charter is not passed in accordance with Art. II, section 14 of the Constitution the charter is valid but such town cannot levy any tax under said charter, although the charter may contain restrictions on the power to tax that are valid, under Art. VII, section 4 of the Constitution. The town may for necessary expense levy taxes under this section subject to the restrictions of the charter. Cotton Mills v. Waxhaw, 130 N. C. 293, 41 S. E. 488.

When There Is No Special Statute.—When there is no provision for taxes in the charter of a town taxes necessary to the expenses of the town may be levied under this section. If there is a provision in the charter for levying taxes, all taxes levied will be presumed to conform to the law and the constitution Art. VII, section 7. State v. Irvin, 126 N. C. 989, 35 S. E. 430.

Taxes on Traders and Professions.—Since the enactment of this section taxes laid upon trades and professions under the name of privilege taxes have been laid expressly for revenue, and such taxes are authorized by this section. State v. Irvin, 126 N. C. 989, 994, 35 S. E. 430.

The power to levy a tax on all trades includes "any employment or business embarked into for gain or profit. Lenoir Drug Co. v. Lenior, 160 N. C. 571, 76 S. E. 480.

Unless inconsistent with a special law or charter of a city a tax may be levied under this section, on a person engaging in any trade within the city. Guano Co. v. Tarboro, 126 N. C. 68, 35 S. E. 231.

A manufacturer of fertilizers maintaining its sales department in another State from which sales are exclusively made for fertilizer stored for distribution only, in a city in this State, is liable under an ordinance of the city levying a tax upon callings and professions, naming among others "fertilizer manufacturers' agents or dealers," the tax being for the protection afforded by the city in the exercise of such occupation, and the profits derived therefrom. Guano Co. v. New Bern, 158 N. C. 354, 74 S. E. 2.

Same—Classification.—The law of uniformity does not prohibit the classification of the municipality of dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same generic term. Rosenbaum v. New Bern, 118 N. C. 83, 92, 24 S. E. 1.

But an ordinance requiring a license of livery men, and providing that it shall include any persons making contract for hire in town, "or carry any person with a vehicle out of town for hire," is void as being unreasonable, and is unlawful as well. Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129.

Money and Choses in Action Subject to Tax.—Article VII, section 9, of the Constitution was not intended to apply the rules of uniformity and equality to the subjects alone selected by the Legislature for taxation in granting a municipality charter, but requires that all property in the municipality shall be taxed, and taxed uniformly and equally. The word "property," includes moneys, credits, investments and other choses in action. Redmond v. Commissioners, 106 N. C. 122, 10 S. E. 845.

Taxes on Lottery Applied Strictly.—A city having power to levy a heavy tax on "gift enterprises" must restrict this tax to enterprises that are of a lottery nature. A dealer in trading stamps cannot be taxed, for the tax cannot be applied to a business merely because of its peculiarity. Winston v. Beeson, 135 N. C. 271, 47 S. E. 457.

Tax on Firm Outside City.—Construing the charter of a city in pari materia with this section, the city is given

power to tax a firm outside the city, but which delivers products inside the city to customers procured by its salesman, and collects for its goods upon delivery, such trade being "carried on or enjoyed within the city." Hilton v. Harris, 207 N. C. 465, 177 S. E. 411.

The charter of a city giving it certain powers in respect to the levying of franchise taxes on trades and professions, etc., and this section will be construed together in determinating the legislative grant of power to the municipality to levy taxes of this class. Id.

Cited in dissenting opinion of Clark, J., in Mayo v. Commissioners, 122 N. C. 5, 29 S. E. 343. The dissenting opinion was followed when this case was overruled in Fawcett v. Mt. Airy, 125, 134 N. C. 130, 45 S. E. 1029; Love v. Raleigh, 116 N. C. 296, 309, 21 S. E. 503.

§ 2678. Taxes must be uniform and ad valorem.—All taxes levied by any county, city, town, or township, shall be uniform and ad valorem upon all property in the same, except property exempted by the constitution. (Rev., s. 2968; Const. Art. VII, s. 9.)

See note to preceding section and Art. VII, section 9 of the Constitution.

§ 2679. Poll tax limitation.—The equation of taxation described in the constitution applying only to taxation levied for the ordinary purposes of the state and county, no poll tax shall be levied or collected by any city or town, except as hereinafter provided, in excess of two dollars for any or all purposes combined, and all acts levying or authorizing the levy of taxes for special purposes which contain authority to levy a poll tax in excess of two dollars in the aggregate for all purposes are hereby repealed or modified so as to restrict and provide that the poll tax for general purposes and special taxes combined shall never exceed two dollars: Provided, this section shall not be construed to affect and shall not affect the district or other special school taxes and road taxes on the poll where they are now required to be levied by law: Provided further, that this section shall not affect any special act for the sale of bonds by municipalities where said bonds have been sold or voted for or authorized on or prior to the eleventh day of March, one thousand nine hundred and seven. This section shall not apply to the counties of Halifax, Beaufort, Cleveland, New Hanover, Burke, Catawba, Union, Randolph, Orange, Edgecombe, Pasquotank, and Rowan. (1907, c. 935.)

§ 2680. Tax lists taken.—The mayor, or other suitable person, shall, by order of the commissioners, take the list of taxables in the town, in such manner and at such time as the commissioners shall prescribe. If any person fail to list his taxables within the time prescribed by the commissioners, he shall be liable to a double tax. (Rev., s. 2969; Code, s. 3807; R. C., c. 111, s. 19.)

As to entering property escaping tax, see sec. 7924. As to where list must be filed, see sec. 7903. As to listing property of a ward of a deceased person, see sec. 7909.

List Made up by Agent.—A tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid. Covington v. Rockingham, 93 N. C. 134.

How Valuation Made.—It is decided in Carolina Central R. Co. v. Wilmington, 72 N. C. 73, that any provision in the charter of a town, whereby the town officers are authorized to value the property in the town for taxation, is superseded by the provision in the constitution that the township trustees shall value all the property of the township, subject to the revision of the county commissioners. Cobb v. Elizabeth City, 75 N. C. 1, 7.

§ 2681. Tax lists corrected.—All tax lists, either county or municipal, which may be placed in the hands of any sheriff or tax collector, shall be at all times under the control of the authorities imposing the tax, and subject to be corrected or altered by them, and shall be open for inspection by the public, and upon demand by the authorities imposing the tax, or their successors in office, shall be surrendered to the lawful authorities for such inspection or correction. (Rev., s. 2970; Code s. 3823; 1870-1, c. 177, s. 2.)

In General.—The settlement of a tax list is always more or less a summary proceeding, and ought to be subject to correction upon proper application, and the Legislature, having an eye to this necessity, has wisely provided by this section the largest reasonable opportunity for correcting errors in it, even after it has passed into the hands of the collecting officer but where one does not pursue his remedy as provided for here he cannot avoid the taxes by injunction or any other means. Wilson v. Green, 135 N. C. 343, 352, 47 S. E. 469.

§ 2682. Taxation of municipal bonds. — All laws and clauses of laws heretofore passed exempting bonds issued by any municipal corporation of the state of North Carolina from state, county or municipal taxation are hereby repealed: Provided, that nothing herein shall be construed to prevent a municipality from exempting its bonds from its own taxation. (Rev., s. 2976; 1905, c. 532.)

In General.—In 1 N. C. Law Rev. 185 in speaking of tax exemption it is said: "The term municipal corporation is here used in a broad sense to include counties, townships, school districts, etc., as well as cities and towns, though the property of counties, etc., might also be exempt as agencies of the state. Drainage districts are, in a sense, agencies of the government, and have been called quasi-municipal corporations, Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225; Newby v. Drainage Dist., 163 N. C. 24, 79 S. E. 266; but they are more properly quasi-public corporations, like railroads, and their property and bonds are not exempt from taxation. Comrs. v. Webb, 160 N. C. 594, 76 S. E. 552. Where a private corporation has been created within certain governmental powers conferred upon it, such as are usually exercised by municipal corporations, it does not thereby become a municipal corporation, so as to have its property exempt from taxation. So. Assembly v. Palmer, 166 N. C. 75, 82 S. E. 18."

§ 2683. Dog tax.—If any person residing in a town shall have therein any dog, and shall not return it for taxation, and shall fail to pay the tax according to law, the commissioners, at their option, may collect from the person so failing double the tax, or may treat such dog as a nuisance, and order its destruction. (Rev., s. 2971; Code, s. 3815; R. C., c. 111, s. 24.)

As to general dog tax, see sec. 1673.

In General.—Although a dog is property, a dog tax is not directory on the dog as property but is upon the privilege of keeping a dog. If the tax is not paid the dog may be declared a nuisance and killed. Mowery v. Salisbury, 82 N. C. 175.

§ 2684. Monthly settlements by tax collector.—Each town and city constable, or any other officer authorized by any town or city to collect taxes, fines or penalties, shall make a monthly settlement of all moneys coming into his hands, with the town treasurer or other officer authorized to receive the same. (Rev., s. 2972; Code, s. 3813; 1879, c. 194.)

As to rights to deny validity of tax collected, see sec. 2640 and notes.

§ 2685. Punishment for failing to pay over taxes monthly.—If any constable or collector of taxes for any town or city, or any other officer, shall fail to make settlement and full return of all moneys, penalties and fines coming into his

hands each month with the town or city treasurer, or other officer authorized to receive the same, he shall be guilty of a misdemeanor. (Rev., s. 3609; Code, s. 3814; 1879, c. 194, s. 2; 1881, c. 37.)

§ 2686. Annual statement of taxes.—The commissioners shall annually publish an accurate statement of the taxes, levied and collected in the town, together with a statement of the amount expended by them, and for what purpose. And any board of commissioners failing to comply with this section shall forfeit and pay one hundred dollars to any person who will sue for the same. (Rev., s. 2973; Code, s. 3816; R. C., c. 111, s. 25.)

Bonds Must Give Account of Acts.—The plain meaning of the statute is that each governing board of towns and cities shall give an account of its own stewardship and they will not be relieved of liability by their successors supplying the omission. Roberts v. Southern Pines, 125 N. C. 172, 174, 34 S. E. 268.

Right to Penalty.—The person suing for the penalty prescribed by this section has no vested right until judgment. See Dyer v. Ellington, 126 N. C. 941, 36 S. E. 177.

§ 2687. Publication of receipts and disbursements.—Statements showing the receipts and disbursements of public money by municipal corporations, quasi-municipal corporations, and administrative boards of limited territorial jurisdiction, under grant of power from the state, shall be regularly published, as follows:

1. The board of aldermen or other governing body of incorporated cities and towns having a population of three thousand or over shall cause to be published monthly or quarterly statements of all municipal receipts and disbursements, which shall be itemized and show from what source received and to whom and on what account paid, and shall likewise cause to be published annually, at the end of each fiscal year, condensed and classified statements of such municipal receipts and disbursements, showing the source from which received and the account on which expended.

2. The boards of commissioners of all incorporated towns having a population of less than three thousand; boards of graded school trustees and other governing and administrative bodies of public school districts created by special act of the general assembly; county boards of education; boards of road commissioners and fence commissioners charged with the supervision, maintenance and repair of public roads and fences; the governing bodies of all other quasi-municipal corporations; all other administrative boards of limited territorial jurisdiction under grant of power from the state, charged with the receipt and disbursement of public money, and for the publication of whose receipts and disbursements no other provision is made by law, shall cause to be published annually, at the end of each fiscal year, statements of all receipts and disbursements of public money collected and expended. The statements shall be itemized in the manner provided for itemizing the monthly and quarterly statements of municipal receipts and disbursements, and shall further contain a classified summary of such receipts and disbursements, showing the source from which received and the amount on which expended.

3. The statements above provided for shall be published in some newspaper having its place of publication, or which is of general circulation, in the city or town in which such public moneys are collected and expended. The cost of such publication shall not exceed one-half of one cent per word; but if no newspaper, as herein provided, will publish the statements at the rate named, the board of commissioners or other governing body shall, in their discretion, publish the statements by posting as notices at the courthouse door in the county and two other public places in the city, town, or district in which the money is collected and expended. (1911, c. 123; 1919, c. 112.)

Art. 6. Sale of Municipal Property

§ 2688. Public sale by mayor and commissioners.—The mayor and commissioners of any town shall have power at all times to sell at public outcry, after thirty days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best. (Rev., s. 2978; Code, s. 3824; 1872-3, c. 112.)

As to when sale at public outcry not necessary, see sec. 2623 par. 6.

As to power to lease property, and corporate powers generally, see § 2787 and the note thereto.

What Real Estate May Be Sold.—In Southport v. Stanly, 125 N. C. 464, 34 S. E. 641, the Supreme Court, construing this section says: "The reasonable construction of the statute must be that the town or city authorities can sell any personal property, or sell or lease any real estate which belongs to a town or city, as the surplus of the original acreage ceded for the town or city cite, or such land as may have been subsequently acquired or purchased. But in no case can the power be extended to the sale or lease of any real estate which . . . is to be held in trust for the use of the town, or any real estate . . . which is devoted to the purpose of government. To enable the town to sell such real estate there must be a special act of the General Assembly authorizing such sale or lease." Brockenbrough v. Board, 134 N. C. 1, 22, 46 S. E. 28.

In Moose v. Carson, 104 N. C. 431, 10 S. E. 689 it was held that when a city conveys land bounded by an established street, and the grantee enters upon and improves the land, a subsequent conveyance by the corporation of the land covered by the street, whereby the easement of the appurtenant owner is interfered with, is void. But where there have been no improvements made on a dedicated street and the dedicated land has never been used as a street, a city by an act of the Legislature conferring authority may sell and convey the land so dedicated to it for street purposes. Church v. Dula, 148 N. C. 262, 61 S. E. 639.

§ 2689. Sale by county commissioners.—In any town where there is no mayor or commissioners, the board of county commissioners shall have the power given in the preceding section. (Rev., s. 2979; Code, s. 3825; 1872-3, c. 112, s. 2.)

§ 2690. Title made by mayor.—The mayor of any town, or the chairman of any board of commissioners of any town or county, is fully authorized to make title to the purchaser of any property sold under this chapter. (Rev., s. 2980; Code, s. 3826; 1872-3, c. 112, s. 3.)

Art. 7. General Municipal Debts

§ 2691. Popular vote required, except for necessary expense.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officer of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified

voters therein. (Rev., s. 2974; Const. Art. VII, s. 7.)

For cases under this section, see Article VII, section 7 of the Constitution, as it is the same as this section. See also Article 2, section 14, in general.

§ 2692. Debts paid out of tax funds.—Debts contracted by a municipal corporation in pursuance of authority vested in it shall not be levied out of any property belonging to such corporation and used by it in the discharge and execution of its corporate duties and trusts, nor out of the property or estate of any individual who may be a member of such corporation or may have property within the limits thereof. But all such debts shall be paid alone by taxation upon subjects properly taxable by such corporation: Provided, that whenever any individual, by his contract, shall become bound for such debt, or any person may become liable therefor by reason of fraud, such person may be subjected to pay said debt. (Rev., s. 2975; Code, s. 3821; 1870-1, c. 90.)

Applied in Faucett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029.

§ 2693. Debts limited to ten per cent of assessed values.—It shall be unlawful for any city or town to contract any debt, pledge its faith or loan its credit for the construction of railroads, the support or maintenance of internal improvements or for any special purpose whatsoever, to an extent exceeding in the aggregate ten per cent of the assessed valuation of the real and personal property situated in such city or town. And the levy of any tax to pay any such indebtedness in excess of this limitation shall be void and of no effect. (Rev., s. 2977; 1889, c. 486.)

Constitutional.—This section is constitutional, not being in conflict with Art. VII, sec. 7 of the Constitution. Wharton v. Greensboro, 146 N. C. 356, 59 S. E. 1043.

May Be Repealed in Part or in Toto.—This limitation is statutory and not a constitutional one therefore the legislature may repeal it in toto or only in its application to certain cities and towns. The fact that a bond issue was in excess of the limitation will not invalidate it if it is later ratified by state legislature. Wharton v. Greensboro, 149 N. C. 62, 62 S. E. 740.

Only Applicable to Special Purposes.—This section does not apply to indebtedness for necessary expenses nor to bonds to pay debts contracted for necessary expenses, but applies to "special purposes" which are construed to mean enterprises not necessary to the city government. Wharton v. Greensboro, 146 N. C. 356, 59 S. E. 1043; Underwood v. Asheville, 152 N. C. 641, 68 S. E. 147; Charlotte v. Trust Co., 159 N. C. 388, 74 S. E. 1054.

Art. 8. Public Libraries

§ 2694. Libraries established upon petition and popular vote.—The governing body of any incorporated city or county, upon the petition of ten per cent of the registered voters thereof, shall submit the question of the establishment and/or support of a free public library to the voters at the next municipal election, the next general election, or at a special election. If a majority of the qualified votes cast on said question be in the affirmative, the board of aldermen or town commissioners or board of county commissioners shall establish the library or reading room and levy and cause to be collected as other general taxes are collected a special tax of not more than ten cents or not less than three cents on the hundred dollars of the assessed value of the taxable property of such city, town or county. The fund so derived shall constitute the library fund, and shall be kept separate from the other funds of the city, town or county to be expended exclusively upon such library. In lieu of establishing a library by vote of the people as above provided, the governing body of any city, town or county may establish such a library upon petition as above provided and maintain the same by a special tax not less than that provided in this section. When such library has been established by either method as above provided, it may be abolished only by a vote of the people. (1911, c. 83, s. 1; 1927, c. 31, s. 91; 1933, c. 365, s. 1.)

Editor's Note.—Public Laws 1933, c. 365, repealed the former section and enacted the above in lieu thereof.

§ 2695. Library trustees appointed.—For the government of such library there shall be a board of six trustees appointed by the governing body of the city or town or county, chosen from the citizens at large with reference to their fitness for such office; and not more than one member of the board of aldermen or town commissioners shall be at any one time a member of said board. Such trustees shall hold their office for six years from their appointment, and until their successors are appointed and qualified: Provided, that upon their first appointment under this article two members shall be appointed for two years, two for four years, and two for six years, and at all subsequent appointments, made every two years, two members shall be appointed for six years. All vacancies shall be immediately reported by the trustees to the governing body and be filled by appointment in like manner, and, if in an unexpired term, for the residue of the term only. The governing body may remove any trustee for incapacity, unfitness, misconduct, or for neglect of duty. No compensation shall be allowed any trustee. (1911, c. 83, s. 2; 1927, c. 31, s. 2, c. 172.)

Editor's Note.—By amendment of 1927, ch. 31, sec. 2 a provision was passed for an insertion in section 2694 between "town" and "chosen," of the words, "or county"; it was evidently intended to apply to this section as it fits here and there is no place in sec. 2694 where it can apply.

§ 2696. Powers and duties of trustees.—Immediately after appointment, such board of trustees shall organize by election one of its members as president and one as secretary-treasurer, and such other officers as it may deem necessary. The secretary-treasurer before entering upon his duties shall give bond to the municipality in an amount fixed by the board of trustees, conditioned for the faithful discharge of his official duties. The board shall adopt such by-laws, rules and regulations for its own guidance and for the government of the library as may be expedient and conformable to law. It shall have exclusive control of the expenditure of all moneys collected for or placed to the credit of the library fund, and of the supervision, care, and custody of the rooms or buildings constructed, leased, or set apart for library purposes. But all money received for such library shall be paid into the city treasury or county treasury, be credited to the library fund, be kept separate from other moneys, and be paid out to the secretary-treasurer upon the authenticated requisition of the board of trustees through its proper officers. With the consent of the governing body of the city or town or county, it may lease and occupy, or purchase, or erect upon ground secured

through gift or purchase, an appropriate building: Provided, that of the income for any one year not more than one-half may be employed for the purpose of making such lease or purchase or for erecting such building. It may appoint a librarian, assistants, and other employees, and prescribe rules for their conduct, and fix their compensation, and shall also have power to remove such appointees: Provided, that after the ratification of this section no vacancies existing or occurring in the position of head librarian in such libraries shall be filled by appointment or designation of any person who is not in possession of a library certificate issued under the authority of this article. It may also extend the privileges and use of such library to nonresidents upon such terms and conditions as it may prescribe. (1911, c. 83, s. 3; 1927, c. 31, s. 3; 1933, c. 365, s. 2.)

Editor's Note.—Public Laws 1933, c. 365, inserted the proviso in the next to the last sentence of this section.

§ 2696(a). Library certification board. — The secretary of the North Carolina library commission, the librarian of the University of North Carolina, the president of the North Carolina library association and one librarian appointed by the executive board of the North Carolina library association shall constitute a library certification board who shall serve without pay and who shall issue librarian's certificates under reasonable rules and regulations to be promulgated by the board and a complete record of the transactions of said board shall be kept at all times. (1933, c. 365, s. 3.)

§ 2696(b). Librarians now acting—temporary certificates.—The provisions of this article shall not be construed to affect any librarian at this time in his or her position. Such librarians as are now acting shall be entitled to receive a certificate in accordance with positions now held.

Upon the submission of satisfactory evidence that no qualified librarian is available for appointment, a temporary certificate, valid for one year, may be issued upon written application of the library board. Such certificate shall not be renewed or extended and shall not be valid beyond the date for which it is issued. (1933, c. 365, s. 3.)

§ 2697. Annual report of trustees.—The board of trustees shall make an annual report to the governing body of the city, town or county, stating the condition of their trust, the various sums of money received from the library fund and all other sources, and how much money has been expended; the number of books and periodicals on hand, the number added during the year, the number lost or missing, the number of books loaned out, and the general character of such books, the number of registered users of such library, with such other statistics, information and suggestions as it may deem of general interest. (1911, c. 83, s. 7; 1927, c. 31, s. 4; 1933, c. 365, s. 4.)

Editor's Note.—The above section was substituted for the former reading by Public Laws 1933, c. 365. A comparison of the two sections is necessary to determine the changes.

§ 2698. Power to take property by gift or devise.—With the consent of the governing body of the city or town or county, expressed by ordinance or resolution, and within the limitations of this article as to the rate of taxation, the library board may accept any gift, grant, devise, or bequest made or offered by any person for library purposes, and may carry out the conditions of such donations. And the city or town or county, in all such cases is authorized to acquire a site, levy a tax, and pledge itself by ordinance or resolution to a perpetual compliance with all the terms and conditions of the gift, grant, devise, or bequest so accepted. (1911, c. 83, s. 5; 1927, c. 31, s. 5.)

§ 2699. Title to property vested in the city, town or county.—All property given, granted, or conveyed, donated, devised or bequeathed to, or otherwise acquired by any city, town or county for a library shall vest in and be held in the name of such city, town or county and any conveyance, grant, donation, devise, bequest or gift to or in the name of any public library board shall be deemed to have been made directly to such city, town or county. (1911, c. 83, s. 4; 1917, c. 31, s. 6; 1933, c. 365, s. 5.)

Editor's Note.—The above section was substituted for the former reading by Public Laws 1933, c. 365. A comparison of the two sections is necessary to determine the changes.

§ 2700. Library free.—Every library established under this article shall be forever free to the use of the inhabitants of the city or town, subject to such reasonable regulations as the board of trustees may adopt. (1911, c. 83, s. 6.)

§ 2701. Ordinances for protection of library.—The governing body of such city or town or county shall have power to pass ordinances imposing suitable penalties for the punishment of persons committing injury upon such library or the grounds or other property thereof, or for any injury to or for failure to return any book, plate, picture, engraving, map, magazine, pamphlet, or manuscript belonging to such library. (1911, c. 83, s. 8; 1927, c. 31, s. 7.)

§ 2702. Contract with existing libraries.—The governing body of any city, town or county, when deemed best for the interest of the city, town or county, may in lieu of supporting and maintaining a public library, enter into a contract with and make annual appropriations of money to such library, associations or corporations as shall maintain a library or libraries, whose books shall be available without charge to the residents of such city, town or county, under such rules and regulations of said library, associations or corporations, as shall be approved by the governing body of such city, town or county. All money paid to such society or corporation under such contract shall be expended solely for the maintenance of such library, and for no other purpose. For the governing body of such library when contract has been made between city and county, the trustees shall be appointed proportionately to the funds provided for its support.

Nothing in this section shall be construed to abolish or abridge any power or duty conferred upon any public library established by virtue of any city or town charter or other special act, or to affect any existing local laws allowing or providing municipal aid to libraries. (1911, c. 83, ss. 9, 10; 1917, c. 215; 1927, c. 31, s. 8; 1933, c. 365, s. 6.)

Editor's Note.—The above section was substituted for the former reading by Public Laws 1933, c. 365. A comparison of the two sections is necessary to determine the changes.

§ 2702(a). Detention of library property after notice.—Whoever willfully or maliciously fails to return any book, newspaper, magazine, pamphlet or manuscript belonging to any public library to such library for fifteen days after mailing or delivery in person of notice in writing from the librarian of such library, given after the expiration of the time, which by regulation of such library such book, newspaper, magazine, pamphlet or manuscript may be kept, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than fifty dollars or imprisonment for not more than thirty days: Provided, that the notice required by this section shall bear upon its face a copy of this section. (1921, c. 118; 1925, c. 39, s. 1.)

Editor's Note.—The 1925 amendment changed the punishment from that given in the discretion of the court.

It was also provided in the amending act that this section shall not affect the liability of any person to punishment who has before its enactment but since March fourth, one thousand nine hundred and twenty-one, offended against chapter one hundred and eighteen of the Public Laws of one thousand nine hundred and twenty-eight ("twenty-one" was probably intended).

§ 2702(b). Combined counties.—Where found to be more practicable, two or more adjacent counties may join for the purpose of establishing and maintaining a free public library under the terms and provisions herein above set forth for the establishment and maintenance of a free county library. In such cases the combined counties shall have the same powers and be subject to the same liabilities as a single county under the provisions of this article. The board of county commissioners of the counties which have combined for the establishment and maintenance of a free library shall operate jointly in the same manner as herein provided for the commissioners of a single county. Should any county at any time desire to withdraw from such combination, the said county shall be entitled to such proportion of the property as may have been agreed upon in the terms of combination at the time such joint action was taken. (1933, c. 365, s. 7.)

Art. 9. Local Improvements

§ 2703. Explanation of terms.—In this article the term "municipality" means any city or town in the state of North Carolina now or hereafter incorporated.

"Governing body" includes the board of aldermen, board of commissioners, council, or other chief legislative body of a municipality.

"Street improvement" includes the grading, regrading, paving, repaving, macadamizing and remacadamizing of public streets and alleys, and the construction, reconstruction and altering of curbs, gutters and drains in public streets and alleys.

"Sidewalk improvement" includes the grading, construction, reconstruction and altering of sidewalks in public streets or alleys, and may include curbing and gutters.

"Local improvement" means any work undertaken under the provisions of this article, the cost of which is to be specially assessed, in whole or in part, upon property abutting directly on the work.

"Frontage" when used in reference to a lot or parcel of land abutting directly on a local improvement, means that side or limit of the lot or parcel of land which abuts directly on the improvement. (1915, c. 56, s. 1.)

As to frontage, see sec. 2710 par. 10 and notes. As to effect of Act of 1917 on this article, see sec. 2966.

Ownership of Street Prerequisite to Levy Assessment for Improvement.—The ownership by the city of a street is a prerequisite to the power of the city to levy an assessment for street improvements against abutting owners thereon. Efird v. Winston-Salem, 199 N. C. 33, 153 S. E. 632.

Cited in Atlantic, etc., R. Co. v. Ahoskie, 192 N. C. 258, 134 S. E. 653; Jones v. Durham, 197 N. C. 127, 147 S. E. 824; Atlantic Coast Line R. Co. v. Ahoskie, 207 N. C. 154, 176 S. E. 264; Farmville v. Paylor, 208 N. C. 106, 107, 179 S. E. 459.

§ 2704. Application and effect.—This article shall apply to all municipalities. It shall not, however, repeal any special or local law or affect any proceedings under any special or local law for the making of street, sidewalk or other improvements hereby authorized, or for the raising of funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided. (1915, c. 56, s. 2.)

As to street improvements, see secs. 2675, 2793, 2710.

Cited in Wake Forest v. Holding, 206 N. C. 524, 426, 174 S. E. 296.

Laws Construed Separately.—The general statutes authorizing cities and towns to issue bonds and assess abutting lands for improving and paving streets, and not requiring that the questions be submitted to the voters, are additional and independent of special or local laws, and where the latter required the question to be first submitted to the voters for their approval, and these requirements have been fully met, under the private act, the transactions thereunder complete and their validity unquestioned, a railroad company may not resist an assessment made under the general law, upon the ground that the provisions of the private acts, requiring the approval of the voters, control the question of the validity of the assessments. Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645.

In case a special or local law is invalid, this article may be followed in making local improvements. But its provisions must be complied with. Cottrell v. Lenoir, 173 N. C. 138, 91 S. E. 827.

Special Act Prevails.—When a special or local law is passed that is inconsistent with this article the special or local law will prevail, although there is no reference to this section, or repealing clause. Bramham v. Durham, 171 N. C. 196, 88 S. E. 347.

§ 2705. Publication of resolution or notice. — Every resolution passed pursuant to this article shall be passed in the manner prescribed by other laws for the passage of resolutions. Whenever a resolution or notice is required by this article to be published, it shall be published at least once in a newspaper published in the municipality concerned, or if there be no such newspaper, such resolution or notice shall be posted in three public places in the municipality for at least five days. (1915, c. 56, s. 3.)

Cited in Jones v. Durham, 197 N. C. 127, 147 S. E. 824.

§ 2706. When petition required.—Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local asssessment, by general taxation, and by borrowing, as herein provided. No petition shall be necessary, however, for the ordering or making of private water, sewer and gas connections as hereinafter pro-

vided. Nor shall a petition be necessary for the making of sidewalk improvements in those municipalities in which by other law or laws sidewalk improvements are authorized to be made without petition. (1915, c. 56, s. 4.)

Absence of Petition Cured by Legislation.—When improvements are made under an assessment, and there has been no petition as required by this section the assessments are invalid. However this defect may be cured by a validating act of the Legislature although the act is retrospective. Holton v. Mockville, 189 N. C. 144, 126 S. E. 326; Gallimore v. Thomasville, 191 N. C. 648, 650, 132 S. E. 657.

Validation of Proceedings for Improvements Made without Petition.—The General Assembly having the power to confer upon the authorities of a municipal corporation power to improve its streets and sidewalks and to assess the owners of abutting property with a part of the cost of such improvements without a petition, as indicated by this section, has the power to validate proceedings for the improvement of streets and sidewalks which were begun and which have been concluded without an initial petition. Crutchfield v. Thomasville, 205 N. C. 709, 715, 172 S. E. 366.

Cited in Jones v. Durham, 197 N. C. 127, 147 S. E. 824.

§ 2707. What petition shall contain.—The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets or part of a street or streets proposed to be improved. The petition shall cite this article and shall designate by a general description the local improvement to be undertaken and the street or streets or part thereof whereon the work is to be effected. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. The determination of the governing body, upon the sufficiency of the petition shall be final and conclusive. (1915, c. 56, s. 5.)

As to number of owners that must sign when assessment is more than 50 per cent, see sec. 2792(b).

Applicable When City Owns Part of Abutting Land.—A town is subject to assessment on its abutting property, and the rule of a majority of lineal feet and number of owners will apply just the same when a city owns a part of the abutting land as any other time. And if the city fails to sign when its signature is necessary to have a majority of lineal feet, the assessment is a nullity. Tarboro v. Forbes, 185 N. C. 59, 116 S. E. 81.

Actual Contact with Abutting Property Not Necessary.—An objection by the owner of land abutting on the street to an assessment by the front foot rule for special benefit, upon the ground that his property does not come in actual contact with the part of the street for which the city has paid as a general benefit, is untenable under this section. Anderson v. Albemarle, 182 N. C. 434, 109 S. E. 262.

Petition Necessary.—Under this section an assessment for widening a street under contract with the Highway Commission without petition of a majority of the owners is invalid. Sechriest v. Thomasville, 202 N. C. 108, 162 S. E. 212.

How Sufficiency of Petition Determined.—In Tarboro v. Forbes, 185 N. C. 59, 116 S. E. 81, the Supreme Court held that where it appears upon the face of the petition, as a matter of law, that the signers of the petition do not represent a majority of the lineal feet of the total frontage on the street, proposed to be improved, the determination of the governing body as to the sufficiency of the petition is not final or conclusive. In so far as the sufficiency of the petition, authorized to be filed under this section, involves only questions of fact, the determination of the governing body, in the absence of fraud, and when acting in good faith, is final and conclusive. Gallimore v. Town of Thomasville, 191 N. C. 648, 650, 132 S. E. 657.

Where levies are made without a petition the assessments are invalid but not void, and the Legislature has the power to validate the assessments by subsequent legislative act, the Legislature having the power to authorize the assessments in the first instance. Crutchfield v. Thomasville, 205 N. C. 709, 172 S. E. 366.

Procedure Must Fulfill Essential Requirements.—While a slight informality of procedure under this section or a failure to observe a provision which is merely directory, will not generally affect the validity of an assessment, it is nevertheless true that any substantial and material departure from the essential requirements of the law under which the improvement is made will render an assessment therefor invalid. Tarboro v. Forbes, 185 N. C. 59, 65, 116 S. E. 81.

Lineal Feet of Frontage—Signing by Railroad Company.—The right of way of a railroad company abutting on a street proposed to be improved by a city properly included in the lineal feet in the petition for improvement under the provisions of this section. Jones v. City of Durham, 197 N. C. 127, 147 S. E. 824, 826.

Abutting Owners.—See note under § 2710.

Improvement of Only One Side of Street.—Under this section, an assessment levied for street improvements on abutting property owner, is not void on the ground that the assessment was for improving only one side of a street. Waxhaw v. S. A. L. Ry. Co., 195 N. C. 550, 142 S. E. 761.

Approval of Petition Final.—Where the municipal authorities have approved the petition of owners of land abutting upon a street proposed to be improved in accordance with the provisions of statute, their approval and order for the improvements to be made is final, except where it appears from the face of the petition, as a matter of law, that the signers do not represent a majority of the owners or of the lineal feet required by statute. Jones v. Durham, 197 N. C. 127, 147 S. E. 824.

§ 2708. What resolution shall contain:

1. Designate improvements. The preliminary resolution determining to make a local improvement shall, after its passage, be published. Such resolution shall designate by a general description the improvement to be made, and the street or streets or part or parts thereof whereon the work is to be effected, and the proportion of the cost thereof to be assessed upon abutting property and the terms and manner of the payment.

2. Sidewalk improvements. If such resolution shall provide for a sidewalk improvement, it may, in those municipalities in which the owners of the abutting property are required to make payment of the entire cost thereof, without petition direct that the owners of the property abutting on the improvement shall make such sidewalk improvement, and that unless the same shall be made by such owners on or before a day specified in the resolution, the governing body may cause such sidewalk improvement to be made.

3. Affecting railroads. If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement, with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made: Provided, however, that where any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this section, ex-

cept in so far as may be consistent with the provisions of such franchise or contract.

4. Water, gas, and sewer connections. If the resolution shall provide for a street or sidewalk improvement, it may, but need not, direct that the owners of all property abutting on the improvement shall connect their several premises with water mains, gas and sewer pipes located in the street adjacent to their several premises in the manner prescribed in such resolution, and that unless such owners shall cause connection to be made on or before a day specified in such resolution, the governing body will cause the same to be made. (1915, c. 56, s. 6.)

Construction of Former Franchise to a Railroad.—A city ordinance granting a franchise to a street railway to operate upon its streets, requiring that it do certain grading and other things enumerated in its construction at its own expense, and further states in direct and continuous connection with this subject that "nothing herein contained shall be construed to require said company to pave its road," is held to apply only to conditions then existing, and will not be construed to exempt the corporation from paying its part of future assessments that may be levied upon abutting owners for the paving and improvements of the streets. Durham v. Durham Public Service Co., 182 N. C. 333, 109 S. E. 40.

Extent of Railroads Liability.—This section specifying that the burden imposed upon a street railway company in assessing its property for street improvements shall not exceed "the space between the tracks, the rails of the track, and eighteen inches in width outside of the tracks," is not violated if including the length of the cross-ties, the statutory limitation of the width had not been exceeded. Durham v. Durham Public Service Co., 182 N. C. 333, 109 S. E. 40.

Railroad Property.—A town, to widen its streets, agreed with a railroad company to condemn land and give it to the company if it would remove its tracks thereto at its own expense. After this arrangement has been carried out, the town assessed the lands of the railroad company for street paving, under a resolution which contains no requirement that the company should improve the land occupied by its tracks as specified by subsection 3 of this section. It was held that the railroad was not liable for the assessment as the property being a part of the street was not "adjoining" within the provisions of this article. Lenoir v. Carolina, etc., Ry. Co., 194 N. C. 710, 140 S. E. 618.

Cited in Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824.

§ 2709. Character of work and material.— The governing body shall have power to determine character and type of construction and of material to be used in making a local improvement, and whether the work, where not done by owners of abutting property or by a street or other railroad company, shall be done by the forces of the municipality or by contract: Provided, that for the purposes of securing uniformity in the work the governing body shall always have the power to have all street paving done by the forces of the municipality or by contract under the provisions of this article. (1915, c. 56, s. 7.)

Cited in Jones v. Durham, 197 N. C. 127, 147 S. E. 824.

§ 2710. Assessments levied:

1. One-half on abutting property. One-half of the total cost of a street or sidewalk improvement made by a municipality, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways, shall be specially assessed upon the lots and parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon, by an equal rate per foot of such frontage, unless the petition for such street or sidewalk improvement shall request that a larger proportion of such cost, specified in the petition, be so assessed, in which case such larger proportion shall be so assessed, and the remainder of such cost shall be borne by the municipality at large; but no assessment for streets and sidewalks shall be made against abutting property on any such street or sidewalk until said street or sidewalk has been definitely laid out and the boundaries of the same definitely fixed.

2. Upon railroads. The cost of that part of a street improvement required to be borne by a railroad or street railway company, and made by the municipality after default by a railroad or street railway company in making the same as hereinbefore provided, shall be assessed against such company, and shall be collected in the same manner as assessments are collected from abutting property owners, and such assessment shall be a lien on all of the franchises and property of such railroad or street railway company.

3. For sidewalks. The entire cost of a sidewalk improvement required to be made by owners of property abutting thereon, and made by the municipality after default by such property owners in making the same, as hereinbefore provided, shall be assessed against the lots and parcels of land abutting on that side of the street upon which the improvement is made and directly on the improvement, according to their respective frontages thereon, by an equal rate per foot of such frontage.

4. Water, gas and sewer connections. The entire cost of each water, gas and sewer connection, required to be made by the owner of the property for or in connection with which such connection was made, but made by the municipality after default by such property owner in making the same, as hereinbefore provided, shall be specially assessed against the particular lot or parcel of land for or in connection with which it was made. No lands in the municipality shall be exempt from local assessment. (1915, c. 56, s. 8; 1919, c. 86.)

As to other powers to assess and repair streets, see sec. 2675. See also note under § 2715.

In General.—The clear interpretation of this section means what its language says—that one-half of the total cost of the street improvements shall be assessed upon the parcel of land abutting directly on the improvement, according to the extent of the respective frontage thereon. Carpenter v. Maiden, 204 N. C. 114, 116, 167 S. E. 490.

Abutting Property.—The power to impose assessments upon owners whose lands abut upon the streets of a city to be improved, comes within the sovereign right of taxation, and no license, permit, or franchise from the Legislature or a municipal board will be construed to establish an exemption from the proper exercise of this power by future Legislatures, or in derogation of it, unless these bodies are acting clearly within their authority, and the grant itself is in terms so clear and explicit as to be free from substantial doubt. Durham v. Durham Public Service Co., 182 N. C. 333, 109 S. E. 40.

In Anderson v. Albemarle, 182 N. C. 434, 436, 109 S. E. 262, it was said: "The words 'abutting on the improvement' mean abutting on the street that is improved, and that this does not require that the pavement shall extend the entire width of the street when this would be an unnecessary cost, and would greatly enhance the burden of which the plaintiff in this case complains. By the term 'abutting property' is meant that between which and the improvement there is no intervening land."

Abutting property cannot exist in the street itself, but, in the nature of things, must be property outside of the street, touching or bordering upon the street or improvement. So a railroad is not an abutting owner by virtue of

the fact that its tracks are laid in a public street. Town of Lenior v. Carolina & N. W. Ry. Co., 194 N. C. 710, 140 S. E. 618, 619.

Same—Public Park.—In the absence of constitutional or statutory provision to the contrary, the public property of a municipality, such as park, etc., is subject to assessment for local improvements of its streets, and when there is no provision exempting them, a public park of a city is included within the intent and meaning of Laws 1915, ch. 56, providing that lands abutting on a street to be paved or improved should be assessed for such improvements to the extent of the respective frontage of the lots thereon, in a certain proportionate part of the cost, by the "front foot" rule. Tarboro v. Forbes, 185 N. C. 59, 116 S. E. 81.

Same—Interference by Courts.—Where an act allows assessments to be made by a city on property abutting on a street for pavements or improvements thereon, the legislative declaration on the subject is conclusive as to the necessity and benefit of the proposed improvements, and in applying the principle and estimating the amount as against the owners, individual or corporate, the court may interfere only in case of palpable and gross abuse. City of Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645.

Same—Application of Constitution and Sections 7768, 7901.—While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, or sections 7768, 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. Tarboro v. Forbes, 185 N. C. 59, 116 S. E. 81.

Subsection 2—Railroads.—Where railroad property in a city lies along an unimproved street, but abuts upon an improved street that runs through the unimproved one, the owner is ordinarily liable to an assessment of one-half of the costs of the improvement on the abutting and improved street, and the exception in the statute as to street intersections is inapplicable. Mount Olive v. Atlantic, etc., R. Co., 188 N. C. 332, 335, 124 S. E. 559.

Same—Assessed as Private Owners. — The property of railroad companies abutting upon the streets of a city is liable to assessments for the paving and improvements thereon to the same extent as that of private owners, in proper instances, and where proper legislative authority is therefor shown. Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645.

Street Railroad Treated as Abutting Owner.—The property and franchise of street railways laid along a given street or designated locality within the effects and benefits of the proposed improvements, may lawfully be considered abutting owners. Durham v. Durham, Pub. Service Co., 182 N. C. 333, 109 S. E. 40.

A city ordinance granting a franchise to a street railway to operate upon its streets, requiring that it do certain grading and other things enumerated in its construction at its own expense, and further states in direct and continuous connection with this subject that "nothing herein contained shall be construed to require said company to pave its road," is held to apply only to conditions then existing, and will not be construed to exempt the corporation from paying its part of future assessments that may be levied upon abutting owners for the paving and improvements of the street. Durham v. Durham Pub. Service Co., 182 N. C. 333, 109 S. E. 40.

Same—How Estimate Made.—In making an assessment on the property of a street railway company as an abutting owner on the street improved, not only the value of its tangible property, such as tracks, etc., should be considered, but, also, the estimated value of the company's franchise under which it is operating, and which by fair apportionment should be included in the estimate. Durham v. Durham Public Service Co., 182 N. C. 333, 109 S. E. 40.

Section Additional to Local Laws.—These general statutes are additional and independent of special or local laws, and where the latter require the question to be first submitted to the voters for their approval, and these requirements have been fully met, under the private act, the transactions thereunder complete and their validity unquestioned, a railroad company may not resist an assessment made under the general law, this section, upon the ground that the provisions of the private acts, requiring the approval of the voters, control the question of the validity of the assessments. Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645.

Where a city or town has proceeded under private acts to issue bonds and assess the lands of abutting owners for street paving and improvements and for insufficiency of funds thus expended find it necessary to assess the lands of a railroad company abutting on streets so improved under this section, a later act ratifying the private acts, evidently for the purpose of curing apprehended defects and to make the bonds a more safe and desirable investment, cannot affect the validity of the proceedings under the general laws. Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 745.

Subsection 4—Assessment for Drains.—For constructing drains it is not necessary that the assessments be the same, for cost will be different because of difference in location and slope of the several lots. Gallimore v. Thomasville, 191 N. C. 648, 132 S. E. 657.

Cited in Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824.

§ 2711. Amount of assessment ascertained.—Upon the completion of any local improvement the governing body shall compute and ascertain the total cost thereof. In the total cost shall be included the interest paid or to be paid on notes or certificates of indebtedness issued by the municipality to pay the expense of such improvement pursuant to the provisions of this article and incident to the improvement and assessment therefor. The governing body must thereupon make an assessment of such total cost pursuant to the provisions of the preceding section, and for that purpose must make out an assessment roll in which must be entered the names of the persons assessed as far as they can ascertain the same, and the amount assessed against them, respectively, with a brief description of the lots or parcels of land assessed. (1915, c. 56, s. 9.)

As to assessments for street repair, see sec. 2675.

In General.—Where a city or town has regularly and sufficiently proceeded to assess the lands of abutting property owners under the provisions of this statute, and have published the notice thereof as sec. 2712 requires, and such owners have been afforded ample opportunity to be heard by the commissioners of the municipality, sec. 2713, their failure to appear and resist the assessment thus laid on their property under the proceedings prescribed will bar their right to impeach the ordinance. Vester v. Nashville, 190 N. C. 265, 129 S. E. 593.

Insufficiency of Description of Land.—The assessments made upon the lands of an owner adjoining a street improved by the authorities of a city or town, will not be declared invalid on the ground of the insufficiency of description in the assessment roll at the suit of such property owners, when in substantial compliance with this and the next section. Vester v. Nashville, 190 N. C. 265, 129 S. E. 593.

Map Sufficient Description.—A map made by the city engineer duly approved by the city commissioners is sufficient compliance with the requirements of this statute. Holton v. Mockville, 189 N. C. 144, 126 S. E. 326.

Cited in Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824.

§ 2712. Assessment roll filed; notice of hearing.—Immediately after such assessment roll has been completed, the governing body shall cause it to be deposited in the office of the clerk of the municipality for inspection by parties interested, and shall cause to be published a notice of the completion of the assessment roll, setting forth a description in general terms of the local improvement, and the time fixed for the meeting of the governing body for the hearing of allegations and objections in respect of the special assessment, such meeting not to be earlier than ten days from the first publication or posting of said notice. Any number of assessment rolls may be included in one notice. (1915, c. 56, s. 9.)

This section gives notice that the assessment roll has been filed and is open to inspection. Wake Forest v. Holding, 206 N. C. 425, 428, 174 S. E. 296.

It Does Not Confer Power to Condemn Property.—The governing body of a town has no jurisdiction in proceed-

ing under this section and § 2713, to condemn land for street purposes, under the power of eminent domain. Atlantic Coast Line R. Co. v. Ahoskie, 207 N. C. 154, 176 S. E. 264.

Cited in Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824.

§ 2713. Hearing and confirmation; assessment lien.—At the time appointed for that purpose, or at some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested, who appear and may make proof in relation thereto. The governing body may thereupon correct such assessment roll, and either confirm the same or may set it aside, and provide for a new assessment. Whenever the governing body shall confirm an assessment for a local improvement, the clerk of the municipality shall enter on the minutes of the governing body the date, hour, and minute of such confirmation, and from the time of such confirmation the assessments embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances. After the roll is confirmed a copy of the same must be delivered to the tax collector or other officer charged with the duty of collecting taxes. (1915, c. 56, s. 9.)

See the foregoing section and the note thereto.

Lien. — Assessments made upon the property of the owner for street and side-walk improvements by a town, and in all respects under the authority conferred on the municipality by statute, extending in partial payments over a designated period of time, are to be regarded in the nature of a statutory mortgage when due and payable, and constitute liens on the property within the warranty clause against encumbrances contained in a deed, and recoverable in the grantee's action against the grantor to the extent he has been required to pay them. Coble v. Dick, 194 N. C. 732, 140 S. E. 745.

The lien against property for street improvements is a lien in rem against the land itself, but it is not strictly a tax lien and is based upon the theory of special benefit to the property itself, and therefore does not come within the provisions of Art. VII, sec. 9, and a lien for street assessments, while superior to the liens of mortgages or deeds of trust, by this section, is subject to the lien of the city and county for taxes for general revenue. Saluda v. Polk County, 207 N. C. 180, 176 S. E. 298.

When Lien Attaches.—By provision of this section the lien for street assessments does not attach to land until confirmation of the assessments, and where such assessments are not confirmed by the governing body of the town until after the execution of a deed to the property, the subsequently attaching lien for the assessments does not violate the warranty and covenant in the deed, in the usual language, against encumbrances. Oliver v. Hecht, 207 N. C. 481, 177 S. E. 399.

Sufficiency of Compliance.—Where the property owner signs the petition and has notice that improvements are to be made, and notice that the assessment roll giving the amount of the assessment against his property, has been filed in the office of the city clerk, as required by § 2712, and accepts the benefits and pays installments of the assessments without objection, as provided by § 2714, he ratifies same and this section is sufficiently complied with. Wake Forest v. Holding, 206 N. C. 425, 174 S. E. 296.

Priority of Lien.—The amount of an assessment on the owner of land lying along a street for street improvements, is by this statute, creating a lien, superior to all other liens and encumbrances and continuing, until paid, against the title of successive owners thereof. Merchants Bank, etc., Co. v. Watson, 187 N. C. 107, 121 S. E. 181.

The provision of this section in regard to liens does not exclusively refer to subsequent liens; and the reference to the date of confirmation is only to fix the time when the lien is conclusively established, and when so established it takes precedence over all liens then existent or otherwise. Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645.

An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed, payable in installments, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of § 93, as to the order of payment of debts of the deceased, has no application. Carawan v. Barnett, 197 N. C. 511, 149 S. E. 740. See also High Point v. Brown, 206 N. C. 664, 666, 175 S. E. 169.

Statute of Limitations.—The assessment against abutting lands for street improvements is made a lien on the land superior to all other liens and encumbrances under this section, and the ten-year statute of limitation is applicable thereto and not the three-year statute. High Point v. Clinard, 204 N. C. 149, 167 S. E. 690.

Cited in Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824; Statesville v. Jenkins, 199 N. C. 159, 154 S. E. 15.

§ 2714. Appeal to the superior court. — If a person assessed is dissatisfied with the amount of the charge, he may give notice within ten days after such confirmation that he takes an appeal to the next term of the superior court of the county in which the municipality is located, and shall within five days thereafter serve a statement of facts upon which he bases his appeal, but the appeal shall not delay or stop the improvements. The appeal shall be tried at the term of court as other actions at law. (1915, c. 56, s. 9.)

Constitutionality.—The right of appeal to the courts being provided in case of dissatisfaction by an owner of land abutting on a street assessed by the governing body of a municipality for street improvement, the objection that the owner's property is taken for a public use in contravention of the due process clause of the Constitution is untenable. Lake v. Wadesboro, 186 N. C. 683, 121 S. E. 12.

Jurisdiction of Court Is Derivative.—The jurisdiction of the Superior Court upon appeal from a levy of assessments for street improvements by the governing body of a town as provided by this section, is entirely derivative, and where a town has no jurisdiction to condemn land the Superior Court on appeal likewise has no jurisdiction to do so. Atlantic Coast Line R. Co. v. Ahoskie, 207 N. C. 154, 176 S. E. 264.

No Other Remedy.—The owner of land abutting on a street the municipality proposes to improve has his remedy in objecting to the local assessment on his property because of the insufficiency of the petition, and he may not enjoin the issuance of bonds for this necessary expense on that ground when he has failed to pursue his statutory remedy. Brown v. Hillsboro, 185 N. C. 368, 117 S. E. 41.

Injunctive Relief.—The remedy of abutting owners assessed for street improvements is given by this section providing the right of appeal and when no appeal has been taken and the work has been completed, injunctive relief against the collection of the assessments by the city will not lie. Jones v. Durham, 197 N. C. 127, 147 S. E. 824.

Existence of Street May Be the Issue.—Under the provisions of this statute, it is necessary that there be an existing street in order for a valid assessment for improvements to be laid on the property of abutting owners, and this may be made an issue in an appeal under this section, and the adjoining owner may introduce his evidence to show to the contrary. Atlantic Coast Line R. Co. v. Ahoskie, 192 N. C. 258, 134 S. E. 653.

Cited in Greensboro v. Bishop, 197 N. C. 748, 150 S. E. 495; Efird v. Winston-Salem, 199 N. C. 33, 37, 153 S. E. 632; Wake Forest v. Holding, 206 N. C. 425, 427, 174 S. E. 296; Crutchfield v. Thomasville, 205 N. C. 709, 713, 172 S. E. 366.

§ 2715. Power to adjust assessments.—The governing body may correct, cancel or remit any assessment for a local improvement, and may remit, cancel or adjust the interest or penalties on any such assessment. The governing body has the power, when in its judgment there is any irregularity, omission, error or lack of jurisdiction in any of the proceedings relating thereto, to set aside the whole of the local assessment made by it, and thereupon to make a reassessment. In such case there shall be included, as a part of the costs of the public improvement in-

volved, all interest paid or accrued on notes or certificates of indebtedness, or assessment bonds issued by the municipality to pay the expenses of such improvement. The proceeding shall be in all respects as in case of local assessments, and the reassessment shall have the same force as if it had originally been properly made. (1915, c. 56, s. 9.)

Section Not Applicable.—Where in accordance with the provisions of 2710(1), the board of aldermen grant a petition for street improvements requesting the assessment of a larger proportion of the cost of the improvements against the lots of land abutting directly thereon than is otherwise required by statute, after the confirmation of the assessment roll a subsequent board of aldermen is without power to grant a petition of the abutting landowners for a reduction of the assessment upon the ground alone that the amount of the assessments exceeded that which they had originally anticipated, and a suit by other taxpayers of the town to enjoin the granting of such petition is proper. This section and § 2806(f), have no application. McClester v. China Grove, 196 N. C. 301, 145 S. E. 562.

Cited in Gallimore v. Thomasville, 191 N. C. 648, 652, 132 S. E. 657; Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824.

§ 2716. Payment of assessment in cash or by installments.—The property owner or railroad or street railway company hereinbefore mentioned shall have the option and privilege of paying for the improvements hereinbefore provided for in cash, or if they should so elect and give notice of the fact in writing to the municipality within thirty days after the notice mentioned in next succeeding section, they shall have the option and privilege of paying the assessments in not less than five nor more than ten equal annual installments as may have been determined by the governing body in the original resolution authorizing such improvement. Such installments shall bear interest at the rate of six per centum per annum from the date of the confirmation of the assessment roll, and in case of the failure or neglect of any property owner or railroad or street railway company to pay any installment when the same shall become due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable and such property and franchises shall be sold by the municipality under the same rules, regulations, rights of redemption and savings as are now prescribed by law for the sale of land for unpaid taxes. The whole assessment may be paid at the time of paying any installment by payment of the principal and all interest accrued to that date. (1915, c. 56, s. 10.)

See notes to the following section.

Right to Declare All Installments Due.—The provision of this section, that upon failure to pay any installment when due, all installments remaining unpaid should at once become due and payable, gives the municipality the optional right to declare all installments due and payable upon default, and in the absence of its declaration to invoke the acceleration provision the statute of limitations will not begin to run against unpaid installments not then due. Farmville v. Paylor, 208 N. C. 106, 179 S. E. 459.

Cited in Coble v. Dick, 194 N. C. 732, 733, 140 S. E. 745; Statesville v. Jenkins, 199 N. C. 159, 154 S. E. 15; High Point v. Brown, 206 N. C. 664, 667, 175 S. E. 169; Saluda v. Polk County, 207 N. C. 180, 184, 176 S. E. 298.

§ 2717. Payment of assessment enforced.—After the expiration of twenty days from the confirmation of an assessment roll the tax collector or such other officer of the municipality as the governing body may direct so to do shall cause to be published in a newspaper published in the municipality, or if there be no such newspaper, shall cause to be posted in at least three public places therein, a notice that any assessment contained in the assessment roll, naming and describing it, may be paid to him at any time before the expiration of thirty days from the first publication of the notice without any addition. In the event the assessment be not paid within such time the same shall bear interest at the rate of six per cent per annum from the date of the computation and ascertainment by the governing body after the completion of the local improvement of the total cost thereof: Provided, that this shall not apply to improvements made under an ordinance prior to February 26, 1923, and shall become due and payable on the date on which taxes are payable: Provided, that where an assessment is divided into installments one installment shall become due and payable each year on the date on which taxes are due and payable. If any assessment or installment thereof is not paid when due, it shall be subject to the same penalties as are now prescribed for unpaid taxes, in addition to the interest herein provided for. After default in the payment of any installment, the governing body may, on the payment of all installments in arrears, together with interest due thereon and on reimbursement of any expenses incurred in attempting to obtain payment, reinstate the remaining unpaid installments of such assessment so that they shall become due in the same manner as they would have if there had been no default, and such extension may be granted at any time prior to the institution of an action to foreclose. (1915, c. 56, s. 11; 1923, c. 87; 1929, c. 331, s. 1.)

As to enforcement of lien within statutory period, see sec. 441 and notes.

Editor's Note.—By the amendment of 1923 the date when interest begins to run was changed from the time of the "confirmation of the assessment roll" to "after the completion of the local improvement." But it was not retroactive.

The Act of 1929 added the last sentence to this section.

The lien given under this section, when properly established, amounts to a statutory mortgage, having preference over any and all liens and encumbrances existent or other, and to be enforced by decree of sale of the property and franchise. Saluda v. Polk County, 207 N. C. 180, 183, 176 S. E. 298.

Lien Superior to All Others.—The lien created by this section is superior to all other liens and encumbrances, and may be enforced by decree of sale. Kinston v. Atlantic, etc., R. Co., 183 N. C. 14, 110 S. E. 645.

Judgments for Installments.—Where the abutting owner of land on the streets has refused to pay the assessments lawfully made on him for street improvements, a judgment allowing him to pay by installments may be entered. Durham v. Durham Public Service Co., 182 N. C. 333, 109 S. E. 40.

Cited in Coble v. Dick, 194 N. C. 732, 140 S. E. 745.

§ 2717(a). Sale or foreclosure for unpaid assessments barred in ten years; no penalties.—No statute of limitation, whether fixed by law especially referred to in this chapter or otherwise, shall bar the right of the municipality to enforce any remedy provided by law for the collection of unpaid assessments, whether for paving or other benefits, and whether such assessment is made under this chapter or under other general or specific acts, save from and after ten years from default in the payment thereof, or if payable in installments, ten years from the default in the payment of any install-

ments. No penalties prescribed for failure to pay taxes shall apply to special assessments, but they shall bear interest at the rate of six per cent per annum only. In any action to foreclose a special assessment the costs shall be taxed as in any other civil action, and shall include an allowance for the commissioner appointed to make the sale, which shall not be more than five per cent of the amount for which the land is sold, and one reasonable attorney's fee for the plaintiff. This section shall apply to all special assessments heretofore or hereafter levied, but shall not apply to any special assessment for the collection of which an action or proceeding has heretofore been instituted. (1929, c. 331, s. 1.)

Editor's Note.—For an act applicable only in Durham county, see Public Laws of 1935, chapter 224.

§ 2717(b). Extension of time for payment of special assessments.—At any time or times prior to July the first, one thousand nine hundred and thirty-six, the governing body of any city or town may adopt a resolution granting an extension of the time for the payment of any instalment or instalments of any special assessment, including accrued interest thereon and costs accrued in any action to foreclose under the lien thereon, by arranging such instalment or instalments, interest and costs into a new series of ten equal instalments so that one of said instalments shall fall due on the first Monday in October after the expiration of one year after adoption of the aforesaid resolution and one of said instalments on the first Monday in October of each year thereafter. Accrued interest on any instalment or instalments of any special assessment extended under the provisions of this section shall be computed to the first Monday in October following the adoption of the aforesaid resolution: Provided, however, that such extension shall not prevent the payment of any assessment or interest at any time: Provided further, no such extension shall in any way discriminate in favor of or against any property assessed by virtue of said assessment roll: Provided further, that any instalment or instalments, together with accrued interest and costs extended in accordance with the provisions of this section shall bear interest at the rate of six per centum per annum from the first Monday in October following the adoption of the aforesaid resolution. (1931, c. 249; 1933, c. 410; 1935, c. 126.)

Editor's Note.—The above section was substituted for the former reading by Public Laws 1935, c. 126. A comparison of the two sections is necessary to determine the changes.

§ 2718. Assessments in case of tenant for life or years.—Whenever any real estate is in the possession or enjoyment of a tenant for life, or a tenant for a term of years, and an assessment is laid or levied on said property by any city, town, county, township, municipal district, or the state, to cover the cost of permanent improvements ordered put thereon by the law or the ordinances of such city or town, township, or municipal district, such as paving streets and sidewalks, laying sewer and water lines, draining lowlands, and permanent improvements of a like character, which constitute a lien upon such property, the amount so assessed for such purposes shall be paid by the tenant for life or for years, and the remaindermen after the life estate, or the owner in fee after the expiration of tenancy for a term of years, pro rata their respective interests in said real estate. (1911, c. 7, s. 1.)

§ 2719. Interests of parties ascertained.—In calculating the respective interests of a tenant for life and the remainderman in fee, the duration of the life tenancy should be ascertained and the expectation of life of the tenant as is provided by law by the mortuary table, as near as may be justly and fairly done. (1911, c. 7, s. 2.)

§ 2720. Lien of party making payment. — If the assessment, after same shall be laid or levied, shall all be paid by either the tenant for life or the tenant for a term of years, or by the remainderman, or the owner in fee, the party paying more than his pro rata share of the same shall have the right to maintain an action in the nature of a suit for contribution against the delinquent party to recover from him his pro rata share of such assessment, with interest thereon from the date of such payment, and be subrogated to the right of the city, town, township, municipal district, county, or the state, to a lien on such property for the same. (1911, c. 7, s. 3.)

§ 2720(1). Lien in favor of co-tenant or joint owner paying special assessments.—Any one of several tenants in common, or joint tenants, or co-partners, shall have the right to pay the whole or any part of the special assessments assessed or due upon the real estate held jointly or in common, and all sums by him so paid in excess of his share of such special assessments, interest, costs and amounts required for redemption, shall constitute a lien upon the shares of his co-tenant or associates, payment whereof, with interest and costs, he may enforce in proceedings for partition, actual or by sale, or in any other appropriate judicial proceeding: Provided, the lien herein provided for shall not be effective against an innocent purchaser for value unless and until notice thereof is filed in the office of the clerk of the superior court in the county in which the land lies and indexed and docketed in the same manner as other liens required by law to be filed in such clerk's office. (1935, c. 174.)

§ 2721. Money borrowed to be paid out of assessment.—At any time before the cost of any local improvement shall be computed and ascertained as provided in this article, the governing body may from time to time by resolution authorize the treasurer to borrow money to the extent required to pay the cost of any such improvement or to repay any money borrowed under this section with interest thereon. The resolution authorizing any such loan or loans may provide for the issue of notes or certificates of indebtedness of the municipality, or both, payable either on demand or at a fixed time, not more than six months from the date thereof, and bearing interest not exceeding six per centum per annum. Said notes or certificates may be sold at public or private sale, or pledged as security for temporary loans, as the governing body may by such resolution direct. Any temporary indebtedness incurred under the authority of this section, with the interest thereon, may be paid out of moneys raised by the issue and sale of "local improvement bonds" or "assessment bonds,"

or both, to be issued and sold as hereinafter provided, or may be included in the annual tax levy. (1915, c. 56, s. 12.)

§ 2722. Assessment books prepared.—After the governing body of the municipality has levied the assessment against the property abutting upon the street or streets, the city clerk or person designated shall prepare from such assessment roll and deliver to the tax collector or person designated a well bound book styled Special Assessment Book, which shall be so ruled as to conveniently show:

1. Name of owner of such property.
2. The number of lot or part of lot and the plan thereof if there be a plan.
3. The frontage of said lot.
4. The amount that has been assessed against such lot.
5. The amount of such installments and the day on which installments shall become due.

Such book shall be indexed according to the names of the owners of the property, and entries of all payments or partial payments shall be immediately entered upon said book when made, and said book shall be open to the inspection of any citizen of the municipality. (1915, c. 56, s. 13.)

Necessity of Special Book.—As between the abutting landowners upon the street improved by a city or town and the proper municipal authorities acting thereon, the failure of the latter to keep the special assessment book is not fatal to the validity of the assessments, if the original assessment roll or book is accessible, sufficient to give all necessary information of the property assessed, and available upon the statutory notice given. Vester v. Nashville, 190 N. C. 265, 129 S. E. 593.

§ 2722(a). Apportionment of Assessments.—In any case where one or more special assessments shall have been made against any property for any improvement or improvements authorized by this chapter, and said property has been or is about to be subdivided and it is therefore desirable that said assessment or assessments be apportioned among the subdivisions of such property, the governing body may, with the consent of the owner or owners of said property, apportion said assessment or assessments, or the total thereof, fairly among said subdivisions, as same are benefited by the improvement and release such subdivisions, if any, as in the opinion of the governing body are not benefited by the improvement. Thereafter, each of said subdivisions shall be relieved of any part of such original assessment or assessments except the part thereof apportioned to said subdivisions, and the part of said original assessment or assessments apportioned to any such subdivision shall be of the same force and effect as the original assessment or assessments. At the time of making such apportionments, the governing body shall cause to be entered upon its minutes an entry to the effect that such apportionment is made with the consent of the owner or owners of the property affected, and such entry shall be conclusive of the truth thereof in the absence of fraud. Such re-assessments may include past due installments of principal, interest and penalty, if any, as well as assessments not then due, and the remaining installments shall fall due at the same dates as they did under the original assessment. (1929, c. 331, s. 1; 1935, c. 125.)

Editor's Note.—Prior to the amendment of 1935 the last sentence of this section prohibited reassessment before payment of past due installments.

§ 2723. Local improvement bonds issued.—Whenever an assessment for any local improvement has been confirmed, the governing body may by resolution direct that the amount and proportion of the expense of such improvement which shall be borne by the municipality at large shall be raised by the issuance of bonds of the municipality to be known as "local improvement bonds." Such bonds shall be payable at such time or times, not exceeding thirty years from their date, as the governing body shall determine. There shall be raised annually by tax upon all the taxable property of the municipality, after the issuance of any such bonds, a sum sufficient to meet and pay the interest thereon as the same becomes due, and a sum to be paid into a sinking fund which will, together with the accumulations thereof, provide a fund sufficient to meet and pay the principal of said bonds at maturity: Provided, however, that if such bonds be made payable in annual installments substantially equal in amount, the first of which installments shall be payable within two years from the date of such bonds and the last within twenty years of such date, the governing body authorizing such bonds, in lieu of providing for a sinking fund to meet the principal of such bonds, shall cause to be raised by taxation in each year in which an installment of principal shall be payable, or in the next preceding year, an amount sufficient to meet said installment, in addition to the annual tax during the life of the bonds to provide for the payment of the interest accruing thereon. The municipality's share of two or more improvements may be included in a single issue of local improvement bonds. (1915, c. 56, s. 14.)

As to improvements under the Municipal Finance Act, see secs. 2939 et seq.

§ 2724. Assessment bonds issued.—Whenever an assessment for any local improvement has been confirmed, and twenty days have elapsed since the first publication of notice of such confirmation, the governing body may by resolution direct that the amount and proportion of the expense of such improvement which has been assessed upon the abutting property, or any part of such expense, shall be raised by the municipality by the issuance of its bonds, to be known as "assessment bonds." Such bonds shall be made payable in not less than five and not more than ten substantially equal annual installments, the last of which shall become due not less than five nor more than ten years after the issuance of the bonds. All moneys derived from the collection of assessments upon which assessment bonds are predicated, collected after the passage of the resolution authorizing such bonds, shall be placed in a special fund, to be used only for the payment of the principal and interest of assessment bonds issued under this section, and if at the time of the annual tax levy for any year in such municipality it shall appear that such fund will be for any cause insufficient to meet the prin-

cipal and interest of such bonds maturing in such year, the amount of the deficiency shall be included in such tax levy. The amount of the assessments for two or more improvements may be included in a single issue of assessment bonds. (1915, c. 56, s. 15.)

As to other provisions, see secs. 2939 et seq.

§ 2725. Form of bonds; sale.—Bonds authorized to be issued by this article shall be of such denomination, bear such rate of interest, not exceeding six per centum per annum, and be payable at such places, and be in such form as the governing body may by resolution provide. Such bonds shall be signed by the mayor or other chief executive officer, and the clerk of the municipality issuing them, and shall bear the seal of such municipality. Coupons attached to such bonds shall bear the facsimile signature of one or more of said officers. Such bonds may be either coupon bonds or registered bonds, or coupon bonds with the privilege of registration as to principal only, or of conversion into bonds registered as to both principal and interest. They may be sold at public or private sale, but for not less than their par value. They shall recite that they are issued pursuant to the authority of this article and of the resolution authorizing the issuance thereof, which shall be conclusive evidence of their validity and of the regularity of their issuance. (1915, c. 56, s. 16.)

As to transfer of bonds, see sec. 2954; sale, sec. 2955.

§ 2726. Power to provide for payment. — The full faith and credit of a municipality shall be pledged for the payment of the principal and interest of all of its local improvement bonds, assessment bonds, notes and other obligations issued under this article. For the purpose of paying such principal and interest the governing body shall have power to levy sufficient taxes upon all the taxable property in the municipality and to borrow money temporarily upon notes of the municipality in anticipation of taxes of the same or the succeeding fiscal year. (1915, c. 56, s. 17.)

As to taxes for payment, see sec. 2959.
Cited in Cottrell v. Lenoir, 173 N. C. 138, 147, 91 S. E. 827.

§ 2727. Bonds issued without popular vote validated.—All bonds heretofore issued or proceedings taken by any city or town in substantial compliance with the provisions of this article are hereby validated, notwithstanding that the question of issuing bonds was not submitted to the voters of such city or town, and every such city or town is authorized to continue such proceedings to issue bonds or other obligations, as provided in this article, without submitting to the voters or taxpayers of such city or town the question of issuing such bonds. (1917, c. 71; 1917, c. 113, ss. 1, 2.)

As to bonds issued, see sec. 2691 and notes.

§ 2728. Popular vote not required in certain cases. — Notwithstanting anything contained in any law heretofore enacted, whether general, special, private, or local, it shall be lawful for any city or town to borrow money, contract debts, and issue bonds or other evidence of indebtedness for necessary expenses without the assent of the voters or taxpayers of such city or town, in all cases where the whole or at least one-fourth of the cost of the improvements or properties for which the money is borrowed, debt incurred, or bonds or other evidences of indebtedness issued, has heretofore been or is hereafter to be specially assessed upon abutting property or other property deemed benefitted by the making of such improvement or the acquisition of such properties. (1917, c. 113, s. 3.)

For general notes, see notes to sec. 2691 which will be found under Art. VII, Sec. 7 of the Constitution.

§ 2728(a). Improvements on streets abutting railroads.—Municipalities desiring to make street and sidewalk improvements on property owned and/or leased by railroad companies, are hereby authorized to make such improvements on any such street used as a public street, subject to the rights of any such railroad company to use and occupy the same for railroad purposes: Provided, however, that the petition or petitions contemplated and required by the provisions of this article, need not be signed by such railroad company or companies, nor shall any part of the railroad right of way be considered as abutting property, but the said petition shall be signed by at least a majority in number of the owners of property other than the railroad right of way, who must represent at least a majority of all the lineal feet frontage of the lands, other than said railroad right of way (a majority in interest of owners of undivided interest in any piece of property to be deemed and treated as one person for the purpose of the petition), abutting upon such streets or streets proposed to be improved: Provided, further, that not more than one-half of the total cost of the street or sidewalk improvement made by such municipality, exclusive of so much of the cost as is incurred at street intersections, shall be specially assessed upon the lots or parcels of land abutting directly on the improvement, other than the property included in the railroad right of way, according to the extent of their respective frontage thereon, by an equal rate per foot of such frontage. (1931, c. 222, s. 1.)

Editor's Note.—Since a municipality may proceed to make street improvements without petition of the owners of abutting property (Shute v. City of Monroe, 187 N. C. 676, 123 S. E. 71), it is clear that where a railroad, owning half of the abutting property, could hold up the improvement by refusal to sign the petition, that the state may authorize the municipality to proceed without the railroad's consent. 9 N. C. Law Rev. 362.

§ 2728(b). Railroad rights of way and contracts as to streets unaffected; expense of preparation of improving.—Nothing contained in section 2728(a) shall be construed so as to deprive any railroad company of any right which it may now or hereafter possess by reason of its ownership of any right of way.

Any additional expense which the railroad may incur in removing or altering any pavement or other improvements made under and by virtue of the provisions of section 2728(a), which interfere with the railroad's use of its right of way, shall be borne by the municipality affected: Provided, such section shall not affect in any way existing contracts between municipalities and railroads for rights of way through streets, and shall not affect existing contracts between mu-

nicipalities and railroads for upkeep and improvements of streets. (1931, c. 222, s. 1½.)

Art. 10. Inspection of Meters

§ 2729. Inspectors appointed. — In every city or town in the state of North Carolina where is furnished, for pay, electricity, gas or water by meter measure, the governing body of the city or town may appoint some competent person to act as inspector of meters, whose duty it shall be to inspect and test such meters and to carry out the provisions of this article as herein provided. (1909, c. 150, s. 1.)

§ 2730. Time of appointment; oath, bond, and compensation. — Such appointment, if made, shall be made at the first meeting in May of each year of such governing body, subject to the power of such city or town authorities to remove such appointee in the manner provided for the removal of its other appointees and to fill the vacancy caused by such removal. The compensation of such inspector shall be fixed and shall be paid by the city or town so appointing him, and such inspector shall upon his appointment take oath before the mayor of said city or town that he will faithfully perform the duties herein imposed upon him, and the governing body of the city or town may require the inspector to give bond in such sum as they may fix for the faithful discharge of his duties. (1909, c. 150, s. 2.)

§ 2731. Apparatus for testing meters provided. —Every person, firm, corporation or municipality furnishing for pay electricity, gas or water by meter measure in any city or town having appointed an inspector of meters, as aforesaid, shall provide and keep a suitable and proper apparatus for testing and proving the accuracy of the meters to be so furnished for use, by which apparatus all such meters shall be tested at their rated capacity. (1909, c. 150, s. 3.)

§ 2732. Meters tested before installed. — No person, firm, or corporation or municipality furnishing for pay electricity, gas or water by meter measure shall hereafter furnish, install and put in use any such meter in any city or town having appointed an inspector of meters, as aforesaid, until such meter shall first have been inspected and found correct by such inspector, and it shall be the duty of such inspector to test the same upon the written request of such proposed furnisher. No meter now in service shall be required to be taken out for test, except where there is doubt as to its accuracy and upon the written request of the consumer, as herein provided. (1909, c. 150, s. 4.)

§ 2733. Inspection made upon complaint. — When any consumer, by meter, of electricity, gas or water in any city or town having appointed an inspector of meters, as aforesaid, doubts the accuracy of such meter and desires to have the same tested, such consumer may file with the inspector of meters a written complaint of the meter and request that the same be tested, and shall at the same time deposit with the furnisher the sum of one dollar to cover the expense of taking out and replacing such meter, and thereupon it shall be the duty of such inspector as soon as practicable to accurately test said meter in the presence of and jointly with the authorized agent of the furnisher, and also in the presence of the complainant, if he so desires, and shall give to both the complainant and to the furnisher a written report of such test and the result thereof. (1909, c. 150, s. 5.)

§ 2734. Repayment of deposit. — If upon such test the meter is found to be incorrect, in that it registers more than two and one-half per cent too fast—that is, more than two and one-half per cent more electricity, gas or water than it should, then and in that event the furnisher shall return to the complainant the one dollar deposit and shall promptly properly adjust and repair the meter or furnish a correctly adjusted meter; but if upon such test the meter shall not register more than two and one-half per cent too fast—that is, more than two and one-half per cent more than it ought to—the one dollar deposit shall be retained by the furnisher to cover the expense of taking out and replacing the meter. (1909, c. 150, s. 6.)

§ 2735. Adjustment of charges. — If upon such test the meter shall register more than two and one-half per cent too fast, as above defined, the furnisher shall reimburse the complainant at the rate at which the meter registers too fast for a period of one month back; but if upon such test the meter shall be found to be incorrect, in that it registers more than two and one-half per cent too slow—that is, more than two and one-half per cent less electricity, gas or water than it should—then and in that event the complainant shall, in addition to the amount already charged him, pay at once to the furnisher at the rate at which the meter is too slow for a period of one month back, and the furnisher shall have the same rights for collecting such additional sum as is provided for the collecting of the past due and unpaid bills for electricity, gas or water, as the case may be. (1909, c. 150, s. 7.)

§ 2736. Standard of accuracy. — Any such meter having been tested and found to be not more than two and one-half per cent too slow nor more than two and one-half per cent too fast, as above defined, shall be considered correct, and such inspector shall so mark or stamp such meter and report the same to the governing body of the city or town. (1909, c. 150, s. 8.)

§ 2737. Free access to meters. — Nothing in this article shall be so construed as to prevent any furnisher of electricity, gas or water from having free access to the meters. (1909, c. 150, s. 9.)

Art. 11. Regulation of Buildings

§ 2738. Chief of fire department. — There is hereby created in the incorporated cities and towns of the state, where not already established by their charters, the office of chief of fire department. (Rev. s. 4815; 1901, c. 677, s. 1.)

§ 2739. Election and compensation. — The governing body of every incorporated city and town, when no provision is made in their charters for such office, shall elect a chief of fire department, fix his term of office, prescribe his duties and obligations, and see that he is rea-

sonably remunerated by the city or town for the services required of him by law. They may change his duties and compensation from time to time, not inconsistent with the duties prescribed in this article. Where the governing body fails or neglects to perform such duty, the insurance commissioner shall call it to their attention and if necessary bring the matter before the proper court. Nothing herein may prevent any person elected hereunder from holding some other position in the government of the city or town. (Rev., ss. 2981, 4816; 1901, c. 677, s. 2; 1905, c. 506, s. 4; 1915, c. 192, s. 1.)

Power Governmental.—The power to regulate and prevent fire is governmental, and a failure to exercise this power does not subject a city to action for negligence which causes loss by fire. Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849.

§ 2740. Duties of chief of fire department. — The chief of the fire department shall perform the duties required of him by this article; where such duties are not prescribed by the charters or governing body of incorporated cities and towns, it shall be his duty to preserve and care for the fire apparatus, have charge of the fighting and putting out of all fires, make annual reports to the city municipal governments, seek out and have corrected all places and conditions dangerous to the safety of the municipality from fire, look after buildings being erected with a view to their safety from fires, and do and perform the other duties prescribed by the governing boards of the several municipalities. (Rev., ss. 4815, 4817; 1901, c. 677, ss. 1, 3.)

§ 2741. Local inspector of buildings. — The chiefs of fire departments hereinbefore provided for shall also be local inspectors of buildings for the cities or towns for which they are appointed and shall perform the duties required herein and shall make all reports required by the insurance commissioner, and shall make all inspections and perform such duties as may be required by the state law or city or town ordinance or by the said insurance commissioner: Provided, however, that any city or town may appoint and reasonably remunerate a local inspector of buildings, in which case the chief of fire department shall be relieved of the duties herein imposed. (Rev., s. 2982; 1905, c. 506, s. 6; 1915, c. 192, s. 2.)

§ 2742. Town aldermen failing to appoint inspectors. — If the aldermen or commissioners of any city or town shall fail or refuse to appoint a chief of the fire department, or shall fail or refuse to reasonably remunerate him, they shall be guilty of a misdemeanor. This section shall not apply to the aldermen or commissioners of any city or town, where such city or town is by law exempt from the law regulating and controlling the erection and inspection of buildings. (Rev., s. 3607; 1905, c. 506, s. 4.)

§ 2743. Town officers; inspection of buildings. —If any chief of any fire department or local inspector of buildings shall fail to perform the duties required of him by law or shall give a certificate of inspection without first making the inspection required by law, or shall improperly give a certificate of inspection, he shall be guilty of a misdemeanor. (Rev., s. 3610; 1905, c. 506, s. 5; 1915, c. 192, s. 17.)

§ 2744. Electrical inspectors. — The governing body of any incorporated city or town may in their discretion appoint an electrical inspector in addition to the building inspector, and when said electrical inspector is so appointed he shall do and perform all things herein set out for the building inspector to do and perform in regard to electrical wiring and certificates for same, and in such cases the building inspector shall be relieved of such duties. (Rev., s. 2983; 1905, c. 506, s. 33.)

§ 2745. Deputy inspectors. — All duties imposed by this article upon the building inspector may be performed by a deputy appointed by such inspector. (Rev., s. 2984; 1905, c. 506, s. 32.)

§ 2746. Fire limits established. — The governing body of all incorporated cities and towns shall pass ordinances establishing and defining fire limits, which shall include the principal business portion of the cities and towns. (Rev., s. 2985; 1905, c. 506, s. 7.)

Power Discretionary.—The courts will not pass upon the reasonableness of fire limits established by an incorporated town under authority conferred by the Legislature, at least where the limits established appear to be reasonable, and without palpable oppression or injustice done. State v. Lawing, 164 N. C. 492, 80 S. E. 69.

Reasonableness of Ordinances.—While it might be unreasonable to prohibit even the slightest repairs to wooden buildings standing within the fire limits prior to the passage of a statute of ordinance establishing such limits, the power to prevent repairs is delegated and presumably exercised for the protection of property, and where a wooden structure within the bounds is partially destroyed by fire already it is not unreasonable to require a new roof to be made of material less liable to conbustion, or to forbid the repairs altogether when the damage to the building is serious, and to that end to compel the owners to give notice to the town authorities of their purpose to repair, and of the character of the contemplated work. Lewisville v. Webster, 108 Ill. 414; State v. Johnson, 114 N. C. 846, 849, 19 S. E. 599.

Cited in 5 N. C. Law Rev. 241.

§ 2747. Punishment for failing to establish fire limits. — If the aldermen or commissioners of any city or town shall fail or refuse to establish and define the fire limits for such town according to law, they shall be guilty of a misdemeanor. This section shall not apply to aldermen or commissioners of those towns which are exempt from the law governing the inspection of buildings. (Rev., s. 3608; 1905, c. 506, s. 7.)

§ 2748. Building permits. — Before a building is begun the owner of the property shall apply to the inspector for a permit to build. This permit shall be given in writing and shall contain a provision that the building shall be constructed according to the requirements of the building law, a copy of which shall accompany the permit. As the building progresses the inspector shall make as many inspections as may be necessary to satisfy him that the building is being constructed according to the provisions of this law. As soon as the building is completed the owner shall notify the inspector, who shall proceed at once to inspect the said building and determine whether or not the flues and the building are properly constructed in accordance with the building law. If the building meets the requirements of the building law the inspector shall then issue to the owner of the building a certificate which shall state that he has complied with the requirements of the building law as to that particular building, giving

description and locality and street number if numbered. The inspector shall keep his record so that it will show readily by reference all such buildings as are approved. The inspector shall report to the insurance commissioner every person neglecting to secure such permit and certificate, and also bring the matter before the mayor, recorder or municipal court for their attention and action. (Rev., s. 2986; 1905, c. 506, s. 26; 1915, c. 192, s. 3.)

Contrary Ordinance Void.—By this section a permit from the inspector is all that is required before an owner may repair his buildings, an ordinance requiring that a permit be gotten from the board of aldermen is contrary to this statute and void. State v. Eubanks, 154 N. C. 628, 70 S. E. 466.

Rule Must Be Uniform.—The ordinance of a city providing that no person shall erect within the city limits any house or building of any kind, or add to, improve or change any building without having first obtained permission from the Board of Aldermen, is void, for the reason that it does not prescribe a uniform rule of action for governing the exercises of the discretion of the Aldermen, but on the contrary, leaves the rights of property subject to their arbitrary discretion. State v. Tenant, 110 N. C. 609, 14 S. E. 387.

Permit by Mandamus.—Where a city, under an ordinance, with legislative authority in such matters, has issued a permit to build an additional room to a residence, and thereafter has recalled the permit pending the settlement of a dispute as to whether it would be situate upon an alley claimed to have been widened, and upon the finding by the jury that the alley had not been widened and that the room would not be thereon, a mandamus is the proper remedy, though the form of the issue was incorrect. Clinard v. Winston-Salem, 173 N. C. 356, 91 S. E. 1039.

§ 2749. Material used in construction of walls.—The walls of all buildings in cities or towns where this article applies, other than frame or wooden buildings, shall be constructed of brick, iron or other hard, incombustible material. All rules, regulations and requirements contained in the building law, or set out in this article in regard to the erection of buildings, or any part thereof, shall apply also where any building or walls, or any part thereof, is proposed to be raised, altered, repaired or added to, in order that the objects of the law may be accomplished and deficiencies and menaces to the safety of the city or town may not be made or perpetuated. (Rev., s. 2987; 1905, c. 506, s. 9; 1915, c. 192, s. 4.)

§ 2750. Frame buildings within fire limits.—Within the fire limits of cities and towns where this article applies, as established and defined, no frame or wooden building shall be hereafter erected, altered, repaired, or moved except upon the permit of the building inspector, approved by the insurance commissioner. (Rev., s. 2988; 1905, c. 506, s. 8; 1915, c. 192, s. 5.)

As to permit, see sec. 2748.

Cited in 5 N. C. Law Rev. 241.

§ 2751. Thickness of walls.—The walls of warehouses, stores, factories, liverystables, hotels or other brick or stone buildings for business purposes in cities or towns where this article applies, except fireproof buildings where the framework is of steel, shall conform to the following schedules:

Height of Building	Minimum Thickness in Inches of Wall				
	1st	2d	3d	4th	5th
One-story building	13	..	..	..	..
Two-story building	17	13	..	..	..
Three-story building	17	17	13	..	..
Four-story building	22	17	17	13	..
Five-story building	26	22	17	17	13

The walls of all brick or stone buildings over five stories high shall be thirteen inches thick for the top story and increasing four inches in thickness for each story below to the ground, the increased thickness of each story to be utilized for beam and girder ledges. All top story walls must extend through and eighteen inches above the roof in parapets not less than thirteen inches thick and coped with terra-cotta, stone, cast-iron or cement. Upon written application approved by the building inspector the insurance commissioner may, where he deems it advisable, allow decreased thickness in walls of concrete, or in brick walls where such thickness is compensated for by pilasters. The roofs of all buildings named in this section shall be of metal, slate or tile or gravel or other standard fireproof roofing. (Rev., s. 2989; 1905, c. 506, s. 10; 1915, c. 192, s. 6.)

Public Laws 1933, c. 254, provides for the construction of parapet walls but applies in Durham county only.

§ 2752. Foundation of walls; openings and doors protected.—In all buildings mentioned in the preceding section there shall be prepared a proper and substantial foundation, and no foundation shall be less than one foot below the exposed surface of the ground, and no foundation shall rest on any filling or made ground, and the breadth of the foundation of the several parts of any building shall be proportioned so that as near as practicable the pressure shall be equal on each square foot of the foundation, and cement mortar shall be used in the masonry of all foundations exposed to dampness. No opening or doorway shall be cut through a party or fire wall of a brick or stone building without a permit from the inspector, and every such door or opening shall have top, bottom and sides of stone, brick or iron, shall be closed by two sets of standard metal-covered doors (separated by the thickness of the wall) hung to rabbeted iron frames or to iron hinges in brick or stone rabbets, shall not exceed ten feet in height by eight feet in width, and every opening other than a doorway shall be protected in a manner satisfactory to the inspector. (Rev., s. 2990; 1905, c. 506, s. 11.)

§ 2753. Metallic stand-pipes required.—All business buildings being more than fifty-six feet high, covering an area of more than five thousand superficial feet, also all buildings exceeding eighty feet in height, shall have a four-inch or larger metallic stand-pipe within or near the front wall extending above the roof and arranged so that engine hose can be attached from the street, such riser to have two and one-half inch hose coupling on each floor. The building inspector may, with the approval of the insurance commissioner, allow two or more stand-pipes of smaller size and proper hose coupling, provided they are of such sizes and number as to be at least equivalent in service to the large stand-pipes required. All hose coupling shall conform to the size and pattern adopted by the fire department. (Rev., s. 2991; 1905, c. 506, s. 12; 1915, c. 192, s. 7.)

§ 2754. Construction of joists.—The ends of joists or beams entering a brick wall shall be cut not less than three-inch bevel so as not to disturb the brickwork by any deflection or breaking

of the joists or beams. All such joists or timbers entering a party or division wall from opposite sides shall have at least four inches of solid brickwork between the ends of such timbers or joists. (Rev., s. 2992; 1905, c. 506, s. 13.)

§ 2755. Chimneys and flues.—All fireplaces and chimneys in stone or brick walls in any building hereafter erected and any chimneys or flues hereafter altered or repaired shall have the joints struck smooth on the inside, and the firebacks of all fireplaces hereafter erected shall not be less than eight inches in thickness of solid masonry, the chimney walls to be not less than four inches thick, the top of the chimney to extend not less than five feet above the roof for flat roofs and two feet above the ridge of any pitched roof. No woodwork or timber shall be placed under any fireplace or under the brickwork of any chimney. All floor beams, joists and headers shall be kept at least two inches clear of any wall enclosing a fire flue or chimney breast. (Rev., s. 2993; 1905, c. 506, s. 14.)

§ 2756. Chimneys not built on wood.—No chimney shall be started or built upon a beam of wood or floor, the brickwork in all cases to start from the ground with proper foundation. In no case shall a chimney be corbeled out more than three inches from the wall, and in all cases corbeling shall consist of at least five courses of brick, the corbeling to start at least three feet below the bottom of the flue. (Rev., s. 2994; 1905, c. 506, s. 16.)

§ 2757. Construction of flues.—All flues shall extend at least three feet above the roof and always above the comb of the roof, and shall be coped with well-burnt terra-cotta, stone, cast-iron or cement. In all buildings hereafter erected the stone or brickwork of all flues and the chimney shafts of all furnaces, boilers, bakers' ovens, large cooking ranges, and laundry stoves, and all flues used for similar purposes shall be at least eight inches in thickness, with the exception of smoke flues, which are lined with fire-clay lining or cast iron. These may be four inches in thickness, but this shall not apply to metal stacks of boiler-houses where properly constructed and arranged at a safe distance from wood or other inflammable material. All buildings hereafter erected shall have smoke flues constructed either in walls of eight inches thickness or with smoke flues lined with cast-iron or fire-clay lining, the walls of which may be four inches in thickness, the lining to commence at the bottom of the flue or at the throat of the fireplace and be carried up continuously the entire height of the flue. All joints shall be closely fitted and the lining shall be built in as the flue or flues are carried up. All chimneys which shall be dangerous in any manner whatever shall be repaired and made safe or taken down. (Rev., s. 2995; 1905, c. 506, s. 17.)

§ 2758. Hanging flues.—Hanging flues (that is, for the reception of stovepipes built otherwise than from the ground) shall be allowed only when built according to the following specifications: The flue shall be built four inches thick of the best hard brick, laid on flat side, never on edge, extending at least three feet above the roof and always above the comb of the roof, lined on the inside with cast-iron or fire-clay flue lining from the bottom of the flue to the extreme height of the flue, and ends of all such lining pipes being made to fit close together and the lining pipe being built in as the flue is carried up. If the flue starts at the ceiling and receives the stovepipe vertically it shall be hung on iron stirrups, bent to come flush with the bottom of ceiling joints. All flues shall have a proper and sufficient support at their base, and in no case shall they be supported even partially by contact in passing through partitions, ceilings, or roofs. Flues not lined as above shall be built from the ground eight inches thick of the best hard brick with the joints struck smooth on the inside. (Rev., s. 2996; 1905, c. 506, s. 18; 1915, c. 192, s. 8.)

§ 2759. Flues cleaned on completion of building.—The flues of every building shall be properly cleaned and all rubbish removed and the flues left smooth on the inside upon the completion of the building. (Rev., s. 2997; 1905, c. 506, s. 19.)

§ 2760. Construction of stovepipes.—No stovepipe shall pass through any roof, window or weatherboarding, and no stovepipe in any building with wood or combustible floors, ceiling or partitions shall enter any flue unless such pipe shall be at least twelve inches from such floors, ceiling or partitions, unless same is properly protected by metal shield, in which case the distance shall not be less than six inches. In all cases where stovepipes pass through wooden partitions of any kind or other woodwork they shall be guarded by either a double collar of metal with at least three inches air space and holes for ventilation or by a soapstone or burnt-clay ring not less than one inch in thickness extending through the partition or other woodwork. If any chimney, flue or heating apparatus on any premises shall, in the opinion of the inspector, endanger the premises, the inspector shall at once notify in writing the owner or agent of said premises. If such owner or agent fails for a period of forty-eight hours after the service of said notice upon him to make such chimney, flue or heating apparatus safe he shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each day that the condition remains uncorrected. (Rev., s. 2998; 1905, c. 506, s. 20; 1915, c. 192, s. 9.)

§ 2761. Height of foundry chimneys. — Iron cupola or other chimneys of foundries shall extend at least ten feet above the highest point of any roof within a radius of fifty feet of such cupola or chimney. (Rev., s. 2999; 1905, c. 506, s. 22.)

§ 2762. Steam pipes, how placed. — No steam pipes shall be placed within two inches of any timber or woodwork unless the timber or woodwork is protected by a metal shield; then the distance shall not be less than one inch. All steam pipes passing through floors and ceilings or laths and plastered partitions shall be protected by a metal tube one inch larger in diameter than the pipe, and the space shall be filled in with mineral wool, asbestos or other incombustible material. (Rev., s. 3000; 1905, c. 506, s. 21.)

§ 2763. Electric wiring of houses. — The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters. In order to protect the property of citizens from the dangers incident to defective electric wiring of buildings, it shall be unlawful for any firm or corporation to allow any electric current for the purpose of illuminating any building belonging to any person, firm or corporation to be turned on without first having had an inspection made of the wiring by the building inspector and having received from the inspector a certificate approving the wiring of such building. It shall be unlawful for any person, firm or corporation engaged in the business of selling electricity to furnish any electric current for use for illuminating purposes in any building or buildings of any person, firm or corporation, unless the said building or buildings have been first inspected by the inspector of buildings and a certificate given as above provided. The fee that shall be allowed said inspector of buildings for the work of such inspection of electrical wiring shall be one dollar for each building inspected, to be paid by the person applying for the inspection. (Rev., s. 3001; 1905, c. 506, s. 23.)

Editor's Note.—Public Laws 1931, c. 49, as amended by c. 133, applicable only to Moore County and to the city of Burlington, amended this section by striking out the last sentence and inserting in lieu thereof the following: "The fee that shall be allowed said inspector of buildings for the work of such inspection of electric wiring shall be fixed by the governing body of the town or city, and shall be paid by the person applying for the inspection."

Great Care Required.—There is nothing by which the user of an electrical appliance can detect the presence of an unusual high voltage or deadliness of current before touching the wire or coming in contact with it, and the greatest degree of care is required of those furnishing this deadly instrumentality to guard against the danger of its ordinary use as the circumstances may require. McAllister v Pryor, 187 N. C. 832, 123 S. E. 92.

Liability for Injuries.—Where the furnisher of electricity for a building was, under its contract with the owner, required to furnish a low voltage of electricity for lighting and various domestic uses, and there is evidence tending to show that in attempting to iron clothes within the building with an electric iron the plaintiff touched the ironer and received a severe shock of electricity, to her injury, which should not and would not ordinarily have occurred by such use had the defendant supplied the current it had contracted to do, the doctrine of res ipsa loquitur applies, and the issue of actionable negligence should be submitted to the jury, denying defendant's motion as of nonsuit thereon. McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92.

§ 2764. Quarterly inspection of buildings. — Once in every three months the local inspector of buildings shall make a personal inspection of every building within the fire limits, and shall especially inspect the basement and garret, and he shall make such other inspections as may be required by the insurance commissioner and shall report to the insurance commissioner all defects found by him in any building upon a blank furnished him by the insurance commissioner. The building inspector shall notify the owner or occupant of buildings of any defects, and notify them to correct the same within a reasonable time. (Rev., s. 3002; 1905, c. 506, s. 25; 1915, c. 192, s. 10.)

Cited in McAllister v. Pryor, 187 N. C. 832, 836, 123 S. E. 92.

§ 2765. Annual inspection of buildings. — At least once in each year the local inspector shall make a general inspection of all buildings in the corporate limits and ascertain if the provisions of this article are complied with, and the local inspector alone or with the insurance commissioner or his deputy shall at all times have the right to enter any dwelling, store or other building and premises to inspect same without molestation from any one. It shall be the duty of the local building inspector to notify the occupant and owner of all premises of any defects found in this general inspection, and see that they are properly corrected. (Rev., s. 3003; 1905, c. 506, s. 29; 1915, c. 192, s. 11.)

Cited in McAllister v. Pryor, 187 N. C. 832, 836, 123 S. E. 92.

§ 2766. Record of inspections. — The local inspector shall keep the following record: A book indexed and kept so that it will show readily by reference all such buildings as are approved; that is, name and residence of owner, location of building, how it is to be occupied, date of inspection, what defects found and when remedied and date of building certificate; also a record which shall show the date of every general inspection, defects discovered and when remedied; also a record which shall show the date, circumstances and origin of every fire that occurs, name of owner and occupant of the building in which fire originates, the kind and value of property destroyed or damaged; also a record of inspection of electrical wiring and certificate issued. (Rev., s. 3004; 1905, c. 506, s. 30.)

Cited in McAllister, v. Pryor, 187 N. C. 832, 836, 123 S. E. 92.

§ 2767. Reports of local inspectors. — The local inspector shall report before the fifteenth of February of each year the number and dates of general and quarterly inspections during the year ending the thirty-first day of December upon blanks furnished by the insurance commissioner, and furnish such other information and make such other reports as shall be called for by the insurance commissioner. (Rev., s. 3005; 1905, c. 506, s. 31; 1915, c. 192, s. 12.)

§ 2768. Fees of inspector. — For the inspection of every new building, or old building repaired or altered, the local inspector shall charge and collect an inspection fee before issuing the building certificate, as follows: Two dollars for each one-story mercantile store-room, livery-stable or building for manufacturing, and fifty cents for each additional story, and for other buildings twenty-five cents per room; but the inspection fee shall in no case exceed five dollars. The building inspector shall be paid an adequate salary by the city or town for the quarterly and annual inspection of buildings as provided for in this article, and also for the duties under this section where the fees are collected and paid into the treasury of the municipality. (Rev., s. 3006; 1905, c. 506, s. 27; 1915, c. 192, s. 13.)

Editor's Note.—Public Laws 1931, c. 49, as amended by c. 133, applicable only to Moore County and the city of Burlington, amended this section by striking out the first sentence and inserting in lieu thereof the following: "For the inspection of every new building or old building repaired or altered, the local inspector shall charge and collect, before issuing the building certificate, inspection fees which shall be fixed by the governing body of the city or town, and which shall be paid by the owner of such new

building, or old building which has been repaired or altered."

For an act providing that no fees shall be charged in Lenoir county if the amount involved is less than one hundred dollars, see Public Laws 1933, c. 294.

§ 2769. Care of ashes, waste, etc. — Ashes shall be removed in metal vessels and unless moved by city drays shall be stowed in brick, stone or metal receptacles or removed by owner to a place not less than fifteen feet from any wooden building or fence. Oily rags and waste shall be kept in closed metal vessels and shall be removed from building daily. Unslaked lime shall not be left exposed to the weather in or near a building. Stoves or ranges shall not be nearer to unprotected woodwork than two feet and the floors under them shall be protected by metal or sand box. (Rev., s. 3007; 1905, c. 506, s. 24.)

§ 2770. Ordinances to enforce the law. — No provision of this article shall be held to repeal the power of any incorporated city or town to make and enforce any further rules and regulations under the powers granted in their several charters, and said cities and towns may pass ordinances for the enforcement of any provision of this article. (Rev., s. 3008; 1905, c. 506, s. 34.)

§ 2771. Defects in buildings corrected. — Whenever the local inspector finds any defects in any new building, or finds that said building is not being constructed or has not been constructed in accordance with the provisions of this law, or that an old building because of its condition is dangerous and likely to cause a fire, it shall be his duty to notify the owner of the building of the defects or the failure to comply with this law, and the owner or builder shall immediately remedy the defect and make the building comply with the law. The owner or builder may appeal from the decision of the local inspector to the insurance commissioner. (Rev., s. 3009, 1905, c. 506, s. 28; 1915, c. 192, s. 14.)

§ 2772. Owner of building failing to comply with law. — If the owner or builder erecting any new building, upon notice from the local inspector, shall fail or refuse to comply with the terms of the notice by correcting the defects pointed out in such notice, so as to make such building comply with the law as regards new buildings, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars. Every week during which any defect in the building is willfully allowed to remain after notice from the inspector shall constitute a separate and distinct offense. (Rev., s. 3798; 1905, c. 506, s. 28; 1915, c. 192, s. 18.)

§ 2773. Unsafe buildings condemned.—Every building which shall appear to the inspector to be especially dangerous to life because of its liability to fire or in case of fire by reason of bad condition of walls, overloaded floors, defective construction, decay or other causes shall be held to be unsafe, and the inspector shall affix a notice of the dangerous character of the structure to a conspicuous place on the exterior wall of said building. No building now or hereafter built shall be altered, repaired or moved, until it has been examined and approved by the inspector as being in a good and safe condition to be altered as proposed, and the alteration, repair or change so made shall conform to the provisions of the law. (Rev., s. 3010; 1905, c. 506, s. 15; 1915, c. 192, s. 15; 1929, c. 199, s. 1.)

Editor's Note.—The Act of 1929 added the words "to life" in the third line of this section.

Cited in State v. Eubanks, 154 N. C. 628, 70 S. E. 466; Bonapart v. Nissen, 198 N. C. 180, 181, 151 S. E. 94.

§ 2774. Punishment for allowing unsafe building to stand.—If the owner of any building which has been condemned as unsafe and dangerous to life by any local inspector, after being notified by the inspector in writing of the unsafe and dangerous character of such building, shall permit the same to stand or continue in that condition, he shall forfeit and pay a fine of not less than ten nor more than fifty dollars for each day such building continues after such notice. (Rev., s. 3802; 1905, c. 506, s. 15; 1915, c. 192, s. 19; 1929, c. 199, s. 2.)

Editor's Note.—The Act of 1929 added the words "to life" in line four of this section.

Cited in Bonapart v. Nissen, 198 N. C. 180, 181, 151 S. E. 94.

§ 2775. Removing notice from condemned buildings.—If any person shall remove any notice which has been affixed to any building by the local inspector of any city or town, which notice shall state the dangerous character of the building, he shall be guilty of a misdemeanor, and be fined not less than ten nor more than fifty dollars for each offense. (Rev., s. 3799; 1905, c. 506, s. 15.)

Cited in Bonapart v. Nissen, 198 N. C. 180, 181, 151 S. E. 94.

§ 2776. To what towns applied.—This article shall apply only to incorporated cities and towns of over one thousand inhabitants according to the last United States census, and such other cities and towns in the state as shall by a vote of their board of aldermen or governing body adopt this article. (Rev., s. 3011; 1905, c. 506, s. 35; 1915, c. 192, s. 16.)

Art. 11(A). Recreation Systems and Playgrounds

§ 2776(a). Application of article; "municipality" defined.—This article shall apply to cities, to towns, to townships, to school districts and to counties. The term "municipality" as used in this article includes any city, town, township, school district, and any county. (1923, c. 83, s. 1.)

Editor's Note.—This article is summarized in 1 N. C. Law Rev. 271.

§ 2776(b). Power to dedicate property already owned; power to acquire property. — The city council or governing body of any city or town, or the county commissioners or governing body of any county, or the board of trustees or governing body of any school district may dedicate and set apart for use as playgrounds, recreation centers and other recreational purposes, any lands or buildings, or both, owned or leased by such municipality and not dedicated or devoted to another and inconsistent public use; and such municipality may, in such manner as may now or hereafter be authorized or provided by law for the acquisition of lands or buildings for public purposes, acquire or lease lands or buildings, or both,

for said recreational purposes; or if there be no law authorizing such acquisition or leasing of such lands or buildings, the governing body of any such municipality is empowered to acquire lands or buildings, or both, for such purposes by gift, purchase, condemnation or lease. (1923, c. 83, s. 2.)

§ 2776(c). System of supervised recreation. Appropriation; delegation of powers.—The governing body of any municipality as defined in section 2776(a) shall have the power to provide, establish, maintain and conduct a system of supervised recreation, including playgrounds, recreation centers, and other recreational activities and facilities, and may appropriate funds for the same; and the authority to provide, establish, maintain and conduct such supervised recreation system and facilities may be vested by the said governing body in the school board, park board or recreation commission, as the governing body of such municipality may determine. Any such board, body or commission in which shall be vested by appropriate action of the said governing body the authority aforesaid may for the purpose of carrying out the provisions of this article employ play leaders, playground directors, supervisors, recreation superintendents, or such other officers or employees as they deem proper. (1923, c. 83, s. 3.)

§ 2776(d). Powers; components of recreation board; terms of office; compensation; vacancies.—If the governing body of any municipality shall determine that the power to provide, establish, conduct and maintain a supervised recreation system and facilities, and to acquire by gift, purchase, eminent domain or lease, lands and buildings for such purposes, shall be exercised by a recreation board or commission or the school board, or park board, such governing body shall by resolution or ordinance vest such powers in such body, and the body to which such powers and duties shall be thus delegated shall have the same powers which the said governing body would have had to effectually carry out the purposes of this article: Provided, however, that if there is not a recreation board or commission in existence and it is the desire of the governing body to vest the said powers, duties and responsibilities in a recreation board or commission, then the said governing body shall have the power to create such board or commission, which shall consist of five persons, at least two of whom may be members of the school board, to be appointed by the mayor or presiding officer of such governing body, to serve for terms of five years or until their successors are appointed, except that the members of such board or commission first appointed shall be appointed for such terms that the term of one member shall expire annually thereafter. The members of such board or commission shall serve without pay. Vacancies in such board or commission occuring otherwise than by expiration of term shall be filled only for the unexpired term and such appointment shall be filled by the mayor or presiding officer of the governing body. (1923, c. 83, s. 4.)

§ 2776(e). Co-operation.—Any two or more municipalities may jointly provide, establish, maintain and conduct a supervised recreation system and acquire property for and establish and maintain playgrounds, recreation centers, and other recreational facilities and activities. (1923, c. 83, s. 5.)

§ 2776(f). Gifts; deposits of funds; payments from funds.—A recreation board or commission or other authority in which this article vests the power to provide, establish, maintain and conduct such supervised recreation system may accept any grant or devise of real estate or any gift or bequest of money or other personal property or any donation to be applied, principal or income, for either temporary or permanent use, for playgrounds or recreation purposes, but if the acceptance thereof for such purpose will subject the municipality to additional expense for improvement, maintenance, or renewal, the acceptance of any grant or devise of real estate shall be subject to the approval of the governing body of such municipality. Money received for such purpose, unless otherwise provided by the term of the gift or bequest, shall be deposited with the treasurer of the municipality to the account of the recreation board or commission or other body having charge of such work, and the same may be withdrawn and paid out in the same manner as money appropriated for recreation purposes. (1923, c. 83, s. 6.)

§ 2776(g). Bond issues.—The governing body of any municipality may, pursuant to law, provide that the bonds of such municipality may be issued in the manner provided by law for the issuance of bonds for other purposes, for the purpose of acquiring lands or buildings for playgrounds, recreation centers and other recreational purposes, and for the equipment thereof. (1923, c. 83, s. 7.)

§ 2776(h). Petition for establishment of system and levy of tax; election.—Whenever a petition signed by at least twenty-five per cent of the qualified and registered voters in any municipality shall be filed in the office of the clerk of such municipality, requesting the governing body of such municipality to provide, establish, maintain and conduct a supervised recreation system and to levy an annual tax for the conduct and maintenance thereof of not less than.....mills nor more than.....mills on each dollar of assessed valuation of all taxable property within the corporate limits of such municipality, said petition setting forth definitely the maximum and minimum rate of said proposed tax, it shall be the duty of the governing body of such municipality to cause the question of the establishment, maintenance and conduct of such supervised recreation system as in the judgment of the governing body it may be advisable and practicable to provide, conduct and maintain out of the tax funds thus provided, to be submitted to the voters at a special election to be held as now provided by law for special elections for municipal corporations. Except the board ordering said election may fix the date thereof: Provided, the petition shall have been filed at least thirty days prior to the date of such election: Provided further, there shall be no new registration under this article. (1923, c. 83, s. 8.)

§ 2776(i). Resolution for establishment, maintenance, and conduct of system; appointment of recreation commission.—Upon the adoption of the proposition provided for in the preceding section at the election therein provided for the governing body of the municipality shall by appropriate resolution provided for the establishment, maintenance and conduct of such supervised recreation system as they may deem advisable and practicable to provide and maintain out of the tax money thus voted. And the said governing body may designate, by appropriate resolution or ordinance, the body or commission to be vested with the powers, duties and obligations necessary for the establishment, maintenance and conduct of such recreation system as provided in this article. (1923, c. 83, s. 9.)

§ 2776(j). Playground and recreation tax.—The governing body of any municipality adopting the provisions of this article at an election shall thereafter annually levy and collect a tax of not less than the minimum nor more than the maximum amount set out in the said petition for such election, which tax shall be designated as the "playground and recreation tax" and shall be levied and collected in like manner as the general tax of the municipality, but the same shall be in addition to and exclusive of all other taxes such municipality may levy or collect, nor shall such tax be scaled down under any existing law. (1923, c. 83, s. 10.)

§ 2776(k). Advice and counsel of state director of physical education.—The state board of education may, upon request of such municipality, give to any municipality adopting or considering the adoption of, the provisions of this article the benefit of the expert advice and counsel of the state director of physical education provided for in section 5401 and may from time to time make and issue for the benefit of municipalities general suggestions furthering the purposes of this article. (1923, c. 83, s. 11.)

§ 2776(l). Laws not repealed or impaired.—This article does not repeal nor impair any power now vested by law in any municipality or park or recreation board or commission. (1923, c. 83, s. 12.)

Art. 11(B). Market Houses

§ 2776(m). Municipality and counties authorized to act jointly; location of house, etc.—The governing body of any city or town of over five thousand inhabitants and the county commissioners of the county in which such city or town is situated shall have the right, and they are fully authorized and empowered to jointly establish, own, maintain and operate a market house or market houses within the corporate limits of such city or town. For the purposes aforesaid such city or town and county may lease, purchase or otherwise acquire, and own and hold as tenants in common of equal interest, land necessary as a site for such market house or houses, and build and erect thereon such market house or houses, the cost thereof to be borne and paid equally by such city or town and county: Provided, however, that the cost of any such building or buildings shall not be less than two thousand five hundred dollars ($2,500.00) nor more than one hundred thousand dollars ($100,000.00). In connection with and as a part of such market house or houses, the governing body of such city or town and the commissioners of such county may also provide, establish, maintain and operate open-air market places, slaughter places or abattoirs, a cold storage plant and a canning plant for the purpose of preserving and canning such fruits, vegetables and other produce as may be left unsold from day to day or may be in excess of present market requirements, or which may be bought, and to establish, maintain and operate places, scales, and equipment for the weighing, measuring and grading of corn, grain, fodder, vegetables, fruits and other like farm products, and for such purposes to appoint an official weigher, fix his fees and make reasonable rules, regulations and charges covering such services. (1923, c. 158, s. 1.)

Editor's Note.—This act is summarized in 1 N. C. Law Rev. 272.

§ 2776(n). Control and management; regulations; leasing space; inspection; keeper.—Such market house or houses and appurtenances shall be under the joint control and management of such city or town and such county, and they shall make all necessary rules and regulations covering the maintenance and operation thereof not inconsistent with this article; they may provide for the leasing or letting of stalls or space therein to persons, firms or corporations, and fix the rental thereof, and may prescribe the time, place and manner of sale of fish, meats, fruits, vegetables and other produce therein, and provide for the inspection of all foodstuffs offered for sale therein and the condemnation of such as may be unfit for sale and consumption; they may elect or employ a keeper of such market house or houses and fix his compensation: Provided, the term of office of such keeper shall not exceed two years. (1923, c. 158, s. 2.)

§ 2776(o). Directors; organization of board; powers; accounts.—The entire direct management and operation of such market house or houses established under this article shall be vested in a board of directors to consist of six members, and the mayor of the city and the chairman of the commissioners of the county in which such market house or houses are located shall be ex officio members of said board; or the other four members of said board, two, one of whom shall be a man and one a woman, shall be elected and appointed by the governing body of the city immediately following the time of the regular biennial May election of city officials, by said governing body, and the other two members, one of whom shall be a man and one a woman, shall be elected and appointed by the county commissioners at their regular meeting in May of the same year, and the four members so elected shall serve for terms of two years, and until their successors shall have been elected and qualified: Provided, that the first board of directors may be elected at any time after establishment of such market house or market houses, to serve until the time of the next regular municipal election. The said board shall organize and elect a chairman, secretary and treasurer from among its membership, may adopt by-laws for its own government

and exercise the usual powers inherent in such bodies; they shall keep accurate minutes of their transactions and meetings, and keep or have kept accurate accounts of all moneys and property coming into their hands. Said board shall make and promulgate such rules and regulations for the operation, management and use of such market house or houses as it may deem advisable, not inconsistent with this article and not inconsistent with such rules and regulations as may be adopted from time to time by the governing bodies of such city or town and county, and employ such help as may be necessary in the operation thereof. (1923, c. 158, s. 3.)

§ 2776(p). Special tax; specific appropriation. —To assist in and provide funds for the carrying out of the provisions and purposes of this article, the county commissioners of the county and the governing body of the city in which any market house or houses may be established under this article may each levy annually, as a part of their general levy for general purposes and not as a specially authorized tax, a tax of not exceeding two cents on each one hundred dollars ($100.00) value of real and personal property within their respective jurisdictions, which shall be collected as other taxes, kept in a separate fund and be used exclusively for the purposes contemplated and set forth in this article: Provided, however, that nothing in this section contained shall be held or construed to authorize or allow any city, town or county to levy any tax in excess of the amount now or hereafter limited by any general law or special charter. (1923, c. 158, s. 4.)

§ 2776(q). Repeal of inconsistent laws; effect. —This article shall in no way affect any laws now in force in reference to market house or houses now in existence or the establishment or maintenance of market house or houses in towns of less than five thousand inhabitants under the laws now in force. (1923, c. 158, s. 5.)

Art. 11(C). Zoning Regulations

§ 2776(r). Grant of power. — For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. (1923, c. 250, s. 1.)

Editor's Note.—Volume five of the North Carolina Law Review contains a comprehensive article on the validity of zoning statutes generally. This article is considered of such merit as to justify quoting therefrom at length under this section.

Purpose of Article.—This article is comprehensive; it contains a grant of powers not contained in other acts. For the purpose of promoting health, safety, morals, and the general welfare, the General Assembly delegated the powers prescribed to the legislative body of cities and towns. Harden v. Raleigh, 192 N. C. 395, 396, 135 S. E. 151.

Origin and Necessity for Law.—"Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." Euclid v. Ambler Realty Co., 272 U. S. 365, 386.

"A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities." Euclid v. Ambler Realty Co., 272 U. S. 365, 387.

Validity.—"This [statute] is a new departure in municipal legislation in this state, and an attempt to put it into operation, according to its expressed intent, may give rise to some interesting questions in municipal control. City planning and zoning regulations are not new, however, but have been tried and discussed in various ways in England and in the United States. In this country, when the question has come before the courts, the decisions have not been uniform." 1 N. C. Law Review, 277.

"Although several North Carolina cities have adopted general zoning ordinances, the Supreme Court has not yet passed on their validity. However, there are a number of cases involving municipal regulations of the use of private property which may give us some light on the larger question. The establishment of fire limits by a city or town is justified under the general welfare clause and is authorized specifically by statute 2746, 2802. Within such fire limits, it shall be unlawful to erect, alter and repair wooden buildings or structures or additions thereto. C. S. 2750, 2802." 5 N. C. Law Review, 241.

In the recent case of Harden v. Raleigh, 192 N. C. 395, 135 S. E. 151, the lower court held that the general zoning ordinance of Raleigh was constitutional. But it was found that the plaintiff's property was located in the neighborhood-business zone and therefore that the plaintiff was entitled to erect a gasoline station on her property. Hence, the appeal by the City of Raleigh from this finding did not raise the question of constitutionality. 5 N. C. Law Review, 243.

In a recent United States case it was said: "This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view." Euclid v. Ambler Realty Co., 272 U. S. 365, 390.

"As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way." Euclid v. Ambler Realty Co., 272 U. S. 365, 391.

"The reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Cusack Co. v. City of Chicago, supra, pp. 530-531; Jacobson v. Massachusetts, 197 U. S. 11, 30-31, 49 L. Ed. 643, 25 S. Ct. 358." Euclid v. Amber Realty Co., 272 U. S. 365, 395.

"It seems likely that the North Carolina Supreme Court would uphold a general zoning ordinance in line with the

more numerous and better reasoned state decisions and the recent holding of the United States Supreme Court. In any case which may arise, the fundamental problem will be whether the particular zoning regulation is a reasonable exercise of the police power." 5 N. C. Law Review, 244.

Same—Under Power to Abate Nuisances.—"Incorporated cities and towns are authorized to pass laws for preventing and abating nuisances. Perhaps this is the earliest form of zoning. Certainly there is a relation between the validity of a zoning ordinance restricting property to certain uses and the power to regulate nuisance. Whether the use of property may be abated as a nuisance or restricted under a zoning regulation is largely determined in view of surrounding conditions." 5 N. C. Law Rev. 241.

"While there is a good deal of talk in the United States Supreme Court decision about nuisances, still it seems clear that there is no desire to limit zoning regulations to the prohibition and regulation of nuisances, unless we are willing to extend our conception of nuisances. The police power is broader, extending to all the great public needs." 5 N. C. Law Rev. 243.

"A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U. S. 292, 294;" Euclid v. Ambler Realty Co., 272 U. S. 365, 388.

"In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class. It can not be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' Purity Extract, etc., Co. v. Lynch, 226 U. S. 192, 204, 57 L. Ed. 184, 33 S. Ct. 44." Euclid v. Ambler Co., 272 U. S. 365, 389.

Validity of Ordinance.—An ordinance passed under this statute following its provisions and carrying it into effect in the city passing it, prescribing uniform regulations for each zone or district and giving an inspector certain judicial functions with respect to the kind or class of buildings under a board of adjustment and review, and providing for certiorari is a valid exercise of power and not repugnant to the organic law prohibiting discriminations. Harden v. Raleigh, 192 N. C. 395, 135 S. E. 151.

Cited in State v. Roberson, 198 N. C. 70, 150 S. E. 674.

§ 2776(s). Districts. — For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts. Provided, however, that when at any intersection of streets in the corporate limits of any city or town the said legislative body of the said city or town promulgates any certain regulations and/or restrictions for the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land on two or more of said corners at said intersection, it shall be the duty of such legislative body upon written application from the owner of the other corners of said intersection to redistrict, restrict and regulate the remaining said corners of said intersecting streets in the same manner as is prescribed for the erection, construction, reconstruction, alteration, repair or use of buildings, structure or land of the other said corners for a distance not to exceed one hundred and fifty feet from the property line of said intersecting additional corners: Provided, further, that the provisions of this act shall not apply to the cities, towns or municipalities in the following counties: Rowan, Durham, Rockingham, Perquimans, Guilford, Cleveland, Wayne and Forsyth. (1923, c. 250, s. 2; 1931, c. 176, s. 1; 1933, c. 7.)

Editor's Note.—The Act of 1931 added all of this section beginning with the first proviso.

Public Laws 1933, c. 7, added "Forsyth" to the list of counties in which the section does not apply. For an act relating to zoning for filling stations and garages in Elizabeth city and Pasquotank county, see Public Laws 1933, c. 263.

Nature of Uniformity of Law.—In one part of a district a filling station may be noxious or offensive to the public within the purview of the ordinance, and in another part it may not be; at one place it may menace the public safety and at another it may not. Conditions and probable results must be taken into account. This is the principle on which the board of adjustment has acted; it passes on individual cases, of course; but each case is determined in the contemplation of the statute and the ordinance by a uniform rule. Harden v. Raleigh, 192 N. C. 395, 397, 135 S. E. 151.

Application Where Ordinance Invalid.—Under the provisions of this Statute that the regulations prescribed shall be uniform for each class or kind of building throughout each district, and the regulations of one district may differ from those of the others, and can have no application to the question of the rights of the governmental body of the city refusing to issue a permit for a gasoline filling station, in denial of the right of an applicant for such license under an invalid ordinance. Bizzell v. Board, 192 N. C. 364, 135 S. E. 58.

§ 2776(t). Purposes in view. — Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. (1923, c. 250, s. 3.)

§ 2776(u). Method of procedure. — The legislative body of such municipality shall provide for the manner is which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in such municipality, or, if there be no newspaper published in the municipality, by posting such notice at four public places in the municipality, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing. (1923, c. 250, s. 4; 1927, c. 90.)

Editor's Note.—The 1927 amendment revised the last sentence of this section. Prior thereto the sentence read, "at least fifteen days notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality."

§ 2776(v). Changes. — Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change signed by the owners of twenty per cent or more either of the area of the lots in-

cluded in such proposed change or of those immediately adjacent in the rear thereof extending one hundred feet therefrom, or of those directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments. (1923, c. 250, s. 5.)

§ 2776(w). Zoning commission. — In order to avail itself of the powers conferred by this article, such legislative body shall appoint a commission to be known as the zoning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission. (1923, c. 250, s. 6.)

§ 2776(x). Board of adjustment.—Such legislative body may provide for the appointment of a board of adjustment consisting of five members, each to be appointed for three years; provided, that such legislative body in the appointment of the original members of such board, or in the filling of vacancies caused by the expiration of the terms of the existing members of any such board, may make appointments of certain members for less than three years to the end that thereafter the terms of all members shall not expire at the same time. Such board of adjustment shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this act. It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under such ordinance or to effect any variation in such ordinance. Every decision of such board shall, however, be subject to review by proceedings in the nature of certiorari. Such appeal may be taken by any person aggrieved or by an officer, department, board or bureau of the municipality. Such appeal shall be taken within such time as shall be prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties, and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of adjustment may reverse or affirm, wholly or partly or may modify the order, requirement, decision or determination appealed from, and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done. (1923, c. 250, s. 7; 1929, c. 94, s. 1.)

Editor's Note.—The provisions of this section relating to the stay of proceedings thereon seem to be patterned after the general law of appeals. See sec. 655 where many constructions of the language here used will be found in the annotations.

The Act of 1929 added the proviso in the first sentence of this section.

Nature of Power.—The board of adjustment is clothed, if not with judicial, at least with quasi-judicial power, it being its duty to investigate facts and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature. These are not mere ministerial duties. Harden v. Raleigh, 192 N. C. 395, 397, 135 S. E. 151.

Within the class of quasi-judicial acts fall the board's conclusions as to whether the proposed building would be noxious or offensive or detrimental to the public safety or welfare by reason of its situation or the surrounding conditions; also in this class is the legal discretion to be exercised by the board upon the conclusions reached. Harden v. Raleigh, 192 N. C. 395, 397, 135 S. E. 151.

Same—Extent to Which Reviewable.—Quasi-judicial functions, when exercised, not arbitrarily, but in subordination to a uniform rule prescribed by statute ordinarily are not subject to judicial control. It is only in extreme cases, those which are arbitrary, oppressive, or attended with manifest abuse, that the courts will interfere. In Rosenthal v. Goldsboro, 149 N. C. 128, 62 S. E. 905, it is said: "It may now be considered as established with us, that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers, conferred upon them for the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. This position is, we think, supported by the better reason, and is in accord with the decided weight of authority." Harden v. Raleigh, 192 N. C. 395, 397, 135 S. E. 151.

Cited in State v. Roberson, 198 N. C. 70, 150 S. E. 674.

§ 2776(y). Remedies. — In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or main-

tained, or any building, structure or land is used in violation of this article or of any ordinance or other regulation made under authority conferred thereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises. (1923, c. 250, s. 8.)

See 13 N. C. Law Rev., 235.

§ 2776(z). Conflict with other laws. —Wherever the regulations made under authority of this article require a greater width or size of yards or courts, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this act shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards or courts, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other high standards than are required by the regulations made under authority of this article, the provisions of such statute or local ordinance or regulation shall govern. (1923, c. 250, s. 9.)

§ 2776(aa). Other statutes not repealed. — This article shall not have the effect of repealing any zoning act or city planning act, local or general, now in force, except as to such provisions thereof as are repugnant to or inconsistent herewith; but it shall be construed to be in enlargement of the duties, powers and authority contained in such statutes and all other laws authorizing the appointment and proper functioning of city planning commissions or zoning commissions by any city or town in the state of North Carolina. (1923, c. 250, s. 11.)

SUBCHAPTER II. MUNICIPAL CORPORATION ACT OF 1917.

Art. 12. Operation of Act

§ 2777. Explanation of terms. — The following words and phrases as used in this act shall, unless a contrary intention clearly appears, have the following meanings, respectively: The phrase "regular municipal election" shall mean the biennial election of municipal officers for which provision is made in this act. The phrase "qualified voter" shall mean any registered qualified voter. The words "office" and "officers," when used without further qualification or description, shall mean any person or persons holding any office in the city or in charge of any department or division of the city. The said words when used in contrast with a board or members of a board, or with division heads, shall mean any of the persons in sole charge of a department of the city. The word "ordinance" shall mean an order of the governing body entitled "ordinance," and designed for the regulation of any matter within the jurisdiction of the governing body as laid down in this act. The word "city" shall mean any city, town, or incorporated village. (1917, c. 136, sub-ch. 15, s. 1.)

Cited by Clark, C. J. dissenting in Kornegay v. Goldsboro, 180 N. C. 441, 456, 105 S. E. 187.

§ 2778. Effect upon prior laws. — Nothing in this act shall operate to repeal any local or special act of the general assembly of North Carolina relating to cities, towns, and incorporated villages, but all such acts shall continue in full force and effect and in concurrence herewith, unless hereafter repealed or amended in manner provided for in this act. The provisions of this act shall not be construed to repeal the provisions as to cities and towns contained in subchapter I of this chapter, except in case they are inconsistent with this act. The provisions of this act, so far as they are the same as those of existing general laws, are intended as a continuation of said laws and not as new enactments, and so far as they give general powers to cities are supplementary to and additional to the special charters of cities which have not such powers, unless inconsistent with or repugnant thereto, and a repetition of such powers if already possessed by cities by virtue of special charters. The provisions of this act shall not affect any act heretofore done, liability incurred, or right accrued or vested, or affect any suit or prosecution now pending or to be instituted to enforce any right or penalty or punish any offense. Subject to the foregoing provisions hereof, all laws or parts of laws in conflict with this act are hereby to the extent of such conflict repealed. (1917, c. 136, sub-ch. 1, s. 1.)

Effect upon Existing Charters.—In case of a conflict between this act and a city charter the charter must prevail as this article is intended only to add to already existing powers, and not to repeal them. Clinton v. Johnson, 174 N. C. 286, 93 S. E. 776; Kendall v. Stafford, 178 N. C. 461, 101 S. E. 15.

Art. 13. Organization under Act

§ 2779. Municipal board of control; changing name of municipality. — The municipal board of control shall be composed of the secretary of state, the attorney general, and the public utilities commissioner. The attorney general shall be chairman and the secretary of state shall be secretary of such board. The said municipal board of control shall have the power and privilege of changing the name of any said town or municipal corporation within the bounds of the State of North Carolina; and the procedure for changing the name of any municipal corporation shall be the same as prescribed by sections two thousand seven hundred and eighty-one and two thousand seven hundred and eighty-two of Consolidated Statutes. (1917, c. 136, sub-ch. 2, s. 4; 1935, c. 440.)

Editor's Note.—The amendment of 1935 substituted the "public utilities commissioner" for the "chairman of the corporation commission." It also added the last sentence relative to changing the name of a municipality.

§ 2780. Number of persons and area included. —Any number of persons, not less than fifty, at least twenty-five of whom shall be freeholders or homesteaders, and twenty-five qualified voters living in the area proposed to be incorporated, which area shall have an assessed valuation of

real property of at least twenty-five thousand dollars according to the last preceding assessment for taxes, and shall not be a part of the area included in the limits of any city, town, or incorporated village already or hereafter existing, may be organized into a town upon compliance with the method herein set forth. (1917, c. 136, sub-ch. 2, s. 1.)

An act of the legislature expressly validating and confirming a municipality as established cures all objections under this section. Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649.

§ 2781. Petition filed. — 1. What petition must show. A petition signed by a majority of the resident qualified electors and a majority of the resident freeholders or homesteaders of the territory proposed to be so organized shall be presented to the secretary of state of North Carolina, accurately describing such territory, with map attached, containing the names of all qualified voters therein, the assessed valuation of such territory, and the proposed name of the new town. The petition shall further be signed by at least twenty-five resident freeholders or homesteaders of the age of twenty-one years or over, at least twenty of whom are qualified voters; and further, the petition shall show the valuation of the real property of the proposed town to be at least twenty-five thousand dollars, according to the last preceding tax assessment; and the petition shall be verified by at least three of the signers who are qualified voters.

2. Order and notice for hearing. The secretary of state shall thereupon make an order prescribing the time and place for the hearing of said petition before the municipal board of control. At least thirty days before the hearing, notice of such hearing shall be published once a week for four weeks in a newspaper published in the county where such territory is situate, designated as most likely to give notice to the people of the territory proposed to be so organized or incorporated into a town; or, if no newspaper is so published, then in some newspaper of general circulation in such proposed city, town, or incorporated village; and such notice shall also be posted at the county courthouse door of such county for a like period. Such notice shall be signed by at least three of the freeholders signing the petition for the organization of the town. (1917, c. 136, sub-ch. 2, s. 2.)

§ 2782. Hearing of petition and order made:

1. Manner of hearing. Any qualified voter or taxpayer of such territory proposed to be incorporated into a town may appear at the hearing of such petition, and the matter shall be tried as an issue of fact by the municipal board of control, and no formal answer to the petition need be filed. The board may adjourn the hearing from time to time, in its discretion.

2. Order creating corporation. The municipal board of control shall file its findings of fact at the close of such hearing, and if it shall appear that the allegations of the petition are true, and that all the requirements in this article have been substantially complied with, and that the organization of such city, town, or incorporated village will better subserve the interests of said persons and the public, the board shall enter an order creating such territory into a town, giving it the name proposed in the petition.

3. Election of officers provided for. The board of control shall provide for the place of holding the first election for mayor and commissioners; and shall designate how many commissioners shall serve, as set forth in subchapter I of this chapter, naming the number of commissioners, not less than three nor more than seven. The election of mayor and commissioners shall be under the same laws as now govern the election of mayor and commissioners in subchapter I of this chapter.

4. Filing papers; fees. All the papers in reference to the organization of any town under this article shall be filed and recorded in the office of the secretary of state, and certified copies thereof shall be filed and recorded in the office of the clerk of the superior court of the county in which the town organized is situated. The fees shall be the same as are now provided for the organization of private corporations and shall be paid out of the treasury of the city, town, or incorporated village.

5. When organization complete. Upon the approval of the board of control and the recording of the papers in the offices above mentioned, the said town shall become a municipal corporation with all the powers and subject to all the laws governing towns as set forth in subchapter I of this chapter and as in this act set forth. (1917, c. 136, sub-ch. 2, s. 3.)

Art. 14. Power Vested in Utilities Commission

§ 2783. To fix rates for public utilities furnished. —The corporation commission shall have full power and authority to fix and establish any and all rates which any public-service or quasi public-service corporation other than railroads using steam as a motive power shall charge or exact from any person, firm or corporation in any city for the services rendered or commodity furnished. (1917, c. 136, sub-ch. 3, s. 1.)

See 12 N. C. Law Rev., 293.

Editor's Note.—The authority conferred by this article is now vested in the utilities commissioner. See sec. 1112(b). And see editor's notes to sec. 1035 and 1112(1).

City's Charter Subject to State Powers.—"The power conferred by its charter upon the city of Henderson 'to provide water and lights and to contract for same, provide for cleaning and repairing the streets, regulate the market, take proper means to prevent and extinguish fires,' is subject to the police power of the State, with respect to rates to be charged under such contracts as the city may make under its charter by a public-service corporation." Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 73, 128 S. E. 465.

Contract Rate May Be Changed.—Although the rate to be charged is fixed by contract this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed is just. The burden of proof is on the one alleging that the rate fixed by the Commissioners is unreasonable. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 128 S. E. 465.

Same—Rights of Party Relieved.—A public service corporation, having a contract with a city, applying to the corporation commission for the increase of the rate contracted for with the city, and obtaining partial relief will not be granted an injunction by the Federal Court against the Commission on the grounds that the rate is confiscatory for such increase as is allowed by the Commission is that much more than could have been received under the contract with the city had the Commission refused to act. Henderson Water Co. v. Corporation Com's, 269 U. S. 278, 46 Sup. Ct. 112.

§ 2784. Manner of enforcing regulations.—The North Carolina corporation commission shall

have the power to require such improvements and extensions to the service of public service corporations as it may deem necessary after the investigation of any complaint of any person, corporation, or municipality as to the inadequacy of such service. Upon application being made, the corporation commission shall proceed to hear, pass on, and determine, in the manner prescribed by law, a just or reasonable rate or charge for the service or other commodity rendered or furnished; the hearing before the corporation commission shall be governed by the law as to the commission relating to the fixing of rates and rules and orders of the commission as to the enforcement thereof by the commission. The corporation commission shall have the same power and authority in hearing and passing on any matter or case under this act, enforcing or fixing of rates, supervising and regulating said corporation or otherwise under this act, as they now have under the chapter entitled Corporation Commission, in addition to such power and authority as they now have under the general law. The failure or refusal to conform to or obey any decision, rule, regulation, or order made in such cases by the corporation commission shall subject said public-utility corporation or quasi public-utility corporation refusing or failing to comply herewith to the penalties provided in chapter, Corporation Commission, article 7. (1917, c. 136, sub-ch. 3, s. 2.)

See note under sec. 2783.

§ 2785. Not to affect existing power.—Nothing contained in this article shall be construed to deprive the corporation commission of the authority and power which it now has under the laws of North Carolina to supervise and regulate and fix the rates for public-utility corporations or quasi public-utility corporations operating or doing business in such city. (1917, c. 136, sub-ch. 3, s. 3.)

See note under sec. 2783.

Art. 15. Powers of Municipal Corporations

Part 1. General Powers Enumerated

§ 2786. Powers applicable to all cities and towns.—All the provisions of this article, conferring powers upon cities and towns, shall apply to all cities and towns, whether they have adopted a plan of government under this act or not. And the powers herein granted are in addition to and not in substitution for existing powers of cities and towns. (1919, c. 296.)

Cited in Hailey v. Winston-Salem, 196 N. C. 17, 23, 144 S. E. 377.

§ 2787. Corporate powers. — In addition to and coordinate with the power granted to cities in subchapter I of this chapter, and any acts affecting such cities, all cities shall have the following powers:

1. To acquire property in fee simple or a lesser interest or estate therein by purchase, gift, devise, bequest, appropriation, lease, or lease with privilege to purchase.

2. To sell, lease, hold, manage, and control such property and make all rules and regulations by ordinance or resolution which may be required to carry out fully the provisions of any conveyance, deed, or will in relation to any gift or bequest, or the provisions of any lease by which the city may acquire property.

3. To purchase, conduct, own, lease, and acquire public utilities.

4. To appropriate the money of the city for all lawful purposes.

5. To create, provide for, construct, regulate, and maintain all things in the nature of public works, buildings, and improvements.

6. To supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.

7. To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.

8. To provide for the destruction of noxious weeds, and for payment of the expense thereof by assessment or otherwise.

9. To regulate the erection of fences, billboards, signs, and other structures, and provide for the removal or repair of insecure billboards, signs, and other structures.

10. To make and enforce local police, sanitary, and other regulations.

11. To open new streets, change, widen, extend, and close any street or alley that is now or may hereafter be opened, to purchase any land that may be necessary for the closing of such street or alley, and adopt such ordinances for the regulation and use of the streets, squares, and parks, and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city.

12. To acquire, lay out, establish, and regulate parks within or without the corporate limits of the city for the use of the inhabitants of the same.

13. To erect, repair, and alter all public buildings.

14. To regulate, restrain, and prohibit the running or going at large of horses, mules, cattle, sheep, swine, goats, chickens, and all other animals and fowl of whatsoever description, and to authorize the distraining and impounding and sale of the same for the costs of the proceedings and the penalty incurred and to order their destruction when they cannot be sold, and to impose penalties on the owners or keepers thereof for the violation of any ordinance or regulation of said governing body, and to prevent, regulate, and control the driving of cattle, horses, and all other animals into or through the streets of the city.

15. To regulate and control plumbers and plumbing work, and to enforce efficiency in the same by examination of such plumbers and inspection of such plumbing work.

16. To regulate, control, and prohibit the keeping and management of houses or any building for the storage of gunpowder and other combustible, explosive, or dangerous materials within the city, and to regulate the keeping and conveying of the same, and to authorize and regu-

late the laying of pipes and the location and construction of houses, tanks, reservoirs, and pumping stations for the storage of oil and gas.

17. To regulate, control, restrict, and prohibit the use and explosion of dynamite, firecrackers, or other explosives or fireworks of any and every kind, whether included in the above enumeration or not, and the sale of same, and all noises, amusements, or other practices or performances tending to annoy or frighten persons or teams, and the collection of persons on the streets or sidewalks or other public places in the city, whether for purposes of amusement, business, curiosity, or otherwise.

18. To direct, control, and prohibit the laying of railroad and street railway tracks, turnouts, and switches in the streets, avenues, and alleys of the city unless the same shall have been authorized by ordinance, and to require that all railroads, street railways, turnouts and switches shall be so constructed as not to interfere with the drainage of the city and with the ordinary travel and use of the streets, avenues, and alleys in the city, and to construct and keep in repair suitable crossings at the intersection of streets, avenues, and alleys and ditches, sewer and culverts, where the governing body shall deem it necessary, and to direct the use and regulate the speed of locomotive engines, trains, and cars within the city.

19. To make all suitable and proper regulations in regard to the use of the streets for street cars, and to regulate the speed, running, and operation of the same so as to prevent injury or inconvenience to the public.

20. To make such rules and regulations in relation to butchers as may be necessary and proper; to establish and erect market houses, and designate, control, and regulate market places and privileges.

21. To prohibit and punish the abuse of animals.

22. To acquire, establish, and maintain cemeteries and to regulate the burial of the dead and the registration of deaths, marriages, and births.

23. To prohibit prize-fighting, cock and dog fighting.

24. To regulate, restrict, and prohibit theaters, carnivals, circuses, shows, parades, exhibitions of showmen, and shows of any kind, and the exhibition of natural or artificial curiosities, caravans, menageries, musical and hypnotic exhibitions and performances.

25. To create and administer a special fund for the relief of indigent and helpless members of the police and fire departments who have become superannuated, disabled, or injured in such service, and receive donations and bequests in aid of such fund and provide for its permanence and increase, and to prescribe and regulate the conditions under which, and the extent to which, the same shall be used for the purpose of such relief. Also, to insure policemen, firemen, or any class of city employees against death or disability, or both, during the terms of their employment under forms of insurance known as group insurance; the amount of benefit on the life of any one person not to exceed the sum of two thousand dollars, and premiums on such insurance to be payable out of the current funds of the municipality.

26. To prevent and abate nuisances, whether on public or private property.

27. To regulate and prohibit the carrying on of any business which may be dangerous or detrimental to health.

28. To condemn and remove any and all buildings in the city limits, or cause them to be removed, at the expense of the owner or owners, when dangerous to life, health, or other property, under such just rules and regulations as it may by ordinance establish; and likewise to suppress any and all other nuisances maintained in the city.

29. To provide for all inspections which may be expedient, proper, or necessary, for the welfare, safety, and health of the city and its citizens, and regulate the fees for such inspection.

30. To require any or all articles of commerce or traffic to be gauged. inspected, measured, weighed, or metered, and to require every merchant, retail trader or dealer in merchandise of property of any description which is sold by weight or measure to have such weights and measures sealed and to be subject to inspection.

31. To provide for the regulation, diversion, and limitation of pedestrains and vehicular traffic upon public streets, highways, and sidewalks of the city.

32. To require the examination of all drivers of motor vehicles upon the streets and highways of the city, to prescribe fees for such examinations, and to prevent the use of such vehicles by all persons who shall not satisfactorily pass such examination.

33. To regulate the emission of smoke within the city.

34. To license, prohibit, and regulate pool and billiard rooms and dance halls, and in the interest of public morals provide for the revocation of such licenses.

35. To regulate and control electricans and electrical work and to enforce efficiency in the same by examination of such electricans and inspection of such electrical work.

36. To license and regulate all vehicles operated for hire in the city. To require that the operator of every jitney bus or taxicab and of every other motor vehicle, (other than jitney buses and taxicabs, operated under the jurisdiction of the utilities commission of North Carolina), engaged in the business of transporting passengers for hire over the public streets of such city or town shall furnish and keep in effect for each such jitney bus, taxicab or other such motor vehicle so operated a policy of insurance or surety bond with sureties whose solvency shall at all times be subject to the approval of the governing body of such city or town, said policy of insurance or surety bond to be in such amount as may be fixed by the governing body of such city or town, not to exceed the sum of ten thousand dollars ($10,000.00), and to be conditioned on such operator responding in damages for any liability incurred on account of any injury to persons or damage to property resulting from the operation of any such jitney bus, taxicab or other such motor vehicle, and to be filed with the governing

body of such city or town as a condition precedent to the operation of any such jitney bus, taxicab or other such motor vehicle over the streets of such city or town.

37. To acquire property in fee simple and to use the lands now owned in fee simple or otherwise for the purpose of establishing and maintaining new cemeteries. To abandon any cemetery which has not been used for interment purposes within ten years, and to remove or consolidate such cemetery, so abandoned, and the monuments, tombstones, fenses, walls and enclosures, and the contents of any graves therein, or any part of either, at its own expense, to or with any established cemetery maintained for interment purposes; to take possession of, convey or utilize the lands in such abandoned cemetery, or any part thereof, as may best subserve the interests of the city or town.

38. In cities or towns having a population of not less than twenty thousand inhabitants, the governing bodies may, in their discretion, create and establish a civil service with reference to any and all of the employees of such municipalities, and prescribe rules and regulations for the conduct and government of such civil service.

39. Every incorporated city or town in the state, in addition to the other powers granted unto it by this chapter, shall have the following enumerated powers:

Whenever there shall be in any incorporated city or town a lot or lots owned by one or more persons, upon which water shall collect, either by falling upon the said lot or lots or collected thereon by drainage or otherwise from the adjacent lots, no edaquate drainage from which is provided by natural means, the governing body of any such city or town, upon being advised by the health officer of the said city or town, or the health officer of the county in which the town is located, that the conditions so existing are, or are liable to become, a nuisance, and to that end may proceed to abate in the following manner:

Such city or town shall cause a survey to be made by a competent engineer to ascertain the means and methods and costs of providing an adequate drainage from such lot or lots and such engineer shall prepare plans and specifications to provide such drainage, with the estimated cost thereof and in making such survey he shall include therein the area of adjoining and adjacent lots which will be drained by such system or drainage. He shall also include in such survey the area of all adjoining and adjacent lots from which water flows and is gathered upon the lot or lots which are to be drained. The city or town shall thereupon cause notice to be published once in a newspaper published in the municipality, or if no newspaper is published in the municipality, then in a newspaper published in the county and of general circulation in the municipality, or if no newspaper is published in the county, said notice shall be posted in three public places in the municipality, which notice shall state in general and briefly the fact that a nuisance has been created and so declared, and that it is the purpose of the city or town to abate the same by causing a system of drainage to be put in, and that the cost thereof is to be paid or assessed in one of the ways hereinafter provided, that the report of the engineer is on file and subject to inspection, and that on a date to be named in the notice a hearing will be had before the board as to whether the plan shall be adopted and the assessment made, at which hearing the persons affected may be present and present such objections as they may have to the adoption of the report of the engineer and the doing of the work. Said notice shall also contain the names of the owners of the property affected in so far as the same can be ascertained on reasonable inquiry. Said notice shall be published or posted at least ten days before the hearing.

At the hearing provided for, if the governing body of the city or town shall determine that the work shall be done, and that the plans and specifications of the engineer are proper, it may adopt the said plans and specifications, and have the work done, either by letting a contract therefor or otherwise, and in the event a contract is let, shall be advertised as is provided for in either cases of municipal work.

At the hearing above provided for, the governing body shall also determine the manner in which the cost of said work shall be paid or assessed, which shall be in either of the following ways: (a) Each and every lot affected by the plan or system shall be assessed with the cost thereof upon the following basis: that is to say, such proportion of the total cost of the survey and construction as the area of said lot bears to the total area as shown by the plans of the engineer when adopted by the governing body, which sum shall be due in such annual installments as the governing body may determine, which shall not exceed five in number, and such installments shall bear interest; (b) The cost of the survey and the construction of the main drains shall be borne by the municipality, and the cost of the construction of tributary drains assessed against the lots on which such tributary drains are constructed so that each lot shall bear the expense of tributary drains constructed on it. Said assessments shall be due in such annual installments as the governing body may determine, which shall not exceed five in number, and such installments shall bear interest.

The area which shall be included within and drained by the plans and specifications as herein provided for is hereby declared to be a "special improvement district."

For the purpose of enabling the governing body of the city or town to obtain money with which to pay for the improvement herein authorized to be made, such governing body is hereby authorized and empowered to execute the notes of such city or town, payable in installments as are the assessments, and the assessments made shall be pledged for the payment of the said notes; such notes shall bear a rate of interest not exceeding six per cent and may be sold publicly or privately at not less than par and accrued interest, and shall be due in not more than five years, and at such time and in such installments as the assessments made shall be due: Provided, the due date of the notes may be made sixty days after the due date of any of the assessments. Pro-

vided further, that if the cost of drainage is to be paid as provided in subdivision (b) of the second preceding paragraph, the governing body is authorized and directed to levy annually a tax which, with the assessments, will be sufficient to pay the principal and interest of said notes or installments as the same become due.

The full faith and credit of such city and town shall be pledged for the payment of the said notes and interest when due.

The powers herein contained and hereby conferred are additional to any other powers conferred by any other law or laws, and are not affected by any limitations imposed by any other law.

The assessments, when made, shall be a lien upon the property benefited, and shall be collectible by the same means and methods as are other assessments for local or special improvements as is provided for in article nine of this chapter.

All acts or proceedings done or taken under this subdivision of this section prior to February 17, 1923, shall be valid. (1917, c. 136, sub-ch. 5, s. 1; 1919, cc. 136, 237; Ex. Sess. 1921, c. 21; 1923, c. 102; 1925, c. 200; 1935, c. 279, s. 1.)

As to powers to pass ordinances prior to this section, see section 2623, sec. 2673 et seq.

See annotations to § 2675.

Editor's Note.—By Public Laws, Ex. Sess. 1921, subsection 39 was added. By the amendment of 1923 notice to owners as provided was changed from notice by service to notice by publication; an alternative was given as to how charges were to be assessed, the original act of 1921 providing only for the proportionate assessment on the total cost. The alternative was for the city to pay for the main drain if so determined by its governing body. Provision was made for a tax assessment in case the city bore the expense of the main drain, see 1 N. C. Law Rev. 274.

By Public Laws of 1925 subsection 11 was amended so as to apply to alleys, and provision was also made for purchase of land necessary for closing the streets or alleys.

Chapter 20 amends Public Laws, 1923, subs. 25, by adding thereto authority in the municipality to take out group insurance for policemen, firemen, or any class of city employees, such insurance to be either against death or disability or both, and the amount for the life of any one person not to exceed $2000. See 1 N. C. Law Rev. 277.

The amendment of 1935 adds all of subsection 36 except the first sentence thereof.

Sale of Coco-Cola on Sunday.—An ordinance regulating the sale of merchandise, drinks, etc., on Sunday is a valid exercise of the police powers of an incorporated city or town; and while the service of meals within the town at restaurants, etc., is a necessity, permitting the sale of coffee, tea, etc., the sale of coco-cola as a part of the meals is not included, and a sale thereof as a part of the meal may be prohibited by ordinance. Secs. 2787 (6), (10), (27). State v. Weddington, 188 N. C. 643, 125 S. E. 257.

Regulation of Streets.—A city ordinance in pursuance of subsec. 11 of this section requiring a license to be issued by the municipal authorities to beg upon the city streets or to solicit contributions for charitable or religious purposes, in accordance with whether the person or purpose is ascertained by such authorities as worthy or whether the moneys solicited will be properly applied, is a valid and undiscriminating exercise of a police power, and not unlawful as an interference with the religious liberties of our people, or an obstruction to the lawful pursuit of their business. State v. Hundley, 195 N. C. 377, 142 S. E. 330.

An abutting owner may not recover from a city damages resulting to his property by reason of the fact that the abutting sidewalk has been narrowed in order to widen the street under orders of the city commissioners, the width of the street and sidewalk being within the sound discretion of the commissioners. See also §§ 2703, 2787. Ham v. Durham, 205 N. C. 107, 170 S. E. 137.

Regulation of Parking of Vehicles. — A city ordinance prohibiting parking of automobiles on one side of a street on certain blocks where, because of the narrowness of the street, there is insufficient room for cars to pass between parked cars and a street-car track in the street, is valid in the light of this section, subsec. (17), (31). State v. Carter, 205 N. C. 761, 172 S. E. 415.

Vehicles for Hire.—The express authority to regulate, as provided by subsec. 36 of this section, extends to the physical operation of vehicles rather than to the imposition of conditions precedent to their operation hitherto unknown in the general legislation of the State. See § 2673. State v. Gulledge, 208 N. C. 204, 179 S. E. 883.

Regulation of Dance Halls. — Cities have power, among other things, to license, prohibit, and regulate dance halls, by express provisions of this section, and in the interest of public morals provide for the revocation of such licenses, as valid exercise of the State's inherent police power, made applicable to cities and towns generally. See sec. 2786.

An ordinance requiring the consent of the board of directors of the city before keeping a dance hall therein is not objectionable as an arbitrary exercise of power, or as being at the pleasure of the board, but comes within its limited legal discretion, which the courts will not permit it to abuse, or will disturb in the absence of its abusive use. State v. Vanhook, 182 N. C. 831, 109 S. E. 65.

Power to Acquire Parks.—Under the provision of our general statutes, a city or town is given authority to acquire and maintain parks for the use of its citizens beyond its corporate limits, and to provide suitable streets or ways of access thereto for the purpose. Berry v. Durham, 186 N. C. 421, 119 S. E. 748.

Power to Regulate Markets.—A city in the exercise of statutory authority may enact a valid penal ordinance as affecting the health of its citizens, and under its police power, require that meats, fish, oysters and perishable matter be sold at a sanitary market building containing refrigeration and other sanitary methods, under proper inspection, where adequate accommodation may be obtained at a reasonable rental, not for profit, and may exclude such business within a prescribed territory therefrom, the location of the market-house being reasonably suitable to the business or trades specified. Angelo v. Winston-Salem, 193 N. C. 207, 136 S. E. 489.

A city has authority under this section to lease an auditorium in its municipal building which was equipped at the time the building was erected with a ticket booth and a moving picture projecting equipment, it appearing that the lease does not involve property held in trust for the use of the city, or property devoted to governmental purposes, although administrative offices of the city are located elsewhere in the building. Cline v. Hickory, 207 N. C. 125, 176 S. E. 250.

License Tax on Automobiles.—Section 2612(a) provides for a city automobile license of one dollar, and a license for more than that amount is invalid, if levied on ownership alone, for this section is not contrary to that one and they must be construed together. State v. Jones, 191 N. C. 371, 131 S. E. 734.

Forbidding Lumber Yards in Certain Sections.—In Turner v. New Bern, 187 N. C. 541, 122 S. E. 469, the principle was laid down: "Under the provision of this section and under the provision of its charter authorizing a city to pass needful ordinances for its government not inconsistent with the law to secure the health, quiet, safety—general welfare clause—within its limits, etc., it is within the valid discretionary exercise of the police powers of the municipality to pass an ordinance forbidding the erection of lumber yards within a long established, exclusively residential portion, and when this discretionary power has not been abused the courts will not interfere." Angelo v. Winston-Salem, 193 N. C. 207, 215, 136 S. E. 489.

Ordinances against Keeping Cows.—An ordinance forbidding the keeping of cows within a certain portion of the city is valid. State v. Stowe, 190 N. C. 79, 128 S. E. 481.

Clarkson, J. dissented, saying: "But section two of the city ordinance prohibits absolutely the keeping of a cow in the zigzag district. There is no authority in the Constitution or law of this land, in my opinion, for such unreasonable, arbitrary, discriminatory, and autocratic power, and the ordinance, section 2, is unconstitutional and void. In this age drifting towards 'nervous particularity' we are forgetting the fundamental rights of a citizen. The evidence in the record is that one man drew the ordinance. All the evidence is that defendant kept his place clean. His neighbors testified that he kept the stables clean, and there was no complaint; nothing offensive. The health officer had no complaint; nothing offensive."

Recovery of Excess Tax.—In order to recover money paid a municipality as a license tax in excess of the amount the town was lawfully authorized to collect, and in the absence of statutory regulations, or under the common law, it is necessary that the one so paying should have done so under protest at the time or under circumstances of duress or such as would endanger his person or property; and where

the payment has been voluntarily made, the action may not be successfully maintained. Blackwell v. Gastonia, 181 N. C. 378, 107 S. E. 218.

Disposition of Garbage.—An incinerator operated by a city for the burning of its garbage comes within the authority conferred upon it by statute and, its operation being a purely governmental function, exercised as a local agency of State government, the city is not liable for an injury caused by defect therein to an employee, in the absence of statutory provision to the contrary. Scales v. Winston-Salem, 189 N. C. 469, 127 S. E. 543.

Cited in regard to city's control over grade crossings in 2 N. C. Law Rev. 102. Cited also in Mewborn v. Kinston, 199 N. C. 72, 81, 154 S. E. 76.

§ 2788. Salary of mayor and other officers. — The governing body of any city may by ordinance fix the salary of the mayor of such city or heads of departments or other officers. (1917, c. 136, sub-ch. 5, s. 6.)

§ 2789. Enumeration of powers not exclusive.— The enumeration of particular powers by this act shall not be held or deemed to be exclusive; but in addition to the powers enumerated or implied therein, or appropriate to the exercise thereof, the city shall have and may exercise all other powers which under the constitution and laws of North Carolina now are or hereafter may be granted to cities. Powers proper to be exercised, and not specially enumerated herein, shall be exercised and enforced in the manner prescribed by this act; or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the governing body. (1917, c. 136, sub-ch. 5, s. 3.)

§ 2790. Police power extended to outside territory.—All ordinances, rules, and regulations of the city now in force, or that may hereafter be enacted by the governing body in the exercise of the police powers given to it for sanitary purposes, or for the protection of the property of the city, unless otherwise provided by the governing body, shall, in addition to applying to the territory within the city limits, apply with equal force to the territory outside of the city limits within one mile in all directions of same, and to the rights of way of all water, sewer, and electric light lines of the city without the corporate limits, and to the rights of way without the city limits, of any street railway company, or extention thereof, operating under a franchise granted by the city, and upon all property and rights of way of the city outside the corporate limits and the above mentioned territorial limits, wheresoever the same may be located. (1917, c. 136, sub-ch. 5, s. 2.)

Part 2. Power to Acquire Property

§ 2791. Acquisition by purchase. — When in the opinion of the governing body of any city, or other board, commission, or department of the government of such city having and exercising or desiring to have and exercise the management and control of the streets, water, electric light, power, gas, sewerage or drainage systems, or other public utilities, parks, playgrounds, cemeteries, wharves, or markets, open-air or enclosed, which are or may by law be owned and operated or hereafter acquired by such city or by a separate association, corporation, or other organization on behalf and for the benefit of such city, any land, right of way, water right, privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such streets, parks, playgrounds, cemetery, water, electric light, power, gas, sewerage or drainage systems, wharves, or other public utility so owned, operated, and maintained by or on behalf of any such city, such governing body, board, commission, or department of government of such city may purchase such land, right of way, water right, privilege, or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon. (1917, c. 136, sub-ch. 4, s. 1; 1919, c. 262.)

Cross Reference.—As to power of railroads to acquire property for side tracks, see sec. 1044 and notes; as to general powers, see sec. 2623; as to power to regulate railroads, see note to sec. 2675.

Editor's Note.—"The peculiar feature of this proceeding is the combination of a condemnation under eminent domain and special assessments for improvements in assessment districts. It is not intended to supplant any powers given in special charters, but gives an alternative method of procedure. Another plan for making such improvements is contained in the local improvement statutes, § 2703-2728 in which the assessment plan is used but only for part of the expense, and the amount of the assessments are determined through the governing body instead of by a special proceeding in court; and the condemnation of property would be a separate proceeding under the law of eminent domain. § 1706, 1716." 1 N. C. Law Rev. 275.

Power Discretionary—See note to following section. Where it appears that the governing authorities of a town have taken lands to widen a street intersecting with other streets so as to lessen the danger to traffic thereon, and it is made to appear that doing so was a reasonable exercise of the discretion vested in them, the findings that such course was unnecessary is not binding on the Supreme Court, the question being, primarily, whether the administrative authorities of the town have so grossly and manifestly abused the exercise of their discretionary powers as to render their action ineffectual. Lee v. Waynesville, 184 N. C. 565, 115 S. E. 51.

Parks out of City.—The general statutes giving power to cities and towns to acquire parks for its citizens outside of the corporate limits, and provide access for the public thereto, prevail whenever and to the extent there is no irreconcilable repugnancy with special charter provisions on the same subject. Berry v. Durham, 186 N. C. 421, 119 S. E. 748.

Cited in Durham v. Sou. R. Co., 185 N. C. 240, 243, 117 S. E. 17; Winston-Salem v. Ashley, 194 N. C. 388, 139 S. E. 764.

§ 2792. By condemnation.—If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, or for a site for city hall purposes, condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purposes shall be conclusive. (1917, c. 136, sub-ch. 4, s. 1; 1919, c. 262; 1923, c. 181.)

As to powers and duties of commissioners when condemning, see sec. 1721; as to Eminent Domain, see sec. 1721.

Editor's Note.—"C. 181 Public Laws 1923 amends s. 2792, by empowering municipalities to condemn land for a site for a city hall, as well as for the various purposes mentioned in s. 2791." 1 N. C. Law Rev. 277.

Constitutionality.—The acquisition of land to be used to connect a railroad in which the State and counties own an interest with the city's public wharves and docks for water commerce, and necessary to continue or develop the industries of its citizens, is for a public use, and not subject to the exception that the city, in taking the right of way

by condemnation from the owner, according to the provisions of its charter and the general statutes, were acting in violation of the Constitution in taking private property for a public use; and the private statutes specifically authorizing the proceedings are constitutional and valid. Hartsfield v. New Bern, 186 N. C. 136, 119 S. E. 15.

The question as to the constitutionality of this section does not invalidate an ordinance or arise in its construction, referring to the voters the question of amending its charter by creating a board of education and authorizing the raising of a minimum tax levy for the maintenance of its schools, or affect it. Taylor v. Greensboro, 175 N. C. 423, 95 S. E. 771.

Construed with Section 2791.—Under the provision of this section before a city may take lands by condemnation to widen its streets it is necessary for it to allege and prove that it has first attempted to acquire them by purchase as provided by section 2791. Winston-Salem v. Ashby, 194 N. C. 388.

City Charter Inconsistent with Section.—The right of eminent domain of a municipality can be exercised only in the mode pointed out in the statute conferring it; and where the method prescribed for the city or town in its character is inconsistent with or repugnant to this section by the express terms the proceedings given under the municipal charter will have to be followed in condemnation of lands for the use of its streets. Clinton v. Johnson, 174 N. C. 286, 93 S. E. 776.

Improvements No Bar to Condemnation.—The governing authorities of a town are not estopped to condemn land for the widening or improving of its streets by reason of an owner having put extensive improvements on his land a long time prior to the time it was condemned for that purpose, the power of condemnation, in cases of this character, being a continuing one to be exercised when and to the extent that the public good may require it. Lee v. Waynesville, 184 N. C. 565, 115 S. E. 51.

Property of Persons under Disability.—Under this section an attempt by a city to acquire lands of owners before proceeding to condemn the lands is a preliminary jurisdictional fact. But the statute does not contemplate the useless formality of attempting to acquire the property of persons under disability, such as minors. City of Winston-Salem v. Ashby, 194 N. C. 388, 139 S. E. 764.

Acquiring Land and Assessment for Improvements in Same Action.—Under the provisions of this section a city may in the same action proceed to acquire land for a street by condemnation and to have the assessment made for street improvements on the lands of the abutting owner. Efird v. Winston-Salem, 199 N. C. 33, 34, 153 S. E. 632.

§ 2792(a). Powers in addition and supplementary to powers in charters.—It is the intention of this law that the powers herein granted to cities for the purpose of improving their streets and improving their drainage and sewer conditions shall be in addition and supplementary to those powers granted in their charters, and in any case in which the provisions of this law are in conflict with the provisions of any local statute or charter, then the governing body of any such municipality may in its discretion proceed in accordance with the provisions of such local statute or charter, or, as an alternative method of procedure, in accordance with the provisions of this law. (1923, c. 220, s. 1.)

Cited in Greensboro v. Bishop, 197 N. C. 748, 150 S. E. 495.

§ 2792(b). Order for condemnation of land; assessment districts; maps and surveys; hearing.—When it is proposed by any municipal corporation to condemn any land, rights, privileges or easements for the purpose of opening, extending, widening, altering or improving any street or alley, or changing or improving the channel of any branch or watercourse, for the purpose of improving the drainage conditions, or the laying and construction of sanitary, storm or trunk sewer lines in such municipality, an order or resolution of the governing body of the municipality at a regular or special meeting shall be made stating generally, or as nearly as may be, the nature of the proposed improvement for which the land is required, and shall lay out, constitute and create an assessment district extending in every direction to the limits of the area or zone of damage or special benefits to property resulting from said improvement, in the best judgment of said governing body. Said governing body shall cause such maps and surveys to be made showing the area of such assessment district and improvements proposed to be made, and of all the lands located in said assessment district, as it may deem necessary. The governing body shall appoint a time and place for its final determination thereof, and cause notice of such time and a brief description of such proposed improvement to be published in some newspaper published in said municipality for not less than ten days prior to said meeting. At said time and place said governing body shall hear such reasons as shall be given for or against the making of such proposed improvement, and it may adjourn such hearing to a subsequent time: Provided, however, that no district shall be declared as an assessment district by the governing body of any municipality, where the purpose of the proposed improvements contemplates the opening of a new or the widening of an existing street and the destruction or removal of buildings abutting thereon and where as much or more than fifty per cent of the costs of such proposed improvement is to be charged against the property within such district, unless and until a petition therefor signed by the owners of a majority of the street frontage to be assessed within said district shall be filed with the governing body of the municipality: Provided, further, that for the purpose of this section the word "owners" shall be considered to mean the owners of a life estate or estate by the entirety or the estate of inheritance, and shall not include mortgages, trustees of a naked trust, trustees under deeds of trust to secure the payment of money, lienholders, or persons having inchoate rights of curtesy or dower, and that the owners of undivided interests in any land shall be deemed and treated as one person, and such land shall be sufficiently signed for when the petition is signed by the owner or owners of a majority in amount of such undivided interest: Provided, further, that the owner of a leasehold estate of ninety-nine years or longer shall be deemed to be the owner within the meaning of this section: Provided, further, that the governing bodies of municipality and the officers, trustees, or boards of all incorporated or unincorporated bodies in whom is vested the right to hold and dispose of real property shall have the right by authority duly given to sign such petition. The determination of the governing body upon the sufficiency of the petition shall be final and conclusive. (1923, c. 220, s. 2; 1924, c. 107; 1927, c. 115.)

As to rule prior to this section, see sec. 2707.

Construed with Other Sections.—This section should be construed in pari materia with the other sections relating to this subject so as to reasonably harmonize them, and when so construed it is in harmony with section 2792. Winston-Salem v. Ashby, 194 N. C. 388.

Who Must Sign Petition.—Where the abutting owners along a street of a city proposed to be widened by a munici-

pality are to pay more than 50 per cent of its costs, the petition required by the statute to be filed with the municipality must show that it was signed by a majority of the owners along the street, including those who have the beneficial interest and each tenant in common when any of the lots are held in common, and the majority of such persons must own a majority of the frontage of the lots along the street. Winston-Salem v. Coble, 192 N. C. 776, 136 S. E. 123.

Manner of Determining Equality.—The fact that the commissioners adopted a so-called "frontage rule" in fixing the value of the benefits or advantages to the different lots within the assessment district, is not sufficient to upset the apportionment made, without an additional finding that the application of such a rule resulted in hardship or injustice to the property owners in the particular case. It is only such practical equality as is reasonably attainable under the circumstances, and not absolute mathematical accuracy, that is to be expected in a matter of this kind. Durham v. Proctor, 191 N. C. 119, 121, 131 S. E. 276.

§ 2792(c). Final order; petition for appointment of commissioners.—Whenever a final order shall be made by such governing body creating such assessment district and directing the laying out, opening, extending, altering, straightening or widening any street or alley, or the changing or otherwise improving any channel or watercourse for the purpose of improving the drainage conditions, or the building and construction of any sanitary, storm or trunk sewer lines in any such municipality, also its determination to condemn land, rights, privileges or easements for the purpose of making such proposed improvement, it shall determine what proportion of the estimated cost thereof, if any, shall be assessed against the city at large. After the adoption of such final order, as aforesaid, the governing body of such municipality shall file with the clerk of the superior court its petition, praying for the appointment of three commissioners to estimate and assess the expenses of the proposed improvement and to appraise and value the real property, rights, privileges or easements proposed to be taken or condemned for public use, also to appraise the value of the benefits accruing from such improvement to all property as shown and described on the maps or surveys of such assessment district. The petition shall set forth and describe the particular property, rights, privileges or easements proposed to be taken or condemned for the purposes, as aforesaid, also all other property situated and located in said assessment district, as shown on the maps or surveys of same, a copy or copies of which maps or surveys shall be filed with such petition, and such petition shall state the names and addresses of the owner or owners who have any interest in the lands therein which may be affected by the said condemnation or the said assessment of benefits, and whether any of the said owners are minors or without guardians. (1923, c. 220, s. 3.)

§ 2792(d). Summons; return day; conduct of proceedings.—Upon the filing of said petition the clerk of the superior court shall issue a summons to the parties interested in the lands, rights, privileges or easements sought to be taken for public use and benefits proposed to be assessed, described in such petition, requiring them to appear at his office in the courthouse of said county on a day at least ten and not more than twenty days after the service of said summons, and answer or otherwise plead to the petition, or show cause why such condemnation, improvement and assessment of benefits should not be made. The said proceeding shall be conducted in all respects as are other special proceedings, and the clerk may issue process and make publication for parties and appoint guardians in like manner as is provided by law in the case of special proceedings. (1923, c. 220, s. 4.)

§ 2792(e). Hearing; appointment of commissioners; damages and benefits.—The clerk of the superior court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, he shall make and order appointing three disinterested competent freeholders of the county as such commissioners. The clerk shall issue a notice of their appointment to the said freeholders, to be served upon them by the sheriff of the county, and when so notified, they shall, within five days after being sworn to perform the duties which shall devolve upon them, go upon the premises and ascertain the value of the land, rights, privileges or easements to be taken for public use, determine by a majority vote the amount of damages, if any, to be paid for the same. Said commissioners shall also go upon the lots or lands described in the petition and shown on such map or survey of such assessment district, including the land condemned or any remainder thereof, and ascertain and determine by a majority vote the value of the benefits or advantages to such lots or lands accruing from the opening, extending, widening or improving said street or alley, or the changing or improving the channel of any branch or watercourse, or the building and construction of such sanitary, storm or trunk line sewers, both such benefits or advantages as are special to such lots and the benefits or advantages in common with other lots located in said assessment district: Provided, that if, in the judgment of the commissioners, any portion of the benefits accrue to the city at large, then a part of the estimated cost of such improvement, not exceeding the proportion fixed by said governing body in its final order or resolution, shall be assessed upon the city at large. Before making the reports hereinafter referred to the commissioners may take the evidence of witnesses as to the estimated cost of such improvement, the damage to such land or lands so condemned for public use, and the amount that should be paid therefor, and the benefits accruing to all other lands within such assessment district, either special or in common with others, as shown on such map or survey. In making the valuation and assessments aforesaid, the commissioners shall consider the loss or damage that may accrue to the owner or owners of the land condemned by reason of the surrender of the land or easement, and also any benefit or advantage such owner or owners may receive by reason of the making of such improvements, special to his land or in common with other lots located in said assessment district. (1923, c. 220, s. 5.)

§ 2792(f). Written reports; land acquired on deposit of award.—The said commissioners shall make a separate written report of their findings to the clerk of the superior court within ten days after notice of their appointment, rela-

tive to the land, rights, privileges or easements so condemned, together with the amount to be paid each owner thereof, and upon deposit with the said clerk of the amount determined by said commissioners to be due said owners by such municipality, such land, rights, privileges or easements shall be deemed to be acquired for public use. (1923, c. 220, s. 6.)

§ 2792(g). Report of benefits and advantages; assessment; hearing, confirmation; lien. — The said commissioners shall make a separate written report of their findings to the clerk of the superior court within ten days after notice of their appointment, relative to the benefits or advantages so appraised against said lands located in said assessment district, if any, giving the names of the owners thereof and the amount so appraised against each, with a brief description of the lots or parcels of land so appraised. The clerk shall thereupon deliver to the said governing body of such municipality a certified copy of such appraisal of benefits, which certified copy of appraisal of benefits, upon such receipt by said governing body, shall thereupon become an assessment roll, which the governing body shall cause to be deposited in the office of the clerk of the municipality for inspection by parties interested, and shall cause to be published a notice of the completion of such assessment roll, setting forth a description in general terms of the local improvement, and the time fixed for the meeting of the governing body for the hearing of allegations and objections relative to the adoption of such assessment roll, such meeting not to be earlier than ten days from the first publication of such notice, which publication shall be made in a newspaper published in such municipality. At the time appointed for the purpose, or to some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested who appear and make proof in relation thereto. The governing body may thereupon correct such assessment roll and either confirm the same or may set it aside and provide for a new appraisal of benefits in such proceeding pending before the clerk of the superior court. Whenever the governing body may confirm an assessment for such improvement the clerk of the municipality shall enter on the minutes of the governing body the date, hour and minute of such confirmation, and from the time of such confirmation the assessments embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumberances. Such governing body shall have the power and authority to provide either in proceedings already completed or in others hereafter instituted, that such assessment shall be paid in cash or not less than five nor more than ten equal annual installments. (1923, c. 220, s. 7; 1927, c. 241.)

§ 2792(h). Appeal; correction, etc., of assessment; interest; collection.— If a person assessed is dissatisfied with the amount of the charge, he may give notice of appeal in said proceeding pending before the clerk of superior court as hereinafter provided for. The governing body may correct, cancel or remit any assessment in connection with such improvement. After the assessment roll is confirmed a copy of the same must be delivered to the tax collector or other officer charged with the duty of collecting taxes, and such assessments shall be due and payable on the date on which taxes are payable and shall be collected like other taxes. In the event the governing body authorizes the payment of any assessment by installment, such installments shall bear interest at the rate of six per centum from the date of the confirmation of the assessment roll, and in case of the failure or neglect of any person to pay any such installments when the same shall became due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable. (1923, c. 220, s. 8.)

§ 2792(i). Limit of assessments; exceptions; transfer to court for trial; appeal to supreme court.—The total value of the benefits assessed against the lots or land situated and located in said assessment district shall not exceed the total net amount of damages to be paid by the municipality to the owner or owners of the land or right condemned, together with the cost of such improvement as estimated by said commissioners. If any party to the proceedings shall be dissatisfied with the report of the commissioners, or the assessment levied by the said governing body [on either benefits or damages] he may file exceptions thereto with the clerk of the superior court within ten days after the filing of said report with said clerk, or in the event the appeal be from the levying of the assessment by said governing body, within ten days after the confirmation of such assessment roll by such governing body, and the issues of fact and law raised before the clerk in the said proceedings and upon the said exceptions shall be transferred to the superior court for trial [before a jury on issues of fact relating either to damages or to benefits] in like manner as provided in the case of other special proceedings pending before the clerk; and the said issues shall be tried at the first term after they are transferred, unless for a good cause shown a trial or hearing of the matter may be continued by the court. From the judgment of the superior court rendered in said proceeding any of the parties may appeal to the supreme court, as in other cases pending in the superior court: Provided, that if such municipality, at the time of the appraisal, shall pay into the court the sum appraised by the commissioners as being due any person for land so condemned and taken for public use, then and in that event such municipality may enter, take possession of and hold said lands notwithstanding the pendency of any appeal, and no appeal either to the superior court or to the supreme court shall hinder or delay such municipality in proceeding with such proposed improvement. (1923, c. 220, s. 9.)

Editor's Note.—Public Laws 1931, c. 258, inapplicable to accrued actions or pending litigation, amended this section by inserting the words in brackets. This act provided that it should not apply to the City of Greensboro, or to any city, town or municipality in the counties of Stanly, Mitchell, Moore, Davidson, Hertford, Haywood, Madison, Rutherford, Halifax, Pender, Transylvania, Wake, Cleveland, Pitt, Rockingham, Buncombe, Harnett, Lincoln, Cabarrus, Watauga, Forsyth, Alexander and Nash.

§ 2792(j). Power of courts; practice and procedure.—In all cases of appraisal under this law, whether the mode or manner of procedure is not expressly or sufficiently provided for herein, the court before which such proceedings may be pending shall have the power to make all necessary orders and give proper directions to carry into effect the object and intent of this law, and the practice and procedure in such cases shall conform as nearly as may be to the ordinary practice and procedure in such court. (1923, c. 220, s. 10.)

§ 2792(k). Change of ownership or transfer of property, effect.—When any proceedings for appraisal of property of rights under this law shall have been instituted, no change of ownership or transfer of the real estate, or any interest therein, or of the subject-matter of the appraisal, or any part thereof, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made, or attempted to be made. (1923, c. 220, s. 11.)

§ 2792(l). Proceedings to perfect title; possession by municipality; parties. — If at any time after proceedings under this law shall have been instituted it shall be found that the title to any property or right proposed to be condemned, or which has been acquired or condemned, is defective, said municipality may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of the new proceeding the court may authorize the municipality, if in possession of said property or rights, to continue in possession of the same, and if not in possession, to take possession and use such property of rights during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the municipality on account thereof, and in every case any party interested may conduct the proceedings to a conclusion if the municipality delays or omits to prosecute the same. (1923, c. 220, s. 12.)

§ 2792(m). Recovery by municipality if title defective; limit of recovery.— If the title to any property, rights, privileges or easements condemned in any proceedings instituted under this law shall prove to be defective, such municipality may by action recover of the person or persons who have received compensation for the property or rights so condemned any loss or damage the city may have sustained by reason of said defect of title, not exceeding the amount paid as compensation for the taking of said property or rights. (1923, c. 220, s. 13.)

§ 2792(n). Notice served on nonresidents. — Where any notice is required to be given in said proceeding before the court and the person to be notified is a nonresident of the county in which said proceedings are pending, the notice may be served by the sheriff or other lawful officer of any county in which the said person may be, and if the said person is a nonresident of the state, the notice may be served by the publication thereof once a week for four weeks in a newspaper published in such municipality, and the affidavit of the publisher, proprietor or foreman of said newspaper that said notice was so published shall be sufficient prima facie evidence or proof of such publication, and the time of notice shall be counted from the last day on which the notice was inserted in said newspaper. (1923, c. 220, s. 14.)

§ 2792(o). Registration of final judgment; evidence; certificate under seal.— A copy of the final judgment of the court, duly certified by its clerk, may be registered in the office of the register of deeds for said county, and said copy so certified, or a copy of the registry of such judgment duly certified by the register of deeds, shall be received as evidence in all courts of the state, and where the said copy is offered is evidence in any court not held in the county in which the judgment is rendered, the certificate shall have affixed the official seal of the certifying officer. (1923, c. 220, s. 15.)

§ 2792(p). Pay of appraisal commissioners; taxation as costs.—The commissioners appointed by the clerk of the superior court to make the appraisals provided for herein shall receive compensation at the rate of five dollars ($5.00) per day each, which compensation shall be taxed in the court costs of such proceedings. (1923, c. 220, s. 16.)

Part 3. Streets and Sidewalks

§ 2793. Power to make, improve and control.— The governing body of the city shall have power to control, grade, macadamize, cleanse, and pave and repair the streets and sidewalks of the city and make such improvements thereon as it may deem best for the public good, and may provide for and regulate the lighting of the public parks, and regulate, control, license, prohibit, and prevent digging in said streets and sidewalks, or placing therein of pipes, poles, wires, fixtures, and appliances of every kind, whether on, above, or below the surface thereof, and regulate and control the use thereof by persons, animals and vehicles; to prevent, abate and remove obstructions, encroachments, pollution or litter therein, and shall have under its government, management, and control all parks and squares within or without the city limits established by the governing body for the use of the city except as otherwise provided. (1917, c. 136, sub-ch. 10, s. 1.)

As to Parks, see sec. 2787 and notes.

§ 2793(a). Increasing width of streets. — Any incorporated city or town in North Carolina where the State Highway Commission or governing body of any city, town or county has constructed a road or street, or any part of any road or street through such city or town in North Carolina, and the governing body of said city or town desires to increase the width of said road or street or either, or both sides of same, so as to make such road or street conform to such width as the said governing body of said city or town may determine, the governing body of such city or town may increase the width of such road or street, on either side of same, such number of feet as may be necessary and may be determined by the governing body of such city or town: Provided, however, that the expense and cost of such increase in width to such road or street shall be borne by the city or town through which

such road or street may run and without any expense or obligation, in any way, to the State Highway Commission. (1925, c. 71, s. 1.)

§ 2793(b). Right of eminent domain.—Whenever the governing body of any city or town in North Carolina deems it necessary to extend the width of any road or street in such city or town, and it becomes necessary for such governing body of such city or town to exercise the right of eminent domain, such governing body of such city or town shall have the power to exercise the right of eminent domain to the extent that the same is given such city or town, or governing body of such city or town, in the charter and amendments to the charter of such city or town or under the general law pertaining to such matters. (1925, c. 71, s. 2.)

§ 2793(c). Interference with highway commission. — Nothing in sections 2793(a) and 2793(b) shall authorize the governing body of any city or town to interfere with the rights and privileges of the State Highway Commission when such city or town undertakes to exercise any of the privileges by such sections. (1925, c. 71, s. 3.)

§ 2793(d). Whitakers excepted. — Sections 2793(a) to 2793(c) shall not apply to the town of Whitakers. (1925, c. 71, s. 4.)

§ 2793(e). Maps of streets and sidewalks in subdivisions within one mile of city or town limits to be approved by such city or town.—No lands, lying within a distance of one mile of the corporate limits of any town or city in North Carolina, shall be subdivided and proposed streets and sidewalks laid out, until a map of said sub-division, showing the location of the lots and the proposed streets and sidewalks, shall have been submitted to the governing body of such town or city, and approved by it as to the location of the streets and sidewalks. After approval of the map as provided in this act, the map shall be placed on the records of the county in which the land is situated. (1929, c. 186, s. 1.)

§ 2793(f). Maps to be recorded; effect of laying out of streets and sidewalks without approval.—Should any lands, lying within a distance of one mile of the corporate limits of any town or city in North Carolina, be subdivided and streets and sidewalks laid out, without the approval of the governing body of the town and city as provided in section one of this article, upon the incorporation of such sub-division into the limits of such town and city, the said town or city shall have the right to extend its streets and sidewalks into and through said sub-division in conformity with the general plan of the town or city; and there shall be no damage recovered against the said town or city for so extending its streets and sidewalks except for purchase or condemnation value of lands so taken without regard to improvements or betterments placed thereon in contravention of this act: Provided, that this act shall not apply to any sub-divisions which have been laid out or are now in the process of being laid out. (1929, c. 186, s. 2.)

Part 4. Markets

§ 2794. Establish and control markets.—The governing body of the city shall have power to provide for the establishment, maintenance, and regulation of open-air or enclosed markets and slaughter places; may prescribe the time and place of sale of fresh meats, fish, and other marketable products therein; may rent the stalls in such manner and at such prices as it may deem best; may appoint a keeper of the market or other persons, who may summarily condemn all unsound products offered for sale in the city for food, and cause the same to be removed at the expense of the person offering it for sale. (1917, c. 136, sub-ch. 12, s. 1.)

See notes to sec. 2674.

Part 5. Protection of Public Health

§ 2795. Ordinances for protection of health; contracts for medical treatment and hospitalization of poor.—The governing body of cities is hereby given, within the city limits, all the power and authority that is now or may hereafter be given by law to the county health officer or county physician, and such further powers and authority as will best preserve the health of the citizens. The governing body is hereby given power to make such rules and regulations, not inconsistent with the constitution and laws of the state, for the preservation of the health of the inhabitants of the city, as to them may seem right and proper.

The governing body of any city or town, when deemed for the best interest of the city or town, is hereby given authority to contract for periods not to exceed thirty years with public or private hospitals or institutions within or without the city or town for the medical treatment and hospitalization of the sick and afflicted poor of the city or town upon such terms and conditions as may be agreed, provided that the annual payments required under such contract shall not be in excess of ten thousand dollars ($10,000.00). The full faith and credit of each city or town shall be deemed to be pledged for the payment of the amounts due under said contracts. The contracts provided for in this paragraph and the appropriations and taxes therefor are hereby declared to be for necessary expenses within the meaning of the Constitution of North Carolina and shall be valid and binding without a vote of the majority of the qualified voters of each city and town and are hereby expressly exempted from any limitation, restriction or provisions contained in the County Fiscal Control Act and acts amendatory thereof as it may be applicable to cities or towns by virtue of section 2969(n). No limitation, restriction or provision contained in any general, special, private or public-local law or charter of any city or town relating to the execution of contracts and the appropriation of money and levying of taxes therefor shall apply to the contracts authorized and executed under this paragraph: Provided, that the town of Lincolnton shall not enter into any such contract except after a public hearing at the county court house in Lincoln county, notice of which hearing shall be published for two successive weeks in a newspaper published in the county. The provisions of this paragraph shall not apply to the municipalities of Salisbury, Spen-

cer, East Spencer, Rocky Mount, Reidsville, Leaksville, Madison, Asheville, Charlotte, Edenton, Gibsonville, Greensboro, Hamlet, High Point, Jamestown, Rockingham, Tarboro and Wilmington. This paragraph shall not apply to the city of High Point in Guilford county; to the city of Elizabeth City in Pasquotank county; nor to the counties of Beaufort, Camden and Lee or any city or town therein; nor to any city or town in the counties of Ashe, Avery, Columbus, Davidson, Durham, Gates, Jackson, Martin and Rockingham; nor to the counties of Ashe, Alexander, Brunswick, Clay, Cumberland, Forsyth, Haywood, Henderson, Jones, Macon, Montgomery, Moore, Pasquotank, Robeson, Sampson, Transylvania, Wilkes, Catawba, Lincoln, Surry, Washington, Rowan, Warren, Vance, Johnson, Edgecombe, Halifax, Cumberland, Davie, Forsyth, Gaston, Harnett, Iredell, Pitt, Stanly Union and Yadkin. Before this paragraph shall apply to any city or town in Catawba county it must be submitted to a vote of the people of said Catawba county. (1917, c. 136, sub-ch. 5, s. 4; 1935, c. 64.)

As to subject in general, see sec. 7064 through sec. 7077.

Editor's Note.—The amendment of 1935 added the last paragraph of this section.

§ 2796. Establish hospitals, pesthouses, quarantine, etc.—The governing body may acquire, establish, and maintain a hospital or hospitals, or pesthouses, slaughter-houses, rendering plants, incinerators and crematories in the city limits or within three miles thereof; may stop, detain, examine, or keep in a pesthouse or house of detention persons having or suspected of having any infectious, contagious, or other communicable disease; may quarantine the city or any part thereof; may cause all persons in the city limits to be vaccinated; may, without incurring liabilities to the owner, remove, fumigate, or destroy furniture, bedding, clothing, or other property which may be found to be tainted or infected with any contagious or infectious disease, and may do all other proper and reasonable things to prevent or stamp out any contagious or infectious disease, and to preserve better the health of the citizens. All expenses incurred by the city in disinfecting or caring for any person or persons, by authority of this section, may be recovered by it from the person, or persons, or property cared for; and when expense is incurred in caring for property, the same shall become a lien on such property. Any person who shall attempt by force, or by threat of violence, to prevent his removal or that of any other persons to the pesthouse, house of detention, or hospital, or who shall in any way interfere with any officer while performing any of the duties allowed by this article, shall be guilty of a misdemeanor. (1917, c. 136, sub-ch. 5, s. 4.)

As to the validity of bonds issued by municipality to erect and maintain a hospital, see § 2937 and the note thereto.

§ 2797. Elect health officer.—The governing body of any city may elect a health officer and create such other offices and employments as to them may seem right and proper, and fill the same and fix their compensation. (1917, c. 136, sub-ch. 5, s. 4.)

§ 2798. Regulate the management of hospitals.—The governing body is hereby empowered to make rules and regulations for the management and conduct of all hospitals and sanatoriums which may have for treatment any patient afflicted with any infectious, contagious, or other communicable disease, and prescribe penalties for any violation of same. Any person violating any rule or regulation of the governing body shall be guilty of a misdemeanor, and upon conviction, except as herein otherwise provided, shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1917, c. 136, sub-ch. 5, s. 5.)

§ 2799. Provide for removal of garbage.—The governing body may by ordinance provide for the removal, by wagon or carts, of all garbage, slops, and trash from the city; and when the same is not removed by the private individual in obedience to such ordinance, may require the wagons or carts to visit the houses used as residences, stores, and other places of habitation in the city, and also may require all owners or occupants of such houses who fail to remove such garbage or trash from their premises to have the garbage, slops, and trash ready and in convenient places and receptacles, and may charge for such removal the actual expense thereof. (1917, c. 136, sub-ch. 7, s. 3.)

Liability Growing from Power.—A city in exercising the governmental duty passed in accordance with this section is not liable in a civil action to one injured by the negligence of its drivers of the carts or wagons when so engaged, there being no provision of law conferring such right.

The fact that the city is permitted to charge the cost of such service does not change its act from a governmental function to a business for profit, or affect its liability for the negligent acts of its agents or employees therein. James v. Charlotte, 183 N. C. 630, 112 S. E. 423.

§ 2800. Abate or remedy menaces to health.—The governing body, or officer or officers who may be designated for this purpose by the governing body, shall have power summarily to remove, abate, or remedy, or cause to be removed, abated, or remedied, everything in the city limits, or within a mile of such limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and, if not paid, shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes. (1917, c. 136, sub-ch. 7, s. 4.)

As to abating nuisance, see sec. 2676.

Part 6. Fire Protection

§ 2801. Establish and maintain fire department.—The governing body shall have power to provide for the organization, equipment, maintenance and government of fire companies and a fire department; and, in its discretion, may provide for a paid fire department, and for this purpose may create any offices and employments and fix their compensation as to the governing body may seem right and proper. (1917, c. 136, sub-ch. 8, s. 1.)

As to hearing on subject, see note to sec. 2807.

Liability for Failure to Furnish.—The maintenance of a fire department for extinguishing fire without cost to the property owner, is a governmental function, and there is no liability for failure to provide adequate pressure or service in extinguishing a fire. Howland v. Ashville, 174 N. C. 749, 94 S. E. 524.

Liability for Injuries to Firemen.—A city is not liable to firemen for injuries sustained in the performance of their duties, although the appliances used were defective, and

known to be defective, by the city, for the maintenance of a fine department is a governmental function. Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853.

§ 2802. Establish fire limits.—The governing body may establish and maintain fire limits in the city, in which it shall be unlawful to erect, alter, and repair wooden buildings or structures or addition thereto; it may also prohibit the removal of wooden buildings or structures of any kind into such limits, or from one place to another within the limits, and make such other regulations as may be deemed best for the prevention and extinguishment of fires. (1917, c. 136, sub-ch. 8, s. 2.)

§ 2803. Regulate buildings. — The governing body may make rules and regulations governing the erection and construction of buildings in the city so as to make them as safe as possible from fire. (1917, c. 136, sub-ch. 8, s. 3.)

§ 2804. Fire protection for property outside city limits.—The governing body may provide, install, and maintain water mains, pipes, hydrants, and buildings and equipment, either inside or outside of the city limits, for protection against fire of property outside of the city limits, and within such area as the governing body may determine, not exceeding a boundary of two miles from the city limits, under such terms and conditions as the governing body may prescribe. (1919, c. 244.)

Part 7. Sewerage

§ 2805. Establish and maintain sewerage system.—The governing body shall have power to acquire, provide, construct, establish, maintain and operate a system of sewerage for the city, and protect and regulate the same by adequate rules and regulations; and if it shall be necessary in obtaining proper outlets to such system to extend the same beyond the corporate limits, the governing body may condemn a right of way or rights of way to and for such outlets, and the proceedings for such condemnation shall be as herein provided for opening new streets and other purposes. It is the intention of this law that the powers herein granted to municipalities shall not repeal any special or local law or affect any proceedings under any special or local law relative to providing, constructing, establishing, maintaining or operating any system of sewerage in any municipality, or for the raising of funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and supplementary to those powers granted municipalities in their charters. In any case in which the provisions of this law are in conflict with the provision of any local statute or charter, then the governing body of any such municipality may, in its discretion, proceed in accordance with the provisions of such local statute or charter, or as an alternative method of procedure in accordance with the provisions of this law. (1917, c. 136, sub-ch. 7, s. 1; 1923, c. 166, s. 1.)

As to power to establish, see 9 N. C. Enc. Dig. 409; as to liability for injury from, see 9 N. C. Enc. Dig. 562.

Editor's Note.—All of this section except the first sentence was added by Public Laws of 1923.

"These sections provide in a general way for the construction of a sewerage system in cities and towns, and the amending statute adds an alternative method of procedure to this general law and to any similar provision in special charters. The plan devised in the amending statute is for ascertaining the actual expense of constructing a sewerage system and assessing the same against the abutting property according to the front-foot rule.

"The method of procedure is given in detail, as to the ordinance or resolution by the governing body, publication of notice, assessment against property and a hearing thereon with right of appeal, and how the assessments are to be collected. The plan is somewhat similar to that contained in the local improvements statutes, sec. 2703 et seq., except that this contemplates the payment of the whole expense by assessments instead of only a part thereof, as in case of local improvements. The plan is only alternative and supplementary, and is not intended to change any other method now provided for in general laws or special charters." 1 N. C. Law Rev. 274.

Effect on Prior Rights.—The fact that the General Assembly has authorized an alternative method of financing an installation of sewerage does not in any wise militate against the plan the town may adopt. This section, while giving towns the privilege of adopting a different system, does not deprive them of the power to proceed in the manner which its authorities see fit to adopt. Indeed, the act is careful to provide that it shall not repeal any other method or proceeding that has been authorized or adopted for providing sewerage. McNeill v. Whiteville, 186 N. C. 163, 164, 119 S. E. 6.

Liable for Maintenance of Nuisance.—In one case it was held that the maintenance of a free public sewer system by a city is an exercise of its police power for the public benefit, so that a city would not be liable for the death of a citizen from illness caused by the pollution of a stream by the sewer which emptied into it. Metz v. Asheville, 150 N. C. 784, 64 S. E. 881, 22 L. R. A., N. S., 940, cited in note in 47 L. R. A., N. S., 138.

But this case seems to be contrary to the weight of authority both in North Carolina and elsewhere, and the rule sustained by the greater number of cases is that a municipal corporation, empowered to construct and maintain a sewerage system, may not exercise its power in such a way as to create a private nuisance without making compensation for the injury inflicted or being liable in damages therefor or to equitable restraint in a proper case, and it is a nuisance to pollute a stream by emptying sewerage therein. Moser v. Burlington, 162 N. C. 141, 78 S. E. 74, cited in note in 47 L. R. A., N. S., 138.

Cited in Abbott Realty Co. v. Charlotte, 198 N. C. 564, 152 S. E. 686.

§ 2806. Require connections to be made.—The governing body may require all owners of improved property which may be located upon or near any line of such system of sewerage to connect with such sewerage all water-closets, bathtubs, lavatories, sinks, or drains upon their respective properties or premises, so that their contents may be made to empty into such sewer, and fix charges for such connections. (1917, c. 136, sub-ch. 7, s. 2.)

§ 2806(a). Order for construction or extension of system; assessment of cost; payment of assessment.—When it is proposed by any municipality to provide, construct and establish a system of sewerage, or to provide for the extension of any such system, an order or resolution of the governing body of such municipality at a regular or special meeting shall be made stating generally, or as nearly as may be, the nature of the proposed improvement. In such order or resolution such governing body may provide that the actual cost of the establishment and construction of such sewerage system, or any extension thereof, shall be assessed upon the lots and parcels of land abutting directly on the lateral mains of such sewerage system, or extension thereof, according to the extent of the respective frontage thereon, by an equal rate per foot of such frontage. Such governing body may provide in such order or resolution that the assessments to be levied in connection with such work may be paid

in equal installments covering a period of not exceeding five years. Such order or resolutions shall designate by a general description the improvement to be made, and the street or streets, or part or parts thereof, whereon the work is to be affected and the cost thereof to be assessed upon all abutting property and the terms and manner of payment. Such order or resolution after its passage shall be published in a newspaper published in such municipality, or if there be no such newspaper, such order or resolution shall be posted in three public places in such municipality for at least five days. (1923, c. 166, s. 2.)

§ 2806(b). Ascertainment of cost; assessment.—Upon the completion of the construction and establishment of any such sewerage system, or of any such extension, the governing body shall compute and ascertain the total cost thereof. The governing body shall thereupon make an assessment of such total cost, and for that purpose shall make out an assessment roll, in which must be entered the names of persons assessed as far as can be ascertained, and the amount assessed against them respectively, with a brief description of the lots or parcels of land assessed. (1923, c. 166, s. 3.)

§ 2806(c). Deposit for inspection; publication of completion; time for hearing objections.—Immediately after such assessment roll has been completed, the governing body shall cause it to be deposited in the office of the clerk of the municipality for inspection by parties interested, and shall cause to be published in the same manner as the order or resolution authorizing such work, a notice of the completion of the assessment roll, setting forth a description in general terms of the improvement, and the time fixed for the meeting of the governing body for a hearing of allegations and objections in respect of the special assessment, such meeting not to be earlier than ten days from the first publication or posting of said notice. (1923, c. 166, s. 4.)

§ 2806(d). Hearing on objections; action; entry of confirmation; lien of assessment; copy of roll to tax collector.—At the time appointed for that purpose, or at some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested, who appear and make proof in relation thereto. The governing body may thereupon correct such assessment roll, either confirm the same or may set it aside, and provide for a new assessment. Whenever the governing body shall confirm an assessment for such a local improvement, the clerk of the municipality shall enter on the minutes of the governing body the date, hour and minute of such confirmation, and from the time of such confirmation the assessments embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances. After the assessment roll is confirmed a copy of the same must be delivered to the tax collector, or other officer charged with the duty of collecting taxes. (1923, c. 166, s. 5.)

§ 2806(e). Notice of appeal; service of statement; stay of work; trial of appeal.—If a person assessed is dissatisfied with the amount of the charge, he may give notice within ten days after such confirmation that he takes an appeal to the next term of the superior court of the county in which the municipality is located, and shall within five days thereafter serve a statement of facts upon which he bases his appeal; but the appeal shall not delay or stop the improvements. The appeal shall be tried at the term of court as other actions at law. (1923, c. 166, s. 6.)

§ 2806(f). Correction, etc., of assessment; interest and penalties; power to set aside assessment.—The governing body may correct, cancel or remit any assessment for a local improvement, and may remit, cancel or adjust the interest or penalties on any such assessment. The governing body has the power when in its judgment there is any irregularity, omission, error or lack of jurisdiction in any of the proceedings relating thereto, to set aside the whole of the local assessment made by it, and thereupon to make a reassessment. (1923, c. 166, s. 7.)

See note under § 2715.

§ 2806(g). Cash payment; installment payments; rate of interest; sale of property.—In the event such governing body of such municipality shall provide that said assessment may be paid in equal annual installments, then and in that event the property owner shall have the option and privilege of paying for the improvement as hereinbefore provided for, in cash, or if they should elect and give notice of the fact in writing to the municipality within thirty days after the notice mentioned in the next succeeding section, they shall have the option and privilege of paying the assessment in not less than the number of equal annual installments as may have been determined by the governing body in the original order or resolution authorizing the improvement. Such installments shall bear interest at the rate of six per cent per annum from the date of the confirmation of the assessment roll, and in case of the failure or neglect of any property owner to pay any installment when the same shall become due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable, and such property shall be sold by the municipality under the same rules, regulations, rights of redemption and savings as are now prescribed by law for the sale of land for unpaid taxes. The whole assessment may be paid at the time of paying any installment by the payment of the principal and the interest accrued to that date. (1923, c. 166, s. 8.)

§ 2806(h). Notice for payment of assessment; interest for nonpayment; maturity of installments; penalties.—After the expiration of twenty days from the confirmation of an assessment roll the tax collector, or such other officer of the municipality as the governing body may direct so to do, shall cause to be published in a newspaper, or, if there is no such newspaper, shall cause to be posted in at least three public places therein a notice that any assessment contained in the assessment roll, naming and describing it, may be paid to him at any time before the ex-

piration of thirty days from the first publication of the notice, without any addition. In the event the assessment be not paid within such time the same shall bear interest at the rate of six per cent per annum from the date of the confirmation of the assessment roll and shall become due and payable on the date on which taxes are payable: Provided, that when an assessment is divided into installments, one installment shall become due and payable each year on the date on which taxes are due and payable. If any assessment or installment thereof is not paid when due, it shall be subject to the same penalties as are now prescribed for unpaid taxes, in addition to the interest herein provided for. (1923, c. 166, s. 9.)

§ 2806(i). Authority to fix sewerage charges; lien thereof.—The governing body of any municipality, maintaining and operating a system of sewerage, including sewerage treatment works, if any, is hereby authorized to charge for sewerage service, to determine and fix a schedule of charges to be made for such service, to fix the time and manner in which such sewerage service charges shall be due and payable and to fix a penalty for the non-payment of the same when due. In no cases shall the charges, rents or penalties be a lien upon the property served and in cases where the service is rendered to a tenant and the tenant removes from the premises, the municipality shall not charge against the owner thereof the service charges or penalties for said service: Provided, that this act shall not apply to the counties of Transylvania, Mecklenburg, and Davie: Provided, however, that for sewerage service supplied outside of the corporate limits of the city, the governing body, board or body having such sewerage system in charge may fix a different schedule of rates from that fixed for such service rendered within the corporate limits, with the same exemption from liability by city or town as is contained in section two thousand eight hundred and seven. (1933, c. 322, s. 1.)

Part 8. Water and Lights

§ 2807. Establish and maintain water and light plants.—The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens and to any person, firm or corporation desiring the same outside the corporate limits, where the service is available, but shall in no case be liable for damages for a failure to furnish a sufficient supply of either water or light. And the governing body shall have power to acquire and hold rights of way, water rights, and other property, within and without the city limits. (1917, c. 136, sub-c. 11, ss. 1, 2; 1929, c. 285, s. 1.)

As to establishment and maintenance of a fire department see sec. 2801 and note.

See 13 N. C. Law Rev., 96; 12 N. C. Law Rev., 324.

Editor's Note.—The act of 1929 inserted in this section the words: "And to any person, firm or corporation desiring the same outside the corporate limits, where the service is available."

In Mabe v. Winston-Salem, 190 N. C. 486, 130 S. E. 169 the question of a city's liability for loss by fire arose. The plaintiff contended that the city was liable as the position of the curb which kept the trucks from the hydrant was the proximate cause of the loss and that the loss was occasioned directly by the negligence of the city in repairing the streets.

The Court says in discussing the case: It is conceded that a city, which owns a municipal light and waterworks system, and operates the same in its governmental capacity, cannot be held liable in damages for a failure to furnish a sufficient supply of either water or light. Howland v. Asheville, 174 N. C. 749, 94 S. E. 524; Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849. "It is also conceded that the defendant, in the absence of statutory provision to the contrary, is not liable for any damage occasioned by the negligence of its fire department. Mack v. City Water Works, 181 N. C. 383, 107 S. E. 244; Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853; note, 9 A. L. R. 143." "The extinguishment of fires is a function which a municipal corporation undertakes in its governmental capacity, and in connection with which, in the absence of statutory provision to the contrary, it incurs no civil liability, either for inadequacy in equipment or for the negligence of its employees. 19 R. C. L., 1116; Seales v. Winston-Salem, 189 N. C. 469, 127 S. E. 543, and cases there cited."

In a discussion of the case in N. C. Law Rev. it is said: "The court refuses to agree with the plaintiff's theory of the case that the negligence of the street department was the proximate cause of the loss, but holds that the proximate cause of the loss was the failure of the fire department to put out the fire. The court concedes that it is the duty of the city in the exercise of proper care, to keep and maintain its streets in a reasonably safe condition for public travel, but that this refers to street uses, the traffic of vehicles and pedestrians, and is not meant to include a case where the plaintiff is not using the street at all. But, granting for the sake of argument, that the negligence of the street department was the proximate cause of the plaintiff's loss, yet the court said that this was also the negligence of the city and that the statute provides that in no case shall the city be liable for failure to furnish a sufficient supply of water." 4 N. C. Law Rev. 137.

"Viewed from the practical standpoint of ordinary fairness, there is no valid reason why the municipality which has been guilty of an act for which a private corporation would be liable, should not be required to compensate the injured party. The risk of loss now falls on those least able to bear it. That there has been a tendency to broaden the scope of municipal liability is evidenced by recent decisions. But, if the old doctrines have become too strongly intrenched in our law for a change to take place through judicial legislation, the problem will have to be given over to the legislature for satisfactory solution." 4 N. C. Law Rev. 140.

In Munick v. Durham, 181 N. C., 188, 106 S. E. 665 opinion by the Chief Justice, a recovery against the city was sustained, but that was a suit growing out of the settlement of claimant's water bill, and involving only the business relations between the individual and the city as vendor of water for profit, and not a matter concerning the water supply for general fire protection. Mack v. City Water-Works, 181 N. C. 383, 385, 107 S. E. 244.

Power to Sell Electricity within Three-Mile Zone.—A municipality has the power to purchase electricity for its own use and the use of its citizens, and where it is authorized by general and special statutes to purchase current from a power company and to resell and distribute it at a profit to its citizens and to those within a three-mile zone therefrom, the grant of power to do so is effective in law under the authority of the Legislature to grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established unless prohibited by the organic law. Holmes v. Fayetteville, 197 N. C. 740, 741, 150 S. E. 624.

§ 2808. Fix and enforce rates.—The governing body, or such board or body which has the management and control of the waterworks system in charge, may fix such uniform rents or rates for water or water service as will provide for the payment of the annual interest on existing bonded debt for such waterworks system, for the payment of the annual installment necessary to be raised for the amortization of the debt, and the necessary allowance for repairs, maintenance, and operation, and when the city shall own and maintain both waterworks and sewerage systems, including sewerage disposal plants, if any, the governing body shall have the right to operate such system as a combined and consolidated system, and when so operated to include in the rates adopted for the waterworks a sufficient amount to provide for the

payment of the annual interest on the existing bonded debt for such sewerage system or systems, for the payment of the annual installment necessary to be raised for the amortization of such debt, and the necessary allowance for repairs, maintenance and operation. Such body shall fix the times when the water rents shall become due and payable, and in case such rent is not paid within ten days after it becomes due and payable, the same may at any time thereafter be collected either by suit in the name of the city or by the collector of taxes for the city. Upon the failure of the owner of property for which water is furnished under the rules and regulations of such body to pay the water rents when due, then the body, or its agents or employees, may cut off the water from such property; and when so cut off it shall be unlawful for any person, firm, or corporation, other than the body or its agents or employees, to turn on the water to such property, or to use the same in connection with the property, without first having paid the water rent and obtained permission to turn on the water: Provided, however, that for service supplied outside the corporate limits of the city, the governing body, board or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits, with the same exemption from liability by city or town as is contained in section two thousand eight hundred seven: Provided further, that where the water may be cut off under the provision of this section for the failure of the occupant of the premises to pay his water bill, and such occupant is not the owner of the premises but occupies said premises as a tenant, it shall not be lawful for the board in charge or management of the waterworks to require the payment of such delinquent bill before turning on the water at the instance of a new and different tenant or occupant of said premises. This proviso shall not apply in cases where the premises are occupied by two or more tenants serviced by the same water meter. Nor shall this proviso apply in Caldwell county. (1917, c. 136, sub-ch. 11, s. 3; 1929, c. 285, s. 2; 1933, cc. 140, 353, 368.)

Editor's Note.—The Act of 1929 added the first proviso to this section.

Prior to the amendment by Public Laws 1933, c. 353, the first sentence of this section merely provided that the governing board should fix "such uniform rates for water as is deemed best." Public Laws of 1933, c. 140 added the last proviso of the section. By the terms of the act the amendment of 1933, c. 353, does not apply in Haywood, Ashe, Transylvania and Mecklenburg counties.

§ 2809. Separate accounts for water system.—It shall be the duty of the governing body to keep a separate statement and account of the money received by the city from the waterworks system, and it shall be the duty of the said body to give preference to the waterworks system over the other departments of the city in such funds, and to provide for the proper upkeep of the waterworks system and an amount necessary for the enlargement of the water works system before turning over to the other departments the money so received. (1917, c. 136, sub-ch. 11, s. 4.)

Part 9. Care of Cemeteries

§ 2810. Care fund established.—The governing body is authorized to create a fund to be known as the perpetual care fund for the cemeteries, for the purpose of perpetually caring for and beautifying the cemeteries, and such fund shall be kept by the city as is provided for bequests and gifts for cemetery purposes; and the governing body may make contracts with lot or space owners in the cemeteries, obligating the city to keep up and maintain said lots or spaces in perpetuity upon payment of such sum as may be fixed by the governing body; and the governing body is further authorized and empowered to accept gifts and bequests for such purposes, or upon such other trusts as the donors may prescribe; and the governing body is authorized to set aside for such perpetual care fund such portion of the proceeds of sales of cemetery lots as the governing body may deem advisable. (1917, c. 136, sub-ch. 9, s. 1; 1927, c. 254.)

Editor's Note.—The amendment, Public Laws 1927, c. 254 changed the amount to be set aside from "an amount not exceeding twenty-five per cent" to "such portions as the governing body may deem advisable."

§ 2811. Application of fund.—The principal of the funds appropriated by the governing body for caring for the cemeteries shall be held by the governing body for caring for and beautifying the cemeteries and improving the same. The income from the fund heretofore or hereafter made shall be used for the purpose of carrying out contracts with the individual or space owners for the perpetual care of individual plats and spaces. Any gifts heretofore or hereafter made to and received by the city or any of its officers shall be held and used as a sacred trust fund for the purposes and upon the conditions named in such gifts or bequests, and all such funds shall be kept and invested separately and shall not be used for any other purpose, or by the city in its affairs. (1917, c. 136, sub-ch. 9, s. 1.)

§ 2812. Separate accounts kept.—The city treasurer shall keep a separate account of the cemetery funds, and a still further separate account of all special gifts or bequests made by persons for and in connection with the cemeteries and particular lots therein. The governing body has the power to make rules and regulations and adopt ordinances for the carrying out of the duties imposed by this and the two preceding sections in regard to the care of cemeteries. (1917, c. 136, sub-ch. 9, s. 1.)

Part 10. Municipal Taxes

§ 2813. Provide for listing and collecting taxes.—The governing body shall provide by an ordinance or otherwise means for the collection of taxes in the city and shall cause property to be listed for taxation which has not otherwise been listed as required by law. The governing body of cities and towns are in all respects vested with the same powers and authority as is now, or may hereafter be, vested in the board of county commissioners of the county in which such city or town is located, with respect to the allowance of discounts and charging penalties in the collection of taxes. (1917, c. 136, sub-ch. 6, s. 2; 1925, c. 183.)

See notes to secs. 2677 et seq.

Editor's Note.—By amendment, Public Laws 1925, the last sentence to this section was added.

§ 2814. Unlisted taxables entered.—The officer who has charge of the collection of taxes in any

city shall, after the most diligent inquiry, and by comparing his book with the county tax books, make out a list of all persons liable for poll tax, or for taxes on property, who have failed to return a list in the manner and in the time prescribed, together with the estimated value of all the property not listed, and shall enter such persons in a separate part of his book. (1917, c. 136, sub-ch. 6, s. 4.)

As to county taxes, see secs. 7923 et seq.

§ 2815. Lien of taxes.— The lien for taxes levied for any and all purposes in each year shall attach to all the real estate of the taxpayers within the city on the first day of May annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid. But there shall be no lien for taxes on the personal property of the taxpayer but from a levy thereon. (1917, c. 136, sub-ch. 6, s. 5; 1919, c. 126.)

As to tax liens in general, see secs. 7986 et seq.

When Lien Attaches.—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon, subject to certain exceptions specified in Const., Art. V, secs. 3 and 5. Carstarphen v. Plymouth, 186 N. C. 90, 118 S. E. 905.

There is no lien upon the personal property for taxes except from the date of levy thereon. Reichland Shale Products Co. v. Southern Steel, etc., Co., 200 N. C. 226, 156 S. E. 777.

Where Assessment of Property for Taxes Has Not Been Made at Time of Foreclosure.—Construing this section with § 7980, requiring the one selling lands under foreclosure sale of a mortgage or deed of trust to pay all taxes then assessed against the property out of the proceeds, it is held that where the taxes have not been assessed nor the tax rate ascertained under the provisions of the County Fiscal Control Act until after the foreclosure sale has been made, the proceeds or surplus from the foreclosure sale are not subject to the payment of the taxes, and the lien of a judgment creditor of the mortgagor is payable out of the surplus from the sale without deducting the amount of the taxes, and the taxes later assessed attach to the land in the hands of the purchaser at the foreclosure sale, although they attach to the land as of the first of May. American Agricultural Chemical Co. v. Brock, 198 N. C. 342, 151 S. E. 869.

Cited in Shaffner v. Lipinsky, 194 N. C. 5, 138 S. E. 418.

§ 2816. Power and duties of tax collector.—The officer who has charge of the collection of taxes in any city shall, in the collection of taxes, be vested with the same power and authority as is given by the state to sheriffs for like purpose, and shall be subject to the same fines and penalties on failure or neglect of duty.

It shall be his duty to collect all taxes levied by the governing body, and he shall be charged with the sums appearing on the tax list as due for city taxes. He shall at no time retain in his hands over three hundred dollars for a longer time than seven days, under a penalty of ten per cent per month to be paid to the city upon all sums so unlawfully retained. (1917, c. 136, sub-ch. 6, s. 1.)

As to collections by sheriff, see secs. 7992 et seq.

§ 2817. Settlement with tax collector.—In settlement with the city tax collector shall be credited with all poll taxes and taxes on personal property which the governing body shall declare to be insolvent and uncollectible, and with such amounts as may be involved in suit by appeal from the ruling of the board, and he shall be charged with and shall pay over all other sums appearing on the tax list. After the accounts of the tax collector shall be audited and settled, the same shall be reported to the governing body, and when approved by it the same shall be recorded in the minute book of such body, and shall be prima facie evidence of correctness, and impeachable only for fraud or specified error. (1917, c. 136, sub-ch. 6, s. 1.)

§ 2818. Bond of tax collector and other officers.—The governing body of the city shall require of the tax collector of the city, and any and all officers and employees, such bonds as it may deem necessary, and may pay the expenses of providing such bonds, including the bond of the mayor. (1917, c. 136, sub-ch. 6, s. 3.)

§ 2819. License to plumbers and electricians.—The governing body may regulate and license plumbers and those engaged in the electrical wiring of buildings for light, power, or heat, and before issuing a license may require the applicant to be examined and to give bond in such sum and upon such conditions as the governing body may determine, and with such sureties as it may approve; and such body may, for incompetency on the part of such licensees or for refusal to comply with the ordinances relating to such business, or for any other good cause, revoke any license issued hereunder. No person, firm, or corporation shall do any kind of plumbing or electrical wiring of buildings without first having obtained a license from the governing body. No license issued hereunder by the governing body shall be for more than one year, and the same shall not be transferable or assignable except by the permission of the governing body. And no license shall be issued, as herein provided, before the license tax shall have been paid. (1917, c. 136, sub-ch. 6, ss. 6, 7, 8, 9.)

Art. 16. Exercise of Powers by Governing Body

Part 1. Municipal Meetings

§ 2820. Legislative powers, how exercised.—Except as otherwise specially provided, the legislative powers of the governing body may be exercised as provided by ordinance or rule adopted by it. (1917, c. 136, sub-ch. 13, s. 1.)

§ 2821. Quorum and vote required.—Every member of the governing body shall have the right to vote on any question coming before it. A majority shall constitute a quorum, and a majority vote of all members present shall be necessary to adopt any motion, resolution or ordinance. (1917, c. 136, sub-ch. 13, s. 1.)

§ 2822. Meetings regulated, and journal kept.—The city governing body shall from time to time establish rules for its proceedings. Regular and special meetings shall be held at a time and place fixed by ordinance. All legislative sessions shall be open to the public, and every matter shall be put to a vote, the result of which shall be duly recorded. The governing body shall not by executive session or otherwise consider or vote on any question in private session. A full and accurate journal of the proceedings shall be kept, and shall be open to the inspection of any qualified registered voter of the city. (1917, c. 136, sub-ch. 13, s. 1.)

Part 2. Ordinances

§ 2823. How adopted.—No ordinance shall be

passed finally on the date on which it is introduced, unless by two-thirds vote of those present. No ordinance making a grant, renewal, or extension, whatever its kind or nature, of any franchise or special privilege shall be passed until voted on at two regular meetings, and no such grant, renewal, or extension shall be made otherwise than by ordinance. (1917, c. 136, sub-ch. 13, s. 3.)

§ 2824. Ordinances amended or repealed.—No ordinance or part thereof shall be amended or annulled except by an ordinance adopted in accordance with the provisions of this act. (1917, c. 136, sub-ch. 13, s. 4.)

§ 2825. How ordinance pleaded and approved.—In all judicial proceedings it shall be sufficient to plead any ordinance of any city by caption, or by number of the section thereof and the caption, and it shall not be necessary to plead the entire ordinance or section. All printed ordinances or codes or ordinances published in book form by authority of the governing body of any city shall be admitted in evidence in all courts, and shall have the same force and effect as would the original ordinance. (1917, c. 136, sub-ch. 13, s. 14.)

As to mayor certifying, see sec. 2637; as to prima facie evidence, see sec. 1750.

In General.—The introduction of an ordinance of a town regulating the speed of trains backing upon the track, and properly proven, under this section requiring a signal light to be displayed, will not be regarded as error on appeal, when it is proved that upon the evidence in the case the jury has found, upon a trial without legal error, the negligence of the defendant's employees proximately caused the personal injury for which damages were sought in the action. Parker v. Seaboard, etc., Railway, 181 N. C. 95, 106 S E. 755.

Part 3. Officers

§ 2826. City clerk elected; powers and duties.—The governing body shall, by a majority vote, elect a city clerk to hold office for the term of two years and until his successor is elected and qualified. He shall have such powers and perform such duties as the governing body may from time to time prescribe in addition to such duties as may be prescribed by law. He shall keep the records of the meetings. The person holding the office of city clerk at the time when any of the plans set forth in this act shall be adopted by such city shall continue to hold office for the term for which he was elected, and until his successor is elected and qualified. (1917, c. 136, sub-ch. 13, s. 1.)

§ 2827. Vacancies filled; mayor pro tem.— If a vacancy occurs in the office of the mayor or governing body, the vacancy shall be filled by the governing body of the city. If the mayor is absent or unable from any cause temporarily to perform his duties, they shall be performed by one elected by the governing body of the city for that purpose, who shall be called "mayor pro tem.," and he shall possess the powers of mayor only in matters not admitting delay, but shall have no power to make permanent appointments. (1917, c. 136, sub-ch. 13, s. 6.)

As to powers of mayor pro tem, see sec. 2633, 2634; as to commissioner filling vacancy, see sec. 2631.

§ 2828. Bonds required.—Every official, employee, or agent of any city who handles or has custody of more than one hundred dollars of such city's funds at any time shall, before assuming his duties as such, be required to enter into bond with good sureties, in an amount sufficient to protect such city, payable to such city, and conditioned upon the faithful performance of his duties and a true accounting for all funds of the city which may come into his hands, custody, or control, which bond shall be approved by the mayor and board of aldermen or other governing body and deposited with the city. (1917, c. 136, sub-ch. 13, s, 15.)

§ 2829. Information requested from mayor.—The governing body at any time may request from the mayor specific information on any municipal matter within its jurisdiction, and may request him to be present to answer written questions relating thereto at a meeting to be held not earlier than one week from the date of the receipt by the mayor of such questions. (1917, c. 136, sub-ch. 13, s. 2.)

Part 4. Contracts Regulated

§ 2830. Contracts awarded on public advertisement.—No contract for construction work on for the purchase of apparatus, supplies, or materials, whether the same shall be for repairs or original construction, the estimated cost of which amounts to or exceeds one thousand dollars, except in cases of special emergency involving the health or safety of the people or their property, shall be awarded unless proposals for the same shall have been invited by advertisement once in at least one newspaper of general circulation in the city, the publication to be at least one week before the time specified for the opening of said proposals. Such advertisement shall state the time and place where plans and specifications of proposed work or supplies may be had and the time and place for opening the proposal in answer to such advertisements, and shall reserve to the city the right to reject any or all such proposals. All such proposals shall be opened in public. No bill or contract shall be divided for the purpose of evading any provision of this act. (1917, c. 136, sub-ch. 13, s. 7.)

As to sale at public outcry, see sec. 2688; as to granting franchises, see § 2623, par. 6. As to subsequent similar statute relating to counties, cities, etc., see § 1361(a).

See note, 13 N. C. Law Rev., 248.

Effect of Failure to Comply with Section.—Where the verdict of the jury establishes that the contract for construction was in violation of this section, and that the corporate defendant conspired with the other defendants to obtain the contract in violation of the statute, the corporate defendant doing the work is entitled to the reasonable value of the work as determined by the jury on the issue of quantum meruit, and it is liable to the city for the amount by which the price paid exceeds the reasonable value of the work performed. Moore v. Lambeth, 207 N. C. 23, 175 S. E. 714.

Relief to Taxpayers When Violated.—Injunctive relief against a municipality will be available to a citizen thereof and taxpayer therein, when in a suit in behalf of himself and others so situated, he alleges that the municipal authorities accepted a bid for street paving higher than that submitted by another responsible bidder, induced thereto by personal favor. Murphy v. Greensboro, 190 N. C. 268, 129 S. E. 614.

Liability of City Officers.—Where municipal officers wrongfully, wilfully and knowingly disburse municipal funds in payment for municipal construction under a contract let without advertising for bids, as required by this section, and it appears that the contract price was excessive and exorbitant, and was let by such officers with intent to evade the law, such officers may be held liable in a suit by taxpayers of the city to recover the loss for the city for the amount by which the contract price exceeds the reasonable

worth of work performed thereunder, even though they did not act corruptly and of malice. Moore v. Lambeth, 207 N. C. 23, 175 S. E. 714.

Appointment of Subcommittees.—The municipal authorities in passing upon bids for street improvements, are acting in a quasi-judicial capacity, and may not delegate this power to a subcommittee under an agreement to accept the report of the committee thereon as their own act, and give it validity. Murphy v. Greensboro, 190 N. C. 268, 129 S. E. 614.

Plea of Ultra Vires in Action for Consideration.—Where a contract with a corporation has been fully performed by both parties and nothing remains to be done but the payment of the consideration by the corporation, the plea of ultra vires is not available to the corporation; and where a contractor for the construction of certain municipal improvements has given a surety bond to insure his faithful performance, etc., and has completed the work under the contract, he may not, in an action by the surety to recover the premium due on the surety bond, set up the plea that the contract with the city was void for failure to comply with this section with regard to the advertisement for bids. Union Indemnity Co. v. Perry, 198 N. C. 286, 287, 151 S. E. 629.

Cited in Abbott Realty Co. v. Charlotte, 198 N. C. 564, 152 S. E. 686.

§ 2831. Certain contracts in writing and secured.—All contracts made by any department, board, or commission in which the amount involved is two hundred dollars or more shall be in writing, and no such contract shall be deemed to have been made or executed until signed by the officer authorized by law to sign such contract, approved by the governing body. Any contract made as aforesaid may be required to be accompanied by a bond with sureties, or by a deposit of money, certified check, or other security for the faithful performance thereof, satisfactory to the board or official having the matter in charge, and such bonds or other securities shall be deposited with the city treasurer until the contract has been carried out in all respects; and no such contract shall be altered except by a written agreement of the contractor, the sureties on his bond, and the officer, department, or board making the contract, with the approval of the governing body. (1917, c. 136, sub-ch. 13, s. 8.)

Cited in Abbott Realty Co. v. Charlotte, 198 N. C. 564, 152 S. E. 686.

§ 2831(a). Separate specifications for contracts; responsible contractors.—Every officer, board, department, commission or commissions charged with the duty of preparing specifications or awarding or entering into contract for the erection, construction or alteration of buildings in any county or city, when the entire cost of such work shall exceed ten thousand dollars, must have prepared separate specifications for each of the following branches of work to be performed: 1. Heating and ventilating. 2. Plumbing and gas fitting. All such specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by any county, or city, or a department, board, commission, or commissioner, or officer thereof, for the erection, construction or alteration of buildings or any part thereof, must award respective work specified in the above subdivisions separately to responsible persons, firms or corporations regularly engaged in their respective line of work. (1925, c. 141, s. 1; 1929, c. 339, s. 1; 1931, c. 46.)

Editor's Note.—The Act of 1929 which substituted "may" for the words "must" and "shall" in lines nine, thirteen and twenty was repealed by the Act of 1931.

§ 2831(b). Validating certain conveyances.—All deeds heretofore made, executed, and delivered, for a good and valuable consideration, by incorporated cities and towns conveying lands used for park purposes, without authority to make and deliver such deed having been first granted by the General Assembly, are hereby in all respects validated, ratified, and confirmed as fully and completely as if said cities and towns had been granted authority of the General Assembly to make and deliver said deeds, and said deeds are hereby declared to be valid conveyances of the land and premises therein described. (1924, c. 95.)

Part 5. Control of Public Utilities

§ 2832. Power to establish and control public utilities.—Any city shall have the right to acquire, establish, and operate waterworks, electric lighting systems, gas systems, schools, libraries, cemeteries, market houses, wharves, play or recreation grounds, athletic grounds, parks, abattoirs, slaughter-houses, sewer systems, garbage and sewage disposal plants, auditoriums or places of amusement or entertainment, and armories. The city shall have the further right to make a civic survey of the city, establish hospitals, clinics, or dispensaries for the poor, and dispense milk for babies; shall have the power to establish a system of public charities and benevolence for the aid of the poor and destitute of the city; for the welfare of visitors from the country and elsewhere, to establish rest rooms, public water-closets and urinals, open sales places for the sale of produce, places for hitching and caring for animals and parking automobiles; and all reasonable appropriations made for the purposes above mentioned shall be binding obligations upon the city, subject to the provisions of the constitution of the state. (1917, c. 136, sub-ch. 13, s. 11.)

See 12 N. C. Law Rev., 324.

Granting Exclusive Franchises.—No grant of franchise by a city is deemed exclusive unless so expressed by the grant, and by granting a franchise to a Light and Sewerage Company the city does not deprive itself of its rights under this section, except as set out in the grant. Hill v. Elizabeth City, 291 Fed. 194, 209.

Schools.—The power given by this section to acquire, establish and operate schools applies to any city whether or not it has adopted a plan of government under this chapter. And the grant of the power is by implication the grant of such power as is necessary to exercise the power expressly granted. Hailey v. Winston-Salem, 196 N. C. 17, 23, 144 S. E. 377.

§ 2833. How control exercised:

1. Control over departments. The waterworks department, electric or gas light system, sewerage system, library system, park or park and tree commission system, or playground system, or any other public service owned, operated, or conducted by any city under separate organization or as a separate corporation under the control of any city in the state, which has been heretofore under the separate management and control of separate boards or corporations, may henceforth be under the management and control of the governing body of such city in the state.

2. Departments may be abolished. In all cities except those which have adopted Plan C or Plan D, hereafter set forth, before the governing body

shall have control or management of the waterworks, electric light, sewerage system, library system, park or park and tree commission system, or playground system, or any other public service owned, operated, or conducted by such city under separate organization or corporation, the governing body of the city, by two-thirds vote taken at two separate regular meetings of such governing body, shall pass an ordinance to the effect that the waterworks, electric or gas light system, sewerage system, library, park or park and tree commission system, or playground system, or any other public service owned, operated, or conducted by such city under separate organization or corporation, or either of them, shall be abolished and the control and management shall be under the governing body of the city.

3. Property vested in the city. Upon the passage by the governing body of any city of such ordinance, the waterworks, electric or gas light system, sewerage system, the library system, and the park or park and tree commission system, and any other public service owned, operated, or conducted by such city under separate organization or corporation then in existence either under separate organization or under separate management or control or under separate corporation, shall immediately become the property of the city, and all land, real estate, rights, easements, franchises, choses, and property of every kind, whether real or personal, tangible or intangible, the title of which is vested in such separate corporation or board, shall be and become vested in such city, and the boards of water commissioners, electric light commissioners, sewerage commissioners, library boards, park boards, or park and tree commission boards, or the board or commission of any other public service owned, operated, or conducted by or on behalf of such city under separate organization or corporation shall cease to exist as a corporation; and all indebtedness, bonds, or other contracts and obligations of any nature incurred by, for, or on account of the waterworks, electric or gas light system, sewerage system, library system, park or park and tree commission system, or other public utility in the name of or by such corporation, or by such city in its behalf, or by the corporation and such city jointly, shall be and become the sole obligation of such city.

4. Same procedure in other cases. There shall be the same procedure with reference to the library system, park or park and tree commission system, or playground system by the governing body of all cities which shall have adopted Plan C or Plan D before such control and title shall become vested as hereinbefore stated.

5. Popular vote required. In all cities, except those which have adopted Plan C or Plan D, hereafter set forth, before the foregoing provisions of this section shall become effective, such changes in the control and management of the waterworks, electric light, sewerage, etc., shall first be approved by a majority of the qualified voters of such municipality at any regular or special election held under the provisions of this act. (1917, c. 136, sub-ch. 13, s. 9.)

§ 2834. Ordinances to regulate management. — The governing body of any city in the exercise of its control and management of the waterworks, electric light, sewerage system, library system, park or park and tree commission system, or any other public service owned, operated, or conducted by such city, shall have power to make rules, regulations, and ordinances in connection with the management thereof as they may deem necessary, and shall have power to enforce such rules, regulations, and ordinances. (1917, c. 136, sub-ch. 13, s. 10.)

§ 2835. Additional property acquired. — The governing body of any city shall have power to acquire such additional property as it may deem necessary for a better system of waterworks, electric light, sewerage, library, park or parks, or other public service owned, operated, or conducted by such city. Upon the adoption by the governing body of any city of any one of the plans of government provided for in this act, the laws now in force in reference to the waterworks, electric light, sewerage, parks, libraries, or other public service owned, operated, or conducted by such city, shall not be repealed by this act, but shall be construed with this act and only repealed in so far as they are inconsistent with the provisions of this act. (1917, c. 136, sub-ch. 13, s. 10.)

Part 6. Effect Upon Existing Regulations

§ 2836. Existing rights and obligations not affected. — All official bonds, recognizances, obligations, contracts, and all other instruments entered into or executed by or to the city before this act takes effect in any city, and all taxes, special assessments, fines, penalties, forfeitures incurred or imposed, due or owing to the city, shall be en forced and collected, and all writs, prosecutions actions and causes of action, except as herein otherwise provided, shall continue without abatement and remain unaffected by this act; and no legal act done by or in favor of the city shall be rendered invalid by its adoption of any plan of government provided for by this act. (1917, c. 136, sub-ch. 13, s. 5.)

§ 2837. Existing ordinances remain in force.— All valid ordinances and resolutions of any city in force at the date of the ratifications and not inconsistent with the provisions of this act, and all rules of procedure adopted by the governing body of any city, shall be and remain in full force and effect until repealed, annulled, or amended under the provisions of this act, or under the provisions of the charter of such city, and all laws relative to any city, not in conflict with the provisions of this act shall be and remain in full force and effect. (1917, c. 136, sub-ch. 13, s. 5.)

§ 2838. Existing election laws remain in force. —This act shall not repeal or impair any general, special, or local election laws now in force in any city, but such general, special, or local laws shall be and continue in full force and effect except where clearly inconsistent with and repugnant to the provisions of this act; and the municipal elections of such city shall continue to be held under and subject to the provisions of such special election laws except as herein otherwise provided: Provided, however, that in every case the governing body of any city shall have the right and power in its discretion and by an ordinance adopted by a

two-thirds vote of the members of the entire governing body, to order a new registration of the voters of such city for any general, regular, or special municipal election held in such city for any purpose, unless excepted in this act. (1917, c. 136, sub-ch. 13, s. 12.)

§ 2839. General laws apply. — All questions arising in the administration of the government of any city, and not provided for in this act, shall be governed by the laws of the state in such cases made and provided. (1917, c. 136, sub-ch. 13, s. 13.)

Art. 17. Accounting System

§ 2840. Nature of accounting system. — Accounting systems shall be devised and maintained which shall exhibit the condition of the city's assets and liabilities, the value of its several properties, and state of its several funds. Such systems shall be adequate to record in detail all transactions affecting the acquisition, custodianship, and disposition of values, including cash receipts and disbursements. The recorded facts shall be presented periodically to officials and to the public in such summaries and analytical schedule as shall be necessary to show the full effect of such transactions for each fiscal year upon the finances of the city and in relation to each department of the city government; and there shall be included distinct summaries and schedules for each public utility owned and operated by the city. In all respects, as far as the nature of the city's business permits, the accounting systems maintained shall conform to those employed by progressive business concerns and approved by the best usage. The governing body shall have power to employ accountants to assist in devising such accounting systems. (1917, c. 136, sub-ch. 14, s. 1.)

§ 2841. Co-operation through board of control. —The board of municipal control shall investigate what amount of cost will be required to employ expert accountants to devise proper uniform accounting systems for municipalities, and shall submit to each city a statement of the cost thereof and attempt to obtain coöperation among as many of the cities of the state as possible in the payment of the cost of such systems; and in case a satisfactory arrangement can be made by such cities for the payment of such costs, then the board of municipal control shall employ such expert accountants for such purpose, and the governing body of each of the cities in the state shall have power to pay its proportion of the cost thereof and install such system. (1917, c. 136, sub-ch. 14, s. 2.)

Art. 18. Adoption of City Charters

Part 1. Effect of Adoption

§ 2842. Continues corporation with powers according to plan.—Any city which shall adopt, in the manner hereinafter prescribed, one of the plans of government provided in this act shall thereafter be governed by the provisions thereof: and the inhabitants of such city shall continue to be a municipal corporation under the name existing at the time of such adoption, and shall have, exercise, and enjoy all the rights, immunities, powers, and privileges, and shall be subject to all the duties, liabilities, and obligations provided for herein or otherwise pertaining to or incumbent upon such city as a municipal corporation. (1917, c. 136, sub-ch. 16, s. 1.)

§ 2843. Legislative powers not restricted.— None of the legislative powers of a city shall be abridged or impaired by the provisions of this act, but all such legislative powers shall be possessed and exercised by such body as shall be the legislative body of the city under the provisions of this act. (1917, c. 136, sub-ch. 16, s. 2.)

§ 2844. Ordinances remain in force.—All ordinances, resolutions, orders, or other regulations of a city or of any authorized body or official thereof existing at the time when such city adopts a plan of government set forth in this act shall continue in full force and effect until annulled, repealed, modified, or superseded. (1917, c. 136, sub-ch. 16, s. 3.)

§ 2845. Mayor and aldermen to hold no other offices.—The mayor or any member of the board of aldermen shall not hold any other office or position of profit, trust, or honor, or perform any other duties or functions than mayor or aldermen under the city government unless it shall be submitted to and approved by a majority of the qualified voters of the city at a regular or special election. (1917, c. 136, sub-ch. 16, s. 4.)

§ 2846. Wards regulated.—The territory of any city adopting any one of the plans of government provided for in this act shall continue to be divided into the same number of wards existing at the time of such adoption, which wards shall retain their boundaries until same shall be changed under the provisions of this act: Provided, that if the plan so adopted provides for a different number and arrangement of wards from that existing at the time of such adoption, then in such event the wards of such city shall be so changed and arranged as to conform to the provisions of the plan so adopted. (1917, c. 136, sub-ch. 16, s. 5.)

Part. 2. Manner of Adoption

§ 2847. Petition filed.—A petition addressed to the board of elections of the county in which the city is situated, in the form and signed and certified as provided in the next section, may be filed with the county board of elections. The petition shall be signed by qualified voters of the city to a number equal to at least twenty-five per cent of the qualified voters at the last election next preceding the filing of the petition. In cities having a population of eighty thousand (80,000), as shown by the last census, in which it is proposed to adopt plan "B," the petition shall be signed by ten per cent of the qualified voters of said city. (1917, c. 136, sub-ch. 16, s. 6; 1933, c. 80, s. 5.)

Editor's Note.—Public Laws of 1933, c. 80, added the last sentence relating to cities having a population of 80,000.

§ 2848. Form of petition.—The petition shall be in substantially the following form:

To the County Board of Elections of .....
.....County:

We, the undersigned qualified voters of the city, respectfully petition your honorable body to cause to be submitted to a vote of the voters of the city of ..... the following question: "Shall the city of ..... adopt the

form of government defined as Plan (A, B, C, or D), as it is desired by petitioners and consisting of (describe plan briefly, as government by a mayor and councilors elected at large, or government by a mayor and councilors elected partly at large and partly from wards or districts, or government by three commissioners, one of whom shall be the mayor, or government by a mayor and four councilors with a city manager), according to the provisions of the chapter, Municipal Corporations, in the Consolidated Statutes, articles nineteen to twenty-three, inclusive.

Or, in case it shall be desired by such petitioners that two of such plans shall be submitted, then the question may be stated as follows:

Shall the city of ..... adopt the form of government defined as Plan ..... or ..... (naming two of such plans as stated above), or remain under the present form of government?

The petition may be in the form of separate sheets, each sheet containing at the top thereof the heading above set forth, and when attached together and offered for filing the several papers shall be deemed to constitute one petition, and there shall be endorsed thereon the name and address of the person presenting the same for filing. (1917, c. 136, sub-ch. 16, s. 7.)

§ 2849. Election held.—Within five days after the petition has been filed with the county board of elections, if the petition shall contain twenty-five per cent of the qualified voters as before set forth, the board of elections shall call an election in accordance with such petition. The board of elections shall cause notice of such election to be given at least once a week for four weeks in some newspaper of general circulation in the county in which the election is to be held, or at the courthouse door of the county in which the city is situated or at the door of the city or town hall, and the date of such election shall be fixed by the board not later than forty days from the receipt of such petition. The notice shall be signed by the chairman of the county board of elections, and the cost of publication thereof paid by the city. The election shall be held under, and governed and controlled by, the laws in force at the time of such election governing regular elections of such city. (1917, c. 136, sub-ch. 16, s. 8.)

§ 2850. Petitions for more than one plan.—Separate petitions for the submission of more than one of such plans may be filed in the form and manner hereinbefore provided, but if petitions for the submission of more than two of such plans shall be submitted at such election, those two plans shall be submitted at the election, petitions for which shall be first filed with the county board of elections. (1917, c. 136, sub-ch. 16, s. 9.)

§ 2851. What the ballots shall contain.—All ballots used in elections held upon the adoption of the plans of government herein set forth shall contain the name of the plan submitted, as Plan A, B, C, or D, or any two of such plans submitted, as the case may be, with a brief description of each plan submitted, as described in the petition, and shall also contain the existing form of government under the name "present form of government." The names of the plans and forms shall be so printed that in appropriate squares the voter may designate by a cross (X) mark only the plan or form of government for which he casts his vote; if there shall be only one plan submitted, the letter and description of such plan and the "present form of government" only shall appear, and the voter shall express his preference between such plan and the "present form of government." If there shall be two plans submitted, then each of the plans shall be denominated and described on the ballot as herein set forth, and the "present form of government" shall also appear upon the ballot, and the ballot shall be so printed that in appropriate squares the voter may designate by a cross (X) mark only the plan or form of his first choice and the plan and form of his second choice. (1917, c. 136, sub-ch. 16, s. 10.)

§ 2852. Form of ballots. — Except that the crosses here shown shall be omitted, the ballots shall be printed substantially as follows:

(Form of ballot when only one plan is submitted:)

Special Municipal Election

Plan ..... (with brief description). ☒
Present Form of Government. ☐

(Form of ballot when two plans are submitted:)

Special Municipal Election

To vote for any plan or form of government, make a cross in the appropriate square to the right of the name of such plan or form.

Note your first choice in the first column.

Note your second choice in the second column.

Names of plans or forms	First Choice.	Second Choice.
Plan—(with brief description).	X	
Plan—(with brief description).		X
Present Form of Government.		

(1917, c. 136, sub-ch. 16, s. 11.)

§ 2853. Series of ballots.—The plans and forms on all ballots shall be printed in rotation as follows: The ballots shall be printed in as many series as there are plans or forms. The whole number of ballots to be printed shall be divided by number of series and the quotient so obtained shall be the number of ballots in each series. In printing the first series of ballots the names of each plan or form shall be arranged in the alphabetical order of the letters of the plans submitted, followed by the "present form of government." After printing the first series, the first plan or form shall be placed last and the next series printed, and the process shall be so repeated until each plan shall have been printed first an equal number of times. The ballot so printed shall be then combined in tablets or packages so as to have the fewest possible ballots having the same order of plans or forms printed thereon together

in the same tablet or package. (1917, c. 136, sub-ch. 16, s. 12.)

§ 2854. How choice determined:

1. One plan submitted. If only one of the plans herein set forth and the "present form of government" are submitted, the plan or form of government receiving a majority of the votes cast shall be declared the plan or form selected.

2. More than one plan submitted. If two of the plans herein set forth and the "present form of government" are submitted, the plan or form receiving a majority of first choice votes equal to a majority of all the ballots cast shall be declared the plan or form selected. If no plan or form shall receive such a majority, then the second choice votes received for each plan or form shall be added to its first choice votes, and the plan or form receiving the highest total of first and second choice votes equal to a majority of all ballots cast shall be declared the plan or form selected.

3. How ballots are counted. In counting the ballots, if two plans and the "present form of government" are submitted, the precinct officers shall enter the total number of ballots on a tally-sheet printed therefor. They shall also carefully enter on such sheet the number of first choice and second choice votes for each plan or form of government. Only one vote shall be counted for any one plan or form on any one ballot. If two votes are cast for the same plan or form, the higher choice only shall be counted. If but one choice is voted on a ballot, it shall be counted as a first choice. If more than one cross appears in the same choice column on any ballot, they shall be counted as choices with priority as between each other in the order in which they appear in the choice column. Ballots marked with more than two crosses shall be declared void. A tie between two or more plans or forms shall be decided in favor of the one having the largest number of first choice votes. (1917, c. 136, sub-ch. 16, ss. 13, 14.)

Part 3. Result of Adoption

§ 2855. Plan to continue for two years.—Should any one of the plans of government provided for in this act be adopted, the plan shall continue in force for the period of at least two years after beginning of the term of office of the officials elected thereunder; and no petition proposing a different plan shall be filed during the period of one year and six months after such adoption. (1917, c. 136, sub-ch. 16, s. 15.)

§ 2856. City officers to carry out plan.—It shall be the duty of the mayor, the governing body, and the city clerk and other city officials, in office, and all boards of election and all election officials, when any plan of government set forth in this act has been adopted by the qualified voters of any city or is proposed for adoption, to comply with all requirements of this act relating to such proposed adoption and to the election of the officers specified in such plan, to the end that all things may be done which are necessary for the nomination and election of the officers first to be elected under the provisions of this act and of the plan so adopted. (1917, c. 136, sub-ch. 16, s. 16).

§ 2857. First election of officers.—The first election next succeeding the adoption of any of the plans provided for by this act shall take place on Tuesday after the first Monday in May next succeeding such adoption, and thereafter the city election shall take place biennially on the Tuesday next following the first Monday in May, and the municipal year shall begin and end at ten o'clock in the morning following the day of election. (1917, c. 136, sub-ch. 16, s. 17.)

§ 2858. Time for officers to qualify.—On Wednesday after the first Monday in May following the adoption of any of the plans herein provided for, and biennially thereafter, the mayor elect and the councilors-elect or commissioners shall meet and be sworn to the faithful discharge of their duties. The oath may be administered by the city clerk or by any justice of the peace, and a certificate that such oath has been taken shall be entered on the journal of the city council. At any meeting thereafter the oath may be administered in the presence of the city council to the mayor, or to any councilor or commissioner absent from the meeting on the first Wednesday after the first Monday in May. (1917, c. 136, sub-ch. 16, s. 18.)

Art. 19. Different Forms of Municipal Government

Part 1. Plan "A." Mayor and City Council Elected at Large

§ 2859. How it becomes operative. — The method of city government herein provided for shall be known as Plan A. Upon the adoption of Plan A by a city in the manner prescribed by this act, such plan shall become operative, and its powers of government shall be exercised, as prescribed herein and in article eighteen of this chapter. (1917, c. 136, sub-ch. 16, Part II, Plan A, ss. 1, 2.)

§ 2860. Mayor's election and term of office. — There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from Wednesday after the first Monday in May following his election and until his successor is elected and qualified. (1917, c. 136, sub-ch. 16, Part II, Plan A, s. 3.)

As to election prior to this section, see sec. 2631.

§ 2861. Number and election of city council.—The legislative powers of the city shall be vested in a city council. In cities of five thousand inhabitants and under the city council shall consist of three; in cities of five thousand to ten thousand the city council shall consist of five; in cities of ten thousand to twenty thousand inhabitants, the city council shall consist of seven; and in all over twenty thousand inhabitants the city council shall consist of nine. The councilmen shall be elected at large and from the qualified voters of the city. One of its members shall be elected by the council biennially as mayor pro tem. At the first election held in a city after its adoption of Plan A, the councilors shall be elected to serve for two years from Wednesday after the Monday in May following their election and until their successors are elected and qualified, and at each biennial city election there-

after the councilors elected to fill vacancies caused by the expiration of the terms of councilors shall be elected to serve for two years. The number of inhabitants shall be determined by the last United States government census or estimate. (1917, c. 136, sub-ch. 16, Part II, Plan A, s. 4.)

§ 2862. Salaries of mayor and councilmen. — The mayor shall receive for his services such salary as the city council shall by ordinance determine: Provided, however, that the salary of the mayor shall be within the following limits: In cities of five thousand inhabitants and under, not less than three hundred nor more than one thousand dollars. In cities of five thousand to ten thousand inhabitants, not less than five hundred dollars nor more than fifteen hundred dollars. In cities of ten thousand to twenty-five thousand inhabitants, not less than one thousand nor more than three thousand dollars. In cities of over twenty-five thousand inhabitants, not less than two thousand nor more than thirty-five hundred dollars. The number of inhabitants shall be determined by the last United States government census or estimate. The mayor shall receive no other compensation from the city, and his salary shall not be increased or diminished during the term for which he is elected: Provided, however, that the council first elected under this plan shall fix by ordinance the salary within the above limits of the mayor first elected hereunder and shall six months prior to the time of the expiration of its term fix by ordinance the salary within the above limits of the mayor who shall succeed the first mayor under this plan, and each council shall thereafter fix by ordinance the salary of succeeding mayors, but such ordinance shall not be binding in case another plan shall be adopted during the term of office of such council. The council may by a two-thirds vote of all its members, taken by call of the "yeas" and "nays," establish a salary for its members not exceeding two hundred dollars each year. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted. (1917, c. 136; sub-ch. 16, Part II, Plan A, s. 5.)

§ 2863. Officers elected by city council.—All heads of departments and members of municipal board, as their present terms of office expire, shall be elected by the city council: Provided, that the city council may by two-thirds vote at any time abolish, alter, or establish such departments and boards as it may by ordinance determine. A city attorney shall be elected by the city council, and the council may also elect a city solicitor. (1917, c. 136, sub-ch. 16, Part II. Plan A, s. 5.)

As to election by Commissioners, see sec. 2630.

§ 2864. Power of removal in mayor. — The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board, other than governing board, before the expiration of his term of office. The person so removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing. (1917, c. 136, sub-ch. 16, Part II, Plan A, s. 7.)

§ 2865. Veto power of mayor.—Every order, ordinance, resolution, and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it, he shall sign it; if he disapproves it, he shall return it, with his objections in writing, to the city council, which shall enter the objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution, or vote by a two-thirds vote of all the members of the city council, it shall then be in force; but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution, and vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him. (1917, c. 136, sub-ch. 16, Part II, Plan A, s. 8.)

Part 2. Plan "B." Mayor and Council Elected by Districts and at Large

§ 2866. How it becomes operative. — The method of city government herein provided for shall be known as Plan B. Upon the adoption of Plan B by a city in the manner prescribed by this act, such plan shall become operative, and its powers of government shall be exercised, as is prescribed herein and in article eighteen of this chapter. (1917, c. 136, sub-ch. 16, Part III, Plan B, ss. 1, 2.)

§ 2867. Mayor's election and term of office.— There shall be a mayor elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from Wednesday after first Monday in May following his election and until his successor is elected and qualified, and at each biennial city election thereafter the mayor shall be elected to serve for two years. (1917, c. 136, sub-ch. 16, Part III, Plan B, s. 3.)

As to election prior to this section, see sec. 2631.

§ 2868. City council, election and term of office. —The legislative powers of the city shall be vested in a city council. One of its members shall be elected biennially as its mayor pro tem. In cities over eighty thousand (80,000) population, as shown by the last census, the city council or aldermen shall consist of twelve members, one shall be elected from each ward by and from the qualified voters of that ward. That on or before March 1, 1933, the governing body of each city of over eighty thousand (80,000) inhabitants shall, and it is made mandatory on them to divide the said city into twelve wards as nearly equal as possible as to population. In cities having more than seven wards the city council shall be composed of twelve members, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city. In cities having seven wards or less, the city council shall be composed of eleven members, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remain-

ing members shall be elected by and from the qualified voters of the city. At the first election held in a city after its adoption of Plan B, the councilors elected from each ward shall be elected to serve for two years from Wednesday after first Monday in May following their election and until their successors are elected and qualified; and at each biennial city election thereafter the councilors elected to fill vacancies caused by the expiration of the terms of councilors shall be elected to serve for two years. (1917, c. 136, sub-ch. 16, Part III, Plan B, s. 4; 1933, c. 80, s. 1.)

As to election of Commissioners, see sec. 2626.

Editor's Note.—Public Laws 1933, c. 80, added the third and fourth sentences relating to cities of over 80,000.

§ 2869. Officers elected by city council.—All heads of departments and members of municipal boards, as their terms of office expire, shall be elected by the city council: Provided, that the city council may by two-thirds vote at any time abolish, alter, or establish such departments and boards as it may by ordinance determine. A city attorney shall be elected by the city council, and the council may also elect a city solicitor. (1917, c. 136, sub-ch. 16, Part III, Plan B, s. 5.)

As to election by commissioners, see section 2630.

§ 2870. Power of removal in mayor.—The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board before the expiration of his term of office. The person so removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing. (1917, c. 136, sub-ch. 16, Part III, Plan B, s. 6.)

§ 2871. Salaries of mayor and council. — The mayor shall receive for his services such salary as the city council shall by ordinance determine: Provided, however, that the salary of the mayor shall be within the following limits: In cities of five thousand inhabitants and under, not less than three hundred dollars nor more than one thousand dollars. In cities of five thousand to ten thousand inhabitants, not less than five hundred nor more than fifteen hundred dollars. In cities of ten thousand to twenty-five thousand inhabitants, not less than one thousand nor more than three thousand dollars. In cities of over twenty-five thousand inhabitants, not less than two thousand nor more than five thousand dollars, and it shall be mandatory that the mayor shall give his entire time and attention to the affairs of the city. The number of inhabitants shall be determined by the last United States government census or estimate. The mayor shall receive no other compensation from the city, and his salary shall not be increased or diminished during the term for which he is elected: Provided, however, that the council first elected under this plan shall fix by ordinance the salary within the above limits of the mayor first elected hereunder, and shall six months prior to the time of the expiration of its term fix by ordinance the salary, within the above limits, of the mayor who shall succeed the first mayor under this plan, and each council shall thereafter fix by ordinance the salary of the succeeding mayors; but such ordinance shall not be binding as to succeeding mayors in case another plan shall be adopted during the term of office of such council. The council may by two-thirds vote of all its members, taken by call of the "yeas" and "nays," establish a salary for its members not exceeding one hundred dollars each per year. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted. (1917, c. 136, sub-ch. 16, Part III, Plan B, s. 7; 1933, c. 80, s. 2.)

Editor's Note.—Public Laws 1933, c. 80, increased the salaries in cities of over 25,000 inhabitants from $3,500 to $5,000, and made it mandatory that the mayor should devote his entire time to city affairs.

§ 2871(a). Supervisory power of mayor. — All heads of departments after their election by the city council or aldermen, as provided for by section 2869 of the consolidated statutes, shall be under the direction, control and supervision of the mayor during their tenure of office and until discharged by law. (1933, c. 80, s. 3.)

§ 2871(b). Approval of contracts.—No contract or obligation of whatever nature shall be binding upon the city until first approved by the majority of the city council or aldermen, and approved and counter-signed by the mayor. (1933, c. 80, s. 4.)

§ 2872. Veto power in mayor.—Every order, ordinance, resolution, and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it, he shall sign it; if he disapproves it, he shall return it, with his objections in writing, to the city council, which shall enter his objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution, or vote by a majority vote of all the members of the city council, it shall be in force; but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution, or vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him. (1917, c. 136, sub-ch. 16, Part III, Plan B, s. 8.)

Part 3. Plan "C." Commission Form of Government

§ 2873. How it becomes operative.—The method of city government herein provided for shall be known as Plan C. Upon the adoption of Plan C by any city in the manner prescribed by this act, such plan shall become operative, and its powers of government, shall be exercised, as is prescribed herein and in article eighteen of this chapter. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 1, ss. 1, 2.)

§ 2874. Board of commissioners governing body.—The government of the city and the general management and control of all of its affairs shall be vested in a board of commissioners, which shall be elected and shall exercise its powers in the manner hereinafter set forth; and such board shall have full power and authority to enact laws and ordinances for the government and management of the city and all its depart-

ments. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 1, s. 3.)

Cited in Abbott Realty Co. v. Charlotte, 198 N. C. 564, 567, 152 S. E. 686.

§ 2875. Number, power and duties of commissioners.—The board of commissioners shall consist of three members, one of whom shall be mayor, and all of whom shall be elected by a vote of the people as hereinafter provided. One of the commissioners shall be elected and known as commissioner of public works; one of the commissioners shall be elected and known as commissioner of public safety; and the mayor shall be known as commissioner of administration and finance. And the commissioners are hereby empowered to appoint, elect, employ, suspend, and discharge all other officers and employees necessary for the operation and management of the city government and its various departments and activities, and to make all necessary rules and regulations for their government; and full power and authority is hereby granted the board of commissioners to enact all laws and ordinances for the proper government of the city. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 4.)

Cited in Abbott Realty Co. v. Charlotte, 198 N. C. 564, 567, 152 S. E. 686.

§ 2876. Power and duties of mayor.—The mayor shall be the chief executive officer of the city, and, subject to the supervision of the board of commissioners, shall perform all duties pertaining to such office. He shall do and perform all duties provided or prescribed by law or by the ordinances of the city not expressly delegated to any other person. He shall have general supervision and oversight over the departments and offices of the city government, and shall be the chief representative of the city, and shall report to the board any failure on the part of any of the officers of his or any other department to perform their duties, and shall preside at all meetings of the board of commissioners. He shall sign all contracts on behalf of the city unless otherwise provided by law, ordinance or resolution of the board of commissioners; he shall have charge of and cause to be prepared and published all statements and reports required by law or ordinance or by resolution of the board of commissioners. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 5.)

§ 2877. Commissioner of administration and finance:

1. Purchasing Agent.—The commissioner of administration and finance (who is also mayor) shall be the purchasing agent of the board of commissioners of the city, and all property, supplies, and material of every kind whatsoever shall, upon the order of the board of commissioners, be purchased by him; and when so purchased by him, the bills therefor shall be submitted to and approved by the board of commissioners before warrants are issued therefor. When such warrants are issued, they shall be signed by the commissioners and countersigned by some other person designated by the board of commissioners.

2. Collector of Taxes and Other Dues.—He shall collect all taxes, water rents, license fees, franchise taxes, rentals, and all other moneys which may be due or become due to the city; he shall issue license or permits as provided by law, ordinance, or resolution adopted by the board of commissioners; he shall report the failure on the part of any person, firm or corporation to pay money due the city; and he shall report to the board of commissioners any failure on the part of any person, firm, or corporation to make such reports as are required by law, ordinance, or order of the board of commissioners to be made, and he shall make such recommendations with reference thereto as he may deem proper.

3. Supervision of Accounts.—He shall have charge of and supervision over all accounts and records of the city, and accounts of all officers, agents, and departments required by law or by the board of commissioners to be kept or made He shall regularly, at least once in three months, inspect or superintend inspection of all records or accounts required to be kept in any of the offices or departments of the city, and shall cause proper accounts and records to be kept, and proper reports to be made. He shall recommend to the board methods of modern bookkeeping for all departments, employees, and agents of the city, and shall, acting for the board of commissioners, audit or cause to be audited by an expert accountant, quarterly, the accounts of every officer or employee who does or may receive or disburse money, and shall publish or cause to be published quarterly statements showing the financial condition of the city. He shall examine or cause to be examined all accounts, payrolls, and claims before they are acted on or allowed, unless otherwise provided by law or by order of the board of commissioners.

4. Control of Employees.—He shall have control of all employees of his department, and of all other officers and employees not by law, ordinance, or resolution of the board of commissioners apportioned or assigned to some other department. The assessor, auditor, city clerk, city attorney, and their respective offices or departments, and all employees therein, and all bookkeepers and accountants are apportioned and assigned to the department of administration and finance, and shall be under the direction and supervision of the commissioner thereof.

5. General Duties.—In the absence or inability of any commissioner to act, he shall exercise temporary supervision over the department assigned to such commissioner, subject, however, to the power of the board to substitute some one else temporarily to perform any of such duties. He shall do and perform any and all other services ordered by the board and not herein expressly conferred upon some other department. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 8.)

§ 2878. Commissioner of public works:

1. Construction of Public Works.—The commissioner of public works shall have authority and charge over all the public works not herein expressly given to some other department; the construction, cleansing, sprinkling, and repair of the streets and public places, the erection of buildings for the city, and making and construction of all other improvements, paving, curbing,

sidewalks, bridges, viaducts, and the repair thereof. He shall approve all estimates of the city engineer of the cost of public works, and recommend to the board of commissioners the acceptance of the work done or improvement made, when completed according to contract, and perform such other duties with reference to such other matters as may be required by law, ordinance, or order of the board of commissioners.

2. Control of Streets and Public Places.—The commissioner shall have supervision and control, and it shall be his duty to keep in good condition the streets, cemeteries, and public parks in the city or belonging to the city, subject to the supervision and control of the board of commissioners; he shall have control, management and direction of all public grounds, bridges, viaducts, subways, and buildings not otherwise assigned herein to some other department; he shall have supervision of the enforcement of the provisions of law and the ordinances relating to streets, public squares and places, cemeteries, and the control of the placing of billboards and street waste-paper receptacles.

3. Control over Public Utilities.—He shall have supervision over the public-service utilities not otherwise assigned to some other department, and all persons, firms, or corporations rendering service in the city under any franchise, contracts, or grant made by the city or state, not otherwise assigned to some other department. He shall have control of the location of street-car tracks, telephone and telegraph wires, and other things placed by public-service corporations in, along, under, or over the streets, and shall report to the board of commissioners or city officers, as may be appointed by them to receive his reports, any failure of such person or corporation to render proper service under a franchise granted by the city or state, and shall report any failure on the part of such person, firm, or corporation to observe the requirements or conditions of such franchise, contract, or grant.

4. Control of Water System.—He shall have charge of the watersheds from which the city takes its supply of water, pumping stations, pipe lines, filtering apparatus, and all other things connected with or incident to the proper supply of water for the city; it shall be his duty to act for the city, subject to the control of the board of commissioners, in securing all rights of way and easements connected with and necessary to the supply of water for the city; he shall have supervision and control of all buildings, grounds, and apparatus connected therewith and incident to the furnishing of water for the city; he shall superintend the erection of water tanks and laying of water lines and the operation thereof.

5. Control of Departments.—The department of the city engineer, and all employees therein, the departments of streets, parks, cemeteries, buildings, and all employees in said departments, shall be under the supervision and control of the commissioner of public works; and he shall do and perform all other services ordered by the board, or that may be ordered by the board, not herein expressly conferred upon some other department. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 7.)

§ 2879. Commissioner of public safety:

1. Charge of Police Force.—The commissioner of public safety shall have charge of the police force, subject to the supervision and control of the board of commissioners, and shall have power temporarily to supplant the chief of police and take charge of the department, and shall at all times have power to give directions to the officers and all employees in the police department, and his directions shall be binding upon all such officers and employees, subject only to the control of the board of commissioners. He shall have charge of the police stations, jails, and property and apparatus connected therewith, including city ambulance and patrol wagons used in connection with his department.

2. Control of Fire Department.—He shall have the supervision and control, subject to the control of the board of commissioners, of the fire department, of all firemen, officers, and employees therein or connected therewith, and of all fire stations, property and apparatus connected therewith; he shall have power to supersede temporarily the chief of the fire department, and his orders to such department and all employees therein shall be binding upon the department.

3. Traffic Regulations.—He shall be charged with the duty of enforcing all ordinances and resolutions relating to traffic on the public streets, alleys, and public ways, on and across railway lines and through and over the cemeteryways, public parks, and other public places.

4. Health Regulations.—He shall, subject to the supervisions of the board of commissioners, have control of the laws, ordinances, and orders relating to the public health and sanitation, and all health officers, employees of the city, connected with and under his department; and it shall be the duty of the board of commissioners to pass such ordinances and prescribe such rules and regulations and employ such persons as will be necessary to protect and preserve public health. He shall have control and supervision, through the health officer under his department, over public dumping grounds and dumps and city scavengers; he shall be charged, through his department, with the enforcement of all quarantine regulations, of keeping clean all streets, alleys, and public places, and with suppressing and removing conditions on private property within the city that are a menace to health or public safety. He shall be authorized to enter upon private premises for the purpose of discharging the duties imposed upon him, and he shall cause to be abated all nuisances which may endanger or affect the health of the city, and generally do all things, subject to the control of the board of commissioners, that may be necessary and expedient for the promotion of health and suppression of disease.

5. Sewer and Light Systems.—He shall have control and supervision over the sewer system, and shall have charge and control over the sewer inspector and all other officers and employees connected with the department of lights and sewers. He shall have supervision and control over the lighting system of the city, and the management and direction of the lighting of the streets, alleys, and all other public places and grounds and all other places where city lights

are placed; he shall be charged with the duty of seeing that all persons, firms, and corporations charged with the duty of supplying lights or waterpower perform the obligation imposed upon them by law, ordinance, or order of the board of commissioners.

6. Control over Officers.—He shall have charge of the electrical inspector, plumbing inspector, building inspector, market house and the employees connected therewith and of all apparatus and property used therein; he shall have charge, supervision and direction of all officers and employees of the city connected with and under his department. He shall perform all other services ordered by the board of commissioners, or that may be ordered by the board of commissioners, not herein expressly conferred upon some other department. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 8.)

§ 2880. Recommendations as to purchases.—It shall be the duty of each commissioner to recommend to the city purchasing agent the purchase of goods and the contract for all things necessary to be contracted for in his department, and these recommendations shall be submitted to the board of commissioners for its orders with respect thereto. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 9.)

§ 2881. General powers of board of commissioners.—The board of commissioners shall exercise all legislative powers, functions, and duties conferred upon the city or its officers. It shall make all orders for the doing of work or the making or construction of any improvements, bridges, or buildings. It shall levy all taxes, apportion and appropriate all funds, audit and allow all bills and accounts, payrolls, and claims, and order payment thereof. It shall make all assessments for the cost of street improvements, sidewalks, sewers, and other work, improvements, or repairs which may be specially assessed. It shall make or authorize the making of all contracts, and no contracts shall bind or be obligatory upon the city unless either made by ordinance or resolution adopted by the board of commissioners or reduced to writing and approved by the board or expressly authorized by ordinance or resolution adopted by the board. All contracts and all ordinances and resolutions making contracts or authorizing the making of contracts shall be drawn by the city attorney, or submitted to such officer before the same are made or passed. All heads of departments, agents, and employees are the agents of the board of commissioners only, and all their acts shall be subject to review and to approval or revocation by the board of commissioners. Every head of department, superintendent, agent, employee, or officer shall from time to time, as required by law or ordinance, or when requested by the board of commissioners, or whenever he shall deem necessary for the good of the public service, report to the board of commissioners in writing respecting the business of his department, office, or employment, all matters connected therewith. The board of commissioners may by ordinance or resolution assign to a head of a department, a superintendent, officer, agent, or employee, duties in respect to the business of any other department, office, or employment, and such service shall be rendered without additional compensation. The board of commissioners shall elect and have authority over the city clerk, who shall be the clerk of the board of commissioners. The board of commissioners shall have charge of all matters pertaining to public health, and shall perform all duties belonging thereto. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, ss. 10, 11.)

Cited in Abbott Realty Co. v. Charlotte, 198 N. C. 564, 152 S. E. 686.

§ 2882. Commissioners' service exclusive. — Each member of the board of commissioners shall devote his time and attention to the performance of the public duties to the exclusion of all other occupations, professions, or callings. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 12.)

§ 2883. The initiative and referendum:

1. Ordinances Submitted by Petition.—Any proposed ordinance may be submitted to the board of commissioners by petition signed by electors of the city equal to the number provided herein for recall of any official. The signatures, verifications, authentications, inspections, certification, amendments, and submission of such petition shall be the same as provided for the removal of officials.

2. Duty of the Board.—If the petition accompanying the proposed ordinance be signed by the requisite number of electors, and contains a request that the ordinance be passed, or submitted to a vote of the people if not passed by the board of commissioners, such board shall either:

a. Pass such ordinance without alteration within twenty days after attachment of the clerk's certificate to the accompanying petition, or

b. After the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the board of commissioners shall forthwith submit the question to the qualified voters at a special election called for that purpose, or to a general election occurring within ninety days after the date of the clerk's certificate. If the petition is signed by not less than ten and less than twenty-five per cent of the electors as above defined, then the board of commissioners shall within twenty days pass such ordinance without change or submit the same at the next general city election.

3. Popular Vote Taken.—The ballots used when voting upon such ordinance shall contain these words: "For the Ordinance" (stating the nature of the proposed ordinance) and "Against the Ordinance" (stating the nature of the proposed ordinance.) If the majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people. Any number of proposed ordinances may be voted upon at the same election, but in accordance with the provisions of this section, but there shall not be more than one special election in any period of six months for such purpose.

4. Proposition for Repeal.— The board of

commissioners may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general election; and should any such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall thereby be repealed or amended accordingly.

5. Publication.—Whenever any ordinance or proposition is required by this act to be submitted to the voters of the city at any election, the city shall cause such ordinance or proposition to be published once in a newspaper of general circulation in the city, such publication to be not more than twenty nor less than five days before the submission of such proposition or ordinance to be voted on.

6. When Ordinance Takes Effect.— No ordinance passed by the board of commissioners, unless otherwise expressly provided, except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the board of commissioners, shall go into effect before twenty days from the time of its final passage and publication, as herein provided.

7. Action upon Protest Filed.— If during the twenty days a petition, signed by electors of the city equal to the number prescribed herein to be signed to a petition for the recall of any official, protesting against the passage of such ordinance, be presented to the board of commissioners, the operation of such ordinance shall thereupon be suspended, and it shall be the duty of the board of commissioners to consider such ordinance, and if the same is not entirely repealed, the board of commissioners shall submit to the qualified voters the question of the repeal of such ordinance at an election to be held for that purpose in the manner and under the conditions herein provided for reference to voters of the question of recall of an official. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 3, s. 1.)

§ 2884. Nomination of candidates:

1. Nomination by Primaries.—All candidates to be voted for at all general municipal elections, at which time a mayor, commissioners, or any other elective officers are to be elected under the provisions of this act, shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those nominated in such primary in the manner hereinafter prescribed.

2. How Primaries Held.—The primary election for such nominations shall be held on the second Monday preceding all general municipal elections. The judges and other officers of election appointed for the general municipal election shall, whenever practicable, be the judges of the primary election, and it shall be held at the same place and in the same manner and under the same rules and regulations and subject to the same conditions, and the polls to be opened and closed at the same hours, as are required for the general election.

3. Notice of Candidacy.—Any person desiring to become a candidate for nomination by the primary for the office of mayor or commissioner of either of the other two departments or any other elective office shall, at least ten days prior to the primary election, file with the clerk a statement of such candidacy in substantially the following form:

State of North Carolina—County of .....

I, ..., hereby give notice that I reside at ..... street, city of ..... county of ....., State of North Carolina; that I am a candidate for nomination to the office of (mayor, or commissioner of a particular department, or other office) to be voted upon at the primary election to be held on the ..... Monday of ....., 19.., and I hereby request that my name be printed upon the official ballot for the nomination by such primary election for such office.

(Signed) .....

And he shall at the same time pay to the clerk, to be turned over to the city treasurer, the sum of five dollars.

4. Publication of Names.—Immediately upon the expiration of the time for filing the petition of candidates, the city clerk shall cause to be published for three successive days in a daily newspaper of general circulation in the city, in proper form, the names of the persons as they are to appear upon the primary ballots.

5. Ballots Prepared.—The clerk shall thereupon cause the primary ballots to be printed, authenticated with a facsimile of his signature. Upon the ballot the names of the candidates for mayor, arranged alphabetically, shall be placed, with a square at the left of each name, and immediately below the words, "vote for one." Following the names, likewise arranged in alphabetical order, shall appear the names of the candidates for the commissioners of the two other departments, respectively, with a square at the left of each name, and below the names of such candidates for each of the departments shall appear the words, "vote for one." Like provision shall be made for the names of candidates for each other elective office provided by law. The ballots shall be printed upon plain, substantial white paper, and shall be headed: "Candidates for nomination for mayor and commissioners of two other offices (naming them), of the city of ....., North Carolina, at the primary election," but shall have no party designation or mark whatever.

6. Form of Ballots.—The ballots shall be in substantially the following form:

(Place a cross in the square preceding the names of parties you favor as candidates for the respective positions.)

Official primary ballot. Candidates for nomination for mayor and commissioners and other offices (naming them) of the city of ..... North Carolina, at the primary election.

For Mayor (naming candidates.) (Vote for one.)

For Commissioner of the Department of Public Safety (names of candidates.) (Vote for one.)

For Commissioner of the Department of Public Works (names of candidates.) (Vote for one.)

Official ballot. Attest:

(Signature) ..... City Clerk.

7. Distribution of Ballots. — Having caused

ballots to be printed, the city clerk shall cause to be delivered at each polling place a number of ballots equal to twice the number of votes cast in such polling precinct at the last general municipal election for mayor.

8. Who Entitled to Vote.—The persons who are qualified to vote at the succeeding municipal election shall be qualified to vote at such primary election, and shall be subject to challenge made by any resident of the city, under such rules as may be prescribed by the board of commissioners, and such challenge shall be passed upon by the judge of election and registrars: Provided, however, that the law applicable to challenge at a general municipal election shall be applicable to challenge made at such primary election.

9. Ballots Counted.—Judges of election shall, immediately upon the closing of the polls, count the ballots and ascertain the number of votes cast in such precincts for each of the candidates, and make return thereof to the city clerk, upon blanks to be furnished by the clerk, within six hours of the closing of the polls.

10. Returns Canvassed.—On the day following the primary election the city clerk, under the supervision and direction of the mayor, shall canvass such returns so received from all the polling precincts, and shall make and publish in some newspaper of general circulation in the city, at least once, the result thereof. The canvass by the city clerk chall be publicly made.

11. Who to Be Candidates. — The two candidates receiving the highest number of votes for mayor, and the two candidates receiving the highest number of votes for commissioners for each of the respective departments, and the two candidates receiving the highest number of votes for any other elective office, shall be the candidates, and the only candidates whose names shall be placed upon the ballot for mayor, commissioners, and other elective offices at the next succeeding general municipal election. Provided, however, if any candidate for Mayor receives a majority of all the votes cast for the office of Mayor, or if any candidate for Commissioner receives a majority of all the votes cast for the office of Commissioner of the Department for which such person is a candidate, then only the name of the candidate receiving a majority of all the votes cast for such position shall be placed upon the ballot for Mayor or Commissioner of such Department at the next succeeding general municipal election. (1917, c. 136, sub-c. 16, Part 4, Plan, c. 4; 1929, c. 32, s. 1.)

Editor's Note.—The Act of 1929 added the proviso to subsection 11 of this section.

§ 2885. Recall of officials by the people:

1. Who may be Removed.—The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent.

2. Petition Filed and Verified.—The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the clerk, which petition shall contain a general statement of the ground for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true, as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be.

3. Clerk to Examine and Certify Sufficiency.—Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not the petition is signed by the requisite number of qualified electors, and he shall attach to the petition his certificate, showing the result of such examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of the certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the board of commissioners without delay.

4. Board to Order Primary.—If the petition shall be found to be sufficient, the board of commissioners shall order and fix a date for holding a primary, as provided in cases preceding regular elections, the primary to be held not less than ten days or more than twenty days from the date of the clerk's certificate to the board of commissioners that a sufficient petition is filed. If in the primary election any candidate receives a majority of all the votes cast, he shall be declared to be elected to fill out the remainder of the term of the officer who is sought to be recalled. If there be more than two candidates in such primary and no one received a majority of all the votes cast therein, then there shall be an election held within twenty days from the date of the primary, at which election the two candidates receiving the highest vote in the primary shall be voted for. Candidates' names shall be placed on the ticket in the primary and election held, and the results canvassed, under the same rules, conditions, and regulations as are prescribed for the primaries preceding regular elections. The board of commissioners shall make or cause to be made publication for ten days of notice and all arrangements for holding such election, and the same shall be conducted, returned, and the results thereof declared in all respects as other city elections.

5. Candidate Elected Succeeds to Office. — The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he re-

quests otherwise in writing, the clerk shall place his name on the official ballot without nomination. At such election, if some other person than the incumbent is elected, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor.

6. Vacancy Filled.—In case the party elected should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant, and in that event the unexpired term shall be filled by election by the board, but the commissioner removed shall not be eligible to election by the board, and the person so elected by the board shall be subject to recall as other commissioners. If the incumbent receives a majority of votes in the primary election he shall continue his office.

7. Application of Method of Removal.—Such method of removal shall be cumulative and additional to any other method provided by law. In the event any officer is recalled and any person is elected as his successor, the right of recall of such successor so elected shall be as in case of an officer originally elected. (1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 5.)

Power to Remove Officers.—"In 1 Dillon Mun. Corp. (4th Ed.), sec. 240, it is said: 'The power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations.' This doctrine, though declared before, has been considered settled ever since Lord Mansfield's judgment in the well known case of The King v. Richardson, 1 Burrows, 517. It is there denied that there can be no power of a motion unless given by charter or prescription, and the contrary doctrine is asserted, 'that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.'" State v. Jenkins, 148 N. C. 25, 27, 61 S. E. 608.

§ 2886. Salaries of officers. — The mayor and commissioners shall have offices at the city hall. The compensation of the mayor and commissioners shall be as follows: In cities of five thousand inhabitants and under, the mayor shall receive one thousand dollars and the commissioners each seven hundred and fifty dollars. In cities of five to ten thousand inhabitants the mayor shall receive fifteen hundred dollars and the commissioners each one thousand dollars. In cities of ten to fifteen thousand inhabitants the mayor shall receive two thousand dollars and the commissioners each fifteen hundred dollars. In cities of fifteen to twenty-five thousand inhabitants the mayor shall receive twenty-six hundred dollars and the commissioners each twenty-four hundred dollars. In cities of twenty-five to forty thousand inhabitants the mayor shall receive three thousand five hundred dollars ($3,500.00), and the commissioners each three thousand two hundred and fifty dollars ($3,250.00). In cities over forty thousand inhabitants the mayor shall receive six thousand dollars ($6,000.00), and the commissioners each five thousand dollars ($5,000.00). The number of inhabitants shall be determined by the last United States government census or estimate. Every other officer, agent, employee, and assistant of the city government shall receive such salary or compensation as the board of commissioners shall by ordinance provide, payable in equal monthly installments, unless the board shall order payments to be made at nonpayment intervals. (1917, c. 136, sub-ch. 16, Part IV. Plan C, c. 6; 1923, c. 203; 1927, c. 243.)

Editor's Note.—Prior to the amendment of 1923 the salaries of officers in all cities over 25,000 was the same as is now provided for cities from 25,000 to 40,000 inhabitants. By the amendment of 1923 the salaries of officers in cities over 40,000 inhabitants was raised; the mayor to receive $4,500, and the commissioners each $4,250. By amendment of 1927 salaries of officers in cities having more than 40,000 inhabitants were raised again; the mayor to receive $6,000 and the commissioners each, $5,500.

Part 4. Plan "D." Mayor, City Council, and City Manager

§ 2887. How it becomes operative.—The method of city government herein provided for shall be known as Plan D. Upon the adoption of Plan D by a city in the manner prescribed by article eighteen of this act, such plans shall become operative, and the powers of government of such city shall be exercised, as provided herein and in article eighteen. (1917, c. 136, sub-ch. 16, Part V, Plan D, ss. 1, 2.)

§ 2888. Governing body.—The government of the city and the general management and control of all its affairs shall be vested in a city council, which shall be elected and shall exercise its powers in the manner herein and in article eighteen set forth, except that the city manager shall have the authority hereinafter specified. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 3.)

§ 2889. Number and election of city councils.—The city council shall consist of five members, who shall be elected at large by and from the qualified voters of the city for a term of two years and until their successors are elected and qualified. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 4.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2890. Power and organization of city council.—All the legislative powers of the city shall be vested in the city council. The city council elected as aforesaid shall meet at ten o'clock in the forenoon on Wednesday after the first Monday of May in each year, and the members of the city council whose terms of office then begin shall severally make oath before the city clerk or justice of the peace to perform faithfully the duties of their respective offices. The city council shall thereupon be organized by the choice from its members of a mayor, who shall hold his office during the term for which he was elected a member of the city council, and a mayor pro tem., who shall hold his office during the pleasure of the city council. The organization of the city council shall take place as aforesaid, notwithstanding the absence, death, refusal to serve, or nonelection of one or more of the members: Provided, that at least three of the persons entitled to be members of the city council are present and make oath as aforesaid. Any member entitled to make the aforesaid oath, who was not present at the time fixed therefor, may make oath at any time thereafter. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 5; 1919, c. 270, s. 1.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2891. Meetings regulated.—The city council

shall fix suitable times for its regular meetings. The mayor, the mayor pro tem. of the city council, or any two members thereof, may at any time call a special meeting by causing a written notice, stating the time of holding such meeting and signed by a person or persons calling the same, to be delivered in hand to each member or left at his usual dwelling place at least six hours before the time of such meeting. Meetings of the city council may also be held at any time when all the members of the council are present and consent thereto. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 6.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2892. Quorum and conduct of business.—A majority of the members of the city council shall constitute a quorum. Its meetings shall be public, and the mayor, who shall be the official head of the city, shall, if present, preside and shall have the same power as the other members of the council to vote upon all measures coming before it, but shall have no power of veto. In the absence of the mayor, the mayor pro tem. of the city council shall preside, and in the absence of both, a chairman pro tempore shall be chosen. The city clerk shall be ex officio clerk of the city council, and shall keep records of its proceedings; but in case of his temporary absence, or in case of a vacancy in the office, the city council may elect by ballot a temporary clerk, who shall be sworn to the faithful discharge of his duties, and may act as clerk of the city council until a city clerk is chosen and qualified. All final votes of the city council involving the expenditure of fifty dollars or over shall be by yeas and nays and shall be entered on the records. On request of one member, the vote shall be by yeas and nays, and shall be entered upon the records. Three affirmative votes at least shall be necessary for the passage of any order, ordinance, resolution, or vote. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 7.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2893. Vacancies in council.—Vacancies in the city council shall be filled by the council for the remainder of the unexpired terms. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 8.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2894. Election of mayor.—The mayor shall be elected by the city council from among its own members, and shall hold office during the term for which he has been elected to the council. In case of a vacancy in the office of mayor, the remaining members of the council shall choose from their own number his successor for the unexpired term. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 9; 1919, c. 60, s. 1, c. 270, s. 2.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2895. Salaries of mayor and council.—The mayor shall receive for his services such salary as the city council shall by ordinance determine, not exceeding seven hundred dollars a year, and he shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected. The council may, by a vote of not less than three members, taken by call of the yeas and nays, establish a salary for its members not exceeding two hundred dollars a year for each. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 10.)

Editor's Note.—For acts applicable only to the city of Charlotte, see Public Laws of 1935, chapter 94.

§ 2895(a). Election of treasurer; salary.—The mayor and council may elect from their membership a treasurer by the method outlined above, and in addition to the salary allowed as a member of the council, such treasurer may be paid for his services as treasurer not exceeding three hundred dollars per annum. (1935, c. 180.)

§ 2896. City manager appointed. — The city council shall appoint a city manager, who shall be the administrative head of the city government, and shall be responsible for the administration of all departments. He shall be appointed with regard to merit only, and he need not be a resident of the city when appointed. He shall hold office during the pleasure of the city council, and shall receive such compensation as it shall fix by ordinance. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 11.)

See note under § 2897.

§ 2897. Power and duties of manager.—The city manager shall (1) be the administrative head of the city government; (2) see that within the city the laws of the state and the ordinances, resolutions, and regulations of the council are faithfully executed; (3) attend all meetings of the council, and recommend for adoption such measures as he shall deem expedient; (4) make reports to the council from time to time upon the affairs of the city, keep the council fully advised of the city's financial condition and its future financial needs; (5) appoint and remove all heads of departments, superintendents, and other employees of the city. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 12.)

Conceding that the city manager is an officer in the meaning of the Constitution, Art. XIV, § 7, yet the duties of his office in the cases set forth in this section for the time being can be performed ex officio by one of the council "as mere auxiliary duties." State v. Holmes, 207 N. C. 293, 298, 176 S. E. 746.

§ 2898. Appointment and removal of officers.—Such city officers and employees as the council shall determine are necessary for the proper administration of the city shall be appointed by the city manager, and any such officer or employee may be removed by him; but the city manager shall report every such appointment and removal to the council at the next meeting thereof following any such appointment or removal. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 13.)

§ 2899. Control of officers and employees.—The officers and employees of the city shall perform such duties as may be required of them by the city manager, under general regulations of the city council. (1917, c. 136, sub-ch. 16, Part V, Plan D, s. 14.)

§ 2900. School system controlled.—The public

school system may be placed by the council under the management and control of a board of education of not less than three and not more than seven members, to be appointed by the council under such rules and regulations and with such powers and duties as the council may from time to time prescribe: Provided, however, that if any city adopting this form of government shall have, at the time of such adoption, a board of education acting under powers and regulations given it by a vote of the voters of such city, such board of education shall remain in existence and the powers and duties given it by a vote of the people shall be and remain in full force and effect, except that the appointment of the members of such board of education shall vest in the council: Provided further, that in all cases wherein the said board of education is now elected by the people, such board shall continue to be elected by the electors of the municipality at the same time and in the same manner as the city council is elected, as herein provided: Provided further, that the duties and powers of the city manager, prescribed herein in Plan D, shall not be construed as applying in any manner to the public schools, their financial management and operation. The words "board of education" shall be construed to mean and include board, school commissioners, or other similar educational board. (1919, c. 60, s. 2.)

Editor's Note.—The act of the Legislature, chapter 142, Private Laws of 1929, amending chapter 78, Private Laws of 1923, providing for the election and appointment of the school commissioners of a certain city has the effect of modifying this section and the board of school commissioners should be elected or appointed, in case of vacancy, according to the provisions of chapter 78, Private Laws of 1923, as amended by the act of 1929. Goode v. Brenizer, 198 N. C. 217, 151 S. E. 254.

Part 5. Plans "A" and "D," with Initiative, Referendum and Recall

§ 2901. How submitted, and effect of adoption.—There may be submitted as an addition to Plans A or D "The Initiative and Referendum" and "Recall of Officials by the People," as set forth in Plan C, in which case all references to the board of commissioners shall apply to the mayor and council, and the petition for election and the ballots shall contain the name of the plan as "Plan A, with Initiative, Referendum, and Recall"; "Plan D, with Initiative, Referendum and Recall," and such plans shall be submitted with such additions as provided in this act for the submission of such plans. (1917, c. 136, sub-ch. 16, Part VI.)

Art. 20. Amendment and Repeal of Charter

§ 2902. "Home rule" or "Local self-government."—Within the limitations prescribed by the constitution and now existing or hereafter enacted general laws, any municipality may amend or repeal its charter or any part thereof or adopt a new charter. The proposal to amend, repeal, or adopt may be initiated: (a) By the governing body of such municipality; (b) By any number of the qualified electors of such municipality not less than twenty-five per centum of qualified electors entitled to vote at the next preceding regular municipal election in such municipality. (1917, c. 136, sub-ch. 16, Part VII, s. 1.)

§ 2903. Ordinances to amend or repeal charter: 1. How Adopted. If any amendment, repeal, or adoption be initiated by the governing body of any municipality, the governing body shall at one of its regular meetings, and not less than six days after the introduction thereof, adopt by not less than a two-thirds vote of all its members an ordinance in which shall be recited in full the amendment, repeal, or adoption proposed; such ordinance shall also recite that such amendment, repeal, or adoption is, in the opinion of the governing body, for the best interest of the municipality.

2. Publication Made. It shall direct publication over the name of the mayor or other chief officer of the municipality of a notice in substantially the following form (the blank spaces to be properly filled in):

Notice of Amendment to Charter of

.....

(here insert name of municipality.)

The governing body of (here insert name of municipality) at a regular meeting held on the .... day of ....., 19.., adopted a resolution as follows (here copy verbatim the resolution).

Dated this .... day of ....., 19....

....., Mayor.

3. Submitted to Vote. The governing body shall in its resolution provide that the amendment, repeal, or adoption therein proposed shall not become effective until submitted to and approved by a majority of the votes cast at a regular municipal election or a special election called for that purpose, and such amendment, repeal or adoption shall be submitted to the qualified voters of the city at an election called and held for such purpose, or at a regular municipal election. Thereupon, if such amendment, repeal, or adoption shall have been approved by a majority of the votes cast as hereinbefore provided, such amendment, repeal, or adoption shall become effective.

4. Manner of Publication. The notice required shall be published once a week for four successive weeks in a newspaper of general circulation in the municipality. (1917, c. 136, sub-ch. 16, Part VII, ss. 2, 8.)

§ 2904. Officers to be voted for.—The governing body of the town, if it submits the question of amending the charter of the town at a regular election so as to provide for a different number of members constituting the governing body of the town from that number provided for in the old charter, may also order an election to be held at said regular municipal election for the commissioners or members of the governing body provided for in the proposed amended charter, and at said election commissioners shall also be voted for as provided for under the old charter. If the proposed amendment is adopted, then the commissioners or members of the governing body elected under the proposed amendment shall constitute the governing body of the town for the ensuing term. If the proposed amendment is not adopted, the commissioners or the members of the governing body of said town elected under the provisions of the old charter shall constitute the governing body of the town for the ensuing term. (1919, c. 334.)

§ 2905. Petition for amendment or repeal of charter:

1. Nature of Petition.—If any amendment, repeal, or adoption be initiated by the qualified electors of such municipality the same shall be by a petition signed by not less than twenty-five per centum of the qualified electors entitled to vote at the next preceding regular election in such municipality. The petition shall be appropriately entitled and shall be addressed to the governing board of such municipality, and shall state in exact language the amendment, repeal, or adoption proposed; the petition need not be all on one sheet, and if on one or more than one sheet shall be verified by a freeholder in such municipality who is also a signer of such petition. The petition shall contain a request to the governing body of the municipality to submit to the qualified electors thereof the amendment, repeal, or adoption as therein stated, either at a regular election or at a special election to be called for that purpose. It shall thereupon be the duty of the clerk of such municipality to examine the petition for the purpose of ascertaining whether the same has been signed by the required number of qualified electors of the municipality, and the clerk shall certify to the governing body the result of his investigation.

2. Submitted to Vote.—Upon such certificate, it shall be the duty of the governing body to provide for submission to a vote of the amendment, repeal, or adoption proposed in the petition, either at a regular election or at a special election to be called for that purpose, and if the amendment, repeal, or adoption shall be approved by a majority of the votes cast, as hereinbefore provided, such amendment, repeal, or adoption shall become effective. (1917, c. 136, sub-ch. 16, Part VII, s. 3.)

§ 2906. Nature of verification.—Whenever verification of any petition is provided or required to be made by this article, such verification shall consist of a written oath signed by the person making the same, which shall state in substance that the persons whose names appear signed to such petition were so signed by such persons respectively in the presence of the person making oath, and that, to the best of the knowledge and belief of the person making the oath, each of such persons is a qualified elector entitled to vote at the next preceding regular election in the municipality. (1917, c. 136, sub-ch. 16, Part VII, s. 4.)

§ 2907. Laws controlling elections.—Whenever any election, either regular or special, is provided or required to be held under this article, such election shall be held under such laws, either general or special, as are at the time of the holding of such election in force and effect with reference to such municipality. (1917, c. 136, sub-ch. 16, Part VII, s. 5.)

§ 2908. Several propositions voted on.—Any number of amendments or repeals may be initiated by one and the same resolution or petition, and whenever under this article an election is provided or required to be held, any number of such amendments or repeals may be submitted and voted upon at one and the same election. (1917, c. 136, sub-ch. 16, Part VII, s. 6.)

§ 2909. Limitations as to holding special elections.—No special election provided or required by this article shall, except as otherwise provided in this article, be held within two months of the time of holding any regular municipal election in any municipality; not more than two special elections may be held under this article in any municipality within any one year. The elections, subject to the other provisions of this section, shall be held within three months from the date of the filing of the petition. Any election heretofore called within three months from the date of filing any petition under this section and related sections is hereby validated. (1917, c. 136, sub-ch. 16, Part VII, s. 7; 1921, c. 56.)

Editor's Note.—By amendment of 1921 the last sentence to this section was added, and the words "within three months" in the next to the last sentence were substituted for "not less than three months."

§ 2910. Adoption or change certified and recorded.—Upon the amendment, repeal, or adoption of a charter of any municipality as provided in this article, the governing body shall cause to be certified to the secretary of the municipal board of control a copy of such amendment, repeal, or adoption duly certified by its clerk and under the seal of such municipality; the copy so certified shall be recorded in the office of the secretary of state, and a copy shall be so certified by the secretary of state to the clerk of the superior court of the county in which such municipality is situated and recorded in the office of the clerk; the record therein provided for, either in the office of the secretary of state or in the office of the clerk of the superior court, shall be evidence in all the courts of this state. (1917, c. 136, sub-ch. 16, Part VII, s. 9.)

§ 2911. Adoption or change ratified by vote.—Whenever any amendment, repeal, or adoption of a charter of any municipality is submitted under the provisions of this article to the qualified electors of such municipality, such amendment, repeal, or adoption shall not become effective unless and until the same shall have been approved by a majority of the votes cast at the election and the result of the election thereon canvassed, determined, and declared as provided by law. (1917, c. 136, sub-ch. 16, Part VII, s. 10.)

§ 2912. Plan not changed for two years.—When any municipality shall, as provided in this act, adopt any one of the plans as set forth in this act, no amendment, repeal, or adoption of such plans shall be made until and after the expiration of two years from the date of the adoption of such plan. (1917, c. 136, sub-ch. 16, Part VII, s. 3.)

Art. 21. Elections Regulated

§ 2913. Laws governing elections.—All elections called and held by any city for any purpose under the provisions of this act shall be held under, governed and controlled by the laws in force at the time of such election governing and controlling regular and special municipal elections of such city in so far as they are applicable and not inconsistent with the provisions of this act,

and where not otherwise provided by law. (1917, c. 136, sub-ch. 16, Part VIII, s. 1.)

§ 2914. Publication of notice.—Except as otherwise provided in this act, notice of every special election held in any city shall be published in a newspaper of general circulation in such city at least once a week for four weeks preceding the date of such election, and posted for thirty days at the door of the building in which the governing body holds its meetings and three other public places in the city. Such notice shall set forth the date and hours of such elections, the proposition to be voted on thereat, the location of the polling places, and, in the event a new registration is ordered for such election, shall so state and set forth the dates of opening and closing the registration books and the names and addresses of the several registrars in charge thereof. (1917, c. 136, sub-ch. 16, Part VIII, s. 1.)

§ 2915. Time for holding elections.—If any city shall adopt any one of the plans of government provided for in this act during the year nineteen hundred and seventeen, the election of city officers under such plan shall be held on Tuesday after the first Monday in May following the adoption of such plan, and the regular municipal elections of such city shall take place biennially thereafter. (1917, c. 136, sub-ch. 16, Part VIII, s. 1.)

Art. 22. General Effect of Act

§ 2916. Not to repeal Municipal Finance Act.—Nothing in this act contained shall be construed to amend or repeal any provisions of the "Municipal Finance Act," and wherever this act and the "Municipal Finance Act" conflict, the "Municipal Finance Act" shall control. (1917, c. 136, sub-ch. 16, Part VII, s. 4.)

§ 2917. Effect of unconstitutionality in part.—If any part of this act shall be declared unconstitutional, it shall not affect other parts of this act. (1917, c. 136, sub-ch. 17.)

SUBCHAPTER III. MUNICIPAL FINANCE ACT

Art. 23. General Provisions

§ 2918. Short title.—This law may be cited as "The Municipal Finance Act, 1921." (1917, c. 138, s. 1; 1919, c. 178, s. 3(1); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment Ex. Sess. 1921 the word "law" was substituted for "act."

The Municipal Finance Act was amended and re-enacted by Public Laws 1921. This amended and re-enacted law was declared unconstitutional by Allen v. Raleigh, 181 N. C. 453, 107 S. E. 463, so the amendment and re-enactments of Ex. Sess. 1921 was had to make the amendments that were attempted to be made by Public Laws 1921. See Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187 as touching on the constitutionality and prior changes in the Act.

As to application of sinking funds to purchase of bonds, see §§ 1334(82), 1334(85). As to accelerating maturity of bonds, see § 1334(11a). As to Local Government Act, see §§ 2492(1)-2492(51). As to validation of municipal bonds, etc., see §§ 2492(52)-2492(61).

Applicability to School Districts.—This Act does not deal with school districts. It, therefore, does not repeal the Acts of 1915, ch. 722. Waters v. Com's, 186 N. C. 719, 120 S. E. 450.

§ 2919. Meaning of terms.—In this law, unless the context otherwise requires the expressions:

"Bond ordinance" means an ordinance authorizing the issuance of bonds of a municipality;

"Clerk" means the person occupying the position of clerk or secretary of a municipality;

"Financial officer" means the chief financial officer of a municipality;

"Funding bonds" means bonds issued to pay or extend the time of payment of debts not evidenced by bonds.

"Governing body" means the board or body in which the general legislative powers of a municipality are vested;

"Local improvement" means any improvements or property the cost of which has been or is to be specially assessed in whole or in part;

"Municipality" means and includes any city, town, or incorporated village in this state, now or hereafter incorporated;

"Necessary expenses" means the necessary expenses referred to in section seven of article seven of the constitution of North Carolina;

"Publication" includes posting in cases where posting is authorized by this act as a substitute for publication in a newspaper;

"Refunding bonds" means bonds issued to pay or extend the time of payment of debts evidenced by bonds.

"Special assessments" means special assessments for local improvements, levied on abutting property or other property specially benefited, or on street railroad companies or other companies or individuals having tracks in streets or highways, and "specially assessed" has a corresponding meaning. (1917, c. 138, s. 2; 1919, c. 178, s. 3(2); 1919, c. 285, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1931, c. 60, s. 46; 1933, c. 259, s. 1.)

Editor's Note.—By amendment, Ex. Sess. 1921 the provision as to the determination of who is chief financial officer being left to the determination of governing body was omitted by the new Law.

Prior to Public Laws 1933, c. 259, this section, in the definition of "funding bonds" and "refunding bonds" limited such bonds to those issued for the payment of debts "incurred before July first, one thousand nine hundred and thirty-one." The quoted clause was deleted by the amendment.

§ 2920. Publication of ordinance and notices.—An ordinance or notice required by this act to be published by a municipality shall be published in a newspaper published in the municipality, or, if no newspaper is published therein, in a newspaper published in the county and circulating in the municipality, or, if there is no such newspaper, the ordinance or notice shall be posted at the door of the building in which the governing body usually holds its meetings and at three other public places in the municipality. (1917, c. 138, s. 3; 1919, c. 178, s. 3 (3); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—Sections 2920 to 2928 were re-enacted without charge by the Public Laws Ex. Sess. 1921.

§ 2921. Application and construction of law.—This law shall apply to all municipalities. Every provision of this law shall be construed as being qualified by constitutional provisions, whenever such construction shall be necessary in order to sustain the constitutionality of any portion of this law. If any portion of this law shall be declared unconstitutional, the remainder shall stand, and the portion declared unconstitutional

shall be exscinded. (1917, c. 138, ss. 4, 5; 1919, c. 178, s. 3 (4), (5); Ex. Sess. 1921, c. 106, s. 1.)

Art. 24. Budget and Appropriations

§ 2922. The fiscal year.—The fiscal year of every municipality shall begin either on the first day of July, one thousand nine hundred thirty-one, and on the first day of July in each year thereafter. In any municipalities whose fiscal year begins on the first day of June the present fiscal year shall be a year of thirteen months ending on the last day of June, one thousand nine hundred thirty-one. In order that the additional expenses of such municipality by reason of the added month may be met without unduly burdening taxable property, any such municipality shall have the power to borrow money and issue negotiable notes therefor in such sum as may be approved by the Commission and in the manner and under the limitations provided by the Municipal Finance Act, except that any such notes and the renewals thereof may mature at any time prior to July first, one thousand nine hundred thirty-four, but it shall be the duty of any municipality taking advantage of this provision to include in the budget of each of the fiscal years beginning in one thousand nine hundred thirty-one, one thousand nine hundred thirty-two and one thousand nine hundred thirty-three at least one-third of the face amount of such notes. (1917, c. 138, s. 6; 1919, c. 178, s. 3 (6); Ex. Sess. 1921, c. 106, s. 1; 1913, c. 60, s. 66.)

Editor's Note.—Prior to the 1931 amendment the fiscal year of a municipality began either on the first day of June or September as the governing body might determine.

§ 2923-2931. Repealed by Public Laws 1931, c. 60, s. 72.

§ 2931(a). Special revolving fund for municipalities to supplant borrowing money on anticipations.—In order to avoid the necessity of borrowing money in anticipation of the receipt of taxes and revenues or the proceeds of the sale of bonds, a municipality may by ordinance create a special revolving fund and with the consent of the Commission, provide for raising the same to be used in anticipation of the receipt of such moneys and to be replenished by means of such moneys when received. Withdrawals of money from said fund shall be made only for the purposes and within the amounts and for the periods and upon the conditions stated in sections two thousand nine hundred and thirty-two, two thousand nine hundred and thirty-three and/or two thousand nine hundred and thirty-four in respect to the borrowing of the money. Such withdrawals shall not be made unless approved by the Local Government Commission in the same manner as loans made under said sections. No ordinance creating such a fund shall be repealed or amended so as to divert or reduce the amount of the fund, without the approval of said Commission as to necessity or expediency. (1931, c. 60, s. 47.)

Art. 25. Temporary Loans

§ 2932. Money borrowed to meet appropriations.—A municipality may borrow money for the purpose of meeting appropriations made for the current fiscal year, in anticipation of the collection of the taxes and revenues of such fiscal year, and within the amount of such appropriations. Such loans shall be paid not later than the tenth day of October in the next succeeding fiscal year. Provision shall be made in the annual budget and annual appropriation ordinance of each fiscal year for the payment of all unpaid loans predicated upon the taxes and revenues of the previous fiscal year. (1917, c. 138, s. 12; 1919, c. 178, s. 3 (12); Ex. Sess. 1921, c. 106, s. 1.)

§ 2933. Money borrowed to pay judgments or interest.—For the purpose of paying a judgment recovered against a municipality, or paying the principal or interest of bonds due or to become due within two months and not otherwise adequately provided for, a municipality may borrow money in anticipation of the receipt of either the revenues of the fiscal year in which the money is borrowed or the revenues of the next succeeding fiscal year. Such loans shall be paid not later than the end of such next succeeding fiscal year. In the event, however, that a judgment or judgments against a municipality amount to more than one cent per hundred dollars of the assessed valuation of taxable property of the municipality for the year in which taxes were last levied before the recovery of the judgment, a loan to pay the judgment may be made payable in not more than five substantially equal annual installments, beginning within one year after the loan is made. For the purpose of paying or renewing notes evidencing indebtedness incurred before July first, one thousand nine hundred thirty-three, and authorized by this act, as amended, to be funded, any municipality may issue new notes from time to time until such indebtedness is paid out of revenues or funded into bonds. Such new notes may be made payable at any time or times not later than five years after the first day of July, one thousand nine hundred thirty-three, notwithstanding anything to the contrary in this section. (1919, c. 178, s. 3 (12); Ex. Sess. 1921, c. 106, s. 1; 1931, c. 60, s. 64; 1933, c. 259.)

See Editor's Note to § 1334(8).

Editor's Note.—By amendment of Ex. Sess. 1921 this section was made applicable to a judgment or judgments, and bonds, where before the amendment it provided for "a judgment" and debts.

The Act of 1931 added the last two sentences to this section.

Public Laws 1933, c. 259, changed the time mentioned in this section from January 1, 1931, to July 1, 1933.

City May Anticipate Collection of Taxes.—Where the levy of the taxes had been approved by the qualified voters of the city, the city, under this section, has the authority to borrow money to pay judgments in anticipation of the collection of the taxes validly levied for that purpose. Hammond v. Charlotte, 206 N. C. 604, 175 S. E. 148.

§ 2934. Money borrowed in anticipation of bond sales.—At any time after a bond ordinance has taken effect as provided in article twenty-six herein, a municipality may borrow money for the purposes for which the bonds are to be issued, in anticipation of the receipt of the proceeds of the sale of the bonds, and within the maximum authorized amount of the bond issue. Such loans shall be paid not later than three years after the time of taking effect of the ordinance authorizing the bonds upon which they are predicated. The governing body may, in its discretion, retire any such loans by means of current revenues, special assessments, or other funds, in lieu of re-

tiring them by means of bonds: Provided, however, that the governing body, before the actual retirement of any such loan by any means other than the issuance of bonds, under the bond ordinance upon which such loan is predicated, shall amend or repeal such ordinance so as to reduce the authorized amount of the bond issue by the amount of the loan to be so retired. Such an amendatory or repealing ordinance shall take effect upon its passage and need not be published. (1917, c. 138, s. 13; 1919, c. 178, s. 3 (13); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921.

§ 2935. Notes issued for temporary loans. —Negotiable notes shall be issued for all moneys borrowed under the last three sections. Such notes may be renewed from time to time and money may be borrowed upon notes from time to time for the payment for any indebtedness evidenced thereby, but all such notes shall mature within the time limited by said sections for the payment of the original loan. No money shall be borrowed under said sections at a rate of interest exceeding the maximum rate permitted by law. The said notes may be disposed of by public or private negotiations. The issuance of such notes shall be authorized by resolution of the governing body, which shall fix the actual or maximum face amount of the notes and the actual or maximum rate of interest to be paid upon the amount borrowed. The governing body may delegate to any officer the power to fix said face amount, and the rate of interest within the limitations prescribed by said resolution, and the power to dispose of said notes. All such notes shall be executed in the manner provided in section two thousand nine hundred and fifty-four of this subchapter in relation to bonds. They shall be submitted to and approved by the attorney for the municipality before they are issued, and his written approval indorsed on the notes. (1917, c. 138, s. 14; 1919, c. 178, s. 3 (14); Ex. Sess. 1921, c. 106, s. 1; 1931, c. 293.)

Editor's Note.—By the amendment of Ex. Sess. 1921 negotiable notes were provided for instead of "notes" as was formerly provided, and provision was made for maximum rate of interest instead of six per cent as was formerly specified. Provision was also made for private or public negotiation, and the power to fix the face amount was vested in "any officer" appointed by the governing body instead of as was formerly provided "the financial officer or chief executive officer."

The Act of 1931 substituted "three" for the word two formerly appearing in the third line of this section.

Art. 26. Permanent Financing

§ 2936. Not applied to temporary loans.—The provisions of this article shall not apply to temporary loans made under article twenty-five, unless otherwise provided in said article. (1917, c. 138, s. 15; 1919, c. 178, s. 3 (15); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By the amendment of Ex. Sess. 1921 the application of this article was qualified by adding the last six words.

In General.—Prior to the decision of the Supreme Court of the State in Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825, December 18, 1903, it was held that the construction and maintenance of a system of light, water and sewerage was not within the meaning of the words "necessary expenses," as used in the State Constitution, Art. 7, sec. 7. In that case the court, in an opinion written by Justice Montgomery, expressly overruled the earlier cases. Mayo v. Commissioners, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163. This decision has been uniformly, and in a large number of cases cited in the Annotated Edition of the 134th Volume, approved and has been and is now the fixed, accepted law of the State. Connor & Cheshire, Anno. Const. 319. In accordance with these decisions the Legislature enacted the Municipal Finance Act; Consol. Statutes, subc. 3, sec. 2936. Hill v. Elizabeth City, 291 Fed. 194, 210.

§ 2937. For what purpose bonds may be issued. —A municipality may issue its negotiable bonds for any one or more of the following purposes:

1. For any purpose or purposes for which it may raise or appropriate money, except for current expenses.

2. To fund or refund a debt of the municipality if such debt be payable at the time of the passage of the ordinance authorizing bonds to fund or refund such debt or be payable within one year thereafter, or if such debt, although payable more than one year thereafter, is to be cancelled prior to its maturity and simultaneously with the issuance of the bonds to fund or refund such debt. The word "debt" as used in this subsection two includes all valid or enforceable debts of a municipality, whether incurred for current expense or for any purpose. It includes debts evidenced by bonds, bond anticipation notes, revenue anticipation notes, judgments and unpaid interest on said debts accrued to the date of the bonds issued. Bond anticipation notes evidencing debts incurred before July first, one thousand nine hundred thirty-three, may, at the option of the governing body, be retired either by means of funding bonds issued under this section or by means of bonds in anticipation of the sale of which the notes were issued. It also includes debts assumed by a municipality as well as debts created by a municipality. Furthermore, the said word "debt" as used in this section includes the principal of and accrued interest on funding bonds, refunding bonds, and other evidences of indebtedness heretofore or hereafter issued. The above enumeration of particular kinds of debt shall not be construed as limiting the word "debt" as used in this section, the intention being that said word shall include debts of every kind and character. Bonds hereafter issued to fund or refund interest may, at the option of the governing body, be named or designated as certificates of indebtedness. No interest accruing after the year one thousand nine hundred thirty-eight shall be funded or refunded. (1917, c. 138, s. 16; 1919, c. 178, s. 3 (16); Ex. Sess. 1921, c. 106, s. 1; 1931, c. 60, s. 48; 1933, c, 259, s. 1; 1935, c. 302, s. 1.)

Editor's Note.—By amendment of Ex. Sess. 1921 "negotiable bonds" were specified instead of "bonds," and the date prior to which they were incurred was changed from March seventh, 1917 to December fifth, 1921. The Act of 1931 changed the date to July first, 1931. A provision in regard to refunding serial bonds was added by the Act of 1921.

Public Laws 1933, c. 259, omitted the limitation that the debt must have been incurred before July 1, 1931, and inserted the third and fourth sentences of subsection 2.

The amendment of 1935 substitutes the word "incurred" for the word "issued" in the second sentence of subsection 2. It also added the last four sentences of that subsection beginning with the words "Furthermore, the said word debt," etc.

Power to Hold Election Implied.—This section impliedly confers the power to hold the necessary election. Hailey v. Winston-Salem, 196 N. C. 17, 21, 144 S. E. 377.

Bonds Issued by School Trustees.—The board of trustees of a city school is an official board of the city and under this section bonds may be issued to pay the indebtedness

they have incurred in operating the school. Jones v. New Bern, 184 N. C. 131, 113 S. E. 663.

Refunding Bond.—Under the provisions of this and the following section an ordinance authorizing the issuance of refunding bonds need not be submitted to the voters. Bolich v. Winston-Salem, 202 N. C. 786, 164 S. E. 361.

Issuance of Bonds Pursuant to Section Not Enjoined. — The authority to issue valid bonds for the erection and maintenance of a public hospital with the approval of its voters is conferred on a municipality by this section and § 2796, and where the other statutes relevant have been duly followed, the bonds so issued are a valid obligation of the town issuing them, and their issuance will not be enjoined by the courts. Burleson v. Spruce Pine Board of Aldermen, 200 N. C. 30, 156 S. E. 241.

§ 2938. Ordinance for bond issue:

1. Ordinance Required.—All bonds of a municipality shall be authorized by an ordinance passed by the governing body.

2. What Ordinance Must Show.—The ordinance shall state:

a. In brief and general terms the purpose for which the bonds are to be issued, including, in case of funding or refunding bonds a brief description of the indebtedness to be funded or refunded sufficient to identify such indebtedness.

b. The maximum aggregate principal amount of the bonds;

c. That a tax sufficient to pay the principal and interest of the bonds shall be annually levied and collected: Provided, in lieu of the foregoing and in the case of funding or refunding bonds, such statement with respect to an annual tax may, in the discretion of the governing body, be altered or omitted;

d. That a statement of the debt of the municipality has been filed with the clerk and is open to public inspection.

e. One of the following provisions:

(1) If the bonds are funding or refunding bonds or for local improvements of which at least one-fourth of the cost, exclusive of the cost of paving at street intersections, has been or is to be specially assessed, that the ordinance shall take effect upon its passage, and shall not be submitted to the voters; or

(2) If the bonds are for a purpose other than the payment of necessary expenses, or if the governing body, although not required to obtain the assent of the voters before issuing the bonds, deems it advisable to obtain such assent, that the ordinance shall take effect when approved by the voters of the municipality at an election as provided in this law; or

(3) In any other case, that the ordinance shall take effect thirty days after its first publication (or posting) unless in the meantime a petition for its submission to the voters is filed under this law, and that in such event it shall take effect when approved by the voters of the municipality at an election as provided in this law.

3. When the Ordinance Takes Effect.— A bond ordinance shall take effect at the time and upon the conditions indicated therein. If the ordinance provides that it shall take effect upon its passage no vote of the people shall be necessary for the issuance of the bonds.

4. Need not Specify Location of Improvement. —In stating the purpose of a bond issue, a bond ordinance need not specify the location of any improvement or property, or the kind of pavement or other material to be used in the construction or reconstruction of streets, highways, sidewalks, curbs, or gutters, or the kind of construction or reconstruction to be adopted for any building, for which the bonds are to be issued. A description in a bond ordinance of a property or improvement substantially is the language employed in sections two thousand nine hundred and forty-two of this subchapter to describe such a property or improvement, shall be a sufficiently definite statement of the purpose for which the bonds authorized by the ordinance are to be issued.

5. Application of Other Laws.—No restriction, limitation or provision contained in any special, private or public-local law relating to the issuance of bonds, notes or other obligations of a municipality shall apply to bonds or notes issued under this act for the purpose of refunding, funding or renewing indebtedness, and no vote of the people shall be required for the issuance of bonds or notes for said purpose, unless required by the constitution of this state. The special, private and public-local laws here referred to include all such laws enacted prior to the expiration of the regular session of the general assembly in the year one thousand nine hundred thirty-five. Nothing herein shall be construed, however, as prohibiting a municipality from issuing bonds or notes under any special private or public-local law applicable to such municipality, it being intended that this law shall be cumulative and additional authority for the issuance of bonds and notes. (1917, c. 138, s. 17; 1919, c. 178, s. 3 (17); 1919, c. 285, s. 2; Ex. Sess. 1921, c. 106, s. 1; 1931, c. 60, s. 49; 1933, c. 259, s. 1; 1935, c 302, s. 1.)

As to election, see section 2948.

Editor's Note.—By the amendment Ex. Sess. 1921 two subdivisions under subsection 2 were omitted. They provided for the statement of taxable valuations for the past three fiscal years, and the amount of the municipal debt. The provision for funding or refunding debts incurred prior to March seventh, 1917 was also changed by the provision for funding and refunding being made applicable to bonds for local improvement.

Public Laws of 1933, c. 259, added to subdivision 2, a, the requirement for a brief description of indebtedness for funding or refunding bonds. It also added the proviso to 2, c, relating to funding and refunding bonds. And it omitted the limitation formerly occurring in subdivision 5, that the indebtedness must have been incurred before July 1, 1931.

The amendment of 1935 added the last two sentences of the section.

What Ordinance Must Show.—It is not required by the various statutes on the subject that a bond ordinance of a municipality set forth in express terms the proportion of the cost of the proposed improvements which has been, or is to be, assessed against the property of each owner abutting upon the streets to be improved or the terms and method of making the payment, if the procedure follow the direction of the statutes relating to the subject. Leak v. Wadesboro, 186 N. C. 683, 121 S. E. 12.

Subsequent Ratification of Bond Issue.—If a school board borrows money and the debt is taken up by an election this ratification renders unimportant the question of whether or not the money was borrowed for necessary purposes. Jones v. New Bern, 184 N. C. 131, 113 S. E. 663.

Cited in Adcock v. Fuquay Springs, 194 N. C. 423, 425, 140 S. E. 24.

§ 2939. Ordinance not to include unrelated purposes.—Bonds for two or more unrelated purposes, not of the same general class or character, shall not be authorized by the same ordinance: Provided, however, that bonds for two or more improvements or properties mentioned together in any one clause of subsection four of section two thousand nine hundred and forty-two of this subchapter may be treated as being but for one purpose, and may be authorized by the same bond

ordinance. After two or more bond ordinances have been passed, the governing body may, in its discretion, direct all or any of the bonds authorized by the ordinances to be actually issued as one consolidated bond issue. Separate issues of funding and/or refunding bonds may be made under authority of the same bond ordinance for the retirement of two or more different debts or classes of debts. (1919, c. 178, s. 3 (17); 1919, c. 285, s. 3; Ex. Sess. 1921, c. 106, s. 1; 1933, c. 259, s. 1.)

Editor's Note.—By the amendment of Ex. Sess. 1921 the reference to subsection 4 of section 2942 refers to the same subject matter as the reference to subsection 3 in the prior law, the change of reference is brought about by change in arrangement of the later act. A provision in next to the last sentence which required the bond ordinance to "have taken effect," before a consolidated bond issue could be had, was omitted.

Public Laws 1933, c. 259, added the last sentence to this section.

§ 2940. Bonds may be divided into two classes and separate issues. (Obsolete.)

§ 2941. Ordinance and bond issue; when petition required.—In cases where a petition of property owners is required by law for the making of local improvements, a bond ordinance authorizing bonds for such local improvements may be passed before any such petition is made, but no bonds for the local improvements in respect of which such petitions are required shall be issued under the ordinance, nor shall any temporary loan be contracted in anticipation of the issuance of such bonds, unless and until such petitions are made, and then only up to the actual or estimated amount of the cost of the work petitioned for. The determination of the governing body as to the actual or estimated cost of work so petitioned for shall be conclusive in any action involving the validity of bonds or notes or other indebtedness. The bond ordinance may be made to take effect upon its passage, notwithstanding that the necessary petitions for the local improvements have not been filed: Provided, that it appears upon the face of the ordinance that one-fourth or some greater proportion of the cost, exclusive of the cost of work at street intersections, has been or is to be assessed. (1919, c. 178, s. 3 (17); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921. As to validation of bonds or notes notwithstanding failure to follow requirements of this section, see § 2492(54).

Bonds for Street Improvement.—The borrowing of money by an incorporated city or town for street paving or improvements is for a necessary expense, and does not fall within the provisions of Article VII, section 7, of the State Constitution requiring that in order for the municipality to pledge its faith or lend its credit, the proposition must have the approval of a majority of the qualified voters. Brown v. Hillsboro, 185 N. C. 368, 117 S. E. 41.

§ 2942. Determining periods for bonds to run: 1. How Periods Estimated.—Either in the bond ordinance or in a resolution passed after the bond ordinance but before any bonds are issued thereunder, the governing body shall, within the limits prescribed by subsection four of this section, determine and declare:

a. The probable period of usefulness of the improvements or properties for which the bonds are to be issued; or

b. If the bonds are to be funding or refunding bonds, either the shortest period in which the debt to be funded or refunded can be finally paid without making it unduly burdensome upon the taxpayers of the municipality, or, at the option of the governing body, the probable unexpired period of usefulness of the improvement or property for which the debt was incurred.

2. Average of Periods Determined.—In the case of a consolidated bond issue comprising bonds authorized by different ordinances for different purposes, and in the case of a bond issue authorized by but one ordinance for several related purposes in respect of which several different periods are determined as aforesaid, the governing body shall also determine the average of the different periods so determined, taking into consideration the amount of bonds to be issued on account of each purpose or item in respect of which a period is determined.

The period required to be determined as aforesaid shall be computed from a date not more than one year after the time of passage of any bond ordinance authorizing the issuance of the bonds. The determination of any such period by the governing body shall be conclusive.

3. Maturity of Bonds.—The bonds must mature within the period determined as aforesaid, or, if several different periods are so determined, then within said average period.

4. Periods of Usefulness.—In determining, for the purpose of this section, the probable period of the usefulness of an improvement or property, the governing body shall not deem said period to exceed the following periods for the following improvements and properties, respectively, viz.:

a. Sewer systems (either sanitary or surface drainage), forty years.

b. Water supply systems, or combined water and electric light systems, or combined water, electric light, and power systems, forty years.

c. Gas systems, thirty years.

d. Electric light and power systems, separate or combined, thirty years.

e. Plants for the incineration or disposal of ashes, or garbage, or refuse (other than sewage), twenty years.

f. Public parks (including or not including a playground, as a part thereof, and any buildings thereon at the time of acquisition thereof, or to be erected thereon, with the proceeds of the bonds issued for such public parks), fifty years.

g. Playgrounds, fifty years.

h. Buildings for purposes not stated in this section, if they are:

(1) Of fireproof construction, that is, a building the walls of which are constructed of brick, stone, iron, or other hard, incombustible materials, and in which there are no wood beams or lintels, and in which the floors, roofs, stair halls, and public halls are built entirely of brick, stone, iron, or other hard, incombustible materials, and in which no woodwork or other inflammable materials are used in any of the petitions, floorings, or ceiling (but the building shall be deemed to be of fireproof construction notwithstanding that elsewhere than in the stair halls and entrance halls there is a wooden flooring on top of the fireproof floor, and that wooden sleepers are used, and that it contains wooden handrails and treads, made of hardwood, not less than two inches thick), forty years.

(2) Of nonfireproof construction, that is, a build-

ing the outer walls of which are constructed of brick, stone, iron, or other hard, incombustible materials, but which in any other respect differs from a fireproof building as defined in this section, thirty years.

(3) Of other construction, twenty years.

i. Bridges and culverts (including retaining walls and approaches), forty years, unless constructed of wood, and in that case, ten years.

j. Lands for purposes not stated in this section, fifty years.

k. Constructing or reconstructing the surface of roads, streets, or highways, whether including or not including contemporaneous constructing or reconstructing of sidewalks, curbs, gutters, or drains, and whether including or not including grading, if such surface:

(1) Is constructed of sand and gravel, five years;

(2) Is of waterbound macadam or penetration process, ten years;

(3) Is of bricks, blocks, sheet asphalt, bitulithic, or bituminous concrete, laid on a solid foundation, or is of concrete, twenty years.

l. Land for roads, streets, highways, or sidewalks, or grading, or constructing or reconstructing culverts, or retaining walls, or surface, or subsurface drains, fifty years.

m. Constructing sidewalks, curbs, or gutters of brick, stone, concrete, or other material of similar lasting character, twenty years.

n. Installing fire or police alarms, telegraph or telephone service, or other system of communication for municipal use, thirty years.

o. Fire engines, fire trucks, hose carts, ambulances, patrol wagons, or any vehicles for use in any department of the municipality, or for the use of municipal officials, ten years.

p. Land for cemeteries, or the improvement thereof, thirty years.

q. Constructing sewer, water, gas, or other service connections, from the service main in the street to the curb or property line, when the work is done by the municipality in connection with any permanent improvement of or in any street, ten years.

r. The elimination of any grade crossing or crossings and improvements incident thereto, thirty years.

s. Equipment, apparatus, or furnishings not included in the foregoing clauses of this subsection, ten years.

t. Any improvement or property not included in other clauses of this subsection, forty years.

u. Land for airports or landing fields, including grading and drainage, forty years.

v. Buildings and equipment and other improvements of airports or landing fields, other than grading and drainage, ten years.

5. Improvements and Properties Defined.—The maximum periods fixed herein for the improvements and properties mentioned in clauses numbered from a to i, both inclusive, of subsection 4 of this section shall be applied thereto whether such improvements or properties are to be acquired, constructed, reconstructed, enlarged, or extended, in whole or in part, and whether the same are to include or are not to include buildings, lands, rights in lands, furnishings, equipment, machinery, or apparatus constituting a part of said improvements or properties at the time of acquisition, construction, or reconstruction. If the improvements of properties are to be an enlargement or extension of existing properties or improvements, the probable period of usefulness to be determined as aforesaid may be either that of the existing properties or improvements; or that of the enlargement or extension. Bonds for any or all improvements or properties included in any one clause of subsection 4 above may for the purposes of this section be deemed by the governing body to be for but one improvement or property.

6. Kind of Construction Determined. — If the bonds are for a building referred to in clause h of subsection 4 above, and the bond ordinance does not state the kind of construction of the building, or if the bonds are for street improvements mentioned in clause k of subsection 4 above, and the bond ordinance does not state the kind or kinds of pavement or other material to be used, then the kind of construction, or the kind or kinds of pavement or other material, as the case may be, shall be determined by resolution before any of the bonds are issued.

7. Period of Payment.—In determining for the purpose of this section the shortest period in which a debt to be funded or refunded hereunder can be finally paid without making it unduly burdensome upon the tax-payers of the municipality, the governing body shall not deem said period to be greater than fifty years. (1917, c. 138, s. 18; 1919, c. 178, s. 3 (18); Ex. Sess. 1921, c. 106, s. 1; 1929, c. 170; 1931, c. 60, s. 50, cc. 188, 301; 1933, c. 259, s. 1.)

Editor's Note.—By amendment Ex. Sess. 1921, c. 106 the arrangement of this section was changed and the period for the bonds to run, in most cases was changed. The Act of 1929, which inadvertently referred to § 2943, added the last two paragraphs under subsection 4. These paragraphs were also added by Public Laws 1931, c. 301, and c. 188 corrected the erroneous reference in the Act of 1929. Public Laws 1931 c. 60, s. 50, struck out subsection 7 and inserted in lieu thereof the present subsection.

The only change effected in this section by Public Laws 1933, c. 259, occurs in subsection 7. The limitation was formerly thirty years if the gross debt of the county was less than twelve per cent of the assessed valuation, and fifty years in other cases. The amendment makes the limitation fifty years in all cases.

Maturity of Refunding Bonds. — Under this section the period for maturity of refunding bonds is in the discretion of the governing body of the city issuing them. Bolich v. Winston-Salem, 202 N. C. 786, 164 S. E. 361.

Cited in Jones v. Durham, 197 N. C. 127, 133, 147 S. E. 824.

§ 2943. Sworn statement of indebtedness. —

1. What Shall Be Shown.—After the introduction and before the final passage of a bond ordinance an officer designated by the governing body for that purpose shall file with the clerk showing the following:

(a) The gross debt (which shall not include debt incurred or to be incurred in anticipation of the collection of taxes or in anticipation of the sale of bonds other than funding and refunding bonds), which gross debt shall be as follows:

(1) Outstanding debt not evidenced by bonds.

(2) Outstanding bonded debts.

(3) Bonded debt to be incurred under ordinances passed or introduced.

(b) The deductions to be made from gross debt in computing net debt, which deductions shall be as follows:

(1) Amount of unissued funding or refunding bonds included in gross debt.

(2) Amount of sinking funds or other funds held for the payment of any part of the gross debt other than debt incurred for water, gas, electric light, or power purposes or two or more of said purposes.

(3) The amount of uncollected special assessments theretofore levied on account of local improvements for which any part of the gross debt was or is to be incurred which will be applied when collected to the payment of any part of the gross debt.

(4) The amount, as estimated by the engineer of the municipality or officer designated for that purpose by the governing body or by the governing body itself, of special assessments to be levied on account of local improvements for which any part of the gross debt was or is to be incurred, and which, when collected, will be applied to the payment of any part of the gross debt.

(5) The amount of bonded debt included in the gross debt and incurred, or to be incurred, for water, gas, electric light or power purposes, or two or more of said purposes.

(5a) The amount of existing bonded debt included in the gross debt, and incurred or to be incurred for the construction of sewerage systems or sewerage disposal plants where said sewerage system is entirely supported by sewerage service charges or when said systems or plants are operated together with the waterworks as a combined and consolidated system and as an integral part thereof, and when the amount necessary to meet the annual interest payable on the debt, and the annual installment necessary for the amortization of the debt, and the amount necessary for repairs, maintenance and operation of said system or systems is included in the rate for waterworks service and so collected by the municipality: Provided, the provisions of this subsection shall not apply to Transylvania county nor to municipalities situate therein, nor shall it apply to cities and towns in Mecklenburg county.

(6) The amount which the municipality shall be entitled to receive from any railroad or street-railway company under contract theretofore made for payment by such company of all or a portion of the cost of eliminating a grade crossing or crossings within the municipality which amount will be applied when received to the payment of any part of the gross debt;

(7) Indebtedness for school purposes.

(c) The net debt, being the difference between the gross debt and the deductions.

(d) The assessed valuation of property as last fixed for municipal taxation.

(e) The percentage that the net debt bears to said assessed valuation.

2. Limitation upon Passage of Ordinance.—The ordinance shall not be passed unless it appears from said statement that the said net debt does not exceed eight (8) per cent of said assessed valuation, unless the bonds to be issued under the ordinance are to be funding or refunding bonds, or are bonds for water, gas, electric light or power purposes, or two or more of said purposes, or are bonds for sanitary sewers, sewage disposal or sewage purification plants, the construction of which shall have been ordered by the state board of health or by a court of competent jurisdiction.

3. Statement Filed for Inspection.—Such statements shall remain on file with the clerk and be open to public inspection. In any action or proceeding in any court involving the validity of bonds, said statement shall be deemed to be true and to comply with the provisions of this act, unless it appears (in an action or proceeding commenced within the time limited by § 2945 for the commencement thereof), first, that the representations contained therein could not by any reasonable method of computation be true; and second, that a true statement would show that the ordinance authorizing the bonds could not be passed. (1917, c. 138, s. 19; 1919, c. 178, s. 3 (19); 1919, c. 285, s. 4; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 102, s. 1; 1931, c. 60, s. 51; 1933, c. 259, s. 1; c. 321.)

As to limitation of debts prior to this section, see section 2693.

Editor's Note.—This section has been changed by the Public Laws Ex. Sess. 1921 to such an extent that a comparison of the old with the new is the most expeditious method of determining the effect of the later law. One of the most decided changes was in subsection 2 where the net indebtedness was lowered from twelve and one-half per cent when assessed valuation was less than four million dollars and ten per cent in any other case, to eight per cent in all cases.

The Act of 1931 changed the date in paragraph (a) (1) of subsection 1, December 6, 1921 to the one now specified.

By section 2966 all acts under prior laws are declared valid, but all subsequent proceedings must be under the Municipal Finance Act. It was held in Crayton v. Charlotte, 175 N. C. 17, 94 S. E. 689 that proceedings begun under Public Laws of 1915, c. 131, should be continued under this section and construed with it. Therefore an election held under Laws of 1915, c. 131, although not required under this section will be construed as valid, but the remainder of the proceedings must be under this section, and though the bond issue under Laws of 1915 would be invalid because it exceeded 10 per cent of the assessed value of the real and personal property, it will be valid under this section if it does not exceed the new limitations, which allows a greater indebtedness than allowed by the Laws of 1915.

Public Laws 1933, c. 259, eliminated the provision that the outstanding debt must have been incurred before July first, one thousand nine hundred and thirty-one. Public Laws 1933, c. 321, inserted subsection (5a).

For an amendment applicable only in the city of Burlington, see Public Laws 1933, c. 334.

Bonds Including Amount of Assessment.—Where a town has issued bonds for general street improvements under legislative authority, and includes the amount required for local improvements by assessment of owners of lands abutting a particular street improved, it may charge off from the proceeds of the sale of the bonds the estimated amount to be realized by the special assessments under the provisions of a recent statute. Brown v. Hillsboro, 185 N. C. 368, 117 S. E. 41.

Bonds issued by a municipality for water and sewer systems should be deducted from the gross debt in computing the net debt of the municipality in relation to the prohibition against incurring debt in excess of eight per cent of the assessed valuation of property for taxation, bonds for sewer systems being necessarily included in bonds for "water purposes" within the meaning of this section, subsec. 1(5). Lamb v. Randleman, 206 N. C. 837, 175 S. E. 293.

Such bonds do not come within the inhibition of this section, subsec. 2, against incurring debt in excess of eight per cent of the assessed valuation. Id.

§ 2944. Publication of bond ordinance.—A bond ordinance shall be published once in each of two successive weeks after its final passage. A notice substantially in the following form (the blanks being first properly filled in), with the printed or written signature of the clerk appended thereto, shall be published with the ordinance:

The foregoing ordinance was passed on the.... day of....., 19...., and was first published (or posted), on the.....day of.....,19.....

Any action or proceeding questioning the va-

lidity of said ordinance must be commenced within thirty days after its first publication (or posting).

....., Clerk (or Secretary).

(1917, c. 138, s. 20; 1919, c. 49, s. 1; 1919, c. 178, s. 3 (20) Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment Ex. Sess. 1921 publication is required only twice where formerly it was required four times, except that when it was to take effect at once, then only one publication was required.

§ 2945. Limitation of action to set aside ordinance.—Any action or proceeding in any court to set aside a bond ordinance or to obtain any other relief upon the ground that the ordinance is invalid, must be commenced within thirty days after the first publication of the notice aforesaid and the ordinance or supposed ordinance referred to in the notice. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the ordinance shall be asserted, nor shall the validity of the ordinance be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1917, c. 138, s. 20; 1919, c. 49, s. 1; 1919, c. 178, s. 3. (20); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by the Public Laws Ex. Sess. 1921.

§ 2946. Certain bond ordinance validated. (Obsolete).

§ 2947. Ordinance requiring popular vote.—1. When Vote Required.—If a bond ordinance provides that it shall take effect thirty days after its first publication, unless a petition for its submission to the voters shall be filed in the meantime, the ordinance shall be inoperative without the approval of the voters of the municipality at an election if a petition shall be filed as provided in this section.

2. Petition Filed.—A petition demanding that a bond ordinance be submitted to the voters may be filed with the clerk within thirty days after the first publication of the ordinance. The petition shall be in writing and signed by voters of the municipality equal in number to at least twenty-five per centum of the total number of registered voters in the municipality as shown by the registration books for the last preceding election for municipal officers therein. The residence address of each signer shall be written after his signature. Each signature to the petition shall be verified by a statement (which may relate to a specified number of signatures), made by some adult resident freeholder of the municipality, under oath before an officer competent to administer oaths, to the effect that the signature was made in his presence and is the genuine signature of the person whose name it purports to be. The petition need not contain the text of the ordinance to which it refers. The petition need not be all on one sheet, and if on more than one sheet, it shall be verified as to each sheet.

3. Sufficiency of Petition.—The clerk shall investigate the sufficiency of the petition and present it to the governing body with a certificate stating the result of his investigation. The governing body shall thereupon determine the sufficiency of the petition and the determination of the governing body shall be conclusive. (1917, c. 138, s. 21; 1919, c. 49, ss. 1, 2; 1919, c. 178, s. 3 (21); Ex. Sess. 1921, c. 106, s. 1; 1927, c. 102, s. 2.)

Editor's Note.—The amendment of Ex. Sess. 1921 changed the required number of petitioning voters from thirty-three and one-third per centum to twenty-five per centum.

Injunction against Bond Issue.—In Hill v. Elizabeth City, 291 Fed. 194, 210, it is said: "Section 2947, par. 1 provides for an election before bonds are issued, upon a petition to be filed within 30 days after the first publication of the ordinance. No such petition having been filed, the board of aldermen, on the 9th day of October, 1922, adopted an ordinance for directing the issuance of the bonds. I find no valid objection to the proceedings taken by the board of aldermen, entitling plaintiff to enjoin the issuance of the bonds."

Cited in Smith v. Carolina Beach, 206 N. C. 834, 835, 175 S. E. 313.

§ 2948. Elections on bond issue.

1. What Majority Required.—If a bond ordinance provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the municipality, the approval of a majority of the qualified voters of the municipality, as required by the constitution of North Carolina, shall be necessary in order to make the ordinance operative. If however, the bonds are to be issued for necessary expenses, the affirmative vote of the majority of the voters voting on the bond ordinances shall be sufficient to make it operative, in all cases where the ordinance is required by this act to be submitted to the voters.

2. When Election Held.—Whenever the taking effect of an ordinance authorizing the issuance of bonds is dependent upon the approval of the ordinances by the voters of a municipality, the governing body may submit the ordinance to the voters at an election to be held not more than six months after the passage of the ordinance. The governing body may call a special election for that purpose or may submit the ordinance to the voters at the regular municipal election next succeeding the passage of the ordinance, but no such special election shall be held within one month before or after a regular election. Several ordinances or other matters may be voted upon at the same election.

3. New Registration.—The governing body of the city or town in which such election is held may, in their discretion, order a new registration of the voters for such election. The books for such new registration shall remain open in each precinct from nine a. m. to six p. m. on each day except Sundays and holidays, for three weeks, beginning on a Monday morning and ending on the second Saturday evening before the election. A registrar and two judges of election shall be appointed by the governing body for each precinct: Provided, that the books shall be open at the polling places on each Saturday during the registration period. Sufficient notice shall be deemed to have been given of such new registration and of the appointment of the election officers if a notice thereof be published at least thirty (30) days before the closing of the registration books, stating the hours and days for registration. It shall not be necessary to specify in said notice the places for registration. In case the registrar shall fail or refuse for any cause to perform his duties, it shall be lawful for the clerk to appoint another person to perform such duties, and no notice of such appointment shall be necessary.

4. Notice of Election.—A notice of the elec-

tion shall be deemed sufficiently published if published once not later than twenty days before the election. Such notice shall state the maximum amount of the proposed bonds and the purpose thereof, and the fact that a tax will be levied for the payment thereof. The date of the election shall be stated therein.

5. Ballots.—A ballot or ballots shall be furnished to each qualified voter at said election, which ballots may contain the words "for the ordinance authorizing $.... bonds (briefly stating the purpose), and a tax therefor," and "against the ordinance authorizing $.... bonds (briefly stating the purpose), and a tax therefor," and if one ballot contains the two alternatives it may contain squares in one of which the voter may make a (X) mark, but this form of ballot is not prescribed.

6. Returns Canvassed.—The officers appointed to hold the election in making return of the result thereof, shall incorporate therein not only the number of votes cast for and against each ordinance submitted, but also the number of voters registered and qualified to vote in the election. The governing body shall canvass the returns, and shall include in their canvass the votes cast and the number of voters registered and qualified to vote in the election, and shall judicially determine and declare the result of the election.

7. Application of other laws.—Except as herein otherwise provided, the registration and election shall be conducted in accordance with the laws then governing elections for municipal officers in such municipality, and governing the registration of the electors for such election of officers.

8. Statement of Result.—The board shall prepare a statement showing the number of votes cast for and against each ordinance submitted, and the number of voters qualified to vote in the election, and declaring the result of the election, which statement shall be signed by a majority of the members of the board and delivered to the clerk of the municipality, who shall record it in the book of ordinances of the municipality and file the original in his office and publish it once.

9. Limitation as to Actions.—No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement: Provided, that sections 2947 and 2948 shall not apply to the incorporated towns of Madison county. (1927, c. 138, s. 22; 1919, c. 178, s. 3 (22); 1919, c. 291; Ex. Sess. 1921, c. 106, s. 1.)

As to ordinance for bond issue, see section 2938 and note. See also note under § 2806(f).

Editor's Note.—By amendment of Ex. Sess. 1921 the time within which election may not be held after notice was changed from two months to one month; all except the first sentence in subsection three was added; subsection seven was added and the time within which proceedings may be commenced to question an election was changed from twenty to thirty days.

Necessity of Notice.—In Hill v. Skinner, 169 N. C. 405, 408, 86 S. E. 351, it is said: "While, so far as the officers are concerned who are charged with the duty of giving notice, the requirement as to notice is imperative, yet it will be regarded, otherwise, as directory, if the result would not be changed by a departure from the provisions of the statute. The law looks more to the substance than to the form, and if it appears that a clear majority of the qualified voters have cast their votes in favor of the proposition submitted to them, and that there has been a fair and full opportunity for all to vote, and that there has been no fraud, and the election is in all respects free from taint of any sort, so that no well founded suspicion can be cast upon it, it would be idle to say that this free and untrammeled expression of the popular will should be disregarded and set aside." Comrs. v. Malone & Co., 179 N. C. 604, 607, 103 S. E. 134.

Form of Ballot Directory.—There being nothing in the statute making the exact language essential to the validity of a ballot, and the words used carrying practically the same meaning the requirement is directory and not mandatory, and a substantial compliance, is all that is necessary. Commissioners v. Malone & Co., 179 N. C. 604, 607, 103 S. E. 134.

Publication of Returns.—It is not necessary to the validity of an election that the returns be published as required by this section if it appears that no prejudice was sustained because of such failure. Commissioners v. Malone, 179 N. C. 604, 607, 103 S. E. 134.

When Election Held.—The requirement of this section, subsection 2, that bond elections shall not be held within one month or after a regular municipal election, is mandatory and refers to a month according to the designation in the calendar without regard to the number of days it may contain, § 3949(3), and is computed by excluding the first and including the last day thereof as provided in § 922. Adcock v. Fuquay Springs, 194 N. C. 423, 140 S. E. 24.

And the term "general election" is interpreted with the antecedent words of the statute "municipal election," and excludes a general State or National election. Adcock v. Fuquay Springs, 194 N. C. 423, 140 S. E. 24.

§ 2949. Preparation for issuing bonds.—At any time after the passage of a bond ordinance, all steps preliminary to the actual issuance of bonds under the ordinance may be taken, but the bonds shall not be actually issued unless and until the ordinance takes effect. (1917, c. 138, s. 23; 1919, c. 178, s. 3 (23); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by the Public Laws Ex. Sess. 1921.

§ 2950. Within what time bonds issued.—After a bond ordinance takes effect, bonds may be issued in conformity with its provisions at any time within three years after the ordinance takes effect, unless the ordinance shall have been repealed, which repeal is permitted (without the privilege of referendum upon the question of appeal), unless notes shall have been issued in anticipation of the receipts of the proceeds of the bonds and shall be outstanding. (1917, c. 138, s. 24; 1919, c. 178, s. 3 (24); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment of Ex. Sess. 1921 the qualification following the second comma was added.

§ 2951. Amount and nature of bonds determined.—The aggregate amount of bonds to be issued under a bond ordinance, the rate or rates of interest they shall bear, not exceeding six per centum per annum, payable semiannually or otherwise, and the times and place or places of payment of the principal and interest of the bonds, shall be fixed by resolution or resolutions of the governing body. The bonds may be issued either all at one time or from time to time in blocks, and different provisions may be made for different blocks. (1917, c. 138, s. 25; 1919, c. 178, s. 3 (25); Ex. Sess. 1921, c. 106, s. 1; 1933, c. 259, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921.

Public Laws 1933, c. 259, inserted the words "or otherwise" following the word "semi-annually."

§ 2952. Bonded debt payable in installments.—Each bond issue made under this act shall mature in annual installments or series, the first of which shall be made payable not more than three years after the date of the first issued bonds of such issue, and the last within the period determined and declared pursuant to section two thousand nine hundred and forty-two of this subchapter. No such installment or series shall be more than two and one-half times as great in amount as the smallest prior installment or series of the same bond issue. If all of the bonds of an issue are not issued at the same time, the bonds at any one time outstanding shall mature as aforesaid. This section shall not apply to funding or refunding bonds. (1917, c. 138, s. 26; 1919, c. 178, s. 3 (26); Ex. Sess. 1921, c. 106, s. 1; 1931, c. 60, s. 52; 1933, c. 259, s. 1.)

Editor's Note.—This section was re-enacted without change in meaning by the amendment of Public Laws Ex. Sess. 1921.

Public Laws 1933, c. 259, inserted the last sentence of the section stating that the section shall not apply to funding or refunding bonds. Prior to the amendment the section was applicable to such bonds in municipalities having a debt of less than twelve per cent of the assessed valuation.

§ 2953. Medium and place of payment.—The bonds may be made payable in such kinds of money and at such place or places within or without the state of North Carolina as the governing body may by resolution provide. (1917, c. 138, s. 27; 1919, c. 178, s. 3 (27); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921.

§ 2954. Formal execution of bonds.—The bonds shall be issued in such form as the officers who execute them shall adopt, except as otherwise provided by the governing body. They shall be signed by two or more officers designated by the governing body, or, if the governing body makes no such designation, then by the mayor or other chief executive officer and by the clerk, and the corporate seal of the municipality shall be affixed to the bonds. The bonds may have coupons attached for the interest to be paid thereon, which coupons shall bear a facsimile signature of the clerk in office, at the date of the bonds or at the date of delivery thereof. The delivery of bonds so executed shall be valid notwithstanding any change in the officers or in the seal of the municipality occurring after the signing and sealing of the bonds. (1917, c. 138, s. 28; 1919, c. 178, s. 3 (28); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—The amendment of Ex. Sess. 1921 provided that in case no one was designated the mayor and clerk sign the bonds. Formerly it was provided that the mayor and financial officer sign, and the clerk affix the seal of the municipality and attest it.

§ 2955. Registration and transfer of bonds: 1. Bonds Payable to Bearer.—Bonds issued under this law shall be payable to the bearer unless they are registered as provided in this section; and each coupon appertaining to a bond shall be payable to the bearer of the coupon.

2. Registration and Effect.—A municipality may keep in the office of its financial officer or in the office of a bank or trust company appointed by the governing body as bond registrar or transfer agent, a register or registers for the registration and transfer of its bonds, in which it may register any bond at the time of its issue, or, at the request of the holder, thereafter. After such registration the principal and interest of the bond shall be payable to the person in whose name it is registered except in the case of a coupon bond registered as to principal only, in which case the principal shall be payable to such person, unless the bond shall be discharged from registry by being registered as payable to bearer. After registration a bond may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompanied by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner.

3. Registration and Transfer Noted on Bond.—Upon the registration or transfer of a bond as aforesaid, the bond registrar shall note such registration or transfer on the back of the bond. Upon the registration of a coupon bond as to both principal and interest he shall also cut off and cancel the coupons.

4. Agreement for Registration.—A municipality may, by recital in its bonds, agree to register the bonds as to principal only, or agree to register them either as to principal only or as to both principal and interest at the option of the bondholder. (1917, c. 138, s. 29; 1919, c. 178, s. 3 (29); Ex. Sess. 1921, c. 106, s. 1.)

See 13 N. C. Law Rev., 76.

Editor's Note.—By amendment Ex. Sess. 1921 in subsection 2 the appointment of registrar or transfer agent is designated as appointed by the "governing body," where formerly it was by the "governing board."

In subsection 4 a former provision for agreeing by a recital in the bond to register them as to both principal and interest, was omitted, by the same amendment.

§ 2956. Repealed by Public Laws 1931, c. 60, s. 53.

Editor's Note.—The cases treated in the following note were decided prior to the repeal of this section in 1931 and are likely to be of historical value only.

Sale of Bonds Below Par.—In Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187, it is held that although this section provides that bonds may not be sold below par, a sale below par may be allowed by special statute and it will not be contrary to Art. VIII, section 4 of the Constitution, which provides that "general laws" shall be provided by the legislature for all cities and towns. Nor is the special law contrary to Art. 1, section 7 as allowing special privileges.

Clark, C. J., and Brown, J., dissented to the above holding that Art. VIII, section 4 was meant to apply uniform rules to all towns and cities and that special laws were contrary to its meaning and intention.

Notice in a Trade Journal.—The requirement that notice be given in a financial paper or trade journal is construed to mean some paper that would likely afford notice to buyers of such security, and not to a paper carrying only such notices, for North Carolina has no such paper, and the statute will not be construed to require the impossible. Commissioners v. Prudden, 180 N. C. 496, 105 S. E. 7.

It is said by the court in this case that "The construction of the statute we have indicated being the true one, we must hold that these bonds have not been properly advertised, it appearing so far as the case discloses that the notice of sale has only been given in a newspaper having local circulation, and has not appeared in a financial or trade journal of any kind published in the State. And the matter being in fieri, it is open to the original parties to the transaction to present and insist on the objection." Bennett v. Comrs., 173 N. C. 625, 630, 92 S. E. 603.

§ 2957. Application of funds.—The proceeds of the sale of bonds under this act shall be used only for the purposes specified in the ordinance authorizing said bonds, and for the payment of the

principal and interest of temporary loans made in anticipation of the sale of bonds: Provided, however, that if for any reason any part of such proceeds are not applied to or are not necessary for such purposes, such unexpended part of the proceeds shall be applied to the payment of the principal or interest of said bonds. The cost of preparing, issuing, and marketing bonds shall be deemed to be one of the purposes for which the bonds are issued. (1917, c. 138, s. 31; 1919, c. 178, s. 3(31); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921.

§ 2958. Bonds incontestable after delivery.—Any bonds reciting that they are issued pursuant to this law shall in any action or proceeding involving their validity be conclusively deemed to be fully authorized by this law and to have been issued, sold, executed, and delivered in conformity herewith, and with all other provisions of statutes applicable thereto, and shall be incontestable, anything herein or in other statutes to the contrary notwithstanding, unless such action or proceeding is begun prior to the delivery of such bonds. (1917, c. 138, s. 32; 1919, c. 178, s. 3 (32); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921.

§ 2959. Taxes levied for payment of bonds.—The full faith and credit of the municipality shall be deemed to be pledged for the punctual payment of the principal of and interest on every bond and note issued under this law, including assessment bonds or other bonds for which special funds are provided. The governing body shall annually levy and collect a tax ad valorem upon all the taxable property in the municipality sufficient to pay the principal and interest of all bonds issued under this act as such principal and interest become due: Provided, however, that such tax may be reduced by the amount of other moneys appropriated and actually available for such purpose.

So much of the net revenue derived by the municipality in any fiscal year from the operation of any revenue producing enterprise owned by the municipality after paying all expenses of operating, managing, maintaining, repairing, enlarging and extending such enterprise, shall be applied, first to the payment of the interest, payable in the next succeeding year on bonds issued for such enterprise, and next, to the payment of the amount necessary to be raised by tax in such succeeding year for the payment of the principal of said bonds. All money derived from the collection of special assessments for local improvements for which bonds or notes were issued shall be placed in a special fund and used only for the payment of bonds or notes issued for the same or other local improvements.

Every municipality shall have the power to levy taxes ad valorem upon all taxable property therein for the purpose of paying the principal of or the interest on any bonds or notes for the payment of which the municipality is liable, issued under any act other than this law, or for the purpose of providing a sinking fund for the payment of said principal, or for the purpose of paying the principal of or interest on any notes issued under this law.

The powers stated in this section in respect of the levy of taxes for the payment of the principal and interest of bonds and notes shall not be subject to any limitation prescribed by law upon the amount or rate of taxes which a municipality may levy. Taxes levied under this section shall be levied and collected in the same manner as other taxes are levied and collected upon property in the municipality: Provided, in the case of funding or refunding bonds which do not mature in installments, as provided in section two thousand nine hundred fifty-two of this act, a tax for the payment of the principal of said bonds need not be levied prior to the fiscal year or years said bonds mature unless it is so provided for in an ordinance or resolution passed before the issuance of said bonds, in which case such tax shall be levied in accordance with the provisions of such ordinance or resolution. (1917, c. 138, s. 33; 1919, c. 178, s. 3 (33); Ex. Sess. 1921, c. 106, s. 1; 1933, c. 259, s. 1.)

Editor's Note.—By amendment Ex. Sess. 1921 the provision in the last sentence of the second paragraph for local improvement and collection of assessments for local improvements, replaced a former provision for "special assessments upon which assessment bonds or other bonds or notes are predicated."

Public Laws 1933, c. 259, inserted the proviso at the end of this section.

Art. 26A. Validation of Bonds

§ 2959(1). 1935 Validating Act.—This article may be cited as the "1935 Validating Act." (1935, c. 401, s. 1.)

§ 2959(2). "Municipality" defined.—The term "municipality" wherever used or referred to in this article shall mean any city, town, county or sanitary district in this state. (1935, c. 401, s. 2.)

§ 2959(3). Municipal bonds issued by local units to aid F. E. A. projects validated.—All bonds heretofore issued for the purpose of financing or aiding in the financing of any work, undertaking, or project by any municipality to which any loan or grant has heretofore been made by the United States of America through the federal emergency administrator of public works for the purpose of financing or aiding in the financing of such work, undertaking or project, including all proceedings for the authorization and issuance of such bonds and the sale, execution and delivery thereof, are hereby validated, ratified, approved and confirmed, notwithstanding any want of power of such municipality or governing body or commission, or officer thereof, of authority to issue such bonds, or sell, execute or deliver the same, and notwithstanding any defects or irregularities in such proceedings or in such sale, execution or delivery; and such bonds are and shall be binding, legal and enforceable obligations of such municipality. (1935, c. 401, s. 3.)

§ 2959(4). Proceedings begun for issuance of such bonds validated.—In all cases where proceedings have heretofore been taken or begun authorizing bonds by any municipality for any improvements, the financing of which shall be aided by a loan or grant or both by the United States of America through the federal emergency administrator of public works, all such proceedings are hereby validated, ratified, approved and con-

firmed, notwithstanding any irregularity or defect in such proceedings, and notwithstanding any want of power of such municipality to take such proceedings or to authorize such bonds, and the issuance of bonds pursuant to such proceedings is hereby approved and authorized, and such bonds declared to be valid and enforceable obligations of such municipality. (1935, c. 401, s. 4.)

§ 2959(5). Approval by local government commission.—This article shall apply only to these bonds submitted to and approved by the local government commission. (1935, c. 401, s. 5.)

Art. 27. Restrictions Upon the Exercise of Municipal Powers

§ 2960. In borrowing or expending money: 1. No municipality shall:

a. Make an appropriation of money except as provided in this law.

b. Borrow money or issue bonds or notes except as provided in this law;

c. Make an expenditure of money unless the money shall have been appropriated as provided in this law, or unless the expenditure is a payment of a judgment against the municipality or is a payment of the principal or interest of a bond or note of the municipality; or,

d. Enter into any contract involving the expenditure of money unless a sufficient appropriation shall have been made therefor, except a continuing contract to be performed in whole or in part in an ensuing fiscal year, in which case an appropriation shall be made sufficient to meet the amount to be paid in the fiscal year in which the contract is made.

2. The authorization of bonds by a municipality shall be deemed to be an appropriation of the maximum authorized amount of the bonds for the purposes for which they are to be issued. (1917, c. 138, s. 34; 1919, c. 178, s. 3 (34); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—This section was re-enacted without change by Public Laws Ex. Sess. 1921.

In General.—A city purchasing a cemetery in excess of the acreage allowed by sec. 2623(3), although the act is ultra vires and no provision is made under section 2922 in the city's budget for payment, takes a good title, and only the state in direct proceedings can question it. Harrison v. New Bern, 193 N. C. 555, 137 S. E. 582.

Continuing Contract.—A definition of a "continuing contract" as used in subsection d of this section depends largely upon the facts of particular cases. The governing principle in such contracts is successive transactions between the parties over a definite or indefinite period of time. White Co. v. Hickory, 195 N. C. 42, 45, 141 S. E. 494.

A contract with an engineer to furnish services in connection with the construction of a city's water supply, the completion of which will extend beyond the period of one year, is a continuing one under this section. White Co. v. Hickory, 195 N. C. 42, 141 S. E. 494.

§ 2961. Manner of passing ordinances and resolutions.—Ordinances and resolutions passed pursuant to this law shall be passed in the manner provided by other laws for the passage of ordinances and resolutions, but shall not be subject to the provisions of other laws prescribing conditions, acts, or things necessary to exist, happen, or be performed precedent to or after the passage of ordinances or resolutions in order to give them full force and effect: Provided, however, that in any municipality in which the acts of the governing body thereof involving the raising or expenditure of money are required by law to be approved by some other official board or officer of the municipality in order to make them effective, all ordinances and resolutions passed by the governing body under this law shall, unless they relate solely to elections held under this law, be so approved before they take effect. (1917, c. 138, s. 35; 1919, c. 178, s. 3 (35); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment of Ex. Sess. 1921 a part of the last sentence reading "expenditure of money as required by law" was changed to read: "expenditures of money are required by law."

§ 2962. Enforcement of law.—If any board or officer of a municipality shall be ordered by a court of competent jurisdiction to levy or collect a tax to pay a judgment or other debt, or to perform any duty required by this act to be performed by such board or officer, and shall fail to carry out such order, the court, in addition to all other remedies, may appoint its own officers or other persons to carry out such order. (1917, c. 138, s. 36; 1919, c. 178, s. 3 (36); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment Ex. Sess. 1921 there was omitted from this section a provision for officers, creditors and taxpayers to maintain an action to declare invalid any illegal official act, and a provision for jurisdiction of the superior court to enforce by mandamus or injunction the provision of this act.

§ 2963. Limitation of tax for general purposes.—For the purpose of raising revenue for defraying the expenses incident to the proper government of the municipality, the governing body shall have the power and it is hereby authorized to levy and collect an annual ad valorem tax on all taxable property in the municipality at a rate not exceeding one dollar on the one hundred dollars valuation of said property, notwithstanding any other law, general or special, heretofore or hereafter enacted, except a law hereafter enacted expressly repealing or amending this section: Provided, that in cities where the taxable values for the year 1920 amounted to one hundred million dollars or more, the rate of taxation for general purposes shall not exceed sixty-five (65) cents on the one hundred dollars valuation. (1917, c. 138, s. 37; 1919, c. 178, s. 3 (37); Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment, Ex. Sess. 1921 the rate of one dollar on the one hundred dollar valuation replaced a former rate of one dollar and twenty-five cents on the one hundred dollar valuation. All that part following the second comma beginning with notwithstanding, was added.

§ 2964. Certain taxes validated.—All taxes levied by any municipality after the enactment of chapter one hundred and thirty-eight of public laws of one thousand nine hundred and seventeen, and prior to December sixth, one thousand nine hundred and twenty-one, are hereby ratified and validated, notwithstanding the rate of said taxes exceeded the maximum rate prescribed by law, or any other defect or irregularity in the levy thereof. (1919, c. 193; Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By the amendment Ex. Sess. 1921 the former general ratification was changed to apply only to taxes levied prior to December sixth, 1921; the provision for "all taxes" replaced a provision for "all taxes levied for general purposes"; the validation of all taxes irrespective of rate replaced a validation of taxes at a rate not ex-

ceeding one dollar and twenty-five cents on the hundred dollar assessment.

§ 2965. Outstanding floating debt validated, and may be funded.—All floating or other indebtedness, not evidenced by bonds, which was outstanding on December sixth, one thousand nine hundred and twenty-one, and was incurred by a municipality in good faith for necessary expenses thereof (including floating or other indebtedness incurred in anticipation of the collection of taxes or for current expenses) is hereby validated, notwithstanding any want of power or authority to incur indebtedness for the purpose for which such indebtedness was incurred, and notwithstanding any defect in the procedure for incurring indebtedness, or any other defect or illegality, including the failure to observe any debt limit prescribed by law. The municipality may fund such outstanding indebtedness by issuing bonds as herein provided. (1919, c. 178, s. 4; Ex. Sess. 1921, c. 106, s. 1.)

Editor's Note.—By amendment of Ex. Sess. 1921 a provision for all indebtedness not evidenced by bonds replaced a former provision for floating indebtedness only. The validation of debts prior to December sixth, 1921, replaced a validation of debts prior to March seventh, 1919.

Art. 27A. Emergency Municipal Bond Act

§ 2965(1). Title of article.—This article may be cited as the "Emergency Municipal Bond Act of 1935." (1935, c. 426, s. 1.)

§ 2965(2). Meaning of terms.—In this article, unless the context otherwise requires, the terms:

(a) "Undertaking" shall mean any project, undertaking or improvement which constitutes necessary expenses and for which the municipality may legally appropriate money, the financing of which is to be aided in whole or in part by means of a loan and/or grant through the federal emergency administrator of public works or through any other agency or department of the United States of America.

(b) "Municipality" means and includes all cities, towns or incorporated villages in this State now or hereafter incorporated.

(c) "Necessary expenses" means the necessary expenses referred to in section seven of Article VII of the Constitution of North Carolina.

(d) "Governing body" means the board or body in which the general legislative powers of the municipality is vested.

(e) "Clerk" means the person occupying the position of clerk or secretary of a municipality.

(f) "Financial officer" means the chief financial officer of the municipality. (1935, c. 426, s. 2.)

§ 2965(3). Bonds authorized. — Every municipality is hereby authorized pursuant to this law to issue its negotiable coupon bonds for the purpose of financing any of the undertakings referred to in section 2965(2). The bonds shall be issued in such form as the officers who execute them shall adopt, except as otherwise provided by the governing body; they shall be signed by two or more officers designated by the governing body, or if the governing body makes no such designation, then by the mayor or other chief executive officer, and by the clerk, and the corporate seal of the municipality shall be affixed to the bonds. The bonds may have coupons attached for the interest to be paid thereon, which coupons shall bear a facsimile signature of the clerk in office at the date of the bonds or at the date of the delivery thereof. The delivery of bonds so executed shall be valid notwithstanding any change in the officers or in the seal of the municipality occurring after the signing and sealing of the bonds. The bonds shall bear such date and such rate of interest, not exceeding four (4%) per cent per annum (payable semi-annually), or such other rate of interest as may be fixed by contract between the governing body and the United States of America, or any agency or department thereof, and shall be payable at such time or times, at such place or places, and in such medium of payment and in such denomination as the governing body may by resolution determine. The bonds may be issued either all at one time or from time to time in blocks. (1935, c. 426, s. 3.)

§ 2965(4). Registration and transfer of bonds.—(a) Bonds issued under this article shall be payable to bearer, unless they are registered as provided in this section; each coupon appertaining to a bond shall be payable to the bearer of the coupon.

(b) A municipality may keep in the office of its financial officer or in the office of a bank or trust company appointed by the governing body as bond registrar or transfer agent, a register or registers for the registration and transfer of its bonds, in which it may register any bond at the time of its issue, or, at the request of the holder, thereafter. After such registration the principal and interest of the bond shall be payable to the person in whose name it is registered except in the case of a coupon bond registered as to principal only, in which case the principal shall be payable to such person, unless the bond shall be discharged from registry by being registered as payable to bearer. After registration a bond may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompanied by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner.

(c) Upon the registration or transfer of a bond as aforesaid, the bond registrar shall note such registration or transfer on the back of the bond. Upon the registration of a coupon bond as to both principal and interest he shall also cut off and cancel the coupons.

(d) A municipality may, by recital in its bonds, agree to register the bonds as to principal only, or agree to register them either as to principal only or as to both principal and interest at the option of the bondholder. (1935, c. 426, s. 4.)

§ 2965(5). Application of funds.—The proceeds of the sale of bonds under this article shall be used only for the purposes specified in the resolution authorizing said bonds; Provided, however, that if for any reason any part of such proceeds are not applied to, or are not necessary for such purposes, such unexpended part of the proceeds shall be applied to the payment of the principal or interest of said bonds. The cost of preparing, issuing, and marketing the bonds, together with the interest on the amount expended during the course of construction of any undertaking shall be deemed to be one of the purposes for which the bonds are

issued and may be paid for out of the proceeds derived from the sale of the bonds. (1935, c. 426, s. 5.)

§ 2965(6). Bonds authorized by resolution shall be incontestable after delivery.—All bonds issued under this article shall be authorized by appropriate resolution of the governing body, which shall be the only proceeding necessary to evidence the legality thereof. The bonds shall recite that they are issued pursuant to this article, and shall in any action or proceeding involving their validity, be conclusively deemed to be fully authorized by this article and to have been issued, executed, sold, and delivered in conformity herewith and with all other provisions and statutes applicable thereto, and shall be incontestable, anything herein or in other statutes to the contrary, notwithstanding, unless such action or proceeding is begun prior to the delivery of such bonds. (1935, c. 426, s. 6.)

§ 2965(7). Taxes levied for the payment of the bonds.—The full faith and credit of the municipality shall be deemed to be pledged for the punctual payment of the principal of and interest on every bond issued under this article. The governing body shall annually levy and collect a tax, ad valorem, upon all the taxable property subject to taxation by the municipality, sufficient to pay the principal and interest of all bonds issued under this article as such principal and interest become due: Provided, however, that such tax may be reduced by the amount of other moneys appropriated and actually available for such purposes.

So much of the net revenue derived by the municipality in any fiscal year from the operation of any revenue producing undertaking owned by the municipality after paying all expense of operating, managing, maintaining, repairing, enlarging and extending such undertaking, shall be applied, first to the payment of the interest payable in the next succeeding year on the bonds issued for such undertaking, and next, to the payment of the amount necessary to be raised by tax in such succeeding year for the payment of the principal of said bonds.

The powers stated in this section in respect to the levy of taxes for the payment of principal and interest of bonds shall not be subject to any limitation prescribed by law upon the amount or rate of taxes which a municipality may levy. Taxes levied under this section shall be levied and collected in the same manner as other taxes are levied and collected upon property by the municipality. (1935, c. 426, s. 7.)

§ 2965(8). Local government act applicable. — Any municipality issuing bonds under the provisions of this article, shall before the issuance and delivery thereof, make application to the local government commission and obtain the approval of that commission to issue such bonds, and they shall be subject to all the provisions of the Local Government Act, as amended, but the issuance of such bonds shall not be subject to any of the provisions of the Municipal Finance Act, as amended by the Local Government Act, and provided further that the local government commission may sell any bonds issued under this article to the United States of America, or any agency or department thereof, at private sale and without advertisement. (1935, c. 426, s. 8.)

§ 2965(9). Effect upon prior laws and proceedings taken.—This article shall not affect any acts or proceedings heretofore done or taken for the issuance of bonds for any undertaking under the Municipal Finance Act as it stood prior to the ratification of this article, or under any other law, and every municipality is hereby authorized to complete said acts and proceedings pursuant to the law under which they were done or taken and to issue said bonds under such acts in the same manner as if this article had not been passed: Provided, however, that the governing body may at its option proceed under this article for the issuance of such bonds, except in cases where a sufficient petition has theretofore been filed pursuant to law by the voters of such municipality demanding a referendum on the question of the issuance of such bonds without regard to the restrictions imposed by the said Municipal Finance Act and other laws. (1935, c. 426, s. 9.)

§ 2965(10). Consent of state agencies.—It shall not be necessary for any municipality proceeding under this article to obtain any certificate of convenience or necessity, franchise, license, permit, or other authorization from any bureau, board, commission or other like instrumentality of the State, except as provided by section 2965(8), in order to permit any undertaking authorized by this article, except the approval of the state board of health for an undertaking consisting of a water supply or sewer system as now provided by law (1935, c. 426, s. 10.)

§ 2965(11). Application and construction of article.—The powers conferred by this article are in addition to and not in substitution for those conferred by any other act, either general, special or local, and every municipality may proceed to issue bonds under the provisions of this article, notwithstanding any conditions, restrictions or limitations contained in any other act, whether general, special or local. Every provision of this article shall be construed as being qualified by constitutional provisions, whenever such construction shall be necessary in order to sustain the constitutionality of any portion of this article. If any portion of this article shall be declared unconstitutional, the remainder shall stand, and the portion declared unconstitutional shall be exscinded. (1935, c. 426, s. 11.)

§ 2965(12). Termination of power to issue bonds.—Except in pursuance to any contract or agreement theretofore entered into by any municipality, no municipality shall borrow any money or deliver any bonds pursuant to this article to the purchaser or purchasers thereof after June thirty, one thousand nine hundred thirty-seven, no bonds shall be issued under this act except with the express approval of the local government commission. (1935, c. 426, s. 12.)

Art. 28. General Effect of Municipal Finance Act

§ 2966. Effect upon prior laws and proceedings taken.—(Obsolete.)

§ 2967. Other acts repealed; exceptions.—(Obsolete.)

§ 2968. Proceedings under act of 1917 validated.—(Obsolete).

§ 2969. General repealing clause. — (Obsolete.)

§ 2969(a). Effect upon prior laws and proceedings taken. — All acts and parts of acts, whether general, special, private or local, regulating or relating in any way to the issuance of bonds or other obligations of a municipality, or relating to the subject-matter of this law, are hereby repealed: Provided, however, that this law shall not affect any local or private act enacted at the present session of the general assembly, or regular session of one thousand nine hundred and twenty-one, but the powers hereby conferred and the methods of procedure hereby provided shall be deemed to be conferred and provided in addition to and not in substitution for those conferred or provided by any such local or private act enacted at the extraordinary session, 1921, of the general assembly, or regular session of one thousand nine hundred and twenty-one, so that any municipality may, at its option, proceed under any such local or private act applicable to it enacted at the extraordinary session, 1921, of the general assembly or regular session of one thousand nine hundred and twenty-twenty-one without regard to the restrictions imposed by this law, or may proceed under this law without regard to the restrictions imposed by any other act: Provided further, that this law shall not affect any of the provisions of article nine of subchapter one of chapter 56 of Consolidated Statutes, except those provisions which prescribe methods of procedure for borrowing money or issuing bonds or other obligations, and said article shall apply to all municipalties in this state, notwithstanding any inconsistent, general, special, local or private laws: Provided further, that this law shall not affect any acts or proceedings heretofore done or taken for the issuance of bonds or other obligations under the municipal finance act, as it stood prior to December 20, 1921, or under any other law, and every municipality is hereby authorized to complete said acts and proceedings pursuant to the laws under which they were done or taken, and to issue said bonds or other obligations under such acts in the same manner as if this law had not been passed: Provided further, that this law shall not render invalid any bonds or notes or proceedings for the issuance of bonds or notes in cases when such bonds, notes or proceedings have been validated by any other act. (Ex. Sess. 1921, c. 106, s. 2.)

Art. 29. State Supervision of Payment of Bonds

§§ 2969(b)-2969(i). Repealed by the Public Laws of 1925, c. 100, s. 13.

Editor's Note.—Ch. 100 of the Public Laws 1925 was repealed by Public Laws 1927, c. 214, which in turn was repealed by Public Laws 1931, c. 60, s. 4.

As to supervision under Local Government Act, see §§ 2492(1)-2492(51).

Art. 30. Municipal Fiscal Agency Act

§ 2969(j). Title of Act. — This act shall be known as "the Municipal Fiscal Agency Act." (1925, c. 195, s. 1.)

§ 2969(k). Payment of fees to bank.—Whenever any county, city, town, township, school district or school taxing district is or shall be authorized or permitted to make payments of bonds or coupons issued by it or in its behalf at any place other than within such county, city, town, township, school district or school taxing district, and such bonds or coupons are by their terms payable at such other place, it shall be lawful for the officer disbursing the funds for such payment to pay the reasonable fees of the bank, trust company or other agency making payment at such place, and to agree to pay such fees at a fixed rate throughout the term of the bonds as to which such payment is to be made at such place, but no fee in excess of one-fourth of one per cent of the amount of interest paid and one-eighth of one per cent of the amount of principal paid shall be deemed reasonable. (1925, c. 195, s. 2.)

As to effect of Local Government Act, see §§ 2492(1) et seq.

Art. 31. Municipal Bond Registration Act

§ 2969(l). Title of Act. — This act shall be known as "The Municipal Bond Registration Act". (1925, c. 129, s. 1.)

§ 2969(m). Registration. — Each county, city, town, school district and school taxing district which has issued or shall hereafter issue bonds in its own name, and each county, city, and town, which has issued or shall hereafter issue bonds in behalf of a school district or a school taxing district, is hereby authorized to keep in the office of its treasurer or financial agent or its clerk, or in the office of the bank or trust company appointed by its governing body as bond registrar, a register or registers for the registration as to principal of such bonds in the name of the owner thereof, in which it may register any such bond as to principal at the time of its issue, or at the request of the holder thereafter. Such registration shall not affect the payment of interest, but such interest shall continue to be made upon the presentation and surrender of interest coupons if issued, but after such registration as to principal, the principal shall be payable to the person in whose name registered or to the person in whose name the bonds registered may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompanied by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner: Provided, however, that a registered bond may be discharged from registry by a transfer to bearer registered as herein provided. Upon the registration or transfer of a bond as aforesaid the bond registrar shall note such registration or transfer on the back of the bond. (1925, c. 129, s. 2.)

As to effect of Local Government Act, see §§ 2492(1) et seq.

SUBCHAPTER IV. FISCAL CONTROL ACT AND COLLECTION OF TAXES

Art. 32. Fiscal Control Act

§ 2969(n). Municipalities brought under terms of county fiscal control act.—All cities and towns shall be subject to and be governed by all of the provisions of the County Fiscal Control Act [§§ 1334(53)-1334(76)] and acts amendatory thereof and supplemental thereto, including acts ratified at the present session of the General Assembly, except as herein otherwise provided or except as the context shows that it is not intended that such acts shall be applicable to cities and towns. (1931, c. 60, s. 65.)

§ 2969(o). Terms in county fiscal control act made applicable to cities and towns. — Except as the context may otherwise show, and for the purpose of applying the provisions of the County Fiscal Control Act to cities and towns, the following words and phrases in the County Fiscal Control Act, and acts amendatory thereof and supplemental thereto, shall be deemed to have the following meanings when applied to cities and towns:

County Accountant, County Treasurer, County Auditor, County Depository and County Treasury shall mean Municipal Accountant, Municipal Treasurer, Municipal Auditor, Municipal Depository and Municipal Treasury; the Board of County Commissioners shall mean the governing body of a municipality, sub-division shall mean a school district, school taxing district or other political corporation or sub-division wholly or partly within a municipality, the taxes for which are under the law levied by the governing body of the municipality: county as a noun shall mean municipality; county as an adjective shall mean municipal; Clerk of the Board of County Commissioners shall mean clerk of the municipality or of its governing body; courthouse door shall mean door of the municipal building; appropriation resolution and resolution making tax levy shall mean appropriation ordinance and ordinance making tax levy, respectively; County Fiscal Control Act shall mean Local Government Act, being this Act and acts amendatory thereof and supplemental thereto; County Government Advisory Commission shall mean the Director of Local Government whose office is created by the Local Government Act. (1931, c. 60, s. 67.)

As to the Local Government Act, see §§ 2492(1) et seq.

§ 2969(p). Purposes of municipal funds required by act.—The municipal funds required by this Act for cities and towns are not those funds required by the County Fiscal Control Act for counties, but are funds for each of the following functions of municipal government:

(1) Current operating expense of the municipality.

(2) School expenses of the municipality supplemental to constitutional school maintenance.

(3) Municipal debt service.

(4) Each special purpose to which the General Assembly has given its special approval, separately stated.

(5) Debt service of each sub-division, separately stated.

(6) Maintenance of each sub-division, separately stated.

(7) Permanent improvements in each sub-division, separately stated.

(8) Such other funds as may be established by the governing body, separately stated. (1931, c. 60, s. 68.)

§ 2969(q). Exceptions. — Notwithstanding the foregoing, none of the provisions of the County Fiscal Control Act or acts amendatory thereof or supplemental thereto in relation to maintenance of schools for the constitutional term, depositories and security for deposits, abolition of the office of County Treasurer or appointment of financial agents to perform functions of the County Treasurer shall be applicable to or govern cities or towns. (1931, c. 60, s. 69.)

Art. 33. Collection of Taxes

§ 2969(r). Sections 1334(45)-1334(52) applicable: Sale of land for non-payment of special assessments.—All cities and towns shall be subject to the provisions of sections 1334(45)-1334(52). Except as the context may otherwise show, and for the purpose of applying the provisions of said sections to cities and towns, the following words and phrases in said sections shall be deemed to have the following meanings when applied to cities and towns, viz.: "county commissioners" shall mean the governing body of a municipality; "county" shall mean a municipality; "township" shall mean taxing district; "county-town" shall mean the municipality.

Sales of land for delinquent special assessments shall be advertised and made at the time provided for advertisements and sales of land for taxes upon property. In applying the provisions of section 1334(48) to cities and towns, duties required to be performed on the first Monday in May shall be deemed duties to be performed on the second Monday in May and duties required to be performed on the first Monday in June shall be deemed duties required to be performed on the second Monday in June. In applying the provisions of section 1334(51) to cities and towns, references to the first Monday in December being made three times in said section seven shall be deemed to refer to the date any tax collector ceases to hold such office although such date be not the first Monday in December. (1931, c. 296, s. 3.)

SUBCHAPTER V. REVENUE PRODUCING UNDERTAKINGS.

Art. 34. Revenue Bond Act of 1935

§ 2969(1). Title of article.—This article may be cited as "The Revenue Bond Act of one thousand nine hundred and thirty-five." (1935, c. 473, s. 1.)

§ 2969(2). Definitions.—Whenever used in this article, unless a different meaning clearly appears from the context:

(a) The term "undertaking" shall mean any one or combination of two or more of the following: Water, sewerage, gas or electric, heat, light or power works, plants and systems, together with all parts thereof and appurtenances thereto

including, but not limited to, supply and distribution systems, reservoirs, dams, sewage treatment and disposal works and generating plants, and also including plants for the incineration or disposal of ashes, garbage or refuse (other than sewerage).

(b) The term "municipality" means and includes all cities, towns, incorporated villages or sanitary districts in this State now or hereafter incorporated.

(c) The term "governing body" means the board or body in which the general legislative powers of the municipality is vested. (1935, c. 473, s. 2.)

§ 2969(3). Declaration of policy.—It is hereby declared to be the policy of this State that any municipality acquiring, purchasing, constructing, reconstructing, improving, bettering or extending an undertaking pursuant to this article shall manage such undertaking in the most efficient manner consistent with sound economy and public advantage to the end that the services of the undertaking shall be furnished to consumers at the lowest possible cost. No municipality shall operate such undertaking primarily for profit but shall operate such undertaking for the use and benefit of the consumers served by such undertaking and for the promotion of the welfare and for the improvement of the health and safety of the inhabitants of the municipality. (1935, c. 473, s. 3.)

§ 2969(4). Additional powers of municipalities.—In addition to the powers which it may now have, any municipality shall have power under this article: (a) to construct, acquire by gift, purchase, or the exercise of the right of eminent domain, reconstruct, improve, better or extend any undertaking, within the municipality, and to acquire by gift, purchase, or the exercise of the right of eminent domain, lands or rights in land or water rights in connection therewith, (b) to operate and maintain any undertaking for its own use or for the use and benefit of its inhabitants and also to operate and maintain such undertaking for the use and benefit of persons, firms, and corporations (including municipal corporations and inhabitants thereof) whose residences or places of business are (or which are) located in such municipality, (c) to issue its bonds to finance in whole or in part the cost of the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of any undertaking, (d) to prescribe and collect rates, fees, charges for the services, facilities and commodities furnished by such undertaking, and (e) to pledge to the punctual payment of said bonds and interest thereon an amount of the revenues of such undertaking (including improvements, betterments, or extensions thereto thereafter constructed or acquired) or of any part of such undertaking, sufficient to pay said bonds and interest as the same shall become due and to create and maintain reasonable reserves therefor. Such amount may consist of all or any part or portion of such revenue. The governing body of the municipality in determining such cost may include all costs and estimated costs of the issuance of said bonds, all engineering, inspection, fiscal and legal expenses, and interest which it is estimated will accrue during the construction period and for six months thereafter on money borrowed or which it is estimated will be borrowed pursuant to this article. (1935, c. 473, s. 4.)

§ 2969(5). Authorization of project; bond provisions. — The construction, reconstruction, improvement, betterment or extension of any undertaking may be authorized under this article and bonds may be authorized to be issued under this article to provide funds for such purpose or purposes by resolution or resolutions of the governing body which may be adopted at the same meeting at which they are introduced by a majority of all the members thereof then in office and shall take effect immediately upon adoption, notwithstanding any provisions to the contrary contained in the charter of such municipality, or in any other law, and such resolutions shall not be required to be published. Said bonds shall bear interest at such rate or rates not exceeding five per centum per annum, payable semi-annually, may be in one or more series, may bear such date or dates, may mature at such time or times not exceeding forty years from their respective dates, may be payable in such medium of payment, at such place or places, may carry such registration privileges, may be subject to such terms of redemption, may be executed in such manner, may contain such terms, covenants and conditions, and may be in such form, either coupon or registered, as such resolution or subsequent resolutions may provide. The local government commission may sell said bonds at private sale without advertisement to the United States of America or any agency, instrumentality, or corporation thereof. Pending the preparation of the definitive bonds, interim receipts or certificates in such form and with such provisions as the governing body may determine may be issued to the purchaser or purchasers of bonds sold pursuant to this article. Said bonds and interim receipts or certificates shall be fully negotiable within the meaning of and for all the purposes of the chapter of the Consolidated Statutes, entitled "Negotiable Instruments." (1935, c. 473, s. 5.)

§ 2969(6). Covenants in resolution authorizing issuance of bonds.—Any resolution or resolutions authorizing the issuance of bonds under this article may contain covenants as to (a) the purpose or purposes to which the proceeds of sale of said bonds may be applied and the use and disposition thereof, (b) the use and dispostion of the revenue of the undertaking for which said bonds are to be issued, including the creation and maintenance of reserves, (c) the transfer from the general funds of the municipality to the account or accounts of the undertaking an amount equal to the cost of furnishing such municipality or any of its departments, boards or agencies with the services, facilities and commodities of said undertaking, (d) the issuance of other or additional bonds payable from the revenues of said undertaking, (e) the operation and maintenance of such undertaking, (f) the insurance to be carried thereon and the use and disposition of insurance mon-

eys, (g) books of account and the inspection and audit thereof, and (h) the terms and conditions upon which the holders of said bonds or any proportion of them or any trustee therefor shall be entitled to the appointment of a temporary or permanent receiver by the resident judge of the superior court of the judicial district in which the municipality is situated, or by a judge holding a regular or special term therein, which court shall have jurisdiction in such proceedings, and which receiver may, subject to the orders of said court, enter and take possession of said undertaking, operate and maintain the same, prescribe rates, fees, or charges, and collect, receive and apply all revenue thereafter arising therefrom in the same manner as the municipality itself might do. The provisions of this article and any such resolution or resolutions shall be a contract with the holder or holders of said bonds, and the duties of the municipality and of its governing body and officers under this article and any such resolution or resolutions shall be enforceable by any bondholder, by mandamus or other appropriate suit, action or proceeding in any court of competent jurisdiction. (1935, c. 473, s. 6.)

§ 2969(7). Validity of bonds.—Said bonds bearing the signature of officers in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all the persons whose signatures appear thereon shall have ceased to be officers of the municipality issuing the same. The validity of said bonds shall not be dependent on nor affected by the validity or regularity of any proceedings relating to the acquisition, purchase, construction, reconstruction, improvement, betterment, or extension of the undertaking for which said bonds are issued. The resolution authorizing said bonds may provide that the bonds shall contain a recital that they are issued pursuant to the act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance. (1935, c. 473, s. 7.)

§ 2969(8). Lien of bonds.—All bonds of the same issue shall, subject to the prior and superior rights of outstanding bonds, claims or obligations, have a prior and paramount lien on the revenue of the undertaking, for which said bonds have been issued, over and ahead of all bonds of any issue payable from said revenue which may be subsequently issued and over and ahead of any claims or obligations of any nature against said revenue subsequently arising or subsequently incurred. All bonds of the same issue shall be equally and ratably secured without priority by reason of number, date of bonds, of sale, of execution or of delivery, by a lien on said revenue in accordance with the provisions of this article and the resolution or resolutions authorizing said bonds. All bonds issued under this article shall have a junior and subordinate lien on the revenue of the undertaking under and secondary to outstanding bonds issued to finance in whole or in part the acquisition, purchase, or construction of such undertaking, where any part of such revenues are by other laws required to be applied to the payment of the principal or interest of such outstanding bonds. (1935, c. 473, s. 8.)

§ 2969(9). Bonds not a general obligation of municipality.—No holder or holders of any bonds issued under this article shall ever have the right to compel any exercise of taxing power of the municipality to pay said bonds or the interest thereon. Each bond issued under this article shall recite in substance that said bond, including interest thereon, is payable from the revenue pledged to the payment thereof, and that said bond does not constitute a debt of the municipality within the meaning of any statutory limitation. (1935, c. 473, s. 9.)

§ 2969(10). Undertakings to be self-supporting.—The governing body of a municipality issuing bonds pursuant to this article shall prescribe and collect reasonable rates, fees or charges for the services, facilities and commodities of such undertaking, and shall revise such rates, fees or charges from time to time whenever necessary so that such undertaking shall be and always remain self-supporting. The rates, fees or charges prescirbed shall be such as will produce revenue at least sufficient (a) to pay when due all bonds and interest thereon, for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor, and (b) to provide for all expenses of operation and maintenance of such undertaking, including reserves therefor. (1935, c. 473, s. 10.)

§ 2969(11). Use of revenue.—Any municipality issuing bonds pursuant to this article for the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of any undertaking shall have the right to appropriate, apply or expend the revenue of such undertaking for the following purposes: (a) to pay when due all bonds and interest thereon, for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor, (b) to provide for all expenses of operation and maintenance of such undertaking, including reserves therefor, (c) to pay and discharge notes, bonds or other obligations and interest thereon, not issued under this article for the payment of which the revenue of such undertaking is or shall have been pledged, charged or encumbered, (d) to pay and discharge notes, bonds or other obligations and interest thereon, which do not constitute a lien, charge or encumbrance on the revenue of such undertaking, which shall have been issued for the purpose of financing the acquisition, purchase, construction, reconstruction, improvements, betterment or extension of such undertaking, and (e) to provide a reserve for betterments to such undertaking. Unless and until adequate provision has been made for the foregoing purposes, no municipality shall have the right to transfer the revenue of such undertaking to its general funds. (1935, c. 473, s. 11.)

§ 2969(12). Consent of state agencies; and application of the local improvement act.—It shall not be necessary for any municipality proceeding under this article to obtain any certificate of convenience or necessity, franchise, license, permit, or other authorization from any bureau, board, commission or other like instrumentality of

the state except the approval of the local government commission, as required by the Local Government Act as amended, which act as amended shall apply to all bonds issued hereunder, in order to acquire, construct, purchase, reconstruct, improve, better, extend, maintain and operate an undertaking, but the powers and duties of the state board of health shall continue as heretofore. (1935, c. 473, s. 12.)

§ 2969(13). Construction of article.—The powers conferred by this article shall be in addition and supplemental to the powers conferred by any other general, special or local law. The undertaking may be acquired, purchased, constructed, reconstructed, improved, bettered, and extended, and bonds may be issued under this article for said purposes, notwithstanding that any general, special or local law may provide for the acquisition, purchase, construction, reconstruction, improvement, betterment, and extension of a like undertaking, or the issuance of bonds for like purposes, and without regard to the requirements, restrictions, limitations, or other provisions contained in any other general, special or local law, including, but not limited to, any requirement for the approval by the voters of any municipality. In so far as the provisions of this article are inconsistent with the provisions of any other general, special or local law, the provisions of this article shall be controlling. (1935, c. 473, s. 13.)

§ 2969(14). Termination of power to issue bonds.—Except in pursuance to any contract or agreement theretofore entered into by any municipality, no municipality shall borrow any money or deliver any bonds pursuant to this article to the purchaser or purchasers thereof after June thirtieth, one thousand nine hundred and thirty-seven. (1935, c. 473, s. 15.)

§ 2969(15). Consent of local government commission necessary before bonds are issued. — No bonds shall be issued under this article except with the express approval of the local government commission. (1935, c. 473, s. 17.)

CHAPTER 57

NAMES OF PERSONS

§ 2970. Legislature may regulate change by general but not private law.—The general assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same. (Rev., s. 2146; Const., Art. II, s. 11.)

As to name of partnership, see section 3269. As to persons trading as "company" or "agent" to disclose names of real parties, see section 3292. As to name of corporation, see section 1114. As to trademarks, brands and marks, see section 3971 et seq. As to changing name of minor child upon adoption, see section 186.

§ 2971. Procedure for changing name; petition; notice.—A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given ten days notice of the application by publication at the courthouse door. (Rev., s. 2147; 1891, c. 145.)

§ 2972. Contents of petition.—The applicant shall state in the application his true name, the name he desires to adopt, his reasons for desiring such change, and that his name has never been changed before by law. (Rev., s. 2147; 1891, c. 145.)

§ 2973. Proof of good character to accompany petition.—The applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing. (Rev., s. 2148; 1891, c. 145.)

§ 2974. Clerk to order change; certificate and record.—If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of applicant from his true name to the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court. (Rev., ss. 2149, 2150; 1891, c. 145.)

§ 2975. Effect of change; only one change.—When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this chapter but once. (Rev., ss. 2147, 2149; 1891, c. 145.)

CHAPTER 58

NEGOTIABLE INSTRUMENTS

Art. 1. General Provisions

§ 2976. Definitions.—In this chapter, unless the context otherwise requires—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and setoff.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print. (Rev., s. 2340; 1899, c. 733, s. 191.)

Cross Reference.—For full digest treatment of Negotiable Instruments see 2 N. C. Enc. Dig. 373; 13 N. C. Enc. Dig. 253. As to terms bearer and holder, see note to sec. 2990.

Editor's Note. — Especial attention is called to the fact

that the purpose in enacting this statute was to bring about, insofar as possible, a uniformity of the law of the various states upon the subject. This being true, if the purpose is to be realized to the fullest extent, uniformity of interpretation is as essential as uniformity in the statutory provisions. Hence, an investigation of the decisions of the other states which interpret the N. I. L. is not only proper but almost indispensable, and such decisions are more persuasive as authority than is usually the case with the decisions of other states. While it would be impossible in a work of this nature to incorporate all the holdings of the courts of other states upon the subject, some of these decisions have been inserted in this chapter where it is thought they may be of great value in construing the law, or where no decision of the Supreme Court of North Carolina covers the special point.

Some of the North Carolina cases herein annotated were decided under the Law Merchant before the N. I. L. was adopted, but should be of aid in construing this law.

Section quoted in defining bearer and holder in Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220. See notes of this case under section 3010.

§ 2977. Person primarily liable on instrument.—The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable. (Rev., s. 2342; 1899, c. 733, s. 192.)

Cross Reference.—As to accommodation endorser, see 2 N. C. Enc. Dig. 418; as to liability of parties, see sections 3041-3050.

A surety on an instrument comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same. Rouse v. Wooten, 140 N. C. 557, 559, 53 S. E. 430. See also Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597; Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Joint makers upon the face of a negotiable instrument are deemed to be primarily liable thereon, and in an action upon the note the burden is upon the defendants to prove any matter in release, if brought within three years. Roberson Co. v. Spain, 173 N. C. 23, 91 S. E. 361. See also Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597.

When a promissory note sued on has the signatures of two of the defendants on its face as joint makers and the other defendant's signature on the back as endorser, the statute makes them each liable to the payee and nothing else appearing, those signing as makers are primarily liable, with the right of contribution among themselves, while the endorser is secondarily liable. Raleigh Trust Co. v. York, 199 N. C. 624, 155 S. E. 263.

Indorser.—If a note, whether negotiable or not, is indorsed at the same time the note itself is made, the indorser ought to be held as original promisor or maker of the note. But where the note is indorsed after its delivery to the payee, the indorser is to be held as an indorser or guarantor depending upon whether the note is negotiable or not. Lilly v. Baker, 88 N. C. 151, 154.

A married woman may now make executory contracts as binding as if she were a feme sole, § 2507, with certain restrictions, § 2515, and when she has executed a note as co-maker with her husband, a holder in due course for value, may accordingly enforce collection thereof against her as a person primarily liable on the note, and absolutely required to pay it. Taft v. Covington, 199 N. C. 51, 153 S. E. 597.

Parol Evidence as to Character of Signing.—As between the payee of a negotiable note and the signers thereof, a person signing his name on the face of the note may prove by parol evidence that to the knowledge of the payee he signed the same as surety and not maker. Davis v. Alexander, 207 N. C. 417, 177 S. E. 417.

Cited in Mayers v. Bank, 198 N. C. 542, 152 S. E. 628.

§ 2978. What constitutes reasonable time.—In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. (Rev., s. 2343; 1899, c. 733, s. 193.)

Cross Reference. — As to failure to present bill for acceptance within a reasonable time, see sec. 3126; as to demand for payment, see 2 N. C. Enc. Dig. 472.

As Dependent upon Circumstances. — What constitutes reasonable time will vary under the facts and circumstances of different cases, and this statute expresses as definite a rule as could well be established or considered desirable. Manufacturing Co. v. Summers, 143 N. C. 102, 108, 55 S. E. 522.

Though it be inconvenient to have several rules, applicable to different classes of persons, it is more so to have one applied to all, which is wholly unsuited to the habits, transactions, and experience of the greater number. It is impossible to lay down a rule in the abstract which is equally just in its bearing on all persons to be affected by it; it must depend upon the circumstances of the case, and must be determined by the jury, under the directions of the court. Raines v. Grantham, 205 N. C. 340, 343, 171 S. E. 360, citing Brittain v. Johnson, 12 N. C. 293.

Same—Demand and Notice of Default upon Notes.—Four months, when the parties all resided in the same village, is an unreasonable time in making a demand of the maker of a note and giving notice of non-payment to the indorser. Yancey v. Littlejohn, 9 N. C. 525.

But where a demand note was given to raise money for marketing a crop to be negotiated when needed, a negotiation forty four days after the date of making was not an unreasonable time. Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979.

Same—Presentation of Check.—The holder of a check upon a bank located in the town of his residence may present it for payment on the day after the same is drawn, and his omission to present it sooner is no defense to the drawee bank, unless he had information of its precarious condition. First National Bank v. Alexander, 84 N. C. 30.

Cited in State, etc., Trust Co. v. Hedrick, 198 N. C. 374, 151 S. E. 723.

§ 2979. When law merchant governs.—In any case not provided for in this chapter the rules of the law merchant shall govern. (Rev., s. 2344; 1899, c. 733, s. 196.)

§ 2980. Acts to be done on Sunday or holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday, or on a holiday, the act may be done on the next succeeding secular or business day. (Rev., s. 2839; 1899, c. 733, s. 194.)

§ 2981. Application of chapter.—The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the eighth day of March, one thousand eight hundred and ninety-nine. (Rev., s. 2345; 1899, c. 733, s. 195.)

Applied in Barden v. Hornthal, 151 N. C. 8, 65 S. E. 513.

Art. 2. Form and Interpretation

§ 2982. Form of negotiable instrument. — An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty. (Rev., s. 2151; 1899, c. 733, s. 1.)

Cross Reference.—As to certainty of sum, see sec. 2983; as to unconditional promise, see sec. 2984; as to fixed determinable time, see sec. 2988, 2 N. C. Enc. Dig. 409; as to payment to order, see sec. 2989; as to payment to bearer, see sec. 2990. As to negotiability in general, see 2 N. C. Enc. Dig. 404.

Editor's Note.—It is apparent that this section is declaratory of the prior law upon the subject. As to certainty of amount to be paid and time of payment, see First Nat. Bank v. Bynum, 84 N. C. 25; necessity of payment in money, Johnson v. Henderson, 76 N. C. 227.

Effect of Conditions.—A contingent condition has always

defeated the negotiability of an instrument. Goodloe v. Taylor, 10 N. C. 458.

Since the passage of this law the court has held that a note, the payment of which was made dependent upon a condition expressed in a separate instrument, a deed, was not negotiable. Pope v. Righter Parey Lumber Co., 162 N. C. 206, 78 S. E. 65.

Necessity for Payment to Order or Bearer.—Subsection four was applied in Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23.

Where an instrument is expressly made payable to a named person, such a provision clearly imports a lack of negotiability under this section. Bank of United States v. Cuthbertson, 67 F. (2d) 182, 186.

The absence of the words "to bearer" or "to order" does not render the bonds nonassignable, but nonrecognizable. Id.

Form of Instrument.—So long as the requirements of this section are complied with, the form of the instrument is immaterial. Thus it has been held that the fact that the instrument is written in pencil (Gudger v. Fletcher, 29 N. C. 372, although decided prior to section this holding would seem to be applicable), or that it is under seal (First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855. This case was also decided prior to N. I. L. but is apparently applicable, see section 2987) does not affect the negotiability.

To illustrate further, it has been held that a certificate of deposit containing words of negotiability (Johnson v. Henderson, 76 N. C. 227, though decided prior to N. I. L., this case is applicable under it), or a due bill (Purtel v. Morehead, 19 N. C. 239) or a mortgage note for a specified sum, payable a certain future day, though it provided that the whole principal sum should become payable at the option of the mortgagee upon a default in an installment, (decided under the N. I. L. of Wisconsin which is identical with this section) is negotiable. Thorpe v. Minderman, 123 Wis. 149, 101 N. W. 417.

Although county warrants are transferable by indorsement and the indorsee or holder may sue upon them in his own name, they are not negotiable in the sense that the holder in due course is protected by the N. I. L. Wright v. Kinney, 123 N. C. 618, 619, 31 S. E. 874. For further treatment, see notes to section 2983-2995.

The provisions therein that a bond should be payable to bearer, or if registered to the registered holder only, and provisions for an extension of time, upon application of the maker, in the discretion of trustee in the deed of trust securing it, does not change its negotiable character. Thomas v. De Moss, 202 N. C. 646, 163 S. E. 759.

A municipal bond payable to bearer, and otherwise complying as to form with the provisions of this section, is a negotiable instrument, and as such when in the hands of a holder in due course as defined by C. S., 3033, is not subject to defenses which would otherwise ordinarily be available to the municipal corporation by which the bond was issued. Bankers' Trust Co. v. Statesville, 203 N. C. 399, 407, 166 S. E. 169.

A bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, the bond being payable to the liquidating bank and not to its order, is not a negotiable instrument within the meaning of this section. North Carolina Bank, etc., Co. v. Williams, 201 N. C. 464, 160 S. E. 484.

Holders of negotiable mortgage notes are necessary parties plaintiff in an equitable action to reform the deed of trust and the notes. First Nat. Bank v. Thomas, 204 N. C. 599, 169 S. E. 189.

Cited in Peoples Building & Loan Assn. v. Swaim, 198 N. C. 14, 16, 150 S. E. 668; Dixon v. Smith, 204 N. C. 480, 168 S. E. 683; Stein v. Levins, 205 N. C. 302, 305, 171 S. E. 96.

§ 2983. What constitutes certainty as to sum.—The sum payable is a sum certain within the meaning of this chapter, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments with a provision that upon default in payment of any installment the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity. But a provision incorporated in the instrument to pay counsel fees for collection is not enforceable, but does not affect the other terms of the instrument or the negotiability thereof. (Rev., ss. 2152, 2346; 1899, c. 733, ss. 2, 197; 1905, c. 327.)

Editor's Note.—In First Nat'l Bank v. Bynum, 84 N. C. 25, decided before this section was enacted, it was held that a provision for attorneys' fees and exchange made the note non-negotiable because of uncertainty of the amount to be paid. This, according to the specific terms of the section, is, of course, no longer the law.

Although the first sentence of paragraph five appears in the N. I. L., the second sentence was inserted by the legislature of this State so that, in accordance with the uniform law, the stipulation for attorney fees does not destroy the negotiability of the instrument although the provision is not enforceable. It is the evident policy of the legislature to prevent any stipulation permitting "collection fees" as being against public policy. See Turner v. Boger, 126 N. C. 300, 302, 35 S. E. 592, and citations. An application of the operation of this paragraph will be found in Security Finance Co. v. Hendry, 189 N. C. 549, 177 S. E. 629.

Since the provision in an instrument is invalid it does not affect the amount in suit in determining the jurisdiction of a justice court. Bank v. Appalachian Land, etc., Co., 128 N. C. 193, 38 S. E. 813.

Since attorney fees are not collectible under this section an agent with special authority to pay a note due out of funds held by him is limited to a payment of the principal sum, interests and costs that have accrued at the time of payment. Hooper v. Trust Co., 190 N. C. 423, 130 S. E. 49.

Same—Foreign Contract for Attorney's Fees.—The validity of a provision in a note for attorneys' fees executed and payable in Georgia, must be determined by the laws of North Carolina. Exchange Bank v. Land Co., 128 N. C. 193, 38 S. E. 813. And because of this section, the courts of North Carolina will not enforce such a provision. Security Finance Co. v. Hendry, 189 N. C. 549, 177 S. E. 629.

§ 2984. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. (Rev., s. 2153; 1899, c. 733, s. 3.)

Cross Reference.—As to draft with bill of lading attached, see sec. 318 and the notes thereto; as to payment on contingency, see 2 N. C. Enc. Dig. 386.

Editor's Note.—This section is declaratory of the prior law upon the subject [See 9 Enc. Dig. (sections 10, 14, 58) pages 386, 400], except that very early it was held that a statement of the consideration made the instrument conditional. See Mason v. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625; and Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308, which overruled the early case, Howard v. Kimball, 65 N. C. 175, and held in conformity with this section.

Retention of Title in Seller.—A written unconditional, promise to pay a specified sum of money at a designated time is a negotiable instrument, and the negotiability is not affected because the title to goods sold for which the note was given is retained in the seller until payment shall have been made; or stipulations are made in the instrument for application of the proceeds to the obligor's unqualified promise to pay. See Branch Banking, etc., Co. v. Leggett, 185 N. C. 65, 116 S. E. 1.

Particular Fund Provided.—Bonds issued for road building are negotiable, notwithstanding that a fund is provided for their payment. While the specification of a particular fund out of which payment is to be made destroys the negotiability, a fund may be provided for payment, as in this case, without affecting it. Commissioners v. Bank, 157 N. C. 191, 72 S. E. 996.

§ 2985. What constitutes determinable future time.—An instrument is payable at a determinable furture time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a con-

tingency is not negotiable, and the happening of the event does not cure the defect. An instrument is payable at a determinable future time, within the meaning of this chapter, notwithstanding the fact that it contains a provision waiving notice of protest, notice of dishonor, and an agreement to be bound notwithstanding any extension of time which may be granted. Or, if collaterals have been deposited as security for the payment thereof and the instrument contains a provision that if the value of the securities so deposited has so decreased or declined as to render the holder insecure, the holder may require the maker to deposit other and further collaterals to secure the same, and, upon failure to comply with such demand, to declare the instrument due at once. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, but an instrument payable at a determinable future time is negotiable, even though it may mature or be declared due upon a contingency happening before such future time. (Rev., s. 2156; 1899, c. 733, s. 4; 1923, c. 72.)

Editor's Note.—By the amendment, Public Laws 1923, there was added all that part of the section including and following the third sentence.

In I N. C. Law Rev. 299, in an article discussing the statutory changes effected by the Public Laws of 1923, it is said: "C. 72 of the Public Laws of 1923 amends the Negotiable Instruments Law (N. I. L.) s. 4, C. S. s. 2985 in one important respect in order to conform with banking experience and the recommendation of the Federal Reserve Bank of Richmond. [The Tar Heel Banker, April 1923, p. 14.] There are in common usage today many kinds of provisions in negotiable paper for the purpose of accelerating maturity. Thus the principal amount may be made payable in installments with the provision that upon default in payment of any installment or of interest, the whole shall become due. [sec. 2983, par. 3]. Or notes may be issued in a series to fall due on successive dates, and each note stating that if one is dishonored the whole series is payable at once. [Chicago Ry. Equipment Co. v. Merchants Bank, 136 U. S. 268, 34 L. Ed. 349, is an example.] Other examples are found in "chattel notes," [Whitlock v. Lumber Co., 145 N. C. 120, 58 S. E. 909] which contain provisions to protect the seller of goods under a conditional sale. If the note provides that the amount shall be payable at a fixed date, or sooner at the demand of the holder if he deems himself insecure, the courts have generally held that such provisions destroy negotiability. (First Nat'l Bank v. Bynum, 84 N. C. 25.) If the ultimate time of payment can be ascertained from the face of the instrument and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper, it would seem that all these provisions should be upheld. [This is the argument made by Zachariah Chafee, Acceleration Provision in Time Paper, 32 Harv. L. Rev. 746.]

"The amendment makes valid another type of acceleration provision used largely by banks, and which bankers looked upon as valid, although the majority of courts thought otherwise. [Strickland v. National Salt Co., 79 N. J. Eq. 182, 91 Atl. 828; National Salt Co. v. Ingraham, 122 Fed. 40. But see National Salt Co. v. Ingraham (1906) 143 Fed. 805. For further cases see Mr. Chafee's article cited, supra. This article is the best discussion of this subject available, and Mr. Chafee argues for the negotiability of time paper with acceleration provisions.] Suppose that collateral is deposited as security for the payment of a note, which contains a provision that if the value of the securities declines so as to render the holder insecure, the holder may require the maker to deposit other collateral, and upon failure to comply, the holder may declare the instrument due at once. It has been argued that such a provision violates three formal requisites of negotiability, certainty of time, certainty of amount, and the rule against the promise to do anything but pay money. But such a provision makes it more certain that the holder will receive the full face value of the instrument, and under the N. I. L. a note payable "on or before" a certain date is not rendered non-negotiable. [§ 2985, par. 2.] Further the purpose of the additional promise is to secure the payment of the money and protect the holder from the risks of the maker's insolvency. The provision makes the note more valuable as a substitute for money, and the amendment brings the law of North Carolina into line with business practice.

"The amendment also provides that provisions waiving notice of protest, notice of dishonor and agreements to be bound notwithstanding any extension of time, shall not affect negotiability. It seems that this merely makes more certain what was already understood to be the law. (Sections, 3091, 3092, 3093, 3141. See First Nat'l Bank v. Johnston (1915) 169 N. C. 526, 86 S. E. 360.)" (The citations which here appear in the brackets are footnotes of the Article as it reads in the Law Review.)

Acceleration.—Acceleration of the maturity of a note, or of notes in a series, as the result of the failure of the maker to pay interest, or to pay one of the notes of said series, when same becomes due, according to the tenor of the note or notes, by virtue of an agreement to that effect appearing on the face of the note, or notes, does not make the note, or notes of the series, payable upon a contingency, and therefore non-negotiable within the meaning of this section. New Bern Banking, etc., Co. v. Duffy, 153 N. C. 62, 68 S. E. 915; Walter v. Kilpatrick, 191 N. C. 458, 461, 132 S. E. 148.

Section applied as to retaining title to the goods for which the note was given, in Chicago R. Co. v. Merchants' Bank, 136 U. S. 268, 34 L. Ed. 349. See note of Trust Co. v. Legett under section 2984.

§ 2986. Additional provisions as affecting negotiability.—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorized a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal, nor authorize the enforcement of an authorization to confess judgment of a waiver of homestead and personal property exemptions. (Rev., ss. 2154, 2346; 1899, c. 733, ss. 5, 197; 1905, c. 327.)

Editor's Note.—Subdivision two and all the provisions after the word "illegal" in the last sentence were inserted by the North Carolina Legislation and does not appear in the proposed Uniform Law.

A Procedure Statute.—In so far as this section relates to the enforcement of an authorization to confess judgment, it is merely procedural. Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790, 793.

This section and §§ 624, 625, are mere procedural statutes, regulating the practice of the courts, and can of course have no extraterritorial effect or be looked to as limiting the powers of corporations. Id.

Negotiability Not Affected by Mortgage.—The recital on the face of a note, to wit: "This is one of a series of notes secured by deed of trust or mortgage," does not affect the negotiable character of the notes under this section. Walter v. Kilpatrick, 191 N. C. 458, 461, 132 S. E. 148.

Additional Act Destroying Negotiability.—A bond to pay money, and to do something else, "as to feed and clothe a slave," is not negotiable. Knight v. Wilmington R. Co., 46 N. C. 357.

Enforcement of Foreign Homestead Waiver.—A provision in a note for the waiver of homestead exemption will not be enforced by the courts of this State although the note may have been executed by parties in another state. Exchange Bank v. Land Co., 128 N. C. 193, 38 S. E. 813.

Applied in Branch Banking, etc., Co. v. Legett, 185 N. C. 65, 116 S. E. 1. See note under section 2984.

§ 2987. Effect of omissions; seal; designation of particular money. — The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where

it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. (Rev., s. 2155; 1899, c. 733, s. 6.)

Cross Reference.—As to certainty of parties, place, and payment, see 2 N. C. Enc. Dig. 408; as particular kind of currency, see 2 N. C. Enc. Dig. 409-410.

Editor's Note.—Prior to this secton it was held that a negotiable instrument payable in "current funds" was not negotiable. It was also intimated that one paid in "currency" was not, but that one payable in "legal tender notes" was negotiable.

See the note to the following section.

Statement of Transaction.—A negotiable instrument, setting out the transaction for which the instrument is given, cannot be set aside when a holder in due course takes without notice of the infirmity or defect, where there is nothing in such contract to restrict negotiability in the instrument or to indicate fraud or an existent breach. Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308; Bank v. Michael, 96 N. C. 53, 1 S. E. 855.

Bonds under Seal Negotiable.—Bonds for the payment of money only, while they retain in other respects the properties and incidents of obligations under seal, are in this State put upon the footing of promissory notes and both are made negotiable securities under the statute. Pate v. Brown, 85 N. C. 166, 167.

§ 2988. When payable on demand.—An instrument is payable on demand (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. (Rev., s. 2157; 1899, c. 733, s. 7.)

Editor's Note.—In Freeman v. Ross, 15 Ga. 252, it was held that a draft in which no time of payment was expressed was due instantly, and after presentment it became an overdue instrument and a holder after that time took with notice of all equities. One who took before presentment took before it was overdue. Rosewell Mfg. Co. v. Hudson, 72 Ga. 24. A note payable "after date" without expressing any time is payable on demand. Morrison v. Morrison, 102 Ga. 170, 29 S. E. 125. A note payable on or before a certain date is payable on that date. The maker may pay before the date if he likes, but if he wishes he may delay payment until the date named. James v. Benjamin, 72 Ga. 185.

Demand Not Necessary.—When an instrument is payable on demand it is not necessary to aver and prove demand, the suit itself is sufficient demand. Dougherty v. Western Bank, 13 Ga. 287.

Statute of Limitations.—A promissory note, payable on demand, is due immediately, and the statute of limitations runs from the date. Caldwell v. Rodman, 50 N. C. 139. The same is true of a bond when no time is specified for payment of it. Ervin v. Brook, 111 N. C. 358, 16 S. E. 240.

§ 2989. When payable to order.—The instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. When the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. (Rev., s. 2158; 1899, c. 733, s. 8.)

See 13 N. C. Law Rev., 80.

Negotiability.—Unless a note is payable "to the order of a special person or to bearer" it is not negotiable. Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23. So a note payable to a specific person or his order is negotiable. Insurance Co. v. Jones, 191 N. C. 176, 179, 131 S. E. 587.

§ 2990. When payable to bearer.—The instrument is payable to the bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank. (Rev., s. 2159; 1899, c. 733, s. 9.)

The terms bearer and holder are of the same import, and where either is employed in an instrument it may be negotiated by delivery. Pryor v. American Trust Co., 15 Ga. App. 822, 84 S. E. 312.

Fictitious Payee.—A negotiable instrument payable to a fictitious payee does not make one whose name is identified as that appearing on the instrument payee, but the intention of the maker in inserting the name governs. Norton v. City Bank (Va.) 294 Fed. 839.

Effect of Indorsement upon Negotiability.—An indorsement in blank of a non-negotiable instrument does not make it negotiable. Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23.

§ 2991. No formal language required. — The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. (Rev., s. 2160; 1899, c. 733, s. 10.)

§ 2992. Presumption as to date.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be. (Rev., s. 2161; 1899, c. 733, s. 11.)

§ 2993. Antedated and postdated.—The instrument is not invalid for the reason only that it is antedated or postdated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. (Rev., s. 2162; 1899, c. 733, s. 12.)

When Postdated Check Subject to Payment.—Since postdated checks are payable at the time of their date and not before, the drawee cannot accept them and charge them against funds of the drawer prior to that time. The drawer does not undertake to have the funds in the drawee's hands until the time it bears date. Smith v. Maddox-Rucker Bkg. Co., 8 Ga. App. 288, 68 S. E. 1092.

Status of Postdated Check before Maturity.—A postdated check is payable on or after the day of its date; but in the meantime it is negotiable, and the drawer cannot be charged by garnishment as debtor of the payee unless it affirmatively appears at the time of the judgment that the check is due and is still the property of the payee. Wilson v. McEachern, 9 Ga. App. 584, 71 S. E. 946.

§ 2994. When date may be inserted.—When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date. (Rev., s. 2163; 1899, c. 733, s. 13.)

§ 2995. When blanks may be filled.—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling

up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion be negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. (Rev., s. 2164; 1899, c. 733, s. 14.)

Liability Where Amount Left Blank.—The affixing a seal by an agent without authority will not lessen the maker's liability where the amount inserted by the agent was more than agreed to. Humphreys v. Finch, 97 N. C. 303, 1 S. E. 870; Phillips v. Hensley, 175 N. C. 23, 94 S. E. 673; McArthur v. McLeod, 51 N. C. 476.

Who May Fill Blank.—A bill of exchange drawn and issued in blank for the name of the payee may be filled up by a bona fide holder with his own name, and will bind the drawer. Lawrence v. Mabry, 13 N. C. 473, 475.

One taking before the blanks are filled takes with notice, and must at his peril ascertain the real authority of the person intrusted to complete the instrument. Guerrant v. Guerrant, 7 Va. Law Reg. 639.

Must Be Filled in Reasonable Time.—The blanks in a negotiable instrument must be filled in in a reasonable time. Brown v. Thomas, 120 Va. 763, 92 S. E. 977. As to what constitutes a reasonable time, see sec. 2978.

§ 2996. Incomplete instrument not delivered.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery. (Rev., s. 2165; 1899, c. 733, s. 15.)

Acknowledgment after Completion. — If the maker of a sealed note, blank as to the payee's name, acknowledges it to be his bond after the insertion of the payee's name, and delivery, it is valid and its maker is liable thereon. Wester v. Bailey, 118 N. C. 193, 24 S. E. 9.

§ 2997. Delivery necessary; when effectual; when presumed.—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing or indorsing as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. (Rev., s. 2166; 1899, c. 733, s. 16.)

As to necessity for delivery in negotiation, see sec. 3010.

Presumption of Delivery to Holder in Due Course. — Where a negotiable municipal bond is in the hands of a holder in due course, it is conclusively presumed that a valid delivery of the bonds had been made so far as the rights of the holder are concerned. Bankers' Trust Co. v. Statesville, 203 N. C. 399, 166 S. E. 169.

Presumption of Delivery to Payee. — Whenever a bill or note is found in the hands of the payee it will be presumed that it was delivered to him, but the presumption may be rebutted. Pate v. Brown, 85 N. C. 166, 167.

Delivery to Other than Payee.—It is not necessary that delivery be made to the payee. If the delivery is made to another but shows that the maker intended to part with control, and that it was for the payee's benefit, such delivery is sufficient to bind the maker. Irvin v. Harris, 182 N. C. 647, 109 S. E. 867.

Parol Proof of Conditional Delivery — Contemporaneous Parol Agreements.—It seems to be the rule that as against any person not a holder in due course a contemporaneous parol agreement may be shown to prove that the delivery was conditional, and that there was no contract on the failure of the condition. The instrument cannot be varied by such agreements. See, Robertson v. Virginia Nat. Bank, 135 Va. 166, 115 S. E. 536. Ed. Note.

Therefore it is competent to prove a collateral agreement as between the immediate parties making a note non-payable upon a contingency which would deprive the note of all consideration even though the note is under seal. Farrington v. McNeill, 174 N. C. 420, 422, 93 S. E. 957.

But in an action upon a note the defendants were not permitted to set up the defense that as a part of the contemporaneous parol agreement they were given further time, until certain lands had been sold, for such would be in contradiction of the written instrument. Cherokee County v. Meroney, 173 N. C. 653, 92 S. E. 616.

§ 2998. Construction, where instrument is ambiguous.—Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. (Rev., ss. 1952, 2341; 1899, c. 733, s. 17.)

See 13 N. C. Law Rev., 81.

As to how indorsement made, see sec. 3011; as to liability of indorser, see sec. 3044 to 3049.

Note without Interest. — A note given for a specified amount "without interest" will be construed to bear interest after maturity. Dowd v. Railroad, 70 N. C. 468.

Figures Not Material.—The figures are not a material part of an instrument as the words control. State v. Lotono, 62 W. Va., 310, 58 S. E. 621.

The indorsement may be on any part of the note, even the face or under the maker's name. Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979.

§ 2999. Signature must appear; trade or assumed name.—No person is liable on the instru-

ment whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. (Rev., s. 2167; 1899, c. 733, s. 18.)

Cross Reference.—As to consideration in general, see 2 N. C. Enc. Dig. 390, 391.

Name in Body of Instrument Not Necessary.—It is not necessary that the name of the obligor appear in the note it is sufficient that he sign it. Howell v. Parsons, 89 N. C. 230.

Maker Must Show Lack of Consideration.—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee as a defense, in an action thereon the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payee to a judgment in his favor. Merchants Nat. Bank v. Andrews, 179 N. C. 341, 102 S. E. 500; Piner v. Brittain, 165 N. C. 401, 81 S. E. 462.

Instruments under Seal.—The lack of consideration cannot benefit a maker of a bond under seal because the law conclusively presumes that it was made upon good and sufficient consideration. Angier v. Howard, 94 N. C. 27; Wester v. Bailey, 118 N. C. 193, 194, 24 S. E. 9.

§ 3000. Signature by agent; how authority shown. — The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency. (Rev., s. 2168; 1899, c. 733, s. 19.)

In General.—This provision is an expression and affirmance of the better considered decisions on the subject. Midgette v. Basnight, 173 N. C. 18, 91 S. E. 353.

Authority of Agent Necessary.—The power to bind the principal by the making of negotiable paper is an important one, and not lightly to be inferred. It should be conferred directly, unless by necessary implication the duties of the agent cannot be performed without the exercise of the power, or where, as otherwise expressed, the power is practically indispensable to accomplish the object of the agency, and the person dealing with the agent must, subject to the principles heretofore stated, see to it that his authority is adequate. Bank v. Hay, 143 N. C. 326, 337, 55 S. E. 811.

Extent of Power.—Power to make restricted indorsements will not authorize a general indorsement in blank. Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316.

A general power to discount bills of exchange confers on the agent power to indorse. Merchants Bank v. Central Bank, 1 Ga. 418.

Agent by Implication.—The indorsement by an agent is valid although the power to indorse was conferred in a vague way, and the agency is one by implication. Midgette v. Basight, 173 N. C. 18, 91 S. E. 353.

Written Authority Not Necessary.—Authority to indorse a promissory note for another may be orally conferred. Conner v. Hodges, 7 Ga. App. 153, 66 S. E. 546; Taylor v. Johnson, 18 Ga. App. 161, 89 S. E. 77.

Necessity for Proof.—The fact that a signature is by a duly authorized agent does not prove itself, but the facts must be established by proper testimony. Midgette v. Basnight, 173 N. C. 18, 91 S. E. 353.

§ 3001. Liability of person signing as agent.— Where the instrument contains, or a person adds to his signature, words indicating that he signed for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. (Rev., s. 2169; 1899, c. 733, s. 20.)

Sufficient Disclosure of Principal. — Where a negotiable instrument is made by an agent for his principal, the agent, in order to exempt himself from liability, must not only name the principal, but must sufficiently show that the signature is that of the principal though done by an agent. A mere description of the relation is not sufficient to relieve the agent of liability. Graham v. Campbell, 56 Ga. 258; Lester v. McIntosh, 101 Ga. 675, 29 S. E. 7.

If the principal is distinctly indicated and the contract is in his name, the agent is not liable if he has the power to bind the principal. No form is indicated, all that is required is that the parties and intent be made plain. Merchants Bank v. Central Bank, 1 Ga. 418; Rawlings v. Robson, 70 Ga. 595.

Agreement as to Personal Liability.—Where an administrator signs a note in the name of the estate and thereunder writes his name as administrator, and at the time of the execution of the note the parties agree that he should not be personally liable thereon, the payee may not hold the administrator personally liable thereon, in view of this section. Bank of Spruce Pines v. Vance, 205 N. C. 103, 170 S. E. 119.

Proof of Principal by Parol.—As between themselves it may be shown that it was the intent of the parties that the principal and not the agent be bound, and that the instrument was given and accepted as such. Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665; Ocilla Southern R. Co. v. Morton, 13 Ga. App. 504, 79 S. E. 480.

But where the principal is not sufficiently described parol evidence cannot be introduced to charge him. The reason for this rule is that for a party to be bound his name must appear on the instrument. Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631; Bedell v. Scarlett, 75 Ga. 56.

Applicability to Fiduciaries.—See 9 N. C. L. Rev. 444.

§ 3002. Effect of signature by procuration.—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent so signing acted within the actual limits of his authority. (Rev., s. 2170; 1899, c. 733, s. 21.)

Signature of Attorney.—An attorney to whom a note is sent for collection has, prima facie, no authority to indorse the same in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority. Sherrill v. Weisiger Clothing Co., 114 N. C. 436, 438, 19 S. E. 365.

§ 3003. Effect of forged signature.—When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. (Rev., s. 2171; 1899, c. 733, s. 23.)

As to liability of acceptor in case of forged signature, see sec. 3043.

Editor's Note.—When a signature is forged no title can be acquired through it. Hillman v. Cornett, 137 Va. 200, 119 S. E. 74. Such infirmity inheres in the factum of the instrument and by the terms of the statute renders it inoperative; and this is true even where the instrument is in the hands of a bona fide holder for value. Pettyjohn v. National Exch. Bank, 101 Va. 111, 43 S. E. 203. The same rule applies whether it is the signature of the maker or the indorser that is attacked.

A bank is presumed to know the signature of its customers and if it pays a forged check it cannot charge the amount to the account of the depositor, unless the depositor is negligent. Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 296, as to forged bank checks, see also sec. 220 (h) and notes thereto.

In case of drafts presented for payment by an agent, the bank must be assured of the agency to hold another as principal. Letters of instruction to the agent are not sufficient to show power to draw drafts on the principal. Bank v. Hay, 143 N. C. 326, 55 S. E. 811.

In the case of McKaughan v. Trust Co., 182 N. C. 543, 109 S. E. 355, it is held that when one forges a deed and under the forgery obtains a check payable to a third party and he indorses the check in the name of the third party, paying an outstanding debt, to the drawer with a part of the funds so obtained, in an action against the bank the drawer can only recover the difference between the amount of the check and the amount paid to the drawer. This case is discussed and criticised in 1 N. C. Law Rev. 40, where it is suggested that the check was payable to a fictitious per-

son in which case the bank would not be liable, for the funds went into the hands of the person intended by the drawer, still it is said that if the drawer should recover at all he should recover all, for the funds that were paid him were for a prior debt and he became purchaser for value without notice.

The defense of forgery is personal, and an indorser cannot plead the forgery of the signature of the maker nor can he plead forgery of signatures of subsequent indorsers. Produce Co. v. Bieberback, 176 Mass. 577, 58 N. E. 162. Nor can a maker avoid liability because of forgery of the signature of a co-maker. Bum v. Farrell, 135 Iowa, 670, 113 N. W. 539.

There seems to be a conflict of authority as to whether or not a forgery may be ratified, see 36 L. R. A. (N. S.) 1006 (notes). The doctrine of estoppel seems to be generally applied, see 36 L. R. A. (N. S.) 1017 (notes), also 8 C. J. p. 763, sec. 1030 and that North Carolina will apply the doctrine that a forgery may be ratified is indicated in Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 296.

Art. 3. Consideration

§ 3004. Presumption of consideration.—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. (Rev., s. 2172; 1899, c. 733, s. 24.)

See 13 N. C. Law Rev., 52.

Editor's Note.—In Planter's Bank v. Yelverton, 185 N. C. 314, 117 S. E. 299, this section is construed with § 3010, and 3030 and it is held that one taking without indorsement takes subject to equities between the original parties, and the presumption of consideration may be rebutted.

Maker Must Show Lack of Consideration.—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee as a defense, in an action thereon the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payee to a judgment in his favor. Merchants Nat. Bank v. Andrews, 179 N. C. 341, 102 S. E. 500. Piner v. Brittain, 165 N. C. 401, 81 S. E. 462. See also Bank of Lewiston v. Harrington, 205 N. C. 244, 170 S. E. 916.

Where there is evidence tending to show that the president of a bank had received from the defendant an exchange of notes for the former's benefit, and that the defendant in the bank's action on the note admits its execution and delivery, it is prima facie evidence that the note was given for a consideration and defendant must show failure of consideration when relied upon by him. American Trust Co. v. Anagnos, 196 N. C. 327, 145 S. E. 619.

When Holder Must Show Consideration.—While a valuable consideration is essential to the support of negotiable instruments it is not necessary in an action upon them for the plaintiff to aver and prove such consideration; yet when evidence has been introduced by the defendant to rebut the presumption which they raise, the burden is thrown upon the plaintiff to satisfy the jury by a preponderance of evidence that there was a consideration. Campbell v. McCormac, 98 N. C. 491. Hunt v. Eure, 188 N. C. 716, 718, 125 S. E. 484.

Instruments under Seal.—The lack of consideration cannot benefit a maker of a bond under seal because the law conclusively presumes that it was made upon good and sufficient consideration. Angier v. Howard, 94 N. C. 27. Wester v. Bailey, 118 N. C. 193, 194, 24 S. E. 9.

Presumption of Sanity of Maker.—There is a rebuttable presumption that a promisor was sane at the time of the execution of a note, and on that question the burden of showing the contrary, as a general rule, is upon the defendant or the person alleging it. Jones v. Winstead, 186 N. C. 536, 538, 120 S. E. 89.

Burden of Proof.—Whenever a prima facie case is made out as provided by this section, in favor of the plaintiff, it is upon the defendant to go forward with his proof, or take the risk before the jury of an adverse verdict, but the burden of proof and the burden of the issue remains upon the plaintiff throughout the trial. Stein v. Levins, 205 N. C. 302, 305, 171 S. E. 96.

Quoted in White v. Johnson & Sons, 205 N. C. 773, 774, 172 S. E. 370.

Cited in Peoples Building & Loan Assn. v. Swaim, 198 N. C. 14, 16, 150 S. E. 668; Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597.

§ 3005. What constitutes consideration.—Value is any consideration sufficient to support a simple contract. An antecedent or preëxisting debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time. (Rev., s. 2173; 1899, c. 733, s. 25.)

Cross Reference.—As to consideration in general, see 2 N. C. Enc. Dig. 390, 391.

Rule Prior to This Act.—Many of the courts have heretofore denied that an indebtedness was sufficient consideration to constitute one a holder for value within the meaning of the law merchant. This statute on this question, however, changes the rule. Manufacturing Co. v. Summers, 143 N. C. 102, 107, 55 S. E. 522.

Necessity for Adequate Consideration.—When the parties are competent to contract, relief will not be given on grounds of inadequacy of consideration unless the inequality is so gross as to amount to fraud. Jones v. Degge, 84 Va. 685, 5 S. E. 799; Mathews v. Crockett, 82 Va. 394.

Pre-Existing Debt.—An extension of time by a creditor to his principal debtor is a sufficient consideration to support the indorsement of a note renewing the original debt. Hollingshead v. Bank, 104 Ga. 250, 30 S. E. 728; Colley v. Summers Parrot Helve Co., 119 Va. 439, 89 S. E. 906.

The provisions of this section that a preëxisting debt is sufficient consideration for a promissory note does not apply when the note in question is not negotiable within the meaning of the negotiable instrument law, and the debt was not contracted by the maker, and where the nonnegotiable note is given by a widow for the defalcation of her husband without consideration, it must be alleged and shown that she knowingly accepted profit, advantage or benefit from the transaction. Peoples Building and Loan Association v. Swaim, 198 N. C. 14, 150 S. E. 668.

Dower.—The relinquishment of a right of dower is a valid consideration for a promissory note. Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435.

Note to Secure Mortgage.—A note given by incorporators of a land company to secure the holder of a mortgage for the purchase price carries sufficient consideration. Johnson v. Rodeger, 119 N. C. 446, 25 S. E. 1021.

Assignment of Contract for Carrying Mail.—See note under § 3008.

Cited in New Bern Oil, etc., Co. v. National Bank, 28 Fed. (2d) 554; American Trust Co. v. Anagnos, 196 N. C. 327, 145 S. E. 619; Pridgen v. Baugh & Sons Co., 30 Fed. (2d) 353.

§ 3006. What constitutes a holder for value.—Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time. (Rev., s. 2174; 1899, c. 733, s. 26.)

Drafts with Bill of Laden Attached.—Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor. Willard Mfg. Co. v. Tierney, 133 N. C. 630, 631, 45 S. E. 1026.

Deposit of Draft for Collection.—If drafts, deposited by the customer for his credit, returned unpaid, are charged back to the customer's account, and returned to him, this constitutes only an agency for collection. Davis v. Lumber Co., 130 N. C. 174, 176, 41 S. E. 95; Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218. But if the drawer was in debt to the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and as a purchaser for value to the extent of the goods described in the bills of lading. Latham v. Spragins, 162 N. C. 404, 408, 78 S. E. 282.

Transfer to a Creditor.—The transfer of a negotiable note by the holder to his creditor before maturity for an antecedent debt constitutes the transferee a holder for value. American Exch. Nat. Bank v. Seagroves, 166 N. C. 609, 82 S. E. 947.

Held as Collateral.—One who holds a negotiable note as collateral for the payment of a debt may maintain an action thereon in his own name, but not one who holds "for collection," for the latter is not "the party in interest." Third National Bank v. Exum, 163 N. C. 199, 79 S. E. 498.

Possession is prima facie evidence that the holder is a holder for value, and the burden of proof is on one seeking to impeach the title. Fent v. Miller, 17 Gratt. (58 Va.) 47-82; Wilson v. Fagin, 11 Gratt. (56 Va.) 477; Duerson v. Alsop,

27 Gratt, (68 Va.) 229; Board v. Randolph, 89 Va. 619, 16 S. E. 722; Piedmont Bank v. Hatcher, 94 Va. 229, 26 S. E. 505.

§ 3007. When lien on instrument constitutes holder for value.—Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien. (Rev., s. 2175; 1899, c. 733, s. 27.)

Assignment to Secure Debt.—When a negotiable note is transferred before maturity as collateral security for a pre-existing debt, the assignee is such holder for value that he takes free from equities of which he had no notice, to the extent of the debt secured. See Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822. But that is a change of law which was previously otherwise. Holderby v. Blum, 22 N. C. 51; Harris v. Horner, 21 N. C. 455, 30 Am. Dec., 182; Potts v. Blackwell, 56 N. C. 449.

Holder as Collateral Security.—An interpleader, where a note has been attached, who claims as a holder in due course, and makes it appear that the note was taken as collateral security to another note, is a holder in due course only to the extent of his lien. The balance is subject to attachment. Sugg v. St. Mary's Oil Engine Co., 193 N. C. 815, 138 S. E. 169.

A bank taking a warehouse receipt as collateral security is a holder in due course to the extent of its lien. Lacy v. Indemnity Co., 189 N. C. 24, 126 S. E. 316.

Same—Payment of Original Debt.—If a promissory note, before its maturity, is pledged as collateral security for a particular debt, and such debt is afterward paid, the holder of the collateral note has no right to collect it, but so long as any part of the secured debt remains unpaid the holder of the security note may collect enough to pay his claims thereby secured. Bank v. Tuck, 96 Ga. 456, 23 S. E. 467.

Fertilizer Notes Where Grade Misrepresented.—A note given for the purchase price of fertilizer reciting that there is no warranty is subject to the defense of lack of consideration, and if it appears that the fertilizer was not the grade as shown by the analysis on the sack, the plaintiff is not entitled to recover on the note. Swift v. Etheridge, 190 N. C. 162, 129 S. E. 453.

Against Holder in Due Course.—A total absence of consideration is a matter of defense by the maker against the original payee. Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141.

Burden to Show Want of Consideration.—In Conservatory v. Dickerson, 158 N. C. 207, 73 S. E. 990, it is said that although notes, as simple contracts, require a consideration to support them, it has been long settled that they import a consideration, prima facie, so as to throw on the maker the burden to show a want of consideration. McArthur v. McLeod, 51 N. C. 476; Campbell v. McCormac, 90 S. E. 491. In the latter case it was said that "It is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof rests upon the other party to establish the contrary and to rebut the presumption of validity and value which the law raises." Piner v. Brittain, 165 N. C. 401, 81 S. E. 462.

Not Applicable to Non-negotiable Paper.—Whether the provisions of this section should be extended to non-negotiable instruments so as to make the rule uniform is a matter which is addressed to the legislative discretion. Hunt v. Eure, 188 N. C. 716, 125 S. E. 484

Stated in Hardy v. Mitchell, 156 N. C. 76, 72 S. E. 95.

Cited in New Bern Oil, etc., Co. v. National Bank, 28 Fed. (2d) 554.

§ 3008. Effect of want of consideration.—Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. (Rev., s. 2176; 1899, c. 733, s. 28.)

A contract for carrying mail is not assignable, and in an action on a note given in part consideration of such assignment this may be shown as a failure of consideration, except as against a holder for value, in due course, without notice. Peoples Bank, etc., Co. v. Duncan, 194 N. C. 692, 140 S. E. 610.

Presumption of Consideration May Be Rebutted.—While the execution and delivery of a note under seal raises the presumption of consideration, such presumption, in view of this section, is rebuttable as against any person not a holder in due course. Lentz v. Johnson & Sons, 207 N. C. 614, 178 S. E. 226.

Parol Evidence Rule Not Violated.—The rule which prohibits the introduction of parol evidence to vary, modify or contradict the terms of a written instrument, is not violated by showing failure of consideration. Virginia Trust Co. v. Asheville, 207 N. C. 164, 166, 176 S. E. 257.

Failure of consideration is a valid defense to a note under seal by reason of the fact the presumption arising from a seal upon a negotiable instrument is rebuttable. Patterson v. Fuller, 203 N. C. 788, 791, 167 S. E. 74.

Quoted in White v. Johnson & Sons, 205 N. C. 773, 774, 172 S. E. 370.

Cited in New Bern Oil, etc., Co. v. National Bank, 28 Fed. (2d) 554; Owens v. Carstarphen, 197 N. C. 424, 425, 149 S. E. 374; Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597.

§ 3009. Liability of accommodation party.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. (Rev., s. 2177; 1899, c. 733, s. 29.)

Failure of Maker to Conform to Agreement.—An accommodation indorser is not relieved from liability upon the ground that the maker agreed in parol to negotiate the note at a certain bank which he failed to do, but negotiated to the plaintiff instead who had notice of the agreement. Parker v. Sutton, 103 N. C. 191, 9 S. E. 283; Parker v. McDowell, 95 N. C. 219.

Order of Liability on Instrument.—A note indorsed for the makers accommodation signed by the principal, and surety is a joint and several obligation, and the owner may sue any one of the indorsers or sureties without joining the maker other sureties or indorsers. Bank v. Carr, 121 N. C. 113, 28 S. E. 186. Norfolk Nat. Bank v. Griffin, 107 N. C. 173, 11 S. E. 1049.

Right to Recover from Principal and Prior Parties.—An accommodation indorser of a negotiable note who pays the note has only the right of a surety to be fully idemnified for his payment on account of his principal. Burton v. Slaughter, 26 Gratt. (67 Va.) 914; Call v. Scott, 4 Call (8 Va.) 402.

Agreements for Equal Liability.—Unless agreed among themselves to be held equally liable, accomodation indorsers are held prima facia liable in the inverse order of the indorsement. Plumely v. First Nat. Bank, 76 W. Va. 635, 87 S. E. 94.

Indorser for Member of a Partnership.—A note executed by a member of a partnership to a third party who, as surety and for the accommodation of the maker, endorses it and receives no benefit from it, cannot be the subject of an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorser unless the firm be insolvent. Patton v. Carr, 117 N. C. 176, 23 S. E. 182.

Sufficient Interest to Defeat Accommodation Character Illustrated.—Factors to whom the drawee of a draft for the purchase money of a steam engine for ginning cotton was in debt, and who agreed to accept it in order to facilitate their collection from the drawer out of his cotton, did not stand on the footing of accommodation acceptors, but were original contractors. Saulsbury Co. v. Blandys, 65 Ga. 45.

Cited in Mayers v. Bank, 198 N. C. 542, 152 S. E. 628; Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597.

Art. 4. Negotiation

§ 3010. What constitutes negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery. (Rev., s. 2178; 1899, c. 733, s. 30.)

Cross Reference.—As to words to negotiability, see 2 N. C. Enc. Dig. 406; as to definition, see 2 N. C. Enc. Dig. 404.

Form Immaterial.—No form of indorsement is necessary to negotiate an instrument. In case of a corporation the seal is not necessary. Sheffield v. Johnson County Sav. Bank, 2 Ga. App. 221, 58 S. E. 386.

Endorsement Must Be Proven.—A note being made payable to X or order, indorsement by him was necessary to transfer the title and give the plaintiffs, as the holder, the benefit of the presumptions of the negotiable instrument act; and proof of such indorsement by the payee was necessary. Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447; Myers v. Petty, 153 N. C. 462, 464, 69 S. E. 417.

Purchaser without Indorsement.—A purchaser of a negotiable instrument for value before maturity, but without indorsement, becomes the holder of the equitable title only, and takes subject to any defense the maker may have against the original payee. Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220; Whitman v. York, 192 N. C. 87, 88, 133 S. E. 427; Bresee v. Crumpton, 121 N. C. 122, 28 S. E. 351; Planters Bank v. Yelverton, 185 N. C. 314, 117 S. E. 299.

The introduction of a note in evidence without indorsement raises the presumption of equitable ownership and assignment, and without proof of indorsement the holder is not one in due course. Woods v. Finley, 153 N. C. 497, 69 S. E. 502.

Warehouse receipts, issued under sec. 4925(b), indorsed by the owner of the cotton and by the superintendent of the warehouse are negotiable by delivery, and when taken as collateral confer upon the holder the position of a bona fide holder for value. Lacy v. Globe Indemnity Co., 189 N. C. 24, 126 S. E. 316.

Stated in Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803.

Cited in Insurance Co. v. Jones, 191 N. C. 176, 131 S. E. 587; Dawson v. Bank, 197 N. C. 499, 150 S. E. 38; Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

§ 3011. How indorsement made.—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. (Rev., s. 2179; 1899, c. 733, s. 31.)

As to indorsement by agent, see, sec. 3000.

In General.—The position of the indorsement is immaterial, it may be on the face or the back of the instrument so long as the intention of the parties can be ascertained. Quinn v. Sterne, 26 Ga. 223; First Nat. Bank v. Messer, 136 Ga. 226, 71 S. E. 148.

Prerequisite to Indorsement on Additional Paper.—While a lack of room for further indorsements is not a prerequisite to attaching a paper an essential requirement is that the paper be physically attached or that it should have been when the indorsement was made, and that an assignment or transfer on a separate paper will not suffice. Midgette v. Basnight, 173 N. C. 18, 91 S. E. 353; Commercial Security Co. v. Main St. Pharmacy, 174 N. C. 655, 656, 94 S. E. 298.

Indorsement by Letter Attached to Note.—Where a note was sent to a bank as security and attached to a letter, in which it is stated that the holder did assign the note to the bank as collateral security, it was held that the signature on the letter was sufficient indorsement. Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979.

Indorsement with Rubber Stamp.—Where the name of the drawee is stamped on the back of a draft with a rubber stamp, by one having authority to do so and with intent to indorse it, it is a valid indorsement, but does not prove itself. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447.

§ 3012. Effect of indorsement by infant or corporation.—The indorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon. (Rev., s. 2180; 1899, c. 733, s. 22.)

Editor's Note—Married Women.—In the case of Vann v. Edwards, 128 N. C. 425, 39 S. E. 66; 130 N. C. 70, 72, 40 S. E. 853; 135 N. C. 661, 47 S. E. 784, which was decided under the prior law, and was before the Supreme Court three times. It was held that a married woman may dispose of her property without the assent of her husband except in those cases where a written instrument or conveyance is required for that purpose.

The delivery of a note to the indorsee after it has been indorsed in blank by the wife, the owner and the husband, is a sufficient conveyance. But the indorsement may be explained as between the immediate parties. Coffin v. Smith, 128 N. C. 252, 38 S. E. 864.

Corporations.—If a corporation indorses a negotiable instrument when it has no power to do so it cannot be bound by subsequent holders. Savannah Ice Co. v. Canal-Louisiana Bank, etc., Co., 12 Ga. App. 818, 79 S. E. 45; but see Towers Co. v. Inman, 96 Ga. 506, 23 S. E. 418; Jacobs Pharmacy Co. v. Southern Banking, etc., Co., 97 Ga. 573, 25 S. E. 171, where the corporation receives value.

Infants.—"In stipulating that the indorsement of the instrument by an infant 'passes the property therein,' it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties. It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one. The act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words 'passes the property therein,' if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser's infancy. The quoted words are not qualified so as to save his rights in such an assumed case. It must be admitted that the Legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law." Murray v. Thompson, 136 Tenn. 188, 188 S. E. 578.

§ 3013. Indorsement must be of entire instrument.—An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue. (Rev., s. 2181; 1899, c. 733, s. 32.)

In General.—An assignment of a note, to enable the assignee to sue thereon, must be made by the payee, and must be for the whole, and not for a part of the sum mentioned in the note. Martin v. Hayes, 44 N. C. 423.

§ 3014. Kinds of indorsement.—An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional. (Rev., s. 2182; 1899, c. 733, s. 33.)

§ 3015. Special indorsement; indorsement in blank.—A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery. (Rev., s. 2183; 1899, c. 733, s. 34.)

As to right of holder without indorsement when payable to order, see sec. 3030 and annotations; as to indorsements in general, see 2 N. C. Enc. Dig. 413-416.

Indorsement Where Note Payable to Bearer.—Although a note payable to bearer may be transferred by delivery, it may also be transferred by indorsement of the holder, and in such case the indorser incurs the same obligation and liability as an indorser of a note payable to order. Lilly v. Baker, 88 N. C. 151.

Right of Indorser in Blank When Instrument Subsequently Acquired by Delivery.—An indorsement "without recourse," but not saying to whom the bill was indorsed was an indorsement in blank, and the bill became payable to bearer; and notwithstanding that subsequent holders afterwards indorsed it in full or specially, yet when it came again to C. by delivery, he had a right to demand payment of the bill from any prior indorser. French v. Barney, 23 N. C. 219.

Transfer by Blank Indorsement Presumed.—An indorsement in blank by the payee of a note is presumed to have been intended as a transfer thereof. Davis v. Morgan, 64 N. C. 570. And nothing else appearing such indorsement constitutes a transfer of the note. Coffin v. Smith, 128 N. C. 252, 38 S. E. 864; but as between the immediate parties parol

evidence is admissible to show a qualified or special contract. Hoffman v. Moore, 82 N. C. 313; Bank v. Pegram, 118 N. C. 671, 24 S. E. 487; Mendenhall v. Davis, 72 N. C. 150; Hill v. Shields, 81 N. C. 251.

Title of Attorney Holding for Collection.—A bond indorsed in blank and given to an attorney for collection amounts to an assignment of title, and conveys authority to the attorney to dispose of it as his own. Parker v. Stallings, 61 N. C. 590; Bradford v. Williams, 91 N. C. 7.

§ 3016. How blank indorsement changed to special indorsement.—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. (Rev., s. 2184; 1899, c. 733, s. 35.)

Changing Liability by Filling Blank.—In case of an indorsement in blank any holder may fill in the blank over the signature thus making it payable to himself or some other person. But by filling in over the indorsement the holder cannot change the indorser's liability. Lilly v. Baker, 88 N. C. 151.

Time of Filling Blank. — Where a note is indorsed in blank, the holder has the authority to make it payable to himself or to any other person by filling up the blank over the signature, and this may be done at or before the trial. Johnson v. Hooker, 47 N. C. 29; Lilly v. Baker, 88 N. C. 151. It then becomes a special indorsement. Tyson v. Joyner, 139 N. C. 70, 74, 51 S. E. 803.

§ 3017. When indorsement restrictive.—An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. (Rev., s. 2185; 1899, c. 733, s. 36.)

See notes to section 3018.

Construing this section with § 446 under Civil Procedure, that says every action must be prosecuted in the name of the real party in interest, § 446 is mandatory and compelling, and the instant section does not allow a contrary construction. Federal Reserve Bank v. Whitford, 207 N. C. 267, 269, 176 S. E. 584.

§ 3018. Effect of restrictive indorsement; rights of indorsee.—A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. (Rev., s. 2186; 1899, c. 733, s. 37.)

Editor's Note.—Prior to the passage of this and the preceding section it was uniformly held in this State that a bank holding a note under a restricted indorsement for collection could not bring suit in its own name, but must bring suit in the name of the indorser. In Bank v. Exum, 163 N. C. 199, 79 S. E. 498, decided after this section, the same rule was followed, the court citing prior cases and not referring to this and the preceding section. The case of Bank v. Rochamora, 193 N. C. 1, 136 S. E. 259, decided the same question and follows the prior ruling.

In 5 N. C. Law Rev. 369, there appears a discussion and criticism of these cases, citing cases of other states where this section has been adopted with the Negotiable Instrument Law, showing that in most jurisdictions it is held that a bank as endorsee for collection can bring suit in its own name, as it has legal title although holding in trust.

Construing this and the preceding section of the N. I. L. referred to with the section under civil procedure, that says every action must be prosecuted in the name of the real party in interest, we think section 446, is mandatory and compelling. We think the decision of Bank v. Exum, 163 N. C. 199, 79 S. E. 498; correct in principle and founded on a just and reasonable interpretation of the statutes applicable and cognate. To say a collecting agency, because it is a bank, can sue in its own name would be to say that any attorney or any kind of collecting agent can likewise enter suit by reason of the agency. We do not think our statute allows this construction as to favoritism. The contrary construction would permit the real owner of the instrument to defeat all equities of the maker by simply turning it over to an agent for collection. Id.

In General.—There is a general and restrictive indorsement. In case of restrictive indorsement the indorsee cannot indorse to one, who will become a holder in due course, and have a right to sue either indorser. A restrictive indorsement restricts the rights of the indorsee to specified steps. Drew v. Jacocks, 6 N. C. 138.

Indorsed as Collateral Security. — A note indorsed to a bank is restrictive where the indorsement is unrestricted, if it appears that the note is only indorsed as collateral security, and for collection, or it appears that the indorser had been given depositor's credit for the amount of the note with the right to charge back in case of dishonor. Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365.

Rights of Restricted Endorsee.—A draft or bill which is transferred to a bank by restrictive indorsement, as for deposit or for collection, is taken and held by the bank as agent of the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for a like purpose and affected by the restriction. Boykin v. Bank, 118 N. C. 566, 24 S. E. 357; Bank v. Hubble, 117 N. Y. 384; Balback v. Frelinghyser, 15 Fed. 675; Tyson & Rawles v. Bank, 77 Md. 412; Murchinson Nat. Bank v. Oil Mills, 150 N. C. 718, 721, 64 S. E. 885.

Indorsement Enlarging Liability.—"Demand, notice and protest waived, payment guaranteed by the undersigned" is an indorsement with an enlarged liability. The language makes the holder one in due course and the instrument is taken free from equities and defenses which the maker has against the payee. Richmond Guano Co. v. Walston, 191 N. C. 797, 801, 133 S. E. 196.

§ 3019. Qualified indorsement. — A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. (Rev., s. 2187; 1899, c. 733, s. 38.)

As to instrument with indorsement enlarging liability, see notes to sec. 3018.

Effect of Indorsement without Recourse.—Notes indorsed by the payee named therein, who wrote above his signature on the back of each note the words, "without recourse," is a qualified indorsement. Its effect is to constitute the indorser a mere assignor of the title to the note, which he held at the date of the indorsement. It does not impair the negotiable character of the note so indorsed. Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Walter v. Kilpatrick, 191 N. C. 458, 462, 132 S. E. 148.

Alone, a qualified indorsement is not sufficient notice as to discredit a negotiable instrument, but when combined with other suspicious facts it may become evidence to show infirmities. Merchants Nat. Bank v. Branson, 165 N. C. 344, 81 S. E. 410.

Qualifying Words May Precede or Follow Signature.—The words qualifying an endorsement of a negotiable instrument, such as "without recourse" and words of like effect, may either precede or follow the signature of the transferer of title. Medlin v. Miles, 201 N. C. 683, 161 S. E. 207.

Qualified Indorser May Be Liable on Warranties.—A negotiable instrument transferred by an endorsement reading "for value received I hereby sell, transfer and assign all my right, title and interest to within note to M." assigns title to the instrument by qualified endorsement, exempting the transferer from all liability as a general endorser, except that he is still chargeable with implied warranties as a seller. Medlin v. Miles, 201 N. C. 683, 161 S. E. 207.

§ 3020. Conditional indorsement.—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so

indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally. (Rev., s. 2188; 1899, c. 733, s. 39.)

As to indorsement with enlarged liability, see sec. 3018.

In General.—An indorsement to "A. B. for sixty days," if conditional is only a guaranty for sixty days, if unconditional it is only to be in force for a limited time. Johnson v. Olive, 60 N. C. 213.

§ 3021. Indorsement of instrument payable to bearer.—Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. (Rev., s. 2189; 1899, c. 733, s. 40.)

As to special indorsee indorsing in blank, see note to sec. 3015, as to who is bearer, see sec. 2990.

§ 3022. Indorsement of instrument payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. (Rev., s. 2190; 1899, c. 733, s. 41.)

See 13 N. C. Law Rev., 92.

Cited in Dawson v. Bank, 197 N. C. 499, 150 S. E. 38; applied in Virginia-Carolina Bank v. First, etc., Bank, 197 N. C. 526, 534, 150 S. E. 34.

§ 3023. Effect of instrument drawn or indorsed to a person as cashier.—Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer. (Rev., s. 2191; 1899, c. 733, s. 42.)

§ 3024. Indorsement, where payee's name misspelled.—Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature. (Rev., s. 2192; 1899, c. 733, s. 43.)

§ 3025. Indorsement in representative capacity.—Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability. (Rev., s. 2193; 1899, c. 733, s. 44.)

§ 3026. Presumption as to time of indorsement.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. (Rev., s. 2194; 1899, c. 733, s. 45.)

In General.—Indorsements in blank upon negotiable instruments are presumed to be made contemporaneously with the execution of such instrument. Southerland v. Freemont, 107 N. C. 565, 12 S. E. 237.

Indorsement to a Deceased Person.—Where a negotiable instrument has been indorsed to a decedent, and it is found among his papers, the indorsement not bearing a date, he is prima facie presumed to have acquired it in due course. Insurance Co. v. Jones, 191 N. C. 176, 131 S. E. 587.

§ 3027. Presumption as to place of indorsement.—Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated. (Rev., s. 2195; 1899, c. 733, s. 46.)

§ 3028. Continuation of negotiable character.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. (Rev., s. 2196; 1899, c. 733, s. 47.)

See annotations under section 3018.

Applied in Dunlap v. London Guaranty, etc., Co., 202 N. C. 651, 163 S. E. 750.

§ 3029. Striking out indorsement.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument. (Rev., s. 2197; 1899, c. 733, s. 48.)

As to negotiation by prior party, see note to section 3031.

In General.—An indorser in full, who takes up a bill, is remitted to his former title, and may strike out his indorsement and sue as indorsee those standing before him on the bill, although he may have once made a restrictive indorsement. French v. Barney, 23 N. C. 219, 221.

Suit without Striking Subsequent Indorsees.—An indorser of a note may strike out the subsequent indorsers and bring suit, or he may bring suit without striking the subsequent indorsers, as possession is prima facie evidence of payment to the indorsee. Smith v. St. Lawrence, 2 N. C. 174.

§ 3030. Effect of transfer without indorsement.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires in addition the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. (Rev., s. 2198; 1899, c. 733, s. 49.)

As to indorsement in blank, see section 3015.

In General.—Where a note is payable to order and not to bearer, the indorsement of the payee is necessary to transfer the legal title; and where this is not done, a subsequent holder is not one in due course, though the instrument may have been indorsed to him for value by an intermediate holder. Elgin City Banking Co. v. McEachern, 163 N. C. 333, 79 S. E. 680; Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220; Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803.

Endorsement is not the only mode by which an interest in notes may be assigned in view of this section. Dozier v. Leary, 196 N. C. 12, 144 S. E. 368, applying this rule in a case where a husband transferred his interest in a note executed by him and his wife by a registered paper writing, which was held competent evidence in an action by the transferee for one-half the proceeds of the note.

Payable to Order of Maker.—One making a note payable to her own order and delivering it to another without indorsement does not make the holder a holder in due course. Planters Bank v. Yelverton, 185 N. C. 314, 117 S. E. 299.

When Indorsement Must Be Proven.—Where the plaintiff at the trial presented the draft sued on, with the name of the drawee stamped on the back and testified that the draft had been discounted to him by the drawee before maturity for value and without notice, he is only the equitable owner, in the absence of proof that the instrument had been indorsed, and he holds it subject to any valid defense open to the maker, and it was error to exclude evidence tending to show fraud. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447.

Indorsing Two Notes Folded Together. — Where two notes are folded together and only one of them is indorsed, the indorsement is operative only to the one indorsed though the intention of the parties was otherwise. National Bank v. Leonard, 91 Ga. 805, 18 S. E. 32.

§ 3031. When prior party may negotiate instrument.—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening

party to whom he was personally liable. (Rev., s. 2199; 1899, c. 733, s. 50.)

Editor's Note.—In I. N. C. Law Rev. 187 there is a discussion of the N. I. L. which includes this and section 3039. The rule seems to be as laid down in Adrian v. McCaskill, 103 N. C. 182, 9 S. E. 284 that one who obtains possession of a negotiable instrument after having formerly indorsed it is restored to his former position and cannot hold indorsers subsequent to his first indorsement. The reason for this rule is clearly to avoid circuity of action for the subsequent indorsers would eventually hold him liable under his first indorsement. See editor's note under section 3039 for rights of holder with notice of fraud.

One who obtains possession of a note or bill after endorsing it is restored to his original position and cannot hold intermediate parties; and one who acquires possession of the instrument from such person, with notice of the fact, cannot hold the intermediate endorser. Ray v. Livingston, 204 N. C. 1, 4, 167 S. E. 496.

Art. 5. Rights of Holder

§ 3032. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. (Rev., s. 2200; 1899, c. 733, s. 51.)

Cross References.—As to right of bank holding for collection to sue, see editor's note under section 3018; as to definition of holder, see section 2976; as to presumption that holder is holder in due course, see section 3040; as to person to whom payment may be made, see 2 N. C. Enc. Dig. 481.

§ 3033. What constitutes holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. (Rev., s. 2201; 1899, c. 733, s. 52.)

Cross Reference.—As to defenses which may or may not be set up against a holder in due course see § 3038 and the note thereto.

As to defective title, see section 3036; as to presumption in favor of a holder, see section 3040. As to defenses which are good as against a holder in due course, see note to section 3036.

Indorsement Necessary.—To constitute a holder in due course it is required that the instrument be indorsed. Bank v. Yelverton, 185 N. C. 314, 117 S. E. 299; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447. See also Keith v. Henderson County, 204 N. C. 21, 24, 167 S. E. 481.

Same—Taking Without Notice.—A holder of a note not indorsed to him is not a holder in due course, and it makes no difference if he had no notice of the equities of the parties, he is subject to them nevertheless. Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220.

Indorsement Implies "Due Course."—The holder of a negotiable instrument duly indorsed is, prima facie, a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it. Worth Co. v. International Feed Co., 172 N. C. 335, 342, 90 S. E. 295; Smathers v. Toxaway Hotel Co., 168 N. C. 69, 84 S. E. 47.

Admission of Indorsement to Holder.—The admission by the maker of a promissory note that it had been indorsed to the plaintiff in due course raises the presumption prima facie that he is a holder in due course, and the prima facie case is not rebutted by a denial in the pleadings. Gulf States Steel Co. v. Ford, 173 N. C. 195, 91 S. E. 844.

The transfer by endorsement to another of a bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, is an assignment of a chose in action, and the assignee is not a holder in due course. North Carolina Bank, etc., Co. v. Williams, 201 N. C. 464, 160 S. E. 484.

Defective Title Rebuts Presumption. — The presumption that every holder is a holder in due course does not apply when it is alleged and shown that the negotiable instrument was indorsed by one whose title was defective. Whitman v. York, 192 N. C. 87, 93, 133 S. E. 427; American Exch. Nat. Bank v. Seagroves, 166 N. C. 608, 82 S. E. 947.

Fraud as Preventing Party from Being Holder in Due Course.—Where the endorser alleged in his answer that he signed the note upon representations made by the maker that the payee was lending the money to the maker to finance the equipment of a law office, that in fact the note was given to cover funds of the payee on deposit in a bank which had been wrongfully converted by the maker, and that the payee had full knowledge of, agreed to, and participated in, the fraudulent scheme to procure the endorser to sign the note by such false representations, the answer was sufficiently broad to allege fraud, and the payee was not a holder in due course under this section. Mitchell v. Strickland, 207 N. C. 141, 176 S. E. 468.

When Burden Shifts to Holder.—A holder of a note to show that he is a holder in due course without notice must do so by the greater weight of evidence when the maker pleads and shows fraud, infirmity or defective title. Discount Co. v. Baker, 176 N. C. 546, 97 S. E. 495; Myers v. Petty, 153 N. C. 462, 69 S. E. 417; Bank v Branson, 165 N. C. 344, 81 S. E. 410; Hooker v. Hardee, 192 N. C. 229, 134 S. E 485; Bank v. Fountain, 148 N. C. 590, 595, 62 S. E. 738; Smathers v. Toxaway Hotel Co., 168 N. C. 69, 84 S. E. 47.

When a holder of a note admits certain infirmities in the note, in an action to recover on the note, the burden is upon him to show that he is a holder in due course. Whitman v. York, 192 N. C. 87, 133 S. E. 427.

The holder of a negotiable note is presumed to be a holder in due course, but, when its execution is proved to have been obtained by fraud, the burden then shifts to him to prove that he took it before maturity, for value and without notice. Williams v. Green, 23 Fed. (2d) 796.

Enlarged Liability of Indorser Does Not Affect Negotiability.—A negotiable note indorsed to a holder, bearing an enlarged liability—a guaranty of payment, makes the holder a holder in due course in spite of the enlarged liability of the indorser. Richmond Guano Co. v. Walston, 191 N. C. 797, 133 S. E. 196.

Renewal Note after Notice.—A bank purchasing a note after maturity takes it subject to the equities of the parties. A subsequent note taken as a renewal of the first will not cure the defect and such holder cannot enforce payment. Grace & Co. v. Strickland, 188 N. C. 369, 124 S. E. 856; Merchants Nat. Bank v. Howard, 188 N. C. 543, 125 S. E. 126.

Holder for Collection.—A bank taking a note for collection is not a holder in due course. Insurance Co. v. Cotton Mill Co., 187 N. C. 233, 121 S. E. 439; Bank v. Rochamora, 193 N. C. 1, 136 S. E. 259.

Drafts Charged Back.—The fact that there is a custom among banks to take drafts for collection, and charge them back if they are unpaid, is not sufficient evidence to show that a bank holding a draft is not a holder in due course; Lumber Co. v. Childerhose, 167 N. C. 34, 83 S. E. 22; nor will the charging back of a check which is unpaid, make the holder bank a holder for collection, if the back charge was against an account that consisted of deposited checks that were later returned unpaid. Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 303.

Question for Jury.—Whether the execution of notes were induced by fraudulent representations held a question for jury. Clark v. Laurel Park Estates, 196 N. C. 624, 146 S. E. 584.

Same—Duty to Instruct.—Where there is evidence that the holder of a negotable instrument had notice of its infirmity, the question is for the jury, and a failure to instruct thereon is reversible error. Peoples Bank, etc., Co. v. Duncan, 194 N. C. 692, 140 S. E. 610.

Applied in Wellons v. Warren, 203 N. C. 178, 165 S. E. 545; Bankers' Trust Co. v. Statesville, 203 N. C. 399, 166 S. E. 169; Dyer v. Bray, 208 N. C. 248, 180 S. E. 83.

Cited in Mayers v. Bank, 198 N. C. 542, 544, 152 S. E. 628. See also Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

§ 3034. When person not deemed holder in due course.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. (Rev., s. 2202; 1899, c. 733, s. 53.)

As to what is reasonable time, see sec. 2978 and note.

In General.—A cashier's check negotiated to a holder in another state within five days is negotiated in a reason-

able time. Manufacturing Co. v. Summers, 143 N. C. 102. 55 S. E. 522.

Cited in State, etc., Trust Co. v. Hedrick, 198 N. C. 374, 151 S. E. 723.

§ 3035. Notice before full amount paid.—Where the transferee has received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. (Rev., s. 2203; 1899, c. 733, s. 54.)

As to what constitutes notice, see sec. 3037.

In General.—The title passes to one who takes a negotiable paper without notice of any defect or equities no matter how little he paid, in the absence of fraud. If there is fraud he is only entitled to what he has paid before receiving notice of the fraud. Bank v. McNair, 116 N. C. 550, 21 S. E. 389.

Taken as Collateral Security.—Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud (Dresser v. Missouri, etc., R. Co., 93 U. S. 92, 95, 23 L. Ed. 815), or the amount of the debt to which it is collateral. Kerr v. Cowen, 17 N. C. 356; United States Nat. Bank v. McNair, 116 N. C. 550, 551, 554, 21 S. E. 389.

Cited in Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 77 S. E. 1006.

§ 3036. When title defective.—The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. (Rev., s. 2204; 1899, c. 733, s. 55.)

As to burden of proof when title defective, see sec. 3040.

Editor's Note.—A careful reading of this section will reveal that it applies to "the title of a person who negotiates" and thus has full knowledge of or the means of knowing the circumstances. The question of whether or not fraud, duress, usury, illegality of consideration, etc., will render the instrument unenforceable in the hands of a person in due course without notice presents itself.

In the case of the fraud which is sufficient to avoid an instrument as to such holder there is a considerable amount of conflict. See 8 C. J. sections 1048, 1049, pp. 789, 790. However, it would seem that the better rule is that fraud ordinarily renders the instrument voidable only, and therefore, in accordance with the general rule is not a good defense as against a holder in due course where he proves himself to be such in accordance with section 3040. See Discount Co. v. Baker, 176 N. C. 546, 97 S. E. 495, and citations.

Of course, it might be that upon principle, the rule should be that where one who has been induced through fraud to sign an instrument the actual terms of which he has no knowledge and signs thinking he is signing a different instrument, as for example, where he cannot read and he depended upon the payee to read the terms to him correctly, which the payee did not do, should be allowed to defend against holders in due course, because in such cases the instrument is in fact no more the maker's than if it were forged or altered and this should be placed in the same category. But, be this as it may, where the maker has proved such fraud or deception the burden of proving that the holder is one in due course is upon the holder and he cannot recover if he fails to sustain the burden. See section 3040; Discount Co. v. Baker, supra; Duncan v. Carson, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

As to duress as a defense, see 8 C. J. section 1027, p. 761; illegality of consideration, 8 C. J. sections 1031, 1032, p. 766, gambling transactions, 8 C. J. section 1031, p. 769.

Rights of Holders of Notes Tainted with Usury or Illegality.—The exceptions to the rule of section 3040 are: (1) When by statute the paper is void in whole or in part from its inception, as for usury or for gaming or immoral contracts. (See notes to section 2306 as to usury, section 2142 as to gaming transaction). In such cases it is void to the same extent into whosoever hands it may pass, even if acquired before maturity, for value and without notice, and the sole remedy of the holder for the deficiency is against the indorser. Ward v. Sugg, 113 N. C. 489, 18 S. E. 717, and cases there cited. (2) Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually, paid by the indorsee before notice of the fraud (Dresser v. Missouri, etc., R. Co., 93 U. S. 92, 23 L. Ed. 815), or the amount of the debt to which it is collateral. Kerr v. Cowen, 17 N. C. 356. But the exception does not extend further, not even to cases where the note was issued without any consideration, though it may be purchased by the indorsee for less than its face. United States Nat. Bank v. McNair, 116 N. C. 550, 21 S. E. 389, 390; See also sections 3033, 3046, 3046 and 3047.

In the case of an instrument tainted with usury it is void to the extent declared by statute. See sec. 2306 and note, and the bona fide holder cannot recover upon the portion which is void.

When Title Subject to Question.—In the absence of an allegation of fraud the intervener's title is not subject to question when suit is brought by a holder in due course. Moon v. Simpson, 170 N. C. 335, 87 S. E. 118, 172 N. C. 576, 90 S. E. 578; Worth Co. v. Feed Co., 172 N. C. 335, 90 S. E. 295.

Burden of Proof.—When it is shown or admitted that the title of the person who negotiated the instrument is defective, or there is evidence of the fact, it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he is such a holder according to the terms of section 3033. Manufacturing Co. v. Summers, 143 N. C. 102, 108, 55 S. E. 522; Smathers & Co. Toxaway Hotel Co., 168 N. C. 69, 84 S. E. 47; Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Bank v. Branson, 165 N. C. 344, 81 S. E. 410; First Nat. Bank v. Warsaw Drug Co., 166 N. C. 99, 100, 81 S. E. 993; Whitman v. York, 192 N. C. 87, 133 S. E. 427; Hooker v. Hardee, 192 N. C. 229, 134 S. E. 485; Moon v. Simpson, 170 N. C. 335, 337, 87 S. E. 118.

Cited in Bank v. Roch mora, 193 N. C. 1, 136 S. E. 259; Clark v. Laurel Park Estates, 196 N. C. 624, 638, 146 S. E. 584.

§ 3037. What constitutes notice of defect.—To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. (Rev., s. 2205; 1899, c. 733, s. 56.)

In General.—Observable irregularities on the face of the instrument will no longer suffice to affect the rights of a holder in due course. It is necessary that circumstances set out in this section should occur in order to charge the holder with notice. Holleman v. Trust Co., 185 N. C. 49, 115 S. E. 825; Critcher v. Ballard, 180 N. C. 111, 112, 104 S. E. 134; Smathers & Co. v. Toxaway Hotel Co., 162 N. C. 346. 78 S. E. 224; Lacy v. Globe Indemnity Co., 189 N. C. 24, 32, 126 S. E. 316; Smathers & Co. v. Toxaway Co., 167 N. C. 469, 470, 83 S. E. 844.

In Hotchkiss v. National Banks, 88 U. S. (21 Wall.) 354, 22 L. Ed. 645 it is said: "A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser." Piedmont Carolina R. Co. v. Shaw, 223 Fed. 973, 977.

The fact that a note is negotiated by a stranger at a discount and one of the alternative places of payment was not known to the holder, is not sufficient to put him on notice of the defects. Farthing v. Dark, 111 N. C. 243, 16 S. E. 337. This case was reported in Farthing v. Dark, 109 N. C. 291, 13 S. E. 918, but at that time the court was not advertent of the fact that there was an alternative place of payment.—Ed. Note.

When a note is signed through fraud of another, and discounted with an indorsee that had notice of this fraud, the indorsee is subject to the equities between the parties. Grace & Co. v. Strickland, 188 N. C. 369, 124 S. E. 856.

Notice to Bank Through Officers.—A note payable to an officer of a bank and discounted at the bank through the discount committee does not make the bank subject to the principle of imputed knowledge when the officer is not a member of the discount committee. Bank v. Howard, 188 N. C. 543, 125 S. E. 126.

A bank taking a note indorsed to it by its president takes

with notice of all equities between the parties, when the president and cashier constitute the discount committee, as notice to the president constitutes notice to the bank. Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888.

Duty to Inquire.—When a person has knowledge of such facts and circumstances which make it incumbent on him to inquire as to the character of the note which he purchased, and, that being so, he will be affected with knowledge of all that the inquiry would disclose. Bunting v. Ricks, 22 N. C. 130, 32 Am. Dec. 699; Hulbert v. Douglas, 94 N. C. 122. Loftin v. Hill, 131 N. C. 105, 106, 110, 42 S. E. 548. But knowledge of the crookedness in business matters of the assignee does not defeat the title of the assignee or make it his duty to inquire relative to the note. Setzer v. Deal, 135 N. C. 428, 47 S. E. 466.

Same—Interest Past Due.—The fact that interest is past due does not of itself constitute notice of equities between the parties, but it may be considered by the jury in passing on the issue. Trust Co. v. Whitehead, 165 N. C. 74, 80 S. E. 1065.

Statement of Transaction.—A note containing on its face an express statement of the transaction for which it was given, in the absence of further evidence, is not notice of the equities between the parties. Bank v. Hatcher, 151 N. C. 359, 66 S. E. 308. See sec. 2984 and notes thereto.

Question for the Jury.—Where there is conflicting evidence as to notice the holder had of equities between the parties, issue should be submitted to a jury. Loftis v. Hill, 131 N. C. 105, 42 S. E. 548.

Cited in New Bern Oil, etc., Co. v. National Bank, 28 Fed. (2d) 554.

§ 3038. Rights of holder in due course.—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (Rev., s. 2206; 1899, c. 733, s. 57.)

For discussion of rights of prior holder taking through a holder in due course, see note to section 3339.

In General.—One taking a note as a holder in due course can, under this section, enforce his right against all prior parties, except in case of a defective title as provided in section 3036. Bank v. McNair, 116 N. C. 550, 21 S. E. 389; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601; Bank v. Griffin, 153 N. C. 72, 68 S. E. 919; Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 54, 77 S. E. 1006. But see section 3040 as to burden of proof where defect is shown.

The maker of a note may not set up defenses he may have against the payee of the note in an action by a holder in due course, but where the holder is not a holder in due course without notice, the maker may set up all defenses which he may have as against the payee. Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129.

Where the answer sufficiently alleges that the holder was not a holder in due course for value without notice, all defenses which the defendant may have are presentable under the pleadings. Id.

Relief from Scheme to Evade Usury Laws.—Where a borrower is entitled to enforce an equity against the payee because of a device to evade the usury laws, this equity cannot be enforced against a holder in due course. Federal Reserve Bank v. Jones, 205 N. C. 648, 650, 172 S. E. 185.

Cited in Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

§ 3039. When subject to original defenses.—In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter. (Rev., s. 2207; 1899, c. 733, s. 58.)

Editor's Note.—The dictum in Pierce v. Carlton, 184 N. C. 175, 114 S. E. 13 is to the effect that one who is not a party to the fraud in procuring an instrument but who takes with notice, and then passes the instrument on to a holder in due course, will take a good title and hold as a holder in due course when he reacquires the instrument from the holder in due course. The court cites Calverts on Negotiable Instruments sec. 805 which recognizes only one exception to the rule that one taking from a holder in due course takes good title, and that is a taking by a fraudulent payee from a holder in due course. Such fraudulent payee can't take as a holder in due course. In 1 N. C. Law Rev. 187 this dictum is criticized and it is contended that one who takes with notice of an infirmity should not be allowed to clear his title by passing it through a holder in due course, for such would open the door to fraud.

In General.—If plaintiff failed to prove that he was a holder in due course, the notes, although in his hands as a holder, other than a holder in due course, are subject to the same defenses as if they were non-negotiable. Whitman v. York, 192 N. C. 87, 90, 133 S. E. 427. A past due instrument, lodged with bank as security, is subject to all defenses. Bank v. Loughran, 126 N. C. 814, 36 S. E. 281. The transferee of an unindorsed instrument not payable to bearer also takes subject to defenses. Bresee v. Crumpton, 121 N. C. 122, 28 S. E. 351.

A holder in due course may transfer a complete title to a third person although the latter when he takes the paper has knowledge of facts which would defeat recovery by the payee. Wellons v. Warren, 203 N. C. 178, 181, 165 S. E. 545.

"But this rule is subject to the single exception that if the note were invalid as between the maker and the payee, the payee could not himself, by purchase from a bona fide holder, become successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far." Ray v. Livingston, 204 N. C. 1, 4, 167 S. E. 496.

Cited in Merchants Nat. Bank v. Howard, 188 N. C. 543, 548, 125 S. E. 126.

§ 3040. Who deemed holder in due course.—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. (Rev., s. 2208; 1899, c. 733, s. 59.)

Cross References.—As to what constitutes holder in due course, see section 3033; as to burden of proof and presumption rebutted, see 2 N. C. Enc. Dig. 504-508; as to defenses against Bona Fide Purchaser, sec. 2 N. C. Enc. Dig. 458.

Editor's Note.—There are several exceptions to this section, see note to section 3036.

Holders to Whom Applicable.—The presumption that the holder is one in due course exists in favor of the holder of a draft payable to order with bill of lading attached. Manufacturing Co. v. Tierney, 133 N. C. 630, 635, 45 S. E. 1026; Mangum v. Mutual Grain Co., 184 N. C. 181, 182, 114 S. E. 2.

This presumption does not exist in favor of a holder of an unindorsed note not payable to bearer. Harlan, J., in Osgood v. Artt, 17 Fed. 575, says: "It is well settled that the purchaser, if the paper be delivered to him without indorsement, takes by the law merchant only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in which case becomes only the equitable owner of the claim or debt evidenced by the negotiable security." Tyson v. Joyner, 139 N. C. 69, 70, 72, 51 S. E. 803.

But when a properly negotiated note is found among the papers of a deceased person that is prima facie evidence that the holder is a holder in due course, until it is alleged and shown by a party liable on the note that it is defective, the evidence is sufficient for the administrator of the holder to recover thereon. Insurance Co. v. Jones, 191 N. C. 176, 131 S. E. 587.

When Presumption Becomes Operative—Proof of Indorsement.—The presumption becomes operative as a matter of course where there is neither allegation nor proof that the title to a negotiable instrument is defective. The holder by indorsement is only required to prove the indorsement in order for him to be deemed prima facie a holder in due course. Moon v. Simpson, 170 N. C. 335, 87 S. E. 118.

Rebuttal of Presumption.—The prima facie case is not rebutted by a mere denial in the answer of the ownership of the plaintiff. Causel v. Snow, 120 N. C. 279, 26 S. E. 775; Gulf States Steel Co. v. Ford, 173 N. C. 195, 196, 91 S. E. 844.

Defective Title—Holder's Burden of Proof.—Where fraud on the part of the payee in the procurement and issuance of the instrument is shown the burden of proving due course is shifted to the holder. Myers v. Petty, 153 N. C. 462, 69 S.

E. 417; Hooker v. Hardee, 192 N. C. 229, 134 S. E. 485; Bank v. Sherron, 186 N. C. 297, 119 S. E. 497; Bank v. Exum, 163 N. C. 199, 79 S. E. 498; Bank v. Branson, 165 N. C. 344, 349, 81 S. E. 410; American Exch. Nat. Bank v. Seagroves, 166 N. C. 608, 610, 82 S. E. 947.

This rule also applies where the holder admits infirmities in the instrument. Whitman v. York, 192 N. C. 87, 133 S. E. 427.

The holder by indorsement must show that the instrument was indorsed before maturity. An indorsement by a rubber stamp is a valid indorsement but does not prove itself. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447.

It was competent for the defendant to introduce evidence as to the quality of goods for which a draft was accepted in order that he might show fraud and deception and where such proof was admitted the burden of proving holding in due course devolved upon holder. Campbell v. Patton, 113 N. C. 481, 18 S. E. 687; Manufacturing Co. v. Summers, 143 N. C. 102, 109, 55 S. E. 522; Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Park v. Exum, 156 N. C. 228, 72 S. E. 309; Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 62, 77 S. E. 1006; Fidelity Trust Co. v. Ellen, 163 N. C. 45, 46, 79 S. E. 263; Smathers & Co. v. Toxaway Hotel Co., 168 N. C. 69, 72, 84 S. E. 47; Bank v. Branson, 165 N. C. 344; 81 S. E. 510; Discount Co. v. Baker, 176 N. C. 546, 97 S. E. 495.

The credibility of the plaintiff's evidence that he is a holder in due course is for the jury. Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522; Bank v Fountain, 148 N. C. 590, 62 S. E. 738; Park v. Exum, 156 N. C. 228, 231, 72 S. E. 309; Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 63, 77 S. E. 1006; Fidelity Trust Co. v. Ellen, 163 N. C. 45, 46, 79 S. E. 263.

Rule applied in Merchants Nat. Bank v. Howard, 188 N. C. 543, 550, 125 S. E. 126.

Interveners Assume Burden of Proving Title.—Where a forwarding bank intervenes and claims title to a draft of a nonresident debtor attached in the hands of a local bank, the burden is on the intervener to show its title to the property attached. Sterling Mills v. Milling Co., 184 N. C. 461, 114 S. E. 756.

Renewal Note Subject to Defenses against the Original.—If a note is negotiated after maturity and then taken up by a renewal note, the renewal note is subject to all the equities the original note was subject to. Grace v. Strickland, 188 N. C. 369, 124 S. E. 856.

Section applied in Manufacturing Co. v. Summers, 143 N. C. 102, 109, 55 S. E. 522; Dyer v. Bray, 208 N. C. 248, 180 S. E. 83.

Cited in Dixon v. Smith, 204 N. C. 480, 168 S. E. 683.

Art. 6. Liabilities of Parties

§ 3041. Liability of maker.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. (Rev., s. 2209; 1899, c. 733, s. 60.)

Quoted in White v. Johnson & Sons, 205 N. C. 773, 774, 172 S. E. 370.

Cited in Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597; Howell v. Robertson, 197 N. C. 572, 150 S. E. 32; Wachovia Bank & Trust Co. v. Black, 198 N. C. 219, 151 S. E. 269; Davis v. Alexander, 207 N. C. 417, 419, 177 S. E. 417.

§ 3042. Liability of drawer.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. (Rev., s. 2210; 1899, c. 733, s. 61.)

See note under section 220(aa).

Right of Drawer to Arrest Payment. — A drawer of a draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on the paper, or by agreement dehors the instrument as to persons affected with notice, retain the right to arrest payment. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.

Where a draft or bill is transferred to a bank by restrictive indorsement, as for deposit or for collection, the instrument is taken and held by the bank as agent for the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for like purpose and affected by the restriction. Boykin v. Bank, 118 N. C. 566, 24 S. E. 357; Bank v. Hubble, 117 N. Y. 384; Balbach v. Frelinghuysen, 15 Fed. 675; Tyson & Rawles v. Bank, 77 Md. 412; Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 721, 64 S. E. 885.

Rights of Holder without Notice of Restrictions.—When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of an agreement restricting its negotiation, the drawer may not stop payment of the draft as against the rights of the bank so holding the paper. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.

Cited in Morris v. Cleve, 197 N. C. 253, 262, 148 S. E. 253.

§ 3043. Liability of acceptor.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse. (Rev., s. 2211; 1899, c. 733, s. 62.)

Burden on Acceptor to Prove Signature of Drawer. — When a check drawn against a depositor of a bank is paid by the bank, in an action to recover deposits, the burden is on the bank to show that the check was signed by the depositor as maker. Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 296.

Where the cashing bank acts in good faith, the drawee cannot recover the amount which it has paid on the forged check. The drawee should know the signature of the drawer, its own depositor, better than the holder. The drawee cannot plead a custom that would entitle it to pay such draft without the signature being genuine. The fact that the cashing bank stamped the check "all prior indorsements guaranteed" makes no difference to the drawee, as that guarantee is only applicable to subsequent holders in due course. State Bank v. Savings etc., Co., 168 N. C. 605, 698, 85 S. E. 5.

When Forgery Known to Drawee.—Where a depositor is aware of forgery and indorses the check, and it is accordingly credited to him without knowledge of such facts on the part of the bank, the bank may return the check to such depositor and rightfully charge his account therewith, without reference to any fraudulent intent on his part. Woodward v. Savings, etc., Co., 178 N. C. 184, 100 S. E. 304.

Mistake Not Grounds for Repudiating Acceptance.—When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because, later it is ascertained that the drawer, was without funds to meet the check, though when the payment was made the officials labored under the mistake that there were funds sufficient. Woodward v. Savings, etc., Co., 178 N. C. 184, 186, 100 S. E. 304.

§ 3044. When person deemed indorser.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. (Rev., s. 2212; 1899, c. 733, s. 63.)

As to liability of indorsers, see 2 N. C. Enc. Dig., 419 to 436.

In General.—A person indorsing a note at the time it is made should be held as original promisor. If the note is indorsed after delivery to the payee and negotiated, the indorsement binds the indorser as indorser only, but if it is not negotiated he is liable as guarantor. Lilly v. Baker, 88 N. C. 151.

Persons placing their names on the back of the note are, therefore, nothing else appearing, indorsers and liable on the note only as indorsers. Perry v. Taylor, 148 N. C. 362, 62 S. E. 423; Houser v. Fayssoux, 168 N. C. 1, 83 S. E.

692; Bank v. Wilson, 168 N. C. 557, 84 S. E. 866; Meyers v. Battle, 170 N. C. 168, 86 S. E. 1034; Barber v. Absher Co., 175 N. C. 602, 96 S. E. 43; Gillam v. Walker, 189 N. C. 189; 126 S. E. 424. Dillard v. Farmers Mercantile Co., 190 N. C. 225; 227, 129 S. E. 598.

Such "appropriate words" as provided by this section, must appear upon the instrument itself or in some sufficient writing attached thereto and becoming an essential and integral part thereof, and parol evidence is not admissible to show that one signing as endorser is primarily liable on the note. Waddell v. Hood, 207 N. C. 250, 176 S. E. 558.

Indorsement as Surety.—When it is set out in the body of a note that indorsers on the back are sureties, they will be held liable as sureties and not as indorsers. Dillard v. Mercantile Co., 190 N. C. 225, 129 S. E. 598.

When Parol Evidence Admissible.—Parol Evidence is admissible as between the parties to explain the instrument. For example, "the surety on the fact of a note, and an accommodation indorser, may, as between themselves, be shown by parol to be co-sureties by virtue of a verbal understanding to that effect. So several successive accommodation indorsers of a negotiable instrument may be shown by parol to be co-sureties." Brandt Suretyship Guaranty, Vol. 1 3 ed.), pp. 562-3; Sykes v. Everett, 167 N. C. 600, 83 S. E. 585; Gillam v. Walker, 189 N. C. 189, 126 S. E. 424.

But it is not competent to show that the liability of one whose name is written on the back of a note as an indorser is primary, and not secondary, for the purpose of sustaining the contention that notice of dishonor by nonpayment is dispensed with. Busbee v. Creech, 192 N. C. 499, 500, 135 S. E. 326; Fourth Nat. Bank v. Wilson, 168 N. C. 557, 84 S. E. 866.

Where the directors of a corporation sign a negotiable instrument on the back thereof as endorsers, the holder may not show by parol that they signed as co-makers, or guarantors, or sureties. Wrenn v. Lawrence Cotton Mills, 198 N. C. 89, 150 S. E. 676.

Testimony in direct contradiction of the written agreement as expressed in the endorsement to "guarantee payment of this note . . . with full knowledge of this contract," should be excluded under this section. Carr v. Clark, 205 N. C. 265, 266, 171 S. E. 88.

Applied in Corporation Commission v. Wilkinson, 201 N. C. 344, 160 S. E. 292; Hyde v. Tatham, 204 N. C. 160, 167 S. E. 626.

Cited in Nance v. Hulin, 192 N. C. 665, 135 S. E. 774; Howell v. Robertson, 197 N. C. 572, 150 S. E. 32.

§ 3045. Liability of irregular indorser.—Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accomodation of the payee he is liable to all parties subsequent to the payee. (Rev., s. 2213; 1899, c. 733, s. 64.)

Cited in Perry v. Taylor, 148 N. C. 362, 62 S. E. 423; Meyers v. Battle, 170 N. C. 168, 86 S. E. 1034; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, and held not applicable to that case. Wrenn v. Lawrence Cotton Mills, 198 N. C. 89, 90, 150 S. E. 676.

§ 3046. Warranty, where negotiation by delivery.—Every person negotiating an instrument by delivery or by a qualified indorsement warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes. (Rev., s 2214; 1899, c. 733, s. 65.)

As to qualified indorsement, see sec. 3019.

§ 3047. Liability of general indorser.—Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of the next preceding section; and (2) that the instrument is at the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. (Rev., s. 2215; 1899, c. 733, s. 66.)

Cross References.—As to words which exempt transferer from liability as general endorser see § 3019 and the note thereto.

Considered with Other Sections.—This section, which restricts the warranty to subsequent holders in due course, must be considered in connection with other sections of the Negotiable Instruments Law. Ray v. Livingston, 204 N. C. 1, 4, 167 S. E. 496.

Contract of Indorsement Is a Separate Contract.—A contract of indorsement is a substantive contract, separable and independent of the instrument on which it appears, and where it has been made without qualification and for value it guarantees to a holder in due course among other things that the instrument, at the time of the indorsement, is a valid and subsisting obligation. Wachovia Bank, etc., Co. v. Grafton, 181 N. C. 404, 405, 107 S. E. 316.

Indorsement after Maturity.—An indorsee taking after maturity takes the title to whatever interest his indorsee had, and by the indorsement the indorser makes such warranties as are provided by statute. Smith v. Godwin, 145 N. C. 242, 58 S. E. 1089.

An indorsement "without recourse" does not impair the negotiability of the instrument, but qualifies the indorsement and where one has acquired a negotiable instrument by an indorsement by a holder without recourse, there is no implied warranty on the part of such indorser. Walter v. Kilpatrick, 191 N. C. 458, 132 S. E. 148; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

Signature Not Explained by Parol.—When a payee or regular indorsee thereof writes his name on the back of a note, as between him and a bona fide holder for value and without notice, the law implies that he intended to assume the well-known liability of an indorser, and he will not be permitted to contradict this implication. But this rule does not apply between the original parties to a contract which is not in writing, although there may be the signature of one or more parties to authenticate that some contract was made. Sykes v. Everett, 167 N. C. 600, 604, 835 S. E. 585.

Liability of Substituted Indorser.—Where an endorser as originally appearing on a negotiable note has his name stricken from the instrument by the payee and another person signs in substitution for him, the liability of the substituted endorser to the payee remains as a general endorser, unaffected by the cancellation and substitution, when his signature is not obtained by misrepresentation that the other endorsers had consented to the substitution and remained bound by the instrument. Efird v. Little, 205 N. C. 583, 172 S. E. 198.

Set-off of Deposits against Note.—Where a depositor in an insolvent national bank had indorsed a note on which he was in fact primarily liable, and procured the bank to discount it for his benefit, he was entitled in a suit by the bank's receiver to recover the amount of the note, to set off his deposit in the bank against his liability on the note. Williams v. Rose, 218 Fed. 898; Yardley v. Clothier, 51 Fed. 506, 17 L. R. A. 462; Scott v. Armstrong, 146 U. S. 499, 36 L. Ed., 1059; Yardley v. Philler, 167 U. S. 344, 346, 42 L. Ed. 192; Williams v. Coleman, 190 N. C. 368, 371, 129 S. E. 818.

Not Applicable to Usury. — The provisions made as to warranties which prevail in case of unqualified indorsements refer to lawful transactions, and do not relate to transactions coming within the meaning of our usury laws. Sedbury v. Duffy, 158 N. C. 432, 74 S. E. 355.

Parol Evidence. — Where an unqualified endorsement is supported by a valuable consideration and the maker seeks

to enforce the endorser's liability the endorser may introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payment was to be made out of a particular fund, but he may not introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event. Kindler v. Wachovia Bank, etc., Co., 204 N. C. 198, 167 S. E. 811.

Applied in Hyde v. Tatham, 204 N. C. 160, 167 S. E. 626.

§ 3048. Liability of indorser, where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. (Rev., s. 2216; 1899, c. 733, s. 67.)

§ 3049. Order in which indorsers are liable.—As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. (Rev., s. 2217; 1899, c. 733, s. 68.)

As to liability of subsequent holder when instrument is negotiated back to prior holder, see section 3031.

See 13 N. C. Law Rev., 82, 87.

Contribution between Indorsers. — An indorser of a negotiable instrument is not subject to contribution among all others who may have indorsed the same, but only liable to those who are subsequent in date to his indorsement, to the full amount of their payment as an indemnitor. Lancaster v. Stanfield, 191 N. C. 340, 132 S. E. 21.

An indorser of a negotiable instrument who had paid a judgment obtained thereon in an action against him and the insolvent makers, cannot, nothing else appearing, recover the amount in his action therefor against a subsequent indorser. Lynch v. Loftin, 153 N. C. 270, 69 S. E. 143.

Parol Evidence between Immediate Parties.—Parol evidence is admissible to show that as between or among themselves parties to a negotiable instrument are liable otherwise than appears prima facie. Bank v. Burch, 145 N. C. 316, 59 S. E. 71; Sykes v. Everett, 167 N. C. 600, 83 S. E. 585; Gillam v. Walker, 189 N. C. 189, 126 S. E. 424; Dillard v. Mercantile Co., 190 N. C. 225, 129 S. E. 598; Lancaster v Stanfield, 191 N. C. 340, 343, 132 S. E. 21.

Parol Evidence against Remote Indorsee.—In an action upon a note by a remote indorsee, who purchased bona fide for full value and without notice, against the payee, who indorsed the note in blank, evidence of an agreement between the payee and his immediate indorsee that he should not be held liable on his indorsement is not admissible. Hill v. Shields, 81 N. C. 250.

Cited in Howell v. Robertson, 197 N. C. 572, 574, 150 S. E. 32.

§ 3050. Liability of agent or broker.—Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section three thousand and forty-six, unless he discloses the name of his principal and the fact that he is acting only as agent. (Rev., s. 2218; 1899, c. 733, s. 69.)

Art. 7. Presentment for Payment

§ 3051. Effect of want of demand on principal debtor.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. (Rev., s. 2219; 1899, c. 733, s. 70.)

Cross References.—As to when presentment is not necessary in order to charge drawer and indorsers, see sections 3060, 3061; as to place of presentment, see sec. 3054; as to notice to those secondarily liable, see secs. 3071 et seq.

Presentment Necessary to Hold Drawer.—When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and a failure to do so will discharge the debt. Mauney & Son v. Coit, 80 N. C. 300.

Presentment Must Be Made in a Reasonable Time to Hold Drawer.—A drawer of a bill, having funds in the hands of the drawee has a right that the bill be presented for payment, and he cannot be charged unless the bill was presented in a reasonable time, although he knew at the time of drawing the bill that the drawee was insolvent. Cedar Falls Co. v. Wallace, 83 N. C. 225; Long v. Stephenson, 72 N. C. 569.

Effect of Guaranteeing Prior Indorsements. — A certificate of deposit forwarded to another bank by the drawer bank must be presented in a reasonable time, and if not presented the drawer is not liable, although it stamped the certificate "Prior indorsements guaranteed." Bank v. Trust Co., 159 N. C. 85, 74 S. E. 747.

Presentment of Checks.—A postdated check, like any other check need not be presented on the day of its date, but may be presented within a reasonable time thereafter, and the fact that the drawee had money on deposit to meet it on that date, but did not have it when the check was presented, is not equivalent to a "tender of payment." Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. Rep. 339.

Sufficient Funds on Deposit May Amount to Tender.—The fact that the maker of a negotiable note payable at a certain bank kept a deposit sufficient to pay the note at the bank on the due date may amount to a tender of payment under this section, but such tender would discharge only persons secondarily liable on the note, and would not discharge the liability of the maker and surety on the note. Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Surety's Liability.—When one is a surety on a note, as to all holders he stands on the same basis as the principal, and presentment for payment is not necessary to make him liable thereon. Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430. See also Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Guarantor's Liability.—One who is a guarantor on a note is not primarily liable, and presentment is necessary to hold him liable thereon. Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430.

When Failure to Make Demand Available as Defense — Proof.—If a note be payable at a particular time and place, a demand at the time and place need not be averred or proven in an action by the holder against the maker. A failure to make such demand can only be used in defense if the money was ready at the time and place. Nichols v. Pool, 47 N. C. 23.

Cited in Perry v. Taylor, 148 N. C. 362, 62 S. E. 423.

§ 3052. Presentment, where the instrument is not payable on demand.—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. (Rev., s. 2220; 1899, c. 733, s. 71.)

In General.—Where a negotiable paper is assigned, the transaction is to be regulated according to the laws of merchants, by which the assignee is bound to apply for payment within a reasonable time. Plummer v. Christmas, 1 N. C. 145, 146.

Presentment of Checks Must Be within Reasonable Time.—Section 192 of the Negotiable Instruments Act (sec. 3167, this Code) says that "a check is a bill of exchange drawn on a bank payable on demand". Instruments payable on demand may be presented within a reasonable time after their issue. In this respect there is no difference between a postdated check and any other. In either case it should be presented within a reasonable time after its issue, but the only effect of a failure to present it within such time is to discharge the drawer from liability to the extent of the loss caused by the delay. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339, 342.

§ 3053. What constitutes a sufficient presentment.—Presentment for payment to be sufficient must be made (1) by the holder or by some per-

son authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made. (Rev., s. 2221; 1899, c. 733, s. 72.)

In General.—The presentment of a bill of exchange or draft must be made to the drawee or acceptor, or to an authorized agent. A personal demand is not always necessary, and it is sufficient to make the demand at the residence or usual places of business of the drawee, where the presentment is for payment. It is the duty of the bank collector to be careful, not only to present the draft at the usual place of business, but, if the plaintiff was not in, to assure himself that the person to whom he presented the draft for acceptance was the authorized agent of the plaintiff. Burrus v. Life Ins. Co., 124 N. C. 9, 12, 32 S. E. 323.

§ 3054. Place of presentment.—Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make the payment is given in the instrument, and it is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. (Rev., s. 2222; 1899, c. 733, s. 73.)

Place of Payment Specified.—Whenever a bill of exchange or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary whether the maker lives at the same place or a different one. Sullivan v. Mitchell, 4 N. C. 93. But the maker is not bound to pay it until it is presented at the place where it is expressed to be payable. Bank v. Bank, 35 N. C. 75.

Presentment at the place of data is sufficient, no other place of presentment appearing. Wittkowski v. Smith, 84 N. C. 671.

§ 3055. Instrument must be exhibited.—The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it. (Rev., s. 2223; 1899, c. 733, s. 74.)

Lost or Destroyed Note. — The provisions of this section that upon payment of a note it must be delivered up to the party paying it, does not apply where the note has been lost or destroyed, and, under the facts of this case, there was no error in not requiring a bond for the protection of the maker where there was no request made therefor. Wooten v. Bell, 196 N. C. 654, 146 S. E. 705.

§ 3056. Presentment where instrument payable at bank.—Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. (Rev., s. 2224; 1899, c. 733, s. 75.)

§ 3057. Presentment where principal debtor is dead.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. (Rev., s. 2225; 1899, c. 733, s. 76.)

§ 3058. Presentment to persons liable as partners.—Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. (Rev., s. 2226; 1899, c. 733, s. 77.)

In General.—Where the protest of a notary public stated that he presented a bill, which purported to be drawn on a firm, to A, one of the members thereof, it was held to be evidence that A was a member of that firm, and that the presentment was properly made. Elliott v. White, 51 N. C. 98.

§ 3059. Presentment to joint debtors.—Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all. (Rev., s. 2227; 1899, c. 733, s. 78.)

§ 3060. When presentment not required to charge the drawer.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. (Rev., s. 2228; 1899, c. 733, s. 79.)

In General.—The drawers, having funds in the hands of the drawee, had the right to expect their bill to be honored by them, and they were entitled to presentment of their bill in a reasonable time and strict notice if dishonored on the part of the plaintiff, although the defendants at the time they drew the bill may have believed the drawees were insolvent and had been so notified by them and requested not to draw on them. Cedar Falls Co. v. Wallace Bros., 83 N. C. 225, 228.

§ 3061. When presentment not required to charge the indorser.—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. (Rev., s. 2229; 1899, c. 733, s. 80.)

This section is not applicable where holder testifies endorser was not accommodation endorser. Hyde v. Tatham, 204 N. C. 160, 167 S. E. 626.

Lack of Funds with Which to Pay.—Where the treasurer of a corporation indorses the corporate note, payable at a certain bank, and at its maturity the corporation has no funds at the bank, it is not necessary that the note should have been presented to the bank for payment. Meyers Co. v. Battle, 170 N. C. 168, 86 S. E. 1034.

Burden of Proof on Holder.—If it is in fact an accommodation paper, then, notwithstanding the form of the paper, the drawer would be primarily liable and not entitled to notice, but the burden to show this is on the holder, and there being no evidence to that fact, the form of the paper governs and the drawer is entitled to notice. National Bank v. Bradley, 117 N. C. 526, 530, 23 S. E. 455.

§ 3062. When delay in presentment is excused.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (Rev., s. 2230; 1899, c. 733, s. 81.)

Delay Caused by One Liable.—Where an agent has incurred a personal liability on a negotiable instrument given in behalf of his principal, he may not avoid payment on the ground of delay in presenting it for payment, when the delay was at his own request and by his own conduct. Caldwell Co. v. George, 176 N. C. 602, 97 S. E. 507.

§ 3063. When presentment may be dispensed with.—Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter cannot be made; (2) where the drawee is a ficti-

tious person; (3) by waiver of presentment, express or implied. (Rev., s. 2231; 1899, c. 733, s. 82.)

Where Presentment Cannot Be Made.—Where the maker is a seaman, without any domicil in the State, and goes on a voyage about the time the note falls due, no demand on him is necessary in order to charge the indorser. Moore v. Coffield, 12 N. C. 247.

Implied Waiver of Presentments.—Where a check was given for county bonds and the bonds could not be issued at once, and the drawer cooperated with the county to get the bond issue, there is a sufficient implied waiver of immediate presentment, and a presentment within a reasonable time after the bond issue was sufficient to bind the drawer. Caldwell County v. George, 176 N. C. 602, 97 S. E. 507.

§ 3064. When instrument dishonored by nonpayment.—The instrument is dishonored by nonpayment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid. (Rev., s. 2232; 1899, c. 733, s. 83.)

§ 3065. Liability of persons secondarily liable when instrument dishonored. — Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. (Rev., s. 2233; 1899, c. 733, s. 84.)

§ 3066. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace, except as allowed by the succeeding section. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. (Rev., s. 2234; 1899, c. 733, s. 85; 1907, c. 897; 1909, c. 800, s. 1.)

§ 3067. When days of grace allowed.—All bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight, but no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand. (Rev., s. 2235; Code, s. 43; 1905, c. 327; 1907, c. 861.)

§ 3068. How time is computed.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment. (Rev., s. 2236; 1899, c. 733, s. 86.)

§ 3069. Rule where instrument is payable at bank.—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. (Rev., s. 2237; 1899, c. 733, s. 87.)

Where a note is made payable at a certain bank it amounts to an order to the bank to pay same out of the maker's deposit upon presentment when due. Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Liability Where Bank Fails to Pay out of Deposits.—Where the bank of deposit of the maker of a note is the one specified as the place of its payment, and also the one to which the note is sent at maturity for collection, the maker's written order on the note to the bank to pay it from his deposits is sufficient; and where the bank accepts this order and retains the note without entry on its books for twelve days, then its doors are closed and a receiver appointed, the payee of the note is held responsible for the acts of its agency for collection, and a plea of payment is good. Peaslee-Gaulbert Co. v. Dixon, 172 N. C. 411, 90 S. E. 421.

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074.

§ 3070. What constitutes payment in due course.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. (Rev., s. 2238; 1899, c. 733, s. 88.)

Art. 8. Notice of Dishonor

§ 3071. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. (Rev., s. 2239; 1899, c. 733, s. 89.)

As to notice to principal, see section 3051; as to notice in general, see 2 N. C. Enc. Dig. 472-478.

In General.—The draft having been accepted, the drawee became primarily liable, and in the event of dishonor notice must be given to all those who are secondarily liable as drawer and indorsers. Denny v. Palmer, 27 N. C. 610; Tiedman Com. Paper, sec. 336; 3 Randolph Com. Paper, sec. 1238; 2 Daniel Neg. Inst., sec. 995; Brown v. Teague, 52 N. C. 573; National Bank v. Bradley, 117 N. C. 526, 530, 23 S. E. 455.

Following the statute it was held in Perry v. Taylor, 148 N. C. 362, that failure to give notice of dishonor discharged the indorser from further liability. Barber v. Absher, 175 N. C. 602, 604, 96 S. E. 43.

Notice to Surety.—A surety on a note is not discharged from liability by reason of the fact that he was not given notice of its dishonor. Rose v. Wooten, 140 N. C. 557, 53 S. E. 430.

Notice to Forwarding Bank.—When a bank forwards a check to another bank to be collected, and the drawee bank is negligent in notifying the forwarding bank of nonpayment, the right of the forwarding bank to recover will be determined by whether or not it would have prevented loss by notice, and it can recover such loss only as was occasioned by the delay. Bank v. Trust Co., 177 N. C. 254, 98 S. E. 595.

Waiver of Notice.—Notice of dishonor may be waived by an indorser of a negotiable paper before or after maturity thereof by express words or by necessary implication, and when so waived, notice of dishonor need not be given. National Bank v. Johnson, 159 N. C. 526, 86 S. E. 360.

Burden on Holder to Show Primary Liability.—The burden is on the holder of a note, seeking to hold an indorser, to whom notice of dishonor has not been given, liable thereon upon the contention that notice was not required, to prove that the note was given for his accommodation. Parol evidence is not admissible to show primary liability to sustain the contention that notice of dishonor is dispensed with. Busbee v. Creech, 192 N. C. 499, 135 S. E. 326.

Effect of Endorser's Consent to Extension of Time.—It cannot be determined as a matter of law that an endorser is not entitled to notice of dishonor as provided in this section, by reason of his consent to an extension of time of payment granted the principal. Davis v. Royall, 204 N. C. 147, 167 S. E. 559.

§ 3072. By whom notice given.—The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given. (Rev., s. 2240; 1899, c. 733, s. 90.)

In General.—The notice required by law to be given to an indorser is good if it be sufficient to put the indorser on inquiry; no particular form is required and any person through whose hands a bill or note has passed may give notice to the drawer or his prior indorser of the dishonor of

the bill, although the bill or note may not have been taken up by him at that time. Bank v. Seawell, 9 N. C. 560.

Verbal Notice.—Where a bank holding a note for collection gave verbal notice of dishonor to one of the indorsers, and all of the indorsers discussed the matter among themselves and determined to refuse payment, the notice was sufficient, as the indorsers notified each other, and this notice inured to the benefit of the holders. Piedmont Carolina Ry. Co. v. Shaw, 223 Fed. 973, 974.

Verbal notice is good if sufficient to put endorsers upon inquiry. Bank v. Seawell, 9 N. C. 560.

§ 3073. Notice given by agent.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. (Rev., s. 2241; 1899, c. 733, s. 91.)

§ 3074. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. (Rev., s. 2242; 1899, c. 733, s. 92.)

§ 3075. Effect, where notice is given by party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given. (Rev., s. 2243; 1899, c. 733, s. 93.)

§ 3076. When agent may give notice.— Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. (Rev., s. 2244; 1899, c. 733, s. 94.)

§ 3077. When notice sufficient.—A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate it unless the party to whom the notice is given is in fact misled thereby. (Rev., s. 2245; 1899, c. 733, s. 95.)

Prior Law.—There was no necessity for signing under the prior law. Bank v. Seawell, 9 N. C. 560.

§ 3078. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. (Rev., s. 2246; 1899, c. 733, s. 96.)

§ 3079. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf. (Rev., s. 2247; 1899, c. 733, s. 97.)

§ 3080. Notice when party is dead.— When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased. (Rev., s. 2248; 1899, c. 733, s. 98.)

§ 3081. Notice to partners.—When the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. (Rev., s. 2249; 1899, c. 733, s. 99.)

§ 3082. Notice to persons jointly liable.—Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others. (Rev., s. 2250; 1899, c. 733, s. 100.)

§ 3083. Notice to bankrupt.—Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee. (Rev., s. 2251; 1899, c. 733, s. 101.)

§ 3084. Time within which notice must be given.—Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter. (Rev., s. 2252; 1899, c. 733, s. 102.)

The burden is on the holder of a negotiable note to show that notice of nonpayment was given the endorsers, and in the absence of evidence of such notice to an endorser, or to his personal representative after his death, the holder is not entitled to recover on the endorsement. Williams v. Fowler Automobile Co., 207 N. C. 309, 176 S. E. 567.

§ 3085. Notice where parties reside in the same place.—When the person giving and the person to receive notice reside in the same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the post office in time to reach him in the usual course on the day following. (Rev., s. 2253; 1899, c. 733, s. 103.)

§ 3086. Notice where parties reside in different places.—Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the post office then within the time that notice would have been received in due course of mail if it had been deposited in the post office within the time specified in the last subdivision. (Rev., s. 2254; 1899, c. 733, s. 104.)

In General.—As to what was a reasonable notice under varying circumstances, it has now been long settled that a reasonable notice is one which is sent by the first post after the day of dishonor, and when there is a daily mail, this necessarily means the next day, if the next day's mail does not leave before business hours. National Bank v. Bradley, 117 N. C. 526, 530, 23 S. E. 455; Hubbard v. Troy, 24 N. C. 134; Denny v. Palmer, 27 N. C. 610.

Sufficient Proof of Notice.—It was unanimously held by the Supreme Court of the United States, in Lindenberger v. Beal, 6 Wheat. 104, that the evidence of the latter containing notice, put into the post office, directed to the defendant at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter

before parol evidence could be admitted. Faribault v. Ely, 13 N. C. 67, 72.

§ 3087. When sender deemed to have given due notice.—Where notice of dishonor is duly addressed and deposited in the post office the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. (Rev., s. 2255; 1899, c. 733, s. 105.)

§ 3088. What constitutes deposit in postoffice.—Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter-box under the control of the postoffice department. (Rev., s. 2256; 1899, c. 733, s. 106.)

§ 3089. Time of notice to antecedent parties.—Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. (Rev., s. 2257; 1899, c. 733, s. 107.)

§ 3090. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or (2) if he lives in one place and has his place of business in another, notice may be sent to either place; or (3) if he be sojourning in another place notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section. (Rev., s. 2258; 1899, c. 733, s. 108.)

Diligent Attempt to Notify Necessary.—A holder of a dishonored bill must give notice to all indorsers, or make a diligent attempt to give this notice, if he does not know where the indorser resides. Runyon v. Montfort, 44 N. C. 371.

Nearest Post Office.—The rule that notice to a distant indorser should be sent to the post office nearest to his residence was founded on the presumption that the information would most speedily be given in such way; but the rule is subject to modification, and the true inquiry is, was the notice directed to that post office which was most likely to impart to the indorser the earliest intelligence, though it may not be the nearest; if it was, it is sufficient. Bank v. Lane, 10 N. C. 453.

Notice sent to the place where the bill was drawn is not sufficient. Denny v. Palmer, 27 N. C. 610.

§ 3091. Waiver of notice.—Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. (Rev., s. 2259; 1899, c. 733, s. 109.)

As to waiver in general, see 2 N. C. Enc. Dig. 487-480.

Mistake.—When one thinking there has been a present ment for payment makes promises that would amount to a waiver, had there been a presentment, he is not liable on the grounds of waiver of notice if there had been no presentment for payment. Lilly v. Petteway, 73 N. C. 358.

Extension of Time.—The authorities seem to hold that where the indorser consents in advance of maturity to extensions of the time of payment of the note, he thereby waives his right to receive notice of dishonor and presentment for payment. Worley v. Johnson, 33 L. R. A. 641, notes. National Bank v. Johnston, 169 N. C. 526, 529, 86 S. E. 360.

Promise to Pay after Failure to Be Notified.—A promise to pay generally, or a promise to pay a part, or a part payment made, with a full knowledge that he had been fully released from liability on the bill by the neglect of the holder to give notice, will operate as a waiver and bind the party who makes it for the payment of the whole bill. Dixon v. Elliot, 5 Car. & P., 437; Margetson v. Atkins, 3 Car. & P., 388; Harvey v. Thorpe, 23 Miss., 538; Shaw Bros. v. McNeill, 95 N. C. 535, 538.

Where, upon the dishonor of a bill of exchange or promissory note, the indorsee has neglected to give the proper notice, the drawer or indorser of the bill or indorser of the note will still be liable, if, after a knowledge of all the facts which in law would have discharged him, he promises to pay the bill or note. Moore v. Tucker, 25 N. C. 347.

§ 3092. Who affected by waiver.—Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only. (Rev., s. 2260; 1899, c. 733, s. 110.)

In General. — Where upon the face of a negotiable note there is an agreement to waive notice of dishonor or an extension of time, etc., one placing his name on the back thereof is deemed to be an indorser without indication of other liability therein, and is bound by the agreement expressed on the face of the instrument waiving notice, etc. Gillam v. Walker, 189 N. C. 189, 126 S. E. 424.

Applied in Fidelity Bank v. Hessee, 207 N. C, 71, 175 S. E. 826.

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360.

§ 3093. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. (Rev., s. 2261; 1899, c. 733, s. 111.)

Waiver Binding Partnership.—Where a partner, after the dissolution of the firm, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former copartner, especially when the latter has been a dormant member. Mauney & Son v. Coit, 80 N. C. 300.

Inland Bills.—Although protest is not necessary on an inland bill, yet its waiver in such a case is construed to signify as much as when applied to foreign bills. Shaw Bros. v. McNeill, 95 N. C. 535.

Foreign Bills.—A protest is necessary only in case of foreign bills. A waiver of protest on a foreign bill is also a waiver of presentment and notice. Shaw Bros. v. McNeill, 90 N. C. 535.

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360.

§ 3094. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. (Rev., s. 2262; 1899, c. 733, s. 112.)

§ 3095. Delay in giving notice.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. (Rev., s. 2263; 1899, c. 733, s. 113.)

§ 3096. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) Where the drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment. (Rev., s. 2264; 1899, c. 733, s. 114.)

As to notice, see notes to section 3060.

§ 3097. When notice need not be given to indorser.—Notice of dishonor is not required to be given to an indorser in either of the following cases; (1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation. (Rev., s. 2265; 1899, c. 733, s. 115.)

In General.—Although, at the time of the indorsement of a note, the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance does not dispense with the necessity of a due notice. Denny v. Palmer, 27 N. C. 610.

Cited in Busbee v. Creech, 192 N. C. 499, 135 S. E. 326.

§ 3098. Notice of nonpayment where acceptance refused.—Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted. (Rev., s. 2266; 1899, c. 733, s. 116.)

§ 3099. Effect of omission to give notice of nonacceptance.—An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. (Rev., s. 2267; 1899, c. 733, s. 117.)

§ 3100. When protest need not be made; when it must be made.—Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be, but protest is not required except in the case of foreign bills of exchange. (Rev., s. 2268; 1899, c. 733, s. 118.)

In General.—Protest is not necessary to fix the drawee and indorsers of inland bills of exchange with liability, although it is necessary in the case of foreign bills. Shaw Bros. v. McNeill, 95 N. C. 535.

Art. 9. Discharge

§ 3101. How instrument discharged.—A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right. (Rev., s. 2269; 1899, c. 733, s. 119.)

In an action on a note the maker and sureties may rely on the discharge of the note by the payee's acceptance of the note of another party in the sum due, and the payee's delivery to them of the papers on which defendants were bound, since this is an intentional cancellation by the payee, under this section, which is not required to be in writing. Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 172 S. E. 360.

An instruction that a negotiable instrument may be discharged by an act which would discharge a simple contract for the payment of money is not error under this section. Id.

§ 3102. Discharge of person secondarily liable.—A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved. (Rev., s. 2270; 1899, c. 733, s. 120.)

Release of Maker Discharges Indorser.—Where the holder of a negotiable instrument releases the maker from liability thereon, he thereby discharges from liability his indorser from whom he acquired the instrument. Lumber Co. v. Buchanan, 192 N. C. 771, 136 S. E. 129.

A tender of payment under § 3051 would discharge only persons secondarily liable on the note, as provided by this section, and would not discharge the liability of the maker and surety on the note. Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Extension of Payment.—In an action upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," is not an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability. Roberson v. Spain, 173 N. C. 23, 91 S. E. 361.

Where the face of a note contains an agreement that the parties should remain bound notwithstanding any extension of time granted the maker, upon payment of interest by him, the endorsers remain liable although ignorant of such extensions and payments of interest by the maker, they being bound by their agreement in the note and the extension being supported by the necessary elements of certainty, mutuality and consideration. Fidelity Bank v. Hessee, 207 N. C. 71, 175 S. E. 826.

Applied in Corporation Commission v. Wilkinson, 201 N. C. 344, 349, 160 S. E. 292.

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360.

§ 3103. Right of party paying instrument.—When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated. (Rev., s. 2271; 1899, c. 733, s. 121.)

Right to Put into Circulation.—When a bill of exchange made payable to a third person is protested and taken up by the drawer, the latter cannot again put it in circulation. Price v. Sharp, 24 N. C. 417.

Liability of Principal.—An indorser who pays off and discharges the note of his principal can only recover from the latter the amount actually paid by him. Pace v. Robertson, 65 N. C. 550.

Cited in Roberson v. Spain, 173 N. C. 23, 91 S. E. 361.

§ 3104. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. (Rev., s. 2272; 1899, c. 733, s. 122.)

In General.—The right of an obligor to defend an action against himself on a negotiable note, under the provisions of this section may be done by virtue thereof only as therein expressed when the release is in writing, and may not be

shown when resting only by parol. Manly v. Beam, 190 N. C. 659, 130 S. E. 633.

A parol agreement between an official of a bank that the bank would release the endorsers or sureties on a note upon the maker confessing judgment thereon is not enforceable, a verbal renunciation being ineffectual under the provisions of this section. Page Trust Co. v. Lewis, 200 N. C. 286, 287, 156 S. E. 504.

No writing is necessary if "the instrument is delivered to the person primarily liable thereon." Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 779, 172 S. E. 360.

§ 3105. Unintentional cancellation; burden of proof. — A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority. (Rev., s. 2273; 1899, c. 733, s. 123.)

§ 3106. Effect of alteration of instrument. — Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor. (Rev., s. 2274; 1899, c. 733, s. 124.)

See annotations to § 3107.

In General.—It is familiar learning that if the payee of a bond alters it in any material part, without the consent of the obligor, the bond is avoided and may be defeated on the plea of non est factum. Mathis v. Mathis, 20 N. C. 55; Dunn v. Clements, 52 N. C. 58; Darwin v. Rippey, 63 N. C. 319; Davis v. Coleman, 29 N. C. 424.

Liability on Raised Checks. — Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink and delivers it to the payee as a complete instrument, there is no question of implied agency of the payee to do anything further regarding the negotiation of the instrument as the agent for the maker, and where the payee has fraudulently raised the amount of the check, indorses it to another, and receives the money thereon, the maker is not liable to the indorsee except in an action for the original or true amount of the check. Broad St. Bank v. Nat. Bank, 183 N. C. 463, 112 S. E. 11.

§ 3107. What constitutes a material alteration. —Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. (Rev., s. 2275; 1899, c. 733, s. 125.)

In General. — Adding the words "in specie" after the word "dollars" in a note is a material alteration. Darwin v. Rippey, 63 N. C. 319.

The cutting of the name of one of the makers of a promissory note and substituting that of another was a material alteration of the note, and vitiated it. Davis v. Coleman, 29 N. C. 424, 427.

Striking Out Endorser's Name and Substituting Another Is Material.—Where the payee of a negotiable instrument acquires it with certain endorsers thereon and subsequently strikes out the name of one endorser and another signs as endorser in lieu of the endorser whose name was stricken out, the change is a material one under this section, and will release the endorsers who had not consented to the substitution, but will not release those endorsers whose consent had been procured, as provided in § 3106. Efird v. Little, 205 N. C. 583, 172 S. E. 198.

Immaterial Alterations.—The addition that does not vary the terms of the contract, and adds nothing more than is already implied by law is not sufficient to be construed as a material alteration. Houston v. Potts, 64 N. C. 33.

Art. 10. Bills of Exchange

§ 3108. Bill of exchange defined.—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. (Rev., s. 2276; 1899, c. 733, s. 126.)

See note under section 220(aa).

In General.—Where a draft drawn to the maker's order and, having been indorsed by another, is accepted at a bank, and then purchased in due course before maturity by an innocent purchaser for value, the bank may not resist payment upon the ground that the transaction was ultra vires, and not within the authority of its charter, authorizing it to accept bills, notes, commercial paper, etc., for it comes within the statutory definition of an inland bill of exchange, and may be treated as a bill or note, at the option of the holder. Sherrill v. American Trust Co., 176 N. C. 591, 97 S. E. 471.

Cited in Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23; Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074; Morris v. Cleve, 197 N. C. 253, 262, 148 S. E. 253.

§ 3109. Bill not an assignment of funds in hands of drawee.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. (Rev., s. 2277; 1899, c. 733, s. 127.)

See 13 N. C. Law Rev., 131, as to what orders constitute an assignment.

Cited in Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074.

§ 3110. Bill addressed to more than one drawee.—A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession. (Rev., s. 2278; 1899, c. 733, s. 128.

§ 3111. Inland and foreign bills of exchange.— An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill. (Rev., s. 2279; 1899, c. 733, s. 129.)

§ 3112. When bill may be treated as promissory note.—Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. (Rev., s. 2280; 1899, c. 733, s. 130.)

In General.—A paper coming directly within the definition of an inland bill of exchange can be treated as a bill or note at the option of the holder, the drawer and drawee being the same person. Sherrill v. American Trust Co., 176 N. C. 591, 592, 97 S. E. 471.

§ 3113. Referee in case of need.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need: that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the

referee in case of need or not, as he may see fit. (Rev., s. 2281; 1899, c. 733, s. 131.)

Art. 11. Acceptance

§ 3114. Acceptance defined; how made.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. (Rev., s. 2282; 1899, c. 733, s. 132.)

Acceptance by Agent.—The authority to draw, accept or indorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that is, if the purpose of the agency cannot otherwise be accomplished. Bank v. Hay, 143 N. C. 326, 55 S. E. 811.

§ 3115. Holder entitled to acceptance on face of bill.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. (Rev., s. 2283; 1899, c. 733, s. 133.)

Cited in Commercial Investment Trust v. Windsor, 197 N. C. 208, 148 S. E. 42.

§ 3116. Acceptance by separate instrument.—Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. (Rev., s. 2284; 1899, c. 733, s. 134.)

Letters of Acceptance. — A letter written to a drawer within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even though there are no funds in his hands belonging to the drawer, if the bill is drawn payable at a fixed time, and not at or after sight. Nimock v. Woody, 97 N. C. 1, 2 S. E. 249.

Where the letters, upon which the plaintiff bank relied as authority to an agent to make the draft which is cashed, show that the alleged authority to draw was nothing more than private instructions by the principal to his agent as to how he should conduct this part of the business, and were not to be used as a basis of credit to the agent, the court properly nonsuited the plaintiff. Bank v. Hay, 143 N. C. 326, 55 S. E. 811.

§ 3117. When promise to accept equivalent to acceptance.—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. (Rev., s. 2285; 1899, c. 733, s. 135.)

§ 3118. Time allowed drawee to accept.—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation. (Rev., s. 2286; 1899, c. 733, s. 136.)

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074; Lamb v. Hood, 205 N. C. 409, 410, 171 S. E. 359.

§ 3119. Liability of drawee retaining or destroying bill.—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same. (Rev., s. 2287; 1899, c. 733, s. 137.)

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074; Lamb v. Hood, 205 N. C. 409, 410, 171 S. E. 359.

§ 3120. Acceptance of incomplete bill. — A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to acept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. (Rev., s. 2288; 1899, c. 733, s. 138.)

§ 3121. Kinds of acceptances.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. (Rev., s. 2289; 1899, c. 733, s. 139.)

§ 3122. What constitutes a general acceptance.—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere. (Rev., s. 2290; 1899, c. 733, s. 140.)

§ 3123. What constitutes a qualified acceptance.—An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all. (Rev., s. 2291; 1899, c. 733, s. 141.)

Qualified as to Time.—Where one accepted a draft on him "payable when I receive funds to the use of the drawer," he became liable when the moneys were placed to his credit though he had not taken manual possession thereof. Wallace Brothers v. Douglas, 116 N. C. 659, 21 S. E. 387.

§ 3124. Rights of parties as to qualified acceptance.—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto. (Rev., s. 2292; 1899, c. 733, s. 142.)

Art. 12. Presentment for Acceptance

§ 3125. When presentment for acceptance must be made. — Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is pre-

sentment for acceptance necessary in order to render any party to the bill liable. (Rev., s. 2293; 1899, c. 733, s. 143.)

§ 3126. Failure to present in reasonable time discharges drawer and indorsers. — Except as herein otherwise provided the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged. (Rev., s. 2294; 1899, c. 733, s. 144.)

§ 3127. How presentment made. — Presentment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and (1) where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead, presentment may be made to his personal representative; (3) where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. (Rev., s. 2295; 1899, c. 733, s. 145.)

Cross Reference.—As to necessity of presentment, see 2 N. C. Enc. Dig. 463; as to time, see 2 N. C. Enc. Dig. 475.

In General.—A draft payable at no definite place in a city or town, must be presented at the maker's residence or place of business, if he has such, at its maturity, and if he has none, then the presence of the instrument in the city is a sufficient presentation. Peoples Nat. Bank v. Lutterloh, 95 N. C. 495, 499.

§ 3128. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of this chapter. (Rev., s. 2296; 1899, c. 733, s. 146; 1909, c. 800, s. 1.)

§ 3129. Presentment where time is insufficient.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. (Rev., s. 2297; 1899, c. 733, s. 147.)

§ 3130. Where presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment cannot be made; (3) where, although presentment has been irregular acceptance has been refused on some ground. (Rev., s. 2298; 1899, c. 733, s. 148.)

§ 3131. When dishonored by nonacceptance. —A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or cannot be obtained; or (2) when a presentment for acceptance is executed and the bill is not accepted. (Rev., s. 2299; 1899, c. 733, s. 149.)

§ 3132. Duty of holder, where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers. (Rev., s. 2300; 1899, c. 733, s. 150.)

§ 3133. Rights of holder, where bill not accepted.—When a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. (Rev., s. 2301; 1899, c. 733, s. 151.)

Art. 13. Protest

§ 3134. In what cases protest necessary.— Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance; and where such a bill which had not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest in case of dishonor is unnecessary. (Rev., s. 2302; 1899, c. 733, s. 152.)

As to protest and certificate thereof, see 2 N. C. Enc. Dig. 473.

Waiver of Protest.—In foreign bills the protest may be waived; the words, "I waive protest," or "waiving protest," or any similar words, infer that the protest is waived, and when applied to foreign bills, are universally regarded as expressly waiving presentment and notice, the protest being, according to the law-merchant, the formal and necessary evidence of the dishonor of such an instrument. Shaw Bros. v. McNeill, 95 N. C. 535, 539.

Protest in Another State.—A promissory note made in another state need not be protested before the owner may sue an indorser, there being no evidence that this is required in the state where the note was executed. Bank v. Carr, 130 N. C. 479, 41 S. E. 876.

How Protested.—By the law merchant a protest of a bill by a public notary is, in itself, evidence. And by our statute such protest is prima facie evidence. Gordon v. Price, 32 N. C. 385.

Protest of Inland Bills.—Protest of an order or inland bill is not necessary to enable the holder to recover the principal and interest. Notice in due time of non-acceptance or non-payment is all that is required for that purpose. Hubbard v. Troy, 24 N. C. 134; National Bank v. Bradly, 117 N. C. 526, 23 S. E. 455; Peoples Nat. Bank v. Lutterloh, 95 N. C. 495.

§ 3135. How protest made.—The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. (Rev., s. 2303; 1899, c. 733, s. 153.)

§ 3136. By whom protest made.—Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is

dishonored, in the presence of two or more credible witnesses. (Rev., s. 2304; 1899, c. 733, s. 154.)

§ 3137. When protest to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting. (Rev., s. 2305; 1899, c. 733, s. 155.)

§ 3138. Where protest made.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by nonacceptance it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for the payment to or demand on the drawee is necessary. (Rev., s. 2306 1899, c. 733, s. 156.)

§ 3139. Protest both for nonacceptance and nonpayment.—A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. (Rev., s. 2307; 1899, c. 733, s. 157.)

§ 3140. Protest before maturity, where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (Rev., s. 2308; 1899, c. 733, s. 158.)

§ 3141. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. (Rev., s. 2309; 1899, c. 733, s. 159.)

§ 3142. Protest where bill is lost.—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (Rev., s. 2310; 1899, c. 733, s. 160.)

Art. 14. Acceptance for Honor

§ 3143. When a bill may be accepted for honor.—Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party. (Rev., s. 2311; 1899, c. 733, s. 161.)

§ 3144. How acceptance for honor made.—An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. (Rev., s. 2312; 1899, c. 733, s. 162.)

§ 3145. When deemed an acceptance for honor of drawer. — Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. (Rev., s. 2313; 1899, c. 733, s. 163.)

§ 3146. Liability of acceptor for honor.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. (Rev., s. 2314; 1899, c. 733, s. 164.)

§ 3147. Agreement of acceptor for honor.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided, also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. (Rev., s. 2315; 1899, c. 733, s. 165.)

§ 3148. Maturity of bill payable after sight accepted for honor.—Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. (Rev., s. 2316; 1899, c. 733, s. 166.)

§ 3149. Protest of bill accepted for honor. — Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need. (Rev., s. 2317; 1899, c. 733, s. 167.)

§ 3150. How presentment for payment to acceptor for honor made.—Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified. (Rev., s. 2318; 1899, c. 733, s. 168.)

§ 3151. When delay in making presentment excused.—The provisions of section 3062 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. (Rev., s. 2319; 1899, c. 733, s. 169.)

§ 3152. Dishonor of bill by acceptor for honor. —When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. (Rev., s. 2320; 1899, c. 733, s. 170.)

Art. 15. Payment for Honor

§ 3153. Who may make payment for honor.— Where a bill has been protested for nonpayment any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. (Rev., s. 2321; 1899, c. 733, s. 171.)

§ 3154. How payment for honor must be made.—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it. (Rev., s. 2322; 1899, c. 733, s. 172.)

§ 3155. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. (Rev., s. 2323; 1899, c. 733, s. 173.)

§ 3156. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference. (Rev., s. 2324; 1899, c. 733, s. 174.)

§ 3157. Effect on subsequent parties, where bill is paid for honor.—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. (Rev., s. 2325; 1899, c. 733, s. 175.)

§ 3158. Where holder refuses to receive payment supra protest.—Where the holder of a bill refuses to receive payment supra protest he loses his right of recourse against any party who would have been discharged by such payment. (Rev., s. 2326; 1899, c. 733. s. 176.)

§ 3159. Rights of payer for honor.—The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest. (Rev., s. 2327; 1899, c. 733, s. 177.)

Art. 16. Bills in a Set.

§ 3160. Bills in a set constitute one bill. — Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. (Rev., s. 2328; 1899, c. 733, s. 178.)

§ 3161. Rights of holders, where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. (Rev., s. 2329; 1899, c. 733, s. 179.)

§ 3162. Liability of holder who indorses two or more parts of a set to different persons.—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills. (Rev., s. 2330; 1899, c. 733, s. 180.)

§ 3163. Acceptance of bills drawn in sets. — The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. (Rev., s. 2331; 1899, c. 733, s. 181.)

§ 3164. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. (Rev., s. 2332; 1899, c. 733, s. 182.)

§ 3165. Effect of discharging one of a set. — Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged. (Rev., s. 2333; 1899, c. 733, s. 183.)

Art. 17. Promissory Notes and Checks

§ 3166. Negotiable promissory note defined.— A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him. (Rev., s. 2334; 1899, c. 733, s. 184.)

As to form of negotiable instrument, see section 2982 and following sections.

In General. — To render a note non-negotiable it must show on its face that the promise to pay is conditional, or render the amount to be paid uncertain. First National Bank v. Micheal, 96 N. C. 53, 1 S. E. 855. A note not payable to order or bearer is not a negotiable paper. Newland v. Moore, 173 N. C. 728, 92 S. E. 367.

Bond Treated as Promissory Note under Seal.—A bond is in form negotiable, and when indorsed for value and without notice before maturity it is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal. Miller v. Tharel, 75 N. C. 148; Spence v. Tapscott, 93 N. C. 246. The principle was applied in Lewis v. Long, 102 N. C. 206, 9 S. E. 637, in which it was decided that an obligor on a bond could not, as against an indorsee for value, before maturity and without notice, set up the defense that he executed the same as a surety only. Christian v. Parrott, 114 N. C. 215, 218, 19 S. E. 151.

Note under Seal.—A written instrument, whereby a party promises to pay the party therein named a sum certain at a time specified therein, is a promissory note in this State, although it be under seal. First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855.

Cited in Wachovia Bank & Trust Co. v. Black, 198 N. C. 219, 151 S. E. 269; Taft v. Covington, 199 N. C. 51, 55, 153 S. E. 597.

§ 3167. Check defined.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check. (Rev., s. 2335; 1899, c. 733, s. 185.)

See note under section 220 (aa).

A check is further defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment at all events of a sum of money to a certain person therein named, or to him or his orders, or to bearer, and payable on demand. Woody v. First Nat. Bank, 194 N. C. 549, 140 S. E. 150.

Restrictions as to Payments.—A stipulation stamped on the face of a check, that it will positively not be paid to a certain company or its agents, is a valid restriction and binding on the holder. Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524.

Time of Presentment.—A "check" is a bill of exchange

drawn on a blank, payable on demand, and instruments payable on demand may be presented within a reasonable time after its issue. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339.

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074; Morris v. Cleve, 197 N. C. 253, 262, 148 S. E. 253; State v. Crawford, 198 N. C. 522, 524, 152 S. E. 504.

§ 3168. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. (Rev., s. 2336; 1899, c. 733, s. 186.)

As to what is reasonable time, see section 2978.

In General.—Cashier's checks, whether certified or otherwise, are classed with bills of exchange payable on demand; and if negotiated by indorsement for value without notice and within a reasonable time, a holder can maintain the position of a holder in due course. Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522.

A check is only conditional payment, but the payee must exercise due diligence in presenting it for payment, and where his failure to exercise such diligence causes loss he must suffer it, due diligence being determined in accordance with the facts and circumstances of each particular case. Henderson Chevrolet Co. v. Ingle, 202 N. C. 158, 162 S. E. 219.

Facts to Be Considered.—In determining what is a reasonable time for the presentment of a check for payment regard must be had to the nature of the instrument, the customs and usages of trade in regard to such instrument, and the facts of the particular case. Raines v. Grantham, 205 N. C. 340, 171 S. E. 360.

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074.

§ 3168(a). Bank may refuse to honor check more than six months old in the absence of contrary instructions.—Where a check or other instrument payable on demand at any bank or trust company doing business in this State is presented for payment more than six months from its date, such bank or trust company, may, unless expressly instructed by the drawer or maker to pay the same, refuse payment thereof and no liability shall thereby be incurred to the drawer or maker for dishonoring the instrument by non-payment. (1929, c. 341, s. 3.)

§ 3169. Effect of certification of check.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance. (Rev., s. 2337; 1899, c. 733, s. 187.)

In General.—The certification of a check by the bank on which it is drawn is equivalent to the acceptance, and the bank then becomes the debtor to the holder, against whom he may maintain his action. It does not affect the enforcement of an agreement between the original parties, made before certification of the check, and the debtor has agreed to waive or withdraw a condition annexed to the acceptance of his check that it was to be received by the payee, his creditor, in full compromise of his debt in a larger amount. Drewry-Hughes Co. v. Davis, 151 N. C. 295, 66 S. E. 139.

Whether Certified at Instance of Drawer or Payee.—A drawer of a check by having the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. Commercial Investment Trust v. Windsor, 197 N. C. 208, 148 S. E. 42.

§ 3170. Effect, where holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon. (Rev., s. 2338; 1899, c. 733, s. 188.)

§ 3171. Check not assignment of funds.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. (Rev., s. 2339; 1899, c. 733, s. 189.)

See 13 N. C. Law Rev., 131.

In General.—A depositor is a creditor of a bank, his deposit becoming a part of the general fund, the property of the bank, and subject to assignment by the owners of the bank and a check-holder is, to the extent of his check, the assignee of the depositor's debt due him by the bank, but he has no lien upon the deposit for the amount of this check and a payee or holder of a check has an interest in the deposit as against the drawer, subject to the bank's right to pay outstanding checks before notice. Howes v. Blackwell, 107 N. C. 196, 12 S. E. 245.

The giving of a check passes no title, legal or equitable, to money on deposit in a bank. Perry v. Bank, 131 N. C. 117, 42 S. E. 551.

An action cannot be sustained against a bank by the payee of a negotiable check, though the drawer has funds on deposit sufficient for its payment against which the bank has no claim. Perry v. Bank, 131 N. C. 117, 42 S. E. 551, until after its acceptance by the bank. Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524. See also Brantley v. Collie, 205 N. C. 229, 171 S. E. 88.

Acceptance under this section may be evidenced in various ways, as where the bank pays the check without endorsement to some person unauthorized by the payee to receive it and charges the amount to the depositor's account, and where evidence on this point is conflicting an issue is raised for the jury, and a judgment as of nonsuit should be denied. Dawson v. National Bank, 196 N. C. 134, 144 S. E. 833.

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074; Dawson v. National Bank, 197 N. C. 499, 150 S. E. 38.

§ 3171(a). When stop-payment order given banks to expire.—No revocation, countermand or stop-payment order relating to the payment of any check or draft against an account of a depositor in any bank or trust company doing business in this State shall remain in effect for more than six months after the service thereof on the bank, unless the same be renewed, which renewals shall be in writing and which renewals shall be in effect for not more than six months from date of service thereof on the bank or trust company, but such renewals may be made from time to time. (1929, c. 341, s. 1.)

§ 3171(b). Application to present orders.—No notice affecting a check upon which revocation, countermand or stop-payment order has been made at the time of the taking effect of § 3171(a) shall be deemed to continue for a period of more than six months thereafter. (1929, c. 341, s. 2.)

CHAPTER 59

NOTARIES

§ 3172. Appointment and commission; term of office; revocation of commission.—The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public, and shall issue to each a commission. They shall hold their office for two years from and after the date of their appointment.

Any commission so issued by the Governor or his predecessor, shall be revokable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any notary public appointed by

him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (Rev., ss. 2347, 2348; Code, ss. 3304, 3305; 1927, c. 117.)

Editor's Note.—The Supreme Court, by a three to two decision, with the great Chief Justice Clark dissenting, held in State v. Knight, 169 N. C. 333, 85 S. E. 418, that women could not hold the position of notary public in North Carolina. The Legislature had, at its previous session, enacted chapter 12, Laws 1915, as follows: "The Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed to be a place of trust and profit, and not an office." The Governor, acting upon this authority, issued his commission to Mrs. Noland Knight as a notary public. Thereafter a quo warranto proceeding was brought, averring that a notary public was not a place of trust and profit, as the Legislature has enacted, but was in truth an office, and therefore that the commission issued to her by the Chief Executive was a nullity because she was a woman. The action was brought before his Honor Judge Webb of the superior court, who declined to hold the commission void. The Supreme Court reversed the decision and held the act unconstitutional on the grounds that a notary public was a public office; that a woman was ineligible for public office under the Constitution; and that being a public office, that the Legislature could not change its character by simply making a change in its name. This was so held in spite of the fact that, as pointed out by Mr. Chief Justice Clark, there was no constitutional provision as to notaries public, and that the place was wholly a creature of legislative enactment. In Opinion of Justices, 165 Mass. 599, 601, 43 N. E. 927, 32 L. R. A. 350, the court said: "Where an office is created by statute . . . . the qualifications required . . . . are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution." And in Bank v. Smith (Tenn.), 37 S. W. 1102, it was said: "All that is needed to enable one to be a de jure female notary public is an enabling act of the Legislature."

However correct or incorrect may have been the conclusion of the court in State v. Knight, supra, by the very reasoning in that case, women are now eligible as notaries public. Federal and State constitutional amendments now insure to women the right to the ballot on equal terms with men. Article VI, sec. 4, of the Constitution of North Carolina is as follows: "Every voter, except as hereinafter provided, shall be eligible to office, etc. Women are not included within the exceptions numbered. See Lee v. Dunn, 73 N. C. 602; Spruill v. Batemen, 162 N. C. 588, 77 S. E. 768. Therefore, since women can vote, and voters may hold office, and the position of notary public is a public office, it follows that women are eligible to the office if notary public.

Origin.—The office of notary public has long been known both to the civil and to the common law. State v. Knight, 169 N. C. 333, 337, 85 S. E. 418; 29 Cyc. 1068.

In Loan Co. v. Turrell, 19 Ind. 469, it was said: "The office originated in the early Roman jurisprudence, and was known in England before the Conquest." State v. Knight, 169 N. C. 333, 338, 85 S. E. 418.

Same—Recognized as an Officer.—That the position was recognized as an office at common law is shown by the following, taken from 5 Comyn's Dig., 140, when speaking of protests of bills of exchange: "The protest must be made by a public notary upon all foreign bills of exchange, because he is a public officer to whom credit is given"; and by the opinion of Buller, J., in Lefty v. Mills, 4 T. R., 175 (1791), that "The demand of a foreign bill must be made by a notary public, to whom credit is given, because he is a public officer." State v. Knight, 169 N. C. 333, 337, 85 S. E. 418.

Present Status.—In Ashcraft v. Chapman, 38 Conn. 232, Chief Justice Butler says: "Notaries were originally mere commercial scriveners. Becoming important to the commercial world, their appointment was provided for and their duties regulated by public law, and they became sworn public officers." State v. Knight, 169 N. C. 333, 338, 85 S. E. 418. See also, 21 A. and E. Enc. Law, 555.

It is in most of the states a state office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope. State v. Knight, 169 N. C. 333, 337, 85 S. E. 418.

Who Eligible.—In U. S. v. Bixby, 10 Bizzell, 520, it was held by Gresham, J., that "at common law a minor is eligible to the position of notary public." State v. Knight, 169 N. C. 333, 358, 85 S. E. 418.

After the passage of C. 12, Laws 1915 an official inquiry was instituted as to the status of notary public in the other states. The replies from their judicial departments show that out of the fifty-three jurisdictions in the United States (i. e., forty-eight States, the District of Columbia, and the territories of Alaska, Porto Rico, Hawaii, and the Philippines) women are competent to be notaries public in all except ten, and in those ten they were held incompetent either because, as in Massachusetts, the Constitution had made the position an office or a statute had made it an office, or, as in a few of them, "it had not been the custom to admit women to hold the place, and there was no statute as yet authorizing them to fill the position." In no case was there found, or reported, a decision holding women incompetent to fill the place when there was a statute authorizing them to do so, or providing that the position was not an office. Outside of these ten States (of our fifty-three jurisdictions) there is no country which disqualifies a woman to hold the position of notary public. From dissenting opinion of Clark, C. J., in State v. Knight, 169 N. C. 333, 359, 85 S. E. 418.

Same—In Virginia.—In Virginia, which naturally more nearly follows the English law than any other State in the Union, its Attorney-General says: "In this State any man or woman over 18 years of age can be a notary public." State v. Knight, 169 N. C. 333, 358, 85 S. E. 418.

Same—English Rule as to Women.—Sir John Simon, when Attorney-General of England, said: "No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed." State v. Knight, 169 N. C. 333, 358, 85 S. E. 418.

§ 3173. To qualify before clerk; record of qualification.—Upon exhibiting their commission to the clerk of the superior court of the county in which they are to act, the notaries shall be duly qualified by taking before said clerk an oath of office, and the oaths prescribed for officers. A certificate of the commission shall be deposited with the clerk and filed among the records, and he shall note on his minutes the qualification of the notary public. (Rev., ss. 2347, 2348; Code, ss. 3304, 3305.)

§ 3174. Clerks notaries ex officio; may certify own seals.—The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerk, and may certify their notarial acts under the seals of their respective courts. (Rev., s. 2349; Code, s. 3306; R. C., c. 75, s. 3; 1833, c. 7, ss. 1, 2.)

A clerk of the superior court, is, by virtue of his office, a notary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. Lawrence v. Hodges, 92 N. C. 672, 681.

§ 3175. Powers of notaries.—Notaries public, in and out of the state, have power to take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, to take depositions and to administer oaths and affirmations in matters incident or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer, within the state, and have power to take the privy examination of femes covert. (Rev., s. 2350; Code, s. 3307; 1866, c. 30; 1879, c. 128.)

Scope of Powers.—A notary public is recognized by the universal law of civilized and commercial nations; but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. Benedict, Hall & Co. v. Hall, 76 N. C. 113, 114.

By statute in this State the powers of notaries public have

been extended beyond those which were incident to the office by the universal law-merchant, and pertained to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

Duty in Taking Acknowledgments.—The notary is required "to take and certify the acknowledgment or proof" and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the execution of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto. Young v. Jackson, 92 N. C. 144, 147; Darden v. Steamboat Co., 107 N. C. 434, 446, 12 S. E. 46; State v. Knight, 169 N. C. 333, 343, 85 S. E. 418.

Acknowledgment Quasi Judicial Act. — An acknowledgment of a deed, taken before a notary public, is a judicial, or at least a quasi judicial act. Long v. Crews, 113 N. C. 256, 18 S. E. 499.

Protest as Evidence.—The protest of a notary establishes the facts stated in it in respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being prima facie true. Elliott v. White, 51 N. C. 98; Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

Certificates of Probate Prima Facie Evidence.—With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is prima facie evidence of the truth of its pertinent recitals. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

Not Disqualified to Act Because Employee of Grantee.—A notary public is not disqualified to take acknowledgment of grantors and privy examination of married women to conveyances of land when he is an employee of the grantee, without any interest in the land conveyed. Smith v. Ayden Lumber Co., 144 N. C. 47, 56 S. E. 555.

Incurable Incompetency.—Where a notary public was interested in a deed of trust, he was disqualified to take the acknowledgment, his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration. Long v. Crews, 113 N. C. 256, 18 S. E. 499.

§ 3176. May exercise powers in any county.—Notaries public have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done. (Rev., s. 2351, 1891, s. 248.)

A notary public resident out of the State has no authority to take affidavits to be used in the courts of this State. Hall & Co. v. Hall, 76 N. C. 113, 114.

§ 3177. Expiration of commission to be stated after signature.—Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts. (Rev., s. 2351a.)

§ 3178. Fees of notaries.—Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill or any other thing necessary to be protested, and the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words. Cases of protest concerning vessels or other cargoes shall not be affected by this section. (Rev., s. 2800; Code, s. 3749; 1889, c. 446, 1895, c. 296; 1903, c. 734.)

The fees of notaries public are created and regulated by statute. Cider & Vinegar Co. v. Carroll, 124 N. C. 555, 559, 32 S. E. 959.

§ 3179. Notarial seal.—Official acts by notaries public shall be attested by their notarial seals. (Rev., s. 2352.)

Courts Take Judicial Notice.—It was said in Pierce v. Indseth, 106 U. S. 546: "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." State v. Knight, 169 N. C. 333, 338, 85 S. E. 418.

Name in Seal.—The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of deed by a notary public is adjudged to have been proved by such seal and certificate, it is not rebutted by the mere fact that the notary signs his name, "Geo. Theo. Somner" and the seal has on it the name of "Theo. Somner." Deans v. Pate, 114 N. C. 194, 19 S. E. 146.

Failure to Attest by Seal.—A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal. Tucker v. Inter-States Life Association, 112 N. C. 796, 17 S. E. 532.

The acknowledgment of a deed before a notary public in due form is not defective because not attested by his notarial seal. Peel v. Corey, 196 N. C. 79, 144 S. E. 559.

CHAPTER 60

NUISANCES AGAINST PUBLIC MORALS

§ 3180. What are nuisances under this chapter.—Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (1919, c. 288; P. L. 1913, c. 761, s. 25.)

Authority of Municipalities Concerning Nuisances.—Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house. State v. Webber, 107 N. C. 962, 12 S. E. 598.

§ 3181. Action for abatement; injunction. — Whenever a nuisance is kept, maintained, or exists as defined in this chapter, the city prosecuting attorney, the solicitor, or any citizen of the county may maintain civil action in the name of the state of North Carolina upon the relation of such city prosecuting attorney, solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if

it shall be made to appear to the satisfaction of the judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as complainant may elect, unless the judge, by previous order, shall have directed the form and manner in which it shall be presented. When an injunction has been granted it shall be binding on the defendant throughout the county in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt, as hereinafter provided. (1919, c. 288; P. L. 1919, c. 761, s. 26.)

§ 3182. When triable; evidence; dismissal of complaint.—The action when brought shall be triable at the first term of court after service of the summons has been made, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the city prosecuting attorney, or solicitor, in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the city prosecuting attorney, or the solicitor, to prosecute said action to judgment; and if the action continued more than one term of court, any citizen of the county, or the county attorney, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause of said action, the costs may be taxed to such citizen. (1919, c. 288; P. L. 1913, c. 761, s. 27.)

§ 3183. Violation of injunction; punishment.—In case of the violation of any injunction granted under the provisions of this chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred or more than one thousand dollars, or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (1919, c. 288; P. L. 1913, c. 761, s. 28.)

As to certain evidence relative to keeping disorderly houses admissible, see section 4347.

§ 3184. Order abating nuisances; what it shall contain.—If the existence of the nuisance be established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter, or use said building, erection, or place so directed to be closed, he shall be punished as for contempt, as provided in the preceding section. For moving and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. (1919, c. 288; P. L. 1913, c. 761, s. 29.)

Fishing in waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law by a proceeding in the nature of claim and delivery, or by injunction to prevent sale, or by an action to recover the proceeds of sale plus damages. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992.

§ 3185. Application of proceeds of sale.—The proceeds of the sale of the personal property as provided in the preceding section shall be applied in the payment of the costs of action and abatement, and the balance, if any, shall be paid to the defendant. (1919, c. 288; P. L. 1913, c. 761, s. 30.)

§ 3186. How order of abatement may be canceled.—If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (1919, c. 288; P. L. 1913, c. 761, s. 31.)

§ 3187. Attorney's fees may be taxed as costs.—The court shall tax as part of the cost in any action brought hereunder such fee for the attorney prosecuting the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (1919, c. 288; P. L. 1913, c. 761, s. 32.)

CHAPTER 61

OATHS

Art. 1. General Provisions

§ 3188. Oaths to be administered with solemnity.—Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity. (Rev., s. 2353; R. C., c. 76, s. 1; 1777, c. 108, s. 2.)

This "solemnity" applies not only to the substance of

the oath, but to the form and manner of taking it and of administering it. State v. Davis, 69 N. C. 383, 385.

Object of Statutes.—It is manifest, by a perusal of the statutes, that they were not intended to alter any rule of law, but the sole object was to prescribe forms for the sake of convenience and uniformity. State v. Pitt, 166 N. C. 268, 271, 80 S. E. 1060.

Double Sanction to Oath of Witness.—The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. Shaw v. Moore, 49 N. C. 25, 26.

Sufficiency of Belief.—A person who believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in this world, all violators of his law, and that the sinner will inevitably be punished in this world for each and every sin committed; but there will be no punishment after death, and that in another world all will be happy and equal to the angels is competent to be sworn. Shaw v. Moore, 49 N. C. 25, 26.

In the case of Omychund v. Barker, 1 Atk. 19, and Wiles, 538, it was decided by the Lord Chancellor, with the assistance of Chief Baron Parker, Chief Justice Willes and Chief Justice Lee, that a Gentoo, who was an infidel, who did not believe in either the Old or New Testament, but who believed in a God, as the Creator of the Universe, and that he is a rewarder of those who do well, and an avenger of those who do ill, according to the common law, may be sworn in that form which is the most sacred and obligatory upon his religious sense. Shaw v. Moore, 49 N. C. 25, 27.

The great case of Omychund v. Barker, establishes the rule to be, that an infidel is competent to be sworn, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. Shaw v. Moore, 49 N. C. 25, 29.

It is laid down by Lord Hale to be the common law, that a Jew is competent to be sworn, and may be sworn on the Old Testament, and such has ever since been taken to be the law. Shaw v. Moore, 49 N. C. 25, 27.

Finding of the Judge Conclusive.—The finding of the judge as to the competency of a witness to take oath is conclusive, and not reviewable. State v. Pitt, 166 N. C. 268, 270, 80 S. E. 1060.

Sufficiency of Juror's Oath.—An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." State v. Paylor, 89 N. C. 539.

At Common Law.—In Shaw v. Moore, 49 N. C. 25, Pearson, J., said that "in the old cases it was held to be common law that no infidel (in which class Jews were included) could be sworn as a witness in the courts of England." He then proceeds to say that the reason for this as given by Lord Coke, "to say the least of it, is narrow-minded, illiberal, bigoted, and unsound." State v. Pitt, 166 N. C. 268, 270, 80 S. E. 1060.

Objection to Oath of Incompetent after Verdict.—Where a juror is incompetent to be sworn because an atheist (State v. Davis, 80 N. C. 412) and the objection is not discovered till after verdict, setting aside the verdict rests in the discretion of the trial judge. State v. Lambert, 93 N. C. 618; State v. Council, 129 N. C. 511, 39 S. E. 814, 816.

Objection to Manner of Administering after Verdict.—Where a juror was sworn in the presence of the prisoner and his counsel let him acquiesce in the manner in which the oath was taken, and then object after the verdict, would simply make a trial not a decision upon the merits but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. State v. Boon, 82 N. C. 638; State v. Patrick, 48 N. C. 443; Briggs v. Byrd, 34 N. C. 377; State v. Ward, 9 N. C. 443; State v. Council, 129 N. C. 511, 39 S. E. 814, 816.

Failure to Administer.—In State v. Gee, 92 N. C. 756, where a witness was not sworn at all, the court held that this was not ground of objection after verdict. State v. Council, 129 N. C. 511, 39 S. E. 814, 817.

§ 3189. Administration of oath upon the Gospels.—Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head; and he shall kiss the Holy Gospel, as a seal of confirmation to the said engagements. (Rev., s. 2354; Code, s. 3309; R. C., c. 76, s. 1; 1777, c. 108, s. 2.)

Cross References.—As to exceptions to this section; for administration of oath with uplifted hand, see section 3190; for affirmation of Quakers and others, see section 3191; as to forms of oath, see section 3199; as to perjury, see section 4364.

The essential requirements of the law are that the party sworn "shall lay his hand upon the Holy Evangelist of Almighty God," and after the oath is administered he shall invoke the blessing or the curse of God by repeating the words, "So help me, God," and shall kiss the Holy Gospel as a seal of confirmation to his engagements. State v. Owen, 72 N. C. 605, 612.

Application to Witnesses.—After this manner, every witness, except as hereinafter provided, must be sworn. State v. Davis, 69 N. C. 383, 385.

Ministerial Act.—The administration of an oath is a ministerial act and may be done by any one in the presence and by the direction of the court, but is the act of the court. State v. Knight, 84 N. C. 790.

Partially Directory.—"As to the form of the oath, when it is prescribed by statute," remarks, Mr. Bishop, "the statute is to be construed in some sense directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking it from the pains of perjury." 2 Bish. Cr. Law, secs. 862, 982; State v. Mazon, 90 N. C. 676, 678.

Same—Validity of Irregular Oath.—To hold invalid an oath that did not follow the very words of the statute might prove disastrous to the public interests. "Perjury and slander," in the language of the Supreme Court of Tennessee, "could often find, in slight variances from the prescribed forms of oath, the means of escape from condign punishment which justice invokes. Undoubtedly an oath, administered substantially according to the prescribed form, will be valid, and if taken falsely the party will be guilty of perjury." Sharp v. Wilhite, 21 Tenn. 434. And in the language of Green, C. J., in State v. Daylor, 3 Zab. (N. Y.), 49: "The Legislature did not design to prescribe the precise form of the oath, the slightest deviation from the phraseology of which would prove fatal." State v. Mazon, 90 N. C. 676, 678.

Same—Same—Juror's Oath in Capital Cases.—Although the omission of the words "you swear" at the commencement of the oath of jurors in a capital case looks awkward and mars the comeliness of judicial proceedings, we do not think that it vitiates the oath. State v. Owen, 72 N. C. 605, 612.

The manner of swearing is, as Judge Pearson says, merely a form "adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity." State v. Pitt, 166 N. C. 268, 271, 80 S. E. 1060.

Presumption.—The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. State v. Mace, 86 N. C. 668, 670.

The maxim omnia presumuntur rite esse acta applies in no case with greater effect than to official acts of this nature, the minute and particular details of which, while important, are not likely to attract such attention as to insure their being accurately remembered. State v. Mace, 86 N. C. 668, 670.

Willful Violation.—A willful violation of such an oath in a material matter is perjury, and no other is. This is the general rule. State v. Davis, 69 N. C. 383, 385.

When Deputy Clerk May Administer.—The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff in an action of claim and delivery. Jackson v. Buchanan, 89 N. C. 74.

A deputy sheriff is not authorized to administer oath to homestead appraisers. Oates v. Munday, 127 N. C. 439, 444, 37 S. E. 457. As to the effect of the deputy sheriff administering the oath, see annotations under section 730.

Cited in State v. Beal, 199 N. C. 278, 280, 154 S. E. 604.

§ 3190. Administration of oath with uplifted hand.—When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from

laying hands upon, or touching the Holy Gospel: and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be.) Rev., s. 2355; Code, s. 3310; R. C., c. 76, s. 2; 1777, c. 108, s. 3.)

As to oath required of voter, see section 5940.

Conscientious Scruples.—If the usual form of oaths upon the Holy Evangelists is dispensed with, and an "appeal" or "information" is substituted, it must appear that the person sworn had conscientious scruples, else the "appeal" or "affirmation" is invalid. State v. Davis, 69 N. C. 383, 386; Pearre v. Folb, 123 N. C. 239, 31 S. E. 475.

Presumption as to Manner.—Where it appears that the registrar administered the prescribed oath to electors, but that he did not swear them on the Bible, it will be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by the section, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner is sufficient to meet the requirements of the election law. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Presumption as to Witness.—When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. State v. Whisenhurst, 9 N. C. 458.

Cited in State v. Beal, 199 N. C. 278, 280, 154 S. E. 604.

§ 3191. Affirmation of Quakers and others.—The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the constitution of the state, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear"; which affirmation shall be effectual to all intents and purposes. (Rev., s. 2356; Code, s. 3311; R. C., c. 76, s. 3; 1777, c. 108, s. 4; 1777, c. 115, s. 42; 1819, c. 1019; 1821, c. 1112.)

Quakers and some others who have conscientious scruples about swearing at all, are permitted to "affirm." State v. Davis, 69 N. C. 383, 385.

Cited in State v. Beal, 199 N. C. 278, 280, 154 S. E. 604.

§ 3192. Oaths of corporations.—In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2.)

§ 3193. Oath to support constitution of United States; all officers take.—All members of the general assembly, and all officers who shall be elected or appointed to any office of trust or profit within the state, shall, agreeably to act of congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States; so help me, God.

Which oath shall be taken before they enter upon the execution of the duties of the office. (Rev., s. 2357; Code, s. 3313; R. C., c. 76, s. 5; 1791, c. 342, s. 2.)

As to what constitutes an office or place of trust or profit within the meaning of this section, see secs. 3200-3207.

Officers and Placemen.—Officers are required to take an oath to support the Constitutions of the State and of the United States, while placemen are not. Worthy v. Barrett, 63 N. C. 199.

Oath Incidental.—The oath required of public officers is merely incidental to and constitutes no part of the office. State v. Stanley, 66 N. C. 60, 63.

Failure to Take Oath. — Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. Wiley v. Worth, 61 N. C. 171.

§ 3194. Oath or affirmation to support state constitution; all officers to take.—Every member of the general assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the state, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the state of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the constitution of said state, not inconsistent with the constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the constitution of the state and constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the state, by any means, in any conspiracy whatever, against the state; that I will disclose and make known to the legislative, executive or judicial powers of the state all treasonable conspiracies which I shall know to be made or intended against the state. (Rev., s. 2358; Code, s. 3312; R. C., c. 76, s. 4; 1781, c. 342, s. 1.)

Cross References.—As to oath with uplifted hand, see sec. 3190; as to affirmation by Quakers and others, see sec. 3191; as to public officers. see sec. 3193.

§ 3195. When deputies may administer.—In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to

administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (Rev., s. 2359; Code, s. 3316; R. C., c. 76, s. 7; 1836, c. 27, s. 2.)

As to administration of homestead appraiser's oath, see annotations to secs. 730, 3189.

§ 3196. Administration by certain officers.—The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (Rev., s. 2362; 1899, c. 89; 1889, c. 529.)

Cross References.—As to power of sheriff to administer oath to homestead appraisers, see sec. 730; as to administration of oath to appraisers in homestead allotment, see annotations under secs. 730, 3189.

§ 3197. When county surveyors may administer oaths.—The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants. (Rev., s. 2361; Code, s. 3314; 1881, c. 144.)

§ 3198. Certain oaths validated.—All oaths and affidavits made prior to the first day of March, nineteen hundred and fifteen, administered by authorized officers to persons with uplifted hands be and the same are hereby validated and made as legal and binding as if administered to persons laying hands on and kissing the Holy Evangelists of Almighty God, whether said oaths and affidavits were made by persons conscientiously scrupulous of taking a "book oath" or not, and whether such oaths and affidavits were made in other respects in strict compliance with section 3189 of this chapter: Provided, that this section shall not affect the rights of the parties in actions now pending nor in any manner affect prosecutions for perjury claimed to have been heretofore committed. (Rev., s. 2363; 1899, c. 50; 1915, c. 3.)

Art. 2. Forms of Official and Other Oaths

§ 3199. Oaths of sundry persons; forms.—The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney-General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of attorney-general (solicitor for the state or attorney for the state in the county of .....); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Oaths—Art. 2.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help me, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Book Debt Oath for Administrator

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will give, to any person whatsoever, any gratuity, gift, fee or reward, in consideration of my appointment to the office of clerk of the supreme court of North Carolina; nor have I sold or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly, or indirectly, hold any other lucrative office in this state; I do further swear that I will execute the office of clerk of the supreme court without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of.....; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the state; and I do further swear that I will execute the office of clerk of the superior court for the county of ..... without prejudice, favor, affection or

partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of ....., in the county of....., according to law; so help me, God.

Constable

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of constable; I will see and cause the peace of the state to be well and truly preserved and kept, according to my power; I will arrest all such persons as, in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

Cotton Weigher for Public

I, ..., public weigher for the city of ..... (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A, B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of.....according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Finance Committee

I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality; so help me, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the state's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person, sworn on this jury, together in some private or convenient place, without meat or drink (water excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Jury, in a Capital Case

You swear (or affirm) that you will well and truly try, and true deliverance make, between the state and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you, God.

Jury, in Criminal Actions Not Capital

You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term".)

Jury, in Civil Actions

You and each of you swear (or affirm) that you will well and truly try all civil actions which shall come before you during this term, and true verdicts give according to the evidence; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

Jury, Laying off Dower

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D. as by law she is entitled to; so help you, God.

Jury, Laying off Roads and Assessing Damages

I, A. B., do solemnly swear (or affirm) that I will lay out the road, directed to be laid out by the board of commissioners of the county, to the greatest ease and advantage of the inhabitants, and with as little prejudice to the owners of land over which same shall be laid out as may be; and will truly and impartially assess the damages which may be awarded by me for injuries done to lands by the laying out of said road, without favor, affection, malice or hatred, to the best of my skill and knowledge; so help me, God.

Judge of the Supreme Court

I, A. B., do solemnly swear (or affirm) that in my office of justice of the supreme court of North Carolina I will administer justice without respect to persons, and do equal right to the poor and the rich, to the state and to individuals; and that I will honestly, faithfully, and impartially perform all the duties of the said officer according to the best of my abilities, and agreeably to the constitution and laws of the state; so help me, God.

Judge of the Superior Court

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of judge of the superior court of the said state; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not wittingly or willingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or order notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Justice of the Peace

I, A. B., do solemnly swear (or affirm) that as justice of the peace of the county of ....., in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the state; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or other officers or ministers of the state, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of....., in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of secretary of state of the state of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of ..... county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of state treasurer, in all things according to law, and account for the public taxes; and I will not, directly or in-

directly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of ....., according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of ....., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the state and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the state and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath

Any officer of the state or of any county or township, the form of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of ..... according to the best of my skill and ability, according to law; so help me, God. (Rev., s. 2360; Code, ss. 3057, 3315; 1903, c. 604; 1874-5, c. 58, s. 2; R. C., c. 76, s. 6.)

CHAPTER 62

OFFICES AND PUBLIC OFFICERS

Art. 1. General Provisions

§ 3200. No person shall hold more than one office.—No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly; Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes. (Rev., s. 2364; Const., Art. XIV, s. 7.)

I. Editor's Note.
II. General Considerations.
III. Distinguishing Characteristics.
IV. General Illustrations.

Cross References.

As to right of citizens and tax-payers of a county to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time, see annotation under sec. 870.

I. EDITOR'S NOTE.

Editor's Note.—The celebrated case of Hoke v. Henderson, 15 N. C. 1, 2, was decided in the December Term, 1833. In that case the court held that a public office constitutes a species of private property based upon a contract between the officer and the State, and while the Legislature has the power, as the mere incident of a general law, to abolish offices as useless, it can not retain the office and deprive the officer of his property therein. Thus the status of a public office was established as a vested right. This decision and approximately forty cases following it form a part of our legal history, and are justly famous in the judicial annals of North Carolina, hence it is unnecessary to refer directly to each individual case in this note. Around the principle thus enunciated raged one of the fiercest battles of legal arguments within the experience of the bar of this State.

The struggle began with the decision of Hoke v. Henderson, supra, and extended over a period of more than seventy years, flaring up with particular heat in 1870, 1898 and 1903. It was finally in 1903 that the court by a three to two decision overruled Hoke v. Henderson, supra, in Mial v. Ellington, 134 N. C. 131, 46 S. E. 961. In the words of Mr. Justice Connor at page 162, "To conclude the matter, the doctrine of Hoke v. Henderson is based upon the proposition that a public office is private property, with all the results that logically flow therefrom. In so far as that case holds this proposition to be law, we expressly overrule it and declare that no officer can have a property in the sovereignty of the State; that in respect to offices created and provided for by the Constitution, the people in convention assembled alone can alter, change their tenure, duties or emoluments, or abolish them; that in respect to legislative offices, it is entirely within the power of the Legislature to deal with them as public policy may suggest and public interest may demand."

When Hoke v. Henderson was decided, the Supreme Court of the United States had not then held, as it soon afterwards did, in Butler v. Pennsylvania, 10 Howard 402, 416, 13 L. Ed. 472, that an office was not a contract and not protected by the contract clause of the Federal Constitution. That court has maintained that doctrine with uniformity ever since notably in Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710; Blake v. United States, 103 U. S. 227; Crenshaw v. United States, 134 U. S. 99; Taylor v. Beckham, 178 U. S. 548, 577, 20 S. Ct. 890, 1009. Mr. Chief Justice Clark, in his concurring opinion in Mial v. Ellington, 134 N. C. 131, 165, 46 S. E. 961, ventures the opinion that, "Had those decisions on any one of them, been rendered in 1833, it is quite certain Hoke v. Henderson would have been decided the other way, for the construction placed by the United States Supreme Court upon any clause of the Federal Constitution is conclusive upon all courts." It is interesting to note that Montgomery, J., in his dissenting opinion in Mial v. Ellington frankly admits that "it may be taken as true that the Supreme Court of North Carolina is the only court, State or Federal, which has held that a legislative office is property; that it is

held by contract between the State and the officer, and that the officer can be deprived of his office by judicial determination only." And Mr. Justice Douglas, also dissenting, fails to name a single case outside of North Carolina holding with Hoke v. Henderson.

The case was decided at a time when the American political spirit was still in its most formative years. We had hardly learned to stand without leaning heavily upon English institutions and customs. It was customary to cling to or adopt English political ideas, unless conditions clearly indicated the inadvisability of so doing. The question in Hoke v. Henderson was one of first impression in any American court. It was quite natural that the famous court of that day, learned in English Law, should have decided as they did. Neither is it to be doubted that the high esteem in which that great court, composed of Ruffin, C. J., Gaston, J., and Daniel, J., is, and has always been, held by the courts of the State, was a great influence in upholding the decision in Hoke v. Henderson. However, at the dawn of the twentieth century, the principle, being so clearly out of harmony with the American political ideas, was at last forced to yield in the name of democratic progress. For, as Mr. Justice Connor points out in his opinion in Mial v. Ellington, supra, if it be held that a public office is private property, "the State instead of being sovereign, finds herself, in her efforts to perform her governmental functions, bereft of her sovereignty, her hands tied, her progress obstructed, for those whom she has commissioned to be her servants have, by grants of parts and parcels of her sovereignty, become her masters, and, connecting her commissions into grants, forbid her to proceed or go forward."

II. GENERAL CONSIDERATIONS.

One man may not hold two offices. Dowtin v. Beardsley, 126 N. C. 119, 35 S. E. 241.

At common law there was no limit on the right of a citizen to hold several offices, except the incompatibility of the duties of the several offices, and much learning was invoked in England and in this country on the question of "incompatibility." Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720, 721.

Under Constitution.—The question in this State does not turn upon the incompatibility of the duties of the two offices alone, as it did at common law, but upon the plain positive language of the Constitution. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554; Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720, 722.

Under art. 14, § 7, providing that no person who shall hold any office or place of trust or profit under the United States or any department thereof or under the State, etc., shall hold or exercise any other office or place of trust or profit under the authority of the State, provided, etc., an office or place of trust is a public position, involving a delegation to the individual of some part of the sovereign functions of the government to be exercised for the public benefit. State v. Smith, 145 N. C. 476, 59 S. E. 649.

Office Vacated Ipso Facto.—The acceptance of a second office by one already holding a public office operates ipso facto to vacate the first. While the officer has a right to elect which of the two he will retain, his election is deemed to be made when he accepts and qualifies for the second. State v. Thompson, 122 N. C. 493, 29 S. E. 720.

Necessity of Taking Oath.—The taking of an oath of office is not an indispensable criterion, for the office may exist without it. State v. Stanley, 66 N. C. 60; State v. Patrick, 124 N. C. 651, 33 S. E. 151, 153.

Power of the Legislature.—The Legislature may reduce or increase the salaries of such officers as are not protected by the constitution during their term of office, but can not deprive them of the whole. Cotten v. Ellis, 52 N. C. 545. This case is evidently following Hoke v. Henderson, 15 N. C. 1, which was overruled by Mial v. Ellington, 134 N. C. 131, 46 S. E. 961. For a complete discussion of this line of cases, see Editor's Note, supra.

Although an office is a constitutional one, the Legislature may, within reasonable limits change the statutory duties and diminish the emoluments of such office, if the public welfare requires it. Fortune v. Board, 140 N. C. 322, 52 S. E. 950; Commissioners v. Stedman, 141 N. C. 448, 54 S. E. 269.

The Legislature may attach additional duties to an existing office, and it may afterwards lop off those duties and assign them to a new office, leaving the original office as it was before the additional duties were attached to it. Dowtin v. Beardsley, 126 N. C. 119, 35 S. E. 241. As to power of Legislature to wholly abolish an office, or to transfer its duties, see Editor's Note, supra.

Manner of Appointment.—Where officers have to be appointed to fill a regular term, the Governor nominates to the Senate, unless it be an officer who is elected by the people, and then he fills the vacancy or term until the people can elect his successor. People v. McIver, 68 N. C. 467. See also, People v. Bledsoe, 68 N. C. 457; People v. McKee, 68 N. C. 429.

Authority to Suspend or Remove.—The power to create vacancies in a public office, incumbents of which are charged with continuing duties and responsibilities, rests, in the absence of provisions to the contrary, in the body possessing the original power of appointment. Greene v. Owen, 125 N. C. 212, 34 S. E. 424.

By Consolidation.—Offices whose duties are congruous may be consolidated; but it is just, in cases of consolidation of offices, to postpone the operation of the law until a vacancy appears in the office whose duties are to be transferred. Troy v. Wooten, 32 N. C. 377.

III. DISTINGUISHING CHARACTERISTICS.

Definition.—Public office is tenure by virtue of an appointment, conferred by public authority. Willis v. Melvin, 53 N. C. 62, 63.

The term embraces the ideas of tenure, duration, emolument and duties. United States v. Hartwell, 6 Wall. 385, 393, 18 L. Ed. 830; State v. Patrick, 124 N. C. 651, 662, 33 S. E. 151.

Same—Portion of Sovereignty Attaches.—An office or place of trust requiring a proceeding by quo warranto for the motion of the incumbent is defined as follows: "A public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public." High Ex. Leg. Rem., sec. 620; Mechem Pub. Off., sec. 1; State v. Smith, 145 N. C. 476, 477, 59 S. E. 649.

Same—Agency from State.—A public office is an agency from the State, and the person whose duty it is to perform this agency is a public officer. State Prison v. Day, 124 N. C. 362, 32 S. E. 748.

Same—Same—Essence of Duty.—This is considered to be the true definition of a public officer in its original, broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or acts or series of acts for the State. State v. Stanley, 66 N. C. 60, 63.

Same—Authority to Appoint.—If a person is authorized to appoint to an office, this duty of itself constitutes him a public officer. State v. Stanley, 66 N. C. 60, 8 Am. Rep. 488, citing Hoke v. Henderson, 15 N. C. 1, 12, cited in notes in 17 L. R. A. 243, 244, 247, 249; State v. Tate, 68 N. C. 546, cited in note in 17 L. R. A. 247.

Same—Combination of Duty and Agency.—In the textbooks it is taught that the word office in its primary signification implies a duty or duties—the agency from the State to perform the duties. The duties of the office are of first consequence, and the agency from the State to perform those duties is the next step in the creation of an office. It is the union of the two factors, duty and agency, which makes the office. State Prison v. Day, 124 N. C. 362, 368, 32 S. E. 748, 46 L. R. A. 295.

Mere Addition of Duties.—An act which merely attaches new duties to existing offices does not create a new office. McCullers v. Board, 158 N. C. 75, 82, 73 S. E. 816.

Distinguished from a Public Agency.—The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government. In this respect the terms "office" and "place of trust" as used in our Constitution are synonymous. Doyle v. Raleigh, 89 N. C. 133, 136, 45 Am. Rep. 677; Barnhill v. Thompson, 122 N. C. 493, 495, 29 S. E. 720; State v. Smith, 145 N. C. 476, 59 S. E. 649, 650.

It is an administrative agency or public employment, and, as was said by Chief Justice Marshall, "although an office is an employment, it does not follow that every employment is an office." United States v. Maurice, Fed. Cas. No. 15747, 2 Brock. (U. S. C. C.), 96; State v. Smith, 145 N. C. 476, 478, 59 S. E. 649.

Distinguished from Placemen.—The distinction between officers and placemen is that the former are required to take an oath to support the Constitutions of the State and of the United States; whilst the latter are not. Worthy v. Barrett, 63 N. C. 199.

Distinguished from Employment and Contract.—An "office" is defined by good authority as involving a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, by which it is distinguished from "employment" or "contract." Mech. Pub. Off. secs. 1, 4; Eliason v. Coleman, 86 N. C. 236. A public office is an agency for the state. State v. Stanley, 66 N. C. 60; Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720, 721.

IV. GENERAL ILLUSTRATIONS.

The Executive Department is an agency for the State, and the Governor and others, whose duty it is to discharge this agency, are public officers. State v. Stanley, 66 N. C. 60, 64.

The trustees of the University, and the directors of the penitentiary, of the lunatic asylum and of the institution for the deaf, dumb and blind, are public officers. People v. McKee, 68 N. C. 429; People v. Bledsoe, 68 N. C. 457, cited in notes in 17 L. R. A. 243, 246; People v. Johnson, 68 N. C. 471; People v. McGowan, 68 N. C. 520.

The position of public administrator is a mere administrative agency, and not an office or place of trust, within the Const. Art. 14, sec. 7, prohibiting a person from filling two or more offices or places of trust under the federal, State, or county government at the same time. State v. Smith, 145 N. C. 476, 59 S. E. 649.

Legislative Members.—Mr. Justice Reade declares that "members of the Legislature are not officers. Theirs are places of trust and profit, but not offices of trust and profit." Worthy v. Barrett, 63 N. C. 199; Doyle v. Raleigh, 89 N. C. 133, 136. But see the two following notes.

The Legislative Department is an agency for the State, and the members of the Senate and of the House of representatives are public officers. State v. Stanley, 66 N. C. 60, 64. This case and the next preceding one are to be considered in the light of the explanation given in the next succeeding note. Ed. Note.

In State v. Stanley, 66 N. C. 60, 65, Pearson, C. J., says: "The distinction between Worthy v. Barrett (supra) is this: Here we are treating the terms 'public offices and public officers' in the broad, original, legal sense in which these terms are used in the Constitution of the State; there we were treating the terms in the restricted sense in which they are used in Article XIV of the Amendment of the Constitution of the United States."

Judges.—The judicial department is an agency for the State, and the judges are public officers. State v. Stanley, 66 N. C. 60, 64.

Federal Attorney Acting as Solicitor.—The appointment by the judge of the United States District Attorney to act temporarily for the absent solicitor in the prosecution of a criminal action in the State court, does not come within the inhibition of our Constitution, Art. XIV, sec. 7, as to holding two offices at the same time. State v. Wood, 175 N. C. 809, 95 S. E. 1050.

A clerk of the court is a public officer. Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139.

Deputy clerk and justice of the peace under Acts 1808, c. 12, sec. 3, declares the appointment of deputy clerk of the county court to be incompatible with the office of a justice of the peace. Wardens v. Sneed, 5 N. C. 485.

A town clerk is a public officer. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

A recorder is a public officer. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

Under Const. Art. 14, sec. 7, excepting a justice of the peace from the inhibition against one holding two offices of trust or profit, one may be both a justice of the peace and the recorder of a city recorder's court. State v. Lord, 145 N. C. 479, 59 S. E. 656.

A clerk of the peace is a public officer. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

A constable is a public officer. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

State Printer.—Under Acts 1869-70, c. 43, abolishing the office of State printer, and Acts 1871-72, c. 180, providing for the letting of the State printing by contract, the position of State printer is not a public office. Brown v. Turner, 70 N. C. 93, cited in note in 17 L. R. A. 248.

Clerk of City Works. — It has even been held that a clerk of the city works is a public officer. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

The office of the superintendent of the State's prison, with its attendant duties, is a public office. State v. Stanley, 66 N. C. 60; Hoke v. Henderson, 15 N. C. 1; Wood v. Bellamy, 120 N. C. 212, 27 S. E. 113; State Prison v. Day, 124 N. C. 362, 32 S. E. 748, 749.

That the members of the county board of education are public officers is expressly held in Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720. Greene v. Owen, 125 N. C. 212, 34 S. E. 424, 426.

Member of Board of Health.—Laws 1911, c. 62, sec. 9, relating to boards of health, held not to violate Const. Art. 14, sec. 7, forbidding the holding of two offices by one person. McCullers v. Board, 158 N. C. 75, 73 S. E. 816.

The office of brigadier general under the Confederate States was held to be incompatible with that of adjutant general of the State of North Carolina, and the acceptance of the former office was held to vacate the latter which was held at the time of such acceptance. In the Matter of Martin, 60 N. C. 153, in the appendix. But it is now customary for the adjutant general of a state to hold a commission as brigadier general from the Federal government.—Ed. note.

The office of chief inspector of the shell fish commission is a public office. White v. Hill, 125 N. C. 194, 34 S. E. 432.

The place of chief engineer of the W. N. C. R. R. is not a public office. The true test of a public office is that it is parcel of the administration of government, or is itself directly created by the law-making power. Eliason v. Coleman, 86 N. C. 236.

Sexton.—It has even been held that a sexton is a public officer. Rhodes v. Love, 153 N. C. 468, 69 S. E. 436.

Performance of Duties after End of Term.—Where the statute imposes certain duties to be performed by an officer after the expiration of the term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time. State v. Somers, 96 N. C. 467, 2 S. E. 161.

§ 3201. Holding office contrary to the constitution; penalty.—If any person presumes to hold any office, or place of trust or profit, or is elected to a seat in either house of the general assembly, contrary to the seventh section of the fourteenth article of the constitution of the state, he shall forfeit and pay two hundred dollars to any person who will sue for the same. Provided, such action shall not be brought or maintained by any person who is not a bona fide resident of the same county in which the defendant resides. (Rev., s. 2365; Code, s. 1870; R. C. c. 77, s. 1; 1790, c. 319; 1792, c. 366; 1793, c. 393; 1796, c. 450; 1811, c. 811; 1924, c. 110.)

As to parties to suits for penalties, see sec. 447.

Editor's Note.—This section was amended by chapter 110, Laws 1924, by adding thereunto the proviso restricting the right of action to residents of the county in which the defendant resides.

§ 3202. Bargains for office void.—All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void. (Rev., s. 2366; Code, s. 1871; R. C., c. 77, s. 2; 5 and 6 Edw. VI, c. 16, s. 3.)

Section 3946 prohibits a sheriff from letting to farm, in any manner, his county, or any part of it. Cansler v. Penland, 125 N. C. 578, 34 S. E. 683.

Theory of Appointments.—Ames, C. J., says in Eddy v. Capron, 67 Am. Dec. 541. "By the theory of our government, appointments to office are presumed to be made solely upon the principle detur digniori, and any practice whereby the bare consideration of money is brought to bear in any form upon such appointments to or resignation of office conflicts with and degrades this great principle. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted at the point of adequate remuneration only. Any premium paid to obtain office interferes with this adjustment and tempts to speculation, overcharges and frauds in the effort to restore the balance thus disturbed." Quoted with approval in Basket v. Moss, 115 N. C. 448, 458, 20 S. E. 733.

The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. Basket v. Moss, 115 N. C. 448, 457, 20 S. E. 733.

Agreements Void.—Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments, to the great detriment of the public. Hence, such agreements, of whatever nature, have always been held void as being against public policy. Maguire v. Comine, 101 U. S. 108; Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868; Gray v. Hook, 4 N. Y. 449; Gaston v. Drake, 33 Am. Rep. 548; Filsom v. Himes, 47 Am. Dec. 422; Faurie v. Morin, 4 Martin (La.), 39; Liness v. Hessing, 92 Am. Dec. 153; Basket v. Moss, 115 N. C. 448, 457, 20 S. E. 733.

Contracts to procure appointments to an office (Mechem on Public Officers, sec. 351), or to resign an office in another's favor are void. Meacham v. Dow, 32 Vt. 721; Gra-

cone v. Wroughton, 11 Exch. 146; Basket v. Moss, 115 N. C. 448, 457, 20 S. E. 733.

Same—Common Law.—Such agreements are void at Common law, as well as by statute. Basket v. Moss, 115 N. C. 448, 457, 20 S. E. 733.

Same—Federal Offices.—Notwithstanding the office is an office under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Basket v. Moss, 115 N. C. 448, 457, 20 S. E. 733.

§ 3203. Oath required before acting; penalty.—Every officer and other person required to take an oath of office, or an oath for the faithful discharge of any duty imposed on him, and also the oath appointed for such as hold any office of trust or profit in the state, shall take all said oaths before entering on the duties of the office, or the duties imposed on such person, on pain of forfeiting five hundred dollars to the use of the poor of the county in or for which the office is to be used, and of being ejected from his office or place by proper proceedings for that purpose. (Rev., s. 2367; Code, s. 1873; R. C., c. 77, s. 4.)

The taking of the oath of office is not an indispensable criterion, for the office may exist without it. It is a mere incident, and constitutes no part of the office. State v. Stanley, 66 N. C. 60; Comrs. v. Evans, 74 Penn. St., 124, 139; State v. Patrick, 124 N. C. 651, 662, 33 S. E. 151.

§ 3204. Persons admitted to office deemed to hold lawfully.—Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void. (Rev., s. 2368; Code, s. 1872; R. C. c. 77, s. 3; 1844, c. 38, s. 2; 1848, c. 64, s. 1; Const., Art. IV, s. 25.)

Tabulation By Clerk.—A tabulation of the result of an election by the clerk, in the manner required by law is prima facie correct. Cozart v. Fleming, 123 N. C. 547, 31 S. E. 822.

Appointment Biennially.—A proviso for an appointment to office "biennially" ex vi termini, implies a two years' term of office. State v. Patrick, 124 N. C. 651, 33 S. E. 151.

A relator in quo warranto proceedings to try title to office accepts the position that he has been displaced in the office, by the form of action in which he seeks to assert his rights, and may not therein avail himself of the position that under the section, he should have been ousted therefrom by a judicial sentence, under a proper proceeding, etc. State v. Croom, 167 N. C. 223, 83 S. E. 354.

To constitute an officer de facto it is requisite that there be some colorable election or appointment to and induction into the office. Van Amringe v. Taylor, 108 N. C. 196, 12 S. E. 1005, 23 Am. St. Rep. 51, 12 L. R. A. 202; Burke v. Elliott, 26 N. C. 355, 361; Gillam v. Reddick, 26 N. C. 368; Burton v. Patton, 47 N. C. 124; Commissioners v. McDaniel, 52 N. C. 107; People v. Staton, 73 N. C. 546; Keeler v. New Bern, 61 N. C. 505; State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

The indispensable basis of being a de facto officer is that there is such an office. Meacham Public Offices, sec. 324, and numerous cases there cited; State v. Shuford, 128 N. C. 588, 591, 38 S. E. 808, cited in note in 15 L. R. A., N. S. 102.

Persons who have been regarded as public officers for the greater part of the time during which the office existed, and whose acts are recognized by other public functionaries, must be taken to be officers de facto. Burton v. Patton, 47 N. C. 124, 62 Am. Dec. 194.

An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, such as taking an oath, giving a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247; State v. Taylor, 108 N. C. 196, 12 S. E. 1005; State v. Speaks, 95 N. C. 689; Whitehead v. Pittman, 165 N. C. 89, 80 S. E. 976.

Acts of de facto officers, who exercise their office for a considerable length of time, are as effectual when they concern the rights of third persons or the public as if they were officers de jure, but to constitute one an officer de facto there must be an actual exercise of the office and acquiescence of the public authorities long enough to cause, in the mind of the citizen, a strong presumption that the officer was duly appointed. Hughes v. Long, 119 N. C. 52, 25 S. E. 743; Gilliam v. Reddick, 26 N. C. 368; Burke v. Elliott, 26 N. C. 355; State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

The acts of one purporting to be an officer are evidence of his authority; and such acts, as to third persons, are to be taken as valid while the incumbent is thus acting. Swindell v. Warden, 52 N. C. 575.

The official acts of persons entering into office under color of an irregular election are of full force until such officers are removed by a proper proceeding. Commissioners v. McDaniel, 52 N. C. 107.

Usurping De Facto and De Jure Officers Distinguished.—A usurper is one who takes possession without any authority. His acts are utterly void, unless he continues to act for so long a time or under such circumstances as to afford a presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defense in a direct proceeding against himself. A de facto officer is one who goes in under color of authority or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons; but he may be ousted by a direct proceeding. A de jure officer is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid, and he can not be ousted. The only difference between an officer de facto and an officer de jure is that the former may be ousted in a direct proceeding against him, while the latter cannot be. So far as the public and third persons are concerned, there is no difference whatever. The acts of one have precisely the same force and effect as the acts of the other. People v. Staton, 73 N. C. 546, 550, citing Burke v. Elliott, 26 N. C. 355; Gilliam v. Reddick, 26 N. C. 368; Commissioners v. McDaniel, 52 N. C. 107; Swindell v. Warden, 52 N. C. 575; Keeler v. New Bern, 61 N. C. 505; Culver v. Eggers, 63 N. C. 630; Ellis v. N. C. Institution, 68 N. C. 423.

A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases. This can happen only by the continued exercise of the office by him and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when without color of authority he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency. Burke v. Elliott, 26 N. C. 355, 361; State v. Staton, 73 N. C. 546; State v. Taylor, 108 N. C. 196, 202, 12 S. E. 1005; 23 Am. St. Rep. 51, 12 L. R. A. 202; Whitehead v. Pittman, 165 N. C. 89, 80 S. E. 976.

To Try Title—In the Case of Contested Election.—Injunction does not lie to restrain county commissioners from declaring a public office vacant because of an apparent tie vote, where it is an attempt, in effect, to try the title to the office by injunction, which is not permissible. Cozart v. Fleming, 123 N. C. 547, 31 S. E. 822.

The erroneous action of the county commissioners in declaring an office vacant because of an apparent tie vote, and ordering a new election, does not warrant the granting of an injunction to one of the candidates, since the title to the office can be inquired into by quo warranto even after such a new election. Cozart v. Fleming, 123 N. C. 547, 31 S. E. 822.

Same—By Incumbent against an Intruder.—Injunction is not the proper method of trying title to an office and it

will not lie at the suit of the incumbent of a public office to restrain a claimant of the office from claiming and exercising its powers and duties. Jones v. Commissioners, 77 N. C. 280; Patterson v. Hubbs, 65 N. C. 119.

How Brought.—An action to try the right of an incumbent to any public office, may be brought by the Attorney-General upon his own information, or upon the complaint of any private party. People v. Hilliard, 72 N. C. 169; People v. Wilson, 72 N. C. 155.

Right of Action.—Any person having a right to an office, can in his own name, bring an action for the purpose of testing his right as against one claiming adversely. Brown v. Turner, 70 N. C. 93.

Notwithstanding the maxim "De minimis non curat lex," a suit will be entertained to determine rights to an office paying only eight dollars a month in addition to board. Greene v. Owen, 125 N. C. 212, 34 S. E. 424.

Pleading—Proceeding in the Nature of Quo Warranto.—Title to a public office can not be tried by motion, but must be determined by a proceeding in the nature of quo warranto. Sneed v. Bullock, 77 N. C. 282, citing Patterson v. Hubbs, 65 N. C. 119; Brown v. Turner, 70 N. C. 93.

Same—As to Necessity of Demand.—No demand is necessary before suing to try the right to an office. Shennonhouse v. Withers, 121 N. C. 376, 28 S. E. 522.

Same—Allegation of Citizenship in Complaint.—Where persons who have been elected and qualified as county commissioners bring an action against persons appointed by the judge of the district, under the provisions of ch. 135, Laws 1895, to try the defendants' title to office, the complaint must allege that the plaintiffs are citizens and tax-payers of the county. Houghtalling v. Taylor, 122 N. C. 141, 29 S. E. 101, citing Hines v. Vann, 118 N. C. 3, 23 S. E. 932; Foard v. Hall, 111 N. C. 369, 16 S. E. 420, and cases there cited.

Conduct of Incumbent as Estoppel to Deny Vacancy.—Where a person had been elected clerk of the superior court, and at the proper time had tendered his bonds, which had been accepted by the court, and he inducted into office, while the former clerk was present in court, cognizant of what was going on, and did not object thereto, but surrendered up the office and records to the new clerk and retired from the performance of the duties of the office for twelve months thereafter. It was held, in an action in the nature of quo warranto, that such conduct in the old clerk amounted to a surrender of his office to the court, and justified the reception and induction into office of the newly elected clerk. Williams v. Somers, 18 N. C. 61.

Same—Estoppel to Deny.—A person who held himself out and who acted as an officer and who signed his name as such, and who in writing resigned the office, is estopped from denying that he accepted the office, and he vacated a prior office filled by him. Midgett v. Gray, 159 N. C. 443, 74 S. E. 1050, reversing judgment on rehearing on other grounds 158 N. C. 133, 73 S. E. 791.

A person who held himself out and who acted as an officer is estopped to deny his qualification when the acceptance of such office is relied on to vacate a prior office filled by him, and that he was not sworn on the Bible when he qualified for the second office is not available. Midgett v. Gray, 159 N. C. 443, 74 S. E. 1050, reversing judgment on rehearing on other grounds 158 N. C. 133, 73 S. E. 791; State v. Long, 76 N. C. 254; State v. Cansler, 75 N. C. 442.

§ 3205. Officer to hold until successor qualified.—All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified. (Rev., s. 2368; Code, s. 1872; R. C., c. 77, s. 3; 1848, c. 64, s. 2.)

Holding over after Expiration of Term.—An officer elected by the people, holding over his regular term on failure of his successor to qualify, holds over until the place is filled at the next general election, under Const. Art. 3, §§ 1, 13. People v. McIver, 68 N. C. 467, cited in note in 50 L. R. A., N. S., 376.

Where an officer has been inducted into his office before the beginning of the term for which he was re-elected, one who is appointed to fill the vacancy, caused by his death before that term begins, holds only until the expiration of the first term. State v. Smith, 81 N. C. 304, cited in notes in 14 L. R. A. 858; 50 L. R. A., N. S. 380.

Term of Appointee of Judge.—In case of a vacancy in the office of the clerk of the superior court the appointee of the judge holds only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

Status of Officer Holding over—De Jure.—Whether regarded as a part of an original term or a new and conditional one by virtue of the statute, the holders are regarded as officers de jure until their successors have been lawfully elected or appointed and have properly qualified. State v. Simpson, 175 N. C. 135, 95 S. E. 106.

Same—De Facto.—Where a clerk of the superior court held over in office until his successor qualified, he was at least clerk de facto; his acts can not be collaterally impeached, and are valid as to third parties. Threadgill v. Carolina Cent. R. Co., 73 N. C. 178. It would seem that the rule now is, as laid down in the preceding case, to consider such an officer an officer de jure.

§ 3206. Citizen to recover funds of county or town retained by delinquent official.—When an official of a county, city or town is liable upon his bond for unlawfully and wrongfully retaining by virtue of his office a fund, or a part thereof, to which the county, city or town is entitled, any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from the delinquent official the fund so retained. Any county commissioners, aldermen, councilmen or governing board who fraudulently, wrongfully and unlawfully permit an official so to retain funds shall be personally liable therefor; any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from such county commissioners, aldermen, councilmen or governing board, the fund so retained. Before instituting suit under this section, the citizen and taxpayer shall file a statement before the county commissioners, treasurer, or other officers authorized by law to institute the suit, setting forth the fund alleged to be retained or permitted to be retained, and demanding that suit be instituted by the authorities authorized to sue within sixty days. The citizen and taxpayer so suing shall receive one-third part, up to the sum of five hundred dollars, of the amount recovered, to indemnify him for his services, but the amount received by the taxpayer and citizen as idemnity shall in no case exceed five hundred dollars. (1913, c. 80.)

The section applies to money collected before the passage of the act, and a citizen and taxpayer on sufficient and proper averment of default on part of the county officials, had and has a right to maintain an action of this character without resort to the provisions of the statute. Waddill v. Masten, 172 N. C. 582, 585, 90 S. E. 694.

Under the provisions of this section, citizens and taxpayers of a county may maintain an action against the commissioners of the county and its defaulting sheriff to enforce collection of the amount of the default upon allegations that the county commissioners have corruptly refused to perform their duties in this respect. Weaver v. Hampton, 201 N. C. 798, 161 S. E. 480.

§ 3206(a). Trust funds to be kept separate.—Any sheriff, treasurer or other officer of any county, city, town or other political subdivision of the State, receiving, by virtue of his office, public money or money to be held by him in trust shall keep or deposit such money or the credits or other evidence thereof separate and apart from his own funds and shall not, at any time, apply such money to his own use or benefit or intermingle the same in any manner with credits or funds of his own. (1931, c. 77, s. 1.)

Editor's Note.—To the extent that this section requires local public officers to keep their official bank accounts separate from their personal accounts and prohibits them from applying official funds to personal uses and from intermingling official and personal moneys, it probably states a well-known principle of law. The need for the statute, however, arose out of cases where local officials had defaulted and where the mixup of personal and official funds in the same account made tracing difficult if

not impossible. The new statute, therefore, by making the principle specific, perhaps puts the officers on warning. It should be read in connection with §§ 1326 and 1334(70), relating to the reports and deposits. While it is made the duty of the County Government Advisory Commission to report violations to the solicitor, the Local Government Commission, which succeeds to the rights and liabilities of the former by § 2493(3) now has such duty to perform. 9 N. C. Law Rev. 400.

§ 3206(b). Violations to be reported; misdemeanors.—It shall be the duty of the Executive Secretary of the County Government Advisory Commission to report to the solicitor of the district any violation of section 3206(a) of which he may have knowledge, and that any violation of such section shall be unlawful and shall constitute a misdemeanor, punishable be fine or imprisonment, or both, in the discretion of the court. (1931, c. 77, s. 2.)

§ 3207. Local: Officers compensated from fees to render statement; penalty; proceeds to school fund.—Every clerk of the superior court, register of deeds, sheriffs, coroner, surveyor, or other county officer, whose compensation for services performed shall be derived from fees, shall render to the board of county commissioners of their respective counties, on the first Monday in December of each year, a statement, verified under oath, showing: first, the total gross amount of all fees collected during the preceding fiscal year; second, the total amount paid out during the preceding fiscal year for clerical or office assistance. Any county officer, subject to this section, who refuses or fails to file such report as above provided, on or before the first Monday in December, shall be subject to a fine of twenty-five dollars and ten dollars additional for each day or fraction of a day such failure shall continue. The board of county commissioners shall assess and collect the penalty above provided for, and apply same to the general school fund of the county. The first report under this section shall be for the fiscal year beginning December twelfth, one thousand nine hundred and thirteen.

This section applies only to the counties of Anson, Bertie, Bladen, Cabarrus, Carteret, Chowan, Currituck, Duplin, Halifax Harnett, Haywood, Hertford, Johnston, Jones, Moore, Pender, Perquimans, Pitt, Randolph, Richmond, Rowan, Scotland, Union, Vance, Warren, Washington, Wayne, Wilson. (1913, c. 97; Ex. Sess. 1913, c. 10; 1935, c. 390.)

Editor's Note.—The amendment of 1935 added Cabarrus county to the list of counties to which the section is applicable.

Power of Legislature to Regulate Pay.—One who accepts a public office does so, with well defined exceptions as to certain constitutional offices, under the authority of the Legislature to change the emoluments he is to receive for the performance of his duties, at any time, and, while the office of sheriff is a constitutional one, the regulation of his fees is within the control of the Legislature, and the same may be reduced during the term of the incumbent, or he may therein be compensated by a salary instead of on a fee basis. Mills v. Deaton, 170 N. C. 386, 87 S. E. 123.

Construction of Act Changing Pay from Salary to Fee Basin.—An act changing the pay of county officials from a salary to a fee basis, taking prospective effect from the expiration of the terms of the present incumbents, will be presumed to have a sensible and just intent, with knowledge of existing conditions and will not be construed as to apply to deprive the incumbent sheriff of the emoluments of his term by requiring that he deliver the tax lists to his successor. Commissioners v. Bain, 173 N. C. 377, 92 S. E. 176.

Art. 2. Removal of Unfit Officers

§ 3208. Officers subject to removal; for what offenses.—Any city prosecuting attorney, any sheriff, police officer, or constable, shall be removed from office by the judge of the superior court upon charges made in writing, and hearing thereunder, for the following cause:

First. For willful or habitual neglect or refusal to perform the duties of his office.

Second. For willful misconduct or maladministration in office.

Third. For corruption.

Fourth. For extortion.

Fifth. Upon conviction of a felony.

Sixth. For intoxication, or upon conviction of being intoxicated. (1919, c. 288; P. L. 1913, c. 761, s. 20.)

As to appropriate manner of action by which to try the title to an office, see section 870 and annotations thereto.

Purpose.—The officer may be removed for misconduct or failure to perform the duties of his office, whether such failures were willful or habitually negligent; the statute was evidently enacted for the protection of the public, and not for the punishment of the delinquent officer. State v. Hamme, 180 N. C. 684, 687, 104 S. E. 174.

Failure to Take Oath Does Not Exempt from Liability.—There can be no doubt that if one elected to an office takes possession of it, and engages in the exercise of its duties, and misbehaves as in this case—take unlawful and extortionate fees—he will be liable for such misbehavior, notwithstanding the fact that he failed to take oath of office. State v. Cansler, 75 N. C. 442, 444.

What Evidence Sufficient.—The evidence of a prosecuting attorney in proceedings before the judge to remove him from office, under this section is sufficient to sustain an order removing him when it admits that he attempts to induce, and did induce, a person to violate the statutes of our State in participating in acts made an offense for immorality, etc., whatever his intent may have been therein. State v. Hamme, 180 N. C. 684, 104 S. E. 174. It was also held in this case that the prosecuting attorney could not complain because he was removed not in accordance with the specifications alleged in the petition, but upon his own evidence, the element of surprise or possibility of an amendment to the petition not entering.—Ed. Note.

Jury Not Required.—The proceedings under this section do not require an issue to be submitted to the jury. Upon the defendant's own admissions in this case, and evidence, he is guilty of the offense charged, which is sufficient to remove him from office; such office is not a property right under the provisions of the Constitution of North Carolina, Art. 1, section 19. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

Appeal from Superior Court.—An appeal from the judgment of the superior court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inferences, if justified by the findings of facts supported by evidence. Constitution, Art. VI, sec. 8; and the appeal is allowed by C. S., 638; State v. Hamme, 180 N. C. 684, 104 S. E. 174.

Enjoining Vacating of Office by Commissioners before They Have Qualified.—An action to enjoin newly-elected county commissioners, who had not yet qualified, from declaring a public office vacant, and electing a successor, is properly dismissed as premature. Cozart v. Fleming, 123 N. C. 547, 31 S. E. 822.

§ 3209. Petition for removal; county attorney to prosecute.—The complaint or petition shall be entitled in the name of the state of North Carolina, and may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the solicitor of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or solicitor to appear and prosecute this proceeding. (1919, c. 288; P. L. 1913, c. 761, s. 21.)

§ 3210. Petition filed with clerk; what it

shall contain; answer.—The accused shall be named as defendant, and the petition shall be signed by some elector, or by such officer. The petition shall state the charges against the accused, and may be amended, and shall be filed in the office of the clerk of the superior court of this county in which the person charged is an officer. The accused may at any time prior to the time fixed for hearing file in the office of the clerk of the superior court his answer, which shall be verified. (1919, c. 288; P. L. 1913, c. 761, s. 22.)

§ 3211. Suspension pending hearing; how vacancy filled.—Upon the filing of the petition in the office of the superior court, and the presentation of the same to the judge, the judge may suspend the accused from office if in his judgment sufficient cause appear from the petition and affidavit, or affidavits, which may be presented in support of the charges contained therein. In case of suspension, as herein provided, the temporary vacancy shall be filled in the manner provided by law for filling of the vacancies in such office. (1919, c. 288; P. L. 1913, c. 761, s. 23.)

§ 3212. Precedence on calendar; costs.—In the trial of the cause in the superior court the cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next term after the petition is filed, provided the proceedings are filed in said court in time for said action to be heard. The superior court shall fix the time of hearing. If the final termination of such proceedings be favorable to any accused officer, said officer shall be allowed the reasonable and necessary expense, including a reasonable attorney fee, to be fixed by the judge, he has incurred in making his defense, by the county, if he be a county officer, or by the city or town in which he holds office, if he be a city officer. If the action is instituted upon the complaint of citizens as herein provided, and it appears to the court that there was no reasonable cause for filing the complaint, the costs may be taxed against the complaining parties. (1919, c. 288; P. L. 1913, c. 761, s. 24.)

CHAPTER 63

PARTITION

Art. 1. Partition of Real Property

§ 3213. Partition is a special proceeding.—Partition under this chapter shall be by special proceeding and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein. (Rev., s. 2485; Code, s. 1923; 1868-9, c. 122, s. 33.)

As to partition generally, see 9 Enc. Dig. 857 et seq.; 15 Enc. Dig. 158 et seq.

Editor's Note.—At one time partition could be effected only by a suit in equity of which the several State courts possessing general equity or chancery jurisdiction had cognizance. This was changed in 1868 and the proceedings made special. Special proceedings are regulated by sections 753 et seq., of this code, to which, with the annotations thereto, reference should be made.

Chapter Does Not Apply to Partition by Agreement.—This chapter applies to compulsory or judicial partition. It does not apply to partition by agreement. Keener v. Den, 73 N. C. 132. As to the authority of the court in a partition by agreement, and the procedure therein, see Outlaw v. Outlaw, 184 N. C. 255, 114 S. E. 4; Newsome v. Harrell, 168 N. C. 295, 84 S. E. 337. See also, 9 Enc. Dig. 861 et seq.; 15 Enc. Dig. 159 et seq.

When the proceeding for partition becomes adverse to him the plaintiff is not allowed to take a voluntary nonsuit. Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9.

Cited in Skinner v. Carter, 108 N. C. 106, 12 S. E. 908.

§ 3214. Venue in partition.—The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (Rev., s. 2486; Code, s. 1898; 1868-9, c. 122, s. 7; 1924, c. 62.)

As to jurisdiction in partition generally, see 9 Enc. Dig. 872 et seq.

Editor's Note.—The latter part of the section, stating the extent of the jurisdiction of the court, and the provision for partition of land consisting of several tracts, were added by the Public Laws of 1924, Extra Session.

Waiver of Venue.—Construing secs. 469, 470, and this section, in pari materia, venue cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 25. For distinctions between venue and jurisdiction, see the Editor's Note to sec. 463.

§ 3215. Petition by cotenant.—One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the superior court. (Rev., s. 2487; Code, s. 1892; 1886-9, c. 122, s. 1.)

I. In General.
II. Parties.
III. Plea of Sole Seizin.

Cross References.

As to requirements of petition for partition, see 9 Enc. Dig. 875 et seq., 15 Enc. Dig. 158 et seq.; as to the procedure for sale, and the remainder to uncertain persons, see section 1744 and annotations thereunder. See also note under § 3233.

I. IN GENERAL.

Jurisdiction of Superior Court.—The superior court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in term, and may proceed therewith and fully determine all matters in controversy. In such case it is immaterial whether it was properly instituted before the clerk. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86.

Necessity of Possession.—Tenants in common who are not in possession can not procure an order for partition. Church v. Thornton, 158 N. C. 119, 73 S. E. 810; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639.

The Petition—Omission of Term of Court.—A petition entitled in the original cause, but addressed to the clerk, in special proceedings for partition is not demurrable because it does not give the term of court or any court in the caption. Hartsfield v. Bryan, 177 N. C. 166, 98 S. E. 379. For full treatment of the requirements of the petition, see 9 Enc. Dig. 875 et seq.; 15 Enc. Dig. 158 et seq.

Same—Possession.—If the petition alleges that the petitioners are tenants in common in fee, it will not be dismissed for failure to allege that they are entitled to immediate possession. Epley v. Epley, 111 N. C. 505, 16 S. E. 321; Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep., 757.

Same—Leave to Amend.—On petition before the clerk for partition, permission to amend the petition is purely within the discretion of the clerk. Simmons v. Jones, 118 N. C. 472, 24 S. E. 114.

Lands Not Included in Petition.—The petitioners are not entitled as a matter of right to have a part only of the lands divided, and the defendants may have other land held

in common included. Luther v. Luther, 157 N. C. 499, 73 S. E. 102. But see section 3227 and notes thereto.

Not Proper Remedy for Ouster.—Where a tenant in common has been actually ousted by his cotenant, his remedy is by ejectment, and not partition. Thomas v. Garvin, 15 N. C. 223, 25 Am. Dec. 708, cited in note in 20 L. R. A. 627.

Divorced Wife against Husband's Grantee.—When marriage is dissolved by divorce the husband and wife become tenants in common of property formerly held by the entirety, and are entitled to partition. McKinnon, etc., Co. v. Caulk, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396.

Partition as to Churches. — Churches belonging to an association controlling a school are not entitled to partition. Church v. Thornton, 158 N. C. 119, 73 S. E. 810.

II. PARTIES.

As to parties in partition proceedings generally, see 9 Enc. Dig. 873 et seq.

In General.—Parties claiming to hold in common may properly be brought in as defendants. McKeel v. Holloman, 163 N. C. 132. Partition can be made only by tenants in common who are seized of the freehold, and not by those in remainder or reversion. Ordinarily, partition lies only in favor of one who has a seizin and right of immediate possession. Osborne v. Mull, 91 N. C. 203.

Sale or Partition of Reversions, Remainders and Executory Interests.—This section is no authority for partition as between the life tenant and remaindermen, except where the proceeding is brought by the remaindermen, and the life tenant is joined. Burton v. Cahill, 192 N. C. 505, 510, 135 S. E. 332. For a full treatment of the sales mentioned in the catch-line, see section 3234 and the notes thereto.

Persons Bound. — Persons not parties are not bound. Henderson v. Wallace, 72 N. C. 451; Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200. And if named as parties they must be served with process. Putillo v. Lytle, 158 N. C. 92, 73 S. E. 200.

Partition by Infant and Another.—Where partition was brought by a minor and another, the latter was bound by the judgment, although it was not approved by the judge of the court. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Claimant of Paramount Title.—In an action for partition of lands, it is proper to allow another party claiming paramount title to the land to intervene and assert his rights. Roughton v. Duncan, 178 N. C. 5, 100 S. E. 78. But such a claimant may be estopped by his laches. Thomas v. Garvin, 15 N. C. 223, 25 Am. Dec. 703.

Administrator as Party.—In an action by the heirs at law for partition of an intestate's lands, the administrator can not be made a party defendant, on his opposition to the partition, and application to sell the land for debts of the estate. Garrison v. Cox, 99 N. C. 478, 6 S. E. 124.

Judgment Creditors and Mortgagees.—In proceedings for partition, judgment creditors of the individual tenants, and their mortgagees, are proper parties to the proceedings; and where such lienors have been made parties thereto, it is error for the trial judge to dismiss the action as to them. Holley v. White, 172 N. C. 77, 89 S. E. 1061.

Making Additional Party for Purpose of Setting Aside Sale.—An application to be made a party defendant in partition proceedings after confirmation of sale was properly denied, where it was based on deeds from persons who never had claimed any title and accompanied by a motion to set aside the sale to permit his principals to make a bid. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Presence of Unnecessary Party.—The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as immaterial, except as affecting costs. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86.

Unknown Parties.—See section 3218 and notes thereto.

III. PLEA OF SOLE SEIZIN.

As to determination of titles in partition proceedings generally, see 9 Enc. Dig. 867 et seq.

Effect of Plea.—Where the plea of sole seizin is set up, the effect is practically to convert it into an action of ejectment. When it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interests owned. Haddock v. Stocks, 167 N. C. 70, 74, 83 S. E. 9; Graves v. Barrett, 126 N. C. 267, 270, 35 S. E. 539. Where the plea is set up the proper course is for the court to try title to the land. Purvis v. Wilson, 50 N. C. 22, 69 Am. Dec. 773. The action should not be dismissed because of the policy of the code that all matters of controversy concerning the same subject, between all the parties having an interest therein, be disposed of in one action. Goodman v. Sapp, 102 N. C. 477, 9 S. E. 483.

Plea Not Put in before Partition Ordered. — Where, in partition, a plea of sole seisin is not put in before the order of partition is made, it will be considered as waived. Wright v. McCormick, 69 N. C. 14.

Burden of Proof.—Where the defendants plead sole seizin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title, after a prima facie case of tenancy in common is made out. Lester v. Harvard, 173 N. C. 83, 91 S. E. 698.

Effect of Adjudication When Title Put in Issue.—While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. Baugham v. Trust Co., 181 N. C. 406, 107 S. E. 431; Buchanan v. Harrington, 152 N. C. 333, 67 S. E. 747, 136 Am. St. Rep. 838.

Cited in Brittain v. Mull, 91 N. C. 498, 504.

§ 3216. Surface and minerals in separate owners; partitions distinct.— When the title to the mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest and without joining as parties the owner or owners of the mineral interest. In all instances where the mineral interests and surface interests have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (Rev., s. 2488; 1905, c. 90.)

§ 3217. Petition by judgment creditor of cotenant; assignment of homestead.—When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgement lien. (Rev., s. 2489; 1905, c. 429.)

§ 3218. Unknown parties; summons and representation.—If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons

interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. (Rev., s. 2490; 1887, c. 284.)

See section 1744 and notes thereto; as to parties to partition proceedings generally, see 9 Enc. Dig. 873 et seq.

Appointment Discretionary.—It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interest of unknown persons, etc., and this discretion is not reviewable. Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766.

Purchaser Acquires Good Title.—When the service of summons has been made by publication on parties unknown, as required by this section, the proceedings being regular upon their face, and the court having jurisdiction of the subject matter, a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served. Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766.

Purchaser Cannot Resist Payment of Purchase Price. — Where the method prescribed by this section is followed, a purchaser may not successfully resist payment of the purchase price of the land on the ground of a defect in title for that the commissioner's deed would not preclude the claim of the missing heir. Bynum v. Bynum, 179 N. C. 14, 101 S. E. 527.

§ 3219. Commissioners appointed.—The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (Rev., s. 2487; Code, s. 1892; 1868-9, c. 122, s. 1; 1924, c. 62.)

Cross References.—See notes to section 3222; as to the salaries and fees of commissioners in partition proceedings, see section 3895.

Editor's Note.—The provision of this section in regard to the appointment of additional commissioners when the land lies in more than one county was added to the original section by the amendment of 1924.

§ 3220. Oath of commissioners.—The commissioners shall be sworn by a justice of the peace, or other person authorized to administer oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability. (Rev., s. 2492; Code, s. 1893; 1868-9, c. 122, s. 2.)

As to the form of the oath, see section 3199.

§ 3221. Delay or neglect of commissioner penalized.—If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner. (Rev., s. 2498; Code, s. 1901; 1868-9, c. 122, s. 10.)

§ 3222. Commissioners to meet and make partition; equalizing shares.—The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (Rev., s. 2491; Code, s. 1894; 1887, c. 284, s. 2; 1868-9, c. 122, s. 3.)

Cross References.—As to owelty generally, see 9 Enc. Dig. 883, et seq.; 15 Enc. Dig. 165 et seq.; as to determination of mode of partition, see 9 Enc. Dig. 879 et seq.

Applies Only to Compulsory Partition or Sale. — Where the partition was not compulsory but was under an agreement between cotenants, this section is not applicable. Outlaw v. Outlaw, 184 N. C. 255, 258, 114 S. E. 4; Newsome v. Harrell, 168 N. C. 295, 84 S. E. 337.

Action of Two Commissioners Valid.—Where three commissioners are appointed to partition land the action of any two of them is valid. Thompson v. Shemwell, 93 N. C. 222. And this action may consist in filling the vacancy caused by the absence of the third commissioner, when done in the presence of the interested parties and without their objection. Simmons v. Foscue, 81 N. C. 86.

By the very terms of section 3228, the signature of two of the commissioners to their report is sufficient. Thompson v. Shemwell, supra.

Existing Easement.—It would seem that existing easements are not destroyed by a division in partition. See Jones v. Swindell, 176 N. C. 34, 96 S. E. 663.

Improvements.—A tenant in common is entitled to recover against a co-tenant for betterments he has placed on the land. Daniel v. Dixon, 163 N. C. 137, 79 S. E. 425. Section 699 does not apply in such a case. See the section and the last paragraph of the notes thereto.

Where no appeal is taken from the order allowing for the improvements, it concludes the plaintiff from having the good faith of the defendant, in making the improvements, inquired into. Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887.

But where in a partition an excessive portion is allotted to one, which is reduced on a re-allotment, he can not be allowed for improvements made on the excess, as it was his own folly to make them before obtaining a final decree and his deed. Carland v. Jones, 55 N. C. 506.

Basis of Owelty.—The right to owelty on an unequal partition is based on the implied warranty attaching to each share from all the others. Cheatham v. Crews, 88 N. C. 38; Nixon v. Lindsay, 55 N. C. 230.

Owelty Not Mere Lien Debt. — The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is a tenant in common with the holder of the share in whose favor the decree is entered to the extent of the charge, until the same shall be satisfied. In re Walker, 107 N. C. 340, 12 S. E. 136.

Same—Charge upon Land.—The sums charged upon "the more valuable dividends," in partitions of lands are charges, not upon the persons of the owners of such dividends, but upon the land alone. Young v. Trustees, 62 N. C. 261.

Owelty Follows Land.—Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380; Dobbin v. Rex, 106 N. C. 444, 11 S. E. 260. As to the docketing of owelty charges, see section 3232.

When Land Charged with Payment of Several Shares.—Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share. Meyers v. Rice, 107 N. C. 24, 12 S. E. 66.

Effect of Discharge in Bankruptcy on Owelty.—A discharge in bankruptcy does not cancel the charge of owelty of partition against the land of the bankrupt. In re Walker, 107 N. C. 340, 12 S. E. 136.

Division of Costs.—The costs in proceedings for partition (including the expenses of the partition) are charges upon the several shares in proportion to their respective values. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.

Costs Precede Homestead Exemption.—Where in an ex

parte proceeding for the partition of lands, partition was duly made and one part was assigned in severalty to A, and A failed to pay the costs adjudged against her and the share allotted to her was sold on execution issued on the judgment, and no homestead was allotted to A, who has no other land, and her interest was not worth $1,000. In an action by the heirs of A against the purchaser at the execution sale, the sale was held to be valid. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.

Procedure to Subject Land Charged.—A motion in the cause for execution is the proper proceeding to subject land charged with owelty of partition to the payment thereof. Meyers v. Rice, 107 N. C. 24, 12 S. E. 66.

Charges for equality of partition should be enforced by proceedings in rem against the more valuable shares of the land divided, and not by personal judgments against the owners thereof. Young v. Trustees, 62 N. C. 261; Waring v. Wadsworth, 80 N. C. 345; Meyers v. Rice, 107 N. C. 24, 12 S. E. 66, 67.

Confirmation Necessary to Execution.—No execution can issue to satisfy a charge against land in partition proceedings until the commissioner's report has been confirmed. In re Ausborn, 122 N. C. 42, 29 S. E. 56.

Parties to Action to Recover Owelty of Partition.—The widow of the party upon whose land a charge is placed is not a necessary party to an action brought to recover the sum charged. Ruffin v. Cox, 71 N. C. 253.

Counterclaim.—A cotenant, who is charged in the partition proceedings with owelty, may set up by way of counterclaim damages sustained by his eviction from part of the land awarded to him. Huntley v. Cline, 93 N. C. 458.

Cited in Capps v. Capps, 85 N. C. 408, 409.

§ 3223. Owelty to bear interest.—The sums of money due from the more valuable dividends shall bear interest until paid. (Rev., s. 2496; Code, s. 1899; 1868-9, c. 122, s. 8.)

§ 3224. Owelty from infant's share due at majority.—When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (Rev., s. 2497; Code, s. 1900; 1868-9, c. 122, s. 9.)

Charged Land Inherited by Infants. — Owelty may be enforced against land inherited by infants from an adult who owned the land when the owelty was made a charge against it, though as to land partitioned to an infant cotenant owelty is not payable until he reaches his majority. Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380.

§ 3225. Partition where shareowners unknown or title disputed.—If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. (Rev., ss. 2491, 2511; Code, s. 1894; 1868-9, c. 122, s. 3; 1887, c. 284, ss. 2, 4.)

Cross References. — As to unknown parties, see section 3218; as to shares of unknown parties when land sold, see section 3245.

§ 3225(a). Judgments in partition of remainders validated.—In all cases where land has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, where a judgment of partition has been rendered by the superior court authorizing a division of said lands upon the petition of the life tenant or tenants and all other persons then in being who would have taken such land if the contingency had then happened, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing a division of said lands among the respective life tenants and remaindermen, or executory devisees, shall be valid and binding upon the parties thereto and upon all other persons not then in being: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate. (1933, c. 215, s. 1.)

Ordinarily, proceedings for partition of land cannot be maintained when the plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant who is still living at the time the suit is instituted. See 11 N. C. Law Rev., 221.

§ 3226. Dower claims settled on partition; dower valued.—When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, or joint tenants, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six percent on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds. (Rev., s. 2517; Code, s. 1909; 1893, c. 341; 1868-9, c. 122, s. 18.)

See notes to section 3235; as to the allotment of dower generally, see section 4104 et seq.

Partition and Dower in Same Proceedings.—Partition of lands and the allotment of dower therein may be had in the same proceedings. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86. See also Vannoy v. Green, 206 N. C. 77, 173 S. E. 277.

Allotment before Division. — The widow of a deceased owner of lands held by him in common with another may have her dower interest therein set apart to her before division of the lands among the heirs at law. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025.

Immediate Payment of Dower.—In a sale for partition of land subject to dower, where the widow is a party, her life estate may be valued in money and the money paid to her in lieu of the interest for life on one-third of the proceeds of the sale. Ex Parte Winstead, 92 N. C. 703.

Dower Allotment Cannot Be Attacked Collaterally.—An allotment to the widow in dower proceedings cannot be attacked collaterally in proceedings for partition of the lands of the deceased ancestor by his heirs at law. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025.

§ 3227. Partial partition; balance sold or left in common.—In all proceedings under this chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder, or a part only, of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (Rev., s. 2506; 1887, c. 214, s. 1.)

Intent of Section. — This section does not authorize a partition or a sale of a fractional part of the land only. Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200; Brooks v. Austin, 95 N. C. 474.

§ 3228. Report of commissioners; contents; filing.—The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted of each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5.)

Cross References.—See section 3222 and notes thereto; as to the report when a sale is ordered, see section 3243 and notes thereto; as to the report generally, see 9 Enc. Dig. 889 et seq.

Alteration of Report. — The report of commissioners in partition proceedings, dividing land, when filed, approved, confirmed, recorded and registered, becomes a muniment of title, and the commissioners, without the order and approval of the court, have no right to alter or change the same. Clinard v. Brummell, 130 N. C. 547, 41 S. E. 675.

Findings as to Value of Property.—The findings of commissioners on value is not subject to review in the appellate court. Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887.

§ 3229. Map embodying survey to accompany report.—The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (Rev., s. 2493; Code, s. 1895; 1868-9, c. 122, s. 4.)

§ 3230. Confirmation and impeachment of report.—If no exception to the report of the commissioners is filed within twenty days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5.)

Proceedings Interlocutory until Confirmation.—Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76.

Effect of Failure to Object.—Where no exceptions were filed and no objections made, plaintiff was entitled to a decree of confirmation as a matter of law. Roberts v. Roberts, 143 N. C. 309, 55 S. E. 721.

Time for Filing Exception.—Exceptions to the report of the commissioners appointed to make partition of land must be filed within twenty days after the report is filed. Floyd v. Rock, 128 N. C. 10, 38 S. E. 33. As to objection to confirmation, see sec. 3243 and notes thereto.

Sufficiency of Exception.—Where within 20 days after filing the report the defendant notified the clerk that he desired to file exceptions, whereupon the clerk made a memorandum that the defendant had objected to the report, and later amended exceptions, setting out various grounds why the report should not be confirmed, were filed with the clerk without objection, it was held error to confirm the report on the ground that no exception had been filed within 20 days. McDevitt v. McDevitt, 150 N. C. 644, 64 S. E. 761.

Resale after Confirmation. — After confirmation a resale may be ordered for sufficient cause shown; but should be upon petition or notice to the purchaser who has acquired equitable rights under the first confirmation. Ex parte White, 82 N. C. 378.

Estoppel as to Lands Not Included in Petition.—When land is assigned in a decree in a partition proceeding with the knowledge and consent of the parties thereto, the administrator of one of the parties is estopped from denying that the land was not originally included in the petition for partition. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Appeals May Be to Different Judges.—When appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom comes a later appeal may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76.

Jurisdiction of Judge in Chambers.—A judge in chambers has jurisdiction of appeals from the report of commissioners appointed in special proceedings to partition land. McMillan v. McMillan, 123 N. C. 577, 31 S. E. 729.

Right of Clerk to Set Aside Former Order.—Where it appears of record that the clerk of the court in proceedings to partition lands had rendered a judgment in the plaintiff's favor, and had set it aside on the defendant's motion made before him seventeen months thereafter upon allegation of fraud in its procurement, and likewise that he had fraudulently prevented them from appearing and defending, to which the plaintiff did not except, his motion in the superior court, in the cause transferred, for judgment in his favor upon the whole record cannot be allowed. It is held that the clerk was within the provisions of this section in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him. Turner v. Davis, 163 N. C. 38, 79 S. E. 257.

Statute of Limitation. — Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-year statute of limitations begins to run from the confirmation of the report by the clerk, approved by the judge, and the fact that the clerk has not docketed the judgment in the seven years, as between the parties having at least constructive notice of the proceedings, does not alone repel the bar of the statute. Cochran v. Colson, 192 N. C. 663, 135 S. E. 794.

Some of the earlier cases, since overruled, held that limitations do not run against a charge on land for owelty of partition. In re Ausborn, 122 N. C. 42, 29 S. E. 56; Sutton v. Edwards, 40 N. C. 425.

Under the Acts of 1837.—For a case where proceedings for a partition of lands were under the provisions of chapter 85 Revised Statute of 1837, which did not contain provisions similar to this section and the section immediately following, see Power Co. v. Taylor, 188 N. C. 351, 124 S. E. 634.

§ 3231. Report and confirmation enrolled and registered; effect.—Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns. (Rev., s. 2495; Code, s. 1897; 1868-9, c. 122, s. 6.)

Effect of Adjudication before Clerk.—In proceedings to partition lands among tenants in common, the adjudication before the clerk operates as an estoppel as to them and those in privity with them, when no appeal has been taken. Southern State Bank v. Leverette, 187 N. C. 743, 748, 123 S. E. 68 and cases cited. Matters not in issue and claims for different rights are not, however, concluded. Gillans v. Edmonson, 154 N. C. 127, 69 S. E. 9.

Color of Title.—The record of the proceedings constitutes color of title. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Admissibility of Record in Evidence.—The record of the proceedings is admissible in evidence though not recorded as required by this section. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

§ 3232. Clerk to docket owelty charges; no release of land and no lien.—In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are alloted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are alloted against which owelty is charged being marked defendants on

said docket; that said entry on said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; that when said owelty charges are paid said entry upon the judgment docket shall be marked satisfied in like manner as judgments are canceled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge. (1911, c. 9, s. 1.)

As to owelty charges, see section 3222.

Effect of Failure to Docket.—Failure of the clerk to docket the owelty of partition upon his judgment docket, within seven years after such date, does not affect the right of plaintiff to enforce payment of the owelty by execution. Cochran v. Colson, 192 N. C. 663, 135 S. E. 794.

Art. 2. Partition Sales of Real Property

§ 3233. Sale in lieu of partition.—Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.)

Cross References.—As to the power of the court to collect money on judicial sales, see section 621 and annotations thereunder; as to partition by agreement, see 9 Enc. Dig. 861 et seq.; 15 Enc. Dig. 159 et seq.; as to determination of mode of partition, see 9 Enc. Dig. 879 et seq. See, also, for sale of lands in partition proceedings, 9 Enc. Dig. 895 et seq.; as to notice to unknown parties, see section 3218.

Entitled to Actual Partition.—Tenants in common are entitled to an actual partition, if it can be made without injury to any of the co-owners. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76; Gillespie v. Allison, 115 N. C. 542, 548, 20 S. E. 627. See 9 Enc. Dig. 879 et seq. as to determination of mode of partition.

Tenant Entitled to Homestead.—That a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. Holley v. White, 172 N. C. 77, 89 S. E. 1061.

Purchase of Lands by Tenant in Common.—A tenant in common suing to partition the premises controlled by him as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure any one to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008. See also Credle v. Baugham, 152 N. C. 18, 67 S. E. 46.

Issues of Fact—Questions of Fact.—In Ledbetter v. Piner, 120 N. C. 455, 27 S. E. 123, it is held: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact but a question of fact for the decision of the clerk subject to review by the judge on appeal." Vanderbilt v. Roberts, 162 N. C. 273, 78 S. E. 156.

Question for Court.—Whether or not, in a proceeding instituted under § 3215, for partition of the land of tenants in common, there shall be an actual partition, or a sale for partition, involves question of fact to be determined by court. In such proceedings, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of fact for the trial judge, and not an issue of fact for the jury, and he has the power to order a sale for partition. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Effect of Interests of Others.—The owner of an undivided one-half interest in land can not be denied his rights to have a partition or sale in lieu of partition, because of interests which defendants, other than his cotenants, claiming under him, have acquired in and to his undivided interest. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Effect of Trust Created by Another Co-Tenant. — The right of a tenant in common to have the lands sold for a division, under this section cannot be defeated by a trust creating an interest in the lands by another of the tenants. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Parties—Trustee and Beneficiaries. — The trustee and beneficiaries under a trust created in lands by a tenant in common are proper parties to the proceedings for a sale for division. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Same—Right of Wife of Co-Tenant to Resist Partition.— The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof, for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, under this section or section 3215, with the right to be heard when the lands are sold for division in order to protect her contingent interests in the proceeds of the sale. But she cannot resist the plaintiff's right to a partition nor challenge the power of the court to order sale for partition. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Interest of Trust Beneficiaries Attaches to Proceeds. — The interest of the beneficiaries under a deed of trust upon the interest of a tenant in common in land will upon its sale under this section attach to the proceeds and be fully protected in the final judgment or order in the proceedings. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Review of Decision.—The action of a judge of the superior court in setting aside the report of partition commissioners, advising actual partition, and ordering a sale, is not reviewable, unless an error of law was committed. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76; Albemarle Steam Nav. Co. v. Wovell, 133 N. C. 93, 45 S. E. 466.

§ 3234. Remainder or reversion sold for partition; outstanding life estate.—The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed. But this shall not interefere with the possession of the life tenant during the existence of his estate. (Rev., s. 2508; 1887, c. 214, s. 2.)

See section 1744 and notes thereto. See, also, notes to the succeeding section.

Rule before Section Adopted.—Before the passage of this section cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627, 628. See Wood v. Sugg, 91 N. C. 93; Ex parte Miller, 90 N. C. 625. But partition was permitted between the holder of the life estate and the owner in fee. McEachem v. Gilchreet, 75 N. C. 196.

Section Not Limited to Sale.—By the wording of this section, that is, "a sale for partition" followed by the words "purposes of partition," it is apparent that the Legislature did not intend to limit the application of the section to sales, and it is held that it is to be construed to include actual partition by the remaindermen, as well as for a sale for division by them. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86.

Section Enlarges Vested Rights.—A statute giving to remaindermen the right to have partition of lands in remainder vested before the passage of such statute is remedial and, instead of impairing, enlarges vested rights. Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627.

All Parties Interested.—A sale for partition will not be decreed when there are contingent remainders or other conditional interests therein unless all the persons who may be by any possibility interested unite in asking such a decree. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500, quoting Aydlett v. Pendleton, 111 N. C. 28, 16 S. E. 8. See § 1744 and notes thereto.

If contingent interests are to be affected by the partition they must be represented. Overman v. Tate, 114 N. C. 571, 19 S. E. 706.

Life Estate with Power of Sale.—When lands are devised to the wife for life, giving her control thereof with power of sale, pay debts, etc., this section does not apply, for if applied it would defeat the very purpose as to powers given the wife. Makely v. Makely, 175 N. C. 121, 95 S. E. 51.

Holder of Contingent Interest.—Proceedings for partition of lands cannot be maintained when the plaintiff holds

only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time. Vinson v. Wise, 159 N. C. 653, 75 S. E. 732.

§ 3235. Life tenant as party; valuation of life estate.—In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely. (Rev., s. 2509; 1887, c. 214, s. 3.)

See notes to section immediately preceding.

Life Tenants May Waive Rights.—Under a will providing that "home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided between the next of kin," single members of the family were entitled to partition of the home place among remaindermen as directed by will, where they showed the court that they no longer desired to retain it as a home, since life tenants could waive the right if they desired to enjoy their share in severalty. Sides v. Sides, 178 N. C. 554, 101 S. E. 100.

Estate Durante Viduitate.—This section does not apply to an estate durante viduitate, as there is no practicable rule by which the present value of such an estate can be determined; hence, where land to which an estate durante viduitate attached was sold for partition and the proceeds are in custody of the court below, they cannot be divided among the widow and the remaindermen, against the will of the remaindermen, but will remain real estate until partition can be made at the termination of the estate durante viduitate. Gillespie v. Allison, 117 N. C. 512, 23 S. E. 438.

Same—Payment until Termination of Estate.—Where the tenant of an estate durante viduitate joins with some of the remaindermen for a sale for partition of the lands, this section will be satisfied with the payment to her of the interest upon the proceeds of the lands sold, until the termination of the particular estate by her marriage or death. Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627.

Application of Life Tenant for Sale.—While under this and the preceding section there is authority for a sale for partition, at the instance of the remaindermen, of the reversion, or by their joining the life tenants, or between tenants in common or joint tenants, there is no statute which authorizes the sale on the application of the life tenant as against the remaindermen. Ray v. Poole, 187 N. C. 749, 751, 123 S. E. 5.

Cited in Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500.

§ 3236. Sale of standing timber on partition; valuation of life estate.—When two or more persons own, as tenants in common, joint tenants, or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, on which there may be standing timber trees, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law. (Rev., s. 2510; 1895, c. 187.)

§ 3237. Sale of mineral interests on partition.—In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear. (Rev., s. 2507; 1905, c. 90, s. 2.)

§ 3238. Sale of land required for public use on cotenant's petition.—When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. (Rev., s. 2518; Code, s. 1907; 1868-9, c. 122, s. 16.)

§ 3239. Manner and terms of partition sale.—The sale shall be made by some person appointed by the court, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.)

Private or Public Sale.—The superior court may, in the exercise of its discretion, order a sale of lands in proceedings for partitions, where minors are interested and represented by guardian ad litem, either to be publicly or privately made. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508. And where no abuse of this discretion is shown on appeal, the action of the lower court will not be reviewed. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Private Bids.—The court may authorize its commissioner in a proceeding for sale for partition to receive and report to it a private offer or bid for the land. Wooten v. Cunningham, 171 N. C. 123, 88 S. E. 1.

§ 3240. Notice of partition sale.—The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriff under execution: Provided, however, that in case a re-sale of such real property shall become necessary under such proceeding, that such real property shall then be re-sold only after notice of re-sale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the re-sale and also published at any time during such fifteen day period once a week for two successive weeks of not less than eight days in some newspaper published in the county, if a newspaper is published in the county, but if there be no newspaper published in said county the notice of re-sale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the re-sale. (Rev., s. 2514; Code, s. 1905; 1868-9, c. 122, s. 14; 1933, c. 187.)

As to execution and judicial sales, see section 687 and notes thereto.

See 11 N. C. Law Rev., 219, for brief review of this section.

Editor's Note.—Public Laws 1933, c. 187, added the proviso at the end of this section relating to notices of resale.

§ 3241. Title made to purchaser; effect of deed.—On the coming in of the report of sale, and

confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. And the deed of the officer or person designated to make such sales shall convey to the purchaser such title and estate in the property as tenants in common, or joint tenants, had. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.)

Cross References.—As to unknown parties and their effect on purchaser's title, see sections 3218 and 3245; as to actual partition, see section 3231 and notes thereto.

Sale an Official Act.—When an officer of the court, designated either by his official or individual name in the order, is commissioned to make sale of real or personal estate, he acts in his official capacity and his sureties undertake for the fidelity of his conduct. Kerr v. Brandon, 84 N. C. 128, 131.

Enforcement.—Upon acceptance by court's commissioner of a bid, whether at public or private sale, for land involved in partition proceedings, the court has jurisdiction over the purchaser to enforce the bid. Wooten v. Cunningham, 171 N. C. 123, 88 S. E. 1.

Same—Balance of Bid.—The purchaser of land at a judicial sale for partition can be required by summary proceedings to pay into court the amount of his bid which remains unpaid after the confirmation of the sale and delivery of the deed; such statute not being unconstitutional as depriving the purchaser of his right to a jury trial. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

When Title Passes.—Where, under a petition of tenants in common, lands are sold for division under the provisions of this section, title to the lands held in common will not pass to the purchaser until the purchase price has been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the court. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

Title of Intending Purchaser before Confirmation.—An intending purchaser at a partition sale is a mere preferred proposer, and not a purchaser, until after the sale has been confirmed. Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200.

Same—After Confirmation.—Under section 3243 after confirmation by the court of a judicial sale of lands, the purchaser is regarded as the equitable owner, and the sale, as it affects his interest, can only be set aside for "mistake, fraud, or collusion," established on petition regularly filed in the cause. Upchurch v. Upchurch, 173 N. C. 88, 91 S. E. 702.

When Purchaser Fails to Pay.—Where a purchaser of land under decree of court fails to pay the price, the title will not be made even though there be a confirmation of the sale. And if the land in such case be sold under an execution against said purchaser, the purchaser thereof takes subject to the equities against the defendant in the execution. Burgin v. Burgin, 82 N. C. 197.

Formal Direction to Make Title Unnecessary.—A formal direction to make title is not necessary when the order of sale reserves the title as an additional security for the purchase-money, and the money has been paid. Latta v. Vickers, 82 N. C. 501.

Purchaser Need Not Look beyond Decree.—A purchaser at a judicial sale, if not a party to the proceeding, is not bound to look beyond the decree if the facts necessary to give jurisdiction appear on the face of the proceedings. If there has been an irregularity, or the jurisdiction has been improvidently exercised, it will not be corrected at his expense. Herbin v. Wagoner, 118 N. C. 656, 657, 24 S. E. 490.

When Judgment Creditor Not Made Party. — Where judgment creditors of a tenant in common are not made parties to a partition proceeding, the purchaser buys subject to their liens. Holley v. White, 172 N. C. 77, 89 S. E. 1061.

Estoppel of Persons Parties to Sale.—One who was a party to ex parte partition proceedings, was present at the sale, and received her share of the purchase money could not thereafter have the judgment and sale set aside for division as to her. In re Wilson, 161 N. C. 211, 75 S. E. 1086; Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520.

Liens against Interest of Tenant in Common.—A sale of land for partition does not destroy liens against the interest of one of the tenants in common, and therefore the proceeds of the sale of the tenants' interest can not be applied to payment of the liens. Jordan v. Faulkner, 168 N. C. 466, 84 S. E. 764.

Proceedings Cannot Be Collaterally Attacked. — When land is sold and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form, and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked, as the remedy is by petition in the cause. Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520.

Deed Erroneously Made to Husband and Wife.—Where the wife alone is entitled to a deed in the severance of her interest as a tenant in common of lands sold for division, and in proceedings thereunder it is erroneously adjudged by the court that the deed be made to her and her husband by entireties, the title will inure only to her under a resulting trust, and the husband cannot acquire by survivorship. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

§ 3242. Who appointed to sell.—The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. (Rev., s. 2513; Code, s. 1906; 1868-9, c. 122, s. 15; 1899, c. 161.)

Editor's Note.—The last part of this section was passed to abolish the practice of clerks appointing themselves to make partition sales. This practice was condemned in Evans v. Cullens, 122 N. C. 55, 28 S. E. 961, and thereupon the next Legislature adopted the last clause.

§ 3243. Report of sale; filing; confirmation and impeachment.—Such officer or person shall file his report of sale, giving full particulars thereof, within ten days after the sale, in the office of the clerk of the superior court, and if no exception thereto is filed within twenty days, the same shall be confirmed. Any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2513; Code, s. 1906; 1899, c. 161: 1868-9, c. 122, s. 15.)

Cross References.—As to the confirmation and impeachment of partition sales generally, see 9 Enc. Dig. 895 et seq.; 15 Enc. Dig. 166 et seq.; as to the purchasers title generally, see 9 Enc. Dig. et seq.; 15 Enc. Dig. 168 et seq.; as to the commissioner's report when actual partition is made, see section 3228 and notes thereto; as to the confirmation and impeachment of such report, see section 3230 and notes thereto.

In General.—This section does not require formal exceptions; but because of the use of the word "shall" it is a prerequisite to the power of the court to order a resale that exceptions in a recognized legal way be made within the time prescribed. McConnick v. Patterson, 194 N. C. 216.

What Exceptions Contemplated.—In the contemplation of this section an exception is an objection to the regularity of the proceeding or sale or because of "inequitable adjustment." McConnick v. Patterson, 194 N. C. 216.

Section Relates Only to Public Sale.—This section relates only to public sales, and does not prevent confirmation of a private sale within 20 days. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Execution Sales.—This section is not applicable to execution sales. Weir v. Weir, 196 N. C. 268, 269, 145 S. E. 281.

Effect of Failure to File Report.—Upon the commissioner's failure to file a report and final account with the clerk, as provided by this section, the demand upon the commissioner or his administrator, for the disbursement of the funds, will be considered to have been made as a matter of law upon the failure to act and disburse the proceeds. Peal v. Martin, 207 N. C. 106, 176 S. E. 282.

Power of Superior Court to Confirm Sale.—The superior court in a partition action having general jurisdiction in law and equity has power to order and confirm a private as well as a public sale. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; McAfee v. Green, 143 N. C. 411, 418, 55 S. E. 828.

Power to Set Aside.—Where lands are ordered to be sold for partition by a court of equity, the authority of the court to set aside an inchoate sale and reopen the biddings applies as well to cases where all the parties are adults as where some of them, or all, are infants. Ex parte Post, 56 N. C. 482.

Same—Objection Must Be Timely. — Under this section exceptions must be filed or an increased bid placed upon the purchase price within twenty days or before a motion to confirm the sale is made. McCormick v. Patterson, 194 N. C. 216, 219; as to objections to report, see section 3228 and notes.

Same—Sufficiency of Objection. — Where three commissioners for the sale of lands in partition proceedings for a division have regularly sold the locus in quo as provided by law, and two of them have filed the report of sale, and the other protests against its confirmation upon the ground of a mistake in fact and appears before the clerk and gives his reason therefor within the statutory time, his conduct may amount to a substantial compliance with the statute leaving the matter within the power of the court to order a resale. McCormick v. Patterson, 194 N. C. 216.

Advance in Bid.—Before a partition sale has been confirmed, if an advanced bid of 10 per cent. is offered, the court may, in its discretion, order a resale. Trull v. Rice, 92 N. C. 572. But where no increase bid was received within twenty days and the purchaser moved promptly for confirmation, an increased bid received thereafter will not prevent confirmation. Ex parte Garrett, 174 N. C. 343, 93 S. E. 838.

Same—Where Parties Do Not Join in Motion.—The court did not abuse its discretion in a partition action in refusing to grant a re-sale upon an offer of an advance bid on motion of the officer in which none of the parties joined. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76.

Same—Ten Per Cent Advance Unnecessary. — While it has been in accord with the practice in this State to refuse to confirm a judicial sale unless there has been an advanced bid from a responsible bidder, this is but to afford evidence as to the inadequacy of the price, which the court, in the exercise of its discretion to confirm or set aside the sale, may regard or disregard; and while a bid of 10 per cent will customarily be considered, so may, also, an advanced bid in a less sum, when the amount is large. Upchurch v. Upchurch, 173 N. C. 88, 91 S. E. 702.

Cited in Buncombe County v. Arbogast, 205 N. C. 745, 748, 172 S. E. 364.

§ 3244. Shares in proceeds to cotenants secured.—Upon confirmation of the report, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (Rev., s. 2513; Code, s. 1921; 1868-9, c. 122, s. 31.)

§ 3245. Shares to persons unknown or not sui juris secured.—When a sale is made under this chapter, and any party to the proceeding be an infant, a married woman, non compos mentis. imprisoned, or beyond the limits of the state, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative. (Rev., s. 2516; Code, s. 1908; 1887, c. 284, s. 3: 1868-9, c. 122, s. 17.)

As to notice to unknown parties, see section 3218.

Effect on Title.—This section in nowise interferes with power to free the title and make a valid conveyance of the same. Bynum v. Bynum, 179 N. C. 14, 17, 101 S. E. 527.

Same—Failure to Invest. — A purchaser for full value, without notice, of lands at a sale for partition thereof by the heirs at law, acquires a title which is not affected by the failure of the court to retain and invest funds sufficient to protect the rights of such unknown persons, served with summons by publication, who may afterwards appear and establish an interest in the lands. Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766.

Consent of Court Necessary to Agreement.—Parties can not stipulate as to the distribution of the proceeds of a judicial sale without the full knowledge and consent of the court, especially where there are infants in the case whose rights may be seriously prejudiced by such an agreement. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

Infant's Share of Proceeds Remains Realty. — The proceeds of land, sold for partition, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money. Bateman v. Latham, 56 N. C. 35.

Payment to Guardian.—A payment made by purchaser of lands, under a decree for the sale and partition of lands which directed the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common, is proper and in pursuance of the statute. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148. As to sufficiency of payment to husband before the modern statute liberating married women from their legal disabilities, see Burgin v. Burgin, 82 N. C. 177.

Cited in McCormick v. Patterson, 194 N. C. 216.

Art. 3. Partition of Lands in Two States

§ 3246. Petition to partition lands in two states descended or devised.—Whenever on the death of any person his lands in this state, and in another state, descend or are devised to several persons, who, by the law of this and the other state, hold in the lands undivided estates as tenants in common, or by any other undivided tenancy, and such heirs or devisee cannot, without suit, have partition for want of consent, or because of inability in any of the cotenants, then, if such deceased person was at the time of his death a resident of the state, or not then a resident of any of the states in which his lands lie, and in the last case the most valuable part of such lands lie in this state, such heir or devisee, or any person claiming under him, may file a petition in the superior court for the county where the deceased resided at his death, or where any part of the land lies in this state, setting forth all the lands in which the plaintiff has an undivided estate, without and within the state, described by their names and boundaries, or by the adjoining tracts, and also the estate the deceased had in them, and the supposed value of the lands in each state, and the share, in severalty, to which the plaintiff and each of his cotenants is entitled under the laws of the several states, and praying for partition to be made of all the tracts, according to their respective interests. The material facts set forth in the petition shall be verified by the affidavit of the plaintiff or his guardian, or other person, at the discretion of the court; and all persons concerned in interest in the lands shall be made parties, according to the practice of the superior court in this state. (Rev., s. 2499; Code, s. 1911, 1868-9, c. 122, s. 20.)

§ 3247. Court may decree partition.—On the hearing of the petition, the court may decree a partition; and shall allot in severalty to each tenant his just share of the lands, according to the value of his interest in the same, by the laws of the several states in which they are situated. (Rev., s. 2500; Code, s. 1912; 1868-9, c. 122, s. 21.)

§ 3248. Commissioners appointed; how partition made; report and confirmation.—The court making such decrees shall issue a commission to three respectable freeholders in this or any other state where any part of the land may lie, unconnected by blood or interest with the parties, directing them or a majority of them to make partition between the cotenants, plaintiffs and defendants in said petition, and to assign each his

respective share in the value, in severalty, in any tract or tracts, in any or all the states. Before making the allotment the commissioners shall make a valuation of all the lands held by the cotenants in all the said states; and where they cannot, without injury to the value of some shares, make an exact division of the lands, they shall charge the more valuable dividends with money to be paid to the tenants of a less valuable dividend to make equality of partition. They shall report their proceedings as they may be directed, and the report shall contain a valuation of all the estate in this and the other states, and the division among the cotenants according to such valuation. The court may confirm such report, or on sufficient cause shown may correct and alter, or set it aside and order a new commission. (Rev., s. 2501; Code, s. 1913; 1868-9, c. 122, s. 22.)

§ 3249. Provisions as to owelty.—Where any sum is charged on a more valuable dividend, it shall be a charge on the land into whose hands soever it may come, although it may be taken without notice, and shall bear interest at a rate not greater than allowed in this state. The tenant of the larger dividend may discharge himself from accruing interest by paying the whole amount due at any time. The court may direct, if the tenant taking such a dividend is an infant, that the sum charged shall not be paid till a future day. (Rev., s. 2501; Code, s. 1913; 1868-9, c. 122, s. 22.)

See section 3231 and notes thereto as to owelty on land within the States.

§ 3250. Final decree; enrollment and registry; service on parties; effect.—The court shall, upon the confirmation of any report of the commissioners, make a final decree. And where all the parties are within the jurisdiction of this court, the court shall, by the usual proceedings, direct and compel the parties to execute and deliver deeds and assurances, sufficient, by the laws of this state and the other states, to give the partition full force and validity in all states; and in case any of the parties are under such disabilities that they cannot execute such assurances, or are without the jurisdiction of the court, then the court, upon receiving evidence from the plaintiff that, by a law of the other state in which lie the parts of the lands described in the petition to be without this state, the decree can have effect thereon, shall direct the decree to be enrolled, and a copy of it shall be registered in the register's office of all the counties within this state where any of the lands lie; and a copy shall also be furnished to the plaintiff or other party interested, duly certified, to the end that, as to the lands without this state, it may be carried into effect in the state in which the said lands may be, in such manner as said state may direct; and on satisfactory evidence being made to the court in this state that the decree may have full effect by the law of such other state, the court in this state shall by its decree declare the partition in the land in this state to be final and conclusive. The decree shall be firm and irreversible, as hereinafter provided; and shall, on registration as aforesaid, pass to the tenants the title in severalty to the lands in this state in the same manner as if all the land mentioned in the decree were situate within this state. (Rev., s. 2501; Code, s. 1913; 1868-9, c. 122, s. 22.)

§ 3251. Effectuating decree of sister state; enrollment; registry and confirmation; effect.—Where real estate may be partly in this state and partly in another state, and the deceased person from whom it was derived by descent or devise was, at the time of his death, a resident of some other state, or was a resident of none of the states in which he held lands, and in this last case the lands of which he was seized in this state were of less value than the lands of which he was seized in any other state, the courts of the state in which such deceased person had his residence at his death, or in which he held lands of greater value than those he held in this state, shall have full power and authority, under any law passed by the legislature of such state substantially in accordance with the provisions herein made on this subject, to decree partition of the lands in this state, together with those within such other state, in the same manner as if the whole real estate were within the jurisdiction of such court, and in the same manner as the courts in this state are directed and authorized to do by the preceding section, as to the lands of deceased persons resident here at their death, or leaving lands of greater value here than in any other state. In case any person having an interest in the final decree, made as aforesaid in another state, as to lands in this state, shall, within twelve months after the same may be entered up in the courts of said state, produce the records and proceedings of such courts of record duly certified to a superior court of any county in this state where any of the lands of this state lie, the court, on petition ex parte in such case, shall order such proceedings to be entered of record in the court of this state, and order that the said decree shall be of the same force and validity as if it had been a decree of the court in this state in which the petition is filed, upon a petition and regular proceedings had thereon, and the decree of the court of such other state, and the proceedings on it by petition in the superior court in this state confirming it and giving it validity, being enrolled in the said court of this state and registered in all the counties where the lands lie in this state, shall pass the lands in this state, according to the decree, and shall vest estates in severalty therein declared, as to said lands, in the same manner and with the same effect in law as if the lands in this state had been so allotted on a petition for partition, according to the provisions of the former sections of this chapter. (Rev., s. 2502; Code, s. 1914; 1868-9, c. 122, s. 23.)

§ 3252. When court may decide whether statute passed in another state.—Where a copy of a decree and proceedings of a suit in any other state are produced, as in the preceding section, and also when it is necessary for a superior court to be certified that its decree of a partition of lands without this state and within the territory of another state can have effect herein, it is competent for the judge of the superior court before which the existence of a law in such other state is to be proved, to decide whether any act of the

legislature of such state has been passed. (Rev., s. 2503; Code, s. 1915; 1868-9, c. 122, s. 24.)

Art. 4. Partition of Personal Property

§ 3253. Personal property may be partitioned; commissioners appointed.—When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equal as possible among the tenants in common, or joint tenants. (Rev., s. 2504; Code, s. 1917; 1868-9, c. 122, s. 27.)

Exclusiveness of Remedy.—A petition for the partition of personal property is the only remedy one tenant in common has against another for withholding possession. Grim v. Wicker, 80 N. C. 343; Powell v. Hill, 64 N. C. 169.

Same—No Right to Exclusive Possession.—One tenant in common or joint owner of personal property cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property because the defendant forcibly took it from the plaintiff's possession; the plaintiff's only remedy is to have the property partitioned. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782.

Injunction to Prevent Destruction.—Where, pending a suit for partition of personal property, the defendant threatened the destruction or removal of the property, the court, on the plaintiff's application, might grant an injunction or appoint a receiver. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782.

Title to Personalty.—In petitions for the partition of personal property owned in common, where the defendant sets up title in severalty in himself, the title to the property may be tried on the petition. Edwards v. Bennett, 32 N. C. 361, cited in note in 27 L. R. A., N. S., 69.

Notes.—The owners of notes, as tenants in common, are entitled to partition. Central Bank, etc., Co. v. Board of Commissioners, 195 N. C. 678, 681, 143 S. E. 252.

§ 3254. Report of commissioners.—The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made. (Rev., s. 2505; Code, s. 1918; 1868-9, c. 122, s. 28.)

As to the commissioner's report in proceedings for the partition of real property, see section 3228 et seq.

Cited in Clement v. Ireland, 129 N. C. 220, 39 S. E. 838.

§ 3255. Sale of personal property on partition; report of officer.—If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person, who shall file his report of sale in the office of the clerk of the court within ten days after sale. (Rev., s. 2519; Code, s. 1919; 1868-9, c. 122, s. 29.)

As to the sale of real property in partition proceedings, see section 3242 et seq.

§ 3256. Confirmation and impeachment of reports of commissioners or officer.—If no exception to the report of the commissioners making partition, or to the report of the officer making sale, as the case may be, is filed within twenty days, the same shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., ss. 2505, 2519; Code, ss. 1918, 1919; 1868-9, c. 122, ss. 28, 29.)

Cross References.—As to the confirmation or impeachment of the commissioner's report in partition of real property, see section 3230.

As to the confirmation and impeachment of sales, see section 3243.

§ 3257. Notice of sale of personal property.—The sale shall be made after twenty days notice, by advertisement in three or more public places in the county and shall be on such terms as the court may direct. (Rev., s. 2520; Code, s. 1920; 1868-9, c. 122, s. 30.)

As to the statutory provision regarding the notice of sale of real property, see section 3240.

CHAPTER 64

PARTNERSHIP

Art. 1. Limited Partnership

§ 3258. Purposes for which formed.—Limited partnership for the transaction of any mercantile, manufacturing or mechanical business within the state may be formed by two or more persons, upon the terms and with the rights and powers and subject to the conditions and liabilities in this chapter; but its provisions shall not be construed to authorize any such partnership for the conducting of a banking or insurance business, other than writing or soliciting insurance. (Rev., s. 2521; Code, s. 3088; 1860-1, c. 28.)

Justice's Jurisdiction.—Where the liability of a defendant, sued in a justice's court as a general partner of a partnership indebted to the plaintiff, depends upon the legal sufficiency of the articles of limited copartnership and matters connected with their registration and publication, and there being no equities to adjust, the justice had jurisdiction, and a motion to dismiss for want of such jurisdiction, based on the ground that it was necessary to bring an action in the superior court to declare the articles void, was properly refused. Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815.

§ 3259. General and special partners; liability.—Such partnerships may consist of one or more persons, who are general partners, and are jointly and severally responsible as partners are now by law, and of one or more persons, who contribute in actual cash payments a specific sum as capital to the common stock, who are called special partners, and who are not liable for the debts of the partnership beyond the funds so contributed to the capital. (Rev., s. 2522; Code, s. 3089; 1860-1, c. 28, s. 2.)

As to effect of false statement upon status of special partner, see section 3264.

See 13 N. C. Law Rev., 79.

Liability.—In a special partnership the power of each partner in regard to dealings with third persons, who have notice of the terms, is special. If, however, the terms are violated and the transaction inures to the benefit of the partnership, the partnership is liable. Clark v. Bernheim, 76 N. C. 139.

Nature of Liability.—Under the provisions of this section, the liability of each partner for the firm's debt is made both joint and several, and the English equitable doctrine that requires the firm's creditors to exhaust the partnership assets and then call in aid the property of the individual partner for the unpaid balance of the firm's debts no longer obtains in this jurisdiction. As to whether the individual and private creditors of a deceased partner are entitled to share ratably with the creditors of the partnership in the deceased partner's interest in the firm assets, quere? Virginia-Carolina Chemical Co. v. Walston, 187 N. C. 817, 123 S. E. 196.

When a Special Partner Is Liable.—A partner, not bound

by the act of his associate in its inception, assumes the obligation when he takes the benefit of the property acquired by his copartner and assents to its going into the common stock, as truly as if the right to bind the firm in the premises existed. Johnston, etc. Co. v. Bernheim, 86 N. C. 339, 342.

The power of each partner is special in regard to all dealings with third persons, at least, who have notice of the terms. But even in that case, if the terms are violated, as if a partner buy on time, when he ought to buy for cash, and the thing bought comes into the partnership, and the partnership takes the benefit, the partnership must pay for it; and so must each member of the firm be liable if necessary, out of his individual estate. Johnston, etc., Co. v. Bernheim, 86 N. C. 339, 341.

Benefit Need Not Accrue to Him Separately.—It is not necessary in order to reach this result that the benefit should accrue to him separately and peculiarly. It is sufficient if the funds of the firm are argumented by the acquisition, in which he could participate, or the joint liability for expenses incurred in conducting the business are paid or lessened in amount by an appropriation of the proceeds, for the obvious reason that each partner has a direct interest in both. Johnston, etc., Co. v. Bernheim, 86 N. C. 339, 342.

§ 3260. Certificate filed; contents.—The persons desirous of forming such partnership must make and severally sign a certificate containing: First, the name or firm under which such partnership is to be conducted; second, the general nature of the business to be transacted; third, the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence; fourth, the amount of capital which each special partner has contributed to the common stock; fifth, the period at which such partnership is to commence and terminate. (Rev., s. 2523; Code, s. 3090; 1860-1, c. 28, s. 3.)

The articles of limited partnership must be filed and recorded as required by the statute. Southern States Supply Co. v. Lyon, 173 N. C. 445, 447, 92 S. E. 145.

§ 3261. Certificate proved and registered. — The certificate must be acknowledged or proved before some one competent to take the probate of deeds and ordered registered in the same manner as provided for deeds, and must be registered in the county in which the principal place of business of such partnership is situated. If the partnership has places of business in different counties, a transcript of the certificate and acknowledgement certified by the register must be registered and filed in the register's office of each of such counties. (Rev., s. 2524; Code, ss. 3091, 3092; 1860-1, c. 28, ss. 4, 5.)

As to who may take acknowledgment and proof, see sections 3293 et seq.; as to registration, see sections 3308-3321.

§ 3262. Affidavit as to cash payment.—At the time the certificate is ordered to be registered an affidavit of one or more of the general partners shall be made before the officer taking such acknowledgment, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually in good faith paid in cash, and the affidavit so made shall be registered with the original certificate. (Rev., s. 2525; Code, s. 3093; 1860-1, c. 28. s. 6.)

§ 3263. Probate and registration necessary.— No such partnership shall be deemed to have been formed until such certificate and affidavit have been made, acknowledged, or proved, and registered as required in the preceding sections. (Rev., s. 2526; Code, s. 3094; 1860-1, c. 28, s. 7.)

As to probate and registration generally, see sections 3293 et seq.

§ 3264. Effect of false statement.—If any false statement is made in such certificate of affidavit, all the persons interested in such partnership shall be liable as general partners. (Rev., s. 2527; Code, s. 3095; 1860-1, c. 28, s. 8.)

§ 3265. Terms of partnership published.—The terms of the partnership must be published immediately after its formation for six successive weeks, in at least one newspaper in the same county or near the place of said partnership business, and if such publication be not made, the partnership shall be deemed general. (Rev., s. 2528; Code, s. 3096; 1860-1, c. 28, s. 9.)

Publication of the terms of the partnership in a newspaper, as directed by the section, is indispensable in order to constitute a limited partnership; if such publication be omitted, the partnership is general. Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815.

§ 3266. Proof of publication. — Affidavits of such publication, made by the proprietor of such newspaper in which the same is published, may be filed with the clerk of the superior court of the county in which such business is conducted, and shall be evidence of the fact. (Rev., s. 2529; Code, s. 3097; 1860-1, c. 28, s. 10.)

§ 3267. Requirements for renewals and continuances.—Every renewal or continuance of such partnership beyond the time originally fixed for its duration must be certified, acknowledged and registered, and on affidavit of a general partner made and filed, and notice given by publication as required for its original formation, and every such partnership which is otherwise continued must be deemed a general partnership: Provided, the affidavit herein required may state that the amount of cash therein specified had been originally paid in good faith, and that it is represented by goods or merchandise then on hand, and has not been impaired in the course of trade. (Rev., s. 2530; Code, s. 3098; 1860-1, c. 28, s. 11.)

§ 3268. Alteration deemed a dissolution.— Every alteration which is made in the names of the partners, in the nature of the business, in the capital or shares thereof or in any other matter specified in the original certificate must be deemed a dissolution of the partnership; and any such partnership which is in any manner carried on after such alteration has been made must be deemed a general partnership, unless renewed as a special partnership, according to the preceding sections. (Rev., s. 2531; Code, s. 3099; 1860-1, c. 28, s. 12.)

§ 3269. Name of firm.—The business of the partnership must be conducted under a firm, in which the names of the general partners only are inserted, without the addition of the word "company" or any other general term, except the word "limited"; and if the name of any special partner is used in the firm with his privity, he shall be deemed a general partner. (Rev., s. 2532; Code, s. 3100; 1899, c. 75; 1860-1, c. 28, s. 13.)

§ 3270. Actions as in general partnership. — Suits in relation to the business of the partner-

ship may be brought and conducted by and against the general partner in the same manner as if there was no special partner. (Rev., s. 2533; Code, s. 3101; 1860-1, c. 28, s. 14.)

§ 3271. Special stock not withdrawn nor reduced.—No part of the sum which any special partner has contributed to the capital stock must be withdrawn by or paid to him in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of such capital; and if, after the payment of such interest, any profit remain to be divided, he may receive his portion of such profits. (Rev., s. 2534; Code, s. 3102; 1860-1, c. 28, s. 15.)

§ 3272. Depleted capital restored.—If it appears by the payment of interest or profits to any special partner that the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital without interest. (Rev., s. 2535; Code, s. 3103; 1860-1, c. 28, s. 16.)

§ 3273. Rights of special partner.—A special partner may from time to time examine into the state and progress of the partnership concern; he may advise as to its management and act as attorney at law, but must not transact any other of the partnership business, nor be employed for that purpose as agent or otherwise; and if he interfere contrary to this section he is deemed a general partner. (Rev., s. 2536; Code, s. 3104; 1860-1, c. 28, s. 17.)

§ 3274. Accounting inter se. —These general partners are liable to account to each other, and to the special partners, for their management of the partnership, as other partners. (Rev., s. 2537; Code, s. 3105; 1860-1, c. 28, s. 18.)

§ 3275. Special partner as a creditor in insolvency.—In case of the bankruptcy or insolvency of the partnership, no special partner, under any circumstances, is to be allowed to claim as a creditor until the claims of all the other creditors of the partnership are satisfied. (Rev., s. 2538; Code, s. 3107; 1860-1, c. 28, s. 20.)

§ 3276. Notice of dissolution.—No dissolution of such partnership by the acts of the parties must take place before the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of its dissolution has been registered in the register's office in which the original certificate was registered, and published once a week for four successive weeks in the nearest newspaper to each of the places where the partnership transacts its business. (Rev., s. 2539; Code, s. 3108; 1860-1, c. 28, s. 21.)

In a case involving the dissolution of a general partnership it was held that personal notice of dissolution of a partnership should be given to those who had theretofore sold it goods, and notice by newspaper publication to the public generally. Where a vendor ships goods to a partnership who had theretofore dealt with it, upon the order in the partnership name, without knowledge of the dissolution or notice sent to that effect, each member of the partnership is liable therefor. Southern States Supply Co. v. Lyon, 173 N. C. 445, 92 S. E. 145.

Art. 2. Surviving Partners

§ 3277. Surviving partner to give bond.—Upon the death of any member of a partnership, the surviving partner shall, within thirty days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the state of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds. (1915, c. 227, ss. 1, 2, 3.)

The death of a partner works, by operation of law, a dissolution of the firm. George on Partnership, 257; Bates on Partnership, sec. 610; Bank v. Hollingsworth, 135 N. C. 556, 568, 47 S. E. 618.

Applied in Reel v. Boyd, 198 N. C. 214, 151 S. E. 192.

§ 3278. Effect of failure to give bond.—Upon the failure of the surviving partner to execute the bond provided for in the preceding section, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person. (1915, c, 277, s. 4.)

§ 3279. Surviving partner and personal representative make inventory.—When a member of any partnership dies the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner. (Rev., s. 2540; 1901, c. 640.)

Not Retroactive.—This section does not apply to actions then pending and is not retroactive. Bank v. Hodgin, 129 N. C. 247, 39 S. E. 959.

Property Vests in Surviving Partner.—The surviving copartner has the closing up of partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and, under Revisal 1905, sec. 1579, now section 1735 of this Code, the title to this class of personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Duty.—After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all persons interested. Calvert v. Miller, 94 N. C. 600.

"Although as to future dealings," remarks Story, "the partnership is terminated by the death of one partner, yet for some purposes, it may be said to subsist, and the rights, duties, powers and authorities of the survivors remain, so far as is necessary to enable them to wind up and settle the affairs of the partnership." Story Part., Sec. 344. Quoted with approval in Calvert v. Miller, 94 N. C. 600, 603.

Same—Rights.—It is the right as well as the duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and apply the same toward the payment of the debts and liabilities of the firm. Story on Partnership, sec. 344; Weisel v. Cobb, 114 N. C. 22, 18 S. E. 943; Hodgin v. Bank, 124 N. C. 540; Hodgin v. Bank, 128 N. C. 110, 111, 38 S. E. 294.

Same—Same—To Create New Debts.—A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new

material and making new debts so far as may be necessary to work up unfinished material and sell the same. Howell v. Boyd Mfg. Co., 116 N. C. 806, 22 S. E. 5.

Same—Power to Endorse Note.—A surviving partner has no power after dissolution to renew or endorse a firm note in the name of the firm. Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

A surviving partner who, more than two years after dissolution of the firm, indorsed a note in the firm name for the renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind the firm. Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

Same—Impressed with a Trust.—The death of a partner, in the absence of any stipulation in the articles of copartnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. Walker v. Miller, 139 N. Co. 448, 52 S. E. 125.

When Danger of Misapplication of Funds.—In case of danger of misapplication by the surviving partner of partnership funds, the court would certainly, in behalf of the representatives of a deceased partner, interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and there is no reason why they should not interfere in behalf of a creditor in such a case. Hodgin v. Bank, 128 N. C. 110, 111, 38 S. E. 294.

When Surviving Partner Is Agent of Executor.—Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, it was held that the manager became the agent of the executor as well as of the other surviving member, and a demand and refusal to account are necessary to terminate the agency and put the statute of limitations in operation. Patterson v. Lilly, 90 N. C. 82.

When Property Held in Common.—An arrangement between distributees and legatees to permit their property with the consent and co-operation of the representatives of the deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership. Walker v. Miller, 139 N. C. 448, 52 S. E. 125.

Personal Property Exemptions.—A surviving partner of an insolvent firm is not entitled to have his personal property exemptions paid out of the partnership assets. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

Competency of Witness.—In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the executor of the deceased partner or against the firm. Fertilizer Co. v. Rippy, 124 N. C. 643, 32 S. E. 980; Moore v. Palmer, 132 N. C. 969, 44 S. E. 673.

A surviving partner, who assigns partnership property of an insolvent firm to pay his own debts pro rata with those of the firm, cannot be allowed to testify that he did not thereby intend to defraud the firm creditors. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Representative Not Subject to Suit.—The representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler, 1 N. C. 167.

§ 3280. When personal representative may take inventory; receiver.—If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of the preceding section. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (Rev., s. 2541; 1901, c. 640, s. 2.)

Receiver Appointed When Assignee Holds for Indefinite Time.—Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver might be appointed to administer the partnership fund among the creditors though the deed was not set aside. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Surviving Partner Appointed Receiver.—Where the surviving partner of a firm is appointed receiver of the firm, he cannot maintain an action against one who, as surety for the accommodation of the deceased partner indorsed the latter's note, which was discounted by the firm, if it appears that the assets of the partnership are sufficient to pay its debts and leave a surplus against the deceased partner's share of which the note can be charged. Patton v. Carr, 117 N. C. 176, 23 S. E. 182.

Duty of Assignee to Charge Interest.—Where the surviving partner of a firm conveyed the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the business has been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the copartnership, and he is liable to the surviving partner for his failure to do so. Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782.

Same—Assignee Liable for Interest.—The assignee of a surviving partner is chargeable with interest on the partnership moneys kept by him after twelve months from the time he assumed the trust until he disbursed it. Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782.

§ 3281. Notice to creditors.—Every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from the date of first publication of such notice. The notice shall be published once a week for four weeks in a newspaper (if there be any) published in the county where the partnership existed. If there should be no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. (Rev., s. 2542; 1901, c. 640, s. 3.)

Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

§ 3282. Debts paid pro rata; liens.—All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (Rev., s. 2543; 1901, c. 640, s. 4.)

When Interest of Firm Demands Creation of Debt.—While a surviving partner cannot enter into contracts, or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, bona fide, for the interest of the common property, he may pay them out of the common fund. Calvert v. Miller, 94 N. C. 600.

Same—Creditors Advancing Funds to Market Product.—Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to pay out of assets of the partnership. Howell v. Boyd Manufacturing Co., 116 N. C. 806, 22 S. E. 5.

Personal Debt as Set-Off.—In an action brought by a surviving partner for a debt, a debt due from him may be pleaded as a set-off. Hogg v. Ashe, 2 N. C. 471.

But a defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, being for the board of his partner, should be paid out of the store in which the plaintiff and the defendant were copartners. Norment v. Johnston, 32 N. C. 89.

Division Not Permitted before Settlement.—"There can be no division of partnership property," in the language of Ruffin, C. J., in Baird v. Baird, 21 N. C. 524, "until all the accounts of the partnership have been taken and the clear

interest of each partner ascertained." Mendenhall v. Benbow, 84 N. C. 646, 650.

Prior Encumbrance.—The claims of a surviving partner upon the proceeds of sale of the deceased partner's half of the real estate (here mill property), to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constitute a prior encumbrance and must be paid, to the postponement of creditors of the deceased partner. Mendenhall v. Benbow, 84 N. C. 646.

When Assignment for Indefinite Term Fraudulent.—An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants and to replenish the stock, and out of the proceeds to pay firm debts, and also the individual debts of the survivor pro rata, is fraudulent as against creditors. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Bank May Not Apply Deposits to Debts.—When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor. Hodgin v. National Bank, 125 N. C. 503, 34 S. E. 709, 712.

Accommodation Indorser of Note for Member of Firm.—A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, indorses it and receives no benefit from it, cannot be subject to an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorsers unless the firm is insolvent. Patton v. Carr, 117 N. C. 176, 23 S. E. 182.

Prior Law.—A surviving partner, is not compelled to pay the debts of the partnership pro rata, or in any prescribed order. Hodgin v. Bank, 124 N. C. 540, 32 S. E. 887. It is true that he holds the funds in trust for the payment of the partnership debts, but he has the same discretion as to preference in the payment of those debts as the firm had before the dissolution by death of one of the partners. He is not bound by any rule prescribed by statute, as are executors and administrators, in this respect. Hodgin v. Bank, 128 N. C. 110, 112, 38 S. E. 294. This case was decided in the February term, 1901, before the section went into effect. It would seem that it is now obsolete under the terms of the section.

§ 3283. Effect of failure to present claim in twelve months.—In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (Rev., s. 2544; 1901, c. 640, s. 5.)

§ 3284. Procedure for purchase by surviving partner.—1. Appraisal of Property.—The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisement of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

2. Surviving Partner May Purchase.—The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

3. Surviving Partner to Give Bond.—In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and the performance of all contracts for which the partnership is liable.

4. Sale of Real Estate.—In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law devisees of the deceased partner are duly made parties. (Rev., s. 2545; 1901, c. 640, s. 6; 1911, c. 12.)

§ 3285. Surviving partner to account and settle.—In case the partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the death of the deceased partner, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent out of the share of the deceased partner. (Rev., s. 2546; 1901, c. 640, s. 7.)

Editor's Note.—The English doctrine is that surviving partners, trustees, etc., are not entitled to commissions or compensation for their services. However, the doctrine has met with little favor in the American courts. The rule in America has been to allow commissions. The rule was laid down in this State, by Mr. Chief Justice Ruffin in Boyd v. Hawkins, 17 N. C. 195. It seems that the great Chief Justice correctly pointed out the reason for the difference between the English and the American rule in that case. In England persons acting in a fiduciary capacity are not practically at any trouble or expense about their trusts, because the whole business is managed through attorneys. In this country the custom is different. The surviving partner himself looks after the closing out of the business, often involving much time and expense.

The holding of the courts and the tendency of legislation in this State has been to provide compensation for persons acting in a fiduciary character. Yet, it was 1901 before the Legislature finally confirmed the rule laid down by the court by statutory enactment.

Presumption of Equal Interest. — In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business. State v. Brower, 93 N. C. 344.

If an agreement for a common or special partnership appears to have existed between parties for the purchase of

property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the concern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there be no contract as to the amount of the advances to be made by them respectively. Taylor v. Taylor, 6 N. C. 70.

Note Arising Out of Business.—In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from or grew out of the business of the co-partnership business. Royster v. Johnson, 73 N. C. 474.

Compensation.—Under the law of this State, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business. Royster v. Johnson, 73 N. C. 474. See Editor's Note above.

In Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782, it was held, that two and one-half per cent. commissions on receipt and disbursement was enough to be allowed the assignee for his services, under the circumstances in that case.

Loss.—Where the surviving partner, has acted in good faith in a fiduciary character he is not chargeable with loss. Thompson v. Rogers, 69 N. C. 361.

§ 3286. Accounting compelled.—In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators. (Rev., s. 2547; 1901, c. 640, s. 8.)

§ 3287. Settlement otherwise provided for.—When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will. (Rev., s. 2545; 1901, c. 640, s. 6.)

Art. 3. Business Under Assumed Name Regulated

§ 3288. Certificate filed; contents.—No person shall hereafter carry on, conduct or transact business in this state under assumed name, or under any designation, name or style other than the real name of the individual owning, conducting or transacting such business, unless such person shall file in the office of the clerk of the superior court of the county in which such person owns, conducts or transacts, or intends to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business owned is or is to be conducted or transacted, and the true or real full name of the person owning, conducting or transacting the same, with the home and post-office address of such person. The certificate shall be executed and duly acknowledged by the person so owning, conducting or intending to conduct such business: Provided, that the selling of goods by sample or through traveling agents or traveling salesman, or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this section as conducting or transacting business so as to require the filing of such certificates. (1913, c. 77, s. 1.)

Highly Penal.—The section is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision. Jennette v. Coppersmith, 176 N. C. 82, 97 S. E. 54.

Purpose and Operation.—This statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation of the statute are prescribed by sec. 3291. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute. Farmers' Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527, 529.

The section was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract in our courts made in the course of such business, though the statute does not expressly invalidate such transactions. Courtney v. Parker, 173 N. C. 479, 92 S. E. 324. The rule laid down in this case is now changed by legislative enactment. See sec. 3291 and annotations thereto.

The intent of chapter 77, Public Laws 1913, now this and the following sections of this article requiring that a partnership under an assumed name shall file a certificate in the office of the clerk of the superior court setting forth the name under which the business is conducted, with the full names and addresses of the persons owning and conducting it, etc., was to prevent fraud or imposition upon those dealing therewith, and to afford them means for knowing the statute and responsibility of the concern with which they deal. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

When Not Applicable.—It does not apply between partners who are presumed to know these conditions; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead partner, and the requirements of the statute had not been complied with. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

Same—Surname of Proprietors. — Where a partnership business is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, chapter 77, Laws 1913, forbidding the carrying on or transacting business under an "assumed name," etc., does not apply. Befarah v. Spell, 176 N. C. 193, 96 S. E. 949.

Same—A Silent Partner.—Where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves, chapter 77, Public Laws 1913, now this article does not apply, and an action of the silent partner to recover his share of the assets from the other is not founded upon any wrong, and the principles relating to such transactions do not apply, or avoid his recovery. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

§ 3289. Index of certificates kept by clerk. — The several clerks of the superior court of this state shall keep an alphabetical index of all persons filing certificates provided for herein, and for the indexing and filing of such certificates they shall receive a fee of twenty-five cents. A copy of such certificates duly certified to by the clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained. (1913, c. 77, s. 2.)

§ 3290. Corporations and limited partnerships not affected.—This article shall in no way affect or apply to any corporation created and organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall it in any manner affect the right of any persons to form limited partnerships as provided by the laws of this state. (1913, c. 77, s. 3.)

§ 3291. Violation of article misdemeanor. — Any person owning, carrying on or conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this article, shall

be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars or imprisonment in the county jail for a term of not exceeding thirty days. Provided, however, that the failure of any person or persons owning, carrying on, or conducting or transacting business as aforesaid, to comply with the provisions of this article shall not prevent a recovery by said person or persons in any of the courts of this state. (1913, c. 77, s. 4; 1919, c. 2.)

Nature of Section.—As stated in Courtney v. Parker, infra, and reaffirmed in Price v. Edwards, infra, this statute is "a police regulation to protect the general public, as heretofore stated, from fraud and imposition." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Application.—In Courtney v. Parker, 173 N. C. 479, 92 S. E. 324, it was held that the statute was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract made in the course of such business, though the statute does not expressly invalidate such transactions. See note infra.

This statute was further considered by the court in Jennette v. Coppersmith, 176 N. C. 82, 97 S. E. 54. In that case, Courtney v. Parker, supra, was distinguished, and the plaintiffs allowed to recover without filing the certificate required by sec. 3288, because the title of the plaintiffs' firm, Jennette Bros., afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and therefore did not come clearly within the doctrine of "assumed" names. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630. See note following immediately hereafter.

When Courts Will Not Lend Aid.—The courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

In Jennette v. Coppersmith, supra, the court, reviewing Courtney v. Parker, after referring to the highly penal character of this statute, says: "It should not be extended or held to include cases that do not come clearly within its provision." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Same—Act Not Forbidden by Statute.—In Hines v. Norcott, 176 N. C. 123, 130, 96 S. E. 899, the court held that this statute did not apply, because the action did not arise out of the doing of an act forbidden by the statute. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630.

Same—When Transaction Illegal.—In Fineman v. Faulkner, 174 N. C. 13, 16, 93 S. E. 384, L. R. A. 1918F 337, the plaintiff had not violated any statute, but was suing the administrator of Mamie Faulkner who was engaged in an illegal business, and the court says: "In all the cases in which recovery has been denied, it will be found that either the consideration or the transaction was illegal or the vendor participated in the illegal purposes of the purchaser." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630. See notes supra.

Same—Courtney v. Parker Overruled by 1919 Amendment.—The foregoing were decided by the court prior to the enactment of chapter 2, Public Laws 1919. This enactment added the proviso now appearing in this section, and this proviso had the effect to change the decision in Courtney v. Parker, supra, as to violations of section 3288. The legislative intent is clear, not only in the act itself, but the title: "An act to amend chapter 77 of the Public Laws of 1913, regulating the use of assumed names in partnerships, so as to permit recovery in actions brought by a partnership which has failed to register." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

In Real Estate Co. v. Sasser, 179 N. C. 497, 498, 103 S. E. 73, the court considers this statute (Public Laws 1913, ch. 77) together with chapter 2, Public Laws 1919, now contained in sections 3288-3291, inclusive, and allows the plaintiff to recover, although he was carrying on a real estate business, and he admitted direct violation of this statute. The court says that this amendment (chapter 2, Public Laws 1919) applied to pending actions and to transactions prior to its enactment, in the absence of a saving clause (36 Cyc. 1164). And, since it is a mere police regulation, it may be abolished at any time and no vested rights are required under it. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Same—Contracts Not Void.—It is clear by express enactment, that the Legislature intended by adding the proviso that the punishment should be confined to the fine or imprisonment, set out in this section, but that contracts made by persons carrying on or conducting or transacting business in violation of this statute, should not be void. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

§ 3292. Person trading as "company" or "agent" to disclose real parties; married woman not disclosing, a free trader.—If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to disclose the name of his principal or partner by sign placed conspicuously at the place wherein such business is conducted; or if any married woman conducts such business through her husband or any other agent, or if a husband or agent of any married woman conducts such business for her without displaying the Christian name of such married woman, and the fact that she is a feme covert, by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. A married woman conducting such business as aforesaid without complying with the provisions of this section shall for all purposes be deemed and treated, as to all debts contracted in the course of such business, as a free trader as fully as if she had in all respects complied with the provisions of law for a registered free trader: Provided, this section shall not apply to any person transacting business under a license as an auctioneer, broker, or commission merchant; in all actions under this section it is incumbent on such trader, merchant or married woman to prove compliance with the same. (Rev., s. 2118; 1905, c. 443.)

Constitutionality.—The section declaring a married woman a free trader, as to goods purchased in conducting a mercantile business, in charge of her husband as agent, etc., without displaying a sign to that effect in the manner directed, is constitutional and valid. Scott-Sparger Co. v. Ferguson, 152 N. C. 346, 67 S. E. 750.

The penalty fixed for the violation of the section is that the married woman so violating shall be deemed a free trader and shall be liable for her debts but she is not deprived of her rights to her personal property exemption, because such right is guaranteed by the Constitution. Crummen v. Bennett, 68 N. C. 494; Arnold v. Estes, 92 N. C. 162; Rankin v. Shaw, 94 N. C. 405; Dortch v. Benton, 98 N. C. 190, 3 S. E. 638; Rose v. Bryan, 157 N. C. 173, 72 S. E. 960; Bristol Grocery Co. v. Bails, 177 N. C. 298, 300, 98 S. E. 768.

Purpose of Section.—The purpose of the section is to prevent a married woman from conducting her business through her husband or any other agent so as to mislead her creditors in believing they are dealing with the person legally responsible in advancing credit to the husband or other agent, and from concealing her identity and coverture to that end. Weld v. LaMarguerite Shop Co., 147 N. C. 588, 61 S. E. 573.

When within Jurisdiction of Justice of Peace.—An action to make a stock of goods liable for a debt of a feme covert for goods sold and delivered, the business being hers and run by the husband as her agent, without complying with the provisions of the section, requiring the sign to be displayed showing such fact and the christian name of the feme covert, is cognizable in the court of a justice of the peace when the amount is within his jurisdiction. Scott-Sparger Co. v. Ferguson, 152 N. C. 346, 67 S. E. 750.

Application.—When the wife's name is properly displayed,

it is necessary to show some fraud on the part of the husband in order to hold him under the section. Morse v. Shultz, 156 N. C. 165, 72 S. E. 218.

The stock of goods of a feme covert in charge of her husband as her agent, etc., when the provisions of the section have not been complied with, requiring the sign to be displayed showing her christian name, and the fact that she was a feme covert, is liable for debts for goods sold to the husband for the business, notwithstanding the vendor knew the fact that the husband, for a brief interval previous to the purchase in question, did not run the business. Scott-Sparger Co. v. Ferguson, 152 N. C. 346, 67 S. E. 750.

Goods knowingly sold to and upon the responsibility of the wife, who was not a free trader, by the agent of the creditor, who knew the husband and was by him referred to the wife, with whom he made the contract in her own behalf, are not within the mischief intended to be suppressed by the statute so as to charge the feme covert or her property. Weld v. LaMarguerite Shop Co., 147 N. C. 588, 61 S. E. 573.

One partner may execute a valid mortgage on the partnership property to secure a partnership debt; and when the general manager of a firm composed of a feme covert and another executes such mortgage and has it registered and its execution and registration are admitted by the other partner as a partnership mortgage, it will be binding upon the partnership property, whether its execution on the part of the feme covert was formally and correctly proved or not. Stone Co. v. McLamb & Co., 153 N. C. 378, 69 S. E. 281.

CHAPTER 65.

PROBATE AND REGISTRATION

Art. 1. Probate

§ 3293. Officials of state authorized to take probate.—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this state: the several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the governor of this state, the clerk of the supreme court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. (Rev., s. 989; Code, s. 1246; 1899, c. 161, ss. 1, 3; 1897, c. 87.)

Cross References.—For a complete treatment of the nature and incidents of acknowledgments and proof of instruments, see 1 N. C. Enc. Dig. 80 et seq.; 13 N. C. Enc. Dig. 14, et seq.

Effect of Disqualification.—If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrances. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99. But when the incapacity of the acknowledging or probating officer is latent, i. e., does not appear upon the record, one who takes under the grantee in such instrument gets a good title, unless the party claiming the benefit of the defective acknowledgment or probate is cognizant of the facts. See cases cited in the opinion of Clark, J., and also Richmond Co. v. Walston, 187 N. C. 67, 122 S. E. 663; County Sav. Bank v. Tolbert, 192 N. C. 126, 130, 133 S. E. 558.

Woman Notary Qualified.—A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when deputized by the clerk of the superior court under the provisions of our statutes. Preston v. Roberts, 183 N. C. 62, 110 S. E. 586.

Interest and Relationship.—As to disqualification on the ground of interest and relationship, see sections 3299, 3305, and annotations thereto.

Cited in McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

§ 3294. Officials of the United States, foreign countries, and sister states.—The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice consul, consul general, vice consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States. If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this state or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (Rev., s. 990; 1899, c. 235, s. 5; 1905, c. 451; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1.)

See sections 963, 967, 968, 3175, 3176.

Compliance Essential.—This section prescribing how deeds may be proved and acknowledgment and privy examination taken in other states as well as in foreign countries, must be followed, or they and the registration thereon will be declared void. New Hanover Shingle Mills v. Roper Lumber Co., 171 N. C. 410, 88 S. E. 633.

Probate by Commissioner of Deeds in Another State. — Where the probate to a deed is taken by a commissioner of deeds in another state, and the certificate of the clerk of the court of that county is alone to that effect, without indication of authority of the commissioner to act therein for the State of North Carolina, the registration here upon the probate, as well as the probate, are both ineffectual, and will not be received as evidence of title, New Hanover Shingle Mills v. Roper Lumber Co., 171 N. C. 410, 88 S. E. 633.

In Wood v. Lewey, 153 N. C. 401, 402, 69 S. E. 268, the deed was acknowledged before a commissioner of deeds for the State of New Jersey, and not before some official authorized by the laws of this State to take such acknowledgment. The court declared that the probate was void and that the registration was also void. New Hanover Shingle Mills v. Roper Lumber Co., 171 N. C. 410, 411, 88 S. E. 633.

Proof before Notary Public in Another State.—A deed regularly proved before a notary public in South Carolina by authority of this section, is effectual to pass title as against creditors. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

Proof in This State by Notary of Another State.—The probate of an instrument taken in this State by a notary public of another state is defective. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

Same—Rights of Purchaser Where Record Is Clear.—While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire by his deed the title as against a subsequent judgment creditor, when the probate appears of record, in the office of the register of deeds in the county wherein the land is situate here, to have been regularly taken in South Carolina, and there is no evidence that such pur-

chaser had knowledge of the defect at or before the time he acquired his deed. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

By Woman Notary Public.—The position cannot be maintained that the probate is fatally defective, being taken by a woman, for it will be assumed that the notary was rightfully appointed in the State in which the deed was probated, and her act will be recognized as valid here. Nicholson v. Eureka Lumber Co., 160 N. C. 33, 75 S. E. 730.

§ 3295. Commissioner appointed by clerk for nonresident maker.—When it appears to the clerk of the superior court of any county that any person nonresident of this state desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he shall issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power or other instrument is duly acknowledged or proved, and that such examination, is in due form and shall order the same to be registered. (Rev., s. 991; Code, s. 1258; 1869-70, c. 185.)

§ 3296. By justice of peace of other than registering county.—If the proof of acknowledgment of any instrument is had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal. (Rev., s. 992; 1899, c. 235, s. 4.)

Omission to Register Seal Not Fatal.—The execution of a deed was proved before a justice of the peace in the County of Franklin, and the clerk of the superior court of that county certified the official character of the Justice of the peace under his official seal; the deed was thereupon registered in Granville County upon the fiat of the clerk of the superior court of the county, but the official seal of the clerk of Franklin superior court was not registered: It was held that the registration was valid. Perry v. Bragg, 111 N. C. 159, 16 S. E. 10.

§ 3297. When seal of officer necessary to probate.—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary. (Rev., s. 993; 1899, c. 235, s. 8.)

See note under § 3179.

Name of Notary on Notarial Seal.—The statute does not require that his name or any name should be used on the notarial seal, though customarily the name of the notary does appear thereon. The seal appended by the notary to his certificate is presumably his, in the absence of evidence to the contrary. This is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer," when the fact of the execution of the deed is adjudged to have been proved by such seal and certificate of the notary. Deans v. Pate, 114 N. C. 194, 196.

Effect of Omission of Justices' Seal.—The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, otherwise regular. Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758.

No Seal When Not Required by Statute.—The certificate of probate to a deed need not have a seal if not required by statute at the date of the execution. Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823.

Presumption as to Seal.—When a copy of the certificate of the commissioner of affidavits concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. Johnson v. Eversole Lumber Co., 147 N. C. 249, 60 S. E. 1129.

§ 3298. Officials may act although land or maker's residence elsewhere.—The execution of all instruments required or permitted by law to be registered may be proved or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this state in which the subject-matter of the instrument be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made. (Rev., s. 994; 1899, c. 235, s. 13.)

§ 3299. Probate where clerk is a party.—All instruments required or permitted by law to be registered to which clerks of the superior court are parties or in which such clerks are interested may be proved or acknowledged and privy examination of any married woman, when necessary, taken before any justice of the peace of the county of said clerk, which clerk may then, under his hand and official seal, certify to the genuineness thereof, or before any judge of the superior court or justice of the supreme court, and the instrument probated and ordered to be registered by such judge or justices of the supreme court in like manner as is provided by law for probates by clerks of the superior court in other cases: Provided, that nothing contained herein shall prevent the clerk of the superior court, who is a stockholder or officer of any bank or other corporation, from adjudicating and ordering such instruments for registration, as have been acknowledged or proven before some justice of the peace or notary public. All probates made prior to March 8, 1921, by any such clerk of conveyances or other papers by any corporation in which such clerk was an officer or stockholder are hereby validated and declared sufficient for all such purposes. (Rev., s. 995; 1891, c. 102; 1893, c. 3; 1913, c. 148, s. 1; 1921, c. 92; 1921, c. 106, s. 2.)

See sections 3305, 3343.

Officer Party Trustee or Cestui Que Trust.—An acknowledgment and privy examination before an officer who was

a party, trustee or cestui que trust in the deed is invalid. Long v. Crews, 113 N. C. 256; McAllister v. Purcell, 124 N. C. 262, 264, 32 S. E. 715.

Relation to Parties Not a Disqualification.—Probate and private examination taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715.

§ 3300. Attorney in action not to probate papers therein.—No practicing attorney at law has power to administer any oaths to a person to any paper writing to be used in any legal proceedings in which he appears as attorney. (Rev., s. 2350; Ex. Sess. 1908, c. 105, s. 2.)

§ 3301. Probates before stockholders in building and loan associations.—No acknowledgment or proof of execution, including the privy examination of any married woman, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments, proofs and privy examinations. (1913, c. 110, ss. 1, 3.)

§ 3301(a). Probate before stockholders in banking corporations.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred twenty-nine, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, was a stockholder or director in such banking corporation: Provided, that this section shall not affect litigation pending at the time of the passage of this section. (1929, c. 302, s. 1.)

Under this section where a mortgage is executed on the equity in lands in order to secure endorsers on a note against loss and the note is discounted at a bank, the contract to secure the endorsers against loss is a collateral agreement between the makers and endorsers to which the bank is not a party, and the acknowledgment to the mortgage taken by an official of the bank is valid. Watkins v. Simonds, 202 N. C. 746, 164 S. E. 363.

§ 3302. Subpœnas to maker and subscribing witnesses.—The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpoena for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpœna shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpœna he is liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses. (Rev., s. 996; Code, s. 1268; 1899, c. 235, s. 16; 1897, c. 28.)

See next section and notes thereto.

§ 3303. Proof of attested writing.—If an instrument required or permitted by law to be registered has a subscribing witness and such witness is dead or out of the state, or of unsound mind, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, but this shall not be proof of the execution of instruments by married women. Provided, that no instrument required or permitted by law to be registered shall be acknowledged or probated upon the oath and examination of a subscribing witness, who is also the grantee his agent or servant in said instrument; and the registration of any such instrument, which has been proven by the oath and examination of a subscribing witness, who is the grantee in said instrument shall be invalid; provided further, that nothing herein shall invalidate the registration of such instruments prior to the enactment of this section. Provided further, that this section shall apply also to agricultural liens. (Rev., s. 997; 1899, c. 235, s. 12; 1935, c. 168.)

Cross References.—See Black v. Justice, 86 N. C. 504, in annotation to the following section. As to proof by attesting witnesses of instruments which are not required to be attested, see section 1782; as to proof of handwriting by comparison, see section 1784.

Editor's Note.—The provisos at the end of this section were added by the 1935 amendment.

§ 3304. Proof of unattested writing.—If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker, but this shall not apply to proof of execution of instruments by married women. (Rev., s. 998; 1899, c. 235, s. 11.)

Admission to Probate by Proof of Handwriting of the Maker.—A deed having no subscribing witness, may be admitted to probate and registration upon proof of the handwriting of the maker; or, if the subscribing witness be dead, upon proof of his handwriting. Rollins v. Henry, 78 N. C. 342, overruled upon this point. Black v. Justice, 86 N. C. 504.

Proof of Writing of Nonresident by Resident Party. — Where the parties to an instrument requiring registration are nonresidents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party. LeRoy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

§ 3305. Clerk to pass on certificate and order registration.—When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration shall, before the same is registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he

shall so adjudge, and shall order the instrument to be registered, together with the certificates. If the clerk of the superior court is a party to or interested in such instrument such adjudication and order of registration shall be made by his deputy or by the clerk of the superior court of some other county of this state, or by some justice of the supreme court of this state or some judge of the superior court of this state. The acknowledgment of such instruments may also be made before a justice of the peace of said county, and the adjudication of the sufficiency of the certificate of said justice may be made by said clerk or his deputy: Provided, that nothing contained herein shall prevent the clerk of the superior court, who is a stockholder or officer of any bank or other corporation, from adjudicating and ordering such instruments for registration, as have been acknowledged or proven before some justice of the peace or notary public. All probates made prior to March 8, 1921, by any such clerk of conveyances or other papers by any corporation in which such clerk was an officer or stockholder are hereby validated and declared sufficient for all such purposes. (Rev., s. 999; 1899, c. 235, s. 7; 1905, c. 414; 1921, c. 91.)

Cross References.—See section 3299; As to form of adjudication and order of registration, see section 3322.

Elements of Adjudication.—If the certificate is not found in due form, the instrument is rejected. If the certificate is adjudged in due form, then the clerk admits to probate, i. e., probates it, passes upon the certificate as furnishing proof of execution, adjudges as to the genuineness of the certificate, the authority of the officer, and whether the justice or officer certifying is such, and the sufficiency of proof as certified. White v. Connelly, 105 N. C. 65, 66, 68, 11 S. E. 177.

Adjudication by Clerk Mandatory.—That this section requiring clerks of the superior court to adjudicate upon the probate to a deed for lands situated here is mandatory, and its omission will invalidate the conveyance as against the rights of purchasers and creditors. Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810.

The requirement of this section that the clerk of the court shall pass upon the sufficiency of the probate of a deed is mandatory and not directory. Woodlief v. Woodlief, 192 N. C. 634, 635, 135 S. E. 612.

The decision seems to overrule an earlier contrary holding in Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 125 S. E. 46, where it was held that when an acknowledgment or proof of the execution of a deed, or other instrument required or allowed to be registered, is taken by any other officer than the clerk of the superior court of the county where the land lies, it is not essential to the validity of registration that the latter should add an adjudication, or order of registration to the certificate and fiat of the officer taking the probate, as the provisions of this section were not intended to be mandatory, but directory merely. Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Same—Qualification of the Rule.—While it is held that such act of adjudication and order of registration are directory upon the clerk of the superior court of the county wherein the land is situated, it is so only where the fiat or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810.

Same—Where Probate Taken by Foreign Commissioner of Deeds.—The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another state, registered without the fiat or order for registration by a clerk of the superior court within the State, and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810.

Requirement as to Adjudication by Other Officer When Clerk Interested Mandatory.—The requirements of our statute as to certain other officials who shall pass upon the sufficiency of probate of mortgages when the clerk of the court is a mortgagee, in order to give priority of lien over those subsequently registered, must be observed in order for a valid registration of the instrument, it being a matter referred to the legislative branch of the government, with which the courts may not interfere. Norman v. Ausbon, 193 N. C. 791, 138 S. E. 162.

Where the clerk of the superior court is the grantee in a mortgage on lands, his passing upon the sufficiency of the grantor's probate before a justice of the peace is a judicial act which this section forbids, and cannot have the effect of giving his subsequent registration of the instrument priority of lien over a subsequent mortgage, properly probated and prior registered. Id.

Use of Words "In Due Form" Not Essential to Adjudication.—The adjudication by the clerk of the superior court that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," does not follow the very words of the statute in that it does not adjudge that said probate is "in due form." But it is intelligible and means substantially the same thing and "will be upheld without regard to mere form." Devereux v. McMahon, 102 N. C. 284, 9 S. E. 635. The acknowledgment was before an officer authorized to take it and probate was in fact in due form. The omission, therefore, of the clerk to adjudge in just so many words that the probate was "in due form" when in substance he did so adjudge, was not sufficient ground to exclude the deed. Deans v. Pate, 114 N. C. 194, 196, 19 S. E. 146.

Adjudication Cannot Be Delegated—Adjudication by Interested Clerk.—When the clerk of the superior court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution, and privy examination of a married woman by a justice of the peace, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function, which cannot be delegated to a deputy, nor exercised by the clerk as to an instrument to which he is a party. Hence, when the clerk, who is the grantor in a deed of trust, acknowledges the execution of the same before a justice of the peace, who also takes the privy examination of grantor's wife, and the clerk adjudges the certificate made by the justice of such acknowledgment and privy examination to be in due form, admits the instrument to probate and orders registration: It was held that such registration is without legal warrant, and invalid as to third parties. White v. Connelly, 105 N. C. 65, 11 S. E. 177.

Substantial Compliance Sufficient.—A substantial compliance with this section and section 3322, is all that is necessary to be observed by the clerk of the superior court of the county wherein the land lay, in passing upon the certificate to a deed thereto made and executed in another state; and when objection to the validity of registration is made on that ground and it appears of record on appeal that the certificate made in such other state is in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court. Kleybolte & Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S. E. 663.

Certificate of Probate or Acknowledgment Necessary Even if Probate Made before Clerk.—The statutes of North Carolina require, as the method of authentication and warrant to the register to record a deed, that a certificate complying substantially with the terms of the statute shall be attached to or indorsed upon the deed, even though probate is had before the clerk of the superior court, and where no sufficient certificate was attached to or indorsed upon an instrument, it could not be shown by parol that proper proof was made before the clerk. National Bank v. Hill, 226 Fed. 102, 103.

Registration No Evidence of Adjudication without Signed Certificate of Clerk.—Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the court has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence that the clerk or his deputy has complied with the provisions of this section requiring the clerk, etc., to adjudicate the sufficiency of the certificate of the justice of the peace, or permit a copy of such deed to be used in evidence under the provisions of section 1763. The curative statutes, 3331, 3336 (a), (b), (c), (d), have no application. Woodlief v. Woodlief, 192 N. C. 634, 135 S. E. 612.

No Adjudication When Instrument Proved before Clerk.—It is only required for a valid probate that the clerk should certify to the proof of a deed taken before him and it is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of

the probate and certificate, and order the instrument to be registered. Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164.

Adjudication of Instrument Probated in Another State.—When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with this and section 3322, for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." Kleybolte & Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S. E. 663.

Failure of Certificate to Recite Death of Witnesses and Maker.—Failure of the certificate to recite that the maker and attesting witness were dead did not render the registration of the deed improper, for those jurisdictional facts will be presumed. Richmond Cedar Works v. Stringfellow, 236 Fed. 264, 265.

Certificate of Clerk for Registration of Grant by State Not Required.—The certificate of the clerk of the court, required as a prerequisite to the registration of instruments of writing named therein, is not essential to the validity of the registration of a grant; the great seal of the State being sufficient authority for such registration. Ray v. Stewart, 105 N. C. 472, 11 S. E. 182.

Presumption of Regularity from Clerk's Certificate.—Where it appears that the clerk appended to a lease offered for registration his certificate, it will be presumed, nothing to the contrary appearing, that it was in due form. Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Instrument Proved in Another County—Extent of Adjudication.—It is not essential to the validity of registration of an instrument proved in another county that the clerk of the county where the land lies should have adjudged that it had been duly acknowledged and proved in the same manner as if taken before him. Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Defective Corporate Deed—Invalid Notwithstanding Adjudication.—A corporate deed of trust was executed by the trustee, as well as the corporation, and bore a notary's certificate of proof of the trustee's execution, and a certificate of the clerk that the instrument had been duly proved, "as appears from the foregoing seals and certificate, which are adjudged to be in due form and according to law," but no certificate as to the proof of execution by the corporation was attached. It was held, under this section that the clerk's certificate was invalid, and did not entitle the deed to registration. National Bank v. Hill, 226 Fed. 102, 103.

§ 3306. Probate of husband's deed where wife insane.—When a deed executed by a married man whose wife is insane or a lunatic, and whose homestead has been allotted, together with the certificate of the clerk of the superior court or with the certificate of the superintendent of the insane institution of the state where the wife is confined in conformity to section 1004 under the chapter Conveyances, is offered for probate before the clerk of the superior court of the county in which the land conveyed is situated, and the execution of such deed is acknowledged or proved, the clerk shall adjudge whether the certificate of the superintendent or the clerk is in due form, and if adjudged to be in due form he shall order the registration of the deed and certificate. (Rev., s. 1000; 1905, c. 138, s. 2; 1919, c. 20.)

§ 3307. Probate of corporate deeds, where corporation has ceased to exist.—It is competent for the clerk of the superior court in any county in this state, on proof before him upon oath and examination of the subscribing witness to any contract or instrument required to be registered under the laws of this state, to adjudge and order that such contract or instrument be registered as by law provided, when such contract or instrument is signed by any corporation in its corporate name by its president, and when such corporation has been out of existence for more than ten years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and purposes as if signed, sealed and acknowledged, or proven, as provided under the existing laws of this state. (1911, c. 44, s. 1.)

Art. 2. Registration

§ 3308. Probate and registration sufficient without livery.—All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessor or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony. (Rev., s. 979; Code, s. 1245; 1885, c. 147, s. 3; 29, Ch. II, c. 3; R. C., c. 37, s. 1; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; 1905, c. 277.)

Cross References.—For a full treatment of the nature and necessity of acknowledgment and proof of instruments, see 1 N. C. Enc. Dig. 80, et seq.; 13 N. C. Enc. Dig. 14, et seq.

Purpose of Section.—This section together with section 3311 were intended to uproot all secret liens, trusts, unregistered mortgages, etc., and under its force it has been held that no notice, however full and formal, will supply the place of registration. Robinson v. Willoughby, 70 N. C. 358; Hooker v. Nichols, 116 N. C. 157, 160, 21 S. E. 207.

Application to All Deeds.—The construction first put upon this section was, that it only applied to such deeds as operated at common law by livery of seizin. Hogan v. Strayhorn, 65 N. C. 279. But our courts, in their policy of relaxing the rigid and technical rules of common law, have since extended the construction so as to bring all of our deeds of conveyance within the purview of that statute. Thus it has been held that deeds of bargain and sale covenants to stand seized to uses are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. Love v. Harbin, 87 N. C. 249; Ivy v. Cranberry, 66 N. C. 224. Prior to that statute, and the more recent interpretation upon it, if there was a deed of bargain and sale upon a consideration, the consideration raised a use for the bargainee, and then the statute transferred the legal estate to the uses, that is, to the bargainee, but no further use could be declared by the deed, for it was held a use could not be mounted upon a use. But there is no reason now why it may not be done, since the registration of the deed has all the effect of livery of seizin. Jones v. Jones, 164 N. C. 320, 324, 80 S. E. 430.

All Registered Deeds Put on Same Footing with Feoffment.—This section in terms at least, does not give to registered deeds the effect of conveyances with livery, but on the contrary enacts that registered deeds without livery shall pass title. It is, however, settled law in North Carolina that by the statute all registered deeds "are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration." Bryan v. Eason, (1908) 147 N. C. 284, 61 S. E. 71. That is, because the statute has abolished livery, all registered deeds operate as if they were given with livery. 1 N. C. Law Rev. 155.

Probate May Be Sufficient as Contract.—While the order of probate cannot authorize the registration of an instrument in the form of a deed which has been defectively executed, it is sufficient, nevertheless, to authorize its registration as a contract to convey, which is expressly provided for in this and the following section. Haas v. Rendleman, 62 F. (2d) 701.

Subsequently Acquired Title—Estoppel.—See article in 1 N. C. Law Rev. 153, as to relation of this section to the

doctrine of estoppel and rebutted where the grantor at the time of conveyance has no interest in the property conveyed but subsequently acquires title thereto.

Registration between Parties Not Necessary to Validity of Conveyance.—See annotations to next section.

Cited in McClure v. Crow, 196 N. C. 657, 660, 146 S. E. 713; General Motors Acceptance Corp. v. United States, 23 Fed. (2d) 799.

§ 3309. Conveyances, contracts to convey, and leases of land.—No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies: Provided, the provisions of this section shall not apply to contracts, leases or deeds executed prior to March first, one thousand eight hundred and eighty-five, until the first day of January, one thousand eight hundred and eighty-six; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Rev., s. 980; Code, s. 1245; 1885, c. 147, s. 1.)

I. In General.
II. Registration as between the Parties.
III. What Instruments Affected.
IV. Rights of Persons Protected.
V. Notice.
VI. Effect of Defective Registration.
VII. Unregistered Deed as Color of Title.

Cross References.

As to docketing, and lien of a judgment when docketed, see section 614 et seq.; as to registration of Deeds, see 4 N. C. Enc. Dig. 524, 13 N. C. Enc. Dig. 714.

See 12 N. C. Law Rev., 70, for note referring to this section.

I. IN GENERAL.

The object of probate and registration in the county where the land lies was intended to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed. Warren v. Williford, 148 N. C. 474, 62 S. E. 697; Weston v. Roper Lumber Co., 160 N. C. 263, 266, 75 S. E. 800.

Not Applicable to Grants.—This section does not apply to grants, the registration of which is regulated by sections 7578, 7579. Wyman v. Taylor, 124 N. C. 426, 32 S. E. 740.

Date of Registration Controls Title as against Purchasers.—Under this section a grantee in a deed acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument. Sills v. Ford, 171 N. C. 733, 88 S. E. 636.

Liberal Construction of Proviso.—The words of the proviso should receive a liberal construction so as to give full force and effect to the spirit and intention of the section. Cowen v. Withrow, 112 N. C. 736, 737, 17 S. E. 575.

Similar Construction with Section 3311.—This section and section 3311 in view of the similarity of their terminology, may be construed interchangeably. Cowen v. Withrow, 112 N. C. 736, 740, 17 S. E. 575.

Registry Does Not Cure Lack of Mental Capacity, though Prior Deed Unregistered.—Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when he had sufficient mental capacity, the registration under this section can give no effect to the invalid deed, and the valid deed, though subsequently registered, will be effective. Thompson v. Thomas, 163 N. C. 500, 79 S. E. 896.

Effect of Amendment of 1885, Connor Act.—Under this section a conveyance of land, made prior to the amendment of 1885, is not valid against creditors or bona fide purchasers, unless registered before 1 January, 1886. Phillips v. Hodges, 109 N. C. 248, 13 S. E. 769.

Conversion in Partition Proceedings—Registration before Confirmation of Sale.—In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. McLean v. Leitch, 152 N. C. 266, 67 S. E. 490.

Registration of Plat as Notice.—It was formerly held that the registration of plats not being required or allowed by our registry laws, it does not give constructive notice to innocent purchasers for value. Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344. But registration of plats is now required by that section.—Ed. Note.

Applied in Fidelity, etc., Co. v. Massachusetts Mut. Life Ins. Co., 74 F. (2d) 881.

Cited in Johnson v. Fry, 195 N. C. 832, 836, 143 S. E. 857, holding the section not applicable; Jones v. Rhea, 198 N. C. 190, 151 S. E. 255; Threlkeld v. Malcragson Land Co., 198 N. C. 186, 151 S. E. 99.

II. REGISTRATION AS BETWEEN THE PARTIES.

Formerly Registration Prerequisite Even as between Parties.—The provision of this section prior to its amendment, as construed in White v. Holly, 91 N. C. 67, was that "no conveyance of land nor contract to convey, etc., shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved, etc., and registered. At the next session of the General Assembly the law was so amended as to provide that "no conveyance of land or contract to convey, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof in the county where the land lies." The manifest purpose of this section therefore, is to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands inter se to litigate their rights under the rules of evidence in force. Hargrove v. Adcock, 111 N. C. 166, 167, 170, 16 S. E. 16.

At Present Instrument Good between Parties without Registration.—A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. Warren v. Williford, 148 N. C. 474; Weston v. Roper Lumber Co., 160 N. C. 263, 266, 75 S. E. 800.

Contracts to convey land, as between the parties thereto, may be read in evidence without being registered. Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16.

Same—Deed Effective under Statute of Uses.—Under this section registration is not necessary to the validity of a deed for valuable consideration, effective under the Statute of Uses, as between the parties. In cases where livery of seisin was formerly required registration still supplies the place of that ceremony. Hinton v. Moore, 139 N. C. 44, 46, 51 S. E. 787.

Same—Registration after Commencement of Action.—As between the parties, there being no question of title arising from prior registration of junior deeds, a deed registered after the commencement of an action is admissible in evidence. Hudson v. Jordan, 108 N. C. 10, 12 S. E. 1029.

Same—Analogy with Section 3311.—The Connor Act (the amendment to this section) has substantially the same legal effect upon deeds that the Act of 1819 had upon mortgages and deeds in trust (Robinson v. Willoughby, 70 N. C. 358, 362), leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value, and creditors. King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027.

III. WHAT INSTRUMENTS AFFECTED.

Instruments in Writing Dealing with Estate Which Lie in Grant.—It will be observed that this section, in terms, applies only to conveyances of land, contracts to convey, and leases of land for more than three years. Such instruments deal with estates that lie in grant, and therefore, are required to be in writing under the statute of frauds and under the law of North Carolina. Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32.

Same—Parol and Implied Trusts Not Affected.—The primary purpose and intent of the Legislature, in the passage of this act, was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations. Hence, from its very nature and purpose it would seem to require that it be restricted to writ-

ten instruments capable of being registered. There are certain parol trusts, and those created by operation of law, dealing with beneficial interests in lands, which are fully recognized in this jurisdiction. Jones v. Jones, 164 N. C. 320, 80 S. E. 430, and cases there cited. And it has been held with us consistently that these trusts, though resting in parol, or not evidenced by any writing, may be enforced against the holder of the legal title, unless it appear that such holder, or some one under whom he claims, has acquired his title for a fair and reasonable value and without notice of the trust. Here it will be observed that a bona fide purchaser for value without notice (but not a creditor) is protected against the claim of one in whose favor the trust is sought to be established, not by virtue of the terms of this section, but on the broad principles of equity. Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32; Sills v. Ford, 171, 733, 88 S. E. 636; Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570; Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Eaton v. Doub, 190 N. C. 14, 21, 128 S. E. 494.

Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of this section. These trusts were purposely omitted from its terms for the reason that, being incapable of registration because not in writing, it was considered unfair and subversive of right to destroy them in favor of one who had acquired his title with full knowledge of their existence. See concurring opinion of Hoke, J., in Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570, 326, and opinion of Connor, J., author of the act, in Wood v. Tinsley, 138 N. C. 507, 51 S. E. 59. See, also, Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32.

Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value without notice; and this section requiring notice by registration as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, necessarily, in contemplation of the express provisions of the statute, refer to such instruments as are in writing and capable of registration. Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in this section, are not included, Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

A declaration of trust is not a conveyance, or contract to convey, or lease of land, requiring registration as against creditors, by virtue of the provisions of this section. Crossett v. McQueen, 205 N. C. 48, 51, 169 S. E. 829.

Contracts to Sell—The One First Registered Prevails. — Among two or more contracts to sell land, the one first registered will confer the superior right. Combes v. Adams, 150 N. C. 64, 68, 63 S. E. 186.

Wills Not Affected—Purchaser under a Will Not Purchaser for Value.—The evil which it was intended to remedy by this section was the uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. This evil could not exist in regard to wills, where the devisee is not a purchaser for value, but takes as a donee or volunteer. Bell v. Couch, 132 N. C. 346, 349, 43 S. E. 911.

Hence it is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. Harris v. Dudley Lumber Co., 147 N. C. 631, 61 S. E. 604.

Same—Will Not a Conveyance.—Looking to the purpose of the Legislature and the meaning of the language used, the statute can not by construction include wills under the general term "conveyance." Bell v. Couch, 132 N. C. 346, 349, 43 S. E. 911.

Same—But Purchaser from Devisee Prevails against Unregistered Deed.—This section requiring conveyances of land, contracts to convey, and leases to be recorded, applies when the grantee in a deed fails to record his deed until after the probate of a will of the grantor devising the same land, and after the registration of a deed for the same land from the devisee to a purchaser for value. Bell v. Couch, 132 N. C. 346, 43 S. E. 911.

What Included in Phrase "Unregistered Deed" in Proviso. —The use of the words "unregistered deed" in the proviso is in their broad generic sense and has reference to the same scope as the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section. McNeill v. Allen, 146 N. C. 283, 59 S. E. 689.

Agreement for Division of Proceeds of Sale Not Affected. —An instrument which is neither a conveyance of land, nor a contract to convey, nor lease of land, but only an agreement for a division of the proceeds of sales thereafter to be made of land and authority to one to take entire control and management of sales of land for the parties, is not required to be registered. Lenoir v. Valley River Min. Co., 113 N. C. 513, 18 S. E. 73.

Applies to Both Lost and Unlost Deeds.—This section applies both to lost and unlost deeds executed after 1 December, 1885, and there was no error in rejecting parol evidence to show that the plaintiff's grantor deeded the land in controversy to W. in 1891 and that the said deed had been lost before registration, where the plaintiff was purchaser for value of said title under registered conveyances. Hinton v. Moore, 139 N. C. 44, 51 S. E. 787.

Lease in Writing.—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing. Mauney v. Norvell, 179 N. C. 628, 103 S. E. 372.

Mortgages Included.—Mortgages have been uniformly held to be conveyances of the legal title, and require the formality of a conveyance in their assignment as against purchasers for value, and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of the registration act, and this section includes mortgages within its terms. First Nat. Bank v. Sauls, 183 N. C. 165, 170, 110 S. E. 865.

Creation of Building Restrictions Included. — A building restriction, being an easement, which must be created by a grant is within this section. Davis v. Robinson, 189 N. C. 589, 127 S. E. 697.

IV. RIGHTS OF PERSONS PROTECTED.

Cross References.—For a construction of § 1138 in connection with this section see annotations under that section.

In General.—By virtue of this section only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years. Gosney v. McCullers, 202 N. C. 326, 162 S. E. 746.

Right to Easement.—Under this section where a grantor conveys land by registered deed creating an easement in land reserved by grantor, his grantee is entitled to the easement unaffected by an unregistered contract to convey the reserved land executed prior to the deed. Walker v. Phelps, 202 N. C. 344, 162 S. E. 727.

Where a deed provides that it is subject to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease although the lease is for more than three years and is not recorded. Hildebrand Machinery Co. v. Post, 204 N. C. 744, 169 S. E. 629.

Creditors Put upon the Same Plane as Purchasers.—No distinction is made in the statute or in the opinions of the court, construing and applying the statute, between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, as against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value, who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. The same is true as against the creditors. Eaton v. Doub, 190 N. C. 14, 19, 128 S. E. 494.

Volunteers and Donees Not Protected.—This section for lack of timely registration, only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail. Tyner v. Barnes, 142 N. C. 110, 113, 54 S. E. 1008.

The trustee in bankruptcy is regarded as a purchaser for value under the amendment to the Bankrupt Act of 1910, and acquires a valid title as against the holder of the unregistered deed, under this section. Lynch v. Johnson, 171 N. C. 611. 89 S. E. 61.

Dower Where Title Divested Prior to Marriage.—Where a man executed and delivered a deed to a tract of land prior to his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow is not entitled to dower. She is not a purchaser. Haire v. Haire, 141 N. C. 88, 53 S. E. 340.

Possessor under Unregistered Contract to Convey—Rights to Improvements.—One who goes into possession of land, under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase money and improvements as against a purchaser for value from the vendor, under a duly registered deed. Wood v. Tinsley 138 N. C. 507, 51 S. E. 59. As to a purchaser for value, for the common grantor, the rule applies to one in possession, under an unregistered deed, who

has enhanced the value of the land by improvements, although made in good faith. Eaton v. Doub, 190 N. C. 14, 21, 128 S. E. 494. Expressions in Kelly v. Johnson, 135 N. C. 647, 47 S. E. 674. Conflicting with these views were obiter and this was corrected by Wood v. Tensley, Supra.

Tort Feasor Neither a Purchaser Nor a Creditor.—A tort feasor, whose negligence has damaged a chattel in the rightful possession of the mortgagor, is neither a purchaser nor creditor within the contemplation of our registration laws, this section and section 3311, 3312, and an action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other. Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319.

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for valuable consideration. Brem v. Lockhart, 93 N. C. 191.

Priorities between Unregistered Deed and Execution of Judgment.—A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. Wimes v. Hufham, 185 N. C. 178, 116 S. E. 402.

Purchaser under Execution Sale — Prior Purchaser in Possession.—The purchaser at execution sale who registers his deed prior to a deed from the defendant in execution to his wife, which was executed before the sale, acquires the title to the land; and the wife in possession of the land conjointly with her husband at the time of the sale and of the execution of the sheriff's deed to the plaintiff, is not within the saving clause of the act, as the plaintiff does not take as purchaser from the "donor, bargainor or lessor," as against a donee in possession under an unregistered deed, but from the sheriff, who is the agent of the law. Cowen v. Withrow, 109 N. C. 636, 13 S. E. 1022.

Extent of Judgment Creditor's or Execution Sale Purchaser's Right.—A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective. Bristol v. Hallyburton, 93 N. C. 384, 387; Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

Rights of Creditor Whose Judgment Docketed between Execution and Registration of Prior Deed.—The grantee, in a deed executed by the grantor and deposited with the holder of a mortgage under an agreement between the latter and the grantee that it should not be registered until the payment of the purchase price, took subject to the lien of a judgment creditor of the grantor, whose judgment was rendered and docketed between execution and registration of the deed. Board v. Micks, 118 N. C. 162, 24 S. E. 729.

Execution Purchaser with Notice Prior to 1885, Subordinate to Prior Unregistered Deed.—The proviso that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to 1 December, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." Cowen v. Withrow, 112 N. C. 736, 17 S. E. 575.

Priority of Judgment Obtained before Registration of Prior Deed.—Where a judgment is obtained against a grantor of lands subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. Maxton Realty Co. v. Carter, 170 N. C. 5, 86 S. E. 714.

The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Same—Agreement between Parties as to Registration.—Under the provisions of this section the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. Board v. Micks, 118 N. C. 162, 24 S. E. 729; Bostic v. Young, 116 N. C. 766, 21 S. E. 552; Francis v. Herren, 101 N. C. 497, 8 S. E. 353; Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 24, 85 S. E. 40.

Same—Judgment against Grantee.—Where a judgment has been obtained and docketed against the grantee, the lien thereof immediately attaches upon the registration of his deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore resting only in parol; and the consideration recited in grantee's deed is immaterial. Colonial Trust Co. v. Sterchie Bros., 109 N. C. 21, 85 S. E. 40.

Collateral Attack by Creditors for Want of Registration.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceeding instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. Boyd v. Turpin, 94 N. C. 137; Brem v. Lockhart, 93 N. C. 191; Francis v. Herren, 101 N. C. 507, 8 S. E. 353.

V. NOTICE.

No Notice Will Supply Want of Registration.—No notice, however full or formal, will supply the want of registration of a deed. Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

A deed to lands registered under this section, conveys title as against any unregistered deed though previously executed to the knowledge of the grantee of the later deed, no notice supplying the place of registration, though the claimant is in possession; the provision of this section as to such possession is restricted to deeds executed prior to 1 December, 1885. Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593.

No notice however full and formal as to the existence of a prior deed can take the place of registration. McClure v. Crow, 196 N. C. 657, 659, 146 S. E. 713.

See note under § 3311.

In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

Possession No Notice after 1885.—The mere possession of the locus in quo under an unregistered ninety-nine year lease or any other circumstance is not sufficient notice to the owner of the fee under a valid paper chain of title. Dye v. Morrison, 181 N. C. 309, 107 S. E. 138.

Possession as Notice Only as to Deeds before 1885.—The proviso making actual possession notice to subsequent purchasers, applies only to deeds executed prior to 1 December, 1885. Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

A deed executed prior to the Registration Act of 1885, ch. 147, but not registered until after the registration of a mortgage from the same grantor, is competent evidence to show title in the grantee, he being in possession before the passage of the said act. Eaton v. Crowell, 136 N. C. 377, 48 S. E. 767.

Doctrine of Estoppel Not Applicable.—The equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, under this section, supply the place of registration. Revisal, sec. 980; Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344.

VI. EFFECT OF DEFECTIVE REGISTRATION.

Registration of Defectively Probated Deed Ineffective. — The registration of a deed executed outside of the State with defective probate is without authority and ineffective for any purpose; such a deed previously executed and so registered, unless probated and registered prior to January 1, 1866, takes effect to pass the legal title only from the date of lawful registration, and is invalid as against a conveyance made and registered in the meantime under a decree of court against the grantor which left in him no title to pass thereunder. United States v. Hiawassee Lumber Co., 202 Fed. 35.

The registration of a deed upon an unauthorized probate is invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title. Allen v. Burch, 142 N. C. 524, 525, 55 S. E. 354.

While a defective probate of a deed to lands appearing upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in some other state and there is no evidence that the grantee in the commissioner's deed under the foreclosure of

a mortgage had actual notice of the defect. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

Provisions as to Adjudication by Interested Clerk Must Be Observed.—The requirements of section 3305 that other officials shall pass upon the sufficiency of probate of mortgages when the clerk of the court is a mortgagee, in order to give priority of lien over those subsequently registered, must be observed in order for a valid registration of the instrument. Norman v. Ausbon, 193 N. C. 791, 138 S. E. 162.

VII. UNREGISTERED DEED AS COLOR OF TITLE.

Unregistered Deed as Color of Title—Synopsis of Law.—Formerly an unregistered deed was in all cases color of title if sufficient in form (Hunter v. Kelly, 92 N. C. 285), but after the passage of that act it was held in Austin v. Staten, 126 N. C. 783, 36 S. E. 338, that an unregistered deed was not color of title.

The question was again considered in Collins v. Davis, 132 N. C. 106, 43 S. E. 579, and the ruling in the case of Austin v. Staten was modified so that it only applied in favor of the holder of a subsequent deed executed upon a valuable consideration, and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Burwell v. Chapman, 159 N. C. 209, 211, 74 S. E. 685; Gore v. McPherson, 161 N. C. 638, 644, 77 S. E. 835; King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027.

Where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee, in a subsequent deed for a valuable consideration, who has duly registered his deed. Collins v. Davis, 132 N. C. 106, 43 S. E. 579. Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by this section. Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Eaton v. Doub, 190 N. C. 14, 18, 128 S. E. 494.

Same—Qualification — Adverse Possession. — The principle, that under this section an unregistered deed does not constitute color of title, does not extend to a claim by an adverse possession held continuously for the requisite time under deeds "foreign" to the true title or entirely independent of the title under which the plaintiff makes his claim. Austin v. Staten, 126 N. C. 783, 36 S. E. 338, distinguished; Janney v. Robbins, 141 N. C. 400, 53 S. E. 863.

But where one makes a deed for land for a valuable consideration and grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027.

Same—No Color of Title as against Judgment Creditors.—The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the locus in quo, the source of title being a common one, nor can the grantee establish his rights to betterments. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Registration as Affecting Commencement of Limitations.—The statute of limitations does not begin to run in favor of the lessee in possession under a ninety-nine-year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. Dye v. Morrison, 181 N. C. 309, 107 S. E. 138.

§ 3310. Unregistered deeds prior to January, 1890, registered on affidavit.—Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and ninety, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. This section shall not interfere with vested rights nor shall a deed so admitted to record be used as evidence in any action now pending. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (Rev., s. 981; 1885, c. 147, s. 2; 1905, c. 277; 1913, c. 116; 1915, cc. 13, 90; 1924, c. 56.)

Editor's Note.—The amendment of 1924, Public Laws, c. 56, extended the operation of this section to deeds executed between 1885 to 1890.

Affidavit in Case of Corporation Grantee, by Whom Made.—Where a corporation is the holder of such a deed, the affidavit under this section, may properly be made by its president. Richmond Cedar Works v. Pinnix, 208 Fed. 785.

Affirmation of Belief That Deed Is Bona Fide, Essential.—The probate of a deed dated in 1845 upon an affidavit that the affiant claims title under the said deed and that the maker of said deed and the witnesses thereto are dead, and that he cannot make proof of their handwriting, is defective, in that it does not appear by the affidavit that the "affiant believes such a deed to be a bona fide deed and executed by the grantor therein named." Allen v. Burch, 142 N. C. 524, 525, 55 S. E. 354.

§ 3311. Deeds of trust and mortgages, real and personal.—No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the state, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee, resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence. (Rev., s. 982; Code, s. 1254; R. C., c. 37, s. 22; 1829, c. 20; 1909, c. 847, s. 1.)

I. In General.
II. Registration as between Parties.
III. Instruments Affected.
IV. Rights of Persons Protected.
V. Notice.
VI. Place of Registration.

Cross References.

For a complete treatment of registration of mortgages and deeds of trust and priorities arising therefrom, see 9 N. C. Enc. Dig. 270, et seq., 277 et seq.; 15 N. C. Enc. Dig. 6 et seq.; for identity in phraseology and purpose the constructions placed upon section 3309 are, for the most part, applicable to this section. See annotations to that section.

I. IN GENERAL.

See note under § 3312.

Section Liberally Construed. — This section is liberally construed. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767.

Registration Statutory.—The probate and registration of deeds and mortgages are entirely statutory, and creditors and purchasers are entitled to rely upon at least a substantial compliance with the statute. National Bank v. Hill, 226 Fed. 102.

The object of this section was to prevent fraud, and to that end it requires all encumbrances upon estates to be registered, so that purchasers and creditors might have notice of their existence and nature, and that all persons might see for what the encumbrance was created.

When the registration is made the means of knowledge thus furnished, it enables creditors of the mortgagor to avail themselves of their legal remedy against the equity of redemption in the land. This publicity affords the creditor all the benefit he can reasonably ask or that the law intended. Starke v. Etheridge, 71 N. C. 240, 244.

Character of Registration.—The recording of the transfer is not required by this section in the sense in which that word is used in section 60b of the National Bankruptcy Act concerning voidable preferences. In re Cunningham, 64 F. (2d) 296, 299.

Effective from Time of Registration.—A mortgaged deed,

not registered within time, when registered operates from the time of registration only, and has no relation back to its date. Davison v. Beard, 9 N. C. 520.

Identical Construction with Section 3309. — In view of practical identity of the terminology of this section and section 3309, the construction put upon them will be identical. Cowan v. Withrow, 112 N. C. 736, 740, 17 S. E. 575; Francis v. Herren, 101 N. C. 497, 8 S. E. 353.

Registration of Chattel Mortgages at Common Law.—At common law, mortgages of personal property were not required to be reduced to writing, and our statute only requires them to be reduced to writing and registered as affecting creditors and purchasers for value. Butts v. Screws, 95 N. C. 215.

The Words "at Law" Construed.—The words "at law" in this section do not mean in a court of law only, but in all courts. "At law" is an expression in a statute which does not mean merely a legal tribunal as distinguished from an equitable jurisdiction, but, generally, our system of jurisprudence, whether legal or equitable. Hooker v. Nichols, 116 N. C. 157, 160, 21 S. E. 207.

Effect of Defective Registration.—A defective registration is no registration and is void; and hence does not prevent the rights of subsequent purchasers for value from attaching upon the property. Such is a registration of a deed acknowledged before a clerk who was a party to the deed. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155, 156.

Under this and the following section where a chattel mortgage is registered prior to the registration of the title-retaining contract the lien of the chattel mortgage is superior to that of the title-retaining contract. Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610.

Want of Registration at Any Particular Time Does Not Avoid Instruments.—This section does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. McKinnon v. McLean, 19 N. C. 79.

Determination of Priorities between Mortgages by the Time of Filing.—The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. Attention is called to ch. 68, Laws 1921, amending sec. 3553, though not applicable to the instant case. Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72.

Sale of Mortgaged Property—Left with Mortgagor — Waiver by Mortgagee.—Where the mortgagor of an automobile has sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgagee gave permission for the sale. It was held, that an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he acquired the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which was left with the mortgagor for sale. Rogers v. Booker, 184 N. C. 183, 113 S. E. 671.

Applied in Commercial Casualty Ins. Co. v. Williams, 37 F. (2d) 326; First Nat. Bank v. Raleigh Sav. Bank & Trust Co., 37 F. (2d) 301; Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773.

Cited in Hetherington & Sons v. Rudisill, 28 Fed. (2d) 713; Andrews Music Store v. Boone, 197 N. C. 174, 176, 148 S. E. 39; Threlkeld v. Malcragson Land Co., 198 N. C. 186, 189, 151 S. E. 99.

II. REGISTRATION AS BETWEEN PARTIES.

Between the Parties—Valid without Registration. — As between the parties a mortgage is valid without registration. Leggett v. Bullock, 44 N. C. 283, 285.

As between the parties, a mortgage is valid without registration, but not so as to creditors. Ellington v. Supply Company, 196 N. C. 784, 789, 147 S. E. 307.

Same—Personal Representative Occupies Intestate's Position.—As between the original parties, the lien of an unregistered mortgage holds priority. Wallace v. Cohen, 111 N. C. 103; 15 S. E. 892; Deal v. Palmer, 72 N. C. 582; Leggett v. Bullock, 44 N. C. 283. And the personal representative of a deceased mortgagor stands in the shoes of the latter. Hence, the plaintiff holding an unregistered second mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of the deceased. McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204.

Intended Primarily to Protect Creditors and Purchasers.—This section was intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. South Georgia Motor Co. v. Jackson, 184 N. C. 328, 331, 114 S. E. 478.

III. INSTRUMENTS AFFECTED.

Absolute Sale Not Affected.—When the circumstances of a given transaction amount to an absolute sale, rather than a mortgage, such transaction is valid without registration as against the persons protected under this section. Chemical Co. v. Johnson, 98 N. C. 123, 3 S. E. 723.

It is not necessary under this section that a sale or conveyance of personal property by a corporation shall be in writing or shall be registered for any purpose when such sale is absolute and delivery of the property is made to the purchaser. Carolina Coach Co. v. Begnell, 203 N. C. 656, 166 S. E. 903.

Same—Except Where It Is Actually a Mortgage.—A bill of sale of property, absolute on its face, but intended as a mortgage, is void as against a purchaser for valuable consideration, by force of this section requiring mortgages, etc., to be registered. Dukes v. Jones, 51 N. C. 14.

Agreement in Substance a Chattel Mortgage.—A bankrupt, having several textile mills, in order to provide working capital agreed that claimants, who were factors, should advance on its goods, in process of manufacture, in transit, in the hands of finishers, and in the possession of customers until paid for, and that the goods should be subject to advances to him, made generally by claimants against all merchandise in and produced at enumerated mills. It was to be held in effect a chattel mortgage, and not an equitable lien, and hence such contract, not being recorded as required, was not a valid lien against the creditors of the bankrupt. In re Southern Textile Co., 174 Fed. 523.

Under this section where a transaction is in effect a pledge of security for borrowed money, it is not a chattel mortgage requiring registration as against creditors and third persons. Bundy v. Commercial Credit Co., 201 N. C. 604, 163 S. E. 676.

Advancement of Money to Pay Off Lien.—This section does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands. Wallace v. Benner, 200 N. C. 124, 125, 156 S. E. 795.

Preferred Stock Giving Lien.—Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement be construed as a mortgage, it is inoperative as to creditors without compliance with this section requiring registration. Ellington v. Supply Co., 196 N. C. 784, 147 S. E. 307.

IV. RIGHTS OF PERSONS PROTECTED.

Not Valid without Registration — As against Judgment Creditor.—Under this section a deed of trust is of no validity whatever as against a judgment creditor unless registered. Bostic v. Young, 116 N. C. 766, 21 S. E. 552. See "Place of Registration" under this section.

Same—As against Subsequent Purchasers Whose Deeds Are Registered.—A mortgage not registered in time is ineffectual against purchasers subsequent to the mortgage whose conveyances are registered before the mortgage. Cowan v. Green, 9 N. C. 384. See "Place of Registration" under this section.

Void as to Creditors of Mortgagor and Not of Mortgagee.—An unregistered mortgage or deed of trust is void as against creditors of the mortgagor, and not of the mortgagee. Chemical Co. v. Johnson, 98 N. C. 126, 3 S. E. 723.

Between Mortgagee and Creditor.—While the sale of property to a creditor in possession in partial payment of a preëxisting debt is not good as against the equity of a mortgagee having a prior unregistered chattel mortgage against the property, since the creditor takes the property subject to the equities existing against it in the hands of the debtor, the chattel mortgage in itself creates no equity in favor of the mortgagee therein, and where the mortgagee shows no equity existing in his favor, the creditor takes the property free from the lien of the unregistered chattel mortgage in view of this section. Weil v. Herring, 207 N. C. 6, 175 S. E. 836.

General Creditors Not Protected.—Under this section general creditors are not protected as against prior unregistered mortgages or deeds of trust, unless and until such general creditors have secured a specific lien upon the property covered by the mortgage or deed of trust. Only the lien creditors are protected. National Bank v. Hill, 226 Fed. 120, 103. See also In re Cunningham, 64 F. (2d) 296.

Same—Even in Bankruptcy Proceedings. — In Holt v.

Crucible Steel Co., 224 U. S. 262, 56 L. Ed. 756, 32 S. Ct. 414, Justice Van Devanter discussed the Kentucky statute in regard to the registration of mortgages, which, in this respect, is the same as this section, holding that, as no creditor has fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy, by which the title passed to the trustee, the mortgage was valid as against him. Davis v. Hanover Sav. Fund Society, 210 Fed. 768, 127 C. C. A. 318; National Bank v. Hill, 226 Fed. 102, 115.

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same, as required by such statute. In re Franklin, 151 Fed. 642.

Mortgagee for Future and Contingent Debts.—A debtor may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent. The mortgagee in such case is deemed a purchaser for value, and his rights are not affected by a prior unregistered mortgage. Moore v. Ragland, 74 N. C. 343.

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for a valuable consideration. Brem v. Lockhart, 93 N. C. 191.

Right of Attachment Creditors. — The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. Williamson v. Bitting, 159 N. C. 321, 74 S. E. 808.

Collateral Attack by Creditors Not Warranted.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. Boyd v. Turpin, 94 N. C. 137; Brem v. Lockhart, 93 N. C. 191; Francis v. Herren, 101 N. C. 497, 507, 8 S. E. 353.

Rights of Mortgagee Registering within Four Months of Bankruptcy of Mortgagor.—Under the Federal Bankruptcy Act of 1898, section 60b, and under this section a chattel mortgage given by a bankrupt, but not registered until some time after its execution and within four months of the filing of the petition, is a "preference," if on the date of its registration the mortgagee knew that the mortgagors were insolvent and that the mortgage would constitute a preference, though the mortgagors were solvent at the date of the execution of the mortgage. Brigman v. Covington, 219 Fed. 500.

Priority between Judgment Creditor and Purchaser at the Same Term.—A. executed a mortgage upon his land; the mortgage was filed for registration during a term of the superior court, at a subsequent day of which a judgment was rendered against him and duly docketed. It was held that the lien of the judgment was prior to that of the mortgage. Fleming v. Graham, 110 N. C. 374, 14 S. E. 922.

Mortgagee for Purchase Price—Priority against Subsequent Mortgage.—A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. Allen v. Stainback, 186 N. C. 75, 118 S. E. 903.

Tort Feasor as Purchaser or Creditor.—See Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319, annotations sec. 3309.

Trustee in Bankruptcy.—A mortgagee who failed to register his mortgage has no rights to the property mortgaged as against the trustee in bankruptcy of a corporation, to which the mortgagor subsequently conveyed the property in consideration of stock in such corporation. Holt v. Pick & Co., 25 Fed. (2d) 378.

Where Mortgagor Displaying Property in Sales Room.—Where a mortgagee of an automobile permits the mortgagor, a dealer, to keep it on display at his show room for sale with others therein, and the mortgage sufficiently describes the property, giving the serial and motor numbers and is duly registered under the provisions of this section the mortgagee by his conduct does not lose his right of lien as against a subsequent purchaser from the dealer, and the doctrine of implied authority to the dealer to sell the machine free from the mortgage lien as agent of the mortgagee does not apply under the facts of this case. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

Priority is given to the mortgage first recorded, by virtue of this section. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 72, 147 S. E. 691. As to priority in proceeds of insurance on property, see note under § 6420.

V. NOTICE.

No Notice Will Take Place of Registration.—No notice, however full and formal, will supply the place of registration, in the case of mortgages and deeds of trust, as is the case under section 3309. Robinson v. Willoughby, 70 N. C. 358; Blacknall v. Hancock, 182 N. C. 369, 371, 109 S. E. 72; Robinson v. Willoughby, 70 N. C. 358; Hooker v. Nochols, 116 N. C. 157, 160, 21 S. E. 207. Therefore, mortgage given for the purchase-money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99. But see Collins v. Davis, 132 N. C. 106, 43 S. E. 579, the syllabus of which states the following rule of law: "A person who purchases land with notice of an uncanceled mortgage thereon is charged with notice of all rights of the mortgagee and those claiming under him." Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

"In construing the registration laws of this State, this Court has consistently held that no notice, however full and formal, will supply the place of registration. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835; Mills v. Kemp, 196 N. C. 145, 309, 145 S. E. 557; Salassa v. Mortgage Co., 196 N. C. 501, 146 S. E. 83; Weeks v. Adams, 196 N. C. 512, 146 S. E. 130." Ellington v. Supply Co., 196 N. C. 784, 789, 147 S. E. 307.

No notice, however full and formal, will supply the place of registration required by this section, and a registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose. Duncan v. Gulley, 199 N. C. 552, 155 S. E. 244.

No notice, however full and formal, can replace the statutory notice of registration as against creditors or purchasers for value, and where a mortgage on lands is executed and delivered, but not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice aliunde advantage the holder of the mortgage first executed. Williams v. Lewis, 158 N. C. 571, 74 S. E. 17, cited and distinguished. Story v. Slade, 199 N. C. 596, 155 S. E. 256.

No notice, however full and formal, can replace the statutory notice of registration, and where a second mortgage is executed and delivered, but not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference in a first and second deed of trust, and contained a warranty against encumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens. Lawson v. Key, 199 N. C. 664, 155 S. E. 570.

Same—Except Where Fraud Is Used.—Where one who knows of a prior unregistered deed of trust or mortgage, procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. Traders Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363.

Same—Except When Subsequent Mortgage Recites Prior Mortgage.—While it is the established rule that as notice however full and formal, can take the place of registration, where the subsequent mortgage of the same property recites that it is made subject to a prior mortgage, such recitation is more than a mere notice of the prior incumbrance; and it establishes a trust in equity in favor of the prior incumbrances ever though his instrument is not registered. Bank v. Vass, 130 N. C. 590, 594, 41 S. E. 791; Avery County Bank v. Smith, 186 N. C. 635, 120 S. E. 215.

Where a trust deed is given to secure purchase money for land, and later a mortgage is given on the same land, which refers to the trust deed as a prior lien for purchase money, and the mortgage is registered before the trust deed, the debt secured by the trust deed must be paid by the mortgagee from the proceeds of the sale of the land, but the mortgage is entitled to the possession of the land. Bank v. Vass, 130 N. C. 590, 41 S. E. 791.

Constructive Notice to All the World.—Under this section deeds of trust and mortgages on real and personal property, when properly probated and registered, are constructive notice to all the world. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

Registration upon a defective probate does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. Todd, etc., Co. v. Outlaw, 79 N. C. 235.

Same—Mortgage for Future Advances—Effect of Actual Notice.—Where the plaintiffs took a mortgage from A. to secure future advancements, there being a prior mortgage to B. defectively registered, it was held that if after the

execution of the plaintiffs' mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with actual notice of prior mortgages in equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment. Todd, etc., Co. v. Outlaw, 79 N. C. 235.

Same—Corporate Deed. — Where the execution of a corporate deed of trust was not proved as the statute required, its registration was without warrant or authority of law, and as against creditors and purchasers for value it was not registered until subsequently probated in proper form and again registered. National Bank v. Hill, 226 Fed. 102.

VI. PLACE OF REGISTRATION.

County of Actual Personal Residence.—The mere fact that a person had personal property in a certain county does not constitute residence. The purpose of the statute is to have the deed of trust or mortgage of personalty registered in the county where the donor, bargainor, or mortgagor has actual personal residence. The reason is that persons interested to have knowledge in such respect would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered; they would not ordinarily look elsewhere. The statutory requirement is too plain to be mistaken. Harris v. Allen, 104 N. C. 86; Bank v. Cox, 171 N. C. 76, 79, 87 S. E. 967.

The term "residence" as used in this section is the actual personal residence of the mortgagor. Industrial Discount Corp. v. Radecky, 205 N. C. 163, 170 S. E. 640.

Registration in County Where Land Lies.—Under this section a mortgage deed, conveying land which is not registered in the county where the land lies, is not valid as against creditors or purchasers for value. King v. Portis, 77 N. C. 25.

Same—Where Land Lies in Two or More Counties.—Upon the question whether a mortgage of one tract of land described by metes and bounds and registered in one county only—both mortgagor and mortgagee believing the whole tract to be situated in such county—is valid against creditors and purchasers, when in fact a part of said tract is situated in an adjoining county, about which the controversy arose, it was held invalid. King v. Portis, 77 N. C. 25, 26.

Registration at Changed Residence.—We know of no law requiring a new registration of mortgages of personal property whenever the mortgagor changes his residence. Weaver v. Chunn, 99 N. C. 431, 6 S. E. 370; Harris v. Allen, 104 N. C. 86, 90, 10 S. E. 127.

Effect of Registration in Wrong County.—This section requires that a mortgage or personal property be registered where the mortgagor resides, and where a mortgage on such property has been registered in the wrong county, and subsequently registered in the right one, but after a mortgage on the same property has been given to another and properly registered, the second mortgage has priority of lien over the first one, and no other notice, however full, will take the place of that of registration required by the statute. Bank v. Cox, 171 N. C. 76, 87 S. E. 967.

§ 3311(1). Blank or master forms of mortgages, etc., embodiment by reference in instruments later filed.—It shall be lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other instrument conveying an interest, in, or creating a lien on, real and/or personal property, filed, indexed and recorded in the office of the register of deeds. When any such blank or master form is filed with the register of deeds, he shall record the same, and shall index the same in the manner now provided by law for the indexing of instruments recorded in his office, except that the name of the person, firm or corporation whose name appears on such blank or master form shall be inserted in the indices as grantor and also as grantee. The fee for filing, recording and indexing such blank or master form shall be five ($5.00) dollars.

When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, refers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equivalent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Chowan, Stanly, Iredell, Yates, Watauga, Guilford, Camden, Transylvania, Jackson, Washington, Alleghany, Bladen, Halifax, Ashe, Dare, Beaufort, Moore, Swain, Orange, Granville, Perquimans, Martin, Vance, Columbus, Cartaret, Cleveland, Avery, Sampson counties. (1935, c. 153.)

§ 3312. Conditional sales of personal property.—All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the state, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides. (Rev., s. 983; Code, s. 1275; 1891, c. 240; 1883, c. 342.)

Cross References.—As to power of sale, see section 2587; for a complete treatment of the law of conditional sales, see 11 N. C. Enc. Dig. 113 et seq.; 15 N. C. Enc. Dig. 427.

See 11 N. C. Law Rev., 322.

In General.—Prior to the time when this section became operative, "conditional sales" of personal property, that is, sales, whether the contract of sale was reduced to writing or not, in which it was stipulated, that although the property agreed to be sold, was placed in the possession of the bargainee and used by him, the title to the same should not pass to him, but should remain in, and be retained by, the bargainor, until the bargainee should pay the price agreed to be paid for it, were upheld in this State, as valid against all persons claiming under the bargainee, without registration. Such sales became frequent and a public grievance. They were the source of much fraud, and many fraudulent practices. The bargainee having possession of the property, and being the apparent owner, easily obtained credit on the faith of it, and when it became necessary to resort to it to satisfy his just debts, he would take shelter behind the bargainor, who retained the title. To cure this evil, the statute was passed. The bargainor really retained the title to the property so sold by him, only as a security for the purchase money due him for it. The Legislature, therefore, deemed it just and salutary, that he should be required to reduce the contract of sale to writing, and register the same, just as creditors are required to do, who take the lien created by chattel mortgages. Empire Drill Co. v. Allison, 94 N. C. 548, 552.

The purpose of this section requiring all conditional sales of personal property to be reduced to writing and registered, is to protect creditors and purchasers for value. It is no part of its purpose to render such sales, whether in writing or not, invalid as between the parties to it. As between them, such sale has the same qualities and is just as effectual as it would have been, and may be proven by the like evidence as before the statute was enacted, and the parties may have the like remedies against each other. Brem v. Lockhart, 93 N. C. 191; Empire Drill Co. v. Allison, 94 N. C. 548; Butts v. Screws, 95 N. C. 215; Kornegay v. Kornegay, 109 N. C. 188, 190, 13 S. E. 770.

Purpose of Section—Forfeiture Proceedings by Government. — This section is designated for the protection of creditors or purchasers for value, without notice, and the government of the United States, in a forfeiture proceeding under the National Prohibition Act does not come under either class. So, the failure to register a conditional sales contract does not render the seller's lien void as against the government's claim of forfeiture. General

Motors Acceptance Corp. v. United States, 23 Fed. (2d) 799, 802.

Section Liberally Construed.—This section is liberally construed. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767.

The effect of this section requiring all conditional sales of personal property to be reduced to writing and registered, is to render inoperative, as against creditors and purchasers for value, so much of the contract as reserves the title in the vendor unless and until the contract is registered. Brem v. Lockhart, 93 N. C. 191.

Where personal property is sold under a registered conditional sales contract and the purchase price is not paid in accordance with the agreement, the seller is the owner thereof and is entitled to possession as against the purchaser and all persons claiming under him. Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys, 204 N. C. 609, 169 S. E. 186.

Validity of Conditional Sales Apart from this section.—Aside from this section, a conditional sale contract is valid without registration not only between the parties but also as against all the world. Perry v. Young, 105 N. C. 463, 466, 11 S. E. 511.

Sufficiency of Form.—The certificate of registration of a contract of sale of personal property reserving title need not be in any particular form to meet the requirement for registration. Manufacturers' Finance Co. v. Amazon Cotton Mills Co., 182 N. C. 408, 109 S. E. 67.

Where the certificate for registration of a contract of sale of personal property thereon appears to have been "subscribed before" a notary public, with the seal attached showing the county, and has been certified to for registration by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it had been registered, and by reference to the certificate and the paper to which it relates the names of the parties sufficiently appears, it was held, that the contract is sufficient in form for the purposes of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged; the fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. Manufacturers' Finance Co. v. Amazon Cotton Mills Co., 182 N. C. 408, 109 S. E. 67.

No Registration or Writing as between Parties.—As between the parties, a conditional sale is binding without registration, and is only void if not reduced to writing and registered as against creditors and purchasers for value. Deal v. Palmer, 72 N. C. 582; Gay v. Nash, 78 N. C. 100; Reese & Co. v. Cole, 93 N. C. 87. And as between the parties it is not essential that it should be reduced to writing, for the act gives to conditional sales the same effect as that given by law to chattel mortgages. But chattel mortgages are not required to be reduced to writing, except when it is necessary to have them registered to validate them against creditors and purchasers for value, and then only for the reason they could not be registered without being reduced to writing. Butts v. Screws, 95 N. C. 215, 218.

It has been uniformly held that a mortgage or conditional sales contract although not recorded, is valid as between the parties. It is void only as against creditors or purchasers for value. Cutter Realty Co. v. Dunn Moneyhun Co., 204 N. C. 651, 653, 169 S. E. 274.

Other Notice Will Not Take Place of Registration.—No notice however full and formal can supply notice by registration and thus by virtue of this section where a conditional sale contract has not been registered a subsequent purchaser acquires title free from its lien. Brown v. Burlington Hotel Corp., 202 N. C. 82, 161 S. E. 735.

Registration Required to Prevail over Subsequent Chattel Mortgage.—A conditional sale requires registration in respect to its priority of lien over chattel mortgages subsequently given to others upon the same property and registered in the proper county. Commercial Inv. Trust v. Albemarle Motor Co., 193 N. C. 663, 137 S. E. 874.

Regarded as Chattel Mortgages as to Registration. — Under this section conditional sales are regarded as chattel mortgages and void as to creditors and purchasers, except from registration. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526.

Priority between Vendor and Mortgagee of After-Acquired Property. — Under this section conditional sale contracts of personal property are in effect chattel mortgages, and are required to be recorded as such, and such contracts covering machinery or fixtures sold to a corporation and attached by the purchaser to realty which is subject to a mortgage containing an after-acquired property clause, unless recorded, are not effective as against the mortgagee. Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193.

Where the bargainor under a conditional sale to a corporation has not recorded the instrument, as required by this section and a receiver has been appointed under the provisions of sec. 1210, his right to a preferential lien has been lost by his failure to register the instrument, the receiver representing the rights of the other creditors, and he is only entitled as any other general distributee of the funds. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526. But see Union Trust Co. Southern Sawmills, etc., Co., 166 Fed. 193 where it is held that contracts of conditional sales of loose personal property, such as live stock, to a corporation, although not recorded as required by this section, where the property passes into the hands of a receiver for the corporation and is sold together with its other property, entitle the sellers to priority of payment from the proceeds over the holders of a prior mortgage upon the property of the corporation containing an after-acquired property clause.

Priority between Widow's Year's Allowance and Vendor's Rights.—A conditional sale of personal property made to the husband, registered after his death, like a mortgage, takes precedence over an allotment of a year's allowance, made to his widow after the registration. Williams v. Jones, 95 N. C. 504; Hinkle, etc., Co. v. Greene, 125 N. C. 489, 34 S. E. 554.

Transactions Constituting Conditional Sales.—Where the vendor of personalty ships to itself as consignee, order notify the purchaser, and the latter has received money from another with which to pay the draft and obtain the goods from the common carrier, under an agreement that the title to the goods shall vest in such third person until the goods are paid for, the effect of the contract is a conditional sale falling within the meaning of this section. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767.

A contract under which the seller ships to the purchaser certain goods, to which the latter acquires title upon the payment of the specified purchase price, is a conditional sale, requiring registration as against the rights of creditors. National Furniture Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208.

See Hetherington & Sons v. Rudisill, 28 Fed. (2d) 713.

Necessity for Registration—Between Parties to Contract.—Between the parties to a conditional sales contract probate and registration is not required by this section. Pick & Co. v. Morehead Bluffs Hotel Co., 197 N. C. 110, 147 S. E. 819; General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767; National Furn. Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208; Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39.

Same—As to Receiver of Corporation.—While a conditional sale to a corporation does not require registration as between the parties, after receivership of the corporation its validity as to the rights of creditors depends upon its registration. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767; National Furniture Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208; Hetherington & Sons v. Rudisill, 28 Fed. (2d) 713.

Registration in County of Residence at Time of Purchase.—The provision of this section requiring conditional sales to be reduced to writing and registered in the county where the purchaser resides, refers to the county in which he resides at the time the contract is made, and as construed by the Supreme Court of the State the contract is valid if there recorded, although the property is thereafter removed into another county to which the purchaser changes his residence. In re Franklin, 151 Fed. 642.

A bankrupt at the time of purchasing property under a conditional sale contract had acquired no fixed place of residence in the state but was then residing and receiving his mail in the county where the contract was made and to which the property was shipped. It was held that the recording of the contract in that county was sufficient to preserve the seller's lien. In re Franklin, 151 Fed. 642.

No Registry Required in the County of Removal. — An instrument constituting a conditional sale of personal property is properly registered in the county where the purchaser resides, and in case of the latter's removal to another county with the property, need not be again recorded in the latter county. Barrington v. Skinner, 117 N. C. 47, 48, 23 S. E. 90.

Transaction in Effect Absolute Sale.—Where goods were sold and delivered under a contract in which it was stipulated that the vendee should deliver to the vendor the notes taken by the vendee from purchasers of such goods, to be held by the vendor "as collateral security for the payment of the purchase-money to him," and further, that such "goods," as well as the proceeds therefrom, are to be held in trust by him for the payment of the price to the vendor." It was held that this agreement was not a mortgage, nor

a conditional sale, but an absolute sale of the goods, and its registration was not necessary. Chemical Co. v. Johnson, 98 N. C. 123, 3 S. E. 723.

Instrument in Effect Conditional Sale Required to Be Registered.—A contract for the "lease" of personal property upon payments of rent, the property to belong to the lessee upon the last payment of rent, is in effect a conditional sale, and unless registered its stipulation for the retention of title by the vendors is invalid as to third parties. Clark v. Hill, 117 N. C. 11, 23 S. E. 91.

Conditional Sale, and Conditional Hiring Distinguished.—A contract of "conditional sale," and a contract of hiring, conditional in its provisions, are essentially different in their respective natures and purposes. The latter need not be in writing, and when it is, it need not be registered. The former, to be effectual against creditors and subsequent purchasers for value, must be in writing and registered. Foreman v. Drake, 98 N. C. 311, 315, 3 S. E. 842.

Priority over Attachment.—A title retaining contract in the sale of personalty is in the nature of a chattel mortgage, and when registered prior to an attachment of the property it is superior to the claim of the attaching creditor. And this is true though the purchaser falsely entered into the contract under an assumed name. Weeks v. Adams, 196 N. C. 512, 146 S. E. 130.

Section Not Repealed by Laws 1923—Registration Cannot Be Dispensed with Notice.—Chapter 236, Public Laws of 1923, requiring a certificate of the transfer of title to an automobile to be issued to the purchaser by the Secretary of State does not repeal this section so as not to require the registration of title retaining a contract to secure the balance due on the purchase price of an automobile, as against subsequent purchaser for value, and no notice, however formal, is sufficient to supply that of registration required by the statute. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414. See Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835. See also note under § 3311.

Tort Feasor as Purchaser or Creditor.—See Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319, annotations to sections 3309, 3311.

This section has no retroactive effect. Harrell v. Godwin, 102 N. C. 330, 8 S. E. 925.

Interest of Innocent Party in Unregistered Mortgage Not Subject to Confiscation. — Failure to register a mortgage taken to secure payment on an automobile, will not subject the interest of an innocent mortgagee to confiscation under section 3404, for violation of that section relating to seizure of automobiles engaged in illegal transportation of liquor. South Georgia Motor Co. v. Jackson, 184 N. C. 328, 114 S. E. 478.

Question for Jury.—Upon conflicting evidence as to whether one was a purchaser for value from the vendee in a conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39.

Cited in Standard Motors Finance Co. v. Weaver, 199 N. C. 178, 179, 153 S. E. 861; Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773.

§ 3313. Conditional sales or leases of railroad property. — When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless—

1. The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.

3. Each locomotive or car so sold, leased or loaned has the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three. (Rev., s. 984; Code, s. 2006; 1883, c. 416; 1907, c. 150, s. 1.)

§ 3314. Marriage settlements.—All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration. (Rev., s. 985; Code, ss. 1269, 1270, 1281; 1885, c. 147; R. C., c. 37, ss. 24, 25; 1785, c. 238; 1871-2, c. 193, s. 12.)

Cross References.—As to the general nature of, and what constitutes, marriage settlement, see 7 N. C. Enc. Dig. 335 et seq.

Place of Registration.—Registration of a marriage settlement, embracing the slaves of a feme, was held to be properly made in the county where the feme resided and the slaves were, at the time the instrument was executed. Latham v. Bowen, 52 N. C. 337.

Deed Possessing Two Characters.—A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered. Johnston v. Malcom, 59 N. C. 120.

Registration after Three Years, as against Subsequent Creditors.—A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was held to be valid as against creditors, whose debts were contracted after such registration. Johnston v. Malcom, 59 N. C. 120.

Agreement in Effect Not a Marriage Settlement. — An agreement by which the husband consents that the wife may convert one tract of land, which is in nowise subject to the claims of his creditors, into another tract of land; and in order to enable her to make the conversion he stipulates to allow her to hold as her separate property the price of her land until it can be reinvested in another tract of land, is not a marriage settlement falling within the section. Teague v. Downs, 69 N. C. 280, 287.

The Law of What Time Governs. — Where a marriage took place, and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed, and is not affected by the changes in the marital relations brought about by the Constitution of 1868, and the statutes passed in pursuance thereof, although the deed was not registered until 1884. Walton v. Parish, 95 N. C. 259.

Registration in Another State.—An antenuptial contract entered into between a husband whose domicile was in North Carolina and a wife whose domicile was in New York, and which was duly registered in New York, but not in North Carolina, is good against the creditors of the husband, although the property was removed to North Carolina and changed from what it originally was when the contract was signed. Hicks v. Skinner, 71 N. C. 539.

§ 3315. Deeds of gift.—All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration. (Rev., s. 986; Code, s. 1252; 1885, c. 147; R. C., c. 37, s. 18; 1789, c. 315, s. 2.)

Editor's Note.—The time of the registration of deeds of gifts under this section has beeu affected by seciton 7593(a) of this Code which extends the time until September 1, 1926. The effect of the curative act has given rise to some conflict of opinion in the case of Booth v. Hairston, 193 N. C. 278, 136 S. E. 879. In that case A made a deed of gift of her property, which deed was not registered until after the statutory period of two years had expired. After such expiration A devised this land to her daughter. The question arose whether the devisee under the will or the

grantee under the deed prevailed under the statute above referred to; the court held that the deed was void, not having been registered within the time prescribed, and that the statute extending the time would not validate a deed which had been once avoided, so as to impair vested rights. This decision met a strong dissent in the same case and has also been criticized in 5 N. C. Law Review 365. The criticism is based on the ground that as the devisee took no interest under the will until after the death of the testatrix (for the will speaks as of the dates of the death of its maker) no vested rights of third parties were involved and that as between the grantor and the grantee the deed would be validated, even though not registered within two years, under the extension given by the above referred to statute.

Though met with criticism and dissent, it seems that the majority holding is correct. This conclusion may be justified first (1) upon the analogy of the effect of curative statutes upon a right of action already barred under the statute of limitations. It has been uniformly held throughout this country that where a right of action has been barred by the statute of limitations a subsequent statute extending the time of its enforcement does not revive the right of action already barred. It may also be justified (2) upon the ground of legislative intention as expressed by the use of the word "extended". This word in its etymological sense confers the idea of continuity without any intermission. It follows that the word "extended" as used in this statute cannot refer to the registration of a deed which has already been barred. Extension of a limitation can only take effect from a time on or prior to the expiration of such limitation. Any new time limited thereafter is not an "extension" of the prior limitation, but a new limitation in itself.

A deed of gift not registered within the time prescribed by this section is void, and thereafter the Legislature is without power to bring it to life again by the enactment of a statute lengthening the period in which it may be registered. Booth v. Hairston, 195 N. C. 8, 141 S. E. 480.

Formerly when this section was differently worded it was held that the requirement of recordation of deeds of gift applied only where creditors and purchasers were interested. Hancock v. Hovey, 1 N. C. 152. But the present section in plain terms rebuts this holding.—Ed. Note.

Registration as Notice. — The registration of the prior voluntary deed is notice to the subsequent purchaser. Taylor v. Eatman, 92 N. C. 602.

Cited in Blades v. Wilmington Trust Co., 207 N. C. 771, 774, 178 S. E. 565.

§ 3316. Deeds of easements.—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

1. It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.

2. It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this act.

3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

4. It shall not apply to local telephone companies, operating exclusively within the state, or to agreements about alley-ways.

Any person, firm, or corporation knowingly and willfully violating this section shall be guilty of a misdemeanor, and each day's continuance of this violation shall be a separate offense.

This section shall not apply to Alleghany, Harnett, Lee, Surry and Wilkes counties. (1917, c. 148; 1919, c. 107.)

§ 3317. Powers of attorney.—Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted. (Rev., s. 987; Code, s. 1249; 1899, c. 235, s. 15.)

Power of Attorney Given by Married Woman. — See Hollingsworth v. Harman, 83 N. C. 153, prior to this section, holding that a power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity.

§ 3318. Plats and subdivisions.—Any person, firm or corporation owning land in this State may have a plat thereof recorded in the office of the registrar of deeds of the county in which such land or any part thereof is situated, upon proof upon oath by the surveyor making such plat that the same is in all respects correct and was prepared from an actual survey by him made, giving the date of such survey. Such plat, when so proven and probated as deeds and other conveyances, shall be recorded either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book to be designated the "Book of Plats"; and when so recorded shall be duly indexed. Reference in any instrument heretofore or hereafter executed to the record of any plat herein authorized or validated shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

Where any map or plat has been recorded, either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats," such map or plat shall be deemed to have been

recorded in full compliance with this section, notwithstanding the fact that the same has not been probated in accordance with the provisions hereof; and the registration of all plats and maps which have been recorded by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats" is hereby validated as fully as if the statute had been fully and completely complied with: Provided, this paragraph shall not apply to pending litigation, nor shall it affect vested rights accrued prior hereto. (1911, c. 55, s. 2; 1923, c. 105; 1935, c. 219.)

Editor's Note.—The amendment of 1935 so changed this section that a comparison is necessary to determine the full extent.

Object in Enacting Section.—This section was enacted in view of a decision of the Supreme Court in Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344, in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat, but who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. Wittson v. Dowling, 179 N. C. 542, 547, 103 S. E. 18.

Intended to Regulate Priorities.—The statute was designed to regulate priorities as between two conflicting dedications, and does not and was not intended to affect the general principles, dedication and acceptance, and the owner's right of revocation. Wittson v. Dowling, 179 N. C. 542, 547, 103 S. E. 18.

§ 3319. Certified copies may be registered; used as evidence.—A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state. (Rev., s. 988; Code, s. 1253; 1858-9, c. 18, s. 2.)

For records of court as proof of lost instruments, etc., see §§ 376, 377.

Registration of Copies in Proper County Allowed.—This section allows certified copies of deeds erroneously registered to be recorded in the proper counties. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800.

Proper Registration of the Original Presumed.—It is to be assumed that the deed was properly put upon the registry, until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified by the register. Starke v. Etheridge, 71 N. C. 240; Love v. Hardin, 87 N. C. 249; Strickland v. Draughan, 88 N. C. 315, 317.

Copy of Contract Used in Evidence to Prove Lost Original.—For proof of the loss of a contract to convey land, a copy thereof, if shown to be correct, is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid between the parties without registration. Mauney v. Crowell, 84 N. C. 314.

Certified Copy 100 Years Old May Be Registered though Mutilated.—Under this section a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, is admissible to probate and registration, though by reason of the mutilation of the records some lines of the conveyance showing the consideration therefor were lost; this being particularly true where an earlier certified copy of the same conveyance included the destroyed portions. Richmond Cedar Works v. Stringfellow, 236 Fed. 264.

§ 3319(a). Photostatic copies of plats, etc.; fees of clerk.—In all special proceedings in which a plat, map or blue-print shall be filed as a part of the papers, the Clerk of the Superior Court may have a photostatic copy of said plat, map or blue-print made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blue-print. The Clerk of Superior Court shall be allowed a fee to be fixed by the County Commissioners not exceeding the sum of five dollars to be taxed in the bill of costs, which fee shall cover the cost of making said photostatic copy and all services of the clerk in connection therewith. (1931, c. 171.)

§ 3320. Register to fill in deeds on blank forms with lines.—Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces. (1911, c. 6, s. 1.)

§ 3321. Errors in registration corrected on petition to clerk.—Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases. (Rev., s. 1008; Code, s. 1266; R. C., c. 37, s. 28; 1790, c. 326, ss. 2, 3, 4.)

Proceedings provided for by this section are exclusive. Hopper v. Justice, 111 N. C. 418, 16 S. E. 626.

Same—Grantor Cannot call upon Grantee to Correct Mistake.—Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under this section and a promise by the grantee to make such correction at his own expense and trouble would be nudum pactum. Oldham v. First Nat. Bank, 85 N. C. 241.

The Register May Correct His Mistake.—The order of registration by the clerk is a continuous one, with which the register may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Original Deed as Evidence to Show Mistake of Register.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Art. 3. Forms of Acknowledgment, Probate and Order of Registration

§ 3322. Adjudication and order of registration.—The form of adjudication and order of registration required by section 3305 shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annnexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This ..... day of ....., A. D.....

(Official seal.)

.....

(Signature of officer.)

But the order of registration may be substantially in the form: "Let the same with this certificate be registered." (Rev., ss. 1001, 1010; 1899, c. 235, s. 7; 1905, c. 344.)

See section 3305 and annotations thereto.

It is a sufficient compliance with this section for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." Kleybolte & Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S. E. 663.

§ 3323. Acknowledgment by grantor.—Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the .... day of .... (year).

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1002.)

Acknowledgment Taken Over Telephone. — Section 997, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privity examination of the wife provided for shall be made in the presence of the officer, which is emphasized by this section and section 3324 as to acknowledgments of grantors and married women; and such acknowledgment, taken of the wife over a telephone, does not meet the statutory requirements, and renders the conveyance invalid as to her. Southern State Bank v. Summer, 187 N. C. 762, 122 S. E. 848.

Position of the Name of the Justice.—It is not necessary to the validity of the probate of a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Cited in McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

§ 3324. Private examination of wife.—When an instrument purports to be signed by a married woman, the form of certificate of her acknowledgment and private examination before any officer authorized to take the same shall be in substance as follows:

North Carolina, ... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this ..... (day of month), A. D. ..... (year).

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1003; 1899, c. 235, s. 8; 1901, c. 637.)

For provisions related to this subject, see sec. 997.

"And Doth Voluntarily Assent Thereto" Not Essential.—The privy examination of a feme covert which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto." Robbins v. Harris, 96 N. C. 557, 2 S. E. 70.

§ 3325. Husband's acknowledgment and wife's examination before same officer.—Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give name of official and his official title), do hereby certify that (here give name of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument, and the said (here give the name of the married woman or women), wife (or wives) of (here give name of husband or husbands), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this.... (day of month), A. D. ..... (year).

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1004; 1899, c. 235, s. 8; 1901, c. 299.)

See section 997 and annotations thereto; as to seal of probating officer, see section 3297.

§ 3326. Corporate conveyances.—The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law. If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This ..... day of ....., A. D. ....., personally came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing wit-

ness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this.... day of ..... (year).

(Official seal.)

.....
(Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by, its secretary or assistant secretary either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ... County.

This .... day of ....., A. D. ....., personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ..... day of ..... (year).

(Official seal.)

.....
(Signature of officer.)

North Carolina, ... County.

This is to certify that on the .... day of ....., 19...., before me personally came ..... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ..... is the president (or vice-president), and ..... is the secretary (or assistant secretary) of the ....., the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the .... day of ..... (year).

(Official seal.)

.....
(Signature of officer.)

If the deed or other instrument is executed by the signature of the president, presiding members or trustee of the corporation, and sealed with its common seal and attested by its secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This .... day of ....., A. D. ....., personally came before me (here give name and official title of the officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (presiding member or trustee) of the ..... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of the company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

.....
(Signature of officer.)

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered." (Rev., s. 1005; 1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; 1907, c. 927, s. 1.)

For validation of corporate probates, see section 3352-3356.

Power of Directors to Mortgage Corporate Property.— This section appears to recognize inferentially the power of a board of directors to mortgage the corporate property. Wall v. Rothrock, 171 N. C. 388, 390, 88 S. E. 633.

Reference to Forms of Probate Sufficient by Common Law. — This section providing that it shall not exclude "other forms of probate which would be deemed sufficient in law," can only refer to forms of probate deemed sufficient by the common law, under which a certificate, showing that the officer whose duty it was to affix the seal acknowledged that he did so, is sufficient. National Bank v. Hill, 226 Fed. 102.

Substantial Compliance Sufficient. — Under the decisions of the Supreme Court of North Carolina, the probate of a deed of a corporation is sufficient if it substantially shows the facts required by the statute which expressly provides that the form prescribed "shall not exclude other forms of probate." Board v. Wills & Sons, 236 Fed. 362.

Where the probate of a corporation's deed for land is in substantial compliance with this section, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

While it is the better course to follow the suggested methods of this section, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. Merchants, etc., Bank v. Pearson, 186 N. C. 609, 613, 120 S. E. 210.

Same—What Does Not Constitute Substantial Compliance.—When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation, or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with this section, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

Same—Seal of Corporation. — It is not necessary to the valid probate of a deed made by a corporation that it literally follows the statutory printed forms of this section if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary,

each acting in his official capacity, or as representing the corporation, who is designated as "the grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that their officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word "seal" enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seems to be cured under the provisions of § 3354, and as to signatures of the officials by § 3355. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

Acknowledgment of Individuals Instead of Officers.—The probate of a deed of a corporation by the acknowledgment of individuals instead of by its officers, is fatally defective and its registration, in consequence, is a nullity. Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884.

§ 3327. Clerk's certificate upon probate by justice of peace.—When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this state, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, ... County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of ..... and state (or territory) of ....., and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this ..... day of ....., A. D. .....

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1006; 1899, c. 235, s. 8.)

§ 3328. Clerk's certificate upon probate by nonresident official without seal.—When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

.....County.

I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer taking proof, etc.) in and for the county of ..... and state of ..... (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this .... day of ....., A. D. .....

(Official seal.)

.....

(Signature of Clerk.)

(Rev., s. 1007; 1899, c. 235, s. 8.)

§ 3328(a). Verification; form of entry.—The registers of deeds in the several counties of the State shall, after each instrument or document has been transcribed on the record, verify the record with the original and the entry of record shall read "Recorded and Verified," and the same shall be without extra charge. (1929, c. 320, s. 1.)

Art. 4. Curative Statutes; Acknowledgments; Probates; Registration

§ 3329. Defective order of registration; "same" for "this instrument."—Where instruments were admitted to registration prior to March 2, 1905, and the clerk's order for the registration used the word "same" in place of "this instrument," the said registrations are good and valid. (Rev., s. 1010; 1905. c. 344.)

§ 3330. Clerk's certificate failing to pass on all prior certificates.—When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate, it shall be conclusively presumed that he has passed upon all the certificates of said deed or instrument necessary to the admission of the same to probate, and the certificate of said clerk or other probating officer shall be deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes. (1917, c. 237.)

§ 3331. Defective certification or adjudication of clerk, etc., admitting to registration. — In all cases where, prior to January first, nineteen hundred and nineteen, instruments by law required or authorized to be registered, with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the state of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and make as good and sufficient as though such instruments had been in all respects properly proved and recorded, notwithstanding the failure of clerks or other officers qualified to pass upon the proofs or acknowledgments of instruments and to admit such instruments to registration to adjudge or certify that said instruments were duly proven, and notwithstanding the failure of such officers to adjudge or certify that the certificates of proof or acknowledgment of

said instruments were correct or in due form. This act shall not affect any suit, action, or proceeding pending in the courts of this state March 10, 1919, and shall not impair vested rights. (1919, c. 248.)

§ 3332. Order of registration omitted.—In every case where it appears from the records of the office of the register of deeds of any county in this state that the execution of a deed of conveyance was duly acknowledged before the clerk or deputy clerk of the superior court of such county and the certificate of such officer taking the acknowledgment was made complete except that the order of registration was omitted, and such deed, with the certificate of such officer, was duly registered without any order of registration, any and all such probates and registrations are hereby validated, and the records of such deeds of conveyance may be read in evidence upon the trial or hearing of any cause with the same force and effect as if the same had been duly ordered registered. This section only applies to deeds so acknowledged and registered prior to January first, one thousand nine hundred and fifteen. Suits pending October 13, 1913, are not affected by this section. (1911, c. 91; 1911, c. 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1.)

§ 3333. Official deeds omitting seals.—All deeds executed prior to August 22, 1924, by any sheriff, commissioner, receiver, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall be good and valid nevertheless: Provided, this act shall not apply to actions pending August 22, 1924. (1907, c. 807; 1917, c. 69, s. 1; 1924, c. 64.)

See section 8031 for tax deeds.

Editor's Note.—The Act of 1924 re-enacted this section, bringing it down to date and inserting receivers in the list of officers.

§ 3333(a). Defective acknowledgment on old deeds validated.—The clerk of the superior court may order registered any deed, or other conveyance of land, in all cases where the instrument and probate bears date prior to January first, one thousand nine hundred and seven (1907) where the acknowledgment, private examination, or other proof of execution, has been taken or had before a notary public residing in the county where the land is situate, where said officer failed to affix his official seal, and where the certificate of said officer appears otherwise to be genuine. (1933, c. 439.)

§ 3334. Probates omitting official seals.—In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this state, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this state, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," "notarial seal," or words of similar import, and no such seal appears of record, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, 1929; provided this section does not apply to pending litigation. (Rev. s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; 1929, c. 8, s. 1.)

Editor's Note.—The Act of 1929 amended the last two sentences as formerly appearing in this section to read as the last sentence above.

§ 3335. Registrations by register's clerks or deputies.—All registration of deeds and other instruments heretofore made by the several registers of deeds of the several counties of the state by their deputies and clerks, and signed in the name of the register of deeds by a deputy or clerk, and when said registration is in all other respects regular, are hereby validated and declared of the same force and effect as if signed in the name of the register and not by a deputy or clerk. This section does not affect litigation pending March 8, 1911, in any state or federal court or any suit in substantial renewal of any pending litigation. (1911, c. 184, s. 1.)

§ 3336. Before officer in wrong capacity or out of jurisdiction.—All deeds, conveyances, or other instruments permitted by law to be registered in this state, which have been probated or ordered to be registered previous to January first, one thousand nine hundred and thirteen, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the state, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. This section does not affect actions pending March 11, 1913. (Rev., ss. 1017, 1030; 1913, c. 125, s. 1.)

Deeds, etc., Ordered to Be Registered by Justices Validated.—All deeds, conveyances, or other instruments permitted by law to be registered in this State which have been probated or ordered to be registered by any of the several justices of the peace appointed under the Act of 1921 L. 237, set out since the first Monday in April, nineteen hundred and twenty-five, where the certificate of the probate is sufficient in form, but appears to have been certified by one of the several justices of the peace named in said act, are hereby declared to have been duly proved, probated and recorded, and to be valid. 1927, ch. 189, section 2.

Has no Retroactive Effect as to Vested Rights of Third Parties.—Acts validating irregular acknowledgments and probates while good, as between the parties, and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. Gordon v. Collett, 107 N. C. 362, 12 S. E. 332; Williams v. Kerr, 113 N. C. 306, 310, 18 S. E. 501.

§ 3337. Before justices of peace, where clerk's certificate or order or registration defective.—In

every case where it appears from the record of the office of any register of deeds in this state that a justice of the peace in this state has taken and certified the proof of any instrument required by law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered, prior to the first day of January, one thousand nine hundred and seven, in the county where the lands described in the instrument are located, without or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, certificates and registration are validated; but as against creditors or purchasers from donor, bargainor or lessor, only from February first, nineteen hundred and seven. (1907, c. 83, s. 1.)

For amendment applicable in Clay county only, see P. L. 1933, c. 530.

§ 3338. Probates on proof of handwriting of maker refusing to acknowledge.—All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated. (Rev., s. 1026; 1897, c. 28.)

§ 3339. Before judges supreme or superior courts or clerks before 1889.—Wherever the judges of the supreme or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of any instrument required or allowed by law to be registered, and the privy examination of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated. (Rev., s. 1009; Code, s. 1260; 1871-2, c. 200, s. 1; 1889, c. 252; 1891, c. 484.)

In General.—It is evident from the general scope of all the legislation upon this important subject that this section was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800, 801.

Liberal Construction.—The statutes validating defective probates and registrations of deeds are remedial, and must be liberally construed to embrace all cases fairly within their scope. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800.

Defective Probates of County Courts Embraced.—Where it is argued by counsel that this section does not refer to probates taken by the county courts, but to those of the clerks of said courts, it was held that the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead to that conclusion. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800, 801.

Was Not Intended to Validate Intentional Breaches of Authority. — There was no purpose to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in misconceiving the extent of the power affirmatively conferred by law, but in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such legal restrictions for his own advantage or convenience. Freeman v. Person, 106 N. C. 251, 253, 10 S. E. 1037.

Probate of Officer Who is a Party Not Validated.—This section has been considered in Freeman v. Person, 106 N. C. 251, 10 S. E. 1037, and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party. White v. Connelly, 105 N. C. 65, 71, 11 S. E. 177.

Probate by Deputy Clerks.—At the time, and prior to the enactment of this section, deputy clerks could not, take proof of deeds and other instruments requiring registration; but an erroneous impression prevailed then and before that time, that they and the judges of the courts had authority to do so, and in many instances they undertook to exercise such authority. This was attributable to confused legislation on the subject of the probate of deeds and other instruments, and the fact that such officers were invested with such power before the present statutes on that subject were enacted. To cure errors in this respect, and render effectual many official acts done by honest misapprehension of the law, the Legislature enacted this section. Tatom v. White, 95 N. C. 453, 458. Deputy clerks are now authorized by section 3293 to take probate on instruments.—Ed. Note.

Same—Signing by Deputy Clerk.—This section validates probates of deeds and privy examinations taken before a deputy clerk prior to January 1, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. Gordon v. Collett, 107 N. C. 362, 12 S. E. 332.

Constitutionality.—This curative statute is constitutional and valid if rights of third parties have not accrued, but it would not divert the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute. Gordon v. Collett, 170 N. C. 362, 12 S. E. 332.

Scope of the Original Section. — This section originally rendered valid all probates of deeds, etc., made before the officers therein named, prior to 12 February, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code. Tatom v. White, 95 N. C. 453.

§ 3340. Before clerks of inferior courts.—All probates and orders of registration made by and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Halifax, Northampton, Hertford, Buncombe, Mecklenburg, Granville, Beaufort, Lenoir, Robeson, Cumberland, Ashe, Martin, Wayne, Greene, Iredell, Bertie, Edgecombe, Duplin and New Hanover. This section applies to probates and private examinations taken before the clerks of the criminal court of Buncombe prior to February second, one thousand eight hundred and ninety-three. (Rev., ss. 1020, 1021; 1885, cc. 105, 108; 1889, c. 143; 1889, c. 463.)

§ 3341. Before de facto officers of Greene county.—The probate of all instruments requiring registration made by Alexander Taylor while acting as and being the de facto clerk of the superior court of Greene county during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are hereby de-

cleared valid; and the registration of all instruments requiring registration as made by W. E. Murphrey while acting as the de facto register of deeds of Greene county during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are declared valid. (Rev., s. 1029; 901, c. 369.)

§ 3342. Order of registration by judge, where clerk party. — All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the supreme court, to which clerks of the superior court are parties, are hereby confirmed, and the probates and orders for registration declared to be valid. (Rev., s. 1011; 1893, c. 3, s. 2.)

§ 3343. Order of registration by interested clerk.—The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, one thousand nine hundred and thirty-five, to which the clerks of the superior courts are parties, or in which they have an interest, and which have been registered on the order of such clerks or their deputies, or by assistant clerks of the superior courts, on proof of acknowledgment taken before such clerks, assistant clerks, deputy clerks, justices of the peace or notaries public, be, and the same are declared valid. This section shall not be construed so as to impair any vested right nor effect pending litigation. (Rev., s. 1015; 1891, c. 102; 1899, c. 258; 1905, c. 427; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1; 1935, c. 235.)

Editor's Note.—The amendment of 1935 changed the date from "prior to the fourth day of March, 1908" to "prior to the fifteenth day of January, 1935." It also validated registration on the order of deputies or assistant clerks.

§ 3344. Probates before interested notaries.—The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in such instruments. (Ex. Sess. 1908, c. 105, s. 2.)

§ 3345. Probates before officer of interested corporation.—In all cases when acknowledgment of proof of any conveyance has been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, justice of the peace, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1.)

Although a grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, a chattel mortgage to a bank will not be declared void because the acknowledgment thereof was taken by its cashier. Bank of Duplin v. Hall, 203 N. C. 570, 166 S. E. 526.

§ 3346. Probates before officers, stockholders or directors of corporations prior to January 1, 1929. —No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, one thousand nine hundred and twenty-nine, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was an officer, stockholder, or director in said corporation; but such proofs and acknowledgments and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was an officer, stockholder or director in any corporation which is a party to any such instrument. Provided, this act shall not affect pending litigation or in any wise impair vested rights. Ex. Sess. 1913, c. 41; 1929, c. 24, s. 1.)

Editor's Note.—The Act of 1929 inserted the above section in lieu of the one formerly appearing. The catchline to the section has been changed to conform to the amendment. See § 3366(g2).

§ 3347. Clerk's deeds, where clerk appointed himself to sell.—All deeds made by any clerk of the superior court of any county or his deputy, prior to the first day of January, one thousand nine hundred and five, in any proceeding before him in which he has appointed himself or his deputy to make sale of real property or other property are hereby validated. (1911, c. 146, s. 1.)

§ 3348. Certificate of wife's "previous" examination.—All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred and ninety-three, in which probate it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed. (Rev., s. 1016; 1893, c. 130.)

§ 3349. Probates of husband and wife in wrong order.—All probates prior to the sixth day of March, one thousand eight hundred and ninety-three, of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated. (Rev., s. 1017; 1893, c. 293.)

See section 998 as to order of acknowledgment being immaterial.

Rights of Third Parties Acquired before Statute Cannot Be Divested.—If third parties acquired rights, as by liens, against the grantor or conveyances from him, registered before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. Robinson v. Willoughby, 70 N. C. 358; Smith v. Castrix, 27 N. C. 318; Gordon v. Collett, 107 N. C. 362, 12 S. E. 332; Long v. Crews, 113 N. C. 256, 18 S. E. 499; Williams v. Kerr, 113 N. C. 306, 18 S. E. 501; Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99; Barrett v. Barrett, 120 N. C. 127, 129, 26 S. E. 691.

Husband's Deed Acknowledged or Subscribed by Witnesses. —The Curative Act, 1893, chap. 293, made valid probates where the wife's privy examination was had prior to the husband's "acknowledgment," and under this provision it was held that this embraces, in the true intendment of the act, cases in which the execution of the deed by the husband was proved by a subscribing witness, and not by his technical acknowledgment. Barrett v. Barrett, 120 N. C. 127, 130,

26 S. E. 691. The wording of the present section seems to cover both situations,—Ed. Note.

§ 3350. Probates of husband and wife before different officers.—Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this state or one in this state and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this state, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered, and the word "probate," as used in this section, shall include privy examination of the wife. This section does not affect actions pending January 25, 1907. (Rev., s. 1018; 1895, c. 120; 1907, c. 34, s. 1.)

§ 3351. Wife free trader; no examination or husband's assent. — In all cases prior to the twenty-fourth day of September, nineteen hundred and thirteen, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would affect the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed. Ex. Sess. 1913, c. 54, s. 1.)

Section 2515 Not Affected.—This section does not affect section 2515, requiring the additional certificate in deed of wife of her separate realty to her husband. Foster v. Williams, 182 N. C. 632, 109 S. E. 834.

Application to Deed to Husband.—It is not within the meaning or intent of this section purporting to insure defective execution of deeds of married women, free traders, that it should apply to deeds made directly to the husband, or annul the requirement that the probate officer certify that it was not unreasonable or injurious to her; but this should only apply to such conveyances made to third persons in respect to the husband's assent, etc., coming within the provisions of the section referred to, when the grantor is a free trader. Foster v. Williams, 182 N. C. 632, 109 S. E. 834. See notes of this case under section 2515.

§ 3352. By president and attested by treasurer under corporate seal.—All deeds and conveyances for lands in this state, made by any corporation of this state, which have heretofore been proved or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the state of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and declared to be good and valid deeds for all purposes. Where such deeds have been executed for the corporation by its president and attested, sealed and acknowledged or probated as aforesaid, and the acknowledgment or probate has been duly adjudged sufficient by any deputy clerk and ordered registered, the acknowledgment, probate and registration are ratified, and said deed is declared valid. Such deeds, or certified copies thereof, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this state where the title of said lands shall come in controversy. (Rev., s. 1028; 1905, c. 307.)

For a curative act related to this subject, see sec. 1134.

§ 3353. By president and attested by witness before January, 1900.—All deeds and conveyances for land in this state, made prior to January first, one thousand nine hundred, by the president of any corporation duly chartered under the laws of this state, and attested by a witness, is hereby declared to be a good and valid deed by such corporation for all purposes, and shall be admitted to probate and registration and shall pass title to the property therein conveyed to the grantee as fully as if said deed were executed according to provisions and forms of law in force in this state at the date of the execution of said deed. This section does not apply to suits pending March 8, 1909. (1909, c. 859, s. 1.)

§ 3354. Corporate name not affixed, but signed otherwise prior to January, 1927.—In all cases prior to the first day of January, one thousand nine hundred and twenty-seven, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; 1927, c. 126.)

§ 3355. Probated and registered on oath of subscribing witness.—In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid. (1919, c. 53, s. 2.)

§ 3355(a). Certificate alleging examination of grantor instead of witness. — Wherever any deed of conveyance registered prior to January first, eighteen hundred and eighty-six, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and

any such deed shall be taken and considered as duly acknowledged and probated: Provided, this section shall not affect litigation pending Feb. 27, 1925. (1925, c. 84.)

§ 3356. Proof of corporate articles before officer authorized to probate.—All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages are ratified. (Rev., s. 1027; 1901, c. 170.)

For a curative section, see section 1134.

§ 3357. Before officials of wrong state.—In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding. This section applies to probate and acknowledgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. This section does not affect any suit pending March 6, 1905. (Rev., s. 1013; 1905, c. 505.)

§ 3358. Before notaries and clerks in other states.—All deeds and conveyances made for lands in this state which have, previous to February fifteenth, one thousand eight hundred and eighty-three, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of congress regulating the certifying of records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof and registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (Rev., ss. 1022, 1023; Code, ss. 1262, 1263; 1883, c. 129, ss. 1, 2; 1885, c. 11; 1915, c. 213.)

For registration of certified copies and their value as evidence, see sec. 3319.

Deed Probated in Tennessee in 1869. — When no vested rights are impaired, a deed dated in 1869 is not incompetent evidence upon the ground of a defective probate, showing the acknowledgment of the grantor and his wife, and her privy examination, taken before the clerk of a certain county court of Tennessee, with the seal of that court affixed to, apparently the seal of his office, the same being validated by this section. Penland v. Barnard, 146 N. C. 378, 59 S. E. 1109.

Registry of Deed Upon Certificate of Commissioner of Deeds from Another State.—A deed registered in the proper county upon the certificate of a commissioner of deeds from another state must have the fiat from the clerk ordering it to be registered, or the registration will be invalid. This defect is not cured by this section. Cozard v. McAden, 148 N. C. 10, 61 S. E. 633. See section 3362.

Constitutionality.—The Legislature has the constitutional right to enact statutes making valid deeds theretofore invalid by reason of defective probate, when no vested rights are impaired. Penland v. Barnard, 146 N. C. 378, 59 S. E. 1109.

§ 3359. Acknowledgment by resident taken out of state.—When prior to the ninth day of March, one thousand eight hundred and ninety-five, a deed or mortgage executed by a resident of this state has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid. (Rev., s. 1019; 1895, c. 181.)

§ 3360. Before deputy clerks of courts of other states.—Where any deed or conveyance of lands in this state, executed prior to January first, one thousand nine hundred and thirteen, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this state, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this state in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon is validated, and the conveyance, if otherwise sufficient, is declared valid. This section does not apply to any litigation pending March 6, 1913. (1913, c. 57, ss. 1, 2.)

§ 3361. Sister state probates without governor's authentication. — In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this state then

in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument. (Rev., s. 1014; 1901, c. 39.)

§ 3362. Before commissioners of deeds.—Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. Nothing in this section affects litigation pending March 3, 1913. (1913, c. 39, s. 2.)

Does Not Interfere with Vested Rights.—This section is remedial in character and beneficient in purpose—making for the saving of titles, and not their destruction—yet they will not be permitted to impair or to interfere with the vested rights of others. Champion Fibre Co. v. Cozard, 183 N. C. 600, 611, 112 S. E. 810. See notes of this case under section 3305

Same—Purchasers at Execution Sale.—This section cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. Champion Fibre Co. v. Cozard, 183 N. C. 600, 112 S. E. 810.

§ 3363. Foreign probates omitting seals.—In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice consul, vice consul general or commercial agent of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this state, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office, or words of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. This section does not apply to suits pending March 7, 1913. (1913, c. 69, s. 1.)

§ 3364. Before consuls general.—Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, nineteen hundred and thirteen, been proved or acknowledged before a "consul general," is validated; and its registration is authorized and validated. This section does not affect litigation pending October 13, 1913. (Ex. Sess. 1913, c. 72, s. 2.)

§ 3365. Before vice consuls and vice consuls general.—The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this state prior to January first, one thousand nine hundred and five, upon the certificate of any vice consul or vice consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice consul or vice consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated. (Rev., s. 1024; 1905, c. 451, s. 2.)

Application to Right Prior to Statute—Person Not Claiming from Same Grantor Not Protected.—This section validating acknowledgment of deeds in foreign countries before "vice consuls and vice consuls general," though not valid against a deed from the same grantor duly registered or a lien against the grantor acquired before the validating act, is good as against a person not claiming under the grantor therein. Powers v. Baker, 152 N. C. 718, 68 S. E. 203.

§ 3366. Before masters in chancery.—All probates, acknowledgments and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state are declared to be valid, and all registrations of such deeds or conveyances upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient. All such deeds and conveyances and registration thereof, and all certified copies of such registations, shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds and conveyances with probates, acknowledgments, or private examinations made in accordance with provisions of statutes of this state in force at the time and as registrations thereof and certified copies of such registrations. This section does not apply to any suit pending in the courts of this state or of the United States on February 15, 1911. Nothing in this section contained shall have effect to deprive any one of any legal rights acquired, before its passage, from the grantors in such deeds or conveyances subsequently to their execution, where the deeds or conveyances by which such rights were acquired have been duly acknowledged or probated and registered. (1911, c. 10.)

§ 3366(a). Validation of probate of deeds by clerks of courts of record of other states, where official seal is omitted.—In all cases where, prior to the first day of January, one thousand eight hundred and ninety-one, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, other instrument authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other

proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this state and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and hereby is to all intents and purposes validated: Provided, that this section shall not apply to litigation pending February 5, 1921. (1921, c. 15, ss. 1, 2.)

§ 3366(b). Validation of probates by different officers of deeds by wife and husband.—In all cases where, prior to the second day of March, one thousand eight hundred and ninety-five, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument, authorized to be registered, executed by husband and wife, has been taken as to the husband and wife in different states and by different officers having power to take acknowledgments, any and every such acknowledgment, privy examination of a married woman, or other proof of execution, and the probate of any and every such deed, mortgage or other instrument shall be and hereby is, to all intents and purposes validated. This section shall not apply to litigation pending February 5, 1921, or to vested rights. (1921, c. 19, ss. 1, 4.)

§ 3366(c). Registration without formal order validated.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument, authorized to be registered, has been taken before a commissioner in another state appointed by the probate judge of any county of this state, under the provisions of section twenty of chapter thirty-five of Battle's Revisal, during the time said chapter remained in force and effect, and such commissioner has certified to such acknowledgment, privy examination or other proof, and has returned such deed, mortgage or other instrument to said probate judge, with his certificate endorsed thereon, and such deed, mortgage or other instrument, together with such certificate, has been registered, without any adjudication or order of registration by such probate judge, the probate and registration of any and every such deed shall be, and hereby is, to all intents and purposes validated. This section shall not apply to litigation pending February 5, 1921, or to vested rights. (1921, c. 19, ss. 2, 4.)

§ 3366(d). Same.—In all cases where any deed, mortgage or other instrument has heretofore been acknowledged or probated in accordance with the provisions of this law, and such deed, mortgage or other instrument has been registered, without any order of registration by the probate judge or clerk of the superior court appearing thereon, the probate and registration of any and every such deed, mortgage or other instrument shall be, and hereby is to all intents and purposes validated. This section shall not apply to litigation pending February 5, 1921, or to vested rights. (1921, c. 19, ss. 3, 4.)

§ 3366(e). Validation of acknowledgments taken by notaries public holding other office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public, at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid: Provided, this section shall not affect vested rights or litigation pending February 3, 1921. (1921, c. 21.)

§ 3366(f). Validation of certain probates of deeds before consular agents of the United States.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument authorized or required to be registered has been taken before any consular agent of the United States, during the time chapter thirty-five of Battle's Revisal remained in force and effect, and such acknowledgment, privy examination, or other proof of the execution of such deed, mortgage, or other instrument is in other respects regular and in proper form, and such deed, mortgage, or other instrument has been duly ordered to registration and registered in the proper county, the acknowledgment, probate, and registration of any and every such deed, mortgage, or other instrument is hereby validated as fully and to the same effect as though such acknowledgment, privy examination, or other proof of execution had been taken before one of the officers named in subsection five of section two of said chapter thirty-five of Battle's Revisal. No litigation pending March 8, 1921, shall be affected by this section. (1921, c. 157.)

§ 3366(g). Probates before stockholders and directors of banks.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred and twenty-three (1923), shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder or director in such banking corporation: Provided, that this section shall not affect litigation pending February 7, 1923. (1923, c. 17.)

Editor's Note.—A provision for a similar purpose to that of this section is found in section 3345.

This section is summarized in 1 N. C. Law Rev. 302.

§ 3366(g 1). Acknowledgments taken by stockholder, officer, or director of bank.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-four, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation: Provided, that this act shall not affect litigation pending August 22, 1924. (1924, c. 68.)

§ 3366(g2). Acknowledgment and registration by officer or stockholder in building and loan association.—All acknowledgments and proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association prior to the first day of January, one thousand nine hundred and twenty-nine, shall not be, nor held to be, invalid by reason of the fact that the clerk of the Superior Court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the Superior Court, or by any deputy or assistant clerk of the Superior Court, be or held to be invalid by reason of the fact that the clerk of the Superior Court, or deputy, or assistant clerk of the Superior Court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any building and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (1924, c. 108; 1929, c. 146, s. 1.)

Editor's Note.—The Act of 1929 made this section applicable to acknowledgments and registrations prior to Jan. 1, 1929, instead of Aug. 10, 1924 as formerly provided. The act does not apply to pending litigation.

§ 3366(h). Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public or justices of the peace prior to January first, one thousand nine hundred thirty-one, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid: Provided, this section shall not affect litigation pending March 1, 1923. (1923, c. 61; 1931, cc. 166, 438.)

Editor's Note.—It is suggested in 1 N. C. Law Rev. 302, where it is analyzed, that this section should be considered as an addition to section 3344.

The first 1931 amendment, which amended this section by inserting the words "prior to January first, one thousand nine hundred thirty-one," provided that it should not affect litigations pending January thirty-first, one thousand nine hundred thirty-one. The other 1931 amendment inserted the words "or justice of the peace."

§ 3366(i). Validation of instruments registered without probate.—In every case where it shall appear from the records in the office of the register of deeds of any county in the state that any instrument of writing required or allowed by law to be registered prior to January first, eighteen hundred and sixty-nine, without any acknowledgment, proof, privy examination, or probate, or upon a defective acknowledgment, proof, privy examination, or probate, the record of such instrument may, notwithstanding, be read in evidence in any of the courts of this state, if otherwise competent. This section shall not apply to suits pending March 6, 1923, or affect any vested rights. (1923, c. 215, s. 1.)

Editor's Note.—It is suggested in 1 N. C. Law Rev. 302, where this section is summarized, that it probably means that the registration must have been made prior to 1869, and that this and section 3366(j) should be considered as amendments or additional sections to ch. 35 Art. 2, secs. 1751-1778, and ch. 65, Art. 4, secs 3329-3366.

For act relating to validation applicable to Graham and Cherokee counties only, see Public Laws of 1935, chapter 92.

§ 3366(i)1. Validation of corporate deed with mistake as to officer's name.—In all cases where the deed of a corporation executed before the first day of January, 1918, is properly executed, properly recorded and there is error in the probate of said corporation's deed as to the name or names of the officers in said probate, said deed shall be construed to be a deed of the same force and effect as if said probate were in every way proper. (1933, c. 412, s. 1.)

§ 3366(j). Registration on defective probates beyond state.—In every case where it shall appear from the records in the office of the register of deeds of any county in this state that any instrument required or allowed by law to be registered, bearing date prior to the year one thousand eight hundred and thirty-five, executed by any person or persons residing in any of the United States, other than this state, or in any of the territories of the United States, or in the District of Columbia, has been proven or acknowledged, or the privy examination of any feme covert taken thereto, before any officer or person authorized by any of the laws of this state in force prior to the said year one thousand eight hundred and thirty-five to take such proofs, privy examinations and acknowledgments, and the said instruments has been registered in the proper county without the certificate of the governor of the state or territory in which such proofs, acknowledgments or privy examinations were taken, or of the secretary of state of the United States, when such certificate or certificates were required, as to the official character of the person taking such acknowledgment, proof or privy examination, as aforesaid, and without an order of registration made by a court or judge in this state having jurisdiction to make such order, then and in all such cases such proofs, privy examinations, acknowledgments and registrations are hereby in all respects fully validated and confirmed and declared to be sufficient in law, and such instruments so registered may be read in evidence in any of the courts of this state. This section shall not apply to suits pending March 6, 1923, or affect any vested rights. (1923, c. 215, ss. 2, 3.)

§ 3366(j1). Certificate of clerks without seal.—All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments heretofore executed by clerks of the Superior Court of the State and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instrument bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or vertifi-

cations resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248.)

See note to preceding section.

§ 3366(j2). Acknowledgments taken by officer who was grantor.—In all cases where a deed or deeds dated prior to the first day of January, one thousand nine hundred and ten, purporting to convey lands, have been registered in the office of the Register of Deeds of the county where the lands conveyed in said deeds are located, prior to said first day of January, nineteen hundred and ten, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1.)

Editor's Note.—By express provision this section does not affect actions and proceedings pending at the time of its ratification which was on the 21st of February, 1929.

§ 3366(j3). Seal of acknowledging officer omitted; deeds made presumptive evidence.—In all cases where deeds appear to have been executed for land prior to January 1, 1900, and appear to have been recorded in the offices of the registers of deeds in the proper counties in this state, and the same appear to have been acknowledged before commissioners of affidavits (or deeds) of North Carolina, residing in the District of Columbia or elsewhere in the different states, or appear to have been recorded without any certificate being recorded on the record of such deed or deeds, such record or records shall be presumptive evidence of the execution of such deed or deeds by the grantor or the grantors to the grantee or grantees therein named for the lands therein described, and the record of such deed or deeds may be offered or read in evidence upon the trial or hearing of any cause in any of the courts of this state as if the same had been properly probated and recorded. Provided, however, that nothing herein contained shall prevent such record or records from being attacked for fraud, and provided further that this act shall not apply to creditors or purchasers, but as to them the same shall stand as if this act had not been passed, neither shall it apply to pending suits, and shall only apply to deeds executed prior to January first, nineteen hundred. (1929, c. 14, s. 1.)

§ 3366(j4). Absence of notarial seal. — Any deed executed prior to the first day of January, nineteen hundred and ten, and duly acknowledged before a North Carolina notary public, and the probate recites "witness my hand and notarial seal," or words of similar import, and no seal was affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. Such registration shall not impair vested rights and shall not affect any suit, action or proceeding pending in the courts of this State prior to March 26, 1935. (1935, c. 130.)

§ 3366(j5). Acknowledgments of notary holding another office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid: Provided, this section shall not affect vested rights or pending litigation. (1935, c. 133.)

Art. 5. Registration of Official Discharges from the Military and Naval Forces of the United States

§ 3366(k). Book for record of discharges in office of register of deeds; specifications.—There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and permanent book, in which shall be recorded official discharges from the military and naval forces of the United States. Said book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1.)

§ 3366(l). Registration of official discharge or certificate of last discharge; fee.—Upon the presentation of any official discharge, or official certificate of lost discharge, from the army, navy, or marine corps of the United States, and the payment of a fee of twenty-five (25) cents therefor, it shall be the duty of the register of deeds of the several counties of the state to record such discharge in the book provided for in the preceding section. (1921, c. 198, s. 2.)

§ 3366(m). Inquiry by register of deeds; oath of applicant.—If any register of deeds shall be in doubt as to whether or not any paper so presented for registration is an official discharge from the army, navy or marine corps of the United States, or an official certificate of lost discharge, he shall power to examine, under oath, the person so presenting such discharge, or otherwise inquire into its validity; and every register of deeds to whom a discharge or certificate of lost discharge is presented for registration shall administer to the person offering such discharge or certificate of lost discharge for registration the following oath, to be recorded with and form a part of the registration of such discharge or certificate of lost discharge:

"I, ..., being duly sworn, depose and say that the foregoing discharge (or certificate of lost discharge) is the original discharge (or certificate of lost discharge) issued to me by the Government of the United States; and that no

alterations have been made therein by me, or by any person to my knowledge.

.....

Subscribed and sworn to before me this ..... day of ....., 19 ...." (1921, c. 198, s. 3.)

§ 3366(n). Forgery or alteration of discharge or certificate; punishment. — Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the Government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1921, c. 198, s. 4.)

§ 3366(o). Certified copy of registration; fee. —Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered; and it shall be the duty of the register of deeds to furnish such certified copy upon the payment of a fee of fifty (50) cents therefor. (1921, c. 198, s. 5.)

CHAPTER 66

PROHIBITION AND REGULATION OF INTOXICATING LIQUORS

Art. 1. Manufacture and Sale of Intoxicating Liquors

§ 3367. Unlawful to manufacture or sell.—It is unlawful for any person, firm or corporation to manufacture or in any manner make, or sell, or otherwise dispose of, for gain, any spirituous, vinous, fermented or malt liquors or intoxicating bitters within the state of North Carolina: Provided, that wines and ciders may be manufactured or made from grapes, berries or fruits, and wine sold at the place of manufacture only, and only in sealed or crated packages containing not less than two and one-half gallons per package; but no wine, when sold, shall be drunk upon the premises where sold, nor shall the package containing the same be opened on the premises: Provided further, that nothing herein contained shall be construed to prevent the sale of cider, in any quantity, by the manufacturer from fruits grown on his lands within the state of North Carolina; nor to prevent the sale of wine to any minister of religion or other officer of a church to be used for religious or sacramental purposes. (Rev., ss. 2058, 2058(b), 2061; 1908, c. 71, ss. 1, 5; 1915, c. 97, s. 8.)

Editor's Note.—A perusal of the general, special and local laws regulating the sale of intoxicating beverages prior to 1908 shows the growth and development of the desire on the part of the people of North Carolina to restrict, and in many sections, as evidenced by local acts, to wholly prohibit the sale thereof. The final climax of this growing tendency for restriction came in 1908 with the enactment of the prohibition law.

Since the Act of 1908 the Legislature has, session after session, amended and added to the prohibition law. The more important additions coming in Laws 1911, cc. 35, 45, 133, Laws 1913, c. 44, Laws 1915, cc. 97, 197, Laws 1919, c. 151, Laws 1919, cc. 4, 241. In all of these acts the intent was to strengthen the bonds of prohibition, by enlarging the scope and effect of the law, and providing more effective machinery for the enforcement thereof.

Later legislation has evidenced a weakening of prohibition influence. See sections 3411(dd)-3411(mm), 3411(1) et seq. And certain counties have been exempted from the provisions of the prohibition law. See sections 3411(38) et seq.

Same—The Turlington Act.—The Turlington Act, Laws 1923, c. 1, is intended to make the state law conform in a substantial manner to the Federal Volstead Act. In doing this a number of very important changes in the law were made. Sections 3368, 3387 are changed by section one of the act, now 3411(a) of this Code, which defines the words "intoxicating liquor," and "liquor" to include generally any spirituous, vinous, malt, or fermented liquors, liquids, and compounds, containing one half of one per centum or more of alcohol by volume.

Section 3411(b), prohibiting the manufacture, sale, transportation, etc., of intoxicating liquors materially changes sections 3367, 3373, 3374, 3375, 3376, 3378, 3379, 3384, 3385, and 3386.

Section 3411(e) is substantially the same as section 3370; section 3411(f) providing for the seizure of liquor or conveyance, arrests, and sale of property, is much more in detail than sections 3403, 3404, and 3405. It is interesting to note here that one of the evils of the former law is remedied by protecting the property rights of innocent third parties whose vehicles are seized. Section 3411(g) is a practical re-enactment of section 3406. Section 3411(h) changes section 3369 by providing that in case of a sale where the delivery is by carrier, the venue for the prosecution may be in either the county of sale, the county of shipment, or the county of delivery.

Section 3411(j) changes sections 3379, 3384, 3385, 3386. While it is true that the rule as to prima facie evidence is the same, the amount in possession is not limited as formerly. Section 3380, which embodied the search and seizure law, is changed by section 3411(l), to conform to the new regulation prohibiting the possession of any quantity of liquor. Section 3411(q) is a substantial re-enactment of section 3390; section 3411(n) does not differ materially from section 3372; section 3411(o) and section 3377 requiring transportation companies to keep records are quite similar; section 3411(r) and section 3391 are practically identical; section 3411(s) follows section 3392 in allowing grain alcohol to be used for scientific and medicinal purposes; section 3393 insuring to the Church vinous liquors for sacramental purposes, is re-enacted as section 3411(t); sections 3411(v) to 3411(x) still require sheriffs to seize and destroy stills, and fixes the fees therefor, as was formerly provided in sections 3398, 3399, and 3401. Sections 3411(z), 3411(aa) provide the same punishment for violations of the law as found in sections 3409, 3410.

Same—Counties Exempted from Turlington Act.—See sections 3411(38) et seq.

Liberal Construction.—Our prohibition act was passed in pursuance of Article 1, § 2, of the State Constitution providing that all political power is vested in and derived from the people, and the approval of the people of this statute as expressed in the elections requires a liberal construction of the statute to carry out its intention as gathered from its related parts and clearly expressed. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

State Enforcement of Eighteenth Amendment.—The defendant was convicted of having liquor in his possession for the purpose of sale in violation of sec. 3379. He appealed on the ground that the statute was repealed by the Eighteenth Amendment to the Constitution of the United States. The court sustained the conviction. State v. Campbell, 182 N. C. 911, 110 S. E. 86 (1921).

"The Eighteenth Amendment gives to Congress and to the several states 'concurrent power' to enforce its provisions by 'appropriate legislation.' Since this is the only place in the Constitution where this identical expression is used in a similar connection, the construction of this phrase has given rise to a new problem. See 33 Harv. Law Rev. 968. Does the Amendment mean that the joint action of both Congress and the state legislatures is necessary to the enactment of enforcement provisions? Interpreting the word 'concurrent' as meaning 'running together, having joint and equal authority,' the phrase may mean that the laws of neither sovereign are supreme over those of the other and that the united action of state and nation is necessary to the validity of any legislation on the subject. See National Prohibition Cases, 253 U. S. 350, 392, 407, 64 L. Ed. 946, 40 S. Ct. 486, 588 (1919), dissenting opinions. Or, does the term 'concurrent power,' contemplate that each sovereignty may enact such legislation as is actually an enforcement of the Amendment? By this theory the words are held to imply that the power exists in both at the same time, each being

independent of the other. This view is adopted by the courts. National Prohibition Cases, 253 U. S. 350, 64 L. Ed. 946, 40 S. Ct. 486, 588 (1919); Powell v. State, 90 So. 138, 18 Ala. App. 101, (Ala. 1921); Palmer v. State, 191 Ind. 683, 133 N. E. 388 (Ind. 1921). But the same authorities hold that, where there is a conflict between the national and state laws on this subject, the state laws must yield. Each state may then make such laws as it pleases within its jurisdiction so long as such acts contemplate the enforcement of the Amendment and are not inconsistent with the existing federal statutes on the same subject." Ex parte Volpi, 199 Pac. 1090 (Cal. 1921). See 34 Harv. Law Rev. 317. See also, State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

"Thus all of the prohibition laws of North Carolina, whether passed prior to or after the adoption of the Amendment, if not in conflict with the federal enforcement provisions, are to this extent valid. State v. Fore, 180 N. C. 744, 105 S. E. 334 (1920); State v. Muse, 181 N. C. 506, 107 S. E. 320 (1921). Moreover, one act may be a violation of the laws of both sovereigns, state and nation. See 19 Mich. Law Rev. 647. Therefore, a conviction under the laws of one is not a bar to a subsequent prosecution for the same act under the laws of the other. That is to say, such a proceeding does not constitute double jeopardy. U. S. v. Holt, 270 Fed. 639 (W. D., N. Dak. 1921); Bryson v. State, 27 Ga. App. 230, 108 S. E. 63 (Ga. 1921)." 1 N. C. Law Rev. 60.

Meaning of "Sale" and "Sell."—The words "sale" or "sell" used in the general prohibition law, have a well-known legal signification and in the absence of anything to the contrary appearing in the statute, that is assumed to be the one intended. State v. Colonial Club, 154 N. C. 177, 69 S. E. 771. Barter and exchange are included. State v. Mitchell, 156 N. C. 659, 72 S. E. 632. But there must be an actual transfer for valuable consideration. State v. Colonial Club, 154 N. C. 177, 69 S. E. 771.

To constitute a sale under the statute against retailing, there is no necessity for a manual separation and delivery of the parcel by the retailer to the customer, but it will be a delivery sufficient in law if the keg, decanter, or other vessel be so placed or prepared as that the customers can or may, with the consent of the owner, draw for himself; and so, likewise, the price paid on completing the sale need not be paid into the hands of the proprietor, but it will be equivalent if it be deposited for him in a place of his appointment. State v. Kirkham, 23 N. C. 384; State v. Bell, 47 N. C. 337; State v. Simmons, 66 N. C. 622; State v. Poteet, 86 N. C. 612; State v. Taylor, 89 N. C. 577; 1 Mechem on Sales, sec. 1. State v. Colonial Club, 154 N. C. 177, 182, 69 S. E. 771.

For illustrative cases, see State v. Denton, 154 N. C. 641, 70 S. E. 839; State v. Neis, 108 N. C. 787, 13 S. E. 225.

Warrant Charging Separate Sales.—Where the warrant for the unlawful sale of intoxicating liquors charges several separate sales at various times, the defendant's motion that the State elect between the evidence of the different sales will be denied. State v. Cardwell, 166 N. C. 309, 81 S. E. 628.

Vendor Cannot Recover Purchase Price.—A seller of intoxicating liquor sold in violation of our prohibition law cannot recover the purchase price in the courts of this State. Pfeifer & Co. v. Love's Drug Co., 171 N. C. 214, 88 S. E. 343.

Exemption of Cider.—For a case under the prior law, see State v. Williams, 172 N. C. 973, 90 S. E. 905.

Allegation and Proof.—Conforming to the usual rules of procedure the allegation and proof in liquor prosecutions must correspond. State v. Ray, 92 N. C. 810; State v. Wilkerson, 164 N. C. 431, 444, 79 S. E. 888.

Evidence of Possession of Intoxicating Liquor.—Where a defendant is indicted for violating our State prohibition law, evidence that he had in his possession one-half gallon of "liquor" is interpreted as being an intoxicating beverage having the prohibited quantity of intoxicant, or containing more than one-half of one per centum of alcohol by volume, when there is no evidence to the contrary. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

§ 3368. Intoxicating liquors defined.—All liquors or mixtures thereof, by whatever name called, that will produce intoxication shall be construed and held to be intoxicating liquors within the meaning of this article: Provided, that medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia and National Formulary which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution, and which are manufactured and sold as medicines and not as beverages, shall not be held or construed to be or to come within the meaning or provisions of this article. (1908, c. 71, s. 2.)

Editor's Note.—Section 3411 (a), which is section one of Turlington Act of 1923, defines intoxicating liquors, and would seem to supersede this section. The definition there laid down is almost identical with the definition found in the Federal Volstead Act. Indeed, it was the intention of the Legislature to arrive at this result, i. e. to bring the State Act into conformity with the Federal Act. It is now declared that generally beverages containing one half of one per cent alcohol come with that forbidden and abolished circle classed as "intoxicating liquors." See 1 N. C. Law Rev. 303.

"Spirituous Liquors" as Used in Local Acts.—See State v. Giersch, 98 N. C. 720, 4 S. E. 193.

§ 3369. Place of delivery place of sale. — The place where delivery of any intoxicating liquors is made in the state of North Carolina shall be construed and held to be the place of sale thereof, and any station or other place within the state to which any person shall ship or convey any intoxicating liquors for the purpose of delivering or carrying the same to a purchaser shall be construed to be the place of sale. (Rev., s. 2080; 1908, c. 71, s. 4; 1915, c. 97, s. 8.)

Editor's Note.—This section is changed by section 3411(h), section 7 of the Turlington Act. While it is declared by this section that the place of delivery is the place of sale, the Act of 1923 provides the venue for the prosecution may be in either the county of sale, the county of shipment, or the county of delivery. See 1 N. C. Law Rev. 304.

Constitutionality.—Under the section making the place of delivery to the purchaser of intoxicating liquors the place of sale, an indictment at the place of delivery is not prohibited by the Sixth Amendment to the Constitution of the United States. State v. Patterson, 134 N. C. 612, 47 S. E. 808; State v. Herring, 145 N. C. 418, 58 S. E. 1007.

§ 3370. Unlawful to solicit orders for liquor.— It is unlawful for any person, for himself or as agent or traveling salesman for any person, firm or corporation, to solicit orders or proposals of purchase of intoxicating liquors by the jug or bottle or otherwise within the state of North Carolina. (1908, c. 118, s. 1.)

As to the effect of section 3411 (e) on this section, see Editor's Note, section 3367.

§ 3371. Unlawful sale through agents. — If any person unlawfully and illegally procures and delivers any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and shall be punished in the discretion of the court. When the solicitor of any judicial district has good reason to believe that liquor has been manufactured or sold contrary to law within any county in his district, and believes that any person has knowledge of the existence and establishment of any illicit distillery, or that any person has sold liquor illegally, then it is lawful for the solicitor to apply to the clerk of the superior court of the county wherein the offense is supposed to have been committed to issue subpœnas for the person so having knowledge of said offenses to appear before the next grand jury drawn for the county, there to testify upon oath what he may know touching the existence, establishment and whereabouts of said distillery or persons who have sold

intoxicating liquors contrary to law, and shall give the names and personal description of the keepers thereof, and such evidence when so obtained, shall be considered and held in law as an information on oath upon which the grand jury shall make presentment, as provided by law, in other cases. If any officer shall fail or refuse to use due diligence in the execution of the provisions of this section, he shall be guilty of laches in office and such failure be cause for removal from office. (Rev., ss. 3526, 3534; 1905, c. 498, ss. 6, 7, 8.)

As to the effect of section 3411(m) (Laws 1923, c. 1, section 13), upon this section, see Editor's Note under section 3367.

For cases under the former law, see State v. Colonial Club, 154 N. C. 177, 69 S. E. 771; State v. Whisnant, 149 N. C. 515, 63 S. E. 91.

What Constitutes One an Agent.—Revisal, section 3534, now this section, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. State v. Burchfield, 149 N. C. 537, 63 S. E. 89.

If one buys whisky for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey for another within the meaning of Revisal, section 3534, now this section, and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. State v. Burchfield, 149 N. C. 537, 63 S. E. 89.

§ 3372. Social clubs using liquors. — No corporation, club, association, or person shall directly or indirectly keep or maintain, alone or by association with others, or by any other means, or shall in any manner aid, assist, or abet others in keeping or maintaining a clubroom or other place where intoxicating liquors are received, kept, or stored for barter, sale, exchange, distribution, or division among the members of any such club or association or aggregation of persons, or to or among any other persons by any means whatever, or shall act as agents in ordering, procuring, buying, storing, or keeping intoxicating liquors for any such purpose: Provided, this section shall not apply to churches using wines for sacramental purposes, or to hospitals or asylums keeping intoxicating liquors for medical purposes. (1911, c. 133, s. 1; 1915, c. 97, s. 8.)

See section 3411(n).

Art. 2. Sale of Near-Beer and Other Specified Drinks

§ 3373. Unlawful to sell near-beer and other mixed drinks.—It is unlawful for any person, firm or corporation to sell or dispose of, for gain, near-bear, beerine, or other spirituous, vinous, or malt liquors, or mixtures of any kind, and under whatsoever name called, that shall contain alcohol, or cocaine, or morphine, or other opium derivative, except as herein provided. (1911, c. 35, s. 1.)

This section is now materially changed by section 3411(b). See Editor's Note, section 3367.

§ 3374. Must allow package to be taken away. —It is unlawful for any person, firm or corporation, who is engaged in the sale of any kind of drinks, to refuse to allow any person to carry away from the place where such drinks are being sold or offered for sale, any package or quantity of any size of the drink which has been bought and paid for; and if any person, firm or corporation shall refuse to allow the package or quantity of such drink to be carried away from the place of sale, it shall be prima facie evidence of the violation of this article. (1911, c. 35, s. 2.)

As to effect of Turlington Act, section 3411(b) of this Code, upon this section, see Editor's Note, section 3367.

§ 3375. Construction of article. — This article shall not be construed to forbid the sale of cocaine or morphine or other opium derivative to any registered pharmacist, or to forbid the sale of cocaine, morphine, or other opium derivative by a licensed pharmacist upon a written prescription by a regularly licensed physician or surgeon. This article shall not apply to the sale of domestic wines when sold in quantity of not less than two and one-half gallons in sealed packages or crated, on the premises where manufactured, or to the sale of cider in any quantity by the manufacturer from fruits grown on his land within the state of North Carolina, or to the sale of wine to any minister of religion or other officer of a church when such wine is bought for religious or sacramental purposes, or to the sale of flavoring extracts or essences when sold as such, or to the sale of medical preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia and National Formulary which contain no more alcohol than is necessary to extract the medical properties of the drug contained in such preparations, and no more alcohol than is necessary to hold the medical agents in solution, and which are manufactured and sold as medicines and not as beverages, or to the sale of any medical preparation which is manufactured, sold, and used as a medicine and not as a beverage, or to the sale of carbonated drinks that contain no more than one-tenth of one per cent of alcohol, and in which drinks a flavoring agent is used, in the manufacture of which flavoring agent alcohol is used to dissolve and hold in solution or to extract from the crude material the flavoring agent. (1911, c. 35, s. 3; 1915, c. 97, s. 8.)

Time Not of the Essence.—The time of offense of selling intoxicating liquors, contrary to the statute, is not of its essence and failure to allege that the sale took place in the county, may only be taken by plea in abatement. State v. Hicks, 179 N. C. 733, 102 S. E. 388.

Judicial Notice.—Wine is an intoxicating liquor, and the courts will take judicial notice of the fact. State v. Piner, 141 N. C. 760, 53 S. E. 305.

Sale of Domestic Wines.—The sale of domestic wines on the premises where manufactured, when made from fruits grown on the lands of the manufacturer within this State, is lawful, under this section. State v. Hicks, 174 N. C. 802, 93 S. E. 964. But see section 3411(a), and Editor's Note under catch line "General Considerations," section 3367.

Same—Need Not Be Set Out in Indictment.—The proviso is a matter of defense, which deed not be set out in the indictment, and must be shown in proof by the defendant as a matter of defense. State v. Wainscott, 169 N. C. 379, 85 S. E. 380, citing State v. Moore, 166 N. C. 284, 81 S. E. 294; State v. Hicks, 174 N. C. 802, 93 S. E. 964; State v. Hicks, 179 N. C. 733, 734, 102 S. E. 388.

Possession of Wine.—Findings of the trial judge, in imposing a sentence on the defendant under a suspended judgment, that the defendant had manufactured and had in his possession 150 gallons of wine and had bought grapes therefor in another county, and persons had been coming from his place intoxicated, are insufficient for the imposition of the sentence, the manufacturer of wine from grapes not being prohibited by the State law § 3367, and the mere possession, unless for the purposes of sale, being lawful.

Nor is it prima facie evidence of guilt if the wine had been manufactured from grapes grown on the owner's premises. State v. Hardin, 183 N. C. 815, 112 S. E. 593.

"Flavoring Extracts."—This chapter dealing with the subject of prohibition, provides by art. 2, sec. 3373, an amendment theretofore enacted in 1911, that it is unlawful to sell or dispose of intoxicating liquors for gain, "except as hereinafter provided," followed in this section, with the proviso, excepting "flavoring extracts when sold as such." By express terms of the statute, the amendment of 1911, placed in art. 2 of ch. 66, "flavoring extracts when sold as such" were excluded from the operation of the general law; and any other interpretation would leave the language of the exception altogether without meaning and contravene the manifest purpose of the Legislature. State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

Same—"Imitation Extracts."—Where an agent is indicted for violating our State prohibition law, section 3367, and there is evidence tending to show that though he had sold flavoring extracts containing 40 per cent alcohol, they came within the exception of this section, the mere fact that the bottles containing it are labeled "imitation extracts" does not preclude him from establishing his innocence by showing that the word "imitation" had reference alone to the flavor they were endeavoring and intending to produce. State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

Same—Question for Jury.—Where the State satisfies the jury beyond a reasonable doubt that the defendant has violated section 3367, by selling or offering for sale intoxicating liquors, or those containing alcohol sufficient to make men drunk, the defendant so indicted must be convicted under the provisions of our prohibition law, ch. 66, unless he has satisfied the jury with his evidence that the liquors he has sold or offered for sale were in fact and truth flavoring extracts and sold or offered for sale as such. State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

Same—Evidence.—Where the evidence offered by the State is sufficient to convict the defendant under the provisions of section 3367, of selling or offering for sale an intoxicating liquid sufficient to make men drunk, and there is evidence on the defendant's behalf that the liquid was in truth and fact a flavoring extract coming within the exception of this section and only sold or offered for sale as such, the question of guilt or innocence of the defendant depends upon the verdict of the jury upon the conflicting evidence, and it is error for the trial judge to direct a verdict of guilty upon the issue, as a matter of law. State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

Same—Volstead Act.—The Volstead Act, section 4, recognizes and provides for the lawful sale of flavoring extracts, when they are unfit for use as a beverage or for intoxicating beverage purposes, and is not in conflict with this section when such extracts are unfit for drinking purposes. State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

Same—Federal Permit—Agricultural Department Standard.—Where there is sufficient evidence on the part of the State to show that the defendant was guilty of offering for sale or selling intoxicating liquor prohibited by section 3367, and also on defendant's behalf that the liquid was a flavoring extract coming within the exception of this section and only sold or offered for sale as such, it is competent for the defendant to introduce in evidence the permit of the Federal prohibition officer allowing the manufacture of the formula for the extracts the defendant was selling, also the standard as to the use of alcohol in flavoring extracts established by the Agricultural Department, as tending to show his good faith and that the liquid so offered by him was what it purported to be, a flavoring extract, and not sold for a beverage. State v. Barksdale, 181 N. C. 621, 107 S. E. 505.

A loan of intoxicating liquor upon a promise that it should be returned in kind is a violation of our prohibition law, and where there is further evidence that the buyer had promised to pay in money, rejection of testimony as to whether the defendant had eventually been paid is immaterial either the barter or the promise to pay being sufficient. State v. Lemons, 182 N. C. 828, 109 S. E. 27.

Sufficient to Sustain Conviction.—Where the defendant has been arrested and eight quarts of spirituous liquor found in a suit-case he was carrying into the house of another, its possession is prima facie case of the unlawful purpose of sale, sufficient to convict him thereof; and, also, for unlawfully transporting the same. State v. Simmons, 183 N. C. 684, 110 S. E. 591.

Same—Burden of Proof.—The possession of the specified quantity of spirituous liquors sufficient to make out prima facie evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. State v. Helms, 181 N. C. 566, 107 S. E. 228.

Where the possession of the specified quantities of intoxicating liquors under our statute, sec. 3385, has made out prima facie evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. State v. Helms, 181 N. C. 566, 107 S. E. 228.

Necessity for Search Warrant.—Where the prima facie case of unlawful sale of spirituous liquor arises from the possession, its capture by the officers is not illegal, and its being given to the jury for them to taste and smell, in corroboration of the other evidence, is not erroneous; and the liquor being the corpus delicti, such evidence would be competent had it been unlawfully seized, or in the illegal possession of the officers. State v. Simmons, 183 N. C. 684, 110 S. E. 591.

The defendant was seen entering with a suit-case the house of another and when followed by officers he endeavored to escape, and eight quarts of liquor were discovered in the suit-case. Under such circumstances a search warrant was unnecessary. State v. Simmons, 183 N. C. 684, 685, 110 S. E. 591.

Art. 3. Manufacture and Sale of Malt

§ 3376. Unlawful to make or sell malt.—It is unlawful for any person, firm or corporation, or any agent, officer or employee thereof, to manufacture or sell malt, such as is used in the manufacture of spirituous liquors, in the state of North Carolina. (1915, c. 91, s. 1.)

This section is now superseded by section 3411(b). See Editor's Note, section 3367.

§ 3377. Transportation companies to keep record.—All express companies, railroad companies, or other transportation companies, doing business in this state, are required to keep a separate record of all shipments of such malt, in which shall be entered, immediately upon receipt thereof, the name of the person to whom shipped, the amount of each shipment, the date when received and the date when delivered, and by whom delivered, and to whom delivered, which record shall be open for the inspection of any officer of the state, county or municipality any time during business hours of the company. (1915, c. 91, s. 2.)

Cross References.—As to general provision requiring carriers to keep record of shipments under "Search and Seizure Act," see section 3382; as to malt liquors defined, see section 3387; as to effect of section 3411(o) on this section, see Editor's Note, section 3367.

Art. 4. Search and Seizure Law

§ 3378. Handling liquor for gain.—It is unlawful for any person, firm, corporation, or association, by whatever name called, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous or malt liquors in the state of North Carolina. (1913, c. 44, s. 1.)

As to present governing law, see section 3411(b).

Constitutionality.—Chapter 44, Laws 1913, now this Article, known as the Search and Seizure Law, is constitutional and valid. State v. Cathey, 170 N. C. 794, 87 S. E. 532.

Jurisdiction of Recorder's Court.—The recorder's court has jurisdiction over offenses committed under the act of 1913, ch. 44, now this article, known as the "Search and Seizure Act," relating to intoxicating liquors, etc., making the possession of certain specified quantities of the various kind prima facie evidence of guilt. State v. Denton, 164 N. C. 530, 80 S. E. 401.

§ 3379. Keeping liquor for sale; evidence.—It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute

prima facie evidence of the violation of this section:

1. The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or

2. The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or

3. The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or

4. The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or

5. The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or

6. The possession of intoxicating liquors as samples to obtain orders thereon. Provided, that this section shall not prohibit any person from keeping in his possession wines and ciders in any quantity where such wines and ciders have been manufactured from grapes or fruit grown on the premises of the person in whose possession such wines and ciders may be. (1913, c. 44, s. 2; 1915, c. 97, s. 8.)

This section is now materially changed by sections 3411(b), 3411(h).

See 13 N. C. Law Rev., 315.

Constitutionality.—The section is constitutional and valid. State v. Randall, 170 N. C. 757, 87 S. E. 227.

And is not in contravention of the Federal Constitution. State v. Brown, 170 N. C. 714, 86 S. E. 1042.

"Prima Facie" Defined.—The words "prima facie evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient, in law, to raise a presumption of fact or establish the fact in question, unless rebutted." It must presume that the Legislature had such meaning in mind when such words were used in the statute. State v. Russell, 164 N. C. 482, 490, 80 S. E. 66.

Effect of the Presumption.—This (prima facie evidence) neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. State v. Russell, 164 N. C. 482, 487, 80 S. E. 66, citing Com. v. Williams, 72 Mass. (6 Gray). The evidence is not conclusive. Id.

Same—Sufficient to Sustain Verdict.—While the prima facie case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence, and relieve the State of the burden of the issue, which is placed upon it. State v. Wilkerson, 164 N. C. 431, 79 S. E. 888.

Same—Power of Legislature to Change Rule of Evidence.—See full discussion in State v. Wilkerson, 164 N. C. 431, 440, 79 S. E. 888.

U. S. Government License as Defense.—For cases under the former law, see Pfeifer v. Drug Co., 171 N. C. 214, 88 S. E. 343; State v. Dowdy, 145 N. C. 432, 58 S. E. 1002; State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Possession Means Actual or Constructive.—This section making the "possession of certain specified quantities of spirituous, vinous, or malt liquors" prima facie evidence of its violation, intends that the "possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principle for the purpose of the act. State v. Lee, 164 N. C. 533, 80 S. E. 405.

The possession of the agent, for the one accused of violating our prohibition law, of more than one gallon of intoxicating liquor is sufficient to make out a prima facie of guilt, under the provisions of this section. State v. Blauntia, 170 N. C. 749, 87 S. E. 101.

Possession for Use of Owner.—The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. State v. Mull, 193 N. C. 668, 137 S. E. 866.

Evidence.—Where there is evidence that the defendant, indicted under this section had in his possession sufficient spirituous liquors to raise the prima facie presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. State v. Simons, 178 N. C. 679, 100 S. E. 239.

Effect of Turlington Act.—The Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private use and in the residence of the possessor; and the prior statute making the possession of more than one gallon thereof prima facie evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby. State v. Foster, 185 N. C. 674, 116 S. E. 561. Applied in State v. Potter, 185 N. C. 742, 117 S. E. 504. See Editor's Note, section 3367, and sections 3411(b), 3411(h).

Cited in State v. Scoggins, 199 N. C. 821, 155 S. E. 927.

§ 3380. Search and seizure upon complaint and warrant.—Upon the filing of complaint, under oath, by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by law to issue warrants, charging that any person, firm, corporation or association, by whatever name called, has in possession, at a place or places specified, more than one gallon of spirituous or vinous liquors or more than five gallons of malt liquors for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information, and if more than one gallon of spirituous or vinous liquors or more than five gallons of malt liquors be found in any such place or places, to seize and take into his custody all such intoxicating liquors described in the complaint or information, and seize and take into his custody all glasses, bottles, kegs, pumps, bars or other equipment used in the business of selling intoxicating liquors which may be found at such place or places, and safely keep the same subject to the orders of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquors or other property alleged to be used in carrying on the business of selling intoxicating liquors as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All spirituous, vinous or malt liquors seized under this section shall be held and upon acquittal of the person so charged shall be returned to such person, and upon conviction, or upon default of appearance, shall be destroyed. (1913, c. 44, s. 3.)

As to the effect of section 3411(l) upon this section, see Editor's Note, section 3367.

For obsolete case holding wines and cider exempt, see State v. Williams, 172 N. C. 973, 90 S. E. 905.

§ 3381. Unlawful to handle draft connected with receipt for liquor.—It is unlawful for any bank incorporated under the laws of this state, or national bank, or any individual, firm or association, to present, collect or in any wise handle any draft, bill of exchange or order to pay money, to

which draft, bill of exchange or order to pay money is attached a bill of lading, or order, or receipt for intoxicating liquors, or which draft is enclosed with, connected with, or in any way related to, directly or indirectly, any bill of lading, order, or receipt for intoxicating liquors. (1913, c. 444, s. 4.)

§ 3382. Transportation companies to keep record.—All express companies, railroad companies, or other transportation companies doing business in this state are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and such book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transporation company or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor: Provided, upon the filing of a certificate signed by a reputable physician or two reputable citizens that the consignee is unable, by reason of sickness or infirmities of age, to appear in person, then the company is authorized to deliver any package to the agent of the consignee, and the agent shall sign the name of the consignee, and his own name and the certificate shall be filed of record. (1913, c. 44, s. 5.)

See State v. R. Co., 169 N. C. 295, 84 S. E. 283.

§ 3383. Indictment and proof.—In indictments for violating the first section of this article, it shall not be necessary to allege a sale of a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence. (1913, c. 44, s. 6.)

Sufficiency of Indictment.—In a bill of indictment for retailing intoxicating liquor, the words "willfully and unlawfully," or words of equivalent import, should be used, though such language is not found in the statute. State v. Powell, 141 N. C. 780, 53 S. E. 515.

An indictment is sufficient which simply charges the unlawful and willful sale of vinous liquors without naming the person to whom sold. State v. Hicks, 179 N. C. 733, 734, 102 S. E. 388.

The validity of an indictment for the unlawful sale of intoxicating liquors does not depend upon a charge of a sale to any particular person or to persons unknown. State v. Lemons, 182 N. C. 828, 109 S. E. 27.

Objection to a bill of indictment on account of duplicity comes too late after verdict, and where it is to the charge of two separate offenses in the same bill, one under section 3407 for unlawfully permitting a still to be set up for operation on the defendant's land; and the other for unlawfully manufacturing spirituous liquors, section 3409, and there is sufficient evidence on the latter count, a judgment upon the verdict on that count will be sustained. State v. Mundy, 182 N. C. 907, 110 S. E. 93.

Amendment of Warrant. — Upon appeal, the Superior Court judge has authority, after the jury has been impaneled, to permit an amendment to a warrant issued under the "search and seizure law," being chapter 44, Laws 1913, now this article, so as to charge that the defendant had spirituous, etc., liquors "for the purpose of sale." State v. Lee, 164 N. C. 533, 80 S. E. 405.

Evidence — Sale to Unknown Persons.—To convict under an indictment of sale of intoxicating liquors "to some person to the jurors unknown," it is as necessary to offer evidence of an actual sale to the unknown person as if his name had been inserted in the indictment. State v. Watkins, 164 N. C. 425, 79 S. E. 619.

Same—Other Sales.—The rule of evidence that one illegal sale of intoxicating liquors should not be received as any evidence that another such sale had been made, applies where the sales are entirely separated and distinct transactions, the one having no fair or reasonable tendency to establish the other, but inapplicable when it tends to show that the defendant, accused of violating the prohibition law at a certain city number, with evidence tending to show such violation there, kept the spirituous liquor elsewhere in the city, or under his control, for the purpose of making illegal sales. State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Same—Liquors on Hand.—Upon trial on indictment for the sale of intoxicating liquors at a certain city number, testimony that the accused had and kept liquors on hand in other portions of the city is a relevant circumstance tending to show that he had it on hand and was prepared and equipped to make the illegal sale charged in the bill of indictment, and to be considered by the jury with other evidence tending to show that he had sold such liquor at the place charged in the indictment. State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Upon indictment for violating the prohibition law, the possession of liquors by the accused, at the time of the offense charge, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown. State v. Boynton, 155 N. C. 456, 71 S. E. 341.

Same—Photographs.—Photographs are admissible in evidence. Butler v. State, 142 Ga., 286, 82 S. E. 654; Wade v. R. R., 89 S. C. 280, 71 S. E. 859; Griffith v. Coal Co., 75 W. Va. 686, 84 S. E. 621; Spencer v. Looney, 116 Va. 767, 82 S. E. 745; Prok v. R. R., 75 W. Va. 697, 84 S. E. 568; Napier v. Little, 38 L. R. A. (N. S.), (Anno. Cases, 1913 A, 1013); Shaw v. State, 83 Ga. 92, 9 S. E. 768; and in State v. O'Reilly, 126 Mo., 597, A 29 S. W. 577, where it is said: "It has always been permissible to use diagrams in the trial of causes, both civil and criminal, and especially in the latter class to use diagrams, if shown to be correct, to illustrate the position of persons and places and to better enable the witnesses to properly locate them. If, then, a diagram may be used for such a purpose, we can see no good reason why a photograph may not be, by which is presented to view everything within the range of the camera at the time the photograph was taken." State v. Jones, 175 N. C. 709, 713, 95 S. E. 576.

Same—Conversation between Accused and Wife.—Where the husband is on trial for violating the prohibition law, it is competent for a third person to testify as to the conversation between the defendant and his wife, with statements by the latter tending to fix the former with guilt of the offense charged. State v. Randall, 170 N. C. 757, 87 S. E. 227.

Same—General Bad Reputation.—Where there is substantive evidence tending to show the guilt of the defendant in having spirituous liquor for sale in violation of section 3378, and his defense, supported by his evidence, is that some one else had taken the jugs and bottles of whisky to his home in his absence, without his knowledge, where the officer had found them, the general bad reputation of the defendant for unlawfully selling whisky may be shown as a circumstance in corroboration of other evidence tending to show guilt. State v. McNeill, 182 N. C. 855, 109 S. E. 84.

Upon the criminal trial for having in possession spirituous liquors for the purposes of sale, section 3379, and for unlawfully receiving more than one quart within fifteen consecutive days, section 3385, evidence of the reputation of the defendant's place as being bad for selling liquor is unauthorized by this section, and it is purely hearsay and incompetent; and testimony of this character, admitted on the trial over the defendant's objection, and submitted in the charge as an independent circumstance to show guilt under defendant's exceptions, constitutes reversible error. State v. Springs, 184 N. C. 768, 114 S. E. 851.

Sufficiency of Verdict.—Where the defendant is tried for violating our prohibition law, and indicted under the provisions of sec. 3379, with possession of spirituous liquor for purposes of sale; section 3385 with receiving more than a designated quantity; section 3386, with receiving such liquor more than one quart at a time within fifteen consecutive days; section 3384, with shipping and transporting the same,

a verdict upon the evidence "that the defendant is guilty of receiving more liquor than allowed by law, and not guilty of receiving and transporting liquor," is a finding of guilty of violating the provisions of sec. 3385; and defendant's motion to set aside the verdict as unresponsive to the issues or the counts set out in the bill of indictment, is properly denied. State v. Brame, 185 N. C. 631, 116 S. E. 164.

Art. 5. Delivery and Receiving Regulated

§ 3384. Amount delivered restricted.—It is unlawful for any person, firm or corporation, or any agent, officer or employee thereof, to ship, transport, carry or deliver, in any manner or by any means whatsoever, for hire or otherwise, in any one package or at any one time from a point within or without this state to any person, firm or corporation in this state any spirituous or vinous liquors or intoxicating bitters in any quantity greater than one quart, or any malt liquors in a quantity greater than five gallons; and it is unlawful for any spirituous or vinous liquors or intoxicating bitters so shipped, transported, carried or delivered in any one package to be contained in more than one receptacle. (1915, c. 97, s. 1.)

As to effect of sections 3411(b), 3411(h), on this section, see Editor's Note, section 3367.

Purpose.—Chapter 97, Laws 1915, now this article, was passed primarily to regulate the shipments of spirituous, vinous, or malt liquors. State v. Williams, 172 N. C. 973, 90 S. E. 905.

Liquor on Persons.—Where the defendant has been arrested for violating our prohibition law, and at his own request he is not searched, but voluntarily produces five pints of spirituous liquor concealed in different places on person, before the committing magistrate, the question of search and seizure without a warrant and the Federal constitutional question predicted thereon does not arise; and he may be convicted under this section by the provisions of section 4548, relating to an arrest without a warrant for offenses committed in the presence of the officer, etc. State v. Campbell, 182 N. C. 911, 110 S. E. 86.

When Conviction Not Sustained.—A conviction for the unlawful transportation of liquor, chapter 97, Laws 1915, now this article, cannot be sustained when the defendant was transporting his own liquor, but not for the purpose of sale, and only gave the package to his companion to take a drink. State v. Coleman, 178 N. C. 757, 101 S. E. 261.

§ 3385. Amount received restricted. — It is unlawful for any person, firm or corporation at any one time, or in any one package, to receive at a point within the state of North Carolina for his use of any person, firm or corporation, or for any other purpose, any spirituous or vinous liquor or intoxicating bitters in a quantity greater than one quart or any malt liquors in a quantity greater than five gallons. (1915, c. 97, s. 2.)

As to present law governing, see section 3411(b), and section 3411(j).

Purpose.—Considering the language of this section with the history of legislation relating to prohibition, it is held that its controlling intent and purpose is to make it unlawful for any person to acquire and take into his possession within the State at any one time or in any one package, spirituous or vinous liquors, etc., in a quantity greater than one quart, without restricting the meaning of the word "receive" to "accepting from another"; and evidence tending to show that the defendant had walked straight to the place where the prohibited quantity was concealed and taken it from its hiding place, is sufficient to show that he knew it had been hidden there for his benefit, and sustain a conviction. State v. Snipes, 185 N. C. 743, 117 S. E. 500.

Unlawful Purpose Essential.—The unlawful purpose of sale of spirituous liquors is the offense made indictable by our statutes, whether the indictment be under this section or 3386, and not the possession thereof, for lawful purposes, though the possession of the specified quantities is prima facie evidence of the illegal purpose, and does not establish a prima facie case of guilt. State v. Helms, 181 N. C. 566, 107 S. E. 228.

Evidence Sufficient to Sustain Verdict.—Evidence that half a gallon of whisky, in a fruit jar, and one pint thereof, in a bottle, were found concealed in defendant's overcoat hanging in his store, and of his breaking the jug and bottle in the officer's presence and saying, "Damn it, if I can't drink it, I guess you won't get to drink it either," is sufficient to sustain a verdict that the defendant was guilty of receiving more than one quart of spirituous liquor at one time, or in a single container or package, as prohibited by this section. State v. Bradshaw, 184 N. C. 680, 114 S. E. 161.

Effect of Sec. 3379.—Where the judge has withdrawn from the consideration of the jury the question of prima facie guilt of violating the statute from the possession of more than one gallon of spirituous liquor, sec. 3379, a conviction under this section in having more than one quart thereof in possession, will be sustained when supported by competent evidence. State v. Campbell, 182 S. E. 911, 110 S. E. 86.

Federal Statutes Not in Conflict.—This section is to prohibit the receiving of more than specified quantities of spirituous or malt liquors, and is an aid to the enforcement of the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States; and the Federal amendment giving concurrent jurisdiction to the Federal and state courts in the enforcement of the prohibition law, does not take from that of the state court the enforcement of a state statute on the subject not in conflict with the Federal statute, whether the state statute was passed before or after the amendment to the Federal Constitution. State v. Brame, 185 N. C. 631, 116 S. E. 164.

Same—Volstead Act Not Applicable.—The Volstead Act, title 2, sec. 25, has no application to an action in the State Court wherein the possession of specified quantities of intoxicating liquors under our statutes, makes out prima facie evidence of guilt, and an instruction that it made a prima facie case sufficient to place the burden on the defendant to establish his innocence is reversible error. State v. Helms, 181 N. C. 566, 107 S. E. 228.

Same—The IVth and Vth Amendments to the Federal Constitution are limitations upon the Federal Government and do not affect the validity of this section, making unlawful the possession of more than one quart of spirituous liquor, or section 3384 making the carrying and delivery thereof unlawful. State v. Campbell, 182 N. C. 911, 110 S. E. 86.

§ 3386. Fifteen days between receipts.—It is unlawful for any person, firm or corporation, during the space of fifteen consecutive days, to receive any spirituous or vinous liquors or intoxicating bitters in a quantity or quantities totaling more than one quart, or any malt liquors in a quanity greater than five gallons: Provided, that the provisions of this and the two preceding sections shall not apply to the receipt by a common carrier for transportation to a point in another state where delivery is not forbidden by the laws of such state. (1915, c. 97, s. 3.)

This section is superseded by the Turlington Act, sections 3411(b), 3411(j) of this Code. See Editor's Note, section 3367.

See State v. Snipes, 185 N. C. 743, 117 S. E. 500.

§ 3387. Malt liquors defined. — The words "malt liquors" as used in this article shall be construed to include only such malt liquors as contain not to exceed five per centum of alcohol, and any malt liquors containing more than five per centum of alcohol shall be held to be "spirituous liquors" within the meaning of this article. (1915, c. 97, s. 4.)

Cross References.—As to unlawful manufacture or sale of malt, see section 3376; as to requirement that transportation companies keep records of malt shipped, see section 3382; as to definition of "intoxicating liquors," see section 3341(a). See "Editor's Note," section 3367, for general effects of Turlington Act.

§ 3388. No order in fictitious name or in name of another.—It is unlawful for any person to order in a fictitious name or in the name of another any spirituous or vinous or malt liquors or intoxicating bitters or to receive for himself any spirituous or vinous or malt liquors or

intoxicating bitters so ordered or shipped. (1915, c. 97, s. 5.)

§ 3389. To allow use of name forbidden.—It is unlawful for any person to allow or in any way permit the use of his name in the ordering for another or the delivery to another of any spirituous or vinous or malt liquors or intoxicating bitters. (1915, c. 97, s. 6.)

§ 3390. To serve liquors with meals forbidden.—It is unlawful for any person, firm or corporation to serve with meals, or otherwise, any spirituous, vinous, fermented or malt liquors or intoxicating bitters where any charge is made for such meal or service. (1915, c. 97, s. 7.)

As to the effect of section 3411(q) of this section, see Editor's Note, section 3367.

See Felia v. Belton, 170 N. C. 112, 86 S. E. 999.

§ 3391. Sale by druggists.. prohibited.—All laws authorizing or allowing the sale of spirituous, vinous, or malt liquors or intoxicating bitters by any medical depository, druggist or pharmacist are hereby repealed, and it shall be unlawful for any medicial depository, druggist or pharmacist to sell or otherwise dispose of for gain any spirituous, vinous, fermented or malt liquors or intoxicating bitters. (1915, c. 97, s. 8.)

As to the effect of section 3411(r) of this section, see Editor's Note, section 3367.

§ 3392. Application of provisions of this article.—The provisions of this article shall not apply to grain alcohol received by duly licensed physicians, druggists, dental surgeons, college, university and state laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes, when obtained as hereinafter provided: Provided, however, that nothing contained in this article shall prohibit the importation into the state of North Carolina and the delivery and possession in the state for use in industry, manufactures, and arts of any denatured alcohol or other denatured spirits, which are compound and made in accordance with the formula prescribed by acts of congress of the United States and regulations made under authority thereof by the treasury department of the United States and the commissioner of internal revenue thereof, and which are not now subject to internal revenue tax levied by the government of the United States: Provided further, that this article shall not apply to wines and liquors required and used by hospitals or sanatoria bona fide established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs, when the same are administered to patients actually in such hospitals or sanatoria for treatment, and when the same are administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing. (1915, c. 97, s. 9.)

As to the effect of section 3411(s) on this section, see Editor's Note, section 3367.

§ 3393. Vinous liquors for sacramental purposes.—It shall be lawful for any duly ordained minister of the gospel who is in charge of a church and at the head of a congregation in this state, to receive in the space of ninety consecutive days a quantity of vinous liquors not greater than three gallons for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles. (1919, c. 241.)

This section was reenacted as section 3411(t). See Editor's Note, section 3367.

§§ 3394 to 3397.—Repealed by Public Laws. (1921, c. 204.)

As to effect of general prohibition laws upon local statutes, see section 3411, and annotations thereto.

Art. 6. Seizure and Forfeiture of Property

§ 3398. Duty of sheriff to seize distilleries. — It is the duty of the sheriff of each county in the state and of the police of each incorporated town or city in the state to search for and seize any distillery or apparatus used for the manufacture of intoxicating liquors in violation of the laws of North Carolina, and to deliver the same, with any materials used for making such liquors found on the premises, to the board of county commissioners, who shall confiscate the same and shall cause the distillery to be cut up and destroyed, in their presence or in the presence of a committee of the board, and who may dispose of the material, including the copper or other material from the destroyed still or apparatus, in such manner as they may deem proper. (Rev., s. 3533; 1905, c. 498, s. 2; 1907, c. 807, s. 1.)

§ 3399. Duty of officers to destroy liquor and arrest offenders.—It is the duty of the sheriff and other officers mentioned in the preceding section to seize and then and there destroy any and all liquors which may be found at any distillery for the manufacture of intoxicating liquors in violation of law, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquors. (Rev., s. 3533; 1905, c. 498, ss. 4, 5; 1909, c. 807, s. 2.)

§ 3400. Officer failing to discharge duty removed from office.—If any officer mentioned in the two preceding sections shall fail or refuse to use due diligence in the execution of the provisions of such sections, after being informed of violation thereof, he shall be guilty of laches in office and such failure be cause for removal therefrom. (Rev., s. 3526; 1905, c. 498, s. 8.)

§ 3401. Fee for seizure.—For every distillery seized under this article the sheriff or other police officer shall receive the sum of twenty dollars, which shall be allowed by the commissioners of the county in which the seizure is made: Provided, that the commissioners shall not pay this amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made. (1909, c. 807, s. 3; 1911, c. 45, s. 1.)

See § 3402(a).

Editor's Note.—This section was amended as to Surrey county only by the Laws 1925, c. 173 by striking out, after the word "every," in line one, the words "distillery seized" and in lieu thereof inserting the words "copper still seized and destroyed."

Public Laws 1931, c. 91, which amended this section by adding at the end thereof the following: "Provided the

provisions of this act shall not apply to Nash County," provided that "the commissioners of Nash County shall not hereafter pay the sheriff or other officer any sum whatsoever for seizing distilleries in Nash County."

Public Laws 1933, c. 246 provides that this section shall not apply to Moore and Lenoir counties. Public Laws 1933, c. 230 provides that the sum received by the officer in Warren county shall not exceed five dollars.

By the Public Laws of 1935, chapter 253, Moore county was eliminated from the exception made by Public Laws 1933, chapter 246.

Effect of Local Act Abolishing Fees.—Where the fees incident to a sheriff's office for the seizure and destruction of illicit distilleries, are excluded by a public-local law applicable to a certain county, subsequenty enacted, but prior to the commencement of the term of the incumbent, wherein it is provided that the sheriff shall turn over to the county treasurer all moneys collected from fees, and receive a specified sum as a salary in lieu of his fees, with exception only of certain fees allowed to the township deputy in certain instances, the duty to seize the illicit distilleries is the same as any other required of him as sheriff of the county. Thompson v. Comr's., 181 N. C. 265, 107 S. E. 1.

§ 3402. Claimant may sue for fee.—The person making the seizure may institute an action before the proper court for the amount claimed under and by virtue of the seizure; then the matter may be inquired into on its merits and judgment rendered accordingly. (1911, c. 45, s. 2.)

See § 3402(a).

§ 3402(a). Sections 3401 and 3402, repealed, as to still rewards; counties excepted. — Sections three thousand four hundred and one and three thousand four hundred and two of article six, chapter sixty-six of the consolidated statutes of North Carolina, are hereby repealed: Provided the county commissioners of Surry, Avery, Northamption, Greene, Alamance counties shall pay the sum of ($5.00) five dollars for the capture of each distillery captured in said counties: Provided the commissioners of Radkin county may in their discretion pay not exceeding ($5.00) five dollars: Provided that the county commissioners of Graham and Jackson counties be allowed to pay, not to exceed, the sum of ($5.00) five dollars for seizure of a distillery: Provided that this section shall not apply to the counties of Caswell, Chowan, and Wilson counties.

This section shall not repeal any public-local law. (1933, c. 480, s. 1.)

§ 3403. Seizure of vehicle used in conveying liquor.—If any person, firm or corporation shall have or keep in possession any spirituous, vinous or malt liquors in violation of law, the sheriff or other officer of any county, city or town, who shall seize such liquors by any authority provided by law, is hereby authorized and required to seize and take into his custody any vessel, boat, cart, carriage, automobile and all horses and other animals or things used in conveying, concealing or removing such spirituous, vinous or malt liquors, and safely keep the same until the guilt, or innocence of the defendant has been determined upon his trial for the violation of any such law making it unlawful to so keep in possession any spirituous, vinous or malt liquors, and upon conviction of a violation of the law, the defendant shall forfeit and lose all right, title and interest in and to the property so seized; and it shall be the duty of the sheriff having in possession the vessel, boat, cart, carriage, automobile and all horses and other animals or things so used in conveying, concealing or removing such spirituous, vinous or malt liquors, to advertise and sell same under the laws governing the sale of personal property under execution. (1915, c. 197, s. 1.)

As to the effect of section 3411(f) upon this section, see Editor's Note, section 3367.

Strict Construction.—The principle requiring a strict construction of a statute creating a forfeiture or in derogation of a common-law right applies to this section, requiring a seizure and sale of the defendant's right, title, or interest in an automobile unlawfully used in liquor traffic, and such seizure may not be extended by implication to apply to the seizure of an automobile, owned exclusively by some person other than the defendant, and who is innocent of the offense or complicity therein. State v. Johnson, 181 N. C. 638, 107 S. E. 433.

Only Defendant's Interest Forfeited.—Under the provisions of this statute, the automobile or property itself is not condemned and forfeited, but only the right, title, and interest of the defendant in and to the property so seized. State v. Johnson, 181 N. C. 638, 641, 107 S. E. 433.

In Motor Co. v. Jackson, 184 N. C. 328, 331, 114 S. E. 478, the court said: It is contended that the Court's construction of the statute in Skinner v. Thompson, 171 N. C. 98, 103, 87 S. E. 976, (that this section does not affect the rights of innocent third person) affords such opportunity for collusion as will destroy the purpose of the law in its practical operation. But we cannot accept such possibility as a ground for extending the terms of the statute to cases not within the contemplation of the Legislature; it is our duty to declare the law, not to make it.

Innocent Owner.—Where the driver of an automobile has been indicted for the unlawful use of the owner's automobile in the liquor traffic, and the owner himself establishes his innocence of the offense, upon interpleader, the statute, (this section) does not deprive him of title to the machine exclusively owned by him, and a conviction would have the effect of condemning him of committing the offense without affording him a trial thereof. State v. Johnson, 181 N. C. 638, 107 S. E. 433.

Same—Responsibility for Drivers.—Where the owner of automobiles for hire has instructed his drivers not to use them in connection with the traffic in spirituous liquors, and one of them, without his knowledge, has disobeyed the order, the doctrine of qui fecit per alium, or respondeat superior, does not apply, and he may intervene, where the driver is alone tried and convicted, and regain possession of the automobile and establish his title thereto. State v. Johnson, 181 N. C. 638, 107 S. E. 433.

Innocent Mortgagee—Failure to Register Mortgage.—This section creating a forfeiture of an automobile used in the unlawful transportation of intoxicating liquors, and providing for its sale, etc., by its express terms relates only to the interest therein of the violator of the law upon his conviction, and cannot be extended by legal construction to include the interest of a mortgagee of the automobile who is entirely ignorant and innocent of the unlawful act of which the defendant has been convicted; nor will the failure of registration of the mortgage affect the matter under our registration laws enacted for the protection of creditors and purchases for a valuable consideration, etc. Motor Co. v. Jackson, 184 N. C. 328, 114 S. E. 478.

§ 3404. Notice to owner to claim property. — In the event the sheriff or other officer shall, at the time of seizing spirituous, vinous or malt liquors, fail to capture or arrest the owner or party in possession and so using the vessel, boat, cart, carriage, automobile and all horses and other animals or thing to convey, conceal or remove such spirituous, vinous or malt liquors, he shall advertise for the owner to come forward and institute the proper proceeding to secure possession of the property, and upon the failure of any person to so come forward and surrender himself to the sheriff to the end that the question of whether the property was used as set out in this article, and upon the failure of such person to come forward, if an individual, in person, and make such claim within thirty days after such notice shall have appeared in at least one issue of some newspaper published in the county where such seizure was made, and after such notice and time the sheriff shall advertise such property so seized

for sale and sell as provided in the preceding section. (1915, c. 197, s. 2.)

As to effect of section 3411(f) on this section, see Editor's Note, section 3367.

Premature Appeal.—An appeal is premature and will not lie from an order that the sheriff hold the proceeds of sale of property seized under the section. Richardson v. Hobgood, 170 N. C. 37, 86 S. E. 709.

§ 3405. Proceeds of sale applied to school fund.—The proceeds derived from the sale of such property, after paying for the reasonable expense of such sale, shall be paid by the sheriff to the county treasurer, and be applied by the treasurer to the credit of the public school fund of the county. (1915, c. 197, s. 3.)

As to effect of section 3411(f) upon this section, see Editor's Note, section 3367.

Art. 7. General Provisions

§ 3406. No witness privileged. — No person shall be excused from testifying on any prosecution for violating any law against the sale or manufacture of intoxicating liquors, but no discovery made by such person shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned for the offense done or participated in by him. (1913, c. 44, s. 7.)

As to effect of section 3411(g) upon this section, see Editor's Note, section 3367. See notes to section 3411(g).

Validity.—The section is constitutional and valid. State v. Randall, 170 N. C. 757, 87 S. E. 227.

§ 3407. Allowing distillery to be operated on land.—If any person shall knowingly permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control, he shall be guilty of a misdemeanor and shall be punished in the dicretion of the court. (Rev., s. 3533; 1905, c. 498, s. 2.)

See State v. Jones, 175 N. C. 709, 712, 95 S. E. 576.

§ 3408. Federal license as evidence. — The possession of a license or the issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous or malt liquors by the United States government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous or malt liquors is forbidden by the laws of this state shall be prima facie evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by such license in violation of the laws of this state. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person, by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept. (Rev., s. 2060; 1905, c. 339, s. 5; 1907, c. 931.)

As to Federal license as prima facie evidence of keeping liquor for sale, see section 3379.

§ 3409. Manufacturing liquor a felony. — It is unlawful for any person to distil, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the state of North Carolina; but this shall not be understood as prohibiting the manufacture of wines and cider in the manner and under the conditions which are now or may hereafter be provided by law. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor, and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction said person or persons shall be guilty of a felony, and, upon conviction or confession in open court, shall be imprisoned in the state prison for not less than one year and not exceeding five years, in the discretion of the court. (1917, c. 157; 1919, c. 4.)

See note under § 7738.

Process of Manufacturing Need Not Be Complete.—It is not necessary for a conviction under the provisions of Public Laws 1917, chap. 157, now this section, making the distilling or manufacturing, etc., of spirituous or malt liquors or intoxicating bitters within the State unlawful, including within its express terms those who aid, assist, or abet therein, that the liquor should have been actually manufactured or the product finished; and where there is evidence tending to show that such manufacture had been in progress, but had been suspended by the arrest of the prisoner, and that he was aiding or assisting therein, it is sufficient to be submitted to the jury and to sustain conviction of the offense charged. State v. Horner, 174 N. C. 788, 94 S. E. 291.

When Question for Jury.—Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor prohibited by Public Laws 1917, chap. 157, now this section, by hauling it away, and also consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. State v. Horner, 174 N. C. 788, 94 S. E. 291.

Second Degree.—Upon a charge in an indictment for manufacturing liquor, etc., under this section, the defendant may be convicted of the second degree of the offense—i. e., aiding or abetting its manufacture. State v. Horner, 174 N. C. 788, 94 S. E. 291.

Accessories Equally Guilty.—The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. State v. Clark, 183 N. C. 733, 110 S. E. 641.

The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment, under this section, may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. State v. Smith, 183 N. C. 725, 110 S. E. 654.

Presumption Regarding Previous Conviction.—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. State v. Clark, 183 N. C. 733, 110 S. E. 641.

Irrelevant Testimony.—The rejection of evidence as to the quantity of cotton or corn the defendant, tried for the unlawful manufacture of liquor, etc., under this section, had raised on his farm that year, is of irrelevant testimony, and its exclusion not erroneous. State v. Smith, 183 N. C. 725, 110 S. E. 654.

Evidence Sufficient for Conviction.—See State v. Smith, 183 N. C. 725, 110 S. E. 564; State v. Grier, 184 N. C. 723, 114 S. E. 622; State v. McMillan, 180 N. C. 741, 105 S. E. 403.

§ 3410. Other violations a misdemeanor. — Any person violating any of the provisions of this chapter, except as specified in the preceding section, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1908, c. 71, s. 8; 1908, c. 118, s. 2; 1911, c. 35, s. 3; 1911, c. 133, s. 1; 1913, c. 44, ss. 1, 4; 1915, c. 91, s. 3; 1915, c. 97, s. 13.)

§ 3411. Local laws not repealed. — Nothing

in this chapter shall operate to repeal any of the local or special acts of the general assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this chapter, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this chapter or under any special or local act relating to the same subject. (1908, c. 71, s. 7; 1913, c. 44, s. 8.)

For complete review and consideration of this section, see State v. Johnson, 170 N. C. 685, 86 S. E. 788.

Art. 8. National Liquor Law, Conformation of State Law.

§ 3411(a). Definitions.—When used in this article—

(1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes: Provided, that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process of which beer, ale, porter, or wine is produced, if it contains less than one-half of one per cent of alcohol by volume, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, sealed and labeled bottles, casks, or containers, and is made in accordance with the regulations set forth in Title II of "The Volstead Act," an act of Congress enacted October twenty-eight, one thousand nine hundred and nineteen, and an act supplemental to the National Prohibition Act, "H. R. 7294," an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one.

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations. (1923, c. 1, s. 1.)

As to the effect of this act upon the prior law, see the Editor's Note under section 3367. For a summary review of this statute, see 1 N. C. Law Rev. 303.

As to counties exempted from the provisions of this and the succeeding sections of this article, see § 3411(38) and note.

Editor's Note.—This article is popularly known as the Turlington Act and is often referred to as such in the cases.

Similarity to Volstead Act.—This and the following section are, in many respects, the same as "The Volstead Act," although more stringent. State v. Sigmon, 190 N. C. 684, 690, 130 S. E. 854.

An act by our Legislature to make the State law conform to the "Volstead Act" passed by Congress, is valid, and in some respects more stringent than the Congressional act. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

Same—Power of State to Pass Stricter Regulation.—The State has the power through legislation to further regulate and control the manufacture, sale, etc., of intoxicating liquor beyond the restrictions contained in a Federal statute upon the subject, the latter prevailing in interstate regulations in case of conflict; and the State statute may consistently give further effect or efficiency to the Federal statute upon the subject as it relates to State regulation. State v. Hammond, 188 N. C. 602, 125 S. E. 402.

Effect upon Existing Legislation.—This act, with certain reservations as to existing State laws, establishes the rule now prevailing on the subject of prohibition and it applies to the extent that it is inconsistent with former legislation and is in conformity with valid Federal statutes on the subject where interstate regulation is concerned. State v. Hammond, 188 N. C. 602, 125 S. E. 402.

Beverages Not Enumerated.—It may be shown in evidence as a fact that other beverages than those defined by this section as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute. State v. Fields, 201 N. C. 110, 159 S. E. 11.

Cited in State v. Dowell, 195 N. C. 523, 525, 143 S. E. 133.

§ 3411(b). Manufacture, sale, etc., forbidden; construction of law; nonbeverage liquor.—No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of "The Volstead Act," act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act, "H. R. 7294," an act of congress approved November twenty-third, one thousand nine hundred and twenty-one. (1923, c. 1, s. 1.)

See the annotations under sections 3411(f), 3411(j).

Constitutionality.—The State in its inherent and reserved power preserved to it by the Tenth Amendment to the Federal Constitution may enact valid laws relating to prohibition when not in conflict with the Eighteenth Amendment to the Federal Constitution, or congressional legislation, and this section, making the purchase of intoxicating liquor a criminal offense, is valid and enforceable. State v. Lassiter, 198 N. C. 352, 151 S. E. 721.

Effect of Acquiring Possession Prior to Act.—Evidence tending to show that the defendant had intoxicating liquor in his possession before the efficacy of this act, is not a defense under the provisions of this act for the defendant's possession a year thereafter, upon the trial for violating the prohibition law. State v. Knight, 188 N. C. 630, 125 S. E. 406.

Effect on Recovery under Compensation Act.—The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to this section does not alone prevent the recovery of compensation. Jackson v. Dairymen's Creamery, 202 N. C. 196, 162 S. E. 359.

When Receipt Prohibited.—There is no provision in this act which in express terms prohibits one from receiving intoxicating liquors. Except as embraced and included by the acts which are prohibited in the statute, the mere receiving of intoxicating liquors is not forbidden. State v. Hammond, 188 N. C. 602, 608, 125 S. E. 402.

It is bad pleading to make the mere receipt of liquor the subject of a separate and independent count; and the charge that the mere receipt of same, though only in the home of the recipient, and kept there only for a lawful purpose, is forbidden, is not warranted by any proper construction of the statute that has been suggested to us. State v. Hammond, 188 N. C. 602, 608, 125 S. E. 402.

Section Liberally Construed—What Amounts to Possession.—This section was expressly to be liberally construed to prevent intoxication, and makes it unlawful for one to possess intoxicating liquor, with restricted qualifications; and a conviction will be sustained under a verdict of guilty upon evidence tending to show that the defendant received a bottle of intoxicating liquor from another, took a drink therefrom, and handed the bottle back to the one from whom he had received it, neither of them being upon his own premises. State v. McAllister, 187 N. C. 400, 121 S. E. 739.

Character of Possession Necessary.—The possession may, within this statute, be either actual, or constructive. State v. Meyers, 190 N. C. 239, 243, 129 S. E. 600. See also State v. Norris, 206 N. C. 191, 173 S. E. 14.

A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to show that the defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him. State v. Pierce, 192 N. C. 766, 136 S. E. 121.

If a man procures another to obtain liquor for him and

put it in a given place, and the other performs this agreement and places the liquor, then the possession is complete. A person may be in the possession of the article which he has not at the moment about his person. The constructive possession, as well as the actual possession, is in the contemplation of the statute. State v. Pierce, 192 N. C. 766, 769, 136 S. E. 121; State v. Meyers, 190 N. C. 239, 129 S. E. 600.

Transportation as Including Possession.—Where the evidence is sufficient to convict the defendant of transporting whiskey under this and the following section, the transportation of spirituous liquor includes the possession. State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

Where an indictment for violating our prohibition law contains a count as to the unlawful possession and also unlawfully transporting spirituous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute. State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

Purpose of Possession.—Upon the trial for transporting intoxicating liquors in violation of our statute, the purpose of the possession of the intoxicants, or that they were for the purpose of profit, are immaterial, and the fact that the person accused is carrying them from one place to another is sufficient. State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

Possession—Admissibility of Evidence.—Where on a trial for unlawful possession of intoxicating liquor there is evidence tending to show that on the premises of the defendant's gasoline station two barrels partly containing whiskey were found concealed, buried in the ground and encased in concrete of the same character and material as the filling station, etc., testimony of the officer that the barrels, from the indication, had thus been there since the building of the station is competent as tending to show that the possession of the whiskey was for an unlawful purpose. State v. Hege, 194 N. C. 526, 140 S. E. 80.

Same—Evidence Sufficient to Go to Jury.—On a trial for the unlawful possession of intoxicating liquors, evidence of the State tending to show that the defendant had several gallons of whiskey concealed on the premises of his gasoline station held, sufficient to take the case to the jury on defendant's motion to dismiss upon the State's evidence. State v. Hege, 194 N. C. 526, 140 S. E. 80.

Same—Defense.—Where the defendant is indicted for the unlawful possession of whiskey under this section, evidence of its possession before the enactment of the statute is no defense. State v. Hege, 194 N. C. 526, 140 S. E. 80.

Purchase and Transportation for Use in Home.—It is unlawful to purchase and transport intoxicating liquor under this section even though it is intended for use in the home under section 3411(j). State v. Winston, 194 N. C. 243.

Separate Offenses Charged in Same Warrant.—The offenses of delivering, and of keeping for sale, are separate offenses under this act and although charged in the same warrant, they will be treated as separate counts. State v. Janett, 189 N. C. 516, 127 S. E. 590.

Sufficiency of Evidence—To Convict of Transporting. — Where a car, parked with the rear to the road and with the tail light concealed by a cap but with the front lights on, and the rear of the car smelled of liquor, and empty jugs, and a funnel which smelled of liquor, were found on the ground near, and someone ran through the field as the officers approached the car, and the officers arrested the defendant who came up after their arrival, carried him to jail, and upon return to the place found the jug and funnel gone, and a car which passed ran up the road a piece turned around and came back, it was held that the facts were sufficient to justify a finding "beyond a reasonable doubt that not only defendant was transporting liquors, but he had confederates and had been getting the liquor and had sold out and gone back to them to get another load. He had all the implements of a blind-tiger transporting liquor. The officers caught him before he had gotten his new supply." State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

Same—To Deny Nonsuit.—Evidence in this case tending to show that the defendant lived in a part of his filling station used as a residence, where was found a quantity of empty bottles smelling of whisky, and that in the vicinity was a used roadway leading to several places where cartons with bottles of whisky were concealed, etc., was sufficient to deny defendant's motion as of nonsuit. State v. Pierce, 192 N. C. 766, 136 S. E. 121.

A motion for nonsuit upon the evidence on the trial for a violation of the prohibition law, will be denied when, though circumstantial, it is sufficient upon the question of possession and unlawful transportation of intoxicating liquor. State v. Meyers, 190 N. C. 239, 129 S. E. 600.

Where the man went to feed his hogs, the wife ran out of the house with liquor and hid it; the boy took some and ran and spilled it as he ran; the daughter covered up an old 30-gallon drum, the evidence as to violation of this section and section 3411(d) was sufficient to refuse a nonsuit. State v. Norris, 206 N. C. 191, 197, 173 S. E. 14.

General Verdict Sufficient for Conviction.—A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited. State v. McAllister, 187 N. C. 400, 121 S. E. 739.

Same—Erroneous Charge as to Separate Count Harmless. —Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, an erroneous charge as to receiving and transporting it, is harmless error. State v. McAllister, 187 N. C. 400, 121 S. E. 739.

Sentence of Two Years Constitutional.—A sentence of two years for violating this Act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. State v. Beavers, 188 N. C. 595, 125 S. E. 258.

Cited in State v. Dowell, 195 N. C. 523, 525, 143 S. E. 133; State v. Scoggins, 199 N. C. 821, 155 S. E. 927.

§ 3411(c). Advertisements, signs, and billboards.—It shall be unlawful to advertise, anywhere or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the means, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. (1923, c. 1, s. 3.)

Editor's Note.—This section is partly repealed or superseded by section 3411(37).

§ 3411(d). Advertising, etc., of utensils, etc., for use in manufacturing liquor.—It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or receipt advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. It shall be unlawful to have or possess any liquor or property designated for the manufacture of liquor intended for use in violating this article, or which has been so used, and no property rights shall exist in any such liquor or property. (1923, c. 1, s. 4.)

Possession of Property Designed for Manufacture.—An indictment charging the defendant with a violation of this section, in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. State v. Jaynes, 198 N. C. 728, 153 S. E. 410.

"Designated."—In the interpretation of this section making it unlawful to possess any property "designated" for use in manufacturing intoxicating liquor, the word "designated" is construed to mean "designed," and so used it is held in this case that evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery is immaterial under the language of the statute. State v. Jaynes, 198 N. C. 728, 153 S. E. 410.

§ 3411(e). Soliciting orders for liquor.—No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this article. (1923, c. 1, s. 5.)

§ 3411(f). Seizure of liquor or conveyance; arrests; sale of property.—When any officer of

the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. When ever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this article in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court, upon the conviction of the person so arrested, shall order the liquor destroyed, and, unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor, and shall pay the balance of the proceeds to the treasurer or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage. (1923, c. 1, s. 6.)

Constitutionality.—The provisions of this section do not contravene the provisions of the State Constitution, Art. I, secs. 11 and 15. State v. Godette, 188 N. C. 497, 125 S. E. 24.

Arrest without Warrant.—An arrest may not be lawfully made by the properly authorized officers of the law for the violation of our prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers' presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. State v. DeHerrodora, 192 N. C. 749, 136 S. E. 6.

It follows that for an officer to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result, is manslaughter at least, and a verdict thereof under conflicting evidence will be sustained on appeal. State v. Simmons, 192 N. C. 692, 135 S. E. 866.

But where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobile, and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. State v. Godette, 183 N. C. 497, 125 S. E. 24.

Same—Evidence Not Excluded.—The arrest by the officer of the law without a warrant, being valid under the provisions of our statute, it may not successfully be maintained that evidence thereof should have been excluded. State v. Godette, 188 N. C. 497, 125 S. E. 24.

A search warrant is not necessary to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when under the circumstances the officer had reasonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of this section. State v. Jenkins, 195 N. C. 747, 143 S. E. 538.

The "baggage" of the proviso of this section, refers to baggage accompanying or in the vehicle transporting the intoxicating liquor. State v. Jenkins, 195 N. C. 747, 750, 143 S. E. 538.

By "baggage" is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunk of a passenger, but which are not, however, designed for such use, but for other purposes, such as sale and the like. State v. Jenkins, 195 N. C. 747, 751, 143 S. E. 538.

A suitcase or traveling bag with four one-half gallon cans of contraband liquor in it is not baggage, under the definition in this section. State v. Jenkins, 195 N. C. 747, 751, 143 S. E. 538.

"Other Vehicle"—Suit Case.—A suitcase carried in one's hand along a public highway would not be an "other vehicle" within the meaning of this section. State v. Jenkins, 195 N. C. 747, 750, 143 S. E. 538.

Search without Warrant.—Officers have no authority to search a car without a warrant, under this section where they do not see or have "absolute personal knowledge" that there is intoxicating liquor in his car. State v. Simmons, 192 N. C. 692, 135 S. E. 866; State v. Godette, 188 N. C. 497, 125 S. E. 24; State v. DeHerrodora, 192 N. C. 749, 753, 136 S E. 6.

Forfeiture of Property Used.—See article in 2 N. C. Law Rev. 126 for a review of the cases and statutes.

Rights of License on Automobile Forfeited and Sold.—This section expressly transfers the lien upon an automobile seized and sold for the unlawful transportation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with Const., Art. 1, § 17, or with the Due Process Clause of the Federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function. C. I. T. Corporation v. Burgess, 199 N. C. 23, 153 S. E. 634.

One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of this section, after notice by publication required by the statute, may not successfully maintain his action for possession of the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure. C. I. T. Corporation v. Burgess, 199 N. C. 23, 153 S. E. 634.

Liability of Sheriff for Destruction of Vehicle.—In a case arising prior to this section it was held that where the sheriff took an automobile in custody under a corresponding statute and while he was holding it in a storage garage according to law, it was destroyed by fire through no fault of his, he was not liable on his forthcoming bond. There were two dissenting opinions filed. Motor Co. v. Sands, 186 N. C. 732, 120 S. E. 459.

§ 3411(f1). Use of seized property forbidden.—It shall be unlawful for any State, county, township or municipal officer to use or cause to be used for any purpose whatsoever any automobile or other article of personal property seized by said officer for the reason that the owner of said property or one in possession thereof at time of seizure has violated the terms of the State or Federal prohibition laws, or any other laws, until the respective rights of the owner, or person in possession at time of seizure, or mortgagee if one should intervene, are passed upon by the proper court, and final order is made as to proper disposition of said personal property so seized.

It shall be the duty of the officer seizing said automobile or other personal property to store same in a safe and suitable place, until final disposition is ordered.

Any officer or officers violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days. (1927, c. 18.)

§ 3411(g). Witnesses; self crimination; immunity.—No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this article, but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence; but no person shall be exempt from prosecution and punishment for perjury committed in so testifying. (1923, c. 1, s. 7.)

Immunity Must Be Claimed Under Section.—The immunity from punishment of an offender against our prohibition law when testifying against others charged with the same offense, must be claimed by him under the provisions of this section which supersede sec. 3406, so as to make our statute conform to the Federal Act, whereunder no discovery made by such person shall be used against him and he shall be altogether pardoned for the offense done or participated in by him. State v. Luquire, 191 N. C. 479, 132 S. E. 162.

Voluntary Testimony of Offender.—The evidence in criminal prosecutions that may not be received from the offender, is such as is compulsory, and does not apply to one volunteering his testimony and willingly giving it. State v. Luquire, 191 N. C. 479, 132 S. E. 162.

Same—Waiver.—An offender against the criminal law relating to prohibition, may waive his constitutional right not to give evidence that would tend to incriminate himself by his voluntary act in so doing. State v. Luquire, 191 N. C. 479, 132 S. E. 162.

Testimony at Former Trial.—Where a witness on a former trial for violating the prohibition law against the manufacture or sale of intoxicating liquor has voluntarily testified as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify, it is competent for witnesses to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of this section. State v. Burnett, 184 N. C. 785, 115 S. E. 57.

§ 3411(h). Place of sale and delivery; place of prosecution.—In case of a sale of liquor where the delivery thereof was made by a common or other carrier, the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or the consignee, his agent or employee, or in the county wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in either county. (1923, c. 1, s. 8.)

§ 3411(i). Uniting separate offenses in indictment, etc.; bill of particulars; trial.—In any affidavit, information, warrant, or indictment for the violation of this article, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, warrant, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful; but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so. (1923, c. 1, s. 9.)

§ 3411(j). Possession prima facie evidence of keeping for sale.—The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein. (1923, c. 1, s. 10.)

For a discussion of the wisdom of permitting proof of possession to raise a presumption of unlawful handling for gain, see 5 N. C. Law Rev. 302.

Liberal Construction.—This section is to be liberally construed to prevent the use of liquor as a beverage; and the possession of such liquor is made prima facie evidence of the violation of the law, but allowing the possession thereof for the personal consumption of the owner and bona fide guests, etc. State v. Hammond, 188 N. C. 602, 125 S. E. 402.

Section 3379 Not Repealed.—The prior statute making the possession of more than one gallon, prima facie evidence of the purpose of unlawful sale is not in conflict with or repealed by this section. State v. Foster, 185 N. C. 674, 116 S. E. 561.

Possession as Evidence of Sale.—If one had possession of liquor as disclosed by this record it was prima facie evidence that he had it for sale. If not in his private dwelling, if he had actual constructive possession, whether for sale or not, it is a violation of law. State v. Pierce, 192 N. C. 766, 770, 136 S. E. 121; State v. McAllister, 187 N. C. 400, 121 S. E. 739; State v. Knight, 188 N. C. 630, 125 S. E. 406.

But the prima facie case so established may be rebutted by showing that possession was lawful under the statutory qualification, the burden remaining with the State to show guilt beyond a reasonable doubt. State v. Hammond, 188 N. C. 602, 125 S. E. 402.

However, the mere possession unrebutted is sufficient to carry the issue to the jury. State v. Hammond, 188 N. C. 602, 607, 125 S. E. 402.

Prima Facie Evidence Applies to Possession in Private Dwelling.—The prima facie evidence arising under this section from the possession of liquor applies to possession in a private dwelling or elsewhere. State v. Dowell, 195 N. C. 523, 143 S. E. 133.

Keeping in Home.—As shown in this section one is not

allowed "to manufacture, sell, barter, etc., or possess intoxicating liquors," except as heretofore explained and modified, but if received only in one's home (without violation of the acts as specified and prohibited in the statute), and is kept there only for the consumption of the owner and his family and the bona fide guests entertained by him, this constitutes no breach of the present statute, though received since the same was enacted. State v. Hammond, 188 N. C. 602, 608, 125 S. E. 402.

Such possession in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. State v. Mull, 193 N. C. 668, 137 S. E. 866.

When Possession in Private Dwelling Unlawful.—Under this section the possession of liquor in the private dwelling of defendant, for any other purpose than stated in the exception, is unlawful. State v. Dowell, 195 N. C. 523, 143 S. E. 133.

Purchase and Transportation to Home Unlawful.—While this section does not make it a criminal offense for one to have intoxicating liquor in his own dwelling for his own personal use or that of his family and friends, it is a violation of the criminal law, by the express provisions of section 3411(b), for him to either purchase it elsewhere or carry it there. State v. Winston, 194 N. C. 243.

Burden of Proving Proper Purposes.—Where the defendant, charged with the violation of our prohibition law, seeks to defend himself under the provisions of this act, allowing the possession of intoxicating liquors in his house for his own purposes, he must plead and show that the liquor was for the purpose allowed by the act. State v. Foster, 185 N. C. 674, 116 S. E. 561. See the discussion in 5 N. C. Law Rev. 302.

Under this section the State is not required to allege or prove that the case does not fall within the exception allowing possession for personal use, etc. This being a matter of defense, must be alleged and proven by the defendant. State v. Dowell, 195 N. C. 523, 143 S. E. 133.

Same—Rebuttal by Proof of Large Quantity.—The possession of a large quantity of whisky in the home of the defendant raised the prima facie case of her guilt, permitting the inference from the method of its being bottled, etc., that it was for the purpose of an unlawful sale, or that it had been received for unlawful purposes, defendant's motion as of non-suit thereon was properly denied. State v. Hammond, 188 N. C. 602, 125 S. E. 402.

Charge Negativing Proper Purpose Unnecessary. — Where the indictment sufficiently charges the offense of the unlawful possession of whiskey under this section, a charge negativing the exception making it lawful to have such possession for family purposes, etc., as provided in § 3411(j) is unnecessary to a conviction. State v. Hege, 194 N. C. 526, 140 S. E. 80.

§ 3411(k). Summons on citizens having interest in property.—In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court. (1923, c. 1, s. 11.)

§ 3411(l). Search warrants; disposal of liquor seized.—Upon the filing of a complaint under oath by a reputable citizen or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling intoxicating liquor which may be found at such place or places, and to keep the same subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor seized under this section shall be held and upon acquittal of the person so charged shall be returned to such person, and upon conviction, or upon default of appearance, shall be destroyed. (1923, c. 1, s. 12.)

§ 3411(m). Grand jury, witnesses before; effect of evidence.—When the solicitor of any judicial district has good reason to believe that liquor has been manufactured or sold contrary to law within a county in his district, and believes that any person has knowledge of the existence and establishment of any illicit distillery, or that any person has sold liquor illegally, then it is lawful for the solicitor to apply to the clerk of the superior court of the county wherein the offense is supposed to have been committed to issue a subpœna for the person so having knowledge of said offense to appear before the next grand jury drawn for the county, there to testify upon oath what he may know touching the existence, establishment, and whereabouts of said distillery, or persons who have sold intoxicating liquor contrary to law, who shall give the names and personal description of the keepers thereof, and of any person who has sold liquor unlawfully; and such evidence, when so obtained, shall be considered and held in law as an information on oath upon which the grand jury shall make presentment, as provided by law in other cases. If any officer shall fail or refuse to use due diligence in the execution of the provisions of this section he shall be guilty of laches in office, and such failure be cause for removal from office. (1923, c. 1, s. 13.)

§ 3411(n). Clubrooms and other places for keeping, etc., of liquor.—No corporation, club, association, or person shall directly or indirectly keep or maintain, alone or by association with others, or by any other means, or shall in any manner aid, assist, or abet others in keeping or maintaining a clubroom or other place where intoxicating liquor is received, kept, or stored for barter, sale, exchange, distribution, or division among the members of any such club or association or aggregation of persons, or to or among any other persons by any means whatever, or shall act as agents in ordering, procuring, buying, storing, or keeping intoxicating liquor for any such purpose. (1923, c. 1, s. 14.)

§ 3411(o). Records of transporation companies; evidence.—All express companies, railroad companies, or other transportation companies doing business in this state are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom de-

livered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or, if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and such book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transportation company, or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor. (1923, c. 1, s. 15.)

§ 3411(p). Indictments; allegations of sale; circumstantial evidence.—In indictments for violating any provisions of this article it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence. (1923, c. 1, s. 16.)

§ 3411(q). Serving liquor with meals.—It is unlawful for any person to serve with meals, or otherwise, any liquor or intoxicating bitters, where any charge is made for such meal or service. (1923, c. 1, s. 17.)

§ 3411(r). Sale by druggists or pharmacists.—It is unlawful for any druggist or pharmacist to sell, or otherwise dispose of for gain, any intoxicating liquor. (1923, c. 1, s. 18.)

§ 3411(s). Grain alcohol for use in medicine or surgery; manufacture or sale of cider.—The provisions of this article shall not apply to grain alcohol, received by duly licensed physicians, druggists, dental surgeons, college, university, and state laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes, when obtained as hereinbefore provided: Provided, however, that nothing contained in this article shall prohibit the importation into the state of North Carolina and the delivery and possession in the state for use in industry, manufactures, and arts of any denatured alcohol or other denatured spirits which are compounded and made in accordance with the formulae prescribed by acts of Congress of the United States and regulations made under authority thereof by the Treasury Department of the United States and the commissioner of internal revenue thereof, and which are not now subject to internal revenue tax levied by the Government of the United States: Provided further, that this article shall not apply to wines and liquors required and used by hospitals or sanatoriums bona fide established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs, when the same are administered to patients actually in such hospitals or sanatoriums for treatment, and when the same are administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing: Provided, further, that this article shall not prohibit the manufacture or sale of cider or vinegar. (1923, c. 1, s. 19.)

§ 3411(t). Wine for sacramental purposes. — It is lawful for any ordained minister of the gospel who is in charge of a church and at the head of a congregation in this state to receive in the space of ninety consecutive days a quantity of vinous liquor not greater than five gallons, for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles. (1923, c. 1, s. 20; 1935, c. 114.)

Editor's Note.—By the amendment of 1935 the quantity which could be received was increased from three to five gallons.

§ 3411(u). Sheriffs and police to search for and seize distilleries; confiscation; disposal of property.—It is the duty of the sheriff of each county in the state and of the police of each incorporated town or city in the state to search for and seize any distillery or apparatus used for the manufacture of intoxicating liquor in violation of the laws of North Carolina, and to deliver same, with any materials used for making such liquor found on the premises, to the board of county commissioners, who shall confiscate the same and shall cause the distillery to be cut up and destroyed, in their presence or in the presence of a committee of the board, and who may dispose of the material, including the copper or other material from the destroyed still or apparatus, in such manner as they may deem proper. (1923, c. 1, s. 21.)

§ 3411(v). Destruction of liquor at distillery; persons arrested.—It is the duty of the sheriff and other officers mentioned in the preceding section to seize and then and there destroy any and all liquor which may be found at any distillery for the manufacture of intoxicating liquor in violation of law, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquor. (1923, c. 1, s. 22.)

§ 3411(w). Laches of officers; removal from office.—If any officer mentioned in the two preceding sections shall fail or refuse to use diligence in the execution of the provisions of such section, after being informed of violation thereof, he shall be guilty of laches in office, and such failure be cause for removal therefrom. (1923, c. 1, s. 23.)

§ 3411(x). Rewards for seizure of still.—For every distillery seized under this article the sheriff or other police officer shall receive such sum as the board of county commissioners of the county in which the seizure was made shall, in the discretion of such board, allow, which sum shall not be less than five dollars nor more than twenty dollars: Provided, that the commissioners shall not pay any amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made: Provided further, that when the sheriff of a county captures a distillery he shall receive the fee for his own use, regardless of whether he be on fees or salary. (1923, c. 1, s. 24.)

Editor's Note.—By Public Laws 1935, chapter 253, Moore county was eliminated from the exception made by Pub-

lic Laws 1933, chapter 246, which provided that this section should not apply in Moore and Lenoir counties.

For an amendment of this section applicable in Burke county only, see Public Laws 1933, c. 136.

§ 3411(x1). Same—In certain counties.—The Board of Commissioners of the several counties in the State, hereinafter named, shall pay by way of reward to the sheriff or other officers in the various counties for the capture and destruction of stills used in the manufacture of spirituous liquors, the sum of twenty dollars ($20.00) and no more, upon the production of a certificate from the Clerk of the Superior Court or other court having final jurisdiction, that one or more operators of the still captured and destroyed were by the sheriff or other officer apprehended, captured and have been convicted and that no appeal has been taken from the judgment rendered, which said twenty dollars ($20.00) shall be in lieu of any and all other rewards authorized by law to be paid for the capture and destruction of stills to the sheriff or other officers in the counties hereinafter named.

This section shall apply to the following counties only: Alleghany, Ashe, Avery, Bladen, Buncombe, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Beaufort, Hyde, Hoke, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Union, Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1927, c. 42.)

§ 3411(y). Officers given power to compel evidence; effect of evidence; process; immunity to witnesses.—When any justice of the peace of magistrate, recorder, mayor of a town, or judge of the superior courts or supreme court shall have good reason to believe that any person within his jurisdiction has knowledge of the unlawful sale of liquor or the existence and establishment of any place where intoxicating liquor is sold or manufactured contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, recorder, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such place where intoxicating liquor is sold or manufactured contrary to law is supposed to be, a subpœna, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, recorder, mayor, or judge, and give evidence on oath as to what he may know touching the existence, establishment, and whereabouts of such place where intoxicating liquor is sold or manufactured contrary to law, and the name and personal description of the keeper thereof, or person selling or manufacturing liquor. Such evidence, when obtained, shall be considered and held in law as an information under oath, and the justice, magistrate, recorder, mayor, or judge may thereupon proceed to seize and arrest such keeper or person selling, manufacturing, or having liquor contrary to law, and issue process as is provided by law. No discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. (1923, c. 1, s. 25.)

§ 3411(z). Distilling or manufacturing liquor; first offense misdemeanor.—It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the state of North Carolina. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction, said person or persons shall be guilty of a felony, and upon conviction or confession in open court shall be imprisoned in the state prison for not less than four months and not exceeding five years, in the discretion of the court. (1923, c. 1, s. 26.)

§ 3411(aa). Misdemeanor; punishment; effect of previous punishment by federal court. — Any person violating any of the provisions of this article, except as otherwise specified in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court: Provided, that no person shall be punished who has been previously punished for the same offense by a federal court. (1923, c. 1, s. 27.)

§ 3411(bb). Laws repealed; local laws.—All laws in conflict with this article are hereby repealed, but nothing in this article shall operate to repeal any of the local acts of the general assembly of North Carolina prohibiting the manufacture or sale or other disposition of any liquor mentioned in this article, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this article or under any local act relating to the same subject. (1923, c. 1, s. 28.)

§ 3411(cc). Effect of partial invalidity of article.—If any provision of this article shall be held invalid, it shall not be construed to invalidate other provisions of this article. (1923, c. 1, s. 29.)

Art. 9. Legalization of Sale of Beverage with Not More than 3.2% Alcoholic Content.

§ 3411(dd). Sale of beer and light wines in state allowed.—On an after the passage of this article it shall be lawful for any person, firm, or corporation to sell, barter, trade, exchange, or dispose of beer, lager beer, ale, porter, fruit juices, and/or light wines, containing not more than 3.2% of alcohol by weight, or such other percentage as may conform to any act of the congress of the United States, within the domains of the state of North Carolina, subject, however, to payment of tax hereinafter imposed. (1933, c. 216, s. 1.)

See 11 N. C. Law Rev., 241, for comprehensive review of this section.

Editor's Note.—For local modifications prohibiting sales in or near certain specified places see Public Laws 1933, c. 454 (Quaker Children's Home and Wingate Junior College); c. 472 (Pelham M. E. Church, South); c. 395 (village

of Macon); c. 396 (Montreat, Mars Hill and association grounds of Baptist assembly at Ridge Crest); c. 455 (Stumpy Point voting Precinct, Dare County); c. 381 (Cane Creek Church and Sylvan High School in Southern Alamance County); cc. 369, 406 (Guilford College); c. 564 (Wake Forest College); c. 370 (Oak Ridge Military Institute); c. 416 (Town of Bakersville); c. 417 (Elon College); c. 313 (Davidson College); and c. 512 (village of Worthville). For other local restrictions, see note to § 3411(1).

§ 3411(ee). Tax $2 per barrel; on bottles, 2c.— There shall be levied and collected on all beer, lager beer, ale, porter, fruit juices, and/or other light wines, containing not more than 3.2% of alcohol by weight, by whatever name the same may be called, offered for sale in this state a tax of two dollars ($2.00) for every barrel containing not more than thirty-one (31) gallons and at a proportionate rate for barrels containing more than thirty-one (31) gallons: Provided, however, that if such beer, lager beer, ale, porter, fruit juices, and/or other light wines be offered for sale in bottles, there shall be levied and collected a tax of two cents for every bottle containing not more than twelve (12) ounces, and a proportionate rate for bottles containing more than twelve (12) ounces. (1933, c. 216, s. 2.)

§ 3411(ff). Revenue department to make regulations; revenue to general fund. — The North Carolina department of revenue is hereby authorized, empowered and directed to promulgate rules and regulations governing the sale and distribution of such beer, lager beer, ale, porter, fruit juices, and/or other light wines, and the payment of the taxes hereby levied, which revenue derived from the sale of the aforesaid sale of beer, lager beer, ale, porter, fruit juices, and/or other light wines shall be placed in the general fund of the state of North Carolina. (1933, c. 216, s. 3.)

§ 3411(gg). County license fee of $25.—It shall be unlawful for any person, firm, or corporation to sell beer, lager beer, ale, porter, fruit juices, and/or other light wines in North Carolina without first applying for and receiving a permit or license from the board of commissioners of the several counties of the state, which license fee shall be fixed at the sum of twenty-five ($25.00) dollars and placed in the treasury of the county, to be used in the payment of the public debt of said counties. (1933, c. 216, s. 4.)

§ 3411(hh). Tax for municipalities, $10.—Each and every incorporated city or town in North Carolina may levy a similar license tax on each dealer inside, or two miles outside the incorporated limits of such city or town not exceeding the sum of ten ($10.00) dollars, the license for incorporated cities and towns, and the funds derived therefrom shall be put in the general funds of the city or town, to be used in their debt-service fund. (1933, c. 216, s. 5.)

§ 3411(ii). Sale in places used expressly for purpose prohibited.—It shall be unlawful to sell, barter, exchange, dispose of or allow to be sold, bartered, exchanged, disposed of any such beer, lager beer, ale, porter, fruit juices and/or other light wines in any container in any place, building, edifice or structure primarily and expressly used, rented, occupied or maintained for the sole or primary purpose of selling such beer, lager beer, ale, porter, fruit juices and/or other light wines, and no county, city or town shall license the sale of any beer, lager beer, ale, porter, fruit juices and/or other light wines, and shall revoke any license heretofore granted when it shall be made to appear that the same is being sold in any place, building, edifice or structure primarily and expressly used, rented, occupied or maintained for the sole and/or primary purpose of selling such beer, lager beer, ale, porter, fruit juices, and/or other light wines. (1933, c. 216, s. 6.)

§ 3411(jj). Sale without license made misdemeanor.—It shall be unlawful for any person, firm, or corporation to sell, barter, exchange, dispose of, or allow to be sold, bartered, exchanged, or disposed of such beer, lager beer, ale, porter, fruit juices, and/or other light wines on which the tax hereby levied be not paid to the state, county, city or town, and any person, firm, or corporation so selling, bartering, exchanging, disposing of, or allowing to be sold, bartered, exchanged, or disposed of such beer, lager beer, ale, porter, fruit juices and/or other light wines, or who shall fail to keep accurate records of wholesale purchases, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court, for each offense. (1933, c. 216, s. 7.)

§ 3411(kk). Sale to minors under 18 made misdemeanor.—It shall be unlawful for any person, firm, or corporation to sell or give any of the products herein authorized to be sold to any minor under eighteen years of age; and any person violating the terms of this section shall be guilty of a misdemeanor and punished for each offense in the discretion of the court. (1933, c. 216, s. 8.)

§ 3411(ll). Shipment into state of beer and light wines permitted.—It shall be lawful for any person, firm or corporation to transport and deliver beer, lager beer, ale, porter, fruit juices, light wines and/or other brewed or fermented beverages, containing not more than three and two-tenths (3.2%) per cent of alcohol by weight, or such other percentage as may conform to any act of the congress of the United States, within the domains of the state of North Carolina. (1933, c. 297, s. 1.)

§ 3411(mm). Laws prohibiting advertisement of beer and light wines repealed. — All laws and clauses of laws prohibiting newspaper, radio, billboard or other forms of advertising for sale of beer, lager beer, ale, porter, fruit juices and/or other light wines containing not more than 3.2 per cent of alcohol by weight, are hereby repealed. (1933, c. 216, s. 11, c. 229.)

Art. 10. Beverage Control Act of 1933

§ 3411(1). Title.—This article shall be known as the beverage control act of one thousand nine hundred and thirty-three. (1933, c. 319, s. 1.)

Editor's Note.—For local restrictions on sale of beer and wine, see note to § 3411(dd). See also Public Laws 1933, c. 508, regulating sale in Yanceyville; c. 475 prohibiting sale in Frenches Creek Township; c. 398 restricting sale near Campbell College; and c. 358 prohibiting sale within mile of Pineland Junior College. See also note to § 3411(dd).

§ 3411(2). Definitions.—The term "beverages" as used in this article shall include beer, lager beer, ale, porter, wine, fruit juices and other brewed or fermented beverages containing not exceeding five per cent of alcohol by weight.

The term "person" used in this article shall mean any individual, firm, partnership, association, corporation, or other group or combination acting as a unit.

The term "sale" as used in this article shall include any transfer, trade, exchange or barter in any manner or by any means whatsoever. (1933, c. 319, s. 2; 1935, c. 134.)

Editor's Note.—By the 1935 amendment the maximum alcoholic content was increased from three and two-tenths per cent (3.2%) by weight to five per cent (5%) by weight.

§ 3411(3). Regulations.—The beverages enumerated in section 3411(2) may be manufactured, transported or sold in this state in the manner and under the regulations hereinafter set out. (1933, c. 319, s. 3.)

§ 3411(4). Transportation.—The beverages enumerated in section 3411(2) may be transported into, out of or between points in this state by railroad companies, express companies or by steamboat companies engaged in public service as common carriers and having regularly established schedules of service upon condition that such companies shall keep accurate records of the character and volume of such shipments, the character and number of packages, or containers, shall keep records open at all times for inspection by the commissioner of revenue of this state or his authorized agent, and upon condition that such common carrier shall make report of all shipments of such beverages into, out of or between points in this state at such times and in such detail and form as may be required by the commissioner of revenue.

The beverages enumerated in section 3411(2) may be transported into, out of or between points in this state over the public highways of this state by motor vehicles upon condition that every person intending to make such use of the highways of this state shall as a prerequisite thereto register such intention with the commissioner of revenue in advance of such transportation, with notice of the kind and character of such products to be transported and the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of his act, the commissioner of revenue shall without charge therefor issue a numbered certificate to such owner or operator for each motor vehicle intended to be used for such transportation, which numbered certificate shall be prominently displayed on the motor vehicle used in transporting the products named in section 3411-(2). Every person transporting such products over any of the public highways of this state shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence, showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases or gallons of such shipment, the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any representative of the commissioner of revenue, produce and offer for inspection said invoice or bill of sale or record evidence. If said person fails to produce invoice or bill of sale or record evidence, or if when produced, it fails to clearly and accurately disclose said information, the same shall be prima facie evidence of the violation of this article. Every person engaged in transporting such beverages over the public highways of this state, shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the commissioner of revenue of this state, or his authorized agent, and upon condition that such person shall make report of all shipments of such beverages into, out of or between points in this state at such times and in such detail and form as may be required by the commissioner of revenue.

The purchase, transportation and possession of beverages enumerated in section 3411(2) by individuals for their own use is permitted without restriction or regulation. The provisions of this section as to transportation of beverages enumerated in section 3411(2) by motor vehicles over the public highways of this state shall in like manner apply to the owner or operator of any boat using the waters of this state for such transportation, and all of the provisions of this section with respect to permit for such transportation and reports to the commissioner of revenue by the operators of motor vehicles on public highways shall in like manner apply to the owner or operator of any boat using the waters of this state. (1933, c. 319, s. 4.)

§ 3411(5). Manufacture.—The brewing or manufacture of beverages for sale as defined in section 3411(2) containing not more than five per cent (5%) of alcohol by weight shall be permitted in this State upon the payment of an annual license tax to the commissioner of revenue in the sum of five hundred dollars ($500.00) for a period ending on the next succeeding thirtieth day of April and annually thereafter. Persons licensed under this section may sell such beverages in barrels, bottles, or other closed containers only to persons licensed under the provisions of this act for resale, and no other license tax shall be levied upon the business taxed in this section. The sale of malt, hops, and other ingredients used in the manufacture of beverages for sale enumerated in section 3411(2) are hereby permitted and allowed: Provided, that it shall be lawful for any person to manufacture the wine, fruit juices and other fermented beverages made of fruit, described in section 3411(2) for his own use without obtaining the license required by this section. (1933, c. 319, s. 5; 1935, c. 315.)

Editor's Note.—The clause reading "containing not more than five per cent," etc., was inserted by the 1935 amendment.

§ 3411(6). Bottlers' license.—License to receive shipments of beverages enumerated in section 3411(2) in barrels or other containers and bottling same for sale to others for resale shall be issued by the commissioner of revenue upon the payment of an annual license tax of two hundred and fifty dollars ($250.00) for a period ending on the next succeeding thirtieth day of April and annually thereafter, and no other license tax shall be levied upon the business taxed in this section. Licensees under this section shall pay the tax of one cent per bottle levied in section 3411(16): Provided no tax shall be paid upon such beverages in bar-

rels, where such beverages are to be bottled. (1933, c. 319, s. 6.)

§ 3411(7). Wholesalers' license.—License to sell at wholesale, which shall authorize licensees to sell beverages in barrels, bottles, or other containers in quantities of not less than one case or container to a customer, shall be issued as a statewide license by the commissioner of revenue. The annual license under this section shall be one hundred and fifty dollars ($150.00) and shall expire on the next succeeding 30th day of April. The license issued under this section shall be revocable at any time by the commissioner of revenue for failure to comply with any of the conditions of this act with respect to the character of records required to be kept, reports to be made or payment of other taxes hereinafter set out.

If any wholesaler maintains more than one place of business or storage warehouse from which orders are received or beverages are distributed a separate license shall be paid for each separate place of business or warehouse.

The owner or operator of every distributing warehouse selling, distributing or supplying to retail stores beverages enumerated in section 3411(2) shall be deemed wholesale distributors within the meaning of this article and shall be liable for the tax imposed in this section and shall comply with the conditions imposed in this article upon wholesale distributors of beverages with respect to payment of taxes levied in this article and bond for the payment of such taxes. (1933, c. 319, s. 7.)

§ 3411(8). On railroad trains.—The sale of beverages enumerated in section 3411(2) shall be permitted on railroad trains in this state to be sold only in dining cars, buffet cars, pullman cars, or club cars, and for consumption on such cars upon payment to the commissioner of revenue of one hundred ($100.00) dollars for each railroad system over which such cars are operated in this state for an annual state-wide license expiring on the next succeeding thirtieth day of April. No other license shall be levied upon licensees under this section, but every licensee under this section shall make a report to the commissioner of revenue on or before the tenth day of each calendar month covering sales for the previous month and payment of the tax on such sales at the rate of tax levied in this article. (1933, c. 319, s. 8.)

§ 3411(9). Salesmen's license. — License for salesmen, which shall authorize the licensee to offer for sale within the state or solicit orders for the sale of within the state beverages enumerated in this article, shall be issued by the commissioner of revenue upon the payment of an annual license tax of twelve dollars and fifty cents ($12.50) to the commissioner of revenue, such license to expire on the next succeeding thirtieth day of April. License to salesmen shall be issued only upon the recommendation of the vendor whom they represent, and no other license tax shall be levied under this section. (1933, c. 319, s. 9.)

§ 3411(10). Character of license.—License issued under authority of this act shall be of two kinds:

(1) "On Premises" license which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drug stores, filling stations, grocery stores, cold drink stands, tea rooms, or incorporated or chartered clubs. Such license shall authorize the licenees to sell at retail beverages for consumption on the premises designated in the license, and to sell the beverages in original packages for consumption off the premises.

(2) "Off Premises" license which shall authorize the licensee to sell at retail beverages for consumption only off the premises designated in the license and only in the immediate container in which the beverage was received by the licensee.

In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a "premises" license under the terms of this article, and outside of municipalities such determination shall be by the board of commissioners of the county. (1933, c. 319, s. 10.)

§ 3411(11). Amount of retail license tax.—The license tax to sell at retail under this article for municipalities shall be:

(1) For "On Premises" license fifteen dollars ($15.00).

(2) For "Off Premises" license ten dollars ($10.00).

The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten per cent of the base tax, such increase to apply progressively for each additional license issued to one person. (1933, c. 319, s. 11.)

§ 3411(12). Who may sell at retail.—Every person making application for license to sell at retail beverages enumerated in section 3411(2), if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) Name and residence of the applicant and the length of his residence within the state of North Carolina.

(1½) That state, county or city shall not issue license under this article to any person, firm or corporation who has not been a bona fide resident of North Carolina for one year.

That no resident of the state shall obtain a license under this act and employ or receive aid from a non-resident for the purpose of defeating the above section.

The penalty for violating item one and one-half shall be a misdemeanor. All persons convicted shall be imprisoned not more than thirty days, nor fined more than two hundred dollars.

That this shall only apply to the following counties: Currituck, Camden, Pasquotank, Perquimans, Chowan, Hertford, Dare, Gates, Polk and Henderson.

(2) The particular place for which the license is desired, designating the same by a street and number if practicable; if not, by such other apt description as definitely locates him.

(3) The name of the owner of the premises upon which the business licensed is to be carried on.

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(5) A statement that the applicant is a resident of the state of North Carolina and not less than twenty-one years of age, that such applicant is of good moral character and has never been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws, either state or federal, within the last two years prior to the filing of the application. The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oath. If it appear from the statement of applicant or otherwise that such applicant has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws, either state or federal, within the last two years prior to the filing of the application, or within two years from the completion of sentence, such license shall not be granted, and if it shall afterwards appear that any false statement is knowingly made in any part of said application and license received thereon, the license of the applicant shall be revoked and the applicant subjected to the penalty provided by law for misdemeanors. Before any such license shall be issued, the governing body of the municipality shall be satisfied that statements required by subsections (1), (2), (3), (4) and (5) of this section are true. (1933, c. 319, s. 12, c. 444.)

§ 3411(13). County license to sell at retail.—License to sell at retail shall be issued by the board of commissioners of the county, and application for such license shall be made in the same manner and contain the same information set out in the preceding section with respect to municipal license. If the application is for license to sell within a municipality, the application must also show that license has been granted the applicant by the governing board of such municipality. The granting of a license by the governing board of a municipality shall determine the right of an applicant to receive a county license upon compliance with the conditions of this article.

If the application is for license to sell outside of a municipality within the county, the application shall also show the distance to the nearest church or public or private school from the place at which the applicant purposes to sell at retail. No license shall be granted to sell within three hundred (300) feet of any public or private school buildings or church building outside of incorporated cities and towns: Provided, the restriction set forth in this sentence shall not apply to unincorporated towns and villages having police protection.

The clerk of the board of commissioners of each county shall make prompt report to the commissioner of revenue of each license granted by the board of commissioners of such county. The county license fee shall be fixed at $25.00 and the same shall be placed in the county treasury, for the use of the county. (1933, c. 319, s. 13.)

§ 3411(14). Issuance of license mandatory; schools and churches protected.—It shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with the requirements of this article: Provided, no person shall dispense beverages herein authorized to be sold, within fifty feet of a church building in an incorporated city or town, or in a city or town having police protection whether incorporated or not, while religious services are being held in such church, or within 300 feet of a church building outside the incorporate limits of a city or town while church services are in progress. (1933, c. 319, s. 14.)

§ 3411(15). Expiration of licenses.—All licenses issued by counties and municipalities under this article shall be for the current year, and shall expire on the next succeeding thirtieth day of April. (1933, c. 394, s. 1.)

§ 3411(16). Revocation of license.—If any licensee violates any of the provisions of this article or any rules and regulations under authority of this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises with respect to which the license was issued to be used for any unlawful, disorderly or immoral purposes, or knowingly employs in the sale or distribution of beverages any person who has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws within two years or otherwise fails to carry out in good faith the purposes of this article, the license of any such person may be revoked by the governing board of the municipality or by the board of county commissioners after the licensee has been given an opportunity to be heard in his defense. Whenever any person, being duly licensed under this article, shall be convicted of the violation of any of the prohibition laws on the premises herein licensed, it shall be the duty of the court to revoke said license. Whenever any license which has been issued by any municipality, any board of county commissioners or by the commissioner of revenue has been revoked, it shall be unlawful to reissue said license for said premises to any person for a term of six months after the revocation of said license. (1933, c. 319, s. 15.)

§ 3411(17). State license.—Every person who intends to engage in the business of retail sale of the beverages enumerated in section 3411(2) shall also apply for and procure a state license from the commissioner of revenue, which license shall be issued by the commissioner of revenue upon information that license to such person has been issued by the board of commissioners of the county for the place at which such licensee proposes to sell, and if in a municipality that such license has been granted by the governing board of the municipality, and upon the payment to the commissioner of revenue an annual license tax as follows:

For the first license issued to each licensee five dollars ($5.00), and for each additional license issued to one person an additional tax of ten per cent (10%) of the five dollars base tax. That is to say, that for the second license issued the tax shall be five dollars and fifty cents ($5.50) annually, for the third license six dollars ($6.00) annually, and an additional fifty cents (50c.) per

annum for each additional license issued to each person. (1933, c. 319, s. 16.)

§ 3411(18). Additional tax.—In addition to the license taxes herein levied a tax is hereby levied upon the sale of the beverages enumerated in section 3411(2) of three dollars ($3.00) per barrel of thirty-one (31) gallons, of the equivalent of such tax in containers of more or less than thirty-one (31) gallons, and in bottles of not more than twelve (12) ounces per bottle a tax of one cent (1c.) per bottle. (1933, c. 319, s. 17.)

§ 3411(19). Tax payable by wholesale distributors.—The tax levied in the preceding section shall be paid to the commissioner of revenue by the wholesale distributor or bottler of such beverages. The tax herein levied shall be paid by every wholesale distributor or bottler on or before the tenth day of each month for all beverages sold within the preceding month. As a condition precedent to the granting of license by the commissioner of revenue to any wholesale distributor or bottler of beverages under this article the commissioner of revenue shall require each such wholesale distributor or bottler to furnish bond in an indemnity company licensed to do business under the insurance laws of this state in such sum as the commissioner of revenue shall find adequate to cover the tax liability of each such wholesale distributor or bottler, proportioned to the volume of business of each such wholesale distributor or bottler but in no event to be less than one thousand dollars ($1,000) or to deposit federal, state, county or municipal bonds in required amounts, such county or municipal bonds to be approved by the commissioner of revenue. The commissioner of revenue may grant such extension of time for compliance with this condition as may be found to be reasonable. (1933, c. 319, s. 18.)

§ 3411(20). Payment of tax by retailers.—The granting of license by any municipality or county under this article to any person to sell at retail the beverages enumerated under section 3411(2) shall not be a valid license for such sale at retail until such person shall have filed with the commissioner of revenue a bond in a surety company licensed by the insurance department to do business in this state in such sum as the commissioner of revenue may find to be sufficient to cover the tax liability of every such person, but in no event to be less than one thousand dollars ($1,000). The commissioner of revenue may waive the requirement of this section for indemnity bond with respect to any such person who may file a satisfactory contract or agreement with the commissioner of revenue that such person will purchase and sell beverages enumerated in section 3411(2) only from wholesale distributors or bottlers licensed by the commissioner of revenue under this article who pay the tax under section 3411(18) upon all such beverages sold to retail dealers in this state. The violation of the terms of any such contract or agreement between any such retail dealer and the commissioner of revenue by the purchase or sale of any of the beverages enumerated in section 3411(2) from any one other than a licensed wholesale distributor or bottler under this article shall automatically cancel the license of any such retail dealer and shall be prima facie evidence of intent to defraud, and any person guilty of violation of any such contract or agreement shall be guilty of a misdemeanor. (1933, c. 319, s. 19.)

§ 3411(21). Books, records, reports.—Every person licensed under any of the provisions of this article shall keep accurate records of purchase and sale of all beverages taxable under this article, such records to be kept separate from all purchases and sales of merchandise taxable under this article, including a separate file and record of all invoices. The commissioner of revenue or any authorized agent, shall at any time during business hours have access to such records. The commissioner of revenue may also require regular or special reports to be made by every such person, at such times and in such form as the commissioner may require. (1933, c. 319, s. 20.)

§ 3411(22). No sales upon school or college grounds.—No license shall be issued for the sale of beverages enumerated in section 3411(2) upon the campus of property of any public or private school or college in this state. (1933, c. 319, s. 21.)

§ 3411(23). License shall be posted.—Each form of license required by this article shall be kept posted in a conspicuous place at each place where the business taxable under this article is carried on, and a separate license shall be required for each place of business. (1933, c. 319, s. 22.)

§ 3411(24). Administrative provisions.—The commissioner of revenue and the authorized agents of the state department of revenue shall have and exercise all the rights, duties, powers and responsibilities in enforcing this article that are enumerated in the act of the general assembly known as the revenue act in administering taxes levied in schedule B of said act, codified as sections 7880(30) et seq. (1933, c. 319, s. 23.)

§ 3411(25). Enforcement by commissioner of revenue of tax provisions; use of stamps, etc.—A discretion is herein vested in the commissioner of revenue to adopt such general rules and regulations as the commissioner may find expedient for the enforcement of the tax provisions of this article, and it is specifically authorized to require the use of stamps upon all packages containing beverages taxable under this article and evidencing the payment of the tax upon every such package, and with respect to beverages taxable under this article which may be either manufactured or bottled in this state may require the use of crowns to be furnished by the state evidencing the payment of the tax upon all such beverages manufactured and/or bottled in this state. The commissioner of revenue is authorized to promulgate rules and regulations governing the purchase, sale and distribution of crowns with which to seal said bottled drinks within this state. Said crowns shall carry design approved by the commissioner of revenue, the use of which crowns may be evidence of the payment of the license taxes provided in this article. The commissioner is authorized to purchase and fur-

nish crowns to manufacturers and/or bottlers at the manufacturer's price for such crowns, plus all transportation charges to consignee at destination, and an additional charge of one cent (1c.) per crown, when to be used upon bottled drinks taxable under this article and in bottles containing not more than twelve ounces and at a proportionate rate upon bottles containing more than twelve ounces. Such crowns may be sold to manufacturers and/or bottlers at a discount of four per cent (4%), such discount to apply to the tax and not to the manufacturer's price or transportation cost. If the commissioner shall by regulations require that stamps be used on beverages taxable under this article and not manufactured or bottled in this state, such stamps may be sold at the same rate of discount provided herein upon the sale of crowns, and either crowns or stamps may be sold to licensed bonded manufacturers or wholesale distributors payable not later than the tenth of the next succeeding month. The commissioner of revenue by and with the consent and approval of the council of state may make arrangements with the state's prison to manufacture and distribute the bottle crowns authorized under this article, and in the event such arrangement is made, only such bottle crowns as are manufactured by the state penitentiary shall be used in the bottling of beverages sold under authority of this article. If either the use of crowns or stamps shall be provided for by regulations adopted by the commissioner of revenue under authority of this article, such regulations as to crowns shall have application to all beverages taxable under this article that may be manufactured and/or bottled in this state, and such regulations as to the use of stamps shall have application to all beverages taxable under this article that may be sold in this state and not manufactured or bottled in this state, and any violation of such regulations shall constitute a violation of this article and be punishable as other violations of this article.

In any case where license taxes have been collected in rates in excess of the rates provided in this act the commissioner of revenue is authorized and directed to refund so much of license taxes as are in excess of the rates provided in this article. (1933, c. 558, ss. 3, 5.)

§ 3411(26). Appropriation of 3% of revenue for administration.—For the efficient administration of this article an appropriation is hereby made for the use of the department of revenue in addition to the appropriation in the appropriation bill of a sum equal to three per cent (3%) of the total revenue collections under this article to be expended under allotments made by the budget bureau of such part or the whole of such appropriation as may be found necessary for the administration of this article. The budget bureau may estimate the yield of revenue under this article and make advance apportionment based upon such estimate, and to provide for the necessary expense of providing materials, supplies, and other expenses needful to be incurred prior to the beginning of the next fiscal year, July 1, 1933, the budget bureau may make such advance allotment from such estimate of revenue yield as it may find proper for the convenient and efficient administration of this article. (1933, c. 319, s. 24.)

§ 3411(27). Violation of article made misdemeanor.—Whosoever violates any of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. If any licensee is convicted of the violation of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, the court shall immediately declare his permit revoked, and notify the county commissioners accordingly, and no permit shall thereafter be granted to him within a period of three years thereafter. Any licensee who shall sell or permit the sale on his premises or in connection with his business, or otherwise, of any alcoholic beverages not authorized under the terms of this article, unless otherwise permitted by law, shall, upon conviction thereof, forfeit his license in addition to any punishment imposed by law for such offense. (1933, c. 319, s. 25.)

§ 3411(28). Conflicting laws repealed. — All laws and clauses of laws in conflict with this article, including the provisions of sections 3411(dd)-3411(kk) of this code, if any are in conflict, are hereby repealed. (1933, c. 319, s. 27.)

Art. 11. Manufacture and Sale of Light Domestic Wines.

§ 3411(29). Manufacture of domestic wines permitted.—It shall be lawful for all person growing crops, either wild or cultivated, of grapes, fruits or berries to make therefrom light domestic wines or wines having only such alcoholic content as natural fermentation may produce, for the use of his or their family and guests. (1935, c. 393, s. 1.)

§ 3411(30). Growers of crops may make, sell and transport wines; sale in original packages.—Any grower of such crops may make such wines, sell and transport the same to any person, firm, or corporation in the State engaged either as wholesaler or retailer of food products, such wines to be sold in original packages not for consumption on the premises, except in hotels and bona fide restaurants engaged in selling food and serving meals. (1935, c. 393, s. 2.)

§ 3411(31). Manufacture by any person, firm or corporation authorized to do business in State. — Any person, firm or corporation authorized to do business in the State may, under regulations prescribed by the commissioner of agriculture and approved by the governor, engage in the business of manufacturing and producing wines and ciders by natural fermentation from the juices of fruits, grapes and berries grown within the State, and such wines and ciders shall be classified and recognized as food and distributed as such. (1935, c. 393, s. 3, c. 466, s. 1.)

§ 3411(32). Rules and regulations of commissioner of agriculture.—The commissioner of agriculture shall promulgate and publish such reasonable rules and regulations, with the approval

of the governor, for the regulation of such wineries as may be established, and such rules and regulations shall have the force and effect of laws, after the same have been approved by the governor. (1935, c. 393, s. 4.)

§ 3411(33). Application for permit to sell at retail.—If any producer of wine or wines desires to sell his product at retail he may do so in any county where such sale is not prohibited by filing with the clerk of court of such county an application in which he shall describe the place, at which he desires to sell such wine, and the clerk of court shall keep a list of such applicants open to public inspection. (1935, c. 393, s. 5.)

§ 3411(34). Counties may prohibit. — The county board of commissioners of any county shall have the right to prohibit the sale of wines in said county. (1935, c. 393, s. 6, c. 466, s. 2.)

§ 3411(35.) Information furnished farmers.—It shall be the duty of the department of agriculture to disseminate to the farmers of the State in an economical way the best information it can get of the best methods of cultivation of such crops, and the making of such light domestic wines. (1935, c. 393, s. 7.)

§ 3411(36). Fruit ciders included.—All the provisions of this article shall also apply to the manufacture, sale and transportaton of fruit ciders. (1935, c. 393, s. 7½.)

Art. 12. Advertising of Alcoholic Beverages

§ 3411(37). Advertising permitted in newspapers, magazines and periodicals.—It shall be lawful for newspapers, magazines and periodicals to accept and publish advertisements relating to wines, beers and other alcoholic beverages permitted to be sold and distributed under the laws of North Carolina. (1935, c. 465.)

Art. 13. Exemption of Certain Counties from Provisions of Article 8

§ 3411(38). Counties exempted from Turlington Act.—The provisions of article eight of chapter sixty-six, volume three, of the Consolidated Statutes of North Carolina, known as the Turlington Act, shall not apply to Pasquotank county, Carteret county, Craven county, Onslow county, Pitt county, Martin county, Beaufort county, Halifax county, Franklin county, Wilson county, Edgecombe county, Warren county, Vance county, Lenoir county, Rockingham county, Nash county and Greene county. (1935, c. 493, s. 1.)

As to local beverage control act exempting New Hanover County from the provisions of the Turlington Act, codified as §§ 3411(a)-3411(cc), see Public Laws 1935, c. 418.

§ 3411(39). Creation of county alcoholic beverages control boards and county liquor commissions.—There is hereby created a county liquor commission to be known and designated as the Pasquotank county alcoholic beverages control board. In Carteret county described in section 3411(38), there is hereby created a county liquor commission to be known and designated in said county by its name Carteret county alcoholic beverages control board. The board in said county shall consist of three members and except Pasquotank county in which the method of selecting said board and the members thereof as fully set forth in this section shall serve for a term of four years and be appointed in the following manner: The board of commissioners in Carteret county shall appoint the members of the county alcoholic beverages control board in said county. The Pasquotank county alcoholic beverages control board shall consist of three members, one of whom shall be chairman, and the persons composing said board for the first term hereinafter mentioned shall be W. D. Glover, chairman, F. G. Jacocks and Marvin Lister, and their successors to or vacancies in said board shall be appointed by the city council of Elizabeth City, North Carolina, and one by the board of commissioners of Pasquotank county. In the remainder of said counties, described in section 3411(38), there is hereby created, a county liquor commission to be known and designated in each of said counties by their respective names, the Pitt county, Beaufort county, Martin county, Lenoir county, Greene county, Warren county, Vance county, Halifax county, Craven county, Wilson county, Franklin county and Nash county alcoholic beverages control board. The board in each of said counties shall consist of three members and except Pasquotank county in which the method of selecting said board and the members thereof as fully set forth in this section, shall serve for a term of four years and be appointed in the following manner, viz.: The board of commissioners of each of said counties shall appoint the members of the county alcoholic beverages control board in their respective counties, with the exception of Halifax county, in which the board shall consist of three members, one of whom shall be chairman and the persons composing said board for the first term, hereinafter mentioned, shall be R. Hunter Pope, B. B. Everett, and W. A. Thorne, and their successors to or vacancy in said board shall be appointed by the board of commissioners of Halifax county. The term of the members above named and to be appointed as herein provided shall be for four years and their successors shall be elected as above provided for a term of four years. The members of the Pasquotank county alcoholic beverages control board shall give bond for the faithful performance of their duties to the city of Elizabeth City and the county of Pasquotank in the sum of five thousand dollars each, which bond as to form and execution shall be approved by the county attorney. The county of Pasquotank and the city of Elizabeth City shall pay the pro rata cost of said bonds of members of the board, on the basis of their taxable wealth. The main office of the board shall be located in Elizabeth City. The members of the respective boards in each of the counties described in section 3411(38), except in Pasquotank county, which is specifically hereinabove provided for, shall give bond for the faithful performance of their duties to each of their respective counties, in the sum of five thousand dollars ($5,000.00) each, which bond as to form and execution shall be approved by the county attorney. The main office of each of several respective boards shall be located in the county seat of the respective counties described in section 3411(38). (1935, c. 493, s. 2.)

§ 3411(40). Control and jurisdiction over alcoholic beverages; rules and regulations.—The said board shall have complete control and jurisdiction over the importation, transportation, sale and distribution of alcoholic beverages within Pasquotank county and shall have the exclusive power to buy in the manner hereinafter set forth, have in its possession and sell in its own name, all alcoholic beverages distributed within Pasquotank county. The board shall adopt rules and regulations governing the carrying out of this article and any supplemental acts, which said regulations shall have the force and effect of law. All rules and regulations promulgated by the board shall be published in pamphlet form and supplied to the public on request. The said board shall have the right to transport into the State of North Carolina for the purpose of sale by it any alcoholic beverage from any other state in the Union. (1935, c. 493, s. 3.)

§ 3411(41). Board members disqualified from having interest in manufacture of beverages.—No member, officer, agent or employee of the board shall directly or indirectly, individually or as a member of a partnership or of an association, or as a member, or stockholder of a corporation, have any interest whatsoever in the manufacture of or in the dealing in alcoholic beverages, or in any enterprise or industry in which alcoholic beverages are required, or receive any commission or profit whatsoever from, or have any interest whatsoever in the purchase of or sale of alcoholic beverages by the board, or by any other person whatsoever, or have any interest in or mortgage on any land or building where alcoholic beverages are manufactured for sale, kept for sale, offered for sale, or sold or any personal property used therein, or in any contract other than this contract of employment made with the board. (1935, c. 493, s. 4.)

§ 3411(42). Salary of chairman and members; expenses.—The chairman shall receive a salary of fifty dollars per month and each of the members shall receive a salary of seven dollars and fifty cents per day for the time actually engaged in the performance of their duties as a member of the board. They shall receive their actual expenses incurred in the performance of their official duties in addition to the amounts above prescribed. (1935, c. 493, s. 5.)

§ 3411(43). Civil liability of board members restricted. — No member of the board may be sued civilly for doing or omitting to do any act in the performance of his duties as prescribed by this article, except by the county of Pasquotank or the city of Elizabeth City, in Pasquotank county, and by the counties in which each of the remaining respective boards are operating, and then in the courts. (1935, c. 493, s. 6.)

§ 3411(44). Oath of office.—Each member of the board before entering into the duties of his office shall file with the chairman of the board of commissioners of Pasquotank county and the council of Elizabeth City his oath of office to support the Constitution and the laws of the United States and the State of North Carolina. (1935, c. 493, s. 7.)

§ 3411(45). Disposition of monies collected. — All monies collected by the Pasquotank county alcoholic beverages control board shall be paid directly and promptly into a depository designated by the board of commissioners of Pasquotank county and the council of the city of Elizabeth City without any deductions on account of salaries, fees, costs, charges, expenses, refunds or claims of any description whatsoever. All monies collected by the board in each of the respective counties, in other than Pasquotank county, shall be paid directly into a depository, designated by the board of commissioners of each of said respective counties without any deduction on account of salaries, fees, costs, charges, expenses, refunds, or claims of any description whatsoever. Which sums shall be paid out on warrants issued and drawn in the manner required by the boards of commissioners in each of said counties described in secton 3411(38). The salary of the disbursing agent, and the amount of his bond shall be fixed by the board of commissioners, in each of said respective counties, the compensation however, to be proportionate to the amount of work required to be done by said disbursing agent. All monies so paid into the said depository shall be set aside and constitute a special fund for the payment of the salaries and remuneration of the members, officers, agents and employees of the board, and all costs and expenses incurred in the establishing and maintaining of county stores, purchasing stocks therefor and in the administration of the provisions of this article, and are hereby specificalley appropriated for such purposes, to be paid out on warrants issued and signed by the person designated by the board of county commissioners and the council of the city of Elizabeth City to issue such vouchers, and the board of county commissioners and the council of the city of Elizabeth City are hereby directed to promptly name such person as disbursing agent, to fix his salary and such bond as they shall deem necessary. (1935, c. 493, s. 8.)

§ 3411(46). Clerks and assistants; contracting for beverages.—The board is hereby authorized to employ such clerical and other assistance as may be necessary to carry out the provisions of this article and to stipulate the salaries to be paid, and the board is authorizd to purchase and contract for particular kinds of beverages in amounts, kinds and brands designated by the said board, and quantities contracted for shall be in the discretion of the said board. (1935, c. 493, s. 9.)

§ 3411(47). Other duties and powers of board. —The functions, duties and powers of the board shall include the following:

(a) To purchase, import, transport, receive, sell, deliver, and have in its possession for sale for present and future delivery alcoholic beverages in the manner set forth in this article.

(b) To purchase or lease upon the approval of the board of county commissioners of each of said counties described in section 3411(38) property, furnish and equip buildings, rooms and accommodations as shall be required for office space and storing alcoholic beverages for distribution to county stores; to rent and use rooms, accom-

modations and real estate for the purpose of retail sale of alcoholic beverages offered for sale in all localities permitted by the provisions of this article.

(c) To borrow sums of money, guarantee the payment thereof and of the interest thereon by the transfer or pledge of goods, or in any other manner required or permitted by law within the limitations herein prescribed; to issue, sign, endorse and accept checks, promissory notes, bills of exchange, and other negotiable instruments; to investigate and aid in the prosecution of every violation of this article, demand seizure of alcoholic beverages sold, kept, imported or transported in contravention thereof, and apply for the confiscation thereof whenever required by this article, and co-operate in the prosecution of offenders before any court of competent jurisdiction.

(d) To make such regulations as are necessary and feasible for carrying out the provisions of this article and to amend or repeal such regulations. Such regulations shall include provisions for assuring purity of alcoholic beverages and the true statement of its contents and the proper labeling thereof with regard to all forms of sale.

(e) To control, regulate, and prohibit any advertising by manufacturers, wholesalers, retailers of alcoholic beverages by the medium of newspapers, letters, billboards, radio or otherwise.

(f) To exercise all other powers, duties and functions conferred by this article, and all powers incidental, convenient or necessary to enable it to administer or carry out any of the provisions of this article.

(g) To license the use of alcohol for scientific, pharmaceutical and industrial purposes and to provide by regulation for the withdrawal thereof from warehouses, denaturing plants, and prescribe the manner in which the same may be used for scientific research, for hospitals and sanitoriums, in industrial plants and for other manufacturing purposes, tax free. (1935, c. 493, s. 10.)

§ 3411(48). Fixing prices.—The board shall have the power to and shall fix the prices at which alcoholic beverages containing over five per centum of alcohol by weight may be purchased from it. (1935, c. 493, s. 11.)

§ 3411(49). Establishment of stores and warehouses. — The board shall establish such stores and warehouses in such places in the county as in its judgment are required by public convenience or necessity for the sale of spirituous liquors, wines, and other alcoholic beverages containing over five per centum of alcohol by weight, in sealed containers not less than one pint in size, for consumption off the premises only, and shall keep on hand in such stores or warehouses established by it such quantities and kinds of alcoholic beverages as shall reasonably be required to supply the public demand. Any person qualified to purchase such beverages from said board as hereinafter provided shall have the right to present to the board or to any of its stores an application for any kind or brand of such alcoholic beverage which he may desire and which may be manufactured or obtainable in any place in the United States, and it shall be the duty of the board to obtain for and sell to such applicant such alcoholic beverage: Provided, however, that such person shall deposit in cash the required amount necessary to purchase such particular kind or brand of alcoholic beverage as may be requested to be purchased by such person. The said stores shall be closed on Sundays, election days and days established as legal holidays, and on week days between six o'clock p. m. and nine o'clock a. m.

The advertising of the sale of alcoholic beverages by the board or window displays in its stores hereby are expressly prohibited, except that the board may provide for appropriate signs on windows or front, denoting the fact that it is a store of the Pasquotank county alcoholic beverage control board, and may post within such store appropriate price lists and may otherwise provide for printed lists.

No person, firm or corporation shall purchase or import into the counties described in section 3411(38), except in the manner herein specified, for resale, any alcoholic beverage containing over five per centum of alcohol by weight, from any source except from or through the board, and any person so purchasing or importing alcoholic beverages in violation of this section shall be subject to the penalties hereinafter provided for: Provided, however, that this provision shall not prohibit an individual entering the state from having in his possession not to exceed four quarts of alcoholic beverages. In addition thereto, any person, firm or corporation so convicted shall forfeit the alcoholic beverages so purchased or imported to the board, and the board shall seize the alcoholic beverages so forfeited, which then shall become the property of the board. (1935, c. 493, s. 12.)

§ 3411(50). Management of stores. — Every county retail control store shall be conducted by a person appointed by the board as provided by this article, who shall be known as the "manager" and who shall under the directions of the board be responsible for carrying out the provisions of this article and the regulations adopted by the board under this article as far as they relate to the conduct of such store. (1935, c. 493, s. 13)

§ 3411(51). Official seal of board.—The board shall adopt an official seal for its use under the provisions of this article. The copy of the official seal as prescribed herein shall be attached in a conspicuous place to all packages to be sold at retail. (1935, c. 493, s. 14.)

§ 3411(52). Closing of unprofitable stores; additional stores in cities.—In the event the board shall find the operation of any county store established under this article to be unprofitable or in the event it shall appear to the satisfaction of the board that the operation of any established county store in any community fails to serve the purposes of this article, and fails to promote law enforcement, the said board in its discretion may discontinue the operation of such store after thirty days notice posted in the said store and two other public places in the town or county in which said store is operated; and if, in the opinion of the board, one store is inadequate to handle the trade in any city located in said county, it shall have the authority to open an additional store or stores. (1935, c. 493, s. 15.)

§ 3411(53). Advancement of county funds to carry article into effect.—In order to carry the provisions of this article into effect, county commissioners are authorized and directed to advance from the general fund of said county such sums as may from time to time be necessary to purchase stocks, fixtures and equipment, and to provide operating capital and expenses to carry out the provisions and enforcement of this article. (1935, c. 493, s. 16.)

§ 3411(54). Special fund; repayment of advances to general funds; profits; reserve for enforcement.—All monies derived from the sale of alcoholic beverages under the provisions of this article shall be placed in a special fund in the depository and designated as the alcoholic beverage fund, and out of such fund as the same may accumulate from time to time there shall be paid back to the general fund out of the profits which may arise all moneys which may have been expended out of the expenditures authorized in section 3411(53); and all profits in excess of the sums necessary to fully repay the expenditures made as above described, and carry the necessary stocks of alcoholic beverages for the purposes of sale and costs of operation, shall remain in said alcoholic beverage fund for distribution as hereinafter provided.

The profit arising from the sale of alcoholic beverages under the terms of this article shall be determined upon a basis of the profits of each individual store or unit operated under the provisions of this article, and on the first days of January, April, July and October of each year such store or unit shall be audited by an auditor designated by the city council of the city of Elizabeth City and the board of county commissioners in Pasquotank county, and in the remainder of said counties by the board of commissioners of each of the respective counties described in section 3411(38), who shall determine the profit of each unit as of the dates above set forth; and in Pasquotank county the profit so determined shall be paid to the county of Pasquotank and the city of Elizabeth City in proportion as the taxable value in the city of Elizabeth City bear to the taxable value to the remaining part of Pasquotank county, and in the remainder of said counties described in section 3411(38), the profits so determined shall be paid to each of the several respective counties described in section 3411(38): Provided, however, that before said distribution is made a sum equal to five per cent of said profits shall be set aside for the enforcement of this article. (1935, c. 493, s. 17.)

§ 3411(55). Restrictions on operation of stores.—The manager of each local liquor store shall operate said store under the following provisions:

(a) Shall sell only at retail such alcoholic beverages as shall be furnished him by the county alcoholic control board and at such prices as the county alcoholic control board shall direct.

(b) Shall perform any other acts required of him by this article and as required by the county alcoholic control board, not inconsistent with the provisions hereof.

(c) Shall open said stores after nine o'clock in the morning and close them at six o'clock p. m., unless otherwise ordered by the board.

(d) Shall not sell alcoholic beverages to minors or to any person convicted of being a liquor addict.

(e) Shall not sell alcoholic liquors to be drunk upon the premises nor permit the same to be drunk upon the premises.

(f) All county stores shall close on legal holidays and election days. (1935, c. 493, s. 18.)

§ 3411(56). Refusal to sell to individuals; amount limited to one buyer; illicit liquors prohibited; other violations. — Managers and/or employees of county stores may in their discretion refuse to sell alcoholic beverages to individual applicants; and may refuse to sell to any one purchaser an amount in excess of one quart in any one day, regardless of the amount applied for.

Manufacture, possession for sale, or sale of illicit liquors is hereby prohibited and such manufacture, possession for sale, or sale shall constitute a misdemeanor and shall be punished by a fine of not more than five thousand dollars or imprisonment for not more than two years, or both. Violation of the administrative features of this article by any store manager or employee shall constitute a misdemeanor, subject to dismissal from service and may be punished by the court as a misdemeanor.

If any person shall take a drink of alcoholic beverages or shall tender such a drink, whether accepted or not at the place of purchase, or on any public road or street, he shall be guilty of a misdemeanor. (1935, c. 493, s. 19.)

§ 3411(57). False representations made misdemeanor.—No person under the age of twenty-one years shall knowingly and falsely represent himself to be twenty-one years of age to a manager or employee of a county store for the purpose of purchasing any alcoholic beverages as defined in this article. A violation of the provisions of this section shall constitute a misdemeanor. (1935, c. 493, s. 20.)

§ 3411(58). Places of illegal sales made common nuisances. — All houses, boathouses, buildings, tents, club, fraternity and lodge rooms, boats and places of every description, including drug stores, where alcoholic beverages are manufactured, sold, dispensed, or used contrary to law by any scheme or device whatever, shall be held, taken, and deemed common nuisances. Any person who shall maintain, or who shall aid or abet or knowingly be associated with others in maintaining, such common nuisance shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars, or imprisoned not exceeding six months, and judgment shall be given that such house, building, tent, boathouse, car, or other place, or any room or part thereof, be closed up, but the court may upon the owner giving bond in the penalty of not less than five hundred dollars, and with security to be approved by the court, conditioned that the premises shall not be used for unlawful purposes, or in violation of the provisions of this article for a period of five years, turn the same over to its owner, lessee, or person in possession. (1935, c. 493, s. 21.)

§ 3411(59). Abating and enjoining such nuisances.—The board, duly authorized agents of the board, the state solicitor, or any citizen of the

county, city or town where such a nuisance as is defined in section 3411(61) exists, or is kept or maintained, may, in addition to the remedies given in and punishment imposed by this article, maintain an action in the name of the state to abate and perpetually to enjoin the same. The superior courts shall have jurisdiction thereof, and in every case where the complaint charges, on the knowledge or belief of complainant, and is sworn to by two reputable citizens, that alcoholic beverages are manufactured, sold, dispensed, or used in any house, building, boathouse, club-room, fraternity room, lodge room, hotel, boarding house, apartment house, lodging house, boat, tent, or place contrary to the laws of this State; an injunction shall be granted as soon as the complaint is presented to the superior court judge in term or in vacation. The injunction shall enjoin and restrain the owners, tenants, their agents, employees, servants, and any person connected with said houses, building, or other place named in this section, and all persons whomsoever from manufacturing, selling, dispensing, or using alcoholic beverages in said house, building, boathouse, club-room, fraternity room, boat, tent, or other place named in this section, and shall also restrain all persons from removing any alcoholic beverages then on said premises until the further order of the court. Upon the hearing of the cause when it shall have been matured, and set for hearing as required by law, upon deposition of witnesses, documentary and oral evidence, if the judge shall be satisfied that the material allegations of the complaint are true, although the premises complained of may not then be unlawfully used, it or he shall continue the injunction against such house, building, or place for such period of time as the court may think proper, with the right to dissolve the injunction upon the application of the owner, leasee or person in possession of such house, building, or place if a proper case is shown for dissolution. (1935, c. 493, s. 22.)

§ 3411(60). Surety bonds of managers and employees.—All managers of county stores and all employees hereunder serving in any fiduciary capacity shall enter into bonds conditioned upon the faithful performance of their duties in such amounts as shall be fixed by the county alcoholic beverage control board and said bonds shall be in a form to be approved by the chairman of the board of county commissioners. (1935, c. 493, s. 23.)

§ 3411(61). Manufacture of liquors. — Nothing herein contained shall be construed so as to permit the manufacture of alcoholic beverages in North Carolina except in such manner as is now prescribed by law. (1935, c. 439, s. 24.)

§ 3411(62). Submission of question to voters of counties.—Provided, that this article shall not become effective until approved by a majority vote of the qualified voters of Pasquotank, Pitt, Beaufort, Martin, Halifax, Edgecombe, Carteret, Craven, Onslow, Wilson, Greene, Lenoir, Warren, Vance, Franklin and Nash counties participating in an election to be held in said counties upon the call of the board of county commissioners of said respective counties to be held within sixty (60) days from the ratification of this article, the same to be held under the same laws, rules and regulations as govern the election of members of the general assembly, and at said election those who favor said control act shall vote a ballot on which shall appear the words "for control act" and those opposed shall vote a ballot on which shall appear the words "against control act" and the county board of elections of each of said counties shall provide said ballots and conduct said election, and canvass the returns as provided by law in general elections: Provided, further, that this article shall become effective in the counties described in section 3411(38) if and when ratified by a majority of the qualified voters voting in said election in each of said counties. Provided that the elections herein provided for as to counties shall not be held in any county unless and until called by the board of county commissioners of that county and nothing herein contained shall be construed as compelling the board of county commissioners to call such an election and the provisions of this article as to the repeal of the Turlington Act shall not apply until such an election shall be held and determined as provided herein. (1935, c. 493, s. 24½.)

§ 3411(63). "Board" defined. — Wherever the word "board" is used in this article, it shall be construed to mean the plural or the singular and to refer to the board or boards in each or all of said counties as the necessity of such construction and interpretation shall demand, in order to effectuate the true intent and purposes of this article. (1935, c. 493, s. 24¾.)

§ 3411(64). Article applicable to Southern Pines and Pinehurst.—Should a majority of the qualified voters at the election herein provided for vote in favor of the sale of liquor under the provisions of this article, the board herein named for the enforcement of this article and to provide for the sale of liquor shall establish and maintain a store for the sale of liquor under the provisions of this article in Southern Pines and in the county of Moore when a petition requesting such establishment shall be presented to such board signed by a majority of the qualified voters of McNeills Township in Moore county; and shall likewise establish and maintain a store for the sale of liquor under the provisions of this article in Pinehurst in Moore county when a petition requesting such establishment shall be presented to such board signed by a majority of the qualified voters of Mineral Springs Township in Moore county. The finding by such board that such petition in either case is signed by a majority of such qualified voters shall be conclusive of such fact. (1935, c. 493, s. 26.)

CHAPTER 67

RAILROADS AND OTHER CARRIERS

Art. 1. General Provisions

§ 3412. Application to existing railroads; special charters.—All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. This chapter shall govern and control, anything in any spe-

cial act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed. (Rev., s. 2566; Code, ss. 701, 1982; 1871-2, c. 138, s. 45.)

Editor's Note.—Railroad companies are common carriers, receiving from the state a delegation of a portion of its sovereign powers for the public good; and being agents and, in the place and stead of the government, exercising public duties, they are therefore, subject to legislative as well as judicial control. The sections comprising this chapter are the result of the exercise of this power by the legislature of North Carolina.

To What Charters Applicable.—This section governs and controls all charters granted after its enactment. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

Does Not Affect Subsequent Legislation.—The section is like any other act of the legislature and is subject to any subsequent legislation, and is only useful in construing the meaning of subsequent legislation when it is doubtful. It cannot have the effect to prevent antagonistic legislation at a subsequent date. Watauga, etc., R. Co. v. Ferguson, 169 N. C. 70, 71, 85 S. E. 156.

Repeal by Implication Not Favored. — "This provision very plainly shows that it was the intention of the legislature that the general railroad act should apply, and that its important provisions should not be repealed, either by implication or by hasty legislation. It is but an affirmance of the principle that the repeal by implication of a general law by a private statute is not favored. But the statute goes a step further, and prescribes a rule of construction under which the private act, even if it be inconsistent with the provisions of the general law, shall not repeal them 'unless they are specially referred to by number, and, as such, specially repealed'." Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

Consequently a provision of a charter that the railroad shall have the power to condemn land under the "same rules and regulations as are prescribed for the North Carolina Railroad Company," is invalid. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041, cited as conclusive in Livermon v. Roanoke, etc., R. R. Co., 109 N. C. 52, 55, 13 S. E. 734.

Cited in Land v. Wilmington & Weldon R. Co., 107 N. C. 72, 12 S. E. 125; Rumbough v. Southern Improvement Co., 106 N. C. 461, 11 S. E. 528.

§ 3413. Roads not to be established unless authorized by law. — If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported.

This section shall not apply to any narrow-gauge railroad, tramroad or toll road made and established and maintained solely by the owner of the lands upon which said road may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad: Provided, that the corporation commission shall have power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers and to charge therefor reasonable rates to be approved by said commission. (Rev., s. 2598; Code, s. 1717; R. C., c. 61, s. 37; 1874-5, c. 83; 1901, c. 282; 1907, c. 531; 1911, c. 160; 1915, c. 6.)

Editor's Note.—Public Laws of 1935, chapter 134, codified as secs. 1112(a)-1112(q), abolished the corporation commission and conferred its functions, powers, etc., upon the utilities commissioner.

Violation by Company Can Not Be Set Up as Defense.—A lumber company cannot avail itself of the defense, in an action for damages, that it was prohibited by this section, from building a standard-gauge railroad, in consideration of which it had obtained the plaintiff's timber at a less price than its actual value; for if the stipulation to construct the road is invalid, the plaintiffs, though they should be particeps criminis, are not pari delicto. Herring v. Cumberland Lumber Co., 159 N. C. 382, 383, 74 S. E. 1011.

§ 3414. Conductor and certain other employees to wear badges.—Every conductor, baggagemaster, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property. (Rev., s. 2604; Code, s. 1958; 1871-2, c. 138, s. 30.)

§ 3415. Actions for penalties to be in name of state. — All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state. (Rev., s. 2647; Code, s. 1976; 1885, c. 221.)

The penalty prescribed by section 3516 for failure to transport within a reasonable time is given directly to the party aggrieved, and an action therefor is not required to be brought in the name of the state. Robertson v. Atlantic, etc., R. Co., 148 N. C. 323, 62 S. E. 413.

§ 3416. Discrimination in charges misdemeanor.—If any common carrier shall directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever; or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such person or corporation shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense. (Rev., s. 3749; 1899, c. 164, s. 13.)

Cross References.—As to failure to receive and forward freight, see sections 3515, 3516. As to rules of utilities commissioner preventing discrimination, see section 1054. As to discrimination between connecting lines, see section 1107. As to preferences and discrimination by railroads generally see 2 Enc. Dig. 769 et seq. See, also, section 3475.

Editor's Note.—At common law it was an indictable offense for a common carrier to unjustly discriminate between members of the public; and by constitutional and statutory provisions in a number of states, including North Carolina by

this section, unlawful discrimination makes the carriers subject to prosecution.

The sine qua non for a prosecution under this section is that the variance in charge constituting the discrimination must be for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." This language seems to be patterned after the Act of Congress of 1887, c. 104, section 2, U. S. Comp. Stat., 1901, p. 3155, which regulates the same subject in interstate commerce, and is found in substantially the same form in all of the state laws. For example the Kentucky statute is held not to apply to a discrimination in charges for the transportation of freight unless the shipments are of the same class from and to the same point and upon the same condition. See Louisville, etc., R. Co. v. Com., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

Section Is Remedial.—"The statutes enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few." Garrison v. Southern R. Co., 150 N. C. 575, 585, 64 S. E. 578.

It will be observed, as said by Clerk, C. J., in Lumber Co. v. Atlantic, etc., R. Co., 136 N. C. 479, 487, 48 S. E. 813, that this section is substantially like that portion of the English "Traffic Act" known as the "Equality Clause" and the "Interstate Commerce Act." The fundamental purpose underlying all of this legislation, both in England and this country, is, as said by Mr. Justice White, in R. R. v. Interstate Commission, 200 U. S. 361, that "Whilst seeking to prevent unjust and unreasonable rates, to secure equality of rates as to all, and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of unjust discrimination, to this extent and for these purposes, the statute is remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve . . . . What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

Declaratory of Common Law.—This section is declaratory of the common law and secures to every person the right to participate in the use of the facilities furnished, or which it is its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

Recovery of Excess.—Where a higher freight charge was paid than that charged other shippers, the payment is not to be considered voluntary, and the excess may be recovered back upon account for money had and received, and it is not necessary that at the time of payment there should have been any protest. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

What Constitutes Unlawful Discrimination. — A common carrier is guilty of unlawful discrimination by the principles of the common law, and the terms of this section when it charges one person for service rendered a larger sum than is charged another person for like service under substantially similar conditions. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

A carrier cannot rightfully charge one shipper $2.50 per 1,000 feet for hauling his logs if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at $2.10 per 1,000 feet in consideration of the shipment of the manufactured products over its railroad. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

Embargoes Prohibited.—A common carrier cannot place an embargo on its customer or patron so as to discriminate against him or those dealing with him, and for such unjust discrimination the carrier is indictable under this section. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Allegations.—There are discriminations which require more explicit allegations, as for instance, illegal rebates upon freight charges, and the like, U. S. v. Hanley, 71 Fed. 672, but as the common carrier carries for hire, the allegation that it gave a person named undue preference by transporting him free ex vi termini alleges discrimination. State v. Southern Ry. Co., 125 N. C. 666, 671, 34 S. E. 527.

§ 3417. Discrimination by rebate or reduced charges, misdemeanor.—Any railroad company doing business in the state, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances, by way of any rebate or reduced rate not authorized by law or by the North Carolina corporation commission, or which shall make charges for shipments of freight in violation of the law as to railroad freight rates, contained in article 5 of the chapter Corporation Commission, or shall willfully discriminate in the matter of service in favor of one person or corporation against another in like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the state of North Carolina who shall knowingly accept any rebate or other consideration or service from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court. (1907, c. 217, s. 2.)

See Editor's Note to section 3413.
See notes to the preceding section.

§ 3418. Discrimination against connecting lines and violation of certain rules of the corporation commission misdemeanor. — If any common carrier shall not afford all reasonable, proper and equal facilities for the interchange of traffic between its respective lines and for the forwarding and delivering of passengers and freights to and from its several lines and those connecting therewith, or shall discriminate in its rates and charges against such connecting lines, of if any connecting line shall not make as close connection as practicable for the convenience of the traveling public, or shall not obey all rules and regulations made by the corporation commission relating to trackage, it shall be punished by a fine of not less than five hundred dollars nor exceeding five thousand dollars for each and every offense. (Rev., s. 3751; 1899, c. 164, s. 21.)

See Editor's Note to section 3413.
As to powers of the utilities commissioner to prevent discrimination between connecting lines see section 1107.

§ 3419. Discrimination against the Atlantic and North Carolina railroad misdemeanor; venue. —If any railroad in North Carolina shall discriminate against the freights received from the Atlantic and North Carolina railroad, or shall make rates by which, either directly or indirectly, by rebates or otherwise, freights may be delivered at less rates when received from other points than from points along the Atlantic and North Carolina railroad in proportion to distance hauled, it shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars for each and every violation thereof. An indictment for the misdemeanor may be found and tried in the courts where the goods were either shipped or delivered, but the court in which the indictment for the offense is first found shall have exclusive jurisdiction. (Rev., s. 3750; 1889, c. 358.)

§ 3420. Articles of association; contents; signature; filing.—Any number of persons, not less than six, at least one of whom shall be a citizen and resident of this state, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the convey-

ance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which the capital stock shall consist, and the names and places of residence of six directors of the company, at least one of whom shall be a citizen and resident of this state, upon whom legal process may be served, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in the company. On compliance with the provisions of the succeeding section, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to railroad corporations by this chapter. The articles of association of any company formed under the provisions of this chapter, or the charter of any railroad company formed under a special act, may be amended as provided in sections eleven hundred and thirty and eleven hundred and thirty-one, and said sections eleven hundred and thirty and eleven hundred and thirty-one are hereby made to apply to railroad companies: Provided, no amendment may be made changing the nature of the company's business extending its corporate existence or authorizing any powers other than those authorized by this chapter. (Rev., s. 2548; Code, s. 1932; 1871-2, c. 138; 1905, c. 187; 1907, c. 472, ss. 1, 2; 1921, c. 117.)

As to formation of corporations generally, see sections 1114 et seq.

Editor's Note.—The last sentence of this section with the proviso thereto relative to amendments of articles of associations and carriers, was added by the Public Laws of 1921.

Section Provides Exclusive Method of Creating.—The legislature has in this and the two following sections manifested a clear and positive intention that railroad corporations shall not be created by the action of associated persons otherwise than as provided in such sections. Bradley v. Ohio River & C. Ry. Co., 119 N. C. Appx. 918, 926.

Not Applicable to Continuing Existence.—This as the two following sections refer only to the mode and manner of creating railroad corporations, and not as to the methods of continuing the existence and operation of railroad franchises in the hands of purchasers at judicial sales. Bradley v. Ohio River & C. Ry. Co., 119 N. C. Appx. 918, 927.

Effect of Noncompliance.—The filing and recording by the secretary of state of articles of association of a proposed railroad company, if not such as required by law, is a nullity. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

May Be Declared Void by Court.—Where the articles of incorporation of a railroad company are upon their face void, though not subject to collateral attack, the trial court will so declare in a proceeding to condemn land by right of eminent domain claimed thereunder. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

§ 3421. Prerequisites of filing; stock subscription; affidavit of directors; payment of fees.—Such articles of association shall not be filed and recorded in the office in the secretary of the state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent paid thereon in good faith, and in cash, to the directors named in the articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in such articles, that the amount of stock required by this section has been in good faith subscribed and five per cent paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay the taxes and fees provided for under the chapter Corporations, Article 11, entitled Taxes and Fees. (Rev., s. 2549; Code, s. 1933; 1871-2, c. 138, s. 2; 1905, c. 168.)

See notes to 3420.

§ 3422. Copy of articles evidence of incorporation.—A copy of any articles of association filed and recorded in pursuance of this article and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated. (Rev., s. 2550; Code, s. 1934; 1871-2, c. 138, s. 3.)

§ 3423. Opening of subscription books.—When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed. (Rev., s. 2551; Code, s. 1935; 1871-2, c. 138, s. 4.)

§ 3424. How stock paid for; forfeiture for nonpayment.—The directors may require the subscribers to the capital stock of the company to pay the amounts by them respectively subscribed in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or the same to be deposited in the postoffice, properly directed to him at the post office nearest his usual place of residence, stating that he is required to make such payment at the time and place speci-

fied in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made. (Rev., s. 2554; Code, s. 1938; 1871-2, c. 138, s. 7.)

As to payment of subscriptions to corporations generally, see section 1159.

§ 3425. Increase of capital stock.—In case the capital stock of any railroad company is found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same, properly folded and directed to him at the postoffice nearest his usual place of residence, in the post-office at least twenty days prior to such meeting. Such notice must state the time and place of the meeting and its object and the amount to which it is proposed to increase the capital stock. The proceedings of such meetings must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company aforesaid. (Rev., s. 2555; Code, s. 1939; 1871-2, c. 138, s. 9.)

§ 3426. Liability for unpaid stock to laborers; notice to stockholder.—Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholder. Before such laborer or servant shall charge such stockholders for such thirty days service he shall give them notice in writing within twenty days after the performance of such service that he intends to hold them liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself. (Rev., s. 2556; Code, s. 1940; 1871-2, c. 138, s. 10.)

§ 3427. Liability of trustees and other fiduciaries holding stock.—No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company. The estates in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name, and a person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly. (Rev., s. 2557; Code, s. 1941; 1871-2, c. 138, s. 11.)

§ 3428. Directors and presidents.—There shall be a board of six directors, one of whom shall be elected president, of every corporation formed under this article, to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it. (Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5.)

§ 3429. Appointment of officers and agents.—The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws. (Rev., s. 2553; Code, s. 1937; 1871-2, c. 138, s. 6.)

§ 3430. Officials to account to successors. — The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company. (Rev., s. 2648; Code, s. 2001; 1870-1, c. 72, ss. 1, 3.)

Art. 3. County Subscriptions in Aid of Railroads

§ 3431. Counties may subscribe stock. — The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of

the county may have an interest. (Rev., s. 2558; Code, s. 1996; 1868-9, c. 171, s. 1.)

Cross References.—As to bonds in general, see sections 324 et seq.; as to Municipal Finance Act, see sections 2918 et seq. For full treatment of the powers to incur indebtedness and expenditures, see 9 N. C. Enc. Dig. 569 et seq.; 15 N. C. Enc. Dig. 75 et seq.; as to subscriptions by townships, see sections 3436 et seq.; as to county aid to railroad generally see 3 N. C. Enc. Dig. 805 et seq.; 809 et seq.; 13 N. C. Enc. Dig. 526.

Editor's Note.—As this section appeared in the Code of 1883 it permitted subscription when necessary to aid in the completion of any railroad. This phraseology was the cause of some litigation as it was doubtful whether the section was applicable only to those railroads which were partially completed or whether it extended to all such companies. The Supreme Court of North Carolina adhered consistently to the former view, while the Federal Courts adopted the latter. The decisions of the Federal Courts were made statutory by the substitution in the Revisal of 1905, of the word "construction" for the word "completion." For the North Carolina cases prior to this substitution see Com'rs. v. Snuggs, 121 N. C. 394, 28 S. E. 539; Com'rs v. Payne, 123 N. C. 432, 31 S. E. 711; Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134. For the controlling federal cases see Com'rs v. Coler, 113 Fed. 705; Wilkes County v. Coler, 190 U. S. 107, 47 L. Ed. 971, 23 S. Ct. 738; Stanly County v. Coler, 190 U. S. 437, 47 L. Ed. 1126, 23 S. Ct. 811.

Interest of Citizens of County.—The same state and federal cases which were in conflict upon the question of whether this section referred to all railroads or only those partially completed (see Editor's Note above) were also at variance upon the sufficiency of interest requisite to authorize the subscription. The state cases maintained the position that the interest must be direct and in and of the county subscribing, while the federal cases were decided on the theory that a public interest would suffice. The best statement of this rule is found in Coler v. Commissioners, 89 Fed. 257 where it is said: "The section does not require the citizens to have a direct pecuniary interest in the road, but a public interest, such as is created by the building of a railroad into the county, and the fixing of one of the termini therein, is sufficient to fulfill the condition and authorize a subscription to its stock by the county, and the issuance of bonds and levying of taxes to carry out the same." On reason and principle, this seems to be sound, and, in view of the United States Supreme Court decisions cited supra, should control future cases.

Burden of Proving Validity.—Where the recitals in railroad bonds are that they were issued under a particular act of the Legislature, the burden of validating them, as made under this section, is on the party alleging their validity. Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134.

Constitution Requirements.—See Article II, section 14, and Art. VII, section 7 of the State Constitution.

§ 3432. Election on question of county aid. — The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. If a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company: Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money as they may think proper. (Rev., s. 2559; Code, s. 1997; 1868-9, c. 171, s. 2.)

Cross References.—For a full treatment of the submission of the question of issue of bonds to popular vote, see 9 N. C. Enc. Dig. 585; 15 N. C. Enc. Dig. 78 et seq.

Editor's Note.—Section 2691 of this Code and Article VII, section 7 of the Constitution require a popular vote for the contraction of debts by cities and towns except in the case of necessary expenses; the constructions of these provisions which are also constructions of this section will be found under the section and Article of the Constitution cited.

Vote on Two Subscriptions.—Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot. Goforth v. Rutherford Ry. Constr. Co., 96 N. C. 535, 2 S. E. 361.

§ 3433. Conduct of election.—All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners, who shall make a record of the same. (Rev., s. 2560; Code, s. 1998; 1868-9, c. 171, s. 3.)

As to conduct and control of elections for the issuance of bonds generally, see 9 N. C. Enc. Dig. 593 et seq.

§ 3434. Interest on bonds.—In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal on said bonds shall be payable and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of paying the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on such bonds. (Rev., s. 2561; Code, s. 1999; 1868-9, c. 171, s. 4.)

No Estoppel by Payment of Interest.—The payment of interest from year to year on the bonds is not an estoppel, does not validate them. Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711.

§ 3435. Collection and disposition of taxes authorized.—The taxes authorized by this article to be raised for the payment of interest or principal shall be collected by the sheriff in like manner as other state taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this article. (Rev., s. 2562; Code, s. 2000; 1868-9, c. 171, s. 5.)

For collection of taxes generally, see sections 7972 et seq.

Art. 4. Township Subscriptions in Aid of Railroads

§ 3436. Townships may subscribe stock.—The board of commissioners of the several counties of the state shall have power to subscribe stock for the use and benefit of any township in their several counties, when necessary to aid in the construction of any railroad, which is now or may be hereafter incorporated under the laws of this state, in which the citizens of such county may have an interest. (1917, c. 64, s. 1.)

As to the power of municipal corporations to issue bonds and levy taxes to aid railroads, see 9 N. C. Enc. Dig. 583 et seq.; 616 et seq.

Editor's Note. — In Graves v. Com'rs, 135 N. C. 49, 47 S. E. 134, it was held that section 3431 did not apply to townships and that there existed no provision authorizing the aid from townships similar to that which might be afforded by counties under section 3431. The Supreme Court, however, has held in several cases, that, despite the absence of express statutory provisions townships may by observing the constitutional requirements, issue bonds to aid in the construction of railroads. Wood v. Oxford, 97 N. C. 227, 2 S.

E. 653; Brown v. Commissioners, 100 N. C. 92, 5 S. E. 178; Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69; Wittkowsky v. Com'rs, 150 N. C. 90, 94, 63 S. E. 275. See also, McCracken v. Greensboro, etc., R. Co., 168 N. C. 62, 84 S. E. 30. It would seem that these latter cases are made statutory by the enactment of this article in 1917.

§ 3437. Election on question of township aid.—The board of commissioners of any county proposing to take stock, for the use and benefit of any township, as mentioned in the preceding section, shall meet and agree upon the amount to be subscribed for such township, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, and for what township, to what company, and whether in bonds, money or other property; and thereupon the board shall order an election, to be held upon a notice of not less than thirty days, in each and every township for whose use and benefit such subscription is proposed to be made, for the purpose of voting for or against the proposition to subscribe the amount agreed on by the board of commissioners. If a majority of the qualified voters of the township for whose use and benefit such subscription is proposed to be made shall vote in favor of the proposition, the board of county commissioners through their chairman shall have power to subscribe the amount of stock proposed by them, and submitted to the voters, for the use and benefit of such township, subject to all rules, regulations, and restrictions of other stockholders in such railroad company: Provided, that the township, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as it may think proper. (1917, c. 64, s. 2.)

§ 3438. Conduct of election; canvass of votes.—All elections ordered under the preceding section shall be held by the sheriff of the county in which such township is located, under such laws and regulations as are now or may hereafter be provided for the election of members of the general assembly. The votes of each township for whose use and benefit subscription under this article is proposed to be made shall be compared and the results of such election determined by the board of commissioners of the county in which such township is located, who shall make a record of the same. (1917, c. 64, s. 3.)

§ 3439. Bond issue; special tax.—In case the township shall authorize, at the election herein provided for, a subscription of the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal of such bonds shall be payable, and at what place, and shall also fix the time and place for paying interest, and shall also determine the mode and manner of paying the same. The board of commissioners shall, in order to provide for the payment of the bonds and interest thereon authorized to be issued by this article, compute and levy each year at the time of levying the county and state taxes a sufficient tax upon the property in any township authorizing the issuing of bonds under this article to pay the interest on the bonds issued on account of and for the use and benefit of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1917, c. 64, s. 4.)

§ 3440. Levy, collection, and disposition of tax.—The tax authorized by this article to be raised for the payment of interest and principal shall be levied by the board of commissioners of the county in which such township is located, at such times as is now or hereafter may be fixed for levying state and other county taxes, against the taxable property located in such township, in addition to the regular state and county taxes assessable against such property. The tax shall be collected by the sheriff or tax collector or other collecting officer of the county in which such township is located in like manner as state taxes are collected, and shall be paid into the hands of the county treasurer, to be used by the chairman of the board of commissioners as directed by this article. (1917, c. 64, s. 5.)

§ 3441. Tax to be kept separate.—The taxes levied and collected under the provisions of this article shall be kept separate and apart from all other state and county taxes levied and collected in the county in which such township shall be located. (1917, c. 64, s. 6.)

§ 3442. Townships may subscribe to purchase of railroad corporations.—The board of commissioners of the several counties of the state shall have power to make subscriptions, for the use and benefit of any township in their several counties, for the purpose of purchasing or aiding in the purchase of any railroad corporation now or hereafter incorporated under the laws of this state which shall be dissolved or whose property and franchises are proposed to be sold privately or under execution, judicial decree, deed in trust, mortgage, or other conveyance, and all the provisions of this article shall apply as fully and as well to such subscriptions as they do to subscriptions to stock to aid in the construction of railroads. (1917, c. 64, s. 1; 1919, c. 130, s. 1.)

§ 3443. Election on question of purchase; proxies to represent stock.—The county commissioners shall, upon the petition of one-fourth of the qualified voters of any township mentioned in the preceding section, order an election and submit the question of such subscription according to the terms of the petition. At such election five persons shall be chosen as proxies to represent such stock, if the vote shall be in favor of the subscription, in all respects as fully as if private promoters, corporators or holders of such stock. They shall be eligible to the position of director or other office in the corporation. They shall hold office until the first Monday in December following the next general election and until their successors chosen at such general election shall qualify. Such proxies shall be chosen at the general election every two years as township officers are. They shall have authority, alone, if sole purchasers, and with the proxies from other townships and others participating in the purchase, if not acting alone, to purchase such railroad property and franchise, and shall constitute a new corporation upon compliance with law as in other

cases of a dissolution and sale of railroad property and franchise. (1917, c. 64, s. 2; 1919, c. 130, s. 2.)

§ 3443(a). Increase of interest; procedure. — Whenever the board of county commissioners of any county has subscribed for the use and benefit of any township to any interest in any railroad or railroad corporation, as provided in said article, and the majority of the proxies chosen to represent the stock or interest of the township in such railroad shall certify to the board of commissioners that in their opinion the interest of the township in said railroad or railroad corporation should be increased, the board of county commissioners shall order an election to be held in such township, upon the petition of one-fourth of the qualified voters of such township, in the same manner as provided in said article and chapter, and if the majority of the qualified voters of such township shall vote in favor of the proposition contained in the petition, the county commissioners shall execute and deliver the bonds authorized, levy and collect in the township and dispose of the tax, as authorized in said article four, chapter sixty-seven of the Consolidated Statutes. (1924, c. 117, s. 1.)

§ 3443(b). Execution and sale of bonds for increase of interest.—Said bonds shall be executed by the chairman of the board of county commissioners of such county, attested by the clerk of said board, who shall affix the seal of the board, and deliver the same to the board of proxies representing said township.

The board of proxies shall advertise said bonds as provided by law, and faithfully apply the same to the purposes set forth in the petition for the election. (1924, c. 117, s. 2.)

§ 3443(c). Organization of proxies; report; vacancies.—The proxies chosen at each general election shall qualify and organize on the first Monday in December, elect a chairman, vice-chairman and secretary, and they shall annually in each year file with the board of county commissioners a copy of the report required by law to be made to the Interstate Commerce Commission.

Any vacancy occurring in the board of proxies shall be filled by the board of proxies until the next general election. (1924, c. 117, s. 4.)

Art. 5. Powers and Liabilities

§ 3444. Powers of railroad corporations enumerated. — Every railroad corporation shall have power:

1. To Survey and Enter on Land.—To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

As to the right of entry on land, see section 1707; as to the right of way generally, see 10 Enc. Dig. 675 et seq.; 15 Enc. Dig. 30 et seq.

Conflicting Locations.—As between two railroad companies the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. Fayetteville Street Ry. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345.

2. To Condemn Land under Eminent Domain.—To appropriate land and rights therein by condemnation, as provided in the chapter Eminent Domain.

As to condemnation by right of eminent domain, see sections 1706 et seq.

Editor's Note.—Since railroads are quasi-public corporations they are given by the state the power to take, by proper proceedings the necessary lands upon which to build their roads. Nor will the courts enjoin a railroad corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized. In Powers v. Hazelton, etc., R. Co., 33 Ohio St. 429, it was held that a land-owner could not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road. See, also, Wellington, etc., R. Co. v. Cashie, etc., R. Co., 114 N. C. 690, 19 S. E. 646.

3. To Take Property by Grant.—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

Editor's Note.—Railroads can acquire real estate only by statutory authority. After the authority is granted, either by general legislation, charter or implied power, property may be acquired by purchase, grant, dedication, adverse possession, license or by condemnation under the power of eminent domain.

In 1 Elliott on Rys., sec. 390, the general principle is stated as follows:

"The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied." See Wallace v. Moore, 178 N. C. 114, 115, 100 S. E. 237.

Land May Be Taken from Another Railroad.—Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina, etc., R. Co. v. Carolina, etc., R. Co., 83 N. C. 489.

4. To Purchase and Hold Property.—To purchase and hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

See Editor's Note to par. 3.

5. To Grade and Construct Road.—To lay out its road, not exceeding one hundred feet in width and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the chapter Eminent Domain.

Change of Grade.—A railroad company has a right to change the grade of its road-bed or to remove it to any point on its right of way. Brinkley v. Sou. R. Co., 135 N. C. 654, 47 S. E. 791.

Extending User of Right of Way.—While a railroad can use only the part of its right of way actually occupied, whenever the necessities of the company require it, it can extend its user of the right of way to the extent of the statutory right for additional tracks or other railroad purposes. Tighe v. Seaboard Air Line R. Co., 176 N. C. 239, 244, 97 S. E. 164; Atlantic, etc., R. Co. v. Bunting, 168 N. C. 579, 84 S. E. 1009; R. R. v. Olive, 142 N. C. 257, 264, 55 S. E. 263.

6. To Intersect with Highways and Water-

ways.—To construct its road across, along or upon any stream of water, water-course, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plankroad or turnpike road, thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city.

Cross References.—See annotations under section 3449. As to the duty of railroads to construct and maintain bridges which it has necessitated building, see sections 3797 and 3900; as to their duty to provide cattle guards, see section 3454.

Editor's Note.—The right of railroad companies to cross highways is limited to the necessities of the crossing and no greater rights can be claimed than those reasonably necessary to accomplish the purpose of the crossing. It is the duty of a railway company constructing its line across a public highway, to do so in such a manner as to interfere with the right of the public to the use of the highway as little as possible and to restore the highway to as safe a condition for travel as before the crossing was made so far as it can reasonably and practicably be done. A railroad company that has constructed its line across a highway may lay such additional parallel tracks as are reasonably necessary for it in the transaction of its business.

Duty to Public.—While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

Whole Street Cannot Be Appropriated.—In Seaboard Air Line R. Co. v. Raleigh, 219 Fed. 573, 581, in construing this section it is said: "It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road 'across, along, or upon' a street, always of much greater width than a railroad track, and the cross-ties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible to restore the street to 'its former state' if the track occupies its entire width? Statutes must be given a reasonable construction."

Assent of City an Essential Power.—The assent to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. Griffin v. Southern R. Co., 150 N. C. 312, 314, 64 S. E. 16.

Court Cannot Review Grant.—The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. Griffin v. Southern R. Co., 150 N. C. 312, 64 S. E. 16.

Cited in Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 567, 36 S. E. 115.

7. To Intersect with Other Railroads. — To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in the chapter Eminent Domain.

Editor's Note.—In Elliott on Railroads, p. 1687, the author says, "This provision (that the companies shall unite in agreement) has the effect of a condition precedent to the right to invoke the aid of the statute, and a complaint or instrument to condemn a crossing hereunder must show that the companies were unable to agree. If there is a waiver of an agreement or of an effort to agree, that fact should be alleged. Negotiations had with officers of the road sought to be crossed, who assume to act in its behalf, although they have no authority to so act, will be sufficient to constitute an effort to agree, unless the person with whom such officers' act has knowledge of their lack of authority. The burden of proof is upon the petitioner to show that there was a failure to agree. It must be made to appear before a crossing will be granted when so required by the statute authorizing the condemnation, that the crossing is necessary."

Railroad Decides Necessity of Intersection. — Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. Virginia, etc., R. Co. v. Seaboard Air Line R. Co., 161 N. C. 531, 78 S. E. 68.

No Restriction of Right Except Voluntary.—A railroad company having the power of condemnation across the road of another company should exercise this right with the regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the courts cannot restrict this right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. Virginia, etc., R. Co. v. Seaboard Air Line R. Co., 165 N. C. 425, 81 S. E. 617.

Agreement or Condemnation Necessary for Entry. — Under this section one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement, or condemnation proceedings. Richmond, etc., R. Co. v. Durham, etc., Ry. Co., 104 N. C. 658, 10 S. E. 659.

Parol Agreement Ineffectual.—A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements. Richmond, etc., R. Co. v. Durham, etc., Ry. Co., 104 N. C. 658, 10 S. E. 659.

8. To Transport Persons and Property.—To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

As to the railroads duty to transport see section 3475 and notes thereto.

Charter May Confer Right to Lease.—The charter of a railroad company conferring the right to transport passengers and freight, and giving the power to "farm out" the right of transportation, authorizes the company to execute a valid lease of its property and franchises to another railroad company. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854.

9. To Erect Stations and Other Buildings.—To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

As to the power of the utilities commissioner to establish and regulate stations see section 1040 et seq.

10. To Borrow Money, Issue Bonds and Exe-

cute Mortgages.—From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Corporation Has Power to Issue Bonds.—A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, i. e., to make and issue its bonds. Commissioners v. Atlantic, etc., R. Co., 77 N. C. 289.

11. To Lease Rails.—To lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

12. To Establish Hotels and Eating Houses. —To purchase, lease, hold, operate or maintain eating-houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (Rev., ss. 2567, 2575; Code, s. 1957; 1887, c. 341; 1889, c. 518; 1871-2, c. 138, s. 29.)

§ 3444(a). Engaging in authorized business. —It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (1924, c. 80.)

§ 3445. Power to aid in construction of connecting and branch lines.—Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law. (Rev., s. 2567, subsec. 12; 1885, c. 108, s. 1.)

§ 3446. Power to seize fuel.—If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of coal, wood, or other fuel not its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking that his property has been appropriated, giving the date thereof, and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for the coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent as above provided, within thirty days after converting the same to its own use, it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of the appropriation of the fuel, or its failure to pay for the same, and five dollars for each day thereafter in which it shall fail to notify such consignee or pay for the same. (Rev., s. 2617; 1903, c. 590, s. 4; 1907, c. 467.)

§ 3447. Agreements for through freight and travel.—The directors representing the stock held in the various railroad corporations are herby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them. (Rev., s. 2640; Code, s. 1995; 1866-7, c. 105.)

§ 3448. Intersection with highways.—Whenever the track of a railroad shall cross a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike, or plankroad desirable, then such corporation may take such additional lands for the construction of the road, highway, turnpike or plankroad on such new lines as may be deemed requisite by the directors. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad may be held for highway purposes. (Rev., s. 2568; Code, s. 1954; 1871-2, c. 138, s. 26.)

Cross References.—See notes to succeeding section. See also section 3444 par. 6 and notes thereto; as to crossing highways generally see 10 Enc Dig. 686 et seq.; 13 Enc. Dig. 304 et seq; as to the power of the utilities commissioner to regulate crossings see section 1048.

Cited in Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 567, 36 S. E. 115; Herndon v. Southern R. Co., 161 N. C. 650, 77 S. E. 683.

§ 3449. Obstructing highways; defective crossings; failure to repair after notice misdemeanor. — Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing

body of the county, city, town, township or road district having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in no wise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (Rev., s. 2569; Code, s. 1710; R. C., c. 61, s. 30; 1874-5, c. 83; 1915, c. 250, ss. 1, 2.)

As to the power of the utilities commissioner to regulate crossings, see section 1048; as to accident at crossings see 10 Enc. Dig. 714 et seq.; 13 Enc. Dig. 313 et seq.

Editor's Note.—Section 1048 confers authority upon the utilities commissioner to abolish grade crossings by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways.

Duty Required.—While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

Not Restricted to Public Highway.—This section does not restrict the defendant's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill and church road and in going to town, as was this road. Goforth v. Southern R. Co., 144 N. C. 569, 570, 57 S. E. 209.

Same—Applies to Private Crossings. — An "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. Tate v. Seaboard Air Line R. Co., 168 N. C. 523, 84 S. E. 808.

"Negligent Construction" Defined.—By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115. But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. Edwards v. Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730, 731.

Presumption That Crossing Is Safe. — One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. Tankard v. Railroad R., etc., Co., 117 N. C. 558, 23 S. E. 46.

Indictment.—An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing, is fatally defective if it does not charge the manner of the misuse of the plank, as plank may be used for such a purpose. State v. Roanoke R. etc., Co., 109 N. C. 860, 13 S. E. 719.

It is a fatal variance in an indictment for obstructing a highway at a railroad crossing, to prove that the defendant permitted for some time a dangerous hole to remain in the crossing. State v. Roanoke R., Co., 109 N. C. 860, 13 S. E. 719.

When Injury Might Have Been Caused by Defective Crossing.—Under this section it is error for the trial court to sustain a motion of nonsuit on competent evidence from which the jury could have found that, if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. Goforth v. Southern R. Co., 144 N. C. 569, 57 S. E. 209.

Cited in Bass v. Navigation Co., 111 N. C. 439, 455, 16 S. E. 402; Stone v. Seaboard Air Line R. Co., 197 N. C. 429, 149 S. E. 399.

§ 3450. Service of notice of defective crossings.—The notice required by the preceding section may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by letter properly stamped, registered and addressed to either of such persons. (1915, c. 250, s. 1.)

§ 3451. Change in location of highways.—In order to prevent the frequent crossing of such road or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient. (Rev., s. 2570; Code, s. 1711; R. C., c. 61, s. 31; 1874-5, c. 83.)

May Change County Road.—A railroad company may make a change in a county road that does not necessarily impair its usefulness. Brinkley v. Sou. R. Co., 135 N. C. 654, 47 S. E. 791.

§ 3452. Damages due to change in location.—For any injury done to the lands of persons by taking them under the preceding section, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands under the chapter Eminent Domain. (Rev., s. 2571; Code, s. 1712; R. C., c. 61, s. 32; 1874-5, c. 83.)

§ 3453. Old road not to be impeded until new road is made. — Before any part of an established road or way shall be impeded by any railroad corporation, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change. (Rev., s. 2572; Code, s. 1713; R. C., c. 61, s. 33; 1874-5, c. 83.)

§ 3454. Cattle-guards and private crossings; failure to erect and maintain misdemeanor.—Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall hereafter be incorporated and shall own, operate or construct any railroad passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle-guards at the points of entrance upon and exit from such enclosed land, and shall also make and keep in constant repair crossings to any plantation road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle-guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a misdemeanor and fined in the discretion of the court.

So far as this section relates to cattle-guards, the corporation commission is hereby authorized, directed and empowered to adopt such good and sufficient make of cattle-guard now upon the market as is best suited for turning stock. When such guard is selected, approved and authorized by the commission any company operating in this state which shall procure, install and maintain and keep in good and safe condition on its line of road such guard so selected by the commission shall be deemed and held in all suits, actions or proceedings in all the courts of this state to have complied with the conditions of this section in installing a good and sufficient cattle-guard: Provided, that any railroad company operating in this state may make application to the commission to adopt for its road any particular brand or make of cattle-guard, and if the commission shall approve and authorized the use of such guard, it shall, if kept and maintained in good and sufficient condition at all times by such railroad company, be deemed and held in all actions, suits or proceedings in any court of this state a good and sufficient cattle-guard. (Rev., ss. 2601, 3753; Code, s. 1975; 1883, c. 394, ss. 1, 2, 3; 1915, c. 127.)

See Editor's Note to section 3413.

As to the railroad's duty to provide safe crossings, see section 3449 and notes thereto.

Applies to Town Lot.—This section which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the county. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

Adoption of Stock Law.—The adoption of the stock law does not abrogate this section in a locality. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

Joinder of Actions.—Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant ponding water back on plaintiff's land; the other to recover damages for a breach of duty on the part of defendant in not putting up sufficient cattle-guards as required by this section, this was an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. Hodges v. Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917.

Cited in Allen v. Wilmington, etc., R. Co., 102 N. C. 381, 389, 9 S. E. 4. Concurring opinion of J. Avery in Allen v. Wilmington, etc., R. Co., 106 N. C. 515, 526, 11 S. E. 576, 826; Hinkle v. Richmond, etc., R. Co., 109 N. C. 472, 481, 13 S. E. 884; Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 443, 36 S. E. 14.

§ 3455. Change of route of railroad.—The directors of any railroad corporation may by a vote of two-thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located therein the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the road-bed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route. (Rev., s. 2573; Code, s. 1953; 1871-2, c. 138, s. 25; 1889, c. 391; 1893, c. 396, s. 3.)

Authority Necessary to Change Route.—While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general railroad laws of the State. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

Original Rights May Be Retained.—Variations in a route over which a railroad may run, do not affect the identity of a corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter, is retained unimpaired. Cheraw, etc., R. Co. v. Commissioners, 88 N. C. 519. See notes to section 3459.

When Corporation Commission Orders Change.—This section requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission, acting under express legislative authority and direction, require the railroad to make the change for the convenience of the general public. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

See Editor's Note to section 3413.

Right to Change Grade.—A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right of way. Brinkley v. Sou. R. Co., 135 N. C. 654, 47 S. E. 791.

Cited in North Carolina, etc., R. Co. v. Central. etc., R. Co., 83 N. C. 489, 494.

§ 3456. Forfeiture for failure to begin or complete railroad.—If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and expend thereon ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease. (Rev., s. 2564; Code, s. 1980; 1871-2, c. 138, s. 43; Ex. Sess. 1908, c. 142.)

See annotations under section 3420. As to what constitutes abandonment, see Carolina-Tennessee Power Co. v. Hiawassee Power Co., 175 N. C. 668, 96 S. E. 99; as to the dissolution of corporations generally see section 1182 et seq.

State Must Institute Forfeiture Proceedings.—The failure of a railroad company to organize under an act of incorporation within the two years prescribed, does not prevent a valid organization thereafter, unless forfeiture has been declared in proceedings instituted by the state. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263.

The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under the provisions of this section for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Same—Waiver of Forfeiture.—If the legislature knowing the ground of forfeiture deals with the corporation as if it were lawfully existing it thereby waives its right of forfeiture. Attorney-General v. Petersburg, etc., R. Co., 28 N. C. 456.

Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by this section, and thereafter by statute the Legislature declares that certain bonds

may be issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Same—Attorney-General Cannot Bring Action.—The attorney-general cannot of his own motion bring an action to vacate the charter of a corporation. Attorney-General v. Railroad, 134 N. C. 481, 46 S. E. 959.

Same—Cannot Be Attacked in Condemnation Proceedings.—The existence of a railroad corporation can not be attacked or questioned in an action brought by it to condemn land for its purposes. Wellington, etc., R. Co. v. Cashie, etc., R. Co., 114 N. C. 690, 19 S. E. 646.

Forfeiture for Failure to Comply with Either of Time Limits.—Construing this section as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon the failure of a railroad to comply with either one of the provisions the suit of the Attorney-General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

§ 3457. Secretary of state may extend time to begin railroad in certain cases.—In all cases where railroad companies have been chartered by the act of the general assembly or the charter of any railroad company has been amended by act of the general assembly, during or subsequent to the session of one thousand nine hundred and eleven, but where construction work has not begun in accordance with the provisions of preceding section, or having been begun such construction work has not been completed, the secretary of state may in the exercise of his sound discretion, upon application of any such railroad company and the payment to the state of the same fees as provided in section 1218 of the Consolidated Statutes, extend from time to time for periods of two years the time within which to begin or renew construction work as required by the preceding section; and the fact of extending the time by the secretary of state, as herein provided, shall for the period of such extension, fully and to all intents and purposes, renew corporate existence and corporate powers as fully as the same are conferred in the original charter. (1919, c. 19; 1921, c. 184; 1923, c. 245.)

Editor's Note.—In 1921, by Public Laws 1921, ch. 184, this section was amended so as to include railroads whose charters had been amended since 1911. At the same time the provision regarding construction work begun but not completed was added. By Public Laws 1923, ch. 245, the legislature made the granting of any extension of time for beginning, renewing or completing, work on railroads within the state discretionary with the secretary of state, instead of obligatory as heretofore.

§ 3458. Forfeiture for preferences to shippers.—In the event of any contract having been entered into by any railroad company in this state with any person or company, whereby preferences or exclusive rights of transportation, either in priority or in arrangements, are given to such person or company, the attorney-general is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter. (Rev., s. 2563; Code, s. 1969; 1865-6, resolution ratified December 14, 1865.)

As to actions brought by the attorney-general to forfeit the charters of corporations generally see sections 1187 et seq.

Art. 6. Lease, Sale, and Reorganization

§ 3459. Lessee of noncompeting railroad may acquire its stock; merger of lessor.—Any railroad corporation or its successors, being the lessee of the road of any other noncompeting railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the corporation whose stock shall have been so surrendered, or transferred shall thereupon vest in and be held and enjoyed by the corporation to whom such surrender or transfer shall have been made, and as fully and entirely, without charge or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation to whom the surrender or transfer of such stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section. (Rev., s. 2574; Code, s. 1994; 1871-2, c. 138, s. 57; Ex. Sess. 1908, c. 119, s. 2.)

Cross Reference.—For an excellent discussion of the right of railroads to lease property and formalities to be complied with, see Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854. See, also, Reid v. Norfolk Sou. R. Co., 162 N. C. 355, 78 S. E. 306; Railroad v. Olive, 142 N. C. 257, 55 S. E. 263; as to sales and leases of railroads generally see 10 Enc. Dig. 692 et seq.; 13 Enc. Dig. 307.

Editor's Note.—The stockholders of the old corporation cannot be compelled to become stockholders of the new corporation without their consent and do not become such until they have actively participated in the transfer by exchanging their old stock for the new.

A railroad corporation has no power to consolidate with another railroad company so as to form a single corporation unless this authority is granted by legislative act. Under this section no consolidation can take place until one corporation holds all of the capital stock of another.

The sentence reserving the right of taxation is a saving clause to prevent the operation of Tennessee v. Whitworth, 117 U. S. 139, 29 L. Ed. 833, which held that all special privileges, including exemption from taxation, of the old corporation were inherited by the new. See notes to section 3455.

When New Corporation Formed.—Where a new corporation is formed out of two existing corporations, these lat-

ter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights. Cheraw & Salisbury R. Co. v. Commissioners, 88 N. C. 519.

Legislative Act Authorizing Consolidation.—An act authorizing the consolidation of certain railroad corporations upon a vote of a majority of the stockholders and allowing a stockholder actual value for his stock in lieu of taking stock in the consolidated company, is valid. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96.

§ 3460. Lease or merger of competing carrier declared a misdemeanor.—No railroad or other transportation company or its officers, now or hereafter doing business in this state, shall purchase, lease, absorb, take over, buy stock in, merge with or in any way secure an interest in a competing line of railroad or other transportation company, nor shall any railroad or other transportation company or its officers enter into any contract, agreement or understanding with a competing line of railroad or other transportation company calculated to defeat or which may defeat or lessen competition in this state. All such contracts, purchases or sales shall be void. Any violation of this section shall make the corporation or person so offending guilty of a misdemeanor, and on conviction the offender shall be fined in the discretion of the court. This section shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property. (Ex. Sess. 1908, c. 119, ss. 2, 3.)

§ 3461. Acquisition of interest in or lease of noncompeting branch or connecting lines.—Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or adjoining state connecting with it directly or indirectly. But no railroad or other transportation company or its officers shall acquire, hold or guarantee the bonds or stock of, or lease or be leased to, or purchase or buy or consolidate with or be merged into, any parallel or competing railroad or other transportation company, nor shall any railroad or other transportation company or its officers sell any of its stock or bonds to any holding or voting company or its officers, whereby such consolidation or merger may be effected, and any such purchase, contract, merger or sale shall be void. This provision shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property. (Rev., s. 2567, subsec. 13; 1885, c. 108, s. 2; 1908, c. 119, ss. 1, 3.)

Lease Beyond Time Granted for Corporate Existence. — Where the term of a lease of property of a railroad company extends beyond the time fixed by its charter for the corporate existence of the lessor, such a lease is valid for the period of the corporate life of the lessor, and will extend beyond that period if the charter is renewed, and the lessor's corporate existence is thereby extended, and by this process it may endure for the full term. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854.

Lessor Responsible for Torts. — The lessor of a railroad is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchise. Mitchell v. Sou. R. Co., 176 N. C. 645, 97 S. E. 628; Hill v. Director-General, 178 N. C. 607, 610, 101 S. E. 376.

Same—Granting New Trial to Lessee Railroad.—When the lessor railroad company is sued jointly with its lessee company for damages caused by the alleged negligence of the lessee, and after verdict the lessor moves for judgment upon the verdict, but makes no motion for a new trial, while the lessee company moves for a new trial, and both motions are refused and both defendants appeal from the judgment rendered against them, the granting a new trial to the lessee is to vacate the judgment as to both defendants. Tillett v. Lynchburg, etc., R. Co., 115 N. C. 662, 663, 20 S. E. 480.

§ 3462. Purchaser at mortgage or execution sale of railroads may incorporate.—Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter, Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this chapter. (Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5.)

Cross References.—See notes to the succeeding section; as to statutory provisions regarding the original organization see section 3428.

Railroad May Be Sold.—A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the Legislature; not the franchise, but the land itself constituting the road. State v. Rives, 27 N. C. 297.

Corporation Not Dissolved by Sale.—A railroad corporation is not dissolved by the sale of its road. State v. Rives, 27 N. C. 297.

Purchaser Take Rights of Old Company.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. Barker v. Sou. R. Co., 137 N. C. 214, 49 S. E. 115.

Cited in Saluda v. Polk County, 207 N. C. 180, 184, 176 S. E. 298.

§ 3463. On dissolution or sale of railroads purchaser becomes a corporation.—When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (Rev., s. 2565; Code, s. 2005.)

See notes to the preceding section.

Corporate Existence Not Extinguished by Sale. — The sale of a railroad under a second mortgage and a conveyance thereunder, subject to the first mortgage upon its franchise and corporate property, did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which it is operated. James v. Western North Carolina R. Co., 121 N. C. 523, 28 S. E. 537.

Same—When Sale Effects Dissolution.—In order that the sale of the franchise and property of a railroad corporation under mortgage shall have the effect of a dissolution of such corporation another corporation must be provided, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist and when it is done the new corporation will be a domestic corporation. James v. Western North Carolina R. Co., 121 N. C. 523, 28 S. E. 537.

Property Must Be Associated with Franchises.—The property of railroads must be kept in association with their franchises to preserve value; to give credit to such corporations; to secure creditors and keep railroads in operation for the benefit of the public. Bradley v. O. R. & C. Ry. Co., Appx. 119 N. C. 918, 927.

Same—Object.—The legislative purpose, as clearly manifested in this section, is that the property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Bradley v. Ohio, etc., Ry. Co., 78 Fed. 387, 393.

Sale under Second Mortgage.—The effect of the sale of a railroad company's franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, is to place the purchaser in the place of the mortgagor in its relation to the trustee of the first mortgage, with the right to run and operate the road as agent of the mortgagor, but the old corporation was not extinguished, but is still in existence and liable for damages caused by the mal-administration of its agent which liability can be enforced against the property which it allows the purchaser to use. James v. Western North Carolina R. Co., 121 N. C. 523, 28 S. E. 537.

Art. 7. Liability of Railroads for Injuries to Employees

§ 3464. Common carrier defined.—The term "common carrier," as used in this article, shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier. (1913, c. 6, s. 5.)

§ 3465. Fellow-servant rule abrogated; defective machinery.—Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void. (Rev. s. 2646; 1897 (Pr.), c. 56; 1915, c. 256.)

I. Editor's Note.
II. Fellow-Servant Rule.
III. Assumption of Risk.

Cross Reference.

As to the fellow-servants rule generally see 9 Enc. Dig. 62 et seq.; 14 Enc. Dig. 772; as the employer's duty and liability in regard to defective machinery see 9 Enc. Dig. 35 et seq.; 14 Enc. Dig. 759, et seq.; as to a railroad liability for injuries generally see 10 Enc. Dig. 702 et seq.; 13 Enc. Dig. 311 et seq.

As to logging roads and tramroads see § 3470 and notes thereto.

I. EDITOR'S NOTE.

In Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, it was held that a railroad company was not liable for injury to its servants, resulting from the negligence of a fellow servant. In that case the attention of the legislature was called to the fact that many of the states had by legislative enactment abrogated the fellow servant rule in so far as it applied to railroad employees. Thereupon there ensued a strenuous discussion for and against the passage of a similar statute in North Carolina. In 1897 such a statute was passed and its constitutionality sustained in Hancock v. Norfolk, etc., Railway, 124 N. C. 222, 32 S. E. 679. By several decisions of the United States Court similar statutes in other states have been held not to be in violation of the Fourteenth Amendment to the Federal Constitution.

In Mott v. Southern R. Co., 131 N. C. 234, 237, 42 S. E. 601, it was sought to curtail and restrict this section so that it should apply to employees engaged in operating trains, but the court held the contrary and said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained by 'any servant or employee of any railway company . . . in the course of his services or employment with said company.' The plaintiff was an employee and was injured in the course of his employment."

However to come within the provisions of this section a railroad must be "operating" and not "under construction."

The succeeding section was passed after congress had passed a similar statute applicable to employees engaged in interstate commerce. It is not as broad as this section for it applies only to common carriers by railroad. See Editor's Note under that section.

The act applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

II. FELLOW-SERVANT RULE.

See Editor's Note under the succeeding section.

Abrogation of Fellow-Servant Rule.—This section is an unconditional abrogation of the kindred doctrines of Fellow Servant and Assumption of Risk as applied to railroad companies. Coley v. North Carolina R. Co., 129 N. C. 407, 409, 40 S. E. 195.

Rule Abrogated Only as to Railroads.—The law relating to the doctrine of fellow-servants has been only modified in regard to its application to those employed by railroad companies operating in this state. Robinson v. Ivey & Co., 193 N. C. 805, 138 S. E. 173.

Applies to Any Department of Railroad.—The provisions of this section apply to an injury negligently inflicted by a fellow-servant in any department of a railroad being operated. Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 225.

Applies to Street Railways.—This section applies to street railways. Brookshire v. Asheville Elect. Co., 152 N. C. 669, 68 S. E. 215; Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420.

Applicable to Logging Roads.—See section 3470 and notes thereto.

This section has been held to apply to logging roads. Moore v. Rawls, 196 N. C. 125, 144 S. E. 552.

Applies to Manufacturing Company Operating Spur Track.—This section applies to a manufacturing corporation which owns and operates a spur track on its grounds as incidental to its main business, with respect to servants employed in such service. United States Leather Co. v. Howell, 151 Fed. 444; Hairston v. United States Leather Co., 143 N. C. 512, 55 S. E. 847.

Does Not Apply to Railroad under Construction. — This section does not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains are being operated. Nicholson v. Railroad, 138 N. C. 516, 51 S. E. 40; Bailey v. Meadows Co., 152 N. C. 603, 68 S. E. 11.

Kind of Employment. — The provisions of this section applying to railroads do not require that the servant, at the time of the injury, should be engaged in the running or operation of a train, but applies to any other kind of service, whether more or less dangerous. Mincey v. Atlantic Coast Line R. Co., 161 N. C. 467, 77 S. E. 673.

Applies to All Employees.—This section operates on all employees of the company, whether in superior, equal, or subordinate positions. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391; Bloxham v. Stave etc. Corp., 172 N. C. 37, 89 S. E. 1013.

Section Read into Contract.—Where a contract of service with the defendant railroad was made in this State, the provisions of this section must be read into the contract, and there being no evidence that the service was to be performed altogether in another State, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract. Miller v. Railroad, 141 N. C. 45, 53 S. E. 726.

Injury When Duty Delegated to Another.—Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car. Britt v. Carolina, etc., R. Co., 144 N. C. 242, 56 S. E. 910.

Injury in Loading Logs—Where a tram railroad is engaged in loading logs and a fellow-servant of the plaintiff engaged in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him the defendant is liable in damages for the negligent injury proximately caused. Lilley v. Interstate Cooperage Co., 194 N. C. 250.

Injury by Falling Tree.—This section applies where an employee was injured by a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, a change of wind having deflected the tree from its expected course, so that it struck the tops of smaller trees and thence fell upon the plaintiff, the engineer should reasonably have seen the danger in time for him to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. Bloxham v. Stave, etc., Corp., 172 N. C. 37, 89 S. E. 1013.

Defective Ladder.—Where two employees of a railroad company were instructed to do certain work, requiring the use of a ladder, and a discarded ladder, which proves defective, is selected from several supplied by the company, the others being sound, and one of the employees sustains

a fall because of the defect and sues for damages therefor, this section applies. Mincey v. Atlantic Coast Line R. Co., 161 N. C. 467, 77 S. E. 673.

Flagman at Crossing.—Where the plaintiff was employed by a railroad to warn pedestrians of approaching trains at a public crossing, and by signalling to the engineer, and the plaintiff was injured by the defendant's negligence when he had crossed the platform on this train and was on the lowest step of the car for the performance of his duty on the other side, the evidence is sufficient upon the question of employment to sustain a verdict in plaintiff's favor. West v. Atlantic Coast Line R. Co., 174 N. C. 125, 93 S. E. 479.

Engineer Injured by Assistant's Negligence.—It was the duty of a railroad company to furnish its engineer, a competent person to assist him in fixing his locomotive, when such assistance is necessary from the character of the work being done; and the defendant is liable in damages when the assistant fails to exercise ordinary care to prevent an injury, such failure being the proximate cause of the injury. Horton v. Seaboard Air Line Railway, 145 N. C. 132, 58 S. E. 993.

Death by Fellow-Servant's Pistol. — Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removes a pistol which he knew to be loaded, takes it in his hand, and in a careless manner opens another drawer to the desk, and in doing so causes the pistol to fire, and kills his assistant, his negligent acts are attributable to the company employing him. Moore v. Southern R. Co., 165 N. C. 439, 81 S. E. 603.

Catching Hand between Cross-Tie and Rail.—Where the plaintiff was employed by a railroad to replace the cross-ties under the rails of the road, while a tie was being depressed into position by his fellow servant his hand was caught between the end of the tie and the rail and injured; that the plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." The injury was the result of an accident in doing work of a simple nature, and a recovery should have been denied as a matter of law. Lloyd v. Southern R. Co., 168 N. C. 646, 85 S. E. 10.

Contracts Exempting Railroad from Liability. — Contracts attempting to exempt a railroad from liability under this section are void. See section 3469 and notes thereto.

III. ASSUMPTION OF RISK.

As to the assumption of risk generally see 9 Enc. Dig. 77 et seq.; 14 Enc. Dig. 775 et seq.

Editor's Note.—After the passage of a similar Federal Statute applying to employees engaged in interstate commerce this legislature enacted section 3468. It is not as broad as this section for it applies only to common carriers.

General Considerations. — The doctrine of assumption of risk is that an employee assumes the risk of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company, in not furnishing proper appliances or in any other respect. Horton v. Seaboard Air Line R. Co., 175 N. C. 472, 474, 95 S. E. 883.

The employee assumes no risk in the proper use of defective appliance after notifying the employer thereof, who promises to remedy the defect; but he must use them with proper regard to their known condition, and, failing in this, he would be guilty of contributory negligence, which would bar his recovery. Britt v. Carolina, etc., R. Co., 144 N. C. 242, 56 S. E. 910.

It is not the mere working in the presence of an obvious defect in an appliance furnished by the master that will constitute contributory negligence on the part of the servant; and assurances on the part of the former that needed repairs will be made will frequently relieve the latter of this charge, which might otherwise bar his recovery of damages for an injury thereby sustained by him. Bissell v. Greenleaf-Johnson Lumber Co., 152 N. C. 123, 67 S. E. 259.

Defense of Assumption of Risk Eliminated.—In an action for negligence against a railroad company operating in this state, the defense of working on in the presence of a defective appliance or machine, usually dealt with under the head of assumption of risk, has been eliminated by this section; but if, apart from the element of assumption of risk, the plaintiff in his own conduct has been careless in a manner which amounts to contributory negligence, his action fails, except in extraordinary cases. Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512.

Under the construction of this section assumption of risk is not available. Moore v. Rawls, 195 N. C. 125, 128, 144 S. E. 552.

Duty to Furnish Safe Tools.—It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general use. Eplee v. Southern R. Co., 155 N. C. 293, 71 S. E. 325; Bissell v. Greenleaf Johnson Lumber Co., 152 N. C. 123, 67 S. E. 259. If he fails to do so he exposes the servant to extraordinary risks. Moore v. Railroad, 141 N. C. 111, 53 S. E. 745.

Same—Acquiescence in Use.—The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Wallace v. Railroad, 141 N. C. 646, 54 S. E. 399.

Obviously Defective Machinery. — The use of machinery obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference of probable consequences. Coley v. North Carolina R. Co., 129 N. C. 407, 40 S. E. 195.

When Plaintiff Causes Own Injury. — When under instructions from his superior officer the plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently caused as injury to himself in such manner as it was his duty in repairing to prevent, he cannot recover, and this section has no application. Mathis v. Atlantic Coast Line R. Co., 144 N. C. 162, 56 S. E. 864.

Liability Not Affected by Act of Shipper.—The duty of the railroad company to have a crosspiece used to keep steady lumber on flat cars, secured in a reasonably safe manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car. Wallace v. Railroad, 141 N. C. 646, 54 S. E. 399.

Question for Jury. — Where the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck proper for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk in attempting to lift the trunk. Hines v. Atlantic, etc., R. Co., 185 N. C. 72, 116 S. E. 175; see also, Horton v. Seaboard Air Line R. Co., 175 N. C. 472, 95 S. E. 883; Wallace v. Tallahassee Power Co., 176 N. C. 558, 97 S. E. 611.

Failure to Equip Car with Automatic Couplers. — Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessness, was whether plaintiff was injured in the course of his service and employment. Hairston v. United States Leather Co., 143 N. C. 512, 55 S. E. 847.

Defective Coupler.—In an action for an injury alleged to have been sustained from a defective coupler the use of a defective coupler was a violation of a positive duty, and in connection with an express order of the superintendent to make the coupling was continuing negligence, and the causa causans of the injury. Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795; Sears v. Atlantic, etc., R. Co., 169 N. C. 446, 86 S. E. 176.

Engine without Handhold Along Pilot Beam.—Where the plaintiff's evidence shows that he was at the time of the injury at the usual position provided for the purpose on the pilot of the engine by order of his superiors and in the necessary performance of his duties, and that he was thrown and injured because the engine did not have the usual handhold along the pilot beam and that he did not know it was lacking when he got on, and was guilty of no carelessness, his right of action is established. Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512.

Exposed Screw or Power Drill.—A power drill furnished by the master to the servant for boring holes in iron plates, leaving an exposed set-screw thereon dangerous in operating the drill and which are usually covered or countersunk, is not a proper tool for the purpose, and the master is liable in damages proximately caused by the defect. Eplee v. Southern R. Co., 155 N. C. 293, 71 S. E. 325.

Improper Ladder—Where it is the custom of a railroad company to furnish ladders to its painters and one of them so employed had not been furnished with a proper ladder, but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work and the ladder fell over and struck the plaintiff, causing him to fall and the injury would not have occured if a proper ladder or appliance had been furnished the evidence was sufficient

to take the case to the jury upon the issue of the defendant's actionable negligence. Jones v. Atlantic Coast Line R. Co., 194 N. C. 227, 139 S. E. 242.

Defective Handcar.—Where plaintiff was injured in consequence of using a defective hand car which he had theretofore repeatedly reported to his employer as defective, and had been promised another, the railroad is liable. Boney v. Atlantic, etc., R. Co., 145 N. C. 248, 58 S. E. 1082.

Evidence.—Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved established the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391.

Cited in Stewart v. Black Wood Lumber Co., 193 N. C. 138, 140, 136 S. E. 385; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436; Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169.

§ 3466. Injuries through fellow-servants or defective appliances.—Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine appliances, machinery, track, road-bed, works, boats, wharves, or other equipment. (1913, c. 6, s. 1.)

See notes to section 3465.

Editor's Note.—This section applies only to employees engaged exclusively in intrastate commerce. There is a federal statute similar in its provisions which applies to employees engaged in interstate commerce. See Barnes Federal Code, sec. 8069. Rights accruing under the latter statute may be enforced in the state courts as well as the federal courts.

There is a distinction between the state and federal statute as to the basis of the damage assessed. Under the State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. Ward v. North Carolina R. Co., 161 N. C. 179, 186, 176 S. E. 717. Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary. North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305.

There is also a distinction as to the beneficiary. Under the State statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff had reasons to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss. The personal representatives sue for the benefit of the next of kin. See Horton v. Sea Board Air Line R. Co., 175 N. C. 472, 477, 95 S. E. 883.

The difference between section 3465 and this section is very marked. The former applies to all railroads, while this section applies only to a common carrier by railroad. See Williams v. Kinston Mfg. Co., 175 N. C. 226, 227, 95 S. E. 366.

Under section 160 of this Code none of the amount recovered in action for death by wrongful act belongs to the estate of the deceased and none of it is liable for the payment of his debts.

"Common Carrier" Defined.—A common carrier is one who, by virtue of his calling, undertakes for compensation to transfer personal property from one place to another for all persons as choose to employ him. Williams v. Kinston Mfg. Co., 175 N. C. 226, 227, 95 S. E. 366.

Statute Applicable.—The federal and state courts have concurrent jurisdiction and the question of which statute will apply depends upon whether or not the employee was engaged in interstate commerce. West v. Atlantic, etc., R. Co., 174 N. C. 125, 93 S. E. 479; Renn v. Seaboard Air Line R. Co., 170 N. C. 128, 86 S. E. 964. See also Capps v. Atlantic, etc., R. Co., 178 N. C. 558, 101 S. E. 216.

When Interstate Question Immaterial. — In an action brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, the question whether the train was an interstate one, or the plaintiff was at the time engaged in interstate commerce, is not material, since the enactment of this section which, in this respect, is substantially identical with the Federal statute. Sears v. Atlantic, etc., R. Co., 169 N. C. 446, 86 S. E. 176.

As to the time within which the action must be brought, under the federal act, see Belch v. Seaboard Air Line R. Co., 176 N. C. 22, 96 S. E. 640; King v. Norfolk-Southern R. Co., 176 N. C. 301, 97 S. E. 29.

Effect of Nonsuit in Action under Federal Act.—A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the laws of this State, §§ 3466, 3467, the law and facts applicable to the first not being identical with those applicable to the second. Fuquay v. A. & W. Ry. Co., 199 N. C. 499, 155 S. E. 167.

Cited in Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436.

§ 3467. Contributory negligence no bar, but mitigates damages.—In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (1913, c. 6, s. 2.)

As to contributory negligence generally see 9 Enc. Dig. 88 et seq.; 14 Enc. Dig. 77 et seq. See notes under §§ 567, 3470.

See 13 N. C. Law Rev., 256.

Editor's Note.—The provisions of this section apply only to employees engaged exclusively in intrastate commerce. There is a similar federal statute which applies to employees engaged in interstate commerce. See Barnes Federal Code, section 8071. See also, the Editor's Note under the preceding section.

In an action brought in a court of common law there could be no recovery for negligence by a plaintiff whose default contributed to the injury. The common law rule was that there could be no recovery for injuries where it appeared that the person injured was guilty of contributory negligence, or, in other words, where the injury was the result of the united, mutual, concurring and contemporaneous negligence of the parties to the tranaction. This section abolishes the common law rule and substitutes the doctrine of comparative negligence, reducing the damage but not barring the action.

There is a vital difference between contributory negligence and assumption of risk, which is thus stated, 1 Labatt on Master and Servant, secs. 305 and 306, as follows: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely matter of conduct." This distinction has often been approved by the United States Supreme Court in cases under the Employers' Liability Act. Seaboard Air Line Railway v. Horton, 233 U. S. 492. 58 L. Ed. 1062, 34 S. Ct. 635; Yazoo, etc., R. Co. v. Wright, 235 U. S. 376, 59 L. Ed. 277, 35 S. Ct. 130.

In General.—The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and this section, and then only for the purpose of mitigating the damages or as a partial defense. Moore v. Chicago Bridge, etc., Works, 183 N. C. 438, 111 S. E. 776.

Contributory Negligence Question for Jury.—Under this section, the plaintiff is entitled to have his cause submitted

to the jury, for, as herein provided, contributory negligence is no longer a bar to an action by an employee against the railroad for injuries sustained during his employment and the assumption of risk were for the jury, the burden of proof being upon the defendant. Hines v. Atlantic, etc., R. Co., 185 N. C. 72, 75, 116 S. E. 175.

In Hines v. Atlantic Coast Line R. Co., 185 N. C. 72, at p. 75, 116 S. E. 175, it is said: "Assumption of risk is also a matter of defense analogous to contributory negligence to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger. Lloyd v. Hanes, 126 N. C. 359; the numerous cases cited thereto in the Anno. Ed.; C. S., 3468." West v. Fontana Mining Corporation, 198 N. C. 150, 155, 150 S. E. 884.

When Jury Fails to Allow for Contributory Negligence.—Where the plaintiff's complaint demands damages in a certain amount in his action involving the issues of negligence and contributory negligence, and the application of the rule of comparative negligence under the provisions of this section the fact that the jury has rendered a verdict for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not on that ground be disturbed on appeal. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Effect of Intent.—The plaintiff's contributory negligence will not bar his recovery of damages in his action when the defendant has inflicted the injury with either actual or constructive intent, but it is otherwise if it is admitted that he had not this intent, and his contributory negligence will bar his recovery. Ballew v. Askeville, etc., R. Co., 186 N. C. 704, 120 S. E. 334.

Evidence Raising Issue for Jury.—In an action for a deceased employee's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's negligence proximately caused the employee's death, and, raises the issue for the determination of the jury though the intestate might have been guilty of contributory negligence. Hinnant v. Tidewater Power Co., 187 N. C. 288, 121 S. E. 540.

The section applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

Negligence in Obtaining Improper Ladder.—The failure of a railroad company to furnish an employee engaged in the scope of his employment in painting a station house, a proper ladder or appliance which caused the injury in suit comes within the provisions of this section, and the contributory negligence of the plaintiff is not a complete bar to his recovery, but only to be considered by the jury in diminution of the damages. Jones v. Atlantic Coast Line R. Co., 194 N. C. 227, 139 S. E. 242.

Motion to Nonsuit.—Where plaintiff, while performing his duty coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, though there was evidence of contributory negligence, its establishment would not be complete defense, under this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. Lamm v. Atlantic, etc., R. Co., 183 N. C. 74, 110 S. E. 659

Logging Roads and Tramroads.—See § 3470 and notes thereto.

Federal Statute.—The rule under the federal statute is substantially the same as that prescribed by this section. Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company caused by the latter in interstate commerce, in an action brought under the Federal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. Cobia v. Atlantic, etc., R. Co., 188 N. C. 487, 125 S. E. 18; Hinnant v. Tidewater Power Co., 187 N. C. 288, 121 S. E. 540; Ballew v. Asheville, etc., R. Co., 186 N. C. 704, 120 S. E. 334; Moore v. Atlantic Coast Line R. Co., 185 N. C. 189, 116 S. E. 409.

Applied in Byers v. Boice Hardwood Co., 201 N. C. 75, 159 S. E. 3; Bateman v. Brooks, 204 S. C. 176, 167 S. E. 627.

Cited in Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436; Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169.

§ 3468. Assumption of risk as defense.—In any action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence. (1913, c. 6, s. 3.)

Editor's Note.—Section 3465 is an earlier section similar in its import. It applies to all railroads in North Carolina while this section applies only to common carriers. See note to that section. As to the assumption of risk generally see 9 Enc. Dig. 77 et seq.; 14 Enc. Dig. 775 et seq.; as to the distinction between assumption of risk and contributory negligence see the Editor's Note under the preceding section.

Applied in Bateman v. Brooks, 204 N. C. 176, 167 S. E. 627.

Cited in Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436.

§ 3469. Contracts and rules exempting from liability void; set-off.—Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this article, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this article, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought. (1913, c. 6, s. 4.)

See notes to section 3465.

Accepting Benefit from Relief Department.—A relief department of a railroad for providing hospitals for employees contributed to by the employees and the company under the control and management of the company, it but an agency of the company; and a stipulation in the contract with its employee that in the case of accident he must accept the benefit of the contract and release the company from liability, is prohibited by the provisions of this section. Borden v. Atlantic Coast Line R. Co., 152 N. C. 318, 67 S. E. 971; Herring v. Atlantic, etc., R. Co., 168 N. C. 555, 84 S. E. 863.

Cited in dissenting opinion of J. Walker in Tilghman v. Seaboard Air Line R. Co., 167 N. C. 163, 169, 83 S. E. 315, 1090; Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744. Dissenting opinion of C. J. Clark, in Lloyd v. Southern R. Co., 168 N. C. 646, 85 S. E. 10.

§ 3470. Provisions of this article applicable to logging roads and tramroads.—The provisions in this article relating to liability for damages shall also apply to logging roads and tramroads. (1919, c. 275.)

See note under § 567.

Editor's Note.—Before the enactment of this section provisions of section 3465 were held, by judicial construction, to apply to logging roads and tramroads. See Roberson v. Greenleaf-Johnson Lumber Co., 154 N. C. 328, 70 S. E. 630; Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 225.

However, in Williams v. Kenston Mfg. Co., 175 N. C. 226, 95 S. E. 366. (decided in 1918) it was held that a logging road was not a common carrier within the meaning of section 3467 and that the doctrine of comparative negligence was not applicable to actions for injuries sustained by employees of such roads. This decision seems to have engendered the legislative enactment enunciated by this section which was passed in 1919.

In a recent decision, Lilley v. Interstate Cooperage Co., 194 N. C. 250, the rule of the section, as to tram railroads,

applied, and it is held that section 3467 is operative as to such railroads.

The provisions of §§ 3467, 3465, are applicable to tram or logging roads under the provisions of this section. Sampson v. Jackson Bros. Co., 203 N. C. 413, 166 S. E. 181.

The employee must be engaged in duties connected with or incidental to the operation of such roads. Gurganous v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

Comparative Negligence Rule Applies.—Under this section contributory negligence is no longer a bar to injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is now, under the law, applicable to logging roads. Moore v. Rawls, 196 N. C. 125, 129, 144 S. E. 552, citing McKinish v. Lumber Co., 191 N. C. 836, 133 S. E. 163.

Narrow-Gauge Logging Road. — A small narrow-gauge road running through the woods and used for the purpose only of transporting logs to the defendant's sawmill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables operating around a drum upon the skidder, is logging road within the intent and meaning of this section and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow-servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained. Stewart v. Blackwood Lumber Co., 193 N. C. 138, 136 S. E. 385; Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Applied in Bateman v. Brooks, 204 N. C. 176, 167 S. E. 627.

Cited in Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436.

Art. 8. Construction and Operation of Railroads

§ 3471. Map of route to be served with summons for condemnation.—Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways. (Rev., s. 2599; Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; 1871-2, c. 138, s. 24.)

Section Mandatory. — These conditions must be complied with before any company can construct any part of its road. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 23, 10 S. E. 1041.

Same—Defect May Be Cured by Amendment.—The failure to serve a map and profile with the summons in condemnation proceedings as required this section may be cured by amendment. State v. Wells, 142 N. C. 590, 55 S. E. 210.

§ 3472. Map of railroad to be made and filed.—Every railroad corporation shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and shall file the same in the office of the corporation commission. Every such map shall be drawn on a scale and on paper to be designated by the corporation commission, and shall be certified and signed by the president or engineer of such corporation. (Rev., s. 2600; Code, s. 1977; 1871-2, c. 138, s. 41.)

Purpose of Section.—By this section railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission. But this is for the information of that body and is not required as a part of a correct and completed location. Fayetteville Street Railway v. Railroad, 142 N. C. 423, 55 S. E. 345.

Survey Unnecessary When Old Road-Bed Adopted. — Where the line of a railroad is clearly defined by the existence of an old road-bed which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, in such case a survey by engineers is not essential. Fayetteville Street Railway v. Railroad, 142 N. C. 423, 55 S. E. 345.

Profile Must Show Fills and Cuts.—The profile required to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

Railroad Completed before Section Passed. — Where the railroad was completed through the locus in quo prior to the passage of this section, it was not necessary to the validity of the location that a map of the route should be filed. Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741.

§ 3473. Joint construction by railroads having same location.—Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they made by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be construed. (Rev., s. 2602; Code, s. 1983; 1871-2, c. 138, s. 46.)

§ 3474. Construction of part of line in another state.—Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors. The sections of such railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state. (Rev., s. 2603; Code, s. 1984; 1871-2, c. 138, s. 47.)

§ 3475. Carriage must be according to public schedule.—Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. (Rev., s. 2611; Code, s. 1963; 1871-2, c. 138, s. 35.)

Cross References.—As to the powers of the utilities commissioner to prevent discrimination in transportation facilities, see section 1054; as to similar powers of the Interstate Commerce Commission in regard to railroads engaged in interstate commerce, see Barnes' Federal Code,

section 7886; as to preferences and discriminations by railroads generally, see 2 Enc. Dig. 769 et seq.; as to refusal to receive as transport freight generally, see 2 Enc. Dig. 776, et seq.; 13 Enc. Dig. 311 et seq.; as to the carriage of live stock see 2 Enc. Dig. 843 et seq.; 13 Enc. Dig. 339 et seq.

Editor's Note.—Railroads are great public service corporations and are public agents in the sense that they are created for the purpose of transporting goods and passengers. In accepting the grant of rights and franchises from the state the railroad corporation impliedly assumes the duties of a common carrier. Because their functions are public they have no right to choose their passengers and customers but must under substantially similar conditions treat all those who seek transportation alike. This is a common law duty and is only reaffirmed in this section. It applies alike to individuals, receivers and trustees.

The carrier is not bound to accept every person as a passenger. It may make reasonable rules and regulations and require those who would become passengers to conform to such rules. Prima facie every person is entitled to be carried as a passenger but a railroad company may refuse to accept a person by showing that because of his condition or conduct, or even because of his character he is not a fit person to enter the train with other persons. See Elliott on Railroads, sections 1577 et seq.

Similarly, a railroad company is not bound to accept all freight that is offered it for transportation. It is only a common carrier as to those goods which are of the kind usually or professedly carried. Goods may properly be refused which are dangerous or which are in an unfit condition for transportation. See Elliott on Railroads, sec. 1466.

Reaffirmance of Common Law Rule.—The requirement to furnish accommodations within a reasonable time is but a reaffirmance of the common law (leaving the courts to say what time was reasonable). Alsop v. Southern Exp. Co., 104 N. C. 278, 285, 10 S. E. 297.

Duty to Provide Transportation.—It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

When Contract of Carriage Begins. — The contract of carriage by a common carrier begins when a passenger comes upon the carrier's premises or conveyance with the purpose of buying a ticket, within a reasonable time or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. Hansley v. Jamesville, etc., R. Co., 115 N. C. 602, 20 S. E. 528.

Trains Need Not Stop at All Stations.—It is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. Hutchinson v. Railroad, 140 N. C. 123, 52 S. E. 263.

Schedule Is Offer.—Under this section, the printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has the right to be transported by the first train stopping at his destination. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Passenger on Baggage Car. — A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 758.

Ticket Not Good on Particular Train. — It is the duty of the defendant to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station, as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. Hutchinson v. Railroad, 140 N. C. 123, 52 S. E. 263.

Where Conductor Fails to Return Ticket.—Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, and the conductor on the first train neglected to return passenger's ticket, he having no money, and, when the conductor of the second train asked for his fare, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

Injury Caused by Misdirection of Agent. — The plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, can recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Ejected Passenger Has Right of Action.—Under this section a passenger, ejected from train of defendant road for failure to pay again fare which he had paid once upon purchasing ticket, has a right of action. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

Same—Passenger Need Not Pay Additional Fare to Prevent Ejection. — Under this section where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

Duty to Stop Train at Passenger's Station.—A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop, attributable to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. Elliott v. Norfolk Southern R. Co., 166 N. C. 481, 82 S. E. 853.

Carrier under No Duty to Delay Trains.—A common carrier of passengers is under no obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by the invitation or command of persons in charge of the trains, attempt to get on or off while the cars are in motion. Browne v. Raleigh, etc., R. Co., 108 N. C. 34, 12 S. E. 958.

Failure to Transport Passenger. — Where the plaintiff purchased a ticket from defendant's agent at a regular station before the time advertised for the arrival and departure of its trains at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff; the plaintiff was entitled to punitive damages, in the absence of sufficient excuse shown by the defendant. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

Action May Be Brought in Tort or Contract.—A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by this section may bring an action on contract, or in tort, independent of the statute. Pursell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

Same—Damages.—It the tort is the result of simple negligence, damages will be restricted to such as are compensatory; but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

Where a railroad company, negligently and by reason of defective and inadequate equipment, failed to carry a passenger to whom it had sold an excursion ticket back to its starting point, but no personal injury or indignity was inflicted upon him, the passenger's right of action is ex contractu and not in tort, and hence exemplary or punitive damages cannot be recovered. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, which was overruled in Hansleys v. Jamesville, etc., R. Co., 115 N. C. 602, 20 S. E. 528, is reinstated, but the ground of the judgment is changed. Hansley v. Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 551, 53 A. S. R. 600.

If a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Failure to Stop at Flag Station.—Where plaintiff went to a flag station on a railroad a reasonable time before the arrival of a train on which he intended to take passage and, by reason of absence of the agent and the failure of the engineer to see his signal, the train did not stop for him, the railroad is liable for the actual damages sustained by

the plaintiff. Thomas v. Southern R. Co., 122 N. C. 1005, 30 S. E. 343.

Same—Stepping Off Moving Train at Conductor's Suggestion.—Where a train on which plaintiff was a passenger, did not stop at the station to which he had paid his fare, and the conductor agreed that he would slow up the train at a safe place for plaintiff to alight the plaintiff consented to jump off and went upon the platform as the train slowed up, but seeing a "go ahead" signal from the rear, did not step for that reason; and then, feeling the increased motion of the train, he stepped off believing he was at a safe place and relying upon the conductor's promise to put him off at a safe place, and was injured, the evidence of the defendant's negligence was sufficient to be submitted to the jury. Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Same—When Punitive Damages Allowed. — It is only when the railway engineer actually sees the signal of an intended passenger at a flag station and wilfully passes him by that punitive damages will be allowed in an action for damages, and the burden of showing the reckless disregard of plaintiff's rights is upon the latter. Thomas v. Southern R. Co., 122 N. C. 1005, 30 S. E. 343.

Passenger Carried by Station.—Under this section when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or wilfully he is entitled to punitive damages. Hutchison v. Railroad, 140 N. C. 123, 52 S. E. 263, overruling Smith v. Wilmington, etc., R. Co., 130 N. C. 304, 41 S. E. 481.

Under the well settled rules of law, and plainly under this section a railroad company is liable for nominal damages for its negligence in failing to stop its train at and conveying a passenger beyond the destination to which he had paid his fare, it being a regular station on the line. Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Basis of Exemplary Damages.—The true ground for allowing exemplary damages in an action against a railroad company for damages on account of its negligence is personal injury, or (in the absence of personal injury) insult, indignity, contempt, etc., to which the law imputes bad motive towards the plaintiff. Hansley v. Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443.

Carrier May Demand Prepayment of Freight.—A common carrier has a right to demand the prepayment of charges for transportation before receiving freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. Allen v. Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105.

Same—May Demand It of Particular Shipper.—A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others. It should appear, however, that a plaintiff had notice of such regulation. Randall v. Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137.

§ 3476. Arrangement of cars in passenger trains.—In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes. If any officer or agent of a railroad company, in forming a passenger train, shall direct or knowingly suffer an arrangement of the cars different from the one herein provided for, he shall be guilty of a misdemeanor: Provided, the criminal liability hereby imposed shall not apply to officers and agents of the Wilmington sea-coast railroad company. (Rev., ss. 2612, 3747; Code, s. 1971; 1871-2, c. 138; 1893, c. 331; 1895, c. 212.)

§ 3477. Unauthorized manufacture or sale of switch-lockkeys misdemeanor.—It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this state on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1909, c. 795.)

§ 3478. Willful injury to railroad property misdemeanor.—If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor. (Rev., s. 3756; Code, s. 1974; 1871-2, c. 138, s. 39.)

§ 3479. Headlights on locomotives on main lines.—Every company, corporation, lessee, manager or receiver owning or operating a railroad in this state is hereby required to equip and maintain and use upon every locomotive in operation in railroad service on main lines in the state an electric or power headlight of at least one thousand five hundred candlepower, measured without the aid of a reflector. This section shall not apply to locomotive engines regularly used in switching cars or trains, to locomotive engines used exclusively between sunup and sundown, and to locomotive engines going to and returning from repair shops when ordered in for repairs; neither shall this section apply to independently owned and operated railroad companies in this state whose mileage of road in this state is one hundred and twenty-five miles or less, nor to railroad companies having only lines extending into this state, no one of which is one hundred miles in length in this state. The corporation commission may relieve from the operation of this section such locomotives and roads, or parts or sections or branches of roads, upon which the said corporation commission may deem electric or power headlights not advisable. Should an engine start on a trip with the headlight in good working condition, and from some unavoidable cause such headlight becomes disabled and cannot be repaired on the line of the road on which such run is being made, there shall be nothing in this section to prevent such engine from continuing on its trip, and the railroad company shall not be liable for prosecution on acount of such failure to repair. Any company, corporation, lessee, manager or receiver violating the provisions of this section shall be guilty of a misdemeanor. (1909, c. 446.)

See Editor's Note under section 3413.

Proximate Cause of Death.—Evidence failing to show how deceased was killed, whether walking along railroad tracks or at platform, and showing that he was intoxicated at the time, does not show that the violation of this section was the proximate cause of death. Owens v. Southern Ry. Co., 33 F. (2d) 870.

Burden of Proof.—It is negligence for a railroad company not to equip its locomotives with electric headlights, with the burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry, Barnes v. Atlantic, etc., R. Co., 168 N. C. 512, 84 S. E. 805, citing Powers v. Norfolk Southern R. Co., 166 N. C. 599, 82 S. E. 972. But see McNeill v. Atlantic, etc., R. Co., 167 N. C. 390, 83 S. E. 704.

§ 3480. Operation of trains on Sunday misdemeanor; exceptions. — No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall it permit any

car, train of cars or locomotive to be run on Sunday on any railroad, save in case of accident, except such as may be run for the purpose of transporting the United States mails, passengers with their baggage and ordinary express freight in express cars exclusively, and except such as may be run for the purpose of transporting fruits, vegetables, livestock and perishable freights. Where there are not sufficient cars of livestock or other perishable freights to make a complete train, or section of a train, the company may add other cars to complete the same. Solid trains, made up of through freight cars, reaching on Sunday any point upon any railroad in North Carolina and destined for some point or points beyond the limits of the state of North Carolina, may be continued as a solid through freight train along the line of such railroad through the state of North Carolina, without stopping the train for other purposes than to take on fuel and receive necessary running orders. The word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset. Trains in transitu, having started on Saturday, may, in order to reach the terminus or shops, run until nine o'clock a. m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops. Any railroad company violating the provisions of this section shall be guilty of a misdemeanor in each county in which such car, train of cars, or locomotive shall run, or in which any such freight car shall be loaded or unloaded, and upon conviction shall be fined not less than five hundred dollars for each offense. (Rev., ss. 2613, 3844; Code, s. 1973; 1879, cc. 97, 203; 1885, c. 92; 1897, c. 126; 1901, c. 444; 1909, c. 285.)

Constitutionality.—The setting aside of Sunday as a day of rest and quiet is not a religious, but a police regulation, necessary to the health and welfare of the people, and it applies to railroads, including logging roads, by this section, to the employees therein engaged; and the provisions of our Constitution requiring religious liberty have no application. State v. Suncrest Lumber Co., 186 N. C. 122, 118 S. E. 882.

This section contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any intent other than to prescribe a rule of civil conduct for persons in the territorial jurisdiction of the Legislature; and, although to some extent and indirectly affecting interstate commerce, so far as it relates to trains engaged in carrying freight from one State to another on Sunday, it is not unconstitutional. State v. Southern R. Co., 119 N. C. 814, 25 S. E. 862.

Lumber Railroad.—A lumber railroad, over which steam locomotives haul logs, comes within the provisions of this section, whether it transports freight or passengers, for hire or otherwise, and it is immaterial whether it was for the sole purpose of supplying its extensive lumber manufacturing plants on Monday. State v. Suncrest Lumber Co., 186 N. C. 122, 118 S. E. 882.

Running to Preserve Health of Crew.—On an indictment for violating this section when the railroad defends on the ground that it was necessary to run latter than the hour fixed by the statute in order to preserve the health or save the lives of the crew, it was incumbent upon the defendant to prove that the unlawful act was done under the stress of such necessity. State v. Southern R. Co., 119 N. C. 814, 25 S. E. 862.

Does Not Affect Time Allowed for Transportation. — Though by this section freight trains are prohibited from running on Sunday within certain hours, Sundays are not excluded from the reasonable time in which railroads are given to transport freight, except when Sunday is the last day in computing the time. Davis v. Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53; Watson v. Atlantic, etc., R. Co., 145 N. C. 236, 59 S. E. 55.

What State Must Show.—Upon a trial under an indictment against a railroad company for loading and running a freight train on Sunday, in violation of the provisions of this section, the State must show, beyond a reasonable doubt, that the defendant had permitted the offense to be done; but when the State has shown the wrongful act, it is sufficient for the jury to find that it was done with defendant's permission. State v. Atlantic Coast Line R. Co., 149 N. C. 470, 62 S. E. 755.

Cited in Keeter v. Wilmington, etc., R. Co., 86 N. C. 346, 348.

§ 3481. Operation of fast mail trains; discontinuance of passenger service.—The corporation commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall stop only at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train such railroad company shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday. The corporation commission, or its successor, however, shall have and it is hereby vested with the power in any case in which the convenience and necessity of the traveling public do not require the running of passenger trains upon its railroad to authorize such railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public shall not require such operation: Provided that this section and any ruling hereafter made by the corporation commission, or its successors, shall not be construed as abrogating or repealing the provisions of any charter or franchise requiring such common carrier to furnish daily freight service over its lines, nor cause the discontinuance of daily freight service where now maintained. (Rev., s. 2614; 1893, c. 97; 1933, c. 528.)

See Editor's Note under section 3413.

Editor's Note.—Public Laws 1933, c. 528, added the last sentence of this section relating to discontinuance of passenger service.

§ 3482. Negligence presumed from killing livestock. — When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued. (Rev., s. 2645; Code, s. 2326; 1856-7, c. 7.)

As to injuries to animals by railroad generally see 10 Enc. Dig. 780 et seq.; 13 Enc. Dig. 331 et seq.

Editor's Note.—Several of the earlier cases notably Doggett v. Richmond, etc., R. Co., 81 N. C. 459, and Durham v. Wilmington, etc., R. Co., 82 N. C. 352, stated that, where the facts are known and show there was no negligence on the part of the railroad, the presumption created by this section does not apply. But the language used by the Court in these cases is calculated to produce an erroneous impression and it would have been much more accurate to have said that the prima facie case here created is rebutted where the undisputed facts show there was no negligence on the part of the defendant, than to say the statute did not apply to such a case. There is no exception in the statute. It is in terms general and applies alike to all cases of killing stock by a railroad. The rule is thus

stated in the later cases. See Hardison v. Atlantic, etc., R. Co., 120 N. C. 492, 494, 26 S. E. 630.

In some of the early decisions it was said that when livestock were injured by the engine or cars of a railroad company and an action thereon was brought within six months, this section raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption, Bether v. Raleigh, etc., R. Co., 106 N. C. 279, 10 S. E. 1045; Carlton v. Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516. But it is now the established rule, as settled by the later and prevailing cases, that "prima facie evidence of negligence" means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong.

Plaintiff Must Prove Case.—Where a railroad train runs into, kills or injures livestock and turkeys of the owner along its tracks, and he brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. Ferrell v. Norfolk Southern R. Co., 190 N. C. 126, 129 S. E. 155.

Section Applies When Facts Known. — The presumption of negligence in killing live stock, when the action is brought within six months, applies where the facts were known. Hanford v. Southern R. Co., 167 N. C. 277, 279, 83 S. E. 470.

Applies When Stock under Control of Person. — The statutory presumption of negligence for killing live stock, when the action is brought within six months, is not rebutted by showing that the live stock were under the control of a person at the time. Randall v. Richmond, etc., R. Co., 104 N. C. 410, 10 S. E. 691.

Same—When Horse Hitched to Buggy. — The statutory presumption of negligence of a railroad company in killing live stock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Hanford v. Southern R. Co., 167 N. C. 277, 83 S. E. 470.

Where it is proven or admitted that cattle had been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing, where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. Randall v. Richmond, etc., R. Co., 107 N. C. 748, 12 S. E. 605.

Does Not Apply to Fowls.—No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. This section makes it prima facie evidence of negligence in respect only to "cattle and other live stock," which does not include "geese" or other fowl within its terms. James v. Atlantic, etc., R. Co., 166 N. C. 572, 82 S. E. 1026.

Same—Nor to Dogs.—The killing of a dog by a street railway is not prima facie evidence of negligence. Moore v. Charlotte Elect. R., etc., Co., 136 N. C. 554, 48 S. E. 822.

Same—Nor When Horses Run into Trestle.—In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and stopped 100 feet from the trestle this section does not apply. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

How Presumption Rebutted.—In an action against a railroad company for killing certain mules of the plaintiff, where negligence is established by force of this section, it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them. Pippen v. Wilmington, etc., R. Co., 75 N. C. 54.

This rule can only be rebutted by showing that the agents of such railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. Battle v. W. & W. Railroad, 66 N. C. 343.

Same—Presumption Not Repelled. — Where plaintiff's horse had been injured on a railroad by the running of a train against it, and it was doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on track, the prima facie case of negligence made by this section was not repelled. Clark v. Western North Carolina Railroad, 60 N. C. 109.

Same—Instructions. — Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. Baker v. Roanoke, etc., R. Co., 133 N. C. 31, 45 S. E. 347.

When Owner Permits Cattle to Stray on Railroad Track. —If the owner of cattle permit them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented. Doggett v. Richmond, etc., R. Co., 81 N. C. 459.

Effect of Local Stock Law.—The prima facie evidence of negligence on the part of a railroad company in a suit for damages for killing stock is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. Roberts v Richmond, etc., R. Co., 88 N. C. 560.

No Duty to Cut Down Weeds.—A railroad company is not negligent in failing to cut down bushes or weeds on the right-of-way beyond the portion over which it is exercising actual control for corporate purposes, though a horse is killed as a result of the engineers inability to see him on account of the weeds. Ward v. Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926.

Measure of Damages.—The measure of damages when a cow is killed by a train is the difference in the value of the cow and that of the beef. Roberts v. Richmond, etc., R. Co., 88 N. C. 560.

When Judge May Direct Verdict.—This section applies to all cases of killing stock by a railroad and while the presumption of negligence arising from the killing may be rebutted, it is only where the undisputed facts show there was no negligence that the trial judge should direct a verdict for the defendant. Hardison v. Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E. 630.

Defendant Not Entitled to Nonsuit. — Where a plaintiff makes a prima facie case by suing for the killing of a cow within six months, the defendant is not entitled to nonsuit the plaintiff on the ground that such prima facie case is rebutted by the evidence of the defendant. Davis v. Railroad Co., 134 N. C. 300, 46 S. E. 515.

Applied in Aycock v. W. & W. R. Road Co., 51 N. C. 231; Wilson v. Norfolk, etc., R. Co., 90 N. C. 69; Snowden v. Norfolk, etc., Railroad, 95 N. C. 93; Carlton v. Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516.

Cited in State v. Divine, 98 N. C. 778, 4 S. E. 477; Cable v. Southern R. Co., 122 N. C. 892, 897, 29 S. E. 377.

Art. 9. Railroad Police

§ 3483. Railway conductors and station agents declared special police.—All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of the state of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall have such power only on board of their respective trains or their railroad right of way, and the agents at their respective stations; and such conductors and agents may cause any person so arrested by them to be detained and delivered to the proper authority for trial as soon as possible. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad company from any civil liability now existing by statute or under the common law for the act or acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred. (1907, c. 470, ss. 3, 4.)

Conductor Has Power of Peace Officer.—A conductor on a railroad passenger train is held to a high degree of care in looking after and protecting passengers on his train, and he is clothed, to some extent, with the powers of a peace officer. Brown v. Atlantic Coast Line R. Co., 161 N. C. 573, 77 S. E. 777.

§ 3484. Governor may appoint and commission railroad police; civil liability of railroads.—Any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or water-power company or con-

struction company or manufacturing company may apply to the governor to commission such persons as the corporation or company may designate to act as policemen for it. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad company from any civil liability now existing by statute or under the common law for the act or acts of such policemen, in exercising or attempting to exercise the powers conferred by this section. (Rev., ss. 2605, 2606; Code, ss. 1988, 1989; 1871-2, c. 138, ss. 51, 52; 1907, c. 128, s. 1; 1923, c. 23; 1933, c. 61.)

Editor's Note.—This section was amended by Public Laws 1923, ch. 23, so as to include manufacturing companies.

Public Laws 1933, c. 61, added the last sentence of this section providing that it shall not relieve the railway from civil liability.

A railroad policeman appointed pursuant to this section, is prima facie a public officer, but the question of whether a particular act is done as an employee of the railroad company or as a public officer is a question to be determined from the nature of the act, whether it relates to vindication and enforcement of public justice or whether it is in the scope of duties owed to the company by reason of employment. Tate v. Southern Ry. Co., 205 N. C. 51, 169 S. E. 816.

Cited in Stanley v. Southern R. Co., 160 N. C. 323, 76 S. E. 221.

§ 3485. Oath, bond, and powers of railroad police.—Every policeman so appointed shall, refore entering upon the duties of his office, take and subscribe the usual oath. Such oath, with a copy of the commission, shall be filed with the corporation commission and a certificate thereof by its clerk shall be filed with the clerk of each county through or into which the railroad for which such policeman is appointed may run or in which the company may be engaged in work, and in which it is intended he shall act, and such policemen shall severally possess within the limits of the county all the powers of policemen in the several towns, cities and villages in which they shall be so authorized to act as aforesaid: Provided, that every policeman appointed under this and the preceding section shall, before entering upon the duties of his office, enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his office, with good and sufficient surety, to be passed upon and accepted by and filed with the corporation commission. (Rev., s. 2607; Code, s. 1990; 1871-2, c. 138, s. 53; 1907, c. 128, s. 2; 1907, c. 462.)

See note to § 3484.

§ 3486. Railroad police to wear badges.—Such railroad police shall, when on duty, severally wear a metallic shield with the words "Railway Police" and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives. (Rev., s. 2608; Code, s. 1991; 1871-2, c. 138, s. 54.)

§ 3487. Compensation of railroad police.—The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them. (Rev., s. 2609; Code, s. 1992; 1871-2, c. 138, s. 55.)

§ 3488. Police powers cease on company's filing notice.—Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the several offices in which notice of such appointment was originally filed, and thereupon the power of such officer shall cease and be determined. (Rev., s. 2610; Code, s. 1993; 1871-2, c. 138, s. 56.)

Art. 9A. Joint Rates

§ 3488(a). Carriers permitted to establish joint rates. — Any operating railroad company is authorized and directed to enter into arrangements for the establishment of joint rates and through routes with common carriers by water and with other such railroad companies for the transportation of persons and/or property transported wholly within the State of North Carolina by such carrier by water and such railroad company. (1931, c. 195.)

Art. 10. Carriage of Passengers

§ 3489. Railroad passenger rates established.—No railroad company doing business as a common carrier of passengers in the state of North Carolina shall, except as herein provided, charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its road in North Carolina, a rate in excess of three cents per mile: Provided, however, that independently owned and operated railroad companies in North Carolina whose mileage of road in said state is one hundred miles or less may charge a rate twenty per cent higher than the rate above specified; but this proviso shall not extend to branch lines of railroad companies controlling over one hundred miles of road, whether chartered in or out of the state: Provided further, this section shall not apply to railroads hereafter built less than fifty miles in length. For transporting children under twelve years and over five years old, one-half of the rate above prescribed. For transporting children under five years old, accompanied by any person paying fare, no charge whatever shall be made. Where the amount of the ticket at the prescribed rate would amount to any figure between two multiples of five, the price of the ticket shall be the multiple of five which is nearest the price of the ticket at the rate above mentioned; or, in the event that the amount is equidistant between the multiples of five, the price charged for the ticket shall be on the basis of the higher of those two multiples of five. No charge less than ten cents shall be required. Independently owned and operated railroad companies in North Carolina, whose mileage of road in this state is one hundred miles or less, may charge a rate not exceeding three cents per mile; and independently owned and operated railroad companies in North Carolina, whose mileage of road in the state is ten miles, or less, may charge the same rate which is now in existence on such roads. This provision shall not extend to branch lines of railroad companies

controlling over one hundred miles of road, whether chartered in or out of the state. Newly constructed railroads, or the portion of railroad which may be newly constructed, shall be exempt from the operation of this section for two years after completion, to the extent that they may charge a rate in no case to exceed three cents per mile. A charge of fifteen cents may be added to the fare of any passenger when the same is paid on the train, if the ticket might have been procured within a reasonable time before the departure of the train. (Ex. Sess. 1908, c. 144, s. 1; Ex. Sess. 1920, c. 51, s. 1.)

Cross References. — As to the power of the utilities commissioner to fix freight and passenger rates see section 1066; as to rights of passengers see section 3475 and annotations thereunder; as to freight and baggage see sections 3518 and 3523; as to the carriage of passengers generally see 2 Enc. Dig. 851 et seq.; 13 Enc. Dig. 143 et seq.

Editor's Note.—Formerly the maximum charge allowed by this section was two and one-half cents per mile. This section was amended by Public Laws 1920, Ex. Sess., ch. 51, sec. 1, and the maximum rate allowed raised to three cents per mile. At the same time the proviso allowing a twenty per cent higher rate for railroads less than one hundred miles in length was added.

Federal Control of Rates.—The provisions of this section apply only to fixing rates for intrastate carriers, and cannot be applied to interstate carriers, as control of the rates charged by the latter is vested in the Interstate Commerce Commission. The Interstate Commerce Commission in fixing rates cannot by their order fix rates between points that are remotely internal and from which no prejudice to interstate commerce can arise. But it can fix rates on intrastate carriers where such rate as fixed by the State is a discrimination against interstate or foreign commerce. See R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563, 66 L. Ed. 236, 42 S. Ct. 232.

Right to Put Off Child on Train with Parent.—Where a conductor has taken up the ticket of a person traveling with his child for whom a half ticket is required, but has not been purchased, and who is unable to pay the fare of the child with the extra fare allowed when a ticket has not been regularly purchased, his right to put the child off the train is dependent upon the return of the ticket he has collected from the father, or its equivalent. Landford v. Southern R. Co., 165 N. C. 653, 81 S. E. 998.

§ 3490. Rates on leased or controlled lines.—In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in the state, the rate for carrying passengers thereon shall be determined for such railroad company by the rate prescribed by the preceding section for the railroad company which owns, controls or operates the same. (Ex. Sess. 1908, c. 144, s. 2.)

§ 3491. Violations of passenger rates misdemeanor.—Any railroad company violating any of the provisions of the two preceding sections, or counseling, ordering or directing any employee, agent or servant to violate any of such provisions, by charging, demanding or receiving any rate greater than that fixed by such section, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars; and any agent, servant or employee of any railroad company who shall violate either of the two preceding sections shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court. (Ex. Sess. 1908, c. 144, s. 3.)

For a similar provision applying to freight rates see section 3519. For decisions under the act of 1907, see State v. Southern R. Co., 145 N. C. 495, 59 S. E. 570; Ex parte Wood, 155 Fed. 190; as to persons entitled to free carriage, see section 1710.

§ 3492. Accepting or giving free transportation illegally misdemeanor.—Any persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court; and any railroad, or its employees or agents, giving free transportation of any kind whatsoever, except that permitted by law, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than two thousand dollars for each offense. (Ex. Sess. 1908, c. 144, s. 4.)

For cases arising previous to the enactment of this section see State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133; McNeill v Railroad Co., 135 N. C. 682, 47 S. E. 765.

§ 3493. Powers of corporation commission over rates limited.—The corporation commission shall have no power to change, alter, modify or in any way affect the enforcement or operation of any of the provisions of the preceding sections of this article, except as the same shall be therein specifically authorized, or the enforcement of any penalties for violating the provisions thereof. (Ex. Sess. 1908, c. 144, s. 7.)

See Editor's Note under section 3413.

§ 3494. Separate accommodations for different races.—All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting-rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the corporation commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported. (Rev., s. 2619; 1899, c. 384; 1901, c. 213.)

Cross Reference.—As to the duty and power of the ultilities commissioner to see that separate waiting rooms are provided for the white and colored races, see section 1043. See § 2613(p).

See Editor's Note under section 3413.

Conductor Directing White Passengers to Colored Coach.—When a railroad company has furnished equal and separate accommodations on its train for the white and colored races, no penalties may be recovered by reason of the conductor merely directing a few white passengers to take the coach set apart for the colored people. Merritt v. Atlantic Coast Line R., 152 N. C. 281, 67 S. E. 579.

Sheriff with Colored Prisoner.—Where the conductor of a train requires a white sheriff to go into the coach provided for colored people with a colored prisoner in his custody, traveling with him on the train, without any evidence that he did so in a harsh or abusive manner, or that the accommodations furnished were unequal to those of the other coach, damages sought by the sheriff will be denied as a matter of law. Huff v. Norfolk Southern R. Co., 171 N. C. 203, 88 S. E. 344.

Power of Corporation Commission to Require Bus Lines to Provide Equal Separate Accommodations for Races.—The Corporation Commission is given plenary power by statute to require bus lines operating between points

within the State in carrying passengers for hire, which are public-service corporations, to provide indiscriminatory separate accommodations for the carriage of white and negro passengers, and for their separate accommodations at the bus stations, the working out of the plans or details for the purpose being vested largely within the discretion of the Commission, and where this is done without racial discrimination it is not objectionable as being in contravention of Thirteenth and Fourteenth Amendments to the Federal Constitution. Hotels, theatres, etc., distinguished from public-service corporations, and the policy of our State with regard to the equal treatment of the negro race discussed by Mr. Justice Clarkson. Corporation Commission v. Transportation Committee, 198 N. C. 317, 151 S. E. 648.

§ 3495. Certain carriers may be exempted from requirement.—The corporation commission is hereby authorized to exempt from the provisions of the preceding section steamboats, branch lines and narrow-gauge railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-guage railroads, branch lines or mixed trains. (Rev., s. 2620; 1899, c. 384, s. 2; 1901, c. 213.)

See Editor's Note under section 3413.

§ 3496. Use of same coach in emergencies.—When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race. (Rev., s. 2621; 1899, c. 384, s. 3.)

§ 3497. Penalty for failing to provide separate coaches.—Any railroad or steamboat company failing to comply in good faith with the provisions of the three preceding sections shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat only in a car or compartment with a person of a different race in a violation of law. (Rev., s. 2622; 1899, c. 384, s. 5.)

See § 2613(p).

§ 3497(1). Exceptions to requirement of separate coaches and toilets.—As to trains consisting of not more than one passenger car unit, operated principally for the accommodation of local travel, although operated both intrastate and interstate and irrespective of the motive power used, the ultities commissioner is authorized to make such rules and regulations for the separation of the races and with regard to toilet facilities as in his best judgment may be feasible and reasonable in the circumstances, and the rules and regulations established pursuant to this authority shall be exceptions to the provisions of section three thousand four hundred and ninety-four and three thousand five hundred and eleven of Consolidated Statutes. (1935, c. 270.)

§ 3498. Facilities for exchange of mileage required.—All railroad companies of one hundred miles of more in length doing business in whole or in part in the state of North Carolina are hereby required to provide and keep at all depots in cities or towns of two thousand and over in population, as fixed by the United States census of the year one thousand nine hundred and ten, two windows opening in the waiting-room for passengers of the race using the greatest amount of mileage or coupon books, for the sale or exchange of fares on all passenger trains in North Carolina. One of such windows shall be used for the sale of cash fares exclusively, and the other for the sale and exchange of mileage or coupon books. Each window is to be attended by an agent whose duty it shall be to wait upon the traveling public, during the hours now prescribed, for the sale of cash-fare tickets and the sale and exchange of mileage or coupon books. Over each such window shall be kept a sign, painted in plain letters, "Mileage Exchange" and "Cash Fares," respectively: Provided, that the provisions of this section shall not apply to any railroad company in North Carolina, as aforesaid, selling mileage or coupon books at a rate of not more than two cents per mile and pulling or taking the same on the train: Provided further, that all the provisions of this section shall not apply to the following railroad junctions in this state, irrespective of population, namely: Dunn Selma, Maxton, Hamlet, Norlina, and Sanford. (1911, c. 41, s. 1.)

Railroad Must Furnish Opportunity for Exchange.—The railroad selling mileage books must furnish reasonable opportunity for the holder to exchange it for a ticket. Mason v. Seaboard Air Line R. Co., 159 N. C. 183, 75 S. E. 25; Dorsett v. Atlantic Coast Line R. Co., 156 N. C. 439, 72 S. E. 491.

Same—When No Opportunity to Exchange Mileage.—It is the duty of a conductor on a passenger train to accept mileage of a person traveling thereon when the railroad company has not afforded him time to get it exchanged for a ticket at its station. McNairy v. Norfolk, etc., R. Co., 172 N. C. 505, 90 S. E. 497.

§ 3499. Application of requirement for exchange of mileage.—The corporation commission shall upon complaint, and in its discretion, apply the provisions of the preceding section to railroad junctions not named in the second proviso of that section and to depots in cities and towns of less than two thousand population. The commission may in like manner exempt, in its discretion, depots in cities and towns of over two thousand population from the operation of that section. When the requirements of the preceding section are so applied by the commission, then all of the provisions of this article having to do with the sale and use of mileage-books shall extend to and include all railroad companies thereby affected, and such companies shall be subject to all of the penalties prescribed for a failure to comply with such provisions. (1911, c. 41, s. 2.)

See Editor's Note under section 3413.

§ 3500. Penalty for failure to provide mileage-exchange facilities. — Any railroad company failing to comply in good faith with the provisions of the two preceding sections shall be liable to a penalty of fifty dollars per day for each city or town where such failure occurs that is covered by the provisions of those sections, or

taken in by the corporation commission as therein provided, to be recovered by any passenger demanding cash-fare or mileage tickets at any depot in any such city or town in an action brought by such passenger. (1911, c. 41, s. 3.)

See Editor's Note under section 3413.

§ 3501. Right to check baggage on mileage books.—Any legal holder of a mileage book shall be privileged to have his baggage checked before the exchange of mileage for a ticket entitling such holder to transportation upon the surrender of the baggage slip forming a part of such mileage-book for the requisite number of miles and the payment of all proper excess-baggage charges. (1911, c. 41, s. 4.)

§ 3502. Corporation commission may regulate the checking of baggage on mileage tickets.—The corporation commission is hereby empowered and directed to take into consideration the provisions of the preceding section and promulgate such rules and regulations, with regard to checking baggage on mileage tickets, as, in the opinion of the commission, shall be necessary and proper to safeguard and protect both the convenience of passengers and the rights of railroad companies; and such rules and regulations of the commission, when so promulgated, shall have the same force and effect as if they were a part of such section. (1911, c. 124, s. 1.)

See Editor's Note under section 3413.

§ 3503. Unused tickets to be redeemed.—When any round-trip ticket is sold by a railroad or other transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or other transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and other transportation companies shall redeem in money all mileage tickets known as five-hundred, thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, when as much as fifty per centum of such ticket has been used by the purchaser, by paying the same price per mile paid for it, or shall allow the original holder to ride it out. (Rev., s. 2627; 1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418.)

Cited in State v. Ray, 109 N. C. 736, 738, 14 S. E. 83; Kindley v. Seaboard Air Line R. Co., 151 N. C. 207, 208, 65 S. E. 897.

§ 3504. Ticket may be refused intoxicated person; prohibited entry misdemeanor.—The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, captain or other person in charge of any railroad car, steamboat or other conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such car, boat or other conveyance. If any intoxicated person, after being forbidden by the conductor, captain or other person having charge of any such railroad train, steamboat or other conveyance for the use of the traveling public, shall enter such train, boat or other conveyance, he shall be guilty of a misdemeanor. (Rev., ss. 2625, 2626, 3757; 1885, c. 358, ss. 1, 2, 3.)

When Exemplary Damages Allowed.—In an action for damages for refusal to allow a person with a ticket to board a train before he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. Story v. Norfolk, etc., R. Co., 133 N. C. 59, 45 S. E. 349.

Cited in Stanley v. Southern R. Co., 160 N. C. 323, 76 S. E. 221.

§ 3505. Entering cars after being forbidden misdemeanor.—No person shall enter any railroad passenger car, baggage car, mail car or caboose car, or go upon the platform of such cars, after being forbidden so to do by the conductor, his assistants, the baggage-master or other person in charge of such cars, unless the person enter such cars or go upon such platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad, or for some other like purpose. Any person violating this section shall be guilty of a misdemeanor and shall be fined not exceeding ten dollars. (Rev., s. 3752; Code, s. 1979; 1883, c. 351.)

§ 3506. Riding in first-class cabin with second-class ticket misdemeanor.—If any passenger purchasing or holding a second-class ticket, after being requested or directed by any captain or other officer in charge of any steamboat in this state, riding in any first-class cabin, refuses to pay the difference between a first-class and a second-class fare or rate, or refuses to go into the second-class cabin, when there shall a comfortable second-class cabin on such steamboat, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any justice of the peace in the county where such offense is committed shall have jurisdiction of the offense, upon sworn complaint of any officer of such steamboat company. (Rev., s. 3761; 1903, c. 795.)

§ 3507. Passenger refusing to pay fare and violating rules may be ejected.—If any passenger shall refuse to pay his fare, or violate the rules of a railroad corporation, it shall be lawful for the conductor of the train and servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train. (Rev., s. 2629; Code, s. 1962; 1871-2, c. 138, s. 34.)

As to ejection of passengers generally see 2 Enc. Dig. 901 et seq.; 13 Enc. Dig. 357 et seq.

Right to Put Child with Parent Off Train.—See note to section 3489.

Permission to Ride in Express Car. — Where a party shipped horses by express with an agreement that he should ride in the same car he cannot ride in the passenger coach without paying his fare. Teeter v. Southern Exp. Co., 172 N. C. 616, 90 S. E. 761.

Ejecting Person on Baggage Car.—A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger

for injuries received by being pulled off the train by the conductor. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 758.

Mileage Book Holder Must Comply with Terms. — The holder of a mileage book must comply with its terms if reasonable opportunity is given, as he may be ejected. McNairy v. Norfolk, etc., R. Co., 172 N. C. 505, 90 S. E. 497; Mason v. Seaboard Air Line R. Co., 159 N. C. 183, 75 S. E. 25.

Ejection of Party Refusing to Show Mileage Book.—When a purchaser of a mileage book from a railroad company is riding on an exchange ticket, and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Mason v. Seaboard Air Line R. Co., 159 N. C. 183, 75 S. E. 25.

Evidence of Drunkenness Inadmissible.—In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff is not admissible, where the answer simply denies the wrongful ejection alleged in the complaint. Raynor v. Wilmington Seacoast R. Co., 129 N. C. 195, 39 S. E. 821.

Ejection by Failure of Conductor to Return Ticket. — Where the conductor failed to return ticket to passenger to be used on another train, and the passenger was ejected therefrom for lack of the ticket the railroad is liable for all damages attending the ejection. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

How Conductor May Eject Passenger.—The conductor of a railroad train is authorized to expel without using unnecessary force one who refuses to pay regular fare, at any point where he may safely get off provided it be "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train"; and provided further that the ejected person is not willfully and wantonly exposed to danger of life or limb. Rosmean v. Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766.

Person Must Be Ejected Near Station or House. — The railroad company owed a duty to plaintiff ejected from its train to put her off the train at a suitable and proper place, either at a station or near a house, even though she had not been rightfully a passenger. Bullock v. Atlantic Coast Line R. Co., 152 N. C. 66, 67 S. E. 60.

Flag Station Not a Usual Stopping Place.—A place along a railroad company's track is not a usual stopping place within the meaning of this section when it is merely a flag station without shelter, and the nearest dwelling three-quarters of a mile away; and where one traveling on the train has been put off at such place at 9 o'clock in the night for failure to exchange his mileage for a ticket, and was informed by the conductor that it was "a rather poor place to spend the night," it does not preclude his recovery, for the company's violation of the statute, that he again boarded the train and complied with the conductor's demand in paying the additional charge required of those who have no ticket. McNairy v. Norfolk, etc., R. Co., 172 N. C. 505, 90 S. E. 497.

Carrier Not Liable for Unusual Results. — A conductor requiring an intoxicated man to leave the train for nonpayment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. Roseman v. Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766.

Reliance on Agent's Statements.—The purchaser of a ticket may rely upon the statements of the railroad agent as to trains, connection, validity of ticket, etc., and if the passenger is ejected as a result of the agent's mistake the railroad is liable. Creech v. Atlantic, etc., R. Co., 174 N. C. 61, 93 S. E. 453; Hallman v. Southern R. Co., 169 N. C. 127, 130, 85 S. E. 298.

§ 3508. Beating way on trains misdemeanor; venue.—If any person, other than a railroad employee in the discharge of his duty, without authority from the conductor of the train or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this state, or on the draw-heads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. Any person charged with a violation of this section may be tried in any county in this state through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (Rev., s. 3748; 1899, c. 625; 1905, c. 32.)

Effect on Liability of Insurance Co.—A policy of accident insurance that excepts from the company's full liability diseases contracted before the date of the policy, "nor for sickness due to immorality or the violation of law," does not of itself exclude such liability for an injury caused by the plaintiff stealing a ride on a railway train, made a misdemeanor by this section, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. Poole v. Imperial Mut. Life, etc., Co., 188 N. C. 468, 125 S. E. 8.

§ 3509. Injury while on platform or in other prohibited places.—In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passengers cars then in the train, such company shall not be liable for the injury: Provided, such company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers. (Rev., s. 2628; Code, s. 1978; 1871-2, c. 138, s. 42.)

Effect of Posting Notice.—When this section has been complied with, a rule of a railroad company prohibiting passengers from going on the platform while the train is in motion, is given the force and effect of a state law, and barring a recovery for injuries sustained under such circumstances. Shaw v. Seaboard Air Line R. Co., 143 N. C. 312, 55 S. E. 713.

Notice Need Be Only in English.—This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that such passenger cannot read that language is immaterial. Bane v. Norfolk Southern R. Co., 176 N. C. 247, 97 S. E. 11.

Riding on Platform Prima Facie Negligence. — It is prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. Wagner v. Atlantic Coast Line R. Co., 147 N. C. 315, 61 S. E. 171.

Same—Not Applicable When Passenger Alighting.—This section is for the protection of passengers and should be reasonably construed, and no application when the injury complained of has been received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. Kearney v. Seaboard Air Line R. Co., 158 N. C. 521, 74 S. E. 593.

Same—When Getting on. — One who is on the passenger platform of a railroad company at its station with the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usages there. Thomas v. Southern R. Co., 173 N. C. 494, 92 S. E. 321.

§ 3510. Checking baggage; liability for loss.—A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of any railroad corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in

charge of the train, and on producing the check, if his baggage shall not be delivered to him, he may, by an action, recover the value of such trunk or baggage. (Rev., s. 2623; Code, s. 1970; 1871-2, c. 138, s. 36.

See notes to section 3523.

§ 3511. Cars and toilets to be kept clean.—Every person or railroad company, whether incorporated or not, engaged in the regular business of carrying passengers on his or its railroad cars in this state, shall have such cars cleaned, brushed, dusted and the windows washed, if needed, at least once each day, and shall in each car, in which male and female passengers are carried, have therein a toilet-room for each sex, and have the same kept clean and decent. Any person or corporation engaged in the business aforesaid who shall willfully or negligently fail or refuse to give orders to his or its agent in charge of such cars to comply with the requirements of this section, shall forfeit twenty dollars for each day of such failure or refusal, to be recovered by any person suing therefor. (1907, c. 474, ss. 1, 2.)

As to exception to requirements of this section, see section 3497(1).

§ 3512. Evidence of failure to order cleaning of cars; violation of orders misdemeanor.—The willful or negligent refusal or the failure on the part of the conductor or manager of any passenger car named in the preceding section to comply with such section shall be received as evidence of failure or refusal of such person or railroad company to give the orders therein provided for. Moreover, such conductor or manager shall be guilty of a misdemeanor if he fail or refuse to carry out such orders of the persons or company mentioned in the preceding section. (1907, c. 474, s. 3.)

§ 3512(a). Surcharge on Pullman car transportation.—It shall be unlawful for any railroad or Pullman car company doing business in North Carolina to collect from any person within the boundaries of North Carolina any surtax or surcharge for Pullman car transportation from one point to any other point within the bounds of the state of North Carolina; but nothing in this section shall be construed to affect in any way the charge which any railroad or Pullman car company may require for transportation on interstate travel. (1923, c. 147.)

Editor's Note.—It was said in 1 N. C. Law Rev. 305, that the power exercised in this section is clearly within the power of the state, and has been observed by carrier's since its passage.

Art. 11. Carriage of Freight

§ 3513. Freight rates to be posted.—It shall be the duty of every railroad or other transportation company to keep posted in a conspicuous place in its depots or other places where freight is received for shipment a list of its charges for carrying freight, specifying name of places, class of freight and charge for carrying the same. Such charges shall not be increased without giving fifteen days notice. Any company represented by an agent who refuses to comply with this section shall be liable to a penalty of not less than fifty nor more than one hundred dolars. (Rev., s. 2630; Code, s. 1965; 1879, c. 182, s. 2.)

As to the requirement of the utilities commissioner for the publication of rates, see section 1074.

Interstate Commerce.—In Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 166 N. C. 62, 82 S. E. 1, it was held that the posting of interstate freight charges, required by a similar provision of the Interstate Commerce Commission, was not necessary to the effectiveness of the schedule of rates, such provision being merely for the convenience of the public. See also Hardware Co. v. Seaboard Air Line, 170 N. C. 395, 86 S. E. 1025.

Effect of Private Agreements.—The rates of transportation allowed are established by the Interstate Commerce Commission, and the State Corporation Commission, which may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law. Southern R. Co. v. Latham, 176 N. C. 417, 97 S. E. 234.

§ 3514. No charge in excess of printed tariffs; refunding overcharge; penalty.—No railroad, steamboat, express or other transportation company engaged in the carriage of freight and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law. In case of any overcharge, contrary to the provisions of this section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed a written demand, supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section. Any company failing to refund such overcharge within the time allowed shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said over charge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars. (Rev., ss. 2642, 2643, 2644; 1903, c. 590, ss. 1, 2.)

Cross References.—As to power of the utilities commissioner to fix rates, see section 1066; as to powers of the Interstate Commerce Commission to fix rates on interstate railroads, see Barnes' Federal Code, section 7884; as to excessive charges generally, see 2 Enc. Dig. 841 et seq.; 13 Enc. Dig. 339. See also, notes to section 3518.

Constitutionality of Section.—This section is not unconstitutional as in violation of the Fourteenth Amendment to the Federal Constitution, or the Commerce Clause of said Constitution, and the acts passed in pursuance thereof. Efland v. Southern R. Co., 146 N. C. 135, 59 S. E. 355; Iron Works v. Southern R. Co., 148 N. C. 469, 62 S. E. 595; Hardware Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.

Not Applicable to Interstate Shipment.—Under the Interstate Commerce Act, as amended, Congress, in the exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and this section is inoperative, as to such shipments. Hdw. Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.

For earlier cases holding contra, see Macon County Supply Co. v. Tallulah Falls R. Co., 166 N. C. 82, 82 S. E. 13; Thurston v. Southern R. Co., 165 N. C. 598, 81 S. E. 785.

Burden of Proof.—The burden is upon the plaintiff to show that a freight rate charged and collected by the carrier on an interstate shipment was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the State statutory penalty; and where the shipment has been routed over one line of con-

necting carriers and the tariff filed by the carrier over another route is shown, it affords no evidence as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit should be granted. Hdw. Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.

Penalty Enforceable though Charges Small.—The penalty fixed by this section to enforce the duty of the carrier in regard to proper charges for transporting freight and refund of overcharges, and which cannot in any event exceed $100, is enforceable for a default established against defendant, though the particular transportation charges may appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large matters the claimant can better afford the cost of litigation. Efland v. Southern R. Co., 146 N. C. 129, 59 S. E. 359.

Rates Need Not Be Same for Both Directions.—In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in an action for the recovery of the penalty under this section, it is error for the judge below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly. Scull & Co. v. Atlantic Coast Line R. Co., 144 N. C. 180, 56 S. E. 876.

Agent as Party Aggrieved.—Where under agreement with his principal the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, and may maintain his action to recover the excess, and also the penalty when settlement has not been made within sixty days, when he has filed written demand supported by the original freight bill and the original or duplicate bill of lading, etc. Tilley v. Southern R. Co., 172 N. C. 363, 90 S. E. 309.

Freight Charge on Undelivered Shipment.—Where the defendant collected freight charges for an entire shipment, as invoiced and originally billed, and 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge, and failure to refund such overcharge after the 60 days allowed for investigation rendered the defendant liable for the penalty denounced by this section. Cottrell v. Carolina, etc., R. Co., 141 N. C. 383, 54 S. E. 288.

What Demand Must Specify.—Where the carrier has demanded and received an unlawful freight charge for a shipment, and the party aggrieved has made written demand of the carrier for payment of the overcharge, required by the statute, it is not necessary for him, in order to maintain an action for the penalty imposed upon the carrier failing to settle in sixty days, that the written demand specify the penalty, or that demand therefor was made in the justice's court or alleged in the complaint filed on appeal therefrom. Tilley v. Southern R. Co., 172 N. C. 363, 90 S. E. 309.

Same—Separate Demand in Same Envelope.—The mere fact that the plaintiff, inclosed separate written demands in the same envelope and gave an aggregate amount thereof in a letter accompanying them, does not affect the demands being specific, when the overcharges were separate and distinct, the demand made specifically as to each, accompanied separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; and such is a compliance with the provisions of this section. Efland v. Southern R. Co., 146 N. C. 129, 59 S. E. 359.

§ 3515. Penalty for failure to receive and forward freight tendered.—Agents or other officers of railroad and other transportation companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. (Rev., s. 2631; Code, s. 1964; 1903, cc. 444, 693.)

Cross Reference.—As to the power of the utilities commissioner to prevent discrimination see section 1054; as to the carrier's duty to receive and transport goods, see 2 Enc. Dig. 796 et seq.

This section is constitutional as applied to intrastate shipments. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.

Section Strictly Construed.—This is a penal statute and must be strictly construed. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 S. E. 556.

Intrastate Shipments.—The penalty imposed by this section is not a burden upon interstate commerce when shipments are intrastate. Wampum Cotton Mills v. Carolina, etc., R. Co., 150 N. C. 612, 64 S. E. 588.

Interstate Shipments.—In Reid v. Southern R. Co., 150 N. C. 753, 64 S. E. 874, it was held that the penalty provided for by the provisions of this section would apply to interstate shipments, the same not being a burden on interstate commerce. In reviewing the same case the United States court reversed this decision and held that the section could not apply to interstate shipments. Southern Ry. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140.

Requisites of Valid Tender.—This section provides that the tender be made at a regular station and that the articles tendered be of the nature and kind received by the carrier for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions. Olive v. Atlantic Coast Line R. Co., 152 N. C. 279, 67 S. E. 583.

Same—Sufficiency of Complaint.—A complaint alleging that plaintiff tendered to a carrier at a certain station a certain quantity of loose lumber for shipment, etc., which the defendant wrongfully and unlawfully refused to receive, states a good cause of action, since it would be inferred, to be thereafter shown by proof, that this station referred to was a regular station, and that loose lumber was an article usually received by the carrier. Olive v. Atlantic Coast Line R. Co., 152 N. C. 279, 67 S. E. 583.

Meaning of "Whenever Tendered."—The words "whenever tendered" can only be qualified by supplying the ellipsis "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made." Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Requisites for Daily Penalty.—In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment under the provisions of this section, it is necessary for actual or constructive tender thereof to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them when notified that the company would receive them, is insufficient except as to the first penalty. Bane v. Atlantic Coast Line R. Co., 171 N. C. 328, 88 S. E. 477.

When the common carrier permits a shipper to load a car with his goods and refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under this section; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad, makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Same—Placing Goods in Depot.—Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and thus leaving them there, makes each day's delay by the carrier "a refusal to ship," under this section, and the carrier, thus refusing, is responsible for the penalty. Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Money Tendered After Regulation Hours.—Where money was tendered to the agent of an express company at a regular station for shipment at 2 o'clock P. M., and the trains carrying express freight in the direction of the place to which it was to be consigned passed only at 12:55 o'clock each day. A regulation of the company that money would be received for shipment only on the morning before the train on which it was to be transported passed, would not

protect the company in an action brought to recover a penalty incurred by violation of this section. Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Meaning of "Under Existing Laws."—The words "under existing laws," in this section, qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines. Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Who Is the "Party Aggrieved."—The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in this section which arises from the wrongful refusal of the carrier's agent to accept them for transportation. Reid v. Southern R. Co., 149 N. C. 423, 63 S. E. 112.

Same—Consignee of Goods Shipped on Approval.—A consignee to whom goods are shipped on approval owes it as a duty to the consignee to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under this section, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept them for shipment. Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Same—Agent of Attaching Creditor.—The penalty prescribed by this section is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released. McRackan v. Atlantic Coast Line R. Co., 150 N. C. 331, 63 S. E. 1042.

Goods Not Delivered to Carrier.—When the plaintiff did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but carried it back and shipped it the next day, a nonsuit should be allowed. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 S. E. 556.

No Penalty for Refusal to Accept Loose Hay.—Where the Corporation Commission has authorized and fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it does not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition, etc., the carrier is not liable, for the penalty prescribed by this section, for refusing to receive for shipment a car-load of loose hay, such shipments evidently being of such a character as to endanger the property, not only of the carrier, but that of others received by the carrier for shipment. Tilley v. Norfolk & Western R. Co., 162 N. C. 37, 77 S. E. 994.

Embargo on Consignee's Freight. — A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered, such matters as would excuse its failure to do so at common law, unavoidable conditions then existing, over which it had no control; when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad for shipments tendered to be forwarded to him there. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Embargo by Connecting Carrier.—The penalty imposed by this section is enforcible against a railroad company refusing to receive freight when tendered, though to reach destination it was necessary for another road to receive and transport it beyond the junctional point; and it is no valid excuse that the connecting line had laid an embargo on the consignee, for it was the duty of the initial carrier to transport the goods and make a tender to the connecting line to be relieved of the penalty. Wampum Cotton Mills v. Carolina & Northwestern R. Co., 150 N. C. 612, 64 S. E. 588.

When Rate Unknown.—Where the defendant carrier refused to receive for shipment goods tendered to it, basing its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, the plaintiff offered to prepay the freight, and asked for a bill of lading, it was the duty of the defendant, to accept the shipment, forward it to its connecting line; and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through bill of lading. Reid v. Southern R. Co., 153 N. C. 490, 69 S. E. 618.

In an action to recover the penalties alleged to have been incurred under this section, for refusing to receive freight for transportation, where the plaintiff delivered freight for shipment at the defendant's station and tendered the charges, and an agent received the freight for storage, but refused to give a bill of lading because he did not know the freight rates, and kept the freight twelve days there was a refusal "to receive for transportation," and the action is brought under the proper statute. Twitty v. Southern R. Co., 141 N. C. 355, 53 S. E. 957.

Mismarking of Part of Shipment.—In an action to recover a penalty against a carrier for failing to ship one of four packages consigned for shipment under a single bill of lading, the defendant is estopped to claim as a defense that the mismarking of three of the packages was a sufficient excuse for failing to ship the fourth. Grocery Co. v. Sou. R. Co., 136 N. C. 396, 48 S. E. 801.

Freight Not Consigned to Regular Station.—A refusal of the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by this section when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. Reid v. Southern R. Co., 149 N. C. 423, 63 S. E. 112.

Tender of Freight Eight Minutes before Train. — Where the plaintiff tendered to the defendant thirty crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, when the train for which the shipment was intended was seen approaching the depot, and about eight minutes before its arrival there; a charge of the court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. Shaw v. Southern Express Co., 171 N. C. 216, 88 S. E. 222.

Need Not Accept Express for All Trains.—An express company is not liable for damages, and the statutory penalties of this section for refusing to receive a shipment of thirty crates of strawberries for a certain train not carrying accommodations for shipments of this character, though it had taken, on occasion, a few berries thereon for the plaintiff, when it so advertised, the shipper knew of it, and accommodations on other daily trains were specially provided. Shaw v. Southern Express Co., 171 N. C. 216, 88 S. E. 222.

Conclusiveness of Referee's Findings.—Where in an action to recover the prescribed penalties under this section the referee finds upon ample evidence in a hearing in which no error of law is committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding is approved by the trial court, such finding is conclusive on appeal, and the carrier may not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff has been charged on one shipment the shipper is entitled to recover the excess paid. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.

Sufficiency of Evidence.—Evidence that shipper's contract to deliver certain merchandise was canceled because of carrier's wrongful refusal to accept the merchandise for shipment is sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for carrier's wrongful refusal of the shipment being recoverable under this section. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.

Cited in Burlington Lbr. Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167; Kemp v. Norfolk, etc., R. Co., 169 N. C. 731, 86 S. E. 621.

§ 3516. Penalty for failure to transport within reasonable time.—It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this state to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina corporation commission.

Any company violating any of the provisions

of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carloads lots, and in less quantities there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day, but the forfeiture shall not be collected for a period exceeding thirty days.

In reckoning what is a reasonable time for such transportation, it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations. A delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which such freight is to be transported shall not be charged against the transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the freight from the station where is it received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, then upon the establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a transportation company under this section, the burden of proof shall be upon the transportation company to show where the delay, if any, occurred. (Rev., s. 2632; 1903, c. 590, s. 3; 1905, c. 545; 1907, cc. 217, 461.)

As to delay in transportation of freight, generally, see 2 Enc. Dig. 782 and 811 et seq.; 13 Enc. Dig. 312, and 321 et seq.

See Editor's Note under section 3413.

Editor's Note.—Under this section as it formerly prevailed, a penalty was imposed for unreasonable delay in the transportation of goods. Construing the statute in Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697 the Court held that the term "transportation" did not include a delivery to consignee at the point of destination, and if goods shipped by a carrier had been properly placed at the point of destination, no penalty was incurred under this section for a negligent delay in delivery from the car or warehouse of the company. Subsequently the Legislature amended the statute so as to include delays in delivery after transportation had ceased.

For a review of the history of legislative penalties for the refusal of railroads to transport freight, see Grocery Co. v. Sou. R. Co., 136 N. C. 396, 48 S. E. 801.

Constitutionality of Section.—This section is in the nature of a police regulation and is constitutional and valid. Owens v. Hines, 178 N. C. 325, 100 S. E. 617; Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

It does not deny to the carrier the equal protection of the laws. Rollins Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671; Grocery Co. v. Sou. R. Co., 136 N. C. 396, 48 S. E. 801.

Common Law Duty.—This section does not supersede or alter the duty of a carrier at comon law, but merely enforces an admitted duty and superadds a penalty. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

Section Strictly Construed.—This is a penal statute and must be strictly construed. Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697.

Does Not Apply to Interstate Shipments.—A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation, under this section. Bivens Bros. v. Atlantic Coast Line R. Co., 176 N. C. 414, 97 S. E. 215. See, also, Hickory Marble Co. v. Southern R. Co., 147 N. C. 53, 60 S. E. 719.

Same—Although Both Terminal Points in State.—A penalty under this section cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are within the State, but the shipment necessarily passes into another State in transitu. Such is interstate commerce and cannot be interferred with by the State. Shelby Ice, etc., Co. v. Southern R. Co., 147 N. C. 66, 60 S. E. 721.

Two Days Allowed at Initial Point.—Under this section, the carrier is allowed two days at the initial point for the transportation of freight instead of the one day allowed by general statute section 922. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

Same—No Deduction for Receipt and Delivery.—Under this section the two days at the initial point are allowed for the purpose of giving a reasonable time to begin the transportation; the forty-eight hours at each intermediate point are allowed for the necessary change of cars or unloading and loading; and it is not a reasonable construction of the statute to deduct the day of the receipt and the day of delivery from the time thus fixed. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55.

Deductible Time Allowed Applies to Actions for Penalty as Well as Damages.—The deductible time allowed by this section in computing "reasonable time," to wit, "two days at the initial point and forty-eight hours at one intermediate point for each hundred miles distance or fraction thereof," applies to actions brought to recover the penalty given by said section and fixing the amount thereof, and not to actions for damages only. Talley v. Atlantic Coast Line R. Co., 198 N. C. 492, 493, 152 S. E. 390.

"Intermediate Point" Defined.—An "intermediate point" for which time is allowed under this section, in transporting freight is only where the freight is transferred to another road. Davis v. Atlantic Coast Line R. Co., 145 N. C. 207, 59 S. E. 53.

In shipment of less than car-load lots a point where they are ordinarily transferred from one car to another in transit, at a junctional point on the same road, is an intermediate point, within the meaning of this section. Blue Ridge Collection Agency v. Southern R. Co., 147 N. C. 593, 61 S. E. 462.

Same—Transfer at Carrier's Distributing Point.—When a car-load intrastate shipment necessarily is transferred without breaking bulk from one road of the carrier's system to another thereof at a general distributing point in the carrier's system in order to reach destination, the carrier is allowed thereat the statutory time for transportation at such point as an intermediate point. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

"Ordinary Time" a Question for Jury.—The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, under this section, is a question of fact for the jury. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277; Shelby Ice, etc., Co. v. Southern R. Co., 147 N. C. 66, 60 S. E. 721.

In an action for the recovery of a penalty under this section, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery after allowing for the "lay days," etc., provided by this section. It is error for the trial court to instruct the jury, if they believed the evidence, to answer the issue in a certain way or in a sum certain. Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

Same—No Fixed Rule.—This section does not fix a "hard and fast" rule in defining reasonable time. From the "ordinary time" within which the jury find the goods should have been transported and delivered, the court must deduct two days at the "initial point" and forty-eight hours at each "intermediate point," and for all time in excess thereof the statutory penalty may be recovered. Jenkins v. Southern R. Co., 146 N. C. 178, 59 S. E. 663.

Same—Burden of Proof.—When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff. Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697.

Same—Evidence.—In an action to recover the penalty given by this section, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may

be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions the carrier has failed to transport and deliver within a reasonable time. Jenkins v. Southern R. Co., 146 N. C. 178, 59 S. E. 663.

Same—Illustrations.—When there is evidence that the time in transporting a certain shipment from one station to another on the same railroad, leading directly to the point of destination, and only 25 miles apart, was twelve days, the jury will be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and in the absence of explanation by defendant, fix the amount of wrongful delay. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.

When it is admitted that certain articles were received by defendant, to be transported and delivered to plaintiff, the party aggrieved, both points being in the State, the distance separating them 58 miles, with but one intermediate point between the place of shipment and destination, and that they were not delivered to plaintiff within twenty-one days, the delay was unreasonable. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55. The official headnote to this case is misleading.—Ed. Note.

Computation of Time.—The time in which railroads shall transport freight shall be computed by excluding the first day and including the last, except when the last day falls on Sunday. Davis v. Atlantic Coast Line R. Co., 145 N. C. 207, 59 S. E. 53.

When the carrier was allowed two days time for a shipment at an intermediate point, and therefore could not deliver it before Sunday, delivery on the next succeeding day was a compliance with the law. Blue Ridge Collection Agency v. Southern R. Co., 147 N. C. 593, 61 S. E. 462.

In a suit for penalty against the carrier for failure to transport freight, under this section, the defense that the last day, being Sunday, should not be counted, under section 3480, is unavailable when it is made to appear that the delay chargeable began to run and to be counted from the Saturday preceding; for the charge for delay having once begun to run, it continues to run without deduction for Sundays or holidays. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277; Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55.

Issues.—An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty, under this section, is objectionable. Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

Who Entitled to Recover.—The real "party aggrieved" is entitled to recover the penalty, under this section, irrespective of the question of knowledge of or notice to the defendant. Cardwell v. Southern R. Co., 146 N. C. 218, 59 S. E. 673.

Who Is "Party Aggrieved."—The plaintiff may maintain his action against the defendant railroad company, under this section, for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appears that plaintiff shipped the goods to be for his benefit sold by the consignee, and that he (the plaintiff) was the one who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.

When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under this section, and the proper party plaintiff. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

Same—Party Whose Legal Right Denied.—The plaintiff is entitled to recover the penalty as the "party aggrieved," under this section, for the defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made. Cardwell v. Southern R. Co., 146 N. C. 218, 59 S. E. 673.

Same—Goods Not to Be Paid for until Delivery.—When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay in transitu, as the party aggrieved. Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

When, by the contract or agreement between a vendor and vendee of goods, the goods are to be "received, inspected and weighed" by the vendee before any part of the purchase price is payable, the title does not vest in the vendee, and the vendor is the "party aggrieved" under the meaning of this section. Elliott v. Southern R. Co., 155 N. C. 235, 71 S. E. 339.

Same—Notice Immaterial.—When it is shown that the plaintiff is the "party aggrieved," under this section, it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.

Action Not Brought "on Relation of State."—Under this section, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, that would be a mere informality, which could be remedied by amendment. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

No Right to Hold Freight Full Time Limit.—This section providing that a carrier shall not allow any freight to remain at any "intermediate point" for more than forty-eight hours, does not authorize the carrier to hold it at each of such points the extreme limit, without any necessity for detaining it at all. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

When Transportation Ceases.—Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended. Brooks Mfg. Co. v. Southern R. Co., 152 N. C. 665, 669, 68 S. E. 243.

Transportation does not cease when a car-load is placed by the carrier within the yard limits of the point of destination. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

Delivery Does Not Have to Be on Private Tracks.—This section does not apply to a delivery on the private tracks of a consignee; but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. Brooks Mfg. Co. v. Southern R. Co., 152 N. C. 665, 68 S. E. 243.

When Goods Travel over Several Lines.—When the initial carrier delivers goods to its connecting carrier, necessary for them to be by it further transported to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier, is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55.

Same—Parties to Action.—Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time, the burden being upon each defendant to show that it had not failed in its duty. Sellars Hosiery Mills v. Southern R. Co., 174 N. C. 449, 93 S. E. 952.

When Bill of Lading Not Presumptive Evidence.—When it was the consignor's duty to load a car for shipment, which had been placed at its mill by the carrier, and the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, and the question is an open one for the jury in a suit by the consignee for the penalty for failure to deliver under this section. Peele v. Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

As to bills of lading, generally, see section 280 et seq.

Negligent Default in Delivery.—This section extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. Mitchell v. Atlantic Coast Line R. Co., 183 N. C. 162, 110 S. E. 859.

Duty to Notify Consignee.—Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery. This principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. Acme Mfg. Co. v. Tucker, 183 N. C. 303, 111 S. E. 525.

Burden of Proof as to Destruction of Goods.—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by this section, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial

carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

Verdict Incomplete.—Where it is established by the jury that a consignment of goods was carried to the delivering point by the carrier, its failure to deliver to the consignee, or to notify him, and the goods are lost while in its possession, the verdict is incomplete when there was no issue submitted as to whether the carrier, who is a party to the action, was in default in not delivering it to the consignee. Acme Mfg. Co. v. Tucker, 183 N. C. 303, 111 S. E. 525.

Sufficiency of Evidence on Motion for Nonsuit.—Where a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time the motion for nonsuit was properly denied. Mitchell v. Atlantic Coast Line R. Co., 183 N. C. 162, 110 S. E. 859.

Joinder of Actions.—An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay given by this section, do not merge into each other. They arise on contract and may be joined in the same action. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

Regulation of Dangerous Article.—The Corporation Commission is given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public-service corporation, and particularly to regulate the shipment of articles rendering transportation dangerous, such as inflammable articles of freight. Tilley v. Norfolk & Western R. Co., 162 N. C. 37, 77 S. E. 994.

Applied in Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697.

Cited in Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 88, 170 S. E. 129.

§ 3517. Flume companies exercising right of eminent domain become common carriers.—All flume companies availing themselves of the right of eminent domain under the provisions of the chapter Eminent Domain shall become public carriers of freight, for the purposes for which they are adapted, and shall be under the direction, control and supervision of the corporation commission in the same manner and for the same purposes as is by law provided for other public carriers of freight. (1907, c. 39, s. 4.)

For special law as to Duplin County, see Public Laws 1911, c. 214.

§ 3518. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.—All common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the interstate commerce commission in case of shipments from without the state and with those of the corporation commission of this state in case of shipments wholly within this state, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee aggrieved by any suit in any court of competent jurisdiction. (Rev., s. 2633; 1905, c. 330.)

See Editor's Note under section 3413.

Cross Reference.—As to filing and adjustment of claims, see section 3524 and notes thereto; as to the bill of lading, see sections 280 et seq.; as to the power of the utilities commissioner to fix freight rates, see section 1066. For present established rates, see section 1080; as to the power of the utilities commissioner to regulate the delivery of freight, see section 1053; as to the carrier's duty to deliver goods, see 2 Enc. Dig. 796; as to the carrier's duty in making delivery, see 2 Enc. Dig. 810 et seq.; 13 Enc. Dig. 319 et seq.

Constitutionality of Section.—The penalty for failure of a common carrier to deliver freight, as prescribed by this section, shipped from beyond the State, after it has been unloaded from its cars and while in the depot, is constitutional and not a burden upon interstate commerce. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181; Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, this section, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce. Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383.

Foreign Corporation Bound to Obey Laws.—Where a railroad corporation chartered by another state, leases a railroad chartered by this state, it is bound to observe and obey all laws of this state regulating the business of transportation. Hines v. Wilmington, etc., R., 95 N. C. 434.

Intrastate Rebilling of Interstate Shipment.—An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of this section, the penalty therein accrues. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Section Not Cumulative.—This section imposes only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for the same offense. Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383.

Consignee Must Produce Bill of Lading.—A consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242; as to the bill of lading, generally, see section 280 et seq.

Insufficient Notice to Consignee.—Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignee. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Burden of Proof.—Where the consignee brings his action to recover the value of a shipment of goods from the carrier, shows that the shipment was addressed to him, was prepaid, in the carrier's possession at destination, and a demand for delivery, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

No Liability for Unlawful Shipment.—A druggist who has not received a valid license to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty by this section, for the failure to deliver such liquors to him for the purpose of sale, for such are unlawful and prohibited. Smith v. Southern Express Co., 166 N. C. 155, 82 S. E. 15.

Carrier Cannot Collect Storage for Illegal Detainment.—A carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Agent Ignorant of Amount of Charges.—It is no defense to an action to recover a penalty for refusing to deliver shipment upon tender of freight charges by the consignee, for the defendant company to show its agents did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates. Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383.

Rate When Smaller Cars Furnished.—Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size the rate for the shipment must be the same. Yorke Furniture Co. v. Railroad, 162 N. C. 138, 78 S. E. 67.

§ 3519. Charging unreasonable freight rates misdemeanor.—If any railroad company doing business in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of

freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this state which has the right, license or permission to use, operate or control the same, it shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars. (Rev., s. 3768; 1899, c. 164, s. 12.)

For a similar provision applying to passenger rates, see section 3491. See, also, section 1082, forbidding railroads from receiving greater rates than these established by section 1080.

§ 3520. Allowing or accepting rebates or pooling freights misdemeanor. — If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months. (Rev., s. 3762; Code, s. 1968; 1879, c. 237, s. 2.)

Cited in McGwigan v. Wilmington & W. R. R., 95 N. C. 428, 445.

§ 3521. Partial charges for partial deliveries. —Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not h ve been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight, or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interferring with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu. (Rev., s. 2641; 1893, c. 495.)

See section 3514 and notes thereto.

§ 3522. Placing cars for loading.—Whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for cars to be loaded in carload lots with any kind of freight embraced in the tariffs of the company, stating in the application the character of the freight, the number of cars wanted, the station, depot, siding, wharf or boat-landing on the line of the company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the cars within four days from seven o'clock a. m., the day following such application. The application must be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the cars named in such written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making application: Provided, that the railroad company, before furnishing the cars upon such application, may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage in case the car or cars are not loaded within forty-eight hours after notice of the placement of car or cars in accordance with demand: Provided, that the corporation commission may excuse from the penalties imposed by this section independent lines not owned, operated, or controlled by any other line or system when trackage is less than one hundred miles. (1907, c. 217, s. 3.)

See Editor's Note under section 3413.

As to the power of the utilities commissioner to make rules for the loading of cars and demurrage, see section 3522.

Carrier Entitled to Notice.—The carrier is entitled to reasonable notice from the shipper for placing a car to be loaded, and when written notice is required by its rules, the rule may be waived or abandoned by a verbal agreement. Futch v. Atlantic Coast Line R. Co., 178 N. C. 282, 100 S. E. 436.

Same—No Liability for Penalty unless Four Days Notice Given.—A railway company is not liable for the penalty for failure to furnish cars to those who apply in writing when the company is not allowed the four days therein specified within which to furnish them, notwithstanding the railway company did not furnish them for twenty-three days. McDuffie v. Seaboard Air Line Ry., 145 N. C. 397, 59 S. E. 122.

When Action Not Brought for Penalty.—Where the recovery of the penalty is not sought, but the action is to recover damages for the carrier's failure to receive and ship the goods, a written demand for the cars is not required, and a verbal one is sufficient. Bell v. Norfolk Southern R. Co., 163 N. C. 180, 79 S. E. 421.

Failure to Furnish Ventilated Cars.—When a railroad company fails in its duty to furnish the shipper a ventilated car for transporting his fruit, and furnishes a box car instead, the company is not relieved from liability solely by the fact that the shipper knew his fruit was forwarded in a box car. Forrester & Co. v. Southern R. Co., 147 N. C. 553, 61 S. E. 524.

Interstate Shipment.—An action may be brought in the state courts to recover damages for failure to furnish cars to be used in interstate commerce. Smart v. Tallulah Falls R. Co., 173 N. C. 650, 92 S. E. 929.

Cited in Pinehurst Peach Co. v. Norfolk Southern R. Co., 201 N. C. 176, 159 S. E. 359.

§ 3523. Baggage and freight to be carefully handled.—All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such company it shall be presumed that the injury was caused by the negligence of the company. (Rev., s. 2624; 1879, c. 46.)

As to the power of the utilities commissioner to regulate the delivery of freight and baggage, see section 1053.

Delivery Necessary.—To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to a valid delivery the general rule is that when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. Williams v. Southern R. Co., 155 N. C. 260, 71 S. E. 346.

Same—Estoppel.—The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. Williams v. Southern R. Co., 155 N. C. 260, 71 S. E. 346.

Stipulations Limiting Liability.—Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk Southern R. Co., 161 N. C. 400, 77 S. E. 339.

A common carrier cannot contract with a passenger against the loss of baggage by its negligence. Thomas v. Southern R. Co., 131 N. C. 590, 42 S. E. 964.

Liability for Non-Personal Baggage.—While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

When Liability as Carrier Ceases.—When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

Liability When Passenger Not Carried.—When there is no partnership arrangements between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junctional point, without compensation. Kindley v. Seaboard Air Line Ry. Co., 151 N. C. 207, 65 S. E. 897.

Baggage Not on Same Train.—The passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. Perry v. Seaboard Air Line R. Co., 171 N. C. 158, 88 S. E. 156.

§ 3524. Claims for loss of or damage to goods; filing and adjustment.—Every claim for loss of or damage to property while in possession of a common carrier, including every express company, firm or corporation doing an express business within the state, shall be adjusted and paid within ninety days in case of shipments wholly within the state and within four months in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee, or at the point of origin by the consignor, when it shall appear that the consignor was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint. (Rev., s. 2634; 1907, c. 983; 1911, c. 139.)

As to requirement of notice of loss, see 2 Enc. Dig. 831 et seq.; 13 Enc. Dig. 330 et seq.; as to the failure to adjust claims, see 2 Enc. Dig. 788 et seq.; 13 Enc. Dig. 312 et seq.; as to the loss or injury to goods, generally, see 2 Enc. Dig. 820 et seq.; 13 Enc. Dig. 339 et seq.

Section Strictly Construed.—This is a penal statute, and in order to recover, the plaintiff must bring his case strictly within its terms. Watkins v. American Ry. Express Co., 190 N. C. 605, 130 S. E. 305.

Section Must Be Followed.—The penalty imposed by this section is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning; and in order to recover the penalty, the consignee must file his claim with the agent as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. Eagles Co. v. East Carolina Ry., 184 N. C. 66, 113 S. E. 512.

Who May Bring Action.—Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon their acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale has been canceled by consent, the consignor may maintain his action against the carrier for damages. Aydlett v. Norfolk Southern R. Co., 172 N. C. 47, 89 S. E. 1000.

Joinder of Causes of Action.—A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver and for the failure to settle the claim within the statutory period, may be united in the same action. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

Same—Issues Separate and Distinct.—In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by this section, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. Hussey v. Atlantic Coast Line R. Co., 183 N. C. 7, 110 S. E. 599.

Carrier Cannot Contract against Own Negligence.—A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. Everett v. Norfolk, etc., R. Co., 138 N. C. 68, 50 S. E. 557; Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.

Owner Cannot Refuse Damaged Goods.—Damages to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless. He must accept the goods and sue for the damages upon the refusal of the carrier to pay them. Whittington v. Southern R. Co., 172 N. C. 501, 90 S. E. 505.

Prima Facie Case.—In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Osborne v. Southern Ry. Co., 175 N. C. 594, 96 S. E. 34; Everett v. Norfolk, etc., R. Co., 138 N. C. 68, 50 S. E. 557.

Same—Limited Liability.—In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.

Connecting Carriers—Duty Assumed by Carrier.—Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

Same—When Duty of Safe Carriage Attaches.—The duty of

safe carriage attaches as the goods pass into the custody of each company, and ceases only when they are safely delivered to its successor. Lindley v. Richmond, etc., R. Co., 88 N. C. 547.

Same—Burden of Proof as to Safe Delivery.—On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

Same—Evidence.—To show that the freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it is the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, is admissible. Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735.

Same—Prima Facie Case.—Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a prima facie case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. Lyon v. Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. 1.

Same—Presumption of Damage.—Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption. Gwyn Harper Mfg. Co. v. Carolina Central R., 128 N. C. 280, 38 S. E. 894; Mitchell v. Carolina Central R. Co., 124 N. C. 236, 32 S. E. 671; Morganton Mfg. Co. v. Ohio, etc., R. Co., 121 N. C. 514, 28 S. E. 474.

Same—Goods Found Damaged at Destination. — When goods are shipped over several connecting lines of carriers and are found in a damaged condition at destination, there is a presumption that the injury was negligently inflicted by the last carrier subject to be rebutted by evidence. Boss v. Atlantic Coast Line R. Co., 156 N. C. 70, 72 S. E. 93. This in on the principle that as the carrier is peculiarly in a position to know the facts, the burden of proof should rest on it. Beville v. Atlantic Coast Line R. Co., 159 N. C. 227, 74 S. E. 349.

Same—Liability for Negligence of Connecting Carrier.—A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735.

But where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading, the freight charges to be divided according to the respective mileage of the companies, they become a copartnership and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line. Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854.

Same — Interstate Shipments. — The Interstate Commerce Act and Carmack Amendment placed the entire regulation of interstate commerce under Federal control, and the penalty provided for by this section for failure of a carrier to pay a claim in the time prescribed does not apply to interstate shipments. See Morphis v. Express Co., 167 N. C. 139, 83 S. E. 1. These acts made the initial carrier liable for damages to a shipment made over connecting lines. However this does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the state court from requiring the carriers to show which is responsible for the damage. See Aydlett v. Norfolk Sou. R. Co., 172 N. C. 47, 89 S. E. 100. And notice of damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. Gilikin v. Norfolk Southern R. Co., 174 N. C. 137, 93 S. E. 469.

While the initial carrier may also be held liable for damages to a shipment, made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the carrier whose negligence caused the damages. Gilkin v. Railroad, 174 N. C. 137, 93 S. E. 469.

As to connecting carriers, generally, see 2 Enc. Dig. 834 et seq.; 13 Enc. Dig. 333 et seq.

Parol Agreement to Ship Sufficient.—When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. Lyon v. Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. 1.

Filing of Claim Prerequisite to Penalty.—A consignor of a shipment of goods is required by this section to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within ninety days, etc. Hamlet Grocery Co. v. Southern R. Co., 170 N. C. 241, 87 S. E. 57.

Same—Carrier May Regulate.—A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. Phillips v. Seaboard Air Line R. Co., 172 N. C. 86, 89 S. E. 1057.

A stipulation that they must be filed in four months is reasonable. Culbreth v. Atlantic Coast Line R. Co., 169 N. C. 723, 86 S. E. 624. An allowance of sixty days is reasonable. Gwyn-Harper Mfg. Co. v. Carolina Central R., 128 N. C. 280, 38 S. E. 894. But an allowance of thirty days is unreasonable. Gwyn-Harper Mfg. Co. v. Carolina Central R., 128 N. C. 280, 38 S. E. 894.

Same—Notice to Agent.—Where the second carrier in the connected line of shipment causes damages to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. Aydlett v. Norfolk Southern R. Co., 172 N. C. 47, 89 S. E. 1000.

Same—Omission of Amount of Loss. — It is not required that a claimant state the amount of his loss, in his claim for damages against a carrier. McRary v. Southern Ry. Co., 174 N. C. 563, 94 S. E. 107.

Same—Interstate Shipments.—The Federal statutes, while recognizing the right of the carrier to stipulate for the filing of claims within a reasonable period, provide that if the loss or damage is due to a delay in transit by negligence no notice shall be required as a condition precedent to recovery. Mann v. Transportation Co., 176 N. C. 104, 96 S. E. 731.

Same — By Mail.—The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of this section, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. The delivery of the mail will be presumed. Eagles Co. v. East Carolina Railway, 184 N. C. 66, 113 S. E. 512.

Same—Necessity of Written Demand.—A penal statute is to be strictly construed, and the provisions of this section is not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give. Thompson v. Southern Express Co., 147 N. C. 343, 61 S. E. 182. But it is no bar to a recovery from the carrier of actual damages sustained. Hinkle v. Southern Ry. Co., 126 N. C. 932, 36 S. E. 348; Kime v. Sou. R. Co., 153 N. C. 398, 69 S. E. 264.

Stipulations May Be Waived.—The stipulation in a live-stock bill of lading requiring that notice in writing be given the carrier's agent at destination, of claim for damages to the animals shipped, before they are removed or mingled with other animals, may be waived by the carrier's agent at the delivering point. Newborn v. Louisville, etc., R. Co., 170 N. C. 205, 87 S. E. 37.

Recovery Must Equal Claim.—In order to recover the penalty for failure to settle a claim for damages within ninety days, etc., the burden is on plaintiff to show that the amount of his recovery be at least equal to the amount of his written demand. Watkins v. American Railway Express Co., 190 N. C. 605, 130 S. E. 305.

Settlement after Penalty Accrues.—The proviso that consignee must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued. Rabon v. Atlantic Coast Line R., 149 N. C. 59, 62 S. E. 743.

Plaintiff Must Prove Failure to Settle.—The burden is on plaintiff to show that the common carrier has failed to settle his claim in ninety days, etc., after written de-

mand under the provisions of this section, applying to intrastate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment, is not sufficient. Watkins v. American Ry. Express Co., 190 N. C. 605, 130 S. E. 305.

Measure of Damages for Delay.—In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff, which was engaged in equipping a cotton factory, it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to workmen and such other costs and expenses incurred by plaintiff in consequence of the delay. Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854.

§ 3525. Existing remedies to continue.—The preceding section shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers. (Rev., s. 2635; 1905, c. 330, s. 5.)

See section 3475 and notes thereto.

Common Law Remedies.—The common law remedies of shippers and passengers are not taken away by the provisions of this chapter. Bell v. Norfolk Sou. R. Co., 163 N. C. 180, 79 S. E. 42, and cases there cited.

Action May Be Brought in Contract or Tort.—A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond & Danville R. Co., 108 N. C. 414, 12 S E. 954, 956; Va-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 155 N. C. 148, 71 S. E. 71.

§ 3526. Carrier's right against prior carrier.—Any common carrier, upon complying with the provisions of the two preceding sections, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question. (Rev., s. 2636; 1905, c. 330, s. 3.)

As to the power of the utilities commissioner to act as a board of arbitrators between carriers, see section 1059.

§ 3527. Regulation of demurrage.—No railroad or other transportation company doing business in the state shall make any charge on account of demurrage while a car, whether the same be a refrigerator car or not, is being loaded for shipment until it has remained at the place of loading for forty-eight hours from the time it has been so placed; but the corporation commission may change this provision, if it considers it unreasonable, under the power vested in it under the chapter Corporation Commission, to make regulations as to demurrage and the loading of cars. (Ex. Sess. 1913, c. 55.)

See Editor's Note under section 3413.

As to the power of the utilities commissioner to regulate demurrage, see section 1057.

§ 3528. Shipment of livestock on Scuppernong river regulated; violation of regulations misdemeanor.—If any transportation company or common carrier shall receive livestock for shipment at any of the landings or shipping points on Scuppernong river, Columbia excepted, between the hours of sunset and sunrise, or shall during the time any livestock may be held for shipment at any landing or shipping point on such river, Columbia excepted, fail to keep the same in a covered pound or inclosure, supplied with necessary food and drinking water, and at all times in full view of the public, such transportation company, common carrier, or the agent of either, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3675; 1903, c. 283.)

See State v. Southern R. Co., 141 N. C. 846, 54 S. E. 294.

§ 3529. Carload shipments of watermelons regulated; violation of regulations misdemeanor.—It shall be the duty of all common carriers to furnish the weights of all carload shipments of watermelons originating within the state to the shippers thereof within forty-eight hours after receipt of the same. Any common carrier violating the provisions of this section shall upon conviction be fined ten dollars for each offense. (Ex. Sess. 1913, c. 68.)

§ 3530. Express companies to settle promptly for cash-on-delivery shipments; penalty.—Every express company which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within twenty days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars, where the value of the shipment is twenty-five dollars or less, and, where the value of the shipment is over twenty-five dollars, a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars in any case: Provided, no penalty shall be collectible where the shipments, through no act of negligence of the company, is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall not be in derogation of any right the consignor may now have to recover of the company damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. (1909, c. 866.)

§ 3531. Failure to place name on produce shipped misdemeanor.—Any person, firm or corporation selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without the state of North Carolina, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that this section shall not apply to railroads, express companies and other transportation companies selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other transportation companies, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193.)

§ 3532. Unclaimed freight to be sold.—Every railroad, steamboat, express or other transportation company which shall have had unclaimed

freight, not perishable, in its possession for a period of six months, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of the advertisement and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to take place. The expenses incurred for advertising shall be a lien upon such freight in a ratable proportion according to the value of each article, package or parcel, if more than one. (Rev., s. 2637; Code s. 1985; 1871-2, c. 138, s. 48.)

What Storage Charges Allowed for.—Storage charges are allowed the carrier for the service rendered in taking care of the goods, the inconvenience to the warehouseman, and the liability for their safe custody if they do not exercise proper care. Holloman v. Southern R. Co., 172 N. C. 372, 90 S. E. 292.

Same—When Consignee Refuses Good. — Where a consignee of goods wrongfully refuses to receive goods on account of excessive charge made for their transportation, no demurrage charges are collectible by the carrier, but only reasonable storage charges, until, in the exercise of its rights under this section, it could properly dispose of the goods and thereby be relieved of further charge concerning them. Norfolk Southern R. Co. v. New Bern Iron Works, 172 N. C. 188, 90 S. E. 149.

Applies to Interstate Shipment.—This section applies to interstate as well as intrastate shipments, in the absence of any interfering regulation by Congress or of the Interstate Commerce Commission. Norfolk Southern R. Co. v. New Bern Iron Works, 172 N. C. 188, 90 S. E. 149.

§ 3533. Sale of unclaimed perishable freight.—In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be, on giving the notice required in the preceding section, after its receipt at the place where it was directed to be left. (Rev., s. 2638; Code, s. 1986; 1871-2, c. 138, s. 49.)

§ 3534. Funds from unclaimed freight to be paid to state university.—Such railroad, steamboat, express or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim the surplus within five years, such surplus shall be paid to the state university. (Rev., s. 2639; Code, s. 1987; 1871-2, c. 138, s. 50.)

§ 3534(a). Sale of unclaimed baggage or freight; notice; sale of neglected property.—Any common carrier which has had in its possession on hand at any destination in this state any article whether baggage or freight, for a period of sixty days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said sixty days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered mail, if known to such carrier, not less than fifteen days before such sale shall be made; or notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the state: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication. (1921, c. 124, s. 1.)

§ 3534(b). Sale of live or perishable or cheap freight.—Where the article referred to in the preceding section is live freight, or perishable freight, or freight of such low value as would not bring the accrued transportation and other charges if held for sixty days as provided in the preceding section, the common carrier may, with or without advertisement, sell the same in such manner and at such time and in such place as will best in its judgment protect the interests of the carrier the consignor and the consignee, and whenever practicable the consignor and consignee shall be notified of the proposed sale of such live or perishable freight, or freight of such low value. (1921, c. 124, s. 2.)

§ 3534(c). Record of articles and prices; deduction of expenses; payment of balance.—The carrier shall keep a record of the articles sold, and of the prices obtained therefor, and shall, after deducting all charges and expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within two years from the date of the sale. (1927, c. 124, s. 3.)

Art. 12. Street and Interurban Railways

§ 3535. May build and maintain water-power plants.—Where any street or interurban railway company owns lands on one or both sides of a stream which can be used in developing a water-power, and desires to erect and maintain a water-power plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain and operate such water-power plant for such purpose, and may build, maintain and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, water-ways, wasteways, reservoirs, and all works, machinery, houses, shops and buildings necessary for the use and operation of a water-power plant for generating electricity. Whenever such company shall not own the entire water-front, or all of the lands, water rights, or other easements necessary to be used in fully developing such water-power, it shall have the power to acquire any other lands, water rights or easements which may be needed to fully develop such water-power; and if the company cannot agree with the owners for the purchase of such lands, water rights or other easements, the same may be condemned by the railway company for that purpose, and the procedure shall be the same as that provided for the condemnation of lands for railroads: Provided, that no dwelling

house, yard, garden, orchard or burial-ground shall be condemned for such purpose: Provided further, that such company shall not have the power to condemn any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. Any surplus electric power generated by any plant erected under the provisions of this section may be sold by such company upon reasonable terms. (1907, c. 302; 1913, c. 94.)

Burden of Proof.—Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water-power within the provision of the statutes excepting them. Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 171 N. C. 314, 88 S. E. 245.

Land to Be Used in Developing Power.—A public-service corporation, owning lands on one bank of stream, cannot condemn across the stream and take the water rights held in the stream by another public-service corporation, when it appears that the defendant holds its lands across the stream to supply power to operate its electric light and power plant, with which it is supplying such light and power to its patrons. Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 169 N. C. 471, 86 S. E. 296; Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167; 80 S. E. 398.

§ 3536. Separate accommodations for different races; failure to provide misdemeanor.—All street, interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the state of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1907, c. 850, ss. 1, 5, 7; 1909, c. 851.)

As to the power of the utilities commissioner to require separate waiting rooms for the white and colored races, see section 1043.

§ 3537. Passengers to take certain seats; violation of requirement misdemeanor. — Any white person entering a street-car for the purpose of becoming a passenger therein shall, if necessary to carry out the purposes of the preceding section, occupy the first vacant seat or unoccupied space in the aisle nearest the front of the car, and any colored person entering such car for a like purpose shall occupy the first vacant seat or unoccupied space in the aisle nearest the rear end of the car: Provided, however, that no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time unless or until all of the other seats in the car shall be occupied. Any person wilfully violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section. (1907, c. 850, ss. 2, 6.)

§ 3538. No liability for mistake in assigning passengers to wrong seat.—No street, suburban, interurban railway company, its agents, servants, or employees, shall be liable to any person on account of any mistake in the designation of any passenger to a seat or part of a car set apart for passengers of the other race. (1907, c. 850, s. 8.)

§ 3539. Misconduct on car; riding on front platform misdemeanor.—It shall be unlawful for any passenger to expectorate upon the floor or any part of any street-car, or to use, while thereon, any loud, profane or indecent language, or to make any insulting or disparaging remark to or about any other passenger or person thereon within his or her hearing. It shall likewise be unlawful for any passenger to stand willfully upon the front platform, fender, bumper, running-board or steps of such car while the same is in motion, whether such passenger has or has not paid the usual fare for riding on such car. Any person willfully violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section. (1907, c. 850, ss. 3, 6.)

§ 3539(a). Sections 3536-3539, extended to motor busses used as common carriers.—The provisions of sections 2536-3539 are hereby extended to motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators. (1933, c. 489.)

§ 3540. Passenger riding on rear platform assumes risk; copies of section to be posted.—Any passenger who shall ride upon the rear platform of any street-car in motion, when there is room for such passenger either to sit or stand inside the car, shall be deemed to have assumed all the risks of being injured while so riding, as the result of any act of the street-car company: Provided, that such company shall make it appear that such passenger would not have been injured had he been on the inside of the car: Provided further, that before any street, interurban or suburban railway shall be allowed to invoke the provisions of this section it shall have copies thereof printed and framed and one copy hung in each end of all cars operated on its lines, and shall further have a placard hung in a conspicuous place on the rear of such cars, which shall read as follows: "Passengers are warned not to ride on this platform," and a placard hung on each side of open cars in a

conspicuous place, which shall read as follows: Passengers are warned not to ride on the running board." (1907, c. 850, s.).)

As to injury while on train platform, see section 3509.

§ 3541. Street-cars to have vestibule fronts; failure to provide them misdemeanor.—All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, that such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for the use of vestibule fronts. The corporation commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of refusal or failure. (Rev., ss. 2615, 3800; 1901, c. 743.)

See Editor's Note under section 3413.

Duty of Street Car Company.—A street car company owes the duty to its passengers to use a high degree of care to see that they safely alight from its cars. Woods v. North Carolina Public-Service Corporation, 174 N. C. 697, 94 S. E. 459.

Plaintiff Must Prove Casual Connection.—The plaintiff must show a casual connection between the violation by defendant of this section and the injury sustained. Rich v. Asheville Electric Co., 152 N. C. 689, 68 S. E. 232.

§ 3542. Street cars to have fenders; failure to provide them misdemeanor.—All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The corporation commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure. (Rev., ss. 2616, 3081; 1901, c. 743, s. 2.)

See Editor's Note under section 3413.

"Practical Fenders."—The "practical fenders" required for street cars by this section are those which are efficient for the purpose of protecting human life, etc., or the most approved appliance in general use, and a violation of this statute is negligence per se. Smith v. Charlotte Elec. Ry. Co., 173 N. C. 489, 92 S. E. 382.

Violation Negligence Per Se.—The violation of this section by a street car company, in failing to provide a "practical fender" for its car, causing an injury, is evidence of actionable negligence per se. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 131 S. E. 402; Ingle v. Asheville Power, etc., Co., 172 N. C. 751, 90 S. E. 953.

Travelers by Vehicles Protected. — The requirement of this section, that all street cars when operated must have practical fenders on the lead end thereof, applies to the protection of those traveling by vehicles, automobiles, etc. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 131 S. E. 402.

Burden of Proof as to Exemption.—The burden of proof is on a street railway company to show that the Corporation Commission, in its judgment, had found it unnecessary to enforce the provisions of this section, requiring the use of "practical fenders" on their street cars, in an action to recover damages caused by its negligence in not using them. Smith v. Charlotte Elec. Ry. Co., 173 N. C. 489, 92 S. E. 382.

Exemption of All Companies Unauthorized.—This section does not authorize an exemption of all the street railway companies by the Corporation Commission, as this amounts to a suspension of the statute. Henderson v. Durham Traction Co., 132 N. C. 779, 44 S. E. 598.

Evidence.—In an action for the killing of a dog by a street car, it is not competent to show the condition of the fenders on particular cars other than the one by which the dog was killed, it being shown that the fenders were different on different cars. Moore v. Electric Ry., etc., Co., 136 N. C. 554, 48 S. E. 822.

Art. 12A. Electric Interurban Railways

§ 3542(a). Organization.—Any electric interurban railway company, whether organized under the laws of this or any other State, may construct, maintain and operate electric interurban railways and engage in business in this State. (1927, c. 33, s. 1.)

§ 3542(b). Right of eminent domain.—Any such company may exercise the right of eminent domain under the provisions of chapter thirty three of the Consolidated Statutes of North Carolina, and acts amendatory thereof, and for the purpose of constructing its roads and other works, shall have the powers given railroad corporations by this chapter except that no such company when organized under the laws of another state shall operate any part of its line of railway in this State by steam motive power, or as a part of a general steam railroad system of transportation. (1927, c. 33, s. 2.)

§ 3542(c). Status defined.—All such companies shall be deemed public service corporations and shall be subject to the laws of this State regulating such corporations. (1927, c. 33, s. 3)

CHAPTER 68

REGISTER OF DEEDS

Art. 1. The Office

§ 3543. Election and term of office.— In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, a register of deeds. (Rev., s. 2650; Const., Art. VII, s. 1.)

Legislature May Change Duties and Emolument.—The office of register of deeds is constitutional, but the duties are statutory, and the Legislature may, within reasonable limits, change the duties and diminish the emoluments of the office, if the public welfare requires it to be done. Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950.

§ 3543(1). Four-year term for registers of deeds; counties excepted. — At the general election for the year one thousand nine hundred and thirty-six and quadrennially thereafter there shall be elected in each county of this State by the qualified voters thereof a register of deeds, who shall serve for a term of four years from the first Monday in December after his election and until his successor is elected and qualified: Provided, however, that this section shall not apply to Alleghany, Alexander, Ashe, Avery, Beaufort, Bladen, Clay, Davidson, Halifax, Harnett, Haywood, Hyde, Iredell, Jackson, Johnston, Macon, Mitchell, Orange, Rowan, Stanly, Swain, Transylvania, Vance, Washington, Yadkin, Cherokee, Dare,

Lincoln, and Moore Counties. (1935, cc. 362, 392, 462.)

§ 3544. Oath of office.— The register of deeds shall take the oath of office on the first Monday of December next after his election, before the board of county commissioners. (Rev., s. 2652; Code, s. 3647; 1868, c. 35, s. 2; 1876-7, c. 276, s. 5.)

As to form of the oath taken by the register, see section 3199.

§ 3545. Bond required.— Every register of deeds shall give bond with sufficient surety, to be approved by the board of county commissioners, in a sum not exceeding ten thousand dollars, payable to the state, and conditioned for the safe keeping of the books and records, and for the faithful discharge of the duties of his office, and shall renew his bond annually on the first Monday in December. (Rev., s. 301; Code, s. 3648; 1868, c. 35, s. 3; 1876-7, c. 276, s. 5; 1899, c. 54, s. 52.)

Cross References.—As to the penalty for issuing marriage licenses unlawfully, see section 2503 and notes thereto; as to actions on bonds, generally, see sections 354 and 356. See, also, 2 Enc. Dig. 555 et seq.; as to the bond in Dare County, see Public Laws 1907, ch. 75.

Office Vacated unless Bond Given.—The board of commissioners may declare the office vacant for failure of the register to give a sufficient bond. State v. Patterson, 97 N. C. 360, 2 S. E. 262.

All Duties Included.—The words "and faithfully discharge the duties of his office," in the hand of a register of deeds, do not refer alone to the safe-keeping of the "records and books," but to all other official acts, the nonperformance of which results in injury. State v. Young, 106 N. C. 567, 10 S. E. 1019, and cases there cited.

§ 3546. Vacancy in office.— When a vacancy occurs from any cause in the office of register of deeds, the board of county commissioners shall fill such vacancy by the appointment of a successor for the unexpired term, who shall qualify and give bond as required by law. (Rev., s. 2651; Code, s. 3649; 1868, c. 35, s. 4.)

As to the authority of the county commissioner to approve registers' bonds, see section 1297, par. 12.

Office Declared Vacated.—The county commissioners may appoint a successor to the office of register of deeds where they have declared the office vacant by reason of the incumbent's failure to give a sufficient bond. State v. Patterson, 97 N. C. 360, 2 S. E. 262.

§ 3547. Deputies may be appointed.—The registers of deeds of the several counties in this state are hereby authorized and empowered to appoint deputies, whose acts as such shall be valid and for which the registers of deeds shall officially be responsible. They shall file the certificate of the appointment of the deputy in the office of the clerk of the superior court, who shall record the same. (1909, c. 628, s. 1.)

Editor's Note.—Special acts have been passed by the legislature in regard to the appointment of deputies in certain counties; as to Dare County, see Public Laws 1907, ch. 393; as to Durham County, see Public Laws 1909, ch. 91; as to Person County, see Public Laws 1909, ch. 546.

§ 3548. Office at courthouse. — The register shall keep his office at the courthouse unless the board of county commissioners shall deem it impracticable. (Rev., s. 2653; Code, s. 3650; 1868, c. 35, s. 5.)

§ 3549. Attendance at office. — The board of county commissioners may fix by order, to be entered on their records, what days of each week, and at what hours of each day, the register of deeds shall attend at his office in person or by deputy, and he shall give his attendance accordingly. (Rev., s. 2654; Code, s. 3651; 1868, c. 35, s. 6.)

Free Abstracts Not Required.—While it is the duty of the Register of Deeds to permit all persons to inspect the records committed to his custody, he will not be required, without the payment of his proper fees, to allow any one to make copies or abstracts therefrom. Newton v. Fisher, 98 N. C. 20, 3 S. E. 822.

§ 3550. Official seal.—The office of register of deeds for every county in the state shall have and use an official seal, which seal shall be provided by the county commissioners of the several counties, and shall be of the same size and design as the seals now used by the clerk of the superior court, with the words "Office of Register of Deeds," the name of the county and the letters "North Carolina" surrounding the figures. (Rev., s. 2649; 1893, c. 119, s. 1.)

Art. 2. The Duties

§ 3551. Apply to clerk for instruments for registration.—The register of deeds shall at least once a week apply to the clerk of the superior court of his county for all instruments of writing admitted to probate, and then remaining in the office of such clerk for registration, and also for all fees for registration due thereon; which fees the clerk of the superior court shall receive for the register. (Rev., s. 2655; Code, s. 3652; 1868, c. 35, s. 7.)

§ 3552. Failure of clerk to deliver papers. — In case the clerk fails to deliver such instruments of writing, and pay over such fees as are prescribed in the preceding section, on application of the register, the clerk shall forfeit and pay to the register one hundred dollars for every such failure; for which sum judgment may be entered at any time by the judge of the superior court, on motion in behalf of the register, on a notice of ten days thereof to the clerk. (Rev., s. 2656; Code, s. 3653; 1868, c. 35, s. 8.)

§ 3553. Registration of instruments.—The register of deeds shall register all instruments in writing delivered to him for registration forthwith. He shall indorse on each instrument in writing the day and hour on which it is presented to him for registration, and such indorsement shall be entered on his books and form a part of the registration, and he shall, immediately upon making the indorsement herein required upon each instrument in writing, index and cross-index the same in the order of time in which such instruments are presented to him: Provided, that the register of deeds may, if in his opinion it is proper to do so, prepare and use in lieu of his permanent index a temporary index until the instrument is actually recorded, upon which all instruments shall be indexed immediately upon receipt of same into his office, and until said instruments shall have been recorded the temporary index shall operate in all respects as the permanent index. In the event the register of deeds shall use a temporary index, however, all instruments shall be recorded and cross-indexed on the permanent index within thirty (30) days from date of receipt of same. (Rev., s. 2658; Code, s. 3654; R. C., c. 37, s. 23; 1868, c. 35, s. 9; 1921, c. 114.)

Cross References.—As to requisites and formalities of the registration of deeds, generally, see section 3308 et seq.; 4 Enc. Dig. 524 et seq.; 13 Enc. Dig. 714 et seq.; as to the

registration of mortgages, generally, see section 3311; 9 Enc. Dig. 270 et seq.; 15 Enc. Dig. 6; as to the indexing of instruments, see section 3561 and notes thereto.

Editor's Note.—The section was radically changed in 1921, Public Laws 1921, ch. 114. Until this amendment twenty days were allowed for the registration of all instruments except mortgages and deeds of trust, it was not required that the hour of filing be endorsed on instrument, and there was no provision for a temporary index.

Section Means Complete Registration.—This section means a registration complete and perfect, so that it may serve all the purposes of the law in protecting the rights of parties directly interested, and give notice truly to the public. State v. Young, 106 N. C. 567, 570, 10 S. E. 1019.

Filing Has Effect of Registration.—The filing for registration is in law registration, and all rights and liabilities accrue from the date of filing and do not depend upon the greater or less diligence of the register in performing his duty. Glanton v. Jacobs, 117 N. C. 427, 428, 23 S. E. 335.

Delivery to Proper Officer Necessary to Filing.—Where the filing of a paper in the office of the register of deeds is necessary to the title to lands, the time thereof will be considered as at that which the paper was delivered to and received by the proper officer; and while the file mark of the officer is evidence as to the time, it is not essential under our statutes. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99.

Same—Delivery at Office.—It is required for a valid filing of a mortgage that it be delivered at the register of deeds' official office, and where a paper was delivered to the register outside of his office it is ineffectual until he returns and makes the proper entry. McHan v. Dorsey, 173 N. C. 694, 92 S. E. 598.

Sufficiency of Acknowledgment.—A certificate by the Clerk of the Superior Court that the officers of the corporation who signed the deed "acknowledged the due execution of the annexed instrument for the purpose therein set forth," was sufficient to warrant the registration of the deed. Heath, etc., Co. v. Cotton Mills, 115 N. C. 202, 20 S. E. 369.

Registry Dated When Fees Paid.—Where a deed was handed to the register for registration, but he refused to register it because his fees were not paid, but the paper was left in his office for several months, when, the fees being paid, he made an endorsement that it was filed on the day first presented, followed by an explanatory endorsement reciting the facts. The register was not compelled to register before his fees were paid, and the facts did not constitute a filing for registration on the day when the deed was first presented to the register. Cunninggim v. Peterson, 109 N. C. 33, 13 S. E. 714.

Endorsement Unnecessary.—The endorsement required to be made by register of deeds on mortgages and deeds in trust on the day on which such deeds are presented to him for registration, is not essential to registration; and when made is not conclusive evidence—but only prima facie evidence of the facts therein recited. Cunninggim v. Peterson, 109 N. C. 33, 13 S. E. 714.

Clerical Mistake.—A registry of a mortgage is not void because of a clerical mistake made by the register in transcribing, which does not affect the sense and provision as to the amount secured, description of property, etc., or obscure the meaning of the instrument. Royster v. Lane, 118 N. C. 156, 24 S. E. 796.

Omission of Signatures.—The registration of a deed showing the probate, including the separate examination of the wife, and the order of registration, and the names of the grantors, but omitting a copy of their signature at the end of the instrument is sufficient notice under this section. Smith v. Ayden Lumber Co., 144 N. C. 47, 56 S. E. 555.

Omission of Seal.—The failure of the register of deeds to copy the seal of the corporation on his books, or make an imitation copy thereon, does not render the conveyance of the lands invalid where the recitals in the deed signify that the seal was in fact attached, it appears upon the original, and the books show the name of the corporation appearing in brackets therein at its proper location. Lockville Power Corporation v. Carolina Power & Light Co., 168 N. C. 219, 84 S. E. 398; Heath, etc., Co. v. Cotton Mills, 115 N. C. 202, 20 S. E. 369.

Omission of Great Seal of State. — The fact that it does not appear of record that a scroll or imitation of the Great Seal of State was copied thereon, does not invalidate the registry of the grant. The recital in the body of the grant, as recorded, of the affixing of the seal is sufficient evidence of its regularity. Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

Correction of Omission or Error.—Where the register has committed an error or omission in the recordation of an instrument he has the power to correct such error. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Certificates of Registration Prima Facie Evidence. — The certificates of registration made by registers of deeds are prima facie evidence of the facts therein recited. Sellers v. Sellers, 98 N. C. 13, 3 S. E. 917.

Cited in Moore v. Ragland, 74 N. C. 343; Fleming v. Graham, 110 N. C. 374, 14 S. E. 922.

§ 3554. Certify and register copies. — When a deed, mortgage, or other conveyance conveying real estate situate in two or more counties is presented for registration duly probated and a copy thereof is presented with the same, the register shall keep in files alphabetically labeled all and if it be a true copy thereof he shall certify the same, and thereupon the register shall indorse the original deed or conveyance as duly registered in his county, designating the book in which the same is registered, and deliver the original deed to the party entitled thereto and register the same from the certified copy thereof to be retained by him for that purpose. (Rev., s. 2657; 1899, c. 302.)

§ 3555. Liability for failure to register.— In case of his failure to register any deed or other instrument within the time and in the manner required by the preceding section, the register shall be liable, in an action on his official bond, to the party injured by such delay. (Rev., s. 2659; Code, s. 3660; 1868, c. 35, s. 10.)

As to the register's bond and his liability thereunder, see section 3545 and notes thereto.

Error in Amount of Mortgage.—A register is liable for wrongly recording the amount of a mortgage, to a person injured thereby. State v. Young, 106 N. C. 567, 10 S. E. 1019.

Presumption of Regularity.—The probate of a deed is presumed to be regular from the fact of registration. Cochran v. Improvement Co., 127 N. C. 386, 37 S. E. 496.

Abatement of Action by Death.—Under the provisions of section 461, an action for a penalty, against a register of deeds and the surety on his bond, abates by the death of the officer. Wallace v. McPherson, 139 N. C. 297, 51 S. E. 897.

§ 3556. Papers filed alphabetically.— The register shall keep in files alphabetically labeled all original instruments delivered to him for registration, and on application for such originals by any person entitled to their custody, he shall deliver the same. (Rev., s. 2660; Code, s. 3661; 1868, c. 35, s. 11.)

§ 3557. Transcribe and index books.— The board of county commissioners, when they deem it necessary, may direct the register of deeds to transcribe and index such of the books in the register's office as from decay or other cause may require to be transcribed and indexed. They may allow him such compensation at the expense of the county for this work as they think just. The books when so transcribed and approved by the board shall be public records as the original books, and copies therefrom may be certified accordingly. (Rev., s. 2661; Code, s. 3662; 1868, c. 35, s. 12.)

See notes to section 3561.

§ 3558. Number of survey in grants registered. —The register of deeds in each county in this state, when grants have been registered without the number of tract or survey, shall place in the registration of the grants the number of the tract or survey, when the same shall be furnished him by the grantee or other person; and in registering any grant he shall register the number of the tract or survey. (Rev., s. 2662; 1889, c. 522, s. 2.)

As to the registry of surveys, see section 7570.

§ 3559. Certificate of survey registered. — It shall be the duty of the register of deeds in each county, when any grant is presented for registration with a certificate of survey attached, to register such certificate of survey, together with all indorsements thereon, together with said grant, and a record of any certificate of survey so made shall be read in evidence in any action or proceeding: Provided, the failure to register such certificate of survey shall not invalidate the registration of the grant. (Rev., s. 2663; 1905, c. 243.)

§ 3560. General index kept.—The board of county commissioners, at the expense of the county, shall cause to be made and consolidated into one book a general index of all the deeds and other documents in the register's office, and the register shall afterwards keep up such index without any additional compensation. The board of county commissioners shall also have the authority to install the modern "Family" index system and wherever the "Family" index system is in use, no instruments shall be lawfully recorded until indexed and cross-indexed under the appropriate family name and the appropriate alphabetical sub-division of said family name, according to the particular system in use. (Rev. s. 2664; Code, s. 3663; 1868, c. 35, s. 13; 1929, c. 327, s. 1.)

Editor's Note.—The Act of 1929 added the provision relating to the "Family" index system. The act, which also amended § 3561, by express provision did not affect pending legislation or instruments theretofore registered. It also provided that upon its ratification a copy of the act be mailed to each of the registers of deeds of the several counties.

Chattel Mortgages.—An indexing of chattel mortgages is an essential part of their registration. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

Where for years a proper index of chattel mortgages has been kept in the books wherein the instruments were registered, it is a substantial compliance with this section and § 3561, it appearing that the record of the instrument could have been found with an ordinary search such as a man of ordinary prudence would have made. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

Mortgage upon Land.—The proper indexing of a mortgage upon lands is an essential part of its registration, and where the husband and wife make a mortgage on her lands which is only indexed by the register of deeds in the name of the husband, it is not good as against a subsequent purchaser for value by deed from the husband and wife that had been properly indexed and registered. Heaton v. Heaton, 196 N. C. 475, 146 S. E. 146.

Cited in Woodley v. Gregory, 205 N. C. 280, 284, 171 S. E. 65.

§ 3561. Index and cross-index of registered instruments.—The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well bound books, and shall state in full the names of all parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and wherever the "Family" index system shall be in use, to also show the name of each party under the appropriate family name and the initials of said party under the appropriate alphabetical arrangement of said index; and all instruments shall be indexed according to the particular system in use in the respective office in which the instrument is filed for record. Reference shall be made, opposite each name to the page, title or number of the book in which is registered any instrument; Provided, that where the "Family" system hereinbefore referred to has not been installed, but there has been installed an indexing system having sub-divisions of the several letters of the alphabet, a registered instrument shall be deemed to be properly indexed only when the same shall have been indexed under the correct sub-division of the appropriate letter of the alphabet; Provided, further, that no instrument shall be deemed to be properly registered until the same has been properly indexed as herein provided; Provided, further, that in all counties where a separate index system is kept for chattel mortgages or other instruments concerning personal property, no instrument affecting the title to real estate shall be deemed to be properly registered until the same has been properly registered and indexed in the books and index system kept for real estate conveyances; Provided, further, that it shall be the duty of the register of deeds of each county, in which there is a separate index for conveyances of personal property and for those of real estate, to double index every such conveyance, provided that such conveyance shall contain both species of property. A violation of this section shall constitute a misdemeanor. (Rev. ss. 2665, 3600; Code, s. 3664; 1899, c. 501; 1876-7, c. 93, s. 1; 1929, c. 327, s. 2.)

As to registration of instruments see § 3553 and the note thereto.

Editor's Note.—The Act of 1929 struck out the section formerly appearing and inserted in lieu thereof the above. See note under § 3560.

Indexing Essential.—The indexing of deeds in the office of the register thereof is an essential part of the registration; and where the grantor's name has been omitted from the book, a subsequent grantee of the same lands from the same grantor acquires the title from him. Fowle & Son v. Ham, 176 N. C. 12, 96 S. E. 639.

The provisions of this section are mandatory and the indexing and cross-indexing of a deed of trust given by a life tenant and the remainder man owning the land, in the name of the life tenant only followed by the words "et als.," is not a sufficient compliance with the statute, and where another deed of trust is subsequently executed on the same lands which is registered, indexed and cross-indexed in compliance with the statute, the purchaser under foreclosure of the second deed of trust acquires title free from the lien of the improperly indexed prior deed of trust. The case of Prudential Ins. Co. v. Forbes, 203 N. C. 252, 165 S. E. 699, in which the lien was indexed under "S. T. et ux." cited and distinguished. Woodley v. Gregory, 205 N. C. 280, 171 S. E. 65.

Liability for Failure to Index.—The failure of a register of deeds to properly index the registry of a mortgage renders him liable on his official bond to one injured by such neglect. State v. Grizzard, 117 N. C. 105, 106, 23 S. E. 93. See also Watkins v. Simonds, 202 N. C. 746, 164 S. E. 363.

Same—Failure to Index Must Cause Damage.—While the register of deeds and the surety on his official bond are liable for his failure to index and cross-index instruments such liability does not arise to the individuals claiming damages therefor unless the default of the register in these particulars has been the proximate cause of injury to the claimant, and liability will not be imputed to the register of deeds when the negligence of the claimant or his agent, has caused or concurred in causing the injury. State v. Hester, 177 N. C. 609, 98 S. E. 721; Overruling Davis v. Whitaker, 114 N. C. 279, 19 S. E. 699. See, also Fowle & Son v. Ham, 176 N. C. 12, 96 S. E. 639; Ely v. Norman, 175 N. C. 294, 298, 95 S. E. 543.

Index of Mortgage on Land Held by Entireties under "J. H. and Wife."—Where the husband and wife mortgage their lands held by the entireties and the mortgage is indexed and cross-indexed under "J. H. and wife," the name of the

wife not appearing on the index although it appeared on the mortgage deed, the index is sufficient to put a reasonable man upon inquiry which would have disclosed the facts, and upon the husband's death and the wife's remarriage, a mortgage given by the wife and her second husband is subject to the first mortgage, and the subsequent mortgage is charged with notice thereof, and he may not restrain the first mortgagee from foreclosing his mortgage on the ground of insufficient indexing, although the name of the wife should have appeared on the index. West v. Jackson, 198 N. C. 693, 153 S. E. 257.

Filing at Same Instant of Time.—Where the record discloses that a purchase-money mortgage and another mortgage given to secure cash payment for land were filed for registration at the same instant of time, neither mortgage has priority over the other, but both constitute a first lien on the land, and the fact that one necessarily appeared before the other on the index of the day's transactions does not alter this result, since the record fails to show that the mortgages were not indexed at the same time. Hood v. Landreth, 207 N. C. 621, 178 S. E. 222.

Priority of Second Mortgage to One Not Indexed.—A mortgage duly filed for registration and spread upon the registry, but not indexed or cross-indexed as required by this section, is not superior to the lien of a duly registered "second mortgage" on the same property. Story v. Slade, 199 N. C. 596, 597, 155 S. E. 256.

Under this and the previous section a duly recorded chattel mortgage which is indexed and cross-indexed in the general chattel mortgage index has priority over a mortgage covering the same personal property and also certain real estate which is previously executed and recorded and indexed in the general real estate mortgage index but subsequently indexed and cross-indexed in the general chattel mortgage index. Pruitt v. Parker, 201 N. C. 696, 161 S. E. 212.

§ 3562. Clerk to board of commissioners. — The register of deeds is ex officio clerk of the board of county commissioners, and as such shall perform the duties imposed by law or by order of the said board. (Rev., s. 2666; Code, s. 3656; 1868, c. 35, s. 15; Const., Art. VII, s. 2.)

Cross References.—As to the registers duty as clerk to the board of commissioners, see sections 957, 1309 et seq. and 7930 et seq., and notes thereto.

Same Office.—The register of deeds is ex officio clerk to the board of county commissioners, and the two positions are not separate offices. State v. Gouge, 157 N. C. 602, 72 S. E. 994.

§ 3563. Notices to certain officers served by mail.—The register of deeds shall serve by mail all notices issued by the board of county commissioners to justices of the peace, road overseers and school committeemen, in lieu of the service by the sheriff, and shall receive as his compensation his actual expenses for mailing, and nothing more. (Rev., s. 2667; Code, s. 3657; 1879, c. 328, ss. 1, 3.)

§ 3564. Make out tax lists.—The register shall make out the tax lists as directed by law, under the supervision of the board of county commissioners. (Rev., s. 2668; Code, s. 3658; 1868, c. 35, s. 16.)

See sections 7930 et seq.

§ 3565. Keep list of statutes authorizing special tax.—The register of deeds in each county, or the auditor in those counties having county auditors, must keep on file and subject to inspection by the public a list of the statutes authorizing a special tax levy in their respective counties, showing the year in which such special tax levy was authorized by the general assembly of North Carolina and the chapter of the public laws containing the authority for such special levy. Upon payment of a fee of one dollar the register of deeds or county auditor shall furnish to any one making application therefor a certified copy of said list of statutes. (1917, c. 182.)

§ 3566. Duties unperformed at expiration of term.—Whenever, upon the termination for any cause of the term of office of the register of deeds, it appears that he has failed to perform any of the duties of his office, the board of commissioners shall cause the same to be performed by another person or the successor of any such defaulting register. Such person or successor shall receive for his compensation the fees allowed for such services, and if any portion of the compensation has been paid to such defaulting register, the same may be recovered by the board of county commissioners, by suit on his official bond, for the benefit of the county or person injured thereby. (Rev., s. 2669; Code, s. 3655; 1868, c. 35, s. 14.)

§ 3567. Register of deeds failing to discharge duties; penalty.—If any register of deeds fails to perform any of the duties imposed or authorized by law, he shall be guilty of a misdemeanor, and besides other punishments at the discretion of the court, he shall be removed from office. (Rev., s. 3599; Code, s. 3659; 1868, c. 35, s. 18.)

Cross References.—See, also, section 4384; as to the duty of the register in regard to the clerk's bond, see section 349; as to his duty as to strays, see section 3951 et seq.; as to his duties as entry-taker, see section 7553.

Issuing Marriage License Not Included. — A register of deeds is not liable under this section for issuing a license for the marriage of an infant female under eighteen years of age, without the written consent of her parent or guardian. State v. Snuggs, 85 S. C. 542. But see sections 2503 et seq. and notes thereto.

CHAPTER 69

RELIGIOUS SOCIETIES

§ 3568. Trustees may be appointed and removed.—The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the state, as also the religious societies and congregations within the state, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76.)

As to religious societies generally, see 10 Enc. Dig. 996 et seq.

Applies Only to Religious Societies.—This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N. C. 126, 127, 31 S. E. 383; Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Society May Remove Trustee. — Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created. Nash v. Sutton, 117 N. C. 231, 23 S. E. 178. Faithlessness is not required, however, it may remove trustees at will. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

Same—Trustee May Maintain Action.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N. C. 550, 14 S. E. 77.

Same—Member May Maintain Action.—In the absence of competent trustee and a governing body authorized to appoint, any member of a religious society has such a benefi-

cial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. Nash v. Sutton, 109 N. C. 550, 14 S. E. 77.

Same—Section Not Affected by Church Rule.—A church has authority to appoint a "suitable number" of its own trustee, for the purpose of acquiring and holding church property, and remove them or any of them at will, and where the congregational regulations of the denomination with which a church is affiliated has provided a notice to be given for the trial of "offenses," it does not apply to the election or removal of trustees nor take from the church its rights when in conflict with the statutes. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

When All Trustees Are Dead.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors will be appointed under section 2583, by the clerk of the court. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Voluntary Withdrawal of Members.—What amounts to a voluntary withdrawal of members from a religious association is a question of law. Perry v. Tupper, 74 N. C. 722.

Cited in dissenting opinion of C. J. Faircloth in Tilley v. Ellis, 119 N. C. 233, 245, 26 S. E. 29.

§ 3569. Trustees may hold property. — The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76.)

Cross References.—As to charitable trust generally, see section 4033 et seq.; as to property rights of religious societies generally, see 9 Enc. Dig. 999 et seq.

Applies Only to Property Held for Religious Purposes.—The provisions of this section apply only to property held for religious purposes and not to property held in trust for a "Baptist church and for the education of the youths of the colored race." Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

No General Capacity of Acquisition.—Religious societies or their trustees have not a general capacity of acquisition; they can only take for the use of the society. Trustees v. Dickenson, 12 N. C. 189.

And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. Trustees v. Dickenson, 12 N. C. 189.

Original Trustees May Sue though Not Legally Appointed.—Where a conveyance is made to three persons for a certain tract of land, as trustees for a church, a suit of trespass may be brought by them against the wrongdoers, though they may not have been appointed trustees according to law. Walker v. Fawcett, 29 N. C. 44.

It is only when a suit is brought by persons, who claim as "successors," that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support an action. Walker v. Fawcett, 29 N. C. 44.

Trustees Are Agents.—The trustees of a church are merely agents and have no property interest as against the governing body of the church. Conference v. Allen, 156 N. C. 524, 527, 72 S. E. 617.

Same—May Mortgage Property.—A congregation taking possession of a church cannot contest the validity of a mortgage given by the trustees for the purchase money on the ground that it was ultra vires. Rountree v. Blount, 129 N. C. 25, 39 S. E. 631.

Same—Parties to Enforce Bequest.—Where a testator provides for building a fence arount a certain chapel cemetery, the trustees of the chapel are the proper parties to require the executor to perform this provision. Cabe v. Vanhook, 127 N. C. 424, 37 S. E. 464.

Same—Cannot Recover for Individual Suffering.—In suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery can be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. Taylor v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129.

Title Vested Individually.—The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." Walker v. Fawcett, 29 N. C. 44.

Church Has Right to Use of Property.—A church of the congregational system having elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

Interest of Individual Member.—An individual member of a religious society has an equitable interest in the property held by the society. Nash v. Sutton, 117 N. C. 231, 23 S. E. 178.

Title Not in Controversy in Contest between Trustees.—In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Levy on Communion Service. — A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. Lord v. Hardie, 82 N. C. 241.

Liability of Trustees.—The trustees of a church are liable for material ordered by one of their number and used in building the church although the order was not authorized. Tull v. Trustees, 75 N. C. 424. But the building committee of a church is not liable for injuries received by a workman. Wilson v. Clark, 110 N. C. 364, 14 S. E. 962.

§ 3570. Title to lands vested in trustees or in societies.—All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregagtion within the state for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (Rev., s. 2672; Code, s. 3665; R. C., c. 97, s. 1; 1776, c. 107; 1796, c. 457, s. 4.)

See notes to the preceding section.

Editor's Note.—The rights of an individual congregation under the congregational system is discussed in Conference v. Allen, 156 N. C. 524, 526, 72 S. E. 617; and the connectional system is discussed in Kerr v. Hicks, 154 N. C. 265, 268, 70 S. E. 468; Tilley v. Ellis, 119 N. C. 233, 242, 26 S. E. 29; See Gold v. Cozart, 173 N. C. 612, 614, 92 S. E. 600; Simmons v. Allison, 118 N. C. 763, 770, 24 S. E. 716.

No Legal Provision for Diffusing Christianity.—There is no provision in our laws for donations, to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. Bridges v. Pleasants, 39 N. C. 26.

Applies Only to Religious Societies.—This section applies

only to religious societies and not to educational instituitons. Allen v. Baskerville, 123 N. C. 126 127, 31 S. E. 383.

Specific Trust Must Be Imperative.—A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control their management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432.

Purpose Must Be Definite.—A bequest for religious charity must, in this State, be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. Bridges v. Pleasants, 39 N. C. 26.

Division of Devised Property.—Where a will devised certain lands to the diocese of a church and afterwards the diocese was divided into two dioceses the land becomes the property of both and not that of the diocese in which the land happens to be and in which the testator resided. Trustees v. Trustees, 102 N. C. 442, 9 S. E. 310.

Title by Adverse Possession.—A church holding real property for a hundred years, and using it for religious purposes, acquires a fee-simple title by adverse possession, independent of the validity of its deed. Gold v. Cozart, 173 N. C. 612, 92 S. E. 600.

Amount Insufficient.—A provision in a will that a church is to be built from certain funds will not fail because there is not sufficient amount of the funds to build a church as large as directed by the testator. Paine v. Forney, 128 N. C. 237, 38 S. E. 885.

No Trust Created.—The recital in a deed conveying land to the vestry and wardens of a church, that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" by the grantee, creates no trust, and the guarantee can convey a perfect title. St. James v. Bagley, 138 N. C. 384, 50 S. E. 841.

Doctrine of Cy-Pres Not Applicable.—In the case of devises to charitable purposes, the doctrine of cy-pres does not obtain in this State. Bridges v. Pleasants, 39 N. C. 26.

Cited in Dissenting opinion of C. J. Faircloth in Tilley v. Ellis, 119 N. C. 233, 245, 26 S. E. 29.

§ 3571. Trustees may convey property. — The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (Rev., s. 2673; 1855, c. 384; 1889, c. 484.)

Sale to Promote Testator's Purpose.—Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees might sell the property if the purpose declared would be promoted thereby; or the court might order a sale under its general equity power. Church v. Ange, 161 N. C. 314, 77 S. E. 239.

Same—Lease of Part of Property.—Where land was conveyed to a church for the purpose of maintaining a church for worship, the court will not restrain the officers of the church from leasing a small portion of the lot for erecting a store. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432.

§ 3572. House on vacant land vests title.—All houses and edifices erected for public religious worship on vacant lands, or on lands of the state not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (Rev., s. 2674; Code, s. 3666; R. C., c. 97, s. 2; 1778, c. 132, s. 6.)

CHAPTER 70

ROADS AND HIGHWAYS

Art. 1. State Highway Commission and State Highway Fund

Part 1. State Highway Commission

§ 3573. State highway commission established. —A state highway commission is hereby established, whose duties it shall be to assist the counties in developing a state and county system of highways as set forth more specifically hereinafter. (1915, c. 113, s. 1.)

Cross References.—As to roads and highways generally, see 8 Enc. Dig. 14 et seq., 14 Enc. Dig. 292 et seq.; as to bridges see 2 Enc. Dig. 681 et seq., 13 Enc. Dig. 288 et seq.

Editor's Note.—The act of 1921, sections 3846(a) et seq., creating subsequent state highway system radically changed the control etc., of state highways. Prior to that time the primary control was in the counties and political subdivisions and the state commission served in an advisory capacity, but by that act it has been changed so that the state highway commission has primary control. That act also provided for a comprehensive means of financing the immediate construction and maintenance of improved, hard surface highways. This was a virtual revision of the prior law which was inadequate for facilitating improvement upon such an enormous scale. Although the act expressly repealed only the conflicting provisions of the old law, it is apparent that a considerable portion of it is superseded by provisions which cover the subject-matter of the old, substituting different regulations. As a general rule no attempt has been made to point out conflicts or express opinions as to the effect of this act upon specific provisions of the old law.

And this rule has been followed with respect to the Act of 1931, §§ 3846(1) et seq., under which the State Highway Commission took over and assumed full charge of all county roads in the State on July 1, 1931. At the same time all local road-governing bodies were abolished, and all local taxation or bond issues for roads forbidden, except for the repayment or funding of outstanding indebtedness. In view of the abolishment of the local road-governing bodies, the boards of county commissioners were constituted fiscal agents, in their respective counties, to levy taxes and pay off all outstanding road bonds and other road debts of the minor political divisions. The State Highway Commission has final authority to decide what roads shall constitute the county road system to be taken over by the State. And hereafter all prison camps are to be under the direction of the Commission and operated under its rules. See §§ 3846(19) et seq., 9 N. C. Law Rev. 374-376.

The present title of the commission is State Highway and Public Works Commission. See note under sec. 3846(f).

Commission an Agency of State. — The State Highway Commission is a government agency of the State, while acting within the powers and duties prescribed in the act creating it. Independence Trust Company v. Massachusetts, etc., Ins. Co., 190 N. C. 680, 130 S. E. 547.

Suit against Commission.—The statutes creating the State Highway Commission enumerate their powers and duties in the construction, maintenance, etc., of highways for public benefit, without either expressly or impliedly giving it the right to sue and be sued, but manifestly as an agency of the State for the purpose of exercising administrative and governmental functions. Carpenter v. Atlantic, etc., Ry. Co., 184 N. C. 400, 114 S. E. 693.

§ 3574. How commission constituted. — (Superseded by Chapter 2, Public Laws 1921, which is incorporated in this Chapter as Article 15.)

§ 3575. Governor to fill vacancies. — The governor shall fill all vacancies in the commission caused by death or otherwise, and he shall have the power to remove any member for due cause. (1915, c. 113, s. 3.)

Editor's Note.—It would seem that this section is superseded by § 3846(f).

§ 3576. Bond. — (Superseded by Chapter 2, Public Laws 1921, which is incorporated in this Chapter as Article 15.)

§ 3577. Offices and supplies. — (Superseded

by Chapter 2, Public Laws 1921, which is incorporated in this chapter as Article 15.)

§ 3578. Assistants and clerks.—The state highway commission may employ such assistants and clerks as in its opinion the needs of the state demand. The salaries paid such assistants and clerks shall be determined by the state highway commission. (1915, c. 113, s. 6.)

Editor's Note.—It would seem that this section is superseded by section 3846(g).

§ 3579. State highway engineer; term. — The commission shall appoint a civil engineer well versed in the science of road building and maintenance, who shall be the state highway engineer, whose compensation shall be fixed by the state highway commission. The term of office of the state highway engineer shall be six years from the date of his appointment, unless removed from office for due cause by the highway commission. (1915, c. 113, s. 4.)

Editor's Note.—It would seem that this section is superseded by section 3846(g).

§ 3580. Duties of highway engineer. — Upon the written request to the state highway commission of the road officials of any county desiring to avail themselves of the services of the highway engineer on the terms of this article, for advice in regard to the improvement of any bridge, road, roads or section thereof, the highway engineer, under the direction of the state highway commission, shall survey or have surveyed such bridge, road, roads, or sections of road, and shall prepare, or have prepared, such maps, profiles, plans and specifications as are necessary in his judgment to determine the cost of the proper improvement of such bridge, road, roads, or sections of road; and these, together with the estimated cost, shall be presented to the board of county commissioners or other officials in authority, who made the request for such information, at their next regular meeting held after the completion of such surveys and estimates. If such bridge, road, roads, or section of road shall thereafter be built by the county officials it shall be constructed according to the plans and specifications as furnished by the highway engineer. In the event that the construction work on any such bridge, road, roads, or section of road is not started within twelve months after the highway engineer makes his report to the county officials, the county officials shall, and are hereby directed to, reimburse the state highway commission for the expense incurred by its office in obtaining the information furnished the county officials. Should, however, the construction be taken up at a later date, the state highway commission when the highway engineer takes charge of the actual construction shall return said amount to the county officials. The highway engineer, or his duly authorized assistants, shall have entire charge of the location, construction, and maintenance of all roads, bridges, etc., constructed under this section. The state highway engineer shall keep an accurate record of all costs and expenditures of his office. He shall supply, as directed by the highway commission, technical information regarding roads to any citizen or officer in the state, and shall, from time to time, publish for public use such information as will be generally useful for road improvements. Such publications shall be printed at the expense of the state, as other public documents. (1915, c. 113, s. 7.)

Editor's Note.—It would seem that this section is superseded by § 3846(g) and Art. 19 of this Chapter.

§ 3581. Location of roads.—In the location of roads provided for in the preceding section, the highway engineer shall so locate them as to serve the needs of the people in the immediate section in so far as this would not conflict with such roads being links in the system of state highways. (1915, c. 113, s. 9.)

§ 3582. State highway system.— The state highway engineer, as directed by the state highway commission, shall from time to time make surveys, prepare plans, profiles, specifications, and estimates of the cost of a system of highways connecting by the most direct and practicable route all the county-seats and principal cities of the state. He shall make a detailed report to the state highway commission of the mileage and cost in each county. He shall state the type of road suitable for each section. He shall give the average number and class of teams which each section or road is at present accommodating and the probable increase in traffic which would follow improvements as recommended by him. (1915, c. 113, s. 8.)

Editor's Note.—This section seems to be superseded by sections 3846(a)-3846(j).

§ 3583. When commission may meet in counties.—The state highway commission shall, upon written request of the county commissioners of any county, call an open meeting to be held at the office of the county commissioners within such county, for the purpose of affording instruction relative to matters pertaining to road and bridge construction, maintenance and repairs. Such meeting shall be conducted by the state highway engineer or one of his assistants designated for the purpose by the state highway engineer. Upon receipt of the notice of the date of such meeting from the state highway commission, the county commissioners shall call such meeting on the date set by the state highway commission, and shall be present themselves and notify the county engineer, the commissioners of each township and the superintendent of each road district within the county to be present at such meetings, in person. Each of the county, township and road district officials above mentioned shall be paid the regular per diem allowance in the usual manner, for the actual time in attendance at such meetings. The members of the commission when employed in any manner required of them under this article shall receive their actual expenses. (1915, c. 113, s. 11.)

For provision in more recent act regulating meetings, see section 2846(f).

§ 3584. Coöperation with federal government and other states.—It shall also be the duty of the state highway commission, where possible, to cooperate with the state highway commissions of other states and with the federal government in the correlation of roads so as to form a system of intercounty, interstate, and national highways. (1915, c. 113, s. 12.)

See section 3846(a) for more recent law.

§ 3585. Acceptance of Federal Aid Road Act.—The state of North Carolina, through its general assembly, hereby assents to the provisions of the act of congress known as the Federal Aid Road Act, approved July eleventh, nineteen hundred and sixteen, entitled "An act to provide that the United States shall aid the states in the construction of rural post-roads, and for other purposes." (Thirty-ninth United States Statutes at Large, p. 355). (1917, c. 22.)

See section 3846(a) for more recent law.

§ 3586. Powers of commission to meet requirements of Federal Aid Road Act.—(Superseded by Chapter 2, Public Laws 1921, which is incorported in this Chapter as Article 15.)

§ 3587. Appropriation.—The sum of ten thousand dollars annually, or so much thereof as may be necessary, is hereby appropriated out of moneys in the state treasury not otherwise appropriated for the purpose of carrying out the provisions of this article. (1915, c. 113, s. 13.)

§§ 3588-3599. Superseded by Public Laws 1921, c. 2, incorporated in this Chapter as Article 15.

Art. 2. State Fund for County Road Loans

§ 3600. Semiannual road loan fund; state bonds for; first issue.—For the purpose of creating a semiannual road fund, not to exceed four hundred thousand dollars, to be used by the several counties of the state for permanent road improvement upon the terms herein prescribed, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina payable forty-one years after date of issue, which bonds shall be issued semiannually on the first days of January and July of each year. On the first day of July following the ratification of this article the state treasurer shall issue bonds to an amount not to exceed four hundred thousand dollars, which bonds shall bear interest at a rate not exceeding four per cent per annum from date of issue until paid, which interest shall be payable semiannually on the first days of January and July of each year so long as any portion of said bonds shall remain due and unpaid. (1917, c. 6, s. 1; 1919, c. 115.)

Editor's Note.—Sections 3846(1) et seq. vesting the control of county roads in the State Highway Commission seem to render inoperative the sections under this article.

Purpose of Article.—This article is designed to enable the state to lend its aid to road building and maintenance in counties, townships, and road districts. Commissioners v. State Treasurer, 174 N. C. 141, 93 S. E. 482.

See the regulations under the State Highway System created in 1921, which vests the direct control of the state system in the State Commission and provides for financing the system including the reimbursements of the counties. Sections 3846(a) et seq.

§ 3601. Loans to counties.—The proceeds received by the state treasurer from the sale of said bonds shall be loaned to the several counties of the state, as hereinafter provided, to be used by said counties in the construction of macadam, sandclay, or other surfaced roads. (1917, c. 6, s. 2; 1919, c. 115.)

§ 3602. Counties pay interest to treasurer; how such interest used.—Said counties shall pay to the state treasurer five per cent interest per annum on the amount so loaned, to be paid semiannually on the first days of December and June of each year, for a period of forty-one years, or for such time thereafter as may hereinafter be required. From the five per cent interest received on such county bonds the state treasurer shall pay the four per cent interest on the state bonds issued for this purpose, and the surplus shall become a part of the semiannual road fund herein provided for. (1917, c. 6, s. 3; 1919, c. 115.)

§ 3603. Second bond issue; disposition of surplus.—On January first following the first issue of bonds under this article the state treasurer shall issue like bonds to an amount sufficient, when added to said surplus, to make an available fund of four hundred thousand dollars, or so much thereof as may be necessary, to meet the demands made for loans, which said sum shall be loaned in the same manner as the proceeds arising from the first sale of bonds. Said bonds shall be the same in all respects as those first issued, and shall run for a period of forty-one years from date of issue, and bear interest at a like rate, which interest shall be payable on the first days of January and July of each year. If sufficient applications for loans to counties shall not be made under the provisions of this article to take up the surplus at any time, the state treasurer is authorized to loan such remaining surplus, in such manner as he may deem best, at a rate of not less than five per cent per annum, payable semiannually on the first day of December and June of each year. (1917, c. 6, s. 4; 1919, c. 115.)

§ 3604. Successive issues and loans.—Each six months thereafter, for a period of forty-one years, the state treasurer shall issue bonds of the same class, to run for a period of forty-one years from date of issue, to an amount sufficient, when added to said surplus, to create a fund of four hundred thousand dollars, or so much thereof as may be demanded, which amounts shall be loaned to the counties applying therefor under the conditions herein imposed. (1917, c. 6, s. 5; 1919, c. 115.)

§ 3605. Payment and retirement of bonds provided for.—At the expiration of said period of forty-one years the state treasurer shall retire all of said bonds, as they mature, from the surplus remaining each six months after paying the semiannual interest on the bonds outstanding. (1917, c. 6, s. 6; 1919, c. 115.)

§ 3606. Formal requirements as to bonds and coupons; sales.—The bonds authorized and directed to be issued by this article shall be coupon bonds, and of the denominations of one hundred dollars, five hundred dollars, and one thousand dollars each, as may be determined by the said state treasurer, and shall be signed by the governor and the state treasurer, and sealed with the great seal of the state, and shall be known as "North Carolina Highway Bonds." The coupons thereon may be signed by the State Treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the said bonds shall in all other respects be in such form as the state treasurer may direct, and the coupons thereon shall, after maturity, be received in payment of all taxes, debts, dues, licenses, funds, and demands due the state of North Carolina of any kind whatsoever which shall be expressed on the face of said bonds. Before selling

the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such a manner as in his judgment may seem to be most effectual to secure the best price. He is authorized to accept bids for the entire issue or any part thereof, and where the advantages are equal, he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. Any premium received by the state treasurer from the sale of the bonds shall become a part of the surplus or sinking fund herein provided for. (1917, c. 6, s. 7; 1919, c. 115.)

§ 3607. Exemption from taxation. — The said bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purpose of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for income nor shall said bond and coupons be subject to taxation when constituting a part of the surplus or capital stock of any bank, trust company, or other corporation, but when constituting a part of such surplus or capital stock shall be deducted from the total assets in order to ascertain the taxable value of such shares. (1917, c. 6, s. 8; 1919, c. 115.)

§ 3608. County election on question of state aid. —When as many as twenty-five per centum of the voters registered at the preceding general election in any county of the state shall sign and present a petition to the board of commissioners of such county, requesting said board to call an election for the purpose of securing state aid for the construction of highways in such county, under the provisions of this article, specifying in such petition the amount to be so borrowed and asking that the special tax necessary to meet the payments herein provided for be levied and collected and used for said purpose, if a majority of the votes cast shall favor such loan, said board shall call an election for that purpose, which shall be held on the second Tuesday in April or the second Tuesday in October of that year. A special registration of voters shall be required before any such election is held. Such registration and election shall be conducted under the provisions of the general election law. When calling said election, the board of commissioners shall specify in such call the amount to be voted upon, accompanied by a statement to the effect that a favorable vote thereon shall carry the power and duty on the part of such board of commissioners to levy and collect the special tax herein required for the purposes herein named, and such election shall be conducted in the same manner, as near as may be, as elections for members of the general assembly. At such election those qualified voters who are in favor of securing state aid for road building shall vote a ballot upon which is written or printed the words "For good roads," and those who oppose such state aid shall vote a ballot upon which is written or printed the words "Against good roads." The result of said election shall be certified by the returning board to the board of county commissioners. (1917, c. 6, ss. 10, 11; 1919, c. 115.)

Bond Must Be Given by County.—See Commissioners v. Lacy, 174 N. C. 141, 93 S. E. 482.

§ 3609. County to give bond to state for amount voted; discharge of bond.—If a majority of the votes cast shall be "For good roads," the board of commissioners of such county shall execute a bond payable to the state of North Carolina, in form to be approved by the state treasurer and attorney-general, for the amount so voted, which bond shall be signed by the chairman of the board of county commissioners and countersigned by the register of deeds, and sealed with the seal of the county, and shall be immediately delivered to the state treasurer. Said bond shall obligate said county to pay to the state treasurer five per cent interest per annum on the amount thus loaned, payable semiannually on the first days of December and June of each year for a period of forty-one years. At the expiration of forty-one years said county bond shall be returned by the state treasurer, and said county shall be discharged from further liability on said bond: Provided, that if upon the maturity of any series of state bonds issued in pursuance of this article the state shall not have sufficient funds to retire the same derived from the difference in interest herein provided, owing to its inability to keep such difference in interest continually invested, or on account of expenses or delay incident to its investment, then and in that event any such deficiency shall be made good by the counties participating in the original proceeds of any such state bonds in proportion to the amount of such proceeds received by any such county. (1917, c. 6, s. 11; 1919, c. 115.)

§ 3610. Interest due from county; special tax; penalties for delinquency.—Said interest shall constitute a special state tax, which shall be collected and accounted for under the same penalties as other state taxes, except that the state treasurer shall also be required to collect, in addition to said five per cent to be paid semiannually, a penalty of one-half of one per cent of the interest due for each day the same shall remain unpaid after the first days of December and June of each year. One-half of such penalty shall be paid by the county and one-half by the sheriff of such delinquent county. If any county which has obtained money from the state under the provisions of this article shall fail or refuse to pay the interest due on such loan or loans for a period of thirty days, the amount due by such county, together with the penalty, shall at once become due and payable, and the state treasurer is authorized to proceed to collect the same from such delinquent county. (1917, c. 6, s. 12; 1919, c. 115.)

§ 3611. County files estimates and accounts with treasurer.—At the time of filing said bond with the state treasurer said board of commissioners shall also file an estimate of the amount of money which will be actually needed for the following six months; and semiannually thereafter, on the first days of May and November, they shall file with said treasurer an estimate of the amount needed for the ensuing six months until said loan has been exhausted. Each six months after securing a state loan the board of county commissioners shall publish a sworn statement showing in detail all receipts and expenditures, to whom paid and for what purpose, during the preceding six months, which shall also

be filed with the state treasurer. (1917, c. 6, s. 13; 1919, c. 115.)

§ 3612. Adjustment of aggregate of loans to amount of semiannual fund.—If the aggregate of the estimates by the several boards of commissioners which vote for state aid under this article shall exceed the sum of four hundred thousand dollars, the state treasurer shall reduce all loans pro rata for the following six months. If such estimates shall not amount to four hundred thousand dollars, then the bonds to be issued and sold for that period shall be reduced accordingly. (1917, c. 6, s. 14; 1919, c. 115.)

§ 3613. Times when loans made; limit of aggregate loans.—From the first to the thirteenth days of January and July of each year, and at no other time, the state treasurer shall loan to the several counties which have complied with the provisions of this act the amounts asked for by each: Provided, that interest shall be charged and collected from the first day of the month: Provided further, that the aggregate of such loans shall not exceed four hundred thousand dollars; and each six months thereafter, at the time herein prescribed, for a period of forty-one years and as long thereafter as the amount so loaned is unpaid, said counties shall pay to the state treasurer five per cent interest on the amount so loaned. (1917, c. 6, s. 15; 1919, c. 115.)

§ 3614. Additional loans. —Additional loans may be made to counties within the limit prescribed by this article if another election shall have been held therefor as is herein provided, and if a majority of the votes cast shall have been "For good roads." (1917, c. 6, s. 16; 1919, c. 115.)

§ 3615. Second election when first unfavorable —If a majority of the votes cast at any such election shall be "Against good roads," no loan shall be made to that county: Provided, however, that said board of commissioners shall order another election for the same purpose after the lapse of one year upon having presented to it a petition signed by twenty-five per cent of the voters as herein provided. (1917, c. 6, s. 17; 1919, c. 115.)

§ 3616. County "Road Loan Tax"; maintenance tax.—There shall be levied by the proper authorities in each county accepting a loan, as provided for in this article, at the same time other taxes are levied, a special annual tax for a period of forty-one years, to be known as the "Road Loan Tax" which shall be sufficient to pay, and which shall be collected by the sheriff and be used in paying, the semiannual interest on said loan or loans at five per centum per annum. Said tax shall be sufficient to cover the cost of collection and disbursement and the penalty herein provided for, in case such penalty should be incurred, in addition to the five per centum per annum, which shall be paid to the state treasurer by the sheriff of the county semiannually on the first days of December and June of each year. And a vote authorizing the issuance of bonds under this article shall be understood and construed to authorize and empower a levy of said tax. There shall also be annually levied by said board of county commissioners at the times herein specified a separate special tax for the maintenance of the roads built from moneys procured under the provisions of this article, which special tax shall be sufficient, after paying the costs of collection and disbursement, to equal each year, for the first four years after such loan is made, four per centum of the amount so borrowed; each year for the next four years, eight per centum of the amount so borrowed; and thereafter, each year, ten per centum of the amount so borrowed, so long as any of said loans remain due and unpaid to the state. If any board of county commissioners whose duty it is to levy any tax or taxes under the provisions of this article shall fail or refuse to make such levy, or to make such rate of levy as is required by this article, they and each of the members thereof shall be guilty of a misdemeanor, and, upon conviction, shall be fined personally and severally not less than two hundred dollars each, nor more than one thousand dollars each, or be imprisoned not exceeding one year, in the discretion of the court. (1917, c. 6, s. 18; 1919, c. 115.)

§ 3617. County loan limited by its indebtedness. —No county shall be allowed to borrow money under the provisions of this article to an amount which, added to the other bonded indebtedness, exceeds six per cent of the assessed valuation of the property of the county. (1917, c. 6, s. 19; 1919, c. 115.)

See Commissioners v. Lacy, 174 N. C. 141, 93 S. E. 482.

§ 3618. Article available to townships and road districts; conditions.—Townships, and road districts created by special act of the general assembly, may avail themselves of the benefits of this article upon compliance with the requirements herein set out: Provided, that the bond or undertaking filled with the state treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated. Such bond or undertaking shall specify that it is given on behalf of such township or road district only. It shall not be a liability in any wise against the county; and the special taxes shall be levied and collected out of the township or road district named, and not out of the county. It shall be the duty of such commissioners to levy, and the duty of the sheriff to collect, such special taxes and make payment thereof in the manner and under the penalty set out in this article. (1917, c. 6, s. 20; 1919, c. 115.)

Constitutionality.—Prior to the 1919 amendment this section was held unconstitutional because under it other districts of a county could be taxed for the exclusive benefit of one without the consent of the districts taxed. (Const. Art. 1, sec. 17.) It was also violative of Article VII, section 7, forbidding a municipality to contract a debt except in certain instances without the approval of its voters. Commissioners v. Lacy, 174 N. C. 141, 93 S. E. 482; Commissioners v. Boring, 175 N. C. 105, 95 S. E. 43.

The court refused to consider the effect of holding a part of the act unconstitutional upon the remainder of the act. But in Commissioners v. Boring, 175 N. C. 105, 95 S. E. 43, the court held that the constitutional part was unaffected by the unconstitutional portion.

The purpose of the 1919 amendment was evidently to cure the constitutional defect. Ed. Note.

Bond Must Be Given by County.—The bond contemplated to be given to the State is that of the county and not that of the township road district. Commissioners v. Lacy, 174 N. C. 141, 93 S. E. 482.

This section cannot be construed so as to require the county commissioners, as agent for the township, to give the township bond to the State upon which the latter shall

issue its 4 per cent bond to aid the township in the construction, etc., of its public roads, for apart from the express language, the statute contemplates more adequate security than a township bond would afford, the size and boundaries of the townships being under the statutory control of the commissioners and subject to be changed by them. Commissioners v. Lacy, 174 N. C. 141, 142, 93 S. E. 482.

Art. 3. Road Improvement with Federal Coöperation

§ 3619. County bonds for road improvement with federal coöperation.—The board of county commissioner of every county in this state is hereby authorized, upon the conditions and subject to the limitations and restrictions hereinafter set forth, to issue bonds of the county from time to time for the purpose of paying the county's share of the cost of constructing or improving public roads in the county at the joint expense of the federal government and the county, or at the joint expense of the federal government, the state, and the county, under agreement between the secretary of agriculture of the United States and the state highway commission of North Carolina. (1919, c. 312, s. 1.)

Editor's Note.—Sections 3846(1) et seq., vesting the control of county roads in the State Highway Commission, would seem to render inoperative the sections under this article.

§ 3620. Annual tax to pay bonds and interest authorized.—The board of county commissioners of every county in this state is hereby authorized to levy annually a special tax ad valorem upon all taxable property in the county for the special purpose of paying the principal and interest of all bonds issued by the county under this article, as principal and interest become due, which tax shall be in an amount sufficient for said purpose and in addition to all other taxes authorized to be levied by said board. (1919, c. 312, s. 2.)

§ 3621. Bonds to mature serially within thirty years.—Each issue of bonds made by a county under the provisions of this article shall so mature that the aggregate principal amount of the issue shall be payable in annual installments, beginning not more than three years after the date of the bonds of such issue and ending not more than thirty years after such date. No such installment shall be more than two and one-half times as great in amount as the smallest prior installment of the same bond issue. If all bonds of any one issue are not delivered simultaneously, the bonds of such issue outstanding at any one time shall mature as aforesaid. (1919, c. 312, s. 3.)

§ 3622. Form of bonds and coupons; interest limit; delivery.—Said bonds shall be issued in such form and denominations, and with such provisions as to time, place, and medium of payment of principal and interest, as the board of county commissioners of the county issuing the bonds may determine, subject to the limitations and restrictions of this article. The bonds shall bear interest at a rate not exceeding six per centum per annum, payable semiannually. They may be either coupon bonds or registered bonds; and, if issued in coupon form, may be made registerable as to principal or as to both principal and interest. They shall be signed by the chairman of the board of county commissioners of the county issuing them, and the county seal shall be affixed to the bonds and attested by the clerk of said board; and the coupons of such bonds shall bear the printed, or lithographed, or engraved facsimile signature of the chairman of said board of county commissioners who is in office at the date of the bonds. The delivery of bonds signed as aforesaid by officer in office at the time of such signing shall be valid not withstanding any changes in officers occurring after such signing. (1919, c. 312, s. 4.)

§ 3623. Sale of bonds.—Said bonds shall be sold in the manner provided in the Municipal Finance Act for the sale of bonds of cities and towns. They shall not be sold for less than par and accrued interest. (1919, c. 312, s. 5.)

§ 3624. Proceeds of sale a separate fund.—The proceeds of the sale of said bonds shall be placed in a separate fund and used only for the purposes for which the bonds were issued. (1919, c. 312, s. 6.)

§ 3625. Highway commission certifies county's share of cost for bonds.—Whenever a board of county commissioners proposes to issue any bonds under this article said board shall obtain from the state highway commission of North Carolina a certificate stating the amount of the county's share of the cost of the road improvements for which the bonds are to be issued, as such share is estimated by said commission, and no bonds shall be issued under this article in an amount exceeding such share as estimated by said commission. For the purposes of this article, the cost of acquiring rights of way for roads for which bonds are hereby authorized to be issued and the amount of any incidental damages to adjoining property, due to construction work, shall be treated as a part of the county's share of the cost of constructing the roads and may be paid out of the proceeds of the sale of such bonds. (1919, c. 312, s. 7.)

§ 3626. "Road" includes bridges and culverts.—The term "road" as used in this article, shall include bridges and culverts in all cases where bridges and culverts are to be constructed or improved as a part of a road for which bonds are hereby authorized to be issued and the federal government is to bear a part of the expense of constructing or improving such bridges or culverts. (1919, c. 312, s. 7.)

Validity of Act.—An act incorporating a board of road commissioners, distinct from the county commissioners, and giving them full control and authority over the construction, maintenance, and discontinuing of public roads is valid, although the issuing of bonds and the control and ordering of road work are given to the local authorities, while the county commissioners levy and collect taxes. Huneycutt v. Board, 182 N. C. 319, 109 S. E. 4.

Authority of Legislature.—The legislature has the authority to create a board of road commissioners and vest them with the authority over the roads that the county commissioners had theretofore possessed. Road Comm'rs v. Bank, 181 N. C. 347, 107 S. E. 245, 247.

§ 3627. Temporary notes of county in anticipation of bonds.—Whenever a board of county commissioners shall have obtained from the state highway commission a certificate showing the amount of bonds which may be issued by the county as provided in this article, it shall be lawful for the board of county commissioners to issue notes of the county in anticipation of the

issuance of bonds under this article. Such notes may run for periods of not exceeding one year, and may be renewed from time to time by the issuance of new notes: Provided, however, that no such notes shall continue to be issued more than two years after the date of the highway commissioner's certificate upon which they are predicated. The board of county commissioners may, if it deems it advisable, retire such notes or any of them by means of taxation or any available funds of the county, and the board of county commissioners is hereby authorized to levy in any year a special tax ad valorem on all taxable property in the county, for the special purpose of paying such notes. In case any such notes are retired by any means other than the issuance of bonds under this article, the amount of bonds which may be issued shall be reduced by the amount of notes so retired. (1919, c. 312, s. 8.)

§ 3628. Special county tax for maintaining federal-aided roads.—The board of county commissioners of every county is hereby authorized to levy annually a special tax ad valorem upon all taxable property of the county for the special purpose of maintaining any public road constructed or improved with the aid of the federal government under an agreement between the secretary of agriculture of the United States and the state highway commission of North Carolina, which tax may be in an amount sufficient for said purpose and in addition to all other taxes authorized to be levied by such board of county commissioners. (1919, c. 312, s. 9.)

§ 3629. Proceeds of other county road bonds made available.—The board of county commissioners of every county is hereby authorized to use, for the same purposes for which bonds are hereby authorized to be issued, the proceeds of the sale of any bonds of the county issued for road purposes under any act other than this article, and also any other funds of the county which may lawfully be used for constructing or improving public roads of the county. (1919, c. 312, s. 10.)

§ 3630. Road authorities of county may contract with highway commission.—The board or body in any county having charge and control of the county roads in the county (whether such board or body be the board of county commissioners or a road commission or other separate body) may enter into agreements with the state highway commission of North Carolina to cause the county to issue bonds or levy taxes under this article. If such an agreement is made by a board or body other than the board of county commissioners, the board of county commissioners may carry out the provisions of the agreement. (1919, c. 312, s. 11.)

§ 3631. Provision for use of bonds of townships, etc.—The board or body having charge and control of the public roads of any county is hereby authorized, by agreement with the state highway commission of North Carolina, to use the proceeds of the sale of any bonds of any road district or township in the county, issued for road purposes, for the same purposes for which county bonds are hereby authorized to be issued: Provided, the road commissioners or other authorities issuing such road district or township bonds join in or consent to such an agreement, which they are hereby authorized to do; and Provided, the road to be constructed or improved by means of said moneys is situated within such road district or township. (1919, c. 312, s. 12.)

§ 3632. Construction of article and powers granted.—The powers granted by this article are granted in addition to and not in substitution for existing powers of counties, and are not subject to any limitation or restriction contained in any other law: Provided, however, that this article shall be constructed as a supplement to any other act passed at the present session of the general assembly providing a plan for meeting any offer on the part of the federal government to provide funds for the construction or improvement of roads in this state, and all provisions of any such other act relating to the expenditure of moneys for road purposes shall apply to the expenditure of moneys raised under the provisions of this article or authorized by it to be used for the purposes herein stated. This section shall not be construed as authorizing the issuance of the road district or township bonds herein referred to, nor shall section 3631 of this article be construed as authorizing the issuance of any bonds other than bonds of a county, payable by general tax upon the county at large. This section deals only with the application of the proceeds of the sale of road district and township bonds, the issuance of which is authorized by some other law. (1919, c. 312, s. 13.)

§ 3633. In certain counties article applicable only if adopted at special election. — In the counties of Alexander, Anson, Ashe, Bladen, Catawba, Cherokee, Cumberland, Franklin, Gates, Graham, Halifax, Haywood, Hertford, Hyde, Jones, Macon, Mitchell, Orange, Pitt, Polk, Rowan, Rutherford, Stanley, Surry, Swain, Transylvania, Tyrrell, Warren, and Washington the provisions of this article, in so far as they authorize the issuance of county bonds or notes, or the levying of a special tax for paying county bonds or notes, or the levying of a special tax for maintaining roads, shall not be in force unless and until the question of adopting the provisions of this article shall be submitted to the qualified voters of the county at an election, and a majority of the qualified voters of the county voting on said question shall vote in favor of adopting the provisions of this article.

The board of county commissioners of any of said counties may cause a special election to be held for said purpose at such time as may be designated by said board. Said board shall cause a notice of said election to be posted at the courthouse door of the county at least thirty days before the election, and to be published once in each of the four successive weeks immediately preceding the election. The board of county commissioners shall name the registrars and judges of election for the voting precincts of the county for said election, and shall cause to be printed a sufficient number of ballots for use at the election. At said election the voters who are in favor of the adoption of the provisions of this act shall vote a ballot on which shall be written or printed,

"For the adoption of the Federal Aid Act"; and the voters who are opposed to the adoption of the provisions of this act shall vote a ballot on which shall be written or printed the words, "Against the adoption of the Federal Aid Act." At the close of the election the votes shall be counted and returns thereof made to the board of county commissioners, for which purpose said board shall cause blank abstracts to be printed and furnished to the registrars and judges of election.

On the first Thursday following the election said board county commissioners shall meet as a canvassing board, shall receive the returns of said election, shall judicially pass upon the returns, and shall judicially determine and declare the result of said election, all of which shall be recorded in the records of said board. The returns shall be executed in duplicate, and one copy shall be delivered to the board of county commissioners as aforesaid, and the other filed with the clerk of the superior court of the county. In all respects other than those herein mentioned said special election shall be held and conducted and the qualifications of voters at said election determined, as nearly as may be practicable, in accordance with the general law relating to the holding and conduction of elections for members of the general assembly and the determination of the qualifications of voters at such elections. The expense of holding said special election shall be paid out of the general funds of the county.

The board of county commissioners shall cause a notice containing a brief statement of the result of said election as determined by the board to be published at least once in a newspaper published in the county. No right of action or defense founded upon any invalidity of said election shall be asserted, nor shall the validity of said election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the first publication of said notice: Provided, however, that a copy of this sentence shall be incorporated in said notice. The board of county commissioners may, in its discretion, order a new registration for said special election, but such new registration shall not be necessary unless ordered by the board. Upon the determination, made as aforesaid, by the board of county commissioners, that a majority of the qualified voters voting upon said question voted in favor of adopting the provisions of this article, then all of the provisions of this article shall be in force in the county so adopting them.

Sections 3629, 3631, and 3632 of this article shall be operative in all counties of this state from and after the 11th day of March, 1919. (1919, c. 312, s. 13a; Ex. Sess. 1920, cc. 7, 38.)

Editor's Note. — The counties of Avery and Clay were originally included in this section but were omitted herefrom by act, 1920, Ex. sess. chapter 7, 38.

Art. 4. General Road Improvement; Road Commissions; Bonds and Taxes

Part 1. Bond Issues, Special Taxes and Funds

§ 3634. County issue of road bonds; petition and election; approved by state commission; bond limit.—Bonds may and shall be issued by the board of county commissioners of any county for the purpose of laying out and opening, altering, or improving the public roads and bridges of county under the conditions and provisions hereinafter provided. The board of county commissioners of any county, upon the petition of one hundred freeholders of the county petitioning for an election for a bond issue, shall make an order providing for holding an election at the next election of county officers, or at any time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question of whether the board of county commissioners of such county shall issue bonds for such purpose. The petition must include the amount of bonds it is proposed to issue and the approximate number of miles of road that it is proposed to improve by such bond issue. No election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued will be sufficient to construct or reconstruct, alter or improve approximately the number of miles of road proposed to be improved, reconstructed, or altered, as set out in the petition. (1917, c. 284, s. 1; 1919, c. 12, s. 1; 1919, c. 68.)

As to power of counties to issue bonds see 3 Enc. Dig. 809 et seq; 13 Enc. Dig. 527 et seq.

Editor's Note.—Sections 3846(1) et seq., vesting control of county roads in the State Highway Commission, would seem to render inoperative the sections under this article.

Chapter Not Violative of Restriction on Private Laws.—The restriction placed by the constitutional amendment of 1916 upon the General Assembly to pass local or private laws as to public highways has no application to the provisions of this chapter for the statute relates to the establishment of roads, ferries and bridges for the whole county at such places as are deemed expedient by the local authorities charged with the duty of providing and supervising them, and not for the laying out or maintenance of a special road or erecting a certain bridge. Parvin v. Commissioners, 177 N. C. 508, 99 S. E. 432.

Construction of Roads a Necessary Expense.—The construction and improvement of public roads are a necessary expense, within the meaning of our constitution. Woodall v. Highway Comm., 176 N. C. 377, 97 S. E. 226; Guire v. Board, 177 N. C. 516, 99 S. E. 430.

The construction and maintenance of public roads are necessary public expenses, and the General Assembly may provide for construction and working the same. Road Comm'rs v. Bank, 181 N. C. 347, 107 S. E. 245, 247; Huneycutt v. Board, 182 N. C. 319, 321, 109 S. E. 4.

When Public Road Not a Necessary Expense.—While the building of public roads has been held a necessary expense the application of the principle may not be extended to instances where a statute requires the county to issue its bonds for road purposes to obtain aid for a township or local taxing district therein, upon the approval of the voters of the particular district alone, and without benefit to the others. Commissioners v. Lacy, 174 N. C. 141, 93 S. E. 482.

Vote of People Not Required.—The bond issue provided for by this chapter is for a special purpose within the meaning of Art. V, section 5 of our Constitution and not within that of section 1 of the same article prescribing the limitations and equation between the property and the poll tax; and being for a necessary county expense the vote of the people in the county is not required by our Constitution. Parvin v. Commissioners, 177 N. C. 508, 99 S. E. 432.

§ 3635. Powers vested in road commission. — Whenever it is stated in the petition to the board of county commissioners praying for a bond issue for road work, as is authorized in the preceding section, that the bonds thus authorized shall be issued and sold by the county road commission hereinafter created by this article, or the existing

road commission of the county in which the petition for road bonds is made, then the said county road commission or other road commission or board having charge of the road work in said county is hereby vested with all the power, rights, and authority now vested in the board of county commissioners of said county for issuing and selling the road bonds, as authorized in the petition, and said county road commission or other commission or board having charge of the road work in the county shall proceed to issue and sell bonds called for in the petition as hereinafter provided. (1917, c. 284, s. 2; 1919, c. 68.)

§ 3636. Apportionment by townships of funds from bond sale. — Whenever it is stated in the petition to the board of county commissioners praying for a bond issue for road work that the funds derived from the sale of such bonds shall be expended by the county road commission or other commission or board having charge of the road work of said county in the various townships composing the county, in proportion to the assessed tax valuation of each township, then whenever bonds are issued by the board of county commissioners or county road commission, as provided, the county road commission shall apportion the funds arising from the sale of said bonds and use same in the several townships of the county issuing said bonds, as nearly as may be in proportion to the assessed tax valuation of said township, the intention being that each township shall receive and have expended on roads within its borders, or on roads built for its benefit, a fair and equitable proportion of the money arising from the bond issue authorized by this article. The purchasers of said bonds shall not be required to see to the application of such funds. (1917, c. 284, s. 3; 1919, c. 68.)

§ 3637. Special road tax; petition and election; tax limit; approval of state commission. — The board of county commissioners of any county, upon the petition of one hundred freeholders of said county petitioning the board of county commissioners to levy a special road tax for carrying on the road work of said county, shall make an order requiring an election to be held at the time of election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question whether the board of county commissioners shall levy a tax for such purpose. The petition for such election must state the maximum rate for which such special road tax is to be levied, which rate shall not exceed fifty cents on the hundred dollars worth of property according to the last tax list and one dollar and fifty cents on the poll, observing at all times the constitutional equation: Provided, the petition also states approximately the number of miles of road to be improved by such special road tax and the length of time for which such special road tax shall be levied. The board of county commissioners, before calling such election, must be notified by the state highway commission in writing that the amount of money to be raised annually by the special road tax proposed will be sufficient to maintain and operate with economy a construction force suitable for the work proposed or will be sufficient to secure for the county reasonable contract prices for the work to be done, and that within the time named and for the amount thus to be raised the approximate number of miles of road can be built that is named in the petition. (1917, c. 284, s. 4; 1919, c. 68.)

A Necessary Expense.—County bonds for road purposes are for a "necessary expense," and if the levy of a tax therefor provided in the act should be found insufficient, taxes therefor can be levied under the general statutes, authorizing counties to construct roads and bridges. Commissioners v. Bank, etc., Co., 178 N. C. 170, 100 S. E. 421.

§ 3638. When bond issues by township authorized.—At the end of three months after the seventh of March, nineteen hundred and seventeen, in any county that has not taken advantage of the provisions of this article and issued bonds as provided in section 3634 of this chapter, or levied a special tax as provided in the preceding section, then any township may proceed to take advantage of the provisions hereinafter set forth. (1917, c. 284, s. 5; 1919, c. 68.)

Cited in State v. Lucas, 124 N. C. 804, 32 S. E. 553.

§ 3639. Petition from township; election; approval of commission; bond limit.—The board of county commissioners of any county, upon the petition of twenty-five freeholders of said township of said county for a bond issue for the construction or reconstruction of the public roads and bridges of said township, shall make an order providing for holding an election at the next election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the township on the question of whether the board of county commissioners of such county shall issue bonds for such township for the purpose stated in the petition. The petition must state the amount of bonds it is proposed to issue and the approximate number of miles of road that it is proposed to improve by such bond issue. No election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued will be sufficient to construct or reconstruct, alter or improve, approximately the number of miles of road proposed to be constructed, reconstructed, or altered as set out in the petition. (1917, c. 284, s. 6; 1919, c. 68; 1919, c. 12, s. 2.)

§ 3640. Special road tax for townships; tax limit; approval of commission. — The board of county commissioners of any county, upon the petition of twenty-five freeholders of any township of any county petitioning the board of county commissioners to levy a special road tax for carrying on the road work of the township, shall make an order requiring an election to be held at the next election of county officers or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the township on the question whether the board of county commissioners shall levy a tax for such purposes. The petition for such election must state the maximum rate for which such special road tax is to be levied, which rate

shall not exceed fifty cents on the one hundred dollars worth of property, according to the last tax list, and one dollar and fifty cents on the poll, observing at all times the constitutional equation. The petition must also state approximately the number of miles of road to be improved by said special road tax and the length of time for which such special road tax shall be levied. The board of county commissioners, before calling such election, must be notified by the state highway commission, in writing that the amount of money to be raised annually by the special road tax proposed will be sufficient to maintain and operate with economy a construction force suitable for the work proposed, or will be sufficient to secure for the county reasonable contract prices for the work to be done, and that within the time named, and for the amount thus to be raised, the approximate number of miles of road can be built that is named in this petition. 1917, c. 284, s. 7; 1919, c. 68.)

§ 3641. Bond issues in counties having township bond issues.—The board of county commissioners of any county in which township bonds have been issued and sold for the construction of roads shall, upon petition of one hundred freeholders of said county petitioning for an election for a bond issue for road construction, make an order providing for holding an election at the next election of county officers or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question of whether the board of county commissioners of such county shall issue bonds for the purpose of providing funds for taking over the township bonds already issued for road purposes and of providing an additional amount with which to construct additional roads in such county. Such petition must state the amount of bonds which it is proposed to issue in excess of the amount required to cover the township bond issue, and also the approximate number of miles that it is proposed to improve by such bond issue. No election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued for road construction work will be sufficient to construct, reconstruct, or alter approximately the number of miles of road proposed to be improved by said bond issue. The maximum amount of bonds issued under this article in such county, together with all the bonds previously issued and remaining unpaid by such county, shall in no case exceed an amount equal to ten per cent of the total assessed valuation of the county. The township in which the bonds have been issued and which are taken over by the county shall not be subject to any additional tax on account of the county bonds issued to refund or buy in said township bonds, but shall be liable for its pro rata portion of the county bonds. (1917, c. 284, s. 8; 1919, c. 68.)

§ 3642. Bonds and taxes by road districts. — Whenever there has been established in any county or counties of this state a road district, composed of one or more townships in one or more counties, or parts of one or more townships in one or more counties such road district is herewith granted the same rights and privileges in regard to the issuing of bonds or levying of special road tax as is given to townships under the provisions of this article. (1917, c. 284, s. 9; 1919, c. 68.)

§ 3643. Petition and election for county road commission.—Upon the petition of one hundred freeholders of any county petitioning for the creation of a county road commission, the board of county commissioners of said county shall make an order providing for holding an election at the next election of county officers or at any other time not less than thirty days from the date of said order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question of whether there shall be created in said county a county road commission. In the event that the majority of votes cast shall be for the creation of a county road commission at any election herein provided for, after the result has been declared and recorded as herein provided for there shall be and there is herewith created in said county a county road commission as provided hereinafter. (1917, c. 284, s. 10; 1919, c. 68.)

§ 3644. Qualified voters defined; law governing elections; registrations; ballots; returns. — The qualified voters at any special election held under the provisions of this article, until otherwise provided by general law, shall be those qualified to vote at the preceding regular November election and those who may have become of age and qualified since the preceding regular November election, except those who by commission of crimes or by removal from the district or county or for other legal causes have disqualified themselves to vote. Any election held under the provisions of this article shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the member of the general assembly, except as herein provided. The said board of county commissioners shall appoint the registrars of election, the judges or inspectors, and any other election officers, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for the election of members of the general assembly; and said county commissioners may or may not order a new registration for any or all of said elections.

At any special election held under the provisions of this article for a bond issue, the ballots tendered and cast by the voters shall have written or printed upon them "For road bond issue" or "Against road bond issue," and all electors who favor the issuing of said bonds shall vote a ballot written or printed thereon "For road bond issue," and those opposed to the issuing of the bonds shall vote a ballot written or printed thereon "Against road bond issue"; and at any special election held under the provisions of this article, providing for a special road tax, the ballots tendered and cast by the voters shall have written or printed upon them "For special road tax" or "Against special road tax," and all electors who favor the levying of said special road tax shall vote a ballot written or printed thereon "For special road tax" and those opposed to levying

the special road tax shall vote a ballot written or printed thereon "Against special road tax"; and at any special election held under the provisions of this article, providing for the creation of a county road commissioner, the ballots tendered and cast by the voters shall have written or printed upon them "For county road commission" or "Against county road commission"; and all electors who favor the creating of a county road commission shall vote a ballot written or printed thereon "For county road commission," and those opposed to creating a county road commission shall vote a ballot written or printed thereon "Against county road commission."

The vote shall be counted at the close of the polls and returned to the board of county commissioners or clerk of the board on the Thursday next following the election, and the board shall tabulate and declare the result of the election not later than its next regular meeting following the return of the vote of the election, all of which shall be recorded in the minutes of the board of county commissioners, and no other recording and declaring of the result of the election shall be necessary. The result of the vote shall be counted, declared, and reported to the board of county commissioners as prescribed by law in the election of the members of the general assembly. (1917, c. 284, s. 11; 1919, c. 68.)

Voting without Administration of Oath.—Votes, on issuance of bonds, of electors of special highway district otherwise qualified, should not be rejected because registrars failed to administer oath to them, and they were allowed to vote without being challenged. Woodall v. Highway Comm., 176 N. C. 377, 97 S. E. 226.

§ 3645. When bonds to be issued.—In the event that the majority of the votes cast shall be "For road bond issue" at any election herein provided for, after the result has been declared and recorded as aforesaid the board of county commissioners or county road commission, as authorized, of the county at its next regular meeting shall proceed to carry out the wishes of the voters as expressed at such election, as hereinafter provided in this article. (1917, c. 284, s. 12; 1919, c. 68.)

When Vote a Tie.—It requires a majority of the qualified voters in favor of an election upon the question of adopting a special tax to carry it, and the tax cannot be declared as carried when by striking from the registration disqualified voters the result is a tie. Groves v. Commissioners, 180 N. C. 568, 105 S. E. 172.

§ 3646. Levy of special road tax.—In the event that the majority of the votes cast shall be "For special road tax" at any election herein provided for, after the results has been declared and recorded as aforesaid the board of county commissioners of the county at its next regular meeting shall proceed to carry out the wishes of the voters as expressed at such election, as hereinafter provided for in this article. (1917, c. 284, s. 13; 1919, c. 68.)

§ 3647. County road commission created.—In the event that the majority of the votes cast shall be "For county road commission" at any election herein provided for, after the result has been declared and recorded as aforesaid the board of county commissioners at its next regular meeting shall proceed to carry out the wishes of the voters as expressed at such election, as hereinafter provided for in this article. (1917, c. 284, s. 14; 1919, c. 68.)

§ 3648. Advertisement and sale of bonds; when noncompliance not to invalidate bonds. — The board of county commissioners, or county road commission, or other commission of any county which is authorized to issue county, township, or road district bonds under the provisions of this article, shall then proceed with the least possible delay to issue such bonds in such denominations and of such class and for such term as may be deemed best by said board of county commissioners or other said commission. In making sale of the bonds authorized by this article, advertisement of same shall be made in a recognized financial paper of the country, or a newspaper of state-wide circulation, as well as in a local paper, for at least thirty days prior to receiving of bids by the board of county commissioner or county road commission. The advertisement shall state the date, the time and the place for the opening of bids, and the advertisement shall also state that all bids must be accompanied by certified check properly vouched for by a local bank, if any, of the county in which sale is to be consummated and for which bonds are issued; but if there is no bank in said county, then by any solvent bank in a neighboring county, and the amount of said check to be determined by the board of county commissioners or county road commission of the county proposing to issue the bonds. The state highway commission must be notified by the board of county commissioners or county road commission of the date, place, and time of sale of bonds authorized to be sold under this article, in order that the state highway commission, if it so desires, may have a representative present who shall act in an advisory capacity with the board of county commissioners in the sale of the bonds. The noncompliance with the conditions herein required shall not be construed to invalidate the bonds issued which may have passed into the hands of innocent purchasers for value and without notice. No bonds shall be sold for less than their par value. (1917, c. 284, s. 15; 1919, c. 68.)

Advertisement Once a Week.—Where the statute for the issuance of county bonds for road purposes provides that previous advertisement of notice for the sale of these bonds shall be given for thirty days, an advertisement for once a week, beginning more than thirty days before the sale, is a compliance with the statute. Commissioners v. Bank and Trust Co., 178 N. C. 170, 100 S. E. 421.

§ 3649. State or federal aid.—If any act shall be passed at this or any subsequent session of the general assembly authorizing the state to loan money to the counties to aid in the building or improving of public roads, taking county bonds as collateral for said loan, or if any provision shall be made for the federal government to loan money to the county for the purpose as stated above, then the board of county commissioners or county road commissioner is hereby authorized and empowered to avail themselves of the privileges and benefits of any such act. (1917, c. 284, s. 16; 1919, c. 68.)

§ 3650. No fees allowed officers. — In selling the bonds and in handling the funds derived from the sale of the bonds, and in turning same over to the bank or banks of the county herein-

after authorized to be the depository of such funds, the board of county commissioners, the county road commission, or the treasurer of the county shall not be allowed any fees for handling such funds. (1917, c. 284, s. 17; 1919, c. 68.)

§ 3651. Levy of tax for interest on bonds; misappropriation punished.—When any bonds are issued under the provisions of this article, the board of county commissioners shall levy annually the first Monday in May, or at such time as county taxes are levied, a special tax for the county, township, or road district, of such an amount on the one hundred dollars of property and on the poll as will provide a sufficient sum with which to pay the interest due on the bonds issued and pay whatever part of the principal of the bond issue may become due that year, and also to set aside the amount necessary to provide an adequate sinking fund with which to redeem or buy in the bonds. The taxes so levied shall be collected as other taxes and shall be kept as a separate fund, to be applied for the purposes as stated above, and it shall be a misdemeanor for the members of the board of county commissioners to use such fund for any other purpose. (1917, c. 284, s. 18; 1919, c. 68.)

§ 3652. Levy of special road tax.—The board of county commissioners of any county which is authorized to levy a special road tax for county, township, or road district road work under the provisions of this article shall, beginning with the first Monday in May after the election authorizing such levy, proceed to levy each year, on the first Monday in May or at such time as county taxes are levied, the special road tax authorized by the election and for the number of years stated in the petition calling for the election. (1917, c. 284, s. 19; 1919, c. 68.)

§ 3653. Emergency fund or bonds provided for; limit.—Wherever in any county, township, or road district a condition exists in connection with the location, construction, reconstruction, maintenance, or repair of the roads of said county or township or road district such that in the judgment of the county road commission or any other similar road commission or board having charge of the roads and bridges of the county, township, or road district, the fund available for such condition is insufficient for the work demanded, then on application of the county road commission or any other similar road commission or board of the county, township, or road district, the board of county commissioners shall appropriate from the general fund of the county, or shall issue short-time notes or bonds in sufficient amount for the work required. The amounts of such fund or bonds issued shall not in any one year exceed one per cent of the taxable valuation, both real and personal, of the county, township, or road district. (1917, c. 284, s. 20; 1919, c. 68.)

§ 3654. Fund for maintenance of roads.—Whenever the board of county commissioners or county road commission of any county under the provisions of this article has issued and sold bonds or has levied a special road tax, it shall levy an additional special maintenance tax sufficient to raise an amount equal to not less than one or more than four per cent of the par value of said bonds issued for the road work of the county, township, or road district, or the amount that has been raised by the said special road tax, to be used for the purpose of maintaining the roads built through the expenditure of the funds raised from such bond issue or from such special road tax. The money thus raised shall be deposited by the sheriff to the credit of the county road commission hereinafter provided for in said bank or banks authorized to receive funds under the provisions of this article. This money shall be deposited as a maintenance fund, to be expended only for the maintenance of the roads constructed under the authority of this article. (1917, c. 284, s. 21; 1919, c. 68.)

§ 3655. Depository for road funds.—All moneys derived from the sale of bonds authorized and sold under the provisions of this article or from the levy of the special road tax authorized under the provisions of this article shall be deposited by the board of county commissioners in such solvent bank or banks, if any, of said county, or if there is no bank in said county, then in any solvent bank in a neighboring county as will pay the highest rate of interest on daily balances as may be determined by the board of county commissioners; said moneys to be deposited in said bank or banks to the credit of the county road commission hereinafter provided for, and to be drawn upon by said commission as hereinafter directed. (1917, c. 284, s. 22; 1919, c. 68.)

Commissioners May Designate Bank for Deposit.—Where a county has issued bonds for the purpose of lending their proceeds to the State Highway Commission, to be used for the construction of certain highways within the county, and the county commissioners have such proceeds on hand, they may designate the banks in which they are to be deposited, and mandamus by the county treasurer will not lie for control of the funds as a part of the general county funds coming within his control. Lewis v. Commissioners, 192 N. C. 546, 135 S. E. 347.

Liability of Surety.—Where a local bank has been lawfully appointed to perform the duties ordinarily performed by the county treasurer, and has also been appointed as a special depository for the proceeds of sale of an issue of bonds for highway construction upon which interest is required to be paid, the surety on its bond for the faithful performance by the bank of the duties of county treasurer is not liable for the failure of the bank to collect interest on the funds received by it from the sale of the highway bonds, as such was not in contemplation of the surety bond. State v. First Nat. Bank, 194 N. C. 436, 140 S. E. 38.

§ 3656. Other funds deposited.—Any other moneys, in whatever way collected or appropriated, which are designed to be used for the construction or maintenance of the roads of any county, township, or road district in which bonds for road work within such county, township, or road district have been issued and sold or in which special road tax for road improvement has been levied under the provisions of this article, shall be deposited in the same bank or banks as heretofore provided in which the moneys obtained from the bond issue or special road tax are deposited, and these moneys shall be deposited to the credit of the county road commission hereinafter provided for, and shall be drawn upon by said commission as hereinafter directed. (1917, c. 284, s. 23; 1919, c. 68.)

§ 3657. Monthly statements by depositories.—The bank or banks in which the said road moneys designated in this article are deposited shall prepare monthly statements showing the amounts paid, to whom paid, and for what purposes, and

submit same to the said county road commission, and the said road commission shall have said monthly statement posted at the courthouse door of such county. (1917, c. 284, s. 24; 1919, c. 68.)

Part 2. County Road Commission and Road Management

§ 3658. County road commission.—Whenever a bond issue or a levy of a special road tax or the appointment of a county road commission is authorized as hereinbefore provided in this article, there shall be and there is herewith created in such county, except as hereinafter provided, a county road commission to be composed of either three or five members one of whom shall be at all times a member of the minority political party of the county, and who shall be appointed by the board of county commissioners. Should the board of county commissioners decide to appoint three men in the making the first appointments one members shall be appointed for two years, one for four years and one for six years. Should the board decide to appoint five men, in making the first appointments one member shall be appointed for two years, two for four years, and two for six years. Thereafter all appointments shall be for six years. Nothing in this law shall be so construed as to prevent the reappointment of a member of this commission at the expiration of his term. Each member of the county road commission shall take and subscribe an oath before the clerk of the court of his county for the faithful performance of his duties as a member of the said commission: Provided, however, that when in any petition authorized by this article it is stated that the board of county commissioners or road commission or board already existing in such county shall have charge of the road work of such county, township, or road district, then the board of county commissioners shall not appoint a new county road commission as set forth in this section, but the said commission or board mentioned in the said petition shall become the county road commission for carrying out the purpose of this article. (1917, c. 284, s. 25; 1919, c. 12, s. 3; 1919, c. 68.)

See editor's note under § 3634.

Section Partly Directory.—The feasibility and practicability of electing persons of different political parties as highway commissioners, is a matter for the voters, and their judgment is final and not reviewable by the courts. Cole v. Sanders, 174 N. C. 112, 93 S. E. 476.

§ 3659. County commissioners appoint township road commissioners in certain cases.—Whenever a bond issue or a levy of a special road tax is authorized or has been authorized, as hereinbefore provided in this article, for any township in any county where one or more townships have heretofore voted bonds for the working of the public roads under special acts or under acts other than this article, and the working of the roads of said township is under the charge of a township commission, and no county road commission is in existence or has been appointed under this article, in such case the county commissioners may appoint a township road commission for such township, to be composed of three members, one of whom shall be at all times a member of the minority political party of the township. Township commissioners so appointed shall be appointed for the same term and in the same manner as is hereinbefore provided for the appointment of the county road commission, and such township commission shall have in said township, and for the purpose of working the roads of said township, all the rights, powers and privileges in this article given, granted and conferred upon the county road commission. (1919, c. 37.)

§ 3660. Extension of jurisdiction of commission.—Wherever a township or road district has taken advantage of the provisions of this article, so that a county commission has been created and appointed and has charge of the road work of such township or road district, and there should be in the same county in which such township or road district is located another or other townships which avail themselves of the privileges of this article, there shall be no additional county road commission appointed by the board of county commissioners as provided for herein, but the county road commission already appointed shall have charge of the road work in the additional township or townships or road district or districts of said county that may come under the provisions of this article. (1917, c. 284, s. 26; 1919, c. 68.)

§ 3661. Corporate powers; use of road funds.—The county road commission and its successors in office are and they are hereby constituted a body corporate under and by virtue of the laws of North Carolina and by this article, under the name and style of County Road Commission, and shall have all powers and authority granted to corporations of like nature by the laws of North Carolina, and by that name may sue and be sued, make contracts, acquire real and personal property by gift or devise, hold, exchange, sell the same, and exercise such other rights and privileges as are incident to other municipal corporations of like nature, such as the condemnation of land for the construction, widening or changing of any roads in the county, and such other powers as are necessary to carry out any and all the provisions of this article. The said county road commission shall use the funds derived from the sale of bonds or by levy of special tax, or whatever way derived, as authorized by this article, to locate, construct, reconstruct, surface, repair, improve, and maintain the public highways and bridges in the county, township, or road district under their jurisdiction; shall purchase such materials and purchase and hold, or contract for the use of, such tools, machinery, implements, and teams as they may deem necessary for carrying on the road work of said county or township, and perform such other duties as are hereinafter provided for by this article. (1917, c. 284, s. 27; 1919, c. 68.)

§ 3662. Duties and powers of county road commissions.—It shall be the duty of the said county road commission to take charge of laying out, opening, altering, maintaining, or discontinuing of any and all roads of said county, or of such roads as may be stated in the petition, authorizing the issuing of bonds or of levying special road tax or the formation of a county road commission, that are now maintained or may be maintained by the county as public roads; and it is

hereby vested with all powers, rights, and authority now vested in the board of county commissioners and other commissions or boards or other road officials of said county for the general supervision of such roads of said county, and for the construction and repair thereof, by contract or otherwise, as may be deemed best: Provided, that if the bonds issued or the special road tax levied under the provisions of this article applies only to a township or road district, then the duties of the county road commission shall only apply to said township or road district. (1917, c. 284, s. 28; 1919, c. 68.)

§ 3663. Organization of road commissions; compensation of commissioners.—The county road commission shall biennially from the date of its organization elect a chairman and a secretary who shall hold office for two years and until their successors shall be elected and qualified. All moneys expended by said commission shall be by draft upon the bank or banks which are depositories for the said road fund, and said drafts shall be signed by the secretary and countersigned by the chairman, and shall show upon their face the purpose for which the money is expended. The members of said county road commission shall receive pay only when acting jointly as a road commission and such compensation shall be the same as paid to the members of the board of county commissioners of said county. (1917, c. 284, s. 29; 1919, c. 68.)

§ 3664. Vacancies filled.—In case of any vacancy caused by death, resignation or otherwise, of any member of the county road commission, such vacancy shall be filled by the board of county commissioners for the unexpired term, as provided above for regular appointments. (1919, c. 284, s. 30; 1919, c. 68.)

§ 3665. Continuation of existing road management.—Those counties or townships or road districts, coming under the provisions of this article, which already have a road commission, or other commission or board which has charge of the road work, or in which the board of county commissioners have charge of the road work, and desire to retain such commission or board to have charge of the road work of said county, township, or road district, then such desire shall be stated in the petition praying for a bond election or special road tax; and if the bond election or special road tax is passed, then said board of county commissioners, or other board or commission stated in the petition, shall become the county road commission for all the purposes of this article, and shall be required to perform the duties that the county road commission created by this article is authorized to perform; if, however, no desire is stated in the petition praying for a bond election or special road tax that an existing road commission or board or the board of county commissioners shall retain charge of or have charge of the road work in such county, township, or road district, then in that event the county road commission authorized by this article shall be appointed by the board of county commissioners, and such appointment shall abolish the said county, township, or district road commission or board, but all the rights and authority conferred upon such commission or board herewith abolished are hereby conferred upon the county road commission herein enacted. (1917, c. 284, s 31; 1919, c. 68.)

§ 3666. Road engineer to keep books and accounts.—The county road commission is authorized to employ an expert road engineer at such compensation as may be fixed by said county road commission. The county road engineer, however appointed, may request, at any time, the advice of the state highway engineer in solving any problem that may arise, either technical, economical, or otherwise, that may be deemed by him to be of benefit to the county, and such advice shall be without any expense to the county or township. It shall be the duty of the engineer of the county, township, or road district coming under the provisions of this article to keep or have kept the necessary books and accounts showing in detail the expenditure for all work done through money derived by bonds issued or special road tax levied for road work in such county, township, or road district. The engineer shall keep or have kept in suitable way a cost accounting system showing the unit cost of various items entering into the construction of the roads, showing when and where the various elements of cost entering into the said work were used, giving the name of the road and the nearest station number to culverts, bridges, etc. It shall be his duty to keep approximate yardage costs, and approximate classification of the materials moved in all excavations made for the purpose of building such roads. (1917, c. 284, s. 32; 1919, c. 68.)

§ 3667. Assessments of damages and benefits.—In opening new highways, widening and straightening old roads and repairing same, the county road commission created by this article, or any other road commission or board, or the board of county commissioners, having charge of the road work in any county, township, or road district, or the state highway commission, is hereby authorized through its agents to enter upon any land and locate and build such highways. If the said commission or board and the owner or owners of said land cannot agree as to the damages, if any, the said commission or board shall, after sixty days after said highway is completed, cause to be summoned three disinterested freeholders of said county, who shall go upon the land and assess the damages and benefits under the general law as it now exists. Before entering upon lands as authorized by this section it shall be the duty of the said commission or board to serve notice upon the owner or owners of said land, notifying them that the highway is to be located upon said land under authority of this article. In assessing the damages sustained by any landowner, the jury shall take into consideration the special benefits, if any, accruing to the landowner, and in determining such benefits consideration shall be given to the benefits the landowner has derived from the fact that any old road right of way has reverted back to said landowner by reason of the relocation and construction of the new road; and if such benefits shall exceed the damages, then the amount of such excess of benefits shall be assessed against the landowner and shall constitute a lien upon the land adjoining the road, and shall

be collected by the sheriff in the same way as public taxes. No suit shall be instituted by the landowner for damages on account of location of the road under this article or the taking of timber or material until after sixty days after the completion of the road across the lands of such landowner, and no suit shall be brought by any landowner unless the same is commenced within six months after the completion of the road by or across the lands of the claimant. Either party may appeal to the superior court for the assessment of damages and benefits, where the matter shall be heard by the court and jury de novo. No cost shall be awarded against any county or township upon appeals when the recovery awarded through such appeal is not more favorable to appellant than the award of the referees. (1917, c. 284, s. 33; 1919, c. 68.)

How Damages Assessed.—In assessing damages for the construction of a highway the jury should estimate the value of the land taken, and any damage to the rest of plaintiff's tract by the location of the road, and from such sum should subtract any benefits to the plaintiff by reason of any additional value given to the land by special advantages not general to the lands of others. Campbell v. Board, 173 N. C. 500, 92 S. E. 323 (decided under a private act).

Location of Road Not Considered.—Where a part of the owner's lands has been taken by the county in straightening a highway, and he is left with the use of the old road running near his dwelling on another part of his land, he is not entitled to having considered by the jury, in estimating his damages, the fact that the new road did not run by his dwelling, the location of the new part of the road being a matter entirely within the discretion of the proper county authorities. Elks v. Commissioners, 179 N. C. 241, 102 S. E. 414.

Appeal from Award of Assessors.—The Legislature may make the award of assessors to lay off and construct a public road final as to the amount of damages to be paid the owners of the land so appropriated; the awarding of such damages is to a large extent a judicial question, and unless the statute clearly shows that the action of the appraisers is to be regarded as final, the superior court, in the exercise of its general powers of supervision and control over any and all subordinate tribunals, may in proper instances bring the cause before it for review, certainly in case of manifest and gross abuse. Dickson v. Perkins, 172 N. C. 359, 90 S. E. 289.

Cited in Lassiter v. Adams, 196 N. C. 711, 712, 146 S. E. 808.

§ 3668. Entry on land for material; obstruction of drains or ditches.—The county road commission created by this article, or any other road commission or board, or the board of county commissioners, having charge of the road work in any county, township, or road district, or the state highway, commission, is hereby authorized through its agents to enter upon any land in said county, to cut and carry away any timber except trees or groves on improved land planted or left for shade or ornament, dig or cause to be dug and carry away any gravel, sand, clay dirt, or stone which may be necessary for the proper repair and construction of roads in said county, and make or cause to be made such drains or ditches upon any land adjoining or lying near any road in said county that the said commission or board may deem necessary for the better condition of the road; and the drains and ditches so made shall not be obstructed by the occupants of such lands or any other person; and any person obstructing such drains or ditches shall be guilty of a misdemeanor. Before entering upon land as authorized by this section, it shall be the duty of the said commission or board, through its representatives, to serve notice upon the owner or owners of said land, notifying them that certain material authorized to be taken by this section is required for the road work. (1917, c. 284, s. 34; 1919, c. 68.)

County Not Liable for Trespass.—An action will not lie against a county for trespass and damages where its officers wrongfully quarried rock on plaintiff's land. Keenan v. Commissioners, 167 N. C. 356, 83 S. E. 556.

§ 3669. Cutting timber shading roads.—The county road commission or other commission or board having charge of the road work in any county, township, or road district, or the state highway commission, through its agents is hereby authorized to enter upon any land adjoining or bordering on any county road and cut the trees on such land for a distance in width of not over thirty feet from the edge of the right of way of said road; but such cutting must be necessary for the maintenance of the road, and trees or groves on improved land planted or left for shade or ornament shall not be cut. Due compensation shall be made for any damage sustained by the landowner, to be ascertained under the rules and regulations provided in the second section preceding. (1917, c. 284, s. 35; 1919, c. 68.)

§ 3670. Claims for timber or material.—The owner of any land from which any timber or other material has been removed may present to the authorities his claim therefor in writing, and upon such presentment it shall be the duty of the said authorities to set a day not later than thirty days thereafter for the purpose of hearing and determining such claim. Upon the hearing and determination thereof, the claimant may appeal to the superior court of said county to have his cause tried as in other civil cases. (1917, c. 284, s. 36; 1919, c. 68.)

§ 3671. Width, alignment, and grade of highways.—The highways in any county, township, or road district constructed or improved under this article shall have a right of way of not less than forty feet, except where the road authorities or state highway commission deem it impracticable to acquire such width, and in such cases the width shall be as determined by said authorities. The alignment of the road shall be as straight as practicable and with no grade over four and one-half per cent, except as such grade is considered impracticable by the road engineer. (1917, c. 284, s. 37; 1917, c. 68.)

§ 3671(a). Drainage of highway; application to court; summons; commissioners.—Whenever in the establishment, construction, improvement or maintenance of any public highway it shall be necessary to drain said highway, and to accomplish such purpose it becomes necessary to excavate a canal or canals for carrying the surplus water to some appropriate outlet, either along the right-of-way of said highway or across the lands of other landowners, and by the construction, enlargement or improvement of such canal or canals, lands other than said highway will be drained and benefited, then, and in such event, the State highway commission, if said highway be a part of the State highway system, or the county highway commission, or such agency in the county as may have jurisdiction over public highways, if said highway be a county highway, may, by petition,

apply to the Superior Court of the county in which, in whole or in part, said highway lies or said canal is to be constructed, setting forth the necessity for the construction, improvement or maintenance of said canal, the lands which will be drained thereby, with such particularity as to enable same to be identified, the names of the owners of said land and the particular circumstances of the case; whereupon a summons shall be issued for and served upon each of the proprietors, requiring them to appear before the court at a time to be named in the summons, which shall not be less than ten days from the service thereof, and upon such day the petition shall be heard, and the court shall appoint three disinterested persons, one of whom shall be a competent civil and drainage engineer recommended by the State Geologist, and the other two of whom shall be resident freeholders of the county or counties in which the road and lands are, in whole or in part located, as commissioners, who shall, before entering upon the discharge of their duties, be sworn to do justice between the parties. (1925, c. 85, s. 3.)

§ 3671(b). View by commissioners; report; judgment.—The commissioners, or a majority of them, one of whom must be the engineer aforesaid, shall, on a day which each party is to be notified at least five days in advance, meet on the premises, and view the highway, or proposed highway, and also the lands which may be drained by the proposed canal, and shall determine and report what lands will be drained and benefited by the construction, enlargement or improvement of such canal, and whether said drainage ought to be done exclusively by said highway authorities, and if they are of opinion that the same ought not to be drained exclusively at their expense, then they shall decide and determine the route of the canal, the dimensions and charter thereof, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, the extent, area and identity of lands which shall be permitted to drain therein, and providing as far as possible for the effectual drainage of said highway, and the protection and benefit of the lands of all the parties; and they shall apportion the cost of the construction, repair and maintenance of said canal among said highway authorities and said landowners, and report the same to the court, which when confirmed by the clerk shall stand as a judgement of the court against each of the parties, his or its executors, administrators, heirs, assigns or successors. (1925, c. 85, s. 4.)

§ 3671(c). Appeal.—Upon the entry of the judgment or decree aforesaid the parties to said action, or any of them, shall have the right to appeal to the Superior Court in term time under the same rules and regulations as apply to other special proceedings. (1925, c. 85, s. 5.)

§ 3671(d). Rights of parties.—The parties to such special proceeding shall have all the rights which are secured to similar parties by article one of chapter ninety-four of the Consolidated Statutes, and shall be regulated by the provisions thereof and amendments thereto, in so far as the same are not inconsistent herewith. (1925, c. 85, s. 6.)

§ 3671(e). Closing road during construction.—If it shall appear necessary to the road governing body of any county, its officers or appropriate employees, to close any road or highway coming under its jurisdiction so as to permit of proper completion of work which is being performed, such road governing body, its officers or employees, may close or cause to be closed the whole or any portion of such road or highway deemed necessary to be excluded from public travel. While any such road or highway, or portion thereof, if so closed, or while any such road or highway, or portion thereof, is in process of construction or maintenance, such road governing body, its officers or appropriate employees, or its contractor, under authority from such road governing body, may erect, or cause to be erected, suitable barriers or obstructions thereon, may post, or cause to be posted, conspicuous notices to the effect that the road or highway, or portion thereof, is closed, warning signs, lights and lanterns on such road or highway, or portions thereof. When such road or highway is closed to the public or in process of construction or maintenance, as provided herein, any person who willfully breaks down, drives into new construction work, removes, injures, or destroys any such barrier or barriers or obstructions on road being constructed, or tears down, removes, or destroys any such notices, drives into new construction work, or extinguishes, removes, injures or destroys any such warning lights or lanterns so erected, posted, or placed, shall be guilty of a misdemeanor: Provided, a detour shall be provided when the road is closed. (1924, c. 81.)

§ 3672. Deposit of money; transfer of equipment.—Any moneys on hand in any county treasury or in the hands of any county treasurer or in any township or road district treasury, or in the hands of any township treasurer, to the credit of the road funds of such county or township or road district at the time the location, construction, repair and maintenance of the public roads in said county, township, or road district comes under the provisions of this article, shall be turned over to the bank or banks designated as the depository for the road fund of said county or township or road district by the board of county commissioners, or other authorities having charge of such funds, and shall become part of said road fund and shall be expended for the construction of the roads in said county, township, or road district as provided in this article. Whenever the construction of the roads of any county or township or road district comes under the provisions of this article, any teams, material, machinery tools supplies, or any property whatsoever belonging to the county or township or road district, shall be turned over to the county road commission herein provided for, to be used by them for and in whatever way they deem best in constructing or improving the roads of said county or township or road district: Provided, that when the bonds issued or special road tax levied only applies to a township or road district, then other such teams, materials, machinery, tools, sup-

plies, or other property as belong to said township or road district shall be turned over to the county road commission. (1917, c. 284, s. 38; 1919, c. 68.)

Settlement between Road Commissioners and County Commissioners.—When commissioners of a certain county sold bonds for the completion of the state highway through the county, and other specified purposes, and thereafter a county board of road commissioners was established by legislative enactment, in a settlement between the two boards it was held that the county commissioners were entitled to a credit of such amount as had been paid by it for the designated purposes, but not for any amount used for general county purposes. Com'rs v. Commissioners, 184 N. C. 463, 115 S. E. 54.

§ 3673. County-line roads.—When the proper location of any public road is such as to cause it to run along the dividing line between two counties or to traverse first a part of one county and then a part of the other county, thus making the road a "county-line road," then a representative or representatives of the county road commission of each county, or, in case the county has no road commission, then of the board of county commissioners, shall together with representative of the state highway commission, meet on the first Wednesday in March or as soon thereafter as practicable of each year and determine the amount necessary to maintain for the succeeding year the said "county-line road" in a proper manner, and also determined the best method of expending such sum in the most economical manner to accomplish the desired result; and each county commission shall then provide from the road funds at its disposal an amount equal to one-half of that previously determined as necessary to maintain said road in a proper manner, and shall use such sum in the maintenance of said road in such manner as is determined by the representatives of said commissions. In case the county commission desires and requests in writing that the state highway commission supervise and take charge of the maintenance of said "county-line road," then the said sum provided for the maintenance of said road by the said county commissions shall be placed by the said commissions at the disposal of the state highway commission, to be used for the maintenance of the road. (1917, c. 284, s. 39; 1919, c. 68.)

§ 3674. Construction by one county of county-line roads.—When the survey for the location of a road is completed and it is found that the road when constructed will follow the dividing line between two counties or traverse first a part of one county and then a part of the other county, and thus making such a road a "county-line road," and satisfactory arrangements cannot be made between the road officials of the two interested counties for the construction of said "county-line road," then the road officials of the county desiring the construction of said road are hereby authorized to build said road, including that portion wholly within the other county, and pay for same out of the road funds of their county, and the road thus constructed shall become a public road of both counties and shall be maintained as provided in the preceding section for "county-line roads." (1917, c. 284, s. 40; 1919, c. 68.)

§ 3675. Extension of work to adjoining counties.—When the county road commission or any other commission board that has charge of the road work of any county has built a road to a county line of an adjoining county, which does not contain any connecting road or if such connecting road is one that is in poor condition, and thus, there is a gap between the said county line to a good road in the adjoining county, and satisfactory arrangements cannot be made between the road officials of the two interested counties for the construction of a road connecting the two roads mentioned above, then the county road commission or other commission or board having charge of the road work of the county desiring the construction of said road in order to make said connection, and when necessary the board of county commissioners, are herewith authorized to build said connecting road in the adjoining county and pay the cost of such construction out of the road or other funds of the county desiring the construction of said road, and the road thus constructed shall become a public road of the county in which it is located, and shall be maintained by said county in which it is located in a manner to be approved by the state highway commission. (1917, c. 284, s. 41; 1919, c. 68.)

§ 3676. Work by county commission in municipalities.—The county road commission provided for in this article, and any other commission or board having in charge the road work in any county or township of said county, or in any road district, is herewith authorized to expend a portion of the funds available for road work in said county township, or road district upon the public roads of any incorporated town within said county, township, or road district having a population, as shown by the latest available federal census, of less than twenty-five hundred, and that portion of any street or road in an incorporated city or town having a population of twenty-five hundred or more, along which the houses average more than two hundred feet apart, whenever in their judgment the construction of such road within said incorporated city or town is to the interest of the county, township, or road district: Provided, that the board of aldermen or other governing body of said city or town agrees that the county road commission or other commission or board having charge of the road work for the county, township, or road district, have full charge of the road work in said city or town as authorized by this section. (1917, c. 284, s. 42; 1919, c. 68.)

§ 3677. Free labor required on roads.—In those counties where the able-bodied men are required to work a certain number of days on the public roads of the county or township of such county, the labor of such men shall be under the jurisdiction and supervision of the county road commission, and the men shall be worked at such time and in such manner as said road commission may direct, in conformity with the county or township law governing such labor, except in so far as the following provisions amend such laws:

1. All able-bodied men of any county or township that are subject to work on the public roads of said county or township may be called out by the county road commission to work on such roads any time during the year for three consecutive days until the required number of days are

worked out, and the work-year shall begin with the first day of January.

2. No man shall be called upon for more days work than is prescribed in the act authorizing such labor in said county or township.

3. Any able-bodied man required to work on the roads may, in lieu thereof, pay to the chairman of the county road commission a sum equal to seventy-five cents per day for the number of days he may be required to work; and in such case he shall be relieved from all labor on the roads.

4. Such sum is paid to the county road commission prior to the time he is called upon to work the roads.

5. Any able-bodied man subject to work on the road who fails to report for work at the time called upon by the county road commission, or refuses to work as required by the county road commission, and has not paid to the county road commission the required sum in lieu of such labor, unless prevented from reporting for such duty by illness or other cause beyond his control, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars or more than twenty-five dollars, or imprisoned not less than five or more than ten days. (1917, c. 284. s. 43; 1919, c. 68.)

Editor's Note.—This section is superseded by § 3846(18).

§ 3678. Prisoners on roads.—Any person in any county that has a county road commission appointed under the provisions of this article, who shall be convicted in any of the courts of said county, superior, justice's or mayor's courts, and sentenced to work on the public roads, shall be assigned into the custody and control of the county road commission by the board of county commissioners, when said board is so requested by the county road commission. Said prisoners while in the custody and under the control of the said county road commission shall be employed on such road work as may be deemed best by the county road commission, and the expense of maintaining and guarding said convicts while so employed may be paid by the board of county commissioners out of the general fund of the county upon vouchers approved by the chairman and secretary of the county road commission. The county road commission shall have direct supervision of the care, feeding, and clothing of said prisoners and shall provide the necessary sleeping quarters and camps necessary for the proper care of said prisoners. All prisoners' camps shall be maintained in a sanitary manner approved by the state board of health. The county road commission is also authorized, in their care and working of convicts, to divide the prisoners into classes or groups according to the character of the prisoner, and work any and all such prisoners as they deem best without guards and without stripes. Prisoners worked in this manner without guard and stripes, shall be known as "honor prisoners," and shall be entitled to receive a reduction of at least twenty-five per cent and not more than fifty per cent of the time they are sentenced for satisfactory work and good behavior. (1917, c. 284, s. 44; 1919, c. 68.)

Editor's Note.—This section is superseded by §§ 3846(19) et seq.

§ 3679. Road statistics.—As it is necessary for the state highway commission to know as accurately as possible the number of miles and type of construction of the roads in each county in order to enable the state highway commission to supply the secretary of agriculture of the United States with the information he desires in connection with the operation of the Federal Aid Road Act, and to enable the state highway commission to carry on its work most efficiently and effectively, the chairman of the county road commission, or the chairman of whatever board or commission that has charge of the road work in such county or township of each and all the counties and townships of the state, is herewith authorized and directed to furnish to the state highway commission, upon blanks to be provided by said state highway commission, the number of miles of each type of road constructed, number of bonds issued, and amount of tax levied, and such other information and statistics regarding the road work of the county or township under his jurisdiction as the state highway commission may deem necessary. (1917, c. 284, s. 45; 1919, c. 68.)

§ 3680. Guard railings.—The county road commission of any county, or whatever board has charge of the roads and road work of any county or township or road district in said county, are herewith authorized and directed to provide suitable means to insure the safety of the public traveling over the roads of such county, township, or road district, by erecting, whenever it is considered necessary, substantial railings, walls, or other suitable structures for this purpose. If road officials of said county or township or road district fail to provide such satisfactory measures of insuring the safety of those traveling the roads of such county, township, or road district, then upon petition of twenty freeholders of the county, township, or road district who are frequent patrons of the road in question, the said county road commission, or whatever commission or board has charge of the road work of said county, township, or road district, shall, within ten days after receipt of said petition, begin erecting such satisfactory railing, wall, or other suitable structure for this purpose: Provided, that if in the judgment of the county road commission, or whatever commission or board has charge of the road work of said county, such railings, walls, or other suitable structures are not needed, then they shall advise with the state highway commission, and if such commission deems such railings, walls, or other suitable structure necessary for the protection of the patrons of the said road, the county road commission or other said commission or board shall erect such railings, walls, or other suitable structures as called for in the petition. (1917, c. 284, s. 46; 1919, c. 68.)

Part 3. Road Institutes

§ 3681. Road institutes.—The members of the county road commission of any county, or the members of whatever commission or board who have charge of the road work in any county, township, or road district, are herewith authorized to attend the road institute held annually at the University of North Carolina, and the county road commission of any county, or whatever commission or board has charge of the road work in any

county, township, or road district, are herewith authorized to detail any and all persons employed by said county in connection with the road work of said county, township, or road district to attend said institute, when in their judgment such attendance will inure to the benefit of the road work of said county, township, or road district; and the said road commission, or other commission or board, is herewith authorized to pay the expenses of the members of said county road commission or board, and other persons detailed to attend said road institute, out of the funds of the said county, township, or road district. (1917, c. 284, s. 47; 1919, c. 68.)

See editor's note under § 3634.

Part 4. Road Districts

§ 3682. Creation of road districts.—Whenever it is desired to create a road district in any county, and provide funds for the location, construction, reconstruction, or maintenance of roads within such district, such road district may be created in the following manner: Upon petition of twenty-five freeholders living within the area of a proposed road district, which petition shall give the boundaries of the proposed district, together with the amount of bonds it is desired to issue for the district, or the amount of special tax it is desired to levy upon the proposed district, and when said petition is presented to the board of county commissioners it shall be the duty of the board of county commissioners of any county, upon receipt of such petition, to provide for holding an election at the next election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters living within the boundaries of the proposed road district on the question of whether the board of county commissioners of said county in which the proposed road district is located shall issue the bonds called for in the petition, or levy the special tax called for in the petition, provided that there is included in the petition the approximate number of miles of road it is proposed to improve by such bond issue or special tax; but no election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued or special road tax proposed to be levied will be sufficient to construct, alter, or improve approximately the number of miles of road proposed to be improved: Provided, that the approximate amount of bonds proposed to be issued as called for in the petition, together with all bonds previously issued and remaining unpaid by said county for which the property of the road district is liable, shall in no case exceed an amount equal to ten per cent of the total assessed valuation of the area included within the proposed road district.

In case the petition for a road district calls for an election, the board of county commissioners shall proceed to call, hold, and report the elections as hereinbefore provided for in the election in townships; and in case the result of the election is in favor of road bond issue or special road tax, then the said board of county commissioners shall declare the road district created, and proceed to carry out the wishes of the people of the district in regard to the issuing of bonds or the levying of special tax heretofore provided for townships or road districts. (1917, c. 284, s. 48; 1919, c. 68.)

See editor's note under § 3634.

Creation of District for Improvement of Single Road. — The legislature may create a district for the improvement and maintenance of a single road, within its constitutional authority to create road districts, by statute passed in accordance with the constitutional requirements. Woodall v. Highway Comm., 176 N. C. 377, 97 S. E. 226.

§ 3683. Special road district; apportionment of assessments.—A county road commission of any county, or whatever commission or board has charge of the road work of any county, shall have authority and power as hereinafter provided to cause to be relocated, constructed, reconstructed, or improved any public road of the county, or any part of such road, upon petition signed by the owners of sixty per cent of the land area in each and every subdivision hereinafter provided for; and the board of county commissioners are authorized and directed as hereinafter provided to levy and cause to be collected an assessment upon all lots, tracts, and parcels of land specially benefited by such improvement, for paying two-thirds of the cost and expense thereof, as hereinafter provided, which assessment shall become a first lien upon all property liable therefor prior and superior to all other liens and encumbrances, and to provide for the payment of such assessment either on the immediate payment plan or by installments, and to issue local road district warrants or bonds for such installments. (1917, c. 284, s. 49; 1919, c. 68.)

§ 3684. Petition for improvement of adjoining roads.—The owners of sixty per cent of the land area in each and every subdivision hereafter provided for adjoining such county road or part thereof sought to be improved in any county in this state may present to the county road commission or whatever commission or board that has charge of the road work of any county, a petition setting forth that the petitioners are such owners, and that they desire such road or part thereof to be improved under the provisions of this article, the particular road or portion thereof sought to be improved, the kind and nature of the improvement desired, and the mode of payment of the assessments to be levied for defraying the cost and expenses of such improvement and the maximum cost of the proposed improvement. (1917, c. 284, s. 50; 1919, c. 68.)

§ 3685. Procedure upon petition for special road district, or road improvement.—Upon the presentation of a petition as provided in the two preceding sections, the county road commission, or whatever commission or board has charge of the road work of any county, shall forthwith proceed to carry out the wishes of the petitioners: Provided, that before the county road commission, or whatever commission or board has charge of the road work of any county, shall act upon said petition the register of deeds shall certify to the commission that the petition represents at least sixty per cent of the land area in each and every subdivision hereinafter provided for adjoining the county road proposed to be improved; and that the county road commission, or whatever commission or board has charge of the road work of any county,

shall, through its engineer, examine and survey and make plans and specifications and estimate of the cost of such construction and improvement as is desired by the petitioners; and if two-thirds of the estimated cost of such improvement is greater than the amount stated in the petition, then the county road commission, or whatever commission or board has charge of the road work of any county, shall reject such petition, except that they are authorized to do the work petitioned for. The total assessment charged against the property owners shall not be greater than the amount named in the petition.

The engineer shall examine and determine the lands that will be specially benefited by such improvement and which should be included within the local district to be assessed to defray the cost and expense of such improvement and to prepare the estimate rolls as hereinafter provided; the engineer shall also determine the cost of right of way, if any, for that portion of the road that it is necessary to relocate. As soon as the engineer has completed his report he shall present same to the county road commission, or whatever commission or board that has charge of the road work of such county, at their next meeting. (1917, c. 284, s. 51; 1919, c. 68.)

§ 3686. Local road districts constituted; apportionment of assessment.—Such local road districts shall be constituted and the boundaries thereof fixed as follows: The road or portion thereof to be improved, coterminous with the improvement, shall be the central line through the district, and the bordering lands on each side, within a distance of half a mile from the margin of said road and coterminous with the construction work or improvement, shall be included in and constitute the body of the local road district, and shall be subject to assessment to the extent above provided.

For the purpose of making an equitable apportionment of the assessment, such local road district shall be divided longitudinally into three parts, as follows: All land on both sides of said road, or portion thereof, to be improved, and within a distance of eight hundred and eighty feet from the margins thereof, shall constitute the first subdivision; all the land outside of the first subdivision and within eight hundred and eighty feet from the exterior margins thereof shall constitute the second subdivision; and all the land outside of said second subdivision and within eight hundred and eighty feet from the exterior margins thereof shall constitute the third subdivision. Each separate tract or parcel of land in said first subdivision shall be assessed and be subject to a charge for a proportional part of forty-five per cent of not over two-thirds of the cost of the construction work or improvement of said road, including said incidental expenses, and it shall be subject to a lien therefor until it shall be paid; each separate tract or parcel of land in said second subdivision shall be assessed and subject to a charge for a proportional part of thirty-five per cent of not over two-thirds of the cost and expense of said construction work or improvement, and be subject to a lien therefor until it shall be paid; each tract or parcel of land in said third subdivision shall be assessed and subject to a charge for a proportional part of twenty per cent of not over two-thirds of the cost and expense of said construction work or improvement, and be subject to a lien therefor until it shall be paid.

The charge upon the several separate tracts or parcels of land in each subdivision shall be assessed ratably according to the front foot plan, that is to say, one foot of longitude measured along the road constituting the center of such improvement district and extending latitudinally across the subdivision shall be taken as the unit by which to determine the proportion of the assessment, so that a unit in each subdivision will be eight hundred and eighty square feet of superficial area. If the areas of said subdivisions are not equal to each other, the rates fixed for each subdivision shall be fixed on the basis that the benefit conferred on eight hundred and eighty square feet of land in subdivisions first, second, and third are related to each other as are the numbers forty-five, thirty-five, and twenty, respectively. This section is to imply that the property on each side of said road shall bear one-third of the cost and the county one-third. (1917, c. 284, s. 52; 1919, c. 68.)

§ 3687. Report of engineer; creation of district.—The county road commission, or whatever commission or board has charge of the road work of any county, shall at their next meeting after the completion of the engineer's report relating to local road districts, consider such report, and if it shall appear from said report that the whole amount of the cost and expense of said construction or improvement, and, together with any cost for right of way chargeable as a lien against the property specially benefited within such local road district, comes within the amount specified in the petition, the said county road commission, or whatever commission or board has charge of the road work of any county, shall make and enter upon their records an order that the said improvement be made, and creating such local road district for the payment of said cost and expenses of making said improvement, by special assessment of the property in said district specially benefited according to said engineer's report, be known and designated Local Road District, No ...., in .... County, North Carolina, and such report shall be kept on file in the office of the county road commission, or whatever commission or board that has charge of the road work of any county. (1917, c. 284, s. 53; 1919, c. 68.)

§ 3688. Work undertaken.—After the making of such order and directing the making of such improvement and establishing such local road district, the county road commission, or other commission or board having charge of the road work of said county, shall proceed to do the work under the same provisions and conditions as they are authorized to carry on road work for townships and counties. (1917, c. 284, s. 54; 1919, c. 68.)

§ 3689. Apportionment of expense; assessment roll, etc.—When the final order for said improvement in the local road district shall have been made, the county road commission, or whatever commission or board has charge of the road work of said county, through its engineer or other representative shall proceed to apportion the estimated cost and expenses of said improvement upon the land embraced in said local road district according to the benefits to be derived therefrom,

and not more than thirty days after the beginning of work on said improvement report to and file with the board of county commissioners an assessment roll in duplicate, which shall contain a description of each lot or parcel of land or part thereof to be assessed; the amount to be charged, levied, or assessed against each lot or parcel of land or part thereof, in proportion to the special benefits to be derived by each such lot or parcel or part thereof from such improvement, and the name of the owner of each such lot or parcel of land or part thereof, if known; but in no case shall a mistake in the name of the owner be fatal when the description of the property is correct.

As soon as said assessment roll shall have been so reported and filed, the board of county commissioners shall cause notice to be published for three consecutive weeks, which notice shall be published in a newspaper of the county, or, in case there is no newspaper in the county in which the local road district is located, then in a newspaper of an adjoining county, notifying all persons interested that said assessment roll has been filed, and requiring them to appear at the office of the board of county commissioners, at the county courthouse, at a time not less than fifteen days from the date of the last issue of said publication of said notice, and make objections thereto, if any they have. At the time fixed the board of county commissioners shall meet, and, if no objections have been filed to said assessment roll, they shall make and enter an order confirming the same; but if objections in writing have been filed by any of the landowners affected thereby the board of county commissioners shall proceed to hear such objections, and for that purpose shall hear any testimony that shall be offered by any party interested and either one of the board of county commissioners shall be authorized to administer oaths to witnesses. After such hearing they shall make such corrections and changes, if any, as to them shall appear just and requisite to apportion the assessment to the benefits to be received from such improvement, and shall then make and enter an order approving and certifying such assessment roll, and levying and assuming the amounts thereof against each and all of the lots and parcels of land, or parts thereof, respectively, including in said roll as approved, and the same shall become a first lien thereon: Provided, that any landowner may appeal to the superior court from the decision of said board, on giving an appeal bond in the sum of one hundred dollars, but such appeal shall not hinder or delay the carrying out of the provisions of this article.

The cost and expenses of survey and of all preliminary proceedings and all other expenses included in organization of the local road district, and for the preparation, issuance, and disposal of the bonds or warrants for the payment of cost and expense of such improvements, and for the cost of the improvements for the construction and reconstruction of the roads in said local district shall be paid out of the road fund and the general fund of the county in a ratio one to two; that is, one-third of all cost and expenses mentioned above shall be paid out of the road fund of the county by the county road commission, or whatever commission or board that has charge of the road work of said county; and the other two-thirds out of the general fund of the county; this latter being repaid in the assessments collected from the owners of the land jointly, under this article, in the local district. (1917, c. 284, s. 55; 1919, c. 68.)

§ 3690. Maintenance.—All roads laid out, constructed, or reconstructed or improved under the provisions of this article shall, after their construction, be maintained by the county road commission, or other commission or board having charge of the public roads of said county. (1917, c. 284, s. 56; 1919, c. 68.)

§ 3691. Methods of payment and collection of assessments.—There shall be two methods of making payment of the special assessment chargeable against the several tracts and parcels of land included in the local road district authorized under this article, namely that of "immediate payment" and that of "payment by bonds or warrants"; the method to be adopted and the period not exceeding ten years over which such bonds or warrants shall be made payable shall be that petitioned for as authorized herein. In case the payment of such assessments in local road districts is to be by the method of "immediate payment" the board of county commissioners shall, as soon as such assessment roll has been approved and certified, deliver the same to the sheriff of the county for the collection of such assessments. The sheriff shall give notice by publication for two consecutive weeks in a newspaper in the county, or, in case there is no paper in the county in which the local road district is located, then in a newspaper of an adjoining county, and shall mail a copy of such notice to the owner of the property assessed when the name of such owner and his postoffice address is known; but the failure to mail such notice shall not be fatal when publication thereof is made; which said notice shall state that such assessment roll has been certified to him for collection, and that unless payment is made within thirty days from date of such notice such assessment will become delinquent and shall bear interest at the rate of six per cent per annum; and if not paid before such assessment shall have become delinquent, a penalty of five per cent shall be added, and the sums delinquent shall be added on the annual tax roll for the current year against each lot, tract, and parcel so delinquent, and, with the interest and penalty, collected as other taxes, separate account being kept thereof; and if not paid within the time fixed for the payment of general county taxes, shall be collected as such taxes are collected, together with such additional charges and penalties as are authorized to be charged and collected on other delinquent taxes; and each lot, tract, or parcel so delinquent shall be sold for the amount of such assessment, with interest, penalty, and cost, at the time and in the manner and by the same authority and process as lands and lots are sold for general county taxes. (1917, c. 284, s. 57; 1919, c. 68.)

§ 3692. Payment by bonds or warrants. — In case the method of payment is to be "payment by bonds or warrants," the board of county commissioners, after the assessment roll has been approved and certified as hereinbefore provided, shall, at the time of levying said assessment and in their order making such levy, provide and de-

clare that the sum charged thereby against each of such tracts or parcels of land in said local road district may be paid in equal annual installments, with interest upon the whole sum so charged at the rate fixed in said order, specifying the number of such installments, which shall be equal to the number of years which the bonds or warrants issued to pay for the improvement may run before payment of the same may be demanded by the holder thereof; and each year thereafter the sheriff shall collect one of said installments, together with the interest due thereon, and all installments thereafter to become due in the same manner and with the same added penalty and interest, in case of delinquents, and by means of the same proceedings to enforce such payments by the sale of the land, and as hereinbefore provided for the collection of said assessment by the method of "immediate payment." (1917, c. 284, s. 58; 1919, c. 68.)

§ 3693. Issuance of bonds of district; payable from general fund.—The board of county commissioners shall make and enter an order authorizing and directing the issuance of such warrants or bonds of the local road district that has been authorized by the petition for the improved road work in said district, which by their terms shall be made payable on or before a date not to exceed ten years from and after the date of their issue, which latter date may be fixed by the order, and payment of which shall not be demanded by the holder thereof until the end of said period, and they shall bear such interest as shall insure their being disposed of at par and as may be provided for in said order, not exceeding six per cent per annum, which interest shall be payable annually, and each warrant or bond shall have attached thereto interest coupons for each interest payment. Such warrants or bonds shall bear the date of issue and be made payable to bearer. The warrants or bonds and each coupon shall be signed by the chairman of the board of county commissioners, and shall be attested by the clerk of said board, and the seal of such board shall be affixed to each warrant or bond, but not to the coupon: Provided, that each coupon may be signed by facsimile signature of said officers. Such warrant or bond shall be printed, engraved, or lithographed on good bond paper and state on its face that it is issued in accordance and compliance with the act of 1917, chapter 284, designating the same by title and date of approval. Such warrants or bonds shall be in denominations of not less than one hundred or more than one thousand dollars, and they shall refer to the improvement to pay for which the same shall be issued, and to the order and record thereof, authorizing the same, and shall bear upon its face the designation of the local road district, thus: Local Road District, Number ..... in ..... County, North Carolina. The principal sum named in the warrant or bond, and the interest thereon shall be payable out of the general fund of the county, the same to be reimbursed as the assessments are collected by the sheriff from the assessment on the lands in the local road district. Such warrants or bonds shall not be issued in excess of of the amount named in the petition requesting organization of the local road district. (1917, c. 284, s. 59; 1919, c. 68.)

§ 3694. Notice of issuance of bonds; payment of assessments.—In case the payment of the assessments provided for in the previous sections is by such special warrants or bonds, then the sheriff shall give notice by publication for two consecutive weeks in a newspaper of the county, or in case there is no newspaper published in said county, then in a newspaper of an adjoining county, and shall mail a copy of such notice to the owner of the property assessed, when the name of such owner and the postoffice address is given; but the failure to mail such notice shall not be fatal when publication thereof is made; which said notice shall state that such assessment roll has been certified to the sheriff for collection, and that unless payment of the whole amount of such assessment is made within thirty days from the date of such notice special warrants or bonds will be issued against said property for the payment of said assessments, and thereafter the same will be payable in annual installments, with interest thereon at the rate provided for in said warrants or bonds. At any time within such thirty days any owner of lands within such local improvement district may pay the said assessment chargeable against said owner's lands, and release and discharge the same therefrom and from the operation and effect of such warrants or bonds; and no warrants or bonds shall be issued until twenty days after the expiration of such thirty days, nor for any amounts of such assessment so paid in full within such thirty days. The owner of any such lands may redeem the same from all liability for such assessment at any time after said thirty days by paying the entire installments of said assessment remaining unpaid and charged against such lands at the time of such payment, with interest and all charges thereon to the date of the maturity of the installment next falling due. In all cases where any assessment or any installment thereof is paid as herein provided, the same shall be paid to the sheriff, and such funds shall be paid over by the sheriff into the general fund of the county. (1917, c. 284, s. 60; 1919, c. 68.)

Part 5. Definition; Validating Clause

§ 3695. Definition of terms; validation of bonds and elections.—When provision is made by any section of this article for some other commission to have charge of the road work of any county, township, or road district, as provided for in this article, then such commission shall for the purposes of this article be considered as the county road commission of such county, township, or road district, and all the duties and authorities conferred upon the county road commission authorized by this article are herewith conferred upon such commission acting as the county road commission; and whenever the words "county road commission" are used in this article they shall be construed to mean such other commission as has been conferred with the authority and duties of the county road commission as authorized by this article. Whenever the word "owner" is used in this article, it shall be construed to mean owner or owners, guardian of infants, idiots, lunatics, or inebriates owning lands, or agents for nonresident owners of land in this state, or other persons whose property rights may be materially affected. All bonds issued and elections heretofore held un-

der the provisions of this article are validated. (1917, c. 284, s. 61; 1919, c. 68.)

See editor's note under § 3634.

Art. 5. Township Road Bonds and Road Commissions

§ 3696. Road bonds by townships authorized; bond limit.—For the purpose of laying out, establishing, altering, repairing, grading, constructing and improving in any way the public roads in various townships of the state, and for purchasing machinery, tools, etc., necessary for such improvements, the boards of county commissioners of any county are authorized, empowered and directed to issue coupon bonds bearing interest at a rate not to exceed six per cent per annum, payable semiannually at the office of the treasurer of the county issuing such bonds, or at such other place as the board of county commissioners may determine, to an amount not to exceed fifty thousand dollars for any one township in any county, in the manner and under the restrictions hereinafter provided, and the bonds so issued by the commissioners of the county shall be paid by the township for which they are issued, and shall not be chargeable against any property or polls outside of such township. The board of county commissioners in performing the duties of issuing, selling and purchasing bonds or doing any other thing under this article shall be deemed the agent of any township acting under this article. If bonds hereunder have been voted at an election authorizing an issue of five per cent bonds, but not issued before March 8, 1919, the issuance of six per cent bonds in such case is authorized. (1913, c. 122, s. 1; 1915, c. 237, s. 1; 1919, c. 188, s. 1.)

As to power of counties to issue bonds see 3 N. C. Enc. Dig. 809 et seq., 13 Enc. Dig. 527 et seq.

Editor's Note.—Sections 3846(1) et seq., vesting control of county roads in the State Highway Commission, would seem to render inoperative the sections under this article.

Sections Construed with Amendatory Act.—Sections 3705 et seq., passed in 1917, amending this and the following sections from the Public Laws of 1913, should be construed together to ascertain their true intent and meaning; and semble, no authority is given a township to work its roads by current taxation. Road Commission v. Commissioners, 178 N. C. 61, 100 S. E. 122.

Methods of Financing Road System.—Under the provisions of this article townships may establish and maintain a township road system under its separate governance, but the method is restricted to an issuance of bonds for road purposes upon the approval of its voters, and to taxation limited to the payment of the interest on the bonds, without provision for the working or maintenance of the roads directly by current taxation. Road Commission v. Commissioners, 178 N. C. 61, 100 S. E. 122.

County Commissioners as Agents of Townships.—Statutes making county commissioners agents of townships to dispose of road bonds, to levy assessments, to pay interest, etc., are valid. Commissioners v. Borng, N. C. 105, 95 S. E. 43.

Petition Charging Interest Rate. — Where in accordance with the Constitution and statutes, the question of an issue of bonds by a county for road purposes has been submitted by its proper authorities to its voters and favorably passed upon, they will not be declared invalid because before the enactment of a later statute only 5 per cent bonds were authorized, and the petition for the 6 per cent bonds was filed with the commissioners five days before the enactment of the amendatory law, but the order of the commissioners for the election and the election were after such enactment. Commissioners v. Spitzer, 179 N. C. 436, 102 S. E. 778.

Commissioners Not to Be Enjoined.—Where the county commissioners have acted within the powers conferred on them by this section and have accordingly issued bonds and expended most of the money on the townships roads, they may not be enjoined at the suit of the taxpayer from laying out and constructing an additional road, with the use of the money remaining on hand from the sale of the bonds, upon allegation, as to this particular road, that it was not for the public convenience, or that the majority of the voters were not in favor of it; and a general allegation without specific averment, that the commissioners were not acting for the public good, but for their own individual advantage, is insufficient to warrant the interference of the courts. Edwards v. Commissioners, 170 N. C. 448, 87 S. E. 346.

§ 3697. Election to determine issuance; return of election; issue and sale of bonds.—Upon presentation of a petition in writing signed by not less than one-fourth of the qualified voters of any township, to the board of county commissioners of their county, requesting them to submit to the qualified voters of the township where such petitioners reside a proposition to issue bonds for the purposes named in the preceding section for a definite amount at a maximum rate of interest and to run for a period not to exceed fifty years, all to be named in said petition, the board of county commissioners shall within thirty days order an election to be held in such township and submit to the qualified voters therein the question of issuing bonds to the amount, at the rate of interest, and to run for a period specified in said petition, at which election all those qualified to vote who are in favor of said proposition shall vote a ballot on which shall be written or printed the words "For road bonds," and those opposed to the proposition shall vote a ballot on which shall be written or printed the words "Against road bonds," and the election for this purpose shall be conducted in the same manner and subject to the same rules and regulations as are or may be provided for the election of township officers by the general election laws of this state, unless in any manner otherwise provided for in this article.

The board of county commissioners shall at the time of ordering any election under this article appoint one registrar and two judges of election in each precinct in said township to hold said election. The books shall be kept open for the registration of voters for twenty days preceding the day of election. For the purpose of registration the books used in the general election shall be delivered to and revised by the registrar, and the commissioners may order a new registration by giving thirty days notice of such registration. Such election shall be held after thirty days notice thereof, specifying the amount of the proposed bond issue, rate of interest and period for which bonds shall run, shall have been posted at the courthouse and at every polling place in the township where said election shall take place, and published in four issues of some newspaper published in the county, if the board of county commissioners so order, and the returns thereof shall be made to the board of county commissioners, and returns recorded and result declared by said board as they may determine.

If a majority of the votes cast be "For road bonds," then the board of county commissioners shall issue coupon bonds to the amount, at a rate of interest, and to run for a period specified in the said petition and order of election, and the bonds shall upon their face indicate on account of what township they are issued. They may, at the option of the county commissioners, be issued so as to mature serially or in annual installments, the last payment of which shall be due within the maximum period authorized. They shall be in denomination of not less than one hundred dol-

lars and not exceeding one thousand dollars each. They shall be signed by the chairman of the board of county commissioners and attested by the official seal and signature of the register of deeds of said county. The chairman of the board of county commissioners, under the direction of said board, shall sell the bonds so issued at not less than par value and for as much above par value as possible: Provided, that said bonds shall be issued and sold only as the funds are needed in the township for the purposes indicated herein: Provided further, elections may be ordered and held upon petitions under the provisions of this article not oftener than every twelve months, in any township, until the full amount of bonds authorized by this article shall have been issued for such township. (1913, c. 122, s. 2; 1919, cc. 188, 339.)

Single Proposition. — When a popular vote is required to authorize or validate a municipal indebtedness the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference on decision on a single ballot, and on the question as an entirety, the election as a rule is invalid and, on objection made, in apt time in a proper way, may be disregarded and set aside. Winston v. Bank & Trust Co., 158 N. C. 512, 74 S. E. 611.

§ 3698. Tax for interest and sinking fund.—The county commissioners or other county authorities who are legally authorized and empowered to levy taxes shall, in order to provide for payment of the bonds and interest thereon to be issued under the preceding section, compute and levy each year at the time of levying county taxes a sufficient tax upon the property and poll, observing the constitutional equation, in any township having issued bonds to pay the interest on the bonds issued on account of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of said bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be enforced for levying and collecting other county taxes. (1913, c. 122, s. 3.)

Validation of Tax Issued after Expiration of Period.—The Legislature, having the power to authorize a county to levy a special road tax for the purpose of co-operating in the construction of State or National highways in the county, may validate, by retroactive legislation, an attempt of the municipal authorities to levy this tax after the expiration of the period fixed in the prior act, when in the ratifying act there is no attempt to legalize prior legislation, or a prior invalid seizure or sale of property thereunder, or to interfere with vested rights. Edwards v. Commissioners, 183 N. C. 58, 110 S. E. 600.

§ 3699. Record of bonds; proceedings and elections.—The county commissioners of any county so issuing bonds shall provide a record which shall be kept by their clerk, in which shall be entered the name of every purchaser of a bond, the number of the bond purchased, the date of issue, when due, rate of interest, the township on account of of which the bond is issued, and the amount received for said bond. They shall also cause to to be kept a record of all proceedings, and elections, as well as a record of the bonds redeemed annually, and the bonds when redeemed and recorded shall be destroyed by fire in the presence of the board of commissioners and that fact recorded: Provided, the record of bonds for each township shall be kept separate. (1913, c. 122, s. 4.)

§ 3700. Investment of excess fund from tax; provisions as to redemption; required statements in bonds; advertisement of sale.—The funds raised by taxation in excess of the amount required to pay interest, if any, shall be safely invested by the board of county commissioners; and the county commissioners are authorized to purchase at par value any of such bonds from the excess fund, provided they are offered to them by the holder thereof; or the commissioners may stipulate in the bonds when same are to be redeemable, provided it is not less than five nor more than forty years from the date of the bonds. The bonds when so issued, after election is proved by the commissioners, shall bear on their face the statement that the tax shall be levied by the county commissioners in accordance with this article for payment of interest and principal, full payment of which interest and principal is guaranteed by the county, though no polls or property outside of the township in whose name the bonds are issued shall be liable for such bonds until the resources of the township shall be exhausted. All bonds issued under this article shall be sold at a public meeting of the board of county commissioners of the county in which the bonds are issued, after the bonds have been advertised for sale in at least one issue of a newspaper: Provided, that this provision as to advertising shall apply only to bonds sold after March tenth, one thousand nine hundred and seventeen. (1913, c. 122, s. 5; 1917, c. 207, ss. 1, 5.)

§ 3701. Separate accounts of funds; bond of treasurer.—The funds derived from the sale of any bonds hereinbefore provided for and the taxes levied and collected under this article on account of any township shall be turned over to the county treasurer and a separate account of each fund for the benefit of each township shall be kept separate from all other funds. But before any such funds shall be placed in his hands the treasurer shall execute a good and sufficient bond in the penal sum of fifty per cent more than the amount of money in his hands at any time for road purposes and payment of bonds and interest thereon on account of the several townships in the county, and for the faithful performance of such other duties as may devolve upon him as treasurer of said fund. The said bond shall be approved by the board of county commissioners and shall be recorded and kept as bonds of county officers as required to be kept. (1913, c. 122, s. 6.)

§ 3702. Corporate powers of and judgments against commissioners.—The board of county commissioners may sue and be sued, plead and be impleaded in any court of competent jurisdiction in this state touching the bonds issued on account of any township in any county issuing bonds under this article, or any matter connected therewith, or touching the road fund of any such township derived under this article, or on any contract made by or with the said board for carrying out the purposes of this article, and any judgment in favor of the board shall specify for the benefit of what township such judgment is rendered, and any judgment against the board shall specify what township is liable for the payment thereof, and the judgment shall be paid only out of the funds of such township, or by taxes derived from property and polls in such township. (1913, c. 122, s. 7.)

§ 3703. Orders on funds; direction of expenditures. — All orders for payment of any of said bonds and for interest on said bonds shall be made by the county commissioners, and shall specify thereon the purpose, and the amount for bonds and amount for interest shall be on separate orders. The funds for other purposes shall be expended under the direction of the commissioners, or by the township supervisors with the consent of any of the commissioners and paid upon the order of the commissioners, or in such manner and on such orders as the board of county commissioners may direct, and the board of commissioners shall make such rules and regulations and such directions in this respect as they may see proper. (1913, c. 122, s. 8.)

§ 3704. Use of proceeds of bonds; working convicts.—The funds derived from sale of bonds on account of any township shall be used for the purpose of laying out, establishing, altering, repairing, grading, constructing and improving in any manner public roads in the township so issuing bonds and for purchasing such material, machinery and improvements as may be necessary. The money so expended shall be as far as possible used for permanent improvements only. The county commissioners may at any regular meeting organize a convict force, and elect necessary officers and guards as provided by law, and shall work such convicts on the public roads of the townships, and the expenses shall be paid by the said townships. Any damage that may be awarded to any person by reason of establishing, altering or repairing any public roads on which permanent improvements are to be made in any township issuing bonds shall be paid by such township. The county commissioners may use the funds aforesaid on any roads within the township, in their discretion, unless the petition has designated certain roads for the expenditure of a part or all of said funds, in which case the funds shall be expended as provided in the petition. The designation of certain roads in the petition shall not be held to invalidate any election heretofore or hereafter held. (1913, c. 122, s. 9; 1917, c. 125, s. 1.)

Payment for Work Done on State Highway.—There being no highway funds in hand except those derived from sale of bonds, an obligation of the county highway commission to the State Highway Commission for work done on a part of a state highway in the county may be paid therefrom. Board v. Highway Comm., 182 N. C. 617, 109 S. E. 848.

§ 3705. Appointment of township road commissioners.—If at any election held in any township under this article the purpose of the article shall be ratified by a majority of the votes cast in the township, then it shall be the duty of the board of county commissioners at their next meeting to appoint a board of township road commissioners, to be known as the Township Road Commission of .....Township. This township road commission shall consist of three freeholders of the township. The appointment of this township road commission shall be agreed upon and approved by the state highway commission. The term of office of the members of the township road commission shall be for one, two, and three years respectively for the first three years, and thereafter one member shall be appointed as above each year for a term or period of three years. (1917, c. 279, s. 1; 1919, c. 339, s. 2.

Editor's Note.—Attention is called to the fact that in Road Commission v. County Commissioners, 178 N. C. 61, 100 S. E. 122, it was held that every part of the act of 1917, from which this and the following sections were taken, which purports to confer the power of taxation, is violative of the State Constitution, Art. 2, sec. 4, because not passed with the formalities required.

§ 3706. Incorporation of commission; use of funds.—The said township road commission and its successors in office is hereby constituted a body corporate under and by virtue of the laws of North Carolina under the name and style of Township Road Commission, and shall have all powers and authority granted to corporations of like nature by the laws of North Carolina, and by that name may sue and be sued, make contracts, acquire real and personal property by gift or devise, hold, exchange, and sell the same, and exercise such other rights and privileges as are incident to other municipal corporations of like nature, such as the condemnation of land for the construction, widening, or changing of any roads in the county, and such other powers as are necessary to carry out any and all the provisions of this article. The said township road commission shall use the funds derived from the sale of bonds or by levy of special tax, or whatever way derived, as authorized by this article, to locate, construct, reconstruct, surface, repair, improve, and maintain the public highways and bridges in the township under their jurisdiction; shall purchase such materials and purchase and hold or contract for the use of such tools, machinery, implements, and teams as they may deem necessary for carrying on the road work of the township, and perform such other duties as are hereinafter provided for by this article. (1917, c. 279, s. 1.)

§ 3707. Duties and powers of commission.—It shall be the duty of the township road commission to take charge of laying out, opening, altering, maintaining, or discontinuing of any and all roads of the township that are now maintained or may be maintained by the township as public roads, and it is hereby vested with all powers and rights and authorities now vested in the board of county commissioners or other commission or board or other road officials of such township for the general supervision of its roads, and for the construction and repair thereof, by contract or otherwise as may be deemed best. (1917, c. 279, s. 1.)

§ 3708. Organization; drafts for money; pay of commissioners.—The township road commission shall annually from the date of its organization elect a chairman and a secretary, who shall hold office for one year and until their successors shall be elected and qualified. All moneys expended by the commission shall be by draft upon the bank or banks which are depositaries for the road fund, and such drafts shall be signed by the secretary and countersigned by the chairman, and shall show upon their face the purpose for which the money is expended. The members of the township road commission shall receive pay only when acting jointly as a road commission, and such compensation at this time shall be the same as paid to the members of the board of

county commissioners of said county. (1917, c. 279, s. 1.)

§ 3709. When governor to appoint commissioners; vacancies.—In the event the state highway commission does not approve the appointment made by the board of county commissioners for members of the township road commission, and an agreement cannot be reached by the above commissions, then the governor of the state shall appoint the necessary number of members to compose or complete the membership of the township road commission. In case of any vacancy caused by death, resignation, or otherwise, of any member of the township road commission, such vacancy shall be filled by the board of county commissioners for the unexpired term as provided above for regular appointments. (1917, c. 279, s. 1.)

§ 3710. Township road engineer; duties; compensation; assistance from state; books and accounts. — The township road commission is authorized and directed to employ an expert road engineer, who shall be approved by the state highway commission, at such compensation as may be fixed by the township road commission; or, if in the opinion of the state highway commission a whole-time engineer is not required for the work to be done by the township, then, if practicable, arrangements may be made for the employment of an engineer for such portion of his time as may be deemed necessary by the state highway commission. In case an engineer is not employed continuously by the township, then in the absence of the engineer a superintendent shall be appointed by the engineer, with the approval of the township road commission and the state highway commission, who shall have charge of the road work and act for the engineer in his absence. His compensation may be paid in part by the state highway commission when arrangements for such payment is made by the township road commission with the state highway commission. When the state furnishes to the township engineering assistance and supervision of road work, the acceptance by the township road commission of the state road engineer shall be considered as fulfilling the requirements of this article. The road engineer, whether appointed by the township road commission or furnished by the state highway commission, shall have general supervision and direction of all the road work of the township, supervise the plans and specifications of all road work, and see to their execution. He shall appoint and discharge, by and with the approval of the township road commission, all superintendents, foremen, supervisors, overseers, and other assistants needed in conducting the road work of the township in a satisfactory and economical manner. The township road engineer, however appointed, may request, at any time, the advice of the state highway engineer in solving any problem that may arise, either technical, economical, or otherwise, that may be deemed by him to be of benefit to the township, and such advice shall be without any expense to the township.

It shall be the duty of the engineer of the township coming under the provisions of this article to keep or have kept the necessary books and accounts showing in detail the expenditures for all work done through money derived by bonds issued or special road tax levied for road work in such township. The engineer shall keep or have kept in suitable way a cost accounting system showing the unit cost of various items entering into the construction of the roads, showing when and where the various elements of cost entering into the said work were used, giving the name of the road and the nearest station number to culverts, bridges, etc. It shall be his duty to keep approximate yardage, costs, and approximate classification of the materials moved in all excavations made for the purpose of building such roads. (1917, c. 279, s. 1.)

Township Has Separate Governance of Road.—Under the provisions of this section, townships may establish and maintain a township road system under its separate governance, but the method is restricted to an issuance of bonds for road purposes upon the approval of its voters, and to taxation limited to the payment of the interest on the bonds, without provision for the working or maintenance of the roads directly by current taxation. Road Com. v. Comrs. 178 N. C. 61, 100 S. E. 122.

§ 3711. Entry on lands; damages; excess of benefits a lien on lands; suits.—In opening new highways, widening and straightening old roads and repairing same, the township road commission through its agents is hereby authorized to enter upon any land and locate and build such highways. If the township road commission and the owners of said land cannot agree as to the damages, if any, the township road commission shall, after sixty days after said highway is completed, cause to be summoned three disinterested freeholders of said township who shall go upon the land and assess the damages and benefits under the general law as it now exists. Before entering upon lands as authorized by this section it shall be the duty of the township road commission to serve notice upon the owner or owners of said land, notifying them that the highway is to be located upon said land under authority of this article. In assessing the damages sustained by any landowner, the jury shall take into consideration the special benefits, if any, accruing to the landowner, and in determining such benefits consideration shall be given to the benefits the landowner has derived from the fact that any old road right of way has reverted back to said landowner by reason of the relocation and construction of the new road, and if such benefits shall exceed the damages, then the amount of such excess of benefits shall be assessed against the landowner and shall constitute a lien upon the land adjoining the road, and shall be collected by the sheriff in the same way as public taxes.

No suit shall be instituted by the landowner for damages on account of location of the road under this article until after sixty days after the completion of the road across the lands of such landowner, and no suit shall be brought by any landowner unless the same is commenced within six months after the completion of the road by or across the lands of the claimant. Either party may appeal to the superior court for the assessment of damages and benefits, where the matter shall be heard by the court and jury de novo. No cost shall be awarded against any township upon appeal when net damages awarded through

such appeal are not greater than given by the referees. (1917, c. 279, s. 1.)

Compensation Required Only by Federal Constitution. — While, so far as North Carolina is concerned, the only organic law requiring just compensation to be paid the owner for taking his land for a public use, as the relocation of a highway thereon, is to be found in the Federal Constitution, and relates to such matters as are cognizable by the United States courts thereunder, the principle is grounded in natural equity and applies to the internal matters of State government as a part of the laws of this State. Parks v. Commissioner, 186 N. C. 490, 120 S. E. 46.

Notice Must Be Given before Decision. — Notice must be given to the owner of land for the assessment of damages claimed by him in accordance with a statute, for the relocation of a highway thereon, before final determination thereof by the local board to which the statute refers it. Parks v. Commissioners, 186 N. C. 490, 120 S. E. 46.

§ 3712. Entry on land for material; drains or ditches; obstruction. — The township road commission through their officers and agents are hereby authorized to enter upon any land near or adjoining any public road of said township, to cut and carry away any timber except trees or groves on improved land planted or left for shade or ornament, dig or cause to be dug and carry away any gravel, sand, clay, dirt, or stone which may be necessary for the proper repair and construction of roads in said township, and make or cause to be made such drains or ditches upon any land adjoining or lying near any road in said township that the township road commission may deem necessary for the better condition of the road; and the drains and ditches so made shall not be obstructed by the occupants of such lands or any other person; and any person obstructing such drains or ditches shall be guilty of a misdemeanor. Before entering upon land as authorized by this section, it shall be the duty of the township road commission, through its representatives, to serve notice upon the owner or owners of the land, notifying them that certain material authorized to be taken by this section is required for the road work. (1917, c. 279, s. 1.)

§ 3713. Presentation of and hearing on claims. —The owner of any land from which any timber or other material has been removed may present to the township road commission his claim therefor in writing, and upon such presentment it shall be the duty of the township road commission to set a day not earlier than sixty days after the removal of such timber or material for the purpose of hearing his claim. Upon the hearing thereof the claimant may appeal to the superior court of the county in which said township is located, to have his cause tried as in other civil cases. (1917, c. 279, s. 1.)

§ 3714. Deposit of proceeds of bonds. — All moneys derived from the sale of bonds authorized and sold under the provisions of this article shall be deposited by the board of county commissioners in such solvent bank or banks, if any, of said township, or if there is no bank in said township, then in any solvent bank in a neighboring township or county as will pay the highest rate of interest on daily balances as may be determined by the board of county commissioners; said moneys to be deposited in such bank or banks to the credit of the township road commission, and to be drawn upon by the commission as hereinbefore directed. (1917, c. 279, s. 1.)

§ 3715. Deposits of other road funds.—Any other moneys, in whatever way collected or appropriated, which are designed to be used for the construction or maintenance of roads in any township in which bonds for road work within such township have been issued and sold shall be deposited in the same bank or banks in which the moneys obtained from the bond issue or special road tax are deposited, and these moneys shall be deposited to the credit of the township road commission, and shall be drawn upon by said commission. (1917, c. 279, s. 1.)

§ 3716. Monthly statements. — The bank or banks in which the road moneys designated in this article are deposited shall prepare monthly statements showing the amounts paid, to whom paid, and for what purposes, and submit same to the township road commission, and the road commission shall have such monthly statement posted at the courthouse door of the county in which the township is located. (1917, c. 279, s. 1.)

§ 3717. Local acts not affected.—Nothing in this article shall be construed to repeal any local road laws of any county and shall not in any way affect them. (1917, c. 279, s. 1.)

Art. 6. County Road Maintenance Tax

§ 3718. Special tax for maintenance authorized. —Where the board of county commissioners of any county in the state has heretofore issued and sold, or may hereafter issue and sell, bonds for the construction or reconstruction of the roads in the county or in any township or road district therein, such board of commissioners is directed to levy annually during the life of the bonds a special tax on all taxable property, both real and personal, sufficient to raise an amount equal to at least three per cent, and not more than five per cent, of the total amount of bonds issued by the county, except as hereinafter specified, for the construction or reconstruction of the public roads, as may be necessary to maintain said roads in a satisfactory manner. (1919, c. 190, s. 1.)

Editor's Note.—Sections 3846(1) et seq., vesting the control of county roads in the State Highway Commission would seem to supersede the sections under this article.

Local and General Acts Consistent.—It was the intent and purpose of this section and sections 3719, 3720 and 3721, that the public roads of a township formed under the provisions of a special statute, with a road commission having charge of its public roads, to provide for the continued maintenance of the roads, and for the payment of interest on bonds issued for their construction, and under the statute the county commissioners can levy a special tax sufficient for such purposes, the local and general act on the subject being consistent and their terms not repugnant to each other. Road Commission v. Commissioners, 188 N. C. 362, 124 S. E. 743.

§ 3719. Proceeds used for maintenance only.— The money raised by the special tax authorized by the preceding section shall be used for the maintenance of the roads in said county, township, or road district in which the tax is collected, and which were or will be built by the revenue derived from the sale of bonds; and shall not be used for any other purpose except as herein provided, (1919, c. 190, s. 2.)

Cited in Road Commission v. Commissioners, 188 N. C. 362, 124 S. E. 743.

§ 3720. Scale of taxes to be levied.—Taxes for

the maintenance of the roads built from the revenue derived from said bonds shall be levied upon the following scale: Where the roads have cost one thousand dollars per mile or less, a tax sufficient to raise not less than fifty dollars per mile per year shall be levied. Where the roads have cost more than one thousand and not more than two thousand dollars per mile, a tax of five per cent shall be levied. When the roads have cost more than two thousand dollars per mile and not more than three thousand dollars per mile, a tax of four per cent shall be levied. When the roads have cost more than three thousand dollars per mile, a tax of three per cent shall be levied. (1919, c. 190, s. 3.)

Cited in Road Commission v. Commissioners, 188 N. C. 362, 124 S. E. 743.

§ 3721. Deduction of levies provided for.—When in any county, township or road district the fund raised under this article is thought to be more than sufficient to maintain the roads in proper condition the board of county commissioners are authorized to apply to the state highway commission for an investigation to determine the amount needed for the proper maintenance of the roads to be maintained by the county, and upon certification by said state highway commission, showing that funds are more than sufficient, a reduction may be made in the levies as above provided, so that only such levies as will provide the amount needed may be made. (1919, c. 190, s. 4.)

§ 3722. Maintenance work carried out by road authorities.—The work of maintaining the roads provided for in this article shall be under the board of county commissioners, county road commission, township road commission, district road commission, or any other officials having charge of the road work for the county or subdivisions thereof. (1919, c. 190, s. 5.)

§ 3723. County commissioners to report bonds issued and miles of roads built.—The board of county commissioners of any county where bonds have been issued for the construction or reconstruction of roads shall, as soon as practicable after the ratification of the provisions of this article, ascertain the amount of bonds that have been issued or that may be hereafter issued in the county, or in the townships and road districts thereof, and shall ascertain the number of miles of road constructed under such bond issues, and make a report of same in detail to the state auditor and the state highway commission. (1919, c. 190, s. 6.)

§ 3724. Roads maintained by state not included.—This article is not intended to include any roads that are maintained by the state. (1919, c. 190, s. 7.)

Art. 7. County Road Law, Effective on Adoption by County Commissioners

§ 3725. County road electorate created.—Subject to the provisions hereinafter made for the ratification of this article, there is hereby created for each county in this state a road electorate, to be composed of one member from each township in such county, who shall be a resident of the township, and one member at large for such county. (1919, c. 232, ss. 1, 10.)

Editor's Note.—Sections 3846(1) et seq., vesting control of county roads in the State Highway Commission would seem to supersede the sections under this article.

§ 3726. County road commission created.—Subject to the provisions hereinafter made for the ratification of this article, there is hereby created for each county in this state a road commission, to be composed of three members of the road electorate of such county, which said road commission shall be appointed or elected as hereinafter provided. (1919, c. 232, s. 2.)

§ 3727. Provisions to be ratified by county commissioners.—Before the provisions of this article shall become applicable to any county in the state, it shall first be ratified by a resolution adopted by a majority of the board of county commissioners for such county, which resolution shall be spread upon the minutes of said board. (1919, c. 232, s. 3.)

§ 3728. When general assembly appoints electorate.—The general assembly may appoint the members of the road electorate at the session of 1919 for any county, which persons so appointed shall compose the road electorate for such county, provided the county commissioners of such county shall hereafter ratify this article and make it applicable to such county. (1919, c. 232, s. 4.)

§ 3729. When county commissioners appoint electorate.—If the general assembly shall not make such appointments for any county and the board of county commissioners of such county shall ratify this article and make it applicable thereto, as hereinbefore provided, such board of county commissioners shall appoint a road electorate as is hereinbefore provided for such county. (1919, c. 232, s. 5.)

§ 3730. Term of members of electorate.—The members of such road electorate, whether appointed by the general assembly or by the board of county commissioners as herein provided, shall hold their respective offices until the next general election and until their successors are elected and qualified. (1919, c. 232, s. 6.)

§ 3731. Organization and oath of electorate.—The members of a road electorate of any county shall, within thirty days after their appointment, meet at the courthouse of such county upon notice given by the chairman of the board of county commissioners, giving the hour and place of meeting, and before entering upon their respective duties each member shall take and subscribe an oath that he will faithfully, fearlessly, and impartially, at all times discharge the duties of his office to the best of his ability. Such board shall then organize by electing one member chairman and another secretary. (1919, c. 232, s. 7.)

§ 3732. County commissioners fill vacancies.—If any member shall refuse to qualify, or if there shall be a vacancy in the road electorate, the board of county commissioners of such county is authorized to fill such vacancy. (1919, c. 232, s. 8.)

§ 3733. Electorate elects county road commission.—At such first meeting such road electorate shall elect three of its members as members of a road commission for such county, which said members so elected shall within ten days take the oath prescribed to be taken by the members of the road electorate and shall immediately enter upon the discharge of the duties of their respective offices, and shall hold the same until the first Monday of December after the next general election for such county. (1919, c. 232, s. 9.)

§ 3734. Election of successors to appointed road electorate. — At the next general election after a road electorate has been appointed for any county as above provided, the successors of such electorate shall be elected at such election, and their term of office shall begin as other county officers, and they shall qualify as herein provided and proceed to organize and elect a board of road commissioners as hereinbefore provided. (1919, c. 232, s. 10.)

§ 3735. Quarterly meetings of road electorate.—The members of a road electorate shall meet regularly at the courthouse in such county on the first Mondays in January, April, July, and October of each year. (1919, c. 232, s. 11.)

§ 3736. Duties of county road electorate.—It shall be the duty of such road electorate to keep themselves advised as to the condition of all the roads of such county, and they may look over them, either in a body or by committee, at any time they may deem best, and it shall be the duty of said road electorate to make such recommendations as it may deem advisable to the road commission of such county. (1919, c. 232, s. 12.)

§ 3737. Pay of electorate and road commission.—The members of the road electorate of any county other than the members composing the road commission shall each receive three dollars per day for each day they may be engaged wholly and exclusively as a member of such electorate in the performance of the duties herein provided, including the attendance at the first meeting and all regular meetings. The members of the road commission shall receive for their services the same pay as provided for the county commissioners of such county for each day they may be engaged wholly and exclusively in the performance of their duties. But no member of the road electorate, unless he is also a member of the road commission, shall receive more than fifty dollars in one year as compensation for his services; and no member of the road commission shall receive in excess of two hundred dollars as compensation for his services. This limitation on compensation shall not apply to the chairman and secretary of the road commission. All compensation to any member of the road electorate or county road commission shall be passed on and allowed by board of county commissioners for such county. (1919, c. 232, ss. 13, 17, 38, 39; Ex. Sess. 1920, c. 60, s. 1.)

§ 3738. Vacancies in commission filled by electorate.—In case of vacancy caused by the death, resignation, or otherwise, of any member of the county road commission, such vacancy shall be filled by the county road electorate for the unexpired term. (1919, c. 232, s. 18.)

§ 3739. Commission attends and calls meetings; examines roads; assigns duties of chairman.—The road commissioners for any county, in addition to attending the regular meeting of the road electorate, may hold call meetings not exceeding three days in each month, and they may examine the roads at any time they may deem advisable, either in a body or by committee, and the chairman may be required by said commission to do any other work which in its opinion may be to the best interests of the road service in its county. (1919, c. 232, s. 14.)

§ 3740. Commission succeeds other county road authorities in road powers.—It shall be the duty of the county road commission to take charge of laying out, opening, altering, maintaining, or discontinuing of the roads of said county that are now maintained or may be maintained by the county as public roads; and it is hereby vested with all powers, rights, and authority now vested in the board of county commissioners and other commissions or boards or other road officials of said county for the general supervision of the roads of the county, and for the construction and repair thereof, by contract or otherwise, as may be deemed best. All bridges shall be well constructed, iron being recommended when the stream is of any appreciable size, and all approaches shall be well constructed. (1919, c. 232, ss. 16, 25.)

§ 3741. Counties may retain present road authorities.—If those counties coming under the provisions of this article already have lawful road authorities charged with the road work therein, either in the form of a county road commission or other commission or board, or a board of county commissioners charged with road work, and shall desire to retain such road authorities, then such desire shall be respected and no road electorate shall be appointed for such county. (1919, c. 232, s. 19.)

§ 3742. Local funds, etc., pass to county subject to prior contracts.—Any moneys in hand in any county treasury, or in the hands of any county treasurer, or in any township or road district treasury, or in the hands of any township treasurer to the credit of the road funds of such county or township or road district of any county ratifying the provisions of this article, shall be turned over to the banks designated as depositories for the road fund of such county or other authority having charge of such funds, and shall become part of such county road fund and shall be expended for the construction of the roads in such township or road district having turned the same over; but such county, through its road commission, shall carry out any contract previously made by such township or road district, and shall, out of any funds or proceeds of any property received from such township or road district, pay off any liabilities existing against such township or road district. In any county which shall ratify the provisions of this article, any township owning equipment and property used in the construction or maintenance of public roads shall turn the same over to the road commission of such county upon demand made by it. (1919, c. 232, s. 26.)

§ 3743. Expenditure of funds; highway sys-

tems; federal aid.—All funds, whether collected by direct tax, sale of bonds, or otherwise, in such county shall be expended under the authority of the road commission for such county, and the road commission is authorized to appropriate such sums as it may deem expedient to be used by the state highway commission in securing federal aid to be used in the construction of any state or national highway leading through such county, and such road commission is further authorized to enter into any contract providing for the construction of a state highway: Provided, however, that federal funds shall be secured to aid in its construction. (1919, c. 232, s. 27.)

§ 3744. Apportionment of county road funds among townships. — The road funds for such county shall be expended in each township in such county, as nearly as may be, in proportion to the taxes paid by such township in said fund so as to make an equitable apportionment in the course of one year. (1919, c. 232, s. 37).

§ 3745. Sections of general highway law (Art. 4) applicable under this article.—The following sections of the general highway law, forming article 4 of this chapter, dealing with the powers and duties of county road commissions under the said article, are declared applicable to county road commissions under this article:

Section 3661. (Corporate powers; use of road funds.)
Section 3663. (Organization of road commissions; compensation of commissioners.)
Section 3667. (Assessments of damages and benefits.)
Section 3668. (Entry on land for material; obstruction of drains or ditches.)
Section 3670. (Claims for timber or material.)
Section 3671. (Width, alignment, and grade of highways.)
Section 3673. (County-line roads.)
Section 3674. (Construction by one county of county-line road.)
Section 3675. (Extension of work to adjoining counties.)
Section 3676. (Work by county commissions in municipalities.)
Section 3679. (Road statistics.)
Section 3680. (Guard railings.)
Section 3681. (Road institutes.)
Section 3690. (Maintenance.)
(1919, c. 232, ss. 15, 17, 21, 22, 24, 25, 28, 29, 30, 31, 33, 34, 35, 36.)

§ 3746. Cutting trees along road.—The county road commission shall have the power as to cutting trees on land adjoining the road conferred on county road commissioners under section 3669 of this chapter under the limitations contained in said section, but commissioners created under this chapter shall not cut trees in any grove or yard left around or near any house left or used for a grove or shade trees.. (1919, c. 232, s. 23.)

§ 3747. Prisoners on road.—The provisions of section 3678 as to the duties of county road commissioners in reference to persons sentenced to work on the public roads shall be applicable to county road commissioners created by this article, except that the clause of said section is inapplicable which provides that the expense of maintaining and guarding said convicts while employed on the public roads may be paid by the county commissioners out of the general fund of the county.

Where any county or township is working convicts on its public roads under any local, special or private act, such township, upon the demand of the county road commission, shall turn over such convicts to the county road commission, which may proceed to work them on the public roads of the county, or the road commission, if it shall find that working convicts is unprofitable, shall turn such convicts over to counties from which they were received and discontinue convict labor on the public roads. (1919, c. 232, ss. 26, 32.)

Editor's Note.—This section is superseded by §§ 3846(19) et seq.

§ 3748. Counties excepted from article.—This article shall not apply to Alamance, Alexander, Anson, Ashe, Beaufort, Bertie, Buncombe, Cabarrus, Caswell, Catawba, Chatham, Cherokee, Chowan, Clay, Cleveland, Columbus, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Iredell, Johnston, Lee, Lenoir, Lincoln, Macon, Mecklenburg, Moore, Montgomery, Nash, Northampton, Orange, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Surry, Tyrell, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin, and Yancey counties. (1919, c. 232, s. 39a.)

§ 3748(a). Presentation of claims; settlement or rejection; assessment of damage; appeal.—Any person over whose lands or premises the road commission or other road authorities in any county has heretofore or shall hereafter open or construct a road, or any person from whose land such road authorities has heretofore or shall hereafter take any earth, timber, or other material of any kind whatsoever, or shall cut any timber or in any way damage such land, that has not been adjusted, and such claimant desires compensation for the same, he shall present to the road commission or other road authorities, an itemized statement of his claim for damages within six months from the date of such use, and the said road commission shall have thirty days from said presentation to settle the same, or to notify such claimant that the said board has rejected such claim, and if rejected, the said road commission shall in such rejection state in writing the amount, if any, it agrees to pay, and if accepted by the claimant the same shall immediately become due and payable; if the said road commission does not notify claimant within thirty days from presentation of claim that the same has been rejected, in whole or in part, then such claim shall be conclusively presumed to be correct, and such claim as presented shall immediately become due and payable. If such claim or any part thereof is rejected by the road commission or road authorities within thirty days of the time presented, then either party, the road commission or road authorities or claimant, is authorized to make application in writing to the sheriff of such county setting forth the itemized claim, the facts respecting the filing of his claim with

such road commission or road authorities, the action thereon, and it shall be the duty of such sheriff to summon a jury of three disinterested freeholders, who shall be voters and residents of the township in which the claimant resides, and it shall be the duty of said jury after being duly sworn, to impartially hear and determine such matter, enter upon the premises, inspect same, hear any evidence offered by either party and make a full written report by delivering to each party a copy of their findings and assessments. Either party shall have the right to appeal from the findings and report of such jury to the superior court next to be held ten days after the filing of such report, by giving written notice of such appeal to the opposing party within ten days of notice of such filing: Provided, that no claim shall be presented after the expiration of six months from time such damages are sustained, nor shall any claim be paid if not presented within six months from the date of such damage. (Ex. Sess. 1920, c. 60, s. 1.

Application to Township.—This applies to "road commission or other road authorities in any county," not to a township. Lowman v. Abee, 191 N. C. 147, 131 S. E. 277, 280.

§ 3748(b). Itemized account of road funds; publication of statements.—It shall be the duty of the road commission or other road authorities to keep, or cause to be kept, an accurate, itemized account of all road funds received from any source and how the same is expended by townships, and it shall be the duty of said road commission or other road authorities within thirty days from August 25, 1920, to make or cause to be made an itemized statement of all funds heretofore received from any source for road purposes, and an itemized statement of disbursements of same by townships, and the said road commission authorities shall cause the same to be published in one issue of at least one weekly newspaper published in such county, and it shall be the duty of said road commission or road authorities in such county to publish in the first week of October, one thousand nine hundred and twenty, a complete, correct and detailed, itemized statement of all road funds received and disbursed by townships in said county since the last published statement, and such statement shall be published in at least one newspaper as directed, and every month thereafter a similar statement shall be made and published as provided; if said road commission or other road authorities shall fail or refuse to keep such account, or to make or cause to be made and published the statements herein provided, each member thereof shall be guilty of a misdemeanor and punished at the discretion of the court. (Ex. Sess. 1920, c. 60, s. 1.)

§ 3748(c). Duties delegated to township members; powers of delegates.—It shall be the duty of the road commission or road authorities of any county to delegate to each member of the road electorate from any township of such county the duty of supervising the construction and repairing of small bridges, installing cement, clay or other permanent piping, and the maintenance of the public roads in his township respectively, subject to the general supervision of the said road commission or other road authorities. Such member in his township shall have the right, subject to the supervision and control of the road commission, to make contracts for the purpose of maintaining and keeping in good condition the roads in his township, and shall supervise the same to the best interest of the township and county. For such services for the time that he is engaged wholly and exclusively in such work he shall receive not less than three dollars nor more than five dollars per day, including his own conveyance, to be fixed by road commission: Provided, such member for any cause cannot serve in this capacity the road commission shall name another in his stead; and, provided further, that this section shall not apply to any roads which shall be constructed in whole or in part by federal funds, unless it is agreeable to state and federal authorities. (Ex. Sess 1920, c. 60, s. 1.)

§ 3748(d). Temporary closing of roads; obstructions or barriers.—The road commission or other road authorities having charge of the public roads in such county, shall have authority to order any public road, or any part of any road in such county temporarily closed or discontinued and prohibit traveling thereon during the time of the construction, repairing, maintaining, or in any other manner whatsoever improving any such road in such county, and such authorities shall further have the right and authority to place an obstruction or barrier of any kind across such road, in order to give notice to any one traveling or being on same while temporarily closed, and any person who shall cut, injure, remove, or in any manner interfere with such obstruction or barrier, or any person who shall willfully travel on such part of any road while temporarily closed or discontinued with any animal, car, automobile, buggy, wagon, or other vehicle, shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court: Provided, any person residing on or near any closed or discontinued part of any road and shall have no other way to traved to or from his house, shall have the right to travel such closed or discontinued road to the extent only as may be necessary to or from the the nearest road leading therefrom. (Ex. Sess. 1920, c. 60, s. s. 1.)

§ 3748(e). Limitation on right of taking material from land.—It shall be unlawful for any contractor or other person to take or remove from the cultivated lands of any other person in such county, any earth, timber or other material without the written permission of the chairman of the road commission. The road commission or other road authorities may cancel or change permission of such chairman. (Ex. Sess. 1920, c. 60, s. 1.)

§ 3748(f). Itemizing bills and claims; records.—All bills or claims for labor or material shall be made in detailed, itemized form, and if for labor shall show the number of hours worked, the service and place performed, and same if allowed and paid shall be kept on file as permanent records in the office of said board and open to the inspection of any citizen of said county. The road commission or other road authorities shall approve no claim until the above provision is complied with. (Ex. Sess. 1920, c. 60, s. 1.)

§ 3749. Repealing clause. — All laws and clauses of laws in conflict with this article are

hereby repealed in those counties which may ratify this article. (1919, c. 232, s. 40.)

Art. 8. Road Officials

§ 3750. Public roads designated; authority of supervisors and county commissioners. — All roads and ferries that have been laid out or appointed by virtue of any act of assembly, or any order of court, are hereby declared to be public roads and ferries; and the justices of the peace in each township shall have the supervision and control of the public roads in their respective townships. They shall, with respect to this work, constitute and be styled the board of supervisors of public roads of such township, and under that name, for the purposes aforesaid, they are hereby incorporated the board of supervisors of public roads, and the board of county commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and settle ferries, to order the laying out of public roads where necessary, to appoint where bridges shall be made, to discontinue such roads and ferries as shall be found useless, and to alter roads so as to make them more useful. But upon the adoption of road commissions by counties or townships, as provided in this chapter, the powers and authority conferred or exercised under this section are transferred to such road commissions within such counties or townships. (Rev., s. 2681; Code, s. 2014; 1887, c. 73; 1889, c. 543; 1893, c. 141; R. C., c. 101, s. 1; 1784, c. 227, s. 1; 1868, c. 20, ss. 11, 16, 17, 18; 1868-9, c. 185, s. 14; 1879, c. 82, s. 1.)

Cross References.—As to the erection and maintenance of roads and bridges, see section 3767 and notes thereto. See, also, sections 3761, 3762, 1297 par. 18 and notes thereto; as to roads and highways generally, see 8 Enc. Dig. 14 et seq.; 14 Enc. Dig. 292 et seq.; as to bridges, see 2 Enc. Dig. 681 et seq.; 13 Enc. Dig. 288 et seq.; as to county commissioners generally, see 2 Enc. Dig. 785 et seq.; 13 Enc. Dig. 522 et seq. See, also, section 1292 et seq.

Editor's Note.—Sections 3846(1) et seq., vesting control of county roads in the State Highway Commission would seem to supersede the sections under this article.

Public Highway Defined.—A public road is one that is established by public authorities dedicated to the public and worked by an overseer appointed according to law. Collins v. Patterson, 119 N. C. 602, 26 S. E. 154. Or kept in order by other methods. State v. Norris, 174 N. C. 808, 93 S. E. 950.

Public Square Is Highway.—A public square, in a city or town, within which is situated the courthouse, is a public highway, and an indictment for its obstruction, in which it is described as "a certan public square and common public highway," and giving boundaries, is not redundant. State v. Eastman, 109 N. C. 785, 13 S. E. 1019.

Commissioners Benefiting from Selection of Road. — See note to sec. 3761.

Same—Court's Power to Direct Application of Fund.—See Morris v. Board, 184 N. C. 549, 114 S. E. 827.

Legislative Power to Establish Ferries.—The power to establish ferries is one of the attributes of sovereignty which is to be exercised by the Legislature itself, or by any agent whom that body may authorize to act for it. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625. This right is not taken away by Art. VII, sec. 2 of the State Constitution. Id. And the General Assembly cannot deprive itself or its successor of this power. Toll Bridge Co. v. Comrs., 81 N. C. 491.

Public Ferries Not Monopolies.—Public ferries are not monopolies, but franchises granted in consideration of public services. They may be exclusive, but are simply licenses, revocable at will. In Re Spease Ferry, 138 N. C. 219, 50 S. E. 625; Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29.

Commissioners Cannot Restrict License.—An act granting a ferry franchise and making it unlawful to establish any other ferry within 1½ miles thereof is a restriction upon the general power conferred upon county commissioners under this section and the commissioners have no power to authorize a ferry within the prohibited distance. In Re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

Ferry Must Be Authorized by Legislature or Commissioner.—No one, in the absence of special authority from the Legislature or the Board of County Commissioners, has the right to erect and maintain a bridge or ferry, within such a distance of a duly authorized toll-bridge as will divert from the latter the custom which, in the ordinary course of travel, would pass over it, whether that distance be greater or less than five miles. Toll-Bridge Company v. Flowers, 110 N. C. 381, 14 S. E. 918.

Elements of Ferry Franchise.—The essential elements of a ferry franchise, is the exclusive right to transport persons, with the horses and vehicles and such personal goods as accompany them, from one shore to the other. Broadnax v. Baker, 94 N. C. 675.

Same—Incident to Riparian Ownership.—The franchise of keeping a public ferry is so incident to riparian ownership, that it can be granted to none but those who own the land at one of the termini, unless such proprietor refuse to exercise it, when it may be granted to another, upon his making compensation to the owner, and this is so, even when the termini are public roads. Broadnax v. Baker, 94 N. C. 675.

Violation of Franchise—Damages.—Damages to property and property rights are the sole measures of damages when the franchise of a ferry operator is violated—loss of profits to a mill owned by the same operator are too remote and speculative. Milling Co. v. Highway Comm., 190 N. C. 692, 130 S. E. 724.

How Tolls Fixed.—The matter of tolls is left to the discretion of the County Commissioners, subject to right of appeal, if exorbitant, but to be fixed by them in the first instance. Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29.

River in Another County.—Where a river lies wholly within a county the county commissioners of an adjoining county have no jurisdiction to establish a ferry across such river. Robinson v. Lamb, 131 N. C. 229, 42 S. E. 701.

Necessity of Concurrence of Justices.—In an action for the purchase and construction of a bridge exceeding in cost five hundred dollars brought against a Board of County Commissioners, where the contract had been entered into by the defendants without the concurrence of the majority of the justices of the peace, there is no liability imposed on the county. Berlin Iron Bridge Co. v. Commissioners, 111 N. C. 317, 16 S. E. 314.

Only Qualified and Acting Justices Included.—This section, constituting the justices of the peace in each township its board of supervisors, refers to those who are qualified and acting; and in proceedings upon petition to lay off a cartway over the lands of another, where the township is entitled to four justices of the peace and only two have qualified or are acting, the award of those two is valid. Ford v. Manning, 152 N. C. 151, 67 S. E. 325.

Justices' Exemption from Working Road.—As to effect of Pender County Road Act on justice's duties, etc., under this section, see State v. Kelly, 186 N. C. 365, 119 S. E. 755.

Liability of Commissioners for Failure to Repair Road.—See notes to section 3756.

Cited in Mulholland v. Brownrigg, 9 N. C. 349, 354; State v. Durham, 121 N. C. 546, 550, 28 S. E. 22; Tate v. Seaboard Air Line Ry. Co., 168 N. C. 523, 84 S. E. 808; Board v. Board, 169 N. C. 548, 86 S. E. 520.

§ 3751. Local: County commissioners to regulate roads and bridges.—The board of county commissioners shall have power, and it shall be their duty, to make rules and ordinances, not inconsistent with the acts of the general assembly, to regulate the use of the public roads, highways and bridges of their respective counties. They shall have power to make rules and ordinances to regulate the weight of loads permitted to be hauled on the public roads and highways, and as to the width of tires permitted to be used; and may prohibit the carrying thereon of such loads and the use of such tires or vehicles as they may deem needlessly injurious or destructive to such roads or bridges. In making such ordinances, they may have regard to the conditions of the various roads or parts thereof, and the conditions of traffic thereon, and make different rules and ordinances applicable thereto. Any person who shall needlessly violate an ordinance made in

pursuance of the authority herein given, or who shall aid, abet or assist in such violation shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

This section shall apply only to the counties of Alamance, Anson, Beaufort, Bertie, Brunswick, Camden, Cabarrus, Cherokee, Columbus, Cumberland, Davidson, Duplin, Durham, Franklin, Gaston, Granville, Guilford, Hertford, Hoke, Iredell, Johnston, Lee, Madison, McDowell, Macon, Montgomery, Nash, New Hanover, Northampton, Onslow, Pitt, Pasquotank, Randolph, Richmond, Rockingham, Sampson, Tyress, Union, Warren, Washington, Yancey. (1915, c. 264, ss. 1, 2, 3; 1919, cc. 154, 209; Ex. Sess. 1920, c. 50; 1925, c. 224.)

As to county commissioners generally, see 2 Enc. Dig. 785 et seq.; 13 Enc. Dig. 522 et seq.

Editor's Note.—The Counties of Onslow and Warren were added to this section by Public Laws 1920, Ex. Sess., ch. 50.

§ 3752. Meetings of supervisors prescribed.—The board of supervisors shall meet at some place in their respective townships to be agreed upon by themselves, or, in the absence of such agreement, to be named by their chairman, on the first Saturday of February and August, for the purpose of consulting on the subject of the condition of the roads in their township, and may hold special meetings at other times, upon ten days written notice by the chairman to each member of the board, stating the time and place of such meeting. They shall once in each year, during the week of their meeting in August, go over and personally examine all the roads in their township. They shall annually at their meeting in February elect some one of their number chairman. Where the board is composed of more than three members it shall take three members to constitute a quorum of said board for the transaction of business. (Rev., s. 2712; 1909, c. 364, ss. 2, 3; Code, s. 2015; 1879, c. 82, s. 2; 1880, c. 30, s. 1.)

This requirement in nowise forbids that the board shall meet at other times and for other purposes when the township affairs shall require it. Ford v. Manning, 152 N. C. 151, 154, 67 S. E. 325.

§ 3753. Supervisors appoint overseers, designate workers and allot hands.—The board of supervisors shall, annually at the meeting in August, divide the roads of their townships into sections and appoint overseers for such sections at said meeting. They shall at the same time allot the hands to the overseers, and shall also designate the boundaries or points to which each resident shall be liable to work on each section, and shall within five days after such meeting certify to each overseer written notice of his appointment, with a list of the hands assigned to his section. The board of supervisors may at any time alter the sections or allotment, but shall give notice thereof to the overseer. Such overseer shall serve, and be liable as such for neglect of duty, until he shall be relieved by the board, which shall be done only upon his showing that his road is in good condition as prescribed by law. The overseer may resign after the expiration of twelve months, provided his road shall be in good repair and the board of supervisors shall so find; and any overseer so resigning, and whose resignation has been accepted by the board, shall not without his consent be again appointed overseer until after the expiration of two years from the date of his resignation. When a public road shall be a dividing line between townships, the board of commissioners of the county shall determine as to how said road shall be divided, with notice as to the working of said road. The hands may be allotted to a road by allotting all who live or shall live within certain boundaries to be fixed by the board of supervisors, in which event a list of the hands by name need not be given, but the list shall specify the hands living in the prescribed territory. (Rev., s. 2715; Code, s. 2016; 1879, c. 82, ss. 3, 7; 1880, c. 30, s. 1; 1887, c. 93, s. 1.)

As to punishment of overseer for neglect of duties, see section 3760 and notes thereto; as to the duties and liabilities of overseers generally, see 7 Enc. Dig. 42 et seq.

Evidence of Appointment.—An order issued by the Township Board of Trustees appointing a person overseer of a road is proper evidence of such appointment and is admissible. State v. Cauble, 70 N. C. 62.

Overseer Cannot Evade Duties by Resignation.—An overseer can not free himself from the duty imposed by law, by surrendering his order of appointment to the clerk of the board of township trustees; nor is he relieved at the expiration of a year, except by order of the board, on showing his precinct of road to be in the condition required by law. State v. Long, 81 N. C. 563.

§ 3754. To have orders appointing overseers served within thirty days; penalties.—The board of supervisors of the township, within ten days after the rise of the board, shall furnish the constable with two copies of each order appointing overseers of roads that may have been made during the sitting of the board. And the constable shall apply at the office of the board, within ten days after the rise of every meeting of the board, for such orders, and, on receiving them, shall, within twenty days, serve each overseer of roads with a copy of the order, or leave the same at his usual habitation; and the other copy shall be returned to the next meeting of the board of supervisors, with the date of its reception by him and the date of the service indorsed thereon, or the date when it was left at the residence of the said overseer. And if either the board or constable shall fail to perform any duty enjoined by this section, he shall forfeit ten dollars to the county, to be recovered at any time, by notice to show cause at the instance of the solicitor, who shall prosecute the same in the name of the state: Provided, the delivery to the overseer of the order appointing him made by the board of supervisors of the township, or any one of them, shall be deemed and held to be a legal service of the same. (Rev., s. 2714; Code, s. 2043; 1891, c. 519; R. C., c. 101, s. 8; 1812, c. 845, ss. 1, 2; 1813, c. 859, ss. 1, 2.)

§ 3755. Supervisors annually report to superior court.—The board of supervisors shall annually make report to the first term of the superior court of their county after the first Monday in August of the condition of the roads of their township, and if the meetings provided for in this chapter have been held by said board, the judge holding such term of the superior court shall, after his charge to the grand jury and before they shall retire to their room, call upon the clerk of the court for such reports, and they shall then and there be delivered to the foreman of the grand jury. (Rev., s. 2713; Code, s. 2024; 1879, c. 82, s. 10.)

§ 3756. Supervisors neglecting duties punished.—If any board of supervisors shall fail to make any report required by law, or to discharge any duty imposed by law, the members thereof shall be guilty of a misdemeanor. The indictment may be against the board jointly, or against the justices composing said board, or any one or more of them severally. (Rev., s. 3770; Code, s. 2024; 1879, c. 82, s. 10.)

As to liability of county commissioners generally, see section 1302 and the notes thereto.

Keeping Roads in Repair.—It is not the duty of the commissioners of a county to take the initial steps for repairing the bridges thereof when they fall into decay; it is only when their co-operation becomes necessary in a movement started by the township board of trustees or supervisors of public roads for such repairs, and is withheld without legal excuse, or they refuse to provide means to meet the contract, that they are criminally answerable for a breach of official duty. State v. Selby, 83 N. C. 617.

Personal liability will not attach to supervisors for failure to keep the roads in repair, etc., unless it is alleged and proved that the acts complained of were either corrupt or malicious. Ruffin v. Garrett, 174 N. C. 134, 93 S. E. 449. This subject is fully discussed and the authorities reviewed in Hipp v. Farrall, 91 S. E. 831. See also, Holmes v. Upton, 192 N. C. 179, 134 S. E. 401.

§ 3757. Overseers to report on state of road and work done; result when delinquency appears.—Every overseer shall at each and every meeting of the board of supervisors of his township make report to them of the present condition of his road, of the number of days worked on his section since last meeting, of the number of hands who attended and worked each day, of the number and names of hands who failed to attend and work; whether or not they were legally summoned, and whether or not they have paid the one dollar as provided. In all cases the report provided for in this section must state either that the overseer has worked the hands allotted to his section of road the full limit of time allowed by law, or that his section of road of which he is overseer is not in need of any further work at the time such oath is made and subscribed to by the overseer. The said overseer shall, before some person authorized to administer an oath, make written affidavit that the report is true and correct. Upon this report sworn to as aforesaid, if it shall appear that any of the hands, after being legally summoned, have failed to attend and work on said road, and that they did not pay the one dollar, then it shall be the duty of the said supervisors, or any one of them, to issue a warrant for the arrest of any such hand, and shall put him upon trial for the offense: Provided, that nothing herein contained shall prevent the overseer of the road from prosecuting, at any time after the offense has been committed, any hand for failure to work on the road, and such cases of prosecution shall be stated in his report to the board of supervisors, that they may not prefer another prosecution for the same offense. (Rev., s. 2716; Code, s. 2021; 1879, c. 82, s. 7; 1880, c. 30, s. 4; 1909, c. 110, s. 1.)

§ 3758. Overseers to report on collections and expenditures of money.—The said overseers shall, at the meeting of the supervisors in August, make a report of all moneys collected by them from parties excused from work on the road for the preceding year, with a statement as to how the same was expended. In case of failure of any overseer to make any report to the board of supervisors of public roads of his township, as provided in this chapter, it shall be the duty of the chairman of such board immediately upon such failure to make a sworn statement of the fact before some justice of the peace of an adjoining township, who shall immediately issue his warrant for the arrest of the said overseer, and proceed to try him for the offense. (Rev., s. 2717; Code, s. 2022; 1879, c. 82, s. 8.)

§ 3759. Officials of road district to report financial condition annually.—The board of road commissioners or other officials in charge of the roads of any county, township, or road district are and they are hereby required and directed to make out an annual itemized statement of the receipts and disbursements and of the financial condition of such road district for the calendar year, and shall, on or before the first day of February of each year, post a copy of the statement for the previous year at the courthouse door of the county, and shall file a copy of the same with the register of deeds, who shall produce such copy, on request, for the inspection of any taxpayer of such road district. And if any person or persons shall fail to perform the duties required of him by this section, he shall be guilty of a misdemeanor. (1917, c. 189, s. 1.)

§ 3760. Overseer neglecting duties punished.—If any overseer of a road shall wilfully neglect any of the duties imposed on him by law, he shall be guilty of a misdemeanor, and fined not to exceed fifty dollars or imprisoned not to exceed thirty days. (Rev., s. 3785; Code, s. 1054; 1889, c. 504; R. C., c. 34, s. 39; 1786, c. 256, s. 4.)

See note to section 3753. As to the duties and liabilities of overseers generally, see 7 Enc. Dig. 42 et seq.

Requisites of Indictment.—An indictment against a road overseer for neglecting to keep his road in repair, which does not charge a willful neglect, cannot be supported, under this section. State v. Miller, 100 N. C. 543, 5 S. E. 925.

It is not necessary to specially charge in the indictment that "it became and was the duty" of the overseer to repair the road; but such a charge is necessary when the indictment is for violation of a private statute making it the duty of a particular person or several persons to repair a particular road. State v. Miller, 100 N. C. 543, 5 S. E. 925.

Assuming Duties of Overseer.—Where one assumes to be overseer of a road and acts as such, he is liable to indictment for failure to keep it in good order. State v. Long, 81 N. C. 563; State v. Long, 76 N. C. 254.

Art. 9. Construction and Maintenance of Roads and Bridges

Part 1. Procedure

§ 3761. County commissioners to establish or discontinue; no more than five jurors required.—The board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads. In laying out and establishing roads, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required. (Rev., s. 2683.)

Cross References.—As to authority of supervisors and county commissioners see section 3750 and notes thereto. See also section 3767 and notes; as to the establishment and discontinuance of roads generally, see 7 Enc. Dig. 17 et seq.; 14 Enc. Dig. 294 et seq.

Editor's Note.—Sections 3846(1) et seq., vesting control of county roads in the State Highway Commission would seem to supersede the sections under this article.

Jurisdiction Exclusive.—The procedure afforded by this

and following sections gave jurisdiction to the county commissioners to lay out roads in such counties without the cooperation of the township trustees. Russell v. Leatherwood, 114 N. C. 683, 19 S. E. 643.

Propriety of Establishing Roads.—The main question to be determined as to the propriety of laying out a public road is, whether it is necessary for the public good and convenience. King v. Blackwell, 96 N. C. 322, 1 S. E. 485. Discretion is vested in the commissioners which cannot be delegated. McPhail v. Com'rs, 119 N. C. 330, 25 S. E. 958.

Same—Existence of Private Way. — Evidence that there are private ways near to the proposed location of the public road asked for, is competent both before the County Commissioners and the jury on an appeal to the Superior Court, to show that the proposed road is not necessary, because the private ways fulfilled all the public needs. King v. Blackwell, 96 N. C. 322, 1 S. E. 485.

Same—Discretion Power of Commission.—See notes to paragraph 18 of sec. 1297.

Effect of Order of Commissioners.—Where the board of commissioners ordered the construction of a public road, laid it out, appointed an overseer and assigned him hands to construct the road, such order constituted in the eye of the law a public road. State v. Joyce, 121 N. C. 610, 28 S. E. 366.

Appointment of Overseer and Hands.—The mere appointment of an overseer and assignment of hands to a supposed road, by the County Court, are not per se a judicial determination, that a public road be laid out where none before existed. Baker v. Wilson, 25 N. C. 168.

Road May be Established though Proceedings Irregular.—Where upon the presentation of a petition the county commissioners made an order that the roads be laid out as prayed for, particularly designating the terminal points and a jury, summoned by the sheriff and sworn, laid out the roads and made a report of their action to the commissioners, who confirmed the same and ordered the road to be opened, which was done by the sheriff, who made return of his action it was held that the proceedings established the road. State v. Smith, 100 N. C. 550, 6 S. E. 251.

Discontinuance—Grounds.—Evidence that the road hands in a certain township are in number insufficient to keep up all the roads in that township has no tendency, unless connected with other facts, to show that any particular road should be discontinued. Ashcraft v. Lee, 81 N. C. 135.

Same—Appeal from Petition.—Either party to a petition to discontinue a public road has a right to take the cause up, by successive appeals, from the township board of trustees to the Supreme Court. Ashcraft v. Lee, 81 N. C. 135.

Cited in Holmes v. Bullock, 178 N. C. 376, 100 S. E. 531.

§ 3762. Petition for public road or ferry; contents; notice required. — The board of county commissioners shall not establish any ferry, or order the laying out of any public road, or discontinue or alter such road or ferry, unless upon petition in writing. Unless it appear to the board that every person over whose lands the said road may pass, or whose ferry shall be within two miles of the place at which another ferry is prayed to be established, shall have had twenty days notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof be posted during the same period at the courthouse door; at which meeting the board shall hear the allegations set forth in the petition, and if sufficient reason be shown, the board shall appoint and settle or discontinue the ferry, or order the laying out, or discontinue or alter the road, as the case may be. (Rev. s. 2684; Code, s. 2038; R. C., c. 101, s. 2; 1813, c. 862, s. 1.)

See notes to sec. 3750; as to the petition generally, see 7 Enc. Dig. 25 et seq.

Address of Petition Immaterial.—The mere address of a petition is not of its essence; therefore a petition for laying off of public road presented to the county commissioners, and definitely describing the terminal points of the road prayed for, is sufficient in form and substance to support the action of the board in establishing the road, although such petition is addressed to the "board of supervisors of public roads." State v. Smith, 100 N. C. 550, 6 S. E. 251.

Owner Must Follow Statute.—The owner of property must seek compensation for land taken for a highway in the manner pointed out by statute. Hitch v. Commissioners, 132 N. C. 573, 44 S. E. 30.

When Party Has Ample Notice.—The design of notice of an intended petition to lay off a road is that the owners of the land may come forward and object; but the act did not intend that the establishment of a necessary road should be impeded for the want of twenty days' notice, if, before an order is made for laying off the road, ample notice is given to the owner. Where, therefore, a petition for a new road is filed, and is continued in court three years, during which time the owner of the land opposes the petition, continues the cause, appeals to the superior court, etc., he cannot after these steps taken by him, object to the want of twenty days' notice, for his conduct shows that he has had ample notice. Little v. May, 10 N. C. 599.

No Injunction When Notice Not Given.—The county commissioners will not be enjoined from building a public road in a township of a county from the proceeds of the sale of bonds issued at the suit of taxpayers, because notice had not been given to landowners along the route proposed required by this section, for this section was enacted for the benefit of individual landowners, whose rights as such are not involved in a suit of this character. Edwards v. Commissioners, 170 N. C. 448, 87 S. E. 346.

Injunction to Restrain Ultra Vires Act.—It is ultra vires for county commissioners to accept a bridge to be maintained at the county's cost, where it appears it is not a part of a public road, in existence or in contemplation of being made —and they may be enjoined from doing so. Greenleaf v. Commissioners, 123 N. C. 30, 31 S. E. 264.

Bridges and Ferries Incidental to Roads.—Public bridges and ferries are incidental to public roads and are not to be established or assumed, or maintained, as county charges, unless as parts thereof, in actual existence or in contemplation. Greenleaf v. Commissioners, 123 N. C. 30, 31 S. E. 264.

Power to Discontinue Section of Road without Giving Notice.—Where a county highway commission is given authority by statute "to abandon any existing county road or convert it into a cartway" and "to change or relocate any existing road, and add any new roads," and the power thus given is limited by an amendment adding the words "as now given county commissioners by statute" after the word "cartway", the limitation of the amendment refers only to "abandonment" and conversion into a "cartway," and the county highway commission is given power to make a change in an old road by discontinuing a short section thereof without giving notice required of county commissioners by this section, but such discontinuance will be restrained until adequate access to a cemetery along the discontinuance is provided. Hinnant v. Highway Commission, 198 N. C. 293, 151 S. E. 625.

§ 3763. Public road laid out by three freeholders under oath; damages assessed a county charge.—All public roads shall be laid out by a jury of three freeholders, who shall be summoned by the sheriff to meet at one of the termini of the proposed road, and, being duly sworn by the sheriff or other person authorized to administer oaths, shall lay out the road to the greatest advantage of the inhabitants, and with as little prejudice as may be to lands and enclosures. The jury shall also on oath assess such damage as private persons may sustain, and all damages assessed by them shall be deemed a county charge. (Rev., s. 2685; Code, s. 2040; 1885, c. 65; R. C., c. 101, s. 4; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9.)

See, also, 7 Enc. Dig. 28 et seq.

Public Roads a County Charge.—Under the general road law, public roads are deemed and made a county charge. Wells v. Com'rs., 152 N. C. 663, 665, 68 S. E. 212.

County Cannot Be Sued for Trespass—A county cannot be sued for trespass upon land or for any other tort in the absence of statutory authority. But if the commissioners of a county take land for a highway without authority of law they are liable therefor individually. Hitch v. Commissioners, 132 N. C. 573, 44 S. E. 30.

Assessment of Damages and Benefits.—See sec. 3667 and notes thereto.

§ 3764. Appeal from commissioners to court; bond; trial de novo.—Any person may appeal to the superior court at term time from the determination of the board of county commissioners,

and if any person shall appeal from the board on a petition, he shall give bond to the opposing party as provided in other cases of appeal, and the superior court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out, establish, alter or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the superior court in term time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said proceeding tried in the superior court in term time by jury, and from the judgment of the superior court either party may appeal to the supreme court as is provided by law for other appeals. (Rev., s. 2690; Code, s. 2039; R. C., c. 101, s. 3; 1813, c. 862, s. 1; 1879, c. 258.)

As to the appeal generally, see 7 Enc. Dig. 30 et seq.

Refusal of Instruction.—Where, on appeal from the order of the county commissioners establishing a public road, the court read the petition to the jury and charged that the termini of the road were as set out in the petiton, it was not error to refuse further instructions as to the points named as termini. Russell v. Leatherwood, 114 N. C. 683, 19 S. E. 643.

Appeal from Order of Commissioners. —An appeal lies from the order of the Board of County Commissioners directing the establishment of a road, before the order has been executed. McDowell v. Western North Carolina Insane Asylum, 101 N. C. 656, 8 S. E. 118.

Appeal Similar to Appeal from Justice.—An appeal from the board of county commissioners in establishing a public road should be taken in accordance with those sections of the code applicable to appeals from a justice of the peace. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

Effect of Appeal.—An appeal properly taken to the superior court from an order of the county commissioners directing the laying out of a highway, has the force and effect of vacating the order appealed from; and pending such appeal the case does not come within the provision of the law looking to the proper maintenance and working of the roads. State v. Davis, 159 N. C. 455, 74 S. E. 916.

How Appeal Heard.—Upon an appeal the Superior Court hears the matter de novo, and the parties are entitled to have the issues of fact joined in the proceeding passed upon by the jury. McDowell v. Western North Carolina Insane Asylum, 101 N. C. 656, 8 S. E. 118.

When Appeal Docketed. — An appeal under this section from an order of the county commissioners, must be docketed at the succeeding term of the superior court. Brown v Plott, 129 N. C. 272, 40 S. E. 45.

Appeals from orders of the county commissioners are governed by the rules applying to appeals from a justice of the peace, and to be effective, must be docketed at the first ensuing term of the Superior Court, or the appeal will be dismissed. Sutphin v. Sparger, 150 N. C. 517, 64 S. E. 367.

When Appeal Taken in Proceedings to Straighten Road.—Exceptions to a report of road commissioners, in proceedings to change the grade of and straighten a public road, should be made at the confirmation of the report by the county commissioners, and appeal should then be taken, to be effective. Sutphin v. Sparger, 150 N. C. 517, 64 S. E. 367.

§ 3765. Petition for discontinuance; condition for maintenance of new road; duties of commissioners; when old road closed.—Whenever, upon petition of any person, a road shall be changed and, as a condition thereof, it shall be required by the board that he put the proposed road in good condition, he may, at any time thereafter, tender the same to the overseer, who shall receive it, if it be in such condition as is required for highways; and if not, he shall reject it; and in either case he shall report and certify the fact to said board, where the same may be considered; and said board shall hear all persons interested in the matter of receiving or rejecting the road; and the decision of the board shall be conclusive as to the condition of the road; but the old road shall not be closed until it be discontinued by order of the board. (Rev., s. 2692; Code s. 2041; R. C., c. 101, s. 5: 1784, c. 227, s. 13; 1813, c. 862, s. 1.)

See notes to § 3762.

Editor's Note.—Public Laws, 1929, ch. 89, sec. 1, applicable only to Sampson County, amended this section by adding at the end thereof the following: "Provided, that the County Commissioners, on the Road Commission in counties having a Road Commission, shall have the authority in their discretion to pass an order discontinuing any part of the public roads and bridges in said county where there are provided and maintained other roads and bridges ample and convenient for the traveling public."

§ 3766. How landowner may change location on his own land.—In addition to the mode prescribed in the preceding section for turning roads, the following method may be observed by any one who desires to change a road from one part of his land to another part, namely: Such person shall lay out the same, and after putting it in such good condition as highways are directed to be, shall apply to a justice of the peace, who thereupon shall notify the overseer of the road, and summon two freeholders to meet on the premises at a given day; and the said freeholders, being duly sworn, shall, with the justice, view and examine carefully the road which is proposed in place of the other, and all matters and facts tending to show whether the change should be allowed. They shall report, in writing subscribed by them, the result of their consideration to the next meeting of the board of supervisors, which may confirm or reject their report: Provided, that such justice and freeholders shall be disinterested in the land, and not of kin or affinity to the appellant. (Rev., s. 2693; Code, s. 2042; R. C., c. 101, s. 6; 1834, c. 22.)

§ 3766(a). Henderson County excepted. — Henderson County is excepted from the operation and effect of sections 3750 to 3766 of the Code. (1929, c. 118, s. 2.)

Part 2. Bonds and Taxes for Roads and Bridges in the State

§ 3767. Erection and maintenance of roads and bridges; county-line bridges.—Whenever in the opinion of the board of county or road commissioners or other road governing body of any county in the state it shall become necessary to build, rebuild, or repair any of the public roads or bridges in such county, and the same cannot be done with the labor and funds at their command or in their hands, then such board or body are hereby fully authorized and empowered in their discretion to build, rebuild, repair, alter or construct any of the roads and bridges in the county in such manner as to them may seem practicable.

Whenever it shall become necessary to build, rebuild, or repair any highway bridge over any stream which divides one county from another the road governing boards or authorities of the two counties may join in an agreement for building, rebuilding, or repairing the same, and the cost thereof shall be defrayed by the two counties in proportion to the number of taxable polls in each, unless otherwise agreed upon between the said boards or authorities of such counties: Provided, however, that the cost of any bridge erected across a stream dividing one county from another shall not exceed two per cent of the assessed valuation of the taxable

property in each of the said counties. (Rev., s. 2696; 1917, c. 103, ss. 1, 2; 1919, c. 185, s. 1.)

See editor's note under § 3761.

Cross References.—As to authority of commissioners and supervisors, see sections 3750 and 3761 and annotations thereunder; as to roads and highways generally, see 8 Enc. Dig. 14 et seq.; 14 Enc. Dig. 292 et seq.; as to bridges, see 2 Enc. Dig. 681 et seq.; 13 Enc. Dig. 288 et seq.

Editor's Note.—This section is quite similar to paragraph 22 of section 1927 to which section and the notes thereto reference should be made.

Public Laws, 1929, ch. 89, § 1, applicable only to Sampson County, amended this section adding at the end thereof the following: "Provided, further, that wherever there is any bridge or causeway over any stream which divides one county from another, and such bridge or causeway has become unnecessary by reason of the construction of other roads and bridges across said stream which are ample and convenient to the traveling public, then the County Commissioners, or the Road Commission may pass a resolution discontinuing such road, bridges or causeway. And if such action is approved, and concurred in by the other county affected, such action shall be published for thirty days at the court house in both counties, and thereupon such order will become effective."

Constitutionality of Article.—The authority conferred by this article is not necessarily inconsistent with the amendment to Article V, section 6, of our State Constitution, excepting from the limitation of 15 cents on the $100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act," the amendment only adding that the approval may be done by "general act." Norfolk Southern Railroad Co. v. McArtan, 185 N. C. 201, 116 S. E. 731.

Bridges Across County Lines. — County bridges, across county lines, must be authorized by both counties and built at joint expense. McPeeters v. Blankenship, 123 N. C. 651, 652, 31 S. E. 876.

If the adjoining county refuses to join in the construction, an enabling Act of the Legislature must be obtained. McPeeters v. Blankenship, 123 N. C. 651, 652, 31 S. E. 876.

Validity of Notes Issued by County under General Provisions.—Where, with special legislative authority, a board of county commissioners has contracted with the State Highway Commission to build a bridge on a public highway of the county, to be absorbed in the State's system of highways, and for the building of the bridge the county has incurred an indebtedness for which it has afterwards given its notes, exception to taxation levied to meet these notes upon the ground that it required a special act of the Legislature to give them validity is untenable when proceedings for the purpose have been had under the provisions of the general statutes. Norfolk Southern Railroad Co. v. McArtan, 185 N. C. 201, 116 S. E. 731.

Form of Action on Contract to Build Bridge.—An action in the form usual upon money demands was sustained against a county for a debt due on a contract in regard to bridge-building. Winslow v. Com'rs, 64 N. C. 218.

Payment of Amount of Tax Not Unlawful.—The agreement by the commissioners to pay each year a sum of money equal to the aggregate amount of plaintiff's tax for that year till the whole cost of the bridge should be discharged, was not an unlawful appropriation of the tax devoted by law to other purposes, but simply the means of ascertaining the amount of each annual installment. Cleveland Cotton Mills v. Commissioners, 108 N. C. 678, 13 S. E. 271.

Applied in Martin County v. Bank, 178 N. C. 26, 100 S. E. 134.

Cited in Penn Bridge Co. v. Commissioners, 151 N. C. 215, 65 S. E. 895.

§ 3768. Bonds for bridges; terms and denomination; no sale below par.—For the purpose of raising funds with which to defray the cost of building or rebuilding any roads or bridges or either or both of said purposes as provided in the last section the boards of commissioners of the respective counties shall each have full power and authority, subject, to the foregoing limitations, to issue bonds of said respective counties or borrow money and issue notes therefor to an amount not to exceed the actual cost of such roads or bridges or either or both of said purposes. Such bonds shall be in denominations of one thousand dollars, or less, with interest coupons attached, payable semiannually, at such time and place as may be directed by such boards, and to be in such form and tenor, and transferable in such way, and the principal thereof payable at such time or times, not exceeding forty years from the date thereof, and at such place or places as such board may determine: Provided, that none of such bonds shall be disposed of either by sale, exchange, hypothecation, or otherwise, for a less price than fair face value; and the same may be disposed of at public or private sale, as the board of commissioners may determine. (1917, c. 103, s. 1 (c); 1919, c. 185, s. 3; Ex. Sess. 1920, c. 89.)

Cross References.—As to county commissioners generally, see sections 1292 et seq.; as to road bonds, see sections 3634 et seq.; as to county bonds generally, see 3 Enc. Dig. 709 et seq., 13 Enc. Dig. 527 et seq.

Editor's Note.—The words "or either or both of said purposes" were added by Acts 1920, Ex. Sess. ch. 89.

Constitutionality.—An act of the Legislature authorizing the issuance of county bonds for public roads is not in contravention of the Constitution, sec. 29, Art. II. Commissioners v. Bank and Trust Co., 178 N. C. 170, 100 S. E. 421.

Bonds Limited to Actual Cost of Bridge.—A provision limiting the amount of the bonds to the "actual cost" of a bridge and its "approach" is not a prohibition against issuing the bonds before the work is done, for whatever sum that may remain over such cost may be invested in the sinking fund provided in the statute. Martin County v. Bank, etc., Co., 178 N. C. 26, 100 S. E. 134.

Bonds May Be Apportioned though Bridge within One County.—A legislative enactment, authorizing the issue of bonds by two adjoining counties to build a bridge and its approaches specifying that the bonds shall not exceed the actual cost of said bridge and road, and apportioning the issuance three-fourths to the one and one-fourth to the other, is not in contravention of our State Constitution, though the bridge and its approaches specified in the act are within the county authorized only to issue bonds in the smaller amount. Martin County v. Bank and Trust Co., 178 N. C. 26, 100 S. E. 134.

Implied Power to Issue Bonds.—An act that abolishes two boards of road commissioners of a county and substitutes one central board for the entire county, authorizing it to take care of the indebtedness theretofore incurred for such purposes, and to incur obligations for the continuance of this work and to borrow money in pursuance thereof not to exceed a certain amount, is sufficient to imply the power to issue bonds by the new board to take care of this indebtedness incurred and to be incurred, at the rate of interest specified by the act, and to mature them within the forty years limited by this section. Huneycutt v. Commissioners, 182 N. C. 319, 109 S. E. 4.

§ 3769. Special tax to provide for bonds.—The county commissioners or other county authorities who are legally authorized and empowered to levy taxes shall, in order to provide for payment of the bonds or notes to be issued hereunder, and interest thereon, compute and levy each year at the time of levying other county taxes a sufficient tax upon all real and personal property in said county to pay the interest on the said bonds and notes, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds and notes at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1917, c. 103, s. 1 (d); 1919, c. 185, s. 4.)

§ 3770. Record of bonds.—The county commissioners of any county so issuing bonds shall provide a record which shall be kept by their clerk, in which shall be entered the name of every purchaser of a bond, the number of the bond purchased, the date of issue, when due, rate of interest, and the amount received for said

bond. They shall also cause to be kept a record of all proceedings, as well as a record of the bonds redeemed annually, and the bonds when redeemed and recorded shall be destroyed by fire in the presence of the board of commissioners, and that fact recorded. (1917, c. 103, s. 1 (e).

§ 3771. Investment of excess funds from tax; provisions as to redemption; conditions expressed on bond.—The fund raised by taxation in excess of the amount required to pay interest, if any, shall be safely invested by the board of county commissioners, and the county commissioners are authorized to purchase any of said bonds to amount of such excess annually, and after ten years they may purchase at not exceeding their par value one twenty-fifth of the bonds issued for any county; and if no holder of said bonds shall offer to sell such amount, then the said county commissioners are authorized to designate such bonds as they may desire to purchase, and after the designation of such bonds and the notice thereof given to a newspaper published in the county, if the holder of the bonds neglects or refuses to surrender the same and receive their par value, with interest accrued thereon at the time of such notice, then the holders shall not receive any interest subsequently accruing: Provided, the said bonds designated shall express such conditions on their face. (1917, c. 103, s. 1 (f).

§ 3772. Statutes under which such bonds may issue.—County boards of commissioners or other bridge-governing body in any county may operate under the foregoing provisions or under the provisions of any special act in force in said county, or under provisions of any general act relating to bridges hereafter passed by the general assembly. (1917, c. 103, s. 3.)

Part 2A. The Highway Bond Act

§ 3772(a). Entitlement of act.—This act shall be known as "The Highway Bond Act of nineteen hundred and twenty-seven." (1927, c. 95, s. 1.)

See editor's note under § 3761.

§ 3772(b). Purpose of bond issue.—For the purpose of providing additional means for carrying out the provisions of chapter two (2), Public Laws of the Regular Session of one thousand nine hundred twenty-one, as amended, and of enabling the State to avail itself to the fullest extent of all Federal aid funds that are now or may become available for use in the State for road purposes, the State Treasurer is hereby authorized by and with the consent of the Governor and Council of State to issue and sell not exceeding thirty million ($30,000,000) dollars bonds of the State to be designated "State of North Carolina Highway Serial Bonds." Said bonds shall mature in installments of one million five hundred thousand dollars ($1,500,000) in each calendar year, beginning with the year nineteen hundred and twenty-nine, such maturities to be either on the first day of January or the first day of July, and none of said bonds shall mature later than July first, nineteen hundred and forty-eight. At least one million five hundred thousand dollars ($1,500,000) of any bonds or notes issued under this act before July first, nineteen hundred and twenty-nine, or such lesser amount of such bonds or notes as may be issued before July first, nineteen hundred and twenty-nine, shall mature July first, nineteen hundred and twenty-nine, and be then paid. The maturities shall be absolute, without option of prior payment. The Governor and Council of State shall not consent in the year one thousand nine hundred twenty-seven to the issuance of more than twenty million ($20,000,000) dollars bonds. This authorization of bonds shall not take the place of any authorization heretofore made but shall be additional thereto. The said bonds shall bear interest at a rate to be fixed by the Governor and Council of State, but not exceeding five per cent annum to be payable semi-annually on the first days of January and July. (1927, c. 95, s. 2.)

§ 3772(c). Coupons and authentication.—Said bonds shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denomination thereof shall be such as the State Treasurer may determine in conformity with this act. (1927, c. 95, s. 3.)

§ 3772(d). State treasurer to sell bonds.—Subject to determination by the Governor and Council of State as to the manner in which said bonds shall be offered for sale, whether by publishing notices in certain newspapers and financial journals or by mailing notices or by inviting bids by correspondence or otherwise, the State Treasurer is authorized to sell said bonds at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina. All expenses necessarily incurred in the preparation and sale of the bonds shall be paid from the proceeds of such sale. (1927, c. 95, s. 4.)

§ 3772(e). Proceeds to State highway fund.—The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds the issuance of which has been anticipated by such bond anticipation notes) shall be placed by the treasurer in the construction funds known as the "State Highway Fund." (1927, c. 95, s. 5.)

§ 3772(f). Execution and sale of notes authorized.—By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State shall have given consent, if the treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or any installment of principal of any of said bonds then outstanding, if there shall not be sufficient funds

in the State Treasury with which to pay such interest or installment as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1927, c. 95, s. 6.)

§ 3772(g). Payment of bond anticipation notes.—Funds derived from the sale of bonds herein authorized shall be used in the payment of any bond anticipation notes that may have been issued in anticipation of the sale of such bonds and any renewals of such notes; and that funds provided by the General Assembly for the payment of interest and / or principal of bonds herein authorized shall be used in paying the principal and / or interest of any notes and any renewals thereof, the proceeds of which shall have been used in paying interest and / or principal of such bonds. Interest payments upon said notes may be evidenced by interest coupons in the Treasurer's discretion. (1927, c. 95, s. 7.)

§ 3772(h). Full faith, credit and taxing power of State pledged.—The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1927, c. 95, s. 8.)

§ 3772(i). Coupons receivable for demands of State.—The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1927, c. 95, s. 9.)

§ 3772(j). Bonds, notes and coupons exempt from taxation.—All of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1927, c. 95, s. 10.)

§ 3772(k). Lawful investment for trust funds.—It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1927, c. 95, s. 11.)

§ 3772(l). Loans from counties forbidden.—From and after the ratification of this act, it shall be unlawful for the State Highway Commission to enter into any contract or agreement with any county which provides for the reimbursement to such county of any expense hereafter incurred by it or of any money hereafter to be advanced or loaned by it to the State Highway Commission for the building of roads constituting a part of the State Highway System, and section fourteen of chapter two, of Public Laws of the Regular Session of nineteen hundred and twenty-one, is hereby repealed; Provided, however, that nothing herein contained shall prevent the State Highway Commission from receiving donations from any county or political subdivision of the State, such donations not to be subject to such reimbursement. (1927, c. 95, s. 12.)

Editor's Note.—This section repeals section 3846(ee).

Retroactive Effect—Correction of Records to Speak Truth of Contract.—Where the county commissioners have exercised their statutory authority to loan county funds to the State Highway Commission, anticipating the allotment of State funds for the building of highways within the county, and have lawfully contracted for that purpose under section 3846(ee), it may not, after the passage of a later act, this section, taking away this power, materially change the contract, but the county commissioners nunc pro tunc may correct the entries on their minutes therefore duly passed and entered of record so as to make the entry speak the truth as to what had been regularly done, and to this end parol evidence is admissible, the time of the correction so made relating back to the time the entry should have been correctly made. Oliver v. Board of Commissioners, 194 N. C. 380. See section 1310.

§ 3772(m). Use of allocations to counties.—From and after the ratification of this act, all allocations to the several counties of the proceeds of highway serial bonds herein authorized and bond anticipation notes issued in anticipation of the sale of such bonds, shall be first used in reimbursement to counties of moneys of such counties which have been or shall hereafter be loaned or advanced to the State Highway Commission pursuant to any such contract heretofore made; Provided, however, that no such reimbursement shall be made to any county unless and until the State Sinking Fund Commission shall have determined and reported to the State Treasurer that such county has not pledged or promised that the amount so to be reimbursed or any part thereof shall be applied upon the payment of any indebtedness of such county or the interest thereon, and if the State Sinking Fund Commission shall determine and report to the State Treasurer that any county has so promised or pledged, the payments so to be made to such county shall be made to the State Sinking Fund Commission for the use and benefit of such county and shall be held by the State Sinking Fund Commission in a separate fund which shall be used solely for the purchase or payment of such county indebtedness at or before maturity thereof, no purchase of such indebtedness with such funds to be made by the Sinking Fund Commission except with the consent of the governing body of such county and at a price satisfactory to such governing body. The State Sinking Fund Commission shall have power to demand the production of such evidence as it may require for the purpose of reaching such determination and shall give reasonable notice to the governing body of the county of the time and place of hearing to be given by it prior to such determination. (1927, c. 95, s. 13.)

§ 3772(n). Investment of county trust funds.—It shall be the duty of the Sinking Fund Commission to invest each trust fund created under section thirteen of this act in such securities as may be lawful investments of State Sinking Funds, and all the provisions and penalties of the State Sinking Fund Act as amended shall apply to such trust funds and to the care and custody thereof as far as the same may be reasonably applicable thereto, except as otherwise provided in this act. The interest accretions upon each fund shall from time to time be paid to the county to which the same belongs, and shall be used by such county in paying the interest upon its indebtedness to which the principal sum so held is applicable. (1927, c. 95, s. 14.)

§ 3772(o). Use of surplus from gas and license tax on automobiles.—While any of the bonds

authorized by this act shall be outstanding, before any part of any surplus revenue derived from tax on gasoline and automobile licenses, after providing for the interest, sinking fund, and serial payments of any State highway bonds heretofore or hereafter issued, and the administration and collection expense of the State Highway Commission, shall be used for any other purpose, there shall, on or before July first, nineteen hundred and twenty-eight, and each fiscal year thereafter, be set aside a sum sufficient to maintain the roads of the State Highway System for the ensuing year in a sound and serviceable condition. The provisions of this section shall be deemed to enter into and form a part of the contract between the State and the purchasers and holders of the bonds herein authorized, and likewise for the benefit of the citizens of the State; and enforceable in the courts of this State by any interested party. (1927, c. 95, s. 15.)

§ 3772(p). Allocation to counties.—At least eighty per cent of the proceeds of the bonds authorized by this act, after being allocated to the several construction districts, as now provided by law, shall then be allocated to the several counties in each district on the same basis used for district allocations: Provided, however, that in making this county allocation the State Highway Commission shall take into consideration the expenditures in the several counties heretofore made or contracted for from the proceeds of previous bond issues for State highway purposes, and in the event some counties have had expended or contracted therein a larger amount of said former bond issues, and some have had expended or contracted therein a lesser amount of said former bond issues than would have been available under the system of allocation provided for in this section, then in that event such differences shall be adjusted by the allocation of the proceeds from this bond issue, to the extent that at least eighty per cent of the entire one hundred and fifteen million dollars ($115,000,000) State highway bonds, authorized by this and previous General Assemblies, shall have been expended in the several counties as nearly as practicable in accordance with the allocation provided for in this section. In the event that the funds allocated to any county under the system herein provided for shall be more than sufficient to complete the construction of the highways forming a part of the State Highway System within such county, any surplus may be added to the twenty per cent deducted in the original allocation and be available for use by the Commission anywhere within the district; to the end that the entire State system of highways may be completed as nearly as possible with the funds provided: Provided, that nothing in this section shall abrogate or restrict any obligation of the State Highway Commission with respect to the repayment of loans from counties under the terms of any contract heretofore made. (1927, c. 95, s. 16.)

§ 3772(q). Use of revenue derived from tax on gasoline and automobile licenses.—No law enacted at the regular session of the General Assembly in one thousand nine hundred and twenty-nine shall be interpreted to require or permit that while any bonds authorized by this article, shall be outstanding, any surplus revenue derived from tax on gasoline and automobile licenses, after providing for the interest, sinking fund and serial payments of any State Highway bonds heretofore or hereafter issued and the administration and collection expense of the State Highway Commission, shall be used for any other purpose until there shall have been set aside, on or before the first day of July of each year, a sum sufficient to maintain the roads of the State Highway System for the ensuing year in a sound and serviceable condition. (1929, c. 312, s. 1.)

Part 3. Bonds and Taxes for State-line Bridges

§ 3773. Construction and maintenance of interstate bridges.—The board of commissioners of any county in the state of North Carolina bordering on any county in the state of South Carolina, Virginia, or Tennessee, is hereby authorized and empowered to co-operate with the construction and maintenance of any public road—or highway — bridge including approaches over any stream which divides any county in North Carolina from any other county in any of the above mentioned states, the cost of the construction and maintenance of which public road—or highway—bridge shall be defrayed and borne by the two adjoining counties in proportion to the number of inhabitants of each according to the last federal census, unless otherwise agreed upon between the board of commissioners or other proper authorities of the respective counties which such bridge shall connect. (1919, c. 103, s. 1; Ex. Sess. 1920, c. 11.)

See editor's note under § 3761.

Cross References.—As to bridges generally, see 2 Enc. Dig. 681 et seq.; 13 Enc. Dig. 288 et seq.; as to bonds for bridges, see section 3768 and notes thereto.

Editor's Note.—The words "including approaches" were added by Public Laws 1920, Ex. Sess., ch. 11.

Delegation of State Authority.—The authority that a Legislature of this State has to unite with an adjoining State in constructing and maintaining a bridge over a stream on a State line, may be delegated by a general statute to the commissioners of any county lying on the stream, to take proper action, bear the cost, and adjust its contribution with the authorities of the county lying on the other side of the stream. Emery v. Commissioners, 181 N. C. 420, 421, 107 S. E. 443.

§ 3774. When interstate bridge deemed necessary.—The construction and maintenance of any bridge authorized by the preceding section shall be deemed necessary in all cases where public roads or highways shall have been regularly laid off, according to law, in each of said counties to be so connected by such bridge to the banks including approaches of any stream dividing one county from another, if there is no passable ford across said stream at said point. The total cost of any bridge constructed pursuant to the provisions of this part of this article shall not exceed one-fourth of one per cent of the total assessed value of all taxable real and personal property in the two counties engaged in the construction of such bridge. (1919, c. 103, s. 2; Ex. Sess. 1920, c. 11.)

Editor's Note.—The words "including approaches" were added by Public Laws 1920, Ex. Sess., ch. 11.

§ 3775. Bonds for state-line bridges.—For the purpose of raising the funds with which to defray its share of the cost of building or rebuilding any bridge authorized by this part of this article, the board of commissioners of any county in this state in which such bridge is to be

built shall have full power and authority, subject to the foregoing limitations, to issue bonds of said county to an amount not to exceed said county's share of the actual cost of said bridge. Said bonds to be in denominations of one thousand dollars, or less, with interest coupons attached, payable semiannually at such time or times and place as may be directed by said board, and to be in such form and tenor and transferable in such way, and the principal thereof payable at such time or times, not exceeding twenty years from the date thereof, and at such place or places as such board may determine: Provided, that none of such bonds shall be disposed of either by sale, exchange, hypothecation, or otherwise, for a less price than their face value: and, provided further, that none of said bonds shall be disposed of until after the expiration of a period for the receipt of bids therefor and advertisement naming said date and reasonably describing paid bonds, which advertisement shall be deemed sufficiently promulgated if published once at least ten days before said date in a newspaper published in the county, and a newspaper published in the state and in general circulation throughout the state. (1919, c. 103, s. 3; Ex. Sess. 1921, c. 48.)

As to bonds for intrastate bridges, see section 3768 and notes thereto.

Editor's Note.—The last six lines of this section, providing for advertisement and bids before sale of the bonds, were added by Public Laws 1921, Ex. Sess., ch. 48.

§ 3776. Tax to provide for bonds; records of bonds.—The said commissioners or other county authorities empowered to levy taxes shall levy taxes to provide a fund for the payment of the interest of such bonds and a sinking fund for the payment of the bonds in the same manner and subject to the limitations and conditions specified in section 3769, and they shall keep, or cause to be kept, records of such bonds as provided in section 3770. (1919, c. 103, ss. 4, 5.)

§ 3777. Use of excess funds from tax.—The fund raised by taxation in excess of the amount required to pay interest, if any, on said bonds shall be safely invested by the board of commissioners of such county, and such board is authorized to purchase any of said bonds to an amount of such excess annually at not exceeding their par value and accrued interest. (1919, c. 103, s. 6.)

§ 3778. Exercise of powers, where county commissioners superseded. — The powers conferred and the duties imposed on the board of commissioners by this article shall be exercised and performed by the board of road commissioners or the board of highway commissioners or other bridge-governing board, by whatever name known, in counties where the powers and duties of boards of county commissioners in respect to roads and bridges have been transferred or given by law to such board of road commissioners or highway commissioners or other bridge-governing board. (1917, c. 103, s. 2; 1919, c. 103, s. 7.)

Cross References.—As to the duties and liabilities of county commissioners generally, see section 1292 et seq. See, also, 2 Enc. Dig. 785 et seq.; 13 Enc. Dig. 522 et seq.

Art. 10. Regulations for Roads and Bridges

Part 1. Roads

§ 3779. Width of roads.—All roads, except such as are causewayed or through cuts, shall be not less than eighteen feet wide, clear of trees, logs and other obstructions to the passage of ordinary vehicles, and there shall be ten feet in width in the center of the roadway clear of stumps and runners. Where, by the overseers, it may be deemed expedient to make or repair causeways on the same, they shall be at least fourteen feet wide; and earth, necessary to raise or cover them, shall be taken from either hand, so as to form a drain on each side of the causeway; and they shall make, of the same width, necessary bridges through swamps and over small streams of water: Provided, this section shall not apply to the roads in those counties where there is by law a classification of the widths of the roads. (Rev., s. 2682; Code, s. 2025; R. C., c. 101, s. 14; 1784, c. 227, s. 2; 1880, c. 30, s. 6.)

§ 3780. Guide-posts at forks and crossings.—The board of county commissioners shall cause to be erected and maintained at the various crossings and forks of the public highways of each county guide-posts with proper inscriptions and devices thereon indicating the direction to and distance from the most important town or vicinity within ten miles of such guide-posts. Such post shall be of substantial timber and the lettering thereon shall be not less than two inches in height and of legible character. The cost of the erection of such guide-posts shall be paid from the county road fund. In those counties in which road commissions have been established the duty of the erection of such guide-posts shall devolve upon the road commissions instead of the board of county commissioners. Any person who shall willfully deface or destroy any such guide-post shall, upon conviction therefor, be fined not less than five dollars nor more than twenty-five dollars. (1917, c. 24, ss. 1, 2, 3, 4.)

§ 3781. Overseers' duty as to signs at crossings.—Overseers shall cause to be set up, at the forks of their respective roads, a post or posts, with arms pointing the way of each road, with plain and durable directions to the most public places to which they lead, and with the number of miles from that place as near as can be computed; and every overseer who shall, for ten days after notice of his appointment, neglect to do so and to keep the same in repair, shall forfeit and pay for every such neglect ten dollars. (Rev., s. 2722; Code s. 2030; R. C., c. 101, s. 18; 1784, c. 227, s. 11; 1812, c. 846.)

§ 3782. High-water marks at fords; overseers liable.—If any overseer of roads shall fail to establish high-water marks or signals on both sides of any river, creek or stream which is used as a ford for a public highway, and to permanently fix the same, he shall be guilty of a misdemeanor. (Rev., s. 3782; 1889, c. 517.)

§ 3783. Mile-posts to be maintained; overseers liable.—Every overseer of a road shall cause the same to be exactly measured, where it has not already been done, and at the end of each mile shall mark in a plain, legible, and durable manner the number of miles, beginning, continuing, and marking the numbers in such manner and form as the board of supervisors shall direct; and every overseer shall keep up and repair such marks and num-

ber of his road. If an overseer shall neglect any of the duties prescribed in this section, for the space of thirty days after his appointment to office, he shall forfeit and pay four dollars, and the like sum for every thirty days thereafter the said marking may be neglected. (Rev., s. 2723; Code, s. 2032; R. C., c. 101, s. 20; 1784, c. 227, s. 11.)

§ 3784. Injuring signs and mile-posts misdemeanor.—If any person shall needlessly remove, knock down or deface any public sign-post, arms, or any mile-mark, he shall be guilty of a misdemeanor. (Rev., s. 3783; Code, s. 2031; R. C., c. 101, s. 19; 1784, c. 227, s. 11; 1812, c. 846.)

§ 3784(a). Lights required on vehicles.—It shall be unlawful for any person, firm, or corporation to operate during the period from one-half hour after sunset to one-half hour before sunrise, any vehicle on any public road embraced within the State Highway system, without displaying a light on the left side of said vehicle and which is visible to the approaching vehicle from the front and rear: Provided, that such light need not be lighted when the vehicle is standing under the rays of a light and can be plainly seen: Provided, further, that this act shall not be construed to repeal or amend Consolidated Statutes, section two thousand six hundred and fifteen, as same relates to motor vehicle owners.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days.

No failure to display a light on any vehicle shall be considered contributory negligence per se in any action brought by the owner or occupant of any vehicle; but the facts relating to such failure to display a light may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence. (1927, c. 43.)

Editor's Note.—The fourth section of the act from which this section was taken provided that immediately after the ratification of this act the State Highway Commission shall have printed and circulated throughout the State copies of this act for the information of persons using the highways of the State.

§ 3785. Footways at streams, etc.; ten years maintenance establishes right.—Every overseer of the road, when the township board of supervisors may so direct, shall cause to be made and kept in repair, for the convenience of travelers on foot, good and sufficient footways over all swamps and streams of water that may cross that part of the road allotted to him; and, when the board shall so direct, shall also erect and keep hand-rails on each side of all hollow bridges situate on such part of the road: Provided, that at all places where footways and hand-rails, at hollow bridges or over swamps and streams of water, shall have been commonly used, for the space of ten years next preceding any period within three years before presentment made or indictment found for want of such footways or hand-rails, the same shall be conclusive evidence of an order theretofore made by the board, that they shall be erected and kept up, subject to be rebutted only by producing an order dispensing with them made within three years next before such presentment. (Rev., s. 2695; Code, s. 2029; R. C., c. 101, s. 17; 1817, c. 940, ss. 1, 2.)

§ 3786. Gates across highways may be allowed on petition.—Any person desiring to erect a gate across a public road may file his petition before the board of supervisors of the township where the road lies; whereupon publication shall be made at the courthouse and on the land of the person so applying and at three public places in said township until the next succeeding meeting, of such application, specifying the road, the place for the gate and name of the petitioner; and all persons interested in the convenient traveling or transportation on said road shall have leave to appear and defend, demur or plead to said petition; and if, at that meeting, it shall appear that such publication has been made, the supervisors may, at their discretion, authorize the petitioner, at his cost, to erect a gate as prayed for. (Rev., s. 2711; Code, s. 2058; R. C., c. 101, s. 39; 1834, c. 16, ss. 2, 3, 4; 1905, c. 88.)

Section Applies to Existing Roads.—Jurisdiction to license the erection of a gate across a public road is conferred by this section on the board of supervisors of public roads. This applies to roads already established. Andrews v. Beam, 97 N. C. 315, 1 S. E. 532.

§ 3787. Leaving gates open; penalty.—If any person shall leave open, break down or otherwise injure any gate lawfully across any public road, he shall forfeit and pay for every such offense ten dollars to the person erecting the same or his assigns of the land; and if the offense shall be maliciously or wantonly done, he shall be of a misdemeanor. (Rev., s. 3781; Code, s. 2058; 1885, c. 45.)

Cited in Edwards v. Supervisors, 127 N. C. 62, 37 S. E. 73.

§ 3787(a). Gates projecting over right of way forbidden.—It shall be unlawful for any person, firm or corporation to erect, maintain or operate upon his own land, or land of another, any farm gate or other gates which when opened shall project over the right-of-way of any State highway within this State.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, in the discretion of the court. (1927, c. 130.)

§ 3788. Fords across boundaries to be kept in order.—Where a river or stream across which there is a ford is the dividing line between any counties, townships, road districts or road sections it shall be the duty of the board of county commissioners, road and highway commissioners, or supervisors, superintendents, and overseers having in charge the construction, maintenance, or working of a road or highway leading to such river or stream, to work and keep in good condition the part of such ford from such road or highway to the middle of the ford. Any person or persons failing to comply with the provisions of this section shall be guilty of a misdemeanor and punished by a fine not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1917, c. 251, s. 1.)

§ 3789. Obstructing highways and roads misdemeanor.—If any person shall willfully alter, change or obstruct any highway, cartway, mill road or road leading to and from any church or other place of public worship, whether the right of way thereto be secured in the manner provided for by law or by purchase, donation or

otherwise, such person shall be guilty of a misdemeanor, and fined or imprisoned, or both. If any person shall hinder or in any manner interfere with the making of any road or cartway laid off according to law, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3784; Code, s. 2065; 1872-3, c. 189, s. 6; 1883, c. 383.)

Cross References.—As to obstructions on highways generally, see 7 Enc. Dig. 68 et seq.; 14 Enc. Dig. 304; as to what constitutes a public highway, see section 3750.

Requisites of Indictment and Conviction.—An indictment for obstructing a neighborhood road leading to a church, which follows the words of this section, will be sustained—still, to warrant a conviction, it is essential, in the absence of proof of an actual dedication, or of a laying out by public authority under section 3838 to show a user for twenty years, and it must have been worked and kept in order by public authority. State v. Lucas, 124 N. C. 804, 32 S. E. 553.

A special verdict, rendered on a trial for obstructing a road, is also defective, in that, it does not find that the user of the road by the public was as of right and adversary. State v. Stewart, 91 N. C. 566.

Placing Nails in Highway.—Placing nails in the highway in order to puncture automobile tires is an obstruction within this section. State v. Malpass, 189 N. C. 349, 127 S. E. 248.

Preventing Construction of Drainage Ditch.—Where a person obstructs an overseer in cutting a ditch across his land to drain a public road, he is not guilty of obstructing justice there being no provision of law for taking private property for this purpose and the payment of just compensation therefor. State v. New, 130 N. C. 731, 41 S. E. 1033.

Obstruction a Nuisance.—Unlawful obstruction of a highway is a public nuisance. Brooks v. Henrietta Mills, 182 N. C. 719, 110 S. E. 96.

Highway Unknowingly Obstructed.—When a mill company gratuitously maintained a ball ground on its premises for its employees, without direction or supervision, it is manifest that the relation of licensor and licensee without pecuniary compensation existed between them, and it is not liable for an injury caused by obstruction of an adjoining highway by a rope intended to exclude spectators who did not pay for admission, there being no evidence that it had actual or implied knowledge thereof. Brooks v. Henrietta Mills, 182 N. C. 719, 110 S. E. 96.

Damages Allowed Also.—Damages are allowable for the obstruction of a highway. Tate v. Seaboard Air Line R. Co., 168 N. C. 523, 84 S. E. 808.

Obstruction of Permissive Cartway.—A way over the lands of another as an outlet to and from the lands of the one claiming it, cannot be established by permissive user, but by possession adverse to the true owner; and a way of this character which has not been established by the public authorities or used and kept up by the public for a sufficient length of time, does not fall within the meaning of this section so as to make its obstruction punishable. State v. Norris, 174 N. C. 808, 93 S. E. 950.

Private Easement.—A reservation by deed to the grantor of a restricted easement across the lands conveyed, without defining or locating it, and which has not since been located, the grantor and his family going across the lands conveyed whenever they choose, is insufficient proof of a public road so as to sustain an indictment under this section. State v. Haynie, 169 N. C. 277, 84 S. E. 385.

Private Roadway.—In a prosecution for unlawfully and willfully obstructing a public cartway, in the absence of evidence of dedication to the public, or evidence of an adverse continuous user by the prosecuting witness for the period required by law to give him an easement, defendant could not be guilty where the obstruction was on the part of the road where it crossed his land. State v. Lance, 175 N. C. 773, 94 S. E. 721.

Maximum Penalty Constitutional.—Where a defendant is convicted of obstructing a highway and of wanton injury to personal property by the same act, it is not in violation of our constitution nor otherwise improper, to sentence him to the maximum penalty for each offense. State v. Malpass, 189 N. C. 349, 127 S. E. 248.

Law Shortening Statute of Limitation.—A public-local law which shortens the period for the running of the statute of limitations to a time already expired and depriving the owner of lands of his right to stop the public user of a private right of way thereover, and declares the right of way a public one, is unconstitutional in taking the property of the owner without due process of law and in denying him the equal protection of the laws. State v. Haynie, 169 N. C. 277, 84 S. E. 385.

§ 3790. Obstructing highways by dirt or water; liability.—Any person throwing a bank of dirt in the main road shall be compelled to spread the same. When any ditch or drain is cut in such a way as to turn water into any public road the person cutting the ditch or drain shall be compelled to cut another ditch or drain as may be necessary to take the water from said road. (Rev., s. 2697; Code, s. 2036.)

§ 3791. Obstructing highway drains, misdemeanor.—Any person who shall obstruct any drains along or leading from any public road in the state shall be guilty of a misdemeanor, and punished by a fine of not less than ten nor more than one hundred dollars. (1917, c. 253.)

§ 3792. Use of roads by certain vehicles.—It shall be lawful for any person to run and use traction engines and road steamers upon the public roads. (Rev., s. 2727; Code, s. 2061; 1870-1, c. 162.)

§ 3793. Injuring roads by hauling logs; damage and penalty.—If any person, company or corporation shall damage any public road, bridge or causeway by hauling logs or sawmill timber thereon, and shall not repair the damage done thereto within five days after being notified of said damage by the overseer of said road or by any member of the board of supervisors of the township in which said damaged road is situated, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars, or be imprisoned not exceeding thirty days: Provided, if any person shall pay the damage as assessed by the board of supervisors for injury to such road, the payment of such damages shall be a complete bar to any criminal prosecution under this section, and if any criminal prosecution shall have been commenced prior to the payment of said damages, all further proceedings in said criminal prosecution may be ended by the defendant paying the cost necessarily incurred in said criminal prosecution and satisfying the court that said damages and all proper costs have been paid. (Rev., s. 3778; 1893, c. 416, s. 2; 1889, c. 503, s. 2.)

§ 3794. Local: Settlement of damages from hauling logs in certain counties.—If any of the public roads in Anson, Beaufort, Bertie, Clay, Columbus, Currituck, Dare, Gates, Halifax, Lenior, Macon, Pasquotank, Pitt, Rutherford, Stokes, Swain, Tyrell and Yancy counties shall be used by any person engaged in hauling logs or wood, whether such hauling be by the employees or agents of any other person, company or corporation, or by contractors for any other person, company or corporation, and the public roads shall become damaged by such use, upon complaint made to the chairman of the board of supervisors of the public roads of the township in which such damaged road is situated, he shall summon the person, company or corporation, or the manager of such person, company or corporation, alleged by such complainant to have damaged such road, before a called or regular meeting of the board of road supervisors of such township in which such alleged damaged road is situated, within ten days after complaint is made to him, and said board of road supervisors shall investigate by visiting and inspecting such damaged road, and they shall hear

evidence on oath as to the condition of such damaged road and the cause of its bad condition, and the damage done to such road by the hauling of logs over such road by such person, company or corporation; and if the board of supervisors shall find such road or any part thereof damaged by the hauling of logs over the same, the person, company or corporation, or their agents, employees or contractors, alleged in the complaint to have damaged such road or any part thereof, they shall assess against such person, company, or corporation an amount of money sufficient to repair such road. And the board of road supervisors shall return to the clerk of the superior court the amount of such assessment as a judgment of the board of township road supervisors, and the clerk shall docket this transcript and it shall thereupon become a judgment of the superior court, and the clerk shall issue execution against such delinquent person or corporation for the assessed damages as other executions and the sheriff shall pay the proceeds of said judgment to the clerk of the superior court, to be applied by the board of township supervisors to the repair of such damaged road. (Rev., s. 3777; 1889, c. 503, ss. 1-3; 1893, c. 416; 1899, c. 712; 1901, c. 189.)

§ 3794(a). Maximum weight of vehicles or trailers.—No vehicle or trailer which has a greater rated weight of both vehicle and load exceeding seven and one-half (7½) tons shall go over or be operated upon any state highway. Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor. (1921, c. 2, s, 30.)

For a similar provision in the motor vehicle law, see section 2621(78).

Part 2. Bridges

§ 3795. Duty as to bridges of millowners on, or persons ditching or enlarging ditches across, highways.—It shall be the duty of every owner of a water-mill which is situate on any public road, and also of every person who, for the purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair all bridges that are or may be erected or attached to his milldam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill, or milldam, ditch, drain or canal. Nothing herein shall be construed to extend to any mill which was erected before the laying off of such road, unless the road was laid off by the request of the owner of the mill. The duty hereby imposed on the owner of the mill, and on the person cutting the drain or canal, shall continue on all subsequent owners of the mill, or other property, for the benefit of which the said ditch, drain or canal was cut. When any ditch or drain originally constructed across any public road, and bridged for the convenience and safety of the traveling public, has been or may hereafter be enlarged by the owner of adjacent lands to drain his lands, it shall be the duty of such owner to keep up and in repair all bridges crossing such ditch, drain or canal, and such charge shall be imposed upon all subsequent owners of the lands so drained. (Rev., s. 2697; Code, s. 2036; 1887, c. 261; R. C., c. 101, s. 24; 1817, c. 941, s. 1; 1846, c. 95, s. 1; 1881, c. 290.)

As to the erection and maintenance of bridges generally, see section 3767 and notes thereto.

Duty of One Constructing Ditch. — When the proprietor of lands, for the purpose of draining the same, shall construct a ditch, drain or canal across a public road, it shall be the duty of the said proprietor to build a bridge over said ditch, canal, etc., and keep the same in repair. Nobles v. Langly, 66 N. C. 287.

Owners of land cutting ditches through a highway are bound to maintain bridges over them. Norfleet v. Cromwell, 64 N. C. 1, 16.

Priority of Road to Mill.—In an action for failing to keep a sufficient bridge over a canal cut across a public road, brought under this section, the plaintiff need not allege that the road was laid off before the mill was erected, in order to negative the proviso in that statute. Wadsworth v. Stewart, 97 N. C. 116, 2 S. E. 190.

Overseer Not Liable.—When a civil action was brought against the overseer to recover damages alleged to have been incurred in consequence of his negligently permitting a bridge over a canal to become unsafe and in bad condition, it was competent for him to show that the canal had been dug across the public road by the proprietor of the land adjacent thereto, and for the purpose of draining the same, and that a bridge had been built over the canal by the proprietor of the land, and had been kept up by him for several years. Nobles v. Langly, 66 N. C. 287.

Cited in Holmes v. Upton, 192 N. C. 179, 134 S. E. 401.

§ 3796. Liability for failure to maintain bridges; penalty and damages.—If any owner of a water-mill situated on any public road, or any other person whose duty it is under this chapter to keep up and repair bridges built across any public road or across any ditch, drain, or canal, shall refuse or neglect to keep up and repair, or shall suffer to remain out of repair for the space of ten days, unless repair was prevented by unavoidable circumstances any bridges which by law he may be required to keep up and repair, he shall be guilty of a misdemeanor and shall be liable for such damages as may be sustained. (Rev., ss. 2703, 3772, 3773; Code, ss. 1086, 2037; R. C., c. 34, s. 25; 1817, c. 941, ss. 2, 3; 1876-7, cc. 90, 211.)

As to liability of the county commissioners, see Holmes v. Upton, 192 N. C. 179, 134 S. E. 401.

§ 3797. Railroad and turnpike companies to maintain bridges which they make necessary.—All railroad, plankroad and turnpike companies shall keep up, at their own expense, any bridge on or over county or incorporated roads, when the building of such bridges was made necessary in establishing their respective roads; and on failure to do so, shall forfeit and pay twenty-five dollars to any person who may sue the same, and in addition shall be guilty of a misdemeanor. (Rev., ss. 2700, 3775; Code, s. 2054; R. C., c. 101, s. 35; 1838, c. 5, ss. 1-4.)

§ 3798. Counties to provide draws for vessels.—The county or counties which may erect bridges shall, by their boards of commissioners, provide and keep up draws in all such bridges, where the same may be necessary to allow the convenient passage of vessels. When any such draw shall be necessary to be erected for the passage of timber-rafts, said draw may not exceed twenty feet in width. (Rev., s. 2698; Code, s. 2053; 1891, c. 168; R. C., c. 101, s. 34.)

As to the rights of the public in navigable waters generally, see 9 Enc. Dig. 634 et seq.; 14 Enc. Dig. 83 et seq.

It is within the discretion of the commissioners as to whether the draws in the bridges should turn both ways. Lenoir County v. Crabtree, 158 N. C. 357, 74 S. E. 105.

When Commissioner Excused for Failure to Provide Draws.—Where in an action for the penalty under sec. 1302,

for defendant's failure and neglect, as County Commissioner, to construct a draw in a county bridge across a river, it appeared that there had been a question whether the stream above the bridge was navigable, and that during six months or more of the year the water was insufficient to float boats and that the draw had been put in as soon as the question of the navigability was determined by the Engineering Department of the United States Government, it was proper for the trial judge to direct a verdict for the defendant. Staton v. Wimberly, 122 N. C. 107, 29 S. E. 63. As to liability of commissioners for neglect, see section 1302.

§ 3799. Owner of bridge to provide draws on notice.—Owners of steamboats or other craft, who may intend to navigate any river or creek over which any person may have a bridge, may give three months notice of such intention in one of the public journals of the state, published nearest the river or creek intended to be navigated, and to the owner of the bridge, to construct a draw of sufficient width to allow the passage of the boat which is to be used; and if the owner of the bridge shall not, within three months from the date of the notice, construct the required draw, he shall forfeit and pay the person so notifying, if he be thereby prevented from navigating the watercourse, fifty dollars; and shall be further subject to the like penalty, under like circumstances, for every three months default thereafter. (Rev., s. 2699; Code, s. 2052; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2; 1838-9, c. 5.)

§ 3800. Railroad and turnpike companies to provide draws.—Railroad, plankroad and turnpike companies, erecting bridges across watercourses, shall attach and keep up good and sufficient draws, by which vessels may be allowed conveniently to pass. (Rev., s. 2701; Code, s. 2051; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2.)

§ 3801. Solicitor to prosecute for injury to bridges.—The solicitors of the superior court are authorized and directed to institute suits in the name of the state, in the counties wherein the injuries may be done, for the recovery of damages, against all persons who shall willfully or negligently injure any public bridge belonging to or situate in any county or counties, by forcibly running any decked vessel, boat or raft against the same; by cutting trees or timber in the rivers or creeks above such bridges, or by any other matter or means whatsoever. In case the injury is done to two counties, the action may be brought in either for the entire damage; and the damages which may be recovered shall be for the use of the county or counties injured; and if the plaintiff fail, the costs shall be paid by the county or counties for whose use the suit is brought, and in the same proportion in which the recovery would be divided. (Rev., s. 2705; Code, s. 2055; R. C., c. 101, s. 36; 1846, c. 11, ss. 1, 2.)

Injunction May Issue.—The county commissioners, under the general powers granted by this section may bring an action for an injunction to restrain the use of a non-floatable stream for floatage of logs, causing damage to a county bridge over such stream. Commissioners v. Catawba Lumber Co., 115 N. C. 590, 20 S. E. 707, 847.

§ 3802. County liable on commissioners' contracts as to bridge.—Every contract and order by the board of county commissioners entered into or made as authorized by this chapter for or concerning the building, keeping up or repairing bridges, in such manner as to them may seem most proper, shall be valid against the county. (Rev., s. 2702; Code, s. 2035; 1887, c. 370, s. 2; R. C., c. 101, s. 23; 1784, c. 227, s. 6.)

§ 3803. Expenses of bridges borne by counties.—The expense of building and keeping up public bridges in the several counties shall be borne by the whole people of each, and not by the people of the township separately, in which such bridges may be situated; and it shall be the duty of the commissioners to adjust this burden equally among the people of their respective counties, and they shall exercise a due supervision over the action of the respective boards of supervisors of the townships, so as prevent the board of any township from establishing any unnecessary number of bridges in its respective township. (Rev., s. 2704; Code, s. 2060; 1869-70, c. 219.)

Cross References.—As to bonds for bridges, see section 3763; as to interstate bridges, see section 3773 et seq.

See sections 3750, 3767, and 3768 and notes thereto.

§ 3804. Fastening vessels to bridges misdemeanor.—If any person shall fasten any decked vessel or steamer to any bridge that crosses a navigable stream, he shall be guilty of a misdemeanor, and in the case of a bridge that crosses a county line, may be prosecuted in either county. (Rev., s. 3774; Code s. 2050; 1887, c. 93, s. 3; R. C., c. 101, s. 31; R. S., c. 104; 1858-9, c. 58, s. 1.)

§ 3805. Fast driving over bridges misdemeanor.—If any person shall ride or drive over any public bridge at a rate of speed faster than a walk, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that this section shall not apply to any bridge unless the county commissioners shall keep posted at each end of such bridge a notice forbidding the riding or driving over such bridge at a rate of speed faster than a walk. (Rev., s. 3780.)

Art. 11. Road Labor and Material

Part 1. In General

§ 3806. All able-bodied males to work on roads.—All able-bodied male persons between the ages of eighteen years and forty-five years (between twenty-one years and forty-five years in Columbus and Tyrell counties) shall be required under the provisions of this chapter to work on the public roads, except the members of the board of supervisors of public roads; but no person shall be compelled to work more than six days in any one year, except in case of damage resulting from a storm: Provided, that ten days instead of six days shall be the limit as to the counties west of the Blue Ridge. (Rev., s. 2725; Code, s. 2017; 1879, c. 82, s. 4; 1880, c. 30, s. 2 1826, c. 26; 1905, c. 136.)

As to work on roads generally, see 7 Enc. Dig. 56 et seq.; 14 Enc. Dig. 303 et seq.

Editor's Note.—This and §§ 3807-3811 are superseded by § 3846(18).

A Duty Not a Tax.—The statutory requirement to work on the public roads, is not a tax, but a duty—inability to perform it, through sickness, is a full defense. State v. Covington, 125 N. C. 641, 34 S. E. 272.

Assignment Rests with Supervisors.—The assignment of one liable to road duty to any particular road rests with the board of supervisors of the township. State v. Gillikin, 114 N. C. 832, 19 S. E. 152.

Citizen of Another State.—Where an able-bodied male person between eighteen and forty-five years of age resides in this State and pursues a vocation for its income for an indefinite period, he is liable to road duty, under this section, although he is a citizen of another State, to which he in-

tends to return when he finishes his present employment. State v. Johnston, 118 N. C. 1188, 23 S. E. 921.

Effect of Appeal.—Defendants are not guilty of a violation of this section in refusing to work on a public road, after being summoned to do so by the overseer, after they have appealed to the superior court from an order of the county commissioners to lay out the road in question, and have given the bond and in all respects have complied with the statute; for the appeal vacates the order. State. v. Davis, 159 N. C. 455, 74 S. E. 916.

§ 3807. Exemptions from duty to work. — No person between the ages prescribed shall be exempted from working upon the public roads, except such as shall be exempted by the general assembly, or by the board of supervisors of the township, on account of personal infirmity, of which the said board shall be the sole judge. No male student attending any school, college, academy or other institution of learning shall be compelled to perform any road duty or to work on any street or road, or to furnish a person to work in his place, or pay any sum of money in lieu of such work, on the roads or streets in the county, city, town or township in which such institution of learning is located; but this exemption shall not extend to any male person subject to road duty who before becoming a student within the exemption was a bona fide and legally qualified resident of the district: Provided, that all boys in this state under twenty-one years of age are exempt from working the public roads during the time they may be attending school. (Rev., s. 2726; Code, s. 2018; R. C., c. 101, s. 12; 1784, c. 227, ss. 8, 9; 1826, c. 26, ss. 1, 2; 1907, c. 945; 1919, c. 263.)

Exemptions in Private Act Not Repealed.—An exemption from the duty to work roads contained in a private act is not repealed by this section. State v. Womble, 112 N. C. 862, 17 S. E. 491.

Section Hands Not Excused.—Section hands employed on our railroads at regular wages are not thereby excused from working on the public highways of the country. State v. Cauble, 70 N. C. 62.

Justice of the Peace.—Where a general statute exempts a justice of the peace from road duty and a later public-local law relating to a particular county repeals this special privilege, and requires all able-bodied males between certain ages to work the roads a designated number of days a year to pay a certain sum in lieu thereof, a justice of the peace or another—a mail carrier in this case—cannot be claimed to be exempt therefrom when he falls within the general class of persons required to do this public duty, without statutory expressions to that effect. State v. Kelly, 186 N. C. 365, 119 S. E. 755.

§ 3808. Overseers summon to work; notice; amount and conduct of work; substitutions allowed.—The overseer of the road shall, as often as the road shall require, not more than six days in any one year, summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and at least fifteen days shall intervene between workings, except in case of special damage to the road, resulting from a storm. The notice shall be at least three days before the day named for the work, and shall state the hour and place for the meeting of the hands, and what implement the hand shall bring with him. Every person liable to work on the road who has been so summoned shall appear at the time and place named, and with the implement directed, and shall work on the road under the direction of the overseer until discharged by him: Provided, that no hand shall be required to work for a less time than seven hours nor a longer time than ten hours in any one day.

Any person summoned as aforesaid who shall, by twelve o'clock of the day preceding the one appointed for work on the road, pay to the overseer the sum of two dollars shall be relieved from working on the road for one day. The money thus collected by the overseer shall be by him applied on the working and repairing of the road: Provided, that the amendment hereto fixing the amount to be paid the overseer at two dollars shall not have the effect of any special act applying to any county in the state.

Any person who shall furnish one able-bodied hand as a substitute, with the implement directed, shall be held to have complied with this chapter. (Rev., s. 2721; Code, s. 2019; 1879, c. 82, s. 5; 1880, c. 30, s. 3; 1921, c. 51.)

Editor's Note.—By Public Laws 1921, ch. 51. the optional payment provided for by this section was raised from one dollar a day to two dollars a day. At the same time the clause providing that no special act was repealed by the amendment was added.

Summons Need Not Be in Writing.—A summons to a person liable to road duty need not be in writing. State v. Telfair, 130 N. C. 645, 40 S. E. 976.

Service by Overseer Unnecessary.—The personal service of summons to the work hand means service on him personally, and not service by the overseer personally. State v. Covington, 125 N. C. 641, 34 S. E. 272.

§ 3809. Overseers allot tasks to workers.—The overseer, if requested by a majority of the hands on the road assigned him, may, in his discretion, lay off the road equal portions for the convenience of the laborers, who shall finish his or their part in a time agreed on between him and each person, and on default of any agreeing party, the overseer shall cause such part to be finished by the labor of other persons, and by warrant may recover the value thereof to his own use: Provided, that the time agreed on shall not exceed six days, and that nothing in this section shall be a defense to the overseer, when prosecuted for default concerning the condition of the road. (Rev., s. 2718; Code, s. 2026; R. C., c. 101, s. 13; 1784, c. 227, s. 10.)

Overseer Must Comply with Statute.—The overseer of public roads must comply with the statutory provisions in having the roads worked, causing those summoned to work either two days or one, as the occasion requires, allowing an interval of at least fifteen days, and adjourn only on account of rain, sickness, or other unavoidable cause, and not merely for his own convenience. State v. Clayton, 146 N. C. 599, 60 S. E. 415.

§ 3810. Notice to work on road, how served.—When an overseer shall not be able to personally notify the hands three days before the day appointed for working the road, he shall leave at the house of each hand a written summons, specifying the day on which they are required to attend, the place of the road to be worked, and the kind of tools to be brought or used; and the said written summons, left as aforesaid, shall be deemed sufficient notice to the hands required to be notified; and all penalties recovered by an overseer for default of working on the road shall be applied by him to the repair of the road of which he is or may have been overseer. (Rev., s. 2720; Code, s. 2044; R. C., c. 101, s. 10; 1842, c. 65.)

§ 3811. Penalty for failing to work roads.—If any person liable to work on the road shall fail to attend and work, as provided by law, when summoned so to do, unless he shall have paid the one dollar as provided, he shall be guilty of a misdemeanor, and fined not less than two dollars nor more than five dollars, or imprisoned not exceed-

ing five days, and if any defendant shall be unable to discharge the judgment and costs that may be recovered against him, the costs shall be paid by the county. (Rev., s. 3779; Code, s. 2020; 1885, c. 392; R. C., c. 101, s. 11; 1817, c. 935, s. 2;1825, c. 1287; 1879, c. 82, s. 6.)

Cross References.—See notes to sections 3806 and 3807; as to the criminal responsibility to work roads in general, see 7 Enc. Dig. 61 et seq.; 13 Enc. Dig. 303 et seq.

Jurisdiction of Offense.—Justices of the peace have exclusive original jurisdiction of the offense of failing to work the public roads. State v. Craig, 82 N. C. 668.

The superior court can acquire jurisdiction only by appeal. State v. Clayton, 146 N. C. 599, 60 S. E. 415.

Requisites of Warrant.—The warrant against one for refusing to work on a public road must negative the payment of one dollar (now two dollars) in discharge of the defendant's liability. State v. Neal, 109 N. C. 859, 13 S. E. 784.

The warrant, for the penalty for not working on a road, need not show on its face that the road is in the county in which the warrant issues. Warrants never have a venue. The objection, even if the case had been in a court of record, must have been taken advantage of by a plea in abatement. Duffy v. Averett, 27 N. C. 455.

A warrant issued by a justice of the peace reciting that complaint had been made on oath that defendants had willfully failed to work the public road on which they were due road service, after having had legal warning by the overseer, and commanding the sheriff to apprehend them and bring them before the justice to answer the charge, amended by adding recitals that they had not tendered to the overseer the sum of $1, were sufficiently particular to enable the defendants to know what they were to meet and to avail themselves of the conviction or acquittal as a bar to a further prosecution arising out of the same facts, and it was not necessary to charge that defendants were able-bodied men between 18 and 45. State v. Thomas, 168 N. C. 146, 83 S. E. 561.

Superior Court May Amend Warrant.—The superior courts have the power to amend a warrant issued by a justice of the peace against a person refusing to work the road by inserting the State as plaintiff instead of the overseer. State v. Cauble, 70 N. C. 62.

When Proceedings Defective.—Proceedings were fatally defective in that they failed to set forth in what county the offense was committed; that the person summoning the defendant was overseer of that particular road; that the road was not sufficiently described; that the defendant was liable to work the public roads and had been assigned to that one, and that they did not negative the fact that defendant had paid the sum. State v. Pool, 106 N. C. 698, 10 S. E. 1033. See, also, State v. Yoder, 132 N. C. 1111, 44 S. E. 689.

Overseer May Recover Penalty.—The overseer of a road may recover in his own name the penalty for hands not working on the public road. He is not bound nor required to sue "for himself and the county," since the fine is to be applied by the overseer to the keeping up of the road. Duffy v. Averitt, 27 N. C. 455.

Burden of Proof.—Under an indictment for failure to work the public roads, where there is a controversy as to an adjournment by the overseer, the burden is on the State to show the overseer therein exercised a sound and reasonable discretion. State v. Clayton, 146 N. C. 599, 60 S. E. 415.

One Summoned Cannot Attack Judgment of Commissioners.—In an indictment against a person for failure to work a public road, the order of the county commissioners laying out said road is competent evidence to show the establishment of such road, and such judgment cannot be collaterally attached. State v. Joyce, 121 N. C. 610, 28 S. E. 366.

Where Party Does Not Use Road.—The fact that a defendant, in a prosecution for failure to work the public road, had no occasion to use the road to which he was assigned to duty is no defense. State v. Gillikin, 114 N. C. 832, 19 S. E. 152.

When Summoned for Three Days.—The fact that a notice summoned accused to work on a highway for three days consecutively was not a defense to a criminal prosecution for failure to work at all; accused having made no objection to the sufficiency of the notice, which was good for two days, and having been fined only for two days' default. State v. Yoder, 132 N. C.. 1111, 44 S. E. 689.

When Previously Assigned to Work Another Highway.—It is no defense to a prosecution for a refusal to work on a highway that accused has been previously assigned to another highway, the last assignment cancelling the first. State v. Yoder, 132 N. C. 1111, 44 S. E. 689.

When Appointed to Work Non-existent Road.—Any inhabitant assigned to work on a public road, when sued for the penalty incurred for refusing to work on such road, and the overseer indicted for not having the road in order, may show that in fact there is no such public road. Baker v. Wilson, 25 N. C. 168.

Excuse That Repair Duty of Another.—A hand who has been regularly assigned to work a certain road, and who has been properly summoned by the overseer thereof to work said road, cannot excuse himself from aiding to repair a bridge over a ditch across the road, upon the ground that it is the duty of the person who cut the ditch to make a bridge over it, and keep the same in repair. State v. James, 74 N. C. 393.

Part 2. Convict Labor

§ 3812. Application for convicts.—Any county or township or good roads district that desires to use convict labor in the construction or improvement of its highways shall apply first to the geological and economic survey to lay out and make plans for said work or to approve plans already made. The said county, township or good roads district shall then apply to the board or state prison directors for the number of convicts desired for the work, this number in no case to be less than forty. (Ex. Sess. 1913, c. 37, ss. 1, 2.)

As to convicts generally and the power to regulate their labor, see 3 Enc. Dig. 497 et seq.; 13 Enc. Dig. 468 et seq.

Editor's Note.—This and §§ 3813-3815 are superseded by §§ 3846(1) et seq.

§ 3813. Duty of directors of state prison.—The board of directors, as soon as possible after the receipt of the application and the approval of the council of state, shall furnish the labor requested and proceed to construct or improve the highway under the direction of the state geological and economic survey. All applications from counties, townships or good roads districts for convict labor shall be honored in turn, according to the date of their receipt, except that no county, township or good roads district may use at any time more than one hundred convicts if an application from another county is pending and no labor is available for it. (Ex. Sess. 1913, c. 37, ss. 3, 4.)

§ 3814. Compensation paid to state; how expense divided. — Counties, townships, or good roads districts using convict labor shall pay to the state therefor the sum of not less than one dollar per day for each laborer; shall furnish quarters, to be approved by the board of prison directors, for prisoners and employees; it shall also provide pure drinking water and necessary firewood for camp use, and shall furnish overseers to direct the work. All other expenses of every kind whatever shall be borne by the board of prison directors. (Ex. Sess. 1913, c. 37, s. 5.)

§ 3815. Certain existing contracts not affected.—This article shall not interfere with or apply to the agreements now existing and in force between the authorized authorities of the state and the Elkin and Alleghany railroad company, the Statesville Air Line railroad company, the public road in Madison county, under chapter four hundred and sixty-four, public-local laws of one thousand nine hundred and thirteen; the Watauga and Yadkin Valley railroad company and the Hickorynut Gap dirt road now being constructed by the state and leading across the Blue Ridge mountains through the county of Henderson. Should the said railroad companies at any time fail to carry out the provisions of the agreement existing between them and the authorities of the state, then the state shall be under no further obligation to furnish convict labor, and may at once withdraw such

labor from the railroad company failing to carry out its agreement. (Ex. Sess. 1913, c. 37, s. 6.)

§ 3816. Convicts on state farm to be reserved.—The state farm or penitentiary authorities or council of state shall at all times reserve a sufficient number of convicts to properly cultivate and conduct the state farm. (Ex. Sess. 1913, c. 37, s. 7.)

Part 3. Material

§ 3817. Appropriation of earth and timber for roads.—Overseers may lawfully cut poles and other necessary timber, for repairing and making bridges and causeways. And whenever earth shall be needed on a public road, and it cannot be conveniently procured on either side of the causeway, the overseer may lawfully take the earth from any adjoining land. (Rev., s. 2719; Code, s. 2027; R. C., c. 101, s. 18; 1785, c. 256, s. 1; 1818, c. 976, s. 1.)

Editor's Note.—This section would seem to be superseded by §§ 3846(1) et seq.

Authority Given.—This section gives the overseer of a road, (acting in good faith) power to cut poles, etc., on any land adjoining his section, and he is not confined to the land immediately adjoining the spot where the work is to be done. Collins v. Creecy, 53 N. C. 333.

§ 3818. Compensation for earth and timber taken for roads.—The owner of any land or timber used for building or repairing public roads may file his petition before the board of commissioners of the county wherein the injury is done; and, for damages sustained thereby, the board shall make the petitioner adequate compensation: Provided, that this and the preceding section shall not apply to the lands adjoining or contiguous to the causeway, or great road leading across Eagel's island to Wilmington. (Rev., s. 2728; Code s. 2028; R. C., c. 101, s. 16; 1818, c. 976, s. 2.)

Art. 12. Ferries and Toll-Bridges

Part 1. General Provisions

§ 3819. Commissioners may establish toll-bridges.—Whenever, from the rapidity or width of any stream, it may be too burdensome to build and keep up a bridge across the same, at the expense of those who are taxable for that purpose, the board of commissioners of the county, or counties, chargeable therewith may jointly and severally (as the case may be) contract for the building thereof, by allowing the builder to take tolls, at such rate and for such time, on all persons, horses, carriages and other things passing over the bridge, as may be agreed on between the board of commissioners and the builder; which tolls shall be common to all persons. And such bridges shall be built in the manner the board or boards may direct, and shall be kept in good repair by the builder, his heirs and assigns, during the time the tolls are to be enjoyed. (Rev., s. 2706; Code, s. 2045; R. C., c. 101, s. 26; 1784, c. 227, s. 7; 1817, c. 939, s. 2; 1817, c. 940, s. 3.)

Editor's Note.—The State Highway Commission, under § 3846(17), has succeeded to all the rights and duties of the County Commissioners as to ferries and toll bridges.

§ 3820. Condemnation of ferry sites.—Wherever a public ferry has been or may hereafter be established, the board of county commissioners of the county in which any such ferry is or may be located shall have power to condemn land, not exceeding one acre for each public ferry, adjacent or convenient to said ferry, upon which to erect necessary buildings for the use and convenience of ferrymen and the traveling public under the same rules and regulations as are provided by law for condemning land for public roads; and upon the payment or offer of payment, to the owner of said land, of the amount awarded to him therefor, title to the same shall vest in the county in which said land is situate. Nothing in this section shall be construed to deprive the owner of land so condemned of the right of appeal to the superior court. (Rev., s. 2691; 1889, c. 447.)

As to ferries generally, see 6 Enc. Dig. 459 et seq.

§ 3821. Commissioners to regulate ferriage.—The board of commissioners of each county shall, once a year, or oftener if necessary, at the meeting to be held next after the first day of January, rate the prices of such ferries as shall be kept within their respective counties; and ferries lying between two counties shall be rated at a joint meeting of the commissioners of the two counties, to be held at such time and place as may be agreed upon by the commissioners of the two counties, and any ferry keeper who shall ask, demand, or receive a greater price for ferriage than shall be rated by the board or boards of commissioners shall forfeit and pay five dollars for every offense to the party aggrieved. Every person who owns a public ferry, and refuses to keep it up at the rates allowed by the board, shall for every such offense forfeit five dollars. (Rev., s. 2707; 1907, c. 221, s. 1; Code, s. 2046; R. C., c. 101, s. 27; 1779, c. 160, s. 2.)

Cited in Branch v. Wilmington, etc., R. Co., 77 N. C. 347, 349.

§ 3821(a). State highway commission to fix charges.—The state highway commission is directed, authorized, and empowered to fix and determine the charges to be made by all ferries and toll bridges connecting any state highway within the state of North Carolina, which said charges shall be uniform for the same service rendered. (Ex. Sess. 1921, c. 86, s. 1.)

§ 3821(b). Powers granted state highway commission.—The state highway commission is vested with all the rights, powers and authorities granted the corporation commission in the hearing and fixing of rates for any purposes now vested in it by law. (Ex. Sess. 1921, c. 86, s. 2.)

§ 3821(c). Existing rights of appeal conferred.—All rights given any firm, person or corporation in any hearing before the corporation commission in the fixing of rates by way of appeal shall exist in all cases of charges fixed by the state highway commission under and by virtue of this law. (Ex. Sess. 1921, c. 86, s. 3.)

§ 3821(d). Making of excessive charges a misdemeanor; punishment.—Any person, firm or corporation who shall charge any sum greater than the amount fixed by the state highway commission for crossing any ferry or toll bridge connecting any state highway within the state of North Carolina, shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding the sum of one hundred dollars or imprisoned not exceeding six months, or both in the discretion of the court. (Ex. Sess. 1921, c. 86, s. 4.)

§ 3822. Owner of ferry may substitute toll-bridge.—In all cases where the proprietor of a ferry shall prefer building a good and substantial bridge over any water-course instead of keeping a ferry, he may do so; and may claim and hold such bridge under the same rights, and in the same manner, by which the ferry is claimed and held, and under the same rules and regulations, restrictions and penalties as other toll-bridges: Provided, that no more toll shall be demanded for passing any such bridge than is granted by law for the ferriage, unless by agreement with the board of commissioners: Provided further, that in all such bridges the proprietor shall erect a draw where the free navigation of the stream may require it. (Rev., s. 2708; Code, s. 2047; R. C., c. 101, s. 28; 1806, c. 706.)

Duty of Toll-Bridge Owner. — This section requires the owner of a toll-bridge, not only to erect and keep in good repair a draw sufficient for the purposes of a free navigation of the stream, but also to provide the means of raising it, and to have it raised whenever steamboats and other vessels are passing it. Davis v. Jerkins, 50 N. C. 291.

§ 3823. Owners of toll-bridges and ferries to give bond; actions on bond.—The board of commissioners of each county shall compel every person that may own a toll-bridge, or keep a public ferry, within the county, to give bond with good surety in the sum of one thousand dollars, payable to the state of North Carolina, conditioned that he will constantly keep such bridge in good repair, or, as the case may be, provide and keep good and sufficient boats, or other proper craft, always to be well attended, for the passing of travelers of other persons, their horses, carriages and effects, and will indemnify and save harmless every person who may be endamaged by reason of any default in his undertaking. And if any person shall receive damage, because such ferrymen or keeper of a toll-bridge shall not have complied with the conditions of his bond, he may bring suit thereon in the name of the state, and recover his damages. (Rev., s. 2709; Code, s. 2048; R. C., c. 101, s. 29; 1784, c. 227, s. 15,)

As to bonds generally, see section 324 et seq.

§ 3824. Right of action of person detained at ferry.—If any person shall be detained at any public ferry by reason of the ferrymen not having sufficient boats or other proper crafts at hand, or by his neglecting to do his duty in any other respect, he may recover before a justice of the peace, against such ferryman, the sum of ten dollars, as a penalty for every such default or neglect. (Rev., s. 2709; Code, s. 2448; R. C., c. 101, s. 29; R. S., c. 101, s. 29.)

§ 3825. Penalty on unauthorized ferry.—If any unauthorized person shall pretend to keep a ferry or to transport for pay any person or his effects, within five miles of any ferry on the same river or water which theretofore may have been appointed, he shall forfeit and pay two dollars for every such offense, to the nearest ferryman: Provided, that any person who may contract for carrying the mail may keep a boat for the sole purpose of transporting the same, and such passengers as may travel in the coach therewith, across any ferry; but such contractor shall not transport across such ferry any other passengers than such as travel by the coach. (Rev., s. 2710; Code, s. 2049; R. C., c. 101, s. 30; 1764, c. 72, s. 1; 1787, c. 273; 1883, c. 381.)

Editor's Note.—The purpose of the amendment in 1923, Acts 1923, c. 133, was to throw added safeguards around the lives of persons transported by ferries. A violation of this section is a misdemeanor and would probably affect the question of negligence in an action for damages to person or property caused thereby. See 1 N. C. Law Rev. 300.

How Distance Measured.—The distance of five miles prescribed in this section in reference to ferries, is five miles in a direct straight line from the ferry first established. Toll-Bridge Company v. Flowers, 110 N. C. 381, 14 S. E. 918.

Common Law Rule.—The right of a ferryman to his toll, is by the common law, and every subtraction from his profits, by carrying his customers over the same stream, whether for pay or not, is an injury for which he may recover damages. Taylor v. Wilmington etc., Railroad Company, 49 N. C. 277.

Same—Extension of Remedy.—This section recognizes the common law remedy, and further gives a penalty of two dollars for every transportation of passengers, etc., within five miles of an established ferry, if done for pay. Taylor v. Wilmington, etc., Railroad Company, 49 N. C. 277.

Measure of Damages.—It is the diminution in the number of customers who would use the ferry, and the consequent reduction of tolls, which is the measure of damages recoverable against such wrongdoer. Broadnax v. Baker, 94 N. C. 675.

When Steam Used to Carry Freight.—Where the plaintiff was granted a ferry franchise from two points, opposite each other, on a large stream, he could not enjoin and recover damages from a party who used the stream as a highway in conveying freight from points up the river, although one of these points was within the statutory distance of five miles. Broadnax v. Baker, 94 N. C. 675.

When Bridge Burned by Military.—A railroad company did not incur the penalties imposed by this section, by transporting its passengers and freights in boats, across the Roanoke River, during the time that there was no bridge at that point, in consequence of its having been burned by the military. Pugh v. Raleigh, etc., R. Co., 61 N. C. 359.

§ 3825(a). Safeguarding transportation of life; guard chains or gates.—Each and every person, firm or corporation, owning or operating a public ferry upon any sound, bay, river, creek or other stream shall have securely affixed and attached thereto, at each end of the same, a detachable steel or iron chain, or in lieu thereof a steel or iron gate, and so affixed and arranged that the same shall be closed or fastened across the opposite end from the approach, whenever any motor vehicle, buggy, cart, wagon, or other conveyance shall be driven upon or shall enter upon the same; and shall be securely fastened or closed at each end of the ferry after such motor vehicle, buggy, cart, wagon, or other conveyance shall have been driven or shall have entered upon the same. And the said gates or chains shall remain closed or fastened, at each end, until the voyage across the stream upon which said ferry is operated shall have been completed. (1923, c. 133, s. 1.)

§ 3825(b). Weight and type of chain gate.—The board of county commissioners of every county in which any ferry is operated shall fix and determine a standard weight or size of chain, and a standard size, type, or character of gate, for use by said ferry, leaving it optional with the said owner or operator the use of chains or gates. (1923, c. 133, s. 2.)

§ 3825(c). Violation of two preceding sections a misdemeanor.—Any person, firm or corporation violating any of the provisions of this law shall be guilty of a misdemeanor. (1923, c. 133, s. 3.)

§ 3825(d). State highway commission to establish and maintain ferries.—The State Highway Commission is vested with authority to provide

for the establishment and maintenance of ferries connecting the parts of the State Highway System, whenever in its discretion the public good may so require, and to prescribe and collect such tolls therefor as may, in the discretion of the Commission, be expedient.

To accomplish the purpose of this section said State Highway Commission is authorized to acquire, own, lease, charter or otherwise control all necessary vessels, boats, terminals or other facilities required for the operation of such ferries or to enter into contracts with persons, firms or corporations for the operation thereof and to pay therefor such reasonable sums as may in the opinion of said Commission represent the fair value of the public service rendered. (1927, c. 223.)

Part 2. County-line Toll-bridges and Ferries

§ 3826. Counties may purchase ferries or toll-bridges on county-line streams; division of cost.—Wherever in this state there are now operated toll-bridges or ferries with causeways, roads, and bridges leading to the same, which lie partly within one county and partly within another county, the boards of commissioners of the respective counties are authorized to purchase all real and personal property, rights and franchises incident and necessary to the said toll-bridges or ferries, including any causeways, roads, and bridges leading thereto. The proportion of the purchase price to be paid by the said counties shall be determined and agreed upon at a joint meeting of the board of commissioners of said counties, and the amount of said purchase price so agreed upon and determined shall be paid by the respective counties to the owners of the same by proper warrant of the respective counties. (1919, c. 138, s. 1; Ex. Sess. 1920, c. 15.)

See note under § 3819.

Editor's Note.—This section was amended in 1920, Public Laws 1920, Ex. Sess., ch. 15, so as to include toll-bridges. Formerly it was only applicable to ferries.

§ 3827. Right of eminent domain conferred.—If the said counties and the owners of the property the purchase of which is authorized in the preceding section cannot agree upon the purchase price, then the boards of commissioners of said counties are authorized, should they deem it necessary and for the best interests of the counties, to condemn the same, and for that purpose they are empowered to institute condemnation proceedings in either county in which said property, toll-bridge, ferry, causeway, road, or bridges, or any part of same, lie, and conduct the same in accordance with the chapter entitled Eminent Domain in the Consolidated Statutes. (1919, c. 138, s. 4; Ex. Sess. 1920, c. 15.)

As to eminent domain generally, see section 1705 et seq.

Editor's Note.—This section was reenacted in 1920, Public Laws 1920, Ex. Sess. ch. 15 and toll-bridges included within its terms.

§ 3828. Joint operation and maintenance; joint committee. — After the purchase or condemnation aforesaid, the said toll-bridge or ferry, with the causeways, roads, and bridges leading to the same, shall become a part of the public highway and roads of said counties, and it shall be the duty of the said commissioners to operate and maintain the same jointly as a part of such public highways and roads, and the expense of maintenance, improvement, and operation of the said property jointly acquired shall be borne by the said counties upon such terms and in such proportions as shall be agreed upon by the board of commissioners of the same in joint meeting. The said boards of commissioners may vest the control and management of the said ferry and roads, causeways, and bridges, and equipment used in connection therewith, in a committee or committees from said boards, to be selected and determined by said boards in meeting assembled, and said commissioners are authorized to employ agents and servants, provide for the operation and to prescribe reasonable rules and regulations in reference to use and operation of said ferry, toll-bridges, roads, causeways, bridges, and the property and equipment used in connection therewith. (1919, c. 138, s. 3; Ex. Sess. 1920, c. 15.)

Editor's Note.—This section was reenacted in 1920, Public Laws 1920, Ex. Sess., ch. 15, and toll-bridges included within its terms.

§ 3829. Expenses of equipment and maintenance; bond issue.—The said boards of commissioners, after the purchase or condemnation of the toll-bridges, ferries and roads, causeways, and bridges as aforesaid, shall provide all necessary equipment for the toll-bridge or ferry and to improve and repair the causeways, roads, and bridges leading to the same, and thereafter shall keep the same in good condition to the end that the best possible service may be rendered to the public. In order to raise funds for the purchase or condemnation of said toll-bridges, ferries, roads, causeways, bridges, rights, and property, and for the improvement and repair of the causeways, roads, and bridges, and the purchase of the necessary equipment for said toll-bridge, ferry, or ferries, the said boards of commissioners of the respective counties are hereby authorized and empowered to have prepared and issued at such time or times and in such amounts as they deem best, bonds of their respective counties to an amount not exceeding the cost of the toll-bridges, ferries and other property so acquired, the repair and improvement of same, and the purchase of necessary equipment, said bonds to draw interest at such rate as may be determined by said respective counties, to be evidenced by coupons attached, payable semiannually, and to be in such form and tenor and transferable in such way, and the principal thereof payable at such time or times, not exceeding forty years from the date thereof, and at such places as such respective boards may determine: Provided, that none of such bonds shall be disposed of either by sale, exchange, hypothecation, or otherwise, for a less price than their face value. (1919, c. 138, s. 4; Ex. Sess. 1920, c. 15.)

Editor's Note.—This section was amended in 1920, so as to include toll-bridges.

§ 3830. Tax for interest and sinking fund. — The commissioners of the respective counties, in order to provide for the payment of the bonds to be issued hereunder and interest thereon, shall compute and levy each year at the time of levying other county taxes a sufficient tax upon all real and personal property in their respective counties to pay the interest on the said bonds, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of said

bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1919, c. 138, s. 5; Ex. Sess. 1920, c. 15.)

Editor's Note.—After the addition of toll-bridge to the foregoing sections this section was reenacted in toto in 1920, so as to apply to toll-bridges also.

§ 3831. Toll rates; basis of adjustment. — In order to defray the expense of operating, improving and maintaining said toll-bridge or bridges, ferry or ferries, causeways, roads, and bridges and all property used in connection therewith, the boards of commissioners of the said respective counties shall prescribe passage rates from time to time and authorize such tolls for the use of said toll-bridge or bridges, ferry or ferries, roads, causeways, and bridges, and other equipment used in connection therewith, in their discretion, as may be reasonable, just, and proper to provide the operating expenses and reasonable upkeep of the said property, but said boards shall not consider the cost of the same or the amount expended in the first instance in improving, repairing and purchasing the necessary equipment as aforesaid in fixing the amount of toll to be charged and paid by the public for the use thereof: Provided, such rates, charges, or tools shall be uniform on all citizens alike. (1919, c. 138, s. 6; Ex. Sess. 1920, c. 15.)

Editor's Note.—This section was amended by Public Laws 1920, Ex. Sess., ch. 15 so as to include toll-bridges.

§ 3832. Tax to supplement tolls.—If the tolls collected under the last section shall not be sufficient to pay the expenses of operating, repairing, and maintaining such property, the said boards of commissioners of such respective counties are authorized to levy a tax upon the real and personal property of their respective counties sufficient to pay the proportionate loss occasioned by the operation as aforesaid. Said tax shall be levied at the same time as other taxes are levied and shall be collected at the same time and in the same manner as other county taxes; and if it shall become necessary to pay said loss for any one year or part thereof from the general fund of the counties, or in the event it becomes necessary to borrow money to provide for said loss, the said boards of commissioners may, from taxes so collected in any succeeding year, reimburse the general fund of their counties to the extent of the amount so advanced or the amount so borrowed to provide for said deficit; and may provide a contingent fund to meet such event. (1919, c. 138, s. 7; Ex. Sess. 1920, c. 15.)

Editor's Note. — The section was reenacted in toto in 1920, so as to make its provisions applicable to toll-bridges.

§ 3833. Compensation of committee for toll-bridge or ferry control.—If the boards of commissioners should elect to place the control, operation, and management of said toll-bridges, ferries and property used in connection therewith, and the road, causeway, and bridges, in a committee or committees from the joint bodies, as is provided above, said committee or committees shall receive the same pay and mileage for holding meetings in connection with all necessary business of said operation and management as is allowed by law to the members of the boards of commissioners of said respective counties for attending meetings of the board in said respective counties. (1919, c. 138, s. 8; Ex. Sess. 1920, c. 15.)

Editor's Note.—This section was amended by Public Laws 1920, Ex. Sess., ch. 15, so as to include toll-bridges.

§ 3834. When counties may sell or lease ferries or toll-bridges.—If the operation and management of the toll-bridges, ferries and property provided for hereunder, and the roads, causeways, and bridges connected therewith, as provided in this article, shall prove too costly to said counties or shall fail to give adequate and satisfactory service to the general public, or if the public interests would be better subserved by a sale, the boards of commissioners of the respective counties are authorized to sell said toll-bridges, ferries and property upon such terms as they see fit, or the said boards of commissioners may rent and lease the same to such person, firm, or corporation as they may see fit, and subject to such rules and regulations as they may prescribe: Provided, however, that in the event of a sale or lease as aforesaid, the purchase price or lease price, as the case may be, shall be divided between the respective counties in proportion to the price paid in the first instance by the respective counties for such toll-bridges, ferries and property. (1919, c. 138, s. 9; Ex. Sess. 1920, c. 15.)

Editor's Note.—This section was amended in 1920, and toll-bridges added.

Art. 13. Cartways, Church Roads, and the Like

§ 3835. Special proceeding for establishment, alteration or discontinuance of cartways, etc.; petition; appeal. — The establishment, alteration, or discontinuance of any cartway, church road, mill road, or like easement, for the benefit of any person, firm, association, or corporation, over the lands of another, shall be determined by a special proceeding instituted before the Clerk of the Superior Court in the county where the property affected is situate. Such special proceeding shall be commenced by a petition filed with said Clerk and the service of a copy thereof on the person or persons whose property will be affected thereby. From any final order or judgment in said special proceeding, any interested party may appeal to the Superior Court for trial de novo and the procedure established under chapter thirty-three, entitled "Eminent Domain," shall be followed in the conduct of such special proceeding insofar as the same is applicable and in harmony with the provisions of this section. (Rev., s. 2683; Code, s. 2023, 1879, c. 82, s. 9; 1931, c. 448.)

Editor's Note.—Prior to the Act of 1931 the board of supervisors had authority to lay out and discontinue cartways.

§ 3836. Cartways, tramways, etc., laid out; procedure.—If any person, firm, association, or corporation shall be engaged in the cultivation of any land or the cutting and removing of any standing timber, or the working of any quarries, mines, or minerals, or the operating of any industrial or manufacturing plants, or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation affording

necessary and proper means of ingress thereto and egress therefrom, such person, firm, association, or corporation may institute a special proceeding as set out in the preceding section and if it shall be made to appear to the Court necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of other persons, the Court shall appoint a jury of view of three disinterested freeholders to view the premises and lay of a cartway, tramway, or railway of not less than fourteen feet in width, or cableways, chutes, and flumes, and assess the damages the owner or owners of the land crossed may sustain thereby, and make report of their findings in writings to the Clerk of the Superior Court. Exceptions to said report may be filed by any interested party and such exceptions shall be heard and determined by the Clerk of the Superior Court. The Clerk of the Superior Court may affirm or modify said report, or set the same aside and order a new jury of view. All damages assessed by a judgment of the Clerk, together with the cost of the proceeding, shall be paid in to the Clerk's office before the petitioners shall acquire any rights under said proceeding. (Rev., s. 2686; Code, s. 2056; 1917, c. 282, s. 1; 1917, c. 187, s. 1; 1909, c. 364, s. 1; 1903, c. 102; 1887, c. 46; R. C., c. 101, s. 37; 1798, c. 508, s. 1; 1822, c. 1139, s. 1; 1879, c. 258; 1921, c. 135; Ex. Sess. 1921, c. 73; 1929, c. 197, s. 1; 1931, c. 448.)

Proceedings Not Confined to Designated Meetings.—See note to section 3752.

As to private roads generally, see 10 Enc. Dig. 507 et seq.; 15 Enc. Dig. 264.

Editor's Note.—This section was amended by Public Laws 1921, ch. 135 so as to include industrial and manufacturing plants, and the right to cross canals and streams was given. At the same time the words, "affording necessary and proper means of ingress thereto and egress therefrom" were added. Later in 1921, Public Laws Ex. Sess. ch. 73, this section was again amended to provide for new cartways when the old ones had become unreasonably inconvenient.

The Act of 1931 made material changes in the section. See note to § 3835.

Section Strictly Construed.—This section is in derogation of the rights of landowners, and must be strictly construed. Warlick v. Lowman, 103 N. C. 122, 9 S. E. 458.

Section Must Be Followed.—The right to establish cartways, tramways, etc., over the lands of another, when no such right arises by implication of law, is regulated in this State by statute, and one who desires to cross the lands of another for the purpose of removing timber, or for other purposes, must follow the statute or purchase the right. Roper Lumber Co. v. Richmond Cedar Works, 158 N. C. 161, 73 S. E. 902.

Tract Devised without Egress to Public Road.—Where a petition for a "way of necessity" over the lands of another is filed in the Superior Court, and the petition alleges that the petitioner was devised a tract of land without any way of egress to a public road except over the land of another devisee of the testator, and there is no allegation that such a way over the land of the other devisee had theretofore existed, and there is no stipulation in the devise for a way of ingress and egress to a given point, the petitioner's exclusive remedy is under the provisions of this and the previous section, and the proceedings in the Superior Court is properly nonsuited. White v. Coghill, 201 N. C. 421, 160 S. E. 472.

Cartway Quasi-Public Road.—Cartways are regarded as quasi-public roads, and the condemnation of private property for such a use has been sustained upon that ground as a valid exercise of the power of eminent domain. Cook v. Vickers, 141 N. C. 101, 53 S. E. 740.

Undedicated Neighborhood Road Not a Public Road.—A neighborhood road not dedicated to the public, but used by the public under permission or license of the owner of the land, is not a public road within the meaning of this section. Collins v. Patterson, 119 N. C. 602, 26 S. E. 154.

Requisites for Cartways.—The fact that there is no public road leading to the premises upon which a petitioner for a cart-way resides, and that such way will be more convenient to him, will not warrant its establishment; it must be made to appear further that the petitioner has no other way of egress and ingress, and that it is necessary, reasonable and just. Burwell v. Sneed, 104 N. C. 118, 10 S. E. 152.

A cart-way will not be granted, under this section as a mere matter of convenience, but only when it is necessary, reasonable and just that the petitioner should have it. Warlick v. Lowman, 103 N. C. 122, 9 S. E. 458.

Where the applicant for a cartway over the land of another has already one or more convenient rights of way over the land of another to the public road or other public place to which he seeks access, his application shall be rejected, and if an order for a cartway has been previously obtained, the cartway will be discontinued on the petition of the owner of the land. Plimmons v. Frisby, 60 N. C. 200. See, also, Burgwyns v. Lockhart, 60 N. C. 264.

"Necessary, Reasonable and Just." — For the owner of lands, cultivating the same, to obtain a way of necessity over the lands of another to a public road, he must show that such way is "necessary, reasonable and just," under the provisions of this section; and where it appears, without sufficient denial, that there is a public road leading to the cultivated lands, the petition is properly dismissed. Rhodes v. Shelton, 187 N. C. 716, 122 S. E. 761.

Special Local Law Applicable. — While, under the provisions of our general statute, this section, a petitioner who already has an outlet from his lands to a public road, reasonably sufficient for the purpose, is not allowed to have an additional or different cartway established merely because a shorter and better route can be shown, it may be otherwise when the petitioner has proceeded under the provisions of a special local law applicable to a certain county allowing it under certain conditions, the provisions of the local law controlling those of the general statute on the subject. Farmer v. Bright, 183 N. C. 655, 112 S. E. 420.

Sufficiency of Existing Cartway Matter for Jury.—Where there is evidence tending to show that the plaintiffs' lands are situated off of a public highway, with a cartway thereto of great inconvenience, and the board of road supervisors have ordered that a proposed way, more convenient and shorter in distance be laid off, and have held that such way is necessary, reasonable and just, and an appeal has been taken by the owners of the land from this order, and the owners of the lands condemned have further appealed to the superior court, an issue arises for the determination of the jury as to whether sufficient reasons exist for the proposed way, and a judgment of the lower court that the plaintiffs are not entitled to it as a matter of law, is reversible error. Brown v. Mobley, 192 N. C. 470, 135 S. E. 304.

Road Impassable.—Where one's lands are connected with the public road, but by an impassable tract, he is entitled to a cart-way over the lands of another. Mayo v. Thigpen, 107 N. C. 63, 11 S. E. 1052.

Opinion of Witnesses.—Upon the trial of an issue whether a proposed cart-way was necessary and reasonable, the opinions of witnesses are not competent, the question not being one of science, peculiar skill or professional knowledge. Burwell v. Sneed, 104 N. C. 118, 10 S. E. 152.

Cartway May Be Laid out for One Person.—A cartway may be awarded over the lands of another in favor of an individual citizen, when the necessity for it exists, in a manner that is reasonable and just, by proper proceedings upon petition to the township board of supervisors. Ford v. Manning, 152 N. C. 151, 67 S. E. 325.

Lumber Company Cannot Condemn Tramway.—A lumber company cannot condemn land for a tramway solely for carrying its own timber, but, at most, it can obtain only a temporary easement, ex-necessitate, under this section, and this only by a strict compliance with the statute. Leigh v. Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632.

This section is invalid, so far as it authorizes the construction of railways over the lands of others for the exclusive use of the owner of the timber, because authorizing the taking of private property for a use which is not public, though the removal of the timber by means of such railways would aid in the development of the natural resources of the state. Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932.

Failure to Establish Cartway.—The failure to establish a cartway according to law is a matter of defense to be pleaded in the trial of an indictment for breaking down a gate across it. State v. Combs, 120 N. C. 607, 27 S. E. 30.

Inference of Public Road Rebutted by Nonuser.—The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years. Burgwyn v. Lockhart, 60 N. C. 264.

Private Easement.—A mere right of way which a deed gives the grantee over the grantor's remaining lands is not a "cartway," for obstruction of which indictment will lie under section 3789. State v. Haynie, 169 N. C. 277, 84 S. E. 385. See, also, State v. Lance, 175 N. C. 773, 94 S. E. 721.

Permissive Cartway.—Where an owner of land not reached by any public road for 37 years used a road across defendant's land without exercising any ownership or possession except passing back and forth, and occasionally cutting out a tree or other obstruction, the way was neither a public highway nor a private cartway. State v. Norris, 174 N. C. 808, 93 S. E. 950.

Termini Must Be Fixed.—In ordering the laying out of a cartway, it is the duty of the court, in its judgment, to fix both the termini of such way. Burden v. Harman, 52 N. C. 354.

Omission of Justices' Names from Record.—Where the record of an order made in a County Court for laying out a cartway recited—"seven justice being present,"—without giving their names it was held that such record was fatally defective, and the order void. Link v. Brooks, 61 N. C. 499.

When Appeal May Be Taken.—The action of township supervisors in ordering the establishment of a cartway is such a final determination of the matter as will support an appeal to the Board of Commissioners, and thence through the superior to the Supreme Court, although the order may not have been executed. Warlick v. Lowman, 101 N. C. 548, 8 S. E. 120.

How Appeal Heard.—Upon such appeal to the Board of Commissioners, they should have considered the whole matter de novo upon the merits, and so likewise the Superior Court, upon appeal to it. Warlick v. Lowman, 101 N. C. 548, 8 S. E. 120.

Cited in Pool v. Trexler, 76 N. C. 297.

§ 3837. Alteration or abandonment of cartways, etc., in same manner.—Cartways or other ways established under this article or heretofore established, may be altered, changed, or abandoned in like manner as herein provided for their establishment upon petition instituted by any interested party: Provided, that all cartways, tramways, or railways established for the removal of timber shall automatically terminate at the end of a period of five years, unless a greater time is set forth in the petition and the judgment establishing the same. (Rev., s. 2694; Code, s. 2057; 1887, c. 46, s. 2; R. C., c. 101, s. 38; 1798, c. 508, ss. 1, 2, 3; 1834, c. 16, s. 1; 1887, c. 266; 1931, c. 448.)

Editor's Note.—The Act of 1931 inserted this section in place of the former one. See note to § 3835.

When Petitioner Acquires Servient Tract.—A petitioner who has acquired a right, by order of the court, to have a cart-way over the land of another, and who has afterwards obtained title to the servient tenement, has a right to obstruct and discontinue such cart-way. Jacocks v. Newby, 49 N. C. 266.

§ 3838. Church roads laid out on petition; procedure.—Necessary roads leading to any church or other place of public worship may be established in the same manner as set forth in the preceding sections of this article upon petition of the duly constituted officials of such church. (Rev., ss. 2687, 2689; Code, ss. 2062, 2064; 1872-3, c. 189, ss. 1-3, 5; 1931, c. 448.)

Editor's Note.—The Act of 1931 made material changes in this section. Formerly the proceedings were before the board of supervisors.

§ 3838 (a). Proceeding for obtaining cartway over railroad.—Wherever any railroad line track and right of way shall lie between any body of merchantable timber or quarry or other kind or class of heavy property requiring machinery for transportation and any body of navigable water over which such property could be floated or shipped, and the owner of such timber or property shall desire to transport such property to water for purpose of floating or shipping, such property owner shall have the right to file petition before the Corporation Commission for a right to cross such railroad with any other railroad track or tramway. The procedure for the hearing of the petition shall be same as other proceedings of the Commission. The Commission shall hear the facts and if it be found reasonably necessary that the railroad track and right of way shall be crossed by a temporary railroad track the Commission shall so order and prescribe the payment of the expense and the cost. (1931, c. 448.)

§ 3838(b). Neighborhood public roads.—All those portions of the public road system of the state which have not been taken over and placed under maintenance or which have been abandoned by the state highway commission, but which remain open and in general used by the public, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the department of public welfare, are hereby declared to be neighborhood public roads, and they shall be subject to all of the provisions of this section with respect to the alteration, extension, or discontinuance thereof, and any interested citizen is authorized to institute such proceeding, and in lieu of personal service with respect to this class of roads, notice by publication once a week in any newspaper published in said county, or in the event there is no such newspaper, by posting at the courthouse door and three other public places, shall be deemed sufficient. Upon request of the board of county commissioners of any county, the state highway commission is permitted, but is not required, to lend assistance to the local authorities in placing such roads in a passable condition without incorporating the same into the state or county systems, and without becoming obligated in any manner for the permanent maintenance thereof. (1933, c. 302.)

The question of the discontinuance of a road which is a neighborhood public road within the meaning of this section, must be determined by a special proceeding instituted before the clerk, and where the question has been presented by petition to the board of county commissioners the judgment of the Superior Court on appeal dismissing the petition is correct, but that part of the judgment providing that the road shall remain open is erroneous and will be stricken out on further appeal to the Supreme Court. In re Edwards, 206 N. C. 549, 174 S. E. 505.

Art. 14. Central Highway

§ 3839. Central highway established; termini and route.—There shall be established in the manner hereinafter provided a public central highway, extending from such point on Beaufort harbor, in the county of Carteret, through the counties of Carteret, Craven, Jones, Lenoir, Wayne, Johnson, Wake, Durham, Orange, Alamance, Guilford, Forsyth, Davie, Davidson, Rowan, Iredell, Catawba, Burke, McDowell, Buncombe, and Madison, or Haywood, Jackson and Macon, to some point on the Tennessee state line. The said central highway shall be composed as nearly as practicable of roads already existing; and the highway division of the North Carolina geological and economic survey is hereby charged with the duty of selecting and designating the route of the said highway and to report the route so selected and the roads so designated to the board of trustees hereinafter provided for; and shall also report to the boards

of commissioners of each county through which the said highway shall pass the route or line of road designated through such county. The duties imposed by this article upon the highway division of the North Carolina geological and economic survey shall be considered as a part of its official duties, without additional compensation. (1911, c. 58, s. 1; 1913, c. 37; 1915, c. 132; 1919, c. 67.)

§ 3840. Appropriations by counties and cities.—For the purpose of putting said central highway in order the boards of county commissioners of each county through which the said highway shall pass are hereby authorized and empowered to appropriate out of the general county funds a sum not exceeding fifty dollars for each mile of said highway in such county, and each city or town through which said highway may pass is likewise empowered to appropriate out of its general funds a sum not exceeding one hundred dollars; but if such town shall have a population in excess of one thousand persons, as ascertained by the United States census of one thousand nine hundred and ten, such town may, for such additional one thousand inhabitants as shown by said census, appropriate an additional sum of twenty-five dollars for each thousand of population in excess of one thousand. All funds appropriated by any county shall be spent within said county and under the authority of the board of commissioners of said county; and any funds appropriated by any city or town shall be expended within the county in which said city or town shall be located, and under the authority of the board of aldermen or other governing body of such city or town. (1911, c. 58, s. 2.)

§ 3841. Use of county road forces.—In addition to the appropriations hereinbefore authorized the boards of commissioners of the counties through which the said central highway shall pass are hereby authorized and empowered to use the road force of such county, whether it be hired or convict, upon the said highway to such an extent as, in the opinion of the board, may be practicable. And where there be no road force in a county the supervisor of roads shall, as far as possible, use the means available in constructing and maintaining this said central highway, coöperating as far as practicable with the board of trustees hereinafter provided for. (1911, c. 58, s. 3.)

§ 3842. Board of trustees; executive committee; local committees.—There is hereby created a board of trustees of the central highway, to be composed of one member from each county through which the said highway shall pass, who shall serve for a term of four years from and after the first Monday in April, one thousand nine hundred and eleven, and until their successors have been appointed and have qualified. The following named persons are hereby appointed members of the board of trustees of the central highway for a period of four years from and after the first Monday in April, one thousand nine hundred and eleven, and until their successors shall have been appointed and have qualified, to wit: G. D. Canfield, of Carteret; William Dunn, of Craven; J. H. Bell, of Jones; J. F. Hooker, of Lenoir; G. C. Royall, of Wayne; James A. Wellons, of Johnston; Dr. J. M. Templeton, of Wake; Dr. A. Cheatham, of Durham; H. M. McIver, of Orange; Capt. S. H. Webb, of Alamance; Clem G. Wright, of Guilford; A. T. Grant, Jr., of Davie; P. H. Haynes, of Forsyth; H. B. Varner, of Davidson; P. B. Beard, of Rowan; R. R. Clark, of Iredell; R. L. Shuford, of Catawba; W. E. Walton, of Burke; W. T. Morgan, of McDowell; E. C. Chambers, of Buncombe; Thomas J. Murray of Madison; Hugh A. Love, of Haywood; Walter E. Moore, of Jackson, and James A. Porter, of Macon. The said trustees of the central highway shall be notified of their appointment and shall meet in the city of Raleigh, in the rooms of the department of agriculture, on the twentieth day of April, one thousand nine hundred and eleven, for the purpose of organization; and the commissioner of agriculture shall notify each member of the said board of trustees of the time and place of said meeting, and shall himself act as temporary chairman in calling together the board of trustees, and shall serve as such until a permanent chairman shall have been elected. And the said board of trustees at this meeting, or at any subsequent meeting, may appoint such local committees or boards of directors for all or any of said counties as it may think proper, and impose upon such local committees or directorates the duty of conferring with the boards of county commissioners and other road authorities in constructing and maintaining said highway in their respective counties. Said board of trustees is hereby authorized to appoint an executive committee of not less than three members; and this executive committee shall have all such powers as the said board of trustees may confer upon it; and the board of trustees is authorized to repose in said executive committee all or any part of the powers vested in said board of trustees by this article. The boards of commissioners of each of the counties through which the said highway shall pass is authorized and empowered to elect a successor to the member of the board of trustees from such county in case a vacancy shall occur; and in case a vacancy shall occur before the expiration of the term of office of the member from such county, the board of commissioners shall elect a successor, who shall hold office for the unexpired term of such retiring member. On the first Monday in March, one thousand nine hundred and fifteen, and quadrennially thereafter, the board of commissioners of each county through which said central highway shall pass shall elect its member of the board of trustees of the central highway. (1911, c. 58, s. 4; 1913, c. 37; 1915, c. 132; 1919, c. 67.)

§ 3843. Board a body corporate; donations and gifts; stimulus of public interest; road day.—The board of trustees of the central highway and their successors in office shall constitute a body corporate and shall have power to solicit and accept gifts of money, machinery, road materials, labor, or other things of value to be used and expended by the said board of trustees, under the direction of the proper road authorities of the counties or townships, in establishing, maintaining and improving said central highway as a public thoroughfare for the free and perpetual use of

the public; and it shall have power to use all gifts and donations in improving the said central highway without regard to the county or locality. It shall also encourage and stimulate public interest in the maintenance of said highway and send representatives before any board of commissioners or other governing body of any county, city, or town to ask for appropriations of money to be used in each county, and also to advise and recommend the holding of elections to vote special taxes to be used in the construction and maintenance of said central highway. It shall also have power to arrange with and authorize the donation and testing upon the said highway of any improved systems of road building or dressing. It shall also have power to designate one day in each year to be known as "Road Day," on which day voluntary contributions in labor or other things of value shall be accepted to the end that the funds regularly appropriated may be supplemented by the volunteer offerings of the people and by the volunteer work of those who prefer to contribute labor rather than money. The said "Road Day" need not be uniform throughout the state, but shall be uniform throughout each county. (1911, c. 58, s. 5.)

§ 3844. Appropriations made annually.—The counties and municipalities authorized to appropriate funds for the construction and maintenance of said central highway under this article are hereby authorized to make appropriations not exceeding the sums prescribed in this article each year hereafter, which sums shall be used in the improvements and maintenance of said central highway. (1911, c. 58, s. 6.)

§ 3845. Status of trustees; allowance for expenses by counties.—The members of the board of trustees shall not be considered to be public officers, and shall not be required to take an oath of office, and shall receive no compensation for their services out of any funds arising under this article; but any county, city, or town may provide for the payment of the necessary expenses of its own members of said board of trustees. (1911, c. 58, s. 8.)

§ 3846. Secretary and treasurer; reports to governor.—The said board of trustees shall elect a secretary and a treasurer, or it may combine those duties and impose them on one person. Accurate accounts of all proceedings and of all receipts and expenditures shall be kept, and a report made to the governor at the end of each calendar year. (1911, c. 58, s. 9.)

Art. 15. State Highway System (1921)

Part 1. In General

§ 3846(a). General purpose of law; control, repair and maintenance of highways.—The general purposes of this article are for the state to lay out, take over, establish and construct, and assume control of approximately 5,500 miles of hard-surfaced and other dependable highways running to all county-seats, and to all principal towns, state parks, and principle state institutions, and linking up with state highways of adjoining states and with national highways into national forest reserves by the most practicable routes, with special view of development of agriculture, commercial and natural resources of the state, and for the further purpose of permitting the state to assume control of the state highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire state, and to relieve the counties and cities and towns of the state of his burden. (1921, c. 2, s. 2.)

Editor's Note.—Public Laws of 1921 made radical changes in the control etc., of state highways. Prior to that time the primary control was in the counties and political subdivisions and the state commission served in an advisory capacity, but by that act it has been changed so that the state highway commission has primary control. The act also provided for a comprehensive means of financing the immediate construction and maintenance of improved, hard surface highways. This was a virtual revision of the prior law which was inadequate for facilitating improvement upon such an enormous scale. Although the act expressly repealed only the conflicting provisions of the old law, it is apparent that a considerable portion of it is superseded by provisions which cover the subject-matter of the old, substituting different regulations. As a general rule no attempt has been made to point out conflicts or express opinions upon the effect of the new law upon specific provisions of the old. And this rule has been followed with respect to the Act of 1931, §§ 3846(1) et seq., under which the State Highway Commission took over county roads.

As to the general policy of the state as to highway, see Young v. Board, 190 N. C. 52, 128 S. E. 401.

Laws Repealed.—Sections 3580-3593, are repealed by this article in so far as the former conflict with the latter and under the latter power is conferred on the State Highway Commission to take over county highways as a part of the national highway system of roads upon such terms and agreements with the county commissioners as may be made by them as authorized by the article. Lassiter v. Board, 188 N. C. 379, 124 S. E. 738.

The purpose of the act of 1921 is to encourage co-operation between the highway commission and the county authorities. Young v. Board, 190 N. C. 52, 128 S. E. 401.

Statutes Construed in Pari Materia.—The statute relating to the creation, maintenance, etc., of a State-wide system of public roads, and the amendatory act providing for the taking over of county highways for state maintenance are to be construed together in pari materia. Board of Com'rs v. State Highway Comm., 195 N. C. 26, 141 S. E. 539.

The Highway Commission Is an Administrative Body.—Cameron v. State Highway Comm., 188 N. C. 84, 88, 123 S. E. 465.

Broad Discretion Given.—See note under § 3846(c). The statute, section 3846(j), subsec. (b), and section 3846(a), give broad discretionary powers to the State Highway Commission in establishing, altering and changing the route of county roads that are or are proposed to be absorbed in the State highway system of public roads. Road Comm. v. State Highway Comm., 185 N. C. 56, 115 S. E. 886.

Control of Discretion as to Change of Highway.—The State Highway Commission, neither by contract nor otherwise, can be controlled beforehand in the exercise of its discretion, conferred on it by statute, as to the change of location of a public highway. Johnson v. Board, 192 N. C. 561, 135 S. E. 618.

Change of Route as Violating Rights of Owners.—Those who have acquired property along the "proposed" route, as shown in connection with the consideration by the Legislature of the bill which became enacted into what is now this article, acted with implied notice of the powers conferred upon the commission in changing the route, and cannot maintain the position that they have been deprived of the due-process-of-law provision in the Constitution, whether of a vested right or otherwise. Cameron v. State Highway Comm., 188 N. C. 84, 123 S. E. 465.

Liability of Commission for Torts, etc.—The State Highway Commission is an unincorporated agency of the State to perform specific duties in relation to the highways of the State, and is not liable in damages for the torts of its subagencies and an action may not be maintained against it or a county acting thereunder in trespassing upon the lands of a private owner, or for the faulty construction of its drains, or the taking of a part of the lands of such owner for the use of the highway, the remedy prescribed by the statute being exclusive. Latham v. State Highway Comm., 191 N. C. 141, 131 S. E. 385.

Liability for Defects in Highway.—Counties in North Carolina are not liable for damage resulting from defective condition of their highways, being political agencies of the

state; nor are county commissioners individually liable, unless they acted corruptly or of malice. Thompson Caldwell Const. Co. v. Young, 294 Fed. 145.

Power of County and State Commissioners to Contract. — The boards of county commissioners and the state highway commission are vested with powers to enter into contracts and agreements for the construction of roads forming a part of the state highway system. Young v. Board, 190 N. C. 52, 128 S. E. 401.

Injunction.—The action of the State Highway Commission in building the highways and bridges of the State is of public interest and equity will not enjoin them in this work when injury by flooding lands may probably result in the future, there being an adequate remedy at law. Greenville v. State Highway Commission, 196 N. C. 226, 145 S. E. 31.

Cited in Parker v. State Highway Com., 195 N. C. 783, 143 S. E. 871.

§ 3846(b). Establishment of system of state highways; work leading to hard-surfaced construction.—The purpose and intent of this article is to establish a system of state highways for the state, hard-surfacing said highways as rapidly as possible, and maintaining the entire system of said highways in the most approved manner as outlined in this article. Work on the various links in the state highway system shall be of such a character as will lead to ultimate hard-surfaced construction as rapidly as money, labor, and materials will permit, and to a state system of durable hard-surfaced, all-weather roads, connecting the various county-seats, principal towns, and cities. (1921, c. 2, s. 3.)

§ 3846(c). Maximum mileage; routes and maps; objections; changes. — Fifty-five hundred (5500) miles shall be the approximate maximum limit of mileage of the state highway system. The designation of all roads comprising the state highway system as proposed by the state highway commission shall be mapped, and there shall be publicly posted at the courthouse door in every county in the state a map of all the roads in such county in the state system, and the board of county commissioners or county road-governing body of each county, or street governing body of any city or town in the state within sixty days after the notification before mentioned, then and in that case the said roads or streets, to which no objections are made, shall be and constitute links or part of the state highway system. If any objections are made by the board of county commissioners or county road-governing body of any county or street-governing body of the city or town, the whole matter shall be heard and determined by the state highway commission in session, under such rules and regulations as may be laid down by the state highway commission, notice of the time and place of hearing to be given by the state highway commission at the courthouse door in the county, and in some newspaper published in the county, at least ten days prior to the hearing, and the decision of the state highway commission shall be final. A map showing the proposed roads to constitute the state highway system is hereto attached to this article and made a part hereof. The roads so shown can be changed, altered, added to or discontinued by the state highway commission: Provided, no roads shall be changed, altered or discontinued so as to disconnect county-seats, principal towns, state or national parks or forest reserves, principal state institutions, and highway systems of other states. The rights of way to all roads taken over under this article shall be not less than thirty (30) feet: Provided, that no toll road shall be taken over under this section unless by agreement or condemnation as herein provided. (1921, c. 2, s. 7.)

See note under section 3846(f).

Section Construed with § 3846(j).—Section 3846(j) giving the commission broad and comprehensive discretionary powers in the adoption of routes, should be construed in pari materia with this section thereof, the latter limiting the discretion conferred in the former, among other things, in respect to routes between county-seats, "principal towns," according to a map referred to and attached to the act; and as to those matters particularly mentioned in this section the discretion was taken away from the commission by express statutory provision. Cameron v. State Highway Comm., 188 N. C. 84, 123 S. E. 465.

Power to Change Route.—See note under section 3846(a). Where the commission, in pursuance of section 3846(c) have, as required, posted at the courthouse door of a county a map showing the proposed route, and the county roads to be taken, the limitation of sixty days expressed in the statute is upon the time allowed the county to object; and a subsequent change made by the State Highway Commission in the proposed route prior to the time of building the highway is not reviewable by the court in the absence of an abuse by the commission of the discretionary power conferred on it by the statute. Road Comm. v. State Highway Comm., 185 N. C. 56, 115 S. E. 886.

The map referred to in this section as a "proposed" route of the State Highway system, by placing certain towns along its proposed route, does not affect the discretionary authority of the Highway Commission in locating the highway between county-seats, or prevent the commission from changing the route from them, but its determination is reviewable by the courts as a mixed question of law and fact, whether the change decided upon goes by the principal towns as required by the statute. Cameron v. State Highway Comm., 188 N. C. 84, 123 S. E. 465.

Same—After Vote Taken by County.—Where the State Highway Commission has taken over a certain public road within a county, as a link in the State system of public highways, and the county in which it is situate has contracted to loan the State Commission a certain amount of money to be expended on its improvement, subject to approval of the voters in issuing bonds for the purpose, and there is nothing in the contract that would require the route of the existing road to continue as it then was laid out, the discretionary power vested in the State Highway Commission as to changing the route, vesting in them by statute, will not be interferred with by the courts, at the suit of the taxpayers residing in a corporated or unincorporated town, contending that they would not have voted for the bond issue except upon representation made to them that the then existing route would not be changed. Johnson v. Board, 192 N. C. 561, 135 S. E. 618.

Presumption as to Posting of Map.—It is presumed on appeal, when the record is silent in relation thereto, that the Commission made publication of the proposed adoption of a link in the State Highway System, by posting the map thereof at the county-seat, etc., as the law requires. Newton v. State Highway Comm., 194 N. C. 159, 138 S. E. 601.

Change from Route Finally Adopted.—The Commission is not authorized by statute to make an entire change of route in its system of State Highway between county-seats from one that it has finally adopted. Newton v. State Highway Comm., 194 N. C. 159, 138 S. E. 601, citing Carlyle v. Highway Commission, 193 N. C. 36, 49, 136 S. E. 612.

But the power of the commission to slightly or immaterially vary the location of the highway in question is not at an end until its final acceptance thereof. Smith v. State Highway Commission, 194 N. C. 333, 139 S. E. 606, approving Newton v. Highway Com., 194 N. C. 159, 138 S. E. 601.

Enjoining Unauthorized Change. — An injunction will lie against the State Highway Commission from proceedings to make a change in a link of the State System of public highway unauthorized by the statute. Newton v. State Highway Comm., 194 N. C. 159, 138 S. E. 601.

Effect of Finding of Trial Court on Appeal.—A finding by the trial judge that an entire change of route in a link of highways connecting two county-seats was only temporary, is not binding upon the Supreme Court on appeal when as a matter of law, upon the evidence, it is con-

clusively made otherwise to appear. Newton v. State Highway Comm., 194 N. C. 159, 138 S. E. 601.

Failure to Protest Location.—Upon the failure of any principal town along the proposed route to object thereto, it is not a proper or necessary party to the proceedings, and the trial court may refuse its motion to be made a party. Newton v. State Highway Comm., 194 N. C. 159, 138 S. E. 601.

§ 3846(c1). Additional roads for state maintenance.—That the State Highway Commission is authorized and empowered, and it shall be their duty to take over for State maintenance, additional roads heretofore maintained by the several counties, amount of additional roads so taken over for State maintenance shall not exceed twenty per cent of the present mileage as is now designated and maintained as State Highways. (1927, c. 200, s. 2.)

See note under section 3846(f).

§ 3846(c2). Laying out and designation of roads discretional.—The laying out, and designation of new roads placed on the State Highway System as State maintained road, shall be left entirely in the discretion of the said Highway Commission in the respective districts, dividing the mileage of new roads taken on in counties which have heretofore not received as much State Highway mileage as to make said county or counties share equally as nearly as practicable with other counties of the State, or in the discretion of the State Highway Commission in said District to place said additional roads on State maintenance that will best serve that section of the State. (1927, c. 200, s. 2.)

See note under section 3846(f).

§ 3846(c3). Coöperation with county road authorities.—The State Highway Commission shall work in coöperation with the road governing body of the counties in their respective and several districts in the laying out of these roads. always looking after the interest of both county and State in so doing. (1927, c. 200, s. 3.)

See note under section 3846(f).

This section does not impair the large discretionary powers of the Commission, and when it has so cooperated, its selection of a different route than the one fixed upon by the county authorities, cannot be disturbed by the courts. Board of Com'rs v. State Highway Comm., 195 N. C. 26, 141 S. E. 539.

§ 3846(c4). Construction of certain road authorized. — The State Highway Commission is authorized and empowered to construct a suitable road leading from the nearest available public highway to a point near the summit of the said Rendezvous Mountain State Park: Provided, that the funds used for the construction of said road be charged to funds allocated to Wilkes County: Provided, however, that the said Highway Commission shall not be required to pay anything for rights of way in locating and constructing said road. (1927, c. 194, s. 1.)

See note under section 3846(f).

§ 3846(d). Publication of law. — The state highway commission, as soon as practicable after March 3, 1921, shall have carefully complied the road laws of this state relating to the state highway system, and shall have published not exceeding 10,000 copies of said compilation to be distributed by said commission, the cost thereof to be paid out of the state highway fund. (1921, c. 2, s. 47.)

See note under section 3846(f).

§ 3846(e). Effect of partial invalidity of law.— If any provision of this article shall be declared by the courts unconstitutional, such declaration shall not affect the validity of any of the remaining provisions of this article. (1921, c. 2, s. 51.)

Part 1A. A Change of Systems

§ 3846(e1). Power to make changes.—Subject to the provisions of sections 3846(e3) and 3846(e4) the State Highway Commission shall be authorized, when in its judgment the public good requires it, to change, alter, add to, or abandon and substitute new sections for, any portion of the State highway system, as now or hereafter, taken over, maintained and established: Provided, no road shall be changed, altered, or abandoned so as to disconnect county seats and principal towns. (1927, c. 46, s. 1.)

See note under section 3846(f).

Editor's Note.—The preamble to the act from which this section was taken reads, "Whereas, the system of highways, by act of the General Assembly, is peculiarly a State system as distinct from county roads; and,

"Whereas, it is the established policy of North Carolina that State highways shall be constructed and maintained by funds derived from sources other than ad valorem taxes; and,

"Whereas, certain counties, in order to hasten the construction of State highways within said counties, have heretofore made cash donations in part payment of the construction of State highways within said counties; and,

"Whereas, certain other counties have made loans to the State Highway Commission under form of contract by which such loans are to be repaid out of future allocations of State highway construction funds: Now, therefore," and then followed the section.

Validity of Statute.—Chapter 46 of Public Laws 1927, and all its provisions are valid. Parker v. State Highway Commission, 195 N. C. 783, 787, 143 S. E. 871.

§ 3846(e2). Notice to local road authorities.— Before any road, which is being maintained by the State Highway Commission as a part of the State Highway System, can be changed, altered, or abandoned, the chairman or his duly authorized agent shall notify the road governing authorities of the county or counties in which said change, alteration, or abandonment, is proposed, of the extent, nature and character of the proposed change, alteration or abandonment, and a map showing the old location and the new proposed location shall be posted at the courthouse door. If within thirty days after the giving of such notice and the posting of such map the road governing body of such county or the street governing body of any county seat or principal town immediately effected thereby, shall protest the proposed change, alteration or abandonment by filing a written notice of such protest with the State Highway Conmmission at Raleigh; the State Highway Commission shall thereupon designate three members, of the State Highway Commission, one of whom may be the chairman, to hear such protest. The place, which shall be within the county, and the time of such hearings shall be fixed by the chairman and notice given to the protesting parties. Such hearings shall be held publicly and all persons desiring to be heard shall be heard. At the close of such hearing the committee shall publicly state their decision. The protesting parties may appeal from such decision

to the whole Highway Commission and such appeal shall be heard at a regular or duly called meeting for this purpose in the city of Raleigh and notice given to the appellants. The decision of the whole commission shall be determined by roll call vote duly recorded upon the minutes of the commission.

Any county seat or principal town shall be deemed "immediately effected" if the proposed change or alteration shall enter or leave said town by streets other than those used for such purposes prior to the proposed change. (1927, c. 46, s. 2; 1931, c. 145.)

See note under section 3846(f).

Editor's Note.—The Act of 1931 added the words "as a part of the State Highway System" in lines three and four of this section. It struck out the words "commissioner of the district in which said road is located" formerly appearing in the same sentence and inserted in lieu thereof "chairman or his duly authorized agent." It also struck out the words "the others to be from districts other than that from which the protest is filed," formerly appearing before the phrase "to hear such protest" at the end of the second sentence.

Consent of Unimportant Town.—Where, in the exercise of its discretion, the Commission has made a slight change of an existing route, the consent of an unimportant town is unnecessary. Yadkin College v. State Highway Comm., 194 N. C. 180, 138 S. E. 717.

§ 3846(e3). Number of highways entering town not reduced without consent.—The number of State highways entering the corporate limits of a county seat, principal town, or town in which is located any of the principal State institutions, now served by the State Highway system, shall not be reduced without the consent of the street governing body of said town. (1927, c. 46, s. 3.)

The town of Yadkin College with a population of approximately 100 people and no substantial industries is not a principal town as contemplated in this section. Yadkins College v. State Highway Comm., 194 N. C. 180, 183, 138 S. E. 717.

§ 3846(e4). Consent of local road authorities.—No portion of the State Highway system which has heretofore, or which shall hereafter be located and constructed in accordance with plans and specifications prepared by and on file with the State Highway Commission, shall be changed or abandoned without the consent of the road governing body of the county in which said road is situated. (1927, c. 46, s. 4.)

See note under section 3846(f).

§ 3846(e5). Abandoned sections of State system incorporated with local systems.—Whenever the State Highway Commission shall have abandoned, or shall hereafter abandon, any section of the State Highway system heretofore maintained by it, the county road governing body in which said abandoned road, or portion thereof, is situate may then incorporate into the county highway system such abandoned road or portion thereof, whenever in its judgment the public good requires such reincorporation; after the abandonment of such road or portion thereof the State Highway Commission shall be relieved of all responsibility and liability with respect thereto: Provided, that this section shall not authorize the county road governing authorities to reopen any railroad grade crossing that has been closed by order of the State Highway Commission in connection with the building of an overhead bridge or underpass to take the place of such grade crossing. (1927, c. 46, s. 5; 1929, c. 257, s. 1.)

See note under section 3846(f).

Editor's Note.—The Act of 1929 added the proviso to this section and expressly provided that it should not affect pending litigation.

§ 3846(e6). Confirmation.—All changes in, alterations of, and/or abandonments of any portion of the State Highway system heretofore made by the State Highway Commission which are not now the subject of litigation, are hereby ratified approved and confirmed and the newly-established routes are hereby made a part of the State Highway system as fully and to the same extent as if they had appeared upon the map and surveys made and posted by the State Highway Commission as in the preceding part of this article were required, and no action shall hereafter be maintained in any court of this State against the State Highway Commission on account of such change, alteration and/or abandonment. (1927, c. 46, s. 6.)

See note under section 3846(f).

§ 3846(e7). No court action but by local road authorities.—No action shall be maintained in any of the courts of this State against the State Highway Commission to determine the location of any State highways or portion thereof, by any person, corporation, or municipal corporation, other than the road governing body of the county in which said road is situated, or the county seat or principal town effected, as in this act defined, by any change, alteration or abandonment. (1927, c. 46, s. 7.)

See note under section 3846(f).

See note under § 3846(e1).

Discretion Not Reviewable.—It is within the discretion of the road-governing body of a county to object or not, to the partial change in a road by the Commission and their action is not subject to review in the courts. And mandamus will not lie to control such discretion. Parker v. State Highway Commission, 195 N. C. 783, 143 S. E. 871.

Decision of Commission Final.—The decision of the state highway commission upon appeal by the board of commission from an adverse decision is final and conclusive. Parker v. State Highway Commission, 195 N. C. 783, 143 S. E. 871.

§ 3846(e8). Apportionment of road funds. — Nothing contained in this part shall be construed to change the method of apportionment of road funds as now provided in section 3846(hh). (1927, c. 46, s. 8.)

§ 3846(e9). Pending litigation and judgments rendered not interfered with.—This part of this article shall not affect pending litigation or judgments heretofore rendered in causes by courts of competent jurisdiction. (1927, c. 46, s. 9.)

Editor's Note.—Public Laws of 1935, chapter 140, directs that this section shall be stricken out but adds that the act shall apply only to Robeson county.

Part 2. State Highway Commission

§ 3846(f): Repealed by Public Laws 1933, c. 172, s. 15.

Editor's Note.—In lieu of the old State Highway Commission of nine district commissioners and a chairman, the Act of 1931 sets up a new commission which succeeds to all the powers of the old commission. See 9 N. C. Law Rev., 374.

Public Laws 1933, c. 172, §§ 2, 17, codified as sections 7748(b) and 7748(m), created the state highway and public works commission and conferred upon it all the pow-

ers and duties formerly exercised by the state highway commission.

For act creating special highway commission to determine amount of reimbursement to counties, see Public Laws 1935, chapter 206.

§ 3846(f1). Limit of compensation paid by commission.—It shall be unlawful for the state highway commission to pay or authorize the payment of an annual salary or compensation to any employee of that department in excess of the sum of six thousand dollars ($6,000.00). (1929, c. 182, s. 1; 1933, c. 172, s. 16.)

See note under section 3846(f).

Editor's Note.—Public Laws of 1933, c. 172, reduced the maximum salary from $10,000 to $6,000.

§ 3846(g). State highway engineer and other employees. — The said commission, at its first meeting or as soon thereafter as practicable, shall employ a state highway engineer, who shall be a competent civil engineer, qualified by technical training as well as practical construction experience in highway work. The engineer shall hold office during the pleasure of the commission, but not to exceed a period of four years without reappointment. He shall receive an annual salary to be fixed by the state highway commission, approved by the governor, payable in monthly installments together with such actual and other necessary expenses as may be incurred in the official discharge of his duties. Said commission shall prescribe and fix the duties of the engineer, and shall provide the engineer with official and sufficient equipment to discharge his duties as prescribed by the state highway commission and this article. The commission shall employ such other engineers, clerks, and assistants as may be needed, and at such salaries and for such terms as appear necessary, and prescribe and fix their duties. In the discretion of the commission, such offices may be established in construction districts as may be necessary to carry out the provisions of this article. (1921, c. 2, s. 5.)

See note under section 3846(f).

§ 3846(h). Oath and bonds of commissioners and engineers.—The members of the state highway commission and state highway engineer shall each, before entering upon the discharge of his duties, take an oath that he will faithfully and honestly execute the duties of the office during his continuance in office, and each give a bond, to be fixed and approved by the governor, conditioned upon the faithful discharge of the duties of his office and the full and proper accounting for all public funds and property coming into his possession or under his control. The premium on said bond or bonds shall be paid out of the state highway fund. (1921, c. 2, s. 6.)

See note under section 3846(f).

§ 3846(i). Assumption of control by commission.—Within sixty days after March 3, 1921, the state highway commission shall commence to assume control of the various links of road constituting the state highway system, and shall complete the assumption of control of all roads which constitute the state highway system as rapidly as practicable. (1921, c. 2, s. 8.)

See note under section 3846(f).

§ 3846(j). Powers of commission.—The said state highway commission shall be vested with the following powers:

(a) The general supervision over all matters relating to the construction of the state highways, letting of contracts therefor, and the selection of materials to be used in the construction of state highways under the authority of this article.

(b) To take over and assume exclusive control for the benefit of the state of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a state highway system, with full power to widen, relocate, change or alter the grade or location thereof: to change or relocate any existing roads that the state highway commission may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a state highway system: Provided, that nothing in this article shall be construed to authorize or permit the highway commission to allow or pay anything to any county, township, city or town, or to any board of commissioners or governing body thereof, for any existing road or part of any road heretofore contructed by any such county, township, city or town, unless contract has already been entered into with the state highway commission.

(c) To provide for such road materials as may be necessary to carry on the work of the state highway commission, either by gift, purchase, or condemnation: Provided, that when any person, firm or corporation owning a deposit of sand, gravel or other material, necessary for the construction of the system of state highways provided herein, upon first entering into a contract to furnish the state highway commission any of such material, at a price to be fixed by said highway commission, the state highway commission shall have the right to condemn the necessary right of way under the provisions of chapter thirty-three, consolidated statutes, to connect said deposit with any part of the system of state highways or public carrier.

(d) To enforce by mandamus or other proper legal remedies all legal rights or causes of action of the state highway commission with other public bodies, corporations, or persons.

(e) To make rules, regulations and ordinances for the use of, and the police traffic on, the state highways, and to prevent their abuse by individuals, corporations and public corporations, by trucks, tractors, trailers or other heavy or destructive vehicles or machinery, or by any other means whatsoever, and to provide ample means for the enforcement of same; and the violation of any of the rules, regulations or ordinances so prescribed by the state highway commission shall constitute a misdemeanor: Provided, no rules, regulations or ordinances shall be made that will conflict with any statute now in force or any ordinance of incorporated cities or towns.

(f) To establish a traffic census to secure information about the relative use, cost, value, importance, and necessity of roads forming a part of the state highway system, which information shall be a part of the public records of the state, and upon which information the state highway

commission shall, after due deliberation and in accordance with these established facts, proceed to order the construction of the particular highway or highways.

(g) To assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the state highway system from date of acquiring said roads: Provided, the commission may enter into contracts with counties as to the maintenance of highways which shall form a part of the state highway system. The state highway commission shall have authority to maintain all streets constructed by the state highway commission in towns of less than three thousand population by the last census, and such other streets as may be constructed in towns and cities at the expense of the state highway commission, whenever in the opinion of the state highway commission it is necessary and proper so to do; Provided, further, such funds as may be appropriated from time to time for the repair and improvement of highways and streets in cities and towns shall be used by the state highway and public works commission, first, for the maintenance and improvement of streets in cities and towns which form a part of the state highway system, and second, for the maintenance and improvement of such other streets, which are now used, designated and marked or may hereafter be used, designated and marked as a part of the state highway system. The work of maintaining and improving streets which form a part of the state highway system shall be performed by the commission with its highway maintenance forces, except that in the discretion of the commission it may, on such terms as it may deem proper, contract with any city or town having adequate facilities that the city or town shall do the work of maintaining and improving such streets as the highway and public works commission may designate.

The work of repairing and improving streets shall be apportioned or allocated as between the several cities and towns by the state highway and public works commission in such manner as the commission may deem shall best serve the highway system of the State as a whole, taking into consideration the number of miles of state highways and other improved streets, the population, and the motor vehicle registration in the respective cities and towns, and such other factors as may affect an equitable distribution.

Neither the undertaking nor doing of the work of maintenance and improvement upon streets in cities and towns by the state highway and public works commission shall deprive the cities or towns of the right to construct streets or to improve or maintain them as they may deem necessary, in addition to the work done by the state highway and public works commission.

(h) To give suitable names to state highways and change the names of any highways that shall become a part of the state system of highways.

(i) To coöperate with municipal or county authorities, civic bodies and individuals in the proper selection, planting and protection of roadside trees, shrubs and vines for the beautification and protection of said highways.

(j) To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles, sign-boards, fences, gas, water, sewerage, oil, or other pipe lines, and other similar obstructions that may, in the opinion of said highway commission, contribute to the hazard upon any of the said highways or in anywise interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said highway commission shall require the removal of, or changes in, the location of telephone, telegraph, or other poles, sign-boards, fences, gas, water, sewerage, oil, or other pipe lines, or other similar obstructions, the owners thereof shall at their own expense move or change the same to conform to the order of the said highway commission. Any violation of such rules and regulations or non-compliance with such orders shall constitute a misdemeanor.

(k) To regulate, abandon and close to use, grade crossings on any road designated as part of the state highway system, and whenever a public highway has been designated as part of the state highway system and the state highway commission, in order to avoid a grade crossing or crossings with a railroad or railroads, continues or constructs the said road on one side of the railroad or railroads, the commission shall have power to abandon and close to use such grade crossings; and whenever an underpass or overhead bridge is substituted for a grade crossing, the commission shall have power to close to use and abandon such grade crossing and any other crossings adjacent thereto.

(l) The said state highway commission shall have such powers as are necessary to comply fully with the provisions of the present or future federal aid acts. The said commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction, improvement and maintenance of roads under the provisions of the present or future congressional enactments, to submit such scheme or program of construction or improvement and maintenance as may be required by the secretary of agriculture or otherwise provided by federal acts, and to do all other things necessary to carry out fully the coöperation contemplated and provided for by present or future acts of congress, for the construction or improvement and maintenance of rural post roads. The good faith and credit of the state are further hereby pledged to make available funds necessary to meet the requirements of the acts of congress, present or future, appropriating money to construct and improve rural post roads and apportioned to this state during each of the years for which federal funds are now or may hereafter be apportioned by the said act or acts, to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such construction and maintenance. The good faith and credit of the state are further pledged to maintain such roads now built with federal aid and hereafter to be built and to make adequate provisions for carrying out such maintenance. Upon request of the state highway commission and in order to enable it to meet the require-

ments of acts of congress with respect to federal aid funds apportioned to the state of North Carolina, the state treasurer be and he is hereby authorized, with the approval of the governor and council of state, to issue short term notes from time to time, and in anticipation of state highway revenue, and to be payable out of state highway revenue for such sums as may be necessary to enable the state highway commission to meet the requirements of said federal aid appropriations, but in no event shall the outstanding notes under the provisions of this section amount to more than two million dollars ($2,000,000.00).

(m) The state highway commission is authorized and empowered to construct and maintain all walkways and driveways within the Mansion Square in the city of Raleigh including the approaches connecting with the city streets, and any funds expended therefor shall be a charge against general maintenance.

(n) The state highway commission shall have authority to provide roads for the connection of air ports in the state with the public highway system, and to mark the highways and erect signals along the same for the guidance and protection of aircraft.

(o) The state highway commission shall have authority to provide facilities for the use of water-borne traffic by establishing connections between the highway system and the navigable waters of the state by means of connecting roads and piers.

(p) The state highway and public works commission shall have authority to designate any highways upon the state system as light traffic roads when, in the opinion of the commission, such roads are inadequate to carry and will be injuriously affected by the maximum legal loads; and all such roads so designated shall be conspicuously posted as light traffic roads and the maximum load authorized thereon shown on such signs. The operation of any vehicle whose gross load exceeds the maximum load shown on such signs over the roads thus posted shall constitute a misdemeanor; Provided, that no standard concrete highway or other highway built of material of equivalent durability shall be designated as a light traffic road; Provided, further, that the limitations placed on any road shall not be less than eighty per cent of the standard weight unless there shall be available an alternate improved route of not more than twenty per cent increase in the distance. (1921, c. 2, s. 10; 1923, c. 160, s. 1; 1923, c. 247; 1929, c. 138, s. 1; 1931, c. 145, ss. 21, 25; 1933, c. 517, s. 1; 1935, c. 213, s. 1, c. 301.)

See note under section 3846(f).

Editor's Note.—The Act of 1929 added subsection (m) to this section. The first 1931 amendment added subsections (n) and (o), and the other 1931 amendment added the last sentence of subsection (l).

Public Laws 1935, chapter 213, adding to this section all of subsection (g) from and after the last "provided" in the first paragraph, and making an appropriation for the purposes set out, provided that "It shall be the intent and purpose of this act that the funds set up herein for the maintenance and improvements of the streets within the cities and towns shall not be construed as affecting the present powers of the State Highway Commission as to constructing, maintaining and improving the streets of cities and towns having a population of less than three thousand people, according to United States Census of one thousand nine hundred and thirty, but shall be construed to be in addition thereto."

Chapter 301 of Public Laws of 1935 substituted the present subsection (p).

The state highway and public works commission and the chairman thereof now have all the powers and duties formerly conferred upon the state highway commission or its chairman. See secs. 7748(b), 7748(m).

Contract with County Commissioners.—In contemplation of the statute, the State Highway Commission is entrusted to construct and maintain a system of public highways and to contract in reference thereto, and a contract made between this board and the board of commissioners of a county wherein the latter is to advance certain moneys as a proportionate expense in the former's taking over and maintaining a particular highway to be repaid by the State Highway Commission from its funds is a valid and legal contract, supported by a sufficient consideration. Young v. Board, 190 N. C. 52, 128 S. E. 401.

Where the State Highway Commission has taken over the construction of a street and bridge within the incorporated limits of a town, the town is not thereby relieved of liability for an injury proximately caused by a dangerous condition of the street at the bridge when the town has had implied notice of such condition which had existed for several months, this section expressly excepting from its provisions streets in towns and cities. Pickett v. Carolina, etc., Ry., 200 N. C. 750, 158 S. E. 398.

Section Construed with Section 3846(c).—This section giving the commission broad and comprehensive discretionary powers in the adoption of routes, should be construed in pari materia with section 3846(c) thereof, the latter limiting the discretion conferred in the former, among other things, in respect to routes between county-seats, "principal towns," according to a map referred to and attached to the act; and as to those matters particularly mentioned in section 3846(c), the discretion was taken away from the commission by express statutory provision. Cameron v. State Highway Comm., 188 N. C. 84, 123 S. E. 465.

Broad Discretion in Changing Roads.—The statute, this section, subsec. (b), and section 3846(a), give broad discretionary powers to the State Highway Commission in establishing, altering, and changing the route of county roads that are or are proposed to be absorbed in the State highway system of public roads. Road Comm. v. State Highway Comm., 185 N. C. 56, 115 S. E. 886.

Right to Sue and Be Sued. — The statutes creating the State Highway Commission enumerate their powers and duties in the construction, maintenance, etc., of highways for public benefit, without either expressly or impliedly giving it the right to sue and be sued, but manifestly as an agency of the State for the purpose of exercising administrative and governmental functions. Carpenter v. Atlanta, etc., R. Co., 184 N. C. 400, 114 S. E. 693.

Power of County to Raise Fund for Construction.—Where the county authorities make a contract with the state highway commission pursuant to this act to construct one of the highways through the county and the necessary bridges, the county commissioners may proceed under sections 3767, 3772 to raise the necessary funds. See Norfolk So. R. Co. v. McArtan, 185 N. C. 201, 116 S. E. 731.

Abandoned Grade Crossing.—See note under § 3846(j).

Grade Crossing. — The commissioners of a county are without power to order a grade crossing abandoned by the Commission reopened to the public, and this power is not given the county by § 3846 (e 5). Rockingham v. Norfolk, etc., R. Co., 197 N. C. 116, 147 S. E. 832.

Judicial Notice of Highway Ordinance.—An ordinance of the Highway Commission does not come within that class of legislative enactments of which the courts will take judicial notice. State v. Toler, 195 N. C. 481, 482, 142 S. E. 715.

Construction of New Roads.—Subsection (b) of this section does not authorize the commission to totally abandon an existing part of the highway system and construct an entirely new road in its place. Newton v. State Highway Comm., 194 N. C. 159, 138 S. E. 601.

But in view of this subsection the commission may construct new roads notwithstanding statute authorizing the commission "to take over for state maintenance additional roads heretofore maintaned by the several counties." Board of Com'rs v. State Highway Com., 195 N. C. 26, 141 S. E. 539.

Cited in Radford v. Young, 194 N. C. 747, 140 S. E. 806; State v. Henderson, 207 N. C. 258, 259, 176 S. E. 758.

§ 3846(j1). Establishment of administrative districts.—The State Highway Commission may establish such administrative districts as in their

opinion shall be necessary for the proper and efficient performance of the duties of the commission. Such districts as may be established shall be without regard to the places of residence of the members of the State Highway Commission. The commission may from time to time change the number of such districts, or they may change the territory embraced within the several districts, when in their opinion it is in the interest of efficiency and economy to make such change. (1931, c. 145, s. 5.)

See note under section 3846(f).

§ 3846(j2). Enforcement of contracts between commission and cities and towns.—All contracts entered into between the state highway and public works commission and the municipalities of the State under section 3846(j), subsection (g), or other provision of the state highway law may be enforced by proper actions either in the superior court of the county in which said municipality exists or in Wake county. (1935, c. 213, s. 2.)

§ 3846(k). Employment of counsel.—The state highway commission may in its discretion employ any attorney or attorneys to advise them for the purpose of condemning land acquired by this article, making any contracts, and do other legal work that the commission may believe necessary for carrying out this article, and compensation for all such services shall be paid out of the state highway fund. (1921, c. 2, s. 21.)

See note under section 3846(f).

Cited in Rockingham County v. Norfolk, etc., R. Co., 197 N. C. 116, 117, 147 S. E. 832.

§ 3846(l). Reports to general assembly.—The highway commission shall, on or before the tenth day of the convening of each regular session of the general assembly of North Carolina, make full printed, detailed report to the general assembly, showing the construction and maintenance work and the cost of the same, receipts of license fees, and disbursements of the commission, and such other data as may be of interest in connection with the work of the highway commission. A full account of each road project shall be kept by and under the direction of the highway commission or its representatives, to ascertain at any time the expenditures and the liabilities against all projects; also records of contracts and force account work. The account records, together with all supporting documents, shall be open at all times to the inspection of the governor or road authorities of any county, or their authorized representatives, and copies thereof shall be furnished such officials upon request. (1921, c. 2, s. 23.)

See note under section 3846(f).

§ 3846(m). Annual audits; report of audit to general assembly.—The books and accounts of the highway commission shall be audited at least once a year by a certified public accountant to be designated by the auditor of the state, and report of certified accountant shall be made a part of the accompanying report of the state highway commission to the general assembly as herein provided. (1921, c. 2, s. 24.)

See note under section 3846(f).

§ 3846(n). Contracts heretofore made.—All contracts or agreements heretofore made or entered into by the existing highway commission as to location and construction of any roads or highways, or for any other purpose, shall be and remain in full force and effect and taken over by the highway commission provided for in this article, and all contractors who have entered into any contract with the existing highway commission, whether private or municipal, shall carry out such contracts so made and all rights and remedies existing under such contracts by the present highway commission or any contractor shall remain in full force and effect. (1921, c. 2, s. 48.)

See note under section 3846(f).

§ 3846(o). Continuation of old commission; taking over of contracts. — Until the organization of the State Highway Commission provided for in this article the present existing State Highway Commission shall continue in effect and be authorized to act pursuant to chapter 189, Public Laws of nineteen-nineteen, and all other laws in force relating to the State Highway Commission, and to enter into contracts, which, together with all existing contracts, shall be taken over by the State Highway Commission created by this article, and in all other respects this article shall be in force from and after March 3, 1921. (1921, c. 2, s. 53.)

See note under section 3846(f).

§ 3846(o1). Reimbursement made to counties.—The State Highway Commission is empowered and authorized in its discretion to reimburse any county, in whole or in part, from the future allocations of State highway road construction funds available for use in said county, for cash donations heretofore made by such county to aid the State Highway Commission in construction portions of the State highway system in such county; and for the paved highways so constructed under specifications acceptable to the State Highway Commission, and donated to the State.

Provided, said reimbursement shall not be made, except in such cases as the State Highway Commission may deem it necessary to place such county on terms of equality with other counties and built and donated to the State paved highways, constructed under specifications acceptable to the State Highway Commission, similarly situated:

Provided, further, that no part of the bond issue that may be authorized by this General Assembly may be used for said purpose and no other road construction funds allocated to any county shall be used for such reimbursement until all of the State highways in said county have been constructed in a manner satisfactory to the State Highway Commission. (1927, c. 235, s. 1.)

See note under section 3846(f).

For act creating special highway commission to determine amount of reimbursement to counties, see Public Laws 1935, chapter 206.

§ 3846(o2). Amortization of loans from counties to State Highway Commission. — The State Highway Commission and the several counties of the State that have heretofore made loan contracts with the State Highway Commission to aid in the construction of State highways within said counties, and upon which contracts there re-

main unpaid balances, are hereby authorized to execute new contracts providing for the repayment of said loans in fixed annual installments in such amounts and over such periods as may be agreed upon as fair and equitable under all the circumstances of each particular loan, but in no event shall the gross liability of the State Highway Commission be increased over the amount specified in the existing agreements. All such contracts shall be valid obligations of the State, payable solely out of State Highway Commission revenue. All payments made under said contract shall be applied to the debt service of the respective counties, and for no other purpose. (1931, c. 145, s. 6, c. 314.)

See note under section 3846(f).

§ 3846(p). Repealed by Public Laws 1931, c. 145, s. 222.)

Part 3. Construction, Maintenance, and Repair of Highways

§ 3846(q). Standard designs for marking roads constituting system.—After the selection of a part or parts of the State highway system, the commission may cause roads, comprising such system, including connecting streets in incorporated towns and cities, to be distinctly marked with some standard design placed on convenient objects along such routes. Such design shall be uniform on all parts of the state highway system, except that the numbers thereon shall correspond with the numbers given the various routes by the commission, which numbers shall coincide with the numbers placed on the official map or maps issued by the commission. No similar design shall be used for making other routes in North Carolina. (1921, c. 2, s. 9(a).

See note under section 3846(f).

§ 3846(r). Guide and warning signs. — After selection of state highways before mentioned, the commission may cause to be erected such standard guide or warning signs as it may deem necessary along the state highway system. Such signs shall be of uniform design throughout the state, and it shall be unlawful for any person to erect or display any other guide or warning signs upon said highway except in case of emergency, or with the approval of the commission, and, if erected without such approval they may be removed by the commission, and any violator of this section shall be subject to all penalties hereinafter provided. After taking over section or sections of the state highway system, the commission may erect proper and uniform signs directing persons to roads and places of importance. Said commission shall have the power to control all signs within the right of way of state highways. (1921, c. 2, s. 9(b)).

See note under section 3846(f).
See 13 N. C. Law Rev., 101.

§ 3846(s). Repair of road detour.—It shall be mandatory upon the state highway commission, its officers and employees, or any contractor or subcontractor employed by the said commission, to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route while said highways or roads are being improved or constructed, and it shall be mandatory upon the said highway commission and its employees or contractors to place or cause to be placed explicit directions to the traveling public during repair of said highway or road under the process of construction. All expense of laying out and maintaining said detours shall be paid out of state highway fund. (1921, c. 2, s. 11.)

See note under section 3846(f).

§ 3846(t). Closing of state highways during construction; injury to barriers, warning signs, etc. — If it shall appear necessary to the state highway commission, its officers, or appropriate employees, to close any road or highway coming under its jurisdiction so as to permit of proper completion of work which is being performed, such commission, its officers or employees, may close, or cause to be closed, the whole or any portion of such road or highway deemed necessary to be excluded from public travel. While any such road or highway, or portion thereof, if so closed, or while any such road or highway, or portion thereof, is in process of construction or maintenance, such commission, its officers or appropriate employees, or its contractor, under authority from such commission, may erect, or cause to be erected, suitable barriers or obstructions thereon, may post, or cause to be posted, conspicuous notices to the effect that the road or highway, or portion thereof, is closed, warning signs, lights and lanterns on such road or highway, or portions thereof. When such road or highway is closed to the public or in process of construction or maintenance, as provided herein, any person who willfully breaks down, drives into new construction work, removes, injures or destroys any such barrier or barriers or obstructions on road being constructed, or tears down, removes or destroys any such notices, drives into new construction work, or extinguishes, removes, injures or destroys any such warning lights or lanterns so erected, posted or placed, shall be guilty of a misdemeanor. (1921, c. 2, s. 12.)

See note under section 3846(f).

Liability of Contractor for Injury.—Contractor constructing highway was not relieved, by an order of the state highway commission closing the road to travel, of liability for injuries in an automobile collision with an unlighted disabled truck left by defendant on the side of the highway, where on the part of the road where the accident happened barriers had been removed and to defendant's knowledge many people habitually traversed it. Thompson Caldwell Const. Co. v. Young, 294 Fed. 145.

§ 3846(u). Openings, structures, pipes, trees, and issuance of permits.—No opening or other interference whatsoever shall be made in any state road or highway other than streets in cities and towns, nor shall any structure be placed thereon, nor shall any structure which has been placed thereon be changed or removed except in accordance with a written permit from the state highway commission or its duly authorized officers, who shall exercise complete and permanent control over such roads and highways. No state road or state highway, other than streets in cities and towns, shall be dug up for laying or placing pipes, conduits, sewers, wires, railways, or other objects, and no tree or shrub in or on any state road or state highway shall be planted, trimmed, or removed, and no obstruction placed thereon, without a written permit as hereinbefore provided for, and then only in accordance with the regula-

tions of said highway commission or its duly authorized officers or employees; and the work shall be under the supervision and to the satisfaction of the state highway commission or its officers or employees, and the entire expense of replacing the highway in as good condition as before shall be paid by the persons, firms, or corporations to whom the permit is given, or by whom the work is done: the state highway commission, or its duly authorized officers, may, in its discretion, before granting a permit under the provisions of this article, require the applicant to file a satisfactory bond, payable to the state of North Carolina, in such an amount as may be deemed sufficient by the state highway commission or its duly authorized officers, conditioned upon the proper compliance with the requirements of this article by the person, firm, or corporation granted such permit. Any person making any opening in a state road or State highway, or placing any structure thereon, or changing or removing any structure thereon, without obtaining a written permit as herein provided, or not in compliance with the terms of such permit, or otherwise violating the provisions of this article, shall be guilty of a misdemeanor: Provided, this section shall not apply to railroad crossings. The railroads shall keep up said crossings as now provided by law. (1921, c. 2, s. 13; 1923, c. 160, s. 2.)

See note under section 3846(f).

§ 3846(v). Letting of contracts to bidders after advertisement; enforcing claims against contractor by action on bond.—All contracts over one thousand dollars that the commission may let for construction, or any other kinds of work necessary to carry out the provisions of this article, shall be let, after public advertising, under rules and regulations to be made and published by the state highway commission, to a responsible bidder, the right to reject any and all bids being reserved to the state highway commission.

No action shall be brought upon any bond given by any contractor of the highway commission, by any laborer, materialman or other person until and after the completion or the work contracted to be done by the said contractor. Any laborer, materialman or other person having a claim against the said contractor and the bond given by such contractor, shall file a statement of the said claim with the contractor and with the surety upon his bond, and, in the event the surety is a corporation, with the general agent of such corporation, within the State of North Carolina, within six (6) months from the completion of the contract, and a failure to file such claim within said time shall be a complete bar against any recovery on the bond of the contractor and the surety thereon. Only one suit or action may be brought upon the said bond and against the said surety, which suit or action shall be brought in one of the counties in which the work and labor was done and performed and not elsewhere. The procedure pointed out in chapter one hundred of the Public Laws of nineteen hundred twenty-three, section 2445, shall be followed. No surety shall be liable for more than the penalty of the bond. Any person entitled to bring an action shall have the right to require the State Highway Commission to furnish information as to when the contract is completed, and it shall be the duty of the Highway Commission to give to any such person proper notice. If the full amount of the liability of the surety on said bond is insufficient to pay the said amount of all claims and demands, then, after paying the full amount due the State Highway Commission, the remainder shall be distributed pro rata among the claimants. Any claim of the State Highway Commission against the said bond and the surety thereon shall be preferred as against any cause of action in favor of any laborer, materialman or other persons and shall constitute a first lien or claim against the said bond and the surety thereon. (1921, c. 2, s. 15; 1923, c. 160, s. 3; 1925, cc. 260, 269.)

See note under section 3846(f).

Editor's Note.—The Act of 1923 added a second paragraph to this section. The Act of 1925 struck out this paragraph and inserted the present one in lieu thereof.

Section Prospective.—This section falls within the rule of presumption that the effect of the statute is to be prospective only, in the absence of an expressed or clearly implied intent to the contrary. Overman & Co. v. Maryland Casualty Co., 193 N. C. 86, 136 S. E. 250.

Immunity of Contractor from Liability for Defect.—One constructing a roadway under contract with state highway commission did not share the immunity given that body by this section against liability for damages resulting from defective condition of the highway. Thompson Caldwell Const. Co. v. Young, 294 Fed. 145. See note under section 3846(t).

Extent of Surety's Liability.—The surety on a contractor's bond for the building of a pubic road or highway is presumed to have acquainted itself with the character of the road contracted for by its principal, and the local conditions that would affect the cost of its construction, and where its bond includes payment by the contractor of labor and material to be employed or used therein, it is liable to one who has rented to the contractor a steam shovel, boiler, etc., necessary to the construction of the highway under local existing conditions. Wiseman v. Lacy, 193 N. C. 751, 138 S. E. 121.

Venue of Suit. — All action against the State Highway Commission and surety on contractor's bond given for the benefit of those performing labor or work upon a State highway since 10 March, 1925, is governed as to venue by ch. 260, Public Laws, 1925, which is prospective in effect. Independence Trust Co. v. Massachusetts etc., Ins. Co., 190 N. C. 680, 130 S. E. 547.

Laborers, etc., Having No Statutory Lien.—The surety bond given to the State Highway Commission by a contractor for the construction of a highway under the provisions of this section contemplates the protection of laborers and materialmen who have no statutory lien. John L. Roper Lumber Co. v. Lawson, 195 N. C. 840, 143 S. E. 847.

Extent of Liability on Bond.—This section excludes torts committed by the contractor or its employees in negligently setting fire to lands along the route of the project. John L. Roper Lumber Co. v. Lawson, 195 N. C. 840, 143 S. E. 847.

Cited in Southern Surety Co. v. Plott, 28 Fed. (2d) 598; Overman & Co. v. Great American Indemnity Co., 199 N. C. 736, 155 S. E. 730.

§ 3846(w). Working of state convicts. — All able-bodied male convicts sentenced to the state prison may be assigned to work upon the state highway system under the direction of the state highway commission. That the cost or hire of the able-bodied male convicts to the state highway commission shall be agreed upon between the state highway commission and the governor and chairman of the prison board, on the basis of paying the actual expenses in working said convicts, including food, clothing, housing, guarding, transportation and incidental expenses by the state highway commission to the state prison board. (1921, c. 2, s. 17.)

See note under section 3846(f).

See § 3846(27).

§ 3846(x). Working of county convicts. — The state highway commission may make contracts and agreements with the board of county commissioners or road governing bodies of any county in the state for the purpose of hiring any county convicts to be worked on the state highway system or in the production of materials for use in constructing state highways, and for constructing state highways. (1921, c. 2, s. 18.)

See note under section 3846(f).

Editor's Note.—It would seem that this section is superseded by §§ 3846(22), et seq.

§ 3846 (y). Elimination of grade crossings. (a) Whenever any road or street forming a link in or a part of the State highway system, whether under construction or heretofore or hereafter constructed, shall cross or intersect any railroad at the same level or grade, and and in the opinion of the chairman of the State Highway Commission such grade crossing is dangerous to the traveling public, or unreasonably interferes with or impedes the traffic on said State highway, the State Highway Commission shall issue notice requiring the person or company operating such railroad to appear before the State Highway Commission, at its office in Raleigh, upon a day named, which shall not be less than ten days or more than twenty days from the date of said notice, and show cause, if any it has, why such railroad company shall not be required to alter such crossing in such way as to remove such dangerous condition and to make such changes and improvements thereat as will safeguard and secure the safety and convenience of the traveling public thereafter. Such notice shall be served on such railroad company as is now provided by law for the service of summons on domestic corporations, and officers serving such notice shall receive the same fees as now provided by law for the service of such summons.

(b) Upon the day named, the State Highway Commission shall hear said matter and shall determine whether such crossing is dangerous to public safety, or unreasonably interferes with traffic thereon. If it shall determine that said crossing is, or upon the completion of such highway will be, dangerous to public safety and its elimination or safeguarding is necessary for the proper protection of the traffic on said State highway, the State Highway Commission shall thereupon order the construction of an underpass or overpass at said crossing or it may in its discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of said commission upon the hearing as aforesaid the public safety and convenience will be secured thereby. And said order shall specify that one-half of the cost of the construction of such underpass or overpass or the installation of such safety device shall be borne by the State Highway Commission and one-half thereof by the railroad company operating such railroad, as provided in section (c) hereof, but in no instance shall the State Highway Commission bear any part of the cost of the maintenance of any structure or safety device so constructed or installed except in the maintenance of an overhead separation.

(c) Upon the filing and issuance of the order as hereinbefore provided for requiring the construction of any underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices at any crossing upon the State highway system, it shall be the duty of the railroad company operating the railroad with which said public road or street intersects or crosses to construct such underpass or overpass or to install and maintain such safety device as may be required in said order. The work may be done and material furnished either by the railroad company or the State Highway Commission, as may be agreed upon, and, in case of an underpass, the railroad company shall be responsible for one-half of the expense of all excavations through the existing railroad fill as well as one-half of the complete cost of the structure, including both the foundation and superstructure; and in case of an overpass, the railroad company shall be responsible for one-half of the entire cost of the bridge which will span the opening over the tracks of the railroad from abutment to abutment and including such abutments. And if a grade crossing is not eliminated by an overpass or underpass, the railroad company shall be responsible for one-half of the cost of installing gates, alarm signals or other approved safety devices. If the work is done and material furnished by the railroad company, an itemized statement of the total amount expended therefor shall, at the completion of the work, be furnished the State Highway Commission, and the commission shall pay such amount to the railroad company as may be shown on such statement after deducting the amount for which the railroad company is responsible; and if the work is done by the State Highway Commission, an itemized statement of the total amount expended shall be furnished to the railroad company, and the railroad company shall pay to the State Highway Commission such part thereof as the railroad company may be responsible for as herein provided; such payment by the railroad company shall be under such rules and regulations and by such methods as the State Highway Commission may provide.

(d) That within sixty days after the issuance of the order for construction of an underpass or the installation of other safety device as herein provided for, the railroad company against which such order is issued shall submit to the State Highway Commission plans for such construction or installation, and within ten days thereafter said State Highway Commission, through its chairman, shall notify such railroad company of its approval of said plan or of such changes and amendments thereto as to it shall seem advisable. If such plans are not submitted to the State Highway Commission by said railroad company within sixty days as aforesaid, the chairman of the State Highway Commission shall have plans prepared and submit them to the railroad company. The railroad company shall within ten days notify the chairman of its approval of the said plans or shall have the right within such ten days to suggest such changes and amendments in the plans so submitted by the chairman of the State Highway Commission as to it shall seem advisable. The plans so prepared and finally approved by the chairman of the State

Highway Commission shall have the same force and effect, and said railroad company shall be charged with like liability, and said underpass or overpass shall be constructed or such safety device installed in accordance therewith as if said plans had been originally prepared and submitted by said railroad company. If said railroad company shall fail or neglect to begin or complete the construction of said underpass or overpass, or the installation of such safety device, as required by the order of the State Highway Commission, said commission is authorized and directed to prepare the necessary plans therefor, which plans shall have the same force and effect, and shall fix said railroad company with like liability, as if said plans had been originally prepared and submitted by said railroad company, and the State Highway Commission shall proceed to construct said underpass or overpass or install such safety device in accordance therewith. An accurate account of the cost of said construction or installation shall be kept by the State Highway Commission and upon the completion of such work a statement of that portion thereof chargeable to such railroad company as set out in the order of the commission shall be rendered said railroad company. Upon the failure or refusal of said company to pay the bill so rendered, the Highway Commission shall recover the amount thereof by suit therefor against said company in the Superior Court of Wake County: Provided, that the payment by such railroad company of said proportionate part may be made under such rules and regulations and by such methods as the State Highway Commission may provide. If the State Highway Commission shall undertake to do the work, it shall not obstruct or impair the operation of the railroad and shall keep the roadbed and track safe for the operation of trains at every stage of work. That if said railroad company shall construct such underpass or overpass or shall install such safety devices in accordance with the order of the State Highway Commission, one-half of the cost of such construction shall upon the completion of said work be paid to such railroad company by the State Highway Commission. The State Highway Commission may inspect and check the expenditures for such construction or installation so made by the railroad company and an accurate account of the cost thereof shall upon the completion of said work be submitted to the commission by the railroad company. If the Highway Commission shall neglect or refuse to pay that portion of the cost of said construction or installation chargeable to it, the railroad company shall recover the amount thereof by suit therefor against the Highway Commission in the Superior Court of Wake County.

(e) If any railroad company so ordered by the State Highway Commission to construct an underpass or overpass or to install safety devices at grade crossings as hereinbefore provided for shall fail or refuse to comply with the order of the State Highway Commission requiring such construction or installation, said railroad company shall be guilty of a misdemeanor and shall be fined not less than fifty nor more than one hundred dollars in the discretion of the court for each day such failure or refusal shall continue, each said day to constitute a separate offense.

(f) The jurisdiction over and control of said grade crossings and safety devices upon the State highways system herein given the State Highway Commission shall be exclusive.

(g) From any order or decision so made by the State Highway Commission the railroad company may appeal to the Superior Court of the county wherein is located the crossing affected by said order. Such appeal shall not defer or delay the construction of such underpass or overpass or the installation of such safety device as required by the order of the commission, but the railroad company shall proceed to comply with such order in accordance with its terms. The action of the railroad company in complying with and carrying out such order pending said appeal shall not prejudice or affect the rights or remedies of such railroad company on such appeal. Upon such appeal the court shall determine only whether the order of the commission for such construction or installation is unreasonable and unnecessary for the protection of the traveling public and the apportionment of the cost to the extent hereinafter provided in this subsection, and if upon the hearing of said appeal it shall be determined that said order was unnecessary for the protection of the traveling public, the State Highway Commission shall bear the total cost of the construction of such underpass or overpass or the installation of such safety device. In event the decision on appeal should be that the construction or installation was necessary but the cost thereof unreasonable, then the railroad company shall bear its proportion (not to exceed fifty per cent) of such cost as may be determined on appeal would have been reasonable to meet the necessity in the instant case. Upon said appeal from an order of the State Highway Commission, the burden of proof shall be upon the railroad company, and if it shall not be found and determined upon said appeal that said order was unreasonable or unnecessary for the protection of the traveling public at said crossing, then such railroad company shall bear its proportion of the cost of such construction or installation in accordance with this act. (1921, c. 2, s. 19; 1925, c. 277.)

See note under section 3846(f).

Editor's Note.—Public Laws 1929, ch. 74, without taking any account of the Act of 1925 amending this section, attempted to amend this section as appearing in vol. 3 C. S. as follows: "Add in line three, after the word 'level' and before the word 'and,' immediately following the word 'level,' the following: 'or by an underpass or overpass which, in the opinion of the State Highway Commission, is unsafe or inadequate to meet the existing needs of traffic.' Further amend said section by adding in the fifth line from the bottom, on page two hundred and forty-nine, after the word 'abolished' and before the word 'by,' the following: 'or an existing overhead bridge or underpass replaced.' "

Cited in Rockingham v. Norfolk, etc., R. Co., 197 N. C. 116, 117, 147 S. E. 832.

§ 3846(z). Exclusiveness of jurisdiction of commission over grade crossings and safety devices.—The jurisdiction over and control of grade crossings and safety devices upon the state highway system given the state highway commission shall be exclusive. (1923, c. 160, s. 5.)

See note under section 3846(f).

Cited in Rockingham v. Norfolk, etc., R. Co., 197 N. C. 116, 118, 147 S. E. 832.

§ 3846(aa). Maintenance, upkeep, and control.— In assuming control of the roads constituting the state highway system, the commission shall assume as soon as practicable the maintenance and upkeep of said roads, and shall as soon as practicable organize a proper and sufficient patrol force to keep said roads in good condition. In the event of failure to maintain said roads in good condition, upon complaint of the board of county commissioners, or road-governing body of any county, the state highway commission shall at once investigate such complaint, and if the same be well founded, then it shall at once order the repair and maintenance of the road complained of, and investigate the neglect of the person in charge of the road so complained of, and, if upon investigation the person or persons in charge of the road complained of be at fault, he may promptly be discharged from the service of the commission. (1921, c. 2, s. 20.)

See note under section 3846(f).

§ 3846(bb). Acquirement of land and deposits of materials; condemnation proceedings. — The state highway commission is vested with the power to acquire such rights of way and title to such lands, gravel, gravel beds, or bars, sand, sand beds or bars, rock, stone, boulders, quarries, or quarry beds, lime or other earth or mineral deposits or formations, and such standing timber as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work, either by purchase, donation, or condemnation, in the manner hereinafter set out. The state highway commission is also vested with the power to acquire such additional land alongside of the rights of way or roads as in its opinion may be necessary and proper for the protection of the roads and roadways, and such additional area as may be necessary as by it determined for approaches to and from such material and other requisite area as may be desired by it for working purposes.

Whenever the state highway commission and the owner or owners of the lands, materials, and timber required by the state highway commission to carry on the work as herein provided for, are unable to agree as to the price thereof, the state highway commission is hereby vested with the power to condemn the lands, materials, and timber, and in so doing the ways, means, methods, and procedure of chapter thirty-three, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this law, and in all instances the general and special benefits shall be assessed as offsets against damages: Provided, that all actions for damages for rights of way or other causes shall be commenced within six months from the completion of each particular project.

In case condemnation shall become necessary the state highway commission is authorized to enter the lands and take possession of the same, and also take possession of such materials and timber as is required by it prior to bringing the proceeding for condemnation, and prior to the payment of the money for the said property.

In the event the owner or owners shall appeal from the report of the commissioners, it shall not be necessary for the state highway commission to deposit the money assessed with the clerk, but it may proceed and use the property to be condemned until the final determination of the action.

The state highway and public works commission shall have the same authority and under the same provisions of law hereinbefore provided for construction of state highways for the acquirement of all rights of way and easements necessary to comply with the rules and regulations of the United States government for the construction of federal parkways in the State of North Carolina. That the right of way acquired or appropriated may, at the option of the commission, be a fee simple title, and the nature and extent of the right of way and easements so acquired or appropriated shall be designated upon a map showing the location across each county, and, when adopted by the commission, shall be filed with the register of deeds in each county, and, upon the filing of said map, such title shall vest in the state highway and public works commission. The said commission is hereby authorized to convey such title so acquired to the United States government, or its appropriate agency, free and clear of all claims for compensation. All compensation contracted to be paid or legally assessed shall be a valid claim against the state highway and public works commission, payable out of the construction fund of said commission. (1921, c. 2, s. 22; 1923, c. 160, s. 6; 1931, c. 145, s. 23; 1935, c. 2.)

See note under section 3846(f).

Editor's Note.—The Act of 1931 struck out the following from the first paragraph of this section: "Provided, that the right of condemnation provided for in this article shall not apply to gravel beds or bars, sand beds or bars, rock, stone, boulders, quarries, or quarry beds, lime, or other earth, or mineral deposits or formations, in actual bona fide operation for commercial purposes by private enterprise."

The amendment of 1935 added the last paragraph of this section.

When Amendment Took Effect.—At the time of the relocation of the road in question and when this suit was instituted, the rule for the admeasurement of damages was as stated by the trial court in his charge, as prescribed by this section prior to the amendment. Lanier v. Greenville, 174 N. C. 311, 93 S. E. 850. But subsequent to the institution of the suit and before trial, the Legislature amended the law by adding: "And in all instances the general and special benefits shall be assessed as off-sets against damages," etc., ch. 160, sec. 6, Public Laws, 1923. Hence, the law as amended and in force at the time of trial should have been followed in determining the amount plaintiff was entitled to recover. Wade v. State Highway Comm., 188 N. C. 210, 211, 124 S. E. 193.

Procedure for Adjusting Claim Exclusive. — The State highway commission, under sections 3846(f)-3846(p), is charged with the duty of exercising certain administrative and governmental functions, and statutory method of procedure for adjusting and litigating claims against it is exclusive and may alone be pursued. Latham v. State Highway Comm., 191 N. C. 141, 131 S. E. 385.

The owner of land cannot maintain an action in tort against the State Highway Commission, an unincorporated governmental agency, for damages caused to his land for its having been taken by the commission for highway purposes, and is confined for his remedy to the provisions of the special proceedings of this section. McKinney v. North Carolina State Highway Comm., 192 N. C. 670, 135 S. E. 772.

Measure of Damages for Property Injured.—The owner of a water mill which had a right of ingress and egress to his mill over the land of another, had constructed a bridge and maintained a ferry situated to command a large patronage can recover damages for the injury to his property by the building of a highway but not for profits from his mill

which is too speculative. Riverside Milling Co. v. State Highway Comm., 190 N. C. 692, 130 S. E. 724.

Power of Townships.—No such broad and explicit powers to acquire land and road materials by condemnation were given the road commission of Lovelady township, Burke County, by Pub. Loc. Laws 1915, ch. 426, as are given by this section to the state highway commission, and courts should not go beyond language of statute in construing it. Lowman v. Abee, 191 N. C. 147, 131 S. E. 277.

Cited in Greenville v. State Highway Commission, 196 N. C. 226, 227, 145 S. E. 31; Long v. Randleman, 199 N. C. 344, 154 S. E. 317.

§ 3846(bb)1. Purchase of equipment and resale to counties. — The State Highway Commission may at its discretion, and is hereby authorized, when requested by the board of county commissioners, county highway commission, or body having charge of the construction or maintenance of roads in any county in the State, to make, purchase and resell to said county any equipment, supplies, machinery, trucks, motor vehicles, and material to be used in connection with the construction or upkeep of the said roads; and is hereby likewise authorized, upon request of the board of county commissioners, board of education, or other body having the right to contract in the premises, to buy motor vehicles, equipment and supplies to be used in connection with the transportation of pupils to and from the said schools, and resell the same to said counties: Provided, however, that the State Highway Commission may require such deposit or assurances on the part of the county as they may deem proper before making said purchase or reselling to said county. (1924, c. 69.)

See note under section 3846(f).

Editor's Note.—It would seem that this section is rendered inoperative by §§ 3846(1) et seq.

§ 3846(cc). Felonious acts of commissioners and employees.—Any member of the highway commission, or any person employed by the highway commission in connection with carrying on the work outlined in this article, who shall knowingly, or fraudulently, perform any act with intent to injure the state, or any contractor, or his agent or employee, who shall conspire with a member of the highway commission or employee thereof or any state official to permit a violation of the contract or contractor with intent to injure the state, or any agent or employee of any contractor who shall do any work on any state highway in violation of contract, and with intent to defraud the state, and the member of the state highway commission, employee or state official so conspiring shall each be guilty of a felony, and upon conviction thereof, shall be confined in the state prison not less than one year and not more than five years, and be liable to the state in a civil action instituted by the state on relation of the state highway commission, for double the amount the state may have lost by reason thereof. (1921, c. 2, s. 49.)

See note under section 3846(f).

§ 3846(dd). Responsibility of counties for upkeep, etc., devolved.—The board of county commissioners or other road-governing bodies of the various counties in the state are hereby relieved of all responsibility or liability for the upkeep or maintenance of any of the roads or bridges thereon constituting the state highway system, after the same shall have been taken over, and the control thereof assumed by the state highway commission and the state highway commission both as a commission and the individual members thereof, shall not be liable for any damage sustained by any person, firm, or corporation on the said state highway system, except for wanton and corrupt negligence. (1921, c. 2, s. 50.)

See note under section 3846(f).

Part 4. County, City, and Town Roads

§ 3846(ee). Encouragement of county road building; contracts for reimbursement. — To encourage counties to build hard-surfaced or other dependable roads constituting a part of the state highway system before same can be constructed by the state highway commission, the said commission is hereby authorized and empowered to enter into contracts and agreements with said county or counties for fair reimbursement for said expense: Provided, said road or bridge is built in accordance with the specifications and under the direction of the state highway commission. (1921, c. 2, s. 14.)

See note under section 3846(f).

Editor's Note.—This section seems to have been repealed by section 3772(l). See Oliver v. Comm., 194 N. C. 380.

Use of Funds for Other Purposes—Where the citizens and taxpayers have petitioned the county commissioners to issue county bonds and loan the proceeds to the State Highway Commission for the purpose of anticipating the State's allocation of funds to the county, wherein certain roads are designated, the county commissioners may disregard the roads designated in the petition and apply a part of the proceeds thus received to the building of certain other of the county roads found to be more necessary as links in the State system of highways, there being therein no element of contractual relations. Oliver v. Board of Commissioners, 194 N. C. 380.

In such case the building of the two additional roads before the others will not be enjoined at the suit of the citizens and taxpayers upon the ground that the county commissioners were without power to so amend the original contract, it being both to the advantage of the county and its taxpayers as well as to the State. Oliver v. Board of Commissioners, 194 N. C. 380.

Cited in Norfolk So. R. Co. v. McArtan, 185 N. C. 201, 116 S. E. 731.

§ 3846(ff). Connection of highway with improved streets; pipe lines and conduits; cost. — When any portion of the state highway system shall run through any city or town and it shall be found necessary to connect the state highway system with improved streets of such city or town as may be designated as part of such system, the state highway commission shall build such connecting links, the same to be uniform in dimensions and materials with such state highways: Provided, however, that whenever any city or town may desire to widen its streets which may be traversed by the state highway, the state highway commission may make such arrangements with said city or town in connection with the construction of said road as, in its discretion, may seem wise and just under all the facts and circumstances in connection therewith: Provided further, that such city or town shall save the state highway commission harmless from any claims for damage arising from the construction of said road through such city or town and including claims for right of way, change of grade line, and interference with public-service structures. And the state highway commission may require such city or town to cause to be laid all water, sewer, gas or other pipe lines or conduits,

together with all necessary house or lot connections or services, to the curb line of such road or street to be constructed: Provided further, that whenever by agreement with the road governing body of any city or town any street designated as a part of the state highway system shall be surfaced by order of the state highway commission at the expense, in whole or in part, of a city or town it shall be lawful for the governing body of such city or town to declare an assessment district as to the street to be improved, without petition by the owners of property abutting thereon, and the costs thereof, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways whose tracks are laid in said street which shall be assessed under their franchise, shall be specially assessed upon the lots or parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon by an equal rate per foot of such frontage. (1921, c. 2, s. 16; 1923, c. 160, s. 4.)

See note under section 3846(f).

Construed with Local Act.—Chapter 56, article 9, of the acts of 1921 providing for local improvements of the streets of a city or incorporated town by a method of assessing the owners of abutting land, and this section, are to be construed together in pari materia. Shute v. Monroe, 187 N. C. 676, 123 S. E. 71.

Same—Exercise of Power by City. — Where the State Highway Commission orders a connecting link to be hard-surfaced, and the municipality voluntarily agrees to make the improvement, it is not required, under chapter 56, article 9, that a petition of the abutting owners of land thereon be made. This section gives the governing body of the municipality power to make it an assessment district. Shute v. Monroe, 187 N. C. 676, 123 S. E. 71.

This section applies only where the width of the street and the regular highway are the same. Sechriest v. Thomasville, 202 N. C. 108, 162 S. E. 212.

Power of City to Voluntarily Improve.—Where a city or incorporated town having three thousand inhabitants, or more, has a considerable portion of its streets hard-surfaced, the municipality may voluntarily assess and undertake the improvement of a street being a connecting link in the highway system. Shute v. Monroe, 187 N. C. 676, 123 S. E. 71.

Invalid Assessment May Be Subsequently Validated. — Where an incorporated town, under authority of this section, levies an assessment against abutting property owners for street improvements in paving a strip on either side of a state highway running through the town, but such levies are made without a petition of the abutting owners as prescribed by section 2707, the assessments are invalid but not void, and the Legislature has the power to validate the assessments by subsequent legislative act. Crutchfield v. Thomasville, 205 N. C. 709, 172 S. E. 366.

Cited in Long v. Randleman, 199 N. C. 344, 154 S. E. 317.

Part 5. Funds and Bonds

§ 3846(gg). Repealed by Public Laws 1931, c. 145, s. 2.

§ 3846(hh). Repealed by Public Laws 1931, c. 145, s. 2.

§ 3846(ii). How funds used.—The revenues derived in each fiscal year under chapter 55, article 3, and 3(A) shall be set aside and paid out for the purposes following:

First. A sum sufficient to defray the expenses of the State Highway Commission, but not exceeding two hundred and fifty thousand dollars ($250,000) annually, and a sum sufficient to pay all expenses of collecting the revenues provided hereby, including clerical assistance, the cost of furnishing number plates and mailing same, and the cost of necessary blanks, books and other supplies, such expenses of collecting to be approved by the chairman of the State Highway Commission and not to exceed in any fiscal year four per cent of the total amount of the collections in such year;

Second. A sum sufficient to pay the principal and interest falling due in such fiscal year and on the first day of the ensuing July upon all highway bonds issued and to be issued under this act and under any act or acts passed by the General Assembly at its regular session in one thousand nine hundred and twenty-five or thereafter, including a sum sufficient to make the five hundred thousand dollars ($500,000) annual sinking fund payments required by chapter one hundred eighty-eight (188), Public Laws one thousand nine hundred and twenty-three, ch. 125, art. 12 upon the sixty-five million dollars ($65,000,000) bonds issued and to be issued under this act, such payments to be made in the fiscal year in which falls the beginning of the calendar year in which said chapter one hundred eighty-eight (188) required the same to be made; said five hundred thousand dollars ($500,000) sinking fund payments for each year to and including the fiscal year one thousand nine hundred and twenty-seven, and one thousand nine hundred and twenty-eight, aggregating two million five hundred thousand dollars ($2,500,000), having been anticipated and having heretofore been paid;

Third. Any surplus of such revenues in any fiscal year including any unused balances of the maximum amounts hereinabove provided for the expenses of the commission and collection of revenues, after provision has been made for all the items hereinabove set forth in this section, shall be subject to disposition by the Highway Commission in the maintenance of highways in the State highway system and of the several county road systems, and in the construction and reconstruction of highways in said system and in meeting the requirements of the United States government as to Federal aid in such construction and reconstruction. No part of such revenues shall be used in the maintenance, construction and reconstruction of highways or in meeting Federal aid requirements unless the above requirements for expense, interest, principal and sinking fund have been met or can be met from such revenues. If at any time such revenues should be insufficient for interest, principal and sinking fund payments herein required to be made, and for proper maintenance of the highways, additional revenues for such purposes shall be provided by the General Assembly. It shall be lawful to reduce in any year the revenues provided hereby, by act of the General Assembly, which may authorize such redemption for a period not longer at one time than the biennium for which appropriations for general expense are permitted, but no such act shall be passed unless (a) the sinking fund commission, or if there be no sinking fund commission, the State Treasurer, shall certify to the General Assembly the amount required for the principal, interest and sinking fund payments and (b) the State Highway Commission shall certify to the General Assembly the amount required for maintenance of highways and (c) the General Assembly shall determine that the proposed reduction may be made without

prejudice to the payment from the remaining revenues of the amounts so certified for principal, interest, sinking fund and maintenance of highways, as well as the maximum amount herein set aside to defray the expenses of the commission and for expenses of collection: Provided, however, that no holder of any highway bonds of the State shall be prejudiced by this amendment or by any act amendatory of this section passed subsequent to the issuance of such bonds, and any such bondholder shall be entitled to all the rights to which he would be entitled if no such amendment had been made. (1921, c. 2, s. 27; 1923, c. 263, s. 1; 1925, c. 45, s. 45; 1925, c. 133, s. 2.)

See note under section 3846(f).

As to act to provide for the expenditure of state highway maintenance funds for the erection of markers at points of historic interest along the public highways, see Public Laws 1935, chapter 197.

Editor's Note.—The Act of 1931 added the words: "and of the several county road sytems" in lines nine and ten of subsection "Third" of this section, and struck out the words "in the State Highway System" formerly appearing after the word "highways" in line twenty-three of said subsection.

§ 3846(jj). Bond issue for road construction.—For the purpose of carrying out the provisions of this article, and of enabling the state to avail itself to the fullest extent of all federal aid funds that are now or may become available for use in the state for road purposes, the state treasurer is hereby authorized, empowered, and directed to issue and sell serial bonds of the state payable in not less than ten nor more than forty years from the date of issue, and aggregating not more than fifty million dollars ($50,000,000), to be known, styled, and designated "State of North Carolina Highway Serial Bonds," said bonds to mature at such time or times, not less than ten years nor more than forty years from the date of said bonds, as may be determined and fixed by the governor and council of state. Not more than ten million dollars ($10,000,000) of said bonds may be issued and sold in the year one thousand nine hundred and twenty-one; and not more than ten million dollars ($10,000,000) of said bonds may be issued and sold in the year one thousand nine hundred and twenty-two; and the balance may be issued and sold at the rate of ten million dollars ($10,000,000) per annum: Provided, however, that if the progress of the work shall be such as to justify it, then, and in that event, more than ten million dollars ($10,000,000) of the total amount herein authorized may be issued and sold in any one year at the request of the state highway commission, and by and with the consent of the governor and council of state.

An additional issue of fifteen million dollars ($15,000,000) of bonds is hereby authorized. The said bonds shall be issued in the manner and in accordance with the provisions of this section, and the proceeds received therefrom shall be used for the purposes in this section prescribed. (1921, c. 2, s. 39; Ex. Sess. 1921, c. 74; 1923, c. 263, s. 3.)

See note under section 3846(f).

Cited in Spitzer & Co. v. Commissioners, 188 N. C. 30, 38, 123 S. E. 636.

§ 3846(kk). Interest on bonds. — All of said bonds shall bear interest at a rate to be fixed by the governor and council of state, but not exceeding five per cent per annum, and are to be dated the first day of January or July of the year in which the bonds are issued. Interest on said bonds shall be payable semiannually on the first day of January and July of each and every year so long as any portion of said bonds shall remain unpaid; and when sold and turned over to the state treasurer all of said fund to be part of the construction fund and known as the "State Highway Fund." (1921, c. 2, s. 40; 1923, c. 263, s. 4.)

§ 3846(ll). Coupon or registered bonds; denomination; receipt for state taxes; sale.—All bonds authorized and issued under this article shall be coupon bonds of the denomination of one hundred dollars ($100), five hundred dollars ($500), and one thousand dollars ($1,000), respectively, or such other denominations as the state treasurer may determine, and shall be signed by the governor and the state treasurer, and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or he may have lithographed, engraved, or printed thereon a facsimile of his signature. The said bonds shall be in all other respects in such form as the state treasurer may direct. The coupons after maturity shall be receivable in payment of taxes, debts, dues, licenses, fines, and demands due the state of any kind whatsoever, which shall be expressed on the face of the bonds. Before selling the bonds herein authorized to be issued, the state treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price. He is authorized to accept bids for the entire amount of such issue to be sold in any one year, or any portion thereof, and when the conditions are equal, he shall give the preference of purchase to the citizens of North Carolina; and he is empowered to sell the bonds herein authorized in such manner as in his judgment will produce the best price, but not for less than par and accrued interest and the full faith, credit, and taxing power of the state are hereby pledged for the payment of the principal and interest of the bonds herein authorized to be issued and sold. All expenses necessarily incurred in the preparation and sale of the bonds shall be paid from the proceeds of such sale. (1921, c. 2, s. 41; 1923, c. 263, s. 5.)

§ 3846(mm). Registration of bonds.—The said bonds shall be subject to registration as to principal alone, or both principal and interest, in accordance with the provisions of the general law governing registration of the state securities as the same may from time to time be in force. (1921, c. 2, s. 42; 1923, c. 263, s. 6.)

§ 3846(nn). Exemption of bonds from taxation.—The bonds and coupons and notes issued in anticipation of the sale of the bonds, or for the payment of the interest thereon shall be exempt from all state, county, and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for incomes, nor shall said bonds and coupons and notes issued in anticipation of sale of the bonds, or for the payment of the interest thereon, or install-

ment of principal, be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. (1921, c. 2, s. 43.)

§ 3846(oo). Investment in bonds by fiduciaries.—It shall be lawful for all executors, administrators, guardians, and fiduciaries generally, and all sinking fund commissioners to invest any moneys in their hands in said bonds when such investments are made. (1921, c. 2, s. 44.)

§ 3846(pp). Loans in anticipation of sale of bonds. Loans for payment of interest and installments.—The state treasurer, by and with the consent of the governor and council of state, is hereby authorized to borrow money at the lowest rate of interest obtainable, in anticipation of the sale of the bonds herein authorized, and for the purposes for which said bonds are authorized to be issued. The state treasurer is hereby further authorized, by and with the consent of the governor and council of state, to borrow money at the lowest rate of interest obtainable, for the purpose of paying the interest on, or any installments of the said bonds, in the event that there are not sufficient funds in the state treasury with which to pay said interest or installments of principal as they respectively fall due. The state treasurer shall execute and issue notes of the state for the money so borrowed, and he is hereby authorized to renew any such notes from time to time by issuing new notes. The rate of interest, the date of payment of said notes or renewals, and all matters and details in connection with the issuance and sale thereof shall be fixed and determined by the governor and council of state. Such notes when issued shall be entitled to all the privileges, immunities and exemptions that the bonds authorized to be issued are entitled to. The full faith, credit and taxing power of the state are hereby pledged for the payment of such notes as may be issued, and all interest thereon. The proceeds received from said notes, other than notes that may be issued to pay interest or installments of principal of the bonds, shall be placed by the state treasurer in the "State Highway Fund" herein provided for. The notes issued in anticipation of the sale of the bonds shall be paid with funds derived from the sale of bonds, unless otherwise provided for by the general assembly. The notes issued for the payment of interest shall be paid from the funds collected under this article, as herein provided for, when collected, unless otherwise provided for by the general assembly. (1921, c. 2, s. 45.)

§ 3846(qq). Control of funds; vouchers for payment from funds.—The State Highway Commission, under rules and regulations established by the commission, shall have full control over the funds in the hands of the state treasurer known as the "State Highway Fund," and the same shall be paid out by the state treasurer upon proper voucher of the State Highway Commission for carrying out the purposes of this article. (1921, c. 2, s. 46.)

See note under section 3846(f).

Art. 15(A). Additional Bond Issue

§ 3846(qq) 1. Authorization; maturity. — For the purpose of providing additional means for carrying out the provisions of Article fifteen of chapter seventy, as amended and of enabling the State to avail itself to the fullest extent of all Federal aid funds that are now or may become available for use in the State for road purposes, the State Treasurer is hereby authorized by and with the consent of the Governor and Council of State to issue and sell not exceeding twenty million ($20,000,000) dollars, bonds of the State to be designated "State of North Carolina Highway Serial Bonds," maturing in annual installments on the first day of January in the following amounts and years: Six hundred thousand ($600,000) dollars in one thousand nine hundred thirty, six hundred and fifty thousand ($650,000) dollars in one thousand nine hundred thirty-one, seven hundred thousand ($700,000) dollars in one thousand nine hundred thirty-two, seven hundred fifty thousand ($750,000) dollars in one thousand nine hundred thirty-three, seven hundred fifty thousand ($750,000) dollars in one thousand nine hundred thirty-four, eight hundred thousand ($800,000) dollars in one thousand nine hundred thirty-five, eight hundred thousand ($800,000) dollars in one thousand nine hundred and thirty-six, eight hundred fifty thousand ($850,000) dollars in one thousand nine hundred thirty-seven, nine hundred thousand ($900,000) dollars in one thousand nine hundred thirty-eight, nine hundred fifty thousand ($950,000) dollars in one thousand nine hundred thirty-nine, one million ($1,000,000) dollars in one thousand nine hundred forty, one million fifty thousand ($1,050,000) dollars in one thousand nine hundred forty-one, one million one hundred thousand ($1,100,000) dollars in one thousand nine hundred forty-two, one million one hundred fifty thousand ($1,150,000) dollars in one thousand nine hundred forty-three, one million two hundred thousand ($1,200,000) dollars in one thousand nine hundred forty-four, one million two hundred fifty thousand ($1,250,000) dollars in one thousand nine hundred and forty-five, one million three hundred thousand ($1,300,000) dollars in one thousand nine hundred forty-six, one million three hundred fifty [thousand] ($1,350,000) dollars in one thousand nine hundred forty-seven, one million four hundred thousand ($1,400,000) dollars in one thousand nine hundred forty-eight, and one million four hundred fifty thousand ($1,450,000) dollars in one thousand nine hundred forty-nine, without option of prior payment. The Governor and Council of State shall not consent in the year one thousand nine hundred twenty-five to the issuance of more than ten million ($10,000,000) dollars bonds. This authorization of bond shall not take the place of any authorization heretofore made but shall be additional thereto. The said bonds shall bear interest at a rate to be fixed by the Governor and Council of State, but not exceeding five per cent per annum to be payable semi-annually on the first days of January and July. (1925, c. 35, s. 2.)

Editor's Note.—The word in brackets was inserted by the editor.

§ 3846(qq) 2. Interest coupons; registration; form.—Said bonds shall carry interest coupons which shall bear the signature of the State Treas-

urer, or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form or denominations thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 35, s. 3.)

§ 3846(qq) 3. Sale of bonds.—Before selling the bonds herein authorized to be issued the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price. He is authorized to accept bids for all or any portion of the bonds advertised and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is empowered to sell the bonds herein authorized in such manner as in his judgment will produce the best price, but not for less than par and accrued interest. All expenses necessarily incurred in the preparation and sale of the bonds be paid from the proceeds of such sale. (1925, c. 35, s. 4.)

§ 3846(qq) 4. Disposition of proceeds.—The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds the issuance of which has been anticipated by such bond anticipation notes) shall be placed by the treasurer in the construction fund known as the "State Highway Fund." (1925, c. 35, s. 5.)

§ 3846(qq) 5. Issuance of notes by treasurer.—By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State shall have given consent, if the treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or any installment of principal of any of said bonds then outstanding, if there shall not be sufficient funds in the State Treasury with which to pay such interest or installment as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1925, c. 35, s. 6.)

§ 3846(qq) 6. Payment of such notes; interest.—Notes issued in anticipation of the sale of said bonds shall be paid with funds derived from the sale of the bonds unless otherwise provided for by the General Assembly, and notes issued for the payment of interest and installments of principal shall be paid from funds provided by the General Assembly for the payment of such interest and principal when such funds are collected. Interest payments upon said notes may be evidenced by interest coupons in the treasurers discretion. (1925, c. 35, s. 7.)

§ 3846(qq) 7. Credit of state pledged.—The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1925, c. 35, s. 8.)

§ 3846(qq) 8. Coupons receivable for what claims.—The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 35, s. 9.)

§ 3846(qq) 9. Exemption of bonds from taxation.—All of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1925, c. 35, s. 10.)

§ 3846(qq) 10. Fiduciaries may invest in bonds.—It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1925, c. 35, s. 11.)

Art. 15(B). Bridge Authorized; Bond Issue

§ 3846(qq) 11. Bridge authorized.—The State Highway Commission is hereby authorized, empowered and directed to build a bridge across the lower Chowan River between the counties of Bertie and Chowan, which bridge shall be and become a part of the State highway system. (1925, c. 74, s. 1.)

See note under section 3846(f).

§ 3846(qq) 12. Bond issue authorized.—For the purpose of obtaining funds with which to build said bridge, its approaches and abutments, and acquiring the necessary land or rights therefor, the State Treasurer is hereby authorized, by and with the consent of the Governor and Council of State, to issue and sell not exceeding six hundred thousand ($600,000) dollars bonds of the State to be designated "State of North Carolina Highway Serial Bonds" maturing in annual installments on the first day of January, beginning not later than nineteen hundred and thirty-two (1932) and running not longer than nineteen hundred and forty-nine (1949), the amount of each annual installment to be fixed by the Governor and Council of State. The said bonds shall bear interest at a rate to be fixed by the Governor and Council of State, but not exceeding five per cent per annum to be payable semiannually on the first days of January and July. (1925, c. 74, s. 2; 1929, c. 128, s. 1.)

Editor's Note.—The Act of 1929 amended this section by striking out "nineteen hundred and thirty (1930)," and inserting in lieu thereof "nineteen hundred and thirty-two (1932)." It was the intent of this amendment to provide that the six hundred thousand dollar bonds of the State authorized for the construction of a bridge across the Lower Chowan River shall mature in annual installments on the first day of January, beginning not later than nineteen hundred and thirty-two (1932) and running not longer than nineteen hundred and forty nine (1949), the amount of each annual installment to be fixed by the Governor and Council of State.

§ 3846(qq) 13. Coupons; registration; form.— Said bonds shall carry interest coupons which shall bear the signature of the State Treasurer or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denominations thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 74, s. 3.)

§ 3846(qq) 14. Sale of bonds. — Subject to determination by the Governor and Council of State as to the manner in which said bonds shall be offered for sale, whether by publishing notices in certain newspapers and financial journals or by mailing notices or by inviting bids by correspondence or otherwise, the State Treasurer is authorized to sell said bonds at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina. All expenses necessarily incurred in the preparation and sale of the bonds shall be paid from the proceeds of such sale. (1925, c. 74, s. 4.)

§ 3846(qq) 15. Disposition of proceeds. — The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds the issuance of which has been anticipated by such bond anticipation notes) shall be placed by the treasurer in the construction fund known as the "State Highway Fund," but shall be used only for the purposes of this article. (1925, c. 74, s. 5.)

§ 3846(qq) 16. Issuance of notes by treasurer.—By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State have given consent if the treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or any installment of principal of any of said bonds then outstanding if there shall not be sufficient funds in the State Treasury with which to pay such interest or installment as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1925, c. 74, s. 6.)

Editor's Note.—Public Laws of 1929, ch. 144 § 1 amended subsection (c) of § 6, ch. 74, Public Laws of 1925, codified as this section, by striking out the word "loss" and substituting therefor the word "loan." This correction had already been made in the Code.

§ 3846(qq) 17. Payment of such notes.—Notes issued in anticipation of the sale of said bonds shall be paid with funds derived from the sale of the bonds unless otherwise provided for by the General Assembly and notes issued for the payment of interest and installments of principal shall be paid from funds provided by the General Assembly for the payment of such interest and principal when such funds are collected. Interest payments upon said notes may be evidenced by interest coupons in the Treasurer's discretion. (1925, c. 74, s. 7.)

§ 3846(qq) 18. Credit of state pledged.—The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1925, c. 74, s. 8.)

§ 3846(qq) 19. Coupons receivable for what claims. — The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 74, s. 9.)

§ 3846(qq) 20. Bonds exempt from taxation. —All of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. (1925, c. 74, s. 10.)

§ 3846(qq) 21. Fiduciaries may invest in bonds.—It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1925, c. 74, s. 11.)

§ 3846(qq) 22. Provisions for payment of Chowan River Bridge bonds; tolls abolished.—Out of any funds now in the hands of the state treasurer heretofore collected as tolls for the use of the Chowan River Bridge, the state treasurer shall, on June thirtieth, one thousand nine hundred and thirty-five, pay the semi-annual interest of eight thousand five hundred dollars ($8,500.00) due on the outstanding bonds issued in pursuance of authority of this article, and shall transfer to the state highway fund any unexpended balance from the said special Chowan River Bridge bond fund. Hereafter there shall be included in the regular appropriation act an authorization from the state highway fund, for the payment of interest and principal of the said Chowan River Bridge bonds as the same shall become due. From and after the ratification of this section, no tolls or other charges shall be made for the use of the said bridge. (1925, c. 74; s. 12; 1927, c. 176; 1935, c. 15.)

As to act abolishing tolls for use of bridge over Cape Fear River, see Public Laws 1935, chapter 17.

§ 3846(qq) 23. Collectors of tolls to give bonds.—The agents or employees whose duty it shall be to collect such tolls shall be required to give bond for their proper accounting of collections in such sum and with such sureties as the commission shall determine. All funds collected as provided for in section twelve shall be daily deposited with the State Treasurer, as required for the deposits of other State moneys by chapter one hundred twenty-eight, Public Laws of one thousand nine hundred and twenty-five, and any amendments thereof, and the same shall constitute a special fund for the payment of the interest or prin-

cipal on the bonds herein provided for, and/or the interest and/or principal of the notes and renewals thereof issued in anticipation of said bonds. It shall be the duty of the State Treasurer at intervals of six months, or shorter intervals, in his discretion, to pay over said funds to the State Sinking Fund Commission to be invested by it, as provided by law for other sinking funds, to create a fund for the discharge of the bonds and notes herein authorized, together with the interest on the same. (1927, c. 183, s. 12(a).

Art. 16. Abandonment of Highways, Roads, etc., Dedicated to the Public

§ 3846(rr). Time of non-use establishing abandonment. Time for assertion of right. Declaration of withdrawal to be filed and recorded.— Every strip, piece, or parcel of land which shall have been at any time dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by any deed, grant, map, plat, or other means, which shall not have been actually opened and used by the public within twenty years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, unless such right shall have been asserted within two years from and after March 8, 1921: Provided, that no abandonment of any such public or private right or easement shall be presumed until the dedicator or those claiming under him shall file and cause to be recorded in the register's office of the county where such land lies a declaration withdrawing such strip, piece, or parcel of land from the public or private use to which it shall have theretofore been dedicated in the manner aforesaid. (1921, c. 174, s. 1.)

Effect of Withdrawal before Acceptance.—The prospective dedication of streets, parks, etc., in the sale of a development of lands is not binding upon a city until acceptance, and neither the city nor the general public can acquire any rights thereunder against the owner of the land or purchasers from him where the offer of dedication has been withdrawn before acceptance, under the provisions of this section. Irwin v. Charlotte, 193 N. C. 109, 136 S. E. 368.

§ 3846(ss). Vested rights.—The provisions of section 3846(rr) shall have no application in any case where the continued use of any strip of land dedicated for street or highway purpose shall be necessary to afford convenient ingress, egress, and regress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway prior to March 8, 1921. (1921, c. 174, s. 2.)

§ 3846(tt). Law effective when; application of law.—This article shall be in force from and after March 8, 1921, and shall apply to dedications made after as well as before that date. (1921, c. 174, s. 3.)

Art. 17. Giving Publicity to Highway Traffic Laws through the Public Schools

§ 3846(uu). State Highway commission to prepare digest.—The State Highway Commission shall cause to be prepared a digest of the traffic laws of the State suitable for use in the public schools of the State and have the same published in pamphlet form and delivered on or before the first day of August, one thousand nine hundred and twenty-seven, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1.)

See note under section 3846(f).

§ 3846(vv). State superintendent of public instruction to distribute pamphlet.—The State Superintendent of Public Instruction shall cause to be delivered to the superintendents or principals of the various high schools of the State sufficient number of said pamphlets to supply one to each of the teachers engaged for said schools. (1927, c. 242, s. 2.)

§ 3846(ww). Pamphlets brought to attention of children.—The superintendents or principals, or other persons in charge of the public high schools of the State shall cause the contents of said pamphlets to be brought to the attention of all the children in attendance upon the said high schools in the form of lessons of at least one each week until the entire contents of said pamphlet have been read and explained. (1927, c. 242, s. 3.)

§ 3846(xx). Practice to be continued; highway commission to supply additional copies yearly.— This practice shall be continued during each school year and the State Highway Commission is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet, having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the State Highway Commission to be necessary. (1927, c. 242, s. 4.)

See note under section 3846(f).

Art. 18. State Highway Patrol

§ 3846(yy). How constituted. — The State Highway Commission is hereby authorized and directed to create under its control and supervision a division of the State Highway Patrol, consisting of one captain with headquarters in the State Highway Building at Raleigh, and not more than thirty-six (36) patrolmen. The State Highway Commission shall appoint such lieutenants and other officers, and divide the patrolmen into squads, and assign them to the performance of their duties in such portions of the State as may seem best to the State Highway Commission. The officers authorized to be appointed under this section shall be appointed with the approval of the Governor and shall serve at the pleasure of the Governor, and State Highway Commission, and be paid a compensation to be fixed by the State Highway Commission, with the approval of the Governor. (1929, c. 218, s. 1; 1931, c. 381.)

As to increase of number, see section 3846(mmm).

Editor's Note.—The Act of 1931 struck out the former section and inserted the above in lieu thereof.

By Public Laws 1933, c. 214, codified as sections 3846(hhh), et seq., the State Highway Patrol was transferred from the highway department to the revenue department.

§ 3846(zz). Oath of office; bond.—Each of the officers to be appointed under section 3846(yy) before entering upon the discharge of his du-

ties shall subscribe and file with the Chairman of the State Highway Commission an oath of office for the faithful performance of his duties and provide a bond in such sum as the Commission may determine conditioned upon his discharge of the duties of his office. (1929, c. 218, s. 2.)

See note under preceding section.

§ 3846(aaa). Rules and regulations. — The State Highway Commission is hereby authorized and empowered to make all necessary rules and regulations for the conduct of the members of the State Highway Patrol. (1929, c. 218, s. 3.)

See note under section 3846(yy).

§ 3846(bbb). Duties of patrol.—The State Highway Patrol herein created shall regularly patrol the State highways of the State, and enforce all laws and regulations respecting the use of motor vehicles upon the highways of the State, and all laws for the protection of the highways of the State, and to this end, and for this purpose the members of said Patrol are given the power and authority of Peace Officers for the service of any warrant or other process issuing from any courts of the State having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who in the presence of said officer is engaged in the violation of any of the laws of the State with respect to the use of motor vehicles upon the highways or of laws with respect to the protection of the highways of the State, and they shall have jurisdiction anywhere within the State irrespective of the county lines. (1929, c. 218, s. 4.)

§ 3846(ccc). Uniforms; furnishing motor vehicles.—The State Highway Commission shall adopt some distinguishing uniform for the members of said State Highway Patrol, and furnish each member of the Patrol with an adequate number of said uniforms and each member of said Patrol force when on duty shall be dressed in said uniform. The State Highway Commission shall likewise furnish each member of the Patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said Patrol while on duty. (1929, c. 218, s. 5.)

See note under section 3846(yy).

§ 3846(ddd). Establishment of district headquarters. — The State Highway Commission shall supply at its various district offices, or at some other point within the district if it shall be deemed advisable, suitable district headquarters, and the necessary clerical assistance for the Captain of the force at his headquarters in Raleigh and at the several district headquarters. (1929, c. 218, s. 6.)

See note under section 3846(yy).

§ 3846(eee). Shifting of patrolmen from one district to another.—The captain of the State Highway Patrol under such rules and regulations as the State Highway Commission may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate more than one district force at any point for special purposes. (1929, c. 21, s. 7.)

See note under section 3846(yy).

§ 3846(fff). Fees for service of process by patrolmen to revert to county.—All fees for arrests or service of process that may be taxed in the bill of costs for the various courts of the State on account of the official acts of the members of the State Highway Patrol shall be remitted to the general fund in the county in which the said cost is taxed. (1929, c. 218, s. 8.)

§ 3846(ggg). Expense of administering. — All expenses incurred in carrying out the provisions of this article shall be paid out of the maintenance funds of the State Highway Commission. (1929, c. 218, s. 9.)

See note under section 3846(yy).

§ 3846(hhh). State highway patrol transferred to revenue department.—The state highway patrol and all its books, office records, office, motors and all other equipment created by the acts of 1929, chapter 218, and as amended by the acts of 1931, chapter 381 codified as sections 3846(yy)-3846(ggg), shall be and the same is hereby transferred from the highway department to the department of revenue and from and after the first day of April, 1933, the aforesaid state highway patrol shall be under the direction and control of the department of revenue and subject to such orders, rules and regulations as may be adopted and put in force by the commissioner of revenue, and shall be required to perform other and additional duties as may be required of it by the commissioner of revenue in connection with the work of the motor vehicle bureau of this department. Said patrol shall also be required to perform such other and additional duties as may be required of it from time to time by the governor. The funds necessary to carry out the provisions of this section shall be appropriated to the department of revenue from the highway fund. Whenever, in said acts, the highway commission appears, the same shall be stricken out and in lieu thereof shall be inserted "the commissioner of revenue." (1933, c. 214, ss. 1, 2.)

The significant development is the consolidation of functions under the Department of Revenue and the use of the Highway Patrol to assist in the work. Thus the Motor Vehicle Bureau, the Motor Vehicle Theft Bureau, the Division of Oil and Gas Inspection, and the Division of Weights and Measures are now consolidated under the Department of Revenue. 11 N. C. Law Rev., 252.

§ 3846(iii). Duties as to inspection of illuminating oils, gasoline, etc.—In addition to the duties prescribed by the Acts of 1929, codified as sections 3846(yy)-3846(ggg), required to be performed by the highway patrol, the said highway patrol shall from time to time make an inspection of the illuminating oils, gasoline, naphtha, benzine, other petroleum products and other like liquid fluids used for the purpose of generating power in internal combustion engines for propulsion of motor vehicles and under such rules and regulations as may be adopted by the department of revenue; to collect samples of such oils, gasoline and other petroleum products as are offered for sale in this state and to transmit the same under such regulations as may be prescribed therefor by the commissioner of revenue to the depart-

ment of agriculture in the city of Raleigh for analysis, and otherwise to do and perform all duties of inspection now required by law to be made of such illuminating oils, gasoline, and other petroleum products. (1933, c. 214, s. 3.)

§ 3846(jjj). Deputy inspectors of weights and measures.—The aforesaid highway patrol, or such members thereof as have the necessary qualifications and so designated by the commissioner of revenue, shall act in the capacity of, and perform such duties as required of, deputy inspectors of weights and measures as defined in chapter 261, public laws 1927 [sections 8064(k)-8064(l)], and their activities shall be governed by the same supervision, rules and regulations as set forth in said chapter 261, public laws 1927, relating to deputy or local inspectors: Provided, however, that the appointment, employment and/or assignment of said highway patrolman shall be made by the commissioner of revenue. (1933, c. 214, s. 4.)

§ 3846(kkk). Inspection of pumps, etc.—The activities of the highway patrol as mentioned in this law shall relate to the inspection of measuring pumps, measures, containers, devices and apparatus used in measuring and/or dispensing to the public gasoline, lubricating oil and illuminating oil and other petroleum products. (1933, c. 214, s. 5.)

§ 3846(lll). Analysis by commissioner of agriculture.—The commissioner of agriculture shall from time to time, as samples may be transmitted to him for analysis, provide for the analysis and examination of such samples as may be transmitted to him by the department of revenue or others under its direction in the laboratory now provided for such analysis, and shall cause to be promptly reported to the commissioner of revenue the results of such analysis. (1933, c. 214, s. 6.)

§ 3846(mmm). Number of state highway patrol increased; subordinate officers; salaries.—The state highway patrol, created and existing by virtue of chapter two hundred and eighteen of the Public Laws of one thousand nine hundred and twenty-nine, as amended [§§ 3846(yy)-3846(lll)] shall consist of one hundred and twenty-one persons, inclusive of one person to be designated as captain, and such additional subordinate officers as the commissioner of revenue, with the approval of the governor and advisory budget commission, shall direct. The captain, other officers, and members of the state highway patrol shall be paid such salary as may be established and fixed under the provisions of chapter two hundred seventy-seven, Public Laws of one thousand nine hundred and thirty-one, and chapter forty-six of the Public Laws of one thousand nine hundred and thirty-three, codified as sections 7521(k) et seq. (1935, c. 324, s. 1.)

§ 3846(nnn). Division of highway safety authorized; duties. — The commissioner of revenue shall have the right to set up in his department a division of highway safety, and to make rules and regulations governing said division, and shall have the right to assign to said division of highway safety the direction and control of the state highway patrol, the responsibilities of the administration of the Uniform Drivers' Law, ratified on February twenty-eighth, one thousand nine hundred and thirty-five, and to assign to said division such other duties and work, not inconsistent with the provisions of this law, as he may deem proper. (1935, c. 324, s. 2.)

§ 3846(ooo). Additional duties and authority of patrol; constituted peace officers; arrest power; jurisdiction. — In addition to the duties and authority conferred on the state highway patrol by chapter two hundred and eighteen of the Public Laws of one thousand nine hundred and twenty-nine, codified as sections 3846(yy) et seq., and by section one of chapter two hundred and fourteen of the Public Laws of one thousand nine hundred and thirty-three, codified as section 3846(hhh), the said state highway patrol shall be subject to such rules and regulations as may be adopted by the commissioner of revenue, and shall regularly patrol the highways of the State and enforce all laws and regulations respecting travel upon the highways of the State and all laws for the protection of the highways of the State, and to this end and for this purpose, the members of the said patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the State having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who, in the presence of said officer, is engaged in the violation of any of the laws of the State regulating travel upon the highways, or of laws with respect to the protection of the highways, and they shall have jurisdiction anywhere within the State, irrespective of county lines. The state highway patrol or any member or members thereof shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the governor, and such officers may at any time and without special authority either upon their own notion or at the request of any sheriff or local police authority make arrests of persons accused of highway robbery, bank robbery, murder, or other crimes of violence. (1935, c. 324, s. 3.)

§ 3846(ppp). Relieved of duties of oil and gasoline inspection.—The state highway patrol shall be relieved of all duties with respect to the inspection of gasoline and oil and the collection of samples, as provided in sections 3846(iii) and 3846(jjj), and the duties therein referred to shall be performed by such persons, other than the highway patrol, as may be designated by the commissioner of revenue. (1935, c. 324, s. 4.)

§ 3846(qqq). Co-operation between patrol and local officers. — The commissioner of revenue, through the division of highway safety, shall encourage the co-operation between the highway patrol and the several municipal and county peace officers of the State for the enforcement of all traffic laws and the proper administration of the Uniform Drivers' License Law, and arrangements for compensation of special services rendered by such local officers out of the funds allotted to the division of highway safety may be made, subject to the approval of the director of the budget. (1935, c. 324, s. 5.)

§ 3846(rrr). State-wide radio system authorized; use of telephone lines in emergencies.—The commissioner of revenue, through the division of highway safety, is hereby authorized and directed, as soon as practicable, to set up and maintain a state-wide radio system, with adequate broadcasting stations so situate as to make the service available to all parts of the State for the purpose of maintaining radio contact with the members of the state highway patrol and other officers of the State, to the end that the traffic laws upon the highways may be more adequately enforced and that the criminal use of the highways may be prevented.

If the director of the budget shall find that the appropriation provided for the department is not adequate to take care of the entire cost of the radio service herein provided for, after providing for the administration of other provisions of this law, the state highway and public works commission, upon the order of the director of the budget and approved by the advisory budget commission, shall make available such additional sum as the said budget commission may find to be necessary to make the installation and operation of such radio service possible; and the sum so provided by the state highway and public works commission shall constitute a valid charge against the appropriation item of betterments for state and county roads.

The commissioner of revenue is likewise authorized and empowered to arrange with the various telephone companies of the State for the use of their lines for emergency calls by the members of the state highway patrol, if it shall be found practicable to arrange apparatus for temporary contact with said telephone circuits along the highways of the State.

In order to make this service more generally useful, the various board of county commissioners and the governing boards of the various cities and towns are hereby authorized and empowered to provide radio receiving sets in the offices and vehicles of their various officers, and such expenditures are declared to be a legal expenditure of any funds that may be available for police protection. (1935, c. 324, s. 6.)

§ 3846(sss). Certain sections amended and modified.—Sections 2621(127)-2621(145) and sections 3846(yy)-3846(lll) are hereby amended and modified so as to conform to the provisions of this law [§§ 3846(mmm)-3846(ttt)], and all provisions of said sections not inconsistent with the provisions of this law are continued in full force and effect. (1935, c. 324, s. 8.)

Art. 19. Management of County Roads Vested in State Highway Commission

§ 3846(1). County roads managed by State Highway Commission; trustees of road districts holding over; county commissioners.—From and after July first, one thousand nine hundred and thirty-one, the exclusive control and management and responsibility for all public roads in the several counties shall be vested in the State Highway Commission as hereinafter provided, and all county, district, and township highway or road commissioners, by whatever name designated, and whether created under public, public-local, or private acts, shall be abolished: provided, however,

(a) Where any road district comprises territory in two or more counties, the commissioners of said district may continue to function as trustees of said districts for a period of two years, for the purpose and with full authority to sell or otherwise dispose of any property belonging to said district not taken over by the State Highway Commission. The net proceeds from the sale of all such district property shall by said trustees be applied to the creation of a sinking fund adequate, as far as possible, for the retirement of all bonds or other indebtedness outstanding against said district, or to the immediate payment of such indebtedness. After the debts of such district have been provided for, if a surplus remain, it shall be turned over to the State Highway Commission and used by it solely for the permanent or semi-permanent improvement of the roads within the territory of such road district.

(b) Provided, further, that for the purpose of providing for the payment of any bonded or other indebtedness, and for the interest thereon, that may be outstanding as an obligation of any county, district, or township commission herein abolished, the board of county commissioners of the respective counties are hereby constituted fiscal agents, and are vested with authority and it shall be their duty to levy such taxes on the taxable property or persons within the respective county, district, or township by or for which said bonds or other indebtedness were issued or incurred and as are now authorized by law to the extent that the same may be necessary to provide for the payment of such obligations; and the respective commissions herein abolished shall on or before July first, one thousand nine hundred and thirty-one, turn over to said board of county commissioners any moneys on hand or evidences of indebtedness properly applicable to the discharge of any such indebtedness (except such moneys as are mentioned in paragraph (a) above); and all uncollected special road taxes shall be payable to said board of county commissioners, and that the portion of said taxes applicable to indebtedness shall be applied by said commissioners to said indebtedness, or invested in a sinking fund according to law. All that portion of said taxes or other funds coming into the hands of said county commissioners and properly applicable to the maintenance or improvement of the public roads of the county shall be held by them as a special road fund and disbursed upon proper orders of the State Highway Commission.

(c) Provided, further, that in order to fully carry out the provisions of this section the respective boards of county commissioners are vested with full authority to prosecute all suitable legal actions. (1931, c. 145, s. 7.)

See note under section 3846(f).

Cited in In re Edwards, 206 N. C. 549, 550, 174 S. E. 505.

§ 3846(2). Allocation of State Highway funds for use in counties.—After fully and completely complying with the provisions of the Public Laws of one thousand nine hundred and twenty-one, chapter two, section twenty-seven, as amended by the Public Laws of one thousand nine hundred

and twenty-three, chapter two hundred and sixty-three, section one, and as amended by the Public Laws of one thousand nine hundred and twenty-five, chapter forty-five, section four, and as amended by the Public Laws of one thousand nine hundred and twenty-five, chapter one hundred and thirty-three, section two [§ 3846(ii)], and with the Public Laws of one thousand nine hundred and twenty-seven, chapter ninety-five [§§ 3772(a)-3772(p)], and all laws and parts of laws amendatory thereof, the State Highway Commission shall set aside and appropriate from the State Highway funds a sum sufficient to provide for the proper care, maintenance and improvement of county road systems of the several counties herein provided for; for the reconstruction of such portion thereof as in the opinion of the State Highway Commission should be reconstructed from time to time and for the opening and construction of new roads; such said sum to be equal in amount to the estimated revenues to be derived from a tax of two cents per gallon on motor vehicle fuels levied or to be levied under the provisions of law for the benefit of the State Highway funds, said amount, however, not to be less than six million dollars in any one year. It being the intent and purpose of this section that the fund herein set up for county road maintenance shall have priority in the use of State Highway surplus maintenance funds over any new construction work, and said fund shall be by the State Highway Commission used for the care, maintenance, improvement, construction, and reconstruction of the county road system in the several counties as may be needed for such purposes, to the end that the road system in the several counties shall be fairly, justly, and equitably maintained and improved in accordance with the traffic requirements of the people of the several counties and the convenience of the traveling public; special attention being given to roads used by public school trucks or busses, and to this end the State Highway Commission is hereby authorized to classify the various and different roads in the several counties in the State and establish standards for the maintenance and improvement thereof. (1931, c. 145, s. 8.)

See note under section 3846(f).

Where the complaint in an action on the bond given by a contractor for construction of a highway alleges that a statement of the claim against the surety on the bond was filed with the defendant surety company within six months after the project was completed, it is a sufficient allegation of compliance with the provisions of this section. Bank of Wadeboro v. Northwestern Casaulty, etc., Co., 202 N. C. 148, 162 S. E. 236.

§ 3846(3). Disposition of road equipment and materials; local authorities prohibited from purchasing new equipment; retirement of debts for equipment. — On July first, one thousand nine hundred and thirty-one, the boards of county commissioners and the several county, district, and township highway or road commissions in each county shall turn over to the State Highway Commission or its duly authorized agents, all road machinery, equipment, teams, material, and supplies of every kind on hand or belonging to said commissioners or commissions, and acquired by them from road funds; and all such property as may be accepted by the State Highway Commission, shall be duly inventoried and appraised by said State Highway Commission or its duly authorized agents. Any such property held by any board of county commissioners or any county, district, or township highway or road commission not deemed by said State Highway Commission suitable or efficient for road work may be sold or exchanged by the board of county commissioners of the county or by the State Highway Commission with the approval of the board of county commissioners of the county, and the proceeds thereof applied to the road work in said county, or the payment of any debt due for road machinery, or road debt, or any bonds issued for road purposes. From and after the passage of this article the road-governing authorities of any and all counties in the State are prohibited from purchasing or selling any road machinery except the purchase of supplies for maintenance and repairs of the machinery owned at the date of the passage of this article, without the approval of the State Highway Commission. In the event the road-governing authorities of any county in the State shall have purchased any road machinery and given notes or other evidences of debt therefor or owe for some on open account, which are now outstanding and unpaid, such road-governing authorities are authorized to make settlement with the holders of such notes or other evidences of debt, either by the surrender of the property on such terms as may be agreed upon or otherwise. (1931, c. 145, s. 9.)

See note under section 3846(f).

§ 3846(4). State Highway Commission given power of eminent domain. — To the end that the State Highway Commission may the better take over the maintenance and improvement, reconstruction and construction of the public roads in the various counties, together with the bridges and railroad grade crossings thereon, and may the better carry out the intent and purposes of this article, the State Highway Commission is vested, in respect of and to the public roads in the various counties, with the same powers of and responsibility of eminent domain as are conferred and imposed upon the State Highway Commission in chapter two of the Public Laws of one thousand nine hundred and twenty-one, and acts amendatory thereto [§ 3846(bb)], in respect of and to the State Highway System, and the State Highway Commission is authorized and empowered to adopt rules and regulations governing the use of the various county road systems and to promulgate the same. (1931, c. 145, s. 10.)

See note under section 3846(f).

§ 3846(5). Mapping of county roads. — On or before May first, one thousand and nine hundred and thirty-one, the designation of all roads comprising the several county road systems as are proposed to be taken over for maintenance and improvement by the State Highway Commission shall be mapped, and there shall be publicly posted at the courthouse door in each county a map of all the roads in such county to be contained in the county road system of such county, and the board of county commissioners of such county and the street-governing body of each city or town in such county shall be notified of the roads that are to be selected and to be made a

part of the county road system of such county. If no objection is made by the board of county commissioners or the street-governing body of any city or town in such county within thirty (30) days after the notification herein provided for, then and in that event the roads to which no objections are made shall be and constitute the county road system for such county. If objections are made by the board of county commissioners of the county or the street-governing body of any city or town in the county, the State Highway Commission shall as soon as practicable send an agent to such county who shall take the matter up with the view of adjusting the objections and agreeing with the county commissioners or the street-governing body of any city or town. If such agent and the board of county commissioners or the street-governing body of any city or town cannot agree, then the whole matter shall be heard and determined by the State Highway Commission in session under such rules and regulations as may be made by the State Highway Commission. Notice of the time and place of the hearing shall be given by the State Highway Commission at the courthouse door and in some newspaper, if any, published in the county, at least ten days prior to the hearing, and the decision of the State Highway Commission shall be final. It is the intent and purpose of this article that all roads legally established and used as public roads in the various counties at the time of the ratification of this article are to and shall be included in the county road systems of the various counties. Maps showing the proposed roads to constitute the county road systems in the several counties have been printed and bound and are now on file in the office of the State Highway Commission, and are the maps which shall be posted. If it shall appear to the State Highway Commission prior to the posting of the maps under this section that any road or roads which should be included in the county road systems of any county have been omitted from the map of any county as printed, the commission may change such maps so as to include such road or roads before posting. (1931, c. 145, s. 11.)

See note under section 3846(f).

§ 3846(6). Road taken over not to be abandoned without consent of county commissioners.—No road, which shall be a part of any county road system as the same shall be finally adopted in pursuance of section 3846(5) shall be abandoned or materially changed without the consent of the board of county commissioners of the county in which said road is located. (1931, c. 145, s. 12.)

§ 3846(7). Petition by county commissioners to change or abandon roads or build new roads.—The board of county commissioners of any county may, when in the opinion of said board the best interests of the people of said county or of any particular community thereof will be subserved thereby, petition the State Highway Commission to change or abandon any road in the county road system or to add thereto any new road. Said petition shall be filed with the chairman of the State Highway Commission, who shall personally or by his duly constituted deputy, after conference with the board of county commissioners of said county, make diligent inquiry into and study of the proposed change, abandonment, or addition, and if in his opinion the public interest demands the same, such change, abandonment, or addition shall be made. Provided, however, that if any such change or abandonment of a road shall affect a road connecting with any street of any city or town in such county, no such change or abandonment shall be made until the street-governing body of such town shall have been duly notified thereof and given opportunity to be heard upon the question. If the chairman of the State Highway Commission shall be of the opinion that the public interest does not demand the change, abandonment, or addition petitioned for, the board of county commissioners filing such petition may appeal from his decision to the whole commission, who shall, at such time and place as shall be designated, due notice of which shall be given the parties interested, give public hearing on the matter. The action of the State Highway Commission upon all such matters shall be final. Provided, however, any petition which has been declined by the State Highway Commission may be again presented under the provisions hereof after the expiration of twelve (12) months. (1931, c. 145, s. 13.)

See note under section 3846(f).

§ 3846(8). Petition of citizens to county commissioners to ask Commission to make road changes.—When any number of citizens of any county or any community thereof, not less than twenty-five (25), shall sign and file with the board of county commissioners of such county a petition asking that any road in the county road system of the county be changed or abandoned or that any new road be added to said system, it shall be the duty of said board of county commissioners to make full and thorough investigation, and if in their opinion the best interests of the people of said county or of the particular community thereof to be affected require such change, abandonment, or addition, the said board of county commissioners shall file and prosecute before the State Highway Commission the petition provided for in section 3846(7). (1931, c. 145, s. 14.)

See note under section 3846(f).

§ 3846(9). Public hearings on road changes.—All public hearings provided for in sections 3846(7) and 3846(8) shall, when practicable, be held in the county in which the road or roads under consideration and the subject of said hearing, shall be located. (1931, c. 145, s. 15.)

§ 3846(10). Erection of road signs; load limits for bridges.—The State Highway Commission shall, as rapidly as practicable, after the selection and adoption of the county road systems of the several counties, erect proper and uniform signs upon the roads of said county road systems directing persons to roads and places of importance. The State Highway Commission shall have authority to determine the maximum load limit for any and all bridges on the State Highway System or on any county road systems, to be taken over under this article, and post warning signs thereon, and it shall be unlawful for any person, firm,

or corporation to transport any vehicle over and across any such bridge with a load exceeding the maximum load limit established by the State Highway Commission and posted upon said bridge, and any person, firm, or corporation violating the provisions of this section shall, in addition to being guilty of a misdemeanor, be liable for any or all damages resulting to such bridge because of such violation, to be recovered in a civil action, in the nature of a penalty, to be brought by the State Highway Commission in the Superior Court in the county in which such bridge is located or in the county in which the person, firm, or corporation is domiciled; if such person, firm, or corporation causing the damage shall be a nonresident or a foreign corporation, such action may be brought in the Superior Court of Wake County. (1931, c. 145, s. 16.)

See note under section 3846(f).

§ 3846(11). Filing of complaints with Commission; hearing and appeal.—In the event of failure to maintain the roads of any county road system in good condition, the board of county commissioners of such county may file complaint with the State Highway Commission. When any such complaint is filed, the State Highway Commission shall at once investigate the same, and if the same be well founded, the said commission shall at once order the repair and maintenance of the roads complained of and investigate the negligence of the persons in charge of the roads so complained of, and if upon investigation the person or persons in charge of the road complained of be at fault, he may be discharged from the service of the commission. The board of commissioners of any county, who shall feel aggrieved at the action of the State Highway Commission upon complaint filed, may appeal from the decision of the State Highway Commission to the Governor, and it shall be the duty of the Governor to adjust the differences between the board of county commissioners and the State Highway Commission. (1931, c. 145, s. 17.)

See note under section 3846(f).

§ 3846(12). District road commissions. — When any road district comprised of territory in two or more counties with a population in excess of twenty thousand inhabitants, as shown by the census of one thousand nine hundred and thirty, has heretofore been established, the Governor shall appoint a road commission for the said district, consisting of three members, which shall, with respect to the roads in said districts, have and exercise the same rights and duties as the board of county commissioners of said county have and exercise with respect to the county road systems under sections 3846(5)-3846(8), 3846(11) and this section. Members of the commission shall be appointed for a term of two years. Vacancies in the commission shall be filled by the Governor. (1931, c. 145, s. 18.)

§ 3846(13). Directors of county roads.—In order to carry out the purposes of this article the State Highway Commission, by and with the consent of the Governor, shall designate some person or persons as director or directors of county roads who shall be a representative or representatives of the State Highway Commission to deal with the boards of county commissioners of the several counties with reference to the county road systems therein. The duties of said director, or directors, of county roads may be combined with the duties of some other position now or hereafter maintained by the State Highway Commission. Such director, or directors, of county roads shall, from time to time and as often as practicable, visit the several counties in the State and confer with the board of county commissioners of such counties with reference to the road problems in the several counties.

When the board of county commissioners of any county shall request a conference with a director of county roads on the road problems of such county, a director of county roads shall, as soon thereafter as practicable, make a special visit to said county and meet and confer with the said board of county commissioners. The directors of county roads are especially charged with the duty of seeing that the services rendered to the various counties throughout the State are fair and equal, taking into consideration the traffic demands of the various counties. The director or directors of county roads shall work under the direction of and report to the State Highway Engineer or the county highway maintenance engineer, or such other person as the State Highway Commission may designate. (1931, c. 145, s. 19.)

See note under section 3846(f).

§ 3846(14). General duties of Commission looking toward taking over county roads.—Prior to July first, one thousand nine hundred thirty-one, the State Highway Commission shall make full and thorough investigation of the county road systems of the several counties to be taken over by the State Highway Commission and shall make all necessary preparation and provide all necessary machinery, implements, supplies and personnel, to enable them effectively and efficiently to take over and control for supervision and maintenance the county road systems of the several counties, on July first, one thousand nine hundred thirty-one. If objection to the county road systems as outlined on the map as posted by the State Highway Commission under the provisions of section 3846(5) for any county shall be made as provided in section 3846(5) and the question of the final roads to be included in the county road system of such county shall not have been determined by July first, one thousand nine hundred thirty-one, then and in that event the State Highway Commission shall take over for control, supervision and maintenance in such county all roads included in the map as posted by the said State Highway Commission pending the final determination of the question as to what roads are to be finally included in the county road system of such county. (1931, c. 145, s. 20.)

See note under section 3846(f).

§ 3846(15). Prohibition of local road taxes and bonds and construction of roads by local authorities; existing contracts.—From and after the first day of July, one thousand nine hundred and thirty-one, no county or road district by authority of any public, public-local, or private act, shall levy any taxes for the maintenance, improvement, re-

construction, or construction of any of the public roads in the various and several counties of the State, nor shall any county, through the board of commissioners thereof or the Highway Commission, nor shall any district or township highway commission, issue or sell or enter into any contract to issue or sell any bonds heretofore authorized to be issued and sold, but unissued and unsold, for the purpose of obtaining money with which to improve, maintain, reconstruct, or construct roads, except for the purpose of discharging obligations entered into prior to the ratification of this article, and all acts authorizing the board of county commissioners, the county highway commissions, district highway or township commissions, to issue and sell bonds for the purpose aforesaid, are hereby amended so as to conform to this section. No board of county commissioners nor county highway commission, nor district nor township highway commission from and after the passage of this article shall enter into any contract to build or construct roads in the various and several counties except for such projects as can be completed and paid for prior to July first, one thousand nine hundred and thirty-one. All contracts heretofore entered into by any county through the board of county commissioners, county highway commission, and all contracts heretofore entered into by any district or township highway commission which shall be incomplete on July first, one thousand nine hundred and thirty-one, shall be taken over by the State Highway Commission and completed by the State Highway Commission by the use of money and funds applicable thereto, by the terms of the said contracts. Nothing in this section or this article shall be construed to prohibit the levying of taxes authorized by law for the payment of interest or principal on outstanding bonds or other evidences of debt lawfully issued. Any county or road district which has heretofore issued bonds or other evidences of debt by authority of law for road improvement purposes may refund said bonds or other evidences of debt under and pursuant to the laws of the State of North Carolina relative thereto. (1931, c. 145, s. 35.)

See note under section 3846(f).

§ 3846(16). Definitions. — Wherever the word "county" or the words "county commissioners" appear in this article, they shall be construed to include any commission or commissioners provided for in section 3846(12). (1931, c. 145, s. 36.)

§ 3846(17). Public ferries and toll bridges. — The State Highway Commission shall succeed to all the rights and duties of the county commissioners or county highway commissions with respect to the maintenance and operation of any public ferries or toll bridges forming links in the county highway systems: Provided, that where there is an outstanding indebtedness against any such ferries or bridges, that all tolls collected shall be turned over to the County Treasurer to be applied to debt service until all indebtedness against such ferry or bridge has been discharged;

Provided, further, that the state highway and public works commission and board of commissioners of Dare county are authorized and empowered to free the Roanoke Sound Bridge of tolls upon such conditions as may be mutually agreed to, and any monies paid by the state highway and public works commission for this purpose shall be a valid charge against the appropriation for betterments—state and county roads. (1931, c. 145, s. 38; 1935, c. 322.)

See note under section 3846(f).

Editor's Note.—The amendment of 1935 added the proviso at the end of this section.

§ 3846(18). Conflicting laws repealed; local laws requiring work on roads or payment of penalty.—All laws and clauses of laws in conflict with the provisions of this article to the extent of such conflict are hereby repealed: All laws, whether public, public-local, or private, authorizing or empowering the board of county commissioners or any highway commission, whether county, township, or district, to work citizens upon the public roads in lieu of the payment of a road tax, or authorizing or empowering the collection of a sum of money in lieu of working upon the public roads, are hereby repealed; and from and after the first day of July, one thousand nine hundred and thirty-one, no person shall be compelled to work upon the public roads, or to pay a sum of money in lieu thereof, in any of the several counties of the State, except under the provisions of this article. (1931, c. 145, s. 39.)

Art. 20. District Prison Camps and Working Prisoners on Roads

§ 3846(19). Establishment of prison districts and camps: Present camps.—As soon as practicable after the ratification of this article there shall be established in this State by the State Highway Commission, with the approval of the Governor, such number of prison districts, not less than five, as they shall determine advisable. The State Highway Commission shall, as soon thereafter as practicable, with the approval of the Governor, locate the prison camp or camps in each of said districts. Until such time as it shall be feasible for the State Highway Commission to build and construct prison camps in accordance with the provisions of this article, it shall be the duty of the State Highway Commission to take over and acquire by contract, under terms to be approved by the Governor, such county or road district prison camps as in their opinion shall be necessary for the use of the county prisoners on the public roads of the several county road systems as hereinafter provided. The State Highway Commission, with the approval of the Governor, in lieu of locating and constructing prison camps in any of the districts, may acquire by contract and take over prison camps in any county or road district and may make such alterations and additions thereto as shall be necessary to render the same suitable for a district prison camp. (1931, c. 145, s. 26.)

See note under section 3846(f).

§ 3846(20). Plans and specifications for prison camps.—Any and all district prison camps, or additions made to present county camps taken over by the State Highway Commission as herein provided for, shall be constructed, altered or changed, under plans and specifications prepared by the State Highway Commission with the approval of the Governor, of the State Board of Health, and

the State Board of Public Welfare and Charities, and the construction, alteration, or changes shall be done by the State Highway Commission, and, as far as shall be practicable, prisoners shall be used to do the work. (1931, c. 145, s. 27.)

See note under section 3846(f).

§ 3846(21). State Highway Commission to control camps.—The district prison camps herein provided for, and all county prison camps acquired by the State Highway Commission in lieu of district prison camps shall be under the control and direction of the State Highway Commission, and operated under rules and regulations to be made by the State Highway Commission, and approved by the Governor and the State Board of Public Welfare and Charities, and subject to such rules and regulations so adopted and approved, the State Highway Commission shall establish grades for prisoners according to conduct, and so far as possible introduce the honor system, and may transfer honor prisoners to honor camps. Prisoners may be transferred from one district camp to another, and the State Highway Commission may where it is deemed practical to do so establish separate camps for white prisoners and colored prisoners. In each district camp quarters shall be provided for the care and maintenance of such prisoners as may be sick, and a physician may be employed for such portion of his time as may be necessary and assigned to each of the several camps, and such of the prisoners as may be chosen may be used as attendants or nurses notwithstanding that such prisoners may not have qualified for such work as may be required by law; and any such prisoners as may have special qualifications to perform labor other than labor upon the public roads may be assigned to such special duties as the State Highway Commission may determine. All necessary directors, physicians, guards or supervisors, or any other necessary employees for the proper care, keep and handling of such prisoners, shall be employed by the State Highway Commission by and with the consent and approval of the Governor, and serve at the pleasure of the State Highway Commission. (1931, c. 145, s. 28.)

See note under section 3846(f).

§ 3846(22). Employment of prisoners on roads.—All able-bodied prisoners committed or assigned to the district prison camps shall be employed in the maintenance and construction of roads in the public road system of the several counties, or upon the State Highway system, or assigned to such special duty in connection with the prison camps, or the preparation and repair of all road equipment and supplies as the State Highway Commission may determine. (1931, c. 145, s. 29.)

See note under section 3846(f).

§ 3846(23). Prisoners in various camps and jails to be turned over to State Highway Commission.—On the first day of July, one thousand nine hundred and thirty-one, all prisoners who shall be in any county prison camp or in jail assigned to work on the county roads, under sentence of any court of competent jurisdiction, except as hereinafter provided, shall be by the various county authorities turned over to the State Highway Commission or its duly authorized agents, and the State Highway Commission shall take over all such prisoners under and pursuant to the provisions of this act on the first day of July, one thousand nine hundred and thirty-one; and all authority vested by law in any board of county commissioners, any county highway commission, any district highway commission, or any other board or commission as to such prisoners, shall pass to and vest in the State Highway Commission. The county authorities having custody of such prisoners shall, upon forms provided by the State Highway Commission, make a complete list of all such prisoners in custody July first, one thousand nine hundred and thirty-one, giving their names, terms of imprisonment, date of commitment, and expiration of terms, together with records of such prisoners, and such other and further information as may be required by the State Highway Commission, and deliver the same, together with the original commitments, to the State Highway Commission, or its duly authorized agents, on the first day of July, one thousand nine hundred and thirty-one. And the State Highway Commission or its duly authorized agents shall, upon such delivery, execute proper receipts to the county authority for such documents and the prisoners delivered as herein provided for. From and after the first day of July, one thousand nine hundred and thirty-one, the various judges and courts of this State, in lieu of assigning persons convicted of violating any of the criminal laws of the State to work upon any county roads under the control of any board of commissioners or any highway commission, shall assign such person so convicted to work upon the roads of the State under the control of the State Highway Commission pursuant to the provisions of this article, and all such laws, public, public-local, or private, heretofore enacted, authorizing the various judges and courts of the State to assign persons convicted to work upon the public roads are hereby amended so as to conform to the provisions of this article, to the end that such persons so convicted shall be assigned to the various prison camps by this article established, to work upon the public roads pursuant to the provisions of this article. But this article shall not be deemed or considered as authorizing any person sentenced under the provisions thereof to have been sentenced to the State Prison, or State Penitentiary, but such person so sentenced shall be deemed to have been sentenced under the provisions either of this article or of such public, public-local, or private acts heretofore enacted authorizing the various judges and courts of the State to sentence persons convicted of crime to work upon the public roads: Provided, that any county, city or town now operating, or that may hereafter operate a farm by convict labor may retain a sufficient number of prisoners for the operation of same, and the judges in the courts of said county, city or town, in lieu of sentencing persons convicted to the Highway Prison Camps, shall sentence a sufficient number to labor on said farms for the necessary operation of same. (1931, c. 145, s. 30.)

See note under section 3846(f).

§ 3846(24). Notification of prisoners sentenced; transfer of prisoners. — The clerks of the Superior Courts in the various counties and the clerks of other courts in the various counties shall notify in writing the superintendent, or person in charge of the district prison camp of the district in which said county is located, and mail a copy thereof to the State Highway Commission at Raleigh of the various persons who shall be sentenced to said district camps, and immediately, or as soon as practicable thereafter, the superintendent of said district prison camp shall designate some person to transfer such prisoners to the place of duty assigned to them, and the clerks and sheriffs of the various counties shall deliver said prisoners to the person so designated together with proper commitments. (1931, c. 145, s. 31.)

See note under section 3846(f).

§ 3846(25). Minimum term for commitment.— No person shall be committed to any of the district camps by any court in this State, nor shall any person be received into the district camps, whose term of imprisonment is less than thirty (30) days: Provided, that in criminal actions in which a Justice of Peace has final jurisdiction no county shall be liable for or taxed with any costs. (1931, c. 145, s. 32; 1933, c. 39.)

Editor's Note. — The sentence specified in this section was reduced from sixty to thirty days by Public Laws 1933, c. 39.

§ 3846(26). Cost of keeping prisoners borne by State Highway Commission. — The cost and expense of construction of the various prison camps, the care, transportation and maintenance of prisoners and their guarding and supervision shall be paid by the State Highway Commission from the county road maintenance funds provided in § 3846(2): Provided, however, when prisoners are used upon the State Highway systems in construction or maintenance, the cost and expense of transportation and maintenance of such prisoners, their guarding and supervision, shall be paid from the funds appropriated to such purposes in this act. (1931, c. 145, s. 33.)

See note under section 3846(f).

§ 3846(27). Employment of prisoners in State penitentiary. — The State Highway Commission may employ prisoners confined in the State's Penitentiary for the construction, improvement, or maintenance of the State Highway system, and for the various county systems to be taken over under sections 3846(1) et seq.: Provided, the compensation of said prison labor shall not exceed the cost at which similar work could be produced by free labor at prevailing prices existing in the district where the work is performed, and may, where it is practical to do so, use material in such road work produced in whole or in part by prisoners confined in the State's Prison or the district prison camps. In the event of disagreement between the State Highway Commission and the Board of Directors of the State's Prison as to whether it is practical and feasible in a given instance to employ prisoners or use material produced by the prisoners confined in the State's Prison such disagreement shall be referred to the Governor of the State, and his decision of the matter shall be final and the same right of appeal granted Directors of the State's Prison shall upon request also be given to any North Carolina manufacturers and producers whose products or materials have been or may be used in the maintenance or construction of the public highways of this State: Provided, nothing contained in this section shall be construed in such manner as to prevent the State Highway Commission from meeting all requirements of the United States Bureau of Public Roads on Federal Aid projects. (1931, c. 145, s. 34.)

See note under section 3846(f).

Art. 21. Counties May Use Surplus Road Funds and Sell Camp Sites and Supplies

§ 3846(28). Application of funds for debt service; payment into general county fund. — Any county, road and/or highway district which has on hand on July first, one thousand nine hundred thirty-one, any surplus of road maintenance funds shall use the said surplus in the retirement of any bonds issued for road purposes or interest accruing thereon. In the event there shall be no outstanding bonds and no interest due, such surplus shall be paid over to the general county fund. (1931, c. 232, s. 1.)

§ 3846(29). Sale of camp sites and other real estate and application of proceeds.—Any county, road and/or highway district which owns a camp site or other real estate built or purchased with road or highway funds, may sell and convey such camp site or real estate, and the money so received therefrom shall be used to retire any bonds issued for road or highway purposes, or interest due thereon. If there are no outstanding bonds, the money received shall be turned over to the general county fund. (1931, c. 232, s. 2.)

§ 3846(30). Sale of unused supplies and application of proceeds.—Any county, and/or road or highway district which has on hand on July first, one thousand nine hundred thirty-one, any unused supplies such as food, hay, grain and other supplies used in and around county camps, may sell and dispose of same and the money so received shall be put into the general county fund. (1931, c. 232, s. 3.)

§ 3846(31). Application of insurance funds collected on burned buildings. — In event any building or buildings erected or constructed with road or highway funds shall be damaged or destroyed by fire and the same were insured, the insurance when collected shall be used to retire any outstanding bonds issued for road purposes and interest thereon, and if there are no outstanding bonds the money shall be turned over to the general county fund: Provided, that said fund received from insurance may be used to rebuild, repair and equip any jail or other building used to house prisoners. (1931, c. 232, s. 4.)

§ 3846(32). Use of funds to retire current liabilities and deficits.—In lieu of paying the moneys received as herein set out on bonds and interest, if there are any current liabilities or current deficits, the money may be used for discharging such current liabilities and deficits. (1931, c. 232, s. 5.)

CHAPTER 71
SALARIES AND FEES

Art. 1. Payment of Salaries and Fees

§ 3847. Salaries payable monthly.—All annual salaries shall be paid monthly out of any money in the treasury not otherwise appropriated. (Rev., s. 2772; Code, s. 3731; 1893, c. 54.)

§ 3847(a). Monthly payment of salaries.—The treasurer of the state is authorized, upon proper warrant, to pay the salaries in sections 3863, 3867-3870 provided for in equal monthly amounts. (1921, c. 11, s. 2.)

§ 3848. Legislative employees paid on certificate of presiding officers.—The auditor is authorized to audit the account of any employee of the senate or of the house of representatives, upon the certificate of the president of the senate and of the speaker of the house of representatives that such services have been rendered for which the account is presented, and that the amount in said account is reasonable, just and proper. (Rev., s. 2735; Code, s. 2873; 1870-71, res., p. 508.)

§ 3849. Payment of fees; when to be paid in advance. — The several officers named in this chapter shall receive the fees herein prescribed for them respectively, from the persons for whom, or at whose instance, the service shall be performed, except persons suing as paupers, and no officer shall be compelled to perform any service, unless his fee be paid or tendered, except in criminal actions. The said officers shall receive no extra allowance or other compensation whatever, unless the same shall be expressly authorized by statute. In case the service shall be ordered by any proper officer of the state, or of a county, for the benefit of the state or county, the fees need not be paid in advance; but if for the state, shall be paid by the state, as other claims against it are; if for a county, by the board of Commissioners, out of the county funds. The fees in criminal cases are not demandable in advance. (Rev., s. 2804; Code, ss. 3758, 1173.)

§ 3850. Fees in state officers; disposition and accounting.—All fees from whatever source which may hereafter be collected by any of the officers or employees of the state, except officers and clerk of the supreme court, shall be paid by the heads of the departments into the state treasury within thirty days from their collection, and the money paid shall be converted into the general fund. An itemized statement thereof shall be rendered each month to the state treasurer. No officer or employee of the state shall receive any compensation other than the salaries fixed in this chapter, except as provided by way of fees or by special appropriation or from any departmental fund. (1907, cc. 830, s. 1; 994, s. 1.)

Cross References.—As to fees in criminal cases not demandable in advance, see sec. 1230; as to summary judgment for official fees, see sec. 1226; as to liability of defendant in criminal actions for costs, see secs. 1267-1270; as to liability of prosecutor for costs, see sec. 1271 et seq.; as to constitutional provision see Act IV, sec. 18.

Officers of Court Must Demand Fees.—Officers of the courts are not compelled to perform their duties, unless the fees prescribed by law are paid or tendered them, but they must demand them before laches can be imputed to the litigants. West v. Reynolds, 94 N. C. 333.

Same—When Demand Not Made. — The officer is not "compelled to perform" the required service, but he may perform it, and dispense with the payment, and if he does not so intend, he should say so at the time, and not presume that the posting of the notice in his office, of an inflexible rule that he had adopted and from which he would not under any circumstances depart, would be known to every one. West v. Reynolds, 94 N. C. 333, 336.

Effect of Unconditional Pardon.—Fees due officers of the court are vested rights by law, and are not discharged when the defendant receives an unconditional pardon, after conviction and sentence, from the Governor of the State. State v. Mooney, 74 N. C. 98.

When Pardon Discharges Defendant from Costs. — In State v. Underwood, 64 N. C. 599, it was held that where the pardon is pleaded after verdict and before judgment, it will discharge the defendant from the costs. State v. Mooney, 74 N. C. 98, 99.

Supreme Court Clerk's Fee for Docketing Case. — The appellant's undertaking does not cover the fee of the clerk of the Supreme Court in docketing the case, and the clerk is in the exercise of his right in refusing to docket the transcript where he has demanded the prescribed fee in advance and its payment has been refused. Dunn v. Clerk's Office, 176 N. C. 50, 96 S. E. 738.

Right of Clerk of Superior Court. — The clerk had the right, even under the common law, as he has under the statute, to demand his fees in advance. West v. Reynolds, 94 N. C. 333; Clerk v. Wagoner, 26 N. C. 131; Andrews v. Whisnant, 83 N. C. 446; Long v. Walker, 105 N. C. 90, 97, 10 S. E. 858; Martin v. Chesteen, 75 N. C. 96; Ballard v. Gay, 108 N. C. 544, 545, 13 S. E. 207.

Same — In Criminal Actions. — In criminal actions, the clerk of the superior court cannot require that the costs of transcript upon appeal shall be paid in advance, although the defendant did not appeal in forma pauperis, and a certiorari will issue directing the clerk to send up the transcript which he holds for such prepayment. State v. Nash, 109 N. C. 822, 13 S. E. 733.

Same—Section 666.—This section and section 666 providing that clerk shall issue execution on all judgments rendered in their respective courts, within six weeks of the rendition thereof, or be amerced in the sum of one hundred dollars, must be construed together, it follows that clerks of the superior court will not incur the penalty prescribed in section 666 unless the plaintiff pays or tenders him his fees for that service. Bank v. Bobbitt, 111 N. C. 194, 16 S. E. 169.

Register May Refuse to Function.—The register has the right to refuse to treat a mortgage as delivered to him for registration until his fees in that respect had been paid. Cunninggim v. Peterson, 109 N. C. 33, 38, 13 S. E. 714.

Legislative Power.—The Legislature may reduce or increase the salaries of such officers as are not protected by the constitution, during their term of office. Cotten v. Ellis, 52 N. C. 545.

Taxation of Salary.—But a State cannot tax the salary of a state officer whose office is created by the Constitution. Purnell v. Page, 133 N. C. 125, 45 S. E. 534. And this applies to the salaries of judges. State Const. Art. IV, § 18, and notes thereto.

Improperly Collected Fee Subject to Recovery.—Where a person is compelled to pay a public officer fees which he had no right to claim, in order to induce him to do his duty, such fees may be recovered back. Robinson v. Ezzell, 72 N. C. 231.

§ 3851. Copy-sheet defined.— A copy-sheet shall consist of one hundred words, and in reckoning the number of words in a copy-sheet, every date, or amount of money, expressed in figures, as "1855," "$250.90," shall be estimated and charged as one word. (Rev., s. 2805; Code, s. 3757; R. C., c. 102, s. 42; 1868-9, c. 279, s. 556.)

Art. 2. Legislative Department

§ 3852. Members of general assembly and presiding officers. — The members of the general assembly for the term for which they have been elected shall receive as a compensation for their services the sum of four dollars per day for each day of their session, for a period not exceeding sixty days; and should they remain longer in session, they shall serve without compensation. They shall also be entitled to receive ten cents per mile, both while coming to the seat of govern-

ment and while returning home, the said distance to be computed by the nearest line or route of public travel. The compensation of the presiding officers of the two houses shall be six dollars per day and mileage. Should an extra session of the general assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty days. (Rev., s. 2729; Const., Art. II, s. 28.)

Inasmuch as per diem of members of the General Assembly is allowed only during its session, which is limited to sixty days, the members of a legislative committee appointed to investigate certain facts and report to the General Assembly before its adjournment if possible, otherwise to the Supreme Court, are not entitled to per diem for services rendered after adjournment when the resolution appointing them only provided for the necessary expenses of the committee while engaged in the investigation. Bank v. Worth, 117 N. C. 146, 147, 23 S. E. 160.

The Legislature has power to authorize a committee of its body to sit during vacation, and fix its compensation. Bank v. Worth, 117 N. C. 146, 147, 152, 23 S. E. 160.

§ 3852(a). Payment in installments or upon per diem basis; extra sessions.—The pay of the members and officers for a regular session of the General Assembly, as provided in section twenty-eight of article two of the Constitution of North Carolina, may be paid in installments, or upon a per diem basis as asked for by the several members and officers of the General Assembly; provided, that in no instance shall installments or per diem amount to more than ten dollars per day for the members and eleven dollars sixty-seven cents for the two presiding officers, for the number of days the General Assembly has been in session, and that the total pay of the officers and members of the General Assembly at a regular session shall in no case exceed six hundred dollars for the members, and seven hundred dollars for the presiding officers of the two houses. And, provided further, that the pay for an extra session of the General Assembly shall be eight dollars per day for members and ten dollars per day for the two presiding officers, for a period not to exceed twenty days. (1929, c. 2, s. 1.)

§ 3852(b). Pay to remain same in session of less than 60 days.—Nothing in the provisions of section 3852(a) shall prevent members and presiding officers of the Generai Assembly from receiving the full compensation of six hundred dollars for the members and seven hundred dollars for the presiding officers of the two houses, for the term of the regular session of the General Assembly, whether the term remains in session for sixty days or a shorter period. (1929, c. 2, s. 2.)

§ 3853. Clerks and doorkeepers.—The principal and his assistant clerks, the engrossing clerks and doorkeepers and assistant doorkeepers of the general assembly, and the chief clerk and assistants, appointed by the secretary of state to supervise the enrollment of bills and resolutions, shall each receive four dollars per day, during the session of the general assembly, and the same mileage as members of the general assembly; and as additional compensation to that herein provided for, the principal clerks of the senate and house of representatives shall each receive the sum of two dollars per day during the session of the general assembly. (Rev., s. 2730; Code, ss. 2871, 2872; 1903, c. 5, s. 2; 1901, c. 631; 1899, cc. 6, 7; 1897, c. 52; 1923, c. 142.)

§ 3854. Copyists.—Copyists employed in copying engrossed or enrolled bills and resolutions of the general assembly shall receive ten cents per sheet, which shall include the making of one carbon copy. (Rev., s. 2731; 1903, c. 5.)

§ 3855. Principal clerks; extra compensation.—The principal clerks of the general assembly shall be allowed four hundred dollars as a compensation for indexing the journals of their respective houses, and five hundred dollars each for extra work and for services required to be performed by them after the adjournment of each session of the general assembly, including the transcribing of a copy of their respective journals, which shall be filed in the office of the secretary of state. (Rev., s. 2732; Code, s. 2868; 1866-7, c. 71; 1881, c. 292; 1911, c. 116; 1919, c. 170; 1921, c. 160.)

§ 3855(a). Compensation of principal clerks for services in organizing senate and house.—The principal clerks of the senate and house of representatives, together with such assistants as may be necessary in arranging the halls of the senate and house and completing the organization of the two branches of the general assembly before the days for convening thereof, and such services as are rendered after adjournment in the completion of the records, shall receive the same per diem as shall be allowed by law to the said clerks and their assistants during the session. The state auditor is directed to issue his warrants for such clerks and for such time as is certified to by the president of the senate and the speaker of the house, upon vouchers signed by them. (1923, c. 130.)

§ 3856. Temporary doorkeepers.—The persons appointed to place the two halls of the general assembly in order, and to wait upon the members until doorkeepers can be regularly appointed, shall be allowed, as a compensation, the sum of four dollars each for their daily attendance and services. (Rev., s. 2734; Code, s. 2871; R. C., c. 52, s. 38; 1846, c. 63, s. 2.)

§ 3857. Repealed by Public Laws. (1925, c. 110, s. 2.)

§ 3857(a). Compensation of employees of general assembly; mileage.—The principal clerks of the general assembly and chief clerk appointed by secretary of state in the enrolling office and chief engrossing clerks of the house and senate shall be allowed the sum of six dollars per day during the session of the general assembly, and mileage at the rate of five cents per mile from their homes to Raleigh and return. The secretary to the speaker of the house of representatives, the secretary to the lieutenant governor, the sergeant-at-arms, the assistants to the engrossing clerks, the assistant clerks to the principal clerks, and the assistant sergeant-at-arms of the general assembly, and the assistants appointed by the secretary of state to supervise the enrolling of bills and resolutions, the reading clerks of the general assembly shall receive the sum of five dollars per day, and mileage at the rate of five cents per mile from their homes to Raleigh and

return. The clerks to all committees which by the rules of either house of the general assembly are entitled to clerks, shall receive four dollars per day during the session of the general assembly, and mileage at the rate of five cents per mile from their homes to Raleigh and return. The chief page of the house of representatives and senate shall receive three dollars and fifty cents per day during the session of the general assembly and mileage at the rate of five cents per mile from their homes to Raleigh and return. All other pages authorized by either of the two houses shall receive two dollars and one-half per day during the session of the general assembly and mileage at the rate of five cents per mile from their homes to Raleigh and return. All laborers of the first class authorized by law or the rules of either the house of representatives or the senate shall receive three dollars per day during the session of the general assembly and all mileage at the rate of five cents per mile from their homes to Raleigh and return, and laborers of the second class the sum of two dollars per day and mileage at the rate of five cents per mile from their homes to Raleigh and return. (1925, c. 72, s. 1; 1929, c. 3, s. 1; 1933, c. 6, s. 1.)

Editor's Note.—Public Laws 1933, c. 6, substituted the above section for the former reading. A comparison of the two sections is necessary to determine the changes.

§ 3857(b). Laws repealed; exceptions.—All laws, and clauses of laws, parts of laws, rules or regulations of either house of representatives or senate other than sections 3855 and 3855(a) in conflict with sections 3857(a), are hereby repealed and declared null and void. (1925, c. 72, s. 2; 1929, c. 3, s. 2; 1933, c. 6, s. 2.)

Editor's Note.—This section was re-enacted by Public Laws 1933, c. 6, without change.

§ 3857(c). Application of sections. — Sections 3857(a) and 3857(b) shall apply to the herein enumerated clerks, assistant clerks, pages, laborers and other employees of the General Assembly from the beginning of the session of nineteen hundred and twenty-nine. (1925, c. 72, s. 3; 1929, c. 3, s. 3.)

§ 3857(d). Classification of laborers.—The chairman of the committee on rules of the House of Representatives and the chairman of the committee on rules of the Senate are hereby authorized, empowered and directed to classify the laborers of the General Assembly and certify to the chief clerk of the House of Representatives and the chief clerk of Senate the names of all laborers of the first class and all laborers of the second class, to the end that proper warrants may be issued in payment of services rendered in accordance with sections 3857(a), 3857(b), and 3857(c), and the list when certified shall be the classification of such laborers and they shall be paid accordingly. (1925, c. 116.)

Art. 3. Executive Department

§ 3858. Governor.—The salary of the governor shall be ten thousand five hundred dollars per annum. He shall be allowed annually the sum of six hundred dollars as traveling expenses in attending to the business for the state and for expenses out of the state and in the state in representing the interest of the state and people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the governor while traveling outside the state on business incident to his office shall be paid by the state treasurer on a warrant issued by the auditor. (Rev. s. 2736; Code, s. 3720; 1879, c. 240; 1901, c. 8; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; 1929, c. 276, s. 1.)

Editor's Note.—The Act of 1929 raised the governor's salary from six thousand five hundred dollars to the present amount.

§ 3859. Private secretary to governor; salary and fees.—The private secretary to the governor shall be allowed an annual salary of three thousand dollars, and he shall charge and collect the following fees, to be paid by the persons for whom the services are rendered, namely: For the commission of a judge, solicitor, senator in congress, representative in congress, notary public, or a place of profit, two dollars and fifty cents each; for a testimonial, one dollar; for affixing the seal to a grant, twenty-five cents; for affixing the great seal of the state to state bonds, ten cents. All fees, except fifty cents on each commission issued, which shall be retained by the private secretary for his services, received by the private secretary shall be paid into the treasury quarterly. He shall be ex officio secretary of the board of internal improvements, and shall be allowed five dollars per day for each day the board is in session. (Rev., s. 2737; Code, ss. 1689, 3721; R. C., c. 102, s. 12; 1856-7, p. 71, res.; 1881, c. 346; Pr. 1901, c. 405; 1903, c. 729; 1907, c. 830; 1911, c. 95; 1913, c. 1; 1915, c. 50; 1917, c. 214; 1921, c. 227.)

Editor's Note.—This section is superseded by § 3859(a).

§ 3859(a). Same—Present Law. — The salary of the Private Secretary to the Governor is hereby fixed at forty-five hundred dollars ($4500) per annum, payable monthly, commencing February 1, 1929. This salary shall be full compensation for all the services performed by him. He shall continue to collect the fees as provided in section 3859, and shall cover the whole of the same into the State Treasury as provided in that section. The five dollars ($5.00) per day for acting as Secretary of the Board of Internal Improvements is hereby repealed. (1929, c. 322, ss. 1, 2.)

§ 3860.—Repealed by Public Laws of 1925, c. 275, s. 6.

§ 3861. Governor and council to fix certain salaries.—The governor and council of state shall constitute a board to adjust and fix the compensation to be paid to the several assistants, chief clerks, clerks and assistants, in the various departments of the state government affected by sections 3861, 3863, 3867-3870, 3873, 3874, and 4668, including employees of the supreme court, and the State Library and including the private secretary of the governor: Provided, that nothing herein shall in any way affect the provisions of sections 3861(c) and 3861(d), except such as are by law required to give bond to the state. Provided further, that the above proviso shall not apply to employees of the State Library.

(1921, c. 143, ss. 1, 4; Ex. Sess. 1921, c. 29; 1924, c. 124.)

Editor's Note.—This section was amended by chapter 124, Laws 1924, by inserting after the words "Supreme Court" and before the word "and," the words "and the State Library." The said chapter of the said Laws also added the final proviso to the section.

§ 3861(a). Limit of salary; certificate and payment.—The compensation fixed under the provisions of section 3861 shall not exceed $3,000 per annum for any individual employee, and shall be certified by the governor to the state auditor, and paid as provided by law for the payment of other salaries. (1921, c. 143, s. 2.)

§ 3861(b). Proceedings and reports.—The proceedings of the board shall be kept by the state auditor, and reported to each regular session of the general assembly. (1921, c. 143, s. 3.)

§ 3861(c). Governor and council to fix salaries, etc.; certificate to auditor and treasurer.—The governor and council of state are hereby authorized to fix the salaries, compensation and wages, and the terms of payment, of all clerks, stenographers and laborers, in the several departments, of the state, assistant state librarian, and second assistant state librarian, keeper of the capitol, janitors, night watchmen and laborers, employed in or about any state building, executive mansion and capitol grounds, whose salaries, compensation or wages do not now amount to the sum of eighteen hundred dollars per annum: Provided, the salary, compensation or wages of any such clerk, stenographer, employee, laborer, janitor, night-watchman or assistant librarians in the state library and in the supreme court library shall not be fixed at a sum greater than eighteen hundred dollars per annum; and the salaries, compensation or wages shall be certified by the governor to the auditor and treasurer of the state, and in no case shall said clerks or stenographers or other employees herein mentioned by whatever name called or designated received any additional compensation from the state or any department thereof. (Ex. Sess. 1920, c. 95, s. 1.)

§ 3861(d). Employment of additional assistants; compensation. — The governor and council of state are authorized and empowered to employ any additional clerical or stenographical help, in any of the departments of the state, upon the written request of the head of said department, and when they shall become satisfied that such additional help is needed, temporarily in such department, to do efficiently the work of said department, and fix the salary of such additional help under section 3861(c). (Ex. Sess. 1920, c. 95, s. 2.)

§ 3862. Lieutenant-governor.—Whenever the lieutenant-governor shall attend any meeting of state officials or otherwise, which he is required by law to attend, he shall be entitled to receive as compensation the per diem allowed him under the constitution as president of the senate for the time required in attending said meeting, together with his necessary traveling expenses in going to and from said meeting. The amount to which he shall be entitled shall be certified to by him, and shall be paid to him by the state treasurer upon the proper warrant. (1911, c. 103.)

§ 3863. Department of secretary of state.—The salary of the secretary of state shall be six thousand dollars per annum, payable monthly. All fees received by him shall be paid into the treasury unless otherwise directed by law. The salaries of the following employees in the department of the secretary of state shall be fixed by the governor and council of state not to exceed the amounts herein indicated.

Corporation clerk .....$2,500 per annum
Grant clerk ..... 2,250 per annum
Special clerk and stenographer . 1,200 per annum

The secretary of state shall be allowed a contingent sum not exceeding fifteen hundred dollars per annum for extra clerical assistance in the discharge of the duties of his office, and the treasurer shall pay the same upon the warrant of the auditor out of the fees collected by the secretary of state and paid into the state treasury. The governor and council of state are authorized to allow the department of the secretary of state not more than four additional clerks, at salaries not exceeding one hundred and twenty-five ($125.00) dollars per month, for such time as the governor and the council of state may find to be absolutely necessary to carry on the work of the department. (Rev., s. 2741; Code, s. 3724; 1879, c. 240, s. 6; 1881, p. 632, res.; 1907, c. 994; 1919, c. 247, s. 2; Ex. Sess. 1920, c. 49, s. 4; 1921, c. 11, s. 1; 1935, c. 304.)

Editor's Note.—The amendment of 1935 increased the salary of the secretary of state from $4,500 to $6,000, and added the provision making such salary payable monthly.

§ 3864. Secretary of state; fees to be collected.—The secretary of state shall collect the following fees, namely: copying and certifying a will, grant or patent not exceeding two copy-sheets, fifty cents; and for every additional copy-sheet, ten cents, correcting an error not made by himself in a patent, fifty cents; copying and certifying a plot and survey, fifty cents for each warrant or for each six hundred and forty acres contained in the plot or survey, not to exceed five dollars for one copy; receiving surveyor's return, making out, recording and endorsing grants, sixty cents; each certificate, ten cents; filing and recording a copy of a judgment vacating a grant and all other services thereon, fifty cents; copying an entry from the journals of the assembly, forty cents; copying and certifying the laws of other states, twenty cents for each copy-sheet; and in all cases not otherwise provided for, the secretary of state shall receive for copies of records from his office, one dollar for the first three copy-sheets and ten cents a copy-sheet thereafter. (Rev., s. 2742; Code, s. 3725; R. C.; c. 102, s. 13; 1870-1, c. 81, s. 1881, c. 79.)

§ 3865. Fees on returns to secretary of state.—All officers required to make returns to the secretary of state shall receive for such returns five cents per copy-sheet, to be audited on the certificate of the secretary of state, and paid as other claims against the state. (Rev., s. 2743; Code, s. 3759; 1868-9, c. 279, s. 557.)

§ 3866. Assistant to secretary of state; for indexing laws, etc.—The assistant to the secretary of state who shall index the laws and prepare the laws and captions for publication shall receive a

compensation of five hundred dollars. (Rev., s. 2733: 1903, c. 3.)

§ 3867. Department of state auditor.—The auditor shall receive a salary of four thousand five hundred dollars per annum, and shall be allowed no fee or other compensation whatever. The salaries of the following employees in the department of the state auditor shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief clerk .....$2,500 per annum
Tax clerk ..... 2,250 per annum

The salaries of the employees in the department of the state auditor, fixed by law, shall be as follows:

Stenographer, who is also pension clerk and bookkeeper .$1,800 per annum
An additional clerk ..... 1,800 per annum

(Rev., s. 2744; Code, s. 3726; 1879, c. 240, s. 7; 1881, c. 213; 1885, c. 352; 1889, c. 433; 1891, c. 334, s. 5; 1907, c. 830, s. 5; 1907, c. 994, s. 2; 1911, c. 108, s. 1; 1911, c. 136, s. 1; 1913, c. 172; 1919, c. 149; 1919, c. 247, s. 7; Ex. Sess. 1920, c. 49, s. 3; 1921, c. 11, s. 1.)

Editor's Note.—Public Laws of 1935, chapter 442, provides as follows: "On and after January first, one thousand nine hundred thirty-seven, the salary of the State Auditor shall be Six Thousand Dollars per annum, payable monthly.

§ 3868. Department of state treasurer. — The salary of the state treasurer shall be six thousand dollars per annum, payable monthly. The salaries of the following employees in the department of the state treasurer shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief clerk .....$2,500 per annum
Teller ..... 2,500 per annum
Institutional clerk ..... 1,800 per annum
Bond clerk ..... 1,700 per annum
Corporation tax clerk ..... 1,800 per annum
Stenographer ..... 1,200 per annum
License clerk ..... 150 per annum

(Rev., s. 2739; Code, s. 3723; 1891, c. 505; 1907, c. 830, s. 3; 1907, c. 994, s. 2; 1917, c. 161; 1919, c. 233; 1919, c. 247, s. 3; Ex. Sess. 1920, c. 49, s 2; 1921, c. 11, s. 1; 1935, c. 249.)

Editor's Note.—The amendment of 1935 increased the salary of the state treasurer from $4,500 to $6,000, and added the provision making such salary payable monthly.

Bond of Clerk Not Official Bond.—A bond by a clerk executed to the State Treasurer individually is not an official bond and does not extend beyond the term during which the clerk was appointed. Jackson v. Martin, 136 N. C. 196, 48 S. E. 672.

Same—Limitation.—An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. Jackson v. Martin, 136 N. C. 196, 48 S. E. 672.

§ 3869. Department of education. — The state superintendent of public instruction shall receive an annual salary of five thousand dollars and actual traveling expenses. The salaries of the following employees in the department of education shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief clerk .....$2,500 per annum
Statistical clerk ..... 2,500 per annum

The statistical clerk, who is also the loan fund clerk, shall be paid out of the loan fund. The stenographer shall receive a salary of twelve hundred dollars per annum. (Rev., s. 2745; Code, s. 2737; 1879, c. 240, s. 8; 1901, c. 4, ss. 9, 11; 1903, c. 435, s. 2; 1903, c. 567, s. 6; 1903, c. 603; 1905, c. 533, ss. 2, 15, 16; 1907, c. 830, ss. 6, 11; 1907, c. 994; 1915, c. 247; 1917, cc. 167, 285; 1919, c. 293; 1919, c. 247, s. 5; 1921, c. 11, s. 1.)

Editor's Note.—This section does not purport to limit the number of employees of the department of education to the two clerks named in the section. Its manifest purpose is to merely provide for the office force in the department. In the chapter on Education will be found provisions for employing persons to serve the department in various capacities in administering and giving effect to the school program of the State, and whose salaries are to be fixed by the State Board of Education.

It is plainly shown that this section was not intended to be, nor has it been construed to be, all inclusive by a glance at some of the recent Legislative enactments. Chapter 146, Laws of 1917, and section 5, chapter 247, Laws of 1919, provide that there shall be a Board of Examiners and Institute Conductors, whose salary shall not exceed three thousand dollars per annum exclusive of expenses. In like manner chapter 224, Laws 1917 provide for a Director of Schools for Adult Illiterates, and chapter 856, Laws of 1907 provide for a Supervisor of Teacher Training.

Public Laws of 1935, chapter 441, provides as follows: "The salary of the Superintendent of Public Instruction of North Carolina is hereby fixed at six thousand dollars ($6,000.00) per annum, payable monthly.

"This act shall be in full force and effect from and after December the thirty-first, one thousand nine hundred thirty-six."

§ 3870. Department of justice.—[The attorney-general shall receive an annual salary of $7,500.00, payable monthly.] The attorney-general shall also be allowed a stenographer who shall serve also as criminal statistics clerk, whose salary shall be fixed by the governor and council of state not to exceed twenty-four hundred dollars per year. (Rev., s. 2746; Code, ss. 3728, 3729; 1889, c. 274; 1893, c. 379; 1907, c. 830, s. 7; 1907, c. 994, s. 2; 1909, c. 804; 1911, c. 94; 1919, c. 247, s. 6; 1921, c. 11, s. 1; 1921, c. 182; 1923, c. 177; 1929, c. 1, s. 2.)

Editor's Note.—The Act of 1929 provided that this section be amended to read as appearing in brackets above. As to salary of assistants, see § 7695(a). As to additional clerical help, see § 7695(b).

§ 3871. Fees of attorney-general. — In all appeals to the supreme court of persons convicted of criminal offenses, a fee of ten dollars against each person who shall not reverse the judgment shall be allowed the attorney-general, to be taxed among the costs of that court. (Rev., s. 2747; Code, s. 3737; 1873-4, c. 170.)

As to fees of State officers; disposition and accounting, see sec. 3850.

§ 3872. Department of agriculture.—The salary of the commissioner of agriculture shall be four thousand five hundred dollars per annum, to be paid monthly out of the receipts of the agricultural department. (Rev., s. 2749; 1901, c. 479, s. 4; 1905, c. 529; 1907, c. 887, s. 1; 1913, c. 58; 1921, c. 35, s. 1; 1933, c. 282, s. 5; 1935, c. 293.

§ 3873. Department of labor and printing.—The salary of the commissioner of labor and printing shall be four thousand five hundred dollars per annum, payable monthly. The salaries of the assistant commissioner of labor and printing and of the following employees in the department of labor and printing shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Assistant commissioner .....$2,500 per annum
Bookkeeper and stock man .. 1,800 per annum
Stenographer ..... 1,200 per annum

The commissioner and assistant commissioner of labor and printing shall also receive their traveling expenses while traveling for the purpose of collecting the information and statistics as provided by law. (Rev., s. 2753; 1899, c. 373, s. 3; 1907, cc. 930, 989; 1915, cc. 157, 177; 1919, c. 247, s. 8; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293.)

Editor's Note.—The department referred to in this section is now the department of labor in charge of the commissioner of labor. See §§ 7309 et seq.

§ 3874. Department of insurance.—The salary of the insurance commissioner shall be four thousand five hundred dollars per annum, payable monthly. The salaries of the following assistants and employees in the department of insurance shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief deputy .....$2,500 per annum
Chief clerk ..... 2,500 per annum
Actuary ..... 2,500 per annum
Cashier ..... 1,500 per annum
License clerk .....1,250 per annum

(Rev., s. 2756; 1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; 1903, c. 771, s. 3; 1907, c. 830, s. 10; 1907, c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293.)

§ 3875. Corporation commission.

Editor's Note.—Public Laws of 1935, chapter 134, codified as secs. 1112(a)-1112(q), abolished the corporation commission and created the office of utilities commissioner. As to salary of commissioner, see sec. 1112(d).

§ 3876. State librarian.—The salary of the state librarian shall be two thousand five hundred dollars per annum, and he shall be allowed two hundred and fifty dollars per annum, for services as custodian of the document library, and one dollar per day during the sessions of the general assembly for keeping the document library open. He shall be allowed to charge a fee of fifty cents for each seal and certificate, and ten cents per copy-sheet for all documents, papers, copies of instruments of every description whatsoever pertaining to his office which he shall be called upon to furnish to any person interested in same, to be paid by the party securing such copy of record. He shall be allowed two assistants, whose salaries shall be as follows:

First assistant .....$900 per annum
Second assistant ..... 500 per annum

(Rev., s. 2748; Code, s. 3604; 1901, c. 503, s. 1; 1887, c. 258, s. 3; 1889, res., p. 519; 1905, c. 537; 1907, c. 647; 1909, cc. 246, 887; Ex. Sess. 1913, c. 33; 1915, c. 74; 1921, c. 202.)

Editor's Note.—Public Laws of 1933, chapter 282, section 6, reduced the salary of state librarian to $1800 per annum. Public Laws of 1935, chapter 306, section 5, increased salaries and wages by twenty per cent for the year 1935-1936 and twenty-five per cent for the year 1936-1937.

Public Laws of 1935, chapter 56 provides: "That section six of chapter two hundred and eighty-two of the Public Laws of one thousand nine hundred and thirty-three be amended by adding after line four, which is: State Librarian, one thousand eight hundred and no/100 ($1,800.00) dollars; the following:

"Provided, however, that the salary so stated shall be subject to any increase of salary provided by the Legislature of one thousand nine hundred and thirty-five, and uniform with such increases as may be made by such salary provisions."

§ 3877. Adjutant-general. — The salary of the adjutant-general shall be four thousand five hundred dollars per annum. The adjutant-general shall reside at the state capital during his term of office. (Rev., s. 2750; Code, ss. 3275, 3730; 1899, c. 390, ss. 2, 3; 1879, c. 240, s. 10; 1883, c. 283, s. 2; 1907, c. 803, s. 1; 1911, c. 110, s. 1; 1915, c. 118; Ex. Sess. 1921, c. 53; 1933, c. 282, s. 6; 1935, c. 293.)

§ 3878. Presidential electors.—Presidential electors shall receive, for their attendance at the meeting of said electors in the city of Raleigh, the sum of $10.00 (Ten dollars) per day and traveling expenses at the rate of 5c (five cents) per mile in going to and returning from said meeting. (Rev., s. 2761; 1901, c. 89, s. 84; 1933, c. 5.)

Editor's Note.—Prior to Public Laws 1933, c. 5, this section provided for travelling expenses and compensation the same as allowed members of the General Assembly.

§ 3879.—Repealed by Public Laws of 1925, c. 275, s. 6.

§ 3880. Keeper of capitol.—The salary of the keeper of the capitol, or superintendent of public buildings and grounds, shall be twelve hundred dollars per annum, which shall include his compensation as keeper of the arsenal. (Rev., s. 2806; Code, ss. 2302, 2303; 1907, c. 989; 1915, c. 150.)

§ 3881. Servants and employees:

1. Servants of the state departments and the supreme court. The governor and the council of state are hereby authorized and empowered to fix the wages of the employees of the state hereafter named, but in no case shall the wages exceed the amount herein specified.

The janitors or servants of the various state departments, including three servants for the supreme court, and the butler at the executive mansion, now authorized and provided by law, fifteen dollars per week.

The gardeners for the capitol grounds and executive mansion grounds, seventeen and a half dollars per week.

The custodian of the capitol building and of the supreme court building, twenty-five dollars per week; and the custodian of the state departments building, twenty-five dollars per week.

Night watchmen for the several state buildings as now authorized by law, seventeen dollars and fifty cents per week; but the night watchman and police for capitol building and grounds shall receive not exceeding twenty-two dollars and fifty cents per week.

The governor and the council of state are authorized to employ one night watchman for two or more buildings, when in their judgment the same is desirable, and, in that event, pay a salary not exceeding twenty-five dollars per week.

The justices of the supreme court may employ one additional servant for service in the supreme court.

The night watchman at the department of agriculture shall be paid out of funds belonging to the department.

2. Janitor for state library. The state li-

brarian may employ a janitor and assistant at seventy-five dollars per month.

3. Engineer and fireman of central heating plant. An engineer, and fireman if necessary, for the central heating plant may be employed, whose duties and salary shall be fixed by the board of public buildings and grounds.

The servants and employees mentioned in this section shall be paid by the state treasurer unless otherwise specified herein. (1913, c. 108; Ex. Sess. 1913, c. 59, s. 1; 1919, cc. 313, 323.)

§ 3882. Laborers' leave of absence.—Every laborer, waiter, and messenger permanently employed under authority of law in and about the public buildings and grounds at a salary, who shall have served faithfully therein for the space of one continuous year, shall be entitled to fifteen days leave of absence per annum, with full pay, at the end of every year of such service. (Rev., s. 2763; 1897, c. 274; 1907, c. 117.)

Art. 4. Judicial Department

§ 3883. Supreme court justices.—Each justice of the supreme court shall be paid an annual salary of seven thousand five hundred dollars, and five hundred annually in lieu of and in commutation for traveling expenses. They shall each be allowed nine hundred dollars annually for stenographer or clerk. (Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51; 1921, c. 25, s. 2; 1925, c. 214; 1927, c. 69, s. 1.)

Editor's Note.—This section was amended by chapter 214, Laws 1925, by raising the salary, including traveling expenses of the Supreme Court Justices from six thousand two hundred and fifty dollars per year, to six thousand five hundred dollars. The section was further amended by chapter 69, Laws 1927, by striking out the words "six thousand" in line two and inserting in lieu thereof the words "seven thousand five hundred."

Justices' Salaries Not Subject to Taxation.—See notes to Const. Art. IV, § 18.

§ 3884. Superior court judges.—The salary of each of the judges of the superior court shall be six thousand five hundred dollars per annum, and each judge shall be allowed the sum of one thousand five hundred and fifty dollars in lieu of his traveling expenses, to be paid monthly. They shall also receive one hundred dollars per week and their actual expenses incurred in attending and holding special terms of court by assignment of the governor, which expenses shall be paid by the county in which such special term is held. (Rev., s. 2765; Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2.)

Editor's Note.—This section was amended by chapter 69, Laws 1927, by striking out the words "five thousand" in line two of said section and inserting in lieu thereof the words "six thousand five hundred."

Additional Compensation Part of Salary.—The additional compensation of one hundred dollars given to a superior court judge by this section for services in holding a special term, is a part of his salary. Buxton v. Commissioners, 82 N. C. 91.

As to taxing salaries of judges, see Const. Art. IV. § 18.

§ 3884(a). Salaries of resigned or retired justices of supreme court and judges of superior courts.—Every justice of the supreme court and judge of the superior court who has heretofore resigned or retired from office at the end of his term, or who shall hereafter resign or retire at expiration of his term, who has attained the age of sixty-five (65) years at the date of his resignation or retirement, and who has served for fifteen (15) years on the supreme court or on the superior court, or on the supreme and superior courts combined or twelve consecutive years on the supreme court, shall receive for life two-thirds (⅔) of the annual salary from time to time received by the justices of the supreme court or judges of superior court, respectively, payable monthly; provided, that any such justice or judge, who has or shall have served as such for twenty-five years or longer (whether continuously or not), and whose seventieth birthday shall occur within six months next succeeding his resignation or retirement, shall be entitled to all of the benefits of this section from and after the date of his resignation or retirement, and shall also be subject to the other provisions of this section. The provisions herein as to the amount of life-time pay shall relate back to and become effective as of the fourth day of March, one thousand nine hundred and twenty-one, and the state treasurer is authorized and directed to pay on the warrant of the state auditor the salary of any justice or judge as affected by such provisions, less any amount heretofore paid. (1921, c. 125, s. 1; Ex. Sess. 1921, c. 20, ss. 1, 2; 1927, c. 133, s. 201; 1935, cc. 233, 400.)

See 12 N. C. Law Rev., 367, for note on "Power of Congress to Diminish the Retired Salaries of Federal Judges."

Editor's Note.—The amendment of 1935 reduced the retirement age from seventy (70) years to sixty-five (65) years and added the phrase reading: "or twelve consecutive years on the supreme court."

§ 3885. Certificates of courts held by judges.—Every judge of the superior court shall produce a certificate from the clerk of each county of his having held the court of the county according to law; and for every such certificate omitted to be produced there shall be a deduction from his salary of one hundred dollars, unless he shall be prevented by sickness or other unavoidable cause. (Rev., s. 2766; Code, s. 3735; R. C., c. 102, s. 4; 1868-9, c. 46, s. 7; 1879, c. 240, s. 5.)

§ 3886. Clerk of supreme court.—The clerk of the supreme court shall receive an annual salary of three hundred dollars, to be paid semiannually, on a certificate of the justices; and, in addition thereto, the following fees, namely: For recording the papers and proceedings in the causes decided in the supreme court, which are required by law to be recorded, such compensation as may be estimated by the justices of the court at each term, not to exceed thirty cents for each page recorded, to be paid by the treasurer on the certificate of the justices; for entering an appeal, one dollar; a continuance, thirty cents; a scire facias, eighty cents; a certiorari, eighty cents; a determination, two dollars; a certificate, sixty cents; a fieri facias, or other execution, fifty cents; a seal, twenty-five cents; a transcript, or copy of a record, twenty cents for each copy-sheet; a rule given for service, twenty-five cents; a rule not for service, fifteen cents; a subpœna, writ, or other process, one dollar; a commission, fifty cents; drawing a decree or judgment, by the copy-sheet, forty cents; a search, ten cents; affixing the seal to any writing requiring it, twenty-

five cents; and an affidavit, twenty-five cents. (Rev., s. 2769; Code, s. 3738; R. C., c. 102, ss. 25, 26; 1870-1, c. 139, s. 7.)

As to clerk's right to demand fees in advance, see annotations under section 3849.

When Judge Allows Appeal without Bond.—The clerk of the Supreme Court is not bound to render his services gratuitously to a party whom the judge of the court below has allowed to appeal without giving the bond required by law. Martin v. Chasteen, 75 N. C. 96, in which Superior Court Office v. Lockman, 12 N. C. 146, and Biggerstaff v. Cox, 46 N. C 534, are cited and approved.

§ 3887. Janitor and fireman of supreme court building.—The janitor of the supreme court shall be appointed by said court. He shall act also as assistant librarian of the supreme court. As janitor he shall receive fifteen dollars per week, and for acting as assistant librarian he shall receive thirty dollars per month. The fireman of the supreme court building shall be appointed by the chief justice and associate justices of the supreme court. When not engaged in his duties as fireman he shall act as assistant janitor of the supreme court building, and shall assist in the cleaning and care of such building and perform such other duties as may be designated by the said justices of the supreme court. (1907, c. 732; 1909, cc. 687, 721; 1911, c. 156.)

§ 3888. Marshal of supreme court.—The salary of the marshal of the supreme court shall be two thousand dollars per annum; and he shall perform the duties of librarian without additional compensation. (Rev., s. 2770; Code, ss. 950, 3606; 1889, c. 482; 1873-4, c. 34; 1881, c. 306; 1907, c. 732; 1909, c. 687; 1919, c. 260.)

As to appointment of marshal, see section 1427.

§ 3889. Supreme court reporter.—The compensation of the supreme court reporter shall not exceed fifteen hundred dollars per annum, to be fixed by the court. The council of state shall furnish him with suitable offices at a cost not to exceed five hundred dollars a year, which shall be paid direct to the lessor upon the warrant of the state auditor drawn upon the state treasurer. He is authorized and empowered to employ a stenographer and clerk at a yearly salary of not exceeding six hundred dollars, payable monthly directly to the person so employed by the reporter, by voucher drawn by the state auditor on the state treasurer, out of the general funds of the state. (Rev., s. 2771; Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429; 1911, c. 107; 1913, c. 59; 1917, c. 272; 1919, c. 276.)

§ 3889(a). Night-watchman of administration building.—The salary of the night-watchman of the state administration building shall be $22.50 per week. (Ex. Sess. 1920, c. 83.)

Art. 5. Solicitors, Jurors, and Witnesses

§ 3890. Solicitors; general compensation.—The several solicitors of the judicial districts of the state of North Carolina shall each receive, as full compensation for services as solicitor, the sum of forty-five hundred dollars ($4,500.00), to be paid in equal monthly installments out of the state treasury upon warrants duly drawn thereon, which said salaries shall be in lieu of all fees or other compensation. (Rev., s. 2767; Code, s. 3736; 1879, c. 240, s. 12; 1923, c. 157, s. 1; 1933, c. 78 s. 1; 1935, c. 278.)

Editor's Note.—The amendment of 1935 increased the salary from $3,900 to $4,500.

In Moore v. Roberts, 87 N. C. 11, it was held that the solicitor of the criminal court of a county has no claim upon the State for such compensation as is allowed the district solicitors under this section, where the act establishing said court puts the burden of sustaining the same upon the county.

§ 3890(a): Repealed by Public Laws 1933, c. 78, s. 2.

§ 3891. Repealed by Public Laws 1923, c. 157, s. 1.

§ 3892. Fees of jurors.—All jurors in the superior court other than special veniremen and tales jurors shall receive such an amount per day as the boards of commissioners of their respective counties may fix, not less than two dollars per day and not more than four dollars per day, and mileage at the rate of five cents per mile while coming to the county-seat and returning home. The said distance to be computed by the usual route of public travel. In the counties of Union, Nash, Brunswick, Randolph, Haywood, Polk, Surry, Swain, Alleghany, Anson, Graham, Ashe, Dare, Alexander, Cleveland, Clay, Transylvania, Harnett, Stanly, Mitchell, Burke, Franklin, Greene, Johnston, and Henderson, jurors other than special veniremen and tales jurors shall not receive more than three dollars per day.

Special veniremen and tales jurors shall receive such an amount per day for their attendance upon court as may be fixed by the boards of commissioners of their respective counties, not exceeding three dollars per day. Special veniremen who have been accepted on the panel in the trial of any cause shall receive the pay and mileage of regular jurors. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1.)

Cross References. — As to compensation of jurors at inquests, see section 1022; as to compensation of jurors to value division fence under the fence and stock law, see section 1836; as to clerks to tax solicitor's fees; use of school fund, see section 1235(a); as to cost of investigating lynchings, see section 1266; as to solicitor's fees in actions for penalties brought by the Corporation Commission, see section 1111.

§ 3893. Fees and mileage of witnesses.—The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be such amount per day as the board of commissioners of the respective counties may fix, to be not less than one dollar per day and not more than three dollars per day, except in the counties of Union, Nash, Brunswick, Randolph, Haywood, Polk, Surry, Swain, Alleghany, Anson, Graham, Ashe, Dare, Alexander, Cleveland, Clay, Transylvania, Harnett, Stanly, Mitchell, Burke, Franklin, Greene, Johnston, and Henderson, in which counties the fees shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and fer-

riage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of justices of the peace, under subpœna, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpœnaed to prove any one material fact, and no prosecutor or complainant shall pay any costs, unless the justice shall find that the prosecution was malicious and frivolous: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the corporation commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route. All witnesses subpœnaed to attend courts of justices of the peace in Franklin county in the trial of civil or criminal cases in any township other than their resident townships shall be paid the same per diem and mileage that is now paid witnesses attending the superior courts: Provided further, that any sheriff, deputy sheriff, chief of police, police, patrolman, state highway patrolman, and/or any other law enforcement officer who receives a salary or compensation for his services from any source or sources other than the collection of fees, shall prove no attendance, and shall receive no fee as a witness for attending at any superior or inferior criminal court sitting within the territorial boundaries in which such officer has authority to make an arrest. (Rev., s. 2803; Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; P. L. 1911, c. 402; Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40.)

Editor's Note.—This section relative to the amount of witnesses' fees must necessarily be construed with article 8 of the chapter on costs, § 1273 et seq., by which is determined when the witness is entitled to the fees here prescribed with other provisions as to witnesses' fees.

Public Laws 1931, c. 54, applicable only to Beaufort County, amended this section by adding at the end thereof the following: "Provided, that in criminal actions no peace officer within said county, serving on a salary from the county or city, shall be allowed to file any witness ticket for attendance upon court in any court held in the township or city, or adjoining the township in which he resides."

Public Laws 1933, c. 40, added the proviso, at the end of this section, abolishing witness fees for police officers on salaries. Public Laws 1933, c. 495 amends the prior 1933 amendment by providing that the act "shall not apply to officers who, under contract of employment, receive as part of their compensation fees allowed by law," but limits the application of this second amendment to Rutherford, Polk, McDowell, Cleveland and Henderson counties.

Public Laws of 1935, chapter 237, providing that the section shall not apply to certain police officers in New Hanover county, was amended by chapter 415, Public Laws 1935.

Public Laws 1935, chapter 247, excepts Duplin county from the operation of chapter 40 of the Public Laws of 1933, which added the proviso to the section.

Public Laws of 1935, chapter 264, likewise excepts Alamance county from the operation of the proviso, except where costs are assessed against the county.

Public Laws of 1935, chapter 333, adds a proviso to this section applicable only in Forsyth county.

Public Laws of 1935, chapter 185, makes specified applications of the proviso of the section in Guilford county.

Public Laws of 1935, chapter 93, repeals the proviso added by the 1933 Act, in so far as the same applied to cases where the defendant pays the cost in Franklin, Guilford, Pitt, Richmond, Rowan and Wayne counties.

Public Laws of 1935, chapter 209, excepts Craven county from the operation of the proviso added by the 1933 amendment.

In General.—The manner of summoning witnesses, and their compensation is entirely regulated by statute. Stern & Co. v. Herren, 101 N. C. 516, 8 S. E. 221.

Proof of Attendance. — Witnesses should swear to their attendance at each term, and the ticket should state the number of days' attendance at each term. Thompson v. Hodges, 10 N. C. 318.

Same—State's Witnesses upon Acquittal. — Costs and charges of State's witnesses upon acquittal of a defendant were ordered to be paid by the county; and in an action against the Commissioners to recover the amount of tickets issued to such witnesses: It was held, (1) that ch. 105, § 33, Bat. Rev. makes the tickets presumptive evidence of the facts set forth therein—attendance, miles traveled, etc.; (2) this evidence, together with the order of the court, imposes a duty upon defendants to provide for their payment. Deaver v. Commissioners, 80 N. C. 116. Section 1274 now provides that "the certificate of the clerk shall be sufficient evidence of the debt." Ed. N.

A witness in a criminal action has no claim upon the county until the liability of the county for the costs is passed upon by the court. Young v. Commissioners, 76 N. C. 316.

Liability of County for Defendant's Witnesses. — The liability of the county for defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. State v. Horne, 119 N. C. 853, 26 S. E. 36; Guilford v. Commissioners, 120 N. C. 23, 28, 27 S. E. 94. See § 1283 and notes thereto.

Witnesses for the losing party receive no pay unless said party be solvent. State v. Wheeler, 141 N. C. 773, 777, 53 S. E. 358.

But this does not abridge the right of all the witnesses to recover compensation against the party summoning them. State v. Massey, 104 N. C. 877, 881, 10 S. E. 608.

A witness can always prove his attendance against the party who subpoenas him. Sitton v. Lumber Co., 135 N. C. 540, 47 S. E. 609.

When Grand Jury Witnesses Entitled to Compensation.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned indorsed thereon as sworn and sent. Lewis v. Commissioners, 74 N. C. 194.

Witnesses to Testify Generally Before Grand Jury.—There is no provision of law for the payment of witnesses summoned to appear and testify generally before the grand jury "in certain matters then and there to be inquired of." Lewis v. Commissioners, 74 N. C. 194.

When Court Rules Witness Incompetent.—Where a witness was ruled by the court to be incompetent, and such ruling was not appealed from, or reversed, it was held that his fees could not be taxed against the adverse party, whether the ruling out of the witness was erroneous or not. Keith v. Goodwin, 51 N. C. 398.

May Not Withdraw Witness Ticket and Sue Thereon.—A witness is not at liberty after final judgment to withdraw his "witness ticket" and sue upon it. His fees for attendance should be taxed and collected with the other costs against the party adjudged to pay the same, if he be solvent; and if not, then the prevailing party who summoned and required his testimony is responsible therefor. Belden v. Snead, 84 N. C. 243.

Rules as to Costs in Justice's Court.—This section is construed with section 1271. See the notes to section 1271.

Court's Power to Fix Fees for Expert Witnesses. — The court has now the statutory authority to fix the fees of expert witnesses, and its action is res judicata as to the amount, leaving open the question of the legality of the taxing of the fee on a motion to retax. Chadwick v. Life Ins. Co., 158 N. C. 380, 74 S. E. 115.

The amount to be paid an expert witness testifying at a hearing before a commissioner of the industrial commission in proceedings before him under the Workmen's Compensation Act is a question to be determined in the discretion of the court and the witness may not require that it be fixed in advance before testifying as to a material matter involved in the inquiry. In re Hayes, 200 N. C. 133, 156 S. E. 791.

The court has discretionary authority under this section, to allow expert witnesses compensation and mileage, and plaintiff's remedy upon being so taxed is to move to retax the costs rather than to except under § 1275. Connor v. Hayworth, 206 N. C. 721, 175 S. E. 140.

Art. 6. Commissioners in Various Court Proceedings

§ 3894. Condemnation commissioners.—The commissioners appointed, under any order of court, to condemn any land, for any railroad or other company or corporation in proceedings to condemn land under and by virtue of any right of eminent domain, shall each receive three dollars per day for each day they are engaged in the performance of their duties. (Rev., s. 2790; Code, s. 1946.)

Commissioners to Be Allowed Reasonable Fee.—In 1 N. C. Law Rev. 284, it is said that "chapter 66, sec. 1, Laws 1923, provides that in all civil actions and special proceedings in which the clerk of the superior court may appoint commissioners, he may allow such commissioners a reasonable fee for their services, to be taxed with the costs in the case. Any party dissatisfied may appeal to the judge, who will hear the matter de novo."

"The fees of commissioners in most cases of special proceedings are already fixed by statute, as to the maximum allowance, and these are generally allowed by the clerk by reason of his jurisdiction over special proceedings; so also in civil actions, where the clerk is empowered to make orders for sales, as in foreclosure of mortgage under a judgment by default final, it would follow as a necessary incident to the exercise of the power, that the clerk might allow compensation to persons appointed to carry out the judgment. This statute (Laws 1923, supra) confers such power definitely, so that no question could arise as to the validity of the order. 1 N. C. Law Rev. 284.

§ 3895. Commissioners to make partition.—The commissioners appointed by any court to make partition to any land, timber or real estate of any kind, or any personal property, shall each receive per diem for his services the sum of not exceeding three dollars, in the discretion of the court. (Rev., s. 2791; Code, ss. 1901, 1922; 1913, c. 18; 1919, c. 10.)

§ 3896. Commissioners to make sale in partition.—In sale of real estate or personalty for partition the allowance to the commissioner for making such sale, and for all services therewith, and for making title, shall be as follows: For sales of five hundred dollars, or less, not more than ten dollars; for sales of over five hundred dollars, two per centum, up to a compensation of forty dollars, and when the allowance shall amount to forty dollars, any additional compensation shall not exceed the rate of one per centum on the excess over two thousand dollars. (Rev., s. 2792; Code, s. 1910.)

No Additional Allowance.—The compensation to a commissioner for making partition sale being fixed by this section, no additional allowance can be made on account of extra trouble or expense. Ray v. Banks, 120 N. C. 389, 27 S. E. 28.

Liability of Debtor.—The debtor is only liable for the debt, interest, actual expense of sale, as advertising, and the like, and a reasonable compensation to trustee for his time and trouble in making sale, say not to exceed 2 per cent. The trustee pays his own attorney. Turner v. Boger, 126 N. C. 300, 35 S. E. 592.

§ 3897. Commissioners to divide land lying in this and another state.—The commissioners appointed to divide lands lying in this and another state shall be entitled to three dollars per day for their services; which, with all fees, expenses and costs, shall be paid as the court may direct. (Rev., s. 2793; Code, s. 1916; 1868-9, c. 122, s. 26.)

§ 3898. Commissioners to assess damages for mills. — Every commissioner appointed in any proceeding to assess the damages arising from the location of any mill, as provided for in the chapter on Mills, shall be entitled to receive two dollars per day. (Rev., s. 2794; Code, s. 1863.)

§ 3899. Commissioners in drainage proceedings.—Each commissioner appointed in proceedings under the chapter on drainage shall be entitled to receive one dollar and fifty cents per day. (Rev., s. 2795.)

§ 3900. Person allotting widow's year's allowance. — Any person appointed by any court or justice of the peace or summoned by any sheriff to allot or set apart to any widow a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar per day or fraction of the day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding. (1907, c. 223; 1913, c. 18.)

§ 3901. Person allotting dower.—Any person designated to allot or assign to any widow dower in her husband's land, and who shall serve, shall be paid not exceeding three dollars per day in the discretion of the court, and the same shall be taxed as a part of the bill of costs of the proceeding. (1913, c. 18; 1919, c. 10.)

§ 3902. Receivers; selling as commissioners. — Receivers of property appointed by any order of court, in any proceedings or action, shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent on the amount received and disbursed by them. (Rev., s. 2797; 1901, c. 2, s. 88; Code, s. 379, subsec. 4.)

Cross References.—As to compensation of receivers dissolving corporation, see section 1215; as to manner of making application for receiver by motion supported by written or documentary evidence, see annotations under section 722; as to receivers generally, see sections, 859 et seq.

Final Judgment.—An order allowing commissions to a receiver is a final judgment. Bank v. Bank, 126 N. C. 531, 36 S. E. 39.

Compensation and Not Commissions.—Trustees and commissioners to sell land under judicial order (other than in partition proceedings) are not allowed commissions, either by statute or common law, but only just such compensation for time, labor, services and expenses as the circumstances of each case warrant. Smith v. Frazier, 119 N. C. 157, 25 S. E. 866.

It was held to constitute error in the instant case to allow 5 per cent commission to the commissioners, and the decree making such allowance will be modified so as to provide for reasonable compensation for the time, services and expenses of the commissioners. Smith v. Frazier, 119 N. C. 157, 25 S. E. 866.

When Land Reconveyed to Grantor. — Where a deed of trust provided that, in case of sale thereunder, the trustee should receive 5 per cent commission on the sale as a compensation for making the sale, and also that if the grantor should discharge the debt before the sale the land should be reconveyed to him; and the trustee advertised the sale, but before sale day the trustor, with the knowledge and consent of the trustee, paid off the debt and interest and the expense of advertisement and demanded his bond and trust deed, it was held that the debt having been paid, the trustee was not entitled to commissions. Pass v. Brooks, 118 N. C. 397, 24 S. E. 736.

Art. 7. County Officers

§ 3903. Clerk of superior court.—The fees of the clerk of the superior court shall be the following, and no other, namely:

Advertising and selling under mortgage in lieu of bond, two dollars for sales of real estate and one dollar for sales of personal property.

Affidavit, including jurat and certificate, twenty-five cents.

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the supreme court, including certificate and seal, two dollars.

Appointing and qualifying justices of the peace, to be paid by the justice, twenty-five cents.

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

Auditing account of receiver, executor, administrator, guardian or other trustee, required to render accounts, if not over three hundred dollars, fifty cents; if over three hundred dollars and not exceeding one thousand dollars, eighty cents; if over one thousand dollars, one dollar.

Auditing final settlement of receiver, executor, administrator, guardian or other trustee, required to render accounts, one-half of one per cent of the amount on which commissions are allowed to such trustee, for all sums not exceeding one thousand dollars; and for all sums over one thousand dollars; one-tenth of one per cent on such excess; but such fees shall not exceed fifteen dollars, unless there be a contest, when the clerk shall have one per cent on the said excess over one thousand dollars; but in no instance shall his fees exceed twenty-five dollars.

Auditing and recording the final account of commissioners appointed to sell real estate, one-half of the fees allowed for auditing and recording final accounts of executors.

Bill of costs, preparing same, twenty-five cents.

Bond or undertaking, including justification, sixty cents.

Canceling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

Capias, when the defendant is not arrested thereunder, shall be such sum as the commissioners of his county may allow.

Caveat to a will, entering and docketing same for trial, one dollar.

Certificate, except where it is a charge against the county, twenty-five cents; and where it is a charge against the county, the fee shall be such sum not exceeding twenty-five cents as the board of commissioners shall allow.

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing ex parte proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.

Filing all papers, ten cents for each case.

Guardian, appointment of, including taking bond and justification, one dollar.

Impaneling jury, ten cents.

Indexing judgment on cross-index book, ten cents for the judgment, regardless of number of parties.

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

Injunction, order for, including taking bond or undertaking and justification, one dollar.

Judgment, final, in term-time, civil action, one dollar.

Judgment, final, against each defendant, in criminal actions, one dollar.

Judgment, final, before the clerk, fifty cents.

Judgment by confession, without notice, all services, three dollars.

Judgment in favor of widow for year's support, fifty cents.

Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.

Juror ticket, including jurat, ten cents.

Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.

Letters of administration, including bond and justification of sureties, one dollar.

Motions, entry and record of, twenty-five cents.

Notices, twenty-five cents, and for each name over one in same paper, ten cents additional.

Notifying solicitors of removal of guardian, one dollar.

Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.

Order of arrest, one dollar.

Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.

Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.

Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women, who acknowledged at the same time, with the certificate thereof, twenty-five cents.

Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.

Probate of limited partnership, fifty cents.

Probate of will in common form and letters testamentary, one dollar.

Qualifying justice of the peace, to be paid by the justice, twenty-five cents.

Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

Recognizance, each party where no bond is taken, twenty-five cents.

Recording and copying papers, per copy-sheet, ten cents.

Recording appointment of process agent for nonresident, fifty cents.

Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.

Registering trained nurses, including certificate of registration, fifty cents.

Recording certificates of incorporation of corporations, three dollars.

Recording names of jurors as required by law, five cents for each name.

Resignation of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.

Seal of office, when necessary, twenty-five cents.

Subpœna, each name, fifteen cents.

Summons, in civil actions or special proceedings, including all the names therein, one dollar, and for every copy thereof, twenty-five cents.

Transcript of judgment, twenty-five cents.

Transcript of any matter of record or papers on file, per copy-sheet, ten cents.

Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.

Witness ticket, including jurat, ten cents.

Five per cent commissions shall be allowed the clerk on all fines, penalties, amercements and taxes paid the clerk by virtue of his office; and three per cent on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under article three of chapter fifty-four; and upon the excess over five hundred dollars of such sums, one per cent.

Provided, that in Franklin county the clerk of the superior court shall not charge and collect the fee for juror ticket, including jurat, or witness ticket, including jurat, as herein prescribed.

Provided, that in such counties of the State where the clerk of the superior court is now or may hereafter be paid a salary in lieu of fees, that such clerk of the superior court shall not charge or collect a fee for juror ticket including jurat, or witness ticket, including jurat, as herein prescribed. (Rev., s. 2773; Code, ss. 229, 1789, 3109. 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 578, 261; 1901, cc. 121, 614, s. 3; 1903, c. 359, s. 6; 1905, c. 360, s. 3; 1917, c. 198, s. 6; 1919, c. 329; 1927, c. 137, c. 247.)

Cross References. — As to compensation and liability of clerk in settling an estate, see section 158; as to fees of clerk for recording certificate of incorporation, see section 1219; as to Costs on Appeal generally, see section 1256 and annotations thereunto; as to costs of transcript on appeal taxed in Supreme Court, see section 1257; as to costs on appeal from justices of the peace, see section 1258.

Editor's Note.—This section was twice amended by the Laws of 1927, each amendment being in the nature of a proviso. Chapter 137 added the proviso that in Franklin County the clerk of the superior court shall not charge and collect the fee for juror ticket, including jurat, or witness ticket. Chapter 247, which added the last proviso and excepted Chatham County therefrom, was amended by Public Laws 1929, c. 214, so as to make the proviso applicable to said County.

For fees clerk in Northampton County shall collect for use of county, see Public Laws, 1931, c. 11.

For act regulating fees of courts and officers in county of Harnett, see 1933, c. 75. Public Laws 1933, c. 91 repealed the provision of Public Laws 1929, c. 45 which provided for fees in Halifax county.

For an act making special provision for the payment of fees in Wilson county, see Public Laws of 1935, chapter 241. As to new provision, not applicable in certain counties, relating to fees for auditing accounts, see sections 3904(g)-3904(i); for docketing judgment, see section 3904(f).

Appeal from Justices of the Peace.—When a defendant is bound over to the superior court by a justice of the peace, the clerk of the superior court is not entitled to the fee of 50 cents allowed for appeal from justice of the peace. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

The fee taxable for "appeal and docketing in Supreme Court" is two dollars only. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

Appeal.—An appeal lies to this court from the erroneous taxation of items in bill of costs in the superior court. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

The fees for continuances of cases allowed to the clerk of the superior court must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. Luther v. Southern R. Co., 154 N. C. 103, 69 S. E. 762.

Motion for Judgment.—The fee of twenty-five cents for motion for judgment can only be taxed when the motion is a motion in the cause, in writing, and required to be recorded. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

Filing Papers.—The fee of 10 cents allowed the clerk of the superior court for "filing papers," is for filing all the papers in an action after final judgment, and not for filing each paper in a case. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

Transcript on Appeal When Fees Unpaid.—The clerk of the court below is entitled to receive his fees before being required to send up a transcript on appeal, and therefore a writ of certiorari will be refused where it appears from the affidavit of the clerk that the transcript was not sent up because the appellant failed, after repeated demands, to pay the fees, and in his reply to the answer setting forth the clerk's affidavit the petitioner did not tender the fees. Saunders v. Thompson, 114 N. C. 282, 19 S. E. 225.

Same—When Incomplete.—Where the clerk of the superior court fails to send up as a part of the transcript the drawing and swearing in of the grand jury who found the indictment, he will not be allowed his costs for making and sending up the transcript of the record. State v. Cameron, 122 N. C. 1074, 29 S. E. 418.

Settlement of Estate.—Where the clerk of the court was appointed a commissioner of the courts to sell certain lands and invest the proceeds, etc., and it appearing that he had rendered services of value, with no indication of conversion, misapplication, or commingling of funds, it was held that he was entitled to his commissions in the settlement of the estate. Hannah v. Hyatt, 170 N. C. 634, 87 S. E. 517.

Section 1259 a Proviso.—The true construction of this section regulating the fees of clerks, is had by reading as a proviso at the end thereof section 1259. Coward v. Commissioners, 137 N. C. 299, 301, 49 S. E. 207.

Recording in the Minute Docket.—The clerk of the superior court is not entitled to a specific fee for recording the proceedings of a cause in the minute docket of the court. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

Clerk's Allowance for Stating Account Disallowed. — Where the plaintiff recovered judgment in the court below and it was ordered that an allowance be made to the clerk for stating an account, one-half to be paid by the plaintiffs and the other half by the defendants it was held to be error. Wall v. Covington, 76 N. C. 150.

Nolle Prosequi.—The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. State v. Johnson, 101 N. C. 711, 8 S. E. 360.

When Judgment Is against State or County. — Costs are not allowed for docketing, filing and indexing a judgment against the State or county, since no lien can be acquired by such docketing. State v. Simmons, 120 N. C. 19, 26 S. E. 649.

The State and county are liable for costs only in the cases expressly provided by statute. Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

A county can not be taxed, under section 1259 with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94.

§ 3904. Local modifications as to clerk's fees. —For the probate of a short-form lien bond, or lien bond and chattel mortgage combined, the clerk shall receive ten cents in the following counties: Alamance, Alleghany, Ashe, Beauford, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Greene, Harnett, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg,

Moore, Nash, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Union, Vance, Warren, Washington, Watauga, Wayne, Wilson. (Rev., s. 2773; 1907, c. 717; 1909, c. 502; 1917, c. 182; 1933, c. 84.)

In Anson, this fee is twenty cents. (1913, c. 49.)

In Bertie county the clerk of the superior court shall collect the sum of fifteen cents for each crop lien or lien bond probated by him for registration in Bertie county, including all services connected therewith. (1915, c. 163.)

In Forsyth county the clerk shall receive fifteen cents for the probate of a deed or other writing, acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof. He shall also receive fifteen cents for the probate of a deed or other writing, proved by a witness, including the certificate. (1913, c. 626.)

In Jackson county, in addition to the fees now allowed by law, the clerk shall receive the sum of five dollars for writing up the minutes of each day's session of the superior court of the county, to be paid by the county. (1913, c. 182.)

In Robeson county the board of county commissioners may make an allowance to the clerk of the superior court for keeping the records of the courts and transcribing the minutes, to be paid out of the general county fund. (Rev., s. 2773.)

From and after February 27, 1923, it shall be unlawful for the clerks of the superior courts of Vance, Warren, Northampton, Wayne and Bertie counties to charge fees for witness and juror tickets issued by them. (1923, c. 92.)

In Mitchell county, the clerk of superior court shall receive double the amount of fees and commissions as provided in section three thousand and nine hundred and three of this chapter. (1931, c. 53.)

As to fees of clerks in Guilford and Montgomery counties, see Public Local Laws 1919, chs. 219, 334, sec. 1.

Editor's Note.—Public Laws 1933, c. 84, inserted Scotland in the list of counties appearing in the first paragraph. For act regulating fees of courts and officers in county of Hartnett, see 1933, c. 75.

§ 3904(a). Fees for probating and recording federal crop liens and chattel mortgages. — The fee to be charged by the clerk of the superior court for the probate of a federal crop lien or a federal chattel mortgage given to secure a seed and fertilizer loan from the United States government or crop production loans, live stock loans, and/or other loans made by the regional agriculture credit corporation of Raleigh, North Carolina and/or production credit associations in North Carolina as provided for by the Farm Credit Act of Congress of one thousand nine hundred and thirty-three, or the North Carolina Rural Rehabilitation Corporation or other relief organizations by relief clients, shall be limited to twenty-five cents for each probate; and the fee of the register of deeds for registering said instrument shall be limited to fifty cents for each lien or chattel mortgage: Provided that this section shall not apply to Brunswick, Caswell, Harnett, Haywood, Hertford, Jackson, Macon, Moore, Person, Polk, Richmond, Stokes, Surry and Wilson counties. (1933, cc. 160, 176, 266, 281, 326, 393, 429, 479, 514; 1935, cc. 120, 260, 369.)

Editor's Note.—Public Laws of 1935, chapter 120, as amended by chapter 260, added the provision, near the center of the section, relating to associations as provided by the Farm Credit Act of Congress. Section 2 of this amendatory act provides that it shall not apply to the counties of Chowan, Gates, Jones, Moore, Perquimans, Richmond, Stanly, and Wilson.

Public Laws of 1935, chapter 369, omitted Johnston from the list of counties excepted from the operation of the section.

Public Laws of 1935, chapter 388, provides for fees for recorded Federal crop liens and chattel mortgages in Wilson county.

§ 3904(b). Fees for issuing certificates of encumbrances.—The fee charged by the register of deeds for preparing and issuing a certificate of encumbrance as required for federal chattel mortgages and/or crop liens shall be limited to fifty (50c) cents for each such certificate. (1933, c. 437.)

§ 3904(c). Advance court costs.—The clerk of the superior court is hereby authorized to collect as advance court cost on all suits started in any court the sum of seven dollars and fifty cents ($7.50) for one defendant, and one dollar and a half for each additional defendant, which fees shall include any process tax or tax on suits and sheriff fees. (1935, c. 379, s. 2.)

§ 3904(d). Advance costs on appeal from justice of the peace.—The clerk of the superior court is authorized to collect from the appellant in all cases in appeals from justices of the peace court to the superior court four dollars as advance cost to be applied on the court cost including the process tax. (1935, c. 379, s. 1.)

§ 3904(e). Fee for cross-indexing names of parties.—The fee for cross-indexing the name of each party to any action or proceeding required to be cross-indexed by law shall be ten cents for each name entered upon the cross-index records. (1935, c. 379, s. 3.)

§ 3904(f). Fee for docketing judgment. — The fee for docketing any judgment shall be ten cents per copy sheet, minimum charge twenty-five cents. (1935, c. 379, s. 4.)

§ 3904(g). Fee for auditing annual accounts of receivers, executors, etc. — For auditing annual accounts of receivers, executors, guardians, administrators, administrators with will annexed, trustees or incompetents, trustees under wills, surviving partner, where the total receipts and disbursements do not exceed eleven thousand dollars, the fee shall be twenty-five cents for each one hundred dollars on receipts and disbursements or a fraction thereof through one thousand dollars. If the receipts and disbursements exceed one thousand dollars, the fee shall be for the receipts and disbursements above one thousand dollars five cents on each one hundred dollars or a fraction thereof through eleven thousand dollars. When the receipts and disbursements exceed eleven thousand dollars the fee for the amount of same above eleven thousand dollars shall be one-tenth of one per cent on the amount of receipts and disbursements in excess of eleven thousand dollars, but in no event shall the fee be less than

one dollar or more than twenty-five dollars. (1935, c. 379, s. 5.)

§ 3904(h). Fee for auditing final accounts of receivers, executors, etc.—For auditing final accounts of receivers, executors, administrators, administrators with will annexed, collectors, trustees for incompetents, trustees under wills, guardians or surviving partner, the fee shall be fifty cents for each one hundred dollars or a fraction thereof of the total receipts and disbursements through one thousand dollars, and ten cents per each one hundred dollars or a fraction thereof on everything above one thousand dollars, but in no event shall the fee be less than two dollars; Provided, that when stocks, bonds or any other personal property is delivered to any heir or distributee without converting the same into cash, these fees shall be computed and charged on the same just as though they had been converted into cash; the value of said stocks, bonds, etc., to be fixed as of the date of death, or qualification of the fiduciary. (1935, c. 379, s. 6.)

§ 3904(i). Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.—For auditing final accounts of trustees, mortgages, commissioners, or other persons, firms, or corporations selling real estate under foreclosure proceeding required to render such final report, the fee shall be twenty-five cents on each one hundred dollars of receipts and disbursements through one thousand dollars and ten cents on each one hundred dollars for everything above one thousand dollars, provided that the minimum fee shall be one dollar and fifty cents and the maximum fee shall not exceed twenty-five dollars. (1935, c. 379, s. 7.)

§ 3904(j). Certain counties not subject to sections 3904(c)-3904(i). — Sections 3904(c)-3904(i) shall not apply to the counties of: Bertie, Cabarrus, Chowan, Cleveland, Columbus, Franklin, Iredell, Lincoln, Martin, Mecklenburg, Montgomery, Moore, New Hanover, Pitt, Richmond, Robeson, Rockingham, Surry, Union, Jackson, Swain, Buncombe, Rowan, Orange, Avery, Wayne, Nash, Wilson, Bladen, Cumberland, Ashe, Edgecombe, Tyrrell, Person, Duplin, Vance, Davie, Guilford, Onslow, Washington, Alleghany, Haywood, Davidson, Burke, Stokes, Franklin, Catawba, Lenoir, Yancey, Jones, Pamlico, Caldwell, Caswell. (1935, c. 379, s. 8, c. 494.)

§ 3905. Coroners.—Fees of coroners shall be the same as are or may be allowed sheriffs in similar cases:

For holding an inquest over a dead body, five dollars; if necessarily engaged more than one day, for each additional day, five dollars.

For burying a pauper over whom an inquest has been held, all necessary and actual expenses, to be approved by the board of county commissioners, and paid by the county. It is the duty of every coroner, where he or any juryman deems it necessary to the better investigation of the cause or manner of death, to summon a physician or surgeon, who shall be paid for his attendance and services ten dollars, and such further sum as the commissioners of the county may deem reasonable. (Rev., s. 2775; Code, s. 3743; 1903, c. 781.)

Editor's Note.—Public Laws 1931, c. 137, provided: "The Coroner of Wake County shall receive in lieu of all fees, commissions and compensations allowed and provided for by section 3905, the sum of one thousand two hundred dollars per annum, payable monthly by the Treasurer of Wake County."

§ 3906. Register of deeds. — The register of deeds shall be allowed, while and when acting as clerk to the board of commissioners, such per diem as such board may respectively allow, not exceeding two dollars; and shall be allowed the following fees for his services as register of deeds:

For registering any deed or other writing authorized to be registered by them, with certificate of probate or acknowledgment and private examination of a married woman, containing not more than three copy-sheets, eighty cents; and for every additional copy-sheet, ten cents.

Registering chattel mortgage, statutory form, twenty cents.

For comparing and certifying a copy of any instrument filed for registration, when the copy is furnished by the party filing the instrument for registration and at the time of filing, one dollar.

For a copy of any record or any paper in their offices, like fees as for registering the same.

For issuing each notice required by the county commissioners, including subpœnas for witnesses, fifteen cents. This shall not include county orders on the treasury.

Recording and issuing each order of commissioners, ten cents. Where a standing order is made for the payment of money, monthly or otherwise, there shall be charged but one fee therefor.

Making out original tax list, two cents for each name thereon; for each name on each copy required to be made, two cents.

Issuing marriage license, one dollar.

For transcript and certificate of limited partnership, fifty cents.

For recording the election returns from the various voting precincts, ten cents per copy-sheet, to be paid by the county.

For attaching and indexing subdivisions or plats now allowed by law to be registered, fifty cents; for transcribing and indexing subdivisions and plats, seventy-five cents. If such subdivision or plat contains more than three lots or tracks of land, register of deeds shall be entitled to charge twenty-five cents for transcribing each and every lot or track of land in excess of three that is contained in such plat or subdivision, but in no case shall the fees exceed five dollars for transcribing and indexing such plat or subdivision. (Rev., s. 2776; Code, ss. 710, 3109, 3751; 1887, c. 283; 1891, c. 324; 1897, cc. 27, 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 261, 302, 578, 723; 1901, c. 294; 1903, c. 792; 1905, cc. 226, 292, 319; 1911, c. 55, s. 3.)

Cross References.—As to right of register of deeds to demand his fees in advance, see section 3949 and annotations thereto; as to fees concerning strays, see sections 3951-3954; as to registration of affidavit of purchaser at a tax sale, see section 8029.

§ 3907. Local modification as to fees of registers of deeds.—The register of deeds shall receive

for registering short form of lien bond, or lien bond and chattel mortgage combined, fifty cents in the counties of Davidson, Halifax, Northampton, Union, Vance, Warren and Wayne; thirty cents in the counties of Alamance, Alleghany, Anson, Ashe, Beauford, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chowan, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Harnett, Hertford, Jones, Lenoir, Lincoln, Martin, McDowell, Moore, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Washington, Watauga and Wilson; twenty cents in the counties of Chatham, Columbus, Cleveland, Iredell, Johnston and Mecklenburg. (Rev., s. 2776; 1907, cc. 421, 636, 717; 1909, cc. 23, 532; P. L. 1913, c. 49; P. L. 1917, c. 182; 1933, c. 48.)

In Alexander county the board of county commissioners are authorized and empowered to pay the register of deeds the sum of one cent each per name for indexing births and deaths in said county. Likewise in Cleveland county. (P. L. 1915, c. 513; P. L. 1917, c. 423.)

In Catawba county the register of deeds shall be allowed as a fee for his services for registering any deed of trust, in which real property is conveyed to a trustee to secure a loan from a building and loan association, the sum of eighty cents. (1909, c. 43.)

In Forsyth county the register shall receive for registering any deed or other writing authorized to be registered with certificate of probate or acknowledgment and private examination of a married woman, containing not more than three copy-sheets, sixty-five cents; and for every additional copy-sheet, ten cents: Provided, that the registration of any deed of trust shall not cost more than one dollar and ten cents, where the same does not contain more than four copy-sheets, and for every additional copy-sheet, ten cents each. (Rev., s. 2776; P. L. 1913, c. 626; P. L. Ex. Sess. 1913, c. 177.)

In Jackson county the register shall, for his service in acting as clerk of the board of commissioners, for recording minutes, and doing other clerical work for or under the direction of the board of commissioners, receive three dollars per day, to be paid by the county. (P. L. 1913, c. 182.)

In Tyrrell county the register shall receive for canceling mortgages, deeds of trust or instruments intended to secure the payment of money, fifteen cents. (1909, c. 780.)

In Union county the county commissioners may revise the fees and commissions which may be charged by the register of deeds, and may fix all such fees and commissions at such amounts and rates as in their judgment will give the register of deeds and his deputies and assistants reasonable compensation. The fees and commissions so fixed shall be the legal fees chargeable by and payable to the register of deeds. (P. L. 1917, c. 366.)

In Gates county the register of deeds shall receive for canceling of a mortgage or deed of trust, ten cents. (P. L. 1919, c. 4.)

In Wake county the register of deeds shall charge and receive the following fees for registration of the papers herein mentioned, to wit: For registration lien bond, fifty cents; for registering short form of chattel mortgage provided for securing a sum not exceeding three hundred dollars, thirty cents; for registering short form of agricultural lien and chattel mortgage for advances, thirty cents; for registering short form of crop lien to secure advances and chattel mortgage to secure pre-existing debt, and to give additional security to the lien, thirty cents; for registering short-form notes given for the purchase price of personal property or combining also a conveyance of the property or other additional property as security, and retaining title to the property sold, twenty cents. (P. L. 1915, c. 138.)

In Yadkin county the fees for recording chattel mortgages, crop liens, conditional sales, etc., shall be twenty cents for the first two copy-sheets or fraction thereof and ten cents for each additional copy-sheet or fraction thereof. (P. L. 1911, c. 414.)

Editor's Note—Halifax County.—Public Laws 1929, ch. 45, relating to fees in Halifax county was repealed by Public Laws 1933, ch. 91.

Same—Northampton County.—Public Laws 1931, c. 11, provided that except as amended below § 3906 shall apply to Northampton County. By this Act the Register of Deeds shall collect the following fees for the use of the County:

For recording any deed or other instrument of writing authorized to be registered, with certificates of probate and acknowledgment and private examination of a married woman, containing not more than three copy sheets, one dollar, and for every additional copy sheet ten cents;

Chattel mortgages, short forms, twenty cents;

Short form lien bond and chattel mortgage, seventy-five cents;

All plats, one dollar and fifty cents;

Title notes, one dollar.

Same—Polk County.—Public Laws 1925, c. 44, provided that the register of deeds of Polk County shall be entitled to receive fees in excess of those allowed by section three thousand nine hundred and six of the Consolidated Statutes as follows:

The register of deeds shall be allowed, while and when acting as clerk to the board of county commissioners, such per diem as the board may allow, not exceeding four dollars per day;

For making out original tax list, five cents for each name thereon;

For each name on each copy required to be made, five cents;

For recording and issuing each order of commissioners, twenty cents. Where a standing order is made for the payment of money monthly there shall be charged but one fee thereof.

For registering chattel mortgage, statutory form, forty-cents.

Same—Scotland County. — Public Laws of 1933, c. 66, changed the fee for registering lien bonds and chattel mortgages in Scotland county from fifty cents to thirty cents.

§ 3908. Sheriffs.—Sheriffs shall be allowed the following fees and expenses, and no other, namely:

Executing summons or any other writ or notice, sixty cents; but the board of county commissioners may fix a less sum than sixty cents, but not less than thirty cents, for the service of each road order.

Arrest of a defendant in a civil action and taking bail, including attendance to justify, and all services connected therewith, one dollar.

Arrest of a person indicted, including all services connected with the taking and justification of bail, one dollar.

Imprisonment of any person in a civil or criminal action, thirty cents; and release from prison, thirty cents.

Executing subpoena on a witness, thirty cents.

Conveying a prisoner to jail to another county, five cents per mile.

For prisoner's guard, if any necessary, and approved by the county commissioners, going and returning, per mile for each, five cents.

Expense of guard and all other expenses of conveying prisoner to jail, or from one jail to another for any purpose, or to any place of punishment, or to appear before a court or justice of the peace in another county, or in going to another county for a prisoner, to be taxed in the bill of costs and allowed by the board of commissioners of the county in which the criminal proceedings were instituted.

For allotment of widow's year's allowance, one dollar.

In claim and delivery for serving the original papers in each case, sixty cents, and for taking the property claimed, one dollar, with the actual cost of keeping the same until discharged by law, to be paid on the affidavit of the returning officer.

For conveying prisoners to the penitentiary, two dollars per day and actual necessary expenses; also one dollar a day and actual necessary expenses for each guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the superior court of his county shall swear to be necessary for the safe conveyance of the convicts, to be paid by the board of commissioners of the county in which the criminal proceedings were instituted.

Providing prisoners in county jail with suitable beds, bed-clothing, other clothing and fuel, and keeping the prison and grounds cleanly, whatever sum shall be allowed by the commissioners of the county.

Collecting fine and costs from convict, two and a half per cent on the amount collected.

Collecting executions for money in civil actions, two and a half per cent on the amount collected; and the like commissions for all moneys which may be paid to the plaintiff by the defendant while the execution is in the hands of the sheriff.

Advertising a sale of property under execution at each public place required, fifteen cents.

Seizing specific property under order of a court, or exceeding any other order of a court or judge, not specially provided for, to be allowed by the judge or court.

Taking any bond or undertaking, including furnishing the blanks, fifty cents.

The actual expense of keeping all property seized under process or order of court, to be allowed by the court on the affidavit of the officer in charge.

A capital execution, ten dollars, and actual expense of burying the body.

Summoning a grand or petit jury, for each man summoned, thirty cents, and ten cents for each person summoned on the special venire.

For serving any writ or other process with the aid of the county, the usual fee of one dollar, and the expense necessarily incurred thereby, to be adjudged by the county commissioners, and taxed as other costs.

All just fees paid to any printer for any advertisement required by law to be printed.

Bringing up a prisoner upon habeas corpus, to testify or answer to any court or before any judge, one dollar, and all actual and necessary expenses for such services, and five cents per mile by the route most usually traveled, and all expenses for any guard actually employed and necessary.

For summoning and qualifying appraisers, and for performing all duties in laying off homesteads and personal property exemptions, or either, two dollars, to be included in the bill of costs.

For levying an attachment, one dollar.

For attendance to qualify jurors to lay off dower, or commissioners to lay off year's allowance, one dollar; and for attendance, to qualify commissioners for any other purpose, seventy-five cents.

Executing a deed for land or any interest in land sold under execution, one dollar, to be paid by the purchaser.

Service of writ of ejectment, one dollar.

For every execution, either in civil or criminal cases, fifty cents.

Whenever any precept or process shall be directed to the sheriff of any adjoining county, to be served out of his county, such sheriff shall have for such service not only the fees allowed by law, but a further compensation of five cents for every mile of travel going to and returning from service of such precept or process: Provided, that whenever any execution of five hundred dollars or upwards shall be directed to the sheriff of an adjoining county, under this chapter, such sheriff shall not be allowed mileage, but only the commissions to which he shall be entitled. [Provided, that when the summons in a civil action or special proceedings shall be from any court of any county other than his own county, the sheriff's fees for serving the same shall be one dollar ($1) for each defendant named therein; and such service shall include the delivery of copy of said summons and complaint or petition attached to the original summons; and that for subpoenas served from other than the county of said sheriff he shall receive a fee of fifty cents (50c.) for each witness named therein.

The part of this section in brackets shall not affect fees provided in section three thousand nine hundred and nine of the consolidated statutes for service upon the waters of the counties of Carteret, Dare, Hyde, and Pamlico.] For the service of summons together with a copy of the complaint, petition or other pleading, the sheriff shall have the fees now prescribed by law in the respective counties for the service of summons only, and shall not be entitled to an additional fee for serving the copy of the pleading unless it is necessary that it be served separately. (Rev., s. 2777; Code, ss. 931, 2035, 2089, 2090, 3752; 1885, c. 262; 1891, cc. 112, 143; 1903, c. 541; 1901, c. 64; R. C., c. 102, s. 21; R. C. c. 31, s. 56; 1822, c. 1132; 1924, c. 101; 1925, c. 275, s. 6; 1929, c. 227; 1933, c. 132.)

Cross References.—As to local act applying to Hartford county only, see Acts 1925, c. 17; as to costs of laying off homesteads and personal property exemptions, see section 1251 and annotations thereto; as to costs in reassessment of homestead, see sec. 1552 and annotations thereto; as to fees in attachment and garnishment proceedings upon failure to pay taxes, see section 8004; as to fees in tax sale, see section 8009; as to fee entering a memorandum of redemption in the list of tax sales, see section 8038.

Editor's Note.—This section was amended by the Laws of 1924, and again by the Laws of 1925. Chapter 101, Laws

1924 added the final proviso to the section which fixes the sheriff's fees for summons and subpoenas from outside the county, placing the fee for the former at one dollar, and for the latter at fifty cents. It is also expressly provided that the said proviso shall not affect fees provided by section 3909 for service upon the waters of the counties of Carteret, Dare, Hyde, and Pamlico.

Chapter 275, section 6, subsection 2, Laws 1925, further amended the section by striking out after the word "by" in line thirty-one of said section down to and including the word "thereof" in line thirty-eight of said section and inserting in lieu thereof the following: "The Board of Commissioners of the county in which the criminal proceedings were instituted," thus removing the cost from the State and placing it upon the county of the proceedings.

Public Laws of 1933, c. 132, reduced the mileage fee for bringing up a prisoner upon habeas corpus from ten cents per mile to five cents per mile. For act regulating fees of courts and officers in county of Harnett, see 1933, c. 75.

The Act of 1929 added the last sentence to this section.

Construed with Section 1259.—The true construction of this section regulating the fees of sheriffs is had by reading as a proviso at the end thereof section 1259. Coward v. Commissioners, 137 N. C. 299, 301, 49 S. E. 207.

Legislative Control of Sheriffs' Salaries and Fees.—One who accepts a public office does so, with well defined exceptions as to certain constitutional offices, under the authority of the Legislature to change the emoluments, he is to receive for the performance of his duties, at any time, and, while the office of sheriff is a constitutional one, the regulation of his fees is within the control of the Legislature, and the same may be reduced during the term of the incumbent, or he may therein be compensated by a salary instead of on a fee basis. Mills v. Deaton, 170 N. C. 386, 86 S. E. 123, State v. Gentry, 183 N. C. 825, 112 S. E. 427; Commissioners v. Stedman, 141 N. C. 448, 54 S. E. 269.

Commissions When Debtor Pays after Levy.—At common law a sheriff could not demand commissions, although the debtor paid the creditor the amount of the judgment after he had received the execution and made his levy. He was allowed to do so at first under the Act of 1784. The Code of 1883, sec. 3752, now this section. Pass v. Brooks, 118 N. C. 397, 398, 24 S. E. 736.

In Dawson v. Grafflin, 84 N. C. 100, when property was levied on and advertised for sale under execution, but payment was made before sale, the sheriff was allowed no commission on the sale. The rule in that case is now changed by this section. Cannon v. McCape, 114 N. C. 580, 581, 584, 19 S. E. 703, 20 S. E. 276.

Whenever a sheriff into whose hands an execution is placed levies the same and advertises a sale, he becomes entitled to his commissions. And if the plaintiff in the execution receives the amount from the debtor, and orders the same to be returned unexecuted, he makes himself liable for the sheriff's fees. Willard v. Satchwell, 70 N. C. 268, which is in conformity with the section, which changes the ruling in Dawson v. Grafflin, 84 N. C. 100.

Collecting Executions for Money.—It was said by Manly, J., in Dibble v. Aycock, 58 N. C. 399, 400: "The law upon the subject of sheriff's fees, Revised Code, Chap. 102, sec. 21, (now this section) gives 2 1-2 per cent commission to that officer upon all moneys collected by him by virtue of any levy, and the like commissions for all moneys that may be paid to the sheriff by the defendant while such precept is in the hands of the sheriff, and after levy. The sum upon which commission is asked, (in the instant case) was paid into the office of the court, for plaintiff, while the precept was in the sheriff's hands, and after a levy. The case is strictly, therefore, within the provisions of the law. That the payment was made under a condition for an injunction does not affect the question at all."

A sheriff is entitled to commissions only on moneys actually collected by himself under execution, and not where the same is paid the plaintiff by defendant after levy. Dawson v. Grafflin, 84 N. C. 100, 101.

When Sheriff Has Lien.—A lien exists in favor of the sheriff when he does not require the plaintiff, as he has a right to do, to pay his fees in advance. In such instances he has the right of retainer to the extent of the costs out of the amount collected, and can not be compelled to look exclusively to the plaintiff's prosecution bond, nor prevented from exhausting his remedy against the debtor, by reason of any receipt or compromise between the judgment creditor and debtor. Long v. Walker, 105 N. C. 90, 10 S. E. 858.

When Process Returned "Fees Not Paid."—Where the return of the sheriff was as follows, to wit: "Defendant does not petition for homestead, and the plaintiffs refuse to pay homestead fees. No action; the necessary fees not paid." The court held that an officer cannot be required to execute process unless his fees be paid or tendered by the person in whose interest the service is to be rendered. Lute v. Reilly, 65 N. C. 20, 21. Taylor v. Rhyne, 65 N. C. 530.

A sheriff is not required to sell the excess of realty beyond the homestead, until the plaintiff has paid, or offered to pay, his fees for so doing. Taylor v. Rhyne, 65 N. C. 530.

Writ of Ejectment.—A sheriff is not entitled to any extra compensation for executing a "writ of ejectment," or a "writ of possession." Allen v. Spoon, 72 N. C. 369.

Summons of Tales Jurors.—There is no provision now, and none is to be found in the Revised Statutes or the Revised Code, giving sheriffs compensation for the service of summoning tales jurors. This is one of the many gratuitous services expected to be performed by sheriffs. The Legislature, no doubt, deemed such service too trivial to be the subject of compensation, for all a sheriff has to do in a performance of the duty is to stand at his desk in the courthouse and, when a deficiency of jurors occurs, order A, B and C to take seats in the jury box. Bryan v. Commissioners, 84 N. C. 105, 106.

Jail Fees of Insolvent Debtor.—The action against the creditor for the jail fees of an insolvent debtor, given by section 1650 to the jailor, can not be maintained by the sheriff as the jailor's principal. Bunting v. McIlhenny, 61 N. C. 579.

Power of Judge to Order Commissioners to Pay. — The judge of the superior court has no power to order the commissioners of one of the counties in his district to pay the sheriff any sum for his services in attending the court. Brandon v. Commissioners, 71 N. C. 62, cited and approved; Griffith v. Commissioners, 71 N. C. 340.

§ 3909. Local modifications as to fees of sheriffs.—The sheriff of Hyde county shall be allowed the sum of two dollars for serving all warrants or capiases or other criminal processes on the waters of Pamlico sound or on the waters of any bay in Hyde county. Whenever such sheriff is compelled to go by boat or vessel a distance of more than two miles from any shore or landing in Hyde and of Dare county to serve any civil process upon the waters of Pamlico sound and waters of Dare county or any bay in Hyde county, such sheriff, in addition to the fee prescribed by law for serving such process, may add the expense of hiring such boat or vessel, which cost or expense shall be taxed by the clerk of the superior court of the county from which such process issued in the bill of costs in the action in which such process issued. Sheriffs and constables of Hyde and Carteret counties shall receive three dollars for every process executed on board of any boat or vessel lying in the waters between Ocracoke island, Hyde county, and Portsmouth in Carteret county. (Rev., s. 2777; 1907, c. 206.)

The sheriff of Dare county shall be allowed his actual traveling expenses incurred by him in serving warrants, capiases or other criminal process on the waters of Dare county or at any point in Dare county across the water. (1909, c. 527.)

For every illicit distillery seized as required by law the sheriffs of Haywood, Lincoln, Pitt and Transylvania counties shall receive the sum of twenty dollars, and in Madison county thirty dollars, which shall be allowed by the commissioners of the county in which the seizure was made. (Ex. Sess. 1908, s. 97; P. L. 1919, c. 30.)

For each person summoned on a special venire the sheriff of Robeson county shall receive thirty cents; but not for a special venire ordered to be summoned from the bystanders, in which case he shall receive ten cents for each person so summoned. (1909, c. 317.)

For sheriff's fees in Greene county, see P. L. 1919, c. 313.)

Editor's Note.—Public Laws 1929, ch. 45, relating to fees in Halifax county was repealed by Public Laws 1933, ch. 91.

Public Laws of 1929, ch. 56, applicable only to Mitchell County provides: "The fee for serving either criminal or civil summonses shall be increased from thirty cents to sixty cents." This Act also includes other changes in § 3908. Public Laws 1931, c. 53, ss. 6, 8, fixing the salary of the sheriff of Mitchell County at $3,000.00, provides that in addition to such salary shall be entitled to all fees and emoluments accruing to him, by virtue of his office, including such fees as are provided in chapter fifty-six, Public Laws 1929.

Same—Northampton County.—Public Laws 1931, c. 11, provides that except as amended below § 3908 shall apply to Northampton County. By this Act the Sheriff of such county shall collect for the use of Northampton County the following fees:

Serving civil summons, one dollar for each defendant;
Subpoena, for each person, thirty cents;
For each arrest, two dollars.

Illicit Distilleries.—The fees or emoluments incident to a sheriff's office as allowance for the seizure and destruction of illicit distilleries, are excluded by a public-local law applicable to a certain county, subsequently enacted, but prior to the commencement of the term of the incumbent, wherein it is provided that the sheriff shall turn over to the county treasurer all moneys collected from fees, and receive a specified sum as a salary in lieu of his fees, with exception only of certain fees allowed to his township deputy in certain instances, the duty to seize the illicit distilleries being the same as any other required of him as sheriff of the county. Thompson v. Board, 181 N. C. 265, 107 S. E. 1.

§ 3910. County treasurer.—The county treasurer shall receive as compensation in full for all services required of him such a sum, not exceeding one-half of one per cent on moneys received and not exceeding two and a half per cent on moneys disbursed by him, as the board of commissioners of the county may allow. As treasurer of the county school fund he shall receive such sum as the board of education may allow him, not exceeding two per cent on disbursements; and the said commissions shall be paid only upon the order of the county board of education, signed by the chairman and secretary, and the county board of education is hereby forbidden to sign any such order until the treasurer shall have made all reports and kept all such accounts required by law in the form and manner prescribed: Provided, that said treasurer shall be allowed no commission or compensation for receipts and disbursements of any loan or loans made to the county by the state board of education out of the state literary fund the special building fund derived from county or district bond issues for the building of schoolhouses: Provided, that in counties where the treasurer's total compensation cannot exceed two hundred and fifty dollars per annum the treasurer may be allowed, in the discretion of the board of county commissioners and of the board of education, as to the school fund, a sum not exceeding two and one-half per cent on his disbursements of all funds handled by him; but the compensation allowed by virtue of the provisions of this last proviso shall not be operative to give a total compensation in excess of two hunded and fifty dollars per annum to such treasurers. (Rev., s. 2778; Code, s. 770; 1899, c. 233; 1909, c. 577; 1913, c. 144; 1919, c. 254, s. 9, 1924, c. 121, s. 6.)

Editor's Note.—This section was amended by chapter 121, section 6, Laws 1924, by inserting after the words "of the state literary fund" and before the words "for the building of schoolhouses" the words "the special building funds derived from county or district bond issues."

Statutes Construed Together.—The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors, and their compensation therefor, being in pari materia, should be construed together by the courts in ascertaining the legislative intent. Drainage Commr's v. Davis, 182 N. C. 140, 108 S. E. 506.

Compensation.—Every county treasurer is entitled to compensation for his labor and responsibility, and in no case less than two and a half per cent per annum on the amount collected, where it can not exceed two hundred and fifty dollars. Koonce v. Commissioners, 106 N. C. 192, 10 S. E. 1038.

Commissioner for Drainage Assessments. — The claim of the treasurer of the county for commissions derived from assessments in Mattamuskeet Drainage District is not allowed on this appeal, under the decision of Board v. Credle, 182 N. C. 442, 109 S. E. 88, which also covers the question as to commissions on the receipt and disbursement of canal tolls by him. Drainage Comm'rs v. Brinn, 182 N. C. 447, 109 S. E. 90.

This section, cannot be construed to allow additional compensation to the county treasurer for receiving and disbursing money of a drainage district under section 36, ch. 442, Laws of 1909, the acts being unrelated; but if otherwise, the county treasurer must bring himself within the provisions of this section by showing the amount claimed was allowed to him in the discretion of the county commissioners, within the limit fixed by the statute, and that the regular procedure followed as to the drawing of the warrants by the drainage commission upon funds on hand derived from collections for the benefit of the drainage district alone, etc. Board v. Credle, 182 N. C. 442, 109 S. E. 88.

May Enforce Claim by Mandamus.—In the event that the county commissioners refuse to consider the treasurer's claim for his fees, the proper remedy is a mandamus proceeding. Koonce v. Commissioners, 106 N. C. 192, 10 S. E. 1038.

§ 3911. County superintendent of public instruction.—The salary of the county superintendent of schools shall be fixed by the county board of education. It shall not be less than three dollars per day while engaged in the service of the public schools. The county board of education may fix an annual salary not to exceed four per cent of the disbursements for schools under his supervision. The county board of education of any county whose total school fund exceeds fifteen thousand dollars may employ a county superintendent for all of his time at such salary as may be fixed by said board. (Rev., s. 2782; 1901, c. 4, s. 44; 1903, c. 435, s. 19; 1909, c. 525.)

§ 3912. County board of education.—The members of the county board of education shall receive three dollars per diem and five cents a mile to and from their respective places of meeting. (Rev., s. 2786; 1901, c. 4, s. 27; 1915, c. 236, s. 2.)

§ 3913. County board of pensions.—Each member of the county board of pensions shall be entitled to two dollars a day, not exceeding three days in any year, when attending the annual meeting of said board, the said compensation to be paid by the county treasurer on the order of the board of county commissioners. (Rev., s. 2783; 1903, c. 273, s. 19.)

§ 3914. County standard-keeper. — Standard-keepers shall be entitled to receive the following fees, and no other, namely: for examining and adjusting a pair of steelyards, twenty-five cents; every weight of half a pound and upwards, five cents; every set of weights below half a pound, including one piece of each denomination, five cents; for a yardstick, or other measure of cloth, five cents; every bushel, half-bushel, peck or other measure used in measuring grain, meal or salt, ten cents; each measure for liquors or wines, three cents, and for extra work on bushel and half-bushel measures a sum not exceeding

twenty-five cents in any one case; and for every surveyor's chain, fifty cents. (Rev., s. 2780; Code, s. 3753; 1889, c. 406; R. C., c. 102, s. 37; 1870-1, c. 139, s. 3; 1874-5, c. 110.)

Cross References.—As to State standard-keeper, see section 8065; as to county standard-keepers generally, see sections 8069-8073.

§ 3915. Finance committee. — The members of the finance committee shall each receive such compensation for the performance of his duties as the board of commissioners may allow, not exceeding three dollars per day; but they shall not be paid for more than ten days in any one year. (Rev., s. 2781; Code, s. 763; 1871-2, c. 71, s. 5; 1873-4, c. 107.)

The commissioners of a county have the right to contract with skilled expert accountants for the auditing of the books and accounts of the various departments of the county at a price agreed upon, and empowers them to order that the same be paid by the county treasurer out of the county funds. Wilson v. Holding, 170 N. C. 352, 86 S. E. 1043.

§ 3916. Committee to examine treasurer's books.—The board of commissioners shall allow to the committee who examine the books and moneys of the treasurer the same pay per diem that is received by a member of the board, not to exceed pay for one day's service for each examination. (Rev., s. 2779; Code, s. 774; 1879, c. 33.)

§ 3917. Election officers.—The registrar shall receive three cents for each name registered in the new registration when ordered, and thereafter in the revision of the registration book he shall receive one cent for each name copied from the original registration book. Each chairman of the county board of elections shall be allowed three dollars per day for the time actually employed, and five cents per mile for distance traveled, for making the returns for senators, and each sheriff shall receive thirty cents for each notice he is required to serve under the law providing for holding elections. The compensation allowed officers shall be paid by the county treasurer after being audited by the board of county commissioners. Clerks and registers of deeds shall also be allowed the usual registration fees for recording the election returns, to be paid by the county. The board of state canvassers may employ two clerks at a compensation of four dollars each per day, during the session of the board of state canvassers. The members of the county board of elections shall each be allowed three dollars per day for each day they may be actually employed in the performance of their duties. The registrars and judges of election shall be entitled to such compensation as may be fixed by the board of commissioners of their county, not to exceed three dollars each for holding the election. The election constables or bailiffs shall be entitled to three dollars per day each; and the registrar or judge of election, who shall act as returning officer, shall be allowed three dollars, payable out of the county treasury: Provided, that the registrars shall receive, in addition to the compensation herein allowed for each name registered, the sum of three dollars per day for each Saturday during the period of registration, and on which they attend at the several polling places for the purpose of registering voters or receiving and hearing challenges: Provided further, that in addition to the compensation herein allowed the several election officers it shall be lawful for the county commissioners to pay to the several members of the county board of elections and also to the several members of the county board of elections and also to the several registrars such additional compensation as may be by them considered just and fair. (Rev., s. 2784; 1901, c. 89, s. 62; 1905, c. 434; 1907, c. 760; 1919, c. 61.)

§ 3918. County commissioners.—Except where otherwise provided by law, each county commissioner shall receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day, as a majority of the board may fix upon, and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile. (Rev., s. 2785; Code, s. 709; 1907, c. 500.)

Mileage Allowed.—Members of the board of county commissioners are only entitled to mileage for the distance by the usual route traveled to attend such meeting of the board as the statute has prescribed, and returning from such meeting; they cannot charge mileage for each day, although they may actually return to their homes at the close of each day of a meeting. State v. Norris, 111 N. C. 652, 16 S. E. 2.

When Mileage Allowance Erroneous but Innocent. — Where a board of county commissioners audited in favor of its members for mileage, to which they were not entitled, and it was found as a fact that they did so under advice and without any corrupt or fraudulent motive, it was held, that the members of the board were not indictable, either under the Statute, sections 4388, or at common law. State v. Norris, 111 N. C. 652, 16 S. E. 2.

Compensation Not Allowed Commissioner for Inspecting Bridge.—A member of the board of county commissioners who, under the direction of the board, inspected and reported upon a bridge cannot recover in his action for the services rendered or mileage; he is forbidden to do so as a county commissioner under this section, and is indictable if claiming compensation for extra services under either an express or implied contract with the board, under section 4388. Davidson v. Guilford County, 152 N. C. 436, 67 S. E. 918.

§ 3919. Fees of jailers.—Jailers shall receive, for furnishing prisoner with fuel, one pound of wholesome bread, one pound of good roasted or boiled flesh, and a sufficient quantity of water, with every necessary attendance, a sum not exceeding fifty cents per day, unless the board of commissioners of the county shall deem it expedient to increase the fees, which it may do provided such increase shall not exceed fifty per cent on the above sum. (Rev., s. 2799; Code, s. 3746; R. C., c. 102, s. 38; 1878, c. 87; 1919, c. 118.)

§ 3920. Fees of entry-taker.—Entry-takers shall receive the following fees, and no other, namely: For an entry, including all services, forty cents; issuing each duplicate warrant, when thereto required, twenty-five cents; for posting and advertising, the applicant shall pay the entry-taker one dollar, and the costs of the newspaper advertisement. (Rev., s. 2801; Code, ss. 2765, 3744; R. C., c. 102, s. 32; 1870-1, c. 139, s. 3; 1903, c. 272, s. 3.)

§ 3921. Fees of surveyors and chain-carriers.—Surveyors appointed by courts to survey any lands the boundaries of which may come in question in any suit or proceeding pending therein, or called upon by the commissioners to assist in surveying and dividing the lands of intestates or others, held in common, shall receive the following fees, and no other, namely: For every survey

on an entry containing three hundred acres or less, one dollar and sixty cents, and for every hundred more than that quantity, forty cents; for surveying lands in dispute, by order of court, traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day. For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place and performing the duty, two dollars per day, which shall be taxed in the bill of costs. In all surveys made by order of the court, the chain-carriers shall be allowed such compensation as the court may determine, not exceeding one dollar each per day; and in matters of disputed boundary, which may come in question, in any suit, the court may make to the surveyor such allowance for plots as it may deem reasonable, which, with the allowance to chain-carriers, shall be taxed as costs. (Rev., s. 2802; Code, s. 3754; 1893, c. 58, s. 2; 1905, cc. 182, 263.)

As to fees for recording and indexing surveys of State lands, see section 7573.

For act applicable to the per diem of the surveyor in Cabarrus county, see Public Laws of 1935, chapter 202.

§ 3921(a) No compensation out of State Equalizing Fund.—No Sheriff, Tax Collector, Treasurer or other fiscal agent of any county shall be allowed or receive any amount by way of commissions, allowance, credits in settlements or otherwise out of, or on account of any sums received by any county out of the State Equalizing Fund. (1929, c. 274, s. 1.)

§ 3921(b) Repayment.—Any Sheriff, Tax Collector, Treasurer or other fiscal agent of any county who shall receive commissions, allowances or credits of any kind out of or on account of any funds received from any county out of the State Equalizing Fund together with the sureties on their respective official bonds, and every member of any Board of County Commissioners, and every Auditor or other county officer or agent approving or acquiescing in payment or allowance of the same, shall each be liable personally and severally for repayment to the county of the amount so received in an action brought in any court of competent jurisdiction at the instance of any taxpayer of the county. (1929, c. 274, s. 2.)

Art. 8. Township Officers

§ 3922. Constable. — Constables shall be allowed the same fees as sheriffs. (Rev., s. 2787; Code, s. 3742; 1883, c. 108.)

§ 3923. Justice of the peace.—That justices of the peace shall receive the following fees, and none other: For attachment with one defendant, twenty-five cents, and if more than one defendant, ten cents for each additional defendant; transcript of judgment, ten cents; summons, twenty cents, if more than one defendant in the same case, for each additional defendant, ten cents; subpœna for each witness, ten cents; trial when issues are joined, seventy-five cents, and if no issues are joined, then a fee of forty cents for trial and judgment; taking an affidavit, bond or undertaking, or for an order of publication, or an order to seize property, twenty-five cents; for jury trial and entering verdict, seventy-five cents; execution, twenty-five cents; renewal of execution, ten cents; return to an appeal, thirty cents; order of arrest in civil actions, twenty-five cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, fifty cents; warrant of commitment, twenty-five cents; taking depositions on order or commission, per one hundred words, ten cents; garnishment for taxes, and making necessary return and certificate of same, twenty-five cents; for hearing petition for widow's year's allowance, issuing notice to commissioners and allotting the same, one dollar; for filing and docketing laborers' liens, fifty cents; probate of a deed or other writing proved by a witness, including the certificate, twenty-five cents; probate of a deed or other writing executed by a married woman, proper acknowledgment and private examination, with the certificate thereof, twenty-five cents; probate of a deed or other writing acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof, twenty-five cents; probating chattel mortgage, including the certificate, ten cents; for issuing all papers and copies thereof in an action for claim and delivery, and the trial of the same, if issues are joined, when there is one defendant, one dollar and fifty cents, and if more than one defendant in action, fifty cents for each additional defendant, and ten cents for each subpœna issued in said cause, and twenty-five cents for taking the replevy bond, when one is given: Provided, that when the trial of such a cause shall have been removed from before the justice of the peace issuing the said papers, the justice of the peace sitting in trial of such cause shall receive fifty cents of the above costs for such trial and judgment.

Justices of the peace in the counties of Montgomery, Onslow, Macon, Swain, Greene, Hyde, Cherokee, Rowan, Anson, Bertie, Nash, Chowan, Alamance, Wake, Transylvania, Watauga, Pender, Lee, Lenoir, Perquimans, Rockingham, Stokes, Johnston, Halifax, Duplin, Chatham, Forsyth, Wilkes, Gates, Tyrrell, Brunswick, Stanly, Columbus, Edgecombe, Franklin, Vance, Mitchell, Orange, Buncombe, Jackson, Alexander, McDowell, Clay, Hertford, Davidson, Northampton, Wayne, Jones, Cabbarrus, Roberson, Richmond, Randolph, Polk, Henderson, Harnett, Bladen, Burke, Granville, Person, Haywood, Caldwell, Cumberland, and Madison shall receive the following fees, and none other: For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each additional defendant, fifteen cents; subpœna for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or under-

taking, or for an order of publication, or an order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution, fifteen cents; return to an appeal, forty cents; order of arrest in civil action, thirty cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty cents; taking depositions on order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (Rev., s. 2788; Code, ss. 2135, 3748; 1870-1, c. 130, s. 9; 1883, c. 368; 1885, c. 86; 1903, c. 225; 1907, c. 967; 1917, c. 260; 1921, c. 113; Ex. Sess. 1921, cc. 38, 64, 67; 1923, cc. 28, 114, 238; 1929, cc. 13, 59; 1931, cc. 51, 303)

For schedule of the fees for justices of the peace in Orange county, see Public Laws of 1935, chapter 358.

Editor's Note.—The amendment of 1929 added Caldwell and Onslow Counties. The Acts of 1931 added Cumberland and Madison Counties.

The fee of the recorder of a city who is ex officio justice of the peace for the trial of an offense should, in proper instances, be taxed against the defendant as a part of the costs, upon the trial in the superior court, upon appeal. State v. Lord, 145 N. C. 479, 59 S. E. 656.

Art. 9. Commissioners of Affidavits

§ 3924. Commissioners of affidavits.—Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: for an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents. (Rev., s. 2796; Code, s. 3741.)

Cross References.—As to fees of notaries, see section 3188; as to fees of commissioners of navigation for issuing pilot's license, see section 6971; as to rates of pilotage, and fees of pilots, see sections 6955, 6974, 6977, 6979, 6991, 6992, and 6993; as to fees of port wardens, see section 6962.

CHAPTER 71A.

SECURITIES LAW

§ 3924(a). Title. — This act may be cited and shall be known as the "Capital Issues Law" of the State of North Carolina. (1925, c. 190, s. 1; 1927, c. 149, s. 1.)

See editor's note under sec. 3924(b).

Editor's Note.—An article discussing the history of blue sky laws and summarizing the various statutes will be found in 3 N. C. Law Rev. 150 et seq. The North Carolina cases are also discussed.

The Act of 1927 repealed the law of 1925 and substituted the following provisions therefor. See Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 420, 422, 142 S. E. 578. For constructions of prior law, see note to §§ 6363-6375.

Application of Chapter.—This chapter applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profits from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute. State v. Heath, 199 N. C. 135, 153 S. E. 855.

§ 3924(b). Definitions — When used in this act.—

(a) The term "commissioner" shall mean the member of the corporation commission of North Carolina, designated by the governor to administer this act, and the term "commission" shall mean the corporation commission of North Carolina, which is charged with certain duties under the terms of this act.

(b) The term "person" shall mean and include a natural person, firm, partnership, association, syndicate, joint-stock company, unincorporated company or organization, trust incorporated or unincorporated and any corporation organized under the laws of the District of Columbia, or of any foreign government. As used herein, the term "trust" shall be deemed to include a common law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament or by a court of law or equity.

(c) The term "securities" or "security" shall include any note, stock certificate, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement certificate of interest in an oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any contract or agreement in the promotion of a plan or scheme whereby one party undertakes to purchase the increase or production of the other party from the article or thing sold under the plan or scheme, or whereby one party is to receive the profits arising from the increase or production of the article or thing sold under the plan or scheme, or any other instrument commonly known as security.

(d) The term "sale" shall include any agreement whereby a person transfers or agrees to transfer either the ownership of or an interest in a security. Any security given or delivered with or as a bonus on account of any purchase of securities, or of any other thing shall be deemed to constitute a part of the subject of such purchase and to have been sold for value. "Sale," or "sell" shall also include an attempt to sell, an option of a purchase or sale, a solicitation of a sale, a subscription, or an offer to sell, either directly or by agent, or by a circular letter, advertisement, or otherwise; but nothing herein shall limit or diminish the full meaning of the term "sell" or "sale" as used by or accepted in courts of law or equity: Provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the provisions of this act, but when such privilege of conversion shall be exercised such conversion shall be subject to the limitations hereinafter provided in subsection (8) of section 3924(d); and provided further, that the issue or transfer of a right pertaining to a security entitling the holder to subscribe to another security of the same issuer, when such right is issued or transferred with the security to which it pertains, shall not be deemed a sale or offer to sell or option of sale of such other security within the meaning of this definition, and such right shall not be construed as affecting the status of

the security to which such right pertains with respect to exemption or registration under the provisions of this act; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this act.

(e) The term "issuer" shall include every person who proposes to issue or who issues or who has issued or shall hereafter issue any security (sold or to be sold, offered or to be offered for sale).

(f) The term "intangible assets" shall mean and include patents, formula, good will, promotions, trade brands, franchises, evidences of indebtedness or corporate securities, titles or rights in and to intangible property, and all other like assets.

(g) "Tangible assets" shall mean all assets other than intangible assets, as above defined.

(h) "Mortgage" shall be deemed to include a deed of trust to secure a debt. (1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432.)

Editor's Note.—Public Laws of 1933, ch. 134, codified as secs. 1112(a)-1112(q), abolishing the corporation commission, created the office of utilities commissioner and provided for the appointment of two associate commissioners. Section 8 of the act, codified as sec. 1112(g), provided that chapter 149 of the Public Laws of 1927, codified as secs. 3924(a) et seq., be amended so that all functions, powers, etc., of the corporation commission "shall hereafter be done and performed by the utilities commissioner." Therefore, the sections of this chapter should be read with this amendment in mind.

Public Laws of 1933, c. 432, inserted in subsection (3) the provision relating to contracts "whereby one party undertakes to purchase an increase or production of the party," etc.

§ 3924(c). Exempted securities. — Except as hereinafter provided, the provisions of this act shall not apply to any security which, at the time of sale thereof, is within any of the following classes of securities:

(a) Any security issued or guaranteed by the United States or by any territory or insular possession thereof, or by the District of Columbia, or by any state or municipal corporation or political subdivision or agency thereof.

(b) Any security issued or guaranteed by any foreign government, or by any state, province or political subdivision thereof, having the power of taxation or assessment, with which the United States is maintaining diplomatic relations and which security is recognized at the time it is offered for sale in this State as a valid obligation for its face value by such foreign government, or by the State, province or political subdivision thereof issuing same.

(c) Any security issued by a national bank, or by any Federal Land Bank, or joint-stock land bank, or national farm loan association under the provisions of the Federal Farm Loan Act of July seventeen, nineteen hundred and sixteen, or any amendments thereof, or by the War Finance Corporation, or by any corporation created or acting as an instrumentality of the government of the United States pursuant to authority granted by the Congress of the United States, provided, that such corporation is subject to supervision or regulation by the government of the United States.

(d) Any security issued or guaranteed as to principal, interest or dividend, by a corporation, domestic, or foreign, owning or operating a railroad, or any other public service utility: Provided, that such corporation is subject to regulation or supervision, either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer, or by any governmental, legislative or regulatory body of this State, or of the United States, or any State, territory or insular possession thereof, or of the District of Columbia, or of the Dominion of Canada, or any province thereof; also equipment securities based on chattel mortgages, leases or agreements for conditional sale of cars, motive power or other rolling stock or equipment mortgaged, leased or sold to or furnished for the use of or upon a railroad or other public service utility corporation, equipment securities where the ownership or title of such equipment is pledged or retained in accordance with the provisions of the laws of the United States, or of any State, or of the Dominion of Canada, to secure the payment of such equipment securities; also bonds, notes or other evidences of indebtedness issued by a holding corporation and secured by collateral consisting of any of the securities herein above in this clause (d) described: Provided, that such collateral securities equal in fair value at least one hundred and twenty-five (125%) per cent of the par value of the bonds, notes or other evidences of indebtedness, so secured.

(e) Securities appearing in any list of securities dealt in any organized stock exchange having an established meeting place in a city of over five hundred thousand population according to the last preceding United States census and providing facilities for the use of its members in the purchase and sale of securities listed by such exchange and on which exchange actual transactions have accrued during each of the preceding twenty years in the purchase and sale of United States bonds, or other bonds of any of the classes exempted herein from the provisions of this act, and which require financial statements to be submitted at the time of listing and annually thereafter; or on any other recognized and responsible stock exchange which has been previously investigated and approved by the commissioner and which securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to any securities so listed, or represented by subscription rights which have been so listed; for evidences of indebtedness guaranteed by companies any stock of which is so listed, if the company whose securities are guaranteed is a subsidiary of the guaranteeing company and controlled by lease or ownership of stock, such securities to be exempt only so long as such listing shall remain in effect: Provided, however, that the commissioner, upon 10 days' notice and hearing may at any time withdraw his approval of any such stock exchange; and provided further, that the commissioner may at any time withdraw his approval of any security so listed on any stock exchange in a city of five hundred thousand population as above defined, or any other approved stock exchange, and thereafter such security shall not be entitled to the benefit of this exemption, except upon further order of the commissioner.

(f) Any security issue by, and representing an interest in, or a direct contract obligation of a bank, trust company or savings institution, which bank, trust company or savings institution is incorporated under the laws of, and subject to the

examination, supervision and control of the United States, or of any state or territory of the United States, or of any insular possession thereof: Provided, this section shall not apply to any security based upon mortgages on real estate nor to saving institutions and trust companies not approved by the banking department of the Corporation Commission of the State of North Carolina.

(g) Negotiable promissory notes or commercial paper if such issue of negotiable notes or commercial paper mature in not more than fifteen months from the date of issue and shall be issued within three months after date of sale.

(h) Securities issued by building and loan associations incorporated under the laws of the State of North Carolina.

(i) Securities issued by insurance companies in North Carolina, subject to State supervision.

(j) Securities issued by any corporation organized not for pecuniary profit or organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes.

(k) Securities evidencing indebtedness due under any contract made in pursuance to the provisions of any statute of any State of the United States providing for the acquisition of personal property under conditional sale contract.

(l) Bonds or notes secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred and twenty-five (125%) per cent of the par amount of such bonds or notes.

(m) Any security other than common stock outstanding and in the hands of the public for a period of not less than five years upon which no default in payment of principal, interest or dividend exists and upon which no such default has occurred for a continuous period of five years immediately preceding.

(n) Any security which, under the laws of this State, is a legal investment for savings banks of trust funds.

(o) Securities issued by a domestic corporation, partnership, association, company, syndicate or trust owning a property business or industry which has been in continuous operation for not less than three years prior thereto, and which has shown during a period of not less than two years nor more than five years prior to the close of its last fiscal year preceding the offering of such securities average annual net earnings, after deducting all prior charges, not including the charges or prior securties to be retired out of the proceeds of such sale, as follows:

(1) In the case of interest bearing securities, not less than one and one-half times the annual interest charges thereon and upon all other outstanding interest-bearing obligations of equal rank.

(2) In the case of preferred stock not less than one and one-half times the annual dividend requirements on the total of the proposed issue of such preferred stock and on all other outstanding stock of equal rank.

(3) In the case of common stock with par value not less than six per cent upon all outstanding common stock of equal rank, or in the case of common stock without par value, not less than six per cent upon the amount charged to capital by reason of the issuance thereof: Provided, the tangible assets of such corporation, partnership, association, company, syndicate, or trust (not including any intangible assets), together with the proceeds of the sale of such securities accruing to the issuer, shall equal or exceed:

(1) In the case of evidence of indebtedness, one hundred twenty-five per centum of the par value of such evidence of indebtedness, and all other obligations of equal rank then outstanding and not to be retired out of the proceeds of the sale of such evidence of indebtedness.

(2) In the case of preferred stock one hundred twenty-five per centum of the par value of the aggregate amount of all outstanding preferred stock of equal and prior rank and the stock then offered for sale, after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the preferred stock offered for sale.

(3) In the case of common stock one hundred per centum of the aggregate of all outstanding stock of equal rank and the stock then offered for sale, reckoned at the price at which such stock is offered for sale or sold after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the common stock offered for sale: Provided, however, that in the case of preferred or common stock, without par value, computation hereunder shall be made upon the basis of the amount charged to capital by reason of the issuance thereof, instead of upon the basis of par value. (1925, c. 190, s. 3; 1927, c. 149, s. 3.)

See Editor's Note under preceding section.

§ 3924(d). Transactions exempted from operation of this chapter.—Except as hereinafter provided, the provisions of this act shall not apply to the sale or the offering for sale of any security in any of the following transactions, viz.:

(1) At any judicial, executor's, administrator's, or guardian's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

(2) By or for the account of any pledgeholder or mortgagee selling or offering for sale, in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

(3) In an isolated transaction in which any security is sold or offered for sale by the owner thereof, or by his representative for the owner's account in the usual and ordinary course of business and not for the direct or indirect promotion of any scheme or enterprise within the purview of this act, and when such sale or offer for sale is not made in the course of repeated and successive transactions of a like character by such owner or on his account by the representative of such owner, and neither such owner nor his representative is the maker or issuer or underwriter of such security.

(4) The sale of, or offer to sell such security to any bank, savings institution, trust company, insurance company, or to any corporation.

(5) The distribution by a corporation of capital stock, bonds or other securities to its stockholders or other security holders as a stock divi-

dend or other distribution out of earnings or surplus; or the issue of securities by a corporation to security holders or creditors of such corporation in the process of a bona fide reorganization of such corporation made in good faith either in exchange for either or both the securities of such security holders or claims of such creditors, or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issue of increased capital stock of a corporation sold or distributed by it entirely among its own stockholders, when no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock.

(6) The transfer or exchange by or on account of one corporation to another corporation or to its stockholders of their or its own securities in connection with a proposed consolidation or merger of such corporations, or in connection with the change of par value of stock to non par value stock or the exchange of outstanding shares for a greater or smaller number of shares; the transfer or exchange by or on the account of one corporation of its own securities to the holders of the securities of another corporation, partnership, trust, person, firm or association, in any plan of distribution or exchange providing for the assumption or acquisition by the issuing corporation of the securities for which its own securities are issued or are to be issued, where the plan of distribution or exchange is contained in a registration statement which has been filed for more than twenty days with the securities and exchange commission of the United States government or like agency of the United States government, charged with the registration of securities.

(7) Subscriptions for shares or sales or negotiations for sales of shares of the capital stock in domestic corporations, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(8) The issue and delivery of any security in exchange for any other security of the same issuer pursuant to a right of conversion entitling the holder of the security exchanged to make such conversion: Provided, that the security exchang-d has been registered by notification under the law or was when sold exempt from the provisions of law and that the security received in exchange if sold at the conversion price would at the time of such conversion fall within the class of securities entitled to registration by notification under the law upon such conversion the par value of the security surrendered in such exchange shall be deemed the price at which the securities received in such exchange are sold.

(9) Subscriptions for shares of the capital stock of a corporation prior to the incorporation thereof, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(10) The sale of securities to a registered dealer.

(11) Bonds or notes secured by mortgage upon real estate where the entire mortgage together with all of the bonds or notes secured thereby are sold to a single purchaser at a single sale. (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154.)

Editor's Note.—The amendment of 1935 adds the second sentence of subsection 6 of this section.

§ 3924(e). Burden of proof as to such transactions.—It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or proceeding laid or brought under this act in either a court of law or equity, or before the commissioner, in either a civil or a criminal action or suit. The sale, unless the transaction is exempted from the operation of this act of any security not exempt from the provisions of this act as hereinbefore provided and not admitted to the record and recorded as hereinafter provided, shall be prima facie evidence of the violation of this act, and the burden of proof of any such exemption shall be upon the party claiming the benefit thereof. (1925, c. 190, s. 5; 1927, c. 149, s. 5.)

§ 3924(f). Registration of securities.—No securities except of a class exempt under any of the provisions of section three hereof, or unless sold in any transaction exempt under any of the provisions of section four hereof shall be sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the notice under section 7 or the application under section 8 for registration of such stock includes a statement that such rights are to be issued. (1925, c. 190, s. 6; 1927, c. 149, s. 6.)

§ 3924(g). Advertisement of securities. — It shall be unlawful hereafter:

(1) To advertise in this State, through or by means of any prospectus, circular, price list, letter, order blank, newspaper, periodical or otherwise, or

(2) To circulate or publish any newspaper, periodical or either written or printed matter in which any advertisement in this section specified shall appear, or

(3) To circulate any prospectus, price list, order blanks, or other matter for the purpose of inducing or securing any subscriptions to or sale of any security or securities not exempted under any of the provisions of section three of this act, and not sold or to be sold in one of the transactions exempted under the provisions of section four and except as provided in section 8 of this act, unless and until the requirements of section six of this act have been fully complied with and such advertising matter has been filed and approved by the commissioner. (1925, c. 190, s. 7; 1927, c. 149, s. 7.)

§ 3924(h). Registration by notification. — The following classes of securities shall be entitled to registration by notification in the manner provided in this section:

(1) Securities issued by a corporation, partnership association, company, syndicate or trust owning a property, business or industry which has been in continuous operation not less than three years, and which has shown during a period of not less than two years, nor more than five years, next prior to the close of its last fiscal year

preceding the offering of such securities, average annual net earnings, after deducting all prior charges not including the charges upon securities to be retired out of the proceeds of sale, as follows:

(a) In the case of interest bearing securities, not less than one and one-half times the annual interest charge thereon and upon all other outstanding interest bearing obligations of equal rank.

(b) In the case of preferred stock, not less than one and one-half times the annual dividend requirements on such preferred stock and on all other outstanding stock of equal rank.

(c) In the case of common stock not less than five per centum upon all outstanding common stock of equal rank, together with the amount of common stock then offered for sale reckoned upon the price at which such stock is then offered for sale or sold. The ownership by a corporation, partnership, association, company, syndicate or trust or more than 50 per cent of the outstanding voting stock of a corporation shall be construed as the proportionate ownership of the property, business or industry of such corporation, and shall permit the inclusion of the earnings of such corporation, applicable to the payment of dividends upon the stock so owned in the earnings of the corporation, partnership, association, company, syndicate, or trust issuing the securities sought to be registered by notification.

(2) Any bond or notes secured by a first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or (leases), or upon city, town or village real estate situated in any State or territory of the United States or in the District of Columbia or in the Dominion of Canada as follows:

(a) When the mortgage is a first mortgage upon such agricultural lands, used and valuable for agricultural purposes, and when the aggregate face value of such bonds or notes, not including interest notes, or coupons secured thereby, does not exceed 60 per centum of the then fair market value of said lands plus 60 per centum of the insured value of any improvements thereon; or,

(b) When the mortgage is a first mortgage upon city, town or village real estate and when the aggregate face value of such bonds or notes, not including interest notes or coupons, secured by such real estate or leaseholds does not exceed 60 per centum of the then fair market value of said mortgaged real estate or leaseholds, respectively, including any improvements appurtenant thereto, and when said mortgaged property is used principally to produce through rental a net annual income, after deducting operating expenses and taxes, or has a fair rental value, after deducting operating expenses and taxes, at least equal to the annual interest, plus not less than 3 per centum of the principal of said mortgage indebtedness.

(c) Bonds or notes secured by first lien on collateral pledged as security for such bonds or notes with a bank or trust company as trustees, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States, which collateral shall consist of (a) a principal amount of first mortgage bonds or notes conforming to the requirements of any one or more of subsection (2) of this section 8 and / or (b) a principal amount of obligations secured as hereinafter in this subsection provided, and/or (c) a principal amount of obligations of the United States, and/or (d) cash, equal to not less than 100 per cent of the aggregate principal amount of all bonds or notes secured thereby. The portion of such collateral referred to in clause (b) shall consist of obligations secured by a first lien on a principal amount of first mortgage bonds or notes conforming to the requirements of subsection (2) of this section, and / or a principal amount of obligations of the United States and/or cash equal to not less than 100 per cent of the aggregate principal amount of such obligations so secured thereby, and all such pledged securities including cash so securing such obligations shall have been deposited with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States.

Securities entitled to registration by notification shall be registered by the filing by the issuer or by any registered dealer interested in the sale thereof in the office of the commissioner of a statement with respect to such securities containing the following:

(a) Name of issuer.

(b) A brief description of the security including amount of the issue.

(c) Amount of securities to be offered in the State.

(d) A brief statement of the facts which show that the security falls within one of the classes in this section defined.

(e) The price at which the securities are to be offered for sale.

In the case of securities falling within the class defined by subsection (1), if the circular to be used for the public offering is not filed with the statement, then a copy of such circular shall be filed in the office of the commissioner within two days thereafter, or within such further time as the commissioner shall allow.

In the case of securities falling within the classes defined by subsection (2), the circular to be used for the public offering shall be filed with the statement.

The filing of such statement in the office of the commissioner and the payment of the fee hereinafter provided shall constitute the registration of such security. Upon such registration, such securities equal to the amount so registered by notification may be sold in this State by any registered dealer by giving notice in the manner hereinafter provided in section 19, subject, however, to the further order of the commissioner as hereinafter provided.

If, at any time, in the opinion of the commissioner, the information contained in the statement or circular filed is misleading, incorrect, inadequate, or incomplete, or the sale or offering for sale of the security may work or tend to work a fraud or, in the opinion of the commissioner, be contrary to good business practices, the commis-

sioner may require from the person filing such statement such further information as may, in his judgment, be necessary to establish the classification of such security as claimed in said statement, or to enable the commissioner to ascertain whether the sale of such security would be fraudulent, or would result in fraud, and the commissioner may also suspend the right to sell such security pending further investigation by entering an order specifying the grounds for such action, and by notifying personally by mail, telephone or telegraph the person filing such statement and every registered dealer who shall have notified the commissioner of an intention to sell such security. The refusal to furnish information required by the commissioner, within a reasonable time to be fixed by the commissioner, may be a proper ground for the entry of such order of suspension. Upon the entry of any such order of suspension no further sales of such security shall be made until the further order of the commissioner; unless the person to be affected by such order shall file with the commissioner a bond in a penalty to be fixed by him in some solvent surety company licensed in the State of North Carolina, to pay all such damages as might be sustained by any purchaser of such security, which bond shall be made payable to the State of North Carolina and sued upon by any person damaged by such sale.

In the event of the entry of such order of suspension the commissioner shall upon request give a prompt hearing to the parties interested. If no hearing is requested within a period of twenty (20) days from the entry of such order, or if upon such hearing the commissioner shall determine that any such security does not fall within a class entitled to registration under this section, or that the sale thereof would be fraudulent or would result in fraud or the continued sale of the same, is in his opinion contrary to good business practices, he shall enter a final order prohibiting sales of such security, with his findings with respect thereto: Provided, that if the finding with respect to such security is that it is not entitled to registration under this section, the applicant may apply for registration by qualification by complying with the requirements of section 3924(i). Appeals from such final order may be taken as hereinafter provided. If, however, upon such hearing, the commissioner shall find that the security is entitled to registration under this section, and that its sale will neither be fraudulent nor result in fraud, or that the continued sale thereof is not contrary to good business practices, he shall forthwith enter an order revoking such order of suspension and such security shall be restored to its status as a security registered under this section, as of the date of such order of suspension.

At the time of filing the statement, as hereinbefore prescribed in this section, the applicant shall pay to the commission a filing fee of ten dollars and a fee of one-twentieth of one per cent of the aggregate par value of the securities to be sold in this State for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding one hundred and fifty dollars. In the case of stock having no par value, the price at which such stock is to be offered to the public, shall be deemed to be the par value of such stock. (1927, c. 149, s. 8.)

§ 3924(i). Registration by qualification. — All securities required by this act to be registered before being sold in this State, and not entitled to registration by notification, shall be registered only by qualification in the manner provided by this section.

The commissioner shall receive and act upon applications to have securities registered by qualification and may prescribe forms on which he may require such applications to be submitted. Applications shall be in writing and shall be duly signed by the applicant and sworn to by a proper person, and filed in the office of the commissioner and may be made either by the issuer of the securities for which registration is applied or by any registered dealer desiring to sell the same within this State.

The commissioner may require the applicant to submit to the commissioner the following information respecting the issuer and such other information as he may, in his judgment, deem necessary to enable him to ascertain whether such securities shall be registered pursuant to the provisions of this section.

(a) The names and addresses of directors, trustees and officers, if the issuer be a corporation or association or trust organized or existing under the common law (as hereinbefore defined) of all partners, if the issuer be a partnership, and of the issuer if the insurer be an individual.

(b) The location of the issuer's principal business office and of its principal office in this State, if any, and if not, the name of its process officer within this State.

(c) The purposes of incorporation, (if incorporated) and the general character of the business actually to be transacted by the issuer, and the purpose of the proposed issue.

(d) A statement of the capitalization of the issuer; a balance sheet showing the amount and general character of its assets and liabilities on a day not more than sixty (60) days prior to the date of filing such balance sheet; a detained statement of the plan upon which the issuer proposes to transact business; a copy of the security for the registration of which application is made; and a copy of all circulars, prospectuses, advertisements or other descriptions of such securities then prepared by or for such issuer, and/or by or for such applicant (if the applicant shall not be the issuer) to be used for distribution or publication in this State.

(e) A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, or if in actual business less than one year, then for such time as the issuer has been in actual business.

(f) A statement showing the price at which such security is proposed to be sold, together with the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale, or offering for sale, of such securities.

(g) A detailed statement showing the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment.

(h) The amount of capital stock which is to be

set aside and disposed of as promotion stock, and a statement of all stock issued from time to time as promotion stock.

(i) If the issuer is a corporation, there shall be filed with the application a certified copy of its articles of incorporation with all amendments and of its existing by-laws, if not already on file in the office of the commissioner, or with the Secretary of State of this State. If the issuer is a trustee there shall be filed with the application a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged. If the issuer is a partnership or an unincorporated association, or joint stock company, or any other form of organization whatsoever, there shall be filed with the application a copy of its articles of partnership or association and all other papers pertaining to its organization, if not already on file in the office of the commissioner or with the Secretary of State of this State.

All of the statements, exhibits, and documents of every kind required by the commissioner under this section, except properly certified public documents, shall be verified in such manner and form as may be required by the commissioner.

With respect to securities required to be registered by qualification under the provisions of this section, the commissioner may by order duly entered fix the maximum amount of commission or other form of remuneration to be paid in cash or otherwise directly or indirectly, for or in connection with the sale or offering for sale of such securities which shall in no case exceed ten per cent of the actual sale price of the security.

At the time of filing the information, as hereinbefore prescribed in this section, the applicant shall pay to the commissioner a filing fee of twenty-five dollars and, upon the entry of an order for the registration of the securities, shall pay to the commissioner a fee of one-tenth of one per cent of the aggregate par value of the securities to be sold in this State, for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding two hundred and fifty dollars. In case of stock having no par value the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock. (1927, c. 149, s. 9.)

§ 3924(j). Consideration of application by commissioner.

(1) As soon as practicable after the filing of an application, under section 3924(i) of this act, the commissioner shall examine the application, statements and documents so filed; and if he deems it advisable, may make or cause to be made such inspection, examination, audit and investigation of the business and affairs of the issuer as he may deem necessary or advisable, which said inspection, examinations, audit and investigation, shall be at the expense of the applicant. As a part of the aforesaid inspection, examination, audit and investigation, the commissioner may, if he deems it necessary or advisable, cause an appraisal to be made of the property or assets of the issuer or parts thereof. Appraisals herein provided for may be made by three disinterested appraisers, and the commissioner is authorized to nominate and appoint such appraisers, who shall be paid not more than twenty-five dollars per day and their actual expenses while so employed, which compensation and expenses shall be paid by the applicant. The commissioner may require a bond sufficient to cover the expense of any such inspection, examination, audit or investigation as may be deemed necessary by the commissioner in connection with the application before, or after the granting of such application for registration.

(2) The commissioner shall make a complete report of the inspection, investigation, examination, etc., of the business and affairs of the applicant above provided for, which record shall include a copy of the appraisal aforesaid, provided such an appraisal be made. (1925, c. 190, s. 10; 1927, c. 149, s. 10.)

§ 3924(k). Hearing before commissioner.—The commissioner shall, within fifteen days after the filing of the report of such investigation, give the applicant a hearing, if he so desires.

(1) If the commissioner shall act favorably upon the application, he shall issue an order, directing that such securities be admitted to record in the register of qualified securities, hereinafter provided for. The commissioner shall keep a permanent record of all proceedings, findings, judgments and orders. In granting to an applicant the privilege of offering securities to the public in the State of North Carolina the commissioner may impose such reasonable conditions, either precedent or concurrent thereto, as in his judgment may be necessary or advisable. If the statement containing information as to securities, as provided for in section 3924(i) of this act, shall disclose that any such securities or any securities senior thereto shall have been or shall be intended to be issued for any patent right, copyright, trademark, process, lease, formulae or goodwill, or for promotion fees or expenses or for other intangible assets, the amount and nature thereof shall be fully set forth and the commissioner may require that such securities so issued in payment of such patent right, copyright, trade-mark, process, lease, formulae or good will, or for promotion fees or expenses, or for other intangible assets shall be delivered in escrow to the commissioner or other depository satisfactory to the commissioner under an escrow agreement that the owners of such securities shall not be entitled to withdraw such securities from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend, or dividends aggregating not less than six per cent for three years, shown to the satisfaction of said commissioner to have been actually earned on the investment in any common stock so held, and in case of dissolution or insolvency during the time such securities are held in escrow, that the owners of such securities shall not participate in the assets until after the owners of all other securities shall have been paid in full: Provided, that during the period such securities shall be held in escrow, the commissioner shall have the right to vote such stock in person, or by proxy as he shall deem advisable.

(2) If, however, the commissioner shall, in any case, believe from all the evidence:

(a) That the sale of such securities would work a fraud, deception or imposition upon the purchaser thereof; or

(b) That the article of incorporation or association, declaration of trust, charter, constitu-

tion, by-laws, or other organization papers of the issuer are unfair, unjust, inequitable, illegal or oppressive; or

(c) That the issuers or guarantors of such securities are insolvent, or are in failing circumstances, or are not trustworthy; or

(d) That the issuer's plan of business is unfair, inequitable, dishonest or fraudulent; or

(e) That the issuer's literature or advertising is misleading or calculated to deceive purchasers or investors; or

(f) That the securities offered or to be offered; issued or to be issued in payment for property or assets, either tangible or intangible, are so in excess of the reasonable value thereof as to indicate fraud or bad faith; or

(g) That the enterprise or business of either the issuers or of the applicant, is unlawful or against public policy; or

(h) That the sale of such securities is a mere scheme of either the issuer or the applicant to dispose of worthless securities of no real intrinsic value, at the expense of the purchasers of said securities; or

(i) That the sale of such securities is contrary to good business practices.

Then the commissioner shall refuse to admit said securities to record in the register of qualified securities, or if such securities are admitted to record, such action may at any time thereafter be revoked by the commissioner for any of the reasons set out in section eleven, subsection two, and it shall thereafter be unlawful to sell such securities in this State or to circulate any advertisement thereof.

In any case the commissioner either before granting or after granting any application for registration by qualification under section 3924(i), shall have the right to require of the applicant a bond, the form whereof shall be prescribed and the surety approved by the commissioner, penalty whereof shall be fixed by the commissioner at not more than twenty per centum of the sales price of the securities issued or proposed or authorized to be issued. The said bond shall be with surety and payable to the State of North Carolina, conditioned that the facts set forth in the application for such permit and in all other documents required by this act to be filed with the commissioner are true, and that the provisions of this act shall be strictly complied with, and that all moneys from the sale of such securities will be used for the proper purpose or purposes as set forth within the security sold and in the papers filed with the commissioner; and that the contract of the promoter as set forth in the securities issued will be complied with and also that all statements set forth in all literature or advertising matter used or circulated in connection with the sale, or offer of sale, of such securities shall be the truth; and that the contract of the promoter shall be fulfilled. Except when the surety offered is a surety company authorized to do business in this State, it shall be the duty of the commissioner to satisfy himself that such surety is amply solvent before accepting the same.

Any person who shall be induced to purchase any securities covered by such bond by reason of any misrepresentation of any material fact concerning such securities, contained in said application or other documents submitted in connection therewith or furnished to the commissioner, upon its request or any other written or printed matter issued or used by the person making such sale or its, or his, agents in making such sale, or shall have suffered loss by reason of the fact that moneys paid by him to the said seller of such securities or the seller's agent, have not been applied to the proper purpose set forth in the security sold or the papers filed with the commissioner, or that the seller has failed or refused to comply with his contract, as set forth in the security issued, shall have the right to bring suit upon the bond above provided for, and such bond shall be security for such person for his losses; but such person shall not be entitled to recover more than the money paid, or the actual value of the property given, or the labor performed. in exchange for such securities, with legal interest from the date of payment or the performance of the services or the transfer of property. One or more recoveries upon such bond shall not vitiate the same, but it shall remain in full force and effect, but no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being commenced in excess of the amount of same, the commissioner may require a new bond, and, if the same is not given within thirty days the commissioner may revoke the registration herein provided for: Provided, however, that any suit or action instituted under this section shall be commenced within one year from the date of any such sale. During the thirty days after notice to file a new bond, the securities shall not be sold or offered for sale. (1925, c. 190, s. 11; 1927, c. 149, s. 11.)

§ 3924(l). No representation to be made of endorsement.—No person, or dealer, or agent shall represent any securities sold under the provisions of this chapter, as being endorsed or recommended by the State of North Carolina, or any officer thereof, nor shall make any mention whatever of recording or being admitted to record in the State of North Carolina. (1925, c. 190, s. 12; 1927, c. 149, s. 12.)

§ 3924(m). Register of qualified securities. — The commissioner shall keep and maintain a permanent register of qualified securities and shall enter therein the names and amounts of all securities the privilege of offering which to the public in the State of North Carolina has been granted by the commissioner, and the date thereof, and such other data as the commissioner may deem proper. All securities admitted to record and recorded in such register shall be deemed, for the purpose of this act, to have been fully qualified for sale in the State of North Carolina and thereafter any person may lawfully sell or offer for sale any part of such issue as recorded; subject, however, to the provisions of this act. Such register shall be open to inspection by the public. (1925, c. 190, s. 13; 1927, c. 149, s. 13.)

§ 3924(n). Report to commissioner. — Every issuer whose securities have been admitted to record and recorded as herein provided, may be required during the offering of such securities to file within thirty days after the close of business on December thirty-first, March thirty-first, June thirtieth, and September thirtieth, of each year,

and at such other times as may be required by the commissioner, a statement, verified under oath by some person having actual knowledge of the facts therein stated, setting forth, in such form as may be prescribed by the commissioner, the financial condition, the amount of assets and liabilities, of such issuer on the above dates and such other information as said commissioner may require. It shall be unlawful for any issuer subject to the provisions of this act, who refuses or fails to comply with the provisions of this section, or for his agent or agents, to thereafter sell such securities in this State. (1925, c. 190, s. 14; 1927, c. 149, s. 14.)

§ 3924(o). Examination and examiners.—The records and the business affairs of every company or person, whose securities have been admitted to record in the register of qualified securities shall be subject to examination and inspection by the commissioner or upon his direction by his assistants, accountants, or examiners, at any time said commissioner may deem it advisable; and such company or person shall pay a fee for each of such examinations of not to exceed twenty-five dollars ($25) for each day or fraction thereof, plus the actual traveling and hotel expenses of said commissioner, his assistant, accountant or examiner, that he is absent from the capitol of the State for the purpose of making such examination. (1925, c. 190, s. 15; 1927, c. 149, s. 15.)

§ 3924(p). Complaints, investigations, findings of facts.—The commissioner may, upon his own initiative or upon the complaint of any reasonable person, hold such public hearings or make or have made such special inspection, examination or investigation as he may deem necessary, in connection with the promotion, sale or disposal in this State of any security or securities, to determine whether the same constitutes a violation of law; and the said commissioner, his assistant or deputy shall have power and authority.

(1) To issue subpœnas and process compelling the attendance of any person and the production of any paper, records or books relating to any matter of which the commissioner has jurisdiction under this article, and

(2) To administer an oath to any person whose testimony may be required on such inspection, examination, or investigation. Upon the conclusion of any such hearing, inspection, examination or investigation the commissioner may make findings of fact concerning the matter or matters investigated. Such findings of facts shall be admissible in evidence in any suit or action, at law or in equity, instituted under any of the laws of this State, and shall be prima facie evidence of the truth of the matters therein found by said commissioner, and,

(3) Maintain by injunction or other remedy any action in any court of competent jurisdiction in this State for the purpose of enforcing this act, or making investigations. (1925, c. 190, s. 16; 1927, c. 149, s. 16.)

§ 3924(q). Certain information and records open to inspection by public.—All information rereceived by the commissioner shall be kept open to public inspection at all reasonable hours, and the commissioner shall supply to the public upon request copies of any papers on record with the commissioner at charges equaling the cost of typing same; and the commissioner shall have power and authority to place in a separate file, not open to the public except on his special order, any information which he deems in justice to the person filing the same should not be made public. An exemplification of the record under the hand of the commissioner, or of his deputy, shall be good and sufficient evidence of any record made or entered by the commissioner. A certificate under the hand of the commissioner or his deputy or assistant, and the seal of the commission showing that the securities in question have not been recorded in the register of qualified securities, shall constitute prima facie evidence that such securities have not been qualified for sale pursuant to the provisions of this act, and shall be admissible in evidence in any proceeding, either civil or criminal, instituted under any of the laws or statutes of this State. (1925, c. 190, s. 17; 1927, c. 149, s. 17.)

§ 3924(r). Appeal.—Any interested person aggrieved by any order of the commissioner, or by any refusal or failure of the commissioner to make an order under any of the provisions of this act, shall, upon written request directed to the commissioner, and within thirty days after such request has been filed with the said commissioner, be entitled to a hearing before the Corporation Commission as a body. The commission shall, within ten days after such hearing, rule upon the subject-matter of such hearing. Any person being dissatisfied with any findings, rulings, or judgment of the commission may, within thirty days after the making and issuance thereof, appeal to the Superior Court. The record made before such commissioner shall thereupon be certified to the Superior Court of the county in which such interested person may reside, or any county adjoining thereto in the discretion of said commission and thereafter the parties may plead and such procedure may be had as in other causes within the jurisdiction of said Superior Court, and after the issues shall have been determined by the court or jury, as the case may be, such judgment shall be rendered by the court as the findings may require. Appeals may be taken from the decision of the Superior Court to the Supreme Court by either party in the same manner as is provided by law in other civil cases, but the commission may appeal without bond. Pending any such appeal, the said findings, rulings, orders and judgments of the commission shall be prima facie evidence that they are just and reasonable and that the facts found are true, and shall remain in full force and effect, if no such suit be brought within said thirty days, said findings, ruling, order or judgment shall become final and binding. (1925, c. 190, s. 18; 1927, c. 149, s. 18.)

See editor's note under sec. 3924(b).

§ 3924(s). Dealers and salesmen; registration.—No dealer or salesman shall carry on business in the State of North Carolina as such dealer or salesman, or sell securities, including any securities exempted under the provisions of section three hereof, unless he has been registered as dealer or salesman in the office of the commissioner pursuant to the provisions of this section. Every applicant for registration shall file in the

office of the commissioner, pursuant to the provisions of this section, an application in writing, duly signed and sworn to, in such form as the commissioner may prescribe, giving particulars concerning the business reputation of the applicant. The commissioner, in his discretion, may require that the applicant shall have been a bona fide resident of the State of North Carolina for a term not to exceed two years prior to the filing of the application. The names and addresses of all persons approved for registration as dealers or salesmen shall be recorded in a register of dealers and salesmen kept in the office of the commissioner, which shall be open to public inspection. Every registration under this section shall expire on the thirty-first day of March in each year, but the same may be renewed. The fee for such registration and for each annual renewal thereof shall be fifty dollars in the case of dealers, and ten dollars in the case of salesmen. Registration may be refused or a registration granted may be cancelled by the commissioner if, after reasonable notice and a hearing, the commissioner determines that such applicant or dealer or salesman so registered (1) has violated any provision of this act or any regulation made hereunder; or (2) has made a material false statement in the application for registration; or (3) has been guilty of a fraudulent act in connection with any sale of securities in the State of North Carolina, or has been or is engaged in making fictitious or pretended sales or purchases of any such securities or has been engaged in any practice or transaction or course of business relating to the purchase or sale of securities which is fraudulent or in violation of law; or (4) has demonstrated his unworthiness to transact the business of dealer or salesman. It shall be sufficient cause for refusal or cancellation of registration in the case of a partnership, corporation or unincorporated association or trust estate, if any member of the partnership, or any officer or director of the corporation, association or trust estate has been guilty of any act or omission which would be cause for refusing or cancelling the registration of an individual dealer or salesman. The word "dealer" as used in this section shall include every person other than a salesman, who in the State of North Carolina engages, either for all or part (of) his time, directly or through an agent, in the business of offering for sale, selling or otherwise dealing in securities including securities exempted under the provisions of section three, or of purchasing or otherwise acquiring such securities from another person with the purpose of reselling them or of offering them for sale to the public for a commission or at a profit, or who deals in futures on market quotations of prices or value of any securities, or accepts margins on prices or values of said securities. The word "salesman," as used in this section shall include every person employed, appointed or authorized by another person to sell securities in any manner in the State of North Carolina. No person shall be registered as a salesman except upon the application of the person on whose behalf such salesman is to act. It shall be unlawful for any person required to register under the provisions of this section to sell any security to any person in the State of North Carolina without having registered, or after such registration has expired or been cancelled and not renewed.

Provided, however, that employees of a company, or the securities of a company directly controlling such company, or the general agent of a domestic corporation, securities of which are exempted under the provisions of section 3924(c), may sell or solicit or negotiate for the sale or purchase of any such securities of such company in the territory served by such company or in which it operates without being considered as salesmen or dealers within the meaning of this chapter and without being required to register under its provision.

The partners of a partnership and the executive officers of a corporation or other association registered as a dealer may act as salesmen during such time as such partnership, corporation or association is so registered without further registration as salesmen. Changes in registration occasioned by changes in the personnel of a partnership or in the principals, copartners, officers or directors of any dealer may be made from time to time by written application setting forth the facts with reference to such change.

Every registered dealer who intends to offer any security of any issue, registered or to be registered, shall notify the commission in writing of his intention so to do. The notice shall contain the name of the dealer and shall state the name of the security to be offered for sale, and whenever a dealer shall have prepared such notice and shall have forwarded the same by registered mail, postage prepaid, and properly addressed to the commissioner, such dealer, as to the contents of such notice and filing thereof, shall be deemed to have complied with the requirements of this paragraph. Any issuer of a security required to be registered under the provisions of this act, selling such securities except in exempt transactions as defined in section 3924(d), shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof. (1925, c. 190, s. 19; 1927, c. 149, s. 19.)

See Editor's Note under section 3924(b).

§ 3924(t). Assistants, clerks, etc., employment of.—It shall be the duty of the commissioner to administer and enforce the provisions of this act and he shall, for his services, be paid, as herein provided for the payment of salaries and expenses, the sum of one thousand ($1,000) dollars per annum. The commissioner shall appoint an assistant who shall have special charge of the administration and enforcement of this act under the direction and authority of the commissioner. He shall keep all records and generally perform such duties as the commissioner may direct; and for his services he shall be paid such salary as may be fixed by the commission. The commissioner may appoint such clerks and other assistants as may from time to time be needed, and may likewise fix their salaries or compensation, subject to the approval of the commission. (1925, c. 19, s. 20; 1927, c. 149, s. 20.)

See Editor's Note under section 3924(b).

§ 3924(u). Fee paid into State Treasury; expenses of administration.—All fees herein provided for shall be collected by the commissioner and shall be paid over to the State Treasurer to go

into the general fund; as well as all fees, per diems expenses, etc., of appraisers, assistants, and investigators as herein provided, and all other expenses and fees required by this act. The commissioner may from time to time employ special counsel for the purpose of enforcing and carrying out the provisions of this act. All expenses of the administration of this act, including salaries, special counsel fees, clerk hire, postage, printing, stationery and the like, shall be paid out of available funds in the Treasury on the Auditor's warrant for the payment of bills itemized and certified to by the commissioner. (1925, c. 190, s. 21; 1927, c. 149, s. 21.)

§ 3924(v). Remedies.—Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller, if such director, officer or agent shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller of the securities sold or of the contract made for the full amount paid by such purchaser: Provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale: and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within sixty days to accept the voluntary offer of the seller to take back the security in question and to refund the full amount paid by such purchaser and court costs, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed.

(a) In case such securities consist of interest bearing obligations at the same rate as provided in such obligations; and

(b) In case such securities consist of other than interest bearing obligations at the rate of six per centum per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser. (1925, c. 190, s. 22; 1927, c. 149, s. 22.)

§ 3924(w). Violation of chapter; punishment. (a) Whoever for the purpose of procuring the registration of any security by notification under this chapter, shall knowingly make or cause to be made any false representation of a material fact to the commissioner shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the State prison for not less than one year or more than five years or fined in any sum not more than one thousand dollars ($1,000), or both.

(b) Whoever shall sell or cause to be sold, or offer to sell or cause to be offered for sale, any security in this State, which is not exempt under any of the provisions of section 3924(c), unless sold in any transaction exempt under any of the provisions of section 3924(d), and which such securities so sold, or caused to be sold or so offered for sale, shall not have been registered as provided in this chapter, shall be guilty of a violation of this chapter and upon conviction thereof shall be imprisoned in the State prison for a period of not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(c) Whoever shall, for the purpose of selling any security in this State, fraudulently represent to the purchaser or prospective purchaser thereof the amount of dividends, interest or earnings which such security will yield, shall be deemed guilty of a violation of the provisions of this chapter and upon conviction thereof shall be imprisoned in the State prison for not less than one year, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(d) Whoever, for the purpose of securing the registration by qualification of any securities under this chapter, shall make any false representation concerning any material fact submitted to the commissioner shall be deemed guilty of a violation of this act, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(e) Whoever, for the purpose of procuring the registration by qualification of any security under this chapter, shall suppress or withhold any information from the commission which he possesses and which if submitted by him to the commissioner would render such security incompetent to be registered by qualification under and pursuant to the terms of this chapter, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(f) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after having been notified by the commissioner that the registration of such securities has been cancelled, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(g) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after being notified by the commissioner to stop the sale of such security pending the investigation provided for in section 3924(h), or pending the filing of the bond which may be required under section 3924(k), shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(h) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State embraced and referred to in section 3924(s), without first having registered under and pursuant to the terms of said section, shall be deemed guilty of a violation of said section, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(i) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after his registration as provided in section 3924(s), has been cancelled by the commissioner as provided by section 3924(s), shall be deemed guilty of a violation of said section 3924(s), and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(j) Whoever for the purpose of procuring the registration of any dealer or agent under this chapter, shall knowingly make or cause to be made any false representations of a material fact to the commissioner shall be guilty of a felony and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(k) Whoever engages in this State in making of fictitious or pretended sales or purchases, or who causes the making of fictitious or pretended sales or purchases, or who engages in the offer of fictitious or pretended sales or purchases of any securities within the meaning of this chapter, the actual delivery of which securities are not to follow such sales, shall be deemed guilty of a violation of the terms of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than five thousand dollars ($5,000), or both.

(l) Whoever, without first having become registered under and pursuant to the terms of section 3924(s), shall assist or attempt to assist, by recommendation or by personal solicitation, any salesman or agent in this State in the sale or disposition of any securities required to be registered under the provisions of this chapter to any purchaser or purchasers, except in transactions exempt under section 3924(d), and who shall in consideration of such assistance or effort to assist receive compensation in any form or gratuity from such dealer or agent, or anyone upon their behalf, or who shall render such assistance or make such effort upon the promise of such dealer or agent, express or implied, that he shall receive in consideration therefor compensation in any form or a gratuity for such assistance or effort to assist, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(m) It is hereby expressly provided that the offenses herein created and the penalties herein imposed are to be deemed cumulative to the offenses and penalties heretofore created and now existing in the criminal code of this State, and that the conviction of any person for the violation of any offense created by this chapter shall not be deemed to have placed such person in jeopardy of trial and conviction for the violation of any offense heretofore created and now existing in the criminal code of this State. (1925, c. 190, s. 23; 1927, c. 149, s. 23.)

See Editor's Note under section 3924(b).

§ 3924(x). Foreign corporations to name process officer within State.—In all cases of application by a foreign corporation, partnership, association or trust company for registration of securities qualification or as a dealer in securities, such corporation, partnership, association or trust company shall name a process officer within the State of North Carolina, approved by the commissioner upon whom service of any process of any court in this State shall be of the same effect as if served upon said corporation, partnership, association or trust company. (1927, c. 149, s. 24.)

§ 3924(y). Constitutionality of chapter. — If any clause, sentence, paragraph or part of this chapter shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not effect, impair or invalidate the remainder or said chapter, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which said judgment shall have been rendered. (1927, c. 149, s. 25.)

§ 3924(z). Repeal of conflicting laws; when chapter effective.

(a) The act entitled "an act to provide laws governing the sale of stocks, bonds and other securities in the State of North Carolina," ratified March 9, 1925, and all laws and clauses of laws in conflict with this chapter, are hereby repealed, to take effect upon the day this chapter goes into force, subject to the limitations provided in subdivisions (b), (c) and (d):

(b) The provisions of all laws which are repealed by this chapter shall remain in force for the prosecution and punishment of any person who, before the effective date of this chapter, shall have committed any act contrary to the provisions of any law in force at the time such act was done, and such person may be prosecuted and punished under the law as it existed when such violation occurred.

(c) In the case of sales, contracts, or agreements made prior to the effective date of this chapter the civil rights and liabilities of the parties thereto shall remain as provided by the law as it existed at the time such sales, contracts or agreements were made, and all parts of laws repealed by this chapter shall remain in force for the enforcement of such rights and liabilities.

(d) All securities which shall have been admitted to record and recorded in the register of qualified securities, as provided by the said act of March 9, 1925, prior to the effective date of this chapter, shall be legally salable unless otherwise ordered by the commissioner under this chapter.

(e) No law or parts of law which were repealed by the said act of March 9, 1925, shall be deemed to be revived by the repeal of the said act of March 9, 1925; and Consolidated Statutes sections 6363 to 6375, as amended by chapters 1 and 74, Public Laws of 1920, extra session, chapter 233, Public Laws of 1921, and chapters 161 and 180, Public Laws of 1923, which were repealed by the said act of March 9, 1925, shall remain so repealed.

(f) The commission and the commissioner provided for by this chapter shall respectively succeed the commission and the commissioner heretofore acting under the law hereby repealed, and as such successors shall receive all the files, papers and property of said former commission and commissioner respectively. All proceedings pending before said former commission or commissioner

under the law hereby repealed shall be continued under the provisions of this chapter by the commission and commissioner herein provided for. (1927, c. 149, s. 26.)

Cited in Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 420, 142 S. E. 578.

CHAPTER 72
SHERIFF

Art. 1. The Office

§ 3925. Election and term of office.—In each county a sheriff shall be elected by the qualified voters thereof, as is prescribed for members of the general assembly, and shall hold his office for two years. (Rev., s. 2808; Const., Art. IV, s. 24.)

Editor's Note.—It was held in Hoke v. Henderson, 15 N. C. 1, that a public office is to be classed as private property based on a contract between the State and the officer. In cases following Hoke v. Henderson, supra, it was held that there is a contract between the sheriff and the State that he will discharge the duties of the office, and it cannot be abrogated, or impaired except by the consent of both parties. King v. Hunter, 65 N. C. 603. However, Hoke v. Henderson, supra, and all cases following it in holding a public office to be private property, were overruled by Mial v. Ellington, 134 N. C. 131, 46 S. E. 961. Therefore, a sheriff is no longer considered to have a vested right in his office, nor is his tenue considered to be based upon a contract with the State. For a full treatment of the principle, see Editor's Note under § 3200. As to quo warranto to try title to office, see § 870 and notes thereto.

§ 3926. Disqualifications for the office.—No person shall be eligible to the office of sheriff who is not of the age of twenty-one years, and has not resided in the county in which he is chosen for one year immediately preceding his election, or who is a member of the general assembly, or practicing attorney, or who heretofore has been sheriff of such county and has failed to settle with and fully pay up to every officer the taxes which were due from him. (Rev., s. 2809; Code, ss. 2067, 2068, 2069; R. C., c. 105, ss. 5, 6, 7; 1777, c. 118, ss. 2, 4; 1806, c. 699, s. 2; 1829, c. 5, s. 6; 1830, c. 25, ss. 2, 3.)

Full Settlement of Public Funds by Incumbent.—A person although elected by the qualified voters of a county, to the office of sheriff of said county, for a term of two years, beginning on the first Monday in December, after said election, was not eligible for said office, if he, having been theretofore sheriff of said county, had failed to settle with, and fully pay up to, every officer the taxes which were due to him. Lenior County v. Taylor, 190 N. C. 336, 340, 130 S. E. 25.

A former sheriff must exhibit to the board of commissioners the receipts in full of the proper officers, for all public funds which he received, or ought to have received during his preceding official term, before he will be permitted to re-enter upon a new term. Colvard v. Board, 95 N. C. 515; Lenoir County v. Taylor, 190 N. C. 336, 340, 130 S. E. 25.

Same—Produce Receipts. — The fact that he was able, ready and willing at the time of tendering his bond, to make settlement and payment of any liability on account of funds so received, does not dispense with the requirement that he shall produce receipts in full. Colvard v. Board, 95 N. C. 515.

Same—Requirement Constitutional.—The requirement that a sheriff-elect who has theretofore been sheriff, produce his tax receipts is not unconstitutional. State v. Dunn, 73 N. C. 595.

Cited in Pender County v. King, 197 N. C. 50, 54, 147 S. E. 695.

§ 3927. Sheriff may resign.—Every sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff. (Rev., s. 2810; Code, s. 2077; R. C., c. 105, s. 15; 1777, c. 118, s. 1; 1808, c. 752.)

§ 3928. Removal for misdemeanor in office.—If any sheriff shall be convicted of a misdemeanor in office, the court may at its discretion, as a part of his punishment, remove him from office. (Rev., s. 2811; Code, s. 2071; R. C., c. 105, s. 11; R. S., c. 109, s. 11; 1829, c. 5, s. 8.)

As to removal of unfit officers generally, see sections 3208-3212.

Proceedings in Nature of Quo Warranto.—An action by the Attorney-General in the name of the people of the State, and of the person who claims the office of sheriff, is the proper mode of proceeding against the person who is alleged to be usurping it, to try the question as to which of the parties is entitled to the office. Loftin v. Sowers, 65 N. C. 251. See § 870 and the notes thereto.

§ 3929. Vacancy filled; duties performed by coroner.—If any vacancy occurs in the office of sheriff, the coroner of the county shall execute all process directed to the sheriff until the first meeting of the county commissioners next succeeding such vacancy, when the board shall elect a sheriff to supply the vacancy for the residue of the term, who shall possess the same qualifications, enter into the same bonds, and be subject to removal, as the sheriff regularly elected. If the board should fail to fill such vacancy, the coroner shall continue to discharge the duties of sheriff until it shall be filled. (Rev., s. 2811; Code, s. 2071; R. C., c. 105, s. 11; R. S., c. 109, s. 11; 1829, c. 5, s. 8.)

Cross References.—As to liability of commissioners for failure to declare vacancy and fill same when sheriff fails to fulfill statutory requirements, see section 1302 and annotations thereto; as to duty of commissioners to declare vacancy, see section 1297, subsection 12 and annotations thereto, and section 3932 and annotations thereto; as to commissioners' authority to fill vacancy, see section 1297, subsection 13 and annotations thereto.

Commissioners Appoint for Unexpired Term Only.—In case of a vacancy in the sheriff's office, it is within the power of the board of county commissioners to appoint for the unexpired term only. Worley v. Smith, 81 N. C. 304. Indeed, a different holding would be to place it within the discretion of the commissioners, once they filled a vacancy, whether in the future the voters or the Board would elect to the said office. Ed. Note.

Sheriff-elect Fails to Qualify—Commissioners Appoint.—Where a sheriff-elect failed to qualify as sheriff for the term to which he had been elected, it became the duty of the board of commissioners forthwith to elect some suitable person in the county as sheriff for the unexpired term. Lenoir County v. Taylor, 190 N. C. 336, 343, 130 S. E. 25.

It is the duty of the county commissioners, to declare the sheriff's office vacant, and appoint some one for the unexpired term, whenever the incumbent thereof is found to be, on re-election, in arrears in his settlement of the public taxes. People v. Green, 75 N. C. 329.

S was appointed sheriff in 1875, to fill a vacancy, and held the office until May, 1877; in the meantime—November, 1876—an election was held, and upon the result of certain legal proceedings in May, 1877, M was declared to be elected sheriff, who failed to give bond, and the county commissioners declared a vacancy and appointed B to fill the same; It was held, that S had no right to hold over until the next popular election, but that B was entitled to the office, being elected by the commissioners. State v. Bullock, 80 N. C. 132.

When Sheriff Becomes Insane.—Upon the prima facie ascertainment of the insanity of the sheriff, or by inquisition of lunacy, the commissioners may declare the office vacant, under this section, but their failure to do so merely authorizes the coroner to perform the duties of sheriff proper, till such declaration (Greer v. Asheville, 114 N. C. 678, 19 S. E. 635), and does not cast upon him the right to collect the taxes, which goes to the sheriff's bondsmen for the current list, and after that the duty devolves upon a tax collector chosen by the county commissioners. Somers v. Board, 123 N. C. 582, 585, 31 S. E. 873.

Upon the insanity of the sheriff his right to exercise the office ceases and the agency of his deputies is terminated and his committal to a hospital for the insane and the appointment of a guardian for him, are certainly at least prima

facie evidence of such insanity. Somers v. Board, 123 N. C. 582, 584, 31 S. E. 873.

Same—Collection of Taxes.—Upon the declaration of insanity the sureties of the sheriff had no more rights than would have gone to them upon his death, i. e., to collect the tax list then in his hands. Code, Section 3687; Laws 1897, Chapter 169, Section 117; Perry v. Campbell, 63 N. C. 257; McNeill v. Somers, 96 N. C. 467, 2 S. E. 161. And the Commissioners on the first Monday in September are vested with the power of electing a tax collector for the ensuing year, unless and until the sheriff should be restored to reason. Somers v. Board, 123 N. C. 582, 584, 31 S. E. 873.

Art. 2. Sheriff's Bonds

§ 3930. Sheriff to execute three bonds.—The sheriff shall execute three several bonds, payable to the state of North Carolina, as follows:

One conditioned for the collection and settlement of state taxes according to law, a sum not exceeding the amount of the taxes assessed upon the county for state purposes in the previous year.

One conditioned for the collection and settlement of county and other local taxes according to law, a sum not exceeding the amount of such county and other local taxes for the previous year.

The third bond, for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

The condition of the above obligation is such that, whereas the above bounden ..... is elected and appointed sheriff of ..... County; if, therefore, he shall well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all fees and sums of money by him received or levied by virtue of any process into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due, his executors, administrators, attorneys, or agents; and in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect. (Rev., s. 298; Code, s. 2073; R. C., c. 105, s. 13; 1777, c. 118, s. 1; 1823, c. 1223; 1879, c. 109; 1895, c. 270, ss. 1, 2; 1899, c. 207, s. 2; 1903, c. 12; 1899, c. 54, s. 52.)

I. General Incidents of Bond.
II. Liability on Official Bonds.
  A. Liability Limited to Terms of Bonds.
  B. Successive Terms and Successive Bonds.
  C. Irregularities or Informalities in Bond.
III. Actions on Bonds.

Cross References.

As to official bonds generally, see section 324 et seq.; as to duty of county commissioners to bring suit on the sheriff's bonds, in case of default, see section 1402 and annotations thereto.

I. GENERAL INCIDENTS OF BOND.

Three Bonds.—The sheriff shall give three bonds, such as are prescribed in the section. Colvard v. Board, 95 N. C. 515, 518.

When Sheriff Fails to Comply.—Where the sheriff had not complied with the requirements of this section, it was held that he was not entitled to have the county commissioners induct him into office. Colvard v. Board, 95 N. C. 515, 518.

And this is true notwithstanding the fact that at the beginning of his term there is a tax collector in that county. Colvard v. Board, 95 N. C. 515. As to duty of commissioners when bonds are insufficient, see section 3932.

When Section Complied with.—But when a sheriff-elect has fulfilled all the statutory requirements as to the execution of bonds, it is not competent for the county commissioners to refuse the said bonds and deprive the rightful holder of his office. Sikes v. Commissioners, 72 N. C. 34. As to the duty of the commissioners to take and approve bonds, see the next succeeding section.

Ceremony. — The ceremony of acknowledgment in open court, and registration, are not essential to the validity of a sheriff's bond. State v. Buchanan, 53 N. C. 444. This case has reference to the new abolished county courts. Since the bonds are now taken by the county commissioners, the decision would seem to be applicable to the formalities before that body. Ed. Note.

Sufficiency of Form.—A sheriff's bond to "his Excellency M. S. Captain General and Commander in Chief, in and over the State of North Carolina in the sum of $10,000, to be paid to his Excellency, the Governor, his successor and assigns:" is a bond payable to the Governor in his official capacity, and is an official bond within the Act of 1823 (Tay. Rev., ch. 1223), which was in force when it was taken. Governor v. Montford, 23 N. C. 155.

School Fund Included in County Bond.—It is immaterial whether the school fund is, strictly speaking, State taxes or county taxes, or partly both. They are included in the "county" bond and the sheriff must account for them in settling his liability on that bond. Tillery v. Candler, 118 N. C. 888, 24 S. E. 709; State v. Sutton, 120 N. C. 298, 301, 26 S. E. 920.

Process Bond Not Liable for County Taxes.—The county tax cannot be recovered of the sheriff upon the official bond required by the Act of 1777, which is the process bond required by this section. Governor v. Barr, 12 N. C. 65.

The case of Governor v. Crumpler, 12 N. C. 63, holds that the sureties on the "process" bond are not liable for default as to county taxes, which is true now, as it was then. State v. Sutton, 120 N. C. 298, 301, 26 S. E. 920.

II. LIABILITY ON OFFICIAL BONDS.

See section 354 and notes thereto.

See 12 N. C. Law Rev., 394, for note "Extent of Liability on Sheriff's Official Bond."

A. Liability Limited to Terms of Bond.

Rule of Construction.—In a bond given for a specific object, general words shall be construed with reference only to that object. Therefore, when a bond is given with a condition that A. M. shall "collect the county contingent tax, and in all things perform his duty as sheriff" the public taxes cannot be recovered on it. Crumpler v. Governor, 12 N. C. 52.

Duties Specifically Described.—A sheriff and his sureties are liable on his official bond only for a breach of some duty specifically described therein. Eaton v. Kelly, 72 N. C. 110.

The general provisions of the bond as to the sheriff's performance of the duties of his office relate to the specific obligations therein set out as to process, and neither the sheriff nor the sureties on his bond are liable in a civil action for damages for injury inflicted by the sheriff while acting in his official capacity. State v. Leonard, 68 F. (2d) 228, 229.

Not Extended as to Years.—Where an action was brought on the bonds of a sheriff, given in 1872 and 1873 and conditioned only for those years, for a default occurring in the year 1874, they could not be enlarged to embrace 1874, on the ground that the law required a bond for the principal's whole term of office. State v. McNeill, 77 N. C. 398.

Where Separate Bond Including All Official Duties Omitted.—Where the condition of a sheriff's bond is made in clear and unambiguous terms to secure the performance of a certain class of duties imposed on him by statute, the super-addition of general terms thereto, though large enough to include all of his official duties, for which by law a separate bond is directed, but omitted to be given will not extend the liability of sureties to such other duties Governor v. Matlock, 12 N. C. 214.

Same—Examples.—In Crumpler v. Governor, 12 N. C. 52, the sheriff had given four bonds, but the condition of no one of them provided for the payment of the State taxes, the non-payment of which was the breach alleged. All of them contained general words, "faithfully execute the office," etc. It was held that these words did not extend beyond the duties specially described and provided for in the preceding clause. Mr. Justice Henderson dissented from the conclusion of the court, but he concurred in this rule of construction, and states it with great clearness and force.

State v. Long, 30 N. C. 415, was an action on a bond with a condition containing general words. In that case it was held that these words did not impose on the sureties an obligation that the sheriff should commit no wrong by color

of his office, nor do anything not authorized by law. See also Jones v. Montford, 20 N. C. 69; State v. Brown, 33 N. C. 141; Commissioners v. Sutton, 120 N. C. 298, 301, 26 S. E. 920.

State v. Bradshaw, 32 N. C. 229, is not in conflict with the cases generally on this subject. That case simply decides that a bond to serve process, collect and pay out moneys, etc., is broad enough to cover money collected for a town which it was the sheriff's duty to collect. See State v. McNeill, 77 N. C. 398, 403.

Trespass under Color of Office.—The sureties in the official bond of a sheriff are not liable for damages for a trespass committed by the sheriff under color of his office. State v. Brown, 33 N. C. 141, cited in note in 21 L. R. A. 738. See also, State v. Long, 30 N. C. 415.

When New Duty Attached.—Where a statute requires a bond from an officer for the faithful discharge of his duty, and a new duty is attached to the office by statute, such bond, given subsequently to the latter statute, embraces a new duty, and is a security for its performance, unless where, when the new duty is attached, a bond is required to be given specifically for its performance. State v. Bradshaw, 32 N. C. 229.

Liability for Injury Caused by Prisoner While Unlawfully at Large as Trusty.—The statutory bonds required to be given by a sheriff under this section may be put in evidence as though they had been written as prescribed by § 324, and where suit is brought on one of the bonds which provides for liability if the sheriff fail to properly execute and return all process, or properly pay all moneys received by him by virtue of any process, "and in all things well and truly and faithfully execute the said office of sheriff," the general provisions of the bond as to the sheriff's faithful performance of the duties of the office relate to the specific obligations therein set out as to service and return of process, and neither the sheriff nor the sureties on his bond is liable thereon in a civil action for damages for a negligent injury inflicted by a prisoner lawfully intrusted to the custody of the sheriff while such prisoner was unlawfully permitted by the sheriff to be at large as a trusty. Sutton v. Williams, 199 N. C. 546, 155 S. E. 160.

Change of Amount of Salary or to Fee Basis.—The liability of a surety on a sheriff's bond, given under this section is not affected by the fact that the sheriff, pending the life of the bond, has been put upon a salary instead of a fee basis, or the amount of his salary has been changed under the authority of a statute. Pender County v. King, 197 N. C. 50, 147 S. E. 695.

B. Successive Terms and Successive Bonds.

The various bonds separately required to be given by the sheriff under this section imposes a distinct liability on the sureties on each bond separately for the terms of office for which given, and where one is given by the same surety for the same sheriff for more than one successive term, the giving of the bond for the succeeding term does not discharge the bond previously given nor release the surety from liability thereon, and a separate cause of action lies against the surety on the bond for each term. Pender County v. King, 197 N. C. 50, 147 S. E. 695.

Appointment of Sheriff Removed for Failure to Give Bond.—Where under § 3932, the board of county commissioners has declared the office of sheriff of that county vacant for his failure to give the bond required by this section, and has appointed another who likewise failed to give the bonds, and has again appointed the former sheriff, who gives the necessary bonds and then qualifies, his term is by virtue of his appointment by the board of County Commissioners, and the liability of the sureties on his official banks commences from the time of his appointment. Pender County v. King, 197 N. C. 50, 147 N. E. 695.

Failure to Renew Bond.—The sureties on the bond of a sheriff are liable for all official delinquencies of which the principal may be guilty during the continuance of his term of office. Where a sheriff, elected in 1872, continued to exercise the duties of the office after his failure to renew his bond and produce his receipts, and was re-elected in 1874, and failed to collect and pay over the taxes for that year, held, that he was liable on his bond of 1872. State v. Pipkin, 77 N. C. 408. See also, State v. McNeill, 74 N. C. 535; State v. Clarke, 73 N. C. 255; State v. McIntosh, 31 N. C. 307.

Effect of Termination of Incumbency.—When the deputy of a sheriff received the note of a married woman for collection within a magistrate's jurisdiction, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was held that there was no breach of the former sheriff's official bond. State v. Buchanan, 60 N. C. 93.

Taxes for Preceding Year.—A sheriff's sureties for one year are not liable for any taxes received by him under the lists furnished in the preceding year; but the sureties of that year are liable. Fitts v. Hawkins, 9 N. C. 394.

Bonds Given During Term Cumulative.—See note to section 354.

C. Irregularities or Informalities in Bond.

When Valid as Voluntary Bond. — When a bond made payable to the State is given by a sheriff for the discharge of public duties, though not taken in the manner or by the persons designated by law to take it, will be good as a voluntary bond. Being for the benefit of the State, the State will be presumed to have accepted it when it was delivered to a third person for its benefit. State v. McAlpin, 26 N. C. 140. For general principle, see section 324 and notes.

Excessive Bond.—If a sheriff voluntarily give bond, with sureties, in an amount larger than is prescribed by law, they will be liable for a breach thereof. Governor v. Matlock, 9 N. C. 366; State Bank v. Twitty, 9 N. C. 5.

III. ACTION ON BONDS.

See section 353 and notes.

Demand Unnecessary.—A demand is not necessary before suit by the county treasurer on a sheriff's bond, as the sheriff is required by law to settle on or before a day certain. McGuire v. Williams, 123 N. C. 349, 31 S. E. 627.

Proper Relator for Settlement of School Taxes.—The Code of 1883, sec. 2563, made the county commissioners the proper relators in an action on the sheriff's bond to compel a settlement of the school taxes. The Acts of 1889, ch. 199, substituted the county board of education as relators (Board v. Wall, 117 N. C. 382, 23 S. E. 358), but Acts of 1895, ch. 439, abolished the county board of education and again made the county commissioners the proper relators. Tillery v. Candler, 118 N. C. 888, 24 S. E. 709; State v. Sutton, 120 N. C. 298, 301, 26 S. E. 920.

Certified Copy as Evidence.—The office of the clerk of the superior court of the county for which one is sheriff, is the proper place of deposit for the bond of such sheriff: Therefore, a copy of such bond, certified by such clerk, is competent evidence of its contents. Such a copy is competent (at least under the maxim, omnia presumuntur, etc.) even although the certificate does not state that it has been recorded. State v. Lawrance, 64 N. C. 483.

Previous Settlements Prima Facie Correct. — Previous settlements with the sheriff, when approved by the board of commissioners, are prima facie correct, and the burden of proving to the contrary rests upon them. Commissioners v. White, 123 N. C. 534, 31 S. E. 670.

Settlement of One Tax Fund at Expense of Another. — Where a sheriff's settlement of one tax fund is made partially by an amount deducted from another tax fund, the settlement exonerates him and his surety from liability on the bond for the taxes settled; he and his sureties are liable in an action on the bond for the taxes misappropriated for such defalcation. McGuire v. Williams, 123 N. C. 349, 31 S. E. 627.

Plea in Bar.—The general rule is, that where there is a plea in bar, it must be disposed of, before a reference for an account can be made. Commissioners v. White, 123 N. C. 534, 31 S. E. 670.

Summary Judgment Set Aside.—Where judgment is entered up summarily against the sureties of a sheriff, upon a proper case, it will be set aside. Crumpler v. Governor, 12 N. C. 52.

When Sum Differs from That Required.—A sheriff's bond payable to the Governor and his successors in a sum different from that directed by law, cannot be sued in the name of the successor. Governor v. Twitty, 12 N. C. 153.

Failure to Take Bail in Civil Cases.—In Governor v. Jones, 9 N. C. 359, it was held that the sheriff was not liable in debt upon his official bond for omitting to take bail when he executed a capias in civil cases; but must be proceeded against as bail by sci. fa.

Return Conclusive.—The return of a sheriff that a fi. fa. is satisfied is conclusive upon his sureties in an action on his official bond. Governor v. Twitty, 12 N. C. 153.

Failure to Have Insolvent's Allowance Made.—Where a sheriff failed to settle for taxes within the time appointed by law and not having had allowance made him by the commissioners for insolvents at the time and in the manner prescribed by law, he cannot have such allowances made by the court in an action brought against him on his official bond for the balance due by him on the tax list. Board v. Wall, 117 N. C. 377, 378, 23 S. E. 358.

Costs in Contested Election.—In Patterson v. Murray, 53

N. C. 278, it was held that a contested sheriff's election before the justices of a county court, was not an action which entitled the successful party to recover costs.

Misjoinder.—Where a sheriff has been elected for successive terms of office, and appointed for a third term by the county commissioners after the office for his third term had been declared vacant, an action against him and the sureties on his bonds given under the provisions of this section, for defalcation during the successive terms is a misjoinder of parties and causes of action, and a demurrer thereto is good. Pender County v. King, 197 N. C. 50, 147 S. E. 695.

§ 3931. County commissioners to take and approve bonds.—The board of county commissioners in every county shall take and approve the official bonds of the sheriffs, which they shall cause to be registered and the originals deposited with the clerk of the superior court for safekeeping. The bonds shall be taken on the first Monday of December next after the election of sheriffs, but no board shall permit any former sheriff to give bonds for, or reënter upon the duties of the office, until he has produced before the board the receipt in full of every such officer for taxes which he has or should have collected. (Rev., s. 2812; Code, ss. 2066, 2068; 1868, c. 20, s. 32; 1876-7, c. 276, s. 5; R. C., c. 105, s. 6; 1806, c. 699, s. 2; 1830, c. 2830, c. 25, s. 2.)

Cross References.—As to duty of commissioners to approve bonds of county officers and induct into office, see section 1297, subsection 12; as to disqualification for office of sheriff, see section 3926.

Purpose.—The evident purpose of the section is only to protect and safeguard the public revenue and to insure its honest collection and application. Hudson v. McArthur, 152 N. C. 445, 67 S. E. 995.

Execution and Approval of Bonds.—To entitle a sheriff to be inducted into office, it is essentially necessary that three several bonds must be executed by him and approved by the county commissioners. Dixon v. Commissioners, 80 N. C. 118.

Receipt for Taxes Must Be Presented.—See notes to § 3926.

Not Liable to Sureties for Failure to Demand Receipt.—The county commissioners are not liable to the sureties on the bond of a defaulting sheriff and tax collector whose defalcations they were required to pay, for a failure to demand of the sheriff his receipts in full, for the taxes collected the previous year before permitting him to receive the tax duplicate for the current year. Hudson v. McArthur, 152 N. C. 445, 67 S. E. 995.

Cited in Pender County v. King, 197 N. C. 50, 53, 147 S. E. 695.

§ 3932. Duty of commissioners when bonds insufficient.—It shall be the duty of the board of county commissioners whenever they shall be of opinion that the bonds of the sheriff of their county are insufficient, to notify the sheriff in writing to appear within ten days and give other and better sureties, or justify the sureties on his bonds; and in case such sheriff shall fail to appear on notice, or fail to give sufficient bonds, or to justify his bonds, it shall be the duty of the board to elect forthwith some suitable person in the county as sheriff for the unexpired term, who shall give proper and lawful bonds and be subject to like obligations and penalties. (Rev., s. 2813; Code, s. 2074; 1879, c. 109, s. 2.)

Right to Examine Sheriff and Vacate Office. — Under article seven, section 2 of the Constitution (1868 as revised) the county commissioners have the right to summons the sheriff to justify or renew his official bond, whenever in fact, or in their opinion the sureties have become, or are liable to become insolvent. And it is not only the right, but the duty of the commissioners, to declare the office of sheriff vacant, and appoint one for the unexpired term, whenever the incumbent thereof takes no notice of a summons by the commissioners to appear before them and justify or renew his bond. People v. Green, 75 N. C. 329.

Power to Fill Vacancy.—Upon the failure of a sheriff-elect to give bonds required by law, the board has power to elect some suitable person in the county as sheriff for the unexpired term. Lenoir County v. Taylor, 190 N. C. 336, 342, 130 S. E. 25.

Cited in Pender County v. King, 197 N. C. 50, 53, 147 S. E. 695.

§ 3933. Liability of commissioners.—If any board of county commissioners shall fail to comply in good faith with the provisions of this article, they shall be liable for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district. (Rev., s. 2814; Code, s. 2075; 1868-9, c. 245, s. 3.)

Court Cannot Compel Approval. — The boards of county commissioners are liable in damages if they knowingly accept insufficient bonds, and approval or disapproval of such bonds is within their discretion, and the courts cannot compel them to approve and receive bonds which they find to be insolvent or insufficient. State v. King, 117 N. C. 117, 23 S. E. 92.

Liable for All Loss.—If any board of commissioners shall fail to comply with the provisions of the statute, they shall be liable for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district. Lenoir County v. Taylor, 190 N. C. 336, 341, 130 S. E. 25.

When Liable for One Penalty Only.—Where the statutes require the sheriff to renew annually his official bonds, and, in addition, produce receipts for the public moneys collected by them, and in default thereof it shall be the duty of the board of county commissioners to declare the office vacant are intended to effectuate the same purpose, and therefore a member of the board of county commissioners is liable for only one penalty for failure to perform his duty in that connection. Bray v. Barnard, 109 N. C. 44, 13 S. E. 729.

§ 3934. Liability of sureties.—The sureties to a sheriff's bond shall be liable for all fines and amercements imposed on him, in the same manner as they are liable for other defaults in his official duty. (Rev., s. 2815; Code, s. 2076; R. C., c. 105, s. 14; 1829, c. 33.)

As to a general discussion of the liability of the sureties in connection with the sheriff, see annotations under section 3930.

Liable for Amercements.—The sureties to a sheriff's bond, with a condition in the ordinary form, are liable for an amercement of the sheriff for a default committed during his official year, though the final judgment for the amercement may not have been rendered until after the expiration of the year. Governor v. Montford, 23 N. C. 155.

Same—Records of Proceedings as Evidence.—The records of the proceedings against a sheriff for an amercement imposed upon him, are not evidence against his sureties to prove his default; but they are admissible against them to prove the fact of the existence of the amercement itself. Governor v. Montford, 23 N. C. 155.

Return Conclusive.—A sheriff cannot be heard to deny or contradict his return; as to him it is conclusive, and he and the sureties upon his bond are liable to the plaintiff in the execution for the sums so indorsed. Walters v. Moore, 90 N. C. 41.

Judgment or Amercement Not Conclusive.—A judgment of an amercement against a sheriff is not conclusive against the sureties on his bond. They may show that the judgment was either fraudulently or improperly obtained against their principal. State v. Woodside, 29 N. C. 296.

Art. 3. Duties of Sheriff

§ 3935. To receipt for process. — Every sheriff, coroner or constable shall, when requested, give his receipt for all original and mesne process placed in his hands for execution, to the party suing out the same, his agent or attorney; and such receipt shall be admissible as evidence of the facts therein stated, against such officer and his sureties, in any suit between the party taking the receipt and such officer and his sureties. (Rev., s. 2816; Code, s. 2081; R. C., c. 105, s. 18; 1848, c. 97.)

This section obviously has no reference to final process. Wyche v. Newsom, 87 N. C. 144, 145.

§ 3936. Execute process; penalty for false return.—Every sheriff, by himself or his lawful deputies, shall execute and make due return of all writs and other process to him legally issued and directed, within his county or upon any river, bay or creek adjoining thereto, or in any other place where he may lawfully execute the same. He shall be subject to the penalty of forfeiting one hundred dollars for each neglect, where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved by order of court, upon motion and proof of such delivery, unless the sheriff can show sufficient cause to the court at the next succeeding term after the order.

For every false return, the sheriff shall forfeit and pay five hundred dollars, one moiety thereof to the party aggrieved and the other to him that will sue for the same, and moreover be further liable to the action of the party aggrieved, for damages.

Every sheriff and his deputies, and every constable, shall execute all writs and other process to him legally issued and directed from a justice's court and make due return thereof, under penalty of forfeiting one hundred dollars for each neglect or refusal, where such process shall be delivered to him ten days before the return day thereof, to be paid to the party aggrieved by order of such court, upon motion and proof of such delivery, unless the sheriff or constable can show sufficient cause to the court at a day within three months from the date of the entry of the judgment nisi, of which the officer shall be duly notified. (Rev., s. 2817; Code, s. 2079; 1899, c. 25; R. C., c. 105, s. 17; 1777, c. 218, s. 5; 1821, c. 1110; 1874, c. 33.)

I. General Considerations.
II. Neglect or Failure to Make Due Return.
A. In General.
B. What Constitutes Failure and Defenses.
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Cross References.

See section 4396 and notes thereto.

I. GENERAL CONSIDERATIONS.

Summary of Section.—The section authorizes the following penalties and remedies: 1. An amercement nisi for $100, on "motion and proof" by the party aggrieved, for failure to "execute and make due return." 2. A qui tam action for penalty of $500 for a "false return," one moiety to the party aggrieved, and the other to any one who will sue for the same. 3. An action for damages by the party aggrieved. 4. An amercement nisi for $100 in justices' courts, on "motion and proof" by the party aggrieved, for "neglect or refusal" to execute process of such court. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 76, 11 S. E. 264.

Who May Issue Process.—Process can be issued by the mayor of a town or city, to any lawful officer, such as a sheriff whose duty it then becomes to execute and make due return. State v. Cainan, 94 N. C. 880; Paul v. Washington, 134 N. C. 363, 385, 47 S. E. 793.

"Return" Defined. — The term "return" means that the process must be brought back and produced in the court whence it issued with such indorsement as the law requires. Watson v. Mitchell, 108 N. C. 364, 12 S. E. 836.

What Constitutes Due Return.—In Waugh v. Brittain, 49 N. C. 470, 471, it was said by Battle, J.: "We concur with his Honor in the opinion, due return of process, means a proper return, made in proper time; and such, we believe, has always been the construction put upon those words, as used in the Act of 1777, Rev. Code, ch. 105, sec. 17 [now this section.]"

A return of a sheriff to a fi. fa. that "he had made a levy on personal property and taken a forthcoming bond, but had not sold it, that the obligors did not deliver the property on the day, and that, after the day, it was too late to make a sale," is not such a "due return" of the process as will exempt the sheriff from amercement. Frost v. Rowland, 27 N. C. 385.

Where a sheriff indorsed upon an execution the words, "debt and interest due to sheriff, costs paid into office"; and upon another, the word "satisfied," without stating what disposition he had made of the fund the returns were held to be sufficient in law to relieve the sheriff from amercement for not making "due return." Person v. Newsom, 87 N. C. 142.

Nor is he required to note thereon the date of its delivery to him. (The Act of Assembly has no reference to final process.) Person v. Newsom, 87 N. C. 142.

Same—Mixed Question of Law and Fact.—Whether, in any particular case, a due return has been made, may involve questions, both of law and fact. Whether the return is a proper one in form and substance is a question of law, to be decided by the court, but whether it was made in proper time, is a question of fact, to be decided by the jury. Waugh v. Brittain, 49 N. C. 470.

Manner of Making Return—By Mail.—If, then, the mail can be used as a medium by which process can be transmitted to a sheriff, so as to charge him with its reception, it would seem that he ought to be allowed to adopt the same means for making his return, at least so far as the due time of the return is involved. In Waugh v. Brittain, 49 N. C. 470, it was intimated that he might do so, and that he would be excused if the letter, indorsing the process, with his return upon it, was properly mailed in due time. Cockerham v. Baker, 52 N. C. 288, 289; affirmed in Yeargin v. Wood, 84 N. C. 326, 329.

Fees in Advance.—Until his fees are paid or tendered, a sheriff is not bound to execute process. Johnson v. Kenneday, 70 N. C. 435.

II. NEGLECT OR FAILURE TO MAKE DUE RETURN.

A. In General.

An amercement is a penalty, and is for a fixed sum without regard to the little or much of the plaintiff's damage. Thompson v. Berry, 65 N. C. 484, 485.

Subsequent Term.—A sheriff may be amerced for a non-return of process at a term subsequent to that at which the process was returnable. Hyatte v. Allison, 48 N. C. 533.

A sheriff, failing to execute and return process, shall be subject to a penalty to be paid to the party aggrieved, by order of the court, on motion, and proof that process was delivered to him before the sitting of the court to which it was returnable, unless the sheriff shows sufficient cause to the court for his failure "at the court next succeeding such order." And there is nothing in the statute to prevent a sheriff not returning process from being amerced at a subsequent term to that to which the return should have been made. Halcombe v. Rowland, 30 N. C. 240.

Expiration of Term.—A sheriff, who goes out of office before the return day of the writ delivered to him, is not subject to amercement for failure to return it. McLin v. Hardie, 25 N. C. 407; State v. Woodside, 29 N. C. 296.

Process Must Be Delivered Twenty Days before Term.—To bring a delinquent officer within the provisions of the statute and subject him to its pains, the process must have been delivered to him twenty days before it is to be returned, and there must be "proof of such delivery." Yeargin v. Wood, 84 N. C. 326, 328.

When Returnable.—Executions shall be returnable to the term of the court next after that from which they bear teste. The sheriff is allowed all the days of the term to return an execution, unless he be ruled, upon motion and cause shown, to return it on some intermediate day. Person v. Newsom, 87 N. C. 142; Turner v Page, 111 N. C. 291, 292, 16 S. E. 174.

A sheriff who fails to make return of process before the adjournment of the court to which it is returnable, is liable to the penalty prescribed by statute. Turner v. Page, 111 N. C. 291, 16 S. E. 174; Boyd v. Teague, 111 N. C. 246, 16 S. E. 338.

Not Applicable to Federal Marshal.—In Lowry v. Story, 31 Fed. 769, 770, it was said by Dick, J.: "The motion before us is founded upon this law of the state imposing a penalty upon sheriffs who fail or neglect to execute process duly issued to and received by them. The motion cannot be allowed, as this court has no power to enforce against the marshal a penalty imposed by the law of this state upon a sheriff for neglect of duty. A federal court has no power to execute the penal laws of a state." Gwin v. Breedlove, 2 How. U. S. 29, 11 L. Ed. 167, affirmed in Gwin v. Barton, 6 How. U. S. 7, 12 L. Ed. 321.

B. What Constitutes Failure and Defenses.

1. The Essential Elements of Failure.

In General.—The delivery of the process to the officer and his failure to execute its commands and make due return are essential ingredients in the criminal dereliction of duty followed by the penal consequences thus summarily enforced. Yeargin v. Wood, 84 N. C. 326, 329.

Insufficient Return.—Under the Act of 1777 (Rev. St. c. 109, § 18), imposing a fine on a sheriff for not making due return of process placed in his hands, a return by the sheriff on a fi. fa. that he has levied on goods subject to older executions, without stating whether he had sold property seized or still held it, is not a due return, and subjects him to amercement. Buckley v. Hampton, 23 N. C. 322.

A return of a sheriff to a fi. fa. that "he had made a levy on personal property and taken a forthcoming bond, but had not sold it, that the obligors did not deliver the property on the day, and that after the day it was too late to make a sale," is not such a "due return" of the process as will exempt the sheriff from amercement. Frost v. Rowland, 27 N. C. 385.

Failure to Sell Property and Make Return.—A sheriff who had not sold property under execution nor made return on writs of venditioni exponas, should be amerced. Anonymous, 2 N. C. 415.

Agreement of Parties.—Where a scire facias was issued on a judgment, the sheriff was liable to amercement for failure to return the process, though the parties agreed, while it was in the sheriff's hands, that the collection of the money should be suspended, so as to enable them to make a full settlement. Morrow v. Allison, 33 N. C. 217.

Refusal of Clerk to Receive Return.—It is not a sufficient excuse to an officer for neglecting to return a process to the proper term of the court that he had tendered it to the clerk, who had refused to receive it, nor that the clerk had died during the term. Hamlin v. March, 31 N. C. 35.

False Impression as to When Summons Returnable No Defense.—A summons issued June 27, 1901, returnable at the July, 1901, term of the court, which recited that it was returnable on the fifth Monday before the first Monday in September, 1901, and was not returned until August 6, 1901, it was held not to constitute a defense to an action to recover the penalty prescribed by the section for the sheriff's failure to return the same within the time required, that he had the erroneous impression that the summons was returnable at a later date, and that his failure was occasioned by endeavoring to obtain service. Bell v. Wycoff, 131 N. C. 245, 42 S. E. 608.

Failure to Pay or Tender Fees.—Though a sheriff is not required to execute process until his fees are paid or tendered by the person at whose expense the service is to be rendered, he is not excused thereby for a failure to make a return of process; for, if he has any excuse for not executing the writ, he must state it in his return. Jones v. Gupon, 65 N. C. 48.

Belief That Lien Divested by Subsequent Legislation.—A sheriff is liable to be amerced for a return on a vend. exp. of "no goods," etc., after levy, although made in the belief that the lien has been divested by subsequent legislation. McKeithan v. Terry, 64 N. C. 25.

2. When Return Is Sufficient.

Sufficient—In General.—Where a sheriff indorsed on an execution the words, "Debt and interest due to sheriff; costs paid into office," it was held, that the return was sufficient in law to relieve the sheriff from amercement for not making "due return." Person v. Newsom, 87 N. C. 142.

Return within Time Prescribed by Law.—A sheriff can not be amerced if he return an execution within the time prescribed by law, though he fail to return the money levied thereon into court, or pay it to the party or his attorney. Cockerham v. Baker, 52 N. C. 288; Davis v. Lancaster, 5 N. C. 255.

Indorsing Execution "Satisfied."—Where a sheriff indorsed upon an execution merely the word "satisfied" without stating what disposition he had made of the fund, the return was sufficient in law to relieve him from an amercement for not making due return. Wyche v. Newsom, 87 N. C. 144.

Same—Return Marked "Satisfied" without Satisfaction.—In Cockerham v. Baker, 52 N. C. 288, 289, it was said by Mr. Justice Battle that "the counsel for the plaintiff contended that there was not a due return of the process as required by sec. 17, chap. 105, Rev. Code, (now this section), because, though returned 'satisfied', the money was not sent with it, nor paid into the clerk's office, nor to the plaintiff or his attorney. If this question were before the court for the first time, we should be strongly inclined to hold this objection to be fatal to the return. The writ, in its terms, demands that the sheriff shall have the money levied before the court, and it would seem a return of 'satisfied', without the 'satisfaction,' is but a mockery. But, at a very early period, a different construction was put upon the Act of 1777 (Chap. 118, sec. 6, Rev. Code of 1820), and as that act has been twice re-enacted in the same terms, we must consider that construction as settled; see Davis v. Lancaster, 5 N. C. 255; and see also 1 Rev. Stat., Chap. 109, sec. 18, and the Rev. Code, Chap. 105, sec. 17, (now this section) in both of which there is a marginal reference to that case, and according to it a sheriff can not be fined if he return the execution within the time prescribed by law, though he fail to return the money levied thereon into court, or pay it to the party or his attorney."

Where Debtor Had No Property in Excess of His Exemptions.—A sheriff is not liable to amercement for failure to have in court the amount of an execution issued on a judgment for a debt contracted prior to 1868, when the judgment debtor had no property in excess of his exemptions, as the exemption laws (Const. Art. 10, and the statutes pursuant thereto) so modify Battle's Revisal, c. 106, § 15, as not to authorize the infliction of a penalty therein imposed for disobedience to the exemption laws. Richardson v. Wicker, 80 N. C. 172.

C. Actions Concerning Amercements.

Jurisdiction of Superior Court.—Where the sheriff has laid himself liable to the penalty for failure to make due return of process, the superior court has jurisdiction to give the judgment nisi on motion. Thompson v. Berry, 64 N. C. 79, 80.

Time of Trial.—Plaintiff is entitled to a trial the first term on a scire facias, on an amercement against the sheriff. Hogg v. Bloodworth, 1 N. C. 593.

Necessity of Trying Issues of Torts on Affidavits.—On a scire facias against a sheriff to amerce him for not returning an execution into the Supreme Court, whence it issued, issues of fact must be tried on affidavits, as the court has no power to call a jury. Kea v. Melvin, 48 N. C. 243.

Remedy by Rule.—When a prima facie case is made against a sheriff, either upon affidavit or other sufficient proof, a rule nisi is granted as of course, and surplusage in the affidavit will not impair its effect. Ex parte Schenck, 63 N. C. 601.

Process Mailed Sufficient for Amercement Nisi.—The proof is sufficient for an amercement nisi under former rulings, where it is shown that the process is an envelope properly directed and with postage prepaid has been deposited in the postoffice in time to enable it to reach its destination in the due course of the mail twenty days before the session of the court to which it is returnable. State v. Latham, 51 N. C. 233; Yeargin v. Wood, 84 N. C. 326, 328.

Where in such case the summons sent by mail did not reach such officer until six days before the sitting of the court to which it was returnable, and he served it in two days thereafter he is not liable to amercement. Yeargin v. Wood, 84 N. C. 326.

Same—To Sheriff in Another County.—It has frequently been decided by the Supreme Court, after argument and full consideration, that if it be made to appear that a clerk has sent a writ to the sheriff of another county, enclosed in a stamped envelope, in due time to reach him in the regular course of the mails, twenty days before the sitting of the court to which it is returnable, it is sufficient to authorize a judgment nisi for an amercement for the non-return of the process. State v. Latham, 51 N. C. 233; Cockerham v. Baker, 52 N. C. 288, 289.

Presumption Subject to Rebuttal.—And the officer is allowed to rebut the presumption of its having been received and to discharge himself, as upon a motion for a rule against him, by making an affidavit that the writ did not come to his hands. Yeargin v. Wood, 84 N. C. 326, 329.

Judgment Nisi Made Absolute.—Where judgment nisi for $100 is rendered against a sheriff for failure to make due return of process, and no sufficient reason is shown for the failure, the judgment should be made absolute. Graham & Co. v. Sturgill, 123 N. C. 384, 31 S. E. 705.

Judgment Absolute Set Aside.—In a proceeding to enforce the statutory penalty against a sheriff for failure to make due return of process, it is not error to set aside a judgment absolute where it appeared that he had no notice of the rule upon him to show cause. Yeargin v. Wood, 84 N. C. 326.

Method of Recovering Penalty Exclusive.—The method by which a sheriff may be amerced for unlawfully failing to execute a warrant it was his duty to serve, as prescribed by this section, is alone to be followed in an action for penalty brought thereunder. Walker v. Odon, 185, N. C. 557, 118 S. E. 2. And a civil action cannot be resorted to. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 76, 11 S. E. 264.

Same—Nature and Form.—The statute provides only for an amercement, on motion, for the failure of a sheriff to

make "due and proper" return of process. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 11 S. E. 264. See also, Harrell v. Warren, 100 N. C. 259, 6 S. E. 777.

Penalty Gives Way to Exemption Laws.—The provisions of the exemption laws (Constitution, Art. X, and the statutes passed in persuance thereof) so modify ch. 106, sec 15, Bat. Rev., now this section, as not to authorize the infliction of the penalty therein imposed for obedience to said exemption laws. Richardson v. Wicker, 80 N. C. 172.

Courts Cannot Relieve.—The courts have no dispensing power to relieve from the penalty prescribed by law. Swain v. Phelps, 125 N. C. 43, 34 S. E. 110.

III. FALSE RETURN.

Penalty Enforced in Civil Action.—The action for $500 penalty for "false return," is properly sought to be maintained by civil action. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 76, 11 S. E. 264.

Power of Court to Allow Return to Be Amended.—In an action against a sheriff, for the penalty of $500 for a false return, as provided in this section. After the action was begun, the defendant, on affidavits, moved the court to be allowed to amend his return so as to speak the truth. The motion was allowed, and upon appeal the Supreme Court held that the power of the superior court judge to allow amendments in process, etc., is broad, both by statute and the inherent power of the court and the ruling of the lower court was affirmed. Swain v. Burden, 124 N. C. 16, 32 S. E. 319, 320.

Where a sheriff to whom a summons issued, returned it "served," and was sued for the $500 penalty for false return provided for by this section. The court permitted him, for proper reasons set out in his affidavit, to amend this return and the power of the court below to allow the amendment was sustained on appeal. Swain v. Burden, 124 N. C. 16, 32 S. E. 319; Swain v. Phelps, 125 N. C. 43, 34 S. E. 110.

When, in an action against a sheriff for a false return, the court permits such return to be amended, the plaintiff should note his exception, and, unless the amended return is admitted to be true, proceed to try the issue. An appeal before final judgment on such admission, or a verdict, is premature and will be dismissed. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 11 S. E. 264.

Plaintiff Need Not Name Other Party.—Any person may sue for the penalty imposed upon sheriffs by the section for a false return, and he need not mention in his complaint the other party, to whom the statute gives one-half of the recovery. Harrell v. Warren, 100 N. C. 259, 6 S. E. 777. See also Martin v. Martin, 50 N. C. 346; Peebles v. Newsom, 74 N. C. 473.

Restricted to Civil Process.—The penalty of $500 imposed for a false return by the section is restricted to sheriffs, and false returns by them made to civil process. Harrell v. Warren, 100 N. C. 259, 6 S. E. 777. See also Martin v. Martin, 50 N. C. 346.

Element Essential to Liability.—In order to render a sheriff liable for a false return, under the section, falsehood must be found in the statement of facts in the return. Harrell v. Warren, 100 N. C. 259, 6 S. E. 777.

Mistake.—A return made by a sheriff, that is false in fact, although the officer was mistaken in the matter as to which he made his return will, nevertheless, subject him to the penalty for a false return. Albright v. Tapscott, 53 N. C. 473.

If a return be false in fact, inadvertence or mistake is no excuse or protection to the officer, although no intentional deceit was practiced. Harrell v. Warren, 100 N. C. 259, 6 S. E. 777.

In an action of debt for the penalty for false return, in which nil debit is pleaded, a verdict finding all issues in favor of the plaintiff and assessing his damages to $500, will not sustain a judgment of recovery. Albright v. Tapscott, 53 N. C. 473.

Illustrations.—In an action for the penalty imposed for a false return the complaint stated, in substance, that an execution was placed in the sheriff's hands and by him levied on the goods of the defendant therein named, which goods the sheriff kept locked up for several days; that defendant in the execution, at the time of the levy, demanded that his exemptions be allotted to him; that defendant paid the sheriff $2.50 in part of the execution, while his goods were held under the levy; that after keepng said goods several days, and receiving the said $2.50, the sheriff returned said execution, "Levy made; fees demanded for laying off exemptions and not paid; no further action taken;" that said return was false, in that it did not state that he had collected said $2.50 on the execution. Upon such a state of facts the failure to mention the payment of $2.50 in his return made the return defective, but such an omission does not render the sheriff liable to the penalty imposed for a false return. Harrell v. Warren, 100 N. C. 259, 6 S. E. 777.

Where a sheriff returns upon a fi. fa., two credits for money received, thereon at different times, and, suppressing a third credit, returns not satisfied, it was held that such return was false, and subjected him to the penalty of $500, under Rev. Code, ch. 105, sec. 17, now this section. Martin v. Martin, 50 N. C. 346.

Same—Return "Too Late to Hand."—Where a sheriff indorsed truly the day on which he received a declaration in ejectment, returnable to a county court, and returned on the same "too late to hand," although five days intervened between the day indorsed, and the return day, it was held that he was not liable under 17th Section, 105th Chap., of Rev. Code, now this section, to the penalty for making a false return. Hassel v. Latham, 52 N. C. 465.

Same—Return "Not Found."—The return of "Not to be found" on a capias is not true, because of the defendant s being out of the state at the time the return is made, if the officer had an opportunity of making the arrest previously, while the process was in his hands. Martin v. Martin, 50 N. C. 349. See also, Tomlinson v. Long, 53 N. C. 469; Harrell v. Warren, 100 N. C. 259, 6 S. E. 777.

A deputy sheriff having an order of arrest to be executed, went to the house of the person named therein, and, after reading to him the summons in the action, told him that he had an order of arrest for him. After some talk, the deputy left the bond with him, on his promise to call next day and fix the matter up. It was held, that as the deputy did not have, or attempt to have within his control in any way the party named in the order, there was no arrest, and a return of the order "Not served" did not render the officer liable for a false return. State v. Buxton, 102 N. C. 129, 8 S. E. 774.

Same—Arrest.—Where a sheriff, having in hand an order of arrest against B., told B. that he "had better come and go with him to Jackson, and fix the matter there;" B. refused to go with him, and the sheriff left, without taking any further action, it was held that what passed did not constitute an arrest of B., and the sheriff was not liable for a false return, in that he returned on the order of arrest, "not served." State v. Buxton, 102 N. C. 129, 8 S. E. 774.

Statute of Limitations.—When an amercement was imposed upon a sheriff for a false return made more than six years previous, an action upon his official bond to recover the penalty was barred by the statute of limitations. State v. Barefoot, 104 N. C. 224, 10 S. E. 170.

IV. WRITS FROM JUSTICE'S COURT.

No Power to Amerce Sheriff of Another County.—Under the Act of 1874-'75, ch. 33, now this section, a justice of the peace has no power to amerce the sheriff of a county other than that in which he holds his court, for failure to make due return to process issued by such justice. He can only amerce the sheriff of his county when he fails to perform the duties imposed by that act. Boggs v. Davis, 82 N. C. 27.

Action for Failure of Sheriff to Serve Warrant. — The court may not regard an independent action as a motion in the original cause when the latter is not before it; and where the sheriff is liable for the penalty prescribed by this section, for failure to serve a warrant in an action before a justice of the peace, and the plaintiff brings an independent action for the recovery of the penalty before another justice, from whose judgment the defendant has appealed, and a trial de novo had in the superior court, it is error for the trial judge to regard the summons and complaint in the independent action as a motion in the cause under this section, and proceed with the trial accordingly. Walker v. Odom, 185 N. C. 557, 118 S. E. 2.

When Constable Not Liable for Refusal to Serve.—A constable does not subject himself to the penalty of $100 by declining to receive process which, at the time it was tendered, he could not have executed ex. gr. process against a person then attending under subpoena before a commissioner. Fentress v. Brown, 61 N. C. 373.

Where Sheriff a Party.—An execution directed to a sheriff, who is a party, is null and void, and the sheriff can not be amerced for neglecting or refusing to make a return thereon. Bowen v. Jones, 35 N. C. 25.

§ 3937. Sufficient notice in case of amercement.—In all cases where any sheriff or other officer shall be amerced for failure to make due return of any execution or other process placed in his hands, or for any default whatsoever in office, and judgment nisi or otherwise for the penalty or forfeiture in such case made and provided shall be entered, it shall be sufficient to give such sheriff notice, according to law, under the hand of the clerk and seal of the court where such judgment

may be entered, of a motion for a judgment absolute, or for execution, as the case may be; and no other notice, summons or suit shall be necessary to enforce the same; and such proceedings shall be deemed and held in aid of a suit or other proceedings already instituted in court. (Rev., s. 2818; Code, s. 446; 1871-2, c. 74, s. 4.)

Amercement, and not a civil action, is the remedy given against a sheriff for not making "due and proper" return of process. Piedmont Mfg. Co. v. Buxton, 105 N. C. 74, 11 S. E. 264.

When Rule Nisi Granted.—Where a prim facie case is made, either upon affidavit or other sufficient proof a rule nisi is granted as of course. Ex-parte Schenick, 63 N. C. 601.

Immaterial Evidence.—On the trial of an action for the penalty, when the defendant sheriff offered to introduce in evidence the true returns of the proceeds of sale indorsed upon certain other executions, the evidence was immaterial and properly excluded. Finley v. Hayes, 81 N. C. 368.

Jurisdiction in Court to Which Process Returnable.—An action against a sheriff of a county other than that from which the process issued, for making a false return, is properly brought in the courts of the county to which that process was returnable. Watson v. Mitchell, 108 N. C. 364, 12 S. E. 836.

Amerced at Subsequent Term.—A sheriff may be amerced at a subsequent term to that at which the process was returnable, for not having made his return at a previous term. Hyatte v. Allison, 48 N. C. 533.

Return Prima Facie Correct.—The return or certificate of a ministerial officer, as to what he has done out of court, is only to be taken as prima facie true, and is not conclusive; it may be contradicted by any evidence and show to be false, antedated, etc. Smith v. Low, 27 N. C. 197.

Non-Payment of Fees Do Not Excuse Return.—A sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. Jones v. Gupton, 65 N. C. 48.

Section 600.—On motion to set aside a judgment against defendant sheriff for an alleged failure to make due return of process, the facts of the instant case entitled him to relief under section 600. Francks v. Sutton, 86 N. C. 78.

Duties under C. C. P. and Old System. — The duties and liabilities of a sheriff in relation to the execution of process are nearly the same under the C. C. P. as under the old system but the mode of procedure for enforcing a judgment nisi against him is changed from a scire facias to a civil action, and the summons must be in the same court as the judgment, and must be returned to the regular term thereof. Jones v. Gupton, 65 N. C. 48.

§ 3938. Execute summons, order or judgment.—Whenever the sheriff may be required to serve or execute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and this chapter relating to sheriffs shall apply to coroners when the sheriff is a party. Sheriffs and coroners may return process by mail. Their liabilities in respect to the execution of process shall be as prescribed by law. (Rev., s. 2819; Code, s. 598; C. C. P., s. 354.)

Execution from Justice's Court.—Execution from a justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. McGloughan v. Mitchell, 126 N. C. 681, 36 S. E. 164.

When Addressed to Constable.—A constable can not serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. McGlouchan v. Mitchell, 126 N. C. 681, 36 S. E. 164.

When Want of Jurisdiction Not Apparent.—It is well settled, that if a court issuing process has general jurisdiction to issue such process, and the want of jurisdiction does not appear upon the face of the paper, a sheriff and his assistants may justify under it. State v. Ferguson, 67 N. C. 219.

When Coroner Acts.—In an action wherein the sheriff is a party defendant it is proper that a summons issued against a codefendant should be addressed to and served by the coroner. Battle v. Baird, 118 N. C. 854, 24 S. E. 668.

The county commissioner, may declare the office vacant, upon the insanity of the sheriff, but their failure to do so merely authorizes the coroner to perform the duties of sheriff proper, but does not cast upon him the right to collect taxes. Somers v. Board, 123 N. C. 583, 31 S. E. 873.

§ 3939. Liability of outgoing sheriff for unexecuted process.—Any sheriff who shall have received a precept, and shall go out of office before the return day thereof, without having executed the same, shall forfeit and pay to the party at whose instance it was issued the sum of one hundred dollars, if such precept shall have remained in his hands for such length of time wherein it might have been well executed by him; unless the same shall have been thereafter executed by the successor of such sheriff and returned at the day and place commanded therein; or unless it shall have been delivered over to the succeeding sheriff time enough to have allowed of its being executed by him; and the penalty aforesaid shall be recoverable by notice against such outgoing sheriff and his sureties. (Rev., s. 2820; Code, s. 2088; R. C., c. 105, s. 25.)

Delivery to Successor.—It is the duty of the sheriff, going out of office, to deliver, all the processes remaining in his hands, to his successors. State v. Woodside, 29 N. C. 296.

When Not to Make Return.—A sheriff, to whom a writ has been delivered, but who goes out of office before the return day of the writ, has no power to make the return on it, and therefore is not liable to amercement for not doing so. State v. Woodside, 29 N. C. 296.

§ 3940. Payment of money collected on execution.—In all cases where a sheriff has collected money upon an execution placed in his hands, if there be no bona fide contest over the application thereof, he shall immediately pay the same to the plaintiff, or into the office of the clerk of the court from which the execution issued, and upon his failure to make such payment upon demand, he shall be liable to a penalty of one hundred dollars, to be collected as other penalties. (Rev., s. 2821; Code, s. 2080.)

The auditing of account of sheriff by county commissioners is prima facie evidence of its correctness, and it is impeachable only for fraud or special error. Williamson v. Jones, 127 N. C. 178, 37 S. E. 202; Commissioners v. Kenan, 127 N. C. 181, 73 S. E. 997.

§ 3941. Deposit county tax money with treasurer.—Every sheriff shall deposit the county and other local taxes, by him collected, with the county treasurer, if there be a county treasurer, as often as he shall collect or have in his possession at any one time of such county or local taxes a sum equal to five hundred dollars. (Rev., s. 298; Code, s. 2073.)

§ 3942. Publish list of delinquent taxpayers.—Whenever any sheriff or tax collector shall be credited on settlement with any tax or taxes by him returned as insolvent, dead or removed, he shall forthwith make publication at the courthouse door, and at least one public place in each and every township in his county, of a complete list of the names of such insolvent, dead or removed delinquents, with the amount of the tax due from each, and the sum total so credited. Such list, by order of the board of commissioners, may also be published in any newspaper printed in the county; in which case, the expense of the advertisement, for such time as may be directed,

shall be paid by the county. Any sheriff or tax collector failing to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars. (Rev., ss. 2826, 3587; Code, s. 2092; 1876-7, c. 78, ss. 1, 2, 3.)

§ 3943. Liability for escape under civil process.—When any sheriff shall take or receive and have in keeping the body of any debtor in execution, or upon attachment, for not performing a judgment for the payment of any sum of money, and shall willfully or negligently suffer such debtor to escape, the person suing out such execution or attachment, his executors or administrators, shall have and maintain an action for the debt against such sheriff and the sureties on his official bond, and in case of his death, against his executors or administrators, for the recovery of all such sums of money as are mentioned in the execution or attachment, and damages for detaining the same. (Rev., s. 2823; Code, s. 2083; R. C., c. 105, s. 20; 13 Edw. I, c. 11; 1777, c. 118, ss. 10, 11.)

I. General Considerations.
II. Liability of Sheriff.
III. Actions.

I. GENERAL CONSIDERATIONS.

Escape Defined.—An escape is defined to be when one who is arrested gains his liberty before he is delivered in due course of law. State v. Ritchie, 107 N. C. 857, 12 S. E. 251.

An escape has been effected, in the criminal sense of the law, in the language of an eminent author in a work on criminal law, "when one who is arrested, gains his liberty before he is delivered in due course of law." 1 Russell on Crimes, 467. It is defined in brief words by another writer as "the departure of a prisoner from custody." 2 Whar. Cr. Law, § 2606; State v. Johnson, 94 N. C. 924, 926.

It is not an escape in a sheriff to permit a debtor committed under a ca. sa. to remain in prison with the door of the prison open, unless such debtor passes out of the prison. Currie v. Worthy, 47 N. C. 104.

Release before Commitment.—If the sheriff arrests a person on mense process and, before commitment to prison, allows him to go at large, this is not an escape, but the sheriff is liable as special bail. State v. Falls, 63 N. C. 188, 189.

Two Kinds of Escape.—There are only two kinds of escape known to our law, of a prisoner confined for debt: one voluntary and the other negligent, except where the prisoner has escaped by the act of God or of the enemies of our country. Adams v. Turrentine, 30 N. C. 147.

Same—Difference in Liability.—The only difference as to the liability of the officer between the two kinds of escape is that in the case of voluntary escape he is liable absolutely; in the case of negligent escape he has a right to retake the prisoner, and, if he does retake him upon fresh pursuit, he is not liable to an action of debt brought after such recapture, and when he has the prisoner in custody. Adams v. Turrentine, 30 N. C. 147.

Negligent Escape.—The meaning of the term "negligent escape" in our statute is the same that was given to that term at the common law. Adams v. Turrentine, 30 N. C. 147.

At Common Law and under Statutes.—At common law a sheriff who had a person in actual custody under legal authority and suffered him to go at large was guilty of an escape; and in civil cases the only remedy for the injured was an action on the case. Various statutes have increased the remedies of the party injured, and changed in some respects the liability of the sheriff. State v. Falls, 63 N. C. 188, 189.

Not Dependent upon Section 3936.—It would seem that this section is in no wise dependent upon section 3936. In the case of Richardson v. Wicker, 80 N. C. 172, the court says: "The imposition of a penalty for a want of official diligence is a matter of State regulation, and it would be no impairment of the plaintiff's right to collect his debt if the Legislature should repeal the amercement law altogether." Washington Toll Bridge Co. v. Commissioners, 81 N. C. 491, 507.

Recapture as Defense.—Where a prisoner confined for debt escapes, the officer, in an action against him for the escape can only excuse himself by showing that he has not only made fresh pursuit, but also that he has actually recaptured the prisoner before suit brought. Without this, fresh pursuit will not excuse the officer, even though the prisoner die before the officer has it in his power, by due diligence, to recapture him. Whicker v. Roberts, 32 N. C. 485.

Same—Made on General Issue.—In this State the defense of fresh pursuit and recapture need not be by plea, but may be made on the general issue. Whicker v. Roberts, 32 N. C. 485.

II. LIABILITY OF SHERIFF.

General Rule as to Liability.—In all cases of escape after a debtor is committed to jail, the sheriff is liable, however innocent he may be, unless the escape has been occasioned by the act of God or the public enemies. Rainey v. Dunning, 6 N. C. 386.

Escape of Insolvent Surrendered in Open Court.—To render a sheriff liable for the escape of an insolvent, surrendered in open court, it is necessary to show that such insolvent was committed to the sheriff's custody by an order of the court. A mere prayer to that effect will not be sufficient. State v. McKee, 47 N. C. 379.

Release on Bond to Appear and Take Insolvent's Oath.—Where a defendant has been arrested upon mesne process and gives bail, and, after judgment, the bail surrenders him to the sheriff, out of term-time, no execution having been issued on the judgment nor any committitur prayed by the plaintiff, if the sheriff releases him upon a bond to appear at court and take the benefit of the insolvent law, the sheriff is liable for an escape. State v. Ellison, 31 N. C. 261.

When Directed Not to Serve Ca. Sa. on One of Two Defendants.—When a judgment is obtained against two or more, and no bail bond has been taken from either of the defendants in the suit, and the sheriff, who has thus become bail for all, after the rendition of the judgment and the issuing of the ca. sa., is directed by the plaintiff not to serve the ca. sa. on one of the defendants, and is still liable, as bail, for not surrendering the other defendant. Jackson v. Hampton, 32 N. C. 579.

When Prisoner Committed on Mesne Process.—A sheriff is not liable as special bail, after he has committed a defendant on mesne process, though such defendant be permitted by him to go at large. Buffalow v. Hussey, 44 N. C. 237.

A sheriff having permitted one arrested by him upon mesne process in a civil action, to go into an adjoining room, from which he escaped, was guilty of an escape. Winborne & Bro. v. Mitchell, 111 N. C. 13, 15 S. E. 882.

Prisoner Discharged as Insolvent.—Where a scire facies was issued against a sheriff to charge him as special bail for a person sued at the instance of the plaintiff, and who had been, for want of bail, committed to jail in the sheriff's county, and afterwards discharged as an insolvent by two magistrates, it was held that the sheriff was not liable as special bail. Buffalow v. Hussey, 44 N. C. 237.

Return Sufficient to Charge Sheriff.—The words "executed P. R. T., D. Sheriff," indorsed on a capias, which, duly issued, and came to the hands of the sheriff, are so much a due and legal return, as to make the sheriff liable as special bail, on the failure of him or his deputy, to take a bail bond. Washington v. Vinson, 49 N. C. 380.

When Sheriff Fails to Take Bail.—The sheriff is said to fail to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such. Adams v. Jones, 60 N. C. 198.

Same—Exceptions and Notice.—If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. Adams v. Jones, 60 N. C. 198.

Failure to Handcuff as Negligence per se.—A sheriff's liability for permitting an escape depends on the circumstances of the particular case, and failure to handcuff does not constitute negligence per se. State v. Hunter, 94 N. C. 829, 830.

May Become Special Bail.—If the person, after arrest, get at large by the negligence of the sheriff and against his will, he may by his return elect to become special bail. State v. Falls, 63 N. C. 188, 189.

III. ACTIONS.

Negligent Escape When No Actual Negligence.—An action of debt will lie against a sheriff under our statute for a negligent escape of a prisoner confined for debt, even though there was no actual negligence. Adams v. Turrentine, 30 N. C. 147.

Damages Loss Really Sustained.—In an action of debt on a sheriff's bond for the escape of a debtor imprisoned under a ca. sa., the jury are not bound to give the whole sum due from such debtor, but should give the damages really sustained by the escape. State v. Eure, 53 N. C. 320, in which the case of Governor v. Matlock, 8 N. C. 425, is cited and approved.

Objection as to County by Plea in Abatement.—In an action for an escape, if the defendant wishes to except, upon the ground of its being a penal action, that it is brought in the wrong county, he must make the objection by plea in abatement. Whicker v. Roberts, 32 N. C. 485.

When Creditor Will Not Charge Party in Execution.—After surrender, if the creditor, upon reasonable notice, will not charge the party in execution, either a habeas corpus or a supersedeas would be issued by the court. State v. Ellison, 31 N. C. 261.

§ 3944. Custody of jail.—The sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof. (Rev., s. 2824; Code, s. 2085; R. C., c. 105, s. 22.)

Jailer Bound Only to Sheriff.—Where a sheriff arrested a man on a ca. sa. and committed him to jail, in custody of the jailer, and the prisoner escaped, it was held that without a bond of indemnity, the jailer was only bound to the sheriff for want of fidelity or due care in the discharge of his duty. Turrentine v. Faucett, 33 N. C. 652.

Sheriff May Take Jailer's Bond.—A sheriff has a right to take a bond from the jailer to idemnify him for all losses to which he may be subjected by the escape of a prisoner while in custody of the jailer. Turrentine v. Faucett, 33 N. C. 652.

Cited in Sutton v. Williams, 199 N. C. 546, 155 S. E. 160.

§ 3945. Prevent entering jail for lynching; county liable.—When the sheriff of any county has good reason to believe that the jail of his county is in danger of being broken or entered for the purpose of killing or injuring a prisoner placed by the law in his custody, it shall be his duty at once to call on the commissioners of the county, or some one of them, for a sufficient guard for the jail, and in such case, if the commissioner or commissioners fail to authorize the employment of necessary guards to protect the jail, and by reason of such failure the jail is entered and a prisoner killed, the county wherein whose jail the prisoner is confined shall be responsible in damages, to be recovered by the personal representatives of the prisoner thus killed, by action begun and prosecuted before the superior court of any county in this state. (Rev., s. 2825; 1893, c. 461, s. 7.)

§ 3946. Not to farm office.—No sheriff shall let to farm in any manner, his county, or any part of it, under pain of forfeiting five hundred dollars, one-half to the use of the county and the other half to the person suing for the same. (Rev., s. 2828; Code, s. 2084; R. C., c. 105, s. 21; 23 Hen. VI, c. 10.)

A sheriff may employ a deputy to assist him, but he can not delegate his authority to another. Cansler v. Penland, 125 N. C. 578, 34 S. E. 683.

Letting to Farm.—The section prohibits a sheriff from letting to farm, in any manner, his county, or any part of it. Cansler v. Penland, 125 N. C. 578, 34 S. E. 683.

Cannot Be Subject of Bargain and Sale.—The public has an interest in the proper performance of their duties by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency or in any way interfere with or disturb the due execution of the duties of the office. The office of sheriff and tax collector is one of public confidence and fidelity to a public trust, and can not be a matter of bargain and sale. It requires good faith and duty. Cansler v. Penland, 125 N. C. 578, 579, 34 S. E. 683.

Traffic in public offices is against good morals and contrary to public policy. Basket v. Moss, 115 N. C. 448, 20 S. E. 733.

To Secure Appointment, or Expenses for Attempting.—Not only an agreement by A to pay to B, a public officer, an amount equal to the emoluments of the unexpired term of his office in consideration of his resignation and his influence to secure the appointment of A to the office is void, but likewise an agreement to compensate any one for or to pay the expenses of any one in attempting to secure the appointment. Basket v. Moss, 115 N. C. 448, 20 S. E. 733.

§ 3947. Obligation taken by sheriff, payable to himself.—The sheriff or his deputy shall take no obligation of or from any person in his custody for or concerning any matter or thing relating to his office otherwise payable than to himself as sheriff and dischargeable upon the prisoner's appearance and rendering himself at the day and place required in the writ (whereupon he was or shall be taken or arrested), and his sureties discharging themselves therefrom as special bail of such prisoner or such person keeping within the limits and rules of any prison; and every other obligation taken by any sheriff in any other manner or form, by color of his office, shall be void, except in any special case and other obligation shall be, by law, particularly and expressly directed; and no sheriff shall demand, exact, take or receive any greater fee or reward whatsoever, nor shall have any allowance, reward or satisfaction from the public, for any service by him done, other than such sum as the court shall allow for ex officio services and the allowance given and provided by law. (Rev., s. 2829; Code, s. 2082; R. C., c. 105, s. 19; 1777, c. 118, s. 8.)

Cross References.—As to the statute of limitations, see section 439; as to judicial sales, see section 687; as to duty to summons and swear appraisers in homestead proceedings, see section 730; as to duty of sheriff to whom warrant of attachment directed, see section 805; as to duties and liabilities of sheriff in claim and delivery, see sections 834, 835; as to duty to note date of receipt and date of execution on process, see section 951; as to official deed, when sheriff selling or empowered to sell is out of office, see section 995; as to sheriff as tax collector, see sections 1322, 7974; as to sheriff's bonds when office of county treasurer is abolished and sheriff is ex officio treasurer, see section 1392; as to attachment for failure to obey writ of habeas corpus, see section 2218; as to attachment against sheriff to be directed to coroner and procedure, see section 2220; as to penalty for false return to writ of habeas corpus, see section 2229.

CHAPTER 73

STATUTORY CONSTRUCTION

§ 3947(a). No public-local or private act may amend or repeal public law unless latter is referred to in caption.—No act, which by its caption purports to be a public-local or private act, shall have the force and effect to repeal, alter or change the provisions of any Public Law, not directly referred to in the subject matter set out in the caption of the said public-local or private act, unless the caption of said public-local or private act shall make specific reference to the Public Law it attempts to repeal, alter or change. (1929, c. 200, s. 1.)

§ 3948. Repeal of statute not to affect actions.—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (Rev., s. 2830; Code, s. 3764; R. C., c. 108, s. 1; 1830, c. 4; 1879, c. 163; 1881, c. 48.)

Section Not Obligatory.—As the laws of our Legislature do not bind another, except in so far as they may be absolute contracts, this section must be taken as merely a rule of construction having no application where the intention of the Legislature clearly and explicitly appears to the contrary. Dyer v. Ellington, 126 N. C. 941, 945, 36 S. E. 177.

Repeal after Services Rendered.—Where a statute was in force when certain services were rendered, it was held that the plaintiff's right had become absolute, and no subsequent

repeal could invalidate it. Copple v. Commissioners, 138 N. C. 127, 134, 50 S. E. 574.

Action Commenced before Repeal.—By express terms of the section, the repeal of a statute does not affect an action theretofore commenced under it. Smith v. Morganton Ice Company, 159 N. C. 151, 74 S. E. 961.

Same—For Penalty or Forfeiture.—Under the provisions of the section a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. State v. Williams, 97 N. C. 455, 2 S. E. 55; Grocery Co. v. Southern R. Co., 136 N. C. 396, 48 S. E. 801; Epps v. Smith, 121 N. C. 157, 28 S. E. 359.

Subject Matter Destroyed by Statute Pending Appeal.—Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, the Supreme Court will not go into consideration of the abstract question as to which party ought to have prevailed, in order to adjudicate the costs but the judgment below as to costs will be allowed to stand. Wikel v. Board, 120 N. C. 451, 27 S. E. 117; Brinson v. Duplin County, 173 N. C. 137, 91 S. E. 708.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interferences. Where it springs from contract, or from the principles of the common law, it is not competent for the Legislature to take it away. Cooley's Constitutional Limitations, p. 517; Black's Const. Law, p. 432; Williams v. Atlantic Coast Line R. Co., 153 N. C. 360, 363, 69 S. E. 402. This case contains an excellent discussion which will be of aid in determining when a right is vested.—Ed. Note.

Right of Informer.—An informer has, in a certain sense, an inchoate right when he brings his suit, but he has no vested right to the penalty until judgment. Hence, until his right becomes vested, it can be destroyed by the Legislature. Dyer v. Ellington, 126 N. C. 941, 36 S. E. 177.

Action to Recover Arrearages of Taxes.—An action pending to recover arrearages of taxes, brought under an act authorizing the collection of unpaid taxes for past years, is not affected by the repeal of such statute. Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9.

Changing Rules of Evidence.—An act of the Legislature changing the rules of evidence can not be construed as operating retrospectively so as to affect existing rights. Lowe v. Harris, 112 N. C. 472, 17 S. E. 539.

Modes of Procedure.—Statutes which change modes of procedure may govern suits pending at the time of their enactment. Sumner v. Miller, 64 N. C. 688.

A retrospective law is one that in some way affects the rights and liabilities of parties incident to and growing out of a transaction that has passed. Waddill v. Masten, 172 N. C. 582, 584, 90 S. E. 694.

Maxim "Leges Posteriores Priores Contrarias Abrogant."—To give operation to the maxim, leges posteriores priores contrarias abrogant, the latter law must be in conflict with the former; therefore, when a later statute is almost in ipssissimis verbis with a former one: Held, that there was no repeal of the former. Kesler v. Smith, 66 N. C. 154.

General Rule—Prospective Effect.—The general rule is that a statute will be given prospective effects only unless the law in question clearly forbids such a construction. Mann v. Allen, 171 N. C. 219, 88 S. E. 235; Elizabeth City v. Commissioners, 146 N. C. 539, 60 S. E. 416; Waddill v. Masten, 172 N. C. 582, 584, 90 S. E. 694.

Remedial Legislation.—In case of a remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the Legislature. Connecticut and E. Ins. Co. v. Talbot, 113 Ind. 373; Ex Parte Brickley, 53 Ala. 42; People ex re Collins v. Spicer, 99 N. Y. 225; cited and approved in Waddill v. Masten, 172 N. C. 582, 584, 90 S. E. 694.

Mere Court Procedure.—The rule that statutes may be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. Waddill v. Masten, 172 N. C. 582, 90 S. E. 694.

Limitation of Actions.—While the Legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a bar. Strickland v. Draughan, 91 N. C. 103, and cases there cited; Cooly Const. Lim. 450 (8 Ed.), and cases there cited. The action in the instant case having been instituted before the passage of the act, is not affected by it. Nichols v. Norfolk, etc., R. Co., 120 N. C. 495, 498, 26 S. E. 643.

General Rule in Criminal Actions.—The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. State v. Williams, 97 N. C. 455, 2 S. E. 55; State v. Massey, 103 N. C. 356, 9 S. E. 632.

Same—Legislative Authority to Increase Punishment.—The Legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the Federal Constitution, which forbids the enactment by a State of any ex post facto law, could, in either event, be invoked for the protection of the person charged. Ordronaux Cons. Leg., p. 223; State v. Ramsour, 113 N. C. 642, 644, 18 S. E. 707; State v. Williams, 97 N. C. 455, 2 S. E. 55.

§ 3949. Rules for construction of statutes.—

In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the same statute, that is to say:

I. General Considerations.
II. Determination of Intent and Meaning.
  A. In General.
  B. Legislative Intent.
III. Similar and Related Acts.
  A. In General.
  B. Statutes in Pari Materia.
  C. Amendatory and Repealing Acts.
IV. Statutes Strictly Construed.
  A. In General.
  B. Criminal Statutes.
V. Construction in Accord with Constitution.
  A. Construction.
  B. Effect.

I. GENERAL CONSIDERATIONS.

Specific Words Followed by General Words.—Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by a proper interpretation, be confined to acts and things of the same kind. State v. Craig, 176 N. C. 740, 97 S. E. 400.

Words Given Ordinary Meaning. — When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. Abernethy v. Board, 169 N. C. 631, 86 S. E. 577.

When Court May Interpolate Necessary Words.—When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. Fortune v. Commissioners, 140 N. C., 322; Abernethy v. Board, 169 N. C. 631, 86 S. E. 577.

In Palms v. Shawano, 61 Wisc., 217, the words "south" used in the legislative act defining the boundaries of a county was read "north"; in Stoneman v. Whaley, 9 Iowa, 390, a subsequent act purported to repeal the sixteenth section of another act, and it was held that the repealing act referred to the sixth section; and in a case from 3 Utah, 334, a subsequent act referred to section 162 of a prior act, and it was construed to mean section 151. Tooney v. Goldsboro Lumber Co., 171 N. C. 178, 181, 88 S. E. 215.

Proviso.—As a general rule in the construction of statutes, a proviso will be considered as a limitation upon the general words preceding, and as excepting therefrom, but this rule is not absolute, and the meaning of the proviso will be ascertained by the language used in it. Traders Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363.

Words Cannot Be Construed Away. — The court has no power or right to strike out words or to construe them away. Nance v. Southern Railway, 149 N. C. 366, 370, 63 S. E. 116.

When laws have been codified, it is permissible to examine the original legislation as an aid to correct interpretation. Rodgers & Co. v. Bell, 156 N. C. 378, 386, 72 S. E. 817; Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 292, 81 S. E. 418.

The maximum cessante ratione legis, cessat et ipsa lex has no application in the construction of statutes. State v. Eaves, 106 N. C. 752, 11 S. E. 370.

Void for Vagueness.—If a statute be so vague in its terms

as to convey no definite meaning to the court or a ministerial officer, it is void. State v. Partlow, 91 N. C. 550.

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

When Statute Is Clear.—It is not allowable to interpret what has no need of interpretation, or, where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and force construction for the purpose of either limiting or extending their operation. McCluskey v. Cornwell, 11 N. Y. 593; Nance v. Southern Railway, 149 N. C. 366, 372, 63 S. E. 116; Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. Ed. 219, 20 S. Ct. 155; State v. Carpenter, 173 N. C. 767, 769, 92 S. E. 373.

Where Language Is of Doubtful Meaning.—In interpreting the statute where the language is of doubtful meaning, the Court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. Nance v. Southern Railway, 149 N. C. 366, 63 S. E. 116.

Meaning First Sought in Language Used.—In Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 193, the court said: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." State v. Carpenter, 173 N. C. 767, 768, 91 S. E. 373.

Law Existing at Time of Enactment.—To discover the true meaning of a statute, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. Kendall v. Stafford, 178 N. C. 461, 101 S. E. 15.

But the meaning must be ascertained from the statute itself, and the means and signs of which, as appears upon its face, it has reference. State v. Parlow, 91 N. C. 550, 552.

Objects Embraced.—The meaning of a statute in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. State v. Pratlow, 91 N. C. 550, 552.

Misdescription or Misnomer.—The question was fully considered by the Supreme Court in Fortune v. Commissioners, 140 N. C. 322, 328, 52 S. E. 950, and the court there says: "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing." Black Interp. of Laws, sec. 558. Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Black Interp. Laws, sec. 38; Toomey v. Goldsboro Lumber Co., 171 N. C. 178, 181, 88 S. E. 215.

The title of a statute is no part thereof. State v. Welsh, 10 N. C. 404. But it may be construed when the meaning is doubtful. State v. Woolard, 119 N. C. 779, 25 S. E. 719.

It cannot control the text when it is clear. Blue v. McDuffie, 44 N. C. 131; Hines v. Wilmington, etc., Railroad, 95 N. C. 434; Jones v. Hartford Ins. Co., 88 N. C. 499, 500; State v. Woolard, 119 N. C. 779, 25 S. E. 719. Especially is this true as to the headings of a section in the Code. Cram v. Cram, 116 N. C. 288, 21 S. E. 197; In re Chisholm's Will, 176 N. C. 211, 213, 96 S. E. 1031.

B. Legislative Intent.

Motive and Purpose of Legislature.—If the language of a statute is doubtful, and the intention of the Legislature is clear, the former will be construed by the later; but where the language is plain, the Courts can not look into the motive or purpose of the Legislature in the enactment of the law. State v. Eaves, 106 N. C. 752, 11 S. E. 370.

Same—Understanding of Individual.—Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. State v. Boon, 1 N. C. 191; Drake v. Drake, 15 N. C. 110; Adams v. Turrentine, 30 N. C. 147; State v. Melton, 44 N. C. 49; Blue v. McDuffie Ib., 131; Potter's Dwarris Statutes, 179, et seq.; State v. Partlow, 91 N. C. 550, 552.

Same—Same—Affidavit of Legislators.—In interpreting a statute it is not permissible to show its intent and meaning by affidavit of legislators, for such must be gathered from the act itself. Goins v. Trustees Indian Training School, 169 N. C. 736, 86 S. E. 629.

Harmonizing Context. — It is the duty of the Court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature. U. S. v. Winn, 3 Summer, 209; Nance v. Southern Railway, 149 N. C. 366, 372, 63 S. E. 116.

Effectuation of Purpose.—Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950; State v. Partlow, 91 N. C. 550, 552.

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. Fortune v. Commissioners, 140 N. C. 322, 522 S. E. 950.

Mistakes or Omissions.—Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the Legislature can be collected from the whole statute. If the mistake renders the intention doubtful, the courts will look to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. Toomey v. Goldsboro Lumber Co., 171 N. C. 178, 181, 88 S. E. 215, quoting Nazro v. Ins. Co., 14 Wisc. 298.

Impossible Requirements.—In the construction of a statute the court will avoid attributing to the legislature the intention to punish the failure to do an impossible thing. Garrison v. Southern R. Company, 150 N. C. 575, 64 S. E. 578.

Proviso Prevails over Purview.—When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature. Orinoco Supply Co. v. Masonic, etc., Star Home, 163 N. C. 513, 79 S. E. 964.

As to Whether Statute Mandatory or Directory.—There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directly. The meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. Black's Interpretation of Laws, p. 338 (124); Spruill v. Davenport, 178 N. C. 364, 368, 100 S. E. 527.

III. SIMILAR AND RELATED ACTS.

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act.—Dwarris on Statutes, 274, says: "That words and phrases, the meaning of which, in a Statute, has been ascertained, are, when read in a subsequent Statute, to be understood in the same sense," and in the note of Judge Potter on the same page, it is said that "where the terms of a Statute which has received judicial construction are used in a later Statute, whether passed by the Legislature of the same State or county, or by that of another, that construction is to be given to the later Statute. Conn. v. Hartwell, 3 Gray, 450; Ruchmabaye v. Mottichmed, Eng. L. & Eng. 84; Bogards v. Trinity Church, 4 Sand. Chan. 633; Riggs v. Wilton, 13 Ill. 15; Adams v. Field, 21 Vt. 256. It is presumed that the Legislature which passed the latter Statute knew the judicial construction which had been placed on the former one, and such a construction becomes a part of the law." Bridgers v. Taylor, 102 N. C. 86, 89, 8 S. E. 893.

Permissible to Look at Other Statutes.—To ascertain the mischief which an act of the Legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to one under construction. Abernethy v. Board, 169 N. C. 631, 86 S. E. 577.

It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no

way of reconciling conflicting clauses of a statute and nothing to indicate which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation. Black's Interpretation of Laws (1896), p. 60, sec. 32; State Board v. White Oak Buckle Drainage District, 177 N. C. 222, 226, 98 S. E. 597.

B. Statutes in Pari Materia.

Statutes relating to the same subject-matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the Legislature may be considered in the effect to ascertain the uniform and consistent purpose of the Legislature. Allen v. Reidsville, 178 N. C. 513, 101 S. E. 267.

Where a former act has been repealed, or has expired by its limitation when it is in pari materia, it must be considered in connection with the last act and if necessary, a part of it. Walser v. Jordan, 124 N. C. 683, 33 S. E. 139.

Where there are different statutes in pari materia, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. Walser v. Jordan, 124 N. C. 683, 33 S. E. 139.

Same—Apparent Conflict.—"Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act." Black's Interpretation of Laws (1896), p. 60, sec. 32; Peoples Bank v. Loven, 172 N. C. 666, 90 S. E. 948; State Board v. White Oak Buckle Drainage District, 177 N. C. 222, 226, 98 S. E. 597.

Acts of Same Session of Legislature.—All acts of the same session of the Legislature upon the same subject matter are considered as one act, and must be construed together, under the doctrine of "in pari materia." They should be considered in pari materia, whether passed at the same session or not. Walser v. Jordan, 124 N. C. 683, 33 S. E. 139.

Act Declaratory of Intent of Previous Act.—An act of the Legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in actions prior to the declaratory act. Rodwell v. Harrison, 132 N. C. 45, 43 S. E. 540.

Private and Local Acts.—Private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of the general law. State v. Womble, 112 N. C. 862, 864, 17 S. E. 491.

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory.—Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. Toomy v. Goldsboro Lumber Co., 171 N. C. 178, 88 S. E. 215.

Amended and Amending Acts Construed Together.—Where an amendment to an existing statute is enacted the proper method of arriving at their true intent and meaning is by construing together. Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640; Township Road Commission v. Board, 178 N. C. 122.

When Amendatory Act Refers to Wrong Section.—If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. Toomey v. Goldsboro Lumber Co., 171 N. C. 178, 181, 88 S. E. 215, quoting People v. King, 28 Cal. 266.

Erroneous Statement of Date.—An act of the Legislature subsequent to and in amendment of a former Act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended Act is erroneously stated, provided it sufficiently appears beyond cavil, what prior Act is referred to. State v. Woolard, 119 N. C. 779, 25 S. E. 719.

Summary of Rules of Construing Repealing Acts.—In Winslow v. Morton, 118 N. C. 486, 492, 24 S. E. 417, it was said: "Upon a perusal of the authorities it appears that the courts have universally given their sanction to the following rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. State v. Woodside, 30 N. C. 104; Simonton v. Lanier, 71 N. C. 498. (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. Wood v. United States, 16 Peters, 341, 363, 10 L. Ed. 987; Chew Heong v. United States, 112 U. S. 536, 549, 28 L. Ed. 770, 5 S. Ct. 255; St. Louis v. Independent, 17 Mo. 146. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. Southerland on Stat. Construct., sec. 158. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature as a substitute. Chicago, etc., R. Co. v. United States, 127 U. S. 406, 32 L. Ed. 180, 8 S. Ct. 1194; State v. Stolt, 17 Wallace, 425; Longlois v. Longlois, 48 Mo. 60; Casey v. Harned, 5 Clarke (Iowa) 1; State v. Custer, 65 N. C. 339; The Code, sec. 3766; Brietung v. Lindoner, 37 Mich. 217. * * * (3). Where a later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by a necessary implication. Matter of N. Y. Institution, 121 N. Y. 234; United States v. Tynen, 11 Wall., 88, 20 L. Ed. 153; Jernigan v. Holden, 34 Fla. 530."

Repeal of Act Giving Forfeiture.—The repeal of an act of Assembly giving a forefeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. Governor v. Howard, 5 N. C. 465.

Repeal of Repealing Act.—The repeal of a statute repealing a former statute leaves the latter in force. Brinkley v. Swicegood, 65 N. C. 626.

Implied Repeal by Lessening Degree of Crime.—It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmatively lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. State v. Upchurch, 31 N. C. 454, 457.

When Acts Irreconcilably Inconsistent.—A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. State v. Massey, 103 N. C. 356, 9 S. E. 632.

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law.—A statute in derogation of the common law must be strictly construed. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8.

Acts Limiting Rights to Contract.—Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. Marriner & Bro. v. Roper Co., 112 N. C. 164, 16 S. E. 906.

Mandatory Act.—No provision, it would seem, could be more mandatory, in form or substance, than one which declares that non-compliance with it shall make void the act of the body required to observe its requirements. Spruill v. Davenport, 178 N. C. 364, 368, 100 S. E. 527.

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction. State v. Sullivan, 110 N. C. 513, 14 S. E. 796.

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed. Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976.

Acts Restricting Private Acts.—Statutes which restrict the private rights of persons or the use of property in which the public have no concern should be strictly construed. Nance v. Southern Railway, 149 N. C. 366, 63 S. E. 116.

Local Lien Law.—In Orinoco Supply Co. v. Masonic, etc., Star Home, 163 N. C. 513, 79 S. E. 964, it was held that a lien law applicable to certain counties only, was local in its nature, and being contrary to the general lien laws of the State, must be strictly construed.

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. Cape Lookout Co. v. Gold, 167 N. C. 63, 67, 83 S. E. 3.

B. Criminal Statutes.

Rule for Construction of Penal Statutes.—It is familiar learning that penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all other instruments, but not liberally, so as to stretch their

meaning beyond what the words will warrant. 36 Cyc., 1185, 1186, 1187; Sears v. Whitaker, 136 N. C. 37, 48 S. E. 517; Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 99, 56 S. E. 697; Coble v. Schoffner, 75 N. C. 42; Hamlet Grocery Co. v. Southern R. Co., 170 N. C. 241, 244, 87 S. E. 57; State v. Godfrey, 97 N. C. 507, 1 S. E. 779.

Rule Explained.—The rule that a penal Statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a Statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is a reasonable doubt as to the meaning of the words used in the Statute, the Court will not give them such an interpretation as to impose the penalty, nor will the purpose of the Statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines v. Wilmington, etc., Railroad, 95 N. C. 434.

This rule is, however never to be applied so strictly as to defeat the clear intention of the Legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail. Hines v. Wilmington, etc., Railroad, 95 N. C. 434.

Supplying Omission and Strained Constructions.—In State v. Massey, 103 N. C. 356, 9 S. E. 632, it was announced that as a policy it is more dangerous for the Supreme Court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished.

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

General Rule.—Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the Court. State v. Pool, 74 N. C. 402.

Valid and Invalid Portions of Same Act.—Where there are distinct and valid provisions of a statute, with unconstitutional provisions the two portions of the law being separate and it appearing from a perusal of the statute that the Legislafure intended the valid portion to be effective and independently of the invalid part the valid provisions may be enforced. Archer v. Joyner, 173 N. C. 75, 91 S. E. 699.

In Black on Constitutional Law the rule is said to be: "That if the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the Legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent." Quoted in Keith v. Lackhart, 171 N. C. 451, 458, 88 S. E. 640.

The position, however, is not allowed to prevail when the parts of the statute are so connected and dependent the one upon the other that to eliminate one will work substantial change to the portion which remains. Thus, in Black's work, the author says, page 63: "And if the unconstitutional clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole statute must fall." Employers' Liability Cases, 207 U. S. pp. 463-501; Illinois Cen. R. Co. v. McKendree, 203 U. S. 514, 27 S. Ct. 153; Greene v. Owen, 125 N. C. 212, 34 S. E. 424; Riggsbee v. Durham, 94 N. C. 800; Keith v. Lockhart, 171 N. C. 451, 458, 88 S. E. 640; Lewis Sutherland Statutory Construction (2 Ed.), sec. 306. Or if constitutional and unconstitutional parts are all interdependent. State v. Godwin, 123 N. C. 697, 700, 31 S. E. 221.

Resort to Implication.—Courts may resort to an implication to sustain an act, but not to destroy it. Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267.

Presumption in Favor of Validity.—Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act. Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267.

It is never to be presumed that the Legislature intends an infringement of the Constitution, even when the infringement is palpable; but it is to be set down to inadvertence or mistake, or unconscious bias from pressing circumstances. Jacobs v. Smallwood, 63 N. C. 112, 113.

When Object Is Valid and Effect Invalid.—A statute, while its object may be legitimate and altogether praiseworthy, is, nevertheless, invalid if its effect is unconstitutional. Jacobs v. Smallwood, 63 N. C. 112, 117.

B. Effect.

Liability of Public Officer under Unconstitutional Act. — An individual officeholder is not required to be wiser than the whole people represented in their General Assembly; therefore, he is not indictable for obeying an unconstitutional legislative act (unless it required the commission of a crime, which is not for a moment to be supposed); nor is he indictable for refusing to perform certain duties under a former law repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority. State v. Godwin, 123 N. C. 697, 31 S. E. 221.

When Court Reverses Itself Decision Not Retroative. — Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect. Fowle & Son v. Ham, 176 N. C. 12, 96 S. E. 639.

1. Singular and plural number, masculine gender, etc. Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary. (Rev., s. 2831; R. C., c. 108, s. 2.)

Purpose.—The section was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they," "himself or themselves," to be met with in some badly drawn statutes. Von Glahn v. Harris, 73 N. C. 323, 333.

"Person" Extends to "Persons."—The word "person" is construed to extend to "persons" under the authority of this section. State v. Dunn, 134 N. C. 663, 670, 46 S. E. 949; State v. Wilkerson, 98 N. C. 696, 701, 3 S. E. 683.

2. Authority, to three or more exercised by majority. All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

3. "Month" and "year." The word "month shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

The words "twelve months," in the absence of any legislative definition of the word month and the word "year," will be interpreted to mean twelve calendar, not **lunar** months. Muse v. London Assur. Corp., 108 N. C. 240, 13 S. E. 94.

Month.—The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. S. v. Upchurch, 72 N. C. 146. In this respect our statute has adopted the computation of the civil instead of the common law. Satterwhite v. Burwell, 51 N. C. 92; Adcock v. Fuquay Springs, 194 N. C. 423, 425, 140 S. E. 24.

"Thirty days," as used in Art. IV of the Constitution, is not synonymous with "one month"; it may be more or less. State v. Upchurch, 72 N. C. 146.

In Action of Slander.—The words of limitation to an action of slander are to be taken as lunar and not as calendar months. Rives v. Guthrie, 46 N. C. 84.

4. Leap-year, how counted. In every leap-year the increasing day and the day before, in all legal proceedings, shall be counted as one day. (R. C., c. 31, s. 108; R. S., c. 31, s. 113; 21 Hen. III.)

5. "Oath" and "sworn," The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed,"

6. "Person" and "property." The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless

the context clearly shows to the contrary. The words "personal property" be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. The word "property" shall include all property, both real and personal.

Does Not Affect Constitution.—This provision could not affect the meaning of the terms employed in the Constitution; indeed, it purports to apply only to statutes, and to them, when the meaning is manifestly otherwise than as therein provided and defined. Redmond v. Commissioners, 106 N. C. 122, 144, 10 S. E. 845.

"Property" Used in Limited Sense. — While the terms "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its limited sense, and this is so notwithstanding the statutory provision. Redmond v. Commissioners, 106 N. C. 122, 144, 10 S. E. 845.

A chose in action is property, and embraced in the terms of this subsection. Winfree v. Bagley, 102 N. C. 515, 9 S. E. 198.

A promissory note or due bill being an "evidence of debt" is embraced in the term "personal property." State v. Sneed, 121 N. C. 614, 28 S. E. 365.

Money.—While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not intended, that interpretation will be given it by the courts with which the testator had evidently employed it. Patterson v. Wilson, 101 N. C. 584, 8 S. E. 229.

The word "estate" has a broader meaning than the word "property." The latter word could not include choses in action, unless there be something in the context which would require it to receive this interpretaton, except by force of the definition contained in this section. Vaughan v. Murfreesboro, 96 N. C. 317, 2 S. E. 676.

7. "Preceding" and "following."—The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

8. "Seal."— In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

9. "Will."—The term "will" shall be construed to include codicils as well as wills.

10. "Written" and "in writing."— The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

11. "State" and "United States."—The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

12. "Imprisonment for one month," how construed, The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days." (Rev., s. 2831; Code, s. 3765; R. C., c. 108.)

13. "Governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," and "auditor."—The words "governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," "auditor," and any other words of like character shall when applied to the holder of such office, or occupant of such position, be words of common gender, and they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman. (1921, c. 30.)

§ 3950. Construction of amended statute. — Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. (Rev., s. 2832; Code, s. 3766; 1868-9, c. 270, s. 22; 1870-1, c. 111.)

See 12 N. C. Law Rev., 262.

Amending Act Presumed Not to Repeal.—Where a statute only undertakes to amend one already on the statute-books, it will be presumed that it did not intend to repeal it, unless there is an express repealing clause. State v. Massey, 97 N. C. 465, 2 S. E. 445. State v. Broadway, 157 N. C. 598, 601, 72 S. E. 987.

Time of Enactment of New Proviso.—By this section when a part of the statute is amended, the new proviso is considered as having been enacted at the time of the amendment, and the act of 1885, amendatory of the Code of 1883 is subject to this rule of construction. Leak v. Gay, 107 N. C. 468, 12 S. E. 312.

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. Nichols v. Board, 125 N. C. 13, 34 S. E. 71.

Re-enacted Contemporaneous with Repeal.—The re-enactment by the Legislature of a law in the terms of a former law at the time it repeals the former law, is not, in contemplation of law, a repeal, but is a reaffirmance of the former law whose provisions are thus continued without any intermission. State v. Bellamy, 120 N. C. 212, 27 S. E. 113.

It was held in State v. Williams, 117 N C. 753, 23 S. E. 250, that: "The re-enactment by the Legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a re-affirmance of the former law, whose, provisions are thus continued without any intermission." Bishop, Stat. Crimes, sec. 181; State v. Sutton, 100 N. C. 474, 6 S. E. 687; State v. Gumber, 37 Wis., 298; State v. Southern R. Co., 125 N. C. 666, 673, 34 S. E. 527.

Bill of Indictment.—If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. State v. Massey, 97 N. C. 465, 2 S. E. 445.

Misdemeanor Made Punishable by Fine or Imprisonment.—A public-local law making an act a misdemeanor is not repealed by a statute, making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense; the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. State v. Mull, 178 N. C. 748, 101 S. E. 89.

CHAPTER 74

STRAYS

§ 3951. Notice to owner of stray, or to register of deeds.—Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within ten days after

taking up such stray inform the owner, if to him known, if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of the stray shall pay a fee of twenty-five cents, except for hogs and sheep, for which the fee shall be ten cents. The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars, then in some newspaper published in the county. Such notice shall be published for thirty days, and shall contain a full and complete description of the stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray. (Rev., s. 2833; Code, s. 3768; 1874-5, c. 258, s. 2.)

§ 3952. Owner may reclaim.—When any stray has been taken up, the owner may at any time before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in the preceding section, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays. (Rev., s. 2834.)

§ 3953. When and how strays sold. — If the owner of any stray shall fail to claim the same within thirty days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisement shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray, and the sheriff shall sell such stray at public auction after ten days public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the cost of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall, at any time within twelve months after such funds have been paid to the county treasurer, upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray. (Rev., s. 2385.)

§ 3954. Failure to comply with stray law misdemeanor.—If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3306.)

As to fences and stock law, see section 1827, et seq.

CHAPTER 75

SUNDAY AND HOLIDAYS

§ 3955. Work in ordinary calling on Sunday forbidden.—On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or water, do or exercise any labor, business or work, of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fowling, nor use any game, sport or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar. (Rev., s. 2836; Code, s. 3782; R. C. c. 115; 1741, c. 30, s. 2.)

Editor's Note.—The theory is often advanced that Christianity is a part of the law of the land, and, hence, independent of any statute, contracts made on Sunday are illegal, and that the statute forbidding labor on Sunday was enacted solely for religious reasons. However, to show the fallacy in this argument, it need only be stated. Under our constitution, both State and Federal, no act can be required or forbidden by statute because such act may be in accordance with or opposed to the religious views of anyone. If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons, the statute could not be maintained.

Some economic or political ground must be found upon which to sustain the Sunday laws, because religious grounds will avail us nothing. Apparently the only ground upon which the "Sunday laws" can be sustained is that, in pursuance of the police power, the State can and ought to require a cessation of labor upon specified days, to protect the masses from being worn out by incessant and unremitting toil. If such days as the Legislature may care to designate happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection but a convenience. For a complete review of the Sunday laws, see Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19.

Acts Which May Be Lawfully Done on Sunday.—It is said in State v. Ricketts, 74 N. C. 187, 192: "In this State every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day." Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Keeping "Open Shop" on Sunday.—This section does not make keeping open shop and selling goods on Sunday an indictable offense, and an ordinance of a town, passed in pursuance of this section, for the better government of the town, prohibiting keeping open stores and other places of business on Sunday for the purpose of buying and selling, excepting ice, drugs and medicines, and permitting drug stores to sell soft drinks, etc., within certain hours, is not objectionable on the ground that the offense is covered by this section for the ordinance is passed under the police powers of the town, its violation is indictable, and in furtherance of local government, which the statute contemplates. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

It is against the public policy of this State that one should pursue his ordinary business calling on Sunday, and such may not only be regulated by town ordinances, but altogether prohibited on that day; and an ordinance of this kind is not rendered invalid, as unduly discriminative, by reason of an exception in favor of drug stores or on account of this section. State v. Burbage, 172 N. C. 876, 89 S. E. 795.

Same—Powers of Towns.—Commissioners of a town may, by valid ordinance, prohibit the opening of places of business in the town on Sunday, excepting drug stores. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

Power to Prohibit Labor—Public and Private.—The Legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency. But when it goes further and prohibits labor which is done in private, the power is exceeded and the statute is void. Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Sunday Contracts.—In Melvin v. Easley, 52 N. C. 356, it was conceded by the whole court that a contract made on Sunday was illegal, and could not support an action. Covington v. Threadgill, 88 N. C. 186, 189.

"In the language of Caldwell, J., in Swann v. Swann, 21 Fed., at p. 305, 'It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on

the Lord's Day.' And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday." Rodman v. Robinson, 134 N. C. 503, 513, 47 S. E. 19.

Same—Check.—Where a mechanic has repaired an automobile for its owner during the week, and delivered possession to him on Sunday on receipt of his check to cover his charges, the fact that the check was dated on Sunday does not render it invalid under this section, or permit the owner to stop its payment and retain the car in his possession, so as to release it from the lien thereon for the amount of the repairs. Maxton Auto Co. v. Rudd, 176 N. C. 497, 97 S. E. 477.

Same—Sale with Warranties.—The sale, privately, of a horse on Sunday by a horse-dealer to one knowing of the calling of the seller, was held not to be such a violation by the buyer of the section as to prevent him from recovering in an action for a deceit and false warranty against the seller. Melvin v. Easley, 52 N. C. 356.

§ 3956. Hunting or going armed on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday with a dog, or shall be found off his premises on Sunday, having with him a shotgun, rifle or pistol, he shall be guilty of a misdemeanor, and pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days. (Rev., s. 3842; Code, s. 3783; 1868-9, c. 18, ss. 1, 2.)

Cross Reference.—For act making exceptions as to Perquimans county in permitting use of twenty-two calibre firearm for artificial and inanimate target purposes, see Public Laws of 1935, chapter 145.

Creates Two Offenses.—The section creates two offenses: 1st, Hunting on the Sabbath with a dog. 2d, Being found off one's premises having a shot-gun, rifle or pistol. State v. Howard, 67 N. C. 24.

Sufficiency of Indictment.—An indictment charging that the defendant was a common Sabbath-breaker and prophaner of the Lord's day, commonly called Sunday was held to be insufficient. State v. Brown, 7 N. C. 224.

A conviction is sustainable under an indictment charging the defendant with beng "found off his premises on the Sabbath day, having with him a shot-gun, contrary to the form of the statute," etc. State v. Howard, 67 N. C. 24.

Same—"Sabbath."—It is immaterial that the indictment used the expression "the Sabbath" instead of "Sunday." State v. Drake, 64 N. C. 589.

Same—Must State Act Committed on Sunday.—An indictment for an act which is criminal when committed upon Sunday, must state that the act in question was committed upon Sunday; but if it do so, no exception can be taken to it for reference to the same day by a wrong day of the month. State v. Drake, 64 N. C. 589.

§ 3957. Local: Sale of articles on Sunday in Forsyth and Johnson.—No person, firm or corporation in Forsyth county or Johnson county shall expose for sale, sell or offer for sale on Sunday any goods, wares or merchandise within one mile of the corporate limits of any incorporated town or city; and no store, shop, or other place of business in which goods, wares or merchandise of any kind are kept for sale shall keep open doors from twelve o'clock Saturday night until twelve o'clock Sunday night: Provided, that this section shall not be construed to apply to hotels or boarding-houses, or to restaurants or cafes furnishing meals to actual guests, where the same are not otherwise prohibited by law from keeping open on Sunday: Provided futher, that drug stores, with licensed pharmacists, may be kept open for the sale of goods to be used for medical or surgical purposes, and for the sale of cigars and tobacco; and cigars stands and news stands may sell cigars, tobacco and newspapers: Provided futher, that ice dealers and dairies may remain open for the sale and delivery of ice and dairy products. Nothing in this section shall be construed to prohibit livery stables or garages from operating on Sunday or to prohibit publication and sale of newspapers. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (P. L. 1917, c. 597; 1925, c. 185.)

Editor's Note.—This section was amended by Laws 1925, c. 185, by inserting the words "or Johnston county" after the words "Forsyth county" and before the word "shall."

Constitutionality.—A statute which prohibits as a criminal offense the exposing of goods, merchandise, etc., for sale, and keeping open of a store on Sunday, except for the sale of drugs, etc., is constitutional and valid. State v. Pulliam, 184 N. C. 681, 114 S. E. 394.

Sale of Food in Store.—An act which makes it a crime to expose for sale or selling, or offering for sale, on Sunday, any goods, etc., within four miles of an incorporated city, etc., and in the same sentence, divided by a semicolon, prohibits the keeping open of any store, etc., on Sunday, does not permit the keeping open of the store for the sole purpose of running a restaurant therein on Sunday, for the sale of food, etc., though the latter may not be of itself unlawful, when conducted in a separate place of business. State v. Pulliam, 184 N. C. 681, 114 S. E. 394.

Restaurants or Cafes. — Under this section prohibiting shops, stores, etc., from being kept open on Sunday for the sale of any goods, wares or merchandise within four miles of any incorporated city or town within the county, providing that the act shall not apply to hotels or boarding houses, or restaurants or cafes furnishing meals to actual guests, when not otherwise prohibited by law from being kept open on Sunday, it was held, that the words "restaurants or cafes' are substantially synonymous, and a place where tools and counters only were used for the service to customers of lunches, "weiners" and egg sandwiches, comes within the definition of the exception; and the sale of these not being unlawful, the fact that the place was called a "weiner joint" does not render it so. State v. Shoaf, 179 N. C. 744, 102 S. E. 705.

§ 3958. What process executed on Sunday.—It shall not be lawful for any sheriff, constable, or other officer to execute any summons, capias, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor. (Rev., s. 2837; Code, s. 928; R. C., c. 31, s. 54; 1777, c. 118, s. 6.)

Execution of Writ or Other Process.—It is unlawful for an officer to execute any writ or other process on Sunday. Devries & Co. v. Summit, 86 N. C. 126.

A levy of an execution on Sunday is void. Bland v. Whitfield, 46 N. C. 122.

Distress for Penalty under Revenue Act.—The sheriff may proceed on Sunday by distress to enforce the penalty authorized by a revenue Act of the Legislature for peddling without license. Cowles v. Brittain, 9 N. C. 204.

Sunday is not a juridical day, hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." State v. Howard, 82 N. C. 623.

When Court May Sit on Sunday.—There have been some instances in the judicial proceedings in this State where the courts have held their sessions on Sunday, but the cases are rare, and whenever it has been done, exception has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But the Supreme Court has held that in special cases ex necessitate the Court might sit on Sunday. State v. Ricketts, 74 N. C. 187; State v. McGimsey, 80 N. C. 377; State v. Howard, 82 N. C. 623, 626.

Term of Court Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week," (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875.

Verdict of Jury.—The rendition by the jury of a verdict on Sunday is not invalid for that cause. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008.

There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute, that it shall be entered up at once on the verdict) is valid. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875.

A verdict entered on Sunday of a week set for the dura-

tion of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N. C. 274, 26 S. E. 875.

A notice to take a deposition on Sunday is not good, and a deposition taken on such notice must be rejected. Sloan v. Williford, 25 N. C. 307.

§ 3959. Dates of public holidays. — The first day of January, the nineteenth day of January, the twenty-second day of February, Easter Monday, the twelfth day of April, the tenth day of May, the twentieth day of May, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, Tuesday after the first Monday in November when a general election is held, the day appointed by the governor as a Thanksgiving Day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday. (Rev., s. 2838; Code, s. 3784; 1891, c. 58, 1899, c. 410; 1901, c. 25; 1881, c. 294; 1907, c. 996; 1909, c. 888; 1919, c. 287; 1935, c. 212.)

Editor's Note.—Public Laws 1935, chapter 212, which inserted "Easter Monday" and "the thirtieth day of May" in this section, provided that "this act shall apply to all State and National Banks only."

Effect of Legal Holiday Generally.—The statute declaring certain days public holidays, does not prohibit the pursuit of the usual avocations of citizens, nor public officers, or the courts from exercising their respective functions on those days. While it might be the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N. C. 743, 10 S. E. 183.

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following section prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively; nor, particularly for the present purpose, is there any inhibition upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State that a public holiday is dies non juridicus, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the Superior Courts, very frequently sit on such days and hear and try causes and dispatch the business that ordinarily comes before them, especially when there is no objection. State v. Moore, 104 N. C. 743, 747, 10 S. E. 183.

Deposition Opened on Holiday.—A legal holiday has not the same status in respect to legal proceedings as Sunday; and while depositions opened on the latter day are void, they are not so when they are opened on a legal holiday. Latta v. Catawba Elect. Co., 146 N. C. 285, 59 S. E. 1028.

§ 3960. Acts to be done on Sunday or holidays. —Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day. (Rev., s. 2839; Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194.)

Cross References.—As to arrest on Sunday in civil actions, see section 768; as to the part played by Sunday in the computation of time, see section 922; as to Sunday fishing, see section 1970; as to hunting on Sunday, see section 2122; as to negotiable instrument when day of maturity falls upon Sunday or a holiday, see section 3066; as to operation of trains on Sunday a misdemeanor, see section 3480.

CHAPTER 76
SURETYSHIP

§ 3961. Surety and principal distinguished in judgment and execution.—In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk or justice of the peace issuing it. (Rev., s. 2840; Code, s. 2100; R. C., c. 31, s. 124; 1826, c. 31, s. 1.)

In General.—A surety is bound with his principal as an original promissor. Baylies' Sureties and Guarantors, 4. Coleman v. Fuller, 105 N. C. 328, 329, 11 S. E. 175.

The surety's promise is to pay a debt, which becomes his own debt when the principal fails to pay it. 2 Parsons' Notes and Bills, 117-118. Coleman v. Fuller, 105 N. C. 328, 330, 11 S. E. 175.

Construed Strictly.—The liability of a surety cannot be enlarged by construction. Shoe Co. v. Peacock, 150 N. C. 545, 64 S. E. 437.

Order of Liability.—The order in which parties to a security are liable at law, is the order in which, independently of contract, they will be held bound in equity. Smith v. Smith, 16 N. C. 173.

Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing executed some time thereafter by one to indemnify the other two that they (the other two) "signed as co-sureties" of the third, it was held, that the character of suretyship in which all three signed was sufficiently established. Southerland v. Fremont, 107 N. C. 565, 12 S. E. 237.

Same—Parol Evidence to Show Coprincipals.—In Williams v. Glenn, 92 N. C. 253, the note (under seal) was made with W. "as principal" and B. and G. "as sureties," yet as between the obligors the court held that parol evidence was admissible to show that Boyden and Glenn were coprincipals, and that the rule of contribution obtained among them. Smith v. Carr, 128 N. C. 150, 153, 38 S. E. 732.

While all of the makers may appear as principals upon the face of the paper, or some principals and some sureties, yet it may be shown that while appearing as principals they were in fact sureties, or some principals and others sureties; and upon the establishment of the fact of cosuretyship, the right of contribution follows. Smith v. Carr, 128 N. C. 150, 153, 38 S. E. 732.

Same—Issue Submitted.—In an action against the maker and indorsers of a note, an issue should be submitted as to whether or not the endorsers were cosureties, or whether one was a supplemental surety to the other. Parish v. Graham, 129 N. C. 230, 39 S. E. 825.

May Allege and Prove Suretyship.—When sued, either of the defendants may allege that he is surety, and, if the allegation be proven, the jury in their verdict and the court in the judgment shall distinguish the principal and surety, and it shall be so indorsed on the execution issued for the collection of the judgment. Bank v. McArthur, 261 Fed. 97, 101.

In Gatewood v. Leak, 99 N. C. 357, 6 S. E. 635, 637, it was said: "If the appellee was surety, as he alleges, he might, as allowed by the statute, (this section) have shown, by proper evidence on the trial in the actions in which the judgments were obtained by the appellant, that he was such surety, and the jury in their verdict, or the justice of the peace in his judgment, would have distinguished him as surety, and the executions would have been issued with a proper indorsement to that effect; and in that case the sheriff would have levied the sum required to be collected, first, out of the property of the principal if he had sufficient for that purpose."

Same—Practice of Courts.—It is not the practice of the courts to see that evidence of suretyship is produced and such fact inserted in the judgment in the absence of the defendants and without any averment or request on their part. Morehead Banking Co. v. Duke, 121 N. C. 110, 28 S. E. 191.

Effect of Not Alleging Suretyship.—In Bank v. McArthur, 261 Fed. 97, 103, it was said that "It would not seem that, by failing to set up his suretyship in the action brought by the American National Bank on the note, McArthur lost any equitable rights against McBryde to which he was entitled as surety. It is true, as held in Gatewood v. Leak, 99 N. C. 357, 6 S. E. 635, that the surety, who has failed to set up the fact and have it found as provided by the statute, cannot enjoin the plaintiff in the judgment from proceeding to sell his land for its satisfaction. Neither McArthur nor plaintiffs may enjoin the bank from enforcing its judgment against himself until it has exhausted McBryde's property."

The magistrate is not bound to discriminate except upon the application of, and due proof by, the surety. Stewart v. Ray, 26 N. C. 269.

Effect of Finding of Jury.—Where a suit is brought at law against two persons, a finding of the jury, that one of the defendants is principal, and the other surety, if binding at all between the parties, does not in equity establish the relation of suretyship. Lowder v. Noding, 43 N. C. 208.

When Execution Does Not Distinguish.—Where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the sheriff may collect it from the surety, though the plaintiff in the execution directed him to collect it from the other. Shuford v. Cline, 35 N. C. 463.

Right of Surety to Subrogation.—See notes to § 3963.

Right of Surety to Assign Judgment.—It was stated by the Supreme Court of this state in Barringer v. Boyden. 52 N. C. 187: "The right of a surety to keep alive a judgment, which he has paid, by having an assignment made to a stranger for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desires it) to be subrogated to the rights of the creditor, and to use the creditor's judgment for the purpose of coercing payment against the principal. Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intention. If it be paid, and nothing be said or done to show a contrary intendment, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase and not as a payment." Bank v. McArthur, 261 Fed. 97, 103.

Signing on Faith of Creditors Representations.—Persons signing a note as surety upon faith in the creditor's representation that another will sign as co-surety, leaving the note with the creditor for that purpose, are not bound thereon to such creditor upon the failure of the fulfillment of the representation. Bank v. Hunt, 124 N. C. 171, 32 S. E. 546, cited and distinguished. Bank v. Jones, 147 N. C. 491, 61 S. E. 193.

Bond Joint and Several on Face.—Although the bond is joint and several on its face it can be shown by parol that a party thereto is a surety. Brandt on Surety, secs. 29 and 30. Coffey v. Reinhardt, 114 N. C. 509, 510, 19 S. E. 370.

Statute of Limitations.—If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. Coffey v. Reinhardt, 114 N. C. 509, 19 S. E. 370.

§ 3962. Principal liable on execution before surety.—When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy on all the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and, for want of sufficient property of the principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety. (Rev., s. 2841; Code, s. 2101; R. C., c. 31, s. 125; 1826, c. 31, s. 2.)

Surety's Interest in Collateral. — The principle is stated by Ruffin, C. J., in these words: "The surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound, as soon as such a security is created, and by whatever means the surety's interest in it arises; and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest." Nelson v. Williams, 2 Dev. & B. Eq. 118. See also Smith v. McLeod, 3 Ired. Eq. 390; Cooper v. Wilcox, 2 Dev. & B. Eq. 90; Bank v. Homesley, 99 N. C. 531, 6 S. E. 797.

§ 3963. Summary remedy of surety against principal.—Any person who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the same, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has laid out and expended any sum of money as the surety of such person, may move the court or justice of the peace, as the case may be, for judgment against his principal for the amount which he has actually paid; a situation having previously issued against the principal to show cause why execution should not be awarded; and should the principal not show sufficient cause, the court or justice shall award execution against the estate of the principal. (Rev., s. 2842; Code, s. 2093; R. C., c. 110, s. 1; 1797, c. 487, s. 1.)

I. General Considerations.
II. Subrogation.
III. Assignments.

I. GENERAL CONSIDERATIONS.

See 13 N. C. Law Rev., 116.

The words "Superior Court" used in this section mean the clerk of the Superior Court. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Cannot Sue in Tort.—A surety who has paid money for his principal cannot sue him in an action of tort. Ledbetter v. Torney, 33 N. C. 294.

Citation Issued to Principal.—The section providing that a surety who shows that he has paid out money upon a judgment against his principal and himself may have a citation issued to the principal by the clerk to show cause why execution should not be awarded him therefor, is constitutional. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Notice to Corporation to Show Cause.—A notice issued by a court of competent jurisdiction, served upon the secretary and treasurer of a corporation, to show cause why an execution should not be awarded in favor of a surety who has paid a judgment against the corporation and himself, which sets out the date and amount of the judgment, the relation of the parties, that the surety has actually expended money in payment of said judgment, and that the principal has not reimbursed him, is a compliance with the section. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Validity of Order.—While, under the section the court may not revive a dormant judgment against the principal and the surety, an order otherwise valid is not rendered void by the addition of the words "that the judgment heretofore rendered is hereby revived, to the end that execution may be issued." The last sentence will be regarded as surplusage. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

When Surety Entitled to Action for Money Paid.—A judgment against a surety will not entitle him to maintain an action for money paid to the use of the defendant, until it has been satisfied. Hodges v. Armstrong, 14 N. C. 253.

To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of the debt. Hodges v. Armstrong, 14 N. C. 253.

Right of Surety When Funds Misapplied.—Where a surety prays a judgment against his principal he may recover my funds wrongfully converted or misapplied by the principal. Fidelity Co., v. Jordan, 134 N. C. 236, 46 S. E. 496.

Surety Cannot Trace Property.—A surety who has to pay the debt, has no equity to follow the specific property which the principal debtor purchased with the borrowed money. Carlton v. Simonton, 94 N. C. 401.

Same—Bank Deposits.—Where the principal debtor borrowed a sum of money, which he deposited in a bank which soon afterwards became insolvent, and the surety had to pay the debt, the surety has no equity to enjoin the principal debtor from collecting the dividends from the insolvent bank, until he can recover a judgment. Carlton v. Simonton, 94 N. C. 401.

Right against Partnership.—Where a writ is issued against two copartners for partnership debt, and one of them is arrested and gives bail, such bail, upon being afterwards compelled by due course of law to pay the debt, has no remedy except against the individual for whom he became bail. He has no claim upon the other partner. The case of Osborne v. Cunningham, 4 Dev. & Bat., 423, cited and approved. Foley v. Robards, 25 N. C. 177.

Where one endorsed a note at the request of a member of a firm for the purpose of obtaining money or the use of the firm, and the proceeds were so used, the endorser, upon payment of the note, can recover therefor against the firm, though no member of such firm signed the note. Springs v. McCoy, 122 N. C. 628, 29 S. E. 903.

When Surety's Liability Barred by Limitations.—Property mortgaged by an administrator to a surety to secure him against loss may be subjected to payment of estate

debts, though the personal liability of the surety is barred. Hooker v. Yellowley, 128 N. C. 297, 38 S. E. 889.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be delivered to the officer at the time designated and not that the execution shall be satisfied; and therefore, if a surety to the forthcoming bond before it is forfeited discharges the execution without the request of his principal, such surety cannot maintain an action against his principal for money expended for the latter's use, although by the payment of the money in satisfaction of the execution the bond was discharged. Gray v. Bowls, 18 N. C. 437.

When Mortgage Inures to Benefit of Creditors.—A mortgage given by an administrator to a surety on his bond to secure the latter against loss inures to the benefit of the creditors of the estate. Hooker v. Yellowley, 128 N. C. 297, 38 S. E. 889.

Bond of Guardian in Suit on Behalf of Ward.—Where a guardian, having given a bond for the prosecution of a suit by him on behalf of his ward and signed the same individually, was compelled to pay the costs of the suit out of his individual estate, he cannot recover the same under the provisions of this section, which gives a summary method for reimbursement of a surety who has paid money for another. Green v. Burgess, 117 N. C. 495, 23 S. E. 439.

II. SUBROGATION.

Subrogation Explained. — Subrogation is the substitution of another person in the place of a creditor, so that the former can succeed to the rights of the latter in relation to the debt, and to entitle one to such equitable relief, he must have paid the money upon request or as surety or under some compulsion made necessary by the adequate protection of his own rights. Liles v. Rogers, 113 N. C. 197, 18 S. E. 104.

Legal subrogation is based upon payment and exists where one who has an interest to protect or is secondarily liable makes payment, while conventional subrogation, so named from the convention or agreement of the civil law, is founded upon the agreement of the parties, which really amounts to an equitable assignment. Liles v. Rogers, 113 N. C. 197, 18 S. E. 104; Bank v. Bank, 158 N. C. 250, 73 S. E. 157; Pub. Co. v. Barber, 165 N. C. 478, 488, 81 S. E. 694; Joyner v. Reflector Co., 176 N. C. 274, 278, 97 S. E. 44.

The doctrine of equity, upon which subsequent cases have been ruled, was announced in Deering v. Earl of Winchelsea (1787) White & Tudor's L. C. Eq. 784, and Pomeroy, Eq. (3d Ed.) 1419, in which it is said: "By the fact of payment the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender. Bank v. McArthur, 261 Fed. 97, 103.

It is held that an indorser on a note may pay it and demand its delivery, and if the contract has been merged into a judgment, his right is to an assignment of the judgment and enforce it for his own benefit. Eno v. Crook, 10 N. Y. 66; Freeman on Judgments, 471; Lennox v. Prout, 3 Wheat. 521, 4 L. Ed. 449. The principle is clearly stated by Prof. Langdell: "If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished; i. e., equity destroys the legal right of the debtor, and converts the creditor into a trustee for surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is therefore entitled to the pledge as an incident of the debt. This, however, is only a fiction—a fiction, moreover, which is contrary to law, for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law." Bank v. McArthur, 261 Fed. 97, 103.

A surety paying the debt of his principal is entitled to be subrogated to all the rights of the creditors, against a co-surety as well as against the principal, and this includes the right to have a judgment which he has paid assigned to a trustee for his benefit, so as to compel his co-surety to pay his pro rata part. Peebles v. Gay, 115 N. C. 38, 20 S. E. 173.

In Brandt on Suretyship, sec. 347, quoted in Tripp v. Harris, 154 N. C. 296, 299, 70 S. E. 470, it is said: "A surety who pays the debt of his principal is entitled to subrogation to a mortgage given by the principal to the creditor for the security of the debt, and he may, with or without a formal assignment thereof, have the same foreclosed in his own name, for his benefit."

Where a surety, as such, paid the whole of a debt, then the section gives him a right of action against co-sureties at law, and also such priority as the creditor would have had as a claimant against his principal's estate. Holden v. Strickland, 116 N. C. 185, 195, 21 S. E. 684.

Rights Acquired.—The party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none. Sheldon on Subrogation, sec. 6; Clark v. Williams, 70 N. C. 679; Liles v. Rogers, 113 N. C. 197, 201, 18 S. E. 104.

An endorser or surety who pays the indebtedness is subrogated to the rights of the creditor as against the property of the debtor. Ex parte Pittinger, 142 N. C. 85, 54 S. E. 845.

A surety to an administration bond who paid one-half of a debt recovered against the insolvent administrator is not subrogated to the rights of the creditor whose debt he paid, but to the right of the administrator for whom he paid it. Clark v. Williams, 70 N. C. 679.

Same—Liens and Securities.—A surety who pays the debt, is subrogated to all the specific liens and securities which the creditor has against the principal debtor. Carlton v. Simonton, 94 N. C. 401.

When Doctrine Cannot Be Invoked.—If a surety pays a judgment and has it entered "satisfied," without having it assigned to a trustee for his benefit, the remedy of subrogation is lost. Peebles v. Gay, 115 N. C. 38, 20 S. E. 173.

Where several or successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to or operation upon each other, the doctrine of subrogation can not be invoked. Liles v. Rogers, 113 N. C. 197, 18 S. E. 104.

Same—Corporation Note.—The endorsers on a note of a corporation secured by mortgage on its property are not entitled to subrogation, either legal or conventional, when it is ascertained that the note was paid by the corporation, and not the endorsers, and where there is evidence that the latter had paid it, the question should be submitted to the jury. Joyner v. Reflector Co., 176 N. C. 274, 97 S. E. 44.

Rights of Surety against Party Receiving Money with Full Knowledge.—A surety company which has been called upon to pay a devastavit committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation, and his rights are exactly those of the creditor. Caviness v. Fidelity Co., 140 N. C. 58, 52 S. E. 265.

A surety, omitted in the deed in trust to secure the sureties is entitled to be subrogated to the rights of his co-sureties pro tanto, if he has paid the debts, and the payees in the notes have a superior equitable right of subrogation to the benefit of any security given by the principal debtor to his sureties. James v. Gaither, 93 N. C. 358, 362; Sherrod v. Dixon, 120 N. C. 60, 63, 26 S. E. 770; Harrison v. Styres, 74 N. C. 290; Wisewall v. Potts, 58 N. C. 184, 189. And this is true whether they knew of it or not. Matthews v. Joyce, 85 N. C. 258, 266; Brandt on Suretyship, sec. 282; Blanton & Co. v. Bostic, 126 N. C. 418, 420, 35 S. E. 1035.

III. ASSIGNMENTS.

Preservation of Lien by Assignment.—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852.

A surety who pays the amount recovered against him and his principal, or co-sureties, may have the judgment assigned to another in trust for his use, and it will continue in force for his benefit; and he may, upon motion in the cause, have satisfaction of the judgment entered. even against the consent of the assignee. State v. Hearn, 109 N. C. 150, 13 S. E. 895.

Assignment of Right by Surety.—Where one of two defendants has paid a joint judgment upon a note against them both, and has the judgment assigned to another for his use, who brings action to recover against the other judgment debtor, he may, as between themselves, show that the defendant in the second action was the principal payee, and that he, the plaintiff, was an indorser, though not pleaded in the original action, and recover the full amount of the judgment he has paid, the action being, in substance, one by the surety on the note to recover against the principal thereon. Haywood v. Russell, 182 N. C. 711, 110 S. E. 81.

When One-half of Judgment Paid and Other Assigned.—

Where a surety who paid and had satisfaction entered as to one-half of a judgment against himself, his principal and a co-surety, and procured the judgment as to the other half to be assigned to a trustee for his benefit, it was in effect the same as if he had procured the whole judgment to be so assigned. Peebles v. Gay, 115 N. C. 38, 20 S. E. 173.

When Assignment of Security Taken.—If an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor but while it is not in force, the surety can not maintain an action for the money paid for the assignment. Hodges v. Armstrong, 14 N. C. 253.

When Person Charged with Notice of Assignment. — Where a judgment against a principal and the sureties on a note is paid by the sureties, and an assignment thereof is made to a trustee for the benefit of the sureties, but by a mistake payment is entered on the judgment record, which is afterwards corrected by the entry thereon of the assignment, a person taking a mortgage on the property of the judgment debtor, after the assignment is entered on the record, takes with notice of the assignment. Patton v. Cooper, 132 N. C. 791, 44 S. E. 676.

§ 3964. Subrogation of surety paying debt of deceased principal. — Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal as had the debt before its payment. (Rev., s. 2843; Code, s. 2096; R. C., c. 110, s. 4; 1829, c. 23.)

Scope. — This section which confers on the claim of a surety, paying the debt for which he is surety, the dignity, in the administration of the assets of the principal, which the debt, if unpaid would have had, applies to a judgment whether the payment be made before or after the death of the principal. Drake v. Coltrane, 44 N. C. 300.

When Co-surety Deemed Bond Creditor. — A co-surety, who pays the bond debt for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety, under the act of 1828 as construed in Drake v. Coltrane, 44 N. C. 300; Howell v. Reams, 73 N. C. 391.

When a plaintiff, a co-surety, discharged the bond debt, for the payment of which the defendant's intestate was equally bound, he becomes a bond creditor as to the assets of the intestate; and when, pending an action for contribution, the administrator paid off the bonds voluntarily, of equal dignity with said surety debt, having previously paid an open account, he committed a devastavit to the extent of the plaintiff's claim for contribution, such claim being for a sum smaller than the bonds so preferred and the open account. Howell v. Reams, 73 N. C. 391.

Applied, in subrogating widow to rights of mortgagee where policy in which she is named beneficiary is assigned to and paid to mortgagee, in Russel v. Owen, 203 N. C. 262, 165 S. E. 687.

§ 3965. Contribution among sureties. — Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent, or out of the state, such surety may have and maintain an action against every other surety for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest or cost. (Rev., s. 2844; Code, s. 2094; R. C., c. 110, s. 2; 1807, c. 722.)

I. The Right to Contribution Generally.
II. When Surety Obtains Advantage over Co-sureties.
III. Contribution Enforced.
  A. In General.
  B. Actions and Incidents Thereto.

I. THE RIGHT TO CONTRIBUTION GENERALLY.

Editor's Note.—Atwater v. Farthing, 118 N. C. 388, 24 S. E. 736, was a case where A endorsed a note for the maker, and subsequently, but before it was discounted, F endorsed it. The principal became insolvent and left the state. A paid the note. The court held that F was a co-surety, and that the doctrine of contribution was applicable for A's benefit. Mr. Justice Furches, who delivered the opinion of the Court, said that the decision was governed by Daniel v. McRae, 9 N. C. 590; and Dawson v. Pettway, 20 N. C. 551. There are a number of other cases to the same effect, but these two seem to be the leading ones. The learned Justice concluded the opinion by saying: "It was admitted by the learned counsel who argued for the defendant that Daniel v McRae, supra, was against him. But he contended that this opinion was not supported by principle and was in conflict with the adjudged cases of nearly every State of the Union, and that it had been severely criticised by this Court. But whether it was put on sound business principles or not (and we do not say that it was not), and whether it has been criticised or not (and we must admit that it has been), it has stood for itself since 1823; and although it was criticised by Gaston, J., delivering the opinion of the Court in Dawson v. Pettway, supra, in 1839, he then said it has been too long the recognized law of the State to be reversed, even admitting that the reasoning upon which it was founded was not sound. And if it had been the recognized law in 1839 for too great length of time to be changed, how much greater is that reason now, after a period of more than fifty years since that opinion was rendered? According to this opinion, the defendants were co-sureties and subject to the doctrine of contribution. We can add nothing to the argument contained in these cases, and we do not propose to re-occupy this field of discussion, exhausted by Judge Henderson and Judge Gaston more than fifty years ago."

Rule of Contribution.—The rule of contribution is founded upon the maxim that "equality is equity," and not upon contract. It is a rule of common justice whereby parties who undertake to account for the default or miscarriage of another, should equally bear the burden imposed by a failure of their principal. As between them, there is no agreement implied, but an equitable presumption raised by the fact of the payment by one, that the others will equalize the burden thus borne by him, by paying to him such sum as will make the loss equal upon each, which can be rebutted by showing that there was an agreement, whether verbal or written, to the contrary. 1 Brand Suretyship and Guaranty, Sec. 261. Smith v. Carr, 128 N. C. 150, 153, 38 S. E. 732; Allen v. Wood, 38 N. C. 386.

This maxim can only be applied to those whose situations are equal; otherwise equality is not equity, and hence if one surety stipulate for a separate indemnity, the equality of situation between him and his co-surety ceases, and the maxim does not apply. Moore v. Moore, 11 N. C. 358.

It is broadly stated in 2 Brandt Suretyship 309, that "A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the principal." This is found in reason and justice, and up to the adoption of our present Constitution was enforced in the courts of equity. Art. IV, sec. 1, of the Constitution abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. Peebles v. Gay, 115 N. C. 38, 41, 20 S. E. 173.

The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or who have property available to process within the jurisdiction of the court. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852.

Same—Primary and Conditional Liability. — The equitable doctrine of contribution is enforced upon the principle that those engaged in a common hazard in the same degree or relation should bear the loss equally, but where one is surety and the others indorsers, the liability of the former is primary and of the latter a conditional one, and not being in the same situation with regard to the hazard, the surety is not entitled to contribution from the indorsers. Edwards v. Jefferson Standard Life Ins. Co., 173 N. C. 614, 92 S. E. 695.

Presumption of Equity.—Co-principals and co-sureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence. Smith v. Carr, 128 N. C. 150, 38 S. E. 732.

Surety for Other Sureties.—It is entirely competent for one person to become surety for other sureties, or to limit the extent of his liability with respect to other sureties. The test of liability is the intent of the parties as indicated by their agreement. Citizens Nat. Bank v. Burch, 145 N. C. 316, 317, 318, 59 S. E. 71.

Sureties on Successive Guardianship Bonds.—The sureties to the successive bonds of a guardian stand in the relation of co-sureties, one bond to the other or others, and are liable, in case of insolvency of the guardian, to contribution in proportion to the amount of the several penalties of the bonds. The risk they take is a joint risk, and there is an implied engagement or obligation, each set of sureties with

the other, to bear any loss which may fall on them proportionally, as above stated; or, if it is borne by one class, to contribute by way of reimbursement. Bell v. Jasper, 37 N. C. 597; Jones v. Hays, 38 N. C. 502; Bright v. Lennon, 83 N. C. 184, 187.

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of co-sureties to the sureties on every other bond; the only qualification to the rule being, that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. Jones v. Hays, 38 N. C. 502.

All the bonds given by a guardian are but securities for the same thing, and the sureties on each are bound to contribution, but their liabilities are in proportion to the amount of their respective bonds. Jones v. Blanton, 41 N. C. 115.

When Surety Should Answer for Default and Stop Costs.—As a general rule, upon the default and insolvency of a principal, a surety should answer for the default, and not unnecessarily let cost be run up where the liability and amount thereof is clear. But where, as in the instant case, the guardian claimed to have settled with and paid the wards, it was prudent in plaintiff in regard to his own interests and as an act of justice to his co-sureties on other bonds, to incur costs to the point of developing how the fact of alleged settlement was, and to this effect are the authorities. Brandt Suretyship, sec. 248; McKinson v. George, 2 Rich. (S. C.) Eq., 15; Fletcher v. Jackson, 23 Vt. 593; Bright v. Lennon, 83 N. C. 184, 188.

The costs incurred by one surety, or one set of sureties, are not always to be regarded as a loss borne to which in equity contribution may be had, but it would seem to depend on the prudence and bona fides of the defense by which they were incurred. Bright v. Lennon, 83 N. C. 184, 188.

Assets Given Up by Mistake of Law.—Where A and B were co-sureties on an administration bond, and being sued upon the same by one of the next of kin, and while the suit was pending compromised the same under the advice of counsel and from an honest belief that both were liable to a larger sum on account of the devastavit and insolvency of their principal, and it is afterwards discovered that B, who had administered on the estate of the principal, had, by a misapprehension of law, but acting under legal counsel, and in good faith, erroneously given up assets of their principal to another claim, which, if they had been held by him, would have saved them both from loss by this suretyship, yet it was held that A could not sustain a bill to throw the whole loss on B, there being no evidence that B had concealed from A the fact of having thus parted with the assets and not making any allegation of fraud or imposition on the part of B. Brandon v. Medley, 54 N. C. 313.

Release of Principal.—A surety who seeks to recover from a cosurety a ratable part of money paid must take care to do no act which will prevent the cosurety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the cosurety. Draughan v. Bunting, 31 N. C. 10.

Sureties on Sheriff's Tax Bond.—The right of contribution does not exist between sureties of the different bonds of a sheriff as tax collector. McGuire v. Williams, 123 N. C. 349, 357, 31 S. E. 627.

When One Surety in Fact Surety for Cosurety.—Where A. and B. signed a negotiable note apparently as joint principals, when, in fact, the latter was surety for the former and the appellant signed the note by writing his name across the back, with the word "surety" underneath, it was held that in the absence of any evidence that appellant knew of the relation between the makers, he was surety for the two, and that surety B. could not compel contribution. Citizens Nat. Bank v. Burch, 145 N. C. 316, 317, 59 S. E. 71.

Released by Securing Part of Debt.—If there be several sureties for the same principal, and one of them be fixed with the payment of the whole debt, or of more than his rateable part thereof, the others, who are solvent, shall be compelled to contribute, in order to equalize the loss. But if by any agreement between the sureties, one of them is released by the creditor, upon his securing the payment of a certain part of the debt, he shall not afterwards be called upon to contribute to one or more of the remaining sureties, for a loss arising from the deficiency of another to them. Moore v. Isley, 22 N. C. 372.

Agreement between Sureties.—There can be no doubt that after two persons have become sureties for a common principal they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal or for contribution from another co-surety. Long v. Barnett, 38 N. C. 631; Commissioners v. Nichols, 131 N. C. 501, 505, 42 S. E. 938.

Where the land of one of two sureties of a third person was sold under execution for the debt, and the other surety and a third person bid it off, it was held that an agreement by the surety who owned the land to take the whole debt upon himself and satisfy the execution in return for an assignment of the bid to him, was a promise to pay his own debt and not affected by the statute of frauds; and in such case the surety who paid could not obtain contribution from his co-surety. Hockaday v. Parker, 53 N. C. 16.

II. WHEN SURETY OBTAINS ADVANTAGE OVER CO-SURETIES.

Property Advanced by Principal to One of Sureties.—Where money is advanced by the principal to one of the sureties, to discharge the debt, before the debt is actually discharged, the co-surety may file his bill in equity for an account and for relief but if the money is paid by the principal after the debt has been discharged by the sureties, to one of two sureties, to reimburse both, then the co-surety has his remedy against the surety receiving the money, by an action at law for money had and received, and, therefore, can not support a suit in equity. Allen v. Wood, 38 N. C. 386.

An indemnity obtained from a principal by one of two co-sureties, after the risk is incurred, inures equally to the benefit of both. Pool v. Williams, 30 N. C. 286.

Where the principal placed property in the hands of a surety sufficient to satisfy the debt, and then left the State, it was held, that a third person, also bound for the debt as surety, having been compelled to pay it, might recover its amount from the person who had received the property without making a previous demand. Parham v. Green, 64 N. C. 436, citing with approval Draughn v. Bunting, 31 N. C. 10, 12; Hall v. Robinson, 30 N. C. 56, 58; Sherrod v. Woodward, 15 N. C. 360; Norfleet v. Cromwell, 64 N. C. 1.

When two persons engage in a common risk as sureties for a third and one of them subsequently takes an indemnity from the principal debtor it inures to the benefit of both. Fagan v. Jacocks, 15 N. C. 263; Gregory v. Murrell, 37 N. C. 233, 236; Hall v. Robinson, 30 N. C. 56.

Separate Indemnity.—In Long v. Barnett, 38 N. C. 631, Ruffin, C. J., speaking for the court said: "As one, when he is about to become a surety with others, may stipulate for a separate indemnity from the principal to him, and the co-sureties would be only entitled to a surplus after his reimbursement." Moore v. Moore, 11 N. C. 358; 15 Am. Dec., 523; Commissioners v. Nichols, 131 N. C. 501, 505, 42 S. E. 938.

When Indemnity May Be Reached.—The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in fraud, or for the benefit of the other. Moore v. Moore, 11 N. C. 358.

Before and after Severance of Relationship.—While the relation of joint sureties exists, funds received by one of them (except under special circumstances) for the discharge of, or, as an indemnity against, his liability, are to be applied for the common benefit of the sureties. But after that connection has been severed by an agreement among the sureties, each of them has his distinct and several claim to prosecute, because of what he has paid for his principal, or for an insolvent joint surety; and the others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting his several claims. Moore v. Isley, 22 N. C. 372.

When Advantage Lost by Laches. — Where the surety merely had a deed of trust for certain property, as an indemnity, executed by the principal, and neglected to have it registered, so that the property was sold by other creditors, the co-surety is not entitled, on account of this laches, to make him responsible for the value of the property. Pool v. Williams, 30 N. C. 286.

Supplementary Surety.—Where one of two sureties claims to be a supplemental surety by agreement, the burden is upon him to show the agreement. Carr v. Smith, 129 N. C. 232, 39 S. E. 831.

Parties.—One of three joint solvent sureties cannot sustain a bill against either of his co-sureties for contribution out of a fund alleged to have been received by that surety for his indemnity from the estate of an insolvent co-surety, without making the other a party. Moore v. Isley, 22 N. C. 372.

III. CONTRIBUTION ENFORCED.

A. In General.

Accommodation Maker and Endorser.—An accommodation maker who pays a note may recover contribution for an accommodation endorser of the note where they intended to become co-sureties. Gilliam v. Walker, 189 N. C. 189, 126 S. E. 424.

Co-surety Paying Bond Debt Deemed Bond Creditor. — In Howell v. Reams, 73 N. C. 391 it was held that a co-

surety who pays the bond debt, for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety. Peebles v. Gay, 115 N. C. 38, 41, 20 S. E. 173.

Liable for Ratable Part of Debt Only.—The section provides that where one or more sureties have been compelled to satisfy the contract of their principal, they may sue their co-sureties for their ratable part of the debt paid for the principal. Peebles v. Gay, 115 N. C. 38, 41, 20 S. E. 173.

There was a judgment against the principal and two sureties, and an execution levied on the property of one of the sureties. A bought this property from this surety, pending the levy, and, afterwards, obtained an assignment of the judgment, to enable him to have the whole amount satisfied out of the property of the co-surety, and issued an execution for that purpose. It was held, that he was restrained from collecting out of the co-surety more than the fair proportion which the latter owed, whether A had actual notice of the lien of the execution or not. Dobson v. Prather, 41 N. C. 31, citing with approval the cases of Gilkey v. Dickerson, 2 Hawks, 341; Brassfield v. Whitaker, 4 Hawks, 309; Bell v. Hill, 1 Hay. 72; Ricks v. Blount, 4 Dev., 128; and Jones v. Judkins, 4 Dev. & Bat., 454.

Rights of Surety Paying Entire Debt.—Under the act of 1807, now this section, one surety may recover at law from another his ratable proportion of the debt of the principal, but the rights of the surety who pays the debt are not enlarged nor is the co-surety deprived of any just grounds of defense which would before have been available to him in equity. Hall v. Robinson, 30 N. C. 56.

In Case of Absent Co-surety.—A co-surety must make contribution, without regard to the share of contribution, which the absent co-surety would have had to pay, had he been within the reach of the process of our courts. Jones v. Blanton, 41 N. C. 115.

Accommodation Endorser Not Liable as Co-surety. — Where A, as surety, signed the note of B, payable to C, and it was endorsed by C, at the request and for the accommodation of B, there being no contract between A and C whereby they agree to become co-sureties of B, it was held that A had no right to contribution from C. Smith v. Smith, 16 N. C. 173.

Liability Need Not Be Fixed by Judgment.—It is not necessary, to entitle a surety to maintain an action for contribution, that the amount of his liability which was paid by him should be fixed by a judgment. Bright v. Lennon, 83 N. C. 184.

Statute of Limitations.—In the case of a surety's payment and action for contribution against the co-surety, the statute of limitations runs only from the payment. Sherrod v. Woodward, 15 N. C. 360; Craven v. Freeman, 82 N. C. 361, 363.

A surety who pays money for his principal, may maintain an action against his co-surety for his ratable part, without first making a demand, and the statute of limitations therefore begins to run from the time of the payment of the money. Sherrod v. Woodward, 15 N. C. 360.

Same—Failure to Plead Limitations When Sued. — A surety when sued is not bound to plead the statute of limitations, but may or may not according to his discretion. Jones v. Blanton, 41 N. C. 115; Street v. Comrs., 70 N. C. 644; Craven v. Freeman, 82 N. C. 361. And if so, the withdrawal of such a plea or a waiver of it ought not to affect and does not affect the right to contribution. The design of that plea is to protect against a false and unjust claim or one of whose discharge the evidence is lost, but it is not obligatory in morals or law to use it to defeat a just debt. Bright v. Lennon, 83 N. C. 184, 189.

A surety to a guardian bond, when sued by the wards, is not bound to avail himself of the statute of limitations and a failure to do so does not release co-sureties. Jones v. Blanton, 41 N. C. 115.

B. Actions and Incidents Thereto.

Action at Law for Aliquot Parts.—An action at law by a surety for contribution lies only against the co-sureties, severally, for the aliquot part due from each. Adams v. Hayes, 120 N. C. 383, 27 S. E. 47.

Where two sureties on a note to a bank agreed, after the insolvency of their principal, to employ a broker to buy notes of the bank to an amount sufficient to pay the debt, and one of them paid the broker for notes purchased by him, and discharged the debt, it was held, that he could maintain an action on the case against his co-surety for contribution. DeRossett v. Bradley, 63 N. C. 17.

Surety Should Allege Principal's Insolvency.—When one surety brings a bill for contribution against a co-surety, he should at least allege that the principal is insolvent, so that he can have no redress against him. For the equity of a plaintiff, seeking contribution from a co-surety, lies in the insolvency of the principal. Allen v. Wood, 38 N. C. 386.

A surety has no right to call upon his co-surety in equity for contribution, without showing that he could not obtain satisfaction for the amount he has paid from their common principal. Rainey v. Yarborough, 37 N. C. 249.

When Insolvency Not Alleged and Improper Relief Asked. —Where a complaint in an action by a surety for contribution, joined the principals as parties, and alleged the contract of suretyship, payment by the plaintiff and demand of the co-sureties "for their contributive shares," and asked judgment against all, but did not allege insolvency of the principal except by the averment that plaintiff was compelled to pay the debt, it was held, that though the proper relief was not asked, and the insolvency of the principals was imperfectly alleged, the cause of action will be construed, on demurrer, as equitable rather than legal, in order to confer jurisdiction below. Adams v. Hayes, 120 N. C. 383, 27 S. E. 47.

Costs Paid by Plaintiff.—In an action by a surety of an insolvent guardian for contribution against other sureties, it is proper to include in the sum adjudged to be raised by contribution costs which were paid by plaintiff in an action against him as a condition for leave to plead the statute of limitations. Bright v. Lennon, 83 N. C. 184.

When Surety Must Show Actual Money Payment. — Where a surety brings an action of assumpsit, for money paid for the use and at the request of the defendant, against his co-surety, to obtain contribution, it is not sufficient for him to show that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt. To entitle him to recover in this action, he must prove an actual payment in money, or in money's worth, such as bank notes, the note of a third person, or a horse or the like, which is valuable in itself to the surety who parts with it. Brisendine v. Martin, 23 N. C. 286.

Notice.—In an action for contribution by a surety against four different guardian bonds, with different penalties and different sureties, some solvent and some otherwise, it is not necessary that notice should be given before the action is brought. Bright v. Lennon, 83 N. C. 184.

Right to Demand Waived.—Where the plaintiff brings suit for contribution against a co-surety on a note, alleging his liability as such, and that he had failed or refused reimbursement to the extent of his liability to the plaintiff, who had paid the same, and the defendant answers, denying liability, and there is no averment that demand had been previously made on the defendant, the right to a demand is waived by the answer, and the statement of the cause of action being only defective, is cured. Shuford v. Cook, 164 N. C. 46, 80 S. E. 61.

What Co-sureties Must Be Made Parties.—A surety, who has been compelled to pay the debt of his principal, must make all his co-sureties parties to a bill for contribution, if they are in this State and solvent. But where one is out of the jurisdiction of the court, and others are within it, the plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone. Jones v. Blanton, 41 N. C. 115.

Principal or Executor Party Defendant.—To a bill brought by one surety against his co-surety for contribution, their common principal, or, if he be dead, his executor or administrator should be made a party defendant. Rainey v. Yarborough, 37 N. C. 249.

Bankruptcy of Principal.—Where it appears that the principal on a note has secured his discharge in bankruptcy from his obligations, including a note paid at maturity by one of two sureties thereon, and that a few months thereafter the surety who paid the note brought his action for contribution against his co-surety, who has paid nothing, the right of action given by Revisal, sec. 2844, now this section, will not, without more, be denied upon the ground that it requires the insolvency of the principal, in such cases, to be shown at the institution of the action. Shuford v. Cook, 164 N. C. 46, 80 S. E. 61.

Interest on Collaterals.—In an action against an alleged co-surety to recover money paid in settlement of their joint liability, the amount received by the plaintiff as interest on collaterals deposited, should be deducted from the amount paid by plaintiff. Carr v. Smith, 129 N. C. 232, 39 S. E. 831.

Discharge of Levy by Co-surety.—A, having a judgment against B, as principal and C, as surety, C, without the consent of A, has an execution issued and levied upon B.'s property, A, has a right to withdraw the execution and discharge the levy, without making herself liable to C. Forbes v. Smith, 40 N. C. 369.

Principal's Reputation to Show Insolvency.—In an action for contribution by a surety against his co-surety, the plain-

tiff may offer evidence of their principal's insolvency by showing his general reputation, and this even after direct evidence of the said principal's insolvency. Leak v. Covington, 99 N. C. 559, 6 S. E. 241.

Record of Judgment in Evidence.—A surety seeking contribution from a co-surety can offer in evidence the record of a judgment against the surety as such, which, in the absence of any suggestion of fraud or collusion in procuring the same, is prima facie proof of the damages suffered by the said surety. Leak v. Covington, 99 N. C. 559, 6 S. E. 241.

Operation of Parol Evidence Rule. — The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not to such as arise collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution parol evidence is admissible to show that they were really principals. Williams v. Glenn, 92 N. C. 253.

§ 3966. Dissenting surety not liable to surety on stay of execution.—Whenever any judgment shall be obtained before a justice against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the justice, which shall absolve him from all liability to the surety who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment. (Rev., s. 2845; Code, s. 2095; R. C., c. 110, s. 3; 1829, c. 6, ss. 1, 2.)

§ 3967. Surety may notify creditor to sue.—In all cases where any surety or indorser on any note, bill, bond, or other written obligation shall consider himself in danger of loss in consequence of his contingent liability, either from the insolvency or misconduct of the principal, in the note, bill, bond, or other written obligation, or from the negligence of the payee or holder of any such instrument, it shall be lawful for such surety or indorser, at any time after such note, bill, bond, or other written obligation becomes due and payable, to cause written notice to be given to the payee or holder of any such paper or obligation, requiring him to bring suit on such obligation, and to use all reasonable diligence to save harmless such surety or indorser: Provided, nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity. (Rev., s. 2846; Code, s. 2097; 1868-9, c. 232, s. 1.)

As to the statute of limitations, see subdivision 6, section 441.

Reasonable Compliance.—The requirements of this section are reasonably complied with when the holder of a negotiable note, after receiving notice in accordance with this section within thirty days causes the maker to be a party defendant, and it is made to appear that he is a non-resident. Taylor v. Bridger, 185 N. C. 85, 116 S. E. 94.

Protection Secured.—In Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772, which was a case holding that payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations, Mr. Justice Davis, who delivered the opinion of the court, said in reference to this section: "Counsel says that if several co-obligors owe a debt of $1,000 under this ruling, if a note or bond shall be credited with the pitiful sum of ten cents within every three years, the debt may be kept in force against the sureties for a century. The hardship and injustice, so eloquently portrayed by counsel are without force, in view of the facts that the payment must be honestly made, and the credit not falsely or fraudulently given, and the surety or indorser, if he shall consider himself in danger of being held liable for a century, or for a longer time than he may wish, he can easily and safely protect himself against such hardship by giving the notice prescribed in section 2097 of the Code (now this section)."

This section affords relief to securities in cases not provided for in the pre-existing law, by requiring the creditor, at the instance of the surety who considers himself in danger of loss from his contingent liability, to bring suit, and use reasonable diligence in making his money from the principal, and saving harmless the surety, at the hazard of losing his claim upon the latter, if negligent in doing so. But official bonds or securities held as collateral are excepted from the operation of the act; nor does it reach the present case, since the requirement of the sureties was verbal only, if in other aspects applicable to the present case. There is no error, and the judgment is affirmed. Bank v. Homesley, 99 N. C. 531, 6 S. E. 797, 798.

Where an action was brought upon a negotiable instrument the defendants on its face being joint makers, a mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," was held to constitute an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability but his remedy is by quia timet notice under this section. Roberson-Ruffin Co. v. Spain, 173 N. C. 23, 91 S. E. 361.

Same—Endorser in Blank of Non-Negotiable Paper.—The rights of an endorser in blank upon a non-negotiable note are sufficiently protected under the section which provides that a surety or endorser on any note, bill, bond or written obligation, except those held in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and use all diligence to collect, and if the payee or holder refuses to bring action within thirty days, the surety or holder giving notice is discharged. Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23.

Surety Released after Thirty Days.—The surety can give the holder written notice quia timet to bring suit under this section, and if the holder does not do so within thirty days the surety will be released. Cole v. Fox, 83 N. C. 463; Coffey v. Reinhardt, 144 N. C. 509, 512, 19 S. E. 370.

Legal Duty of Principal.—Except when required by written notice under the section it is not the legal duty of the principal to institute a suit against the debtor, or to pursue such a suit with diligence and to call to his aid all of the remedies provided by the law. Bell v. Howerton, 111 N. C. 69, 70, 15 S. E. 891.

When Inapplicable.—Where there is an agreement in a negotiable note that the endorsers will continue to be bound notwithstanding an extension of time granted to the maker, the endorsers cannot avail themselves of the provisions of this section, when the maker is a nonresident, demand for payment after dishonor has been made upon the resident endorsers, defendants in the action, and they have delayed to give the statutory notice until after action commenced. Taylor v. Bridger, 185 N. C. 85, 116 S. E. 94.

§ 3968. How notice served.—Such notice shall be served by the sheriff or his deputy, who shall return it to the party for whose benefit the notice was issued, which shall be evidence of the fact in all courts. (Rev., s. 2848; Code, s. 2099; 1868-9, c. 232, s. 3.)

To have the benefit of the next preceding section and that there may be no controversy as to whether the demand is sufficient to have this effect, it must be a notice in writing given to the creditor; and its benefits are secured to such only as give the notice if there be more than one surety. Bank v. Homesley, 99 N. C. 531, 6 S. E. 797, 798.

§ 3969. Failure of creditor to sue discharges surety; exceptions.—Should the payee or holder of any such note, bond, bill, or other written obligation refuse or fail, within thirty days from the service of such notice, to bring suit in the appropriate court in an effort to save harmless such surety or indorser, such refusal or failure to sue shall operate as a discharge of such surety or indorser, from all liability whatever, on any such note, bond, bill, or other written obligation: Provided, that this notice shall not have the effect to discharge from liability any cosurety who does not join in such notice, or who has not given a separate notice: Provided further, that

this and the preceding section shall not apply to holders of such note, bond, bill, or obligation, who hold the same as collateral security or in trust. (Rev., s. 2847; Code, s. 2098; 1868-9, c. 232, s. 2.)

Extension of Time.—Where a creditor enters into a binding contract with his principal debtor for an extension of time, without consent of sureties, ipso facto discharges them, and also any security given for the debt. Flemming v. Borden, 127 N. C. 214; 53 L. R. A. 316, 37 S. E. 219; Jenkins v. Daniel, 125 N. C. 161, 74 Am. St. 632, 34 S. E. 239; Smith v. Building & Loan Asso'n, 119 N. C. 257, 26 S. E. 40; Hinton v. Greenleaf, 113 N. C. 6, 18 S. E. 56. Receipt of interest in advance is prima facie evidence of a binding contract of forbearance. Scott v. Fisher, 110 N. C. 311; 28 Am. St. 688, 14 S. E. 799; Hollingsworth v. Tomlinson, 108 N. C 245, 12 S. E. 989; Smith v. Parker, 131 N. C. 470, 42 S. E. 910.

Where a plaintiff creditor made a parol contract with principal to extend the time of payment of bond beyond the date of the commencement of a suit thereon, without the knowledge of consent of the surety, it was held, that such contract has the effect of suspending the plaintiff's right of action and of exonerating the surety from liability. Carrier v. Duncan, 84 N. C. 676.

Reservation of Right against Surety.—An agreement with a principal on a sufficient consideration to forbear to sue for a fixed period, without reserving the right to proceed against the surety and made without his assent, will exonerate him from liability. Forbes v. Sheppard, 98 N. C. 111, 3 S. E. 817.

The exoneration grows out of the agreement to forbear and is not affected by the creditor's breach of it. Forbes v. Sheppard, 98 N. C. 11, 3 S. E. 817.

§ 3970. Cancellation of contract of suretyship in case of common carrier and employee.—Whenever an employee of a common carrier authorized to do business in this state is required to give a bond or undertaking of any nature whatever with a bonding company or companies, as surety thereon, any such employee who shall have given such bond or undertaking shall, upon the breach of any of the conditions thereof by the other party or parties thereto, have the power to cancel the same by giving the surety or sureties thereon, for the benefit of whom same shall have been made, at least ten days notice in writing, setting out in full the reason for canceling the same. Any such notice to a company, corporation or association may be served by leaving the same with any person upon whom service of legal process upon such company, corporation or association may be had. Any surety on any such bond or undertaking shall, upon the breach of any of the conditions thereof by the common carrier employee for whom same shall have been made, have power to cancel the same by giving such employee at least ten days notice in writing, and, upon demand, set out in full the reasons for canceling same, the notice to be signed by an agent or manager of such surety. Nothing herein shall affect any right of action accruing to any person upon the breach of a contract; nor shall any bonding company furnishing the information which causes it to withdraw from the bond be liable in any action at the instance of the party aggrieved for damages, nor be required to disclose to the party aggrieved the sources of information that caused it to withdraw from the bond. But any bonding company may be required to give evidence in any action brought by the party aggrieved against the party or person furnishing the information causing the company to withdraw as surety.

Any person, officer or manager, company, corporation, association or firm who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of not less than five hundred dollars nor more than one thousand dollars. (1913, c. 17.)

As to sureties on bonds of executors, administrators and collectors, see sections 33 to 44 inclusive; as to evidence against principal admissible against sureties, see section 358.

§ 3970(a). Cancellation of judgment as to surety.—Whenever a judgment shall be rendered in any court in accordance with the provisions of section thirty-nine hundred and sixty-one (3961) and the surety, endorser or other person shown in said judgment to be secondarily liable thereon and having the rights as by this chapter prescribed against the person or persons primarily liable, and the surety, endorser or other person so shown in the judgment to be secondarily liable, shall pay the said judgment or shall be compelled to pay an execution issued thereon and such fact shall appear to the satisfaction of the clerk of the Superior Court of the county in which the said judgment is rendered and docketed, such judgment shall be canceled as to said surety, endorser or other person secondarily liable and shall cease to be a lien upon his real estate and other property, but such cancellation shall not have the force and effect nor operate as a cancellation and discharge of the judgment as to any other person against whom the said judgment shall be rendered and the person so paying the said judgment shall have all the rights given to a surety who has been compelled to pay a judgment against the principal debtor and cosureties which are given in this chapter, notwithstanding the cancellation of the said judgment as herein provided for. (1925, c. 38.)

CHAPTER 77

TRADEMARKS, BRANDS AND MARKS

Art. 1. Trademarks

§ 3971. Adoption and filing for registry. — It shall be lawful for any person to adopt for his protection and file for registry, as in this chapter provided, any label, trademark, term or design that has been used or is intended to be used for the purpose of designating, making known or distinguishing any goods, wares, merchandise or products of labor that have been or may be wholly or partly made, manufactured, produced, prepared, packed or put on sale by any such person, or to or upon which any work or labor has been applied or expended by any such person, or by any member of any corporation that has adopted and filed for registry any such label, trademark, term or design as aforesaid, or announcing or indicating that the same have been made in whole or in part by any such person or corporation, or by any member thereof. (Rev., s. 3012; 1903, c. 271.)

Editor's Note.—It is deemed expedient at this point to quote at length from the opinion of the court delivered by Mr. Justice Bynum in Blackwell v. Wright, 73 N. C. 310, 312. The learned Justice lays down the theory upon which is based the law dealing with trademarks, brands, etc. His theory is, in part, as follows: "Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior reputation as his may be the means of gaining. If, therefore,

the inventor or manufacturer adopts a label, symbol or trademark to distinguish the article he thus manufactures and sells, no other person has the right to adopt his label or trademark, or one so like his as to induce the public to suppose the article to which it is affixed is the manufacture of the inventor. This rule is grounded upon a two-fold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit almost always is; and 2nd, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him. When one, therefore, adopts a symbol or device, and affixes it to the goods he thus manufactures and puts upon the market, the law will throw its protection around the trade-mark thus affixed, as his property and a thing of value. And it would seem to be immaterial whether an infringing trade-mark is adopted by fraud or mistake, for the injury is the same. When an article, not of his manufacture, is sold with the mark or device affixed, which he has adopted to distinguish his own goods, a damage results to him. His label indicates to his customers that the article is made or sold by him, or by his authority, and he will be protected against any who attempt to pirate upon the good will of his friends or customers by using such sign without his authority." American Trade-Mark Cases, 142, 72, 87.

Name of Town or Locality.—It seems, that the name of a town or locality cannot be exclusively appropriated as a trade-mark. Tob. Co. v. McElwee, 94 N. C. 425.

Use of Surname.—As a rule, a trade mark cannot be taken in a surname, and any one named Bingham could start a school called the "Bingham School," in the absence of proof of intent to injure, or fraudulently attract the benefit of the good name and reputation acquired by a previously existing "Bingham School." Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 S. Ct. 625; 2 Beach Inj., sec. 762. And certainly there could be no confusion between a Bingham School at Asheville and a school even of the identically same name at Mebane, N. C. Investor Pub. Co. v. Robinson, 82 Fed. 56; Bingham School v. Gray, 122 N. C. 699, 707, 30 S. E. 304.

It is beyond the scope of the powers of the State Legislature to establish a monopoly in a family name or to confer a patent right in its use. Bingham School v. Gray, 122 N. C. 709.

But one may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. Zagier v. Zagier, 167 N. C. 616, 83 S. E. 913.

§ 3972. Property rights protected by filing for registry.—Whenever any person shall adopt and file for registry any label, trademark, term or design pursuant to the provisions of this chapter, the property, privileges, rights, remedies and interests in and to any such label, trademark, term or design, and in and to the use of same, provided or given by this chapter to, or otherwise conferred upon or enjoyed by, the person filing the same for the registry, shall be fully and completely secured, preserved and protected as the property of those entitled to the same before any such label, trademark, term or design has been actually applied to any goods, wares, merchandise, or product of labor, and put upon the market for sale or otherwise, and before any use or appropriation of any such label, trademark, term or design has been made in connection with any such goods, wares, merchandise or product of labor, as well as after the same has been used or applied to designate, make known or distinguish any such goods, wares, merchandise, or product of labor and they have been put upon the market. (Rev., s. 3013; 1903, c. 271, s. 2.)

§ 3973. Filing to be with secretary of state; contents of affidavits; fees.—Any person who has heretofore adopted and used, or shall hereafter adopt and use any label, trademark, term or design, as in this chapter provided, may file the same for registry in the office of the secretary of state, by leaving two copies, facsimiles or counterparts thereof, with the said secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney, if a corporation, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, facsimiles or counterparts filed therewith are true and correct copies, facsimiles or counterparts of the genuine label, trademark, term or design of the person filing the same; and there shall be paid for such registry a fee of five dollars to the secretary of state for the use of the state, and the same recording fees required by law for recording certificate of organization of corporations. (Rev., s. 3014; 1903, c. 271, s. 3; 1935, c. 60.)

Editor's Note.—The amendment of 1935 increased the registry fee from one to five dollars.

§ 3974. Registration; certified copies evidence; fees.—The secretary of state, upon the filing of any such label, trademark, term or design that is not in conflict with section 3976, shall register the same, and shall deliver to the person filing the same as many certified copies thereof, with his certificate of such registry, as any such person may request, and for every such copy and certificate there shall be paid to the secretary of state, for the use of the state, a fee of one dollar; and any such certified copy and certificate shall be admissible in evidence and competent and sufficient proof of the adoption, filing and registry of any such label, trademark, term or design, by any such person in any action or judicial proceeding in any of the courts of this state, and of due compliance with the provisions of this chapter. (Rev., s. 3015; 1903, c. 271, s. 4.)

§ 3975. Transfer of trademarks.—The right to use any registered label, trademark, term or design shall be granted only by an instrument in writing, duly filed in the office of the secretary of state. The fees for recording or filing such transfer and issuing copies thereof shall be the same as for filing such label, trademark, term or design. (Rev., s. 3016.)

§ 3976. Similar trademarks refused registration.—It shall not be lawful for the secretary of state to register for any person any label, trademark, term or design that is in the identical form of any other label, trademark, term or design theretofore filed by any other person, or that bears any such near resemblance thereto as may be calculated to deceive, or that would be liable to be mistaken therefor. (Rev., s. 3017; 1903, c. 271, s. 5.)

§ 3977. Fraudulent registration; penalty.—Any person who shall file or procure the filing and registry of any label, trademark, term or design in the office of the secretary of state under the provisions of this chapter, by making any false

or fraudulent representations or declarations, with fraudulent intent, shall be liable to pay any damages sustained in consequence of any such registry, to be recoverd by or in behalf of the party injured thereby. (Rev., s. 3018; 1903, c. 271, s. 5.)

§ 3978. Use of counterfeit trademarks unlawful.—Whenever any person has adopted and filed for registry any label, trademark, term or design, as provided by law, and the same shall have been registered pursuant to law, it shall be unlawful for any other person to manufacture, use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term or design, or have in possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor to which or on which any counterfeit or imitation of any such label, trademark, term or design is attached, affixed, printed, stamped, impressed or displayed, or to sell or dispose of, or offer to sell or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, stamped, impressed or displayed. (Rev., s. 3019; 1903, c. 271, s. 6.)

If it appear that the trade-mark alleged to be imitated, though resembling the complainant's in some respect, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. Blackwell v. Wright, 73 N. C. 310, 313.

§ 3979. Unauthorized use unlawful; use under license.—Whenever any person has adopted and registered any label, trademark, term or design, as provided by law, it shall be unlawful for any other person to make any use, sale, offer for sale or display of the genuine label, trademark, term or design of any such person filing the same, or to have any such genuine label, trademark, term or design in possession with intent that the same shall be used, sold, offered for sale, or displayed, or that the same shall be applied, attached or displayed in any manner whatever to or on any goods, wares or merchandise, or to sell, offer to sell, or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares or merchandise in any box, case, can or package to or on which any such genuine label, trademark, term or design of any such person is attached, affixed, or displayed, or to make any use whatever of any such genuine label, trademark, term or design, without first obtaining in every such case the license of the person adopting, filing and registering the same; and any such license may be revoked and terminated at any time upon notice, and thereafter any use thereof shall be unlawful. (Rev., s. 3020; 1903, c. 271, s. 7.)

Before the owner of a trade-mark can call upon the courts for relief, he must show not only that he has a clear legal right to the trade-mark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was calculated to deceive. Blackwell v. Wright, 73 N. C. 310, 313.

§ 3980. Remedies; damages; profits; destruction of counterfeits.—Any person who has registered any label, trademark, term or design under the provisions of this chapter shall have a right of action against any person for the unauthorized use of such label, trademark, term or design, and the courts shall by appropriate remedies prevent the unauthorized or unlawful use, manufacture or display of any label, trademark, term or design, or the imitation or counterfeit thereof, or the sale, disposal or display of any articles of property on which any counterfeit or imitation of any registered label, trademark, term or design, or on which any genuine label, trademark, term or design may be used or displayed without proper authority; and shall further secure and protect all persons in all rights of property and interest which they may have in any label trademark, term or design registered under this chapter; and the court shall award to the plaintiff any and all damages resulting from any such wrongful use of any such label, trademark, term or design; and any counterfeit or imitation of any labels, trademarks, terms or designs, and any die, engraving, mould or mechanical device or the manufacture of the same in the possession or under the control of the defendant, shall be delivered up to an officer of the court, to be destroyed, and any such genuine labels, trademarks, terms or designs in the possession or under the control of any such defendant shall be delivered to the plaintiff. (Rev., s. 3021; 1903, c. 271, s. 8.)

§ 3981. Concurrent action for penalty.—In addition to any other rights, remedies or penalties provided by this chapter, and as concurrent therewith, any person who shall violate any of the provisions of this chapter shall be liable to a penalty of two hundred dollars, to be recovered by any person who has filed any such label, trademark, term or design. (Rev., s. 3022; 1903, c. 271, s. 9.)

§ 3982. Use of private marks or labels to defraud, misdemeanor.—If any person shall knowingly and willfully forge or counterfeit, or cause or procure to be forged or counterfeited, the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person, being a resident of the United States, with intent to deceive and defraud the purchasers, mechanics, or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof he shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court. (Rev., s. 3852; Code, s. 1038; 1870-1, c. 253, s. 1.)

§ 3983. Selling goods with forged marks or labels, misdemeanor.—If any person shall vend any goods, wares or merchandise having thereon any forged or counterfeit marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, he shall be guilty of a misdemeanor, and punished by imprisonment in the

county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court (Rev., s. 3850; Code, s. 1039; 1870-1, c. 253, s. 2.)

§ 3984. Misbranding sacks to defraud, misdemeanor.—If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny. (Rev., s. 3851; Code, s. 1040; 1874-5, c. 225.)

Art. 2. Timber Marks

§ 3985. Timber dealers may adopt.—Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this article provided. (Rev., s. 3023; 1903, c. 261, s. 1.)

§ 3986. How adopted, registered and published. — Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.), business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

Dated this .....day of ....., 19.....

A..... B.....

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of secretary of state, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county. (Rev., s. 3024; 1889, c. 142; 1903, c. 261, s. 2.)

§ 3987. Property in and use of trademarks.—Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed. (Rev., s. 3025; 1889, c. 142; 1903, c. 261, ss. 3, 4.)

§ 3988. Effect of branding timber purchased.—When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. (Rev., s. 3026; 1889, c. 142; 1903, c. 261, s. 6.)

§ 3989. Trademark on timber evidence of ownership.—In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary. (Rev., s. 3027; 1903, c. 261, s. 7.)

§ 3990. Fraudulent use of timber trademark, misdemeanor. — If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor. (Rev., s. 3854; 1903, c. 261, ss. 3-5.)

§ 3991. Larceny of branded timber. — If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise empressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny. (Rev., s. 3853; 1903, c. 261, s. 5.)

§ 3992. Altering timber trademark larceny.—If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a mindemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both; if the same shall have been done with a felonious intent, such person shall be guilty of larceny and punished as for that offense. (Rev., s. 3855; 1889, c. 142, s. 3; 1903, c. 41.)

§ 3993. Possession of branded logs without consent, misdemeanor. — If any person shall knowingly and willfully take up or have in his possession any logs, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (Rev., s. 3856; 1889, c. 142, s. 4; 1903, c. 42.)

Art. 3. Mineral Waters and Beverages

§ 3994. Description of name, labels, or marks filed and published.—Any person, partnership or corporation engaged in manufacturing, bottling, selling or dealing in mineral, soda or aerated waters, beers, large-beer, milk or other beverages, in kegs, boxes, trays, crates, bottles, syphons, barrels, casks, or other vessels, with his name or other marks or devices printed, impressed, or otherwise produced thereon, or upon labels pasted thereon, shall file with the clerk of the superior court of the county in which his principal office or place of business (or in case of a foreign corporation, its principal office or place of business or agency) is located, a description of the names, marks, or devices so used by him, and cause such description to be printed twice a week for two successive weeks in some daily newspaper published in said county, if there be a daily newspaper published therein, and if not, then in some newspaper published in said county once a week for two successive weeks. The description of the names, marks or devices, before being filed as aforesaid, shall be signed by the person filing the same, or in case of a partnership, by a partner, or in case of a corporation, by one of its officers or managers, and shall be acknowledged by the person signing the same as his act, or as the act of said partnership or corporation, before an officer competent to take acknowledgment of deeds. The publication hereby required need only be a brief description, sufficient for identification, of such names or marks, and need not contain a certified copy of the acknowledgment. The provisions of this article shall apply to all vessels enumerated above upon which said names or marks shall appear as aforesaid, whether or not any of the same shall be in existence at the time of said filing and publication. (1907, c. 901, s. 1.)

§ 3995. Clerk to record description. — The several clerks of the superior courts mentioned in the preceding section shall record in some book of record in their custody all such descriptions filed with them, and also copies of the said advertisement in the newspaper, certified to by the publishers thereof, and shall furnish copies thereof, duly certified by them in the usual manner, to any person who may apply therefor, and shall receive for the recording of such copies a fee of fifty cents. Such certified copies shall be evidence that the provisions of the preceding section have been complied with, and shall be prima facie evidence of the title of the person, named therein, to the vessels upon which his name, marks, labels or devices appear as described in said description. (1907, c. 901, s. 2.)

§ 3996. Refilling vessels and defacing marks forbidden; punishment.—After any person has filed and published his description of such names, marks or devices, in accordance with the preceding provisions of this article, it shall be unlawful for any person to fill in any way the vessels upon which such names or other marks are printed, impressed or otherwise produced, with any water or beverage enumerated in this article, or to deface, remove or conceal such names or other marks, thereon, with intent to convert the same to his use or to have on sale, offer for sale, traffic in, handle in the course of business, transport, or to take or collect from ash or garbage receptacles or from public or private premises, or to keep in stock, store or dispose of or deal or traffic in same, or any parts thereof, without the written consent of the person whose name or other marks are upon such vessels, or to willfully break, destroy or otherwise injure any of the articles mentioned in this section. Any person who shall do any of the acts declared to be unlawful by this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for the first offense by imprisonment of not less than ten days or more than one year, or by a fine of three dollars for each of such kegs, casks or barrels, and one dollar for each of such boxes, trays, crates, bottles, syphons, or any other vessels so unlawfully used; and for the second and subsequent offense by imprisonment for not less than twenty days or more than one year, or by a fine of not less than two dollars or more than five dollars for each vessel unlawfully used, or by both such fine and imprisonment, at the discretion of the court before whom such offense is tried: Provided, this section shall not apply to such vessels as the bottler charges his customers for at the time of sale of the goods. (1907, c. 901, s. 3.)

§ 3997. Disposal of fine. — In the event of a fine being imposed by any court for any offenses under this article, one-half thereof shall go to the state and one-half to the informer, to be collected as other fines are collected. (1907, c. 901, s. 3.)

§ 3998. Possession of vessels as evidence of offense.—If any person shall be found to be in possession of any of the vessels mentioned above in this article, or any parts thereof, and the persons whose names, marks or devices have been placed thereon, as above provided, have complied with the provisions of this article, and the persons so found in possession thereof shall be charged with any of the offenses mentioned in the preceding section, then such possession shall be prima facie evidence that such person is guilty of the offenses so charged: Provided, this section shall not apply to bottlers who receive such vessels in the course of business and mixed and exchanged in shipment, when such bottler within a reasonable time notifies the owners thereof of the location thereof. (1907, c. 901, s. 4.)

§ 3999. Search warrants.—If the owner of any vessel mentioned in section 3994 of this article who has complied with the provisions thereof, or the officer, agent or employee of such owner, shall make an affidavit before a justice of the peace asserting that he has reason to believe and does believe that any person is in actual or constructive possession of, or is making use of, any article above mentioned or any part thereof, or in any way declared to be unlawful by section 3996 of this article, the justice may issue his search warrant to any sheriff, constable or other officer of the law to whom such warrant may be directed, and cause the premises designated in the warrant to be searched; and if article above mentioned or any part thereof shall be found upon the premises so designated, the officer ex-

ecuting such search warrant shall thereupon report the same, under his oath, to the justice, who shall thereupon, upon said report and upon the oath of any person or persons charging any violations of section 3996 of this article, issue his warrant for the arrest of the person against whom the charge is made, and cause him, together with such articles, to be brought before him for trial. (1907, c. 901, s. 5.)

§ 4000. Concurrent jurisdiction of justices.—The justices of the peace in the counties of this state shall have concurrent jurisdiction with the superior courts of their respective counties in the case of persons arrested for violation of the above provisions of this article, and such justices of the peace shall proceed to hear and determine such cases when the parties arrested are brought before them, in all cases where the punishment fixed in this article is such as to give the justices jurisdiction under the constitution and laws of this state. And if such person shall be found to be guilty of the violation of any of the provisions of this article, the court trying such person and imposing the punishment herein prescribed shall also award possession to the owner of all the property involved in such violation. (1907, c. 901, s. 6.)

§ 4001. Accepting deposit not deemed sale.—The requiring, taking or accepting of any deposit for any purpose upon any vessel above enumerated shall not be deemed to constitute a sale of such property, either optional, conditional or otherwise, in any proceedings under this article. (1907, c. 901, s. 7.)

§ 4002. When refiling description not required.—Any person, partnership, or corporation that has heretofore filed and published a description of his name, marks or devices for the purposes mentioned in section one of this article, in accordance with the law existing at the time of such filing and publication, shall not be required to again file such description, but shall be entitled to all the benefits of this article as fully as if he had complied with all the provisions thereof. (1907, c. 901, s. 8.)

§ 4003. Application of the article.—The provisions of this article do not apply to any person using the vessels enumerated above for the beverages placed therein by the owners, or who after consumption of the contents is in possession of the same, while awaiting the return to the owners, nor shall the provisions of this article apply to any garbage man collecting the same in the regular course of his business: Provided, this article shall not apply to beer and mineral water bottles shipped into this state from other states. (1907, c. 901, s. 9.)

Art. 4. Farm Names

§ 4004. Registration of farm names authorized.—Any owner of a farm in the state of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner a proper certificate setting forth the name and description of the lands. (1915, c. 108, s. 1.)

§ 4005. After registry, similar name not registered.—When any name has been recorded as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county. (1915, c. 108, s. 1.)

§ 4006. Distinctive name required.—No name shall be registered as the name of a farm where such proposed name or one so nearly like it as to produce confusion has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. (1915, c. 108, s. 2.)

§ 4007. Application for registry; publication and hearing.—Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least ten days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the name to any party, with the right to appeal by the aggrieved party to the superior court within ten days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party. (1915, c. 108, s. 2.)

§ 4008. Fees for registration.—Any person having the name of his farm recorded as provided in this article shall first pay to the register of deeds a fee of one dollar, which fee shall be paid to the county treasurer as other fees are to be paid to the county treasurer by such register of deeds: Provided, that in counties where the fee system obtains, the fees herein mentioned shall go to the register of deeds of such counties. (1915, c. 108, s. 3.)

§ 4009. When transfer of farm carries name.—When any owner of a farm, the name of which has been recorded as provided in this article, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then, in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed or conveyance. (1915, c. 108, s. 4.)

§ 4010. Cancellation of registry; fee.—When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name

the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person cancelling such name, and attested by the register of deeds. For such latter service the register of deeds shall charge a fee of twenty-five cents, which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. (1915, c. 108, s. 5.)

§ 4011. Article not applicable to certain counties.—This article shall not apply to the counties of Surry, Stokes, and Sampson. (1915, c. 108, s. 6.)

Art. 5. Stamping of Gold and Silver Articles

§ 4012. Marking gold articles regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy or gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flat-ware and watch-cases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watch-cases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 1.)

§ 4013. Marking silver articles regulated.—It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of—

1. Any article of merchandise made in whole or in part of silver or any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

2. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "coin" or "coin silver," or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

3. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word "sterling" or the word "coin") indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 2.)

§ 4014. Marking articles of gold plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold, or of any alloy of gold, which article is known in the market as "rolled gold plate," "gold plate," "gold-filled," or "gold electroplate," or by similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any word or mark usually employed to indicate

the fineness of gold, unless such word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold-filled, as the case may be. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 3.)

§ 4015. Marking articles of silver plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word "sterling" or the word "coin," either alone or in conjunction with any other words or marks. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 4.)

§ 4016. Violation of article misdemeanor.—Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this article, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, at the discretion of the court: Provided, that if the person charged with violation of this article shall prove that the article concerning which the charge was made was manufactured prior to the thirteenth day of June, one thousand nine hundred and seven, then the charge shall be dismissed. (1907, c. 331, s. 5.)

Art. 6. Cattle Brands

§ 4017. Owners of stock to register brand or marks.—Every person who has any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses eighteen months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle twelve months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof. (Rev., s. 3028; Code, s. 2317; R. C., c. 17, s. 1.)

§ 4017(1). "Stock growers" and "live stock" defined.—Every person, firm, association or corporation, who owns, raises, buys or sells cattle in this State, is deemed a stock grower, and all cattle are deemed live stock, within the meaning of this law. (1935, c. 233, s. 1.)

§ 4017(2). Stock growers limited to single mark or brand; registration not required; law compulsory upon registration.—Every stock grower in this State must use one, and only one, mark or brand for said stock grower's cattle, which mark or brand shall be placed in some conspicuous place on said cattle, which place must be designated in the application for the recording of said mark or brand hereinafter provided for in this law: Provided, however, nothing in this section nor in any subsequent section of this law shall be construed to be compulsory upon any stock grower in this State to apply for or register his mark or brand of cattle; but when a stock grower does so, then this law and all provisions thereof shall be binding and compulsory upon said stock grower. (1935, c. 232, s. 2.)

§ 4017(3). Commissioner of agriculture named recorder.—The commissioner of agriculture of the State of North Carolina is hereby declared to be the state recorder of marks and brands of cattle growers in this State. (1935, c. 232, s. 3.)

§ 4017(4). Recording with commissioner.—All brands or marks shall be recorded with the state recorder. (1935, c. 232, s. 4.)

§ 4017(5). Application; effect of recording; fee; no duplication allowed.—Any stock grower in the State of North Carolina, who desires to avail himself of the provisions of this law, shall make and sign an application, furnished by the state recorder, setting forth a facsimile and description of the brand or mark which said stock grower desires to use, and shall file the same with the state recorder, who shall record the same in a book kept by him for that purpose, and from and after the filing of the same, the stock grower filing the same shall have exclusive right to use said brand or mark within the State; and shall pay the state recorder a fee of one dollar; Provided, that the state recorder shall not file or record such mark or brand if the same has been heretofore recorded by him in favor of some other grower. (1935, c. 232, s. 5.)

§ 4017(6). Certified copy of mark or brand; registration; fees and disposition thereof.—Upon the recording of any such brand or mark with the state recorder, as herein provided, the owner thereof may procure from the state recorder a certified copy thereof, paying therefor the sum of fifty cents, and may cause the same to be recorded in the office of the register of deeds in the county where said stock grower resides, and shall pay said register of deeds a fee of fifty cents for recording same. It shall be unlawful for any register of deeds to record any such mark or brand, unless the same is certified to him by the state recorder. Application blanks and a book for recording said marks and brands shall be furnished each register of deeds of the county applying for same, and shall be paid for by the state recorder, if he has sufficient funds derived from the recording fees, and if not, then by the county so applying for same. All fees received by the state recorder shall be used in the administration of this law, and any surplus paid into the general fund of the agriculture department. In order to put the provisions of this law in force the commissioner of agriculture is hereby authorized to use any fund in his

department not otherwise appropriated. (1935, c. 232, s. 6.)

§ 4017(7). Certified copy prima facie evidence of ownership.—In all civil or criminal suits in any court in this State a duly certified copy, under the seal of the department of agriculture, of any brand or mark, duly recorded under the provisions of this law, shall be prima facie evidence of the ownership of the animal of said cattle grower. (1935, c. 232, s. 7.)

§ 4017(8). Records to be kept by those engaged in slaughtering.—Any person, firm or corporation engaged in the business of slaughtering cattle shall keep at its place of business a book in which must be kept the name or names of the persons from whom any marked or branded cattle are purchased and the date of purchase and his address, and the mark or brand of such cattle. Said book must be kept ready at all times for the inspection of any person who desires to examine the same. (1935, c. 232, s. 8.)

§ 4017(9). Purchaser of branded cattle to keep record of purchases.—Any person purchasing any marked or branded cattle, the mark or brand of which has been duly recorded under the provisions of this law, shall keep the name and address of the person from whom said cattle are purchased, a description of the mark or brand and the date of the purchase, and exhibit same to any person desiring to examine same. (1935, c. 232, s. 9.)

§ 4017(10). Defacing marks or brands made misdemeanor.—No stock grower or other person in this State must change, conceal, deface, disfigure or obliterate any brand or mark previously branded, impressed or marked on any head of cattle, or put his or any other brand or mark upon or over any part of any brand or mark previously branded or marked upon any head of cattle, and no person shall make or use any counterfeit of any mark or brand of any other person. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. (1935, c. 232, s. 10.)

§ 4017(11). Violation of law made misdemeanor.—Any person violating any of the provisions of this law shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1935, c. 232, s. 11.)

CHAPTER 78
TRUSTEES

Art. 1. Investment and Deposit of Trust Funds

§ 4018. Certain investments deemed cash.—Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by Federal land banks, or in bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, such bonds or other securities of the United States, and such bonds of the state of North Carolina, and such drainage bonds, and state road bonds, issued under sections 3600 to 3607 of chapter Roads and Highways, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled. (Rev., s. 1792; Code, s. 1594; 1870-1, c. 197; 1885, c. 389; 1917, c. 6, s. 9; 1917, c. 67, s. 1; 1917, c. 152, s. 7; 1917, c. 191, s. 1; 1917, c. 269, s. 5.)

Cross References. — For provisions authorizing banks to invest in federal farm bonds, see § 225. For further provisions as to investment by guardians and interest thereon, see section 2308; as to the general duty of guardians to invest his wards money, see 6 N. C. Enc. Dig. 930; as to the general duty of trustee to invest cestuis' funds, see 12 N. C. Enc. Dig. 87, 15 N. C. Enc. Dig. 682.

As to authority of guardians and other fiduciaries to buy real estate foreclosed under mortgages executed to them, see section 2174(1). As to investment in bonds guaranteed by United States, see section 220(a) 1. As to loans on mortgages, etc., issued under federal housing act, see section 220(a) 2.

§ 4018(a). Investment of trust funds in county bonds.—Guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, are authorized to invest funds in their hands as such fiduciaries in bonds issued by any county, city, town or school district of the state of North Carolina subsequent to January first, one thousand nine hundred and fifteen, provided that the net debt of such county, city, town or school district does not exceed ten (10%) per cent of the assessed valuation of the property therein subject to taxation for the payment of such bonds, in the same manner, to the same extent and with the same legal consequence as fiduciaries are now authorized to invest such funds in bonds of the state of North Carolina under the provisions of section four thousand and eighteen. (Ex. Sess. 1921, c. 63; 1931, c. 257.)

Editor's Note.—The Act of 1931 made this section applicable to city, town and school district bonds.

§ 4018(b). Investment in building and loan associations.—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this state: Provided, that no such funds may be so invested unless and until authorized by the insurance commissioner. (1933, c. 549, s. 1.)

§ 4018(c). Investment in registered securities.—Any guardian having in hand surplus funds belonging to a minor ward may, if he so elects, invest the same in registered securities within the classes designated by sections 4018 and 4018(a), the registration of said securities as to principal only to be in the name of said minor ward.

Upon delivery of such registered securities to the clerk of the superior court of the county in which the estate of said minor ward is being administered, said clerk of the superior court shall give said guardian a receipt for the same and said clerk of the superior court shall thereafter hold said scurities for said ward, subject only to final

disposition thereof to be approved by the resident judge or presiding judge of the suprior court, Provided, however, all income accruing therefrom shall be paid to said guardian in the same manner and for the same purposes as any other income of said estate derived from other sources.

Whenever any guardian shall have delivered to the clerk of the superior court registered securities as hereinbefore provided, he shall be entitled to credit in his account as guardian for the amount actually expended for such securities, and his bond as such guardian shall thereupon be reduced in an amount equal to twice the amount of the funds actually invested in said securities. Provided this section does not repeal any local or private acts affecting Craven county. (1935, c. 449.)

§ 4019. Trust funds deposited at trustee's risk.— No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds. (Rev., s. 1793; 1889, c. 470.)

Art. 2. Removal of Trust Funds from State

§ 4020. Proceeding to remove trust funds of nonresidents.—When any personal estate in this state is vested in a trustee resident therein, and those having the beneficial interest in the said estate are nonresidents of this state, the clerk of the superior court of the county in which the said trustee resides may, on a petition filed for that purpose, order him or his personal representative to pay, transfer, and deliver the said estate, or any part of it, to a nonresident trustee appointed by some court of record in the state in which the said beneficiary or beneficiaries reside. No such order of any clerk shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district. (1911, c. 161, s. 1.)

Cited in Fidelity Trust Co. v. Walton, 198 N. C. 790, 793, 153 S. E. 401.

§ 4021. Removal ordered on notice; bond of nonresident trustee. — No such order shall be made, in the case of a petition, until notice of the application shall have been given to all persons interested in such trust estate, as now required by law in other special proceedings, nor until the court shall be satisfied by authentic documentary evidence that the nonresident trustee, appointed as aforesaid, has given bond, with sufficient surety, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the state will not prejudice the right of any person interested or to become interested therein. (1911, c. 161, s. 2.)

§ 4022. Order of removal discharges resident trustee. — When any guardian or committee trustee or other person in this state, shall pay over, transfer, or deliver any estate in his hands or vested in him, under any order or decree made in pursuance of this article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3.)

Art. 3. Resignation of Trustee

§ 4023. Clerk's power to accept resignations.— The clerks of the superior courts of this state have power and jurisdiction to accept the resignation of executors, administrators, guardians, trustees, and other fiduciaries and to appoint their successors in the manner provided by this article. (1911, c. 39, s. 1.)

Appointment by Clerk.—Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or the one designated fails or refuses to act, or one may be appinted under the provisions of this section. Ladies Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493.

Section Not Extended to Give Jurisdiction. — The equitable jurisdiction of the Superior Courts does not extend to the clerks of court unless expressly given by statute, and this and following sections giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes. In re Smith, 200 N. C. 272, 156 S. E. 494.

§ 4024. Petition; contents and vertification.— When any executor, administrator, guardian, trustee, or other fiduciary desires to resign his trust, he shall file his petition in the office of the clerk of the superior court of the county in which he qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualification of the applicant as such fiduciary, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the cestuis que trustent and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the fiduciary and due the estate, together with a full statement of the reasons why the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant. (1911, c. 39, s. 2.)

§ 4025. Parties; hearing; successor appointed. —Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the fiduciary as plaintiff and the cestuis que trustent as defendants, and shall issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The cestuis que trustent, creditors, or any other person interested in the trust estate, have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the cestuis que trustent demand that the resignation of the fiduciary be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the cestuis que trustent, the

clerk may, in the exercise of his discretion, allow the applicant to resign; and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this article. (1911, c. 39, s. 3.)

§ 4026. Resignation allowed; costs; judge's approval.—In making an order allowing the fiduciary to resign the clerk shall make such order concerning the costs of the proceedings and commissions to the fiduciary as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same become effective. (1911, c. 39, s. 3.)

§ 4027. Appeal; stay effected by appeal. — Any party interested may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4.)

§ 4028. On appeal judge determines facts.—Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the supreme court. (1911, c. 39, s. 5.)

§ 4029. Final accounting before resignation.—No executor, administrator, guardian, trustee, or other fiduciary shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6.)

§ 4030. Resignation effective on settlement with successor.—In case the resignation of the fiduciary is accepted by the court, the same shall not go into effect, or release or discharge the fiduciary from liability, until he shall have accounted to his successor in full for all moneys, securities, property or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate. (1911, c. 39, s. 6.)

§ 4031. Court to appoint successor; bond required. — If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the person entitled to receive the same of all moneys, assets, or other things of value which may come into his hands. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose. (1911, c. 39, s. 7.)

§ 4032. Rights and duties devolve on successor.—Upon the acceptance by the court of the resignation of any executor, administrator, guardian, trustee, or other fiduciary, and upon the appointment by court of his successor in the manner provided by this article, the substituted trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee. (1911, c. 39, s. 8.)

Art. 4. Charitable Trusts

§ 4033. Trustees to file accounts.—When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts. (Rev., s. 3922; Code, s. 2342; R. C., c. 18, s. 1; 1832, c. 14, s. 1; 43 Eliz., c. 4.)

References.—For a full treatment of the general nature and validity of charitable trusts, see 3 N. C. Enc. Dig. 8; 13 N. C. Enc. Dig. 369.

Trust Estate Is Not Forfeited.—The trustees of a charitable trust who violate the provisions of the trust are subject to the procedure prescribed by this section, and where the trust is created by will the trust estate is not forfeited in favor of a residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547.

§ 4034. Action for account; court to enforce trust.—If the preceding section be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court to give notice thereof to the attorney-general or solicitor who represents the state in the superior court for that county; and it shall be his duty to bring an action in the name of the state against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The attorney-general or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust. (Rev., s. 3923; Code, ss. 2343, 2344; R. C., c. 18, ss. 2, 3; 1832, c. 14, ss. 2, 3.)

§ 4035. Fees allowed solicitor. — The court may allow fees to the attorney-general or solicitor for his services, to be paid by the trustees, the estate, or the county, as shall be ordered by the court. (Rev., s. 3924; Code, s. 2345; R. C., c. 18, s. 4; 1832, c. 14, s. 4.)

§ 4035(a). Indefiniteness; title in trustee; vacancies.—No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the object or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the Superior Court of the proper county shall appoint a trustee or trustees, pursuant to section four thousand and twenty-three, of the Consolidated Statutes of North Carolina, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1.)

Trusts Held Valid.—A devise to "the authorities in control of the Deaf, Dumb and Blind Asylum of the State of North Carolina for the use and benefit of the indigent children therein, born blind, of the Caucasian race," constitutes a valid charitable trust. Hass v. Hass, 195 N. C. 734, 143 S. E. 541.

A devise of all the income and profits of lands in trust for a charitable organization of a certain church "to be used by the stewards of the church in defraying the expenses of the institution" is a sufficient designation of the stewards of that church as trustees for the execution of the trust contemplated by the instrument, and to vest in them the title and right of possession for its purposes. Ladies Benevolent Society v. Orrel, 195 N. C. 405, 142 S. E. 493.

Details of Administration May Be Left to Trustee.—A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details of its administration to duly appointed trustees. Whitsett v. Clapp, 200 N. C. 647, 158 S. E. 183.

§ 4035(b). Trusts created in other states valid.—Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2.)

§ 4035(c). Application of section 4035(b).—Section 4035(b) shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3.)

CHAPTER 79

WAREHOUSE RECEIPTS

Art. 1. General Provisions

§ 4036. Name of act.—This act may be cited as the Uniform Warehouse Receipts act.

§ 4037. Terms defined.—In this act, unless the context or subject-matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership of two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not. (1917, c. 37, s. 58.)

What Constitutes Warehousemen. — It matters not if a concern is a person or partnership. If the concern is engaged in the business and goods are stored for profit, this section applies. It matters not if the concern stores its own and also the goods of others. The receipt issued by the concern under consideration terms itself "warehouse receipt" and shows on the face that the goods are stored for profit; it gives the "storage rates." Webb & Co. v. Friedberg, 189 N. C. 166, 126 S. E. 508.

§ 4038. Uniform construction. — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1917, c. 37, s. 57.)

§ 4039. General law applied.—In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1917, c. 37, s. 56.)

§ 4040. Prior receipts not affected. — The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act, March 1, 1917. (1917, c. 37, s. 59.)

Art. 2. Issue of Warehouse Receipts

§ 4041. Who may issue receipts. — Warehouse receipts may be issued by any warehouseman. (1917, c. 37, s. 1.)

§ 4042. What receipt must contain. — Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

1. The location of the warehouse where the goods are stored.
2. The date of issue of the receipt.
3. The consecutive number of the receipt.
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
5. The rate of storage charges.
6. A description of the goods or of the package containing them.
7. The signature of the warehouseman, which may be made by his authorized agent.
8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred, and the purpose thereof, is sufficient. A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required. (Rev., s. 3032; 1917, c. 37, s. 2.)

§ 4043. Other terms inserted; exceptions. — A warehouseman may insert in a receipt issued by him any other terms and conditions, provided that such terms and conditions shall not—

1. Be contrary to the provisions of this act.
2. In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. (1917, c. 37, s. 3.)

§ 4044. Nonnegotiable receipts.—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. (1917, c. 37, s. 4.)

§ 4045. Nonnegotiable receipts marked. — A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "nonnegotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. (Rev., s. 3032; 1917, c. 37, s. 7.)

§ 4046. Negotiable receipts. — A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provisions shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void. (Rev., s. 3032; 1917, c. 37, s. 5.)

§ 4047. Duplicate negotiable receipts.—When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. (1917, c. 37, s. 6.)

Art. 3. Obligations and Rights of Warehousemen on Receipts

§ 4048. Delivery of goods on proper demand.— A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

1. An offer to satisfy the warehouseman's lien;
2. An offer to surrender the receipt if negotiable, with such indorsement as would be necessary for the negotiation of the receipt; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. (1917, c. 37, s. 8.)

§ 4049. To whom goods may be delivered.—A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

1. The person lawfully entitled to the possession of the goods, or his agent;
2. A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods or who has written authority from the person so entitled, either indorsed upon the receipt or written upon another paper; or
3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. (1917, c. 37, s. 9.)

§ 4050. Liability for wrong delivery.—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession

of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (2) and (3) of the preceding section, and though he delivered the goods as authorized by said subdivisions, he shall be so liable if prior to such delivery he had either—

1. Been requested, by or one behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. (1917, c. 37, s. 10.)

§ 4051. Liability on receipt not taken up on delivery.—Except as hereafter provided in this article, when the goods may have been sold to satisfy warehouseman's charges or because of their perishable or hazardous nature, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable, to any one who purchases for value and in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. (1917, c. 37, s. 11.)

§ 4052. Liability on receipt for partial delivery.—Except when goods may have been sold to satisfy warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, where a warehouseman delivers a part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel the receipt or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. (1917, c. 37, s. 12.)

§ 4053. Effect of alteration of receipt.—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

1. Immaterial,

2. Authorized, or

3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. (1917, c. 37, s. 13.)

§ 4054. Delivery in case of lost receipt.—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties, to be approved by the court, to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also, in its discretion, order the payment of the warehouseman's reasonable costs. The delivery of the goods under an order of the court as provided in this section shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. (1917, c. 37, s. 14.)

§ 4055. Effect of issuing duplicate receipt.—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. (1917, c. 37, s. 15.)

§ 4056. Claim of title no defense for nondelivery; exceptions.—No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 16.)

§ 4057. Interpleader in conflicting claims.—If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate, require all known claimants to interplead. (1917, c. 37, s. 17.)

§ 4058. Reasonable time to investigate conflicting claims.—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1917, c. 37, s. 18.)

§ 4059. Title in third person no defense; exceptions.—Except as provided in the two preceding sections and except when the goods may have been delivered to the person authorized to have such delivery, as heretofore provided in this

article, or when the goods may have been sold to satisfy the warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 19.)

§ 4060. Failure to deliver goods as described.—A warehouseman shall be liable to the holder of a receipt issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (1917, c. 37, s. 20; 1931, c. 358, s. 1.)

Editor's Note.—The Act of 1931, inapplicable to pending litigation, added the words "issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts," beginning in the third line of this section.

§ 4061. Liability for negligence.—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise; but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. (1917, c. 37, s. 21.)

§ 4062. Goods kept separate.—Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. (1917, c. 37, s. 22.)

§ 4063. Effect of confusion of goods.—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. (Rev., s. 3034; 1917, c. 37, s. 23.)

§ 4064. Liability of warehouseman for confusion of goods.—The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been separate. (1917, c. 37, s. 24.)

§ 4065. Goods not subject to attachment or execution.—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. (1917, c. 37, s. 25.)

Order Constituting Injunction.—In view of § 848, an order of the judge operating to prevent the holder of warehouse certificates from disposing of them except under order of the court, is a sufficient compliance with this section constituting it an injunction. Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842, 845.

§ 4066. Creditor's remedy against receipt.—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1917, c. 37, s. 26.)

§ 4067. Warehouseman's lien.—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. (1917, c. 37, s. 27.)

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674; Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 4068. Against what goods lien enforced.—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman's lien may be enforced—

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. (1917, c. 37, s. 28.)

§ 4069. Loss of lien.—A warehouseman loses his lien upon goods—

1. By surrendering possession thereof, or

2. By refusing to deliver the goods when a

demand is made with which he is bound to comply under the provisions of this act. (1917, c. 37, s. 29.)

§ 4070. What liens enforced against negotiable receipts. — If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerate other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms for a warehouseman's lien as heretofore provided in this article, although the amount of the charges so enumerated is not stated in the receipt. (1917, c. 37, s. 30.)

§ 4071. Right to retain until liens satisfied.—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. (1917, c. 37, s. 31.)

§ 4072. Other legal remedies for warehouseman.—Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. (1917, c. 37, s. 32.)

§ 4073. Enforcement of liens.—A warehouseman's lien for a claim which has become due may be satisfied as follows:

1. Notice given. The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

a. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

b. A brief description of the goods against which the lien exists;

c. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and

d. A statement that unless the claims are paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

2. Sale of goods. In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

3. Right of claimant to pay charges. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise, the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. (Rev., ss. 3036, 3037, 3038; 1917, c. 37, s. 33.)

§ 4074. Sale of perishable goods.—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse; and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. (Rev., ss. 3039, 3040; 1917, c. 37, s. 34.)

§ 4075. Other remedies not excluded. — The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. (Rev., s. 3041; 117, c. 37, s. 35.)

Cited in Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 4076. Liability discharged by sale for liens.—After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt for the goods when they were deposited, even if such receipt be negotiable. (1917, c. 37, s. 36.)

Art. 4. Negotiation and Transfer of Receipts

§ 4077. Negotiation by delivery.—A negotiable receipt may be negotiated by delivery—

1. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the bearer; or

2. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where by the terms of a negotiable receipt the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. (1917, c. 37, s. 37.)

Cited in Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 4078. Negotiation by indorsement.—A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are by the terms of the receipt deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner. (1917, c. 37, s. 38.)

§ 4079. Transfer of nonnegotiable receipts.—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. (1917, c. 37, s. 39.)

§ 4080. Who may negotiate a receipt.—A negotiable receipt may be negotiated by any person in possession of the same however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery. (1917, c. 37, s. 40; 1931, c. 358, s. 2.)

Editor's Note.—The Act of 1931, inapplicable to pending litigation, struck out the former section and inserted the above in lieu thereof. This new law gives the warehouse receipt full negotiability, thus placing it on the same level with bills of lading under § 312. 9 N. C. Law Rev. 404.

§ 4081. Rights acquired by negotiation. — A person to whom a negotiable receipt has been duly negotiated acquired thereby—

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. (1917, c. 37, s. 41.)

§ 4082. Rights acquired by transfer.—A person to whom a receipt has been transferred but not negotiated acquires thereby, as against the transferrer, the title of the goods, subject to the terms of any agreement with the transferrer. If the receipt is nonnegotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferrer or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the warehouseman by the transferrer or a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer. (1917, c. 37, s. 42.)

§ 4083. Right to compel indorsement.—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. (1917, c. 37, s. 43.)

§ 4084. Warranties in negotation and transfer.—A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

1. That the receipt is genuine;

2. That he has a legal right to negotiate or transfer it;

3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and

4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a receipt the goods represented thereby. (1917, c. 37, s. 44.)

§ 4085. Indorser not liable for failure of prior parties.—The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. (1917, c. 37, s. 45.)

§ 4086. No warranty by collection of debt secured by receipt. — A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. (1917, c. 37, s. 46.)

§ 4087. Rights of bona fide holder not affected by fraud.—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, in good faith, without notice of the breach of duty, or loss, theft, fraud, accident, mistake, or duress or conversion. (1917, c. 37, s. 47; 1931, c. 358, s. 3.)

Editor's Note.—The Act of 1931, inapplicable to pending litigation, amended this section to conform to amended § 4080. See 9 N. C. Law Rev. 404.

Fraudulent Negotiation by Superintendent. — Warehouse receipts issued under § 4925(e), and upon being returned endorsed, negotiated by the superintendent of the warehouse as collateral for a loan to himself, in breach of his duty to cancel them, are directly within the force of this section. Lacy v. Globe Indemnity Co., 189 N. C. 24, 126 S. E. 316.

§ 4088. Subsequent purchasers protected. — Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. (1917, c. 37, s. 48.)

§ 4089. Right of purchaser superior to seller's lien.—Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. (1917, c. 37, s. 49.)

Art. 5. Criminal Offenses

§ 4090. Issuing receipt for goods not stored.—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. (1917, c. 37, s. 50.)

§ 4091. Issuing receipt with false statement.—A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 51.)

§ 4092. Issuing fraudulent duplicates.—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings for delivery as heretofore provided in this chapter, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. (1917, c. 37, s. 52.)

§ 4093. Failure to state in receipt the interest of warehouseman.—Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 53.)

§ 4094. Delivering goods without obtaining receipt. — A warehouseman, or any officer, agent, or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, except in the cases heretofore provided for in this chapter for the delivery of goods upon a lost receipt and for the sale of goods to satisfy the warehouseman's lien or because of their perishable or hazardous nature, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 54.)

§ 4095. Fraudulent deposit and negotiation. — Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his

want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 55.)

CHAPTER 80
WIDOWS

Art. 1. Dissent from Will

§ 4096. Time and manner of dissent. — Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant or insane, she may dissent by her guardian. (Rev., s. 3080; Code, s. 2108; 1868-9, c. 93, s. 37.)

Cross References.—For full treatment of widow's rights in her husband's property including many illustrative cases wherein she entered her dissent to his will, see "Dower," 4 N. C. Enc. Dig. 884 et seq.; 13 N. C. Enc. Dig. 780 et seq. See also 12 N. C. Enc. Dig. 674 et seq.; 15 N. C. Enc. Dig. 821. And see the note to § 4100. For effect of the widow's dissent, see section 4097 and note thereto.

See 11 N. C. Law Rev., 274, for suggested revision of this and subsequent sections.

Section a "Statute of Limitations."—This section is not a statute conferring a right of dower, but a statute of limitation upon that right, as it existed at common law. In other words its effect is to prescribe a limitation in respect to the time in which the widow may claim or reject the provisions of the will. Hinton v. Hinton, 61 N. C. 410, 412.

Purpose of Six Months' Period.—The object of giving the widow six months within which to make an election to take under the will or against it, under the law, is to enable the widow to fully learn the condition of the estate and the advantages to be derived under the provisions made for her, as compared with those occurring as in case of an intestacy, and thus to intelligently exercise her right to dissent. Yorkly v. Stinson, 97 N. C. 236, 240, 1 S. E. 452; Richardson v. Justice, 125 N. C. 409, 410, 412, 34 S. E. 441. And if the widow is acquainted with the condition of the estate and what is included therein, then her election once made is binding. Horton v. Lee, 99 N. C. 227, 5 S. E. 404.

Other Rights Not Impaired.—The right of the widow to dissent from her husband's will cannot be attended with the deprivation or impairment of other rights because of an unsuccessful opposition to the will. Under this principle the wife may, if the validity of the will is established, claim and accept any benefit given her by the will. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452.

Failure to Dissent within Time Allowed.—Where a widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance given her by section 4108, such action is not maintainable. Perkins v. Brinkley, 133 N. C. 86, 45 S. E. 465.

Same—Where the Estate Is Insolvent.—The failure of a widow to dissent from her husband's will within six months does not prevent her from claiming dower, or its equivalent in lands devised, when it appears that the estate is insolvent. Trust Co. v. Stone, 176 N. C. 270, 97 S. E. 8.

Dissent by Next Friend Where Widow an Infant.—Where the widow is a minor without a guardian, she may be represented by her next friend duly appointed, when dissenting from her deceased husband's will. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 99.

When Dissent Made in Person.—Where a widow, being a minor and having no guardian, dissented in person and in open court from her husband's will, her dissent is made erroneously; however if she is assigned her dower by a court of competent jurisdiction her right to it cannot be impeached in an action of ejectment. Cheshire v. McCoy, 52 N. C. 376.

Acts Constituting Election.—The widow will not be precluded from the exercise of the legal right herein provided for by an agreement, even under seal, which she may be induced by the executor to sign, in ignorance of the condition of the estate. Richardson v. Justice, 125 N. C. 409, 410, 34 S. E. 441.

The institution of proceedings by the widow to have her dower allotted in order to protect her estate from creditors was held not to amount to a renunciation of the will. Lee v. Giles, 161 N. C. 541, 77 S. E. 852.

Where the widow entered a caveat to a will and contested its validity, it was held that she was not prevented from accepting any benefit given her by the will, nor was she prevented from entering her dissent thereto within the proper time. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452. For other cases of acts amounting to an election thus preventing the widow from entering her dissent, see 12 N. C. Enc. Dig. 677 et seq.

Persons against Whom Election May Be Enforced.—See 12 N. C. Enc. Dig. 676.

Revocation of Election.—See 12 N. C. Enc. Dig. 679.

Where a widow is appointed executrix and proves the will and qualifies, she cannot afterwards renounce and dissent, but must carry out the will in all its provisions. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452.

Entry of Dissent.—The entry of a dissent to her husband's will by the widow, is an incident to the jurisdiction of the probate, and as this jurisdiction has been conferred upon the clerk of the superior court, the widow's dissent is to be made and entered in his office. Ramsour v. Ramsour, 63 N. C. 231.

Applicability of Doctrine of Estoppel.—Where a widow agrees to adhere to the provisions of a will, and in consequence thereof the executor proceeds to pay legacies and assume obligations which would cause loss to him if the widow were to dissent, she will be estopped by her agreement, and will not be allowed to dissent; but where in such case she offers to put the estate in **statu quo,** and the executor has not acted under her agreement so as to cause him any loss whatever, she is not estopped. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452.

Dissent as Bar to Property in Foreign State. — If the widow does not enter her dissent in one state and takes under the will in that state, she cannot then go to a foreign state and enter her dissent and claim her dower. In other words she will not be allowed to take under the will in one state and against it in another. Jones v. Gerock, 59 N. C. 190, 195, citing Mendenhall v. Mendenhall, 53 N. C. 287.

§ 4097. Effect of dissent.—Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate. (Rev., s. 3081; Code, s. 2109; R. C., c. 118, s. 12; 1868-9, c. 93, s. 38.)

Generally.—The "estate" referred to is dower; the "rights" referred to are the year's support and child's support as a distributee, both of which are legal rights, enforcible at law, and not cognizable in a court of equity except when equity may be invoked to enforce her legal rights. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

The words "as if he had died intestate" are not limited to the ordinary meaning of the husband dying without making a will, but include the case of his death without effectually disposing of his property. Corporation Commission v. Dunn, 174 N. C. 679, 685, 94 S. E. 481.

Method of Determining Widow's Share.—In ascertaining the distributive share of a widow who dissents from her husband's will, all his personal estate, whether consisting of advancements heretofore made to children, or legacies to grandchildren or to strangers, is to be brought together, and her share is to be taken out of it pursuant to the statute of distributions. Arrington v. Dorten, 77 N. C. 367.

Dissent Accelerates the Vesting of the Property.—Where property is devised to the widow during her life and then to a university and she dissents thereto, such property vests immediately in the university if the property is not given to the widow in her dower. Trustees v. Borden, 132 N. C. 476, 44 S. E. 47, 1007.

Right Subject to Inheritance Tax.—The dower right in lands of the husband taken by the dissenting widow is subject to the inheritance tax. Corporation Commission v. Dunn, 174 N. C. 679, 685, 94 S. E. 481.

Widow as Donee of Power.—Where the widow is the donee of a discretionary power, by dissenting from the will she renounces all gifts whether of estates or powers under it, at least of such powers as imply personal trust and confidence. Hinton v. Hinton, 68 N. C. 100, 104.

§ 4098. Widow's interest not liable for husband's debts.—The dower or right of dower of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quan-

tity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life. (Rev., s. 3082; Code, ss. 2104, 2105; R. C., c. 118, s. 8; 1868-9, c. 93, s. 34; 1791, c. 351, s. 4.)

Generally.—This section secures a provision out of the husband's land to the widow in two cases: (1) Where dower has been actually assigned, as in cases of intestacy, and dissent from the husband's will, and (2) where the husband devises lands to the wife, which are presumed to be in lieu of dower. Simonton v. Houston, 78 N. C. 408.

Exempt from Debts and Legacies.—Dower assigned to a widow who dissents from her husband's will is subject to neither debts nor legacies, Bray v. Lamb, 17 N. C. 372, 374, and where the personalty is insufficient to pay the debts the lands of the husband are sold subject to this right of dower. Curry v. Curry, 183 N. C. 83, 110 S. E. 579.

Lands Devised to Wife.—When, for the payment of a deceased husband's debts, it becomes necessary to resort to the lands devised by him to his wife, she is remitted to her right of dower, which, as in other cases, is not subject to those debts during her life. Ex parte Avery, 64 N. C. 113. But her right of dower is not protected against the debt due the vendor for the purchase money of the land. Kirby v. Dalton, 16 N. C. 195.

Where wife joins in mortgage of husband to exclude claim for inchoate dower therein, her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower. American Blower Co. v. Mackenzie, 197 N. C. 152, 147 S. E. 829.

Stated in Boyd v. Redd, 118 N. C. 680, 686, 24 S. E. 429; Shackelford v. Miller, 91 N C. 181, 187.

Art. 2. Dower

§ 4099. Who entitled to dower.—Widows shall be endowed as at common law as in this chapter defined: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the felonious slaying of her husband, or being accessory before the fact to the felonious slaying of her husband, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of dower. (Rev., s. 3083; Code, s. 2102; 1889, c. 499; 1868-9, c. 93, s. 32; 1871-2, c. 193, s. 44.)

Cross References.—See generally the subject bar, release or forfeiture, 4 N. C. Enc. Dig. 895; 13 N. C. Enc. Dig. 781. As to barment of the right to a year's support, see section 4108 and note thereto.

Definition.—Dower is the provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Bouvier's Law Dict., Vol. 1, p. 611.

Reconciliation May Prevent Forfeiture.—The forfeiture, by this section, takes effect, not when the wife shall commit adultery, but when she does so and "shall not be living with her husband at his death." In other words, the door stands open until the death of the husband for a reconciliation and return of the wife. Leonard v. Leonard, 107 N. C. 171, 172, 12 S. E. 60.

Single Act of Adultery Sufficient.—If the wife leaves her husband and once commits adultery with the adulter, even though she does not continually remain in adultery, it is a "continuing" within the meaning of the act. Walters v. Jordan, 35 N. C. 361.

This decision was reached when the section read "if she willingly leave her husband and go away and continue with her adulterer," a requirement no longer found within the provision of this section. While the precise point in this case does not appear to have recently come before the courts, the present wording of the section would seem to furnish all the more reason for the justification of the ruling that a single act of adultery, without a reconciliation with the husband, is sufficient to constitute a bar to the wife's claim for dower.—Ed. Note.

Wrongdoing of Husband No Defense.—The violation of the marriage vows by the husband will not justify the wife in violating her vows, and since the dower right is given for the benefit of the guiltless and not those standing **in pari delicto,** her adultery will bar the widow's right to dower. Phillips v. Wiseman, 131 N. C. 402, 42 S. E. 861.

Stated in Lee v. Thornton, 176 N. C. 208, 97 S. E. 23; Higdon v. Higdon, 206 N. C. 62, 64, 173 S. E. 273.

§ 4100. In what property widow entitled to dower.—Subject to the provision in the preceding section, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling-house in which her husband usually resided, together with offices, outhouses, buildings and improvements thereunto belonging or appretaining; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbances existing before the coverture or made during it with her free consent lawfully appearing thereto. The jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow. This section shall not be construed so as to compel the jury selected to allot dower to allot the dwelling-house in which the husband usually resided, when the widow shall request that the same be allotted in other property. (Rev., s. 3084; Code, s. 2103; R. C., c. 118, s. 3; R. S., c. 121, s. 3; 1827, c. 46; 1869-70, c. 176; 1883, c. 175; 1908, c 132.)

I. General Consideration of Dower.
II. Property Subject to Dower.
  A. In General.
  B. Estates and Interests.
    1. Nature of Seisin Required.
    2. Applications.
III. Pleading and Practice.

Cross References.

For general treatment, see 4 N. C. Enc. Dig. 884 et seq. 13 N. C. Enc. Dig. 780 et seq.; for general treatment of the rights and remedies of the wife, see 4 N. C. Enc. Dig. 895 et seq.; 13 N. C. Enc. Dig. 780 et seq.; as to rights of creditors of the husband, see 4 N. C. Enc. Dig. 894; 13 N. C. Enc. 780; as to conveyances before marriage in fraud of wife, see 4 N. C. Enc. Dig. 891.

See 11 N. C. Law Rev., 272, for suggested change in this section.

I. GENERAL CONSIDERATION OF DOWER

Editor's Note.—It is practically impossible in a work of this nature to give a full treatment and discussion of the whole law of this important subject, for any one of the innumerable issues which arise in litigation on this topic could be the basis of a lengthy article. As will be seen from the frontal analysis, the editor has deemed it advisable, from the viewpoint of the practitioner, to place hereunder cases which contain construction of this specific section and likewise to deal with those topics which appear to have given the most trouble in the decided cases. A full discussion of the subject-matter of this note may be found at the places in the digests above referred to.

Positive Law Is Basis of Dower.—The contract of marriage does not vest in the wife her right of dower. This right is not regarded as springing from contract, although the contract of marriage is a prerequisite to its existence, but from the positive terms of the common law or statute

law. Corporation Commission v. Dunn, 174 N. C. 679, 681 94 S. E. 481; Rose v. Rose, 63 N. C. 391.

Right of Dower Is a Legal Right.—The right of a widow is a legal right and is prior to that of the heir. Campbell v. Murphy, 55 N. C. 357. It does not arise from the estate of the heir but is a continuation of that of her husband Everett v. Newton, 118 N. C. 919, 922, 23 S. E. 961; William v. Bennett, 26 N. C. 122.

As to exemption from debts and legacies, see note o Curry v. Curry, 183 N. C. 83, 110 S. E. 579, under section 4098; as to assignability of interest on conveyance or re lease, see 4 N. C. Enc. Dig. 903.

Law of Lex Situs Governs.—The existence and incidents of the right of dower are determined by the law of the state in which the real estate lies and not by that of the place of the marriage or the domicile of the parties. Corporation Commission v. Dunn, 174 N. C. 679, 681, 94 S. E. 481. The law existing when the estate becomes consumate by the husband's death is the governing law. Id.

Attaches to Proceeds of Sale by Receiver.—Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's rights of inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband. American Blower Co. v. Mackenzie, 197 N. C. 152, 147 S. E. 829, laying down rule for computing present value of right of dower.

Where Dissent of Wife Not Necessary.—It will be noticed that the widow's right to claim dower is subject to the two contingencies, (1) that her husband die intestate, or (2) that she dissent from his will. In other words, this and the foregoing section give the widow the right to elect whether she will take under the provisions of the will or whether she will dissent therefrom and take under the law. There seems to be at least one case wherein the widow is not put to this election. It appears to be this: Where the husband takes a defeasible title to lands and the limitation is defeated at his death because of the non-performance of the condition thereof, then he has no legal title or estate in the lands which he could dispose of by will. Now when the husband dies leaving a will disposing of his other real and personal property, is the widow required to dissent from this will in order to lay claim to dower in the defeasible fee of which the husband was seized and possessed during coverture, but which limitation was terminated at his death? As stated above, it is held that she need not dissent. The reasons given are these: The dissent authorized by this section has reference to property which may be the subject of a devise. The husband in this case has no right to devise the defeasible fee, and his widow therefore is not claiming dower in opposition to the will. See Alexander v. Fleming, 190 N. C. 815, 819, 130 S. E. 867.—Ed. Note.

Not Consummate Until Death of Husband. — A married woman has an inchoate right or estate in one-third in value of all the lands of which her husband is seized and possessed during coverture, but its enjoyment is postponed by law until his death, and is contingent upon her surviving him. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 318. And the wife cannot in the lifetime of her husband have her dower allotted even though his lands are sold under execution. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 318.

The widow has no right under this section, to select the lands to constitute her dower, the provision providing that the commissioners need not select the dwelling-house if the widow requests otherwise, being merely to afford relief from the otherwise mandatory duty of the commissioners to select the dwelling-house, and not conferring the right of selection on the widow, and the commissioners being further required to equally protect the interests of the heirs and widow. Vannoy v. Green, 206 N. C. 77, 173 S. E. 277.

Nature of the Inchoate Dower.—The sections of the code pertaining to dower seem to recognize the right during the husband's life as a valuable interest that may pass by a conveyance. When she encumbers it by joining in a mortgage to secure his debt she becomes his surety. Gore v. Townsend, 105 N. C. 228, 232, 11 S. E. 160. In Bullard v. Briggs, 7 Pick. (Mass.) 533, cited and approved in Gore v. Townsend, supra, it is said: "It is a right and interest of which she cannot be divested but by her consent or crime, or by her dying before her husband."

An examination of the cases will show that no little difficulty has been encountered in fixing a precise and accurate definition of this inchoate right of dower possessed by the wife during the lifetime of her husband. But whatever contrariety may be found in the various statements made in reference to this right, all the courts adhere to the same established rules in the decision of the cases bearing on the subject, and substantiate the foregoing principles.

In summarizing the nature of this right, it is said in 2 Scriber on Dower 8: "It cannot properly be denominated an estate in lands nor indeed, a vested right therein, however it is a substantial right, possessing in contemplation of law, the attributes of property, and is to be estimated and valued as such." And in Dollin v. Coin, 14 Wall 472, 479, 20 L. Ed. 830, it is said: "A wife having only an inchoate right of dower has no present title to the land, either legal or equitable."—Ed. Note.

Although inchoate dower has a present value, the enjoyment of the estate is expressly postponed by statute until after the husband's death, and is contingent upon the wife surviving her husband. Higdon v. Higdon, 206 N. C. 62, 173 S. E. 273.

Cited in Honeycutt v. Burleson, 198 N. C. 37, 38, 150 S. E. 634.

II. PROPERTY SUBJECT TO DOWER.

A. In General.

For general treatment of subject, see 4 N. C. Enc. Dig. 886 et seq.

Editor's Note.—The courts have followed the clear and unambiguous terms of this section in the determination of just what property is subject to the dower right of the widow. The cases given below will illustrate that the provisions herein contained constitute the formula which he property claimed by the wife must satisfy. A full collection of the decided cases may be found in 4 N. C. Enc. Dig. 886. The chief issue around which litigation has arisen is in regard to the nature of the seizin which the husband must have and whether or not he has such seizin in the property in question. This topic is thought to be of so great importance as to justify treatment under a separate analysis line.

Last Usual Residence Must Be Included.—In the allotment of the widow's dower, the provision pertaining to last usual residence of the husband has been given a literal interpretation, and it is held that this residence must be embraced therein and if the value thereof is as much as one-third of the realty of which the husband dies seized, then the widow has no interest in the balance of the estate. Howell v. Parker, 136 N. C. 373, 375, 48 S. E. 762. The widow cannot waive the right to the residence. Id. But note the effect of the last sentence of this section.—Ed. Note.

Same—Where Dwelling House Constitutes Entire Estate.—If the deceased had no other property but his dwelling house, then only a third can be set aside as dower. Caudle v. Caudle, 176 N. C. 537, 97 S. E. 472.

Valuation of Property.—A widow is not entitled to have dower of the improved value of her husband's estate, but she must take it according to the value as it was in his lifetime. Campbell v. Murphy, 55 N. C. 357. For a comprehensive treatment of the valuation and selection of property, see 4 N. C. Enc. Dig. 913.

Same—Right to Interest.—The widow's claim of dower becomes a vested right upon allotment, continuing from the death of her husband, and from that time she is entitled to damages, measured by the rental value, for the time she has been kept out of possession. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Same—Same—Where Lands Sold to Pay Debts of Deceased.—In case of a sale of the lands to make assets to pay the debts of the deceased, the widow is entitled to interest on her proportionate part from the sale until payment, charging her interest in return, for such sums as she may be indebted to the estate. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Partnership Property.—Real estate belonging to a partnership is subject to dower in favor of a widow of one of the partners only so far as a surplus may be left after paying the partnership debts. Stroud v. Stroud, 61 N. C. 525.

This holding is based upon the reasoning stated in Summey v. Patton, 60 N. C. 601, which is to the effect that where the partnership realty is sold to pay partnership debts, the surplus retains its character as real estate and descends to the heir, so that the heir takes subject to the widow's right of dower.—Ed. Note.

Mortgaged Property.—Under this section where an entire transaction was in effect an indirect mortgage on the property of a father and his children received no consideration and acquired no beneficial interest in the lands, the sole beneficial interest in the lands was in the father, and upon his death his widow is entitled to her dower rights in the lands. Stack v. Stack, 202 N. C. 461, 163 S. E. 589.

Right to Possession.—See 4 N. C. Enc. Dig. 903.

B. Estates and Interests.

1. Nature of Seisin Required.

For comprehensive treatment of the subject, see 4 N. C. Enc. Dig. 886 et seq.; 13 N. C. Enc. Dig. 780 et seq.

Seisin of Estate of Inheritance Necessary.—The seisin to render the estate dowable must be of an estate of inheritance, with the freehold vested in the deceased husband. Barnes v. Roper, 90 N. C. 189, 190.

The widow's right to dower rests upon the theory that during coverture her deceased husband died intestate, seized of an estate which any child she may have borne him might have taken by descent. Alexander v. Fleming, 190 N. C. 815, 130 S. E. 867.

Same—Seizin in Law or in Deed.—A widow is entitled to dower only in an estate of inheritance of which her husband had a seisin in law or in deed at any time during the coverture, Houston v. Smith, 88 N. C. 312; the latter being the actual possession of a freehold estate and the former the right to the immediate possession or enjoyment of a freehold estate. Redding v. Vogt, 140 N. C. 562, 53 S. E. 337.

Possession Alone Will Not Suffice. — Possession cannot supply the seisin of an inheritable estate necessary to support the right of dower. Barnes v. Roper, 90 N. C. 189, 191; Efland v. Efland, 96 N. C. 488, 1 S. E. 858.

The original Act of 1784 read "seisin or possession." The section now reads "seisin and possession," the substitution of the word "and" for the word "or" having been made by the Act of 1836. This substitution, however, does not affect the substantive meaning and intent of the section, and is said in Weir v. Tate, 39 N. C. 264, 278, to be only a clerical error. This being true the section as it now reads is to be given the same construction as it received prior to the exchange of these words. Under this construction it would seem that the word "possession" is surplusage, and at least one court has said that no member of the profession has ever understood why it was placed in the section. Weir v. Tate, supra. This view seems to be rested on the fact that if the requisite of seisin is satisfied, the possession, so far as is necessary, is likewise satisfied.—Ed. Note.

When Husband Deemed to Be Seized.—The husband is generally deemed to be seized of any land, "when he may have had any right, title or interest in the inheritance." Boyd v. Redd, 118 N. C. 680, 685, 24 S. E. 429.

2. Application.

Editor's Note. — The determination of the question as to whether or not the husband has been seized of the land, within the meaning of the judicial construction placed on the word as used in this section, probably has been the most fruitful source of litigation of the whole subject of dower. The contests which have been waged around this particular requisite have arisen in various forms, and have involved all kinds of estates and interests. However, the conclusions reached by the courts are believed to be placed on reasons which in turn, have as their foundation the basic principles hereinbefore set out. A few of what are believed to be the leading cases are given in the following passages, for it is believed that the constructions of the section on this particular point, handed down by the courts in these cases, are well established in the State of North Carolina. A full collection of cases bearing on the subject of seisin will be found in 4 N. C. Enc. Dig. 886 et seq.

Seisin of Estate in Remainder.—The widow of a remainderman is not entitled to dower where the life tenant survives the remainderman, because the husband in such case is never seized of such an estate of inheritance in the land as is required. Royster v. Royster, 61 N. C. 226, 229.

Seisin of Purchaser at Judicial Sale.—Where a purchaser at a judicial sale gave his bond for the purchase money and died before the sale was reported to or confirmed by the court, it was held that he was seized of such an equitable estate as would entitle the widow to dower in such lands. Klutts v. Klutts, 58 N. C. 80.

Devise by Will—Rule in Shelley's Case.—Where under his will a testator gave all his lands to his son for life, "and after his death to his lawful heirs, born of his wife," it was held that the son did not take a fee simple, under the rule in Shelley's case, so as to give his widow dower therein. Thompson v. Crump, 138 N. C. 32, 50 S. E. 457.

A testator devised land in trust for the sole benefit of his son and the son's family, specifying that the whole of the property, with all its increase, on the death of the son, was to go on to his lawful heirs, share and share alike; it was held that the son did not take the fee under the rule in Shelley's Case but only a life estate, and therefore his widow was not entitled to dower therein. Gilmore v. Sellars, 145 N. C. 283, 59 S. E. 73.

The general doctrine of the rule in Shelley's Case may well be mentioned at this point. If the rule of this case is applicable to the controversy in question, then the husband takes a fee simple to the lands out of which dower may be had, because the husband will have been seized during coverture of an estate of inheritance within the meaning of the word as used in this section. But if the rule in Shelley's Case is inapplicable, then the husband takes only a life estate out of which dower cannot be had, and this because the husband will not have been "seized" within the meaning of this section for, as we have already seen, seisin as here used means an estate of inheritance. See note of Barnes v. Roper, ante, this note, analysis line II, B, 1. The reason which prevented this doctrine from operating in the Thompson case, just noted, was the fact that the words "born of his wife" were held to qualify and explain "his lawful heirs," thus confining the remainder to the children of his will. For a discussion of the rule in Shelley's Case, see the note to section 1734.—Ed. Note.

Seisin under Unrecorded Deed.—Where title to land is claimed under a deed it is essential that such deed be registered for otherwise the widow is not entitled to dower out of the premises covered by the unrecorded deed. Thomas v. Thomas, 32 N. C. 123. But see Tyson v. Harrington, 41 N. C. 329 where it is held that the widow of a man, to whom a deed for land had been delivered, but from whom it had been abstracted before registration, has a right to her dower in such land, the husband having an incomplete legal title. The case of Thomas v. Thomas, supra, was cited without disapproval.

Estate in Expectancy.—See 4 N. C. Enc. Dig. 890.

Rent.—In a U. S. Supt. Ct. case Herbert v. Wren, 7 Cranch 370, 3 L. Ed. 374, it was held that if a wife join her husband in a lease for years, she is still entitled to dower in the rent.

Mortgaged Property.—See 4 N. C. Enc. Dig. 889.

Estate at Will.—At common law a wife had no right of dower in an estate at will. See Duncan v. Navassa Phosphate Co., 137 U. S. 647, 34 L. Ed. 826.

Land Held in Trust by Husband.—See 4 N. C. Enc. Dig. 887.

III. PLEADING AND PRACTICE.

For treatment of pleading generally, see 4 N. C. Enc. Dig. 911 et seq. See also § 4104 et seq.

Only One Proceeding Necessary.—This section gives the widow dower in **all the lands** of which the husband was seized during coverture, and this provision contemplates that the dower was intended to be sought, and must be sought, in but one special proceeding for the purpose. Askew v. Bynum, 81 N. C. 350, 355. Proceedings for the assignment of dower instituted and determined in the county of the deceased husband's last residence are a bar to subsequent proceedings for the same purpose in another county to affect lands therein located. Id.

Where Petition Filed.—Petition for dower should be filed in the county of the husband's last usual residence, but the jury of allotment may assign the same in one or more tracts situated in one or more counties. Askew v. Bynum, 81 N. C. 350.

See section 4105 and note thereto.

There is no statute of limitations in regard to the writ of dower; and if her case is not affected by the statute of presumptions the widow is not bound to account for a delay. Campbell v. Murphy, 55 N. C. 357.

Parties.—As to who are necessary parties, see section 4105 and note thereto. See also 4 N. C. Enc. Dig. 909 et seq.; 13 N. C. 781.

§ 4101. Dower not affected by conveyance of husband; exception.—No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: Provided, that a mortgage or trust deed by the husband to secure the purchase money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed. Rev., s. 3085; Code, s. 2106; 1868-9, c. 93, s. 35.)

As to private examination of wife, see section 997 and note thereto.

Editor's Note.—Under this section as it formerly stood no joinder of the wife in a conveyance by the husband was necessary, because as section 4100 stood under the old law, the wife was given dower only in those lands of which the husband died seized. That section no longer requires seisin

at the death of the husband, but only a seisin of inheritance at any time "during coverture." Hence under the prior law the husband had full power to defeat the dower right of the wife by making a conveyance of his lands, for in so doing he would destroy a prerequisite for the attachment of the right of dower. However, this power of the husband was taken away by the change of the wording of the section (4100), and the wife's right, although, in a sense, a qualified one, attaches to all lands seized by the husband during coverture, assuming of course, the existence of the other essential elements. It necessarily follows, then, that all purchasers, etc., take the property conveyed by the husband, subject to the dower right of the wife, and this section (4101) is merely a statutory protection thereof. For comprehensive treatment as to the state of the law prior to 1868, see 4 N. C. Enc. Dig. 898 et seq.

This section is modified by section 4103(a) to the extent that the husband of an insane or lunatic wife may alienate his property without her joinder provided the terms of that section are complied with.

Generally.—It is an established principle that every citizen has the right to enjoy the fruits of his own labor, and when his earnings are invested in land, the rule is that he acquires with the title the incidental right of absolute and unrestrained alienation. However there are a few instances where the law has trammeled this right to reach some beneficent end; the provision that the wife must join in a conveyance by her husband constitutes one of these restrictions. But this and the other restrictions must be construed as to carry out the kindly purpose for which they were created, with no more restraint on the power of alienation than is necessary to make them effectual. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437.

Non Joinder of Wife—Dowable Property Retained.—Where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but retained lands, which descend to his heirs, of a kind and quantity which permit that dower be assigned out of the lands descended and according to the provisions of this section, the purchasers have a right to require that dower be allotted out of lands descended, and the lands which they have purchased and paid for be relieved of the widow's claim. Harrington v. Harrington, 142 N. C. 517, 55 S. E. 409.

Cited in Boyd v. Brooks, 197 N. C. 644, 645, 150 S. E. 178; Taft v. Covington, 199 N. C. 51, 55, 153 S. E. 597.

§ 4102. Dower conveyed by wife's joinder in deed.—The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law. (Rev., s. 3086; Code, s. 2107; 1868-9, c. 93, s. 36.)

See annotations to § 4103.

As to private examination of the wife, see section 997 and note thereto.

Inchoate Right of Dower as Collateral Security.—The wife by joining in her husband's mortgage given on his lands may convey, as additional security to his debt, her inchoate right of dower. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Same—Foreclosure.—A deed of trust given by the husband and joined in by the wife unreservedly of her inchoate right of dower, may be enforced under its terms and conditions to pay off the debt it secures, and completely bars the inchoate right of dower. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Same—Equity Will Not Intervene.—Equity will not interfere in behalf of the wife who has unreservedly joined in a mortgage on her husband's lands, to restrain the sale according to the terms of the instrument, by first ordering a foreclosure sale of the lands outside of the wife's inchoate interest, and if not sufficient, subject her interest to sale for the payment of her husband's debt. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Joinder Makes Wife a Surety.—When the wife encumbers her inchoate right of dower by joining in a mortgage of his land to secure his debt she becomes his surety, Gore v. Townsend, 105 N. C. 228, 11 S. E. 160, and is entitled to call upon her husband to exonerate her estate from the debt. Id.

Dower Need Not Be Sold When Estate Is Solvent.—The widow may subject her dower to the payment of the debts of her husband's estate by joining in his mortgage deed or conveyance in conformity to the requirements of this section, yet if his estate is solvent the dower need not be sold, and in the event that it is insolvent the estate must be administered according to the established rules. Holt v. Lynch, 201 N. C. 404, 160 S. E. 469.

Cited in Higdon v. Higdon, 206 N. C. 62, 65, 173 S. E. 273.

§ 4103. Conveyance of home site without wife's signature.—No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the resident is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife without the voluntary signature and assent of his wife, signified on her private examination according to law: Provided, the wife does not commit adultery, or has not and does not abandon the husband and live separate and apart from him. (1919, c. 123.)

Editor's Note. — Section 4103(a) passed by the Public Laws of 1923, is undoubtedly intended to modify the section in that it allows the husband in certain specified cases to alienate the property concerned without the joinder of his wife.

In General.—In Southern State Bank v. Summer, 188 N. C. 687, 688, 125 S. E. 489, the court said: "The value of the 'home site' is not fixed by the statute. It is not certain as to whether it is intended to be in addition to, or included within, the homestead right. Nothing is said as to whether it is superior to the rights of heirs or the claims of creditors. It has been suggested that the statute may apply, and probably was intended to apply only as against those claiming under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration."

Validity of Section.—This section is valid, and does not fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

It Is Mandatory.—In regard to the "home site" so far as the rights of the wife are concerned, this section is mandatory. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

Distinguished from § 2577.—See note to § 2577.

Property Constituting a "Home Site."—Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of this section and held in this case that a 54.75 acres of farm land is not excessive for the purpose. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

Deed to "Home Site" without Wife's Joinder Not Void.—This section limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of the "home site" under such deed until the death of the husband, when it then passes to the grantee subject only to the dower right of the wife if she survives him. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

Rights of Parties under Foreclosure of Mortgage on "Home Site" in Which the Wife Did Not Join.—Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of this section and the purchaser at the foreclosure of such mortgage sale does not acquire under his deed the right to immediate title or possession to the land. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

A minor wife's joinder in the execution of a mortgage on the home site of her husband may be disaffirmed by her within three years after her majority, her husband living, and the execution of the instrument never having been ratified by her, and upon such disaffirmance the mortgage is void, under this section, and §§ 997, 4102, 4103 (a) (b), being separate and distinct statutes, are held to have no application to this action. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 178 S. E. 863.

Homestead Distinguished. — Homestead exemption should not be confused with the wife's interest under this section. The wife's interest in the husband's "home site" exists by this section and a different principle applies as to a conveyance without her valid execution. Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490.

§ 4103(a). Conveyance without joinder of wife; certificate of lunacy.—Every man whose wife is a lunatic or insane may bargain, sell, lease, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust, or lease, without the signature or private examination of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the state, or any other state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed, free and exempt from the dower rights and all other interests of his wife: Provided, this section shall not apply to the homestead of the husband which has been actually alloted. (1923, c. 65, s. 1.)

See annotations to § 4103.

Editor's Note.—Attention is called to the fact that section two of the act of 1923, which enacted this section, provided that all sections conflicting with this section are repealed to the extent of this conflict and section 4103 was specifically mentioned. As to the extent of the repeal of sections 4101 and 4103, see the editor's note under those sections.

§ 4103(b). Renouncement of dower.—All married persons under the age of twenty-one years shall have the same privilege to renounce their dower rights and rights of curtesy and to give their written assent to conveyances of real property as are now conferred upon married persons twenty-one years old and over. (1923, c. 67, c. 2; 1935, c. 18.)

See annotations to § 4103.

Editor's Note.—It was stated in 1 N. C. Law Rev. 271, that while this section does not refer to any section, it should be considered as an amendment to sections 997 and 4102.

The amendment of 1935 made this section applicable to the renunciation of curtesy and assent to conveyances of real property.

Art. 3. Allotment of Dower

§ 4104. By agreement between widow and heir.—If the personal property of a decedent be sufficient to pay his debts and charge of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower. (Rev., s. 3087; Code, s. 2110; 1868-9, c. 93, s. 39.)

There is nothing in this or the following section to indicate that the widow may select her dower or "endow herself." Vannoy v. Green, 206 N. C. 77, 79, 173 S. E. 277.

§ 4105. Petition filed in superior court.—If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she fail to make such application within three months after the death of her husband, any heir or devisee may file a petition reciting the facts that the widow is entitled to dower on certain lands and has not applied for it, and demand that her dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estate in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings. (Rev., s. 3088; Code, ss. 2111, 2112; 1891, c. 133; 1868-9, c. 93, ss. 40, 41.)

Cross Reference.—For full treatment of the subject, see 4 N. C. Enc. Dig. 905 et seq.; 13 N. C. 781; as to nature and form of action, see 4 N. C. Enc. Dig. 906, see also section 4100, analysis line "Pleading and Practice."

See § 3226 and notes thereto.

In General.—The remedy by petition, as prescribed by this section, is a substitute for the action of dower at common law. McMillan v. Turner, 52 N. C. 436, 437.

Special Proceeding.—A proceeding for dower is a special proceeding. Tate v. Powe, 64 N. C. 644.

Where Equitable Element Involved.—While the assignment of dower is a special proceeding of which the clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a court of equity, the superior court in term has jurisdiction, and the application for dower becomes a civil action. Efland v. Efland, 96 N. C. 488, 1 S. E. 858.

Where Question of Title Raised.—In a petition for a partition of land, in a court of law, where the defendant denies the tenancy in common by a plea of sole seizin in himself, the proper course is for the court to try the question of title thus raised, and not to force the plaintiff to resort to an action of ejectment for that purpose. Purvis v. Wilson, 50 N. C. 22.

Summons Returnable to Clerk.—A summons in a proceeding for the allotment of dower is returnable before the clerk of the superior court and not to the court in term. Gatewood v. Tomlinson, 113 N. C. 312, 18 S. E. 318.

Legal Right Personal to Widow.—The right to apply for allotment of dower by special proceeding under this section is a legal right, personal to the widow, and cannot be transferred by assignment. Parton v. Allison, 109 N. C. 674, 14 S. E. 107.

Dissent Essential to Jurisdiction.—The entry of a dissent by the widow is an incident to the jurisdiction of probate, and as this jurisdiction has been conferred upon the clerk of the superior court, the widow's dissent is to be made and entered in his office. Ramsour v. Ramsour, 63 N. C. 231.

Assignment before Allotment. — Where the right to a dower has been assigned before allotment, the assignee's remedy to enforce it is by civil action in term; the clerk of the superior court has no jurisdiction. Parton v. Allis n, 109 N. C. 674, 14 S. E. 107.

Rights of assignee, see 4 N. C. Enc. Dig. 903 et seq.

Allotment by Heirs.—In McMillan v. Turner, 52 N. C. 436, 437, there is strong intimation that the heirs could assign the widow her dower, and also that twenty years continuous possession by the widow of a certain tract of land claimed as dower, is sufficient to raise a presumption that such assignment had been made. But as to the first point mentioned, i. e., allotment by heirs, see Freeman's Heirs v. Ramsey, 189 N. C. 790, 128 S. E. 404, where it is held that the statutory method of allotment of dower is exclusive.

Administrator as a Party.—If there is no prayer against the administrator he is not a necessary party to a bill for the assignment of dower. Campbell v. Murphy, 55 N. C. 357.

Creditors as Parties.—Creditors are not necessary parties to the proceedings. Ramsour v. Ramsour, 63 N. C. 231; but the court may permit a creditor of a person, who died seized and possessed of lands to be made a party to the proceeding and contest the claim of the widow. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025.

Creditors Must Make Exceptions within Allowed Time.—While creditors of an estate may be permitted to contest the widow's allotment of dower in proper instances upon the ground that the allotment is excessive, they must pursue their remedy in apt time by excepting to the report of the jury, and their motion to be made parties in order to contest the allotment of dower, made almost three months after approval by the court of the clerk's confirmation of the jury's report, is too late. Poindexter v. Call, 208 N. C. 62, 179 S. E. 335.

Judgment Conclusive upon All Claimants.—The judgment in a special proceeding for the allotment of dower to a widow is intended by this section to be and is conclusive upon the heirs, devisees or other claimants who may be parties as to the title of the husband and the rights of the widow. Boyd v. Redd, 118 N. C. 680, 685, 24 S. E. 429.

Same—Where Lessee Not Made Party. — The lessee of lands for a term, during the continuance of the lease after the death of the deceased owner, is a proper and necessary party to proceedings to lay off the widow's dower wherein the locus in quo had been included, and where he has not been made a party he is not bound by the judgment in his action of ejectment and to recover damages against the

widow, administrator and heirs at law. Ingram v. Corbit, 177 N. C. 318, 99 S. E. 18.

§ 4106. Dower assigned by jurors summoned by sheriff. — If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and being duly sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands within five days to the clerk of the superior court.

When the husband dies seized and possessed of lands in any other county than that in which dower is to be assigned, the clerk of the superior court of the county in which the dower is to be assigned shall, upon application of the widow entitled to dower, issue a commission to the sheriff of such other county requiring him to summons three or more persons, as may be asked in said application, qualified to act as jurors, to go upon the lands of said husband in the county of said sheriff and assess the value of the same after being duly sworn by the sheriff for that purpose, and report their assessment under their hands and seals through the sheriff, who shall countersign the same as their report to the clerk issuing said commission; and said report in the hands of the jury summoned to assign the dower shall be considered by them a true valuation of the lands mentioned in the report, and said last-mentioned jury shall be deemed to have met on the lands thus assessed and shall assign the dower accordingly.

If either party to the proceeding shall demand it, the clerk shall appoint three persons qualified to act as jurors, unless one of the parties demands a greater number, and then not exceeding twelve, who shall meet on the premises or some part thereof, and after being duly sworn by the clerk or someone authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands, or the hands of a majority of them, within five days to the clerk of the Superior Court; and when the jurors are so appointed the sheriff will not countersign the report nor take any part in the proceedings, except that the clerk may cause notice to be served on the jurors so appointed, if he deems or finds it necessary. (Rev., s. 3089; Code, s. 2113; 1893, c. 314; 1868-9, c. 93, s. 42; 1931, c. 393.)

Cross Reference. — For general treatment, see 4 N. C. Enc. Dig. 915 et seq.; as to property subject to dower, see section 4100, analysis line, II; as to valuation of property of deceased husband, see note of Campbell v. Murphy, 55 N. C. 357, 364, under section 4100, analysis line, II A; as to conclusiveness of judgment in proceeding, see note of Boyd v. Redd, 118 N. C. 680, 24 S. E. 429, under section 4105.

Editor's Note.—The Act of 1931, which added the last paragraph to this section, provided: "This shall apply to proceedings pending where the order to the sheriff has not been made and also when a new jury is ordered in any proceeding now pending."

Signature of Sheriff Unnecessary.—It is not required that the sheriff attest the report of the jury by signing the same. Brickhouse v. Sutton, 99 N. C. 103, 5 S. E. 380.

Where Secondary Evidence of Report Admissible.—Where it appeared that the report of the jury fully described the dower of the widow, but had been lost, and the ommission of a certain line in the report was made in copying it up in the record, it was held that the report is a part of the record and secondary evidence of its contents is admissible. Wells v. Harrell, 152 N. C. 218, 67 S. E. 584.

Manner of Allotment of Mortgaged Lands.—In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment should not be in part of the lands as if unencumbered or subject to the same encumberance, but in each parcel separately, and then the widow can work out her relief by asserting her equity against each creditor, as he seeks to enforce his security. Askew v. Askew, 103 N. C. 285, 290, 9 S. E. 646.

The remedy against an excessive assignment of dower is by exceptions to the report of the jury, upon the hearing of which it is competent for the court to hear affidavits, with a view to ascertain the facts. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025.

Power of Court.—Ordinarily, the court, before which exceptions to the report of the jury in the allotment of dower is heard, is the sole judge whether a reassignment or successive reassignments shall be made. Poindexter v. Call, 208 N. C. 62, 179 S. E. 335.

Setting Aside the Allotment.—Where the report of the jury alloting dower is returned, and exceptions are taken by one thereby aggrieved, the court will set aside the allotment, and order a new allotment, if sufficient cause be shown. Stiner v. Cawthorn, 20 N. C. 640. But if the report is confirmed, a petition to set aside the allotment will not be heard at a subsequent term. Bowers v. Bowers, 30 N. C. 247.

Order Directing Reallotment of Dower. — The Supreme Court will not disturb an order directing a reallotment of dower, made after hearing the case on argument on both sides and all the papers, including conflicting affidavits concerning value, since the trial court, in the exercise of sound discretion, is the judge of how often, for just cause, it will direct a reallotment. Wilson v. Featherstone, 118 N. C. 840, 24 S. E. 714.

§ 4107. Notice to parties of meeting of jury.— The parties to such proceeding, or their attorneys, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting. (Rev., s. 3090; Code, s. 2114; 1868-9, c. 93, s. 43.)

Art. 4. Year's Allowance

Part 1. Nature of Allowance

§ 4108. Who entitled to allowance. — Every widow of an intestate, or of a testator from whose will she has dissented, shall be entitled, besides her distributive share in her husband's personal estate, to an allowance therefrom, for the support of herself and her family for one year after his decease, and such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of her husband: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the murder of her husband, or of being accessory before the fact to the murder of her husband, she shall thereby lose all right to a year's provision, and to a distributive share from the personal property of her husband, and such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of such rights and estates. (Rev., s. 3091; Code, s. 2116; 1889, c. 499, s. 2; 1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42.)

Cross Reference.—For full treatment of the subject, see 6 N. C. Enc. Dig. 109 et seq, 14 N. C. Enc. Dig. 174 et seq; as to amount allowed, see section 4109; as to who are members of the family, see section 4110 and note thereto; as to property subject to allowance, see section 4112 and note thereto; as to bar, waiver or relinquishment, see 6 N. C. Enc. Dig.; as to time of making application, see note of Ex parte Rogers, under section 4115.

Purely a Statutory Right.—The right of a widow to a

year's support is purely statutory. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216.

Priority Over Creditors—Rule Stated.—The widow is given her right to her years support against all general creditors, but no better title to the property assigned her than her husband had. Hence, the rule to be deduced would seem to be this: She is entitled to her years allowance in preference to all general creditors, and also in perference to the special lien acquired by an execution bearing tests prior to the husband's death. In regard to other liens and equities, she takes the property in the same manner and plight in which her husband held it. Williams v. Jones, 95 N. C. 504. Her priority extends over the funeral expenses and costs of administration. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116.

Same—Mortgage Registered after Husband's Death. — Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support, it was held that the widow took the property subject to the mortgage lien. Williams v. Jones, 95 N. C. 504.

Where husband predeceased by wife, see note of In re Stewart, 140 N. C. 28, 30, 52 S. E. 255, under section 4111.

When Husband Died a Citizen of Foreign State. — The widow of a man who dies a citizen of another state is not entitled to a year's support out of the assets of the decedent in this State, and the fact that she became a citizen of this State after her husband's death is immaterial, since her relations to the estate and her right to share in it are fixed at the intestate's death, and by the laws of his domicil. Simpson v. Cureton, 97 N. C. 113, 2 S. E. 668; Medley v. Dunlap, 90 N. C. 527.

The decision in these cases appears to have been changed in the case of Jones v. Layne, 144 N. C. 600, 57 S. E. 372, in which it is held that a widow, whose husband died domiciled in another state, is entitled to her year's support in this State in which there is a fund due her husband, if the widow is a bona fide resident in the State. The reason given for this ruling is that the fiction of personal property being considered as belonging to the domicil of the owner applies only to the distribution of the assets of the one deceased, and has no application to payment of debts, legacies, costs of administration, etc. See Moye v. May, 43 N. C. 131, also Story Confl. Laws, 354. When it is recalled that the year's support given to the widow is superior to all these claims, then this, coupled with the fact that it seems well settled that the fiction that personal property follows the owner is limited in its operation to the case of distributing the assets of one deceased, would be ample reason for the ruling in the Jones case. Further support may also be found in the very purpose and object of the enactment of the Legislature giving to the widow her year's support. See In re Hayes, 112, 76, 77, 16 S. E. 904; Kimball v. Deming, 27 N. C. 418.—Ed. Note.

Adultery Prior to Enactment of Section, Not a Bar. — A widow is not barred of her right to a year's support under this section by reason of adultery committed prior to the passage of the act. Cook v. Sexton, 79 N. C. 305.

Antenuptial Contract as a Bar.—A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. Perkins v. Brinkley, 133 N. C. 86, 45 S. E. 465.

Award under Will as Estoppel.—Where the widow and the executor by mutual consent selected three men to lay off the widow her year's support, provided for her in the husband's will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was estopped by the award and cannot maintain a proceeding under this section. Flippin v. Flippin, 117 N. C. 376, 23 S. E. 321.

§ 4109. Amount allowed. — Except in cases in which a large allowance is hereinafter provided for, the value of a year's allowance shall be three hundred dollars, and one hundred dollars in addition thereto for every member of the family besides the widow. (Rev., s. 3092; Code, s. 2118; 1868-9, c. 93, s. 10.)

§ 4110. Family defined.—The family of the deceased, for the purposes of this chapter, shall be deemed to be, besides the widow, any child with which she may be pregnant at the death of her husband, every child, either of the deceased or of the widow, and every other person to whom the deceased or widow stood in place of a parent, who was residing with the deceased at his death, and whose age did not then exceed fifteen years. (Rev., s. 3093; Code, s. 2119; 1868-9, c. 93, s. 11; 1909, c. 93.)

In General.—The object of the clause, "who were residing with the deceased at his death," is to exclude from the bounty children who might come in after the death of the husband and make themselves "members of the family," and was not meant to embrace those for whom the testator in his will appointed a guardian, directing him to take them to live with him and educate them out of the profits of the estate, and such children do not constitute a part of the "family" after his death. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 99.

Death of Child before Filing of Application.—Where two children under fifteen years of age resided with the widow at the death of her husband, and one died before the application for the year's provision was filed, it was held that the widow was entitled to an allowance for two children. In re Hayes, 112 N. C. 76, 77, 16 S. E. 904.

This decision was rested on the ground that the chief object of this and the foregoing sections is to provide for the dependent family of the deceased residing with the widow at the death of the husband, and not at the date of her application. As was said in the early case of Kimball v. Deming, 27 N. C. 418, cited and approved in In re Hayes, supra, the purpose "was to make provision for the pressing wants of the widow personally, and to enable her at that mournful juncture to keep her family about her for a short season, and prevent the necessity of scattering her children abroad, until time was allowed for selecting suitable situations for them.—Ed. Note.

Entire Allowance to Widow.—It is proper to make the entire allowance to the widow and none to the minor children, but the existence of such children may be considered, the widow being charged with their care and support. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 4111. When children entitled to allowance.—If a man die intestate leaving no widow surviving him, or if his widow die before her year's allowance is assigned her, then there shall be assigned to every other member of the family, as in this chapter defined, the sum of one hundred dollars each, which shall be turned over immediately to the guardian and used by him in the care and education of the members of the family, respectively; and if there be no guardian, it shall be received and disbursed by the clerk of the superior court for their benefit. (Rev., s. 3094; 1889, c. 496.)

Where Husband Predeceased by Wife.—Formerly it was held that where the wife dies before her husband no allowance could be set aside for the members of the family, Kimball v. Deming, 27 N. C. 418; this holding was placed on the ground that the allowance was personal to the widow. However, it is now held that in such case an allotment may still be had for the benefit of the members of the family surviving under the age of fifteen years. In re Stewart, 140 N. C. 28, 30, 52 S. E. 255.

§ 4112. From what property assigned.—Such allowance shall be assigned from the crop, stock and provisions or any personal property of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value, and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased. (Rev., s. 3095; Code, s. 2117; 1868-9, c. 93, s. 9; 1925, c. 92.)

See the treatment of the subject in 6 N. C. Enc. Dig. 111 et seq.

Editor's Note.—The words "or any personal property" after the word "provisions" are new with the Public Laws of 1925. The insertion of these words takes away all doubt as to whether or not the enumerated classes of property herein contained were meant to exclude all other property. But it is submitted that the addition of these words to this section was not intended to make all the personal property of the deceased subject to the widow's allowance in the first instance. The general words "or any personal property," following the enumeration of specific classes, (crop, stock, and provisions) must, under the maxim ejusdem generis, be restricted to things of the same kind as those specifically

mentioned and enumerated. This seems to be the only possible construction to give to the new words since the section in all its other respects is left without any change whatever, and note must be taken of the clause that "if there be a deficiency it shall be made up by the personal representative from the personal estate of the deceased." Unless the newly inserted words are given the limited meaning above referred to, then this last provision would not only be surplusage but would be meaningless. In other words, the door to the personal estate of the deceased has been opened wider but has not been opened to its fullest extent. For example, since the words used in this section seem to contemplate only personal property of a tangible nature, the intangible property would still be outside the scope of the property from which the widow's allowance may be taken, unless it is necessary to make up a deficiency.

"Stock."—In an early case, Van Norden v. Prim, 3 N. C. 149, the word "stock" contained in this section was construed to mean live stock.

Time of Valuation.—The widow's allowance must be made on the basis of the property's value at the time of the allowance, and not at the time of the testator's death. Hunter v. Husted, 45 N. C. 97.

Damages for Wrongful Death.—The right of action for wrongful death is conferred by statute at death, and any recovery therefor never belonged to the deceased and is not assets of the estate, therefore the widow is not entitled to have her year's support assigned to her therefrom. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216.

Failure to Pay Deficiency.—An administrator is personally liable if he has assets to pay a deficiency and he fails to pay it. Irvin v. Hughes, 82 N. C. 210.

Sale of Land—Retention of Character as Realty.—In case of the sale of lands for assets to pay debts of a decedent, the surplus, after paying the debts and costs, remains real estate and cannot be applied to the payment of a judgment against the administrator in favor of the widow for the balance of her year's allowance. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116.

Part 2. Assigned by Justice of the Peace

§ 4113. Duty of personal representative.—It shall be the duty of every administrator, collector, or executor of a will, from which the widow of a testator has dissented, on application in writing, signed by the widow of such intestate or testator, at any time within one year after the decease of the husband, to assign to her a year's allowance in the manner prescribed in this chapter, to the value herein prescribed, deducting therefrom the value of any articles consumed by the widow and her family since the death of her husband to the time of the assignment. If there be no widow, or if she should die before the year's provision is assigned, the personal representative shall assign one hundred dollars to every other member of the family as defined in this chapter; but if there be no personal representative it shall be assigned by a justice of the peace, upon the application of the guardian or next friend of the children entitled. (Rev., s. 3096; Code, s. 2120; 1889, c. 496; 1868-9, c. 93, s. 12.)

As to who are members of the family, see section 4110.

§ 4114. Value of property ascertained.—The value of stock, crop and provisions assigned to the widow, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved. (Rev., s. 3097; Code, s. 2121; 1868-9, c. 93, s. 13.)

§ 4115. Procedure for assignment.—Upon the application of the widow, the personal representative of the deceased shall apply to a justice of the peace of the township in which the deceased resided, or some adjoining township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially, shall, with him, ascertain the number of the family of the deceased according to the definition given in this chapter, and examine his stock, crop and provisions on hand, and assign to the widow so much thereof as will not exceed the value limited in this chapter, subject to the deduction prescribed in this chapter: Provided, that in case there shall be no administration upon such estate, or in the event that the personal representative shall fail or refuse to apply to a justice of the peace as aforesaid for the space of ten days after the widow shall have filed with him the application as aforesaid, or if the widow shall be the personal representative, she may make the application, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative: Provided further, that in all cases, if there be no crop, stock or provisions on hand, or not a sufficient amount, the commissioners may allot to the widow any articles of personal property of the deceased, and also any debt or debts known to be due him, and such allotment shall vest in the widow such property, and the right to collect the debts thus allotted: Provided further, that where the widow and personal effects of the deceased husband shall have been removed from the township or county where deceased husband resided before his death, the widow may apply to any justice of the peace of any township or county where such personal property is located, and it shall be the duty of such justice to allot and assign the year's allowance as if the husband had resided and died in that township. (Rev., s. 3098; Code, s. 2122; 1891, c. 13; 1899, c. 531; 1870-1, c. 263.)

Cross Reference.—For treatment of subject generally, see 6 N. C. Enc. Dig. 113 et seq. As to parties entitled to claim assignment, see section 4108 and note thereto; as to property subject to allowance, see section 4112 and note placed thereunder. As to right of a bona fide resident to claim assignment under section, see note of Jones v. Layne, 144 N. C. 600, 57 S. E. 372, under section 4108; as to antenuptial contract as bar to recovery, see note of Perkins v. Brinkley, 144 N. C. 600, 57 S. E. 372, under section 4108.

Next Friend as Representative of Minor Widow.—In dissenting from her husband's will and applying for a year s allowance, the widow, being a minor without guardian, may be represented by a next friend, duly appointed. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 99.

Assignment under Section Not Exclusive.—The assignment of a year's provision under this section does not serve to preclude her right to an increase thereof under section 4120 et seq. Mann v. Mann, 173 N. C. 20, 91 S. E. 355.

The reasons for this construction are two-fold. (1) The year's provision of $300. is intended for the immediate and pressing needs of the widow and is not given her as a substitute for any or all that she may rightfully claim, (2) the words "further allowance," as used in section 4120 contemplate the possibility of the right of the widow to lay claim to an additional sum, depending on the existence or non-existence of the circumstances mentioned in that section.—Ed. Note.

Effect of Delay in Administration of Estate.—It is not the lapse of time since the death of the husband, but such lapse since the taking of administration, that effects the right of the widow to a year's provision, that where the administration was delayed for eight years after the death of the husband, the widow is entitled to recover under a petition filed at that term, Ex parte Rogers, 63 N. C. 110, but the failure to file petition for two years after administration is granted will defeat the widow's recovery, Gillespie v. Hyman, 15 N. C. 119, and also where the widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance, such action is not maintainable. Perkins v. Brinkley, 133 N. C. 86, 45 S. 465.

§ 4116. Report of commissioners.—The commissioners shall make and sign three lists of the

articles assigned to the widow, stating the quantity and value of each, the number in the family, and the deficiency to be paid by the personal representative. One of these lists shall be delivered to the widow, one to the personal representative, and one returned by the justice, within twenty days after the assignment, to the superior court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the widow. (Rev., s. 3099; Code, s. 2123; 1868-9, c. 93, s. 15.)

As to recovery of deficiency, see section 4112 and note thereto; as to personal liability of administrator for failure to pay deficiency, see note of Irvin v. Hughes, 82 N. C. 210, under section 4112.

Filing of List of Articles Mandatory. — The filing and recording of the list of articles alloted to the widow, as her year's support, as required by this section, is essential to its validity, and to the vesting in her of the property or debt alloted to the widow. Kiff v. Kiff, 95 N. C. 72.

Reasonable Certainty Required. — The allotment to the widow must be made with such reasonable certainty, in regard to the thing alloted, as to indicate what property was intended by the commissioners, otherwise the allotment will be void. Kiff v. Kiff, 95 N. C. 72. Under this principle the item, "labor for 3½ years, $173," was held void. Id.

§ 4117. Right of appeal.—The personal representative, or the widow, or infant by his guardian or next friend, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation. (Rev., s. 3100; Code, s. 2124; 1897, c. 442; 1868-9, c. 93, s. 16.)

Evidence to Support Findings as Bar to Appeal. — The findings of the judge in the special proceedings for the allotment of the year's support will not be reviewed on appeal where there is evidence to support such findings. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 4118. Hearing on appeal.—At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners. (Rev., s. 3101; Code, s. 2125; 1868-9, c. 93, s. 17.)

§ 4119. Personal representative entitled to credit.—Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him. (Rev., s. 3102; Code, s. 2126; 1868-9, c. 93, s. 18.)

§ 4120. When above allowance is in full.—If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowance for the year's support of his widow and her family shall not, in any case, exceed the value prescribed above; and the allowance made to her as above prescribed shall preclude her from any further allowance. (Rev., s. 3103; Code, s. 2127; 1868-9, c. 93, s. 19.)

Allowance under section 4115 does not preclude operation of this section, see note of Mann v. Mann, 173 N. C. 20, 91 S. E. 355, under section 4115.

Part 3. Assigned in Superior Court

§ 4121. Widow may apply to superior court.—It shall not, however, be obligatory on a widow to have her support assigned as above prescribed. Without applying to the personal representative of her deceased husband, she may, at any time within one year after the death of her husband, apply to the superior court of the county in which the will was proved, or administration granted, to have a year's support for herself and her family assigned to her. (Rev., s. 3104; Code, s. 2128; 1868-9, c. 93, s. 20.)

§ 4122. Nature of proceeding; parties.—The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties. (Rev., s. 3105; Code, s. 2129; 1868-9, c. 93, s. 21.)

§ 4123. What complaint must show.—In her complaint the widow shall set forth, besides the facts entitling her to a year's support and the value thereof, as claimed by her, the further facts that the estate of the deceased is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not she had an allowance made her, and the nature and value thereof; and if no allowance has been made, the quantities and values of the articles consumed by her and her family since the death of her husband. (Rev., s. 3106; Code, s. 2130; 1868-9, c. 93, s. 22.)

§ 4124. Judgment, and order for commissioners.—If the material allegations of the complaint be found true, the judgment shall be that she is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to assign to the plaintiff from the crop, stock and provisions of the deceased a sufficiency for the support of herself and her family for one year from the death of her husband; and if there be a deficiency thereof, to assess such deficiency, to be paid by the personal representative from the personal assets of the deceased, deducting, nevertheless, in all cases from such allowance the articles, or the value thereof, consumed by the widow and her family before such assignment, and also any sum previously assigned her. (Rev., s. 3107; Code, s. 2131; 1868-9, c. 93, s. 23.)

§ 4125. Duty of commissioners; amount of allowance.—The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the widow a value sufficient for the support of herself and her family according to the estate and condition of her husband and without regard to the limitation aforesaid in this chapter; but the value allowed shall not in any case exceed the one-half of the annual net income of the

deceased for three years next preceding his death. This report shall be returned by the justice to the court. (Rev., s. 3108; Code, s. 2132; 1868-9, c. 93, s. 24.)

§ 4126. Exceptions to the report.—The personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (Rev., s. 3109; Code, s. 2133; 1868-9, c. 93, s. 25.)

§ 4127. Confirmation of report; execution.—If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases. (Rev., s. 3110; Code, s. 2134; 1868-9, c. 93, s. 26.)

CHAPTER 81

WILLS

Art. 1. Execution of Will

§ 4128. Infants incapable.—No person shall be capable of disposing of real or personal estate by will until he shall have attained the age of twenty-one years. (Rev., s. 3111; Code, s. 2137; R. C., c. 119, s. 2; 1811, c. 280.)

Under the prior law, see Williams v. Her Heirs at Law and Next of Kin, Williams Legatees v. Heirs at Law, 44 N. C. 271, where it was held that an infant between twenty-one and eighteen could dispose of personal estate by will.

A will executed by a minor's father is not sufficient grounds for a court of equity to refuse the petition of the minor's guardian to be authorized and directed to enter proceedings to attack a consent judgment on grounds of irregularity and that it was not binding on the minor, it appearing that the purported will executed by the minor's father seeking to divest the minor's interest in trust estates was void under this section, the minors' father at the time of executing the instrument being under twenty-one years of age. In re Reynolds, 206 N. C. 276, 173 S. E. 789.

§ 4129. Married woman capable.—A married woman owning real or personal property may dispose of the same by will. (Rev., s. 3112; Code, s. 2138; R. C., c. 119, s. 3; 1844, c. 88, s. 8.)

Curtesy of Husband Defeated.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Watts v. Griffin, 137 N. C. 572, 50 S. E. 218.

§ 4130. Local: Wills of married women in Gaston.—All devises and bequests heretofore or hereafter made by any married woman to her husband shall be void, if such married woman has thereafter or shall hereafter become insane, and if a decree of divorce a vinculo matrimonii or a mensa et thoro has been obtained or shall hereafter be obtained by either party to such marriage: Provided, that this section shall apply only to Gaston county. (1908, c. 138.)

§ 4131. Formal execution.—No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's life time, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate. (Rev., s. 3113; Code, s. 2136; R. C., c. 119, s. 1; 1784, c. 204, s. 11; 1784, c. 225, s. 5; 1840, c. 62; 1846, c. 54.)

I. In General.
II. Signing Attestation and Date.
III. Holograph Wills—Depositing Valuable Papers.

Cross Reference.

For an exhaustive and analytical text treatment of the subject of wills and administration, see Vartanian on "Wills and Administration"—(a North Carolina text book under publication). For an exhaustive digest treatment, see 12 N. C. Enc. Dig. 408, et seq.; 15 N. C. Enc. Dig. 762.

I. IN GENERAL.

Editor's Note.—The Statute of Frauds in England, in relation to wills, and this section upon the same subject, have in view the same object, namely, the protection of the heirs-at-law, and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose, many forms and ceremonies are required to be observed in the execution of such instruments. With regard to attested wills, the requisites of the English statute, and this section, except as to the number of witnesses, are substantially the same. The courts, in both countries, have demanded a strict compliance with these provisions of the law. The same policy must govern the courts of this State, when they come to decide, whether the requisitions of this section have been complied with in the execution of a paper writing, propounded as a holograph will. See Little v. Lockman, 49 N. C. 495, 496.

Natural Right to Dispose of Property by Will.—The right to dispose of property by will is not a natural right, but one conferred and regulated by statute. Peace v. Edwards, 170 N. C. 64, 86 S. E. 807.

Necessity of Animus Testandi.—The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written animus testandi. It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it. In re Perry, 193 N. C. 397, 398, 137 S. E. 145.

For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show that it was made animus testandi, and where the other formalities have been observed, a "pack" of letters containing a note in his favor, with the indorsement written thereon, and signed by him, a long time prior to his death, "I want S. W. have this pack." will not operate either as a valid holograph will or codicil. Id.

Where the animus testandi appears as doubtful or ambiguous, the question is one for the jury. In re Will of Harrison, 183 N. C. 457, 111 S. E. 867.

Where propounders introduce ample evidence that the paper-writing was in the handwriting of deceased and there is no evidence to the contrary, and the paper-writing is dispositive on its face and unequivocally shows the intention of deceased that it should operate as his will, the animus testandi is conclusively presumed, and it is error for the court to submit the question of such intention to the jury over the objection of propounders. In re Rowland's Will, 206 N. C. 456, 174 S. E. 284.

Nuncupative Wills Not Precluded.—The language of this section does not preclude the validity of nuncupative wills in this State; for section 4144 par. 3 expressly provides for their probate. The different sections of the code must be construed together. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

Will Drafted from Dictations after Testator's Death.—A paper writing drafted by an attorney from a stenographer's notes taken from dictation of deceased as to the disposition of her property after death, unsigned and unwitnessed, is not admissible as a last will and testament. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

Letter as Will.—A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying "Brother Richard, take good care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house . . . . . I hope in a few days I will come back," etc., indicates the writer's present intention to dispose of his property, and is provable as his holograph will. Wise v. Short, 181 N. C. 320, 107 S. E. 124.

Reference on Certain Questions.—For an article on the following questions, see 2 N. C. Law Rev. 107 et seq., (1) what is sufficient subscription; (2) what are valuable papers; wherein is considered the relaxation of the doctrine of Little v. Lockman, 49 N. C. 493; (3) what is meant by "Depositing with Someone for Safe Keeping"; (4) animus testandi.

Same—Devisability of Possibility of Reverter before Condition Broken.—See Church v. Young, 130 N. C. 8, 40 S. E. 691, under the preceding section.

Cited in In re Will of Lowrance, 199 N. C. 782, 784, 155 S. E. 876; Grantham v. Grantham, 205 N. C. 363, 366, 171 S. E. 331.

II. SIGNING ATTESTATION AND DATE.

In General.—In order to a valid written will with witnesses, the same should be signed or his signature identified by the testator, or signed by some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089.

What Constitutes Signing and Subscribing.—The authorities make a distincton between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity, in reference to the first class, that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. Peace v. Edwards, 170 N. C. 64, 66, 86 S. E. 807.

Name in Body of Will Sufficient Signature.—It is well settled that if the name of the testator appears in his handwriting in the body of the will this is a signing within the meaning of the statute. Hall v. Misenheimer, 137 N. C. 185; Richards v. Lumber Co., 158 N. C. 56; Boger v. Lumber Co., 165 N. C. 559; Burriss v. Starr, 165 N. C. 660; Peace v. Edwards, 170 N. C. 64, 66, 86 S. E. 807.

Under this section a paper-writing in the testator's handwriting, dispositive on its face, with the name of the testator inserted therein in his own handwriting followed by the words "this being my will" is sufficient in form to constitute a holographic will. In re Rowland, 202 N. C. 373, 162 S. E. 897.

Same—For Example.—"I, John Jones, do make and publish this my last will and testament" is good if John Jones wrote the above even though he did nothing further in the way of signing or attesting the instrument concerned. 2 N. C. Law Rev. 107.

Signing in Presence of Witnesses Not Necessary.—This section does not require the testator to manually sign his will in the presence of the subscribing witnesses, and the validity of the written instrument in this respect will be upheld if the testator produces the will itself, and acknowledges and identifies it and his signature thereto, at the time the witnesses subscribe their names as such. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089; In re Fuller's Will, 189 N. C. 509, 127 S. E. 549, 550.

Witnesses Need Not Sign in Presence of Each Other.—It is not required that the subscribing witnesses sign the will in the presence of each other. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089; In re Will of Johnson, 182 N. C. 522, 109 N. C. 373.

Signature Made for Testatrix in Her Presence.—An instruction that it was not required that the will should be manually signed by the alleged testatrix if her name was signed thereto by some one in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will was held correct. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

Signing Attestation by Both Witnesses in Presence of Testator Essential.—When a witness who had properly signed as such, no other witness signing, had the will copied upon different paper in the absence of the testator, signed the copy, left it at the home of the testator with the original, who afterwards procured the due attestation and signature of the other witness on the copy, both of which were found among the papers of the testator after his death, but the original was destroyed, the copy is not valid as a will, and evidence that the first draft was identical with the copy is incompetent, the first witness having signed before the testator, and not in his presence, there being no physical connection between the original and copy, and not upon the same paper as that of the signature of the testator. In re Baldwin, 146 N. C. 25, 59 S. E. 163.

Attestation and Signing—Relation in Point of Time.—Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witness, and that, if the signature of the latter precede the signing by the testator, the will is void. Gardner on Wills, 263. Until the testator has signed, there is no will and nothing to attest. There are eminent authorities, however, which hold that where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first. Gardner, supra. In re Baldwin, 146 N. C. 25, 29, 59 S. E. 163.

Attestation and Subscription on the Same Sheet.—The attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected with that sheet. In re Baldwin, 146 N. C. 25, 30, 59 S. E. 163.

Attestation Does Not Invalidate a Holographic Will.—The fact of there being a signature of one subscribing witness to a will of land does not prevent it from being proved as holograph will; and it is no objection to the probate of a script as a holograph will that it has one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses, which intent was frustrated by the fact that the second attesting witness was incompetent. Hill v. Bell, 61 N. C. 122, 124.

Necessity of Date—Signature Required.—The testator's signature to the will is required though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting, appears in the body thereof, has the same legal effect as those bearing dates and subscribed by the testator. Peace v. Edwards, 170 N. C. 64, 86 S. E. 807.

A paper-writing in the handwriting of testatrix, duly proven by three credible witnesses, signed by testatrix and found among her valuable papers after her death, which paper-writing contains dispositive words sufficient to dispose of the estate, is valid as a holograph will under this section and § 4144(2), and it is not necessary that the writing be dated or show the place of execution. In re Parson's Will, 207 N. C. 584, 178 S. E. 78.

Same—Inconsistent Wills, Effect Intestacy.—Where the decedent has left several paper-writings purporting to be his last will, containing the opening declaration, as to each, that the testator made the same as his "last will and testament," but only one of them bears date and his name subscribed thereto, and each of them making a disposition of his property different from the other, the undated and unsubscribed wills have the same legal effect as the one dated and subscribed, though the testator had indorsed under his signature, thereon, the words "last will"; and in the absence of proof as to which of the wills was the last one, the legal effect is intestacy. Peace v. Edwards. 170 N. C. 64, 86 S. E. 807.

Question for Jury.—It is for the jury to determine whether the testatrix impliedly requested the attesting witnesses to attest the will, an implied request being sufficient to submit the question to the jury. In re Kelly's Will, 206 N. C. 551, 174 S. E. 453.

III. HOLOGRAPH WILLS—DEPOSIT WITH VALUABLE PAPERS.

Cross References.—See 12 N. C. Enc. Dig. 415; 15 N. C. Enc. Dig. 764.

Construction of Statute—Illustration.—The requirements of this section that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and effects must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient, and under the facts of this case the paper-writing was adjudged to be effective as his will when found after his death in the pockets of the clothes he was wearing, with large sums

of money and other papers of value. In re Will of Groce, 196 N. C. 373, 145 S. E. 689.

When all the words appearing on a paper in the handwriting of the deceased person are sufficient to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be her last will and testament. In re Parson's Will, 207 N. C. 584, 587, 178 S. E. 78.

What Constitutes Proper Depositing under This Section—Example.—A script purporting to be a holograph will was found in a drawer inside of a desk, between a bag of gold coins and a bag of silver coins; and immediately above the drawer, in pigeon-holes, were found notes, bonds and other valuable papers, arranged in files; the drawer and pigeonholes were secured by the same door and lock: It was held, that the script was properly deposited, under this section defining the requisites of holograph wills. Hughes v. Smith, 64 N. C. 493.

Deposit in Drawer of Bookcase with Deeds, etc.—Where the proof showed that the script propounded, as a holograph will, was found in a small drawer of a bookcase, in the room which the alleged testator occupied at his death, with his deeds and other papers, held to be such a finding "among the valuable papers of the decedent" as will, in connection with the other evidence required by the statute in respect to handwriting authorizing its probate. Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78.

Deposit in a Trunk Left with Friend for Safe-keeping.—The placing of a holograph in a trunk, left for safe-keeping with a friend, and having it in the larger part of the valuable papers and money of the deceased, will satisfy the requirements of the statute upon the point of deposit. Hill v. Bell, 61 N. C 122.

Need Not Be Found among Most Valuable Papers.—The phrase, "among the valuable papers and effects of," etc., used in this section does not necessarily and without exception mean among the most valuable papers, etc. Winstead v. Bowman, 68 N. C. 170. So the fact that decedent kept valuable papers in a tin box in a bank which were intrinsically more valuable than papers kept in a trunk where the will was found would not prevent the latter from being a depository within the meaning of the section. Id.

Deposit among Useless Papers and Rubbish.—In the case of Little v. Lockman, 49 N. C. 495, the script propounded was found in the drawer of a bureau, among some useless papers and rubbish, and there were valuable papers and effects kept in another drawer of the same bureau. Under such circumstances the court properly held that the script was not found in such a place of deposit as was contemplated by the statute. Hughes v. Smith, 64 N. C. 493, 495.

It is proper to notice that this section does not say "among valuable papers or effects," or "among any valuable papers or effects," but uses the definite article, the saying "among the valuable papers and effects." Id. This case is criticized by some of the later cases holding that the will need not be deposited among the most valuable papers. But it seems that the holding can be distinguished, without disparaging its authority, by the fact that the will here was deposited with useless papers and rubbish which had little or no comparative value with other papers of the testator deposited elsewhere—Ed. Note.

Jury to Determine Intention in Depositing with Valuables.—It was entirely proper in the judge to leave it to the jury to determine whether, from all the circumstances, they believed that the paper-writing was deposited by the deceased among his valuable papers with the intention that it should be his will. Simms v. Simms, 27 N. C. 684; Hill v. Bell, 61 N. C. 122, 125.

Evidence of Finding among Valuables.—That a holograph script was seen among the valuable papers and effects of the decedent eight months before his death, is no evidence that it was found there at or after his death. Adams v. Clark, 53 N. C. 56.

Sufficiency of Evidence.—Evidence that the will and testament of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers, and those she desired to keep for their sentimental value to herself, and transferred after her death to her trunk where they were found, is held sufficient, under the circumstances of this case. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

Found among the Valuable Papers "or" Effects.—The word "and" appearing in the phrase "among the valuable papers and effects" should be taken in its alternative rather than in its conjunctive sense. The change of the conjunction "or" which originally appeared in place of "and" did not affect the construction of the section. This for the reason that if the word "and" is taken in its strict conjunctive sense, the statute would be virtually repealed or its benefits greatly diminished, as only few persons who manage their business with order and system keep their valuable papers and effects mixed up together. Hughes v. Smith, 64 N. C. 493, 495.

What Constitutes Valuable Papers.—Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value; depending much upon the condition and business and habits of the decedent in respect to keeping his valuable papers. Winstead v. Bowman, 68 N. C. 170.

Note Held to Be Codicil.—A note payable to the deceased, found with his holographic will in a box with his other valuable papers after his death, and endorsed thereon in the handwriting of the deceased and over his signature to his wife to take effect after his death, when proved as § 4144 requires, is to be construed as a codicil to his will, and it is not necessary to such construction that it be physically attached to the holographic will. In re Will of Thompson, 196 N. C. 271, 145 S. E. 393.

What Constitutes Depositing with Someone for Safe Keeping.—In the case of Alston v. Davis, 118 N. C. 202, 24 S. E. 15, a brother in Texas wrote to his sister in North Carolina that if he got sick or died in Texas he wanted her to have his farm. He simply mailed her the letter. Subsequently he died in Texas and his sister undertook to probate the letter as a holographic will in this State. The question arose whether it had been deposited "with someone for safekeeping"; the court held that this constituted depositing with someone for safekeeping and that the will should be probated. In view of that fact that a testamentary disposition must be accompanied with animus testandi, the decision seems to be clearly unsound, inasmuch as the letter in question discloses no such intention. This conclusion is supported by later decisions of the court which in express terms refuses to follow the doctrine of Alston v. Davis, see Spencer v. Spencer, 163 N. C. 83, 79 S. E. 291. It is believed that if the writer of the letter indicates clearly that by mailing it to the addressee he intends to deposit it as a will, the letter would be admitted to probate as such. See the case of In re Ledford's Will, 176 N. C. 610, 97 S. E. 482; 12 N. C. Law Rev. 199.

§ 4132. Execution of power of appointment by will.—No appointment, made by will in exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. (Rev., s. 3114; Code, s. 2139; R. C., c. 119, s. 4; 1844, c. 88, s. 9.)

Art. 2. Revocation of Will

§ 4133. Revocation by writing or by cancellation or destruction.—No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted

therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least. (Rev., s. 3115; Code, s. 2176; R. C., c. 119, s. 22; 1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62.)

Cross Reference.—For full treatment of revocation of wills, see 12 N. C. Enc. Dig. 425 et seq; 15 N. C. Enc. Dig. 769.

Material Alteration Necessary.—In order to a revocation of a will, in whole or in part, under the provisions of this section there must not only exist the intent of the testator to cancel, but it must be accompanied by the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significances as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Same—Primary Controlling Clause Unaltered, Effect. — Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of this section; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Presumption as to Second Will.—A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of a prior date. In re Wolfe's Will, 185 N. C. 563, 565, 117 S. E. 804. In this case it was held that where a testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters, the two wills were not inconsistent and the latter did not revoke the former—Ed. Note.

Presumption of Revocation Where Will Cannot Be Found. —It being shown that a will was once in existence and last heard of in possession of the testator, but it could not be found after his death, a presumption arises that it was destroyed by his consent with intent to cancel it. Scoggin v. Turner, 98 N. C. 135, 3 S. E. 719.

Such presumption is not conclusive, but it imposes upon the person asserting the will, the burden of proving that it was not so destroyed, or that the testator was not of sound mind at the time of such presumed destruction. Scoggins v. Turner, 98 N. C. 135, 3 S. E. 719.

Revocation of Holographic Will.—It seems clear that a holographic will may be revoked just as an attested will may, i. e. (1) by burning, tearing, canceling or obliterating or (2) by another will, which may be holographic or attested, provided only that the statutory requirements in each case are complied with. No witnesses are necessary on the holographic revocation. See 14 L. R. A. N. S. 968 and 112 Am. St. Rep. 822, 2 N. C. Law Rev. 110.

Revocatory Paper Must Be a Testamentary Paper. — Where the writing offered as operating a revocation of the will of the testator, contains none of the elements of a testamentary paper, it cannot be helped by evidence aliunde, and hence has no revocatory effect. Davis v. King, 89 N. C. 441.

Effect of Disposal of Articles Already Bequeathed.—A bequest of personal property in a trunk which contained the holograph will and other valuable papers of the deceased, after removing certain articles specifically bequeathed to others, is not a revocation of her will by the testatrix. In re Foy, 193 N. C. 494, 137 S. E. 427.

Revocation by Parol Prior to Section.—See, early case of Giles v. Giles, 1 N. C. 377, prior to the enactment of this section, where it is held that a will of real estate in writing may be revoked by parol if the words of revocation denote a present intention to revoke.

Revival by Parol Declaration.—A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol. Giles v. Giles, 1 N. C. 377.

§ 4134. Revocation by marriage; exception.— All wills shall be revoked by subsequent marriage of the maker except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his heirs, executor or administrator or the person entitled as his next of kin, under the statute of distributions. (Rev., s. 3116; Code, s. 2177; R. C., c. 119, s. 23; 1844, c. 88, s. 10.)

Republication by Parol Not Effective.—Under this section the will of a married woman is revoked by another marriage contracted after the will was made, and her verbal declaration, during the last coverture, that said paperwriting was her last will and testament without any further execution thereof, in accordance with the statute, does not constitute a reexecution and republication of it. Means v. Ury, 141 N. C. 248, 53 S. E. 850.

Same—How Republished.—A holograph will revoked by the marriage of the testator, can only be revived and republished by a written instrument setting forth his intention, and duly attested by two witnesses, or by a writing by the testator himself, found among his valuable papers, or handed to one for safekeeping. Sawyer v. Sawyer, 52 N. C. 133.

Evidence of Undue Influence.—This section revokes any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. In re Will of Bradford, 183 N. C. 4, 110 S. E. 586.

§ 4135. No revocation by altered circumstances.—No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. (Rev., s. 3117; Code, s. 2178; R. C., c. 119, s. 24; 1844, c. 88, s. 11.)

Subsequent Birth or Adoption of Child.—The subsequent birth of a child or the adoption of one under our statute, does not revoke the will of the father, under this section as in case of subsequent marriage under section 4134. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306.

Right of After-born Child Does Not Effect Revocation.— While after-born children not provided for in the will of their deceased parent my claim by inheritance their part of the estate, under section 4169, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796.

§ 4136. No revocation by subsequent conveyance.—No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (Rev., s. 3118; Code, s. 2179; R. C., c. 119, s. 25; 1844, c. 88, s. 2.)

Parol Evidence to Fasten Constructive Trust.—Since the enactment of this section parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another. Chappell v. White, 146 N. C. 571, 60 S. E. 635.

This statute was enacted in view of the decision of this court, in 1843, in Cook v. Redman, 37 N. C. 623, in which a trust of this kind was upheld. Chappell v. White. 146 N. C. 571, 573, 60 S. E. 635.

Conveyance, etc., Not to Affect Provisions of Will.—No conveyance or act done after the execution of a will, unless it amounts to a revocation, will affect its provisions. Wood v. Cherry, 73 N. C. 110.

Where Construed, Approved and Cited.—This statute was construed in 1875 by an exceptionally able court, and the opinion delivered by Chief Justice Pearson in a notable case, which has been since repeatedly cited and approved. Wood v. Cherry, 73 N. C. 110, cited and approved in Avery v. Stewart, 136 N. C. 426, 48 S. E. 775; Sykes v. Boone, 132 N. C. 199, 43 S. E. 645; Cobb v. Edwards, 117 N. C. 244, 245, 23 S. E. 241; Herring v. Sutton, 129 N. C. 107, 39 S. E. 772; Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61, and many other adjudications of this court. Chappell v. White, 146 N. C. 571, 573, 60 S. E. 635.

Cited in Wright v. Wright, 198 N. C. 754, 755, 153 S. E. 321.

Art. 3. Witnesses to Will

§ 4137. Executor competent witness.—No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity thereof. (Rev., s. 3119; Code, s. 2146; R. C., c. 119, s. 9.)

Purpose of Section.—This section was intended to give the benefit of an executor's testimony to every person who should be interested, either in the establishment, or defeat of a paper writing propounded as a will. Pannell v. Scoggin, 53 N. C. 408, 410.

Executor or Administrator C. T. A. Competent.—An executor or administrator cum testamento annexo, who is also a subscribing witness to a will, is competent to testify to the execution thereof; and the same rule applies to one who was competent at the time of the making of the will, but subsequently acquired an interest therein. Vester v. Collins, 101 N. C. 114, 7 S. E. 687.

Same—Rule Prior to Section.—An executor, before the enactment of this section, could not be a witness in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856. Gunter v. Gunter, 48 N. C. 441.

May Be Examined for Both Parties.—Under this section one named as executor in a receipt, propounded as a will, though named as plaintiff in an issue devisavit vel non, may be examined as a witness for the caveator as well as for the propounder. Pannell v. Scoggin, 53 N. C. 408.

§ 4138. Beneficiary competent; interest rendered void.—If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof. (Rev., s. 3120; Code, s. 2147; R. C., c. 119, s. 10.)

In General.—This section unlike that in force under the Revised Statutes, which invalidates the will unless it was attested by at least "two witnesses no one of whom shall be interested in the devise of the lands" as a means of transmitting the title therein to the devisees, in such case, applying to wills of both real and personal estate, avoids only the devise or bequest to such attesting witness and to his and her wife and husband and privies, and leaves the other dispositions made of the testator's property in unimpaired force and operation. Vester v. Collins, 101 N. C. 114, 116, 7 S. E. 687.

Interest of Witness to Holographic Will Not Avoided.—One who is beneficiary under a holograph will may testify to such competent, relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

This section applies only to wills that have attesting witnesses, and to the attesting witness. Hence a devisee under a holographic will is a competent witness to prove the will without losing his interest thereunder. His interest in the results affects only the credit to be given to his testimony. Hampton v. Hardin, 88 N. C. 592.

Interest of One Who Does Not Sign as Witness Not Avoided.—One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. Boone v. Lewis, 103 N. C. 40, 9 S. E. 644.

Competency of Witness—Question of Fact or Law.—If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive him of the legacy and it is error in the Judge to submit the competency of a witness as a question of fact for the jury. The competency of a witness is a question for the court, to be raised when he offers to testify, and to be determined by the court. McLean v. Elliott, 72 N. C. 70.

Object in Avoiding Witnesses' Interest.—It was to remove all improper influences and secure impartiality, in such as are called to attest the execution of the will, that all gifts to them or to their husbands or wives are annulled, and all temptations to swerve from the truth are taken away. Hampton v. Hardin, 88 N. C. 592, 595.

Competency of Widow and Devisee.—The widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valuable papers of the deceased. Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78.

Application of Section 1795.—Section 1795 does not apply to wills, which are governed by this section. Cox v. Lumber Co., 124 N. C. 78, 82, 32 S. E. 381.

Art. 4. Probate of Will

§ 4139. Executor may apply for probate.—Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate. Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or devisor. If such will is fraudulently suppressed, stolen or destroyed, or been lost, and an action or proceeding shall be commenced within two years from the death of the testator or devisor to obtain said will or establish the same as provided by law, then the limitation herein set out shall only begin to run from the termination of said action or proceeding, but not otherwise. If the clerk of the superior court having jurisdiction to probate any will be a subscribing witness thereto, or a devisee or legatee therein, or if said clerk shall have any pecuniary interest in the property disposed of by said will, then the clerk of the superior court of any adjoining county shall have jurisdiction to probate said will, and upon petition filed before him by any one interested in any way in said will, he shall proceed to have said will produced before him, and the said will shall thereupon be probated, recorded, and filed as provided by this chapter, and a duly certified copy of the said will, together with the probate of the same, and the said petition, under the hand and seal of the said clerk, shall be filed and recorded in the book of wills, in the office of the clerk of the superior court of the county whose clerk was a subscribing witness thereto, or a devisee or legatee therein, or who had a pecuniary interest in the property disposed of by said will and the clerk in said last mentioned county is hereby authorized to issue letters to personal representatives, who may qualify and administer the estate in said will as if originally probated in said county, and the title to all property, both real and personal, conveyed in said will, shall be as good and effectual as if the said will had been originally probated and recorded in said last mentioned county: Provided, that the preceding sentence shall not affect vested rights or litigation pending March 9, 1921. (Rev., s. 3122; Code, s. 2151; C. C. P., s. 439; 1919, c. 15; 1921, c. 99; 1923, c. 14.)

Editor's Note.—The provisions of this section, which concern the probating of wills where the clerk of the superior court having jurisdiction to probate it is a subscribing witness thereto, are added by the amendment of 1921, (Public Laws 1921, c. 99), and the similar provisions where such clerk is a devisee or legatee under the will or has a pecuniary inter-

est in the property disposed by the will, are added by the amendment of 1923, (Public Laws 1923, c. 14).

"While the amending statutes expressly refer to this section . . . . . they more particularly affect §§ 1 and 2, of the code defining the jurisdiction of the clerk in administrations, and §§ 939, 940 and 941, as to disqualifications. By sec. 939, the clerk is disqualified to act, if he is a subscribing witness to a will, but this disqualification ceases when the will has been admitted to probate by another clerk; and the same result follows from the amending statute. That the wife of the clerk is a subscribing witness also disqualifies the clerk, but this is not affected by the amendment. This defect may be waived by the parties interested, but the clerk cannot very well take the probate, when he is one of the two subscribing witnesses. Section 940; Trenwith v. Smallwood (1892) 111 N. C. 132, 15 S. E. 1030. The procedure would then be under the amended statute, or by application to the judge, as provided in sec. 941; and in either case, the will, after probate, would be returned to the clerk of the original county to proceed with the administration of the estate. If the clerk has an interest in the estate under the will, he is disqualified by sec. 939; but this may be waived, and he may then proceed as if the defect did not exist. Section 940. If this defect is not waived, what procedure is required? The recent amendment says that the petition may be filed and probate taken before the clerk of any adjoining county and when a certified return is made to the clerk of the original county, he may proceed to appoint the personal representative. Section 941 provides that application may be made to the proper judge for an order to remove the proceedings to the clerk of an adjoining county in the same district; or the judge himself may make all necessary orders for the settlement of the estate. There appears to be a conflict between the two statutes in this respect, unless the recent amendment is limited to the mere fact of probate; but if that is all that is meant, the amendment is not necessary, since the same result may be readily obtained under the former statute. The appointment and qualification of the personal representative is as much a judicial act as any other order made in the settlement of the estate; and to allow the clerk who is interested to proceed in the matter without a waiver, would confer upon him the power to sit in judgment in his own cause, contrary to the general policy of the law. Land Co. v. Jennett (1901), 128 N. C. 3, 37 S. E. 954. The obvious purpose of the two amending statutes was to provide a simple and speedy method of obtaining the probate of a will, when the clerk was disqualified, and this has been done; but how far it was intended to change the former practice, if at all, in case of interest, is not clearly shown." 1 N. C. Law Rev. 314.

In General.—This section and § 4141, by implication at least, require the probate of a will. Wells v. Odum, 207 N. C. 226, 228, 176 S. E. 563.

No Limitation to Probate a Will—Exception.—In the absence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven, and when duly proven it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it. Steadman v. Steadman, 143 N. C. 345, 346, 55 S. E. 784. But this section sets a period of limitation after which a will may not be probated as to bona fide purchasers.—Ed. Note.

Title Descends to Heirs Subject to Be Divested.—The title of the land descends to the heirs of the testator, subject to be divested in favor of the devisee, when the will is duly admitted to probate. Floyd v. Herring, 64 N. C. 409, 411.

Limitation as to Lost Wills Prior to Statute.—See McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971, where it is held that no statute of limitation applies to the probate of a lost will. This case was decided prior to the amendment of 1919, which sets a limitation to the probate of lost wills where the right of bona fide purchasers are involved.

Citation to those in interest is not necessary to the probate of a will in common form, the proceeding being ex parte, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally. In re Rowland, 202 N. C. 373, 162 S. E. 897.

The probate of a will in common form without citation to those in interest "to see the proceedings," is an ex parte proceeding and not binding on caveators upon the issue of devisavit vel non raised in their direct attack upon the validity of the will, and the admission in evidence in the caveat proceedings of the order of probate constitutes reversible error. Wells v. Odum, 205 N. C. 110, 170 S. E. 145.

Appointment Is Reviewable.—The power, conferred by this section, to appoint administrators is reviewable to the judge of the Superior Court of the county. In re Estate of Wright and Wright v. Ball, 200 N. C. 620, 158 S. E. 192.

§ 4140. Executor failing, beneficiary may apply.—If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days notice thereof to the executor. (Rev., s. 3123; Code, s. 2152; C. C. P., s. 440.)

Notice to Executor in Probating a Codicil.—Before others interested in the probate of a will may apply for its probate ten days previous notice must be given the executor therein named, and where an executor has probated and qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil. Spencer v. Spencer, 163 N. C. 83, 79 S. E. 291.

§ 4140(a). Clerk to notify legatees and devisees of probate of wills. — The clerks of the superior court of the state are hereby required and directed to notify by mail, all legatees and devisees whose addresses are known, designated in wills filed for probate in their respective counties. All expense incident to such notification shall be deemed a proper charge in the administration of the respective estates. (1933, c. 133.)

While this requirement appears to be mandatory, it does not seem to be prerequisite to the probate of the will itself. Nor does it assume the status and importance of a citation to devisees and legatees as in the case of the probate of a will in solemn form. Apparently the purpose of the statute is to expedite the settlement of the estate of a person who has died testate. 11 N. C. Law Rev., 263.

§ 4141. Clerk may compel production of will.—Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the state, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt. (Rev., s. 3124; Code, s. 2154; C. C. P., s. 442.)

See annotations to § 4139.

In General.—A petition before the clerk of the superior court alleging that the respondents were in possession of a later will than that probated in another county, and that the petitioner was withholding this will for fraudulent purposes, etc., is a proceeding under this section to compel the production of a will. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

Failure of Petitioners to Pursue Proceedings—Discharge of Respondents.—Where the respondents in proceedings to compel the production of a will appear before the clerk at the time set for the hearing, and in writing under oath fully deny the charges made, and the petitioners neither file reply, offer evidence, nor request an examination, no issues are raised requiring the matter to be transferred to the trial docket, and the rule against the respondents should be discharged at the petitioner's cost. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

Issue of Wrong Venue No Excuse.—Where the clerk of the court of G. county issued a notice to the respondent, who had the will of the deceased in his possession, to exhibit the same for probate, it was the duty of the respondent to obey the summons, and he could have raised in his answer the question of whether the will should be probated in G. or L. county. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931.

Impossibility to Comply with Order as Excuse.—An order of the clerk of the court of G. county which adjudges the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on

appeal where it appears that the respondent can not comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of the will and has refused to surrender it to the respondent. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931.

Allowance of Reasonable Expenses.—Where the law imposes a duty upon a person, or group of persons, with respect to probating and establishing the validity of a will, in the performance of such duty, in good faith, reasonable expenses thereby incurred should be allowed and paid out of the fund or property which is the subject of the litigation. Wells v. Odum, 207 N. C. 226, 228, 176 S. E. 563.

Attachment for Contempt—Scope of Proceedings.—In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and can not be passed upon. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931.

Motion to Dismiss Proceedings under This Section.—Where a rule issued under the provisions of this section in proceedings to compel the production of a will, should be discharged, a motion by the respondents to dismiss the proceedings will be treated as a motion to discharge them. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

§ 4142. What shown on application.—On application to the clerk of the superior court, he must ascertain by affidavit of the applicant—

1. That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.

2. The value and nature of the testator's property, as near as can be ascertained.

3. The names and residences of all parties entitled to the testator's property, if known, or that the same on diligent inquiry cannot be discovered; which of the parties in interest are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate. (Rev., s. 3125; Code, s. 2153; C. C. P., s. 441.)

§ 4143. Proof and examination in writing. — Every clerk of the superior court shall take in writing the proofs and examinations of the witnesses touching the execution of a will, and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office. (Rev., s. 3126; Code, s. 2149; C. C. P., s. 437.)

Former Practice.—Formerly the court of pleas and quarter sessions had jurisdiction of the probate of wills, and there was at that time no provision in the statute requring the taking of the proofs in writing or for recording the probate. The practice was to exhibit the will before the court and offer the proofs of execution, and for an entry to be made upon the minutes of the adjudication, and the clerk, acting upon the authority of the court, then recorded the will upon the will book. In most instances he also recorded a memorandum of the proceedings before the court, but this was not done in all cases. Poplin v. Hatley, 170 N. C. 163, 166, 8 S. E. 1028.

Presumption of Valid Recordation.—The requirements of this section did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary. Poplin v. Hatley, 170 N. C. 163, 86 S. E. 1028.

Same—Vacating Probate in Collateral Proceedings.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. Mayo v. Jones, 78 N. C. 402; McClure v. Spivey, 123 N. C. 678, 31 S. E. 857.

Foreign Records Conformant to This Section Sufficient.—Where a non-resident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of this section, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

§ 4144. Manner of probate.—Wills and testaments must be admitted to probate only in the following manner:

1. In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or resides out of the state, or cannot after due diligence be found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.

2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping.

3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest such will if they think proper. (Rev., s. 3127;

Code, s. 2148; 1893, c. 269; 1901, c. 276; C. C. P., s. 435.)

I. In General—Attested Wills.
II. Holographic Wills.
III. Nuncupative Wills.

Cross References.

For full treatment of the law governing the probate of wills, see 12 N. C. Enc. Dig. 433; 15 N. C. Enc. Dig. 770, et seq.

See annotations to § 4131.

I. IN GENERAL—ATTESTED WILLS.

Evidence Must Show Subscribing in Presence of Testator.—Under sec. 4136 and this section regulating the manner in which wills shall be attested and admitted to probate, it is essential, not only that the document shall be subscribed in the presence of the testator by at least two witnesses, but that the evidence upon which the will is admitted to probate must show that fact. In re Thomas, 111 N. C. 409, 411, 16 S. E. 226.

Proof of Handwriting of Testator Where One Witness Alive.—Upon an issue of devisavit vel non, purporting to be signed by testator himself, it is necessary for the propounders to show, in the superior court, the handwriting of the testator and his signature to the will, where only one of the subscribing witnesses to the will is alive, the matter of probate being de novo, and the record of the clerk not being competent evidence in this respect. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089.

Cited in In re Will of Thompson, 196 N. C. 271, 145 S. E. 393; In re Will of Shemwell, 197 N. C. 332, 333, 148 S. E. 469; In re Will of Lowrence, 199 N. C. 782, 784, 155 S. E. 876; In re Will of Stewart, 198 N. C. 577, 152 S. E. 685.

II. HOLOGRAPHIC WILLS.

The phrase, "among the valuable papers and effects of." etc., used in this section, does not necessarily and without exception mean among the most valuable papers, etc., Winstead v. Bowman, 68 N. C. 170.

Effect of Provisions of Section 1791.—Where the validity of a holograph will depends upon its having been left with the beneficiary for safe keeping, his testimony thereof, after the death of the testator, is a transaction or communication of which he may not testify under section 1791. McEwan v. Brown, 176 N. C. 249, 97 S. E. 20, overruling the case of Hampton v. Hardin, 88 N. C. 592.

III. NUNCUPATIVE WILL.

Similarity with English Statute of Frauds.—The statutory provision in relation to nuncupative wills have existed in this State since 1784, and they are substantially the same as those in the Statute of Frauds, 29 Car. II., ch. 3, secs. 19, 20; and these provisions have always been strictly construed and enforced by the courts, both in this State and in England. Smith v. Smith, 63 N. C. 637, 639.

Strict Compliance Necessary—Purpose of Requirements.—The requisites of this statutory provision must be strictly complied with and observed, in all material respects, in order to prevent opportunity for fraudulent practices on the part of such persons as would be disposed to obtain undue advantage of persons in their last sickness as to the final disposition of their property; and also to prevent mischiefs that might arise from the ignorance, misapprehension or dishonest purposes of persons called upon to be the witnesses of such wills. The purpose of such requisites is to prevent the fabrication of such wills; they are necessary, and it is essential to observe them strictly. Brown v. Brown, 6 N. C. 350; Rankin v. Rankin, 31 N. C. 156; Webster v. Webster, 50 N. C. 95; Haden v. Bradshaw, 60 N. C. 259; Smith v. Smith, 63 N. C. 637; Bundrick v. Haygood, 106 N. C. 468, 471, 11 S. E. 423; Long v. Foust, 109 N. C. 114, 118, 13 S. E. 889.

Witnesses Must Be Called in to Witness Transaction.—Where a woman in her last illness, without expressing any purpose to make a will, in terms, said she wanted to give to her sister certain articles of personal property, and called her to her bedside and gave them to her, in the presence of two other persons but did not call them, or either of them to witness the transaction: It was held that this did not constitute a nuncupative will. Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423.

It is necessary to the validity of a nuncupative will that the testator state her wishes in the presence of two witnesses and "specially require them to bear witness thereto." Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

Where a person, being in extremis, and conscious of it, sent for a friend with whom he had often talked on the subject of a will and told him what disposition he wanted to make of his property, and then such friend replied that if he wanted to do anything of that kind he had better have some other person in the room, and thereupon the speaker went out and brought in another person, and in the presence of the sick man repeated the proposed disposition of the property, to which the latter assented: It was held, to be a sufficient rogatio testium to satisfy the requirements of a nuncupative will. Smith v. Smith, 63 N. C. 637.

Same—Designation by Name Not Necessary.—It is sufficient that the testator saw the witnesses and charged them to bear witness to his will, and they did so, and it is not a good objection that he failed to designate them particularly by name. That he required them, each, all of them, to bear witness, was what the section requires. The purpose is that the testator shall require two witnesses at least to take notice and bear witness that he makes his will. He must require and direct a competent person, and that person must be able to testify that he was one of the persons—the witnesses—so required, and that he did take notice and bear witness. Long v. Foust, 109 N. C. 114, 119, 13 S. E. 889.

Same—Sufficiency of Showing.—Under this section, it is sufficient to show, on the question of the testator's requesting that the witness "bear witness" to the will, that believing himself to be in extremis, he told the witness during his last illness that he wanted to make a will, who, at his request, called in another and while they were at his bedside, testator gave specific directions for the disposition of his personal property; and though he had therefore expressed his wish to make a written will, and had failed in his effort to do so, the matters sought to be established as the nuncupative will were declared at a time he was apprehensive he would become unable to talk, and his death occurred about four days thereafter. In re Garland's Will, 160 N. C. 555, 76 S. E. 486.

No Probate Until Citation—Limitation of Six Months.—After the contents of the will are established within the time and in the manner prescribed by this section it cannot be admitted to probate until the citation or publication, and the probate based thereon shall be completed within six months from the making of the alleged will. The limitation of six months refers only to the proof and establishment of the contents, and that only where it is not reduced to writing within ten days of its making. In re Haygood's Will, 101 N. C. 574, 8 S. E. 222.

Same—May Be Proved before Citation.—It will be observed that it is not required that the will shall not be proved by the witnesses until the citation and notice provided for shall be made, but it shall not be proved—that is, proved in the sense of admitting it to probate at once—until citation shall be made, the purpose being to give the widow and next of kin opportunity to contest the will—the proof thereof by the witnesses thereof—if they shall see fit to do so. In re Haygood's Will, 101 N. C. 574, 577, 8 S. E. 222.

The purpose of the statute is not to prevent the examination of the witnesses of the will, after such lapse of six months, on the trial of the issue devisavit vel non in the course of a contest of it, but it is to require that they shall not be allowed to prove it in the first instance, when it is first presented for probate after that time, unless it shall have been put in writing within ten days next after the making thereof. In re Haygood's Will, 101 N. C. 574, 578, 8 S. E. 222.

If Reduced to Writing May Be Proved after Six Months.—A just interpretation of the provision relative to the proof of a nuncupative will is, that if such will shall be put in writing within ten days next after it was made, it may be proved by the witnesses thereof either before or after the lapse of six months next after the making thereof, because the will being in writing with the sanction of the witnesses, their recollection as to what it was is helped and strengthened thereby, and they could the better be trusted to testify as to the making of the same, and what it was in its detail, at any time within a reasonable period. In re Haygood's Will, 101 N. C. 574, 576, 8 S. E. 222.

Difference in Terminology of This and Section 4133.—The statute with reference to revocation by holographic will and that with reference to probate of a holographic will are worded somewhat differently. As to revocation it must be "lodged by him with some person for safe-keeping or left by him in some secure place, or among his valuable papers and effects." As to probate it is sufficient if it "was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping." 2 N. C. Law Rev. 110.

Writing Postponed Execution as Nuncupative Will.—A paper writing which the deceased had theretofore dictated but postponed executing from time to time and which he finally declared to be his will without reading it, at a time he was in his last sickness not expecting to recover and physically unable to execute it, is invalid as a nuncupative

will: (1) his intent that it should be a written will is evidenced by his conduct; (2) the dictation was not in law "during his last sickness." Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

The declaration of a testator made in the presence of two witnesses that a paper writing contained the disposition he desired made of his property and that he desired its provisions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him several months before, is invalid as a nuncupative will. (1) the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within ten days. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

§ 4145. Probate conclusive until vacated. — Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal, provided that whenever in a will so probated or recorded a bank or trust company shall be named executor and/or trustee and shall have at the time of such probate and recording become absorbed by or consolidated with another bank or trust company such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the former bank or trust company. (Rev., s. 3128; Code, s. 2150; C. C. P., c. 438; 1929, c. 150.)

Cross Reference.—For full treatment of this subject, see 12 N. C. Enc. Dig. 461 et seq.; 15 N. C. Enc. Dig. 780, et seq. See note under § 217(p).

Editor's Note.—The Act of 1929 added the proviso to this section.

Conclusively Valid Until Declared Void.—A will probated in common form before the clerk of the superior court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. Holt v. Ziglar, 163 N. C. 390, 79 S. E. 805.

Cannot Be Attacked Collaterally.—Where a will has been admitted to probate a party claiming property disposed of by it to another can not, in an action to recover the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded, under this section. Varner v. Johnston, 112 N. C. 570, 17 S. E. 483.

A will probated in common form is not subject to collateral attack, but is binding or conclusive until set aside in a direct proceeding. Mills v. Mills, 195 N. C. 595, 143 S. E. 130; In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

Until so set aside it is conclusively presumed to be the will of the testator. In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

A will which has been duly probated in common form may not be collaterally attacked even for fraud. Crowell v. Bradsher, 203 N. C. 492, 166 S. E. 731.

Probate a Judicial Act—Conclusive Presumption of Validity.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. Mayo v. Jones, 78 N. C. 402; McClure v. Spivey, 123 N. C. 678, 31 S. E. 857.

An order of the clerk adjudging a will to be fully proved in common form is not "conclusive in evidence of the validity of the will" under this section, on the issue of devisavit vel non, raised by a caveat filed thereto. Wells v. Odum, 205 N. C. 110, 111, 170 S. E. 145.

Effect of Revocation of Probate upon Administration.—The revocation of the probate in common form did not have the effect of annulling the administration properly granted. Floyd v. Herring, 64 N. C. 412.

§ 4146. Wills filed in clerk's office.—All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records. If said will contains a devise of real estate, outside said county where said will is probated, then a copy of the said will, together with the probate of the same, certified under the hand and seal of the clerk of the superior court of said county may be recorded in the book of wills and filed in the office of the clerk of the superior court of any county in the state in which said land is situated with the same effect as to passing the title to said real estate as if said will had originally been probated and filed in said county and the clerk of the superior court of said last mentioned county had had jurisdiction to probate the same. (Rev., s. 3129; Code, s. 2173; R. C., c. 119, s. 19; 1777, c. 115, s. 59; 1921, c. 108, s. 1.)

Editor's Note.—All but the first sentence of this section was added by the amendment of 1921, Public Laws, ch. 108, § 1.

Will Taken from Record as Evidence of Testator's Handwriting.—An original will taken from the records of the court, is competent without further proof of its execution, as a basis of comparison in determining the genuineness of the handwriting of testator to the instrument in controversy. Croom v. Sugg, 110 N. C. 259, 14 S. E. 748.

§ 4146(a). Validation of wills heretofore certified and recorded.—All wills which have heretofore been certified and recorded in the office of the clerk of the superior court of any county, substantially following the provisions of section 4146 are hereby validated and approved as to the conveyance and transfer of any title to real estate as contained therein, to the same extent as if said wills had originally been probated and filed in said county, and the clerk of the superior court of said county had had jurisdiction to probate the same, provided the probates and witnesses to the said wills are sufficient and according to law. (1921, c. 108, s. 2.)

§ 4147. Certified copy of will proved in another state. — When a will, made by a citizen of this state, is proved and allowed in some other state or country, and the original will cannot be removed from its place of legal deposit in such other state or country, for probate in this state, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording such copy as by law might be taken upon the production of the original. (Rev., s. 3130; Code, s. 2157; C. C. P., s. 445; R. C., c. 44, s. 9; 1802, c. 623.)

Defective Certificate of Clerk.—The certificate of probate of a will executed in another state, disposing of real estate in this State, is defective which does not show affirmatively that the will was executed according to the laws of this State. Raleigh etc., Ry., Co. v. Mining & Mfg. Co., 113 N. C. 241, 18 S. E. 208.

§ 4148. Probate of will made out of the state.—Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the state, or that a will has been made in the state and the witnesses thereto have moved out of the state, disposing of or charging land or other property within the state, the clerk of the superior court of the county where the property is situated may issue a commission to such person as he may select, authorizing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge

the will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded. (Rev., s. 3131; Code, s. 2155; 1899, c. 55; C. C. P., s. 443.)

Defective Certificate.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence, as departing from the requirements of this section. Hunter v. Kelly, 92 N. C. 285.

§ 4149. Probate when witnesses are nonresident. — Where one or more of the subscribing witnesses to the will of a testator, resident in this state, reside in another state, or in another county in this state than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside; and the affidavits, so taken and subscribed, shall be transmitted by the notary public, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; 1933, c. 114.)

Editor's Note.—Public Laws 1933, c. 114, inserted, near the beginning of this section, the words "or in another county in this state than the one in which the will is being probated."

The 1933 amendment will facilitate the probate of wills where difficulty is encountered in securing the personal appearance of witnesses who reside within the state but at a distance from the county of probate. 11 N. C. Law Rev., 262.

§ 4150. Probate when witnesses in another county.—When a will is offered for probate in one county of this state and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for the witnesses requiring them to appear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside more than seventy-five miles from the place where the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact upon affidavit or other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, or inside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the clerk to prove the will, then the clerk shall have power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him. (Rev., s. 3132; 1899, c. 55; 1911, c. 13; 1923, c. 59.)

Editor's Note.—Public Laws of 1923, chapter 59 amended this section by adding after the words "resides out of the county" the words "or inside of the county," so that in case of physical disability of the witness, either within or out side of the county, the clerk may order the deposition to be taken. See 1 N. C. Law Rev. 315.

Depositions. — Depositions were taken in proceedings to caveat a will, referring to a paper-writing which was not attached, and it was held competent for the commissioner to identify the paper-writing as a part of the deposition. In re Clodfelter's Will, 171 N. C. 528, 88 S. E. 625.

§ 4151. Probate of wills of soldiers and sailors. —In addition to the methods already provided in existing statutes therefor, the will of a soldier or sailor, executed while in the actual service of the United States, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the state the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the tenth day of March, one thousand nine hundred and nineteen.

The provisions of this section shall expire by limitation on April sixth, one thousand nine hundred and twenty-two. (1919, c. 216; Ex. Sess. 1921, c. 39.)

§ 4152. Certified copy of will of nonresident recorded.—Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will, duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not the copy had been produced, proved and allowed before such clerk. But when any will contains any devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this state; and that fact must appear affirmatively in the certified probate or exemplification of the will; and if it does not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proofs, touching the execution of the will, as prescribed in the preceding section; and the same may be adjudged duly proved, and shall be recorded as herein provided. (Rev., s. 3133; Code, s. 2156; 1885, c. 393; C. C. P., s. 444; 1883, c. 144.)

Editor's Note.—Note that the statement in the first syllabus of Whitton v. Peace, 188 N. C. 298, 124 S. E. 571, stating: "semble, a will properly attested and otherwise sufficient under the laws of another state would operate to pass title to lands situated here" is erroneous, unless it is qualified by saying: provided it also conforms to the requirements of the law of this State. The statute in plain and express terms declares such wills invalid as to realty de-

vised in the State, unless the will is executed according to the laws of this State.

Orderly Arrangement of Pages of Exemplification.—Where the will has been admitted to probate in the court having jurisdiction to admit wills and testaments to probate, even though the pages of the manuscript exemplified copy are not orderly arranged, the will will be admitted to probate and record in this State, under the provisions of this section. Roscoe v. Lumber Co., 124 N. C. 42, 32 S. E. 389; Roper Lumber Co. v. Hudson, 153 N. C. 96, 99, 68 S. E. 1065.

Authentication by Clerk of Court and Not Register of Deeds.—It is necessary to the registration of a copy of a will in this State that the copy or exemplification of the will be duly certified and authenticated by the clerk of the court in which it had been proved or allowed, and if it has been allowed to be registered here under the certificate and seal of the register of deeds in another state it is ineffectual as evidence in a claimant's chain of title. Riley v. Carter, 158 N. C. 484, 74 S. E. 463.

Appearance and Examination of Attesting Witness Not Necessary.—Under the provisions of this section, it is not required that a will executed and admitted to probate in another state be also probated in this State by the appearance and examination of the attesting witnesses in order to pass title to property here when a copy or exemplification thereof duly certified and authenticated by the clerk of the court in which it had been proven and allowed shall be allowed, filed and recorded in the proper county in this State. The doctrine of Hunter v. Kelly, 92 N. C. 285, is no more the law. Vaught v. Williams, 177 N. C. 77, 97 S. E. 737.

Due Record and Certificate of Foreign Probate—Effect.—Where a nonresident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of section 4143, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

Subscription by Two Witnesses Must Appear from Certificate.—Where a certified copy from another state has been recorded, the fact of subscribing by at least two witnesses must appear affirmatively "in the certificate probate or exemplification of the will." The mere recitation in the attestation clause is not affirmative evidence. Raleigh, etc., Ry. Co. v. Mining & Mfg. Co., 113 N. C. 241, 244, 18 S. E. 208.

§ 4153. Probates validated where proof taken by commission or another clerk.—In all cases of the probate of any will heretofore made in common form before any clerk of the superior courts of this state, where the testimony of the subscribing witnesses has been taken in the state or out of it by any commissioner appointed by said clerk or taken by any other clerk of the superior court in any other county of this state, and the will admitted to probate upon such testimony, the proceedings are validated. (Rev., s. 3134; 1899, c. 680.)

§ 4154. Probates by deputy clerk validated in certain counties.—All probates of wills heretofore made before a deputy clerk of the superior court, wherein no contest or suit is pending for the purpose of annulling the probate, shall be deemed to have been probated before the clerk of the superior court, and the acts of the deputy clerk in probating the same shall be deemed as effectual and valid in law as if done by the clerk in person. This section shall apply only to Burke and Scotland counties. (1907, c. 669.)

§ 4155. Probates in another state before 1860 validated. — In all cases where any will devises land in this state, and the original will was duly admitted to probate in some other state prior to the year one thousand eight hundred and sixty, and a certified copy of such will and the probate thereof has been admitted to probate and record in any county in this state, and it in any way appears from such recorded copy that there were two subscribing witnesses to such will, and its execution was proved by the examination of such witnesses when the original was admitted to probate, such will shall be held and considered, and is hereby declared to be, good and valid for the purpose of passing title to the lands devised thereby, situated in this state, as fully and completely as if the original will had been duly executed and admitted to probate and recorded in this state in accordance with the laws of this state: Provided, that this section shall in no way affect actions or suits pending on March 8, 1913, or any vested rights. (1913, c. 93, s. 1.)

§ 4156. Local: Validating probate of certain old wills.—In all cases where wills and testaments were executed prior to the first day of January, one thousand nine hundred and fifteen, and which appears to have two or more subscribing witnesses thereto, and such wills and testaments were admitted to probate in jurisdictions outside of North Carolina upon the proof of one witness, and such wills, or exemplified copies thereof, were presented to the clerk of the superior court in any county in this state where the makers thereof owned property, and by such clerk recorded in the records of wills for his county, said wills and testaments, or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to the real and personal property therein devised and bequeathed, to the same extent and as completely as if the execution of such wills had been proven by two subscribing witnesses thereto in the manner provided by the laws of this state. And where such wills and testaments were duly admitted to probate in jurisdictions outside of North Carolina, upon proof of one witness, and in cases where parties interested desire to have them recorded in this state, where they have not already been so recorded, the clerk of the superior court of any county in North Carolina, when such wills or exemplified copies thereof are duly authenticated and presented to him by parties interested, shall receive and record the same, and if the same are otherwise sufficient such wills shall have the effect to pass the title to all real and personal property therein devised and bequeathed, to the same extent and as completely as if the execution of such wills had been proven by two subscribing witnesses thereto in the manner provided by the laws of this state. This section shall not have the effect to invalidate the title of any person owning any land embraced in the provisions of any such will which was valid prior to the tenth day of March, one thousand nine hundred and nineteen. This section shall not apply to suits pending on the tenth day of March, one thousand nine hundred and nineteen, and nothing herein shall be construed to prevent such wills from being impeached for fraud. This section shall only apply to Henderson, Transylvania, Halifax, Wake, Cleveland and Lee counties. (1919, c. 250; Ex. Sess. 1920, c. 63; 1924, c. 10; 1929, c. 313.)

Editor's Note.—The Act of 1929 inserted "1915" in lieu of "1889" in lines 4 and 5, of this section, and made it applicable to Lee County. By express provision the Act did not affect pending litigation or vested rights.

Cleveland and Halifax counties were added by the amendments of 1920 and 1924, respectively.

§ 4157. Wills in Haywood.—All wills recorded by the clerk of the superior court of Haywood county, under and by virtue of chapter eight of the laws of one thousand eight hundred and eighty-five, shall be deemed and held to have been duly probated and recorded, subject to the right of any person interested to show by competent proof that said will has never been proved and recorded. (Rev., s. 1614; 1885, c. 8.)

§ 4157(a). Validation of wills recorded without probate by subscribing witnesses; death of witnesses; loss of original wills.—In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and seventy-five (1875), and which appear as recorded in the record of last wills and testaments to have had two (2) or more witnesses thereto, and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this state prior to the first day of January, one thousand eight hundred and eighty-eight (1888), without having been duly proven as provided by law, and such wills were presented to the clerk of the superior court in any county in this state where the makers of said wills owned property, and where the makers of such wills lived and died, and where by such clerks recorded in the record of wills for his county, said wills and testaments or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to real or personal property, or both, therein devised and bequeathed, to the same extent and as completely as if the execution thereof had been duly proven by the two (2) subscribing witnesses thereto in the manner provided by law of this state. This section shall not apply to suits pending February 26, 1921, and nothing herein shall be construed to prevent such wills from being impeached for fraud, and this section shall not affect vested rights. (1921, c. 66.)

§ 4157(b). Validating wills admitted on oath of one subscribing witness.—In all cases where last wills and testaments which appear as recorded in the record of last wills and testaments to have had two witnesses thereto and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this state prior to the first day of January, one thousand eight hundred and ninety (1890) upon the oath and examination of one of the witnesses, such proof being taken in writing and recorded, and the certificate of probate of the Clerk of the Court states that such a will is proven by one of the subscribing witnesses thereto and the handwriting of the other subscribing witness being a non-resident is proven under oath, and such a will and certificate has been recorded in the record of wills of the proper county, such probate is hereby validated as fully as if the proof of the handwriting of the non-resident witness had been taken in regular form in writing and recorded. This section shall not effect any litigation commenced at any time prior to its ratification. (1929, c. 41, ss. 1, 2.)

Art. 5. Caveat to Will

§ 4158. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form or at any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of twenty-one years, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability. (Rev., s. 3135; Code, s. 2158; C. C. P., s. 446; 1907, c. 862; 1925, c. 81.)

Editor's Note.—Prior to the amendment of 1907 there was no express provision as to period of limitation upon the right to file a caveat. And by judicial construction the period of limitation was fixed at a reasonable time. See In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025. In that case it was further held that the seven years' limitation intended by the amendment would apply to a caveat filed after the amendment to a will probated before the amendment. See also, In re Will Beauchamp, 146 N. C. 254, 59 S. E. 687; Etheridge v. Corprew's Executors, 48 N. C. 14; Gray v. Maer, 20 N. C. 41; In re Dupree, 163 N. C. 256, 259, 79 S. E. 611.

Until the amendment of 1926 married women were extended an additional period of three years after the removal of the disability of coverture. But the amendment of 1926 struck out this provision with the effect that married women were put upon the same place as other persons. But the amendatory act did not apply to caveats filed prior to the first day of January, 1926. See In re Witherington's Will, 186 N. C. 152, 119 S. E. 11, 12.

In General.—By this section, the legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be left open to such uncertainties for an indefinite length of time. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

The Limitation at Common Law.—While at common law there was no definiteness or uniformity in the adoption of a period of time wherein the right would be presumed to have been forfeited either by acquiescence or unreasonable delay, the period of twenty years was that more generally prevalent, and though this presumption might be rebutted by proper and sufficient evidence, when the facts are admitted, or had been properly established, it becomes a question for the court to determine whether on such facts the presumption prevails. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Common Law Limitation Applied After Amendment.—As the caveat in the case of In re Dupree's Will, 163 N. C. 256, 79 S. E. 611 was filed in 1911, the will being admitted to probate in 1887, from 1907 to 1911 the statutory period of seven years had not expired, but from 1887 to 1911 the common law limitation had expired, the court applied to the common law limitation and held that the right to caveat the will was barred.

Forty Years of Laches.—An action to probate a will in solemn form will be dismissed when the petitioner had knowledge of the probate of the will in common form and the qualification of the executors for forty years of their removal from the State many years thereafter, of the appointment of an administrator c. t. a., and of his proceedings for final account and settlement, to which she was a party. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Twenty-Three Years of Laches.—The devisee, and those who claim under him, having been in possession of the lands devised for twenty-three years, exercising absolute ownership, with the knowledge of the adversary party seeking to caveat the will, and who had for that period of time lived only a short distance from the property; it is held, as a matter of law, that the right to caveat the will had, under the circumstances, been forfeited. In re Dupree, 163 N. C. 256, 79 S. E. 611.

No Exception as to Married Woman.—If the proviso of this section, that, if any person entitled to file a caveat of a married woman, such person may file a caveat within three years after the removal of disability, was meant as a restoration of married women to disability in this particular it was possibly, and indeed probably, an inadvertence; but if so it was soon again corrected by the Martin Act in 1911, now C. S. sec. 454, and chapter 13, Laws 1913, which gave her the fullest and most untrammeled power to bring actions, even against her husband, and in all cases whatever. This was upheld by this court in Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206, and in other cases since. In re Witherington's Will, 186 N. C. 152, 119 S. E. 11, 12.

Who May Caveat the Will.—The right to interfere in a question of probate belongs to a party in interest, which

must mean some person whose rights will be affected by the probate of the instrument to the prejudice of the party. In re Thompson, 178 N. C. 540, 542, 101 S. E. 107; Armstrong v. Baker, 31 N. C. 109, 114.

Persons Having Pecuniary Interest May Caveat. — This section, in authorizing a person "who is otherwise interested in sustaining or defeating the will" to appear and, at his election, to support or oppose its probate, means only a person who has a pecuniary interest to protect, either as an individual or in a representative capacity. An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient, but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property by the probate of a will, is authorized to appear and be heard upon the subject. In re Will of Davis, 182 N. C. 472; In re Thompson, 178 N. C. 540, 542, 101 S. E. 107.

Person Interested May Caveat—Laches.—A person interested is entitled under this section to file a caveat to a will probated in common form and require the propounder to prove the will in solemn form, if the right has not been lost by acquiescence or unreasonable delay; as to whether laches can be imputed without notice of probate in common form, Quaere. In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025.

Creditor of the Heir May Caveat.—It is also held, in Bloor v. Platt, 78 Ohio St., 49, and in 33 Mass. 265, that a creditor of the heir, who has acquired a lien, may caveat the will, the court saying in the Ohio case: "Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'" In re Thompson, 178 N. C. 540, 543, 101 S. E. 107.

Purchasers from Heirs May File Caveat.—The purchasers of land from the heirs of the deceased owner "are interested in the estate" within the intent and meaning of this section, and thereunder, and under the rule of justice, reason, and authority, are entitled to caveat a will brought forward many years thereafter, and admitted to probate in common form. In re Thompson, 178 N. C. 540, 101 S. E. 107.

Heirs Not Cited under § 4159.—The heirs at law of a deceased testator whose will is duly probated and who have no knowledge of proceedings to caveat the will, and who were not cited under the provisions of § 4159, are not estopped to fill a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded. Mills v. Mills, 195 N. C. 595, 143 S. E. 130.

Proceedings Transferred to Civil Issue Docket.—Where a caveat to a will is duly filed, with the required bond, etc., at the same time the paper-writing is offered for probate, it is required of the clerk to transfer the proceedings to the civil-issue docket for the trial of the issue of devisavit vel non, and all further steps are stayed in the matter until its final adjudication, except such as may be necessary for the preservation of the estate. In re Little's Will, 187 N. C. 177, 121 S. E. 453.

Nature of Proceedings.—The proceedings in the matter of the probate of a will is summary and in rem, and at first it is ordinarily ex parte, and the contest of it is begun by a caveat under this section. In re Haygood's Will, 101 N. C. 574, 578, 8 S. E. 222.

Caveat a Proceeding in Rem—Nonsuit.—Proceedings to caveat a will are in rem involving the rights of the beneficiaries as named in the will, and those of the opposing heirs at law or next of kin depending upon the answer to the issues of devisavit vel non, and there being no parties, strictly speaking, upon whom a judgment as of nonsuit may be taken, the issue should be tried in the due course and practice of the court, and a motion of nonsuit should be denied. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

Suspension of Limitation—Application to Caveat Barred.—Chapter 78, Laws 1898, suspending the running of the statute of limitations, has no application to a caveat to a will theretofore barred and for which there was no such statute prior to 1907. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Amendments Not Retroactive. — While amendment of 1907, fixes seven years after probate of a will in common form as a limitation, and permits seven years after its ratification as to wills theretofore proven, it will not apply to revive a cause of action theretofore barred. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

What Must Propounder Prove upon Caveat Being Filed.—Upon the filing of a caveat to a will probated in common form the propounder must prove the will per testes in solemn form, and the burden is upon him to show (1) the formal execution as prescribed by statute; (2) the contents, if the original was not produced; (3) the loss of the original will or that it had not been destroyed by the testator or with his consent or procurement. In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025.

When an issue of devisavit vel non is raised by caveat, it is tried in the Superior Court in term by a jury. Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will per testes in solemn form. In re Rowland, 202 N. C. 373, 375, 162 S. E. 897.

Application to Clerk within the Time No Excuse, When.—Where parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied to the clerk several times when their rights would have been allowed, and the clerk declined and refused to entertain the application because the parties failed to give a proper bond as required by law, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted, the absence of notice issued in reasonable time works a discontinuance. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Probate in Common Form Valid Until Set Aside.—The probate of a will in common form is valid until set aside, and the right to require probate in solemn form may be forfeited, either by acquiescence or unreasonable delay, now seven years, under this section. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Effect of Infancy, Absence from the State.—Where the common law presumption of forfeiture of the right to caveat a will from unreasonable delay or acquiescence prevails, the matters of infancy, (coverture,) and absence from the State are not necessarily controlling, but they are considered as relevant facts bearing on the question as to whether the presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication. Summerlin v. Cowles, 101 N. C. 473, cited and distinguished, where the courts of equity adopt ten years as a legal bar in analogy to the statutory period prevailing in an action at common law. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Caveat in Spite of Outstanding Life Estate.—One who is authorized by law to caveat a will is not requried to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limited in which a caveat to a will may be filed. In re Will of Withers ington, 186 N. C. 152, 119 S. E. 11.

§ 4159. Bond given and cause transferred to trial docket.—Upon a caveator giving bond, with sufficient surety to be approved by the clerk, in the sum of two hundred dollars, payable to the propounder of the will, conditioned to pay all costs which may be adjudged against such caveator in the superior court by reason of his failure to prosecute his suit with effect, or deposit the money or give a mortgage in lieu of such bond, or shall file affidavits and satisfy the clerk of his inability to give such bonds or secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for four weeks, in some newspaper printed in the state, for nonresidents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term of court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveators or whose interests appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and on failure to file such bond the judge shall dismiss the proceeding. (Rev., s. 3136; Code, s.

2159; 1899, c. 13; 1901, c. 748; C. C. P., s. 447; 1909, c. 74.)

Cited in Mills v. Mills, 195 N. C. 595, 598, 143 S. E. 130.

§ 4160. Affidavit of deceased witness as evidence.—Whenever the subscribing witness to any will shall die, or be absent beyond the state, it shall be competent upon any issue of devisavit vel non to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will. (Rev., s. 3121; 1899, c. 680, s. 2.)

§ 4161. Caveat suspends proceedings under will.—Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts and payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the superior court, until a decision of the issue is had. (Rev., s. 3137; Code, s. 2160; C. C. P., s. 448; 1927, c. 119.)

Editor's Note.—By the amendment of 1927 (Pub. Laws, c. 119), the representative can not be made to stop, upon a caveat filed, the payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the superior court.

Purpose of Section.—This section is manifestly intended in cases to which it is applicable, to dispense with the necessity of appointing an administrator pendente lite, and confers very similar forms upon the executor, and more especially when he has entered upon the duties of his office before the caveat is entered. Syme v. Broughton, 86 N. C. 153. The prosecution of the action in order to the collection of the debts, is evidently sanctioned by the statute and in furtherance of the purpose of its enactment. Hughes v. Hodges, 94 N. C. 57, 59.

Effect of Caveat upon Rights and Duties of Representative.—The executor is not divested of all his representative powers; nor is the first probate vacated absolutely when the issue touching the will is made up to be tried; nor is there a necessity meanwhile for the appointment of an administrator pendente lite. The function of the executor is suspended only until the controversy is ended, and he is still required to take care of the estate in his hands and may proceed in the collection of debts due the deceased. Randolph v. Hughes, 89 N. C. 428; In re Palmer, 117 N. C. 133, 134, 138, 23 S. E. 104.

In the observance of the mandate to preserve the property the executor may operate and manage the property in the exercise of that degree of care, diligence and honesty which he would exercise in the management of his own property, or he may institute a civil action in which all persons having an interest are made parties and request the court in its equity jurisdiction to authorize such operation, or he may apply to the clerk in his probate jurisdiction for such authorization. Hardy & Co. v. Turnage, 204 N. C. 538, 168 S. E. 823.

Office of Representative Continued.—The proper construction of this section is that after probate granted in common form and there is an executor who acts or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he has all the power and is subjected to all the liabilities of an administrator or an executor, except that his right to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit. In re Palmer, 117 N. C. 133, 134, 137, 23 S. E. 104.

Effect of Absence of Order to Suspend Proceeding.—In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by this section, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

May Be Sued, Sell Land, But May Not Pay Legacies.—An executor, or administrator c. t. a., after the will is proved in common form, may be sued, and by leave of court may sell property to pay debts, but cannot pay legacies or exercise other special powers given in the will, where issues upon a caveat are pending; the right to execute the will is suspended until the determination of the suit. Syme v. Broughton, 86 N. C. 153.

§ 4161(a). Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.—Wherever a caveat is filed with the clerk of the superior court of any county in the state to any last will and testament which has been admitted to probate in said office, it shall be the duty of such clerk, and he is hereby directed to give notice of the filing of such caveat by making an entry upon the page of the will book where such last will and testament is recorded, evidencing that such caveat has been filed and giving the date of such filing. When such caveat and proceedings resulting therefrom shall have resulted in final judgment with respect to such will, the clerk of the court shall make a further entry upon the page of the will book where such last will and testament is recorded to the effect that final judgment has been entered, either sustaining or setting aside such will. (1929, c. 81, s. 1.)

Art. 6. Construction of Will

§ 4162. Devise presumed to be in fee.—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. (Rev., s. 3138; Code, s. 2180; R. C., c. 119, s. 26; 1784, c. 204, s. 12.)

Editor's Note.—The trend of judicial decisions for years has been toward relaxing the rigor of the common-law rule, that without words of inheritance no estate of greater dignity than for life could be created by deed. While devises were held, after the statute of wills, to be but a species of alienation, the courts construed them more liberally than deeds; and where, without the use of the word "heirs," as by inserting the word "forever," the testator indicated an intent to pass an estate in fee, it was held, on the ground that testators were generally inops consilii, that the instrument should be so interpreted as to effectuate his purpose. Then followed the liberal principle inculcated by this section to the effect that a devise of real estate to any person should be held to be a devise in fee, unless it plainly appears from some part of the will that the testator intended to convey an estate of less dignity.

The liberal tendency of the age in reference to deeds culminated in the enactment of section 991, providing the same rule of construction for deeds as for devises. Vickers v. Leigh, 104 N. C. 248, 257, 10 S. E. 308.

The common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only unless there is a manifest intention to convey the fee has been changed by this section. Henderson v. Western Carolina Power Co., 200 N. C. 443, 157 S. E. 425.

No technical words of conveyance are required in wills. Alston v. Davis, 118 N. C. 202, 24 S. E. 15; Keith v. Scales, 124 N. C. 497, 505, 514, 32 S. E. 809.

Intent of Testator Controls Interpretation.—The intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of this section when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. Rees v. Williams, 165 N. C. 201, 81 S. E. 286.

The presumption established by this section that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. Roberts v. Saunders, 192 N. C. 191, 134 S. E. 451.

Thus under a devise to the testator's wife of all of his "estate real and personal," and by a later paragraph all

of the rest of the testator's property "as above stated" during her widowhood, and should she remarry her dower "according to law:" It was held only a life estate, according to the testator's intent, is given to his widow, and her conveyance of a fee-simple title is ineffectual, the statutory presumption of a fee-simple title being inoperative. Roberts v. Saunders, 192 N. C. 191, 134 S. E. 451.

Unrestricted Devise Passes Fee.—The uniform holdings, since the passage of this section has been that an unrestricted devise of real estate passes the fee. Barbee v. Thompson, 194 N. C. 411, 412, 139 S. E. 838.

A testator devised to his daughters, B. and M., all of his real estate after the death of his widow, and also to his daughter T. an equal life interest therein with B. and M., "or so long as the said T. may remain a widow." Upon the death of the testator's widow, B. and M. took in remainder a fee-simple estate, with the intent to provide for T., who remained unmarried and is now deceased, during her widowhood. Barbee v. Thompson, 194 N. C. 411, 139 S. E. 838.

A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies: Held, after the death of the widow, the devise is not a trust created in the children as trustees for the "heirs of their bodies," and the devise not falling within the rule in Shelly's case, and there being no expression in the will to show an intent of the testator to create an estate of less degree than fee, it constitutes an estate tail, converted by our statute into a fee simple. Washburn v. Biggerstaff, 195 N. C. 624, 143 S. E. 210.

A devise of real estate to the testator's son for his own use and benefit with the expressed intent that it should vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life, under the provisions of this section, the devise being without clause limiting the estate to one of less dignity, the devisee took a fee-simple title thereto, and could convey a good title to the purchaser. Lineberger v. Phillips, 198 N. C. 661, 153 S. E. 118.

A devise will be construed to be in fee simple unless an intention to convey an estate of less dignity is apparent from the will, and regard will be had to the natural objects of the testator's bounty, and the testator's intention as gathered from the whole instrument will be given effect unless it is contrary to some rule of law or public policy. Jolley v. Humphries, 204 N. C. 672, 169 S. E. 417.

Under this section the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or where the devise is general and the devisee is given the power of disposition, or a limitation over is made of such part as may not be disposed of by the first taker. Hambright v. Carroll, 204 N. C. 496, 168 S. E. 817.

In construing wills the courts will endeavor to ascertain the intent of the testator as expressed in the words used, and in cases of doubt resort may be had to the usual canons of interpretation, and a devise will be construed to be in fee unless it appears from the will that the testator intended to convey an estate of less dignity. Bell v. Gillam, 200 N. C. 411, 157 S. E. 60.

Devise for "Use and Benefit without Let or Hinderance."—Where testator left property in trust with power in his wife to demand that trustee turn over property to her "for her own use and benefit without let or hinderance," upon such demand and compliance therewith, the wife takes and can convey a fee simple, notwithstanding a further provision in the will that a third person should take a life estate in property remaining in the hands of trustees at the wife's death. O'Quinn v. Crane, 189 N. C. 97, 126 S. E. 174.

Devise with Power of Full Management and Control, etc.—A devise to the wife of all of the testator's property, real, personal or mixed, with full management and control thereof during her natural life; that she shall enjoy the full benefit thereof with power to sell and dispose of it at her discretion, and that it was the testator's will and desire that she shall devise whatever property she has not thus disposed of during her natural life, or the proceeds thereof, to the person who has been the "kindest to us in aiding and comforting us in our old age," it was held, that under the provisions of this section the wife acquired a fee-simple title. Weaver v. Kirby, 186 N. C. 387, 119 S. E. 564.

Devise with Full Power of Disposal.—A devise to a husband with full power of its disposal, but on certain conditions any part undisposed of by him to go to a nephew, vests a fee simple in the husband. Roane v. Robinson, 189 N. C. 628, 127 S. E. 626.

Devise Absolutely as Testator Held Himself.—A devise and bequest to the testator's wife of all of his estate, real or personal, wherever located or however held, including that held at the time of his death, absolutely as he held it himself, declaring that she should not be considered as holding it in trust "technically so called, to be enforced by the judge or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it:" It was held the devise and bequest to the widow, under the clear terms of the will, was in fee absolute. Fellowes v. Durfey, 163 N. C. 305, 79 S. E. 621.

Fee Simple Defeasible upon a Condition. — An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies if any," standing alone, would convey the fee simple title, but with the further expression, "in case she should die leaving no lawful issue of her body then I give all the above described land to my son J., and his lawful heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body." Jarman v. Day, 179 N. C. 318, 102 S. E. 402.

Where a testator devises realty to a grandson, and in the event of death of the latter without children, then the land to descend to other grandchildren, such devises vest a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body. Whitfield v. Garris, 131 N. C. 148, 42 S. E. 568; Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904.

Fee Simple with Power of Appointment.—A devise to A, and to such persons as he shall appoint, vests the absolute property in A, without an appointment. But if it be to him for life and after his death to such person as he shall appoint, he must make an appointment in order to entitle that person to anything. The express life estate to him repels the implication of a fee simple for himself. Levy v. Griffis, 65 N. C. 236, 239.

Same—Trust in Favor of Married Women.—A devise to a trustee in trust for the sole and separate use of a married woman with a power given to her of appointing the estate in fee by deed or will, will vest the trust in her in fee under this section. Levy v. Griffis, 65 N. C. 236.

Vested Remainder to Be Divested upon Condition.—A devise of lands to K. "his lifetime, then to go to" G. and M., "and if they should die without leaving bodily heirs, then to go to the Flow Heirs;" It was held, after the falling in of the life estate, G. and M. take the fee in the remainder defeasible upon their dying without leaving "bodily heirs," in which event it would go to the ultimate devisees, upon the principles of a shifting use operating by way of an executory devise. Kirkman v. Smith, 174 N. C. 603, 94 S. E. 423.

Trust in Devised Lands—Precatory Words.—For precatory words used in a will to be regarded as mandatory to create a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character, both under our modern decisions and this section providing that a devise of land shall be construed to be in fee, unless the terms of the will clearly shows the testator's intent to pass an estate of less dignity. Springs v. Springs, 182 N. C. 484, 109 S. E. 839.

Conflicting Expressions—Which Controls.—Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent expressions used in the will. Fellows v. Durfey, 163 N. C. 305, 79 S. E. 621.

Conflicting Interest—General Interest Prevails.—The provisions of this section, while laying down a rule of construction, still leave the question of the intention of the testator open for construction, and where there is a particular, and a general paramount interest apparent in the same will, and they clash, the general interest must prevail. Leeper v. Neagle, 94 N. C. 338.

Cited in West v. Murphy, 197 N. C. 488, 149 S. E. 731; Brown v. Lewis, 197 N. C. 704, 150 S. E. 328.

§ 4163. Probate necessary to pass title; rights of innocent purchasers.—No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against

the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the will has been fraudulently withheld from probate. (Rev., s. 3139; Code, s. 2174; R. C., c. 119, s. 20; 1784, c. 225, s. 6; 1915, c. 219.)

Probate an Indispensable Prerequisite.—The probate of a will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate. Osborne v. Leak, 89 N. C. 433.

No Statute of Limitation to Probate Will.—There is no statute of limitations as to when a will may be admitted to probate, section 3309 not being applicable to registration of wills; and the probate, when proved, allowed and recorded, as the statute requires, becomes effective and relates back to the death of the devisor, passing the title from that date, avoiding all disposition or conveyances of the property by the heirs contrary to the provisions of the will, unless the claimants are protected by the statute of limitations or some recognized equitable principle. Cooley v. Lee, 170 N. C. 18, 86 S. E. 720.

Section Not Retroactive as to Recordation.—This section requiring copies of wills to be recorded in the county where the devised lands are situate, is prospective and refers only to the wills proved after November, 1, 1883—the time when the Code went into effect. Curles v. Smith, 91 N. C. 172.

Statute of Limitations Where Right of Purchasers Involved.—Under this section prior to the amendment by Laws of 1915, there was no limitation as to the time when a will could be probated and recorded, the ordinary registration acts having no application to wills, and they becoming effective from the death of the testator, ordinarily passing the title to devisees from that date against all dispositions or conveyances from the heirs to the contrary. Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218.

Same—Amendment Not Retroactive.—The amendment of this section by the laws of 1915 is prospective in effect, and the right of the devisees, under the section prior to the amendment, to have unlimited time to probate the will will not be affected except from the effective date of the amendment. Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218. That is the devisees will have two years after the effective date of the amendment to have their will probated.—Ed. Note.

§ 4164. What property passes by will.—Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (Rev., s. 3140; Code, s. 2140; R. C., c. 119, s. 5; 1844, c. 88, s. 1.)

After-Acquired Lands—Devisability under English Statute.—As the statutes of devises, 32 and 34 Henry VIII., declares that "a man having lands may devise them," lands acquired subsequent to the devise do not pass by it, although the devisor expressly refers to all the lands he might have at his death; for at the time of the devise he had not the lands. Jiggitts v. Maney, 5 N. C. 258. But under this section the contrary rule is established.—Ed. Note.

A conveyance of "all the property I possess," where there is no apparent motive for making an exception, conveys all property the party owned. Hollowell v. Manly, 179 N. C. 262, 265, 102 S. E. 386.

Right of Entry for Condition Broken.—"And also to all rights of entry for conditions broken;" etc., evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. Church v. Young, 130 N. C. 8, 12, 40 S. E. 691.

Same—Condition Broken during Lifetime of Testator.—Where a church receives an absolute fee in land, subject to be defeated only by the breach of a condition, and this condition is not broken until after the death of the grantor and a daughter, neither the grantor nor the daughter have any estate in the land (before the breach of the condition, the testator having a mere possibility of reverter) at the time of their death which can be willed or inherited, and upon breach of the condition the estate goes to the heirs at law of the grantor. Church v. Young, 130 N. C. 8, 40 S. E. 691.

Possibility of Reverter Not Devisable.—A mere possibility of reverter cannot be subject of a devise. Church v. Young, 130 N. C. 8, 9, 40 S. E. 691; Hollowell v. Manly, 179 N. C. 262, 265, 102 S. E. 386.

Where a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected, there being a presumption against partial intestacy. Holmes v. York, 203 N. C. 709, 166 S. E. 889.

§ 4165. Will relates to death of testator.—Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (Rev., s. 3141; Code, s. 2141; R. C., c. 119, s. 16; 1844, c. 88, s. 3.)

The General Rule Expounded.—This general rule seems to be established, that where a testator uses general terms, as "all of my estate" or "all of my lands or real estate," then the devise will speak at the date of the death; but, where he refers to a specific subject of gift, with sufficient particularity in the description of the specific subject of it, showing that an object in existence at the date of his will was intended, referring to the existing state of things at the date of the will and not at his death, then the operation of the general rule is excluded. The death is a prospective event, but the date of the will refers to actual conditions. Hines v. Mercer, 125 N. C. 71, 74, 34 S. E. 106.

Section Relates to Subject Matter, and Not the Objects of the Will.—This section, making the will speak from the death, relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift. The reason for this is that the objects of the testator's bounty were not found within the mischiefs which were intended to be prevented by the statute. Robbins v. Windley, 56 N. C. 286; Hines v. Mercer, 125 N. C. 71, 74, 34 S. E. 106.

This section has no retroactive effect, and does not apply to wills made prior to its enactment, though the testator dies subsequent to its enactment. Such will, with reference to the property they devise, speak as of the date of their execution, and not as of the date of testator's death under the rule of construction promulgated by this section. Williamson v. Williamson, 58 N. C. 142.

Devise of "the Whole of My Lands" Passes After-Acquired Property.—A devise of "the whole of my lands" to devisees, includes land acquired by the testator after the publication of his will when no intention to the contrary appears. A subsequent clause in the will, directing "my other property of every kind not before mentioned to be sold," refers to other personal property. Edwards v. Warren, 90 N. C. 604.

Effect of Will Speaking as of Time of Testator's Death.—Inasmuch as a will speaks as of the time of testator's death, a devise by O. of her "undivided interest and property in the estate of the late G. C." passes no such part of the distributive share in such estate as has been collected and received by O., for, immediately upon its payment to O., it became her property and ceased to be a part of the estate of G. C. Aydlett v. Small, 115 N. C. 1, 20 S. E. 163.

Designation of Quantity of Land Does Not Prevent Operation of Rule.—Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the

latter lands being included in the devise. Brown v. Hamilton, 135 N. C. 10, 47 S. E. 128.

Land under Contract of Purchase after Execution of Will.—In re Champion, 45 N. C. 246, the devise was to testator's wife: Item 1: "All my real estate, consisting of several lots in Shelby," etc., and in item 2: "All of my personal estate of whatever nature." After the date of the will he contracted to purchase another tract, but had not paid for it at his death: it was held that his rights in the unpaid for land passed to his wife, and it was put on the ground that looking at the whole instrument, the intention to give the whole estate to his wife was manifest. Hines v. Mercer, 125 N. C. 71, 75, 34 S. E. 106.

Cited in Wright v. Wright, 198 N. C. 754, 755, 153 S. E. 321.

§ 4166. Lapsed and void devises pass under residuary clause.—Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will: Provided, there shall be no lapse of the devise or legacy by reason of the death of the devisee or legatee during the life of the testator, if such devisee or legatee would have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the devise or bequest named in the will. (Rev., s. 3142; Code, s. 2142; R. C., c. 119, s. 7; 1844, c. 88, s. 4; 1919, c. 28.)

Cross References.—For full treatment, see 12 N. C. Enc. Dig. 700, et seq.; 15 N. C. Enc. Dig. 822.

In the Absence of Statute Heirs Prevail over Residuary Devise.—In the absence of statute, upon general principles, the heir at law is favored as much as possible, even to the detriment of a residuary devisee; and, accordingly, a specific devise lapsing by the death of a devisee, devolves upon the "heir" and not the residuary legatee, in fact, whether a devise lapsed or was void ab initio, the residuary devise does not absorb it. Holton v. Jones, 133 N. C. 399, 403, 45 S. E. 765.

Rights of Collateral Heirs.—Where the owner of real and personal property executed a will devising and bequeathing all his property, both real and personal, to his wife, the collateral heirs at law of the testator are entitled to the real property, the devise to the wife having lapsed by reason of her prior death, and the provisions of this section, not applying to prevent such lapse of the devise, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage are entitled to the personalty, since the wife would have been a distributee of the personal estate of her husband had she survived him, and this section providing that in such case the legacy should not lapse, but should go to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution. Farnell v. Dongan, 207 N. C. 611, 178 S. E. 77.

Section a Prototype of English Statute.—This section enacted in 1844, is a copy of the English statute upon the same subject. It will be observed that it provides for such devises as shall fail or be void: (1) by reason of the death of the devisee during the lifetime of the testator; (2) by reason of such devise being contrary to law; (3) or otherwise incapable of taking effect. Holton v. Jones, 133 N. C. 399, 402, 45 S. E. 765.

Construction of Residuary Clause in General.—In a specific gift, you must look to see whether that particular item is included. The question is whether it is included or not; but in a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded; and you must find words sufficiently large, sufficiently definite, sufficiently distinct, to enable you to say that some item is excluded, so that, to use the language of one of the authorities, what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. Faison v. Middleton, 171 N. C. 170, 173, 88 S. E. 141.

Construction of Residuary Clause to Prevent Intestacy.—A residuary clause in a will should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. Faison v. Middleton, 171 N. C. 170, 88 S. E. 141.

Intestacy Not Favored.—No one supposes that he has failed in his intention to dispose of all of his property by his will, and the courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. Faison v. Middleton, 171 N. C. 170, 174, 88 S. E. 141.

Whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among a specific class, where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown into the fund for distribution among the class named, and it does not go to the next of kin of the legatee. Stevenson v. Wachovia Bank, etc., Co., 202 N. C. 92, 161 S. E. 728.

"All of the Residue" Embraces Personalty and Realty.—General words in a residuary clause of a will, "all of the residue," etc., embrace every species of property, whether real or personal, owned by the testator at his death, unless restricted by the context. Faison v. Middleton, 171 N. C. 170, 88 S. E. 141.

Effect of Failure to Name Devisee.—A devise of land "to my . . . . . ." without naming the devisee, followed by a residuary clause of the will, "that all of the residue of my estate be sold, and if there should be any surplus over the payment of debts and expenses, that such surplus be equally divided and paid over" to certain named persons: it was held the failure to name the devisee brings the devise within the terms of the statute as to void devisee, or those incapable of taking effect, and the property devised will go to the residuary legatees, and not to the heirs at law. Faison v. Middleton, 171 N. C. 170, 88 S. E. 141.

Lapsed Devise for Misdescription.—A general residuary bequest carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. 40 Cyc., 1563 to 1570; Gardner on Wills, 418; Faison v. Middleton, 171 N. C. 170, 172, 88 S. E. 141.

Subject-Matter of Void Legacy Is Included in Residuary Legacy.—Under the provisions of this section, the property which is the subject-matter of a void legacy, is included within the residuary legacy provided by the will, and should be delivered by the executor to the residuary legatees. Wilmington Sav., etc., Co. v. Cowan, 208 N. C. 236, 238, 180 S. E. 87.

Devise to Brother Lapses by His Early Death.—A devise to a brother who dies before the testator does not come within the provision of section 4168, and lapses, by reason of his prior death to that of the testator, under this section. Howell v. Mehegan, 174 N. C. 64, 93 S. E. 438.

Lapse of Shares of Some of the Residuary Legatees.—Where the testator has named several beneficiaries in a residuary clause, and it appears upon the face of the will that several of these names have been run through with a pen, and the intention of the testator to revoke has been established, the beneficiaries whose names have been thus erased taking nothing, and the whole estate, under the residuary clause, goes to the others therein named together with such legacies as may have lapsed. Barfield v. Carr, 169 N. C. 574, 86 S. E. 498.

Rule Applied in Absence of Contrary Intention Only.—A lapsed devise of lands will not fall within the residuary clause of a will, under this section, where a contrary intent appears from the construction of a will itself; and where the testator has specifically devised his lands, making ample provision for his widow, and gives her, in the residuary clause, "all other property not herein specified," and the use of the word "property," with the expression "not herein specified," shows the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's next of kin instead of those of the widow of her devises under her will. Howell v. Mehegan, 174 N. C. 64, 93 S. E. 438.

§ 4167. General gift by will an execution of power of appointment.—A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person men-

tioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. (Rev., s. 3143; Code, s. 2143; R. C., c. 119, s. 8; 1844, c. 88, s. 5.)

Power Not Exercised in Express Terms—Construction of Entire Will.—Where the execution by will of a power is not exercised in express terms by reference to the power or the subject, a construction must be given by looking to the whole instrument and giving effect to the intent therein manifested. Johnston v. Knight, 117 N. C. 122, 23 S. E. 92.

Residuary Devise Executes Power, Unless Contrary Intention Shown.—Unless there is something to show a contrary intention on the part of a testator, a general residuary devise will operate as an execution of a power to dispose of property by will. Id.

Where the donee of a power to dispose of property by will to certain persons devises the property to such persons by a residuary clause, without referring to the power, the devise will be considered an intentional and not an accidental exercise of the power. Id.

§ 4168. Gifts to children dying before testator pass to their issue.—When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (Rev., s. 3144; Code, s. 2144; 1868-9, c. 113, s. 61.)

Former Law.—Prior to the year 1816, the law was such that if a devise or bequest were made by a testator to his child, and such child died in his lifetime, leaving issue, the devise or legacy would lapse and fall into the residuum, if there were any residuary clause in the will; or, if there were none, would be intestate property, and descend to the heirs-at-law, or be distributed among the next of kin of the testator, according to the nature of the property. Smith v. Smith, 58 N. C. 305, 307.

Section Not Intended for Benefit of Deceased Creditor's.—This section giving the legacy intended for a deceased child, to his or her children, where the parent died in the life time of the testator, was held not to be intended for the benefit of the creditors of such deceased parent. Smith v. Smith, 58 N. C. 305.

Where Motive of Devise was Dependent upon Devisee's Surviving Testator.—Where it appeared that the sole motive with a testator, for leaving the greater part of his estate to a son, was, that the latter should live with him and help him pay his debts, and also treat his parents with "humanity and kindness," and such son died in the lifetime of the testator, it was held, that the devise lapsed and that the son's interest in the condition was not "real or personal estate" within the meaning of this section, which gives such estate to the issue of a son dying under such circumstances. Lefler v. Rowland, 62 N. C. 143.

Legatee Not in Existence at Time of Bequest—Section Not Applicable.—This section was intended to apply to a lapsed, and not a void, legacy, and where the legacy is void by reason of the fact that the legatee was not in existence at the time the will was made, his (legatee's) children do not take anything under the will. Scales v. Scales, 59 N. C. 163, 166.

Devise to Brother—Right of Brother's Child.—A devise to a brother who dies before the testator does not come within the provisions of this section as to "a child or other issue of the testator" and lapses by reason of his prior death to that of the testator. Howell v. Mehegan, 174 N. C. 64, 93 S. E. 438. To the same effect see Gordon v. Pendleton, 84 N. C. 98. It is believed that this holding would not be true under the amendment of section 4166 by the laws of 1919, c. 28, if at the time of the testator's death his brother, had he not died, would have been an heir or distributee at law of the testator. In such event the devisee to the brother would not lapse, but would go to the brother's issue if such issue survived his parent and the testator.—Ed. Note.

§ 4169. After-born children share in testator's estate.—Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter. (Rev., s. 3145; Code, s. 2145; 1868-9, c. 113, s. 62.)

See 12 N. C. Law Rev., 402, for note on "Inheritance by Child Adopted after Execution of Adopting Parent's Will."

Common Law and Civil Law Rules.—At common law, the subsequent birth of a child did not work a revocation of the parent's will; but the civil law adopted and applied a different rule, which apparently was based upon the presumed oversight or inadvertence of the parent in providing for an existing or a contingent situation. It has been suggested that the object of the law is to secure the moral influence of having before the mind of the testator a contingent event so momentous as the birth of a child. Ellis v. Darden, 11 L. R. A. (Ga.), 51; Christian v. Carter, 193 N. C. 537, 137 S. E. 596.

Section Not Intended to Direct a Parent to Make Provision for Child.—This section is construed as not intending to control a parent as to the provision he should make for his child, but to apply when by inadvertence or mistake the after-born child has not been provided for. Unless the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children. Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936.

"Without Making Any Provision" Construed.—The true meaning of the section has been held in Meares v. Meares, 26 N. C. 192, and King v. Davis, 91 N. C. at pp. 142, 147, to be that "without making any provision" is not intended to be construed to mean that there must be a gift of certain property or thing for the children, for that would be merely adopting the popular misconception of "cutting one off with a shilling," but that "without making any provision" means any arrangement or circumstances tending to show that the testator had these children in mind when the will was made and without any indication that it was his purpose to disinherit them. Thomason v. Julian, 133 N. C. 309, 310, 45 S. E. 636.

Express Exclusion of Children Tantamount to Making Provision.—A will expressly excluding the children of the testator born after the execution thereof "makes a provision for them" within the meaning of this section and such children do not share in the estate as though the testator had died intestate. Thomason v. Julian, 133 N. C. 309, 45 S. E. 636.

Inadequacy of Provision Immaterial.—If any provision is made for an after-born child, the court cannot say that it is inadequate. The statute only applies when no provision at all has been made. King v. Davis, 91 N. C. 142.

Knowledge of Testator as to Child En Ventre Sa Mere Immaterial.—The beneficent provisions of this section are not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the fact that the child was born thereafter. Christian v. Carter, 193 N. C. 537, 137 S. E. 596.

It is the subsequent birth, not the father's knowledge, which effects the partial revocation. Id.

Under Section 1654 and This Section Child Will Inherit

Land Subjected to Dower.—A child for whom no provision was made, will, under the rule of descent, section 1654, and under this section, inherit the real estate of which his father dies seized, subjected to the dower of the widow, his mother. Nicholson v. Nicholson, 190 N. C. 122, 129 S. E. 148.

Under this section where there is a devise to a wife "to do with as she thinks best for herself and the children," and a child is born two months after the testator's death, such child is not entitled to a share in the estate but is provided for as one of "the children" under the will in view of rule 7, § 1654. Rowls v. Durham Realty, etc., Co., 189 N. C. 368, 127 S. E. 254.

Not Applicable to Adopted Children—Illegitimate Children.—This section applies only to natural born children of the testator, and does not apply to adopted children. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306. Illegitimate children subsequently adopted, however, fall within the class of natural children. King v. Davis, 91 N. C. 142.

Entire Will is Not Revoked.—While afterborn children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under this section, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796.

Cited in Trust Co. v. Lenz, 196 N. C. 398, 145 S. E. 776.

§ 4170. Administrator c. t. a. must observe will.—In all cases where letters of administration with the will annexed are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will. (Rev., s. 3146; Code, s. 2168; C. C. P., s. 455.)

Administration, d. b. n., c. t. a., Not on Same Footing with Executor in All Respects.—The administrator de bonis non, cum testamento annexo, although clothed with the power, and required to execute the will, according to its legal effect as if he were executor, does not stand upon the same footing in all respects with an executor. He derives his authority, not from the will simply, but from the statute (this section) and he would not be treated as an executor in another state, nor would he have the power to sue there as administrator, because his authority is conferred by the law, and not by the will. Grant v. Reese, 94 N. C. 720, 730.

Duties and Liability of Administrator, c. t. a.—Ancillary Administration.—Where a testator died domiciled in this State, leaving debts due by parties in Virginia, the administrator de bonis non, cum testamento annexo, and the sureties on the bond, are not liable for a failure to return such notes on the inventory in this State and collect the same, when there is administration on the estate in Virginia. Grant v. Reese, 94 N. C. 720.

Personal Powers in Executor Extinct upon His Death.—Where the powers conferred upon the executor by the will are personal to and discretionary with the executor, and become extinct at his death they can not be judicially prolonged and vested either in the administrator c. t. a., nor in a substituted trustee. Young v. Young, 97 N. C. 132, 2 S. E. 78; Lewin on Trusts, 435; Creech v. Grainger, 106 N. C. 213, 219, 10 S. E. 1032.

Under a will directing the executor therein named to continue testator's business as long as the executor should think it profitable, and such of the profits as the executor might think actually necessary for the support of testator's wife and children to be paid to the wife; also, to invest six thousand dollars, bequeathed by testator to his children, and apply the interest, annually, to the education of the children; also, to have entire control of testator's business, to continue or discontinue in all, or any department of it, at any time he might find it not yielding a reasonable profit, and out of the profits pay to testator's wife, from time to time, such amounts as he might consider actually necessary for her support and the support of the children. It was held that upon the death of the executor and the appointment of an administrator d. b. n. c. t. a. the trust in respect to the investment of six thousand dollars, for the education of testator's children, passed to the administrator; the other trusts were personal to and discretionary with the executor, and became extinct at his death. Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032.

Administrator c. t. a. as Trustee.—An administrator, with the will annexed, becomes a trustee for any trusts declared in the will which could pass and be transferred to any one, as much as if he had been named executor. Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032.

Same—Recovery of Lands Held in Trust.—An administrator cum testamento annexo has all the rights and powers and is subject to the same duties as if he had been named as executor; therefore, where an executor was charged with the management of land, which implied the right of possession until the trust should be fully carried out, upon his death and the appointment of an administrator de bonis non, cum testamento annexo, the latter became entitled to the possession of the land, and can recover the same from those withholding it. Smathers v. Moody, 112 N. C. 791, 17 S. E. 532.

CHAPTER 82

CRIMES AND PUNISHMENTS

SUBCHAPTER 1. GENERAL PROVISIONS

Art. 1. Felonies and Misdemeanors

§ 4171. Felonies and misdemeanors defined.—A felony is a crime which is or may be punishable by either death or imprisonment in the state's prison. Any other crime is a misdemeanor. (Rev., s. 3291; 1891, c. 205, s. 1.)

Common Law Provisions.—Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, and what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. State v. Mallett, 125 N. C. 718, 723, 34 S. E. 651; State v. Holder, 153 N. C. 606, 608, 69 S. E. 66. See State v. Hill, 91 N. C. 561.

Purpose of Section.—This section was for the purpose of settling the line between felonies and misdemeanors; but this did not prevent misdemeanors from including cases where the offense was infamous, for section 4173, specially provides for imprisonment in the county jail or State's Prison on conviction of misdemeanor "if the offense be infamous." Jones v. Brinkley, 174 N. C. 23, 24, 93 S. E. 372. See Editor's Note to section 4173.

Section Constitutional.—This section is held to be constitutional in State v. Lytle, 138 N. C. 738, 744, 51 S. E. 66

Punishment Determines Classification of Offenses.—By this section, North Carolina adopted the rule, now almost universally prevalent, by which the nature of the punishment determines the classification of offenses, those which may be punished capitally or by imprisonment in the penitentiary are felonies (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years. State v. Mallett, 125 N. C. 718, 723, 34 S. E. 651; as to statute of limitations for misdemeanors, see section 4512.

The measure of punishment is the test of the nature of a crime, whether felony or misdemeanor. State v. Hyman, 164 N. C. 411, 414, 79 S. E. 284; Jones v. Brinkley, 174 N. C. 23, 24, 93 S. E. 372.

It should be noted that there are exceptions to this general rule. The legislature has the power to style any offence a misdemeanor, notwithstanding it is punishable in the state's prison. Examples of this appear in sections 2456, 4417, 4419 and 6545 where the offenses are specifically declared to be misdemeanors although they are punishable in the State's Prison. See State v. Holder, 153 N. C. 606, 608, 609, 69 S. E. 66. See also Editor's Note under section 4173.—Ed. Note.

Offence Need Not Be Specified.—It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. State v. Lewis, 142 N. C. 626, 630, 55 S. E. 600.

Indictment Must Use Word "Feloniously."—Since all criminal offenses punishable with death or imprisonment in a State prison were by this section declared felonies, indictments wherein there has been a failure to use the word "feloniously," as characterizing the charge in the latter class of cases, have been declared fatally defective. State v. Wilson, 116 N. C. 979, 21 S. E. 692; State v. Skidmore, 109 N. C. 795, 14 S. E. 63; State v. Shaw, 117 N. C. 764, 23 S. E. 246; State v. Bryan, 112 N. C. 848, 16 S. E. 909; State v. Caldwell, 112 N. C. 854, 16 S. E. 1010; State v. Holder, 153 N. C. 606, 608, 69 S. E. 66. But this principle does not hold good where the Legislature otherwise expressly provides.

In section 4615 the legislative has prescribed a form of indictment for perjury (which is by section 4364 a felony) and left out the word "feloniously." And in State v. Harris, 145 N. C. 456, 59 S. E. 115 the court held that in the case of

perjury it was unnecessary that the word appear. See State v. Holder, supra, at page 609.—Ed. Note.

Same—New Bill Obtained.—But the bill should not be quashed, the defendant should be held until a new bill is obtained. State v. Skidmore, 109 N. C. 795, 14 S. E. 63.

Penitentiary Unknown to Common Law.—The penitentiary, being a modern device, unknown to the common law, punishment in the penitentiary could not be imposed by the common law. State v. McNeill, 75 N. C. 15, 16.

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's Prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. State v. Burnett, 184 N. C. 783, 115 S. E. 57.

Concurrence of General and Local Laws. — Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder is guilty of a felony, by this section, and the two-year statute of limitations is not a bar to the prosecution. State v. Burnett, 184 N. C. 783, 115 S. E. 57.

Thus in the case of a public local law the fact that the offense is declared a misdemeanor does not govern where the punishment prescribed is confinement in the state prison. In such cases by this section the offense is a felony. See above catchline "Punishment Determines Classification of Offense."—Ed. Note.

§ 4172. Punishment of felonies.—Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or state prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or state prison not less than four months nor more than ten years, or be fined. (Rev., s. 3292; Code, s. 1096; R. C., c. 34, s. 27.)

In General.—It is only felonies where no specific punishment is prescribed, and offenses that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, that may be punished with imprisonment in the penitentiary. State v. Powell, 94 N. C. 920, 921, 924. See Editor's Note under next section.

Where Section Applies.—This section applies only where an act is prohibited or is made unlawful, without specifying the nature of punishment. State v. Rippy, 127 N. C. 516, 517, 37 S. E. 148.

The felony defined in section 4209 is not one "for which no specific punishment is prescribed," within this section. The punishment is expressly left to the discretion of the court, which takes the case out of this section. State v. Swindell, 189 N. C. 151, 126 S. E. 417. See further under next section, catchline "Meaning of Specific Punishment."

Cited in State v. Ritter, 199 N. C. 116, 119, 154 S. E. 62.

§ 4173. Punishment of misdemeanors.—All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined. (Rev., s. 3293; Code. s. 1097; R. C., c. 34, s. 120; 1927, c. 1.)

As to statute of limitations for misdemeanors, see section 4512.

See § 4283 as to uttering a worthless check.

Editor's Note.—The Act of 1927 amended this section by inserting the words "or state prison." The effect of this amendment is to make misdemeanors, where no specific punishment is prescribed and which are "infamous or done in secrecy and malice or with deceit and intent to defraud," punishable in the state prison.

"Interpreting, then, this addition to § 4173, in connection with § 4171, it makes the particular offense in the instant case, having been done in secrecy and malice, distinctly a felony. That section is not defining offences, but providing punishment for them and it, therefore, sets aside, as the necessary effect of the amendment, the offenses in the latter clause as felonies, to be punished by imprisonment in the State's prison. Consequently, properly interpreted, this amendment of 1927 creates a conspiracy formed in secrecy and in malice, a felony, which, using the words in § 4171, may be punishable by imprisonment in State's prison." State v. Ritter, 199 N. C. 116, 120, 164 S. E. 62.

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, under this section, and is a felony. State v. Harwood, 206 N. C. 87, 173 S. E. 24.

When Section Applies.—This section applies only where an act is prohibited or is made unlawful, without specifying the nature of the punishment. State v. Rippy, 127 N. C. 516, 517, 37 S. E. 148.

If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, and punishable by indictment, if the statute specifies no other mode of proceeding. State v. Bloodworth, 94 N. C. 918, 920.

Meaning of Specific Punishment.—It can not be said that all the crimes in the Code fall within the scope of this and the preceding sections, because "no specific punishment" is prescribed. The punishment is specific (i. e., specified as fine, or imprisonment in jail or in State's Prison), though the extent of the specified punishment is left in the discretion of the court, or in its discretion not exceeding a limit stated. State v. Rippy, 127 N. C. 516, 517, 37 S. E. 148.

Same—Assault Not Punishable under Section.—Under the ruling in State v. Rippy, 127 N. C. 516, 37 S. E. 148, section 4215, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of this section, and entirely withdraws the case of assault from the operation if this section. State v. Smith, 174 N. C. 804, 806, 93 S. E. 910.

Common Law Punishment.—Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both. State v. McNeill, 75 N. C. 15; State v. Powell, 94 N. C. 920, 923.

Fornication and Adultery.—Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. State v. Manly, 95 N. C. 661.

Conspiracy to Charge with Infanticide.—A conspiracy to charge one with infanticide, being only a common-law misdemeanor, is not punishable by imprisonment in the penitentiary. State v. Jackson, 82 N. C. 565.

Receiving Stolen Goods.—Although the offense of receiving stolen goods is declared to be a misdemeanor by section 4250, the same section authorizes the court to punish the offense in the same manner as larceny is punished; that is, confinement in the State's prison or county jail for not less than four months, nor more than ten years. State v. Brite, 73 N. C. 26.

What Amounts to Confession of Felony.—A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, is a confession of a felony under this section, although § 4255 designates such offense as a misdemeanor. State v. Harwood, 206 N. C. 87, 173 S. E. 24.

Discretion of Trial Judge.—Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Smith, 174 N. C. 804, 807, 93 S. E. 910; State v. Willer, 94 N. C. 904.

Excessive Punishment. — The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. And so where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine and imprison. State v. Walters, 97 N. C. 489, 2 S. E. 539.

Same—Example. — A sentence of imprisonment for five years in the county jail and a recognizance of $500 to keep

the peace for five years after the expiration thereof upon a defendant convicted of assault and battery, is excessive and therefore unconstitutional. State v. Driver, 78 N. C. 423.

Same—Two Years Not Cruel or Unusual.—It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. State v. Driver, 78 N. C. 423; State v. Miller, 94 N. C. 904. State v. Farrington, 141 N. C. 844, 845, 53 S. E. 954.

Effect of Consent of Defendant.—No consent of the defendant can confer a jurisdiction which is denied to the court by the law, and any punishment imposed, other than that prescribed for the offense, is illegal. In re Schenck, 74 N. C. 607, 608.

Where Common Law Offense Altered by Statute.—Where the grade of a common law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law. State v. Lawrence, 81 N. C. 522, 523.

Where Statute Repealed before Judgment. — Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed. State v. Perkins, 141 N. C. 797, 53 S. E. 735; State v. Cress, 49 N. C. 421; State v. Nutt, 61 N. C. 20; State v. Long, 78 N. C. 571; State v. Massey, 103 N. C. 356, 9 S. E. 632; State v. Biggers, 108 N. C. 760, 12 S. E. 1024.

§ 4174. Violation of town ordinance misdemeanor; punishment.—If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (Rev., s. 3702; Code, s. 3820; 1871-2, c. 195, s. 2.)

As to valid and invalid ordinances. see 2673.

In General.—While the town or city government has no right to make criminal law, the Legislature has made the violation of ordinances a criminal offense. State v. Higgs, 126 N. C. 1014, 35 S. E. 473; Board v. Henderson, 126 N. C. 689, 691, 36 S. E. 158.

Prior to Section Violation Not Punishable.—Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. State v. Parker, 75 N. C. 249; School Directors v. Asheville, 137 N. C. 503, 509, 50 S. E. 279.

Jurisdiction.—The mayor, or other chief officer of towns or cities, has jurisdiction of offenses under this section. State v. Cainan, 94 N. C. 880; State v. Wood, 94 N. C. 855; State v. Smith, 103 N. C. 403, 405, 9 S. E. 435.

Same—Concurrent with Justice.—A justice of the peace has concurrent jurisdiction with the mayor of a city or town, of violation ordinances, which are made misdemeanors. State v. Cainan, 94 N. C. 880.

Same—Superior Court Excluded.—The superior court has no original jurisdiction to try indictments for violation of town ordinances. State v. White, 76 N. C. 15; State v. Threadgill, 76 N. C. 17.

Ordinance Must Conform to State Law. — It is uniformly held that a town ordinance in violation of a valid state statute appertaining to the question is void. Board v. Webb, 155 N. C. 379; State v. Beacham, 125 N. C. 652, 34 S. E. 447; Shaw v. Kennedy, 4 N. C. 591; State v. Austin, 114 N. C. 855, 858, 19 S. E. 919; State v. Prevo, 178 N. C. 740, 743, 101 S. E. 370.

Violation of Invalid Ordinance No Offense.—The violation of a valid ordinance is, under the provision of this section, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. State v. Hunter, 106 N. C. 796, 11 S. E. 366; State v. Webber, 107 N. C. 962, 967, 12 S. E. 598.

Failure to Prescribe Penalty.—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor, is untenable. State v. Razook, 179 N. C. 708, 103 S. E. 67.

Where Fine Provided It Must Be Certain.—An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. State v. Irvin, 126 N. C. 989, 996, 35 S. E. 430.

Provision in Ordinance for Arrest Void.—When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined twenty-five dollars upon conviction thereof." It was Held, that so much of the ordiance as provided for the arrest was void, but the other provisions were valid. State v. Earhardt, 107 N. C. 789, 12 S. E. 426.

Personal Notice to Offender Sufficient.—The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring it to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits the offense prohibited, the requirement of publication, etc., is not necessary for a conviction. State v. Razook, 179 N. C. 708, 103 S. E. 67.

State Must Show Violation of Valid Ordinance.—Upon the prosecution of a criminal action for the violation of a city ordinance, under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. State v. Prevo, 178 N. C. 740, 101 S. E. 370; State v. Snipes, 161 N. C. 242, 76 S. E. 243; State v. Hunter, 106 N. C. 796, 11 S. E. 366.

And where the state fails to show that the original act of incorporation authorized the enactment of an ordinance, it fails to make out the case, for the legislature never intended to make the violation of a void ordinance an indictable misdemeanor. State v. Threadgill, 76 N. C. 17, 19.

Defects in Warrant May Be Waived.—Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. State v. Prevo, 178 N. C. 740, 101 S. E. 370.

Form of Indictment.—It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. State v. Cainan, 94 N. C. 880; State v. Merritt, 83 N. C. 677, 679.

In an indictment under an ordinance for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. State v. Cainan, 94 N. C. 880.

No Removal under Section 1498.—In a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal, under section 1498. State v. Joyner, 127 N. C. 541, 37 S. E. 201.

Costs of Prosecutions under Section.—Whether the criminal offenses created by the violation of town ordinances under this section, are tried before the mayor, or before a Justice of the Peace, they are State prosecutions, in the name of the State, or for violation of the criminal law of the State, and at the expense of the State (State v. Higgs, 126 N. C. 1014, 35 S. E. 473), and the city can not be charged with the costs of such prosecutions. Board v. Henderson, 126 N. C. 689, 692, 36 S. E. 158.

Conviction for Fighting No Bar to Prosecution for Assault.—A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the State for an assault. State v. Taylor, 133 N. C. 755, 46 S. E. 5.

Art. 2. Principals and Accessories

§ 4175. Accessories before the fact; trial and punishment.—If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amendable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. The offense of the person so counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the state. In case the principal felony shall have been committed within the body of any county, and the of-

fense of counseling, procuring or commanding shall have been committed within the body of any other county, the last mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense. (Rev., s. 3287; Code, s. 977; R. C., c. 34, s. 53; 1797, c. 485, s. 1; 1852, c. 58.)

For further cases concerning accessories see under "Criminal Law" in 4 N. C. Enc. Dig. 36-38; 13 N. C. Enc. Dig. 582-583.

In General.—It is a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. State v. Simmons, 51 N. C. 21, 24.

Common Law Provision.—At common law an accessory before the fact could only be convicted when tried at the same time with the principal, and after conviction of the principal, or unless the principal had been before tried, convicted and sentenced. State v. Duncan, 28 N. C. 98; State v. Jones, 101 N. C. 719, 721, 8 S. E. 147.

But the rule that an accessory could not be tried and convicted before the principal had no application as between two principals in first and second degrees. State v. Jarrell, 141 N. C. 722, 53 S. E. 137.

"Accessory before Fact" Is a Substantive Felony. — This section made the facts which formerly had been called "accessory before the fact" the substantive felony (whether in murder or any other felony). State v. Bryson, 173 N. C. 803, 807, 92 S. E. 698.

Prior Conviction of Principals Unnecessary.—Under the provisions of this section it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. State v. Walton, 186 N. C. 485, 119 S. E. 886; State v. Jones, 101 N. C. 719, 722, 8 S. E. 147.

One indicted as accessory before the fact can not complain that his cause was tried before that of the alleged principal, and before the alleged principal had even been called on to plead. State v. Reid, 178 N. C. 745, 101 S. E. 104.

Same—What Indictment Must Aver.—Where the principal felon is not amenable to the process of the law, it is necessary to aver that in the indictment. State v. Ives, 35 N. C. 338, 339; State v. Groff, 5 N. C. 270.

Who Are Principals.—All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime. State v. Gaston, 73 N. C. 93; State v. Jarrell, 141 N. C. 722, 53 S. E. 127.

Same—Second Degree.—Persons present assisting in doing a criminal act are principals in the second degree, not accessories. State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58; State v. Skeen, 182 N. C. 844, 109 S. E. 71.

In Misdemeanors All Are Principals.—In a misdemeanor all aiders, abettors, and accessories, whether before or after the fact, are principals. State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58; State v. Barden, 12 N. C. 518; State v. Cheek, 35 N. C. 114; State v. De Boy, 117 N. C. 702, 23 S. E. 167; State v. Grier, 184 N. C. 723, 114 S. E. 622. For an example of "first degree" and "second degree" in misdemeanors see section 4361.

Accessory Tried as Principal.—An accessory before the fact can be tried and convicted as principal, under this section. State v. Bryson, 173 N. C. 803, 806, 92 S. E. 698.

One Charged with Murder May Be Convicted as Accessory.—Under section 4640 the charge of the principal crime includes the crime of accessory before the fact and hence one charged with murder may be convicted as accessory before the fact. State v. Bryson, 173 N. C. 803, 92 S. E. 698, overruling on this point. State v. Dewer, 65 N. C 572. See also State v. Simons, 179 N. C. 700, 103 S. E. 5.

Principal in Assault Cannot Be Convicted as Accessory.—A defendant charged as principal in an indictment for an assault with intent to kill can not be convicted as accessory. State v. Green, 119 N. C. 899, 26 S. E. 112.

No Conviction of Accessory Where Principal Acquitted.—This section does not change the common law rule that an acquittal of the principal is an acquittal of the accessory. State v. Jones, 101 N. C. 719, 8 S. E. 147.

Effect of Acquittal of One of Several Principals.—Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. State v. Walton, 186 N. C. 485, 119 S. E. 886.

Accessory Tried by Special Veniremen.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. State v. Register, 133 N. C. 746, 46 S. E. 21.

What Constitutes Counseling, Procuring and Commanding.—At a meeting of a board of commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within sixty days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. And, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said: "The way is open, go ahead and remove them." It was held, that the mayor was individually guilty of counseling, procuring and commanding an act within the meaning of this section, the committing of which afterwards was a felony. State v. McLean, 121 N. C. 589, 28 S. E. 140.

The meaning of the word "command," as applied to the case of principal and accessory, is, where a person, having a control over another, as a master over his servant, orders a thing to be done. State v. Mann, 2 N. C. 4.

One Present Not Bound to Interfere.—One who is present, and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. State v. Hildreth, 31 N. C. 440.

Evidence Admissible.—The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal, and prima facie evidence of his guilt. State v. Chittem, 13 N. C. 49.

But the conviction of the principal is not admissible evidence until judgment has been rendered on the verdict. State v. Duncan, 28 N. C. 98.

Same—Sufficient for Conviction.—Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. State v. Jones, 176 N. C. 702, 97 S. E. 32.

Cited in State v. Ferrell, 205 N. C. 640, 172 S. E. 186; State v. Kluttz, 206 N. C. 726, 175 S. E. 81.

§ 4176. Punishment of accessories before the fact.—Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life in the state's prison. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned in the state's prison for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact in any other felony shall be punished be imprisonment in the state prison or county jail for not more than ten years, or may be fined in the discretion of the court. (Rev., s. 3290; Code, s. 980; 1868-9, c. 31, s. 2; 1874-5, c. 212.)

Life Sentence for Accessory to Murder Valid.—Upon conviction of murder in the second degree, and sentence to twenty years in the State's Prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the Superior Court for resentence, as the statute provides a sentence for life. State v. Bryson, 173 N. C. 803, 92 S. E. 698.

Sufficiency of Evidence to Go to Jury.—Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, is sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder under this section. State v. Mozingo, 207 N. C. 247, 176 S. E. 582.

§ 4177. Accessories after the fact; trial and punishment.—If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicated and convicted together with the principal felon, or may be indicated and convicted for such felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amendable to justice, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicated or tried for the same offense. (Rev., s. 3289; Code, s. 978; R. C., c. 34, s. 54; 1797, c 485, s. 1; 1852, c. 58.)

See generally in connection with this section the annotations under section 4175, many of which apply equally to this section.

Receiver of Stolen Goods Not Accessory.—All felonious stealing being now reduced by section 4249 to the grade of petit larceny, a receiver of stolen goods is not an accessory after the fact. State v. Tyler, 85 N. C. 569.

Husband of Accessory Not Competent Witness.—The husband of one charged as an accessory is not a competent witness in favor of the one charged as the principal felon. State v. Ludwick, 61 N. C. 401.

SUBCHAPTER 2. OFFENSES AGAINST THE STATE

Art. 3. Rebellion

§ 4178. Rebellion against the state.—If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the state of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and, shall be punished by imprisonment in the state's prison for not more than fifteen years and by a fine of not more than ten thousand dollars. (Rev., s. 3437; Code, s. 1106; 1868, c. 60, s. 2; 1861, c. 18; 1866, c. 64; Const., Art. IV, s. 5.)

§ 4179. Conspiring to rebel against the state.—If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the state, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the state, or by force or fraud to seize or take possession of any firearms or other property of the state, against the will or contrary to the authority of such state, every person so offending in any of the ways aforesaid shall be guilty of a felony and shall be imprisoned not more than ten years in the state's prison and be fined not exceeding five thousand dollars. (Rev., s. 3438; Code, s. 1107; 1868, c. 60, s. 1.)

In General.—"It is a rule well established that all who engage in a conspiracy, as well those who participate after it is formed as those with whom it originates, are equally liable, and the acts and declarations of each in furtherance of the common illegal design are admissible against all. State v. Dean, 35 N. C. 63; State v. Earwood, 75 N. C. 210." State v. Jackson, 82 N. C. 565, 567.

§ 4180. Secret political and military organizations forbidden.—If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extra-judicial oath or secret solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extra-judicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court. (Rev., s. 3439; Code, s. 1095; 1870-1, c. 133; 1868-9, c. 267; 1871-2, c. 143.)

Art. 4. Counterfeiting and Issuing Monetary Substitutes

§ 4181. Counterfeiting coin and uttering coin that is counterfeit.—If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and re-

ceived in the discharge of contracts by the citizens of the state; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the state from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3422; Code, s. 1035; R. C., c. 34, s. 64; 1811, c. 814, s. 3.)

§ 4182. Possessing tools for counterfeiting.—If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the state, and shall be duly convicted thereof, the person so offending shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years, or be fined not more than five hundred dollars. (Rev., s. 3423; Code, s. 1036; R. C., c. 34, s. 65; 1811, c. 814, s. 4.)

As to forgery in general, see sections 4293 et seq. and notes.

Indictment Sufficient.—An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offence designated in this section. State v. Collins, 10 N. C. 191.

§ 4183. Issuing substitutes for money without authority.—If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate or deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars; and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor. (Rev., s. 3711; Code, s. 2493; 1895, c. 127; R. C., c. 36, s. 5.)

Editor's Note.—In State v. Humphreys, 19 N. C. 555, the act of 1816, ch. 900, which was very similar to this section is discussed. It is there held that the act is constitutional and that the intent in so issuing the notes, etc., is an essential ingredient of the offense.

For act permitting the issuance of script in Currituck county, see Public Laws 1933, c. 328. For act authorizing issuance of script in Cumberland county, see Acts of 1933, c. 33.

§ 4184. Receiving or passing unauthorized substitutes for money.—If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in the preceding section, whether the same be issued within or without the state, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor. (Rev., s. 3712; Code, s. 2494; 1895, c. 127; R. C., c. 36, s. 6.)

Editor's Note.—In State v. Bank, 48 N. C. 450, it was held that this section making it an offense to "pass and receive" banknotes, did not apply to a bank but that the bank should be penalized under another section which made it unlawful to make and issue notes of a less denomination than three dollars.

SUBCHAPTER 3. OFFENSES AGAINST THE ELECTIVE FRANCHISE

Art. 5. Corrupt Practices at Elections

§ 4185. Certain acts declared misdemeanors.—Any person who shall in connection with any primary, special, general or other election in this state do any of the acts and things declared in this section to be unlawful shall be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned, or both, in the discretion of the court. It shall be unlawful—

1. To Fail as Election Officer to Perform Duties.—For any person to fail as an officer or as a judge or registrar of election, or as a member of any election or canvassing board, to prepare the books, tickets and return blanks which it is his duty under the law to prepare, or to distribute the same as required by law, or to make the returns, or to perform any other duty within the time and in the manner required by law. (Rev., s. 3396; 1901, c. 89, s. 46; 1913, c. 164, s. 1.)

2. To Act as Election Officer aft r Removal.—For any person to continue, or attempt, to act as a judge or registrar of election, or as a member of any election board, after having been legally removed from such position, and after having been given notice of such removal. (Rev., s. 3399; 1901, c. 89, s. 10; 1919, c. 164, s. 1.)

3. To Interfere with Elections and Duties of Election Officers.—For any person to break up, or by force or violence to stay or interfere with, the holding of any election, to interfere with the possession of any ballot box, election book, ticket or return sheet by those entitled to the possession of the same under the law, or interfere in any manner with the performance of any duty imposed by law upon any election officer or member of any election or canvassing board. (Rev., s. 3385; 1901, c. 89, s. 51; 1913, c. 164, s. 1.)

4. To Disturb Election Officers in the Performance of Their Duties.—For any person to be guilty of boisterous conduct so as to disturb any member of any election or canvassing board, or any judge or registrar of elections, in the performance of his duties as imposed by law. (Rev., s. 3385; 1901, c. 89, s. 51; 1913, c. 164, s. 1.)

5. To Bet on Elections.—For any person to bet or wager any money or other thing of value on any election. (Rev., s. 3384; 1901, c. 89, s. 55; 1913, c. 164, s. 1.)

In General.—Prior to the passage of this section it was held that a bond, given for money lost upon a wager in the result of a public election, though neither of the parties be a voter, is based upon an illegal consideration, being against public policy, and is therefore void. Bettis v. Reynolds, 34 N. C. 344.

6. To Intimidate or Oppress Voters.—For any person to directly or indirectly discharge or threaten to discharge from employment or otherwise intimidate or oppress any legally qualified voter on account of any vote such voter may cast or consider casting, or intend to cast or not to

cast, or which he may have failed to cast. (Rev., s. 3387; 1901, c. 89, s. 53; 1913, c. 164, s. 1.)

Strict Construction.—This section being penal, must be construed strictly, not by implication or otherwise than by its strict words and plain signification. State v. Rogers, 128 N. C. 576, 38 S. E. 34.

Expulsion from Church Not Included.—Under this section the expulsion of a person from a church because he voted a certain ticket is not punishable. State v. Rogers, 128 N. C. 576, 38 S. E. 34.

7. To Make Contributions Toward Campaigns Without Properly Reporting Same.—For any person to spend or contribute directly or indirectly any money or other thing of value to aid in the campaign or election of any candidate for any office in a primary or in a general election, unless the same be reported immediately to such candidate, to the end that it may be included by him in the reports required of him by law, or unless such contribution be reported to the campaign committee of such candidate within the meaning of "campaign committee" as herein defined. The term "campaign committee," as used in this subsection, shall embrace only such committees as are designated by candidates for office before primary elections and reported to the secretary of state at least thirty days before any such primary election by those who are candidates for any office embracing a greater territory than a county, and reported to the clerk of the superior court in any county of the candidate at least thirty days prior to the primary election by those who are candidates for any office to be voted for only by the electors in a particular county or subdivision thereof. It shall be the duty of each candidate to receive from such campaign committee, and of each campaign committee of each candidate to give to the candidate appointing such committee, all the information they may have, and for such campaign committee and candidate to embrace such information in the reports required of them by law, and it shall be unlawful for the candidate and the members of his campaign committee to fail to do so. (1913, c. 164, s. 1.)

8. To Fail Before Primary Elections to Report Campaign Receipts and Disbursements.—For any person who is a candidate or member of the campaign committee to fail to report under oath within the time required by law for the report from such candidate, the amount of money received in connection with or in aid of his campaign, the sources thereof, and for what purposes it has been applied. The report to be made by the campaign committee of any candidate before the primary shall be made in duplicate, one copy thereof to be filed with the candidate and one copy to be filed with the officer to whom such candidate is required to report, and shall be made within the time required for a report from such candidate. (1913, c. 164, s. 1.)

9. To Expend More Than a Certain Sum for Campaign Purposes before Primary Elections.—For any person who is a candidate for any political office before a primary to expend or knowingly assent to or permit the expenditure of more than fifty per cent of what the annual salary of such person will be if elected to the office for which he is a candidate, except that a candidate for governor and a candidate for the United States senate may spend or allow others to spend a total amount, which shall not be greater than the annual salary would be if the candidate were elected to such office, and such candidate may lawfully pay in addition his transportation expenses and board and lodging bills while campaigning for such office. (1913, c. 164, s. 1.)

10. To Fail before General Elections to Report Campaign Receipts and Disbursements.—For any person who is a member of any executive, managing or other committee of any political party for any county or subdivision of any county in the state, to fail to report to the clerk of the court of such county, not more than fifteen nor less than ten days before any general election, the amount of money received by such committee for campaign purposes, and within twenty days after the election to make a similar report of money received and from whom, and the purposes for which it was used, such report to be made under oath by the secretary or chairman of the committee who has full knowledge of all the details of the committee's affairs; or for any chairman or secretary of such committee of a political party having a territory embracing more than one county to fail to make, within the time required by law, similar reports to the secretary of state. (1913, c. 164, s. 1.)

11. To Publish Unsigned Derogatory Changes Concerning Candidates.—For any person to publish in any newspaper or pamphlet, or otherwise, any change derogatory to any candidate, or calculated to affect the candidate's chances of election to office, unless such publication be signed by the party giving publicity to and being responsible for such charge. (1913, c. 164, s. 1.)

12. To Circulate False Derogatory Charge Concerning Candidates.—For any person to publish or cause to be circulated derogatory reports with reference to any candidate, known by the person publishing or circulating such report to be false, when such report is calculated or intended to affect the chances of such candidate for office. (1913, c. 164, s. 1.)

13. To Promise Political Appointments in Securing Political Support.—For any person to give or promise, in return for political support or influence, any political appointment or support for political office. (1913, c. 164, s. 1.)

See note under § 6055(a 53).

§ 4185(a). Intimidation of voters by officers made misdemeanor.—It shall be unlawful for any person holding any office, position, or employment in the state government, or under and with any department, institution, bureau, board, commission, or other state agency, or under and with any county, city, town, district, or other political subdivision, directly or indirectly, to discharge, threaten to discharge, or cause to be discharged, or otherwise intimidate or oppress any other person in such employment on account of any vote such voter or any member of his family may cast, or consider or intend to cast, or not to cast, or which he may have failed to cast, or to seek or undertake to control any vote which any subordinate of such person may cast, or consider or intend to cast, or not to cast, by threat, intimidation, or declaration that the position, salary, or any part of the salary of such subordinate depends in any manner whatsoever, directly or indirectly, upon the way in which such subordinate

or any member of his family casts, or considers or intends to cast, or not to cast his vote, at any primary or election. Any person violating this section shall be guilty of a misdemeanor and punished by fine and/or imprisonment, in the discretion of the court. (1933, c. 165, s. 25.)

§ 4186. Certain acts declared felonies.—Any person who shall in connection with any primary special, general or other election in this state do any of the acts and things declared in this section to be unlawful shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison not less than four months, or fined not less than one thousand dollars, or both, in the discretion of the court. It shall be unlawful—

1. To Register in More than One Precinct or Impersonate Other Voters. — For any person fraudulently to cause his name to be placed upon the registration books of more than one election precinct, or fraudulently to cause or procure his name, or that of any other person, to be placed upon the registration books in any precinct when such registration in that precinct does not qualify such person to vote legally therein, or to impersonate falsely another registered voter for the purpose of voting in the stead of such other voter. (Rev., s. 3395; 1901, c. 89, s. 70; 1913, c. 164, s. 2.)

2. To Buy and Sell Votes.—For any person to give or promise or request or accept at any time before or after any such election any money, property or other thing of value whatever, in return for the vote of any elector. (Rev., s. 3386; 1901, c. 89, s. 54; 1913, c. 164, s. 2.)

3. To Make Fraudulent Entries and Returns.—For any person who is an election officer, a member of a canvassing or election board or other officer charged with any duty with respect to any election, knowingly to make any false or fraudulent entry on any election book, or any false or fraudulent return, or knowingly to make, or cause to be made, any false statement on any ticket, or to do any fraudulent act, or knowingly and fraudulently to omit to do any act or make any report legally required of such person. (1913, c. 164, s. 2.)

4. To Swear Falsely in Connection with Elections.—For any person knowingly to swear falsely with respect to any matter pertaining to any such election. (1913, c. 164, s. 2.)

5. To Qualify Any One Fraudulently as an Elector.—For any person falsely to make or present any exemption from poll tax, tax receipt, certificate or other paper to qualify any person fraudulently as an elector, or to attempt thereby to secure to any person the privilege of voting. (Rev., s. 3401, 1901, c. 89, s. 13; 1913, c. 164, s. 2.)

See note under § 6055(a53).

§ 4187. Persons pardoned compellable to testify.—Any person subpœnaed by the state to testify relative to any offense arising under the provisions of the two preceding sections shall be required to testify, but such person shall be immune from prosecution and shall be pardoned for any violation of law about which such person is so required to testify. (1913, c. 164, s. 3.)

See § 6055(a 54).

Art. 6. Other Offense against the Elective Franchise

§ 4188. Disposing of liquor at or near polling places.—If any person shall give away or shall sell any intoxicating liquor, except for medical purposes and upon the prescription of practicing physician, at any place within five miles of the polling place, at any time within twelve hours next preceding or succeeding any public election, whether general, local or municipal, or during the holding thereof, he shall be guilty of a misdemeanor, and shall be fined not less than one hundred nor more than one thousand dollars. (Rev., s. 3389; 1901, c. 89, s. 76, c. 531.)

Editor's Note.—In State v. Edwards, 134 N. C. 636, 46 S. E. 766 the court discusses the former provisions regulating this subject. The Act of 1901, ch. 89, sec. 76 omitted the words "or sell" from the section and hence it was decided that it was no offense for a person who has a license, to sell liquors on an election day, although they could not be given away. This case of State v. Edwards, supra, was decided in 1904 and by Public Laws 1905, ch. 531 the words "or shall sell" were again inserted in the section.

Form of Indictment.—An indictment for selling or giving away spiritous liquors during a public election should set forth the name of the person to whom the liquor was sold or given; also the indictment should negative the selling upon "the prescription of a practicing physician and for medical purposes," which is allowed by the act. State v. Stamey, 71 N. C. 202.

§ 4189. Voting of felons at elections.—If any person convicted of a crime which excludes him from the right of suffrage shall vote at an election without having been restored to the right of citizenship, he shall be guilty of a felony and punished by a fine not exceeding one thousand dollars or imprisoned in the state's prison not exceeding two years, or both. (Rev., s. 3388; 1901, c. 89, s. 71.)

See § 6055(a 53) and note thereto.

§ 4190. Corrupt taking of oath by voter.—If any person shall corruptly take the oath prescribed for voters, he shall be guilty of perjury, and shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be imprisoned in the state's prison not less than two nor more than five years. (Rev., s. 3390, 1901, c. 89, s. 49.)

See § 6055(a53) and note thereto.

§ 4191. False oath of voter in registering.—If any person shall knowingly register under the permanent registration law who is not qualified within the meaning of that law and article six, section four, of the constitution, or if any person shall knowingly take any false oath in registering under the same, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars or imprisoned not more than five years. (Rev., s. 3392; 1901, c. 550, s. 12.)

See § 6055(a53) and note thereto.

§ 4192. Voting illegally at elections; fraudulent entries by registrars and clerks.—If any person shall, with intent to commit a fraud, register or vote at more than one box or more than one time, or shall induce another to do so, or if any person shall illegally vote at any election, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than six nor more than twelve months, or fined not less than one hundred nor more than five hundred dollars, at the discretion of the court. If any registrar of voters, or any clerk or copyist, shall make any entry or copy

with intent to commit a fraud, he shall be guilty of a like offense. (Rev., s. 3394; 1901, c. 89, s. 48.)

See § 6055(a53) and note thereto.

Decision of Election Judges Protects Voter.—The decision of the judges of election that a person is entitled to vote is a complete defense to an indictment for illegal voting, although such person may not in fact be entitled to vote. State v. Pearson, 97 N. C. 434, 1 S. E. 914.

Opinions of Others No Justification.—Where a person voluntarily gives an unlawful vote, the unlawful purpose prima facie attaches to the act, and the opinions of others who believed the vote lawful, does not amount to a justification or excuse. State v. Hart, 51 N. C. 389.

When a man is indicted, under the statute, for "knowingly and fraudulently voting at an election," when he is not qualified to vote, he cannot justify himself by showing that he was advised by a very respectable gentleman that he had a right to vote; for the maxim, that "ignorance of the law excuses no man," applies as strongly to this case as to any other. State v. Boyett, 32 N. C. 336.

That Election Was Irregular No Defense.—One, who votes illegally at an election cannot defend himself against an indictment, upon the ground that the election was conducted irregularly. State v. Cohoon, 34 N. C. 178.

§ 4193. Willful failure of returning officer to discharge duty.—If any chairman of the county board of elections, or other returning officer whatever, shall willfully, or of malice, neglect to perform any duty, act, matter or thing required or directed in the time, manner and form in which such duty, act, matter or thing is required to be performed in relation to the election, and returns thereof, of the governor, representatives in congress, justices of the supreme court, judges of the superior court, solicitors, electors for president and vice president of the United States or other officers, the person so offending shall be guilty of a felony, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than one nor more than three years. (Rev., s. 3391; 1901, c. 89, s. 47.)

See § 6055(a 52) subsection (13).

§ 4194. Willful failure of registration officer to discharge duty.—If any officer charged with any duty under the permanent registration law willfully fails and neglects to perform the same, he shall be guilty of a misdemeanor, and upon conviction shall forfeit his office and be fined not more than one thousand dollars or imprisoned not more than five years. (Rev., s. 3393; 1901, c. 550, s. 11.)

See § 6055(a 52).

§ 4195. Making false returns or tampering with poll books.—If any person shall make, certify, deliver or transmit a false return of an election held in this state, or make any erasure or alteration in the poll books, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than one year, and shall, in addition, forfeit and pay five hundred dollars, one-half to the use of the person who shall sue for the same and the other half to the use of the state. (Rev., s. 3397; 1901, c. 89, s. 83.)

See § 6055(a53) and note thereto.

§ 4196. Refusing to furnish copy of election returns.—If any register of deeds or clerk of the superior court shall refuse to make and give to any person a duly certified copy of the returns of any election, or of a tabulated statement of any election, the returns of which are by law deposited in his office, upon the tender of the fees therefor, he shall be guilty of a misdemeanor, and upon conviction shall be dismissed from office and imprisoned for one year. (Rev., s. 3398; 1901, c. 89, s. 83.)

See § 6055(a 52) subsection (14).

§ 4197. Failing to furnish poll-tax list.—If any sheriff or tax collector shall fail, between the first day of May and the tenth day of May of any year in which a general election occurs to certify to the clerk of the superior court of his county a list of all persons who have paid their poll tax for the previous year, he shall be guilty of a misdemeanor. (Rev., s. 3400; 1901, c. 89, s. 13.)

§ 4198. Failing to give or falsely dating poll-tax receipt.—If any tax collector or sheriff shall willfully fail to give a tax receipt to any person paying his poll tax, or shall falsely date any tax receipt or duplicate thereof, he shall be guilty of a misdemeanor, and shall be punished in the discretion of the court. (Rev., s. 3402; 1901, c. 89, s. 13.)

§ 4199. Using funds of insurance companies for political purposes.—No insurance company or association, including fraternal beneficiary associations, doing business in this state shall, directly or indirectly, pay or use, or offer, consent or agree to pay or use, any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint-stock company, or other association organized or maintained for political purposes, or for or in aid of any candidate for political office or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used. Any officer, director, stockholder, attorney or agent of any corporation or association which violates any of the provisions of this section, who participates in, aids, abets, advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars. Any officer aiding or abetting in any contribution made in violation of this section shall be liable to the company or association for the amount so contributed. The insurance commissioner may revoke the license of any company violating this section. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon criminal investigation or proceeding. (1907, c. 121.)

See § 6055(a 52) and note thereto.

§ 4199(a). Assault on election officer a felony; punishment.—Any person who assaults any registrar, judge, or other election officer, while in discharge of his duties, in any general, special, or primary election in the state, shall be guilty of a

felony, and upon conviction shall be punished by imprisonment in the state prison or be worked on the county roads for a period of not less than four months nor more than ten years. (1921, c. 176, s. 1.)

See § 6055(a 53) and note thereto.

§ 4199(b). Intimidation of election officers a misdemeanor; punishment.—If any person shall by threats, menaces, or in any other manner intimidate or attempt to intimidate any registrar, judge, or other election officer in the state in the discharge of the duties of his office, in any general, special, or primary election in the state, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1921, c. 176, s. 2.)

See § 6055(a 53) and note thereto.

SUBCHAPTER 4. OFFENSES AGAINST THE PERSON

Art. 7. Homicide

§ 4200. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two nor more than thirty years in the state prison. (Rev., s. 3631; 1893, c. 85; 1893, c. 281.)

I. Editor's Note.
II. Murder in General.
III. Murder in the First Degree.
IV. Murder in the Second Degree.
V. Pleading and Practice.

Cross References.

For a general discussion of this subject, see 7 Enc. Dig. 136 et seq.; 14 Enc. Dig. 313 et seq.

I. EDITOR'S NOTE.

"Homicide," in its largest sense is generic, embracing every mode by which the life of one person is taken by another. Generally speaking, therefrom, homicide is the taking of human life, which may or may not be criminal. It is only those homicides which are committed in the manner described by the laws prescribing punishment therefor that are criminal.

Criminal homicide is the unlawful killing of a human being, and is classified as murder and manslaughter, and by statute, in most of the states as in North Carolina, murder is divided into two or more degrees.

The statutes where murder is divided into two degrees, have not, as a general thing, added to or taken away any ingredients of murder at common law, and every murder at common law is murder under the statutes. I Michie on Homicide 68.

II. MURDER IN GENERAL.

Effect of Section Dividing Murder into Degrees. — This section, dividing murder into two degrees, does not give any new definition of murder, but the same remains as it was at common law before the enactment. State v. Delton, 178 N. C. 779, 101 S. E. 548.

Principal May Be Prosecuted under This Section and Accessory under § 4176.—Section 4176 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section was enacted and the principal may therefore be convicted and punished under this section for murder in the second degree, while the accessory before the fact receives life under § 4176. State v. Mozingo, 207 N. C. 247, 250, 176 S. E. 582.

Malice—Definition.—Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183 N. C. 795, 111 S. E. 869.

Same—Necessity.—Malice is always a necessary ingredient of murder. State v. Baldwin, 152 N. C. 822, 68 S. E. 148.

Same—Express.—But it is not necessary to a conviction for murder that the state prove express malice. State v. McDowell, 145 N. C. 563, 59 S. E. 690.

Same—Implied.—For this intentional killing of a human being with a deadly weapon implies malice. State v. Pasour, 183 N. C. 793, 111 S. E. 779; State v. Brinkley, 183 N. C. 720, 110 S. E. 783; State v. McDowell, 145 N. C. 563, 59 S. E. 690.

Same—Presumption.—At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts. State v. Rhyne, 124 N. C. 847, 33 S. E. 128. The common law rule has been followed and it is now also presumed that a killing with a deadly weapon is unlawful and malicious. State v. Benson, 183 N. C. 795, 111 S. E. 869; State v. Walker, 193 N. C. 489, 137 S. E. 429.

As where accused previously procures a weapon for the purpose of using it, and does so use it, the offense is ordinarily murder. State v. Johnson, 172 N. C. 920, 90 S. E. 426.

Provocation never disproves malice; it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. State v. Johnson, 23 N. C. 354.

Motive—Necessity.—It is not necessary to a conviction of murder that the state prove motive. State v. Adams, 136 N. C. 617, 48 S. E. 589; State v. McDowell, 145 N. C. 563, 59 S. E. 690.

Same—To Strengthen State's Case.—But the case of the state may be strengthened by the showing of a motive when the evidence is circumstantial. State v. Stratford, 149 N. C. 483, 62 S. E. 882; State v. Turner, 143 N. C. 641, 57 S. E. 158.

Same—To Identify Prisoner or Establish Malice.—And it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. State v. Wilkins, 158 N. C. 603, 73 S. E. 992; State v. Adams, 138 N. C. 688, 50 S. E. 765.

Intent—Necessity.—Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown, and though sometimes this may be imputed by reason of the killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life, it must always exist before a charge of murder can be sustained. State v. Stitt, 146 N. C. 643, 61 S. E. 566.

Same—Must Co-exist with Killing.—"The act of killing, and the guilty intent, must concur to constitute the offense." State v. Scates, 50 N. C. 420, 423.

Attempt to Kill.—"An attempt only, to kill, with the most diabolical intent, may be moral, but can not be legal, murder." State v. Scates, 50 N. C. 420, 423.

Cited in State v. Evans, 198 N. C. 82, 150 S. E. 678; State v. Macon, 198 N. C. 483, 152 S. E. 407; State v. Beard, 207 N. C. 673, 678, 178 S. E. 242; State v. Cooper, 205 N. C. 657, 658, 172 S. E. 199.

III. MURDER IN THE FIRST DEGREE.

Effect of Statute Dividing Murder into Degrees.—By the act of 1893, chapter 85 (this section), the crime of murder has been divided into two degrees, first and second. The common law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree—the killing must be wilful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. State v. Rhyne, 124 N. C. 847, 33 S. E. 128.

Deliberation and Premeditation—Premeditation.—Premeditation means "thought of beforehand," for some length of time, however short. State v. Benson, 183 N. C. 795, 111 S. E. 869. It is a prior determination to do the act. State v. Cameron, 166 N. C. 379, 81 S. E. 748.

Same—Deliberation. — Deliberation means a preconceived intent to kill, executed in cold blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. State v. Benson, 183 N. C. 795, 111 S. E. 869.

Same—Necessity.—And before a conviction for murder in the first degree can be had, the state must show that the prisoner had formed, prior to the killing, with deliberations and premeditations, a purpose to kill deceased. State v. Terry, 173 N. C. 761, 92 S. E. 154; State v. Benson, 183 N. C. 795, 111 S. E. 869. See also 5 N. C. Law Rev. 364.

Same—Length of Time Immaterial.—The killing of a hu-

man being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree. State v. Walker, 173 N. C. 780, 92 S. E. 327. For, no particular period of time is necessary to premeditations and deliberations for a conviction of murder in the first degree under this section. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. State v. Holdsclaw, 180 N. C. 731, 105 S. E. 181; State v. Cogey, 174 N. C. 814, 94 S. E. 416. And deliberation and premeditations need not be of any perceptible time. State v. Bynum, 175 N. C. 777, 95 S. E. 101.

Same—Sufficiency. — Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. State v. Dowden, 118 N. C. 1145. 24 S. E. 722.

Same—Willful.—For a conviction of murder in the first degree the killing must be done with willful premeditations and determinations. State v. McKay, 150 N. C. 813, 63 S. E. 1059; State v. Baldwin, 152 N. C. 822, 68 S. E. 148. And an act is done willfully where it is done intentionally, purposely, and deliberately, in violation at law. State v. Stackhouse, 152 N. C. 808, 67 S. E. 764.

Malice.—For a conviction of murder in the first degree the killing must be done with malice aforethought, express or implied. State v. McKay, 150 N. C. 813, 68 S. E. 1059.

Formed Design to Take Life.—If the circumstances of the killing show a formed design to take life of deceased, the crime is murder in the first degree. State v. Walker, 173 N. C. 780, 92 S. E. 327; State v. Cain, 178 N. C. 724, 100 S. E. 884.

Lying in Wait.—Defendants who lay in wait and killed deceased from ambush are guilty of murder in first degree. State v. Wiggins, 171 N. C. 813, 89 S. E. 58. See also State v. Satterfield, 207 N. C. 118, 176 S. E. 466; State v. Mozingo, 207 N. C. 247, 176 S. E. 582.

Killing in Perpetration of Robbery.—A homicide committed in the perpetration of, or in attempt to perpetrate, a robbery will be deemed murder in the first degree. State v. Lane, 166 N. C. 333, 81 S. E. 620. See also State v. Glover, 208 N. C. 68, 179 S. E. 6.

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, under this section, and the failure of the trial court to submit the issue of guilty of murder in the second degree is not error. State v. Donnell, 202 N. C. 782, 164 S. E. 352.

Where upon a trial for murder all the evidence and inferences therefrom unquestionably tend to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there is no evidence in mitigation of the offense, the evidence establishes the crime of murder in the first degree under this section, and an instruction to the jury either to convict the defendant of murder in the first degree, or to aquit him is not error. State v. Myers, 202 N. C. 351, 162 S. E. 764.

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, the credibility and probative force of the evidence being for the jury. State v. Langley, 204 N. C. 687.

Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, as defined by this section, under proper instructions from the court thereon upon conflicting evidence. State v. Sterling, 200 N. C. 18, 19, 156 S. E. 96.

All Conspirators Are Guilty Regardless of Who Actually Committed Crime.—Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, under this section, and it is immaterial which one of them fired the fatal shot. State v. Green, 207 N. C. 369, 177 S. E. 120.

Thus, where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. State v. Stefanoff, 206 N. C. 443, 174 S. E. 411.

Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. State v. Bell, 205 N. C. 225, 171 S. E. 50.

IV. MURDER IN THE SECOND DEGREE.

Definition.—Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. State v. Benson, 183 N. C. 795, 111 S. E. 869.

Effect of Statute Dividing Murder into Degrees.—At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse, devolved upon the prisoner. The statute dividing murder into two degrees (under this section) contains no reference to this rule, but the Supreme Court of N. C. in State v. Fuller, 114 N. C. 885, 19 S. E. 797, held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggravate the offense to murder in the first degree, as it was on the prisoner, to reduce it. But this applies only to cases of homicide in which premeditation must be shown and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment or torture. As to these, when intentionally done the law still raised the presumption of murder in the first degree, as the prisoner justly contends. But none the less if the jury convict of a less offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. State v. Matthews, 142 N. C. 621, 625, 55 S. E. 342.

Same—Presumption.—Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N. C. 636, 34 S. E. 247.

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. State v. Miller, 197 N. C. 445, 446, 149 S. E. 590.

Intent Formed Simultaneous with Act of Killing.—Where this intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. State v. Dowden, 118 N. C. 1145, 24 S. E. 722; State v. Barrett, 142 N. C. 565, 54 S. E. 856.

V. PLEADING AND PRACTICE.

Cross Reference.—As to indictments, generally, see 7 Enc. Dig. 196, et seq.; as to evidence, generally, see 7 Enc. Dig. 203 et seq.; 14 Enc. Dig. 331 et seq.; as to admissibility in evidence of the intoxication of prisoner, see 5 N. C. Law Rev. 364; as to trial, see 7 Enc. Dig. 249 et seq.; 14 Enc. Dig. 346 et seq.; as to instructions, see 7 Enc. Dig. 257 et seq.; 14 Enc. Dig. 349 et seq.; as to verdict, see 7 Enc. Dig. 274 et seq.; 14 Enc. Dig. 354; as to sentence and punishment, see generally, 7 Enc. Dig. 280, 281; 14 Enc. Dig. 358.

Form of Indictment.—Nothing contained in the act of 1893 requires any alteration or modification of the existing form of indictment for murder therefore it is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said act of 1893. State v. Covington, 117 N. C. 834, 23 S. E. 337.

Evidence of Killing in Perpetration of Robbery.—Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by this section, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. State v. Westmoreland, 181 N. C. 590, 107 S. E. 438.

Evidence of Facts Succeeding Homicide. — Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree. State v. Westmoreland, 181 N. C. 590, 107 S. E. 438.

Determination of Degree of Murder.—Under this section, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the first or second degree. State v. Truesdale, 123

N. C. 696, 34 S. E. 646; State v. Gadberry, 117 N. C. 811, 23 S. E. 477.

Charge—Willful Premeditation and Deliberation.—The law is fixed by the statute, that the killing must be willful, upon premeditation and with deliberation, and where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in the first degree ought not to be submitted to them. State v. Rhyne, 124 N. C. 847, 33 S. E. 128.

Same—Burden of Proof of Unlawful Killing.—Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, and in keeping with the language of this section, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation, or murder committed in the perpetration, or attempt to perpetrate, other felonies named. State v. Walker, 193 N. C. 489, 137 S. E. 429.

Sufficient Showing of Provocation So as to Reduce the Crime.—A defendant who has intentionally killed another with a deadly weapon to rebut the presumption arising from such showing or admission, must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or excuse it altogether but if there is no evidence of mitigation or provocation sufficient to reduce the offense to manslaughter it is proper to withhold this issue from the jury's consideration. State v. Keaton, 206 N. C. 682, 686, 175 S. E. 296.

Instruction.—See note under § 4642.

Evidence Sufficient to Support Instruction as to Murder in First Degree.—Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, is sufficient to support an instruction to the jury on the question of murder in the first degree. State v. Brooks, 206 N. C. 113, 172 S. E. 879.

Sufficiency of Evidence for Submission to Jury.—Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and that deceased was killed by a shot from a gun fired from the outside, is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree as stated in this section. State v. Ferrell, 205 N. C. 640, 172 S. E. 186.

Verdict.—For a conviction of murder in the first degree under this section and section 4642, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const., Art. I, sects. 13, 17, which right may not be waived. State v. Bazemore, 193 N. C. 336, 137 S. E. 172.

§ 4201. Punishment for manslaughter.—If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or state prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both. (Rev., s. 3632; Code, s. 1055; 1879, c. 255; R. C., c. 34, s. 24; Hen. VII, c. 13; 1816, c. 918; 1933, c. 249.)

Cross References.—For an extensive treatment of "Manslaughter," see 7 Enc. Dig. 164 et seq.; 14 Enc. Dig. 323 et seq. For a general treatment of sentence and punishment, see 7 Enc. Dig. 280, 281.

Editor's Note.—Public Laws of 1933, c. 249, added the proviso at the end of this section, relating to involuntary manslaughter.

As to Less Degrees of Same Crime.—While under the provisions of section 4640, the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. State v. Lutterloh, 188 N. C. 412, 124 S. E. 752.

Construing chapter 80, section 6, Laws 1907, with this section to ascertain the legislative intent, upon consideration of the inherent nature of the subject-matter with the mischief and the proposed remedy, it is Held, that the later act was not intended to take away the discretion of the trial judge, upon conviction of manslaughter, to sentence the prisoner to a three-year term in the State's prison, and to wear a felon's stripes, when in his opinion a sentence to the roads will result in the prisoner's escape. State v. Killian, 173 N. C. 792, 92 S. E. 499.

Punishment Not Reviewable on Appeal.—The question of the imposition of a sentence on the prisoner convicted of manslaughter within the maximum and minimum allowed by this section, is within the discretion of the trial court and is not reviewable on appeal. State v. Fleming, 202 N. C. 512, 163 S. E. 453.

§ 4202. Punishment for second offense of manslaughter.—If any person, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, he shall be imprisoned in the state prison not less than five nor more than sixty years; and in every such case of conviction for such second offense, the prior conviction of the same person and sentence thereon may be shown to the court. (Rev., s. 3633; Code, s. 1056; R. C., c. 34, s. 25.)

§ 4203. Killing adversary in duel; aiders and abettors declared accessories.—If any persons fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact. (Rev., s. 3629; Code, s. 1013; R. C., c. 34, s. 3; 1802, c. 608, s. 2.)

As to punishment for sending, accepting or bearing a challenge to fight a duel or aiding and abetting a duel, see section 4411.

Definition. — Webster's International Dictionary defines "duel" to be a combat between two persons, fought with deadly weapons by agreement. State v. Fritz, 133 N. C. 725, 727, 45 S. E. 957.

Offense at Common Law.—Dueling was an offence at common law, 4 Bl. Com., 145; State v. Fritz, 133 N. C. 725, 727, 45 S. E. 957.

Deadly Weapons.—In 2 Bishop New Criminal Law, § 313(2), it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. State v. Fritz, 133 N. C. 725, 727, 45 S. E. 957.

When Offense Complete.—Both at common law and under our statute the offense is complete, although no casualty results. State v. Fritz, 133 N. C. 725, 727, 45 S. E. 957.

Challenge to Fight with Fists and Hands.—Challenge to fight a fair fight with fist and hands, without the use of any deadly weapons, is not dueling within the statute. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

Challenge to Fight Out of State.—Challenge to fight duel out of state is indictable under this section. State v. Farrier, 8 N. C. 487.

Indictments.—An indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. State v. Farrier, 8 N. C. 487.

Punishment.—Where a person is convicted in the Superior Court for violation of the provisions of this section of which a justice of the peace has jurisdictions, the punishment cannot exceed that which a justice of the peace could impose. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

Art. 8. Rape and Kindred Offenses

§ 4204. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing

any female child under the age of twelve years, shall suffer death. (Rev., s. 3637; Code, s. 1101; R. C., c. 34, s. 5; 18 Eliz., c. 7; 1868-9, c. 167, s. 2; 1917, c. 29.)

Cross Reference.—For full treatment of this subject see 10 Enc. Dig. 808 et seq.; 15 Enc. Dig. 314 et seq.

Editor's Note.—At common law rape was a felony, but the offense was afterwards changed to a misdemeanor before the statute of Westminster 1. By that statute the punishment, which then was castration and loss of eyes, was mitigated. State v. Dick, 6 N. C. 388. But by the statute of Westminster 2, the offense was again changed to a felony, and hence its present existence as a felony is in virtue of that statute. State v. Dick, 6 N. C. 388; State v. Jesse, 20 N. C. 95, 102.

Rape, under these and later statutes, was the "carnal knowledge of a female forcibly and against her will." State v. Johnston, 76 N. C. 209, 210. This definition left out the elements of age altogether. But as the instances of children below the age of discretion being enticed to yield without knowledge of the act and its consequences multiplied, it became necessary to fix an age under which it should be presumed, not that the act could not be consummated, but that consent could not be given. And so it came to be provided that the consummation of the act upon a female under ten years of age, with or without her consent, should be the same as if consummated upon a female over ten years of age without her consent or against her will. And the object of 18 Eliz., conclusively presuming lack of consent of a female under ten years of age, was not to create a new offense distinct from rape, but it was to make such carnal knowledge and abuse rape. The reason why the act does not call it rape in so many words is because of the seeming incongruity of calling an act rape when it is by consent, whereas the established meaning of rape is "against her will." State v. Johnston, 76 N. C. 209, 210. So that now the definition of rape of a female over ten years of age is as it always has been, "carnal knowledge against her will." But since 18 Eliz. and under our statute rape of a female under ten years of age is simply carnal knowledge; or in other words, carnal knowledge of a female under ten years of age is rape. State v. Johnston, 76 N. C. 209, 211.

By Public Laws 1917, chap. 29, the age of consent, below which it is conclusively presumed that a female child could not consent to sexual intercourse, was raised from ten to twelve years.

For a comprehensive treatment of the subject, including many points such as the indictment, the evidence, etc., which could not be considered constructious of this section, the searcher is referred to the digest citations above given.

"The 'abusing' construed with the 'carnally knowing' means the imposing upon, deflowering, degrading, ill-treating, debauching and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist. If the act be committed forcibly and against her will, it would be rape without reference to the statute." State v. Monds, 130 N. C. 697, 700, 41 S. E. 789.

" 'Injury' of her genital organs might have occurred from the effort to penetrate, or in some other way; but the statute does not declare it to be an element of the crime to injure or abuse the organs." State v. Monds, 130 N. C. 697, 700, 41 S. E. 789.

Same—Not Endeavoring to Penetrate.—"To have injured the organs in some way other than by endeavoring to penetrate with his person, if done with her consent, though it would be abusing her, would not be a crime, because there was no act of carnal knowledge." State v. Monds, 130 N. C. 697, 700, 41 S. E. 789.

Same—Against Her Will.—"But if the injury occurred against her will and intentionally, then it, the injury, would be embraced in the assault charged, for which he could be convicted." State v. Monds, 130 N. C. 697, 700, 41 S. E. 789.

Presumption of Force.—Under this section, force is conclusively presumed in the case of carnal knowledge of a female under the age of ten (now twelve). State v. Dancy, 83 N. C. 608, 609.

Age of Consent.—It is a settled construction of the latter clause of this section that to carnally know and abuse any child under ten (now twelve) years of age, whether she consents to such carnal knowledge or not, is rape. State v. Goldston, 103 N. C. 323, 324, 9 S. E. 580; State v. Storkey, 63 N. C. 7, 8.

But it in no way affects the guilt of one who carnally knows a female above that age against her will. State v. Storkey, 63 N. C. 7, 8.

Penetration without Emission of Seed Sufficient.—In rape the least penetration of the person is sufficient, and the emission of seed is unnecessary. State v. Monds, 130 N. C. 697, 41 S. E. 789.

Before the passage of the Act of 1860-'61, Chp. 30 (now section 4206), it was decided in State v. Gray, 53 N. C. 170, that in an indictment under this section, for carnally knowing and abusing an infant female under the age of ten (now twelve) years, there must be proof of the emission of seed, as well as of penetration, in order to convict the offender. Immediately after that decision, and probably in consequence of it, the act of 1860-'61, Chp. 30 was passed, providing that it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon the proof of penetration only. State v. Hodges, 61 N. C. 231, 232.

Offense Complete on Proof of Penetration.—"It shall not be necessary upon the trial of any indictment for the offense of rape, carnally knowing and abusing any female child under 10 (now 12) years of age, ... to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only." State v. Monds, 130 N. C. 697, 699, 41 S. E. 789.

Upon Whom Rape May Be Committed.—For a conviction of rape under this section it is not always essential that this offense be committed upon a virtuous woman or actual physical force be used. The circumstances of this case may do away with the necessity of all the elements of the crime and yet constitute rape, as in the following cases.—Ed. Note.

Same—Common Strumpet.—One may be guilty of rape on a common strumpet or a woman shown to have been his mistress previously. State v. Long, 93 N. C. 542, 544.

Capacity of Infant to Commit Rape.—An infant under the age of 14 can not commit the crime of rape or assault with intent to commit rape. State v. Pugh, 52 N. C. 61, 63; State v. Gray, 53 N. C. 170, 173; State v. Sam, 60 N. C. 293, 295.

Who May Be Guilty of Rape.—The word, "person", in this section, includes slaves, free negroes and free persons of color, as well as white men. State v. Peter, 53 N. C. 19.

Same—Two or More Persons.—Two or more persons may be guilty of the single crime of rape by being present, aiding and abetting in its commission. State v. Jordan, 110 N. C. 491, 14 S. E. 752.

Same—Aiding and Abetting.—One holding the husband of prosecutrix while another is perpetrating the crime of rape is guilty as principal in the offense. State v. Jordan, 110 N. C. 491, 14 S. E. 752.

Same—Female Aiding Man to Commit Crime.—A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. State v. Hairston, 121 N. C. 579, 28 S. E. 492.

Necessary Allegations—Intent.—By this section, rape is the ravishing and carnally knowing any female of the age of twelve or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indictment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not. State v. Allen, 186 N. C. 302, 119 S. E. 504.

§ 4205. Punishment for assault with intent to commit rape.—Every person convicted of an assault with intent to commit rape upon the body of any female shall be imprisoned in the state's prison not less than one nor more than fifteen years. (Rev, s. 3638; Code, s. 1102; 1868-9, c. 167, s. 3; R. C., c. 107, s. 44; 1823, c. 1229; 1917, c. 162, s. 1.)

Cross References.—For a general treatment of offenses under this section and the offender's responsibility therefor, see 10 Enc. Dig. 814 et seq.; 15 Enc. Dig. 341; as to indictments and informations under this section, see 10 Enc. Dig. 817 et seq.; as to sufficiency of evidence, see 10 Enc. Dig. 824 et seq.; 15 Enc. Dig. 342; as to instructions bearing upon the elements of assault with intent to commit rape, see 10 Enc. Dig. 831.

Editor's Note.—The offense of "assault with intent to commit rape" is a separate and distinct crime in and by itself and is not an "attempt to commit rape," as it is, sometimes, falsely designated. The attempt to commit rape is embraced by the offense of "an assault with intent to commit rape," and one could not be indicted for an attempt to commit rape, where the attempted crime is in its very

nature an attempt. There is thereupon no such criminal offense as "an attempt to commit rape." See State v. Hewett, 158 N. C. 627, 629, 74 S. E. 356.

In General.—This section should be construed as if it read as follows: if any person shall attempt to commit rape specified in the preceding section, that is to say, to carnally know a female over ten (now twelve) years of age against her will, or to carnally know and abuse a female under ten (now twelve) years of age, with or against her will, he shall be punished, etc. State v. Johnston, 76 N. C. 209, 211.

Age of Female.—This section in the act of 1868 followed immediately after the second section (4204) of that act, and had direct reference to it, and was intended to include assaults upon females, whether of the age of ten years or more. It uses the words "any female," which embrace females of all ages. State v. Dancy, 83 N. C. 608, 610.

Who May Be Guilty of Offense.—At common law, rape was a felony, and all persons who were present, aiding and abetting a man to commit the offense, whether men or women, were principal offenders and might be indicted as such. In this regard the law is not different to-day, so that a woman as well as a man can be found guilty as a principal in the offense. See State v. Jones, 83 N. C. 605, 606.

Same—Husband upon Wife.—A husband who, by threats to kill in event of refusal, compels his wife to submit to, and a man to attempt, sexual connection, is guilty of an assault with intent to commit a rape upon his wife. State v. Dowell, 106 N. C. 722, 11 S. E. 525.

Same—Females.—A female who aids and abets a male assailant in an attempt to commit a rape becomes thereby a principal in the offense. State v. Jones, 83 N. C. 605.

Same—Infant under 14.—An infant under the age of 14 years connot be guilty of an assault with intent to commit rape. State v. Sam, 60 N. C. 293.

Withdrawal of Consent before Perpetration of Offense.—If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed. State v. Long, 93 N. C. 542.

Effect of Subsequent Consent.—It seems that this offense is complete, if the defendant attempts to force the prosecutrix against her will, although she afterwards consents. State v. Long, 93 N. C. 542.

Punishment.—Unlawfully to carnally know and abuse a female under the age of ten years (now twelve) constitutes a crime of rape: Therefore, one convicted of an assault with intent to commit such offense is liable to the punishment prescribed in this section. State v. Dancy, 83 N. C. 608.

§ 4206. Emission not necessary to constitute rape and buggery.—It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. (Rev., s. 3639; Code, s. 1105; 1860-1, c. 30; 1917, c. 29.)

Editor's Note.—The Editor has deemed it expedient to treat the substance of the provisions of this section in connection with those of section 4204. For a treatment of the origin and effect of this section, reference is therefore made to section 4204.

§ 4207. Obtaining carnal knowledge of married woman by personating husband.—If any person shall have carnal knowledge of any married woman by fraud in personating her husband, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison at hard labor for not less than ten nor more than twenty years. (Rev., s. 3624; Code, s. 1103; 1881, c. 89, s. 1.)

Misrepresentation by Words or Conduct Sufficient.—A person who, either by his acts or by his conduct, induces a woman to believe he is her husband and has intercourse with her, is guilty of a felony under this section. State v. Williams, 128 N. C. 573, 37 S. E. 952.

Offense Does Not Constitute Rape.—An intercourse, obtained with such fraud, is not rape, for lack of force, except in those cases where the prisoner has been instrumental in disabling the prosecutrix to make resistence. State v. Brooks, 76 N. C. 1, 3.

§ 4208. Attempted carnal knowledge of married woman by personating husband.—Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the state's prison at hard labor for not less than five nor more than fifteen years. (Rev., s. 365; Code, s. 1104; 1881, c. 89, s. 2.)

Violation of this section is not tantamount to assault with intent to commit rape. State v. Brooks, 76 N. C. 1.

§ 4209. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.—If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court; and any female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: Provided, that the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution. (Rev., s. 3348; 1895, c. 295; 1917, c. 29; 1923, c. 140, s. 1.)

Editor's Note.—Prior to 1917 the protection of this section extended only to a female child over ten and under fourteen years of age. The same act (1917) that raised the age of consent for the criminal offense of rape to twelve, limited this section by making it applicable to females over twelve and under fourteen years of age only. The radical change in the provisions of the section as it now stands was, however, effected by the Acts of 1923, ch. 140. As a result of this plausible amendment, the crime under this section is committed if the female child is over twelve and under sixteen, thus raising the age of consent for this particular offense to sixteen years.

The section was further amended by making it a misdemeanor for any female to carnally know any male child under the age of sixteen, a new criminal offense, hitherto unguarded against, and one that seems only fair and reasonable in an age that recognizes the equal rights of men and women.

Lastly, the new section makes the marriage of the offenders a bar to further prosecution. See 1 N. C. Law Rev. 286.

Effect of Amendment of 1923.—When the defendant would not be guilty of the offense prohibited by this section, but has since continued to carnally know a female child thereafter, the plea that his continued acts after the passage of the amendment of 1923 would not make him guilty thereunder cannot be sustained. State v. Porter, 188 N. C. 804, 125 S. E. 615.

On defendant's appeal from judgment against him in violation of the provisions of this section, amended in 1923, he must show error upon the face of the record, or his exception to the judgment cannot be sustained. State v. Porter, 188 N. C. 804, 125 S. E. 615.

Essentials of Crime.—The essentials of the crime in this case are (1) carnally know or abuse a female child; (2) over twelve and under sixteen years of age; (3) the female child never before having had sexual intercourse with any person. State v. Swindell, 189 N. C. 151, 126 S. E. 417.

Injuring Genital Organs Not Sufficient.—In an indictment under this section, for carnally knowing a girl between the ages of 10 and 14 (now 12 and 16), it is error to charge that the crime would be complete "if the jury should find that the defendant injured and abused her genital organs." State v. Monds, 130 N. C. 697, 41 S. E. 789.

Aiding and Abetting.—One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under sixteen years of age, in violation of this section; and with knowledge of this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abetter in the commission of the offense, and punishable as a principal therein. State v. Hart, 186 N. C. 582, 120 S. E. 345.

Evidence of Recent Complaint.—Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen years of age, her testimony in answer to the ques-

tions of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. State v. Winder, 183 N. C. 776, 111 S. E. 530.

Family Bible Entries Evidence of Child's Age.—Authenticated entries in family Bible constitute competent evidence to prove age of child. State v. Hairston, 121 N. C. 579, 28 S. E. 492.

Evidence of Relations with Other Men Is Admissible.—In a prosecution under this section, it is not error to exclude evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant. State v. Houpe, 207 N. C. 377, 177 S. E. 20.

Plea of Guilty May Not Be Withdrawn.—Upon the trial under this section of carnally knowing a female child over twelve and under sixteen years of age, the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion. State v. Porter, 188 N. C. 804, 125 S. E. 615.

Punishment.—The felony defined in this section is not one "for which no specific punishment is prescribed" within section 4172, and the discretion of the court in fixing the punishment is limited only by Const. Art. I, § 14. A sentence of 30 years and hard labor is not a "cruel and unusual punishment" for an offense under this section. State v. Swindell, 189 N. C. 151, 126 S. E. 417.

§ 4209(a). Jurisdiction of court. Offenders classed as delinquents.—All persons charged with a violation of the preceding section under the age of sixteen years shall be subject to the jurisdiction of the juvenile court and such other courts as may hereafter exercise such jurisdiction, and shall be classed as delinquents and not as felons: Provided, that where the offenders agree to marry, the consent of the parent shall not be necessary: Provided further, that any male person convicted of the violation of the preceding section who is under eighteen (18) years of age, shall be guilty of a misdemeanor only. (1923, c. 140, s. 2.)

Editor's Note.—This section is summarized and a brief history of the law given in 1 N. C. Law Rev. 286.

Art. 9. Assaults

§ 4210. Malicious castration.—If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the state's prison for not less than five nor more than sixty years. (Rev., s. 3627; Code, s. 999; R. C., c. 34, s. 4; 1831, c. 40, s. 1; 1868-9, c. 167, s. 6.)

See cases cited under sections 4211 and 4212 and notes thereto.

Appeal from Sentence for Punishment.—Upon conviction of the criminal offense inhibited by this section sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of our Constitution, Art. I, sec. 14, or discretionary against the principal actor in committing the crime, when the others participating therein to a less extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. State v. Griffin, 190 N. C. 133, 129 S. E. 410.

§ 4211. Castration or other maiming without malice aforethought.—If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off the nose, or lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned in the county jail or state's prison not less than six months nor more than ten years, and fined, in the discretion of the court. (Rev., s. 3626; Code, s. 1000; R. C., c. 34, s. 47; 1754, c. 56; 1791, c. 339, ss. 2, 3; 1831, c. 40, s. 2.)

Cross References.—For a general treatment of this section see 9 Enc. Dig. 177 et seq. See also cases cited under section 4212 and notes thereto.

As to punishment under this section and the section following, see cases cited thereunder.

Proof of Malice Aforethought Not Necessary.—Proof, of malice aforethought, or of a preconceived intention to commit the maim, is not necessary. State v. Girgin, 23 N. C. 121.

§ 4212. Malicious maiming.—If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall for the first offense, be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offense shall be imprisoned in the state's prison not less than five nor more than sixty years. (Rev., s. 3636; Code, s. 1080; R. C., c. 34, s. 14; 1754, c. 56; 1791, c. 339, s. 1; 1831, c. 12; 22 and 23 Car. II, c. 1 (Coventry Act).

Cross References.—For a general treatment of this section, see 9 Enc. Dig. 177 et seq.

When Corpus Delicti Complete.—Under this section the corpus delicti is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense. State v. Crawford, 13 N. C. 425.

"Malice Aforethought" Construed.—For the words "malice aforethought" do not mean an actual, express or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids. State v. Crawford, 13 N. C. 425.

Malicious Intent Express or Implied.—The malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Irwin, 2 N. C. 112.

Proof of Grudges or Threatenings Not Necessary.—And proof of antecedent grudges, threatenings or an express design is not necessary. State v. Irwin, 2 N. C. 112.

Presumptions.—An intent to disfigure is prima facie, unless inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. State v. Girgin, 23 N. C. 121.

What Constitutes Maiming.—To constitute a maim, under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off—it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. State v. Girgin, 23 N. C. 121.

Conviction for Loss of Eye.—Construing this section in connection with the history of legislation on the subject, it is held that thereunder the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by section 4211, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the provisions of section 4211. State v. Wilson, 188 N. C. 781, 125 S. E. 612.

Defenses First Blow or Sudden Affray.—The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. State v. Crawford, 13 N. C. 425, 426.

Same—Accident or Self-Defense.—When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. State v. Evans, 2 N. C. 281, 282; State v. Skidmore, 87 N. C. 509.

Indictment—Necessary Allegations.—An indictment, for

biting off ear, must state the offense to be done on purpose, as well as unlawfully. State v. Ormond, 18 N. C. 119.

Same—Unnecessary Allegations.—But it need not be alleged whether it was the right or left ear. State v. Green, 129 N. C. 39.

§ 4213. Maliciously assaulting in a secret manner.—If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony and shall be punished by imprisonment in jail or in the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court. (Rev., s. 3621; 1887, c. 32; 1919, c. 25.)

Scope.—This section embraces assaults made upon one who has no notice of the purpose or presence of the assailant, whether the latter conceals his identity or otherwise. State v. Jennings, 104 N. C. 774, 10 S. E. 249.

Same—Effect of Words, "or Otherwise."—The Legislature, after denouncing as criminal secret assaults with intent to kill, and after giving one explicit illustration, added the words "or otherwise," in order to prevent the application of the maxim expressio unius exclusio ulterius, thus including every other manner of making secret attempts, regardless of the attendant circumstances. State v. Shade, 115 N. C. 757, 758, 20 S. E. 537.

Same—Assault with Intent to Commit Murder.—"Attempts to commit any of the four capital offences were formerly felonies, but during the prosecution for 'Ku Klux' troubles the offence of assault with intent to commit murder was reduced to a simple misdemeanor. The Act of 1887, Ch. 32, restored the grade of the offence to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. State v. Telfair, 109 N. C. 878, 13 S. E. 726;" State v. Harris, 120 N. C. 577, 579, 26 S. E. 774.

What Constitutes Secret Assault.—While it is not required for the conviction of a secret assault, under the provisions of this section that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant, be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error. State v. Oxendine, 187 N. C. 658, 122 S. E. 568.

Same—Person Assaulted Unconscious of Assailant.—An assault cannot be said to have been made in a secret manner except when the person assaulted was unconscious of the presence as well as of the purpose of his adversary. State v. Gunter, 116 N. C. 1068, 21 S. E. 674.

Same—Assault from Behind.—An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault. State v. Harris, 120 N. C. 577, 26 S. E. 774.

Same—Assault by Means of Poison.—An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. State v. Alderman, 182 N. C. 917, 110 S. E. 59.

Same—Assault Facing Victim.—Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of this section. State v. Patton, 115 N. C. 753, 20 S. E. 538.

Same—Sufficiency.—For sufficiency of evidence to prove a secret assault, see State v. Bridges, 178 N. C. 733, 101 S. E. 29.

Indictment—Necessary Allegations.—Indictment omitting the words "by waylaying or otherwise," is sufficient. State v. Shade, 115 N. C. 757, 20 S. E. 537.

Elements of Offense, Burden of Proof.—On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by this section, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence is conflicting, it is an expression of opinion inhibited by sec. 564, for the judge to charge the jury that if they believe the evidence, a cold-blooded and cruel assault had been committed. State v. Kline, 190 N. C. 177, 129 S. E. 417.

Evidence Permissible to Show Malice, etc.—As bearing on the question of malice and felonious intent, the state was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. State v. Miller, 189 N. C. 695, 128 S. E. 1.

Prosecution within Two Years.—Misdemeanors committed in a secret manner, may be prosecuted within two years after the discovery of the offense. State v. Frisbee, 142 N. C. 671, 55 S. E. 722

Instruction.—For charge not sufficiently explaining the offense, see State v. Vanderburg, 200 N. C. 713, 158 S. E. 248.

Verdict for Simple Assault.—Upon the trial of an indictment charging a secret felonious assault, verdict may be rendered for simple assault. State v. Jennings, 104 N. C. 774, 10 S. E. 249.

Cited in State v. Strickland, 192 N. C. 253, 134 S. E. 850.

§ 4214. Assault with deadly weapons with intent to kill resulting in injury.—Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked on the county roads for a period not less than four months nor more than ten years. (1919, c. 101.)

Elements of Offense.—In order for a conviction of crime under the provisions of this section there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. State v. Hefner, 199 N. C. 778, 155 S. E. 879.

Evidence of Infliction of Serious Injury.—Evidence that several defendants indicted under the provisions of this section were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, is sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of the statute. State v. Hefner, 199 N. C. 778, 155 S. E. 879.

Evidence of Use of Deadly Weapon.—Where the evidence against the defendants, tried under an indictment for violating this section tends to show an assault with a blackjack and other like instruments whereby they beat the one assaulted into unconsciousness and carried him into a field where alone he eventually recovered consciousness, is sufficient as to the use of a deadly weapon in making the assault. State v. Hefner, 199 N. C. 778, 155 S. E. 879.

Evidence of communicated threats was received with apparent approval in State v. Scott, 4 Ired. 409, and with explicit approval in State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455. It was denied in State v. Byrd, 121 N. C. 684, 28 S. E. 353, in an obscure opinion and in State v. Skidmore, 87 N. C. 509, in an opinion which overlooked the two cases first cited. 11 N. C. Law Rev., 230.

Instruction as to Serious Injury.—Where the evidence is sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," is held not to be reversible error to the defendant's prejudice where all the evidence tends to show that serious injury was inflicted in violation of the statute. State v. Hefner, 199 N. C. 778, 155 S. E. 879.

Burden of Proof.—This section under which the appealing defendant was indicted and convicted provides that any person who assaults another (1) with a deadly weapon, (2) with intent to kill, and (3) inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punishable by imprisonment in the state's prison or be worked on the county roads for a period of not less than four months nor more than ten years. These three essential elements must be proved in order to warrant a conviction under the statute (State v. Crisp, 188 N. C. 799, 800, 125 S. E. 543); and the burden is on the state to establish them all beyond a reasonable doubt, where the defendant enters a plea of "not guilty" to the

charge contained in the bill of indictment. State v. Redditt, 189 N. C. 176, 126 S. E. 506, 507.

State Must Prove Murderous Intent.—Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of murderous intent being for the State to prove. State v. Gibson, 196 N. C. 393, 145 S. E. 772.

Guilt of Lesser Degree of Offense.—Where the defendants are tried for violating this section in making an assault with a deadly weapon with intent to kill, etc., the action will not be dismissed when the undisputed evidence tends to show the assault was made with a deadly weapon. State v. Hefner, 199 N. C. 778, 155 S. E. 879.

Conviction of Simple Assault.—An instruction directing verdict of guilty of at least simple assault is not erroneous when the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries. State v. Strickland, 192 N. C. 253, 134 S. E. 850.

Stated in State v. Goff, 205 N. C. 545, 551, 172 S. E. 407.

Cited in State v. Colson, 194 N. C. 206, 139 S. E. 230.

§ 4215. Punishment for assault. — In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person: Provided, that in all cases of assault, assault and battery, and affrays, wherein deadly weapons are used and serious injury is inflicted, and the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of death or serious bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (Rev., s. 3620; Code, s. 987; 1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; 1911, c. 193; 1933, c. 189.)

Cross Reference.—For a general discussion of criminal responsibility for assault and battery, see 2 Enc. Dig. 10 et seq.; 13 Enc. Dig. 180 et seq.

As to excessive punishment, see State v. Driver, 78 N. C. 423; as to punishment under acts of 1870-1, ch. 43, see State v. Miller, 75 N. C. 73, 77; State v. McNeill, 75 N. C. 15.

Editor's Note.—Public Laws of 1933, c. 189, added the proviso, at the end of this section, relative to the admission of any evidence of threats of assailant.

Constitutionality.—This section is not unconstitutional on the grounds that severe sentences for criminal offenses can only be upheld under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intention to kill, the person convicted shall be punished by fine or imprisonment in the discretion of the court, and not so limiting the court's discretion as to an assault upon a female, etc. State v. Stokes, 181 N. C. 539, 106 S. E. 763.

The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse by the trial judge acting within a legislative discretion given him; and, in this case, a sentence of three months on the road, upon conviction for an assault upon a female, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual. State v. Stokes, 181 N. C. 539, 106 S. E. 763.

Same—Question of Discrimination.—This section, is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitution. State v. Stokes, 181 N. C. 359, 106 S. E. 763.

Punishment—Extent.—While the language of this section authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of the punishment is referred to the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Smith, 174 N. C. 804, 807, 93 S. E. 910.

Same—Limitation. — In conviction for simple assaults, where there is no intent to commit rape, and no deadly weapon used, and no serious bodily harm done, the punishment is limited to a fine of $50, or imprisonment for thirty days. State v. Johnson, 94 N. C. 863; State v. Battle, 130 N. C. 655, 41 S. E. 66.

Evidence Sufficient under Section.—Evidence that the prisoner wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though insufficient for a conviction of the intent to ravish her. State v. Hill, 181 N. C. 558, 107 S. E. 140.

Evidence that a negro man twenty-three years of age several times accosted a white girl of fifteen years of age, on the streets of a town, with improper solicitation, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, is held to be such evidence of violence, begun to be executed with ability to effectuate it, as will come within the intent and meaning of this section making it a crime for a man or boy over eighteen years of age to assault any female person. State v. Williams, 186 N. C. 627, 120 S. E. 224.

Burden to Prove Age Below Eighteen. — The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the proviso, and it is not necessary to the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. State v. Smith, 157 N. C. 578, 72 S. E. 853.

Cited in State v. Stansberry, 197 N. C. 350, 148 S. E. 546; State v. Griggs, 197 N. C. 352, 148 S. E. 547.

§ 4216. Assaulting by pointing gun. — If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court. (Rev., s. 3622; 1889, c. 527.)

Accidental Discharge of Gun—Manslaughter.—One who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. State v. Cable, 177 N. C. 588, 99 S. E. 339.

When one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse its discharge, he is guilty at least of manslaughter. State v. Stitt, 146 N. C. 463, 61 S. E. 566.

Same—Question of Guilt for Jury.—Where one pointed a gun at another and death ensued by its discharge evidence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of manslaughter. State v. Limerick, 146 N. C. 649, 61 S. E. 568; State v. Turnage, 138 N. C. 566, 49 S. E. 913.

Gun Need Not Be Loaded.—In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty, was correct under the provisions of this section. State v. Atkins, 141 N. C. 734, 53 S. E. 228.

Pointing Pistol in Pocket. — An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error. State v. Atkinson, 141 N. C. 734, 53 S. E. 228.

Evidence of Guilt.—Defendant, pointing gun at the prosecutor, was, under the circumstances, guilty of an assault at

common law, if not under this section. State v. Scott, 142 N. C. 582, 55 S. E. 69.

Art. 10. Hazing

§ 4217. Hazing; definition and punishment. — It shall be unlawful for any student in any college or school in this state to engage in what is known as hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass him, or to subject him to personal indignity." Any violation of this section shall constitute a misdemeanor. (1913, c. 169, ss. 1, 2, 3, 4.)

§ 4218. Expulsion from school; duty of faculty to expel.—Upon conviction of any student of the offense of hazing, or aiding or abetting in the commission of this offense, he shall, in addition to any punishment imposed by the court, be expelled from the college or school he is attending. The faculty or governing board of any college or school charged with the duty of expulsion of students for proper cause shall, upon such conviction at once expel the offender, and a failure to do so shall be a misdemeanor. (1913, c. 169, ss. 5, 6.)

§ 4219. Certain persons and schools excepted; copy of article to be posted.—This article shall not apply to females, nor to schools or colleges not keeping boarders, nor to schools keeping less than ten student boarders. A copy of this article shall be framed and hung on display in every college or school to which it applies. (1913, c. 169, s. 3.)

§ 4220. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony. —In all trials for the offense of hazing any student or other person subpœnaed as a witness in behalf of the state shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony. (1913, c. 169, s. 8.)

Art. 11. Kidnapping and Abduction

§ 4221. Punishment for kidnapping. — If any person shall forcibly or fraudulently kidnap any person, he shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding twenty years in the state's prison. (Rev., s. 3634; 1901, c. 699, s. 1.)

Editor's Note.—Section 4221(a) repeals this section. State v. Kelly, 206 N. C. 660, 663, 175 S. E. 294.

Necessary Proofs.—Under an indictment for kidnapping, it is only necessary to prove the taking and carrying away of a person forcibly or fraudulently. State v. Harrison, 145 N. C. 408, 59 S. E. 867; as to sufficiency of evidence for conviction under this section for carrying away an imbecile girl, irrespective of the question of her consent, see State v. Marks, 178 N. C. 730, 101 S. E. 24.

§ 4221(a). Kidnapping. — It shall be unlawful for any person, firm or corporation, or any individual, male or female, or its or their agents, to kidnap or cause to be kidnapped any human being, or to demand a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or to hold any human being for ransom: Provided, however, that this section shall not apply to a father or mother for taking into their custody their own child.

Any person, or their agent, violating or causing to be violated any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life.

Any firm or corporation violating, or causing to be violated through their agent or agents, any of the provisions of this section, and upon being found guilty, shall be liable to the injured party suing therefor, the sum of twenty-five thousand dollars ($25,000), and shall forfeit its or their charter and right to do business in the state of North Carolina. (1933, c. 542.)

Section Increases Maximum Punishment. — The effect of this section, repealing § 4221, relating to the crime of kidnapping, is to increase, within the discretion of the court, the maximum punishment for the crime from twenty years to life, and not to make a life term mandatory upon conviction, the intent of the statute to this effect being shown by the use of the word "punishable" in prescribing the sentence. State v. Kelly, 206 N. C. 660, 175 S. E. 294.

§ 4222. Enticing minors out of the state for the purpose of employment.—If any person shall employ and carry beyond the limits of this state any minor, or shall induce any minor to go beyond the limits of this state, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred and not more than one thousand dollars for each offense. The fact of the employment and going out of the state of the minor, or of going out of the state by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the state is a minor. (Rev., s. 3630; 1891, c. 45.)

Count Joined with One under Section 4223.—An indictment for abduction, containing two counts, one under this section and the second under section 4223, cannot be quashed for misjoinder of two different offenses, as the two counts are merely statements of the same transaction to meet the different phases of proof. State v. Burnett, 142 N. C. 577, 578, 55 S. E. 72.

§ 4223. Abduction of children. — If any one shall abduct or by means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the state's prison for a period not exceeding fifteen years. (Rev., s. 3358; Code, s. 973; 1879, c. 81.)

For an extention treatment of this subject, see 1 Enc. Dig. 39 et seq.; 13 Enc. Dig. 4 et seq.

Definition.—Abduction under this section, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction. State v. Burnett, 142 N. C. 577, 578, 55 S. E. 72.

Father's Consent a Good Defense.—If the carrying away was with the father's consent, that fact is a defense the burden of which is upon the defendant. State v. Burnett, 142 N. C. 577, 578, 55 S. E. 72.

The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of her father, State v. Burnett, 142 N. C. 578, 55 S. E. 72, nor that the defendant

was not a nearer relation to the child than the person from whose custody it was abducted. State v. George, 93 N. C. 567.

§ 4224. Conspiring to abduct children.—If any one shall conspire to abduct, or by any means to induce any child under the age of fourteen years, who shall reside with any of the persons designated in the preceding section, or shall reside at school, to leave such persons or the school, he shall be guilty of a felony, and on conviction shall be punished as prescribed in the preceding section: Provided, that no one who may be a nearer blood relation to the child than the persons named in the preceding section shall be indicted for either of said offenses. (Rev., s. 3359; Code, s. 947; 1879, c. 81, s. 2.)

For application of this section see notes to and cases cited under section 4223.

§ 4225. Abduction of married women.—If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman. (Rev., s. 3360; 1903, c. 362.)

Elopement Defined.—Elopement of wife is her voluntary act in deserting her husband to go away with and cohabit with another man. State v. O'Higgins, 178 N. C. 708, 100 S. E. 438.

Effect of Prior Adultery.—In order to constitute the offense of abducting or eloping with a married woman, under this section, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it was shown that the wife had not thus yielded herself to any other man than the defendant. State v. Hooper, 186 N. C. 405, 119 S. E. 769.

Adultery after the elopement is an essential element of the offense under this section. State v. Ashe, 196 N. C. 387, 145 S. E. 784.

Voluntary Leaving of Husband.—The fact that the wife had voluntarily left her husband falls within the definition of this section when this results from the unlawful scheming of the man to achieve that end. State v. Hopper, 186 N. C. 405, 119 S. E. 769.

Evidence.—Evidence tending to show that the defendant knew of the whereabouts of the wife of another after she had left her husband, and that they had dined together at a house of ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury. State v. Ashe, 196 N. C. 387, 145 S. E. 784.

In a prosecution under this section the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. State v. Ashe, 196 N. C. 387, 145 S. E. 784.

Testimony of Wife Supported by Others.—The provision of this section that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. State v. Hopper, 186 N. C. 405, 119 S E. 769.

Evidence of Influence of Defendant.—Upon the question of influence of the defendant over the wife of another with whom he is being tried for abducting and eloping, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that she had used her own money for expenses, is not subject to just exception. State v. Hopper, 186 N. C. 405, 119 S. E. 769.

Testimony of Husband as to Chastity. — On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home, such testimony may be sufficient to sustain a conviction. State v. Hopper, 186 N. C. 405, 119 S. E. 769; State v. O'Higgins, 178 N. C. 708, 199 S. E. 438.

Woman's General Character for Virtue Admissible.—In an indictment under this section, where the character of the woman is by express terms of the statute directly in question, evidence as to her general character for virtue is admissible. State v. Connor, 142 N. C. 70, 55 S. E. 787.

Burden of Proof of First Proviso.—The state has the burden of proving the facts required under the first proviso of the section. State v. Connor, 142 N. C. 700, 55 S. E. 787.

Instruction—"Bad" House.—Where the evidence is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house or "house of ill fame," where this was not brought to his attention at the time. State v. Ashe, 196 N. C. 387, 145 S. E. 784.

Art. 12. Abortion and Kindred Offenses

§ 4226. Using drugs or instruments to destroy unborn child.—If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (Rev., s. 3618; Code, s. 975; 1881, c. 351, s. 1.)

Cross References.—For a general discussion of this subject, see 1 Enc. Dig. 43 et seq.; 13 Enc. Dig. 6; as to sentence and punishment, see 1 Enc. Dig. 45.

As to criminal abortion, see State v. Summers, 173 N. C. 775, 92 S. E. 328.

Elements of Offense—Intent.—The essential ingredient of the offense is the intent and not the noxious nature of the drug used. State v. Crews, 128 N. C. 581, 582, 38 S. E. 293; State v. Shaft, 166 N. C. 407, 81 S. E. 932.

Same—Prescribing or Advising.—For a conviction under this section it is not essential to show that defendant procured the drug or that the woman used it. If defendant prescribed or advised its use with the illegal intent, that alone is sufficient. State v. Powell, 181 N. C. 515, 106 S. E. 133.

Same—Procuring Drug.—Under this section it is not necessary to charge or prove that the accused **procured** the drug. State v. Crews, 128 N. C. 581, 38 S. E. 293.

Same—Nature of Drug.—It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. State v. Crews, 128 N. C. 581, 582, 38 S. E. 293. For the offense is committed by administering any substance with intent to procure an abortion. State v. Shaft, 166 N. C. 407, 81 S. E. 932.

Same—Stage of Pregnancy.—The offense can be perpetrated upon a woman at any stage of her pregnancy. State v. Seagle, 83 N. C. 630, 632.

Woman Not an Accomplice.—The woman is not, in a legal sense, an accomplice, whether or not she consents to the abortion. State v. Shaft, 166 N. C. 407, 81 S. E. 932, 933.

Statement of Woman as to Payment of Doctor's Fee.—The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and section 4227, that the defendant had paid the physician one-half of the $200 fee he had charged for such services, and uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances, was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence; whether they were understood by him, or he denied them or remained silent. State v. Martin, 182 N. C. 846, 109 S. E. 74.

Admissibility of Statement Made Four Months Prior to Abortion.—Upon the trial of a physician for procuring an abortion testimony of a conversation between the physician and the woman as to an abortion about four months prior

to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. State v. Brown, 202 N. C. 221, 162 S. E. 216.

Sufficiency of Evidence.—Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine, or substance with intent to destroy the child is sufficient for a conviction under this section. State v. Powell, 181 N. C. 515, 106 S. E. 133.

Testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. State v. Martin, 182 N. C. 846, 109 S. E. 74.

Joinder of Offenses.—Where the defendant is tried under this section and section 4227, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. State v. Martin, 182 N. C. 846, 109 S. E. 74.

Cited in State v. Geurukus, 195 N. C. 642, 643, 143 S. E. 208.

§ 4227. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or state's prison for not less than one year nor more than five years and shall be fined at the discretion of the court. (Rev., s. 3619, Code, s. 976; 1881, c. 351, s. 2.)

For a general treatment of this subject, see 1 Enc. Dig. 43 et seq.; 13 Enc. Dig. 6. See also notes to and cases cited under section 4226.

§ 4228. Concealing birth of child.—If any person shall by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or state's prison, at the discretion of the court: Provided, that the imprisonment in the state's prison shall in no case exceed a term of years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. Any person aiding, counseling, or abetting any woman in concealing the birth of her child shall be guilty of a misdemeanor. (Rev., s. 3623; Code, s. 1004; R. C., c. 34, s. 28; 1818, c. 985; 1883, c. 390; 21, Jac. I, c. 27. See 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14.)

Editor's Note.—The editor deems it advisable to note here some of the older cases construing this section as it stood after the amendment of act 1818, chap. 985, in view of the fact that these constructions may well be applied to the section as it now stands.

Under the section as it then stood, the offense was the concealing of the death of a being on whom murder could have been committed if therefore the child was stillborn, concealment would be no offense. The burden of showing that fact would, however, be on the defendant. State v. Joiner, 11 N. C. 350.

And a former conviction for concealing the birth of a child is no defense to an indictment for the murder of such child. State v. Morgan, 95 N. C. 641. See also 2 Enc. Dig. 328 et seq.

Evidence Insufficient for Directed Verdict. — Under the provisions of this section making it a felony for any person to conceal the birth of a new-born child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. State v. Arrowood, 187 N. C. 715, 122 S. E. 759.

Art. 13. Libel and Slander

§ 4229. Communicating libelous matter to newspapers.—If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor. (Rev., s. 3635; 1901, c. 557, ss. 2, 3.)

Cross References.—For an extensive treatment of this subject, see 8 Enc. Dig. 651 et seq.; 14 Enc. Dig. 647 et seq. As to truth of allegations in indictment for libel as a defense, see section 4638. As to punishment for libel by newspaper, see section 2430.

Responsibility of Newspaper Men. — "This statute punishes criminally the person who communicates libelous matter to newspapers, but that does not excuse the newspaper for publishing such libels, and the newspaper is responsible in damages for the injury done by the publication. Newspaper men (however) are not so apt to be prosecuted criminally for libel unless the publication attempts to destroy the reputation of an innocent woman by words which amount to charge of inconsistency (under section 4230), or unless there is a willful derogatory statement about the financial condition of a bank (under section 4231)." 4 N. C. Law Rev. 27.

§ 4230. Slandering innocent women.—If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor. (Rev., s. 3640; Code, s. 113; 1879, c. 156.)

Cross References.—For a general discussion of this subject, see 8 Enc. Dig. 651 et seq.; 14 Enc. Dig. 647 et seq.; as to civil liability for charging innocent women with incontinency, see section 2432 and notes thereto.

Object of Statute.—The object of the legislature in enacting this section was to protect the character of innocent women, that is, chaste and virtuous women, against wanton and malicious attempts to destroy their reputation by charges of incontinency. State v. Aldridge, 86 N. C. 680, 681.

Essential Elements of Offense.—The innocence and virtue, then, of the woman who is subject of the attempt, lie at the very foundation of the offense, and constitute its most essential element. State v. McDaniel, 84 N. C. 803, 805; State v. Aldridge, 86 N. C. 680, 681; State v. Smith, 155 N. C. 473, 71 S. E. 305.

What Constitutes Offense.—The offense of slandering an innocent woman consists in the attempt to destroy the reputation of an innocent woman by a charge of incontinency. State v. Davis, 92 N. C. 764. Not in the slander of a woman falsely by charging her with incontinency, but in the attempt to destroy her reputation by such means. State v. McDaniel, 84 N. C. 803, 804.

Same—Sufficiency.—And to constitute this offense, it is necessary to prove that the words alleged to have been spoken amounted to a charge of actual, definitive, illicit sexual intercourse. State v. Moody, 98 N. C. 671, 4 S. E. 119.

"Innocent Woman."—An "innocent woman," within the meaning of this section, is one who has never had sexual intercourse with any man. State v. Malloy, 115 N. C. 737, 20 S. E. 461; One who had never had actual illicit intercourse with any man. State v. Davis, 92 N. C. 764; State v. Brown, 100 N. C. 519, 6 S. E. 568; a pure woman—one whose character is "unsullied." State v. McDaniel, 84 N. C. 803, 805; a woman who, at the time the alleged slanderous charge was made, and at the time of the trial therefor, was chaste and virtuous. State v. Grigg, 104 N. C. 882, 10 S. E. 684.

Improper Conduct Short of Incontinency.—Mere lascivious-

ness, and the permission of liberties by men with her, although we might consider them improper, were not contemplated by the statute. State v. Davis, 92 N. C. 764, 765.

And a woman who has never had actual sexual intercourse with any one is an innocent woman, within the meaning of this section, even though she and a man were surprised in each other's embrace, about to commit the act of copulation, but before it took place. State v. Hinson, 103 N. C. 374, 9 S. E. 552.

Status of Reformed Women. — The question whether to slander a woman who had once lapsed from virtue, but who had reformed and led an exemplary life, would be a crime under this statute, was discussed but undecided in State v. Davis, 92 N. C. 764, the court expressing the opinion that in view of the strict construction put on the statute it would seem to exclude from the protection of its provisions every woman who had, at some time of her life, made a slip in her virtue, even though she had afterwards reformed.

Fortunately, however, the question was finally decided in favor of the reformed woman and the present law is that the fact that a woman at some former period in her life had departed from the path of virtue, will not per se entitle a defendant, indicted under the statute, to an acquittal; on the contrary, if the prosecutrix has satisfied the jury that she has reformed and led an exemplary life, she is entitled to the protection of the law. State v. Grigg, 104 N. C. 882, 10 S. E. 684.

Status of Seduced Women.—"A man cannot seduce a virtuous woman and then slander her with impunity, and, when indicted for such slander, claim protection against the penalties of law by pleading her disgrace, which he had caused to be brought upon her. The statute would fail to give that protection to innocent women, that was intended, if this was allowed." State v. Misenheimer, 123 N. C. 758, 763, 31 S. E. 852.

And a woman, seduced before marriage, but whose character was good before and since marriage, with this exception, is an "innocent woman" under this section. State v. Grigg, 104 N. C. 882, 10 S. E. 684; State v. Misenheimer, 123 N. C. 758, 31 S. E. 852.

Slander by Husband.—State v. Edens, 85 N. C. 522, holding that a husband is not indictable for slandering his wife, is overruled, and now, he is indictable under this section, if he wantonly and maliciously slanders his wife. State v. Fulton, 149 N. C. 485, 63 S. E. 145.

Malice Implied.—Where a slanderous charge is made, malice is implied, except in case of a privileged communication. State v. Malloy, 115 N. C. 737, 20 S. E. 461.

Burden of Proof.—The burden is upon the State to show that an innocent and virtuous woman has been slandered in order to convict under the provisions of this section. State v. Smith, 155 N. C. 473, 71 S. E. 305.

On trial of an indictment for slander under this section, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant. State v. McDaniel, 84 N. C. 803.

§ 4231. Derogatory statements about banks.—Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank or building and loan association, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1915, c. 273; 1921, c. 4, s. 82; 1931, c. 12.)

Editor's Note.—By Acts of 1921, ch. 4, the words "savings bank, banking institutions or trust company doing business in this state" after the words "any bank" were omitted, evidently with no effect on the section. The word "start" in the section as it formerly stood was changed to "state," which seems to have originally been a typographical error. And lastly the provisions of the section for punishment were amended to the effect that either fine or imprisonment, or both, may now be imposed, instead of either one or the other, as the section provided before this last amendment.

The Act of 1931 inserted the words "or building and loan associations" in this section.

Art. 13(A). Injuring Others by Use of High Explosives

§ 4231(a). Willful injury a felony; punishment.—Any person who shall willfully and maliciously injure or attempt to injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitro-glycerine, dynamite, gunpowder, or other high explosive, shall be guilty of a felony and on conviction shall be punished by imprisonment in the state prison for not less than five years and not more than thirty years. (1923, c. 80, s. 1.)

§ 4231(b). Conspiracy declared a felony; punishment.—If any two or more persons shall conspire to willfully and maliciously injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitroglycerine, dynamite, gunpowder, or other high explosive, each and every one so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for not less than two years and not more than fifteen years. (1923, c. 80, s. 2.)

SUBCHAPTER 5. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS

Art. 14. Burglary and Other House-Breakings

§ 4232. First and second degree burglary.—There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. (Rev., s. 3331; 1889, c. 434, s. 1.)

Cross Reference.—As to power of an individual to arrest a burglar, see sec. 4543; as to what constitutes breaking, see 2 N. C. Enc. Dig. 723; as to buildings that can be burglarized, see 2 N. C. Enc. Dig. 720; as to time, see 2 N. C. Enc. Dig. 723; as to entry, see 2 N. C. Enc. Dig. 723.

In General.—The common law definition of burglary is a capital offense, i. e., the breaking into and entering of the "mansion or dwelling-house of another in the night-time, with an intent to commit a felony therein," whether the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. State v. Allen, 186 N. C. 302, 119 S. E. 504.

The crime of burglary at common law was composed of five distinct elements, which were: (1), the breaking; (2), the entering; (3), that the breaking and entry be into a mansion house; (4), that the breaking and entering were in the nighttime, and (5), that the breaking and entering were with the intent to commit a felony. State v. Whit, 49 N. C. 349, 350.

Curtilage.—The meaning of the terms curtilage, is a piece of ground either inclosed or not, that is commonly used with the dwelling house. State v. Twitty, 2 N. C. 102.

Indictment Must Charge Intended Felony.—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though the actual commission of the intended felony is not necessary to be charged or proven, or that it was committed at all. State v. Allen, 186 N. C. 302, 119 S. E. 504.

Same—Proof of a Different Intent.—An averment in an indictment for burglary, that the breaking was with the intent to commit larceny, is supported by proof that the entry was made with a purpose to commit a robbery. State v. Halford, 104 N. C. 874, 10 S. E. 524. The intent may be shown by circumstances. State v. McBryde, 97 N. C. 393.

Indictment Must Charge Occupancy. — The indictment charging the offense alleging that the dwelling-house was in the actual occupation of someone at the time of the commission of the crime, was not required at common law, nor under sec. 4234, but now, under the provisions of this section omission of that averment makes the indictment good only as an indictment for burglary in the second degree. State v. Fleming, 107 N. C. 905, 908, 12 S. E. 131.

Burglary can not be committed in a tent or booth erected in a market or fair, although the owner lodges in it. See 1 Hawk. pl. Cr., Ch. 38, § 35; 1 Hale pl. Cr. 559; Roscoe Cr. Ev., 300. State v. Jake, 60 N. C. 471.

Burglary in a Store with Sleeping Quarters.—The offense of burglary may be committed by breaking into a store if there are sleeping quarters in the store, for the sleeping there makes it a dwelling. State v. Foster, 129 N. C. 704, 40 S. E. 209.

Charging Elements of First and Second Degree.—Where a burglarious breaking into a dwelling-house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous. State v. Allen, 186 N. C. 302, 119 S. E. 504.

Where there is evidence of a burglarious entry into a dwelling-house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. Id.

Discretionary Power of the Jury as to Degree.—The jury does not have the discretionary power to return a verdict of burglary in the second degree if all the evidence show burglary in the first degree. But under an indictment for burglary in the first degree a verdict of second degree burglary may be returned if the evidence shows such an offense. State v. Fleming, 107 N. C. 905, 12 S. E. 131.

Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized. State v. Johnston, 119 N. C. 883, 26 S. E. 163; State v. Alston, 113 N. C. 666, 18 S. E. 692; see sec. 4641 and notes thereto.

One charged with burglary in the first degree and having admitted the entering and taking, the only question is whether it was done at nighttime, and the jury should not be charged that they could convict of a lesser offense as provided by this section, for the offense was either burglary in the first degree or larceny. State v. McKnight, 111 N. C. 690, 16 S. E. 319.

Cited in State v. Lawrence, 199 N. C. 481, 154 S. E. 741; State v. Brown, 206 N. C. 747, 175 S. E. 116; State v. Hamlet, 206 N. C. 568, 174 S. E. 451.

§ 4233. Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death, and any one so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court. (Rev., s. 3330; Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222.)

As to discretionary power of jury to reduce penalty see note to preceding section.

Cited in State v. Lawrence, 199 N. C. 481, 154 S. E. 741.

§ 4234. Breaking out of dwelling-house burglary.—If any person shall enter the dwelling-house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling-house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of such dwelling-house in the nighttime, such person shall be guilty of burglary. (Rev., s. 3332; Code, s. 995; R. C., c. 34, s. 8; 12 Anne, c. 7, s. 3.)

As to discretionary power of jury to convict of a less offense, see note to sec. 4232.

Indictment Must Charge Breaking Out.—One charged by indictment of breaking into a house cannot be convicted of breaking out, and a charge of the court to that effect is error. State v. McPherson, 70 N. C. 239.

§ 4235. Breaking into or entering houses otherwise than burglariously.—If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking-house, counting-house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years. (Rev., s. 3333; Code, s. 996; 1874-5, c. 166; 1879, c. 323.)

As to what constitutes breaking, see 2 N. C. Enc. Dig. 723. As to subject in general, see 2 N. C. Enc. Dig. 719.

Burglarious Intent Necessary. — Under the provisions of this section the burglarious, etc., intent of breaking into a storehouse, dwelling, etc., is necessary to a conviction. State v. Crisp, 188 N. C. 799, 125 S. E. 543.

Intent Must Be Shown.—In order to convict under this section it is necessary to show intent and a failure to show intent leaves no other course except acquittal. State v. Spear, 164 N. C. 452, 79 S. E. 869.

The case of State v. Hooker, 145 N. C. 581, 59 S. E. 866, is cited and it is said that the construction of the statute in that case, which is that intent should only apply to a breaking into an uninhabited house, was obiter dictum as that point was not raised in the case. Clark, C. J., dissents on the grounds that a conviction for a less offense should be sustained.—Ed. Note.

In State v. Crisp, 188 N. C. 799, 801, 125 S. E. 543, it is said: "The trial court was doubtless misled by the dictum in State v. Hooker, 145 N. C. 581, 582, 59 S. E. 866, to the effect that, as used in section 3333 of the Revisal, the words 'with intent to commit a felony or other infamous crime therein,' applied only to the clause with which it was closely connected, and not to all the clauses in the section; but this was expressly disapproved in State v. Spear, 164 N. C. 452, 79 S. E. 869. And, further, it should be noted that this section of the Revisal has been restated in accordance with the decision in the Spear case, brought forward as this section.

"Unlawfully Breaking" Charges Intent. — An indictment under this section for housebreaking, is sufficient when charging "that defendant did break and enter (otherwise than burglarous breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., etc., feloniously to steal, etc." and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony." State v. Goffney, 157 N. C. 624, 73 S. E. 162.

Intent to Commit More Than One Offense.—An indictment entering a house with an intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. State v. Christmas, 101 N. C. 749, 8 S. E. 361.

Owner Procuring Act to Be Done.—In order to convict of housebreaking under this section there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. State v. Goffney, 157 N. C. 624, 73 S. E. 162.

Entry without Breaking.—It is evident it was the intention of the Legislature to make it a penal offense to wilfully break into a store-house where merchandise, etc., is kept, or into an uninhabited house, or to willfully enter

into a dwelling-house in the night otherwise than by breaking, with intent to commit a felony. State v. Hughes, 86 N. C. 662, 664.

Crime Therein Distinct from Breaking and Entering.—"Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being necessarily distinct from the breaking and entering. State v. Ridley, 48 Iowa, 370; Fisher v. State, 46 Ala., 717; State v. Ford, 30 La. Ann. (Part I), 311; People v. Curtis, 76 Cal., 517; Smith v. State, 22 Tex. App., 350; Copenhaven v. State, 15 Ga. 64." State v. Hooker, 145 N. C. 581, 584, 59 S. E. 866.

Question for the Jury.—Under sec. 4543 a person seeing a felony committed, or it being committed in his presence, has power to arrest the offender. Where some one breaks into the garage of another and the owner of the garage is killed in trying to make the arrest, the question of the offense being committed in his presence should be submitted to the jury, especially where he could not identify the burglars at the time of breaking and pursues them a distance attempting to make the arrest. State v. Blackwelder, 182 N. C. 899, 109 S. E. 644.

Evidence Sufficient for Conviction.—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. State v. Williams, 187 N. C. 492, 122 S. E. 13.

Evidence held sufficient to sustain conviction under this section. State v. Hargett, 196 N. C. 692, 146 S. E. 801.

Cited in State v. Ellsworth, 130 N. C. 690, 41 S. E. 548, in dissenting opinion State v. Gadberry, 117 N. C. 811, 23 S. E. 477; State v. Ratcliff, 199 N. C. 9, 11, 153 S. E. 605; State v. Setzer, 198 N. C. 663, 153 S. E. 118.

§ 4236. Preparation to commit burglary or other house-breakings.—If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house-breaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein; such person shall be guilty of a felony and punished by fine or imprisonment in the state's prison, or both, in the discretion of the court. (Rev., s. 3334; Code, s. 997; 1907, c. 822.)

§ 4237. Breaking into or entering railroad cars.—If any person shall, with intent to commit larceny or other felony, break any seal upon a railroad car containing any goods, wares, freight or other thing of value, or shall unlawfully and willfully break or enter into any railroad car containing any goods, wares, freight or other thing of value, such person shall upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term not exceeding five years. Any person found unlawfully in such car shall be presumed to have entered in violation of this section. (1907, c. 468.)

Cited in State v. Brown, 198 N. C. 41, 150 S. E. 635.

§ 4237(a). Burglary with explosives.—Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitro-glycerine, dynamite, gunpowder, or by any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as for burglary in the second degree, as provided in section forty-two hundred and thirty-three. (1921, c. 5.)

Art. 15. Arson and Other Burnings

§ 4238. Punishment for arson.—Any person convicted according to due course of law of the crime of arson shall suffer death. (Rev., s. 3335; Code, s. 985; R. C., c. 34, s. 2; 1870-1, c. 222.)

Cross Reference.—As to buildings destroyed by a tenant, see sec. 2351 and notes. As to nature and elements, see 1 N. C. Enc. Dig. 965.

Editor's Note.—At common law arson was defined by Lord Coke as "the malicious and voluntary burning of the house of another by night or by day." "House" was meant to designate dwelling house and did not apply to barns and other buildings. Some of the states have extended the term so as to apply it to all property, and the common-law idea of "an offense against the security of the habitation" has been extended to an "offense against property." With this extension of application and meaning has come a change in the penalty, and but few states punish the offense by death.

In this state all offenses against property other than the habitation are covered by statutes making the offense punishable by imprisonment. So the offense that carries the death penalty is one against the habitation only and one that will greatly endanger human life.

By the act of 1869 the punishment for arson was confinement in the penitentiary, but by the act of 1871 a death penalty was fixed. In State v. Wise, 66 N. C. 120, the defendant was convicted and received the death sentence but judgment was arrested because the indictment did not specify which of the two acts it was found under. The failure to set out in the indictment the date of the offense left a question as to which of the statutes should apply as both of them provided punishment, one for offenses before April 4, 1871, the other for offenses after that date. Such a question would not arise today and offenders against the security of the habitation are subject to the death penalty.

Wood Must Be Charred.—Where the statute requires that the building be "burned" an indictment charging "setting fire to" is not sufficient for there can be a setting fire to without charring the wood, as required to constitute burning. But if the statute provides "setting fire to," the indictment charging "setting fire to and burning" is sufficient as the charge of burning is surplusage and not detrimental to the indictment. State v. Hall, 93 N. C. 571.

Cited in State v. Freeman, 197 N. C. 376, 148 S. E. 450.

§ 4239. Burning of certain public and other corporate buildings.—If any person shall willfully and maliciously burn the statehouse, or any of the public offices of the state, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the state or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town or corporation, he shall, on conviction, be imprisoned in the state's prison for not less than five nor more than ten years. (Rev., s. 3344; Code, s. 985, subsec. 3; R. C., c. 34, s. 7; 1830, c. 41, s. 1; 1868-9, c. 167, s. 5.)

The purpose of the statute is to protect houses from wilful injury, damage and defacement. State v. Bryan, 89 N. C. 531.

Intent Necessary.—"If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act of assembly. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape." State v. Mitchell, 27 N. C. 350, 353.

§ 4240. Setting fire to schoolhouse.—If any person shall willfully set fire to any schoolhouse, or procure the same to be done, he shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state's prison or the county jail, and may also be fined, in the discretion of the court. (Rev., s. 3345; 1901, c. 4, s. 28; 1919, c. 70.)

§ 4241. Burning or attempting to burn certain bridges and buildings.—If any person, with intent to destroy the same, shall willfully and maliciously set fire to and burn any public bridge, or private toll-bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall willfully and maliciously attempt to burn any of such houses or bridges, or any of the houses or buildings mentioned in this article, the person offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3337; Code, s. 985, subsec. 4; R. C., c. 34, s. 30; 1825, c. 1278.)

City Market House.—A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they conflict. The municipal court would have jurisdiction only by express legislation conveying it. Washington v. Hammond, 76 N. C. 33.

§ 4242. Setting fire to churches and certain other buildings.—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of any church, chapel or meeting-house, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than two nor more than forty years. (Rev., s. 3338; 1885, c. 66; 1903, c. 665, s. 2; 1874-5, c. 228; Code, s. 958, subsec. 6; 1927, c. 11, s. 1.)

As to burning crops in fields, see sec. 4313.

I. In General.
II. Indictment.
III. Evidence.
IV. Question for Jury.

I. IN GENERAL.

Editor's Note.—By the amendment Public Laws 1927, c. 11, that part immediately after "set fire to" reading as follows "or burn or cause to be burned, or aid counsel or procure the burning of," was added.

Crime Fixed Herein Is Separate from That in § 4245(a).—A verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a second count brought under § 4245(a), the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 208 N. C. 47, 179 S. E. 8.

Barn Defined.—A building of hewn logs (twenty-six feet by fifteen), divided by a partition of the same, upon one side of which were horses and upon the other corn, oats and wheat (threshed and unthreshed), also hay, fodder, etc., having sheds adjoining, under which were wagons and other farming utensils, is a "barn" within the meaning of this section. State v. Cherry, 63 N. C. 493.

But a house seventeen feet long and twelve wide, setting on blocks in a stable yard, having two rooms in it—one quite small, used for storing nubbins and refuse corn to be first fed to the stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute. State v. Laughlin, 53 N. C. 455.

II. INDICTMENT.

"Wantonly and Wilfully" Must Be Charged.—An indictment charged that the defendant "did unlawfully, wilfully and feloniously set fire to and burn a certain gin house, belonging to B. and in the possession of one G." Verdict of guilty and defendant moved in arrest of judgment for that this section had been amended (Laws 1885, Chapter 66,) by striking out the words "unlawfully and maliciously" and inserting in lieu thereof "wantonly and wilfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under this section. State v. Morgan, 98 N. C. 641, 3 S. E. 27; State v. Massey, 97 N. C. 465, 2 S. E. 445. But it is a valid indictment under section 4244, as was held in State v. Thorne, 81 N. C. 555, cited and followed by State v. Green, 92 N. C. 779. It seems to be the rule that "unlawfully and wilfully" do not answer the requirements under this section but under section 4244 it is sufficient in the indictment. State v. Pierce, 123 N. C. 745, 746, 31 S. E. 847.

Charge of Particular Intent Not Necessary.—An indictment for burning a mill, under this section, as amended by the Laws of 1885, Ch. 66, need not allege that the prisoner set fire to the mill with the intent to injure some particular person. State v. Rogers, 94 N. C. 860.

It was formerly the rule that an indictment under this section for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. And an indictment for such offense at common law must charge that the barn contained hay or grain, or is a parcel of the dwelling house. State v. Porter, 90 N. C. 719.

Title to Property Immaterial.—In the indictment it is not necessary to set out that the burned property "was the property of" or "was in the possession of" anyone. The constituent element is "wilful and wanton." State v. Daniel, 121 N. C. 574, 28 S. E. 255.

Kind of Building Must Be Specified.—An indictment for burning a gin house will not lie under this section as a gin house is not specified. An indictment describing the subject of offense as "house" is sufficient to describe a dwelling, and "house" is only used to describe dwellings. This section applies only to specified buildings. State v. Thorne, 81 N. C. 555.

III. EVIDENCE.

In General.—Under an indictment for burning a barn evidence of bad blood for the owner of the barn, footprints, failure of defendant to go to fire when the remainder of the neighborhood was there, the hour defendant arose, and his acts when notified of the fire is admissible and is sufficient to sustain a verdict of guilty. State v. Allen, 149 N. C. 458, 62 S. E. 597.

Admissibility.—On trial under indictment under this section for burning a barn to collect fire insurance thereon evidence that the defendant at another place, at some indefinite time in the past, had another barn to burn, is incompetent and does not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, and not a part of same transaction. State v. Deadmon, 195 N. C. 705, 143 S. E. 514.

Motive or Intent.—"It is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. State v. King, 86 N. C. 603; State v. Voight, 90 N. C. 741; State v. Smith, 93 N. C. 516; State v. McBrayer, 98 N. C. 619, 2 S. E. 755; State v. McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A., 721. But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent." State v. Morgan, 136 N. C. 628, 629, 48 S. E. 670.

Bad Feeling.—It is entirely competent for the State to show motive upon the part of the defendant to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reason for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should be excluded and the jury carefully cautioned not to regard it as it puts the character of the defendant in issue. State v. Barrett, 151 N. C. 665, 666, 65 S. E. 894..

Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should withdraw the case from the jury. State v. Freeman, 131 N. C. 725, 42 S. E. 575.

The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, is relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. State v. Rash, 34 N. C. 382; State v. Gailor, 71 N. C. 88; State v. Green, 92 N. C. 779; State v. Thompson, 97 N. C. 496, 498, 1 S. E. 921.

Same—Toward Agent.—Ill will toward an agent of the

owner of a building is not sufficient to show motive for setting fire to the building, as such evidence is too remote. State v. Battle, 126 N. C. 1036, 35 S. E. 624.

Clark, J., dissents on the ground that malice toward the owner is not necessary to constitute the offense, and though the ill will was remote it was a circumstance to show motive.

Proof of Title Not Necessary.—"Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy. State v. Daniel, 121 N. C. 574, 576, 28 S. E. 255; State v. Thompson, 97 N. C. 496, S. E. 921; State v. Jaynes, 78 N. C. 504, 507; State v. Gailor, 71 N. C. 88." State v. Sprouse, 150 N. C. 860, 861, 64 S. E. 900.

"This section is copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply 'of' A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification." State v. Daniel, 121 N. C. 574, 577, 28 S. E. 255.

Subsequent Attempt to Fire Another Building.—Where the defendant was indicted for setting fire to an outhouse, evidence is competent to show that at the same time an attempt was made to fire a dwelling-house near it, the evidence directly connecting the defendant with the latter attempt. State v. Thompson, 97 N. C. 496, 1 S. E. 921.

Blood Hounds.—On the trial of defendant for burning a barn, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, is sufficient evidence of guilt to take the case to the jury. State v. Thompson, 192 N. C. 704, 135 S. E. 775.

IV. QUESTION FOR JURY.

Must Be Sufficient Evidence.—The general rule is, if there be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the Judge should say so, and, in a criminal case, direct an acquittal. In State v. Vinson, 63 N. C. 335, it is said: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. State v. Rhodes, 111 N. C. 647, 650, 15 S. E. 1038.

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. State v. Church, 202 N. C. 692, 163 S. E. 874.

On trial for wilfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit is sufficient to be submitted to the jury that defendant had committed the crime, the corpus delicti being reasonably inferable from the circumstances, there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in the presence of officers, under circumstances calling for a reply. State v. Wilson, 205 N. C. 376, 171 S. E. 338.

Intent.—It is prima facie presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary and then "intent" becomes a question for the jury. State v. Phifer, 90 N. C. 721.

Alibi.—The burden of proving an alibi does not rest on the prisoner, but the burden of proving the guilt of the prisoner rests on the state. It is for the jury to decide, and it is only necessary for the prisoner to offer enough evidence to produce in the mind of the jury a reasonable doubt. State v. Jaynes, 78 N. C. 504.

§ 4243. Burning boats and barges.—If any person, with the intent to destroy the same, shall willfully and maliciously, or for a fraudulent purpose, set fire to and burn any boat, barge or float, whether he be the owner thereof or not, he shall be guilty of a felony and shall be punished by imprisonment in the state's prison for not less than four months nor more than ten years, or fined in the discretion of the court. (1909, c. 854.)

§ 4244. Burning of gin-houses, tobacco houses and stables.—Every person convicted of the willful burning of any gin-house or tobacco house, or any part thereof, or, in the nighttime, of any stable containing a horse or a mule, or cattle, shall be imprisoned in the state's prison not less than two nor more than ten years. (Rev., s. 3341; 1863, c. 17; 1868-9, c. 167, s. 5; 1903, c. 665, s. 1; Code, s. 985, subsec. 2.)

As to burning crops in the field, see section 4313.

Indictment in General. — Any informality will not be grounds for quashing proceeding if the charge is set out in a clear manner and enough matter appears to enable the court to proceed to judgment, see sec. 4623. Judgments will not be vitiated for failure to aver certain unnecessary matter, see section 4625. State v. Rogers, 168 N. C. 112, 83 S. E. 161,

Necessity of Alleging "Wilful Burning."—In the case of State v. Thorne, 81 N. C. 555, there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been wilfully done. The court held that the word maliciously was more comprehensive and included wilfully. State v. Green, 92 N. C. 779, 783.

"Nighttime" Must Be Alleged.—An indictment which omits to allege that the burning was in the "nighttime," is defective. State v. England, 78 N. C. 552.

Necessity of Showing Motive.—It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State has to rely upon circumstantial evidence to establish the guilt to the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. State v. Green, 92 N. C. 779, 782.

§ 4245. Fraudulently setting fire to dwelling-houses.—If any person, being the occupant of any building used as a dwelling-house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling-house shall willfully and wantonly or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court. (Rev., s. 3340; Code, s. 985; 1903, c. 665, s. 3; 1909, c. 862; 1927, c. 11, s. 2.)

Editor's Note.—By the amendment Public Laws 1927, c. 11, that part of the section immediately following "set fire to" reading as follows "or burn or cause to be burned, or aid, counsel or procure the burning of," was added.

Specifying Particular Fraudulent Purpose.—Where in a prosecution under this section the indictment charges that the defendant burned his dwelling-house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged for a fraudulent purpose, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal. State v. Morrison, 202 N. C. 60, 161 S. E. 725.

Sufficiency of Evidence.—Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic, that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes a motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and is sufficient to be submitted to the jury in a prosecution under this section. State v. Moses, 207 N. C. 139, 176 S. E. 267.

Cited in State v. Kluttz, 206 N. C. 726, 727, 175 S. E. 81.

§ 4245(a). Willful and malicious burning of personal property.—Any person who shall willfully or maliciously burn, or cause to be burned, or aid, counsel, or procure the burning of any goods, wares, merchandise, or other chattels or personal property of any kind, whether the same shall be at the time insured, by any person, or

corporation against loss or damage by fire, or not, with intent to injure or prejudice the insurer, creditor or the person owning the property, or any other person, whether the same be the property of such person or another, shall be guilty of felony. (1921, c. 119.)

See the note to § 4242.

§ 4246. Attempting to burn dwelling-houses and certain other buildings.—If any person shall willfully attempt to burn any dwelling-house, uninhabited house, barn, stable or outhouse, or any mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the property of another, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court. (Rev., s. 3336; Code, s. 985, subsec. 7; 1876-7, c. 13.)

See notes to section 4244.

In General.—A conviction for burning a ginhouse can be had either under this section or section 4244, all that is required is a clear statement of the charge and because of sections 4623, 4625 if sufficient matter is set out in the charge, the proceedings will not be quashed, because of use of terms that have the same meaning as those used in the statute. If the punishment does not exceed that prescribed by either section it is immaterial under which section the conviction was had. State v. Rogers, 168 N. C. 112, 83 S. E. 161.

§ 4247. Failure of owner of property to comply with orders of public authorities.—If the owner or occupant of any building or premises shall fail to comply with the orders of the chief of the fire department, or of the insurance commissioner, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars for each day's neglect. (Rev., s. 3343; 1899, c. 58, s. 4.)

§ 4248. Failure of officers to investigate incendiary fires.—If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars. (Rev., s. 3342; 1899, c. 58, s. 5.)

SUBCHAPTER 6. OFFENSES AGAINST PROPERTY

Art. 16. Larceny

§ 4249. Distinction between grand and petit larceny abolished.—All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the state's prison for a period not exceeding ten years. (Rev., s. 3500; Code, s. 1075; R. C., c. 34, s. 26.)

Cross Reference.—As to larceny in general, see 8 N. C. Enc. Dig. 613; as to horse stealing, see section 4260; as to cotton stealing, see section 4467; as to certifying when second offense, see section 4617.

Intent Necessary.—"To constitute the crime of larceny, there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be felony by any subsequent misconduct or bad faith on the part of the taker. State v. Arkle, 116 N. C. 1017, 1031, 21 S. E. 408." State v. Holder, 188 N. C. 561, 563, 125 S. E. 113.

Stolen Property Must Be Designated in Indictment. — "There is required a reasonable certainty in the designation of stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offense." State v. Clark, 30 N. C. 226; State v. Horan, 61 N. C. 571; State v. Bragg, 86 N. C. 688, 690.

Evidence Must Sustain Charge.—A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. State v. Moore, 33 N. C. 70; State v. Bragg, 86 N. C. 688, 690.

One Act Two Offences.—A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offences. State v. Bynum, 117 N. C. 749, 23 S. E. 218; State v. Bynum, 117 N. C. 752, 23 S. E. 219.

Accessories Abolished.—There are no accessories to larceny. All that counsel and aid are guilty of the offence as principals. State v. Gaston, 73 N. C. 93.

Larceny and Malicious Mischief Distinguished. — An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. State v. Butler, 65 N. C. 309, cited in note in 29 L. R. A., N. S., 40. See section 4264.

Exclusive Jurisdiction in Superior Court.—"Under the general law all misdemeanors are punishable by fine and imprisonment at the discretion of the Superior Court, so by the Constitution the jurisdiction over such offenses appertains exclusively to the Superior Courts, unless some statute has limited the punishment to a fine not exceeding fifty dollars or imprisonment not exceeding one month. Art. IV, sec. 15. (Amended Const., Art. IV, sec. 25)." Washington v. Hammond, 76 N. C. 33, 35.

§ 4250. Receiving stolen goods.—If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county where he actually received such chattel, money, security, or other thing; and such receivers shall be punished as one convicted of larceny. (Rev., s. 3507; Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2.)

Included in Indictment for Larceny Charge.—An indictment for larceny if concluded at common law may include two counts, one for larceny, the other for receiving stolen goods. The count for receiving stolen goods must conclude against this section. If the offence of larceny charged is punishable by statute with a sentence greater than is provided by this section and if the count charging larceny concludes against the statute the two counts can not be joined, as the punishment is different, but if the count charging larceny concludes at common law, which provided whipping, the two counts may be joined, for by abolishing whipping the punishment for the two offences was made the same. State v. Lawrence, 81 N. C. 522, 523.

A judgment upon a general verdict of guilty upon an indictment containing two counts—one for horse stealing, under sec. 4260, and the other for receiving, under this section, is erroneous—the offenses not being of the same grade and the punishment being different. State v. Goings, 98 N. C. 766, 4 S. E. 121.

Felonious intent in receiving stolen goods with knowl-

edge at the time that they had been stolen is necessary to a conviction under this section, and a charge which fails to submit the question of such intent to the jury entitled defendant to a new trial. State v. Morrison, 207 N. C. 804, 178 S. E. 562.

Interest Not Necessary for Conviction.—It is not necessary that one receiving stolen goods do it for the purpose of making them his own or to derive profit from them, if he receives them to help the thief, as a friendly act he is nevertheless guilty. State v. Rushing, 69 N. C. 29.

Goods Received Through Agent.—If stolen goods are received by an agent of the accused, at his instance that is sufficient to sustain a conviction if he knew that they were stolen goods. State v. Stroud, 95 N. C. 626.

Failure to Prove Ownership of Property.—In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or nonsuit should be allowed. State v. Pugh, 196 N. C. 725, 147 S. E. 7.

The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the charge of this section of receiving said property knowing it to have been feloniously stolen or taken. State v. Best, 202 N. C. 9, 10, 161 S. E. 535; State v. Lowe, 204 N. C. 572, 573, 169 S. E. 180.

Accessories Abolished.—By abolishing the distinction between petit and grand larceny the offense of accessory after the fact was also abolished, and one receiving stolen goods is treated and punished as principal. State v. Tyler, 85 N. C. 569.

Verdict Need Not Specify Value of Goods.—In a prosecution under this section, it is not required that the jury should determine the value of the goods in its verdict. State v. Morrison, 207 N. C. 804, 178 S. E. 562.

Defective Verdict.—Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. State v. Shaw, 194 N. C. 690, 140 S. E. 621.

Same—Failure to Charge as to Guilty Knowledge. — Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a venire de novo will be ordered on appeal. State v. Barbee, 197 N. C. 248, 148 S. E. 249.

Punishment. — Receiving stolen goods is only a misdemeanor under this section but it may be punished as larceny at the discretion of the court. State v. Brite, 73 N. C. 26.

Cited in dissenting opinion in State v. Kittelle, 110 N. C. 560, 15 S. E. 103; State v. Brown, 198 N. C. 41, 150 S. E. 635; Factor v. Laubenheimer, 290 U. S. 276, 299, 54 S. Ct. 191, 78 L. Ed. 151.

§ 4251. Larceny of property, or the receiving of stolen goods, not exceeding twenty dollars in value.—The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than twenty dollars, is hereby declared a misdemeanor and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen. (Rev., s. 3506; 1895, c. 285; 1913, c. 118, s. 1.)

Editor's Note.—Prior to the amendment of 1913 there was no express provision in this section making it inapplicable to breaking and entering a house at night and stealing less than $20. The section provided that it should not apply if the larceny was from the person or from a house in the daytime. In the case of State v. Shuford, 152 N. C. 809, 67 S. E. 923, the prisoner was indicted for burglary and was convicted of larceny, and was sentenced to three years imprisonment. It was contended by defendant that as this section provided for only one year punishment for larceny of property valued less than $20 the sentence should be for no more than one year. The Court construed the section liberally and by the nature of the offence and in the light of section 4249, providing for discretionary sentences for hardened criminals, decided that the legislature did not intend to give a longer sentence to daytime breakers than nighttime breakers, and the judgment of the lower court was sustained.

In the case of In re Holley, 154 N. C. 163, 69 S. E. 872, the question of punishment under this section again arose, and the court followed the rule laid down in State v. Shuford setting out additional grounds for the ruling; that this section only provided punishment for misdemeanors and that under section 4172 and section 4173 the punishment in all cases unless otherwise provided would be from 4 months to ten years. By the amendment of 1913 this section was made to cover all cases of such nature and remove any ground for contention as to how it should be construed in such cases.

Indictment for Larceny from the Person.—It is not necessary for the indictment to allege that the larceny was from the person for it to be shown. State v. Bynum, 117 N. C. 749, 23 S. E. 218.

Exclusive Jurisdiction in Superior Court.—The crime of larceny is a felony punishable in the State's Prison, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense be termed therein a misdemeanor or otherwise, Const., Art. I, secs. 12 and 13; and when such has been attempted, it will be disregarded upon conviction of this offense in the Superior Court having jurisdiction. State v. Newell, 172 N. C. 933, 90 S. E. 594.

Larceny from the person regardless of the value of the property is within the exclusive jurisdiction of the Superior Court, as punishment under section 4249 may be as much as ten years. State v. Brown, 150 N. C. 867, 64 S. E. 775.

Applied in State v. Davidson, 124 N. C. 839, 32 S. E. 957.

Cited in State v. Corpening, 207 N. C. 805, 178 S. E. 564.

§ 4252. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property or the receiving of stolen goods knowing them to be stolen, of the value of more than twenty dollars. (1913, c. 118, s. 2.)

See notes to § 4251.

§ 4253. Larceny by servants and other employees.—If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods, chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be fined or imprisoned in the state prison or county jail not less than four months nor more than ten years, at the discretion of the court: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of sixteen years. (Rev., s. 3499; Code, s. 1065; R. C., c. 34, s. 18; 21 Hen. VIII, c. 7, ss. 1, 2.)

As to embezzlement, see sections 4268 et seq.

Servant Defined. — In a strict sense all employees are servants but the term servant is usually applied, and meant

to apply to one of menial rank. State v. Higgins, 1 N. C. 36.

Trust Relation Necessary.—A person employed as a clerk, who takes goods from his employer's store and sends them to another at a distance to be sold cannot be convicted under this statute as there was no parting with possession by the owner which brought about a trust relation. State v. Higgins, 1 N. C. 36.

Trust Relation Must Be Alleged.—In an indictment under this section, it is necessary to allege that the property was received and held by the defendant in trust, or for the use of the owner, and being so held it was feloniously converted or made way with by the servant or agent. State v. Wilson, 101 N. C. 730, 7 S. E. 872.

Averment of Age.—"The averment that the defendant, when committing the act, was not within—that is, was of the age of eighteen years or more, and thus negatives that she was under sixteen years of age—does not invalidate the indictment, although the negative goes beyond the statutory requirement, for the greater includes the less." State v. Wilson, 101 N. C. 730, 734, 7 S. E. 872.

Cited in State v. Connelly, 104 N. C. 794, 797, 10 S. E. 469.

§ 4254. Larceny of chose in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a felony of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of any value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of value. (Rev., s. 3498; Code, s. 1064; R. C., c. 34, s. 20; 1811, c. 814, s. 1.)

As to sufficiency of description of stolen money, in indictment, see section 4619.

Treasury Notes.—Treasury notes issued by the United States Treasury Department are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. State v. Thompson, 71 N. C. 146.

Due-Bills.—While a "due-bill' is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this section. The larceny of such a paper is indictable. State v. Campbell, 103 N. C. 344, 9 S. E. 410.

A pension check on the United States treasury comes under this section. State v. Bishop, 98 N. C. 773, 4 S. E. 357.

Larceny of the Instrument and Paper Distinguished. — When a person is indicted for stealing a promissory note or any other chose in action, it is upon the state to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid the indictment charging only larceny of a chose in action is not sufficient to convict. If the indictment charges larceny of the paper on which it is written the payment can not effect a conviction for larceny of the paper. State v. Campbell, 103 N. C. 344, 9 S. E. 410.

Charter of Bank Issuing Immaterial.—If a stolen note was issued by a bank within one of the United States, it is within the letter of the act, and there can not be the slightest doubt but that it is also within its spirit and meaning. The act is silent as to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a bona fide holder is the same, whether it derived its existence from an act of Congress or from the Legislature of New York. State v. Banks, 61 N. C. 577, 578.

Authority to Issue Must Be Set Out in Indictment.—An indictment, charging the stealing of a bank note of a certain denomination and value, without setting forth by what authority such note was issued, is not sufficient to authorize judgment on a conviction. State v. Brown, 53 N. C. 443.

An indictment for larceny which describes the thing stolen, as "one promissory note issued by the treasury department of the government of the United States for the payment of one dollar," is in that respect sufficient. State v. Fulford, 61 N. C. 563.

Amount Must Be Set Out.—An indictment for stealing a bank note is sufficient if it states the amount of the note and what bank it was drawn on. Some cases hold that the mere statement of the amount of the note is sufficient description. State v. Rout, 10 N. C. 618.

Cited in State v. Freeman, 89 N. C. 469.

§ 4255. Larceny, mutilation, or destruction of public records and papers.—If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper-writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor. (Rev., s. 3508; Code, s. 1071; R. C., c. 34, s. 31; 8 Hen. VI, c. 12, s. 3; 1881, c. 17.)

In General.—An indictment will lie under this section for changing, injuring or obliterating tax books, and the oral testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circumstances to show his guilt. State v. Gouge, 157 N. C. 602, 72 S. E. 994.

Nomenclature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with § 4173 the offense prescribed by this section is punishable by imprisonment in the penitentiary, and therefore a felony. State v. Harwood, 206 N. C. 87, 89, 173 S. E. 24.

Must Show Offense Committed on Day of Opportunity.—On a trial under this section for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the of-

fense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N. C. 100, 144 S. E. 555.

§ 4256. Larceny, concealment or destruction of wills.—If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor. (Rev., s. 3510; Code, s. 1072; R. C., c. 34, s. 32.)

Obviously the basis for making the fraudulent suppression of a will a crime as provided by this section is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. Wells v. Odum, 207 N. C. 226, 228, 176 S. E. 563.

§ 4257. Larceny of ungathered crops.—If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly. (Rev., s. 3503; Code, s. 1069; 1811, c. 816; R. C., c. 34, s. 21; 1868-9, c. 251.)

At Common Law.—"By the common law, larceny can not be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and the produce of land. 2 Russell Crimes, 136; State v. Foy, 82 N. C. 679." State v. Thompson, 93 N. C. 537, 538.

What Indictment Must Allege.—On trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, is not admissible. To render such evidence competent, the indictment should be framed under the statute, and described the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. State v. Bragg, 86 N. C. 688.

In the case of State v. Liles, 78 N. C. 496, the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc., and the words "cultivated for food or market," were omitted, and it was held by this Court that the indictment, for that reason, was fatally defective. State v. Thompson, 93 N. C. 537, 539.

Indictment Must Conclude Against the Statute.—An indictment for larceny of growing cabbage must conclude against the statute, and a failure to so conclude makes the indictment one at common law. As the offence at common law was not larceny but only a civil trespass there can be no judgment. State v. Foy, 82 N. C. 679.

Applies to All Crops.—This section applies to any growing crops cultivated for food or market, and is not restricted to several articles specifically named. State v. Ballard, 97 N. C. 443, 1 S. E. 685.

Exclusive Jurisdiction of Superior Court.—The punishment for an offence under this section is greater than a justice of the peace can adjudge under the Constitution Art. IV sec. 5. State v. Cherry, 72 N. C. 123, therefore exclusive jurisdiction is vested in the Superior Court. State v. Graham, 76 N. C. 195.

§ 4258. Larceny of ginseng.—If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another person, with intent to steal the same, he shall be guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court: Provided, that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence. (Rev., s. 3502; 1905, c. 211.)

As to digging ginseng, see section 4510.

§ 4259. Larceny of wood and other property from land.—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (Rev., s. 3511; Code, s. 1070; 1866, c. 60.)

Cross Reference.—As to trespass on land after being forbidden, see section 4305. As to other property, see 8 N. C Enc. Dig. 619. As to regulations by certain counties, see sections 4307, 4308. As to forcible entry and detainer see sec. 4300.

In General.—This section and section 4305 were enacted immediately after the Civil War to protect land owners from aimless wanderers who entered land without force, but often did great damage. It was not intended to prevent entry by person who had an honest claim to the land, nor was it intended to apply when force was employed. State v. Crawley, 103 N. C. 353, 9 S. E. 409. It was intended to prevent the willful and unlawful taking from the land of another property that was not by common law or prior statute subject to larceny. State v. Vosburg, 111 N. C. 718, 720, 16 S. E. 392.

The word "whatsoever" shows a clear intent of the Legislature to make it general in its application.

The taking of a brass rail from around an engine that is stationary is larceny under this section. The rule in State v. Burt, 64 N. C. 619 in holding that taking a loose nugget of gold from a loose pile of stone is not larceny is not approved. It, although decided after this section was enacted, was probably decided under the common law as this section is not mentioned by the Court and in all probability was not called to its attention. State v. Beck, 141 N. C. 829, 53 S. E. 843. In the case of State v. Graves, 74 N. C. 396, it is held that an indictment for trespass to personal property can not be supported for the taking of rails from a fence as the taking is "one continuous act" and is trespass to the realty. State v. Burt is cited and approved, and no reference is made to this section. The technical distinction of one continuous act is exactly what was repealed.

One having title to the land or a bona fide claim thereto is not liable under this section by its express terms. One who enters as a servant of a bona fide claimant or one having title is not subject to the application of this section as the protection afforded the master extends to his servant.

In the case of State v. Boyce, 109 N. C. 739, 14 S. E. 98, it is held that a tenant of seven acres being a part of a tract of thirty five acres claimed by the landlord, when expressly prohibited from cutting timber on any of the tract except the seven acres on which he is a tenant, may as the servant of a third person claiming adversely go on the other part of the tract and cut timber, and he will not be estopped to deny his landlord's title except as to the seven acres leased to him, nor will he be liable under this section if the person whose servant he has been can prove his title or bona fide claim. Davis, J., and Avery, J., dissent.

Money Not Included.—The penalty for entering the lands of another and carrying off wood or any other kind of property whatsoever growing or being thereon, does not contemplate or embrace such taking and carrying away of money; it means such property as was not, at common law, subject to larceny. State v. Vosburg, 111 N. C. 718, 16 S. E. 392.

Turpentine which has flowed down trees into boxes made to catch it, and is in a state to be dipped out, is a subject of larceny. State v. Moore, 33 N. C. 70, cited in note in 49 L. R. A., N. S., 966; State v. King, 98 N. C. 648, 4 S. E. 44.

Claim of Interest Must Be Founded.—An entry, without a survey and grant from the state is not sufficient to support a claim to the land, and is no defense to an indictment under this section. State v. Calloway, 119 N. C. 864, 26 S. E. 46.

§ 4260. Larceny of horses and mules.—If any person shall steal any horse, mare, gelding or mule, he shall suffer imprisonment at hard labor for not less than one nor more than twenty years, at the discretion of the court. A count under this

section may be joined in a bill of indictment with a count under the section that immediately follows. (Rev., s. 3505; Code, s. 1066; 1868, c. 37, s. 1; 1879, c. 234, s. 2; 1866-7, c. 62; 1917, c. 162, s. 2.)

Taking with Belief of Interest.—One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when he took the mule that he had an interest in it. State v. Thompson, 95 N. C. 596.

Same—Question for a Jury.—One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the qusetion of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the rule he would be guilty of larceny was not error. State v. Thompson, 95 N. C. 596.

Joinder with Charge of Receiving Stolen Goods.—An indictment for horse stealing concluded at common law is punishable as petit larceny. If there are two counts and the second is for receiving stolen goods and concludes against the statute, the punishment for the two is the same and they may be joined, but on conviction a sentence of ten years is all that can be given. State v. Lawrence, 81 N. C. 522, 523.

An indictment having two counts one for horse stealing the other for receiving stolen property, both concluding upon a statute is defective as the offences are not of the same grade and a conviction is error. State v. Johnson, 75 N. C. 123.

§ 4261. Taking horses or mules for temporary purposes.—If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court. (Rev., s. 3509; Code, s. 1067; 1879, c. 234, s. 1; 1913, c. 11.)

Indictment.—An indictment for stealing the temporary use of a horse in violation of this section is not defective because it charges the stealing of the temporary use of a buggy also. State v. Darden, 117 N. C. 697, 23 S. E. 106.

Employee Liable.—An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. Clark v. Whitehurst, 171 N. C. 1, 86 S. E. 78.

§ 4262. Taking of automobiles and electric vehicles for temporary purpose.—If any person shall unlawfully take and carry away any automobile or electrical vehicle of any nature, kind or description whatsoever, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of larceny, and shall be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, in the discretion of the court: Provided, that this section shall not be construed to repeal any other section of this article. (1907, c. 126.)

As to removal of manufacturer's serial number, see section 4292. As to report of stolen or recovered motor vehicles, see section 2621(u), 2621(37). As to registration of stolen motor vehicles, see section 2621(23). As to receiving stolen vehicles, see section 2621(33). As to Motor Vehicles Act, see section 2621(1) et seq.

§ 4263. Larceny of taxed dogs misdemeanor.—The larceny of any dog upon which the license tax provided in article two of the chapter entitled Dogs has been paid shall be a misdemeanor. (1919, c. 116, s. 9.)

As to being personalty, see section 1683.

§ 4264. Pursuing or injuring livestock with intent to steal.—If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (Rev., s. 3504; Code, s. 1068; 1876, c. 57.)

As to subject in general see 5 N. C. Enc. Dig. 114-128.

Sufficiency of Indictment.—An indictment under this section for injury to livestock, in which the animal alleged to have been injured is described as a "certain cattle beast," is sufficiently definite. State v. Credle, 91 N. C. 640.

§ 4265. Local: Killing unmarked livestock with felonious intent. — If any person, not being the owner of any unmarked neat cattle, sheep, or hogs, shall kill any unmarked neat cattle, sheep or hogs in the range, such person shall, if the act be done with felonious intent, be guilty of larceny and punished as for that offense, and if not done with such intent shall be guilty of a misdemeanor: Provided, that this section shall apply only to the counties of Haywood, Hyde and Tyrrell. (Rev., s. 3316; 1891, c. 258; 1895, c. 8; 1909, c. 597.)

Art. 17. Train Robbery

§ 4266. Train robbery.—If any person shall enter upon any locomotive engine or car on any railroad in this state, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished by imprisonment in the state's prison for not less than ten years nor more than twenty years. (Rev., s. 3765; 1895, c. 204, s. 2.)

§ 4267. Attempted train robbery.—If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this state, by intimidation of those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the state's prison for not less than two years nor more than twenty years. (Rev., s. 3766; 1895, c. 204, s. 1.)

Art. 17A. Robbery with Firearms

§ 4267(a). Made a felony.—Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means,

whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five or not more than thirty years. (1929, c. 187, s. 1.)

Applied in State v. Riddle, 205 N. C. 591, 172 S. E. 400.

Art. 18. Embezzlement

§ 4268. Embezzlement of property received by virtue of office or employment.—If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any officer or agent of a corporation, or any agent, consignee, clerk or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny. (Rev., s. 3406; Code, s. 1014; 21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; 1889, c. 226; 1891, c. 188; 1897, c. 31; 1919, c. 97, s. 25; 1931, c. 158.)

As to larceny by servants or other employees, see section 4253; for full treatment of embezzlement, see 5 N. C. Enc. Dig. 114-128.

Editor's Note.—The Act of 1931 amended this section so as to add "trustees" to the list of persons who may be guilty of embezzlement. Section 4270 applies only to trustees of public bodies and institutions. The addition was probably necessary because of the fact that embezzlement is wholly a statutory crime. 9 N. C. Law Rev. 398.

Origin and Purpose.—Embezzlement was not a common-law offense. State v. Hill, 91 N. C. 561. It was first made a criminal offense in England by statute, 21 Henry VIII., ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed on them. 1 McLain Cr. Law, § 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use, could not be, convicted of larceny on the ground that the money had never been in the employer's possession. Clark's Cr. Law, p. 308. State v. McDonald, 133 N. C. 680, 683, 45 S. E. 582.

Compared with Section 4401.—The use of the word "abstract" in section 4401 differentiates it from this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under section 4401 to allege that the defendant is more than sixteen years old. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. State v. Cohoon, 206 N. C. 388, 174 S. E. 91.

Conversion Not Necessary.—To embezzle is for an agent fraudulently to misapply the property of his principal, it is not necessary that the agent should convert it to his own use, that is, expend the money for his own benefit. State v. Foust, 114 N. C. 842, 843, 19 S. E. 276.

Necessity of Demand for Payment.—A demand is not necessary to support a prosecution under this section as it is not made a prerequisite to prosecution. State v. Blackley, 138 N. C. 620, 50 S. E. 310.

Property of Prosecutor.—The property alleged to have been embezzled must be the property of the prosecutor. State v. Barton, 125 N. C. 702, 34 S. E. 553.

Goods Received under Special Directions.—Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzle the same, he is indictable under this section. State v. Costin, 89 N. C. 511.

Intent to Repay No Defense.—An intent to restore the property embezzled or a readiness and willingness at a latter date is not a defense to a prosecution under this section. State v. Summers, 141 N. C. 841, 53 S. E. 856.

To Whom Section Applies.—A contractor is not an officer, clerk or servant within the meaning of this section. State v. Barton, 125 N. C. 702, 34 S. E. 553. Nor is the relation of lessor and lessee embraced by the statute. State v. Keith, 126 N. C. 1114, 36 S. E. 169. And it does not apply to clerks of the superior courts and like officers who would seem to fall within the terms of section 4270. State v. Connelly, 104 N. C. 794, 10 S. E. 469.

Commissioner in Equity Cannot Be Convicted as Agent or Attorney.—A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz.: to sell the land and distribute the proceeds to the parties entitled thereto; immediately upon his appointment he ceases to be an attorney or agent for either party, and where the indictment charges the defendant with embezzlement of funds under this section as commissioner the defendant could not be convicted as agent or attorney. State v. Ray, 207 N. C. 642, 644, 178 S. E. 224.

Allegations and Proof.—The name of the person from whom the money was received need not be stated. State v. Lanier, 89 N. C. 517, 88 N. C. 658. And it need not be alleged or proved that the property charged to have been embezzled had been committed to the care of defendant, nor that any breach of confidence of trust, save that which grows out of the relation of owner and servant or agent, had occured. State v. Wilson, 101 N. C. 730, 7 S. E. 872. The averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute. State v. Lanier, 89 N. C. 517, 88 N. C. 658, 660.

The crime of embezzlement rests upon statute alone, and conviction thereof under an indictment drawn under this section, when the evidence tends only to show a violation of § 4270, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. State v. Grace, 196 N. C. 280, 145 S. E. 399.

Evidence—Intent Must Be Shown.—The conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud. State v. McDonald, 133 N. C. 680, 45 S. E. 582. But the burden of showing that he is under age is on the defendant and the state is not called on to prove that he is past sixteen years old, for this is a matter of defence and within the defendant's knowledge. State v. Blackley, 138 N. C. 620, 50 S. E. 310.

It is not necessary that a warrant for embezzlement issued by a justice of the peace should describe the criminal offense with the legal accuracy required in an indictment. Durham v. Jones, 119 N. C. 262, 25 S. E. 873.

Where there is evidence that an agent is charged with the duty of selling a load of tobacco upon a local market on behalf of the principal only, and accordingly receiving the price, he intentionally and wrongfully converted it to his use, it is sufficient to constitute the crime of embezzlement under this section and sustain a verdict of guilty, on a motion as of nonsuit. State v. Eubanks, 194 N. C. 319, 139 S. E. 451.

Accusation of Embezzlement Actionable Per Se in Slander.—The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. Elmore v. Atlantic Coast Line R. Co., 189 N. C. 658, 127 S. E. 710.

Illustrations of Wrongful Misapplications.—By a treasurer of a society depositing money in his private bank. See State v. Dunn, 138 N. C. 672, 50 S. E. 772. By a sales agent for automobiles. See State v. Klingham, 172 N. C. 947, 90 S. E. 690. By an agent selling a load of tobacco. See State v. Eubanks, 194 N. C. 319, 139 S. E. 451.

By an agent to buy a lot and build house. See State v. McClure, 205 N. C. 11, 169 S. E. 809. By a Consignee and Agent of a Piano Co. See State v. Dula, 206 N. C. 745, 175 S. E. 80.

Stated in In re Hege, 205 N. C. 625, 629, 172 S. E. 345.

Cited in Beck v. Bank, 161 N. C. 201, 76 S. E. 722; State v. Connor, 142 N. C. 700, 708, 55 S. E. 787; State v. Dunn,

134 N. C. 663, 668, 46 S. E. 949; State v. Hill, 91 N. C. 561; State v. Harper, 94 N. C. 936, 939; State v. Wadford, 194 N. C. 336; State v. Shore, 206 N. C. 743, 744, 175 S E. 116; State v. Harwood, 206 N. C. 87, 173 S. E. 24.

§ 4269. Embezzlement of state property by public officers and employees. — If any officer agent or employee of the state, or other person having or holding in trust for the same any bonds issued by the state, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of a felony, and shall be fined not less than ten thousand dollars, or imprisoned in the state's prison not less than twenty years, or both, at the discretion of the court. (Rev., s. 3407; Code, s. 1015; 1874-5, c. 52.)

Cited in State v. Connelly, 104 N. C. 798, 10 S. E. 469; State v. Hill, 91 N. C. 561, 562.

§ 4269(a). Recovery of moneys paid into State to cover misappropriation or embezzlements.— Whenever any moneys are or have been paid into the State Treasury by an officer of the State for or on account of the embezzlement or misappropriation of any funds of the State by an employee or subordinate of such officer, a claim for the refund of said moneys may be filed with the State Auditor and the State Auditor shall refer said claim to the Governor and Council of State, and if the Governor and Council of State determine that said claim or any part thereof should be allowed they shall direct the State Auditor to issue his warrant for the same to the person entitled to receive said moneys or his or her personal representative and the State Auditor shall issue said warrant and the State Treasurer shall pay said warrant out of any funds in the State Treasurer not otherwise appropriated.

This section shall not apply to any claim for moneys paid into the State Treasury after the first day of January one thousand nine hundred and three: Provided, that the power herein conferred on the Governor and Council of State shall not be exercised on or after the first day of July one thousand nine hundred and twenty-seven. (1927, c. 238.)

§ 4270. Embezzlement of funds by public officers and trustees.—If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, and shall be fined and imprisoned in the state's prison in the discretion of the court. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the state shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their succe sors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the state's prison or county jail, or fine in the discretion of the court. (Rev., s. 3408; Code, s. 1016; 1891, c. 241; 1876-7, c. 47.)

Compared with Section 4385.—Under section 4385 failure by an officer to pay over money coming into his hands is a misdemeanor. That section is very broad and seems to cover every case of failure by an officer to pay to the proper person funds coming into his hands. By this section the offence is declared a felony. An officer indicted for failure to pay to proper persons funds coming into his hands should be allowed the privilege of having the facts submitted to the jury. State v. Windley, 178 N. C. 670, 100 S. E. 116.

Meaning of "Wilfully and Corruptly."—In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition that "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" is not erroneous under the circumstances of this case. State v. Shipman, 202 N. C. 518, 163 S. E. 657.

Applies Only to Public Funds.—This section does not embrace the unlawful appropriation of the property of private individuals. State v. Connelly, 104 N. C. 794, 10 S. E. 469.

Clerks of Courts.—In the case of State v. Connelly, 104 N. C. 794, 10 S. E. 469, it was held that this section was not applicable to clerks of the Superior Courts but by an amendment at the next session of the Legislature it was expressly made applicable to clerks of Superior Courts. State v. Windley, 178 N. C. 670, 672, 100 S. E. 116.

Cited in State v. Hill, 91 N. C. 561, 562; New York Indemnity Co. v. Corporation Commission, 197 N. C. 562, 563, 150 S. E. 16.

§ 4271. Embezzlement by treasurers of charitable and religious organizations.—If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3409; Code, s. 1017; 1879, c. 105.)

Two Offenses Created.—Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending their moneys without consent; the other is the failure to account for such moneys. State v. Dunn, 138 N. C. 672, 50 S. E. 772.

Association for Members Solely.—An association organized for the benefit of its members solely is not a benevolent or religious association and an indictment under this section cannot be sustained against an officer who misappropriates funds of the association. State v. Dunn, 134 N. C. 663, 46 S. E. 949.

Cited in State v. Hill, 91 N. C. 561, 562.

§ 4272. Embezzlement by officers of railroad companies.—If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or ap-

propriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the state's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (Rev., s. 3403; Code, s. 1018; 1870-1, c. 103, s. 1.)

§ 4273. Conspiring with officers of railroad companies to embezzle.—If any person shall agree, combine, collude or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in the preceding section, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the state's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (Rev., s. 3404; Code s. 1019; 1870-1, c. 103, s. 2.)

Cited in State v. Lewis, 142 N. C. 626, 633, 55 S. E. 600; State v. Hill, 91 N. C. 561, 562.

§ 4274. Embezzlement by insurance agents and brokers.—If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order or society, lawfully doing business in this state, embezzles or fraudently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny. (Rev., s. 3489; 1889, c. 54, s. 103; 1911, c. 196, s. 8.)

§ 4274(a). Appropriation of partnership funds by partner to personal use.—Any person engaged in a partnership business in the state of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his co-partners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor. (1921, c. 127.)

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. State v. Rawls, 202 N. C. 397, 162 S. E. 899.

§ 4275. Embezzlement by surving partner.—If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the state's prison in the discretion of the court. (Rev., s. 3405; 1901, c. 640, s. 9.)

§ 4276. Embezzlement by tax officers.—If any officer appropriates to his own use the state, county, school, city or town taxes, he shall be guilty of embezzlement, and may be punished by confinement in the state's prison not exceeding five years, at the discretion of the court. (Rev., s. 3410; Code, s. 3705; 1883, c. 136, s. 49.)

Whether Felony or Misdemeanor.—As this section is silent as to whether or not the offence set out is a felony or a misdemeanor it will be construed as a misdemeanor as an offence will never be made a felony by construction of any doubtful or ambiguous words in the statute. State v. Hill, 91 N. C. 561. But see section 4171 as that seems to change the construction as given in this case and make all offences punishable by imprisonment felonies.—Ed. Note.

Inference of Fraudulent Intent.—While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. State v. Lancaster, 202 N. C. 204, 162 S. E. 367.

Cited in State v. Connelly, 104 N. C. 794, 797, 10 S. E. 469.

Art. 19. False Pretenses and Cheats

§ 4277. Obtaining property by false tokens and other false pretenses.—If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the state any money, goods, property or other thing of value, or any bank-note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state or any of the United States, or any treasury warrant, debenture, certificate of stock or public security, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and shall be imprisoned in the state's prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on the trial of any one indicated for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged

with an intent to defraud. (Rev., s. 3432; Code, s. 1025; R. C., c. 34, s. 67; 1811, c. 814, s. 2; 33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1.)

Cross Reference.—For full treatment, see 6 N. C. Enc. Dig. 378, 409.

Origin of Section. — This section was derived from the English Statutes, 33 Hen VIII, and 30 George II. State v Yorboro, 194 N. C. 501 and cases cited.

Elements of the Crime.—To constitute the crime of false pretense, a mistake, a pretense, a false pretense, a mere promise of opinion is not sufficient. It must be a (1) false representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive, and (3) which does in fact deceive (4) by which one man obtains value from another without compensation. State v. Simpson, 10 N. C. 621; State v. Roberts, 189 N. C. 93, 126 S. E. 161, 162; cited in State v. Yorboro, 194 N. C. 501.

The constituent elements of the offense of false pretense are: (1) That the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. State v. Carlson, 171 N. C. 818, 89 S. E. 30; State v. Johnson, 195 N. C. 506, 507, 142 S. E. 775.

Same—Subsisting Fact.—It is settled that a promise is not a pretense. No matter what the form, or however false the promise, to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact. State v. Phifer, 65 N. C. 321, 324; State v. Knott, 124 N. C. 814, 32 S. E. 798.

Same—Whether in Writing or Words.—It was held formerly that some false writing or token was necessary to constitute the offense. See State v. Simpson, 10 N. C. 620. This case was overruled in State v. Phifer, 65 N. C. 321, 323, where it is held that a naked lie meeting the other requirements enumerated in the preceding paragraph is a crime within the meaning of the section. This latter case is followed in State v. Dixon, 101 N. C. 741, 743, 7 S. E. 870. In fact the false pretense may be by act or conduct without spoken words. See State v. Matthews, 121 N. C. 604, 28 S. E. 469.

Same—Intent to Deceive.—The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. State v. Blue, 84 N. C. 807; State v. Oakley, 103 N. C. 408, 9 S. E. 575. In the absence of such definite finding, the uniform practice is to grant a new trial. State v. McCloud, 151 N. C. 730, 731, 66 S. E. 568.

Same—Actual Deceit.—Another of the elements is that the party to whom made was deceived by the representation. State v. Whedbee. 152 N. C. 770, 67 S. E. 60. If he is so deceived it matters not whether he parted with goods for the sake of gain or for a charitable purpose. State v. Matthews, 91 N. C. 635.

Caveat Emptor.—The doctrine of caveat emptor "let the buyer beware" does not apply to actual fraud or obtaining property by false representation. By this doctrine the purchaser is forewarned of tricks of the trade, bluster, puffs and empty boasts on the part of the person putting his property on the market; but the seller can not escape the penalty by reason of the doctrine where the facts constituting the crime, as stated in the first paragraph of this note, are made to appear. See State v. Jones, 70 N. C. 75; State v. Burke, 108 N. C. 750, 751, 12 S. E. 1000; State v. Young, 76 N. C. 258.

False Representations as to Deed of Trust.—A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money is a false pretense within this section. State v. Roberts, 189 N. C. 93, 126 S. E. 161.

False Representations as to Standing Timber.—A conviction under this section for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. State v. Corey, 199 N. C. 209, 153 S. E. 923.

Passing Counterfeit Money.—Where a person buys goods from another and the change given back by the seller is counterfeit an indictment under this section cannot be had, for there has been no fraudulent representations, nor intent to defraud before the defendant received the money. State v. Allred, 84 N. C. 749.

Representation to Agent of Owner of Goods.—It is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent. State v. Taylor, 131 N. C. 711, 42 S. E. 539.

Corporations Liable.—"In State v. Rowland Lumber Co., 153 N. C. 610, 612, 69 S. E. 58, it is said: 'The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. State v. Shaw, 92 N. C. 768.' This is fully sustained by all the late authorities." State v. Salisbury Ice, etc., Co., 166 N. C. 366, 367, 81 S. E. 737.

The Indictment.—The indictment must allege all of the essential elements of the offense. State v. Claudius, 164 N. C. 521, 526, 80 S. E. 261.

"The indictment must show a causal connection between the false representation and the parting with the property (State v. Whedbee, 152 N. C. 770, 774, 67 S. E. 60) but 'no particular form of words is necessary ; an allegation that 'by means of the false pretense' or 'relying on the false pretense,' or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged. 19 Cyc. 430." State v. Claudius, 164 N. C. 521, 525, 80 S. E. 261.

The charge as to the persons intended to be cheated is surplusage and immaterial, all that is necessary is a change of intent. State v. Ridge, 125 N. C. 655, 658, 34 S. E. 439; State v. Salisbury Ice, etc., Co., 166 N. C. 366, 367, 81 S. E. 737.

Necessity of Averring Property Obtained.—The indictment must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the name or term usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State's evidence tends only to show that the defendant had obtained the signature of the prosecutor as an indorser or surety to a negotiable instrument, there is a fatal variance between the charge and the proof, and defendant's motion to nonsuit should be sustained. State v. Gibson, 169 N. C. 318, 85 S. E. 7. No averment of the value of the property obtained is necessary. State v. Gillespie, 80 N. C. 390. And where the allegation is that money was obtained and the proof is that property was obtained there is no ground for reversal. State v. Ashford, 120 N. C. 588, 26 S. E. 915. Nonsuit is the proper method of raising the question of variance. State v. Gibson, supra.

The offense is a felony and a bill of indictment charging such offense and which omits the word "feloniously" is defective, and judgment will be arrested on a verdict of guilty. State v. Caldwell, 112 N. C. 854, 16 S. E. 1010.

Applied in State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99.

Cited in State v. Jones, 65 N. C. 395; State v. Howard, 129 N. C. 584, 40 S. E. 71; Factor v. Laubenheimer, 290 U. S. 276, 299, 54 S. Ct. 191, 78 L. Ed. 151.

§ 4278. Obtaining signatures or property by false pretenses.—If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, or obtain from any person any money, goods, wares, merchandise or other property or valuable thing whatsoever, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the state's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court. (Rev., s. 3433; Code, s. 1026; 1871-2, c. 92.)

Cross Reference.—See annotations under preceding section. as to forgery, see sections 4293, 4299. For full treatment of false pretenses, see 6 N. C. Enc. Dig. 378, 409.

Offence Is a Felony.—This section provides for imprisonment in the penitentiary, and therefore since the enactment of section 4171 all offences under this section are felonies, and an indictment must charge "feloniously." State v. Caldwell, 112 N. C. 854, 16 S. E. 1010.

This case overrules the case of State v. Crumples, 90 N. C. 701 in which it was held that as this section did not specify that the offence was a felony it would be treated as a mis-

demeanor in spite of the punishment being as for felonies. —Ed. Note.

Signing or Endorsing Note.—It has been held in S. v. Gibson, 169 N. C. 318, 85 S. E. 7, that it is an indictable offense under this section, to procure a person to sign or endorse a note by means of false representation and with intent to cheat and defraud. State v. Johnson, 195 N. C. 506, 507, 142 S. E. 775.

Same—Element of Intent. — In order to constitute false pretense in the discounting a note at the bank by a maker upon misrepresentation to one of the endorsers that he had secured certain endorsers with him, when, in fact he had used the note without other endorsers, evidence that the maker had turned over to the endorsers on the note his entire stock of merchandise and that he had thereupon had a civil judgment in their favor canceled of record, is material and competent upon the element of intent necessary to constitute the offense charged. State v. Johnson, 195 N. C. 506, 142 S. E. 775.

Representation as to Titles to Land. — One who obtains money as the purchase price of land sold by him to another upon the representation that the land is unencumbered when it is encumbered by a mortgage, is liable under this section. State v. Munday, 78 N. C. 460.

Sufficient Indictment.—An indictment for false pretense charging that defendant wilfully, knowingly, falsely and feloniously pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in truth and in fact he had not cut the same, and by means of said false pretense did obtain from the prosecutor three dollars in money, with intent, etc., is sufficient. State v. Eason, 86 N. C. 674.

Same—Must Allege Certain Offence.—An indictment should state with reasonable certainty the offence charged, and an indictment charging the defendant with obtaining money when he obtained a note, is defective. State v. Gibson, 170 N. C. 697, 86 S. E. 774.

Cited in State v. Gibson, 169 N. C. 318, 85 S. E. 7.

§ 4279. Obtaining property by false representation of pedigree of animals.—If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars nor more than three hundred dollars, or by imprisonment for a term not exceeding six months. (Rev., s. 3307; 1891, c. 94, s. 2.)

§ 4280. Obtaining certificate of registration of animals by false representation.—If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars or by both such fine and imprisonment. (Rev., s. 3308; 1891, c. 94, s. 1.)

§ 4281. Obtaining advances under promise to work and pay for same.—If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Evidence of such promise or agreement to work, the obtaining of such advances thereon and the failure to comply with such promise or agreement shall be presumptive evidence of the intent to cheat and defraud at the time of obtaining the advances and making the promise or agreement, subject to be rebutted by other testimony which may be introduced by the defendant. (Rev., s. 3431; 1889, c. 444; 1891, c. 106; 1905, c. 411.)

Constitutional in Part.—The gist of the offence of procuring advances "with intent to cheat and defraud" is not the obtaining the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. This part of the section is constitutional. State v. Norman, 110 N. C. 484, 14 S. E. 968.

Unconstitutional in Part.—The part of this section which makes the mere failure to do the work or perform the contract presumptive evidence of fraudulent intent, upon which a person may be convicted and imprisoned, is violative of the Thirteenth Amendment to the Federal Constitution, and is in conflict with our own State Constitution prohibiting imprisonment for debt except in case of fraud. State v. Griffin, 154 N. C. 611, 70 S. E. 292.

Intent Must Be Shown.—To convict under this section it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. State v. Griffin, 154 N. C. 611, 70 S. E. 292; State v. Islay, 164 N. C. 491, 79 S. E. 1105.

No Day of Grace.—Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday: Held, to be a failure to begin work within the meaning of the statute. State v. Norman, 110 N. C. 484, 14 S. E. 968.

§ 4282. Obtaining advances under written promise to pay therefor out of designated property.—If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. (Rev., s. 3434; Code, s. 1027; 1879, cc. 185, 186; 1905, c. 104.)

Constitutional.—It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge; on this ground it is declared constitutional. State v. Torrence, 127 N. C. 550, 553, 37 S. E. 268; State v. Mooney, 173 N. C. 798, 92 S. E. 610.

Representations Must Be of Existing Facts.—An indictment for obtaining goods under a false pretense, must be founded on a false representation by the defendant of an existing fact, and the pledging of a check to be received at

a subsequent date does not come within the meaning of the section. State v. Whidbee, 124 N. C. 796, 32 S. E. 318.

Indictment Should Charge Exact Terms.—The indictment should charge in the exact terms of the statute, and on failure to follow the statute it is subject to being quashed. State v. Mooney, 173 N. C. 798, 92 S. E. 610.

Compared with Section 4287.—This section is on the same footing as section 4287 for disposing of mortgaged property. It is the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus pro tanto become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. State v. Mooney, 173 N. C. 798, 799, 92 S. E. 610.

§ 4283. Obtaining property in return for worthless check, draft or order.—Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud. (1907, c. 975; 1909, c. 647.)

As to the present law, see 4283(a).

It is a misdemeanor for any person knowingly to utter a worthless check in this state and such act involves moral turpitude under this section if done with intent to defraud. See § 4173. Oates v. Wachovia Bank, etc., Co., 205 N. C. 14, 16, 169 S. E. 869.

Intent to Cheat or Defraud.—In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. Chapter 14 Public Laws of 1925, which is ineffectual, and chapter 62, Public Laws of 1927, not being in effect at the time of the alleged offense, are not considered. State v. Horton, 199 N. C. 771, 155 S. E. 866.

Signing in Name of Company.—Upon the trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflicting as to whether the defendant was a member of the concern. It was held, that the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was reversible error. State v. Anderson, 194 N. C. 377, 139 S. E. 701.

Same—Burden of Proof. — The burden of proving the guilt of defendant in violating this section, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. State v. Anderson, 194 N. C. 377, 139 S. E. 701.

§ 4283(a). Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor. [If the amount due on such check is not over fifty dollars, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days.]

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft. The part of this section in brackets shall only apply to Pitt county, Robeson county, Iredell county, Martin county, Lee county, Rutherford county, Bladen county, Cumberland county, Mecklenburg county, Catawba county, Sampson county, Alleghany county, Lenoir county, Randolph county, Gaston county, Hoke county, Madison county, Burke county, Transylvania county, Rockingham county, Halifax county, Hertford county, Richmond county, Chatham county, Pamlico county, Wake county, Haywood county, Davidson county, Anson county, Carteret county, Davie county, Forsyth county, Greene county, Jackson county, Henderson county, Stokes county, Onslow county, Macon county, Currituck county, Chowan county, Vance county, Edgecombe county, Northampton county, Stanly county, Cabarrus county, Mitchell county, Yancey county, Avery county, Alamance county, Franklin county, Yadkin county, Caldwell county, Gates county, Ashe county, Washington county, Nash county, Johnston county, Duplin county, Wayne county, Guilford county, Rowan county, Bertie county, Moore county, Harnett county, Columbus county, Watauga county, Lincoln county, Caswell county, Orange county, Buncombe county, Wilkes county, Hyde county, Durham county, Swain county, Clay county, Graham county, Cherokee county, Scotland county, Union county, and Surry county. (1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138, 292; 1933, cc. 43, 64, 93, 170, 265, 362, 458.)

See note to foregoing section.

Editor's Note.—The part of this section appearing in brackets in the second paragraph, and some of the counties to which applicable, were added by the Act of 1929. The Acts of 1931 added other counties.

As pointed out in the Article in 3 N. C. Law Rev. 141, the giving of worthless checks was first regulated in this state by the Acts of 1907, and 1909. Those acts are partly quoted and the elements of the crime analysed in the article. It was pointed out that although not expressly stated a logical interpretation discloses that under those acts the checks must have been given for present value and it was held that the freight for a car load of lumber was a present value within the section (See State v. Freeman, 172 N. C. 925, 90 S. E. 507.)

In 1925 the legislature passed a new bad check law which left out the element of intent to defraud, etc., so that under it the giving of a check with insufficient funds was a crime. The elements of the crime under that law are outlined by Mr. Justice Adams in State v. Edwards, 190 N. C. 322, 130 S. E. 10, and repeated in the Law Review Article. It was also pointed out that the indictment must have charged both "insufficient funds" and "insufficient credits" to charge a violation. The question of the constitutionality of this act was raised both in the article previously cited and in 5 N. C. Law Rev. 75, where the position was taken that the law was violative of the constitution, Art. I, section 16, as permitting the imprisonment for debt.

Subsequently the legislature at the 1927 session repealed the act and passed the present section which cures the defect pointed out in the Law Review, and it has been upheld by the supreme court. See State v. Yarboro, 194 N. C. 498.

It would seem that this section does not require that the check be given for present value. The essence of the crime seems to be the giving of a check for the payment of money or its equivalent knowing that there are insufficient funds or credit with which to pay upon presentment whether for a

pre-existing debt or for present value. See State v. Yarboro, 194 N. C. 504.

It is also apparent that this section does not require an actual intent to cheat or defraud. This element is presumed, no doubt, from the knowledge of lack of funds.

The prior laws contain a provision allowing the drawer 10 days within which to make the check good; the present law contains no such provision.

Under the prior laws which made intent to cheat or defraud an element of the crime, the uttering of the check raised a prima facie presumption of such intent and this cast the burden upon the defense of disproving the element. This section contains no such provision and the burden of proving the knowledge of lack of funds is upon the state, it would seem.

For a general note on the subject, see XIV Va. Law Rev. 134; as to applicability of Virginia Statute to post-dated checks, see XIV Va. Law Rev. 145.

The various amendments by Public Laws 1933, c. 43, did not affect the substance of the section but merely added counties to the list in the last paragraph.

Postdated Check.—A postdated check given for a past due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. State v. Crawford, 198 N. C. 522, 152 S. E. 504.

Indictment—Necessity of Charging All Elements.—In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. State v. Edwards, 190 N. C. 322, 130 S. E. 10.

Issuance as Fraud.—The issuance of a check on a bank in violation of this law is a false representation of subsisting facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor, and is in effect a fraud upon the payee, the payee accepting it in good faith. State v. Yarboro, 194 N. C. 498. See dissenting opinion.

Fatal Variance in Allegata and Probata.—An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of our statute, and evidence that it was given for the hire of an automobile, ten days later, are at fatal variance, and will not support a conviction. State v. Corpening, 191 N. C. 751, 133 S. E. 14.

Waiver of Right to Trial by Jury.—Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. 1, § 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. State v. Crawford, 197 N. C. 513, 149 S. E. 729.

Cited in State v. Byrd, 204 N. C. 162, 167 S. E. 626; Oates v. Wachovia Bank, etc., Co., 205 N. C. 14, 16, 169 S. E. 869.

§ 4283(b). Obtaining property by false coins or tokens. — Any person who shall operate or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use of enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 1.)

§ 4283(c). Manufacture, etc.; sale of devices for cheating.—Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 2.)

§ 4284. Obtaining entertainment at hotels and boarding-houses without paying therefor.—Any person who obtains any lodging, food or accommodation at any inn, boarding-house or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn, boarding-house or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, boarding-house or lodging-house, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation or lodging, shall be guilty of a misdemeanor, and shall upon conviction be fined or imprisoned at the discretion of the court. (1907, c. 816.)

Cross Reference.—As to definition of hotel, see section 2255; as to hotels in general, see sections 2249-2283; as to liens on baggage, see section 2461; as to fraud in general, see 6 N. C. Enc. Dig. 570-638.

Editor's Note.—This section was amended by the Acts of 1929, c. 103, § 1 by adding at the end thereof the following sentence: "If the amount claimed as due for such board be not over fifty dollars, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days." Section 2 of the same Act as amended by Public Laws 1931, c. 9, however, limits the application of the amendment to Martin, Pitt, Wake and Watauga Counties.

By P. L. 1933, c. 531, the application of the Act of 1929, c. 103, described in the Editor's note, is extended to Buncombe, Jackson and Franklin counties.

Constitutionality. — The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhabited by Article I, section 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. State v. Bargee, 187 N. C. 703, 122 S. E. 753.

Boarding House Defined.—One who has not been licensed to keep a boarding house, and who does not hold his place out as such, but who has received a boarder in his home, for

pay, is not the keeper of a boarding house. State v. McRae, 170 N. C. 712, 86 S. E. 1039.

Evidence Insufficient for Conviction.—In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boarding house, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boarding house to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. State v. Barbee, 187 N. C. 703, 122 S. E. 753.

Evidence Sufficient to Convict. — Where there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. State v. Hill, 166 N. C. 298, 81 S. E. 408.

§ 4284(a). Fraudulently obtaining credit at hospitals and sanatoriums.—Any person who obtains accommodation at any public or private hospital or sanatorium without paying therefor, with intent to defraud the said hospital or sanatorium, or who obtains credit at such hospital or sanatorium by the use of any false pretense, or who, after obtaining credit or accommodation at a hospital or sanatorium, absconds surreptitiously removes his baggage therefrom without paying for the accommodation or credit, shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned at the discretion of the court. (1931, c. 214.)

§ 4285. Obtaining wearing apparel on approval.—If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of wearing apparel on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor. Evidence that a person has solicited a merchant to deliver to him any article of wearing apparel for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section. (1911, c. 185.)

§ 4286. Obtaining money by false representation of physical defect.—It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor. (1919, c. 104.)

Art. 20. Frauds

§ 4287. Fraudulent disposal of mortgaged property.—If any person, after executing a chattel mortgage, deed of trust or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed of trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. In all indictments for violations of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such chattel mortgage, deed of trust or lien, by the grantor thereof, after the execution of said chattel mortgage, deed of trust or lien, and while it is in force, the further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for his seizure, for the satisfaction of such chattel mortgage, deed of trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed of trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be prima facie proof of the fact of the disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed of trust or lien was made. (Rev., s. 3435; Code, s. 1089; 1887, c. 14; 1873-4, c. 31; 1874-5, c. 215; 1883, c. 61.)

For treatment of chattel mortgages, see 3 N. C. Enc. Dig. 18, 69.

Three Classes of Offenders.—The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts. State v. Woods, 104 N. C. 898, 10 S. E. 555.

Intent Necessary. — Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the Legislature. State v. Manning, 107 N. C. 910, 911, 12 S. E. 248. The actual sale of mortgaged crops raises a presumption of fraudulent intent. State v. Holmes, 120 N. C. 573, 26 S. E. 692. In a trial under this section the burden is upon the defendant to disprove the criminal intent. State v. Surles, 117 N. C. 720, 23 S. E. 324; State v. Holmes, 120 N. C. 573, 26 S. E. 692.

Result of Sale Must Injure.—If the property included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudicial result as is contemplated by the statute. State v. Manning, 107 N. C. 910, 912, 12 S. E. 248.

Justice Jurisdiction.—Under the original acts justices of the peace have exclusive jurisdiction of the offense of fraudulently disposing of personal property embraced in a chattel mortgage. State v. Jones, 83 N. C. 657.

Infants Liability.—An indictment under this section for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. State v. Howard, 88 N. C. 651.

Indictment Must Charge Maker Buyer or Assistant.—If the indictment does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property no offense is charged. State v. Woods, 104 N. C. 898, 900, 10 S. E. 555.

Indictment Must Charge Lien and Manner of Sale.—An

indictment for disposing of mortgaged property is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition. State v. Burns, 80 N. C. 376; State v. Pickens, 79 N. C. 652.

Indictment in Two Counts.—Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed. State v. Surles, 117 N. C. 720, 721, 23 S. E. 324.

Prior Lien as Defense.—It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property—a crop of tobacco—to show that he, in good faith, applied the entire crop to the discharge of his landlord's lien. State v. Ellington, 98 N. C. 749, 4 S. E. 534.

Evidence of Other Sales Inadmissible.—On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed. State v. Jeffries, 117 N. C. 727, 23 S. E. 163.

Cited in State v. Barrett, 138 N. C. 630, 635, 50 S. E. 506; State v. Torrence, 127 N. C. 550, 553, 37 S. E. 268.

§ 4288. Secreting property to hinder enforcement of lien.—Any person removing, exchanging or secreting any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor. (Rev., s. 3436; 1887, c. 14.)

§ 4289. Fraudulent entry of horses at fairs.—If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this state, any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by a fine not less than one hundred nor more than one thousand dollars, or by imprisonment in the state's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court. (Rev., s. 3429; 1893, c. 387.)

§ 4290. Fraudulent and deceptive advertising.—It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminate, circulate or place before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1915, c. 218.)

§ 4291. Blackmailing.—If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the state's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor. (Rev., s. 3428; Code, s. 989; R. C., c. 34, s. 110.)

Indictment.—Where the offence charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication, that the defendant threatened to indict the prosecutor for an offence punishable by imprisonment in the penitentiary, with a view and intent to extort money; a criminal offence is sufficiently charged. State v. Harper, 94 N. C. 936.

Circumstantial Evidence. — Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. State v. Frady, 172 N. C. 978, 90 S. E. 802.

§ 4292. Fraudulent removal of manufacturer's serial number from automobile.—Every person within this state is hereby prohibited from knowingly buying, selling, receiving, disposing of or concealing any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motor car, or motor vehicle. Any person violating the provisions of this section, and any person who shall knowingly buy, sell, receive, dispose of, or conceal any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed, for the purpose of concealment or misrepresenting the identity of said automobile, motor car, or motor vehicle, shall be guilty of a misdemeanor. This section shall not apply to automobiles in the possession of innocent purchasers who acquired title or possession prior to March fourth, one thousand nine hundred and nineteen. (1919, c. 110.)

As to protection of title of motor vehicles, see secs. 2621(1), 2621(j).

Art. 21. Forgery

§ 4293. Forgery of bank-notes, checks and other securities.—If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or

on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court. (Rev., s. 3419; Code, s. 1030; R. C., c. 34, s. 60; 1819, c. 994, s. 1.)

Cross Reference.—As to alleging intent in the indictment, see section 4621; as to other forgeries, see seciton 4296. For full treatment of forgery, see 6 N. C. Enc. Dig. 548, 565.

Elements of Offense.—To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false: it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud. 2 Bishop Cr. Law, sec. 533; Barnes v. Crawford, 115 N. C. 76, 79, 20 S. E. 386. While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making or altering of the instrument. State v. Hall, 108 N. C. 776, 13 S. E. 189; State v. Cross, 101 N. C. 770, 7 S. E. 715.

Indictment Must Allege Existence of Bank.—In an indictment under this section to punish the making, passing, etc., of counterfeit bank notes, if the note alleged to have been passed be of a bank not within the State, the indictment should aver that such a bank exists as that by which the counterfeit note purports to have been issued. State v. Twitty, 9 N. C. 248.

Evidence of Former Acts.—Upon an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the scienter to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried. State v. Twitty, 9 N. C. 248.

Cited in State v. Peter, 53 N. C. 19, 23.

§ 4294. Uttering forged paper.—If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section; or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or state's prison not less than four months nor more than ten years. (Rev., s. 3427; Code, s. 1031; R. C., c. 34, s. 61; 1819, c. 994, s. 2; 1909, c. 666.)

Delivering to Agent.—"It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the statute has in view. Hence, upon a similar statute, it was held, that delivering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act. Palmer's case, R. and R. 72." State v. Harris, 27 N. C. 287, 293.

Cited in dissenting opinion State v. Jarvis, 129 N. C. 598, 40 S. E. 220.

§ 4295. Selling of certain forged securities.—If any person shall sell, by delivery, indorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3425; Code, s. 1033; R. C., c. 34, s. 63.)

§ 4296. Forgery of deeds, wills and certain other instruments.—If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court. (Rev., s. 3424; Code, s. 1029; R. C., c. 34, s. 59; 1801, c. 572; 5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26.)

As for general treatment of forgery, see 6 N. C. Enc. Dig. 548, 565.

General Considerations.—Differing from false pretenses it is not an element of this offence that the forgery was "calculated to deceive and did deceive," intent alone suffices to constitute the crime. State v. Collins, 115 N. C. 716, 20 S. E. 452; State v. Hall, 108 N. C. 776, 138 S. E. 189. It is immaterial to whom the advantages of the forgery would accrue. State v. Cross, 101 N. C. 770, 7 S. E. 715.

An instrument in writing on which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. 3 Greenleaf Ev., 103." Barnes v. Crawford, 115 N. C. 76, 78, 20 S. E. 386.

To constitute an "order for the delivery of goods," within the meaning of this section a forgery, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered, and if the paper-writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under this section, State v. Lamb, 65 N. C. 419; but in such case a conviction will be sustained for the offense at common law. State v. Leak, 80 N. C. 403, cited in note in 32 L. R. A., N. S., 331.

Possession Raises Presumption of Guilt.—One possessing a forged instrument is presumed to have either forged it or consented to the forgery, and nothing else appearing such holder will be presumed guilty. State v. Peterson, 129 N. C. 556, 40 S. E. 9.

"In State v. Britt, 14 N. C. 122, Ruffin, J., says: 'That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or caused it to be done until he showed the actual perpetrator and that he himself was not privy.' To the same effect is State v. Morgan, 19 N. C. 348. It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same." State v. Lane, 80 N. C. 407, 408.

Lost Instruments.—If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. State v. Peterson, 129 N. C. 556, 40 S. E. 9.

Misspelled Signature.—An indictment lies for forgery of an order for the payment of money, although the signature is misspelled, State v. Covington, 94 N. C. 913, cited in notes in 24 L. R. A. 33, 27 L. R. A., N. S., 1004; or the names of a firm in reverse order if it is clear who the parties intended to be designated are. State v. Lane, 80 N. C. 407.

Falsely putting a witness' name to a bond not required to be attested by a subscribing witness does not affect the validity of the bond, and is not forgery. State v. Gherkin, 29 N. C. 206.

Erasure or Obliteration Not a Forgery. — Obliterating by

erasure or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not according to the law of North Carolina, a forgery. State v. Thornburg, 28 N. C. 79, cited in note in 54 L. R. A. 798.

Forgery of One of Two Names.—Where the alleged forged instrument has the names of two or more persons affixed, it is sufficient if one of them is proved to have been forged. State v. Cross, 101 N. C. 770, 7 S. E. 715.

Instrument Partly Printed and Partly in Writing.—An indictment for forging "a certain instrument in writing" is supported by proof of the forgery of an instrument partly printed and partly in writing. State v. Ridge, 125 N. C. 655, 34 S. E. 439.

"Railroad Pass" Insufficiency of Description.—A description of the forged instrument as a "railroad pass," merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. State v. Weaver, 94 N. C. 836, cited in note in 24 L. R. A. 43.

Cited in dissenting opinion State v. Jarvis, 129 N. C. 698, 40 S. E. 220.

§ 4297. Forging names to petitions and uttering forged petitions.—If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or state's prison not exceeding five years, or both, at the discretion of the court; and if any person shall willfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner. (Rev., s. 3426; Code, s. 1034; 1883, c. 275.)

§ 4298. Forging certificate of corporate stock and uttering forged certificates.—If any officer or agent of a corporation shall falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be imprisoned in the county jail or state's prison not less than four months nor more than ten years. (Rev., s. 3421; Code, s. 1032; R. C., c. 34, s. 62.)

§ 4299. Forgery of bank-notes and other instruments by connecting genuine parts. — If any person shall fraudulently connect together different parts of two or more bank-notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged. (Rev., s. 3420; Code, s. 1037; R. C., c. 34, s. 66.)

SUBCHAPTER 7. CRIMINAL TRESPASS

Art. 22. Trespasses to Land and Fixtures

§ 4300. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor. (Rev., s. 3670; Code, s. 1028; R. C., c. 49, s. 1; 5 Ric. II, c. 8.)

Cross Reference.—For full treatment of forcible entry and detainer, see 6 N. C. Enc. Dig. 530-544; as to larceny of timber, see section 4259; as to trespass after being forbidden, see section 4305.

Force.—Actual force or appearances tending to inspire a just apprehension of violence is necessary to constitute the offense. 13 Am & Eng. Enc. (2 Ed.) 757. A forcible entry is not proved by evidence of a mere trespass; there must be proof of such force, or at least such show of force, as is calculated to prevent resistence. State v. Leary, 136 N. C. 578, 48 S. E. 570; State v. Davenport, 156 N. C. 596, 72 S. E. 7. So riding into the yard of a house occupied by a woman and remaining there cursing her constitutes force. State v. Davenport, supra. But where a person, in the absence of the prosecutor, merely unlocked and took off the lock put on by the prosecutor and put his own lock on, without breaking anything or doing any violence, and committed no violence upon the return of the prosecutor, he is not guilty of forcible entry and detainer. State v. Leary, supra.

Same—Title No Excuse.—The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. State v. Webster, 121 N. C. 586, 28 S. E. 254, where it is said: "As forcible trespass is essentially an offense against the possession of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." State v. Davenport, 156 N. C. 596, 602, 72 S. E. 7.

Original Entry Unlawful.—In order to convict of a misdemeanor under the provisions of this section it is not necessary that the act of going on the lands be unlawful, if the accused thereafter has in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language. State v. Fleming, 194 N. C. 42, 138 S. E. 342.

Same—Title Not Invalid.—The offense of forcible trespass under this section, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction. State v. Earp, 196 N. C. 164, 144 S. E. 23.

Extent of Liability of Title Holder.—The court in Reeder v. Purdy, 41 Ill., 279, says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlaw-

ful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie..... Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly can not recover damages for any injury done to them by him who has the title." Mosseller v. Deaver, 106 N. C. 494, 497, 11 S. E. 529.

Actual Possession Necessary.—The essential element of the offense of forcible entry, that the lands, etc., must be in the actual possession of him whose possession is charged to have been interfered with. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises. State v. Bryant, 103 N. C. 436, 9 S. E. 1. This element must be charged in the indictment. Id. It is a sufficient compliance with this rule to allege that the owner was "then and there in peaceable possession." State v. Eason, 70 N. C. 88, 91.

Right of Tenant of Sufferance.—Where the possession of the prosecutor in forcibly entry and detainer is only by sufferance, the prosecution cannot be sustained. State v. Leary, 136 N. C. 578, 48 S. E. 570.

No Accessories.—In misdemeanors there are no accessories, and those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the locus in quo, were his aiders and abettors and equally guilty of forcible trespass. State v. Davenport, 156 N. C. 596, 72 S. E. 7.

Jurisdiction of a Justice of the Peace.—The distribution of judicial powers by Art. IV of the Constitution is a virtual repeal of all laws giving jurisdiction to Justices of the Peace in case of forcible entry and detainer, except for the binding of trespassers to the Superior Court to answer a criminal charge. State v. Yarborough, 70 N. C. 250; Atlantic, etc., R. Co. v. Sharpe, 70 N. C. 509.

Entry under Void Warrant.—Where four or more men enter upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. State v. Yarborough, 70 N. C. 250; Atlantic, etc., R. Co. v. Johnston, 70 N. C. 348.

§ 4301. Malicious injury to real property.—If any person shall maliciously commit any damage, injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days. (Rev., s. 3677; Code, s. 1081; R. C., c. 34, s. 111; 1873-4, c. 176, s. 5.)

§ 4301(a). Injury to trees, woods, crops, etc., near highway; depositing trash near highway.—Any person, not being on his own lands, or without the consent of the owner thereof, who shall, within one hundred yards of any State highways of North Carolina or within a like distance of any other public road or highway, willfully commit any damage, injury, or spoilation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower within such limits, or shall deposit any trash, debris, garbage, or litter within such limits, shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars ($50) or imprisoned not exceeding thirty days: Provided, however, that this act shall not apply to the officers, agents, and employees of the State Highway Commission or county road authorities while in the discharge of their duties. (1924, c. 54.)

Editor's Note.—It was said in 3 N. C. Law Rev. 25 that it is hoped that this section may prevent the laying waste of gardens, flowers, etc., by tourists who are not in the habit of regarding another's property rights and who usually leave trash and garbage at every place they stop to eat.

§ 4302. Trespass on public lands.—If any person shall erect a building on any public lands before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have been sold and conveyed by them, or cultivate or remove timber from any of such lands, he shall be guilty of a misdemeanor. Moreover, the state board of education can recover from any person cutting timber on its land three times the value of the timber which is cut. When any person shall be in possession of any part of such land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary he shall summon the power of the county to assist him in so doing. (Rev., s. 3746; Code, s. 1121; R. C., c. 34, s. 42; 1823, c. 1190; 1842, c. 36, s. 4; 1909, c. 891.)

Cited in Worth v. Commissioners, 118 N. C. 118, 125, 24 S. E. 778; Eastern Carolina Land, etc., Co. v. State Board, 101 N. C. 35, 7 S. E. 573.

§ 4302(1). Trespass on land under option by the federal government.—On lands under option which have formally or informally been offered to and accepted by the North Carolina department of conservation and development by the acquiring federal agency and tentatively accepted by said department for administration as state forests, state parks, state game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs, or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment.

The department of conservation and development through its legally appointed forestry, fish and game wardens is hereby authorized and em-

powered to assist the county law enforcement officers in the enforcement of this section. (1935, c. 317.)

§ 4303. Disorderly conduct in and injuries to public buildings.—If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the state, or of any county or municipality, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the state or of any county or municipality, or any statue or monument, or shall do or commit any nuisance in or near any public building of the state or of any county or municipality, he shall be guilty of a misdemeanor. The keeper of the capitol or any person in charge of any of such public buildings shall have authority to arrest summarily and without warrant for a violation of this section. The words "public building," as used in this section, shall include the grounds around such buildings. (Rev., s. 3742; Code, s. 2308; R. C., c. 103, ss. 7, 8; 1829, c. 29, ss. 1, 2; 1842, c. 47; 1915, c. 269.)

§ 4304. Local: Erecting artificial islands and lumps in public waters.—If any person shall erect artificial islands or lumps in any of the waters of the state east of the Wilmington and Weldon railroad and the Petersburg and Weldon railroad, he shall be guilty of a misdemeanor. (Rev., s. 3543; Code, s. 986; 1883, c. 109.)

§ 4305. Trespass on land after being forbidden; license to look for estrays.—If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: Provided, that if any person shall make a written affidavit before a justice of the peace of the county that any of his cattle or livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the justice may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the justice shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (Rev., s. 3688; Code, s. 1120; 1866, c. 60.)

Cross Reference.—As to forcible trespass, see section 4300; as to wilful destruction by tenant, see section 2351; as to larceny of wood from the land, see section 4259.

Entry under Claim of Right.—One who enters upon the land of another under a bona fide claim of right is guilty of no criminal offense. State v. Crosset, 81 N. C. 579. Mere belief of the claim is not sufficient, there must be proof of title or evidence of a reasonable belief of the existence of the right of entry. State v. Fisher, 109 N. C. 817, 13 S. E. 878; State v. Durham, 120 N. C. 546, 550, 28 S. E. 22. This bona fide claim of right must be passed on by a jury before defendant can be convicted. State v. Wells, 142 N. C. 590, 595, 55 S. E. 210. But the question will not be submitted as a mere abstraction; there must be evidence of a claim or of facts giving rise to a reasonable and bona fide claim. State v. Faggart, 170 N. C. 737, 740, 87 S. E. 31.

It must be noted that entry under a claim of right is a defense only in a criminal action, as ignorance of a trespasser will not exonerate him from civil liability. State v. Whitener, 93 N. C. 590, 593.

Land Sought to Be Condemned.—An indictment for wilful trespass under this section will lie against an employee of a railroad company for an entry after being forbidden on land which the company is seeking to condemn, the entry being for the purpose of constructing the road and before an appraisement has been made, although a restraining order against such a trespass would be refused. State v. Wells, 142 N. C. 590, 55 S. E. 210.

Entry by Husband on Wife's Property.—A husband is not subject to the rule of this section, in regard to property of his wife, and although she may forbid him to enter he may enter nevertheless. State v. Jones, 132 N. C. 1043, 43 S. E. 939.

Entry as Servant.—Upon the trial under an indictment for trespass on lands after being forbidden, it is no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad. Evidence that such superior officer therein acted by the advice of counsel learned in the law is incompetent. State v. Mallard, 143 N. C. 666, 57 S. E. 351.

One who enters upon the land of another, after being forbidden, as the servant, and at the command of a bona fide claimant, is not guilty of any criminal offense. State v. Winslow, 95 N. C. 649.

Entry by Former Tenant to Gather Crops.—For a conviction under the provisions of this section for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser peacefully entered upon a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. State v. Faggart, 170 N. C. 737, 87 S. E. 31.

Entry as Guest of Tenant.—One forbidden by the landlord to enter his land is not guilty under this section if he enters a part of the land in the possession of a tenant and as a guest of the tenant. State v. Lawson, 101 N. C. 717, 7 S. E. 905.

License to Enter Must Be Negatived in Indictment.—In an indictment for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be distinctly negatived as an essential part of the description of the offense. State v. Bullard, 72 N. C. 445.

An indictment in which it is charged that the defendant did unlawfully enter upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., is sufficient. State v. Whitehurst, 70 N. C. 85.

Court Having Jurisdiction.—Justices of the peace have exclusive original jurisdiction of the offense under this section. State v. Dudley, 83 N. C. 660.

In State v. Presly, 72 N. C. 204 the rule at that time was held to be that Justice of the Peace and Superior Courts had concurrent jurisdiction and after six months the Superior Court had exclusive jurisdiction. Again in State v. Edney, 80 N. C. 360 the court held that because of the wording of the statute and Art. IV sec. 33 of the Constitution Justices of the peace had no jurisdiction. These irregularities were removed by legislation, and State v. Dudley, supra construed this section as it was no doubt originally intended by the Legislature to be construed.

Warrant May Be Amended. — The Superior Court has power to amend, after verdict, a warrant brought by appeal of defendant from a Justice's court, charging defedant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "willful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." State v. Smith, 103 N. C. 410, 9 S. E. 200.

Warrant with Affidavit Attached.—A warrant for trespass will not be quashed because it does not contain the necessary descriptive words of the alleged offense, when it refers to an "annexed affidavit" in which all the essential averments are made, as the reference to the affidavit makes it a part of the warrant. State v. Winlow, 95 N. C. 649.

Cited in State v. Conor, 142 N. C. 700, 708, 55 S. E. 787; State v. Holmes, 120 N. C. 573, 576, 26 S. E. 692.

§ 4306. Cutting, injuring, or removing another's timber.—If any person, not being the bona fide owner thereof, shall knowingly and willfully cut down, injure or remove any standing, growing or fallen tree or log, the property of another, he shall be guilty of a misdemeanor, and shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than thirty days. (Rev., s. 3687; 1889, c. 168.)

§ 4307. Local: Cutting, felling or removing another's timber.—If any person, or his agent or employee, shall cut, fell or remove any timber tree, for the purpose of sale or gain, knowing the same to be upon the land of another, without the consent of the owner thereof, the person so cutting, felling or removing, or causing the same to be done, shall be guilty of a misdemeanor, and shall be fined or imprisoned in the discretion of the court, and shall also be liable to such owner for an amount equal to double the value of the timber so cut, felled or removed, to be recovered in a civil action to be brought therefor. The prosecution for any offense committed under this section shall be commenced within one year after its commission. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee, Duplin and Mitchell counties. (1907, c. 320, ss. 1, 2, 5; 1929, c. 174, s. 1.)

As to larceny of wood, see section 4259.

Editor's Note.—The Act of 1929 added Duplin County to this section.

Cited in Caldwell Land, etc., Co. v. Hayes, 157 N. C. 333, 72 S. E. 1078.

§ 4308. Local: Purchasing timber unlawfully removed from another's land.—If any person or corporation shall purchase or receive any timber tree, knowing the same to have been cut or removed from the lands of another without the consent of the owner thereof, or shall purchase or receive any logs, planks, boards, staves, shingles or other lumber made from such timber tree, knowing the same to have been cut or removed as aforesaid, the person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court, and shall be liable to double the amount of the actual damages to the owner of such timber, to be recovered in a civil action brought therefor. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee and Mitchell counties. (1907, c. 320, ss. 3, 5.)

Cited in Caldwell Land, etc., Co. v. Hayes, 157 N. C. 333, 72 S. E. 1078.

§ 4309. Setting fire to grass and brush lands and woodlands.—If any person shall intentionally set fire to any grass land, brush land or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for a period of not less than sixty days nor more than four months for the first offense, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the state evidence sufficient for the conviction of a violation of this statute shall receive the sum of fifty dollars, to be taxed as part of the court costs. (Rev., s. 3346; Code, ss. 52, 53; R. C., c. 16, ss. 1, 2; 1777, c. 123, ss. 1, 2; 1915, c. 243, ss. 8, 11; 1919, c. 318; 1925, c. 61, s. 1.)

Editor's Note.—By amendment of this section, Public Laws 1925 c. 61 sec. 1, the punishment was changed from "'a fine not less than ten dollars or more than fifty dollars, or imprisonment not exceeding thirty days'" to "a fine not less than fifty dollars nor more than five hundred dollars or imprisonment not less than sixty days nor more than four months for the first offence, and for subsequent similar offences imprisonment from four months to one year."

The sum provided for one furnishing state evidence was raised from twenty dollars to fifty dollars.

This section formerly provided only for setting fire to woodland, and one who let fire escape while burning other lands was not liable, under this section. Averitt v. Murrell, 49 N. C. 322, but was only liable for negligence. Cato v. Toler, 160 N. C. 104, 75 S. E. 929. In the case of Hall v. Crawford, 50 N. C. 3 it was held that "an old field which had turned out without any fence around it and which had grown up in broom sedge and pine brushes" came within the meaning of woodland. This case was pointed out in Achenback v. Johnston, 84 N. C. 264, as stretching the doctrine of liability too far. There it was held that a field grown up in grass and used as a pasture was not woodland. By Public Laws 1917 this section was made applicable to setting fire to grassland and bushland as well as woodland, so the prior constructions so strictly made in regard to firing woodland are no longer applicable as this section now seems to cover burning of any lands.

For amendment applicable to Onslow county, see Public Laws, 1929, c. 185.

Care no Defense.—If one firing woods fails to give the statutory notice, to adjoining owners and damages ensues, the cause of action is complete, no matter what degree of care may have been shown. Lamb v. Sloan, 94 N. C. 534.

Waiver of Notice Bars Damages.—A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. Roberson v. Kirby, 52 N. C. 477; Lamb v. Sloan, 94 N. C. 534. Waiver when made by a tenant in common while in possession is also a sufficient defense. See Stanland v. Rousk, 168 N. C. 568, 84 S. E. 845.

Waiver by Adjoining Owner No Bar to Penalty.—When an adjoining owner waives notice of the intended fire such waiver does not waive the penalty of this section, but is only a waiver of the land owners right of action for damages to his land caused by the spreading of the fire. Lamb v. Sloan, 94 N. C. 534.

Liability to One Not an Adjoining Owner.—The notice required by this section applies only to adjoining owners and one is not subject to the penalty for failure to give notice to one who is not an adjoining owner, but by the express terms of the statute there is a liability in damages for damages to "any property." See Robinson v. Morgan, 118 N. C. 991, 992, 24 S. E. 667.

Firing to Protect Property.—In the case of Lamb v. Sloan, 94 N. C. 534 it was held that if one set fire to his property to protect it he was not liable under the statute in force at that time which provided the act must be "willfully." This section now provides that if the act is "intentionally" alone there is a liability. It would seem that this covers all except accidental fires.

No Evidence to Show Fire Started by Defendant.—Where the evidence tends only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there is neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority, a judgment as of nonsuit is proper. Sutton v. Herrin, 202 N. C. 599, 163 S. E. 578.

Burning Off Railroad Right of Ways.—In Case of Nizzell v. Bramming Mfg. Co., 158 N. C. 265, 73 S. E. 802, it was held under a prior statute, similar in some respects to this

except that it did not provide against burning grassland and bushland, that the statute did not apply to railroad burning off their rights of way that were covered with grass and tree tops.

Action to Recover Penalty.—Action for a recovery of penalties provided for by this section may be brought before any justice of the peace where service can be had on the defendant. Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799.

§ 4310. Local: Willfully or negligently setting fire to woods and fields.—If any persons shall wilfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields whatsoever, every such offender, upon conviction, shall be fined in the discretion of the court, one-half of the fine to go to the informer, if there be one, and the residue to the school fund of the county wherein such offense was committed, or he shall be imprisoned, in the discretion of the court. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee, Transylvania, Swain, Graham and Mitchell counties. (1907, c. 320, ss 4, 5; 1925, c. 61, s. 2.)

Editor's Note.—By amendment, Public Laws 1925, c. 61 sec. 2 this section was made applicable to Transylvania, Swain, and Graham Counties.

Cited in Lumber Co. v. Hayes, 157 N. C. 333, 72 N. C. 1078.

§ 4311. Setting fire to woodlands and grass lands with campfires.—Any wagoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grass land, brush land or woodland without fully extinguishing the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment not exceeding thirty days. For the purposes of this section the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. (Rev., s. 3347; Code, s. 54; 1885, c. 126; 1913, c. 8; 1915, c. 243, ss. 9, 11.)

§ 4312. Certain fires to be guarded by watchman.—All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not exceeding thirty days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions. (1915, c. 243, s. 10.)

§ 4313. Burning or otherwise destroying crops in the field.—If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than five years. (Rev., s. 3339; 1885, c. 42; 1874-5, c. 133; Code, s. 985, subsec. 2.)

Cross Reference. — As to arson, see sections 4238, 4248; as to burning of special buildings other than dwellings, see sections 4242, 4244.

Out of Doors Defined.—One who burn cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N. C. 798, 13 S. E. 931. Clark, J., dissents on the ground that it is merely secured out of doors and comes within the application of the statute.

Formerly Misdemeanor.—The burning provided in this section was at one time a misdemeanor. State v. Huskins, 126 N. C. 1070, 35 S. E. 608.

Indictment. — An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder without charging the burning, is defective. State v. Hall, 93 N. C. 571.

It is not necessary under this section to aver in the indictment that the stack burned was "out of doors." State v. Huskins, 126 N. C. 1070, 35 S. E. 608.

§ 4314. Local: Removing dog-tongue and certain other products from another's land.—If any person shall enter upon and remove from the lands of any other person, without first obtaining permission from the land owner, any dog-tongue (or vanilla), whortleberries or other fruits, or any other marketable product of the soil, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days: Provided, that this section shall apply to the counties or Sampson and Duplin only. (Rev., s. 3683; 1889, c. 77.)

§ 4315. Injuries to dams and water channels of mill and factories.—If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3678; Code, s. 1087; 1866, c. 48.)

Obstruction Below Dam or Channel.—This section only applies to obstructions and damages to the dam or channel and an indictment cannot be had for obstructions below the dam or channel. State v. Tomlinson, 77 N. C. 528.

Cited in State v. Suttle, 115 N. C. 784, 20 S. E. 725.

§ 4316. Taking unlawful possession of another's house.—If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. (Rev., s. 3685; 1893, c. 347.)

See notes to section 4305.

Editor's Note.—By the Act of 1929, c. 109, limited in operation to Durham county, this section was amended to read as follows: "If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, he shall be guilty of

a misdemeanor and shall be fined or imprisoned at the discretion of the court."

§ 4317. Injuring houses, churches, fences and walls.—If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this chapter in the article entitled Arson and Other Burnings; or shall unlawfully and willfully burn, demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor. (Rev., s. 3673; Code, s. 1062; R. C., c. 34, s. 103.)

I. Houses.
II. Fences Around Fields.

I. HOUSES.

Trespass Necessary Part of Offense.—It is held, to constitute a criminal offense under this section, there must be a trespass. State v. Williams, 44 N. C. 197; State v. Watson, 86 N. C. 626; State v. McCracken, 118 N. C. 1240, 24 S. E. 530. And a party in lawful possession cannot commit a trespass upon the property he is in possession of. State v. Howell, 107 N. C. 835, 12 S. E. 509; State v. Reynolds, 95 N. C. 616; Dobbs v. Gullidge, 20 N. C. 197. Therefore, according to the logic of these decisions, if a defendant is shown to have been in the actual possession of the house at the time he tore it down, he committed no criminal offense under this section. We say the lawful possession, to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. State v. Jones, 129 N. C. 508, 39 S. E. 795, 796.

Tenant's and Landlord's Liability to One Another.—A tenant is not subject under this section for damage done to property in his possession, but the owner of the reversion would be subject to prosecution for damage to property in the possession of a tenant, as the statute covers offences against possession. State v. Mason, 35 N. C. 341; State v. Whitener, 92 N. C. 798.

A tenant cannot divest the possession of his landlord by an attempted attornment to another, and if the person to whom the attempted attornment is made enters the land and damages buildings he is liable under this section, in spite of proof of good faith and claim of title. State v. Howell, 107 N. C. 835. 12 S. E. 569.

Same—Tenant at Sufferance.—If a building is torn down by a landlord while it is in the possession of a tenant at sufferance an indictment under this section cannot be supported, for this section was intended to protect property which the tenant at sufferance has no interest in. State v. Mace, 65 N. C. 344.

Houses Erected Through Mistake.—One who peaceably enters upon lands believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under this section. State v. Reynolds, 95 N. C. 616.

School Houses Held by Adverse Possession.—If defendants are in the adverse possession of the schoolhouse and bona fide claiming it as their own, it is not a crime in them to pull it down. State v. Roseman, 66 N. C. 634, 635.

"Other Houses."—It is manifest that the words "other house or building," embrace a jail, a jail-house or building. State v. Bryan, 89 N. C. 531, 533.

Dynamiting a Crib.—An indictment will lie under this section for injury to a crib by an explosion of dynamite. See State v. Martin, 173 N. C. 808, 92 S. E. 597.

II. FENCES AROUND FIELDS.

Field Defined.—The ruling in State v. Allen, 35 N. C. 36, was cited and approved in State v. McMinn, 81 N. C. 585, in which case it was also held that the smallness of the tract made no difference; that a town lot, if inclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described. State v. Campbell, 133 N. C. 640, 642, 45 S. E. 344.

Cultivated Field Defined.—"Where a piece or tract of land has been cleared and fenced, and cultivated, or proposed to be cultivated and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a 'cultivated field' within the description of the statute." State v. McMinn, 81 N. C. 585, 588. State v. Allen, 35 N. C. 36.

Fence Must Enclose Something.—It is necessary under this section that the fence destroyed or injured surround or enclose something and a fence along a road to prevent passers-by from turning into the field to avoid mud in the road, when not connected with any other fence is not within the meaning of this section. See State v. Roberts, 101 N. C. 744, 7 S. E. 714.

Instruction That Pasture Is a Field.—Where in a criminal prosecution for the violation of this section providing that a person removing a fence surrounding "any yard, garden, cultivated field, or pasture" should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture, the words "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. State v. Cornett, 199 N. C. 634, 155 S. E. 451.

Title to Land No Defense.—It is well settled that where the state, in an indictment under this section, for unlawfully and wilfully removing a fence, shows actual possession in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence was situated. State v. Campbell, 133 N. C. 640, 45 S. E. 344; State v. Fender, 125 N. C. 649, 34 S. E. 448; State v. Haves, 76 N. C. 117; State v. Howell, 107 N. C 835, 12 S. E. 569; State v. Marsh, 91 N. C. 632; State v. Graham, 53 N. C. 397; State v. Taylor, 172 N. C. 892, 90 S. E. 294, 295.

Question of Title Cannot Be Raised.—Where a party has neither possession, nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defence to him that he did the act to bring on a civil suit in order to try the title. State v. Graham, 53 N. C. 397.

Agency No Defence. — Under an indictment for tearing down a fence the defendant cannot avoid liability by showing that he acted as agent for another. State v. Campbell, 133 N. C. 640, 45 S. E. 344.

Destroying Fence When Line Is in Dispute—Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. State v. Fender, 125 N. C. 649, 34 S. E. 448; State v. Watson, 86 N. C. 626. Nor is a quasi tenant occupying by the consent of the owner subject to prosecution under this section for the removal of a fence. State v. Williams, 44 N. C. 197.

Right to Reclaim Fence.—Although rails of which a fence around an enclosure is made were taken from the land of another no right to go on the land and remove the fence exists in favor of the person from whom the rails were taken as the fence is a part of the realty, and such a trespass comes within the meaning of this section. State v. McMinn, 81 N. C. 585.

Applicable to Wire Fences.—An indictment for cutting and destroying a wire fence may be maintained under this section if it charges that the wire fence was an enclosure. State v. Biggers, 108 N. C. 760, 12 S. E. 1024.

Defective Bill of Indictment.—A motion in arrest of judgment after conviction for a removal of fences on the ground that the bill of indictment is defective, will not be granted, unless it appears that the bill is so defective that judgment cannot be pronounced upon it. State v. Taylor, 172 N. C. 892, 90 S. E. 294, 295.

Fences Across a Street Removed by Officer. — A fence erected across a public street is a public nuisance, and a city marshall will not be liable for abating the nuisance by pulling it down. State v. Godwin, 145 N. C. 461, 59 S. E. 132.

§ 4317(a). Unlawful posting of advertisements.—Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile building, or other object, which

is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, mile-stone, danger-sign, danger-signal, guide-sign, guide-post, automobile building or other object within the limits of a public highway, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50) or imprisoned not exceeding thirty (30) days. (1924, c. 109.)

Editor's Note.—It was suggested in 3 N. C. Law Rev. 25 that the first part of this section seems to apply to posting adds anywhere on private property, while the last part applies to those posted within the limits of the public highway.

§ 4318. Injuring bridges.—If any person shall unlawfully and willfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the state, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court. (Rev., s. 3771; Code, s. 993; 1883, c. 271.)

§ 4319. Removing, altering or defacing landmarks.—If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested. (Rev., s. 3674; Code, s. 1063; 1858-9, c. 17; 1915, c. 248.)

Removal of Stakes.—As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. State v. Jenkins, 164 N. C. 527, 529, 80 S. E. 231.

Indictment Must Aver.—An indictment charging that one A. B., with force and arms, etc., willfully and unlawfully did alter, deface and remove a corner tree, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the proviso to the act creating the offense. State v. Bryant, 111 N. C. 693, 16 S. E. 326.

§ 4320. Removing or defacing monuments and tombstones.—If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully and on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor. (Rev., s. 3680; Code, s. 1088; R. C., c. 34, s. 102; 1840, c. 6.)

See notes to section 4322.

Right of Landowner to Remove.—Where the owner of land consents, either expressly or by implication to the interment of dead bodies on his land, he has no right to afterwards remove the bodies or to deface or pull down the gravestones and monuments erected to perpetuate their money. State v. Wilson, 94 N. C. 1015.

Indictment.—It is not necessary, to charge in the indictment that the monument removed was intended to designate the spot where the dead body of a particular person named, or a person unknown, was interred. State v. Wilson, 94 N. C. 1015.

It is not necessary to charge in terms that the dead body was that of a dead person. State v. Wilson, 94 N. C. 1015.

§ 4321. Interfering with graveyards.—If any person shall unlawfully take away any stone, brick, iron or other material that encloses private graveyards, or shall cut or keep open any ditch or drainway, or put any permanent log or other obstruction not intended as a monument to a grave in such graveyards, or knowingly plow over and tear up any grave, or shall remove or change the location of any fence around such graveyard without the consent of such person or persons as may have parents, children or brothers or sisters buried therein, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than ten dollars or imprisoned not more than thirty days. (Rev., s. 3681; 1889, c. 130; 1919, c. 218.)

§ 4322. Disturbing graves.—If any person shall, without due process of law, or the consent of the surviving husband or wife or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3672; 1885, c. 90.)

Intent.—The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. State v. McLean, 121 N. C. 589, 28 S. E. 140.

Persons Liable.—The mayor or other town officers counseling their subordinates that they have a right to remove bodies makes them liable under this section. State v. McLean, 121 N. C. 589, 28 S. E. 140.

When Lot Is Not Paid for.—The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. State v. McLean, 121 N. C. 589, 28 S. E. 140.

§ 4323. Interfering with gas, electric and steam appliances.—If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subsections, he shall be guilty of a misdemeanor:

1. Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

2. Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

3. In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

4. Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stop-cock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifice or mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stop-cock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers or to interfere with the valves, stop-cocks, wires or other appliances of such, as the case may be; or,

5. Retain possession of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

6. Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gate-boxes, valves, stop-cocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

7. Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district stream corporation; or,

8. Turn on steam or cause it to be turned on or to reënter any premises when the same has been lawfully stopped from entering such premises. (Rev., s. 3666; 1901, c. 735.)

§ 4324. Injuring fixtures and other property of gas companies; civil liability.—If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury. (Rev., s. 3671; 1889 (Pr.), c. 35, s. 3.)

§ 4325. Tampering with engines and boilers.—If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor. (Rev., s. 3667; 1901, c. 733.)

Cited in State v. Hargett, 196 N. C. 692, 693, 146 S. E. 801.

§ 4326. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.—If any person shall willfully injure, destroy or pull down any telegraph, telephone or electric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court. (Rev., s. 3847; Code, s. 1118; 1881, c. 4; 1883, c. 103; 1907, c. 827, s. 1.)

§ 4327. Making unauthorized connections with telephone and telegraph wires.—It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this state, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days for each offense. Each day's continuance of such unlawful connection shall be separate offense. (1911, c. 113.)

§ 4328. Injuring fixtures and other property of electric-power companies.—It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court. (1907, c. 919.)

§ 4329. Felling trees on telephone and electric-power wires.—If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to penalty of fifty dollars for each and every offense. (Rev., s. 3849; 1903, c. 616; 1907, c. 827, s. 2.)

§ 4330. Interfering with telephone lines.—If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of a telephone line, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned for a term not exceeding two years, in the discretion of the court. (Rev., s. 3845; 1901, c. 318.)

Civil Action for Damages.—The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by this section, and where such act has caused damages to another the action sounds in tort, making the tort feasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. Hodges v. Virginia-Carolina R. Co., 179 N. C. 566, 103 S. E. 145.

§ 4330(a). Trespass on engines, locomotives or cars.—It shall be unlawful for any person to ride, swing upon, or trespass in any way upon any locomotive, engine, derrick, loader, steam shovel, car, tram-car or any other rolling stock of any firm, corporation or individual, used or operated in the conduct of any manufacturing or transportation business, after verbal notice by the owner, manager or any person in charge thereof, except persons employed in the operation thereof, or duly authorized by the owner, manager or any person in charge of such engine, locomotive, car or other rolling stock; and any one so offending will be guilty of a misdemeanor and fined not to exceed fifty dollars ($50.00) or imprisoned not to exceed thirty days: Provided, that this section shall not apply except to Swain county. (1923, c. 213.)

Editor's Note.—The position is taken by the 1 N. C. Law Rev. 213, that this section partly duplicates section 3505 and that while this section may have some effect on questions of negligence, it will hardly be construed to prevent recovery by the trespasser for injury occurring to him where the trespass is not the proximate cause of the injury.

§ 4330(b). Injuring buildings or fences; taking possession of house without consent.—If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1929, c. 192, s. 1.)

Art. 23. Trespasses to Personal Property

§ 4331. Malicious injury to personal property.—If any person shall wantonly and willfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3676; Code, s. 1082; 1885, c. 53; 1876-7, c. 18.)

As to definition of personal property, see section 3949, par. 6.

Things That Are Personalty.—A promissory note or due bill being an "evidence of debt" is personal property within the meaning of this section and section 3949, par. 6. State v. Sneed, 121 N. C. 614, 28 S. E. 365.

An electric street car is personalty and not a fixture. State v. Sneed, 121 N. C. 614, 28 S. E. 365.

Malice Not Necessary.—It is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and willfully injures it nor is it material whether the property was destroyed or not. State v. Sneed, 121 N. C. 614, 28 S. E. 365.

"Wantonly and Wilfully" Necessary.—An indictment for injury to personal property, under this section, which charged that the act was "wantonly and wilfully" done, was not defective because it did not aver the act to have been unlawfully perpetrated. Lawful acts are not done wantonly and wilfully. State v. Martin, 107 N. C. 904, 12 S. E. 194.

But an indictment cannot be sustained under this section if there is neither an allegation or finding that the injury was "wilfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. State v. Tweedy, 115 N. C. 704, 20 S. E. 183.

Malicious Mischief at Common Law.—This section was not intended to supersede the common law as to malicious mischief, and though malice must be charged at common law it is not necessary under this section. State v. Martin, 141 N. C. 832, 53 S. E. 874.

No Accessories.—As there are no accessories in misdemeanors the offence under this section may be committed jointly by several persons, one doing the act the others aiding and abetting or participating. State v. Martin, 141 N. C. 832, 53 S. E. 874.

Destroying Whisky.—The mere possession of whisky gives no title; and a revenue officer who seizes a barrel concealed on private premises, and in good faith destroys it, is not guilty of a misdemeanor under this section. North Carolina v. Vanderford, 35 Fed. 282.

Conviction under This Section in Place of Section 4335(a).—Where there is an erroneous conviction under this section, when the indictment should have been drawn under section 4335(a), et seq., the prisoner should be discharged with permission to the solicitor to send another bill, is so advised. State v. Reed, 196 N. C. 357, 145 S. E. 691.

§ 4332. Malicious removal of packing from railway coaches and other rolling stock.—If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, car, caboose or truck used or operated upon any railroad whether the same be operated by steam or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or state's prison, in the discretion of the court. (Rev., s. 3759; 1905, c. 335.)

§ 4333. Removing boats or their fixtures and appliances.—If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same, any boat, canoe, pettiaugua, oars, paddles, sails or tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such property, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (Rev., s. 3544; Code, s. 2288; 1889, c. 378; R. C., c. 14, ss. 1, 3.)

§ 4334. Injuring livestock not inclosed by lawful fence.—If any person shall willfully and unlawfully kill or abuse any horse, mule, hog, sheep

or other cattle, the property of another, in any enclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court. (Rev., s. 3313; Code, s. 1003; 1868-9, c. 253.)

At Common Law.—Wounding of cattle maliciously is not an indictable offense at common law. State v. Manuel, 72 N. C. 201.

Purpose of Section.—The obvious purpose of the statute is to prohibit and prevent every person from unlawfully and willfully killing and abusing live-stock of another, that may get into and trespass upon inclosures not surrounded and protected by a lawful fence, while so trespassing. This is the mischief to be suppressed. State v. Godfrey, 97 N. C. 507, 508, 1 S. E. 779.

Offence May Be Completed Elsewhere.—In order to complete the offense of injury to live-stock, it is not necessary that the offense should be consummated within the inclosure not surrounded by a lawful fence, for if it is begun therein and completed outside of such inclosure, the offence is complete. State v. Godfrey, 97 N. C. 507, 1 S. E. 779.

Cattle Defined.—The word "cattle" has a restricted sense which applies only to the bovine species, and also a broader meaning which includes all domestic animals. That it is used in this section in the latter and broader sense is apparent from the context, "horse, mule, hog, sheep or other cattle." State v. Groves, 119 N. C. 822, 823, 25 S. E. 819.

Injuries in Enclosed Fields.—A person is not liable under this section for injuring stock within his own field which is enclosed and under cultivation. State v. Waters, 51 N. C. 276.

Indictment Must Charge. — An indictment for injuring stock under this section must charge that the cattle abused or killed were property of some one, the abusing or killing must be charged to have been willfully and unlawfully done, and while the animal was in an enclosure not surrounded by a lawful fence. State v. Deal, 92 N. C. 802. State v. Simpson, 73 N. C. 269.

An indictment charging an offence under this section but not setting out who owned the inclosure, although not encouraged because of its looseness, is sufficient. State v. Allen, 69 N. C. 23; State v. Painter, 70 N. C. 70.

"The Field" Is Too General.—An indictment which simply charges the injury, etc., to have been committed on stock in "the field" is not certain to that extent required in such pleading. State v. Staton, 66 N. C. 640.

§ 4335. Taking away or injuring exhibits at fairs.—If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition. (Rev., s. 3668; Code, s. 2796; 1870-1, c. 184, s. 4.)

As to fraudulent entries at fairs, see section 4289.

Art. 23A. Vehicles and Draft Animals.—Protection of Bailor against Acts of Bailee

§ 4335(a). Malicious injury and hired property defined.—Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, for temporary use, who shall maliciously or wilfully injure or damage the same by in any way using or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of a misdemeanor and subject to punishment as hereinafter provided. (1927, c. 61, s. 1.)

See note under § 4331.

§ 4335(b). Sub-letting of hired property.—Any person who shall rent or hire, for temporary use, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sub-let or rent the same to any other person, firm or corporation, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 2.)

§ 4335(c). Failure to return hired property.—Any person who shall rent or hire, for temporary use, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, and who shall wilfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for which such property has been rented or hired, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 3.)

§ 4335(d). Hiring with intent to defraud.—Any person who shall, with intent to cheat and defraud the owner thereof of the rental price therefor, hire or rent for temporary use any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 4.)

§ 4335(e). Violation.—Any person violating the provisions of this act shall be guilty of a misdemeanor and punished at the discretion of the Court. (1927, c. 61, s. 5; 1929, c. 38, s. 1.)

Editor's Note.—Prior to the amendment of 1929 this section provided for a maximum fine of fifty dollars and a maximum jail sentence of thirty days. By section two of the amendment it is expressly provided that the Act shall not have a retroactive effect.

Art. 23B. Regulating the Leasing of Storage Batteries

§ 4335(f). "Rental battery" defined; identification of rental storage batteries.—As used in this article the words "rental battery" are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such rental batteries belonging to them with the word "rental," or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation. (1933, c. 185, s. 1.)

§ 4335(g). Defacing word "rental" prohibited.—It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word "rental" on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify

the same as belonging to or being the property of any person, firm or corporation. (1933, c. 185, s. 2.)

§ 4335(h). Sale, etc., of rental battery prohibited. — It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner as provided by section 4335(f). (1933, c. 185, s. 3.)

§ 4335(i). Repairing another's rental battery prohibited.—It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner thereof as provided by section 4335(f). (1933, c. 185, s. 4.)

§ 4335(j). Time limit on possession of rental battery without written consent.—It is unlawful for any person, firm or corporation to retain in his, their or its possession for a longer period than ten (10) days, without the written consent of the owner, any rental battery marked as such by the owner as provided by section one of this article. Demand must be made on any person who so retains a rental battery in his possession at least five days before a prosecution can be instituted: Provided, however, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand. (1933, c. 185, s. 5.)

§ 4335(k). Violation made misdemeanor.—Any person, firm or corporation, and the officers, agents, employees, and members of any firm or corporation violating any of the provisions of sections 4335(f)-4335(j) shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding fifty dollars or be imprisoned for a term of not exceeding thirty days in the discretion of the court. (1933, c. 185, s. 6.)

§ 4335(l). Rebuilding storage batteries out of old parts and sale of, regulated.—Any person, firm or corporation who assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of second-hand or used material such as containers, separators, plates, groups or other battery parts, and sells same or offers same for sale in the state of North Carolina without the word "rebuilt" placed in the side of the container, shall be guilty of a midemeanor and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars or imprisoned for a term not exceeding six months or both. (1933, c. 535.)

SUBCHAPTER 8. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

Art. 24. Offenses against Public Morality and Decency

§ 4336. Crime against nature.—If any person shall commit the abominable and detestable crime, against nature, with mankind or beast, he shall be imprisoned in the state's prison not less than five nor more than sixty years. (Rev., s. 3349; Code, s. 1010; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; 5 Eliz., 17; 25 Hen. VIII, c. 6.)

Scope of Section.—This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Griffin, 175 N. C. 767, 769, 94 S. E. 678. It includes unnatural intercourse between male and male. State v. Fenner, 166 N. C. 247, 80 S. E. 970.

Conviction for Attempt.—Upon the trial of an indictment for the crime against nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. State v. Savage, 161 N. C. 245, 246, 76 S. E. 238.

§ 4337. Incest between certain near relatives.—In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the state's prison for a term not exceeding fifteen years, in the discretion of the court. (Rev., s. 3351; Code, s. 1060; 1879, c. 16, s. 1; 1911, c. 16.)

In General.—Incest was not indictable at common law. State v. Sauls, 190 N. C. 810, 811, 130 S. E. 848, and cases cited. The amendment of 1911 increasing the punishment was held not retroactive. State v. Broadway, 157 N. C. 598, 72 S. E. 987.

Carnal intercourse by the father with his illegitimate daughter constitutes the offense. State v. Lawrence, 95 N. C. 659. Both parties are not necessarily guilty (W. C. fraud and force against female). Strider v. Lewey, 176 N. C. 448, 97 S. E. 398.

Evidence.—Confessions of the wife to the husband are not admissible in a trial for incest. State v. Brittain, 117 N. C. 783, 23 S. E. 433. But proof of other similar acts is competent in corroboration. State v. Broadway, 157 N. C. 598, 72 S. E. 987.

Failure to Charge "Carnal" Knowledge.—The mere fact that indictment failed to charge "carnal" knowledge, is not a fatal defect that would sustain the defendant's motion to quash the indictment. State v. Sauls, 190 N. C. 810, 130 S. E. 848.

§ 4338. Incest between uncle and niece and nephew and aunt.—In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, in the discretion of the court. (Rev., s. 3352; Code, s. 1061; 1879, c. 16, s. 2.)

With Daughter of Half Sister.—It has been held under this section that carnal intercourse of a man with the daughter of his half sister is incest. State v. Harris, 149 N. C. 513, 62 S. E. 1090.

§ 4339. Seduction.—If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the state prison not exceeding the term of five years: Provided, the unsupported testimony of the woman shall not be sufficient to convict: Provided further, that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of nolo contendere, and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same. (Rev., s. 3354; 1885, c. 248; 1917, c. 39.)

For full treatment of this subject, see 11 N. C. Enc. Dig. 161 et seq.

Who May Be Convicted.—A male, at the marriageable age of 18 years, is indictable for seduction under this section. State v. Creed, 171 N. C. 837, 88 S. E. 511.

Distinguishing Civil and Criminal Action.—It is only nec-

essary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under this section, that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. Hardin v. Davis, 183 N. C. 46, 110 S. E. 602.

Three Elements of Offense.—To convict the defendant of seduction, it is incumbent upon the state to satisfy the jury beyond a reasonable doubt of every element essential to the offense. The three elements are: (1) The innocence and virtue of the prosecutrix; (2) the promise of marriage; and (3) the carnal intercourse induced by such promise. State v. Crook, 189 N. C. 545, 127 S. E. 579. State v. Pace, 159 N. C. 462, 74 S. E. 1018. If any one of these elements is lacking there can be no seduction. State v. Ferguson, 107 N. C. 841, 848, 12 S. E. 574. See also State v. McDade, 208 N. C. 197, 179 S. E. 755.

Deceit is the very essence of this offence, the warp and woof of it, so to speak. State v. Crowell, 116 N. C. 1052, 1053, 1057, 21 S. E. 502. The promise of marriage alone makes the seduction criminal. State v. Whitley, 141 N. C. 823, 824, 53 S. E. 820. Consent is no defense. State v. Horton, 100 N. C. 443, 6 S. E 238.

Meaning of "Innocent and Virtuous."—Should any woman committing the act of adultery induced by her own lascivious desires, with or without the promise, her conduct is not such as to bring her within the intent and meaning of this section as an innocent and virtuous woman. State v. Johnson, 182 N. C. 883, 109 S. E. 786. See State v. Crowell, 116 N. C. 1052, 1058, 21 S. E. 502; State v. Ferguson, 107 N. C. 841, 12 S. E. 574.

Permitting familiarities not amounting to incontinence may be considered by the jury in determining whether the prosecutrix was virtuous. State v. Whitley, 141 N. C. 823, 53 S. E. 820. But when permitted by the prosecutrix after the act they do not negative evidence that she was innocent and virtuous prior thereto, though they may be properly considered by the jury with reference to the weight of her evidence. State v. Lang, 171 N. C. 778, 87 S. E. 957.

Sexual intercourse by a widow with her husband prior to marriage would not prevent the defendant from being guilty under this section. State v. Johnson, 182 N. C. 883, 109 S. E. 786.

Promise of Marriage Must Be Unconditional. — In order for conviction under this section, the promise of marriage must be absolute and unconditional, and a promise at the time to marry the woman in the event "anything should happen to her," is insufficient for a conviction under the statute. State v. Shatley, 201 N. C. 83, 159 S. E. 362.

Testimony of Woman Must Be Corroborated as to Each Element.—The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This proviso has been construed to mean that the prosecutrix must be supported by independent facts and circumstances as to each element of the offense. State v. Crook, 189 N. C. 545, 127 S. E. 579. See also, State v. Maness, 192 N. C. 708, 135 S. E. 777.

For cases setting out facts held either sufficient or insufficient to support, see State v. Cooke, 176 N. C. 731, 97 S. E. 171; State v. Raynor, 145 N. C. 472, 59 S. E. 344; State v. Malonee, 154 N. C. 200, 69 S. E. 786; State v. Pace, 159 N. C. 462, 74 S. E. 1018.

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under this section, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be. State v. Doss, 188 N. C. 214, 124 S. E. 156.

The proviso that "the unsupported testimony of the woman shall not be sufficient to convict" is fully met where the testimony of the prosecutrix was corroborated in respect to each essential element of the offense charged; as to the promise of marriage by evidence of the proscutrix' statements to others, and by the witness who "heard them talking," and by the further circumstance of the long and constant association of the defendant with the prosecutrix; as to her innocence and virtue by the evidence of her good character; and as to the intercourse by the admission of the defendant. State v. Tuttle, 207 N. C. 649, 650, 178 S. E. 76.

Resemblance of Child to Defendant.—It is not error to permit a child to be exhibited to the jury that they may trace a resemblance to one charged with having begotten it; and such evidence is admissible on an indictment for seduction. State v. Horton, 100 N. C. 443, 6 S. E. 238.

Effect of Marriage upon Consent Judgment.—Where, in a prosecution for seduction a consent judgment is entered requiring the defendant to pay a certain sum to the prosecutrix, a subsequent marriage of the parties before the whole sum is paid does not discharge the judgment, the consent of all parties being necessary to set aside such judgment. For the defendant to get the benefit of this section the marriage must be before he is adjudged guilty. State v. McKay, 202 N. C. 470, 163 S. E. 586.

Indictments—No Set Form of Words.—In the trial of an indictment for seduction under this section, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse. State v. Malonee, 154 N. C 200, 69 S. E. 786.

Limitation of Action.—Deceit being the very essence of the offense of seduction, section 4512 exempting certain crimes, including deceit, from the two years statute of limitations, applies to the offense of seduction under promise of marriage. State v. Crowell, 116 N. C. 1052, 21 S. E. 502.

Punishment.—This section, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment. State v. Crowell, 116 N. C. 1052, 1053, 21 S. E. 502.

Cited in State v. Wade, 197 N. C. 571, 150 S. E. 32.

§ 4340. Miscegenation.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court. (Rev., s. 3369; Code, s. 1084; Const., Art. XIV, s. 8; R. C., c. 68, s. 7; 1834, c. 24; 1838-9, c. 24.)

Editor's Note.—Under the act of 1838-9, ch. 24, declaring void all marriages between white persons and free negroes and persons of color, all marriages between white persons and Indians were void, if within the third degree, and any violation thereof was punishable by indictment for fornication. State v. Melton, 44 N. C. 49.

The law has not been affected by the changes in the State or Federal Constitution. See State v. Puitt, 94 N. C. 709, 718, and cases there cited.

Domicile in This State.—A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in this State, and who leave it for the purpose of evading this law and with intent to return, is not valid in this State. State v. Kennedy, 76 N. C. 251; State v. Ross, 76 N. C. 242.

Domicile in Another State.—A marriage solemnized in a State whose laws permits such marriage between a negro and a white person domiciled in such State is valid in this State. State v. Ross, 76 N. C. 242.

Evidence.—It was not error to admit evidence that the wife was reputed to be of mixed blood within the prohibited degrees, or to permit the witness to state his opinion on that point, although not an expert. It was also competent to corroboration of other evidence tending to show the taint of blood, to show that the wife usually associated with colored people. Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1.

Cited in Corporation Commission v. Transportation Committee, 198 N. C. 317, 323, 151 S. E. 648.

§ 4341. Issuing license for marriage between white person and negro; performing marriage ceremony.—If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor. (Rev., s. 3370; Code, s. 1085; R. C., c. 34, s. 80; 1830, c. 4, s. 2.)

§ 4342. Bigamy.—If any person, being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more

than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (Rev., s. 3361; Code, s. 988; R. C., c. 34, s. 15; 1790, c. 323; 1809, c. 783; 1829, c. 9; 1913, c. 26. See 9 Geo. IV, c. 31, s. 22.)

Editor's Note.—At common law, the second marriage was always void and from the earliest history of England polygamy has been treated as an offense against society. It is considered as a crime against the marital relation rather than against the wife. Bigamy and polygamy are likewise crimes by the laws of all civilized and Christian countries.

Mr. Chief Justice Waite said: "From that day (the date of the enactment of the bigamy statute in Virginia, 12 Hening's Stat. 691), to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." Reynolds v. United States, 98 U. S. 145, 165, 25 L. Ed. 244.

In State v. Cutshall, 110 N. C. 538, 545, 15 S. E. 261, it is said: "If every State of the American Union would enact a statute identical in its terms with The Code, sec. 988 (similar to this section), the enforcement of these laws might lead to just such a series of prosecutions as the learned jurist seemed to consider so absurd, outrageous and palpable a violation of a fundamental right asserted in our own national Magna Carta, the Declaration of Independence."

Constitutes a Felony.—While at common law bigamy was not an indictable offense, and even as late as the enactment of 1885, it was only a misdemeanor; it is now a felony under this statute. State v. Burns, 90 N. C. 707.

Necessity of Valid Marriage.—That the first marriage was celebrated without procurement of a license, while subjecting the parties to punishment, will not so invalidate the marriage so that bigamy cannot be predicated thereon. State v. Robbins, 28 N. C. 23.

In a trial for bigamy, an instruction that defendant could not be convicted, unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a de facto officer. State v. Davis, 109 N. C. 780, 14 S. E. 55.

The evidence showing that there were a number of eyewitnesses to the marriage, and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Belief That First Wife Is Dead.—A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Absence of Wife.—"The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living." State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Admissions as to Prior Marriage.—In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Where a defendant charged with bigamy, upon the preliminary examination before a Justice of Peace, and after being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the superior court, as to his guilt. State v. Melton, 120 N. C. 591, 26 S. E. 933.

Testimony of First Wife.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage. State v. Melton, 120 N. C. 591, 26 S. E. 933.

The record book of marriage for the county or the original marriage license signed by the Justice solemnizing the marriage is admissible to prove a marriage. State v. Melton, 120 N. C. 591, 26 S. E. 933.

Second Marriage out of State.—It was held formerly that the courts of this State could not take jurisdiction of the case where the second marriage took place out of the State. See State v. Barnett, 83 N. C. 615, 616. Subsequent to this decision a clause was inserted in the section in furtherance of a purpose to make the offense cognizable "whether the second marriage shall have taken place in the State of North Carolina, or elsewhere." This clause, in State v. Cutshall, 110 N. C. 538, 15 S. E. 261, was held unconstitutional insofar as it attempted to make a second marriage bigamous which occurred out of the State without proving that the parties afterwards cohabited in North Carolina. The constitutionality of the section was upheld in State v. Long, 143 N. C. 670, 671, 57 S. E. 349, but from the statement of facts in that case it appears that while the second marriage took place in South Carolina the parties subjected themselves to the jurisdiction of this State by living here for four weeks thereafter. In State v. Ray, 151 N. C. 710, 66 S. E. 204, the authorities are reviewed and it is held (Clark, C. J., dissenting) that the words "or elsewhere," in the clause just quoted, were void. In recognition of these decisions the legislature, by the Public Laws of 1913, c. 26, amended the section and added the words "shall thereafter cohabit with such person in this State," which qualify and constitute a requisite to the jurisdiction when the second marriage is not in North Carolina. It has been held that this amendment is constitutional and does not confer extraterritorial jurisdiction upon the courts. See State v. Herron, 175 N. C. 754, 94 S. E. 698; State v. Moon, 178 N. C. 715, 100 S. E. 614.

Same—Pleading and Proof.—If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the state, he can not move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. State v. Barrington, 141 N. C. 820, 53 S. E. 663; State v. Burton, 138 N. C. 575, 576, 50 S. E. 214; State v. Mitchell, 83 N. C. 674; State v. Long, 143 N. C. 670, 671, 674, 57 S. E. 349.

Foreign Divorces.—Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient residence in such other State, with supporting evidence, the defendant must satisfy the jury of the bona fide of his residence for the required time, but not beyond a reasonable doubt. State v. Herron, 175 N. C. 574, 94 S. E. 698.

Proof of a divorce granted in another State, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions. State v. Herron, 175 N. C. 754, 94 S. E. 698.

The Indictment.—An indictment for bigamy which charges that defendant "wilfully, unlawfully and feloniously, being a married man, did marry one W. during the life of his first wife," sufficiently avers the first marriage. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Same—Name of First Wife.—It it not necessary, in an indictment for bigamy, to set out the name of the first wife. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Same—Negativing Divorce Unnecessary.—It was not necessary that an indictment for bigamy should contain an averment that the defendant had not been divorced from his wife. State v. Norman, 13 N. C. 222; State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. Melton, 120 N. C. 591, 596, 26 S. E. 933.

Same—Time and Place of Marriage.—This section does not by its language make it necessary for the indictment to state the dates of the marriages, and section 4625 expressly enacts that such a statement shall not be necessary. State v. Long, 143 N. C. 671, 57 S. E. 349.

Under this section it is unnecessary to state where the second marriage took place, and it is not necessary that the offense should be committed in the county where the bill is found, to confer jurisdiction, and the proper remedy,

where permissible, is by plea in abatement. State v. Long, 143 N. C. 671, 57 S. E. 349.

Bill of Particulars.—As in other offenses a bill of particulars is necessary if defendant desires further information upon which to prepare his defense. State v. Long, 143 N. C. 671, 57 S. E. 349.

§ 4343. Fornication and adultery.—If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. (Rev., s. 3350; Code, s. 1041; R. C., c. 34, s. 45; 1805, c. 684.)

Cross Reference.—For a comprehensive treatment of the subject, see 1 N. C. Enc. Dig. 186 et seq.; 13 N. C. Enc. Dig. 31 et seq.

General Consideration.—Adultery is an aggravated species of fornication. State v. Crowell, 26 N. C. 231, 232. Fornication occurs upon cohabitation after miscegenation. See § 4340 and notes thereto.

The Indictment.—The use of the word "adulterously" dispenses with the necessity of alleging that the parties were not married (State v. McDuffie, 107 N. C. 885, 12 S. E. 83) and were of different sex. State v. Britt, 150 N. C. 811, 812, 62 S. E. 1056. The words "lewdly and lasciviously" need not be used. Id. The state is not called upon to allege or prove the criminal intent. State v. Cutshall, 109 N. C. 764, 14 S. E. 107. The fact that the female is erroneously alleged to be a "spinster" is not ground of arrest. State v. Guest, 100 N. C. 410, 6 S. E. 253. See further as to the indictment. 1 N. C. Enc. Dig. 188 et seq.

Evidence.—The admissions or confessions of one party are not to be received against the codefendant. State v. Rhinehart, 106 N. C. 787, 11 S. E. 512. However, it has been held that under certain circumstances such declarations are admissible when made by the female defendant in the presence of the male. See State v. Roberts, 188 N. C. 460, 124 S. E. 833.

It is competent to prove that either defendant had a living spouse. State v. Manly, 95 N. C. 661. Statements and conduct prior to the offense charged are admissible; State v. Austin, 108 N. C. 780, 13 S. E. 219, as is also testimony as to conduct of the parties after indictment. State v. Stubbs, 108 N. C. 774, 13 S. E. 90. For further consideration of the evidence, see 1 N. C. Enc. Dig. 190 et seq.

Acquittal as to One Party.—Where only one party is convicted and the other acquitted, there can be no judgment against the one convicted. State v. Mainor, 28 N. C. 340. This holding was followed in the case of State v. Lyerly, 52 N. C. 158, and was held as law in this state until doubted in the opinion of Mr. Justice Davis in State v. Rhinehart, 106 N. C. 787, 11 S. E. 512. The question came before the court again in State v. Cutchall, 109 N. C. 764, 14 S. E. 107, when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This seems to be the present status of the law on this point. It was followed in State v. Simpson, 133 N. C. 676, 45 S. E. 567.

Both Convicted—New Trial as to One.—Following a line of reasoning similar to that discussed in the foregoing paragraph, the court in State v. Parham, 50 N. C. 416, 417, held that if both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other.

General Verdict of Guilt.—While it is true that the offense (fornication and adultery) cannot be committed except by more than one, yet a general verdict of guilty finds the guilt of the woman as well as the guilt of the man (defendant in this case). State v. Lyerly, 52 N. C. 158, 161.

Punishment.—In fixing the punishment of persons convicted under this section, the courts have looked to the provisions of section 4173 which prescribes the punishment of misdemeanors for which a specific punishment has not been fixed.—Ed. Note.

Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. State v. Manly, 95 N. C. 61, 662, citing State v. McNeal, 75 N. C. 15; State v. Jackson, 82 N. C. 565.

The court has power, during the term, to correct or modify an unexecuted judgment in criminal as well as in civil actions. State v. Manly, 95 N. C. 661, 663. See also, In re Brittain, 93 N. C. 587.

§ 4344. Inducing female persons to enter hotels or boarding-houses for immoral purposes.—Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter a hotel, public inn or boarding-house for the purpose of prostitution or debauchery or for any other immoral purpose, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 1.)

§ 4345. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.—Any man and woman found occupying the same bedroom in any hotel, public inn or boarding-house, for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boarding-house, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 2.)

§ 4346. Permitting unmarried female under eighteen in house of prostitution.—Whoever, being the keeper of a house of prostitution, or assignation house, building, or premises in this state where prostitution, fornication or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building or premises, shall be guilty of a misdemeanor. (1919, c. 288; P. L. 1913, c. 761, s. 18.)

§ 4347. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.—On a prosecution in any court for keeping a disorderly house or bawdy-house, or permitting a house to be used as a bawdy-house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly or bawdy-house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy-house is also "keeper" thereof. (1907, c. 779.)

See the general treatment in 4 N. C. Enc. Dig. 816, et seq., 13 N. C. Enc. Dig. 761 et seq.

Constitutionality.—This section is constitutional. State v. Price, 175 N. C. 804, 95 S. E. 478.

Disorderly House Defined—Illustrations. — A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. State v. Wilson, 93 N. C. 608.

A few of the decided cases are given here in order that the counsel may have an idea as to what situations and conditions have been held to be included in the definition set out in the above paragraph.

The following have been held to constitute disorderly houses: A shop in which disorderly crowds assemble. State v. Robertson, 86 N. C. 628. A store in which persons collect and disturb the neighborhood. State v. Thornton, 44 N. C. 252.

The following have been held not to constitute disorderly houses: A private dwelling wherein an uproar was frequently raised but which disturbed few people. State v. Wright, 51 N. C. 25. The residence of an unchaste woman. State v. Evans, 27 N. C. 603.

Persons Leasing Premises as a "Keeper."—A person who leases a house knowing that it is to be used for disorderly and unlawful purposes is treated as a direct offender. State v. Boyd, 175 N. C. 791, 95 S. E. 161.

Powers of City Authorities.—The extent of the powers of the authorities of a municipality to enact ordinances concerning houses of ill-fame is discussed by Mr. Justice Avery in State v. Webber, 107 N. C. 962, 12 S. E. 598.

Evidence.—This section authorizes the admission of evidence tending to show the lewd, dissolute, and boisterous conversation of the inmates and frequenters of the house, and especially provides that evidence of the general reputation or character of the house shall be admissible and competent. State v. Hilderbran, 201 N. C. 780, 161 S. E. 488.

§ 4348. Obscene literature.—It shall be unlawful for any person, firm or corporation to exhibit for the purpose of gain, or display for sale, lend or hire, or otherwise publish or sell for the purpose of gain, or exhibit in any school, college, or other institution of learning, or have in his possession for the purpose of sale or distribution, any obscene literature, as determined and defined in the postal laws and regulations of the United States post office department, in the form of book, paper-writing, print, drawing, or other representation, at any newsstand, book store, drug store or other public or private places; or if any person shall post any indecent placards, writings, pictures or drawings on walls, fences, billboards or other public or private places, he shall be guilty of a misdemeanor. (Rev., s. 3731; 1885, c. 125; 1907, c. 502; 1935, c. 57.)

Editor's Note.—The amendment of 1935 made many changes in this section and a comparison is necessary to determine its full extent. Prior to the amendment, the section also covered the offense of indecent exposure. This is now the subject of section 4348(a).

Test of Immorality.—It has been suggested that the test of immorality is whether the literature "has a tendency to shock the moral sense of the average, normal head of a family." If such a test would prevent the publication of writings of an educational value on sex hygiene, commercialized vice and the like, the remedy would be a matter for the legislature, since the Constitution only prevents restrictions upon, and not enlargement of, the right to publish. 4 N. C. Law Rev. 33.

§ 4348(a). Indecent exposure; immoral shows, etc.—If a person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so as to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor. (Rev., s. 3731; 1885, c. 125; 1907, c. 502; 1935, c. 57.)

§ 4348(b). Sheriffs and deputies to report violations of two preceding sections.—It shall be the duty of the sheriffs and their deputies of the various counties to see that the provisions of sections 4348 and 4348(a) are enforced by reporting violations of said sections to the presiding judge of a superior court, county or municipal court, or justice of the peace, who shall have warrants issued to cause such violators to come before their courts for immediate trial. (1935, c. 57.)

Editor's Note.—The case treated under this section was decided under section 4348 as it read prior to the 1935 amendment. Prior to the enactment of this section there was no provision providing for the enforcement of section 4348.

Powers of Officers.—Under section 4348 it was held that the chief of police and his lawful officers or subordinates had the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public were invited and, in the proper discharge of these duties they could act immediately whenever such exhibitions were taking place in their presence or were imminent and their interference was required to prevent them. Brewer v. Wynne, 163 N. C. 319, 79 S. E. 629.

§ 4349. Cutting or painting obscene words or pictures near public places.—It shall be unlawful for any person to write, cut or carve any indecent word, or to paint, cut or carve any obscene or lewd picture or representation, on any tree or other object near the public highways or other public places. Any person guilty of violating this section shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (1907, c. 344.)

§ 4349(a). Exhibition of sacrilegious, obscene, or immoral pictures; posting of advertisements.—If any person, firm, or corporation shall, for the purpose of gain or otherwise, exhibit any obscene or immoral motion pictures; or if any person, firm or corporation shall post any obscene or immoral placard, writings, pictures, or drawings on walls, fences, billboards, or other places, advertising theatrical exhibitions or moving picture exhibitions or shows; or if any person, firm, or corporation shall permit such obscene or immoral exhibitions to be conducted in any tent, booth, or other place or building owned or controlled by said person, firm, or corporation, the person, firm, or corporation performing either one or all of the said acts shall be guilty of a misdemeanor, and punishable in the discretion of the court. For the purpose of enforcing this statute any spectator at the exhibition of an obscene or immoral moving picture may make the necessary affidavit upon which the warrant for said offense is issued. (1921, c. 212.)

§ 4349(b). Circulating publications barred from the mails.—It shall be unlawful for any news agent, news dealer, book-seller, or any other person, firm, or corporation to offer for sale, sell, or cause to be circulated within the State of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

It shall be unlawful for any person, firm, or corporation to offer for sale, sell or give to any person under the age of twenty-one years any such magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

This section shall not be construed to in any way conflict with or abridge the freedom of the press, and shall in no way affect any publication which is permitted to be sent through the United States mails.

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. (1924, c. 45.)

Editor's Note.—A practical criticism of the effect of this section upon the freedom of the press will be found in 4 N. C. Law Rev. 35. See also the review in 3 N. C. Law Rev. 26.

§ 4350. Using profane or indecent language on passenger trains.—It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 470, ss. 1, 2.)

§ 4351. Using profane or indecent language to female telephone operators.— It shall be unlawful for any person to use any lewd or profane words, or any words of vulgarity, or to use indecent language to any female telephone operator operating any telephone, switchboard, circuit or line. Any person violating this section shall upon conviction be guilty of a misdemeanor. (1913, c. 35; 1915, c. 41.)

§ 4352. Local: Using profane or indecent language on public highways.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempted from the provisions of this section: Dare, Tyrell, Washington, Beaufort, Martin, Pitt, Wautauga, Cleveland, Brunswick, Stanly, Perquimans, Pasquotank, Camden, Swain, Davie, Orange, Jones, Transylvania, Macon and Craven. (1913, c. 40; 1933, c. 309.)

Editor's Note.—Public Laws of 1933, c. 309, omitted Gates from the list of excepted counties.

§ 4353. Lewd women within three miles of colleges and boarding-schools.—If any loose woman or woman of ill-fame shall commit any act of lewdness with or in the presence of any student who is under twenty-one years old, of any boarding-school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months. (Rev., s. 3353; 1889, c. 523.)

§ 4354. Obstructing way to places of public worship.—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3776; Code, s. 3669; R. C., c. 97, s. 5; 1785, c. 241.)

Cross References.—As to procedure for laying out church roads, see section 3838. As to obstruction of such highway see section 3789 and the notes thereto.

§ 4355. Disturbing religious assembly by certain exhibitions.—If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exihibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there exhibit them, he shall forfeit and pay to any one who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. This section shall not apply to Hatteras township in Dare county. (Rev., s. 3705; Code, s. 3670; R. C., c. 97, s. 6; 1809, c. 779, s. 1; 1907, c. 412.)

§ 4356. Permitting stone-horses and stone-mules to run at large.—If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall not apply to Hatteras township in Dare county. (Rev., s. 3323; Code, s. 2325; R. C., c. 17, s. 6; 1907, c. 412.)

§ 4356(a). Secretly peeping into room occupied by woman.—Any person who shall peep secretly into any room occupied by a woman shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 78.)

Editor's Note.—It was suggested in 1 N. C. Law Rev. 286 that although this law is made to apply generally to all persons, it is believed that it will not interfere with police officers or detectives who may be compelled to violate the letter of the law to get evidence.

Art. 25. Prostitution

§ 4357. Definition of terms.—The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term "assignation" shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement (1919, c. 215, s. 2.)

Cited in State v. Fletcher, 199 N. C. 815, 155 S. E. 927.

§ 4358. Prostitution and various acts abetting prostitution unlawful.—It shall be unlawful:

1. To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

2. To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

3. To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

4. To direct, take, or transport, or to offer to agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

5. To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

6. To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any

conveyance, for the purpose of prostitution or assignation.

7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever. (1919, c. 215, s. 1.)

Competency of Evidence.—Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. State v. Waggoner, 207 N. C. 306, 176 S. E. 566.

Cited in State v. Fletcher, 199 N. C. 815, 155 S. E. 927.

§ 4359. Prosecution: in what courts.—Prosecutions for the violation of any of the provisions of this article shall be tried in the courts of this state wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the constitution of this state that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6.)

§ 4360. Reputation and prior conviction admissible as evidence.—In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3.)

§ 4361. Degrees of guilt.—Any person who shall be found to have committed two or more violations of any of the provisions of section 4358 of this article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4.)

Province of Judge.—When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. State v. Barnes, 122 N. C. 1031, 29 S. E. 381; State v. Lee, 192 N. C. 225, 134 S. E. 458; State v. Brinkley, 193 N. C. 747, 748.

§ 4362. Punishment; probation; parole.—Any person who shall be deemed guilty in the first degree, as set forth in the preceding section, shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court, or may be committed to any penal or reformatory institution in this state: Provided, that in case of a commitment to a reformatory institution, the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Any person who shall be deemed guilty in the second degree, as set forth in the preceding section, shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this article shall be placed on probation or on parole in the care or charge of any person except a woman probation officer. (1919, c. 215, s. 5; 1921, c. 101.)

Admission of Guilt—Effect on Time Limitation.—A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute. State v. Brinkley, 193 N. C. 747.

§ 4363. Constitutionality.—The declaration by the courts of any of the provisions of this article as being in violation of the constitution of this state shall not invalidate the remaining provisions. (1919, c. 215, s. 7.)

SUBCHAPTER 9. OFFENSES AGAINST PUBLIC JUSTICE

Art. 26. Perjury

§ 4364. Punishment for perjury.—If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the state, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or state's prison not less than four months nor more than ten years. (Rev., s. 3615; Code, s. 1092; R. C., c. 34, s. 49; 1791, c. 338, s. 1.)

Cross Reference.—As to perjury in general see 10 N. C. Enc. Dig. 111-126; as to form of bill for perjury see section 4615; as to oaths, see sections 3188 3189; as to definition of felony, see section 4171. As to indictment, see section 4615.

Essential Elements.—The administration of an oath is an essential element of perjury. State v. Glisson, 93 N. C. 506. Another is jurisdiction of the court. Bolling v. Luther, 4 N. C. 635; State v. Wyatt, 3 N. C. 56; State v. Alexander, 11 N. C. 182, cited in note in 54 L. R. A. 513. The false testimony given must be material. State v. Cline, 146 N. C. 640, 61 S. E. 522.

Irregularity of Warrant Immaterial.—When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. State v. Peters, 107 N. C. 876, 12 S. E. 74.

Burden of Proof on State.—The burden is not on the defendant in perjury to show the truth of the matter at issue, but the burden is on the state to show that it is false. State v. Cline, 150 N. C. 854, 64 S. E. 591.

Sufficient Evidence.—To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. State v. Peters, 107 N. C. 876, 12 S. E. 74.

The direct oath of one witness and the declarations of the prisoner, in which perjury is assigned, is sufficient to convict. State v. Molier, 12 N. C. 263.

Where the defendant swears to an answer in a civil an-

swer before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of this section it must be shown that he "willfully and corruptly" committed the offense. State v. Dowd, 201 N. C. 714, 161 S. E. 205.

Formerly Called Misdemeanor.—The former provision in this section that the offence was a misdemeanor did not make it so for the punishment was felony punishment, and the offence was treated as a felony. State v. Hyman, 164 N. C. 411, 79 S. E. 284.

The Indictment.—See § 4615 and notes thereto.

Cited in Grudger v. Penland, 108 N. C. 593, 13 S. E. 168.

§ 4365. Subordination of perjury.—If any person shall, by any means, procure another person to committ such willful and corrupt perjury as is mentioned in the preceding section, the person so offending shall be punished in like manner as the person committing the perjury. (Rev., s. 3616; Code, s. 1093; R. C., c. 34, s. 50; 1791, c. 338, s. 2.)

§ 4366. Perjury before legislative committees.—If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee of either house of the general assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the superior court of Wake county, shall be confined in the state's prison for the time prescribed by law for perjury. (Rev., s. 3611; Code, s. 2857; 1869-70, c. 5, s. 4.)

§ 4367. Perjury in court-martial proceedings.—If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury. (Rev., s. 3612; Code, s. 3235; R. C., c. 70, s. 73; 1812, c. 828, s. 3.)

§ 4368. False oath to insurance statement.—Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (Rev., s. 3493; 1899, c. 54, s. 97.)

§ 4369. False oath to procure benefit of insurance policy or certificate. — Any person who shall willfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a policy or certificate holder in any insurance corporation or fraternal benefit society, for the purpose of procuring payment of a benefit named in the certificate of such holder, shall be guilty of perjury. (Rev., s. 3487; 1899, c. 54, s. 60; 1913, c. 89, s. 28.)

§ 4370. False oath to statement required of fraternal benefit societies.—Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury. (1913, c. 89, s. 28.)

As to misdemeanor offense, see section 6529.

§ 4371. False oath to certificate of mutual fire insurance company.—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within thirty days after granting a license to such company, shall be guilty of perjury. (Rev., ss. 4738, 4834; 1899, c. 54, s. 32; 1901, c. 391, ss. 3, 4; 1903, c. 438, s. 4.)

As to oaths by officers of the insurance company, see section 6346.

Art. 27. Bribery

§ 4372. Bribery of officials.—If any person holding office under the laws of this state who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court. (Rev., s. 3568; Code, s. 991; 1868-9, c. 176, s. 2.)

As to bribing of bank examiners, see section 4387.

"The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office." State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

Sufficiency of Indictment.—An allegation in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to receive" such compensation, is sufficient and is not defective because of the use of "and" instead of "or" as used in the statute. State v. Wynne, 118 N. C. 1206, 24 S. E. 216.

Necessity of Proving Corrupt Intent.— On the trial of an officer for bribery in taking unlawful fees, it is necessary to prove a corrupt intent. State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

Applied in State v. Cofer, 205 N. C. 653, 172 S. E. 176.

§ 4373. Offering bribes.—If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony, and shall be punished by imprisonment for a term not less than one year nor more than five years in the state's prison or county jail, in the discretion of the court. (Rev., s. 3569; Code, s. 992; 1870-1, c. 232.)

Not Necessary that Bribed Juror Received Fee.—In a prosecution under this section it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe. State v. Noland, 204 N. C. 329, 168 S. E. 412. As to venue, see note to § 4606.

Cited in State v. Barkley, 198 N. C. 349, 151 S. E. 733.

§ 4374. Bribery of legislators.—If any person shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given, any money, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the senate or house of representatives of this state after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending before the general assembly, or which may come before him for action in his capacity as a member of the general assembly, such person so offering, promising or giving, or causing or procuring to be promised, offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or

delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the state's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the general assembly and shall be forever disqualified to hold any office of honor, trust or profit under this state. (Rev., s. 3570; Code, s. 2852; 1868-9, c. 176, s. 5.)

§ 4375. Bribery of jurors.—If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years. (Rev., s. 3697; Code, s. 990; R. C., c. 34, s. 34; 5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12.)

Art. 28. Obstructing Justice

§ 4376. Breaking or entering jails with intent to injure prisoners.—If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the state's prison or the county jail not less than two nor more than fifteen years. (Rev., s. 3698; 1893, c. 461, s. 1.)

Cross Reference.—As to cost of investigating lynchings, see section 1266; as to sheriff's duty to protect, see section 3945; as to investigation, see sections 4570, 4571; as to superior court jurisdiction in adjoining counties, see section 4600; as to subject in general, see 9 N. C. Enc. Dig. 769, 772.

Conviction of Attempt.—On an indictment under this section as construed with sections 4640 and 4600, the defendant may be found guilty of an attempt. State v. Rumple, 178 N. C. 717, 100 S. E. 622.

Indictment Need Not Charge Accomplices.—It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the others or charge that they were unknown. State v. Lewis, 142 N. C. 626, 55 S. E. 600. As to effect of splitting act of 1893, see note of this case under section 1266.

Indictment in Adjoining County.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. See sec. 4600. State v. Lewis, 142 N. C. 626, 55 S. E. 600.

§ 4377. Refusal of witness to appear or to testify in investigations of lynchings.—If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3699; 1893, c. 461, s. 3.)

§ 4378. Resisting officers.—If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor. (Rev., s. 3700; 1889, c. 51, s. 1.)

Cross Reference.—As to powers and duties of constable, see sections 976, 2639; as to criminal authority of policeman, see section 2642; as to arrest in general, see section 4542 et seq.

Indictment in Two Counts.—An indictment having two counts, one against one person under this section, and the other against several persons under section 4379, is defective, but if not objected to before a verdict which convicts on one count and acquits on the other, is not sufficient grounds for arrest of judgment, as the acquittal is equivalent to a nol. pros. State v. Perdue, 107 N. C. 853, 12 S. E. 253.

Quashing Indictment if Sufficient to Convict of Assault.—Where an indictment for resisting an officer is defective, as such it ought not to be quashed if the defendant may be convicted thereon for a simple assault. State v. Dunn, 109 N. C. 839, 13 S. E. 881.

Process Must Be Legal.—A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. State v. Curtis, 2 N. C. 471.

Authority of Officer and Notice to Party.—"If the officer has no authority to make the arrest, or having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person." State v. Belk, 76 N. C. 10, 14; State v. Kirby, 24 N. C. 201; State v. Bryant, 65 N. C. 327.

In a prosecution for resisting arrest under this section, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing in view of § 976, and Art. IV, sec. 24 of the Constitution, a constable having authority to make an arrest anywhere in the county within which he is appointed. State v. Corpening, 207 N. C. 805, 178 S. E. 564.

Collector of Back Tax.—See State v. Alston, 127 N. C. 518, 37 S. E. 137.

Preventing Road Overseer Cutting Ditch.—See State v. New, 130 N. C. 731, 41 S. E. 1033.

Resisting Second Service of Warrant.—Defendant is not liable for assault and battery for resisting an entry into her house by an officer armed with a warrant which had once been served and returned, though defendant had entered into a recognizance and failed to appear. State v. Queen, 66 N. C. 615.

Persons Aiding and Abetting.—See State v. Morris, 10 N. C. 388.

Cited in State v. McClure, 166 N. C. 321, 81 S. E. 458; State v. Scoggins, 199 N. C. 821, 155 S. E. 927.

§ 4379. Failing to aid police officers.—If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor. (Rev., s. 3701; 1889, c. 51, s. 2.)

See note "Indictment in Two Counts" under preceding section.

Guilt of Party Arrested Immaterial.—As was said in State v. James, 80 N. C. 370, "The guilt or innocence of the party charged, or the false evidence on which the precept was based, does not impair this authority." Meeds v. Carver, 30 N. C. 298.

To the person summoned by a lawful officer to come to his aid in making an arrest it is absolutely immaterial and irrelevant what is the name of the party to be arrested or the nature of the offense.

"It is not for him to ask the reason why." State v. Ditmore, 177 N. C. 592, 594, 99 S. E. 368.

§ 4380. Intimidating or interfering with jurors and witnesses.—If any person shall by threats,

menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this state, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (Rev., s. 3696; 1891, c. 87.)

In General.—This section is additional to and not a repeal of the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and criminal cases. In re Young, 137 N. C. 552, 50 S. E. 220.

Cited in State v. Hodge, 142 N. C. 665, 670, 55 S. E. 626.

§ 4381. Failing to attend as witness before legislative committees.—If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the general assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be subject to imprisonment at the discretion of the court. (Rev., s. 3692; Code, s. 2854; 1869-70, c. 5, s. 2.)

Art. 29. Misconduct in Public Office

§ 4382. Buying and selling offices.—If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office or any part thereof, shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court. (Rev., s. 3571; Code, s. 998; R. C., c. 34, s. 33; 5, 6 Edw. VI, c. 16, ss. 1, 5.)

As to sheriff letting to farm his office, see sec. 3946.

§ 4383. Acting as officer before qualifying as such.—If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office. (Rev., s. 3565; Code, s. 79.)

§ 4384. Willfully failing to discharge duties.—If any clerk of any court of record, sheriff, justice of the peace, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the state institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully or corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (Rev., s. 3592; 1901, c. 270, s. 2.)

Cross References.—As to failure of county commissioners to perform duty, see section 1302; as to failure to docket appeal from justice court, see section 660, 1 N. C. Law Rev. 55; as to issuing licenses unlawfully, see section 2503; as to failure of sheriff to make returns, or making false returns, see sec. 4396; as to officer acting without bond, see section 325. See notes to following section.

In General.—"The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. State v. Commissioners, 4 N. C. 419; State v. Williams, 34 N. C. 172; State v. Com's, 48 N. C. 399; State v. Furguson, 76 N. C. 197. If the neglect, ommission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty to removal from office." State v. Rocky Mount, 156 N. C. 329, 337, 72 S. E. 354.

Proceedings of Forfeiture under Section 870.—Forfeiture cannot be enforced by judgment of a motion from office as a part of the punishment, where the clerk has been convicted of a misdemeanor, under this section in wilfully neglecting to discharge the duties of his office, but proceedings of forfeiture must be under section 870. State v. Norman, 82 N. C. 687.

Willful Neglect and Injury to Public.—It is to be observed that the essentials of the crime as prescribed are: first, a willful neglect in the discharge of official duty; and second, injury to the public. State v. Anderson, 196 N. C. 771, 773, 147 S. E. 305.

Corrupt Intent Not Necessary.—It is not necessary to allege corrupt intent in a bill of indictment against county commissioners for neglect of duty in providing a necessary courthouse, and it is sufficient if the words of the statute are followed. State v. Loeper, 146 N. C. 655, 61 S. E. 585.

However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. State v. Anderson, 196 N. C. 771, 147 S. E. 305, quoting from State v. Hatch, 116 N. C. 1003, 21 S. E. 436.

Liability for Honest Errors.—It is so well settled that there is nothing to the contrary that an officer who has to exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. State v. Powers, 75 N. C. 281, 284.

"If the illegal act be done mala fide, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only." State v. Snuggs, 85 N. C. 542, 544.

Accused Must Show Good Faith.—Where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is wilful, and makes it incumbent upon him to rebut the presumption. State v. Heaton, 77 N. C. 505.

The Indictment.—It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be

removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. State v. Anderson, 196 N. C. 771, 147 S. E. 305.

Cited in Moffitt v. Davis, 205 N. C. 565, 570, 172 S. E. 317.

§ 4385. Failing to make reports and discharge other duties.—If any state or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor. (Rev., s. 3576.)

Cross Reference.—As to mandamus to enforce turning over public funds, see section 867 and note; as to failure of sheriff to return process, see sec. 4396; as to sheriff executing process, see section 3936; as to duty of clerk of court, see sections 950 et seq.; 3 N. C. Enc. Dig. 108. See notes to preceding section; as to embezzlement by officers see section 4278.

Injurious Effect Not Necessary.—The crime exists although no injurious effects result to any individual because of the misconduct of the officer. State v. Glasgow, 1 N. C. 264.

Honesty of Purpose.—There may be neglect without corruption. Therefore honesty of purpose is not a full defense under this section. Turner v. Mckee, 137 N. C. 251, 254, 49 S. E. 330, and cases there cited.

Enforcing Unconstitutional Law.—An officer it not liable for obeying the mandates of an unconstitutional statute. State v. Godwin, 123 N. C. 697, 31 S. E. 221.

Liability on Official Bonds.—See sections 353 et seq. and notes thereto.

Manager of Elections.—Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under this section. State v. Cole, 156 N. C. 618, 72 S. E. 221.

§ 4386. Swearing falsely to official reports.—If any clerk, sheriff, register of deeds, county commissioner, county treasurer, justice of the peace, constable or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, state or school revenue, he shall be guilty of a misdemeanor. (Rev., s. 3605; Code, s. 731; 1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4.)

§ 4387. Making of false report by bank examiners; accepting bribes.—If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than four months nor more than ten years. (Rev., s. 3324; 1903, c. 275, s. 24; 1921, c. 4, s. 79.)

Editor's Note.—The amendment of this section by Public Laws 1921, c. 4, sec. 79, effected one change. Prior to this amendment the offence was "receiving or accepting" any bribe instead of "keeping or accepting" any bribe as the section now reads. It is easy to see the change that this amendment brings about. By the prior law one was an offender if he received a bribe no matter what his purpose might be. If he received the bribe for the sole purpose of bringing the person offering the bribe to justice, he himself was guilty. Under such law it was hard to ascertain one who would bribe a bank examiner for the act that would make the officer guilty of bribery would also make the examiner guilty of receiving a bribe. Now the offense is only the keeping and does not subject a bank examiner to punishment for accepting bribes in an attempt to ascertain and convict crooked bank officials.

§ 4388. Director of public trust contracting for his own benefit.—If any person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board. (Rev., s. 3572; Code, s. 1011; R. C., c. 34, s. 38; 1825, c. 1269; 1826, c. 29; 1929, c. 19, s. 1.)

Editor's Note.—The Act of 1929 added the two provisos at the end of this section.

Effect of Special Validating Act.—Although municipal bonds were sold to a corporation controlled by the mayor, an act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649.

Additional Service. — A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. Davidson v. Guilford County, 152 N. C. 436, 67 S. E. 918.

Officer of City and Corporation.—The prohibition of this section, extends to an officer of a corporation in making contracts between the corporation and the city of which he is commissioner or an alderman. State v. Williams, 153 N. C. 595, 68 S. E. 900.

Contracts between city when an alderman is an employee of the other contracting party are not covered by the section. State v. Weddell, 153 N. C. 587, 68 S. E. 897.

Contracts for Benefit of County.—A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. State v. Garland, 134 N. C. 749, 47 S. E. 426.

§ 4389. Speculating in claims against towns, cities and the state.—If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim, including teachers' salary vouchers, at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation on any such claim, he shall be guilty of a misdemeanor and shall be fined or imprisoned, and shall be liable to removal from office at the discretion of the court. (Rev., s. 3475; Code, s. 1009; 1868-9, c. 260; 1923, c. 136, s. 208.)

Editor's Note.—The amendment of this section by Public Laws 1923, c. 136, sec. 208 added "including teacher's salary voucher," and replaced the words "speculation in any such claim" with "speculation on any such claim."

§ 4390. Acting as agent for those furnishing supplies for schools and other state institutions.—If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the state, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any

school or other institution supported in whole or in part from any of the public funds of the state or any officer, agent, manager, teacher or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or state or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court. (Rev., s. 3833; 1899, c. 732, s. 73; 1897, c. 543.)

Purchase of Property from Company Owned by Wife.—A member of the board of education of a county is not guilty under this section for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. State v. Debnam, 196 N. C. 740, 146 S. E. 857.

§ 4391. Buying school supplies from interested officer.—If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, or if any school officers or teachers shall receive any gift, emolument, reward or promise of reward for influence in recommending or procuring the use of any school supplies for the schools with which they are connected, such person shall be removed from his position in the public service and shall, upon conviction, be deemed guilty of a misdemeanor. (Rev., s. 3835; 1901, c. 4, s. 69.)

§ 4391(1). Soliciting during school hours without permission of school head.—No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1933, c. 220.)

§ 4392. Selling bonds without giving proper notice.—It shall be unlawful for any board of county commissioners, board of road commissioners, school board or school committee, or any drainage commissioner or board of drainage commissioners of any county, city, town, road, school, or drainage district to sell bonds for any purpose, either at public or private sale, without giving notice of the time and place of sale in some newspaper published in such county, city or town at least thirty days prior to the date of sale: Provided, that where there is no newspaper published in the county, such notice shall be posted at the courthouse door in such county at least thirty days prior to the sale.

Any violation of this section by any person or corporation whose duty it shall be to issue and sell such bonds shall constitute a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1917, cc. 147, 174.)

As to sale of municipal bonds, see section 2956 and notes.

Adjournment to Future Date after Notice.—Where the municipal authorities have advertised the sale of bonds to be issued according to the terms of a valid statute, and cannot finish the transaction and consummate the sale on the day designated in the advertisement, they may adjourn over to some other day in the near future for the purpose of completing the matter, especially when they have given due notice of the second meeting, the object of the law being to prevent clandestine sales of bonds of this character. Guire v. Board, 178 N. C. 39, 100 S. E. 141.

§ 4393. Allowing prisoners to escape; burden of proof.—If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any capias issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (Rev., s. 3577; Code, s. 1022; R. C., c. 34, s. 35; 1791, c. 343, s. 1; 1905, c. 350.)

General Consideration.—This is a common law offense. State v. Ritchie, 107 N. C. 857, 12 S. E. 251. The statute contemplates two offenses—negligently permitting or wilfully promoting the escape—but charging negligence alone will suffice, State v. McLain, 104 N. C. 894, 10 S. E. 518. The section changes the ordinary rule of the burden of proof by shifting such burden to the defendant. State v. Hunter, 94 N. C. 829; State v. Lewis, 113 N. C. 622, 18 S. E. 69. The question of good faith and diligence of the officer is for the jury. State v. Blockley, 131 N. C. 726, 42 S. E. 569.

For full treatment of Escape, see 5 N. C. Enc. Dig. 33 et seq.; as to liability for escape under civil process, see sec. 3943 and notes thereto.

Right to Kill to Prevent Escape.—The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or, anything that would suggest danger to the person of the guard. Holloway v. Moser, 193 N. C. 185, 136 S. E. 375.

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has exercised due care in his selection. State v. Lewis, 113 N. C. 622, 18 S. E. 69.

Cited by Avery, J., concurring in State v. Kittelle, 110 N.

C. 560, 573, 15 S. E. 103; Sutton v. Williams, 199 N. C. 546, 155 S. E. 160.

§ 4394. Solicitor to prosecute officer for escape.—It shall be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the state, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (Rev., s. 2822; Code, s. 1023; R. C., c. 34, s. 36; 1791, c. 343, s. 2.)

§ 4395. Disposing of public documents or refusing to deliver them over to successor.—It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the general assembly, supreme court reports or other public documents are transmitted or deposited for the use of the county or state, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, at the discretion of the court. (Rev., s. 3598; Code, s. 1073; 1881, c. 151.)

§ 4396. Failing to return process or making false return.—If any sheriff, constable or other officer, whether state or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor. (Rev., s. 3704; Code, s. 1112; R. C., c. 34, s. 118; 1818, c. 980, s. 3; 1827, c. 20, s. 4.)

See section 3936, and the exhaustive note thereto.

Civil Process.—This section applies to failure to return civil as well as criminal process. State v. Berry, 169 N. C. 371, 85 S. E. 387, overruling Mfg. Co. v. Buxton, 105 N. C. 74; Harrell v. Warren, 100 N. C. 259, 6 S. E. 777.

For a similar section in the civil code, see section 3936 and notes thereto.

Process That Could Not Be Served.—An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. Fentress v. Brown, 61 N. C. 373.

Cited in State v. Brown, 119 N. C. 827, 25 S. E. 820.

§ 4397. Failing to surrender tax-list for inspection and correction.—If any sheriff or tax collector shall refuse or fail to surrender his tax-list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court. (Rev., s. 3788; Code, s. 3823; 1870-1, c. 177, s. 2.)

As to right and power to inspect, see section 2681, and notes.

§ 4398. Failing to file report of fines.—If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor. (Rev., s. 3579; 1901, c. 4, s. 62.)

§ 4398(a). Justices of the peace soliciting official business or patronage.—If any justice of the peace shall solicit official business, and/or patronage for his or her office, he or she shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1935, c. 58.)

§ 4399. Failure of ex-justice of the peace to turn over books and papers.—If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor. (Rev., s. 3578; Code, ss. 828, 829; 1885, c. 402.)

Cited in Bailey v. Hester, 101 N. C. 538, 8 S. E. 164; Whitehurst v. Transportation Co., 109 N. C. 342, 344, 13 S. E. 937.

§ 4399(a). Private use of publicly owned vehicle.—It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. (1925, c. 239, s. 1.)

§ 4399(b). Obtaining repairs and supplies for private vehicle at expense of State.—It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

§ 4399(c). Limitation of amount expended for vehicle.—It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State, to expend from the public treasury an amount in excess of fifteen hundred dollars ($1,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that this act shall not apply to any automobile purchased for the use of the Governor: Provided, further, however, that nothing in this act shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so. (1925, c. 239, s. 3.)

§ 4399(d). Publicly owned vehicle to be marked.—It shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State, or to some

county, or institution or agency of the State, and that such car is "for official use only." Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be so lettered. (1925, c. 239, s. 4; 1929, c. 303, s. 1.)

Editor's Note.—The 1929 amendment added the proviso at the end of this section.

§ 4399(e). Penalties.—Any person, firm or corporation violating any of the provisions of sections 4399(a) to 4399(d) shall be guilty of a misdemeanor, and punished by a fine of not less than one hundred dollars ($100), nor more than one thousand dollars ($1,000), or imprisonment in the discretion of the court. Nothing in this act shall apply to the purchase, use or up-keep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5.)

§ 4399(f). Five preceding sections applicable to cities and towns.—Sections 4399(a) to 4399(e) in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

Art. 30. Misconduct in Private Office

§ 4400. Failure of certain railroad officers to account with successors.—If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and shall be punished in like manner. The governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (Rev., s. 3760; Code, ss. 2001, 2002; 1870-1, c. 72, ss. 1-3.)

Not Applicable to Tax Bond.—As this section has reference only to money, books, choses, etc., an indictment can not be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. State v. Jones, 67 N. C. 210.

§ 4401. "Misapplication, embezzlement of funds, etc.—Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank note in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificates, or as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars or imprisoned in the State's prison not more than thirty years, or both. (Rev., s. 3325; 1903, c. 275, s. 15; 1921, c. 4, s. 83; 1927, c. 47, s. 16.)

See note under § 224(e).

Editor's Note.—By the amendment of 1927 this section was made identical with section 224(e). Reference should be made to that section and the notes thereto.

Compared with Section 4268.—The use of the word "abstract" in this section marks a difference between this statute and section 4268, the latter applying to embezzlement; and under the former statute it is not necessary for the indictment or evidence to comply with the terms of section 4268, excepting offenders under the age of sixteen years. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Sufficiency of Indictment.—An indictment for unlawfully abstracting the funds of a bank, to the injury of persons, corporations, etc., is sufficient if it substantially follows the express wording of this section in a plain, intelligent and sufficient manner, though without strict regard to form, technicality or refinement. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

In order to convict of malfeasance of bank officers and agents under the provisions of this section, it is sufficient to allege in the indictment the "intent to defraud, without naming therein the particular person or body corporate intended to be defrauded," etc.; and an indictment under this section, charging the act "with intent to injure," is held sufficient. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

§ 4402. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.—If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any corporation, partnership, firm or individual transacting a banking business, or shall knowingly subscribe to or exhibit false papers, with intent to deceive any person authorized to examine into the affairs of such corporation, partnership, firm or individual, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any such corporation, partnership, firm or individual, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state's prison not less than four months nor more than ten years. (Rev., s. 3326; 1903, c. 275, s. 27.)

Editor's Note.—This section is similar to sec. 224(e) covering in terms the same subject matter.

Sufficiency of Indictment.—Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of this section under

which the indictment had been drawn. State v. Hedgecock 185 N. C. 714, 117 S. E. 47.

Art. 31. Prison Breach and Prisoners

§ 4403. Escape of hired prisoners from custody.—If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for the hiring out of prisoners by counties and towns, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and shall be imprisoned at hard labor not more than thirty days, or fined not more than fifty dollars. (Rev., s. 3658; Code, s. 3455; 1876-7, c. 196, s. 4.)

As to power to hire out, see sections 1356-1358.

§ 4404. Prison breach and escape.—If any person shall break prison, being lawfully confined therein, or shall escape from the custody of any superintendent, guard or officer, he shall be guilty of a misdemeanor. (Rev., s. 3657; Code, s. 1021; R. C., c. 34, s. 19; 1 Edw. II, st. 2d; 1909, c. 872.)

At Common Law.—The offense of breaking jail was a felony at common law, but by this section, all cases, no matter what the person is confined for, are reduced to a misdemeanor. State v. Brown, 82 N. C. 585.

Escape from Officer.—This section applies only to breaking prison or escaping therefrom and does not, because of its wording, include escape from an officer before being confined to prison. State v. Brown, 82 N. C. 585.

Cited in Holloway v. Moser, 193 N. C. 185, 136 S. E. 375.

§ 4405. Permitting escape of or maltreating hired convicts.—If any person charged in any way with the control or management of convicts, hired for service outside of the state's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any criminal liability. (Rev., s. 3659; Code, s. 3450; 1881, c. 127, s. 2.)

As to power to hire out, see section 1356; as to allowing prisoners to escape, see section 4393.

Negligence Test of Guilt.—Officers and public agents will not be held to the rigorous common-law rule of responsibility for the custody of convicts employed in labors outside of the Penitentiary, actual negligence being the test of guilt. State v. Johnson, 94 N. C. 924.

Negligence Implied.—It is not necessary to prove negligence of the person having lawful custody of prisoners, for it is implied, unless occasioned by the act of God, or irresistable adverse force. State v. Johnson, 94 N. C. 924.

Cited in State v. Sneed, 94 N. C. 806, 809.

§ 4406. Conveying messages and weapons to convicts and other prisoners.—If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted or furnishing the means shall be sentenced to not less than four years hard labor in the state's prison. (Rev., s. 3662; Code, s. 3441; 1873-4, c. 158, s. 12; 1911, c. 11.)

§ 4407. Injury to prisoner by jailer.—If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor. (Rev., s. 3661; Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6.)

§ 4408. Confining prisoners to improper apartments.—If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor. (Rev., s. 3660; Code, s. 3471; R. C., c. 87, s. 16; 1795, c. 433, s. 4.)

§ 4409. Requiring female prisoners to work in chain-gang.—If any officer, either judicial, executive or ministerial, shall order or require the working of any female on the streets or roads in any group or chain-gang in this state, he shall be deemed guilty of a misdemeanor. (Rev., s. 3596; 1897, c. 270.)

§ 4409(a). Classification and commutation of time for prisoners other than state prisoners.—The board of county commissioners, or such governing body as may have charge of prisoners in any county, city or town in the State of North Carolina, shall divide all prisoners into three classes, or grades, as follows:

In the first class shall be included all those prisoners who have given evidence that they will, or who it is believed will observe the rules and regulations and work diligently and are likely to maintain themselves by honest industry after their discharge. These shall be known as Grade A prisoners and shall receive a commutation of their sentences at the rate of one hundred and four days for each year served.

In the second class shall be included those prisoners who have not yet given evidence that they can be trusted entirely, but are reasonably obedient to the rules and regulations. These shall be known as Class B prisoners and shall receive a commutation of their sentences of seventy-eight days for each year served.

In the third class shall be those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations and seriously interfere with the discipline and the effectiveness of the labor of the other prisoners. Such prisoners shall receive no commutation of their sentences.

All prisoners shall be admitted into Class B except where it is known by the superintendent of the prison that a prisoner is serving for a second offense. In such cases the superintendent may put the prisoner in Class C in his discretion.

Prisoners of Class A shall be known as honor prisoners and shall be worked without stripes and in the discretion of the superintendent of the prison without guards. When in prison camps or in any other place of detention they may not be chained or under armed guards.

Prisoners in Class B shall wear stripes, if felons, be under guard and may or may not be chained in the discretion of the superintendent.

Prisoners in Class C shall wear stripes, if felons, wear chains during the day or night as in the opinion of the superintendent may be necessary.

Preference in assignment of work shall be given Class A prisoners.

The purpose of this act is to unify the regulations pertaining to county prisoners and to encour-

age industriousness among the prisoners. (1927, c. 178, s. 1.)

§ 4409(b). Record to be kept; items of record.—The superintendent or other person having charge of prisoners shall keep a record showing, the name, age, date of sentence, length of sentence, crime for which convicted, home address, next of kin, and the conduct of each prisoner received. (1927, c. 178, s. 2.)

§ 4409(c). Commutation of sentences for Sunday work.—All prisoners in the State's Prison, or in any county jail or county convict camp, who shall be assigned to regular work which requires the performance of the same, or substantially the same duties on Sundays as on other days of the week, shall be allowed a commutation of their sentences for each Sunday, or fractional part of a Sunday on which they shall be required to perform the duties of the task assigned to them. The commutation of sentence provided for in this act shall be in addition to all other communtations of sentence allowed such prisoners under existing statutes and laws of the State. (1931, c. 198, s. 1.)

Art. 31A. Custodial Institutions

§ 4409(1). Persuading inmates to escape. — It shall be unlawful for any parent, guardian, brother, sister, uncle, aunt, or any person whatsoever to persuade or induce to leave, carry away, or accompany from any state institution, except with the permission of the superintendent or other person next in authority, any boy or girl, man or woman, who has been legally commmitted to said institution, by juvenile, recorder's, superior, or any other court of competent jurisdiction. (1935, c. 307, s. 1.)

§ 4409(2). Harboring fugitives.—It shall be unlawful for any person to harbor, conceal, or give succor to, any known fugitive from any institution whose inmates are committed by court. (1935, c. 307, s. 2.)

§ 4409(3). Violation made misdemeanor.—Any person violating the provision of this article, shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court. (1935, c. 307, s. 3.)

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC PEACE

Art. 32. Offenses against the Public Peace

§ 4410. Carrying concealed weapons.—If any one except when on his own premises, shall carry concealed about his person any bowie-knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court. If any one, except on his own premises, shall carry concealed about his person any pistol or gun, he shall be guilty of a misdemeanor and shall be fined not less than fifty dollars, nor more than two hundred dollars, or imprisoned not less than thirty days nor more than two years, at the discretion of the court. Upon conviction or submission the deadly weapon with reference to which the defendant shall have been convicted shall be condemned and ordered confiscated and destroyed by the judge presiding at the trial. If any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army, when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city, or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties. (Rev., s. 3708; Code, s. 1005; 1917, c. 76; 1919, c. 197, s. 8; 1923, cc. 48, 57; 1924, c. 30; 1929, cc. 51, 224.)

As to concealed weapon generally, see 12 Enc. Dig. 350 et seq.; 15 Enc. Dig. 740 et seq.

Editor's Note.—The construction of this section has frequently been before the court but the power of the legislature to prescribe the rules of evidence and fix the burden of proof to the extent herein dictated has never been questioned.

The 1923 amendment, chapter 48, struck the word "fifty" and substituted the words "one hundred" as to Durham county. The other amendment of the same year, chapter 57, made the same changes as to Halifax and Northampton counties. The latter amendment also inserted the matter relating to the second and subsequent offenses but limited the application to Halifax and Northampton counties. The 1924 amendment extended the provisions relating to second and subsequent offenses to Franklin county; hence, the necessity for the explanatory provisions in parenthesis.

The first amendment of 1929 repealed the amendatory Act of 1923, c. 57. The second amendment of 1929, added the qualifying clause, appearing in the last sentence, which follows the reference to soldiers and sailors and reads "when in discharge of official duties," etc.

Includes Butcher Knife.—The act of assembly making it indictable for one to carry concealed about his person any "pistol, bowie knife, razor or other deadly weapon of like kind," embraces a butcher's knife. State v. Erwin, 91 N. C. 545.

Concealment Is Gist of Offense.—The mischief provided against, is the practice of wearing weapons concealed about the person to be used upon any emergency. State v. Broadnax, 91 N. C. 543. The intent to carry, not the intent to use, determines the guilt. State v. Reams, 121 N. C. 556, 27 S. E. 1004. But the weapon carried must be concealed. State v. Lilly, 116 N. C. 1049, 21 S. E. 563. If the weapon is carried openly the defendant could not be guilty under this section. State v. Brown, 125 N. C. 704, 34 S. E. 549.

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose to so carry it that it may not be seen. State v. Gilbert, 87 N. C. 527, 528.

The question is as to the manner of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it. State v. Brown, 125 N. C. 104, 34 S. E. 549.

But if from defendant's own testimony it appears that he necessarily knew that he was carrying it concealed intent is immaterial. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of this section, although the statute makes such possession prima facie evidence of the concealment thereof. State v. Vanderburg, 200 N. C. 713, 158 S. E. 248.

Same—Weapon on Person Prima Facie Evidence.—The fact that defendant had a pistol about his person, off of his own premises, was prima facie evidence of concealment, which shifted the burden upon the defendant to rebut or disprove. State v. Hamby, 126 N. C. 1066, 35 S. E. 614; State v. Reams, 121 N. C. 556, 27 S. E. 1004; State v. Lilly, 116 N. C. 1049, 21 S. E. 563; State v. McManus, 89 N. C. 555.

Same—Presumption Rebutted.—To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. State v. Brown, 125 N. C. 704, 34 S. E. 549; State v. Gilbert, 87 N. C. 527.

Same—Concealment Question for Jury. — Whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. State v. Reams, 121 N. C. 556, 27 S. E. 1004. See also State v. Lilley, 116 N. C. 1049, 21 S. E. 563.

Carrying on Own Premises.—The use of the words, "on his own premises," and not being "on his own lands," in this section, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives. State v. Perry, 120 N. C. 580, 26 S. E. 915, 1008.

A superintendent or overseer of a department of a cotton mill, is not, while therein, "on his premises," within the meaning of this section. State v. Bridgers, 169 N. C. 309, 84 S. E. 689.

Same—Servant on Employer's Premises.—A mere servant or hireling who carries concealed weapons on the premises of his employer is indictable. State v. Deyton, 119 N. C. 880, 26 S. E. 159.

Illustrations—Not on Person but Within Reach.—The language of the statute is, not "concealed on his person," but "concealed about his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. State v. McManus, 89 N. C. 555.

Same—Pistol in Coat on Shoulder.—Upon evidence tending to show that the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. State v. Mangum, 187 N. C. 477, 121 S. E. 765.

Same—Carrying to Deliver to Another.—One is not guilty of a violation of this section where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. State v. Broadnax, 91 N. C. 543.

Same—Apprehension of Assault.—Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by this section. State v. Woodlief, 172 N. C. 885, 90 S. E. 137.

Same—Acting upon Advice of Attorney.—A person acting in ignorance of the law in good faith and upon advice of the clerk of the court or of an attorney, but in violation of this section, is not excused. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

Exceptions—Necessity of Being in Performance of Duties. —In order to come within the exception of this section, the defendant, otherwise having the authority, must have been in the actual performance of his duties at the time. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

Same—Officials of Transportation Companies. — The exception in this section does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. State v. Perry, 120 N. C. 580, 26 S. E. 915, 1008.

Same—United States Mail Carrier.—A United States mail carrier is indictable under this section for carrying a concealed weapon while carrying the mail and while returning to his home after delivering the mail. State v. Boone, 132 N. C. 1107, 44 S. E. 595.

Same—Night Watchman.—A private night watchman is not guilty of carrying a concealed weapon, under this section, while on duty upon the premises he is employed to watch. State v. Anderson, 129 N. C. 521, 39 S. E. 824.

Jurisdiction.—The superior court does not acquire jurisdiction over a prosecution for carrying a concealed weapon by the fact at the time of the presentation of the indictment therefor it had exclusive cognizance of such offense, where, at the time of the commission of the offense sole jurisdiction was in justices of the peace. State v. Ramsour, 113 N. C. 642, 18 S. E. 707.

Former Conviction of Assault.—A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. State v. Robinson, 116 N. C. 1046, 21 S. E. 701.

Time Not Essence of Offense.—Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N. C. 765, 117 S. E. 803.

Punishment. — In penal statute "or" will never be construed "and" so as to make it more penal. Hence one found guilty under this section could not be both fined and imprisoned. State v. Taylor, 124 N. C. 803, 32 S. E. 548.

Cited in State v. Divine, 98 N. C. 778, 784, 4 S. E. 477; State v. Barrett, 138 N. C. 630, 635, 50 S. E. 506; State v. Sauls, 199 N. C. 193, 154 S. E. 28.

§ 4411. Sending, accepting or bearing challenges to fight duels.—If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the state, any pardon or reprieve notwithstanding. (Rev., s. 3628; Code, s. 1012; R. C., c. 34, s. 48; 1802, c. 608, s. 1.)

See Article XIV, sec. 2, of the State Constitution.

See State v. Fritz, 133 N. C. 725, 45 S. E. 957; State v. Farrier, 8 N. C. 487, as digested in the title Dueling, 4 N. C. Enc. Dig. 958.

§ 4412. Engaging in and betting on prize fights. —If any two or more persons engage in a prize fight, sparring match or glove or fist contest for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars, or imprisoned in the state's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court. (Rev., s. 3707; 1895, c. 28, ss. 1-4.)

As to the power of the governor to prevent prize fights see section 7636, par. 6, and annotations thereunder.

§ 4413. Disturbing picnics, entertainments and other meetings.—If any person shall willfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainment, political meeting or other meeting or organization is held, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court. (Rev., s. 3704; 1897, c. 213.)

The section applies to disturbing Sunday-school, State v. Branner, 149 N. C. 559, 63 S. E. 169, and family reunions, State v. Starnes, 151 N. C. 724, 66 S. E. 347.

§ 4414. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.—If any person shall willfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. (Rev., s. 3838; Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28.)

Preventing Use of School Building.— To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of this section. State v. Spray, 113 N. C. 686, 18 S. E. 700.

§ 4414(a). Disturbing students at schools for women.—It shall be unlawful for any male person to willfully disturb, annoy or harass the students

of any boarding school or college for women situated anywhere in North Carolina by rude conduct or by persisting unnecessary presence on or near the property of the school or college; or by the willful addressing or communicating orally or otherwise with said students while on school property, or while elsewhere when in charge of a teacher, officer or student of said school. The violation of this section shall be deemed a misdemeanor punishable by a fine of not less than five dollars ($5) nor more than fifty dollars ($50), or by imprisonment not to exceed thirty days. (1925, c. 189, s. 1.)

Editor's Note.—For a criticism of the wisdom and necessity for this law, see 3 N. C. Law Rev. 143.

§ 4415. Disturbing religious congregations.—If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned in the discretion of the court. (Rev., s. 3706; 1901, c. 738.)

In General.—In order to render indictable the disturbance of persons assembled for divine worship, the people, or some considerable number, must be collected at or about the time when worship is about to commence, and in the place where it is to be celebrated. State v. Bryson, 82 N. C. 576. But the congregation need not be engaged in the act of worship. State v. Ramsey, 78 N. C. 448. However the indictment will not lie after the congregation has dispersed. State v. Davis, 126 N. C. 1059, 35 S. E. 600. The act itself must disturb the congregation—information of the act, for example that a fight is in progress, will not suffice. State v. Kirby, 108 N. C. 772, 12 S. E. 1045.

Persistent speaking in church after remonstance from the minister has been held sufficient to sustain a verdict under this section (see State v. Ramsey, 78 N. C. 448) but not persistence in singing off the key where the intention is not to disturb. State v. Linkhow, 69 N. C. 214.

Disturbing Sunday School.—See note to section 4413.

Family Gathering.—See State v. Starnes, 151 N. C. 724, 66 S. E. 347.

The Indictment.—The indictment should charge that the assembly had met "for divine worship," "divine service," "religious worship or service," or something of the same import. State v. Fisher, 25 N. C. 111.

Where the charge against the defendant is disturbing a congregation actually engaged in divine worship, it is variance to show merely the disturbance of parties assembled for such worship. State v. Bryson, 82 N. C. 576.

§ 4416. Detectives going armed in a body.—If any body of men composed of more than three persons, calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives, shall go armed, they shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (Rev., s. 3703; 1893, c. 191.)

§ 4416(a). Impersonation of peace officers.—It shall be unlawful for any person other than duly authorized peace officers or officers of the court to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers. That nothing in this act shall be construed to prohibit a private citizen in whose presence a felony has been committed from arresting such person or persons participating in the commission of said felony when such arrest is deemed necessary, or to prohibit any private citizen in whose presence an act, which would constitute a breach of the peace and for which an indictment would lie, is committed from arresting such person or persons committing said breach of the peace when such arrest is deemed necessary. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction may be fined or imprisoned at the discretion of the court. (1927, c. 229.)

SUBCHAPTER 11. OFFENSES AGAINST THE PUBLIC SAFETY

Art. 33. Offenses against the Public Safety

§ 4417. Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.—If any person shall willfully and maliciously put or place any matter or thing upon, over or near any railroad track; or shall willfully and maliciousy destroy, injure or remove the road-bed, or any part thereof, or any rail, sill or other part of the fixture appurtenant to or constituting or supporting any portion of the track of such railroad; or shall willfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall wilfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the state's prison or county jail not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time of not less than three nor more than seven years. If it shall happen that by reason of the commission of the offenses aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the person is killed, and shall be imprisoned in the state's prison not less than five nor more than sixty years if the person is maimed or disabled. If any person shall maliciously destroy or injure any plank-road, turnpike or canal, or any appurtenance or fixture belonging thereto or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purpose of navigation, or improving the navigation, of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section is provided for maliciously injuring a railroad. (Rev., s. 3754; Code, s. 1098; R. C., c. 34, ss. 99, 100; 1838, c. 38; 1879, c. 255, s. 2; 1911, c. 200.)

§ 4418. Injuring without malice property of railroads and other carriers; causing death or

other physical injury thereby.—If any person, unlawfully and on purpose, but without malice, shall commit any of the offenses mentioned in the preceding section, he shall be guilty of a misdemeanor. If it shall happen that by reason of the commission of any such offense any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, shall be imprisoned not less than twelve months, and fined at the discretion of the court. (Rev., s. 3755; Code, s. 1099; R. C., c. 34, s. 101.)

§ 4419. Shooting or throwing at trains or passengers.—If any person shall willfully and unlawfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or state's prison, at the discretion of the court. (Rev., s. 3763; Code, s. 1100; 1887, c. 19; 1876-7, c. 4; 1911, c. 179.)

Intent a Question for Jury.—Where a defendant was indicted, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. State v. Barbee, 92 N. C. 820.

Proof that Gun was Loaded Unnecessary. — If a gun be unloaded and this is relied on as a defense, in an action for shooting at a train, the fact must be shown by the defendant. State v. Hinson, 82 N. C. 597.

Proof of Conspiracy.—Upon trial for throwing stones at a train, it is not necessary to show a conspiracy, it appearing that the several defendants were not only present, but threw stones at different coaches of the same train. State v. Holder, 153 N. C. 606, 69 S. E. 66.

The Indictment.—Upon a trial for throwing stones at a train, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void for vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." State v. Holder, 153 N. C. 606, 69 S. E. 66.

But it must, charge that the train was in actual motion or stopped for a temporary purpose. State v. Boyd, 86 N. C. 634.

§ 4420. Operating trains and street cars while intoxicated.—Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (Rev., s. 3758; Code, s. 1927; 1891, c. 114; 1871-2, c. 138, s. 38; 1907, c. 330.)

§ 4421. Displaying false lights on seashore.—If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than four months nor more than ten years. (Rev., s. 3430; Code, s. 1024; R. C., c. 34, s. 58; 1831, c. 42.)

§ 4422. Local: Building unguarded barbed-wire fences along public highways.—If any person shall erect or maintain a barbed-wire fence along any public road or highway, and within ten yards thereof, without putting a railing, smooth wire, board or plank on the top of such fence not less than three inches in width, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. This section shall apply to the counties of Rowan, Swain, Catawba, Greene, Richmond, Stokes, Rutherford, Forsyth, Yadkin, Brunswick, Durham, Wilkes, Stanly, Cumberland, Iredell, Macon and Mitchell: Provided, that in Rutherford county only a railing or plank shall be used at the top of such fence. (Rev., s. 3769; 1895, c. 65; 1899, c. 43; 1899, c. 225; 1905, c. 220; 1909, cc. 318, 604, 629, 810.)

As to fences generally, see 6 Enc. Dig. 440 et seq.; 14 Enc. Dig. 213 et seq.

Barbed Wire on Top of Board Fence.—A board fence with barbed wire on top comes within the mischief at which this section is directed. State v. Thomas, 149 N. C. 565, 63 S. E. 166.

Cited in Winkler v. Carolina, etc., R. Co., 126 N. C. 370, 35 S. E. 621.

§ 4423. Exploding dynamite cartridges and bombs.—If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor. (Rev., s. 3794; 1887, c. 364, s. 53.)

As to explosives generally, see 6 N. C. Dig. 334 et seq.; 14 Enc. Dig. 187, et seq.

§ 4424. Storing explosives near causeway on Eagle's island.—It shall be unlawful for any person, firm or corporation to erect or keep any magazine or other building for the storage of gunpowder, dynamite or other explosives within one hundred yards of the road or causeway on Eagle's island between the Cape Fear and Brunswick rivers: Provided, however, that this section shall not apply to warehouses for the storage of spirits of turpentine, rosin and tar. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than fifty nor more than two hundred dollars, or be imprisoned thirty days, or both, in the discretion of the court. (1907, c. 768.)

§ 4425. Keeping for sale or selling explosives without a license.—If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor. (Rev., s. 3817; 1887, c. 364, ss. 1, 4.)

§ 4426. Failing to enclose marl beds.—If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this shall not apply to any person whose marl bed is situated

inside his own inclosure. (Rev., s. 3796; 1887, cc. 235, 268.)

§ 4426(a). False fire alarms, giving.—It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet any one in giving a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any municipal fire alarm system, except in case of fire, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of the fire alarm system of any municipality. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 46.)

§ 4426(b). Local: Fireworks in Lee County.—It shall be unlawful for any person or persons to discharge, or have discharged, or use for any purpose whatsoever, fireworks in Lee County. It shall also be unlawful for any person or corporation to keep, store, sell, or offer for sale any form or style of fireworks in Lee county. The term "fireworks" as used in this section shall apply to and include all such articles, contrivances, and arrangements generally or commonly known as fireworks, and shall specially include sparklers and like methods of fire display and mechanical appliances of any kind made for the discharge of blank cartridges of any calibre or of torpedoes. The mayor or chief of police in any incorporated city or town in Lee county, and the sheriff, where there is no mayor or chief of police, is hereby given authority to confiscate and destroy any stock or fireworks found in violation of this section. Each day such fireworks are kept or stored in violation of this section shall constitute a separate offense. The penalty for the discharge of or the causing to be discharged of any form of fireworks, or for the storing or keeping, selling or offering for sale, any fireworks shall be fifty dollars, the same to be paid into the general school fund. (1921, c. 84.)

§ 4426(c). Leaving unused well open and exposed.—It shall be unlawful for any person, firm or corporation, after discounting the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (1923, c. 125.)

Editor's Note.—This section is said to be a sensible regulation in 1 N. C. Law Rev. 300.

§ 4426(d). Unlawful to pollute any bottles used for beverages.—It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, shall be guilty of a misdemeanor, and upon conviction shall be fined on the first offense, one dollar for each bottle so defiled, and for any subsequent offense by a fine of not more than ten dollars for each bottle so defiled. (1929, c. 324, s. 1.)

SUBCHAPTER 12. GENERAL POLICE REGULATIONS

Art. 34. Lotteries and Gaming

§ 4427. Advertising lotteries.—If any one, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (Rev., s. 3725; 1887, c. 211.)

As to lotteries generally, see 8 Enc. Dig. 946 et seq.; 14 Enc. Dig. 71 et seq. See, also, the discussion in 5 N. C. L. R. 31.

§ 4428. Dealing in lotteries.—If any person shall open, set on foot, carry on, promote, make or draw publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. (Rev., s. 3726; Code, s. 1047; R. C., c. 34, s. 69; 1834, c. 19, s. 1; 1874-5, c. 96; 1933, c. 434.)

As to criminal responsibility for lotteries, see 8 Enc. Dig. 946 et seq.

Editor's Note.—Public Laws of 1933, c. 434, added the last sentence of this section, relating to possession of tickets, certificates, etc.

In General.—A lottery may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Lipkin, 169 N. C. 265, 84 S. E. 340. Statutes, such as this section, regulating such schemes violate neither the State nor Federal Constitution. Mfg. Co. v. Benjamin, 172 N. C. 53, 89 S. E. 797; State v. Lipkin, 169 N. C. 265, 84 S. E. 340. They are remedial and should be liberally construed. And the fact that the device is an advertising scheme of an otherwise legitimately run business concern does not prevent the section from applying. Id. See also State v. Lumsden, 89 N. C. 572.

Amendment of 1933 Is Valid.—The 1933 amendment to this section which makes the possession of tickets, etc., used in the operation of a lottery prima facie evidence of violation

of the section, is constitutional and valid, the presumption being a rational one. State v. Fowler, 205 N. C. 608, 172 S. E. 191.

Note for Lottery Contract.—Notes given in pursuance of a contract prohibited by this section are for an illegal consideration, and collection thereof is not enforcible in our courts. Brevard Mfg. Co. v. Benjamin & Sons, 172 N. C. 53, 89 S. E. 797.

Surety to Lottery Contract.—A bond guaranteeing the performance of a "trade expansion contract" which is contrary to this section, is as unenforcible against the surety thereon as the contract upon which it is founded. Basnight v. American Mfg. Co., 174 N. C. 206, 93 S. E. 734.

Lottery Privilege Not a Contract.—A right, conferred in the charter of a corporation, to dispose of property by means of lottery tickets, is not a contract between the corporation and the state, but a mere privilege or license, and is revocable at will by the legislative power. State v. Morris, 77 N. C. 512.

Purchaser Not Included.—This section does not embrace persons who buy lottery tickets. State v. Bryant, 74 N. C. 207, 209.

Admissibility of Evidence.—In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. The declaration of one defendant as to the other's participation in the enterprise and as to their protection if they were caught was also competent. State v. Ingram, 204 N. C. 557, 559, 168 S. E. 837.

§ 4429. Selling lottery tickets and acting as agent for lotteries.—If any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the state for or on behalf of any such lottery, to be drawn or paid either out of or within the state, such person shall be guilty of a misdemeanor, and shall be punished as provided for in the preceding section. (Rev., s. 3727; Code, s. 1048; R. C., c. 34, s. 70; 1834, c. 19, s. 2.)

Cited in concurring opinion of C. J. Stacy in State v. Yarboro, 194 N. C. 498, 506.

§ 4430. Gambling.—If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor. (Rev., s. 3715; 1891, c. 29.)

As to gambling generally, see 6 Enc. Dig. 797 et seq.; 14 Enc. Dig. 264; as to gaming contracts, see section 2142 et seq.

See 11 N. C. Law Rev., 248, for reference to acts legalizing pari-mutuel race track betting.

In General.—Betting is essential to the offense, playing without betting is not indictable. State v. Brannen, 53 N. C. 208. The section does not apply to prizes given for skill—here there is no betting. State v. Deboy, 117 N. C. 702, 23 S. E. 167. Tenpins is not a game of chance. State v. King, 133 N. C. 631, 18 S. E. 169.

All who engage in gambling are principals. State v. Deboy, 117 N. C. 702, 23 S. E. 167. A defendant may be indicted for keeping a gaming house and playing for money, without misjoinder. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

Calling Transaction a Raffle.—Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. State v. DeBoy, 117 N. C. 702, 23 S. E. 167.

Ordinances as to Gambling Void.—Gambling being an offence under the general law of a city ordinance covering the same subject is void. State v. McCoy, 116 N. C. 1059, 21 S. E. 690.

Sufficiency of Indictment.—An indictment charging defendant with keeping and maintaining a gaming house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or tables where games of chance were played. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

§ 4431. Allowing gambling in houses of public entertainment; duty of police officers; penalty.—If any keeper of an ordinary or other house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this state. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. It shall be the duty of every police officer of the cities, towns and villages of this state to make diligent inquiry and to exercise constant watchfulness to discover whether any of the offenses enumerated in this section are being committed, and to report once a week under oath to the mayor or other chief officer of his city, town or village, whether such offenses are being committed, and all the facts within his knowledge, or of which he has information relating thereto. If any such police officer shall know or have information that such offenses are being committed and shall fail or neglect to report the same to such mayor or other chief officer, together with all the information known to him, as to the person or persons committing the same, the time and place of the commission and the names of the witnesses thereto, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court, and shall forfeit his office. It shall be the duty of such mayor or other chief officer to require the report herein provided for, and to require that the same shall be verified by the oath of such policeman, and if it appear upon such report that any of the said offenses have been committed, it shall be the duty of such mayor or other chief officer to issue his warrant for the arrest of the offender. Any such mayor or other chief officer of any city, town or village who shall fail or neglect to require the reports herein mentioned, or shall fail or neglect to require of such police officer to verify the same upon oath, or who shall refuse or neglect, upon its appearing from such report that there is probable cause to believe that any of the said offenses have been committed, to issue his warrant for the arrest of the offender, shall be guilty of a misdemeanor. Any person committing any of the offenses mentioned in this section shall be liable to a penalty of five hundred dollars, to be recovered by suit in the superior court in the county in which such offense may have been committed, one-half thereof to the use of the person bringing such suit and one-half to the school fund for the county. (Rev., s. 3716; Code,

s. 1043; 1901, c. 753; R. C., c. 34, s. 76; 1799, c. 526; 1801, c. 581; 1831, c. 26.)

Gambling in Leased Room of Tavern.—Where it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendants could not be convicted under this section. State v. Keisler, 51 N. C. 73.

Houses Where Liquor Was Retailed.—For case under this provision, see State v. Terry, 20 N. C. 325.

Excessive Punishment.—For the violation of this section a fine of two thousand dollars and imprisonment for thirty days, and thereafter until the fine and costs were paid, was held not excessive punishment. State v. Miller, 94 N. C. 904.

§ 4432. Gambling with faro-banks and tables.— If any person shall open, establish, use or keep a faro-bank, or a faro-table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and shall be fined at least two hundred dollars and imprisoned not less than three months. (Rev., s. 3717; Code, s. 1044; R. C., c. 71; 1848, c. 34; 1856-7, c. 25.)

Cited in State v. Norwood, 94 N. C. 935.

§ 4433. Keeping gaming tables, illegal punch boards or slot machines, or betting thereat.—If any person shall establish, use or keep any gaming table (other than a faro-bank), by whatever name such table may be called, an illegal punch board or an illegal slot machine, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars and shall be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars. (Rev., s. 3718; Code, s. 1045; R. C., c. 34, s. 72; 1791, c. 336; 1798, c. 502, s. 2; 1931, c. 14, s. 2.)

See notes to §§ 4430, 4433(a).

The Indictment.—An indictment under this section is good, without any averment that the act was done "willfully and unlawfully" or that games of chance were played at such table for money or other property. State v. Howe, 100 N. C. 449, 5 S. E. 671.

But a bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. State v. Norwood, 94 N. C. 935.

Evidence Admissible.—Where defendants admit keeping gaming tables, evidence may be admitted tending to show they were continuously present at the place and tending to show their large share in the receipts of these tables. State v. Galloway, 188 N. C. 416, 124 S. E. 745.

Cited in State v. Bryant, 74 N. C. 207.

§ 4433(a). Illegal slot machines and punchboards defined. — An illegal slot machine or punchboard is defined as one that shall not produce for or give to the person who places coin or money or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. (1931, c. 14, s. 1.)

Editor's Note.—The Act from which this section was taken amended sections 4433-4435 to make them applicable to illegal slot machines and punch boards. The Act expressly provided that it should not have the effect of modifying in any way sections 4437(a)-4437(c) and should be construed as supplemental to that act.

§ 4434. Allowing gaming tables, illegal punch boards or slot machines on premises. — If any person shall knowingly suffer to be opened, kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables by this article prohibited, or any illegal punch board or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned. (Rev., s. 3719; Code, s. 1046; R. C., c. 34, s. 73; 1798, c. 502, s. 3; 1800, c. 5, s. 2; 1931, c. 14, s. 3.)

See note to § 4433(a).

§ 4435. Gaming tables, illegal punch boards and slot machines to be destroyed by justices and police officers. — All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by this article, or any illegal punch board or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (Rev., s. 3720; Code, s. 1049; R. C., c. 34, s. 74; 1791, c. 336; 1798, c. 502, s. 2; 1931, c. 14, s. 4.)

See note to § 4433(a).

Cited in Daniels v. Homer, 139 N. C. 219, 226, 252, 51 S. E. 992.

§ 4436. Property exhibited by gamblers to be seized; disposition of same.—All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game shall be liable to be seized by any justice of the peace, or by any person acting under his warrant. Of the moneys or other property or thing which shall be so seized one-half shall belong to the person seizing them, and the other half shall go to the use of the poor. (Rev., s. 3722; Code, s. 1051; R. C., c. 34, s. 77; 1798, c. 502, s. 3.)

Cited in North Carolina v. Vanderford, 35 Fed. 282, 286.

§ 4437. Opposing destruction of gaming tables and seizure of property.—If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed, and shall, moreover, be guilty of a misdemeanor. (Rev., s. 3723; Code, s. 1052; R. C., c. 34, s. 78; 1798, c. 502, s. 4.)

Cited in North Carolina v. Vanderford, 35 Fed. 282, 286.

§ 4437(a). Operation or possession of slot machine; separate offenses.—It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2.)

See § 4433(a) and note thereto.

Editor's Note.—It was said in 1 N. C. Law Rev. 285, that

"the interesting part of the statute is the definition of unlawful machine or device as one that does not produce for or give to the person operating, playing or patronizing the machine or device 'the same return in market value each and every time such machine or device is operated or patronized by paying money or other thing of value.' The act seems to cover all possible gambling devices not already covered by the lottery provisions of the Consolidated Statutes."

Value Required to Be Given.—Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemnation of the statute. State v. May, 188 N. C. 470, 471. 125 S. E. 9.

License of Lawful Machines Only.—The State license issued for the operation of a slot machine is for one that is lawful, and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. State v. May, 188 N. C. 470, 125 S. E. 9.

Sufficiency of Indictment.—An indictment charging that the defendant "unlawfully and wilfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc., is insufficient because it fails to inform the accused of the specific offense or the necessary ingredience thereof, notwithstanding the statute is cited. State v. Ballangee, 191 N. C. 700, 701, 132 S. E. 795.

§ 4437(b). Punch-boards, vending machines, and other gambling devices; separate offenses.—It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by paying of money or other thing of value for the privilege thereof. Each time said punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by the paying of money or other thing of value therefor, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4.)

See § 4433(a) and note thereto.

§ 4437(c). Violation of two preceding sections a misdemeanor.—Violation of any of the provisions of the two preceding sections shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the court, by both. (1923, c. 138, s. 5.)

§ 4437(d). Slot machines or devices prohibited.—It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device as hereinafter defined. (1935, c. 37, s. 1.)

Editor's Note.—Section 8 of chapter 37, Public Laws 1935, from whence this section is derived, as amended by chapter 85, Public Laws 1935, provides: "This law shall be in full force and effect from and after its ratification: Provided however, that the possession of the machines or devices herein declared unlawful shall not become unlawful until May first, one thousand nine hundred thirty-five, it being the purpose of this amendment to permit the present owner and/or operators of the said machines until May first, one thousand nine hundred thirty-five, to dispose of the said machines."

§ 4437(e). Agreements concerning slot machines or devices prohibited.—It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machine or device, as hereinafter defined, pursuant to which the user thereof, as a result of any element of chance or other outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machines or device, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1935, c. 37, s. 2.)

§ 4437(f). Slot machine or device defined. — Any machine, apparatus or device is a slot machine or device within the provisions of this law if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication or weight, entertainment or other thing of value. (1935, c. 37, s. 3.)

§ 4437(g). No tax to be levied on prohibited machines.—Neither the State, nor any county or municipality in the state shall levy or collect any license or other tax on machines or devices, the ownership or operation of which is herein prohibited. (1935, c. 37, s. 4.)

§ 4437(h). Machine declared nuisance. — Any article or apparatus maintained or kept in violation of this law is a public nuisance. (1935, c. 37, s. 5.)

§ 4437(i). Violation made misdemeanor. — Any person who violates any provision of this law [§§ 4437(d) et seq.] is guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1935, c. 37, s. 6.)

§ 4437(j). Slot machines or devices prohibited.—It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend

or give away, transport, except transporting into or from the state, or expose for sale or lease, or to offer to sell, except where sale is made for delivery without the state, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device except as hereinafter defined. (1935, c. 282, s. 1.)

§ 4437(k). Agreements concerning slot machines or devices prohibited.—It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machine or device, except as hereinafter permitted, pursuant to which the user thereof, as a result of any element of chance over which the operator may not have any control, or the outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machines or device, or to receive any checks, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1935, c. 282, s. 2.)

§ 4437(l). Slot machine or device defined.—Any machine, apparatus or device is a slot machine or device prohibited by the provisions of this law if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated, and by reason of any element of chance over which the operator cannot have any control over the outcome of the operation of such machine or device each and every time the same is operated, or to the operator the outcome of each separate operation of such machine or device is unpredictable in advance of each and every operation of such machine or device, may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value, except as herein permitted, which may be exchanged for any money, credit, or thing of value or allowance, or which may be given in trade or the user may secure additional chances or rights to use such machine, apparatus or device, irrespective of whether it may, apart from any element of chance over which the user may not have any control over the outcome of the operation or where the definite outcome of each separate operation of such machine or device is not predictable to the user in advance, or the outcome of such operation is not dependent in whole or in part upon skill and practice of the operator, also sell, deliver, or present some merchandise, indication, or weight, entertainment or other thing of value. (1935, c. 282, s. 3.)

§ 4437(m). Minors barred from playing. — No person who has charge of the supervision of such coin operated devices shall permit any person under the age of eighteen (18) years to engage in the operation of such devices unless such person be accompanied by a parent or other person in loco parentis who, being present, sanctions such play. (1935, c. 282, s. 4.)

§ 4437(n). Violation made misdemeanor.—Any person, firm or corporation owning, operating, leasing, or displaying with the intent to lease or operate any coin operated machine or device in violation of any of the provisions of this law [§§ 4437(j) et seq.] shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars, and each and every operation of any device prohibited by this law shall be deemed a separate and distinct offense. (1935, c. 282, s. 5.)

§ 4437(o). Proprietor of place where machine located deemed operator. — For the purposes of this law, the proprietor of any place of business in which any coin operated machine may be found shall be deemed the operator thereof for the purpose of enforcing the penalties herein provided. (1935, c. 282, s. 6.)

§ 4437(p). Machine declared nuisance. — Any article or apparatus contained or kept in violation of any provision of this law is a public nuisance. (1935, c. 282, s. 7.)

§ 4437(q). Counties excepted.—Sections 4437(j)-4437(p) shall not apply to the counties of Alleghany, Burke, Davidson, Gates, Harnett, Hyde, Lincoln, Madison, Onslow, Sampson and Alexander. (1935, c. 282, s. 8.)

Art. 34A. Marathon Dances and Similar Endurance Contests

§ 4437(1). Dance marathon and walkathons prohibited.—It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests, by whatever name called, of walking or dancing, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest, and/or similar physical endurance contest by walking and dancing continuing or intended to continue for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of forty-eight hours. (1935, c. 13, s. 1.)

§ 4437(2). Penalty for violation.—Any persons violating the provisions of this article shall be guilty of a misdemeanor and shall be punishable by imprisonment in the county or municipal jail for not less than thirty days nor more than ninety days, or by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by both such fine and imprisonment in the discretion of the court. (1935, c. 13, s. 2.)

§ 4437(3). Each day made separate offense. — Each and every day that any person, firm or corporation shall continue such a contest or engage in any such activities and/or each day's participation in such contest or advertisement of the same or do any act in violation of the provisions of this article shall be and constitute a distinct and separate offense. (1935, c. 13, s. 3.)

Art. 35. Protection of Minors

§ 4438. Selling cigarettes to minors.—If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court. (Rev., s. 3804; 1891, c. 276.)

§ 4439. Aiding minors in procuring cigarettes; duty of police officers.—If any person shall aid or assist any minor child under seventeen years old in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

It shall be the duty of every police officer, upon knowledge or information that any minor under the age of seventeen years is or has been smoking any cigarette, to inquire of any such minor the name of the person who sold or gave him such cigarette, or the substance from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor, the officer shall forthwith cause a warrant to be issued for the person giving or selling, or aiding or abetting in the giving or selling of such cigarette or the substance out of which it was made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer, upon inquiry, the name of the person selling or giving him such cigarette, or the substance out of which it was made, shall be guilty of a misdemeanor. (Rev., s. 3805; 1891, c. 276, s. 2; 1913, c. 185.)

§ 4440. Selling or giving weapons to minors.—If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane or sling-shot, he shall be guilty of a misdemeanor. (Rev., s. 3832; 1893, c. 514.)

§ 4441. Permitting young children to use dangerous firearms.—Any person, being the parent or guardian of, or standing in loco parentis to, any child under the age of twelve years, who shall knowingly permit such child to have the possession or custody of, or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such firearm be loaded or unloaded, or any other person who shall knowingly furnish such child any such firearm, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1913, c. 32.)

§ 4442. Permitting minors to enter barrooms, billiard rooms and bowling alleys.—If the keeper or owner of any barroom, billiard room or bowling alley shall allow any minor to enter or remain in such barroom, billiard room or bowling alley, where before such minor enters or remains in such barroom, billiard room or bowling alley, the owner or keeper thereof has been notified by the parents or guardians of such minor not to allow him to enter or remain in such barroom, billiard room or bowling alley, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3729; 1897, c. 278.)

§ 4443. Exposing children to fire.—If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (Rev., s. 3795; 1893, c. 12.)

§ 4444. Marrying females under fourteen years old.—If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor. (Rev., s. 3368; Code, s. 1083; R. C., c. 34, s. 46; 1820, c. 1041, ss. 1, 2.)

As to capacity to marry in general, see §§ 2494 and 2495.
Cited in Caroon v. Rogers, 51 N. C. 240.

§ 4445. Separating child under six months old from mother.—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the state for such purpose, unless the consent in writing for such separation shall have been obtained from the clerk of the superior court and the county health officer of the county in which the mother resides, or of the county in which the child was born; and it shall be unlawful for any mother to surrender her child for such purpose without first having obtained such consent. Any person violating this section shall, upon conviction, be fined not exceeding five hundred dollars or imprisoned for one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240.)

§ 4446. Failing to pay minors for doing certain work.—Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3428a; 1893, c. 309.)

Art. 36. Protection of the Family

§ 4447. Abandonment of family by husband.—If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the

age of eighteen years. (Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; 1925, c. 290.)

Cross Reference.—As to competency of wife's testimony upon trial of husband for abandonment of minor children, see § 1802 and the note thereto.

As to abandonment of family by husband generally, see 7 Enc. Dig. 441 et seq.; 14 Enc. Dig. 385 et seq.

Editor's Note.—The latter part of this section, providing that the abandonment shall be a continuing offense until the youngest child should arrive at the age of eighteen years and barring the running of the statute of limitation until that time was added by Public Laws 1925, ch. 290.

Two Offenses Created.—The placing of a comma after the words "such wife," in this section, evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with section 4450, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." State v. Bell, 184 N. C. 701, 115 S. E. 190.

Construed with § 4450.—Where the husband has been convicted of wilfully abandoning his wife and minor children (under this section); and, secondly, of wilfully failing to support them (§ 4450), an order suspending judgment upon the second count, to take effect, however, upon the defendant's failure to comply with the order for support under this first one, is not objectionable as being conditional or alternative. State v. Vickers, 196 N. C. 239, 145 S. E. 175.

The Indictment.—An indictment against a husband for abandoning his wife must aver his failure to support her. State v. May, 132 N. C. 1020, 43 S. E. 819.

Abandonment Must Be Willful.—The willful abandonment of the wife is an essential element of the offense made criminal by this section, and this, the prosecutrix is required to show beyond a reasonable doubt. State v. Falkner, 182 N. C. 793, 108 S. E. 756; State v. Smith, 164 N. C. 475, 79 S. E. 979.

But there is no reversible error in the charge of the court for omitting the word "willful" in one part thereof when he has elsewhere repeatedly instructed the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt. State v. Taylor, 175 N. C. 833, 96 S. E. 22.

Where the defendant is indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support under § 4448, and an instruction that leaves out this essential element of the crime will be held for reversible error. State v. Roberts, 197 N. C. 662, 150 S. E. 199.

The word "willfully" as used in § 276(a) is used with the same import as in this section. State v. Cook, 207 N. C. 261, 262, 176 S. E. 757.

Providing for Support. — It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of wilfully abandoning them (§§ 4447, 4449), and, Held, in this case an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of one thousand dollars come within the provisions of the statute. State v. Vickers, 196 N. C. 239, 145 S. E. 175.

Where the husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the Superior Court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. State v. Vickers, 196 N. C. 239, 145 S. E. 175.

Both Abandonment and Non-Support Must Be Proved.—Both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense. State v. Beam, 181 N. C. 597, 107 S. E. 429.

In State v. Johnson, 194 N. C. 378, 139 S. E. 697, it was said: "An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a wilful abandonment of the wife; and, second, a failure to provide 'adequate support for such wife, and the children which he may have begotten upon her.' S. v. Toney, 162 N. C. 635, 788 S. E. 156; S. v. Hopkins, 130 N. C. 647, 40 S. E. 973. The abandonment must be wilful, that is, without just cause, excuse or justification. S. v. Smith, 164 N. C. 475, 79 S. E. 979. And both ingredients of the crime must be alleged and proved. S. v. May, 132 N. C. 1020, 1021, 43 S. E. 819." State v. Yelverton, 196 N. C. 64, 65, 144 S. E. 534.

Good Faith of Abandonment Question for Jury.—In a prosecution of a husband for abandonment the question whether such abandonment was in good faith for the causes assigned is for the jury. State v. Hopkins, 130 N. C. 647, 40 S. E. 973.

Separation by Consent.—Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of this section. State v. Smith, 164 N. C. 475, 79 S. E. 979.

An offer of a home when not made in good faith, and when refused, is equivalent to abandonment by the husband. State v. Smith, 164 N. C. 475, 79 S. E. 978.

Divorce after First Conviction No Defense on New Trial.—Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, under this section, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. State v. Faulkner, 185 N. C. 635, 116 S. E. 168.

Abandonment of Children after Divorce.—The father's duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. State v. Bell, 184 N. C. 701, 115 S. E. 190.

Denial of Paternity.—Where the husband in an action for nonsupport of a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. State v. Ray, 195 N. C. 628, 143 S. E. 216.

Wife Guilty of Adultery.—Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment. State v. Hopkins, 130 N. C. 647, 40 S. E. 973.

Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt. State v. Falkner, 182 N. C. 793, 108 S. E. 756.

While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating this section, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. State v. Johnson, 194 N. C. 378, 139 S. E. 697.

Competency of Wife's Testimony.—Under this section the wife is a competent witness against her husband "as to the fact of abandonment, or neglect to provide adequate support." She is not, however, a competent witness to prove the fact of marriage. State v. Brown, 67 N. C. 470. But see § 1802 and notes thereunder.

Not a Continuing Offense.—The crime of willful abandonment by the husband of his wife is not a continuing offense, day by day, and where there has been a complete act of abandonment and no renewal of the marital association, the act must have occurred within two years next before indictment found. State v. Hannon, 168 N. C. 215, 83 S. E. 701.

Condonation by Wife Does Not Bar Prosecution.—Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. State v. Manon, 204 N. C. 52, 167 S. E. 493.

Jurisdiction.—The constructive domicile of the wife is that of her husband, and where he has resided in another State and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her sup-

port and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. State v. Sneed, 197 N. C. 668, 150 S. E. 197.

Venue.—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of this section, is in that county. State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Same—Where Husband Non-Resident.—Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another State, he cannot direct her choice of residence and is indictable under this section in the county of her residence. State v. Beam, 181 N. C. 597, 107 S. E. 429.

Statute of Limitations.—Where the abandonment consisted in the failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Same—Renewal of Cohabitation. — Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh bandonment and failure to support," and an indictment found within two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N. C. 597, 107 S. E. 429.

Same—Promise and Gifts.—The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings under ths section for his willfully abandoning them. State v. Bell, 184 N. C. 701, 115 S. E. 190.

Plea in Abatement after Plea of Not Guilty.—Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section; on appeal held, his plea in abatement comes too late after his plea of not guilty. State v. Hooker, 186 N. C. 761, 120 S. E. 449.

Amendment of Complaint.—See note under § 513.

Punishment for Violation.—Our Constitution, Art. II, sec. 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction leaving this matter of establishing a house of correction dscretionary with the legislative power, and a sentence may be imposed of imprisonment upon a husband convicted of abandonment under this section, and other offenses of like kind, or to assign them to work on the roads during their term. State v. Faulkner, 185 N. C. 635, 116 S. E. 168.

Husband Cannot Be Twice Convicted. — A husband once convicted of an abandonment of his wife cannot be again tried for the same offense, he not having lived with her since the original abandonment. State v. Dunston, 78 N. C. 418.

Autrefois Acquit and Convict.—In a prosecution for the violation of this section a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. State v. Jones, 201 N. C. 424, 160 S. E. 468.

Wife Not Deprived of Civil Remedies.—Requiring the state to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, under this section, does not deprive the wife of her civil remedies under the provisions of section 1667. State v. Falkner, 182 N. C. 793, 108 S. E. 756.

Quoted in Jeffreys v. Hocutt, 195 N. C. 339, 343, 142 S. E. 226.

Applied in State v. Woodland, 119 N. C. 779, 25 S. E. 719.

Cited in Steel v. Steel, 104 N. C. 631, 10 S. E. 707; State v. Henderson, 207 N. C. 258, 260, 176 S. E. 758.

§ 4448. Evidence that abandonment was willful. —If the fact of abandonment of and failure to provide adequate support for the wife and children shall be proved, or, while being with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful. (Rev., s. 3356; Code, s. 971; 1868-9, c. 209, s. 3.)

When Evidence for Defendant Necessary. — Where the nonsupport and abandonment of the husband are both established or admitted, under this section, it may be necessary for the defendant to come forward with his evidence and proof to avoid the risk of an adverse verdict. State v. Falkner, 182 N. C. 793, 108 S. E. 756.

Cited in Steel v. Steel, 104 N. C. 631, 10 S. E. 707.

§ 4449. Order to support from husband's property or earnings.—Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant. (1917, c. 259.)

A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. State v. Vickers, 197 N. C. 62, 147 S. E. 673. See notes to § 4447.

In Addition to Section 4447.—This section is in addition to the powers conferred by section 4447, and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. State v. Faulkner, 185 N. C. 635, 116 S. E. 168.

"Husband," Applies after Divorce.—This section, uses the word "husband" as descriptio personae, in his relation to the child of the marriage to whom his duty of support continues after a decree of divorcement has been entered; and does not confine the offense to the abandonment of the wife. State v. Bell, 184 N. C. 701, 115 S. E. 190.

A judgment under this section is not conditional because of an order that capias issue at any time on motion of the solicitor, for such order is void and not a part of judgment and capias may issue upon an order of the court. State v. Manon, 204 N. C. 52, 167 S. E. 493.

The practice of suspending judgments or staying executions in criminal prosecutions upon reasonable and just terms, with the consent of defendant, is established by custom and judicial decision, and in prosecutions for abandonment has received express legislative sanction under this section. State v. Henderson, 207 N. C. 258, 176 S. E. 758.

§ 4450. Failure of husband to provide adequate support for family.—If any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor. Upon conviction of any husband as herein provided, the court having jurisdiction thereof may in his discretion make such order as in his judgment will best provide for the support of such wife or children, and may commit the said husband to the common jail of the county, to be hired out by the county commissioners for such length of time as the court may deem proper, which said wage or salary shall be paid to the said wife or children, to be used toward their support. (Rev., s. 3357; Code, s. 972; 1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92; 1921, c. 103.)

See notes to § 4447.

Editor's Note.—The last sentence of the section was added by Public Laws of 1921, ch. 103.

Sufficiency of Indictment.—An indictment charging violation and following the words of the statute is sufficient. State v. Kerby, 110 N. C. 558, 14 S. E. 856.

Cited in State v. Bell, 184 N. C. 701, 115 S. E. 190.

§ 4450(a). Abandonment of child by mother.—If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

Art. 37. Intoxicating Liquors

§ 4451. Adulteration of liquors.—If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as provided in the following section, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3512; Code, s. 982; 1858-9, c. 57, ss. 1, 4.)

See §§ 3367 et seq. As to intoxicating liquors generally, see 7 Enc. Dig. 927 et seq., 14 Enc. Dig. 496 et seq.

§ 4452. Selling recipe for adulterating liquors.—If any person shall sell or offer for sale any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is herein provided, he shall be guilty of a felony, and shall be fined or imprisoned as is provided in the preceding section: Provided, that this section and the two sections that immediately precede and follow it respectively shall not be so construed as to prevent druggists, physicians and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes. (Rev., s. 3513; Code, s. 984; 1858-9, c. 57, ss. 2, 3.)

§ 4453. Manufacturing or selling poisonous liquors.—If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen, after making purchase of any spirituous liquor, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter, it shall be prima facie evidence against the party making such a sale. (Rev., s. 3522; Code, s. 983; 1873-4, c. 180, ss. 1, 2.)

§ 4454. Selling or giving away liquor near political speaking.—If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which such speaking shall take place, he shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. (Rev., s. 3528; Code, s. 1079; 1879, c. 212.)

§ 4455. Giving intoxicants to unmarried minors under seventeen years old.—If any person shall give intoxicating drinks or liquors to any unmarried minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in giving such drinks or liquors to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment in the discretion of the court; but nothing in this section shall prevent any parent or other person standing in loco parentis from giving or administering any such drinks or liquors to his minor child for medicinal purposes, nor any physician from giving or administering such drinks or liquors to any minor patient under his care; nor shall this section apply to the giving or using of wine in the administration of the sacrament. (1915, c. 82.)

§ 4456. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.—If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing such person to be under the age of twenty-one years he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars. (Rev., ss. 3524, 3525; Code, ss. 1077, 1078; 1873-4, c. 68; 1881, c. 242.)

For cases under this law, see Spencer v. Fisher, 158 N. C. 264, 73 S. E. 810, 161 N. C. 116, 76 S. E. 731; State v. Kittelle, 110 N. C. 560, 15 S. E. 103; State v. Lawrence, 97 N. C. 492, 2 S. E. 367; State v. Walker, 103 N. C. 413, 4 S. E. 582.

Art. 38. Public Drunkenness

§ 4457. Public drinking on railway passenger cars; copy of section to be posted.—Any person who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not to exceed thirty days. This section shall not apply to any smoking compartment or to any closet, dining or buffet car. It shall be the duty of all railway companies to have posted a copy of this section in all passenger coaches used for transporting passengers within the state. (1907, c. 455.)

§ 4457(a). Public drunkenness and disorderliness.—It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in North Carolina; person or persons convicted of a violation hereof shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceed-

ing thirty days in the discretion of the court. (1921, c. 211.)

Verdict of guilty of disorderly conduct but not of drunkenness will not support conviction for drunken and disorderly conduct under this section. State v. Myrick, 203 N. C. 8, 164 S. E. 328.

§ 4458. Local: Public drunkenness. — If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Ashe, Catawba, Cherokee, Clay, Cleveland, Dare, Gaston, Graham, Greene, Haywood, Henderson, Hyde, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Moore, Northampton, Orange, Pitt, Richmond, Rutherford, Scotland, Stanly, Union, Vance, Warren, Franklin and Washington, in the townships of Fruitville and Poplar branch in Currituck county, and at Pungo in Beaufort county. (1907, cc. 305, 785, 900; 1908, c. 113; 1909, c. 815; P. L. 1915, c. 790; P. L. 1917, cc. 447, 475; P. L. 1919, cc. 148, 200; 1935, cc. 49, 208.)

2. By a fine of not less than three dollars nor more than fifty dollars, or by imprisonment for not more than thirty days, in Yancey county. (1909, c. 256.)

3. By a fine of not less than two dollars and fifty cents nor more than fifty dollars, or by imprisonment for not more than thirty days, in Buncombe county. (1909, c. 271.)

4. By a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment for not more than ten days, in Yadkin county. (1907, c. 976; 1935, c. 49.)

5. Repealed. (1935, c. 49.)

6. By a fine of not less than five dollars nor more than ten dollars in Wake county, all such fines to go to the general road fund of that county. (1907, c. 908.)

7. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in Mitchell county: Provided, that this subsection shall not apply to incorporated towns in that county. (1909, c. 111.)

8. By a fine of not less than five dollars nor more than fifty dollars, or by imprisonment for not more than ten days, in the village of Kannapolis, or on the premises or within one mile of the Kannapolis cotton mills. (1909, c. 46, s. 2.)

9. By a fine, for the first offense, of not less than ten nor more than twenty dollars; for second and further offense, no less than twenty nor more than thirty dollars, or imprisoned for not more than twenty days, in Transylvania county. (P. L. 1919, c. 190; Rev., 3733; 1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, cc. 116, 124, 523, 758; 1924, c. 5; 1929, c. 135, s. 1; 1931, c. 219.)

10. By a fine of fifteen dollars or imprisonment for ten days for the first offense; by a fine of twenty-five dollars or imprisonment for twenty days for the second offense; by a fine of fifty dollars or imprisonment for thirty days for the third and subsequent offenses, in the King high school district, Stokes county. (1933, c. 287.)

11. By a fine of not less than five dollars or more than fifty dollars or by imprisonment for not more than thirty days, in the discretion of the court in Swain county. (1933, c. 10.)

12. By a fine of not less than five nor more than fifty dollars or by imprisonment not more than thirty days in Nash and Wilson counties. (1935, cc. 284, 350.)

13. In Guilford county, by a fine, for the first offense, of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months period, such third offense to be declared a misdemeanor, punishable as a misdemeanor, within the discretion of the court. (1935, c. 207.)

14. In Iredell county, by a fine of not less than five dollars nor more than fifty dollars, or by imprisonment of not more than thirty days for the first offense; for each conviction thereafter the fine shall not be less than ten dollars nor more than fifty dollars, or imprisonment of not more than thirty days, in the discretion of the court. (1935, c. 158.)

Editor's Note.—By the amendment of 1929 paragraph one of this section was made applicable in Northhampton.

Public Laws of 1933, c. 287, added subdivision 10, relating to King High School District, Stokes county. Chapter 10 struck out Swain from the list of counties in subdivision 1, and added subdivision 11 applicable in that county only.

Public Laws of 1935, chapter 208, added Orange to the list of counties in subsection 1. Public Laws of 1935, chapter 49, added Cherokee and Clay to subsection 1 and omitted Cherokee from subsection 4 and deleted subsection 5, which was applicable in Clay county. Section 4 of this amendatory act makes it lawful for Cherokee and Clay counties to sentence the defendant to thirty days in prison to be assigned to work on the highway. Public Laws of 1935, chapter 350, adds subsection 12 to the section. Public Laws of 1935, chapter 207, adds subsection 13. Public Laws of 1935, chapter 158, adds subsection 14. Section 2 of this last amendatory act provides that the fine shall not be remitted unless the defendant is in prison.

Art. 39. Vagrants and Tramps

§ 4459. Persons classed as vagrants.—If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person may be fined or imprisoned, or both, in the discretion of the court:

1. Persons wandering or strolling about in idleness who are able to work and have no property to support them.

2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.

3. All persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood.

4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.

5. Professional gamblers living in idleness.

6. All able-bodied men having no other visible means of support who shall live in idleness upon

the wages or earnings of their mother, wife or minor children except of male children over eighteen years old.

7. Keepers and inmates of bawdy-houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy-house, or lessening the punishment by law for such crime. (Rev., s. 3740; 1905, c. 391; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1.)

Editor's Note.—For a case decided under the former law, acts 1886, ch. 42, see State v. Custer, 65 N. C. 339.

Amendment to Warrant.—Where a warrant in a criminal action charges the defendant with "being a vagrant," it is within the discretion of the judge to allow an amendment specifying the particular act under which it has been issued; and while it is the better practice to reduce the amendment to writing at the time, the order is self executing, and failure to do so does not destroy its legal effect. State v. Walker, 179 N. C. 730, 102 S. E. 404. See also State v. Price, 175 N. C. 804, 95 S. E. 478.

Evidence.—By express statutory provision, the reputation that a house is kept as a bawdy house may be received in evidence on the trial of a person for keeping one, under an indictment for vagrancy, etc., and the statute is constitutional and valid. State v. Price, 175 N. C. 804, 95 S. E. 478.

Imposition of Wrong Sentence.—Where a conviction for vagrancy has been legally had under this section, and the sentence has been imposed of imprisonment for twelve months allowed under section 4362, the case will be remanded for the imposition of the proper sentence. State v. Walker, 179 N. C. 730, 102 S. E. 404.

§ 4460. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.—It shall be the duty of the chief of police, marshal, constable or other chief ministerial officer of each city and town in this state to furnish every thirty days to the police justice, recorder, mayor or other trial officer of such city or town a list of the bawdy, assignation, lewd and disorderly houses and other places where illegal sexual intercourse is carried on, together with the names of the keepers and inmates of such houses and places, in such city or town; and it shall be the duty of such police justice, recorder, mayor or other trial officer, upon the filing of such list, to issue his warrant for the persons declared in subsection seven of the preceding section to be vagrants, and to punish in accordance with the provisions of that section such of them as may be found guilty. In all trials under said subsection seven of the preceding section any keeper or inmate of any of the houses or places named, or his employees, shall be competent and compellable to give evidence of the character and nature of such house or place and of the character and acts of the keepers and inmates thereof; but the person so testifying shall not be prosecuted or punished for the commission of any crime about which he shall have been required to testify.

If any chief of police, marshal, constable or other chief ministerial officer of any city or town shall fail to furnish the list of houses and places provided for in this section, or shall suppress the name of any person whom he is required herein to report, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1907, c. 1012, ss. 2, 3.)

§ 4461. Tramp defined and punishment provided; certain persons excepted.—If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of fourteen years, or to any blind person. (Rev., s. 3735; Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; 1879, c. 198, ss. 1, 4, 6.)

§ 4462. Trespassing and the carrying of dangerous weapons by tramps.—If any tramp shall enter any dwelling-house or kindle any fire on the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment at the discretion of the court, not to exceed twelve months. (Rev., s. 3736; Code, s. 3829; 1879, c. 198, s. 2.)

§ 4463. Malicious injuries by tramps to persons and property.—If any tramp shall willfully and maliciously do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years. (Rev., s. 3737; Code, s. 3830; 1879, c. 198, s. 3.)

§ 4464. Arrest of tramps by persons who are not officers.—Any person, upon a view of any offense described in the preceding sections, shall cause the offender to be arrested upon a warrant and taken before some justice of the peace, or he may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, he shall be entitled to the same fee as a sheriff. (Rev., s. 3738; Code, s. 3832; 1879, c. 198, s. 5.)

Art. 40. Regulation of Sales

§ 4465. Selling or offering to sell meat of diseased animals.—If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (Rev., s. 3442; 1905, c. 303.)

§ 4466. Unauthorized dealing in railroad tickets.—If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor. (Rev., s. 3764; 1895, c. 83, s. 1.)

Cited in concurring opinion of C. J. Stacy in State v. Yarboro, 194 N. C. 498, 506.

§ 4467. Sale of cotton at night under certain conditions.—If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cot-

ton brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor. On conviction, in Mecklenburg and Nash Counties, the offender shall be imprisoned not less than three months nor more than twelve months, and shall also be liable to a penalty of two hundred dollars, one-half of which shall go to the party suing for same and one-half to the public schools of the county. (Rev., s. 3813; Code, s. 1006; 1873-4, c. 62; 1874-5, c. 70; 1905, c. 417.)

Cited in State v. Moore, 104 N. C. 714, 10 S. E. 143; State v. Yarboro, 194 N C. 498, 506.

§ 4468. Local: Sale of corn at night in less than five-bushel lots.—If any person shall buy, sell, deliver or receive for a price or for any reward whatever, any corn in the ear or shelled of a less amount than five bushels, between the hours of sunset and sunrise, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding fifty dollars or imprisoned not exceeding thirty days. In all prosecutions under this section is shall be necessary for the state only to allege and prove that the defendant bought or received the corn as charged, and the burden shall be upon the defendant to show that the provisions of this section have been complied with: Provided, this section shall apply only to the counties of Beaufort, Hyde, Martin, Tyrell, Washington, Pamlico, Halifax and Edgecombe. (Rev., s. 3809; 1889, c. 90; 1891, c. 6; 1891, c. 8.)

§ 4468(a). Sale of convict-made goods prohibited.—Except as hereinafter provided, the sale anywhere within the state of North Carolina of any and all goods, wares and merchandise manufactured, produced or mined wholly or in part, by convicts or prisoners, except by convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions is hereby prohibited and declared to be unlawful.

The provisions of this section shall not apply to sales or exchanges between the state penitentiary and other penal, charitable, educational and/or custodial institutions, maintained wholly or in part by the state, or its political subdivisions, for use in said institution or by the wards thereof; nor shall the provisions of this section apply to the sale of cotton, corn, grain or other processed or unprocessed agricultural products, including seed for growing purposes, or to the sale of stone, quarried by convict labor, or to the sale of coal or chert mined by convict labor, in any mine operated by the state: Provided that this section shall apply with equal force to sales to the state or any political subdivision thereof by any state penal or correctional institution, including the state highway: Provided further that the state of North Carolina shall have the right of manufacturing in any of its penal or correctional institutions products to be used exclusively by the state or any of its agencies.

This section shall apply equally to convict or prison-made goods, wares or merchandise, whether manufactured, produced or mined within or without the state of North Carolina.

Any person, firm or corporation selling, undertaking to sell, or offering for sale any such prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to fine, or imprisonment, or both, in the discretion of the court. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4.)

Art. 41. Regulation of Employer and Employee

§ 4469. Enticing servant to leave master.—If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to leave unlawfully the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months. (Rev., s. 3365; Code, ss. 3119, 3120; 1866, c. 58; 1866-7, c. 124; 1881, c. 303.)

As to interference with the relation of master and servant by third parties generally see 9 Enc. Dig. 174 et seq. 14 Enc. Dig. 816.

In General.—The offense was not known to the common law. State v. Rice, 76 N. C. 194. The section has reference only to the persons enticing, the servants themselves are not indictable. State v. Daniel, 89 N. C. 553. Nor does the section apply to the parent of a minor child who commands such child to quit employment. State v Anderson, 104 N. C. 771, 10 S. E. 47. But if a minor is induced to leave his employment by a stranger, not in loco parentis, such stranger is amenable to action under this section. State v. Harwood. 104 N. C. 724, 10 S. E. 171. The section does not apply where a mere contract to serve, not entered into, has been made. Sears v. Whitaker, 136 N. C. 37, 48 S. E. 517; State v. Holly, 152 N. C. 839, 67 S. E. 53.

A tenant or cropper of another is not his servant, within the meaning of this section. State v. Etheridge, 169 N. C. 263, 84 S. E. 264.

Sufficiency of Indictment.—It is not necessary to specify whether the contract is oral or written, nor the means by which the enticing was accomplished. State v. Harwood, 104 N. C. 724, 10 S. E. 171.

Cited in Haskins v. Royster, 70 N. C. 601, 607.

§ 4470. Local: Hiring servant who has unlawfully left employer.—If any person shall knowingly hire, employ, harbor or detain in his own service any servant, employee, tenant, or wage hand of any other person, who shall have contracted in writing, or orally, for a fixed period of time to serve his employer, and who shall have left the service of his employer in violation of his contract, he shall be guilty of a misdemeanor, and shall be civilly liable in damages to the party so aggrieved. This section shall apply to the following counties: Beaufort, Edgecombe, Person, Pitt, Washington, Warren, Vance, Pender, Halifax, Guilford, Granville, Hertford, Richmond, Wake, Wayne and Caswell. (Rev., s. 3374; 1901, c. 682; 1903, c. 365; 1907, c. 238, s. 2; 1907, c. 402; 1919, c. 274.)

§ 4471. Enticing seamen from vessel.—If any person shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned

not exceeding thirty days. (Rev., s. 3555; Code, s. 1108; 1879, c. 219, s. 1; 1881, c. 256, s. 1.)

§ 4472. Secreting or harboring deserting seamen.—If any person shall secrete or harbor any seaman who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed prima facie evidence that such person knew that such seaman was a deserter. (Rev., s. 3556; Code, s. 1109; 1879, c. 219, s. 2; 1881, c. 256, s. 2.)

Cited in State v. Barrett, 138 N. C. 630, 636, 50 S. E. 506.

§ 4473. Search warrant for deserting seamen.—If any credible witness shall complain, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found; and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of the search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint. (Rev., s. 3557; Code, s. 1110; 1881, c. 256, s. 3.)

§ 4474. Appeal in cases of deserting seamen regulated.—In all cases arising under the three preceding sections, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to proceed immediately to reduce to writing the testimony of any witness whose testimony is material (if such witness shall be master, officer or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by the justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions. (Rev., s. 3558; Code, s. 1111; 1881, c. 256, ss. 4, 5.)

§ 4475. Influencing agents and servants in violating duties owed employers.—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1.)

§ 4476. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon.—No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpœna of any court, having jurisdiction of the crime denounced in the preceding section, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, before such court or in obedience to its subpœna or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2.)

§ 4477. Blacklisting employees.—If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1.)

Intent of Section.—This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. Seward v. Receivers, 159 N. C. 241, 242, 75 S. E. 34.

Remedial Provisions.—The provisions of this and the following section are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

What Constitutes a Violation.—Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged

the services of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc.: Held, the employee is entitled to recover damages in his civil action against his former employer, and a demurrer ore tenus to a complaint setting forth this cause of action is bad. Goins v. Sargent, 196 N. C. 478, 146 S. E. 131.

§ 4478. Conspiring to blacklist employees.—It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words of writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1909, c. 858, s. 2.)

See notes to § 4477. As to amendment of complaint, see note under § 513.

§ 4479. Issuing nontransferable script to laborers.—If any person who employs laborers by the day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word "nontransferable," or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days. (Rev., s. 3730; 1889, c. 280; 1891, c. 78; 1891, c. 456; 1891, c. 46; 1891, cc. 167, 370; 1895, c. 127; 1891, cc. 167, 456.)

"Face Value" Defined.—The "face value" is the value expressed on the face of the writing in the commodity in which it is payable. Marriner v. Roper Co., 112 N. C. 164, 16 S. E. 906.

Rights of Assignee.—This section does not authorize the assignee of a ticket or scrip payable in merchandise to demand and receive payment in money instead of in merchandise. Marriner v. Roper Co., 112 N. C. 164, 16 S. E. 906.

Art. 42. Regulation of Landlord and Tenant

§ 4480. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Wayne, Lenoir, Greene, Johnston, Jones, Onslow, Craven, Cleveland, Sampson, Pitt, Duplin, Gates, Cumberland, Perquimans, Chowan, Robeson, Bladen, Nash, Harnett, Edgecombe, Hertford, Wilson, Rockingham, Pender, Currituck, Gaston, Northampton, Beaufort, Chatham, Tyrrell, Mecklenburg, Halifax, Caswell, Camden, Cabarrus, Columbus, Martin, Washington, Wake, Alexander, Montgomery, Pamlico, Rowan, Rutherford, Bertie, Vance, Warren, Lincoln, Randolph and Lee. (Rev., s. 3366; 1905, cc. 297, 383, 445, 820; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 8, 639, 719, 869; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; 1931, c. 136.)

Cross References.—As to ejectment of tenant see section 2365 and notes. As to the relation of landlord and tenant generally see 8 Enc. Dig. 505 et seq., 14 Enc. Dig. 622 et seq.

Editor's Note.—This section was amended by Public Laws 1920 Ex. Sess., ch. 26, and Lee county added to the list of counties to which its provisions are applicable. In 1925, Public Laws 1925, ch. 285, section 2, Randolph County was added thereto. The Act of 1931 added Vance County.

Constitutionality of Section.—The provisions of this section contravene Article I, section 16, of our State Constitution, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed. State v. Williams, 150 N. C. 802, 63 S. E. 949; Minton v. Early, 183 N. C. 199, 111 S. E. 347.

Jurisdiction.—A court of a justice of the peace has final jurisdiction of a willful abandonment of crop in violation of this section. State v. Wilkes, 149 N. C. 453, 62 S. E. 430.

Indictment Insufficient.—An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. State v. Williams, 150 N. C. 802, 63 S. E. 949.

Cited in concurring opinion of C. J. Stacy in State v. Yarboro, 194 N. C. 498, 506.

§ 4481. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement; or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the following counties: Wake, Hyde, Anson, Hertford, Sampson, Franklin, Union, Richmond, Moore, Lincoln, Rowan, Rutherford, Halifax, Rockingham, Vance, Lee, Stokes, Granville, Randolph, Person and Stanley. (Rev., s. 3367; 1905, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 238, s. 1; 1907, c. 595, s. 2; 1907, cc. 543, 810; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; 1929, c. 5, s. 1; 1931, cc. 44, 136.)

Editor's Note.—The counties of Randolph and Lee were added hereto by Public Laws 1920, Ex. Sess., ch. 20, 26;

Granville and Person counties were added by Public Laws 1923, ch. 32; and Randolph County was added by Public Laws 1925, ch. 285, § 3. The Act of 1929 added Stanley County, and in 1931 Stokes and Vance counties were added.

Cited in opinion of C. J. Stacy in State v. Yarboro, 194 N. C. 498, 506.

§ 4482. Local: Tenant violating contract not to rent land from others.—Whenever land shall be rented for agricultural purposes and the tenant renting the same shall, at the time thereof or at any subsequent time during the term of such renting, enter into a contract in writing with his lessor, from whom he so rented, that he, the tenant, will not thereafter, without the lessor's consent, rent any land for agricultural purposes from any other person than such lessor during the same term of renting, nor become a cropper on the land of any other person than the lessor during such term, any tenant who shall willfully violate the written contract so entered into by him, without just cause and lawful excuse therefor, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. This section shall apply only to Greene County. (1907, c. 981.)

As to dispossession of tenant for refusal to perform contract see section 2366 and annotations thereunder.

Art. 43. Cruelty to Animals

§ 4483. Cruelty to animals; construction of section. — If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor. In this section, and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food. (Rev., s. 3299; Code, ss. 2482, 2490; 1891, c. 65; 1881, c. 34, s. 1; 1881, c. 368, ss. 1, 15; 1907, c. 42.)

Cross References.—See section 4494 and notes. As to cruelty to animals generally see 1 Enc. Dig. 352 et seq. 13 Enc. Dig. 67 et seq.

In General.—Anger does not excuse the killing when it was wilful and needless. State v. Neal, 120 N. C. 613, 27 S. E. 81. And under such circumstances the intent is immaterial. Id. In order to convict, however, there must be a finding that the act was "wilfully and unlawfully" done. State v. Tweedy, 115 N. C. 704, 20 S. E. 183. Unnecessary suffering knowingly and willfully permitted constitutes the offense. State v. Porter, 112 N. C. 887, 16 S. E. 915.

The Indictment.—The facts constituting torturing, tormenting or cruel conduct must be set out when such conduct is charged. State v. Watkins, 101 N. C. 702, 8 S. E. 346. A charge that defendant "did unlawfully and wilfully beat" was held sufficient in State v. Alleson, 90 N. C. 733.

Injury to Prevent Depredations.—The fact that cows (State v. Butts, 92 N. C. 784) or chickens (State v. Neal, 120 N. C. 613, 27 S. E. 81) were trespassing on defendant's property is not a defense to an action under this section, where the killing or wounding was unnecessary. See also, State v. Smith, 156 N. C. 628, 72 S. E. 321.

Illustrations.—Shooting pigeons for sport (State v. Porter, 112 N. C. 887, 16 S. E. 915) and poisoning chickens (State v. Bossee, 145 N. C. 579, 59 S. E. 879) have been held violations of the section.

Hitting a runaway horse with a rock, however, has been held insufficient to sustain a directed verdict—the question of the wilful purpose to injure being for the jury. State v. Isley, 119 N. C. 862, 26 S. E. 35.

Unnecessary to Show Dog Has Pecuniary Value.—It is unnecessary to show that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the section. State v. Smith, 156 N. C. 628, 72 S. E. 321.

Applied in State v. Holt, 90 N. C. 749.

§ 4484. Instigating or promoting cruelty to animals.—If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3300; Code, s. 2487; 1891, c. 65; 1881, c. 368, s. 6.)

Cited in State v. Porter, 112 N. C. 887, 16 S. E. 915.

§ 4485. Bear-baiting, cock-fighting and similar amusements.—If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3301; Code, s. 2483; 1891, c. 65; 1881, c. 368, s. 2.)

§ 4486. Conveying animals in a cruel manner.—If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. Whenever an offender shall be taken into custody therefor by any officer the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor. (Rev., s. 3302; Code, s. 2486; 1891, c. 65; 1881, c. 368, s. 5.)

Art. 44. Animal Diseases

§ 4487. Selling, using or exposing diseased animals.—If any person shall sell, offer for sale, use or expose, or cause or procure to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other contagious or infectious disease known by such person to be dangerous to the life, or which shall be diseased past recovery, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3295; Code, s. 2488; 1891, c. 65; 1881, c. 368, s. 7.)

§ 4488. Disposal of carcasses of animals.—It shall be unlawful for any person, firm or corpo-

ration to permit knowingly the bodies of animals or fowls dying of disease of any kind to remain unburied or unburned on the land which such person, etc., owns, rents, or has charge of in any capacity, for the space of twenty-four hours after the death of said animal or fowl and it shall be unlawful for any such person, firm, or corporation, to remove said carcasses from the premises over which he shall have charge to the premises of any other person, firm or corporation, without the written permission of the person having charge of said premises and without burying the same as herein provided; such burying to be of such a depth as to prevent disinterment by prowling dogs. (1919, c. 36; 1927, c. 2.)

Editor's Note.—This section was amended by Public Laws of 1927, ch. 2, and the portion requiring written permission of the owner of the land, to which the carcass shall be removed and buried, was added.

§ 4489. Animals affected with glanders to be killed.—If the owner of any animal having the glanders or farcy shall omit or refuse, upon discovery or knowledge of its condition, to deprive the same of life at once, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3296; Code, s. 2489; 1891, c. 65; 1881, c. 368, s. 8.)

§ 4490. Hogs affected with cholera to be segregated and confined.—If any person having swine affected with the disease known as hog cholera, or any other infectious or contagious disease, who discovers the same, or to whom notice of the fact shall be given, shall fail or neglect for one day to secure the diseased swine from the approach of or contact with other hogs not so affected, by penning or otherwise securing and effectually isolating them, so that they shall not have access to any ditch, canal, branch, creek, river or other water-course which passes beyond the premises of the owners of such swine, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3297; 1889, c. 173, s. 1; 1891, c. 67, ss. 1, 3; 1903, c. 106; 1899, c. 47; 1913, c. 120.)

§ 4491. Shipping hogs from cholera-infected territory.—It shall be unlawful for any person, firm or corporation in any district or territory infected by cholera to bring, carry, or ship hogs into any stock-law section or territory, unless such hogs have been certified to be free from cholera either by the farm demonstration agent of the county or some other suitable person to be designated by the clerk of the superior court. Any violation of this section shall constitute a misdemeanor. (1917, c. 203.)

§ 4492. Distributing, selling or using hog-cholera virus without permission.—It shall be unlawful for any person, firm or corporation to distribute, sell or use virulent blood from cholera-infected hogs, or "virus," unless and until written permission has been obtained from the state veterinarian for such distribution, sale or use. Any person, firm or corporation guilty of violating the provisions of this section, or failing or refusing to comply with the requirements hereof, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than one hundred dollars for each offense, and may be imprisoned, in the discretion of the court, not less than ten nor more than thirty days. The offender shall also be liable to any person injured on account of such violation to the full amount of all damages and costs. (1915, c. 88.)

For act permitting sale and use of virus in Edgecombe county, see Public Laws 1933, c. 139. For an act relating to the sale of virus in Wilson county, see Public Laws 1933, c. 58.

For an act providing for selling, using, etc., hog cholera virus in Nash county, see Public Laws of 1935, chapter 67, as amended by chapter 222.

Art. 45. Protection of Livestock Running at Large

§ 4493. Failing to show hide and ears of livestock killed while running at large.—If any person shall kill any neat cattle, sheep or hogs in the woods or range, and shall for two days fail to show the hide and ears to the nearest justice or to two freeholders, he shall be guilty of a misdemeanor. In Tyrrell county this section extends to the killing of neat cattle in enclosures. (Rev., s. 3315; Code, s. 2318; R. C., c. 17, s. 2; 1901, c. 546; 1907, c. 821.)

§ 4494. Molesting or injuring livestock.—If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor. In the counties of Graham, Swain, Haywood, Jackson and Transylvania he shall be guilty of a felony and shall be punished as if convicted of larceny: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. (Rev., s. 3314; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; R. C., c. 34, s. 104; 1850, c. 94, ss. 1, 2.)

See section 4483 and notes.

Cited or applied in State v. Pollard, 83 N. C. 598; State v. Tweedy, 115 N. C. 704, 20 S. E. 183.

§ 4495. Altering the brands of and misbranding another's livestock.—If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny. (Rev., s. 3317; Code, s. 1001; R. C., c. 34, s. 57; 1797, c. 485, s. 2.)

§ 4496. Placing poisonous shrubs and vegetables in public places.—If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mockorange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby

and shall also be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (Rev., s. 3318; 1887, c. 338.)

Art. 46. Protection of Letters, Telegrams, and Telephone Messages

§ 4497. Wrongfully obtaining or divulging knowledge of telephonic messages.—If any person wrongfully obtain, or attempt to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulge to any but the person for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (Rev., s. 3848; 1903, c. 599.)

§ 4498. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.—If any person wrongfully obtain, or attempt to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulge to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor. (Rev., s. 3846; 1889, c. 41, s. 1.)

§ 4499. Unauthorized opening, reading or publishing of sealed letters and telegrams.—If any person shall willfullly, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor. (Rev., s. 3728; 1889, c. 41, s. 2.)

The Indictment.—It is necessary to charge, in an indictment for a violation of this section and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. State v. Bagwell, 107 N. C. 859, 12 S. E. 254.

Art. 46(A). Protection of the Game of Baseball

§ 4499(a). Bribery of baseball players, umpires, and officials.—If any person shall bribe or offer to bribe, any baseball player with the intent to influence his play, action or conduct in any baseball game, or if any person shall bribe or offer to bribe any umpire of a baseball game, with intent to influence his decision or bias his opinion or judgment, in relation to any baseball game, or if any person shall bribe or offer to bribe any manager, or other official of a baseball club, league, or association by whatsoever named called conducting said game of baseball, such person shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state penitentiary for not less than one nor more than five years. (1921, c. 23, s. 1.)

§ 4499(b). Acceptance of bribes by baseball players, umpires, or officials.—If any baseball player shall accept, or agree to accept, a bribe offered for the purpose of influencing his play, action or conduct in any baseball game, or if any umpire of a baseball game shall accept or agree to accept a bribe offered for the purpose of influencing his decision or biasing his opinions, rulings or judgment, or if any manager of a baseball club, or club or league official shall accept or agree to accept any bribe offered for the purpose of inducing him to lose or cause to be lost any baseball game, as set forth in the preceding section of this act, such baseball player, manager, official, or umpire shall be guilty of a felony, and upon conviction, shall be punished by confinement in the state penitentiary for not less than one year nor more than five years. (1921, c. 23, s. 2.)

§ 4499(c). Completion of offenses set out in two preceding sections.—To complete the offenses mentioned in the two preceding sections, it shall not be necessary that the baseball player, manager, umpire, or official, shall, at the time, have been actually employed, selected, or appointed to perform their respective duties; it shall be sufficient if the bribe be offered, accepted or agreed to with the view of the probable employment, selection or appointment of the person to whom the bribe is offered or by whom it is accepted. Neither shall it be necessary that such baseball player, umpire or manager actually play or participate in a game or games concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3.)

§ 4499(d). "Bribe" defined.—By a "bribe" as used in this law, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any baseball player, manager, umpire, club or league official, to see which game an admission fee may be charged, or in which game of baseball any player, manager or umpire is paid any compensation for his services. Said bribe as defined in this law need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt or in any other manner designed to cover the true intention of the parties. (1921, c. 23, s. 4.)

§ 4499(e). Intentional losing of baseball game or aiding therein.—If any baseball player, manager or club official shall commit any willful act of omission or commission in playing or directing the playing of a baseball game with intent to cause the ball club with which he is affiliated to lose a baseball game; or if any umpire officiating in a baseball game, or league official, shall commit any willful act connected with his official duties for the purpose and with the intent to cause a baseball club to win or lose a baseball game which it would not otherwise have won or lost under the rules governing the playing of said game, he or they shall be guilty of a felony, and upon conviction, shall be punished by imprisonment in the state penitentiary for not less than one nor more than five years. (1921, c. 23, s. 5.)

§ 4499(f). Bonus or extra compensation.—Nothing in this article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager or baseball player by any person to encourage such manager or player to a higher degree of skill, ability or diligence in the performance of his duties. (1921, c. 23, s. 7.)

§ 4499(g). Application of article.—This article shall apply only to baseball league and club officials, umpires, managers and players who are officials of, or employed by, baseball clubs who are members of "The National Association of Professional Baseball Leagues." (1921, c. 23, s. 7a.)

Art. 47. Miscellaneous Police Regulations

§ 4500. Desecration of state and national flag.—Any person who in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color or ensign of the United States or state flag or ensign of this state, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance upon which it is so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. Any person violating this section shall also forfeit a penalty of fifty dollars for each offense, to be recovered with costs in a civil action or suit in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this state, and such penalty, when collected, less the costs and expenses of the action or suit, shall be paid one-half to the person suing and one-half to the school fund of the county in which suit was brought; and two or more penalties may be sued for and recovered in the same action or suit.

The words, flag, standard, color or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be a flag, standard, color or ensign of the United States of America, or a picture or a representation of any of them, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe it to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of a flag, standard, color, ensign, article, substance, or thing, on which there is anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section. (1917, c. 271.)

§ 4501. Pollution of water or lands used for dairy purposes.—It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned for not more than thirty days, or both, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222.)

§ 4502. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.—Any person, firm or corporation owning lands or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such tree-tops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor. (1913, c. 56.)

In General.—The section constitutes a valid exercise of the police power and is constitutional. State v. Perley, 173 N. C. 783, 92 S. E. 504.

The motive is immaterial and where the intent to violate the section is shown the defendant is punishable. Id.

§ 4503. Injuring notices and advertisements.—If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a

lawful purpose, before the object for which such notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (Rev., s. 3709; 1885, c. 302.)

§ 4504. Defacing or destroying public notices and advertisements.—If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3710; Code, s. 981; 1876-7, c. 215.)

§ 4505. Erecting signals and notices in imitation of those of railroads.—No person, firm or corporation other than a railroad or street railway company shall, for advertisement or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, in the discretion of the court. (1917, c. 230.)

§ 4506. Operating automobile while intoxicated.—Any person who shall, while intoxicated or ununder the influence of intoxicating liquors or bitters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this act for a period of not more than twelve months nor less than ninety days. (1919, c. 234; 1925, c. 283; 1927, c. 230, s. 1.)

Editor's Note.—This section was amended by Public Laws 1925, ch. 283 and cartways and other roads used by the public included herein. At the same time the provision, giving the judge the right to revoke for twelve months the right to drive an automobile, of any one found guilty of violating this section, was added. The section was again amended in 1927 when the revocation of license was made mandatory upon the judge.

Jurisdiction of Municipal Court.—Where a statute creating a municipal court does not give it criminal jurisdiction over the offense described by this section, this jurisidiction is acquired by this section to the extent only of binding the defendant over to the superior court upon conviction. State v. Jones, 181 N. C. 543, 106 S. E. 827.

Policeman May Arrest without Warrant.—A policeman may arrest without a warrant, a person in his presence violating this section. State v. Loftin, 186 N. C. 205, 119 S. E. 209.

Sentence Not Reviewable on Appeal.—Where a statute leaves a punishment for its violation within the sound discretion of the trial court, the sentence imposed therein will not be reviewed by the Supreme Court on appeal where its exercise has not been grossly and palpably abused. State v. Jones, 181 N. C. 543, 106 S. E. 827.

§ 4506(a). Operation of motor vehicle by person under 16 years of age.—Any person who, being the owner, or in charge of any motor vehicle, authorizes or knowingly permits a person under the age of sixteen years to operate such motor vehicle along any public street or public highway in the state of North Carolina shall be guilty of a misdemeanor, and shall be punished by a fine not in excess of the sum of fifty dollars ($50.00). The term "motor vehicle," as used in this section, shall be construed to mean those vehicles it is construed to mean in section two thousand five hundred and ninety-eight of the Consolidated Statutes. (1923, c. 202.)

Editor's Note.—The opinion is voiced by 1 N. C. Law Rev. 298, that this section considerably strengthens section 2614.

§ 4506(b). Automobile equipped with smoke screen device.—It shall be unlawful for any person or persons to drive, operate, equip or be in the possession of any automobile or other motor vehicle containing, or in any manner provided with, a mechanical machine or device designed, used or capable of being used for the purpose of discharging, creating or causing, in any manner, to be discharged, or emitted either from itself or from the automobile or other motor vehicle to which attached, any unusual amount of smoke, gas or other substance not necessary to the actual propulsion, care and keep of said vehicle, and the possession by any person or persons of any such device, whether the same is attached to any such motor vehicle, or detached therefrom, shall be prima facie evidence of the guilt of such person or persons of a violation of this act.

Any person or persons violating the provisions of this section, shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for a period of not less than one year or not more than ten years, in the discretion of the court. (1927, c. 64.)

Where there is no evidence tending to show that the defendant was in the automobile at the time it was captured, or that the defendant had any connection with the occupants of the automobile at the time it was captured, or that the prohibited device was attached to the automobile at the time the defendant was seen therein even if it be conceded that the evidence was sufficient to establish the defendant's ownership of the automobile to which the prohibited device was attached, such evidence was not sufficient to be submitted to the jury upon the issue of the defendant's güilt under this section. State v. Yates, 208 N. C. 194, 195, 179 S. E. 756.

§ 4507. Sale of Jamaica ginger.—It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regular practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall al-

low said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only. (1919, c. 288; P. L. 1913, c. 761.)

§ 4508. Furnishing intoxicants, poisons or firearms to inmates of charitable and penal institutions.—If any person shall sell or give to any inmate of any charitable or penal institution any intoxicating drink or any narcotic, poison or poisonous substance, except upon the prescription of a physician, or shall give or sell to any such inmate any deadly weapon, or any cartridge or ammunition for firearms of any kind, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned at the discretion of the court; and if he be an officer or employee of any institution of the state, he shall be dismissed from his office. (Rev., s. 3517; 1899, c. 1, s. 52.)

§ 4509. Usurious loans on household and kitchen furniture. — Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, or upon any assignment or sale of wages, earned or to be earned, conditional sale or otherwise, upon any article of household or kitchen furniture, and shall take, receive, reserve or charge a greater rate of interest than six per cent, either before or after the interest may accrue, or who shall refuse to give receipts for payments on interest or principal of such loan, or who shall fail and refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security, shall be guilty of a misdemeanor, and in addition thereto shall forfeit double the interest which has been theretofore paid. (1907, c. 110; 1927, c. 72.)

As to usury generally, see 12 Enc. Dig. 134 et seq.; 14 Enc. Dig. 693 et seq. And see §§ 2305 et seq.

Editor's Note.—This section was broadened by the Public Laws of 1927, ch. 72, by the addition of the portion relating to the assignment of wages.

This section is constitutional. State v. Davis, 157 N. C. 648, 73 S. E. 130.

Interest Need Not Be Received.—The charge of the usurious interest constitutes the offense without the necessity of having received it. State v. Davis, 157 N. C. 648, 73 S. E. 130.

§ 4510. Digging ginseng on another's land during certain months.—All persons shall be allowed to dig ginseng at any time of the year for the purpose of replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day's or part of a day's digging, and shall also be guilty of a misdemeanor. (Rev., ss. 3502, 3714; Code, s. 1053; 1866-7, c. 60; 1905, c. 211.)

§ 4510(a). Purchase of ginseng; register to be kept; details.—Every person, firm or corporation buying ginseng in any quantity shall keep a register, and shall keep therein a true and accurate record of each purchase, showing the amount of the ginseng, the name and residence of the person from whom purchased, the source from which obtained, and amount paid for the same and the date of the purchase. A failure to comply with the above requirements, or the making of a false entry in regard to the purchasing of ginseng, shall be a misdemeanor, punishable in the discretion of the court. (1923, c. 199.)

Editor's Note.—This section supplements section 4510, relative to digging ginseng and section 4528 relative to the larceny thereof, by requiring the accurate record.

§ 4511. Shooting rifles across Currituck sound and waters of Dare county.—If any person shall shoot a rifle across or over the waters of Currituck sound, or the waters of Dare county, except in East Lake township, he shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not less than ten days nor more than thirty days. (Rev., s. 3734; 1889, c. 21, ss. 1, 2; 1903, c. 617.)

§ 4511(a). Anonymous or threatening letters, mailing or transmitting.—It shall be unlawful for any person, firm, or corporation, or any association of persons in this state, under whatever name styled, to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such person, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this act shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 112.)

§ 4511(b). Commercialization of American Legion emblem; wearing by non-members.—It shall be unlawful for any one not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the American Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Any one violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars ($50.00) or imprisoned not more than thirty days. (1923, c. 89.)

§ 4511(c). Hogs running at large prohibited in stated locality.—All people who have hogs running at large on the beach between Nag's Head coast guard station and Oregon inlet are directed to take the same up and place them under fence or on the beach at some other place where running at large is permitted. It shall be unlawful for any hog to run at large on the beach between Nag's Head coast guard station and Oregon inlet.

Any one violating this section shall be guilty of a misdemeanor. (1923, c. 230.)

§ 4511(d). Dogs on "Capitol Square;" worrying squirrels.—It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (1925, c. 289.)

§ 4511(e). Use of name of denominational college in connection with dance hall.—It shall be unlawful for any person, firm, corporation, club or society, by whatsoever name called, to use in connection with any dance, or dance hall, by advertisement, announcement, or otherwise, the name of any college, or any class or organization of any college operated and conducted by a religious denomination, unless the written permission of the Dean of such college is given, permitting and allowing the use of the name of such denominational college, or a class or organization of the same in connection with such dance, or dance hall. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and subject to a fine of not less than one hundred dollars ($100) or imprisonment for not less than sixty days. (1927, c. 6.)

§ 4511(f). Theft or destruction of property of public libraries, museums, etc.—Any person who shall steal or unlawfully take or detain, or wilfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparatus, specimen or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of state or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed twenty dollars ($20.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of twenty dollars ($20.00), the person committing same shall be guilty of a felony, and shall upon conviction be punished in accordance with the laws applicable thereto. (1935, c. 300.)

§ 4511(g). Placing trash, refuse, etc., within five hundred yards of hard-surfaced highway. — It shall be unlawful for any person, firm, organization, private corporation, or the governing body, or its agents and/or employees of any municipal corporation, to cause to be placed, dumped or left, or to place, dump or leave temporarily or permanently any trash, refuse, garbage, scrapped automobiles, trucks or parts thereof, of any nature whatsoever except domestic garbage or trash placed for further removal, and junk yards the property of bona fide junk dealers but which junk yards shall be properly screened or fenced from view of persons traveling the hard-surfaced highway, within one hundred and fifty yards of any hard-surfaced highway, outside of an incorporated town unless said trash, refuse, garbage, scrapped automobiles, trucks or parts thereof is concealed by some obstruction from the view of persons on such highway; and the causing to be placed, dumped or left, or placing, dumping or leaving of trash, refuse, garbage, automobiles, trucks, or parts thereof, of any nature whatsoever, as above set forth for each day or portion thereof shall constitute a separate offense.

Any person, firm, organization, private corporation or the governing body or its agents and/or employees of any municipal corporation, convicted of violation of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each and every offense.

Provided however, this section shall not apply to the counties of Alleghany, Anson, Ashe, Avery, Brunswick, Columbus, Davidson, Duplin, Forsyth, Franklin, Granville, Halifax, Lincoln, Madison, Mitchell, Montgomery, Moore, Person, Richmond, Rockingham, Scotland, Stanly, Stokes, Surry, Swain, Vance, Watauga, Warren, Wilson and Yancey, Macon, Jackson, Gates, Lenoir, Bertie, Cabarrus, Buncombe, Transylvania, Martin, Caswell, Rowan, Guilford, and Hyde. (1935, c. 457.)

CHAPTER 83

CRIMINAL PROCEDURE

Art. 1. General Provisions

§ 4512. Statute of limitations for misdemeanors. —All misdemeanors, and petit larceny where the value of the property does not exceed five dollars, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offense of being accessory after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: Provided, that in case any of the misdemeanors, hereby required to be prosecuted within two years, shall have been committed in a secret manner, the same may be prosecuted within two years after the discovery of the offender: Provided, further, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the state. (Rev., s. 3147; Code, s. 1177; R. C., c. 35, s. 8; 1826, c. 11; 1907, c. 408.)

As to what are misdemeanors see sections 4171-4173 and notes.

General Consideration.—The time between the commission

of the offense and the bringing into court of the presentment should be estimated in determining whether the prosecution is barred. State v. Cooper, 104 N. C. 890, 891, 10 S. E. 510. The time stated in the indictment does not govern, State v. Newsom, 47 N. C. 173, the state can go back two years prior thereto although the indictment marks the beginning of the prosecution. State v. Williams, 151 N. C. 660, 65 S. E. 908. The statute does not begin to run from an entry of nol. pros. "with leave." Id.

Meaning of Malicious Misdemeanors.—When, in this section, the Legislature used the words "other malicious misdemeanors," which immediately follow the words "malicious mischief," it evidently intended to describe offenses of which malice is a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the Court might consider in imposing the punishment. State v. Frisbee, 142 N. C. 671, 675, 55 S. E. 722.

Meaning of "Secret Manner." — The exception in this section "offenses committed in a secret manner," clearly applies to crimes committed in such manner that the offender is unknown to the person injured. State v. Crowell, 116 N. C. 1052, 1057, 21 S. E. 502. See for example State v. Watts, 32 N. C. 369.

"Deceit" as Used in Section.—There has never been such an indictable offence as "deceit" but the meaning of this section has always been that misdemeanors, the gist of which was a malice or deceit, are within the exception. In State v. Christianbury, 44 N. C. 46, it was held that there being no such offence as "deceit" it would apply to "cheating by false token" of which deceit was the gist but would not include "conspiracy to cheat" the gist of which offence is the conspiracy and the cheating but an aggravation. That decision did not restrict deceit to "cheating by false token" but instanced that as an offence coming within the general description of misdemeanors by deceit. State v. Crowell, 116 N. C. 1052, 1056, 21 S. E. 502.

What Offences Barred.—Slandering an innocent woman is not barred within two years. State v. Claywell, 98 N. C. 731, 3 S. E. 920. No length of possession can bar an action to abate a public nuisance. State v. Holman, 104 N. C. 861, 10 S. E. 758. Seduction is not barred. State v. Crowell, 116 N. C. 1052, 21 S. E. 502.

A malicious assault can not be the basis of an action two years after commission. State v. Frisbee, 142 N. C. 671, 55 S. E. 722.

The section has no application to conspiracy which is a felony. State v. Mallett, 125 N. C. 718, 34 S. E. 651 or to bastardy proceeding which are controlled by § 260. State v. Perry, 122 N. C. 1043, 30 S. E. 139.

What Constitutes a Presentment.—See State v. Morris, 104 N. C. 837, 10 S. E. 454.

Trial on Second Bill after Two Years Barred.—Even an indictment within the time will not uphold a trial and conviction on a second bill found after the statutory period. State v. Tomlinson, 25 N. C. 32; State v. Hedden, 187 N. C. 803, 805, 123 S. E. 65.

Preliminary Warrants Not Included.—There is no saving clause in this section as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards. State v. Hedden, 187 N. C. 803, 805, 123 S. E. 65.

Necessity for Pleading Statute.—For a person charged with the commission of a criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court. State v. Brinkley, 193 N. C. 747, 138 S. E. 138.

Whether or not the court below will allow the statute of limitations as a defence to the action, where the same has not been pleaded or mentioned until the argument before the jury, is a matter of discretion. Privett v. Calloway, 75 N. C. 23.

Wrong Name in Bill of Indictment.—A bill of indictment by a wrong name, which is pleaded to in abatement, and the plea found, is, nevertheless, the same cause of action, and the elapse of two years is no bar to prosecution. State v. Hailey, 51 N. C. 42.

§ 4513. Issue and return of criminal process.—All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or percept is returnable. (Rev., s. 3148; Code, s. 1178; R. C., c. 35, s. 9; 1777, c. 115, s. 15.)

§ 4514. Date of receipt and service indorsed on process.—Every sheriff or other officer shall indorse on all process and subpœnas issuing in criminal cases, whether for the state or defendant, the day when such process and subpœnas came to hand, and also the day of their execution; and on failure of any sheriff or other officer to perform either of said duties he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the state, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits for failure to make due return of process delivered to them. (Rev., s. 3149; Code, s. 1179; R. C., c. 35, s. 10; 1850-1, c. 57.)

§ 4515. Accused entitled to counsel.—Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (Rev., s. 3150; Code, s. 1182; R. C., c. 35, s. 13; 1777, c. 115, s. 85.)

As to court's control of argument, see § 203.

A Constitutional Right.—In all criminal prosecution every man has the right * * * to have counsel for his defence. Const. Art. I, sec. 11. State v. Sykes, 79 N. C. 618, 619; see also State v. Hardy, 189 N. C. 799, 128 S. E. 152.

Stated in Powell v. Alabama, 287 U. S. 45, 63, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527.

§ 4516. Fees allowed counsel assigned to defend in capital case.—Whenever an attorney is appointed by the judge to defend a person charged with a capital crime, he shall receive such fee for performing this service as the judge may allow, not to exceed twenty-five dollars; but the judge shall not allow any fee until he is satisfied that the defendant charged with the capital crime is not able to employ counsel. The fees so allowed by the judge shall be paid by the county in which the indictment was found. (1917, c. 247.)

§ 4517. Imprisonment to be in county jail.—No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county. (Rev., s. 3151; Code, s. 1174; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12.)

§ 4518. Post-mortem examinations directed.—In all cases of homicide, any officer prosecuting for the state may, at any time, direct a post-mortem examination of the deceased to be made by one or more physicians to be summond for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the county. (Rev., s. 3152; Code, s. 1214; R. C., c. 35, s. 49.)

Section Valid.—This section is a valid exercise of the police power of the state. Withers v. Board, 163 N. C. 341, 79 S. E. 615.

Left to Discretion of Trial Judge.—The board of commissioners of the county are not parties to a proceeding under this section, nor are they entitled to any notice before such orders are made. The matter is left to the sound discretion of the trial judge, and unless such discretion is grossly abused, the Supreme Court will not interfere. Withers v. Board, 163 N. C. 341, 345, 79 S. E. 615.

§ 4519. Stolen property returned to owner.—Upon conviction of any felon for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose. (Rev., s. 3153; Code, s. 2101; R. C., c. 35, s. 34, 21 Hen. VIII, c. 11.)

§ 4520. Magistrate may associate another with him.—Any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as by law provided, may associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by the two magistrates so associated. (Rev., s. 3154; Code, s. 1159; 1868-9, c. 178, subc. 3, s. 28.)

Section Constitutional.—This section is in harmony with the provision of the Constitution, Art. IV, sec. 12, conferring power upon the General Assembly to allot and distribute judicial powers. State v. Flowers, 109 N. C. 841, 13 S. E. 718.

§ 4521. Speedy trial or discharge on commitment for felony.—When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the state could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment: Provided, the judge presiding may, in his discrecretion, refuse to discharge such person if the time between the first and second terms of the court be less than four months. (Rev., s. 3155; Code, s. 1658; 1868-9, c. 116, s. 33; 1913, c. 2.)

Requirements Peremptory.—This section is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. State v. Webb, 155 N. C. 426, 70 S. E. 1064. The proper remedy is by certiorari. Id.

Remedy Is by Certiorari.—A certiorari is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of this section. State v. Webb, 155 N. C. 426, 427, 70 S. E. 1064.

Art. 2. Warrants

§ 4522. Who may issue warrant.—The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns. (Rev., s. 3156, Code, s. 1132; 1868-9, c. 178, subc. 3, s. 1.)

Mayor Pro. Tem. May Issue.—The power conferred upon a mayor pro tem. "to exercise the duties" of mayor during his absence includes that of issuing warrants in criminal actions. State v. Thomas, 141 N. C. 791, 53 S. E. 522.

Section 9, ch. 569, Public Local Laws of 1913 provides that process of a municipal court "shall be issued by either the judge of said court or by the chief of police." State v. Turner, 170 N. C. 701, 86 S. E. 1019.

§ 4523. Complainant examined on oath.—Whenever complaint is made to any such magistrate that a criminal offense has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him. (Rev., s. 3157; Code, s. 1133; 1868-9, c. 178, subc. 3, s. 2.)

Oath Essential.—This section requires the Justice, before issuing a warrant to examine the complainant on oath. Merrimon v. Commissioners, 106 N. C. 369, 371, 11 S. E. 267.

Examination Must Show Commission of Offence.—It must appear by this examination that an offense has been committed before any warrant is issued. State v. Moore, 136 N. C. 581, 48 S. E. 573.

Sufficiency of Evidence.—It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases super visum, to require evidence on oath amounting to a direct charge or creating a strong suspicion of guilt. Welch v. Scott, 27 N. C. 72.

Complaint Need Not Be Written.—In State v. Bryson, 84 N. C. 780, Ashe, J., in construing the privisions of the act which is now embodied in this and the next section says that no written affidavit or complaint is required. State v. Peters, 107 N. C. 876, 879, 12 S. E. 74.

Same—No Special Form Required.—It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment. 12 Cyc., 294. State v. Gupton, 166 N. C. 257, 262, 80 S. E. 989.

Appellate Court Cannot Look Behind Warrant.—The appellate court "can only look at the warrant, which is the complaint," and "cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." State v. Peters, 107 N. C. 876, 879, 12 S. E. 74; State v. Bryson, 84 N. C. 780.

§ 4524. Warrant issued; contents.—If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county. (Rev., s. 3158; Code, s. 1134; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 3.)

General Consideration. — It is not necessary that a warrant for assault should charge that it was issued upon a sworn complaint. State v. Price, 111 N. C. 703, 16 S. E. 414. The facts constituting the offense must be set out with certainty. State v. Jones, 88 N. C. 671. But the warrant may refer to the affidavit. State v. Yellowday, 152 N. C. 793, 67 S. E. 480, as they will be construed together. State v. Gupton, 166 N. C. 257, 80 S. E. 989.

Appearance waives a defect in a warrant State v. Cole, 150 N. C. 805, 63 S. E. 958. A warrant need not negative an exception in a statute. State v. Moore, 166 N. C. 284, 81 S. E. 294.

Amendment of Warrant.—On appeal to the superior court from a conviction before a justice of the peace, the court can allow an amendment of the warrant. State v. Koonce, 108 N. C. 752, 12 S. E. 1032; State v. Carble, 70 N. C. 62. It is discretionary with the court whether it will exercise the power. State v. Vaughan, 91 N. C. 532; State v. Crook, 91 N. C. 536. But a warrant can not be amended so as to charge a different offense. State v. Taylor, 118 N. C. 1262. 24 S. E. 526; State v. Vaughan, 91 N. C. 532, 535; State v. Cook, 61 N. C. 535.

An order directing an amendment to a warrant by the insertion therein of certain words is self-executing, and the words need not be actually inserted in the complaint or warrant. State v. Yellowday, 152 N. C. 793, 67 S. E. 480;

See also, State v. Winslow, 95 N. C. 649; State v. Davis, 111 N. C. 729, 16 S. E. 540; State v. Sharp, 125 N. C. 628, 634, 34 S. E. 264; State v. Yoder, 132 N. C. 1111, 1113, 44 S. E. 689.

Officer Protected when Warrant Defective.—See State v. Gupton, 166 N. C. 257, 262, 80 S. E. 989; State v. Jones, 88 N. C. 671.

§ 4525. Where warrant may be executed.—Warrants issued by any justice of the supreme court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the peace or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in the section following. (Rev., s. 3159; Code, s. 1135; 1868-9, c. 178, subc. 3, s. 4.)

§ 4526. Warrant indorsed and served in another county.—If the person against whom any warrant is issued by a justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county: Provided, that an officer to whom a warrant charging the commission of a felony is directed, who is in the actual pursuit of a person known to him to be the one charged with the felony, may continue the pursuit without such indorsement. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county, and such warrant when so indorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the state, in which such indorsement is made, to execute the same. (Rev., s. 3160; Code s. 1136; 1917, c. 30; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 5.)

Restricted to Criminal Cases.—The provision of this section is restricted to criminal cases. Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799.

Justice in County of Service Must Endorse.—A warrant issued in one county to be served in another is not given extraterritorial efficacy unless it has the endorsement of a justice of the peace or other authorized officer in the latter county. Stancill v. Underwood, 188 N. C. 475, 476, 124 S. E. 845.

§ 4527. Magistrate not liable for indorsing warrant.—No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of the last section, although it should afterward appear that such warrant was illegally or improperly issued. (Rev., s. 3161; Code, s. 1137; 1868-9, c. 178, subc. 3, s. 6.)

Endorsing Officer Fully Protected.—If a warrant issues from competent authority and the extraterritorial efficacy provided by section 4526 is imparted to it in the county wherein the accused party was arrested, the justification is full to the officer and all who co-operated with him, and no inquiry is admissible into the circumstances under which it was issued. State v. James, 80 N. C. 370, 372.

§ 4528. Before what magistrate a warrant returned.—Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate. (Rev., s. 3162; Code, s. 1143; 1868-9, c. 178, subc. 3, s. 12.)

Mayor Pro Tem.—A warrant may be returnable before a mayor pro tem. State v. Thomas, 141 N. C 791, 53 S. E. 522.

Authority of Magistrate Issuing Warrant. — The magistrate who issues the warrant has the authority to make the warrant returnable before himself or before some officer having like jurisdiction, such a recorder to conduct the preliminary hearing. State v. Lord, 145 N. C. 479, 59 S. E. 656.

Cited in State v. James, 78 N. C. 455, 457.

Art. 3. Search Warrants

§ 4529. In what cases issued, and where executed.—If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law. (Rev., s. 3163; Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38.)

At Common Law.—Warrants to search for stolen goods are authorized by the principles of the common law. State v. McDonald, 14 N. C. 468, 470.

§ 4530. Nature of warrant and procedure thereon.—Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be. and the proceedings thereupon shall be as required in other cases of criminal complaint. (Rev., s. 3164; Code, s. 1172; 1868-9, c. 178, subc. 3, s. 39.)

As to search warrants for deserting seamen see section 4473. As to constitutional prohibition against general warrants, see N. C. Const. Art. I, sec. 14.

Art. 4. Peace Warrants

§ 4531. Officers authorized to issue peace warrants.—The following magistrates have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior courts, and of any special courts which may hereafter be created, the justices of the peace, the mayors or other chief officers of all cities and towns. (Rev., s. 3165; Code, s. 1216; 1868-9, c. 178, subc. 2, s. 1.)

A Criminal Action—A peace warrant is a criminal action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property, and is within the exclusive jurisdiction of a justice of the peace. State v. Oates, 88 N. C. 668; State v. Locust, 63 N. C. 574.

§ 4532. Complaint and examination.—Whenever complaint is made in writing, and upon oath, to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined. (Rev., s. 3166; Code, s. 1217; 1868-9, c. 178, subc. 2, s. 2.)

Applicant Should Not Be Bound Over.—It is error for a justice of the peace to bind to the superior court an applicant for a peace warrant against whom no charge is made. State v. Bass, 75 N. C. 139.

§ 4533. Warrant issued.—If it shall appear from such examination that there is just reason to fear the commission of any such offense by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant. (Rev., s. 3167; Code, s. 1218; 1868-9, c. 178, subc. 2, s. 3.)

Warrant Should Contain Allegations.—A peace warrant in which is alleged no threat, fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded, should be quashed. State v. Goram, 83 N. C. 664; State v. Cooley, 78 N. C. 538.

§ 4534. To whom warrant directed.—The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside the county of said justice or chief officer. (Rev., s. 3169; Code, s. 1219; 1868-9, c. 178, subc. 2, s. 4.)

Right of Private Person to Make Arrest.—A private person has no authority to make an arrest for a riot, rout, affray, or other breach of the peace, without warrant, except when such offenses are being committed in his presence; nor can a justice of the peace confer such authority by a mere verbal order or command. State v. Campbell, 107 N. C. 948, 12 S. E. 441; as to private persons making arrest see generally sections 4542, 4543.

Section Confers Extraordinary Power.—The power conferred by this section is the only extraordinary case in which a justice of the peace is authorized to depute one, who is not an officer, to execute process. Marsh v. Williams, 63 N. C. 371; State v. Jones, 48 N. C. 404; McKee v. Angel, 90 N. C. 60, 61, 62.

§ 4535. Defendant recognized to keep the peace.—Whenever any person complained of on a peace warrant is brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina, in such sum, not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the state, and particularly towards the person requiring such security. (Rev., s. 3170; Code, ss. 894, 1220; 1879, c. 92, s. 9.)

Jurisdiction Given to Justices. — This section gives to justices of the peace exclusive original jurisdiction of peace warrants and proceedings thereunder. State v. Oates, 88 N. C. 668, 670.

§ 4536. Defendant discharged, or new recognizance required.—If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken or they may require a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year. (Rev., s. 3171; Code, s. 1226; 1868-9, c. 178, subc. 2, s. 12.)

§ 4537. Defendant imprisoned for want of security.—If such recognizance is given, the party complained of shall be discharged; if such person fails to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the mittimus the cause of commitment and the sum in which such security was required. (Rev., s. 3172; Code, s. 1221; 1868-9, c. 178, subc. 2, s. 6.)

Prisoner Worked on Roads.—One committed under this section may be worked upon the roads. State v. Yandle, 119 N. C. 874, 25 S. E. 796.

§ 4538. How discharged from imprisonment.—Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the supreme court, or judge of the superior or criminal court, by giving such other security as may seem sufficient. (Rev., s. 3174; Code, 1222; 1868-9, c. 178, subc. 2, s. 7.)

§ 4539. Defendant may appeal.—In all proceedings on peace warrants the defendant may appeal from the decision of the justice of the peace to the superior court by giving the bond required by the justice of the peace to keep the peace, in addition to the appeal bond, when the case shall be heard by the judge holding the court in the county. (Rev., s. 3173; 1901, c. 66.)

Editor's Note.—Previous to the passage of this section it was several times held that there was no appeal in peace warrant proceedings from the justice of the peace to the su-

perior court. See State v. Gregory, 118 N. C. 1199, 24 S. E. 712, citing State v. Walker, 94 N. C. 857 and State v. Lyon, 93 N. C. 575. This section makes these decisions obsolete.

§ 4540. Breach of peace in presence of court.—Every person who in the presence of any magistrate specified in the first section of this article, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offense against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided. (Rev., s. 3168; Code, s. 1224; 1868-9, c. 178, subc. 2, s. 9.)

§ 4541. Recognizance returned to superior court.—Every recognizance taken pursuant to the provisions of this article shall be transmitted by the magistrate taking the same to the next term of the superior court for the county in which the offense is charged to have been committed. (Rev., s. 3175; Code, s. 1223; 1868-9, c. 178, subc. 2, s. 8.)

Art. 5. Arrest

§ 4542. Persons present may arrest for breach of peace.—Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders. (Rev., s. 3176; Code, s. 1124; 1868-9, c. 178, subc. 1, s. 1.)

For a full treatment of arrest on criminal charges see 1 N. C. Enc. Dig. 951-963; 13 N. C. Enc. Dig. 176-180.

Authority Strictly Limited.—The authority given by this section to private persons to make arrests without warrant only extends to the offenses therein mentioned and committed under the conditions therein prescribed. State v. Campbell, 197 N. C. 948, 12 S. E. 441.

Same—Breach of Town Ordinance. — The violation of a town ordinance, even in the presence of a policeman, does not necessarily give him a right to arrest the offender. State v. Belk, 76 N. C. 10.

Same—After Offense Committed. — After the offenses—misdemeanors—mentioned above have been committed, and the offenders have dispersed, a private person has no authority of himself to arrest the offenders without warrant nor can he go out to make such arrest by the mere order of justice of the peace or any officer. State v. Campbell, 107 N. C. 948, 954, 12 S. E. 441.

Liability When Authority Exceeded.—If a private person, of his own purpose, without warrant, undertakes to make arrest of a party guilty of only a misdemeanor otherwise than in the cases and in the way pointed out by the section he at once becomes a trespasser, and the party whom he so undertakes to deprive of his liberty may resist him by such force as may be necessary to defend himself successfully. State v. Campbell, 107 N. C. 948, 954, 12 S. E. 441.

§ 4543. Arrest for felony, without warrant.—Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of the police, upon information, to assist in such arrest. (Rev., s. 3177; Code, s. 1129; 1868-9, c. 178, subc. 1, s. 6.)

Right of Private Person to Arrest.—A private person may arrest the felon without a warrant, and it is his duty to do so if he is present at the time the felony is committed. Martin v. Houck, 141 N. C. 317, 321, 54 S. E. 291. In such case, he may and ought to arrest and, as soon as practicable, take him before a proper officer, to the end that he may be duly held to answer for the offense. In such case, the private person would not be justified unless a felony had actually been committed. It is better and safer to obtain a warrant when this may be promptly done. State v. Roane, 13 N. C. 58; Brockway v. Crawford, 48 N. C. 433; State v. Bryant, 65 N. C. 327; State v. Shelton, 79 N. C. 605; Neal v. Joyner, 89 N. C. 287; State v. Campbell, 107 N. C. 948, 953, 12 S. E. 441; Martin v. Houck, 141 N. C. 317, 322, 54 S. E. 291.

As to what constitutes reasonable ground for believing that accused has committed a felony in the presence of the person making the arrest, see State v. Blackwelder, 182 N. C. 899, 109 S. E. 644.

Party Arresting Must State His Purpose. — A private citizen, attempting to arrest a felon without warrant, must make his purpose known, and for what offense. And unless he does so, the party attempted to be arrested has the right to resist the arrest. Neal v. Joyner, 89 N. C. 287, 289; State v. Garrett, 60 N. C. 144; State v. Belk, 76 N. C. 10; State v. McNinch, 90 N. C. 695; State v. Stancill. 128 N. C. 606, 610. 38 S. E. 926. And unless he notifies the felon of his purpose, he will be guilty of a trespass. State v. Bryant, 65 N. C. 327.

Force Permissible in Arrest.—Where a private person undertakes to arrest a felon or an escaped felon, and has made his purpose and reason for the arrest known, he must then proceed in a peaceable manner to make the arrest, and if he is resisted he may use such force as is necessary to overcome the resistance, if used for that purpose alone. 2 Am. and Eng. Enc., 906, note 2 But this is put upon the ground that the party attempting to make the arrest becomes personally involved, and he has the right to defend himself. State v. Stancill, 128 N. C. 606, 610, 38 S. E. 926.

No Right to Shoot Escaping Subject. — Where the attempted arrest is for a petty larceny, and the party runs off, the party attempting the arrest has no right to shoot and kill him. State v. Bryant, 65 N. C. 327; State v. Stancill, 128 N. C. 606, 610, 38 S. E. 926.

A Federal prohibition officer, acting under the National Prohibition Act, can derive no further authority to arrest an offender without a warrant than the federal statute itself provides; and no further power can be acquired by him by virtue of this section, permitting such to be done by a private person, in case of a felony, such as murder, rape, and the like, when the unlawful act has been committed in his presence. State v. Burnett, 183 N. C. 703, 110 S. E. 588.

§ 4544. When officer may arrest without warrant.—Every sheriff, coroner, constable, officer or police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest. (Rev., s. 3178; Code, s. 1126; 1868-9, c. 178, subc. 1, s. 3.)

Common Law Provisions. — At common law there is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that an actual felony has been committed. Whereas, a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until an inquiry shall be made by the proper authorities. Neal v. Joyner, 89 N. C. 287, 290.

An Emergency Measure — The arrest of a person by an officer without a warrant is allowed upon emergency. Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391.

Powers of Police Officer.—A police officer was not known to the common law, and therefore he can exercise powers only within the town limits. Martin v. Houck, 141 N. C. 317, 321, 54 S. E. 291. And is guilty of assault when he arrests without a warrant outside such limits. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

The superintendent of a convict gang is not such an officer as contemplated by this section. State v. Stancill, 128 N. C. 606, 38 S. E. 926.

Rearrest of Escaped Convict.—An escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court. State v. Finch, 177 N. C. 599, 99 S. E. 409.

Reasonable Ground for Belief Excuses Officer.—In mak-

ing an arrest upon personal observation and without a warrant an officer will be excused, though no offense was perpetrated, if the circumstances are such as to reasonably warrant the belief that it had been. State v. Campbell. 182 N. C. 911, 914, 110 S. E. 86; State v. McNinch, 90 N. C. 695, 699. As to what constitutes reasonable ground see that catchline in preceding section.

Same—What Must Be Shown.—A peace officer may justify an arrest without a warrant, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of actual commission of the crime is not necessary. Neal v. Joyner, 89 N. C. 287.

Arrest of Participants in Indecent Show.—See Brewer v. Wynne, 163 N. C. 319, 322, 79 S. E. 629.

Officer Cannot Shoot at Fleeing Misdemeanant.—Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757. And indeed the use of a pistol in attempting to arrest for a misdemeanor is excessive force. Id.

This section applies only to peace officers of the State, and in the enforcement of the State law, and does not affect the conduct or powers of Federal officers unless the principles therein are extended to such officers by a Federal statute, when in the enforcement of a valid Federal law. State v. Burnett, 183 N. C. 703, 110 S. E. 588.

Cited in State v. Macon, 198 N. C. 483, 487, 152 S. E. 407.

§ 4544(1). Sheriffs and deputies granted power to arrest felons anywhere in state.—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State. (1935, c. 204.)

§ 4545. House broken open to prevent felony.—All persons are authorized to break open and enter a house to prevent a felony about to be committed therein. (Rev., s. 3179; Code, s. 1127; 1868-9, c. 178, subc. 1, s. 4.)

§ 4546. When officer may break and enter houses.—If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief. (Rev., s. 3180; Code, s. 1128; 1868-9, c. 178, subc. 1, s. 5.)

§ 4547. Persons summoned to assist in arrest.—Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so. (Rev., s. 3181; Code, s. 1125; 1868-9, c. 178, subc. 1, s. 2.)

As to liability for failure to aid police officers, see section 4379.

Protection of Persons Assisting.—This section makes it imperative on the person so summoned to aid, whether he be present at the perpetration of the offense when summoned, or not. State v. Campbell, 107 N. C. 948, 953, 12 S. E. 441. The protection extends to persons aiding. State v. McMahan, 103 N. C. 379, 382, 9 S. E. 48.

Limits Imposed by Section. — The power conferred upon officers by this section is limited to the cases mentioned in the section, and while they are actually being perpetrated, or are imminent. It does not go to the extent of authorizing the persons thus summoned to make arrests, without warrant, where the offense has been accomplished and the offenders have dispersed. State v. Campbell, 107 N. C. 948, 12 S. E. 441.

§ 4548. Procedure on arrest without warrant.—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law. (Rev., s. 3182; Code, s. 1130; 1868-9, c. 178, subc. 1, s. 7.)

Proper Compliance Protects Justice.—If the justice shall comply with this section by carefully examining the complainant, on oath, before issuing his warrant, few cases would arise in which he would not have judgment for his fees. Merrimon v. Commissioners, 106 N. C. 369, 371, 11 S. E. 267.

Liability of Officer for Wrongful Delay.—A warrant must be procured as soon after the arrest as possible and, where it appears that this was not done, the officer responsible for the arrest is personally answerable in damages. Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391.

Art. 6. Fugitives from Justice

§ 4549. Outlawry for felony.—In all cases where any two justices of the peace, or any judge of the supreme, superior or criminal courts shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the state in which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime. (Rev., s. 3183; Code, s. 1131; 1868-9, c. 178, subc. 1, s. 8; 1866, c. 62.)

Cross References.—See generally chapter entitled extradition in the appendix. For full treatment of extradition see 6 N. C. Enc. Dig. 344 et seq.

Fugitive from Justice. — A fugitive from justice is one who, having committed a crime in one jurisdiction, flees

therefrom in order to evade the law and escape punishment. State v. Hall, 115 N. C. 811, 20 S. E. 729.

Outlaws Must Be Warned. — "So careful is the law to protect those who have not been tried and convicted, that the 'outlaws' are entitled to be 'called upon and warned to surrender' before they are allowed to be slain." State v. Stancill, 128 N. C. 606, 611, 38 S. E. 926, in dissenting opinion by Cook, J.

§ 4550. Fugitives from another state arrested.—Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the state has committed, out of the state and within the United States, any offense which, by law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is hereby required, to issue a warrant for such fugitive or other person and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of congress in that case made and provided. If no demand be made within that time the fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary. (Rev., s. 3184; Code, s. 1165; 1895, c. 103; 1868-9, c. 178, subc. 3, s. 34.)

Editor's Note.—See Editor's Note under section 4604. The same defendants, who were freed in the case discussed in that note were rearrested and held under the provisions of this section which then provided for the arrest of "any fugitive in the state" etc. Upon a petition by the defendants for habeas corpus it was decided in State v. Hall, 115 N. C. 811, 20 S. E. 729, that they were not fugitives and hence could not be held for extradition. This section has since been amended by adding after the words "any fugitive" the words "or other person" which seem to make the statute broad enough to cover a case like that above.

This section seems to have been superseded by § 4556(l).

In General.—This section prescribes the manner in which criminals escaping from other States may be restored to that having jurisdiction of the offense, and its directions can not be disregarded. It provides fully a method by which the crime may be punished, and at the same time guards and preserves the personal security of the citizen from lawless invasion. State v. Shelton, 79 N. C. 605, 608.

Process Necessary.—No one has authority, without process legally issued in this State, to arrest a person charged with crime in another state and fleeing here for refuge. Such an arrest makes the parties engaged in it guilty of an assault and battery. State v. Shelton, 79 N. C. 605.

Departure after Crime Is Flight from Justice.—Departure from a jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law. In re Sultan, 115 N. C. 57, 20 S. E. 375.

Cited in In Re Veasey, 196 N. C. 662, 663, 146 S. E. 599.

§ 4551. Record kept, and copy sent to governor.—Every magistrate committing any person under the preceding section shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law. (Rev., s. 3185; Code, s. 1166; 1868-9, c. 178, subc. 3, s. 35.)

See editor's note under § 4550, and see §§ 4556(a) et seq.

§ 4552. Duty of governor.—The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case. (Rev., s. 3186; Code, s. 1167; 1868-9, c. 178, subc. 3, s. 36.)

See editor's note under § 4550, and see §§ 4556(a) et seq.

§ 4553. Person surrendered on order of governor.—Every sheriff or jailer in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order. (Rev., s. 3187; Code, s. 1168; 1868-9, c. 178, subc. 3, s. 37.)

See editor's note under § 4550, and see §§ 4556(a) et seq.

§ 4554. Governor may employ agents, and offer rewards.—The governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (Rev., s. 3188; Code, s. 1169; 1891, c. 421; R. C., c. 35, s. 4; 1800, c. 561; 1860, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; 1925, c. 275, s. 6.)

Editor's Note.—This section formerly contained at the end a clause authorizing the governor to issue warrants on the state treasurer for sufficient money to carry out the provisions of the section. This clause made the section an exception to section 7682 which provides that "no monies shall be paid out of the treasury except on the warrant of the auditor."

By sec. 6, ch. 275, Public Laws 1925 the provision authorizing warrants by the governor was stricken out. By the same act section 4556, which contained a similar provision was repealed. See Burton v. Furman, 115 N. C. 166, 171, 20 S. E. 443.

§ 4555. Officer entitled to reward.—Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehension a reward has been offered, is entitled to such reward, and may sue for and recover the same in any court in this state having jurisdiction: Provided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest: Provided further, that the foregoing proviso shall not apply to Wake county; and that in Wake county, upon conviction of convict of an escape, the reward paid to the sheriff or other officer for the apprehension of such escaped convict shall be taxed against such convict on the bill of costs. (1913, c. 132; 1917, c. 8.)

See 13 N. C. Law Rev., 15, as to whom an offer may be made.

Law Giving Reward to Sheriff Valid.—In view of this and the preceding section, Public Local Laws of 1925, ch. 318, s. 2 providing that the board of commissioners should pay a reward to the sheriff or other police officers for arresting violators of the prohibition law, is a valid exercise of the police power of the State and not contrary to public policy. Hutchins v. Board, 193 N. C. 660, 137 S. E. 711.

§ 4556. Expenses paid, in bringing fugitive from another state.—In all cases where the governor of

the state has made a requisition on the governor of another state for any fugitive from justice and has sent an agent to receive such fugitive, it shall be lawful for the governor to issue a warrant on the state treasurer for the amount of money necessary to pay the expenses of the agent and other costs in the arresting of the fugitive from justice, to be paid by the treasurer of the state. (Rev., s. 3189; Code, s. 1170; 1870-1, c. 82.)

Editor's Note.—This section seems to have been superseded by § 4556(v).

Art. 6A. Extradition

§ 4556(a). Definitions. — Where appearing in this article, the term "Governor" includes any person performing the functions of Governor by authority of the law of this State. The term "Executive Authority" includes the Governor and any person performing the functions of Governor in a State other than this State. And the term "State," referring to a State other than this State, refers to any other State or territory organized or unorganized of the United States of America. (1931, c. 124, s. 1.)

§ 4556(b). Criminals to be delivered upon requisition.—Subject to the qualifications of this article, and the provisions of the Constitution of the United States controlling, and acts of Congress in pursuance thereof, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State of the United States any person charged in that State with treason, felony, or other crime, as provided in section 4550, or abandonment of wife and/or children, who has fled from justice and is found in this State. (1931, c. 124, s. 2.)

§ 4556(c). Form of demand.—No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the State having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth. (1931, c. 124, s. 3.)

§ 4556(d). Governor may investigate case. — When a demand shall be made upon the Governor of this State by the executive authority of another State for the surrender of a person so charged with crime the Governor may call upon the attorney general or any prosecuting officer in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (1931, c. 124, s. 4.)

§ 4556(e). What extradition papers must show. —A warrant of extradition must not be issued unless the documents presented by the executive authority making the demand show that the accused was present in the demanding State at the time of the commission of the alleged crime, and that he thereafter fled from that State, and is now in this State, and that he is lawfully charged by indictment found or by an information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that State, with having committed a crime under the laws of that State, or that he has been convicted of crime in that State and has escaped from confinement or broken his parole. (1931, c. 124, s. 5.)

§ 4556(f). Issue of Governor's warrant of arrest; its recitals.—If the Governor shall decide that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the State seal, and be directed to a sheriff, marshal, coroner, or other person whom he may think fit to entrust with the execution thereof; and the warrant must substantially recite the facts necessary to the validity of issue. (1931, c. 124, s. 6.)

§ 4556(g). Manner and place of executing warrant.—Such warrant shall authorize the officer or other person to whom directed to arrest the accused at any place where he may be found within the State and to command the aid of all sheriffs and other peace officers in the execution of the warrant, and to deliver the accused subject to the provisions of this article, to the duly authorized agent of the demanding State. (1931, c. 124, s. 7.)

§ 4556(h). Authority of arresting officer. — Every such officer or other person empowered to make the arrest, shall have the same authority in arresting the accused to command assistance therein, as sheriffs and other officers have by law in the execution of any criminal process directed to them with the like penalties against those who refuse their assistance. (1931, c. 124, s. 8.)

§ 4556(i). Accused may apply for writ of Habeas Corpus.—No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends, or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this State, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. And when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding State. (1931, c. 124, s. 9.)

§ 4556(j). Penalty for noncompliance with preceding section.—Any officer who shall deliver to the agent for extradition of the demanding State a person in his custody under the Governor's warrant in disobedience to the last section or any agent for extradition who shall attempt to deprive the defendant of the benefits of section nine shall be guilty of a misdemeanor, and on conviction shall be fined (not more than one

thousand ($1,000) dollars, or be imprisoned not more than six months, or both). (1931, c. 124, s. 10.)

§ 4556(k). Confinement in jail when necessary.—The officer or person executing the Governor's warrant of arrest, or the agent of the demanding State to whom the prisoner may have been delivered, may when necessary confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route, such person being chargeable with the expense of keeping. (1931, c. 124, s. 11.)

§ 4556(l). Arrest prior to requisition.—Whenever any person within this State shall be charged on the oath of any credible person before any judge or other magistrate of this State with the commission of any crime in any other State and with having fled from justice; or whenever complaint shall have been made before any judge or other magistrate in this State setting forth on the affidavit of any credible person in another State that a crime has been committed in such other State and that the accused has been charged in such State with the commission of the crime, and has fled therefrom and is believed to have been found in this State, the judge or magistrate shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed directing him to apprehend the person charged, wherever he may be found in this State, and bring him before the same or any other judge, court or magistrate who may be convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit; and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (1931, c. 124, s. 12.)

Where a justice of the peace of this State issues a warrant for the arrest of a person based upon an affidavit that such person was a fugitive from justice from another state, and the warrant is regular and valid, as provided by this section, in habeas corpus proceedings instituted prior to a hearing upon the warrant before the justice of the peace, an order remanding the petitioner to the custody of the sheriff who had arrested petitioner is not error, but petitioner is entitled to a hearing before the justice of the peace before he is committed to await the issuance of an extradition warrant. In re Mitchell, 205 N. C. 788, 172 S. E. 350.

A person arrested upon a warrant of a justice of the peace of this state, issued upon an affidavit that such person was a fugitive from justice from another state, as provided by this section, may not be lawfully delivered to the authorities of such other state until the Governor of this State has honored a requisition for such person from the Governor of such other state. Id.

§ 4556(m). Arrest without a warrant.—The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged with a crime punishable by death or life imprisonment or ten years in the State's Prison in the courts of another State; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the last section; and thereafter his answer shall be heard as if he had been arrested on a warrant. (1931, c. 124, s. 13.)

§ 4556(n). Commitment to await requisition; bail.—If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and that he probably committed the crime, and, except in cases arising under section 4556(f), that he has fled from justice, the judge or magistrate must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the State having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged. (1931, c. 124, s. 14.)

§ 4556(o). Bail except in capital and life imprisonment cases; condition and requisites of bond. — Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the State in which it was committed, the judge or magistrate must admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the Governor of this State. (1931, c. 124, s. 15.)

4556(p). Discharge of accused where no arrest made within time specified.—If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant, bond or undertaking, the judge or magistrate may discharge him or may recommit him to a further day, or may again take bail for his appearance and surrender, as provided in section 4556(o); and at the expiration of the second period of commitment, or if he has been bailed and appeared according to the terms of his bond or undertaking, the judge or magistrate may either discharge him, or may require him to enter into a new bond or undertaking, to appear and surrender himself at another day. (1931, c. 124, s. 16.)

§ 4556(q). Forfeiture of bail.—If the prisoner is admitted to bail, and fails to appear and surrender himself according to the condition of his bond, the court, by proper order, shall declare the bond forfeited; and recovery may be had thereon in the name of the State as in the case of other bonds or undertakings given by the accused in criminal proceedings within this State. (1931, c. 124, s. 17.)

§ 4556(r). Accused held to answer charges in this State.—If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor at his discretion either may surrender him on the demand of the executive authority of another State, or may hold him until he has been tried and discharged, or convicted and punished in this State. (1931, c. 124, s. 18.)

§ 4556(s). Govenor may recall warrant or issue alias.—The Governor may recall his warrant of

arrest, or may issue another warrant whenever he deems proper. (1931, c. 124, s. 19.)

§ 4556(t). Method of demanding fugitives from this State.—Whenever the Governor of this State shall demand a person charged with crime in this State from the chief executive of any other State, or from the chief justice or an associate justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this State, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this State in which the offense was committed. (1931, c. 124, s. 20.)

§ 4556(u). Manner of applying for requisition.—When the return to this State of a person charged with crime in this State is required, the prosecuting attorney (of the county in which the offense is committed) shall present to the Governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, and the approximate time, place and circumstances of its committal, the State in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this State for trial, and that the proceeding is not instituted to enforce a private claim. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged. The prosecuting officer may also attach such further affidavits and other documents in duplicate as he may deem proper to be submitted with such application. One copy of the application with the action of the Governor indicated by indorsement thereon, and one of the certified copies of the indictment or complaint or information and affidavit, shall be filed in the office of the Governor, to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition. (1931, c. 124, s. 21.)

§ 4556(v). Costs and expenses. — When the crime shall be a felony, the expenses shall be paid out of the State Treasury, on the certificate of the Governor and warrant of the Auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to be committed. The expenses shall be the actual travelling and subsistence costs of the agent of the demanding State, together with such legal fees as were paid to the officers of the State on whose Governor the requisition is made. In every case, the officer entitled to these expenses shall itemize the same and verify them by his oath for presentation, either to the Governor of the State, in proper cases, or to the board of county commissioners, in cases in which the county pays such expenses. (1931, c. 124, s. 22.)

§ 4556(w). Exemption from civil process. — A person brought into this State on extradition based on a criminal charge, shall not be subject to service of personal process in civil actions arising out of the same fact as the criminal proceeding to answer which he is returned, until he has been convicted in the criminal proceeding, or if acquitted, until he has had ample opportunity to return to the State from which he was extradited. (1931, c. 124, s. 23.)

§ 4556(x). No right of asylum.—After a person has been brought back to this State upon extradition proceedings, he may be tried in this State for other crimes which he may be charged with having committed here, as well as that specified in the requisition for his extradition. (1931, c. 124, s. 24.)

§ 4556(y). Interpretation.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it. (1931, c. 124, s. 25.)

Art. 7. Preliminary Examination

§ 4557. Waiver of examination.—If any person arrested desires to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any judge of the supreme or superior court. (Rev., s. 3190; Code, ss. 1138, 1139; 1868-9, c. 178, subc. 3, ss. 7, 8.)

As to bail in criminal proceedings see section 4574 et seq.

§ 4558. Procedure, when justice has not final jurisdiction.—In all cases where a justice of the peace has not final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided. (Rev., s. 3191; Code, s. 896; 1868-9, c. 178, subc. 4, s. 7; 1879, c. 302, s. 2.)

As to jurisdiction of justice in criminal actions see section 1481 and notes.

When Jurisdiction of Justice Ends.—The justice has no jurisdiction of a case after he had bound the defendant to court and taken his recognizance. State v. Lucas, 139 N. C. 567, 569, 51 S. E. 1021.

§ 4559. Duty of examining magistrate.—The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel. (Rev., s. 3192; Code, ss. 1144, 1145; 1868-9, c. 178, subc. 3, s. 13.)

Person Charged Must Be Present.—There can be no examination in the absence of the person charged. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

Rights of Accused.—The present wise and beneficent policy of the law allows a prisoner under arrest time for deliberation and an opportunity to obtain correct legal advice, so that the statements which he may make on an examination are made of his own free will and with full knowledge of the nature and consequences of his confessions. State v. Matthews, 66 N. C. 106, 111.

§ 4560. Testimony reduced to writing; right to counsel.—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall

be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution. (Rev., s. 3193; Code, ss. 1146, 1150; 1868-9, c. 178, subc. 3, ss. 14, 19.)

As to the testimony being used as evidence see section 4572 and notes.

Exact Words Not Required to Be Written.—The magistrate is not required to write down the very words of the witness as they are uttered. It is sufficient if he puts down fully and accurately the testimony of the witness as he intends it upon the subject matter of inquiry. State v. Bridgers, 87 N. C. 562, 564.

Notes Not Conclusive.—The notes of evidence made by a committing magistrate upon the hearing are not conclusive as to the testimony of witnesses examined. State v. Hooper, 151 N. C. 646, 65 S. E. 613.

Magistrate Can Give Parol Testimony.—It is competent for a magistrate to state what a witness swore before him in regard to a homicide, although he afterwards committed the statement to writing. State v. Adair, 66 N. C. 298.

Use of Written Statement on Trial.—The written statement can only be referred to, to refresh his memory, and is properly treated as a memorandum, State v. Adair, 66 N. C. 298, unless the witness is dead, or too ill to be present, or insane, or has removed from the State at the instigation or connivance of the defendant or prosecutor. State v. King, 86 N. C. 603, 605.

§ 4561. Prisoner examined; advised of rights.—The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings. (Rev., s. 3194; Code, ss. 1145, 1146; 1868-9, c. 178, subc. 3, ss. 14, 15.)

As to the right of a prisoner to testify as a witness see section 1799.

Purpose of Section.—It was intended by this section to safeguard the rights of the prisoner as guaranteed by the law, and to afford him every protection against imposition, oppression, or undue influence, so that what he may say in any investigation in regard to the accusation against him may be entirely voluntary. State v. Parker, 132 N. C. 1014, 1017, 43 S. E. 830. For the accused, without the caution, might, before the magistrate, feel compelled to answer questions put to him, and such answers as he might make, might not be voluntary. State v. Conrad, 95 N. C. 666, 670.

Prisoner Must Not Be Sworn.—It was the purpose and intent that the person under examination, who is accused of crime, should feel free to admit or deny his guilt, and the oath which is forbidden by statute deprives him of this perfect freedom. State v. Parker, 132 N. C. 1014, 1018, 43 S. E. 830.

Section Extends to Coroner's Inquest.—The reason of the section extends to an inquisition by a coroner. In this respect he is an examining magistrate. State v. Matthews, 66 N. C. 106.

Caution to Prisoner Is Essential.—This caution is not a mere matter of form: it is a substantial right, necessary for the protection of prisoners who are too poor to employ counsel and too ignorant to conduct their own defense. State v. Rorie, 74 N. C. 148, 150.

And in the opinion of the Court in State v. Matthews, 66 N. C. 106, "this caution is an essential part of the proceedings, and must be given to the prisoner under arrest to make his examination admissible in evidence." State v. Rorie, 74 N. C. 148, 150. Thus where a confession is made before the cautions required by the section were given it is inadmissible as evidence. State v. Matthews, 66 N. C. 106, 113.

Caution Applies to Whole Examination.—The purpose of the section is, that the prisoner shall be advised by the magistrate of his right to refuse to answer all questions that may be put to him as to the charge made against him, without prejudice, during the whole examination, and not simply so much of it as applies to him personally. State v. Conrad, 95 N. C. 666, 670.

When Caution to Be Given.—The commencement of the examination is properly, when, after the warrant of arrest is returned executed, the accused is present before the magistrate, and the latter having called and noticed the matter of the charge, proceeds to read the warrant or state the substance of the charge orally. It is then the caution to the accused is due, and ought to be given, because, then, the magistrate has taken official notice of the charge and the accused, and what he does and says, and then the latter must take notice of the magistrate and be under his jurisdiction and control; then he is before the court and his examination is begun. State v. Conrad, 95 N. C. 666, 669.

It is not necessary to competency of an extra judicial confession to a police officer that defendant be warned he is not compelled to answer. State v. Grier, 203 N. C. 586, 166 S. E. 595.

Exact Words of Section Not Required.—It is not necessary that a committing magistrate at the commencement of the examination of a prisoner shall use the precise words of the section in giving the caution therein prescribed, but it is sufficient if there be a substantial compliance with the requirement of the section. State v. Rogers, 112 N. C. 874, 17 S. E. 297; State v. DeGraff, 113 N. C. 688, 18 S. E. 507; State v. King, 162 N. C. 580, 581, 77 S. E. 301.

Same—What Is Sufficient.—Both the letter and spirit of the statute require that the defendant should be advised of is rights by the justice, to the effect that he is not required to testify; that he is at liberty to refuse to answer any question put to him, and that his refusal to answer shall not be used to his prejudice. State v. Parker, 132 N. C. 1014, 1018, 43 S. E. 830; State v. Simpson, 133 N. C. 676, 677, 45 S. E. 567; State v. Vaughan, 156 N. C. 615, 616, 71 S. E. 1089.

Same—Insufficient Compliance.—Where the prisoner was brought before the magistrate and he was told by that official that "he was charged with selling stolen corn, and that if he wanted to tell anything he could do so; but it was just as he chose." This was not sufficient compliance. State v. Rorie, 74 N. C. 148, 150.

Where Caution Omitted Testimony Not Admissible.—It is not said in terms that without the caution required to be given, the declarations, statements and confessions of the accused, made on the examination, shall not be competent as evidence against him, but this seems to be implied, and it has been so decided in numerous cases. State v. Matthews, 66 N. C. 106; State v. Rorie, 74 N. C. 148; State v. Spier, 86 N. C. 600; State v. Conrad, 95 N. C. 666, 669.

Trial Judge Must Find Proper Caution.—Where the record of a committing magistrate merely states that the prisoner was cautioned and the trial court holds such admission competent, with no other evidence before him except this statement, it is error, as the trial judge should have found as a fact whether the proper caution was given to the prisoner. State v. Parker, 132 N. C. 1014, 43 S. E. 830.

Where Prisoner Examined as Witness at Own Request.—Testimony given by a defendant when examined as a witness at his own request is admissible against him on another hearing or trial for the same or any other offense for such admissions and declarations do not come within either the language or the reason of this section. State v. Ellis, 97 N. C. 447, 2 S. E. 525; State v. Simpson, 133 N. C. 676, 45 S. E. 567, 568; State v. Hawkins, 115 N. C. 712, 20 S. E. 623.

§ 4562. Exclusion of witnesses at examination.—The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined. (Rev., s. 3195; Code, s. 1149; 1868-9, c. 178, subc. 3, s. 18.)

As to exclusion of bystanders in trials for rape, see section 4636.

Judge Has Discretion to Exclude.—Exclusion is a matter of which the presiding judge must judge, and except in cases of abuse of his discretion, such order is not reviewable. Lee v. Thornton, 174 N. C. 288, 289, 93 S. E. 788; State v. Hodge, 142 N. C. 676, 682, 55 S. E. 791; State v. Lowry, 170 N. C. 730, 734, 87 S. E. 62; State v. Davis, 175 N. C. 723, 95 S. E. 48.

§ 4563. Answers in writing, read to prisoner, signed by magistrate.—The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate. (Rev., s. 3196; Code, s. 1147; 1868-9, c. 178, subc. 3, s. 16.)

Seal Not Necessary.—This section does not require the examination of a committing magistrate to be certified under seal. State v. Pressley, 90 N. C. 730.

§ 4564. Witnesses for defendant examined.—After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination. (Rev., s. 3197; Code, s. 1148; 1868-9, c. 178, subc. 3, s. 17.)

§ 4565. Examination of prisoner not required in misdemeanors.—Nothing contained in the preceding sections shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner. (Rev., s. 3198; Code, s. 1153; 1868-9, c. 178, subc. 3, s. 22.)

As to the right of a prisoner to be examined as a witness, see section 1799.

§ 4566. When prisoner discharged.—If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner. (Rev., s. 3199; Code, s. 1151; 1868-9, c. 178, subc. 3, s. 20.)

§ 4567. When prisoner held to answer charge.—If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison. (Rev., s. 3202; Code, ss. 1152, 1156; 1868-9, c. 178, subc. 3, ss. 21, 25.)

As to bail generally, see section 4574 et seq. and notes.

When Jurisdiction of Justice Ends.—It was intended most surely that when the justice had fully performed the duties required of him, his jurisdiction as to the case should be at an end. If he makes a mistake, it must be corrected elsewhere—not in his court. State v. Lucas, 139 N. C. 567, 569, 51 S. E. 1021.

Same—Cannot Reverse His Decision.—Where a justice of the peace heard a warrant charging the defendant with an assault, with serious damage, and adjudged that the accused give bond for his appearance, and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased and his attempt to reverse his decision the next day and fine the defendant was a nullity. State v. Lucas, 139 N. C. 567, 51 S. E. 1021.

§ 4568. Witnesses against prisoner recognized.—The magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offense is alleged to have been committed. (Rev., s. 3203; Code, s. 1152; 1868-9, c. 178, subc. 3, s. 21.)

See notes under next section.

§ 4569. Witnesses required to give security for appearance.—Whenever the magistrate is satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of the recognizances unless security be required, he may order the witness to enter into a recognizance with such sureties as he shall deem meet for his appearance at such court. (Rev., s. 3204; Code, s. 1154; 1868-9, c. 178, subc. 3, s. 23.)

Bond for Appearance before Justice Not Permitted.—There is no statute which authorizes a Justice of the Peace or magistrate to require of a witness to give bond for his appearance before such Justice or magistrate. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 434, 40 S. E. 191.

And a Justice of the Peace, together with those advising him, who order a witness to give a bond to appear before a Justice, thereby become trespassers. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191.

§ 4570. Investigation in case of lynching.—Whenever the solicitor of any judicial district ascertains that the crime of lynching has been committed in any county in his judicial district, it is his duty to go to such county at the earliest possible moment, and at once institute proceedings for the investigation of the crime before the coroner of the county, some judge of the superior court, or justice of the peace, and for the apprehension of the offender. In the performance of this duty he shall cause to be issued subpœnas or other process to compel the attendance of witnesses and examine such witnesses on oath as to their knowledge or information touching the crime being investigated. In all cases where, upon preliminary investigation, it appears probable that any person is guilty of the crime charged, it shall be the duty of the coroner, judge or justice before whom the case is heard to bind such person, with good security, for his appearance at the next ensuing term of the superior or criminal court of some county adjoining the county in which the crime was committed for trial, and in default of bail to commit him to the jail of such adjoining county for safekeeping, and all necessary witnesses shall be recognized to appear at such term as witnesses for the state. (Rev., s. 3200; 1893, c. 461, s. 2.)

For general note on anti-lynching law, see the Editor's Note to § 1266.

Venue in case of lynching is discussed in State v. Lewis, 142 N. C. 626, 55 S. E. 600. See also section 4600.

§ 4571. Witnesses in lynching not privileged.—In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the cause, as authorized by the preceding section or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself; but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall, when so examined as a witness for the state, be altogether pardoned of any and all participation in any crime arising under the provisions of the preceding section, or under existing law, concerning which he is required to testify. (Rev., ss. 1638, 3201; 1893, c. 461, s. 5.)

Editor's Note.—Section 1800 provides for compelling witnesses to testify in certain criminal investigations and ex-

tends immunity to those thus testifying. As those provisions are analogous to the provisions of this section many of the notes thereunder will be useful in considering this section.

Witness Pardoned Though Testimony Does Not Incriminate.—Legislation in "abolition or oblivion of the offense" specified, applicable to all in a given class, is valid and therefore, when under this section, the defendant was summoned, sworn, and examined by and for the State touching an alleged lynching under investigation by the court, he shall be altogether pardoned of any and all participation therein under the statute or existing law, whether the evidence elicited from him tends to incriminate him or not. State v. Bowman, 145 N. C. 452, 59 S. E. 74.

Plea of Pardon as Motion to Quash.—It seems that for the purpose of an appeal, the plea of pardon may be considered and treated as a motion to quash, and so be brought within the direct provisions of section 4649. State v. Bowman, 145 N. C. 452, 455, 59 S. E. 74.

§ 4572. Proceedings certified to court; used as evidence.—All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, within twenty days after the taking of such examinations and recognizances: Provided, that any criminal case tried within twenty days before the sitting of criminal court shall be returned on Saturdays before the court convenes. The examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the depositing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant has removed from the state, or is of unsound mind. (Rev., s. 3205; Code, s. 1157; 1913, c. 24; 1868-9, c. 178, subc. 3, s. 26.)

In General.—Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action do not affect the common-law rule, but they are extensions of its principle, making it only necessary when the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. State v. Maynard, 184 N. C. 653, 113 S. E. 682.

Examinations Must Accord with Preceding Sections.—Where the examinations are offered as substantive evidence bearing upon the criminal charge, they are only admissible under this section, when taken according to the requirements of the preceding sections. State v. Pierce, 91 N. C. 606, 610; State v. Jordan, 110 N. C. 491, 495, 14 S. E. 752.

Reason for Witness Absence Must Appear.—In order to use the examination as substantive evidence it must be shown that witness is absent because of one of reasons given in this section. State v. Pierce, 91 N. C. 606, 610.

No foundation has been laid for the introduction of the evidence of a witness who merely does not respond to the obligations of the subpoena, and is simply proved to have "run away," and not that any effort has been made to secure his presence. State v. King, 86 N. C. 603, 605.

When Parol Evidence Admissible.—On the trial in the superior court it is competent for purposes of contradiction, to offer parol evidence as to what a witness testified to upon such preliminary examination. State v. Hooper, 151 N. C. 646, 65 S. E. 613; State v. Wright, 75 N. C. 439; State v. Roberts, 81 N. C. 605; State v. Lyon, 81 N. C. 600.

To authorize the introduction of parol evidence as to the confession of a prisoner before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law. State v. Parish, 44 N. C. 239; State v. Matthews, 66 N. C. 106, 110.

§ 4573. Penalty for failing to return.—If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law. (Rev., s. 3206; Code, s. 1158; 1868-9, c. 178, subc. 3, s. 27.)

Art. 8. Bail

§ 4574. Officers authorized to take bail, before imprisonment.—Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to take bail as follows:

1. Any justice of the supreme court, or a judge of a superior court in all cases.

2. Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital. (Rev., s. 3209; Code, s. 1160; 1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37.)

For a full treatment of Bail in Criminal Prosecutions, see 2 N. C. Enc. Dig. 237-245; 13 N. C. Enc. Dig. 222.

Editor's Note.—In State v. Herndon, 107 N. C. 934, 12 S. E. 268, the meaning and effect of this and the following section are discussed at pages 939-944 by Merrimon, C. J., in a dissenting opinion. For the constitutional provision as to bail, see N. C. Const. Art. I, § 14. As to arrest and bail in civil cases, see §§ 767 et seq.

§ 4575. Officers authorized to take bail, after imprisonment.—Any justice of the supreme court or any judge of a superior court has power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town has the same power in all cases where the punishment is not capital. (Rev., s. 3210; Code, s. 1161; 1868-9, c. 178, subc. 3, s. 30.)

In General.—This section means that any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ of habeas corpus, adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. State v. Herndon, 107 N. C. 934, 936, 12 S. E. 268.

§ 4576. Recognizance filed with the clerk.—Whenever a prisoner is bailed by any officer under the preceding section, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the superior court of the county to which the prisoner is recognized. (Rev., s. 3211; Code, s. 1162; 1868-9, c. 178, subc. 3, s. 31.)

§ 4577. Bail allowed on preliminary examination.—If the offense charged in the warrant be not punishable with death, the magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense is alleged to have been committed. (Rev., s. 3207; Code, s. 1139; 1868-9, c. 178, subc. 3, s. 8; 1871-2, c. 37, s. 1.)

Recognizance Explained.—The taking of a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the State, and of the conditions on which it is to be defeated. State v. Edney, 60 N. C. 463; State v. Houston, 74 N. C. 549, 550.

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. State v. Smith, 66 N. C. 620; State v. White, 164 N. C. 408, 410, 79 S. E. 297.

Same—A Matter of Record.—A recognizance is a matter of record, and can only be discharged by a record or something of equal solemnity. State v. Moody, 69 N. C. 529.

Same—Need Not Be Executed by Parties.—A recognizance need not be executed by the parties, but is simply acknowledged by them, and a minute of the acknowledgment is en-

tered by the court. State v. Edney, 60 N. C. 463, 471; State v. White, 164 N. C. 408, 410, 79 S. E. 297.

Effect of a Recognizance.—A recognizance binds the sureties for the continued appearance of their principal, from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for term or without day. He must answer its calls at all times and submit to its judgment. State v. Schenck, 138 N. C. 560, 565, 49 S. E. 917.

Bond with Conditions Is Satisfactory.—A bond with conditions, signed and sealed by the parties, is good as a recognizance. State v. Jones, 100 N. C. 438, 6 S. E. 655.

§ 4578. Duty of magistrate granting bail.—Any magistrate taking bail shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which the prisoner has been recognized to appear. (Rev., s. 3212; Code, s. 1140; 1868-9, c. 178, subc. 3, s. 9.)

§ 4579. Sheriff or deputy may take bail.—When any sheriff or his deputy arrests the body of any person, in consequence of the writ of capias issued to him by the clerk of a court of record on an indictment found, the sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the capias; and the sheriff shall in no case become bail himself. (Rev., s. 3208; Code, s. 1180; R. C., c. 35, s. 11; 1797, c. 474, s. 4.)

§ 4580. Sheriff may take bail of prisoner in custody.—If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail bond shall be regarded, in every respect, as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (Rev., s. 3228; Code, s. 1232; R. C., c. 11, s. 8.)

§ 4581. Bail on continuance before a justice.—Upon the continuance of any criminal action returned before any justice of the peace for trial, in which the justice is authorized to take bail on a finding of probable cause or in which he has final jurisdiction, it is the duty of the justice of the peace to take bond for his appearance, payable to the state, on the same being tendered by the accused, with such surety as in his opinion will be sufficient to insure the appearance of the accused for trial at a time and place mentioned in the bond. (Rev., s. 3213; 1889, c. 133.)

As to mortgage in lieu of security for appearance, see section 347.

Section Gives a New Remedy.—Before this section was passed a justice of the peace had no power to allow a party accused of an offense of which he had not final jurisdiction to give bail during the postponement of the examination. If any delay in the examination was necessary, the accused was to be kept in the custody of the sheriff or other officer of the law until the examination was resumed. State v. Jones, 100 N. C. 438, 6 S. E. 655; State v. Jenkins, 121 N C. 637, 641, 28 S. E. 413.

Art. 9. Forfeiture of Bail

§ 4582. In recognizance to keep the peace.—Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear the court shall forfeit his recognizance and order it to be prosecuted, in the manner provided by law, unless reasonable excuse for his default be given. (Rev., s. 3214; Code, s. 1225; 1868-9, c. 178, subc. 2, s. 10.)

As to recognizance see also notes under section 4577.

Recognizance Binds to Three Things.—It is said by the highest authority that a recognizance (or bail bond) in general binds to three things; (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. State v. Schenck, 138 N. C. 560, 562, 49 S. E. 917; State v. Eure, 172 N. C. 874, 875, 89 S. E. 788.

When Time and Place Specified. — If the recognizance specify time and place the defendant cannot be held to be in default for not appearing at some other time or place. State v. Houston, 74 N. C. 174, 176.

Thus a recognizance, conditioned that the defendant appear at the court-house in C, on the eighth Monday after the fourth Monday in March, is not forfeited by the defendant's failure to appear on 22 February. State v. Houston, 74 N. C. 174.

Same—Effect of Subsequent Law.—A recognizance conditioned for the appearance of a party at one day, is not forfeited by his failure to appear at another day, to which the holding of the Court was changed by a law passed after the taking of the recognizance; the law containing no provision that recognizances should be returned and parties appear on that day. State v. Melton, 44 N. C. 426.

When Appearance at Next Term Specified. — A recognizance for the appearance of the defendant at the next term of the Court to be held for a given county is valid and binds the defendant to appear at the next term and at the court-house, although neither time nor place be specifically named; because every one knows, or is presumed to know, the time and place of holding the court. State v. Houston, 74 N. C. 176.

Same—If Term Not Held.—A defendant bound over to answer a criminal charge at a regular term of the Superior Court, which term is not held in consequence of the absence of the Judge, is required to attend at an intervening special term subsequently appointed and held. State v. Horton, 123 N. C. 695, 31 S. E. 218.

Continuance Does Not Release. — The continuance of a criminal case does not release the recognizance given for the appearance of the defendant. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Proceedings When Recognizance Broken.—Where the condition of a recognizance is broken it is competent for the justice to declare the same to be forfeited and order it to be prosecuted in the court having jurisdiction of the penal sum. State v. Oates, 88 N. C. 668.

Defendant Must Appear Until Discharged.—An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court. State v. Eure, 172 N. C. 874, 89 S. E. 788.

Agreement by Solicitor Will Not Relieve.—An agreement by a solicitor for the state to discharge a defendant if he would become a state's witness against codefendant, will not relieve such defendant from a forfeited recognizance. State v. Moody, 69 N. C. 529.

Failure to Sign Warrant.—It is immaterial to the validity of an appearance bond given by defendant before the court and in custodia legis that the warrant for his arrest, in due form, was, inadvertently, not signed by the recorder. State v. Mitchell, 151 N. C. 716, 66 S. E. 202.

§ 4583. When recognizance deemed broken.—No recognizance taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principle be convicted of some offense

amounting in judgment of law to a breach of such recognizance. (Rev., s. 3215; Code, s. 1227; 1868-9, c. 178, subc. 2, s. 12.)

Surety Not Relieved.—The liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. (See sections 4594, 4595.) He is not released by the principal being drunk and under arrest when his case was called in court and continued, and by the principal having since become a fugitive from justice under charge of a different offense. State v. Holt, 145 N. C. 450, 59 S. E. 64.

§ 4584. Recognizance prosecuted.—Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken. (Rev., s. 3216; Code, s. 1228; 1868-9, c. 178, subc. 2, s. 13.)

Independent Proceeding Unnecesary.—The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. State v. Sanders, 153 N. C. 624, 627, 69 S. E. 272.

Proceedings When Forfeiture Is Moved for.—When the forfeiture of a recognizance is moved for, if all the matters are of record, the judge decides without the intervention of a jury. But when the answer raises an issue of fact, the defendant is entitled to have the matter passed upon by a jury. State v. Sanders, 153 N. C. 624, 626, 69 S. E. 272, and cases cited.

Entry of Forfeiture Not Traversed by Answer to Scire Facias.—The entry of the forfeiture of a recognition in a criminal case cannot be contradicted or traversed by an answer or a plea to a scire facias issued to enforce the forfeiture. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Effect of Answer to Scire Facias.—Where the recognizance in a criminal case is entered on the records of the court as forfeited, and scire facias is issued to enforce the forfeiture, an answer denying the truth of the record, though informal, is equivalent to a motion to set aside the entry, when that appears to have been the intention of the defendants. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

§ 4585. Notice of judgment nisi before execution.—No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties. (Rev., s. 3217; Code, s. 1208; R. C., c. 35, s. 43; 1777, c. 115, s. 48.)

For an act relating to docketing of judgments nisi upon forfeited recognizance applicable in Forsyth county only, see Public Laws of 1935, chapter 83.

Notice Must Be Given.—This section has made it imperative, that before suing out execution on a forfeited recognizance, a scire facias shall issue, and judgment be had thereon. State v. Mills, 19 N. C. 552, 554.

Object of Notice.—The object of a scire facias is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. State v. Mills, 19 N. C. 552, 554.

§ 4586. What notice must contain.—When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizors, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant. (Rev., s. 3218; Code, s. 1209; R. C., c. 35, s. 44; 1812, c. 836, s. 1.)

§ 4587. Service of notice.—All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served. (Rev., s. 3219; Code, s. 1210; R. C., c. 35, s. 45; 1812, c. 836, s. 2.)

§ 4588. Judges may remit forfeited recognizances.—The judges of the superior courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before as after final judgment entered and execution awarded. (Rev., s. 3220; Code, s. 1205; R. C., c. 35, s. 38, 1788, c. 292, s. 1.)

Trial Judge Has Discretion.—The power given by this section is a matter of judicial discretion in the judges below, which cannot be reviewed except for some error in a matter of law or legal inference. State v. Moody, 74 N. C. 73, 75; State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Court May Remit Penalty without Setting Aside Forfeiture.—Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

Petition after Final Judgment.—A surety on a bail bond may under this section present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. State v. Bradsher, 189 N. C. 401, 127 S. E. 349.

The Superior Courts have authority, under this section, to lessen or remit forfeited recognizances, upon the petition of the party aggrieved, either before or after final judgment. State v. Moody, 74 N. C. 73.

Solicitor Has No Vested Right to Fee.—Under this section the solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by the court in the exercise of his discretionary power. State v. King, 143 N. C. 677, 57 S. E. 516.

§ 4589. Money refunded by clerk.—The clerk of the superior court, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted. (Rev., s. 3221; Code, s. 1206; R. C., c. 35, s. 39; 1795, c. 442, s. 1.)

§ 4590. Money refunded by treasurer.—If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance has been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto. (Rev., s. 3222; Code, s. 1207; R. C., c. 35, s. 40; 1795, c. 442, s. 2.)

§ 4591. Forfeiture of bond before justice.—On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, shall depart the court without leave thereof first had and obtained, it shall be the duty of the justice of the peace then presiding to enter judgment nisi against the principal and his sureties in the bond for the amount mentioned therein, if the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in the bond, giving ten days time, specifying time and place, to appear and show cause, if any they have, why the judg-

ment nisi shall not be made final. (Rev., s. 3223; 1889, c. 133, s. 2.)

§ 4592. Judgment final, rendered and enforced.—If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of the bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of the court, and the clerk shall issue execution on the final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the state. (Rev., s. 3224; 1889, c. 133, s. 3.)

§ 4593. Forfeiture over two hundred dollars before justice.—If the bond shall exceed the sum of two hundred dollars, and the accused shall fail to appear as therein provided to answer the charge, or, having appeared, shall depart the court without leave first had and obtained, it shall be the duty of the justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case, together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment nisi for the amount of the bond, and issue notice to the accused and his sureties to appear at the next term to show cause why the judgment should not be made final and proceeded in as other cases of forfeited bonds in behalf of the state in such court. The entry on the bond by the justice of the peace shall be prima facie evidence that the principal therein had been called and failed to answer. Nothing in this section shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his surety. (Rev., s. 3225; 1889, c. 133, s. 4.)

§ 4594. Right of bail to surrender principal.—The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance forfeited shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for. (Rev., s. 3226; Code, s. 1230; R. C., c. 11, s. 5; 1777, c. 115, s. 20; 1848, c. 7.)

In General.—The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor, and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately, but be permitted to find security for the costs of his appeal and for his appearance at the next term, and if he fails afterwards to appear, when called during the term, and perfect his appeal and give the necessary security for his appearance, or in default thereof to surrender himself in execution of the judgment, he may be called and his forfeiture entered. State v. Schenck, 138 N. C. 560, 564, 49 S. E. 917.

Compliance with Section Protects Surety.—Where a defendant surrenders his principal in open court in discharge of himself as bail, he is acting in the clear exercise of an undoubted legal right. Under this section the entry of the fact made upon the records of the Court was therefore proper, and the court could not by their subsequent action, deprive the defendant of the belief of it. Underwood v. McLaurin, 49 N. C. 17, 18.

When Condition of Bond Performed.—The condition of a bail bond is not performed by the appearance, conviction, and sentence of the defendant. The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff, but to exonerate the surety the defendant must submit to such punishment as shall be adjudged. State v. Schenck, 138 N. C. 560, 49 S. E. 917.

§ 4595. New bail given upon surrender; liability of sheriff.—Any person surrendered in the manner specified in the preceding section shall have liberty, at any time before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken, the same term to which such bail bond shall be returned, and allowed by the court, the sheriff, having due notice thereof in criminal cases, shall forfeit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled Crimes. (Rev., s. 3227; Code, s. 1231; R. C., c. 11, s. 6; 1827, c. 40.)

§ 4596. Defenses open to bail.—Every matter which would entitle the principal to be discharged from arrest may be pleaded by the bail in exoneration of his liability. (Rev., s. 3229; Code, s. 1233; R. C., c. 11, s. 9.)

Art. 10. Commitment to Prison

§ 4597. Order of commitment.—Every commitment to prison of a person charged with crime shall state:

1. The name of the person charged.
2. The character of the offense with which he is charged.
3. The name and office of the magistrate committing him.
4. The manner in which he may be discharged; if upon giving recognizance or bail, the amount of the recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify.
5. The court before which the prisoner shall be sent for trial. (Rev., s. 3230; Code, s. 1163; 1868-9, c. 178, subc. 3, s. 32.)

Verbal Order Invalid.—A verbal order of a justice of the peace sending a prisoner to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. State v. James, 78 N. C. 455.

§ 4598. Commitment to county jail.—All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been comitted: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction shall receive such prisoner and give a receipt for him, and be bound for his safe-keeping as prescribed by law. (Rev., s. 3231; Code, s. 1164; 1868-9, c. 178, subc. 2, s. 33.)

§ 4599. Commitment of witnesses.—If any witness required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law. (Rev., s. 3232; Code, s. 1155; 1868-9, c. 178, subc. 3, s. 24.)

As to witnesses required to give security for appearance see section 4569.

Art. 11. Venue

§ 4600. In case of lynching.—The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice. (Rev., s. 3233; 1893, c. 461, s. 4.)

Cross References.—For a full treatment of Venue, see 12 N. C. Enc. Dig. 266-281; 15 N. C. Enc. Dig. 716-721. As to venue in civil cases, see §§ 463 et seq. As to removal for fair trial, see §§ 471 to 474.

Section Constitutional. — This section is a constitutional exercise of legislative power. State v. Lewis, 142 N. C. 626, 55 S. E. 600; State v. Rumple, 178 N. C. 717, 100 S. E. 622.

Purpose of Section.—Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. State v. Lewis, 142 N. C. 626, 630, 55 S. E. 600.

Bill Need Not Be Found In County Where Offense Committed.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. State v. Lewis, 142 N. C. 626, 55 S. E. 600.

§ 4601. In offenses on waters dividing counties.—When any offense is committed on any water, or water-course, whether at high or low water, which water or water-course, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed. (Rev., s. 3234; Code, s. 1193; R. C., c. 35, s. 24.)

§ 4602. Assault in one county, death in another.—In all cases of felonious homicide when the assault has been made in one county within the state, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made. (Rev., s. 3235; Code, s. 1196; R. C., c. 35, s. 27; 1831, c. 22, s. 1.)

No New Offense Created by Section.—This section received a judicial construction in S. v. Dunkley, 25 N. C. 116, and it was held that it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. State v. Hall, 114 N. C. 909, 919, 19 S. E. 602.

This section and the following were part of chapter 22 of the Public Laws 1831 and hence this construction applies equally to the following section.—Ed. Note.

Meaning of "assault" see note under following section.

§ 4603. Assault in this state, death in another.—In all cases of felonious homicide, when the assault has been made within this state, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this state. (Rev., s. 3236; Code, s. 1197; R. C., c. 35, s. 28; 1831, c. 22, s. 2.)

Section Is Valid.—The validity of sections similar to this seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. State v. Hall, 114 N. C. 909, 913, 19 S. E. 602.

No new offense created by section, see note to preceding section.

Meaning of "Assault."—The assault mentioned in this section and the preceding section evidently means not a mere attempt, but such an injury inflicted in this State which results in death in another State. State v. Hall, 114 N. C. 909, 920, 19 S. E. 602.

Acts Causing Death Must Take Place in State.—This section plainly contemplates that every part of the offenses, except the death, must have occurred in this State. State v. Hall, 14 N. C. 909, 920, 19 S. E. 602.

Shooting Person in Adjoining State.—See next section and note thereto.

§ 4604. Person in this state injuring one in another.—If any person being in this state, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state as he would be if the effect had taken place within this state. (Rev., s. 3237; 1895, c. 169.)

Editor's Note.—This section was passed in 1895 as a result of the decision in State v. Hall, 114 N. C. 809, 19 S. E. 602. In that case, decided in 1894, the defendants while in North Carolina shot across the State line and killed a person in Tennessee and being indicted for murder in North Carolina it was held that they were not guilty of the crime charged in the absence of a statute like the present. Section 4603 was discussed and held not applicable since the stroke producing death was given not in North Carolina but in Tennessee.

§ 4605. In county where death occurs.—If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas of land, either within or without the limits of this state, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens. (Rev., s. 3238; 1891, c. 68.)

Section Constitutional.—This section is constitutional and applies to foreigners as well as to citizens of this State who have inflicted moral wounds elsewhere. State v. Caldwell, 115 N. C. 794, 20 S. E. 523.

§ 4606. Improper venue met by plea in abatement; procedure.—Because the boundaries of many counties are either undetermined or unknown, by reason whereof high offenses go unpunished; therefore, for the more effectual prosecution of offenses committed on land near the boundaries of counties, in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath or otherwise both as to substance and fact, wherein shall be set forth the proper county in which the supposed offense, if any, was committed; whereupon the court may, on motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offense in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offense in the county averred by his plea to be the proper county, provided the offense be bailable; and, if not bailable, he shall be committed for trial in the county; and, if it be found for the state, the court in all offenses or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty. (Rev., s. 3239; Code, s. 1194; R. C., c. 35, s. 25.)

Cross References.—As to venue in indictment for beating way on trains see section 3508. As to venue in indictment for receiving stolen goods see section 4250. As to venue in case of discrimination against the Atlantic and North Carolina Railroad see section 3419.

Purpose of Section.—This section was evidently intended to provide relief in difficulties originating in doubt entertained in good faith as to the county in which the offense was committed, and should not be construed to modify the common law beyond the reasonable scope of its manifest purpose. State v. Mitchell, 202 N. C. 439, 445, 163 S. E. 581.

Power of Legislature.—Venue is under the control of the Legislature. State v. Woodward, 123 N. C. 710, 31 S. E. 219.

Broad Terms.—This section is very broad in its terms. State v. Outerbridge, 82 N. C. 618, 622.

Old Rule Reversed.—It reverses the rule which seems to have obtained on the trial of criminal cases before its enactment. State v. Lytle, 117 N. C. 799, 801, 23 S. E. 476.

Applies to All Crimes.—In felonies, as to misdemeanors, the objection can only be taken by plea in abatement. State v. Outerbridge, 82 N. C. 618, 622.

Same—Committed Within State.—The offenses referred to in this section are those committed within the borders of the State, in violation of the laws of the State, for our courts cannot take cognizance of the violation of the criminal laws of other States; and would have no right to recognize offenders to appear before their judicial tribunals. State v. Mitchell, 83 N. C. 674, 676.

Laws Regulating Jurisdiction Not a Part of Offense.—Laws conferring, withdrawing or limiting jurisdiction over pre-existing common law offenses do not become a constituent part of the offenses to which they apply. State v. Lewis, 142 N. C. 626, 630, 55 S. E. 600; State v. Williamson, 81 N. C. 540.

Crime Where Alleged.—Under this section, a criminal offense is deemed to have taken place in the county in which the indictment charges it had occurred, unless the defendant deny the same by the plea in abatement. State v. Oliver, 186 N. C. 329, 119 S. E. 370; State v. Allen, 107 N. C. 805, 11 S. E. 1016.

Averment of Venue in Indictment.—In an indictment for murder, the offence must be charged in the body of the bill, to have been committed within the district, over which the court has jurisdiction; it is not sufficient that the caption names the district. State v. Adams, 1 N. C. 56.

But the want of an averment of a proper and perfect venue is not fatal to a bill of indictment. State v. Williamson, 81 N. C. 540, 541.

The crime of offering a bribe to a juror is committed in the county where the offer is communicated to the juror, and the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's kinsmen and wife in the county of their residence. State v. Noland, 204 N. C. 329, 168 S. E. 412.

Objection to Venue Waived.—Objection to venue is waived unless objection is taken in apt time by plea in abatement. State v. Lytle, 117 N. C. 799, 23 S. E. 476; State v. Woodward, 123 N. C. 710, 31 S. E. 219; State v. Holder, 133 N. C. 709, 711, 45 S. E. 862.

Thus where a prisoner is charged with killing the deceased in the county in which the indictment is found, the State need not prove that the offense was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement. State v. Outerbridge, 82 N. C. 618.

Demurrer to Evidence Improper Remedy.—Under this section, an objection to venue must be taken by plea in abatement, and a demurrer to the evidence on this ground was properly overruled. State v. Burton, 138 N. C. 575, 576, 50 S. E. 214.

Plea in Abatement.—An indictment charging that defendant did feloniously embezzle certain certificates of deposit in the county in which the prosecution is instituted, held not subject to defendant's plea in abatement on the ground that the certificates of deposit were issued by a bank in another county and that such other county was the proper venue of the prosecution, since the indictment charges the embezzlement of the certificates of deposit and not the proceeds of the certificates. State v. Shore, 206 N. C. 743, 175 S. E. 116.

What Must Be Stated in Plea in Abatement.—In pleas in abatement the facts upon which the plea rests must be stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted. Emry v. Chappell, 148 N. C. 327, 62 S. E. 411.

Jurisdiction of Person Acquired by Consent.—While the court's jurisdiction of the subject-matter of a criminal offense may not be acquired with the defendant's consent, it is otherwise as to the jurisdiction of his person; and where he asks and obtains a continuance of the action against him, he waives the court's want of jurisdiction of his person, and thereafter a plea in abatement comes too late. State v. Oliver, 186 N. C. 329, 119 S. E. 370.

Cited in State v. Ritter, 199 N. C. 116, 117, 154 S. E. 62.

§ 4606(a). Removal of indictment with consent of defendant; pleas.—Whenever an indictment, charging the commission of a capital or other felony, is returned a true bill, the judge holding the court in which such indictment is found shall have the power, with the written consent of the defendant or defendants charged in said bill, to remove such indictment for trial to some adjacent county prior to the arraignment or plea of the defendant or defendants in such indictment, without the presence in person of the defendant or defendants, and upon such removal the pleas of the defendant or defendants may be entered in such adjacent county. (1921, c. 12, s. 1.)

§ 4606(b). Jurisdiction of grand jury.—Upon the removal of any indictment under section 4606(a), if it shall be found that there is any defect in such indictment, the grand jury of the county to which the same is removed for trial shall have as full and ample jurisdiction and power to find another indictment for the same offense as would the grand jury of the county from which the indictment was removed. (1921, c. 12, s. 2.)

§ 4606(c). Baseball games; bribery of players, intentional losing of games, etc.—In all prosecutions under sections 4499(a) et seq., relating to the bribery of, and acceptance of bribes by, baseball players, umpires and officials, and the inten-

tional losing of games, the venue may be laid in any county where the bribe was given, offered or accepted, or in which the baseball game was played in relation to which the bribe was offered, given or accepted, or the acts referred to in section 4499(e) committed. (1921, c. 23, s. 6.)

Art. 12. Presentment

§ 4607. No arrest nor trial on presentment.—No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law. (Rev., s. 3240; Code, s. 1175; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12.)

As to exception to grand jurors, see section 2335 and notes; as to the indictment generally, see sections 4611 et seq.

Objections to Grand Jury.—In State v. Sharp, 110 N. C. 604, 14 S. E. 504, where there is a full discussion of objections to the competency of a grand jury, it is held that the fact that a son of the prosecutor was a member of the grand jury did not vitiate the indictment, though he had actively participated in finding the bill. State v. Pitt, 166 N. C. 268, 269, 80 S. E. 1060.

Where Foreman Interested in Prosecution.—A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution will be denied when it appears that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. State v. Pitt, 166 N. C. 268, 80 S. E. 1060.

Remedy When Grand Jury Defective.—If there be a defect in the accusing body, it is the right of the party indicted, by plea of abatement or by motion to quash, to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be upon the arraignment when the party is first called upon to answer. State v. Griffice, 74 N. C. 316; State v. Haywood, 73 N. C. 437; State v. Baldwin, 80 N. C. 390, 391.

§ 4608. Names of witnesses indorsed on presentment.—When a presentment shall be made of any offense by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon. (Rev., s. 3241; Code, s. 1176; R. C., c. 35, s. 7; 1797, c. 474, s. 2.)

Failure to Mark Names of Witnesses on Bill.—Section 2336 providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. State v. Hines, 84 N. C. 810.

§ 4609. Subpœna for witnesses on presentment.—In issuing subpœnas for witnesses whose names are indorsed on presentments made by the grand jury, the clerk of the court shall name therein the first Tuesday of the term of court as the time for such witnesses to appear and give evidence. And no clerk shall issue a subpœna for any such witness to appear on Monday, except upon written order of the solicitor of the district. (1913, c. 168.)

Art. 13. Indictment

§ 4610. Waiver of bill of indictment.—No waiver of the finding and return into court of a bill of indictment in any criminal action shall be allowed in the superior courts of this state except in cases wherein the offenses charged is a misdemeanor which does not include or contain the element of fraud, deceit or malice; nor shall such waiver be made in any such action except upon a plea of guilty, or a submission, or a plea of nolo contendere by the defendant in the same. No such waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action, who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court; which service by an attorney so appointed by the court shall be rendered without fee or reward. (1907, c. 71.)

Section Constitutional.—This section, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. Constitution, Art. IV, sec. 13. State v. Jones, 181 N. C. 543, 106 S. E. 827.

§ 4611. Bills returned by foreman except in capital cases.—Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body. (Rev., s. 3242; 1889, c. 29.)

Indictment to Be Returned in Open Court.—It is the returning of the bill or indictment, publicly, in open court and its being there recorded, that makes it effectual. State v. Cox, 28 N. C. 440.

Indictment Need Not Be Signed.—It has been often held that an indictment need not necessarily be signed by any one. State v. Mace, 86 N. C. 668; State v. Pitt, 166 N. C. 268, 269, 80 S. E. 1060; State v. Cox, 28 N. C. 440, 446.

No endorsement by the foreman or otherwise is essential to the validity of an indictment, which has been duly returned into court by the grand jury under this section, and entered upon its records. State v. Avant, 202 N. C. 680, 683, 163 S. E. 806.

§ 4612. Substance of judicial proceedings set forth.—In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it is sufficient to set forth the substance only of the proceedings, or the substance of such part thereof as makes, or helps to make, the offense prosecuted. (Rev., s. 3243; Code, s. 1184; R. C., c. 35, s. 15.)

Power of Legislature.—The legislature has the undoubted right to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to aprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. State v. Harris, 145 N. C. 456, 458, 59 S. E. 115.

Purpose of Section.—The purpose of this section and section 4623 is to render unnecessary merely useless refinements and technicalities in pleading that once prevailed. State v. Murphy, 101 N. C. 697, 701, 8 S. E. 142.

Object of an Indictment.—The office of an indictment is to inform the defendant with sufficient certainty of the charge against him to enable him to prepare his defense. State v. Gates, 107 N. C. 832, 834, 12 S. E. 319.

Refinements Abolished.—The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. State v. Hawley, 186 N. C. 433, 119 S. E. 888. See also State v. Morrison, 202 N. C. 60, 161 S. E. 725.

Statement Required.—In every indictment, the facts and circumstance must be stated with such certainty that the defendant may judge whether they constitute an indictable offence or not. State v. Lewis, 93 N. C. 581. And thus where an indictment sets forth the substance of the offence charged "in a plain, intelligible and explicit manner," with such fullness as that the court could see that it was charged, and it gave the defendant such information as was necessary to enable him to make defence on the trial and in case of a subsequent prosecution, it is sufficient under this section and section 4623. State v. Murphy, 101 N. C. 697, 701, 8 S. E. 142.

Omission of Caption Does Not Vitiate.—While every indictment properly should have a caption, it is no part of

the indictment, and its omission is no ground for arresting judgment, as has been often held. State v. Wasden, 4 N. C. 596; State v. Brickell, 8 N. C. 354; State v. Lane, 26 N. C. 113; State v. Dula, 61 N. C. 437; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

Mistake in Caption.—A misrecital of the county in the caption is not ground for arrest of judgment. State v. Sprinkle, 65 N. C. 463; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

Signature of Solicitor Not Requisite.—It is regular and orderly for the bill to be signed by the solicitor, but such signing is not essential to its validity. State v. Mace, 86 N. C. 668; State v. Cox, 28 N. C. 440; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

§ 4613. Bill of particulars.—In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters. (Rev., s. 3244.)

In General.—This provision as to a bill of particulars had prevailed previously as to civil proceedings, section 534, and was by this section made expressly applicable to criminal cases, to which the court had applied it in State v. Brady, 107 N. C. 822, 12 S. E. 325; State v. Stephens, 170 N. C. 745, 748, 87 S. E. 131.

Purpose of Section.—This section intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. State v. Stephens, 170 N. C. 745, 748, 87 S. E. 131.

Object of Bill of Particulars.—The whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements, as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. State v. Seaboard Air Line R. Co., 149 N. C. 508, 511, 62 S. E. 1088.

State Confined to Particulars Stated.—The granting of a bill of particulars on an indictment for a criminal offense is to primarily inform the accused of the charges against him, and secondarily to inform the court, and while this is not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated, and it is reversible error to the prejudice of the defendant's rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill to show the scienter or quo animo in relation to the particulars enumerated and coming within the scope of those generally charged in the indictment. State v. Wadford, 194 N. C. 336.

Former Details Not Now Charged in Indictment.—It is no longer charged whether a murder was committed with a knife or a pistol, nor the length and breadth and depth of a wound, and the same is true as to all other offenses. In lieu of this, we have adopted this section which provides for a bill of particulars. State v. Stephens, 170 N. C. 745, 747, 87 S. E. 131.

What Bill Will Not Supply.—A bill of particulars will not supply any matter required to be charged in the indictment, as an ingredient of the offense. State v. Long, 143 N. C. 670, 671, 676, 57 S. E. 349.

The provisions of this section cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. State v. Cole, 202 N. C. 592, 163 S. E. 594.

Granting Order Is within Court's Discretion.—The granting of an order for a bill of particulars is in the discretion of the court, and the question of sufficient compliance is likewise in the sound legal discretion of the trial judge. State v. Seaboard Air Line R. Co., 149 N. C. 508, 62 S. E. 1088.

Same—Amendment of Bill.—A bill of particulars, being no part of the indictment, is not subject to demurrer, and may be amended at any time, with permission of the court, on such terms or under such conditions as are just. Townsend v. Williams, 117 N. C. 330; State v. Wadford, 194 N. C. 336, 338.

A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court and the accused of specific occurrences for investigation. State v. Beal, 199 N. C. 278, 279, 154 S. E. 604.

Meaning of "Discretion."—The term "discretion," as used and contemplated in the statute, should be construed to mean the sound legal discretion of the trial court; it is well understood that the action of the lower court will not be reviewed or disturbed on appeal, unless there has been manifest abuse in the respect to defendant's prejudice. State v. Dewey, 139 N. C. 556; State v. Seaboard Air Line R. Co., 149 N. C. 508, 511, 62 S. E. 1088.

When Applied for.—Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. State v. Corbin, 157 N. C. 619, 621, 72 S. E. 1071; State v. Shade, 115 N. C. 757, 20 S. E. 537.

Indictment for Perjury.—Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars under this section if the indictment is in the form prescribed by section 4615. State v. Hawley, 186 N. C. 433, 119 S. E. 888.

Indictment for Malfeasance of Bank Officer.—It is within the sound discretion of the trial judge to try, seperately or collectively, the defendant, indicted under the provisions of section 4401, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

What Constitutes Waiver of Right.—Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. State v. Hedgecock, 185 N. C. 714, 117 S. E. 47.

Motion to Quash Not Proper Remedy.—Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire the defendant's remedy is by a motion for a bill of particulars, and not by a motion to quash. State v. Everhardt, 203 N. C. 610, 166 S. E. 738.

Cited in State v. Suncrest Lumber Co., 199 N. C. 199, 201, 154 S. E. 72.

§ 4614. Essentials of bill for homicide.—In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be. (Rev., s. 3245; 1887, c. 58.)

As to homicide generally, see notes under sections 4200 and 4201.

Section Constitutional.—The power of the Legislature to prescribe the form of indictment for murder is upheld in State v. Moore, 104 N. C. 743, 10 S. E. 183; State v. Brown, 106 N. C. 645; State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990.

Willfully Not Necessary in Indictment for Murder.—The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under this section. State v. Arnold, 107 N. C. 861, 11 S. E. 990; State v. Kirkman, 104 N. C. 911, 10 S. E. 312; State v. Harris, 106 N. C. 682, 11 S. E. 377, cited and approved.

What Is Sufficient under Section.—This section declares

an indictment containing certain words "sufficient," but it does not make those words essential, nor by any reasonable construction can it be held to make technical and "sacramental" words which were not theretofore necessary in indictments for murder. State v. Arnold, 107 N. C. 861, 863, 11 S. E. 990.

Same—Form of Indictment Set Out.—The following is full and sufficient in the body of an indictment for murder: "The jurors for the State on their oaths present that A. B., in the county of E., did feloniously, and of malice aforethought, kill and murder C. D." And it is sufficient in an indictment for manslaughter to follow the same form, omitting the words "and with malice aforethought" and substituting "slay" in the stead of the word "murder." These forms contain, in the words of the statute, "every averment necessary to be proved." State v. Arnold, 107 N. C. 861, 863, 11 S. E. 990. This form also approved in State v. Sou. Ry. Co., 125 N. C. 666, 671, 34 S. E. 527.

An indictment charging the essential facts of murder as required by this section, is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. State v. Fogleman, 204 N. C. 401, 168 S. E. 536.

Statements Not Necessary.—An indictment is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing. State v. Pate, 121 N. C. 659, 28 S. E. 354.

It is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the adoption of the section. State v. Covington, 117 N. C. 834, 23 S. E. 337.

The omission of the word "wound" in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under this section. State v. Rinehart, 75 N. C. 58; State v. Ratliff, 170 N. C. 707, 709, 86 S. E. 997.

Variance in Time Not Fatal.—Where an indictment for murder charged the killing to have taken place December fifth and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found. Held, that the variance was not fatal. State v. Pate, 121 N. C. 659, 28 S. E. 354.

Defendant Can Demand Bill of Particulars.—If a defendant desires fuller information upon which to prepare his defense than is required to be charged in the indictment, he should ask for a bill of particulars. State v. Long, 143 N. C. 670, 671, 57 S. E. 349. As to bill of particulars, see preceding section.

§ 4615. Form of bill for perjury.—In every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission of authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

The jurors for the state, on their oath, present, that A. B., of .....County, did unlawfully commit perjury upon the trial of an action in .....court, in .....County, wherein .....was plaintiff and.....was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true. (Rev., ss. 3246, 3247; Code, s. 1185; R. C., c. 35, s. 16; 1842, c. 49, s. 1; 1889, c. 83.)

See § 4363 and notes thereto.

In General.—A person charged with perjury must be indicted by the grand jury and tried as the offense is a felony. A trial without an indictment is contrary to the Constitution, Art. 1, sec. 12. State v. Hyman, 164 N. C. 411, 79 S. E. 284.

But a defendant certainly can derive no just benefit from the insertion in the charge of the minutiae of what would constitute perjury. The use of such phraseology was indeed always illogical, and the experience of ages has been that it served not so much to enlighten the defendant as to the charge he was to meet, as to present a network of technicalities which hindered the trial of the cause upon its merits and very often caused a miscarriage of justice. State v. Gates, 107 N. C. 832, 834, 12 S. E. 319.

And thus the purpose of this section is to render unnecessary useless details and niceties, in charging the offense of perjury, that one time prevailed to the prejudice of the administration of criminal justice. State v. Robertson, 98 N. C. 751, 752, 4 S. E. 511.

This section dispenses with the necessity of setting forth the record of the indictment, on the train of which the false oath is alleged to have been taken, and only requires that the substance would be set forth, but it did not dispense with the necessity of making all the averments in an indictment for perjury which were all necessary to be proved, and it is necessary to prove in what court, or before whom, the oath was taken. State v. Lewis, 93 N. C. 581, 583.

Section Constitutional.—The form of indictment for perjury prescribed by this section is sufficient and legal. State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Hawley, 186 N. C. 433, 119 S. E. 888 overruling State v. Cline, 150 N. C. 854, 64 S. E. 591; State v. Gates, 107 N. C. 832, 12 S. E. 319.

Word "Feloniously" Not Necessary. — In the cases of State v. Bunting, 118 N. C. 1200, 24 S. E. 118 and State v. Shaw, 117 N. C. 764, 23 S. E. 246, which were indictments for perjury, it was expressly held that the term "feloniously" was required to make a good bill of indictment for this offense. Both of them, too, were on indictments instituted after the adoption of this section which established the form for indictment for perjury. The court, however, in rendering these decisions, was evidently not advertent to the statute above referred to, for the reason probably that it does not appear in the general Code of 1883, and was, therefore, not called to its attention; the statute having been enacted at a subsequent session and being chapter 83, Laws of 1889. State v. Harris, 145 N. C. 456, 458, 59 S. E. 115.

But this section does not make the word "feloniously" a part of the bill, and it does not appear in the form set out, and the same is, therefore, no longer required. State v. Harris, 145 N. C. 456, 457, 59 S. E. 115; State v. Holder, 153 N. C. 606, 609, 69 S. E. 66.

Sufficient Averment of Jurisdiction.—The jurisdiction of the justice of the peace of the complaint upon the examination whereof the alleged perjury was committed is sufficiently averred where it is averred, that the justice had power to administer the oath. State v. Davis, 69 N. C. 495.

Style of the Court.—The style of the court before which the perjury is alleged to have been committed must be legally set forth. State v. Street, 5 N. C. 156, 3 Am. Dec. 682.

Proceedings Not Set Out.—Where an indictment for perjury alleges that the false oath was taken before a justice of the peace upon the trial of a warrant, etc., it is not necessary to set forth the proceedings in which the false oath was alleged to have been made. State v. Roberson, 98 N. C. 751, 4 S. E. 511.

Indictment Need Not Charge Materiality of False Testimony.—Prior to the adoption of this section it was settled that in indictments for perjury the indictment must charge that the alleged false testimony was material to the issue. See State v. Davis, 69 N. C. 495; State v. Mumford, 12 N. C. 519. Since this section was passed however it has been repeatedly held that this need not appear in the indictment. See State v. Hawley, 186 N. C. 433, 435, 119 S. E. 888 and cases cited. The case of State v. Cline, 150 N. C. 854, 64 S. E. 591, though decided in 1909 evidently overlooked the provisions of this section as well as the cases previously construing it and held in accordance with the former view that the materiality of the false testimony must be charged in the indictment. This case was expressly overruled by the court in State v. Hawley, supra.—Ed. Note.

But the averment in a bill that defendant committed perjury includes the necessity for proving that the false testimony was material to the issue. State v. Cline, 146 N. C. 640, 61 S. E. 522.

That Oath was Willfully and Corruptly Taken. — An

indictment for perjury which does not aver that the false oath was taken willfully and corruptly is defective. These terms must be applied to the act of swearing to express the wicked purpose with which such oath is taken. State v. Davis, 84 N. C. 787; State v. Carland, 14 N. C. 114.

Variance Held Fatal.—Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B and the records of that court showed that at that term there was no trial between these parties, but the record showed that at a term other than the one alleged in the indictment there was such a trial, and the judge allowed this record to be introduced; It was held, to be error, and that the variance was fatal. State v. Lewis, 93 N. C. 581.

Not Quashed for Omissions. — Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had. State v. Flowers, 109 N. C. 841, 13 S. E. 718.

Surplusage. — Where perjury was alleged to have been committed in the trial of a "suit, controversy, or investigation," without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. State v. Hawley, 186 N. C. 433, 119 S. E. 888.

An indictment for perjury, alleged to have been committed upon a trial in the court of a justice of the peace, is not defective because it sets out the name of the Justice before whom the case was tried. State v. Flowers, 109 N. C. 841, 13 S. E. 718.

No Change In Proof Required.—This section has merely simplified the form of the indictment for perjury, and the constituent elements of the offenses remain unchanged and required the same proof to establish the commission of the crime. State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Cline, 146 N. C. 640, 642, 61 S. E. 522.

§ 4616. Bill for subornation of perjury.—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed. (Rev., s. 3248; Code, s. 1186; R. C., c. 35, s. 17; 1842, c. 49, s. 2.)

§ 4617. Former conviction alleged in bill for second offense.—In any indictment for an offense which, on the second conviction thereof, is punished with other greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction. (Rev., s. 3249; Code, s. 1187; R. C., c. 35, s. 18.)

In General.—When a second conviction is punished with other or greater punishment then for a first conviction, the first conviction shall be charged as required by this section. State v. Davidson, 124 N. C. 839, 32 S. E. 957.

No Presumption of Second Conviction.—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony, section 3409; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. State v. Clark, 183 N. C. 733, 110 S. E. 641.

§ 4618. Manner of alleging joint ownership of property.—In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint-stock companies and trustees. (Rev., s. 3250; Code, s. 1188; R. C., c. 35, s. 19.)

Apparent Variance Cured.—Where property is charged in an indictment for larceny as belonging to A and another, and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by this section. State v. Capps, 71 N. C. 93.

Where A makes a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, it was held, that in an indictment for larceny the cotton was properly charged to be the property of A and another. State v. Patterson, 68 N. C. 292.

Variance Not Cured.—Upon the trial of an indictment for injury to live stock, it was held, to be a variance where the property was laid in "L. S. and others," and the proof was that L. S. was the exclusive owner. State v. Hill, 79 N. C. 657.

Words "And Another or Others" Invalidates.—An indictment for larceny, which charges the thing taken to be the property of J. R. D. "and another or others" is fatally defective under this section. State v. Harper, 64 N. C. 129.

§ 4619. Description in bill for larceny of money.—In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, treasury note, or bank note, simply as money, without specifying any particular coin or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven. (Rev., s. 3251; Code, s. 1190; 1876-7, c. 68.)

Purpose of Section.—An indictment, before 1877, for stealing "money" without further description could not have been sustained, and the Legislature, to remedy the difficulty of describing and identifying bank bills. Treasury notes, etc., which may be stolen, passed this section. State v. Reese, 83 N. C. 637, 639.

Amount Should Be Charged.—The term "money," without anything added to make it more definite, is too loose in indictments, and it should be described at least by the amount, as to many dollars and cents. State v. Reese, 83 N. C. 637, 640.

Charge Sufficient. — The charge of the theft of "$5 in money of the value of $5" is good under this section and is sustained by the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury as bank note. State v. Carter, 113 N. C. 639, 18 S. E. 517.

Inasmuch as money is the measure of values a charge in an indictment of taking "ten dollars in money" is an allegation of taking "the value of ten dollars." State v. Brown, 13 N. C. 645, 18 S. E. 51.

Variance Allowed.—Where an indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten dollar bills" it was held, no variance. State v. Freeman, 89 N. C. 469.

§ 4620. Description in bill for embezzlement.—In indictments for embezzlement, except when

the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved. (Rev., s. 3252; Code, s. 1020; 1871-2, c. 145, s. 2.)

As to embezzlement in general see sections 4268 et seq.

Sufficient Description of Property.—The description of the property embezzled, as "one note for five dollars in money of the value of five dollars," is sufficiently specific. State v. Fain, 106 N. C. 760, 11 S. E. 593.

Surplusage Which Does Not Vitiate.—An allegation in an indictment for embezzlement that the defendant "did steal, take, carry away" the property alleged to have been embezzled, is surplusage, and will not vitiate an indictment otherwise sufficient. State v. Fain, 106 N. C. 760, 11 S. E. 593.

Variance.—In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. State v. Dula, 206 N. C. 745, 175 S. E. 80.

§ 4621. Intent to defraud; larceny and receiving.—In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (Rev., s. 3253; Code, s. 1191; R. C., c. 35, ss. 21, 23; 1852, c. 87, s. 2; 1874-5, c. 62.)

As to larceny and receiving stolen goods see generally sections 4249 et seq. See note to § 224(e).

In General.—An indictment charging the employee with the indictable offense of making a false entry on the books of a bank for which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. State v. Hedgecock, 185 N. C. 714, 117 S. E. 47.

Solicitor Need Not Elect Count.—On trial of an indictment for larceny and receiving, etc., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the Solicitor to elect upon which count he will proceed. State v. Morrison, 85 N. C. 561.

General Verdict Correct.—A general verdict of guilty an indictment of two counts—one for stealing and the other for receiving stolen goods of a value less than five dollars—is correct and if one count is defective the judgment will be on the good count. State v. Bailey, 73 N. C. 70; State v. Leak, 80 N. C. 403.

§ 4622. Separate counts; consolidation.—When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses. (1917, c. 168; 1921, c. 100.)

Editor's Note.—By ch. 100, Public Laws of 1921 the first proviso to this section, regarding the fees of the solicitor, was amended. The former wording provided that the defendant should be taxed half fees for each subsequent count upon which conviction was had. The amendment in addition to allowing the half fee on but one subsequent count added at the end of the proviso the words "or plea of guilty entered."

General Verdict Covers Several Counts.—Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offense. State v. Mills, 181 N. C. 530, 106 S. E. 677.

Offenses of Same Class. — An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions, does not require the solicitor to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. State v. Charles, 195 N. C. 868, 142 S. E. 486.

Entering Judgment on Each Offense upon General Verdict of Guilty.—Where the trial of two separate criminal indictments are consolidated by the judge and tried together as authorized by this section and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of them, but execution suspended on terms agreed upon, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered, and held further, the sentences being concurrent, the defendant was not prejudiced. State v. Harvell, 199 N. C. 599, 600, 155 S. E. 257.

Obstructing Highway and Injury to Property.—It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. State v. Malpass, 189 N. C. 349, 127 S. E. 248.

Delivering Liquor and Keeping for Sale.—Under this section consolidation of charges of delivering, and keeping for sale under the Turlington Act 3411 par. b. is proper. State v. Jarett, 189 N. C. 516, 127 S. E. 590.

Arson and House Burning.—Where the grand jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. State v. Brown, 182 N. C. 761, 108 S. E. 349.

Housebreaking and Larceny.—When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. State v. Combs, 200 N. C. 671, 158 S. E. 252.

Murder of One Person and Assault upon Another. — Upon the trial under an indictment charging the prisoner with murder of M., it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon D., the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge. State v. Rice, 202 N. C. 411, 163 S. E. 112.

Burglary and Rape.—A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the two offenses being of the same class, which under this section may be joined in one indictment in separate

counts, and it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial. State v. Smith, 201 N. C. 494, 160 S. E. 577.

It is not error, under this section, for the trial court to refuse a separate trial on each two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. State v. Green, 207 N. C. 369, 177 S. E. 120.

Cited in State v. Alridge, 206 N. C. 850, 852, 175 S. E. 191.

§ 4623. Bill or warrant not quashed for informality.—Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment. (Rev., s. 3254; Code, s. 1183; R. C., c. 35, s. 14; 37 Hen. VIII, c. 8; 1784, c. 210, s. 2; 1811, c. 809.)

I. Nature and Purpose.
II. General Effect.
III. Defects Cured.
  A. In General.
  B. Omissions and Mistakes.
  C. Allegations Differing from Proof.

Cross References.

As to particular defects which do not vitiate see section 4625 and notes. For examples of sufficient indictments see the notes under the various sections dealing with particular crimes.

I. NATURE AND PURPOSE.

Purpose of Section.—As far back as State v. Moses, 13 N. C. 452, (at p. 464), Ruffin, C. J., speaking of this section says: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those letters of forms, technically and refinement which do not concern the substance of the charge and the proof to support it. Many of the sages of the law had before called nice objections, of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. . . . We think the legislature meant to disallow the whole of them and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime to be set forth. It is to be remarked that the act directs the Court to proceed to judgment without regard to two things—one the form, the other refinement." State v. Hester, 122 N. C. 104, 1048, 29 S. E. 380. See State v. Barnes, 122 N. C. 1031, 29 S. E. 381, which uses the same language.

This section and section 4625 were passed to forbid refinements and technicalities which, without being any aid to the innocent, brought the administration of justice into disrepute. State v. Leeper, 146 N. C. 65, 658, 61 S. E. 585.

Quashing Indictments Not Favored.—Quashing indictments is not favored. It releases recognizances and set the defendant at large where, it may be, he ought to be held to answer upon a better indictment, though allowable, where it will put an end to the prosecution altogether, and advisable where it appears that the court has not jurisdiction, or where the matter charged is not indictable in any form. * * * It is, a general rule that no indictment which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with. * * * The example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form. State v. Flowers, 109 N. C. 841, 844, 13 S. E. 718. See State v. Colbert, 75 N. C. 368.

Approved Forms Should Be Followed.—This section was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations. State v. Barnes, 122 N. C. 1031, 1038, 29 S. E. 381; State v. Marsh, 132 N. C. 1000, 1003, 43 S. E. 828.

II. GENERAL EFFECT.

Liberal Construction.—This section has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as in form of indictment. State v. Carpenter, 173 N. C. 767, 770, 92 S. E. 373; State v. Smith, 63 N. C. 234, 236.

Plain, Intelligible and Explicit Charge Sufficient.—The current is all one way, sweeping away by degrees "informalities and refinements," until a plain, intelligible and explicit charge is all that is now required in any criminal proceeding. State v. Caylor, 178 N. C. 807, 809, 101 S. E. 627; State v. Smith, 63 N. C. 234. See also State v. Everhardt, 203 N. C. 610, 166 S. E. 738.

Same—Describing Property.—The description in an indictment must be in the common and ordinary acceptation of property, and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny, and also to protect the defendant in any subsequent prosecution for the same offense. State v. Campbell, 76 N. C. 261; State v. Nipper, 95 N. C. 653; State v. Martin, 82 N. C. 672; State v. Caylor, 178 N. C. 807, 808, 101 S. E. 627.

Following Words of Statute.—Where an indictment follows the words of a statute it is sufficient under this section. State v. Leeper, 146 N. C. 655, 658, 61 S. E. 585; State v. Harrison, 145 N. C. 408, 417, 59 S. E. 867. See also State v. Davis, 203 N. C. 47, 164 S. E. 732.

Rule Also Applied in Defendant's Favor.—Although the rule prohibiting reliance upon technicalities applies only against defendants, it is in accordance with the spirit of the section that it should be invoked in their favor also, for example as to the form of defendant's objection to the indictment. State v. Wood, 175 N. C. 809, 820, 95 S. E. 1050.

Motion in Arrest of Judgment.—A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. State v. Francis, 157 N. C. 612, 72 S. E. 1041; State v. Ratliff, 170 N. C. 707, 709, 86 S. E. 997; State v. Sauls, 190 N. C. 810, 130 S. E. 848.

And where sufficient matter appears on the face of a bill of indictment to enable the court to proceed to judgment, an arrest of judgment is forbidden by this section. State v. Darden, 117 N. C. 697, 23 S. E. 106.

Indictment under Private Law.—Upon an indictment under a private statute, it is sufficient if the same is set forth by chapter and date and its material provisions incorporated in the indictment. State v. Heaton, 77 N. C. 505.

Does Not Supply Essential Averments.—By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged. State v. Cole, 202 N. C. 592, 598, 163 S. E. 594.

Where the indictment contains sufficient matter to enable the court to proceed to judgment a motion to quash for duplicity or indefiniteness is properly refused, and a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. State v. Davis, 203 N. C. 13, 14, 164 S. E. 737.

Cited in State v. Beal, 199 N. C. 278, 294, 154 S. E. 604.

III. DEFECTS CURED.

A. In General.

Superfluous Words Disregarded.—The use of superfluous words in a bill of indictment will be disregarded. State v. Guest, 100 N. C. 410, 411, 6 S. E. 253; State v. Arnold, 107 N. C. 861, 11 S. E. 990; State v. Darden, 117 N. C. 697, 23 S. E. 106; State v. Piner, 141 N. C. 760, 53 S. E. 305; State v. Wynne, 151 N. C. 644, 645, 65 S. E. 459.

Variance Must Be Material to Vitiate.—A variance now, since this section was passed, to be fatal must be substantial and material. State v. Ridge, 125 N. C. 655, 34 S. E. 439.

Immaterial Words May Be Omitted.—The inadvertent omission of words not affecting the substances of the charge or prejudicing the defendant is not fatal. State v. Burke, 108 N. C. 750, 12 S. E. 1000, and cases there cited. State v. Ratliff, 170 N. C. 707, 709, 86 S. E. 997.

Endorsement by Grand Jury Unnecessary.—No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. McBroom, 127 N. C. 528, 37 S. E. 193, overruled. State v. Sultan, 142 N. C. 569, 54 S. E. 841; State v. Long, 143 N. C. 670, 671, 57 S. E. 349.

B. Omissions and Mistakes.

In the Complaint.—The omission of the name of the party

in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. State v. Poythress, 174 N. C. 809, 93 S. E. 919.

In Describing a Lease.—In describing a lease the omission of the word "year" after the word "one", is one of the informalities cured by this section. State v. Walker, 87 N. C. 541, 543.

Incorrect Spelling.—Charging that one committed a crime in the "count aforesaid" instead of county aforesaid is an informality which is cured by this section. State v. Smith, 63 N. C. 234; State v. Evans, 69 N. C. 40, 42.

Wrong County in Caption.—A misrecital of the proper county in the caption of an indictment furnishes no ground for arrest of judgment, and it seems that such an indictment would have been sufficient even before this section adopted. State v. Sprinkle, 65 N. C. 463.

Name of Court Incorrect.—Describing the court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a justice of the peace, in and for said county," instead of as "a court of a justice of the peace for township A, of Chowan County," is not a substantial variance from the true description, and is cured by this section. State v. Davis, 69 N. C. 495.

Ownership of Property in Arson. — In a prosecution for arson under §§ 4175, 4245, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or quashal. State v. McKeithan, 203 N. C. 494, 166 S. E. 336.

C. Allegations Differing from Proof.

Names of Parties.—Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, the variance is immaterial. State v. Drakeford, 162 N. C. 667, 78 S. E. 308.

Where indictment alleged that Thomas R. Robertson was defendant, and the proof was that "Thomas Robertson" was the defendant in said action and there was evidence of the identity of Thomas Robertson and Thomas R. Robertson, this is an informality cured by the section. State v. Hester, 122 N. C. 1047, 29 S. E. 380.

In an indictment for murder, the assault is charged to have been made on one "N. S. Jarrett," and in subsequent parts of the indictment he is described as "Nimrod S. Jarrett," Held, to be no variance. State v. Henderson, 68 N. C. 348.

Name of Article Stolen.—In an indictment for larceny, when the article stolen is described as a "calf" skin and is proven on the trial to be a "kip" skin. It was held to be no variance between the allegation and the proof. State v. Campbell, 76 N. C. 261.

§ 4624. No quashal for grand juror's failure to pay taxes or being party to suit.—No indictment shall be quashed nor shall judgment thereon be arrested by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (1907, c. 36.)

§ 4625. Defects which do not vitiate.—No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record" or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute," or "against the form of the statutes" nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense. (Rev., s. 3255; Code, s. 1189; R. C., c. 35, s. 20; 7 Hen. VIII, c. 8.)

For further cases of defects which do not vitiate an indictment, see notes under section 4623 and under the statutes dealing with particular crimes.

In General.—The refined technicalities of the procedure at common law, in both civil and criminal cases, have most entirely if not quite, been abolished by our statute. State v. Hedgecock, 185 N. C. 714, 117 S. E. 47.

Section Cures Formal Defects.—This section is intended to cure only formal defects in the indictment after judgment, and not omissions of averments necessary to enable the court to give judgment intelligently. State v. Wise, 66 N. C. 120.

Locality May Be Omitted.—Formerly failure to allege and prove the locality, appropriate to the forum, was fatal, because essential to the jurisdiction, both in civil and criminal actions, but this has been wisely reversed by this section. State v. Long, 143 N. C. 670, 671, 675, 57 S. E. 349.

Other Expressions Omitted.—Omitting the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State," are not fatal defects. State v. Howard, 92 N. C. 772, 778.

When Time Need Not Be Charged.—Where time is not of the essence of a crime, "the omission to charge any date" is immaterial by this section, though the allegation of time can do no harm. State v. Arnold, 107 N. C. 861, 864, 11 S. E. 990; State v. Peters, 107 N. C. 876, 883, 12 S. E. 74; State v. Taylor, 83 N. C. 602, 603; State v. Williams, 117 N. C. 753, 23 S. E. 250.

Thus time is not the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N. C. 765, 117 S. E. 803.

Failure to specify a particular day in an indictment for abandonment is not fatal especially in view of an instruction that the jury should consider only such evidence as tends to show that the defendant violated the statute after a particular date. State v. Jones, 201 N. C. 424, 160 S. E. 468.

Conclusion Simplified.—The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are not necessary in an indictment for any offense whatever, but are mere surplusage. State v. Kirkman, 104 N. C. 911, 10 S. E. 312, overruling State v. Joyner, 81 N. C. 534; State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Sykes, 104 N. C. 694, 10 S. E. 191; State v. Dudley, 182 N. C. 822, 109 S. E. 63.

That an indictment concludes against the form of the statue instead of statute, is no ground for an arrest of judgment. State v. Smith, 63 N. C. 234.

An indictment concluding against the "force" instead of the "form" of the statute is sufficient under this section. State v. Davis, 80 N. C. 385.

Variance.—In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal under this section. State v. Gore, 207 N. C. 618, 178 S. E. 209.

Jurisdiction. — Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement. State v. Davis, 203 N. C. 13, 14, 164 S. E. 737.

Art. 14. Trial before Justice

§ 4626. In cases of final jurisdiction.—When the justice is satisfied that he has jurisdiction, if no jury is asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars or imprisonment in the

county jail for thirty days. (Rev., s. 3256; Code, s. 897; 1868-9, c. 178, subc. 4, s. 8.)

As to jurisdiction of justice in criminal actions, see section 1481 and notes.

An Adversary Proceeding Intended.—It was contemplated there should be an adversary proceeding in all trials of criminal cases before a justice of the peace, especially when the justice assumes final jurisdiction. It was never intended that the accused should be also the accuser and the sole witness against himself. Such a proceeding would not conduce to the discovery of truth, and the detection and punishment of crime, which is the real object to be obtained, and would oftener than otherwise defeat the very ends of justice. State v. Moore, 136 N. C. 581, 582, 48 S. E. 573.

§ 4627. Trial by jury, if demanded.—If either the complainant or the accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace. (Rev., s. 3257; Code, s. 898; 1868-9, c. 178, subc. 4, s. 9.)

See generally, the notes under Const., Art. I, section 13.

§ 4628. What submitted to jury.—In case a trial by jury is had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offense charged, and shall enter the verdict on his docket, and adjudge accordingly. (Rev., s. 3258; Code, s. 899; 1868-9, c. 178, subc. 4, s. 10.)

§ 4629. Commitment after judgment.—The commitment to the county prison shall set forth—

1. The name of the guilty person.
2. The nature of the offense of which he is convicted and the date of the trial.
3. The period of his imprisonment.
4. It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law.
5. The name of the constable or other officer required to execute it.
6. It shall be signed by the justice and be dated. (Rev. s. 3259; Code, s. 1238; 1868-9, c. 178, subc. 4, s. 17.)

Legality of Custody.—When a prisoner legally sentenced is placed in charge of a special officer to convey to jail, the legality of his custody by the officer depends upon the validity of the special deputation of the officer, and not upon the sufficiency of the mittimus, which is to terminate his duties. State v. Armistead, 106 N. C. 639, 10 S. E. 872.

Same—Where Prisoner Taken from Officer.—It is a criminal offense to take, by force, from the custody of an officer a prisoner legally committed to his charge to convey to jail, and it is no defense that the mittimus does not comply, in all respects, with the requirements of this section. State v. Armistead, 106 N. C. 639, 10 S. E. 872.

§ 4630. Parties entitled to copy of papers; bar to indictment.—The justice shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence. Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offense. (Rev., s. 3260; Code, ss. 902, 903; 1868-9, c. 178, subc. 4, ss. 13, 14.)

Collusive Conviction Not a Bar.—The conviction of a person before a justice of the peace which is collusive and not adversary is not sufficient to sustain a plea of former conviction. State v. Moore, 136 N. C. 581, 48 S. E. 573.

§ 4631. Justice to make return of cases to superior court.—It is the duty of each justice of the peace on or before Monday of every term of the superior court of his county, to furnish the clerk of the court with a list of the names and offenses of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: Provided, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law. (Rev., s. 3261; Code, s. 906; 1869-70, c. 110.)

As to liability for failure to comply with this section, see section 4385.

When Report Unnecessary.—A justice of the peace is not guilty of a violation of this section by failing to make report to the clerk of the superior court when there have been no criminal cases disposed of by him within the time therein prescribed. State v. Latham, 110 N. C. 490, 14 S. E. 390.

Art. 15. Trial in Superior Court

§ 4632. Prisoner standing mute, plea "not guilty" entered.—If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same. (Rev., s. 3262; Code, s. 1198; R. C., c. 35, s. 29; R. S., c. 35, s. 16.)

Deaf Mutes.—Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf mute, and was incapable of understanding the nature of a trial, and its incidents and his rights under it, it was held proper for a jury to be empanelled to try the truth of these suggestions, for the court to decline putting the prisoner on his trial. State v. Harris, 53 N. C. 136.

Changing Plea.—Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or vice versa, is a matter for the sound legal discretion of the trial court. State v. Branner, 149 N. C. 559, 63 S. E. 169.

Entry after Verdict.—It is no error in the court below, on a trial of a defendant for larceny, "as upon a plea of not guilty," and after a verdict of guilty, to amend the record by inserting the plea of "not guilty." State v. McMillan, 68 N. C. 440.

§ 4633. Peremptory challenges of jurors by defendant.—Every person on joint or several trial for his life may make a peremptory challenge of fourteen jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, six jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury shall be impaneled to try the issue; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors. (Rev., s. 3263; Code, s. 1199; 1913, c. 31, s. 3; 1887, c. 53; R. C., c. 35, s. 32; 1871-2, c. 39; R. S., c. 35, ss. 19, 21; 1777, c. 115, s. 85; 1812, c. 833; 1801, c. 592, s. 1; 1826, c. 9; 22 Hen. VIII, c. 14, s. 6; 1935, c. 475, s. 2.)

Cross References.—As to challenges and disqualifications of jurors in general, see 8 N. C. Enc. Dig. 360 et seq.; 14 N. C. Enc. Dig. 606; as to challenge for cause, see section 2324 and notes; as to peremptory challenges in civil cases, see section 2331 and notes.

Editor's Note.—The number of jurors that may be challenged was increased from twelve and four to fourteen and six, respectively, by the Public Laws of 1935.

In General.—Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors, without assigning any cause, and as many more as he can assign a good cause for. State v. Patrick, 48 N. C. 443, 446.

A Right to Exclude.—The right of peremptory challenge is not a right to select but to exclude. State v. Smith, 24 N. C. 402; State v. Banner, 149 N. C. 519, 63 S. E. 84.

Purpose.—The legislative intent in the enactment of this section is to secure a reasonable and impartial verdict. State v. Ashburn, 187 N. C. 717, 122 S. E. 833. See note of this case under section 4634.

When Challenge Should Be Made.—"The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is commenced." Joy on Jurors, 219. State v. Patrick, 48 N. C. 443, 447.

Peremptory Challenges Limited to Four.—A defendant, in an indictment for an offense other than capital, having only four peremptory challenges to jurors, cannot challenge a fifth juror peremptorily although he had first challenged one of the four for cause, which was properly disallowed. State v. Hargrave, 100 N. C. 484, 6 S. E. 185. This case was decided prior to the 1935 amendment. A defendant is now allowed six peremptory challenges.—Ed. Note.

Same—When Verdict of Manslaughter Asked.—Where, upon the trial of an indictment for murder, the solicitor states that he should ask only for a verdict of manslaughter, no special venire was necessary, and the defendant is not entitled to more than four peremptory challenges. State v. Hunt, 128 N. C. 584, 38 S. E. 473; State v. Caldwell, 129 N. C. 682, 40 S. E. 85.

Judge Determines Competency.—Triers are now dispensed with, and the judge determines the facts as well as the legal sufficiency of the challenge based upon them. State v. Kilgore, 93 N. C. 533, 534.

Waiver of Objection by Not Using Challenges.—If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign it for error, if a jury is obtained before he has exhausted his peremptory challenges. State v. Potts, 100 N. C. 457, 458, 6 S. E. 657; State v. Sultan, 142 N. C. 569, 54 S. E. 841.

Where several defendants are tried together for a crime other than a capital felony each is entitled to four (now six) peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four (now six) peremptory challenges for all the defendants, a new trial will be granted upon appeal. State v. Burleson, 203 N. C. 779, 166 S. E. 905.

Challenges Where Bills of Indictment Are Consolidated.—Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four (now six) peremptory challenges to the jury as provided by this section and not to four (now six) peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. State v. Alridge, 206 N. C. 850, 175 S. E. 191.

§ 4634. Peremptory challenges by the state.—In all capital cases the prosecuting officer on behalf of the state shall have the right to challenge peremptorily six jurors for each defendant, but shall not have the right to stand any jurors at the foot of the panel. The challenge must be made before the juror is tendered to the prisoner, and if he will challenge more than six jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature a challenge of four jurors shall be allowed in behalf of the state for each defendant, and challenge also for a cause certain, and in all cases of challenge for cause certain the same shall be inquired of according to the custom of the court. (Rev., s. 3264; Code, s. 1200; 1913, c. 31, s. 4; 1907, c. 415; 1887, c. 53; R. C., c. 35, s. 33; 1827, c. 10; 33 Edw. I, c. 4; 1935, c. 475, s. 3.)

See also, in connection with this section, the references and notes under section 4633.

Editor's Note. — The number of challenges was increased in capital cases from four to six jurors, and in other cases from two to four jurors by the Public Laws of 1935.

Construed with Section 2325.—The effect of section 2325, to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefore, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and this section abolishing the established practice permitting the solicitor to place jurors, upon the trial of capital felony, at the foot of the panel, does not affect the application of section 2325, to the trial of such felonies. State v. Ashburn, 187 N. C. 717, 122 S. E. 833.

Judge Cannot Extend Time.—The discretionary power of the trial Judge in respect to challenges is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by this section than he has to allow more than four (now six) of such challenges. State v. Fuller, 114 N. C. 885, 19 S. E. 797.

§ 4635. Challenge to special venire same as to tales jurors.—In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors. (Rev., s. 3265; 1887, c. 53.)

See 11 N. C. Law Rev., 219.

§ 4636. Exclusion of bystanders in trials for rape.—In the trial of cases for rape and of assault with the intent to commit rape, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the court-room all persons except the officers of the court, the defendant and those engaged in the trial of the case; and upon the preliminary hearing before a justice of the peace of the offenses above named, that officer may adopt a like course. (1907, c. 21.)

§ 4636(a). Waiving jury trial; pleas; demurrer to evidence.—In all trials in the superior courts of this state, wherein the defendant stands charged with an offense not punishable with death, when represented by counsel, it shall be competent for the defendant to enter a conditional plea of guilty therein, or nolo contendere, if the court shall permit the latter plea; and thereupon, the court may hear and determine the matter, having the evidence recorded, if it be demanded by the defendant before, or at the time of entering plea. Upon the conclusion of the evidence for the state the defendant shall have the right to demur to the evidence, which demurrer shall have the same force and effect as such demurrers now have in the trial of criminal causes by jury, and in the event said demurrer is overruled, may again demur at the conclusion of all the evidence, with the like force and effect. When objection has been made and exception taken to the overruling of the demurrer, the defendant may appeal from final judgment and sentence of the court notwithstanding the plea theretofore entered. The judge shall pass upon the evidence with due regard of the weight and sufficiency thereof, as the same may be considered by a jury, and if he is satisfied beyond a reasonable doubt that the defendant is guilty, he shall proceed to judgment and sentence upon the plea entered, and dispose of the case in like manner as upon conviction by a jury. If he is not so satisfied, he shall cause the plea to be stricken out and a verdict of not guilty entered: Provided, however, that, upon such plea, the judge hearing the matter may find the defendant guilty of any count or charge or decree of offense covered by the indictment or warrant, in the same manner as the jury may have been permitted to find in case of jury trial. (1933, cc. 23, 469.)

See 12 N. C. Law Rev., 371, for note on "Effect of Plea of Nolo Contendere."

§ 4637. Term expiring during trial extended.—In case the term of a court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purpose of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week. (Rev., s. 3266; Code, s. 1229; 1893, c. 226; C. C. P., s. 397; R. C., c. 31, s, 16; 1830, c, 22.)

Section Constitutional. — This section is constitutional. State v. Monroe, 80 N. C. 373; State v. Jefferson, 66 N. C. 309; State v. Taylor, 76 N. C. 64; State v. Adair, 66 N. C. 298. See also Natl. Bank v. Gilmer, 116 N. C. 684, 700, 22 S. E. 2.

Expiration of Term No Ground for Discharging Jury.—The expiration of a term of court is no ground for discharging a jury before verdict for the term may be continued for the purposes of the trial. State v. McGimsey, 80 N. C. 377.

Special Term Extended.—Where a trial began on Wednesday of the last week of a special term and the jury had not agreed upon a verdict on Saturday night, it was not improper for the trial judge to open and conduct the regular term on Monday following and to continue the special term into that week for the purpose of receiving the verdict of the jury, since the rights of the parties were not prejudiced thereby. National Bank v. Gilmer, 116 N. C. 684, 22 S. E. 2.

Daily entries on the journal during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 a. m. tomorrow," and the entry next day "court convened at 9:30 a. m. pursuant to recess," etc., in regular form, constitutes a sufficient compliance with this section. State v. Harris, 181 N. C. 600, 107 S. E. 466.

§ 4638. Justification as defense to libel.—Every defendant who is charged by indictment with the publication of a libel may prove on trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (Rev., s. 3267; Code, s. 1195; R. C., c. 35, s. 26.)

Truth of Entire Charge Must Be Proved.—Where the matter set out in the indictment is libellous, in order for the defendant to justify he must show that the entire charge imputed to the prosecutor is true. State v. Lyon, 89 N. C. 568.

General Report Insufficient.—In an indictment for a libel, it is not competent for the defendant to justify by proving that there was and long had been a general report in the neighborhood, of the truth of his charge. State v. White, 29 N. C. 180.

Proof of Specific Charge Necessary.—Proof of the general bad character of an officer in other matters of which he had taken cognizance, will not be received to establish the truth of libellous charge in reference to a particular matter. State v. Lyon, 89 N. C. 568.

§ 4639. Conviction of assault, when included in charge.—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (Rev., s. 3268, 1885, c. 68.)

Section Refers to Assault Generally.—This section does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. State v. Smith, 157 N. C. 578, 584, 72 S. E. 853.

When Section Applicable.—This section and § 4640 are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. State v. Jackson, 199 N. C. 321, 325, 154 S. E. 402.

What Indictment Includes.—An indictment for any offense against the criminal law includes all lesser degrees of the same crime, known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both. State v. Williams, 185 N. C. 685, 116 S. E. 736.

Same—Murder.—Under an indictment for murder, the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault 'if the evidence shall warrant such finding' when he is not acquitted entirely. State v. Williams, 185 N. C. 685, 688, 116 S. E. 736.

Same—Assault with Intent to Rape.—Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment. State v. Smith, 157 N. C. 578, 72 S. E. 853.

Duty of Judge.—Upon the trial under an indictment for murder it is the duty of the trial judge, under supporting evidence, to declare and explain the law upon the less offense of manslaughter, with the burden of proof on defendant, and a statement of the contentions of the parties, etc., with a mere announcement of the principle is insufficient. State v. Hardee, 192 N. C. 533, 135 S. E. 345.

Same—Failure to Charge Upon Lesser Degree.—The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. State v. Williams, 185 N. C. 685, 116 S. E. 736.

Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor has not been aptly tendered in writing. State v. Holt, 192 N. C. 490, 135 S. E. 324.

Effect of Simple Verdict of Guilty.—While this section permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of "guilty," and not specifying a lower offense, is a verdict of guilty of the offense charged in the indictment. State v. Barnes, 122 N. C. 1031, 29 S. E. 381; State v. Lee, 192 N. C. 225, 227, 134 S. E. 458.

§ 4640. Conviction for a less degree or an attempt.—Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (Rev., s. 3269; 1891, c. 205, s. 2.)

Crime of Accessory Included.—The crime of accessory before the fact is included in the charge of the principal crime within the meaning of this section. State v. Simons, 179 N. C. 700, 703, 103 S. E. 5; State v. Bryson, 173 N. C. 803, 806, 92 S. E. 698, discussing and it seems overruling State v. Green, 119 N. C. 899, 26 S. E. 112.

Joinder Mere Surplusage.—Since this section was adopted the joinder in an indictment for an offense of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage. State v. Brown, 113 N. C. 645, 18 S. E. 51.

Indictment for Attempt or Complete Offense.—An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. State v. Addor, 183 N. C. 678, 110 S. E. 650.

Intent Alone Not Sufficient.—The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connected with some overt act or acts towards the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. State v. Addor, 183 N. C. 687, 110 S. E. 650.

Defendant Entitled to Complete Charge.—Under the provisions of this section when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon

the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree. State v. Robinson, 188 N. C. 784, 125 S. E. 617. See also State v. Keaton, 206 N. C. 682, 175 S. E. 296.

Evidence Must Justify Conviction in Lesser Degree. — The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the first count is withdrawn, and the evidence does not support the charge of second degree burglary, the defendant cannot be convicted of the lesser offense. State v. Spain, 201 N. C. 571, 160 S. E. 825.

The provisions of this section in regard to conviction of a less degree of the crime charged in a bill of indictment applies only where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error. State v. Smith, 201 N. C. 494, 160 S. E. 577.

Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. State v. Cox, 201 N. C. 357, 361, 160 S. E. 358.

This section does not confer upon a jury in the trial of a criminal action the power arbitrarily to disregard the uncontradicted evidence tending to show that the crime charged in the indictment was committed as alleged therein and in the absence of evidence to sustain such conviction, to convict the defendant of a crime of less degree. Id.

Failure to charge upon lesser degree see same catchline in the preceding section.

Charge as to Assault Unnecessary Where Homicide Admitted.—While under the provisions of this section the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of human being. State v. Luterloh, 188 N. C. 412, 124 S. E. 752.

Instructions as to Second Degree Murder Where Evidence Shows First Degree.—Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error under this section. State v. Ferrell, 205 N. C. 640, 172 S. E. 186.

Same—Assault.—Where the evidence tended to show a simple assault by defendant on prosecuting witness and a later encounter between the parties in which defendant was armed with a deadly weapon, it was error under this section, for the court to charge the jury that they could convict defendant of assault with the intent to kill, or assault with a deadly weapon or not guilty, and refuse to charge the jury that they might convict defendant of simple assault. State v. Lee, 206 N. S. 472, 174 S. E. 288.

New Trial Must Be on Full Charge.—Upon an appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill. State v. Matthews, 142 N. C. 621, 55 S. E. 342.

Sufficiency.—Indictment held sufficient in form to charge the offense of larceny. State v. McKnight, 196 N. C. 259, 260, 145 S. E. 281.

Stated in dissenting opinion in State v. Beard, 207 N. C. 673, 681, 178 S. E. 242.

Cited in State v. Colson, 194 N. C. 206, 139 S. E. 230; State v. Ratcliff, 199 N. C. 9, 153 S. E. 605.

§ 4641. Burglary in first degree charged, verdict for second degree.—When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do. (Rev., s. 3270; 1889, c. 434, s. 3.)

Conviction in Second Degree Unauthorized.—Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized by this section, since a felonious entry under such circumstances is by section 4232 made burglary in the first degree. State v. Johnston, 119 N. C. 883, 26 S. E. 163.

Cited in State v. Ratcliff, 199 N. C. 9, 11, 153 S. E. 605.

§ 4642. Verdict for murder in first or second degree.—Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree. (Rev., s. 3271; 1893, c. 85, s. 3.)

Object of Section.—The object of this section is, of course, to place it beyond doubt in what degree of murder the prisoner was convicted. State v. Wiggins, 171 N. C. 813, 817, 89 S. E. 58.

Applies to All Indictments for Murder.—This section applies to all indictments for murder, whether perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture, or otherwise. State v. Matthews, 142 N. C. 621, 55 S. E. 342.

Jury Must Determine Degree.—For a conviction of murder in the first degree under this section and section 4200, the jury must find specially under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const., Art. I, sections 13, 17, which right may not be waived. State v. Bazemore, 193 N. C. 336, 137 N. C. 172.

By this section it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N. C. 811, 23 S. E. 477; State v. Bagley, 158 N. C. 608, 73 S. E. 995; State v. Murphy, 157 N. C. 614, 72 S. E. 1075. And the record must show that they have so done, in order that there may be a proper judgment. State v. Lucas, 124 N. C. 825, 827, 32 S. E. 962; State v. Truesdale, 125 N. C. 696, 34 S. E. 646.

Failure To Determine Degree.—Where the degree of murder is not expressed in the verdict, the judges should tell the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict is properly recorded accordingly. State v. Bagley, 158 N. C. 608, 73 S. E. 995.

Judge May Exclude Second Degree in Charge.—When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. State v. Wiggins, 171 N. C. 813, 817, 89 S. E. 58; State v. Spevey, 151 N. C. 676, 65 S. E. 995.

In prosecution for murder, defendant's premeditation and deliberation are questions of fact, to be determined by jury, under this section and section 4200, and not questions of law for judge, and must be proved beyond a reasonable doubt. State v. Newsome, 195 N. C. 552, 143 S. E. 187.

Verdict Construed According to Charge.—The verdict must be construed according to the charge and the evidence and when these make it certain beyond question, the law has been complied with. State v. Gilchrist, 113 N. C. 673, 18 S. E. 319. State v. Wiggins, 171 N. C. 813, 817, 89 S. E. 58.

Mere Killing Presumes Second Degree Murder.—Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N. C. 636, 639, 43 S. E. 247.

"In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree) unless he can satisfy the jury of the truth of facts which justify or excuse his act, or mitigate it to manslaughter." State v. Lane, 166 N. C. 333, 339, 81 S. E. 620.

But a conviction of murder in the first degree may be had upon sufficient circumstantial evidence. State v. Bazemore, 193 N. C. 336, 137 S. E. 172; State v. Melton, 187 N. C. 481, 122 S. E. 17; State v. Matthews, 66 N. C. 106.

When First Degree Presumed.—A homicide committed in

the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that or a less offense. State v. Lane, 166 N. C. 333, 334, 81 S. E. 620.

Prisoner Cannot Object for Failure to Find First Degree.—Although the law raises the presumption of murder in the first degree, none the less if the jury convict of a less offense, it is within their power so to do under this section and the prisoner has no cause to complain that he was not convicted of the higher offense. State v. Matthews, 142 N. C. 621, 55 S. E. 342.

Evidence.—Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. State v. Newsome, 195 N. C. 552, 143 S. E. 187.

Cited in State v. Gooding, 196 N. C. 710, 146 S. E. 806.

§ 4643. Demurrer to the evidence.—When on the trial of any criminal action in the superior court, or in any criminal court, the state has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of "not guilty" as to such defendant. If the motion is refused, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the supreme court.

Nothing in this section shall prevent the defendant from introducing evidence after his motion for nonsuit has been overruled; and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all of the evidence, the defendant may accept; and, after the jury has rendered its verdict, he shall have the benefit of such latter exception on appeal to the supreme court. If defendant's motion for judgment of nonsuit be granted, or be sustained on appeal to the supreme court, it shall in all cases have the force and effect of a verdict of "not guilty." (1913, c. 73; Ex. Sess. 1913, c. 32.)

As to demurrer to the evidence in civil cases, see section 567.

Compared with Section 567.—This section serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by section 567, in civil actions. State v. Fulcher, 184 N. C. 663, 665, 113 S. E. 769; State v. Sigmon, 190 N. C. 687, 130 S. E. 854.

This section serves the same purpose in criminal prosecutions as § 567, serves in civil actions, and a motion for judgment of nonsuit under this section, must be made at the close of the State's evidence in order for a motion thereunder made at the close of all the evidence to be considered. State v. Norris, 206 N. C. 191, 173 S. E. 14.

Sufficiency of Evidence May Be Challenged if Motion Timely Made.—If the defendant, on trial for murder, wishes to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, motion to nonsuit under this section, on the capital charge, should be lodged at the close of the State's case, exception noted, if overruled, and the motion renewed at the close of all the evidence, and exception again noted, if overruled. State v. Bittings, 206 N. C. 798, 802, 175 S. E. 299.

Motion Must Be Renewed.—A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence as this section requires. State v. Helms, 181 N. C. 566, 107 S. E. 228.

Same—Waiver.—Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first exception, and it is not subject to review in the Supreme Court on appeal. State v. Hayes, 187 N. C. 490, 122 S. E. 13.

See State v. Hargett, 196 N. C. 692, 146 S. E. 801, following the rule of State v. Hayes, 187 N. C. 490, 122 S. E. 13, as it appears under this catchline in the Code of 1927.

Only incriminating evidence need be considered upon defendant's motion as of nonsuit under this section, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment. State v. Satterfield, 207 N. C. 118, 176 S. E. 466. See also, State v. Moses, 207 N. C. 139, 176 S. E. 267.

When Motion Denied.—A motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if the evidence is sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt. State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. State v. Carr, 196 N. C. 129, 130, 144 S. E. 698.

Excepting to Entire Evidence.—Where a defendant in a a criminal action desires to except to the sufficiency to the evidence to convict him, his excepting, under this section, at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence brings his exception, to the Supreme Court on appeal, upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. State v. Kelly, 186 N. C. 365, 119 S. E. 755.

Consideration of Entire Evidence on Appeal.—In State v. Pasour, 183 N. C. 793, 794, 111 S. E. 779, the court said: "Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions, therefore, require a consideration of the entire evidence."

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. State v. Brinkley, 183 N. C. 720, 110 S. E. 783.

Upon appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State's evidence alone, but all the evidence in the State's favor, taken in the light most favorable to the State and giving it every reasonable intendment therefrom, will be considered, and where there is sufficient evidence of the defendant's guilt upon the whole record, the action of the trial judge in denying the motion of nonsuit will be upheld. State v. Lawrence, 195 N. C. 562, 146 S. E. 395.

A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. State v. Earp, 196 N. C. 164, 145 S. E. 23.

Same—Supreme Court Not to Weigh Evidence.—This section provides that if on the motion the judgment of nonsuit is allowed on appeal, "It shall, in all cases, have the force and effect of a verdict of not guilty." This is not, therefore, the case of a new trial for some error of the judge, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that the Supreme Court should weigh the evidence and render a verdict. State v. Cooke, 176 N. C. 731, 735, 97 S. E. 171.

Sufficiency of Evidence.—Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorably to the State and the court will not pass upon its weight or the credibility of the witnesses. State v. Rountree, 181 N. C. 535, 106 S. E. 669.

The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy a jury to a moral certainty of the truth of the charge. State v. Sigmon, 190 N. C. 684, 130 S. E. 854.

On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. State v. Fleming, 194 N. C. 42, 138 S. E. 342. See also State v. Lawrence, 196 N. C. 562, 146 S. E. 395; State v. Durham, 201 N. C. 724, 161 S. E. 398.

"In considering a motion to dismiss the action under the statute, we are merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and all inferences that may fairly be drawn from them. S. v. Carlson, 171 N. C., 818, 89 S. E. 30; S. v. Rountree, 181 N. C. 535, 106 S. E. 669;" State v. Carr, 195 N. C. 129, 133, 144 S. E. 698.

Upon motion to dismiss under this section, it is required that the court ascertain merely whether there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it. State v. McLeod, 196 N. C. 542, 146 S. E. 409.

On a trial for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N. C. 100, 144 S. E. 555.

Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all of the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury. State v. Ammons, 204 N. C. 753, 169 S. E. 631.

On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. . . . The evidence favorable alone to the State is considered—defendant's evidence is discarded. State v. Shipman, 202 N. C. 518, 524, 163 S. E. 657.

Upon motion as of nonsuit in a criminal action, under this section, the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. State v. Marion, 200 N. C. 715, 158 S. E. 406.

Same — Accident Rather than Homicide. — Evidence tending only to show, upon a trial for wife murder, that the prisoner unintentionally in his sleep, as a result of a bad dream, inflicted upon his wife a wound too slight to have caused her death, except that from its neglect of treatment it may have been possible for blood poisoning to have set in therefrom that caused her death, is insufficient in law to sustain a conviction of manslaughter, and defendant's motion as of nonsuit, should have been sustained, under this section. State v. Everett, 194 N. C. 442, 140 S. E. 22.

Same—Rape.—Evidence tending to show that the deceased was ravished by a person suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime around the house of the deceased and at the place of the crime, is sufficient, taken with other evidence of guilt, to be submitted to the jury and to sustain their verdict thereon of murder in the first degree. State v. McLeod, 196 N. C. 542, 146 S. E. 409.

Same—Tending Only to Exculpate.—Where the State's evidence and that of the defendant are substantially to the same effect, in an action for an assault, and tend only to exculpate the defendant, his motion as of non-suit after all the evidence has been introduced, considering it as a whole, should be sustained. State v. Fulcher, 184 N. C. 663, 113 S. E. 769.

Same—Father Shielding Child.—The father may shield his child from assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. State v. Fulcher, 184 N. C. 663, 11 S. E. 769.

Same—Recent Possession of Stolen Goods.—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of section 4235, and defendant's demurrer to the State's evidence or motion for dismissal thereon, is properly overruled. State v. Williams, 187 N. C. 492, 122 S. E. 13.

Evidence that the defendants had assisted a prisoner to escape is held insufficient in State v. Pace, 192 N. C. 780, 136 S. E. 11 and the motion for judgment of nonsuit as provided in this section should have been granted.

Insufficient evidence for conviction of manslaughter. State v. Tankersley, 172 N. C. 955, 90 S. E. 781.

Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that at such time defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference the defendant's motion as of nonsuit should be allowed under this section. State v. Anthony, 206 N. C. 120, 173 S. E. 47.

Same—Evidence Raising Suspicion Only.—Evidence that does no more than raise a suspicion, somewhat strong perhaps, of a homicide and the defendant's guilt, is not enough on a prosecution for murder and demurrer to the evidence will be sustained. State v. Carter, 204 N. C. 304, 305, 168 S. E. 204.

Same—Malicious Castration. — The direct evidence of the guilt of one of the defendants in a prosecution for malicious castration, and the circumstantial evidence as to the other's participation and guilt is held sufficient to overrule their motions as of nonsuit. State v. Ammons, 204 N. C. 753, 169 S. E. 631.

Same—Identity.—In a prosecution for homicide the evidence of the defendant's identity as the perpetrator of the crime is sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused. State v. Fogleman, 204 N. C. 401, 168 S. E. 536.

Same—Conspiracy. — Where the direct circumstantial evidence in this case tends to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, that deceased was murdered and that all the conspirators, including the appealing defendant, were present, aiding and abetting in the commission of the crime, the evidence is sufficient to be submitted to the jury and motion for non-suit was properly overruled. State v. Brown, 204 N. C. 392, 168 S. E. 532.

Same—Assault with Intent to Kill.—In a prosecution, for a secret assault and battery with a deadly weapon with malice and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the defendant appeared there suddenly at night and shot the prosecuting witness before he could do anything, and seriously wounded him, is sufficient to overrule defendant's motion as of nonsuit, and to show that the assault was done in a secret manner. State v. McLamb, 203 N. C. 442, 166 S. E. 507.

Same—Operation of Prohibited Mechanical Device.—Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its capture, and that when the automobile was subsequently captured it was being driven by others and had attached thereto a mechanical device for the emission of excessive smoke or gas, is insufficient to resist defendant's motion as of nonsuit under this section, in a prosecution under § 4506(b). State v. Yates, 208 N. C. 194, 179 S. E. 756.

Conflicting Evidence.—Where the prosecutor's goods have been stolen two days before, they are found in the de-

fendant's possession, with conflicting evidence upon the question of his having stolen them, the cases can only be determined by the jury, and the defendant's motion under this section to dismiss must be denied. State v. Jenkins, 182 N. C. 818, 108 S. E. 767.

When the defendant on trial under a criminal indictment for recklessly driving his car and colliding with another car in which deceased was riding, on a public highway, causing her death, and there is both direct and circumstantial evidence that the defendant was driving the car at the time, which his own testimony and evidence of his witnesses contradicts, his motion as of judgments of nonsuit make at the close of the State's evidence and renewed after all the evidence is properly denied. State v. Leonard, 195 N. C. 242, 141 S. E. 736.

Variance. — The defendant in a criminal action may raise the question of a variance between the indictment and the proof by a motion to dismiss the prosecution as in case of nonsuit. This is clearly set forth in S. v. Gibson, 170 N. C. 697, 86 S. E. 774; S. v. Harbert, 185 N. C. 760, 118 S. E. 6; S. v. Harris, 195 N. C. 306, 141 S. E. 883; State v. Grace, 196 N. C. 280, 281, 145 S. E. 399.

Where an indictment in a criminal prosecution charges the defendant with having fraudulently obtained goods by means of a worthless check in violation of § 4283, and the defendant is convicted of having uttered a worthless check in violation of § 4283(a), the offenses are not the same, and there is a fatal variance between the indictment and proof, and the defendant's demurrer to the evidence will be sustained in the Supreme Court on appeal. State v. Martin, 199 N. C. 636, 155 S. E. 447.

Where there is a fatal variance between the indictment and the proof, it is proper to sustain the demurrer to the evidence, or to dismiss the action as in case of nonsuit. State v. Franklin, 204 N. C. 157, 158, 167 S. E. 569.

Effect of Reversal of Judgment of Guilty.—Under the provisions of this section the reversal of a judgment of guilty has the force and effect of a verdict of "not guilty." State v. Corey, 199 N. C. 209, 153 S. E. 923.

Cited in State v. Pridgen, 194 N. C. 795, 139 S. E. 601; State v. Mickle, 194 N. C. 808, 140 S. E. 150; State v. Eubanks, 194 N. C. 319, 320, 139 S. E. 451; State v. Dowell, 195 N. C. 523, 524, 143 S. E. 13; State v. Golden, 196 N. C. 246, 247, 145 S. E. 236; State v. Weston, 197 N. C. 25, 26, 147 S. E. 618; State v. McKinnon, 197 N. C. 576, 150 S. E. 25; State v. Hickey, 198 N. C. 45, 47, 150 S. E. 615; State v. Burleson, 198 N. C. 61, 62, 150 S. E. 628; State v. McLeod, 198 N. C. 649, 152 S. E. 895; State v. Spivey, 198 N. C. 655, 153 S. E. 255; State v. Ritter, 199 N. C. 116, 119, 154 S. E. 62; State v. Beal, 199 N. C. 278, 287, 154 S. E. 604; State v. Johnson, 199 N. C. 429, 430, 154 S. E. 730; State v. Sizemore, 199 N. C. 687, 688, 155 S. E. 724; State v. Baker, 199 N. C. 578, 155 S. E. 249; State v. Fletcher, 199 N. C. 815, 816, 155 S. E. 927; State v. Wrenn, 198 N. C. 260, 151 S. E. 261; State v. Newton, 207 N. C. 323, 325, 177 S. E. 184; State v. Mansfield, 207 N. C. 233, 234, 176 S. E. 761; State v. Mozingo, 207 N. C. 247, 249, 176 S. E. 582; State v. Wilson, 205 N. C. 376, 377, 171 S. E. 338; State v. Davidson, 205 N. C. 735, 738, 172 S. E. 489.

§ 4644. New trial to defendant.—The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases. (Rev., s. 3272; Code, s. 1202; R. C., c. 35, s. 35; 1815, c. 895.)

Cross References.—For a complete treatment of the subject of new trial in criminal cases, see 4 N. C. Enc. Dig. 205-224; 13 N. C. Enc. Dig. 639-641; as to new trial in civil cases, see section 591 and notes.

Rule Similar at Common Law.—Independent of this section, the rule of the common law was the same and in Wharton's Criminal Law, sec. 3391, it is laid down that "at common law the court trying the case, is the sole tribunal by whom a new trial can be granted, and its refusal so to do being matter of discretion is no ground for a writ of error." State v. Bennett, 93 N. C. 503, 506.

New Trial Not Granted After Acquittal.—After a verdict of acquittal on a State prosecution, a new trial is not allowed by this section. State v. Taylor, 8 N. C. 462.

Newly Discovered Evidence.—A motion for new trial for newly discovered evidence will not be granted even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving. State v. Lilliston, 141 N. C. 857, 54 S. E. 427.

Motions for new trials for newly discovered evidence cannot be entertained in the Supreme Court in criminal cases. State v. Lilliston, 141 N. C. 857, 54 S. E. 427.

Disqualification of Jurors and Newly Discovered Evidence.—Where a judgment of the Supreme Court in a criminal case has been certified to the Clerk of the Superior Court, the case is in the latter court for execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. State v. Casey, 201 N. C. 620, 161 S. E. 81.

When Judgment Set Aside.—A judgment regularly entered at one term of the court, can not be set aside at a subsequent term, except in cases of surprise, mistake or excusable neglect. State v. Bennett, 93 N. C. 503.

§ 4645. Nol. pros. after two terms; when capias and subpœnas to issue.—A nolle prosequi "with leave" shall be entered in all criminal actions in which the indictment has been pending for two terms of the court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpœna for the witnesses for the state indorsed on the indictment. (Rev., s. 3273; 1905, c. 360, ss. 1, 3, 4.)

Cross References.—As to nolle prosequi in general, see 4 N. C. Enc. Dig. 76-77; 13 N. C. Enc. Dig. 589; as to clerk's record of nolle prosequi with leave cases, see section 952, par. 35.

In General.—A nolle prosequi is merely a declaration on the part of the solicitor that he will not then prosecute the suit farther, and is not an acquittal, although its effect is to discharge the defendant without delay. Wilkinson v. Wilkinson, 159 N. C. 265, 74 S. E. 740.

Effect of Nol. Pros.—A nol. pros. in criminal proceedings does not amount to an acquittal, and the defendant may be arrested again upon the same bill and put to trial. State v. Thornton, 35 N. C. 256; State v. Faggart, 170 N. C. 737, 744, 87 S. E. 31; State v. Smith, 129 N. C. 546, 40 S. E. 1.

Discretion of Attorney General.—The attorney general has a discretionary power to enter a nolle prosequi, and the court will not interfere, unless the power be oppressively used. State v. Thompson, 10 N. C. 613; State v. Buchanan, 23 N. C. 59.

Permission of Court for New Capias.—Where a nolle prosequi has been entered in a criminal case, a capias will not issue as a matter of course upon the will of the prosecuting officer, but only upon permission of the court first obtained. State v. Thornton, 35 N. C. 256.

Same—When Unnecessary.—Where a "nolle prosequi with leave," is entered, it authorizes the clerk, at the request of the solicitor, to issue another capias. State v. Smith, 129 N. C. 546, 40 S. E. 1.

Does not start statute of limitations see under section 4512 catchline "Effect of Nol. Pros. with Leave."

§ 4646. Prisoner not to be tried in prison uniform.—It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor. (1915, c. 124.)

Art. 16. Appeal

§ 4647. Appeal from justice, trial de novo.—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings. (Rev., s. 3274; Code, s. 900; 1868-9, c. 178, subc. 4, s. 11; 1879, c. 92, s. 10.)

Cross Reference.—For full treatment of appeal in criminal cases, see 4 N. C. Enc. Dig. 230 et seq.; 13 N. C. Enc. Dig. 644 et seq; as to appeal by state, see section 4649 and note thereto; as to form and service of notice, see sec. 914 et seq. and notes there placed.

In General.—These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed. They refer to the conviction and sentence of defendants. State v. Lyon, 93 N. C. 575, 577.

Right of Appeal Has Been Modified.—The right of appeal to the Superior Court from conviction in a justice's court of a misdemeanor within the justice's jurisdiction, as provided by this section, has been modified by the statutes establishing and expanding the uniform system of recorders' courts, §§ 1546, 1596, and under the general provisions of § 1597, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act. State v. Baldwin, 205 N. C. 174, 170 S. E. 645.

Judgment Must Be Final in Nature.—The appeal must be from a final judgment. State v. Seaboard Air Line R. R., 169 N. C. 295, 84 S. E. 283; State v. Bailey, 65 N. C. 426; State v. Pollard, 83 N. C. 598.

Appeal as Matter of Right.—Under this section, a defendant found guilty of an offense of which the justice of the peace has final jurisdiction and an order is made without defendant's consent that judgment be suspended upon payment of costs, need not resort to the circuitous remedy of a recordari but is entitled to an appeal to the superior court as a matter of right. State v. Griffin, 117 N. C. 709, 23 S. E. 164; as to recordaries substitute for an appeal, see section 630 and note thereto.

Right of Appeal Personal to Accused.—The right of appeal provided for by this section is for the benefit only of the person accused. State v. Powell, 86 N. C. 640; but so much of the judgment as is personal to the prosecutor and taxes him with the costs, may be appealed from. Id.

Appeal under Section Presents Trial de novo.—Where the defendant after trial and conviction before a justice of the peace, moved in arrest of judgment, which was refused, and he appealed to the superior court, it was held, that the appeal brought up the whole case, and the defendant under this section was entitled to a trial de novo. State v. Koonce, 108 N. C. 752, 12 S. E. 1032; but where the defendant restricts himself by a plea of guilty then there can be no acts left open for consideration by a jury and the case on appeal does not concern the whole case. State v. Warren, 113 N. C. 683, 684, 686, 18 S. E. 498.

After an appeal from a recorder's court to a Superior Court has been effected and appeal bond given, the recorder's court has no further jurisdiction over the case, the procedure being the same as under this section, and defendant appellant may not thereafter withdraw the appeal by notice given in the recorder's court. State v. Goff, 205 N. C. 545, 172 S. E. 407.

Bill of Indictment Unnecessary.—Upon an appeal from an inferior court from a conviction of a petty misdemeanor the necessity of a bill of indictment in the latter court is dispensed with, State v. Jones, 181 N. C. 543, 106 S. E. 827; State v. Quick, 72 N. C. 241, 242; but where the case is beyond the jurisdiction of the inferior court then an indictment is necessary. State v. McAden, 162 N. C. 575, 77 S. E. 298.

Amendment to Complaint.—Where the defendant has been separately tried before a justice of the peace for several indictable offenses, it is permissible for the superior court, on appeal, to allow an amendment to the complaint or warrant so as to make out complaint include the several offenses under different counts. State v. Mills, 181 N. C. 530, 106 S. E. 677.

Excessive Punishment by Public Justice.—A defendant is not entitled to a new trial because the punishment imposed by a police justice was excessive; the case should be remanded for resentence in conformity to law. State v. Black, 150 N. C. 866, 64 S. E. 778.

Appeal in Civil Cases.—See sec. 660 and notes thereto.

§ 4648. Justice to return papers and findings to superior court.—In every case in which an appeal shall be prayed the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint and which were found by him not to be proved. (Rev., s. 3275; Code, s. 901; 1868-9, c. 178, subc. 4, s. 12.)

Cited in State v. Goff, 205 N. C. 545, 549, 172 S. E. 407.

§ 4649. When state may appeal.—An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment. (Rev., s. 3276; Code, s. 1237.)

For a comprehensive treatment of the subject-matter of the section including numerous illustrative cases, see 4 N. C. Enc. 238 et seq.

See 13 N. C. Law Rev., 321, for note on "Special Verdicts."

Bond Not Essential.—A bond, in the case of an appeal on the part of the state, is not necessary, a recognizance being sufficient. State v. M'Lelland, 1 N. C. 632; as to necessity of bond in appeal by defendant see note of State v. Patrick, 72 N. C. 217, under section 4650.

The word "demurrer" is used in this section in its usual and ordinary significance, as understood and defined in criminal pleading, and is not used in the sense of embracing "demurrer to evidence." State v. Moody, 150 N. C. 847, 64 S. E. 431.

Upon a demurrer to an indictment the state is allowed to appeal because it has the effect in criminal cases of opening the whole record to the court and under it the jurisdiction of the court may be challenged, as well as the sufficiency of the subject-matter of the indictment itself. State v. Moody, 150 N. C. 847, 64 S. E. 431; State v. McDowell, 84 N. C. 799, 802.

No Right of Appeal from Procedural Error. — The state has no right of appeal from the action of the trial judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging the prisoner, upon a trial for an indictable offense. State v. Branner, 149 N. C. 559, 63 S. E. 169.

Overruling Motion to Amend Record.—No appeal lies by the state from an order overruling a motion to amend the record. State v. Swepson, 82 N. C. 541.

Taxing Prosecutor with Costs.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. State v. Morgan, 120 N. C. 564, 26 S. E. 634. See also note of State v. Powell, 86 N. C. 640, under section 4647.

The refusal of the court to mark one as prosecutor of record is not one of the cases enumerated in this section in which the state may appeal. State v. Moore, 84 N. C. 724.

General Verdict of Not Guilty.—In a criminal prosecution where there is a plea and general verdict of not guilty, the state has no right of appeal; such verdict ends the case, State v. Savery, 126 N. C. 1083, 36 S. E. 22 and cases cited; but under the section the state may appeal from a judgment for defendant on a special verdict. State v. Monger, 107 N. C. 771, 12 S. E. 250; State v. Lane, 78 N. C. 547; State v. Winston, 194 N. C. 243, 139 S. E. 240; as to distinction between general and special verdict, see section 585 et seq; notes placed.

Judgment Non Obstanti Veridicto. — Where there is a verdict convicting a defendant of a misdemeanor under the provisions of a statute prohibiting the drawing of a worthless check on a bank under certain conditions, and a judgment has been rendered in favor of the defendant

non obstanto, verdicto, the State may appeal under the provisions of this section. State v. Yarboro, 194 N. C. 498, 140 S. E. 216.

Acquittal in Consequence of Erroneous Charge.—When a defendant has once been tried and acquitted upon an indictment good in form, no appeal lies even though the acquittal is in consequence of the erroneous charge of the presiding judge. State v. West, 71 N. C. 263.

Arrest of Judgment as to One of Two Defendants.—Where in a prosecution for murder two defendants were convicted of manslaughter, the state under sub-division 4 of this section, has a right to appeal from an arrest of judgment as to one of them. State v. Hall, 183 N. C. 806, 112 S. E. 431.

Remanding Case for Lighter Sentence.—This section does not include a ruling of the superior court remanding a case for the imposition of a lesser sentence. State v. Davidson, 124 N. C. 839, 32 S. E. 957.

If a warrant charges simple assault, the State has no right of appeal from a judgment of a justice of the peace acquitting the defendant, the justice having, in such cases, exclusive original jurisdiction. State v. Myrick, 202 N. C. 688, 163 S. E. 803.

The State may appeal from acquittal of defendant upon a special verdict, although the verdict is fatally defective in that it fails to find facts essential to an adjudication of defendant's guilt or innocence. State v. Gulledge, 207 N. C. 374, 177 S. E. 128.

Applied to an order quashing a bill of indictment in State v. Lancaster, 169 N. C. 284, 84 S. E. 529.

Stated in State v. Hinson, 123 N. C. 765, 31 S. E. 854; State v. Davidson, 124 N. C. 839, 32 S. E. 957; State v. Bowan, 145 N. C. 452, 59 S. E. 74; State v. Morris, 208 N. C. 44, 179 S. E. 19.

§ 4650. Appeal by defendant to supreme court.—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions. (Rev., s. 3277; Code, s. 1234; R. C., c. 4, s. 21; 1818, c 962, s. 4.)

Cross Reference.—For general treatment of proceedings for transfer of cause, see 4 N. C. Enc. Dig. 248 et seq; 13 N. C. Enc. Dig. 647 et seq. For full treatment as to perfection of appeal, see section 643 et seq., and notes there placed; as to essentials to transcript, see section 645 and note thereto; as to the undertaking on appeal, see section 646 and note thereto. See also section 4651.

Editor's Note.—The manner of perfecting appeals in criminal cases is precisely the same as that in civil cases, a full and comprehensive treatment of which may be found under the section above referred to.

Appeals in criminal cases are controlled by this section, and a defendant is entitled to appeal only from conviction in the Superior Court or some final judgment thereof, and an appeal from an order of the Superior Court remanding the case to the recorder's court will be dismissed. State v. Rooks, 207 N. C. 275, 176 S. E. 752.

Appeal or Substitute for Writ of Error.—At common law there was no appeal from the decision of any of the courts, high or low, and these decisions could only be reviewed by writ of error or writ of false judgment. In North Carolina appeals are used as a substitute for those writs. State v. Bailey, 65 N. C. 426, 428; State v. Webb, 155 N. C. 426, 70 S. E. 1064.

Bond Necessary.—An appeal by the defendant to the supreme Court will be dismissed where no appeal bond is filed, if there is no order allowing the appeal without such bond. State v. Patrick, 72 N. C. 217; State v. Spurtin, 80 N. C. 362. See section 4651.

Where the defendant appealed in three cases without giving appeal bond, and it appeared that he had obtained leave to appeal without bond in one case only, it was held that the other cases would be dismissed. State v. Hamby, 126 N. C. 1066, 35 S. E. 614.

Appeal "By Consent."—Where an appeal without bond or affidavit was allowed by consent it was held not to be in compliance with the section. State v. Kerns, 90 N. C. 650.

Judgment against Surety.—Where defendant in a criminal action is allowed to appeal upon filing a bond for his appearance at the next criminal term of the court with sufficient surety, but the stay bond required by this section is not filed, upon affirmance of the judgment of the Supreme Court, judgment may not be had against the surety on the appearance bond for the amount of the fine, and the recognizance may not be construed as a stay bond on the ground that the parties so intended. Current v. Church, 207 N. C. 658, 178 S. E. 82.

§ 4651. Defendant may appeal without security for costs.—In all cases of conviction in the superior courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith.

And where it shall appear to the presiding judge that a defendant who has been convicted of a capital felony and who has prayed an appeal to the supreme court from the sentence of death pronounced against him upon such conviction is unable to defray the cost of perfecting his appeal on account of his poverty, it shall be the duty of the county in which the alleged capital felony was committed, upon the order of such judge, to pay the necessary cost of obtaining a transcript of the proceedings had and the evidence offered on the trial from the court reporter for the use of the defendant and the necessary cost of preparing the requisite copies of the record and briefs which the defendant is required to file in the supreme court under the rules of said court. The judge may fix the reasonable value of the services rendered in furnishing such transcript and preparing such copies of the record and briefs, and said copies of the record and briefs shall be prepared in the manner prescribed by the rules of the supreme court in pauper appeals. Provided, that this paragraph shall apply only to those cases in which counsel has been assigned by the court. (Rev., s. 3278; Code, s. 1235; 1869-70, c. 196, s. 1; 1933, c. 197.)

Cross Reference.—For general treatment of subject, see 4 Enc. Dig. 250 et seq.; as to appeals in forma pauperis in civil cases, see section 649 and note thereunder.

Editor's Note.—Public Laws of 1933, c. 197, added the last paragraph of this section, relating to appeals in capital felony to the Supreme Court.

Essentials of Affidavit Cannot Be Waived.—The court has no authority to dispense with, or the prosecutor to waive the requirements of this section in respect to the affidavit which the defendant must file. State v. Moore, 93 N. C. 500.

In State v. Duncan, 107 N. C. 818, 819, 12 S. E. 382, it is said: "It is not a matter of discretion with the court, but it is the right of the state to have an appeal dismissed where there is a failure to comply with either of the three essential requirements (of this section)." (parenthesis supplied); as to dismissal of appeal where no bond given or order allowing appeal without security, see note of State v. Patrick, 72 N. C. 217, under section 4650.

The affidavit is jurisdictional and may not be waived by the solicitor. State v. Stafford, 203 N. C. 601, 166 S. E. 734.

In order that the Supreme Court may have jurisdiction of an appeal in forma pauperis in a criminal action it is required that the application for leave to appeal be supported by an affidavit of the appellant showing that he is wholly unable to give the security required by § 4650; that he is advised by counsel that he has reasonable cause for appeal, and that the application is made in good faith, and where any of these three statutory requirements have not been complied with the appeal will be dismissed. State v. Marion, 200 N. C. 715, 158 S. E. 406.

Compared with Security in Civil Actions. — The requirements of this section for prosecuting an appeal without making deposit or giving security for costs in a criminal prosecution, are different from those in a civil action, but the requirements of both statutes, are jurisdictional, and unless complied with in all respects, the appeal is not properly in this Court. Powell v. Moore, 204 N. C. 654, 655, 169 S. E. 281.

Time of Perfecting Appeal. — Appeals under this section can be allowed only during term of court and by the judge. State v. Gatewood, 125 N. C. 694, 695, 34 S. E. 543, and if

not perfected at this time the appeal is a nullity. State v. Dixon, 71 N. C. 204.

Proper Form Presumed.—If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form. State v. Low, 103 N. C. 350, 351, 9 S. E. 411.

Signature of Judge Essential.—Where the order allowing an appeal in forma pauperis in criminal cases is not signed by the judge but by the clerk, the defect is jurisdictional, without power of the appellate court to allow amendment, and the appeal will be dismissed. State v. Parish, 151 N. C. 659, 65 S. E. 762.

Name of Advising Counsel Need Not Appear.—It is not necessary that an affidavit, filed under this section, should state the name of the counsel by whom the applicant is advised that he has reasonable grounds for appeal. State v. Perkins, 117 N. C. 697, 699, 23 S. E. 274. But it has been suggested that it would be proper to state the name of such counsel. State v. Divine, 69 N. C. 390.

Motion to Reinstate Appeal.—Where one of the essential elements has been omitted from the affidavit, a motion to reinstate the appeal by offering to file a bond or make a deposit should be made when the motion to dismiss was before the court, and after the case has been regularly dismissed, it is too late. State v. Martin. 172 N. C. 977, 90 S. E. 502

Failure to Prosecute According to Rules of Court. — Whether the Supreme Court acquires jurisdiction of an appeal in forma pauperis from a conviction of a capital felony when the affidavit for leave to appeal fails to state, as required by this section, that the "application is in good faith," quaere? and where the appeal has not been prosecuted as required by the Rules of Court the appeal will be dismissed upon the motion of the Attorney-General after an examination of the record proper for errors appearing upon its face. State v. Bynum, 199 N. C. 376, 154 S. E. 918.

Applied in State v. Starnes, 94 N. C. 973; State v. Wylde, 110 N. C. 500, 15 S. E. 5; State v. Atkinson, 141 N. C. 734, 53 S. E. 228.

Cited in State v. Brumfield, 198 N. C. 613, 152 S. E. 926.

§ 4652. Appeal granted; bail for appearance.—The affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the Judge or the clerk, and it shall be the duty of the Judge or the Clerk on filing the affidavit to grant the appeal without security for costs, and for any bailable offense the Judge shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the Superior Court to be held in the county and to further answer the charge preferred. (Rev., s. 3279; Code, s. 1236; 1869-70, c. 196, s. 2; 1929, c. 236, § 1.)

Editor's Note.—The amendment of 1929 added the first provision of this section; namely, "the affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the Judge or the Clerk."

§ 4653. Bail pending appeal.—When any person convicted of a misdemeanor and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal. (Rev., s. 3280; Code, s. 1181; R. C., c. 35, s. 12; 1850-1, c. 2.)

In General.—But for this section an accused would have no right to bail pending an appeal. State v. Bradsher, 189 N. C. 401, 127 S. E. 349; as to right of sureties to surrender principal, see section 4594 et seq., and notes there placed.

§ 4654. Appeal not to vacate judgment; stay of execution.—In criminal cases an appeal to the supreme court shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or in forma pauperis, there shall be a stay of execution during the pendency of the appeal. The clerk of the superior court shall, as soon as may be after execution is stayed, as provided in this section, notify the attorney-general thereof. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by the agreement, the time of such extension. If for any reason the defendant should wish to withdraw his appeal before the same is docketed in the supreme court, he may go, or be taken, before the clerk of the superior court in which he was convicted, and said clerk shall enter such withdrawal upon the record of the case, and notify the sheriff, who shall proceed forthwith to execute the sentence. (Rev., s. 3281; 1887, c. 191, s. 1; 1887, c. 192, s. 4; 1919, c. 5.)

The effect of an appeal is to stay all proceedings in the lower court pending the disposition of the appeal, and where, after appeal bond has been given, the defendant makes motions before the Superior Court judge for a mistrial for prejudice of jurors and for a new trial for newly discovered evidence, the motions are coram non judice. State v. Casey, 201 N. C. 185, 187, 159 S. E. 337.

Clerk to Notify Attorney General of Appeal.—Where an appeal is taken in a criminal case and the execution of the judgment stayed under this section, the clerk of the Superior Court is required to notify the Attorney General of the appeal, and, if the statutory time for perfecting the appeal is extended, he should notify him of such extension. State v. Watson, 208 N. C. 70, 179 S. E. 455; State v. Etheridge, 207 N. C. 801, 178 S. E. 556.

Applied in State v. Casey, 201 N. C. 620, 161 S. E. 81; Current v. Church, 207 N. C. 658, 178 S. E. 82.

§ 4655. Judgment for fines docketed; lien and execution.—When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed, upon an appeal taken, by security being given in like manner as is required in civil cases. Should the judgment be affirmed upon appeal to the supreme court, the clerk of the superior court, on receipt of the certificate from the supreme court, shall issue execution on such judgment. (Rev., s. 3282; 1887, c. 191, s. 3.)

A judgment for a fine, duly docketed, constitutes a lien on the real estate of defendant, under this section, which lien attaches immediately upon the docketing of the judgment. See § 614. Osborne v. Board of Education, 207 N. C. 503, 177 S. E. 642.

Cited in Current v. Church, 207 N. C. 658, 178 S. E. 82.

§ 4656. Procedure upon receipt of certificate of supreme court.—The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate. (Rev., s. 3283; 1887, c. 192, s. 3.)

Art. 17. Execution

§ 4657. Death by administration of lethal gas.—Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor. (1909, c. 443, s. 1; 1935, c. 294, s. 1.)

Editor's Note.—Prior to the amendment of 1935, this section provided for electrocution. The amendatory act provides that it shall not affect execution for crimes committed before its effective date.

Cited in State v. Jackson, 199 N. C. 321, 323, 154 S. E. 402; State v. Baxter, 208 N. C. 90, 93, 179 S. E. 450; State

v. Ferrell, 205 N. C. 640, 641, 172 S. E. 186; State v. Wall, 205 N. C. 657, 658, 172 S. E. 216.

§ 4658. Manner and place of execution.—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and the warden of the penitentiary of North Carolina or, in case of his death, inability or absence, a deputy warden shall be the executioner; and when any person, convict or felon shall be sentenced by any court of the state having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the state penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the state penitentiary shall also cause to be provided, in conformity with this article and approved by the governor and council of state, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article. 1909, c. 443, s. 2; 1935, c. 294, s. 2.)

See note to section 4657.

Cited in State v. Brooks, 206 N. C. 113, 172 S. E. 879.

§ 4659. Sentence of death; prisoner taken to penitentiary.—Upon the sentence of death being pronounced against any person in the state of North Carolina convicted of a crime punishable by death it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the state penitentiary at Raleigh, North Carolina, not more than twenty nor less than ten days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary at Raleigh such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary: Provided, that in all cases where an appeal is taken from the death sentence by any person convicted of a crime punishable by death, except the crime of rape, such convicted felon or convict shall not be taken or conveyed to the penitentiary unless, in the judgment of the sheriff of the county in which the felon was tried and the solicitor prosecuting the felon, it shall be deemed necessary for the safety and safekeeping of the convicted person or felon during the pendency of the appeal. (1909, c. 443, s. 3.)

Judgment Must Be Written and Signed by Trial Judge.—The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. State v. Jackson, 199 N. C. 321, 322, 154 S. E. 402.

Death Sentence without Reference to Crime.—A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commended is held sufficient. State v. Taylor, 194 N. C. 738, 140 S. E. 728.

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, under this section and §§ 4658, 4660, must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death by electrocution, the case will be remanded. State v. Langley, 204 N. C. 687.

When No Reference to Trial or Crime Is Made. — A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. State v. Edney, 202 N. C. 706, 707, 164 S. E. 23.

§ 4660. A guard or guards or other person to be named and designated by the warden to execute sentence.—Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be asphyxiated as provided by this article and all amendments thereto. The electrocution [asphyxiation] shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be electrocuted [asphyxiated] as provided by this article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars ($35.00). (1909, c. 443, s. 4; 1925, c. 123; 1935, c. 294, s. 3.)

Editor's Note.—Public Laws of 1935, chapter 294, provides that the word "electrocuted" first appearing in the section shall be deleted and the word "asphyxiated" substituted. The words appearing in brackets were inserted by the editor in order to maintain the sense of the section.

§ 4661. Certificate filed with clerk.—The warden, with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5.)

§ 4662. Notice of reprieve or new trial.—Should the condemned person, convict or felon be granted a reprieve by the governor or obtain a writ of error, or a new trial be granted by the supreme court of the state of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is

confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6.)

§ 4663. Judgment sustained on appeal, reprieve, time for execution.—In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State Penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; 1925, c. 55.)

§ 4664. New trial granted, prisoner taken to place of trial.—Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, then he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7.)

§ 4665. Disposition of body.—Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; 1925, c. 275, s. 6.)

CHAPTER 84

AGRICULTURE

Art. 1. Department of Agriculture

Part 1. Board of Agriculture

§ 4666. Constitutional provision.—The general assembly shall establish a department of agriculture, immigration, and statistics, under such regulations as may best promote the agriculture interests of the state, and shall enact laws for the adequate protection and encouragement of sheep husbandry. (Rev., s. 3930; Const., Art. III, s. 17.)

General Considerations. — This section is identical with (and consequently not in conflict with) the constitutional provision. Art. III, sec. 17, which is not self-executing, but mandatory upon the legislature, hence, its incorporation in this act. Cunningham v. Sprinkle. 124 N. C. 638, 33 S. E. 138.

Appointment of Members.—Members of the board of agriculture are not constitutional officers, but being of legislative creation, are within the power of legislative appointment. They are not exclusively, nor of necessity, within the power of executive appointment. Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138.

Actions against Board.—The board of agriculture is a department of the state government and an action cannot be maintained against it without the consent of the state. Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032.

§ 4667. Board of agriculture established; members; terms of office.—The department of agriculture, immigration, and statistics is hereby created and established and all the duties shall be performed by the commissioner of agriculture, as in this chapter provided for, with the advice of a board to be styled 'The Board of Agriculture.' The board of agriculture shall consist of the commissioner of agriculture, and five other members, said five other members to be appointed by the governor, by and with the consent of the senate. The commissioner of agriculture shall be the chairman of the board and shall preside at its meetings. In the appointment of the five members of the board, the governor shall take into consideration the different agricultural interests of the State and appoint one member who shall be a practical livestock grower to represent the livestock interests of the State; one who shall be a practical tobacco farmer to represent the tobacco farming interests; one who shall be a practical cotton grower to represent the cotton farming interests; one who shall be a practical truck farmer to represent the truck farming interests; and one who shall be a practical general farmer to represent all other general farming interests. The present governor, in appointing the five members to said board as herein provided for shall appoint three of said members for a term of two years and two of said members for a term of four years, and their successors shall be appointed for a term of four years.

All five members shall hold office until their successors are appointed and qualified. The commissioner of agriculture and the members of the board of agriculture shall be practical farmers engaged in their profession. (Rev., s. 3931; Code, s. 2184; 1901, c. 479, ss. 2, 4; 1907, c. 479, s. 1; 1931, c. 360, s. 1.)

Editor's Note.—The Act of 1931, which repealed the former section and substituted the above in lieu thereof, provided: "This Act shall in no degree be construed as affecting or limiting the authority of the Commissioner of Agriculture and the Board herein created to exercise all the authority and power now imposed upon the existing Commissioner of Agriculture and Board of Agriculture under the statutes, in relation to other subjects not specifically dealt with herein."

§ 4668. Compensation of members. — Each member of the board of agriculture shall receive five dollars for each day he attends a session of the board and for each day necessarily spent in traveling from and to his place of residence, and he shall receive also six cents a mile for the distance to and from Raleigh, by the usual direct route, for each meeting of the board which he attends, the same to be paid from the funds of the department. When attending any committee meeting each member of

the committee, other than the chairman, shall receive the same per diem and mileage as is fixed for attending meetings of the board. (Rev. s. 3932; 1901, c. 479, s. 3; 1919, c. 247, s. 10½.)

§ 4669. Meetings of board. — The board of agriculture shall meet for the transaction of business in the city of Raleigh at least twice a year, and oftener if called by the commissioner of agriculture. (Rev., s. 3935; 1901, c. 479, s. 3; 1921, c. 24; 1931, c. 360, s. 2.)

Editor's Note.—This section formerly set the specific date for one of the meetings on the second Wednesday in December. The Act of 1931 made no mention of any specific date.

§ 4670. Executive committee and finance committee.—The board shall elect from its numbers an executive committee of four, of which committee the commissioner shall also be ex officio a member and chairman. The board shall elect a finance committee of five from its numbers. The board shall prescribe the powers and duties of these committees, and the commissioner may call meetings of these committees whenever in his opinion such meetings are desirable for the good of the department. (Rev., s. 3936; 1907, c. 876, s. 1.)

§ 4671. Moneys received to be paid into state treasury.—All moneys arising from tonnage charges on fertilizers and fertilizing materials, inspection taxes on cottonseed meal and concentrated commercial feeding stuff, and from the sale of any property seized and condemned under the provisions of this chapter, and all other moneys which may come into the hands of the commissioner of agriculture or other officer, member or employee of the department of agriculture by virtue of this chapter, shall be paid into the state treasury by the commissioner of agriculture, and shall be kept on a separate account by the treasurer as a fund for the exclusive use and benefit of the department of agriculture. (Rev., s. 3937; Code, s. 2208; 1876-7, c. 174, s. 22.)

§ 4672. Power of board.—The board shall be empowered to hold in trust and exercise control over donations or bequests made to it for promoting the interests or purposes of the department; and shall have general supervision and control of the finances of the department; and shall regulate the salaries of all officers and employees other than those whose salaries are fixed by law. (Rev., s. 3933; 1901, c. 479, s. 3.)

As to operation of State Fair by board, see § 7534(dd).

§ 4673. May require bonds of officers.—Bonds may be required for such amounts as the board may think best for all officers of the department who handle funds. (Rev., s. 3934; 1901, c. 479, s. 14.)

§ 4674. Annual report.—The board shall annually make a report to the governor, to be transmitted by him to the general assembly the years when in session, of its work and matters relating thereto, which report shall contain a statement of all receipts and expenditures and the objects for which expended. (1907, c. 876, s. 2.)

Part 2. Commissioner of Agriculture

§ 4675. Election; term; vacancy.—The commissioner of agriculture shall be elected at the general election for other state officers, shall be voted for on the same ballot with such officers, and his term of office shall be four years, and until his successor is elected and qualified. Any vacancy in the office of such commissioner shall be filled by the governor, the appointee to hold until the next regular election to the office and the qualification of his successor. (Rev., s. 3938; 1901, c. 479, s. 4.)

§ 4676. To appoint secretary and other officials. —The commissioner of agriculture shall appoint a secretary and prescribe his duties, and shall appoint such employees as may be necessary to the efficient prosecution of the duties of the department of agriculture. He shall, subject to the approval of a majority of the board, appoint heads of divisions and their assistants. (Rev., s. 3939; 1901, c. 479, s. 4; 1913, c. 202.)

§ 4677. To investigate purchases, sources, and manufacture of fertilizer. — The commissioner of agriculture shall investigate all complaints made by purchasers of fertilizers, and render such services as he may be able in bringing about an adjustment and satisfactory settlement of such complaints. It shall be his duty to ascertain as near as may be the actual cost of blood tankage, fish-scrap, nitrate of soda, cotton-seed meal, and other materials from which ammonia or nitrogen is obtained; the cost of all phosphate rock, together with a description of the treatment with acids, the grinding and general manufacture of acid phosphate, and the actual cost thereof as near as may be, and to communicate with dealers, both in this country and in Germany, as to the cost of muriate of potash, kainit, and other sources of potash, and to publish the same in The Bulletin; but he shall not expose to the public the name of any manufacturer in this state who may give him information on this subject, nor shall he divulge any information concerning the private business of any corporation or company manufacturing fertilizers solely in this state: Provided, such corporation or company is not a part or branch of any trust or combination. He shall also make and publish in every fertilizer bulletin a price-list of the market value of all the materials of which fertilizers are made, and revise the same as often as may be necessary. (Rev., s. 3940; 1901, c. 479, s. 4.)

Part 3. Joint Committee on Agricultural Work

§ 4678. Committee authorized; membership; organization.—There is hereby authorized and legalized a joint committee to be known as "The Joint Committee for Agricultural Work," which shall be composed of four members of the board of agriculture and of four members of the board of trustees of the North Carolina State College of Agriculture and Engineering; and in addition thereto the governor of the state, the commissioner of agriculture, and the president of the North Carolina State College of Agriculture and Engineering shall be ex officio members of said committee. The governor shall be ex officio chairman of the committee. The committee may elect a chairman pro tem., who shall preside in the absence of the governor, and the committee shall

make a report annually to the governor on the work in its charge. (1917, c. 223, s. 1.)

§ 4679. Selection and term of members.—The four members of the joint committee from each of the two boards shall be designated by the board of which they are members respectively, and shall serve on the committee during their terms as members of the board, unless excused from such service by their respective boards. The members already designated by the two boards for service on this committee shall continue to serve during their terms as board members. (1913, c. 68, s. 2.)

§ 4680. Purpose of the committee.—It shall be the purpose of the joint committee for agricultural work to prevent duplication and to maintain greater co-operation on the part of the North Carolina State College of Agriculture and Engineering and the State Department of Agriculture, Immigration and Statistics; and the joint committee shall have authority to settle any and all questions relative to jurisdiction or duplication of work that may be referred to it by either the president of the college or the Commissioner of Agriculture, and the decision of the joint committee not inconsistent with the law shall be binding on both institutions. The joint committee shall meet at least once each year at the call of the chairman to receive reports from the president of the college and the Commissioner of Agriculture on the relation of the two institutions with special reference to the research or any other work in which the two institutions are interested, and to make recommendations to the governing bodies of each that may tend to increase their coöperation in promoting agricultural improvement in the State. (1913, c. 18, ss. 3, 4; 1925, c. 142, s. 1.)

Editor's Note.—The section as amended by the Public Laws of 1925 is entirely new in form, although the purpose of the committee remains substantially the same. The provision for meetings and their purpose, and for settling by the committee if questions referred to it are new. A sentence allowing the employment of workers was omitted.

§ 4681. Funds for research work.—After the Board of Agriculture has provided for the work of its several departments each year in accordance with law, the remainder of the funds received by the Department of Agriculture shall be apportioned for agriculture research work, including such experiments, investigations and tests as may be deemed important.

(a) For the year nineteen hundred and twenty-five-twenty-six, the sum of sixty thousand dollars shall be appropriated for research work to be conducted for the Department of Agriculture by the North Carolina State College of Agriculture and Engineering, this being approximately the amount appropriated by the Board of Agriculture to the college for the year nineteen hundred and twenty-four-twenty-five, and the amount that the Board of Agriculture agrees to appropriate to the college for research work for the fiscal year nineteen hundred and twenty-five-twenty-six.

(b) On or before July fifteenth, one thousand nine hundred and twenty-six, and each year thereafter, the State Board of Agriculture shall estimate the amount that shall be available for research work, including tests, experiments and investigations to be conducted by the college for the Department of Agriculture for the next ensuing year, and shall certify the amount to the president of the college: Provided, if the Board of Agriculture shall fail to certify the amount as provided in this subsection, the same amount appropriated to the college for the current year shall be appropriated for the next ensuing year.

(c) The joint committee on agricultural work shall determine how the funds appropriated to the college shall be disbursed and the Commissioner of Agriculture is authorized and directed to make requisitions on the State Treasurer payable to the treasurer of the college in the manner approved by the joint committee.

(d) The president of the college shall transmit annually to the Commissioner of Agriculture a report of the research and other work conducted by the college from funds derived from the Department of Agriculture. (1925, c. 142, s. 2; 1929, c. 253, s. 1.)

Editor's Note.—The entire section is new, the old section numbered 4681, being repealed and this one substituted by the legislature. It is in no sense amendatory.

The amendment of 1929, struck out "June first" from paragraph (b) of this section and substituted "July fifteenth."

Part 4. Powers and Duties of Department and Board

§ 4682. Agricultural experiment station and branch stations.—The work of investigation in agriculture required in this chapter may be designated by the board of agriculture as an agricultural experiment station, and the four test farms now in operation be and the same are hereby designated and established as branch experiment stations, to be conducted as at present under the auspices of the board of agriculture and out of its funds. (1907, c. 876, s. 5.)

For application of this section, see section 5825.

§ 4683. Sale and conveyance of test farms; use of proceeds.—The board of agriculture is hereby authorized and empowered to sell at the discretion of said board any land or lands which may be conveyed to the state or the department of agriculture for the purpose of conducting "test farms"; and that a deed, signed by the commissioner of agriculture and attested by the secretary of the board of agriculture in the name of the state and the board of agriculture, shall be sufficient to convey title to the purchaser or purchasers. The proceeds of any sale may be used by the board of agriculture in the work of the department, except so much of said money as may be necessary to reimburse any one who has contributed to the purchase money. This amount shall be returned to the contributors. (1909, c. 97; 1917, c. 45.)

§ 4683(a). Acquisition of test farm.—The Department of Agriculture is hereby authorized and empowered to acquire by purchase, gift, donation, or lease, a tract or boundary of land of not less than one hundred acres in the sandhill section of North Carolina, and in northeastern North Carolina composed of the counties of Currituck, Camden, Pasquotank, Perquimans, Chowan and Gates, to be developed and used as a "test farm" for the purposes of work investigation in agriculture.

Such "test farm" when acquired and established shall be operated, managed and controlled as other "test farms" in the State.

The sum of thirty thousand dollars ($30,000.00) for the biennium nineteen hundred and twenty-seven-nineteen hundred and twenty-eight and nineteen hundred and twenty-eight-nineteen hundred and twenty-nine is hereby appropriated to be paid out of the funds of the Agricultural Department from any funds not otherwise appropriated, for the Sandhill Section Test Farm, and that the sum of thirty thousand dollars ($30,000.00) for the biennium nineteen hundred and twenty-seven-nineteen hundred and twenty-eight and nineteen hundred twenty-eight-nineteen hundred twenty-nine, is hereby appropriated to be paid out of the funds of the Agricultural Department from any funds not otherwise appropriated, for the Northeastern North Carolina Test Farm for the purpose of carrying into effect the provisions of the section provided no moneys shall be expended under this section until such expenditure has been approved by the Governor and Council of State. (1927, c. 182, s. 1, 2, 3.)

§ 4684. State chemist; duties of office.—The department of agriculture shall employ an analyst or chemist, skilled in agricultural chemistry, and such assistants as may be necessary. It shall be the duty of the state chemist to analyze such fertilizers and products as may be required by this department, and to aid as far as practicable in suppressing fraud in the sale of commercial fertilizers. He shall also, under the direction of the department, analyze for citizens of the state such samples of ores, minerals, mineral and potable waters, soils, marls and phosphates as may be deemed by the department of benefit to the development of the material interests of the state, when such samples are supplied under rules by the department, and he shall carry on such other investigations as the department may direct. He shall make regular reports to the department of all analyses, assays, and experiments made, which shall be furnished when deemed needful to such newspapers as will publish the same. (Rev., s. 3941; 1901, c. 479, s. 11.)

§ 4685. Inoculating culture for leguminous crops.—The board of agriculture is hereby authorized to manufacture inoculating culture for leguminous crops and distribute it to the citizens of the state applying therefor at cost, the expense of manufacture and distribution to be paid for out of the receipts of the department of agriculture. (Ex. Sess. 1913, c. 43.)

§ 4686. Timber conditions to be investigated and reported.—The department of agriculture shall investigate and report upon the conditions of the timber in North Carolina, and recommend such legislation as will promote the growth thereof and preserve the same. (Rev., s. 3942; 1901, c. 479, s. 13).

§ 4687. State handbook; exhibits at expositions; agricultural premiums.—The department shall, as soon as practicable, prepare a convenient handbook, with the necessary illustrative maps, which shall contain all necessary information as to the mines, minerals, forests, soils, climates, waters and waterpowers, fisheries, mountains, swamps, industries, and all such statistics as are best adapted to give proper information of the attractions and advantages which this state affords to immigrants; and shall make an illustrative exposition thereof whenever practicable at international expositions; and shall have authority to offer premiums for the encouragement of agricultural and mechanical pursuits and the raising of improved live-stock in this state. (Rev., s. 3943; Code, s. 2199; 1876-7, c. 174, s. 15; 1883, c. 291, s. 4.)

§ 4688. Joint duties of commissioner and board.—The commissioner of agriculture, by and with the consent and advice of the board of agriculture, shall:

1. General.—Investigate and promote such subjects relating to the improvement of agriculture, the beneficial use of commercial fertilizers and composts, and for the inducement of immigration and capital as he may think proper; but he is especially charged—

2. Commercial Fertilizers.—With such supervision of the trade in commercial fertilizers as will best protect the interests of the farmers, and shall report to solicitors and to the general assembly information as to the existence or formation of trusts or combinations in fertilizers or fertilizing materials which are or may be offered for sale in this state, whereby the interests of the farmers may be injuriously affected, and shall publish such information in The Bulletin of the department;

3. Cattle and Cattle Diseases.—With investigations adapted to promote the improvement of milk and beef cattle, and especially investigations relating to the diseases of cattle and other domestic animals, and shall publish and distribute from time to time information relative to any contagious diseases of stock, and suggest remedies therefor, and shall have power in such cases to quarantine the infected animals and to regulate the transportation of stock in this state, or from one section of it to another, and may coöperate with the United States department of agriculture in establishing and maintaining cattle districts or quarantine lines, to prevent the infection of cattle from splenic or Spanish fever. Any person willfully violating such regulations shall be liable in a civil action to any person injured, and for any and all damages resulting from such conduct, and shall also be guilty of a misdemeanor;

4. Insect Pests.—With investigations relative to the ravages of insects and with the dissemination of such information as may be deemed essential for their abatement, and making regulations for destruction of such insects. The willful violation of any of such regulations by any person shall be a misdemeanor;

5. New Agricultural Industries.—With investigations and experiments directed to the introduction and fostering of new agricultural industries, adapted to the various climates and soils of the state, especially the culture of truck and market gardens, the grape and other fruits;

6. Drainage and Irrigation; Fertilizer Sources.—With the investigation of the subject of drainage and irrigation and publication of information as to the best methods of both, and what surfaces, soils, and locations may be most benefited by such improvements; also with the collection and publication of information in regard to localities, character, accessibility, cost, and modes of utilization of

native mineral and domestic sources of fertilizers, including formulæ for composting adapted to the different crops, soils, and materials;

7. Farm Fences.—With the collection of statistics relating to the subject of farm fences, with suggestions for diminishing their cost, and the conditions under which they may be dispensed with altogether;

8. Fish Culture.—With the supervision of all measures for the propagation and culture of fish in the rivers and inland waters of the state, and to this end may avail himself of such aid as the fish commission of the United States may be induced to extend, and shall offer such encouragement as may be within his power to induce such commission to establish within this state one of its fish hatcheries, and secure the liberation within the waters of this state of the spawn or fry of such fish as are best suited to our inland streams; he may inquire into the practicability of constructions of fishways over the dams and other obstructions of the waters of the state and secure as far as possible the co-operation of mill owners, and with the enforcement of the provisions of law in reference to the free passage of fish through certain waterways in the state;

9. Sales of Fertilizers, Seeds, and Food Products.—With the enforcement and supervision of the laws which are or may be enacted in this state for the sale of commercial fertilizers, seeds and food products, and with authority to make regulations concerning the same;

10. Inducement of capital and immigration by the dissemination of information relative to the advantages of soil and climate and to the natural resources and industrial opportunities offered in this state, by the keeping of a land registry and by the publication of descriptions of agricultural, mineral, forest, and trucking lands which may be offered the department for sale; which publication shall be in tabulated form, setting forth the county, township, number of acres, names and addresses of owners, and such other information as may be needful in placing inquiring home-seekers in communication with landowners; and he shall publish a list of such inquiries in the Bulletin for the benefit of those who may have land for sale;

11. Diversfied Farming.—With such investigations as will best promote the improvement and extension of diversified farming, including the rotation of crops, the raising of home supplies, vegetables, fruits, stock, grasses, etc.;

12. Farmers' Institutes.—With the holding of farmers' institutes in the several counties of the state, as frequently as may be deemed advisable, in order to instruct the people in improved methods in farming, in the beneficial use of fertilizers and composts, and to ascertain the wants and necessities of the various farming communities; and may collect the papers and addresses made at these institutes and publish the same in pamphlet form annually for distribution among the farmers of the state. He may secure such assistants as may be necessary or beneficial in holding such institutes.

13. Publication of Bulletin.—The commissioner shall publish bulletins which shall contain a list of the fertilizers and fertilizing materials registered for sale each year, the guaranteed constituents of each brand, reports of analyses of fertilizers, the dates of meeting and reports of farmers' institutes and similar societies, description of farm buildings suited to our climate and needs, reports of interesting experiments of farmers, and such other matters as may be deemed advisable. The department may determine the number of bulletins which shall be issued each year.

14. Reports to Legislature.—He shall transmit to the general assembly at each session a report of the operations of the department with suggestions of such legislation as may be deemed needful.

15. State Museum.—He shall keep a museum or collection to illustrate the cultural and other resources and the natural history of the state. (Rev., ss. 3294, 3724, 3944; 1901, c. 479, s. 4; 1917, c. 16.)

Constitutionality.—Legislation of this character has been upheld by well considered decisions in this and other jurisdictions. Morgan v. Stewart, 144 N. C. 424, 428, 57 S. E. 149.

Same—Not a Delegation of Legislative Power.—Congress cannot delegate legislative power (Field v. Clark, 143 U. S. 949, 692, 36 L. Ed. 294, 12 S. Ct. 495,) but the authority to make administrative rules is not a delegation of legislative power and such rules do not become legislation, because violations thereof are punished as "public offenses." United States v. Grinnand, 220 U. S. 506, 31 S. Ct. 480; State v. Sou. R. Co., 141 N. C. 486, 54 S. E. 294.

Cattle and Cattle Diseases.—The State Board of Agriculture has authority to make and enforce regulations for the quarantine of cattle and to prevent there transporation in view of preventing the spreading of contagious diseases. State v. Garner, 158 N. C. 630, 74 S. E. 458. And an owner permitting cattle to run at large in a no-fence county who wilfully allows cattle to stray across the line is guilty of a violation of the act. Id.

The third clause of this section confers power upon the commissioner to make regulations prohibiting the transportation of cattle. State v. Southern R. Co., 141 N. C. 846, 54 S. E. 294.

The provision to get rid of the ticks on cattle and prevent infection, is a reasonable and valid regulation. State v. Hodges, 180 N. C. 751, 105 S. E. 417.

Same—Judicial Notice of Quarantined District.—Where the quarantine regulations of the United States Department of Agriculture, relating to the transportation of cattle, which were adopted by the State Board of Agriculture, provided that no cattle originating in the quarantined district as therein described should be moved into "that part of Burke south of the Catawba River," this Court judicially knows that a shipment of cattle from Burlington to Morganton has been across the line fixed as a quarantine line. State v. Sou. R. Co., 141 N. C. 846, 54 S. E. 294.

§ 4688(a). Executive duties transferred from board to commissioner of agriculture.—In all laws, rules and regulations passed by the General Assembly of North Carolina and placed in the State Department of Agriculture for enforcement, where the context clearly states or implies the invocation of executive authority or executive action, such as selecting the workers of the department and appointing same, the execution of the regulations of the Board of agriculture and the enforcing of the laws of the General Assembly, and any other duties that are clearly executive in their nature, the words, "Board of Agriculture," whenever they occur in such connection, shall be and are hereby changed to "Commissioner of Agriculture" in all cases where executive and not legislative action is clearly indicated. (1925, c. 174, s. 1.)

Part 5. Coöperation of Federal and State Governments in Agricultural Work

§ 4689. Legislative assent to Adams act for experiment station.—Legislative assent be and the same is hereby given to the purpose of an act of

congress approved March sixteenth, one thousand nine hundred and six, entitled "An act to provide for an increased annual appropriation for agricultural experiment stations, and regulating the expenditure thereof," known as the Adams act, and the money appropriated by this act be and the same is hereby accepted on the part of the state for the use of the agricultural experiment station, and the whole amount shall be used for the benefit of the said agricultural experiment station, in accordance with the act of congress making appropriations for agricultural experiment stations and governing the expenditure thereof. (1907, c. 793.)

As to control of the experiment station, see section 5825.

Part 6. Coöperation Between Department and United States Department of Agriculture, and County Commissioners

§ 4689(a). Coöperation in gathering information; blanks for statistics.—The commissioner of agriculture is authorized to conduct coöperative work with the United States department of agriculture and the county commissioners in gathering and disseminating information concerning agriculture. It shall be the duty of the said commissioner and the agricultural statistician to prepare and supply to the several tax-listers of the state the necessary printed forms and papers which are necessary in gathering of such agricultural statistics as the said commissioner of agriculture may require, and to issue them to the various tax-listers of the state through the county auditor or register of deeds. (1921, c. 201, s. 1.)

§ 4689(b). Instructions to tax-listers as to securing information; notice.—The county auditor or register of deeds shall include in his instructions to the tax-listers information for the securing of such statistical information. He shall give notice in all county newspapers, and in the advertisements for listing of taxes that each farmer shall be prepared to report the acreage of each crop grown to the tax-lister. (1921, c. 201, s. 2.)

§ 4689(c). Tax-listers' duties.—The tax-listers shall proceed to gather such statistics as the said commissioner of agriculture and the agricultural statistician may require, and the forms and reports when so completed, shall be returned to the department of agriculture on or before the third day of June and of July next ensuing. (1921, c. 201, s. 3.)

§ 4689(d). Failure to perform duties a misdemeanor; punishment.—The failure to properly perform any of the duties herein set forth shall be a misdemeanor, and subject to the penalties prescribed for such by law. (1921, c. 201, s. 4.)

Art. 1A. North Carolina Fertilizer Law of 1933

§ 4689(1). Title.—This article shall be known by the short title of "The North Carolina fertilizer law of one thousand nine hundred and thirty-three." (1933, c. 324, s. 1.)

§ 4689(2). Enforcing official.—This article shall be administered by the commissioner of agriculture of the state of North Carolina, hereinafter referred to as the "commissioner." (1933, c. 324, s. 2.)

§ 4689(3). Definitions.—When used in this article:

(a) The word "person" includes individuals, partnerships, associations and corporations.

(b) Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular.

(c) The word "and" may be construed to mean "or," and the word "or" may be construed to mean "and."

(d) The term "manufacturer" means a person engaged in the business of preparing, mixing or manufacturing mixed fertilizers or fertilizer materials; and the term "manufacture" means preparation, mixing or manufacturing.

(e) The word "sell" or "sale" includes exchange.

(f) The term "fertilizer material" means any substance containing nitrogen, phosphoric acid or potash or combinations of these ingredients in forms available to plants, which is or may be used with another such substance in the compounding of mixed fertilizers or for direct application to the soil, excepting unmanipulated animal manures and vegetable products. The materials covered in paragraph (e) of section 4 shall be considered as fertilizer materials but not suitable for use in mixed fertilizers. Unless such materials are animal products which in addition to phosphoric acid contain nitrogen in forms available as plant food.

(g) The term "mixed fertilizer" means any combination or mixture of fertilizer materials, except as noted in paragraph (f) of this section, designed and fitted for use in inducing crop yields or plant growth when applied to the soil.

(h) The term "brand name" means the name under which any individual mixed fertilizer or fertilizer material is offered for sale and may include a number, trade mark, or other designation.

(i) The term "grade" means the minimum percentages of total nitrogen (N); phosphoric acid (P_2O_5) in available form (comprising the water and citrate soluble phosphoric acid) except as provided for in paragraph (e) of section 4; and potash (K_2O) soluble in water. These are to be stated in this order and, when applied to mixed fertilizers, in whole numbers only.

(j) The term "official sample" means any sample of mixed fertilizer or fertilizer material registered under this act which is taken by an authorized inspector of the department of agriculture according to the methods prescribed under section 9, paragraphs (b), (c), (d), (e) and (f).

(k) The word "ton" means a ton of 2000 pounds avoirdupois.

(l) The term "per cent" or "percentage" means the percentage by weight.

(m) The term "filler" shall mean any material that may be added to a mixed fertilizer or fertilizer material for any purpose other than the addition of available plant food.

(n) The word "formula" as used in this article means a statement of all the materials used in compounding the mixed fertilizer and the amount of each of such materials used in a ton, or a statement of the pounds or fractional parts of the nitrogen, available phosphoric acid and potash that are derived from each fertilizer material used. When the formula of any mixed fertilizer is

printed on a tag attached to the container this constitutes an open formula.

(o) The term "plant food" as used in this article shall mean the nitrogen, phosphoric acid or potash content of materials occurring in fertilizers. (1933, c. 324, s. 3.)

§ 4689(4). Registration.—(a) It shall be unlawful for any person, acting for himself, or as agent, to sell or offer for sale within the state any mixed fertilizer or fertilizer material that has not been registered as required by this section.

(b) Any person who may desire to sell or offer for sale, either by himself or through another person, mixed fertilizer or fertilizer material in this state shall first file with the commissioner on registration forms supplied by him a signed statement, giving the name and address of the applicant, and the following information with respect to each brand, grade or analysis, in the following order:

(1) Weight of each package in pounds.

(2) Brand name.

(3) Guaranteed analysis showing the minimum percentages of plant food in the following order:

A—In mixed fertilizers:

Total nitrogen, per cent (whole numbers only);

Water insoluble nitrogen, per cent;

Available phosphoric acid, per cent (whole numbers only);

Water soluble potash, per cent (whole numbers only).

B—In mixed fertilizers branded for tobacco:

Total nitrogen, per cent (whole numbers only);

Nitrogen in the form of nitrate, per cent;

Water insoluble nitrogen, per cent;

Available phosphoric acid, per cent (whole numbers only);

Water soluble potash, per cent (whole numbers only); and the maximum percentage of chloride expressed as:

Chlorine, per cent.

C—In fertilizer materials:

Total nitrogen, per cent;

Nitrogen in the form of nitrate, per cent;

Available phosphoric acid, per cent;

Water soluble potash, per cent.

(4) The name and address of the person guaranteeing the registration.

(5) The sources from which such nitrogen, phosphoric acid, and potash are derived.

(6) Whether or not the brand will be sold with an open formula.

(c) The grade of any brand of mixed fertilizer shall not be changed during the year for which registration is made, but the guaranteed analysis may be changed in other respects and the sources of materials may be changed, provided prompt notification of such change is given to the commissioner and the change is noted on the container.

(d) The person offering for sale or selling any brand of mixed fertilizer or fertilizer material shall not be required to register the same if it has already been registered under this article by a person entitled to do so and such registration is then outstanding.

(e) In the case of bone, tankage, mineral phosphates or other unacidulated phosphatic fertilizer materials in which the phosphoric acid is not shown by laboratory methods to be available but eventually becomes available in the soil, the phosphoric acid may be guaranteed as total phosphoric acid. If the term available phosphoric acid be used in the statement of analyses, it shall mean the sum of the water soluble and citrate soluble phosphoric acid, except that when applied to basic slag phosphates the term available shall mean that part of the phosphoric acid found available by the Wagner citric acid method as adopted by the association of official agricultural chemists.

(f) In no case shall the term total phosphoric acid and available phosphoric acid be used in the same statement of analysis.

(g) Registration of mixed fertilizers or fertilizer materials shall be effective from the date of registration to and including December thirty-first of the same year. (1933, c. 324, s. 4.)

§ 4689(5). Marking. — (a) Each person who sells or offers for sale mixed fertilizer or fertilizer material in this state shall mark upon each container or associate with each shipment or some document relative thereto the information required by items (1) to (4), both inclusive, of paragraph (b) and by paragraph (e) of section 4689-(4). Said information may either be branded or printed directly on the bag or other shipping container, or may be printed on a tag, label or certificate which shall be affixed to the shipping container or otherwise associated with the shipment as provided for in this section.

(b) If shipped in bags, barrels or other containers commonly used, said information shall be printed (1) either directly on the package, or (2) on tags to be affixed to the package by the manufacturer.

(c) If shipped in bulk by rail, said information shall be printed on a suitable label which shall be fastened on the inside wall of the car near the door.

(d) If shipped in bulk by boat, truck, wagon, or other vehicle, said information shall be attached to the copy of the invoice delivered to the purchaser or other receiver.

(e) If shipped in packages weighing five pounds or less, said information may be printed on the container in which the material is delivered to the purchaser, or upon a common shipping container in which the smaller packages are shipped.

(f) If the fertilizer is not registered for sale with an open formula, there may be attached to the bag or container a tag showing the sources from which the plant food is derived and any other information, which in the opinion of the commissioner accurately describes the materials used: Provided, that if any nitrate is claimed as an ingredient, the percentage of nitrate nitrogen shall be guaranteed on this tag.

(g) If the fertilizer is registered for sale with an open formula it is required that a separate tag be attached to the container which tag shall state only the formula, the brand name and the name and address of the person guaranteeing the registration.

(h) The statement on the open formula tag shall constitute a guarantee of the kinds and amounts of fertilizer materials in the container to which the tag is attached.

(i) If the analysis of any brand of fertilizer

sold or offered for sale with an open formula shall show that this statement is false, the commissioner may revoke the right to sell or offer for sale such brand with an open formula for a period of two years.

(j) Any manufacturer or other producer who shall have suffered three such revocations in any two-year period shall not be permitted to register any brand with an open formula for two years following the last revocation.

(k) The tags, labels or certificates, required by this section, shall be furnished by the manufacturer. (1933, c. 324, s. 5.)

§ 4689(6). Use of the term "high grade."—(a) The words "high grade" shall not appear upon any bag or other container of any mixed fertilizer which contains, by the guaranteed analysis, a total of less than twenty(20) per cent of available plant food. (1933, c. 324, s. 6.)

§ 4689(7). Tonnage tax.—(a) Inspection Tax on Fertilizer; Tax Tags.—For the purposes of defraying expenses of the inspection and of otherwise determining the value of mixed fertilizers and fertilizer materials in this state, there shall be paid to the department of agriculture a charge of twenty cents per ton on such mixed fertilizers and fertilizer materials, except those which are sold to a manufacturer for the sole purpose of use in the manufacture of fertilizers, which charge shall be paid before a delivery is made to agents, dealers, or consumers in this state. Each bag, barrel, or other container of such mixed fertilizer or fertilizer material shall have attached thereto a tag to be furnished by the department of agriculture stating that all charges specified in this section have been paid, and the commissioner, with the advice and consent of the board, is hereby empowered to prescribe a form for such tags, and to adopt such regulations as will insure the enforcement of this law. Whenever any manufacturer of mixed fertilizer or fertilizer material shall have paid the charges required by this section, his goods shall not be liable to further tax, whether by city, town, or county: Provided, this shall not exempt the mixed fertilizer or fertilizer material from an ad valorem tax.

(b) Issuance of Tax Tags.—The tax tags required under this section shall be issued each year by the commissioner and be sold to persons applying for the same at the tax rate provided in paragraph (a) of this section. Tags left in the possession of persons registering mixed fertilizers or fertilizer materials at the end of any calendar year may be exchanged for tags of the succeeding year.

(c) Tax Tags on Shipments in Bulk.—If any manufacturer, dealer, agent or other seller of fertilizer shall desire to ship in bulk any mixed fertilizer or fertilizer materials, the said manufacturer or seller of fertilizer shall send with the bill of lading sufficient tax tags to pay the tax on the amount of goods shipped, and the agent of the railroad or other transportation company shall deliver the tags to the consignee when the goods are delivered. (1933, c. 324, s. 7.)

§ 4689(8). Inspection.—It shall be the duty of the commissioner, personally or by agents, duly authorized in writing, to make such inspection of mixed fertilizer or fertilizer material in this state, to have such samples taken, and to have such analyses made as in his judgment may be necessary to ascertain whether or not persons offering, selling or distributing mixed fertilizer or fertilizer material are complying with the provisions of this article. (1933, c. 324, s. 8.)

§ 4689(9). Official sample; liability for deficiency or damage.—(a) Samples of mixed fertilizer or fertilizer material complying with the definition set forth in paragraph (j) of section 4689(3) and taken as hereafter prescribed in paragraphs (b), (c), (d), (e) and (f) of this section shall constitute official samples.

(b) For purposes of analysis by the commissioner or his duly authorized chemists and for comparison with the guarantee supplied to the commissioner in accordance with sections 4689(4) and 4689(5), the commissioner, or an official inspector duly appointed by him, shall take an official sample of not less than one pound from containers of mixed fertilizer or fertilizer material. No sample shall be taken from less than five (5) containers. If the lot comprises five (5) or more containers, portions shall be taken from each one up to a total of ten (10) containers and if there are more than ten (10) containers one additional portion shall be taken from each additional ton or fraction thereof included in the lot.

(c) In sampling mixed fertilizers or fertilizer materials in bulk, either in a factory or a car, at least ten portions shall be drawn and these from different places so as fairly to represent the pile or car lot.

(d) In sampling, a core sampler shall be used that removes a core from the bag or other package from top to bottom, and the cores taken shall be mixed on clean oil cloth or paper, and if necessary shall be reduced after thoroughly mixing, by quartering, to the quantity of sample required. The composite sample taken from any lot of mixed fertilizer or fertilizer material under the provision of this paragraph shall be placed in a tight container and shall be forwarded to the commissioner with proper identification marks.

(e) The commissioner may modify the provisions of this section to bring them into conformity with any changes that may hereafter be made in the official methods of and recommendations for sampling mixed fertilizers or fertilizer materials which shall have been adopted by the association of official agricultural chemists. Thereafter, such methods and recommendations shall be used in all sampling done in connection with the administration of this article in lieu of those prescribed in paragraphs (b), (c) and (d) of this section.

(f) All samples taken under the provisions of this section shall be taken from original unbroken bags or containers, the contents of which have not been damaged by exposure, water, or otherwise.

(g) The commissioner shall refuse to analyze all samples except such as are taken under the provisions of this section and of section 4689(10).

(h) No suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought unless it shall be shown

by an analysis of a sample taken and analyzed, in accordance with the provisions of this article, that the said lot of fertilizer as represented by a sample or samples taken in accordance with the provisions of this section and section 4689(10) do not conform to the provisions of this article with respect to the composition of the mixed fertilizer or fertilizer material, unless it shall appear to the commissioner that the manufacturer of the fertilizer in question has, in the manufacture of other goods offered in this state during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the commissioner that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods.

(i) In the trial of any suit or action wherein there is called in question the value of composition of any lot of mixed fertilizer or fertilizer material, a certificate signed by the fertilizer chemist and attested with the seal of the department of agriculture, setting forth the analysis made by the chemists of the department of any sample of said mixed fertilizer or fertilizer material, drawn under the provisions of this section or section 4689(10) and analyzed by them under the provisions of the same, shall be prima facie proof that the fertilizer was of the value and constituency shown by said analysis. And the said certificate of the chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. (1933, c. 324, s. 9.)

§ 4689(10). Samples by purchaser or consumer.—Any purchaser or consumer may take and have a sample of mixed fertilizer or fertilizer material analyzed if taken in accordance with the following rules and regulations:

(a) At least five (5) days before taking a sample, the purchaser or consumer shall notify the manufacturer or seller of the brand in writing, at his permanent address, of his intention to take such a sample and shall request the manufacturer or seller to designate a representative to be present when the sample is taken.

(b) The sample shall be drawn in the presence of the manufacturer, seller or a representative designated by either party together with two disinterested freeholders; or in case the manufacturer, seller or representative of either refuses or is unable to witness the drawing of such a sample, a sample may be drawn in the presence of three disinterested freeholders: Provided, any such sample shall be taken with the same type of sampler as used by the inspector of the department of agriculture in taking samples and shall be drawn, mixed and divided as directed in paragraphs (b), (c), (d), (e) and (f) of section 4689(9), except that the sample shall be divided into two parts each to consist of at least one (1) pound. Each of these is to be placed into a separate, tight container, securely sealed, properly labeled and one sent to the commissioner for analysis and the other to the manufacturer. A certified statement in a form which will be prescribed and supplied by the commissioner must be signed by the parties taking and witnessing the taking of the sample. Such certificate is to be made and signed in duplicate and one copy sent to the commissioner and the other to the manufacturer or seller of the brand sampled. The witnesses of the taking of any sample, as provided for in this section, shall be required to certify that such sample has been continuously under their observation from the taking of the sample up to and including the delivery of it to an express agency, a postoffice or to the office of the commissioner. No sample may be taken under the provisions of this section except within thirty (30) days after the actual delivery to the consumer.

(c) Samples drawn in conformity with the requirements of this section shall have the same legal status in the courts of the state as those drawn by an official inspector of the department as provided for in section 4689(9). (1933, c. 324, s. 10.)

§ 4689(11). Chemical analyses.—(a) The commissioner shall have the power at all times and in all places to have collected by an authorized inspector samples of any mixed fertilizer or fertilizer material offered for sale in the state and to have the same analyzed.

(b) The official methods of analysis prescribed by the association of official agricultural chemists shall be followed in making the chemical analyses provided for in this section. (1933, c. 324, s. 11.)

§ 4689(12). Plant food deficiency.—(a) Whenever the commissioner shall be satisfied that any fertilizer is five (5) per cent and not more than ten (10) per cent in value below the analysis guaranteed under section 4689(4) or claimed by the marking required under section 4689(5) in the total value of the sum of the nitrogen, phosphoric acid and potash, it shall be his duty to require that twice the value of the deficiency be paid by the manufacturer of such mixed fertilizer or fertilizer material to any person who purchases for his own use said deficient analysis fertilizer; and should any fertilizer fall more than ten (10) per cent below the value of the guaranteed plant food, it shall be the duty of the commissioner to assess three times the value of such deficiency against the manufacturer of the mixed fertilizer or fertilizer material and require the same to be paid to the consumer of such mixed fertilizer or fertilizer material, and the commissioner may seize any fertilizer belonging to such manufacturer if the deficiency shall not be paid within thirty (30) days after notice to such manufacturer. If the commissioner shall be satisfied that such deficiency in plant food was due to the intention of the manufacturer of the same to defraud, then he shall assess and collect from the said manufacturer double the amount which he would have assessed and collected as hereinbefore provided, and pay the same over to the consumer of such mixed fertilizer or fertilizer material. Any excess of any ingredient above the guarantee shall not be credited to the deficiency of any other ingredient if the deficiency is more than fifteen (15) per cent; and the penalty for deficiencies arising in this connection shall be four times the value of such deficiencies, such deficiencies to be assessed and paid as hereinbefore provided. In fixing the penalties mentioned in this section, or any other sections of this article, the commissioner shall es-

timate them by the wholesale price at the factory at the time of contract. If any manufacturer shall resist such collection or payment the commissioner shall immediately publish the analysis and facts in the bulletin, and in one or more newspapers in the state, to be selected by him: Provided, that if the analysis made by the chemists of the department shall show more than twelve and one-half (12.5) per cent deficiency in the whole, the purchaser may, in lieu of accepting the penalty as provided by law, cancel the contract or purchase; but he must within five (5) days after receipt of said analysis notify the seller of his intention to cancel the contract and his refusal to keep the said fertilizer.

(b) The commissioner, in determining for administrative purposes whether or not any mixed fertilizer or fertilizer material is deficient in plant food, shall be guided solely by the official sample as defined in section 4689(3) and as provided for in paragraphs (b), (c), (d), (e) and (f) of section 4689(9) and the samples taken under the provisions of section 4689(10). (1933, c. 324, s. 12.)

§ 4689(13). Chlorine content. — If the chlorine content of any lot of fertilizer as found by official analysis shall exceed the maximum percentage by more than twenty-five (25) per cent of the guaranteed amount and not more than fifty (50) per cent, the person guaranteeing the registration, or his agent, shall be liable for a penalty equal to ten (10) per cent of the value of the lot of fertilizer from which the sample was taken. If the excess of chlorine is more than fifty (50) per cent and not more than one hundred (100) per cent the penalty shall be twenty (20) per cent of the value, and if the excess is more than one hundred (100) per cent the penalty shall be fifty (50) per cent of the value of the lot of fertilizer from which the sample was taken. All penalties assessed under this section shall be paid to the purchaser or consumer of the lot of fertilizer represented by the sample analyzed. (1933, c. 324, s. 13.)

§ 4689(14). Commercial value. — The approximate retail value per pound and per unit of the various ingredients of mixed fertilizers and fertilizer materials, namely, nitrogen, phosphoric acid and potash, may be computed by the commissioner and be used to establish the relative value of the mixed fertilizers and fertilizer materials sold or offered for sale in this state. The commissioner is authorized to furnish such relative values to any persons engaged in the manufacture or sale of mixed fertilizers or fertilizer materials in this state upon application and to publish the same under the provisions of section 4689(21). (1933, c. 324, s. 14.)

§ 4689(15). Minimum plant food content.—(a) No superphosphate, no fertilizer with a guarantee of two plant food ingredients, or no complete mixed fertilizer shall be sold or offered for sale for fertilizer purposes within this state, which contains less than 14 per cent of plant food, excepting potash in combination with lime which shall contain not less than two (2) per cent of potash soluble in water. This shall not apply to natural animal or vegetable products not mixed with other materials.

(b) No nitrate of soda containing less than fourteen and one-half (14.5) per cent of nitrogen and no sulphate of ammonia containing less than nineteen and one-half (19.5) per cent of nitrogen shall be registered, sold or offered for sale in this state.

(c) This section shall not apply to the sale or offer for sale of fertilizer materials to a fertilizer manufacturer for manufacturing purposes. (1933, c. 324, s. 15.)

§ 4689(16). Fillers.—It shall be unlawful for any person to manufacture, offer for sale or sell in this state any mixed fertilizer or fertilizer material containing any substance used as a filler that is injurious to crop growth or deleterious to the soil, or to use in such mixed fertilizer or fertilizer material as a filler any substance that contains inert plant food material or any other substance for the purpose or with the effect of deceiving or defrauding the purchaser. (1933, c. 324, s. 16.)

§ 4689(17). Materials containing unavailable plant food.—(a) It shall be unlawful for any person to offer for sale or to sell in this state for fertilizer purposes any raw or untreated leather, hair, wool, waste, hoof, horn, or similar nitrogenous materials, the plant food content of which is largely unavailable, either as such or mixed with other fertilizer materials.

(b) This section shall not apply to the substances mentioned in paragraph (a) when they have been treated or processed in such manner as to make available the plant food constituents contained therein.

(c) This section shall not apply to the substances mentioned in paragraph (a) which are shipped, offered for sale or sold to manufacturers of fertilizer. (1933, c. 324, s. 17.)

§ 4689(18). Deception and fraud.—It shall be unlawful for any person to make any false or misleading representation in regard to any mixed fertilizer or fertilizer material shipped, sold or offered for sale by him in this state, or to use any misleading or deceptive trade mark or brand name in connection therewith. The commissioner is hereby authorized to refuse registration for any mixed fertilizer or fertilizer material with respect to which this section is violated. The sale or offer for sale of any mixture of nitrogenous fertilizer materials under a name or other designation descriptive of only one of the components of the mixture shall be considered deceptive or fraudulent. (1933, c. 324, s. 18.)

§ 4689(19). Sales of materials to consumers. — Nothing in this article shall abridge the right of a consumer of mixed fertilizer or fertilizer material to buy materials from any manufacturer or dealer for his own use: Provided, the tonnage tax has been paid thereon, if subject thereto, and that the provisions of this article otherwise in respect to such materials have been complied with. (1933, c. 324, s. 19.)

§ 4689(20). Reports of shipments. — It is required of each person registering mixed fertilizers and fertilizer materials under this article that he furnish the commissioner with a written statement of the tonnage of each grade of fertilizer sold by him in this state. Said statements shall include

all sales for the periods of January first to and including June thirtieth and of July first to and including December thirty-first of each year. These statements are to be made within 30 days of the expiration dates of each of these periods. (1933, c. 324, s. 20.)

§ 4689(21). Publications.—The commissioner is authorized to publish at such time and in such form as he may deem proper information concerning the production and use of mixed fertilizers and fertilizer materials, and shall publish an annual report which shall contain a statement of money received and expended from the sale of tax tags and appropriately classified statistics of fertilizer sales in the state. Reports of the department chemists' findings based on official samples of mixed fertilizer or fertilizer material sold within the state as compared with the guaranteed analyses registered under sections 4689(4) and 4689(5) shall be published by the commissioner as promptly as possible after the completion of analyses, or at least annually. (1933, c. 324, s. 21.)

§ 4689(22). Regulations.—For the enforcement of this article, the commissioner is authorized to prepare and issue such regulations as may be necessary, and to coöperate with any department or agency of the government of the state as he may elect in their enforcement. (1933, c. 324, s. 22.)

§ 4689(23). Misdemeanors.—Each of the following offenses shall be a misdemeanor and any person upon conviction thereof shall be punished as provided by law for the punishment of misdemeanors:

(a) The violation of any one of the following provisions of this article: Section 4689(16); paragraph (a) of section 4689(17); and section 4689(18).

(b) The filing with the commissioner of any false statement of fact in connection with the registration under section 4689(4) of any mixed fertilizer or fertilizer material.

(c) Forcibly obstructing the commissioner or any official inspector authorized by the commissioner in the lawful performance by him of his duties in the administration of this article.

(d) Knowingly taking a false sample of mixed fertilizer or fertilizer material for use under any provision of this article; or knowingly submitting to the commissioner for analysis a false sample thereof; or making to any person any false representation with regard to any mixed fertilizer or fertilizer material sold or offered for sale in this state for the purpose of deceiving or defrauding such other person.

(e) The fraudulent tampering with any lot of mixed fertilizer or fertilizer material so that as a result thereof any sample of such mixed fertilizer or fertilizer material taken and submitted for analysis under this article may not correctly represent the lot; or tampering with any sample taken or submitted for analysis under this article, if done prior to such analysis and disposition of the sample under the direction of the commissioner.

(f) The delivery to any person by the fertilizer chemist or his assistants or other employee of the commissioner of a report that is willfully false and misleading on any analysis of mixed fertilizer or fertilizer material made by the department in connection with the administration of this article. (1933, c. 324, s. 23.)

§ 4689(24). Penalties for unauthorized sale, sale without tax tags, and misuse of tax tags:

(a) Forfeiture for Unauthorized Sale, Release from Forfeiture.—All fertilizers and fertilizer materials sold or offered for sale contrary to the provisions of this article as stated in paragraphs (a), (c) and (f) of section 4689(4); (a), (b), (c), (d), (e), (f) and (g) of section 4689(5) and section 4689(6) shall be subject to seizure, condemnation, and sale by the commissioner. The net proceeds of such sale shall be placed to the credit of the state treasurer for the use of the department of agriculture. The commissioner, however, may in his discretion, release the fertilizers so seized and condemned upon payment of the required tax or charge, a fine of ten dollars ($10.00), and all costs and expenses incurred by the department in any proceeding connected with such seizure and condemnation, and upon compliance with all other requirements of this article.

(b) Method of Seizure and Sale of Forfeiture.—Such seizure and sale shall be made under the direction of the commissioner by any officer or agent of the department. The sale shall be made at the courthouse door in the county in which seizure is made, after thirty (30) days' advertisement in some newspaper published in such county, or if no newspaper is published in such county, then by like advertisement in a newspaper published in the nearest county thereto having a newspaper. The advertisement shall state the brand name or name of the goods, the quantity, and why seized and offered for sale.

(c) Sale without Tag; Misuse of Tag; Penalty; Forfeiture.—Every merchant, trader, manufacturer, broker, or agent who shall sell or offer for sale any mixed fertilizer or fertilizer material without having attached thereto such tags as are required by paragraphs (a) and (c) of section 4689(7), or who shall use the required tags a second time to avoid the payment of the tonnage charge, and every person who shall aid in the fraudulent selling or offering for sale of any such fertilizer, shall be liable to a penalty of the price paid the manufacturer for each separate bag, barrel, or package sold, or offered for sale, or removed, said penalty to be recovered by the commissioner by suit brought in the name of the state, and any amount so recovered shall be paid, one-half to the informer and one-half to the state treasurer for the use of the department of agriculture. If any such fertilizer shall be condemned as provided by law, it shall be the duty of the commissioner to have an analysis made of the same and cause printed tags or labels expressing the true chemical ingredients thereof to be put upon each tag, barrel, or package, and shall fix the commercial value at which it may be sold. It shall be unlawful for any person to sell or offer for sale or remove any such fertilizer or for any agent of any railroad or other transportation company to deliver any such fertilizer in violation of this section. Any person who shall sell or offer for sale or remove any fertilizer in violation of the provisions of this section shall be guilty of a misdemeanor. (1933, c. 324, s. 24.)

Art. 2. Commercial Fertilizers

§ 4690. Packages to be branded with specified particulars; copy to be filed.—All persons, companies, manufacturers, dealers, or agents, before selling or offering for sale in this state any commercial fertilizer or fertilizer material, shall brand or attach to each bag, barrel, or package, the brand name of the fertilizer, the weight of the package, the name and address of the manufacturer, and the guaranteed analysis of the fertilizer, giving the valuable constituents of the fertilizer in minimum percentages only, and also the sources of nitrogen or ammonia and potash: Provided, that the materials supplying nitrogen or ammonia shall be divided into two classes, namely, mineral and organic; and the percentage of nitrogen or ammonia coming from either of these classes shall be guaranteed, but allowing a variability of one-fourth of one per cent for goods containing two per cent of ammonia or under, and a variability of one-third of one per cent for goods containing two to three per cent ammonia, and a variability of one-half of one per cent for goods containing over three per cent ammonia; and the several materials in each of these two classes shall be named on the bag or on a tag attached thereto, and it shall be permissible for the manufacturer to substitute one or more materials in either class of approximately equal agricultural value for another material of the same class: Provided further, that where there is a contract or agreement between the manufacturer and a purchaser of fertilizer that the fertilizer will be manufactured by the use of certain definite sources and amounts of ammonia and potash, the fertilizer must be manufactured from these materials without the substitution of other materials, and failure on the part of the manufacturer to comply with this requirement shall render such manufacturer liable to the purchaser for damages as is now prescribed by law, and in addition thereto the manufacturer shall pay to the purchaser a penalty equal to one-fourth of the purchase price of such fertilizer. These items shall be branded or printed on the bag or package in the following order:

1. Weight of each package in pounds.
2. Brand name or trade-mark.
3. Guaranteed analysis.
4. Available phosphoric acid,.....Per cent.
5. Nitrogen (or equivalent in ammonia).... per cent.
6. Potash,.....per cent.
7. Name and address of the manufacturer.
8. A plainly printed tag, or brand, or print on percentage of watersoluble nitrogen.
9. Where potash is claimed as sulphate it must be derived from high-grade commercial sulphate of potash.

In bone-meal, tankage, or other products, where the phosphoric acid is not available to laboratory methods, but becomes available on the decomposition of the products in the soil, the phosphoric acid shall be claimed as total phosphoric acid, unless it be desired to claim available phosphoric acid also, in which latter case the guarantee must take the form above set forth. In the case of bone-meal and tankage, manufacturers may brand on the bags information showing the fineness of the product, provided it takes a form approved by the department of agriculture. A copy of the brand or stamp on the bag or other package, or on the label attached thereto (all of which must comply with the above requirements), shall be filed with the department of agriculture on or before delivery of such fertilizer to dealers, agents, and consumers in this state, which brand or stamp shall be uniformly used during the fiscal year for which tags have been issued. Such brand, label, or stamp shall truly set forth the data required above. (1917, c. 143, s. 1; 1923, c. 182.)

Editor's Note.—The two provisional sentences the first paragraph of this section are new with the acts of 1925.

For discussion of the section, see 1 N. C. Law Rev. 301.

In General.—This and the following new sections make elaborate and minute provisions with the view of insuring a correct analysis of these important commodities and in protection both of the manufacturer and vendor and of the purchaser and consumer. Fertilizing Co. v. Thomas, 181 N. C. 274, 282, 106 S. E. 835; Fertilizer Works v. Aiken, 175 N. C. 398, 95 S. E. 657.

The section is constitutional. State v. Oil Co., 154 N. C. 635, 70 S. E. 741. Its purpose is to protect the Public from sale of worthless fertilizers. Id.

Warranty of Contents.—Manufacturers and vendors of commercial fertilizers impliedly warrant that they contain the ingredients specified on the tags placed on the bags, according to the requirements of the statute. Swift & Company v. Aydlett, 192 N. C. 330, 135 S. E. 141.

Compliance with Statute Warranted.—When plaintiffs as manufacturers, dealers or agents sold to defendant commercial fertilizers, they must be held to have warranted that they had complied with the statute, and that the articles delivered, as commercial fertilizers were truthfully branded as required by the statute. Swift v. Etheridge, 190 N. C. 162, 167, 129 S. E. 453.

The rule of caveat emptor, as applied at common law in the sale of articles of personal property, is not applicable to the sale of commercial fertilizers in this State. Swift v. Etheridge, 190 N. C. 162, 164, 129 S. E. 453; Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141.

The burden of proof is upon the manufacturer to show, in his action against the purchaser for the purchase price, that the goods were at least merchantable, and that the ingredients used in their manufacture were in accordance with the specifications upon the tags placed on the bags under the requirements of this section. Swift & Company v. Aydlett, 192 N. C. 330, 135 S. E. 141.

A waiver by the purchaser of any demand for damages on account of any deficiencies in the ingredients of fertilizers, except such as may be ascertained in the manner specified in the statute, is valid and enforcible under the present law. Armour Fertilizer Works v. Aiken, 175 N. C. 399, 95 S. E. 657.

Application.—This section was applied as to warranty of analysis, in Guano Co. v. Live-Stock Co., 168 N. C. 442, 443, 84 S. E. 774. It was applied to breach of warranty, in Carter v. McGill, 168 N. C. 507, 508, 84 S. E. 802, and to breach of contract to furnish with certain quality of cotton-seed meal to be used as fertilizer, in Carson v. Bunting, 154 N. C. 530, 70 S. E. 923.

If the contents of the bags or packages delivered to defendant by plaintiffs were not, in fact commercial fertilizers, of the analysis guaranteed on each bag or package, as required, there was no consideration for the note given for the purchase price of the articles brought by defendant, and plaintiffs are not entitled to recover on said note. Swift v. Etheridge, 190 N. C. 162, 167, 129 S. E. 453.

§ 4690(a). Certification of fertilizer laboratories.—Commissioner of agriculture, or his authorized agent, shall, upon the application of any commercial laboratory that analyzes fertilizer or fertilizer materials, make such examination as he shall consider fit of the work of said laboratory, and when, in his opinion, the examination shall show the work of the said laboratory to be accurate and reliable, he shall certify said laboratory to that effect.

To those manufacturers requesting names of certified laboratories, the commissioner of agri-

culture shall supply such information. (1933, c. 551.)

§ 4691. Rules to enforce statute; violation misdemeanor.—The board of agriculture is empowered and directed to make such rules and reglations as are necessary to a proper carrying into effect of the provisions of this article, and to provide for all such tags as manufacturers may demand, upon paying the tax therefor. Any person wilfully violating any of the regulations made by the board of agriculture in connection with the provisions of this article shall be guilty of a misdemeanor. (Rev., s. 3821; 1901, c. 479, s. 4, subsec. 9.)

§ 4692. Sources of ingredients to be disclosed to department.—There shall be delivered to the department a statement of the materials or sources from which the phosphoric acid, nitrogen, and potash are each derived in each brand of goods registered. The department of agriculture shall, under rules which it may formulate, furnish to any person applying for the same the sources of nitrogen, potash, and available phosphoric acid contained in any brand of fertilizer registered with the department. If the source of the ingredient is changed, notification thereof shall be promptly furnished to the department. (1917, c. 143, s. 2.)

§ 4693. Brand names; registration; duplication of brand.—If the same fertilizer is sold under more than one name, a statement shall be furnished to the commissioner as to what brands are identical. A brand name entered by one person shall not be allowed to be registered by another; and no brand or name shall be allowed to be registered which is so nearly similar to another as to lead to uncertainty, confusion or fraud. The person whom the records of the department show to have first registered the name shall be permitted to retain it, subject, however, to appeal to the board to determine who is entitled to the brand; but the action of the board shall be without prejudice to the legal rights of the parties to the brand or trade-mark. No brand or name once registered shall be changed to a lower grade at any subsequent registration. The commissioner shall publish a list of brands or trade-marks registered with the department. (1917, c. 143, s. 3.)

§ 4694. Use of terms "high grade" and "standard".—The words "high grade" shall not appear upon any bag or other package of any complete fertilizer which complete fertilizer contains, by its guaranteed analysis, less than eight per cent available phosphoric acid, two and forty-seven one-hundredths per cent nitrogen (equivalent to three per cent ammonia), and two per cent potash; that the word "standard" shall not appear upon any bag or package of any complete fertilizer which contains, by its guaranteed analysis, less than eight per cent available phosphoric acid, one and sixty-five one-hundredths per cent nitrogen (equivalent to two per cent ammonia), and two per cent potash or a grade or analysis of equal total commercial value; that the words "high grade" shall not appear upon any bag or package of any acid, phosphate with potash which shall contain, by its guaranteed analysis, less than thirteen per cent available phosphoric acid and one percent potash, or a grade or analysis of equal total commercial value; that the word "standard" shall not appear upon any bag or other package of acid phosphate with potash which shall contain, by its guaranteed analysis, less than eleven per cent available phosphoric acid and one per cent potash, or a grade or analysis of equal total commercial value; that the words "high grade" shall not appear upon any bag or other package of any plain acid phosphate which shall contain, by its guaranteed analysis, less than sixteen per cent available phosphoric acid; and, lastly, that the word "standard" shall not appear upon any bag or other package of any plain acid phosphate which shall contain, by its guaranteed analysis, less than fourteen per cent of phosphoric acid. It is further hereby provided that no complete fertilizer, acid phosphate with potash, and phosphate with nitrogen, or plain acid phosphate, shall be offered for sale in this state which contains less than twelve per cent of total plant food, namely, available phosphoric acid, nitrogen, or potash, either singly or in combination, except potash in combination with lime, which shall contain not less than two per cent of potash: Provided, that in mixed fertilizers there shall be claimed not less than one per cent of potash and eighty-two one hundredths per cent of nitrogen (equivalent to one per cent ammonia) when one or both are present in the same mixture; and also, that mixed fertilizers known as superphosphates and containing only phosphoric acid and ammonia may have only ten per cent of plant food, and shall be known as "high grade" when containing six per cent of phosphoric acid and four per cent of ammonia.

No commercial fertilizer shall be sold or offered or exposed for sale or use within this state as to which the words "high grade" or "standard" are prohibited by this section, unless the words "low grade" are printed in two-inch letters in a conspicuous place upon the package of said commercial fertilizer. (1917, c. 143, s. 4.)

§ 4695. Sale below guaranteed quality; duty of commissioner; purchaser's option.—Whenever the commissioner of agriculture shall be satisfied that any fertilizer is five per cent below the guaranteed value in plant food it shall be his duty to assess such deficiency against the manufacturer of the fertilizer and require that twice the value of the deficiency be made good to any person who purchases for his own use such low-grade fertilizer; and should any fertilizer fall as much as ten per cent below the guaranteed value in plant food it shall be his duty to assess three times the value of such deficiency against the manufacturer of the fertilizer and require the same to be paid to the consumer of such fertilizer; and the commissioner may seize any fertilizer belonging to such manufacturer if the deficiency shall not be paid within thirty days after notice to such manufacturer. If the commissioner shall be satisfied that such deficiency in plant food was due to the intention of the manufacturer of same to defraud, then he shall asses and collect from the said manufacturer double the amount of the deficiency which he would have assessed and collected as hereinbefore provided, and pay the same over to the consumer of such fertilizer. Any excess of any ingredient above the

guarantee shall not be credited to the deficiency of any other ingredient if the deficiency is more than fifteen per cent: that is, excess of phosphoric acid or ammonia, or potash, cannot be credited to the deficiency in any other of these ingredients, and in assessing deficiencies arising in this connection the deficiency shall be assessed at four times the value of such deficiencies, such deficiencies to be assessed and paid as hereinbefore provided. In fixing the penalties mentioned in this section, or any other section of this article, the commissioner of agriculture shall estimate them by the wholesale price at the factory at the time of contract. If any manufacturer shall resist such collection or payment, the commissioner shall immediately publish the analysis and facts in the bulletin and in one or more newspapers in the state, to be selected by him. The agricultural department shall secure sufficient chemists and assistants, and provide the necessary equipment to enable the department to make a report of the chemical analysis of all fertilizer samples sent to the department by the purchaser or consumer, within twenty days from the time the same is received by the department, and they shall so make reports unless otherwise requested by the sender, and shall also publish a bulletin of all analyses on the first of each month for the preceding month: Provided, that if the analysis made by the department shall show more than twelve and one-half per cent deficiency in the whole, the purchaser may, in lieu of accepting the penalty as provided by law, cancel the contract of purchase; but he must within five days after receipt of said analysis notify the seller of his intention to cancel the contract and his refusal to keep the said fertilizer. (1917, c. 143, s. 5; 1919, c. 120, s. 1.)

Section Not Interfering with Contractual Rights.—The provisions of this section do not and were not intended to interfere with the rights and remedies of parties as stipulated and provided for in their personal dealings. Towlinson v. Morgan, 166 N. C. 557, 82 S. E. 953.

Measure of Damages. — For sale of fertilizing material deficient in quality an abatement in the price is the measure of damages. Fertilizer Works v. McLawborn, 158 N. C. 274, 73 S. E. 883.

In action for sale of fertilizing material, deficient in quality, the damages, when recoverable, are limited to the difference between the value of the article delivered and its value or market price if it had been such as it was warranted to be. Guano Co. v. Live-Stock Co., 168 N. C. 442, 84 S. E. 774; Fertilizer Works v. McLawhorn, 158 N. C. 274, 73 S. E. 883; Carson v. Bunting, 154 N. C. 530, 70 S. E. 923; Towlinson v. Morgan, 166 N. C. 557, 82 S. E. 953.

Admissibility of Evidence—Worthless Fertilizer.—In an action by the seller for the purchase price defendant can prove the worthlessness of the fertilizer sold. Carter v. McGill, 168 N. C. 507, 84 S. E. 802.

Same—Determination of the Value of Crop.—Determination of the value of crop, under proper circumstances, is admissible in evidence to show a breach of warranty of the quality of fertilizer sold. Towlinson v. Morgan, 166 N. C. 557, 559, 82 S. E. 953.

§ 4696. Certain ingredients prohibited.—It shall be unlawful to sell or offer for sale in this state any fertilizer or fertilizer material which contains hair, hoof meal, horn, leather scraps, or other deleterious substances not available as food for plants, but in which fertilizer or fertilizer material such forbidden materials aid in making up the required or guaranteed analysis. Whenever the analysis by the department shall show the presence of any of these unlawful materials in goods registered for sale, publication shall be made in the next monthly bulletin and in one or more newspapers, to be selected by the commissioner, giving the name and brand of the goods and the unlawful substance contained in its composition. No manufacturer or seller of such goods shall be allowed to collect pay for same, and when payment has been made it shall be returned by the seller to the purchaser. A copy of the bulletin containing the statement of the presence of unlawful material in the named goods shall be evidence in any court in this state in bar of payment and for recovery of money paid for goods so named. The presence of any forbidden material shall vitiate the whole: Provided, that the manufacturers who desire to use any such material may do so under such regulations as the board may prescribe.

Any person who shall wilfully sell or offer for sale any fertilizer or fertilizer material containing the substances declared by this section to be deleterious shall be guilty of a misdemeanor. (Rev., s. 3818; 1901, c. 479, s. 9; 1917, c. 143, s. 6.)

§ 4697. Collection and analysis of samples; analysts' certificate as evidence.—The department of agriculture shall have the power at all times and at all places to have collected by its inspector samples of any commercial fertilizer or fetilizer material offered for sale in the state, and have the same analyzed; and such samples shall be taken from at least ten per cent of the lot from which they may be selected: Provided, that no sample shall be drawn from less than ten bags of any one lot or brand.

The samples must be drawn in the presence of either the agent or seller or dealer, or some other representative of the manufacturer: Provided, that when the agent or seller or dealer, or local representative of the manufacturer, is not present or refuses to act, two disinterested persons may act as witnesses.

The purchaser or consumer, or the agent of either, may take fertilizer samples under the following rules and regulations: When any purchaser or consumer, or agent of either, desires to take a sample of any fertilizer or fertilizer material, he may take such sample according to the rules prescribed by the department of agriculture in the presence of a county or local representative designated by the manufacturer, and notice of which shall be given by the manufacturer on the bill of lading, or, in case there is no county or local representative, or he is unable to serve for any cause, in the presence of an agent, seller, or dealer of the manufacturer and two disinterested freeholders or, in case the agent, or seller, or dealer or local representative of the manufacturer refuses to witness the drawing of such sample, a sample may be drawn in the presence of three disinterested freeholders: Provided, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the department of agriculture in taking samples, the sample to be thoroughly mixed as prescribed by the rules of the department of agriculture, divided into two parts, each part to be placed in a suitable vessel, securely sealed, properly labeled, and one part sent to the department of agriculture for analysis, and the other part to the manufacturer; and a suitable statement shall be signed by the parties taking, or witnessing the

taking of the sample covering the matter; such statement or statements to be also sent to the department of agriculture and the manufacturer.

The department of agriculture shall make additional rules and regulations under and by which the purchaser or consumer, or agent of either, may take the sample or samples of fertilizer or fertilizer material as herein provided, and forward the same to the department for analysis under the provisions of this article: Provided, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the state fertilizer inspector.

In the trial of any suit or action wherein there is called in question the value or composition of any fertilizer, a certificate signed by the state chemist and attested with the seal of the department of agriculture, setting forth the analysis made by the state chemist of any sample of said fertilizer drawn under the provisions of this article, and analyzed by him under the provisions of the same, shall be prima facie proof that the fertilizer was of the value and constituency shown by his said analysis. And the said certificate of the state chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The department shall refuse to analyze any sample of commercial fertilizer that is not drawn and forwarded to the department in accordance with the regulations which it may adopt for the carrying out of this article: Provided, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the department of agriculture that the manufacture of said fertilizer in question has, in the manufacture of other goods offered in this state during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods.

Nothing in this article shall impair the right of contract. (1917, c. 143, s. 7; 1919, c. 120, ss. 2. 3.)

Constitutionality.—This section, does not impair the right of contract, and is constitutional and valid. Armour Fertilizer Works v. Aiken, 175 N. C. 398, 95 S. E. 657; American Fertilizing Co. v. Thomas, 181 N. C. 274, 106 S. E. 835, cited and approved. Jones v. Union Guano Co., 183 N. C. 338, 111 S. E. 612; Pearsall & Co. v. Eakins, 184 N. C. 291, 114 S. E. 291; Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141.

When Section Controls. — This section makes adequate provisions for damages, with further stipulations allowing either party to make further agreement for their reasonable and lawful protection, unless the latter is taken advantage of, this section is controlling. Fertilizer Works v. Aiken, 175 N. C. 398, 95 S. E. 657.

Analysis Made Conclusive by Contract.—Where it appears from the contract of sale of fertilizer that the vendor's warranty was that the goods should come up to the analysis upon the bags, and any deficiency should be determined by the analysis of the State Chemist under our statute, which should be conclusive as to damages claimed by the purchasers, and by this test the fertilizer has bees found to be free from borax or other matter deleterious to crops, parol evidence tending to show that the fertilizer furnished did contain borax from the appearance or condition of the crop, is properly excluded upon an allegation of fraud, whether it comes from expert witnesses or others, as the analysis, under the agreement of the parties, is conclusive as to the ingredients of the fertilizer, and as to the recovery of damages to the crop it is a bar. Fertilizing Co. v. Thomas, 181 N. C. 274, 106 S. E. 835.

Where a seller of fertilizer to a dealer warrants the goods only to be according to a given analysis, but not as to results, the law will not imply a further warranty that the fertilizers should be good for the purposes for which they were sold. Hampton Guano Co. v. Hill Live-Stock Co., 168 N. C. 442, 443, 84 S. E. 774.

Where the provisions of this section as to the State analysis of commercial fertilizers, etc., have not been complied with, the purchaser is not prevented from setting up his defense that the commodity sold was unfit for fertilizing his crop, for which purpose it had been sold and bought. Swift & Company v. Aydlett, 192 N. C. 330, 135 S. E. 141.

Evidence of Deficiency.—In order to recover damages to the crops caused by the use of fertilizer containing harmful deficiency of its ingredients, contrary to the seller's warrant, this section, with its recent amendments, requires evidence of its analysis, showing the alleged deficiency, made by the State Agricultural Department, and whether sold upon a special contract, not waiving the benefit of the section, or under the protection of the section alone, such evidence is essential to defendant's recovery upon a counterclaim set up by him in plaintiff's action upon the note for the purchase price. Pearsall & Co. v. Eakins, 184 N. C. 291, 114 S. E. 291.

Differences in crops raised in several years may be shown by parol evidence in defending an action for the purchase price of fertilizer claimed to be deficient. Swift & Company v. Aydlett, 192 N. C. 330, 135 S. E. 141. And evidence of the effect of the fertilizer upon the crop is competent in an action upon the breach of warranty of sale. Guano Co. v. Live-Stock Co., 168 N. C. 442, 443, 84 S. E. 774.

The rule excluding evidence of the inferiority of fertilizers bought from the manufacturer and used in making the crop, unless the latter had had it analyzed by the State chemist, does not apply to evidence tending to show in this way that the fertilizer was valueless and not that which the manufacturer had contracted to sell. Swift & Company v. Aydlett, 192 N. C. 330, 135 S. E. 141.

While the certificate of the State Chemist showing an analysis of fertilizer is made prima facie evidence of the constituency of the fertilizer under this section such certificate is not admissible unless the samples of fertilizer are taken in accordance with the statute, but when objection to the admission of such certificate is withdrawn, error in its admission, if any, is cured, and Held, under the facts of this case, there was sufficient evidence of damage to crops from the use of such fertilizer to be submitted to the jury. Godwin v. Kennedy, 196 N. C. 244, 145 S. E. 220.

Same—Exclusion of Parol Evidence.—A contract for the sale of fertilizer specifying that the customer could only recover the difference between the contract price and the actual value of the goods in case of deficient analysis, to be determined by the State Agricultural Department from samples furnished by the customer, which analysis shall be conclusive as the best and only test, both by this section and the contract, excludes parol evidence as to the effect the fertilizer had upon the crop grown upon the land, or as to the fertilizer containing an injurious element which the analysis and certificate made by the State Chemist expressly excluded. Fertilizing Co. v. Thomas, 181 N. C. 274, 106 S. E. 835.

Measure of Damages.—See note to sec. 4695.

While the vendor and purchaser of a commodity may agree upon the rule or measure of damages in relation to the latter's recovery upon the former's breach of warranty, express or implied, it will not apply where the goods sold are entirely valueless, and the consideration for the contract has completely failed. Swift & Company v. Aydlett, 192 N. C. 330, 135 S. E. 141.

Application.—See note to sec. 4690.

§ 4698. Tax tags on shipments in bulk.—If any manufacturer, dealer, agent, or other seller of fertilizer shall desire to ship in bulk any fertilizer or fertilizer material to an amount of five tons or more, the said manufacturer or seller of fertilizer shall send with the bill of lading sufficient tax tags to pay the tax on the amount of goods, and the agent of the railroad or other transportation company shall deliver the tags to the consignee when the goods are delivered. The said shipper shall also notify the commissioner of agriculture of the points to and

from which the goods are shipped and the date of forwarding: Provided, the analysis thereof and the source or sources from which the same are derived and the other regulations required of shippers in bags shall apply to the said shippers in bulk. (1917, c. 143, s. 8.)

§ 4699. Carriers to furnish statements of fertilizers transported.—It shall be lawful for the department of agriculture to require the officers, agents, or managers of any railroad, steamboat, or other transportation company transporting fertilizers or fertilizer material for delivery in this state to furnish monthly statements of the quantity of such fertilizers, with the names of the consignor and consignee, delivered on their respective lines at any and all points within the state; and the department is hereby empowered to compel such officers, agents, or managers to submit their books for examination, if found expedient to do so. Persons failing to furnish statements as required by this section shall be guilty of a misdemeanor. (Rev., s. 3819; 1901, c. 479, s. 10; 1917, c. 143, s. 9.)

§ 4700. Forfeiture for unauthorized sale; release from forfeiture.—All fertilizers and fertilizer material sold or offered for sale contrary to the provisions of this article shall be subject to seizure, condemnation, and sale by the commissioner. The net proceeds of such sale shall be placed in the general fund of the department. The commissioner, however, may, in his discretion, release the fertilizers so seized and condemned upon payment of the required tax or charge, a fine of ten dollars, and all cost and expenses incurred by the department in any proceedings connected with such seizure and condemnation, and upon compliance with all other requirements of this article. (1917, c. 143, s. 10.)

§ 4701. Method of seizure and sale on forfeiture.—Such seizure and sale shall be made under the direction of the commissioner by any officer or agent of the department. The sale shall be made at the courthouse door in the county in which the seizure is made, after thirty days advertisement in some newspaper published in such county, or if no newspaper is published in such county, then by like advertisement in a newspaper published in the nearest county thereto having a newspaper. The advertisement shall state the brand or name of the goods, the quantity, and why seized and offered for sale. (1917, c. 143, s. 11.)

§ 4702. Inspection tax on fertilizer; tax tags.—For the purpose of defraying expenses connected with the inspection of fertilizers and fertilizer material in this state, there shall be paid to the department of agriculture a charge of twenty cents per ton on such fertilizers and fertilizer material, except that which is sold to a manufacturer for the sole purpose of use in the manufacture of fertilizers, for each fiscal year ending November thirtieth, which shall be paid before a delivery to agents, dealers, or consumers in this state; but the commissioner, with the advice and consent of the board, shall have discretion to exempt such natural material as may be deemed expedient. Each bag, barrel, or other package of such fertilizer or fertilizer material shall have attached thereto a tag stating that all charges specified in this section have been paid, and the commissioner, with the advice and consent of the board, is hereby empowered to prescribe a form of such tags, and to adopt such regulations as will insure the enforcement of this law. Whenever any manufacturer of fertilizer or fertilizer material shall have paid the charges required by this section his goods shall not be liable to further tax, whether by city, town, or county: Provided, this shall not exempt from ad valorem tax. (1917, c. 143, s. 12.)

Action to Secure Tax Wrongfully Collected.—The Board of Agriculture is a department of the State Government, and an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained, the State not having given its consent to be sued in that respect. Lord, etc., Chemical Co. v. Board, 111 N. C. 135, 15 S. E. 1032.

Property Tax.—This section will not be so construed as to relieve manufacturers of fertilizers or fertilizing material, paying this inspection tax, from the payment of property tax required by the Constitution. Pocomoke Guano Co. v. Biddle, 158 N. C. 212, 73 S. E. 996.

§ 4703. Sale without tag; misuse of tag; penalty; forfeiture.—Every merchant, trader, manufacturer, broker, or agent who shall sell or offer for sale any commercial fertilizer or fertilizer material without having attached thereto such labels, stamps, and tags as are required by law, or who shall use the required tags a second time to avoid the payment of the tonnage charge, and every person who shall aid in the fraudulent selling or offering for sale of any such fertilizer, shall be liable to a penalty of the price paid the manufacturer for each separate bag, barrel, or package sold, or offered for sale, or removed, to be recovered by the commissioner of agriculture by suit brought in the name of the state, and any amount so recovered shall be paid, one-half to the informer and one-half to the state treasurer for the use of the department of agriculture. If any such fertilizer shall be condemned as provided by law, it shall be the duty of the department to have an analysis made of the same and cause printed tags or labels expressing the true chemical ingredients thereof to be put upon each bag, barrel, or package, and shall fix the commercial value at which it may be sold. It shall be unlawful for any person to sell or offer for sale or remove any such fertilizer, or for any agent of any railroad or other transportation company to deliver any such fertilizer in violation of this section, and any person who shall sell or offer for sale or remove any fertilizer in violation of the provisions of this section shall be guilty of a misdemeanor. (Rev., ss. 3820, 3822; 1901, c. 479, ss. 5, 8; 1917, c. 143, s. 13; 1919, c. 13, s. 3.)

Constitutionality.—This section is not in conflict with the constitution. Goodwin v. Fertilizer Works, 119 N. C. 120, 25 S. E. 795.

The penalty is restricted to those who "shall sell or offer for sale" without complying with the terms of the statute. It has no application against the purchaser who buys for his own use. Johnson v. Carson, 161 N. C. 371, 77 S. E. 307.

Party Plaintiff.—Under this section the person suing for the penalty, and not the Department of Agriculture or the State, is the proper party plaintiff. Goodwin v. Fertilizer Works, 119 N. C. 120, 25 S. E. 795.

Judicial Notice of Violation of Section.—Courts will take judicial notice of the violation of the provisions of this article and upon allegation and proof thereof permit recovery, though not specially pleaded. Carson v. Bunting, 154 N. C. 530, 70 S. E. 923.

For sufficiency of indictment for the violation of this section, see State v. Oil Co., 154 N. C. 635, 70 S. E. 741.

Art. 2A. Insecticides and Fungicides

§ 4703(a). Rules and standards.—The department of agriculture shall have power to make rules, regulations and adopt standards to carry out the designs and purposes of this article. (1927, c. 53, s. 1.)

§ 4703(b). Registration.—Before any manufacture or dealer shall sell, offer or expose for sale in this State any paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide he shall register with the Department of Agriculture the name of each brand of said preparation, the name and address of the manufacturer or dealer, the minimum per cent of each and every toxic chemical or compound present, and the specific name of each active ingredient used in its manufacture and the weight of the packages in which the material is packed. The words "paris green, calcium arsenate, lead arsenate and other insecticides and fungicides" mentioned and used in this article, shall apply only to insecticides and fungicides used on cotton, tobacco, all field crops, gardens, orchards, fruits, etc., for the control or destruction of insect life and fungus diseases. (1927, c. 53, s. 2.)

§ 4703(c). Labels to be affixed.—Every lot, package or parcel of paris green, calcium arsenate, lead arsenate, or any other insectitude or fungicide, offered or exposed for sale within this State, shall have affixed thereto a tag or label, in a conspicious place on the outside thereof containing a legible and plainly printed statement in the English language clearly and truly certifying

(a) the net weight of the lot, package or parcel;

(b) the name, brand or trademark;

(c) the name and address of the manufacturer, importer, jobber, firm, association, corporation dealer or person, etc., responsible for placing the commodity on the market;

(d) the minimum per cent of each and every toxic chemical or compound present.

(e) the specific name of each active ingredient used in its manufacture. (1927, c. 53, s. 3.)

§ 4703(d). Refusal and cancellation of registration.—The Commissioner shall have the power to refuse to register any paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide under a name, brand or trademark, which would be misleading or deceptive. Should any paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide be registered in the State and it is afterward discovered that such registration is in violation of any of the provisions of this article, the Commissioner shall cancel such registration. (1927, c. 53, s. 4.)

§ 4703(e). Tax per hundred pounds.—All manufacturers and dealers, for the purpose of defraying the expenses connected with the enforcement of this act, shall pay to the Department of Agriculture the sum of ten cents per hundred pounds for paris green, calcium arsenate, lead arsenate and all other insecticides and fungicides, manufactured for sale or sold in this State. (1927, c. 53, s. 5.)

§ 4703(f). Tax stamps.—Manufacturers and dealers who have registered their brands in compliance with section 4703(b) of this article, shall forward to the Commissioner a request for tax stamps, stating that the said stamps are to be used on brands of paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide registered and sold in accordance with this article and said request shall be accompanied with the inspection tax, whereupon it shall be the duty of the Commissioner to issue stamps to parties applying who shall attach said stamps to each lot, package or parcel, at shipping or selling point. All manufacturers and dealers are hereby forbidden to attach stamps described by this section to any lot, package or parcel of paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide which has not been previously registered as required in section 4703(b) and which is not in accordance with all the provisions of this article. The Department of Agriculture is hereby empowered to adopt a form for said stamps. (1927, c. 53, s. 6.)

§ 4703(g). Sales in small packages.—It shall not be required of manufacturers or dealers to place upon or attach to any package of paris green, calcium arsenate, lead arsenate or any insecticide or fungicide a tax stamp when sold in packages weighing five pounds or less. (1927, c. 53, s. 7; 1929, c. 196, s. 1.)

Editor's Note.—Prior to the amendment this section applied when the packages weighed less than one pound.

§ 4703(h). Statement mailed; what shown.—Every manufacturer and dealer who has registered paris green, calcium arsenate or lead arsenate or any poisonous insecticide or fungicide for sale within the state of North Carolina shall mail to the commissioner on forms provided by the commissioner, within forty-eight hours of each sale, shipment or delivery into or within North Carolina, a statement showing the official name of the insecticide or fungicide, the guaranteed analysis, the quantity and the name and address of the purchaser to whom sold, and the initials and numbers of the car, if sold in car lots. (1927, c. 53, s. 8; 1933, c. 233.)

Editor's Note.—Public Laws of 1933, c. 233, substituted the word "poisonous" for the word "other" between the words "any" and "insecticide."

§ 4703(i). Entrance for inspection or sampling; analysis.—The Commissioner in person, or by deputy, shall have the power to enter into any car, warehouse, store, building, boat, vessel or place supposed to contain insecticides or fungicides, for the purpose of inspection or sampling, and shall have the power to take samples for analysis from any lot, package or parcel of insecticides or fungicides. It shall be unlawful for any person to oppose entrance of said Commissioner or deputy, or in any way interfere with the discharge of his duty. All analyses shall be made by the official methods of the Association of Official Agricultural Chemists of the United States, and shall be made by chemists of the Department of Agriculture. (1927, c. 53, s. 9.)

§ 4703(j). Use of stamp a second time; adulterated and misbranded articles; injunction.—It shall be unlawful for any manufacturer or dealer to sell or offer for sale any paris green, calcium arsenate, lead arsenate, or any other insecticides or fungi-

cides without having attached thereto such tax stamps as are required by law, or, to use the required tax stamp a second time to avoid the payment of the tax, or, to sell adulterated or misbranded paris green, calcium arsenate, lead arsenate, or any other insecticides and fungicides. Paris green, calcium arsenate, lead arsenate and all other insecticides and fungicides shall be deemed to be misbranded if it carries any false or misleading statement upon or attached to the lot, package or parcel, or, if any false or misleading statements concerning its value are made on the lot, package or parcel, or in any printed advertising matter issued by the manufacturer or dealer that registered paris green, calcium arsenate, lead arsenate, or any other insecticide or fungicide, or if the number of net pounds set forth upon the package, lot, or parcel is not correct. It shall be the duty of the Attorney-General when requested by the Commissioner, to institute suit to enjoin any manufacturer, or dealer, resident or non-resident, from manufacturing or selling or soliciting orders for the sale of paris green, calcium arsenate, lead arsenate, or any other insecticide or fungicide, for use in this State without complying with all the provisions in this act, which injunction may be issued without bond or advance cost. (1927, c. 53, s. 10.)

§ 4703(k). Seizure of articles.—Any paris green, calcium arsenate or any other insecticide or fungicide sold, offered or exposed for sale within this State in violation of any provisions of the article shall be liable to seizure at the instance of the Commissioner. Upon complaint being filed by the Commissioner in person or by duly authorized deputy, with any district judge or a justice of the peace, describing the paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide and the place where it is believed paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide is sold, offered or exposed for sale in violation of the law, such district judge or justice of the peace shall issue his warrant directing the sheriff or any of his deputies to search such place, and if the law is being violated to seize the paris green, calcium arsenate, lead arsenate, or any other insecticide or fungicide, and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant and to seize all paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide found there in violation of the law, and if the admission into such place is refused, the officer executing said warrant is hereby authorized to force open the same. If it shall appear at the hearing before the district judge or a justice of the peace, who issued said writ, that the paris green, calcium arsenate, lead arsenate, or any other insecticide or fungicide was sold, exposed or offered for sale in violation of any provisions of this article, said paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide shall be condemned and delivered to an officer or agent of the Commissioner, to be destroyed or to be sold at his discretion. The sale shall be made at the court-house in the county in which the seizure is made. Said paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide shall be sampled and subjected to analysis if necessary or tagged, or branded and otherwise brought into compliance with the requirements of this article, before being sold. The Commissioner, however, may, in his discretion, release the paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide seized or condemned upon the payment of the required tax or charge and all costs and expenses incurred in any proceedings connected with such seizure and condemnation, and upon compliance with all other requirements of this article. (1927, c. 53, s. 11.)

§ 4703(l). Copy of analysis in evidence.—A copy of the analysis made by any chemist of the Department of Agriculture of any paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide certified to by him shall be admissible as evidence in any court of the State on trial of any issue involving the merits of the insecticides and fungicides covered by this article. (1927, c. 53, s. 12.)

§ 4703(m). Articles in transit.—Nothing contained in this article shall interfere with paris green, calcium arsenate, lead arsenate or any other insecticide or fungicide passing through the State in transit nor shall apply to the delivery of materials to manufacture paris green, calcium arsenate, lead arsenate or any other insecticide of fungicide for manufacturing purposes. (1927, c. 53, s. 13.)

§ 4703(n). Violation of act.—Any manufacturer or dealer violating any provision or section in this article or any rule, regulation or standard of the Department of Agriculture promulgated under this article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars nor more than two hundred and fifty dollars for each offense. (1927, c. 53, s. 14.)

§ 4703(o). Effect of decision of unconstitutionality.—If any clause, sentence, paragraph, or part of this article, shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article, but shall be confined in its operation to the clause, sentence, paragraph, or any part thereof, directly involved in the controversy in which such judgment has been rendered. (1927, c. 53, s. 15.)

Art. 3. Cotton-Seed Meal

§ 4704. Cotton-seed meal defined; inspection tax.—Cotton-seed meal is a product of the cotton seed only, composed principally of the kernel with such portion of the fiber or hull and oil as may be left in the course of manufacture of cotton-seed oil, and when sold for use as fertilizer or feed shall be subject to an inspection tax of twenty cents per ton and be subject to inspection as other fertilizers or fertilizing materials, unless sold to manufacturers for use in manufacturing fertilizers or feed. (1917, c. 242, s. 1.)

§ 4705. Bags to be branded with specified particulars.—All cotton-seed meal offered for sale, unless sold to manufacturer for use in manufacturing fertilizers or feed, shall have plainly branded on the bag containing it, or on the tag attached thereto, the following data:

1. Cotton-seed meal (with brand and grade).

2. Weight of package.
3. Ammonia and protein.
4. Name and address of manufacturer. (1917, c. 242, s. 2.)

What Constitutes "Unlawful Removal."—Under this and following sections unlawful removal relates to those who "sell or offer for sale any cotton-seed meal without having the proper tags attached," and not the farmer, for whom protection the statutes were enacted, so as to make him liable for removing from the depot bags of cotton-seed meal, to be used under his crops, and which had been brought by and shipped him for that purpose. Johnson v. Carson, 161 N. C. 372, 77 S. E. 307.

Penalty.—Violation of this section subjects the seller to penalty prescribed by section 4703. Carson v. Bunting, 154 N. C. 530, 70 S. E. 923.

§ 4706. Grades and standards established.—No person, firm, or corporation shall offer for sale any cotton-seed meal except as provided in the preceding section, graded and classed as follows:

1. Prime cotton-seed meal by analysis must contain at least seven and one-half per cent of ammonia or thirty-eight and fifty-six one-hundredths per cent of protein.

2. Good cotton-seed meal by analysis must contain at least seven per cent of ammonia, or thirty-six and no one-hundredths per cent of protein.

3. Ordinary cotton-seed meal by analysis must contain at least six and one-half per cent of ammonia, or thirty-three and forty-four hundreths per cent of protein. (1917, c. 242, s. 3.)

The purpose of these sections is to promote agriculture by insuring the sale of fertilizers containing plant food in certain proportions and of sufficient quality and quantity and to protect those who cultivate the soil from imposition and fraud. State v. Faulkner, 175 N. C. 787, 789, 95 S. E. 171.

§ 4707. Rules to enforce statute; misdemeanor.—The board of agriculture is empowered and directed to make such rules and regulations as are necessary to a proper carrying into effect of the provisions of this article, and to provide for all such tags as manufacturers may demand, upon paying the tax therefor. Any person wilfully violating any of the regulations made by the board of agriculture in connection with the provisions of this article shall be guilty of a misdemeanor. (1917, c. 242, s. 4.)

§ 4708. Sales without tag; misuse of tag; penalty; forfeiture.—Every merchant, trader, manufacturer, or agent who shall sell or offer for sale any cotton-seed meal without having attached thereto such labels, stamps, and tags as are required by law, or who shall use the required tag a second time to avoid the payment of the tonnage charge, and every person who shall aid in the fraudulent selling or offering for sale of any cotton-seed meal, shall be liable to a penalty of the price paid the manufacturer for each separate bag, barrel, or package sold, offered for sale, or removed, to be recovered by the commissioner of agriculture by suit brought in the name of the state, and any amount so recovered shall be paid one-half to the informant and one-half to the state treasurer for the use of the department of agriculture. If any such cotton-seed meal shall be condemned, as provided by law, it shall be the duty of the department to have an analysis made of the same; cause printed tags or labels expressing the proper grade to be put upon each bag, barrel, or package, and shall fix the commercial value at which it may be sold; and it shall be unlawful for any person to sell, offer for sale, or remove any such cotton-seed meal, or for any agent of any railroad or other transportation company to deliver any such cotton-seed meal in violation of this section. (1917, c. 242, s. 4.)

See notes to section 4705, as to damages, see notes to section 4695.

§ 4709. Sales contrary to act a misdemeanor.—Any person, firm, or corporation who shall sell or offer for sale or shall act as agent of or broker for the manufacturer of or dealer in any cotton-seed meal contrary to the provisions above set forth shall be guilty of a misdemeanor. (Rev., 3814; 1917, c. 242, s. 5; 1919, c. 13, s. 2.)

In General. — The fact that neither knowledge of the defect nor an intent to defraud is made an element in the criminal offense is strong reason for confining the statute to the manufacturer, who should be held to have knowledge of the composition of the fertilizer he offers for sale, and to the owner, not a manufacturer, and his agent with authority to sell, who have the opportunity to test the fertilizer before they sell it. State v. Faulkner, 175 N. C. 787, 790, 95 S. E. 171.

For violation of this section, see State v. Oil Co., 154 N. C. 635, 70 S. E. 741.

§ 4710. Forfeiture for unauthorized sale; release from forfeiture.—All cotton-seed meal sold or offered for sale contrary to the provisions above set forth shall be subject to seizure, condemnation, and sale by the commissioner of agriculture. The net proceeds from such sale shall be placed in the general fund of the department and accounted for upon its books. The commissioner, however, shall have the discretion to release the meal so seized and condemned upon compliance with the law as set forth above and the payment of all costs and expenses incurred by the department in any proceedings connected therewith. (1917, c. 242, s. 5.)

§ 4711. Method of seizure and sale on forfeiture.—Such seizure and sale shall be made under the direction of the commissioner of agriculture by an officer or agent of the department; the sale to be made at the courthouse door in the county in which the seizure is made, after thirty days advertisement in some newspaper published in said county, or if no newspaper is published in said county, then by like advertisement in a newspaper published in the nearest county thereto having a newspaper. The advertisement shall state the grade of the meal, the quantity, why seized and offered for sale. (1917, c. 242, s. 5.)

§ 4712. Collection and analysis of samples.—The department of agriculture shall have the same authority and powers for taking and analyzing samples of cotton-seed meal as are provided in case of commercial fertilizers and fertilizer materials; and the same procedure as to law and regulations shall be followed in taking such samples of cotton-seed meal as are prescribed and followed for taking samples of fertilizer and fertilizer materials. (1919, c. 271.)

See section 4697, and notes.

§ 4713. Sales below guaranteed quality; duties of commissioner.—When the commissioner of agriculture shall be satisfied that any cotton-seed meal is five per cent below the guaranteed analysis, it shall be his duty to assess twice the value of said deficiency against the manufacturer, and if said

cotton-seed meal shall fall as much as ten per cent below the guaranteed analysis it shall be his duty to assess three times the value of said meal and require that his findings of said deficiency be made good to all persons who, in the opinion of the commissioner, have purchased the said meal; and the commissioner may seize any meal belonging to said company, to the value of the deficiency, if the deficiency shall not be paid within thirty days after notice to the company. If the commissioner shall be satisfied that the deficiency in analysis was due to intention or fraud of the manufacturer, then the commissioner shall assess and collect from the manufacturer twice the amount above provided for and pay over the same to parties who purchased said meal. That if any manufacturer shall resist such collection or payment, the commissioner shall immediately publish the analysis and the facts in the bulletin and in such newspapers in the state as he may deem necessary. (1917, c. 242, s. 7.)

For a full discussion of this subject see notes to and cases cited under section 4697.

§ 4714. Adulteration prohibited.—It shall be unlawful for any manufacturer to adulterate cotton-seed meal in the process of manufacture or otherwise. (1917, c. 242, s. 8.)

Art. 4. Pulverized Limestone and Marl

§ 4715. Board of agriculture authorized to make and sell lime to farmers.—The North Carolina board of agriculture is authorized and directed, for the purpose of furnishing marl or limestone to the farmers of the state, to make such arrangements as they deem advisable for this purpose, and to this end may lease or purchase oyster shells in large quantities and beds of limestone, and erect machinery suitable for the preparation of the material for use by the farmers; and any lime so prepared and any by-products shall be sold for agricultural purposes to the citizens of the state at a reasonable cost which shall produce an amount of money sufficient to maintain and operate the plant. (1919, c. 182, s. 1.)

§ 4716. Convict labor authorized.—With the approval of the governor, when requested by the board of agriculture, the superintendent of the penitentiary may furnish a superintendent with a squad of able-bodied convicts, not to exceed fifty, to do such work as the commissioner, with the authority of the board, may deem necessary to mine, prepare, load and dispose of the material. The board shall pay the state quarterly such amount as shall be agreed upon by the superintendent of the penitentiary and the board of agriculture for their work, out of the proceeds of the sales, and the state shall guard, feed, clothe, and work such convicts: Provided, that after the first year's operations the expenses of the work shall not exceed the amount of the sales. (1919, c. 182, s. 2.)

§ 4717. Power to make regulations; reports required.—The board of agriculture is authorized to make all regulations necessary to execute the provisions of this article and shall report annually to the governor and furnish him itemized statements of the receipts and expenditures, which shall be published in the report of the commissioner of agriculture to the legislature. (1919, c. 182, s. 3.)

§ 4718. Analyses and guaranty.—All pulverized limestone and marl sold or offered for sale for agricultural purposes in the state shall have the analyses guaranteed by the manufacturers. These analyses shall show the percentage of calcium carbonate and the percentage of magnesium carbonate in the finished product. (1919, c. 182, ss. 4, 5.)

§ 4719. Percentage of carbonates required.—Limestone or marl offered or exposed for sale to the farmers of the state for agricultural purposes must show an average of at least seventy per cent calcium carbonate; domolitic limestone at least fifty per cent calcium carbonate; and a total carbonates equivalent of not less than eighty per cent; and shell marl at least sixty per cent calcium carbonate. (1919, c. 182, s. 6.)

§ 4720. Degree of fineness provided.—All pulverized limestone, except shell marl, offered or exposed for sale to the farmers of the state for agricultural purposes shall be ground to a sufficient degree of fineness to pass a screen of not less than ten meshes to the linear inch. (1919, c. 182, s. 7.)

§ 4721. Manufacturers to register and file statement of analysis.—All manufacturers of ground limestone and marl who shall offer any of their goods for sale in this state shall annually register with the commissioner of agriculture, along with a statement of the analysis of the finished product, a statement showing the name and general average composition of the raw material—limestone, domolitic limestone, marl, etc., from which the finished product is manufactured. (1919, c. 182, s. 8.)

§ 4722. Inspection of factories and shipped products.—The commissioner and board of agriculture are authorized, empowered and directed to inspect all quarries, grinderies, and other places of manufacture, as well as all consignments of pulverized limestone and marl shipped into North Carolina for agricultural purposes, with a view to enforcing the provisions of this article. (1919, c. 182, s. 9.)

§ 4723. Violation of article a misdemeanor.—All persons or firms failing to register their goods before the first of July each year, or failing to comply with the provisions of this article, shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than fifty dollars for the first offense, and not less than one hundred dollars for each subsequent offense. (1919, c. 182, s. 10.)

Art. 5. Commercial Feeding Stuffs

§ 4724. Packages to be marked with statement of specified particulars.—Every lot or parcel of concentrated commercial feeding stuff sold, offered or exposed for sale within this state shall have affixed thereto or printed thereon, in a conspicuous place on the outside thereof, a legible and plainly printed statement in the English language clearly and truly certifying the weight of the package; the name, brand, or trade-mark under which the article is sold; the name and address of the

manufacturer, jobber, or importer; the names of each and all ingredients of which the article is composed; a guarantee that the contents are pure and unadulterated, and a statement of the maximum percentage it contains of crude fiber, and the percentage of crude fat, and the percentage of crude protein, and the percentage of carbohydrates, allowing one per cent of nitrogen to equal six and one-fourth per cent of protein, all four constituents to be determined by the methods in use at the time by the Association of Official Agricultural Chemists of the United States. (1909, c. 149, s. 1.)

Implied Warranty.—Under the provisions of sections 4724, 4726, 4731, there is an implied warranty that foodstuff sold for cattle is reasonably fit for the purpose intended, and that it is not composed of harmful or deleterious substances that will produce injury or death to the cattle fed therewith. Poovy v. International Sugar Co., 191 N. C. 722, 133 S. E. 12.

§ 4725. Weight of packages prescribed.—All concentrated commercial feeding stuffs shall be in standard-weight bags or packages of twenty-five, fifty, seventy-five, one hundred, one hundred twenty-five, one hundred fifty, one hundred seventy-five, and two hundred pounds. (1909, c. 149, s. 1.)

§ 4726. "Concentrated commercial feeding stuffs" defined.—The term "concentrated commercial feeding stuffs" shall be held to include all feeds used for live stock and poultry, except hays, straws, and corn stover, when the same are not mixed with other materials, nor shall it apply to the whole seeds or grains of cereals when not mixed with other materials. (1909, c. 149, s. 2.)

See cases cited under section 4724.

§ 4727. Copy of statement and sample filed for registration.—Each and every manufacturer, importer, jobber, agent, or seller, before selling, offering or exposing for sale in this state any concentrated commercial feeding stuff, shall, for each and every feeding stuff bearing a distinguished name or trade-mark, file for registration with the commissioner of agriculture a copy of the statement required in section 4724 above, and accompany said statement, on request, by a sealed glass jar or bottle containing at least one pound of such feeding stuff to be sold, exposed or offered for sale, which sample shall correspond within reasonable limits to the feeding stuff which it represents in the percentages of crude protein, crude fat, crude fiber, and carbohydrates which it contains. (1909, c. 149, s. 3.)

§ 4728. Agent released by statement of manufacturer.—When a manufacturer, importer, or jobber of any concentrated commercial feeding stuffs files a statement, as required by the preceding section, no agent or seller of such manufacturer, importer, or jobber, shall be required to file such statement. (1909, c. 149, s. 4.)

§ 4729. Power to refuse or to cancel registration.—The commissioner of agriculture shall have the power to refuse the registration of any concentrated commercial feeding stuff under a name which would be misleading as to the materials of which it is composed, or when the names of each and all ingredients of which it is composed, are not stated, or where it does not comply with the standards and rulings adopted by the board of agriculture. Should any concentrated commercial feeding stuffs be registered and it is afterwards discovered that they are in violation of any of the provisions of this article the commissioner of agriculture shall have the power to cancel such registration. (1909, c. 149, s. 5.)

§ 4730. Inspection tax on feeding stuffs; tax tags.—Each and every manufacturer, importer, jobber, agent, or seller of any concentrated commercial feeding stuff, as defined above in this article, shall pay to the commissioner of agriculture an inspection tax of twenty cents per ton for each ton of such commercial feeding stuff sold, offered or exposed for sale or distributed in this state, and shall affix to or accompany each car shipped in bulk, and to each bag, barrel, or other package of such concentrated commercial feeding stuff, a tag or stamp to be furnished by the commissioner of agriculture stating that all charges specified in this section have been paid: Provided, whenever any concentrated commercial feeding stuff, as herein above defined, is kept for sale in bulk, stored in bins or otherwise, the manufacturer, dealer, jobber, or importer keeping the same for sale shall keep on hand cards of proper size, upon which the statement required in section 4724 is plainly printed; and if the feeding stuff is sold at retail in bulk, or if it is put up in packages belonging to the purchaser, the manufacturer, dealer, jobber, or importer shall furnish the purchaser with one of said cards upon which is or are printed the statement or statements described in this section, together with sufficient tax tags or stamps to cover same: Provided, that the inspection tax of twenty cents per ton shall not apply to whole seeds and grains when not mixed with other materials. It is further provided that, upon demand, said inspection tags or stamps shall be redeemed by the department issuing said tags or stamps, upon surrender of same, accompanied by an affidavit that the same have not been used: Provided, said tags or stamps shall be returned for redemption within the time fixed by the board of agriculture: Provided further, that nothing in this article shall be construed to restrict or prohibit the sale of concentrated commercial feeding stuff in bulk to each other by importers, manufacturers, or manipulators who mix concentrated commercial feeding stuff for sale. The commissioner of agriculture is hereby empowered to prescribe the form of such tax tags or stamps. (1909, c. 149, s. 6.)

Feeding Stuff below Grade and without Bags.—Upon a purchase of feeding stuff, below grade and without tags it is the duty of the purchaser to do what he reasonably can to lessen his loss, and the measure of his damages is the difference in value of the goods as it actually is and which it should have been under his contract, and such other expenses as were actually incurred by him in handling it. Jenentte & Co. v. Hay etc., Co., 158 N. C. 156, 157, 73 S. E. 884.

§ 4731. Sale unauthorized by article or below grade; forfeiture; release from forfeiture.—Any manufacturer, importer, jobber, agent, or dealer who shall sell, offer or expose for sale or distribution in this state, any concentrated commercial feeding stuff, as defined above in this article, without complying with the requirements of the preceding sections of this article, or who shall sell or offer or expose for sale or distribution any con-

centrated commercial feeding stuff which contains substantially a smaller percentage of crude protein or crude fat or carbohydrates or a larger percentage of crude fiber than certified to be contained, or who shall adulterate any feeding stuff with foreign, mineral, or other substance or substances, such as rice chaff or hulls, peanut shells, corn cobs, oat hulls, or similar materials of little or no feeding value, or with substances injurious to the health of domestic animals, shall be guilty of a violation of this article, and the lot of feeding stuff in question shall be subject to seizure, condemnation, and sale by the commissioner of agriculture, and the proceeds from said sales shall be covered into the state treasury for the use of the department executing the provisions of this article. The commissioner of agriculture, however, may in his discretion release the feeding stuff so withdrawn when the requirements of the provisions of this article have been complied with, and upon payment of all costs and expenses incurred by the department of agriculture in any proceedings connected with such seizure and withdrawal. (1909, c. 149, s. 7.)

See cases cited under section 4724.

§ 4732. Method of seizure and sale on forfeiture.—Such seizure and sale shall be made under the direction of the commissioner of agriculture, or an officer of the department of agriculture. The sale shall be made at the courthouse door in the county in which the seizure is made, after thirty days advertisement in some newspaper published in such county, or if no newspaper is published in such county, then by like advertisement published in the nearest county thereto having a newspaper. The advertisement shall state the name or brand of the goods, the quantity, and why seized and offered for sale. (1909, c. 149, s. 7.)

§ 4733. Collection and analysis of sample.—The commissioner of agriculture, together with his deputies, agents, and assistants, shall have free access to all places of business, mills, buildings, carriages, cars, vessels, and packages of whatsoever kind used in the manufacture, importation, or sale of any concentrated commercial feeding stuff, and shall have power and authority to open any package containing or supposed to contain any concentrated commercial feeding stuff, and, upon tender and full payment of the selling price of said samples, to take therefrom, in the manner hereinafter prescribed, samples for analysis; and he shall annually cause to be analyzed at least one sample so taken of every concentrated commercial feeding stuff that is found, sold, or offered or exposed for sale in this state under the provisions of this article. Said sample, not less than one pound in weight, shall be taken from not less than ten bags or packages, or if there be less than ten bags or packages, then the sample shall be taken from each bag or package, if it be in bag or package form, or if such feeding stuff be in bulk, then it shall be taken from ten different places of the lot. The sample or samples taken shall be kept a reasonable length of time by the department of agriculture, and on demand a portion of such sample or samples shall be furnished to the manufacturer, importer, or jobber of his feeds for examination by the chemists or other experts of said manufacturer, importer, or jobber. The department of agriculture is hereby authorized to publish from time to time in reports or bulletins the results of the analysis of such sample or samples, together with such additional information as circumstances advise: Provided, however, that if such sample or samples as analyzed differ from the statement prescribed in section 4724 above, then, at least thirty days before publishing the results of such analysis, written notice sall be given of such results to the manufacturer, importer, agent, or jobber of such stock, if the name and address of such manufacturer, jobber, or importer be known: Provided further, that if the analysis of any such sample does not differ within reasonable limits from the statement prescribed in section 4724 above appearing upon the goods, the manufacturer shall be considered as having complied with the requirements of this article. (Rev., s. 3808; 1909, c. 149, s. 9.)

§ 4734. Rules and standards to enforce statute.—The board of agriculture is empowered to adopt standards for concentrated commercial feeding stuffs and such rules and regulation as may be necessary for the enforcement of this article, and a violation of such rules and regulations shall be a misdemeanor. (Rev., s. 3808; 1909, c. 149, s. 9.)

§ 4735. Sales without tag; misuse of tag; counterfeiting tag.—Any manufacturer, importer, jobber, agent, or dealer who shall sell, offer or expose for sale or distribute in this state any concentrated commercial feeding stuff without having attached thereto or furnished therewith such tax stamps, labels, or tags as required by the provisions of this article, or who shall use the required tax stamps, labels, or tags a second time to avoid the payment of the tonnage tax, or any manufacturer, importer, jobber, agent, or dealer who shall counterfeit or use a counterfeit of such tax stamps, labels, or tags, shall be guilty of a violation of the provisions of this article. (1909, c. 149, s. 10.)

See cases cited under section 4730.

§ 4736. Refusal to comply with the article or hindering its enforcement.—Any manufacturer, importer, jobber, agent, or dealer who refuses to comply with the requirements of the provisions of this article, or any manufacturer, importer, jobber, agent, or dealer or person who shall impede, obstruct, hinder, or otherwise prevent any chemist, inspector, or other authorized agent in the performance of his duty in connection with the provisions of this article, shall be guilty of a violation of such provisions. (Rev., s. 3827; 1903, c. 325, s. 8; 1909, c. 149, s. 11.)

§ 4737. Violation of article a misdemeanor.—Any manufacturer, importer, jobber, agent, or dealer who shall violate any of the provisions of this article, upon conviction thereof, shall be fined not exceeding fifty dollars for the first offense nor more than two hundred dollars for each subsequent offense, and the proceeds from such fines shall be covered into the state treasury for use of the department of agriculture in executing the provisions of this article. (1909, c. 149, s. 12.)

Editor's Note.—This section does not refer to § 4741(a) subsequently added to this article.

§ 4738. Notice of charges to accused; hearing before commissioner.—Whenever the commissioner of agriculture becomes cognizant of any violation of the provisions of this article he shall immediately notify in writing the manufacturer, importer, or jobber and dealer, if same be known. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed by the commissioner and the board of agriculture. (1909, c. 149, s. 13.)

§ 4739. Commissioner to certify solicitor and furnish analysis.—If it appears that any of the provisions of this article have been violated the commissioner of agriculture shall certify the facts to the solicitor in the district in which such sample was obtained, and furnish that officer with a copy of the results of the analysis or other examinations of such article, duly authenticated by the analyst or other officer making such examination, under the oath of such officer. (1909, c. 149, s. 13.)

§ 4740. Solicitor to prosecute violations.—It shall be the duty of every solicitor to whom the commissioner of agriculture shall report any violation of this article to cause proceedings to be prosecuted without delay for the fines and penalties in such cases prescribed: Provided, that the provisions of this article shall not apply to any concentrated commercial feeding stuffs now in the hands or in the stock of any dealer or manufacturer. (1909, c. 149, s. 14.)

§ 4741. Certificate of analyst as evidence.—In all prosecutions arising under this article the certificate of the analyst or other officer making the analysis or examination, when duly sworn to by such officer, shall be prima facie evidence of the fact or facts therein certified. (1909, c. 149, s. 13.)

§ 4741(a). Unlawful to sell mixed feed oats unless ground.—It shall be unlawful for any person, firm, or corporation to sell, or offer or expose for sale or distribution within the State the feeding material known as "mixed feed oats" unless it first be ground. The duty of enforcing this section and carrying out its provisions and requirements shall be vested in the Commissioner of Agriculture. The Department of Agriculture shall adopt such rules and regulations as may be necessary for the efficient enforcement of this section. Every violation of the provisions of this section shall be deemed a misdemeanor and punishable by a fine not to exceed one hundred dollars. (1931, c. 106.)

Art. 6. Stock and Poultry Tonics

§ 4742. Application and affidavit for registration.—Before any condimental, patented, proprietary or trade-marked "stock or poultry tonic," "stock or poultry regulator," "stock or poultry conditioner," or any similar preparation, regardless of the specific name or title under which it is sold, which is represented as containing "tonic", "remedial," or other medicinal properties, either is sold, offered or exposed for sale in the state, the manufacturer, importer, dealer, agent or person who causes it to be sold or offered for sale, by sample or otherwise, within this state shall file with the commissioner of agriculture a statement that he desires to offer such "stock or poultry tonic," "stock or poultry regulator" "stock or poultry conditioner," or similar preparation for sale in this state, and also a certificate, the execution of which shall be sworn to before a notary public or other proper official, for registration, stating the name of the manufacturer, the location of the principal office of the manufacturer, and the name, brand, or trademark under which the said preparation or preparations will be sold, together with the guaranty that said preparation or preparations are not injurious to the health of domestic animals and that they do not conflict with the drug requirements of article 7 of this chapter, Pure Foods and Drugs, and that the name or trade-mark under which the article is sold shall not mislead or deceive the purchaser in any way; also, that any statement, design, or device on the label or package regarding the substances contained therein shall be true and correct, and any claim made for the feeding, condimental, tonic, or medicinal value shall not be false or misleading in any particular, and file with the commissioner of agriculture a labeled package of each brand of goods, showing claims made for same, which labeling and claims shall not be changed during the fiscal year for which registration is made without the consent of the commissioner of agriculture. (1909, c. 556, s. 1.)

Note Uncollectible for Noncompliance.—Where a note is given in consideration of the sale of a footstuff or "conditioner" coming within the provisions of this section, requiring the seller to file with the Commissioner of Argiculture a statement of his purpose, a duly verified certificate as to its qualities, for registration, with a labeled package, section 4743 requiring a fee for registration, section 4744 making a noncompliance a misdemeanor, and section 4749 declaring the legislation designed to protect the public from deception and fraud, and these requirements have not been complied with by the seller, the note is uncollectible against the purchaser or maker. Miller v. Howell, 184 N. C. 119, 113 S. E. 621.

§ 4743. Registration fee.—For the expense incurred in registering, inspecting, and analyzing "stock or poultry tonics", stock or poultry regulators," "stock or poultry conditioners," and similar preparations defined in the last section, a registration fee of twenty dollars for each separate brand shall be paid by the manufacturers or sellers of the same to the commissioner of agriculture during the month of July, one thousand nine hundred and nine, and during the month of January in each succeeding year, said fees to be used by the commissioner of agriculture for executing the provisions of this article. (1909, c. 556, s. 2.)

§ 4744. Sale of unregistered tonics a misdemeanor. — Any person, company, corporation, or agent that shall offer for sale or expose for sale any package or sample or any quantity of any condimental, patented, proprietary, or trademarked "stock or poultry tonic," "stock or poultry regulator," "stock or poultry conditioner," or any similar preparation, regardless of the title under which it is sold, which has not been registered as required by section 4742, or which may have been registered, but subsequently found by an analysis or examination made by or under the direction of the commissioner of agriculture to violate any of the provisions of this article, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in the sum of fifty dollars for the first offense and in the sum of one hundred dollars for each subsequent offense. (1909, c. 556, s. 3.)

§ 4745. Notice of violation charged; hearing before commissioner.—Whenever the commissioner of agriculture becomes cognizant of any violation of any of the provisions of this article he shall immediately notify, in writing, the manufacturer, importer, jobber, or dealer, if same be known. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed by the commissioner and the board of agriculture. (1909, c. 556, s. 4.)

§ 4746. Commissioner to notify solicitor and furnish analysis.—If it appears that any of the provisions of this article have been violated the commissioner of agriculture shall certify the facts to the solicitor in the district in which said sample was obtained, and furnish that officer with a copy of the result of the analysis or other examinations of said article, duly authenticated by the analyst or other officer making such examination under the oath of such officer. (1909, c. 556, s. 4.)

§ 4747. Solicitor to prosecute violations.—It shall be the duty of every solicitor to whom the commissioner of agriculture shall report any violation of this article to cause proceedings to be commenced and prosecuted without delay for the fines and penalties in such cases prescribed. (1909, c. 556, s. 5.)

§ 4748. Certificate of analyst as evidence. — In all prosecutions arising under this article the certificate of the analyst or other officer making the analysis or examination, when duly sworn to by such officer, shall be prima facie evidence of the fact or facts therein certified. (1909, c. 556, s. 4.)

§ 4749. Purpose of article.—This article does not repeal any part of any concentrated commercial feeding-stuff law which may be in effect in this state, but is designed to fully cover all preparations commonly known as condimental, patented, proprietary, or trade-marked "stock or poultry tonics," "stock or poultry regulators," "stock or poultry conditioners," and all similar preparations used for "tonic," "regulative," or "condition" purposes, and to protect the public from deception and fraud in the sale of these specific products. (1909, c. 556, s. 6.)

Art. 7. Pure Foods and Drugs

§ 4750. Collection and analysis of samples; publication of results.—For the purpose of protecting the people of the state from imposition by the adulteration and misbranding of articles of food, drugs, confectionery, or liquors, the board of agriculture shall cause to be procured from time to time, and under rules and regulations to be prescribed by them in accordance with section 4764, samples of food, drugs, confectionery, or liquors offered for sale in the state, and shall cause the same to be analyzed or examined microscopically or otherwise by the chemists or other experts of the department of agriculture. The board of agriculture is hereby authorized to make such publication of the results of the examination, analyses, and so forth, as they may deem proper. (1907, c. 368, s. 1.)

§ 4751. Sale or possession of misbranded or adulterated articles prohibited.—No person, firm, or corporation, by himself or agent, shall manufacture, sell, expose for sale, or have in his possession with intent to sell, any article of food, drug, confectionery or liquor which is adulterated or misbranded within the meaning of this article. (1907, c. 368, s. 2.)

This section applies to the adulteration of foods kept for sale. It has no application, therefore, to a controversy involving certain preservation powders for fruits. Smith v. Alphin, 150 N. C. 425, 64 S. E. 210.

§ 4752. Violations of this article a misdemeanor; disposal of fine.—Any person who shall violate any of the provisions of this article shall be guilty of a misdemeanor, and for such offense and for each subsequent offense not exceeding three hundred dollars, or be imprisoned not exceeding one year, or both, in the discretion of the court; and such fines, less legal costs and charges, shall be paid into the treasury of the state for the department of agriculture, to be used exclusively in executing the provisions of this article. (1907, c. 368, s. 2.)

Civil Liability for Violation of Section.—Impure and dangerous articles of food, causing death of purchaser, subjects the seller to liability in a civil action for damages. Ward v. Sea Food Co., 171 N. C. 33. 87 S. E. 958.

§ 4753. Analysis of specimens under rule of department.—The chemists or other experts of the department of agriculture shall make, under rules and regulations prescribed by the board of agriculture, examinations of specimens of foods, drugs, confectionery, or liquors offered for sale in North Carolina, which may be collected from time to time under their direction in various parts of the state. (1907, c. 368, s. 3.)

§ 4754. Notice of violation disclosed; hearing.—If it shall appear from any such examinations that any such specimen is adulterated or misbranded within the meaning of this article, that notice thereof shall be given to the manufacturer or party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed by the commissioner or board of agriculture. (1907, c. 368, s. 3.)

§ 4755. Commissioner to certify solicitor and furnish analysis.—If it appears that any of the provisions of this article have been violated, the commissioner of agriculture shall certify the fact to the solicitor in the district in which such sample was obtained and furnish that officer with a copy of the results of the analysis or other examinations of such article, duly authenticated by the analyst or other officer making such examination under the oath of such officer. (1907, c. 368, s. 3.)

§ 4756. Certificate of analyst as evidence.—In all prosecutions arising under this article the certificate of the analyst or other officer making the analysis or examination, when duly sworn to by such officer, shall be prima facie evidence of the fact or facts therein certified. (1907, c. 368, s. 3.)

§ 4757. Solicitor to prosecute violations.—It shall be the duty of every solicitor to whom the commissioner of agriculture shall report any violation of this article to cause proceedings to be commenced and prosecuted without delay for the fines and penalties in such cases prescribed. (1907, c. 368, s. 4.)

§ 4758. "Drug" and "food" defined.—That the

term "drug" as used in this article shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food" as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound. (1907, c. 368, s. 5.)

§ 4759. "Adulterated" defined.—For the purpose of this article an article shall be deemed to be adulterated:

1. Adulterated Drugs.—In case of drugs:

(1) If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the the United States Pharmacopœia or National Formulary official at the time of investigation: Provided, that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

(2) If its strength or purity fall below the professed standard or quality under which it is sold.

2. Adulterated Confectionery.—In case of confectionery:

(1) If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

3. Adulterated Food.—In case of food:

(1) If any substance has been mixed or packed with it, so as to reduce or lower or injuriously affect its quality or strength.

(2) If any substance has been substituted wholly or in part for the article.

(3) If any valuable constituent of the article has been wholly or in part abstracted.

(4) If it be mixed, colored, bleached, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

(5) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. If it contains any of the following substances, which are hereby declared deleterious and dangerous to health when added to human food, to wit: Colors which contain antimony, arsenic, barium, lead, cadmium, chromium, copper, mercury, uranium, or zinc; or the following colors: gamboge, corallin, picric acid, aniline, or any of the coal-tar dyes; saccharine, dulcin, glucin, or any other artificially or synthetically prepared substitute for sugar; paraffin, formaldehyde, beta-napthol, abrastol, benzoic acid or benzoates, salicylic acid or salicylates, boric acid or borates, sulphurous acid or sulphites, hydrofluoric acid or any fluorine compounds, sulphuric acid or potassium sulphate or wood alcohol: Provided, that catsups and condimental sauces may, when the fact is plainly and legibly stated in the English language on the wrapper and label of the package in which it is retained, contain not to exceed two-tenths of one per cent of benzoic acid or its equivalent in sodium benzoate. Fermented liquors may contain not to exceed two-tenths of one per cent of combined sulphuric acid and not to exceed eight-thousandths of one per cent of sulphurous acid.

(6) If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that had died otherwise than by slaughter. In addition to the ways already provided, sausage shall be deemed to be adulterated if it is composed in any part of liver, lungs, kidneys, or other viscera of animals: Provided, that the use of animal intestines as sausage casings shall not be deemed to be an adulteration.

(7) If it differs in strength, quality, or purity from the standards of purity of food products that have been or may be from time to time adopted by the board of agriculture.

(8) By consent of the board, the commissioner of agriculture may, when he deems it advisable and to the best interest of the public, suspend the action of any provision of subdivision five of subsection three of this section, relating to the use of chemical preservatives and coal-tar dyes in food, when such provision is not in harmony with the provisions of the National Food Law or rulings thereunder. (1907, c. 368, s. 6; 1909, c. 900, s. 2; 1913, c. 136.)

For application of this section see, Smith v. Alphin, 150 N. C. 425, 64 S. E. 210.

§ 4760. "Misbranded" defined.—The term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substance contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

That for the purpose of this article an article shall also be deemed to be misbranded:

1. Misbranded Drugs.—In the case of drugs:

(1) If it be an imitation of, or offered for sale under the name of, another article.

(2) If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein: Provided, that this shall not apply to prescriptions of regularly licensed physicians, dentists, and veterinary surgeons, United States Pharmacopoeia and National Formulary preparations.

(3) If its package or label shall bear or contain any statement, design, or device regarding the

curative or therapeutic effect of such article or any of the ingredients or substances contained therein which is false or fraudulent. (1907, c. 368, s. 7.)

2. Misbranded Food.—In case of food:

(1) If it be an imitation of, or offered for sale under the distinctive name of, another article.

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein, or if it contains any acid reacting compound of aluminum and the presence of same is not plainly stated on the principal label of the package by the use of the common name alum. That all cans, jars, or other packages containing canned meats intended for food shall have printed on the label thereof the correct data on which said food product was canned or put into said package, as provided in the National Pure Food Law.

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count so as to comply with the regulations on labeling prescribed by the board of agriculture, provided for by section 4764 in this article. The board of agriculture is hereby authorized to establish rules and regulations permitting reasonable variations when in their judgment exactness is impractical: Provided, that the provisions of this paragraph shall not apply to articles in packages or containers when the retail price of such article is six cents or less: and Provided further, that it shall not apply to products on hand at the time of the passage of his act until after January first, one thousand nine hundred and sixteen.

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular. (1915, c. 154, s. 1; 1917, c. 19, s. 1; 1929, c. 294, s. 1.)

Editor's Note.—The present subsection two of this section was substituted by the amendment of 1929.

§ 4761. Certain compounds, etc., not deemed adulterated or misbranded.—An article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

1. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place and where said article has been manufactured or produced.

2. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: Provided, the labeling is according to the rules prescribed by the board of agriculture: Provided, that the term "blend" as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: and Provided further, that nothing in this article shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this article may require to secure freedom from adulteration or misbranding. (1907, c. 368, s. 7.)

§ 4762. Sale of unsanitary meat; prosecution and fine; meat destroyed.—It shall be unlawful for any person or persons, firm or corporation, to sell, or to have in his or their possession to sell for human food, the carcass or parts of carcass of any animal which has been slaughtered, prepared, or kept under unsanitary conditions; and unsanitary conditions shall legally exist wherever and whenever any one or more of the following conditions appear or are found, to wit: If the slaughter-house is dilapidated and in a state of decay; if the drainage of the slaughter-house or slaughter-house yard is not efficient; if maggots or filthy pools or hog-wallows exist in the slaughter-house yard or under the slaughter-house; if the water supply is not pure and unpolluted; if hogs are kept in the slaughter-house yard, or fed therein on animal offal, or if the odors of putrefaction plainly exist therein, or if kept in unclean, bad-smelling refrigerators, or if kept in unclean or bad-smelling storage-rooms.

All peace and health officers shall have the power and are commanded to seize any animal carcass or parts of carcasses which are intended for sale or offered for sale for human food, which have been slaughtered and prepared, handled or kept under unsanitary conditions as herein defined, and shall deliver the same forthwith to and before the nearest police judge or justice of the peace, together with all information obtained; and said police judge or said justice of the peace shall, upon sworn complaint being filed, issue warrants of arrest for all persons who have violated the provisions of this section, and proceed to try the case. Any person, persons, firm, or corporation found guilty of violating the provisions of this section shall be fined not less than ten nor more than one hundred dollars, and the meat in question shall be destroyed. (1909, c. 368, s. 8.)

For a full discussion of this section, its inforcement, remedies of the delinquent packer or butcher, and the difficulties arising from its application, see 3 N. C. Law Rev. 27.

§ 4763. Dealer released by guaranty of wholesaler.—That no dealer shall be prosecuted under the provisions of this article when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party, residing in North Carolina, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this article, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or par-

ties making the sale of such articles to such dealer and in such cases said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this article: Provided, that the above guaranty shall not afford protection to any dealer after the first offense in connection with a product from a particular wholesaler, jobber, or manufacturer. (1907, c. 368, s. 9.)

§ 4764. Standards and rules to enforce article; inspector.—The board of agriculture shall, from time to time, fix and publish standards or limits of variability permissible in any article of food, drugs, confectionery, or liquors, and the North Carolina board of pharmacy shall, from time to time, fix and publish standards or limits of variability permissible in any article of drugs, and these standards, when so published, shall be the standards before all courts: Provided, that these standards shall not apply to United States Pharmacopœia and National Formulary preparations. The board of agriculture shall have authority to make uniform rules and regulations for carrying out the provisions of this article, and in the appointment of a drug inspector under the provisions of this article they shall confer with the North Carolina board of pharmacy. (1907, c. 368, s. 10.)

Section referred to in Smith v. Alphin, 150 N. C. 425, 64 S. E. 210.

§ 4765. Seller to furnish samples on payment.—Every person who offers for sale or delivers to a purchaser any food, drugs, confectionery, or liquors, shall furnish within business hours and upon tender and full payment of the selling price, a sample of such food, drugs, confectionery, or liquors to any person duly authorized by the board of agriculture to secure the same, and who shall apply to such manufacturer or vender or person delivering to a purchaser, food, drugs, confectionery, or liquors, for such sample for such use in sufficient quantity for the analysis of such article or articles in his possession. (1907, c. 368, s. 11.)

§ 4766. Refusing samples or obstructing article a misdemeanor.—Any manufacturer or dealer who refuses to comply, upon demand, with the requirements of the preceding section, or any manufacturer, dealer, or person who shall impede, obstruct, hinder, or otherwise prevent, or attempt to prevent, any chemist, inspector, or other person in the performance of his duty in connection with this article, shall be guilty of a misdemeanor, and upon conviction be fined not less than ten dollars nor more than one hundred dollars, or be imprisoned in the discretion of the court; and said fines, less the legal costs, shall be paid into the treasury of the state for the benefit of the department of agriculture, to be used exclusively in executing the provisions of this article. (1907, c. 368, s. 12.)

Cited in Guano Co. v. Live Stock Co., 168 N. C. 442, 84 S. E. 774.

§ 4767. Person includes corporation; liability for acts of agents.—The word "person" as used in this article shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this article, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association, as well as that of the person. (1907, c. 368, s. 13.)

§ 4768. Sale contrary to article misdemeanor; forfeiture; disposal of proceeds.—Any person, firm or corporation who shall manufacture, sell or offer for sale any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this article, or who shall violate any of the rules or regulations adopted by the board of agriculture for the purpose of carrying out the provisions of this article, shall be guilty of a misdemeanor, and in addition to being subject to the penalties already provided in this article, the article of food, drug, or liquor shall be subject to seizure, condemnation, and sale by the commissioner of agriculture, as is provided for the seizure, condemnation, and sale of commercial fertilizers; and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the treasury for the use of the department of agriculture in executing the provisions of this article; but no article or articles shall be sold in any jurisdiction contrary to the provisions of this article or the laws of that jurisdiction: Provided, that the commissioner of agriculture shall have authority for the first offense to allow the shipment of such article or articles without the borders of the state. (Rev., s. 3821; 1907, c. 368, s. 14; 1901, c. 479, s. 4, subsec. 9.)

As to civil liability, see notes to § 4752.

Art. 7(A). Slaughtering of Meat-Producing Animals

§ 4768(a). Application for permit.—Any persons, firms or corporations engaged in the slaughter of meat-producing animals within the State of North Carolina, may make application to the Commissioner of Agriculture for a permit to transport, convey, and sell their products at any place within the limits of the State of North Carolina. (1925, c. 181, s. 1.)

§ 4768(b). Investigation of sanitary conditions; issuance of permit.—It shall be the duty of the Commissioner of Agriculture, on receipt of such application described above, to cause to be made a thorough investigation of the sanitary conditions existing in such establishment, the efficiency of the inspection provided, and the manner in which the food products of such establishment are slaughtered and prepared. If such establishment is found to be operating in accordance with the regulations of the Commissioner of Agriculture as provided for in this article, a numbered permit shall be issued to the persons, firms, or corporations making application for same. (1925, c. 181, s. 2.)

§ 4768(c). Municipalities, inspection of meats.—Municipal corporations shall have power and authority under this article to establish and maintain the inspection of meats and meat products, at establishments located within their corporate limits, and county commissioners shall have power and authority to establish and maintain inspection of meats and meat products at establishments not located in municipal corporations, but located within the boundaries of their county. (1925, c. 181, s. 3.)

§ 4768(d). Fees for inspection.—The officials of municipalities or counties in which such inspection is maintained, shall have full power and authority to fix and collect fees for inspection of any and all meat animals or meat products necessary to the maintenance of such inspection, but no further inspection shall be made within the State. (1925, c. 181, s. 4.)

§ 4768(e). Inspection conducted by veterinarian.—No permit shall be issued to any establishment except where the meat inspection is conducted under the supervision of a graduate veterinarian approved by the State Veterinarian of North Carolina or the North Carolina Veterinary Medical Examining Board. (1925, c. 181, s. 5.)

§ 4768(f). Number of permit to identify meats; revocation of permit.—To each establishment complying with the provisions of this article, the numbered permit shall be the establishment's official State number, and such number may be used to identify all passed meats and meat products prepared in such esablishment. Such permit may be revoked by the Commissioner of Agriculture at any time when the establishment issuing such permit violates any of the regulations prescribed for efficient inspection and sanitation. (1925, c. 181, s. 6.)

§ 4768(g). Carcasses marked when inspected.—All meat carcasses inspected and passed in accordance with this article shall be branded with a rubber stamp bearing the number of the establishment and the words "N. C. Inspected and Passed." (1925, c. 181, s. 7.)

§ 4768(h). Rules and regulations for inspection; power of commissioner.—The Commissioner of Agriculture shall have full power and authority to make and adopt all necessary rules and regulations for the efficient inspection, preparation and handling of meats and meat products in such establishments, and for the disposal of all condemned meats, and such rules and regulations shall govern the inspection of all meats and meat products at establishments operating under this article. (1925, c. 181, s. 8.)

Art. 7(B). Meat Packing Establishments

§ 4768(i). Inspection; meat stamped as approved or condemned.—All persons, firms, or corporations engaged in the business of operating a meat packing plant or plants within the State of North Carolina where more than one thousand beef cattle are slaughtered per annum, or more than ten thousand hogs or swine are slaughtered per annum, or more than five hundred sheep are slaughtered per annum shall have the meat or beef of said slaughtered cattle inspected by a veterinary surgeon duly licensed by the State of North Carolina; that said inspector shall be elected by the governing body of the municipal corporation wherein said packing plant or plants is or are situated, or, if said packing plant be not situated within a municipal corporation, then by the board of county commissioners of the county wherein said packing plant is situated. Said inspector shall condemn all meats found to be unfit for human consumption. Said inspector shall cause all meats so condemned either to be destroyed or put to some use which shall not be dangerous for the public health. Each and every piece of meat or beef not condemned by said inspector shall be stamped by him in the usual manner; that the stamp to be used to stamp said meat or beef shall bear the following words: "North Carolina State Meat Inspection—Approved (insert name of inspector), Inspector." All meat or beef condemned by said inspector shall be stamped by a similar stamp, except that the "condemned" shall be inserted thereon instead of the word "approved." (1924, c. 11, s. 1.)

Editor's Note.—For a discussion of meat inspection, the right to destroy, due process of law, and damages for the destruction of meat which was really fit for human consumption, see 3 N. C. Law Rev. 27. The act is summarized in 3 N. C. Law Rev. 149.

§ 4768(j). Fees for inspection.—The charges for said inspection shall be as follows: twenty-five cents for each and every beef cattle or cow inspected; ten cents for each and every hog inspected, and ten cents for each and every sheep inspected; ten cents for each and every veal calf respectively; no further inspection shall be necessary within the State except such inspection as is provided for in section four thousand seven hundred and sixty-two of the Consolidated Statutes of North Carolina. No further or other inspection charges for the inspection of meat or beef inspected as provided herein shall be made within the State. (1925, c. 11, s. 2; 1925, c. 311.)

§ 4768(k). Veterinary not available; who to inspect.—Should no regularly licensed veterinary surgeon be available for the purposes of this article, then the duties provided herein to be performed by said inspector shall be performed by some competent person to be elected by the governing body of the municipal corporation wherein said packing plant is located, or if said packing plant be not located within a municipal corporation, then by the board of county commissioners of the county wherein said packing plant is located. (1925, c. 11, s. 3.)

§ 4768(l). Collection of fees; remuneration of inspector.—The fees or inspection charges herein provided for shall be collected by the municipal corporation wherein said packing plant is located, or if said packing plant be not located within a municipal corporation, then by the board of county commissioners of the county wherein said plant is located. Said fees or charges so collected shall be placed in the general fund of the municipal corporation or county collecting the same. The salary or remuneration of the inspector shall be fixed and paid by the municipal corporation or county by which said inspector is elected. (1925, c. 11, s. 4.)

Art. 8. Bottling Plants for Soft Drinks

§§ 4769-4780. Superseded by Public Laws of 1935, c. 372, codified as §§ 4780(1)-4780(11).

§ 4780(1). Specifications of places of manufacture and sale.—Every building or room used for the manufacture, bottling or preparation for sale of any soft drink shall be properly lighted and ventilated, and shall have floors of some material which can be flushed and washed clean with water. All manufacturing or bottling of soft drinks shall be conducted with due regard for the purity

and wholesomeness of the product therein produced. (1935, c. 372, s. 1.)

§ 4780(2). Soft drink defined.—The term "soft drink" as used herein shall include all soda waters, orangeade, root beers, and similar beverages, carbonated or otherwise, or ingredients used in the preparation of same. (1935, c. 372, s. 2.)

§ 4780(3). Establishment and equipment kept clean; containers sterilized.—The floors, walls, ceilings, furniture, receptacles, implements, and machinery of every establishment where soft drinks are manufactured, bottled, stored, sold, or distributed shall at all times be kept in a clean sanitary condition; all vessels, receptacles, utensils, tables, shelves, and machinery used in moving, handling, mixing, or processing must be thoroughly cleaned daily, all bottles and other containers used must be sterilized in caustic soda or alkali solution in not less than three per cent alkali as prescribed by the rules and regulations adopted by the board of agriculture. (1935, c. 372, s. 3.)

§ 4780(4). Protection from contamination. — Soft drinks in the process of manufacture, preparation, bottling, storing, or distribution must be protected from flies, other insects and filthy products, and, as far as may be necessary, from all other foreign or injurious contamination. (1935, c. 372, s. 4.)

§ 4780(5). Refuse removed daily.—All refuse and other waste products subject to decomposition and decay incident to the manufacture, preparation, storing, selling, or distribution of soft drinks must be removed from the plant daily. (1935, c. 372, s. 5.)

§ 4780(6). Syrup room screened.—The doors, windows and other openings of the syrup room used for the preparation of soft drinks by bottling establishments shall be fitted with wire screens of not coarser than fourteen-mesh wire gauze and the doors shall be fitted with self-closing screens. (1935, c. 372, s. 6.)

§ 4780(7). Washroom and toilet.—Every bottling establishment shall be provided with washroom, and, if a toilet is attached, it must be of sanitary construction, and such toilet shall be separate and apart from any room used for the manufacture or bottling of soft drinks. (1935, c. 372, s. 7)

§ 4780(8). Use of deleterious substances prohibited.—The use of soap bark or any other substance deleterious to health in soft drinks is prohibited, and the container must bear the name of the material and the name and address of the manufacturer or jobber. (1935, c. 372, s. 8.)

§ 4780(9). Enforcement by commissioner of agriculture; inspectors; obstruction a misdemeanor.—It shall be the duty of the commissioner of agriculture to enforce the provisions of this article. The food inspectors or experts of the department of agriculture shall have authority, during business hours, to enter, for the purpose of inspection, all buildings or rooms used for the manufacture, bottling or handling of soft drinks, and to examine the condition of same, including products before and after manufacture, machinery and all implements used; and any person who shall hinder or prevent any inspector or expert of the department in the performance of his duty in connection with this article shall be guilty of a violation thereof. (1935, c. 372, s. 9.)

§ 4780(10). Violation of article a misdemeanor. —Any person who shall violate any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed twenty-five dollars for the first offense, and for each subsequent offense in the discretion of the court. (1935, c. 372, s. 10.)

§ 4780(11). Bottler's inspection fee.—For the purpose of defraying expenses incurred in the enforcement of the provisions of this article, the owner, proprietor, or operator of each bottling plant or place where soft drinks are made or bottled operated in this State shall pay to the commissioner of agriculture an inspection fee of ten dollars during the month of June of each year or before any such bottling plant shall be operated thereafter. (1935, c. 372, s. 11.)

Art. 9. Marketing and Branding Farm Products

§ 4781. Establishment of standard packages, etc., authorized.—The purpose of this article is to give authority to investigate marketing conditions and to establish and maintain standard grades and packages and state brands for farm and horticultural crops and animal products. The term "farm products" as used hereafter in this article shall be construed to mean any or all of the crops or products named above in this section. (1919, c. 325, s. 1; 1921, c. 140.)

Editor's Note. — This section, made broader by Public Laws 1921, chp. 140, is substantially the same as the former, except for the inclusion of "animal products" in the articles it is applied to, and the addition of the second sentence.

§ 4782. Power to employ agents and assistants. —The board of agriculture is charged with the execution of the provisions of this article, and has authority to employ such agents and assistants as may be necessary, fix their compensation and define their duties, and may require bonds in such amount as they may deem advisable, conditioned upon the faithful performance of duties by any employee or agent. (1919, c. 325, s. 2.)

§ 4783. Board of agriculture to investigate marketing of farm products.—It shall be the duty of the board of agriculture to investigate the subject of marketing farm products, to diffuse useful information relating thereto, and to furnish advice and assistance to the public in order to promote efficient and economical methods of marketing farm products, and authority is hereby given to gather and diffuse timely information concerning the supply, demand, prevailing prices, and commercial movement of farm products, including quantities in common and cold storage, and may interchange such information with the United States department of agriculture. (1919, c. 325, s. 3.)

§ 4784. Promulgation of standards for receptacles, etc.—After investigation, and from time to time as may be practical and advisable; the board shall have authority to establish and promulgate standards of opened and closed receptacles for, and standards for the grade and other classification

of farm products, by which their quantity, quality, and value may be determined, and prescribe and promulgate rules and regulations governing the marks, brands, and labels which may be required for receptacles for farm products, for the purpose of showing the name and address of the producer or packer; the quantity, nature and quality of the product, or any of them, and for the purpose of preventing deception in reference thereto, and for the purpose of establishing a state brand for any farm product produced in North Carolina: Provided, that any standard for any farm product or receptacle therefor, or any requirement for marking receptacles for farm products, now or hereafter established under authority of the congress of the United States, shall forthwith, as far as applicable, be established or prescribed and promulgated as the official standard or requirement in this state: Provided, that no standard established or requirement for marking prescribed under this article shall become effective until the expiration of thirty days after it shall have been promulgated. (1919, c. 325, s. 4.)

§ 4785. Sale and receptacles of standardized products must conform to requirements.—Whenever any standard for the grade or other classification of any farm product becomes effective under this article no person thereafter shall pack for sale, offer to sell, or sell within this state any such farm product to which such standard is applicable, unless it conforms to the standard, subject to such reasonable variations therefrom as may be allowed in the rules and regulations made under this article: Provided, that any farm product may be packed for sale, offered for sale, or sold, without conforming to the standard for grade or other classification applicable thereto, if it is especially described as not graded or plainly marked as "Not graded."

Whenever any standard for an open or closed receptacle for a farm product shall be made effective under this article no person shall pack for sale in and deliver in a receptacle, or sell in and deliver in a receptacle, any such farm product to which such standard is applicable, unless the receptacle conforms to the standard, subject to such variations therefrom as may be allowed in the rules and regulations made under this article, or unless the receptacle be of a capacity twenty-five per cent less than the capacity of the minimum standard receptacle for the product: Provided, that any receptacle for such farm product of a capacity within twenty-five per cent of, or larger than, the minimum standard receptacle for the product may be used if it be specifically described as not a standard size, or be conspicuously marked with the phrase, "Not standard size," in addition to any other markings which may be prescribed for such receptacles under authority given by this article.

Whenever any requirement for marking a receptacle for a farm product shall have been made effective under this article no person shall sell and deliver in this state any farm product in a receptacle to which such requirement is applicable unless the receptacle be marked according to such requirements. (1919, c. 325, s. 5.)

§ 4786. Inspectors or graders authorized; revocation of license.—The board is authorized to employ, license, or designate persons to inspect and classify farm products and to certify as to the grade or other classification thereof, in accordance with the standards made effective under this article, and shall fix, assess and collect, or cause to be collected, fees for such services. Whenever, after opportunity for a hearing is afforded to any person employed, licensed, or designated under this section, it is determined that such person has failed to classify farm products correctly in accordance with the standards established therefor under this article, or has violated any provision of this article, or of the rules and regulations made hereunder, the board may suspend or revoke the employment, license, or designation of such person. Pending investigation the person in charge of this work may suspend or revoke any such appointment, license, or designation temporarily without hearing. (1919, c. 325, s. 6.)

§ 4787. Appeal from classification.—The owner or person in posession of any farm product classified in accordance with the provisions of this article may appeal from such classification under such rules and regulations as may be prescribed. (1919, c. 325, s. 7.)

§ 4788. Certificate of grade prima facie evidence.—A certificate of the grade or other classification of any farm product issued under this article shall be accepted in any court of this state as prima facie evidence of the true grade or other classification of such farm products at the time of its classification. (1919, c. 325, s. 8.)

§ 4789. Unwholesome products not classified; health officer notified.—Any person employed, licensed, or designated shall neither classify nor certify as to the grade or other classification of any farm product which, in his judgment, is unwholesome or unfit for food of man or other animal. If, in the performance of his official duties, he discovers any farm product which is unwholesome or unfit for food of man or for other animal for which it is intended, he shall promptly report the fact to a health officer of the state or of any county or municipality thereof. (1919, c. 325, s. 9.)

§ 4790. Inspection and sampling of farm products authorized. — Agents and employees are authorized from time to time to ascertain the amount of any farm products in this state, to inspect the same in the possession of any person engaged in the business of marketing them in this state, and to take samples of such products. In carrying out these purposes agents and employees are authorized to enter on any business day, during the usual hours of business, any storehouse, warehouse, cold storage plant, packing-house, stockyard, railroad yard, railroad car, or any other building or place where farm products are kept or stored by any person engaged in the business of marketing farm products. (1919, c. 325, ss. 10, 11.)

§ 4791. Rules and regulations; how prescribed.—The board of agriculture is authorized to make and promulgate such rules and regulations as may be necessary to carry out the provisions of this article. Such rules and regulations shall be made to conform as nearly as practicable to the rules and

regulations of the secretary of agriculture of the United States, prescribed under any act of congress of the United States relating to the marketing of farm products. (1919, c. 325, s. 12.)

§ 4792. Violation of article or regulations a misdemeanor.—Any person who violates any provision of this article, or of the rules and regulations made under the article for carrying out its provisions, or fails or refuses to comply with any requirement thereof, or who willfully interferes with agents or employees in the execution, or on account of the execution, of his or their duties, shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under this article shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both in the discretion of the court. (1919, c. 325, ss. 13, 14.)

§ 4793. Unconstitutionality of part of article not to affect remainder.—If any part of this article be declared unconstitutional by the court of competent jurisdiction the validity of the remaining parts of the article shall not thereby be affected or impaired. This article shall not be construed so as to conflict with any statute of the United States regulating commerce among the several states, or in any place under the exclusive jurisdiction of the United States. (1919, c. 325, s. 15.)

§ 4793(a). Division of purchase and contract directed to give preference to home products.—The division of purchase and contract or any other constituted department who is authorized to purchase food stuff and other supplies for state institutions, is hereby directed in all cases where the prices, product, or other supplies are available and equal, the said purchasing department shall in all such cases, contract with and purchase from the citizens of North Carolina and as far as is reasonable and practical, taking into consideration price and quality, shall purchase and use and give preference to all of such products and supplies as are grown or produced within the state of North Carolina. (1933, c. 168.)

Art. 10. Standard Weight of Flour and Meal

§ 4794. Standard-weight packages for corn products; violation a misdemeanor. — It shall be unlawful for any person or persons to pack for sale, or offer for sale in this state, any corn meal, grits, hominy, or corn flour, except in bags or packages containing by standard net avoirdupois weight one pound, two pounds, three pounds, four pounds, five pounds, ten pounds, twenty-five pounds, fifty pounds, and one hundred pounds, or multiples of one hundred pounds, respectively. Each bag or package shall have plainly and legibly printed or marked thereon the net weight of contents thereof, in pounds, avoirdupois, and such weights shall be a true and correct statement thereof; Provided, that the provisions of this section shall not apply to the retailing of meal direct to customers from bulk stock, when purchased and delivered by actual weight or measure, or to exchange of corn for meal by mills grinding for toll. Any violation of this section shall be a misdemeanor and, upon conviction, the offender shall be fined not less than twenty-five dollars nor more than five hundred dollars. (1919, c. 74, ss. 2, 3.)

§ 4795. Flour to be sold in standard-weight and stamped packages.—It shall be unlawful for any person to pack for sale, sell, or offer for sale in this state, flour, except in packages containing by standard weight twelve pounds, twenty-four pounds, forty eight pounds, ninety-eight pounds, or one hundred and ninety-six pounds of flour, with the weight plainly stated on the outside of the package. This section is not applicable to the retailing of flour direct to customers, nor to the packing or selling of flour in packages less than one-eighth of a bushel. (1909, c. 555, s. 3; 1911, c. 145; 1915, c. 10.)

§ 4796. Inspections to enforce article.—The board of agriculture shall cause to be made from time to time, under rules and regulations to be prescribed by them in accordance with the provisions of this article, such inspections or examinations as may be necessary to determine whether the provisions of this article have been violated. (1909, c. 555, s. 4.)

§ 4797. Commissioner to certify solicitor of violation and furnish facts.—If it shall appear from such inspection or examination that any provisions of this article have been violated, the commissioner of agriculture shall certify the fact to the solicitor in the district in which the violation was committed, and furnish that officer with the facts in the case, duly authenticated by the inspector, under oath, who made the examination. (1909, c. 555, s. 4.)

§ 4798. Violation of article a misdemeanor.—Any person or persons violating any provisions of this article shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by fine or imprisonment in the discretion of the court except as otherwise provided in section 4794. (1909, c. 555, s. 5.)

§ 4799. Forfeiture for unauthorized sale; release from forfeiture.—Meal or flour offered for sale in violation of this article shall be subject to seizure, condemnation, and sale by the commissioner of agriculture, as is provided for the seizure, condemnation, and sale of commercial fertilizers; and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the treasury for the use of the department of agriculture in executing the provisions of this article: Provided, that the commissioner of agriculture may in his discretion order the release of the meal or flour seized when the owner of same shall offer to pack it in accordance with the provisions of sections 4794 and 4795 in this article, and it shall appear to the satisfaction of the commissioner that said owner did not intend to violate the provisions of the law. (1909, c. 555, s. 5.)

§ 4800. Rules to enforce statute.—The board of agriculture shall have authority to make uniform rules and regulations for carrying out the provisions of this article. (1909, c. 555, s. 6.)

Art. 11. Artificially Bleached Flour

§ 4801. Collection and analysis of samples; publication of results.—For the purpose of regulating the labeling and sale of artificially bleached flour, the board of agriculture shall cause inspection to be

made from time to time, and samples of flour offered for sale in the state obtained, and shall cause same to be analyzed or examined by the state food chemist or other experts of the department of agriculture for the purpose of determining if same has been artificially bleached or sold in violation of this article. The board of agriculture is hereby authorized to make such publication of the results of the examination, analysis, and so forth as they may deem proper. (1917, c. 249, s. 1.)

§ 4802. Entry to secure samples.—The food inspectors of the department of agriculture shall have authority, during business hours, to enter all stores, ware houses, and other places where food products are stored or offered for sale for the purpose of inspection and obtaining samples of same. (1915, c. 278, s. 2.)

§ 4803. Commissioner to certify solicitor of violation and furnish facts.—If it shall appear from such inspection or examination or both that any of the provisions of this article have been violated, the commissioner of agriculture shall certify the facts to the solicitor in the district in which the violation was committed, and furnish that officer with the facts in the case, duly authenticated by the expert, under oath, who made the examination. (1915, c. 278, s. 3.)

§ 4804. Label for artificially bleached flour.—Flour artificially bleached with nitrogen peroxide or chlorine or any other agent, when offered for sale in North Carolina, shall have plainly marked or printed in a conspicuous place on the sack, barrel, or other package, in letters not smaller than five-eighths of an inch in size, the legend: "Artificially Bleached." (1915, c. 278, s. 4.)

§ 4805. Statement required to be filed before sale.—Before any artificially bleached flour shall be offered for sale in this state the manufacturer, dealer, agent, or person who causes it to be sold or offered for sale, by sample or otherwise, within this state shall file with the commissioner of agriculture a statement that it is desired to offer such bleached flour for sale in North Carolina, and the name of the manufacturer or jobber and the brand name of the flour if it has such. (1915, c. 278, s. 5.)

§ 4806. Inspection fee for registering brands.—For the purpose of defraying expenses incurred in the enforcing of the provisions of this article, for each and every separate brand of artificially bleached flour registered and before being offered for sale in the state, the manufacturer, dealer, or agent registering same shall pay to the commissioner of agiculture an inspection fee of fifteen dollars during the month of July, one thousand nine hundred and fifteen, and during the month of January in each succeeding year, or before such flour is offered for sale in the state, said fees to be used by the board and commissioner of agriculture for executing the provisions of this article. (1917, c. 249, s. 2.)

§ 4807. Violation of article a misdemeanor.—Any person or persons, firm or corporation, by himself or agent, who shall sell, offer for sale, or have in his possession with intent to sell any artificially bleached flour not labeled or branded as required in section 4804, or who shall violate any of the provisions of the article, shall be guilty of a misdemeanor, and for such offense, upon conviction of same, shall be fined not to exceed fifty dollars for the first offense and for each subsequent offense not to exceed one hundred dollars, or be imprisoned not to exceed six months, or both, in the discretion of the court. (1915, c. 278, s. 7.)

§ 4808. Forfeiture for unauthorized sale; release from forfeiture.—The flour offered for sale in violation of this article shall be subject to seizure, condemnation, and sale by the commissioner of agriculture, as is provided for the seizure, condemnation, and sale of commercial fertilizers; and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into treasury for use in executing the provisions of this article: Provided, that the commissioner of agriculture may, in his discretion, for the first offense, order the release of the flour seized, upon payment by the owner of the flour of the expenses incurred by the department in the seizure of the same, and upon compliance with the requirements of this article, when it shall appear to the commissioner that said owner did not intend to violate the law. (1915, c. 278, s. 7.)

§ 4809. Seller to furnish samples on payment.—Every person who offers for sale or delivers flour to a purchaser shall, within business hours, and upon tender or payment of the selling price, furnish a sample of flour as demanded, to any person duly authorized by the board of commissioners to secure same, and who shall apply for such sample. (1915, c. 278, s. 8.)

§ 4810. Refusing samples or obstructing article a misdemeanor.—Any manufacturer or dealer who refuses to comply, upon demand, with the requirements of the last section, or any person who shall wilfully impede, hinder, or otherwise prevent or attempt to prevent, any chemist or inspector in the performance of his duty in connection with this article, shall be guilty of a misdemeanor, and upon conviction be fined not less than ten dollars and not more than one hundred dollars, or imprisoned, in the discretion of the court. (1915, c. 278, s. 8.)

Art. 11A. Oleomargarine

§ 4810(a). Definitions. — (a) The word "person" shall mean person, firm, or corporation, either principal or agent.

(b) Any word used shall indicate the singular or plural as the case demands.

(c) The word "oleomargarine" shall mean: all substance heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of tallow, beef extracts, suet, lard, lard oil, fish oil, or fish fat, vegetable oil, annato, and other coloring matter, intestinal fat and offal fat, if (first) made in imitation or semblance of butter, or (second) calculated or intended to be sold as butter or for butter, or (third) churned, emulsified, or mixed in cream, milk, water, or other liquid and containing moisture in excess of one per centum of common salt. This section shall not apply to puff-pastry shortening nor churned or emulsified in milk or

cream, and having a melting point of one hundred and eighteen degrees Fahrenheit or more, nor to any of the following containing condiments or spices: salad dressings, mayonnaise dressings, or mayonnaise products. (1931, c. 229, s. 1.)

Editor's Note.—It seems that the first "nor" in the last sentence was intended to be "not."

§ 4810(b). Sale of colored oleomargine prohibited.—It shall be unlawful to sell, offer for sale, or merchandise in any manner whatsoever oleomargarine which is of a yellow color in imitation or semblance of butter as defined in section 4810(c). (1931, c. 229, s. 2.)

§ 4810(c). License to sell uncolored oleomargarine. — Every person desiring to manufacture, sell, or offer or expose for sale, or have in possession with intent to sell, oleomargarine not made or colored so as to look like butter, shall make application for a license to do so in such form as prescribed by the State Commissioner of Agriculture.

If the said application is satisfactory to the State Commissioner of Agriculture, there shall be issued to the applicant a license authorizing him to engage in the manufacture or sale of oleomargarine, which shall not contain any color or ingredient that causes it to resemble yellow butter, for which said license the applicant shall pay: if a manufacturer, one thousand dollars ($1,000) annually; if a wholesaler, or distributor, the sum of one hundred dollars ($100) annually. The said license fees shall be collected by the State Department of Agriculture, and covered into the State Treasury as a part of the Agricultural Fund. This license shall not authorize the manufacture, sale, exposing for sale, or having in possession with intent to sell any oleomargarine made or colored so as to look like yellow butter as herein provided. For the purpose of this article oleomargarine or articles or products in semblance of butter shall be deemed to look like and be in semblance of or in imitation of butter or a shade of butter when it has a tint or shade containing more than one and six-tenths degrees of yellow, or of yellow and red collectively, but with an excess of yellow over red, as measured in terms of Lovibond tintometer scale, or its equivalent.

All licenses shall expire on the thirty-first day of December of each year. (1931, c. 229, s. 3.)

§ 4810(d). Display of signs. — It shall be unlawful for any person or any agent thereof to sell or offer, or expose for sale, or have in possession with intent to sell, any oleomargarine not in imitation of yellow butter which is not marked and distinguished by the word oleomargaine on the outside of each tub, package, or parcel. A placard with the words, OLEOMARGARINE SERVED HERE, printed in Gothic letters one inch long, shall be displayed in some conspicuous place in each dining-room, cafe, hotel, or wherever oleomargarine is served to the public as a food. (1931, c. 229, s. 4.)

§ 4810(e). Article enforced by Commissioner of Agriculture.—This article shall be administered and enforced by the State Department of Agriculture, which shall prescribe necessary rules and regulations therefor. Any license which is issued under the terms and conditions prescribed in section 4810(c) can be revoked by the State Commission of Agriculture upon the submission to him of evidence that this article has been violated by the holder of such license. (1931, c. 229, s. 5.)

§ 4810(f). Penalties. — Every person, firm, or corporation, and every officer, agent, servant, or employee of such person, firm, or corporation who violates any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment in the county jail for not more than three months, or both, at the discretion of the court. (1931, c. 229, s. 6.)

§ 4810(f1). Tax imposed. — There is hereby imposed an excise tax of ten cents per pound on all oleomargarine sold, offered or exposed for sale, or exchanged in the State of North Carolina, containing any fat and/or oil ingredient other than any of the following fats and/or oils: Cottonseed oil, peanut oil, corn oil, soya bean oil, oleo oil from cattle, oleo stock from cattle, oleo stearine from cattle, neutral lard from hogs, or milk fat. Such excise tax shall be in the form of a revenue stamp in such denominations as will best carry out the provisions of the law. Said stamps shall be properly safeguarded as to their manufacture, preservation and distribution and shall be in the charge of the state department of agriculture.

The state department of agriculture is hereby empowered to promulgate such rules and regulations as are consistent with the provisions of this section.

Any person violating any of the provisions of this section, or any of the rules or regulations promulgated by the state department of agriculture for the purpose of carrying out its provisions, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00), or by imprisonment in the county jail not to exceed two months, or by both such fine and imprisonment.

All moneys derived from the sale of revenue stamps hereunder shall be paid into the state department of agriculture for the enforcement of this section. (1935, c. 328).

Art. 11B. Sale of Eggs

§ 4810(g). Classification of eggs sold in State. —Within the intent and purpose of this article eggs offered for sale in North Carolina by any person, firm or corporation are hereby classified as follows: Cold storage eggs, construed to mean eggs that have been in cold storage or any refrigerated container for a period of (exceeding) thirty days or more; processed eggs, construed to mean eggs that have been processed with waterglasses or other process, liquid or dry, for the purpose of prolonging the time in which such eggs may be edible or fit for human food; shipped eggs, construed to mean eggs other than storage or processed eggs, as defined in this section, shipped into the State of North Carolina; fresh eggs, construed to mean eggs produced in North Carolina and which shall have been neither cold stored nor processed as defined in this section and

which shall be offered for sale within thirty days from laying; and which shall not have been rendered unfit for human food from any cause whatsoever. Eggs not fresh, construed to mean eggs not coming under any of the above classifications, except fresh eggs as construed in sentence beginning after the word North Carolina and the semicolon. (1931, c. 206, s. 1.)

§ 4810(h). Unlawful to sell eggs without labeling as to kind. — It shall be unlawful for any person, firm or corporation, within this State to offer for sale or sell cold storage eggs, processed eggs, shipped eggs or fresh eggs, either at wholesale or retail in case lots, or in lots less than case lots, without clearly imprinting on said case or container, or securely posting thereto a label not smaller than seven inches by seven inches on which shall be plainly and legibly printed the name and address of the packer of said eggs and the classification to which same belongs as defined in section 4810(g): Provided, this article shall not apply to any case of eggs not divested of its interstate character or to eggs shipped out of the State; this proviso shall not be construed as legalizing the shipment into this State of unsound eggs, or to offer for sale or sell any stored or processed or shipped eggs or fresh eggs in pasteboard or other cartons without plainly and legibly imprinting thereon, or on label pasted thereon, in letters not smaller than one-half inch in height the classification to which said eggs belong as defined in section 4810(g), together with the name and address of the packer or retailer in similar letters.

It shall be unlawful for any person, firm or corporation within this State to offer for sale or sell eggs in bulk from any open case or container without displaying conspicuously on such container a placard or heavy cardboard not smaller than four inches by eleven inches in size on which shall be printed in letters not smaller than one and one-half inches in height words showing the classification to which said eggs belong as defined in section 4810(g), whether the eggs so offered for sale or sold are "cold storage eggs," "processed eggs," or "shipped eggs," or this section shall apply to farmers offering for sale or selling eggs at retail when such eggs shall have been produced by them. (1931, c. 206, s. 2.)

§ 4810(i). Powers of Board of Agriculture not abridged; no appropriation made.—Nothing herein contained shall be deemed to abridge or repeal any provision in any law granting any powers to the Board of Agriculture on any matter covered by the provisions of this article or any other act, but shall be additional to any other legislation pertaining to the preparation and sale of eggs: Provided, no appropriation shall be made for the use of the Department of Agriculture for the purpose of carrying out the provisions of this article. (1931, c. 206, s. 3.)

§ 4810(j). Violation of article a misdemeanor. —Any person, firm or corporation violating any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than three hundred dollars or imprisoned not less than thirty days or more than six months. (1931, c. 206, s. 4.)

Art. 12. Seed Inspection

§ 4811. "Agricultural seed," "vegetable seeds" and "flower seeds" defined.—The term "agricultural seed" as used in this article shall include the seeds of all domesticated grasses, cereals, clovers, vetches, alfalfas, peas (except garden peas), beans (except garden beans), and seeds of all other crops that are or may be successfully grown in North Carolina on field scale; while the term "vegetable seed" shall include the seeds of those crops that are generally grown in North Carolina on garden scale and generally known and sold under the name of "vegetable seeds." And the term "flower seeds" shall include the seeds of those plants grown in flower gardens for both ornamental and commercial purposes, and generally known by the name of "flower seeds." (1917, c. 241, s. 1; 1929, c. 194, s. 1; 1935, c. 380, s. 1.)

Editor's Note.—The last sentence of this section relating to "flower seeds" was added by the 1935 amendment.

§ 4812. Package to be labeled with specified particulars.—Every parcel, package, or lot of agricultural seeds, as defined in section one of this act, offered or exposed for sale in this State, for use within the State, shall have affixed thereto, in a conspicuous place on the outside thereof, distinctly printed in the English language in legible type, a State tag certifying:

(a) The commonly accepted name of such agricultural seeds.

(b) The approximate per cent by weight of purity, meaning the freedom of such agricultural seeds from inert matter and from other seeds distinguishable by their appearance.

(c) The approximate per cent by weight of common weed seeds, noxious weed seeds and other agricultural seeds designated in sections four and five of this act.

(d) The approximate per cent of viability, together with the month and year said seed were tested for viability.

(e) In case of seeds produced within the United States, the State in which seeds were grown, when known, must be shown on the tag.

(f) Full name and address of the seedsman, importer, dealer, agent, or other person or persons, firms or corporations, selling, offering or exposing for sale or for distribution such agricultural seeds in the State for seeding purposes. (1917, c. 241, s. 2; 1921, c. 235, s. 1; 1929, c. 194, s. 2.)

Editor's Note.—By Public Laws 1921, ch. 235, the subdivision (e) of the present section was added. This subdivision formerly contained a proviso excepting seed mixtures which was omitted by the Act of 1929.

§ 4813. "Inert matter" defined.—The term "inert matter" as used in this act shall be understood to include sand, dirt, chaff, and other foreign substances, and broken seed incapable of germinating. (1917, c. 241, s. 3; 1929, c. 194, s. 3.)

§ 4814. "Other agricultural seeds" defined.—The term "other agricultural seeds" as used in this act shall be understood to include all agricultural seeds not of the kind or species named on the package. (1917, c. 241, s. 4; 1929, c. 194, s. 4.)

§ 4815. "Weed seeds" defined.—The term "common weed seeds" as used in this act shall be understood to include seeds of the plants commonly known as wild mustard, Canada thistle, wild carrot, curled dock, sheep sorrel, black mustard, common plantain, bracted plantain, buckhorn, henbit, chickweed, crab-grass, and seeds of all other plants which commonly occur in a wild state. (1917, c. 241, s. 5; 1929, c. 194, s. 5.)

§ 4815(a). "Noxious weed seeds" defined.—The term "noxious weed seeds" shall be applied to seeds of wild onion, wild garlic or wild oats, all dodders, corn cockle, and cheat or chess, and Johnson grass. (1929, c. 194, s. 6; 1931, c. 65, s. 1; 1935, c. 380, s. 2.)

Editor's Note.—The Act of 1931 added wild oats to this section.

The words "and Johnson grass" at the end of this section were added by the 1935 amendment.

§ 4816. Mixed seeds to be so labeled.—Mixtures, when in bulk, packages, or other containers, offered or exposed for sale within the State, for seeding purposes, containing two or more kinds of agricultural seed shall have affixed thereto in a conspicuous place on the exterior of the container of such mixture a plainly written or printed tag or label in the English language, stating:

(a) That such seed is a mixture.

(b) The name, kind of each seed entering into the mixture.

(c) The approximate percentage by weight of inert matter.

(d) The approximate percentage by weight of weed seeds, and other agricultural seeds, as defined in sections four and five of this act.

(e) The full name and address of the seedsman, importer, dealer, or agent, or other person or persons, firms or corporations, selling or offering or exposing for sale or distribution such mixtures in this State for seeding purposes. (1917, c. 241, s. 6; 1929, c. 194, s. 7.)

§ 4817. How locally grown seeds excepted.—Agricultural seeds or mixtures of same shall be exempt from the provisions of this article when plainly marked on the outside of the container, "Not cleaned seed" or "Not tested seed," and when they are grown in the locality in which they are offered for sale. (1917, c. 241, s. 7.)

§ 4818. Label inconsistent with law prohibited.—No statements regarding the quality of such agricultural seeds, or mixtures, if inconsistent with the requirements of this act, shall be written or printed on the tag or label, or placed inside or affixed to any container or bulk of agricultural seed or mixture sold, offered or exposed for sale or distribution within the State for seeding purposes. (1917, c. 241, s. 8; 1929, c. 194, s. 8.)

§ 4819. Standard of purity; test.—No standard of purity shall be maintained for vegetable seeds [or] flower seeds, but each package must show on the tag or label the exact nature of its contents. (1917, c. 241, s. 9; 1921 c. 235, s. 2; 1929, c. 194, s. 9; 1935, c. 380, s. 3.)

Editor's Note.—Under this section, it was formerly required that the seeds have a "reasonable percentage of viability," vesting the power to determine what is a "reasonable percentage of viability" in the commissioner of agriculture. The change was effected by Public Laws 1921, ch. 235.

Public Laws of 1935 directs that the words "flower seeds" be inserted after the words "vegetable seeds." The word "or" appearing in brackets was inserted by the editor for the sake of clarity.

§ 4820. Sale contrary to article; obstructing article.—It shall be unlawful for any person, firm, or corporation to sell, offer or expose for sale or distribute within the state any agricultural, vegetable or flower seeds, or mixtures of agricultural, vegetable or flower seeds, as defined in this article, for seeding purposes without complying with the requirements of this article, or to falsely mark or label as to variety or kind of agricultural, vegetable or flower seeds, or to interfere in any way with the inspectors or assistants in the discharge of their duties herein named. (1917, c. 241, s. 10; 1929, c. 194, s. 10; 1935, c. 380, s. 4.)

Editor's Note.—The amendment of 1935 made the section applicable to "flower seeds."

§ 4821. Enforcement of article; rules; laboratory; inspectors.—The duty of enforcing this article and carrying out its provisions and requirements shall be vested in the commissioner of agriculture. The Department of Agriculture shall adopt such rules and regulations as may be necessary to secure the efficient enforcement of this article; and shall maintain a seed laboratory with necessary equipment. (1917, c. 241, s. 11; 1929, c. 194, s. 11.)

§ 4822. Withdrawal of seeds lacking viability.—Seed not having a reasonable viability, or that are extremely impure, notwithstanding they may be properly labeled, shall be withdrawn from sale when, in the opinion of the commissioner, such withdrawal is in the interest of normal crop production. (1917, c. 241, s. 12; 1929, c. 194, s. 12.)

§ 4823. Procurement and analysis of samples.—It shall be the duty of the said commissioner, either by himself or his duly authorized agents, to inspect, examine, and make analysis of and test any agricultural or vegetable or flower seeds sold, offered or exposed for sale or distribution within the State for seeding purposes, at such time and place and to such extent as he may determine. The commissioner and his agents shall have free access, at all reasonable hours, upon and into any premises or structures to make examination of any agricultural seeds, whether such seeds are upon the premises of the owner or consignee of such seeds or on the premises or in the possession of any warehouse, elevator, railroad or steamship company; and he is hereby given authority in person, or by his analysts, inspectors, or assistants, upon notice to the dealer, his agent, or the representative of any warehouse, elevator, railroad, or steamship company, if present, to take for analysis a composite sample of such agricultural or vegetable seeds from a parcel, package, or lot or other container, or number of parcels, packages, lots, or other containers. Said sample shall be thoroughly mixed and divided into two samples of at least two ounces each and securely sealed. One of said samples shall be left with or on the premises of the vendor, or party in interest, and the other retained by said commissioner, or analyst or agent, for analysis.

(1917, c. 241, s. 13; 1929, c. 194, s. 13; 1935, c. 380, s. 5.)

Editor's Note.—The amendment of 1935 made the section applicable to "flower seeds."

§ 4824. Publication of results.—It shall be the duty of the Commissioner of Agriculture to publish, or cause to be published, at the end of the year, the results of the examinations and tests made of any samples of agricultural or vegetable seeds, or mixtures of agricultural seeds, received from private individuals, or drawn as provided for in section twelve, together with any other information he may deem advisable: Provided, that the rules for analysis shall conform to the best known methods of examining and testing agricultural and vegetable seeds. (1917, c. 241, s. 14; 1929, c. 194, s. 14.)

§ 4825. Violation of article a misdemeanor.—Every violation of the provisions of this article shall be deemed a misdemeanor and punishable by a fine not to exceed one hundred dollars. (Rev., s. 3821; 1901, c. 479, s. 4, subsec. 9; 1917, c. 241, s. 15; 1929, c. 194, s. 15.)

§ 4826. Commissioner to prosecute or to report to attorney-general.—If the commissioner shall find, upon examination, analysis, or test, that any person, firm, or corporation has violated any of the provisions of this act, he or his duly authorized agent or agents may institute proceedings in a court of competent jurisdiction to have such person, firm, or corporation convicted thereof; or the commissioner, in his discretion, may report the results of such examination to the attorney-general, together with sworn statement of the analyst, duly acknowledged, and such other evidence of said violation as he shall deem necessary. (1917, c. 241, s. 15; 1929, c. 194, s. 15.)

§ 4827. Certificate of analyst as evidence.—Said sworn statement shall be admitted as evidence in any court of this State in any proceeding instituted under this article; but, upon a motion of the accused, such analyst shall be required to appear as a witness and be subject to cross-examination. (1917, c. 241, s. 15; 1929, c. 194, s. 15.)

§ 4828. Notice of charge to accused; hearing; duty of attorney-general.—No prosecutions for violations of this article, if such violations are based on tests or analysis, shall be instituted except in the manner following: When the commissioner of agriculture finds that this article has been violated, as shown by test examination or analysis, he shall give notice to the person or firm in whose hands the seeds were found, designating a time and place for a hearing. This hearing shall be private, and the person or firm involved shall have the right to introduce evidence, either in person, by agent or attorney. If, after said hearing, or without said hearing in case said person fails or refuses to appear, the commissioner decides that the evidence warrants prosecution, he shall proceed as herein provided. Moreover, it shall be the duty of the attorney-general, or in his discretion, he may act through the attorney of the county or city in which said violation has occurred, to institute proceedings at once against the person or persons, firms or corporations charged with such violations: Provided, such proceedings for violations shall be instituted according to the laws of this State. (1917, c. 241, s. 15; 1929, c. 194, s. 15.)

§ 4829. State to test seed for citizens; fee.—Any citizen, firm, or corporation of this State shall have the privilege or having samples of seeds tested free of charge in the State seed laboratories; while individuals, firms, and corporations outside the State shall have a like privilege on payment of a fee of twenty-five (25) cents for each purity test and twenty-five (25) cents for each germination test. (1917, c. 241, s. 16; 1921, c. 235, s. 3; 1929, c. 194, s. 16.)

Editor's Note.—Formerly, under this section, the privilege of having samples tested free of charge was extended only to citizens not in the business of selling seeds, the latter being required to pay a fee of fifty cents for each sample tested, and no provision was made for individuals or firms outside the state. The change was effected by Public Laws 1921, ch. 235.

§ 4830. License tax for sale of seed.—For the purpose of providing a fund to defray the expenses of the examination and analysis prescribed in this article, each person, firm, or corporation selling or offering for sale in or for export from this State any seed as mentioned in this article shall register with the Department of Agriculture the name of the person, firm, or corporation offering the seed for sale, and shall pay a license tax annually, on January first of each year, of twenty-five dollars ($25.00). The commissioner's receipt for such money shall be license to conduct the business. Every parcel or package of agricultural and vegetable seeds, as defined in this article, delivered to any farmer of this State for seeding purposes, and weighing ten (10) pounds or more, sold by any person, firm, or corporation whose business residence is either inside or outside the State, shall have affixed thereto a copy of the tag as designated in section 4812; said tag to be purchased from the Commissioner of Agriculture, and the purchaser of said tag to be subject to the penalties outlined in section 4825 for the use of the same tag a second time: Provided, that tags of the previous year may be given in exchange for tags of the current year. (1917, c. 241, s. 17; 1921, c. 235, s. 4; 1929, c. 194, ss. 17, 18.)

Editor's Note.—The provisional clause of this section is new with the Public Laws 1921, ch. 235.

§ 4831. Standards for seed established.—Any grower or dealer who may desire to use the term "Standard Seeds" in describing his goods may do so provided such seeds measure up to the following percentages of purity and germination:

STANDARDS OF PURITY AND VIABILITY.

Name of Seed	Per Cent Purity	Per Cent Germination
Alfalfa	98	80
Asparagus	....	80
Barley	98	90
Bluegrass—Kentucky	80	45
Bluegrass—Canada	90	45
Buckwheat	99	90
Brome Grass	90	75
Cabbage	....	90

Name of Seed	Per Cent Purity	Per Cent Germination
Carrot	....	80
Cauliflower	....	80
Celery	....	60
Clover, Alsike	95	80
Clover, Japan or Lespedeza	95	80
Clover, Crimson	98	90
Clover, Red	98	90
Clover, White	95	80
Collard	....	80
Corn, Field	....	95
Corn, Sweet	....	90
Cotton	....	90
Soy Bean	100	90
Cowpea	....	90
Cucumber	....	90
Egg Plant	....	80
Fescue, Meadow	95	85
Kaffir Corn	98	90
Lettuce	....	90
Melon, Musk	....	90
Melon, Water	....	90
Millet, Pearl	98	90
Millet, Common	96	85
Oats	99	90
Okra	....	85
Onions	....	85
Oat Grass	72	70
Orchard Grass	70	70
Rape	99	90
Red Top	90	80
Rye	99	95
Rye Grass, Perennial	96	80
Rye Grass, Italian	95	80
Sorghum	96	80
Sudan Grass	96	75
Spinach	....	85
Squash	....	90
Timothy	98	90
Tomato	....	90
Turnip	....	90
Tobacco	....	80
Vetch	98	70
Wheat	99	95

Provided, that after the requirements of section eighteen of the State Pure Seed Law (§ 4830) shall have been fully complied with, no farmer residing in North Carolina shall be required to procure a State seed license to sell seeds raised on his own farm. (1921, c. 235, s. 5; 1929, c. 194, s. 19; 1931, c. 65.)

Editor's Note.—The Act of 1931 added Japanese clover and soy bean to the list of seeds in this section, and substituted the present proviso for the former one.

Art. 12A. Farm Crop Seed Improvement Division

§ 4831(a). Creation and purpose; election of director.—There is hereby created in the Agricultural Extension Service of the State College of Agriculture and Engineering a division to be known as the Farm Crop Seed Improvement Division, and it shall be the duty and function of this division to foster and promote the development and distribution of pure strains of crop seeds among the farmers of North Carolina. The Director of said Division shall be selected as the head of other divisions of the State College of Agriculture and Engineering are selected and said division shall have the necessary cooperation of all other members of the college staff of said State College of Agriculture and Engineering for the proper carrying out the purposes of this article. (1929, c. 325, s. 1.)

§ 4831(b). State board of farm crop seed improvement.—The Governor, the Commissioner of Agriculture and the Dean of the School of Agriculture of the State College of Agriculture and Engineering, are hereby created a State Board of Farm Crop Seed Improvement. (1929, c. 325, s. 2.)

§ 4831(c). Powers of Board.—The said board shall have control, management and supervision of the production, distribution and certification of pure-bred crop seeds under the provisions of this article. (1929, c. 325, s. 3.)

§ 4831(d). Co-operation of other departments with Board; rules and regulations; fees for certification.—In so far as any of the State departments or agencies shall have to do with the testing, development, production, certification and distribution of farm crop seeds, such departments or agencies shall actively co-operate with the said Board in carrying out the purpose of this article. The said Board shall have authority to make, establish and promulgate all needful rules and regulations, including rules and regulations fixing fees for certification and fixing the market price of certified seed necessary for the proper exercise of the duties conferred upon said Board and for the carrying out the full purposes of this article. (1929, c. 325, s. 4.)

§ 4831 (e). North Carolina Improvement Association. — For the purpose of carrying out more fully the provisions of this article and of fostering the development, certification and distribution of pure seeds the said Board shall have authority to promote the organization and incorporation of an association of farmers to be known as the North Carolina Crop Improvement Association, which said Association when so organized and incorporated shall, subject to the rules and regulations prescribed by said Board, adopt all necessary rules and regulations and collect from their members such fees as shall be necessary for the proper functioning of such organizations. (1929, c. 325, s. 5.)

§ 4831 (f). Certification of crop seeds.—For the purposes of this article the certification of crop seeds hereunder shall be defined to be a guarantee by the North Carolina Crop Improvement Association herein provided for that the said seed conform to the stated origin, adaptation, variety name, variety purity, quality, germination, seed purity, and any other qualification necessary for the determining of the proper quality or value of crop seed. (1929, c. 325, s. 6.)

§ 4831(f). 1. False certification of pure-bred crop seeds made misdemeanor.—It shall be a misdemeanor, punishable by fine or imprisonment in the discretion of the court, for any person, firm, association, or corporation, selling seeds, tubers, plants, or plant parts in North Carolina, to use any evidence of certification, such as a blue tag or the word "certified" or both, on any package of seed, tubers, plants, or plant parts, nor shall the

word "certified" be used in any advertisement of seeds, tubers, plants, or plant parts, unless such commodities used for plant propagation shall have been duly inspected and certified by the agency of certification provided for in this article, or by a similiar legally constituted agency of another state or foreign country. (1933, c. 340, s. 1.)

§ 4831 (g). Director of Division to supervise certification; co-operation of Department of Agriculture.—Certification of crop seeds in so far as it concerns the origin, adaptation, variety name, variety purity and quality shall be subject to the supervision of the director of the Division of Farm Crop Seed Improvement. Certification of crop seeds in so far as it concerns germination and purity tests shall be subject to the supervision of the State Department of Agriculture. The North Carolina Crop Improvement Association may certify any crop seeds when the certification thereof shall have been approved by both the director of the Division of Farm Crop Seed Improvement and by the State Department of Agriculture. (1929, c. 325, s. 7.)

§ 4831 (h). Appropriation to carry out provisions of article. — For the purposes of aiding in meeting the expenses necessary for the carrying out of the provisions of this article there is hereby appropriated out of any unexpended and unappropriated portion of the Agricultural Fund the sum of three thousand dollars ($3,000.00) for the remainder of the present fiscal year, and the further sum of five thousand dollars ($5,000.00) per year for each year of the incoming biennium. (1929, c. 325, s. 8.)

Art. 13. Linseed Oil

§ 4832. Inspection and analysis authorized.—For the purpose of protection of the people of the state from imposition by the fraudulent sale of adulterated or misbranded linseed oil or flaxseed oil as pure linseed oil or flaxseed oil, the board of agriculture shall cause inspection to be made from time to time and samples of such oil offered for sale in the state obtained, and shall cause the same to be analyzed or examined or tested by the oil chemist or other experts of the department of agriculture for the purpose of ascertaining or determining if same is adulterated or misbranded within the meaning of this article or is otherwise offered for sale in violation of this article. (1917, c. 172, s. 1.)

§ 4833. "Raw" and "boiled" linseed oil defined.—The term "raw linseed oil" as used herein shall be construed to mean the oil obtained wholly from commercially pure linseed or flaxseed, and the term "boiled linseed oil" as used herein shall be construed to mean linseed oil that has been heated in the process of its manufacture to a temperature of not less than two hundred and twenty-five degrees Fahrenheit. (1917, c. 172, s. 2.)

§ 4834. "Adulterated" linseed oil defined.—For the purpose of this article linseed oil shall be deemed to be adulterated if it be not wholly the product of commercially pure and well cleaned linseed or flaxseed, and unless the oil also fulfills the requirements of the chemical test for pure linseed oil, described in the edition of the United States Pharmacopœia for the year nineteen hundred. (1917, c. 172, s. 3.)

§ 4835. Sale of prohibited products; statement required of dealer.—No person, firm, or corporation, by himself or agent or as the agent of any other person, firm, or corporation, shall manufacture or mix for sale, sell, offer or expose for sale, or have in his possession with intent to sell under the name of raw linseed oil or boiled linseed oil, or under any name or device that suggests raw or boiled linseed oil, any article which is not wholly the product of commercially pure linseed or flaxseed, or that is adulterated or misbranded within the meaning of this article, except as is hereinafter provided, and any manufacturer, wholesaler, or jobber desiring to do business in the state shall file with the commissioner of agriculture a statement to that effect and furnish the name of the oil or oils which he proposes to sell by sample or otherwise, and that the oil or oils will comply with the requirements of this article. (1917, c. 172, s. 4.)

§ 4836. Drying agents; label to state name and percentage.—Boiled linseed oil which has been heated to a temperature of not less than two hundred and twenty-five degrees Fahrenheit may contain drying agents not to exceed four per cent by volume, provided that the name and per cent of each drying agent present be plainly stated in connection with the name of the oil on the receptacle containing same: and Provided further, that the statement is printed in letters that meet the requirements of the regulations adopted by the board of agriculture under this article. (1917, c. 172, s. 5.)

§ 4837. Compounds, imitations, and substitutes regulated.—Nothing in this article, shall be construed to prohibit the sale of compound linseed oil, or imitation linseed oil, or any substance to be used as a substitute for linseed oil, provided the receptacle containing same shall be plainly and legibly stamped, stenciled, or marked compound linseed oil, or imitation oil, or with the name of the substance to be used for linseed oil, as the case may be: and Provided further, that the name is stenciled or marked on the container of same in a manner that will meet the requirements of the regulations adopted by the board of agriculture under this article. (1917, c. 172, s. 6.)

§ 4838. Containers to be marked with specified particulars. — Before any raw linseed oil or any boiled linseed oil with drying agents added or any compound linseed oil or any imitation linseed oil or any other substance used or intended to be used as a substitute for linseed oil shall be sold or offered for sale in this state, the container in which same is kept for sale or sold shall have distinctly, legibly, and durably painted, stamped, stenciled, or marked thereon the true name of such oil or substance, setting forth in bold-face capital letters that meet the regulations prescribed by the board of agriculture, whether it be raw linseed oil or boiled linseed oil with drying agent added, or a compound linseed oil or an imitation linseed oil or a substitute for linseed oil, as the case may be; and the container, if a wholesale package, shall also bear the name and address of the manufacturer or jobber of such oil. (1917, c. 172, s. 7.)

§ 4839. Entry for samples authorized.—The inspectors or agents of the department of agriculture, authorized to make inspection under this ar-

ticle, shall have authority, during business hours, to enter all stores, warehouses, or any other place where products named in this article are stored or sold or offered for sale, for the purpose of inspection and obtaining samples of such products. (1917, c. 172, s. 8.)

§ 4840. Refusing samples or obstructing article forbidden.—Every person who offers for sale or delivers to a purchaser any article named in this article shall furnish, within business hours and upon the payment or tender of the selling price, a sample of such product to any person duly authorized to secure the same, and who shall apply to such vender for such sample of such article in his possession; and any dealer or vender who refuses to comply, upon demand, with the requirements of this section, or any person who shall impede, hinder, or obstruct or otherwise prevent or attempt to prevent any chemist, inspector, or agent of the department in the performance of his duty in connection with this article, shall be guilty of a violation of this article. (1917, c. 172, s. 8.)

§ 4841. Violations of article a misdemeanor.—Any person who shall violate any of the provisions of this article shall be guilty of a misdemeanor, and for such offense, upon conviction thereof, shall be fined not exceeding one hundred dollars for the first offense and for each subsequent offense in the discretion of the court. (1917, c. 172, s. 9.)

§ 4842. Forfeiture for unauthorized offer; disposal of proceeds.—The oil offered for sale in violation of this article shall be subject to seizure, condemnation, and sale by the commissioner of agriculture, as is provided for the seizure, condemnation, and sale of commercial fertilizer; and the proceeds thereof, if sold, less the legal cost and charges, shall be paid into the treasury for the use of the department of agriculture in executing the provisions of this article. (1917, c. 172, s. 9.)

§ 4843. Commissioner to certify solicitor and furnish facts.—If it shall appear from the inspection or other examination of oils that any of the provisions of this article have been violated, besides the action above provided for, the commissioner of agriculture shall certify the facts to the solicitor in the district in which the violation was committed, and furnish the officer with the facts in the case, duly authenticated by the expert, under oath, who made the examination. (1917, c. 172, s. 10.)

§ 4844. Solicitor to prosecute.—It shall be the duty of the solicitor to prosecute such cases for fines and penalties provided for in this article in courts of competent jurisdiction. (1917, c. 172, s. 10.)

§ 4845. Inspection tax.—For the purpose of defraying expenses incurred in the enforcement of the provisions of this article there shall be paid to the commissioner of agriculture an inspection tax of one-half cent per gallon for any and all linseed oil or compound linseed oil or any substance used or intended to be used as a substitute for linseed oil, which payment shall be made before the delivery of such oil to any agent, retail dealer, or consumer in this state. (1917, c. 172, s. 11.)

§ 4846. Tax tags.—Each can, barrel, tank, or other container of oils named in this article shall have attached thereto an inspection tag or stamp stating that the inspection charges specified in this article have been paid; and the commissioner of agriculture, with the advice and consent of the board, is hereby authorized to prescribe a form for such tags or stamps: Provided, that they shall be such as to meet the requirements of the trade of linseed oil. (1917, c. 172, s. 11.)

§ 4847. Refilling containers and misuse of tags prohibited.—The refilling of a container bearing an inspection tag or stamp on which the inspection tax has not been paid or the use of an inspection tag or stamp a second time shall constitute a violation of this article. (1917, c. 172, s. 12.)

§ 4848. Rules to enforce article; misdemeanor.—The board of agriculture is hereby authorized to adopt such rules and regulations in regard to handling linseed oil, refilling containers, and use of inspection tags or stamps a second time, as will insure the enforcement of the provisions of this article, and a violation of the said rules or regulations shall constitute a violation of this article. (1917, c. 172, s. 13.)

§ 4849. Dealer released by guaranty of wholesaler.—No dealer shall be prosecuted under the provisions of this article when he can establish a guaranty signed by the manufacturer, jobber, wholesaler, or other party from whom he purchased such article, designating it, to the effect that the same is not adulterated or misbranded within the meaning of this article. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such article to such dealer, and in such cases said party or parties, if in this state, shall be amendable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this article: Provided, that the above guaranty shall not afford protection to any dealer after the first offense in connection with a product from a particular manufacturer, jobber, or wholesaler, or for the sale of oil which is not properly labeled, branded, stamped, or tagged, or on which the inspection tax has not been paid. (1917, c. 172, s. 14.)

Art. 14. Illuminating Oils and Gasoline

§ 4850. Gasoline defined.—The term "gasoline," wherever used in this article, shall be construed to include naphtha, benzine, and other like liquids and fluids used for heating and power purposes. (1917, c. 166, s. 1; 1909, c. 554.)

§ 4851. Inspection authorized; collection and analysis of samples.—All kerosene or other illuminating oils and all gasoline used or intended to be used for heating or power purposes in internal combustion, motors, or otherwise, shall be subject to inspection and test under the direction of the board of agriculture. In case of illuminating oils to determine the safety and value for illuminating purposes, and in case of gasoline for the purpose of preventing adulteration, deception, or fraud in the sale thereof.

The department of agriculture shall have power at all times and at all places to have collected samples of illuminating oils or gasoline offered for

sale in this state and to have the same analyzed. (1909, c. 554, s. 1; 1917, c. 166, s. 2.)

See §§ 2621(127) et seq.

Editor's Note.—The authority and duties formerly exercised by the department of agriculture are now vested in the department of revenue. See sections 4870(1), 4870(2).

§ 4852. Rules and standards to enforce article.—The department of agriculture is authorized to make all necessary rules and regulations for the inspection of such oils or gasolines and to adopt standards not in conflict with the provisions of this article as to the safety, purity, or absence from objectionable substances and luminosity of oils, and as to the quality, purity, and power and heat-producing properties or absence from objectionable substances of gasoline as they may deem necessary to provide the people of the state with factory illuminating oil and with gasoline of a satisfactory quality. (1909, c. 554, s. 1; 1917, c. 166, s. 2.)

See note under preceding section.

§ 4853. Statement required to be filed before sale.—All manufacturers, wholesalers and jobbers, before selling or offering for sale in this state any kerosene or other oil for illuminating purposes, or gasoline for the purposes enumerated in the second preceding section, shall file with the commissioner of agriculture a statement that they desire to do business in this state, and furnish the name or brand of the oils or gasolines which they desire to sell, with the name and address of the manufacturer, producer, or refiner, and that the oil or gasoline will comply with the requirements of this article. (1909, c. 554, s. 1; 1917, c. 166, s. 2.)

See note under section 4851.

§ 4854. Inspectors; appointment and compensation.—The board of agriculture shall appoint such number of inspectors to carry out the provisions of this article as to illuminating oils and gasoline as may be necessary, not exceeding ten, whose compensation shall be five dollars each per day and actual traveling expenses. (1909, c. 554, s. 2; 1911, c. 143; 1917, c. 166, s. 3; 1919, c. 9.)

See note under section 4851.

§ 4855. Qualification and duties of inspectors.—Each inspector, before entering upon his duties, shall take an oath of office before some person authorized to administer oaths. The inspectors shall have power to examine all barrels, tanks, or other vessels containing kerosene or other illuminating oils, or gasoline, to see if they are properly tagged or stamped as required by this article; and they shall, as directed, collect samples of oil or gasoline offered for sale in the state and send the same to the department of agriculture for examination. (1909, c. 554, s. 2; 1917, c. 166, s. 3.)

See note under section 4851.

§ 4856. Inspection taxes; tax tags; tank-car shipments.—For the purpose of defraying the expenses connected with enforcing the provisions of this article there shall be paid to the commissioner of agriculture a charge of one-fourth of one per cent per gallon upon illuminating oil or gasoline, which payment shall be made before delivery to agents, dealers, or consumers in this state. Each barrel, tank, car, or other container of oil or gasoline shall have attached thereto a tag or stamp stating that all charges specified in this section have been paid, and the commissioner of agriculture, with the advice and consent of the board of agriculture, is hereby empowered to prescribe the form of such tags: Provided, that they shall be of such form as to meet the requirements of the trade in oil or gasoline, and to adopt such rules and regulations as will insure the proper enforcement of this article.

Where oil or gasoline is shipped in tanks, cars, or other large containers, the manufacturer or jobber shall give notice to the commissioner of agriculture of their shipment, with the name and address of the person, company, or corporation to whom it is sent, and the number of gallons, on the day the shipment is made.

No county, city, or town shall impose any license or other tax on the sale of gasoline as defined in the first section of this article. (1909, c. 554, s. 3; 1917, c. 166, s. 4; 1917, c. 238.)

See note under section 4851.

§§ 4857, 4858. Repealed by § 4858(a).

§ 4858(a). Gasoline and oil inspection combined fund.—Gasoline and oil inspection shall be combined, and shall be one organization in activities, accounting and reporting and as heretofore under the Department of Agriculture. All moneys received under article fourteen of chapter eighty-four of the Consolidated Statutes shall be paid into the State Treasury, as now provided by law, and kept as a distinct fund, to be styled "The Gasoline and Oil Inspection Fund," and the amounts remaining in such fund at June thirtieth and December thirty-first of each year shall be turned over to the General Fund by the State Treasurer. (1929, c. 280, s. 20.)

See note under section 4851.

§ 4859. Commissioner to report to legislature.—The commissioner of agriculture shall include in his report to the general assembly an account of the operation and expenses under this article. (1909, c. 554, s. 6; 1917, c. 166, s. 6.)

See note under section 4851.

§ 4860. Analysis on complaint; sale forbidden; result reported.—Whenever a complaint is made to the department of agriculture in regard to the qualities of any illuminating oil or gasoline sold in this state, the commissioner of agriculture shall cause a sample thereof to be procured and have the same thoroughly analyzed and tested, in the case of illuminating oil as to its safety and illuminating qualities, and in the case of gasoline to determine if it meets the requirements of the standards adopted by the board of agriculture under this article, or is as represented by the dealer. If the analysis or other tests shall show in the case of oil that it is either unsafe or of inferior illuminating quality, or in the case of gasoline that it is not as represented or does not meet any of the requirements of this article, the sale of such oil or gasoline shall be forbidden, and a report of the result or results of such analysis shall be sent to the party making complaint and to the dealers in and manufacturer thereof. (1909, c. 554, s. 7; 1917, c. 166, s. 7.)

See note under section 4851.

§ 4861. Misuse of, or omitting stamp, or violating rules a misdemeanor.—Every person who shall

fraudulently brand or stamp any package or barrel or other vessel, or use a stamp a second time, or keep any kerosene, illuminating oil or gasoline which has not been marked and branded in accordance with the regulations of the board of agriculture, or who shall violate any other of the provisions of this article, or any regulation adopted by the board of agriculture for its enforcement, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than two hundred dollars nor more than one thousand dollars: Provided, that in case of violation of the provisions of this section in respect to gasoline, upon conviction of a second or any subsequent offense the defendant may be imprisoned for not exceeding six months, in the discretion of the court. (1909, c. 554, s. 8; 1917, c. 166, s. 8.)

See note under section 4851.

§ 4862. Rules as to gasoline to be published.—It shall be the duty of the commissioner of agriculture to publish at least annually in the bulletin of the department the rules and regulations established by the board of agriculture for the purpose of carrying into effect the provisions of this article as to gasoline. (1917, c. 166, s. 9.)

See note under section 4851.

§ 4863. Sale without tag or altering tag a misdemeanor.—If any person, manufacturer, or dealer shall sell or offer for sale in this state any illuminating oil or gasoline before first having the same labeled and tagged, as required by this article and by the regulations adopted by the board of agriculture, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding three hundred dollars or, in case his offense be the sale or offer for sale of gasoline, be imprisoned not exceeding six months, and the oil or gasoline so offered for sale shall be forfeited and sold, and the proceeds of such sale shall go to the common school fund of the state. If any manufacturer or dealer in said oil or gasoline shall, with intent to defraud, alter or erase the label or tag to indicate a different standard or quantity than is indicated by the label or stamp attached to the vessel, he shall, upon conviction, be fined not exceeding two hundred dollars for every such offense, or, in case the alteration or erasure be of gasoline tag, be imprisoned not exceeding three months. (1909, c. 554, s. 9; 1917, c. 166, s. 10.)

See note under section 4851.

§ 4864. Inspectors not to be interested in the business.—Any inspector who, while in office, shall be interested directly or indirectly in the manufacture or vending of any illuminating oils or gasoline shall be guilty of a misdemeanor, and upon conviction shall be fined not less than three hundred dollars. (1909, c. 554, s. 10; 1917, c. 166, s. 11.)

§ 4865. Prosecutions for fines and penalties.—All prosecutions for fines and penalties under the provisions of this article shall be by indictment in a court of competent jurisdiction. (1909, c. 554, s. 11; 1917, c. 166, s. 12.)

§ 4866. Retailer of oil released when wholesaler complies with article.—The provisions of this article shall not apply to the retail dealer in oils unless such retail dealer shall sell or offer to sell oils of the manufacturer, wholesaler, or jobber who refuses to comply with the provisions of this article. (1909, c. 554, s. 12.)

§ 4867. Violation of rules as to gasoline unlawful.—Any violation of any of the rules and regulations established by the board of agriculture for the enforcement of this article shall be deemed a violation thereof. (1917, c. 166, s. 15.)

See note under section 4851.

§ 4868. Substitutes for motor fuels, etc., regulated.—All materials, fluids, or substances offered or exposed for sale, purporting to be substitutes for or motor fuel improvers, or other motor fuels to be used for power or heating purposes, shall, before being sold, exposed or offered for sale, be submitted to the commissioner of agriculture for examination and inspection, and shall only be sold or offered for sale when properly labeled with a label, the form and contents of which label has been approved by the said commissioner of agriculture in writing. (1917, c. 166, s. 13.)

See note under section 4851.

§ 4869. Labels for containers and their use; violation of section a misdemeanor.—Every person delivering at wholesale or retail any gasoline in this state shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "gasoline," or the name of such other like products of petroleum, as the case may be, in English, plainly stenciled or labeled in vermilion red, to meet the requirements of the regulations adopted by the board of agriculture under this article. Such dealer shall not deliver kerosene oil in any barrel, cask, can, or other container which has not been stenciled or labeled as hereinbefore provided. Every person purchasing gasoline for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other container stenciled or labeled as hereinbefore provided: Provided, that nothing in this section shall prohibit the delivery of gasoline by hose or pipe from a tank directly into the tank of any automobile or any other motor: Provided further, that in case gasoline is sold in bottles, cans, or packages of not more than one gallon for cleaning and other similar purposes, the label shall also bear the words "Unsafe when exposed to heat or fire." (1917, c. 166, s. 17.)

See note under section 4851.

§ 4870. Violation a misdemeanor.—Any person violating any of the provisions of the above section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than twenty-five dollars. It shall be the duty of the board of agriculture to enforce the provisions of this article. (1917, c. 166, s. 14.)

See note under section 4851.

§ 4870(1). Division of inspection transferred to revenue department. — The division of inspection of illuminating oils, gasoline, and lubricating oils as existing and defined in consolidated statutes, chapter eighty-four (84), articles fourteen (14) and fourteen-A (14-A), being sections forty-eight hundred and fifty to forty-eight hundred and seventy of consolidated statutes, and all amendments thereto, are hereby transferred from the department of agriculture to the department of

revenue and all of the duties required to be performed by the department of agriculture and/or the commissioner of agriculture are hereby required to be done and performed by the department of revenue and/or the commissioner of revenue, and wherever in said sections or either of them the board of agriculture or the commissioner of agriculture shall be designated to perform any of the duties, and make any regulations or reports concerning the same, such duties shall be done and performed and reports made thereof, and prosecution instituted, by the department of revenue and/or the commissioner of revenue. (1933, c. 214, s. 7.)

§ 4870(2). Existing laws amended so as to supply revenue department for department of agriculture.—Section forty-eight hundred and fifty (4850) to and including section forty-eight hundred and seventy (4870) of the consolidated statutes, and all acts or clauses of acts amendatory thereof wherein the board of agriculture or department of agriculture is mentioned, there shall be inserted "department of revenue" in lieu thereof and wherever in any or either of said sections there shall be named or designated "commissioner of agriculture," the same shall be stricken out and in lieu thereof shall be inserted the "commissioner of revenue" to the end that all the duties therein required to be done by the department of agriculture or the board of agriculture, the same shall be and are hereby required to be done and performed by the department of revenue, and all duties therein prescribed or required to be performed by the commissioner of agriculture shall be and the same are hereby required to be performed by the commissioner of revenue. (1933, c. 214, s. 8.)

Art. 14A. Lubricating Oils

§ 4870(a). Unlawful substitution.—It shall be unlawful for any person, firm or corporation to fill any order for lubricating oil, designated by a trademark or distinctive trade name for an automobile or other internal combustion engine with a spurious or substitute oil unless and until it is explained to the person giving the order that the oil offered is not the oil that he has ordered, and the purchaser shall thereupon elect to take the substitute article that is being offered to him. (1927, c. 174, s. 1.)

§ 4870(b). Brand or trade name of lubricating oil to be displayed.—It shall be unlawful for any person, firm or corporation to sell, offer for sale or delivery, or to cause or permit to be sold, offered for sale or delivery, any oil represented as lubricating oil for internal combustion engines unless there shall be firmly attached to or painted at or near the point or outlet from which said oil represented as lubricating oil for internal combustion engines is drawn or poured out for sale or delivery, a sign or label consisting of the word or words in at all times legible letters not less than one-half inch in height comprising the brand or trade name of said lubricating oil: Provided, that if any of said lubricating oil shall have no brand or trade name, the above required sign or label shall consist of the words in letters not less than three inches high, with the exceptions above provided, "Lubricating Oil no Brand." (1927, c. 174, s. 2.)

§ 4870(c). Display marks of lubricating oil not dealt in unlawfully.—It shall be unlawful for any person, firm or corporation to display, at the place of sale, any sign, label or other designating mark which describes any lubricating oil for internal combustion engines not actually sold or offered for sale or delivered at the location at which the sign, label or other designating mark is displayed, or to display any label upon any container which label names or describes any lubricating oil for internal combustion engines not actually contained therein, but offered for sale or sold as such: Provided, this section shall not prevent the advertising of such products when no lubricating oils is offered for sale at such place of advertisement. (1927, c. 174, s. 3.)

§ 4870(d). Misdemeanor.—That any person, firm or corporation violating any of the provisions of this article shall for each offense be deemed guilty of a misdemeanor and punished by a fine of not less than fifty dollars ($50.00) or more than three hundred dollars ($300.00), or by imprisonment in the county jail for not less than twenty or more than ninety days, or both. (1927, c. 174, s. 4.)

§ 4870(e). Person violating or allowing employee to violate act to forfeit $100.—Any person violating this article, or any person, firm or corporation whose servant, agent or other employees violates this article in the course of his employment shall forfeit to the manufacturer whose oil was ordered, or to the proprietor of the trade-mark or trade name by which the oil ordered was designated by the purchaser, as the case may be, one hundred dollars ($100.00) for each such offense, to be recovered by suit by the person, firm or corporation claiming the penalty against the person, firm or corporation from whom the penalty is claimed. (1927, c. 174, s. 5.)

§ 4870(f). Inspection duties devolve upon revenue department.—The duties of the inspection required by sections 4870(a)-4870(e) to be performed by the board of agriculture shall be performed by the department of revenue and the duties therein prescribed to be performed by the commissioner of agriculture shall be preformed by the commissioner of revenue. (1933, c. 214, s. 9.)

Art. 14B. Liquid Fuels, Lubricating Oils, Greases, etc.

§ 4870(g). Sale of automobile fuels and lubricants by deception as to quality, etc., prohibited.—It shall be unlawful for any person, firm, co-partnership, partnership or corporation to store, sell, offer or expose for sale any liquid fuels, lubricating oils, greases or other similar products in any manner whatsoever which may deceive, tend to deceive or have the effect of deceiving the purchaser of said products, as to the nature, quality or quantity of the products so sold, exposed or offered for sale. (1933, c. 108, s. 1.)

§ 4870(h). Sale of fuels, etc., different from advertised name prohibited.—No person, firm, partnership, co-partnership, or corporation shall keep, expose or offer for sale, or sell any liquid fuels,

lubricating oils, greases or other similar products from any container, tank, pump or other distributing device other than those manufactured or distributed by the manufacturer or distributor indicated by the name, trade mark, symbol, sign or other distinguishing mark or device appearing upon said tank, container, pump or other distributing device in which said products were sold, offered for sale or distributed. (1933, c. 108, s. 2.)

§ 4870(i). Imitation of standard equipment prohibited.—It shall be unlawful for any person, firm or corporation to disguise or camouflage his or their own equipment, by imitating the design, symbol, trade name of the equipment under which recognized brands of liquid fuels, lubricating oils and similar products are generally marketed. (1933, 108, s. 3.)

§ 4870(j). Juggling trade names, etc., prohibited.—It shall be unlawful for any person, firm or corporation to expose or offer for sale or sell under any trade mark, trade name or name or other distinguishing mark any liquid fuels, lubricating oils, greases or other similar products other than those manufactured or distributed by the manufacturer or distributor marketing such products under such trade name, trade mark or name or other distinguishing mark. (1933, c. 108, s. 4.)

§ 4870(k). Mixing different brands for sale under standard trade name prohibited. — It shall be unlawful for any person or persons, firm or firms, corporation or corporations or any of their servants, agents or employees, to mix, blend or compound the liquid fuels, lubricating oils, greases or similar products of the manufacturer or distributor with the products of any other manufacturer or distributor, or adulterate the same, and expose or offer for sale or sell such mixed, blended or compounded products under the trade name, trade mark or name or other distinguishing mark of either of said manufacturers or distributors, or as the adulterated products of such manufacturer or distributor: Provided, however, that nothing herein shall prevent the lawful owner thereof from applying its own trade mark, trade name or symbol to any product or material. (1933, c. 108, § 5.)

§ 4870(l). Aiding and assisting in violation of article prohibited.—It shall be unlawful, and upon conviction punishable as will hereinafter be stated, for any person or persons, firm or firms, partnership or co-partnership, corporation or corporations or any of their agents or employees, to aid or assist any other person in violating any of the provisions of this act by depositing or delivering into any tank, pump, receptacle or other container any liquid fuels, lubricating oils, greases or other like products other than those intended to be stored, therein, as indicated by the name of the manufacturer or distributor, or the trade mark, the trade name, name or other distinguishing mark of the product displayed in the container itself, or on the pump or other distributing device used in connection therewith, or shall by any other means aid or assist another in the violation of any of the provisions of this article. (1933, c. 108, s. 6.)

§ 4870(m). Violation made misdemeanor.—Every person, firm or firms, partnership or co-partnership, corporation or corporations, or any of their agents, servants or employees, violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not more than one thousand ($1000.00) dollars and by imprisonment not to exceed twelve (12) months, or by either or both in the discretion of the trial judge. (1933, c. 108, s. 7.)

§ 4870(n). Article supplementary to existing laws.—The provisions of this article shall be construed to be in addition to and supplementary to any existing laws and not in repeal thereof. (1933, c. 108, s. 8.)

Art. 15. Animal Diseases

Part 1. Quarantine

§ 4871. Proclamation of live-stock quarantine.—Upon the recommendation of the commissioner of agriculture, it shall be lawful for the governor to issue his proclamation forbidding the importation into this state of any and all kinds of live stock from any state where there is known to prevail contagious or infectious diseases among the live stock of such state. (1915, c. 174, s. 2.)

§ 4872. Proclamation of infected feedstuff quarantine.—Upon the recommendation of the commissioner of agriculture, it shall be lawful for the governor to issue his proclamation forbidding the importation into this state of any hay, feedstuff, or other article dangerous to live stock as a carrier of infectious or contagious disease from any state where there is known to prevail contagious or infectious disease among the live stock of such state. (1915, c. 174, s. 2.)

§ 4873. Rules to enforce quarantine.—Upon such proclamation being made, the commissioner of agriculture shall have power to make rules and regulations to make effective the proclamation and to stamp out such infectious or contagious diseases as may break out among the live stock in this state. (1915, c. 174, s. 3.)

Cattle Ticks.—The regulation of quarantine district laid and enforced in pursuance of section 4688 par. 3, and this section, for the eradictions of ticks on cattle is a reasonable and valid regulation. State v. Hodges, 180 N. C. 751, 105 S. E. 417. For a full discussion of this subject, see note to section 4688.

§ 4874. Violation of proclamation or rules.—Any person, firm, or corporation, violating the terms of the proclamation of the governor, or any rule or regulation made by the commissioner of agriculture in pursuance thereof, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1915, c. 174, s. 4.)

See notes to and cases cited under section 4688.

Part 2. Foot and Mouth Disease

§ 4875. Appropriation to combat the disease.—If the foot and mouth disease shall occur or seem likely to appear in this state and the agricultural department has no funds available to immediately meet the situation in coöperation with the United States department of agriculture, the state treasurer, upon the approval of the governor, shall set aside out of funds not otherwise appropriated such sum as the governor shall deem necessary and who will notify the treasurer of the amount, to be

known as the foot and mouth appropriation, to be used by the state agricultural department in the work of preventing or eradicating this disease.

The same shall be paid only for work in this connection upon warrants approved by the commissioner of agriculture. (1915, c. 160, s. 1.)

§ 4876. Disposition of surplus funds.—If said disease shall have appeared and shall have been eradicated and work is no longer necessary in connection with it, the state treasurer shall return such part of the appropriation as is not expended to the general fund, and the commissioner of agriculture shall furnish the governor an itemized statement of the money expended, and all moneys set aside out of the state funds and used for the purpose of eradicating said disease under the provisions of this article shall be paid back to the state funds by the department of agriculture out of the first funds received by said agricultural department available for such purpose. (1915, c. 160, s. 2.)

Part 3. Hog Cholera

§ 4877. Burial of hogs dying natural death required.—It shall be the duty of every person, firm, or corporation who shall lose a hog by any form of natural death to have the same buried in the earth to a depth of at least two feet within twelve hours after the death of the animal. Any person, firm, or corporation that shall fail to comply with the terms of this section shall be guilty of a misdemeanor, and shall be fined not less than five dollars nor more than ten for each offense, at the discretion of the court. (1915, c. 225.)

§ 4878. Price of serum to be fixed.—The department of agriculture shall fix the price of anti-hog-cholera serum at such an amount as will cover the cost of production. (1917, c. 275, s. 1; 1919, c. 6.)

§ 4879. Manufacture and use of serum and virus restricted.—It shall be unlawful for any person, firm, or corporation to distribute, sell, or use in the state anti-hog-cholera serum unless said anti-hog-cholera serum is produced at the serum plant of the state department of agriculture, or produced in a plant which is licensed by the United States department of agriculture, bureau of animal industry, allowing said plant to do an interstate business.

It shall be unlawful for any person, firm, or corporation to distribute, sell, or use in the state of North Carolina, virulent blood from hog-cholera-infected hogs, or virus, unless said virulent blood or virus, is produced at the serum plant of the state department of agriculture or produced in a plant which is licensed by the United States department of agriculture, bureau of animal industry, allowing said plant to do an interstate business. No virulent blood from hog-cholera-infected hogs, or virus, shall be distributed, sold or used in the state unless and until permission has been given in writing by the state veterinarian for such distribution, sale or use. Said permission to be canceled by the state veterinarian when necessary.

Any person, firm, or corporation guilty of violating the provisions of this section or failing or refusing to comply with the requirements thereof shall be guilty of a misdemeanor. (1919, c. 125, ss. 1, 2, 3.)

For act permitting sale and use of virus in Edgecombe county, see Public Laws 1933, c. 139. For an act relating to the sale of virus in Wilson county, see Public Laws 1933, c. 58.

For an act providing for selling, using, etc., hog cholera virus in Pitt county, see Public Laws of 1935, chapter 352.

§ 4880. Provision for serum plant.—The North Carolina state board of agriculture shall have the use and control of the whole of the tract of land owned by the state which land was purchased from W. A. Myatt and wife and conveyed by them to the state, May third, one thousand eight hundred and eighty-nine, and contains seventy-eight acres, more or less, adjoining the city farm of the city of Raleigh. The board of agriculture shall use said land for the raising, feeding and caring of hogs, the manufacture of hog-cholera serum, and for conducting experiments in hog production and other livestock, or crop work, as it may find desirable. The hog-cholera serum so manufactured is to be distributed by the state veterinarian at cost to the people of the state applying for the same. To this end the said board of agriculture is authorized to erect and equip all such buildings and appliances as may be necessary for the purposes for which it is to use said land. (1913, c. 161, s. 1; 1923, c. 224, s. 2.)

Editor's Note.—By Public Laws 1923, ch. 224, the language of this section is changed, but it is similar to the former section in substance and effect.

§ 4881. Counties authorized to purchase and supply serum.—If the county commissioners of any county in the state deem it necessary to use anti-hog-cholera serum to control or eradicate the disease known as hog cholera, they are authorized within their discretion to purchase from the state department of agriculture sufficient anti-hog-cholera serum and virus for use in their county and supply same free of cost to the residents of the county, or pay for any portion of the cost of said serum, the remaining portion to be paid by the owners of the hogs.

The use of anti-hog-cholera serum and virus and the quarantine of diseased animals shall remain under the supervision of the state veterinarian.

Nothing in this section shall in any way interfere with existing laws and regulations covering the use of anti-hog-cholera serum and virus and the quarantine and control of contagious diseases, or any laws or regulations that may become necessary in the future. (1919, c. 132.)

Part 4. Compensation for Killing Diseased Animals

§ 4882. State to pay part of value of animals killed on account of disease.—If it appears to be necessary for the control or eradication of tuberculosis and para-tuberculosis in cattle, or glanders in horses and mules, to destroy such animals affected with such diseases and to compensate owners for loss thereof, the state veterinarian is authorized, within his discretion, to agree on the part of the state, in the case of cattle destroyed for tuberculosis, and para-tuberculosis to pay one-third of the difference between the appraised value of each animal so destroyed and the value of the salvage thereof; Provided, that in no case shall any payment by the state be more than twenty-

five dollars for any grade animal nor more than fifty dollars for any pure-bred animal. In the case of horses or mules destroyed for glanders to pay one-half of the appraised value, said half not to exceed one hundred dollars. (1919, c. 62, s. 1; 1929, c. 107, s. 1.)

See section 4489.

§ 4883. Appraisal of cattle affected with tuberculosis.—Cattle affected with tuberculosis and paratuberculosis shall be appraised by three men—one to be chosen by the owner, one by the United States bureau of animal industry, and one by the state veterinarian. If the United States bureau of animal industry is not represented, then the appraisers shall be chosen, one by the owner, one by the state veterinarian, the third to be chosen by the first two named. The finding of such appraisers shall be final. (1919, c. 62, s. 2; 1929, c. 107, s. 1.)

§ 4884. Appraisal of animals affected with glanders; report.—Animals affected with glanders shall be appraised by three men—one to be chosen by the owner, one to be chosen by the state veterinarian, the third to be named by the first two chosen, the finding of such appraisers to be final. The report of appraisal to be made in triplicate on forms furnished by the state veterinarian, and a copy sent to the state veterinarian at once. (1919, c. 62, s. 3.)

§ 4885. Report of appraisal on tuberculous cattle to state veterinarian; contents.—Appraisals of tuberculous cattle shall be reported on forms furnished by the state veterinarian, which shall show the number of animals, the appraised value of each per head, or the weight and appraised value per pound, and shall be signed by the owners and the appraisers. This report must be made in triplicate and a copy sent to the state veterinarian. (1919, c. 62, s. 4.)

§ 4886. Provision for owner of tuberculous cattle to market and report.—Each owner of tuberculous cattle, which have been appraised, and which have been authorized by the state veterinarian to be marketed, shall market the cattle within thirty days and shall obtain from the purchaser a report in triplicate. One copy to be sent to the state veterinarian at once, certifying as to the amount of money actually paid for the animals, all animals to be identified on report. (1919, c. 62, s. 5.)

§ 4887. Report on salvage.—When the appraised cattle have been slaughtered and the amount of salvage ascertained, a report, on forms furnished by the state veterinarian, in triplicate shall be made, signed by the owner and the United States bureau of animal industry or state inspector and the appraisers by which the animals were appraised and destroyed, showing the difference between the appraised value and salvage. Two copies to be attached to the voucher in which compensation is claimed, and one copy to be furnished by the owner of cattle. (1919, c. 62, s. 6.)

§ 4888. Compensation when killing ordered.—Compensation for animals destroyed on account of glanders will only be paid when such destruction is ordered by the state veterinarian or his authorized representative. When the owner of the animals presents his claim he shall support same with the original report of the appraiser, together with the report of the inspector who destroyed the animal, to the state veterinarian. (1919, c. 62, s. 7.)

§ 4889. Ownership of destroyed animals; outstanding liens.—When animals have been destroyed pursuant to this article the inspector shall take reasonable precautions to determine, prior to his approval of vouchers in which compensation is claimed, who is the owner of and whether there are any mortgages or other liens outstanding against the animals. If it appears that there are outstanding liens, a full report regarding same shall be made and shall accompany the voucher. Every such report shall include a description of the liens, the name of the person or persons having possession of the documentary evidence, and a statement showing what arrangements, if any, have been made to discharge the liens outstanding against the animals destroyed of which the inspector may have knowledge. (1919, c. 62, s. 8.)

§ 4890. State not to pay for feed of animals ordered killed.—Expense for the care and feeding of animals held for slaughter shall not be paid by the state. (1919, c. 62, s. 9.)

§ 4891. Disinfection of stockyards by owners.—Stockyards, pens, cars, vessels and other premises and conveyances will be disinfected whenever necessary for the control and eradication of disease by the owners at their expense under the supervision of an inspector of the United States bureau of animal industry or state veterinarian. (1919, c. 62, s. 10.)

§ 4892. Payments made only on certain conditions.—No payments shall be made for any animal slaughtered in the following cases:

1. If the owner does not disinfect premises, etc., as directed by an inspector of the United States bureau of animal industry or the state veterinarian.
2. For any animals destroyed where the owner has not complied with all lawful quarantine regulations.
3. Animals reacting to a test not approved by the state veterinarian.
4. Animals belonging to the United States.
5. Animals brought into the state in violation of the state laws and regulations.
6. Animals which the owner or claimant knew to be diseased, or had notice thereof, at the time they came into their possession.
7. Animals which had the disease for which they were slaughtered or which were destroyed by reason of exposure to the disease, at the time of their arrival in the state.
8. Animals which have not been within the state of North Carolina for at least one hundred and twenty days prior to the discovery of the disease.
9. Where owner does not use reasonable care in protecting animals from disease.
10. Where owner has failed to submit the necessary reports as required by this article. (1919, c. 62, s. 11.)

§ 4893. Owner's claim for indemnity supported by reports.—The owner must present his claim for indemnity to the state veterinarian for approval, and the claim shall be supported with the original report of the appraisers, the original report of the sale of the animals in the case of cattle destroyed

on account of tuberculosis, the certificate of the state or United States bureau of animal industry inspector, and a summary of the claim. All of which shall constitute a part of the claim.

The owner must state whether or not the animals are owned entirely by him or advise fully of any partnership, and describe fully any mortgages or other liens against animals. (1919, c. 62, s. 12.)

§ 4894. State veterinarian to carry out provisions of article; how moneys paid out.—The state veterinarian is authorized, himself or by his representative, to do all things specified in this article. All moneys authorized to be paid shall be paid from the state treasury on warrant approved by the auditor, and the state treasurer is hereby authorized to make such payment. (1919, c. 62, s. 13.)

§ 4895. Appropriation to pay indemnities.—(Repealed: 1925, c. 275, s. 6.)

Part 5. Tuberculosis

§ 4895(a). Animals reacting to tuberculin test.—All animals reacting to a tuberculin test applied by a qualified veterinarian shall be known as a reactor and be forever considered as affected with tuberculosis. (1921, c. 177, s. 1.)

§ 4895(b). Animals to be branded.—All veterinarians who, either by clinical examinations or by tuberculin test, find an animal affected with tuberculosis, shall, unless the animal is immediately slaughtered, properly brand said animal for identification on the left jaw with the letter "T", not less than two inches high, and promptly report the same to the state veterinarian. (1921, c. 177, s. 2.)

§ 4895(c). Quarantine; removal or sale; sale and use of milk.—The owner or owners of an animal affected with tuberculosis shall keep said animal isolated and quarantined in such a manner as to prevent the spread of the disease to other animals or man. Said animals must not be moved from the place where quarantined or sold, or otherwise disposed of except upon permission of the state veterinarian, and then only in accordance with his instructions. The milk from said animals must not be sold, and if used shall be first boiled or properly pasteurized. (1921, c. 177, s. 3.)

§ 4895(d). Seller liable in civil action.—Any person or persons who sells or otherwise disposes of to another an animal affected with tuberculosis shall be liable in a civil action to any person injured, and for any and all damages resulting therefrom. (1921, c. 177, s. 4.)

§ 4895(e). Responsibility of owner of premises where sale is made.—When cattle are sold or otherwise disposed of in this state by a nonresident of this state, the person or persons on whose premises the cattle are sold or otherwise disposed of with his knowledge and consent shall be equally responsible for violation of this law and the regulations of the department of agriculture. (1921, c. 177, s. 5.)

§ 4895(f). Sale of tuberculin.—No person, firm or corporation shall sell or distribute or administer tuberculin, or keep the same on hand for sale, distribution, or administration, except qualified veterinarians, licensed physicians, or licensed druggists, or others lawfully engaged in the sale of biological products. (1921, c. 177, s. 6.)

§ 4895(g). Notice to owner of suspected animals; quarantine.—When the state veterinarian receives information, or has reason to believe that tuberculosis exists in any animal or animals, he shall promptly notify the owner or owners, and recommend that a tuberculin test be applied to said animals, that diseased animals shall be properly disposed of, and the premises disinfected under the supervision of the state veterinarian, or his authorized representative. Should the owner or owners fail or refuse to comply with the said recommendations of the state veterinarian within ten days after said notice, then the state veterinarian shall quarantine said animals on the premises of the owner or owners. Said animals shall not be removed from the premises where quarantined and milk or other dairy products from same shall not be sold or otherwise disposed of. Said quarantine shall remain in effect until the said recommendations of the state veterinarian have been complied with, and the quarantine canceled by the state veterinarian. (1921, c. 177, s. 7.)

§ 4895(h). Appropriations by counties; elections.—The several boards of county commissioners in the state are hereby expressly authorized and empowered to make such appropriations from the general funds of their county as will enable them to coöperate effectively with the state and federal departments of agriculture in the eradication of tuberculosis in their respective counties: Provided, that if in ten days after said appropriation is voted, one-fifth of the qualified voters of the county petition the board of commissioners to submit the question of tuberculosis eradication or no tuberculosis eradication to the voters of the county, said commissioners shall submit such questions to said voters. Said election shall be held and conducted under the rules and regulations provided for holding stock-law elections in sections one thousand eight hundred and forty-two, one thousand eight hundred and forty-six, and one thousand eight hundred and forty-seven. If at any such election a majortity of the votes cast shall be in favor of said tuberculosis eradication, the said board shall record the result of the election upon its minutes, and coöperative tuberculosis eradication shall be taken up with the state and federal departments of agriculture. If, however, a majority of the votes cast shall be adverse, then said board shall make no appropriation. (1921, c. 177, s. 8.)

§ 4895(i). Petition for election if commissioners refuse coöperation; order; effect.—If the board of commissioners of any county should exercise their discretion and refuse to coöperate as set out in section 4895(h), then if a petition is presented to said board by one-fifth of the qualified voters of the county requesting that an election be held as provided in section 4895(h) to determine the question of tuberculosis eradication in the county, the board of commissioners shall order said election to be held in the way provided in section 4895(h), and if a majority of the

votes cast at such election shall be in favor of tuberculosis eradication, then said board shall coöperate with the state and federal governments as herein provided. (1921, c. 177, s. 9.)

§ 4895(j). Importation of cattle.—Whenever a county board shall coöperate with the state and federal governments, whether with or without an election, no cattle except for immediate slaughter shall be brought into the county unless accompanied by a tuberculin test chart and health certificate issued by a qualified veterinarian. (1921, c. 177, s. 10.)

§ 4895(k). Amount of appropriation.—When coöperative tuberculosis eradication shall be taken up in any county as provided for in this law, the county commissioners of such counties shall appropriate from the general county fund an amount sufficient to defray one-half of the expense of said coöperative tuberculosis eradication. (1921, c. 177, s. 11.)

§ 4895(l). Qualified veterinarian. — The words "qualified veterinarian" which appear in this law shall be construed to mean a veterinarian approved by the state veterinarian and the chief of the United States bureau of animal industry for the tuberculin testing of cattle intended for interstate shipment. (1921, c. 177, s. 12.)

§ 4895(m). Rules and regulations.—The commissioner of agriculture, by and with the consent of the state board of agriculture, shall have full power to promulgate and enforce such rules and regulations as may be necessary to control and eradicate tuberculosis. (1921, c. 177, s. 13.)

§ 4895(n). Violation of law a misdemeanor.—Any person or persons who shall violate any provision set forth in this law, or any rule or regulation duly established by the state board of agriculture or any officer or inspector who shall willfully fail to comply with any provisions of this law, shall be guilty of a misdemeanor. (1921, c. 177, s. 14.)

§ 4895(o). Sale of affected animals a felony.—Any person or persons who shall willfully and knowingly sell or otherwise dispose of any animal or animals known to be affected with tuberculosis without permission as provided for in section 4895(c) shall be guilty of a felony, and punishable by imprisonment of not less than one year or not more than five years in the state prison. (1921, c. 177, s. 15.)

Part 6. Cattle Tick

§ 4895(p). Systematic dipping of cattle or horses.—Systematic dipping of all cattle or horses infested with or exposed to the cattle tick, (Margaropus annulatus) shall be taken up in all counties or portions of counties that shall at anytime be found partially or completely infested with the cattle tick (Margaropus annulatus) under the direction of the state veterinarian acting under the authority as hereinafter provided in this law and as provided in all other laws and parts of laws of North Carolina and the livestock sanitary laws and regulations of the state board of agriculture not in conflict with this law. (1923, c. 146, s. 1.)

Editor's Note.—It is said in 1 N. C. Law Rev. 301, that this statute reinforces sections 4688 and 4873.

§ 4895(q). Quarantine zones.—For the purpose of this law and to efficiently conduct systematic tick eradication in co-operation with the United States department of agriculture, in the area under quarantine on account of the cattle tick (Margaropus annulatus) said area shall be divided into three zones, as follows: Zone one shall embrace the counties of Bertie, Hertford, Gates, Perquimans, Camden and Currituck; zone two, the counties of Martin, Washington, Tyrrell, Dare, Beaufort and Hyde; and zone three, the counties of Craven, Pamlico, Jones, Carteret, Onslow, Brunswick and Columbus. The work of systematic tick eradication shall be taken up in zone one on March first, nineteen hundred and twenty-three; in zone two on January first, nineteen hundred twenty-four, and in zone three on January first, nineteen hundred and twenty-five, as herein provided: Provided, that the state veterinarian may, upon the written request of the board of county commissioners of any county in said zones two and three, take up the work of systematic eradication in said counties at an earlier date than herein provided. When the work is so taken up it shall be conducted to completion as hereinafter provided. (1923, c. 146, s. 2.)

§ 4895(r). Counties not embraced in quarantine zones.—If it shall be determined by the state veterinarian or an authorized quarantine inspector, that any county or counties not embraced in said zones one, two and three shall be partially or completely infested with the cattle tick (Margaropus annulatus), the county commissioners of said counties which are partially or completely infested with the cattle tick (Margaropus annulatus) shall immediately take up the work of systematic tick eradication as hereafter provided and continue same until the cattle tick (Margaropus annulatus) is completely eradicated and notice in writing of same is given by the state veterinarian. (1923, c. 146, s. 3.)

§ 4895(s). Dipping vats; counties to provide; cost.—The county commissioners of the aforesaid counties shall provide such numbers of dipping vats as may be fixed by the state veterinarian or his authorized representative, and provide the proper chemicals and other materials necessary to be used in the work of systematic tick eradication in such counties, which shall begin on said dates and continue until the cattle tick (Margaropus annulatus) is completely eradicated and notice in writing of same is given by the state veterinarian. The cost of said vats and chemicals, or any other expense incurred in carrying out the provisions of this law, except sections 4895(t) and 4895(x), shall be paid out of the general county fund. (1923, c. 146, s. 4.)

§ 4895(t). Local state inspectors; commissioning as quarantine inspectors; salaries, etc.—The state veterinarian shall appoint the necessary number or local state inspectors to assist in systematic tick eradication, who shall be commissioned by the commissioner of agriculture as quarantine inspectors. The salaries of said inspectors shall be

fixed by the state veterinarian and shall be sufficient to insure the employment of competent men. If the services of any of said inspectors is not satisfactory to the state veterinarian, his services shall be immediately discontinued and his commission canceled. (1923, c. 146, s. 5; 1925, c. 275, s. 6.)

Editor's Note. — The only effect of the 1925 amendment was to strike a provision appropriating a sum not to exceed $50,000 with which to pay the salaries of state inspectors.

§ 4895(u). Enforcement of compliance with law.—If the county commissioners shall fail, refuse or neglect to comply with the provisions of this law, the state veterinarian shall apply to any court of competent jurisdiction for a writ of mandamus, or shall institute such other proceedings as may be necessary and proper to compel such county commissioners to comply with the provisions of this law. (1923, c. 146, s. 6.)

§ 4895(v). Owners of stock to have same dipped; supervision of dipping; dipping period.—Any person or persons, firms or corporations, owning or having in charge any cattle, horses or mules in any county where tick eradication shall be taken up, or is in progress under existing laws, shall, on notification by any quarantine inspector to do so, have such cattle, horses or mules dipped regularly every fourteen days in a vat properly charged with arsenical solution as recommended by the United States bureau of animal industry, under the supervision of said inspector at such time and place in such manner as may be designated by the quarantine inspector. The dipping period shall be continued as long as may be required by the rules and regulations of the state board of agriculture, which shall be sufficient in number and length of time to completely destroy and eradicate all cattle ticks (Margaropus annulatus) in such county or counties. (1923, c. 146, s. 7.)

§ 4895(w). Service of notice.—Quarantine and dipping notice for cattle, horses and mules, the owner or owners of which cannot be found, shall be served by posting copy of such notice in not less than three public places within the county, one of which shall be placed at the county courthouse. Such posting shall be due and legal notice. (1923, c. 146, s. 8.)

§ 4895(x). Cattle placed in quarantine; dipping at expense of owner.—Cattle, horses or mules infested with or exposed to the cattle tick (Margaropus annulatus) the owner or owners of which, after five days written notice from a quarantine inspector of such animals as are provided for in section 4895(w), shall fail or refuse to dip such animals regularly every fourteen days in a vat properly charged with arsenical solution, as recommended by the United States bureau of animal industry, under the supervision of a quarantine inspector, shall be placed in quarantine, dipped and cared for at the expense of the owner or owners, by the quarantine inspector. (1923, c. 146, s. 9.)

§ 4895(y). Expense of dipping as lien on animals; enfocement of lien.—Any expense incurred in the enforcement of the preceding section and the cost of feeding and caring for animals while undergoing the process of tick eradication shall constitute a lien upon any animal, and should the owner or owners fail or refuse to pay said expense, after three days notice, they shall be sold by the sheriff of the county after twenty days advertising at the courthouse door and three other public places in the immediate neighborhood of the place at which the animal was taken up for the purpose of tick eradication. The said advertisement shall state therein the time and place of sale, which place shall be where the animal is confined. The sale shall be at public auction and to the highest bidder for cash. Out of the proceeds of the sale the sheriff shall pay the cost of publishing the notices of the tick eradication process, including dipping, cost of feeding and caring for the animals and cost of the sale which shall include one dollar and fifty cents in the case of each sale to said sheriff. The surplus, if any, shall be paid to the owner of the animal if he can be ascertained. If he cannot be ascertained within thirty days after such sale, then the sheriff shall pay such surplus to the county treasurer for the benefit of the public school fund of the county: Provided, however, that if the owner of the animal shall, within twelve months after the fund is turned over to the county treasurer, as aforesaid, prove to the satisfaction of the board of county commissioners of the county that he was the owner of such animal, then, upon the order of said board, such surplus shall be refunded to the owner. (1923, c. 146, s. 10.)

§ 4895(z). Duty of sheriff.—It shall be the duty of the sheriff, in any county in which the work of tick eradication is in progress, to render all quarantine inspectors any assistance necessary in the enforcement of this law and the regulations of the North Carolina department of agriculture. If the sheriff of any county shall neglect, fail or refuse to render this assistance when so required, he shall be guilty of a misdemeanor and be punishable at the discretion of the court. (1923, c. 146, s. 11.)

§ 4895(aa). Rules and regulations.—The commissioner of agriculture, by and with the consent of the state board of agriculture, shall have full power to promulgate and enforce such rules and regulations that may hereafter be necessary to complete tick eradication in North Carolina. (1923, c. 146, s. 12.)

§ 4895(bb). Violation of law rules and regulations as misdemeanor.—Any person, firm or corporation who shall violate any provisions set forth in this law or any rule or regulation duly established by the state board of agriculture, or any officer or inspector who shall willfully fail to comply with any provision of this law shall be guilty of a misdemeanor. (1923, c. 146, s. 13.)

§ 4895(cc). Damaging dipping vats a felony.—Any person or persons who shall wilfully damage or destroy by any means any vat erected, or in the process of being erected, as provided for tick eradication, shall be guilty of a felony and upon conviction shall be imprisoned not less than two years nor more than ten years in the state prison. (1923, c. 146, s. 14.)

§ 4895(dd). Effect of law on offenses committed prior to enactment.—All laws and parts of

laws in conflict with this law are continued in force so far as they affect the state offenses committed prior to March 3, 1923, and for no other purpose. Subject to provisions hereinbefore set out in this section, all laws and parts of laws in conflict with this law are hereby repealed. (1923, c. 147, s. 15.)

Part 7. Rabies

§ 4895(1). Definitions. — The following definitions shall apply to this law:

(a) The term "dog" shall means dogs of any sex.

(b) The term "vaccination" shall be understood to mean the administration of anti-rabic vaccine approved by the department of agriculture, containing not less than twenty percent (20%) of fixed virus material, non-virulent and potent as shown by the required tests of the United States bureau of animal industry. (1935, c. 122, s. 1.)

§ 4895(2). Annual vaccination of all dogs. — It shall be the duty of the owner of every dog to have same vaccinated annually by a rabies inspector in accordance with the provisions of this law. And it shall be the further duty of the owner of said dog to properly restrain same and to assist the rabies inspector in administering the vaccine. (1935, c. 122, s. 2.)

§ 4895(3). Appointment of rabies inspectors; preference to veterinarians.—It shall be the duty of the county health officers of the several counties regularly employing health officers, and in those counties where health officers are not employed, it shall be the duty of the county commissioners, to appoint and designate a sufficient number of rabies inspectors, at least one to each township in each county, to carry out the provisions of this law, the said rabies inspectors so appointed to be approved by and to be under the supervision and direction of the department of agriculture: Provided that in the designation of rabies inspectors preference shall always be given to licensed veterinarians living in the township, and the board of county commissioners is hereby authorized in its discretion to appoint any licensed veterinarian as rabies inspector in any township adjoining the one in which the veterinarian lives. (1935, c. 122, s. 3.)

§ 4895(4). Time of vaccination.—The vaccination of all dogs in the counties shall begin annually on April first and shall be completed within ninety (90) days from the date of beginning the vaccination in the several counties. (1935, c. 122, s. 4.)

§ 4895(5). Publication of notice of date of vaccination; duty of owner.—The department of agriculture shall give due notice through the newspaper of the county and by posting notice at the court house and at one or more public places in each township of the county of the date on which the vaccination of all dogs shall be started in a county and it shall be the duty of the owner of every dog in said county to have said dog, or dogs, at either of two or more points in the township for the purpose of having same vaccinated, said points and date to be designated by the rabies inspector. (1935, c. 122, s. 5.)

§ 4895(6). Vaccine and cost; metal tag to be worn by dog; certificate of vaccination.—The state department of agriculture shall purchase the proper rabies vaccine provided for in this law and supply same to the rabies inspector at a cost of not to exceed twenty-five cents per dose, and a uniform metal tag, serially numbered and suitably lettered and to show the year issued. Said tag, together with certificate shall be given to the owner of each dog vaccinated by the rabies inspector, said tag to be worn at all times by the dog to which issued, provided a certificate of vaccination issued by a registered veterinarian when presented to the rabies inspector shall be satisfactory evidence of the vaccination required under this law and shall entitle the owner to receive the metal tag and certificate of vaccination provided for in this law. Said certificate shall be issued in duplicate and the rabies inspector issuing same shall forward the copy to the department of agriculture. Duplicate tags may be issued by notifying the rabies inspector only when certificate of vaccination is furnished by owner. The fee for duplicate tag shall be twenty-five cents ($.25). (1935, c. 122, s. 6.)

§ 4895(7). Notice to sheriff of each county and his duty to assist.—The department of agriculture shall notify the sheriff of the county of the date when the vaccination of dogs in said county shall begin and it shall be the duty of the sheriff and his deputies to assist the rabies inspector in the enforcement of this law. (1935, c. 122, s. 7.)

§ 4895(8). Canvass of dogs not wearing metal tags; notice to owners to have dogs vaccinated; killing of ownerless dogs.—When the rabies inspector has carried out the provisions of this law as to section 4895(5) in all townships of the county, it shall be the duty of the sheriff with the assistance of the rabies inspector to make a thorough canvass of the county and frequently thereafter to determine if there are any dogs that are not wearing the metal tag provided for in section 4895(6). If such dogs are found the sheriff shall notify the owner to have same vaccinated by a rabies inspector and to produce the certificate provided for in section 4895(6), within three days. If the owner shall fail to do this he shall be prosecuted in accordance with the provisions of this law. If the owner of a dog not wearing a tag cannot be found it shall be the duty of said officer to destroy said dog. (1935, c. 122, s. 8.)

§ 4895(9). Fees; penalty; record of vaccinations and collections.—The rabies inspector shall collect from the owner of each dog vaccinated, as provided for in section 4895(5), not more than fifty cents for each dog, the same to be credited on the dog tax when certificate of vaccination is presented to the sheriff or tax collector of said county. The rabies inspector shall retain for his services the sum of twenty-five cents for each dog vaccinated and remit to the department of agriculture the remainder of the fee, which shall be used by the department of agriculture to cover the cost of the vaccine and other expenses incidental to the enforcement of this law. Any owner who fails to have his dog vaccinated at the time the rabies inspector is in the township in which the owner resides, as provided in section 4895(5),

shall have said dog vaccinated in accordance with section 4895(8) and shall pay the rabies inspector the additional sum of twenty-five cents to be retained by him for each dog treated. The department of agriculture shall keep a record of the dogs vaccinated and the funds collected. (1935, c. 122, s. 9.)

§ 4895(10). Vaccination of dogs born after annual vaccination.—It shall be the duty of the owner of any dog born after the annual vaccination of dogs in his county or any dog that was not six months old at the time of said annual vaccination to take the same when six months old to a rabies inspector for the purpose of having same vaccinated. The fee charged in such cases by the rabies inspector shall not exceed fifty cents per animal. (1935, c. 122, s. 10, c. 344.)

§ 4895(11). Vaccination and confinement of dogs brought into state.—All dogs shipped or otherwise brought into this State, except for exhibition purposes where the dogs are confined and not permitted to run at large, shall be securely confined and vaccinated within one week after entry, and shall remain confined for two additional weeks after vaccination unless accompanied by a certificate issued by a qualified veterinarian showing that said dog is apparently free from rabies and has not been exposed to same and that said dog has received a proper dose of rabies vaccine not more than six months prior to the date of issuing the certificate. (1935, c. 122, s. 11.)

§ 4895(12). Quarantine of districts infected with rabies.—The department of agriculture may declare quarantine against rabies in any designated district when in its judgment this disease exists to the extent that the lives of persons are endangered and all dogs in said district shall be confined on the premises of the owner or in a veterinary hospital: Provided a dog may be permitted to leave the premises of the owner if on leash or under the control of its owner or other responsible person. (1935, c. 122, s. 12.)

§ 4895(13). Killing stray dogs in quarantine districts. — When quarantine has been established, and dogs continue to run at large, uncontrolled by owners or persons responsible for their control, any police officer or deputy sheriff shall have the right after reasonable effort has been made on the part of the officers to apprehend the dogs running at large to kill said dogs and properly dispose of their bodies. (1935, c. 122, s. 13.)

§ 4895(14). Infected dogs to be killed; protection of dogs vaccinated.—Every animal having rabies, and every animal known to have been bitten by another animal having rabies, shall be killed immediately by its owner or a peace officer: Provided that if any animal known to have been bitten by a dog having rabies, but which has not developed the disease, shall have been vaccinated in accordance with this law before being bitten, such animal shall be closely confined until it shall have been determined by the rabies inspector or a registered veterinarian that the animal has rabies, before it shall be required to be killed. (1935, c. 122, s. 14.)

§ 4895(15). Confinement of suspected dogs. — [As to] every animal suspected of having rabies or having symptoms of the disease, or exposed to the disease, it shall be the duty of the person owning the animal or having possession thereof, [to see] that such animal be at once confined in some secure place for at least three weeks and until released by the rabies inspector for the purpose of determining whether such animal has the disease. (1935, c. 122, s. 15, c. 344.)

Editor's Note.—The words in brackets were inserted in an attempt to clarify the language of this section which is confusing.

§ 4895(16). Dogs having rabies to be killed; heads ordered to a laboratory.—Every animal, after it has been determined that it has rabies, shall be killed at once by a peace officer or its owner, and every animal suspected of having rabies which may have died, the head shall be properly prepared and sent at once to the laboratory approved by the state board of health. (1935, c. 122, s. 16.)

Editor's Note.—The wording in this section is somewhat confusing. Seemingly the latter part should read: "and the head of every animal suspected of having rabies which may have died shall be properly prepared and sent at once to the laboratory approved by the State Board of Health."

§ 4895(17). Notice to department of agriculture and rabies inspector when person bitten; confinement of dog.—When a person has been bitten by a dog or animal, which has rabies or which is suspected of having rabies, it shall be the duty of such person and if a minor, his parent or guardian, and the owner of such animal or person having same in his possession, or under his control, to immediately notify the department of agriculture, his name and address, and the owner or person having such dog under his control to immediately notify the rabies inspector and shall securely confine said animal on his premises or surrender it to a veterinary hospital for inspection and observation. After the preliminary examination and observation the animal may be released in the custody of the owner to be kept under quarantine and observation for twenty-one (21) days, and until released by the rabies inspector, if the animal is found not to have rabies. (1935, c. 122, s. 17.)

§ 4895(18). Confinement or leashing of vicious dogs.—When an animal becomes vicious, and a menace to the public health the owner of such animal or person harboring or having such animal in his possession shall not permit such animal to run at large unless on leash in the care of a responsible person, or muzzled with a proper fitting muzzle, securely fastened to prevent such animal from bitting a person or another animal. (1935, c. 122, s. 18.)

§ 4895(19). Administration of law in cities and larger towns; coöperation with sheriffs.—In towns or cities with a population of five thousand (5000), or more, the responsibility for assistance in the enforcement of this law shall be with the public safety or police department of said town or city, and this department shall be subject to the same rules, regulations and penalties as the sheriffs of the several counties; and it shall further be the duty of the public safety or police department in towns or cities assisting in the enforcement of this law to co-operate with the sheriff of any county in the carrying out of the provisions of

this law for a distance of one mile beyond the city limits. (1935, c. 122, s. 19.)

§ 4895(20). Regulation of content of vaccine; doses.—Rabies vaccine intended for use on dogs and other animals shall not be shipped or otherwise brought into North Carolina, used, sold or offered for sale unless said rabies vaccine shall contain not less than twenty percent (20%) of fixed virus material and be non-virulent and potent as shown by the required tests of the United States bureau of animal industry. Said rabies vaccine shall be recommended in doses of not less than five (5) c. c. each for dogs and other small animals; relatively larger doses being recommended for larger animals. (1935, c. 122, s. 20.)

§ 4895(21). Law declared additional to other laws on subject.—The provisions of this law shall not be construed to repeal or change any laws heretofore enacted but shall be in addition thereto except insofar as said laws heretofore enacted and enforced shall actually conflict with the provisions of this law and prevent the proper enforcement of said provisions. And the said laws enacted and now in force shall remain in full force and effect except as they do actually conflict with the enforcement of the provisions of this law in which this law and the provisions thereof shall prevail. (1935, c. 122, s. 21).

§ 4895(22). Application of law.—This law shall not apply for the year of one thousand nine hundred and thirty-five to such cities, towns or counties as may now have a law similar to this law. Nor shall any owner, who can present to the rabies inspector absolute proof that his dog, or dogs, have been vaccinated for the year one thousand nine hundred and thirty-five prior to the enactment of this law be required to again vaccinate his dog, or dogs, for said year. (1935, c. 122, s. 22.)

§ 4895(23). Violation made misdemeanor.—Any person who shall violate any of the provisions of this law or any provision of any regulation of quarantine established thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten ($10.00) dollars or more than fifty ($50.00) dollars, or to imprisonment of not less than ten (10) days or more than thirty (30) days in the discretion of the court. (1935, c. 122, s. 23.)

§ 4895(24). Present dog tax limited. — No county, city or town shall levy any additional taxes on dogs other than the tax now levied. (1935, c. 122, s. 24.)

§ 4895(25). Funds for initial set up and temporary administration of law.—The department of agriculture is hereby authorized, with the approval of the budget bureau, to incur and pay out of the available agricultural fund, not otherwise appropriated, such sums as may be necessary to provide for the initial set up and temporary administration of the rabies law authorized by the general assembly of North Carolina to be administered by the department of agriculture. Any money collected under the provisions of this law in excess of the cost of operations and enforcement shall become a part of the agricultural fund of the State of North Carolina. (1935, c. 190.)

Art. 16. Crop Pests

§ 4896. Crop pest commission.—The board of agriculture shall be the crop pest commission. (1909, c. 90, s. 1.)

§ 4897. Powers and duties of commission; establish regulations.—The board of agriculture shall, from time to time, as it may deem necessary, prepare and publish a list of dangerous crop pests, known to be within the state, or liable to be introduced, and shall also publish methods for exterminating such pests as it may deem capable of being economically exterminated, for repressing such as cannot be economically exterminated, and for preventing their spread within the state. It may also adopt regulations not inconsistent with the laws or constitutions of this state and of the United States, for preventing the introduction of dangerous crop pests from without the state, and for governing common carriers in transporting plants liable to harbor such pests to and from the state; which regulations shall have the force of law. Any violation of any such regulations shall be a misdemeanor, and the person violating the same shall upon conviction be fined or imprisoned in the discretion of the court. (Rev., s. 3980; 1897, c. 264, s. 2; 1909, c. 90, s. 1.)

§ 4898. Crop pests declared nuisance; method of abatement.—No person shall knowingly and wilfully keep upon his premises any plant infested by any dangerous crop pest, listed and published as such by the board of agriculture, or permit dangerous weed pests to mature seed or otherwise multiply upon his land, except under such regulations as the board of agriculture may prescribe. All such infested plants and premises are hereby declared public nuisances. The owner of such plants or premises shall, when notified to do so by the board of agriculture, take such measures as may be prescribed to eradicate such pests. If such action is not taken, or is improperly executed within ten days after such notification, the board of agriculture shall cause such premises to be freed from such pests by the best available method. The cost of such work shall be a lien upon the premises, and may be recovered, together with cost of action, before any court having jurisdiction. The notice shall be written and mailed to the usual or known address, or left at the ordinary place of business of the owner or his agent. No damages shall be awarded the owner of such premises for entering thereon and destroying or otherwise treating any infested plant or crop, when done by the order of the board of agriculture. (Rev., s. 3981; 1897, c. 264, s. 3; 1909, c. 90, s. 1.)

§ 4899. Right to enter and inspect premises.—Whenever the board of agriculture has reason to suspect that any pest, listed as dangerous, exists in any portion of the state, it shall cause an investigation to be made by some person capable of determining the specific identity of such pest, and, if it be found to exist, the board of agriculture shall further appoint a competent person as its agent to inspect such infested premises, and to take such measures for treating the same as the board may direct. Any duly authorized agent of the board of agriculture shall have authority to enter upon and inspect any premises between

the hours of sunrise and sunset during every working day of the year. (Rev., s. 3982; 1897, c. 264, s. 4; 1909, c. 90, s. 1.)

§ 4900. Preventing inspection or hindering execution of article a misdemeanor.—If any one shall seek to prevent inspection of his premises as provided in the preceding section, or shall otherwise interfere with any agent of the commission, or board of agriculture while in performance of his duties under the preceding section, he shall, upon conviction, be fined not less than five nor more than fifty dollars for each offense, or may be imprisoned for not less than ten nor more than thirty days. (Rev., s. 3713; 1907, c. 876.)

See section 4688 par. 4.

§ 4900(a). Purchase of calcium arsenate for poisoning boll weevil.—The state commissioner of agriculture is authorized to purchase in the open markets, upon the best terms and prices obtainable, such amounts of calcium arsenate as in his judgment will be needed for use by the farmers of this state in poisoning the cotton boll weevil, and to store the same in state warehouses in the various towns and communities of the state in such quantities as in his judgment will be needed. (1923, c. 194, s. 1.)

§ 4900(b). Sales of calcium arsenate. — The commissioner of agriculture is authorized, either by himself or his agents, to sell for cash tc the farmers of North Carolina the said calcium arsenate. (1923, c. 194, s. 2.)

§ 4900(c). Purpose of preceding sections; resale at profit.—It is the avowed purpose of the two preceding sections that the calcium arsenate provided for herein is to be sold and delivered directly to the farmers of this state, at actual cost plus the actual cost of handling, and is not to be handled for speculative purposes, nor sold to dealers for resale at a profit; and any person or persons who shall purchase from the state commissioners of agriculture, calcium arsenate and resell the same at a greater price than actual cost shall be guilty of a misdemeanor, and upon conviction be punished by fine or imprisonment at the discretion of the court. The commissioner of agriculture is hereby authorized to use any funds not otherwise appropriated in putting into effect the provisions of this law, which shall only be in force for the years one thousand nine hundred and twenty-three and one thousand nine hundred and twenty-four. (1923, c. 194, ss. 3, 4.)

Art. 17. Cotton Grading

§ 4901. Federal standards recognized. — The standards or grades of cotton established or which may be hereafter established by the secretary of agriculture by virtue of acts of congress shall be recognized as the standards in transactions by and between citizens of this state in transactions relating to cotton. (1915, c. 23, s. 1.)

§ 4902. Duplicates of federal samples may be used. — The commissioner of agriculture shall obtain from the secretary of agriculture a duplicate of each of these samples as represent cotton produced in this state for the use of the citizens of the state who may desire to use them in settlement of any disputed transaction. (1915, c. 23, s. 2.)

§ 4903. Expert graders to be employed.—The North Carolina department of agriculture and the North Carolina State College of Agriculture and Engineering, acting together as provided in part 3 of article 1 of this chapter, entitled "Joint Committee on Agricultural Work," or separately, shall have authority to employ expert cotton graders to grade cotton in this state under such rules and regulations as they may adopt. The above institutions may seek the aid of the United States department of agriculture in the prosecution of this work, and shall have authority to enter into such contracts or arguments as shall be mutually agreeable in furtherance of the object and purpose of this article. (1915, c. 175, s. 1.)

§ 4904. County commissioners to coöperate.— Any board of commissioners of any county in North Carolina is authorized and empowered to coöperate with either, or both, of the above-named institutions in aid of the purposes of this article; and shall have authority to appropriate such sums of money as the said board shall deem wise and expedient. (1915, c. 175, s. 2.)

§ 4905. Grading done at owner's request; grades as evidence.— The expert grader employed by either of the above-named institutions, or by the United States government, shall have full right, power, and authority to grade any cotton in North Carolina upon the request of the owner of said cotton; and said graders shall grade and classify, agreeable to and in accordance with the standards or grades of cotton which are now or may hereafter be established by the secretary of agriculture by virtue of any act of congress. The grade, or classification, pronounced by said expert graders of all cotton graded by them shall be prima facie proof of the true grade or classification of said cotton, and shall be the basis of all cotton sales in this state. (1915, c. 175, s. 3.)

§ 4906. Grader's certificate admissible as evidence.—In the event of any dispute or trial pending in any of the courts of this state, the certificate of any expert grader, employed as above provided, and acknowledged or proven before any clerk of the superior court of any county in the state, shall be admissible in evidence as to the grade or classification of cotton graded or classified by said expert. (1915, c. 175, s. 4.)

§§ 4907 to 4925: Superseded by §§ 4925(a) to 4925(u).

§ 4925(a). Purpose of law.—In order to protect the financial interests of North Carolina by stimulating the development of an adequate warehouse system for our great staple crop, cotton, in order to enable growers of cotton more successfully to withstand and remedy periods of depressed prices, in order to provide a modern system whereby cotton may be more profitably and more scientifically marketed, and in order to give this important crop the standing to which it is justly entitled as collateral in the commercial world, a cotton warehouse system for the

state of North Carolina is hereby established as hereinafter provided. (1921, c. 137, s. 1).

Editor's Note.—This section supersedes section 4907.

Proper Parties in Action to Enforce Section. — The governor of the state, the State Board of Agriculture, and the state warehouse superintendent are proper parties plaintiff in action against the members of the State Tax Commission to require them to provide and enforce the machinery for the collection of the tax provided by this article. Bickett v. Tax Commission, 177 N. C. 433, 99 S. E. 415.

For a full discussion of the purpose and application of the former sections, see Bickett v. Tax Commissions, 177 N. C. 433, 99 S. E. 415.

Cited in Lacy v. Indemnity Co., 193 N. C. 179, 136 S. E. 359; Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

§ 4925(b). Board of agriculture administers law, makes rules, appoints superintendent.—The provisions of this article shall be administered by the state board of agriculture, through a suitable person to be selected by said board, and known as the state warehouse superintendent. In administering the provisions of this article the board of agriculture is empowered to make and enforce such rules and regulations as may be necessary to make effective the purposes and provisions of this act, and to fix and prescribe reasonable charges for storing cotton in the local warehouses and publish the same from time to time as they may deem necessary. (1921, c. 137, s. 2.)

Editor's Note.—This section supersedes section 4908.

§ 4925(c). Employment of officers and assistants. — The board of agriculture shall have authority to employ a warehouse superintendent and necessary assistants, local managers, examiners, inspectors, expert cotton classers, and such other employees as may be necessary in carrying out the provisions of this article, and fix and regulate their salaries and duties. (1921, c. 137, s. 3).

Editor's Note.—This section supersedes section 4909.

§ 4925(d). Bonds of superintendent and employees.—The person named as state warehouse superintendent shall give bond to the state of North Carolina in the sum of fifty thousand dollars ($50,000) to guarantee the faithful performance of his duties, the expense of said bond to be paid by the state, to be approved as other bonds for state officers. The superintendent shall, to safeguard the interests of the state, require bonds from other employees authorized in section 4925(c) in amounts as large at least as he may find ordinary business experience in such matters would suggest as ample. (1921, c. 137, s. 4.)

Editor's Note.—This section supersedes section 4910.

Liability for Loss as Affected by Negligence.—The larceny or loss of the cotton from a warehouse through no fault of the warehouseman does not relieve the warehouseman's bond of liability for a warehouseman, is an insurer. Lacy v. Hartford Acci., etc., Co., 193 N. C. 179, 181, 136 S. E. 359.

Fraudulent Negotiation of Warehouse Receipt. — Where the superintendent of a warehouse delivers cotton, takes the endorsed receipts and instead of cancelling them negotiates a loan for his own benefit pledging the receipts as collateral, this is a clear breach of his duty for which an action on his bond will lie. Lacy v. Globe Indemnity Co., 189 N. C. 24, 126 S. E. 316.

§ 4925(e). Fund for support of system; collection and investment.—In order to provide a sufficient indemnifying or guarantee fund to cover any loss not covered by the bonds hereinbefore mentioned, in order to provide the financial backing which is essential to make the warehouse receipt universally acceptable as collateral, and in order to provide that a state warehouse system intended to benefit all cotton growers in North Carolina shall be supported by the class it is designed to benefit, it is hereby declared: That on each bale of cotton ginned in North Carolina during the period from the ratification of this bill until June thirty, one thousand nine hundred and twenty-two, twenty-five (25) cents shall be collected through the ginner of the bale and paid into the state treasury, to be held there as a special guarantee or indemnifying fund to safeguard the state warehouse system against any loss not otherwise covered. The state tax commission shall provide and enforce the machinery for the collection of this tax, which shall be held in the state treasury to the credit of the state warehouse system. Not less than ten per centum of the entire amount collected from the per bale tax shall be invested in United States government or farm loan bonds or North Carolina bonds, and the remainder may be invested in amply secured first mortgages to aid and encourage the establishment of warehouses operating under this system, such investments to be made by the board of agriculture with the approval of the governor and attorney-general: Provided such first mortgages shall be for not more than one-half the actual value of the warehouse property covered by such mortgages, and run not more than ten years: Provided further, that the interest received from all investments shall be available for the administrative expense of carrying into effect the provisions of this law, including the employment of such persons and such means as the state board of agriculture in its discretion may deem necessary: Provided further, that the guarantee fund, raised under the provisions of sections 4907 to 4925, shall become to all intents and purposes a part of guarantee fund to be raised under this law and subject to all the provisions hereof. (1921, c. 137, s. 5; Ex. Sess. 1921, c. 28.)

Editor's Note.—This section supersedes section 4911.

Constitutionality of Taxation under Section. — The tax, contemplated under this section, being uniform upon those of the class designated, and being laid upon a trade, whether that of cotton ginning or farming, is within the authority conferred on the Legislature to further "tax trades," etc., and is constitutional. Bickett v. Tax Commissions, 177 N. C. 433, 99 S. E. 415.

Loss Due to Failure to Issue Receipt May Be Recovered from State Treasurer.—A recovery may not be had against the State Treasurer out of the fund accumulated under this section, for a loss resulting to plaintiff by failure of a warehouse to issue official receipts for cotton to plaintiff as agreed, the receipts having been issued to the holder of a lien against the cotton and the warehouse having refused delivery of the cotton to plaintiff upon his demand, since the purpose of the act is to make warehouse receipts acceptable as collateral, and plaintiff is not the holder of the receipts. Northcutt v. People's Bonded Warehouse Co., 206 N. C. 842, 175 S. E. 165. This case construes this section as it stood before the 1921 revision, but is applicable in its present form.—Ed. Note.

Recovery on Bond.—Where a warehouse superintendent fraudulently negotiates spent warehouse receipts and the bona fide holder thereof recovers from the indemnifying fund provided by this section, the state may recover on the bond of the superintendent. The bond is the fund primarily liable. Lacy v. Globe Indemnity Co., 189 N. C. 24, 126 S. E. 316.

§ 4925(f). Registration of gins; gin records and reports; payment of tax. — Each person, firm, partnership, or corporation undertaking, the business of operating a cotton gin within the

state shall, before ginning any cotton grown in the years one thousand nine hundred and twenty-one and one thousand nine hundred and twenty-two, make application to the state commissioner of agriculture for a certificate of registration, which application shall show the number of the certificate, the name under which the gin is commonly known, the name of the owner and of the operator or manager, with postoffice address of each, and the township and county in which the gin is located. It shall be the duty of the commissioner of agriculture to require the registration of all gins operating within the state, and to furnish the said certificates of registration, numbered serially, free upon application; and each person, firm, partnership, or corporation receiving the said certificate of registration shall post it conspicuously in the gin to which it applies. For failure to make application and secure such certificate of registration, and to post same as required in this section, before beginning operation, each person, firm, partnership, or corporation, shall be subject to a penalty of five dollars ($5) for each and every day such gin shall be operated prior to securing and posting such certificate of registration. The penalty herein provided for shall be recovered by the state in a civil action to be brought by the state commissioner of agriculture in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such actions. Each person, firm, partnership, or corporation operating a gin shall keep a record, on forms furnished or approved by the commissioner of agriculture, showing the names and addresses of the owners of the cotton ginned, the number of bales ginned, and the date of each ginning; and each such operator of a gin shall report the number of bales ginned, and pay the tax levied in section 4925(e) to the state tax commission at least once every thirty days after beginning operation, and shall send a true copy of the report to the commissioner of agriculture. (1921, c. 137, s. 6.)

§ 4925(g). Qualifications of warehouse manager.—No man shall be employed as manager of a warehouse unless the members of the board of county commissioners and the president of some bank in the county in which the warehouse is operated shall certify to the state warehouse superintendent that the person desiring to be warehouse manager is in their opinion a man of good character, competent, and of good reputation, deserving the confidence of the people. (1921, c. 137, s. 7).

Editor's Note.—This section supersedes section 4912.

§ 4925(h). Warehouse superintendent to accept federal standards. — The state warehouse superintendent shall accept as authority the standards and classifications of cotton established by the federal government. (1921, c. 137, s. 8).

Editor's Note.—This section supersedes section 4915.

§ 4925(i). Duties of superintendent; manner of operating warehouse system.—The state warehouse superintendent shall have the power to lease for stated terms property for the warehousing of cotton: Provided, no rent shall be paid until the for stated terms property for the warehousing of leased shall have been paid from the income of the warehouse so leased, and in no case shall the state be responsible for any rent except from the income of such warehouse so leased in excess of operating expenses; and said superintendent shall fix the terms upon which private or corporate warehouses may obtain the benefits of state supervision and operation. And it shall be his especial duty to foster and encourage the erection of warehouses in the various cotton-growing counties of the state for operation under the terms of this law, and to provide an adequate system of inspection, and of rules, forms, and reports to insure the security of the system, such matters to be approved by the state board of agriculture. The violation of such rules by any officer of the system shall be a misdemeanor. Cotton may be stored in such warehouses by any person owning cotton, and receive all the benefits accruing from such state management; and the person herein permitted to store cotton in any such warehouse shall pay to the manager of the warehouse such sum or sums for rent or storage as may be agreed upon, subject to section 4925(b), by the manager and such person desiring to store cotton therein: Provided further, that, subject to the approval of the state warehouse superintendent and the local manager, but not to the exclusion of cotton offered for storage in accordance with this law, the storage of other commodities may be permitted in the warehouse, which storage of other commodities shall not otherwise be subject to this law: Provided further, that for such other commodities so stored as are graded and standardized in conformity with the grades and standards heretofore or hereafter to be promulgated by the board of agriculture acting under the provisions of the "An act to provide for the establishment of standard packages, grades, state brands, and for other purposes," the same being chapter three hundred twenty-five of the Public Laws of one thousand nine hundred and nineteen, negotiable warehouse receipts of form and design approved by the board of agriculture may be issued, such receipts in no way to be supported or guaranteed by the indemnifying fund provided for in section 4925(e). (1921, c. 137, s. 9.)

Editor's Note.—This section supersedes section 4916.

§ 4925(j). Power of superintendent to sue or to be sued; liability for tort.—The said superintendent shall also have the power to sue, or to be sued, in the courts of this state in his official capacity, but not as an individual, except in case of tort or neglect of duty, when the action shall be upon his bond. Suits may be brought in the county of Wake or in the county in which the cause of action arose. (1921, c. 137, s. 10.)

Editor's Note.—This section supersedes section 4917.

§ 4925(k). Cotton to be graded, stapled, and weighed; negotiable receipts; authentication of receipts.—As soon as possible after any lint cotton, properly baled, is received for storage, the local manager shall, if not previously done, have it graded and stapled by a federal or state classifier and legally weighed. Official negotiable receipts of the form and design approved by the board of agriculture shall be issued for such cotton under the seal and in the name of the state

of North Carolina, stating location of warehouse, name of manager, the mark on said bale, weight, grade, and length of staple, so as to be able to deliver on surrender of the receipt the identical cotton for which it was given. Provided, on request of the depositor, a negotiable receipt may be issued omitting the statement of grade and staple; such receipt to be stamped on its face: "not graded or stamped on request of the depositor." The warehouse manager shall fill in the said receipt, which shall be signed by him and by the state warehouse superintendent or his duly authorized agent: Provided, that if the local manager cannot issue a negotiable receipt complete for such cotton, he shall issue a non-negotiable memorandum receipt therefor, said memorandum receipt to be taken up and marked "Canceled" by the local manager upon the delivery of the negotiable receipt issued for said cotton: Provided further, that if the official negotiable receipt be issued for cotton of which the manager is owner, either solely or jointly in common with others, the fact of such ownership must appear on the face of the receipt: Provided further, that no responsibility is assumed by the state warehouse system for fluctuations in weight due to natural causes. (1921, c. 137, s. 11; 1925, c. 225.)

Editor's Note.—This section supersedes section 4918 in part. The first proviso appearing in this section was inserted by the 1925 amendment.

Former section 4918, superseded by this section, specifically stated that official receipts would carry "absolute title to the cotton." It may thus be doubted whether official receipts could be issued in the name of the owner, when the cotton was encumbered by a lien. Northcutt v. People's Bonded Warehouse Co., 206 N. C. 842, 175 S. E. 165. Although this case construes former section 4918 it would seem applicable to the instant section.—Ed. Note.

Warehouseman as Insurer.—Where under a contract of bailment the bailee receives certain bales of cotton and stores them in his warehouse, under agreement to return the identical bales upon return of the warehouse receipts in the manner provided in the contract, the liability of the bailee is that of insurer, and it is liable in damages when it is prevented by theft from performing its contract, though without negligence on its part. Lacy v. Hartford Acci., etc., Co., 193 N. C. 179, 136 S. E. 359.

Same—Liabilty to State.—Under the provisions of the statute to provide improved marketing facilities for cotton, and the rules and regulations made by the State Board of Agriculture under section 4925(b), and the warehouse receipts, made negotiable by this section, the warehouseman's liability to the State after it has paid the bailor for his stolen cotton, or the one entitled by the proper transfer of the certificate, is not dependent upon the exercise of due care by the warehouseman, or the absence of negligence by its employees or agents, for within the intent and meaning of the statute the liability of the warehouseman is that of insurer. Lacy v. Hartford Acci., etc., Co., 193 N. C. 179, 136 S. E. 359.

§ 4925(l). Transfer of receipt; issuance and effect of receipt.—The official negotiable receipt issued under section 4925(k) for cotton so stored is to be transferable by written assignment and actual delivery, and the cotton which it represents to be deliverable only upon a physical presentation of the receipt, which is to be marked "Canceled," with date of cancellation, when the cotton is taken from the warehouse. The said official negotiable receipt carries absolute title to the cotton, it being the duty of the local manager accepting same for storage to satisfy himself as to the title to the same by requiring the depositor of the cotton to sign a statement appearing on the face of the official receipt to the effect that there is no lien, mortgage, or other valid claim outstanding against such cotton, and any person falsely signing such a statement shall be punished as provided for false pretenses in section four thousand two hundred and seventy-seven. (1921, c. 137, s. 12.)

Editor's Note.—This section supersedes section 4918 in part.

§ 4925 (m). Issuance of false receipt a felony; punishment.—The manager of any warehouse, or any agent, employee, or servant, who issues or aids in issuing a receipt for cotton without knowing that such cotton has actually been placed in the warehouse under the control of the manager thereof shall be guilty of a felony, and upon conviction be punished for each offense by imprisonment in the state penitentiary for a period of not less than one or more than five years, or by a fine not exceeding ten times the market value of the cotton thus represented as having been stored. (1921, c. 137, s. 13.)

Editor's Note.—This section supersedes section 4919.

§ 4925(n). Delivery of cotton without receipt or failure to cancel receipt.—Any manager, employee, agent, or servant who shall deliver cotton from a warehouse under this law without the production of the receipt therefor, or who fails to mark such receipt "Canceled" on the delivery of the cotton, shall, upon conviction, be punished by a fine not more than ten thousand dollars ($10,000), or imprisonment not more than five years, or both fine and imprisonment, in the discretion of the court. (1921, c. 137, s. 14.)

Editor's Note.—This section supersedes section 4920.

§ 4925(o). Rules for issuance of duplicate receipts.—The state warehouse superintendent, or his duly authorized agent, and the manager of the local warehouse is authorized to issue a duplicate receipt for a lost or destroyed receipt, due record of the original receipt being found upon the books of the warehouse, only upon affidavit of the owner of the original that the original receipt has been lost or destroyed, and by giving the state warehouse superintendent bond with approved security in an amount equal to the double value of the cotton represented by the original receipt, said value to be estimated at the highest market price of middling cotton during the preceding two years, to indemnify the state warehouse superintendent and the local manager from loss or damage, and any cost of litigation. (1921, c. 137, s. 15.)

Editor's Note.—This section supersedes section 4921.

§ 4925(p). State not liable on warehouse debts; tax on cotton continued if losses sustained.—No debt or other liability shall be created against the state by reason of the lease or operation of the warehouse system created by this act or the storage of cotton therein, it being the purpose of this law to establish a self-sustaining system to operate as nearly as practicable at cost, without profit or loss to the state, except that expenses of supervision may be paid by the board of agriculture. While it is believed that the provisions and safeguards mentioned in this law, including the bonds required of all officers and supplemental indemnifying or guaran-

tee fund mentioned in section 4925(e), will insure the security of the system beyond any reasonable possibility of loss, nevertheless, in order to establish the principle that this system should be supported by those for whose especial financial benefit it is established, it is hereby provided that in the eventuality that the system should suffer at any time any loss not fully covered by the aforementioned bonds and indemnifying fund, such losses shall be made good by having the state tax commission repeat for another twelve months selected by it the special levy on ginned cotton, as prescribed in section 4925(e), for the two years ending June thirtieth of the year one thousand nine hundred and twenty-three. (1921, c. 137, s. 16.)

Editor's Note.—This section supersedes section 4922.

§ 4925(q). Insurance of cotton; premiums; lien for insurance and storage charges.—The superintendent shall insure, or shall require the local manager to insure and keep insured for its full value, upon the best terms obtainable, by individual or blanket policy, all cotton on storage. In case of loss, the superintendent shall collect the insurance due and pay the same, ratably, to those lawfully entitled to it, insurance policies to be in the name of the state and the premium collected from the owners of the cotton, the state to have a lien on the cotton for insurance and storage charges as in the case of other public warehouses in the state. (1921, c. 137, s. 17.)

Editor's Note.—This section supersedes section 4923.

§ 4925(r). Superintendent to negotiate loans on receipts and sell cotton for owners. — The state warehouse superintendent, in addition to the duties hereinbefore vested in him, is also permitted and empowered, upon the request of the owner or owners of the warehouse receipts and cotton stored in such warehouses to aid, assist, and coöperate, or as the duly authorized agent of such owner or owners (which authorization shall be in writing), to secure and negotiate loans upon the warehouse receipts. And upon like written request or authorization of said owner or owners, and his or their duly authorized agent, he may sell and dispose of such warehoused cotton for such owner or owners, either in the home or foreign markets, as may be agreed upon between such owner or owners and the said superintendent, in writing. And for said loan or sales the said superintendent shall charge reasonable and just commissions, without discrimination, all of which shall be accounted for and held as part of the fund for the maintenance and operation of the state warehouse system: Provided however, that the state incurs no liability whatever for any act or representation of the superintendent in exercising any of the permissions or powers vested in him in this section: Provided further, that the bond of the superintendent will be liable for any unfaithful or negligent act of his by reason of which the owner or owners of such warehoused cotton suffers damage or loss. (1921, c. 137, s. 18.)

Editor's Note.—This section supersedes section 4924.

§ 4925(s). Compliance with United States warehouse law.—The state warehouse superintendent may, upon approval of the board of agriculture, operate or cause to be operated, subject to the United States warehouse act, any or all of the warehouses leased by him under the provisions of this law, and he is authorized to comply with said United States warehouse act and the regulations thereunder. (1921, c. 137, s. 19.)

§ 4925(t). Partial invalidity of law, effect.—If any particular section or part of any section of this law shall be held to be unconstitutional, such holding shall not invalidate any other portion thereof. (1921, c. 137, s. 20.)

Editor's Note.—This section supersedes section 4925.

§ 4925(u). Laws repealed by this law.—Sections 4907 to 4925, inclusive, and all other laws and clause of laws: in so far only as they conflict with the provisions of this law are hereby repealed. (1921, c. 137, s. 21.)

Art. 19. Leaf Tobacco Sales

§ 4926. Accounts of warehouse sales required.—On and after the first day of August, one thousand nine hundred and seven, the proprietor of each and every leaf tobacco warehouse doing business in this state shall keep a correct account of the number of pounds of leaf tobacco sold upon the floor of his warehouse daily. (1907, c. 97, s. 1.)

§ 4927. Monthly reports to commissioner; results classified.—On or before the tenth day of each succeeding month the said warehouse proprietors shall make a statement, under oath, of all the tobacco so sold upon the floor of his warehouse during the past month and shall transmit the said statement, at once, to the commissioner of agriculture at Raleigh, North Carolina. The report so made to the commissioner of agriculture shall be so arranged and classified as to show the number of pounds of tobacco sold for the producers of tobacco from first hand; the number of pounds sold for dealers; and the number of pounds resold by the proprietor of the warehouse for his own account or for the account of some other warehouse. (1907, c. 97, s. 3; Ex. Sess. 1921, c. 76.)

Editor's Note.—Formerly under this section, the date set for making the required statement was "on or before the fifth day of each succeeding month," instead of the tenth, as changed by Public Laws 1921, Ex. Sess., ch. 76.

As to penalty imposed on any warehouse for failure to make the report as required by this section, see section 4929.

§ 4928. Commissioner to keep record and publish in bulletin.—The commissioner of agriculture shall cause said statements to be accurately copied into a book to be kept for this purpose, and shall keep separate and apart the statements returned to him from each leaf tobacco market in the state, so as to show the number of pounds of tobacco sold by each market for the sale of leaf tobacco; the number of pounds sold by producers, and the number of pounds resold upon each market. The commissioner of agriculture shall keep said books open to the inspection of the public, and shall, on or before the fifteenth day of each month, after the receipt of the reports above required to be made to him on or before the tenth day of each month, cause the said reports to be published in the bulletin is-

sued by the agricultural department and in one or more journals published in the interest of the growth, sale, and manufacture of tobacco in the state, or having a large circulation therein. (1907, c. 97, s. 3; Ex. Sess. 1921, c. 76).

Editor's Note.—Formerly, the two dates set under this section for the publication and receipt of reports were the tenth and fifth day of each month, respectively, instead of the fifteenth and tenth under the section as it now stands; the change having been effected by Public Law 1921, Ex. Sess., ch. 76.

§ 4929. Penalty for failure to report sales.— Any warehouse failing to make the report as required by section 4927 shall be subject to a penalty of twenty-five dollars and the costs in the case, to be recovered by any person suing for same in any court of a justice of the peace; and the magistrate in whose court the matter is adjudicated shall include in the cost of each case where the penalty is allowed one dollar, to be paid to the department of agriculture for expense of advertising. (1915, c. 31, s. 1.)

§ 4930. Commissioner to publish failure; certificate as evidence.—The commissioner shall, on the 14th day of each month, publish in some newspaper the names of the tobacco warehouses that have failed to comply with this article.

The certificate of the commissioner under seal of the department shall be admissible as evidence the same as if it were deposition taken in form as provided by law. (1915, c. 31, ss. 2, 3; Ex. Sess. 1921, c. 76.)

Editor's Note.—Formerly, the date set under this section for the publication of the names of delinquent tobacco warehouses was on the 12th day of each month, instead of the 14th under the section as it now stands, the change having been effected by Public Laws 1921, Ex. Sess., ch. 76.

§ 4930(a). Nested, shingled or overhung tobacco.—It shall be unlawful for any person, firm or corporation to sell or offer for sale, upon any leaf tobacco warehouse floor any pile or piles of tobacco, which are nested, or shingled, or overhung, or either, within the meaning of this act (1933, c. 467, s. 1.)

The preamble of the act of 1933 from whence this section derives contains the following definitions:

"1st. Nesting tobacco: That is, so arranging tobacco in the pile offered for sale that it is impossible for the buyer thereof to pull leaves from the botton of such pile for the purpose of inspection;

"2nd. Shingling tobacco: That is, so arranging a pile of tobacco that a better quality of tobacco appears upon the outside and tobacco of inferior quality appears on the inside of such pile; and

"3rd. Overhanging tobacco: That is, so arranging a pile of tobacco that there are alternate bundles of good and sorry tobacco."

§ 4930(b) Sale under name other than that of true owner prohibited. — It shall be unlawful for any person, firm or corporation to sell or offer for sale or cause to be sold, or offered for sale, any leaf tobacco upon the floors of any leaf tobacco warehouse, in the name of any person, firm or corporation, other than that of the true owner or owners thereof, which true owner's name shall be registered upon the warehouse sales book in which it is being offered for sale. (1933, c. 467, s. 2.)

§ 4930(c). Allowance for weight of baskets and trucks.—It shall be unlawful for any person, firm or corporation in weighing tobacco for sale to permit or allow the basket and truck upon which such tobacco is placed for the purpose of obtaining such weight to vary more than two pounds from the standard or uniform weight of such basket and truck. (1933, c. 467, s. 3.)

§ 4930(d). Violation made misdemeanor.—Any person, firm or corporation violating the provisions of sections 4930(a)-4930(c) shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1933, c. 467, s. 4.)

§ 4930(e). Counties excepted. — The provisions of sections 4930(a)-4930(d) shall not apply to Alamance, Rockingham and Surry Counties, Person, Vance and Warren counties. (1933, c. 467, s. 5.)

§ 4930(f). Organization and membership of tobacco boards of trade; rules and regulations; price fixing prohibited. — Tobacco warehousemen and the purchases of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize, either as non-stock corporations, or voluntary associations, tobacco boards of trade in the several towns and cities in North Carolina in which leaf tobacco is sold on warehouse floors, at auction.

Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated.

The tobacco boards of trade in the several towns and cities in North Carolina are authorized to require as a condition to membership therein the applicants to pay a reasonable membership fee and the following schedule of maximum fees shall be deemed reasonable, to-wit:

A membership fee of fifty dollars ($50.00) in those towns in which less than three million pounds of tobacco was sold at auction between the dates of August 20, 1931, and May 1, 1932; A fee of one hundred dollars ($100.00) in those towns in which during said period of time more than three million and less than ten million pounds of tobacco was sold; A fee of one hundred fifty dollars ($150.00) in those towns in which during said period of time more than ten million and less than twenty-five million pounds of tobacco was sold; A fee of three hundred dollars ($300.00) in those towns in which during said period of time more than twenty-five million pounds of tobacco was sold.

Membership, in good standing, in a local board of trade shall be deemed a reasonable requirement by such board of trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction therein.

It shall be unlawful and punishable as of a misdemeanor for any bidder or purchaser of tobacco upon warehouse floors to refuse to take and pay for any basket or baskets so bid off from the seller when the seller has or has not accepted the price offered by the purchaser or bidder of other baskets. That any person suspended or expelled from a tobacco board of trade under the provisions of this section may appeal from such suspension to the superior court of the county in which said board of trade is located.

Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade. (1933, c. 268.)

Art. 20. Boys' Road Patrol

§ 4931. Boys' road patrol authorized.—The State Board of Education, whose duty it shall be to appoint a director of the work of the boys' road patrol in the State of North Carolina is hereby charged with the duty of authorizing a brigade of school boys in this state to be called the Boys' Road Patrol, and to be composed of boys who attend the rural public schools of the state. (1915, c. 239, s. 1; 1925, c. 300, s. 1).

Editor's Note.—The duty imposed upon the State Board of Education by this section was formerly placed on the board of agriculture. This provision is not with Public Laws 1925 ch. 300.

§ 4932. Duties of patrol.—The duties of such patrol to be to look after the maintenance of the road lying near the home of each members of the patrol, dragging and ditching same by the use of machinery placed in the care of the patrol by the state and county in such manner as the State Board of Education shall direct and prevent forest fires by extinguishing fire along the public highway. (1915, c. 239, s. 2; 1925, c. 300, s. 2).

Editor's Note.—By Public Laws 1925, ch. 300, the State Board of Education has the supervisory power over the boy's road patrol instead of the board of agriculture as formerly provided for, and the duty of preventing forest fires is also new.

§ 4933. Regulations for patrol; prizes authorized.—The State Board of Education is specially empowered and directed to devise, organize, and adopt all such rules and regulations as may be necessary for effectually carrying out the purposes of this article; may award suitable prizes and pay all expenses of successful competitors and others engaged in such work in attendance upon meetings and other purposes. (1915, c. 239, s. 3; 1925, c. 300, s. 3).

Editor's Note.—The authority delegated to the State Board of Education under this section was formerly given to the board of agriculture, the charge taking effect by Public Laws 1925, ch. 300.

§ 4934. Funds for support.— All moneys for the carrying out of this article shall be provided by the counties themselves in coöperation with the State of North Carolina. The commissioners of the counties of North Carolina are empowered to make annual donations out of the county funds for the purpose of this article. (1915, c. 239, ss. 4, 6; 1925, c. 300, s. 4).

Editor's Note.—By Public Laws 1925, ch. 300, the State of North Carolina is substituted for the board of agriculture, to co-operate with the counties, in raising the funds necessary to carry out the provisions of this article.

§ 4935. Minimum preliminary appropriation by county.—Said brigade shall not be organized in any county until the commissioners of said county set apart and appropriate not less than one hundred dollars for the purposes of this article, to be spent in said county by the State Board of Education. (1915, c. 239, s. 5; 1925, c. 300, s. 5).

Editor's Note.—By Public Laws 1925, ch. 300, the one hundred dollars set apart under this section is to be spent by the State Board of Education and not by the board of agriculture as formerly provided for.

Art. 21. Agricultural Societies and Fairs

Part 1. North Carolina Agricultural Society

§ 4936. Incorporation. — The North Carolina Agricultural Society, as organized by a voluntary association on the eighth day of October, one thousand eight hundred and fifty-two, at the city of Raleigh, shall be incorporated under the name and style of The North Carolina Agricultural Society, and may take and hold real and personal estate to the value of fifty thousand dollars, and no more, for the purposes hereinafter specified. (Rev., s. 3863; Code, s. 2214; R. C., c. 2, s. 1; 1852, c. 1, ss. 1, 3).

§ 4937. Officers; appointment and terms. — Such corporation shall have a board of directors, which shall consist of seventeen members, five of whom shall be ex officio as follows: The Governor of North Carolina, the president of the North Carolina State College of Agriculture and Engineering, the Commissioner of Agriculture, the mayor of the city of Raleigh, and the president of the North Carolina Agricultural Society; the remaining members of the board of directors shall be appointed as follows: two by the Governor of North Carolina; two by the president of the North Carolina State College of Agriculture and Engineering; two by the Commissioner of Agriculture; four by the members of the North Carolina Agricultural Society, and two by the mayor of the city of Raleigh. The directors shall hold office for one year and until their successors are elected and qualified and shall have the usual powers with reference to the affairs of the society as do directors of other corporations, and shall elect officers of the society in such manner as the by-laws of the society may prescribe. (Rev., s. 863; Code, s. 2214; R. C., c. 2, s. 1; 1852, c. 1, ss. 1, 3; 1925, c. 126).

Editor's Note.—Prior to Act of 1925, the corporation elected annually, a president, four vice presidents, a treasurer, recording secretary, corresponding secretary and other officers necessary. Now the board of directors, some holding office ex officio and others being appointed, elect officers as the by-laws prescribe.

§ 4938. By-laws. — The corporation shall have power to make by-laws and regulations consistent with this chapter and the laws of the state, for its own government and for the due and orderly conduct and management of its affairs; and to rescind, alter, or modify any of the rules, articles of association, by-laws or ordinances which existed before such society was incorporated by the general assembly, to the end that it may improve its organization and be empowered to adapt its operations to the great and useful purposes of its institution. (Rev., s. 3865; Code, s. 2216; 1860, c. 1; 1901, c. 2, s. 1).

§ 4939. Annual fairs to be held.—It shall be the duty of the corporation to provide a place for the holding of annual fairs, in order that the citizens may be encouraged by exhibitions, premiums, and other means to develop and improve the productions of agriculture, and every species of native industry; and to this end, and for these great and valuable purposes, and to no other, shall the corporation apply all the funds which by any means it may acquire. (Rev., s. 3866; Code, c. 2217; R. C., c. 2, s. 3.)

§ 4940. Appropriations from state.—Repealed: (1925, c. 275, s. 6).

Part 2. County Societies

§ 4941. Incorporation; powers and term of existence.—Any number of resident persons, not less than ten, may associate together in any county, under written articles of association, subscribed by the members thereof, and specifying the object of the association to encourage and promote agriculture, domestic manufactures, and the mechanic arts, under such name and style as they may choose, and thereby become a body corporate with all the powers incident to such a body, and may take and hold such property, both real and personal, not exceeding ten thousand dollars in value, as may be needful to promote the objects of their association.

The corporate existence shall continue as long as there are ten members, during the will and pleasure of the general assembly. (Rev., ss. 3868, 3869; Code, s. 2220; R. C., c. 2, ss. 6, 7; 1852, c. 2. ss. 1, 2, 3).

Appropriations and Apportionment.—Acts 1923, "C. 159 apportions 'appropriations which shall be made for the benefit of agricultural fairs' on the basis of a percentage of the amounts last given in premiums—the 'Secretary of Agriculture of North Carolina' having received satisfactory evidence of the holding of the fair and filed a sworn statement with the 'Secretary of Agriculture' of the amount of cash premiums paid. There is no such officer as 'the secretary of agriculture of the State of North Carolina,' nor is there any general appropriation for the benefit of agricultural fairs in the State. There is at present provision for appropriation of $50 per county agricultural fairs, held by societies organized by the act, which have expended $100 subscribed by members and the provision is limited to one society in each county." 1 N. C. L. Rev. 266.

§ 4942. Organization; officers; new members.—Such society shall be organized by the appointment of a president, two vice-presidents, a secretary and treasurer, and such other officers as they may deem proper, who shall thereafter be chosen annually, and hold their places until others shall be appointed. And the society may from time to time, on such conditions as may be prescribed, receive other members of the corporation. (Rev., s. 3869; Code, s. 2221; R. C., c. 2, s. 7; 1852, c. 2, s. 3).

§ 4943. Appropriation from state; payment.—Repealed: (1925, c. 275, s. 6.)

§ 4944. Exhibits exempt from state and county taxes.—All shows, attractions, and amusements authorized by said society to exhibit within the said fair grounds shall be excused of all state and county license tax or charge while so exhibiting: Provided, that all unchaste shows shall be excluded. (Rev., s. 3871; 1905, c. 513, s. 2).

§ 4945. Funds to be used in paying premiums.—All moneys so subscribed, as well as that received from the state treasury as herein provided, shall, after paying the necessary incidental expenses of such society, be annually paid for premiums awarded by such societies, in such sums and in such way and manner as they severally, under their by-laws, rules and regulations, shall direct, on such live animals, articles of production, and agricultural implements and tools, domestic manufactures, mechanical implements, tools and productions as are of the growth and manufacture of the county, and also such experiments, discoveries, or attainments in scientific or practical agriculture as are made within the county wherein such societies are respectively organized. (Rev., s. 3873; Code, s. 2223; R. C., c. 2, s. 9; 1852, c. 2, s. 7).

§ 4946. Annual statements to state treasurer.—Each agricultural society entitled to receive money from the state treasurer shall, through its treasurer, transmit to the treasurer of the state, in the month of December or before, a statement showing the money received from the state, the amount received from the members of the society for the preceding year, the expenditures of all such sums, and the number of the members of such society. (Rev., s. 3874; Code, s. 2224; R. C., c. 2, s. 10; 1852, c. 2, s. 8).

§ 4947. Publication of statements required.—Each agricultural society receiving money from the state under this chapter shall, in each year, publish at its own expense a full statement of its experiments and improvements, and reports of its committees, in at least one newspaper in the state; and evidence that the requirements of this chapter have been complied with shall be furnished to the state treasurer before he shall pay to such society the sum of fifty dollars for the benefit of such society for the next year. (Rev., s. 3875; Code, s. 2225; R. C., c. 2, s. 11; 1852, c. 2, s. 9).

§ 4948. Records to be kept; may be read in evidence.—The secretary of such society shall keep a fair record of its proceedings in a book provided for that purpose, which may be read in evidence in suits wherein the corporation may be a party. (Rev., s. 3876; Code, s. 2226; R. C., c. 2, s. 12; 1852, c. 2, s. 5).

§ 4949. Albemarle agricultural and fish association; Appropriation.—Repealed: (1925, c. 275, s. 6).

§§ 4949 (a)-4949 (f). Appropriations for fairs.—Repealed: (1925, c. 275, s. 6.)

Part 3. Protection and Regulation of Fairs

§ 4950. Lien against licensees' property to secure charge.—All agricultural fairs which shall grant any privilege, license, or concession to any person, persons, firm, or corporation for vending wares or merchandise within any fair grounds, or which shall rent any ground space for carrying on any kind of business in such fair grounds, either upon stipulated price or for a certain per cent of the receipts taken in by such person, persons, firm, or corporation, shall have the right to retain possession of and shall have a lien upon any or all the goods, wares, fixtures, and merchandise or other property of such person, persons, firm, or corporation until all charges for privileges, licenses, or concessions are paid, or until their contract is fully complied with. (1915, c. 242, s. 1.)

§ 4951. Notice of sale to owner.—Written notice of such sale shall be served on the owner of such goods, wares, merchandise, or fixtures or other property ten days before such sale, if he or it be a resident of the state, but if a nonresident of the state, or his or its residence be unknown, the publication of such notice for ten

days at the courthouse door and three other public places in the county shall be sufficient service of the same. (1915, c. 242, s. 2.)

§ 4952. Unlawful entry on grounds a misdemeanor.—If any person, after having been expelled from the fair grounds of any agricultural or horticultural society, shall offer to enter the same again without permission from such society; or if any person shall break over the enclosing structure of said fair grounds and enter the same, or shall enter the enclosure of said fair grounds by means of climbing over, under, or through the enclosing structure surrounding the same, or shall enter the enclosure through the gates without the permission of the gatekeeper or the proper officer of said fair association, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3669; Code, s. 2795; 1901, c. 291; 1870-1, c. 184, s. 3.)

§ 4953. Assisting unlawful entry on grounds a misdemeanor.—It shall be unlawful for any person or persons to assist any other person or persons to enter upon the grounds of any fair association when an admission fee is charged, by assisting such other person or persons to climb over or go under the fence or by pulling off a plank or to enter the enclosed grounds by any trick or device or by passing out a ticket or a pass or in any other way. Any violation of this section shall be a misdemeanor and punishable by a fine not exceeding twenty dollars or imprisonment not exceeding ten days. (1915, c. 242, ss. 3, 4.)

§ 4954. Venders and exhibitors near fairs to pay license. — Every person, firm, officer, or agent of any corporation who shall temporarily expose for sale any goods, wares, foods, soft drinks, ice cream, fruits, novelties, or any other kind of merchandise, or who shall operate any merry-go-round, ferris wheel, or any other device for public amusement, within one-fourth of a mile of any agricultural fair during such fair, shall pay a tax of one hundred dollars in each county in which he shall carry on such business, whether as a principal or agent: Provided, this section shall not apply to any business established sixty days prior to the beginning of such fair. (1915, c. 242, s. 5.)

§ 4955. Application for license to county commissioners.—Every such person mentioned in the preceding section shall apply in advance for a license to the board of county commissioners of the county in which he proposes to peddle, sell, or operate, and the board of county commissioners may in their discretion issue license upon the payment of the tax to the sheriff, which shall expire at the end of twelve months from its date. (1915, c. 242, s. 6.)

§ 4956. Unlicensed vending, etc., near fairs a misdemeanor.—Any person violating the provisions of the two preceding sections shall be guilty of a misdemeanor, punishable by a fine not to exceed fifty dollars or imprisonment not to exceed thirty days, at the discretion of the court. (1915, c. 242, s. 7.)

§ 4957. Commissioners may refuse to license shows within five miles.—The county commissioners of any county in North Carolina in which there is a regularly organized agricultural fair may refuse to allow any circus, menagerie, wild west show, dog and pony show, carnival show to exhibit within five miles of such fair from its beginning to its ending: Provided, that notice is given the sheriff by the commissioners of said county not to issue such license to said entertainments sixty days prior to the date of such exhibition. (1913, c. 163, s. 1.)

§ 4958. Local aid to agricultural, animal, and poultry exhibits.—Any city, town, or county may appropriate not to exceed one hundred dollars to aid any agricultural, animal, or poultry exhibition held within such city, town, or county. (1919, c. 135.)

For fines imposed on fraudulent entry of horses at fairs, see section 4289.

Art. 22. Cotton States Commission

§§ 4958(a)-4958(n). Cotton states commission. —Repealed: (1925, c. 275, s. 6.)

Art. 23. Erosion Equipment

§ 4958(1). Counties authorized to provide farmers with erosion equipment.—The county commissioners in the several counties of the State are hereby authorized and empowered to purchase the necessary equipment to be used as provided in this article by farmers in the cultivation of their lands in such manner as may best tend to prevent erosion; and they are authorized to put such equipment as they deem necessary for the purpose in the hands of farmers who may apply for the same, either by way of resale to the said farmers, or upon a rental basis, or by guarantee, as may in their judgment be deemed best of the purchase price of the said equipment directly sold to the said farmers. (1935, c. 172, s. 1.)

§ 4958(2). Application for assistance.—Any person or persons, corporation or concern, engaged in the cultivation of a farm or farms in this State may apply to the county commissioners for assistance under this article, stating in the said application as nearly as may be the size or area of the cultivated lands, its condition, the kind of soil, the amount of erosion, if any, the topography of the farm, its present manner of drainage and the kinds of crops usually cultivated thereon. It shall also state what means have been used heretofore, if any, to prevent soil erosion, and specifically the extent to which erosion now exists upon the premises. At any time subsequent to the said application, if relief is extended to him, he shall, when so requested by the said county commissioners or any other person delegated by them to receive the information, make detailed reports as to the condition of his said cultivated lands, the extent to which provision has been made thereon to prevent soil erosion, with the results of same. There shall also be stated in the said application the kind and quantity of equipment which, in the judgment of the applicant, is necessary for use upon his farm. (1935, c. 172, s. 2.)

§ 4958(3). Investigation and extending relief. — Upon the filing of such application the county commissioners shall cause due investigation to be

made with reference thereto, and for their guidance; shall fully consider the same and if, in their opinion, the relief asked for should be extended, they shall thereupon proceed to supply or have supplied such equipment as in their judgment may be necessary under the circumstances, as provided in this article. (1935, c. 172, s. 3.)

§ 4958(4). Purchase of equipment and furnishing to farmers; notes and security from applicants; rental contracts; guarantee of payment. — The county commissioners are authorized and empowered to purchase the equipment by them deemed to be necessary and supply the applicant therewith, upon such terms and conditions of purchase, rental or repayment as may be deemed by them just and proper, and which will save the county from loss in the matter. To that end, they are authorized to accept from the applicant such notes and security, if any by them are deemed necessary, or shall make with them such rental contracts as may be reasonably prudent and safe in the premises. They are further authorized and empowered, when in their judgment it may be deemed advisable, to guarantee the payment to the seller, for such equipment as may be directly purchased by the applicant for the use aforesaid: Provided, however, that the purchase of the said equipment has been previously approved by the county commissioners. (1935, c. 172, s. 4.)

§ 4958(5). Guarantee of payment where equipment purchased by federal agencies.—Where the said equipment may be purchased by any federal agency and by it furnished to any person, persons, firm or corporation engaged in the actual cultivation of the soil, the county commissioners are authorized, under such terms and conditions as to them may seem advisable, and as shall conserve the public interest and be just and proper to the county, to guarantee the payment of the purchase price of such equipment in full or the interest upon the obligations made in their purchase, and may do so in full or in part. (1935, c. 172, s. 5.)

§ 4958(6). Expense of counties extending relief made lien on premises of applicant.—In the event the county commissioners shall extend any relief under this article, to the extent of the money furnished or the obligation of the county with respect thereto, the same shall be a lien upon the premises, lands and tenements of the owner and applicant for such relief, securing the repayment of the funds furnished by the county and securing the county against any loss by reason of its obligation in any respect, the said lien to be foreclosed in all respects as provided in the law for deeds of trust or real estate mortgages: Provided, however, that in case the county itself has entered into an obligation in order to extend to any persons herein named the relief provided in this article, the county shall not be postponed in its relief until loss is actually incurred by it, but may proceed in accordance with the contract and agreement made with the applicant for relief, and when the obligations of the county in any respect are due: Provided, further, that the lien created by this section shall not be effective as against innocent purchasers for value unless and until notice of such lien shall be docketed in the office of the clerk of the superior court of the county in which the land lies in the manner and form provided by law for perfecting laborer's or mechanic's liens against real property. (1935, c. 172, s. 6.)

§ 4958(7). Counties excepted.—This article shall not apply to the counties of Alleghany, Alexander, Ashe, Avery, Bladen, Buncombe, Camden, Columbus, Cumberland, Davie, Gates, Haywood, Hyde, Jackson, Lincoln, Macon, Madison, Moore, New Hanover, Pamlico, Pasquotank, Rutherford, Sampson, Transylvania, Union, Washington, Watauga, Wilkes, and Yadkin. (1935, c. 172, s. 7.)

CHAPTER 85

AGRICULTURAL DEVELOPMENT DISTRICTS

§ 4959. Clerk's power to establish; public use. —The clerk of the superior court (hereinafter called the "clerk" of "the court") of any county of the state of North Carolina shall have jurisdiction, power, and authority to establish agricultural development districts in his county for the purpose of clearing and putting in suitable condition for the beginning of cultivation good grades of lands, forested or cut-over, suitable for agriculture, and it is hereby declared that the said development shall be considered a public benefit and conducive to the public welfare. (1917, c. 131, s. 1.)

§ 4960. Landowners' petition and deposits.— Whenever a petition signed by all the landowners in a proposed agricultural development district shall be filed in the office of the clerk of the superior court of any county in which a part of said lands is located, setting forth and certifying the following:

1. That it is their desire and intention to form an agricultural development district (hereinafter called "the district") of an area aggregating not less than one thousand acres, and that it is their purpose, when cleared and put into condition for cultivation, to sell the said land to settlers on long time and at reasonable prices.

2. They shall deposit with the clerk—

a. A certified check for not less than one thousand dollars, plus ten cents per acre for each additional acre in the proposed district, from which funds the clerk shall from time to time meet the actual expenses of examining and verifying and other expenses incidental to forming the district.

b. A complete map of the lands to be included in the district.

c. A soil map showing the types of soils.

d. A drainage map showing the natural drainage of the lands, and any proposed system of drainage it is intended to establish.

e. Certificates of title by a reputable attorney of the county.

f. An estimate of the cost of improvements under the plan submitted.

g. A certificate that the lands when improved will have a market value of at least twice the amount of the total cost of the proposed improvement. (1917, c. 131, s. 2.)

§ 4961. Viewers' appointment. — The clerk shall then appoint a board of viewers (hereinafter called "the viewers"), composed of three members, one a competent civil engineer and the other two practical agriculturists, to examine the lands and data submitted to the clerk by the landowners, and report as to the facts being virtually as stated, or to give their opinion as to any variations. (1917, c. 131, s. 2.)

§ 4962. Viewers' report.—Their written report shall be filed within two weeks from the date of their appointment. The clerk shall consider this report. If the viewers report that the project is not practicable or will not be for the public welfare, and the clerk shall approve such findings, the petition shall be dismissed at the cost of the petitioners. (1917, c. 131, s. 2.)

§ 4963. Plan submitted to state geologist.—If the viewers report that the project is practicable, and that it will be for the public welfare and conducive to the general welfare of the community, and the court shall so find, then all of the data and reports of the proceedings shall be submitted to the state geologist, who shall designate:

1. An engineer to survey and approve of the boundaries and drainage and road plans.
2. An attorney of reputation to examine and approve of the chains of title submitted.
3. A forester to make an estimate of the cost of clearing.
4. A soil expert to report on the availability of the land for agricultural purposes. (1917, c. 131, s. 3.)

§ 4964. District established, if geologist approves.—The state geologist shall consider these reports, data, and plans, and, if he approves the same, shall so certify to the clerk of the court, who shall then declare the district established. (1917, c. 131, s. 3.)

§ 4965. Board of agricultural development commissioners appointed.—After the said district shall have been declared established as aforesaid, and the complete plans therefor approved, the clerk shall appoint two persons, one of whom shall be a landowner of the district, the other a practical agriculturist of good character, not a landowner of the district, and these two shall choose a third, who may or may not be a landowner of the district, and the three so appointed and chosen shall be designated as the Board of Agricultural Development Commissioners of ..... District. (1917, c. 131, s. 4.)

§ 4966. Commissioners incorporated; powers; officers; superintendent's bond. — Such commissioners when so appointed and chosen shall be immediately created a body corporate under the name and style of the Board of Agricultural Development Commissioners of .... District (hereinafter called "the commissioners" or "the board of commissioners"), with the right to hold property and convey the same, to sue and be sued, and shall possess such other powers as usually pertain to corporations. They shall organize by electing from among their number a chairman and vice-chairman. They shall also elect a secretary, within or without their body, and shall adopt by-laws for the government of their proceedings. The treasurer of the county in which the proceedings are instituted shall be ex officio treasurer of such board of commissioners. Such board of commissioners shall adopt a seal, which it may alter at pleasure. They shall have and possess such powers as are herein granted. The name of such district shall constitute a part of its corporate name. The commissioners shall appoint a competent person as superintendent of construction; such person shall furnish a bond, to be approved by the commissioners, in the penal sum of ten thousand dollars, conditioned upon the honest and faithful performance of his duties. Such bond shall be in favor of the board of commissioners. In the event of any vacancy in the membership of the board of commissioners the remaining members shall fill such vacancy, subject to the approval of the court. (1917, c. 131, s. 4.)

§ 4967. Classification of lands according to benefits.—It shall be the further duty of the viewers to personally examine the lands in the district and classify them with reference to the benefits they will receive from the improvements to be made. The land benefits shall be separated into five classes. The land receiving the highest benefit shall be marked Class A; that receiving the next highest benefit, Class B; that receiving the next highest benefit, Class C; that receiving the next highest benefit, Class D; and that receiving the smallest benefit, Class E. The holdings of any one landowner need not necessarily be all in one class, but the number of acres in each class shall be ascertained, though its boundary need not be marked on the ground or shown on the map. The total number of acres owned by one person in each class and the total number of acres benefited shall be determined, and the total number of acres in each class in the entire district shall be ascertained and presented in tabulated form. The scale of assessment upon the several classes of land returned by the viewers shall be in the ratio of five, four, three, two, and one; that is to say, as often as five cents per acre is assessed against the land in Class A, four cents per acre shall be assessed against the land in Class B, and three cents per acre in Class C, and two cents per acre in Class D, and one cent per acre in Class E. This shall form the basis of assessment for benefits to the lands of the district. (1917, c. 131, s. 5.)

§ 4968. Appeal from viewers' report. — Any party aggrieved may, within ten days after the confirmation of the viewers' report, appeal to the superior court in term-time. Such an appeal shall be taken and prosecuted as now provided in special proceedings. Such an appeal shall be based and heard only upon such exceptions theretofore filed by the complaining party, either as to issue of law or fact, and no additional exceptions shall be considered by the court upon the hearing of the appeal. (1917, c. 131, s. 6.)

§ 4969. Letting contract for construction. — The commissioners shall cause notice to be given for two consecutive weeks in some newspaper published in the county wherein said district is located, and such additional publication elsewhere as they deem expedient, of time and place

of letting the work of construction, and in such notice they shall specify the approximate amount of work to be done, the time fixed for the completion thereof, and the date appointed for the letting. They, together with the superintendent of the district shall convene and let to the lowest responsible bidder, either as a whole or in part, or in sections, as they deem most advantageous for the district, the proposed work. The landowners may bid on the work, and in the event of their securing the contract, the work shall be done at actual cost, it being distinctly understood that the landowners are to receive no profit from said contract, and any saving effected shall inure to the benefit of the district. No bids shall be entertained that exceed the estimated cost, except for good and satisfactory reasons it shall be shown that the original estimate was erroneous. The commissioners shall have the right to reject all bids and advertise again the work, if in their judgment the interest of the district will be subserved by so doing. The successful bidder shall be required to enter into a contract with the board of commissioners, and to execute a bond for the faithful performance of such contract, with sufficient surety, in favor of the board of commissioners for the use and benefit of the district, in an amount equal to twenty-five per centum of the estimated cost of the work awarded to him. In canvassing bids and letting the contract the superintendent of construction shall act only in an advisory capacity to the board of commissioners. The contract shall be based on the plans and specifications submitted by the commissioners in a report, and confirmed by the court, the original of which shall remain on file in the office of the clerk and and shall be open to the inspection of all prospective bidders. All bids shall be sealed and shall not be opened except under authority of the commissioners, and on the date therefor appointed for the opening of bids. All bids must be accompanied by a certified check for three per centum of the amount of the bid. (1917, c. 131, s. 7.)

§ 4970. Payment for work done.—The superintendent of construction shall make monthly estimates of the amount of work done and shall furnish one copy to the contractor and file the other with the secretary of the board of commissioners, and the commissioners shall within five days after filing of such estimate meet and direct the secretary to draw a warrant in favor of the contractor for ninety per centum of the work done according to the specifications and contract; and upon the presentation of such, properly signed by the chairman or vice-chairman and secretary, to the treasurer of the district, he shall pay the amount due thereon. When the work is fully completed and accepted by the superintendent, he shall make an estimate for the whole amount due, including the amounts withheld on the previous monthly estimates, which shall be paid from the fund as before provided. In the event that the landowners receive the contract, the monthly payments shall cover only the actual cost of the work, as certified by the superintendent of construction, to whose certific tes shall be attached all payrolls and vouchers. If any contractors to whom said work shall have been let shall fail to perform the same according to the terms specified in his contract, action may be had in behalf of the commissioners against such contractor and his bond in the superior court, for damages sustained in the district, and recovery made against such contractor and his sureties. In such an event the work shall be advertised and relet in the same manner as the original letting. (1917, c. 131, s. 8.)

§ 4971. Record book kept by clerk.—The clerk shall provide a suitable book to be known as the Record Book of the Agricultural Development Commissioners of ..... District, in which he shall cause to be recorded every petition, motion, order, record, judgment, or finding of the board of commissioners in every transaction which may come before it, in such a way as to make a complete and continuous record of the case; copies of all the maps and plans are to be furnished by the commissioners, and marked by the clerk "Official Copy," which shall be kept on file by him in his office, and one of the copies shall be pasted or otherwise attached to his record. (1917, c. 131, s. 9.)

§ 4972. Assessment rolls; preparation; contents; execution.—After the classification of the land and ratios of assessment of the different classes to be made thereon has been confirmed by the court, the commissioners shall ascertain the total cost of improvement, including all incidental expenses, and shall certify under the hand of the chairman and secretary of the board of commissioners to the clerk the said total cost, and said certificate shall be forthwith recorded in the record book and open to the inspection of any land owner in the district. The commissioners shall immediately prepare in duplicate assessment rolls or agricultural improvement tax lists, giving therein the names of the owners of the land in the district as ascertained from the public records, a brief description of the several tracts of land assessed, and the assessment against each tract of land. The first of these assessment rolls shall provide assessments sufficient for the payment of interest on the bond issue to accrue the third year after their issue and the installment of principal to fall due at the expiration of the third year after the date of issue, together with such amounts as shall have to be paid for the collection and handling of the same. The second assessment roll shall make like provision for the fourth year, and in like manner assessment roll shall make provision for each succeeding year during the life of the bonds. Each of the said assessment rolls shall specify the time when collectible, and shall be numbered in their order, and the amounts assessed against the several tracts of land shall be in accordance with the benefits received, as shown by the classification and ratio of the assessment made by the viewers. These assessment rolls shall be signed by the clerk and by the secretary of the board of commissioners. (1917, c. 131, s. 10.)

§ 4973. Filing and collection of assessment rolls; to be lien on land.—One copy of each of said assessment rolls shall be filed in the record book and one copy shall be delivered to the sheriff or other county tax collector, after the

clerk has appended thereto an order directing the collection of said assessment, and the said assessment shall thereupon have the force and effect of a judgment as in the case of the state and county taxes. These assessments shall constitute a first and paramount lien, second only to state and county taxes, upon the land assessed for the payment of the bonds and interest thereon as they become due, and shall be collected in the same manner, by the same officers, as the state and county taxes are collected. (1917, c. 131, s. 10.)

§ 4974. When assessments due; sale of delinquent lands.—The said assessments shall be due and payable on the first Monday in September each year, and if the same shall not be paid in full by the thirty-first day of December following, it shall be the duty of the sheriff to sell the land or lands so delinquent. The sale of lands for failure to pay such assessments shall be made at the courthouse door in the county in which the lands are located, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, on the first Monday of February of each year; and if for any necessary cause the sale cannot be made on that date, the sale may be continued from day to day for not exceeding four days, or the land may be readvertised and sold on the first Monday in March succeeding, during the same hours, without any order therefor. In all other respects, except as to the time of the sale of the land, the existing laws as to the collection of state and county taxes shall have application to the collection of assessments under this article. (1917, c. 131, s. 10.)

§ 4975. Settlement by tax collector.—It shall be the duty of the sheriff or tax collector to pay over to the county treasurer promptly the moneys so collected by him upon said tax assessments, to the end that the said treasurer may have funds in hand to meet the payment of interest and principal due upon outstanding bonds as they mature. (1917, c. 131, s. 10.)

§ 4976. Payment of interest and installments on bonds; county treasurer's liability.—It shall be the duty of the county treasurer, and without any previous order from the commissioners, to provide and pay the installments of interest at the time and place as evidenced by the coupons attached to said bonds, and also to pay the annual installments of principal due on said bonds at the time and place as evidenced by said bonds; and the said county treasurer shall be guilty of a misdemeanor and subject, on conviction, to fine and imprisonment, in the discretion of the court, if he shall neglect or fail to make prompt payment of said interest and principal of said bonds, and shall likewise be liable in a civil action for all damages which may accrue to the board of commissioners or holders of said bonds, to either or both of which a right of action is hereby given. (1917, c. 131, s. 10.)

§ 4977. New assessment on sale of land. — When any land in the district is sold the court shall assess the new owner thereof, and deduct the amount of the new assessment from the assessment of the former owner and correct the assessment rolls accordingly. (1917, c. 131, s. 10.)

§ 4978. Advertisement of intention to issue bonds.—The commissioners shall give notice for three weeks, by publication in some newspaper published in the county in which the district or a part of the district is situated, and shall also post a written or printed notice at the door of the courthouse and at five conspicious places in the district, reciting that they propose to issue bonds for the payment of the total cost of improvement, giving the amount of the bonds to be issued, the rate of interest they are to bear, and the time when payable. Any landowner in the district not wanting to pay interest on the bonds may within fifteen days after the publication of said notice pay to the county treasurer the full amount for which his land is liable, to be assessed from the classification sheet and certificate of the board of commissioners, showing the total cost of improvements, and have his lands released from liability to be assessed for such improvements. (1917, c. 131, s. 11.)

§ 4979. Landowner's waiver.—Each and every person owning land in the district who shall fail to pay to the county treasurer the full amount for which his land is liable as aforesaid, within the time above specified, shall be deemed as consenting to the issuance of the bonds, and in consideration of the right to pay his proportion in installments, he hereby waives his right of defense to the payment of any assessment which may be levied for the payment of the bonds because of any irregularity or defect in the proceedings prior to this time, except in the case of an appeal as hereinbefore provided, which is not affected by this waiver. (1917, c. 131, s. 12.)

§ 4980. Bond issue. — At the expiration of fifteen days after the expiration of the notice of the bond issue, the board of commissioners may issue bonds of the district for an amount equal to the total estimated cost of the improvements, less such amounts as shall have been paid in in cash to the county treasurer, plus an amount sufficient to pay interest on the bond issue for the three years next following the date of the issue: Provided, that the total principal amount of the bonds to be issued shall not exceed fifty dollars per acre for the land to be improved.

These bonds shall bear six per cent interest per annum, payable semiannually, and shall be paid in the twenty equal installments. The first installment of the principal shall mature at the expiration of three years from the date of issue, and one installment for each succeeding year for nineteen additional years. The commissioners shall sell these bonds at not less than par and apply the proceeds to the payment of interest on said bonds for the three years next following the date of issue, and the payment of other expenses of the district provided for in this chapter. The proceeds from such bonds shall be for the exclusive use of the district specified on their face. The bonds shall be numbered by the board of commissioners and recorded in the record book, which record shall set out specifically the lands embraced in the district on which the tax has not been paid in full, which land is to be assessed as hereinbefore provided. If any installment of principal or interest represented by said bonds

shall not be paid at the time and in the manner when the same shall be due and payable, and such default shall continue for a period of six months the holder or holders of such bond or bonds upon which default has been made shall have a right of action against said district, or the board of commissioners of said district, wherein the court may issue a writ of mandamus against said district, its officers, including the tax collector and treasurer, directing the levying of a tax or specific assessment as herein provided and the collection of the same in such sum as may be necessary to meet any unpaid installment of principal and interest and the cost of said action; and such other remedies are hereby vested in the holder or holders of such bond or bonds in default as may be authorized by law; and the right of action is hereby vested in the holder or holders of such bond or bonds upon which default has been made authorizing them to institute suit against any officer on his official bond for failure to perform any duty imposed by the provisions of this chapter. The official bonds of the tax collector and the county treasurer shall be liable for the faithful performance of the duties herein assigned them. Such official bonds may be increased by the board of county commissioners. (1917, c. 131, s. 13.)

§ 4981. Fees allowed sheriff and treasurer.—The fee allowed the sheriff or the tax collector for collecting the tax as prescribed in this chapter shall be two per centum of the amount collected, and the fee allowed the county treasurer for disbursing the revenue obtained from the sale of the bonds shall be one per centum of the amount disbursed: Provided, no fee shall be allowed to sheriff or other tax collector, or to the county treasurer, for collecting or receiving the revenue obtained from the sale of said bonds, nor for disbursing the revenue raised for paying off said bonds: Provided further, that in those counties where the sheriff, tax collector, and treasurer are on a salary basis, no fee whatever shall be allowed for collecting or disbursing the funds of the district. (1917, c. 131, s. 13, (2d).)

§ 4982. Fees and expenses under chapter. — Any engineer employed under the provisions of this chapter shall receive such compensation for his services as shall be fixed and determined by the commissioners. The viewers, other than the engineer, shall receive five dollars per day; the rodman, axeman, chainman, and other laborers shall receive not to exceed two dollars per day. All other fees and costs incurred under the provisions of this chapter shall be the same as are usual for like services in other cases. . Said costs and expenses shall be paid, by order of the court, out of the funds provided for that purpose, and the board of commissioners shall issue warrants therefor when funds shall be in the hands of the treasurer. Any engineer, viewer, superintendent of construction, or other person appointed under this chapter may be removed by the court, upon petition, for corruption, neglect of duty, or other good and satisfactory cause shown. (1917, c. 131, s. 14.)

§ 4983. Liberal construction; defects in proceeding.—The provisions of this chapter shall be liberally construed to promote the objects herein declared and for the general welfare of the state. The collection of assessments shall not be defeated, whether proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the court confirming the final report of the commissioners; but such orders shall be conclusive and final that all prior proceedings were regular and according to law, unless they were appealed from. If on appeal the court shall deem it just and proper to release any person, or modify his assessment or liability, it shall in no manner affect the rights and legality of any other person than the appellant, and the failure to appeal from the order of the court within the time specified shall be a waiver of any illegality in the proceedings, and the remedies provided for in this chapter shall exclude all other remedies. (1917, c. 131, s. 15.)

§ 4984. Statutes repealed; saving clause.—All laws in conflict with this chapter are hereby repealed: Provided, that proceedings now pending by virtue of any statute now or hereafter in force in this state or in any county shall not be affected by this chapter, but that such proceedings may be continued in accordance with such statute, or in accordance with the provisions of this chapter. (1917, c. 131, s. 16.)

CHAPTER 86
ARCHITECTS

§ 4985. Architecture defined.—For the purpose of this chapter, architecture is defined to be the art of designing for the safe sanitary construction of buildings for public and private use, as taught by the various colleges of architecture recognized by the American Institute of Architects. (1915, c. 270, s. 9.)

§ 4986. State board of architectural examination and registration; creation; membership; vacancies.—There shall be a state board of architectural examination and registration, consisting of five members, to be appointed by the governor in the following manner, to wit: Within thirty days after the ninth day of March, one thousand nine hundred and fifteen, the governor shall appoint five persons who are reputable architects residing in the state of North Carolina, who have been engaged in the practice or architecture at least ten years. The five persons so appointed by the governor shall constitute the board of architectural examination and registration, and they shall be appointed for one, two, three, four, and five years, respectively. Thereafter, in each year, the governor in like manner shall appoint one licensed architect to fill the vacancy caused by the expiration of the term of office, the term of such new members to be for five years. If vacancy shall occur in the board for any cause, the same shall be filled by the appointment of the governor. (1915, c. 270, s. 1.)

§ 4987. Oath of members.—Each member of the state board of architectural examination and registration shall, before entering upon the discharge of the duties of his office, take and file with the secretary of state an oath in writing to properly perform the duties of his office as a member of said board, and to uphold the con-

stitution of North Carolina and the constitution of the United States. (1915, c. 270, s. 2.)

§ 4988. Organization of board; officers; treasurer's bond.—The said board shall, within thirty days after its appointment by the governor, meet in the city of Raleigh, at a time and place to be designated by the governor, and organize by electing a president, vice-president, secretary, and treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules, and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The treasurer shall give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1915, c. 270, s. 1.)

§ 4989. Seal of board.—The board shall adopt a seal for its own use. The seal shall have the words "Board of Architectural Examination and Registration, State of North Carolina," and the Secretary shall have charge, care, and custody thereof. (1915, c. 270, s. 5.)

§ 4990. Meeting of board; quorum. — The board shall meet once a year in July of each succeeding year, for the purpose of electing officers and transacting such other business as may properly come before it. Due notice of such annul meeting, and the time and place thereof, shall be given to each member by letter, sent to his last postoffice address at least ten days before the meetings, and thirty days notice of such annual meeting shall be given in some newspaper published in the city of Raleigh, at least once a week for four weeks preceding such meeting. Three members of the board shall constitute a quorum. (1915, c. 270, s. 1.)

§ 4991. Record of proceedings and of registration.—The secretary shall keep a record of the proceedings of the board and registration for all applicants for registration and admission to practice architecture, giving the name and location of the institution or place of training where the applicant was prepared for the practice of architecture, and such other information as the board may deem proper and useful. This registration shall be prima facie evidence of all matters recorded therein. (1915, c. 270, s. 1.)

§ 4992. Examination and certificate of applicant.—Any person hereafter desiring to be registered and admitted to the practice of architecture in the state shall make a written application for examination to the board of architectural examination and registration, on a form prescribed by the board, giving his name, age (which shall not be less than twenty-one years), his residence, and such evidence of his qualification and proficiency as may be prescribed by said board, which application shall be accompanied by twenty-five dollars. If said application is satisfactory to the board, then the applicant shall be entitled to an examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the board, then the board shall issue to the applicant a certificate to practice architecture in North Carolina. Any person failing to pass such examination may be reëxamined at any regular meeting of the board without additional fee. (1915, c. 270, s. 3; 1919, c. 336, s. 1.)

§ 4993. Refusal, revocation, or suspension of certificates.—Said board may refuse to grant certificate to any person convicted of a felony, or who, in the opinion of the board, has been guilty of gross, unprofessional conduct, or who is addicted to habits of such character as to render him unfit to practice architecture. The board of architectual examination and registration may suspend for a period or revoke the certificate of admission to practice, and forbid practice by any architect upon conviction, after a fair and impartial trial, of any dishonest practice, unprofessional conduct, or incompetence. For the purpose of such trial, the board shall have full power to subpœna and examine witnesses under oath as to the facts of the case. Any architect against whom charges are preferred shall have not less than sixty days notice before the trial of his case, and shall have the right to have witnesses subpœnaed in his behalf, and of being heard in person and by counsel. Any such trial shall be open to the public: Provided, that a notice and copy of this chapter shall be mailed by the secretary of the state board of architectural examination and registration to each architect in and out of the state to whom a certificate has been issued under this chapter. (1915, c. 270, s. 5; 1919, c. 336, s. 3.)

§ 4994. Examination fees; expenses of board.—All examination fees shall be paid in advance to the treasurer of said board of architectural examination and registration. The state of North Carolina shall not be liable for the compensation of any members or officers of said board. All expenses incurred by said board in the necessary discharge of their duties shall be paid out of funds derived from examination fees herein provided for, and shall be paid by the treasurer upon warrant drawn by the secretary and approved by the president. The said board shall have the power to determine what are necessary expenses and to fix the salaries of the respective officers. (1915, c. 270, s. 6.)

§ 4995. Annual renewal of certificate; fee.—Every architect continuing his practice in the state shall, on or before the first day of July in each year, obtain from the board of architectural examination and registration a renewal of his certificate for the ensuing year upon the payment of a fee of five dollars, and upon failure to do so shall have his certificate of admission to practice revoked, but such certificate may be renewed at any time within one year upon the payment of a fee of ten dollars. (1919, c. 336, s. 2.)

§ 4996. Holding out as architect without having certificate, provisos.—Any person not registered under this chapter who shall advertise or put up a sign or card or other device, or in any other way hold himself out to the public as an architect, shall be guilty of a misdemeanor and punished by a fine not exceeding fifty dollars: Provided, however, that nothing herein shall prevent any person from making plans or data

for buildings for themselves or other persons, if the person so furnishing such plans or data shall not hold himself out as an architect; and Provided further, that nothing in this chapter shall prevent the procuring of plans and specifications from an architect residing outside of this state. Nonresident architects who come within the state to do business shall be subject to the same examination and upon same terms and conditions as resident applicants, unless such nonresident architects are permitted to engage in business in this state under the terms of the preceding section. (1915, c. 270, s. 4.)

§ 4997. Seal of registered architect; plans to bear seal.—Every architect who shall have obtained from said board a certificate, shall have a seal which must contain the name of the architect, his place of business, and the words "Registered Architect, of North Carolina," and he shall stamp all drawings and specifications issued from his office, for use in this state, with an impression of said seal. (1915, c. 270, s. 7.)

§ 4998. County record of registered architects, fees.—Every person holding a certificate of said board to practice architecture shall have said certificate recorded in the office of the clerk of the superior court of the county in which he resides or has his principal office. Said clerk shall record the same in a book to be kept by him, entitled "Record of Architecture," and the clerk shall be entitled to a fee of one dollar for recording such certificate: Provided, however, that in any counties where the clerk is on a salary and not on a fee basis, then the said fee of one dollar shall be paid into the county treasury. It shall be unlawful for any person to hold himself out as an architect until said certificate shall have been recorded, and any person found guilty of holding himself out as an architect without registration of his certificate, as aforesaid, shall be guilty of a misdemeanor, and fined not more than fifty dollars, in the discretion of the court. (1915, c. 270, s. 8.)

CHAPTER 87

AUCTIONEERS

§ 4999. Application of chapter.—The provisions of this chapter extend only to sales of such articles of goods, wares, and merchandise as are the ordinary subject of traffic and sale by merchants and traders.

This chapter does not affect any sale (1) by auction of goods, wares, and merchandise made pursuant to and in execution of any order, decree, or judgment of the court of the United States or of this state; or (2) made in consequence of any assignment of property and estate for benefit of creditors; or (3) made by executors, administrators, collectors, or guardians; or (4) made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods; or (5) extend to any article the product of the agriculture of this state, in its natural or unmanufactured state; or (6) to any species of stock or domestic animals; or (7) to any article of household furniture or farming utensils which have been in use. (Rev., s. 220; Code, s. 2284; R. C., c. 10, s. 6.)

Auctioneer is the agent of both buyer and seller, and the entry on his lists, taken in connection with the advertisement, is a compliance with the statute of frauds. Cherry v. Long, 61 N. C. 466; Woodruff v. Trust Co., 173 N. C. 546, 92 S. E. 496; Dickerson v. Summons, 141 N. C. 325, 53 S. E. 850.

Authority of auctioneer to vary conditions of sale confirmed as agent of hirer. Satterfield v. Smith, 33 N. C. 60.

Authority of Auctioneer to Explain Conditions.—An advertisement of a sale of property by an auctioneer may be explained at the time of sale. Rankin v. Matthews, 29 N. C. 286.

Liability of Surety.—Since it is the duty of an auctioneer to pay over to his employer the proceeds of sales made by him, sureties on his official bond, which is conditioned that he will do whatsoever the law requires, are liable to his employers for proceeds of sale which he withholds. Comm'rs v. Holloway, 10 N. C. 234.

Bidders presumed to be acquainted with terms when the terms of auction are advertised or otherwise published. Christmas v. Jenkins, 3 N. C. 395.

§ 5000. Appointment; bond.—No person shall exercise or conduct the trade or business of an auctioneer in this state or offer to conduct any such trade or business described in this chapter unless such person shall hold a license issued by the insurance commissioner, and no license shall issue to any person who is not a resident of the state of North Carolina, and has not been a bona fide resident for at least two years prior to the date when such application for license is filed with the insurance department. The license shall issue only upon the filing of a bond in the sum of five thousand dollars ($5,000.00), with such conditions and sureties as may be required and approved by the insurance commissioner. The license shall expire on the first day of April following, unless the authority is sooner revoked by the insurance commissioner and such authority shall be subject to revocation at any time by such officer for cause appearing to him sufficient. The fees for each license shall be two hundred dollars ($200.00): Provided, that the provisions of this law shall not apply to any auctioneers or sales at public auction other than auction sales of jewelry and silverware, and auctioneers conducting or engaged in such sale. (Rev., s. 217; Code, s. 2281; 1889, c. 40; 1891, c. 576; R. C., c. 10, s. 1; 1923, c. 243, s. 1.)

Editor's Note.—The Act of 1923, ch. 243 takes auction sales other than sales of jewelry and silverware, and auctioneers engaged in such sales out of the provisions of this section; makes two years bona fide residence a prerequisite to application for a license; raises the bond required to $5,000 and the license fee to $200. The insurance commissioner is given power to revoke a license for failure to comply with the terms of the act, or for other cause. See 1 N. C. Law Rev. 302.

§ 5000(a). Requirements of law and of insurance commissioner; false statement.—No person who shall conduct the business of an auctioneer in the state shall fail to comply with any provision of the law or any requirement of the insurance commissioner pursuant to the law, and no such person shall make or cause to be made any false statement in any report required of him, and upon any violation of any section of this chapter, the insurance commissioner may revoke his license to do business in this state. (1923, c. 243, s. 2.)

§ 5000(b). Punishment for violation of law.—Any person violating any of the provisions of this chapter shall be punished by a fine not ex-

ceeding two hundred dollars or by imprisonment in jail or worked on the roads for not exceeding two years, or by both such fine and imprisonment. (1923, c. 243, s. 3.)

§ 5000(c). License tax by counties and municipalities.—Nothing in this law shall be construed to take away from the counties, cities or towns of this state any right or rights which they may now have, or may hereafter have, to levy a license tax on persons exercising or conducting the trade or business of an auctioneer. (1923, c. 243, s. 4.)

§ 5001. Account semiannually; pay over moneys received.—It is the duty of such auctioneers, on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any goods, wares, or merchandise may have been sold at auction, and also at private sale, where the price of the goods, wares, and merchandise sold at private sale was fixed or agreed upon or governed by any previous sale at auction of any goods, wares, and merchandise of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the goods, wares, and merchandise sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. The statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it is their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made. (Rev., s. 218; Code, s. 2282; R. C., c. 10, s. 2.)

§ 5002. Acting without appointment; penalty.—No person shall exercise the trade or business of an auctioneer by selling any goods, wares, or merchandise by auction or by any other mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person is appointed an auctioneer pursuant to this chapter, on pain of forfeiting to the state for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district. (Rev., s. 219; Code, s. 2283; R. C., c. 10, s. 5.)

§ 5003. Commissions; one per cent to town.—Auctioneers are entitled to such compensation as may be agreed upon, not exceeding two and a half per cent on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent of the gross amount of sales to the commissioners or other authority of their respective towns. (Rev., s. 221; Code, s. 2285; R. C., c. 10, s. 7.)

Auctioneer's Fee Payable out of Trustee's Commissions.—See Duffy v. Smith, 132 N. C. 38, 43 S. E. 501.

CHAPTER 87A

AUTOPSIES

§ 5003(1). Limitation upon right to perform autopsy.—The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased; cases where a coroner or the majority of a coroner's jury deem it necessary upon an inquest to have such an autopsy; and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy. (1931, c. 152; 1933, c. 209.)

Editor's Note.—Prior statutes dealing with post mortem examinations are sections 1020, 4518, and 6786. The right of burial belongs to the surviving relations in the order of inheritance. See Floyd v. R. R., 167 N. C. 55, 83 S. E. 12 (1914), 9 N. C. Law Rev. 348.

Public Laws 1933, c. 209, deleted a clause reading "for the purpose of ascertaining the cause of death," which formerly appeared at the end of this section.

CHAPTER 87B

BARBERS

§ 5003 (a). Necessity for certificate of registered barber or apprentice.—No person or combination of persons shall for pay, either directly or indirectly, practice or attempt to practice barbering as hereinafter defined in the State of North Carolina without a Certificate of Registration either as a Registered Apprentice or as a Registered Barber issued pursuant to the provisions of this chapter by the State Board of Barber Examiners hereinafter established. (1929, c. 119, s. 1.)

Constitutionality.—This chapter, known as the Barber's Act, relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

Application.—The provisions of this chapter apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

§ 5003 (b). What constitutes practice of barbering.—Any one or combination of the following practices, when done for pay, shall constitute the practice of barbering in the purview of this chapter:

(a) Shaving or trimming the beard, or cutting the hair.

(b) Giving facial or scalp massages, or treatments with oils, creams, lotions and other preparations either by hand or mechanical appliances.

(c) Singeing, shampooing or dyeing the hair or applying hair tonics.

(d) Applying cosmetic preparations, antiseptics, powders, oils, clays and lotions to the scalp, neck or face. (1929, c. 119, s. 2.)

§ 5003 (c). Qualifications for issuance of certificates of registration.—No person shall be issued a certificate of Registration as a Registered Apprentice by the State Board of Barber Examiners. hereinafter established.

(a) Unless such person is at least seventeen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by said Board of Barber Examiners.

(c) Unless each person has completed at least a six months' course in a reliable Barber School or College approved by said Board of Barber Examiners.

(d) Unless such person passes the examination prescribed by the Board of Barber Examiners and

pays the required fees hereinafter enumerated. (1929, c. 119, s. 3.)

§ 5003 (d). Registered Apprentice must serve under Registered Barber before opening shop.—No Registered Apprentice, registered under the provisions of this chapter, shall operate a barber shop in the State, but must serve his period of apprenticeship under the direct supervision of a Registered Barber, as required by § 5003 (e). Provided, however, that no Apprentice nor any person who may qualify as an Apprentice, who is operating a barber shop at the time this bill is enacted into law, shall be affected by the restriction herein relating to the ownership and operation of barber shops by Apprentices, until January first, one thousand nine hundred and thirty. (1929, c. 119, s. 4.)

§ 5003 (e). Period of apprenticeship; affidavit; qualifications for certificate as Registered Barber.—Any person to practice barbering as a Registered Barber, must have worked as a Registered Apprentice for a period of at least eighteen months under the direct supervision of a Registered Barber, and this fact must be demonstrated to the Board of Barber Examiners by the sworn affidavit of three Registered Barbers, or such other methods of proof as the Board may prescribe and deem necessary. A Certificate of Registration as a Registered Barber shall be issued by the Board hereinafter designated, to any person who is qualified under the provisions of this act, or meets the following qualifications:

(a) Who is qualified under the provision of section three of this act;

(b) Who is at least nineteen years of age;

(c) Who passes a satisfactory physical examination as prescribed by said Board;

(d) Who has practiced as a Registered Apprentice for a period of eighteen months, under the immediate personal supervision of a Registered Barber; and

(e) Who has passed a satisfactory examination, conducted by the Board, to determine his fitness to practice barbering, such examination to be so prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, including the liability of the applicant in his preparation of tools, shaving, hair-cutting, and all the duties and services incident thereto, and has sufficient knowledge concerning diseases of the face, skin and scalp, to avoid the aggravation and spreading thereof in the practice of said trade. (1929, c. 119, s. 5.)

§ 5003 (f). State Board of Barber Examiners; appointment and qualifications; governor; term of office and removal.—A board to be known as the State Board of Barber Examiners is hereby established to consist of three members appointed by the Governor of the State. Each member shall be an experienced barber, who has followed the practice of barbering for at least five years in the State. The members of the first Board appointed shall serve for six years, four years and two years, respectively, after appointed, and members appointed thereafter shall serve for six years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1929, c. 119, s. 6.)

§ 5003 (g). Office; seal; officers and secretary; bond.—The Board shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers, and in addition thereto, shall elect a full time Secretary, which Secretary shall receive an annual salary not to exceed three thousand dollars, such salary as well as all other expenses of said Board, to be paid only out of the revenue derived from fees collected under the provisions of this act. Said full time Secretary shall keep and preserve all the records of the Board, issue all necessary notices to the barbers of the State, and perform such other duties, clerical and otherwise, as may be imposed upon him by said Board of Barber Examiners. Said full-time Secretary shall turn over, as required by law, all moneys collected by him, and render full, itemized and detailed reports therewith, as required by law. He shall, before entering upon the duties of his office, execute to the State of North Carolina, a satisfactory bond, with a duly licensed bonding company in this State as surety, or other acceptable surety, such bond to be in the penal sum of not less than ten thousand dollars, and conditioned upon the faithful performance of the duties of his office. (1929, c. 119, s. 7.)

§ 5003(h). Salary and expenses; annual report to Governor.—Each member of the Board of Barber Examiners, as herein created, shall receive for his services the sum of ten dollars per day for each day actually spent in the performance of his duties, and shall be reimbursed for his actual necessary expenses incurred in the discharge of his duties, both per diem allowance and expenses, to be paid only from the funds derived from the fees collected in the administration of this act. The Board shall report annually to the Governor a full statement of its receipts and expenditures, and a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8.)

§ 5003 (i). Application for examination; payment of fee.—Each applicant for an examination shall:

(a) Make application to the Board on blank forms prepared and furnished by the full-time Secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(b) Pay to the Board the required fee.

(c) All applications for said examination must be filed with the full-time Secretary at least thirty days prior to the actual taking of such examination by applicants. (1929, c. 119, s. 9.)

Purpose of Fees—Constitutionality.—The fees prescribed for barbers who are subject to the provisions of this chapter are for the expenses and enforcement of the act, which is necessary to the public health and welfare, and not an annual occupation tax imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by the Barber's Act, and assessment of the fees thereunder is constitutional. State v. Lockey, 198 N. C. 551, 552, 152 S. E. 693.

§ 5003 (j). Board to conduct examinations not less than four times each year.—The Board shall conduct examinations of applicants for Certificates of Registration to practice as Registered Barbers, and of applicants for Certificate of Registration to practice as Registered Apprentices, not less than four times each year, at such times and places as will prove most convenient, and as the Board may determine. The examination of applicants for Certificates of Registration as Registered Barbers and Registered Apprentices shall include such practical demonstration and oral and written test as the Board may determine. (1929, c. 119, s. 10.)

§ 5003 (k). Issuance of certificates of Registration. — Whenever the provisions of this chapter have been complied with, the Board shall issue, or have issued, a Certificate of Registration as a Registered Barber or as a Registered Apprentice, as the case may be. (1929, c. 119, s. 11.)

§ 5003 (l). Barbers from other states; temporary permits. — Persons who have practiced barbering in another state or county, and who move into this State, shall prove and demonstrate their fitness to the Board of Barber Examiners, as herein created, before they will be issued a Certificate of Registration to practice barbering, but said Board may issue such temporary permits as are necessary. (1929, c. 119, s. 12.)

§ 5003 (m). Procedure for registration. — The procedure for the Registration of present practitioners of barbering shall be as follows:

(a) If such person has been practicing barbering for a shorter period of time than eighteen months, he shall, upon paying the required fee, and making an affidavit to that effect to the Board of Barber Examiners, be issued a Certificate of Registration as an Apprentice.

(b) If such person has been practicing barbering in the State of North Carolina for more than eighteen months, he shall upon paying the required fee and making an affidavit to that effect, to the Board of Barber Examiners, be issued a Certificate of Registration as a Registered Barber.

(c) All persons, however, who are not actively engaged in the practice of barbering, at the time this chapter is enacted into law, shall be required to take the examination herein provided, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 13.)

§ 5003 (n). Fees.—The fee to be paid by an applicant for a Certificate of Registration to practice barbering, as an apprentice is three dollars and such fee must accompany his application. The annual license fee of an Apprentice shall be one dollar and fifty cents. The fee to be paid by an applicant for an examination to determine his fitness to receive a Certificate of Registration as a Registered Barber is five dollars. The annual license fee of a Registered Barber shall be three dollars. All licenses, both for Apprentices and for Registered Barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for Apprentices, shall be one dollar and fifty cents, and for Registered Barbers three dollars. The fee for registration of an expired Certificate for Registered Barber shall be five dollars, and registration of expired Certificate of an Apprentice shall be three dollars. The fees herein set out are not to be increased by the Board of Barber Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it may deem expedient. (1929, c. 119, s. 14.)

§ 5003 (o). Persons exempt from provisions of chapter. — The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties.

(a) Persons authorized under the laws of the State to practice medicine and surgery.

(b) Commissioned medical or surgical officers of the United States Army, Navy, or Marine Hospital Service.

(c) Registered nurses.

(d) Students in schools, colleges and universities, who follow the practice of barbering upon the school, college, or university premises, for the purpose of making a part of their school expenses.

(e) Undertakers.

(f) Persons practicing hair dressing and beauty culture in hairdressing and beauty shops patronized by women. (1929, c. 119, s. 15.)

§ 5003(p). Rules for sanitation in barber shops and schools; inspection; posting rules.—The state board of barber examiners shall have authority to make reasonable rules and regulations for the sanitary management of barber shops and barber schools and for the administration of the provisions of this chapter, and to enforce said rules and regulations. The sanitary rules and regulations so prescribed to be approved by the state board of health. Any member of the board, and its agents and assistants, shall have authority to enter upon and inspect any barber shop or barber school at any time during business hours in the performance of the duties conferred or imposed by this chapter. A copy of the rules and regulations adopted by the board of barber examiners shall be furnished by said board to the owner or manager of each barber shop or barber school in the state, and such copy shall be posted in a conspicuous place in each barber shop or barber school, together with the rating of the inspection so made. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2.)

Editor's Note.—The Act of 1931, which struck out the former section and inserted the above in lieu thereof, provided: "This act shall apply to all towns of five hundred population or over, according to the latest Federal Census: And, Provided further, that this act shall apply to Bladen and Catawba counties regardless of the population of towns: Provided further, that the provisions of this act shall apply to all cities and towns of Robeson County, Caldwell County, Cumberland County, Harnett County, and Sampson County, irrespective of population."

This Act was amended by Public Laws 1931, c. 346, so that its provisions "shall apply to all cities and towns in Cabarrus County, whether incorporated or not, with a population of five hundred or more according to the latest Federal Census."

While Public Laws 1931 c. 32 referred to only one section of this chapter, it would seem that it was the intent of the legislature that the provision quoted above supersede section 5003(w).

Public Laws of 1933, c. 95, omitted a proviso, formerly

appearing at the end of this section, requiring reports by the State Board of Barber Examiners of violation of the health and sanitary laws.

Section 3 of c. 95 of the Public Laws of 1933 provides: "Section two, chapter thirty-two, Public Laws, one thousand nine hundred and thirty-one, and section twenty-three of chapter one hundred and nineteen of the Public Laws of one thousand nine hundred and twenty-nine, be and the same are hereby repealed. This act shall not apply to persons occasionally doing barber's work at a distance of five miles or more from any town, whether incorporated or not: Provided, the provisions of this act shall not apply to any person who shall perform the services of a barber for members of his own family or for persons with whom he is in the relation of employer or employee or landlord and tenant: Provided, this act shall not apply to the Counties of Alleghany, Bertie, Camden, Clay, Carteret, Dare, Davie, Duplin, Gates, Hertford, Hoke, Hyde, Jones, Lincoln, Martin, Mitchell, Pamlico, Person, Pender, Rockingham, Stokes, Tyrrell, Wilkes and Yadkin." (1933, c. 95, § 3.)

Public Laws of 1935, chapter 341, amends section 3 of chapter 95, Public Laws of 1933, by striking out the words "Rockingham, Lincoln, Mitchell, Stokes, Bertie and Martin from the list of excepted counties.

§ 5003 (q). Certificates to be displayed.—Every holder of a Certificate of Registration shall display it in a conspicuous place adjacent to or near his work chair. (1929, c. 119, s. 17.)

§ 5003 (r). Renewal or restoration of certificates.—Every Registered Barber and every Registered Apprentice, who continues in active practice or service, shall annually, on or before June thirtieth of each year, renew his Certificate of Registration and pay the required fee. Every Certificate of Registration, which has not been renewed during the month of June in any year, shall expire on the first day of July in that year. A Registered Barber or a Registered Apprentice, whose Certificate of Registration has expired, may have his Certificate restored immediately upon payment of the required restoration fee. Any Registered Barber who retires from the practice of barbering for not more than five years, may renew his Certificate of Registration upon payment of the required restoration fee. (1929, c. 119, s. 18.)

§ 5003(s). Disqualifications for certificate. — The Board may either refuse to issue or renew, or may suspend or revoke, any Certificate or Registration for any one or combination of the following causes:

1. Conviction of a felony shown by certified copy of the record of the court of conviction.
2. Gross malpractice or gross incompetency.
3. Continued practice by a person knowingly having an infectious or contagious disease.
4. Advertising by means of knowingly false or deceptive statements.
5. Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs.
6. The commission of any of the offences described in § 5003 (u), sub-divisions three, four and six. (1929, c. 119, s. 19.)

§ 5003(t). Notice; public hearing; appeal.—The Board may neither refuse to issue nor refuse to renew, nor suspend, or revoke any Certificate of Registration, however, for any of these causes, unless the person accused has been given at least twenty days' notice in writing of the charge against him and a public hearing by the Board.

Upon the hearing of any such proceeding, the Board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers.

Any barber in the State whose case has been passed upon by the Board of Barber Examiners shall have the right and is hereby given the right to appeal to the Superior Court of the State, which Court may in its discretion reverse or modify any order made by the said Board of Barber Examiners. (1929, c. 119, s. 20.)

§ 5003(u). Misdemeanors. — Each of the following constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars, nor more than fifty ($50.00) dollars:

1. The violation of any of the provisions of section 5003(a).
2. Permitting any person in one's employ, supervision or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.
3. Permitting any person in one's employ, supervision or control, to practice, as a barber unless that person has a certificate as a registered barber.
4. Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.
5. Practicing or attempting to practice by fraudulent misrepresentations.
6. The wilful failure to display a certificate of registration as required by section 5003(q).
7. The wilful and continued violation of the reasonable rules and regulations adopted by the state board of barber examiners for the sanitary management of barber schools. (1929, c. 119, s. 21; 1933, c. 95, s. 1.)

Editor's Note.—Public Laws of 1933, c. 95, changed in subsection 7 the words "State Board of Health" to "State Board of Barber Examiners."

§ 5003 (v). Board to keep record of proceedings; data on registrants.—The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of Certificates of Registration. This record shall also contain the name, place of business and residence of each Registered Barber and Registered Apprentice, and the date and number of his Certificate of Registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22.)

§ 5003 (w). To what localities chapter applies. —The provisions of this chapter shall apply only to those barber shops maintained and operated in those cities and towns of the State with a population of two thousand or more, as shown by United States census of nineteen hundred and twenty, and to shops maintained and operated within a distance of one mile from the boundary limits of such cities and towns: Provided, that in towns of less population barbers may willingly come into the Association, be bound by its regulations and protected by its benefits: Provided, further, this chapter shall apply to all cities and towns in the County of Bladen and in the County of Wayne irrespective of population, and shall be of county-wide application to Alexander and Wilkes Counties. (1929, c. 119, s. 23; 1931, cc. 205, 323.)

Editor's Note. — The Acts of 1931 added Alexander,

Wayne and Wilkes counties to this section, which would seem to be superseded by Public Laws 1931, c. 32, except as to the counties specifically named. See note to § 5003(p).

Classification Not Arbitrary or Unreasonable.—The classification of barbers made by this section is not an arbitrary or unreasonable one either as relating only to certain persons among the taxpayers or to only certain individuals among the barbers themselves in accordance with the population of the cities and towns in which they carry on their business, and the act bears equally on all of the class and is available to all barbers who are qualified and desire to come under its provisions, and the act is not a discrimination forbidden by the State Constitution nor by the Fourteenth Amendment to the Federal Constitution. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

§ 5003 (x). Valid parts of chapter upheld.—If any section of this chapter shall be declared unconstitutional for any reason, the remainder of this chapter shall not be affected thereby. (1929, c. 119, s. 24.)

§ 5003(y). Davie county exempted from barbers law.—Davie county is hereby exempted from the provisions of chapter one hundred and nineteen public laws one thousand nine hundred and twenty-nine, and all amendments thereto, the same being an act regulating the practice of barbering in North Carolina. (1933, c. 183, s. 1.)

CHAPTER 88

BOARD OF CHARITIES

Art. 1. State Board of Charities and Public Welfare

§ 5004. Election and term of office.— There shall be elected by the general assembly, upon the recommendation of the governor, seven persons who shall be styled "The State Board of Charities and Public Welfare," and at least one of such person shall be a woman. At the session of the general assembly for the year one thousand nine hundred and seventeen all the members of such board shall be elected, three for a term of two years, two for a term of four years, and two for a term of six years, and thereafter the term shall be six years for all. The election shall be by concurrent vote of the general assembly, and appointments to fill vacancies in the board arising from any cause whatsoever, except expiration of term, shall be made for the residue of such term by the governor. The members of the board shall serve without pay, except that they shall receive their necessary expenses. (Rev., s. 3913; Code, s. 2331; 1868-9, c. 170, s. 2; 1909, c. 899.)

§ 5005. Meetings of board.—The board shall hold meetings at least quarterly, and whenever called in session by the chairman, and shall make such rules and orders for the regulation of its own proceedings as it deems proper. (Rev., ss. 2807, 3914; Code, s. 2332; 1917, c. 170, s. 1; 1868-9, c. 170, s. 2; 1909, c. 899.)

§ 5006. Powers and duties of board.—The board shall have the following powers and duties, to-wit:

1. To investigate and supervise, through and by its own members or its agents or employees, the whole system of the charitable and penal institutions of the state, and to recommend such changes and additional provision as it may deem needful for their economical and efficient administration.

2. To study the subjects of nonemployment, poverty, vagrancy, housing conditions, crime, public amusement, care and treatment of prisoners, divorce and wife desertion, the social evil and kindred subjects and their causes, treatment, and prevention, and the prevention of any hurtful social condition.

3. To study and promote the welfare of the dependent and delinquent child and to provide, either directly or through a bureau of the board, for the placing and supervision of dependent, delinquent, and defective children.

4. To inspect and make report on private orphanages, institutions, maternity homes, and persons or organizations receiving and placing children, and to require such institutions to submit such annual reports and information as the state board may determine: Provided, that the term "maternity homes" used hereinbefore in this sub-section shall be construed to include institutions or homes maintained not only for the purpose of receiving pregnant women for care previous to, during and following delivery, but institutions or lying-in homes wherein pregnant women are received for care previous to and following delivery, the said delivery taking place in a hospital to which this statute does not apply.

5. To grant license for one year to such persons or agencies to carry on such work as it believes is needed and is for the public good, and is conducted by reputable persons or organizations, and to revoke such license when in its opinion the public welfare or the good of the children therein is not being properly subserved; Provided, subsection five shall not apply to any orphanage chartered by the laws of the State of North Carolina, owned by a religious denomination or a fraternal order, and having a plant and assets not less than sixty thousand dollars ($60,000), nor shall it apply to orphanages operated by fraternal orders, under charters of other states, which have complied with the corporation laws of North Carolina and have that amount of property.

6. To issue bulletins and have same printed to such amount and extent as may be approved by the state printing commission, and in other ways to inform the public as to social conditions and the proper treatment and remedies for social evils.

7. To issue subpœnas and compel attendance of witnesses, administer oaths, and to send for persons and papers whenever it deems it necessary in making the investigations provided for herein or in the other discharge of its duties, and to give such publicity to its investigations and findings as it may deem best for the public welfare.

8. To employ a trained investigator of social service problems who shall be known as the commissioner of public welfare, and to employ such other inspectors, officers, and agents as it may deem needful in the discharge of its duties.

9. To recommend to the legislature social legislation and the creation of necessary institutions.

10. To encourage employment by counties a

county superintendent of public welfare and to coöperate with the county superintendent of public welfare in every way possible.

11. To attend, either through its members or agents, social service conventions and similar conventions, and to assist in promoting all helpful publicity tending to improve social conditions of the state, and to pay out of the funds appropriated to the state board office expenses salaries of employees, and all other expenses incurred in carrying out the duties and powers hereinbefore set out.

12. To receive, hold and administer for the purposes for which it is organized, any funds donated to it, either by will or deed, and to administer said funds in accordance with the instructions of the will or deed creating them. (Rev., ss. 3914, 3915; Code, ss. 2332, 2333; 1868-9, c. 170, s. 3; 1917, c. 170, s. 1; 1919, c. 46, ss. 1, 2; 1925, c. 90, ss. 1, 2; 1927, c. 65; 1931, c. 175.)

As to placing or adoption of juvenile delinquents or dependents, see §§ 5067(i)-5067(p).

Editor's Note.—The Act of 1931 added the proviso to subsection 4 of this section.

§ 5007. Investigate and report on mental and physical infirmities. — The board shall also give special attention to the causes of insanity, defect or loss of the several senses, idiocy, and the deformity and infirmity of the physical organization. They shall, besides their own observation, avail themselves of correspondence and exchange of facts of the labors of others in these departments, and thus be able to afford the general assembly data to guide them in future legislation for the amelioration if the condition of the people, as well as to contribute to enlighten public opinion and direct it to interests so vital to the prosperity of the state. The state board shall keep and report statistics of the matters hereinbefore referred to and shall compile these reports and analyze them with a view of determining and removing the cause in order to prevent crime and distress. (Rev., s. 3916; Code, s. 2334; 1868-9, c. 170, s. 4, 1917, c. 170, s. 1.)

§ 5008. Inspection of county prisons; reports required. — The state board shall have power to inspect county jails, county homes, and all prisons and prison camps and other institutions of a penal or charitable nature, and to require reports from sheriffs of counties and superintendents of public welfare and other county officers in regard to the conditions of jails or almshouses, or in regard to the number, sex, age, physical and mental condition, criminal record, occupation, nationality and race of inmates, or such other information as may be required by the state board. The plans and specifications of all new jails and almshouses shall, before the beginning of the construction thereof, be submitted for approval to the state board. (Rev., s. 3917; Code, s. 2335; 1868-9, c. 170, s. 5; 1917, c. 170, s. 1.)

§ 5009. Biennial reports to general assembly. —The state board shall biennially prepare and submit to the general assembly a complete and full report of its doings during the preceding two years, showing the actual condition of all the state institutions under its supervision, with such suggestions as it may deem necessary and pertinent, which shall be printed by the state printer, and shall report such other matters as it may think for the benefit of the people of the state. (Rev., s. 3918; Code, s. 2338; 1868-9, c. 170, s. 8; 1870-1, c. 106; 1917, c. 170, s. 1.)

§ 5010. Attention secured for insane and other unfortunates. — Whenever the board shall have reason to believe that any insane person, not incurable, is deprived of proper remedial treatment, and is confined in any almshouse or other place, whether such insane person is a public charge or otherwise, it shall be the duty of the board to cause such insane person to be conveyed to the proper state hospital for the insane, there to receive the best medical attention. So, also, it shall be their care that all the unfortunate shall receive benefit from the charities of the state. (Rev., s. 3919; Code, s. 2336; 1868-9, c. 170, s. 6; 1917, c. 170, s. 1.)

§ 5011. Public institutions to furnish information.—The board may require the superintendents or other officers of the several charitable and penal institutions of the state to report to them any matter relating to the inmates of such institutions, their manner of instruction and treatment, with structure of their buildings, and to furnish them any desired statistics upon demand. (Rev., s. 3920; Code, s. 2337; 1868-9, c. 170, s. 7; 1917, c. 170, s. 1.)

§ 5012. Relatives ineligible to appointment in state institutions.—No person shall be appointed to any place or position in any of the state institutions under the supervision of the state board who is related by blood or marriage to any member of the state board or to any of the principal officers, superintendents, or wardens of state institutions. (1917, c. 170, s. 1.)

§ 5013. Failure of officers to furnish information. — If the board of commissioners of any county or the justices of the peace of any township, or any officer or employee of any charitable or penal institution of the state shall fail, refuse, or neglect to furnish any informaion required by law to be furnished to the state board of charities and public welfare, when they have been provided with the necessary blank forms for such reports, or shall fail upon request to afford proper facalities for the examination of any charitable or penal institution of the state, they shall be guilty of a misdemeanor. (Rev., s. 3566; Code, s. 2341; 1891, c. 491, s. 2; 1869-70, c. 154, s. 3.)

Art. 2. County Boards of Charities and Public Welfare

§ 5014. County board of charities, etc.; appointment; duty.—The state board shall appoint in each county three persons to be known as the County Board of Charities and Public Welfare, whose duty shall be to advise with and assist the state board in the work in the county, to make such visitations and reports as the state board may request, and to act in a general advisory capacity to the county and municipal authorities in dealing with questions of dependency and delinquency, distribution of the poor funds, and social considerations generally. The members of the county board of charities and public wel-

fare shall serve without pay. The state board shall have the power at anytime to remove any member of the county board. (1917, c. 170, s. 1; 1919, c. 46, s. 3.)

§ 5015. Term of office and meetings of board.—The county board of charities and public welfare shall be appointed one for one year, one for two years, and one for three years and subsequent appointments shall be for a term of three years. The persons so appointed shall meet immediately after their appointment and organize by electing a chairman, and the county superintendent of public welfare shall act as secretary. The county board shall meet at least once a month with the county superintendent of public welfare, and advise with him in regard to problems pertaining to his office. (1917, c. 170, s. 1; 1919, c. 46, s. 4.)

§ 5016. County superintendent of public welfare.—On the first Monday in June, nineteen hundred and twenty-nine, and on the first Monday in June every two years thereafter, the county board of education and the board of county commissioners of every county in North Carolina shall meet in joint session for the purpose of electing a county superintendent of public welfare, who shall serve for the ensuing two years, and until his successor is elected and qualified. The county superintendent of public instruction shall serve as secretary of the joint meeting, make permanent record of the proceedings, and issue all notices and reports necessary previous and subsequent to the meeting. The person elected county superintendent of public welfare shall be qualified by character, fitness, and experience to well discharge the duties thereof. The person so elected superintendent of public welfare shall begin his work on the first Monday in July; but no one so elected shall begin the work of this position until he shall have received a certificate of approval of his fitness from the state board of charities and public welfare; and in case such approval is not received, the two boards shall, upon receiving notice thereof, proceed immediately in like manner to elect another person. In case of a tie vote, the matter may be referred for decision to the state commissioner of public welfare; Provided, that in case of a tie vote in the election of a County Superintendent of Public Welfare for the County of Iredell, the matter shall be referred for decision to the Clerk of the Superior Court of Iredell County. A joint session of the two boards may be held at any time on the call of the chairman of either board for the purpose of discussing the work relating to the office; and a superintendent may be dismissed by joint action for proven unfitness or failure in the performance of duty, and his successor elected. It is the purpose of this section that the board of education and the board of county commissioners shall act in a spirit of mutual cooperation for the purpose of obtaining the best possible results in carrying out the intention of this law. The joint meeting shall fix the salary of the county superintendent of public welfare, which sum shall be sufficient to secure the services of a well qualified person, and one-half of which shall be paid from the funds of each board, and a reasonable expense fund shall be provided by each board for carrying on the work, which sum shall be separate from that allowed as salary for the county superintendent. In counties having a population of less than thirty-two thousand (32,000), by the census of nineteen hundred and twenty, and in counties where on January first, nineteen hundred and twenty-one, the superintendent of education was performing the functions of county superintendent of public welfare, the board of county commissioners shall have the option of taking part or of not taking part in the election of a county superintendent of public welfare as provided above. In any county of less than thirty-two thousand (32,000) population, where the county commissioners do not desire to so participate, the county superintendent of public instruction shall become ex officio county superintendent of public welfare. Whenever by such action a county superintendent of public instructions becomes ex officio county superintendent of public welfare, he shall receive no salary in addition to that received as county superintendent of schools, but the board of education, by and with the approval of the board of commissioners, shall furnish him such clerical or other assistance as it deems necessary to have the compulsory school attendance law fully enforced in accordance with the rules and policy laid down by the state board of education, and the board of county commissioners shall furnish a reasonable expense fund for carrying out the other duties attached by law to the office of county superintendent of public welfare. All such duties shall be as binding upon the county superintendent of public welfare as they would be in case he were not county superintendent of schools. Every county superintendent of public welfare shall make such reports of his work to the county board of education and the board of county commissioners as said boards may require. (1917, c. 170, s. 1; 1919, c. 46, ss. 3, 4; 1921, c. 128; 1929, c. 291, s. 1; 1931, c. 423.)

Editor's Note.—Prior to the amendment of 1929 the meetings provided for were on the first Monday of June 1921 and the first Monday in June every two years thereafter.

The Act of 1931 added the proviso as to Iredell County beginning in line thirty of this section.

§ 5017. Powers and duties of county superintendent.—The county superintendent of public welfare shall be the chief school attendance officer of the county, and shall have other duties and powers as follows:

1. To have, under control of the county commissioners, the care and supervision of the poor and to administer the poor funds.

2. To act as agent of the state board in relation to any work to be done by the state board within the county.

3. Under the direction of the state board, to look after and keep up with the condition of persons discharged from hospitals for the insane and from other state institutions.

4. To have oversight of prisoners in the county on parole from penitentiaries, reformatories, and all parole prisoners in the county.

5. To have oversight of dependent and delinquent children, and especially those on parole or probation.

6. To have oversight of all prisoners in the county on probation.

7. To promote wholesome recreation in the county and to enforce such laws as regulate commercial amusement.

8. Under the direction of the state board, to have oversight of dependent children placed in the county by the state board.

9. To assist the state board in finding employment for the unemployed.

10. To investigate into the cause of distress, under the direction of the state board, and to make such other investigations in the interest of social welfare as the state board may direct. (1917, c. 170, s. 1; 1919, c. 46, s. 3.)

§ 5018. Joint city and county work.—In counties where there are cities which already have a local board of welfare or other social agencies, or which may wish to establish such, the governing bodies of such cities may make such arrangements with the county commissioners to consolidate the work under the authority and supervision of the county board of charities and public welfare as may be mutually agreed upon with such division of expenses as may be equitable. The governing bodies of such cities and the county commissioners are authorized to make such provision for the expense of carrying on the work as they may deem advisable, and may delegate to the county board of charities and public welfare all necessary power. (1919, c. 46, s. 4.)

CHAPTER 89
CEMETERIES

Art. 1. Care of Rural Cemeteries

§ 5019. County commissioners to provide list of public and abandoned cemeteries.—It shall be the duty of the boards of county commissioners of the various counties in the state to prepare and keep on record in the office of the register of deeds a list of all public cemeteries in the counties outside the limits of incorporated towns and cities, and not established and maintained for the use of an incorporated town or city, together with the names and addresses of the persons in possession and control of the same. To such list shall be added a list of the public cemeteries in the rural districts of such counties which have been abandoned, and it shall be the duty of the boards of county commissioners to furnish to the legislative reference librarian copies of the lists of such public and abandoned cemeteries, to the end that he may furnish to the boards, for the use of the persons in control of such cemeteries, suitable literature, suggesting methods of taking care of such places. (1917, c. 101, s. 1.)

§ 5020. Appropriations by county commissioners.—To encourage the persons in possession and control of the public cemeteries referred to in the preceding section to take proper care of and to beautify such cemeteries, to mark distinctly their boundary line with evergreen hedges or rows of suitable trees, and otherwise to lay out the grounds in an orderly manner, the board of county commissioners of any county, upon being notified that two-thirds of the expense necessary for so marking and beautifying any cemetery has been raised by the local governing body of the institution which owns the cemetery, and is actually in hand, is hereby required to appropriate from the general fund of the county one-third of the expense necessary to pay for such work, the amount appropriated by the board of commissioners in no case to exceed fifteen dollars for each cemetery. (1917, c. 101, s. 2.)

§ 5021. County commissioners to have control of abandoned cemeteries.—The county commissioners of the various counties are required to take possession and control of all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes. (1917, c. 101, s. 3.)

Art. 1A. Care of Confederate Cemetery

§ 5021(a). Director of State's prison to furnish labor.—The board of directors of the State's Prison be and are hereby authorized and directed to furnish at such time, or times, as may be convenient to the superintendent of the State's Prison, such prisoner's labor as may be available, to properly care for the Confederate Cemetery situated in the City of Raleigh, such services to be rendered by the State's prisoners without compensation. (1927, c. 224, s. 1.)

Art. 2. Cemeteries for Inmates of County Homes

§ 5022. County commissioners may establish new cemeteries.—The boards of county commissioners of the various counties in the state are authorized and empowered to locate and establish new graveyards or cemeteries upon the lands of their respective counties for the burial of the inmates of the county homes. (1917, c. 151, s. 1.)

§ 5023. Removal and reinterment of bodies.—Whenever the county commissioners have established new graveyards or cemeteries, they are authorized and empowered to remove to such graveyards or cemeteries all bodies of deceased inmates of the county homes. (1917, c. 151, s. 2.)

Art. 3. Trust Funds for the Care of Cemeteries

§ 5024. Money deposited with clerk of superior court.—For the maintenance and preservation of graves, burial plats, graveyards and cemeteries which may be neglected, any person, firm, or corporation may, by will or otherwise, place in the hands of the clerk of the superior court of any county in the state where such grave or lot is located any sum of money not less than one hundred dollars nor more than two thousand dollars, the income from which is to be used for keeping in good condition any grave, burial plat, graveyard, or cemetery in the county in which the money is placed, with specific instructions as to the use of the fund. (1917, c. 155, s. 1.)

§ 5025. Separate record of accounts to be kept.—It shall be the duty of the clerk of the superior court to keep a separate record for keeping ac-

count of the money deposited as above provided, to keep a perpetual account of the same therein, and to record therein the specific instructions about the use of the income on such money. He shall see that the income is spent according to such specific instructions, and shall make report of the same from year to year in the same manner as if it were guardian funds. (1917, c. 155, s. 1.)

§ 5026. Funds to be kept perpetually. — All money placed in the office of the superior court clerk in accordance with this article shall be held perpetually, and no one shall have authority to withdraw or change the direction of the income on same, (1917, c. 155, s. 2.)

§ 5027. Investment of funds.—The superior court clerk, with the advice and consent of the sheriff and register of deeds of such county, who shall constitute an advisory committee to the clerk, may invest such money in North Carolina state bonds, county bonds of any county within the state, municipal bonds of any town of more than ten thousand population in the state, or may invest same in any other way, locally, as they may deem wise. (1917, c. 155, s. 3.)

Editor's Note.—As to probable implied repeal in part of this section, see editor's note under § 962(a).

§ 5028. Clerk's bond and fees.—The clerk of the superior court shall give bond in some surety company, to be approved by the county commissioners, in a sufficient amount to cover such sums as may be held by him, the premium on such bond to be paid out of the income on such money. The clerk shall receive for his services and responsibilities a commission of ten per cent on the net income each year of such money; and the fees or commissions so received by him under this article shall not be taken into consideration as a part of his salary. (1917, c. 155, ss. 3, 4.)

§ 5029. Funds exempt from taxation. — All money referred to in the preceding sections of this article shall be exempt from all state, county, township, town, and city taxes. (1917, c. 155, s. 4.)

See notes and sections referred to under section 5030.

Art. 4. Removal of Graves

§ 5030. Removal to enlarge churches authorized.—In those cases where any church authorities desire to enlarge a church building and where it becomes necessary or expedient to remove certain graves in order to secure the necessary room for such enlargement, it shall be lawful for such church authorities after thirty days notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plat in the church cemetery or in another cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good condition as before removal. When any lands are owned by any hydro-electric power or lighting company for use as a reservoir, on which lands there are graves, it shall be lawful for said company, after thirty (30) days' notice to the surviving husband or wife, or next of kin of the deceased, or the person in control of such graves, if any are known, and if not known, then after publishing a notice for four (4) weeks in a newspaper, published in the county and in a daily State paper, to open any such graves, and to take therefrom any dead body, or part thereof buried therein, and anything interred therewith, and to remove and re-inter the same in some other cemetery or suitable place in the same county to be selected by the next of kin, or the welfare officer of the county or the Clerk of the Superior Court in the order named. Due care shall be taken to do said work in a proper and decent manner, and, if necessary, to furnish suitable coffins or boxes for re-interring said remains. Due care shall also be taken to remove, protect and replace all tombstones or other markers; so as to leave the new grave in as good condition as the former one. All of said work shall be done under the supervision and direction of the welfare officer of the county, if one, or his representatives; but if no welfare officer, then under the supervision and direction of the clerk of the court, or his representatives. All the expense connected with said work, including the actual expense of one of "next of kin" in attending to same, shall be borne by the company doing, or causing same to be done. (1927, c. 23, s. 1; 1919, c. 245.)

Cross References.—As to condemnation of burial grounds, see sections 1699, 1714; as to removal of or interference with monuments and tombstones, see section 4320; as to interference with graveyards, see sections 4317, 4321; as to disturbance of graves, see section 4322; as to burial grounds on watersheds, see section 7126.

The building of a new vestry room of a church to be used with the one as presently located in relation to the use of the choir, etc., comes within the purview of the statute permitting the removal of the bodies buried in the churchyard by the proper authorities of the church, when nceessary or expedient to do so, in carrying out the arrangement. Mayo v. Bragaw, 191 N. C. 427, 132 S. E. 1.

§ 5030(a). Conveyance by church; removal of graves.—Where any church has conveyed, or is about to convey real estate on which there are graves, and where it becomes necessary and expedient to remove said graves, it shall be lawful for such church authorities after thirty days notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good condition as before removal. (Ex. Sess. 1920, c. 46.)

§ 5030(a1). Removal after abandonment of cemetery.—When any person, firm, or corporation, owns any land on which is situated any cemetery or burying ground, and where it becomes necessary and expedient in the opinion of the governing body of the county or town in which any such graves are situated to remove said graves, it shall be lawful for such person, firm or corporation, after thirty days notice to the relatives of the deceased persons buried therein, if any are known, and if none are known, then after thirty days' notice printed in some newspaper published in said county where said property lies, and if no newspaper is published in said county, then by posting notice at the

court house door of said county, to remove said graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly so as to leave the graves in as good condition as before removal: Provided, that all of said work shall be done under the supervision of the county health officer and the board of county commissioners: Provided, further, that the conveyance of the land without reservation of the burying ground shall itself be evidence of the abandonment of the same sufficient for the purposes of this section. (1927, c. 175, s. 1.)

Art. 5. Cemetery Associations

§ 5030(b). Land holdings.—All cemetery associations or corporations created by any local, private or special act or resolution before January tenth, one thousand nine hundred and seventeen are authorized and fully empowered to hold amounts of land in excess of the limitation provided in the local, private or special act or resolution incorporating or chartering such cemetery association or corporation. (1923, c. 76, s. 1.)

§ 5030(c). Change of name of association or corporations.—All corporations or associations chartered or incorporated by any special act of the legislature, as set forth in the preceding section, are authorized and fully empowered to change the name of such association or corporation by a majority vote of its directors, and upon such change in name it shall be the duty of the officers of the board of directors of such corporation or association to file with the clerk of the superior court a copy of resolution changing the name, which resolution must show the act of the legislature creating or incorporating the same and the reasons for the change thereof. (1923, c. 76, s. 2.)

CHAPTER 90.

CHILD WELFARE

Art. 1. Child Labor Regulations

§ 5031. Child welfare commission created; duties.—The state superintendent of public instruction, the secretary of the state board of health, and the commissioner of public welfare of the state of North Carolina are hereby constituted the state child welfare commission, and they shall serve without additional compensation. It shall be the duty of this commission to make and formulate such rules and regulations for enforcing and carrying out the provisions of this article, and of the laws relating to seats for women employees and the laws requiring separate toilets for sexes and races, as in its judgment it shall deem necessary. (1919, c. 100, s. 7.)

Editor's Note—The child welfare commission was abolished by Public Laws 1931, c. 312, § 14 and its duties, etc., transferred to a division of the Department of Labor. See § 7310(j).

§ 5032. Employment of children under fourteen regulated.—No child under the age of fourteen years shall be employed or permitted to work in or about or in connection with any mill, factory, cannery, workshop, or manufacturing establishment. No child under the age of fourteen years shall be employed or permitted to work in or about or in connection with any laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, boot-black stand, public stable, garage, place of amusement, brick yard, lumber yard, or any messenger or delivery service, public works, or any form of street trades, except in cases and under regulations prescribed by the commission herein created: Provided, the employments in this section enumerated shall not be construed to include bonafide boys' and girls' canning clubs recognized by the Agricultural Department of this State, or vocational training classes authorized by the State Board of Education, and such canning clubs and vocational classes are hereby expressly exempted from the provisions of this article. (1919, c. 100, s. 7; 1924, c. 74.)

Editor's Note.—The Laws of 1924, ch. 74 struck out all of the old section and inserted this one in its stead. The provisions in both, however, are practically the same.

Employment before 1903 Act.—As to employment of children before the child labor act of 1903, and the liability for damages resulting therefrom, see Ward v. Allen, 126 N. C. 948, 36 S. E. 194; Fitzgerald v. Furniture Co., 131 N. C. 636, 645, 42 S. E. 946; Hendrix v. Cotton Mills, 138 N. C. 169, 170, 50 S. E. 561.

Employment Since the 1903 Act.—As to employment of children since the child labor act of 1903, see Rolin v. Tobacco Co., 141 N. C. 300, 310, 53 S. E. 891; Leathers v. Tobacco Co., 144 N. C. 330, 342, 57 S. E. 11; Starnes v. Mfg. Co., 147 N. C. 556, 61 S. E. 525.

Employment Since the 1907 Act.—As to employment of children since the child labor act of 1907, see McGowan v. Mfg. Co., 167 N. C. 192, 82 S. E. 1028, see Evans v. Lumber Co., 174 N. C. 31, 93 S. E. 430.

Effect of Decisions on Acts of 1903 and 1907.

1. The statute is constitutional.
2. It applies to employment of factories and manufacturing establishments, and to no other.
3. The employment of a child under twelve years of age in a factory or manufacturing establishment is negligence per se.
4. Such negligence is proximate, if the child is injured as the result of his employment.
5. There is no presumption of risk by the child.
6. The negligence of the parent, if any, in permitting the employment, cannot be imputed to the child.
7. In addition to the usual presumption against contributory negligence, there is a presumption that the child has not the capacity to appreciate the danger of his employment.
8. This presumption may be rebutted. Pettit v. Atlantic Coast Line R. Co., 156 N. C. 119, 127, 72 S. E. 195.

Messenger or Delivery Service Included.—This section does prohibit the employment of "any one under 14 years of age" in messenger or delivery service. Pettitt v. Atlantic Coast Line R. Co., 186 N. C. 9, 16, 118 S. E. 840.

Does Not Apply to Volunteer Workman.—Where the plaintiff, a boy under fourteen, is a mere volunteer injured in the performance of a simple and ordinary task, this section has no application. Reaves v. Catawba Mfg., etc., Co., 206 N. C. 523, 174 S. E. 413.

§ 5033. Prohibited employments of children under sixteen.—No person under sixteen years of age shall be employed or permitted to work in any of the places of occupations referred to in the preceding section for more than eight hours in any one day or forty-eight hours or six days in any one week, or after the hours of seven p. m. or before the hours of six a. m., and no person under sixteen years of age shall be employed or permitted to work in or about or in connection with any quarry or mine, or oiling or cleaning hazardous machinery in motion, or in running elevators, or around exposed electric wires, or in the manufacture, preparation or use of any poisonous substance or gas, or ex-

plosive: Provided, the Child Welfare Commission shall designate and define Hazardous Machinery in the purview of this act: Provided further, no machinery except such as is specifically mentioned herein shall be deemed hazardous until so determined by the Child Welfare Commission: Provided further, the eight-hour day limitation in this action shall not apply to any boy between fourteen and sixteen years of age who is the sole support of himself and/or a widowed mother to be determined by the Local County Child Welfare Officer, and for whom the agent of the State Child Welfare Commission states that an eight-hour day job can not be found.

Nothing in this section shall be construed to prevent male persons under sixteen years of age and over fourteen years of age from distributing newspapers, magazines and periodicals on fixed routes, provided, that such persons shall not be employed, nor suffered to work after eight o'clock P. M. and before five o'clock A. M., and that the hours of work and the hours in school do not exceed eight hours in any one day, and: Provided, further, that such persons shall not be suffered to work, nor be employed more than four hours per day, nor more than twenty-four hours per week. (1919, c. 100, s. 6; 1924, c. 129, s. 2; 1927, c. 251; 1931, cc. 125, 391.)

Editor's Note.—By Public Laws 1927, ch. 251 this section as it formerly stood was repealed, and a section was substituted in lieu thereof. The first 1931 amendment added the exemption as to news boys and the other made considerable change in the first paragraph of this section. See note under § 5031 the hour of employment, the age of the child, etc., are all changed, while the first proviso is new in toto.

In or About or in Connection with Quarry.—In Campbell Contracting Co. v. Maryland Casualty Co., 21 Fed. (2d) 909, 910, it is said: "We cannot agree with the contention that a boy operating a hoist, that by means of a cable pulls cars loaded with stone out of a quarry 150 to 175 feet distant, and whose duty it was upon signal to have the whistle blown, warning of a blast, and whose further duty it was to warn passersby, was not working 'in or about or in connection with a quarry.' "

Violation of Section Must Be Shown to Be Proximate Cause of Injury.—In order to make an employer liable in damages for an injury sustained by an employee between 14 and 16 years of age being required to work more than 8 hours a day in violation of this section, it must be shown that the violation of the statute was a proximate cause of injury complained of. Williamson v. Old Dominion Box Co., 205 N. C. 350, 171 S. E. 335.

§ 5033(a). Night work of females between ages of 16 and 18 prohibited. — No female person between sixteen and eighteen years of age shall be employed, permitted, or suffered to work in any mill, factory, cannery, or manufacturing establishment after nine (9) o'clock in the evening, or before six (6) o'clock in the morning. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, in the discretion of the court. This section shall be enforced in the same manner and by the same officers as laws regulating the employment of persons under sixteen years of age. (1931, c. 112.)

§ 5034. Age certificates.—No child under the age of sixteen years shall be employed in any of the ways enumerated in this article unless at the time of such employment the employer shall in good faith procure, rely upon, and place on file a certificate issued in such form and under such conditions and by such persons as the said commission herein provided for shall prescribe, showing that the person is of legal age for such employment, and the laws and rules made by the State Child Welfare Commission under authority of this article have been complied with. The possession of such certificate by an employer shall be prima facie evidence that he has complied with the requirements and obligations of this article when employing such child. No person shall knowingly make a false statement or present false evidence in, or in relation to any such certificate, or application therefor, or cause any false statement to be made which may result in the issuance of an improper certificate of employment. (1919, c. 100, s. 10; 1924, c. 74.)

See note under § 5031.

Editor's Note.—The Laws of 1924, chap. 74 struck out all of the old section and inserted this one in its stead with substantially the same provisions.

As to effect of failure to have age certificate, in violation of act of 1903, see Rolin v. Tobacco Co., 141 N. C. 300, 53 S. E. 891.

Reliance upon Age Certified.—Where an employer, before employing a boy between 14 and 16 years of age, procures and in good faith relies upon a certificate duly issued by a county welfare officer authorizing such employment, as provided by this section, the employment of the minor is not unlawful, and the decision in McGowan v. Ivanhoe Mfg. Co., 167 N. C. 192, 82 S. E. 1028, (treated under § 5032) is not applicable to an action brought by the minor to recover for an injury sustained in the course of his employment. Williamson v. Old Dominion Box Co., 205 N. C. 350, 171 S. E. 335.

§ 5035. Commission may employ agents.—The Commission shall have authority to appoint and employ such agents for the purpose of enforcing the provisions of this article as may be found to be necessary, and they may use the county superintendent of public welfare or chief school attendance officer or truant officer of the several counties for the purpose of carrying out such provisions, and they may use the agents specially designated for carrying out the provisions of this article to aid in carrying out the provisions of the general compulsory school attendance law under subchapter (IX) of the chapter on education. And all agents and officials enumerated in this section shall make complete report of all official acts done in compliance with this chapter on blanks furnished by the State Child Welfare Commission. (1919, c. 100, s. 9; 1924, c. 74.)

See note under § 5031.

§ 5036. Inspection by agents; obstruction unlawful.—For the purpose of securing the proper enforcement of the provisions of this article and of the laws relating to seats for women employees, and the laws requiring separate toilets for sexes and races, the commission, or its duly authorized agents, shall have authority to enter and inspect, at any time, mines, quarries, mills, factories, canneries, workshops, manufacturing establishments, laundries, bakeries, mercantile establishments, offices, hotels, restaurants, barber shops, boot-black stands, public stables, garages, places of amusement, brick yards, lumber yards, and other places of employment; and it shall be unlawful for any person, firm, or corporation to refuse permission to enter, obstruct, or prevent any duly authorized agent of the commission in his effort

to make the inspection herein provided for. (1919, c. 100. s. 8.)

See note under § 5031.

§ 5037. Expenses of commission. — The state treasurer shall honor all warrants for necessary expenses incurred by the commission for meeting the salaries and expenses of any agents employed by the commission in the enforcement of this article and the necessary expenses so incurred by the commission in carrying out the provisions of this article, out of funds not otherwise appropriated, such expenses so incurred shall not exceed the sum of twenty thousand dollars ($20,000) per annum, and all necessary printing shall be paid out of the general fund of the State not otherwise appropriated. (1919, c. 100, s. 11; 1924, c. 74.)

See note under § 5031.

Editor's Note.—By Public Laws 1924, ch. 74 the maximum amount of expenses to be annually incurred under this section is raised from six to twenty thousand dollars.

§ 5038. Violations of this article and of certain other laws a misdemeanor.—Any person, firm, or corporation violating any of the provisions of this article, or of the laws relating to seats for women employees or of the laws requiring separate toilets for sexes and races, shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, within the discretion of the court. (1919, c. 100, s. 12.)

As to employment of children in violation of the child labor act, see notes to and cases cited under sections 5032.

As to compulsory education of children, see sections 5758-5762.

As to indigent children, see secs. 5763-5764; as to deaf children, see sections 5765-5768; as to blind children, see sections 5769-5774.

Art. 2. Juvenile Courts

§ 5039. Exclusive original jurisdiction over children.—The superior courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within their respective districts:

1. Who is delinquent or who violates any municipal or state law or ordinance or who is truant, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so; or

2. Who is neglected, or who engages in any occupation, calling, or exhibition, or is found in any place where a child is forbidden by law to be and for permitting which an adult may be punished by law, or who is in such condition or surrounding or is under such improper or insufficient guardianship or control as to endanger the morals, health, or general welfare of such child; or

3. Who is dependent upon public support or who is destitute, homeless, or abandoned, or whose custody is subject to controversy.

When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the state, it shall continue for the purpose of this article during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the state. (1919, c. 97, s. 1.)

As to domestic relations court, see §§ 1461(f) et seq.

Editor's Note.—The apprentice Law, Revisal, ch. 4, and the Juvenile Delinquent Law, Public Laws 1915, ch. 222, and all other laws inconsistent with this act are repealed and substituted by this article.

See note of Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824, under sec. 2241.

Constitutionality.—This section and the section following in this article are held to be a constitutional and valid enactment. State v. Burnett, 179 N. C. 735, 102 S. E. 711; In re Coston, 187 N. C. 509, 122 S. E. 183.

Purpose. — This section does not deal with delinquent children as criminals, but as wards of the state, and undertakes to give the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, and a support and not a hinderance to the commonwealth and the objection that the statute ignores or unlawfully withholds the right to a trial by jury can not be sustained. State v. Brunett, 179 N. C. 735, 102 S. E. 711.

Sections Interdependent.—The child's welfare act, Public Laws of 1919, ch. 97, and this and the following sections thereof, establishing the juvenile courts were enacted as a whole, and the sections are interrelated and interdependent, and the intent thereof is so to be interpreted. State v. Ferguson, 191 N. C. 668, 132 S. E. 644.

Repeal of Ch. 122, Laws of 1915.—This section and the following section of this article establishing a juvenile court, repeal ch. 122, Laws of 1915, and State v. Newell, 172 N. C. 933, 90 S. E. 594, has no application. State v. Burnett, 179 N. C. 735, 102 S. E. 711.

Capability of Committing Crimes—Duration of Jurisdiction.—Where the jurisdiction of the juvenile court has once attached it remains during the minority of the youthful offender, for the purpose of his correction and reformation. State v. Coble, 181 N. C. 554, 107 S. E. 132; In re Coston, 187 N. C. 509, 122 S. E. 183.

Exclusive Criminal Jurisdiction.—The juvenile court, as a separate part of the Superior Court, is given by this section, among other things, the sole power to investigate charges of misdemeanors, and of felonies with punishment not exceeding a ten-year imprisonment, made against children between the ages of fourteen and sixteen years at the time of the offense committed, and excludes the jurisdiction of the justice of the peace to bind them over to the Superior Court in such instances. State v. Coble, 191 N. C. 554, 107 S. E. 132.

This section gives exclusive original jurisdiction to the Superior Court where the custody of a child less than sixteen years of age is in question and establishes the juvenile courts as separate, though not necessarily independent parts of the Superior Courts for the administration of the act, and makes the clerks of the Superior Courts judge of the juvenile courts. In re Hamilton, 182 N. C. 44, 108 S. E. 385.

The adjudication of one other than the parent or guardian of the child, of causing the delinquency of a female child under sixteen years of age, etc., must be had in the juvenile courts as having statutory original jurisdiction over the parties and subject-matter. State v. Ferguson, 191 N. C. 668, 132 S. E. 664.

Same—Assault with Deadly Weapon.—The juvenile court has exclusive jurisdiction over investigation a charge of an assault with a deadly weapon, inflicting a serious injury, made by a child within sixteen years of age, and where a justice of the peace has assumed jurisdiction and bound the defendant over to the Superior Court, the case will, on motion, be removed to the juvenile Court, to be proceeded with as the statute directs, though at the latter date the offender's age may be more than sixteen years. State v. Coble, 181 N. C. 554, 107 S. E. 132.

Resume of Result.—By this section and the following section of this article in case of children under the age of sixteen years charged with being delinquent by reason of the violation of the criminal laws of the state, it is provided and intended to be provided in effect: (a) that children under fourteen years of age are no longer indictable as criminals, but must be dealt with as wards of the state, to be cared for, controlled and disciplined with a view to their reformation. (b) That in case of children between fourteen and sixteen years of age, and as to felonies, whenever the punishment can not exceed ten years, they may if the instance requires it, be bound over to the Superior Court to be prosecuted under the criminal law appertaining to the charge. (c) That in case of children from fourteen to sixteen years of age as to felonies, whenever the punishment is ten years and over

they are amenable to prosecution for crime as in case of adults. State v. Burnett, 179 N. C. 735, 102 S. E. 711.

Where the father of a minor child brings a writ of habeas corpus in the Superior Court for the custody of the child, the respondent being the maternal grandmother of the child in whose care the child was left by its mother, the Superior Court has original jurisdiction, and the respondent's motion to transfer the hearing from the Superior Court to the juvenile court is properly overruled. In re Ten Hoopen, 202 N. C. 223, 162 S. E. 619.

§ 5040. Juvenile courts created; part of superior court.—There shall be established in each county of the state a separate part of the superior court of the district for the hearing of cases coming within the provisions of this article. Such part of the superior court shall be called the juvenile court of ..... county.

The clerk of the superior court of each county in the state shall act as judge of the juvenile court of the district for the hearing of cases coming within the provisions of this article in which case the child or children concerned therein reside in or are at the time within such county. Proceedings in such cases may be initiated before such judges, and in hearing such cases such judge shall comply with all the requirements and conform to the procedure provided in this article: Provided, that in counties, where the county seat is a city containing twenty-five thousand inhabitants, or more, the board of commissioners of such counties shall have the right in their discretion to coöperate with the governing body of such city in the election of a judge of a juvenile court provided for in section 5062, which judge when so elected shall perform all the duties, and possess all the powers and jurisdiction conferred by this article upon the clerk of superior court, as well as that conferred upon the judge of the juvenile court of such cities by this article such judge to be so elected by the joint action of the govering bodies of such city and county shall hold office for the term of one year, and until his successor shall be duly elected, and the county availing itself of the provisions of this section shall pay said judge for services rendered the county (outside of city) such sum as the county commissioners of said county shall deem just and proper. (1919, c. 97, s. 2; Ex. Sess. 1920, c. 85.)

Editor's Note.—The provisional clause, in the second paragraph under this section, with regard to the election of a juvenile court judge in a city containing twenty-five thousand inhabitants, or more, is new with Public Laws. Ex. Sess. 1920, ch. 85.

For an act excepting Buncombe county from the provisions of this section and establishing a juvenile court in the county, see Public Laws of 1935, chapter 220.

§ 5041. Definitions of terms.—The term "court" when used in this article without modification shall refer to the juvenile court to be established in each county as herein provided. The term "judge" when used in this article shall refer to the clerk of the superior court acting as judge of the juvenile court. The term "child" shall mean any minor less than sixteen years of age. The term "adult" shall mean any person sixteen years of age or over. (1919, c. 97, s. 3.)

The Word "Child."—The provision of sec. 3, ch. 97, Public Laws 1919, that the meaning of the word "child" shall be one "less than eighteen years of age," and the term "adult" shall mean any person eighteen years old or over, intended, from the interpretation of the entire chapter, that to come within the provision of the act the child should be a minor under the age of sixteen years. The discrepancy is cured by this section. State v. Coble, 181 N. C. 554, 107 S. E. 132.

§ 5042. Sessions of court; records; general provisions.—Sessions of the court shall be held at such times and in such places within the county as the judge shall from time to time determine. In the hearing of any case coming within the provisions of this article the general public may be excluded and only such persons admitted thereto as have a direct interest in the case. Sessions of the court shall not be held in conjunction with any other business of the superior court, and children's cases shall not be heard at the same time as those against adults.

The court shall maintain a full and complete record of all cases brought before it, to be known as the juvenile record. All records may be withheld from indiscriminate public inspection in the discretion of the judge of the court, but such record shall be open to inspection by the parents, guardians, or other authorized representatives of the child concerned. No adjudication under the provisions of this article shall operate as a disqualification of any child for any public office, and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction.

This article shall be construed liberally and as remedial in character. The powers hereby conferred are intended to be general and for the purpose of effecting the beneficial purposes herein set forth. It is the intention of this article that in all proceedings under its provisions the court shall proceed upon the theory that a child under its jurisdiction is the ward of the state and is subject to the discipline and entitled to the protection which the court should give such child under the circumstances disclosed in the case. (1919, c. 97, s. 4.)

§ 5043. Petition to bring child before court.—Any person having knowledge or information that a child is within the provisions of this article and subject to the jurisdiction of the court, may file with the court a petition verified by affidavit, stating the alleged facts which bring such child within such provisions. The petition shall set forth the name and residence of the child and of the parents, or the name and residence of the person having the guardianship, custody, or supervision of such child, if the same be known or ascertained by the petitioner, or the petition shall state that they are unknown, if that be the fact. (1919, c. 97, s. 5.)

§ 5044. Issuance of summons; travelng expenses allowed.—Upon the filing of the petition or upon the taking of a child into custody, the court may forthwith, or after an investigation by a probation officer or other person, cause to be issued a summons signed by the judge or the clerk of the court directed to the child, unless such child has been taken into custody, and to the parents, or, in case there is no parent, to the person having the guardianship, custody, or supervision of the child, or the person with whom the child may be, requiring them to appear with the child at the place and time stated in the summons to show cause why the child should not be dealt with according to the provisions of this article.

The judge may in his discretion authorize the

payment if necessary traveling expenses incurred by any witness or person summoned or otherwise required to appear at the hearing of any case coming within the provisions of this article. Such expenses, when approved by the judge of the superior court, shall be a charge upon the county in which the petition is filed. (1919, c. 97, s. 6.)

§ 5045. Custody of child may be immediate.—If it appears from the petition that the child is embraced within subdivision one of the first section of this article, or is in such condition or surroundings that the welfare of the child requires that its custody be immediately assumed, the court may endorse or cause to be endorsed upon the summons a direction that the officer serving the same shall at once take such child into his custody.

In the case of any child who has been taken into custody or pending the final disposition of any case, the child may be released in the custody of a parent or other person having charge of the child or in the custody of a probation officer or other person appointed by the court, to be brought before the court at the time designated. Any child embraced in this article may be admitted to bail as provided by law. When not released as herein provided such child, pending the hearing of the case, shall be detained in such place of detention as hereinafter provided for. (1919, c. 97, s. 7.)

§ 5046. Service of summons.—Service of summons shall be made personally by reading to and leaving with the persons summoned a true copy thereof: Provided, that if the court is satisfied that reasonable but unsuccessful effort has been made to serve the summons personally upon any of the parties named therein, or if it shall appear to the satisfaction of the court that it is impracticable to serve a summons personally upon any of them, the court may make an order providing for service of the summons by registered mail or by publication or otherwise in such manner as the judge shall determine. It shall be sufficient to confer jurisdiction if service is effected at any time before the time fixed in the summons for the return thereof; but the court, if requested by the child or a parent, or, in case there is no parent, by the person having the guardianship, custody or supervision of the child, shall not proceed with the hearing earlier than three days after the service. Failure to serve a summons upon any person other than said child shall not impair the jurisdiction of the court to proceed in cases arising under subdivision one of the first section of this article, provided that for good cause shown the court shall have made an order dispensing with such service.

If the person summoned as herein provided shall fail without reasonable cause to appear and abide the order of the court or bring the child, he may be proceeded against as for contempt of court. In case the summons cannot be served or the party served fails to obey the same, and in any case when it shall be made to appear to the court that such summons will be ineffectual, or that the welfare of the child requires that he shall be brought forthwith into the custody of the court, a warrant may be issued on the order of the court either against the parent or guardian or other person having custody of the child or with whom the child may be, or against the child himself.

The sheriff or other lawful officer of the county in which the action is taken shall serve all papers as directed by the court, but the papers may be served by any person delegated by the court for that purpose. (1919, c. 97, s. 8.)

When Summons to Parents Unnecessary.—Where the juvenile court has examined into the condition of a child and has adjudged that the child is of wandering or dissolute parents, and living with its poor and dependent grandparents, who had acquiesced in the investigation and its results, it is unnecessary to the valid adjudication fixing the child as a ward of the State and taking its custody accordingly, that the parents should have been notified to be present at the investigation, though such course is to be commended when the child is living with its parents or under their control, or is living at the time within the jurisdiction of the court. In re Coston, 187 N. C. 509, 122 S. E. 183.

§ 5047. Hearing; disposition of child.—Upon the return of the summons or other process or after any child has been taken into custody, at the time set for the hearing, the court shall proceed to hear and determine the case in a summary manner. The court may adjourn the hearing from time to time and inquire into the habits, surroundings, condition and tendencies of the child so as to enable the court to render such order or judgment as shall best conserve the welfare of the child and carry out the objects of this article. In all cases the nature of the proceedings shall be explained to the child and to the parents or the guardian or person having the custody or the supervision of the child. At any stage of the case the court may, in its discretion, appoint any suitable person to be the guardian ad litem of the child for the purposes of the proceeding.

The court, if satisfied that the child is in need of the care, protection or discipline of the state, may so adjudicate, and may find the child to be delinquent, neglected, or in need of more suitable guardianship. Thereupon the court may—

1. Place the child on probation subject to the conditions provided hereinafter; or

2. Commit the child to the custody of a relative or other fit person of good moral character, subject, in the discretion of the court, to the supervision of a probation officer and the further orders of the court; or

3. Commit the child to the custody of the state board of charities and public welfare, to be placed by such board in a suitable institution, society or association as described in subsection four of this section, or in a suitable family home and supervised therein; or

4. Commit the child to a suitable institution maintained by the state or any subdivision thereof, or to any suitable private institution, society or association incorporated under the laws of the state and approved by the state board of charities and public welfare authorized to care for children, or to place them in suitable family homes; or;

5. Render such further judgment or make such further order of commitment as the court may be authorized by law to make in any given case.

6. If a child of fourteen years of age be charged with a felony for which the punishment as now fixed by law cannot be more than ten years in

prison his case shall be investigated by the probation officer and the judge of the juvenile court as provided for in this article, unless it appear to the judge of the juvenile court that the case should be brought to the attention of the judge of the superior court, in which case the child shall be held in custody or bound to the next term of the superior court as now provided by law. (1919, c. 97, s. 9; 1929, c. 84, s. 1.)

As to authority of courts to commit offenders to reformatory, see section 7322.

Editor's Note.—The amendment of 1929 added the words "in a suitable institution, society or association as described in subsection 4 of this section" which appears in subsection 3.

Legislation Justified.—The Legislature has no unlimited and arbitrary power over minors in respect to detaining them in reformatories, and enactments relating thereto are justified only upon the idea that the child is without parental care, and that his environments are such that he may reach manhood without restraint or training under corrupting influences, unless the State, as parens patriae, performs the duty which devolves primarily upon the parent. In re Watson, 157 N. C. 340, 72 S. E. 1049.

Trial by Jury.—The constitutional right of trial by jury does not extend to an investigation into the status and needs of a child upon the question as to whether he should be sent to a reformatory for his own good as well as the good of the community in the interest of good citizenship, nor does the restraint therein put upon the child amount to a deprivation of his liberty without due process of law, nor is it a punishment for crime. In re Watson, 157 N. C. 340, 72 S. E. 1049.

Habeas Corpus.—When a child is placed and detained in a reformatory under order of court, without notice to the parent or giving him an opportunity to be heard, the parent may have the legality of the detention inquired into upon his petition for a writ of habeas corpus. In re Watson, 157 N. C. 340, 72 S. E. 1049.

Sentence—Order of Detention Only.—An act creating a reformatory is "for the training and moral development of the criminally delinquent children of the State," and in its general scheme and purposes is for the benefit of a child therein detained. Hence, the provisions in the act that the child committed thereto must be "convicted" and sentenced" by the court, does not mean that detention therein is an imprisonment as a punishment for a crime, but that the "conviction" is merely evidence that the child needs the care and nurture of the State, and that the sentence is an order of detention. In re Watson, 157 N. C. 340, 72 S. E. 1049.

§ 5048. Child to be kept apart from adult criminals; detention homes.—No child coming within the provisions of this article shall be placed in any penal institution, jail, lockup, or other place where such child can come in contact at any time or in any manner with any adult convicted of crime and committed or under arrest and charged with crime. Provisions shall be made for the temporary detention of such children in a detention home to be conducted as an agency of the court for the purposes of this article, or the judge may arrange for the boarding of such children temporarily in a private home or homes in the custody of some fit person or persons subject to the supervision of the court, or the judge may arrange with any incorporated institution, society or association maintaining a suitable place of detention for children for the use thereof as a temporary detention home.

In case a detention home is established as an agency of the court it shall be furnished and carried on as far as possible as a family home in charge of a superintendent or matron who shall reside therein. The judge of the juvenile court may, with the approval of the state board of charities and public welfare, appoint a matron or superintendent or both and other necessary employees for such home in the same manner as probation officers are appointed under this article, their salaries to be fixed and paid in the same manner as the salaries of probation officers. The necessary expense incurred in maintaining such detention home shall be a public charge.

In case the judge shall arrange for the boarding of children temporarily detained in private homes, a reasonable sum for the board of such children while temporarily detained in such homes shall be paid by the county in which such child shall reside or may be found.

In case the judge shall arrange with any incorporated institution, society or association, for the use of a detention home maintained by such institution, society or association, he shall enter an order which shall be effectual for that purpose and a reasonable sum shall be appropriated by the county commissioners for the compensation of such institution, society or association for the care of children residing or found within the county, who may be detained therein. (1919, c. 97, s. 10.)

§ 5049. Probation officers; appointment and discharge; compensation.—The judge of the juvenile court in each county shall appoint one or more suitable persons as probation officers who shall serve under his direction. The appointment of such probation officers shall be approved by the state board of charities and public welfare.

The county superintendent of public welfare shall be the chief probation officer of every juvenile court in his county and shall have supervision over the work of any additional probation officer which may be appointed.

The judge appointing any probation officer may discharge such officer for cause after serving such officer with a written notice, but no probation officer shall be discharged without the approval of the state board of charities and public welfare.

The judge appointing any probation officer may in his discretion determine that a suitable salary be paid and may, with the approval of the judge of the superior court, fix the amount thereof. Such salary so determined and so approved shall be paid by the board of county commissioners; but no person shall be paid a salary as probation officer without a certificate of qualification from the state board of charities and public welfare.

The state board of charities and public welfare shall establish rules and regulations pursuant to which appointments under this article shall be made, to the end that such appointments shall be based upon merit only.

The appointment of a probation officer shall be in writing and one copy of the order of appointment shall be delivered to the officer so appointed and another filed in the office of the state board of charities and public welfare. (1919, c. 97, s. 11.)

§ 5050. Probation; conditions; revocation. — When the court places any child or adult on probation as provided in this article it shall determine the conditions of probation, which may be modified by the court at any time. A child shall remain on probation for such period as the court shall determine during the minority of such child. An adult shall remain on probation for such period as the court shall determine, not to exceed five years. The conditions of probation shall be

such as the court shall prescribe and may include among other conditions any or several of the following: that the probationer shall indulge in no unlawful or injurious habits; shall avoid places or persons of disreputable or harmful character; shall report to the probation officer as directed by the court or probation officers; shall permit the probation officer to visit him in a reasonable manner at his place of abode or elsewhere; shall answer any reasonable inquiries on the part of the probation officer concerning his conduct or condition; shall, if a child of compulsory school age, attend school regularly; shall, if an adult or a child who does not attend school, work faithfully at suitable employment; shall remain or reside within a specified place or locality; shall pay a fine in one or several sums; shall make restitution or reparation to the aggrieved parties for actual damages or losses caused by an offense upon such conditions as the court shall determine; and shall make payment for the support of any lawful dependents as required by the court.

Any person on probation may at any time be required to appear before the court, and in case of his failure to do so when properly notified by the probation officer, the court may issue a warrant for his arrest. In the case of a child on probation, if the court believes that the welfare of such child will thereby be promoted, the probation may be revoked at any time and the court may make such other disposition of the child as it might have made at the time the child was placed on probation. An adult on probation who violates any of the conditions thereof may be arrested upon a warrant issued by the court and the court may impose any penalties which it might have imposed at the time the defendant was placed on probation. (1919, c. 97, s. 12.)

§ 5051. Duties and powers of probation officers.—It shall be the duty of a probation officer to make such investigations before, during or after the trial or hearing of any case coming before the court as the court shall direct, and shall report thereon in writing. The probation officer shall take charge of any child before or after the trial or hearing when so directed by the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct the probationer and other persons responsible for the welfare of the probationer regarding same, and shall enforce all the conditions of probation. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring of reports, and in other ways, and shall report upon the progress of each case under his supervision at least monthly to the court. Such officer shall use all suitable methods not inconsistent with the conditions imposed by the court to aid and encourage persons on probation and to bring about improvement in their conduct and condition. Such officer shall keep detailed record of his word. He shall keep accurate and complete accounts of all moneys collected from persons under his supervision; he shall give receipts therefore and shall make at least monthly returns thereof; such officer shall make such report to the state board of charities and public welfare as it may from time to time require, and shall perform such other duties as the court under whose direction such officer is serving shall direct. Every probation officer shall have all the powers of a peace officer within the jurisdiction of the court which he serves. With the approval or under the direction of the judge of the court in which a probation officer is serving, such officer is authorized and empowered to act as probation officer over any person on probation transferred to his supervision from any other court and may act as parole officer over any person released from a correctional institution when requested to do so by the authorities thereof and when authorized so to act by the judge of the court in which such probation officer is serving. (1919, c. 97, s. 13.)

§ 5052. Support of child committed to custodial agency.—Whenever any child is committed by the court to the custody of an institution, association, society or person other than its parent or guardian, compensation for the care of such child, when approved by the order of the court, shall be a charge upon the county, but the court may at the issuance and service of an order to show cause on the parent or other person having the duty under the law to support such child adjudge that such parent or other person shall pay in such manner as the court may direct such sum as will cover in whole or in part the support of such child, and wilful failure to pay such sum may be punished as a contempt of court. (1919, c. 97, s. 14.)

§ 5053. Selection of custodial agency.—In committing any child to any institution or other custodial agency other than one supported and controlled by the state or in placing the child under any guardianship other than that of its natural guardians, the court shall as far as practicable select as the custodial agency an institution, society or association governed by persons of like religious faith as the parents of such child or an individual holding the same religious belief. (1919, c. 97, s. 15.)

§ 5054. Modification of judgment; return of child to parents.—Any order or judgment made by the court in the case of any child shall be subject to such modification from time to time as the court may consider to be for the welfare of such child, except that a child committed to an institution supported and controlled by the state may be released or discharged only by the governing board or officer of such institution.

Any parent or guardian, or, if there be no parent of guardian, the next friend of any child who has been or shall hereafter be committed by the court to the custody of an institution other than an institution supported and controlled by the state, or to the custody of any association, society or person, may at any time file with the court a petition verified by affidavit setting forth under what conditions such child is living, and that application for the release of the child has been made to and denied by such institution, association, society or person, or that institution association, society or person has failed to act upon such application within a reasonable time. A copy of such petition shall at once be served by the court

upon such institution, association, society or person, whose duty it shall be to file a reply to the same within five days. If, upon examination of the petition and reply, the court, is of the opinion that an investigation should be had, it may, upon due notice to all concerned, proceed to hear the facts and determine the question at issue, and may return such child to the custody of its parents or guardian or direct such institution, association, society or person to make such other arrangements for the child's care and welfare as the circumstances of the case may require.

Any child while under the jurisdiction of the court shall be subject to the visitation of the probation officer or other agent of the court authorized to visit such child. (1919, c. 97, s. 16.)

As to appeals see sec. 5058.

Rights of Parents.—Parents, guardian etc., must be notified and given an opportunity to be heard in proceedings in the juvenile courts under this section, with the right to review in the Superior Court upon adverse judgment; and if the child is taken over by the state, they are allowed, on proper application at any time, to have their child brought before the court, its condition inquired into and further orders made concerning it except where committed to a state institution and then they may apply directly to the Superior Court, thus giving full consideration to the family relation and parental rights. State v. Burnett, 179 N. C. 735, 102 S. E. 711.

Same—Child in State Institution.—The exception in this section, that a case may not be investigated on the petition of the parent, etc., when the custody of the child is committed to an institution controlled by the state, applies to the action of the juvenile court, and does not limit the Superior Court in its general jurisdiction over matters of law and equity, in making upon proper application and appropriate writs, inquiry and investigation into the statute and condition of children disposed of under the statute, or in rendering such orders and decrees therein as the rights and justice of the case or the welfare of the child may require. State v. Burnett, 179 N. C. 735, 102 S. E. 711.

§ 5055. Guardian appointed if welfare of child promoted.—Whenever in the course of a proceeding instituted under this article it shall appear to the court that the welfare of any child within the jurisdiction of the court will be promoted by the appointment of an individual as general guardian of its person, when such child is not committed to an institution or to an incorporated society or association, or by the appointment of an individual or corporation as general guardian of its property, the court shall have jurisdiction to make such appointment, either upon the application of the child or of some relative or friend, or upon the court's own motion, and in that event an order to show cause may be made by the court to be served upon the parent or parents of such child in such manner and for such time, prior to the hearing, as the court may deem reasonable. In any case arising under this article the court may determine as between parents or others whether the father or mother or what person shall have the custody and direction of said child, subject to the provisions of the preceding section. (1919, c. 97, s. 17.)

§ 5056. Medical examination of child; disposition if mentally defective.—The court, in its discretion, either before or after a hearing, may cause any child within its jurisdiction to be examined by one or more duly licensed physicians, who shall submit a written report thereon to the court. If it shall appear to the court that any child within the jurisdiction of the court is mentally defective he may cause the child to be examined by two licensed physicians, and on the written statement of the two examining physicians that it is their opinion that the child is mentally defective, feeble-minded, or epileptic, the court may commit such child to an institution authorized by law to receive and care for mentally defective, feeble-minded or epileptic children, as the case may be. No child shall be committed to such institution unless the parent or parents or the guardian or custodian of such child, if such there be, are given an opportunity for a hearing.

Whenever a child within the jurisdiction of the court and under the provisions of this article appears to the court to be in need of medical or surgical care a suitable order may be made for the treatment of such child in a hospital or otherwise, and the expense thereof, when approved by the court, shall be a charge upon the county or the appropriate subdivision thereof; but the court may adjudge that the person or persons having the duty under the law to support such child shall pay a part or all of the expenses of such treatment as provided in section 5052 of this article. (1919, c. 97, s. 18.)

§ 5057. Neglect by parents; encouraging delinquency by others; penalty.—A parent, guardian or other person having the custody of a child who omits to exercise reasonable diligence in the care, protection or control of such child, causing it to be adjudged delinquent, neglected, or in need of the care, protection or discipline of the state as provided in this article, or who permits such child to associate with vicious, immoral or criminal persons, or to beg or solicit alms, or to be an habitual truant from school, or to enter any house of prostitution or assignation or any place where gambling is carried on, or to enter any place which may be injurious to the morals, health, or general welfare of such child, and any such person or any other person who knowingly or wilfully is responsible for, encourages, aids, causes or connives at or who knowingly or wilfully does any act to produce, promote or contribute to the condition which caused such child to be adjudged delinquent, neglected, or in need of the care, protection or discipline of the state, shall be guilty of a misdemeanor. (1919, c. 97, s. 19.)

Jurisdiction.—The juvenile courts of the State are now given by statute exclusive original jurisdiction of delinquent children under sixteen years of age, with prescribed procedure by which an adjudication may be therein determined. State v. Ferguson, 191 N. C. 668, 132 S. E. 664.

§ 5058. Appeals.—An appeal may be taken from any judgment or order of the juvenile court to the superior court having jurisdiction in the county by the parent or, in case there is no parent, by the guardian, custodian or next friend of any child, or by any adult described in the two preceding sections of this article whose case has been heard by the juvenile court. Such appeal shall be taken in the manner provided for appeals to the superior court; and written notice of such appeal shall be filed with the juvenile court within five days after the issuance of the judgment or order of such court. (1919, c. 97, s. 20.)

Authority of Superior Court Judge.—Where the proceedings for the custody of a child under sixteen years had

been transferred to the juvenile court, and comes again to the Superior Court judge on appeal, the judge of the latter court has authority to review the findings of fact and the judgment of the former court, under the supervision and control given him by the statute, this section, and his findings upon competent evidence are conclusive an appeal to the Supreme Court. In re Hamilton, 182 N. C. 44, 108 S. E. 385.

Where the Superior Court judge has referred a proceeding brought by a husband in that court for the custody of his child, less than sixteen years of age, and the matter comes on appeal to the Superior Court again, the validity of the order sending or transferring the petition to the juvenile court for original investigation does not present a controlling question, or affect the jurisdiction of the Superior Court on the appeal, for thereon the judge thereof has ample authority to hear the case, either because it was properly instituted in the first instance or by virtue of the appeal. In re Hamilton, 182 N. C. 44, 108 S. E. 385.

Application First Made to Juvenile Court.—Where the parent of a child that has been adjudicated a ward of the State under the statute relating to juvenile courts afterwards claims the possession of the child, the procedure requires that she make application to the juvenile court that had adjudicated the matter in order to avoid conflict and uncertainty as to status or condition of the child, to the end that an investigation be made of the circumstances in the course and practice of the courts. In re Coston, 187 N. C. 509, 122 S. E. 183.

Writ of Habeas Corpus.—The statutory remedy by appeal being provided from the determination of the juvenile court from its judgment that a certain child comes within the statutory provisions, and the status of the child has been ascertained by the juvenile court as being that of a ward of the State, the writ of habeas corpus is not available to the parent or other claiming the child, unless in rare and exceptional cases wherein the welfare of the child has not been properly provided for. In re Coston, 187 N. C. 509, 122 S. E. 183.

While prima facie the parent has the right to the custody of his child in preference to others, this right is not an absolute one and must yield when the best interest of the child requires it; and when the father has filed his petition in habeas corpus proceedings for the custody of his child in the possession of his deceased wife's parents, the award of the Superior Court Judge for the respondents upon findings, sustained by the evidence, that the father was an unsuitable person, and that the best interest of the child required that she should remain with her grandparents, will not be distributed in the Supreme Court on appeal. In re Hamilton, 182 N. C. 44, 108 S. E. 385.

§ 5059. Compensation of judge.—The judge of the juvenile court shall be paid a reasonable compensation for his services, the amount to be determined by the county commissioners, and the amount thus determined by the county commissioners shall be charged against the public funds of the county. And such compensation shall be independent of any compensation which may come to him as clerk of the superior court. (1919, c. 97, s. 21.)

§ 5060. Public officers and institutions to aid.—It is hereby made the duty of every state, county or municipal official or department to render such assistance and coöperation within his or its jurisdiction or power as shall further the objects of this article. All institutions or other agencies to which any person coming within the provisions of this article may be sent are hereby required to give such information concerning such child to the court or to any other officer appointed by it as said court or official may require for the purposes of this article. The court is authorized to seek the coöperation of all societies, organizations or individuals to the end that the court may be assisted in every way in the discharge of its duties. (1919, c. 97, s. 22.)

§ 5061. Rules of procedure devised by court.—The court shall have power to devise and publish rules to regulate the procedure in cases coming within the provisions of this article and for the conduct of all probation and other officers of the court in such cases. The court shall devise and cause to be printed for public use such forms for records and for various petitions, orders, processes, and other papers in the cases coming within this article as shall meet the requirements thereof, and all expenses incurred in complying with the provisions of this article shall be a public charge. (1919, c. 97, s. 23.)

§ 5062. City juvenile courts and probation officers.—Every city in North Carolina where the population was, by the census of one thousand nine hundred and twenty, ten thousand or more shall maintain a juvenile court, to which is hereby given the powers, duties and obligations of this article to be exercised within their territorial boundaries. Such city juvenile courts shall conduct their business in accordance with the procedure set forth in this article as applying to the county juvenile court. It is hereby made the duty of governing bodies of such cities to make provision for such courts and bear the expense thereof, either by requiring the recorder to act as a juvenile judge or by the appointment of a separate judge. The governing bodies of such cities shall also appoint one or more assistant probation officers who shall serve within its jurisdiction under the general supervision of the chief probation officer of the county, which chief probation officer of the county is hereby made the chief probation officer of the city court herein provided for. The salary of the chief juvenile court judge shall be fixed and paid by the governing body of the city, and such governing bodies are hereby given authority to expend such sums from the public funds of the city as may be required to carry this article into effect.

In case it may appear to the governing bodies of such cities herein described that it would be best to allow the county juvenile court to transact the business of the city, they may make such provisions and agreements with the county commissioners for the expense of the joint court as may be agreed upon, and in such event such a city is hereby permitted to make such arrangement in lieu of establishing a city juvenile court. But in case the county commissioners will not agree to such arrangement, then the city must establish a juvenile court, as provided in this section.

Any town of five thousand population which is not a county seat, and in which there is a recorder's court, may, if deemed advisable and necessary by the governing body, provide for the conduct of a juvenile court within the territorial jurisdiction of such recorder's court: Provided, that the provisions and procedure of this article are fully followed as in case for towns of ten thousand inhabitants. (1919, c. 97, s. 24; 1923, c. 193.)

Editor's Note.—This section formerly provided for the maintenance of a juvenile court in every city, where the population was, by the census of 1910, ten thousand, instead of the present provision, estimating the population by the census of 1920, as charged by Public Laws, 1923, ch. 193.

Art. 3. Control over Indigent Children

§ 5063. Institution has authority of parent or

guardian.—Every indigent child which may be placed in any orphanage, children's home, or child-placing institution in this state, which shall be an institution existing under and by virtue of the laws of this state, shall be under the control of the authorities of such institution so long as, under the rules and regulations of such institution, the child is entitled to remain in the same. The authority of the institution shall be the same as that of a parent or guardian before the child was placed in the institution; but such authority shall extend only to the person of the child. (1917, c. 133, s. 1.)

§ 5064. Regulations of institution not abrogated.—Nothing in this article shall be construed in any way to abrogate any of the rules and regulations of such institutions in so far as the rules and regulations have for their purpose the welfare and protection of the institutions. (1917, c. 133, s. 2.)

§ 5065. Enticing a child from institution.—It is unlawful for any person to entice or attempt to entice, persuade, harbor, or conceal, or in any manner induce any indigent child to leave any of the institutions hereinbefore mentioned without the knowledge or consent of the authorities of such institutions. But this article shall not interfere with a mother's right to her child in case she becomes able to sustain her child; and the county commissioners in the county in which she resides shall in case of doubt have authority to recommend to the institution concerning the child. (1917, c. 133, s. 3.)

§ 5066. Violation a misdemeanor.—Any person violating any of the provisions of the three preceding sections shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1917, c. 133, s. 4.)

§ 5067. Institutions for care of children must have license.—It shall be unlawful for any person, institution, or organization for the purpose of caring for or placing children to carry on such work or business without having in full force a written license therefor from the state board of charities and public welfare. (1919, c. 46.)

Art. 4. Aid of Needy Orphans in Homes of Worthy Mothers

§ 5067(a). Allowance by counties authorized.—The board of county commissioners of the several counties of the state are authorized, in their discretion, to make all allowance to any eligible mother (as hereinafter explained and defined) for her support, where she is left with a child or children under fourteen years of age, under the conditions hereinafter set forth. (1923, c. 260, s. 1.)

Editor's Note.—The provisions of this act are summarized in 1 N. C. Law Rev. 273.

§ 5067(b). Determination of amount; recommendation.—The county board of charities and public welfare of any county, after investigation by the county superintendent of welfare, may determine what amount within the provisions of this article is advisible for the care of a child or children, and shall recommend to the board of county commissioners that an appropriation be made for the support of such mother and child or children under fourteen years of age. (1923, c. 260, s. 2.)

§ 5067(c). Maximum allowances; extraordinary circumstances.—The maximum amount to be allowed per month under this article shall not exceed fifteen dollars for one child, ten dollars additional for the second child, and five dollars additional for the third child, or any excess of three: Provided, the total amount shall not exceed forty dollars, except in extraordinary circumstances in which it appears to the satisfaction of the board of county commissioners that a total of forty dollars per month would be insufficient to secure the purposes above set forth. (1923, c. 260, s. 3.)

§ 5067(d). Eligibility; aid by relatives or charitable associations.—To be eligible to apply for mother's aid a woman must be the mother of a child or children under fourteen years of age, a resident of the state of North Carolina for three years, and a resident of the county for one year preceding, and possessed of sufficient mental, moral, and physical fitness to be capable of maintaining a home for herself and child or children and prevented only from lack of means. Such person must be either a widow, or divorced, or deserted, if it be found impossible to require the husband to support her, or if the husband is found to be mentally or physically incapacitated to support his family, or if the husband be confined in any jail and assigned to work the roads of any county or in any penal or eleemosynary institution, provided no relative is able and willing to undertake sufficient aid: Provided, that if the mother is given partial aid or assistance by any relative or charitable organization, the board of county commissioners, in their discretion, may make allowance to such mother to help out the same where it may be necessary, in their opinion and judgment. (1923, c. 260, s. 4.)

§ 5067(e). Approval by juvenile court.— Any board of county commissioners taking advantage of the provisions of this statute may require that the report of the investigation of the county superintendent of welfare in every case shall be presented to and approved by the judge of the juvenile court in that county before making an appropriation. (1923, c. 260, s. 5.)

§ 5067(f). Oversight of administration of law; reports of county superintendent; notice from state board to county.—The state board of charities and public welfare shall have general oversight of the administration of this article with the view to making it uniform throughout the state; shall furnish all necessary blanks and give such advice and help as it can in order to aid in sufficiently securing its purpose. The county superintendent of public welfare shall make his report on any case to the board of county commissioners in duplicate, one copy of which shall be forwarded at once, with the action of the board of county commissioners endorsed thereon, to the state board of charities and public welfare and one filed by the board of county commissioners with its records in the case. The state board of charities and public welfare shall at once notify the board of county commissioners of its approval or disap-

proval for reinbursement as provided in 5067(h), and the said board may suggest additional requirements for the consideration of the board of county commissioners. (1923, c. 260, s. 6.)

§ 5067(g). Determination of monthly allowance; order for payment.—After investigation by the county welfare officer, when the board of county commissioners shall adjudge that a mother is entitled to aid under this article, said board of commissioners shall determine the monthly amount that the board of county commissioners may allow, and order its treasurer in writing to pay said amount to the person designated by it, and continue the same monthly until the order be changed or the expiration of the time for which the order is limited. (1923, c. 260, s. 7.)

§ 5067(h). Statements furnished to state board; approval; vouchers.—At the end of each fiscal quarter the treasurer of the county wherein aid has been granted shall furnish an itemized statement in each case of amounts paid, duly certified by him under oath, to the state board of charities and public welfare. If each case thereon shall have been approved by the state board of charities and public welfare and all required regulations of this article shall have been fulfilled, the state board of charities and public welfare shall certify the account to the state treasurer, whereupon the state treasurer shall immediately make out and forward to such county treasurer his voucher for one-half of the total amount certified as having actually been paid out by the county. Such voucher shall be made out against any fund in the treasury not otherwise appropriated: Provided, the total amount for the state shall not exceed the amount appropriated for this purpose per year, to be apportioned among all the counties on a per capita basis: Provided, that if the board of county commissioners of any county shall fail to enter into an agreement with the State on or before the first Monday of June, one thousand nine hundred and twenty-five, or on or before the first Monday in June of any succeeding year, that they will meet the State apportionment for mothers' aid in such county for the ensuing fiscal year, in accordance with the provisions of this article, then the amount appropriated to that county shall revert to the general mothers' aid fund and be available for apportionment to the counties complying with the provisions of this article, on the basis of the population of those counties. (1923, c. 260, s. 8; 1925, c. 275, s. 6; 1925, c. 292.)

Art. 5. Placing or Adoption of Juvenile Delinquents or Dependents

§ 5067(i). Bringing child into State for adoption without consent of State Board of Charities and Public Welfare.—No person, agency, association, institution or corporation shall bring or send into the State any child for the purpose of placing him out or procuring his adoption without first obtaining the consent of the State Board of Charities and Public Welfare. Such person, agency, association or corporation shall conform to the rules of the board and shall enter into a written agreement with the board to remove such child from the State, when requested so to do by the said board; that it will place the child under written contract approved by the board; that the person with whom the child is placed shall be responsible for his proper care and training; that the board and its agents shall have the same right of visitation and supervision of the child and the home in which it is placed as in the case of a child placed out by the board and its agents. Before the child shall be brought or sent into the State for the purpose of placing him in a home, the person, agency, association, institution or corporation so bringing or sending such child shall first notify the State board of its intention, shall certify to the State board that such child does not have a contagious or incurable disease, is not deformed, feeble-minded or of vicious character, and shall obtain from the State board a certificate stating such home is, in the opinion of the said board, a suitable home for the child. The person, agency, association, institution or corporation bringing or sending the child into the State shall report once a year or when the child is placed in another home, or at such other times as the board may direct as to the location and well-being of the child, so long as he shall remain within the State and until he shall have reached the age of eighteen years or shall have been legally adopted. (1931, c. 226, s. 1.)

§ 5067(j). Bond required. — No child shall be brought into the State under section 5067(i) until a justifiable and continuous bond not to exceed one thousand dollars ($1,000) be furnished and maintained by the said person, agency, association, institution or corporation for the proper fulfillment of the requirements of section 5067(i). Said bond shall be made in favor of and filed with the State Board of Charities and Public Welfare with the premium prepaid by the said person, agency, association, institution or corporation desiring to place such child in the State. (1931, c. 226, s. 2.)

§ 5067(k). Consent of board before sending child out of State. -- No child shall be taken or sent out of the State for the purpose of placing him in a home, otherwise than by a parent, grandparent or guardian, unless the person, agency, association, institution or corporation so taking or sending him shall give the State Board of Charities and Public Welfare notice of its intention and furnish such information as the board may require. Such person, agency, association, institution or corporation shall place the child under written contract, approved by the board, that the person with whom the child is placed shall be responsible for his proper care and training and thereafter shall report to the board once a year and at such other times as the board may direct as to the location and well-being of such child until he shall have reached the age of eighteen years, or shall have been legally adopted. (1931, c. 226, s. 3.)

§ 5067(l). Consent of board where parents of child have not established legal settlement.—No person, agency, association, institution or corporation shall accept for the purpose of placing him out or procuring his adoption any child either legitimate or illegitimate born in this State of parents who have not established legal settlement in the State without first obtaining the written consent of the State Board of Charities and Public Welfare. (1931, c. 226, s. 4.)

§ 5067(m). Requisites for legal settlements. — No juvenile delinquent or dependent, coming from without the State of North Carolina, can acquire a settlement in this State, so as to constitute him or her a charge of the State, unless such juvenile delinquent or dependent has been continuously in the State of North Carolina for a period of three years. (1931, c. 226, s. 5.)

§ 5067(n). Business of caring for dependent, etc., children must have permit from State Board.—No individual, agency, voluntary association or corporation seeking to establish and carry on any kind of organization for the purpose of caring for dependent, neglected, abandoned, destitute, orphaned or delinquent children or children separated temporarily from their parents in this State shall be permitted to organize and carry on such work without first having secured a written permit from the State Board of Charities and Public Welfare. Said board shall issue such permit recommending such organization only after the said board shall have made due investigation of the purpose, character, nature, methods and assets of the proposed organization. (1931, c. 226, s. 6.)

§ 5067(o). Violation of article a misdemeanor. — Every person acting for himself or for an agency who violates any of the provisions of this article or who shall intentionally make any false statements to the State Board of Charities and Public Welfare shall, upon conviction thereof, be guilty of a misdemeanor and punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment. (1931, c. 226, s. 7.)

§ 5067(p). Definitions. — The term "board" wherever used in this article shall be construed to mean the State Board of Charities and Public Welfare. The terms "he" and "his" and "him" wherever used in this article shall aply to a female as well as a male child. (1931, c. 226, s. 8.)

CHAPTER 91.

COMMERCE AND BUSINESS IN STATE

Art. 1. Regulation and Inspection

§ 5068. County commissioners to appoint inspectors.—The board of county commissioners may appoint for their county or any township therefore inspectors for any article of commerce the inspection of which is not otherwise provided for by law, who shall hold office for the term of five years after their employment. (Rev., ss. 4637, 4669.)

§ 5069. Vacancies in office of inspectors; assistants; principal liable.—Whenever there shall be a vacancy in the office of inspector while the county commissioners are not in session, any three justices may appoint some other fit person until the next succeeding meeting of the board; or if any inspector shall be rendered incapable of performing his duty by sickness or other accident, he may, with the consent of three justices, appoint some other person as assistant during his sickness or other disability, which consent shall be certified under their hands and lodged with the clerk of the board of commissioners, and such assistant shall take the same oaths as inspectors; and the inspector shall be liable to the same fines and penalties for the assistant's misbehavior as for his own. (Rev., s. 4638; Code, s. 2989; R. C., c. 60, s. 9; 1784, c. 206, s. 3; 1793, c. 386; 1799, c. 539, s. 2; 1811, c. 807, s. 6; 1811, c. 812.)

§ 5070. Duties of inspectors of certain commodities.—Every inspector of flaxseed, tar, pitch, and turpentine shall constantly attend at the places for which he shall be appointed, and shall provide an iron to brand any of the said commodities, bearing the name of the inspector and his place of residence, and shall find laborers, equally with the owners, to assist in weighing the several commodities he shall inspect and weigh; and also shall find and provide proper steel yards or scales of the lawful standard; and if any inspector shall neglect his duty, or brand or stamp any of the commodities contrary to this chapter, or brand any empty barrels, or lend his brand to any person, he shall forfeit and pay for every such offense twenty dollars; and for branding any empty barrel, or lending his brand, two hundred dollars; and every other person that shall brand, or procure to be branded, any cask or barrel otherwise than by the inspector or by his assistant shall forfeit and pay for every offense the same fines and penalities as inspectors are by this section liable to pay for similar breaches of duty or misbehavior.

This section does not extend to the town of New Bern so far as it relates to tar, pitch, and turpentine. (Rev., ss. 4655, 4658; Code, ss. 3021, 3037; R. C., 60, s. 48; 1784, c. 206 s. 7.)

§ 5071. Bond of inspector; fees.—The said inspector shall enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his office, which bond the board shall take; and he shall be entitled to such fees as may be prescribed by the board. (Rev., s. 4671; Code, s. 3053; R. C., c. 60, s. 76; 1848, c. 43, s. 3.)

§ 5072. Falsely acting as inspector. — If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars, and be guilty of a misdemeanor. (Rev., s. 3580; Code, s. 3046; R. C., c. 60, s. 69; 1824, c. 1254, s. 3.)

§ 5073. Penalty for sale without inspection.—If any person shall sell any article of forage or provision, of which inspection is required in accordance with this article, without the same having been inspected as required, he shall, for every offense, forfeit and pay one hundred dollars. (Rev., s. 4672; Code, s. 3054; R. C., c. 60, s. 77; 1850, c. 74, s. 2.)

§ 5074. Penalty on master receiving without inspection.—No master or commander of any vessel shall take on board any cask or barrel or other commodity, liable to inspection as aforesaid, without being inspected and branded as required, under the penalty of two hundred dollars for each offense.

This section does not extend to the town of

New Bern so far as it relates to tar, pitch, and turpentine. (Rev., ss. 4657, 4658 Code, ss. 3036, 3037; R. C., c. 60, s. 59; 1784, c. 206, s. 6.)

§ 5075. Who to pay inspectors' fees; penalty for extortion.—The fees of inspectors shall be paid by the purchaser or exporter of the articles inspected, and if any inspector shall receive any greater fees than are by law allowed, he shall forfeit and pay ten dollars for every offense to any person suing for the same. (Rev., s. 4673; Code, s. 3055; R. C., c. 60, s. 79; 1824, c. 1254, ss. 1, 2.)

§ 5076. Size of shingles.—Shingles shall not be less than eighteen inches long, four inches broad, and five-eights of an inch thick; should they be larger they shall not for that reason be considered unmerchantable. (Rev., s. 4659; Code, s. 3038; R. C., c. 60, s. 61; 1784, c. 206, ss. 13, 14.)

§ 5077. Merchantable planks and boards. — Boards of plank shall be deemed merchantable, and passed by any inspector, that are free from splits not more than twelve inches long, have no edge less than half an inch thick, and as near as may be of an equal thickness at each end; and every board, plank, piece of scantling or other square timber, being marked with the number of more superficial feet than are contained therein shall be forfeited to the county for the use of the poor: Provided, no shingles, board, plank, or scantling shall be inspected unless required by the purchaser. (Rev., s. 4660; Code, s. 3039; R. C., c. 60, s. 62; 1784, c. 206, s. 14.)

§ 5078. Steam-mill lumber.—All steam-mill lumber, not herein otherwise provided for, showing heart one-half the length, shall be merchantable; and no inspector, having a stated salary from the proprietor of a steam mill, shall inspect any timber brought to the mill unless by consent of the seller under penalty of fifty dollars. (Rev., s. 4662; Code, s. 3042; R. C., c. 60, s. 65; 1828, c. 26.)

§ 5079. Measurement of tun and sawmill lumber.—All tun and square timber and sawmill lumber at the several markets and mills in the state shall be measured by superficial or board measure; and any person who shall sell such timber by any other measure shall pay ten dollars for every offense. (Rev., s. 4663; Code, s. 3043; R. C., c. 60, s. 66.)

§ 5080. Shingles and lumber to be culled; inspector not to buy.—All shingles, boards, plank, and scantling inspected shall be culled, and the refuse separated from the merchantable, except there be an agreement otherwise between the purchaser and seller.

No inspector shall purchase any cullings or other articles that do not pass inspection, upon pain of forfeiting one hundred dollars. (Rev., ss. 4664, 4665; Code, ss. 3044, 3045; R. C., ss. 67, 68; 1784, c. 206, s. 19; 1824, c. 1254, s. 4; 1830, c. 32.)

§ 5081. Firewood in towns.—All firewood sold in incorporated towns shall be sold by the cord and not otherwise; and each cord shall contain eight feet in length, four feet in height and four feet in breadth; and shall be corded by the seller, under the penalty of two dollars for each offence, to the use of the informer. (Rev., s. 4667; Code, s. 3049; R. C., c. 60, s. 72; 1784, c. 211; 1880, c. 401.)

§ 5082. Gas and electric light bills to show reading of meter.—It shall be the duty of all gas companies and electric light companies selling gas and electricity to the public to show, among other things, on all statements or bills rendered to consumers, the reading of the meter at the end of the preceding month, and the reading of the meter at the end of the current month, and the amount of electricity, in kilowatt hours, and of gas, in feet, consumed for the current month.

Any gas or electric light company failing to render bills or statements, as provided for in this section, shall be subject to a penalty of ten dollars for each violation of this section or failure to render such statements, recoverable before a justice of the peace by any person suing for the same; but this section shall not apply to bills and accounts rendered customers on flat rate contracts. (1915, c. 259.)

§ 5083. Sale of seed-cotton or peanuts.—If any person shall buy, sell, deliver or receive for a price, or for any reward whatever, any cotton in the seed where the quantity is less than what is usually baled, or any peanuts, and shall fail to enter upon a book to be kept by him for such purpose the date of such buying or receiving, the number of pounds in each lot, the true name of the person or persons from whom bought or received and that he is the owner thereof, the name of the owner of the land on which such cotton is raised, and the price paid for the same per pound, which book shall be open to inspection by the public at all business hours of the day, he shall be guilty of a misdemeanor, and upon conviction be punished by a fine not exceeding fifty dollars or imprisoned not exceeding thirty days. In all prosecutions under this section it shall only be necessary for the state to allege and prove that the defendant bought or received the seed-cotton or peanuts as charged, and the burden shall be upon the defendant to show that the provisions of this section have been complied with. (Rev., s. 3812; 1887, c. 199; 1905, cc. 201, 523; 1929, c. 281, s. 1.)

As to constitutionality of statute similar to this section, see State v. Moore, 104 N. C. 714, 10 S. E. 143.

§ 5084. Traveling seed-cotton buyers must report; failure a misdemeanor.—Any person engaged in traveling from house to house or from place to place buying or trading for seed-cotton shall keep a correct record of the name and postoffice address of each person from whom he buys or with whom he trades for seed-cotton, together with the number of pounds he buys or trades for from each person and the amount paid in each case.

On or before the third day of each month such person shall file a sworn statement with the clerk of the superior court of the county in which he made such purchases or trades for seed-cotton, showing the name and postoffice address of each person from whom he bought or with whom he traded during the next preceding month, together with the amount paid and the number of pounds of such cotton received from each person.

Any person failing or refusing to comply with this article shall be guilty of a misdemeanor for

each offense, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. (1919, c. 43.)

§ 5085. Cotton weighing.—If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale, or package of lint cotton, for or on account of the draft, turn, or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: Provided, that the weigher may make such proper deduction as shall be agreed on by him and the seller, or his agent, for water, dirt, or other foreign substance in or on such bag, bale, or package of cotton, or for other just cause. (Rev., s. 3816; Code, s. 1007; 1874-5, c. 58, ss. 1, 3.)

§ 5086. Cotton weigher failing to file oath a misdemeanor.—Every public weigher of cotton shall, before entering on the duties of his office, make and subscribe the oath prescribed for cotton weighers, which, when made, shall be filed in the office of the register of deeds for the county in which the person acts as weigher, and said register shall make a note of the same, and any person acting as weigher without making and filing the oath shall be guilty of a misdemeanor, and shall be fined twenty-five dollars for every bag, bale, or package of cotton which he shall have unlawfully weighed before being qualified to do so. (Rev., s. 3815; Code, s. 1008; 1874-5, c. 58, s. 2.)

§ 5087. Shipping fruit or vegetables not having grower's or shipper's name stamped on receptacle a misdemeanor.—Any person or persons, firm or corporation selling or offering for sale or consignment any barrel, crate, box, or other case, package or receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or produce of any kind whatsoever, to be shipped to any point within or without the state, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall not apply to railroads, express companies and all other transportation companies selling or offering for sale for transportation or storage charges or any other charges accruing to said railroads, express companies or other transportation companies any barrel, crate, box, or other case, package or receptacle containing berries, fruit, melons, potatoes, vegetables, truck or produce. (1915, c. 193.)

§ 5088. Sale of oleomargarine without label a misdemeanor.—If any person shall sell, keep for sale, or offer for sale any oleomargarine or butterine without having securely affixed on each package, tub, or firkin thereof a label on which shall be printed in large roman type the chemical ingredient and the proportions thereof, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or be imprisoned not exceeding thirty days, and for each subsequent offense be fined not less than two hundred dollars or imprisoned not less than six months, or both, in the discretion of the court. For the purposes of this section any article manufactured or compounded in imitation or semblance of butter, or which shall be composed of any ingredient in combination with butter, shall be deemed to be oleomargarine and butterine. (Rev., s. 3828: 1895, c. 106.)

As to prohibition of sale of colored oleomargarine and regulation of sale of the uncolored article, see §§ 4810(a)-4810(f).

§ 5089. Sale of adulterated turpentine misdemeanor.—If any person shall adulterate or cause to be adulterated any spirits turpentine, or shall knowingly sell or offer for sale as pure spirits turpentine any adulterated spirits turpentine, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned for thirty days. (Rev., s. 3830; 1897, c. 482.)

§ 5090. Failure of junk dealers to keep record of purchases misdemeanor.—Every person, firm, or corporation buying brass or copper, or any other metal, or any rubber, or leather and rubber belts and belting, as junk, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the description of the article purchased, the name from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal, rubber, or leather and rubber belts and belting. The said register and the mental and rubber, and leather and rubber belts and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning such metals, rubber, or leather, or rubber belts or belting shall constitute a misdemeanor. This act shall not apply to the counties of Anson, Caldwell, Davidson, Randolph, Robeson, or Buncombe. (1917, c. 46.)

§ 5091. Dealing in certain metals regulated; purchasing from minors; violations of section misdemeanor.—Every person, firm, or corporation buying railroad brasses or any composition metal specially used in the operation of trains, or brasses, composition metals, or copper of the kind or quality used by manufacturing or power plants, shall keep a register and shall insert therein a true and accurate record of each purchase, showing the name of the person from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon such metal. The register shall be at all times open to the inspection of the public. Any person or dealer buying or selling metals without complying with this section shall be guilty of a misdemeanor; and any person making a false entry in such register shall be guilty of a misdemeanor. Every person, firm, or corporation who shall buy or receive any such metals from persons under twenty-one years old, or who shall buy or receive any such metals after the same have been broken up and the marks or brands obliterated, shall be guilty of a misdemeanor; and every person buying, receiving or selling, or offering for sale metals broken into small pieces, or so broken as to obliterate the marks or brands, shall be prima facie presumed to have received such metals knowing the

same to have been stolen. (1907, c. 464; 1909, c. 855, s. 1.)

§ 5092. Local: Lumber in certain counties.— The board of county commissioners of Bertie, Carteret, Craven, Cumberland, Harnett, Jones, Northampton, Pender, Pitt, Onslow, Sampson, and Swain counties, upon the petition of any three freeholders of a township, shall appoint one or more, not to exceed three, qualified electors of such township as inspectors and measurers of logs and timber in and for the county wherein said township is situate, who shall hold his office until the thirty-first day of the second December next after his appointment and qualification, or until his successor or successors may be qualified, whose duty it shall be, upon request of the purchaser or seller of any logs or timber sold within the township wherein such inspector resides, to measure and inspect the same and to furnish, if requested so to do, the purchaser and seller each with a certificate of the result of such measurement and inspection. Such inspector shall keep in a suitably bound book a record of all logs and timber inspected or measured by him, together with the marks or brands, if any, and the names of the purchaser and seller, the number of feet, and the date of such measurement and inspection, which record shall be open to the inspection of the public and preserved and delivered to his successors in office. Such inspector shall, before entering upon the duties of his office, take, subscribe, and file with the said board an oath of office, and give bond payable to the state of North Carolina in the sum of five hundred dollars, conditioned for the faithful performance of the duties of his office, such bond to be approved and filed as the bond of other county officers. No inspection or measurement of logs or timber in said counties by any person other than an officer created by this section shall be of any validity or binding force or effect in any sale of logs or timber. The inspector shall be allowed for his services five cents per thousand feet measured or inspected, to be paid one-half by each party to the sale. (Rev., s. 4636; 1891, c. 142, ss. 1, 2, 3, 4, 5; 1895 (Pr.), c. 229.)

§ 5093. Local: Sawmills near Wilmington.— The board of commissioners of the county of New Hanover shall, at the meeting at which they appoint inspectors for the town of Wilmington, also appoint one inspector for each of the sawmills in the vicinity of said town, for the inspection of lumber only; and if any such inspector shall fail, when called upon by the proprietors or their agents, promptly and faithfully to discharge his duties, he shall for every failure forfeit and pay to the party aggrieved fifty dollars. (Rev., s. 4661; Code, s. 3040; R. C., c. 60, s. 63.)

§ 5094. Local: Disputes about cooperage in Wilmington. — In case the purchaser and seller cannot agree as to the amount to be allowed for extra cooperage and defective barrels in the town of Wilmington, any inspector of naval stores and provisions in the town, at the instance of either, shall establish the amount to be allowed therefor and such estimate shall be conclusive; and if such inspector refuse to make the estimate when called on, he shall forfeit and pay twenty-five dollars to any person who will sue for the same. (Rev., s. 4666; Code, s. 3048; R. C., c. 60, s. 71; 1829 c. 50; 1842, c. 40.)

§ 5095. Local: Firewood in New Bern. — The board of commissioners for the county of Craven may appoint one or more inspectors of firewood for the town of New Bern, who shall reside therein and inspect all such wood as may be carried to the town for sale; and before entering upon their duties they shall take the oaths and give the bonds required of other inspectors, and shall receive for inspecting each cord of wood four cents, to be paid by the purchaser. (Rev., s. 4668; Code, s. 3050; R. C., c. 68, s. 73; 1846, c. 198, ss. 1, 2, 3.)

§ 5096. Local: Cotton sales in Wilmington.— All cotton sold in the town of Wilmington shall be weighed, under the penalty of one hundred dollars for any bale sold without being weighed by the proper officer. This not to apply to cotton bought elsewhere and brought to Wilmington for export. Cotton shall be weighed by the inspectors of flour and provisions, who have been or who may be, from time to time, appointed by the board of county commissioners of New Hanover. The board of county commissioners of said county shall, from time to time, fix the fee, not to exceed ten cents per bale, for the weighing of the aforesaid articles, and until said board shall determine said fee the inspector shall be entitled to receive the following fee, viz., for every bale of cotton weighed, ten cents. (Rev., ss. 4674, 4675, 4676; Code, ss. 3058, 3059, 3060; 1856-'7, c. 41.)

§ 5097. Failure of buyer to inspect cotton in certain counties.—If any buyer of baled cotton shall fail to inspect all baled cotton when purchased before the same is delivered, or shall make any deduction from the price agreed to be paid therefor on account of any inspection made after delivery of the same, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. This section shall apply only to the counties of Stanly, Cabarrus, Montgomery, Anson, Catawba, Richmond, and Rowan: Provided, this section shall not have the effect to prevent a deduction or rebate on the price agreed for fraudulent bailing or packing of cotton or to prevent an indictment for false pretenses in the counties of Montgomery, Rowan, and Stanly. (Rev., s. 3811; 1819, c. 287; 1899, c. 320.)

§ 5098. Local: Sales of calves for veal.—It shall be unlawful for any person or persons, firm, or corporation to buy or sell, or engage in the business of buying and selling or shipping calves for veal under the age of six months, either dead or alive: Provided, that this act shall not apply to persons buying or selling heifer calves to be raised for milk cows, nor to bull calves for raising purposes or work stock.

Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall pay a penalty of not less than fifteen dollars nor more than thirty dollars, or be imprisoned for not less than twenty nor more than thirty days, or both,

in the discretion of the court, for each and every offense.

This section shall apply to the following counties only: Alamance, Alexander, Ashe, Avery, Caldwell, Cherokee, Clay, Franklin, Gaston, Graham, Lee (1917, c. 93, s. 1), Madison, McDowell, Mitchell, Robeson, Sampson, Wake, and Wilson. (Ex. Sess. 1913, c. 80; 1915, c. 2 (Cabarrus, Guilford, Hoke, Rowan, Moore, Warren), c. 155 (Durham); P. L. 1919, c. 159 (Lincoln county); P. L. 1917, c. 470 (Cleveland county); 1917, c. 299 (Henderson county).

Editor's Note.—This section has been further modified in Alamance county, by P. L. 1917, ch. 391; Alexander county, by P. L. 1917, ch. 180; Durham county, by P. L. 1915, ch. 155. See also Buncombe, P. L. 1919, ch. 191; Surry, P. L. 1919, ch. 151; Wilkes, P. L. 1919, ch. 63. P. L. 1925, ch. 11, struck out Burke from the list of counties.

§ 5099. Failure of butchers to keep record misdemeanor.—If any butcher shall fail to keep a book of registration and register the ear-mark, brand, or flesh-mark of all cattle, sheep, swine, or goats, and the name of the parties purchased from, in said registration, and the date of said purchase, which registration shall be open to the inspection of all persons, he shall be guilty of a misdemeanor, and upon conviction shall pay a fine of fifty dollars for each offense: Provided, this shall apply only to the counties of Rockingham, Bertie, Edgecombe, Halifax, Martin, Orange, Pitt, Wilson, Wayne, Jones, Warren, Johnston, Richmond, Northhampton, Franklin, Craven, Chowan, Harnett, and Gates, and Warsaw township in Duplin county. (Rev., s. 3803; 1889, c. 318; 1895, c. 363; 1891, c. 38; 1891, c. 557; 1893, c. 116; 1903, c. 82; 1905 c. 31; 1909, c. 865, s. 1.)

§ 5099(a). Numbering of cotton bales by public ginneries; public gin defined.—Any person, firm or corporation operating any public cotton gin, that is any cotton gin other than one ginning only for the individual owner, owners, or operators thereof, shall hereafter be required to distinctly and clearly number, serially, each and every bale of cotton ginned, in one of the following ways: (1) mark in color upon the bagging of the bale, in figures: (2) attach a metal strip carrying serial number to one of the ties of the bale and ahead of the tie lock, and so secure it that ordinary handling will not remove or disfigure the number: (3) impress the serial number upon one of the bands or ties around the bale. (1923, c. 167, s. 1.)

§ 5099(b). Violation of preceding section a misdemeanor.—Any person, firm or corporation failing or refusing to comply with the preceding section shall be guilty of a misdemeanor for each and every offense, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. (1923, c. 167, s. 2.)

Art. 2. Threshers of Wheat

§§ 5100-5105. Superseded by Public Laws of 1935, c. 329, codified as §§ 5105(1)-5105(6).

§ 5105(1). Licensing of power threshers. — It shall be the duty of any person, firm or corporation who shall engage in power threshing in any county in North Carolina to first secure a license from the county in which the operator resides: Provided, that securing of a license in one county shall be sufficient to allow the person, firm or corporation to operate in any county of the State. (1935, c. 329, s. 1.)

§ 5105(2). Issuance by registers of deeds; expiration date; fee; threshers of own crops exempted.—It shall be the duty of the register of deeds of each of the several counties of the State to issue a license to engage in threshing in that county to any person, firm or corporation applying for same. Every license issued under the provisions of this article shall expire on the first day of April succeeding the date of the issue of such license. In lieu of the necessary expenses involved, the register of deeds may make a charge not to exceed fifty cents for each license issued: Provided, that operators who thresh their own crops only shall be exempt from any license cost. (1935, c. 329, s. 2.)

§ 5105(3). Records and reports of threshers, violation made misdemeanor.—It shall be the duty of every person, firm or corporation, who shall engage in threshing for others or themselves, in any county of the State, to keep a complete and accurate record of the acreages harvested and amounts threshed for each farm, and to promptly make, upon blanks to be furnished by the register of deeds of the county, reports showing the acreages and the amounts threshed by said person, firm or corporation, in said county during the preceding season. A violation of the provisions of this section shall be deemed a misdemeanor and shall be punished by a fine of not exceeding twenty-five dollars: Provided, the register of deeds shall give thirty days' notice to the licensee before indictment is made, and if licensee makes said report within said time no indictment shall be made. (1935, c. 329, s. 3.)

§ 5105(4). Public notice of requirements; prosecution for noncompliance.—It shall be the duty of the register of deeds of each of the several counties of the State to give public notice of these requirements before the threshing seasons and to make diligent inquiry as to whether the provisions of section 5105(3) have been complied with, and upon failure of any person, firm or corporation to comply with same, to swear out a warrant before some justice of the peace of the county and the procedure thereon shall be as in other criminal cases. (1935, c. 329, s. 4.)

§ 5105(5). Report of register of deeds to commissioner of agriculture.—It shall be the duty of the register of deeds of each of the several counties in the State to promptly submit, upon blanks to be furnished by the commissioner of agriculture, a report to the commissioner of agriculture showing the crop acreages havested and amounts that have been threshed in the said county in the preceding crop season. (1935, c. 329, s. 5.)

§ 5105(6). Commissioner to furnish blank forms to registers of deeds; publication of reports. — It shall be the duty of the commissioner of agriculture to furnish to the register of deeds of the several counties of the State, on or before the first day of May in each year, a sufficient number of blank forms for threshers' licenses, operators' threshing reports, and registers' of deeds summary

reports. The commissioner of agriculture shall also collect and publish the county results of these reports prior to the next threshing season. (1935, c. 329, s. 6.)

Art. 3. Sale of Weapons

§ 5106. Sale of certain weapons without permit forbidden.—It shall be unlawful for any person, firm, or corporation in this state to sell, give away, or dispose of, or to purchase or receive, at any place within the state from any other place within or without the state, unless a license or permit, therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump-gun, bowie knife, dirk, dagger or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the state of North Carolina any pistol, so-called pump-gun, bowie knife, dirk, dagger or metalic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the clerk of the superior court as provided in section five thousand one hundred and seven; any person violating the provisions of this law shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, or both, in the discretion of the court. (1919, c. 197, s. 1; 1923, c. 106.)

Editor's Note.—This section was amended and strengthened by Public Laws 1923, ch. 106, the second paragraph being a new provision added by that act.

"The amendment makes it a misdemeanor, not only to sell such deadly weapons without a license, but also to receive them, when sent by mail, express or freight, without exhibiting a permit or license. 1 N. C. Law Rev. 285.

§ 5107. Permit issued by clerk of court; form of permit.—The clerks of the superior courts of any and all counties of this state are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,

.....County.

I,....., clerk of the Superior Court of said county, do hereby certify that..... whose place of residence is..... Street, in ..... (or) in ..... Township.....County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said ..... to purchase one pistol. (or if any other weapon is named strike out the word pistol).....from any person, firm or corporation authorized to dispose of the same.

This.....day of....., 19.....

.....

Clerk Superior Court.

(1919, c. 197, s. 2.)

§ 5108. Applicant must be of good moral character; clerk's fee.—Before the clerk of the superior court shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said clerk shall not be so fully satisfied, he shall refuse to issue said license or permit: Provided, that nothing in this article shall apply to officers authorized by law to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 3.)

§ 5109. Record of permits kept by clerk.—The clerk of the superior court shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4.)

§ 5110. Dealer to keep record of sales.—Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted state, county or police officer, within this state. (1919, c. 197, s. 5.)

§ 5111. Weapons to be listed for taxes.—During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapon for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6.)

§ 5112. Violation of article a misdemeanor.—Any person, firm, or corporation violating any of the provisions of this article shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1919, c. 197, s. 7.)

§ 5112(a). Machine guns and other like weapons.—It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, sub-machine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the clerk of the superior court of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the

said business; officers and soldiers of the United States army, when in discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties: Provided, further, that automatic shotguns and pistols or other automatic weapons that shoot less than sixteen shots shall not be construed to be or mean a machine gun or sub-machine gun under this act; and that any bona fide resident of this state who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said ownership to the clerk of the superior court of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred ($500.00) dollars, or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1.)

See 11 N. C. Law Rev., 237, for discussion of this section, and wherein it differs from the Uniform Machine Gun Act.

Art. 4. Manufacture and Sale of Matches

§ 5113. Requirements for matches permitted to be sold.—No person, association, or corporation shall manufacture, store, offer for sale, sell or otherwise dispose of or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as "parlor matches"; nor manufacture, store, sell, offer for sale, or otherwise dispose of, or distribute, white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safty or inert composition, non-ignitible on an abrasive surface; nor manufacture, store, sell, or offer for sale, or otherwise dispose of or distribute matches which when packed in a carton of five hundred approximate capacity and placed in an oven maintained at a constant temperature of two hundred degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell or otherwise dispose of, or distribute, blazer, or so-called wind matches, whether of the so-called safety or strike-anywhere type. (1915, c. 109, s. 12, I.)

§ 5114. Packages to be marked.—No person, association, or corporation shall offer for sale, sell or otherwise dispose of, or distribute, any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trade-mark under which the matches were sold, disposed of, or distributed. (1915, c. 109, s. 12, II.)

§ 5115. Storage and packing regulated.—No more than one case of each brand of matches of any type or manufacture shall be opened at any one time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper-wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches when stored in warehouses must be kept only in properly secured cases, and not piled to a height exceeding ten feet from the floor; nor be stored within a horizontal distance of ten feet from any boiler, furnace, stove, or other like heating apparatus; nor within a horizontal distance of twenty-five feet from any explosive material kept or stored on the same floor. All matches shall be packed in boxes or suitable packages, containing not more than seven hundred matches in any one box or package: Provided, however, that when more than three hundred matches are packed in any one box or package the said matches shall be arranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing three hundred and fifty or more matches shall have placed over the matches a center-holding or protecting strip, made or chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box in nested into the shuck or withdrawn from it. (1915, c. 109, s. 12, II.)

§ 5116. Shipping containers regulated.—All match boxes or packages shall be packed in strong shipping containers or cases; maximum number of match boxes or packages contained in any one shipping container or case shall not exceed the following number:

Number of Boxes	Nominal Number of Matches per Box
½ gross	700
1 gross	500
2 gross	400
3 gross	300
5 gross	200
12 gross	100
20 gross over 50 and under	100
25 gross under	50

No shipping container or case constructed of fiber board, corrugated fiber board, or wood, nailed or wirebound, shall exceed a weight, including its contents, of seventy-five pounds; and no lock-cornered wooden case containing matches shall have a weight, including its contents, exceeding eighty-five pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words "Strike-anywhere Matches" or "Strike-on-the-Box Matches." (1915, c. 109, s. 12, III.)

§ 5117. Violation of article a misdemeanor.—Any person, association, or corporation violating any of the provisions of this article shall be fined for the first offense not less than five dollars nor more than twenty-five dollars, and for each subsequent violation not less than twenty-five dollars. (1915, c. 109, s. 12, IV.)

Art. 5. Public Warehouses

§ 5118. Who may become public warehousemen.—Any person or any corporation organized under the laws of this state and whose charter authorizes it to engage in the business of a ware-

houseman, may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed and upon giving the bond hereinafter required. (Rev., s. 3029; 1901, c. 678; 1919, c. 212.)

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

§ 5119. Bond required.—Every person or every corporation so organized under the preceding section, except such as shall have a capital stock of not less than five thousand dollars, to become a public warehouseman shall give bond in a reliable bonding or surety company, or an individual bond with sufficient sureties, payable to the state of North Carolina, in an amount not less than ten thousand dollars, to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman; but if such person or corporation has a capital stock of not less than five thousand dollars, then it shall not be required to give the bond mentioned in this section. (Rev., s. 3030; 1901, c. 678, s. 2; 1905, c. 540; 1908, c. 56; 1919, c. 212.)

§ 5120. Person injured may sue on bond.—Whenever such warehouseman fails to perform any duty or violates any of the provisions of this chapter, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman. (Rev., s. 3031; 1901, c. 678, s. 3.)

Carrier's Liability as Warehouseman.—The liability of a common carrier continues until notice is given consignee of arrival of shipment of goods at destination and a reasonable time given to remove it. Thereafter the carrier's liability is that of a warehouseman. Poythress v. Durham & Southern R. Co., 148 N. C. 391, 62 S. E. 515.

As to railroad's liability as a warehouseman, see Bank v. Sou. Ry. Co., 153 N. C. 346, 347, 69 S. E. 261.

Care Required of Bailee.—Where it was known to bailor at time of storage that the bailee knew nothing about tobacco, and had no experience in handling it, the bailee will not be held liable for injury resulting from want of skill and experience; but will be bound to use such ordinary care as a prudent man would exercise to guard against moisture in the structure of the warehouse and the location of the tobacco. Motley v. Southern Finishing Co., 126 N. C. 339, 35 S. E. 601.

While warehousemen are not insurers like common carriers, they are liable for damages, caused by their negligence, to articles stored with them. Motley Co. v. Warehouse Co., 122 N. C. 347, 30 S. E. 3.

Warehousemen Liable for Negligence. — Warehousemen are liable under the general law for damages caused by their negligence. Motley v. Southern Finishing, etc., Co., 124 N. C. 232, 32 S. E. 555.

Provision against Liability.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional and void. Motley Co. v. Warehouse Co., 122 N. C. 347, 30 S. E. 3.

The measure of damages for property damaged while in the care of a storage or warehouse company is the difference between the market value of the property in its damaged condition and what it would have sold for, if undamaged, on the day of its return to the owner. Motley Co. v. Warehouse Co., 122 N. C. 347, 30 S. E. 3.

§ 5121. Insurance required; storage receipts.—Every such warehouseman shall, when requested thereto in writing by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall give to each person depositing property with it for storage a receipt therefor. All warehouse receipts issued by warehousemen complying with the provisions of this chapter shall be valid and binding in the hands of all bona fide holders for value without registration. (Rev., s. 3032; 1901, c. 678, s. 4; 1905, c. 540, s. 2.)

As to Uniform Warehouse Receipts Act, see sections 4036 et seq.

§ 5122. Books of account kept; open to inspection.—Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing, and insuring cotton, goods, wares, and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates. (Rev., s. 3035; 1901, c. 678, s. 7.)

§ 5123. Unlawful disposition of property stored.—If any person unlawfully sells, pledges, lends, or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or anything deposited in a public warehouse without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars and by imprisonment in the state's prison for not more than three years; but no officer, manager, or agent of such public warehouse shall be liable to the penalties provided in this section unless, with the intent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending, or other disposition of any goods, wares, merchandise, article, or thing so deposited. (Rev., s. 3831; 1901, c. 678, s. 11.)

As to warehouse receipts, see sections 4036 et seq.

Art. 6. Leaf Tobacco Warehouses

§ 5124. Maximum warehouse charges. — The charges and expenses of handling and selling leaf tobacco upon the floor of tobacco warehouses shall not exceed the following schedule of prices, viz.: For auction fees, fifteen cents on all piles of one hundred pounds or less, and twenty-five cents on all piles over one hundred pounds; for weighing and handling, ten cents per pile for all piles less than one hundred pounds, for all piles over one hundred pounds at the rate of ten cents per hundred pounds; for commissioners on the gross sales of leaf tobacco in said warehouses, not to exceed two and one-half per centum. (Rev., s. 3042; 1895, c. 81.)

A warehouse system to aid in the marketing of leaf tobacco is authorized by this section et seq. Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

§ 5125. Oath of tobacco weigher.—All leaf tobacco sold upon the floor of any tobacco warehouse shall first be weighed by some reliable person, who shall have first sworn and subscribed to the following oath, to wit: "I do solemnly swear (or affirm) that I will correctly and accurately weigh all tobacco offered for sale at the warehouse of ....., and correctly test and keep accurate the scales upon which the tobacco so offered for sale is weighed." Such oath shall be filed in the office of the clerk of the superior

court of the county in which said warehouse is situated. (Rev., s. 3043; 1895, c. 81, s. 2.)

§ 5126. Warehouse proprietor to render bill of charges; penalty.—The proprietor of each and every warehouse shall render to each seller of tobacco at his warehouse a bill plainly stating the amount charged for weighing and handling, the amount charged for auction fees, and the commission charged on such sale, and it shall be unlawful for any other charges or fees to be made or accepted. For each and every violation of the provisions of this article a penalty of ten dollars may be recovered by any one injured thereby. (Rev., s. 3044; 1895, c. 81, ss. 3, 4.)

As to accounts, of the number of pounds of leaf tobacco sold, to be kept and reported to commissioner of agriculture, see sections 4926 et seq.

§ 5126(a). Checks for purchases of leaf tobacco to be payable to order.—The proprietor of each and every warehouse shall pay for all tobacco sold in said warehouse either in cash or by giving to the seller a check payable to his order in his full name or in his surname and initials and it shall be unlawful to use any other method. (1931, c. 101, s. 1.)

Editor's Note.—This section, which prescribes no penalty for its violation, seeks to do away with checks payable to bearer and so apparently to diminish sales by thieves, dishonest tenants and others acting unlawfully. Question may arise as to the constitutionality of the section since it interferes with supposed freedom of contract. Store order and pay ticket laws suggest themselves as an immediate analogy. But these have not always been sustained and even if they were universally admitted to be constitutional, there is one notable distinction, i.e., that such laws prohibiting the giving to employees of merchandise orders to be used at company stores are aimed against oppression of the laborer—one of the contracting parties. In the present case, however, the payee seems actually to prefer the form of payment he receives—or he can freely have it otherwise on request—and the people to be protected are seemingly some outsiders whose interests may be prejudiced by the practice satisfactory to the parties. If the abuse is shown to be of a serious enough character, however, it is believed that the court will find it possible to sustain the section. The argument for its validity would seem to be advanced not at all by the fact that tobacco warehouses are or may be "affected with a public interest." 9 N. C. Law Rev. 387, 388.

Art. 6A. Dealers in Scrap Tobacco

§ 5126(a1). Application for license; amount of tax; exceptions.—Every person, firm or corporation engaging in the business of buying or selling scrap tobacco shall apply to the commissioner of revenue of North Carolina for license to engage in such business, and such applicant shall state the counties in which the said person, firm or corporation proposes to do business, and the place where the principal office of the applicant or warehouse of the applicant is situated, and shall pay to the said commissioner of revenue for the benefit of the State a license tax of one thousand ($1,000.00) dollars for each and every county in which the applicant proposes to do business: Provided, this shall not apply to scrap tobacco sold on floors of warehouses paying a license tax under section one hundred and forty-two, of the Revenue Act of one thousand nine hundred and thirty-five [§ 7880(73)], or to tobacco scrapped by reason of processing by a manufacturer or processor of tobacco: Provided, this shall not apply to any person, firm or corporation regularly engaged in the business of buying, selling or processing leaf tobacco and properly licensed therefor, provided, scrap tobacco bought by such person, firm or corporation is delivered by the landlord thereof to the place of business of such purchaser. (1935, c. 360, s. 1.)

§ 5126(a2). Report to commissioner of agriculture each month.—On or before the tenth day of each month the said person, firm or corporation, engaging in the business described in section 5126(a1), shall make a report to the commissioner of agriculture of the State, stating the number of pounds of said scrap or untied tobacco purchased in each of the counties in which the said person, firm or corporation is doing business, and the price paid therefor in the previous month, and the purposes for which such scrap or untied tobacco is bought or sold. (1935, c. 360, s. 2.)

§ 5126(a3). Display of license; duplicate license.—If the person, firm or corporation licensed to engage in the business described in this section has a warehouse or office or fixed place of business, then such license issued by the commissioner of revenue shall be displayed in a conspicuous place in said office, warehouse, or place of business, and if such person, firm or corporation so licensed to do business herein decribed shall have no fixed office, warehouse or place of business, then such person and each of the partners and the representatives of the corporation buying such tobacco shall carry on his person said license, or a duplicate thereof, and exhibit it when demanded, to any officer who may request to see it, or to any person from whom such tobacco is bought, or to whom such tobacco is sold. Duplicates of any original license issued under this section shall be issued by the commissioner of revenue upon payment of an additional tax of five ($5.00) dollars for each duplicate license. (1935, c. 360, s. 3.)

Art. 7. Collection of Accounts

§ 5126(b). Permit from Insurance Commissioner.—Any person, firm or corporation within the State of North Carolina engaging in the collection of accounts for a percentage consideration of the account collected, or upon any other basis than regular employment, shall, before engaging in such business within the State of North Carolina, apply to and receive from the Insurance Commissioner, a permit to engage in such business, which permit shall at all times be prominently displayed in the main office of the person, firm, or corporation to whom or to which the permit is issued, and the number of said permit shall be printed in bold type upon all letterheads, stationery and forms used by the person, firm or corporation holding said permit. (1931, c. 217, s. 1.)

Editor's Note.—The title of the Act from which this section was taken includes detective agencies, but the body of the act makes no reference to such agencies.

§ 5126(c). Application to Commissioner for permit.—The person, firm, or corporation desiring to secure a permit as provided in section 5126(b), shall make application to the Insurance Commissioner upon such form as the Commissioner may provide, and shall submit with such

application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public offered by the person, firm or corporation filing the application. All information submitted shall be sworn to by the responsible officer, member of the firm, or individual, as in each case necessary, and the Commissioner shall have the right to require any and all additional information which, in his judgment, might assist him in determining whether or not the applicant is entitled to the permit sought. (1931, c. 217, s. 2.)

§ 5126(d). Hearing granted applicant if application declined; appeal.—If, for any reason, upon the application made and upon the consideration of the data submitted with the application or items, the Commissioner shall be of the opinion that permit should not be issued to the applicant, he shall decline the same, giving notice of his action to the applicant. Following notice, the applicant shall have ten days within which to submit additional information in support of his application, and if, upon further hearing upon the application and additional information, the Commissioner shall again decline to issue the permit, the applicant shall have the right to appeal to the Superior Court and his appeal shall stand for hearing in the Superior Court of the County of Wake, and the evidence, data and information submitted to the Commissioner shall constitute the record in the Superior Court, and the same shall be heard by the Judge of the Superior Court to determine whether or not the Commissioner had evidence sufficient to justify his action. (1931, c. 217, s. 3.)

§ 5126(e). Contents of permit and duration; application fee.—If, upon the application and information submitted as hereinbefore required, the Commissioner shall issue a permit to the applicant, giving the name of the applicant, his place of business and the nature and kind of business the applicant is engaged in, and shall assign to the permit a serial number for each year, beginning with July first, one thousand nine hundred thirty-one, upon the payment by the applicant of the sum of fifty dollars as the application fee, which fifty dollars the Commissioner, in his discretion, may require upon the filing of the application, and which fee, if such application is not granted, the Commissioner shall retain five dollars of the application fee so paid and return the remainder thereof to the applicant. The five dollars so retained upon applications not granted, and the full fee of fifty dollars upon all applications granted, shall be used in paying the expenses incurred in connection with the consideration of such applications and the issuance of such permits. Each permit issued shall be for the period of one year, beginning with July first and ending with June thirtieth, of the following year. (1931, c. 217, s. 4.)

§ 5126(f). Revocation of permit.—If the Commissioner shall have issued any permit to any person, firm, or corporation as herein provided, and shall have information that the holder of the permit is not conducting his business in a business-like way, he shall notify the holder of the permit of a date for a hearing, which notice shall name a time and place for the hearing, and at which hearing any and all evidence as to the conduct of the business may be heard by the Commissioner. If, upon the hearing of the evidence, the Commissioner shall be of the opinion that the applicant is not entitled to the permit, the Commissioner shall cancel said permit, after which time it shall be unlawful for the person, firm or corporation whose permit is cancelled to engage in the business covered by the permit. If the permit be cancelled upon hearing, either the holder of the permit or the complaining party shall have the right to appeal as hereinbefore provided in case the application is denied, and the record of the hearing before the Commissioner shall be the record in the Superior Court upon which the Judge shall determine whether or not the Commissioner had sufficient evidence upon which to base his action. (1931, c. 217, s. 5.)

Editor's Note.—Though "business-like way," as used in this section, is an exceedingly indefinite standard of conduct, the statute is probably valid, in view of the right of appeal to the courts. 9 N. C. Law Rev. 390.

§ 5126(g). Rules and regulations; schedule of fees.—The Commissioner shall have the right to make any rules or regulations necessary to enforce the provisions of this article and may approve schedules of fees and methods of collecting the same, or make any other rule or regulation necessary to secure the proper conduct of the business referred to in this article. (1931, c. 217, s. 6.)

§ 5126(h). Violation of article a misdemeanor.—Any person, firm or corporation who shall engage in the business herein referred to without first receiving a permit, or who shall fail to secure a renewal of his permit upon the expiration of the license year, or shall engage in the business herein referred to after the permit has been cancelled as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this article, shall, upon conviction, be guilty of a misdemeanor punishable in the discretion of the court. (1931, c. 217, s. 7.)

§ 5126(i). Disposition of fees. — All fees collected hereunder shall be credited to the account of the Insurance Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this article, but the Director of the Budget shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the General Treasury of the State to be appropriated as other funds. (1931, c. 217, s. 8.)

§ 5126(j). Attorneys at law and local county agencies excepted.—Nothing in this article shall be construed to apply to legally licensed attorneys at law engaged in the practice of the profession of law unless, however, such attorney shall engage in the business herein referred to under a trade name or as a corporation, nor shall this arti-

cle apply or be construed to apply to any person, firm or corporation whose business of collecting accounts is limited to the collection of such accounts against debtors having residence in the county of the residence of such person or firm, or the principal office of such corporations so engaged in such business. (1931, c. 217, s. 9.)

CHAPTER 91A

COMMISSION FOR THE BLIND

§ 5126(1). Commission created; appointment by governor; ex-officio members.—There shall be established a state commission, to be known as the North Carolina State Commission for the Blind, consisting of three persons, to be appointed by the governor within thirty days after the passage of this chapter. The superintendent of the State School for the Blind and the state supervisor of vocational rehabilitation shall be ex-officio members of this commission. (1935, c. 53, s. 1.)

§ 5126(2). Term of office.—The full term of office of the members of this commission with the exception of the superintendent of the State School for the Blind and the state supervisor of vocational rehabilitation shall be five years. The term of office of the said ex-officio members shall be contemporaneous with their tenure of office as superintendent of the State School for the Blind and state supervisor of vocational rehabilitation, respectively. But of the first commission appointed, one member shall be appointed for a term of five years, one for a term of three years, one for a term of one year. At the expiration of the term of any member of the commission, his successor shall be appointed for a term of five years. (1935, c. 53 s. 2.)

§ 5126(3). Register of state's blind.—It shall be the duty of this commission to cause to be maintained a complete register of the blind in the State of North Carolina, which shall describe the condition, cause of blindness, capacity for education and industrial training of each, with such other facts as may seem to the commission to be of value. (1935, c. 53, s. 3.)

§ 5126(4). Information and aid bureaus. — The commission shall maintain or cause to be maintained one or more bureaus of information and industrial aid, the object of which shall be to aid the blind in finding employment and to teach them trades and occupations which may be followed in their own homes, and to assist them in whatever manner may seem advisable to the commission in disposing of the products of their home industry. (1935, c. 53, s. 4.)

§ 5126(5). Training schools and workshops; training outside state; sale of products. — The commission may establish one or more training schools and workshops for employment of suitable blind persons and shall be empowered to equip and maintain the same, to pay to employees suitable wages, and to devise means for the sale and distribution of the products thereof, and may co-operate with shops already established. The commission may also pay for lodging, tuition, support and all necessary expenses for blind persons during their training or instructions in any suitable occupation, whether it be in industrial, commercial, or professional or any other establishments, schools or institutions, or through private instruction wherever in the judgment of the commission such instruction or training can be obtained, when in its judgment the training or instruction in question will contribute to the efficiency or self-support of such blind persons. When special educational opportunities cannot be had within the state, they may be arranged for, at the discretion of the board, outside of the state. The commission may also, whenever it thinks proper, aid individual blind persons or groups of blind persons to become self-supporting by furnishing material or machinery to them, and may also assist them in the sale and distribution of their products; but this shall not be deemed to authorize the making of gifts by the commission. (1935, c. 53, s. 5.)

§ 5126(6). Promotion visits.—The commission may ameliorate the condition of the blind by promotion visits among them and teaching them in their homes as the commission may deem advisable. (1935, c. 53, s. 6.)

§ 5126(7). Investigations; eye examination and treatment.—It shall be the duty of this commission to continue to make inquiries concerning the cause of blindness, to learn what proportion of these cases are preventable and to inaugurate and co-operate in any such measure for the State of North Carolina as may seem wise. The commission may arrange for the examination of the eyes of the individual blind and partially blind persons and may secure and pay for medical and surgical treatment for such persons whenever in the judgment of a qualified opthalmologist the eyes of such person may be benefited thereby. (1935, c. 53, s. 7.)

§ 5126(8). Officers and agents; annual report.—The commission may appoint such officers and agents as may be necessary to carry out the provisions of this chapter and their compensation shall be fixed within the limits of the annual appropriation by the director of personnel, but no persons employed by the commission shall be a member thereof. The annual report shall present a concise review of the work of the commission for the preceding year, with such suggestions and recommendations for improving the conditions of the blind and preventing blindness as may seem expedient. (1935, c. 53, s. 8.)

§ 5126(9). Compensation and expenses of commission.—The members of the commission shall receive no compenation for their services; but their traveling and other necessary expenses, incurred in the performance of their official duties, shall be audited by the state auditor and paid by the treasurer of the state, out of the moneys that may be appropriated therefor. (1935, c. 53, s. 9.)

§ 5126(10). Qualifications of beneficiaries. — The beneficiaries of the commission shall be persons totally or partially blind, or anyone whose eyesight is so seriously affected that he cannot see to read even with the aid of glasses. No person shall benefit, directly or indirectly, from the provisions of this chapter who shall have resided in the State of North Carolina less than

two years, next preceding the receiving of such benefit. (1935, c. 53, s. 10.)

§ 5126(11). Work of state board of health unaffected.—Nothing herein shall be construed to in any way abridge the rights and privileges of the state board of health in the treatment of the blind, or in accumulating and disseminating information in reference to the blind and in the prevention of blindness. (1935, c. 53, s. 11.)

CHAPTER 92

CONFEDERATE HOMES AND PENSIONS

Art. 1. Soldiers' Home

§ 5127. The soldiers' home association incorporated; powers.—The persons now composing and constituting the corporation, created by chapter sixty of the private laws of one thousand eight hundred and ninety-one, together with their successors, shall be and remain a body politic and corporate, under the name and style of The Soldiers' Home Association, and by that name may sue and be sued, purchase, hold, and sell real and personal property and have all of the powers of a charitable corporation under the law, enabling them to establish, maintain, and govern a home for such deserving, needy Confederate soldiers as shall have served in any North Carolina command during the late war, or who shall have served in the Confederate army and shall be a bona fide citizen of the state. The corporation shall have power to buy, lease, or acquire real estate for the purposes of its incorporation, may solicit and receive donations in money or property, may invest its funds to constitute an endowment fund, and shall have a corporate existence of sixty years. It shall also have the power to solicit and receive donations for the purpose of aiding indigent Confederate soldiers at their homes in the various counties of North Carolina, and shall have all powers necessary to this end. (Rev., s. 5309; 1891 (Pr.), 60.)

§ 5128. Directors appointed; officers and powers.—The powers conferred by this chapter shall be exercised by a board of directors consisting of seven members, of whom three shall be elected by the association and four shall be appointed by the governor of the state annually, and in case of a failure to elect or appoint, the members of the board shall hold their office until their successors shall be elected or appointed. The board of directors shall elect from their number a president, and a secretary who shall not be from their number, and the treasurer of North Carolina shall be the treasurer of the association. The board of directors shall appoint such other officers, agents, or employees as it shall see fit, and shall prescribe the duties of such officers and employees. It shall establish rules and regulations for the maintenance and government of the home and shall have entire control and management of it; it shall prescribe the rules for the admission of inmates and their discharge; it shall take whatever action may be desirable in reference to the collection and disbursement of subscriptions either to the home or to the needy veterans elsewhere in the state. The accounts of its officers and employees shall be duly audited and published. The superintendent may be allowed free transportation over any railroad in the state offering the same. (Rev., s. 5310; 1891 (Pr.), c. 60, s. 2; 1913, c. 126, s. 1.)

§ 5129. Lady managers appointed.—The board of directors at their first meeting in each year shall appoint an advisory board of lady managers, consisting of one member from each congressional district, whose term of office shall be prescribed by the board. The lady managers shall assist the directors in the management of the home as they may be requested to do, shall solicit contributions for the home, and generally shall use all the powers given to and perform all the duties required of them by the board of directors, who are hereby empowered to prescribe such duties and confer such powers. (Rev., s. 5311; 1891 (Pr.), c. 60, s. 3.)

§ 5130. Location of home.—The tract of land lying east of and near the corporate limits of the city of Raleigh, known as Camp Russell, and formerly known as "Pettigrew Hospital," the property of the state, shall be and the same is hereby given to the association, to be held and used by them for the purposes of a soldiers' home, and for no other purpose, and when said land shall cease to be used for the benefit of the Confederate veterans the same shall revert and belong to the state. But if the board of directors shall deem it advisable to establish the home elsewhere, they shall have the power, by and with the consent of the council of state of North Carolina, to sell the said tract and reinvest in some other lot or tract of land, the title to which shall be taken in the name of the state, and which shall be held under the trust mentioned above. (Rev., s. 5312; 1891 (Pr.), c. 60, s. 4.)

§ 5131. Record of inmates kept.—The directors shall cause to be kept a minute book of the home, in which full entries shall be kept concerning memorable incidents in the lives of its inmates. They shall also take steps to form a museum of Confederate relics and to perpetuate such historical records of the Confederate soldiers of North Carolina as they shall find it practicable to do. (Rev., s. 5313; 1891 (Pr.), c. 60, s. 6.)

§ 5132. Pensions for inmates of soldiers' home.—A pension of twelve dollars per annum, payable in equal quarterly installments of three dollars each, on the first days of January, April, July, and October in each year, shall be paid to all inmates of the soldiers' home at Raleigh. (1909, c. 684; 1913, c. 126.)

§ 5133. Uniform provided for inmates.—The board of directors of the soldiers' home are authorized and directed to purchase one suit or uniform of Confederate gray each year, if necessary, for the use and wear of each old soldier at said home; and when any old soldier shall leave the home or shall die, he may take said suit or uniform with him or may be buried in the same. (1909, Resolution, p. 1356; 1925, c. 275, s. 9.)

Editor's Note.—The section, as amended by Public Laws 1925, ch. 275, omits the last sentence of the section, as it formerly stood, concerning the appropriation of funds for the purpose of carrying out its provisions.

Art. 2. Confederate Woman's Home

§ 5134. Incorporation and powers of association.—Julian S. Carr, John H. Thorp, Robert H. Ricks, Robert H. Bradley, E. R. Preston, Simon B. Taylor, Joseph F. Spainhour, A. D. McGill, M. Leslie Davis, T. T. Thorne, and W. A. Grier together with their successors in office, are constituted a body politic and corporate under the name and style of Confederate Woman's Home Association, and by that name may sue and be sued, purchase, hold and sell real and personal property, and have all the powers and enjoy all the privileges of a charitable corporation under the law enabling them to establish, maintain, and govern a home for the deserving wives and widows of North Carolina Confederate soldiers and other worthy dependent women of the Confederacy who are bona fide residents of this state.

The corporation may solicit and receive donations in money or property for the purpose of site on which to erect its buildings, to equip, furnish, and maintain it, or for any other purpose whatsoever, may invest its funds to constitute an endowment fund, and shall have a corporate existence for forty years. It shall also have the power to solicit and receive donations for the purpose of aiding indigent Confederate women at their homes in the various counties of the state, and shall have all powers necessary to this end. (1913, c. 62, s. 1.)

§ 5135. Board of directors appointed; officers and duties.—The powers conferred by this article shall be exercised by a board of directors, consisting of seven members, to be appointed by the governor of the state and who shall hold office for the term of two years, and in case of a failure to appoint, the members of such board of directors shall hold their office until their successors are appointed. The board of directors shall elect a president and a secretary, and the treasurer of North Carolina shall be the treasurer of the Woman's Confederate Home Association. The board of directors shall appoint such other officers, agents, or employees as they shall see fit, and prescribe the duties of such officers and employees; establish rules and regulations for the maintenance and government of the home, and have entire control and management of it; prescribe the rules for the admission of the inmates and their discharge, and take what ever action may be desirable in reference to the collection and disbursement or subscription, either to the home or to the needy Confederate women elsewhere in the state. The accounts of the officers and employees shall be duly audited and published and report thereof made as now required by law from the other state institutions. (1913, c. 62, s. 2.)

§ 5136. Location of home.—The board of directors shall locate the Confederate woman's home at such place in North Carolina as they shall deem proper, and it shall be located in or near that town or city offering the largest inducement having due regard to the desirability and suitability for the location of the home. (1913, c. 62, s. 2.)

§ 5137. Advisory board of lady managers.—Mrs. Hunter Smith, Mrs. N. B. Mann, Mrs. T. L. Costner, Mrs. R. F. Dalton, Mrs. F. A. Woodard, Mrs. W. H. Mendenhall, Mrs. E. C. Chambers, Mrs. Charles S. Wallace, Mrs. M. O. Winstead, Mrs. Marshall Williams are appointed an advisory board of lady managers for a term of two years, whose duties it shall be to assist the directors in the equipment and management of the home as they may be requested to do, shall solicit contributions for the home and generally shall use all the powers given to and perform all the duties required of them by the board of directors. The successors in office of said lady managers shall be selected one from each congressional district in the state. All vacancies in said advisory board, whether from expiration of office or otherwise, shall, subject to the limitations herein set out respecting the way of selection, be filled by the board of directors. (1913, c. 62, s. 3.)

§ 5138. Reversion of property.—If the land on which the said home shall be located or used in connection therewith shall at any time cease to be used for that purpose, or for the use and benefit of the dependent wives and widows of the Confederate soldiers as herein specified, or other worthy indigent Confederate women of this state, the same shall revert to the person or persons donating the same, if it has been acquired entirely by donations; otherwise, it shall revert to the state; but in all cases of nonuser for the said purpose, the buildings thereon, the furniture and equipment generally of every nature, shall revert and belong to the state. (1913, c. 62, s. 4.)

§ 5139. Compensation of directors.—The directors provided for in this article shall be entitled to their actual expenses incurred in attending the meetings of the board of directors since their appointment, and also in attending future meetings of the board, the same to be paid out of the funds of the Confederate woman's home. (1915, c. 206.)

§ 5140. Appropriation for building and maintenance.—To build and erect the Confederate woman's home and its necessary outhouses, and to provide for such system of water, lights and sanitation as the board of directors may deem best, the sum of ten thousand dollars is hereby appropriated. Appropriations made to the Confederate woman's home shall be paid to the treasurer of the association, the appropriation for building and erection to be by him disbursed under the orders of the board of directors, and the appropriations for maintenance and support to be paid quarterly under the orders of the board of directors. A report of the receipts and disbursements and the general affairs of the home shall be annually made to the governor of the state, to be by him laid before the general assembly at its biennial session. (1913, c. 62, s. 5.)

As to special appropriations see Public Laws 1915, ch. 151; 1917, ch. 205.

Art. 3. Pensions

§§ 5141-5168: Superseded by sections 5168(a) to 5168(z).

Part 1. Pension Boards

§ 5168(a). State board. Examination of applications.—The governor, attorney-general, and

auditor shall be constituted a state board of pensions, which shall examine each application for a pension, and for this purpose it may take other testimony than that sent by the county boards. Such applications as are approved by the state board shall be paid by the treasurer, upon the warrant of the auditor. (1921, c. 189, s. 1.)

§ 5168(b). State board to make rules.—The state board of pensions is empowered to prescribe rules and regulations for the more certainly carrying into effect this article according to its true intent and purpose. (1921, c. 189, s. 2.)

§ 5168(c). Auditor to transmit lists to clerks of court; publication of list.—The auditor shall, as soon as the same is ascertained, transmit to the clerks of the superior court of the several counties a correct list of the pensioners, with their postoffices, as allowed by the state board of pensions. (1921, c. 189, s. 3; 1929, c. 296, s. 1.)

Editor's Note.—The Act of 1929 struck out the sentence "the auditor may have printed once in each year, but not oftener, a list of the pensioners on the pension roll," formerly appearing at the end of this section.

§ 5168(d). County board.—The clerk of the superior court, together with three reputable ex-Confederate soldiers, or sons, or daughters, or grandsons, or granddaughters of ex-Confederate soldiers, to be appointed by the state auditor, shall constitute a county board of pensions for their county. (1921, c. 189, s. 4; 1929, c. 92, s. 1; 1933, c. 465, s. 1.)

As to compensation of county board of pensions, see section 3913.

Editor's Note.—The Act of 1929 added the words "or daughters" to this section.

Public Laws of 1933, c. 465, made grandsons and granddaughters of veterans eligible for the board.

§ 5168(e). Examination and classification by county board; certificate of disability.—All persons entitled to pensions under this article, not now drawing pensions, shall appear before the county board of pensions on or before the first Mondays in February and July of each year, for examination and classification in compliance with the provisions of this article: Provided, that all such as are unable to attend shall present a certificate from a creditable physician, living and practicing medicine in the community in which the applicant resides, that the applicant is unable to attend. (1921, c. 189, s. 5; 1924, c. 106.)

Editor's Note.—This section was amended in 1924 by adding "s" to "Monday" and inserting the words "February and" as they now appear in this section.

§ 5168(f). Annual revision of pension roll.—On the first Mondays of February and July of each year the pension board of each county shall revise and purge the pension roll of the county, first giving written notice of ten days to the pensioner who is alleged not to be rightfully on the state pension roll, to show cause why his name should not be stricken from the pension list, and the board shall meet another day to consider the subject of purging the list. (1921, c. 189, s. 6; 1924, c. 106.)

Editor's Note. — This section was amended in 1924 by adding the "s" to "Monday" and inserting the words "February and."

Part 2. Persons Entitled to Pensions; Classification and Amount

§ 5168(g). Blind or maimed Confederate soldiers.—All ex-Confederate soldiers and sailors who have become totally blind since the war, or who have lost their sight or both hands or feet, or one arm and one leg, in the Confederate service, shall receive three hundred dollars a year. (Rev., s. 4991; 1901, c. 332, s. 5; 1899, c. 619; 1907, c. 60; 1921, c. 189, s. 7; 1924, c. 83; 1925, c. 275, s. 6.)

Editor's Note.—By the 1925 amendment the words "from the public treasury" were stricken from this section. They immediately followed the word "receive."

Although the act of 1924 purports to amend section 5148 which was superseded by this section by changing the pension from $120 to $300, the codifier of vol. 3 of Consolidated Statutes changed this section to conform to the amendment.

§ 5168(h). Helpless or demented widows of Confederate soldiers.—Every widow of a Confederate soldier who married and was widowed prior to one thousand eight hundred and sixty-six and who has not remarried and who bore and raised legitimate child or children of the deceased Confederate soldier, and who has lost her mind, or become helpless, and is not confined in an asylum, or inmate of any charitable institution, shall receive the same pay and in the same manner as blind Confederate soldiers. (1923, c. 3.)

§ 5168(i). List of blind and disabled soldiers to be sent to governor.—The clerk of the Superior Court shall, under his seal of office, certify to the Governor the names and the number of soldiers examined in his county who are blind and maimed, or who have become paralyzed and are totally disabled by reason thereof; upon such certificate the Auditor, with the approval of the Governor, is authorized to issue his warrant to the Treasurer to pay the sum of four hundred and twenty dollars ($420.00) annually for each blind and maimed person, named in the certificate, and the clerk shall pay out such money monthly to the persons entitled to the same. (1921, c. 189, s. 8; 1927, c. 96, s. 1.)

§ 5168(j). Classification of pensions for soldiers and widows.—There shall be paid out of the Treasury of the State, on the warrant of the Auditor, to every person who has been for twelve months immediately preceding his application for pension a bona fide resident of the State, and who is incapacitated for manual labor, and was a soldier or sailor in the service of the Confederate States of America during the war between the States, and to the widow of any deceased officer, soldier, or sailor who was in the service of the Confederate States of America during the war between the States, if such widow was married to such soldier, or sailor, prior to the date set forth in the widow's classification in this section, and if she has married again, is widow at the date of her application, the following sums annually, according to the degree of disability ascertained by the following grades:

Class "A." To all Confederate soldiers not included in section one of this act, who are now disabled from any cause to perform manual labor, three hundred and sixty-five dollars ($365.00).

Class "B." To such colored servants who

went with their masters to the war and can prove their service to the satisfaction of the country and State pension boards, two hundred dollars ($200.00).

Widows

Class "A." To the widows of ex-Confederate soldiers who are blind in both eyes or totally helpless and confined to the house, three hundred dollars ($300.00). And/or to the widows of ex-Confederate soldiers who were married to said soldiers before or during the war between the states, three hundred dollars ($300.00).

Class "B." To the widows of ex-Confederate soldiers who were married to such soldiers on or before January first, eighteen hundred and eighty, and to such widows who were married to such soldiers subsequent to January first, eighteen hundred and eighty, and who are now on the pension rolls, by virtue of previous statutes, one hundred dollars ($100.00). Provided, that the State Board of Pensions upon the recommendation of the County Pension Board, may add to Class B list of pensions such widows of Confederate Veterans who were married to the deceased Veterans prior to the year one thousand eight hundred and ninety-nine and who are now more than sixty years of age, as in the judgment of the said State Board of Pensions are meritorious and deserving, and who from old age or other afflictions are unable to earn their living. (1921, c. 189, s. 9; Ex. Sess. 1921, c. 89; 1924, c. 111; 1927, c. 96, s. 2; 1929, c. 300, s. 1; 1935, c. 46.)

Editor's Note.—The Act of 1929 added the proviso to the last paragraph of this section.

The second sentence under Class "A" under "Widows" was added by the 1935 amendment.

§ 5168(k). Persons not entitled to pensions.—No person shall be entitled to receive the benefits of this article—

1. Who is an inmate of the soldiers' home at Raleigh;

2. Who is confined in an asylum or county home;

3. Who receives a pension from any other state or from the United States;

4. Who holds a national, state, or county office, which pays annually in salary or fees the sum of three hundred dollars ($300);

5. Who was a deserter, or the widow of such deserter; but no soldier who has been honorably discharged, or who was in service at the surrender shall be considered a deserter in the meaning of this section;

6. Who is receiving aid from the state under any act providing for the relief of soldiers who are blind or maimed.

7. Who owns in his own right, or in the right of his wife, property whose tax valuation excess of two thousand dollars ($2,000), or who, having owned property in excess of two thousand dollars ($2,000), has disposed of the same by gift or voluntary conveyance to his wife, child, next of kin, or to any other person since the eleventh day of March, one thousand eight hundred and eighty-five: Provided, that the county board of pensions may place upon the pension roll, in the classes to which they would otherwise belong, any Confederate soldier, sailor, or widow disqualified by the provisions of this section, who may appear to be unable to earn a living from property valued as much as two thousand dollars ($2,000) or more for taxation, and who may appear to the board from special circumstances worthy to be placed upon the pension roll. (1921, c. 189, s. 10.)

Part 3. Application for Pensions

§ 5168(l). Forms provided by auditor. — The auditor of the state shall provide a form of application (according to the terms of this article), and have the same printed and sent to the clerk of the superior court of the several counties of the state for use of applicants. (1921, c. 189, s. 11.)

§ 5168(m). Application by person, guardian or receiver.—No soldier, officer, sailor, or widow shall be entitled to the benefits of this chapter except upon his or her own application, or, in case he or she is insane, upon the application of his or her guardian or receiver. (1921, c. 189, s. 12.)

§ 5168(n). Applications by persons not on rolls.—Before any officer, soldier, or sailor, not now receiving a pension, shall receive any part of the annual appropriation made for pensions he shall, on or before the first Monday in July of every year, file with the superior court clerk of the county wherein he resides an application for relief, setting forth in detail the company and regiment or battalion in which he served at the time of receiving the wound; the time and place of receiving the wound; whether he is holding an office in the state, United States, or county from which he is receiving the sum of three hundred dollars ($300) in fees or salary; whether he is worth in his own right or in the right of his wife, property at its assessed value for taxation to the amount of two thousand dollars ($2.000); whether he is receiving any aid from the state of North Carolina under any other statute providing for the relief of the maimed and blind soldiers of the state; and whether he is a citizen of the state of North Carolina. Such application shall be verified by the oath of the applicant made before any one empowered to administer oaths, and shall be accompanied by the affidavit of one or more credible witnesses, stating that he or they verily believe the applicant to be the identical person named in the application, and that the facts stated in the application are true; and when the county board of pensions is satisfied with the justice of the claim made by the applicant they shall so certify the same to the auditor of the state under their hands and the seal of the superior court of their county, which shall be impressed by the clerk of the superior court of the county; and there shall accompany the certificate so sent to the auditor the application, affidavit, and proofs taken by them, which papers shall be kept on file in the auditor's office. Clerks of the superior courts shall receive no fees whatsoever for services herein required of them. (1921, c. 189, s. 13.)

§ 5168(o). Time for forwarding certificate; auditor to issue warrant.—It shall be the duty of the clerk of the superior court of the county where the application is filed to forward to the auditor of the state, immediately after the certifi-

cate required by the next preceding section is made and before the first Monday in August in each year, the application and proofs and certificates, and upon the state board of pensions being satisfied of the truth and genuineness of the application the auditor shall issue his warrant on the state treasurer for the same. (1921, c. 189, s. 14.)

§ 5168(p). Subsequent certificate; suggestion of fraud.—After an application has once been passed upon and allowed by the county and state boards, it shall be necessary only for the applicant to file with the auditor of state a certificate from the clerk of the superior court of the county in which the application was originally filed, setting forth that the applicant is the identical person named in the original application which is on file in the auditor's office, and that the applicant is alive, but still disabled, and a citizen of this state, and still entitled to the benefits of this article, which certificate may be passed upon by the state board, upon suggestions of fraud, before the auditor draws his warrant upon such certificate. (1921, c. 189, s. 15.)

Part 4. Payment of Pensions; Warrants

§ 5168(q). Payment of pensions in advance; acknowledgment of receipt of warrants. — Pensions are payable in advance, and the state auditor shall transmit to the clerks of the superior courts of the various counties warrants for pensioners for one-half of the yearly pensions between the first and fifteen of December and for one-half of the yearly pensions between the first and fifteenth of June of each year. It shall be the duty of the clerk of the superior court to acknowledge to the auditor the receipt of such warrants by the next mail after their receipt, to deliver or mail forthwith to each pensioner in his county his warrant, and to post in the courthouse a list of the pensioners to whom he has mailed or delivered warrants. (1921, c. 189, s. 16.)

Petition Not Assignable.—Instalments of a person payable in the future are not assignable. Gill v. Dixon, 131 N. C. 87, 42 S. E. 538.

§ 5168(r). Warrants payable to pensioner or order; indorsement; copy of power of attorney.—The auditor shall issue his warrant payable to the pensioner, or order, and such warrants shall not be paid by the treasurer without the indorsement of the payee or his duly appointed attorney in fact, specially authorized to make such indorsement; and if such indorsement is made by the payee, it shall be attested by the official signature of the clerk of the superior court or some justice of the peace or notary public of the county in which such payee resides, and if such indorsement is made by the attorney in fact of the payee, a copy of the power of attorney, duly attested by the clerk of the superior court or a justice of the peace or notary public of the county in which the payee resides shall be attached to the warrant. (1921, c. 189, s. 17.)

§ 5168(s). Persons to whom payable after death.—Whenever a Confederate pensioner who is now on the pension list shall die after the fifteenth of September, or after the fifteenth of March, and before the December or June pention check is delivered to him or her, it shall be lawful for the clerk of the Superior Court in which such pensioner lived to deliver and pay the next pension warrant due in December or June, as the case may be, to the widow or next of kin of such pensioner, or to such person as designated by the State Board of Pensions, and the endorsement of the widow or next of kin, or person designated by the State Board of Pensions, shall be a valid endorsement of such pension warrant. (1921, c. 189, s. 18; 1927, c. 96, s. 3.)

§ 5168(t). Pensions continued to widows for one year.—All pensions due to Confederate soldiers shall be paid to their widows for a period of one year after the death of any such pensioner: Provided, that the amount paid shall not exceed a widow's pension as prescribed by law. (1921, c. 189, s. 19.)

Part 5. Funds Provided for Pensions

§ 5168(u). Limit and distribution of appropriation.—"The State Auditor is authorized, empowered and directed to apportion, distribute, and divide the money appropriated by the State for pensions, and to issue warrents to the several pensioners pro rata in their respective grades: Provided, that no pensioner on the list shall receive more than one dollar ($1.00) per day annually: Provided, further, that if the money appropriated by the General Assembly for the Confederate soldiers, widows and servants is more than enough to pay them the amounts mentioned in this act, or if for any other cause, after paying the Confederate soldiers, widows and servants the amount stipulated in their respective grades as set out in this act, should there be an excess of the money appropriated for the first year, then the balance in the fund so appropriated for the first year shall revert and supplement the fund appropriated for the second year of the biennium: Provided, further, that any moneys herein appropriated for the purposes aforesaid, shall not be needed to pay the Confederate soldiers, widows and servants the amounts stipulated in their respective grades, then such moneys shall be paid by the State Board of Pensions into the treasury and become a part of the general fund appropriated by the State for other purposes: Provided, that no greater amount shall be paid out under this act than is appropriated under the general appropriation maintenance act. (1921, c. 189, s. 20; 1927, c. 96, s. 4.)

Legislative Right.—It is the exclusive right of the Legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. Board v. Commissioners, 113 N. C. 379, 18 S. E. 661.

§ 5168(v). Increase by counties; special tax.—The county commissioners of each county in the state are authorized and empowered, if in their discretion such levy is deemed advisable, to levy for each year, at the same time and in the same manner as the levy of other county taxes, a special tax not exceeding two cents on the hundred dollars valuation of property and six cents on each taxable poll, the constitutional equation between the property and poll being observed each year for the purpose of increasing the pensions of Confederate soldiers and widows.

Such tax shall be collected and accounted for

by the sheriff or other tax collector in the same manner and under the same penalties as other taxes levied for the county, and the net proceeds thereof shall be applied each year to increase pro rata the pensions of such persons as stand upon the Confederate pension roll of the county for the year in which the tax is levied.

The amount collected under this section shall be disbursed by the county commissioners pro rata to the various pensioners in such county as shown by the state pension list for that county. (1921, c. 189, s. 21.)

As to special pension tax in Cumberland county, see Public Laws 1907, ch. 555.

Constitutionality. — Whether this section be regarded as general or special, it meets the requirements of Article V, section 6, and its efficacy is not impaired by this section of Constitution. It is a familiar principle that existing statutes not expressly or impliedly repealed by an amendment to the Constitution remain in full force and effect, and that a statute will not be declared void unless the breach of the Constitution is so manifest as to leave no room for reasonable doubt. Brown v. Jennings, 188 N. C. 155, 124 S. E. 159.

Part 6. Miscellaneous Provisions

§ 5168(w). Officer failing to perform duties.— Any officer or other person who shall neglect or refuse to discharge the duties imposed upon him by this article shall be guilty of a misdemeanor, and upon conviction thereof in the superior court shall be fined or imprisoned at the discretion of the court. (1921, c. 189, s. 22.)

§ 5168(x). Speculation in pension claims a misdemeanor.—Any person who shall speculate or purchase for a less sum than that to which each may be entitled the claims of any soldier or sailor or widow of a deceased soldier or sailor, allowed under the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both in the discretion of the court. (1921, c. 189, s. 23.)

Pension Not Assignable.—Instalments of a pension payable in the future are not assignable. Gill v. Dixon, 131 N. C. 87, 42 S. E. 538.

§ 5168(y). Payment of burial expenses.— Whenever in any county of this state a Confederate pensioner on the pension roll of the county or the widow of a Confederate soldier shall die, it shall be the duty of the board of commissioners of such county, upon the certificate of such fact by the clerk of the superior court and recommendation of the chairman of the pension board of the county, to order the payment out of the general fund of the county of a sum not exceeding thirty dollars ($30), to be applied toward defraying of the burial expenses of such deceased pensioner or widow. (1921, c. 189, s. 24.)

County Liable for Expenses.—This section requires the $20 (now $30) on account of the burial of a Confederate pensioner to be paid by the board of commissioners of the county of the pension roll on which his name appears, irrespective of residence. Hannah v. Board, 176 N. C. 395, 97 S. E. 160.

§ 5168(z). Peddling without license.—All ex-Confederate soldiers who are without means of support other than their manual labor, and who are incapacitated to perform manual labor for any reason other than by their vicious habits, and now citizens of this state, shall be allowed to peddle drugs, goods, wares, and merchandise in any of the counties of this state without a license therefor. Before any soldier shall be entitled to the benefits of this article he shall make application to the county board of pensioners of the county of which he is a resident, and show to the satisfaction of the county board of pensions that he is entitled to the same by having served in the Confederate army or navy during the war between the states, and that he is incapacitated to perform manual labor, and does not own property the tax valuation of which exceeds the sum of two thousand dollars ($2,000) in his own name or in the name of his wife, deeded to her by him since the first day of March, one thousand nine hundred and two. (1921, c. 189, s. 25.)

As to exception from jury duty, see section 2399; as to constitutionality of exceptions from tax as peddlers, see Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

§ 5168(aa). Exemption of pensions or compensations from taxation.—Every person receiving a pension or compensation from the state, or United States, or any foreign country or government, for and on account of wounds or physical disabilities contracted or sustained during the late war between the United States and Germany, and any of the allied countries coöperating with the United States, shall not be required to pay any tax of any kind upon such pension or compensation, but the same shall be exempted from any and all taxes. This section shall apply to all such taxes for the year one thousand nine hundred and twenty-three, and thereafter. (1923, c. 259.)

§ 5168(bb). Taking fees for acknowledgments by pensioners. — It shall be unlawful for any clerk of the Superior Court, notary public or any magistrate to charge any Confederate pensioner or the widow of such Confererate pensioner receiving a pension from the State of North Carolina for taking acknowledgments in connection with pension papers.

Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1925, c. 68.)

§ 5168(bb)1. Officers required to check roll of pensioners with record of vital statistics. — It shall be the duty of the Register of Deeds and the Clerk of the Court of each county in the State of North Carolina to check the roll of pensioners furnished the Clerks of the Court of the various counties of the State, with the record of vital statistics in the office of the Register of Deeds, within ten days after receipt of the pension roll, which roll shall be furnished by the State Auditor on or before October fifteenth and April fifteenth of each year, and certify under their hands and seals of their office, the names of all deceased pensioners with dates of their death, whose names appear upon the pension roll, to the State Auditor; the State Auditor at the time of furnishing the pension rolls to the Register of Deeds and Clerk of the Superior Court of each county, as herein provided, shall also furnish copies of said pension rolls to the State Registrar of Vital Statistics, who shall cause the same to be checked against the vital statistics records in his office and certify to the State Auditor the names of all persons appearing on said pension rolls, which the records in his office show to be de-

ceased, together with the dates of their death. (1931, c. 144.)

CHAPTER 92A
CONTRACTORS

Art. 1. General Contractors

§ 5168(cc). Contractor defined. — For the purpose of this article a general contractor is defined to be one who, for a fixed price, commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading or any improvement or structure where the cost of the undertaking is ten thousand dollars or more; and anyone who shall engage in constructing or superintending the construction of any structures or any undertakings or improvements above mentioned in the State of North Carolina costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina. (1925, c. 318, s. 1; 1931, c. 62, s. 1.)

§ 5168(dd). Licensing board; organization. — There shall be a State licensing board for contractors consisting of five members who shall be appointed by the Governor within sixty days after this article becomes effective. At least one member of such board shall have as a larger part of his business the construction of highways; at least one member of such board shall have as the larger part of his business the construction of public utilities; at least one member shall have as the larger part of his business the construction of buildings. The members of the first board shall be appointed for one, two, three, four and five years respectively, their terms of office expiring on the thirty-first day of December of the said years. Thereafter in each year the Governor in like manner shall appoint to fill the vacancy caused by the expiration of the term of office a member for a term of five years. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. If vacancies shall occur in the board for any cause the same shall be filled by the appointment of the Governor. The Governor may remove any member of the board for misconduct, incompetency or neglect of duty. (1925, c. 318, s. 2.)

§ 5168(ee). Members of board to take oath.— Each member of the board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)

§ 5168(ff). First meeting of board; officers; secretary-treasurer to give bond.—The said board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice chairman, and a secretary-treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1925, c. 318, s. 4.)

§ 5168(gg). Seal of board. — The board shall adopt a seal for its own use. The seal shall have the words "Licensing Board for Contractors, State of South Carolina," and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5.)

§ 5168(hh). Meetings; notice; quorum. — The board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the board shall elect officers. Special meetings may be held at such times as the board may provide in the by-laws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws may provide. Three members of the board shall constitute a quorum. (1925, c. 318, s. 6.)

§ 5168(ii). Records of board; disposition of funds.—The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the board after the expenses of the board for the current year have been paid shall be paid over, share and share alike, to the University of North Carolina and to the North Carolina state College of Agriculture and Engineering for the use of their engineering departments. The board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation to meet any emergency that may arise. (1925, c. 318, s. 7.)

§ 5168(jj). Records; roster of licensed contractors.—The secretary-treasurer shall keep a record of the proceedings of the board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of funds of said board as provided in section 5168(ii), and a copy mailed to and placed on file by the clerk of each incorporated city, town and county in the State. On or before the first day of March of each year the board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary and a copy of the said roster of licensed general contractors. (1925, c. 318, s. 8.)

§ 5168(kk). Application for license; examination; certificate; renewal.—Anyone hereafter desiring to be licensed as a general contractor in this State shall make and file with the board thirty days prior to any regular or specfiial meeting thereof a written application on such form as may then be by the board prescribed for examination by the board, which application shall be accompanied by twenty ($20.00) dollars. If said application is satisfactory to the board, then the applicant shall be entitled to all examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the board, then the board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina. Any one failing to pass such examination may be reexamined at any regular meeting of the board without additional fee. Certificate of license shall expire on the last day of December following their issuance or renewal and shall become invalid on that date unless renewed. Renewal may be effective any time during the month of January by the payment of a fee of ten dollars ($10) to the secretary of the board. (1925, c. 318, s. 9; 1931, c. 62, s. 2.)

§ 5168(ll). Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; notice of charges; reissuance of certificate.—The board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency or misconduct in the practice of his profession. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the board. Such charges, unless dismissed without hearing by the board as unfounded or trivial, shall be heard and determined by the board within three months after the date in which they were preferred. A time and place for such hearing shall be fixed by the board and held in the county in which said charges originated. A copy of the charges, together with the notice of the time and place of hearing, shall be legally served on the accused at least thirty days before the fixed date for the hearing, and in the event that such service cannot be effected thirty days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel and to cross-examine witnesses against him, her or them, and to produce evidence of witnesses in his, her or their defense. If after said hearing the board unanimously votes in favor of finding the accused guilty of any fraud or deceit in obtaining license, or of gross negligence, incompetency or misconduct in practice the board shall revoke the license of the accused.

The board may reissue a license to any person, firm or corporation whose license has been revoked: Provided, three or more members of the board vote in favor of such reissuance for reasons the board may deem sufficient.

The board shall immediately notify the Secretary of State and the clerk of each incorporated city, town or county in the State of its finding in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the board. (1925, c. 318, s. 10.)

§ 5168(mm). Certificate evidence of license. — The issuance of a certificate of license by this board shall be evidence that the person, firm or corporation named therein is entitled to all the rights and privileges of a licensed general contractor while the said license remains unrevoked or unexpired. (1925, c. 318, s. 11.)

§ 5168(nn). Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to board; penalties. — Any person, firm or corporation not being duly authorized who shall attempt to practice general contracting in this State, except as provided for in this article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who receives or considers a bid from any one not properly licensed under this chapter, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court. (1925, c. 318, s. 12; 1931, c. 62, s. 3.)

Editor's Note.—The Act of 1931 amended the first part of this section and also added the reference to architect or engineer.

§ 5168(oo). Exemptions from chapter. — The following shall be exempt from the provisions of this article: The practice of general contracting as defined in section 5168(cc) by an authorized representative or representatives of the United States government, State of North Carolina, incorporated town, city or county of this State: Provided, however, that such operation shall be under the supervision of a licensed architect or a registered engineer. (1925, c. 318, s. 13; 1931, c. 62, s. 4.)

§ 5168(pp). Copy of chapter included in specifications; bid not considered unless contractor licensed.—All architects and engineers preparing plans and specifications for work to be contracted in the State of North Carolina shall include in their invitations to bidders and in their specifications a copy of this article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this State and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14.)

§ 5168(qq). Monthly reports to Commissioner of Revenue as to licenses issued.—It shall be the duty of the Secretary of the Board to make a monthly report to the Commissioner of Revenue, setting out in detail the name of the contractor, the location of the structure, or work, and the estimated cost of said structure or work, where the same shall exceed in value ten thousand dollars ($10,000.00) for all contracts let coming to his notice and not theretofore reported by him. (1931, c. 62, s. 5.)

Art. 2. Plumbing and Heating Contractors

§ 5168(rr). Board of Examiners; appointment; term of office.—For the purpose of carrying out the provisions of this article there is hereby created a State Board of Examiners of Plumbing and Heating Contractors, consisting of five members to be appointed by the Governor within sixty days after the ratification of this article. The said board shall consist of one member from the Engineering School of the University of North Carolina, one member from the State Board of Health, one member to be a plumbing inspector from some city of the State, one licensed master plumber and one heating contractor. The term of office of said members shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy on the board thus created. Vacancies in the membership of the board shall be filled by appointment by the Governor for the unexpired term. (1931, c. 52, s. 1.)

For act making this article applicable to certain towns in Beaufort, Carteret, Stanly, Moore and New Hanover counties, see Public Laws of 1935, chapter 338.

§ 5168(ss). Removal, qualifications and compensation of members; allowance for expenses.—The Governor may remove any member of the board for misconduct, incompetency or neglect of duty. Each member of the board shall be a citizen of the United States and a resident of this State at the time of his appointment. Each member of the board shall receive ten dollars per day for attending sessions of the board or of its committees, and for the time spent in necessary traveling in carrying out the provisions of this article, and in addition to the per diem compensation, each member shall be reimbursed by the board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof, as shall be approved by a majority of the members of the board. (1931, c. 52, s. 2.)

§ 5168(tt). Organization meeting; officers seal; examination of witnesses and taking of testimony.—The board shall within thirty days after its appointment meet in the city of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the board for the faithful performance of his duties, in such sum as the board may, from time to time determine. The board shall have a common seal and shall formulate rules to govern its actions, and each member of the board shall be empowered to administer oaths and have power to compel the attendance of witnesses, and it may take testimony and proofs concerning all matters within its jurisdiction. (1931, c. 52, s. 3.)

§ 5168(uu). Regular and special meetings; quorum.—The board after holding its first meeting as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the by-laws and/or rules of the board provide; or as may be required in carrying out the provisions hereof. A quorum of the board shall consist of not less than three members. (1931, c. 52, s. 4.)

§ 5168(vv). Record of proceedings and register of applicants; reports. — The board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the board attested by the chairman and secretary. (1931, c. 52, s. 5.)

§ 5168(ww). Contractors licensed by Board; license fee; towns excepted. — All persons, firms or corporations desiring to enter into or carry on the plumbing and/or heating contracting business, shall first apply to the board for examination and license, at least thirty days prior to engaging in said business, said application to be accompanied by certified check in the sum of fifty dollars; Provided, that the requirements of this section shall not apply to persons engaged in the plumbing and/or heating business, in towns or cities having a population of not more than thirty-five hundred. (1931, c. 52, s. 6.)

If the classification of the subjects of taxation, provided for in this section, is not arbitrary and unjust it cannot be regarded in law as a breach of the rule of uniformity. Classification by population is not in itself arbitrary, unreasonable, or unjust. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

§ 5168(xx). Return of license fee to unsuccessful applicants; annual renewal of licenses.—In the event the board refuses to license an applicant, the license fee deposited shall be returned by the board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of licenses, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor in the sum of fifty dollars during the month of January in each year, the board shall increase said license fee ten percentum for each month or fraction of a month that payment is delayed; Provided, that the maximum fee for re-

newal of license shall not exceed twice the regular annual fee. (1931, c. 52, s. 7.)

§ 5168(yy). Revocation of license for cause. — The board shall have power to revoke the license of any plumbing and/or heating contractor, who is guilty of any fraud or deceit in obtaining a license; or for gross negligence, incompetency or misconduct in the practice of or in carrying on the business of a plumbing and/or heating contractor. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency or misconduct against any plumbing and/or heating contractor registered hereunder. All of such charges shall be in writing and verified by the complaint, when submitted to the board. Such charges shall be heard and determined by the board within ninety days after the same are received by it. A time and place for such hearing shall be fixed by the board and a copy of said charges together with notice of the time and place of hearing shall be furnished to the person, firm or corporation accused at least thirty days before the day fixed for the hearing. At said hearing the person accused shall have the right to appear personally and/or by counsel and be heard in defense of said charges. After the conclusion of said hearing if the board finds that there has been any fraud or deceit in obtaining license, or gross negligence, incompetency or misconduct, in the carrying on of the business of plumbing or heating contracting the board shall revoke the license of the accused; Provided, that nothing in this section shall be construed to deny to the party whose license has been revoked the right of appeal and trial of his cause in the superior courts of North Carolina. (1931, c. 52, s. 8.)

The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

§ 5168(zz). Re-issuance of revoked licenses; replacing lost or destroyed licenses.—The board may in its discretion re-issue license to any person, firm or corporation whose license may have been revoked; Provided, three or more members of the board vote in favor of such re-issuance for reasons deemed sufficient by the board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the board. (1931, c. 52, s. 9.)

§ 5168(aaa). Practice without license unlawful. —Any person, firm, or corporation, after this article has been in effect for a period of twelve months, who has not then been licensed to carry on the business of plumbing and heating contracting in this State, according to the provisions of this article or, who shall practice or offer to practice or carry on said business, or any person, firm or corporation, who shall give false or forged evidence of any kind to the board, or any member thereof, in obtaining a license or, who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars or imprisoned for not more than three months or both, in the discretion of the court. (1931, c. 52, s. 10.)

§ 5168(bbb). Licensing of non-resident contractors. — All non-resident plumbing and/or heating contractors desiring to do business in this State shall apply to the board for examination and obtain license before entering into said business, and file with the board certified check for the license fee provided for in this article together with the cost of holding a special meeting to pass upon such application. If such non-resident applicant fails to pass the examination required the license fee deposited shall be retained by the board. (1931, c. 52, s. 11.)

§ 5168(ccc). Only one person in partnership or corporation need have license; those engaged in trades may receive licenses upon payment of fee.—A corporation or partnership may engage in the business of plumbing and/or heating provided one or more persons connected with such corporation or partnership is registered and licensed as herein required. All persons now engaged in the plumbing or heating business and holding a State license shall receive his or their license, or renewal thereof to engage in said business without examination upon payment of an annual license fee of fifty dollars. (1931, c. 52, s. 12.)

§ 5168(ddd). License fees payable in advance; application of; towns of less than 10,000.—All license fees shall be paid in advance to the secretary and treasurer of the board, and by him held as a fund for the use of the board. The compensation and expenses of the members of the board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this article shall be paid out of such fund, upon the warrant of the president and secretary and treasurer: Provided, upon the payment of the necessary expenses of the board as herein set out, and the retention by it of twenty-five per centum of the balance of funds collected hereunder, the residue, if any, shall be paid to the state treasurer: Provided further, that the fee of those doing business in towns of less than ten thousand inhabitants shall be required to pay a license fee of twenty-five dollars only, under the provisions of this article. The license may be renewed upon payment of one-half the yearly fee and payment of the balance on or before June thirtieth of the current year. (1931, c. 52, s. 13; 1933, c. 57.)

Editor's Note.—Public Laws of 1933, c. 57, made the last proviso, as the section now reads, applicable in towns of less than 10,000 instead of 5,000. The act also added the last sentence relating to renewals.

It is obvious that the pervading intent of this section is to provide for the maintenance of the board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

CHAPTER 93
CO-OPERATIVE ORGANIZATIONS

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATION

Art. 1. Organization

§ 5169. Application of term.—The term "building and loan association," as used in this subchap-

ter, shall apply to and include all corporations, companies, societies, or associations organized for the purpose of making loans to its members only, and of enabling its members to acquire real estate, make improvements thereon and remove incumbrances therefrom by the payment of money in periodical installments or principal sums and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes. It shall be unlawful for any corporation, company, society, or association doing business in this state not so conducted to use in its corporate name term "building and loan association" or "building association," or in the manner or device to hold themselves out to the public as a building and loan association. (Rev., s. 3881; 1905, c. 435, s. 16.)

For a full treatment of Building and Loan Associations, see 2 Enc. Dig. 705, et seq.; as to taxation, see § 7880(64).

§ 5170. Method of incorporation; powers. — It shall be lawful for any persons in any city, town, or county of this state, under any name by them to be assumed, to associate for the purpose of organizing and establishing a homestead and building and loan association, and being so associated, they shall, on complying with this subchapter, be a body politic and corporate, and as such be capable in law to hold and dispose of property, both real and personal; may have and use a common seal; may choose a presiding and other officers; may enact by-laws for the regulation of the affairs of such corporation, and compel the due observance of the same by fines and penalties; may sue and be sued, plead and be impleaded, answer and be answered in any court in this state, and do all acts necessary for the well ordering and good government of the affairs of such corporation, and shall exercise all and singular the powers incident to bodies politic and corporate: Provided, that before any such corporation shall be entitled to the privileges of this subchapter it shall file with the clerk of the superior court of the county where such corporation is designed to act a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such clerk, and shall pay a tax of twenty-five dollars to the clerk, which tax shall be paid over by the clerk to the treasurer of the county, to the use of the school fund of the county. The clerk shall certify a copy of the charter to the insurance commissioner. The clerk shall not issue or record the same until duly authorized to do so by the Insurance Commissioner as hereinafter provided.

(a) Upon receipt of a copy of the certificate of incorporation of the proposed association, the Insurance Commissioner shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business for which it is organized the Insurance Commissioner shall so certify to the Clerk of Court in the county in which organized, who shall thereupon issue and record such certificate of incorporation. But the Insurance Commissioner may refuse to so certify, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any purpose other than a mutual building and loan business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said building and loan association is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment; or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted or appropriated by an existing association in the same county, or so similar thereto as to be likely to mislead the public.

(b) Upon receipt of such certificate from the Insurance Commissioner, the Clerk of Court shall, if said certificate of incorporation be in accordance with law, issue and cause same to be recorded in the records of his office as hereinabove provided. (Rev., s. 3877; 1905, c. 435, s. 1; 1931, c. 73.)

Editor's Note.—The Act of 1931 amended this section by providing for an investigation of its organizers, etc., substantially copied from the Banking Law. See § 217(c). The examiner of prospective building and loan associations is, however, the Commissioner of Insurance instead of the Commissioner of Banks. There would seem to be much reason for putting this preliminary examination into the hands of the new Commissioner of Banks. 9 N. C. Law Rev. 351.

§ 5171. Amendments to certificate.—Any addition, alteration, or amendment of the certificate of incorporation of any such corporation shall be signed, certified, and recorded as is provided in the preceding section. (Rev., s. 3878; 1905, c. 435, s. 2.)

§ 5172. Form of certificate.—Substantially the following form shall be used by associations to be formed under this chapter:

Certificate of Incorporation

This is to certify that we, the undersigned citizens of the state of North Carolina, hereby associate ourselves into a building and loan association under and by virtue of the provisions of subchapter I, entitled Building and Loan Associations, of chapter 93 of the Consolidated Statutes of North Carolina, and by this certificate do set forth:

First. The name of said association is to be .....

Second. The location where its business is to be transacted is in the ..... of ..... in the county of ..... and state of North Carolina, and the principal office of said corporation is to be at No. ....., ... street, in the ..... of ..... aforesaid.

Third. The object for which said association is formed is to enable the subscribers hereto to assist each other, and all who may become associated with them, in making loans to its members only, and to enable them to acquire real estate, making improvements thereon and removing incumbrances therefrom by the payment of periodical installments, and to accumulate a fund, to be paid by its members who do not obtain loans for the purposes aforesaid when the funds of said association shall amount to the sum of

..... dollars per share of the first and subsequent classes or series.

Fourth. The amount fixed as the value of each share, when matured or full paid, is to be ..... dollars. The number of shares to be subscribed before said association shall begin business shall be ..... The maximum number of shares in this association at any one time to be in force shall be ..... The number of shares subscribed for by the incorporators is...., and the number of shares subscribed for by each of them is as follows:

Name	Number of Shares
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

In witness whereof, we have hereto set our hands and seals, the .... day of ...., A. D. 19..

..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)

Signed, sealed, and delivered in the presence of ..... (Rev., s. 3879; 1905, c. 435, s. 27.)

§ 5173. When to begin business.—Upon filing the certificate of incorporation with the clerk of the superior court of the county where the principal office of the corporation is located, and with the insurance commissioner, the company shall become a body politic and corporate, and shall be authorized to begin business, when licensed by the insurance commissioner. (Rev., s. 3880; Code, s. 2297; 1907, c. 959, s. 1.)

§ 5174. Chapter on corporations applicable. — All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled Corporations, not inconsistent with this subchapter, or with the business of building and loan associations shall be applicable to building and loan associations. (Rev., s. 3882.)

§ 5175. Charters validated. — The charters of all building and loan associations heretofore organized are hereby in all respects validated and confirmed, and all such associations shall have the powers and privileges of associations formed under this subchapter. (Rev., s. 3883; 1905, c. 435, s. 27.)

§ 5175(a). May become members of and hold stock in federal home loan bank.—Any building and loan association heretofore or hereafter organized under the laws of this state may subscribe to, purchase, hold, own and dispose of stock in any federal home loan bank, and may become members of any such bank authorized by or organized under an act of congress entitled "the federal home loan bank act," approved July 22, 1932. (1933, c. 20.)

§ 5175(b). Annual meetings.—The annual meeting of any such association shall be held at such time and place as shall be fixed in the notice of said meeting. There shall be published once a week for two weeks preceding such meeting, in a newspaper published in the county or town where the association has its principal office, a notice, signed by the secretary, of such meeting, and the time and place where the same is to be held: and such further notice shall be given as the charter or by-laws of the association may require. Notice of special meetings of shareholders shall be given in a like manner. Unless otherwise provided, twenty-five shareholders, present in person or represented by proxy, shall constitute a quorum at any regular or special shareholders' meeting. If no newspaper be published in the county or town in which any association has its principal office, then the notice above provided may be published by posting same at a conspicuous place in the office of the association, and a like notice at the door of the county court house. (1933, c. 19.)

The provision for special meetings of stockholders, of whom 25 shall constitute a quorum "unless otherwise provided," presumably means in the charter or by-laws, though the context might suggest a provision in the notice of the meeting. See 11 N. C. Law Rev., 206.

§ 5175(c). Conversion of building and loan associations into federal savings and loan associations.—Any corporation organized and existing under the laws of this State and operating as a building and loan association may convert itself into a federal savings and loan association pursuant to an act of Congress, approved June thirteenth, nineteen hundred and thirty-three, entitled "Home Owners' Loan Act of Nineteen Hundred and Thirty-three," and any amendments thereto, with the same force and effect as though originally incorporated under such act of Congress, and the procedure to effect such conversion shall be as follows:

1. The directors shall submit a plan of conversion to the insurance commissioner, and he may approve the same, with or without amendment, or disapprove the plan. If he approve the plan, then same shall be submitted to the shareholders as provided in the next sub-section.

2. A meeting of the shareholders shall be held upon not less than ten days' written notice to each shareholder, served personally or sent by mail to the last known address of such shareholder, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this corporation into a federal savings and loan association, pursuant to act of Congress approved June thirteenth, nineteen hundred and thirty-three." The secretary or other officer of the corporation shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

3. At the meeting of the shareholders of such corporation, called and held as above provided, such shareholders may, by affirmative vote of a majority of shareholders present, in person or by proxy, declare by resolution the determination to convert said corporation into a federal savings and loan association. A copy of the min-

utes of the proceedings of such meeting of the shareholders certified by the president or vice-president and secretary or assistant secretary of the corporation shall be filed in the office of the insurance commissioner of this State within five days after such meeting, and a like copy shall also be filed in the office of the clerk of the superior court of the county in which such corporation has its principal office. Each of said certified copies when so filed shall be presumptive evidence of the holding and the action of such meeting.

4. Within a reasonable time after the receipt of a certified copy of the minutes of said meeting the insurance commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the conversion and proceedings, and send same to the corporation. Such certificate shall be recorded in the office of the clerk of superior court of the county in which the corporation has its principal office, and the original shall be held by the corporation. If the commissioner disapproves such proceedings he shall mark the certified copy of minutes in his office disapproved and notify the corporation to that effect.

5. Within sixty days after the approval of the proposed proceedings by the insurance commissioner, the officers of said corporation shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make it a federal savings and loan association, and there shall thereupon be filed in the office of the insurance commissioner a copy of the charter or authorization issued to such corporation by the federal home loan bank board, or a certificate showing the organization or conversion of such corporation into a federal savings and loan association, and upon such filing with the insurance commissioner the corporation shall cease to be a state corporation and shall be deemed to be converted into a federal savings and loan association.

6. Whenever any such corporation shall so convert itself into a federal savings and loan association it shall thereupon cease to be a corporation under the laws of this State, except that its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its concerns as a state corporation, and to dispose of and convey its property. At the time when such conversion becomes effective all the property of the state corporation, including all its right, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal savings and loan association, which shall have, hold and enjoy the same in its right as fully and to the same extent as the same was possessed, held and enjoyed by the state corporation; and the federal savings and loan association as of the time of the taking effect of such conversion shall succeed to all the rights, obligations and relations of the state corporation.

7. Any such corporation may, instead of effecting the conversion above provided, at a meeting called and held as above outlined, authorize the sale of all or any portion of its assets, subject to the approval of the insurance commissioner, to a federal savings and loan association or to a building and loan association of this state, and subject to the approval of the insurance commissioner, may authorize the taking of stock in the association so buying the assets in payment thereof; and upon liquidation of the selling corporation the stock so received shall be distributed to its shareholders. In the event such sale shall be authorized, and approved by the insurance commissioner, the directors and officers shall have full power and authority to do any and everything necessary to carrying same into effect. (1935, c. 104.)

Art. 2. Shares and Shareholders

§ 5176. Number of shares and entrance fee prescribed.—Any corporation created under and by virtue of this subchapter shall have power to declare in its certificate of incorporation the maximum number of shares of which the corporation shall consist to be in force at any one time, the par value of the same, to prescribe the entrance fee per share to be paid by each shareholder at the time of subscribing, to regulate the amount of the installments to be paid on each share, and the time at which the same shall be paid and payable; Provided, that not more than one per cent of the par value of each share of stock subscribed, may be paid as commissions or other remuneration for the soliciting and sale of stock. (Rev., s. 3887; 1905, s. 435, s. 3; 1931, c. 75.)

Editor's Note.—The Act of 1931 added the proviso to this section by which a building and loan association is prohibited from paying more than 1% for services in obtaining stock subscriptions. No penalty is attached for violation but the license of the association might be revoked under the provisions of § 5189 if any prohibited payments were discovered through the annual report (see § 5187) or otherwise. 9 N. C. Law Rev. 351.

Applied in Dorrity v. Greater Durham Bldg., etc., Ass'n, 204 N. C. 698, 169 S. E. 640.

§ 5177. Different classes of shares; dividends; reserve fund.—Every building and loan association doing business in this state shall be authorized to issue as many series or classes and kinds of shares and at such stated periods as may be provided for in its charter or by-laws: Provided, the dividends on paid-up stock shall be less than the association is earning, and such stock may have the right to share in the dividends between the rate paid and the earned per centum. Every association shall at all times have on hand, investments in obligations of the United States government or the government of the state of North Carolina, or stock in the federal home loan bank, or bonds issued by the federal home loan bank, or on deposit in such bank or banks as may have been approved by a majority of the entire board of directors, an amount equal to at least five per centum of the aggregate amount of paid-up stock outstanding, as shown by the books of the as-

sociation. When the aggregate of investment or funds in hand or on deposit as herein provided falls below the amount required under this section, the association shall make no new real estate loans until the required amount has been accumulated: Provided that the refinancing, recasting or renewal of loans previously made, and/or loans made as a result of foreclosure sales under instruments held by the interested building and loan association, shall not be considered as new loans within the meaning of this section. (Rev., s. 3889; 1905, c. 435, s. 6; 1907, c. 959, s. 3; 1919, c. 179, s. 3; 1931, c. 107; 1933, c. 26.)

See 11 N. C. Law Rev., 207, for comment on changes made in this section by the 1933 amendment.

Editor's Note.—The Act of 1931 amended this section in two ways: (1) by doing away with all provisions about guaranteed dividends; (2) by requiring a reserve paid-up stock. Some confusion is introduced into the Act by two provisions as to its effective date. Section 1 declares that the Act shall not take effect till January 1, 1932; section 2 repeals conflicting laws: section 3 reads "This Act shall be in force and effect from and after its ratification" (which was Mar. 13, 1931). Apparently the Act has been a law of the State from last March but its provisions do not become effective as governing rules till next year. If any previous law is repealed by the second section it would seem to leave a gap till the date next year when the Act takes effect. No conflicting laws have been found, however. Consider the effect of the Act on past or future contracts like that involved in Fagg v. So. Building and Loan Association, 113 N. C. 364, 18 S. E. 655, 9 N. C. Law Rev. 352.

Public Laws of 1933, c. 26, substituted the above section in lieu of the former reading. A comparison of the old with the new is necessary to determine the changes.

Optional payment stock may be issued under this section. Lumpkin v. Durham Bldg., etc., Co., 204 N. C. 563, 169 S. E. 156.

§ 5178. Certificate issued and payment enforced.—Any such corporation shall have power to issue to each member a certificate of the shares held by him, and to enforce the payment of all installments and other dues due to the corporation from the members or shareholders by such fines and forfeitures as the corporation may from time to time provide in the by-laws or its certificate of incorporation. (Rev., s. 3888; 1905, c. 435, s. 4.)

§ 5179. New members admitted.—Any person applying for membership or shares in any corporation after the end of a month from the date of its incorporation may be required to pay, on subscribing, such sums or assessments as may from time to time be fixed and assessed in the manner provided by the corporation, in order to place such new member or shareholder or like footing with the original members and others holding shares at the time of such application. (Rev., s. 3886; 1905, c. 435, s. 5.)

§ 5180. Shareholders equally liable. — All shareholders shall occupy the same relative position as to debts, losses, and profits of the association: Provided, that this shall not prevent the payment of a lesser rate of dividend on paid-up stock as provided in section five thousand one hundred and seventy-seven, of the Consolidated Statutes, but this provision shall not prevent any association from receiving dues in advance, allowing such a rate of interest for the anticipated payments of dues as may be agreed upon by the directors. No series or class of stock shall be paid off until fully matured: Provided, that this section shall not prevent the cashing in of any stock before maturity. (Rev., s. 3884; 1905, c. 435, s. 7; 1907, c. 959, s. 2; 1919, c. 179, s. 2; 1931, c. 109.)

Editor's Note.—The Act of 1931 struck out the former section and inserted the above in lieu thereof. The stockholders equality feature of the law is now expressly qualified by a provision that a lesser rate of dividend may be declared on paid-up stock than on serially maturing issues. The proviso is new. What seems to be meant is that until the full matured value of serial stock is earned, i. e., until it has actually matured, it cannot be paid off at that ultimate figure under an agreement or guarantee, but that before maturity it may be cashed in at its value then accrued. This construction has been put upon the act as now amended by a building and loan officer who was consulted on the subject. 9 N. C. Law Rev. 352.

In General.—In case of the insolvency of a building and loan association, every person having stock therein, whether as creditor or debtor, must be considered a corporator, and every member indebted to it must be treated as a debtor. Strauss v. Carolina Interstate Bldg., etc., Ass'n, 117 N. C. 308, 23 S. E. 450; 118 N. C. 556, 24 S. E. 116. Such debtors are liable for authorized assessments to cover losses. New Bern Bldg., etc., Ass'n v. Blalock, 160 N. C. 490, 76 S. E. 532.

Liability of Corporation. — Where a corporation becomes the holder of stock in another corporation, e. g., a Building and Loan Association, which becomes insolvent, it may be held liable on the same, as an incorporator, in the association issuing the stock. Meares v. Monroe Land, etc., Co., 126 N. C. 662, 36 S. E. 130.

Stockholder and Debtor. — Where the borrower from a building and loan association takes out stock, to pay at maturity the debt secured by a mortgage on his building, he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the associations; that of stockholders, and that of debtor to the association, and he is not entitled to have his payments made on his shares of stock credited to his debt, as against the claims of the other creditors. Rendleman v. Stoessel, 195 N. C. 640, 143 S. E. 219.

§ 5181. Married women and minors as shareholders.—Married women and minors of the age of twelve years and upward are authorized and empowered to become shareholders in and buy, sell, hold, pay dues on, withdraw, transfer, and otherwise deal in the shares in any such association in the same manner and with the same powers, rights, and liabilities, force and effect as though such minors or femes covert were of full age or unmarried. (Rev., s. 3885; 1903, c. 728; 1905, c. 435, s. 1.)

Mortgage by Wife for Husband's Debts.—Where the husband is a borrower and incorporator of a Building and Loan Association and his wife joins him in a mortgage of her land to secure the debt, while she incurs no personal liability, yet she occupies the relation of surety to the extent of her mortgaged property. Meares v. Butler, 123 N. C. 206, 31 S. E. 477.

This section is a statutory exception to the general rule that contracts of infants are voidable at the option of the infant, and when so avoided are void ab initio. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 178 S. E. 863.

Art. 3. Loans

§ 5182. Manner of making loans; security required.—At such times as the by-laws shall designate, not less frequently than once a month, the board of directors shall hold meetings at which the funds in the treasury applicable for loans may be loaned. No loans shall be made by such association to any one not a shareholder thereof, nor to any shareholder for an amount greater than the par value of the shares held by such shareholder. Borrowers shall be required to give real estate security, either by way of mortgage or deed in trust unincumbered, except by the prior liens held by such association, accompanied by a transfer and pledge to the association of the shares by reason of which he became entitled to

obtain such loan, as collateral security for the repayment of the loan: Provided, that the shares of any such association may be received as security for a loan on such shares of an amount not to exceed ninety per centum of the amount paid in as dues on such shares: Provided further, that liberty loan bonds issued by the United States government may be received as security to an amount not exceeding ninety per cent of the face value of such bonds, and not exceeding the par value of the shares of stock held by the borrower; and any loans heretofore made by any such association upon the security of such liberty loan bonds, within said limits, are in all respects validated. (Rev., s. 3890; 1905, c. 435, s. 8; 1907, c. 959, s. 4; 1919, c. 249.)

As to investment in bonds guaranteed by United States, see § 220(a) 1. As to loans on mortgages, etc., issued under federal housing act, see § 220(a) 2.

See notes to and cases cited under section 5183.

§ 5183. Repayment at any time.—Any member of such association who shall borrow from it shall have the right at any time prior to the maturing of the shares pledged as collateral for such loan to pay off and discharge his loan by paying the amount received by him, including the cost and expenses of making the loan, if the same has been deducted therefrom, with interest at the rate of six per cent per annum on the whole sum received by him to the date of settlement and all fines and dues then remaining unpaid. Upon such settlement he shall be credited with only the withdrawal value of his shares as fixed by the charter or by-laws, or by the directors of such association. In case of default by a shareholder who has borrowed from the association and a foreclosure of his mortgage or deed of trust, the amount of this indebtedness to such association shall be ascertained in the manner provided by this subchapter. (Rev., s. 3891; 1905, c. 435, s. 9.)

Cross References.—For a full treatment of Building and Loan Associations, see 2 Enc. Dig. 705 et seq.; as to interest and usury laws in general, see section 2305 et seq.

Stockholder Cannot Escape Payment of Losses.—Before availing himself of the privileges provided by this section the stockholder must have paid any assessments to meet losses of the corporation. New Bern Bldg., etc., Ass'n v. Blalock, 160 N. C. 490, 76 S. E. 532. See also Mears v. Davis, 121 N. C. 126, 28 S. E. 188.

Usury.—An illegal transaction cannot be settled. Dickens v. Bldg. Asso., 89 N. C. 37. And the usury laws apply to the same extent as to natural persons. Craven v. Ry. Co., 77 N. C. 289. These laws will be found as section 2305 et seq. of this code, and they cannot be changed by special legislation. Rowland v. Old Dominion Bldg. etc., Ass'n, 116 N. C. 877, 22 S. E. 8. No subterfuge such as calling the charges "fines," "dues." etc., or calling the borrower a partner will prevent the transaction from being usurious. Mills v. Bldg. Ass'n, 75 N. C. 292; Howell v. Southern Bldg., etc., Ass'n, 120 N. C. 286, 26 S. E. 781. A full exposition of usury will be found in the notes to section 2306, and the principles there stated are applicable when usury is charged by a building and loan association.

Same—Effect.—As stated in the notes to sec. 2306 the effect of usury is the forfeiture of the entire interest, and when already paid the recovery back of twice the amount of interest. Building and loan associations applying this principle are. Smith v. Old Dominion, Bldg., etc., Ass'n, 119 N. C. 249, 26 S. E. 41; Cheek v. Iron Belt Bldg., etc., Ass'n, 126 N. C. 242, 35 S. E. 463; Hollowell v. Southern Bldg., etc., Ass'n, 120 N. C. 286, 26 S. E. 781.

This rule is qualified, however, by the equitable doctrine that where the borrower seeks an affirmative relief, such as to prevent the foreclosure of his mortgage, equity will make payment of a legal rate of interest a prerequisite to the grant of relief. This principle is fully explained in the note to section 2306. Building and loan association cases applying the same are: Rowland v. Old Dominion Bldg., etc., Ass'n, 118 N. C. 173, 24 S. E. 366; Williams v. Maxwell, 123 N. C. 586, 31 S. E. 821.

Forfeiture of Mortgage on Default.—A contract, by which the stock, taken out by a borrower and assigned to the association, when the mortgage is executed, is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable, and, though upheld by the laws of the association's own state, will not be enforced in North Carolina. Rowland v. Old Dominion Bldg., etc., Ass'n, 116 N. C. 877, 22 S. E. 8.

Refusal to Make Loan.—On refusal to make loan to subscriber, held, latter entitled to recover back money paid for shares of stock in association. Fagg v. Southern Bldg. etc., Ass'n, 113 N. C. 364, 18 S. E. 655.

§ 5184. Power to borrow money.—Any such association may in its certificate of incorporation, constitution or by-laws authorize the board of directors from time to time to borrow money, and the board of directors may from time to time, by resolution adopted by a vote of at least two-thirds of all the directors and duly recorded on the minutes, borrow money for the association on such terms and conditions as they may deem proper; but the total amount of money so borrowed shall at no time exceed thirty per centum of the gross assets of such association, and the same shall be used for no other purpose than to make loans to members in regular course of business or to pay maturing series of stock. In order to secure obligations for money borrowed under the provisions of this section, any such association may assign its notes, bonds and mortgages and/or other property, including the right to repledge the shares of stock pledged as collateral security, without securing the consent of the owner thereto, as security for the repayment of its indebtedness as evidenced by its bond, obligation or note given for such borrowed money. (Rev., s. 3892; 1905, c. 435, s. 10; 1909, c. 898; 1911, c. 61; 1913, c. 21; 1933, c. 18.)

Editor's Note.—Public Laws of 1933, c. 18, substituted the above section in lieu of the former reading. A comparison of the old with the new is necessary to determine the changes.

The chief change of the 1933 amendment is made by granting express authority to an association to pledge its assets as security for money borrowed. For further comment, see 11 N. C. Law Rev., 208.

Art. 4. Under Control of Insurance Commissioner

§ 5185. Power of insurance commissioner. — The insurance commissioner of the state is hereby empowered and directed to perform all the duties and exercise all the powers as to building and loan associations now imposed or conferred upon any other officer of the state by the laws thereof, unless herein otherwise provided. (Rev., s. 3893; 1905, c. 435, s. 24.)

§ 5186. Annual license fees.—All domestic building and loan associations shall pay an annual license fee of twenty-five dollars and may be licensed upon filing with the insurance commissioner an application in such form as he may prescribe. Such license fee shall be used to defray the expenses incurred by the insurance commissioner in supervising building and loan associations. (1919, c. 179, s. 1.)

§ 5187. Statement filed by association.—Every association doing business under this subchapter shall file in the office of the insurance commis-

sioner, on or before the first day of February in each year, in such form as he shall prescribe, a statement of the business standing and financial condition of the applicant on the preceding thirty-first day of December, signed and sworn to by the principal, or chief managing agent, attorney, or officer therefor, before the insurance commissioner or before a commissioner of affidavits for North Carolina, or before some notary public. (Rev., s. 3894; 1905, c. 435, s. 11; 1907, c. 959, s. 5.)

§ 5188. Statement examined, approved, and published; fees.—It shall be the duty of the insurance commissioner to receive and thoroughly examine each annual statement required by this subchapter, and if made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the state, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The insurance commissioner shall be entitled to a fee of five dollars, to be paid by the association filing such statement. (Rev., s. 3895; 1905, c. 435, s. 12.)

§ 5189. License revoked.—If the insurance commissioner shall become satisfied at any time that any statements made by any association licensed under this subchapter are untrue, or in case a general agent shall fail or refuse to obey the provisions of this subchapter, or if upon examination the insurance commissioner is of opinion that such association or company is insolvent, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of business is not feasible for the purposes of carrying out successfully its plan, or that its condition is such as to render its further proceedings hazardous to the stockholders, he shall thereupon have power to revoke and cancel such license. (Rev., s. 3896; 1905, c. 435, s. 13; 1907, c. 959, s. 6.)

§ 5190. Examinations made; expense paid.—If at any time the insurance commissioner has good reason to think that the standing and responsibility of any building and loan association or company doing business in this state, or its mode of business, is of a doubtful character, or in his discretion whenever he deems it prudent to do so, it shall be his duty to examine and investigate everything relating to the business of such company, and to that end he is hereby authorized, if he deem it advisable, to appoint a suitable and competent person to make such investigation, who shall file with the insurance commissioner a full report of his finding in such case. The expenses and cost of such examination shall be defrayed by the company or association subjected to investigation, and each company or association doing business in this state shall stipulate in writing, to be filed with the insurance commissioner, that it will pay all reasonable cost and expenses of such examination when it shall become necessary. (Rev., s. 3897; 1905, c. 435, ss. 14, 15; 1919, c. 179, s. 4.)

§ 5191. Failing to exhibit books or making false statement a misdemeanor.—If any person having in his possession or control any books, accounts, or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the insurance commissioner, or his agents on demand, or shall knowingly or wilfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned, at the discretion of the court. (Rev., s. 3329; 1893, c. 434; 1899, c. 164.)

§ 5192. Agent must obtain certificate.—It shall be unlawful for any person to solicit business or act as agent for any building and loan association or company without having procured from the insurance commissioner a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent. The fee for such license shall be $2.50, to be paid to the insurance commissioner at the time the certificate is issued; and no other license or fee shall be required for said business of an agent or solicitor so licensed. (Rev., s. 3898; 1895, c. 444, s. 3; 1899, c. 154, s. 2, subsec. 20; 1907, c. 959, s. 7; 1933, c. 17.)

Editor's Note.—Public Laws of 1933, c. 17, added the last sentence to this section, relating to fees.

§ 5193. Penalities imposed and recovered.—Every general agent or attorney of any building and loan company or association who shall fail or refuse to perform any duty required of him by this subchapter shall forfeit and pay to the insurance commissioner fifty dollars for the state for every such refusal, to be recovered before any justice of the peace at the suit of the insurance commissioner. (Rev., s. 3899; 1893, c. 434, s. 2300g; 1899, c. 154, s. 2, subsec. 20.)

§ 5193(a). Notice required before appointment of receivers. — No judge or court shall appoint a receiver for any building and loan association organized and incorporated under the laws of this state unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the insurance commissioner of the state. (1933, c. 38.)

See 11 N. C. Law Rev., 208.

Art. 5. Foreign Associations

§ 5194. Allowed to do business.—A building and loan association of another state may be admitted to transact business in this state in the manner hereinafter provided, and no association not so admitted shall transact business in this state. (Rev., s. 3900; 1905, c. 435, s. 17.)

§ 5195. Copy of charter and list of officers filed.—Application for authority to transact business in this state shall be made to the insurance commissioner, and on making such application every such association shall file with the insurance commissioner a duly authenticated copy of its charter or certificate of incorporation, its constitution and by-laws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the insurance commissioner, which shall be verified by oath of such officers and other persons as the commissioner shall designate, and the commissioner shall furnish blank forms for the report required, and may

call for additional reports at such other times as may seem to him expedient. (Rev., s. 3902; 1905, c. 435, s. 19.)

§ 5196. License granted.—If it shall appear to the insurance commissioner by the report aforesaid and by an examination of the affairs of such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the laws governing building and loan associations of this state, it may be admitted to transact business in this state upon a certificate of authority to be issued by the insurance commissioner, which shall only be issued when such association shall have complied with the further requirements of this article. (Rev., s. 3903; 1905, c. 435, s. 20.)

§ 5197. Securities deposited.—The insurance commissioner before issuing the certificate of authority aforesaid shall require every such association to deposit with the commissioner such securities as he may approve, amounting to at least thirty thousand dollars, which securities shall be held by him in trust for the exclusive benefit and security of the creditors and shareholders of such association resident in this state, and he shall have authority to require it to deposit additional securities and to order a change in any of the securities so deposited at any time, and no change or transfer of the same shall be made or be effectual without his consent. Such deposit shall be maintained intact in the full sum required at all times, but the association making such deposit, so long as it shall continue solvent and comply with all the provisions of this subchapter applicable to it, may receive the dividends or interest on the securities deposited, and may from time to time, with the assent of the commissioner, withdraw any of such securities on depositing with the commissioner other like securities the par value of which shall be equal to such, as may be withdrawn. (Rev., s. 3904; 1905, c, 435, s. 21.)

§ 5198. Annual certificate; service of process.—Such certificate of authority shall be for the current year, only, and shall not be issued until such association shall, by a duly executed instrument filed with the insurance commissioner of the state, constitute the insurance commissioner and his successors in office its true and lawful attorney, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the commissioner shall be of the same force and validity as if served on the association, and that the authority thereof shall continue in force irrevocable so long as any liability of the association remains outstanding in this state. The service of such process shall be made by leaving a copy of the same in the office of the insurance commissioner, with a fee of two dollars, to be taxed in the plaintiff's costs. When any original process is thus served, the commissioner, by letter directed to the secretary, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The commissioner shall keep a record of all such process, showing the day and hour of service. (Rev., s. 3906; 1905, c. 435, s. 23.)

§ 5199. Agent must have certificate of license; fees.—It shall be unlawful for any person to solicit business or act as agent for any foreign building and loan association or company doing business in this state without having first procured from the insurance commissioner a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent. The insurance commissioner shall be entitld to a fee of one dollar for issuing each such certificate, to be paid by the company for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (Rev., ss. 3327, 3901; 1895, c. 444, s. 3; 1905, c. 435, s. 18.)

§ 5200. Fees and expenses.—Every such association shall pay for filing a certified copy of its charter or certificate of incorporation twenty dollars; for filing original annual reports, twenty dollars; for certificate of authority, annually, two hundred and fifty dollars; for certificate for each agency, five dollars; and shall defray all expenses incurred in making any examination of its affairs as herein provided for; and the insurance commissioner may maintain an action in the name of the state against such association for the recovery of such expenses in any court of competent jurisdiction. (Rev., s. 3905; 1905, c. 435, s. 22.)

§ 5201. Stock listed for taxation.—All foreign building and loan associations doing business in this state shall list for taxation with the state auditor, through its agent, is stock held by citizens of this state in the county, city, or town where the owners of such stock reside. In listing such stock for taxation the withdrawal value as fixed by the by-laws of each company shall be furnished the list taker, and the stock shall be valued for taxation as other money investments of citizens of this state. All such taxes shall be paid by the association listing the stock. (Rev., s. 3907; 1905, c. 435, s. 25.)

As to taxation see section 7880(64).

§ 5202. Failure to list stock for taxation a misdemeanor.—If any foreign building and loan association or officer of such association doing business in this state, or any local officer or person shall collect dues, assessments, premiums, fines, or interest from any citizen of this state for any such association which has failed or refused to list for taxation the stock held by citizens of this state, he shall be guilty of a misdemeanor and subject to fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3328; 1905, c. 435, s. 25.)

§ 5203. All contracts deemed made in this state.—Any contract made by any foreign association with any citizen of this state shall be deemed and considered a North Carolina contract, and shall be so construed by all the courts of this state according to the laws thereof. (1905, c. 435, s. 26.)

Foreign building and loan associations are subject to the application of the state usury laws where loans are made at home office. Rowland v. Old Dominion Bldg., etc., Ass'n, 115 N. C. 825, 18 S. E. 965; Meroney v. Atlanta Bldg., etc., Ass'n, 116, N. C. 882, 21 S. E. 924.

Art. 5A. Withdrawals

§ 5203(a). Month's notice required for withdrawals.—Any shareholder in a building and loan association may withdraw all or any part of his or her holdings of unpledged or unhypothecated stock in such association by giving to the secretary of such association one month's written notice of his or her intention so to do, and the right of such shareholder to make such withdrawal shall accrue one month after the giving of such notice, subject to the conditions set out in section 5203(b). (1933, c. 122, s. 1.)

See 11 N. C. Law Rev., 207, for review of this and the following section.

§ 5203(b). Withdrawal or maturity fund. — Whenever any shareholder whose stock has matured or whose right to withdraw his or her stock has accrued, as set out in section 5203(a), has not been paid because of insufficiency of funds in the treasury of the association, the secretary of said association shall under instruction from the directors, create a separate fund to be known as the "withdrawal or maturity fund" and into such fund shall be paid one-half of the net receipts of the association monthly. Net receipts shall mean the receipts of the association from interest, installments, rent and other revenue producing sources, diminished by the expenses of the association, and by any sums directed by the board of directors to be set apart and held separately for the purpose of meeting bills payable or notes payable at the maturity thereof. From time to time as the board of directors may direct, the secretary shall make an equitable and ratable distribution of the funds in said "withdrawal or maturity fund" to the stockholders whose right to receive payment from said fund has accrued, as hereinbefore provided, at the date of such distribution. One-half of the net receipts of the association shall be added monthly to such fund so long as there remains any shareholder of the association entitled to receive a portion thereof as aforesaid. No shareholder whose stock has matured or whose right to withdraw his stock has accrued as hereinbefore set out, shall have the right to demand or receive any funds in excess of the amount equitably and ratably distributed as hereinbefore set out except on approval of board of directors of such association and/or the insurance commissioner. (1933, c. 122, s. 2.)

SUBCHAPTER II. LAND AND LOAN ASSOCIATION

Art. 6. Organization and Powers

§ 5204. Application of term.—The term "Land and Loan Associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to its members only, and of enabling its members to acquire real estate, make improvements thereon, and remove incumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this state not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold themselves out to the public as a land and loan association. (1915, c. 172, s. 1.)

§ 5205. Incorporation and powers.—Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed by building and loan associations under the laws of this state as they now are or may be hereafter enacted, except as prescribed in this article. (1915, c. 172, s. 2.)

§ 5206. Loans. — The boards of directors of land and loan associations may contract for loans to the amount of seventy-five per cent of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one per cent less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholder on their shares and personal indorsement or personal property. (1915, c. 172, s. 3.)

As to loans on mortgages, etc., issued under federal housing act, see § 220(a) 2.

§ 5207. Reserve associations.—Associations to be known as "Reserve Land and Loan Associations" may be chartered and licensed as provided in this article, when organized and the stock therein held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this state, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the insurance commissioner as are building and loan associations. (1915, c. 172, s. 4.)

§ 5207(a). Land conservation and development bureau.—Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a land conservation and land development bureau. The function of this bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

§ 5207(b). Number of incorporators; capital stock.—Any number of persons, resident freeholders of the State, not less than fifteen, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars ($20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State

and known as land mortgage associations. (1925, c. 223, s. 2.)

§ 5207(c). Incorporation.—The articles of incorporation shall be in writing signed and acknowledged by the incorporators and shall contain the following:

(1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this article.

(2) That the name of such association, which shall be in no material respect similar to any other association in the same county.

(3) The name of the village, town, or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars each.

(5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 5207(d). Organization. — The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of by-laws and a plan of organization approved by the Commissioner of Agriculture and the Corporation Commission. (1925, c. 223, s. 4.)

§ 5207(e). Corporate powers. — Said land mortgage association shall have power: (a) To make loans, the conditions of which shall be approved by the Corporation Commission if the security taken therefor is to be used as the basis for a bond issue under subsection (c) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five per cent of the value of such real estate so conveyed, according to the appraisal made as herein provided.

(b) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than twenty years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

(c) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(d) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (a) and (b) hereof as security for the bonds of the land mortgage association referred to in subdivision (c) hereof. (1925, c. 223, s. 5.)

As to investment in bonds guaranteed by United States, see § 220(a) 1. As to loan on mortgages, etc., issued under federal housing act, see § 220(a) 2.

§ 5207(f). Restrictions.—All mortgage obligations acquired by the company shall be subject to the following restrictions;

(a) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(b) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(c) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen per cent of the capital and surplus of the company;

(d) All such mortgages shall contain provisions for soil conservation;

(e) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(f) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two-thirds of all the trustees;

(g) A sufficient amount of the proceeds of any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 5207(g). Mortgage forms; approval. — The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the Corporation Commission and the Attorney-General. (1925, c. 223, s. 7.)

§ 5207(h). Repayment of loan and interest. — The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total

amount shall include (a) the rate of interest agreed upon; and (b) a payment. (1925, c. 223, s. 8.)

§ 5207(i). Terms of payment. — A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: Provided, that not less than one per cent of the original amount of the mortgage shall be paid upon the principal thereof annually, commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the associations. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the by-laws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial payment on account of depreciation and for foreclosure by the association. The borrower may on sixty days notice repay the association his total indebtedness, or, without such notice, upon payment of sixty days interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

§ 5207(j). Transfer of mortgaged lands.—The acquirer of lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within fourteen days after demand. (1925, c. 223, s. 10.)

§ 5207(k). Calling in loans before due.— Every land mortgage association shall have the power to call in loans upon sixty days notice:

(a) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of the previous section and fulfill the obligations incumbent upon him;

(b) When the debtor does not meet the obligation imposed upon him by his contract and the by-laws of the land mortgage association;

(c) When the mortgaged premises become subject to forced sale;

(d) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of mortgaged premises by the State Department of Agriculture for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 1.)

§ 5207(l). Partial recall of debt.—The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 5207(m). Foreclosure.— Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 5207(n). Appraisal of lands.—Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished by the State Department of Agriculture. (1925, c. 223, s. 14.)

§ 5207(o). Preference prohibited; association borrowing money.—No land mortgage association and no officer or agent thereof, shall give any preference to any creditor by pleading any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the Corporation Commission may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15.)

§ 5207(p). Bond issues.

(a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such manner, as the land mortgage association may, subject to the approval of the banking commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the postoffice address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the banking commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 5207(q). Deed of trust.

(a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and

moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed twenty times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 5207(r). Collaterals deposited with State Treasurer.—All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificate of deposit, endorsed in blank, issued by state or national banks located in North Carolina, farm mortgage lands issued under the provisions of the Federal Farm Loan Act approved July seventeenth, one thousand nine hundred and sixteen, or obligations of the United States Government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 5207(s). Redemption of bonds.

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the by-laws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19.)

§ 5207(t). Validity of bonds after maturity. — In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

§ 5207(u). Bonds as payment.—If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 5207(v). Bonds as investments; taxation. — The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

§ 5207(w). Applications of earnings; reserve fund.—The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two per cent of the capital stock outstanding, and until such reserve fund equals twenty per cent of the capital stock of such association. (1925, c. 223, s. 23.)

§ 5207(x). Restriction on holding real estate.— No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interests in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 5207(y). Banking laws applicable.—The statutes relating to banks and banking in this State, that is, section two hundred and sixteen to two hundred and fifty-four, inclusive, of the Consolidated Revised Statutes of one thousand nine hundred and nineteen with all amendments thereto, as passed at the one thousand nine hundred and twenty-one, one thousand nine hundred and twenty three, one thousand nine hundred and twenty-five sessions of the General Assembly, in so far as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III. CREDIT UNIONS

Art. 7. Superintendent of Credit Unions

§ 5208. Office created.—There shall be established in the State Department of Agriculture a superintendent of credit unions and such assistants as may be necessary, at salaries to be fixed by the State Board of Agriculture. (1915, c. 115, s. 1; 1925, c. 73, s. 4; 1935, c. 87.)

Editor's Note.—The Public Laws of 1925, Ch. 73 struck out all of the old section and inserted this one in its stead.

This and the following sections of the subchapter refer to "State department of agriculture," instead of "division of markets and rural co-operation," "state board of agriculture," instead of "joint committee for agricultural work of the state board of agriculture."

This subchapter was formerly entitled Savings and Loan Associations and the article headings conformed thereto. Public Laws 1935, chapter 87, provides: "In order to make the name of this organization conform with the names of similar organizations authorized by federal statute, the words 'savings and loan associations,' wherever appearing in Consolidated Statutes, sections five thousand two hundred and eight to five thousand two hundred and forty-one, inclusive, (Michie's Code of one thousand nine hundred thirty-one) shall be changed to read 'credit unions.'"

§ 5209. Duties of the officer.—The duties of the superintendent of credit unions shall be as follows:

1. To organize and conduct, in the state department of agriculture, a bureau of information in regard to coöperative associations and rural and industrial credits.

2. Upon the application of three persons residing in the state of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the state.

3. To maintain an educational campaign in the state looking to the promotion and organization of credit unions; and upon the written request of twelve bona fide residents of any particular locality in this state expressing a desire to form local credit union at such locality, the superintendent or one of his assistants shall proceed as promptly as convenient to such locality and advise and assist such organizers to establish the institution in question.

4. To examine at least once a year, and oftener if such examination be deemed necessary by the superintendent or his assistant, credit unions formed under this subchapter. A report of such examination shall be filed with the state department of agriculture, a copy mailed to the credit union at its proper address. (1915, c. 115, s. 1; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87.)

See Editor's Note under preceding section.

Editor's Note.—The words "and industrial," in the first clause of this section, are new with the acts of 1925, ch. 73. Under the fourth clause of this section it was formerly required that a report of the examination, therein referred to, be also sent "to the clerk of the court of the county in which the principal office of the credit union or co-operative association"—the present saving and loan association, "is located, and such report" to be "kept on file by the clerk of the superior court for public inspection."

Art. 8. Incorporation of Credit Unions—Central Associations

§ 5209(a). Repealed by Public Laws 1935, c. 87.

§ 5209(b). Central association.—(1) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearing house in the settlement of these accounts, the superintendent of credit unions shall, upon receipt and investigation of charters and by-laws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this article.

(2) The procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local credit union; except that the membership of a central credit union shall be institutional and only local credit unions can become members, unless the by-laws otherwise prescribe.

(3) Any local credit union can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five per cent (25%) of their share capital and reserve fund.

(4) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the by-laws shall prescribe.

(5) The secretary-treasurer shall cast the one vote of local member credit unions, in its annual election of officers and at all meetings of the member associations unless the by-laws otherwise prescribe.

(6) A central credit union shall not charge more than three fourths (3/4) of one per cent for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(7) Section fifty-two eighteen (5218), article nine (9), subchapter three (3) of the Consolidated Statutes, shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of ten times the amount of its capital and reserve fund.

(8) A central credit union shall not be taxable under any law which shall exempt any local credit union. (1925, c. 73, s. 17; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5210. Applications filed.—Seven or more persons employed or residing in the state may become a credit union by making, signing, and acknowledging a certificate which shall contain:

1. The name of the proposed credit union which shall include the words "credit unions."

2. A statement that incorporation is desired under this article.

3. The conditions, whether of residence, of occupation, or otherwise, which shall qualify persons for membership.

4. The par value of the shares, which shall not exceed twenty-five dollars.

5. The city, village, or town in which its principal business office is to be located. If it is to be located in an incorporated city, the street address of the city shall be given. If the condition of its membership is employment by a certain individual, copartnership, or corporation, a statement that its office shall be with such individual, copartnership, or corporation may be substituted for the street address.

6. The number of its directors, not less than five, all of whom must be members of and shareholders in the corporation.

7. The names and postoffice addresses of the directors for the first year.

8. The names and postoffice addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation. (1915, c. 115, s. 2; 1925 c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5211. By-laws adopted.—At the time of filing the certificate the incorporators shall adopt by-laws which shall provide:

1. The name of corporation.

2. The purposes for which it is formed.

3. Qualifications for membership.

4. The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the

number of members which constitute a quorum at the meetings, and the regulations as to voting.

5. The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors.

6. The number of members of the credit committee, their powers and duties.

7. The number of members of the supervisory committee, their powers and duties.

8. The par value of shares of capital stock.

9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.

10. The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.

11. The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.

12. The manner in which the funds of the corporation shall be invested.

13. The conditions upon which loans may be made and repaid.

14. The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.

15. The method of receipting for money paid on account of shares, deposits, or loans.

16. The manner in which the reserve fund shall be accumulated.

17. The manner in which dividends shall be determined and paid to members.

18. The manner in which a voluntary dissolution of the corporation shall be effected. (1915, c. 115, s. 2.)

§ 5212. Certificate of incorporation.—The by-laws acknowledged to have been adopted by all of the incorporators, together with the certificate of incorporation, shall be filed in the office of the superintendent of credit unions who shall approve the certificate of incorporation if he is satisfied that it is in conformity with this subchapter, and shall approve the by-laws if he is satisfied as to the character of the incorporators and that the by-laws are reasonable and will tend to give assurance that the affairs of the prospective credit unions will be administered in accordance with this subchapter. Thereupon, the superintendent of credit unions shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the by-laws, which certificate of approval, together with the attached duplicate certificate of incorporation and duplicate by-laws, shall be filed in the office of the clerk of the superior court of the county in which the office of such credit unions is situated, and upon such filing the incorporators shall become and be a corporation. The county clerk shall charge the same filing fee for filing the certificate of approval, certificate of incorporation and by-laws as he is now allowed to charge for filing a certificate of incorporation of a corporation organized under the business corporations law of the state. (1915, c. 115, s. 2; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5213. Amendment of by-laws.—The by-laws adopted by the incorporators and approved by the superintendent of credit unions shall be the by-laws of the corporation, and no amendment to the by-laws shall become operative until such amendment shall have been approved by the superintendent of credit unions, and a copy thereof certified by him, with a certificate of his approval, shall be filed in the office of the clerk of the superior court of the county where the office of the credit unions is located. Such approval may be given or withheld by the superintendent of credit unions at his discretion. The county clerk shall receive the same fee for filing as provided in the preceding section. (1915, c. 115, s. 3; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5214. Restriction of use of terms.—The use by any person, copartnership, association, or corporation except corporations formed under the provisions of this subchapter, of any name or title which contains the words "credit union" shall be a misdemeanor. (1915, c. 115, s. 4; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5215. Change of place of business. — A credit union may change its place of business on the written approval of the superintendent of credit unions, which written approval shall be filed in the office of the superintendent of credit unions and a duplicate of the approval in the office of the clerk of the superior court of the county where its office was located, and a second duplicate in the office of the clerk of the superior court of the county in which the new office is to be located. Such approval of the superintendent may be given or withheld at his discretion. (1915, c. 115, s. 25; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

Art. 9. Powers of Credit Unions

§ 5216. General nature of business.—A credit union may receive the savings of its members in payment for shares or on deposit; may loan to its members at reasonable rates of interest not exceeding the legal rate, or may invest as hereinafter provided the funds so accumulated, and may undertake such other activities relating to the purpose of the corporation as its by-laws may authorize. (1915, c. 115, s. 5; 1925, c. 73, s. 3; 1935, c. 87.)

§ 5217. Receive deposits.—A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the by-laws shall provide. (1915, c. 115, s. 16; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5218. Borrowing money.—If the by-laws so provide, a credit union shall have power to borrow money from any source in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than four (4) times the sum of its capital, surplus and reserve fund. (1915, c. 115, s. 17; 1925, c. 73, s. 10; 1935, c. 87.)

See Editor's Note under section 5208.

Editor's Note.—The laws of 1925, ch. 73 struck out all of the old sections and inserted this one in its stead.

§ 5218(a). Authority to execute contracts of guaranty in certain cases.—Credit union may execute such contracts of guaranty as may be necessary to procure credit for its members: Provided, that the said contracts of guaranty shall not place on the said local credit union a liability arising in any one year in excess of ten (10) per cent of the total credit under the said contracts of guaranty handled through that association in a particular year; and provided further, that all such contracts shall be approved by the superintendent of credit unions and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said credit union may require of the individual members being served such security as the board of directors of each such credit union may determine upon. (1925, c. 73, s. 11; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5219. Investment of funds.—The capital, deposits, undivided profits and reserve fund of the corporation may be invested in one of the following ways, and in such way only:

1. They may be lent to the members of the corporation in accordance with the provisions of this subchapter.

2. They may be deposited to the credit of the corporation in savings banks, credits unions, building and loan associations, state banks or trust companies, incorporated under the laws of the state, or in National banks located therein. Funds of credit unions deposited in a savings bank, state bank, or trust company which may become insolvent, shall be preferred in the same way that funds of a "credit union" so deposited are preferred under the banking law of the state.

3. "A credit union shall keep on deposit at interest in banks incorporated under the laws of the State of North Carolina and national banks therein so much of the reserve fund and capital stock as shall equal five (5) per cent of the total liabilities."

4. Not more than ten per cent of the capital stock and reserve fund of a credit union may be invested in the stock of another local credit union and not more than twenty-five per cent of the capital stock and reserve fund of a local association may be invested in the stock of a central association. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87.)

See Editor's Note under section 5208.

As to investment in bonds guaranteed by United States, see § 220(a) 1.

Editor's Note.—The words "building and loan associations," in the second clause under this section, are new with the acts of 1925, ch. 73.

The act struck out all of the third clause of the old section and substituted the present one in lieu thereof.

The act also inserted the word "local" before the words "credit union" in the fourth clause of the section and added the provisions that follow them.

§ 5220. Loans.

1. To Members.—A credit union may lend to its members for such purposes and upon such security and terms as the by-laws shall provide and the credit committee shall approve; but security must be taken for any loan in excess of fifty dollars. An indorsed note shall be deemed to be security within the meaning of this section.

2. Installment Loans.— A member who needs funds with which to purchase necessary supplies for growing crops may receive a loan in fixed monthly installments instead of in one sum.

3. Loans to Members of Committee.—The supervisory committee shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the credit union or becomes surety for any other member whose application for a loan is under consideration.

4. Loans to Persons Not Members Forbidden.—All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a credit union to one not a member thereof shall be guilty of a misdemeanor. The credit union shall have the right to recover the amount of such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof or from all of them jointly.

5. Repayment of Loans.—A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 232, s. 4; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

As to loans on mortgages, etc., issued under federal housing act, see § 220(a) 2.

§ 5221. Rate of interest; penalty.—No corporation organized pursuant to this subchapter shall directly or indirectly charge or receive any interest, discount, or consideration, other than the entrance fee, greater than the legal rate.

Any corporation, any person, the several officers of any corporation, and the members of committees who shall violate the foregoing prohibition shall be guilty of a misdemeanor. The corporation shall also be subject to procedure by the superintendent of credit unions as prescribed herein in article twelve. (1915, c. 115, s. 20; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5221(a). Interest or discount rate charged by agricultural association. — An agricultural credit corporation or association, organized under the laws of the State of North Carolina, may charge and collect by way of interest or discount on all loans made for agricultural purposes to farmers, growers and truckers of staple agricultural crops, fruits and vegetables respectively, or for the purpose of raising, breeding, fattening, or marketing of live stock, a rate of interest or discount not to exceed three per centum per annum in excess of the rate of interest or rediscount rate charged by any Federal intermediate credit bank to such agricultural credit corporation or association when rediscounting or purchasing from it the notes of such farmers, growers and truckers: Provided, that the total rate, both interest and rediscount, to the borrower shall not exceed eight (8%) per centum per annum. (1927, c. 101; 1929, c. 43, s. 1; 1931, c. 329.)

§ 5222. Reserve fund.—All entrance fees, transfer fees, and fines shall, after the payment of organization expenses, be known as reserve income, and shall be added to the reserve fund of the corporation.

At the close of each fiscal year there shall be set apart to the reserve fund twenty-five per centum of the net income of the corporation which has accumulated during the year. But upon the recommendation of the board of directors the members at an annual meeting may increase, and whenever such funds equal the amount of the capital may decrease, the proportion of profits which is required by this section to be set apart to the reserve fund. Nor shall the reserve fund in any case exceed the capital of the corporation plus fifty per centum of its other liabilities.

The reserve fund shall belong to the corporation and shall be held to meet contingencies, and shall not be distributed to the members except upon the dissolution of the corporation. (1915, c. 115, s. 21.)

§ 5223. Dividends.—At the close of the fiscal year a credit union may declare a dividend not to exceed six per cent per annum from the income during the year and which remains after the deduction of expenses, losses, interest on deposits, and the amount required to be set apart to the reserve fund. Dividends shall be paid on fully paid shares outstanding at the close of the fiscal year, but shares which become fully paid during the year shall be entitled to a proportional part of such dividends calculated from the first day of the month following such payment in full. (1915, c. 115, s. 22; 1923, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5224. Voluntary dissolution.—At any meeting specially called to consider the subject, three-fourths of the members present and represented may vote to dissolve the corporation and upon such vote shall signify their consent to the dissolution in writing. Such corporation shall then file in the office of the superintendent of credit unions such consent, attested by its secretary or treasurer and its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly verified. The superintendent of credit unions upon receipt of satisfactory proof of the solvency of the corporation shall issue to such corporation in duplicate, a certificate to the effect that such consent and statement have been filed and that it appears therefrom that such corporation has complied with this section. Such duplicate certificate shall be filed by the corporation in the office of the clerk of the superior court of the county in which the corporation has its place of business, and thereupon such corporation shall be dissolved and shall cease to carry on business except for the purpose of adjusting and winding up of its affairs. The corporation, by its board of directors, shall then proceed to adjust and wind up its business and affairs, with power to carry out its contracts, collect its accounts receivable, and to liquidate its assets and apply the same in discharge of debts and obligations of such corporation, and after paying and adequately providing for the payment of such debts and obligations each share, according to the amount paid thereon, shall be entitled to its proportion of the balance of the assets. The corporation shall continue in existence for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets, and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts and obligations until its business and affairs are fully adjusted and wound up. (1915, c. 115, s. 24; 1925, c. 73, ss. 3, 15; 1935, c. 87.)

See Editor's Note under section 5208.

Editor's Note.—The words "three-fourths of the members present and represented," in the first sentence of this section, are new and substituted, in lieu of the words "four-fifths of the entire membership of a corporation" which were stricken out, by the Acts of 1925, ch. 73.

§ 5225. Savings institution; restriction of taxation.—The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt buildings and loan associations or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations therein, be deemed to include corporations doing business in pursuance of the provisions of this sub-chapter, unless they are specifically named in such law. The shares of credit unions, being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; 1925, c. 73, ss. 3, 16; 1935, c. 87)

See Editor's Note under section 5208.

Editor's Note.—The words "buildings and loan associations' in the first clause of this section are new with the acts of 1925, ch. 73 and substituted for the words "savings banks," which are stricken out.

Art. 10. Shares in the Corporation

§ 5226. Ownership and transfer of shares.—The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on the shares. Shares may be subscribed for an paid in such manner as the by-laws shall prescribe. The credit union shall have a lien on the shares of any member and upon any dividends payable thereon for and to the extent of any loan made to him and of any dues or fines payable by him. The credit union may upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of the member's indebtedness.

A credit union may, if the by-laws so provide, charge an entrance fee for each share subscribed, to be paid by the shareholder upon his election to membership.

Fully paid shares of a credit union may be transferred to any person eligible for membership, upon such terms as the by-laws may provide, and the payment of a transfer fee shall not exceed twenty-five cents per share. (1915, c. 115, s. 13; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5227. Shares and deposits for minors and in trust.—Shares may be issued and deposits received in the name of a minor, and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or his parents or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust, the name and

residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. Such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the shares were held or for whom such deposits were made, or by his legal representatives. (1915, c. 115, s. 14.)

See discussion in 9 N. C. L. Rev. 13.

§ 5228. Fines and penalties.—For failure by any member of a credit union to meet his payments on shares when due, such fines and other penalties may be imposed upon the delinquent member as the by-laws provide. Such fines shall not exceed two per centum per month or a fraction thereof on amounts due, except that a minimum fine of five cents may be imposed. (1915, c. 115, s. 15; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5229. Liability of shareholders.—A shareholder of any such corporation, unless the by-laws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1915, c. 115, s. 26.)

Art. 11. Members and Officers

§ 5230. Who may become members. — The membership of the corporation shall consist of those persons who have been duly elected to membership and who have subscribed for one or more shares and have paid for the same in whole or in part, together with the entrance fee as provided in the by-laws, and have complied with such other requirements as the by-laws may contain. No credit union shall ever pay any commission or offer compensation for the securing of members or on the sale of shares (1915, c. 115, s. 6; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5231. Expulsion and withdrawal of members.—The board of directors may expel from the corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this subchapter or of the by-laws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible; no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.

A member may withdraw from a credit union by filing a written notice of his intention to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of explusion or withdrawal shall be paid to such member, but in the order of expulsion or withdrawal and only as funds therefor become available, after deducting and amounts due to the corporation by such member. The member shall have no further right in the credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, s. 23; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5232. Meetings; right of voting.—The fiscal year of every such corporation shall end at the close of business on the thirty-first day of December. The annual meeting of the corporation shall be held at such time and place as the by-laws prescribe. Special meetings may be held by order of the directors or of the supervisory committee, and shall be held upon request in writing of ten per cent of the members. Notice of all meetings of the corporation shall be given in the manner prescribed in the by-laws. At all meetings of members or shareholders a member shall have one vote and but one vote, irrespective of the number of shares that may be held by him, and in case of sickness or other unavoidable absence of a member he shall be allowed to vote by proxy in writing, but no member present shall vote more than one such proxy. At any meeting the members may decide upon any question of interest to the corporation, and overrule the board of directors, and by a three-fourths vote of those present and represented, provided the notice of the meeting shall have specified the question to be considered, may vote to amend the by-laws. (1915, c. 115, s. 8.)

§ 5233. Election of directors and committees.

1. Number Elected.—At the annual meeting the members shall elect a board of directors of not less than five members, a credit committee and a supervisory committee of not less than three members each. However, in credit unions whose business offices are located in places other than incorporated cities, the board of directors as such may also be the credit committee. Except as hereinafter specified, no member of the board shall be a member of either of such committees, nor shall one person be a member of more than one of such committees. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such term as may be determined by the by-laws.

2. Oath of Office.—The oath of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the superintendent of credit unions and filed and preserved in his office. (1915, c. 115, s. 9; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5234. Duties of board of directors.

1. Elect Executive Officers.—At their first

meeting and at each first meeting in the fiscal year, the board of directors shall elect from their number a president, vice-president, a secretary, and a treasurer, who shall be the executive officers of the corporation. The offices of secretary and treasurer may, if the by-laws so provide, be held by one person.

2. General Management.—The board of directors shall have the general management of the affairs, funds, and records of the corporation shall meet as often as may be necessary, and, unless the by-laws shall specifically reserve all or any of these duties to the members, it shall be the special duty of the directors:

1. To act upon all applications for membership and the expulsion of members.

2. To fix the amount of the surety bond which shall be required of each officer having the custody of funds.

3. To determine from time to time the rate of interest which shall be allowed on deposits and charged on loans.

4. To fix the maximum number of shares which may be held by and the maximum amount which may be lent to any one member; to declare dividends; and to recommend amendments to the by-laws.

5. To fill vacancies in the board of directors or in the credit committees until the election and qualification of successors.

6. To have charge of the investment of the funds of the corporation except loans to members, and to perform such other duties as the members may from time to time authorize.

3. Compensation.—No member of the board of directors or of the credit or supervisory committees shall receive any compensation for his services as a member of the board or committees. But the officers elected by the board of directors may receive such compensation as the members may authorize. (1915, c. 115, s. 10.)

§ 5235. Duties of credit committee.—The credit committee shall approve every loan or advance made by the corporation to members. Every application for a loan shall be made in writing and shall state the purpose for which the loan is desired and the security offered. No loan shall be made unless it has received the unanimous approval of those members of the committee who were present when it was considered, who shall constitute at least a majority of the committee, nor if any member of the committee shall disapprove thereof; but the applicant for a loan may appeal from the decisions of the credit committee to the board of directors. The credit committee shall meet as often as may be required after due notice has been given to each member. (1915, c. 115, s. 11.)

§ 5236. Duties of supervisory committee.—The supervisory committee shall inspect the securities, cash, and accounts of the corporation and supervise the acts of its board of directors, credit committee, and officers. At any time the supervisory committee, by a unanimous vote, may suspend the credit committee or any member of the board of directors, or any officer elected by the board, and by a majority vote may call a meeting of the shareholders to consider any violation of this subchapter or of the by-laws, or any practice of the corporation which, in the opinion of said committee, is unsafe and unauthorized. Within seven days after the suspension of the credit committee the supervisory committee shall cause notice to be given of a special meeting of the members to take such action relative to such suspension as may seem necessary. The supervisory committee shall fill vacancies in their own number until the next regular meeting of the members.

At the close of each fiscal year the supervisory committee shall make a thorough audit of the receipts, disbursements, income, assets, and liabilities of the corporation for the fiscal year, and shall make a full report thereon to the directors. This report shall be read at the annual meeting of the members and shall be filed and preserved with the records of the corporation. (1915, c. 115, s. 12.)

Art. 12. Supervision and Control

§ 5237. Subject to superintendent of savings and loan associations.—Corporations organized under the provisions of this subchapter shall be subject to the supervision of the superintendent of credit unions. (1915, c. 115, s. 7; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5238. Annual reports; penalty.— Every corporation organized under this subchapter shall, in January of each year, make a report for the previous calendar year to the superintendent of credit unions giving such information as he shall require, which report shall be verified by the oath of the treasurer and secretary, and by the oath of a majority of the members of the supervisory committee, and it shall make such other and further reports under the like oath as the superintendent shall demand at any time.

Any such corporation which neglects to make an annual report within the month of January, or any of the others required by the superintendent of credit unions at the time fixed by the superintendent, shall forfeit to the state five dollars for each day such neglect continues. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 7; 1935, c. 87.)

See Editor's Note under section 5208.

Editor's Note.—Under the first paragraph of this section it was formerly provided that the report, therein referred to, "shall be verified by the oath of the president, treasurer and secretary, as well as by the oath of a majority of the members of the supervisory committee". By Public Laws 1925, ch. 73, the word "president" is stricken out and the word "and" substituted in lieu of "as well as."

§ 5239. Annual examinations required.—The superintendent of credit unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the superintendent shall have power and authority to subpœna and examine personally, or by one of his deputies or examiners, witnesses on oath and

documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not. (1915, c. 115, s. 7; 1925, c. 73, s. 3; 1935, c. 87.)

See Editor's Note under section 5208.

§ 5240. Revocation of certificate.—If any such corporation shall neglect to make its annual report, as provided in this article, or any other report required by the superintendent of credit unions for more than fifteen days, or shall fail to pay the charges required, including the fines for delay in filing reports, the superintendent of credit unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for fifteen days after such notice, the said superintendent shall, at his discretion, revoke the certificate, and he, personally or by one of his deputies, shall take possession of the property and business of the corporation and retain possession until such times as he may permit it to resume business, or until its affiairs be finally liquidated as provided in the banking laws of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 8; 1935, c. 87.)

Editor's Note.—The words "or any other report required by the superindendent of savings and loan associations," (now credit unions, see Editor's Note under section 5208) following the words "as provided in this article," in the first part of the section, are new with Public Laws 1925, ch. 73.

§ 5241. Deficits supplied; business discontinued.—If it shall appear to the superintendent of credit unions by any examination or report that any such corporation is insolvent, or that it has violated any of the provisions of this sub-chapter or any other law of the state, he may, by an order made over his hand and official seal, after a hearing or an opportunity for a hearing given the accused corporation, direct any such corporation to discontinue the illegal methods or practices mentioned in the order to make good any deficit. A deficit, in the discretion of the superintendent of credit unions may be made good by an assessment on the members in proportion to shares held by each member. If any such corporation shall not comply with such order within the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of credit unions (Provided, that not more than thirty (30) days shall be allowed) the superintendent shall thereupon take possession of the property and business of such corporation and retain such possession until such time as he may permit it to resume business or its affairs be finally liquidated, as provided in the banking law of the state. (1915, c. 115, s. 7; 1925, c. 7, ss. 3, 9; 1935, c. 87.)

Editor's Note.—The provision, in the third sentence of this section, that "the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of savings and loan associations (now credit unions, see Editor's Note under section 5208), (Provided, that not more than thirty (30) days shall be allowed)," is new with and substituted by the acts of 1925, ch. 73, in place of the former provision "sixty days after the same shall have been mailed to the last address filed by such corporation in the division of markets and rural co-operation," which was stricken out by same act.

SUBCHAPTER IV. CO-OPERATIVE ASSOCIATIONS

Art. 13. Organization of Associations

§ 5242. Nature of the association.—Any number of persons, not less than five, may associate themselves as a mutual association, society company, or exchange, for the purpose of conducting any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigration, flume, irrigation, water, sewerage, or mechanical business on the mutual plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; Provided, that the membership of agricultural organizations incorporated under this sub-chapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers. (1915, c. 144, s. 1; 1925, c. 179, ss. 1, 2; 1931, c. 447.)

Editor's Note.—This and the following sections are amended by Public Laws 1925, ch. 179 by striking out the word "co-operative" wherever it occurs in this subchapter and inserting in the lieu thereof the word "mutual."

The scope of this subchapter is enlarged by the new act which adds to the number of societies that may be organized thereunder the following: "horticulture, forestry, and telephone, electric light, power, storage, refrigeration, flume, irrigation, water and sewerage."

The Act of 1931 added the proviso to this section.

§ 5243. Use of term restricted.—No corporation or association hereinafter organized for doing business for profit in this state shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this subchapter. (1915, c. 144, s. 18; 1925, c. 179, s. 1.)

§ 5244. Articles of agreement.—The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares subscribed, and the par value of each. No shareholder in any corporation organized under this subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2.)

§ 5245. Certificate of incorporation. — The original articles of incorporation of corporations organized under this subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the secretary of state. A like verified copy of such articles and certificate of the secretary of state, showing the date when such articles were filed with and accepted by the secretary of state, within thirty days of such filing and acceptance, shall be filed with and recorded by the clerk of the

superior court of the county in which the principle place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The clerk of court shall forthwith transmit to the secretary of state a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the secretary of state shall issue a certificate of incorporation. (1915, c. 144, s. 3.)

§ 5246. Fees for incorporation. — For filing the articles of incorporation of corporations organized under this subchapter, there shall be paid the secretary of state ten dollars and his fees allowed by law, and for the filing of an amendment to such articles, five dollars and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars, such fee for filing either the articles of incorporation or amendments thereto shall be two dollars. For recording copy of such articles, the clerk of court shall receive a fee of fifty cents, to be paid by the persons presenting such papers for record. (1915, c. 144, s. 4.)

§ 5247. By-laws adopted.—At the time of making the articles of incorporation the incorporators shall make by-laws which shall provide:

1. The name of the corporation.
2. The purposes for which it is formed.
3. Qualifications for membership.
4. The date of the annual meeting; the manner in which members shall be notified of meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
5. The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board or directors.
6. In the case of selling agencies or productive societies, regulations for grading.
7. In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
8. The par value of the shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The manner in which the reserve fund shall be accumulated.
11. The manner in which the dividends shall be determined and paid to members.
12. Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a by-law limiting the patrons and subscribers to members of the association. (1915, c. 144, s. 5; 1925, c. 179, s. 4.)

Editor's Note.—This section is amended by Public Laws 1925, ch. 179, by adding thereto subsection twelve.

§ 5248. General corporation law applied; dealing in products of non-members. — All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this subchapter. And no corporation or association hereinafter organized under this sub-chapter for doing business in this State shall be permitted to deal in the products of non-members to an amount greater in value than such as are handled by it for members. (1915, c. 144, s. 17; 1925, c. 179, s. 1; 1931, c. 447, s. 2.)

Editor's Note.—The Act of 1931 added the second sentence to this section.

§ 5249. Other corporations admitted.—All mutual corporations, companies, or associations heretofore organized and doing business under prior statutes, or which attempted to so organize and do business, shall have the benefit of all of the provisions of this subchapter, and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this subchapter. No association organized under this subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; 1925, c. 179, s. 1.)

Art. 14. Stockholders and Officers

§ 5250. Certificate for stock fully paid.— Certificates of stock shall not be issued to any subscriber until fully paid, but the by-laws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11.)

§ 5251. Ownership of shares limited. — No shareholder in any such association shall own shares of a greater aggregate par value than twenty per cent of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the by-laws. (1915, c. 144, s. 9; 1925, c. 179, s. 1.)

§ 5252. Shares issued on purchase of business.—Whenever an association, created under this act, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10.)

§ 5253. Absent members voting.—At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholders, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12.)

§ 5254. Directors and other officers.—Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the by-laws may prescribe, and shall hold office for time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the by-laws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any directors or officer for cause, and fill the vacancy, and thereupon the directors or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the persons filling the office shall be secretary-treasurer. (1915, c. 144, s. 6.)

Art. 15. Powers and Duties

§ 5255. Nature of business authorized.—An association created under this subchapter shall have power to conduct any agricultural, horticultural, forestry, dairy, mechanical, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, on the mutual plan. (1915, c. 144, s. 8; 1925, c. 179, ss. 1, 3.)

§ 5256. Amendment of articles.—The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders meeting, or any special shareholders' meeting called for that purpose, on ten days notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid up capital at the time the amendment is adopted. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the secretary of state and of the clerk of court of the county where the principal place of business is located. (1915, c. 144, s. 7.)

§ 5257. Apportionment of earnings.— The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six per cent per annum, then setting aside not less than ten per cent of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty per cent of the paid-up capital stock, and not less than two per cent thereof for an educational fund to be used in teaching coöperation, and the remainder of the net profits by uniform dividends upon the amount of purchases of shareholders and upon the wages and salaries of employees, and one-half of such uniform dividends to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as fruit, truck, peanuts, and cotton growers' associations, and in productive associations such as creameries, canneries, warehouses, factories and the like, dividends shall be prorated on raw materials delivered instead of on goods purchased. In case the association is both a selling and productive concern, or a service and distributing association the dividends may be on both raw material delivered and on goods or service purchased by patrons. (1915, c. 144, s. 13; 1925, c. 177, s. 5.)

Editor's Note.—The words, "or a service and distributing association" and "or service," in the last sentence of this section, are added, to the sentence as it formerly stood, by Public Laws 1925, ch. 179.

§ 5258. Time of distribution.—The profits or net earnings of such associations shall be distributed to those entitled thereto, at such times as the by-laws shall prescribe, which shall be as often as once in twelve months. (1915, c. 144, s. 14.)

§ 5259. Reports to secretary of state.— Every association organized under the provisions of this subchapter shall annually, on or before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets and rural organization conducted by the "Joint Committee for Agriculture Work" of the state board of agriculture and the North Carolina State College of Agriculture and Engineering, as provided in the chapter on Agriculture. (1915, c. 144, s. 15.)

SUBCHAPTER V. MARKETING ASSOCIATIONS

Art. 16. Purpose and Organization

§ 5259(a). Declaration of policy.—In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through coöperation, and to eliminate speculation and waste; and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer; and to stabilize the marketing problems of agricultural products this subchapter is enacted. (1921, c. 87, s. 1; 1935, c. 230, s. 1.)

Editor's Note. — An excellent discussion of co-operation marketing will be found in 1 N. C. Law Rev. 216, and a review of the cases in 2 N. C. Law Rev. 222. Volume 27 of the Columbia Law Review pp. 827 et seq. contains an article on the constitutionality of this and the corresponding statutes of other states as being in restraint of trade. The soundness of the North Carolina decisions upholding the statute is questioned.

Public Laws of 1935 inserted the words "producing and."

Validity.—"The Tobacco Growers Co-operative Association Act, this and the following section of the chapter, was construed and its validity sustained in Tobacco Growers Co-Op.

Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174." Tobacco Growers Co-Op. Ass'n v. Bissett, 187 N. C. 180, 182, 121 S. E. 446. See the preceding Editor's Note.

Same—Assailed on Ground of Insufficient Signers. — In Pittman v. Tobacco Growers Co-op. Ass'n, 187 N. C. 340, 341, 121 S. E. 634, the Court said that the validity cannot be assailed by alleging an insufficient number of signers. This is a collateral attach and is not a direct attach by the State upon a quo warranto to vitiate the incorporation. Besides, there was no evidence of an insufficient sign-up, and if the plaintiff could bring a collateral attack to vitiate the organization, the burden is upon him to produce evidence to that effect.

Withdrawal of Charter. — It was held in the Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, that since an association formed under this act had no capital, stock, surplus or credit except as given by the act, the legislature may withdraw its charter at any time and for this reason a monopoly is safe guarded against. For a constructive criticism of this holding see 27 Columbia Law Rev. 827 et seq.

§ 5259(b). Definitions.—As used in this subchapter—

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products;

(b) The term "member" shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock;

(c) The term "association" means any corporation organized under this subchapter; and

(d) The term "person" shall include individuals, firms, partnerships, corporations, and association.

Associations organized hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This subchapter shall be referred to as the "Coöperative Marketing Act." (1921, c. 87, s. 2; 1935, c. 436, s. 1.)

Editor's Note.—The 1935 amendment omitted "common" which preceded the word "stock."

§ 5259(c). Who may organize. — Five (5) or more persons engaged in the production of agricultural products may form a nonprofit, coöperative association, with or without capital stock, under the supervision of this subchapter. (1921, c. 87, s. 3.)

§ 5259(d). Purposes. — An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4; 1933, c. 350, s. 2; 1935, c. 230, s. 2.)

Editor's Note.—Public Laws of 1933, c. 350, inserted, near the beginning of this section, the words "and other farmers" after the word "members."

The amendment of 1935 inserted the word "producing" preceding the word "marketing."

§ 5259(e). Preliminary investigation.—Every group of persons contemplating the organization of an association under this subchapter is urged to communicate with the chief of the division of markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5.)

§ 5259(f). Articles of incorporation. — Each association formed under this subchapter must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The names and addresses (not less than five) of those who are to serve as directors for the first term or until the election of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privilege granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment of voting districts and the election of delegates for representative purposes, the issuance, retirement and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherswise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this state to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this state; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this state, and

other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the chief of the division of markets. (1921, c. 87, s. 8; 1935, c. 230, ss. 3, 4.)

Editor's Note.—The amendment of 1935 changed subsection "(e)" of this section and added the next to the last paragraph in its entirety.

When Agreement Becomes Binding. — The agreement to form an association under this subchapter, becomes binding at once upon its being accepted by the association after incorporation. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 5259(g). Amendments to articles of incorporation.—The articles of incorporation may be altered or amended at any regular meeting, or any special meeting called for that purpose. "An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of a quorum of the members attending a meeting of which notice of the proposed amendment shall have been given. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this state. (1921, c. 87, s. 9; 1935, c. 230, s. 5.)

Editor's Note.—The amendment of 1935 changes the second sentence to this section. Prior to the amendment the adoption was by a majority of all members rather than by a majority of the quorum of the members attending a meeting.

§ 5259(h). By-laws.—Each association incorporated under this subchapter must, within thirty (30) days after its incorporation, adopt for its government and management a code of by-laws, not inconsistent with the powers granted by this subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed by-laws shall have been given, is sufficient to adopt or amend the by-laws. Each association under its by-laws may also provide for any or all of the following matters:

(a) The time, place, and manner of calling and conducting its meetings.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, at the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting the members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and the shares of common stock, the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member of the board of directors shall equitably and conclusively appraise his property interests in the association, and shall fix the amount thereof in money, which shall be paid to him within one year after such explusion or withdrawal. (1921, c. 87, s. 10; 1935, c. 230, s. 6.)

Editor's Note.—The amendment of 1935 changes the second sentence to this section. Prior to the amendment the majority vote of all members was required instead of a majority vote of a quorum of stockholders attending a meeting.

§ 5259(i). General and special meetings; how called.—In its by-laws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting: Provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11.)

§ 5259(j). Conflicting laws not to apply.—Any provisions of law which are in conflict with this subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20.)

§ 5259(k). Limtitation of use of term "coöperative".—No person, firm, or corporation, or association hereafter organized or doing business in this state shall be entitled to use the word "Coöperative" as part of its corporate or other business name or title unless it has complied with the provisions of this subchapter.

Any person, firm, corporation, or association now organized and existing, or doing business in this state, and embodying the word "coöperative" as part of its corporate or other business name or title, and which is not organized in compliance with the provisions of this subchapter, must,

within six months from the date at which this act goes into effect, eliminate the word "coöperative" from its said corporate or other business name or title. (1921, c. 87, s. 21.)

§ 5259(l). Association heretofore organized may adopt the provisions of this subchapter.—Any corporation or association organized under previously existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the secretary of state, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be bound by the provisions of this subchapter, articles of incorporation shall be filed as required in section 5259(f), except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24.)

§ 5259(m). Associations not in restraint of trade.—No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26.)

Purpose and Effect of Act.—This chapter, is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members, to enable them to obtain a fair price therefor without profit to the organization itself, in opposition to any agreement among the manufacturers or others that may have a contrary effect, and under conditions that will keep the public informed of its methods, and control them under governmental supervision when they go beyond a protective policy or become monopolistic in effect; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Presumption in Favor of Validity.—The legal presumption is in favor of the validity of the marketing contract made by a member with the coöperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the Anti-trust Law, or in restraint of trade. Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Governmental Control as Affecting.—The governmental control to be exercised as herein prescribed renders the coöperative plan for the protection of its own members incapable of exercise to the extent of a monoply or restraint of trade prohibited by law. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 5259(n). Partial unconstitutionality of law, effect.—If any section of this subchapter shall be declared unconstitutional for any reason, the remainder of the subchapter shall not be affected thereby. (1921, c. 87, s. 27.)

§ 5259(o). Application of general corporation laws.—The provisions of the general corporation laws of this state, and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this subchapter. (1921, c. 87, s. 28.)

Effect of Period Limiting Existence.—The provisions in the charter that an association under the provision of the coöperative marketing acts exists for five years, is the same as applies to a period limited for the existence of other corporations formed under other legislative acts, and does not contemplate that the association hold over the crops raised in one year for one or more successive years, such being destructive of the purposes of the association as contemplated by the statute. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 5259(p). Annual license fees.—Each association organized hereunder shall pay an annual license fee of ten dollars ($10), but shall be exempted from all franchise or license taxes. (1921, c. 87, s. 29.)

§ 5259(q). Filing fees.—For filing articles of incorporation, an association organized hereunder shall pay ten dollars ($10); and for filing an amendment to the articles, two dollars and one-half ($2.50). (1921, c. 87, s. 30.)

Art. 17. Members and Officers

§ 5259(r). Members.—(a) Under the terms and conditions prescribed in its by-laws, an association may admit as many members, or issue common stock, only to persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7.)

§ 5259(s). Directors; election.—(a) The affairs of the association shall be managed by a board of not less than five directors, elected by the members of stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The by-laws shall provide that one or more directors shall be appointed by the director of agricultural extension or any other public official or commission. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers

and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section: Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12.)

Validity of Tristate Provision.—The provision in the Co-operative Marketing Act for the appointment of a director by each of the governors of the three states of Virginia, North Carolina, and South Carolina is not objectionable on the ground that these three directors can control the other twenty-two chosen by the members under the plan outlined in the statute, the purpose therein being that the public may have opportunity to learn at all times how the business is being conducted, and to insure that it will be carried on in a manner that will not be detrimental to the public welfare. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 5259(t). Election of officers.—The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and treasurer, who need not be directors, and they may combine the two latter offices and designate the combined office as secretary-treasurer. The treasurer may be a bank or any depository, and as such shall not be considered an office, but as a function of the board of directors. In such case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13.)

§ 5259(u). Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.

(a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A coöperative association, incorporated under this law, may fix or limit in its by-laws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote.

(f) Any association organized with stock under this subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty per cent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter. (1921, c. 87, s. 14; 1935, c. 436, s. 2.)

Editor's Note.—The amendment of 1935 changes subsection (d) of this section. Prior to the amendment no stockholder could own more than one-twentieth of the common stock and the association could in its by-laws limit the amount to less than one-twentieth.

§ 5259(v). Removal of officer or director.—Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office: Provided, that this section shall not apply to directors appointed under subsection (b) of section 5259(s). (1921, c. 87, s. 15.)

§ 5259(w). Referendum.—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose. (1921, c. 87, s. 16.)

Art. 18. Powers, Duties, and Liabilities

§ 5259(x). Powers. — Each association incorporated under this subchapter shall have the following powers:

(a) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of non-members to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period.

(b) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products, handled by the association, or engaged in the financing of the association.

(e) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the by-laws.

(f) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.

(g) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conductive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this subchapter; and to do any such thing anywhere. (1921, c. 87, s. 6; 1933, c. 350, ss. 2-4; 1935, c. 230, ss. 7-9.

See 11 N. C. Law Rev., 212, for review of this section as amended 1933.

Editor's Note.—Public Laws of 1933, c. 350, made this section applicable to a certain extent to other farmers not members. Prior to the amendment the association could not handle the agricultural products of a non-member.

Near the beginning of subsection (a) the amendment of 1935 inserted the word "producing." The amendment also changed the last sentence of that subsection and added the last clause of subsection (d).

Formation of Subsidiary Companies.—Objection to the validity of the Coöperative Marketing Act that an organization of tobacco growers thereunder has formed subsidiary or minor companies to cure tobacco, redry it, and store it, prize it, and get it ready for market, is without merit; the money for such purpose being very small, specifically limited and under a complete system for its return to its members who have contributed it, it being necessary for the association to own or control enough of the facilities to make effective the authorized purpose of its organization. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 5259(y). Marketing contract.—(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding eight per cent per annum, and reserve for retiring the stock, if any; and other proper reserves; and interest not exceeding eight per cent per annum upon common stock.

(b) The by-laws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this state.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a degree of specified performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. (1921, c. 87, s. 17.)

Validity of Standard Contract. — The provisions of the standard contract made by the Tobacco Co-operative Marketing Association with its members are valid under a constitutional statute, and upon the alleged breach thereof on the part of the member in its material parts, the equitable remedy by injunction is available to the association. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

A co-operative association formed under the provisions of this act, whereby its members agree to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or tenant, being, among other things, for the purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and compensate him for his labor, skill, etc., exists by virtue of a constitutional statute, and the provisions of its standard contract with its members are valid and enforceable. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629.

Remedies for Breach by Member.—Upon the breach by a member of a contract for the sole handling of his crop the recovery of liquidated damages and all cost of the action, including premiums for bonds, expenses, and fees, and equitable relief by injunction to prevent the further breach

of the contract by a member, and a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Same—Liquidated Damages.—The fact that the co-operative marketing contract provides for liquidated damages does not give the association an adequate remedy at law for its members otherwise selling their tobacco as provided in the marketing contract, as such would seriously menace the existence of the association for the purpose for which it was incorporated under the provisions of the statute. Tobacco Growers Co-Op. Ass'n v. Pollock, 187 N. C. 409, 121 S. E. 763.

Same—Specific Performance.—Injuries from the breach of contract by a member with the Co-operative Tobacco Marketing Association, formed under the provisions of chapter 87, Public Laws of 1921, to market his tobacco, etc., cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629.

Same—Extent of Injunction Relief.—Upon an alleged breach on the part of the member the equitable remedy by injunction is available to the association. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Where the defendant resists injuctive relief upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, it was held that the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629; Tobacco Growers Co-Op. Ass'n v. Spikes, 187 N. C. 367, 121 S. E. 636.

The temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the plaintiff's own default, or if the continuance of the temporary restaining order will work greater injury than its dissolution by the court. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636.

The fact that the member gave a lien on his crop for advancements does not invade the rights of the association under the contract such that an injunction against selling the crop should be continued until the final hearing. This was especially true since the lienor was insolvent. Tobacco Growers Co-Op. Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

The general denial by the association of owing the defendant anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient against the defense that the defendant was forced to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract; and an order of the Superior Court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper under the evidence in this case. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636.

Same—Justification for Breach. — A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract for the failure to market the tobacco of his non-member tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636.

Same—Same—Shown by Parol.—Where a member of a co-operative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. Tobacco Growers Co-Op. Ass'n v. Moss, 187 N. C. 421, 121 S. E. 738.

Right of Court to Continue Injunction to Final Hearing.—The right given to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 639.

Where the defendant has admitted breaking his contract and he expects to continue doing so, a temporary injunction should be continued until the final hearing. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 256, 121 S. E. 631.

Right of Member to Mortgage Crop.—In Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 256, 121 S. E. 631, it was said: "It is true that a member may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn."

The mortgagee or lien holder for supplies furnished to produce the crop has a right to demand and receive of defendant, or to enforce delivery by any appropriate procedure, of a sufficient amount of the tobacco or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of plaintiff under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 256, 121 S. E. 631.

Effect of Mortgage upon Injunction.—A preliminary order restraining a member of the co-operative association from disposing of the tobacco embraced in the contract in breach thereof will not be dissolved by reason of a defense set up by its member that the tobacco was the subject of a lien for supplies necessary for its cultivation, a position available to the lienee not a party to the action, and the restraining order should be continued to the hearing, safeguarding the rights of the lienee to be asserted by his appropriate action. The defendant being in an attitude of resistance towards the contract and denying any obligations thereunder. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Evasive Answer Respecting Breach.—In proceedings for injunctive relief by a co-operative marketing association wherein the plaintiff definitely alleges that the defendant had breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of the injunctive relief. Tobacco Growers Co-Op. Ass n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Liability of Landlord for Non-Member Tenant.—The landlord is not liable for a penalty on account of failure of tenant to market tobacco through the association until and unless he receives the tenants crop as payment for rent, etc. He is then liable for as much as is received. Tobacco Growers Co-Op. Ass'n v. Bissett, 187 N. C. 180, 121 S. E. 446.

Evasion of Contract for Fraud.—In order to avoid a written contract, which was made under this section, for fraud for misrepresentations of a party or his authorized agent, it must not only be shown that the statements complained of were false, but among other things that the party was at the time ignorant of their falsity, and was induced thereby to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. Simpson v. Tobacco Growers Co-Op. Ass'n, 190 N C. 603, 130 S. E. 507.

In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of our statute, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. Tobacco Growers Co-Op. Ass'n v. Chilton, 190 N. C. 602, 130 S. E. 312; Simpson v. Tobacco Growers Co-Op. Ass'n, 190 N. C. 603, 130 S. E. 507.

Where one as agent for the Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract, the agent and the one to whom the false representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. Dunbar v. Tobacco Growers Co-Op. Ass'n, 190 N. C. 680, 130 S. E. 505.

§ 5259(z). Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.—Whenever an association organized hereunder with preferred capital stock,

shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may by agreement with the other party or parties to the transaction discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for shares of stock issued. (1921, c. 87, s. 18.)

§ 5259(aa). Annual reports.—Each association formed under this subchapter shall prepare and make out an annual report on forms furnished by the division of markets, containing the name of the association, its principal place of business, and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up, and the number of stockholders of a stock association or the number of members and the amount of membership fees received, if a nonstock association; the total expenses of the operations; the amount of its indebtedness, or liability, and its balance sheets. (1921, c. 87, s. 19.)

§ 5259(bb). Interest in other corporations or associations. — An association may organize, form, operate, own, control, have interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association, or to any other person, and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this state or the United States, its warehouse receipt shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. (1921, c. 87, s. 22.)

§ 5259(cc). Contracts and agreements with other association. — Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other coöperative corporation, association, or associations, formed in this or in any other state, for the coöperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses. (1921, c. 87, s. 23.)

§ 5259(dd). Misdemeanor; breach of marketing contract of coöperative association; spreading false reports about the finances or management thereof.—Any person or persons, or any corporation whose officer of employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness. (1921, c. 87, s. 25.)

§ 5259(ee). Coöperative associations may form subsidiaries.—Nothing in this chapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or by-laws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or by-laws and may by way of illustration, but not of limitation, include the following:

1. Representation of said association on the board of directors or other governing body of said subsidiary corporation, upon such terms as may be deemed advisable.

2. Ownership by an association of an interest or interests in a subsidiary corporation represented by stock of any class thereof, or otherwise, to such extent and upon such terms, and with such voting power, as may be deemed advisable.

3. Participation by said association in the profits of such subsidiary corporation to such extent and upon such terms as shall be deemed advisable. (1933, c. 350, § 1.)

CHAPTER 93A

COSMETIC ART REGULATED

§ 5259(1). Practice of Cosmetology regulated.—On and after June thirtieth, one thousand nine hundred and thirty-three, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the state of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this chapter by the state board of cosmetic art examiners hereinafter established. (1933, c. 179, s. 1.)

§ 5259(2). Cosmetic art.—Anyone or combination of the following practices, when done for pay, or reward, shall constitute the practice of cosmetic art in the meaning of this chapter:

The systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands; the use of cosmetic preparations and antiseptics; manicuring; cutting, dyeing, cleansing, arranging, dressing, waving, and marcelling of the hair, and the use of electricity for stimulating growth of hair. (1933, c. 179, s. 2.)

§ 5259(3). Cosmetologist. — "Cosmetologist" is any person who, for compensation, practices cosmetic art, or conducts, or maintains a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 3.)

§ 5259(4). Beauty parlor, etc.—"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced. (1933, c. 179, s. 4.)

§ 5259(5). Manager. — "Manager," or "managing cosmetologist," as used in this chapter is defined as any person who has direct supervision over operators, or apprentices in a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 5.)

§ 5259(6). Operator.—"Operator" is any person who is not a manager, itinerant, or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6.)

§ 5259(7) Itinerant cosmetologist. — "Itinerant cosmetologist" is any person who practices as a business cosmetic art outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, either in going from house to house or from place to place at regular, or irregular intervals: Provided, this chapter shall not apply to persons attending female institutions of learning, who defray the cost or a part of the cost of such attendance by the occasional practice of cosmetic art as defined herein, or to persons practicing the cosmetic art in rural communities without the use of mechanical appliances. (1933, c. 179, s. 7.)

§ 5259(8). Manicurist. — "Manicurist" is any person who does manicuring only, outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, for compensation. (1933, c. 179, s. 8.)

§ 5259(9). Apprentice. — "Apprentice" is any person who is not a manager, itinerant cosmetologist, or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9.)

§ 5259(10). Qualifications for certificate of registration.—No person shall be issued a certificate of registration as a registered apprentice by the state board of cosmetic art examiners, hereinafter established—

(a) Unless such person is at least eighteen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by the said board of cosmetic art examiners.

(c) Unless such person has completed at least four hundred and eighty hours in classes in a reliable cosmetic art school, or college approved by said board of cosmetic art examiners.

(d) Unless such person passes the examination prescribed by the board of cosmetic art examiners and pays the required fees hereinafter enumerated. (1933, c. 179, s. 10.)

§ 5259(11). Period of apprenticeship.—No registered apprentice, registered under the provisions of this chapter shall operate a cosmetic art beauty shop, beauty parlor, or hairdressing establishment in this state, but must serve his or her period of apprenticeship under the direct supervision of a registered managing cosmetologist as required by this chapter: Provided, however, that any apprentice who, at the time of the effective date of this act, is regularly employed under the direct supervision of one who is entitled to registration as a managing cosmetologist under the provisions of section 5259(19) shall, upon recommendation of such managing cosmetologist, and upon passing a satisfactory physical examination, be entitled to registration as a registered cosmetologist. (1933, c. 179, s. 11.)

§ 5259(12). Qualifications for registered cosmetologist.—Any person to practice cosmetic art as a registered cosmetologist must have worked as a registered apprentice for a period of at least six months under the direct supervision of a registered managing cosmetologist and this fact must be demonstrated to the board of cosmetic art examiners by the sworn affidavit of three registered cosmetologists, or such other methods of proof as the board may prescribe and deem necessary. A certificate of registration as a registered cosmetologist shall be issued by the board, hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(a) Who is qualified under the provisions of section ten of this chapter.

(b) Who is at least nineteen years of age.

(c) Who passes a satisfactory physical examination as prescribed by said board.

(d) Who has practiced as a registered apprentice for a period of six months, under the immediate personal supervision of a registered cosmetologist; and

(e) Who has passed a satisfactory examination, conducted by the board, to determine his or her fitness to practice cosmetic art, such examination to be prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, and services incident thereto, and has sufficient knowledge concerning the diseases of the face, skin, and scalp, to avoid the aggravation and spreading thereof in the practice of said profession. (1933, c. 179, s. 12.)

§ 5259(13). State board of cosmetic art examiners created; appointment and qualifications of members; term of office; removal for cause. — A board to be known as the state board of cosmetic art examiners is hereby established, to consist of three members appointed by the governor of the State. Each member shall be an experienced

cosmetologist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina for at least five years next preceding his or her appointment, and who, during such period of time, and at the time of appointment, shall be free of connection in any manner with any cosmetic art school or college or academy or training school. The appointment of the governor shall be for a term of three years. The governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2.)

Editor's Note.—Several changes were made in this section by the amendment of 1935. The requirement that the appointee shall be free from connection with a school or college is new and it was also the requirement for following "all branches" of the cosmetic art. Prior to the amendment the section provided that the first appointees should serve for three years, two years, and one year respectively.

Relator Must Show Interest in Action to Vacate Office.—It is necessary that a relator in an action to vacate an office under this section, have some interest in the action, though it is not required that he be a contestant for the office. State v. Ritchie, 206 N. C. 808, 175 S. E. 308.

§ 5259(14). Office in Raleigh. — The board of cosmetic art examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said board shall elect its own officers, and in addition thereto, shall elect a full time secretary, which secretary shall receive an annual salary not to exceed one thousand eight hundred dollars, such salary, as well as all other expenses of said board, to be paid only out of the revenue derived from fees collected under the provisions of this chapter. Said full time secretary shall keep and preserve all the records of the board, issue all necessary notices to the registered cosmetologists and apprentices of the state, and perform such other duties, clerical and otherwise, as may be imposed upon him, or her, as the case may be, by said board of cosmetic art examiners. Said full time secretary is hereby authorized and empowered to collect, in the name and on behalf of the board, the fees prescribed in this act, and shall turn over all moneys so collected into such state or national bank or trust company as shall be designated and selected by the board as a depository for such funds; and said secretary shall make full and complete report of such collections from the records of his office as and when required by the chairman of the board. Such secretary shall, upon entering upon the duties of office, execute a bond unto the state of North Carolina with a duly licensed bonding company doing business in this state as surety, or with other surety acceptable to said board, such bond to be in the penal sum of ten thousand dollars and to be conditioned upon the faithful performance of the duties of the office, and faithful and correct accounting for the moneys received.

The fund thus accumulated shall be disbursed under the provisions of this chapter, or vouchers or checks signed by the chairman and secretary, for the purposes of this chapter, and accounting rendered annually of receipts and disbursements as hereinafter provided in section 5259(15). (1933, c. 179, s. 14.)

§ 5259(15). Compensation and expenses of board members; inspectors; annual report to governor.—Each member of the board of cosmetic art examiners, as herein created, shall receive for his or her services the sum of not more than seven dollars and fifty cents per day for each day actually spent in the performance of his or her duties, and shall be reimbursed for actual necessary expenses incurred in the discharge of their duties.

Said board shall appoint three inspectors, who shall be experienced in all branches of the cosmetic art, at a salary to not exceed one hundred and seventy-five ($175.00) dollars per month, this sum to cover salary and expenses incurred in the discharge of such duties as they may be called upon to perform. Such inspectors shall have the authority, at all reasonable hours, to examine cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies or training schools, with respect to their compliance with the provisions of this chapter, and shall be charged with the duty of making monthly reports to the secretary of said board of cosmetic art examiners. All amounts paid out under this section shall be only from funds derived from fees collected in the administration of this chapter. No member of the state board of cosmetic art examiners shall be eligible to act in the capacity of inspector for said board.

The board shall report annually to the governor a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1933, c. 179, s. 15; 1935, c. 54, s. 3.)

Editor's Note.—The second and third paragraphs of this section are new with the amendment of 1935.

§ 5259(16). Applicants for examination.—Each applicant for an examination shall:

(a) Make application to the board of cosmetic art examiners on blank forms prepared and furnished by the full time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(b) Pay to the secretary of the said board the required examination fee, hereinafter established.

(c) All applications for said examination must be filed with the full time secretary at least thirty days prior to the actual taking of such examination by applicant. (1933, c. 179, s. 16.)

§ 5259(17). Regular and special meetings of board; examinations.—The board of cosmetic art examiners shall meet four times a year in the months of January, April, July and October on the first Tuesday in each of said months, for the purpose of transacting all business of the board of cosmetic art examiners and to conduct examinations of applicants for certificates of registration to practice as registered cosmetologists, and of applicants for certificates of registration to practice as registered apprentices, meetings to be held at such places as the board may determine to be most convenient for such examinations. The examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be open to all applicants, and shall include such practical demonstration and oral and written tests as the said board may determine. The chairman of

the board is hereby authorized and empowered to call a meeting of said board whenever necessary, said meetings to be in addition to the quarterly meetings hereinbefore provided for. (1933, c. 179, 17; 1935, c. 54, s. 4.)

Editor's Note.—Prior to the amendment of 1935 this section provided for examination at least three times each year. The last sentence of the section was added by the amendment.

§ 5259(18). Certificate of registration.—Whenever the provisions of this chapter have been complied with, the said board shall issue or cause to be issued, a certificate of registration as registered cosmetologist, or as a registered apprentice to the applicant, as the case may be. (1933, c. 179, s. 18.)

§ 5259(19). Admitting operators from other states.—Persons who have practiced cosmetic art in another state and who move into this state shall prove and demonstrate his, or her fitness, physical and otherwise, as set out in section ten and twelve, to the board of cosmetic art examiners, as herein created, and as herein provided, before they will be issued a certificate of registration to practice cosmetic art, but said board may issue such temporary permits as are necessary. (1933, c. 179, s. 19.)

§ 5259(20). Registration procedure.—The procedure for the registration of present practitioners of cosmetic art shall be as follows:

(a) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art at the time of the effective date of this chapter upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness, and upon paying the required fee to the board of cosmetic art examiners shall be issued a certificate of registration as a registered cosmetologist.

(b) Any person who, at the time of the effective date of this chapter, is operating a shop as a managing cosmetologist, shall, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness and upon paying the required fee to the board of cosmetic art examiners be issued a certificate of registration as a managing cosmetologist.

(c) Any person who, at the time of the effective date of this chapter, is regularly employed under a person who has registered as a managing cosmetologist shall be entitled to register as a cosmetologist as provided in section eleven of this chapter.

(d) All persons who are not actively engaged in the practice of cosmetic art at the time of the effective date of this chapter shall be required to comply with all of the provisions of this chapter. (1933, c. 179, s. 20.)

§ 5259(21). Fees required.—The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be three dollars. The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be five dollars. The annual license fee of a registered cosmetologist shall be three dollars fifty cents, while the annual license fee of a registered apprentice shall be two dollars fifty cents. All licenses, both for apprentices and registered cosmetologists, shall be renewed as of the 30th day of June each and every year; such renewals for apprentices shall be two dollars fifty cents, and for registered cosmetologists three dollars fifty cents. The fees herein set out shall not be increased by the board of cosmetic art examiners, but said board may regulate the payment of said fees and pro-rate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars and registration of an expired certificate of an apprentice shall be three dollars. (1933, c. 179, s. 21.)

§ 5259(22). Persons exempt. — The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

(a) Persons authorized under the laws of the state to practice medicine and surgery.

(b) Commissioned medical or surgical officers of the United States army, navy, or marine hospital services.

(c) Registered nurses.

(d) Undertakers.

(e) Registered barbers.

(f) Manicurists as herein defined. (1933, c. 179, s. 22.)

§ 5259(23). Rules and regulations of board. — The state board of cosmetic art examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said board and approved by the state board of health shall be furnished from the office of the board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school. (1933, c. 179, s. 23; 1935, c. 54, s. 5.)

Editor's Note.—The amendment of 1935 made this section applicable to academies and training schools.

§ 5259(24). Posting of certificates. — Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his, or her work chair. (1933, c. 179, s. 24.)

§ 5259(25). Annual renewal of certificates. — Every registered cosmetologist and every registered apprentice, who continues in active practice or service shall annually, on or before June 30th, of each year, file with the secretary of the board, renewal certificate as to physical fitness, renew his, or her certificate of registration which has not been renewed prior to, or during the month of July in any year, and which shall expire on the first day of August in that year. A registered cosmetologist, or a registered apprentice whose certificate of registration has expired may have his or her certificate restored immediately upon payment of the required restoration fee, and fur-

nishing to the secretary of the board renewal certificate as to physical fitness. Any registered cosmetologist who retires from the practice of cosmetic art for not more than three years may renew his or her certificate of registration upon payment of the required restoration fee, and by furnishing to the secretary of the board renewal certificate as to physical fitness. (1933, c. 179, s. 25.)

§ 5259(26). Causes for revocation of certificates. —The board of cosmetic art examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(a) Conviction of a felony shown by certified copy of the record of the court of conviction.

(b) Gross malpractice, or gross incompetency, which shall be determined by the board of cosmetic art examiners.

(c) Continued practice by a person knowingly having an infectious, or contagious disease.

(d) Advertising by means of knowingly false, or deceptive statements.

(e) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

(f) The commission of any of the offenses described in section 5259(28), sub-sections three, four and six. (1933, c. 179, s. 26.)

§ 5259(27). Hearing on charges. — The board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any certificate of registration, however, for any of these causes, unless the person accused has been given at least twenty days notice in writing of the charge against him or her and public hearing by the board of cosmetic art examiners.

(a) Upon the hearing of any such proceeding, the board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers.

(b) Any cosmetologist in the state whose case has been passed upon by the board of cosmetic art examiners shall have the right to appeal to the superior court of the state, which court may in its discretion reverse, or modify any order made by the said board of cosmetic art examiners. (1933, c. 179, s. 27.)

§ 5259(28). Acts made misdemeanors.—Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than $10.00 and not more than $50.00, or imprisonment for not less than ten days, or more than thirty days:

(a) The violation of any of the provisions of section 5259(1).

(b) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.

(c) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist.

(d) Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.

(e) Practicing or attempting to practice by fraudulent misrepresentations.

(f) The willful failure to display a certificate of registration as required by section 5259(24).

(g) The willful and continued violation of the reasonable rules and regulations adopted by the state board of cosmetic art examiners, and approved by the state board of health, for the sanitary management of shops and schools. (1933, c. 179, s. 28.)

§ 5259(29). Records to be kept by board.—The board of cosmetic art examiners shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business, and residence of each registered cosmetologist and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection during all days, excepting Sundays and legal holidays. (1933, c. 179, s. 29.)

CHAPTER 94

DRAINAGE

SUBCHAPTER I. DRAINAGE BY INDIVIDUAL OWNERS

Art. 1. Jurisdiction in Clerk of Superior Court

Part 1. Petition by Individual Owner

§ 5260. Name of proceeding.—The proceeding under this subchapter shall be the same as prescribed in the chapter Eminent Domain, article 2, Condemnation Proceedings. (Rev., s. 4028; Code, s. 1324.)

Cross References.—For a full discussion of this subject, see 4 Enc. Dig. 922; 13 Enc. Dig. 782. For procedure under this subchapter, see sections 1715 et seq., and notes thereto.

Constitutionality.—The laws, enacted under this and the following sections of this chapter, are constitutional. Forehand v. Taylor, 155 N. C. 353, 71 S. E. 433; Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225, and cases cited. They come within the power of the State for police regulations. Winslow v. Winslow, 95 N. C. 24.

Various Statutes Harmonized.—While the various statutes for the drainage of swamp lands in Eastern North Carolina have not the same provisions in all respects, they have been collected and are to be found in this chapter and should be construed to harmonize, and constitute, with such variations, a system of drainage laws for the State. Adams v. Joyner, 147 N. C. 77, 60 S. E. 725.

Right to Condemn.—The right of the state to condemn land for drains rest on the same foundation as its right in cases of public roads, mills, railroads, school houses, etc. Norfleet v. Cromwell, 70 N. C. 634.

The right to drain through the banks of a natural watercourse is exactly similar in character to the right to construct dykes or levees to keep their excessive waters from overflowing the adjacent lands, a right which has been recognized in the legislation of all countries from the most ancient times. Sanderlin v. Luken, 152 N. C. 738, 742, 68 S. E. 225.

§ 5261. Petition filed; commissioners appointed. —Any person owning pocosan, swamp, or flat lands, or owning lowlands subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands; except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons, may by petition apply to the superior court of the county in which the

lands sought to be drained or embanked or some part of such lands lie, setting forth the particular circumstances of the case, the situation of the land to be drained or embanked, to what outlet and through whose lands he desires to drain, or on what lands he would erect his dam, and who are the proprietors of such lands; whereupon a summons shall be served on each of the proprietors, and, on the hearing of the petition the court shall appoint three persons as commissioners, who shall be duly sworn to do justice between the parties. (Rev., s. 3983; Code, s. 1297; R. C., c. 40, s. 1; 1795, c. 436; 1852, c. 57, ss. 1, 2.)

Jurisdiction.—The clerk of the superior court has jurisdiction of a proceeding to obtain a right of drainage over the land of an adjoining landowner, and to assess damages, etc. Durden v. Simmons, 84 N. C. 555.

In such proceeding the law requires the appointment of disinterested freeholders as commissioners. Durden v. Simmons, 84 N. C. 555.

This chapter, and the amendments thereto, are the charts which should guide the commissioners, and that portion of the judge's order, wherein he undertakes to instruct the new commissioners as to their duties, should be set aside. Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926.

Appeal.—An appeal will not lie from the decision of the county court upon a petition for draining the petitioner's lands through those of others. Stanly v. Watson, 33 N. C. 124, citing Collins v. Haughton, 26 N. C. 420.

The commissioners ordered under this act constitute a separate and distinct tribunal, and an appeal (generally) from the county to the superior court, is not an appeal from the report of such commissioners so as to vacate it. Skinner v. Nixon, 52 N. C. 342.

An order in a drainage proceeding directing matters which are properly for the determination of the commissioners to be referred to a jury is appealable. Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997.

The appointment of appraisers, to assess damages, etc., by the county commissioners under the provisions of this chapter is not a judicial act. Flat Swamp, etc., Canal Co. v. McAlister, 74 N. C. 159.

Enforcement of Lien.—The plaintiff in such proceeding can only enforce the lien acquired by the return of the appraisers, by carrying the whole proceeding by writ of certiorari into the superior court, and obtaining a judgment thereon. The county commissioners cannot render judgment thereupon. Flat Swamp, etc., Canal Co. v. McAlister, 74 N. C. 159.

Same—Justice of the Peace.—A justice of the peace has no jurisdiction to enforce such lien, where the amount is less than two hundred dollars; his judgments are necessarily personal, and enforceable on the property of the debtor, and not in rem. Flat Swamp, etc., Canal Co. v. McAlister, 74 N. C. 159.

Nature of Lien.—Such a lien is not a personal debt, but a lien upon the land benefited, which is the only security therefor. Flat Swamp, etc., Canal Co. v. McAlister, 74 N. C. 159.

Artificial Outlets.—This chapter applies only to artificial outlets made over the land of another to reach a natural watercourse. Mizell v. McGowan, 129 N. C. 93, 39 S. E. 729.

Readjustment.—When the rights and duties of adjoining landowners as to drainage in a certain canal have been determined under this chapter, and judgment entered, proceedings subsequently brought for the purpose of readjustment, owing to change of ownership and partition, etc., are in effect a motion in the cause, in which the judgment, unlike a final judgment, is not conclusive; and the cause can be brought forward from time to time, upon notice to the parties, and further decrees made to conform to the exigencies and changes which may arise. Staton v. Staton, 148 N. C. 490, 62 S. E. 596.

Jury Question.—See Collins v. Haughton, 26 N. C. 420.

Joint Petition.—Two, or more, separate proprietors of land cannot sustain a joint petition for a ditch to drain their lands, without alleging that a common ditch would drain the lands of all the petitioners. Shaw v. Burfoot, 53 N. C. 344.

Diversion of Water—Value of Land before and after. — In an action for damages to land from diversion of water, it is competent to show the difference in value of land before and after the injury. Briscoe v. Young, 131 N. C. 386, 42 S. E. 893.

Same—General Rule.—Water cannot be diverted from its natural course so as to damage another, but it may be increased and accelerated. Mizell v. McGowan, 129 N. C. 93, 39 S. E. 729; 125 N. C. 439, 34 S. E. 538; Bardiff v. Norfolk Southern R. Co., 168 N. C. 268, 84 S. E. 290; Lassiter v. Norfolk, etc., R. Co., 126 N. C. 509, 36 S. E. 49; Hocutt v. Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681.

The owners of swamps, whose waters naturally flow into natural watercourses, can make such canals as are necessary to drain them of the water naturally flowing therein, although in doing so the flow of water in the natural watercourse is increased and accelerated so that the water is discharged on the land of an abutting owner. Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783.

Same—Liability for Damages. — Where a person diverts water from a stream my cutting a channel from it, and at a point lower down the stream turns it back into the old channel, and by it own momentum it is carried on to the lands of an adjoining owner, he is liable for damages. Brisco v. Young, 131 N. C. 386, 42 S. E. 893.

One is liable for damages caused to the lands of another by his diverting the natural flow of surface water thereto. Roberts v. Baldwin, 151 N. C. 407, 66 S. E. 346.

Surface waters should be drained so as to be carried off in the due course of nature. The upper proprietor is liable in damages to the land of the lower proprietor caused by water diverted by his ditches and not carried to a natural waterway. Briscoe v. Parker, 145 N. C. 14, 58 S. E. 443.

Same—Landowner's Remedy. — When the lands of the lower proprietor are damaged by the improper drainage of the upper proprietor, he may elect to bring an action for damages or proceed under this and the following sections. Briscoe v. Parker, 145 N. C. 14, 58 S. E. 443.

Commissioner's Report Set Aside.—Where judge set aside report of commissioners because it did not comply with the statute, and further found as a fact in his order that two of the commissioners had been guilty of gross indiscretion, the Supreme Court would not reverse his order, whether the report conformed to the statute or not. Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926.

Former Judgment—Setting Aside.—If a former judgment in a similar proceeding has not been pleaded in an action for drainage of lands, as an estoppel or res adjudicata, before final judgment, the party relying thereon must move the court within one year to set the judgment aside for excusable mistake or inadvertence. Adams v. Joyner, 147 N. C. 77, 60 S. E. 725.

Reclaiming Swamps.—Laws 1899, ch. 255, for reclaiming swamp or lowlands, applies only where all the parties contribute under a valid agreement to the lawful digging of a ditch or canal. Porter v. Armstrong, 129 N. C. 101, 39 S. E. 799.

Enlarging Canal on Land of Another. — Where a person enlarges a canal on the lands of another, under a void proceeding, he is a trespasser, and cannot claim credit for money spent thereon. Porter v. Armstrong, 129 N. C. 101, 39 S. E. 799.

Stopping Drain Ditches—Liability.—A railroad company is liable in damages for negligently and improperly stopping the drain ditches on plaintiff's land, so as to injure his crop by the water flowing thereon from his own and adjoining lands, incidental to the building and ditching of its roadbed, though the right of way through plaintiff's land may previously have been purchased or regularly acquired by condemnation proceedings. Davenport v. Norfolk, etc., R. Co., 148 N. C. 287, 62 S. E. 431.

Liability to Maintain Artificial Waterway Constructed for Temporary Purposes. — When an upper proprietor of lands constructs and maintains for his own use and advantage an artificial waterway or structure affecting the flow of water, without invading the rights of the lower proprietor, for a temporary purpose or a specific purpose which he may at any time abandon, the upper proprietor comes under no obligation to maintain the structure, though the incidental effect has been to confer a benefit on the lower tenant. Lake Drummond Canal, etc., Co. v. Burnham, 147 N. C. 41, 60 S. E. 650.

Notice to Landowner.—An order by county commissioners appointing appraisers to assess the value of the benefits and damages which would accrue to the owners of land on account of a certain canal sought to be cut through his land, upon the petition of other parties, filed under the provisions of this chapter, is void, unless said land owner be made a party to the petition. Gamble v. McCrady, 75 N. C. 509.

Drainage System by Original Owner—Duty of Subsequent Owners. — Where separate owners of lands have derived them subject to a drainage system placed upon the entire tract by the original owner, each one using the system must bear the costs of maintenance and repair required by the portion of the system on his own premises. Lamb v. Lamb, 177 N. C. 150, 98 S. E. 307.

§ 5262. Duty of Commissioners.—The commissioners, or a majority of them, on a day of which each proprietor of land aforesaid is to be notified at least five days, shall meet on the premises and view the lands to be drained or embanked, and the lands through or on which the drain is to pass or the embankment to be erected and shall determine and report whether the lands of the petitioner can be conveniently drained or embanked except through or on the lands of the defendants or some of them; and if they are of opinion that the same cannot be conveniently done except through or on such lands, they shall decide and determine the route of the canal, ditch, or embankment, the width thereof, and the depth or height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage or embankment of the water from the petitioner's land, and also securing the defendant's lands from inundation, and every other injury to which the same may be probably subjected by such canal, ditch, or embankment; and they shall assess, for each of the defendants, such damage as in their judgment will fully indemnify him for the use of his land in the mode proposed; but in assessing such damages, benefits shall be deducted. (Rev., s. 3984; Code, s. 1298; R. C., c. 40, s. 2; 1795, c. 436; 1852, c. 57, ss. 1, 2.)

Section Not Repealed.—Section 5275, concerning the drainage of lowlands, does not expressly repeal this section, but leaves in operation such of the provisions as are not repugnant to such act of 1889. Worthington v. Coward, 114 N. C. 289, 19 S. E. 154.

Cited in Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997.

§ 5263. Report and confirmation; easement acquired; exceptions.—The commissioners shall report in writing, under their hands, the whole matter to the court, which shall confirm the same, unless good cause be shown to the contrary; and on payment of the damages and cost of the proceedings the court shall order and decree that the petitioner may cut the canal or ditch, or raise the embankment in the manner reported and determined by commissioners; and thereupon the petitioner shall be seized in fee simple of the easement aforesaid; Provided, that, without the consent of the proprietor, such canal, ditch, or embankment shall not be cut or raised through or on his yard or curtilage, nor be allowed when the same shall injure any mill, by cutting off or stopping the water flowing thereto, nor shall such dam be allowed so as to create a nuisance by stagnant water, or cut off the flow of useful springs or necessary streams of water, or stop any ditches of such proprietor when there is no freshet. (Rev., s. 3985; Code, s. 1299; R. C., c. 40, s. 3; 1795, c. 436, s. 2; 1835, c. 7; 1852, c. 57, ss. 1, 2.)

Report of Commissioners Conclusive.—The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. Norfolk Southern R. Co. v. Ely, 101 N. C. 8, 7 S. E. 476.

Jury to Settle Issues of Fact.—Upon an application to condemn lands for the purpose of drainage, the issue of fact raised by the pleadings should be framed and settled by a jury; they cannot be raised or considered upon exceptions to the report of the commissioners appointed to assess damages. Norfolk Southern R. Co. v. Ely, 101 N. C. 8, 7 S. E. 476.

Title in Lands Condemned.—When, upon the petition of one or more parties, under this section, leave was granted by the county court to cut a canal across the land of another for the purposes of drainage, the petitioners and their assignees, upon the report of the jury provided for in said act being confirmed, acquire not merely an easement, but title in fee to the land condemned. Norfleet v. Cromwell, 70 N. C. 634.

Appeal from Judgment of Clerk. — An appeal from the judgment of the Clerk upon the report of commissioners appointed to lay off ditch for drainage of lowlands the Judge could set aside the report either for cause or in his discretion, if in his opinion the ends of justice could be subserved by that course. Worthington v. Coward, 114 N. C. 289, 19 S. E. 154.

§ 5264. Width of right of way for repair. — The commissioners, when they may deem it necessary, shall designate the width of the land to be left on each side of the canal, ditch, or dam, to be used for the protection and reparation thereof, which land shall be altogether under the control and dominion of the owner of the canal, ditch, or dam, except as aforesaid: Provided, that in no case shall a greater width of land on both sides inclusive of a dam, be taken than five times the base of such dam. (Rev., s. 3985a; Code, s. 1302; R. C., c. 40, s. 6.)

Where, upon an appeal from the report of the commissioners acting under that act, the jury found that the amount of land condemned by them for the purpose of the protection and reparation of the ditches was unnecessary, it was proper for the court to remand the cause, with directions to constitute another commission. Winslow v. Winslow, 95 N. C. 24.

§ 5265. Right of owner to fence; entry for repairs.—Any proprietor, through or on whose land such canal or ditch may be cut or embankment raised, may put a fence or make paths across the same, provided the usefulness thereof be not impaired; and the owner of the canal, ditch, or dam, his heirs and assigns, shall at all times have free access to the same for the purpose of making and repairing them; doing thereby no unnecessary damages to the lands of the proprietors. (Rev., s. 3986; Code, s. 1300; R. C., c. 40, s. 4; 1795, c. 436, s. 2; 1835, c. 7; 1852, c. 57, ss. 1, 2.)

§ 5266. Earth for construction of dam; removal of dam.—The earth necessary for the erection of a dam may be taken from either side of it, or wherever else the commissioners may designate and allow. And such dam may be removed by the proprietor of the land, his heirs or assigns, to any other part of his lands, and he may adjoin any dam of his own thereto, if allowed by the court on a petition and such proceedings therein as are provided in this chapter, as far as the same may apply to his case: Provided always, that the usefulness of the dam will not be thereby impaired or endangered. (Rev., s. 3987; Code, s. 1301; R. C., c. 40, s. 5.)

§ 5267. Earth from canal removed or leveled.—The earth excavated from the canal or ditch shall be removed away or leveled as nearly as may be with the surface of the adjacent land, unless the commissioners shall otherwise specially allow. (Rev., s. 3988; Code, s. 1303; R. C., c. 40, s. 7.)

§ 5268. No drain opened within thirty feet.—The proprietor of any swamps or flat lands through which a canal or ditch passes shall not have a right to open or cut any drain within thirty feet thereof but by the consent of the owner. Such proprietor, however, and other person may

cut into such canal or ditch in the manner hereinafter provided. (Rev., s. 3989; R. C., c. 40, s. 8.)

A report of commissioners under this section, which fails to assess and apportion that part of the labor which, under section 5270 is to be contributed by the defendants, is fatally defective. Brooks v. Tucker, 61 N. C. 309.

§ 5269. Right to drain into canal.—Any person desirous of draining into the canal or ditch of another person as an outlet may do so in the manner hereinbefore provided, and in addition to the persons directed to be made parties, all others shall be parties through whose lands, canals, or ditches the water to be drained may pass till it shall have reached the furtherest artificial outlet. And the privilege of cutting into such canal or ditch may be granted under the same rules and upon the same conditions and restrictions as are provided in respect to cutting the first canal or ditch: Provided that no canal or ditch shall be allowed to be cut into another if thereby the safety or utility of the latter shall be impaired or endangered: Provided further, that if such impairing and danger can be avoided by imposing on the petitioner duties or labor in the enlarging or deepening such canal or ditch, or otherwise, the same may be done; but no absolute decree for cutting such second canal or ditch shall pass till the duties or work so imposed shall be performed and the effect thereof is seen, so as to enable the commissioners to determine the matter whether such second canal or ditch ought to be allowed or not: Provided, that any party to the proceeding may appeal from the judgment of the court rendered under this section to the superior court of the county at term-time, where a trial and determination of all issues raised in the pleadings shall be had as in other cases before a judge and jury. (Rev., s. 3990; Code, s. 1305; 1887, c. 222; R. C., 40, s. 9.)

Section cited in Brooks v. Tucker, 61 N. C. 309, 310.

§ 5270. Expense of repairs apportioned.—Besides the damages which the commissioners may assess against the petitioner for the privilege of cutting into such canal or ditch, they shall assess and apportion the labor which the petitioner and defendants shall severally contribute towards repairing the canal or ditch into or through which the petitioner drains the water from his lands and report the same to court; which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors and administrators, heirs and assigns. (Rev., s. 3991; Code, s. 1306; R. C., c. 40, s. 10.)

For application of this section see note to section 5268.

Section applied in Worthington v. Coward, 114 N. C. 289, 19 S. E. 154.

§ 5271. Notice of making repairs.—Whenever the canals or ditches for the reparation of which more than one person shall be bound under the provisions of the preceding section shall need to be repaired, any of the persons so bound may notify the others thereof, and of the time he proposes to repair the same and thereupon each of of the persons shall jointly work on the same and contribute his proportion of labor till the same be repaired or the work cease by consent. (Rev., s. 3992; Code, s. 1307; R. C., c. 40, s. 11.)

§ 5272. Judgment against owner in default; lien.—In case the person so notified shall make default, any of the others may perform his share of labor and recover against him the value thereof, on a notice to be issued for such default, in which shall be stated on oath made before the clerk the value of such labor, and unless good cause to the contrary be shown on the return of the notice, the court shall render judgment for the same with interest and costs; which judgment shall be a lien upon the lands from the date of the performance of the work. (Rev., s. 3993; Code, s. 1308; 1899, c. 396; R. C., c. 40. s. 12.)

Notice to Landowner. — Before any specific amount may be adjudged against a landowner as a lien on his land he is entitled to be heard, after notice, as to whether the assessment made by the commissioners was unjust or oppressive. Adams v. Joyner, 147 N. C. 77, 60 S. E. 725.

Cited in Craft & Co. v. Roper Lumber Co., 181 N. C. 29, 106 S. E. 138.

§ 5273. Subsequent owners bound.—All persons to whom may descend, or who may otherwise own or occupy lands drained by any canal or ditch, for the privilege of cutting which any labor for repairing is assessed, shall contribute the same, and shall be bound therefor, to all intents and purposes and in the same manner and by the same judgment as the original party himself would be if he occupied the land. (Rev., s. 3994; Code, s. 1309; R. C., c. 40, s. 13.)

For application of this section, see Norfleet v. Cromwell, 70 N. C. 634; Staton v. Staton, 148 N. C. 490, 62 S. E. 596.

Applied in Craft & Co. v. Roper Lumber Co., 181 N. C. 29, 106 S. E. 138.

§ 5274. Amount of contribution for repair ascertained.—Whenever there shall be a dam, canal, or ditch, in the repairing and keeping up of which two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each one ought to do and perform therefor shall not be fixed by agreement or by the mode already in this subchapter provided for assessing and apportioning such labor, any of the parties may have the same assessed and apportioned by applying to a justice of the peace, who shall give all parties at least three days notice, and shall summons two disinterested free-holders who, together with the justice, shall meet on the premises and assess the damages sustained by the applicant, whereupon the justice shall enter judgment in favor of the applicant for damages or for work done on such ditch or lands. The costs of this proceeding shall be in the discretion of the justice. (Rev., s. 3995; Code, s. 1310; 1889, c. 101; R. C., c. 40, s. 14.)

Constitutionality. — Section held constitutional and valid. Forehand v. Taylor, 155 N. C. 353, 71 S. E. 433.

Proceeding under this section is in effect a motion in the cause which can be brought forward from time to time, upon notice to all the parties to be affected, for orders in the cause, to promote the objects of the proceeding, the whole matter remainding in the control of the court. Staton v. Staton, 148 N. C. 490, 491, 62 S. E. 596.

Action Dismissed for Non-Compliance with Statute—Not Bar to Second Action.—When damages have been sought in an action before a justice of the peace, relating to drainage districts, etc., and the action was dismissed because there had been no contract or agreement between the parties and the requirements of the act had not been met, the plaintiff is not thereby barred from proceeding under the act to have the damages assessed and from bringing another action therefor as the former judgment does not bar the second one. Forehand v. Taylor, 155 N. C. 353, 71 S. E. 433.

Enlarging or Deepening Canal.—The method by which the user of a canal by prescriptive right may enlarge or deepen it with an apportionment of the costs, is provided by this section. Armstrong v. Spruill, 182 N. C. 1, 108 S. E. 300.

Same—Liability for Damages.—Where the user of a canal by prescriptive right enlarge the same, and thereby place water upon the lower proprietor to his damage, they are liable therefor, and, upon conflicting evidence, the issue should be submitted to the jury. Armstrong v. Spruill, 182 N. C. 1, 108 S. E. 300.

Applied in Porter v. Durham, 98 N. C. 320, 3 S. E. 832.

Cited in Craft & Co. v. Roper Lumber Co., 181 N. C. 29, 106 S. E. 138.

§ 5275. Petition by servient owners against dominant owners.—Any person owning lands lying upon any creek, swamp, or other stream not navigable, which are subject to inundation and which cannot be conveniently drained or embanked on account of the volume of water flowing over the same from lands lying above, and by draining the same the lands above will be benefited and better drained, such person may by petition apply to the superior court of the county in which the lands sought to be drained or embanked, or some part of such lands, lie, setting forth the particular circumstances of the case, the valuation of the lands to be drained or embanked, and what other lands above would be benefited, and who are the proprietors of such lands; whereupon a summons shall be served upon each of the proprietors, who are not petitioners, requiring them to appear before the court at a time to be named in the summons, which shall not be less than ten days from the service thereof, and upon such day the petition shall be heard and the court shall appoint three persons as commissioners, who shall, before entering upon the discharge of their duties, be sworn to do justice between the parties. (Rev., s. 4016; 1889, c. 253.)

Editor's Note.—By Rev. sec. 4016 and Laws 1891 ch. 73 it would seem that a Justice of the Peace has jurisdiction in Lenoir County.

This section does not repeal section 5262, but leaves in operation such of the provisions as are not repugnant to it. Worthington v. Coward, 114 N. C. 289, 19 S. E. 154.

Analogy to Drainage Law.—The procedure under this and the following sections is analogous to the general drainage law, and its provisions are applicable, and the proceedings are regarded as kept alive for further orders without being retained on the docket, and in this case the original assessment did not constitute a bar to the motion to vacate, and the assessment was properly set aside on the facts found. Spence v. Granger, 204 N. C. 247, 167 S. E. 805.

Judgment—Setting Aside.—In an action brought for the drainage of lands under this and the following sections, the judgment upon motion thereafter will not be set aside merely upon the ground that a similar proceeding had been prosecuted to judgment between several of the parties. Adams v. Joyner, 147 N. C. 77, 60 S. E. 725.

§ 5276. Commissioners to examine lands and make report.—The commissioners, or a majority of them, on a day of which each proprietor is to be notified at least five days, shall meet on the premises and view the land to be drained and the lands affected thereby, and shall determine and report whether the lands of the petitioner or petitioners ought to be drained exclusively by him or them, and if they are of the opinion that the same ought not to be drained exclusively at the expense of the petitioner or petitioners, they shall decide and determine the route of the canal, ditch, or embankment, the width thereof, and the depth and the height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage of the petitioner's land, and the protection and benefit of the defendant's lands; and they shall apportion the labor to be done or assess the amount to be paid by each of the owners of the lands affected by such canal, ditch or embankment, towards the construction and keeping the same in repair, and report the same to the court, which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors, administrators, heirs and assigns. (Rev., s. 4017; 1889, c. 253, s. 2.)

Editor's Note.—By Revised, s. 4017, Laws of 1891, ch. 73, s. 2 and p. L. 1911 ch. 545 it would seem that a justice has jurisdiction in Lenoir and Beaufort Counties.

Cost of Work Not Required in Report.—The cost of the work to be done in the drainage of lands is not required under this section, and cannot, for its uncertainty of amount, be set out in the report of the commissioners appointed. It is a compliance with the statutes when the portion of the work to be done by the landowners is set out. Adams v. Joyner, 147 N. C. 77, 60 S. E. 725.

§ 5277. Cost of repairs enforced by judgment.—Whenever any such ditch, canal, or embankment shall need repairs or cleaning out, and any of the parties interested therein refuse to perform the labor apportioned to them, or refuse to contribute the amount assessed against them, the same shall be enforced in the manner hereinbefore provided for the joint repair of canals and ditches. (Rev., s. 4018; 1889, c. 253, s. 3.)

See section 5272 and note thereto.

§ 5278. Obstructing canal or ditch dug under agreement. — Where two or more persons have dug a canal or ditch along any natural drain or other water way under parol agreement or otherwise, wherein all the parties shall have contributed to the digging thereof, if any servient or lower owner shall fill up or obstruct said canal or ditch without the consent of the higher owners and without providing other drainage for the higher lands, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not more than thirty days. (Rev., s. 3375; 1899, c. 255.)

This section applies only where all the parties contributed under a valid agreement to the lawful digging of a ditch or canal. Porter v. Armstrong, 129 N. C. 101, 39 S. E. 799.

§ 5279. Right of dominant owner to repair.—In the absence of any agreement for maintaining the efficiency of such ditch or canal, or should the servient owner neglect or refuse to clean out or aid in cleaning out the same through his lands, it shall be lawful for the dominant or higher owner, after giving three days notice to servient owner, to enter along such canal and not more than twelve feet therefrom and clean out or remove obstructions or accumulated debris therefrom at his own personal expense or without cost to the servient owner. (Rev., s. 4025; 1899, c. 255, s. 2.)

See note to section 5278.

Where a person enlarges a canal on the lands of another, under a void proceeding, he is a trespasser, and cannot claim credit for money spent thereon. Porter v. Armstrong, 129 N. C. 101, 39 S. E. 799.

§ 5280. Canal for seven years necessity presumed; drainage assessments declared liens. — After a canal has been dug along any natural depression or waterway and maintained for seven years, it shall be prima facie evidence of its necessity, and upon application to the clerk of the superior court of any landowner who is interested in maintaining the same, it shall be the duty of the clerk of the su-

perior court to appoint and cause to be summoned three disinterested and discreet freeholders, who, after being duly sworn, shall go upon the lands drained or intended to be drained by such canal, and after carefully examining the same and hearing such testimony as may be introduced touching the question of cost of canal, the amount paid, and the advantages and disadvantages to be shared by each of the parties to the action, shall make their report in writing to the clerk of the superior court stating the facts and apportioning the cost of maintaining such canal among the parties to the action, and the cost of the action shall be divided in the same ratio; and their report when approved shall be properly registered by the clerk and the said report or reports shall, when filed in the office of the clerk of superior court, be a lien upon each tract of land embraced in said report or reports to the extent of the proportionate part of the costs stipulated in said report or reports as a charge against same, and shall have the effect and force of a judgment thereon, and that such judgments shall be subject to execution and collection as in cases of other judgments. (Rev., s. 4026; 1899, c. 255, s. 3; 1917, c. 248, s. 1; 1931, c. 227, s. 1.)

Editor's Note.—The Act of 1931 added the latter part of this section relating to drainage assessments as liens.

Interpretation of Section.—The provisions of this section are necessary for the cultivation and improvement of lowlands required to be drained, and should be construed to carry into effect the beneficent purposes of the act, when practicable. Forest v. Atlantic Coast Line R. Co., 159 N. C. 547, 75 S. E. 796.

Same—"Ditch," "Canal." — This section should be construed in connection with the other section of the chapter wherein it is found, relating to the drainage of lowlands, and therein the terms "ditch" and "canal" are used indiscriminately to designate an artificial drain. Forest v. Atlantic Coast Line R. Co., 159 N. C. 547, 75 S. E. 796.

An artificial drain in some place from 3 to 5 feet wide and from 2 to 5 feet deep, made for the purpose of cultivating and improving lowlands by draining them is a canal within the meaning of this section. Forest v. Atlantic Coast Line R. Co., 159 N. C. 547, 75 S. E. 796.

It is not necessary that the owner of lands lying along a drainage canal, within the meaning of this section shall have contributed to its original construction to make him liable to assessments for its maintenance under the provisions of the statute. Forest v. Atlantic Coast Line R. Co., 159 N. C. 547, 75 S. E. 796.

Same—Railroads.—While a railroad company may not be the absolute owner of lands in fee, they have the proprietorship and control of those constituting its rights of way; and when these lands are benefited by a canal which comes within the meaning of this section, the provisions of the statute relative to the maintenance of the canal apply. Forest v. Atlantic Coast Line R. Co., 159 N. C. 547, 75 S. E. 796.

Applied in Craft & Co. v. Roper Lumber Co., 181 N. C. 29, 106 S. E. 138.

§ 5280(a). Supplemental assessments to make up deficiency; vacancy appointments of assessment jurors.—The freeholders, commissioners or jurors, appointed in any application or proceeding filed or instituted under section five thousand two hundred and eighty, or any other section of chapter ninety-four, article one, of the Consolidated Statutes of North Carolina, are authorized and empowered during the establishment of and providing for the construction, maintenance and payment therefor, of such ditch, canal or drain, to make other and further assessments for the costs of establishment, construction and expense, when it shall be determined by the clerk of the Court that the provisions in the former report for the payment thereof are insufficient, and that such supplementary reports shall be made on the same basis of an equitable and just proportion, as made in the former report, which report or reports shall be filed with the clerk of the superior court and have the same force and effect as the former or original report.

In case of death, resignation, removal or for any other cause there becomes a vacancy as to the freeholders, commissioners or jurors, appointed to carry out the provisions of the sections contained in this chapter, the clerk of the superior court is authorized to fill such vacancy by the appointment of some disinterested freeholder in the county, and that the said person so appointed to fill such vacancy shall qualify before the clerk of the superior court before entering upon his duties: Provided this act shall not apply to Duplin County. (1931, c. 227, s. 2.)

Where drainage assessments are levied against lands under this and related sections, either original assessments or additional assessments to cover unforseen expenses in the construction of the drainage ditch, the parties whose lands are assessed are entitled to notice and an opportunity to be heard. Spence v. Granger, 207 N. C. 19, 175 S. E. 824.

§ 5281. Easement of drainage surrendered.—If any person, or those claiming through or under them, who have cut any ditch or canal into which any other person has been permitted to drain land under any proceeding authorized in this subchapter, shall desire to surrender their easement or right in such ditch or canal and be discharged from any judgment rendered and existing under such proceedings such persons may on motion have such proceeding reinstated for hearing and file a petition therein setting forth such facts or any other grounds for relief thereunder, and upon proof satisfactory to the court that such petitioners have cut another ditch or canal which drains their lands formerly drained by the first ditch or canal, and have abandoned the use of it for any purpose of drainage, the court shall adjudge the easement or right of the petitioners surrendered and determined and from that time the petitioners and their land shall forever be discharged and released from the judgment heretofore rendered in such former proceedings: Provided, however, that all parties then having an easement or right in such ditch or canal shall be served with notice of such petition twenty days before the hearing thereof. (Rev., s. 4027; 1887, c. 222, s. 3.)

§ 5282. Obstructing drain cut by consent.—If any person shall stop in or in any way obstruct the passage of the water in any ditch or canal having been cut through lands of any person by consent of owner of said land, until after giving the interested parties reasonable time to comply with the mode of proceedings provided for the drainage of lowlands, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3376; 1891, c. 434.)

§ 5283. Protection of canals, ditches, and natural drains.—If any person shall fell any tree in any ditch, canal, or natural drainway of any farm, unless he shall remove the same and put such ditch, canal, or natural drainway in as good

condition as it was before such tree was so felled; or if any person shall stop up or fill in such ditch, canal or drainway and thereby obstruct the free passage of water along the said ditch, canal, or drainway, unless the said person shall first secure the written consent of the landowners, and those damaged by such obstruction in said ditch, canal, and drainway, or unless such person so filling in and stopping up such ditch, canal, or drainway shall, upon the demand of the persons so damaged, clean out and put the said ditch, canal, or drainway in as good condition as the same was before such filling in and stopping up of the said ditch, canal, or drainway happened, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than fifty dollars, or imprisoned not less than ten nor more than thirty days. (Rev., s. 3382; 1901, c. 478.)

As to special act for Tyrrell county, see Laws 1907, ch. 438.

Part 2. Petition Under Agreement for Construction

§ 5284. Procedure upon agreement.—1. Agreement; Names Filed.—Whenever a majority of the landowners or the persons owning three-fifths of all the lands in any well-defined swamp or lowland shall, by a written agreement, agree to give a part of the land situated in such swamp or lowlands as compensation to any person, firm, or corporation who may propose to cut or dig any main drainway through such swamp or lowlands then the persons, firm, or corporation so proposing to cut or dig such main drainway shall file with the clerk of the superior court of the county, or, if there be two or more counties, with the clerk of the superior court of either county in or through which the proposed canal or drainway is to pass, the names of the landowners, with the approximate number of acres owned by each to be affected by the proposed drainway who have entered into the written agreement with the person, firm, or corporation, together with a brief outline of the proposed improvement, and in addition thereto shall file with the clerk the names and addresses, as far as can be ascertained, of the land owners, with the number of acres owned by each of them to be affected by the proposed drainway, who have not made any agreement with the person, firm, or corporation proposing to do the improvement.

2. Notice.—Upon the filing of such names, it shall be the duty of the clerk to forthwith issue a notice which shall be served by the sheriff to all landowners who have not made any agreement to appear before him at a certain date, which date shall be not less than ten and not more than twenty days from the service of such notice, or, in lieu of the personal service hereinabove required it shall be sufficient for the clerk to publish in a newspaper published in the country once a week for four weeks a notice to all landowners who have not made any agreement to appear before him at a certain date, which date shall be not less than thirty days and not more than forty days from the first publication of notice, at which time and place the landowners shall state the objections to the proposed improvement, and in addition thereto make an estimate of the amount of damage that might be done to the land owned by each of them on account of the proposed drainway.

3. Hearing; Views.—Upon the hearing it shall be the duty of the clerk of the superior court to forthwith appoint three disinterested persons, none of whom shall own land to be affected by such drainway, if requested by the person, firm or corporation proposing to do the improvement, whose duty it shall be to familiarize themselves with the proposed improvement, view the premises of the landowners, estimating damages, and make an estimate themselves of the amount of damages that might accrue to the lands of each landowner filing objections on account of the proposed improvement, and report the same to the clerk of the superior court within fifteen days from the date of their appointment.

4. Report; Bond.—Immediately upon the filing of the reports the clerk of the superior court shall forthwith notify the person, firm, or corporation proposing to dig the drainage or canal of the estimated damages contained in the reports, and the person, firm, or corporation shall execute and deliver a bond in a surety company authorized to do business in the State of North Carolina in twice the sum total of the estimated amount of damages, which bond shall be payable to the clerk of the superior court and conditioned upon the payment to the landowners of the amount of damages that may be assessed in the manner hereinafter provided.

5. Construction Authorized.—Upon the execution and delivery to the clerk of the said bond, the person, firm, or corporation so proposing to cut or dig such main drainway shall be and they are hereby authorized to proceed with the cutting or digging of the drainway through any lands in its proposed course, whether the owners of the land may have consented thereto or not, and the person, firm, or corporation so proposing to cut or dig the drainway shall have the proper necessary right of way for that purpose and for all things incident thereto through any lands or timbers situated in such swamp or lowlands. (1917, c. 273, s. 1.)

Editor's Note.—The provisions of this and the following sections under this article supplant those of the Act of 1915, ch. 141, which was held unconstitutional and void in Long v. Carolina Land, etc., Co., 169 N. C. 662, 86 S. E. 599, as a taking of private property without providing for just compensation to the private owners of lands, whose consent has not been given.

Withdrawal of Petitioners.—Upon the return day set by the clerk of the court for the hearing of the landowners in a proposed drainage district, it may be shown by those opposed to the petition that some of those who signed it desired to withdraw, and that eliminating their names the petitioners would not represent a majority of the landowners in the district, or such owning three-fourths of the lands, as the statute requires. Armstrong v. Beaman, 181 N. C. 11, 105 S. E. 879.

§ 5285. Recovery for benefits; payments of damages.—After the drainway herein provided for shall be completed the person, firm, or corporation cutting or digging the same shall be entitled to recover of the landowners owning that part of the land with reference to which no contract for compensating those cutting or digging the drainway may have been made, an amount equal to the benefits to accrue to such lands by reason of the drainway, and shall be required by the clerk of

the superior court to pay to any landowner the amount of damages in excess of benefits which may be done to the land to be determined in the manner hereinafter provided: Provided, that the recovery from any owner of the land shall be limited to the benefits to accrue to that land owned by such person, and situated in such swamp or lowlands or adjacent thereto; and Provided further, that the amount to be so recovered as herein provided for until fully paid shall be and constitute a lien upon such land, the lien to be in force regardless of who may own the land at the time the amount to be recovered as compensation for digging or cuttng the drainway shall be determined. (1917, c. 273, s. 2.)

§ 5286. Notice to landowners; assessments made by viewers.—After the completion of the main drainway, upon the application of the person, firm, or corporation, or their heirs or assigns, digging or cutting the same, the clerk of the superior court of the county in which any land through which the drainway may pass is situated shall issue a notice to be served by the sheriff upon any person who may have failed to agree with the person, firm, or corporation digging or cutting such drainway, upon a compensation to be paid by the landowner for the digging or cutting of such drainway, notifying the landowner that on a certain day, which shall be named in the notice and not less than twenty days from the date of the issuing of the notice, the clerk of the superior court will appoint three competent and disinterested persons, one of whom may be a surveyor, and none of whom shall own land to be affected by the drainway, to view the land so drained and for which no compensation for the drainage may have been agreed upon as aforesaid, and report to the clerk of the superior court what amount shall be paid therefor by the various landowners who may have failed to arrange for and agree upon the compensation for the drainage as aforesaid, and the amount of damages in cases where the damages have exceeded the benefits, which shall be paid to the landowners by the person, firm, or corporation cutting or digging such canal or drainway. In making the appointment of the viewers the clerk of the superior court shall hear any objections which may be advanced by those interested to any of the persons the clerk may consider to be appointed as viewers, but the clerk shall name those whom he considers best qualified. (1917, c. 273, s. 3.)

§ 5287. Report filed; appeal and jury trial.—A report signed by two of the persons appointed as viewers shall be entered by the clerk as reported of the viewers, and from the report any landowner affected thereby and the person, firm, or corporation digging or cutting such drainway shall have the right of appeal and the right to have any issue arising upon the report tried by a jury, provided exceptions shall be filed to the report within twenty days after the filing of the report with the clerk, in which exceptions so filed may be a demand for a jury trial. If a jury trial be demanded, the clerk shall transfer the proceedings to the civil-issue docket and it shall be heard as other civil actions. If no jury trial be demanded the clerk shall hear the parties upon the exceptions filed, and appeal may be had as in special proceedings, but no jury trial shall be had unless demanded as herein provided for. (1917, c. 273, s. 4.)

The Superior Court, upon certification of the opinion of the Supreme Court, has jurisdiction to retain the cause for hearing upon the appeal from the clerk's order, this section providing that appeals from the clerk in drainage assessment proceedings shall be the same as in special proceedings, and § 637, giving the Superior Court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings. Spence v. Granger, 207 N. C. 19, 175 S. E. 824.

See Flat Swamp, etc., Canal Co. v. McAlister, 74 N. C. 159.

§ 5288. Confirmation of report.—Unless an appeal shall be taken by any person affected by the report, or by the person, firm, or corporation cutting or digging the drainway, and a jury trial demanded within twenty days after the report shall be filed with the clerk, in all of which appeals exceptions shall be filed, the clerk of the superior court shall confirm the report of the jury; if exceptions shall be filed and no demand for a jury trial shall be made, the clerk shall hear the exceptions as in other cases of special proceedings, and judgment entered accordingly. If the report of the viewers be confirmed by the clerk because no exceptions or demand for a jury trial were filed within twenty days, the judgment of confirmation shall be the judgment of the court and any judgment herein entered against the person, firm, or corporation cutting or digging the drainway shall be a judgment against the person, firm, or corporation and the surety on its bond given as hereinabove provided. (1917, c. 273, s. 5.)

§ 5289. Payment in installments.—The amount to be recovered from any person as compensation for digging or cutting the drainway after the amount shall be definitely determined as herein provided for, shall be payable in five equal annual installments, the first payable one year from the filing of the report of the viewers with the clerk of the superior court, and one payment on the same day of each year thereafter until the full amount be paid. The amount to be recovered from the person, firm, or corporation cutting or digging the drainway, on account of any damages in excess of benefits to the lands of any landowners, shall be payable in one installment which shall be due and payable one year from the filing of the report of the viewers with the clerk of the superior court. (1917, c. 273, s. 6.)

Art. 2. Jurisdiction in County Commissioners

§ 5290. Petition filed; board appointed; refusal to serve misdemeanor.—Upon the petition of three citizens in any county to the county commissioners, petitioning for the draining of any creek, swamp, or branch, either upon the plea of health or to promote and advance the agriculture interests of the farmers who may, own lands lying on such creek, swamp, or branch petitioned to be drained, the county commissioners shall within ten days after the filing of such petition order the county surveyor to summon three disinterested freeholders, good and lawful men of intelligence and discretion, who shall constitute a board, and the county surveyor shall be the chairman of such board; and the chairman shall give

all persons who may be interested in having such creek, swamp, or branch drained three days notice of the time and place of the meeting of the board: Provided, the petitioners shall deposit with the county treasurer the sum of twenty-five dollars for the payment of current expenses not otherwise provided for in this article. Any person duly summoned by the county surveyor to act as a commissioner for the drainage of any such creek, swamp, or branch, who shall refuse to serve, shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., ss. 3379, 4011; 1887, c. 267.)

As to application of the provisions of this article to lakes in Hyde county, see Acts 1901, ch. 166.

§ 5291. Duty of board; refusal to comply with their requirements misdemeanor.—The board provided for in the preceding section shall meet at the call of the chairman and shall proceed to inspect and examine the lands as described in the petition to be drained, and the board shall have power to summon witnesses, administer oaths, and take testimony, and if the board decides that the lands specified in the petition shall be drained, either upon the plea of health or for the benefit of the farms lying on or contiguous to such water-course, then the board shall select a place at which the ditch shall be begun. They shall also decide the depth and width of the ditch to be dug, and shall proceed to survey, locate, lay off, and mark the course of the ditch, and the board shall assign to the landowners the amount of the labor to be performed and the amount of money to be paid for the purpose of defraying the necessary expenses by each landowner in proportion to the amount of lands drained or pro rata benefits received by the drainage of such lands, and the board shall specify the time in which the work so assigned shall be completed: Provided, no one shall be required to commence on the work assigned to him until the person next below him shall have completed his work in accordance with the specifications of the board. If any person shall refuse to comply with any of the requirements of the board he shall be guilty of a misdemeanor and fined not exceeding two hundred dollars, or imprisoned not exceeding two years. (Rev., ss. 3377, 4012; 1887, c. 267, ss. 2, 7.)

§ 5292. Report filed.—The board shall make a written report to the county commissioners showing all the acts and decisions of the board as to the length, depth, and width of the ditch, the names of all the owners of the lands that will be drained, and the amount of work to be performed and the amount of money to be paid by each person benefited by such drainage. But in case the board determines that the lands described in the petition shall not be drained, then the expenses of the board shall be paid out of the funds deposited with the county treasurer by the petitioners. (Rev., s. 4013; 1887, c. 267, s. 3.)

§ 5293. Owners to keep ditch open.—All persons whose lands shall be drained under the provisions of this article shall keep the ditch on his land clear of all rafts of logs, brush, or any trash that will obstruct the flow of water through the ditch. (Rev., s. 4014; 1887, c. 267, s. 4.)

§ 5294. Compensation of board.—The compensation of the board shall be as follows: The county surveyor shall receive three dollars per day and the other members shall receive one dollar and fifty cents per day while engaged in the duties imposed in this chapter. (Rev., s. 4015; 1887, c. 267, s. 5.)

SUBCHAPTER II. DRAINAGE BY CORPORATION

Art. 3. Manner of Organization

§ 5295. Petition filed in superior court.—Any proprietor in fee swamp lands, which cannot be drained except by cutting a canal through the lands of another or other proprietor in fee, situated at a lower level and which would also be materially benefited by the cutting of such canal who desires that such canal be cut on the terms on which it is hereinafter allowed, may apply by petition, setting forth the facts, to the superior court of the county in which any of the lands through which the canal will pass may lie. (Rev., s. 3996; Code, s. 1311; 1868-9, c. 164, s. 2.)

As to constitutionality of, and general procedure under, this chapter, see notes to section 5260.

See also cases cited under section 5261, and notes thereto.

Jurisdiction.—The Clerk of the Superior Court has jurisdiction of a proceeding to obtain a right of drainage over the land of an adjoining landowner, and to assess damages, etc. Durden v. Simmons, 84 N. C. 555.

Notice to Landowners.—Landowners, whose interests might be affected under proceedings under the provisions of this chapter, are entitled to notice. Gamble v. McCrady, 75 N. C. 509.

§ 5296. Commissioners appointed; report required.—On the establishment by the petitioner of his allegations, the court shall appoint three persons as commissioners who, having been duly sworn, shall examine the premises and inquire and report—

1. Whether the lands of the petitioner can be conveniently drained otherwise than through those of some other person.

2. Through the lands of what other persons a canal to drain the lands of the petitioner should properly pass, considering the interests of all concerned.

3. A description of the several pieces of lands through which the canal would pass, and the present values of such portions of the pieces of lands as would be benefited by it, and the reasons for arriving at the conclusion as to the benefit.

4. The route and plan of the canal, including its breadth, depth, and slope, as nearly as they can be calculated, with all other particulars necessary for calculating its cost.

5. The probable cost of the canal and of a road on its bank, and of such other work, if any, as may be necessary for its profitable use.

6. The proportion of the benefit (after the deduction of all damages) which each proprietor would receive by the proposed canal and a road on its bank if deemed necessary, and in which each ought in equity and justice, to pay toward their construction and permanent support.

7. With their report they shall return a map explaining as accurately as may be, the various matters required to be stated in their report. (Rev., s. 3997; Code, s. 1312; 1868-9, c. 164, s. 3.)

Assessment—Constitutionality.—An assessment made un-

der the provisions of this subchapter is constitutional and valid. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1.

Same—Collateral Attack.—When an assessment does not appear to be void on its face, it may not be collaterally attacked by a defendant owner of lands embraced in the district, in an action to enforce its payment. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1.

When Report of Commissioners Confirmed.—The report of the commissioners, assessing persons for benefits accruing to their lands from the operations of the plaintiff canal company, should have been confirmed by the court, as to those defendants who did not object; but as to those who did, the court should have proceeded to try the issues involved in the controversy. Locks Creek Canal Co. v. McKeithan, 89 N. C. 52.

Notice to Owner of Lands.—It is immaterial whether the owner of lands had notice of a meeting at which a committee had been appointed to assess the lands in the district and determine the amount of each assessment, when the assessment has been accordingly made, and duly ratified and confirmed at a subsequent meeting regularly called and held in accordance with the statute, of which he had notice. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1.

§ 5297. Surveyor employed.—The commissioners may employ a surveyor to prepare the map required to accompany their report. (Rev., s. 3998; Code, s. 1313; 1868-9, c. 164, s. 4.)

§ 5298. Confirmation of report.—If it appear that the lands on the lower level will be increased in value twenty-five per cent or upwards by the proposed improvement, within one year after the completion thereof, and that the cost of making such improvement will not exceed three-fourths of the present estimated value of the land to be benefited, and that the proprietors of at least one-half in value of the land to be affected consent to the improvement, the court may confirm such report, either in full or with such modifications therein as shall be just and equitable. (Rev., s. 3999; Code, s. 1314; 1868-9, c. 164, s. 5.)

§ 5299. Proprietors become a corporation. — Upon a final adjudication, confirming the report, the proprietors of the several pieces of land adjudged to be benefited by the improvement shall be declared a corporation, of which the capital stock shall be double the estimated cost of the improvements, and in which the several owners of the land adjudged to be benefited shall be corporators, holding shares of stock in the proportions in which they are adjudged liable for the expense of making and keeping up the improvement. (Rev., s. 4000; Code, s. 1315; 1868-9, c. 164, s. 6.)

§ 5300. Corporate name; officers; powers.— The person assessed to pay the highest sum shall be president of the company until another shall be elected; he shall, or in case of his refusal or an unreasonable delay, any other stockholder may, call a meeting of the corporators. The corporators shall choose a corporate name, elect a president and such officers as may be necessary, and make all by-laws and regulations, not contrary to law, which may be necessary or proper for effecting the purposes of the corporation; they shall fix the number of shares of stock, and assign to each proprietor his proper number; they shall assess the sums which shall be payable by each proprietor, to ascertain the time and mode of payment, in every meeting each proprietor shall vote once for each share owned by him. (Rev., s. 4001; Code, s. 1316; 1868-9, c. 164, s. 7.)

§ 5301. Incorporation of canal already constructed.—Whenever the proprietors of any canal already cut shall desire to become incorporated, any number of the proprietors, not less than one-third in number, may file their petition before the clerk of the superior court of the county in which the canal is located, or in either county, where the canal may be located in more than one county, setting forth the names of the proprietors, the length and size of the canal, the name of the owners of land draining in such canal, and the quantity of land tributary thereto. And upon filing the petition, summons shall issue to all parties having an easement in the canal, returnable as in other special proceedings; upon the return thereof, or upon a day fixed by the clerk for hearing same, all owners of the canal may become corporators, therein, and upon failure of any to avail themselves of that right, they shall not be entitled to become corporators, except under such by-laws and regulations as such corporators, shall make and declare. But those who fail to avail themselves the benefit of this subchapter shall not be deprived of their easement in the canal, but shall enjoy the same upon payment to the corporation of the assessment made upon them pro rata with the corporators; such assessment shall be made on the land tributary to the canal and apportioned pro rata to each owner thereof; it shall be made by the corporation on ten days notice to each owner of the land, under such rules and regulations as the by-laws may prescribe; but any person dissatisfied therewith shall have the right to appeal to a jury at the regular term of the superior court of the county, and the amount of damages assessed shall be a first lien on the land of the owner against whom judgment shall be rendered: Provided, that in making such assessment upon landowners who are not members of the corporation it shall be unlawful to charge in such assessment any charges or per diem pay for the officers of such canal company against the owners of such land, and any such attempt to charge the salaries or per diem of officers of the canal company in such assessment shall render the same void. (Rev., s. 4008; 1889, c. 380; 1901, c. 670.)

Art. 4. Rights and Liabilities in the Corporation

§ 5302. Shares of stock annexed to land.— The ownership of the shares of stock is indissolubly annexed to the ownership of the pieces of land adjudged to be benefited by the improvement; and such shares, or a part thereof proportionate to the area of such land that may descend or be conveyed for any longer time than three years, shall, upon such descent or conveyance, descend and pass with the land, even although such shares be not mentioned in the deed of conveyance, and although their transfer be forbidden by such deed so that every owner of such land in possession, except tenant for a term of years, not exceeding three, and every owner in reversion or remainder after a term not exceeding three years, shall, during his ownership, be entitled to all the rights and privileges and be subject to all the obligations and burdens of a corporator. Every attempted sale of shares otherwise than as annexed to the land shall be void. (Rev., s. 4002; Code, s. 1317; 1868-9, c. 164, 8.)

§ 5303. Shareholders to pay assessments.—Every corporator shall be bound to obey the lawful by-laws of the company, and pay all dues lawfully assessed on him: Provided, he shall in no case pay more than his proportion of the expenses as fixed by this subchapter; and such dues may be collected in the corporate name in any court having jurisdiction; and every assessment duly docketed in the county where the land to be affected lies shall be a lien on the lands of the debtor which are connected with the corporation from the date of such docketing. (Rev., s. 4003; Code, s. 1318; 1868-9, c. 164, s. 9.)

As to collection of assessments out of other property of delinquent, see section 5362.

Assessments—Lien upon Land.—An assessment made upon owners of lands constitutes a lien upon the lands therein and is enforcible by proceedings in rem in a court having equitable jurisdiction, in the absence of other provision of the statute; and personal judgment against the defendant may not be had, as in actions arising ex contractu. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1; Long Creek Drainage Dist. v. Huffstetler, 173 N. C. 523, 92 S. E. 368.

Same—Enforcement by Justice of Peace.—Therefore, a justice of the peace has no jurisdiction over actions to enforce the payment of such assessments, and they will be dismissed upon motion to nonsuit when brought in that court. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1; Long Creek Drainage Dist. v. Huffstetler, 173 N. C. 523, 92 S. E. 368.

Same—Execution.—Assessments, made in accordance with the statute, become liens on the lands when properly certified by the officers of the corporation and docketed in the office of the superior court of the proper county; and executions may issue directing that such lands be sold to pay the assessments and the costs. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1.

Same—Review by Certiorari.—The courts will review by writ of certiorari the action of the drainage corporation in making illegal assessments and enjoin such assessments that are absolutely void upon their face. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1.

Same—Collateral Attack.—An assessment, that does not appear to be void on its face, cannot be attacked collaterally. Middle Canal Co. v. Whitley, 172 N. C. 100, 90 S. E. 1.

§ 5304. Payment of dues entitles to use of canal.—Every corporator paying his dues legally assessed without regard to the number of his shares, shall be entitled to the full and free use of the canal for drainage and navigation, and of the road for passage and tranportation. By-laws may be made to regulate these rights, but not so as to produce inequality. (Rev., s. 4004; Code, s. 1319; 1868-9 c. 164, s. 10.)

§ 5305. Rights of infant owners protected.—If any proprietor whose lands are adjudged to be benefited by a canal shall be an infant, no process shall be issued against him during his minority, or within twelve months thereafter, to enforce payment of any assessment, and he may, at any time within such twelve months, apply to have any order, judgment, or decree made against him set aside as to him. If the infant or his guardian shall, during his minority, and the twelve months next thereafter, pay the dues assessed on him, he shall have all the rights and privileges of a corporator, to be exercised through his guardian. If the infant shall fail to pay, he shall not have any such rights, but if no action to set aside the judgment of the court creating the corporation shall have been brought by him as aforesaid, or upon the decision of such action against him, he shall be entitled to receive his proper share of stock and to possess all the rights and be bound by all the liabilities of a corporator, including a liability for assessment made during his minority, but not for interest on such, nor for any penalty for their prior nonpayment. (Rev., s. 4005; Code, s. 1320, 1868-9, c. 164, s. 11.)

§ 5306. Compensation for damages to lands.—If any proprietor of lands shall be damaged by any improvement proposed, the commissioners shall so report, and he shall be entitled to be compensated as may be just by the proprietor whose lands are benefited in proportion to the benefit to them respectively; but in estimating such damages the benefit shall be deducted, and such proprietor shall be entitled to all the rights and privileges of a corporation as respects the use of the improvement, but shall not be entitled to a vote, or be bound for the assessment. (Rev., s. 4006; Code, s. 1321; 1868-9, c. 164, s. 12.)

§ 5307. Dissolution of corporation.—If, from any cause, the canal or other improvement shall become or shall prove to be valueless, any corporator may apply as is provided in other cases of special proceedings, and the court may dissolve the corporation created in connection with it. (Rev., s. 4007; Code, s. 1322; 1868-9, c. 164, s. 13.)

§ 5308. Laborer's lien for work on canal.—Whenever work or repair shall be done on such canal and any of the parties owning lands liable to be assessed for such work or repairs shall fail or refuse to pay the amount assessed upon their lands, then and in that event the laborers performing such work shall have a lien upon such land to the extent of the amount assessed against the same by the corporation, and such lien may be enforced in the same manner as provided by the laws of this state for the enforcement of laborers' liens. (Rev., s. 4009; 1899, c. 600, s. 2.)

§ 5309. Penalty for nonpayment of assessments.—Whenever any person whose lands have been adjudged liable to contribute to the maintenance or repair of such canal shall fail or refuse to pay the amount assessed against his land for such maintenance or repair for thirty days after such payment has been demanded by the company, then the company may give such person notice in writing of its intention to cut off his right of drainage into the canal, and if such person shall still neglect and refuse to pay such assessment for thirty days after such notice, then the company may proceed to so obstruct and dam up the ditches of such delinquent as will effectually prevent his draining into the canal. (Rev., s. 4010; 1899, c. 600, s. 3.)

§ 5310. Corporation authorized to issue bonds.—The corporations organized under this subchapter are authorized to issue bonds to such an amount and in such denomination as they may elect, payable at such times as may be provided, and to sell the same at not less than par, the proceeds of the sale of such bonds to be used for the payment of the costs of survey and construction and maintenance of the canal. The bonds shall constitute a lien upon the lands drained or improved by the canal as described in the reports of the commissioners. (1908, c. 75, s. 1.)

§ 5311. Payment of bonds enforced.—Upon default of the payment of the interest or principal of such bonds, the holders of the bonds of the corporations oganized under this subchapter shall have a right to enforce the lien created by the preceding section by civil actions in the superior courts of the state. (1908, c. 75, s. 2.)

SUBCHAPTER III. DRAINAGE DISTRICTS

Art. 5. Establishment of Districts

§ 5312. Jurisdiction to establish districts.—The clerk of the superior court of any county in the State of North Carolina shall have jurisdiction, power and authority to establish levee or drainage districts either wholly or partly located in his county, and which shall constitute a political subdivision of the state, and to locate and establish levees, drains or canals, and cause to be constructed, straightened, widened or deepened, any ditch, drain or watercourse, and to build levees or embankments and erect tidal gates and pumping plants for the purpose of draining and reclaiming wet, swamp or overflowed land; and it is hereby declared that the drainage of swamp lands and the drainage of surface water from agricultural lands and the reclamation of tidal marshes shall be considered a public use and benefit and conducive to the public health, convenience and welfare, and that the districts heretofore and hereafter created under the law shall be and constitute political subdivisions of the state, with authority to provide by law to levy taxes and assessments for the construction and maintenance of said public works. (1909, c. 442, s. 1; 1921, c. 7.)

As to construction of drainage act for Mattamuskeet Lake, see Carter v. Commissioners, 156 N. C. 183, 72 S. E. 380.

Editor's Note.—This section, as amended by acts of 1921, ch. 7, extends the authority of the clerk of the superior court to the effect that he has now power to establish levee or drainage districts, either wholly or partly located in his county, whereas his authority, under the former section was limited to his county alone.

Under the new section, the drainage districts constitute political subdivision of the state, "with authority to provide by law to levy taxes and assessments for the construction and maintenance of said public works."

But the rights of landowners in the Mattamuskeet Drainage District having been determined in a court having jurisdiction as to assessments in proportion to the benefits conferred, cannot be affected by chapter 7, Public Laws of 1921, providing that "the districts heretofore or hereafter created under the law shall be and constitute political subdivisions of the State," later enacted, for such would be to impair the vested rights of those whose property had been assessed by the final judgment. O'Neal v. Mann, 193 N. C. 153, 136 S. E. 379.

The proceedings in forming a drainage district under the provisions of chapter 442, Public Laws 1909, is judicial and not administrative, and the amendment of chapter 7, Public Laws 1921, making all districts theretofore or thereafter created a political subdivision of the State cannot affect vested rights of landowners acquired under orders, judgments, or decrees made in pursuance of the powers conferred by the original act. Broadhurst v. Board of Commissioners, 195 N. C. 439, 142 S. E. 477.

Constitutionality.—This and the following sections of the subchapter are constitutional. Lumber Co. v. Drainage Commissioners, 174 N. C. 647, 94 S. E. 457; Drainage Com'rs v. Mitchell, 170 N. C. 324, 87 S. E. 112; Banks v. Lane, 170 N. C. 14, 86 S. E. 713; Shelton v. White, 163 N. C. 90, 79 S. E. 427; In re Drainage District, 162 N. C. 127, 78 S. E. 14; Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225.

Same—Collateral Attack.—The drainage acts are constitutional and the validity of a district laid off accordingly cannot be collaterally attacked. Banks v. Lane, 170 N. C. 14, 86 S. E. 713; Newby v. Drainage District, 163 N. C. 24, 79 S. E. 266.

Purpose and Nature—Scheme.—This subchapter authorizing the establishment of certain levee or drainage districts, is to present a scheme for the drainage of lowlands in which the public of the locality are generally interested, at once comprehensive, adequate and effecient, in which the rights of all persons to be affected have been fully considered and protected, and is not objectionable on the ground that it is for the benefit of private landowners and not for public purposes. Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225.

Same—System.—This section adopts a system for the cooperation of landowners in the drainage of lands by forming drainage districts, which are to become quasi-public corporations, for the purpose of improving the health of the district and the fertility of the lands, under which the lands are assessed in proportion to the benefits derived and an organization is effected in each district, to execute and maintain a system of drainage. In re Drainage District, 162 N. C. 127, 130, 78 S. E. 14.

Same—Police Regulation.—The drainage of swamps and of surface water from agricultural lands in a drainage district are public benefit and conductive to the public health, etc., thus falling within the police regulations; and proceedings thereunder are in the exercise of the right of eminent domain. Taylor v. Commissioners, 176 N. C. 217, 96 S. E. 1027.

Same—Quasi Municipal.—A drainage district laid off under the provisions of this subchapter is a quasi-municipal corporation, partaking to some extent of the character of a governmental agency. Newby v. Drainage District, 163 N. C. 24, 79 S. E. 266; Drainage Commissioners v. Eastern Home, etc., Association, 165 N. C. 697, 700, 81 S. E. 947; Drainage Commissioners v. Webb & Co., 160 N. C. 594, 76 S. E. 552; Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225.

Same—Right of Eminent Domain.—Drainage district is a quasi-public corporation. But it is not a governmental agency, and occupies the same relative position as a railroad company or any similar quasi-public corporation created for private benefit, but endowed with the right of eminent domain and other public functions by reason of the public benefit. Leary v. Board, 172 N. C. 25, 26, 89 S. E. 803.

Same—Liable for Torts.—Drainage districts formed under the statute are not regarded as governmental agencies to the extent that they are protected from civil actions except when authorized by statute, but are classed with quasi-public corporations and are ordinarily liable for their torts and wrongs, which, in proper instances, extend to their participating officers and agents as a personal liability. Spencer v. Wills, 179 N. C. 175, 102 S. E. 275.

A drainage district is liable in damages for wrongs and torts committed on the property of adjoining owners of lands not embraced in the district being established under the provisions of the statute. Sawyer v. Drainage Dist., 179 N. C. 182, 102 S. E. 273.

Basis of Legislative Authority.—The authority of the Legislature to provide for the creation of levee and drainage districts is based upon the police power, the right of eminent domain, and the taxing power. Shelton v. White, 163 N. C. 90, 79 S. E. 427.

Clerk's Authority Not a Delegation of Legislative Power.—The authority and powers conferred by this subchapter upon the clerk of the court is not a delegation of legislative power and duty to the judicial department of the State prohibited by the Constitution, the powers and duties conferred being of a judicial nature in relation to the prescribed proceedings to be instituted for the establishment of drainage districts. Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225.

Right of Receiver to Intervene and Become Party to Suit in Federal Court.—See Board of Drainage Comr's v. Lafayette Southside Bank, 27 Fed. (2d) 286.

Proceedings Not Defective for Delay.—Proceedings for the establishment of a drainage district, under this and the following section of this article, bonds to be issued therefor, will not be held as defective because further steps were not taken for several years after they had been commenced, the court holding, they were still pending, and because of the fact that the engineer and viewers did not file a profile map showing the surface of the ground, bottom grades, etc., at the time of the final report, as required by sec. 5327, it appearing that this was later done upon order of the board of drainage commissioners, and otherwise the provisions of the statutes had been strictly followed. Oden v. Bell, 185 N. C. 403, 117 S. E. 340.

§ 5313. Venue; special proceeding.—When the lands proposed to be drained and created into a

drainage district are located in two or more counties, the clerk of the superior court of either county shall have and exercise the jurisdiction herein conferred, and the venue shall be in that county in which the petition is first filed. The law and the rules regulating special proceedings shall be applicable in this proceeding, so far as may be practicable; and the proceedings hereunder may be ex parte or adversary. (1909, c. 442, ss. 2, 38.)

As to construction of proceedings under this subchapter, see section 5379.

Similar to a Proceeding in Rem.—Proceedings to form drainage district under this subchapter, are regarded as proceedings in rem. Taylor v. Commissioners, 176 N. C. 217, 96 S. E. 1027; Banks v. Lane, 170 N. C. 14, 86 S. E. 713; Staton v. Staton, 148 N. C. 490, 62 S. E. 596.

§ 5314. Petition filed.—A petition signed by a majority of the resident landowners in a proposed drainage district or by the owners of three-fifths of all the land which will be affected or assessed for the expense of the proposed improvements may be filed in the office of the clerk of the superior court of any county in which a part of the lands is located, setting forth that any specific body or district of land in the county and adjoining counties, described in such a way as to convey an intelligent idea as to the location of such land, is subject to overflow or too wet for cultivation, and the public benefit or utility or the public health, convenience or welfare will be promoted by draining, ditching or leveeing the same or by changing or improving the natural watercourses, and setting forth therein, as far as practicable, the starting point, route, and terminus and lateral branches, if necessary, of the proposed improvement. [A petition signed by resident land owners in a proposed drainage, district, or owners of land which will be affected or assessed for the expense of the proposed improvement, who constitute less than a majority of all such resident landowners or who own less than three-fifths of all the lands which will be affected or assessed as aforesaid, may be filed under this section, and shall be deemed to be sufficiently signed, if the petition shall have first been submitted to and approved by the board of county commissioners and the board of health of the county in which the petition is filed: Provided that the portion of this section in brackets shall apply only to the drainage districts in Rowan county, Robeson county, and Iredell county.]

The petition will also show whether or not the proposed drainage is for reclamation of lands not then fit for cultivation or for the improvement of land already under cultivation. It shall also state that, if a reclamation district is proposed to be established, such lands so reclaimed, will be of such value as to justify the reclamation. (1909, c. 442, s. 2; 1921, c. 76; 1925, cc. 85, 144; 1927, c. 98.)

Editor's Note.—By Public Laws, 1921, ch. 76, a proviso was added to this section, to the effect that in case of the construction of a particular improved highway, necessitating the digging of a drainage canal through the lands of residents of the county, it should not be necessary that the petition be signed by a majority of the resident landowners, or by the owners of three-fifths of all the land which will be affected or assessed, but that the petition should have the same effect if filed by the state highway commission. This amendment was repealed by Public Local Laws 1923, c. 88, inapplicable to Franklin, Hyde, Nash and Wilson Counties, and also by Public Laws 1925, ch. 85. The act of 1923 added a proviso to this section which was also repealed by the said act of 1925. Public Laws 1925, c. 144, added the words in brackets. The final paragraph of the section was added by Pub Laws, 1927, ch. 98. For the distinction between the reclamation districts and improvement districts, see section 5320, par. 5.

Statutory Number of Owners Is Sufficient.—It is not necessary that every owner of land within a drainage district should have assented to its formation when the statutory number thereof have done so. Taylor v. Commissioners, 176 N. C. 217, 96 S. E. 1027.

A Flexible Proceeding.—This is a flexible proceeding, and to be modified and molded by decrees from time to time to promote the objects of the proceeding. In re Lyon Swamp Drainage District, 175 N. C. 270, 272, 95 S. E. 485; Staton v. Staton, 148 N. C. 490, 62 S. E. 596; Adams v. Joyner, 147 N. C. 77, 60 S. E. 725.

Property Should Be Described.—One of the essentials of the proceeding is that the property sought to be charged shall be identified by description in the proceedings. Dover Lumber Co. v. Board, 173 N. C. 117, 119, 91 S. E. 714, 845.

§ 5315. Bond filed and summons issued.—Upon filing with the petition a bond for the amount of fifty dollars per mile for each mile of the ditch or proposed improvement, signed by two or more sureties or by some lawful and authorized surety company, to be approved by the clerk of superior court, conditioned for the payment of all costs and expenses incurred in the proceeding in case the court does not grant the prayer of the petition, the clerk shall issue a summons to be served on all the defendant landowners who have not joined in the petition and whose lands are included in the proposed drainage district. The summons may be served by publication as to any defendants who cannot be personally served as provided by law. (1909, c. 442, s. 2.)

In General.—The drainage laws of North Carolina have been largely copied from the acts in Indiana and Illinois, and following the construction of these acts in these and other States for the long period of time the acts have been in force, it is essential that notice of summons in all such proceedings be given to all parties who will be affected thereby. Dover Lumber Co. v. Board of Commissioners, 173 N. C. 117, 118, 91 S. E. 714, 845.

Summons on All Landowners.—This section is mandatory in requiring a "summons to be served on all the defendant landowners who have not joined in the petition and whose lands are included in the proposed drainage district." Dover Lumber Co. v. Board of Commissioners, 173 N. C. 117, 118, 91 S. E. 714, 845. "But the statute requires only landowners to be made parties in such drainage proceedings." Dover Lumber Co. v. Board of Commissioners, 173 N. C. 117, 120, 91 S. E. 714, 845.

Same—Mortgagee Not Included.—It would interfere with a much-needed public development if, as a prerequisite thereto, and before a final order can be made, all defects of title and mortgages or liens that may be claimed must be looked up and adjudicated. It is sufficient that summons shall be served upon the parties in possession under an apparent legal title, and that before final adjudication notice shall be given in the manner prescribed in order that parties claiming liens by mortgage or otherwise, or title to the land adversely to those in possession, shall have opportunity to come in and oppose confirmation of the final report. Banks v. Lane, 170 N. C. 14, 17, 86 S. E. 713. See Drainage Commissioners v. Eastern Home, etc., Ass'n, 165 N. C. 697, 701, 81 S. E. 947.

Effect of Failure to Serve Summons.—Where a landowner having an interest within the meaning of the statute, has not been served, and it does not appear that he was an apparent party, an order laying an assessment on his property is void, and the proceedings as they relate to him are a nullity, and the assessment may be restrained. Banks v. Lane, 170 N. C. 14, holding a mortgagee not a necessary party, cited and distinguished. Dover Lumber Co. v. Board of Commissioners, 173 N. C. 117, 91 S. E. 714, 845.

Same—Subsequent Notification.—The proceedings for forming a drainage district are in rem; and where a valid statute has been complied with therein, and it appears that an owner has not been served with process, it is admissible to notify him, in possession, nunc pro tunc, and have the lands therein assessed. Taylor v. Commissioners, 176 N. C. 217, 96 S. E. 1027.

§ 5316. Publication in case of unknown owners.—If at the time of the filing of the petition, or at any time subsequent thereto, it shall be made to appear to the court by affidavit or otherwise that the owners of the whole or any share of any tracts of land, whose names are unknown, and cannot after due diligence be ascertained by the petitioners, the court shall order a notice in the nature of a summons to be given to all such persons by a publication of the petition, or of the substance thereof, and describing generally the tracts of land as to which the owners are unknown, with the order of the court thereon, in some newspaper published in the county wherein the land is located, or in some other county if no newspaper shall be published in the first-named county, which newspaper shall be designated in the order of the court, and a copy of such publication shall be also posted in at least three conspicuous places within the boundaries of the proposed district, and at the courthouse door of the county. Such publication in a newspaper and by posting shall be made for a period of four weeks. After the time of publication shall have expired, if no person claiming and asserting title to the tracts of land and entitled to notice shall appear, the court in its discretion may appoint some disinterested person to represent the unknown owners of such lands, and thereupon the court shall assume jurisdiction of the tracts of land and shall adjudicate as to such lands to the same extent as if the true owners were present and represented, and shall proceed against the land itself. If at any time during the pendency of the drainage proceeding the true owners of the lands shall appear in person, they may be made parties defendant of their own motion and without the necessity of personal service, and shall thereafter be considered as parties to the proceeding; but they shall have no right to except to or appeal from any order or judgment theretofore rendered, as to which the time for filing exceptions on notice shall have expired. (1911, c. 67, s. 1.)

Owners Bound if Section Is Followed.—By virtue of the notice required by this section the owners of land have opportunity to intervene and assert any right they might have to oppose the proceeding, if deemed contrary to their interest. Not having done so, they are bound by the judgment under which the bonds were issued for this improvement. Banks v. Lane, 170 N. C. 14, 16, 86 S. E. 713.

Judgment Presumed Regular.—Where publication in accordance with this section has been made, every presumption is in favor of the regularity of the judgment. Taylor v. Commissioners, 176 N. C. 217, 225, 96 S. E. 1027.

Mortgagee Must Assert Rights.—Notice by publication is given in proceedings to form a drainage district under this section, of the filing of the report in the office of the clerk of the Superior Court, which is open to inspection to the landowner or other person interested, and a mortgagee of lands who does not intervene and assert his rights to oppose the proceedings is bound by the final judgment. Banks v. Lane, 170 N. C. 14, 86 S. E. 713.

§ 5317. Board of viewers appointed by clerk.—Upon the return day the clerk shall appoint a disinterested and competent civil and drainage engineer and two resident freeholders of the county or counties in which the lands are located as a board of viewers to examine the lands described in the petition and make a preliminary report thereon. The drainage engineer shall be appointed upon the recommendation of the state geologist; and no member of the board of viewers so appointed shall own any land within the boundaries of the proposed district. In the selection of the two members of the board of viewers, other than the engineer, the clerk before making the appointment shall make careful inquiry into the character and qualifications of the proposed members, to the end that the members so appointed shall possess the necessary character, capacity, fitness, and impartiality for the discharge of their important duties. (1909, c. 442, s. 2; 1917, c. 152, s. 1.)

Former Provision for Compensation of Surveyor.—Section 1, ch. 235, Public Laws of 1915, by repealing sec. 14, ch. 67, Public Laws of 1911, amendatory of ch. 442, Public Laws of 1909, providing among other things, for advancing moneys to the credit of the Department of Agriculture in the State Treasury to a drainage district formed under the acts, for compensation, etc., of the drainage surveyor, and its refund out of the future sale of the bonds to be issued by the drainage district, etc., construed with sec. 2 of ch. 235, Public Laws of 1915, requiring the Attorney-General, at the request of the Department of Agriculture to bring action against the commissioners of any such drainage district, and the bond of the petitioners for the district (sec. 2, ch. 442, Laws of 1909) that has failed to refund the money so advanced cannot be construed, by correct interpretation, to relieve a district formed under the statutes from refunding the money advanced, as provided by said sec. 14, ch. 67, Public Laws of 1911, before the enactment of Laws of 1915, from the proceeds of the sale of the drainage bonds thereafter issued. Board of Agriculture v. Drainage Dist., 177 N. C. 222, 98 S. E. 597.

§ 5318. Attorney for petitioners. — The petitioners shall select some learned attorney or attorneys to represent them, who shall prosecute the drainage proceeding and advise with the petitioners and board of viewers, and shall agree upon the compensation for his professional services up to the time when the district shall be established and the board of drainage commissioners elected, or as nearly so as the same may be approximated. If the petitioners are unable to agree upon the selection of an attorney or attorneys, the selection may be made by the clerk of the court. The foregoing provision shall not interfere with the right of any individual petitioner in the selection of an attorney to represent his individual interests if he shall deem the same desirable or necessary. (1917, c. 152, s. 1.)

§ 5319. Estimate of expense and manner of payment.—The clerk shall make an estimate of the aggregate sum of money which shall appear to be necessary to pay all the expenses incident to the performance of the duties by the board of viewers, including the compensation of the drainage engineer and his necessary assistants, and also including the sum for the compensation of the attorney for the district, and such court costs as may probably accrue, which estimates shall embrace the period of services up to and including the establishment of the drainage district and the selection and appointment of the board of drainage commissioners. The clerk shall then estimate the number of acres of land owned or represented by the petitioners, as nearly so as may be practicable without actual survey, and shall assess each acre so represented a level rate per acre, to the end that such assessment will realize the sum of money which he has estimated as necessary to pay all necessary costs of the drainage proceeding up to the time of the appointment of the drainage commissioners, as above provided. The board of viewers, includ-

ing the drainage engineer, shall not be required to enter upon the further discharge of their duties until the amount so estimated and assessed shall be paid in cash to the clerk of the court, which shall be retained by him as a court fund, and for which he shall be liable in his official capacity, and he shall be authorized to disburse the same in the prosecution of the drainage proceeding. Unless all the assessments shall be paid within a time to be fixed by the court, which may be extended from time to time, no further proceedings shall be had, and the proceeding shall be dismissed at the cost of the petitioners. If the entire sum so estimated and assessed shall not be paid the clerk within the time limited, the amounts so paid shall be refunded to the petitioners pro rata after paying the necessary costs accrued. Nothing herein contained shall prevent one or more of the petitioners from subscribing and paying any sum in addition to their assessment in order to make up any deficiency arising from the delinquency of one or more of the petitioners. When the sum of money so estimated shall be paid, the board of viewers shall proceed with the discharge of their duties, and in all other respects the proceeding shall be prosecuted according to the law. After the district shall have been established and the board of drainage commissioners appointed, it shall be the duty of the board of drainage commissioners to refund to each of the petitioners the amount so paid by them as above provided, out of the first moneys which shall come into the hands of the board from the sale of bonds or otherwise, and the same shall be included in ascertaining the total cost of improvement. (1917, c. 152, s. 1.)

§ 5320. Examination of lands, and preliminary report.—The board of viewers shall proceed to examine the land described in the petition, and other land if necessary to locate properly such improvement or improvements as are petitioned for, along the route described in the petition, or any other route answering the same purpose if found more practicable or feasible, and may make surveys such as may be necessary to determine the boundaries and elevation of the several parts of the district, and shall make and return to the clerk of the superior court within thirty days, unless the time shall be extended by the court, a written report, which shall set forth:

1. Whether the proposed drainage is practicable or not.

2. Whether it will benefit the public health or any public highway or be conducive to the general welfare of the community.

3. Whether the improvement proposed will benefit the lands sought to be benefited.

4. Whether or not all the lands that are benefited are included in the proposed drainage district.

5. Whether or not the district proposed to be farmed is to a reclamation district or an improvement district. A reclamation district is defined to be a district organized principally for reclaiming land not already under cultivation. An improvement district is defined to be a district organized principally for the improvement of lands then under cultivation. The board of viewers shall further report, if the district is a reclamation district within the above definitions, whether or not the proposed drainage would be justified by the additional value for agricultural purposes given to land so drained.

They shall also file with this report a map of the proposed drainage district, showing the location of the ditch or ditches or other improvement to be constructed and the lands that will be affected thereby, and such other information as they may have collected that will tend to show the correctness of their findings. (1909, c. 442, s. 3; 1927, c. 98, s. 2.)

Editor's Note.—Paragraph 5, distinguishing between reclamation districts and improvement districts, was added by Pub. Laws 1927, ch. 98, sec. 2.

§ 5321. First hearing of preliminary report.—The clerk of the superior court shall consider this report. If the viewers report that the drainage is not practicable or that it will not benefit the public health or any public highway or be conducive to the general welfare of the community, and the court shall approve such findings, the petition shall be dismissed at the cost of the petitioners, and such petition shall likewise be dismissed at the cost of the petitioners if it is sought to set up a reclamation district and the viewers report that the cost of reclaiming the land would be so great as not to justify the expense of draining it. Such petition or proceeding may again be instituted by the same or additional landowners at any time after six months, upon proper allegations that conditions have changed or that material facts were omitted or overlooked. If the viewers report that the drainage is practicable and that it will benefit the public health or any public highway or be conducive to the general welfare of the community, and the court shall so find, then the court shall fix a day when the report will be further heard and considered. (1909, c. 442, s. 4; 1927, c. 98, s. 3.)

Editor's Note.—The last part of the second sentence of this section, providing that the petition be dismissed where it is sought to set up a reclamation district and the viewers report unfavorably as to the cost, was added by Pub. Laws 1927, ch. 98, sec. 3.

Date for Objections Set by Clerk.—When the two freeholders and surveyors have acted upon the preliminary order of the clerk of the Superior Court in proceedings to establish a drainage district and the required report is made by them to the clerk, as to whether the proposed improvement is practicable and conducive to the general welfare of the district proposed, or whether the lands included will be benefited, etc., and the report filed with map and other things required, it is then the clerk's duty, under this section if the report is favorable, to approve the same and give notice of the date to hear objection, which then may be made by any person whose land has been embraced, that his land be excluded, which may raise an issue of fact as to whether his lands have been benefited or not. Shelton v. White, 163 N. C. 90, 79 S. E. 427.

§ 5322. Notice of further hearing.—If the petition is entertained by the court, notice shall be given by publication for two consecutive weeks in some newspaper of general circulation within the county or counties, if one shall be published in such counties, and also by posting a written or printed notice at the door of the courthouse and at five conspicious places within the drainage district, that on the date set, naming the day, the court will consider and pass upon the report of

the viewers. At least fifteen days shall intervene between the date of the publication and the posting of the notices and the date set for the hearing. (1909, c. 442, s. 5.)

§ 5323. Further hearing, and district established.—At the date appointed for the hearing the court shall hear and determine any objections that may be offered to the report of the viewers. If it appear that there is any land within the proposed levee or drainage district that will not be affected by the leveeing or drainage thereof, such lands shall be excluded and the names of the owners withdrawn from such proceeding; and if it shall be shown that there is any land not within the proposed district that will be affected by the construction of the proposed levee or drain, the boundary of the district shall be so changed as to include such land, and such additional land owners shall be made parties plaintiff or defendant, respectively, and summons shall issue accordingly, as hereinbefore provided. After such change in the boundary is made, the sufficiency of the petition shall be verified, to determine whether or not it conforms to the requirements hereinbefore provided. The efficiency of the drainage or levees may also be determined, and if it appears that the location of any levee or drain can be changed so as to make it more effective, or that other branches or spurs should be constructed, or that any branch or spur projected may be eliminated or other changes made that will tend to increase the benefits of the proposed work, such modification and changes shall be made by the board. The engineer and the other two viewers may attend this meeting and give any information or evidence that may be sought to verify and substantiate their report. If necessary, the petition, as amended, shall be referred by the court to the engineer and two viewers for further report. The above facts having been determined to the satisfaction of the court, and the boundaries of the proposed district so determined, it shall declare the establishment of the drainage or levee district, which shall be designated by a name or number, for the object and purpose as herein set forth.

If any lands shall be excluded from the district because of the court having found that such lands will not be affected or benefited, and the names of the owners of such lands have been withdrawn from such proceeding, but such lands are so situated as necessarily to be located within the outer boundaries of the district, such fact shall not prevent the establishment of the district, and such lands shall not be assessed for any drainage tax; but this shall not prevent the district from acquiring a right of way across such lands for constructing a canal or ditch or for any other necessary purpose authorized by law. The court shall further determine, if it is sought to establish a reclamation district, whether or not the increased value of the particular land should be so great as to justify the cost and expenses of its reclaiming. (1909, c. 442, s. 6; 1911, c. 67, s. 2; 1927, c. 98, s. 4.)

Editor's Note.—By Pub. Laws 1927, ch. 98, sec. 4 the last sentence of this section was added. This addition applies when the proposed district is a reclamation district. The distinction between reclamation and improvement districts was introduced by ch. 98, Pub. Laws 1927 and references to it will be found in sections 5314, 5320, 5321 and 5355. The two classes of districts are defined in section 5320, par. 5.

Minority Landowner Cannot Contest Formation of District.—A minority landowner included in a proposed drainage district to be laid out may not contest the formation of the district, but can raise only the issue as to his benefits therefrom. Shelton v. White, 163 N. C. 90, 79 S. E. 427.

Same—Public Benefit Governs.—It is because of the benefits which accrue to the public from the establishment of a drainage district under the statute, that power conferred thereby upon the court to include lands of owners who are unwilling to sign the petiiton, or who oppose the establishment of the district is sustained. O'Neal v. Mann, 193 N. C. 153, 162, 136 S. E. 379.

Signer of Original Petition Can Object.—Upon report of the viewers and surveyors at the final hearing in proceedings to lay off a drainage district, one who signed the original petition may have ascertained from the information contained in the report, contrary to his previous opinion, that the cost of the improvements and damages will amount to more than the benefits to his land, and hence he may then file his objections, and the same procedure is then open to him as if he had not signed the petition. Shelton v. White, 163 N. C. 90, 79 S. E. 427.

Small District Within Larger.—A smaller drainage district may be laid off within the boundaries of a larger one, theretofore organized, the purposes of each harmonizing with the purposes of the other. Drainage Commissioners v. Eastern Home, etc., Ass'n, 165 N. C. 697, 81 S. E. 947.

§ 5324. Right of appeal.—Any person owning lands within the drainage or levee district which he thinks will not be benefited by the improvement and should not be included in the district may appeal from the decision of the court to the superior court of such county, in term-time, by filing an appeal, accompanied by a bond conditioned for the payment of the costs if the appeal should be decided against him, for such sum as the court may require, not exceeding two hundred dollars, signed by two or more solvent sureties or in some approved surety company to be approved by the court. (1909, c. 442, s. 8.)

As to appeal from final hearing, see section 5333 and notes.

Power to Change Route.—See note under section 3846(a).

Proceedings upon Appeal.—A petition for the establishment of a drainage district of a majority of the resident landowners or of the owners of three-fifths of the land therein, approved by the report of the viewers and surveyor and affirmed by the clerk, permits a majority owner to raise only the issue of fact for the jury to determine as to the benefit to his lands; and should the jury find in favor of the objector, he is not entitled as a matter of right to have his land excluded, but it is for the judge to decide whether this may be done without injury to the district, and if not, he may order that such land be retained, upon payment of the damages to be awarded by the jury, as in condemnation of lands; all other matters embodied in the report are subject to approval by the clerk, and reviewed by the judge without the intervention of a jury, being questions of fact. Shelton v. White, 163 N. C. 90, 79 S. E. 427.

Proper Appeal Is Notice to Purchaser of Bond.—Where the owner of land in a drainage district has duly excepted under this section and again under section 5333 and appealed, the purchaser of bonds issued by the district takes with notice of the rights of the complaining party so excepting, and acquires the bonds subject thereto. Drainage District v. Parks, 170 N. C. 435, 87 S. E. 229.

Effect of Failure to Appeal.—Under the Drainage Act appeals are separately provided for under this section when the drainage district has been laid off, and under section 5333 when the final act is passed upon; and where the complaining owner of land in the district has not entered an exception under either of these two sections as the statute provides, and bonds have been duly issued on the lands of the district for drainage purposes, and thereafter application has been made by the commissioners for the issuance of additional bonds, in the further proceedings he may not be permitted to go back and change the formation of the district and the classification and assessments already made, by attacking the reports of the engineers and viewers, and withdraw a large part of his lands from the district theretofore formed. Drainage District v. Parks, 170 N. C. 435, 87 S. E. 229.

§ 5325. Condemnation of land.—If it shall be necessary to acquire a right of way or an outlet over and through lands not affected by the drainage, and the same cannot be acquired by purchase, then and in such event the power of eminent domain is hereby conferred, and the same may be condemned. The owners of the land proposed to be condemned may be made parties defendant in the manner of an ancillary proceeding, and the procedure shall be substantially as provided by law for the condemnation of rights of way for railroads so far as the same may be applicable, and such damages as may be awarded as compensation shall be paid by the board of drainage commissioners out of the first funds which shall be available from the proceeds of sale of bonds or otherwise. (1909, c. 442, s. 7.)

§ 5326. Complete survey ordered.— After the district is established the court shall refer the report of the engineer and viewers back to them to make a complete survey, plans, and specifications for the drains or levees or other improvements, and fix a time when the engineer and viewers shall complete and file their report, not exceeding sixty days. (1909, c. 442, s. 9.)

§ 5327. Nature of the survey.—The engineer and viewers shall have power to employ such assistants as may be necessary to make a complete survey of the drainage district, and shall enter upon the ground and make a survey of the main drain or drains and all its lateral. The line of each ditch, drain, or levee shall be plainly and substantially marked on the ground. The course and distance of each ditch shall be carefully noted and sufficient notes made, so that it may be accurately plotted and mapped. A line of levels shall be run for the entire work and sufficient data secured from which accurate profiles and plans may be made. Frequent bench marks shall be established along the line, on permanent objects, and their elevation recorded in the field books. If it is deemed expedient by the engineer and viewers, other levels may be run to determine the fall from one part of the district to another. If an old watercourse, ditch, or channel is being widened, deepened, or straightened, it shall be accurately cross-sectioned, so as to compute the number of cubic yards saved by the use of such old channel. A drainage map of the district shall then be completed, showing the location of the ditch or ditches and other improvements and the boundary, as closely as may be determined by the records, of the lands owned by each individual landowner within the district. The location of any railroads or public highways and the boundary of any incorporated towns or villages within the district shall be shown on the map. There shall also be prepared to accompany this map a profile of each levee, drain, or watercourse, showing the surface of the ground, the bottom or grade of the proposed improvement, and the number of cubic yards of excavation or fill in each mile or fraction thereof, and the total yards in the proposed improvement and the estimated cost thereof, and plans and specifications, and the cost of any other work required to be done. (1909, c. 442, s. 10.)

§ 5328. Assessment of damages.—It shall be the further duty of the engineer and viewers to assess the damages claimed by any one that is justly right and due to them for land taken or for inconvenience imposed because of the construction of the improvement, or for any other legal damages sustained. Such damage shall be considered separate and apart from any benefit the land would receive because of the proposed work, and shall be paid by the board of drainage commissioners when funds shall come into their hands. (1909, c. 442, s. 11; 1915, c. 238; 1917, c. 152, s. 16.)

Independent Action for Damages.—The principles that conclude parties to proceedings in the formation of drainage districts under the statute by final judgment, from a recovery of damages to their lands, applies to such as may have accrued in the laying out and the establishment of the district under the procedure prescribed, and does not prevent an injured proprietor, within or without the district, from maintaining his independent action to recover damages caused by an unauthorized and substantial departure from the scheme and plan established by the decrees and orders in the cause, nor where the damage complained of is attributable to the negligence of the company, or its officers or agents in carrying out the proposed work. Spencer v. Wills, 179 N. C. 175, 102 S. E. 275.

Same—Permanent Damages Recoverable.—The whole of plaintiff's lands were originally included in a drainage district to be established under the statutory provisions, but the final judgment so restricted and modified the survey, plat and boundaries as to exclude all except a comparatively small portion of the land, the preliminary survey showing that a canal would go through the land included as well as through the land, or a large part thereof, excluded by the final judgment. There was no evidence that ancillary proceedings for this outside lands by condemnation had been resorted to and it was held, that the plaintiff, in his independent action, may elect to recover the permanent damages caused to his land. Sawyer v. Drainage Dist., 179 N. C. 182, 102 S. E. 273.

Damage to Timber Included.—While under the drainage acts no assessments for benefits can be made against the owner of timber interests, only the land itself being liable, the owner of the land and of timber within the district, by the provision of the statute, when made a party to the proceedings and duly notified, is required to present his claim for the entire injury, inclusive of that to his timber, and the damages to the timber should thus be included and allowed in the final judgment in the proceedings. Lumber Co. v. Drainage Com'rs, 174 N. C. 647, 94 S. E. 457.

Pendency of Proceedings—Notice to Landowners.—The pendency of a proceeding to lay off a drainage district under the provisions of the act is notice to all the lands embraced in the district. Newby v. Drainage District, 163 N. C. 24, 79 S. E. 266.

Same—Notice to Grantees.—And the grantees thereof are bound by the statutory requirements as to the procedure to recover damages to the lands, as were their grantors who were parties to the proceedings and who owned the lands at that time. Newby v. Drainage District, 163 N. C. 24, 79 S. E. 266.

§ 5329. Classification of lands.—It shall be the further duty of the engineer and viewers to personally examine the land in the district and classify it with reference to the benefit it will receive from the construction of the levee, ditch, drain, or water-course or other improvement. In the case of drainage, the degree of wetness on the land, its proximity to the ditch or a natural outlet, and the fertility of the soil shall be considered in determining the amount of benefit it will receive by the construction of the ditch. The land benefited shall be separated in five classes. The land receiving the highest benefit, shall be marked "Class A;" that receiving the next highest benefit, "Class B;" that receiving the next highest benefit, "Class C;" that receiving the next highest benefit, "Class D," and that receiving the smallest benefit, "Class E." The holdings of any one land owner need not be all in one class, but the number of

acres in each class shall be ascertained, though its boundary need not be marked on the ground or shown on the map. The total number of acres owned by one person in each class and the total number of acres benefited shall be determined. The total number of acres of each class in the entire district shall be obtained and presented in tabulated form. The scale of assessment upon the several classes of land returned by the engineer and viewers shall be in the ratio of five, four, three, two and one; that is to say, as often as five mills per acre is assessed against the land in "Class A," four mills per acre shall be assessed against the land in "Class B," three mills per acre in "Class C," two mills per acre in "Class D," and one mill per acre in "Class E." This shall form the basis of the assessment of benefits to the lands for drainage purposes. In any district lands may be included which are not benefited for the agriculture or crop production, or slightly so, but which will receive benefit by improvement in health conditions, and as to such lands the engineer and viewers may assess each tract of land without regard to the ratio and at such a sum per acre as will fairly represent the benefit of such lands. Villages or towns or parts thereof and small parcels of land located outside thereof and used primarily for residence of other specific purposes, and which require drainage, may also be included in any drainage district which by reason of their improved conditions and the limited area in each parcel under individual ownership, it is impracticable to fairly assess the benefits to each separate parcel of land by the ratio herein provided, and as to such parcels of land the engineer and viewers may assess each parcel of land without regard to the ratio and at a higher rate per acre respectively by reason of the greater benefits. If the streets or other property owned by any incorporated town or village are likewise benefited by such drainage works, the corporation may be assessed in proportion to such benefits, which assessment shall constitute a liability against the corporation and may be enforced as provided by law. (1909, c. 442, s. 12; 1923, c. 217, s. 1.)

Editor's Note.—This section was amended by Pub. Laws 1923, ch. 217, sec. 1, by the addition of the last three sentences providing for the inclusion in a drainage district of lands which are not benefitted for agricultural purposes, but which receive other benefits. A higher rate of assessment is provided when the benefits are greater.

Classification May Be Discretionary in Local Act.—The Legislature, in authorizing the establishment of a drainage district, may very largely commit to the commissioners the exercise of their judgment as to what should be done in carrying out the general provisions specified by the statute, and the special act of the Legislature creating the Gaston County Drainage Commission, ch. 427, Public-Local Laws of 1911, thus construed, does not relieve a landowner therein from paying his authorized assessments for benefits solely because the commission failed to strictly and literally divide the lands into the number of classes therein set out. Mitchen v. Drainage Com., 182 N. C. 511, 109 S. E. 551.

§ 5330. Extension of time for report.—In case the work is delayed by high water, sickness, or any other good cause, and the report is not completed at the time fixed by the court, the engineer and viewers shall appear before the court and state in writing the cause of such failure and ask for sufficient time in which to complete the work, and the court shall set another date by which the report shall be completed and filed. (1909, c. 442, s. 14.)

§ 5331. Final report filed: notice of hearing.—When the final report is completed and filed it shall be examined by the court, and if it is found to be in due form and in accordance with the law it shall be accepted, and if not in due form it may be referred back to the engineer and viewers, with instructions to secure further information, to be reported at a subsequent date to be fixed by the court. When the report is fully completed and accepted by the court a date not less than twenty days thereafter shall be fixed by the court for the final hearing upon the report, and notice thereof shall be given by publication in a newspaper of general circulation in the county and by posting a written or printed notice on the door of the courthouse and at five conspicuous places throughout the district, such publication to be made for at least two weeks before the final hearing. During this time a copy of the report shall be on file in the office of the clerk of the superior court, and shall be open to the inspection of any landowner or other person interested within the district. (1909, c. 442, s. 15.)

When Publication Unnecessary.—It is not necessary to the validity of bonds issued by a drainage district, that the notice of the time of hearing objections to the final report of the engineer and viewers was not published in some newspaper of general circulation in the county, when it appears that no newspaper was published therein, or elsewhere, which has a general circulation in the county, and that the landowners affected had actual and ample notice of such time and raised no objection. Board v. Brett Engineering Co., 165 N. C. 37, 80 S. E. 897.

§ 5332. Adjudication upon final report.—At the date set for hearing any landowner may appear in person or by counsel and file his objection in writing to the report of the viewers; and it shall be the duty of the court to carefully review the report of the viewers and the objections filed thereto, and make such changes as are necessary to render substantial and equal justice to all the landowners in the district. If, in the opinion of the court, the cost of construction, together with the amount of damages assessed, is not greater than the benefits that will accrue to the land affected, the court shall confirm the report of the viewers. If, however, the court finds that the cost of construction together with the damages assessed is greater than the resulting benefit that will accrue to the lands affected, the court shall dismiss the proceedings at the cost of the petitioners, and the sureties upon the bond so filed by them shall be liable for such costs: Provided, that the state geological and economic survey may remit and release to the petitioners the cost expended by the board on account of the engineer and his assistants. The court may from time to time collect from the petitioners such amounts as may be necessary to pay costs accruing, other than costs of the engineer and his assistants, such amounts to be repaid from the special tax hereby authorized. (1909, c. 442, s. 16; 1915, c. 238, s. 2; 1917, c. 152, s. 16.)

Effect of Final Decree.—A final decree in proceedings to lay off a statutory drainage district is an adjudication that the benefits derived to the land within the district are more than the burdens assessed against it for such purpose. Banks v. Lane, 170 N. C. 14, 86 S. E. 713.

Failure to Object is Waiver.—The question as to whether an owner of land within a drainage district has realized the benefits anticipated is eliminated when there is the establishment of the district upon the report; and where such owner remains silent or makes no objection or exception at

the proper time as to the proceedings of the board, his silence is a waiver of any right he may have therein had, and the independent remedy by injunction is not open to him. Mitchem v. Drainage Com., 182 N. C. 511, 109 S. E. 551.

Where a drainage district has been duly laid off in conformity with the statute, and a landowner therein has not excepted to either the preliminary or final report, he may not after the appointment of the commissioners, be heard to complain that the benefits he is to receive are not as great as those he had contemplated. Griffin v. Board, 169 N. C. 642, 86 S. E. 575.

§ 5333. Appeal from final hearing.—Any party aggrieved may, within ten days after the confirmation of the assessor's report, appeal to the superior court in term-time. Such appeal shall be taken and prosecuted as now provided in special proceedings. Such appeal shall be based and heard only upon the exceptions theretofore filed by the complaining party, either as to issues of law or fact, and no additional exceptions shall be considered by the court upon the hearing of the appeal. In any appeal to the superior court in term time or in chambers taken under this section or any other section or provision of the drainage laws of the state, general or local, the same shall have precedence in consideration and trial by the court. If other issues also have precedence in the superior court under existing law, the order in which the same shall be heard shall be determined by the court in the exercise of a sound discretion. (1909, c. 442, s. 17; 1911, c. 67, s. 3; 1923, c. 217, s. 2.)

See also notes under section 5324.

Editor's Note.—The last two sentences, providing for precedence of cases under this section, were added by Public Laws 1923, ch. 217, sec. 2.

In General.—This section providing for an appeal upon exception to the final report by an owner of lands in a drainage district laid off under the provisions of the statute necessarily refers to the formation of the district and the assessments of the lands embraced in it. Drainage District v. Parks, 170 N. C. 435, 87 S. E. 229.

Authority of Referee.—Where, by consent of the parties to an action, the court has ordered a referee for hearing and determining "all matters in controversy," and the controversy has arisen upon exceptions taken by a landowner to the final report on the plan and assessments made in forming a drainage district, by this section, the complaining party may not successfully except to the authority of the referee in passing upon questions therein arising which have been referred to him. Drainage District v. Parks, 170 N. C. 435, 87 S. E. 229.

Appeal Only upon Exceptions Filed Below.—An appeal from the final order of the clerk in establishing a drainage district under the provisions of this section is heard only upon the exceptions thereto filed as to issues of law or fact. Shelton v. White, 163 N. C. 90, 79 S. E. 427; In re Drainage District, 162 N. C. 127, 78 S. E. 14. And it is sufficient that the clerk has found as a fact that the allegations set out in the petition are true, if these allegations are sufficient, and distinctly and clearly made. In re Drainage District, 162 N. C. 127, 78 S. E. 14

§ 5334. Compensation of the board of viewers. The compensation of the engineer, including his necessary assistants, rodmen, and laborers, and also the compensation of the viewers, shall be fixed by the clerk. In fixing such compensation particularly of the drainage engineer, the clerk shall confer fully with the state geologist and with the petitioners. The compensation to be paid to two members of the board of viewers, other than the engineer, shall not exceed four dollars per day for the time actually employed in the discharge of their duties, and in addition any actual and necessary expenses of travel and subsistence while in the actual discharge of their duties, an itemized report of which shall be submitted and verified. (1909, c. 442, s. 36; 1917, c. 152, ss. 1, 2.)

§ 5335. Account of expense filed.—The engineer and viewers shall keep an accurate account and report to the court name and number of days each person was employed on the survey and the kind of work he was doing, and any expenses that may have been incurred in going to and from the work, and the cost of any supplies or materials that may have been used in making the survey. (1909, c. 442, s. 13.)

§ 5336. Drainage record.—The clerk of the superior court shall provide a suitable book, to be known as the "drainage record," in which he shall transcribe every petition, motion, order, report, judgment, or finding of the board in every drainage transaction that may come before it, in such a manner as to make a complete and continuous record of the case. Copies of all the maps and profiles are to be furnished by the engineer and marked by the clerk "official copies," which shall be kept on file by him in his office, and one other copy shall be pasted or otherwise attached to his record book. (1909, c. 442, s. 18.)

Purpose of Record Book.—Upon the filing of the final report by the viewers, etc., in a proceeding to establish a drainage district under the provisions of the statute, a record is required by the statute to be kept in a book for the purpose, giving all interested in the proceedings notice of all that has been done materially affecting them; and when they have failed to make objection within three years, semble, they have lost their right to object, by the delay. Griffin v. Board, 169 N. C. 642, 86 S. E. 575.

§ 5336(a). Local: Advancements by Pitt County.—That on presentation of petition as authorized by section five thousand three hundred and fourteen of Consolidated Statutes of one thousand nine hundred and nineteen, and after filing bond as required by section five thousand three hundred and fifteen, said Statutes, and after the clerk has issued summons as directed by said latter section, the board of county commissioners of Pitt County is authorized and empowered, in the exercise of its discretion, in case the proposed drainage district is situate wholly or mostly in said county, to advance to the use of such proposed district to be paid out, on order of said court, and of the general fund of said county, a sum of money sufficient to pay court costs, and the costs incurred by the board of viewers appointed by the court under section five thousand three hundred and seventeen up to the appointment of drainage commission as authorized by section five thousand three hundred and thirty-seven, said Statutes, such advancement shall be repaid to said general fund, after finances have been provided to construct the proposed canal or levee. (1925, c. 205.)

Art. 6. Drainage Commissioners

§ 5337. Election and organization under original act.—After the drainage district has been declared established, as aforesaid, and the survey and plan therefor approved, the court shall appoint three persons, who shall be designated as the board of drainage commissioners. Such drainage commissioners shall first be elected by the owners of land within the drainage or levee district, or by a majority of same, in such manner as the court shall prescribe. The court shall appoint those receiving a majority of the votes. If any one or more of such proposed commissioners

shall not receive the vote of a majority of such landowners the court shall appoint all or the remainder from among those voted for in the election. Any vacancy thereafter occurring shall be filled in like manner. Such three drainage commissioners, when so appointed, shall be immediately created a body corporate under the name and style of the "The Board of Drainage Commissioners of ..... District," with the right to hold property and convey the same, to sue and be sued, and shall possess such other powers as usually pertain to corporations. They shall organize by electing from among their number a chairman and a vice-chairman. They shall also elect a secretary, either within or without their body. The treasurer of the county in which the proceeding was instituted shall be ex officio treasurer of such drainage commissioners. Such board of drainage commissioners shall adopt a seal, which they may alter at pleasure. The board of drainage commissioners shall have and possess such powers as are herein granted. (1909, c. 442, s. 19; 1917, c. 152, s. 17.)

As to appointment of commissioner in Davidson Creek Drainage District, see Public Laws, 1933, c. 466.

Requirements as to Appointment Directory Merely.—The appointment of commissioners for the drainage district for Mattamuskeet Lake and adjoining lands, ch. 509, sec. 3, Laws of 1909, is to be made, two by the State Board of Education and one by the clerk of the court, without reference to this section, requiring an election by the owners of the land within the drainage or levee district. Semble, the requirements of this section are but recommendatory. State v. Gibbs, 156 N. C. 44, 72 S. E. 82.

§ 5338. Name of districts.—The name of such drainage district shall constitute a part of its corporate name, for illustration, the board of drainage commissioners of Mecklenburg Drainage District, No. 1. In the naming of a drainage district the clerk of the court, notwithstanding the name given in the petition, shall so change the name as to make it conform to the county within which the district, or the main portion of the district, is located, and be also designated by number, the number to indicate the number of districts petitioned for in the county. For illustration, the first district organized in Mecklenburg County would be Mecklenburg County Drainage District, No. 1; name of the second would be Mecklenburg County Drainage District, No. 2: the fifth one organized would be Mecklenburg County Drainage District, No. 5: Provided, that so much of this section as provides for numbering the districts in each county shall not apply to districts in which bonds have been issued and sold prior to the fifth day of March, one thousand nine hundred and seventeen. (1909, c. 442, s. 19; 1917, c. 152, s. 17.)

§ 5339. Election and organization under amended act.

1. Method of Election.—In the election of drainage commissioners by the owners of land, each landowner shall be entitled to cast the number of votes equaling the number of acres of land owned by him and benefited, as appears by the final report of the viewers. Each landowner may vote for the names of three persons for commissioners. If any person or persons in any district shall own land in any district containing an area greater than one-half of the total area in the district, such owner shall only be permitted to elect two of the drainage commissioners, and a separate election shall be held under the direction of the clerk by the minority landowners, who shall elect one member of the drainage commissioners.

2. Organization.—Immediately after the election of the board of drainage commissioners, and after the members of the board shall be appointed by the clerk, the clerk of the court shall notify each of them in writing to appear at a certain time and place within the county and organize. The clerk of the superior court shall appoint one of the three members as chairman of the board of drainage commissioners, and in doing so he shall consider carefully and impartially the respective qualifications of each of the members for the position.

3. Term of Office.—The term of service of the members of the board of drainage commissioners so elected and appointed shall begin immediately after their organization. One commissioner shall serve for one year, one for two years, and the other for three years, the term to be computed from the first day of October following their organization. The members so serving for one, two, and three years respectively, shall be designated by the clerk of the court or designated by lot among the members, in the discretion of the clerk. Thereafter each member shall be elected for three years. In the year when the term of any member or members shall expire the clerk of the court shall provide for an election of their successors to be held on the second Monday in August preceding the expiration of their term on the thirtieth day of September. The clerk of the court shall record in the drainage record the date of election, the members elected, and the beginning and expiration of their term of office.

4. Vacancies Filled.—If a vacancy shall occur in the office of any commissioner by death, resignation, or otherwise, the remaining two members are to discharge the necessary duties of the board until the vacancy shall be filled; and if the vacancy shall be in the office of chairman or secretary, the two remaining members may elect a secretary, and the clerk shall appoint one of the two remaining members to act as chairman to hold until the vacancy in the board shall be filled. The clerk shall keep a similar record of any election to fill vacancies, and the member or members shall be elected in like manner as the original members, and shall serve until the expiration of the term of his predecessor. The secretary of the board of drainage commissioners shall promptly notify the clerk of the superior court of any vacancy in the board.

5. Failure to Elect.—If for any reason the clerk of the court shall fail to provide for an election of drainage commissioners on the second Monday in August to succeed those whose terms will expire on the thirtieth day of September, the clerk shall have authority at the most convenient date thereafter to provide for such election, and in the meantime the incumbents shall continue to hold their office as commissioners until their successors are elected and qualified. The term of office of boards of drainage commissioners heretofore elected and appointed shall expire on the thirtieth day of September, nineteen hundred and seventeen, and their successors shall be elected on the

second Monday in August, nineteen hundred and seventeen, in the manner provided by law.

6. Meetings.—The board shall meet once each month at a stated time and place during the progress of drainage construction, and more often if necessary. After the drainage work is completed, or at any time, the chairman shall have the power to call special meetings of the board at a certain time and place. The chairman shall also call a meeting at any time upon the written request of the owner of a majority in area of the land in the district.

7. Compensation.—The chairman of the board of drainage commissioners shall receive compensation based on the annual payment of fifty dollars per annum in districts containing less than five thousand acres in the aggregate, but the clerk of the superior court shall be authorized to increase this annual compensation to one hundred dollars if the duties required of the chairman shall appear to justify such increase. In addition, the chairman shall receive his actual and necessary expenses of travel and subsistence, for which he shall file an itemized statement of the amounts actually paid. The remaining two members of the board shall receive a compensation of not exceeding five dollars per day while necessarily engaged in attendance upon meetings of the board, or in the discharge of other necessary duties imposed by the board, and, in addition, shall receive their actual and necessary expenses in attending meetings of the board. The secretary of the board, if other than a member of the board, shall receive such compensation for work actually performed as may be determined by the board. In drainage districts of unusually large area and requiring greater time and attention, the chairman of the board may be paid a greater compensation than one hundred dollars per annum, to be allowed by the clerk of the superior court, based on a petition filed by the board with the clerk, setting forth all the facts necessary for a determination of the matter. All such payments allowed to the chairman and members of the board shall be paid by vouchers upon the treasurer of the district issued in proper form.

8. Application of Section.—The provisions of subsection one of this section with respect to the right to vote for and the manner of election of commissioners shall not apply to districts organized prior to the fifth day of March, one thousand nine hundred and seventeen, but in those districts the landowners shall be entitled to vote as provided by the law prior to that date. The term of office of boards of drainage commissioners in districts organized prior to the date last mentioned, and in which no election of drainage commissioners has been held under this section, shall expire on the thirtieth day of September, nineteen hundred and nineteen, and their successors shall be elected on the second Monday in August, nineteen hundred and nineteen, in the manner provided by this section. If for any reason the clerk of the court shall fail to provide for such election he shall have authority at the most convenient date thereafter to provide for such election, and in the meantime the incumbents shall continue to hold office as commissioners until their successors are elected and qualified. The length of the term of service of commissioners elected hereunder shall be as provided in subsection three of this section. This section shall not apply to the manner or time of election of the drainage commission of the Mattamuskeet drainage district. (1917, c. 152, s. 5; 1919, cc. 109, 217.)

§ 5339(a). Validation of election of members of drainage commission.—All irregularities caused by failure of any officer whose duty it was to provide for the election of a member or members of board of drainage commissioners of any drainage district, or the failure of any candidate to make a deposit as may be required by law, shall not invalidate such election where the following facts appear affirmatively:

(a) That said election was held at the time and place prescribed by law.

(b) That a ballot box was provided for the ballots cast for drainage commissioner.

(c) That the ballots were canvassed and the results declared by the judge of the general election.

(d) That the candidate receiving the greatest number of votes was declared elected.

(e) That no candidate for election as a member of board of drainage commissioners made any deposit as prescribed by law.

(f) That the candidate receiving the majority votes at said election has already qualified and is acting as such drainage commissioner.

This section shall not apply to any election contested before March 9, 1921. (1921, c. 210.)

Art. 7. Construction of Improvement

§ 5340. Superintendent of construction.—The board of drainage commissioners shall appoint a competent drainage engineer of good repute as superintendent of construction, by and with the approval and recommendation of the state geologist. Such superintendent of construction shall furnish a copy of his monthly and final estimates to the state geologist, in addition to other copies herein provided which shall be filed and preserved. In the event of the death, resignation, or removal of the superintendent of construction, his successor shall be appointed in the same manner. (1909, c. 442, s. 20; 1923, c. 217, s. 3.)

Editor's Note.—The former section 5340 was stricken out by Public Laws 1923, ch. 217, sec. 3 and the present section substituted.

§ 5341. Letting contracts.—The board of drainage commissioners shall cause notice to be given for two consecutive weeks in some newspaper published in the county wherein such improvement is located, if such there be, and such additional publication elsewhere as they may deem expedient, of the time and place of letting the work of construction of such improvement, and in such notice they shall specify the approximate amount of work to be done and the time fixed for the completion thereof; and on the date appointed for the letting they, together with the superintendent of construction, shall convene and let to the lowest responsible bidder, either as a whole or in sections, as they may deem most advantageous for the district, the proposed work. No bid shall be entertained that exceeds the estimated cost, except for good and satisfactory reasons it shall be shown that the orig-

inal estimate was erroneous. They shall have the right to reject all bids and advertise again the work, if in their judgment the interest of the district will be subserved by doing so. The successful bidder shall be required to enter into a contract with the board of drainage commissioners and to execute a bond for the faithful performance of such contract, with sufficient sureties, in favor of the board of drainage commissioners for the use and benefit of the levee or drainage district, in an amount equal to twenty-five per centum of the estimated cost of the work awarded to him. In canvassing bids and letting the contract, the superintendent of construction shall act only in an advisory capacity to the board of drainage commissioners. The contract shall be based on the plans and specifications submitted by the viewers in their final report as confirmed by the court, the original of which shall remain on file in the office of the clerk of the superior court and shall be open to the inspection of all prospective bidders. All bids shall be sealed and shall not be opened except under the authority of the board of drainage commissioners and on the day theretofore appointed for opening the bids. The drainage commissioners shall have power to correct errors and modify the details of the report of the engineer and viewers if, in their judgment, they can increase the efficiency of the drainage plan and afford better drainage to the lands in the district without increasing the estimated cost submitted by the engineer and viewers and confirmed by the court. (1909, c. 442, s. 21; 1911, c. 67, s. 4.)

Power of Commissioners Is Discretionary.—This section directs that the levee or drainage commissioners shall convene with the superintendent of construction and let the work contemplated to the "lowest responsible bidder," thereby conferring a discretionary power in adjudging the responsibility of the bidder, in all respects, with which the courts will not interfere in the absence of undue influence or a procurement by fraud. Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225.

Section Authorizes Only Minor Changes in Report.—Where a drainage district has been laid out in accordance with the requirements of the Drainage Act, and the final report has been filed and recorded, provision is made for the selection of a board of drainage commissioners, etc., who are charged with the duties of carrying out, substantially, the plans and specifications of the report as recorded, their powers being largely ministerial in character, to make out the assessment rolls constituting a lien on the property, as in case of tax lists, observing the classifications and ratio of assessments determined upon by the board of viewers; and the modification made by this section of the act contemplates only such minor charges of detail as may occur in carrying out the plans, etc., specified in the final report and not a substantial departure therefrom. Griffin v. Board, 169 N. C. 642, 86 S. E. 575.

Acceptance of Work by Commissioners.—The acceptance of the work of the contractors as a compliance on their part with the contract is a judicial act of the board of commissioners and cannot be questioned except for fraud or collusion, and then only to make the commissioners personally and individually liable. Craven v. Board, 176 N. C. 531, 533, 97 S. E. 470.

§ 5342. Monthly estimates for work, and payments thereon.—The superintendent in charge of construction shall make monthly estimates of the amount of work done, and furnish one copy to the contractor and file the other with the secretary of the board of drainage commissioners; and the commissioners shall, within five days after the filing of such estimate, meet and direct the secretary to draw a warrant, in favor of such contracts for ninety per centum of the work done, according to the specifications and contracts; and upon the presentation of such warrant, properly signed by the chairman and secretary, to the treasurer of the drainage fund, he shall pay the amount due thereon. When the work is fully completed and accepted by the superintendent he shall make an estimate for the whole amount due, including the amounts withheld on the previous monthly estimates, which shall be paid from the drainage fund as before provided. (1909, c. 442, s. 22.)

§ 5343. Failure of contractors; reletting.—If any contractor to whom such work has been let shall fail to perform the same according to the terms specified in his contract, action may be had in behalf of the board of drainage commissioners against such contractor and his bond in the superior court for damages sustained by the levee or drainage district, and recovery made against such contractor and his sureties. In such an event the work shall be advertised and relet in the same manner as the original letting. (1909, c. 442, s. 23; 1911, c. 67, s. 5.)

§ 5344. Right to enter upon lands; removal of timber.—In the construction of the work the contractor shall have the right to enter upon the lands necessary for this purpose and the right to remove private lands or public bridges or fences and to cross private lands in going to or from the work. In case the right of way of the improvement is through timber the owner thereof shall have the right to remove it, if he so desires, before the work of construction begins, and in case it is not removed by the landowner it shall become the property of the contractor and may be removed by him. (1909, c. 442, s. 24.)

As to recovery of damages for timber see section 5328 and notes.

Purpose of Section.—The drainage acts contemplate that all damages to the owner of lands shall be assessed, including the taking of his timber necessary to carry out its plans, this section being designed to give the owner of the timber the privilege of taking such timber if he so elects. Lumber Co. v. Drainage Comr's, 174 N. C. 647, 94 S. E. 457.

Not an Unlawful Taking.—The objection that this section is an unconstitutional taking of the owner's timber and giving it to the contractor, without compensation, cannot be maintained. Lumber Co. v. Drainage Comr's, 174 N. C. 647, 94 S. E. 457.

§ 5345. Drainage across public or private ways.—Where any public ditch, drain, or watercourse established under the provisions of this subchapter crosses a public highway, the actual cost of constructing the same across the highway or removing old bridges or building new ones shall be paid for from the fund of the drainage district. Wherever any highway within the levee or drainage district shall be beneficially affected by the construction of any improvement or improvements in such district it shall be the duty of the viewers appointed to classify the land to give in their report the amount of benefit to such highway, and notice shall be given by the clerk of the superior court to the clerk of the board of county commissioners in the county where the road is located of the amount of such assessment, and the county commissioners shall have the right to appear before the court and file its objections, the same as any landowner. When it shall become necessary for the drainage commissioners to repair any bridge or construct a new bridge across a highway by reason of en-

larging any water-course, or of excavating any canal intersecting such highway, such bridge shall thereafter be maintained by and at the expense of the board of commissioners of such county, or by such other official board or authority as by law shall be required to maintain such highway so intersected.

Where any public canal established under the provisions of the general drainage law shall intersect any private road or cartway the actual cost of constructing a bridge across such canal at such intersection shall be paid for from the funds of the drainage district and constructed under the supervision of the board of drainage commissioners, but the bridge shall thereafter be maintained by and at the expense of the owners of the land exercising the use and control of the private road: Provided, if the private road shall be converted into a public highway the maintenance of the bridge shall devolve upon the board of commissioners of the county or such other authority as by law shall be required to maintain public highways and bridges. (1909, c. 442, s. 25; 1911, c. 67, s. 6; 1917, c. 152, s. 6.)

Mandamus against County Commissioners.—A judgment in proceedings for mandamus against the county commissioners to compel them to pay an assessment of a drainage district for benefit to the public roads therein, that the defendants pay the same, with interest and cost, out of the first moneys coming into their hands and not otherwise appropriated, is valid and not in violation of the Constitution or statute relating to taxation. Drainage District v. Board, 174 N. C. 738, 94 S. E. 530.

§ 5346. Drainage across railroads; procedure.—Whenever the engineer and the viewers in charge shall make a survey for the purpose of locating a public levee or drainage district or changing a natural water-course, and the same would cross the right of way of any railroad company, it shall be the duty of the owner in charge of the work to notify the railroad company, by serving written notice upon the agent of such company or its lessee or receiver, that they will meet the company at the place where the proposed ditch, drain, or water-course crosses the right of way of such company, the notice fixing the time of such meeting, which shall not be less than ten days after the service of the same, for the purpose of conferring with the railroad company with relation to the place where and the manner in which such improvement shall cross such right of way. When the time shall arrive fixed for such conference, unless for good cause more time is agreed upon, it shall be the duty of the viewers in charge and the railroad company to agree if possible, upon the place where and the manner and method in which such improvement shall cross such right of way. If the viewers in charge and the railroad company cannot agree, or if the railroad company shall fail, neglect, or refuse to confer with the viewers, they shall determine the place and manner of crossing the right of way of the railroad company, and shall specify the number and size of openings required, and the damages, if any, to the railroad company, and so specify in their report. The fact that the railroad company is required by the construction of the improvement to build a new bridge or culvert or to enlarge or strengthen an old one shall not be considered as damages to the railroad company. The engineer and viewers shall also assess the benefits that will accrue to the right of way, roadbed, and other property of the company by affording better drainage or a better outlet for drainage, but no benefits shall be assessed because of the increase in business that may come to the road because of the construction of the improvement. The benefits shall be assessed as a fixed sum, determined solely by the physical benefit that its property will receive by the construction of the improvement, and it shall be reported by the viewers as a special assessment, due personally from the railroad company as a special assessment; it may be collected in the manner of an ordinary debt in any court having jurisdiction. (1909, c. 442, s. 26.)

§ 5347. Notice to railroad.—The clerk of the superior court shall have notice served upon the railroad company of the time and place of the meeting to hear and determine the final report of the engineer and viewers, and the railroad company shall have the right to file objections to the report and to appeal from the findings of the board of commissioners in the same manner as any landowner. But such an appeal shall not delay or defeat the construction of the improvement. (1909, c. 442, s. 27.)

§ 5348. Manner of construction across railroad.

1. Duty of Railroad.—After the contract is let and the actual construction is commenced, if the work is being done with a floating dredge, the superintendent in charge of construction shall notify the railroad company of the probable time at which the contractor will be ready to enter upon the right of way of such railroad and construct the work thereon. It shall be the duty of the railroad to send a representative to view the ground with the superintendent of construction and arrange the exact time at which such work can be most conveniently done. At the time agreed upon the railroad company shall remove its rails, ties, stringers, and such other obstructions as may be necessary to permit the dredge to excavate the channel across its right of way. The work shall be so planned and conducted as to interfere in the least possible manner with the business of the railroad.

2. Corporation Commission to Settle.—If the superintendent of construction and the railroad company shall not be able to agree as to the exact time at which such work can be done, including the time of beginning and the time to be consumed in such work, either party may give written notice thereof to the chairman of the corporation commission of the state, and thereupon the corporation commission shall cause an investigation to be made, and, after hearing both parties, shall fix the time of beginning such work and the time to be consumed in the work of construction, and the final determination of the corporation commission thereon shall be binding upon the superintendent of construction representing the district and the railroad company, and the work shall be done in such time as may be fixed by the corporation commission.

3. Penalty for Delay.—In case the railroad company refuses and fails to remove its track and allow the dredge to construct the work on its

right of way, it shall be held as delaying the construction of the improvement, and such company shall be liable to a penalty of twenty-five dollars per day for each day of delay, to be collected by the board of drainage commissioners for the benefit of the drainage district as in the case of other penalties. Such a fine may be collected in any court having jurisdiction, and shall inure to the benefit of the drainage district.

4. Payment of Expense.—Within thirty days after the work is completed an itemized bill for actual expenses incurred by the railroad company for opening its tracks shall be made and presented to the superintendent of construction of the drainage improvement. Such bill, however, shall not include the cost of putting in a new bridge or strengthening or enlarging an old one. The superintendent of construction shall audit this bill and, if found correct, approve the same and file it with the secretary of the board of drainage commissioners. The commissioners shall deduct from this bill the cost of the excavation done by the dredge on the right of way of the railroad company at the contract price, and pay the difference, if any, to the railroad company. (1909, c. 442, s. 28; 1911, c. 67, s. 7.)

§ 5349. Control and repairs by drainage commissioners. — Whenever any improvement constructed under this subchapter is completed it shall be under the control and supervision of the board of drainage commissioners. It shall be the duty of the board to keep the levee, ditch, drain, or water-course in good repair, and for this purpose they may levy an assessment on the lands benefited by the construction of such improvement in the same manner and in the same proportion as the original assessments were made, and the fund that is collected shall be used for repairing and maintaining the ditch, drain, or water-course in perfect order: Provided, however, that if any repairs are made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act of negligence of his agent or employee, or if the same is caused by the cattle, hogs, or other stock of such owner, employee, or agent, then the cost thereof shall be assessed and levied against the lands of the owner alone, to be collected by proper suit instituted by the drainage commissioners. It shall be unlawful for any person to injure or damage or obstruct or build any bridge, fence, or floodgate in such a way as to injure or damage any levee, ditch, drain, or water-course constructed and improved under the provisions of this sub-chapter, and any person causing such injury shall be guilty of a misdemeanor, and upon conviction thereof may be fined in any sum not exceeding twice the damage or injury done or caused. (1909, c. 442, s. 29.)

Editor's Note.—Sections 5373(a), 5373(f) were added by Public Laws 1923 ch. 231 and have the effect of amending this section. This section authorizes the drainage commissioners to levy an assessment upon the lands in the district for the purpose of keeping up the drainage. The amending statute supra, provides that the commissioners may issue bonds instead of levying an assessment. In order to do so, they must file a petition with the clerk of the superior court showing the nature of the work to be done, that the expense will be more than one dollar per acre for the lands in the district, and to raise the money by one assessment would be an unreasonable burden upon the land.

Upon filing such petition, the proceeding is somewhat similar to the original organization of the district, requiring the appointment of a board of viewers, and their report as to whether the bonds should be issued, the filing of maps and profiles, with a reclassification of the lands if found to be necessary. If the commissioners think it would help the sale of the bonds, they may, with the approval of the clerk of superior court, add to the amount so to be secured an amount sufficient to cover all the obligations of the district, so as to have only one bond issue. See 1 N. C. Law Rev. 288.

Meaning of Original Assessments.—Under the provisions of the statute creating the Mattamuskeet Drainage District the control hereof, after its completion, is continued in the board of drainage commissioners for the purpose of its maintenance, and authority is given it to levy assessments therefor on the lands benefited in the same manner and in the same proportion as the "original assessments" were made, and collected by the same officers as those by whom the State and county taxes are collected: Held, the term "original assessments" refers to those made for construction work on bonds issued therefor, and the assessments for maintenance should be collected by the sheriff of the county for the purpose of maintenance, as taxes for general county purposes are to be collected by him. Drainage Comr's v. Davis, 182 N. C. 140, 108 S. E. 506. See notes to sec. 8042, 5369, as to collection by sheriff.

Provision Limiting Assessments.—A provision in the petition limiting the amount of assessments to be made on lands within a drainage district being formed under the provisions of the statute, which was not inserted in the final judgment rendered in due course, may not at a susbequent term be applied by amendment, being also contrary to the statutory provisions and invalid. Mann v. Mann, 176 N. C. 353, 97 S. E. 175.

§ 5350. Construction of lateral drains.—The owner of any land that has been assessed for the cost of the construction of any ditch, drain, or water-course, as herein provided, shall have the right to use the ditch, drain, or water-course as an outlet for lateral drains from such land; and if the land be of such elevation that the owner cannot secure proper drainage through and over his own land, or if the land is separated from the ditch, drain, or water-course by the land of another or others, and the owner thereof shall be unable to agree with such others as to the terms and conditions on which he may enter their lands and construct the drain or ditch, he may file his ancillary petition in such pending proceeding to the court, and the procedure shall be as now provided by law. (1909, c. 442, s. 30; 1915, c. 43, s. 1; 1917, c. 152, s. 3.)

Art. 8. Assessments and Bond Issue

§ 5351. Total cost for three years ascertained. —After the classification of lands and the ratio of assessments of the different classes to be made thereon has been confirmed by the court, the board of drainage commissioners shall ascertain the total cost of the improvement, including damages awarded to be paid to owners of land, all costs and incidental expenses, and also including an amount sufficient to pay the necessary expenses of maintaining the improvement for a period of three years after the completion of the work of construction, not exceeding ten per centum of the estimated actual cost of constructing the drainage works or the contract price thereof if such contract has not been awarded, and after deducting therefrom any special assessments made against any railroad or highway, and, thereupon, the board of drainage commissioners, under the hand of the chairman and secretary of the board, shall certify to the clerk of the superior court the total cost, ascertained as aforesaid; and the certificate shall be forthwith recorded in the drainage

record and open to inspection of any landowner in the district. (1909, c. 442, s. 31; 1911, c. 67, s. 8; 1923, c. 217, s. 4.)

Editor's Note.—This section which requires an estimate of the expense necessary for maintaining for three years the improvement constructed, was amended by Public Laws 1923, ch. 217, sec. 4, by adding a limitation, "not exceeding ten per cent of the estimated actual cost of constructing the drainage works or the contract price thereof." See 1 N. C. Law Rev. 287.

§ 5352. Assessment and payment; notice of bond issue.—If the total cost of the improvement is less than an average of twenty-five cents per acre on all the land in the district, the board of drainage commissioners shall forthwith assess the lands in the district therefor, in accordance with their classification, and said assessment shall be collected in one installment, by the same officer and in the same manner as state and county taxes are collected, and payable at the same time. In case the total cost exceeds an average of twenty-five cents per acre on all lands in the district, the board of drainage commissioners shall give notice for three weeks by publication in some newspaper published in a county in which the district, or some part thereof, is situated, if there be any such newspaper and also by posting a written or printed notice at the door of the courthouse and at five conspicuous places in the district, reciting that they propose to issue bonds for the payment of the total cost of the improvement, giving the amount of bonds to be issued, the rate of interest that they are to bear, and the time when payable. Any landowner in the district not wanting to pay interest on the bonds may within fifteen days after the publication of such notice, pay to the county treasurer the full amount for which his lands is liable to be ascertained from the classification sheet and the certificate of the board showing the total cost of the improvement, and have his lands released from liability to be assessed for the improvement; but such land shall continue liable for any future assessment for maintenance or for any increased assessment authorized under the law. (1909, c. 442, s. 32; 1911, c. 67, s. 9.)

Assessments Not "Taxes."—Assessments made for the maintenance of a drainage district, incorporated under the provisions of the statute, are not "taxes," though they may be so incorrectly denominated therein; being only assessments made for the special benefits to the land within the district and not imposed for the purpose of general revenue. Drainage Comr's v. Davis, 182 N. C. 140, 108 S. E. 506.

Assessments Are Liens in Rem.—Assessments upon lands in a drainage district are liens in rem, resting upon the lands, into whosoever hands it may be at the time they accrue, and do not come within the terms of a warranty against encumbrances by deed. Taylor v. Commissioners, 176 N. C. 217, 96 S. E. 1027.

Same—Purchaser Takes with Notice.—The purchaser of lands within a drainage district formed under the provisions of this chapter is fixed by the statute with notice of the assessments and the time thereof, whether a resident of another State or not. Pate v. Banks, 178 N. C. 139, 100 S. E. 251.

Timber Interest Not Liable.—A conveyance of the timber, under the usual deed, providing for its cutting and removal from the land within a stated period, is regarded as a severance thereof from the land, and the grantee in the deed is not liable for an assessment for drainage purposes laid thereon. Dover Lumber Co. v. Board of Commissioners, 173 N. C. 117, 91 S. E. 714, 845.

One Owner Not Liable for Failure of Others.—No owner is responsible for other owners by reason of their failure to pay, except through the method of assessment provided by the statute. Carter v. Drainage Commissioners, 156 N. C. 183, 184, 72 S. E. 380.

Owner Liable for Additional Assessments.—The land of the owner who has paid his assessments, as provided by this section, is subject to additional assessments, the lands in the district being liable until the original bond issue for making the improvements or indebtedness incurred therefor is paid in full, and the owner is liable for such additional assessments as might be levied against the lands under his contract with a party purchasing the land from him. Virginia-Carolina Joint Stock Land Bank v. Watt, 207 N. C. 577, 178 S. E. 228.

Courts Can Enjoin Collection of Assessments.—The courts, in proper instances, have the power to interfere and stay amounts assessed against the owner of lands within an established drainage district, when it appears that the commissioners, in carrying out the ministerial duties imposed on them, endeavor to collect from him a sum in excess of their own assessment, or that they had made out these rolls in utter disregard to the classifications and ratio of assessments established by the final report, or they had made such changes in the plans and specifications thereof as to exceed their powers and work substantial wrong and hardship upon a landowner, if he is not guilty of laches and has not unduly delayed asserting his rights. Griffin v. Board, 169 N. C. 642, 86 S. E. 575.

But where a drainage district has been fully and lawfully established in accordance with the statute, and the commissioners duly appointed and bonds issued in furtherance of the scheme, an injunction restraining the collection of the assessment against the landowners therein, at the suit of one of them, will not issue, as against the interest of the holder of the bonds, unless it clearly appears that the commissioners have substantially departed, to the injury of the claimant, from the scheme set forth in the final report of the viewers, etc.; and it appearing in this case that such has not been done, the restraining order is properly dissolved, and the further order that the plaintiff may proceed in his action against the commissioners is approved. Griffin v. Board, 169 N. C. 642, 86 S. E. 575.

Presumption as to Notice.—The presumption is in favor of the regularity of the official proceedings of the commissioners of a drainage district, and applies as to the sufficiency of notice to a landowner within the district of a meeting duly had to assess such owners according to benefits received from the improvements therein. Mitchem v. Drainage Com., 182 N. C. 511, 109 S. E. 551.

Waiver of Notice.—Where the owner of land in a drainage district, formed under the provisions of statute, appears at a meeting of the commissioners held for the purpose, and is silent, making no objection or exception to the assessment imposed upon his land, the question as to whether he had been sufficiently served with notice of the meeting becomes immaterial, his appearance being construed as a waiver thereof, or rather as dispensing with formal notice. Mitchem v. Drainage Com., 182 N. C. 511, 109 S. E. 551. And he can not collaterally, by injunction, restrain the collection of these assessments by sheriff's sale; and this applies to his grantee who knew that the lands were situate within the district and subject to the assessments. Mitchem v. Drainage Com., 182 N. C. 511, 109 S. E. 551.

§ 5353. Failure to pay deemed consent to bond issue.—Every person owning land in the district who shall fail to pay to the county treasurer the full amount for which his land is liable, as aforesaid, within the time above specified, shall be deemed as consenting to the issuance of drainage bonds, and in consideration of the right to pay his proportion in installments, he hereby waives his right of defense to the payment of any assessments which may be levied for the payment of bonds because of any irregularity, illegality, or defect in the proceedings prior to this time, except in case of an appeal, as hereinbefore provided, which is not affected by this waiver. The term "person" as used in this act includes any firm, company, or corporation. (1909, c. 442, s. 33; 1911, c. 67, s. 10.)

§ 5354. Bonds issued.—At the expiration of fifteen days after publication of notice of bond issue the board of drainage commissioners may issue bonds of the drainage district for an amount equal to the total cost of the improvement, less such amounts as shall have been paid in in cash

to the county treasurer. It shall be optional with the board of drainage commissioners in the issuing of bonds to issue serial bonds in denominations of not less than one hundred dollars nor more than one thousand dollars, bearing not more than six per cent interest from date of issue, payable semiannually. The first annual installment of principal shall fall due not less than three years nor more than six years after date thereof, and each annual installment of principal shall not be less than five per cent nor more than ten per cent of the total bonds authorized and issued. (1909, c. 442, s. 34; 1911, c. 67, s. 11; 1917, c. 152, s. 12; 1923, c. 217, s. 5.)

Editor's Note. — This section, as to issuing bonds, was amended by Public Laws 1923, ch. 217, sec. 5 by leaving out the requirement to include in the bond issue an amount sufficient to pay interest on the bond issue for the three years following the date of issue; and also by leaving out the last sentence in the section in regard to assessments to pay interest on installments of bonds maturing more than three years from date of issue. These payments are provided for in a subsequent section. See Editors Note to sections 5355 and 5360. 1 N. C. Law Rev. 287.

Power to Issue Bonds for Interest.—The original section, chapter 442, Laws 1909, sec. 34, authorized the commissioners to issue bonds for the full amount of the assessment for construction, "together with interest thereon, costs of collection or other incidental expense." That former section has been repealed by section 34, chapter 67, Laws 1911, but it shows that the original act authorized the issuing of bonds for "interest and other incidental expenses." Indeed, the power to issue bonds for interest arises by implication, even if there is no express delegation of this power in the statute. Carter v. Com'rs, 156 N. C. 183, 186, 72 S. E. 380. The issuance of bonds to take care of interest is specifically provided for in other sections. See Editor's Note, supra. Ed. Note.

Bonds Not Void.—An issue of bonds by a drainage commission, is not void by reason that the clerk of the court who appointed the commissioners owned an interest in a tract of land within the drainage district, as such an interest is too minute, and not directly the subject-matter of the litigation. White v. Lane, 153 N. C. 14, 68 S. E. 895.

§ 5355. Form of bonds; excess assessments.—All bonds authorized and issued shall be signed by the chairman and secretary of the board of drainage commissioners and the corporate seal of the district affixed thereto and the interest coupons shall be authenticated by the facsimile signature of the secretary, and both the principal and interest coupons shall be payable at some bank or trust company to be designated by the board of drainage commissioners and incorporated in the body of the bond. The form of the bond shall be authorized by the board of drainage commissioners or by the board and the purchaser of the bonds jointly, at the option of the board.

All bonds of reclamation districts shall have that fact noted upon the face of the bond either by stamping or printing the same thereon all bonds of improvement districts shall also have that fact noted upon their face.

For the purpose of meeting any possible deficit in the collection of annual drainage assessments or any deficit arising out of unforeseen contingencies there shall be levied, assessed and collected during each year when either the interest or principal or both interest and principal on the outstanding bonds shall be due an assessment as will yield ten per cent more than the total of interest and principal due in such years that is to say, for every one hundred dollars of principal and interest, or either, due in any one year, there shall be levied, assessed and collected a sufficient drainage assessment to yield one hundred and ten dollars for such year. When this excess of drainage tax so levied, assessed and collected shall accumulate so that the aggregate surplus in the hands of the treasurer of the district shall amount to more than fifteen per cent of the total principal of the bonds of the district outstanding and unpaid, then such surplus above fifteen per cent thereof may be available for expenditure by the board of drainage commissioners in the maintenance and upkeep of the drainage work in such district in the manner provided by law: after all the drainage assessments have been collected except the last assessment, if the surplus which has accumulated amounts to more than five per cent of the total issue of bonds of the district, then and in such event the board of drainage commissioners may in their discretion apply such excess above five per cent toward the reduction of the total amount embraced in the last assessment, reducing the same pro rata as to each tract of land embraced in the district, and having regard to the classification, to the end that such reduction shall be fairly and justly made. As to such surplus as shall accumulate in the hands of the treasurer of the district over and above all obligations of the district which may be due, the treasurer is hereby directed to deposit same in some solvent bank or banks at the highest rate of interest obtainable therefor, and the said treasurer shall be authorized, if he deems it necessary, to demand satisfactory security for such deposits; but the said treasurer shall reserve the right to demand a repayment at any time upon giving not exceeding thirty days notice thereof. Whereas the proceeds of the first drainage assessment may not be collected and in the hands of the treasurer of the district prior to the maturity of the first and second semi-annual installments of interest upon the issue of bonds, the treasurer of the district is hereby directed to pay the interest coupons first maturing and also the interest coupons next maturing if necessary out of funds in his hands for the purpose of maintaining the improvements for the period of three years after the completion of the work or construction. As a surplus fund with the treasurer arising out of the annual additional assessment of ten per centum shall accumulate in any one year in excess of fifteen per centum of the total principal of the bonds of the district outstanding and unpaid, as herein provided, the treasurer shall transfer in each of such years such surplus fund to the fund for maintaining the improvement after completion, as a reimbursement of the fund formerly withdrawn therefrom for the payment of the first and second installments of interest coupons until such reimbursement shall be fully made. The treasurer shall thereafter keep separate accounts of the proceeds of such additional ten per cent assessment remaining each year after the payment of all maturing obligations, and also a separate account of the funds provided for maintaining the improvement for the period of three years after completion of improvement and all payments therefrom and reimbursements thereto. (1917, c. 152, s. 13; 1923, c. 217, s. 6; 1927, c. 98, s. 5.)

Editor's Note.—Public Laws 1923, ch. 217, sec. 6 amended this section by providing that, for the purpose of meeting any deficit, an assessment shall be levied sufficient to yield

ten per cent more than the total of principal and interest of bonds due during that year; and when the surplus of the assessment so levied amounts to more than fifteen per cent of the principal of the bonds outstanding, the excess over such fifteen per cent may be used for maintenance in the district. When all the assessments, except the last one, have been paid, if the accumulated surplus is more than five per cent of the total bond issue, the excess over such five per cent may be applied to the reduction of the last assessment. As the surplus may accumulate, the treasurer may deposit the same in some solvent bank at the highest obtainable rate of interest.

Since the first and second installments of interest on the bonds may be due before the collection of the first drainage assessment, the treasurer is authorized to pay such interest out of the funds for maintaining the drainage work for three years after completion, the same to be repaid out of the additional ten per cent assessment above provided for, when there shall be an accumulated surplus in any one year of more than fifteen per cent of the principal of outstanding bonds. The treasurer is required to keep separate accounts of the funds above specified. See 1 N. C. Law Rev. 288.

The last sentence in the first paragraph of the present section, distinguishing between reclamation and improvement districts was added by Public Laws 1927, ch. 98, sec. 5.

§ 5356. Application of funds; holder's remedy.—The commissioners may sell these bonds at not less than par and devote the proceeds to the payment for the work as it progresses and to the payment of the other expenses of the district provided for in this subchapter. The proceeds from such bonds shall be for the exclusive use of the levee or drainage district specified on their face, and shall be numbered by the board of drainage commissioners and recorded in the drainage record, which record shall set out specifically the lands embraced in the district on which the tax has not been paid in full, which land is to be assessed as hereinafter provided. If any installment of principal or interest represented by the bonds shall not be paid at the time and in the manner when the same shall become due and payable, and such default shall continue for a period of six months, the holders of such bonds upon which default has been made may have a right of action against the drainage district or the board of drainage commissioners of the district wherein the court may issue a writ of mandamus against the drainage district, its officers, including the tax collector and treasurer, directing the levying of a tax or special assessment as herein provided, and the collection of same, in such sum as may be necessary to meet any unpaid installments of principal and interest and cost of action; and such other remedies are hereby vested in the holders of such bonds in default as may be authorized by law; and the right of action is hereby vested in the holders of such bonds upon which default has been made authorizing them to institute suit against any officer on his official bond for failure to perform any duty imposed by the provisions of this subchapter. The official bonds of the tax collector and county treasurer shall be liable for the faithful performance of the duties herein assigned. Such bonds may be increased by the board of county commissioners. (1909, c. 442, s. 34; 1911, c. 67, s. 11; 1911, c. 205; 1923, c. 217, s. 7.)

Editor's Note.—Public Laws 1923, ch. 217, sec. 7 amended this section by striking out in the first sentence of the section the words, "and to the payment of the interest on the bonds for the three years next following the date of issue." This payment is taken care of by the amendment to the preceding section and by the amendment to section 5360. See Editor's Notes to those sections. See 1 N. C. Law Rev. 288.

For amendment of this section applicable only in Columbus and Brunswick Counties, see 1929, ch. 299, §§ 1, 2.

§ 5357. Sale of bonds.—In making the sale of drainage bonds the board of drainage commissioners shall prepare a notice of such sale containing the usual and appropriate information regarding the terms and provisions of the bonds and, shall publish the same for at least a period of two weeks in at least one other newspaper of general circulation published within the state and in at least one other newspaper of large circulation among the buyers of bonds, in which they shall invite sealed bids from prospective purchasers to be opened on a certain day, and may require a cash deposit to accompany all bids, and shall reserve the right to reject any and all bids. In such notice the commissioners may hold in reserve information as to the date when the first installment of principal shall fall due, the annual installments of principal to be paid, the number of years within which the serial bonds are to be paid, the form of the bonds, and the name of the bank or trust company at which the interest coupons and the installments of principal are to be made payable, and shall state that the information and data so withheld may subsequently be agreed upon between the drainage commissioners and the purchaser of the bonds; or the board of drainage commissioners in their advertisement asking bids may make optional propositions in the respects above recited, inviting bids as to each kind of bond so proposed. The board of drainage commissioners shall accept the highest bona fide bid for such bonds and issue and sell the same accordingly, provided the highest bid shall equal or exceed the par value of the bonds with any accrued interest thereon. If no satisfactory bid shall be received the board of drainage commissioners may readvertise the bonds for sale in the manner above provided, or they may accept any private bid for the bonds at not less than their par value, with any accrued interest thereon. The board of drainage commissioners shall in good faith make diligent effort to sell the bonds at a price not less than their par value, with accrued interest. (1909, c. 442, s. 34; 1911, c. 67, s. 11; 1917, c. 152, s. 15.)

§ 5358. Refunding bonds issued.—In any case where the board of drainage commissioners of any drainage district have issued or may issue bonds for the purpose of constructing or completing the drainage works in such district, the payment of which at maturity would in the judgment of the board of drainage commissioners be an unreasonable burden on the owners of the lands in such district assessed for the payment of such bonds and interest, or if it shall appear for other good and substantial reasons that the welfare of the district and the owners of lands therein would be promoted thereby, the board of drainage commissioners shall have the power to refund such bonds, or any part thereof, and issue new bonds equal to the amount of bonds outstanding and unpaid, or any part thereof. The new or refunding bonds shall bear a rate of interest not exceeding six per cent, payable semiannually, and shall be divided into such annual installments not exceeding ten per cent and not less than five per cent of the outstanding bonds so refunded. The new assessments shall be levied and collected with which to pay the principal and inter-

est on the bonds in the manner provided by law. The first installment of principal on the bonds so funded may be made payable at a certain date in the future not exceeding six years from the date of the refunding bonds, and in the meantime annual assessments shall be levied and collected for the payment of the interest. (1917, c. 152, s. 14.)

§ 5359. Drainage bonds received as deposits.— The state treasurer is authorized to receive drainage bonds issued by drainage districts in North Carolina as deposits from banks, insurance companies, and other corporations required by law to make deposits with the state treasurer: Provided, that the attorney general shall have approved the form of such bonds. (1917, c. 152, s. 7.)

§ 5360. Assessment rolls prepared. — The board of drainage commissioners shall immediately prepare the assessment rolls or drainage tax list, giving thereon the names of the owners of land in the district and a brief description of the several tracts of land assessed and the amount of assessment against each tract of land. The first of these assessment rolls shall be due and payable on the first Monday in September following the date of such bonds, and shall provide funds sufficient for the payment of interest on such bonds for one year. The second assessment roll shall make like provision for the payment of the interest for one year. Annual assessment rolls shall thereafter provide funds sufficient to meet the interest for one year on the issue of bonds outstanding. During the year previous to maturity of any annual installment due upon the principal of said bonds there shall be an assessment roll sufficient to provide funds for the payment of both the interest for one year and for the payment of the annual installment due upon the principal of the bonds. Such annual installments shall be made from year to year to provide funds to meet the interest for one year and the annual installment of the principal due upon the bonds outstanding, until the whole principal due upon the outstanding bonds and the interest thereon shall be fully paid. In making up such assessment rolls there shall be included ten per cent additional as provided in section five thousand three hundred and fifty-five. Each of the assessment rolls shall specify the time when collectible and be numbered in their order, and the amounts assessed against the several tracts of land shall be in accordance with the benefits received, as shown by the classification and ratio of assessments made by the viewers. These assessment rolls shall be signed by the chairman of the board of drainage commissioners and by the secretary of the board. There shall be four copies of each of the assessment rolls, one of which shall be filed with the drainage record, one shall be filed with the chairman of the board of drainage commissioners, who shall carefully preserve the same, one shall be preserved by the clerk of the court, without change or mutilation, for the purposes of reference or comparison, and one shall be delivered to the sheriff, or other county tax collector, after the clerk of the superior court has appended thereto an order directing the collection of such assessments, and the assessments, shall thereupon have the force and effect of a judgment as in the case of state and county taxes. If the drainage commission who has assessed the lands of a drainage district prior to March 11th, 1919, shall file the aforesaid four copies of assessment rolls within six months from April 1st, 1919, the filing of such assessment rolls shall have the same legal effect as if filed strictly in accordance with this section immediately after the preparation of such assessment rolls. The state having authorized the creation of drainage districts and having delegated thereto the power to levy a valid tax in furtherance of the public purposes thereof, it is hereby declared that drainage districts heretofore or hereafter organized under existing law or any subsequent amendments thereto are created for a public use and are political subdivisions of the state. (1911, c. 67, s. 12; 1917, c. 152, s. 9; 1919, c. 282, s. 1; 1921, c. 7; 1923, c. 217, s. 8.)

Editor's Note.—The following changes in this section were made by Public Laws 1923, ch. 217, sec. 8. The manner of preparing the assessment rolls, as formerly contained in the first part of this section, was changed and the drainage commissioners are to prepare assessment rolls, giving the names of the owners of the land, a description of the different tracts, and the amount assessed against each tract. The first assessment is to become due on the first Monday in September after the date of the bond issue, and shall provide funds sufficient for the payment of interest on the bonds for one year. The second assessment shall also provide for the payment of interest on the bonds for one year. Thereafter annual assessment shall provide a sufficient fund to meet interest on the bonds for one year; and during the year in which there is an installment of the principal of any bonds due, the assessment shall be sufficient to pay such installment and the interest accuring for that year. The commissioners shall also include in the assessment rolls the ten per cent additional tax above provided for. See 1 N. C. Law Rev. 288.

§ 5360(a). Application of amendatory provisions of certain sections; amendment or reformation of proceedings.—All the provisions of law amendatory of sections 5329, 5333, 5340, 5351, 5354, 5355, 5356 and 5360 shall apply to all drainage districts which shall hereafter be organized and also to all districts where proceedings for the organization thereof have been instituted and are now pending and where the bonds have not been actually issued, sold, and delivered to the purchaser thereof. If it shall be necessary to amend or reform any of the pleadings or orders made by the court or any action taken by the board of drainage commissioners in any drainage proceedings instituted and pending before March 6, 1923, full authority is granted to make any such amendments, to the end that the said drainage proceedings shall conform with the provisions hereof: Provided, that the law amendatory of said sections 5329, 5333, 5340, 5351, 5354, 5355, 5356 and 5360 shall not apply to the county of Hyde. (1923, c. 217, ss. 9. 10.)

§ 5361. Assessment lien; collection; sale of land.—The assessments shall constitute first and paramount lien, second only to state and county taxes, upon the lands assessed for the payment of the bonds and interest thereon as they become due, and shall be collected in the same manner and by the same officers as the state and county taxes are collected. The assessment shall be due and payable on the first Monday in September each year, and if the same shall not be paid in full by the thirty-first day of December following, it shall be the duty of the sheriff or tax collector to sell the lands so delinquent. The sale of lands for

failure to pay such assessments shall be made at the courthouse door of the county in which the lands are situated, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of any date except Sunday or another legal holiday, which may be designated by the Board of Drainage Commissioners. After any such sale date has been designated by the Board of Drainage Commissioners, if for any necessary cause the sale cannot be made on that date, the sale may be continued from day to day for not exceeding four days, or the lands may be re-advertised and sold on any day which the Board of Drainage Commissioners may or shall designate during the same hours and without any order being obtained therefor during the same calendar year. Nothing in this section shall be construed to require any order from any court for any sale or resale held hereunder. The existing general tax law in force when sales are made for delinquent assessments shall have application in redeeming lands so sold, and in all other respects, except as to the time of sale of lands, the existing law as to the collection of state and county taxes shall apply to the collection of such drainage assessments. (1911, c. 67, s. 12; 1917, c. 152, s. 9; 1931, c. 273.)

Editor's Note.—The Act of 1931 struck out the third sentence of the former section and inserted in lieu thereof the third, fourth and fifth sentences above. The original section authorized the sale to be made on the first Monday in February in each year, and if for any cause the sale could not be made on that day, it might be continued from day to day for four days, or readvertised and sold on the first Monday in March, without any order therefor. See 9 N. C. Law Rev. 368.

The Act provides that this amendment shall have effect as if ratified prior to the first day of January, one thousand nine hundred and twenty-nine. It further provides that no sale of drainage lands held under the provisions of this section shall be void by reason of the fact that it may not have been held on the day specified in this section prior to this amendment.

Same—Amendment of 1923.—Public Local Laws 1923, c. 88, inapplicable to Franklin, Hyde, Nash and Wilson Counties, amended this section by adding at the end thereof the following:

"If the sheriff or tax collector fail to make sale of any lands on the first Monday in February or March in any year because of the lack of bidders or for any other reason, he may sell same upon the first Monday of any subsequent month in the same year or any succeeding year, after giving notice as required by law. No bid at any sale shall be received unless sufficient in amount to discharge all the drainage assessments and other charges due by the delinquent lands or owner thereof, together with all costs and expenses of sale. If no sufficient bid be received, the board of drainage commissioners of the district shall be deemed the purchaser in its corporate capacity at a sum sufficient to pay all assessments which are due and costs as above stated, and shall be entitled to receive a certificate of purchase and deed in the manner provided by law for purchasers at tax sales. The board of drainage commissioners shall only be required to pay to the sheriff the costs and expenses of sale before receiving a certificate of purchase. The board of drainage commissioners of the district in their corporate capacity shall be in like position and have the same rights and be subject to the same duties as the purchaser of lands at any tax sale under the general law The owner of said lands so sold or any person having an estate therein, or having a lien thereon, may redeem the same in the manner provided by sections eight thousand and thirty-eight (8038) and eight thousand and thirty-nine (8039), Consolidated Statutes, or any amendments thereof; and if the board of drainage commissioners shall have been the purchaser of said lands the amount paid in redemption shall include the sum bid therefor plus the penalty. The board of drainage commissioners shall pay to the sheriff or tax collector the amount representing their bid at the sale of said lands before they shall be entitled to receive a deed therefor, which the sheriff shall pay to the treasurer of the drainage district in the same manner as other funds received by him. The board of drainage commissioners, after acquiring a deed for said lands, may hold the same as an asset of the district and shall be liable for the payment of all drainage assessments and State and county taxes accruing after the sale at which the district was a bidder, and in all respects be deemed the owner of said lands and subject to the same privileges and liabilities as any other landowner, including the right to convey the said lands for a consideration and pay the proceeds of said sale to treasurer of the district, which may be distributed by the drainage commissioners for the benefit of the district in the same manner as other district funds. * * * Except as herein or otherwise modified or amended, the existing general tax law in force when sales of land are made for drainage assessments shall fully apply to the collection of drainage assessments and the sales of lands and in all other respects."

The Act further provided: "If any sheriff or tax collector failed for any reason to collect drainage assessments upon lands in any drainage districts due in one thousand nine hundred and seventeen, or any subsequent years, and further failed to make valid sales of the lands so delinquent in the payment of such assessments, then and in such event the existing sheriff or tax collector is hereby authorized and directed to proceed to collect such unpaid drainage assessments, with interest thereon from the dates when such assessments respectively became due, and in default of payment being made he is further authorized to make sales of such lands as may be in default at any time hereafter, at the times and in the manner authorized by law as amended herein; and the purchaser at said sales shall acquire title to such lands in the manner provided by law. If the sheriff or tax collector in office at the time such assessments were in default has since died or gone out of office, the powers herein given shall be exercised by the existing sheriff or tax collector."

A receiver cannot intervene, in a bank's action against the board, on the ground that he has the right, under this section to collect payments. See Board of Drainage Com'rs v. Lafayette Southside Bank, 27 Fed. (2d) 286.

Assessments Not a Lien Until Due.—The assessments upon lands in a drainage district, are a lien in rem on the lands of the owner, for the payment of the bonds issued by the district in accordance with the statute, the district being a geographical quasi-public corporation, and the benefits annually accruing to the advantage of successive owners, such assessments are due and payable at stated intervals but are not the personal obligation of the owner until they are due, nor, until they fall due, an encumbrance within the intent and meaning of a warranty in a deed. Pate v. Banks, 178 N. C. 139, 100 S. E. 251.

Same—Not a Debt of Owner.—"The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land and accrues, pari passu with the benefits as they shall accrue thereafter. They are not liens until they successfully fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time." Pate v. Banks, 178 N. C. 139, 141, 100 S. E. 251.

Money from Assessments Is Like Public Money of County.—This and the following sections by its provisions for the collection of assessments within an established drainage district by the same officer and by the same method as State and county taxes are collected, the same to be turned into the county treasury, giving right of action by mandamus to holders of the bonds issued by the district against the district, or its officers, including the tax collector and treasurer, to compel the levy of special assessments upon default in payment of the principal and interest on the bonds, with liability on the bonds of the tax collector or treasurer upon default in the duty assigned to them, impress the moneys derived from the assessments whether the organized district be regarded as a public, quasi-public, or private corporation, as public money of the county, to be kept in the depository designated under the statute for such funds, although the funds in question are devoted to a particular or defined use. Comr's v. Lewis, 174 N. C. 528, 94 S. E. 8.

Due Process of Law Not Denied.—The statute under which a drainage district is formed does not deny the district due process of law by providing for the collection and security of the assessments as other county taxes are collected and kept, etc. Com'rs v. Lewis, 174 N. C. 528, 94 S. E. 8.

Assessments Prior to Mortgage. — The assessments on lands for a bond issue have a prior lien to a mortgage executed thereon prior to the formation of said district. Drainage Commissioners v. Eastern Home, etc., Ass'n, 165 N. C. 697, 703, 81 S. E. 947.

§ 5362. Assessment not collectible out of other property of delinquent.—Only the land assessed in the drainage proceeding shall be liable for drainage tax or assessment, and no other property of the landowner shall or may be sold for said drainage tax or assessment; Provided, that this section shall not apply to any drainage bond sold and delivered prior to the ratification hereof or to any litigation pending at the time of said ratification. (1919, c. 282, s. 2; 1927, c. 139.)

§ 5363. Sheriff in good faith for assessment not liable for irregularity.—The sheriff who executes upon property for the collection of drainage assessments under the provisions of this article shall not be liable either civilly or criminally if he shall sell such property in good faith, even though such sale is irregular or for any cause illegal. (1919, c. 282, s. 4.)

§ 5364. Receipt books prepared.—The clerk of the superior court in each county where one or more drainage districts have been established shall be required to have prepared annually during the month of August a form of receipt, with appropriate stubs attached and properly bound, for the drainage assessments due on each tract of land recited in the assessment rolls. This bound book of tax receipts or bills shall be indorsed "Drainage assessments of the (here give the name of the district) for the county of....., delivered to the sheriff or tax collector as of the first Monday in September, 19.., for collection as required by law," and the same indorsement shall be printed at the top of each tax bill or blank receipt. Each tax bill or blank receipt shall contain a blank space for the name of the owner of the property, the amount of the annual drainage tax, the amount of maintenance tax, if any, and a receipt at the bottom of the same, followed by a blank line for the signature of the tax collector. This bound book of tax bills or receipts, with the blanks duly filled in, shall be delivered to the sheriff or tax collector on the first Monday of September of each year. The necessary cost of printing and binding such book of tax bills or receipts and the filing in of the same shall be a proper charge against such drainage district and shall be paid by the board of drainage commissioners (1917, c. 152, s. 9; 1919, c. 208, s. 2.)

§ 5365. Receipt books where lands in two or more counties.—Where any drainage district which has been established contains lands located in a county or counties other than the county in which the district was established, the clerk of the superior court of the county in which the district was established shall have prepared annually during the month of August a form of tax bills or receipts, with appropriate stubs attached, covering all the lands in the drainage district located in such other county or counties, and in the form herein provided for the county in which the district has been established, and have the same substantially bound in book form. He shall also fill in the blanks of such tax receipts ready for the signature of the collection. On a page in such bound book after the tax bills or receipts there shall be appended an order directed to the sheriff or tax collector in the county in which such lands are located, which shall be in substantially the following form: State of North Carolina—County of ..... The Sheriff or Tax Collector of ..... County: This is to certify that the foregoing tax bills or blank receipts embrace the drainage assessments made on certain lands in the county of ....., which are located in and are a part of (here insert the name of the drainage district), which district was established in the county of ..... These assessments are due on the first Monday of September, 19.., and must be paid and collected within the time required by law. You will make monthly settlements of your collections with the treasurer of ..... county, being the county in which the district was established, and in all other respects you will discharge your duties as sheriff or tax collector as required by law. In witness whereof, I have hereunto set my hand and official seal, this .... day of ....., 19.....

.....,

Clerk Superior Court .....County.

Thereupon such drainage assessments in such county shall have the force and effect of a judgment upon the lands so assessed, as in the case of state and county taxes, and shall in all other respects be as valid assessments as those levied upon lands in the county in which the district was established. The auditor for drainage districts herein authorized shall also examine the records and accounts of the sheriff of such county. In the establishment and administration of the drainage districts the clerk of the superior court, the county treasurer, and the chairman of the board of drainage commissioners shall have jurisdiction over the lands and the collection of drainage assessments in the county or counties other than the county in which the district was established to the same extent as in the county where such district was established: Provided, that in those counties which do not have a county treasurer, then the auditor provided for in this subchapter shall perform the duties required by this section for the county treasurer. (1917, c. 152, s. 11.)

§ 5366. Authority to collect arrears.—If any sheriff or tax collector was authorized to collect drainage assessments in any year prior to 1917, and failed to collect any part of such drainage assessments, and is now out of office, or is still holding the office of sheriff or tax collector, then and in such event such sheriff or tax collector, regardless of the expiration of his term of office, is hereby authorized and directed to proceed to the collection of such unpaid drainage assessments, and in default of payment being made, he is further authorized to make sales of such lands as may be in default at the times and in the manner authorized by law during the year one thousand nine hundred and seventeen, one thousand nine hundred and eighteen, or one thousand nine hundred and nineteen. (1917, c. 152, s. 9.)

§ 5367. Sheriff to make monthly settlements; penalty.—The sheriff or tax collector shall be required to make settlements with the county treasurer on the first day of each month of all collections of drainage assessments for the preceding month, and to pay over to the treasurer the money so collected, for which the treasurer shall exe-

cute an appropriate receipt, to the end that the treasurer may have funds in hand to meet the payments or interest and principal due upon the outstanding bonds as they mature. If any sheriff or tax collector shall fail to comply with the law for the collection of drainage assessments, or in making payments thereof to the treasurer as provided by law, he shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine and imprisonment, in the discretion of the court, and he shall likewise be liable in a civil action for all damages which may accrue either to the board of drainage commissioners or to the holder of the bonds, to either or both of whom a right of action is given. (1911, c. 67, s. 12; 1917, c. 152, s. 9.)

§ 5368. Duty of treasurer to make payment; penalty.—It shall be the duty of the county treasurer, and without any previous order from the board of drainage commissioners, to provide and pay the installments of interest at the time and place as evidenced by the coupons attached to the bonds, and also to pay the annual installments of the principal due on the bonds at the time and place as evidenced by the bonds. The county treasurer shall be guilty of a misdemeanor and subject, upon conviction, to fine and imprisonment, in the discretion of the court, if he shall wilfully fail to make prompt payments of the interest and principal of the bonds, and he shall likewise be liable in a civil action for the damages which may accrue either to the board of drainage commissioners or to the holders of such bonds, to either or both of whom a right of action is hereby given. (1911, c. 67, s. 12.)

Effect of Public Local Act for Robeson County.—Chapter 46, section 1, Public-Local Laws 1917, abolishes the office of County Treasurer of Robeson County and substitutes therefor as designated by the county commissioners, one or more solvent banks or trust companies located in the county of Robeson as a depositary and finanical agent for that county. with provision (sec. 3) that such bank or trust company shall perform the duties of treasurer in disbursement of the county funds; section 4, that the sheriff, as such, or ex officio treasurer, shall turn over all moneys of the county, from whatsoever source derived, whether belonging to the general county fund or otherwise, to the bank or trust company designated: Held, under these and the further pertinent provisions of the act, moneys derived from assessments of a drainage district, being county funds, should be deposited, as the statute directs, with the depository lawfully designated. Comr's v. Lewis, 174 N. C. 528, 94 S. E. 8.

§ 5369. Fees for collection.—The fee allowed the sheriff or tax collector for collecting the drainage tax as hereinbefore prescribed shall be two per cent of the amount collected, and the fee allowed the treasurer for disbursing the revenue obtained from the sale of drainage bonds shall be one per cent of the amount disbursed: Provided, that no fee shall be allowed the sheriff or tax collector or county treasurer for collecting or receiving the revenue obtained from the sale of the bonds hereinbefore provided for, nor for disbursing the revenue raised for paying off such bonds: Provided futher, that in those counties where the sheriff or tax collector and treasurer are on a salary basis, no fees whatever shall be allowed for collecting or disbursing the funds of the drainage district. (1911, c. 67, s. 13.)

Special Provision for Pitt County. — By force of Public Laws 1925, Ch. 271 the last proviso of this section does not apply to Pitt County. Ed. Note.

Construed with Other Sections.—The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors and their compensation therefor, being in pari materia, should be construed together by the courts in ascertaining the legislative intent. Drainage Comr's v. Davis, 182 N. C. 140, 108 S. E. 506.

Sheriff's Compensation Restricted.—The bringing forward of sec. 13, ch. 67, Public Laws 1911, in this section, providing that 2 per cent shall be allowed sheriffs "for collecting the drainage assessments as hereinbefore prescribed," is a legislative construction of section 13 of the prior law, and was intended to restrict the compensation of the sheriff to 2 per cent of the amount of the assessments in drainage districts collected by him, and not to allow him a commission of 5 per cent as in case of taxes collected for general governmental purposes. Drainage Comr's v. Davis, 182 N. C. 140, 108 S. E. 506.

Compensation of Treasurer.—This section, dealing with the compensation to be allowed the county treasurer for disbursing the revenue obtained from the sale of bonds of drainage district, provides but one compensation for all services, i. e., 2 per cent of the revenue derived from the sale of the drainage bonds, and expressly denies compensation for certain other services mentioned, and if not, then under the doctrine of expressio unius excludio alterius the treasurer is not entitled to compensation by way of commissions on the moneys derived from assessments for maintenance. Drainage Com'rs v. Credle, 182 N. C. 442, 109 S. E. 88.

§ 5370. Conveyance of land; change in assessment roll; procedure.—Status of Land Fixed.—The boundaries of lands as surveyed and mapped, the ownership thereof, and the classification and assessment thereof as appears in the final report and map and upon the assessment roll, shall be and remain as of the time when the district was established and the final report of the board of viewers was approved by the court. No conveyance or devise of land devolution by inheritance after the petition has been filed or the owner thereof has been served with the original summons, either by personal service or by publication shall affect the status or liability of such land as a part of such drainage district, except as herein provided.

2. Conveyance before Final Report.—If the owner of any lands included in such district shall after the filing of the petition, and after being served with the original summons and before the approval of the final report, convey the whole or any part of such lands, or the title thereto shall be otherwise changed, then and in such event the grantor and grantee or new owner, or either, may file a petition in an ancillary proceeding before the clerk of the superior court setting forth the facts, with a description of the lands conveyed either in part or the entire body of land, together with a description of the land excepted and not conveyed. If the grantor or grantee or new owner in whole or in part, file such petition, the other not so joining shall be served with notice of same. The clerk may require the petitioner to attach to the petition a map showing the boundaries of the entire body of land as it appears in the record of the proceedings, and also showing the part conveyed. If the ownership of such land has been changed by devise or inheritance, or any joint ownership has been changed by partition, such new owner may file a petition as herein provided. Such petition shall conclude with a prayer that the grantee or new owner be made a party to the proceeding. The court after a hearing may make the grantee or new owner a party to the drainage proceeding and shall certify to the engineer and viewers a description of the land so

conveyed or held by the new owner, with directions to verify the boundaries and to classify the land to the same extent as if the grantee was the original party. Any part of such lands not so conveyed shall be and remain a part of the district.

3. Conveyance after district established.—After the district shall be established, the lands classified, the final report approved, and the assessment roll filed, no conveyance of any land in the district shall effect or change the existing status or liability of such land as to assessment charges or otherwise, except in the manner herein defined. When the title and ownership of any tract of land embraced in the district have been changed or vested in others by grant, device, or inheritance, or by partition between joint owners, subsequent to the establishment of the district, the assessment roll may be amended in the following manner: The grantor and grantee, or the new owners, may file a petition with the chairman of the board of drainage commissioners alleging that the ownership of the land has changed, and the manner thereof, in whole or in part. If the whole body of land as appears in the final report or on the assessment roll has changed ownership, a general description consistent with such final report and map shall be sufficient. If the ownership of the body of land has changed only as to part thereof, the petition shall contain a description of the part thereof claimed by the new owners, and the number of acres and the classifications, or the several classes if it be in more than one class, and also a description of that part of the land the title to which remains in the original owner, with the number of acres and with the classification and the several classes if it contains more than one class of land. The petition shall so describe the land and the number of acres in each class as to that part of which the ownership has changed as to maintain the number of acres originally assessed, and the class or classes in which the same has been assessed, and the chairman of the board of drainage commissioners may require the petitioners to have the lands surveyed, and submit a map if the same shall be necessary.

4. Duty of chairman of drainage commissioners and clerk.—The chairman of the board of drainage commissioners shall present this petition to the clerk of the superior court at any time thereafter, not later than the first Monday in July following. It shall be the duty of the clerk to examine and verify the facts set forth in the petition, and particularly if the number of acres assessed and the classes thereof against the new owners added to the number of acres and the classes assessed against that part of the land, the title to which has not changed, shall equal the total number of acres and the classes so assessed as appear against such entire body of land in the final report and assessment roll. If the clerk shall be so satisfied, he shall enter an order or decree changing the original assessment roll, or the assessment roll as theretofore amended, by adding the name of the new owner with the number of acres assessed in each class, and by amending the number of acres assessed and the classes thereof against the original owner as appears on the original assessment roll or assessment roll as theretofore amended. It shall be the duty of the clerk after such order to make such changes in the assessment roll. It shall be the duty of the clerk of the superior court in making changes in the original assessment roll from time to time to observe and maintain the total number of acres in each class, to the end that the revenue produced from the annual assessment shall not be thereby diminished. The chairman of the board of drainage commissioners, instead of presenting to the clerk of the court each petition of landowners separately, may combine a number of petitions and present the same to the court at one and the same time. The first Monday in July in each year is hereby set apart as a special day on which petitions for changing the assessment roll may be submitted, at which time the clerk shall hear all petitions not theretofore submitted.

5. Failure of chairman of board to act.—If the chairman of the board of drainage commissioners shall fail to act when any petition shall be submitted to him as herein provided, or the chairman or any member of the board shall fail to discharge any duty imposed by this section or any other provision of the general drainage law, it is hereby made the duty of the clerk of the superior court, either independently or upon the request of any landowner in the district, to cite such chairman or member to appear before him upon a certain day and show cause why he should not be removed from office, and unless good cause be shown, it shall be the duty of the clerk to remove the chairman or any member of the board of drainage commissioners and to certify his action, to the end that another member may be elected according to law. If the failure of the chairman or any member of the board of drainage commissioners to discharge such duty shall be wilful, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court.

6. When owner may file petition with clerk.—If the grantor and grantee, or all those claiming to have acquired title to any body of land on the assessment roll and whose assessment will be affected, cannot agree upon joinder in a petition to the chairman of the board of drainage commissioners, or if the said chairman fails within a reasonable time to discharge his duty by presenting the petition to the court, then either party interested in the tract of land as it appears on the assessment roll may file a petition with the clerk of the superior court setting forth the facts as to the change in ownership and title of such land, with the description of the entire tract of land and the number of acres in each class, together with a description of that part of the land as to which the ownership has changed, with the number of acres in each class, and pray the court to order that the assessment roll be amended in accordance with the title and interest of the several owners. At the time of filing the petition a summons shall issue to the other parties interested in the tract of land to show cause, on a day certain, why the prayer of the petition should not be granted. Upon the return day the clerk of the court shall hear all the evi-

dence, find the facts, and enter up a judgment directing the appropriate amendment to the assessment roll. It shall be the duty of the clerk to amend the assessment roll in accordance with his judgment.

7. Effect of change in assessment roll.—No judgment or amendment of the assessment roll shall be valid unless the number of acres and the classes assessed against the original and new owners shall equal the area and classification as contained in the tract of land as it appears on the original assessment roll. This petition may be presented to the court at any time, but the first Monday in July in each year is hereby designated as the day upon which all petitions for amendments to the assessment roll may be submitted. Any amendments to the assessment roll ordered after the last day of August in each year shall not become effective until the first day of September the following year, and the assessment roll as it appears on the first day of September of each year shall constitute the assessment roll to be delivered to the sheriff on the first Monday in September, and he shall collect the drainage assessments as they appear thereon without regard to any changes in title or ownership or any changes in the assessment roll made by the court after thirty-first day of August. All amendments sought to be made to the assessment roll shall have reference to the assessment roll as it appears at the time the amendment is sought, which shall be either the original assessment roll or as amended; but it shall be the duty of the clerk of the superior court to examine frequently the assessment roll as amended, and before the same shall be further amended, and make certain that the aggregate number of acres in each class as appeared on the original assessment roll shall not be reduced, nor the aggregate annual assessments reduced. Any amendments ordered shall be made on the assessment roll and become due in the following September, and on all subsequent assessment rolls which have not become due or collectible.

8. Clerk to prepare new assessment rolls.—It shall be the duty of the chairman and the secretary of the board of drainage commissioners of the district to render to the clerk of the court any clerical assistance involved in changes in the assessment rolls, but the primary duty and responsibility in making such amendments shall remain with the clerk of the superior court, and he shall be held liable for any error or omission which may work a loss to the district or the bondholders. If such amendments to the assessment rolls shall make necessary the preparation of new assessment rolls, the clerk of the superior court shall be required to prepare such new assessment rolls with the clerical assistance of the chairman and secretary of the board of drainage commissioners, and such new assessment rolls shall be signed by the chairman and secretary of the board of drainage commissioners and by the clerk of the superior court before delivery to the sheriff or tax collector as required upon the original assessment rolls. The original assessment rolls shall be preserved by the clerk of the court among his records for future reference.

9. Number of copies.—In the event it shall be necessary to prepare new assessment rolls, the clerk shall prepare four copies, one copy for the drainage record, another for the sheriff or tax collector, another for the chairman of the board of drainage commissioners, and the other for filing and preserving among the records, and which fourth copy shall never be mutilated or interlined, but shall be preserved in its original form for reference. As to all drainage districts heretofore established, the clerk of the court shall prepare an additional copy of all the original assessment rolls for the several years the lands in such districts are assessed and securely preserve the same, at least until all outstanding bonds of the district shall be paid, to the end that they may always be accessible for reference and comparison. It shall not be necessary hereafter to deliver to the sheriff or tax collector a copy of the assessment roll for the current year in which assessments are due and payable, but the copy provided for him may remain among the records of the clerk of the court for safe keeping and reference by him.

10. Costs determined.—As compensation to the clerk of the court for the performance of duties imposed herein, he shall be paid such sum by the board of drainage commissioners of such drainage district as they may deem fair and adequate, and the same is hereby declared a proper charge against said district, but no additional compensation shall be paid to the clerk in those counties where he receives a salary in lieu of fees. Any costs which may accrue in amendments to the assessment rolls shall be adjudged against the parties in interest, in the discretion of the clerk, and such costs shall be paid before the amendment shall become effective. As to all petitions which shall be filed and submitted to the court on the first Monday in July, no costs shall be paid or adjudged against any party in those counties where the clerk and sheriff receive a salary in lieu of fees.

11. Chairman represents board.—As to all petitions filed with the chairman of the board of drainage commissioners, or as to the discharge of any duty by the chairman required of him under the general drainage law, he shall be presumed to act for the board, and the chairman shall do all things necessary to protect and maintain the interests of the drainage district. If the chairman shall be or become a landowner in the drainage district and may desire an amendment to the assessment rolls, he may file his petition before any other member of the board, or file the same directly with the clerk of the superior court.

12. Application of section.—The provisions of this section shall apply to landowners in districts heretofore established and to drainage proceedings heretofore instituted to the same extent as to drainage proceedings hereafter instituted and established. (1917, c. 152, s. 4; 1919, c. 208, s. 1.)

§ 5371. Warranty in deed runs to purchaser who pays assessment.—Where the land assessed by drainage commissioners under the provisions of this article has been purchased since the making of the assessment by a purchaser for value without notice under a deed of general warranty, and said purchaser pays to the sheriff the amount of said drainage assessment, which

is a lien on the land purchased, then such purchaser who pays the said drainage assessment shall have a right of action against the warrantor of his title under the covenant of general warranty contained in his deed for the recovery of the amount paid. (1919, c. 282, s. 3.)

Section Does Not Refer to Future Assessments.—An assessment matured and due, under the decisions, would constitute "a lien on the land purchased," but this section does not refer to future assessments not due at the time the land was purchased. Branch v. Saunders, 195 N. C. 176, 179, 141 S. E. 583.

Consequently, liens on lands within a statutory drainage district for assessment charges for its maintenance and upkeep do not fall within a warranty or covenant against encumbrances contained in a deed until they are due and payable. Branch v. Saunders, 195 N. C. 176, 141 S. E. 583.

§ 5372. Modification of assessments.

1. Relevy.—Where the court has confirmed an assessment for the construction of any public levee, ditch, or drain, and such assessment has been modified by the court of superior jurisdiction, but for some unforseen cause it cannot be collected, the board of drainage commissioners shall have power to change or modify the assessment as originally confirmed to conform to the judgment of the superior court and to cover any deficit that may have been caused by the order of court or unforeseen occurrence. The relevy shall be made for the additional sum required, in the same ratio on the lands benefited as the original assessment was made.

2. Upon sale of land for assessments.—If any person, or any number of persons, claiming to have title to any tract or tracts of land subject to assessment or drainage tax shall fail to pay any annual assessment levied against such lands and the sheriff or tax collector shall be compelled to sell such lands under the law for the purpose of making such collection, the net proceeds of such sale shall be paid to the county treasurer, to be held by him and disbursed for the purpose of paying the current assessment and future annual assessments so far as the proceeds may be sufficient. When the fund in the custody of the treasurer shall be exhausted in the payments of annual assessments against such lands, or there shall not be a sufficient sum to pay the next annual assessment, the county treasurer shall immediately give written notice to that effect to the chairman of the board of drainage commissioners of the district, and also to the clerk of the superior court, whereupon the board of drainage commissioners shall institutue an investigation of such tracts of land to determine the market value, and if they shall find that the market value is not equal to all the future annual assessments to cover its share of installments of principal and interest on the outstanding bonds, they shall proceed, with the approval of the clerk of the superior court, to make new reassessment rolls on all the remaining lands in the district and increase the sum in sufficient sums to equal the deficit thereby created, and such new assessment rolls shall constitute the future assessment rolls until changed according to law, and shall be certified to the tax collector as herein provided in lieu of the former assessment rolls. However, the tract or tracts of land which have been so sold by the tax collector shall continue on the assessment roll in the name of the new owner, but reassessed upon the new basis, and the drainage tax collected at the same time and in the same manner as other lands as long as such lands may have sufficient market value out of which to collect the annual drainage tax, and when such lands shall cease to have such value, or shall be abandoned by the person claiming title thereto, the drainage commissioners may omit the same from the assessment roll with the approval of the clerk of the superior court, but such lands may in the same manner at any time in the future be restored to the assessment rolls.

3. Surplus funds.—If the funds in the hands of the county treasurer at any time arising under this section or in any other manner, shall be greater than is necessary to pay the annual installments of principal and interest, or the annual cost of maintenance of the drainage works, or both, such surplus shall be held by the county treasurer for future disbursement for other purposes as herein provided or subject to the order of the board of drainage commissioners.

Surplus Returned to Owners.—Where a drainage district of a county having assessed the property owners therein for improvements, and when having completed the same there is a surplus in the hands of the county treasurer, the board of drainage commissioners may, upon the exercise of a sound discretion, and in good faith, determine that the fund on hand is not necessary for further disbursements for the benefit of the district, according to the plan adopted, and distribute the same proportionately among those assessed in accordance with law, especially when such owners have thereto agreed. Foil v. Board, 192 N. C. 652, 135 S. E. 781.

Public Local Law Must Be Followed.—Where, under the provisions of statute, a drainage district may loan its money derived from its assessments until required for use in payment of the principal and interest on its bonds maturing serially for a period of 10 years, and the statute provides for a depository for these funds, the drainage commissioners may not contract with a different bank to deposit the funds there, in consideration of such bank buying at par a certain issue of such bonds that could not otherwise have been sold, except below par; nor could the transaction, contemplating a period of 10 years, be construed as a loan to the bank as authorized by the statute, and the transaction is void, regarded either as a deposit of the funds or a loan thereof. Public-Local Laws 1917, ch. 447, sec. 7. Comr's v. Lewis, 174 N. C. 528, 94 S. E. 8.

4. Insufficient funds.—If there shall be any impairment or destruction of the drainage works by any unforeseen cause or occurrence not anticipated, during the period of construction by the contractor, the contractor shall nevertheless repair and complete the works according to the contract and specifications and shall be liable therefor and also his sureties on his bond; but if the contractor shall make default and if there shall be a failure to collect all resulting damages from such contractor and the sureties upon his bond, and it shall thereby be necessary to raise a greater sum of money to complete the drainage works in accordance with the plans, or if for any other unavoidable cause it shall be necessary to raise a greater sum to complete such drainage works, the board of drainage commissioners, having first obtained the approval of the clerk of the superior court, shall prepare new assessment rolls upon all the lands in the district upon the original basis of classification of benefits and increase the same in sufficient sums to equal the deficit thereby created, and the same shall constitute the new assessment rolls until changed accordingly to law, and shall be certified to the tax collector as herein provided.

5. Additional bonds issued.—If for any of the causes hereinbefore recited in this section, or for any other cause, a sum of money greater than the proceeds of sale of the drainage bonds shall become necessary to complete the drainage system, and the board of drainage commissioners shall determine that the amount to be raised is greater than can be realized from the collection of one annual assessment upon the lands in the district without imposing an undue burden upon the lands, or if it is advisable or necessary to raise the money more expeditiously, then and under such conditions additional bonds may be issued in such aggregate sum as may be necessary.

6. Manner of issue.—The proceedings for the issue of such additional bonds shall be substantially as follow: The board of drainage commissioners shall file their petition with the clerk of the superior court, setting forth all the facts which require the expenditure of more money and the issue of additional bonds to complete the drainage system, which shall be accompanied by the recommendation of the drainage engineer who was one of the original viewers, or some other expert drainage engineer selected by the drainage commissioners; whereupon the court shall issue a notice to all the owners of land within the district reciting the substance of the petition and directing each to appear before the court on a day certain, not less than twenty days after the service upon all the parties, and to show cause, if any they have, why the additional bonds should not be authorized, which notice shall be served personally on each such landowner by reading the same, and by leaving a copy, and if the same cannot be personally served, then it shall be served in the manner authorized by law. Any landowner may file an answer denying any material allegation in the petition or setting forth any valid objection to the same before the return day thereof.

Upon the day when the notice is returnable, or on such day as to which the same may have been continued, the court shall proceed to hear the petition and answers. If the court shall find that the allegations of the petition are true, and that the issue of additional bonds is advisable or necessary, the court shall make an appropriate order authorizing and directing the issue of such additional bonds, fixing the amount of such issue, the date of same, the time when the interest and principal shall be payable, and all other matters necessary and appropriate in the premises. Any landowner may appeal from the order of the clerk of the superior court, and on such appeal only the issues raised in the answer shall be considered, and such appeal and the further procedure thereon shall be as prescribed in special proceedings, except as modified by this subchapter.

After the court shall have ordered the additional issue of bonds, the further procedure as to the assessment rolls, the levying and collecting of the drainage taxes, the disbursement of the revenue therefrom for the payment of such bonds and interest thereon, and all further procedure shall be the same as required for the establishment of drainage districts. The additional bonds issued shall not exceed twenty-five per cent of the total amount originally issued. The additional issue of bonds shall bear six per cent interest per annum and may be made payable in ten annual installments, or in lesser number of annual installments as nearly equal as may be, as recommended by the board of drainage commissioners and approved by the court. (1909, c. 442, s. 35; 1911, c. 67, s. 15.)

§ 5373. Subdistricts formed.—Subdistricts may be formed by owners of land in main districts theretofore established in the manner provided for the organization of main districts. Such subdistricts shall have the right to use the ditches or canals of the main districts for outlets. The formation of subdistricts shall not operate to release the lands in any subdistrict from the payment of any assessment or levy made prior to the formation of such subdistricts, nor from any assessment which may thereafter be made for the completion and maintenance of the canals in main districts, or for the payment of the principal and interest on any indebtedness incurred by the main district, nor shall it give the subdistrict any claim on the funds of such main district for its local use. It shall be the duty of the drainage commissioners of the main district to control all matters pertaining to the main district drainage. Drainage commissioners for the subdistricts shall have authority and control over all matters pertaining to drainage within their respective subdistricts, except such work as belongs exclusively to the main district. (1917, c. 152, s. 8.)

§ 5373(a). Bonds for improvement and maintenance; petition.—The board of drainage commissioners for any drainage district heretofore or that may hereafter be formed shall have the right to issue and sell bonds for the maintenance or improvement of their district, if, in the opinion of said board of drainage commissioners that it would be an unreasonable burden on any of the landowners of said district to levy an assessment as provided in section 5349 and amendments thereto, sufficient to do the necessary maintenance or improvement: Provided, that the board of drainage commissioners shall first petition to the clerk of superior court of the county in which their drainage district was formed, setting forth the facts that the canals in their districts are not sufficient to afford proper drainage, and that, in the opinion of the board, the said canals need to be recleaned, widened, deepened, or lengthened, or that additional canals should be cut in certain places, and that the said work will cost more than an average of one dollar ($1.00) per acre for all of the lands in the district, and to raise such an amount by levying one assessment would be an unreasonable burden on a part of the landowners of their district, and they ask the court to allow them to issue and sell bonds for a sufficient amount to do the work which is needed to be done. (1923, c. 231, s. 1.)

§ 5373(b). Viewers; appointment and report.—Immediately after the presentment of such a petition, the clerk shall appoint a board of viewers (of the same qualifications as is required when a drainage district is first formed) to view the said district over, and report to him (not

later than twenty days from date appointed) whether or not any or all of the work asked for in the petition should be done, and whether or not the cost of the work which should be done would be an unreasonable burden on any of the landowners if collected by one assessment, or would it be better to allow a bond issue to cover the work. (1923, c. 231, s. 2.)

§ 5373(c). Disallowance of petition; order; reclassification of lands; map and profile.—If the board of viewers do not favor the bond issue it will be the duty of the clerk to not allow same, but the petition may be presented again any time after six months. If the board of viewers report that a bond issue is preferable, the clerk shall order the board of viewers to make a profile, the same as is required when a district is first formed, and if it is the opinion of the board of drainage commissioners that, on account of subdivisions, a new map of the district should accompany the profile, then the clerk shall order the board of viewers to make a new map of the district, showing the present landowners, and to reclassify all land which has been subdivided since the original map was made, which has not heretofore been reclassified. Said map and profile shall show the total acres in each class for each tract, whether it has been subdivided or not, to be the same as was shown on the original map before the lands were subdivided. It shall also be the duty of the board of viewers to change any line between two or more land-owners which can be proven to their satisfaction was not correctly shown on the original map, but the total acres of each class for the two or more tracts combined must be the same as when shown by the original classification. Said map and profile shall be filed with the clerk, together with an estimated cost of the work to be done; they shall be filed with the clerk in the same time and same manner as is required when a district is first formed. (1923, c. 231, s. 3.)

§ 5373(d). Redress to dissatisfied landowners.—Any one owning land which has been reclassified by the board of viewers who is dissatisfied with their classification shall have the same redress as has heretofore been provided where divisions of classification have been made by a petition to the clerk or otherwise. (1923, c. 231, s. 4.)

§ 5373(e). Increase to extinguish debt.—If in the opinion of the board of drainage commissioners it would help the sale of the maintenance or improvement bonds, or they would deem it necessary under the provision of section 5358, they may, with the approval of the clerk of the superior court, add to the amount estimated by the board of viewers a sufficient amount to pay off all outstanding obligations of the district, leaving this their only bond issue. (1923, c. 231, s. 5.)

§ 5373(f). Proceedings as for original bond issue.—The compensation of the board of viewers and their assistants, together with all other expenses in connection with this bond issue, shall be paid in the same manner, the duties and power of the clerk, and the duties and power of the board of drainage commissioners, the bonds shall be advertised and sold, divided into such annual installments, bear such a rate of interest, the landowners shall be given the same notices and the same rights to pay cash, the contract shall be let and supervised, and contractor paid the same, as if this was the original bond issue. (1923, c. 231, s. 6.)

§ 5373(g). No drainage assessments for original object may be levied on property when once paid in full.—Whenever any assessment has been made or may be made by any drainage district formed under the laws of the state of North Carolina upon any lands in said district, either for construction or maintenance of its system of drainage or for any other purpose, and the particular assessment made against any particular piece of property has been paid or shall be hereafter paid in full, then and in that event no other or further assessment may be made upon said land for the purpose of providing money for the purpose for which the original assessment was made. The provisions of the section shall not apply to Mecklenburg county. (1933, c. 504, s. 1.)

Editor's Note.—Public Laws 1935, chapter 469, section 5, re-enacted this section without change. As to another provision as to reassessments, see § 5373(5).

This section is held not to affect the liability of lands within a drainage district for additional assessments necessary to pay a judgment against the district, rendered prior to the effective date of this section, for improvements theretofore made by the district. Virginia-Carolina Joint Stock Land Bank v. Watt, 207 N. C. 577, 178 S. E. 228.

Art. 8A. Adjustment of Delinquent Assessments

§ 5373(1). Adjustment by board of commissioners authorized.—The board of commissioners of any drainage district may, in connection with the issuance of bonds for the purpose of refunding outstanding bonds of the district, and in addition to preparing a new assessment roll, for the payment of principal and interest of such refunding bonds, and when the bonds so refunded constitute all of the bonds of the district for which an assessment has been made against property therein, adjust the uncollected delinquent installments of the assessment made upon property in the district, for the payment of principal and interest of the bonds so refunded and for other purposes authorized by law before said bonds were refunded. The adjustment of such delinquent assessments may include reduction of the principal amount of the delinquent installments, not exceeding fifty per centum thereof, to which reduced installments shall be added interest computed thereon, at a rate not less than the rate of interest of the refunding bonds, from the date of delinquency of said installments to the date of the refunding bonds, and shall include any costs legally incurred for the collection of the same; the date of delinquency shall be deemed to be the first day of December following the date upon which each of said installments became due: Provided, however, all delinquent installments of such assessment shall be adjusted on the same basis and by the same method. (1935, c. 469, s. 1.)

Editor's Note.—Section 4(a) of chapter 469, Public Laws of 1935, provides for an audit of the affairs of drainage district number two, Pitt county.

§ 5373(2). Extension of adjusted installments.—Upon adjustment of delinquent installments of any assessment as provided herein, the payment

of all delinquent installments so adjusted may be extended over a period not exceeding the life of the issue of refunding bonds, but in no event over a period exceeding twenty years. Such extension shall be made by the preparation of assessment rolls, which shall provide for the payment of installments so adjusted in equal annual installments which shall become due annually on September first, in accordance with the original assessment, and shall bear interest at the rate of four per centum per annum from December first following their due date until paid. Such assessment rolls shall be prepared and filed with the sheriff and the clerk of superior court and receipts shall be prepared and the same shall be collected in the same manner as other assessments of the district. (1935, c. 469, s. 2.)

§ 5373(3). Special fund set up; distribution of collections. — The collection of assessments adjusted under this article and of interest accrued under section 5373(2) shall be set aside in a fund and shall be applied as follows: one-third of such collections may be used solely for operating and administrative expenses of the district, but the remaining two-thirds thereof shall be reserved as additional security for the payment of the refunding bonds, or for the purchase and retirement of such refunding bonds, at prices not exceeding par and accrued interest. (1935, c. 469, s. 3.)

§ 5373(4). Approval of adjustments by local government commission.—Any adjustments of delinquent assessments under the provisions of this article shall be effective only upon approval of the local government commission. (1935, c. 469, s. 4.)

§ 5373(5). Amount of assessments limited; reassessments regulated. — The assessments made under this article shall in no instance, and against no piece of property, be greater in amount than that per cent which the per cent assessment authorized by this article bears to the unpaid original assessment upon each piece or tract of property within the district. In no instance, either under this article or any other law, shall any reassessment be made upon any piece of property for the purpose of providing money for the same purpose for which the original assessment was made, when the original assessment upon said property has been paid, or shall be paid prior to such general reassessment, nor to the extent that the original assessment has been paid. (1935, c. 469, s. 4(b).)

Art. 9. Report of Officers

§ 5374. Drainage commissioners to make monthly statement.—It shall be the duty of the commissioners of all drainage districts in the state of North Carolina organized under the provisions of the laws thereof to file with the clerk of the superior court in the county where such district is organized a monthly statement or account during the course of construction of canals for the district, showing the receipts and expenditures of all funds coming into their hands belonging to such drainage district for the period of one month prior to the day on which the same is filed, and also to post a copy of such statement or account at the courthouse door in the county. Thereafter all statements or accounts shall be filed and posted every sixty days. Such statement or account shall be certified by the chairman of the board of commissioners of each drainage district and shall be attested by the secretary thereof, and a copy thereof to be filed and kept as a part of the minutes of the district: Provided, that if the construction of the canal or canals has been concluded and the drainage commissioners have only to maintain the canals, said board of drainage commissioners need not file and post statements of accounts every sixty days, but only the annual report required in section five thousand three hundred and seventy-five shall be required of them. (1917, c. 72, s. 1; 1927, c. 98, s. 6.)

As to this section not applying in case of special local act, see note under section 5381.

Editor's Note.—The proviso at the end of the section was added by Public Laws 1927, ch. 98, sec. 6.

§ 5375. Annual report.—At the end of each fiscal year the board of commissioners of all drainage districts in the state of North Carolina shall file with the clerk of the superior court in the county where the district is organized a verified itemized statement of receipts and expenditures of all funds belonging to the district during the fiscal year just closed, and shall post a copy of same at the courthouse door in the county where the district is organized, and, if there be a newspaper published in the county, shall publish such account therein. (1917, c. 72, s. 2.)

As to this section not applying in case of special local act see note under section 5381.

§ 5376. Penalty for failure.—Any board of commissioners of any drainage district in the state, and each of the members thereof, which shall fail or refuse to file the statements or accounts, and shall fail to post or publish the same as provided in the two preceding sections, shall be deemed guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1917, c. 72, s. 3.)

§ 5377. Auditor appointed. — The board of county commissioners of each county in which one or more drainage districts have been established shall, annually, on the first Monday in May, appoint one of the members of the finance committee of the county, if the county has such finance committee, who shall be designated "Auditor for Drainage District;" but if the county has no finance committee, then the board of county commissioners shall appoint an intelligent and competent person of sufficient experience who shall be designated as the "Auditor for Drainage District." Such auditor shall receive such compensation as shall be agreed upon by the board of county commissioners, to be paid out of the general fund of said district, but not to exceed fifty dollars annually. (1917, c. 152, s. 10; 1919, c. 208, s. 3.)

§ 5378. Duties of the auditor.—The auditor for the drainage district will be required to examine the assessment roll and the records and accounts of the sheriff or tax collector as to the assessment roll which went into his hands on the previous first Monday in September and for all previous years as to which the records and accounts of the sheriff or tax collector have not been audited.

The auditor shall for each of such years make a report as to each drainage district, showing the total amount of drainage assessments due for each year, the amount collected by the sheriff up to the fifteenth day of May of the following year, the names of the owners of land, and a brief description of the lands on which the drainage assessments have not been paid, and the total amount of unpaid drainage assessments, with any further data or information which the auditor may regard as pertinent.

If lands in the district lie in other counties, the auditor for the county in which the district was established shall also examine the records of the sheriff or tax collector for such other counties.

The auditor shall also examine the books of the treasurer of the county for similar years, and he shall report the amount of drainage assessments paid out to the treasurer by the sheriff or tax collector for each year, and the amounts paid out by the treasurer during such years, and for what purposes paid. It shall be the duty of the sheriff and treasurer to permit the auditor to examine their official books and records and to furnish all necessary information, and to assist the auditor in the discharge of his duties.

The auditor shall make a report to the board of county commissioners on or before the first Monday in July following his appointment, and he shall deliver a duplicate of such report to the chairman of the board of drainage commissioners of each drainage district established in the county.

If the sheriff has not collected all of the drainage assessments, or has not paid over all collections to the county treasurer, or if the treasurer has not made disbursements of the drainage funds as required by law, or has not in his hands the funds not so disbursed by him, it shall be the duty of the auditor to so report, and to prepare two certified copies of his report, one of which shall be delivered to the judge holding a term of superior court in the county following the first Monday in July, and a copy to the solicitor of the judicial district in which the county is located, and it shall be the duty of such solicitor to examine carefully such report and to institute such action, civil or criminal, against the sheriff or tax collector or the treasurer, as the facts contained in the report may justify, or as may be required by law. (1917, c. 152, s. 10.)

Art. 10. General Provisions

§ 5379. Construction of drainage law. — The provisions of this subchapter shall be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands. The collection of the assessment shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the court confirming the final report of the viewers; but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law, unless they were appealed from. If on appeal the court shall deem it just and proper to release any person or to modify his assessment or liability, it shall in no manner affect the rights and legality of any person other than the appellant, and the failure to appeal from the order of the court within the time specified shall be a waiver of any illegality in the proceedings, and the remedies provided for in this subchapter shall exclude all other remedies. (1909, c. 442, s. 37.)

Liberal Construction of Chapter.—The drainage laws apply to the whole State, and by the express provision of this section they should be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands. Board v. Brett Engineering Co., 165 N. C. 37, 80 S. E. 897.

A Necessary Provision.—This provision that the collection of assessments shall not be defeated, etc., is absolutely necessary if the public are to be protected in their purchase of the bonds put upon the market. It is to be presumed that when the Court has rendered such final judgment and the bonds are issued there will be no interference with the collection of the assessments to pay the bondholders, but that all controversies were thrashed out and settled before such final judgment. Banks v. Lane, 171 N. C. 505, 506, 88 S. E. 754.

Formation of District Not Subject to Collateral Attack.—Board of Drainage Com'rs v. Lafayette Southside Bank, 27 Fed. (2d) 286.

§ 5380. Removal of officers. — Any engineer, viewer, superintendent of construction or other person appointed under this act may be removed by the court, upon petition, for corruption, negligence of duties, or other good and satisfactory cause shown. (1909, c. 442, s. 38.)

§ 5381. Local drainage laws not affected. — This subchapter shall not repeal or change any local drainage laws already enacted. (1909, c. 442, s. 38½.)

Special Local Act Not Affected.—Where a special local statute for the formation and operation of a drainage district is complete in itself in all its details, a general law expressing itself applicable to all such drainage districts in the State, adding further duties and making the failure of the commissioners to file certain reports an indictable offense, sections 5374, 5375, will not be construed to apply unless special reference is made to the special local act. State v. Gettys, 181 N. C. 580, 107 S. E. 307.

§ 5382. Punishment for violating law as to drainage districts.—If any person shall violate any of the provisions of law in reference to drainage districts as provided in this chapter, or shall leave any log, brush, trash, or other thing where it is liable to wash into an adjacent stream and obstruct the flow of water or cut any tree so as to fall in a stream, or place any other obstruction in a stream in a drainage district, he shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3378; 1905, c. 541, ss. 7, 9.)

CHAPTER 95

EDUCATION

SUBCHAPTER I. THE PUBLIC SCHOOL SYSTEM

Art. 1. Interpretations

§ 5383. A general and uniform system of schools.—A general and uniform system of public schools shall be provided throughout the state, wherein tuition shall be free of charge to all children of the state between the ages of six and twenty-one years. The length of term of each school shall not be less than six months or one hundred and twenty days, and every man or woman twenty-one years of age or over who has not completed a standard high school course of study, or who desires to study the vocational

subjects taught in said school, shall be given equal privileges with every other student in school. (1923, c. 136, s. 1.)

Editor's Note.—As the school law was changed by Public Laws 1923 many of the cases prior to that time are made inapplicable to the law as it now is, but some of these prior cases construe the parts of the law that have not been changed, or when changed to such an extent only as not to make inapplicable prior cases. Where such cases were thought to be of help in construing the law they have been annotated hereunder, but cases decided prior to 1923 should be cited with caution and noted carefully as they are not always direct constructions but are included here as a means of aiding in construction only.

The statute, chapter 136, Laws of 1923, is a codification with certain modifications or changes of the then existing school laws of the State upon a county-wide plan of organization designing to make them more harmonious and efficient under a workable system for the counties adopting it. Blue v. Board, 187 N. C. 431, 122 S. E. 19.

For a discussion of the changes made in the school law in 1923 and a resume of the present law, see 1 N. C. Law Rev. 306.

As to act to make effective the constitutional provision for six months school term, see Public Laws 1931, c. 430.

Cited in Cox v. Albemarle Drainage District, 195 N. C. 264, 265, 141 S. E. 885.

§ 5384. Separation of races.—The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race; but no child with negro blood, or what is generally known as Croatan Indian blood, in his veins, shall attend a school for the white race, and no such child shall be considered a white child. The descendants of the Croatan Indians, now living in Robeson, Sampson, and Richmond counties, shall have separate schools for their children. (1923, c. 136, s. 1.)

As to constitutional provision against discrimination, see Art. IX, sec. 2, for further provision for separation, see sec. 5445.

Constitutional.—This section is constitutional and valid. Art. XIV, sec. 8, of the Constitution, relating to marriages between the races, has no application. Johnson v. Board, 166 N. C. 468, 82 S. E. 832.

Croatan Indians.—The Legislature is not prohibited by the Constitution from providing separate schools for Croatan Indians, and an act providing for such schools is valid. See McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330.

The provision in regard to Croatan Indians does not embrace only those residing in Robeson, Sampson and Richmond counties, but Croatan Indians who puts themselves within the limits of the schools, although they may come from other territory. See Goins v. Trustees Indian Training School, 169 N. C. 736, 86 S. E. 629.

But children of negro blood are not entitled to admission into the schools provided for Croatan Indians. See McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330.

Cited in Medlin v. County Board, 167 N. C. 239, 83 S. E. 483.

§ 5385. Schools provided for both races; taxes.—When the school officials are providing schools for one race it shall be a misdemeanor for the officials to fail to provide schools for the other races, and it shall be illegal to levy taxes on the property and polls of one race for schools in a district without levying it on all property and polls for all races within said district. (1923, c. 136, s. 1.)

See note to preceding section.

§ 5386. The school system defined. — The school system of each county shall consist of eleven years or grades, and shall be graded on the basis of a school year of not less than one hundred and sixty days. The first seven years or grades shall be styled the elementary school, and the last four years or grades shall be styled the high school: Provided, the system, for convenience in administration, may be divided into three parts, the elementary school, consisting of the first five or six grades, and a junior and senior high school, embracing the last six or five grades, if better educational advantages may be supplied. (1923, c. 136, s. 2.)

§ 5387. The term "district" defined. — The term "district" as used in law is hereby defined to mean any convenient territorial division or subdivision of a county, created for the purpose of maintaining within its boundaries one or more public schools. It may include an incorporated town or city, or a township, or a part of a township. There shall be five different types or kinds of districts: (1) The non-local tax district, that is, one territorial unit of the county system under the control of the county board of education, but having no special local tax funds for supplementing the general county funds; (2) the local tax district, that is, one territorial unit of the county system under the control of the county board of education, but having in addition to the general county funds a special local tax fund voted by the people, for supplementing the general county fund; (3) the special charter district, that is, a district chartered by the general assembly, the control of which is placed in the hands of a board of trustees or school commissioners whose duties are defined by the general assembly, or a territorial unit whose boundary lines may be coterminous with the boundary lines of an incorporated town or city, but without a special charter, the city charter having authorized the city to maintain a system of schools, and the government of the schools having been delegated to a special board; (4) special school taxing district, that is, a territorial division of a county embracing more than one school district in which special taxes for schools may be voted; and (5) special high school district, that is, a special district, embracing two or more school districts and created for the purpose of giving high school advantages to the children completing the elementary schools in the several districts which compose the special high school district. (1923, c. 136, s. 3.)

Cited in Plott v. Board, 187 N. C. 125, 133, 121 S. E. 190.

§ 5388. Schools classified and defined.—The different types of public schools are classified and defined as follows: (1) A city school system, that is, a system maintained for one hundred and eighty days and employing not less than thirty teachers, and one whole-time superintendent. It shall contain a school system of eleven years, including a standard four-year high school, employing not less than five teachers; (2) A union school, that is, a system maintained for at least one hundred and sixty days, and embracing an elementary school of seven grades, and a high school department containing not less than twenty pupils in average daily attendance; and (3) An elementary school, that is, a district school that embraces a part or all

of the seven elementary grades, but without sufficient high school pupils or length of term to become a union school. (1923, c. 136, s. 4.)

§ 5389. Official defined.—The governing board of the county school system shall be styled "The County Board of Education." The governing board of a local-tax district and also of a non-local tax district shall be styled "The District Committee," The name, "The Board of Trustees," as it appears in law, refers to all other governing bodies of special charter districts. And whenever any other name is used in a statute to designate the governing body of a special charter district, the name, "The Board of Trustees," is hereby declared to be its equivalent.

The executive officer of a county system elected by the county board of education, the executive officer of a city school system elected by a board of trustees, and the executive officer of a union school in a special charter district employing as many as twenty teachers, shall be styled "Superintendent." The executive head of all other union schools and of all elementary schools having four or more teachers shall be styled "Principal." (1923, c. 136, s. 5.)

§ 5390. School day and school month defined.—A school day is defined to mean the number of hours each day the public schools are conducted and the time teachers are employed to instruct pupils or to supervise their activities. A school month shall consist of not less than twenty school days. (1923, c. 136, s. 6.)

§ 5391. Part-time classes defined.—The term "part-time classes" is defined to mean the period provided for those pupils who may be able to attend school for only one or more recitations or exercises daily. (1923, c. 136, s. 7.)

§ 5392. A standard high school defined.—A standard high school is defined as a high school that presents the following minimum requirements: A school term of not less than one hundred and sixty days; four years or grades of work beyond the seventh elementary grade; three teachers holding required certificates; not less than forty-five pupils in average daily attendance, a program of studies approved by the state superintendent of public instruction, and such equipment as may be deemed necessary by the state superintendent of public instruction to make the instruction beneficial to pupils: Provided, however, that in schools maintaining a nine months' term, meeting all other requirements, and offering superior instructions, fewer than forty-five pupils in average daily attendance may be considered. (1923, c. 136, s. 8; 1927, c. 40.)

§ 5393. Public school funds defined.—All revenues of the state for the maintenance and support of the public school system of the state shall be divided into three funds, as follows:

(a) The state literary fund—or all funds of the state heretofore derived from the sources enumerated in section four, Article IX of the state constitution, and all funds that may be hereafter so derived, together with any interest that may accrue thereon, shall be a fund separate and distinct from the other funds of the state, to be known as the state literary fund, and shall be loaned by the state board of education to county boards of education, in accordance with law, for the purpose of aiding in the erection and equipment of schoolhouses,

(b) The special building fund—or all funds derived from the sale of state bonds authorized by the general assembly to be sold and loaned by the state board of education to county boards of education for the special purpose of aiding in the erection and equipment of schoolhouses, and designated by the general assembly as a special building fund.

(c) The state public school fund—or all other state funds derived from all other sources in accordance with law, and deposited in the state treasury for the support and maintenance of the public school system and all forfeitures, fines and penalties imposed by the state board of education for the failure of any company or corporation to keep any contract entered into between the state board of education and said company. (1923, c. 136, s. 9.)

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION

Art. 2. The State Board of Education

§ 5394. Incorporation and general corporate powers.—The governor, lieutenant-governor, secretary of state, treasurer, auditor, superintendent of public instruction, and attorney-general shall constitute the state board of education, and by the name, the state board of education, are created a corporation, with the right to sue and be sued, to have a common seal, to take, hold, and dispose of property, to make contracts and by-laws; and it is vested with all other powers conferred on corporations under the chapter on corporations, so far as such powers are necessary or convenient to the attainment of the object of the board or to the performance of its duties. (C. S., 5384.) (Const., Art. IX, ss. 8, 9, 10; Rev. s., 4030; Code, s. 2503; 1881, c. 200; 1903, c. 567, s. 7.)

Editor's Note.—Public Laws 1931, c. 437, provides for the standardization of transportation systems for school children and the economical operation of the same.

Applied in Granville County Board v. State Board, 106 N. C. 82, 10 S. E. 1002.

Cited in Board of Education v. Walter, 198 N. C. 325, 328, 151 S. E. 718.

§ 5394 (a). Power to purchase certain lands.—The State Board of Education is authorized to purchase, at public sale, any land or lands upon which it has a mortgage or deed of trust securing the purchase price, or any part thereof, and when any land so sold and purchased by the said Board of Education is a part of a drainage district already constituted, upon which said assessments have been levied for the maintenance thereof, such assessments shall be paid by the said State Board of Education, as if said land had been purchased or owned by an individual. (1924, c. 24.)

§ 5394 (b). Power to adjust debts for purchase price of lands sold.—The State Board of Education is hereby authorized and empowered to settle, compromise or otherwise adjust any indebtedness due it upon the purchase price of any land or property sold by it, or to cancel and surrender the notes, mortgages, trust, deeds or other evidence of indebtedness without payment, when, in the discretion of the said board, it appears that

it is proper to do so. Said Board of Education is further authorized and empowered to sell or otherwise dispose of any such notes, mortgages, trust deeds, or other evidence of indebtedness. (1925, c. 220.)

§ 5395. Succeeds to "President and directors of literary fund of North Carolina."—The state board of education shall succeed to all the powers and trusts of the "President and directors of the literary fund of North Carolina," and shall have full power to legislate and make all needful rules and regulations for the government of the public schools and for the management of the state educational fund; but all such acts, rules, and regulations of the board may be altered, amended, or repealed by the general assembly, and when so altered, amended, or repealed shall not be reënacted by the board, and the board shall succeed to and have all the property, powers, rights, privileges, and advantages which in any wise belonged or appertained to the "President and directors of the literary fund in North Carolina," and may, in its own name, assert, use apply, and enforce the same. (C. S. 5385.) (Const., Art. IX, 10; Rev., s. 4033; Code, s. 2506; 1881, c. 200, s. 4; R. C., c. 66; R. S., cc. 66, 67.)

§ 5396. Officers; quorum; meetings; expenses.—Of the board, the govenor shall be president, the superintendent of public instruction shall be secretary, and the treasurer of the state shall be treasurer. A majority of the board shall constitute a quorum for the transaction of business. The board shall hold its meetings in the executive office, and shall meet at such times as a majority of the members shall appoint; but the govenor may call a meeting at any time. The contingent expenses of the board shall be provided for by the general assembly. (C. S. 5387.) (Const., Art. IX, ss. 9, 12, 13; Rev., s. 4031; Code, s. 2504; 1881, c. 200, s. 2.)

§ 5397. Record of proceedings.—All the proceedings of the board shall be recorded in a well-bound and suitable book, which shall be kept in the office of the superintendent of public instruction. (C. S. 5387.) (Rev., s. 4032; Code, s. 2505; 1881, c. 200, s. 3.)

§ 5398. Reports to general assembly.—The state board of education shall report to the general assembly the manner in which the state literary fund has been applied or invested, with such recommendations for the improvement of the same as to it shall seem expedient. (C. S. 5388.) (Rev., s. 4034; Code, s. 2507; R. C., c. 66, s. 4; 1825, c. 1268, s. 2; 1903, c. 567, s. 1.)

§ 5399. Investments.—The state board of education is authorized to invest in North Carolina four per cent bonds or in other safe interest-bearing securities, the interest on which shall be used as may be directed from time to time by the general assembly for school purposes. (C. S. 5389.) (Rev., s. 4035; 1891, c. 369.)

§ 5400. State treasurer keeps accounts of, and reports to general assembly.—The state treasurer shall keep a fair and regular account of all the receipts and disbursements of the state literary fund, and shall report the same to the general assembly at the same time when he makes his biennial account of the ordinary revenue. (C. S. 5390.) (Rev., s. 4034; Code, s. 2507; R. C., c. 66, s. 4; 1825, c. 1268, s. 2; 1903, c. 567, s. 1.)

§ 5401. Acceptance of federal aid for physical education.—The state board of education is authorized to accept any federal funds that may be appropriated now or hereafter by the federal government for the encouragement of physical education and to make all needful rules and regulations for promoting physical education. (1921, c. 146, s. 14.)

Art. 3. State Superintendent of Public Instruction

§ 5402. Office at capital; copies of papers therein.—The superintendent of public instruction shall keep his office at the seat of government. Copies of his acts and decisions and of all papers kept in his office and authenticated by his signature and official seal shall be of the same force and validity as the original. He shall be furnished with such offices, heat, and stationery as shall be necessary for the efficient discharge of the duties of his office. (C. S. 5391.) (Rev., s. 4089; 1900, c. 525.)

§ 5403. Powers and duties.—The state superintendent of public instruction is empowered and it shall be his duty:

1. Looks after Schools, Reports to Governor.—To look after the school interests of the state, and to report biennially to the governor at least five days previous to each regular session of the general assembly. His report shall give information and statistics of the public schools, and recommend such changes in the school law as shall occur to him.

2. Directs Schools, Enforces and Construes School Law. — To direct the operations of the public schools and enforce the laws and regulations in relation thereto.

3. Receives Evidence as to County Superintendent's Performance of Duties. — To receive evidence as to unfitness or negligence of the county superintendent, and when necessary to report it to the county board of education for action.

4. Sends Circular Letter to School Officers.—To send to each school officer a circular letter enumerating his duties as prescribed in this chapter.

5. Investigates Other School Systems.—To correspond with leading educators in other states, to investigate systems of public schools established in other states, and, as far as practicable, to render the results of educational efforts and experiences available for the information and aid of the legislature and the state board of education.

6. Acquaints Himself with Local Educational Wants, Delivers Lectures, etc.—To acquaint himself with the peculiar educational wants of the several sections of the state, and to take all proper means to supply such wants, by counseling with county boards of education and county superintendents, by lectures before teachers' institutes, and by addresses before public assemblies on subjects relating to public schools and public school work.

7. Travels in Connection with Loan Fund, etc.—To go to any county when necessary for the due execution of the law creating a permanent loan

fund for the erection of public schoolhouses. He shall include in his annual reports a full showing of everything done under the provisions of the law creating such permanent loan fund.

8. Signs Requisitions on Auditor.—To sign all requisitions on the auditor for the payment of money out of the state treasury for school purposes.

9. Has Publications Made, etc.— To have the school laws published in pamphlet form and distributed on or before the first day of May of each year; to have printed and distributed such educational bulletins as he shall deem necessary for the professional improvement of teachers and for the cultivation of public sentiment for public education; and to have printed all forms necessary and proper for the purposes of this chapter. (C. S. 5392.) (Rev., ss. 4089, 4090, 4091, 4092; 1900, c. 525; 1901, c. 4, ss. 8, 9; 1903, c. 435, s. 1; 1903. c. 751, ss. 11, 12; 1909, c. 525, s. 2; 1923, c. 198.)

§ 5404. Division of certification of teachers.— There shall be created in the office of the superintendent of public instruction a division of certification of teachers, having a director and such assistants, clerks, and stenographers as may be necessary consistent with the appropriation made for this division. All rules and regulations governing the certification of teachers passed by the state board of examiners and institute conductors, and now in force, shall be continued in full force and effect until amended or repealed by the authority of the state board of education, which is hereby constituted the legal board for certificating or providing for the certification of all teachers after April first, one thousand nine hundred and twenty-one.

The appropriation of twenty-five thousand dollars heretofore made to the state board of examiners is hereby appropriated from the state public school fund, to be applied, or so much as may be deemed necessary, by the state board of education to the division of certification of teachers. (1921, c 146, s. 16.)

§ 5405. Division of negro education.—There shall be annually appropriated from the state public school fund the sum of fifteen thousand dollars, or so much of this amount as may be necessary, to secure better supervision of negro education in all normal schools, training schools, high schools, elementary schools, and teacher training departments in all colleges for negroes over which the state now or hereafter may have any control.

The state board of education is authorized, upon the recommendation of the superintendent of public instruction, to employ a director of negro education, and such supervisors, assistants, both clerical and professional, as may be necessary to carry out the purposes of this section not inconsistent with the amount of the appropriation, and to define the duties of the same. (1921, c. 146, s. 17.)

§ 5406. Division of publication.—There shall be created in the office of the superintendent of public instruction a division of publication, having a director and such assistants as may be needful to carry out the provisions of this law. The director shall be appointed by the superintendent of public instruction, and the salary and expenses shall be fixed by the state board of education. But all assistants in this division shall be selected by the superintendent of public instruction from the office of the superintendent of public instruction, and shall serve in this capacity without extra compensation.

All publications issued from the office of the superintendent of public instruction shall be edited by the director and no printing shall be authorized until approved by the superintendent of public instruction.

The director of publications, with the approval of the superintendent of public instruction, shall have control of all publications and such other duties as may be assigned him by the superintendent of public instruction. All county or city superintendents and other public school officials receiving publications from the office of the superintendent of public instruction shall be required to keep a record of publications received, the number of each on hand at the close of the year, and whenever it shall appear that the county or city superintendent or other school officials are careless or negligent in using or distributing the publications, bulletins, blanks, etc., received from the office of the superintendent of public instruction, the state superintendent of public instruction shall report the same to the county board of education, which board shall investigate the matter, and the county superintendent shall be required by the board of education to carry out the provisions of this law. The salary and expenses of the director shall be paid out of the state public school fund.

The position of chief clerk in the office of the superintendent of public instruction is abolished, and the duties assigned heretofore to the chief clerk may be distributed by the superintendent of public instruction among the other employees in the office of the superintendent of public instruction: Provided, the superintendent of public instruction is authorized to employ a clerk at a salary not to exceed fifteen hundred dollars a year to perform such duties as may be assigned to him. The salary of said clerk to be fixed by the state board of education, and to be paid out of the state public school fund. (1921, c. 146, s. 18.)

§ 5407. Division of teacher training.—There shall be appropriated annually from the state public school fund the sum of twenty-five thousand dollars, or so much of the amount as may be necessary, to pay the salaries and expenses and clerical assistance of a director and not more than four supervisors of teacher training, and such assistance as may be necessary. Said director, supervisors, and assistants shall be appointed and their duties assigned by the superintendent of public instruction, but the salaries and expenses shall be fixed by the state board of education. (1921, c. 146, s. 15.)

§ 5408. Teacher training.—There shall be appropriated from the state public school fund for teacher training, the sum of eighty-five thousand dollars in lieu of the fifty thousand dollars specified in said section, and the state board of education is authorized upon recommendation of the state superintendent of public instruction to use

such a part of this amount not otherwise appropriated as may be necessary to provide county summer schools for teachers, teacher training courses for teachers in service, rural supervisors, and such other means as may be necessary to increase the efficiency of the teachers of the state, and to make all needful rules and regulations governing the same: Provided, that not more than one-half the cost of the same as herein provided shall be paid out of the state public school fund except in those counties that draw from the equalizing fund. In all such counties the state board of education may pay not more than three-fourths of the cost out of the state public school fund: Provided further, the state board of education is authorized to use not more than fifteen thousand dollars of the amount set aside herein providing teacher training in negro private or denominational schools. (1921, c. 146, s. 12.)

§ 5409. High school aid.—There shall be appropriated annually from the State public school fund the sum of two hundred twenty-four thousand dollars for the encouragement of vocational education, and for the building of standard high schools in the rural districts, and providing teacher training courses in public high schools. So much of this amount as may be necessary shall be used by the state board for vocational education to meet the federal appropriation under the Smith-Hughes Act for the encouragement of vocational education, and for the rehabilitation of persons injured in industries or otherwise. The state board of education is authorized to spend the remainder in aiding the establishment in rural districts of consolidated schools containing high schools. The preference shall be given first to those counties having no standard high school, and second to those counties having no standard high school in the rural district: Provided, that no part of this fund shall be used in any school unit containing less than five teachers, nor in districts having a special local tax rate voted by the people less than the average rate voted in the state, in addition to the state and county school tax for the six months school term, nor in any districts containing a town of more than one thousand five hundred inhabitants unless the number of children living in the rural districts attending school shall exceed the number attending from within the incorporated limits of said town. (1921, c. 146, s. 13.)

Art. 3(A) Educational Commission

§ 5409(a). Commission created.—An educational commission is hereby created, to be composed of twelve members to be appointed by the Governor. (1925, c. 203, s. 1.)

Editor's Note.—This statute is reviewed in 4 N. C. Law Rev. 18.

§ 5409(b). Appointment; oath.—The said commission shall be appointed on or about the first day of July, one thousand nine hundred and twenty-five, and immediately after they accept such appointment, shall take an oath, to be administered by some person authorized by law to administer oaths, to perform their duties faithfully and to the best of their ability. (1925, c. 203, s. 2.)

§ 5409(c). No compensation; expenses. — The said commission shall serve without compensation, except they may be allowed their actual, railroad or other expense incurred in traveling, and their expenses of sustenance in addition thereto, not to exceed six dollars per day, and their account for such expenses shall be approved by the Budget Bureau and paid out of any funds under the control of the State Board of Education, in the same manner as other administrative expenses of said board are paid. (1925, c. 203, s. 3.)

§ 5409(d). Meeting; organization; clerical assistance.—The said commission shall meet at the call of the Governor in the city of Raleigh, and organize by the election of a chairman and a secretary, and the secretary of this commission need not be a member thereof, and the State Board of Education shall furnish such clerical assistance as may be necessary, the expense thereof to be paid out of any fund under its control. (1925, c. 203, s. 4.)

§ 5409(e). Duties.—The said commission shall have power and shall be charged with the following duties:

(a) To make a complete investigation and survey of the common school system now in use in this State.

(b) To make a complete investigation and survey of the system of higher education now in use in this State.

(c) To make a complete investigation of the State equalizing fund and its administration in the several counties of the State.

(d) To investigate the method of determining the cost of the various phases of the operation of the State educational system, both as to institutions of higher learning, and as to the conduct of high school and grammar school system now in use.

(e) To collect, compile and disseminate educational data and information in order to give the people of the State the complete status of the cost and results of the State's educational activities.

(f) To do or perform any other thing or duty which, in the opinion of the said commission, is proper and necessary, with reference to the relation of the public to the present system of higher and common school education in this State. (1295, c. 203, s. 5.)

§ 5409(f). Policy and purpose of article.—The policy and purpose of this article, and of the commission hereby created shall be constructive and for the purpose of devising a means of informing the public, at a minimum cost, fully in regard to the State's educational problems, and for the purpose of aiding and helping in the conduct of all phases of the common school and higher educational system in North Carolina. (1925, c. 203, s. 6.)

§ 5409(g). Term of office.—The said commission shall continue in office until, in the opinion of the Governor, they have completed the purposes of this article and shall have filed their report. The report of the commission and all information collected shall be transmitted to the General Assembly by the Governor, with such

suggestions and recommendations as he may deem necesssary. (1925, c. 203, s. 7.)

§ 5409(g1). Continuance of commission. — The said commission shall continue in office until and including the thirtieth day of June, one thousand nine hundred and twenty-seven, and within such time shall continue the investigations and the collection, calculation and dissemination of educational data and information required of said commission by this act. Upon the termination of said commission on June thirtieth, one thousand nine hundred and twenty-seven, the commission shall make its final report to the Governor and shall turn over all records and data of the commission to the Tax Commission created by an act passed by the General Assembly at its regular session in one thousand nine hundred and twenty-seven. It shall be the duty of the Tax Commission to transmit to the next session of the General Assembly such report, records and data with such suggestions and recommendations as the Tax Commission may deem necessary, and it shall be the privilege of the Governor to submit to the General Assembly such suggestions and recommendations as he may deem proper. (1927, c. 184, s. 7.)

§ 5409(h). Who appointed.—The Governor is authorized to appoint as members of said commission such persons as may now be officers or employees of the State, or of any of its institutions, and such officers or employees shall receive their actual expenses as herein provided. (1925, c. 203, s. 8.)

SUBCHAPTER III. DUTIES, POWERS AND RESPONSIBILITIES OF COUNTY BOARDS OF EDUCATION

Art. 4. The Board: Its Corporate Powers

§ 5410. How constituted.—The county board of education in each county shall consist either of three members or of five [or seven or nine] members. The counties of Alamance, Bertie, Burke, Chatham, Columbus, Cumberland, Dare, Durham, Franklin, Granville, Guilford, Haywood, Hoke, Jackson, Mecklenburg, Martin, Pamlico, Perquimans, Person, Pitt, Richmond, Rockingham, Rowan, Sampson, Surry, Transylvania, Wake, Wilson and Union shall have five members. All other counties [except Buncombe, Robeson and Wilkes] shall have three members. The members appointed under this law shall qualify by taking the oath of office on or before the first Monday in April, but they shall elect a county superintendent before April fifteenth, one thousand nine hundred and twenty-three. (1923, c. 136, s. 10; 1923, c. 175, s. 1; 1929, cc. 202, 215; 1931, cc. 39, 278, 313, 363.)

Cross Reference.—As to such board being an agency of the State, see § 5489 and the note thereto.

Editor's Note.—Public Laws 1929, c. 215, added Macon to the counties having five members, however this Act was repealed by Public Laws 1931, c. 39. Public Laws 1929, c. 202, provided that § 5403 of the Consolidated Statutes be amended by inserting the word "Perquimans." In the rearrangement of the education statute (1923) by the compiler of vol. 3 of the Consolidated Statutes, new § 5410 includes matter in old §§ 5402 and 5403. Question as to effect as adding Perquimans County to § 5410?

Public Laws 1931, c. 278, reduced the membership of the board in Ashe County from five to three. It also increased the membership in Transylvania and Wake Counties from three to five, in Buncombe from five to seven, and in Robeson from five to nine. This Act was amended by c. 313 to increase the board in Wilkes from three to seven. Chapter 363 reduced the membership in Avery from five to three.

Public Laws 1933, c. 208, reduced the members in Wilkes county from seven to three.

Effect of Failure to Qualify on Day Prescribed.—A county board of education is a body politic and corporate, and is authorized to prosecute and defend suits in its own name, and to discharge certain duties imposed by statute, § 5419, and where the members of the board appointed by the General Assembly fail to take the oath of office on the date prescribed by this section, but take the oath on the next succeeding day, their failure to qualify on the day prescribed does not impair the existence of the corporate body, and where they have discharged the statutory duties imposed upon them, and no vacancy has been declared by the State Board of Education, and no proceedings in the nature of quo warranto have been instituted to determine their right to office, the acts of the appointees as members of the board cannot be annulled by a proceeding to restrain the board from purchasing a school site in discharge of its statutory duties. Crabtree v. Board of Education, 199 N. C. 645, 155 S. E. 550.

Cited in Board of Education v. Walter, 198 N. C. 325, 328, 151 S. E. 718.

§ 5411. Term of office. — The term of office shall be for two years, except as may be otherwise provided in the law appointing members of the boards of education by the general assembly. All members of the board of education in the several counties of the state who are now holding office under appointments heretofore made, and whose terms of office do not expire prior to the first Monday in April, 1925, shall continue and remain in office until said first Monday in April, 1925, at which time the terms of office of all such members shall expire: Provided, however, that the terms of office of the members of the board of education heretofore appointed for the counties of Ashe, Chatham, Catawba, Davie, Davidson, Iredell, Cumberland, Macon, Mecklenburg, New Hanover, Pamlico, Pitt, Rowan, Sampson, Stanly, Alleghany, and Carteret shall not be changed or shortened, but shall continue for the full time named in the law or laws appointing same: Provided, further, that in any county for which a full membership of the board of education is appointed by this law the terms of all present members of the board of education for such counties shall expire on the first Monday in April, one thousand nine hundred and twenty-three. (1923, c. 136, s. 11; 1923, c. 175, s. 3.)

Editor's Note.—Public Laws 1931, c. 278 as amended appointed certain named persons as members of the several county boards of education and specified their terms of office, etc. The act provided:

"In case of any conflict between the existing term of any member of the board of education of any county and the term of any member appointed by this act, then the present incumbent shall be deemed and held as the legal member of the board of education of the particular county."

The act further provided: "The per diem and mileage of not exceeding five members of the county board of education of the several counties of the State, if the six months State-supported school law is adopted, shall be borne out of the State school fund; for any number in excess of five, out of the county school fund."

See note under § 5452.

Public Laws 1933, c. 421, contains an act similar to that passed in 1931, described in the above Editor's note.

§ 5412. How nominated and elected.—In all the counties of the state there shall be nominated in the year one thousand nine hundred and twenty-four, and biennially thereafter, at the party primaries or conventions, at the same time and in the same manner as that in which other

county officers are nominated, a candidate or candidates, by each political party of the state for member or members of the county board of education to take the place of the member or members of said board whose term next expires. The names of the persons so nominated in such counties shall be duly certified by the chairman of the county board of elections, within ten days after their nomination is declared by said county board of elections, to the superintendent of public instruction, who shall transmit the names of all persons so nominated, together with the name of the political party nominating them, to the chairman of the committee on education in the next session of the general assembly within ten days after it convenes. The general assembly shall elect or appoint one or more, from the candidates so nominated, members of the county board of education for such county. Upon failure of the general assembly to elect or appoint members as herein provided, such failure shall constitute a vacancy, which shall be filled by the state board of education. The term of office of each member shall begin on the first Monday of April of the year in which he is elected, and shall continue until his successor is elected and qualified. (C. S. 5404.) (1923, c. 136, s. 12.)

§ 5413. County board of elections to provide for nominations.—The county board of elections, under the direction of the state board of elections, shall make all necessary provisions for such nominations as are herein provided for. (C. S. 5405.) (1923, c. 136, s. 13.)

§ 5414. Members to qualify.—Those persons who shall be elected members of the county board of education by the general assembly must qualify by taking the oath of office on or before the first Monday in April next succeeding their election. A failure to qualify within that time shall constitute a vacancy. Those persons elected or appointed to fill a vacancy must qualify within thirty days after notification thereof. A failure to qualify within that time shall constitute a vacancy. (C. S. 5406.) (1923, c. 136, s. 14.)

Cited in Crabtree v. Board of Education, 199 N. C. 645, 650, 155 S. E. 550.

§ 5415. Vacancies in nominations.—If any candidate shall die, resign, or for any reason become ineligible or disqualified between the date of his nomination and the time for the election by the general assembly of the member or members of the county board of education for the county of such candidate, the vacancy caused thereby may be filled by the action of the county executive committee of the political party of such candidate. (C. S. 5407.) (1923, c. 136, s. 15.)

§ 5416. Vacancies in office.—All vacancies in the membership of the board of education in such counties by death, resignation, or otherwise shall be filled by the action of the county executive committee of the political party of the member causing such vacancy until the meeting of the next regular session of the general assembly, and then for the residue of the unexpired term by that body. If the vacancy to be filled by the general assembly in such cases shall have occurred before the primary or convention held in such county, then in that event nominations for such vacancies shall be made in the manner hereinbefore set out, and such vacancy shall be filled from the candidates nominated to fill such vacancy by the party primaries or convention of such county. All vacancies that are not filled by the county executive committee under the authority herein contained within thirty days from the occurrence of such vacancies shall be filled by appointment by the state board of education. (C. S. 5408; 1931, c. 380.)

Editor's Note. — The Act of 1931 struck out the words "remaining members of said county board of education" formerly appearing in lines four and five of this section and inserted in lieu thereof the words "action of the county executive committee of the political party of the member causing such vacancy."

The Act also repealed paragraph two of this section which had been added by Public Laws 1923, c. 136, s. 16 and was as follows: "In the event that all or a majority of the members of the board die, resign or are removed from office, the vacancies shall be filled at once by the State board of education."

Cited in Board of Education v. Pegram, 197 N. C. 33, 34, 147 S. E. 622.

§ 5417. Eligibility for the office. — No person shall be eligible as a member of the county board of education who is not known to be a man of intelligence, of good moral character, of good business qualifications, and known to be in favor of public education. No person, while actually engaged in teaching in the public schools or engaged in teaching in or conducting a private school in connection with which private school there is in any manner conducted a public school, and no member of a district committee or board of trustees, shall be eligible as a member of the county board of education. (C. S. 5409.) (1923, c. 136, s. 17.)

Constitutional Office.—Under sec. 7, Art. XIV, of the Constitution, one person cannot hold the office of county commissioner and also be a member of the county board of education. State v. Thompson, 122 N. C. 493, 29 S. E. 720.

§ 5418. Organization of the board.—At the first meeting of the new board in April the members of the board shall organize by electing one of its members as chairman for a period of one year or until his successor is elected and qualified. The superintendent of public instruction shall be ex officio secretary to the board. He shall keep the minutes of the meetings of the board, but shall have no vote; Provided, that in the event of a vacancy in the county superintendency the board may elect one of its members to serve temporarily as secretary to the board. (1923, c. 136, s. 18.)

§ 5419. The board a body corporate.—The board of education shall be a body corporate by the name and style of "The Board of Education of ..... County." By that name it shall hold all school property belonging to the county, and it shall be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation.

All public school property now in the possession of school committees who were bodies corporate prior to January first, one thousand nine hundred, or who became bodies corporate by special act of the general assembly, but who have since ceased to be bodies corporate: and where

land or lands were conveyed by deed bearing date prior to January first, one thousand nine hundred, to local trustees for school purposes, and such deed makes no provision for successor trustees to those named in said deed, and all of such trustees are dead; and where such land or lands are not now being used for educational purposes either by the county board of education of the county or the board of trustees of a special charter district wherein same are located the clerk of the superior court of the county wherein such property or such land or lands are located shall convey said property or land or lands to the county board of education, unless same is located in a special charter district. In that event said property or land or lands shall be conveyed to the board of trustees of the special charter district. (1923, c. 136, s. 19.)

Cited in Board v. Board, 192 N. C. 274, 134 S. E. 852; Hickory v. Catawba County, 206 N. C. 165, 173, 173 S. E. 56.

§ 5420. Compensation of members. — The board of education may fix the compensation of each member at not to exceed five dollars per diem and five cents a mile to and from the place of meeting. And no member of the board shall receive any compensation for any services rendered except the per diem provided in this section for attending meetings of the board and traveling expenses when attending meetings of the board, or such other traveling expenses as may be incurred while performing duties imposed upon any member by authority of the board. (C. S. 3912.) (1923, c. 136, s. 20.)

§ 5421. Removal for cause.—In case the state superintendent shall have sufficient evidence that any member of the county board of education is not capable of discharging or is not discharging the duties of his office as reguired by law, or is guilty of immoral or disreputable conduct, he shall notify the chairman of the county board of education, who shall call a meeting of the board at once to investigate the charges, and if found to be true, the board shall declare the office vacant. (C. S. 5414, revised.) (1923, c. 136, s. 21.)

§ 5422. Meetings of the board.—The county board of education shall meet on the first Monday in January, April, July and October. It may elect to hold regular monthly meetings, and to meet in special sessions as often as the school business of the county may require. (C. S. 5410, revised.) (1923, c. 136, s. 22.)

§ 5423. Powers; suits and actions.—(a) The county board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations, or their sureties, for the recovery, preservation, and application of all moneys or property which may be due to or should be applied to the support and maintenance of the schools, except in case of a breach of his bond by the treasurer of the county school fund, in which case action shall be brought by the county commissioners as is hereinafter provided.

(b) In all actions brought in any court against a county board of education for the purpose of compelling the board to admit any child or children who have been excluded from any school by the order of the board, the order or action of the board shall be presumed to be correct, and the burden of proof shall be on the complaining party to show to the contrary. (C. S. 5417). (1923, c. 136, s. 23.)

Cited in Board v. Board, 192 N. C. 274, 134 S. E. 852.

§ 5424. Power to subpœna and to punish for contempt.—The board shall have power to issue subpœnas for the attendance of witnesses. Subpœnas may be issued in any and all matters which may lawfully come within the powers of the board, and which in the discretion of the board require investigation; and it shall be the duty of the sheriffs, coroners and constables to serve such subpœnas upon payment of their lawful fees.

The county board of education of each county shall have power to punish for contempt for any disorderly conduct or disturbance tending to disrupt it in the transaction of official business. (C. S. 5418.) (1923, c. 136, s. 24.)

§ 5425. Witness failing to testify, misdemeanor. —Any witness who shall willfully and without legal excuse fail to appear before the county board of education to testify in any matter under investigation by the board shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days. (C. S. 5419.) (1923, c. 136, s. 25.)

§ 5426. Appeals to board from county officers. —An appeal shall lie from all county school officers to the county board of education, and such appeals shall be regulated by rules to be adopted by the county board of education. (C. S. 5420.) (1923, c. 136, s. 26.)

§ 5427. Superior court to review board's action.—The superior courts of the state may review any action of the county board of education affecting one's character or right to teach. (C. S. 5421.) (1923, c. 136, s. 27.)

Where the county board of education orders the removal of school committeemen, § 5458, who appeal under the provisions of this section, the judgment of the Superior Court judge holding the act of the board of education in removing the committeemen invalid and dismissing the appeal for want of jurisdiction is inconsistent and erroneous. Board of Education v. Anderson, 200 N. C. 57, 156 S. E. 153.

Art. 5. The Direction and Supervision of the School System

§ 5428. To provide for all the children of the county.—It is the duty of the county board of education to provide an adequate school system for the benefit of all the children of the county, as directed by law. The board of education shall so district the county and locate the schools that elementary and high school instruction may be available for all the children of the county. (1923, c. 136, s. 28.)

When Court Will Interfere.—The county board of education is given discretionary powers to direct and supervise the county school system for the benefit of all the children therein, including the duty, among others, of selecting a school site, with which the courts will not interfere in the absence of its abuse. McInnish v. Board, 187 N. C. 494, 122 S. E. 182.

Discretion of Boards.—In the absence of statutory limitations upon the power to perform this duty, discretion is vested in said boards to locate, discontinue, transfer and establish high schools in the districts of their several counties. In the absence of abuse, this discretion cannot be set aside or controlled by the courts. The principle stated and applied in deciding the question presented by the appeal in Newton v. School Committee, 158 N. C. 186, 187, 73 S. E. 886, is well settled. Clark v. McQueen, 195 N. C. 714, 716, 143 S. E. 528.

This section and section 5437 vest in the sound discretion of the board of education of a county the right to transfer an existing school in one district to an adjoining district for the advantage of the residents of the county, and with the fair exercise of this discretion, or in the absence of manifest abuse, the courts will not interfere, or give injunctive relief. Clark v. McQueen, 195 N. C. 714, 143 S. E. 528.

§ 5429. General powers.—All powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other officials, are conferred and imposed upon the county board of education. (C. S. 5412.) (1923, c. 136, s. 29.)

Authority to Employ Janitors.—Under the provisions of this section the county board of education is authorized to select and employ janitors for a school building in a local tax district in preference to one appointed by the district school committee for the same position. Wiggins v. Board of Education, 198 N. C. 301, 151 S. E. 730.

Where the county purchasing agent purchases equipment for a school and gives a note for the same signed by him in the name of the school the county is not liable on the note, the purchasing agent having no connection with the county board of education. Keith v. Henderson County, 204 N. C. 21, 167 S. E. 481.

Cited in Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562.

§ 5430. General control.—The county board of education shall have general control and supervision of all matters pertaining to the public schools in their respective counties, and they shall execute the school laws in their respective counties. But whenever duties are assigned to the county board of education in this subchapter it shall not be construed so as to take away from the board of trustees of any special charter district any duties or other powers assigned to said board of trustees by the general assembly. (C. S. 5412, revised.) (1923, c. 136, s. 30.)

Surrender of Charter by Special District.—See Causey v. Guilford County, 192 N. C. 298, 135 S. E. 40.

§ 5430(a). Fuel for use in schools.—The county board of education in each county and the board of trustees in each special chartered district in North Carolina shall carefully canvass the fuel requirements of each school in their respective county or chartered district and shall determine whether it would be possible, practical and economical to use wood wholly or partly as fuel for heating the school buildings. In making this determination the school board or other governing bodies shall consider the costs of wood in comparison to the cost of coal or other fuels, the suitability of the equipment already installed and the need of establishing a local market for farm products. Each board of education or other governing bodies shall thus determine the amount, quality and size of wood that can be used as fuel in each school and shall receive bids, which shall be recorded in the minutes and compared with the cost of other fuels and when found to be economical the school board shall contract for a supply of standard grade wood of prescribed length and size to be used as fuel in heating the school building, or buildings, for the ensuing year.

The said school authorities shall have the right to reject any and all bids; and they shall further have the right, with a view of distributing the work of supplying fuel to as many persons as practicable, to let contracts with more than one bidder for the year's supply of fuel.

The state board of equalization and the state division of purchase and contract shall coöperate with the said school authorities and promote the use of wood by advising with them relative to the proper form for contracts and the relative costs and heating value of the different fuels.

This section shall not apply to Mecklenburg county. (1933, c. 473, ss. 1-4.)

§ 5431. Determination of method of conducting schools.—The county board of education shall have power and authority to fix and determine the method of conducting the public schools in their respective counties so as to furnish the most advantageous method of education available to the children attending the public schools in several counties of the state. (C. S. 5412.) (1923, c. 136, s. 31.)

Power Discretionary.—The courts may compel the county board of education to act upon discretionary powers conferred on them by the Legislature, but cannot tell them how they must act. Key v. Board, 170 N. C. 123, 86 S. E. 1002.

§ 5432. Fixing time of opening and closing schools.—The time of opening and closing the public schools of the several public school districts of the state, except in special chartered districts, shall be fixed and determined by the county board of education in their respective counties. The board may fix different dates for opening the schools in different townships, but all the schools of each township must open on the same date as nearly as practicable. (C. S. 5412.) (1923, c. 136, s. 32.)

§ 5433. Determination of length of school day.—The length of the school day shall be determined by the county board of education for all public schools under its jurisdiction and by the board of trustees of all other schools: Provided, the minimum time for which teachers shall be employed in the schoolroom or on the school grounds supervising the activities of children shall not be less than six hours. But county boards of education may authorize rural schools in certain seasons of the year, when the agricultural needs of the farm demand it, to be conducted for less than six hours a day: Provided further, it shall be the duty of the county boards of education and boards of trustees, wherever needs are presented, to provide part-time classes for pupils above the compulsory school age and for such other pupils as are unable because of physical defects to attend school for the full time designated for the classes in which they may be enrolled. (1923, c. 136, s. 33.)

§ 5434. Duty to enforce the compulsory school law.—It shall be the duty of teachers, principals, county superintendents of public instruction and attendance officers to enforce the compulsory school law in accordance with the rules and regulations adopted by the state board of education; and if they shall fail to perform their duties in this respect it shall be the duty, of the county board of education to withhold the salary of such a person or to remove such a one from office. Any school official failing to obey the law in regard to compulsory attendance shall be guilty of a misdemeanor and may be fined or imprisoned in the discretion of the court. (C. S. 5759, 5760.) (1923, c. 136, s. 34.)

§ 5435. Continuous school census.—The state

board of education shall adopt such rules and regulations as may be necessary for taking a complete census of the school population and for installing and keeping in the office of the county superintendent in each county of the state a continuous census of the school population. The cost of taking and keeping the census shall be a legitimate item in the budget and shall be paid out of the incidental fund. If any parent, guardian, or other person having the custody of a child, refuses to give any properly authorized census taker, teacher, school principal, or other school official charged with the duty of obtaining the census of the school population of any district, the necessary information to enable such person to obtain an accurate and correct census, or shall knowingly and willfully make any false statement to any person duly authorized to take the school census of any district relative to the age or the mental or physical condition of any child, he shall be deemed guilty of a misdemeanor and shall be fined not to exceed twenty-five dollars or imprisoned not to exceed thirty days in the discretion of the court. (1921, c. 179, s. 16; 1925, c. 95.)

Editor's Note.—By amendment, Public Laws 1925, c. 95, the last sentence of this section was added.

§ 5436. The classification of schools. — The county board of education, on recommendation of the county superintendent, shall have authority to classify the schools of the county and determine the number of grades that each school shall contain, and in what schools high school subjects may be taught. But high school subjects shall not be taught in a school having only one teacher. (1923, c. 136, s. 35.)

§ 5437. The location of high schools.—It is the duty of the county board of education, on recommendation of the county superintendent, to locate high schools in the county or to arrange for high school instruction in special charter districts so as to provide good high school instruction for all the children. Since the cost of good high school instruction is too great to permit the location of small high schools close together, it shall be the duty of the county board, wherever the needs demand it, to locate not more than one standard high school in each township or its equivalent: Provided, it shall be discretionary with county boards of education to continue standard high schools now in existence contrary to the provisions of this section, and to establish such high schools in townships in which city schools are already located. (1923, c. 136, s. 36.)

§ 5438. Number of teachers permitted in each elementary school.—The county board of education, in apportioning the public school fund for the maintenance of a six months school term, is authorized to provide for more than one teacher in the elementary schools, as follows:

In a school where, during the preceding school year, the average number of children attending such school daily was not less than thirty pupils, funds may be apportioned for paying the salaries of two teachers; and in a school where, during the preceding school year, the average number of children attending such school daily was not less than sixty-five pupils, funds may be apportioned for paying the salaries of three teachers; and in schools where, during the preceding school year, the average number of children attending daily was not less than one hundred pupils, funds may be apportioned for paying the salaries of four teachers; and in a school where, during the preceding school year, the average number of children attending such school daily exceeds one hundred pupils, funds may be apportioned for one additional teacher for each thirty-five additional pupils in average daily attendance in the school. (C. S. 5490, revised.) (1923, c. 136, s. 37.)

§ 5439. Number of teachers permitted in each high school.—The county board of education may provide for teachers in high schools on the following basis:

One whole-time teacher for twenty pupils in average daily attendance; two teachers for thirty pupils in average daily attendance; three teachers for forty-five pupils in average daily attendance; four teachers for seventy pupils in average daily attendance; and after four teachers are employed on this basis one additional teacher may be employed for each additional thirty pupils in average daily attendance. Provided, that for the encouragement of the teaching of vocational subjects, teachers of agriculture and home economics may be in addition to the number of teachers allowed above, if instruction is provided for the people of the community in these vocational subjects. (1923, c. 136, s. 38.)

§ 5440. Subjects taught in the elementary schools. — The county board of education shall provide for the teaching of the following subjects in all elementary schools having seven grades or seven years: Spelling, reading, writing, grammar, language and composition, English, arithmetic, drawing, geography, the history and geography of North Carolina, history of the United States, elements of agriculture, health education, including the nature and effect of alcoholic drinks and narcotics, and fire prevention.

It shall be the duty of the state superintendent of public instruction to prepare a course of study outlining these and other subjects that may be taught in the elementary schools, arranging the subjects by grades and classes, giving directions as to the best methods of teaching them, and including type lessons for the guidance of the teachers. The board of education shall require these subjects in both public and private schools to be taught in the English language, and any teacher or principal who shall refuse to conduct his recitations in the English language shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court. (1923, c. 136, s. 39.)

§ 5440(a). Instruction on alcoholism and narcotism.—In addition to health education, which is now required by law to be given in all schools supported in whole or in part by public money, thorough and scientific instruction shall be given in the subject of alcoholism and narcotism.

The State Superintendent of Public Instruction is hereby authorized and directed to prepare, or cause to be prepared, for the use of all teachers who are required by this section to give instruction on the subject of alcoholism and narcotism, a course of study on health education,

which shall embrace suggestions as to methods of instruction, outlines of lesson plans, lists of accurate and scientific source material, suggested adaptations of the work to the needs of the children in the several grades, and shall specify the kind of work to be done in each grade, and the amount of time to be devoted to such instruction. The state textbook commission and the state board of education shall be authorized, directed and empowered to select, approve, and adopt a simple, scientific textbook, which textbook shall be free from political propaganda, and approved by the state board of health and the faculty of the Medical School of the University of North Carolina, on the effects of alcoholism and narcotism on the human system, and/or a different or revised text on 'health' which shall contain chapters giving complete, detailed, and scientific information on the subjects, to be taught as a unit of work every year in the appropriate elementary grade, or grades, of the public schools of North Carolina. Adequate time shall be given to teach the subject efficiently. The work in the subject of alcoholism and narcotism shall be a part of the work required for promotion from one grade to another: Provided also, that provision shall be made in the course of study prepared by the state department of public instruction for teachers, aides and devices for the assistance of teachers in teaching the effects of alcoholism and narcotism on the human system.

In all normal schools, teacher training classes, summer schools for teachers, and other institutions giving instruction preparatory to teaching or to teachers actually in service, adequate time and attention shall be given to the best methods in teaching health education, with special reference to the nature of alcoholism and narcotism.

It shall be the duty of all officers and teachers, principals and superintendents in charge of any school or schools, comprehended within the meaning of this section, to comply with its provisions and any such officer or teacher who shall fail or refuse to comply with the requirements of this section shall be subject to dismissal by the proper authorities. (1929, c. 96, ss. 1-3; 1935, c. 404.)

Editor's Note.—Prior to the amendment of 1935 the latter part of the second paragraph of this section specified the number of lessons on alcoholism and narcotism. The section now goes into the subject in much more detail.

§ 5441. Instruction in Americanism. — There shall be taught in the public schools of North Carolina a course of instruction which shall be known as Americanism.

There shall be included in the term "Americanism" the following general items of instruction.

(a) Respect for law and order.

(b) Character and ideals of the founders of our country.

(c) Duties of good citizenship.

(d) Respect for the national anthem and the flag.

(e) A standard of good government.

(f) Constitution of North Carolina.

(g) Constitution of the United States.

The course of instruction in Americanism shall be taught not less than thirty hours during each and every school year and shall not be optional in the grade or grades in which said course is taught. (1923, c. 49, ss. 1-3.)

Cited in 1 N. C. Law Rev. 308.

§ 5442. Americanism; text-book and course of study.—The state board of education shall, as soon as convenient, adopt some suitable and proper text-book which will conform as near as possible and practicable to the carrying out of the general items of instruction as herein contained in section 5441, and the state superintendent shall prepare or have prepared such outline courses of study, and shall distribute the same among the teachers of the state, which will give them proper direction in carrying out the provisions of this law.

The state board of education shall, before the beginning of the next school year, adopt such suitable rules and regulations as may be necessary as to the time, manner, grade or grades in which said course of Americanism shall be taught. (1923, c. 49, ss. 4, 5.)

§ 5443. Kindergartens may be established. — Upon a petition by the board of directors or trustees or school committee of any school district, endorsed by the county board of education, the board of county commissioners, after thirty days notice at the courthouse door and three other public places in the district named, shall order an election to ascertain the will of the people within said district whether there shall be levied in such a district a special annual tax of not more than fifteen cents on the one hundred dollars worth of property and forty-five cents on the poll for the purpose of establishing kindergarten departments in the schools of said district. The election so ordered shall be conducted under the rules and regulations for holding special tax elections in special school districts, as provided in article twenty-four of this chapter.

At such election those who are in favor of the special tax shall vote a ballot on which shall be printed the words "For Kindergartens," and those who are opposed shall vote a ballot on which shall be printed the word, "Against Kindergartens."

If a majority of the qualified voters shall vote in favor of the tax, then it shall be the duty of the board of trustees or directors or school committee of said district to establish and provide for kindergartens for the education of the children in said district of not more than six years of age, and the county commissioners shall annually levy a tax for the support of said kindergarten departments not exceeding the amount specified in the order of election. Said tax shall be collected as all other taxes in the county are collected and shall be paid by the sheriff to the treasurer of the said school district to be used exclusively for providing adequate quarters and for equipment and for the maintenance of said kindergarten department. (1923, c. 136, s. 40.)

Cited in Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393.

§ 5444. County training schools. — The county board of education is authorized, with the approval of the state superintendent of public instruction, to make special appropriations from the county school fund to provide for the county one county training school of not less than eight

months for either race in which elementary and high school subjects and vocational subjects of agriculture, home economics, and special industrial subjects and methods of teaching shall be taught. The purpose of the special appropriation to the county training school shall be to provide teachers for the elementary schools for six months. (1923, c. 136, s. 41.)

§ 5445. Board shall provide schools for Indians in certain counties.—It shall be the duty of the county board of education to provide separate schools for Indians as follows:

The persons residing in Robeson and Richmond counties supposed to be descendants of a friendly tribe once residing in the eastern portion of the state, known as Croatan Indians, and who have heretofore been known as "Croatan Indians," or "Indians of Robeson County," and their descendants, shall be known and designated as the "Cherokee Indians of Robeson County"; and the persons residing in Person county supposed to be descendants of a friendly tribe of Indians and "White's Lost Colony," once residing in the eastern portion of this state, and known as "Cubans," and their descendants, shall be known and designated as the "Indians of Person County."

The Indians mentioned above and their descendants shall have separate schools for their children, school committees of their own race and color, and shall be allowed to select teachers of their own choice, subject to the same rules and regulations as are applicable to all teachers in the general school law, and there shall be excluded from such separate schools all children of the negro race to the fourth generation. The County Superintendent in and for Robeson County shall keep in his office a record of schools for the Cherokee Indians of Robeson County, which said record shall disclose the operation of such schools, separate and apart from the record of the operation of schools for the other races. (C. S. 5546, 5547; 1923, c. 136, s. 42; 1931, c. 141.)

See notes to section 5384.

Art. 6. Children at Orphanages

§ 5446. Permitted to attend public schools; expenses.—Children living in and cared for and supported by any institution established or incorporated for the purpose of rearing and caring for orphan children shall be considered legal residents of said district in which the institution is located, and a part or all of said orphan children shall be permitted to attend the public school or schools of said district, and the extra expenses of teaching said children for six months in the public school or schools of said district may be borne as follows:

Three fourths of the extra expense for a term of six months of every year, as a result of the attendance of said children, may be paid out of the State equalizing fund and one-fourth out of the county fund, unless otherwise provided.

Provided further, that the provisions of this section shall be permissive only, and shall not be mandatory. (C. S. 5604.) (1919, c. 301, s. 1; 1927, c. 163, s. 1.)

Editor's Note.—By Public Laws 1927, ch. 163, the provision for payment from an "equalizing fund" replaced a provision for payment from the state "public school fund." The last sentence making the section permissive and not mandatory was also added at this time.

Failure of Purpose of Trust.—A trust fund created by will for the purpose of educating through high school a girl inmate of an orphan asylum to be chosen by the board of trustees from time to time does not fall into the residuary clause for failure of the purpose of the trust on the ground that the State educated orphan children through high school without charge under the provisions of this section; since this section makes the payment for the education of the children in orphan asylums permissive only. Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547.

§ 5447. County board to provide for expense in budget.—The county board of education is hereby authorized to provide in the county school budget for the extra expense that may be incurred by said school as the result of the attendance of said orphan children, and the county superintendent shall set forth, in blanks prepared by the state superintendent of public instruction, the number of such children that may attend, in what grades or classes they will be enrolled, and how many extra teachers will be required as the result of the operation of this article. The salaries of such extra teachers for six months shall be provided for in the county budget as provided in the preceding section. (C. S. 5605.) (1919, c. 301, s. 2.)

§ 5448. After six months, tuition fees may be charged.—The board of trustees in special tax or special chartered districts may charge such tuition fees as may be agreed upon between the authorities of said institution and the board of trustees for the attendance of such orphan children for the remainder of the school term, after the constitutional provision for six months school has been complied with. (C. S. 5606.) (1919, c. 301, s. 3.)

Art. 7. Instruction of Illiterates

§ 5449. School for adult illiterates; appropriation.—The state board of education is authorized to provide rules and regulations for conducting schools to teach adult illiterates, and such schools when provided for shall become a part of the public school system of the state and shall be supported as is provided for other public schools of the state. (C. S. 5607.) (1919, c. 161, s. 1.)

§ 5450. Funds provided.—The county board of education shall, upon direction from the state superintendent of public instruction, provide annually in the county school budget, unless otherwise provided, a sum necessary to teach the adult illiterates in accordance with such rules and regulations, and a like sum shall be appropriated from the state public school fund. (C. S. 5608.) (1919, c. 161, s. 2.)

§ 5451. Expenses of organization and direction.—The state board of education is authorized to use annually a sum not to exceed five thousand dollars of the state public school fund for the organization and direction of said work of teaching illiterates under the direction of the state superintendent of public instruction. (C. S. 5609.) (1919, c. 161, s. 3.)

Art. 8. School Officials Selected by or Responsible to the Board of Education

§ 5452. Election of county superintendent.—The county board of education shall as soon as con-

venient on or after the first Monday in April, elect a county superintendent of public instruction to serve for a term of two years. The county board of education shall fix the time for the election of the county superintendent and shall give public notice of the same in a paper published or circulating in the county and shall post a notice of the same at the courthouse door at least fifteen days before the date fixed for the election of said superintendent. His term of office shall begin on the first Monday in July. Immediately after the election the chairman of the county board of education shall report the name, address, experience and qualification of the person elected, to the state superintendent of public instruction. (1923, c. 136, s. 43.)

Editor's Note.—Public Laws 1931, c. 452, invalidated elections of county superintendents of schools and district committeemen before April 15, 1931, and validated such elections since said date by county boards of education consisting of or including the members as appointed by Public Laws 1931, c. 278.

Public Laws 1931, c. 363, invalidated the election of a county superintendent by the board of Avery County on April twenty-one, one thousand nine hundred and thirty-one.

§ 5453. Limitations of the board in selecting a county superintendent.—The county board of education is authorized to select for the office of county superintendent any practical teacher and administrator who holds or is entitled to hold a superintendent's certificate under the rules and regulations of the state board of education. If any board of education shall elect a person to serve as county superintendent of public instruction who does not qualify, or cannot qualify for the superintendent's certificate before taking the oath of office, the election is null and void, and it shall be the duty of the board of education to elect only a person that can qualify. (C. S. 5425, revised.) (1923, c. 136, s. 44.)

§ 5454. Office and assistance for superintendent.—The county board of education shall provide an office for the county superintendent, in the courthouse if possible. It shall provide office supplies for the superintendent, such as stationery, stamps and other necessary supplies in the conduct of his business. The county board of education may employ clerical assistance to aid the county superintendent. (C. S. 5424, revised.) (1923, c. 136, s. 45.)

§ 5455. Removal of county superintendent for cause.—The county board of education is authorized to remove a county superintendent who is guilty of immoral conduct, or shall fail or refuse to perform the duties required of him by law.

In case the state superintendent shall have sufficient evidence at any time that any county superintendent of public instruction is not capable of discharging or is not discharging the duties of his office as required by law, or is guilty of immoral or disreputable conduct, he shall report the matter to the county board of education, which shall hear the evidence in the case; and, if, after careful investigation, it shall find the charges true, it shall declare the office vacant at once and proceed to elect his successor. This section shall not deprive any county superintendent of the right to try his title to office in the courts of the state. (C. S. 5414, revised.) (1923, c. 136, s. 46.)

§ 5456. Prescribing duties of county superintendent not in conflict with law and constitution.—All acts of the county board of education not in conflict with state law shall be binding on the county superintendent, and it shall be his duty to carry out all rules and regulations of the board. (1923, c. 136, s. 47.)

§ 5457. Election of committeemen of school districts.—The county board of education shall elect three committeemen to serve in each school district, in those districts that hereafter may be created. One shall be elected for one year; one for two years; and one for three years, or until their successors are elected and qualified. Their terms of office shall begin as of April first in the calendar year in which they are elected, and as their terms of office expire their successors shall be elected for a term of three years. It shall be the duty of the county board of education to elect in April of each year, or as soon thereafter as convenient, one committeeman for each district of the county already established, to serve for a term of three years or until the successor is elected and qualified: Provided, the county board of education is authorized to elect in a local tax district a committee composed of five members, two for one year, two for two years and one for three years, or until their successors are elected and qualified: Provided further, the jurisdiction of the county board of education to elect district committeemen shall apply to all school districts in a county except those districts that have special authority from the general assembly to elect committeemen in some other manner. (C. S. 5457, 5458, revised.) (1923, c. 136, s. 48.)

§ 5458. Removal of committeemen for cause.—In case the county superintendent or any member of the county board of education shall have sufficient evidence at any time that any member of any school committee is not capable of discharging, or is not discharging, the duties of his office, or is guilty of immoral or disreputable conduct, he shall bring the matter to the attention of the county board of education, which shall thoroughly investigate the charges, and shall remove such committeeman and appoint his successor if sufficient evidence shall be produced to warrant his removal and the best interests of the schools demand it. (C. S. 5414.) (1923, c. 136, s. 49.)

As to the Superior Court dismissing an appeal from such removal and at the same time holding it invalid see § 5427 and the note thereto.

§ 5459. Advising with the committee in regard to needs of district.—The county board of education shall advise with the committee of each district before the May budget is prepared, and seek such information as may be helpful in planning the work for the ensuing year, in providing the number and grade of teachers needed, and the amount needed to thoroughly equip the school building or buildings of the district. The county board of education shall keep the committees informed as to the plans and purposes of the board and shall seek in every way possible to secure their coöperation in providing adequate educational opportunities for all the children of the district, for the enforcement of the compul-

sory school law, for teaching adult illiterates, and for the encouragement of vocational education in the county. (1923, c. 136, s. 50.)

§ 5460. Supervisors or assistant county superintendent.—The county board of education shall have authority to employ an assistant county superintendent or to employ a supervisor or supervisors to aid the county superintendent in supervising the instruction in the elementary and high schools of the county: Provided, that the salary for the same is provided in the budget and approved by the county commissioners. The duties of the supervisor or the assistant county superintendent shall be outlined by the county superintendent of public instruction: Provided further, the supervisor or assistant county superintendent shall not be assigned to regular clerical work in the office of the county superintendent. And no part of the salary of any supervisor or assistant county superintendent shall be paid out of the state public school fund, unless the duties assigned to the same are first approved by the state superintendent of public instruction. (1923, c. 136, s. 51.)

§ 5461. Duty of county board of teachers, supervisors and principals.—The county board of education, upon the recommendation of the county superintendent, shall have full power to make all just and needful rules and regulations governing the conduct of teachers, principals and supervisors, under jurisdiction of the county board of education, the kind of reports they shall make and their duties in the care of school property.

The county board of education shall have power to investigate and pass upon the moral character of any teacher or school official in the public schools of the county, and to dismiss such teacher or school official, if found of bad moral character; also to investigate and pass upon the moral character of any applicant for employment in any public school in the county. Such investigation shall be made after written notice of not less than ten days to the person whose character is to be investigated.

If the superintendent reports to the board that the work of any teacher, principal or supervisor is unsatisfactory, or that either is not observing the rules and regulations of the board of education, the board has full authority at any time during the year, upon notice of ten days, to investigate the charges and, if sustained, to reduce the salary of the teacher, supervisor or principal to the next lower salary in the salary schedule, and finally to discharge the same for failure to perform the duties as prescribed by the board. (C. S. 5412, revised.) (1923, c. 136, s. 53.)

§ 5462. Providing for training of teachers.—The county board of education is authorized to provide summer schools for the improvement of teachers, subject to the rules and regulations of the state board of education. The board is authorized to provide for the professional growth of the teachers while in service, and to pass rules and regulations requiring teachers to coöperate with the county superintendent for the improvement of instruction in the classroom and for promoting community improvement; and the county board of education shall have authority to provide a smaller salary schedule for those teachers who do not conform to the rules and regulations authorized in this section. (1923, c. 136, s. 54.)

§ 5463. Pay of teachers.—The county board of education shall not authorize the payment of the salary of any teacher or school official for a shorter term than one month, unless he or she is providentially hindered from completing the term.

It is the duty of the county board of education to provide monthly for the prompt payment of all salaries due teachers and other school officials, and to meet other necessary operating expense. (1923, c. 136, s. 55.)

§ 5464. Authority to borrow.—If the taxes for the current year are not collected when the salaries and other necessary operating expenses come due, and the money is not available for meeting the necessary expenses, it shall be the duty of the county board of commissioners to borrow against the amount approved in the budget and to issue short-term notes for the amounts so borrowed. The interest on all such notes shall be provided by the commissioners in addition to the amount approved in the budget unless this item is specifically taken care of in the budget. But if the county board of education shall willfully create a debt that shall in any other way cause the expenses for the year to exceed the amount authorized in the budget, without the approval of the county commissioners, the indebtedness shall not be a valid obligation of the county, and the members of the board responsible for making the debt may be held liable for the same. (1923, c. c. 136, s. 56; 1927, c. 239, s. 18.)

See Hampton v. Board of Education, 195 N. C. 213, 141 S. E. 744, where it was held, under the facts and circumstances, that county commissioners were liable for a debt created under this section. See notes to § 5516.

Editor's Note.—By amendment, Public Laws 1927, ch. 239, sec. 18, the authority to borrow was changed from the board of education to the board of commissioners.

§ 5465. Salary schedule for teachers.—The state board of education shall adopt a uniform graduated salary schedule for all teachers, principals, supervisors, superintendents and assistant superintendents, based upon duties, training, experience, professional fitness, and continued service in the same school system.

The adopted salary schedule shall be a guide to county boards of education in fixing all salaries of teachers, supervisors, principals and superintendents in the county, and it shall be considered a fair salary schedule to be presented in the budget to the boards of county commissioners.

Every county board of education or the board of trustees of a city school system or of a union school in a special charter district may adopt a different salary schedule, but it likewise shall recognize a difference in salaries based on different duties, training, experience, professional fitness, and continued service in the same school system; but if any county board of education or the board of trustees of any city school system shall fail to adopt such a schedule, the state salary schedule shall automatically be in force, and the difference in salaries suggested shall be maintained. And the county superintendent shall not approve the voucher of any teacher for a

salary higher than that provided in the salary schedule, unless by action of the county board of education or of the board of trustees of the city school a higher salary is allowed for special fitness, special duties or under extraordinary circumstances. Whenever a higher salary is thus allowed the minutes of the board shall show what salary is allowed and the reason for the same: Provided, the county board of education, upon the recommendation of the committee of a local tax district may authorize the committee and the superintendent to supplement the salaries of all teachers of the district from funds derived from local taxes, and the minutes of the board shall show what increase is allowed each teacher in each local tax district. (C. S. 5494, as amended and revised.) (1923, c. 136, s. 57.)

§ 5466. How school funds shall be disbursed.— School funds under the control of the county board of education as referred to in this section are classified into three groups:

(1) Six months term school fund. Fund appropriated and expended for the constitutional six months school term. The county treasurer shall pay out said funds only on warrants signed by the chairman and secretary of the county board of education, and countersigned by such officer as the county government laws may require.

(2) County-wide extended term school fund. Funds appropriated and expended for the county-wide school term above the constitutional six months term. The county treasurer shall pay out of said funds only on warrants signed by the chairman and secretary of the County Board of Education and countersigned by such officers as the county government laws may require.

(3) Local district funds. Local taxes and other funds belonging to specific districts. The county treasurer shall pay out said funds only on warrants signed by the Chairman and Secretary of the County Board of Education, and countersigned by such officer as the county government laws may require. The County Board of Education shall issue no warrants chargeable against local district funds except in accordance with the adopted district fund budget, which budget shall have been sworn to by the Chairman and Secretary of the local district committee, and approved by the County Board of Education.

All salary warrants for teachers and principals and other regular employees shall be issued only on the basis of written monthly certification, signed by the chairman and secretary of the local district school committee and filed with the County Board of Education, which certification shall specify the length of service rendered by each person and the amount due and payable therefor; and said certification shall further specify that part of the total amount to be charged to the constitutional six months term funds, that part of the total amount to be charged to extended term funds, and that part of the total amount to be charged to district funds, as defined herein: Provided, that the County Board of Education, in case of dispute as to any claim, may in regular or called session finally determine the validity of said claim and order settlement thereof in accordance with their findings. Each warrant drawn in payment of any claim, including salaries or for any other purpose, shall specify the fund to which the warrant is chargeable. If any part of any warrant drawn is chargeable against district funds, the amount charged to local district funds and the district to which said amount is charged shall be specified. In the payment of salary warrants referred to in this section, the County Board of Education may require the teacher's report at the end of each month to be properly attested by the chairman and secretary of the local committee before issuing salary warrant: Provided, that the final report of membership and attendance from any district, whether by a teacher, principal, or superintendent, shall be subscribed and sworn to before an officer authorized to administer oaths, by such teacher, principal, or superintendent making said report, before the last warrant for salary or salaries in said district may be issued: and provided further, that the county superintendent of schools shall be authorized and directed to attest such signature and oath without fee or charge when so requested: Provided, that nothing in this section shall prevent the county board of education from requiring that said warrants be signed by district officials, in addition to the county officials specified therein, if, in the opinion of said board, such procedure is desirable and practicable. (1923, c. 136, ss. 58, 197; 1927, c. 239, ss. 17, 20; 1931, c. 430, s. 17.)

Editor's Note. — This section was changed by the Public Laws 1927, so as to conform to the new budget plan. The Act of 1931 repealed this section and section 5617 and inserted the above in lieu thereof.

Art. 9. Erection, Repair and Equipment of School Buildings

§ 5467. School buildings necessary. — School buildings, properly lighted and equipped with suitable desks for children and tables and chairs for teachers, are necessary in the maintenance of a six-months school term. It shall be the duty of the county board of education to present these needs each year to the county commissioners, together with the cost, and the county commissioners shall be given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for the proper equipment of the county with buildings suitably equipped, and it shall be the duty of the county commissioners to provide the funds for the same. (1923, c. 136, s. 59.)

The mode by which the counties of the State shall effectuate the constitutional mandate to provide for the constitutional six months term of school, Art. IX, sec. 3, is prescribed by this and subsequent statutes. Hickory v. Catawba County, 206 N. C. 165, 173 S. E. 56.

In accordance with the provisions of this section, it is the duty of the county commissioners, upon information being furnished by the county boards of education, to provide the funds necessary for suitable buildings and proper equipment, and such expenses are a county-wide charge. Reeves v. Board of Education, 204 N. C. 74, 167 S. E. 454.

§ 5468. Erection of schoolhouses. — The building of all new schoolhouses and the repairing of all old schoolhouses over which the county board of education has jurisdiction shall be under the control and direction of and by contract with the county board of education. But the board shall not be authorized to invest any money in any new house that is not built in accordance with plans approved by the state superintendent, nor

for more money than is made available for its erection. All contracts for buildings shall be in writing, and all buildings shall be inspected, received, and approved by the county superintendent of public instruction before full payment is made therefor: Provided, this section shall not prohibit county boards of education and boards of trustees from having the janitor or any other regular employee to repair the buildings. From any moneys loaned by the State to any one of the several counties for the erection, repair or equipment of school buildings, teacherages and dormitories, the State Board of Education, under such rules as it may deem advisable, not inconsistent with the provisions of this article, may retain an amount not to exceed fifteen per cent of said loan until such completed buildings, erected or repaired, in whole or in part, from such loan funds, shall have been approved by such agent as the State Board of Education may designate: Provided, that upon the proper approval of the completed building, the State Treasurer, upon requisition of the State Superintendent of Public Instruction, authorized and directed by the State Board of Education, shall pay to the treasurer of the county the remaining part of said loan, together with interest from the date of the loan at a rate not less than three per cent on monthly balances. (C. S., 5415; 1923, c. 136, s. 60; 1925, c. 221.)

As to issuing bonds for building school houses, see sections 5669 et seq.

Editor's Note.—By amendment, Public Laws 1925 c. 221, the last part of this section providing for holding and paying money loaned to counties for repair of school buildings, teacherages and dormitories, was added.

Power Discretionary.—The building of a school is a matter vested by the statute in the sound discretion of the county board of education and not to be restrained by the courts, unless in violation of some provision of law, see Rickler v. County Board, 149 N. C. 221, 62 S. E. 902, or unless the committee is influenced by improper motives, or there is misconduct on their part. See Smith v. School Trustees, 141 N. C. 160, 53 S. E. 524. Venable v. School Committee, 149 N. C. 120, 62 S. E. 902, 903.

Providing Electric Lights.—Under the general statutory authority of this article the erection of electric transmission lines to supply school buildings with electric lighting is given to the board of education of a county. Conrad v. Board, 190 N. C. 389, 130 S. E. 53. But contracts for such work are not within the meaning of this section and need not be in writing. Id. Nor need they be approved by the State Superintendent. Id.

Cited in Chapman-Hunt Co. v. Haywood County Board of Education, 198 N. C. 111, 150 S. E. 713.

§ 5469. How to secure suitable sites. — The county board of education or board of trustees of any special charter district may receive by gift or by purchase suitable sites for schoolhouses or other school buildings. But whenever any such board is unable to obtain a suitable site for a school or school building by gift or purchase, the board shall report to the county superintendent of public instruction, who shall, upon five days notice to the owner or owners of the land, apply to the clerk of the superior court of the county in which the land is situated for the appointment of three appraisers, who shall lay off by metes and bounds not more than ten acres, and shall assess the value thereof. They shall make a written report of their proceedings, to be signed by them, or by a majority of them, to the clerk within five days of their appointment, who shall enter the same upon the records of the court. The appraisers and officers shall serve without compensation. If the report is confirmed by the clerk, the chairman and the secretary of the board shall issue an order on the treasurer of the county school fund or if a charter district upon the treasurer of such charter district, in favor of the owner of the land thus laid off, and upon the payment, or offer of payment, of this order, the title to such land shall vest in fee simple in the corporation. Any person aggrieved by the action of the appraisers, including the county board of education or the board of trustees of any special charter district, may appeal to the superior court in term, upon giving bond to secure the board against such costs as may be incurred on account of the appeal not being prosecuted with effect. If the lands sought to be condemned hereunder, or any part of said lands, shall be owned by a nonresident of the state, before the clerk shall appoint appraisers therefor, notice to such nonresident owners shall be given of such proceedings to condemn, by publication for thirty days in some newspaper published in the county, and if no newspaper is published in the county, then by posting such notice at the courthouse door and three other public places in the county for the period of thirty days: Provided, where sites have already been acquired and additional adjacent lands are necessary such additional lands may be acquired as in this section provided, which lands, together with the old site, shall not exceed ten acres. (C. S. 5416; 1923, c. 136, s. 61; 1924, c. 121, s. 1; 1929, c. 309, ss. 1, 2.)

As to exercising power of eminent domain, see section 1706 and notes.

Editor's Note.—By amendment, Public Laws Ex. Sess. 1924, this section was made applicable to "board of trustees of any special charter district" where formerly it applied only to the county board of education.

The General Assembly amended this section, in March, 1929, by providing that "where sites have already been acquired and additional adjacent lands are necessary, such additional lands may be acquired as in this section provided, which lands, together with the old site, shall not exceed ten acres." Whether the act of 1929 was merely declaratory of the law then existing, or whether it was intended to confer an additional power of condemnation is now wholly immaterial and academic. Board of Education v. Pegram, 197 N. C. 33, 35, 147 S. E. 622.

Construing this section in connection with the former statutes giving the county board of education the power to condemn lands necessary for public school purposes within the limitation of ten acres, it is held, the fact that one of these schools had already acquired a less amount of land did not preclude the county board of education from acquiring by another proceeding sufficient lands to meet the enlarged and necessary requirements of the school for additional lands within the limitation imposed by statute. Board of Education v. Pegram, 197 N. C. 33, 147 S. E. 622.

The meaning of the word "site" as used in the statute is broad enough to embrace such land, not exceeding the statutory limit, as may reasonably be required for the suitable and convenient use of the particular building; and land taken for a playground in conjunction with a school may be as essential as land taken for the schoolhouse itself. 24 R. C. L., 582. See Board v. Forrest, 190 N. C. 753, 756, 130 S. E. 621, which presents an able review of the history of this section.

Right of Appeal.—The board of education does not come within the meaning of the words "party aggrieved" as contemplated by the statute. The right of appeal is open only to the person whose land has been taken. Board v. Forrest, 193 N. C. 519, 137 S. E. 431.

§ 5470: Repealed by Public Acts 1933, c. 494.

§ 5470(a). Sale of school property. — When in the opinion of the board, any schoolhouse, school-

house site or other public school property has become unnecessary for public school purposes, it may sell the same at public auction after advertising the said property for the period of time and in like manner as to places and publication in newspapers as now prescribed for sales of real estate under deeds of trust: Provided further, that the sale shall be reported to the office of the clerk of the superior court and remain open for ten (10) days for an increase bid, and if the said bid is increased the property shall be re-advertised in the manner as re-sales under deeds of trusts, and if there is no raised or increased bid within ten (10) days, the chairman and secretary of the board shall execute a deed to the purchaser, and the proceeds shall be paid to the treasurer of the county school fund. (1933, c. 494, s. 2.)

§ 5471. Deeds to property. — All deeds to the county board of education shall be registered and delivered to the clerk of the superior court for safe-keeping, and the secretary of the county board of education shall keep an index, by townships and school districts, of all such deeds in a book for that purpose. (C. S. 5422.) (1923, c. 136, s. 63.)

§ 5472. Board cannot erect or repair building unless site is owned by board.—The county board of education shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the county board of education, and the deed for the same is properly registered and deposited with clerk of the court. Provided, it shall be lawful for the county board of education to borrow from the State Literary or Special Building Funds for the benefit of special charter districts and to allocate the proceeds of the county school building bonds between special charter and county schools in proportion to the respective needs of the charter schools and the county schools at the time when such county bonds are authorized: Provided further, that the title to the site in any special charter district so aided shall be vested in the board of trustees of the charter district. (C. S. 5450; 1923, c. 136, s. 64; 1925, c. 180, s. 1.)

Editor's Note.—By amendment, Public Laws, 1925, the last two sentences were added to this section.

Not Applicable to Electric Light Wires. — This section does not apply to the erection of electric light wires. It applies only to sites for school buildings; it does not extend to or include right of ways. Conrad v. Board, 190 N. C. 389, 395, 130 S. E. 53.

Cited in Hickory v. Catawba County, 206 N. C. 165, 173, 173 S. E. 56.

§ 5473. Duty of board to keep buildings in repair.—It is the duty of the county board of education to keep all school buildings in good repair, and to that end it should appoint a member of the committee or some other responsible person to care for the property during vacation. All principals and teachers shall be held responsible for the safekeeping of buildings during the school session, and all breakage and damage shall be repaired by those responsible for the same, and if at the end of the session the building or buildings have not been properly cared for by the principal and teachers, the board of education, upon the recommendation of the county superintendent, may reserve enough of the salary belonging to the principal and teachers to repair the damage permitted through the carelessness of the principal and teachers: Provided, principal and teachers shall not be held responsible for damages that they could not have prevented by reasonable supervision in the performance of their duties. (1923, c. 136, s. 65.)

§ 5474. Duty of board of education to provide equipment for school buildings.—It is the duty of the county board of education to provide suitable supplies for school buildings under its jurisdiction, such as window shades, fuel, chalk, erasers, blackboards, and other necessary supplies, and provide standard high schools with reference books, library, maps and equipment for teaching science, and the teachers and principal shall be held responsible for the proper care of the same during the school term. (1923, c. 136, s. 66.)

Cited in Board of Education v. Walter, 198 N. C. 325, 328, 151 S. E. 718.

§ 5475. Sanitary school privies. — The county board of education shall provide upon recommendation of the state board of health, two sanitary privies at each public school, one for boys and one for girls. Sanitary privies shall be considered an essential and necessary part of the equipment of each public school, and may be paid for in the same manner as desks and other essential equipment of the school are paid for, and a failure on the part of the county board of education and county superintendent to make provision for sanitary privies, or a failure on the part of the county commissioners to provide the funds, shall be considered a misdemeanor, and either the county board, the county superintendent, or the county commissioners may be fined or imprisoned in the discretion of the court. (C. S. 5753, 5754.) (1923, c. 136, s. 68.)

Specific or special legislative authority is given the county by this section and § 5479, to issue without a vote bonds for sanitary improvements for its schoolhouses necessary for it to maintain, as an administrative unit of the State, the constitutional school term in the county. Taylor v. Board of Education, 206 N. C. 263, 173 S. E. 608.

§ 5476. Type of privies to be installed. — The less expensive pit-type as recommended by the state board of health may be installed in rural districts in connection with the smaller school buildings. But the kind of privy in all buildings shall be sufficient to protect the health and sanitation of the children and the community. (1923, c. 136, s. 69.)

§ 5477. Privies to be kept sanitary. — The county board of education shall require of the committee that the privies shall be kept in a sanitary condition. They shall be governed in this particular by rules and regulations of the state board of health. And the county board of education shall provide a reasonable expense fund wherever necessary to keep the privies in a sanitary condition.

It shall be the duty of the teachers and principals to report the unsanitary condition of the privies to the committee of the district, or the county superintendent. (C. S. 5757, revised.) (1923, c. 136, s. 70.)

§ 5478. Use of school property. — It shall be the duty of the county board of education and board of trustees to encourage the use of the school buildings for civic or community meetings

of all kinds that may be beneficial to the patrons of the community, and the county board of education or the board of trustees has authority to make rules and regulations governing the use of school property. (1923, c. 136, s. 71.)

§ 5479. Providing good water supply.—It shall be the duty of the county board of education to make such provisions as will give the teachers and pupils a good supply of wholesome water for the school term. (1923, c. 136, s. 72.)

See § 5475 and notes.

Art. 10. Creating and Consolidating School Districts

§ 5480. School districts.—The county board of education shall maintain in each county a convenient number of school districts. There may be one district for each elementary school or there may be two or more elementary schools in the same district. There may be one district for both the elementary and high school, or a special high school district may be created embracing two or more school districts. But no special high school district shall be created unless provisions are made for conducting all elementary schools and the high school in the proposed special high school district the same length of term. Whenever a special high school district is created embracing two or more elementary schools the committee, or board of trustees, of the district in which the high school is located shall have the same jurisdiction over the high school that it has over the elementary school.

There may be one district and one school committee for both races, or the races may have separate districts and separate school committees. The county board of education shall consult the convenience and necessities of each race in fixing the boundary line of school districts for each race, and it shall be the duty of the county board of education to record, in a book kept for the purpose, the location of each school district and the boundary lines of each. (1923, c. 136, s. 73.)

As to limitation on power of legislature to change lines of school districts, see Art. II, sec. 29 of the Constitution.

This Article Is Constitutional.—Sparkman v. Board, 187 N. C. 241, 121 S. E. 531, cited and approved in Blue v. Board, 187 N. C. 431, 122 S. E. 19.

When Court Will Intervene.—The courts will not interfere with the control and supervision of the county board of education in the exercise of its statutory discretion given in the formation of school district and their consolidation, or intervene in behalf of any one who supposes himself to be aggrieved by their action therein, except upon a clear showing that it was acting contrary to law, and then they will only restrain its action to the extent necessary to keep it within the law and the rightful exercise of its powers. Davenport v. Board, 183 N. C. 570, 112 S. E. 246.

§ 5481. County-wide plan of organization. — The county board of education shall create no new district nor shall it divide or abolish a district, nor shall it consolidate districts or parts of districts, except in accordance with a county-wide plan of organization, as follows:

1. The county board of education shall present a diagram or map of the county showing the present location of each district, the position of each, the location of roads, streams and other natural barriers, the number of children in each district, the size and condition of each school building in each county. The county board of education shall then prepare a county-wide plan for the organization of all the schools of the county. This plan shall indicate the proposed changes to be made and how districts or parts of districts are proposed to be consolidated so as to work out a more advantageous school system for the entire county.

2. Before adopting the county-wide plan, the county board of education shall call a meeting of all the school committeemen, and the boards of trustees and lay the proposed plan before them for their advice and suggestions. After receiving the advice of the committeemen and trustees, the county board of education shall have authority to adopt a county-wide plan or organization, and no districts or parts of any district, including non-local tax, and special charter districts, hereafter referred to in this article, shall be consolidated or the boundary lines changed, unless the consolidation or the change of boundary lines is in accordance with the adopted county-wide plan of organization: Provided, that in the event the county board of education deems it wise to modify or change the adopted plan, the board shall notify the committeemen and interested patrons and give them a hearing, if they desire to be heard, before any changes shall be made. The meeting required to be held before the adoption of the county-wide plan shall be called, and the notification required to be given of a contemplated modification or change of an adopted plan shall be given by publication once at least ten days before the meeting or the hearing in a newspaper published at the county-seat of a notice addressed to those affected thereby, giving the hour and day and place of the meeting or the hearing and the purpose thereof, and by mailing to or serving of like notice upon all committeemen and trustees.

If no newspaper be published in the county-seat, such notice shall be posted at the courthouse door and at a public place in each township in the county ten days prior to such meeting.

No adoption or amendment of such plan shall be held invalid or ineffectual because of any failure to comply with the requirement hereof as to the mailing or service of notice.

3. The county board of education shall have authority to execute the entire plan or any part of the same, but the county board of education shall have no authority to create a debt for the execution of any part of the proposed plan, unless authorized by law, and if the amount necessary to put into operation all or any part of said plan shall be greater than the amount that may be reasonably expected from the operating and equipment fund for this purpose, the amount shall be guaranteed by the districts affected by the execution of the plan, or if the districts do not guarantee the funds the county board of education shall lay the proposed plan before the county commissioners, together with the estimated amount necessary to put the same into operation, and if the amount necessary to carry out all or any part of the proposed plan shall be approved by the county commissioners, the county board of education shall then have the authority to organize the districts in accordance with the county-wide plan.

4. When the proposed county-wide plan is adopted the county board shall notify the com-

mitteemen and boards of trustees as to what part of the plan the board proposes to carry out first and in what order the other parts of the plan will be considered, and the preference shall be given to those districts in which the needs are greatest if the funds for providing the equipment are made available.

5. In the event that any child or children of any district or any part of a district are without adequate school advantages, and these advantages may be improved by transferring said child or children to a school or schools in adjoining districts, the county board shall have authority to make such a transfer. But this shall not empower the county board of education to abolish or divide a district unless such act shall be in harmony with the country-wide plan or organization. The temporary transfer of such child or children may be made until such time as the county-wide plan will provide more advantageously for them. (1923, c. 136, s. 73a; 1924, c. 121, s. 2.)

Editor's Note.—At the Ex. Sess. of 1924 the provision as to the methods of giving notice was added at the end of paragraph two of this section. There was a curative provision ratifying certain bond elections passed by the Public Laws of 1927, c. 85.

Effect on Prior Laws.—This section expressly repeals all the former laws, including a provision in a special act providing that the school district therein created shall continue to be an independent school and shall have exclusive control of its public free schools. Causey v. Guilford County, 192 N. C. 298, 299, 135 S. E. 40.

Creation of District Enjoined.—Where it does not appear that the county-wide plan has been adopted, an order for an election which involves the creation of a new district, is in contravention of this section and a judgment injoining such election will be upheld. Howard v. Board, 189 N. C. 675, 127 S. E. 704, 706.

"County Wide Plan."—Where the "county wide plan" has been adopted there is created a "school district" to elections in which § 5639 is applicable, and not a "special school taxing district" to which sec. 5657 would apply. Harrington v. Board, 189 N. C. 572, 127 S. E. 577, 579.

Meeting Held in Advisory Capacity.—The provision as to notice is only for a meeting to be held in an advisory capacity not binding on the board, and when the statute has been complied with before the adoption of plans, the action of the board is final without further notice, when the provisions of the statutes on the subject have been complied with. Causey v. Guilford County, 192 N. C. 298, 135 S. E. 40.

Consolidation Upheld.—Where a county had adopted the county-wide plan or organization for its public schools, and its board of education has consolidated, in good faith, two contiguous school districts with regard to the convenience of those attending the schools of each, and with regard to their better school conveniences and instruction, and at a less cost of maintenance in the consolidation, so much will be upheld in our courts. Parker v. Debnam, 195 N. C. 56, 141 S. E. 535.

Evidence. — Facts found by the lower court that the consolidation of two contingent public school districts was made by the county board of education was under the provisions of this section, are supported by the evidence, and though the evidence is reviewable by the Supreme Court on appeal, the findings and conclusions of law thereon are presumed correct, and the burden is on the appellant to show error. Parker v. Debnam, 195 N. C. 56, 141 S. E. 535.

Maintenance of Elementary Schools.—Under this section and §§ 5483 and 5489 the Constitution requires by mandatory provision that at least one elementary school be maintained in each district. Elliott v. State Board of Equalization, 203 N. C. 749, 166 S. E. 918.

Cited in Sugg v. Debnam, 195 N. C. 23, 24, 141 S. E. 538.

§ 5482. Districts formed of portions of contiguous counties.—School districts may be formed out of portions of contiguous counties by agreement of the county boards of education of the respective counties. In case of the formation of such district, the pro rata part of the public school money due for teaching the children residing in one county shall be apportioned by the county board of education of that county, and paid to the treasurer of the other county in which the schoolhouse is located, to be placed to the credit of the school district so formed. (C. S. 5471.)

In case of a disagreement between the two county boards as to the pro rata part due the county in which the school is located, the evidence shall be laid before the state superintendent, who shall determine from the evidence submitted and from the approved budget for that school, on file in his office, the amount due, and the pro rata part of each county shall be certified to the county board of education of each county, and the county board of education of the county in which the joint school is located may recover by due process of law from the county board of education in the other county the amount due the joint school for the six months term from that county. (1923, c. 136, s. 74.)

§ 5483. Consolidation of schools or school districts.—The county board of education is hereby authorized and empowered to consolidate schools located in the same district and to consolidate school districts, over which the board has full control, whenever and wherever in its judgment the consolidation will better serve the educational interests of the county or any part of it: Provided, existing schools having suitable buildings shall not be abolished until the county board of education has made ample provisions for transferring all children of said school to some other school in the consolidated district. (C. S. 5473.) (1923, c. 136, s. 75.)

As to enlargement of local tax districts, see sections 5646 et seq.

Election Cannot Relate Back to Invalid Consolidation. — Where the consolidation of existing school districts with various rates of taxation attempted under the provisions of § 5646 is invalid, an election thereafter held under the provisions of this section as amended by Laws 1921, ch. 179, section 1, cannot relate back and validate the consolidation and the tax to be levied and bonds to be issued thereunder. Jones v. Board, 187 N. C. 557, 122 S. E. 290.

Consolidation of Districts with Same Tax Rate.—Under the old law, C. S. 5473, school districts, with the same tax rate, could be consolidated by the county board of education, without a vote of the people in the consolidated district. Board v. Bray Bros. Co., 184 N. C. 484, 115 S. E. 47; Paschal v. Johnson, 183 N. C. 129, 131, 110 S. E. 841. The powers conferred under C. S., 5473 have been enlarged and this section, as amended, is brought forward as section 75 of ch. 136, Public Laws 1923. Scroggs v. Board, 189 N. C. 110, 112, 126 S. E. 109.

Consolidation of Tax and Nontax Districts.—It is not necessary to the valid consolidation of nonspecial school tax districts with special school tax districts that it be approved by the voters of the nonspecial school tax districts, when the questions of taxation and bond issues are not involved, and especially so when the consolidation has been made according to the provisions of a Public-Local Law applicable to the county wherein the consolidation has been made. Board v. Bray Bros. Co., 184 N. C. 484, 115 S. E. 47.

Special school-tax districts, organized and exercising governmental functions in the administration of the school laws, are quasi-public corporations subject to the constitutional provisions in restraint of contracting debts for other than necessary purposes, except by the vote of the people of a given district, Const. Art. VII, § 7; and semble, that where an existent tax and nontax district are thereunder consolidated, it would require the submission of the question to those living within the district thus formed, but outside of the district that has theretofore voted the tax as provided in § 5646 for enlargement of local tax districts. Paschal v. Johnson, 183 N. C. 129, 110 S. E. 841; Barnes v. Leonard, 184 N. C. 325, 114 S. E. 325, 398.

The authority given the county board of education to re-

district the entire county or part thereof, and to consolidate school districts, etc., was amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of our Constitution, Art. VII, § 7, but to the extent the amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of § 5646, must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose. Perry v. Commissioners, 183 N. C. 387, 112 S. E. 6.

Issuance of Bonds.—Where there has been a valid consolidation of local-tax school districts, having an equal tax rate for the purpose, by proper proceedings under the statute the new district may then approve the question of an additional special tax, and where this has been done under the authority of a valid statute, and an issue of bonds properly approved by the voters, such bonds are constitutional and valid. Paschal v. Johnson, 183 N. C. 129, 110 S. E. 841.

§ 5484. Consolidating local tax districts having same rate of local tax.—The county board of education is authorized and empowered to consolidate two or more local tax districts, urban and rural, having the same rate of local tax, into one consolidated school district, upon satisfactory evidence furnished to the board that the convenience and best interests of the residents of the districts require the consolidation, except as provided in section 5487.

Wherever three or more local tax districts having the same rate of tax are contiguous or embrace contiguous area the county board of education is authorized to reduce the number of districts by changing the boundary lines and consolidating districts or portions of districts: Provided, the length of the term is not reduced and the efficiency of the school is not impaired, and that better educational advantages may result to the children of each district as a result of the consolidation. (1923, c. 136, s. 76.)

See notes to preceding section.

§ 5485. Consolidating districts having different local tax rates.—The county board of education is authorized to consolidate local tax districts having different local tax rates, but the local tax rate that may be levied in the consolidated district is the lowest tax rate voted in any of the districts which forms a part of the new consolidated district. (1923, c. 136, s. 77.)

Section Mandatory.—A school district composed of several consolidated districts cannot be maintained half taxing and half not taxing. Under this section the tax must be uniform, not matter if a part of the district wants tax and the other part does not. Bivins v. Board 187 N. C. 769, 122 S. E. 846.

§ 5486. Transferring families from non-local tax to local tax or special charter districts.—The county board of education may transfer from non-local tax territory to local tax or special charter districts an individual family or individual families who reside on real property contiguous to said local tax or special charter districts, upon written petition of the taxpayers of said family or families, and there shall be levied upon the property and poll of each individual so transferred the same tax as is levied upon other property and polls of said district. (C. S. 5478.) (1923, c. 136, s. 78.)

§ 5487. Changing the boundary lines of the special charter districts.—Upon the written petition of the governing body of the special charter district the county board of education is authorized to change the boundary line between special charter districts and local tax districts, and to consolidate local tax districts with a special charter district. But a record shall be made of the petition in the minutes of the governing body of the special charter district, and a record shall be made in the minutes of the county board of education, stating that the petition was received and the request was granted. Then the boundary line shall be changed and the consolidation made and properly recorded, and the new boundary line shall be clearly set forth in the minutes of both boards: Provided, that when the tax rates are not the same, only the lower rate of tax may be levied in the whole territory. (1923, c. 136, s. 79; 1925, c. 150.)

Editor's Note.—By amendment, Public Laws 1925, c. 150, the last sentence providing for the lowest tax rate was added, and a former provision making a change possible only when the tax rate was the same, was omitted.

§ 5488. The funds shall be apportioned so as to encourage consolidation.—The apportionment of the state and county public school fund shall be administered so as to encourage consolidation of districts and the elimination of small schools or small districts, and the state board of education may refuse to apportion any part of the state fund to any school or district having an average daily attendance of less than fifteen pupils or to any new school or district created since January first, one thousand nine hundred and nineteen, if the number of districts or the number of separate schools in a county has been increased thereby: Provided, that no district shall be abolished if the geographical conditions are such that the children of the district cannot be annexed to some adjoining district without seriously limiting the educational opportunities of the children of the district. (C. S. 5489.) (1923, c. 136, s. 80.)

§ 5489. Provision for transportation of pupils in consolidated districts.—Upon the consolidation of two or more school districts into one by the county board of education, the said county board is authorized and empowered to make provision for the transportation of pupils in the consolidated district that reside too far from the schoolhouse to attend without transportation.

An amount sufficient to cover the actual expense of such transportation of pupils may be included in the county school budget submitted to the board of county commissioners in May of each year, and when so included and approved by the commissioners it shall be deemed a necessary part of the operating expense of the schools, and it shall be the duty of the county commissioners to provide the funds necessary therefor, in accordance with law. But nothing in this section shall prevent the county board of education from arranging with any district committee to pay a reasonable part of this expense.

The cost of trucks and automobiles and all necessary repairs and operating expenses shall be a legitimate item in the budget. (C. S. 5475, amended 1920.) (1923, c. 136, s. 81.)

§ 5490. School trucks and automobiles exempt from taxation. — All trucks or automobiles owned or controlled by the county board of education and used for transporting pupils to school

or used by school nurses or home and farm demonstration agents, or county superintendents and supervisors, in the prosecution of their work, shall be exempt from taxation, but all such vehicles shall be duly registered in the office of the secretary of state: Provided, that the secretary of state, upon proper proof being filed with him that any motor vehicle for which license is herein required is owned by the state or any department thereof or by any county, township, city or town, or by any board of education, may collect not exceeding one dollar for the registration and numbering of such motor vehicle. (C. S. 5475.) (1923, c. 136, s. 82.)

Art. 10A. Creation of school districts

§ 5490(a). Manner.—It shall be lawful to create school districts, whether the same be enlargements of existing school districts or not, in the manner provided by this article. (1927, c. 131, s. 1.)

§ 5490(b). Composition of districts. — Such school districts, herein sometimes termed new districts, may comprise any part or all of one or more existing school districts including special charter school districts, which comprised districts and comprised parts of districts are herein sometimes termed component districts or component parts of districts: Provided, however, that no new district shall be created under this article, nor shall any division of an existing school district be made hereunder, except in accordance with a county-wide plan of organization of schools adopted under the provisions of the general law; and provided further, that the total number of school districts in the county shall not be increased thereby; and provided further, that no special charter district or part thereof shall be included in any new school district created under this act unless the governing body thereof, such governing body being in this article termed the Board of Trustees, shall consent thereto by resolution passed and recorded. (1927, c. 131, s. 2.)

§ 5490(c). Creation not effective until uniform tax rate and assumption of debt voted for.—The creation of any such new district may be ordered by the County Board of Education in accordance with such county-wide plan, but no such new district shall be deemed created or in existence unless and until a uniform tax rate and the assumption of existing debt shall be voted as hereinafter required. (1927, c. 131, s. 3.)

§ 5490(d). Call for election on local supplement tax; limit of tax rate. — Upon certification to the Board of County Commissioners, or in case the territory in which the vote is to be taken lies entirely within a city or town, upon certification to the governing body of such city or town such board or body shall call and hold an election for voting a local tax to supplement the funds provided for the maintenance of the minimum school term under the constitution, at which election there shall be submitted to the voters of the entire new district the question of whether a maximum rate of tax, which shall not exceed fifty cents (50c.) on the one hundred dollars of assessed valuation, shall annually be levied upon the entire district: Provided, however, that in lieu of submitting such question to the voters of the entire new district at one election, there may be submitted to the voters of any component district or districts or component part or parts of a district separately or in combination the question of whether there shall be levied annually upon such district, districts, part or parts, a maximum rate of tax at the same rate, not exceeding (50c.) on the one hundred dollars of assessed valuation, which was theretofore voted by any other component district or districts component part or parts of the new district. (1927, c. 131, s. 4.)

§ 5490(e). Elections on: Outstanding debts of component or partially component school districts.—At the same or at another election, the said board or body shall submit to the voters of the entire new district the question of whether the new district shall assume (a) the outstanding debt of every component school district and (b) the outstanding debt of every school district any part of which shall be a component part of the new district, or if any such debt was not incurred for permanent school improvements within the new district, such portion of such debt as the assessed valuation of taxable property in such component part bears to the assessed valuation of taxable property in the indebted district and (c) the outstanding city, town and town-ship debt incurred for permanent school improvements within the new district. The foregoing requirements for debt assumption shall not apply to any debt which a county has assumed or for the payment of which the General Assembly shall not have made other provisions. (1927, c. 131, s. 5.)

§ 5490(f). New registration.—A new registration of qualified voters may be ordered for the elections herein provided, and such registrations and elections shall be conducted in accordance with the provisions of the general law for the voting of local school taxes, except as herein otherwise provided, and the Australian Ballot Act of one thousand nine hundred and twenty-seven shall not apply thereto. (1927, c. 131, s. 6.)

§ 5490(g). Returns of elections.—The officers appointed to hold the elections in making returns of the results thereof shall incorporate therein not only the number of votes cast for and against the question submitted, but also the number of votes registered. The board or body holding the election shall canvass the returns and shall include in their canvass the votes cast for and against the question submitted and the number of votes registered, and shall determine and declare the result of the election. (1927, c. 131, s. 7.)

§ 5490(h). Statement of vote on each question; authentication; delivery; record. — Such board or body shall prepare a statement showing the number of votes cast for and against each question submitted and the number of voters registered and declaring the result of the election, which statement shall be signed by a majority of the members of such board or body and delivered to the clerk thereof, who shall record it in the minutes of the board and file the original at his office and publish it once in a newspaper published in the State and circulating within the new district, which newspaper shall

be one published in the new district, if one be there published, but otherwise shall be one published in the county, if one be published in the county. (1927, c. 131, s. 8.)

§ 5490(i). Rights of action or defense barred.— No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be opened to question in any court upon any grounds whatever, except in an action or proceedings commenced within thirty days after publication of such statement. (1927, c. 131, s. 9.)

§ 5490(j). Resolution passed and recorded by county board of education; contingencies. — If at such election or elections a maximum maintenance tax of the same rate shall have received the votes of a majority of the qualified electors in the entire new district, and if the assumption of all the indebtedness as herein required shall have received the votes of a majority of the qualified voters of the entire new district, the County Board of Education shall pass and record upon its minutes a resolution declaring that the new district shall come into existence upon a day to be named in such resolution not later than the first day of the next July. (1927, c. 131, s. 10.)

§ 5490(k). Definition of new district; law applicable.—If the new district shall embrace the whole of any special charter district, or if, embracing the whole of two or more special charter districts, the boards of trustees of such special charter districts shall, by recorded resolutions passed not later than the day upon which the new district shall come into existence as hereinbefore provided, agree upon one of such special charter districts as the district which shall be deemed enlarged, the new district shall be deemed an enlargement of such special charter district and shall be conducted and governed in accordance with the charter thereof and other laws applicable thereto. In all other cases the new district shall be a local tax district. In all new districts created under the terms of this article, the territory added thereto shall be entitled to representation on the governing board of said new district, but in no case shall said governing board be so increased to a total membership in excess of seven. (1927, c. 131, s. 11; 1931, c. 42, s. 1.)

Editor's Note.—The Act of 1931 added the last sentence to this section.

§ 5490(l). Property vested; conveyance of property; record. — When the new district shall come into existence as hereinabove provided, all school property, real and personal within the same, except property maintained by the county for other than district purposes, the debt for which property has not been assumed by the new district shall automatically pass in the case of a new special charter district to the board of trustees thereof, and in the case of a local tax district, to the County Board of Education for the use of the district, but it shall nevertheless be the duty of all boards and bodies holding any such property to convey the same formally by deed and other proper conveyance and every such deed shall be promptly recorded. (1927, c. 131, s. 12.)

Where under the provisions of this section, several school districts have been included in an enlarged district, and certain property in the former districts is not necessary to be used for school purposes in the enlarged district and the trustees of the enlarged district have not assumed any debt on such property, under the express provisions of this section the title to such property remains in the county board of education. Mitchell v. Board of Education, 201 N. C. 55, 158 S. E. 850.

Cited in Hickory v. Catawba County, 206 N. C. 165, 173, 173 S. E. 56.

§ 5490(m). Creation heretofore attempted validated.—In all cases in which a new school district has been attempted to be created since January first, one thousand nine hundred and twenty-three, embracing a part or all of one or more existing school districts, such creation is hereby validated and ratified as of the date upon which such new district began to function as such, provided, such creation was in accordance with the county-wide plan of organization of schools adopted under the provisions of section seventy-three (a), chapter one hundred thirty-six, Public Laws of one thousand nine hundred twenty-three, or in which although not in accordance with such county-wide plan, such county-wide plan was thereafter adopted or shall be adopted before the first day of July, one thousand nine hundred twenty-seven with which plan such creation shall be in accord: Provided, however, that a majority of the qualified voters of such new district shall have heretofore voted or shall vote before the first day of January, one thousand nine hundred twenty-eight, for such levy of maintenance tax and such assumption of debt as are herein required to be voted for the creation of the new district; and in all such cases all new registrations of voters which were made for the purpose of any such elections made in substantial conformitory with the provisions of article seventeen, chapter one hundred thirty-six, Public Laws of one thousand nine hundred twenty-three, are hereby validated and ratified, and all elections held throughout any such new district at which a majority of the voters therein have voted for the issuance of bonds are hereby validated and ratified. (1921, c. 131, s. 13.)

SUBCHAPTER IV. COUNTY SUPERINTENDENT'S POWERS, DUTIES AND RESPONSIBILITIES

Art. 11. Election, Eligibility and General Duties

§ 5491. Election; term of office.—The county superintendent of public instruction shall be elected by the county board of education as soon as convenient on or after its first meeting in April. He shall hold his office for a term of two years from the date of his election and until his successor is elected and qualified. The county board of education shall provide the county superintendent with an office at the county-seat, and in the county courthouse, if possible. (C. S. 5424, revised.) (1923, c. 136, s. 83.)

For an act relating to the appointment of county superintendents by boards of education appointed by the legislature of 1933, see Public Laws 1933, c. 202. This act was amended by Public Laws of 1935, c. 144.

Constitutional Office.—The office created by this section is such an office as comes within the provision of Art. XIV, sec. 7, of the Constitution, which prohibits the holding of more than one office by any person. Whitehead v. Pittman, 165 N. C. 89, 80 S. E. 976.

§ 5492. Eligibility.—The County Superintend-

ent shall be a person of good moral character, a college graduate, shall have had two years' successful experience in teaching, or its equivalent, and shall be a person of good business qualifications and executive ability—but this section shall not, in any way, change the requisites for any County Superintendent now eligible for office, but shall apply only to all incoming County Superintendents. No Superintendent shall be eligible to hold the office of County Superintendent who has an open or active infectious state of tuberculosis or any other contagious disease, and before any person is employed as Superintendent he shall secure a certificate from a reputable physician certifying he has not an open or active infectious state of tuberculosis or any other contagious disease. (C. S. 5424; 1923, c. 136, s. 83; 1929, c. 245, s. 18.)

§ 5493. Election reported to state superintendent. — Immediately after the election of the county superintendent of public instruction, the chairman of the county board of education shall report to the state superintendent of public instruction the name, address, experience, and qualifications of the person elected; and the person elected shall report to the state superintendent as soon as he shall have qualified, giving the date of such qualification. (C. S. 5429.) (1923, c. 136, s. 85.)

§ 5494. Not to teach; to reside in county.— Every county superintendent shall reside in the county of which he is superintendent. It shall not be lawful for him to teach a school while the public schools of his county are in session, nor shall he be regularly employed in any other capacity that may limit or interfere with his duties as superintendent. (C. S. 5426, revised.) (1923, c. 136, s. 86.)

§ 5495. Oath of office.—The county superintendent of public instruction, before entering upon the duties of office, shall take oath for the faithful performance thereof. (C. S. 5427.) (1923, c. 136, s. 87.)

§ 5496. Vacancies.—In case of vacancy by death, resignation, or otherwise, in the office of county superintendent, such vacancy shall be filled by the county board of education. (C. S 5428.) (1923, c. 136, s. 88.)

§ 5497. Secretary to county board.—The county superintendent shall be ex officio the secretary of the county board of education. He shall record all proceedings of the board, issue all notices and orders that may be made by the board pertaining to the public schools, schoolhouses, sites, or districts (which notices or orders it shall be the duty of the secretary to serve by mail or by personal delivery, without cost.) He shall also record all school statistics. The records of the board and the county superintendent shall be kept in the office provided for that purpose by the board. (C. S. 5438.) (1923, c. 136, s. 89.)

§ 5498. Removal from office.—The county superintendent may be removed from office by the county board of education, for immoral or disreputable conduct, or for failure to perform the duties required of him by law. (C. S. 5443, revised.) (1923, c. 136, s. 90.)

§ 5499. Keeping record of all deeds.—All deeds to the county board of education shall be registered and delivered to the clerk of the superior court for safe keeping, and the secretary of the county board shall keep an index by townships and school districts of all such deeds in a book for that purpose. (C. S. 5422.) (1923, c. 136, s. 91.)

§ 5500. Report on condition of school buildings.—It shall be the duty of the county superintendent to inspect all school buildings or have them thoroughly inspected before the opening of school, and report their condition to the committee and to the county board of education, with such recommendations as will make them comfortable and sanitary. (1923, c. 136, s. 93.)

§ 5501. Attending meetings of state and district associations of superintendents. — Unless providentially hindered, the county superintendent shall attend continuously during its session the annual meeting of the state association of county superintendents and the annual meeting of the district association of county superintendents, and the county board of education of his county shall pay out of the county school fund his traveling expenses including board while in attendance upon such meeting. (C. S. 5436.) (1923, c. 136, s. 94.)

§ 5502. Reports to state superintendent.—The county superintendent shall make such reports to the state superintendent as are required by law. The state superintendent of public instruction shall have authority to call on the county superintendent for school statistics and for reports on any phase of the school work or school conditions of the county, and it shall be the duty of the county superintendent to supply the information promptly and accurately. (C. S. 5442, revised.) (1923, c. 136, s. 95.)

Art. 12. Duty of County Superintendent Toward Committeemen, Teachers and Principals

§ 5503. Notifying committeemen of their duties.—The county superintendent shall notify committees of the rules and regulations of the county board of education and their duties in the school district. He shall notify the committees, before the opening of the school, of the appropriation for teachers' salaries, incidental and building fund, the amount of the local tax fund due each district, the salary schedule in force in the county, the law governing the payment of all district funds, the duties of the committeemen in the care and use of school buildings, and all other duties that may be helpful in conducting the school in each district. (1923, c. 136, s. 97.)

§ 5504. Distributing blanks and books. — It shall be the duty of the county superintendent to distribute to the various school committees and to teachers of his county all blanks, registers, report cards, record books, bulletins, and all other supplies and information furnished by the state superintendent of public instruction, who shall give instruction for proper use of same. (C. S. 5439, revised.) (1923, c. 136, s. 98.)

§ 5505. Issuance of second or third grade county certificates.—The county superintendent may issue on examination second and third grade certificates to teachers only when it is impracticable for the county officials to secure teachers holding state certificates, but such certificates shall be merely permits to teach and shall be valid only in the county in which they are issued, and shall be valid for only one year, but may be renewed. (C. S. 5646, revised.) (1923, c. 136, s. 99.)

§ 5506. Keeping record of all teachers.—The county superintendent shall keep a record of all teachers employed in the county, the kind of certificate held by each teacher, the length of service, success as a teacher, and the salary allowed by the county board of education. (1923, c. 136, s. 100.)

§ 5507. Approving selection of all teachers.—No election of a principal, supervisor, teacher, assistant, or supply teacher shall be deemed valid until such election has been approved by the county superintendent. And he shall not approve the election of a teacher for a longer period than one year, and no teacher shall be employed by a committee or approved by a county superintendent who is under eighteen years of age. And no superintendent shall approve the selection of any teacher or principal for a given school year who has willfully broken his or her written contract with some other superintendent for that year: Provided, a teacher shall have the right to resign her position after giving thirty days notice: Provided further, the superintendent shall not approve the selection of a teacher holding a second or third grade certificate unless it is impracticable to secure a resident teacher who holds a higher certificate. (C. S. 5664, 5665, revised.) (1923, c. 136, s. 101.)

§ 5508. Approving dismissal of teacher.—No teacher shall be dismissed by the committee until charges have been filed in writing with the county superintendent and approved by him: Provided, either the teacher or the committee may appeal to the county board of education. (C. S. 5661, revised.) (1923, c. 136, s. 102.)

§ 5509. Administering oaths to teachers.—The county superintendent shall have authority to administer oaths to teachers and all subordinate school officials when an oath is required of the same. (C. S. 5434.) (1923, c. 136, s. 103.)

§ 5510. Advising with teachers, principals and supervisors.—The county superintendent shall advise with teachers, principals, and supervisors as to the best methods of instruction, school organization and school government, and to that end he shall keep himself informed as to the progress of education, both in his own county and in other counties, cities, and states. And teachers, principals, and supervisors shall coöperate with him in putting into use the best methods of instruction, school organization and school government. (C. S. 5432, revised.) (1923, c. 136, s. 104.)

§ 5511. Visiting schools.—The county superintendent shall be required to visit each public school of his county at least twice while the schools are in session. He shall inspect school buildings and grounds in order to advise committeemen and county board of education as to the physical needs of the school, and he shall inform himself of the condition and needs of the several districts of his county. (C. S. 4534.) (1923, c. 136, s. 105.)

§ 5512. Holding teachers' meetings. — The county superintendent shall hold each year such teachers' meetings as in his judgment will improve the efficiency of the instruction in school. He may, with the coöperation of the supervisors or principals, outline reading courses for teachers and organize the teachers into special study groups, and, if necessary, not exceeding three school days may be set apart for this purpose. (C. S. 5435, revised.)

If a superintendent shall fail to advise with his teachers and to provide for the professional growth of his teachers while in service, the state superintendent shall notify the county board of education, and, after due notice, if he shall fail to perform his duties in this respect, either the county board of education may remove him from office or the state board of education may revoke his certificate. (1923, c. 136, s. 106.)

§ 5513. May suspend teachers. — The county superintendent shall have authority to suspend any teacher who shall fail, or who may be incompetent, to give instruction in accordance with the directions of the superintendent, or who shall willfully refuse to coöperate in teachers' meetings: Provided, any teacher who may be suspended by the superintendent may have the right to appear either to the county board of education or to the courts. (C. S. 5432, revised.) (1923, c. 136, s. 107.)

§ 5514. Director of summer schools. — The county superintendent shall have general direction of the county summer school for teachers of his county: Provided, the county board of education, upon the recommendation of the state superintendent of public instruction, may elect a special director of the county summer school and provide his compensation out of funds appropriated for summer schools. (1923, c. 136, s. 109.)

§ 5515. Illegal to keep in service teacher without a certificate.—It shall be unlawful for any board of trustees or school committee that receives any public school money from the county, state, or district, to keep in service any teacher, superintendent, principal, supervisor, or assistant superintendent that does not hold a certificate in compliance with law.

The county, city or union school superintendent or other officials are forbidden to approve any voucher for salary of any person kept in service in violation of the provisions of this section, and the treasurer of the county, town, or city schools is hereby forbidden to pay out of the school fund the salary of any such person: Provided, that nothing herein shall prevent the employment of temporary substitutes or emergency teachers under such rules as the county board of education may prescribe. (C. S. 5656.) (1923, c. 136, s. 110.)

§ 5516. Contracts with teachers.—No contract entered into between a school committee or board of trustees and a teacher shall be valid until the contract is approved and signed by the superintendent. The contract shall show the salary allowed and such rules and regulations governing teachers in school as the county board of education or board of trustees may direct. No voucher for the salary of a teacher shall be signed by the superintendent unless a copy of the contract has been filed with him. Wherever a teacher has been employed under contract as herein provided, and afterward is reëlected to the same or similar position and no new contract is entered into, the old contract shall be deemed valid. (C. S. 5664, revised.) (1923, c. 136, s. 111.)

When the board of trustees of a school district recommends public school teachers for the ensuing term of schools to the county superintendent of education, his contracts with teachers so recommended, made in accordance with the provisions of the statute relating thereto becomes a binding obligation upon the county commissioners when approved by it, and is in conformity with the budget of the county board of education, or when it is later approved by the county board of commissioners under the provisions of the statute. Hampton v. Board of Education, 195 N. C. 213, 141 S. E. 744.

When there is one month for which the teachers of a school district have not been paid in accordance with their contracts of employment, and from the sum total of the approved budget of the board of education there remains a sufficiency to pay them, the board of county commissioners is liable for its payment, the statute not requiring the approval of the county commissioners for each separate item of the school budget. Hampton v. Board of Education, 195 N. C. 213, 141 S. E. 744.

§ 5517. How teachers shall be paid.—When a teacher is properly elected and contract has been properly signed and deposited as required by law vouchers may be presented each school month to the county superintendent signed by at least two members of the committee. When presented the superintendent shall approve the same by countersigning it, and when presented to the treasurer it shall be promptly paid, and it shall be the duty of the county board of education to provide the funds for the prompt payment of teachers' salaries, and it shall be the duty of the county board of education to provide a convenient means for securing the signature of the members of the committee to the teachers' vouchers.

In all union schools the principal of the school may present monthly pay rolls in duplicate of all teachers, signed by two members of the committee. The superintendent may countersign the pay roll, and when presented to the treasurer he shall issue a check on the county fund for the salary of and payable to each teacher: Provided, the county superintendent shall keep in his office a duplicate of the pay roll approved by him. (C. S. 5664, 5669, revised.) (1923, c. 136, s. 112.)

Approval of Vouchers.—Mandamus is the proper action to compel a superintendent to approve a teacher's voucher. The claim is not a money demand. If there are any reasons why the vouchers should not be signed they are matters to be heard by the court, but the signing by the superintendent is a mere ministerial duty. Ducker v. Venable, 126 N. C. 447, 35 S. E. 818.

§ 5518. When superintendent may withhold pay of teachers.—The county superintendent may refuse to sign the salary voucher for the pay of any teacher, supervisor or principal who delays or refuses to render such reports as are required by law. But whenever the reports are delivered in accordance with law the vouchers shall be signed and teachers paid. (C. S. 5667, revised.) (1923, c. 136, s. 113.)

§ 5519. Schools receiving public funds required to report.—All teachers and principals in schools under the control of the county board of education shall be required to make to the county superintendent such reports as the county board of education may direct. But the superintendent of any city school or the superintendent or principal of any union school in a special charter district shall make such reports to the state superintendent of public instruction as are required by him, and a copy of all such reports shall be sent to the county superintendent. (C. S. 5383, revised.) (1923, c. 136, s. 114.)

§ 5520. Reporting defective children. — It shall be the duty of the superintendent to report through proper legal channels the names and addresses of parents, guardians or custodians of deaf, dumb, blind, and feeble-minded children to the principal of the institution provided for each, and upon the failure of the county superintendent to make such reports he shall be fined five dollars for each child of the class mentioned above not so reported. (C. S. 5567, 5571.) (1923, c. 136, s. 117.)

Art. 13. Duty of County Superintendent in Regard to School Funds

§ 5521. Duty in preparing school budgets. — The county superintendent shall keep the records of his office in such detail and in such an orderly way that the information for the budgets required by law may be prepared promptly, and he shall see that the budgets are prepared promptly and accurately, and he shall so keep the records in his office so that any county official or citizen of the county may, upon request, see what the school in each district is costing, and what the total cost is to the county. It shall be his duty to sign all budgets and to take oath that the information contained therein is correct. (1923, c. 136, s. 118.)

§ 5522. Duty to keep complete record of finances. — The county superintendent shall keep in his office a complete record of the school finances of the county, what is appropriated to each district, and the division of the funds between the county and the city, the amount of loans from state and dates of payment, the amount of bond issues in each district, the rate of interest, date of payment, and he shall so keep his records that the school accounts may be audited with the least expense to insure a complete audit in accordance with law, and if he shall fail to keep the records of the acts of the county board of education so that they may be audited in accordance with law, the county board of education may remove him from office. (1923, c. 136, s. 119.)

§ 5523. Record of local taxes. — The county superintendent shall keep in his office a record of all local tax, special charter and special school taxing districts in his county, the boundaries of each, the number of taxable polls, and the valuation of the taxable property and the special tax rate voted and levied for schools. On or before

September first of each year he shall supply the county treasurer with a complete list of all such districts, and the estimated amount of tax to be collected in each district.

The treasurer shall keep a separate account of each such district, and no part of any funds belonging to one district shall be used for any other district, or for any other purpose than to meet the lawful expenses of such district to which the funds collected belong. And no funds derived from local or special taxes shall be paid out by the treasurer except on properly executed order signed by the county superintendent, and if the treasurer shall fail to perform his duties as outlined in this section, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 136, s. 120.)

§ 5524. Record of fines, forfeitures, and penalties.—It shall be the duty of the county superintendent to keep a record of all fines, forfeitures and penalties due the school fund, and to this end all county officials that in any way handle such funds shall on demand report the same to the county superintendent; and he shall see that these funds are deposited with the treasurer and placed to the credit of the school fund. (C. S. 5437, 5497, revised.) (1923, c. 136, s. 121.)

§ 5525. Disbursement of funds.—It is the duty of the county superintendent to approve and sign all vouchers for the disbursement of all district funds except the funds belonging to special charter districts, for the payment of which special provisions are made by law. And the treasurer shall honor no voucher that is not first approved and signed by the county superintendent or the secretary of the board of education. And no order shall be signed by the county superintendent or the secretary of the board for more money than is apportioned to and raised by local or special taxes in that district for the fiscal year. Nor shall he endorse the order of any teacher who does not produce a certificate as required by law, nor for more money than the salary schedule in force in the county would entitle the teacher to receive.

It shall be the duty of the county superintendent or the secretary of the board to sign all vouchers issued by order of the county board of education and signed by the chairman of the board, and no voucher shall be paid by the treasurer that is not properly signed. (C. S. 5450, 5466, 5656, 5669, revised.) (1923, c. 136, s. 122.)

When Treasurer's Duty to Honor.—The treasurer of the school fund can not pay out any of the money coming into his hands as such except upon the order of the secretary of the county board of education and approved by the county superintendent. See County Board v. County of Wake, 167 N. C. 114, 116, 83 S. E. 257.

SUBCHAPTER V. SCHOOL COMMITTEES —THEIR DUTIES AND POWERS

Art. 14. In Non-Local Tax Districts

§ 5526. Number and term of office.—There shall be in each non-local tax school district a school committee, consisting of three persons, appointed by the county board of education. The term of office shall be three years or until their successors are elected and qualified, and the members shall be so elected that one shall retire each year. (C. S. 5457, 5458, revised.) (1923, c. 136, s. 123.)

§ 5527. When elected.—The county board of education at its first meeting in April of each year, or as soon thereafter as convenient, shall appoint one member of the school committee in place of the member whose term has expired. If a vacancy shall occur at any time by death, resignation, or otherwise, the county board shall fill such vacancy. (C. S. 5457, 5460, revised.) (1923, c. 136, s. 124.)

§ 5528. Eligibility. — Each school committeeman shall be a person of intelligence, of good moral character, and of good business qualifications, and known to be in favor of public education. (C. S. 5461.)

In all Indian schools authorized by law the committeemen may be selected from Indians residing in the district. (C. S. 5547.) (1923, c. 136, s. 125.)

§ 5529. Oath of office.—Each school committeeman before entering on the duties of office shall take oath for the faithful performance thereof, and this oath may be taken before the county superintendent. (C. S. 5433 and 5459.) (1923, c. 136, s. 126.)

§ 5530. Dismissal for cause. — In case the county superintendent shall have evidence at any time that any member of any school committee is not capable of discharging the duties of his office, or is not discharging his duties, he shall bring the matter to the attention of the county board of education, which shall thoroughly investigate the charges, and shall remove such committeeman and appoint his successor, if sufficient evidence shall be produced to warrant his removal and the best interests of the schools demand it. (C. S. 5414.) (1923, c. 136, s. 127.)

§ 5531. Committeemen cannot teach.—No person while serving as a member of any district committee shall be eligible to be elected as a teacher of any public school, or as a member of the county board of education, and should such person be elected to teach in any public school or private school receiving public funds or as a member of the county board of education before resigning as a member of the district committee said election is hereby declared null and void. (C. S. 5663.) (1923, c. 136, s. 128.)

§ 5532. Organization of committee. — The school committee, at their first meeting after the membership has been completed by the county board of education, shall elect from their number a chairman and secretary, and shall keep a record of their proceedings in a book to be kept for that purpose. The name and address of the chairman and secretary shall be reported to the county superintendent and recorded by him. (C. S. 5463.) (1923, c. 136, s. 129.)

§ 5533. How to employ teachers.—The school committee shall have authority to employ teachers only on the recommendation of the county superintendent. The committee shall meet at a convenient time and place for this purpose, and no teacher shall be employed by any committee except at regularly called meetings of such com-

mittee. No election of any teacher or assistant teacher shall be deemed valid until such election has been approved by the county superintendent, and no contract for teachers' salaries shall be made during any year to extend beyond the term of a majority of the committee, nor for more money than accrues to the credit of the district for the fiscal year during which the contract is made. (C. S. 5661, 5662, 5664, 5665, revised.) (1923, c. 136, s. 130.)

Period of Employment.—A school committee under an act regulating common schools (Rev. Code, chapter 66), had no authority to employ a teacher for a period extending beyond the time when their office expires. Taylor v. School Committee, 50 N. C. 98.

Personal Liability of Committeeman.—In Robinson v. Howard, 84 N. C. 152, it was held that a school committeeman was not liable personally on a contract by which he employed a teacher, and that the remedy was by mandamus to compel the payment of the money by the proper officer in the way provided by law. If, though the act is wrongful and malicious, an action will lie against the officer in his personal capacity to recover damages for the wrong committed by him. Spruill v. Davenport, 178 N. C. 364, 365, 100 S. E. 527.

Evidence.—Under the provisions of this section, refusal of the county superintendent to approve the election of a teacher on the ground that he did not have sufficiently high certificates as a teacher and that his election as a teacher would not be for the best interests of the school will not sustain the finding of the trial judge that the refusal of the county superintendent of schools to approve the election was arbitrary, captious and without just cause, and a mandamus to cause his approval is improvidently issued by the lower court. Cody v. Barrett, 200 N. C. 43, 156 S. E. 146.

Cited in Hampton v. Board of Education, 195 N. C. 213, 215, 141 S. E. 744.

§ 5534. When teachers may be suspended.—The school committee shall have authority to suspend or dismiss teachers who may be guilty of any immoral or disreputable conduct or who may be incompetent to discharge efficiently the duties of a public school teacher or who may be persistently neglectful of such duties, but no teacher shall be dismissed until charges shall have been filed in writing with the county superintendent. And the county superintendent shall give the teacher at least five days notice, in which time he or she shall have the opportunity to appear before the committee of the district in which the teacher is teaching. And after a full and fair hearing the action of the committee, if it has the approval of the county superintendent, shall be final: Provided, the teacher shall be given the right to appeal to the county board of education. (C. S. 5432, 5661.) (1923, c. 136, s. 131.)

Liability of Committee.—It is the duty of the committee of a school district, under the statute, to dismiss a teacher of the public schools therein who has not been legally appointed, according to the statute, and no damages are recoverable against the individual members when in the exercise of this rightful power they act accordingly, whether their motives were bad or otherwise. Spruill v. Davenport, 178 N. C. 364, 100 S. E. 527.

§ 5535. Minimum term for which teacher can be paid.—The committee shall not approve the voucher of a teacher for compensation for a shorter term than one month, unless the teacher is providentially hindered from completing the term. (C. S. 5668.) (1923, c. 136, s. 132.)

§ 5536. How teachers shall be paid.—In paying teachers the committee shall give an order on the treasurer of the county school fund, payable to such teacher, for the full amount due for services rendered. Orders on the treasurer shall be valid when signed by two members of the committee and countersigned by the county superintendent. (C. S. 5450, 5669.)

If a committeeman shall refuse or fail to sign a teacher's voucher or order for salary the county board of education, for good and sufficient reason, may order the voucher paid, and the treasurer shall honor such a voucher if it is signed by the chairman and secretary of the county board of education. (1923, c. 136, s. 133.)

§ 5537. Power to contract with private schools.—In any school district where there may be a private school regularly conducted for at least six months in the year, unless it is a sectarian or denominational school, the school committee with the approval of the county superintendent may contract with the teacher of such private school to give instruction to all pupils of the district between the ages of six and twenty-one years in the branches of learning taught in the public schools, as prescribed by law, without charge to pupils and free tuition. The amount paid such private school for each pupil in the public school branches, based on the average daily attendance, shall not exceed the regular tuition rates in such school for branches of study. (C. S. 5610 and 5615.) (1923, c. 136, s. 135.)

§ 5538. Powers as to school property.—The school committee shall be entrusted with the care and custody of all schoolhouses, schoolhouse sites, grounds, books, apparatus, or other school property in the district, with full power to control same, as they may deem best for the interest of the public schools and the cause of education, not in conflict with the rules and regulations governing school property adopted by the county board of education: Provided, if the committee is unable or shall fail to take due care of the schoolhouse and to protect all property belonging to it, the county board of education may designate some responsible citizen of the district to have special charge of the property during vacation. (C. S. 5464 revised.) (1923, c. 136, s. 136.)

Cited in Wiggins v. Board of Education, 198 N. C. 301, 302, 151 S. E. 730.

§ 5539. Powers as to purchase of supplies.—The committee shall have authority to purchase the supplies necessary for conducting the schools and for repairs, to an amount not to exceed in the aggregate the sum apportioned for this purpose by the county board of education in any one year. But nothing in this section shall be so construed as to give school committees the right to make expenditures without the order of the county board. (C. S. 5466.) (1923, c. 136, s. 137.)

§ 5540. Reports to board on schoolhouses and school property.—The school committee shall make such reports to the county board of education as the board may deem necessary. (C. S. 5468, revised.) (1923, c. 136, s. 138.)

§ 5541. Superintendent and committee to keep records of receipts, expenditures and contracts.—The county superintendent shall keep by districts an itemized statement of all moneys apportioned to such district, the amount received and expended by each committee for each school, and a copy of all contracts made by them with teachers. It is the duty also of the committee to keep

up with the funds of the district. It should know what the budget for the district contains, in order to know how much money is available and how it is spent. It is their duty to know the salary schedule and the limitations placed on committeemen in making contracts with teachers. It is illegal for committeemen to employ teachers at a salary higher than that contained in the authorized salary schedule; therefore, when the May budget is submitted it is the duty of each committeeman to examine it carefully to see how much money is allowed for teachers' salaries, and how many and what grade of teachers may be employed with the money allowed in the budget. (C. S. 5438, 5476, 5664, revised.) (1923, c. 136, s. 139.)

§ 5542. Disbursements of district funds.—Every order for the payment of money for repairs, school furnishing, supplies, or for any purpose whatsoever, the contract or order for which having been given by the school committee, before it shall be a valid voucher for the county treasurer, shall be signed first by at least two members of the school committee, then by the county superintendent. (C. S. 5450.) (1923, c. 136, s. 140.)

§ 5543. Caring for sanitation of school grounds.—The district committeemen are required to keep the school privies in a sanitary condition, and the committee shall be governed in this particular by recommendations of the state board of health.

Failure of the committeemen to keep privies at public schoolhouses in proper sanitary condition or a failure to notify the county board of education of their unsanitary condition shall be considered a misdemeanor and shall subject them severally and personally to fine and imprisonment, or both, in the discretion of the court. (C. S. 5757, revised.) (1923, c. 136, s. 141.)

§ 5544. Providing good water supply.—It is the duty of the school committeemen to see that the schools have good water supply, and wherever a school is without a good water supply it is the duty of the committee to report the condition to the county superintendent before and even after the opening of school, and it shall be the duty of the county superintendent to present the need to the county board of education, and it shall be the duty of the county board of education to make such provision as will give the teachers and children a good supply of wholesome water. (1923, c. 136, s. 142.)

§ 5545. Obeying orders of sanitary committee or board of health.—It shall be the duty of teachers, principals, superintendent, committee, and all other governing boards having authority over the maintenance, support, and conduct of a public school to obey the rules and regulations of the sanitary committee or board of health for the protection of health in the district. (1923, c. 136, s. 143.)

Art. 15. Duties and Powers of Committeemen in Local Tax Districts

§ 5546. How elected.—Committeemen in local tax districts, created by and under the control of the county board of education, shall be elected by the county board of education, and they shall be subject to the same laws and the same rules and regulations of the county board of education as those governing the acts of the committeemen in non-local tax districts, and they shall be subject to such other laws as may hereafter be provided. (C. S. 5514, 5536, revised.) (1923, c. 136, s. 144.)

§ 5547. Number of committeemen in local tax districts.—The county board of education may in its discretion elect not less than three nor more than five members to serve as committeemen in local tax districts. The term of office of each shall be for three years, but shall be so arranged that a majority of the board shall not retire in any one year, except as a result of death, resignation, or removal for cause. (C. S. 5514, 5536, revised.) (1923, c. 136, s. 145.)

§ 5548. Joint employment of superintendent or principal by districts in cities and towns.—By and with the consent of the county board of education the governing board of two or more local tax or special charter districts, including any city or town, may, by a majority vote of the committee in each district, employ a superintendent of the public schools of such districts, and he shall perform all the duties of the county superintendent of public instruction as to such districts, and shall make to the county superintendent all reports that may be necessary to enable him to make his reports to the state superintendent: Provided, the teacher so employed shall hold or shall be entitled to hold a superintendent's certificate; and provided further, the combined schools under the jurisdiction of the superintendent employed shall be large enough to rank as a city school or a union school of sufficient size to entitle the authorities to employ a superintendent. If the two districts do not employ as many as twenty teachers, a principal may be employed in the same manner provided in this section for the employment of a superintendent. (C. S. 5431, revised.) (1923, c. 136, s. 146.)

§ 5549. Money derived from local taxes.—All moneys derived from local taxes shall, upon collection, be placed to the credit of the committee of the district.

The county superintendent shall keep in his office a record of all tax school districts in his county, the boundaries of each, the number of taxable polls, and the valuation of the taxable property and the special tax rate voted and levied for schools. On or before September first of each year he shall supply the committee of the district with the estimated amount of taxes to be collected in the district, and the balance or deficit from the preceding year.

The treasurer shall keep a separate account of each such district, and no part of any funds belonging to the district shall be used for any other district, or for any other purpose than to meet the lawful expenses of the local tax district to which the funds collected belong. And no local tax district funds shall be paid out by the treasurer except on properly executed order signed by the committee and the county superintendent; and if the treasurer shall fail to perform his duties

as outlined in this section, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (C. S. 5449, 5514, 5536, revised.) (1923, c. 136, s. 147.)

§ 5550. Duty of sheriff or tax collector.—It shall be the duty of the sheriff or the tax collector in collecting the taxes of local tax districts to keep the funds of each district separate from all other funds, and when public school funds are deposited with the treasurer, the sheriff or tax collector shall specify which funds belong to local tax districts and to what district the local tax funds belong. (1923, c. 136, s. 148.)

§ 5551. How special tax funds are paid out.—Orders on the treasurer shall be valid when signed by two members of the committee and countersigned by the county superintendent. It shall be illegal for the county superintendent or the county board of education to use any of local tax funds for any purpose except for the support, maintenance, and permanent improvement of the school within the district in which the tax is collected: Provided, that if in the opinion of the local committee and the County Board of Education the schools could be organized on a more economical basis by transferring the pupils in the upper grades to an adjoining local tax district such part of the local taxes accruing in any such local tax district as may be deemed fair may be used in the adjoining district to pay the instructional cost of the children so transferred. (C. S. 5536, 5669, revised.) (1923, c. 136, s. 150; 1929, c. 225, s. 1.)

Editor's Note.—The Act of 1929 added the proviso to this section.

§ 5552. How to determine rate of local tax to be levied in district.—It is the duty of the committee to advise with the county board of education as to the rate of local taxes to be levied in the district, and upon a petition signed by a majority of the school committee of any local tax district and approved by the county board of education, the board of county commissioners shall increase or reduce, according to the desires of the petitioners, the tax levy in said local tax district or special charter district: Provided, the rates shall not be increased beyond the maximum rate voted by the people, nor shall it be reduced below the minimum rate voted. (1923, c. 136, s. 152.)

§ 5553. Committee may provide for transportation of pupils.—Upon the consolidation of two or more local tax districts, the county board of education has the authority to provide transportation for six months out of the general county fund. The cost of transportation for the remainder of the term shall be paid out of the local tax funds: Provided, the trucks may be owned and controlled by the county boards of education. (C. S. 5475, revised.) (1923, c. 136, s. 153.)

§ 5554. Loans to districts for building schoolhouses.—The county board of education may make loans for the erection of schoolhouses to local tax, special charter or special school taxing districts, but all such loans shall be made upon written petition of a majority of the committee of the local tax or board of trustees of special charter district, and said petition shall authorize the county board of education to deduct a sufficient amount from the local taxes or the county fund due said district to meet the payments as they come due. If the loan is made without a written petition from the committee or the board of trustees, the county board of education shall have no lien upon the local taxes for the repayment of the loan. (C. S. 5675, amended.) (1923, c. 136, s. 156.)

§ 5555. How special charter district may become local tax district.—The authorities of a special charter district may have the charter repealed, and the district may become a local tax district in the following manner: The board of trustees of a special charter school may petition the county board of education to assume full jurisdiction of the special charter district, and the county board of education shall grant the petition. Thereupon, the board of trustees of the special charter school shall convey by deed the title to all school property of whatsoever kind to the county board of education. When the deed is recorded in the name of the county board of education, the special charter is hereby repealed, and the special charter district by that act shall become a local tax district, and shall be governed as all other local tax districts are governed. The term of office of each member of the board of trustees of the special charter school shall expire with the transfer of the property, and a district committee shall be elected in accordance with law by the county board of education.

If the board of trustees of the special charter district shall refuse to act, then one-fourth of the freeholders of a special character district may petition the county board of education for an election to ascertain the will of the people on the question of repealing the charter and becoming a local tax district. If the county board of education shall approve the petition, it shall be presented to the board of county commissioners, which shall call an election of the votes in the special charter district. The laws governing this election shall be the same as the laws governing a local tax election. Those in favor of repealing the charter shall vote a ballot "For repeal of charter," and those against repeal shall vote a ballot "Against repeal of charter." If a majority of the votes cast shall be in favor of repeal, the district shall become a local tax district, and the property shall be transferred by the board of trustees to the county board of education.

The provisions of this section shall in no wise affect the authority to levy local taxes theretofore voted by the people of the district, but the same shall remain in full force and effect, notwithstanding the repeal of the charter. Nor, shall the provisions of this section affect the validity of the bonded indebtedness of any special charter or incorporated district. The same shall be and remain a charge upon all the taxable property of said district in as full and ample manner as it was before the repeal of the charter. (1923, c. 136, s. 157.)

As to enlarging Special Charter districts, see section 5646.

In General.—Special charter districts do not as a rule come within the compulsory regulations of the public school authorities unless and until they have surrendered their

special charter according to the provisions of this section. Blue v. Board, 187 N. C. 431, 434, 122 S. E. 19.

Liability for Past Indebtedness.—Where a special school district with an existing indebtedness has been included in the creation of a larger district, the formation of the new district without provision therefor in effect retains the indebtedness only on the special district incorporated therein, and is valid under our general statutes on the subject, the old district for the purpose of paying the indebtedness becoming a local tax district. Causey v. Guilford County, 192 N. C. 298, 135 S. E. 40.

SUBCHAPTER VI. TEACHERS AND PRINCIPALS

Art. 16. Their Powers, Duties and Responsibilities

§ 5556. Health certificate required for teachers.—Any person serving as county superintendent, city superintendent, teacher, janitor, or any employee in the public schools of the state shall file in the office of superintendent each year, before assuming his or her duties, a certificate from the county physician, or other reputable physician of the county, certifying that the said person has not an open or active infectious state of tuberculosis, or any other contagious disease.

The county physician shall make the aforesaid certificate on a form supplied by the state superintendent of public instruction, and without charge to the person applying for the certification, and any person violating any of the provisions of this section shall be guilty of a misdemeanor and subject to a fine or imprisonment in the discretion of the court. (C. S. 5659.) (1923, c. 136, s. 159.)

§ 5557. How to apply for a position.—It is the duty of teachers, in making application for a position to teach, first to file the application with the superintendent, stating the kind and the number of the certificate held, when the certificate expires, experience in teaching, the position last held, and a statement that the applicant has no contageous disease. The application should also state that the applicant, if elected, will not break the contract, without the approval of the superintendent who approved the contract, without giving at least thirty days notice, and that he or she will observe the rules and regulations adopted by the board of trustees or the county board of education under whose jurisdiction he or she is employed to teach. (1923, c. 136, s. 160.)

§ 5558. When teacher may annul contract.—The teacher may, after entering into a written contract, annul the contract by giving the superintendent a written notice of at least thirty days, and the superintendent shall pay for the full time the teacher has taught: Provided, the teacher has taught as much as twenty days. But if the teacher breaks the contract without giving thirty days notice, it shall be the duty of the superintendent to report the name of the teacher to the state superintendent, and the certificate held may either be revoked or reduced to the next lower grade. And no other superintendent shall employ or recommend for employment in any year a teacher who has broken his or her contract for that year. This section shall also apply alike to principals and supervisors. (1923, c. 136, s. 161.)

§ 5559. How teachers are selected.—All teachers shall be employed by the committee or the board of trustees of the district in which they are to teach, but no election is valid in any district without the approval of the superintendent. The election by the committee or board of trustees shall be at a regular meeting of the committee or board of trustees called for that purpose, and when elected the committee or board of trustees shall enter into a written contract with the teacher for the ensuing year. When the contract is signed by the superintendent on the recommendation of the committee or board of trustees, it is a valid contract and the teacher is properly elected. But no teacher under eighteen years of age shall be eligible for election, and no teacher who has willfully broken her written contract can again legally be elected for that year. (C. S. 5645, 5661, 5662, 5664, revised.) (1923, c. 136, s. 162.)

Cited in Hampton v. Board of Education, 195 N. C. 213, 215, 141 S. E. 744; Perdue v. Board of Equalization, 205 N. C. 730, 734, 172 S. E. 396.

§ 5560. How teachers may be dismissed.—The school committee or board of trustees, with the approval of the superintendent, may dismiss a teacher for immoral or disreputable conduct in the community or for failure to comply with the provisions of the contract. The superintendent, with the approval of the committee or the board of trustees, has authority, and it is his duty, to dismiss a teacher who may prove himself or herself incompetent or may willfully refuse to discharge the duties of a public school teacher, or who may be persistently neglectful of such duties. Every teacher dismissed for cause shall be reported by the superintendent to the state superintendent, and he shall have authority to revoke the certificate and debar the teacher from teaching in any other county. (C. S. 5432, 5661, revised.) (1923, c. 136, s. 163.)

§ 5561. Salaries of teachers.—The salaries of all teachers employed in a county shall be fixed by the county board of education on the recommendation of the county superintendent, unless the general assembly has given special authority to some other board to fix the salaries of teachers in special charter districts. But the salary fixed for all teachers must be in accord with the authorized salary schedule. (1923, c. 136, s. 164.)

Cited in Hampton v. Board of Education, 195 N. C. 213, 215, 141 S. E. 744.

§ 5561(a). Reduction of salaries. — The salary of no teacher engaged solely in teaching in the public schools of the State shall be cut more than ten per cent below the standard salary scale in operation during the year nineteen thirty, nineteen thirty-one, nor more than ten per cent of the salary which was received or should have been received by such teacher during said year, provided, increments accruing for years one thousand nine hundred thirty-one, thirty-two, thirty-three, shall not be added as provided in the General School Bill, any act or resolution of this General Assembly to the contrary notwithstanding. (1931, c. 454.)

§ 5562. Duties of teachers.—It shall be the duty of all teachers to maintain good order and discipline in their respective schools; to encourage temperance, morality, industry, and neatness; to promote the health of all pupils, espe-

cially of the children in the first three grades, by providing frequent periods of recreation, to supervise the play activities during recess, and to encourage wholesome exercise for all children; to teach as thoroughly as they are able all branches which they are required to teach; to provide for singing in the school, and so far as possible to give instruction in public school music; to ascertain the cause for non-attendance of pupils, and report all violators of the compulsory school law to the attendance officer in accordance with the rule governing attendance and reports; and to enter actively into the plans of the county superintendent for the professional growth of the teachers of the county. (C. S. 5666, revised.) (1923, c. 136, s. 165.)

§ 5563. Power to suspend or dismiss pupils.—A teacher in a school having no principal, or the principal of a school, shall have authority to suspend any pupil who willfully and persistently violates the rules of the school or who may be guilty of immoral or disreputable conduct, or who may be a menace to the school. But every suspension for cause shall be reported at once to the attendance officer, who shall investigate the cause and shall deal with the offender in accordance with rules governing the attendance of children in school. (C. S. 5666, revised.) (1923, c. 136, s. 166.)

§ 5564. Duty to make reports to superintendent.—Every teacher or principal of a school under the jurisdiction of the county board receiving aid from the public school fund shall be required to make such reports as are required by the county board of education, and the county superintendent shall not approve the voucher for the pay of teachers at the end of each month until the monthly reports required are made, and at the end of the year until the final reports are made: Provided, the county superintendent may require teachers to make reports to principals, and principals to make reports to the superintendent. (C. S. 5667, revised.) (1923, c. 136, s. 167.)

§ 5565. Care of the school building.—It is the duty of the teachers and principals in charge of school buildings to instruct the children in the proper care of public property, and it is their duty to exercise due care in the protection of school property against damage, either by defacement of the walls and doors or breakage on the part of the pupils, and if they shall fail to exercise a reasonable care in the protection of property during the school day, they may be held financially responsible for all such damage, and if the damage is due to carelessness or negligence on the part of the teachers or principal, the superintendent may hold those in charge of the building responsible for the damage, and if it is not repaired before the close of the term a sufficient amount may be deducted from their final vouchers to repair the damage for which they are responsible under the provisions of this section. If any child in school shall carelessly or willfully damage school property, the teacher shall report the damage to the parent, and if he refuses to repair the same, the teacher shall report the offense to the superintendent of public welfare. (1923, c. 136, s. 168.)

§ 5566. Teacher serving as committeeman, member of county board, or county superintendent.—No person while actively engaged in teaching in the public schools or in a private school which receives money from the county school fund shall be permitted to serve as a member of the county board of education or as a member of the school committee, nor shall a teacher be allowed to teach school and at the same time serve as county superintendent. (C. S. 5409, revised.) (1923, c. 136, s. 169.)

§ 5567. Teachers to make physical examination of children.—Upon receipt of instructions, rules and regulations from the state board of health and from the state superintendent of public instruction, it shall be the duty of every teacher in the public schools to make a physical examination of every child attending the school, and enter on cards and official forms furnished by the state board of health a record of such examination. The examination shall be made at the time directed by the state board of health and the state superintendent of public instruction, but every child shall be examined at least once every three years. The state board of health and the state superintendent of public instruction shall so arrange the work as to cover the entire state once every three years.

The teacher or principal shall transmit the record cards and other blank forms made by him or her to the North Carolina state board of health, and if any teacher or principal fails within sixty days, after receiving the aforesaid forms and requests for examination and report, to make such examination and report as herein provided, the teacher or principal shall be guilty of a misdemeanor and subject to a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) or imprisonment at the discretion of the court. (C. S. 5748, 5749.) (1923, c. 136, s. 170.)

§ 5568. Principal of union school.—The principal of a union school shall be the executive officer of the school, and all teachers in both the high school and in the elementary school departments shall be responsible to the principal. He shall have authority, subject to the approval of the county superintendent, to grade and classify the pupils, outline study courses for teachers, and exercise discipline over the pupils of the school. He shall make all reports to the county superintendent, and give suggestions to teachers for the improvement of instruction in school. And it shall be the duty of each teacher in a union school to coöperate with the principal in every way possible to promote good teaching in the school and a progressive community spirit among its patrons. (1923, c. 136, s. 171.)

Art. 17. Certification of Teachers

§ 5569. Requirement as to holding certificates.—All the teachers and principals employed in the public schools of the state or in schools receiving public funds for the maintenance of a six-months school term shall be required to hold certificates in accordance with the law, and no contract for the employment of teacher or principal is valid until the certificate is secured. (1923, c. 136, s. 158.)

§ 5570. Examinations, accrediting, and certificates.—The state board of education shall have entire control of examining, accrediting without examination, and certificating all applicants for the position of teacher, principal, supervisor, superintendent, and assistant superintendent in all public elementary secondary schools of North Carolina, urban and rural. The board shall prescribe rules and regulations for examining, accrediting without examination, and certificating all such applicants for the renewal and extension of certificates and for the issuance of life certificates. (C. S. 5643.) (1917, c. 146, s. 2; 1921, c. 146, s. 16.)

§ 5571. Certificate prerequisite to employment.—No person shall be employed or serve in the public schools as teacher, principal, supervisor, superintendent, or assistant superintendent who shall not be certificated for such position by the state board of education in accordance with the law. (C. S. 5644.) (1917, c. 146, s. 2; 1921, c. 146, s. 16.)

Cited in Hampton v. Board of Education, 195 N. C. 213, 215, 141 S. E. 744.

§ 5572. Teacher must be eighteen.—No certificate to teach shall be issued to any person under eighteen years of age. (C. S. 5645.) (Rev., s. 4163.)

Cited in Hampton v. Board of Education, 195 N. C. 213, 215, 141 S. E. 744.

§ 5573. Second and third grade certificates.—The examination and certification of all applicants for second and third grade certificates shall be under the control of the county superintendent of each county or of the town or city superintendent of each town or city system operated under any special acts or charter. (C. S. 5646.) (1917, c. 146, s. 2.)

§ 5574. Approval of certificates; refusal of approval; appeal and review.—No certificate issued by the board shall be valid until approved and signed by the county superintendent of the county or the city superintendent of the city in which the examination of the holder of said certificate was held, or in the schools of which the holder of said certificate, if issued without examination, applies to teach. Any certificate when so approved by said county or city superintendent shall be of state-wide validity, and in case such county or city superintendent shall refuse to approve and sign any such certificate, he shall notify the state board of education and state in writing the reasons for such refusal. The said board shall have the right, upon appeal by the holder of said certificate, to review and investigate and finally determine the matter. (C. S. 5647.) (1917, c. 146, s. 2; 1921, c. 146, s. 16.)

§ 5575. Certificates heretofore granted; renewals.—All state high school certificates, five-year state elementary certificates, and first grade county certificates in force on March fifth, nineteen hundred and seventeen, shall continue in force until the date of their expiration as stated in each certificate, after which the present holders of such certificates shall be subject to such rules and regulations as the state board of education may adopt in regard to the issuance or renewal, with or without examination of certificates of the same class. (C. S. 5648.) (1917, c. 146, s. 3; 1921, c. 146, s. 16.)

§ 5576. Temporary and permanent certificates to superintendents and assistants.—The state board of education shall issue to all city superintendents, to all county superintendents, and to all assistant superintendents in service on March fifth, nineteen hundred and seventeen, temporary superintendents' or assistant superintendents' certificates without examination, and prescribe rules and regulations for the renewal and extension of the same. In cases of undoubted fitness, competency, and progressive efficiency, evidence of which shall be submitted in writing to said board, it shall issue to all such superintendents and assistant superintendents a permanent certificate without examination, under such rules and regulations as it may adopt. (C. S. 5649.) (1917, c. 146, s. 3; 1921, c. 146, s. 16.)

§ 5577. Questions for examination; lists printed and distributed. — The state board of education shall prepare questions for the examinations authorized under this article, and the state superintendent of public instruction shall cause lists of the questions so prepared to be printed, and shall, before the date of such examination, send in sealed packages, not to be opened until the day of the examination, to each superintendent or other person appointed to conduct said examinations in the various counties or cities of the state, a sufficient number of such lists. (C. S. 5651.) (1917, c. 146, s. 4; 1921, c. 146, s. 16.)

§ 5578. Dates for examinations; special examinations.—The second Tuesday in April, of each year is hereby designated for said examinations, which may be continued from day to day for three successive days, under such rules and regulations as said board may adopt; but no examination shall commence on any other day than the first day of the period mentioned in this section, and no examination shall be held at any other time. The board may in its discretion provide for special examinations to be conducted by such persons as it may appoint. (C. S., 5652; 1917, c. 146, s. 4; 1925, c. 180, s. 3.)

Editor's Note.—By amendment Public Laws 1925 "The second Tuesday in April" replaced a former provision for "The second Tuesday in April, July and October."

§ 5579. Conduct of examinations; transmission of papers.—The examinations shall be conducted by the county superintendent of each county for all applicants in his county, and in cities and towns of two thousand or more inhabitants the examinations for applicants for positions in the schools under their supervision may be conducted by the licensed superintendents of the schools in such cities and towns. All examinations of applicants for superintendents' certificates shall be conducted by the state board of education under such rules and regulations as it may adopt therefor. All examination papers shall be promptly transmitted to the secretary of the state board of education. (C. S., 5653.) (1917, c. 146, s. 4; 1921, c. 146, s. 16.)

§ 5580. Temporary local certificates. — Upon recommendation of the superintendent concerned, said board may grant a temporary certificate or

permit, valid in the county or city designated, to any teacher who, at the time of the last preceding examination, was not in the state, or who at such time was prevented by illness from taking the examination, as evidenced by the certificate of a physician. Such temporary certificate or permit, however, shall be valid only from the date of issuance to the date on which the state board of education shall make their report upon applicants at the next succeeding regular examination, and no such temporary certificate or permit shall be renewed. (C. S. 5654.) (1917, c. 146, s. 4; 1921, c. 146, s. 16.)

§ 5581. Assistants to board; stenographer; printing. — The state board of education, when judged by it to be absolutely necessary, may employ competent persons to assist in the reading and grading of examination papers, and shall fix the compensation of such persons not to exceed five dollars a day for the time employed, to be paid upon the requisition of the chairman of the board out of the funds provided under this article. The board is authorized to employ a stenographer at such compensation as it may fix, and to have done as public printing by the state printer all printing necessary for its work. (C. S. 5655.) (1917, c. 146, s. 5.)

§ 5582. Employment of persons without certificate unlawful; appropriations withheld; salaries not paid.—After July first, nineteen hundred and seventeen, it shall be unlawful for any board of trustees or school committee or any public school that receives any public school money from county or state to employ or keep in service any teacher, superintendent, principal, supervisor, or assistant superintendent that does not hold a certificate in compliance with the provisions of the law. Upon notification to the state board of education or to the county board of education that any school committee or board of trustees is employing or keeping in service a teacher, supervisor, principal, superintendent, or assistant superintendent in violation of the provisions of this section, the state board of education shall withhold from such county any and all appropriations from the state treasury for such school, and said county board of education shall withhold from said school any and all appropriations from the county school fund until compliance with the law.

The county, town, or city superintendent or other official is forbidden to approve any voucher for salary for any person employed in violation of the provisions of this section, and the treasurer of the county, town, or city schools is hereby forbidden to pay out of the school fund the salary of any such person: Provided, that nothing herein shall prevent the employment of temporary substitute or emergency teachers under such rules as the state board of education may prescribe. (C. S. 5656.) (1917, c. 146, s. 6; 1921, c. 146, s. 16.)

§ 5583. Classes of first-grade certificates.— There shall be the following classes of first-grade certificates: (1) Superintendents' and assistant superintendents'; (2) High school principals'; (3) High school teachers'; (4) Elementary school teachers'; (5) Elementary supervisors'; and (6) Special. The state board of education may subdivide and shall define in detail the different classes of first-grade certificates, determine the time of their duration and validity, prescribe the standards of scholarship for same, and the rules and regulations for the examination for them and for their issuance, and their renewal or extension. (C. S. 5657.) (1917, c. 146, s. 9; 1921, c. 146, s. 16.)

§ 5584. Misdemeanor to tamper with examination questions.—Any person who purloins, steals, buys, receives, or sells, gives, or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law before the date of the examination for which they shall have been prepared, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (C. S. 5658.) (1917, c. 146, s. 10.)

§ 5584(a). Colleges to aid as to certificates. — Each and every college or university of the state is hereby authorized, to aid public school teachers or prospective teachers in securing, raising, or renewing their certificates without restrictions, except as set forth in the rules and regulations of the state board of education, applying alike to all departments, work, and instructors of each and every college or university in this state. (1933, c. 497.)

SUBCHAPTER VII. REVENUE FOR THE PUBLIC SCHOOLS

Art. 18. How to Estimate Amount Necessary for Six Months Term—Equalization Fund

§ 5585. Duty of county board of education and county commissioners.—It shall be the duty of the county board of education of each county to make a fair estimate in accordance with law of the amount necessary to provide a six months school term, and it shall be the duty of the county commissioners of each county to determine and provide the amount necessary to maintain the school six months in accordance with law. And either the members of the county board of education or the members of the board of county commissioners failing to perform their respective duties shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 136, s. 172.)

Cited in Board of Education v. Walker, 198 N. C. 325, 151 S. E. 718; Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562; Powell v. Bladen County, 206 N. C. 46, 49, 173 S. E. 50.

§ 5586. The equalizing fund.—There is appropriated annually, from the state public school fund, as may be otherwise provided by law, an amount sufficient to equalize as near as may be the financial burden of supporting a six months school term in the several counties of the state. This fund shall be designated "'The State Equalizing Fund," which shall be apportioned by the state board of education, to counties needing aid, in such a way as to encourage the counties receiving aid to improve their schools by securing sufficient organization, administration, supervi-

sion, and well trained teachers. (1923, c. 136, s. 173.)

As to compensation of sheriff, etc., out of fund, see §§ 3921(a), 3921(b). As to state board of equalization and subsequent equalization funds, see Public Laws 1927, c. 256; 1929, c. 245; 1931, cc. 425, 430. And see §§ 5602(a), 5602(b).

In connection with Public Laws 1931, c. 430, see generally, Powell v. Bladen County, 206 N. C. 46, 173 S. E. 50; Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396.

Cited in Board of Education v. Walker, 198 N. C. 325, 151 S. E. 718; Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562.

§ 5587. Equalizing fund certified to counties by June first.—There is appropriated annually from the state public school fund the sum of one million two hundred and fifty thousand dollars, which shall be an equalizing fund to be distributed by the state board of education as hereinafter provided. The state board of education shall certify to each county on or before June first of each year the amount such county shall be entitled to draw from the equalizing fund. (1923, c. 141, s. 1.)

Cited in 1 N. C. Law Rev. 308.

§ 5588. How to ascertain per capita cost.—The state superintendent of public instruction shall calculate the per capita cost of instructing all children in all schools in each county of the state for the six months term of each school year on the basis of the salaries of teachers and principals actually paid: Provided, that in the event the salary or salaries actually paid exceed the state salary schedule, the state board of education shall calculate such salary or salaries on the basis of the state salary schedule. In calculating the average per capita cost, the state board of education shall calculate the per capita cost for the races separately and for the elementary and high schools separately. (1923, c. 141, s. 2.)

§ 5589. Basis of equalizing fund apportionment.—The state board of education shall apportion to each county a definite amount of the equalizing fund to be determined on the following basis: The state superintendent of public instruction shall determine for each county the amount necessary to pay the salaries of all teachers and principals for the school year one thousand nine hundred twenty-one, one thousand nine hundred twenty-two, and for the school year one thousand nine hundred twenty-two, one thousand nine hundred twenty-three, and the average amount for these two years, according to the approved November budget for the six months term. He shall then deduct the gross yield of the legal tax rate of each county for the six months school term from the average amount as determined above, and the difference shall be the amount of the equalizing fund for the salaries of teachers and principals for the years one thousand nine hundred twenty-three, one thousand nine hundred twenty-four and one thousand nine hundred twenty-five, except as otherwise provided in this law; but no county shall receive an amount from the equalizing fund sufficient to raise the average per capita cost of instruction for that county higher than the average per capita cost of the state, except as provided in section 5592: Provided further, that in order to receive the amount as specified in this law each county shall raise, together with the amount it will be entitled to draw from the equalizing fund, an amount which shall equal the total amount of the salaries of the teachers, principals, and superintendents actually paid not in excess of the adopted salary schedule for the six months term for the year one thousand nine hundred twenty-two, one thousand nine hundred twenty-three. (1923, c. 141, s. 3.)

§ 5590. Equalizing fund to pay one-half salary of superintendent.—Each county entitled to draw from the equalizing fund shall be paid, in addition to the amount provided in section three, one-half the salary of the county superintendent as fixed by the county board of education, but no county shall receive, in accordance with the provisions of this section, more than one-half the salary in accordance with the state salary schedule. (1923, c. 141, s. 4.)

§ 5591. Aid extended to counties in paying for transportation of pupils.—The state board of education shall have authority to set aside thirty thousand dollars of the state equalizing fund with which to assist the counties in paying the transportation of pupils, and the state board of education shall have authority to make such rules and regulations as it shall deem necessary for determining an average monthly cost per truck of transporting pupils to school: Provided, that not more than one-half the average monthly cost so determined shall be paid out of the funds specified in this section. (1923, c. 141, s. 5.)

See editor's note under § 5394.

§ 5592. Residue of equalizing fund appropriated.—The state board of education is authorized to appropriate the remainder of the equalizing fund, or any part of the same not otherwise appropriated, as follows:

(1) To encourage the more backward counties in improving the grade of teachers employed; and (2) to aid any county in which the actual property values shall fall below the authorized valuation of one thousand nine hundred twenty-two, one thousand nine hundred twenty-three, owing to some disastrous or exceptional industrial or economic reverses. The state board of equalization upon the request of the state board of education shall investigate the cause of the decrease in property values and report the facts to the state board of education, and if the report of the state board of equalization shall show that there has been a reduction in the actual values sufficient to bring the total values of the county below the valuation of one thousand nine hundred twenty-two, one thousand nine hundred twenty-three, the state board of education shall have authority to aid said county or counties out of any funds referred to in this section. But if any balances shall remain after complying with the provisions of this section it shall be prorated and added to the salaries of teachers or principals of those counties specified in section 5589. (1923, c. 141, s. 6.)

§ 5593. Equalizing fund to be paid when county has made provisions for part of teachers' salaries.—After the county has made full provisions for its part of the salaries as specified in section 5589,

the entire amount of the equalizing fund certified to the county shall be paid. (1923, c. 141, s. 7.)

§ 5594. Balance of equalizing fund carried forward for succeeding year.—If any part of the appropriations from the state public school fund shall not be spent in any one year in accordance with the provisions of the law authorizing said appropriations, the balance shall be carried forward and added to said appropriations for the succeeding year: Provided, any balance from any appropriations may be applied to the equalizing fund and distributed by the state board of education in accordance with the provisions of this law. (1923, c. 141, s. 8.)

§ 5595. The May budget.—The county board of education shall fix a date during the month of May when the school budget for all the schools of the county for the next ensuing year shall be prepared. The county board of education shall notify the board or boards of trustees of the special charter districts to prepare their budget for the six months school term and present the same at the time fixed by the county board of education for preparing the May budget. Said board shall also notify the chairman of the board of county commissioners at least twenty days before the date of meeting that the school budget for the next ensuing year is to be prepared and that the boards of county commissioners or a representative selected by the commissioners is required by law to be present and sit with the county board of education when the May budget is prepared. But if the board of county commissioners or its representative shall fail to attend said meeting after being duly notified, the county board of education shall have authority to proceed and prepare the budget in accordance with the provisions of this article. If for good and sufficient reason the budget is not completed at the time appointed by the county board for preparing the May budget, said board may appoint a later date and notify the board or boards of trustees and the county commissioners of the later date selected. The budget shall be prepared by the county board of education on blanks provided for that purpose, and it shall set forth the total estimated cost of maintaining all the schools of the county for six months, including the special charter districts, and it shall be subscribed and sworn to by the chairman and secretary of the county board of education and presented to the board of county commissioners on or before the first Monday in June. (1923, c. 136, s. 174.)

Cited in Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562; Board of Education v. Walker, 198 N. C. 325, 151 S. E. 718.

§ 5596. Contents of the May budget. — The May budget prepared by the county board of education shall provide three separate school funds (a) a current expense fund, (b) a capital outlay fund, and (c) a debt service fund.

(a) The current expense fund shall include (1) Expenses of general control—per diem of board of education, salaries of superintendents, attendance officer, and clerical assistants, travel and communication, office supplies and expense, and other necessary expenses of general control; (2) instructional service—salaries of teachers, principals, and supervisors, and any other necessary items of instruction; (3) operation of school plant—wages of janitors and other employees, fuel, water, light and power, janitors' supplies, expenses for care of grounds, and other necessary expenses of operation; (4) maintenance of plant—upkeep of grounds, repair of buildings, repair and replacement of heating, lighting and plumbing equipment, instructional apparatus, furniture, and other equipment, and other necessary expenses of maintenance; (5) fixed charges—rent, insurance and other necessary fixed charges; (6) auxiliary agencies—replacement of and repair of library books, transportation of pupils, and other necessary auxiliary activities.

(b) The capital outlay fund shall provide for the purchase of sites, the erection of school buildings, including dormitories and teachers' homes, improvement of new school grounds, alteration and addition to buildings, installation of heating, lighting and plumbing, purchase of furniture, including instructional apparatus for new buildings, office equipment, acquisition of trucks and other vehicles for the transportation of pupils and for the better operation and administration of schools, and other necessary capital outlay.

(c) The debt service fund shall provide for the payment of all loans due the State, the interest and principal on bonds, payments to the sinking fund, payment of district indebtedness for schools assumed by the county, apportionment to districts voting bonds or to districts borrowing from the county board of education and all other indebtedness which is payable during the fiscal year for which the budget is prepared. (1923, c. 136, s. 173; 1925, c. 180, s. 5; 1927, c. 239, s. 1.)

Editor's Note.—By Public Laws 1927, ch. 239, sec. 1, this section was amended and reenacted as it now appears. Formerly it provided for (a) "a salary fund," (b) "an operating and equipment fund," and (c) "a fund for the repayment of all notes, loans and bonds."

Cited in Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562; Wiggins v. Board of Education, 198 N. C. 301, 302, 151 S. E. 730; Board of Education v. Walter, 198 N. C. 325, 329, 151 S. E. 718; Hickory v. Catawba County, 206 N. C. 165, 172, 173 S. E. 56.

§ 5597. How to estimate the salary fund.—It shall be the duty of the county board of education, in estimating the amount of the salaries of teachers, principals, supervisors and superintendents for the ensuing year in the May budget, to set forth on blanks supplied by the state superintendent of public instruction the actual salary paid each teacher in each district for the previous year, the proposed salaries for the ensuing year, and the number of additional teachers needed in each school. It shall also exhibit the grade of certificate held by each teacher, the average attendance of pupils in each district for the previous year, and such other information as the state superintendent of public instruction may require. The number of teachers for the next ensuing year in each school shall be based on the average attendance of pupils for the previous year, as given below; Provided, that in the case of the enlargement or consolidation of a district, the superintendent shall add to the attendance of said district the number of children transferred who were attending school the previous year. In case of an extraordinary increase in population, the superintendent shall estimate said increase that may at-

tend school for the year and allow the same in estimating the attendance for said school.

(a) In each elementary school, not more than one teacher shall be allowed, except as follows: Wherever the average attendance for the previous year was at least thirty, two teachers may be allowed, but the commissioners may not be compelled to provide the funds for the second teacher, except when the average attendance for the previous year was at least forty. Wherever the average attendance for the previous year was sixty-five, three teachers shall be considered reasonable, and wherever the average attendance for the previous year was one hundred, four teachers shall be considered reasonable. And one additional teacher for every thirty-five additional pupils in average daily attendance for the previous year shall be considered reasonable.

(b) In each high school one whole-time teacher for the high school grades may be allowed for the ensuing year wherever the number of pupils in average attendance for the previous year was twenty; two teachers may be allowed wherever the average attendance was thirty: three teachers may be allowed wherever the average attendance was forty-five; four teachers may be allowed for seventy pupils in average daily attendance; and one additional teacher may be allowed for every thirty additional pupils in average daily attendance.

(c) Wherever the total number of teachers and the total estimated salaries of teachers, principals, supervisors and superintendents for the ensuing year are not greater than the total actual salaries paid or authorized by law for the previous year, the amount shall not be considered excessive. Wherever the average attendance for the previous year authorizes an increase in the number of teachers for the ensuing year, and the number provided in the budget is in accordance with the provisions of this section, the amount necessary to supply the needed extra teachers at the average monthly salary paid teachers the previous year shall be deemed reasonable and necessary: Provided, the term "legal salaries for the previous year" shall be construed to mean the salaries for the county six months term in accordance with the adopted salary schedule.

(d) The per diem of the county board of education, the salary of the superintendent of public welfare, and other school officials authorized by law shall be legitimate items of expense in the budget.

The amount of the salaries of teachers, principals, supervisors and superintendents for the county schools having been determined, and the amount of the salaries of teachers, principals, supervisors and superintendents for special charter districts having been determined in accordance with the provisions of section 5598, the total for the county and the special charter districts shall constitute the total amount of the salaries of teachers, supervisors, principals, and superintendents for the ensuing year, if the amount is approved by the commissioners they shall levy a tax sufficient to produce the amount clear of all fees, commissioners, rebates, losses, and cost of collection. (1923, c. 136, s. 176; 1927, c. 239, s. 2.)

Editor's Note.—By amendment Public Laws 1927, ch. 239, sec. 2, "current expense fund" as now used in this section replaced the words "salary fund" which were formerly used.

§ 5598. How to estimate the salary fund for the special charter or city schools. — The salaries of teachers, principals, supervisors and superintendents for special charter districts shall be estimated as follows: The county board of education shall incorporate the budget of the special charter districts in the county budget and allow the actual salary for six months in accordance with the adopted salary schedule for each teacher permitted under section 5597. In all counties where the schools of a special charter district are operated as a part of the county system, and are under the control of the county board of education, and pupils living outside the special charter district are permitted, as the county board of education may direct, to attend free of all tuition charges, the amount of the salary budget of said special charter district shall be estimated in the same way as the budget for any other district school of the county is estimated.

The board of trustees of all special charter districts may petition the board of education to take over the management of the school or schools within the special charter district. When such a petition is presented, the county board of education shall grant the petition, and the school or schools within the district shall be governed as all other schools in local tax districts are governed: Provided, the county board of education shall not have the authority to change the method of electing the board of trustees unless the charter is surrendered and the title to the property is transferred to the county board of education. (1923, c. 136, s. 177; 1925, c. 138, s. 1; 1927, c. 239, s. 3.)

Editor's Note.—This section was reenacted by Public Laws 1925, ch. 138 sec. 1, for the provisions prior to this time as enacted by Public Laws 1923, ch. 136, sec. 177, and the changes as made, a comparison is necessary. By amendment Public Laws 1927, ch. 239, sec. 3, the words "salaries of teachers, principals, supervisors and superintendents" as used herein replaced the words "salary fund" which were formerly used.

§ 5599. How to determine the amount of the current expense fund, the capital outlay fund, and the debt service fund.—All poll taxes, fines, forfeitures, penalties, and all public school revenues of the county not otherwise appropriated shall be placed to the credit of the current expense fund authorized in section 5596, subsection (a), except as otherwise provided. "After the county board of education has determined in accordance with law the total current expense for county schools and the salaries for charter districts and, in addition, has determined the capital outlay and debt service needs for the county schools for the year, the basis of the amounts to be included in the May budget for the special charter districts in addition to salaries shall be arrived at in the following manner:

"(1) From the total current expense fund shall be deducted (a) salaries of teachers, principals, supervisors and superintendents and (b) all current expenses for general control. This balance shall be the remainder of the current expense fund for schools other than special charter districts. The county board of education shall allow for current expense, except as otherwise provided herein, the same per capita amount per pupil enrolled for the previous school year to the special

charter districts that is allowed to all the other schools of the county.

"(2) From the total capital outlay fund provided for county schools shall be deducted (a) all revenue for capital outlay for a specific district and (b) items financed by long term loans or bonds and all other non-revenue receipts, including the proceeds from the sale of school property. On the basis of the balance thus determined, the county board of education shall allow for capital outlay the same per capita amount per pupil enrolled for the previous school year to the special charter districts that is allowed to all other schools.

"(3) When the county board of education shall have determined the necessary amount to be raised from county funds for debt service for all schools other than special charter districts and local tax districts voting bonds or borrowing from the county board of education in whole or in part for providing suitable building or buildings for said district for the six months school term, said board shall allow for the debt service fund the same per capita amount per pupil enrolled for the previous school year to the special charter districts and to districts voting bonds or borrowing from the county board of education for said building purposes that is allowed to all the other schools of the county: Provided, the amount allowed for any year shall not exceed the actual debt service need of said school districts in any year."

If the amount derived or to be derived from the sources mentioned above in this section is sufficient for these funds the commissioners are authorized to levy an additional tax to meet the actual needs of each fund.

The county board of education, with the approval of the board of commissioners may include in the debt service fund in the budget the indebtedness of all districts, including special charter districts, lawfully incurred in erecting and equipping school buildings necessary for the six months school term, and when such indebtedness is taken over for payment by the county as a whole and the local districts are relieved of their annual payments, then the county funds provided for such purpose shall be deducted from the debt service fund prior to the division of this fund among the schools of the county as provided in this section. (1923, c. 136, s. 178; 1925, c. 180; c. 6; 1927, c. 239, ss. 4, 5.)

Editor's Note.—By amendment Public Laws 1925, ch. 180, sec. 6, the last sentence of this section was added. The section again was amended by the Public Laws of 1927, ch. 239, sec. 4. A comparison of the statute as it now reads shows many changes both material and immaterial.

This section in its original form (c. 180, § 6, Public Laws of 1925) was not passed in accordance with the formalities required by § 14, Art. II of the Constitution but c. 239, § 6, Public Laws of 1927, which amended the section was regularly passed and the effect is to ratify and make valid any defect in the prior act for the two acts are construed together as one. Reeves v. Board of Education, 204 N. C. 74, 167 S. E. 454.

Assumption of Payment as County-Wide Obligation.—Where bonds to provide funds for buildings and equipment have been voted by special school districts and by a city constituting a special charter district which has since become a part of the general county schools, the county may assume the payment of such bonds as a county-wide obligation under the provisions of this section, and it is not necessary that payment therefor be made from taxes levied only in such special districts. Reeves v. Board of Education, 204 N. C. 74, 167 S. E. 454.

Under the provisions of this section, a county may include in its debt service fund in its budget the indebtedness lawfully incurred by any of its school districts, including special charter districts, in the erection and equipment of necessary school buildings, and it is not prerequisite to the assumption of such debt of special charter districts that the districts should release their charters or that the trustees of such district should convey the school property of such district to the county board of education. Hickory v. Catawba County, 206 N. C. 165, 173 S. E. 56.

§ 5600. Debt Service Fund.—The county board of education shall set forth in the budget the amount of the interest and installments on all loans due the state, and of all interest and installments on bonds and other evidences of indebtedness that may fall due. This shall be a separate item in the budget, and the commissioners shall levy annually a tax sufficient, clear of all fees, commissions, rebates, delinquents and the cost of collection, to repay the same; and if the taxes are not collected when the repayments fall due, the commissioners shall borrow the money and place the amount to the credit of the county board of education. (1923, c. 136, s. 179.)

Editor's Note.—By amendment Public Laws 1927, ch. 239, sec. 5, this section was changed in application from "Fund for repayment of bonds, notes and loans" to "The debt service fund."

§ 5601. The May budget completed.—The completed May budget shall be sworn to and subscribed by the chairman of the county board of education and the county superintendent of schools, and a copy shall be filed in the office of the state superintendent of public instruction. The county board of education shall present a copy to the board of county commissioners on or before the first Monday in June of each year. If the board of county commissioners shall approve the total amount of the budget, it shall levy sufficient rates, after deducting the amount to be received from the state, to produce the amount asked for in the budget, and if the tax rate levied fails to produce, clear of all commissions, rebates, fees and cost of collection, the amount approved in the budget, it shall be the duty of the county commissioners to supply the deficit either out of the general county fund or by borrowing in accordance with law. (1923, c. 136, s. 180; 1927, c. 239. s. 7.)

Editor's Note.—By Public Laws 1927, ch. 239, sec. 7, the words "the first Monday in June" replaced the words "June first."

Cited in Hampton v. Board of Education, 195 N. C. 213, 218, 141 S. E. 744; Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562.

§ 5602. The November budget.— On or before the fifteenth day of November of each year the county board of education and the board of trustees of all special charter school districts shall prepare a budget, on blanks furnished by the state superintendent of public instruction, setting forth the names and number of teachers actually employed in each district in the county, the grade of certificate held, the salary paid, and all other information asked for by the state superintendent of public instruction. The November budget shall be checked by the state superintendent to ascertain whether the teachers are properly certificated, whether the number of teachers is excessive, and whether the authorized salary schedule is observed. The county shall settle with the special charter districts for teachers' salaries in accordance with the corrected budgets, and the state

equalizing fund shall be finally apportioned in accordance with such corrected budgets. The checked and approved November budget shall exhibit the legal salary due each teacher according to the state salary schedule and the number of teachers to which each district is entitled. A copy shall be returned to the county board of education or board of trustees, as the case may be, to be filed in the office of the superintendent. And not more than three-fourths of the estimated maximum amount of the equalizing fund shall be paid to a county until the November budget is approved; and if it shall appear at any time that the superintendent refuses to observe the law providing a uniform salary schedule, the state superintendent of public instruction shall notify the chairman of said board, which board is hereby authorized to remove said superintendent from office. After the November budget is checked, if it shall appear that the county has provided for its part of the budget, and the amount of the equalizing fund submitted to the county is needed to meet the demands on the budget, then the state board of education shall pay in full the amount it specified in such a way as to be of the greatest aid to the counties before the taxes for the year have been collected. (1923, c. 136, s. 181; 1927, c. 239, s. 8.)

Editor's Note.—By amendment Public Laws 1927, ch. 239, sec. 8, the word "budget" as used in the last sentence replaced the words "salary fund."

§ 5602(a). Tax reduction fund to be applied to counties for extended term in school districts. — For the purpose of reducing ad valorem taxes in the county-wide, special charter, and/or local school tax districts of the State and having an extended term of two months beyond the constitutional six-months term, and hereinafter in this section called school districts, it shall be the duty of the State Board of Equalization to set aside the appropriation made for that purpose to be used as a tax reduction fund in said school districts, and to be distributed as follows:

(a) The State Board of Equalization shall determine the value of all taxable property in each and all of said school districts.

(b) The said board shall ascertain the necessary cost of operating the extended term of two months in each and all of the said school districts.

(c) From the total cost of said two months extended term in all of said school districts shall be deducted the sum of said appropriation, and the difference shall be the net amount which the respective school districts shall provide for the support and maintenance of two months of the extended term.

(d) The said Board of Equalization shall then determine the uniform rate necessary to be levied on the total determined valuation in order to produce the amount ascertained under sub-section (c), and shall certify said rate to the tax-levying authorities of each and every county and shall also certify to said tax-levying authorities the determined valuation of all the property in each and every of such school districts in said county.

(e) The tax-levying authorities of each and every county having one or more of such school districts shall levy a tax rate on all the property of all such districts sufficient to produce a net amount equivalent to the amount that would be raised by multiplying the certified uniform rate by the certified equalized value of all the property in said school district; and the difference in the amount of tax thus produced by said school district and the necessary cost as determined by sub-section (b) shall represent the amount which each of said school districts shall be entitled to receive from the tax reduction fund.

(f) The extended term costs in said school districts shall not exceed the pro rata costs of the six-months constitutional term; and no other taxes shall be levied in said school district for current expense unless an itemized statement is filed by the trustees or school committee of such school districts with the county commissioners, approved by the County Board of Education, showing the necessity of such additional levy, in which event the County Commissioners may levy such additional amount as may be agreed upon after approval also by the State Board of Equalization.

(g) It shall be the duty of the County Board of Education in each and every county to originate the school budget for the extended term but the same shall not be effective until approved by the Board of County Commissioners and by the State Board of Equalization: Provided, however, that nothing in this act shall prevent school districts having an extended term of more or less than two months beyond the constitutional six-months term from participating in the benefits of the said appropriation, but all such school districts having an extended term in excess of such two months may only participate in such appropriation under the provisions of this act for and during and including two months of such extended term. (1931, c. 440, s. 1.)

Editor's Note. — Section 3 of act from which this section was taken provided: "The money appropriated under the provisions of this act shall be disbursed to the counties and districts in the same way and manner as is provided in the act for the disbursement of the six months school fund." (Public Laws 1931, c. 430.)

§ 5602(b). Powers and duties of State Board of Equalization. — The powers and the duties of the State Board of Equalization, except in so far as the same may be added to by the provisions of the preceding section, or otherwise, shall continue and remain the same as prescribed in chapter two hundred fifty-six of the Public Laws of one thousand nine hundred and twenty-seven and in chapter two hundred forty-five of the Public Laws of one thousand nine hundred and twenty-nine. (1931, c. 440, s. 2.)

Art. 19. Powers, Duties and Responsibilities of the Board of County Commissioners in Providing Funds for Six Months Term

§ 5603. Duty to provide funds for a six months term.—The board of county commissioners shall provide the funds necessary to maintain the schools for six months, and the May budget submitted to the commissioners shall be presumed to be correct unless it is formally rejected by the commissioners within thirty days after presentation, and an entry is recorded in the minutes of the board stating the time when it was rejected and the reason for rejecting it, and a copy of the entry on the minutes of the board of county com-

missioners shall be sent to the superintendent or the chairman of the county board of education. (1923, c. 136, s. 182.)

Cited in Board of Education v. Walter, 198 N. C. 325, 329, 151 S. E. 718; Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562; Powell v. Bladen County, 206 N. C. 46, 50, 173 S. E. 50.

§ 5604. Commissioners required to raise full amount.—When the budget is approved by the commissioners, or by order of the court, the commissioners are hereby directed and required to levy a tax sufficient to raise the amount necessary to maintain the schools for six months according to the provisions of the budget or the order of the court. At the close of the school year if it shall appear according to the audit required by law that the amount of money actually received by the treasurer, clear of all fees, commissions, rebates, etc., is sufficient to meet all the necessary expenses of the schools for the year, the county commissioners shall provide the necessary amount and place the same to the credit of the county board of education. (1923, c. 136, s. 183; 1927, c. 239, s. 9.)

Cross Reference.—As to the permission of children at orphanages to attend public schools see § 5446 and notes thereto.

Editor's Note.—The words "according to the audit required by law" as used in the second sentence were added by Public Laws 1927, ch. 239, sec. 9.

Cited in Powell v. Bladen County, 206 N. C. 46, 50, 173 S. E. 50.

§ 5605. What the commissioners may require of county board of education.—The commissioners or a representative selected by them shall sit with the county board of education when the May budget is being prepared, and whenever the commissioners or their representative are in doubt as to the reasonableness of the budget, or any item in the same, it may require the county board of education to compare the salaries of teachers as estimated in the May budget for the ensuing school year with the actual salaries authorized by law in the approved November budget for the current school year, and to give the cause of the increase, district by district, and the difference between the total salaries of the current school year as authorized by law for the six months school term and the proposed salaries for the ensuing school year.

It may require in similar detail a statement of the differences in the amount of the remainder of the current expense fund and the capital outlay fund for the two years. It may require the county board of education to show that existing debts were incurred in strict accordance with the law, and the county commissioners, after March 3, 1923, shall not be liable for any debt, other than loans from the state, incurred by the county board of education in excess of the amount set forth in the May budget, unless the making of the debt was approved by the county commissioners. The county board of education shall file with the clerk of the commissioners a list of the bounded indebtedness for schools of the county and of local tax districts, and a certified statement of all loans derived from the state, together with the amount of the annual payments. (1923, c. 136, s. 184; 1927, c. 239, s. 10.)

Editor's Note.—The words "remainder of the current expense fund and the capital outlay fund," as used in the first sentence of the second paragraph replaced the words "operating and equipment fund," by amendment Public Laws 1927, ch. 239, sec. 10.

Cited in Hampton v. Board of Education, 195 N. C. 213, 215, 141 S. E. 744.

§ 5606. Where commissioners have no discretion.—The commissioners are required to levy annually a tax sufficient to repay interest and installments on all loans from the state, and interest and installments on bonds and notes falling due according to the debt service fund as set forth in the approved May budget. And this shall be a separate tax, and if, after all interest and installments are paid each year, any balance that may remain shall be accounted for by the treasurer, and it shall be applied the following year to the payment of interest and installment on loans. But if the amount secured from this tax is not sufficient for these needs it shall be the duty of the commissioners to borrow any amount needed to meet these payments. (1923, c. 136, s. 185; 1927, c. 239, s. 11.)

Editor's Note.—All of that part of the first sentence following the word "due" was added by Public Laws 1927, ch. 239, sec. 11.

Cited in Hampton v. Board of Education, 195 N. C. 213, 217, 141 S. E. 744.

§ 5607. Requiring county board to publish May budget.—The commissioners before approving the May budget may require the county board of education to publish the same in some leading newspaper published or circulating in the county, and when so published it shall set forth the cost, district by district, and the amount of the increase for each district over the previous year, and the total amount of the increase; and the cost of publishing the May budget shall be paid by the commissioners out of the general county fund. (1923, c. 136, s. 186.)

§ 5608. Procedure in cases of disagreement or refusal of county commissioners to levy school taxes.—In the event of a disagreement between the county board of education and the board of county commissioners as to the amount of the current expense fund, the capital outlay fund, and the debt service fund, the county board of education and the board of county commissioners shall sit in joint session, and each board shall have one vote on the question of the adoption of these amounts in the budget. A majority of the members of each board shall cast the vote for each board. In the event of a tie, the clerk of the superior court shall act as arbitrator upon the issues arising between said two boards, and shall render his decision thereon within ten days. But either the county board of education or the board of county commissioners shall have the right to appeal to the superior court within thirty days from the date of the decision of the clerk of the superior court, and it shall be the duty of the judge hearing the case on appeal to find the facts as to the amount of the current expense fund, the capital outlay fund, and the debt service fund, which findings shall be conclusive, and shall give judgment requiring the county commissioners to levy the tax which will provide the amount of the current expense fund, the capital outlay fund and the debt service fund, which he finds necessary to maintain the schools for six months in every school district in the county. Any board of

county commissioners failing to obey such order and to levy the tax ordered by the court shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of court. In case of an appeal to the superior court, all papers and records relating to the case shall be considered a part of the record for consideration by the court. (1923, c. 136, s. 187; 1925, c. 180, s. 4; 1927, c. 239, ss. 12, 13.)

Editor's Note.—By amendment Public Laws 1925, ch. 180, sec. 4, there was included in this section "the operation and equipment fund." This was repealed by Public Laws 1927, ch. 239, sec. 13. By amendment Public Laws 1927, ch. 239, sec. 12, the words "the current expense fund, the capital outlay fund, and the debt service fund," as used replaced the words, "salary fund or the fund necessary to pay interest and installments on bonds, notes and loans."

In General.—This section confers upon the courts duties of a judicial nature, not requiring a trial by jury to determine the disputed matter upon an issue of fact, and the provisions of this section are not void as being repugnant to Art. I, sec. 19, of the State Constitution. Board v. Board, 174 N. C. 469, 93 S. E. 1001, cited and applied. Board v. Board, 182 N. C. 571, 109 S. E. 630; In re Board of Educations, 187 N. C. 710, 712, 122 S. E. 766.

Meeting Must Be Held.—Where the commissioners have refused to levy a tax to provide an additional salary for the county superintendent and the meeting called for in this section has not been held nor the clerk called upon to arbitrate the matter it is erroneous to grant a writ of mandamus to the superintendent to compel the commissioners to levy the tax. Rollins v. Rogers, 204 N. C. 308, 168 S. E. 206.

Cited in Board of Education v. Board of Commissioners, 198 N. C. 430, 152 S. E. 156; Board of Education v. Walter, 198 N. C. 325, 329, 151 S. E. 718; Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562.

§ 5609. Commissioners may demand a jury trial.—The county commissioners shall have the right to have the issues tried by a jury, as to the amount of the current expense fund and the capital outlay fund, which jury trial shall be set at the first succeeding term of the superior court, and shall have precedence over all other business of the court: Provided, that if the judge holding the court shall certify to the governor, either before or during such term, that on account of the accumulation of other business, the public interest will be best served by not trying such action at said term, the governor shall immediately call a special term of the superior court for said county, to convene as early as possible, and assign a judge of the superior court or an emergency judge to hold the same, and the said action shall be tried at such term. There shall be submitted to the jury for its determination the issue as to what amount is needed to maintain the schools for six months, and they shall take into consideration the amount needed and the amount available from all sources as provided by law. The final judgment rendered in such action shall be conclusive, and the county commissioners shall forthwith levy taxes in accordance with such judgment; otherwise those who refuse so to do shall be in contempt, and may be punishable accordingly: Provided, that in case of a mistrial or an appeal to the supreme court which would result in a delay beyond a reasonable limit for levying the taxes for the year, the judges shall order the commissioners to levy for the ensuing year a rate sufficient to pay the debt service fund, to produce, together with what may be received from the state public school fund and from other sources, an amount for the current expense fund equal to the amount of this fund for the previous year. (1923, c. 136, s. 188; 1927, c. 239, s. 14.)

Editor's Note.—By amendment Public Laws 1927 ch. 239, sec. 14 the words "current expense fund, and the capital outlay fund," as used in the first sentence replaced the words "teachers' salary fund and the operating and equipment fund"; the words "the debt service fund" as used in the proviso at the end of the section replaced the words "interest and installment on notes, loans and bonds"; the words "current expense funds" used in the same proviso replaced the words "teachers' salary fund."

Applied In re Board of Education, 187 N. C. 710, 122 S. E. 760.

Cited in Board of Education v. Board of Commissioners, 198 N. C. 430, 152 S. E. 156.

§ 5610. Commissioners authorized to borrow money.—The commissioners are authorized to borrow money for the schools of the county and place the same to the credit of the county board of education, as follows: Whenever the amount provided in the budget shall be insufficient to meet the absolute needs of running a six months school term and providing equipment for same, or paying existing indebtedness for said purposes, and the county commissioners, after investigating, shall find as a fact that additional funds are necessary, they are hereby authorized to borrow the necessary amount and place the same to the credit of the county board of education, and it shall be the duty of the county commissioners to levy sufficient taxes for the next ensuing year to repay money so borrowed in addition to providing for the maintenance of the six months school term. And the county commissioners may issue notes of the county for money so borrowed. (1923, c. 136, s. 189.)

§ 5611. Commissioners to require fines, forfeitures and penalties paid to treasurer.—The board of county commissioners shall require all clerks of all state and municipal courts, justices of the peace and all other clerks or officials having in custody the records of any city or town in the state, to furnish the county board of education and the county commissioners a detailed statement of all fines, forfeitures and penalties that have come into their hands or that have been recorded or should have been recorded in the books kept by them. And it shall be the duty of the county commissioners to require all officials collecting fines, forfeitures and penalties to pay over the same to the treasurer of the county school fund monthly, and a failure on the part of said official to comply with the provisions of this section shall be considered a misdemeanor, and upon conviction they may be removed from office by the court and shall be fined or imprisoned in the discretion of the court. (1923, c. 136, s. 190.)

§ 5612. Commissioners to estimate what per cent school fund is of total county fund.—It is the duty of the county commissioners to furnish the county board of education, as soon as the tax books for the year are completed, a statement showing what per cent the school fund is of the total county fund, and at least this same per cent of the amount of taxes as they are collected and deposited in the treasury shall be placed to the credit of the county board of education. (1923, c. 136, s. 191.)

§ 5613. Commissioners require sheriff to settle.—Every sheriff or tax collector shall deposit the

county and other local taxes collected by him with the county treasurer as often as he shall collect or have in his possession at any one time a sum equal to five hundred dollars ($500,00). (C. S. 3941.)

On or before the close of the fiscal year the sheriff in settling with the board of county commissioners shall exhibit the total amount of the school fund from all sources received, the net amount paid over to the county treasurer, and the net amount due each of the following funds: (1) The current expense fund, (2) the capital outlay fund, and (3) the debt service fund. The sheriff shall also exhibit the amount of uncollected taxes due because of insolvent polls, releases, errors, and rebates allowed by the board of county commissioners, and other causes for failure to collect the entire amount of the taxes due, and the sheriff shall furnish to the county board of education at the time of his settlement with the county commissioners, as provided in this section, a complete itemized copy of his statement; and the state auditor shall prepare and furnish free of cost to the sheriff or county commissioners blanks on which the sheriff shall make his final report to the county commissioners. Said blanks shall set forth the items specified above in such a way as to make the settlement clear and intelligible. (1923, c. 136, s. 192; 1927, c. 239, s. 15.)

Editor's Note.—The change of the name of the funds was the only change by Public Laws 1927, ch. 239, sec. 15. See note to section 5596.

Art. 20. The Treasurer: His Powers, Duties and Responsibilities in Disbursing School Funds

§ 5614. Treasurer shall disburse funds.—The county treasurer of each county shall be the treasurer of the school funds in his county. He shall receive and disburse all public school funds and shall keep the same separate and distinct from all other funds. In all counties in which the office of county treasurer has been abolished all banks or other corporations handling public school funds shall be required to keep the same accounts, perform the same duties as required of the county treasurer, and to give the same bond and make the same reports as are required of the treasurer of the county board of education. (1923, c. 136, s. 193.)

§ 5615. Operation of county school budget.—(a) Duty of County Board of Education.—On or before the first Monday in each month the county board of education shall file with the county board of commissioners a written statement showing the condition of the annual six months school budget at the close of the preceding month. This statement shall also include a careful estimate of the necessary expenditures which will be made during the current month from the six months' school budget. In like manner each special charter district shall prepare and file with the county board of education a similar statement, which shall be the guide in determining for the special charter district the amount which shall be included in the monthly statement of cash needs: Provided, that if the county board of education shall deem to be unreasonable the amount estimated as the cash needs of said district for a current month, the county commissioners may not be required to provide more than one-sixth of the total approved budget for such district prior to the beginning of the first month of the constitutional school term: Provided, further, that no payment to special charter districts shall be made until a copy of the audit for the previous year for the special charter district has been filed as provided by law.

"(b) Duty of the County Board of Commissioners.—It shall be the duty of the board of county commissioners to provide when and as needed the funds necessary to meet the monthly expenditures as set forth in the statement prepared by the county board of education in accordance with the budget." (1923, c. 136, s. 194; 1925, c. 138, s. 2; 1927, c. 239, s. 16.)

Editor's Note.—This section was re-enacted by Public Laws 1927, ch. 239, sec. 16, so as to meet the other changes made in the school system.

§ 5616. Action against the treasurer to recover funds.—After final settlement with the sheriff, if it shall appear that any part of the public school fund received by the county treasurer has not been properly placed to the credit of the respective boards of education, either the county board of education or the special charter district board of trustees, as the case may be, shall bring action on the treasurer's bond to recover any part of the fund still belonging to the respective board. If the county treasurer fails to perform his duties as herein and above prescribed, he shall be guilty of a misdemeanor and be fined or imprisoned in the discretion of the court. (1923, c. 136, s. 195.)

§ 5617. Superseded by § 5466.

See note under § 5466.

§ 5618. County board of education to have accounts of the board of education and the county treasurer of the public school fund audited.— On or before the first day of August of each year the county board of education shall cause to be audited the books of the treasurer of the county school fund and the accounts of the county board of education, and shall provide for the cost of the same, where a county auditor is not provided by special statute, out of the current expense fund. The auditor's report shall show:

"(a) For Six Months School Term.—(1) Sources of revenues and purposes for which expenditures were made; (2) comparison of approved May budget with the actual transactions; (3) statement of salary paid each teacher, principal, supervisor, or superintendent, and all other employees employed in the county system, showing what part was paid out of the State and county six months school fund, and what part was paid out of the local tax funds; (4) the auditor shall compare the expenditures with the budget approved by the State Superintendent of Public Instruction, and report whether all salaries and other expenses have been paid in accordance with law; (5) the auditor shall check the average daily attendance by districts as shown in the budget against the monthly reports from the disrict listing the high school and elementary school average daily attendance separately, and including a statement covering the average daily attendance maintained during the scholastic year which the financial transactions cover and also the average

daily attendance maintained during the year next preceding the year covered by the financial transactions contained in the audit; (6) statement of oustanding indebteness, including county school bonds, amounts due the State Board of Education, and all unpaid accounts; (7) appraisal of all school property; and (8) and all other items which will aid in making a complete audit.

"(b) For Local Tax Districts.—In similar details, the audit of the county board of education shall include accounts of local tax districts and special county taxes.

"(c) For Special Charter Districts.—In like manner and in similar details, unless otherwise provided in special act, the board of trustees of each special charter district shall cause to be audited the accounts of the treasurer and board of trustees of the special charter districts.

At least a consolidated statement of the report of the auditor shall be published in some newspaper circulating in the county, or in bulletin form, and one copy of the complete report shall be sent to the State Superintendent of Public Instruction, and one copy shall be given to the chairman of the board of county commissioners, and one copy to the chairman of the county board of education.

If the county board of education or special charter district board of trustees shall fail to have all accounts audited as provided herein, the State Superintendent shall notify the State Auditor and said State Auditor shall send an auditor to said county and have the accounts audited in accordance with the provisions of this section, and all expenses for the same shall be paid by the county board of education or the board of trustees, as the case may be. (1923, c. 136, s. 198; 1927, c. 239, s. 19.)

Editor's Note.—This section was changed by Public Laws 1927 so as to conform to the new budget plan. For the changes a comparison with the prior law is necessary.

§ 5619. County treasurer to give two bonds. — The county treasurer shall give two bonds: one, for the protection of State school funds forwarded to him for disbursement and one, for the protection of county and district school funds which may come into his possession by authority of law, as hereinafter provided.

a. Bond for the protection of State school funds. Before any money, appropriated by the State for the support of the six months school term or the support of the extended term, shall be forwarded to any county, the county treasurer in said county shall execute a justified bond with security in an amount to be fixed by the State Board of Equalization, which amount in no case shall be less than any monthly installment to be forwarded to said county. The State Board of Equalization shall notify the Budget Bureau, the State Auditor, the State Treasurer, and the State Superintendent of Public Instruction of the amount of bonds so determined for each and every county, and the county board of education in each county of the amount determined for their county. It shall be the duty of the Director of the Local Government Commission to approve or disapprove the character and the competence of the bond so furnished by the county treasurer in each county, and to certify his findings to the State Board of Equalization, to the Budget Bureau, to the State Auditor, to the State Treasurer, to the State Superintendent of Public Instruction, and to the county board of education in each county as to his findings relative to the character and competence of the bond for their county. It shall be unlawful to send any money appropriated by the State for the support of the six months school term or for the support of the extended term in any county, to the county treasurer thereof until the provisions of this act shall have been complied with so far as said county may be affected thereby. This bond shall constitute the county treasurer's liability to the State for the faithful preservation and disbursement of State funds appropriated for the support of the public schools in said county, and the cost of any surety bond, authorized by this act and approved by the State Board of Equalization, shall be paid out of the six months school fund or out of the tax reduction fund, allocated to said county, or out of both funds, as the State Board of Equalization may determine. In case any monthly installments requested by the county exceeds the amount of the bond as herein provided for, said installment shall be sent in two parts, no one of which shall be greater than said bond, and the second part of said installment shall not be forwarded until the first part shall have been disbursed.

b. Bond for the protection of county and district school funds. Before entering upon the duties of his office, the county treasurer shall execute a justified bond with security for all public school moneys which may come into his possession, other than State school funds, in an amount to be fixed by the board of county commissioners, and the character and competence of said bond shall be approved by the Director of the Local Government Commission in the same way and manner as bonds for the protection of other county moneys are approved, which amount shall be sufficient at all times to safeguard the school moneys in the hands of the county treasurer. The county treasurer's bond shall be conditioned upon the faithful performance of his duties as treasurer of the county school fund, and for the payment to his successor in office of any balance of school moneys that may be in his hands unexpended. This bond shall be a departure bond and shall not include liability for funds other than county school funds, and shall be approved by the board of county commissioners and the Director of the Local Government Commission as provided herein. (C. S. 5445.) (1923, c. 136, s. 199; 1929, c. 55, s. 1; 1931, c. 430, s. 16½.)

Editor's Note.—The Act of 1931 repealed the former section as amended, providing for one bond, and inserted the above in lieu thereof.

The Act of 1929 amended the former section by adding a proviso relating to Cumberland County, and Public Laws 1931, c. 67, further amended it by making the proviso applicable to Chowan County.

§ 5620. Action on the treasurer's bond.—The board of county commissioners shall bring action in the name of the state for any breach of the bond of the treasurer or for any failure to account properly for the funds received by him, except in cases where action is otherwise provided for. If the commissioners shall fail to bring such ac-

tion, it may be brought in the name of the state upon the relation of any taxpayer. (C. S. 5446.) (1923, c. 136, s. 200.)

§ 5621. Annual report to state superintendent.—The treasurer of any county, town, or special charter district school fund shall report to the state superintendent of public instruction, on the first Monday of August of each year, the entire amount of money received and disbursed by him during the preceding school year, designating by items the amount received, respectively, from property tax, poll tax, fines, forfeitures and penalties, auctioneers, estrays, from the state treasurer and from the other sources. He shall also designate by item the sum paid to teachers of each race, respectively, the sums paid for schoolhouses, school sites in the several districts, and for all other purposes, specificately and in detail, by item. (C. S. 5451.) (1923, c. 136, s. 201.)

§ 5622. Report to county board.—On the same date that he reports to the state superintendent, he shall file a duplicate of such report in the office of the county board of education. He shall make such other reports as the county board of education may require from time to time. (C. S. 5452.) (1923, c. 136, s. 202.)

§ 5623. Exhibit books, vouchers, and money to county board.—The treasurer of the county school fund shall, when required by the county board of education, produce his books and vouchers for examination, and shall also exhibit all moneys due the public school fund of the county at such settlement required by this article. (C. S. 5453.) (1923, c. 136, s. 203.)

§ 5624. Duties on expiration of term.—Each treasurer of the county school fund, in going out of office, shall deposit in the office of the board of education of his county his books in which are kept his school accounts, and all records and blanks pertaining to his office. If his term expires on the thirtieth day of November during any fiscal school year, or if for any reason he shall hold office beyond the thirtieth day of November and not for the whole of the current fiscal school year, he shall at the time he goes out of office file with the county board of education and with his successor a report, itemized as required by law, covering the receipts and disbursements for that part of the fiscal school year from the thirtieth of June preceding to the time at which he turns over his office to his successor, and his successor shall include in his report to the state superintendent of public instruction the receipts and disbursements for the current fiscal year. (C. S. 5454.) (1923, c. 136, s. 204.)

§ 5625. Treasurers of school fund failing to report a misdemeanor.—If any treasurer of the county or special charter district school fund shall fail to make reports required of him at the time and in the manner prescribed, or to perform any other duties required of him by law, he shall be guilty of a misdemeanor and be fined not less than fifty dollars ($50.00) and not more than two hundred dollars ($200.00) or imprisoned not less than thirty days nor more than six months, in the discretion of the court. (C. S. 5456.) (1923, c. 136, s. 205.)

§ 5626. Treasurer of special charter districts bonded.—The treasurer of every special charter district shall be required by the board of trustees of said school district to execute a justified bond, with security, in an amount to be fixed by the board of trustees, not less than one-half the total amount of money received by him or his predecessor during the previous year, conditioned for the faithful performance of his duties as treasurer of the funds of the special charter district, and for the payment over to his successor in office of any balance of school moneys that may be in his hands unexpended. This bond shall be a separate bond, not including liabilities for other funds, and shall be approved by the board of trustees of said special charter district; and that board may from time to time, if necessary, require him to strengthen his bond. (1923, c. 136, s. 206.)

§ 5627. Speculating in teachers' salary vouchers.—If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or state officer shall engage in the purchasing of any teacher's salary voucher at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation thereon, he shall be guilty of a misdemeanor and shall be fined or imprisoned, and shall be liable to removal from office at the discretion of the court. (1923, c. 136, s. 208.)

Art. 21. Fines, forfeitures and penalties

§ 5628. Constitutional provisions.—All moneys, stocks, bonds and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the state, and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties in this state. (Sec. 5, Art. IX, Constitution.) (1923, c. 136, s. 209.)

Cited in State v. Welborn, 205 N. C. 601, 602, 172 S. E. 174.

§ 5629. Statement of fines kept by clerk.—It is the duty of the clerks of the several courts and of the several justices of the peace to enter in a book, to be supplied by the county, in an itemized detailed statement of the respective amounts received by them in the way of fines, penalties, amercements and forfeitures, and said books shall at all times be open to the inspection of the public. (C. S. 1323.) (1923, c. 136, s. 210.)

§ 5630. Fines paid to treasurer for schools; annual report.—All fines, forfeitures, penalties and amercements collected in the several counties by any court or otherwise shall be accounted for and paid to the county treasurer by the officials receiving them within sixty days after receipt thereof, and shall be faithfully appropriated by the county board of education for the establishment and maintenance of free public schools; and the amounts collected in each county shall be annually reported to the superintendent of public instruction on or before the first Monday in Jan-

uary, by the board of commissioners. (C. S. 1324.) (1923, c. 136, s. 211.)

§ 5631. Failure to file report of fines.—If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor. (C. S. 4398.) (1923, c. 136, s. 212.)

§ 5632. Fines and penalties to be paid to school fund.—Whenever any officer, including justices of the peace, receives or collects a fine, penalty, or forfeiture in behalf of the state he shall, within thirty days after such reception or collection, pay over and account for the same to the treasurer of the county board of education for the benefit of the fund for maintaining the free public schools in such county. Whenever any fine or penalty is imposed by any officer the said fine or penalty shall be at once docketed, and shall not be remitted except for good and sufficient reasons, which shall be stated on the docket. (C. S. 7875.) (1923, c. 136, s. 213.)

§ 5633. Misappropriation of fines a misdemeanor.—Any officer, including justices of the peace, violating the preceding section, shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment, at the discretion of the court. (C. S. 7876.) (1923, c. 136, s. 214.)

§ 5634. Unclaimed fees of jurors and witnesses paid to school fund.—All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same, shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports. (C. S. 960.) (1923, c. 136, s. 215.)

§ 5635. Use by public until claimed.—The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner. (C. S. 961.) (1923, c. 136, s. 216.)

§ 5636. Authority to use fines, forfeitures, penalties and dog tax to increase school term.—The county board of education, with the approval of the county commissioners, may set aside all or a part of the amount derived from fines, forfeitures, penalties, dog tax and amercements which accrue to the school fund and use said amount for the purpose of aiding union school districts of the county which, after having levied a special tax of not less than thirty cents on the one hundred dollars ($100.00) valuation of property or its equivalent, are still unable to provide a minimum school term of eight months. (1923, c. 136, s. 218.)

Art. 22. Federal Forest Funds

§ 5637. Certain counties to receive federal forest funds.—All funds paid by the National Forest Commission, by authority of the Act of Congress, approved May twenty-third, one thousand nine hundred and eight (35 Stat., 260), for the counties of Avery, Buncombe, Burke, Haywood, Henderson, Jackson, Macon, Swain, Transylvania, Watauga, and Yancey, shall be paid to the treasurers, or to the men acting as such, of the above named counties, for the use and benefit of the school fund and road fund of each county: Provided, that said funds in each county shall be divided equally between the road fund and the school fund. (Ex. Sess. 1920, c. 6, s. 1; 1921, c. 179, s. 17.)

§ 5638. Distribution of forest funds.—All funds which may hereafter come into the hands of the state treasurer from like sources shall be likewise distributed. (Ex. Sess. 1920, c. 6, s. 2.)

SUBCHAPTER VIII. LOCAL TAX ELECTIONS FOR SCHOOLS

Art. 23. School Districts Authorized to Vote Local Taxes

§ 5639. How elections may be called.—The citizens of any duly created school district are hereby authorized to petition for a local tax election for schools, as follows: A written petition signed by twenty-five qualified voters who have resided at least twelve months within the district, or if fewer than seventy-five of such qualified voters, reside in the territory, then by one-third of such qualified voters, shall be presented to the county board of education asking for an election in the district to ascertain whether there shall be levied in said district a local annual tax not to exceed fifty cents (50c) on the one hundred dollar ($100.00) valuation of all property, real and personal, to supplement the funds for the six months public school term for that district: Provided, that the petition for an election to be held in any special charter district shall be presented to the board of trustees of said district. (1923, c. 136, s. 219.)

Cross Reference.—As to election in special school taxing districts, see section 5657; as to county wide plan of organization, see section 5481 and Editor's Note thereto for effect of failure to adopt county-wide plan. For constitutional provision requiring election see Art. VII, sec. 7. For a discussion of Special Tax School districts see 1 N. C. Law Rev. 88.

In General.—For an able discussion of this subject by Mr. Justice Hoke in which the various statutes pertaining to the subject are considered, see Sparkman v. Board, 187 N. C. 241, 121 S. E. 531.

Approval of Voters of Each District Unnecessary.—Sparkman v. Board, 187 N. C. 241, 121 S. E. 531.

Who May Sign Petition.—The prior law in regard to authorizing local taxes was that the petition be signed by freeholders. In Gill v. Board, 160 N. C. 176, 76 S. E. 203 it was held that women were not freeholders. The Public Laws 1915, c. 22, section 1746 changed this rule and made it possible for women to sign petitions as required in forming tax districts. See Chitty v. Parker, 172 N. C. 126, 90 S. E. 17.

Construed with Section 5669—This section and section 5669 are in pari materia, and should be construed together. Young v. Commissioners, 194 N. C. 771, 140 S. E. 740.

The provisions of § 5669, that the election shall be called and held under the same rules and regulations as provided in Public Laws of 1923, subchapter 8, for local tax elections, means that the election shall be authorized and conducted in accordance with the rules and regulations prescribed in subchapter 8, and does not include within its meaning the signing of the petition by the voters as required by this section. Young v. Commissioners, 194 N. C. 771, 140 S. E. 740.

Cited in Platt v. Board, 187 N. C. 125, 133, 121 S. E. 190; Forester v. North Wilkesboro, 206 N. C. 347, 350, 174 S. E. 112.

§ 5640. The board to consider petition.—The county board of education or the board of trustees, as the case may be, shall receive the petition and give it due consideration. If the board shall approve the petition for an election, it shall be endorsed by the chairman and secretary of the board and a record of the endorsement shall be made in the minutes of the board of education. The petition shall then be presented to the board of county commissioners or the governing body authorized to order the election, and it shall be the duty of the board of county commissioners or said governing body to call an election and fix the date for the same: Provided, the county board of education or board of trustees, as the case may be, may, for any good and sufficient reason, withdraw the petition before the close of the registration books, and if the petition be so withdrawn, the election shall not be held. In the case of a special charter district coterminous with or situated entirely within an incorporated city or town, said petition shall be presented to the governing body of said city or town, and the election shall be ordered by said governing body. (1923, c. 136, s. 220; 1925, c. 143.)

Editor's Note.—By amendment Public Laws 1925 the last sentence to this section was added.

The duty of the board of education under this section in connection with section 5645 is discretionary and can not be enforced by mandamus. Board v. Board, 189 N. C. 650, 127 S. E. 692.

Same—Duty of Commissioners Ministerial.—But this section does not rest in the county commissioners discretion to order or not order an election. After the board of education has approved the petition, the duty of the commissioners is ministerial only and may be enforced by mandamus. Board v. Board, 189 N. C. 650, 127 S. E. 692.

§ 5641. Rules governing election for local taxes.—In all elections held under this law the board of county commissioners, or the body authorized to order said election, shall designate the polling place or places, appoint the registrars and judges, and canvass and judicially determine the results of said election when the returns have been filed with them by the officers holding the election, and shall record such determination on their records. The notice of the election shall be given by publication at least three times in some newspaper published or circulated in the territory. It shall set forth the boundary lines of the district, the maximum rate of tax to be levied, which shall not exceed fifty cents (50c) on the one hundred dollar ($100.00) valuation of property, real and personal, and the purpose of the tax. The first publication shall be at least thirty days before the election. A new registration of the qualified voters of the territory shall be ordered, and notice of said new registration shall be deemed to be sufficiently given by publication once in some newspaper published or circulating in said district at least twenty days before the close of the registration books. This notice of registration may be considered one of the three notices required of the election. Such published notice of registration shall state the days on which the books will be open for registration of voters and the place or places at which they will be open on Saturdays. The books of such new registration shall close on the second Saturday before the election. The Saturday before the election shall be challenge day, and except as otherwise provided in this act such election shall be held in accordance with the law governing general elections. At the election those who are in favor of the levy and collection of the taxes shall vote a ticket on which shall be printed or written the words "For local tax," and those who oppose shall vote a ticket on which shall be printed or written the words "Against local tax." All other details of said election shall be fixed by the board or other governing body ordering the election, and the expenses of holding and conducting the election in all districts other than in special charter districts shall be provided by the county board of education out of the operating and equipment fund of the county. But the expenses of conducting the election in all special charter districts shall be paid by the board of trustees of said district out of the local tax funds of the district. (1923, c. 136, s. 221.)

As to time registration books must be kept open see section 5947.

Notice in Newspaper.—It is not necessary that the newspaper, in which the notice of election is given be published in the district, it is sufficient if the paper is circulated in the district where the election is to be held. See Miller v. Duke School Dist., 184 N. C. 197, 113 S. E. 786.

And failure to give the notice has been held immaterial where such failure did not affect the result of the election. See Yaunts v. Com., 151 N. C. 582, 66 S. E. 575; Gregg v. Board, 162 N. C. 479, 78 S. E. 301.

What Constitutes a Majority Vote.—The requirement that the measure shall be carried by a "majority of the qualified voters," by correct interpretation, signifies a majority of the qualified voters of the district appearing upon the registration book, and not a majority of those voting in the election. Williams v. County Com., 176 N. C. 554, 97 S. E. 478.

Cited in Young v. Commissioners, 194 N. C. 771, 774, 140 S. E. 740.

§ 5642. Levy and collection of taxes.—In case a majority of the qualified voters in the district or territory referred to above shall vote at the election in favor of the tax, it shall be annually levied and collected in the manner prescribed for the levy and collection of other taxes, and the maximum rate so voted shall be levied, unless the county board of education or board of trustees shall request a levy at a lower rate, in which event the rate requested, shall be levied and collected; and the county superintendent of schools and the officer in charge of county tax records shall keep records in their respective offices showing the valuation of the property, real and personal, in the district, the rate of tax authorized annually to be levied, and the amount annually derived from the local tax, and it shall be illegal for any part of the local tax fund to be used for any other purpose other than to supplement the funds for a six months school term in the district. (1923, c. 136, s. 222.)

§ 5643. Increasing levy in districts having less than fifty cent rate.—Authority is hereby given any local tax district having voted a maximum rate less than fifty (50c) to increase the levy to a maximum of fifty cents (50c) on the one hundred dollars ($100.00) valuation of property, real and personal. Such increase shall be made after an election has been held as provided for in this article. (1923, c. 136, s. 223.)

§ 5644. Validating rates heretofore voted.—If any local tax district in which a fixed or maximum rate of more than thirty cents (30c), but not exceeding fifty cents (50c), has been voted at one election under the authority of sections five thousand five hundred and twenty-six and five

thousand five hundred and thirty-five, Consolidated Statutes of 1919, the election in all respects is hereby validated. (1923, c. 136, s. 224.)

§ 5645. Frequency of election.—In the event that a majority of the qualified voters of a district do not at the election cast their votes for the local tax, another election or elections under the provisions of this article may be held after the lapse of six months in the same district. (1923, c. 136, s. 225.)

§ 5646. Enlargement of local tax or special charter districts.—Upon a written petition of a majority of the governing board of any district, the county board of education, after approving the petition, shall present the same to the board of county commissioners and ask for an election on the question of the enlargement of the boundary lines of any such district so as to include any contiguous territory, and an election in such new territory may be ordered and held under rules governing elections for local taxes as provided in this article: Provided, the local tax rate specified in the petition and submitted to the qualified voters shall be a local tax of the same rate as that voted in the said district to which the territory is to be added. If a majority of the qualified voters in such new territory shall vote in favor of such tax, the new territory shall become a part of said district, and the term "local tax of the same rate" herein used shall include, in addition to the usual local tax, any tax levied to meet the interest and sinking fund of any bonds heretofore issued by the district proposed to be enlarged. In case of a majority of the qualified voters at the election shall vote in favor of the tax, the district shall be deemed enlarged as so proposed. (C. S. 5530, revised.) (1923, c. 136, s. 226; 1925, c. 151; 1927, c. 88.)

Cross Reference.—As to consolidation of tax districts see sections 5483 et seq.; as to what constitutes a majority vote see note to section 5641; as to repealing charter see section 5555; as to failure to adopt county-wide plan see Editor's Note to section 5481.

Editor's Note.—The cases which follow in this note are in the majority of instances constructions of section 5530 of the Consolidated Statutes, which of course did not include the amendment of 1923; as the Act of 1923, codified as section 5646 varies no little from the original statute, it is deemed advisable to advert to the changes here, so that the constructions of the former statute may be more readily understood.

In General.—Laws of 1921, ch. 179, providing for the consolidation and adjustment of rates of taxation and authorizing the voters of a district so consolidated to vote special tax rates for the schools in the entire district, etc., should be construed to harmonize with C. S., 5530, (this section) and the provisions of the former statute do not affect or impair the requirement of the latter one, that for an extension of the boundaries of an existing local school tax district or districts, the approval of the tax proposed must first be given by the voters in the proposed new and contiguous territory. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

Construed with Art. 24.—C. S. 5526, (now incorporated in Art. 24, ch. 95, providing for the creation of new local school tax districts, and section 5530 (this section) requiring the question of an enlargement of an existing special school tax district to be submitted separately to the voters of the proposed new territory are to be construed in pari materia, and the provisions of each are held reconcilable with those of the other. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

C. S., (incorporated in Art. 24,) applies primarily to the consolidation of nonspecial-school-tax territory; and in order to consolidate existent school-tax districts having rates, by extending the limits of some of them to include others, section 5530 (this section) requires that a majority of the committee or trustees of either of these districts sought to be enlarged file a written request with the county board of education to thus enlarge its boundaries, and an election must be held before consolidation, and the other material requirements of the statute complied with; and where this course has not been followed, the tax attempted to be levied in the consolidated district, and bonds ordered to be issued in pursuance thereof, are invalid. Jones v. Board, 187 N. C. 557, 122 S. E. 290. Attention is directed to the fact that the majority now required is not of the "committee or trustees" but of the "governing board." In other respects this decision seems to be still applicable.—Ed. Note.

C. S., 5526 (incorporated in Art. 24,) providing for the creation of a special school tax district by the county board of education without regard to township lines, upon an election to be held within the proposed district, after notice, etc., refers to territory having no special school tax and has no application to the enlargement of such district under the provisions of C. S., (this section), wherein one or more school tax districts having already been established and there is other continuous territory sought to be included which has not voted any special school tax. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

Where special school tax districts have been consolidated with non-school tax territory, it is, in effect, an enlargement of the special tax territory, and coming within the provisions of C. S., 5530 (this section) it is required for the validity of a special tax to be levied for school purposes in the enlarged territory that it be approved by the voters outside of the special tax districts included in the consolidated territory, at an election to be held according to law. Barnes v. Board, 184 N. C. 325, 114 S. E. 398.

Where special school tax districts and nonspecial school tax districts have been consolidated, and the district as a whole has voted, but separately as to each district, approving the question of special taxation for school purposes, and the election as to each, inclusive of the nontax territory, is upheld, counting the votes separately therein, the result of the election will be declared valid. Board v. Bray Bros. Co., 184 N. C. 484, 115 S. E. 47.

Collateral Attack on Special Tax. — Where nonspecial school tax territory is included in a consolidated school tax district with a school tax district that has theretofore voted and continued to levy a special tax, the question of the validity of the tax so levied by the existing district cannot be attacked collaterally in a suit to enjoin the levy of a special tax on the entire consolidated district, later attempted to be formed. Barnes v. Board, 184 N. C. 325, 114 N. C. 325, 114 S. E. 398.

Same—Separate Vote in Nontax Territory.—Where one or more special tax districts have been established under the provisions of our statutes applicable, such districts may not extend their territory to include other districts and adjacent territory that have not voted a special tax, without the question having first been submitted to and approved separately by the voters of the outlying territory, and giving them the right to independently determine for themselves whether they shall be specially taxed, in the amount proposed. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

In Plott v. Board, 187 N. C. 125, 132, 121 S. E. 190, the Court said: "The Court has decided, it is true, that where a school-taxing district has been established its boundaries may not be enlarged or extended so as to include an adjacent nontaxing district without the approval of a majority of the qualified voters of the nontaxing territory."

The uniting of an existing special school tax district with other districts not having such tax is in effect the enlarging of the boundaries of the tax district to take in outlying nontax territory under the provisions of C. S., 5530 (this section) and it is only required for the establishment of the enlarged district and the levying of a special tax therein, that the district to be enlarged and the outlying territory, should each cast a majority vote in favor of the propositions submitted to them, and it is unnecessary that each of the nontax districts included in the enlarged territory should have separately cast a majority vote in favor of the special tax proposed, nor is it material that one of them was separated from the others by the original special tax district so enlarged. Vann v. Board, 185 N. C. 168, 116 S. E. 421.

The authority given the county board of education to re district the entire county or part thereof, and to consolidate school districts, etc., C. S., 5473, (section 5483,) as amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of our Constitution, Art. VII, sec. 7, but to the extent the amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of C. S., 5530 (this section) must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose. Perry v. Commissioners, 183 N. C. 387, 112 S. E. 6,

under the provisions of C. S., 5526 (incorporated in Article 24, ch. 95), it appeared that therein was included several local tax districts already established and also territory wherein no special tax had been voted, and the proceedings were properly instituted by only one of these local school tax districts: Held, the proceedings were for the enlargement of the petitioning local tax district, and required that the others therein should also have proceeded regularly under the statute and that the electors in the proposed part that had not voted a special tax be permitted to vote separately upon the question of the contemplated increase for the designated purpose. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

The combination or consolidation of local school tax districts with territory that has not voted a special tax for the purposes of schools must fall within the provisions of C. S., 5530, (this section) whereby the proposed new territory is required to vote separately upon the question of taxation, in conformity with our Constitution, Art. VIII, § 7, Perry v. Commissioners, 183 N. C. 387, 112 S. E. 6.

Enlarging Special Charter District.—While special charter school districts do not as a rule come within the compulsory regulations of the public school authorities unless or until they have surrendered their special charter, chapter 136, Laws of 1923, § 157, the school authorities, under section 226, (from which this section is codified) are empowered to enlarge one of these districts having a special tax, by adding outside adjoining territory so that it comes under the governing authorities of the special charter district thus enlarged, when the approval of the voters of the outlying territory proposed to be added have approved thereof at an election held for the purpose as directed by the statute. Blue v. Board, 187 N. C. 431, 122 S. E. 19.

Under this article, elections may be had for the various purposes therein specified, and among them a district may be enlarged and a taxing district established in the same on petition of the governing board of the principal district, and on taking the vote of the outside territory to be added, as indicated in this section. Blue v. Board, 187 N. C. 431, 434, 122 S. E. 19. See note to sec. 5655 for restrictions on elections.—Ed. Note.

Enlargement without Required Vote. — When a school district authorizes a local tax and later enlarges without the election as required, being held in the new territory, and a tax is levied for four years without objections from the taxpayers although the annexation was unconstitutional the taxpayers will be estopped to levy the validity of the annexation. Carr v. Little, 188 N. C. 100, 123 S. E. 625.

§ 5646(a). Countywide plan not necessary.—It shall not be necessary, in enlarging school districts under section five thousand six hundred and forty-six (5646) of article twenty-three, chapter Education, of volume three, Consolidated Statutes, or under section five thousand six hundred and fifty thereof, for county boards of education to adopt a countywide plan of organization, under the provisions of said chapter. (1925, c. 151, s. 2.)

§ 5647. Abolition of district upon election.—Upon petition of [twenty-five per cent (25%) of the number of registered voters in the election creating said special tax district, said petition to be signed by qualified voters residing in such special tax district,] one-half of the qualified voters residing in any local tax district established under this article, the same shall be indorsed and approved by the county board of education, and the board of county commissioners shall order another election in the district for submitting the question of revoking the tax and abolishing the district, to be held under the provisions prescribed in this act for holding other elections. It shall be the duty of the board of education to indorse the petition when presented, containing the proper number of names of qualified voters, and this provision is made mandatory, and the board is allowed no discretion to refuse to indorse the same when so presented. If at the election a majority of the qualified voters in the district shall vote "Against Local Tax," the tax shall be deemed revoked and shall not be levied, and the district shall be discontinued. [Provided, this section shall not apply to that part of such tax, if any, in said district as may be necessary to pay the interest on or amortization of any bonded or other indebtedness, incurred in consequence of the voting of said special tax district but to that extent, and to that extent only, shall said special tax district be maintained. And, provided, further, that the provisions of this section in brackets shall apply only to the following counties: Alexander, Anson, Beaufort, Buncombe, Carteret, Catawba, Chatham, Chowan, Cleveland, Craven, Currituck, Davidson, Duplin, Franklin, Gates, Greene, Henderson, Hoke, Hyde, Iredell, Jackson, Johnston, Lenoir, Martin, Mecklenburg, Moore, Nash, Onslow, Pamlico, Pitt, Randolph, Richmond, Rockingham, Transylvania, Vance, Wake, Warren, Wilkes, Robeson.] (C. S. 5531, revised.) (1923, c. 136, s. 227; 1931, c. 372.)

Editor's Note.—It was the rule prior to this section that the approval of the board of education was necessary before a vote to abolish the district could be had, and the exercise of the power to approve was discretionary, there being no way to force the approval. Key v. Board, 170 N. C. 123, 86 S. E. 1002. By the express terms of the section now approval is mandatory.

The Act of 1931 added the portions of this section appearing in brackets.

In General.—Under the provisions of C. S., 5530, (section 5646) a local tax school district may be abolished by the act of creating a new one of which it is a component part, while section 5531 (this section) is restricted simply and singly to the abolition of an existing district, and so construed, it was held that these sections are in harmony with each other. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

Abolition Unnecessary to Valid Consolidation.—Where, in accordance with the provisions of chapter 136, Laws of 1923, an existent special charter tax district has been enlarged to take in added and adjoining territory, it is not required that such district should have first been abolished to make the consolidation valid according to sections 227, 228, § 5647, 5648, the requirements of these sections being intended to provide for the abolition of local-tax districts when that was the single question presented. Blue v. Board, 187 N. C. 431, 122 S. E. 19.

Effect of Abolition on Taxes Already Levied.—Where a school district has been established under the provisions of the Revisal, sec. 4115, and in the exercise of the powers therein conferrd have annually levied a tax for school purposes, and, accordingly, a tax was levied for the current year, but subsequently and in pursuance of chapter 135, Laws 1911, an election was ordered on the question of revoking the special tax, which was held and carried in favor of the repeal: Held, the repeal of the former tax was prospective in its operation, and especially when the authorities had theretofore contracted with teachers and for other necessary expenses to carry on the school work authorized by the former act. Mann v. Allen, 171 N. C. 219, 88 S. E. 235.

Cited in Young v. Commissioners, 194 N. C. 771, 774, 140 S. E. 740.

§ 5648. Local tax district in debt may not be abolished.—The provisions of this article as to abolishing local tax districts shall not apply when such local tax district is in debt in any sum whatever. (1923, c. 136, s. 228.)

§ 5649. Election for abolition not oftener than once a year.—No election for revoking a local tax in any local tax district shall be ordered and held in the district within less than one year from the date of the election at which the tax was voted and the district established, nor at any time within less than one year after the date of the last election on the question of revoking the tax in the district; and no petition revoking such tax shall be approved by the county board of education oftener than once a year: Provided,

this section shall not apply to any indirect abolition or reduction of taxes as may be elsewhere provided. (C. S. 5533, revised.) (1923, c. 136, s. 229.)

In General.—This section requiring that "no election for revoking a special [now local] tax in any special [now local] tax district shall be ordered and held," within less than two [now one] years from the date at which the tax was voted and the district established, "nor at any time within less than two [now one] years after the date of the last election on the question [of revoking the tax] in the district," invalidates any election on the question of taxation held within two years [now one] after the last election, the second proposition being independent from the first as to "revoking" a special tax in the district, otherwise the second provision would be identical with the first, and meaningless. Weesner v. Davidson County, 182 N. C. 604, 109 S. E. 863. The insertions in brackets by the editor indicate the changes in this section effected by the Laws of 1923.—Ed. Note.

Computing the Time.—Computing the two [now one] years period in which an election may be had with regard to taxation in a special school district under the provisions of this section, the time should be computed from the last valid election on the subject. Weesner v. Davidson County, 182 N. C. 604, 109 S. E. 863. Cited and approved in Adwik v. Fugua Spring, 194 N. C. 423.

§ 5650. Enlarging boundaries of district within incorporated city or town.—The boundaries of a district situated entirely within the corporate limits of a city or town, but not coterminous with such city or town, may be enlarged so as to make the district coterminous with such city or town either in the manner prescribed by this section or in the manner prescribed by section five thousand six hundred and forty-six: Provided, however, that no district shall be enlarged under this section if the new territory necessary to be added to such district, in order to make it coterminous with such city or town, has any bonded debt incurred for school purposes, other than debt payable by taxation of all taxable property in such district and such new territory. In cases where the local annual tax voted to supplement the funds of the six months public school term is of the same rate in such district and in the new territory necessary to be added to such district in order to make the district coterminous with such city or town, the county board of education shall have power to enlarge the boundaries of the district as aforesaid. In cases where such tax rates are not the same, the boundaries of the district shall become so enlarged upon the adoption of a proposition for such enlargement by a majority of the qualified voters of such new territory. The governing body of such city or town may at any time, upon petition of the board of education or other governing body of such district, or upon its own initiative if the governing body of the city or town is also the governing body of the district, submit the question of enlarging the district as aforesaid to the qualified voters of such new territory proposed to be added to such district at any general or municipal election or at a special election called for said purpose. Such an election may be ordered and held and a new registration for said election provided under the rules governing elections for local taxes as provided under the article, except that the election and registration shall be ordered by and held under the supervision of and the result of the election determined by the governing body of such city or town. The ballots to be used in said election shall have printed or written thereon the words: "For the enlargement of.... school district, pursuant to section two hundred and thirty of chapter one hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, as amended," and "Against the enlargement of ..... school district, pursuant to section two hundred and thirty of chapter one hundred and thirty-six of the public laws of one thousand nine hundred and twenty-three, as amended." If a majority of the qualified voters of such new territory proposed to be added to such district shall vote in favor of such enlargement, said district shall thereupon become coterminous with said city or town, and there shall be levied annually in such new territory all taxes previously voted in said district for the purpose of supplementing the funds for six months public school terms for said district and for the purpose of paying the principal or interest of any bonds or other indebtedness previously issued or incurred by said district; and a vote in favor of such enlargement shall be deemed and held to be a vote in favor of the levying of such taxes. The validity of the said election and of the registration for said election and of the correctness of the determination of the result of said election shall not be open to question except in an action or proceeding commenced within thirty days after the determination of the result of said election at the same time that said election is held it shall be lawful to hold an election in the entire territory of said city or town on the question of issuing bonds of said city or town or of said school district as so enlarged, for school purposes, and levying sufficient tax for the payment of said bonds, or on the question of levying a local annual tax on all taxable property in said city or town or in said school district as so enlarged, to supplement the funds for the six months public school term for said district, in addition to taxes for the payment of bonds, in the same manner that would be lawful if said district had been so enlarged prior to the submission of said questions. One registration may be provided for all of said simultaneous elections. (1923, c. 136, s. 230; 1925, c. 143.)

Editor's Note. — By Public Laws 1925 this section was amended and re-enacted. Prior to this time the section provided that school districts situated within and coterminous with the boundary line of a town or city which after the district was created was not coterminous with such city or town because of change of boundaries, might be made coterminous, and the board of education had power to consolidate the newly incorporated territory with the school district provided the tax rate was the same.

§ 5651. Local tax districts from portions of contiguous counties.—a. Local tax districts may be formed as provided in this section out of contiguous portions of two or more counties.

The petition for such a district must be initiated as petitions for local tax elections are initiated under the provisions of this article, must be endorsed by the county boards of education of such contiguous counties and each county board of education shall certify to the board of county commissioners of its county that the metes and bounds of the proposed joint local tax district are in accordance with and are an integral part of the lawfully adopted county-wide plan of organization in so far as they pertain to said county.

The board of commissioners of each county, in compliance with the provisions of this article re-

lating to the conduct of local tax elections, shall then call and hold an election in that portion of the proposed district lying in its county. Election returns shall be made from each portion of the proposed district to the board of commissioners ordering the election in that portion and the returns canvassed and recorded as required in this article for local tax districts.

b. In case the election carries in each portion of the proposed district, the several county boards of education concerned shall each pass a formal order consolidating the territory into one joint local tax district; which shall be and become a body corporate by the name and style of '..... Joint Local Tax School District of .... Counties.' The county board of education having the largest school census and the largest area in the part of the joint local tax districts lying in its county shall determine the location of the schoolhouse; but if the largest census and area do not both lie in the same county, then the couny boards shall jointly select the site for the building, and in case of a disagreement they shall submit the question to the board of arbitration, consisting of three members, one member to be named by each board of education if three counties are concerned, or if there are but two counties, then each board shall choose one member and the two so named shall select the third member. The decision of the board of arbitration shall be binding upon all county boards of education concerned.

c. The school committee shall consist of five members, three of whom shall be appointed by the board of education of the county in which the building is to be situated and two to be appointed by the other county or counties, but the terms of office shall be so arranged that not more than two members will retire in any one year. The committee shall officially exercise such corporate powers as are conferred in this section. This said committee shall have all the powers and duties of committee of local tax districts, and in addition thereto it shall adopt a corporate seal and have the power to sue and be sued. The committee shall have the power to determine the rate of local taxes to be levied in said joint district, not exceeding the rate authorized by the voters of the district, and when the committee shall have so determined the rate of local taxes to be levied in said joint district and shall have certified same to the boards of commissioners of the several counties from which said joint district is created, the said boards of county commissioners, and each of them, shall levy said rate of local taxes within the portion of said joint district lying within their respective counties; and the taxes so levied shall be collected in the several counties as other taxes are collected therein, and shall be paid over by the officers collecting the same to the treasurer or other fiscal agent of the county in which the schoolhouse is located, or is to be located, to be by him placed to the credit of the joint district.

d. The committee shall have as full authority to call and hold elections for the voting of bonds of the district as is conferred upon boards of education and boards of commissioners in article twenty-two of this chapter. In calling the election for a bond issue no petition of the county board of education shall be necessary; but the election shall be called and held by the school committee of the incorporated local tax school district under as ample authority as is conferred upon both county boards of education and boards of commissioners under article twenty-two of this chapter. When bonds of the district have been voted under authority of this section, they shall be issued subject to the limitations of article twenty-two of this chapter in the corporate name of the district, signed by the chairman and secretary of the school committee, sold by the school committee, and the proceeds thereof deposited with the treasurer of the county board of education of the county in which the school building is, or is to be, located, to be placed to the credit of the joint district, and the taxes for interest and principal shall be levied and collected as provided in subsection c. above for the levy and collection of local taxes.

e. The committee shall have the same power to call and hold elections to ascertain the will of the voters of the district upon the question of increasing the local tax levy to a maximum rate of fifty cents on the one hundred dollars ($100) valuation of taxable property as it has in the case of bond elections. But local tax elections called and held in such joint districts shall be held under the general provisions of this article governing local tax elections, except that the district committee is hereby granted the powers of county boards of education and boards of commissioners as to local tax elections.

f. The building of all schoolhouses in such joint local tax districts shall be effected by the county board of education of the county in which the building is to be located under authority of law governing the erection of school buildings by county boards of education. It shall be lawful for the boards of education in the other county or counties to contribute to the cost of the building in proportion to the number of children shown by the official census to be resident within that part of the joint district lying within each county respectively. If the building is to be erected from moneys borrowed from the State Building Funds or from county taxation, then each county board of education shall contribute to its construction in the proportion set out above and pay over its contribution to the treasurer of the county board having control of the erection of the building: Provided, it shall be lawful for the county board that controls the erection of the building to borrow from the State and lend to the district the full amount of the cost of the building in cases where the entire amount is to be repaid by the district funds.

g. All district funds of a joint local tax district shall be kept distinct from all other funds, placed to the credit of the district, and expended as other local tax or district bonds funds are lawfully disbursed.

h. The county board of education and county superintendent of public instruction of the county in which the schoolhouse is located shall have as full and ample control over the joint school and the district as it has in the case of other local tax districts subject only to the limitations of this section.

i. It shall be the duty of the committee of the joint school district to prepare a budget in accordance with the law requiring budgets of special

charter districts. The said budget, which shall show the proportionate part of the cost of maintenance for six months to be contributed by each county, the several parts to be ascertained on the basis of the proportions of the total district school census living in each respective county, shall be filed by the committee with the county board of education of each county, and it shall be the duty of each board, if it approves the district budget, to incorporate it in the county budget to be submitted to the commissioners in May of each year. Each of the several county boards of education is hereby directed to pay over its proportionate part of the district budget, when and as collected, to the treasurer of the board of education of the county in which the school plant is located for the purposes for which it has been levied and collected.

j. All districts formed before the ratification of this amendment under the provisions of section two hundred and thirty-two, chapter one hundred and thirty-six, Public Laws of one thousand nine hundred and twenty-three, and all districts incorporated before the ratification of this amendment, under the provisions of section two hundred and thirty-three of said chapter, are hereby authorized and empowered to exercise all the powers and privileges conferred by this section as amended. (1923, c. 136, s. 232; 1924, c. 32.)

Editor's Note.—By Ex. Sess. 1924 this section was changed and re-enacted, for the changes made a comparison of the two acts is necessary.

§ 5652. District already created out of portion of two or more counties.—Districts that have already been created out of portions of two or more counties may be incorporated in the following manner: Upon petition of the county board of education of each county, calling for an election the commissioners of each county shall call an election which shall be conducted in all respects as an election for voting local taxes. But the qualified voters in favor of incorporation shall cast a ballot on which is written or printed "For Incorporation," and those against shall cast a ballot on which is written or printed "Against Incorporation." If a majority of the qualified voters in the portion in each county shall cast their ballots for incorporation, the district is thereby incorporated and shall possess all the authority of incorporated districts as provided in this article. (1923, c. 136, s. 233.)

§ 5653. Validation of local tax elections.—In all cases where, in accordance with the requirements of section seven of article seven of the constitution of North Carolina, a majority of the qualified voters of any school district or of any proposed school district, or of any portion of a school district, have heretofore voted in favor of the levying of a special annual tax for school purposes in said school district, or proposed school district, or portion of a school district, as the case may be to supplement the public school funds which may be apportioned to said district by the county board of education, and a tax has heretofore been levied and collected pursuant to said vote, and no court of competent jurisdiction has held said vote or said annual tax or the establishment or organization of said district to be invalid, the said vote and all acts and proceedings done or taken in or about the calling, holding, or conducting of the election at which said vote was cast or in or about the registration of voters for said election are hereby legalized and validated: Provided, that this section shall not apply to any litigation pending in any of the courts within the state March 2, 1923. (1923, c. 135, ss. 1, 2.)

§ 5654. Incorporation of districts in which election is validated.—In all cases referred to in the preceding section the inhabitants of such proposed school district are hereby constituted a body politic and corporate by the name and style by which said school district is known, and said body politic is hereby authorized to adopt a corporate seal, unless such school district has, since the vote aforesaid, been consolidated with or annexed to another school district, or unless the voters of such district have voted to revoke the said tax or abolish such district: Provided, that this section shall not apply to any litigation pending in any of the courts within the state March 2, 1923. c. 135, ss. 1, 3.)

Art. 24. Special School Taxing Districts

§ 5655. School taxing districts created.—The following territorial divisions of a county are hereby declared to be special school taxing districts in which special school taxes may be voted as hereinafter provided: (1) A township; (2) two or more contiguous or consecutive districts, all of which may be embraced within one common boundary; (3) two or more contiguous or consecutive townships, all of which may be embraced within one common boundary; (4) one or more districts and one or more townships contiguous,, all of which may be embraced within one common boundary, and (5) the entire county excluding one or more tonwships or one or more special charter districts. (1923, c. 136, s. 234.)

Cross Reference. — See notes to sections 5581, 5646, and 5659. For a definition of district, see section 5387. As to uniformity of tax in consolidated district, see secton 5485 and note thereto. For treatment of special tax school districts, see 1 N. C. Law Rev. 88. As to effect of failure to adopt county-wide plan, see Editor's Note to section 5481.

Editor's Note.—As section 5526 of Volume II Consolidation Statutes was codified in no one section but is found scattered throughout the sections comprising article 24, it is thought that the beginning of that article is the most appropriate place for constructions of the former section.

Applicability to Existing Tax Districts.—The application of the provisions of C. S., 5526, [incorporated throughout the various sections of this article] to the formation of new local school tax districts without regard to township lines, etc., refers primarily to instances where new districts are created or formed, as therein prescibed, out of territory exclusive of special tax districts, or out of territory having the same status throughout its entirety, in relation to the then existing school tax or taxes, so as to give every voter a fair chance, uninfluenced by other considerations, to declare with his ballot whether or not he wishes to be taxed for the creation and maintenance of the district proposed. Perry v. Commissioners, 183 N. C. 387, 112 S. E. 6.

C. S., 5526, providing for the creation of a special school tax district by the county board of education without regard to township lines, upon an election to be held within the proposed district, after notice, etc., refers to territory having no special school tax and has no application to the enlargement of such district under the provisions of secs. 5530, 5646, wherein one or more school tax districts have already been established and there is other contiguous territory sought to be included which has not voted any special school tax. Hicks v. Board, 183 N. C. 394, 112 S. E. 1.

C. S., 5526, applies primarily to the consolidation of non-special school-tax territory; and in order to consolidate existent school-tax districts having different rates, by extending the limits of some of them to include others, sections 5530, 5646 requires that a majority of the committee or trustee

of either of these districts sought to be enlarged file a written request with the county board of education to thus enlarge its boundaries, and an election must be held before consolidation, and the other material requirements of the statute complied with; and where this course has not been followed, the tax attempted to be levied in the consolidated district, and bonds ordered to be issued in pursuance thereof, are invalid. Jones v. Board, 187 N. C. 557, 122 S. E. 290.

Section 5657, relates to "special school taxing districts," and not to "school districts." Special taxing districts are created by this section; they include territory within more than one school district. Hence we find the legislative requirement in sec. 5657, that "the governing school boards of at least a majority of the school districts within the special school taxing district shall indorse the petition." Harrington v. Board, 189 N. C. 572, 127 S. E. 577.

Application to Special-Charter Districts.—The power under this article extends to both local and nonlocal taxing districts, but does not seem to include special-charter districts unless these last have surrendered their charters and become local-tax districts, pursuant to the provisions of section 5555. The school authorities have construed this article so as not to embrace such districts within its meaning, unless surrender has been made as suggested. Sparkman v. Board, 187 N. C. 241, 245, 121 S. E. 531.

Separate Vote in Nontax Territory.—See Hicks v. Board, 183 N. C. 394, 112 S. E. 1; Sparkman v. Board, 187 N. C. 241, 242, 121 S. E. 531.

Restriction as to Locating School Invalid. — Where the electors of a school district of a county have voted for a special tax for the erection of a public school building, based upon a petition filed with the county commissioners and approved by the county board of education in conformity with the requirements of C. S., sec. 5526, except that the petition attempted to take away the discretionary power of the commissioners in locating it, this restrictive provision in the petition is contrary to law, and will be disregarded, and the election being free from fraud and giving the electors full opportunity to vote, the special tax thereby approved will be held valid. Lazenby v. Board, 186 N. C. 548, 120 S. E. 214.

Form of Ballot Directory.—Under a statute which sets out a form of ballot to be used at an election, the use of such form is directory and not mandatory, unless the statute so declares, this matter being within the discretionary power of the Legislature. Riddle v. Cumberland County, 180 N. C. 321, 104 S. E. 662.

The failure to use froms prescribed by this section will not render the election invalid when a free and fair opportunity has been afforded the voters therein to express their will at the polls. Riddle v. Cumberland County, 180 N. C. 321, 104 S. E. 662.

Cited in Plott v. Board, 187 N. C. 125, 133, 121 S. E. 190; Forester v. North Wilkesboro, 206 N. C. 347, 350, 174 S. E. 112.

§ 5656. Boundary lines.—The county board of education, after ascertaining in what special school taxing district it is desirable to levy a special local tax for schools, in addition to the county tax for the six months school term, shall define or describe the boundary lines so as to include the territorial divisions embracing only the special school taxing district in which a special school tax election for schools is to be called, and to exclude all other territory. The boundary lines of the special school taxing district, having been defined and recorded on the minutes of the board of education, a special school tax election may be held as hereinafter provided to equalize school advantages within the special school taxing district. (1923, c. 136, s. 235.)

§ 5657. Petition for an election.—The petition for an election in a special school taxing district shall be made as follows: The governing school boards of at least a majority of the school districts within the special school taxing district shall indorse the petition, and it shall be approved by the county board of education. Said petition shall state the maximum rate of tax to be voted on, which rate shall not exceed fifty cents (50c) on the one hundred dollars ($100.00) valuation of all property, real and personal: Provided, however, that when a special school taxing district created in accordance with the provision of this article includes or embraces two or more school districts having indebtedness incurred for the erection of school buildings, the maximum rate of fifty cents (50c) specified in this section may be exceeded by an additional rate necessary to take care of the combined aforesaid indebtedness of the several districts incurred for the erection of such school buildings. (1923, c. 136, s. 236; 1927, c. 37.)

As to a tax under the county-wide plan, see section 5639. See notes to section 5655.

Editor's Note.—By Public Laws 1927 the proviso in the last part of the section providing for exceeding the specified rate, was added.

Form of Petition. — The character of the petition is not specifically set forth in this article, but the same is manifestly provided for and controlled by section 5639. Sparkman v. Board, 187 N. C. 241, 245, 121 S. E. 531.

§ 5658. The election.—Whenever a petition properly indorsed and approved is presented to the board of county commissioners, said board shall call an election in said special school taxing district and fix a date for holding the same. The rules governing the election, the levy and collection of taxes, and the frequency of elections in a special school taxing district shall be the same as rules governing elections, the levy and collection of taxes, and the frequency of elections as provided in article 23. (1923, c. 136, s. 237.)

Notice of Election.—The requirements of this section as to the first publication in a newspaper, etc., provided in sec. 5614 Art. 23 and the giving of the specified time are mandatory if they affect the merits of the election, and directory if they do not. Flake v. Board, 192 N. C. 590, 135 S. E. 467. This case presents splendid illustrations of variations from the terms of the statute which do not affect the merits.—Ed. Note.

Restriction of Boundaries.—In holding an election under this article, the authorities are restricted to districts having established or recognized boundaries, such as a school district or township, or contiguous school districts or townships. Blue v. Board, 187 N. C. 431, 434, 122 S. E. 19. But see note to sec. 5646.

§ 5659. Special school taxing districts.—If a majority of the qualified electors in the special school taxing district shall vote in favor of the special school tax, then it shall operate to repeal all school taxes theretofore voted in any local tax or special charter district located within said special school taxing district, except such taxes as may have been voted in said local tax or special charter district to pay the interest on bonds and to retire bonds outstanding. But the county board of education shall have the authority to assume all indebtedness, bonded and otherwise, of said local tax or special charter district and pay all or a part of the interest and installments out of the revenue derived from the rate voted in the special school taxing district: Provided, the revenue is sufficient to equalize educational advantages and pay all or a part of the interest and installments on said bonds. (1923, c. 136, s. 238.)

Right of Each District to Vote Separately.—See Sparkman v. Board, 187 N. C. 241, 242, 121 S. E. 531.

Cited in Flake v. Board, 192 N. C. 590, 135 S. E. 467.

§ 5660. Organization of the schools in special school taxing districts.—The county board of education is hereby authorized to organize the

schools in a special school taxing district after a special school tax has been voted, in such a way as to equalize educational opportunities within said district. Transportation of pupils may be provided for wherever the needs are apparent, out of county funds for the six months school term and out of funds derived from special school taxes for the remainder of the term. But all consolidation of schools in said special taxing district shall be in accordance with article 10, which provides for creating and consolidating school districts. (1923, c. 136, s. 239.)

Art. 25. Legal Attendance of Pupils in Local Tax or Special Charter Districts

§ 5661. Children residing in a school district shall have the advantage of the public school.—The following persons residing in local tax, special charter or special school taxing districts shall be entitled to all the privileges and advantages of the public schools of said district or districts unless removed from school for cause:

(a) All residents of the district who have not completed the prescribed course for graduation in the high school.

(b) All children whose parents have recently moved into the district for the purpose of making their legal residence in the same.

(c) Any child or children living with either the father or the mother or guardian who has made his or her permanent home within the district.

(d) Any child received into the home of any person residing in the district as a member of the family, who receives board and other support free of cost. (1923, c. 136, s. 240.)

§ 5662. Credits on tuition to nonresidents whose children attend in district.—Any parent or person in loco parentis residing outside of any local tax, special charter or special school taxing district, and owning property within said district, whose child, children, or wards shall attend school in said district, shall be entitled to receive as a credit on the tuition of said child, children, or wards the amount of special school taxes paid on said property. The county board of education may arrange with any such district to send any child or children residing in the county to the school in such district, if they are without adequate educational advantages, for the constitutional term of six months, and to pay the actual cost of the instruction of the children, including the appropriations from the six months school fund. (C. S. 5477, revised.) (1923, c. 136, s. 241.)

Art. 26. Special County Tax in Which Part of Local Taxes May Be Retained

§ 5663. Election upon petition of county board of education.—Upon the petition of the county board of education of any county, the county commissioners shall order an election to be held in the county to ascertain the will of the people whether there shall be levied on all taxable property and polls in the county a special county tax, not to exceed fifty cents (50c) on the one hundred dollars ($100.00) valuation of property, to supplement the six months school fund of the county. (1923, c. 136, s. 242.)

Cited in Young v. Commissioners, 194 N. C. 771, 774, 140 S. E. 740; Forester v. North Wilkesboro, 206 N. C. 347, 350, 174 S. E. 112.

§ 5664. Rules governing election.—The election shall be conducted for the county as nearly as may be under the "Rules Governing Elections for Local Taxes" as provided in this law. (1923, c. 136, s. 243.)

§ 5665. Maximum tax levy.—In the event that a majority of the qualified voters at said election shall vote in favor of a special county tax, said tax shall be in addition to all taxes theretofore voted in any local tax or special charter district except as provided in section 566. The maximum rate voted shall be annually levied and collected each year in the same manner and at the same time as other taxes of the county are levied and collected, unless the county board of education shall petition for a lower rate. In that event the county commissioners shall levy the rate requested. (1923, c. 136, s. 244.)

§ 5666. The rate in local tax or special charter districts.—Whenever the maximum special county tax rate levied or to be levied under the provisions of this article is less than fifty cents (50c), each local tax, special charter or special school taxing district shall have the authority to levy an additional rate, not in excess of the local tax rate voted in the district.

All indebtedness, bonded or otherwise, of said district or districts may be assumed by the county board of education; and such indebtedness, if assumed by the county board of education; shall be paid out of the special county tax levied under the provisions of this article. (1923, c. 136, s. 245; 1925, c. 180, s. 2.)

Editor's Note.—By amendment Public Laws 1925, a former provision at the end of the first paragraph limiting the total special tax to not exceeding fifty cents on the hundred dollars, except in case where the tax was for bonds or other such indebtedness which remained an obligation against the district, was omitted.

§ 5667. Subsequent elections upon failure of first.—In case a majority of qualified voters of said election in any county shall fail to vote for said special county tax, on petition of a majority of the members of the county board of education of the county, the county commissioners may, after six months, order another election in the same manner and under the same rules governing elections for local taxes. (C. S. 5509, revised.) (1923, c. 136, s. 246.)

§ 5668. Payment of election expenses.—The expenses of holding said election shall be paid out of the school fund of the county. (C. S. 5510, revised.) (1923, c. 136, s. 247.)

SUBCHAPTER IX. BONDS AND LOANS FOR BUILDING SCHOOLHOUSES

Art. 27. Authority to Issue Bonds in Any County, School District or Special Taxing Districts

§ 5669. Elections; how called.—Whenever the county board of education shall so petition, the board of county commissioners of any county shall order a special election to be held in any county or special school taxing district, or in

any local tax district within which a union school is maintained, for the purpose of voting upon the question of issuing bonds and levying a sufficient tax for the payment thereof for the purpose of acquiring, erecting, enlarging, altering and equipping school buildings and purchasing sites in such county or district, or for any one or more of said purposes. Said election shall be called and held under the same rules and regulations as provided in subchapter VIII for "Local Tax Elections for Schools." The ballots to be used in said election shall have written or printed thereon the words "For the issuance of $..... school bonds and the levying of a tax for the payment thereof," and "Against issuance of $... school bonds and the levying of a tax for the payment thereof." The notice of election shall set forth the boundaries of the district, unless the district is coterminous with a county, city, town, or township, or is coterminous with a county or township except that it does not include a city, town, or township, in such county or township, and the notice shall set forth either the amount or the maximum amount of bonds proposed to be issued. (1923, c. 136, s. 257; 1924, c. 121, s. 3.)

Cross Reference.—As to constitutional requirement, see Art. II, sec. 14; as to erection and prior to schoolhouse see sections 5467 et seq.; as to effect of failure to adopt county-wide plan, see Editor's Note. to section 5481.

Editor's Note.—The last sentence to this section was added by Ex. Sess. 1924.

Construed with Section 5639.—See notes to § 5639.

In Whose Name Bonds Issued.—Where a constitutional statute provides for the issuance of bonds for public school purposes of a district therein and a tax upon that district from which the bonds, principal and interest, shall be paid, and no other, and does not expressly name the payer of the bonds, but authorizes and directs the board of county commissioners to issue the bonds, which shall be signed by the chairman, attested by the clerk and impressed with the corporate seal of the county: Held, it was the intent of the Legislature, as construed from the act, that the bonds be issued in the name of the county on behalf of the school district without liability on the part of the county, but to be paid only as the act expressly provides, out of the money received from the tax imposed for the purpose on the poll and property of the designated school district. Board of Com'rs v. Hanchett Bond Co., 194 N. C. 137, 138 S. E. 614.

If authorized by a majority of the qualified voters, the bonds of such districts shall be issued by the board of county commissioners in the name of the county, and shall be payable out of taxes to be levied in the district. This and the following section were not applicable to the election held in the Cross Mill District because within the district no union school was maintained; but the legislative mandate that bonds of the designated districts should be issued in the name of the county is at least persuasive in the case under consideration. Board of Com'rs v. Hanchett Bond Co., 194 N. C. 137, 138 S. E. 614.

Sufficient Notice.—An election called under the provisions of the act of 1920, ch. 87, authorizing the trustees of any district to issue bonds for certain school purposes, will not be declared invalid upon the ground that the notice given had not stated the purpose for which the election was held, when it stated that it was for the purpose of issuing serial bonds not exceeding a certain amount, and of levying the special tax, specifying the act under which it was proposed to issue them; and there is nothing to indicate that any voter was misled or misinformed, and the election was carried with practical unanimity. Morris v. Board, 184 N. C. 634, 114 S. E. 621.

Local Law Prevails Over General Law.—Where the provisions of a special statute, authorizing the consolidation of school districts within the county, have been complied with, objection to the validity of a bond issue on the ground that the order for the election was too indefinite as to specifying the amount of interest to be paid thereon under the requirement of our general statutes, C. S., [this section] et seq., is untenable for both the local and the general law having been passed at the same session of the Legislature, and being in force at the same time, the local law will prevail as an exception to the general law. Wilson v. Board, 183 N. C. 638, 112 S. E. 418. See also Felmet v. Com., 186 N. C. 251, 119 S. E. 353.

When Public Laws of 1923 Took Effect.—Township bonds for public school purposes, authorized at an election held 9 May, 1923, under the provisions of C. S., ch. 95, are not invalid, when otherwise regular, on the ground that this section of the Consolidated Statutes was superseded by the prior enactment of chapter 136, Public Laws of 1923, there having been a substantial compliance with the requirements of the Statutes on the subject. Board v. McNear & Co., 136 N. C. 352, 119 S. E. 483.

§ 5670. Bonds; how issued.—If a majority of the qualified voters of said county or district shall vote in favor of the issuance of said bonds and the levy of said tax, then the board of county commissioners shall have power to issue the said bonds, which shall be issued in the name of the county, but unless the election was held in the entire county they shall be made payable exclusively out of taxes to be levied in the district. They shall be issued in such form and denominations, and with such provisions as to time, place and medium of payment of principal and interest as the said board may determine, subject to the limitations and restrictions of this act. They may be issued as one issue or divided into two or more separate issues, and in either case may be issued at one time, or in blocks from time to time. The bonds shall be serial bonds, and each issue thereof shall so mature that the aggregate principal amount of the issue shall be payable in annual installments or series, beginning not more than three years after the date of the bonds of such issue, and ending not more than thirty years after such date. No such installment shall be more than two and one-half times as great in amount as the smallest prior installment of the same bond issue. The bonds shall bear interest at a rate not exceeding six per cent per annum, payable semiannually, and may have interest coupons attached, and may be made registerable as to principal or as to both principal and interest. They shall be signed by the chairman of the board of county commissioners, and the seal of the county shall be fixed to or impressed on each bond and attested by the register of deeds of the county or by the clerk of said board; and the interest coupons shall bear the printed, lithographed or etched facsimile signature of such chairman. The delivery of bonds, signed as aforesaid by officers in office at the time of such signing, shall be valid, notwithstanding any changes in office occurring after such signing. (1923, c. 136, s. 258.)

For history of the legislation on this subject, see Board v. Prudden & Co., 187 N. C. 794, 797, 123 S. E. 96.

§ 5671. Bonds; how sold.—The said bonds shall be sold by the board of county commissioners in the manner provided by the Municipal Finance Act then in force for the sale of bonds of cities and towns. They shall not be sold for less than par and accrued interest. (1923, c. 136, s. 259.)

§ 5672. Proceeds of bonds.—The proceeds derived from the sale of said bonds shall be turned over to the county treasurer, who shall hold same under his official bond, and shall be placed in a separate fund, and paid out, for the purpose for which the bonds were issued, only upon order of the county board of education: Provided, that no treasurer handling the funds derived from the

sale of any school bonds shall receive any commission therefor. (1923, c. 136, s. 260.)

§ 5673. Taxes for interest and principal.—In the event the issue of said bonds is authorized by the voters as above provided, and when same are issued, the board of county commissioners is hereby authorized and directed to levy annually a special tax, ad valorem, on all taxable property in said county if county bonds are authorized, or in said district if district bonds are authorized, sufficient to pay the principal and interest of said bonds as such principal becomes due. Such special tax shall be in addition to all other taxes authorized to be levied in such county or district. The taxes provided for in this section shall be collected by the county officer collecting other taxes, and paid over by him to the county treasurer, who shall hold same under his official bond, and be applied solely to the payment of principal and interest of said bonds. (1923, c. 136, s. 261.)

When Present Tax Sufficient.—An election will not be held invalid because the question was submitted upon levying a limited tax, when it appears that the levy submitted is at present sufficient to meet the requirements of the act authorizing the election, and there is no valid reason shown that it will ever be insufficient for the purposes intended. Morris v. Board, 184 N. C. 634, 114 S. E. 621.

§ 5674. Frequency of elections.—Nothing in this law shall be construed as preventing more than one election and more than one bond issue in the same school district under this law. (1923, c. 136, s. 262.)

§ 5675. Bonds in special charter districts.—Elections may be held in special charter districts, and bonds issued and taxes levied to pay the same in the manner provided by the previous sections of this article, except as otherwise provided in this section.

(a) In case of every special charter district coterminous with an incorporated city or town having authority by virtue of its charter, or other special or local laws, to maintain a system of schools, the petition for the election shall be made to the principal governing body of each city or town, by the board of trustees, unless said board is the principal governing body of said city or town, in which case no petition shall be necessary. But said principal governing body may, in its discretion, grant or refuse said petition. In every special charter district of the kind described in this subsection, all powers and duties conferred or imposed by this article on boards or county commissioners shall be exercised and performed by the principal governing body of said city or town with which the district is coterminous, but the bonds shall be sold and issued by the board of trustees in the name of the district, and shall be signed and sealed as may be provided by said board of trustees, and the proceeds derived from the sale of such bonds shall be turned over to the custodian of funds of such special charter district, who shall receive no commission for the handling of such proceeds.

(b) In the case of all special charter districts not described in subsection (a) of this section the petition for the election shall be made by the board of trustees to the board of county commissioners, which board shall call, hold and determine the result of the election as provided in this article, and the bonds shall be sold and issued by the board of trustees in the name of the district, and shall be signed and sealed as may be provided by said board of trustees, and the proceeds derived from the sale of such bonds shall be turned over to the custodian of funds of such special charter district, who shall receive no commission for the handling of such proceeds: Provided, however, that in districts of the kind described in this subsection in which at the time any action required by this article is to be taken, the principal governing body of a city or town within or partly within the district shall be charged with the duty of levying all special school maintenance taxes for the district (although it may not be charged with the duty of levying taxes for bonds of the district), the powers and duties conferred by this article on boards of county commissioners shall be exercised and performed by said principal governing body: Provided, further, that in districts of the kind described in this subsection which lie in two or more counties, no petition shall be necessary, and the board of trustees of the district shall call, hold and determine the result of the election. (1923, c. 136, s. 263; 1924, Ex. Sess. c. 121; 1927, c. 109.)

Applied in Carr v. Little, 188 N. C. 100, 123 S. E. 625.

§ 5676. Limit of bonds. — No bonds shall be issued by or on behalf of a district under this law, which, including indebtedness for schools thereof then outstanding, shall exceed five per cent of the assessed valuation of taxable property therein; and no school indebtedness of any kind or nature shall be created or assumed by a county under this act, including all school indebtedness of such county and the aggregate amount of all school indebtedness of the districts within such county, in excess of five per cent (5%) of the assessed valuation of taxable property within such county. In computing the amount of indebtedness under the district or the county limitations hereinabove fixed, school indebtedness of cities and towns lying within a school district or within a county shall be included as if the same were a school district indebtedness; but there shall not be included any indebtedness of a district, city, town, or county payable from current revenues, and school bonds issued under the provisions of this law shall not be subject to any debt limitation by any other law. (1923, c. 136, s. 264.)

Validity of Bonds.—The former infirmity of bonds voted for under an unconstitutional provision was cured by this section and a judgment in favor of the plaintiffs was a proper one. Board v. Board, 183 N. C. 300, 111 S. E. 531.

Injunction.—Where a statute authorizes a school district to issue bonds for school purposes, and requires that a sinking fund at a certain rate of taxation be provided for the retirement of the bonds at maturity, and the taxable property in the district is not sufficient to pay the interest and provide an adequate sinking fund, the retirement of these bonds is as vital to their validity as the authorization to issue them, and their issuance will be permanently enjoined at the suit of a taxpayer within the district. In this case the bonds had been issued and the rights of purchasers had not intervened. Proctor v. Board, 182 N. C. 56, 108 S. E. 360.

§ 5677. Bonds authorized by other laws. — If bonds or other indebtedness have heretofore been voted under any act and have not yet been issued or incurred, they may be issued or incurred pursuant to the provisions of the act under which they were voted. But nothing in this article shall be construed to prevent any city or

town from issuing bonds for school purposes under the provisions of the Municipal Finance Act. Any city or town now having the power to issue bonds for school purposes under the Municipal Finance Act may, at its option, issue such bonds either under the Municipal Finance Act or under this law. (1923, c. 136, s. 265.)

Applied in School Committee v. Board, 186 N. C. 643, 120 S. E. 202.

Art. 28. County Commissioners Directed to Fund School Indebtedness

§ 5678. Indebtedness for necessary expenses.—When the outstanding indebtedness created for the necessary expenses of conducting the six months school term for the previous year or years exceeds the sum of ten thousand dollars ($10,000.00) then the board of commissioners is authorized, empowered and directed to fund the same by issuing either the serial notes of the county or serial bonds of the county for the amount of such indebtedness. If notes be issued, they shall be issued in such form and shall carry such rate of interest not in excess of six per cent (6%) and payable at such times and places as to the commissioners shall seem best. (1923, c. 136, s. 266.)

Vote Not Required.—It is not necessary that a bond issue under this section be submitted to a vote. Art. VII, sec. 7, of the Constitution must be understood to refer to debts and taxes in furtherance of local measures and not to Statewide measures, undertaken in obedience to a separate provision of the Constitution, Art. IX. Lovelace v. Pratt, 187 N. C. 686. 122 S. E. 661.

§ 5679. Bonds; how issued. — In the event that bonds are issued, they shall be issued in such denominations and form and with such provisions as to time, place and medium of payment of principal and interest as such board of commissioners may determine, subject to the following limitations and restrictions: Said bonds shall bear interest at a rate not exceeding six per cent (6%) per annum, payable semiannually. They shall be coupon bonds and shall be signed by the chairman of said board of county commissioners and the seal of the county shall be affixed to said bonds and attested by the register of deeds of said county. Said bonds shall mature in annual installments or series of one or more bonds, the last of which installments shall be payable not more than thirty (30) years after the date of issue. No single installment or series shall be more than two and one-half (2½) times as great in amount as the smallest prior installment of said issue. The coupons of said bonds shall be authenticated by a printed or lithographed or engraved facsimile signature or the chairman of said board who is in office on the date of said bonds. The delivery of said bonds, signed as aforesaid, shall be valid notwithstanding any changes occurring in office after the signing of said bonds. Said bonds shall be sold by the board of commissioners of the county in the manner provided by the Municipal Finance Act for the sale of bonds for cities and towns. Said bonds shall not be sold for less than par and accrued interest. The proceeds of said bonds shall be used only for the purpose of liquidating the outstanding indebtedness created for the necessary expense of conducting the six months school term in said county as provided by law for the year or years previous to the year one thousand nine hundred and twenty-three. Such notes or bonds issued shall not be considered a part of the indebtedness of the county in reckoning any limit on indebtedness. (1923, c. 136, s. 267.)

§ 5680. Commissioners required to levy tax.—The commissioners are authorized and directed to levy annually, at the date fixed by law for the levying of other county taxes, a special ad valorem tax upon all taxable property in their county for the purpose of paying the principal and interest of all bonds and notes issued under the provisions of this article as such principal and interest become due, which shall be in an amount sufficient for said purpose and shall be in addition to all other taxes authorized by law to be levied in said county. (1923, c. 136, s. 268.)

§ 5681. Determining validity of bonds.—If the county board of education of any county in which the outstanding indebtedness created for the necessary expenses of conducting the six months school term exceeds five thousand dollars ($5,000.00,) and said board shall find and determine the amount of outstanding indebtedness incurred prior to one thousand nine hundred and twenty-three and certify the same to the board of county commissioners, and the board of county commissioners shall then advertise the amount of the debt, together with the advertisement for the sale of said bonds as required in the Municipal Finance Act, such determination by the county board of education, after being duly advertised by the county commissioners, shall be conclusive in any suit, action, or proceeding involving the validity of bonds issued under this article, except in a suit, action, or proceeding commenced within fifteen days after the first publication of the notice of sale of said bonds. (1923, c. 136, s. 269.)

§ 5682. Validating loans.—Wherever any board of county commissioners has issued notes for funds borrowed to erect buildings at the request of any county board of education in order to provide necessary school buildings for the six months school term, and the plan for such buildings and the location of the same have been approved by the state superintendent of public instruction, the said note or notes are hereby validated in all respects, and the debt may be funded, as provided in this article. (1923, c. 136, s. 270.)

Editor's Note.—For local acts, see 1924, c. 120; 1925, cc. 34, 36, 146, 153, 161, 268; 1927, c. 70.

Art. 28A. Funding or Refunding Loans from State Literary and Special Building Funds

§ 5682(1). State board of education authorized to accept funding or refunding bonds of counties for loans; approval by local government commission.—In any case where a loan has heretofore been made from the state literary fund or from any special building fund of the State to the county board of education of a county and such county has heretofore or shall hereafter authorize the issuance of bonds for the purpose of funding or refunding interest on or the principal of all or a part of the notes evidencing such loan, the state board of education be and the same is hereby au-

thorized to accept funding or refunding bonds or notes of such county in payment of interest on or the principal of the notes evidencing such loan; provided, however, that the issuance of such funding or refunding bonds shall have been approved by the local government commission. (1935, c. 399, s. 1.)

§ 5682(2). Issuance of bonds as part of general refunding plan.—In any case where the funding or refunding of interest on or the principal of such notes shall constitute a part of a refunding plan or program of the county, and the terms of such funding or refunding shall be accepted by a sufficient number of the holders of the county's obligations to put same into effect, the state board of education may authorize the acceptance of such funding or refunding bonds or notes upon the same terms and conditions, both as to principal and interest, as have been agreed upon by a sufficient number of the other holders of the county's obligations to put same into effect. (1935, c. 399, s. 2.)

Art. 28B. Collection of Amounts Due State Literary and Revolving Funds

§ 5682(3). Collecting delinquent amounts due by counties; offsetting amounts due counties on account of road contracts.—In all instances where any sum or amount is due from any county or board of education or school unit therein to the state or to the literary fund or to the revolving fund set up by the general assembly providing loans for the construction of school buildings; and where any sum or amount is payable to such county by reason of any contract made on behalf of the state highway commission or its successor, the state highway and public works commission, for loans made to such commission by such county in behalf of roads; it shall be competent and lawful to offset the amount due such county on account of any contract made with the state highway commission or its successor, the state highway and public works commission, not assigned prior to the passage of this article, by the amount due by such county or board of education or school unit in said county to the State or to the literary fund or the revolving fund set up by the general assembly providing loans for construction of school buildings. (1935, c. 411, s. 1.)

§ 5682(4). Crediting sums due counties for road loans.—If the amount due such county on account of loans made to the state highway commission or its successor, the state highway and public works commission, and not assigned prior to the passage of this article, is insufficient to pay the amount due the State or the literary fund or to the revolving fund by such county, then the amount due such county on account of loans to the highway commission shall be credited on the amount due by such county to the State or literary fund or revolving fund. (1935, c. 411, s. 2.)

§ 5682(5). Provisions of article to be observed by state officers.—The treasurer and other officers of the State charged with the duty of disbursing any funds by reason of such contract between the state highway commission or the state highway and public works commission already made or hereafter to be made are required to observe the provisions of the foregoing section and shall not issue or authorize issuance of any voucher contrary thereto. (1935, c. 411, s. 3.)

Art. 29. Loans from State Literary Fund

§ 5683. Loans by state board from state literary fund.—The state board of education, under such rules and regulations as it may deem advisable, not inconsistent with the provisions of this article, may make loans from the state literary fund to the county board of education of any county for the building and improving of public schoolhouses or dormitories for rural high schools and teacherages and buildings for county farm-life schools in such county; but no warrant for the expenditure of money for such purposes shall be issued by the auditor except upon the order of the state superintendent of public instruction, with the approval of the state board of education. (C. S. 5681.) (1923, c. 136, s. 273.)

§ 5684. Terms of loans.—Loans made under the provisions of this article shall be payable in ten installments, shall bear interest at four per centum, payable annually, and shall be evidenced by the note of the county board of education, executed by the chairman and secretary thereof, and deposited with the state treasurer. The first installment of such loan, together with the interest on the whole amount then due, shall be paid by the county board on the tenth day of February after the tenth day of August subsequent to the making of such loan and the remaining installments, together with the interest, shall be paid, one each year, on the tenth day of February of each subsequent year till all shall have been paid. (C. S. 5673.) (1923, c. 136, s. 274.)

§ 5685. How secured and paid.—At the January meeting of the county board of education, before any installment shall be due on the next tenth day of February, the county board shall set apart out of the school funds an amount sufficient to pay such installments and interest to be due, and shall issue its order upon the treasurer of the county school fund therefor, who, prior to the tenth day of February, shall pay over to the state treasurer the amount then due. And any amount loaned under the provisions of this law shall be a lien upon the total school funds of such county, in whatsoever hands such funds may be; and upon failure to pay any installment of interest, or part of either, when due, the state treasurer may deduct a sufficient amount for the payment of the same out of any fund due any county from any special state appropriation for public schools, or he may bring action against the county board of education of such county, any person in whose possession may be any part of the school funds of the county, and the tax collector of such county; and if the amount of school funds then on hand be insufficient to pay in full the sum so due, then the state treasurer shall be entitled to an order directing the tax collector of such county to pay over to the state treasurer all moneys collected for school purposes until such debt and interest shall have been paid: Provided, this lien shall not lie against taxes collected or hereafter levied to pay interest and principal on

bonds issued by the authorities of any county or any district. (C. S. 5674.) (1923, c. 136, s. 275.)

§ 5686. Loans by county boards to school districts.—The county board of education, from any sum borrowed under the provisions of this article, may make loans only to districts that have already levied a local tax sufficient to repay the installments and interest on said loan for the purpose of building schoolhouses in the district, and the amount so loaned to any district shall be payable in ten annual installments, with interest thereon at four per centum, payable annually. Any amount loaned under the provisions of this law shall be a lien upon the total local tax funds produced in the district. Whenever the local taxes may not be sufficient to pay the installments and the interest, the county board of education must supply the remainder out of the operating and equipment fund, and shall make provision for the same when the county budget is made and presented to the commissioners in May.

All loans hereafter made to such districts shall be made upon the written petition of a majority of the committee of the district asking for the loan and authorizing the county board to deduct a sufficient amount from the local taxes to meet the indebtedness to the county board of education. Otherwise, the county board of education shall have no lien upon the local taxes for the repayment of this loan: Provided, this lien shall not lie against taxes collected or hereafter levied to pay interest and principal on bonds issued by the authorities of the district. (C. S. 5675, revised.) (1923, c. 136, s. 276.)

§ 5687. Appropriation from loan fund for free plans and inspection of school buildings.—The state board of education may annually set aside and use out of the funds accruing to the interest of said state loan fund a sum not exceeding twelve thousand dollars ($12,000.00), to be used for providing plans for modern school buildings to be furnished free of charge to districts, for providing proper inspection of school buildings and the use of state funds, and for such other purposes as said board may determine, to secure the erection of a better type of school building and better administration of said state loan fund. (C. S. 5672, revised.) (1923, c. 136, s. 277.)

Art. 30. Loans from Special Building Fund

§ 5688. The special building fund. — For the purpose of providing a special building fund, to be loaned to the county boards of education for maintaining a six months school term, the state treasurer of North Carolina is authorized and directed to issue bonds of the State of North Carolina, payable in the manner and on the dates hereinafter described, to an amount not to exceed five million dollars ($5,000,000.00). All of said bonds shall bear interest at a rate not to exceed five per cent per annum, payable semiannually on the first days of January and July of each year, and the said bonds shall bear date as of the first day of January of each and every year in which they may be issued, under the provisions of this law.

(a) Special building fund a separate fund. The proceeds from the sale of these bonds shall be a separate fund in the hands of the state treasurer and shall be kept distinct from all other funds of the state. The funds shall be paid out upon the warrant of the state auditor, but no warrant shall be issued by the auditor except upon the requisition of the state superintendent of public instruction, with the approval and at the direction of the state board of education. The bank or banks in which any money belonging to this fund is deposited by the state treasurer shall be required to pay interest on monthly balances on said money at the rate of three per cent per annum, and all such money so collected shall be credited monthly by the state treasurer to this fund.

(b) County board of education authorized to make loans. The state board of education, under such rules and regulations as it may deem advisable, not inconsistent with the provisions of this chapter, may make loans from the special building fund to the county board of education of any county for building, equipping and repairing public school buildings, dormitories, teacherages, and for the purchase of suitable sites: Provided, that no loan shall be made from this fund until an application for said loan has been made by the county board of education and approved by the county commissioners, nor until said commissioners shall certify that the loan is necessary to maintain a six months school term: Provided further, that no loan shall be made from this fund for erecting or repairing any school building containing less than five rooms, nor shall any building be erected in whole or in part from funds borrowed from the state unless the plans for said building shall have been approved by the state superintendent of public instruction. (1923, c. 136, s. 278.)

For a discussion of the Public Laws 1921, ch. 147, in which a building fund was provided, see 1 N. C. Law Rev. 124.

§ 5689. How loans shall be repaid.—Loans to county boards of education made under the provisions of this article shall be payable in twenty equal annual installments, shall bear interest payable annually in advance at the same rate that the state had to pay on the bonds issued under this law for securing the special building fund, and said loans shall be evidenced by the note or notes of the county board of education, excuted by the chairman and secretary thereof, and deposited with the state treasurer. The first installment of such loan, together with the interest on the balance of the principal remaining unpaid, shall be paid by the county board of education on or before the fifteenth day of December subsequent to the making of such loan, and the remaining installments, together with the interest, shall be paid, one each year, on the fifteenth day of December of each subsequent year until all shall have been paid: Provided, if at the end of any five-year period it shall appear that the earnings of said fund are more than sufficient to retire said bonds, the state board may direct the state treasurer to transfer such surplus to the state literary fund, and after all bonds are retired any balance remaining shall be turned over to the state literary fund. (1923, c. 136, s. 279.)

§ 5690. Provision in May budget. — The

county board of education shall provide in its May budget for a special tax, to be styled "A Special Building Fund Tax," sufficient to repay the annual installment, together with the interest due, and shall issue its order upon the treasurer of the county school fund therefor, who, prior to the fifteenth day of December, shall pay over to the state treasurer the amount then due. Any amount loaned under the provisions of this act shall be a lien upon the total school fund of such county, in whatsoever hands such funds may be; and if the board of county commissioners fail to provide for a sufficient tax in building and incidental fund to pay the loans and interest when due, so long as any part of said loan and the interest are due, the board of county commissioners shall borrow the money in order that the six months school term may be maintained in accordance with the constitution. Upon failure of any county to pay any installment or interest, or part of either, when due, the state treasurer may deduct a sufficient amount for the payment of the same out of any fund due such county from any special state appropriation for public schools, and if the amount necessary to conduct a six months school has been decreased thereby, thus making it impossible to provide the funds for a six months term in every district in said county in accordance with law and the constitution, the county commissioners shall borrow the amount necessary to meet the deficit caused thereby.

The state treasurer may bring action against the county board of education of such county, or against any person in whose possession may be any part of the school funds of the county, or against the tax collector of such county; and if the amount of school fund then on hand be insufficient to pay in full the sum so due, then the state treasurer shall be entitled to an order directing the tax collector of such county to pay over to the state treasurer all moneys collected for school purposes until such debt and interest shall have been paid: Provided, this lien shall not lie against taxes collected to pay interest and principal on bonds issued by the authorities of any county or any district. (1923, c. 136, s. 280.)

§ 5691. State board of education shall approve all applications and provide funds. — The state board of education shall approve all applications for loans and the amount to be loaned to each county. When said board has received and approved applications for loans in an amount of not less than five hundred thousand dollars ($500,000.00), the state board of education shall direct the state treasurer to sell, and he shall sell, in accordance with the provisions of this article, North Carolina bonds to provide funds for making the loans in accordance with the applications approved: Provided, that whenever applications are received and approved in accordance with the provisions of this article, if the state board of education shall deem it unwise to sell bonds at that time, the state treasurer, by and with the consent of the governor and the council of state, is hereby authorized to borrow money at the lowest rate of interest obtainable, in anticipation of the sale of the bonds herein authorized, and for the purposes for which said bonds are authorized. The state treasurer shall execute and issue notes of the state for the money so borrowed, and he is hereby authorized to renew any such notes from time to time by issuing new notes. The rate of interest, the date of payment of said notes or renewals, and all matters and details in connection with the issuance and sale thereof shall be fixed and determined by the governor and council of state. Such notes when issued shall be entitled to all privileges, immunities and exemptions that the bonds authorized to be issued are entitled to. The full faith, credit and taxing power of the state are hereby pledged for the payment of such notes as may be issued, and interest thereon. The proceeds received from said notes shall be used for making loans to county boards of education in accordance with this article. The notes issued in anticipation of the sale of bonds shall be paid with the funds derived from the sale of said bonds, whenever said bonds are sold. (1923, c. 136, s. 281.)

§ 5692. Treasurer to sell bonds. — The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars ($500.00) and one thousand dollars ($1000.00) each, as may be determined by said state treasurer, and shall be signed by the governor of the state and state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved or lithographed thereon, and the said bonds shall in all other respects be in such form as the state treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, of any kind whatsoever, which shall be expressed on the face of said bonds. Before selling any of the series of bonds herein authorized to be issued, the state treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the par of said bonds at the lowest rate of interest.

He is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the par value of said bonds at the lowest rate of interest, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina.

One-twentieth of the total bonds issued under date of January first, one thousand nine hundred and twenty-two, shall be due and payable on the first day of January, one thousand nine hundred and twenty-seven, and another one-twentieth of the amount of said bonds shall be due and payable on January first of each year thereafter until the whole series shall be paid; and any bonds issued under this law on any subsequent January first shall be due and payable as follows; one-twentieth of the total amount of said bonds shall be due and payable on the first day of January five years after the date of issuance of said bonds, and one-twentieth on each subsequent January first of each year thereafter until the whole series authorized by this law shall be paid in full. (1923, c. 136, s. 282.)

§ 5693. Exemption from taxation. — The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, and it shall be lawful for all executors, administrators, guardians, or other fiduciaries, generally, to invest in said bonds. (1923, c. 136, s. 283.)

§ 5694. County board may make loans to districts.—The county board of education, from any sum borrowed under the provisions of this law, may make loans to special charter, local tax or special school taxing districts, and the amount so loaned to any such district shall be payable in twenty annual installments, with interest thereon at the rate the county is required to pay, payable annually in advance. Any amount loaned under the provisions of this law shall be a lien upon the total local tax funds produced in the district, Whenever the local taxes at any time may not be sufficient to pay the installments with the interest, the county board of education must apply the remainder out of the operating and equipment fund, and shall make provisions for the same when the county budget is made and presented to the commissioners in May: Provided, nothing in this section shall prevent the county board of education from assuming the entire expense of erecting said building or buildings in any district of the county.

All loans made to such districts, under the provisions of this law, shall be made upon the written petition of a majority of the committee, or board of trustees, of the said district asking for the loan and authorizing the county board to deduct a sufficient amount from the local taxes or other funds belonging to said district other than the teachers' salary fund to meet the indebtedness to the county board of education. Otherwise, the county board of education shall have no lien upon the local taxes for the repayment of his loan: Provided, this lien shall not lie against taxes collected or hereafter levied to pay interest and principal on bonds issued by the authority of any district. (1923, c. 136, s. 284.)

Art. 30A. Additional Special Building Fund

§ 5694(a). Additional building fund.—For the purpose of providing "a special building fund," to be loaned to the county boards of education for maintaining a six months school term, the Treasurer is authorized and directed to issue bonds of the State of North Carolina, payable in the manner and on the date hereinafter described, to an amount not to exceed five million dollars ($5,000,000.) All of said bonds shall bear interest at a rate not to exceed four and one-half (4½) per cent per annum, payable semiannually on the first days of January and July of each year, and the said bonds shall bear date as of the first day of January of each and every year in which they may be issued, under the provisions of this article.

(a) Special building fund for a separate fund.—The proceeds from the sale of these bonds shall be a separate fund in the hands of the State Treasurer and shall be kept distinct from all other funds of the State. The funds shall be paid out upon the warrant of the State Auditor, but no warrant shall be issued by the Auditor except upon the requisition of the State Superintendent of Public Instruction, with the approval and at the direction of the State Board of Education. The bank or banks in which any money belonging to this fund is deposited by the State Treasurer shall be required to pay interest on monthly balances on said money at the rate of three per cent per annum, and all such money so collected shall be credited monthly by the State Treasurer to this fund.

(b) State Board of Education authorized to make loans.—The State Board of Education, under such rules and regulations as it may deem advisable, not inconsistent with the provisions of this chapter, may make loans from "The Special Building Fund" to the county board of education of any county for building, equipping and repairing public school buildings, dormitories, teacherages, and for the purchase of suitable sites: Provided, that no loan shall be made from this fund until the application for said loan has been made by the county board of education and approved by the county commissioners, nor until said commissioners shall certify that the loan is necessary to maintain a six months school term: Provided further, that no loan shall be made from this fund for erecting or repairing any school building containing less than seven rooms, nor shall any building be erected in whole or in part from funds borrowed from the State unless the plans for said building shall have been approved by the State Superintendent of public instruction.

(c) The first four installments paid back to the State by the counties, as contemplated in this section, are hereby declared to be a part of the special building fund and may, in the discretion of the State Board of Education, be loaned to the counties on the same terms and in accordance with the same rules as provided for an original loan. (1925, c. 201, s. 1.)

§ 5694(b). Manner of repayment. — Loans to county boards of education made under the provisions of this article shall be payable in twenty equal installments, shall bear interest payable annually in advance at the same rate that the State had to pay on the bonds issued under this act for securing "The Special Building Fund," and said loans shall be evidenced by the note or notes of the county board of education, executed by the chairman and secretary thereof, and deposited with the State Treasurer. The first installment of such loan, together with the interest on the balance of the principal remaining unpaid, shall be paid by the county board of education on or before the fifteenth day of December subsequent to the making of such loan, and the remaining installments, together with the interest, shall be paid, one each year, on the fifteenth day of December of each subsequent year until all shall have been paid: Provided, if at the end of any five year period it shall appear

the earnings of said fund are more than sufficient to retire said bonds the State board may direct the State Treasurer to transfer such surplus to the State literary fund, and after all bonds are retired any balance remaining shall be turned over to the State literary fund. (1925, c. 201, s. 2.)

§ 5694(c). Provision in May budget.—The county board of education shall provide in its May budget for a special tax, to be styled "A Special Building Fund Tax," sufficient to repay the annual installment, together with the interest due, and shall issue its order upon the treasurer of the county school fund therefor, who, prior to the fifteenth day of December, shall pay over to the State Treasurer the amount then due. Any amount loaned under the provisions of this article shall be a lien upon the total school fund of such county, in whatsoever hands such funds may be; and if the board of county commissioners fail to provide for a sufficient tax for the fund for repayment of notes, loans and bonds to pay the loans and interest when due, so long as any part of said loan and the interest are due, the board of county commissioners shall borrow the money in order that the six months school term may be maintained in accordance with the Constitution. Upon failure of any county to pay any installment or interest, or part of either, when due, the State Treasurer may deduct a sufficient amount for the payment of the same out of any fund due such county from any special State appropriation for public schools, and if the amount necessary to conduct a six months school term has been decreased thereby, thus making it impossible to provide the funds for a six months term in every district in said county in accordance with law and the Constitution, the county commissioners shall borrow the amount necessary to meet the deficit caused thereby.

The State Treasurer may bring action against the county board of education of such county, or against any person in whose possession may be any part of the school funds of the county, or against the tax collector of such county; and if the amount of school fund then on hand be insufficient to pay in full the sum so due, then the State Treasurer shall be entitled to an order directing the tax collector of such county to pay over to the State Treasurer all moneys collected for school purposes until such debt and interest shall have been paid: Provided, this lien shall not lie against taxes collected to pay interest and principal on bonds issued by the authorities of any county or any district. (1925, c. 201, s. 3.)

§ 5694(d). State board of education shall approve all applications and provide funds.—The State Board of Education shall approve all applications for loans and the amount to be loaned to each county. When said board has received and approved applications for loans in an amount of not less than five hundred thousand dollars ($500,000), the State Board of Education shall direct the State Treasurer to sell, and he shall sell, in accordance with the provisions of this article, North Carolina bonds to provide funds for making the loans in accordance with the applications approved: Provided, that whenever applications are received and approved, in accordance with the provisions of this article, if the State Board of Education shall deem it unwise to sell bonds at that time, the State Treasurer, by and with the consent of the Governor and Council of State, is hereby authorized to borrow money at the lowest rate of interest obtainable, in anticipation of the sale of the bonds herein authorized, and for the purposes for which said bonds are authorized. The State Treasurer shall execute and issue notes of the State for the money so borrowed, and he is hereby authorized to renew any such notes from time to time by issuing new notes. The rate of interest, the date of payment of said notes or renewals, and all matters and details in connection with the issuance and sale thereof shall be fixed and determined by the Governor and Council of State. Such notes when issued shall be entitled to all privileges, immunities and exemptions that the bonds authorized to be issued are entitled to. The full faith, credit and taxing power of the State are hereby pledged for the payment of such notes as may be issued, and interest thereon. The proceeds received from said notes shall be used for making loans to county boards of education in accordance with this article. The notes issued in anticipation of the sale of bonds shall be paid with the funds derived from the sale of said bonds whenever said bonds are sold. (1925, c. 201, s. 4.)

§ 5694(e). Treasurer to sell bonds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars ($500) and one thousand dollars ($1,000) each, as may be determined by said State Treasurer, and shall be signed by the Governor of the State and State Treasurer and sealed with the Great Seal of the State. The coupons thereon may be signed by the State Treasurer alone, or may have a facsimile of his signature printed, engraved, lithographed thereon, and the said bonds shall in all other respects be in such form as the State Treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of North Carolina, of any kind whatsoever, which shall be expressed on the face of said bonds. Before selling any of the series of bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the par of said bonds at the lowest rate of interest.

He is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the par value of said bonds at the lowest rate of interest, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina.

One-twentieth of the total bonds issued under date of January first, one thousand nine hundred and twenty-six, shall be due and payable on the first day of January, one thousand nine hundred and thirty-one, and another one-twentieth of the amount of said bonds shall be due and payable on January first of each year thereafter until the whole series shall be paid, and any bonds issued under this act on any subsequent January first

shall be due and payable as follows: One-twentieth of the total amount of said bonds shall be due and payable on the first day of January five years after the date of issuance of said bonds, and one twentieth on each subsequent January first of each year thereafter until the whole series authorized by this article shall be paid in full. (1925, c. 201, s. 5.)

§ 5694(f). Exemption from taxation.—The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or corporation, and it shall be lawful for all executors, administrators, guardians, or fiduciaries generally to invest in said bonds. (1925, c. 201, s. 6.)

§ 5694(g). County board may make loans to districts.—The county board of education, from any amount borrowed under the provisions of this article, may make loans to special charter, local tax or special taxing districts, and the amount so loaned to any such district shall be payable in twenty annual installments, with interest thereon at the rate the county is required to pay, payable annually in advance. Any amount loaned under the provisions of this act shall be a lien upon the total local tax funds produced in the district. Whenever the local taxes at any time may not be sufficient to pay the installments with the interest, the county board of education must supply the remainder out of the operating and equipment fund, and shall make provisions for the same when the county budget is made and presented to the commissioners in May: Provided, nothing in this section shall prevent the county board of education from assuming the entire expense of erecting said building or buildings in any district of the county. All loans made to such districts, under the provisions of this article, shall be made upon the written petition of a majority of the committee, or board of trustees, of the said district asking for the loan and authorizing the county board of education to deduct a sufficient amount from the local taxes or other funds belonging to said district, other than the teachers' salary fund, to meet the indebtedness to the county board of education. Otherwise, the county board of education shall have no lien upon the local taxes for the repayment of this loan: Provided, this lien shall not lie against taxes collected or hereafter levied to pay interest and principal on bonds issued by the authority of any district. (1925, c. 201, s. 7.)

§ 5694(h). Statement of expenditures filed.—Upon the completion of project for which the loan was made, the county board of education, upon blanks prepared for this purpose, shall file with the State Board of Education an itemized sworn statement of all expenditures on said project, including the loan from the State and all other funds invested in such building. Members of the county board of education and the county superintendent refusing or failing to make such report or authorizing the expenditure of said loan otherwise than upon the specific project, set forth in the approved application, or otherwise than as set out in the plans and specifications, approved by the State Board of Education, except upon the written approval of the State Board of Education, shall be severally guilty of a misdemeanor, punishable by a fine or imprisonment, or both, in the discretion of the court. (1925, c. 201, s. 8.)

Art. 30B. State Bond Sinking Fund Act

§ 5694(i). Title.—This article shall be known and may be cited as "The State School Bond Sinking Fund Act." (1927, c. 177, s. 1.)

§ 5694(j). State treasurer to set aside moneys.—From all moneys heretofore or hereafter received in repayment of the principal of or in payment of interest upon loans from the special building funds created under either the act known as chapter 147, Public Laws of 1921, or §§ 5683-5694 and §§ 5694(a)- 5694(h), the State Treasurer shall from time to time set aside moneys sufficient for paying interest upon the bonds of the State issued under the same act, and shall use the moneys so set aside in paying such interest when due. (1927, c. 177, s. 2.)

§ 5694(k). Remainder declared sinking fund.—The remainder of such repayments of principal and interest under each of said acts, except repayments of interest under each of said acts, except repayments of the first four annual installments of principal of the original loans made under said §§ 5694(a)-5694(h), is hereby declared to constitute a sinking fund, and shall be kept as a separate fund and used for the payment of the principal of the bonds of the state issued under the same act, as such principal shall fall due. (1927, c. 177, s. 3.)

§ 5694(l). Duty of State Sinking Fund Commission.—It shall be the duty of the State Sinking Fund Commission to provide for the custody, investment and application of the three sinking funds hereby created. All the provisions of law now or hereafter in force in respect of the custody, investment and application of State sinking funds by said commission including penalties, shall apply to and govern said commission in the custody, investment and application of the said three funds. (1927, c. 177, s. 4.)

As to investment in bonds guaranteed by United States, see § 220(a) 1.

§ 5694(m). State Treasurer to have custody of notes and evidences of debt.—The State Treasurer shall have the custody of all notes and other evidences of indebtedness on account of such loans, and it shall be the duty of each and every officer or person now having the custody or disposal of any such notes or evidences of indebtedness to deliver the same to the State Treasurer. (1927, c. 177, s. 5.)

§ 5694(n). Obligation of treasurer's bond.—The official bond of the State Treasurer shall cover each and all of his duties under the act. (1927, c. 177, s. 6.)

SUBCHAPTER IXA BONDS TO PAY OUTSTANDING INDEBTEDNESS OF SPECIAL CHARTER SCHOOL DISTRICTS.

Art. 30C. Issuance and Levy of Tax for Payment

§ 5694(o). Issued under supervision of Local Government Commission. — The governing body of any special charter school district may, with the approval of the Local Government Commission, issue bonds of the district to such an amount as may be required to pay indebtedness, other than bonded indebtedness, of the district heretofore incurred and now outstanding whether represented by the original obligation or by renewals, or otherwise. The issue and sale of such bonds shall be subject to the provisions of the Local Government Act relating to the issue and sale of public securities [§§ 2492(1) et seq.]. (1931, c. 180, s. 1.)

§ 5694(p). Special tax to be levied and collected.—The authorities charged by law with the duty of levying and collecting school taxes in each special charter school district that shall have issued bonds hereunder, shall annually levy and collect, in addition to all other taxes, a special tax sufficient to meet the interest and principal of all bonds issued by the said district under the authority hereof. (1931, c. 180, s. 2.)

SUBCHAPTER IXB. SCHOOL DISTRICT REFUNDING AND FUNDING BONDS

Art. 30D. Issuance and Levy of Tax for Payment

§ 5694(q). "School district" defined.—As used in this article the term "school district" shall be deemed to include each special school taxing district, local tax district and special charter district by which or on behalf of which bonds have heretofore been issued and are now outstanding. (1935, c. 450, s. 1.)

§ 5694(r). Continuance of school districts till bonds paid. — Notwithstanding the provisions of any law heretofore enacted or enacted hereafter at the present regular session of the general assembly which affect the continued existence of school districts or the levy of taxes therein for the payment of bonds, each such school district shall continue in existence with the boundaries heretofore established until all bonds thereof now outstanding or bonds issued to refund the same, together with the interest thereon, shall be paid. (1935, c. 450, s. 2.)

§ 5694(s). Funding and refunding of bonds authorized; issuance and sale or exchange; tax levy for repayment.—The board of commissioners of the county in which any such school district is located is hereby authorized to issue bonds at one time or from time to time for the purpose of refunding or funding the principal or interest of any bonds of such school district then outstanding. Such refunding or funding bonds shall be issued in the name of the school district and they may be sold or delivered in exchange for or upon the extinguishment of the obligations or indebtedness refunded or funded. Except as otherwise provided in this article, such refunding and funding bonds shall be issued in accordance with the provisions of chapter two hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirty-three [§§ 2492(72)-2492(75)], and the Local Government Act [§§ 2492(1) et seq.] and acts amendatory thereof and supplemental thereto. The tax levying body or bodies authorized by law to levy taxes for the payment of the bonds, the principal or interest of which shall be refunded or funded shall levy annually a special tax on all taxable property in such school district sufficient to pay the principal and interest of said refunding or funding bonds as the same become due. (1935, c. 450, s. 3.)

SUBCHAPTER IXC. SCHOOL DISTRICT TAXES AND SINKING FUNDS

Art. 30E. Transfer to County Treasurer

§ 5694(t). Taxes collected in school districts where bonds assumed by county directed to county treasurer. — In all cases in which the bonds of special school districts have been or may hereafter be assumed by the county in which such district is located, all taxes levied and collected for the purpose of paying the interest upon said bonds and creating a sinking fund for the retirement of said bonds shall be paid to the county treasurer by the sheriff or tax collector. (1935, c. 242, s. 1.)

§ 5694(u). Allocation to district bonds of taxes collected.—If a uniform debt service tax is levied and collected by the county in which school district bonds are now outstanding and have been assumed by the county, all of said tax so levied and collected shall be paid to the county treasurer and the county treasurer shall allocate to each issue of school district bonds its proportionate part of the tax so levied and collected each year. (1935, c. 242, s. 2.)

§ 5694(v). All sinking fund monies and securities likewise directed to county treasurers. — In all cases where school district bonds have been assumed or may hereafter be assumed by the county in which district is located any and all moneys and securities held by the treasurer, trustee or committee of such district or sinking fund commissioner is authorized to transfer any and all moneys and securities belonging to such sinking fund account to the county treasurer of such county and upon the transfer of such funds and securities and a proper accounting therefor such district treasurer, trustee, committee or sinking fund commissioner shall be discharged from further responsibility for the administration of and accounting for such sinking funds. (1935, c. 242, s. 3.)

§ 5694(w). Richmond county excepted. — This article shall not apply to Richmond County. (1935, c. 242, s. 4.)

SUBCHAPTER X. VOCATIONAL EDUCATION

Art. 31. Duties, Powers and Responsibilities of State Board for Vocational Education

§ 5695. Acceptance of benefits of federal vocational education act.—The state of North Carolina hereby accepts all of the provisions and ben-

efits of an act passed by the senate and house of representatives of the United States in Congress assembled, entitled "An act to provide for the promotion of vocational education; to provide for coöperation with the states in the promotion of such education in agriculture and the trades and industries; to provide for coöperation with the states in the preparation of teachers of vocational subjects, and to appropriate money and regulate its expenditure"; approved February twenty-third nineteen hundred and seventeen. (C. S. 5502.) (1923, c. 136, s. 285.)

§ 5696. State board for vocational education created.—There is hereby created a state board for vocational education, to consist of four members, as follows: The state superintendent of public instruction and three other members, to be appointed by the governor, one to represent agriculture, one to represent home economics, and one to represent trades and industries. The terms of office of these men shall be, for one member two years, for one member four years, and for one member six years, who shall serve till their successors are appointed; and thereafter each member shall be appointed for a term of four years. (C. S. 5393.) (1923, c. 136, s. 286.)

§ 5697. Powers and duties of board. — The state board for vocational education shall have all necessary authority to coöperate with the federal board for vocational education in the administration of the federal vocational educational act, to administer any legislation pursuant thereto enacted by the state of North Carolina, and to administer the funds provided by the federal government and the state of North Carolina for the promotion of vocational education in agricultural subjects, trade and industrial subjects and home economics subjects. It shall have full authority to formulate plans for the promotion of vocational education in such subjects as an essential and integral part of the public school system of education in the state of North Carolina, and to provide for the preparation of teachers in such subjects. It shall have full authority to fix the compensation of such officials and assistants as may be necessary to administer the federal act and this article for the state of North Carolina, and to pay such compensations and other necessary expenses of administration from funds appropriated. It shall have authority to make studies and investigations relating to vocational education in such subjects; to publish the result of such investigations, and to issue other publications as seem necessary by the board; to promote and aid in the establishment by local communities of schools, departments, or classes giving instruction in such subjects; coöperate with local communities in the maintenance of such schools, departments, or classes; to prescribe qualifications for the teachers, directors, and supervisors of such subjects; to coöperate in the maintenance of classes supported and controlled by the public for the preparation of teachers, directors and supervisors of such subjects, or to maintain such classes under its own direction and control; to establish and determine by general regulations the qualifications to be possessed by persons engaged in the training of vocational teachers. (C. S. 5394.) (1923, c. 136, s. 287.)

§ 5698. State superintendent to enforce article.—The state superintendent of public instruction shall serve as executive officer of the state board for vocational education, and shall designate, by and with the advice and consent of the board, such assistants as may be necessary to properly carry out the provisions of this article. The state superintendent shall also carry into effect such rules and regulations as the board may adopt, and shall prepare such reports concerning the condition of vocational education in the state as the board may require. (C. S. 5395.) (1923, c. 136, s. 288.)

§ 5699. State appropriation equal federal appropriation.—The state of North Carolina appropriates out of the state public school fund a sum of money for each fiscal year equal to the maximum sum which may be allotted to the state of North Carolina from the federal treasury, under the provisions of the Smith-Hughes act and the industrial rehabilitation act, namely, for the fiscal year ending June thirtieth, one thousand nine hundred and twenty-four, one hundred forty-seven thousand four hundred five dollars and eighty-eight cents ($147,405.88); for the fiscal year ending June thirtieth, one thousand nine hundred and twenty-five, one hundred seventy-one thousand nine hundred ninety dollars and three cents ($171,990.03), and for the fiscal year ending June thirtieth, one thousand nine hundred twenty-six, and thereafter, one hundred ninety-six thousand six hundred sixty-four dollars and eighteen cents ($196,664.18): Provided, that only such portion of above state appropriation shall be used as may be absolutely necessary to carry on the work outlined in this article and to meet the federal requirements. (C. S. 5503, revised.) (1923, c. 136, s. 289.)

§ 5700. State treasurer authorized to receive and disburse vocational education fund. — The state treasurer is hereby designated and appointed custodian of all moneys received by the state from the appropriation made by said act of Congress, and he is authorized to receive and provide for the proper custody of the same, and to make disbursement thereof in the manner provided in the said act and for the purpose therein specified. He shall also pay out moneys appropriated by the state of North Carolina for the purpose of carrying out the provisions of this article upon the order of the state board for vocational education. (C. S. 5504.) (1923, c. 136, s. 290.)

§ 5701. Coöperation of county authorities with state board; funds.—The county board of education, board of county commissioners, or the board of trustees of any district may coöperate with the state board for vocational education in the establishment of vocational schools or classes giving instruction in agricultural subjects, or trade or industrial subjects, or in home economics subjects, or all three subjects, and may use moneys raised by public taxation in the same manner as moneys are used for other public school purposes: Provided, that nothing in this article shall be construed to repeal any appropriations heretofore made by any of said boards for said purposes. (C. S. 5396, revised.) (1923, c. 136, s. 291.)

§ 5702. Report to governor.—The state board for vocational education shall make a report annually to the governor, setting forth conditions of vocational education in the state, a list of the schools to which federal and state aid have been given, and a detailed statement of the expenditures of federal funds and state funds provided for in this article. (C. S. 5397.) (1923, c. 136, s. 292.)

Art. 32. County Farm-life Schools

§ 5703. Establishment of school in county. — There shall be established and maintained in every county complying with the provisions of this article, as hereinafter set forth, a school to be known as a "County Farm-life School," for the training and preparation of the boys and girls of the county for farm-life and home-making. (C. S. 5566.) (1923, c. 136, s. 293.)

§ 5704. Aim of school and course of study. — The aim of said school shall be to prepare boys for agricultural pursuits and farm-life and to prepare girls for home-making and housekeeping on the farm. The course of study shall include practical work on the farm by the boys and practical work in all subjects relating to housekeeping and home-making by the girls. The course of study in said school shall be subject to the approval of the state board for vocational education. (C. S. 5567.) (1923, c. 136, s. 294.)

§ 5705. Board of trustees; appointment; terms; vacancies.—The school shall be under the control and management of a board of trustees of practical farmers, consisting of one member from each township in the county, appointed by the county board of education, who shall serve until their successors shall be appointed. The first board of trustees shall be divided by the county board of education into three as nearly equal groups as possible; one group shall be appointed for a term of two years, one group for a term of four years, and one group for a term of six years. Upon the expiration of the term of office of any trustee, his successor shall be appointed for a term of six years. The county superintendent of public instruction shall be ex officio a member of said board and secretary thereof. All vacancies occurring by death, resignation, or otherwise in said board shall be filled for the unexpired term by the county board of education. (C. S. 5568.) (1923, c. 136, s. 295.)

§ 5706. Qualification and organization of board. —Within ten days after any county, township, or townships shall have complied with the provisions of this article, as hereinafter set forth, for the maintenance and equipment of the school, the members of the board of trustees shall be appointed, and the county superintendent shall duly notify them to meet at the county-seat within ten days after their appointment to qualify and organize. (C. S. 5569.) (1923, c. 136, s. 296.)

§ 5707. Location of school. — After due advertisement, inviting bids for the location of said school within the county, the board of trustees shall locate it at such place in said county as shall offer the largest financial aid for maintenance and equipment, having due regard for desirability and suitability of location: Provided, however, that said school shall not be located in any city or town of more than one thousand inhabitants, nor within two miles of the corporate limits of any city or town of more than five thousand inhabitants. (C. S. 5571.) (1923, c. 136, s. 297.)

§ 5708. Buildings; farm; maintenance.—For the maintenance of said school, the county or township or school district, or all combined, wherein it is located, shall provide annually, by taxation or otherwise, not less than twenty-five hundred dollars ($2,500.00). The county or township or school district, or all combined, shall provide by bond issue, or otherwise, the following equipment for said school: a school building with recitation rooms and laboratories and apparatus necessary for efficient instruction in the prescribed subjects of study; dormitory buildings with suitable accommodations for not less than twenty-five boys and twenty-five girls; a barn and dairy building with necessary equipment; a farm of not less than fifty acres of good arable land. All of said buildings shall be located on said farm and shall be constructed in accordance with plans approved by the state superintendent of public instruction, and the entire equipment shall be subject to his approval and acceptance after inspection: Provided, however, that upon the recommendation of the board of trusteees and the presentation of satisfactory reasons therefor, the state superintendent of public instruction may grant permission to the board of trustees to accept any suitable and properly equipped school already constructed, though it may not be located on the farm: Provided, it be located within reasonable and convenient distance thereof. (C. S. 5571 and 5572, revised.) (1923, c. 136, s. 298.)

Vote Necessary to Bond Issue.—The building and maintenance of a school under this section is not a necessary county expense, and an act which authorizes a tax levy for those purposes without provision requiring the submission of the question to the qualified voters of the territory or district is invalid. Snider v. Jackson County, 175 N. C. 590, 96 S. E. 32.

§ 5709. Election in county to establish schools. —1. Upon written request of the county board of education of any county the board of county commissioners of said county may in their discretion order an election to be held in said county, in accordance with the law governing general elections therein, as nearly as may be. A new registration shall be ordered for said election; and not less than thirty days notice of said election shall be given at the courthouse door and three other public places in the county; and if there be newspapers published in the county, a notice of said election shall also be published weekly for four successive weeks preceding said election in one newspaper therein; and the registrars and poll-holders shall canvass the vote cast, declare the result, and duly certify the returns to the board of county commissioners, and the returns shall be recorded in the records of said board of county commissioners.

2. At said election shall be submitted to the qualified voters of the county the question of levying and collecting a special tax on all taxable property and polls of said county for the maintenance and equipment of a "County Farm-life School" therein. At such election those favoring the levying and collecting of such a tax for such purpose shall vote a ballot on which shall be written or printed the words "For County Farm-life School";

and those opposed shall vote a ballot on which shall be written or printed the words "Against County Farm-life School."

3. If a majority of the qualified voters shall vote "For County Farm-life School," then all the provisions of this article shall be in full force and effect, and the county commissioners shall annually levy and cause to be collected, in the same manner and at the same time as other taxes of the county are levied and collected, a tax on all property and polls of the county sufficient to provide the sum required for the annual maintenance of said school, and, in addition, the sum required for the payment of the annual interest on such bond issue as may be found necessary for providing the equipment for the school as said interest accrues, and to create a sinking fund for the purpose of paying off and discharging said bonds as they become due. The bond of the sheriff or tax collector of said county shall be responsible for the tax to the same extent as it is liable for other taxes collected by him. (C. S. 5573.) (1923, c. 136, s. 299.)

§ 5710. Issuance of bonds.—If a majority of the qualified voters at the election shall vote "For County Farm-life School," it shall be deemed and held that a majority of the qualified voters are in favor of granting to the board of county commissioners of said county authority to issue bonds in an amount not to exceed fifty thousand dollars ($50,000.00) for the purpose of providing the necessary equipment; and such authority shall be granted to and vested in said board of county commissioners, and said board is hereby authorized and empowered to issue and sell bonds in the name of said county to an amount not to exceed fifty thousand dollars ($50,000.00), of such denomination and of such proportion as said board of county commissioners may deem advisable, bearing interest at a rate not to exceed six per cent, with interest coupons attached, payable at such time or times, and at such place or places as they may deem advisable, such bonds to be of such form and tenor and transferable in such way, and the principal thereof payable or redeemable at such time or times, not less than fifteen years from the date thereof, and at such place or places as the board of county commissioners may determine.

The proceeds arising from the sale of said bonds shall be expended by said board of county commissioners in providing, by purchase or otherwise, the equipment in land, buildings, and apparatus required under this article for the "County Farm-life School." The treasurer of said county shall receive no compensation for receiving or disbursing the money which may be received from the sale of said bonds. (C. S. 5574, revised.) (1923, c. 136, s. 300.)

§ 5711. Township election to secure location.—The county commissioners of any county that has voted for the establishment of a "County Farm-life School" therein shall, upon petition of one-fourth of the freeholders in any township applying to the trustees of said "County Farm-life School" to secure the location of said school therein, order an election therein, to be held after thirty days notice at three public places in said township, under the law governing state and county elections as nearly as may be, and the returns of said election shall be certified by the registrars and poll holders to the board of county commissioners, and the same shall be recorded in the records of said county commissioners. At the election shall be submitted to the qualified voters of said township the question of issuing bonds in the sum not to exceed fifty thousand dollars ($50,000.00), the amount of said bond issue to be set out in the petition for said election, and of levying and collecting on all taxable property and polls in said township a special tax sufficient to provide for the payment of the interest on said township bonds as it accrues, and to create a sinking fund for the purpose of paying off and discharging said township bonds as they become due. At such election, those favoring the levy and collection of such a tax for such purpose shall vote a ballot on which shall be written or printed the words "For County Farm-life School," and those opposed shall vote a ballot on which shall be written or printed the words "Against County Farm-life School." (C. S. 5575.) (1923, c. 136, s. 301.)

§ 5712. Township bonds to secure location.—If a majority of the qualified voters at said election shall vote "For County Farm-life School," then it shall be deemed and held that a majority of the qualified voters are in favor of granting to the board of county commissioners of said county authority to issue bonds in the name of said township in such amount as shall have been named in the petition and notice of election, to be sold by said commissioners for the purpose of aiding in providing the buildings and farm and other equipment for "The County Farm-life School": Provided, said school shall be located in said township; and if said school shall be located in said township, the board of county commissioners shall annually levy and cause to be collected, in the same manner and at the same time as other taxes of the county are levied and collected, a tax on all property and polls in said township sufficient to provide for the payment of interest on said township bonds as it accrues and to create a sinking fund for the purpose of paying off and discharging said township bonds as they become due. The board of county commisssioners is authorized and empowered to issue and sell said bonds of the township to the amount specified in the petition and notice of election, of such denomination and of such proportion as they may deem advisable, bearing interest at a rate not to exceed six per cent, with interest coupons attached, payable at the time or times, and at the same place or places, and of the same form and tenor, and the principal thereof payable or redeemable at the same time or times and at the same place or places as the county bonds issued by the board of county commissioners for the equipment of said "County Farm-life School."

The proceeds arising from the sale of the township bonds shall be added to the proceeds arising from the sale of the county bonds and expended therewith by the board of county commissioners in providing, by purchase or otherwise, the equipment in land, buildings, and apparatus required in this article for the "County Farm-life School." (C. S. 5576.) (1923, c. 136, s. 302.)

§ 5713. Election by contiguous townships to secure location.—Any two or more contiguous town-

ships bidding for the location of the "County Farm-life School" may unite and hold an election upon the same terms and conditions as are provided for one township for the location of the "County Farm-life School" at such point in said townships as may be determined by the board of trustees of said "County Farm-life School": Provided, that the amount of bonds authorized to be issued by one or more townships in order to secure the location of the "County Farm-life School" in a given township shall be deducted from the amount of bonds authorized to be issued by the county, so as to limit the total issue of bonds for farm, buildings, and equipment to fifty thousand dollars ($50,000.00). (C. S. 5577.) (1923, c. 136, s. 303.)

§ 5714. Election in townships to establish on failure of county election.—1. In case an election shall be ordered and held in any county as herein provided, for the establishment and maintenance of a "County Farm-life School" therein, and a majority of the qualified voters at such election shall fail to vote "For County Farm-life School," any township in said county, or any two or more contiguous townships in said county, shall upon petition of one-fourth of the freeholders therein to the board of county commissioners of the county, have an election ordered by the commissioners upon the same terms and conditions prescribed in the three preceding sections of this article: Provided, that a new registration shall be ordered.

2. If in such election a majority of the qualified voters in said township or townships shall vote "For County Farm-life School," then in event it shall be deemed and held that the board of county commissioners of the county is authorized and empowered to issue and sell bonds in the name of said township or townships in an amount not to exceed fifty thousand dollars ($50,000.00), and to levy and cause to be collected, in the same manner and at the same time as other taxes of the county are levied and collected, a sufficient tax on all property and polls in said township or townships to comply with all conditions named in this article for the maintenance and equipment of a "County Farm-life School," subject to the same conditions as are herein provided for the issuance and sale of county bonds and the levying and collection of a county tax for said purpose.

3. The said "County Farm-life School" shall thereupon be located at such point in said township or townships as may be determined by the board of trustees of said "County Farm-life School" provided for in this article. Such school, when thus established, shall be a "County Farm-life School" for said county, and shall be subject to all rights, privileges, and obligations and conditions prescribed in this article for "County Farm-life Schools," except as herein otherwise provided. (C. S. 5578, revised.) (1923, c. 136, s. 304.)

§ 5715. Provisions for township school becoming county farm-life school.—At any time after the establishment of the "County Farm-life School" by the township or townships under the provisions of the preceding section, the county may hold an election as provided in this article for the establishment of a county farm-life school by the county; and if at the election a majority of the qualified voters of the county shall vote "For County Farm-life School," and the tax and bond issue provided for in this article for the maintenance and equipment of a "County Farm-life School" shall be provided, as directed herein, by the county commissioners for the entire county, such school established by the township or townships shall become a county farm-life school in all respects like a county farm-life school established under this article, and the bonds of the township or townships and the tax levied for the maintenance of the school and for interest and sinking fund on the bonds shall be assumed by the entire county, and the bonds of the township or townships shall be canceled by substituting therefor county bonds as provided for a county farm-life school. (C. S. 5579.) (1923, c 136, s. 305.)

§ 5716. High school department in connection with county farm-life school.—There shall be established and maintained in connection with the county farm-life school such a high school course of study as may be approved by the state superintendent of public instruction. If said county farm-life school shall be located in the same place with some existing public high school in said county, then said public high school shall be merged into and become the high school department of said farm-life school as an organic part thereof; and the appropriations for the maintenance thereof shall be the same as the appropriations now required for accredited public high schools. The requirements for teachers in said high school department of the county farm-life school shall be the same as are now required for high school teachers under the public school law. Said high school department and course of study, however, and the entire management of the same shall be under the direction and control of the board of trustees and the principal of the county farm-life school, and shall be conducted as an organic part of the said school. (C. S. 5580.) (1923, c. 136, s. 306.)

§ 5717. Agricultural and farm-life extension and demonstration.—It shall be a part of the duty of the faculty of each "County Farm-life School" to conduct agricultural instruction work in said county, in coöperation, as far as possible, with such work carried on in said county by the state department of agriculture, the North Carolina state college of agriculture and engineering, and the United States department of agriculture; to hold township and district meetings in various parts of the county from time to time for farmers and farmers' wives; to coöperate with the county superintendent of public instruction and with the county commissioner of agriculture, where such officer exists, in stimulating, directing, and supervising practical farm-life work in the public high schools and the elementary schools of the county, and in providing instruction, through the county teachers' association and through special short courses of study at said "County Farm-life School," for the public school teachers of said county. (C. S. 5582.) (1923, c. 136, s. 307.)

§ 5718. Short courses for adults.—There shall be provided in the courses of study of the "County Farm-life School" short courses in farm-life studies to which shall be admitted adult farmers, men and women, and boys and girls not in regular at-

tendance upon the school; and there shall be held at the school annually one or more county meetings for the farmers and their wives of the county for instruction and demonstration work. All of the work herein required and all other work of the "County Farm-life School" shall be under the general supervision of the county superintendent of public instruction, and the school shall in all respects be an organic part of the county public school system. (C. S. 5583.) (1923, c. 136, s. 308.)

§ 5719. Admission of students from other counties.—The board of trustees of the "County Farm-life School" of any county is hereby authorized and empowered to admit students from other counties of the state to said school upon payment of such rate of tuition as said board of trustees may fix; but all students who are residents of the county in which said school is located shall be admitted to said school without charge for tuition, except as otherwise provided in this article; and said board of trustees shall fix all other charges in said school at actual cost. (C. S. 5584.) (1923, c. 136, s. 309.)

§ 5720. Treasurer of county farm-life school; compensation.—The treasurer of the county shall be the treasurer of the "County Farm-life School," and shall receive and disburse all funds therefor, keeping and rendering anually to the board of trustees of said school a separate account of such receipts and disbursements. If he be employed on salary, he shall receive no additional compensation for his services; and if employed on commission, he shall receive as compensation not to exceed one per cent on all disbursements and nothing on receipts. The official bond of said treasurer shall be responsible and held liable for all funds coming into his hands for said school to the same extent as it is liable for other funds received by him as treasurer of said county. (C. S. 5585.) (1923, c. 136, s. 310.)

§ 5721. Incorporation and powers.—The board of trustees of said "County Farm-life School" and their successors in office shall be and are hereby constituted a body corporate by the name and style of "The Board of Trustees of the County Farm-life School of ..... County," and by that name may sue and be sued, contract and be contracted with, purchase, hold, and sell real estate and personal property, receive donations by gift or otherwise, and exercise such other rights and privileges as are conferred by law upon corporate bodies so far as such powers are necessary or convenient to the attainment of the objects of the school or to the performance of the duties of the board. The title to all lands and other property of the "County Farm-life School" shall vest in said board of trustees. (C. S. 5586.) (1923, c. 136, s. 311.)

§ 5722. Appropriation of state funds; number of schools.—Upon satisfactory evidence furnished by the state board for vocational education to the state board of education that all the provisions of this article for the establishment, maintenance, and equipment of a "County Farm-life School" have been complied with in any county, the state superintendent of public instruction shall issue a requisition upon the state auditor for a sum equal to the amount appropriated by the county board of education or secured from local donations or both, but not to exceed five thousand dollars ($5,000.00) annually, for the maintenance of said school, and the state auditor shall issue his warrant in favor of the county treasurer of said county for said amount, which shall be paid out of the state treasury and the money placed to the credit of the "County Farm-life School" of said county; and sufficient moneys to pay said warrants are hereby appropriated out of the state public school fund: Provided, however, that there shall not be established more than ten such schools in any one year, and that not more than one such school shall be established in any county. (C. S. 5578; 1923, c. 136, s. 312; 1925, c. 275, s. 6.)

Editor's Note.—By the Public Laws of 1925, a provision as to appropriation from state funds if the school fund should be sufficient was omitted.

Race Discrimination.—The provision that only one school of the kind shall be established in any county, does not deprive the local authorities of the power to provide equal facilities for the two races, but means that there shall not be more than one school of this kind for the instruction of both races, in separate buildings, with equal facilities; and is therefore constitutional. Whitford v. Board, 159 N. C. 160, 74 S. E. 1014.

§ 5723. County board may supplement funds.—If the funds available for the maintenance and support of any county farm-life school shall be insufficient to provide for the proper maintenance and support of said school, the county board of education of any county is empowered to add to its annual budget for the maintenance and support of such school an amount not greater than one thousand dollars ($1,000.00): Provided, that this amount shall not be duplicated out of the state public school fund. (C. S. 5588.) (1923, c. 136, s. 313.)

Art. 33. Farm-life Schools Operated under Special Acts

§ 5724. Reorganization of existing schools.—All high schools having departments of agriculture and home economics and organized to give farm-life instruction under article twenty-five, sections five thousand five hundred and eighty-nine to five thousand six hundred one, Consolidated Statutes of 1919, shall, at the conclusion of this school year, one thousand nine hundred and twenty-two, one thousand nine hundred and twenty-three, be reorganized under the county farm-life school law, article 32, or as all other high schools or union schools giving instruction in agriculture and home economics are organized under the authority of the state board for vocational education. This law shall not affect the schools operating under the following special legislation: Catawba county farm-life school, chapter one hundred eighty, Private Laws one thousand nine hundred twenty-one; Rowan county farm-life school, chapter two hundred seventy-two, Public-Local Laws one thousand nine hundred nineteen; Iredell county farm-life school, chapter one hundred eighty-four, Public-Local Laws, extra session, one thousand nine hundred twenty; Durham county farm-life school, chapter two hundred twenty-nine, Public-Local Laws one thousand nine hundred thirteen. (1923, c. 136, s. 314.)

Art. 34. Vocational Rehabilitation of Persons Disabled in Industry or Otherwise

§ 5725. Acceptance of federal aid.—The state of North Carolina hereby accepts all of the provisions and benefits of an act passed by the senate and house of representatives of the United States in Congress assembled to provide for the promotion of vocational rehabilitation of persons disable in industry or otherwise, and their return to civil employment, approved June second, one thousand nine hundred twenty. (C. S. 5502.) (1923, c. 136, s. 315.)

§ 5726. Coöperation; objects and plans; compensation of officials; expenses; publications.—The state board for vocational education shall have all necessary authority to coöperate with the Federal board for vocational education in the administration of the act of congress providing for the vocational rehabilitation of persons injured in industry and otherwise; to administer any legislation pursuant thereto enacted by the state of North Carolina; and to administer the funds provided by the federal government and the state of North Carolina under the provisions of section two hundred eighty-nine. It shall have full authority to formulate plans for the promotion of vocational rehabilitation; to fix the compensation of such officials and assistants as may be necessary to administer the federal act and this article for the state of North Carolina; and to pay such compensation and other expenses of administration as are necessary from funds appropriated under this law. It shall have authority to make studies and investigations relating to vocational rehabilitation; to publish the result of such investigations and to issue other publications as seem necessary by the board; to promote and aid in the establishment of schools, departments, or classes giving instruction in vocational subjects for rehabilitation purposes; and to prescribe qualifications for the teachers, directors, and supervisors of such subjects. (C. S. 5394.) (1923, c. 136, s. 316.)

§ 5727. State appropriation from state public school fund.—The state of North Carolina appropriates out of the state public school fund a sum of money for each fiscal year equal to the maximum sum which may be allotted to the state of North Carolina from the federal treasury under an act of Congress to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise, and their return to civil employment: Provided, that only such portions of the above state appropriation shall be used as may be absolutely necessary to carry on the work outlined in articles twenty-six and twenty-nine. (C. S. 5503.) (1923, c. 136, s. 317.)

§ 5727(a). Continuation of work of Board for Vocational Rehabilitation.—The State Board for Vocational Education is hereby authorized to continue its work in the Division of Vocational Rehabilitation from the contingent funds heretofore appropriated out of the public school fund for this purpose: Provided, this work shall not be continued beyond March fourth, one thousand nine hundred and twenty-five, unless the appropriation from the Federal Government is made available prior to said date; and Provided further, that the State Board for Vocational Education may not exceed the amount set aside from State funds for this purpose. (1924, c. 4.)

§ 5728. Coöperation with state board of health; reports as to persons under treatment.—The state board of health shall, (a) coöperate with the state board for vocational education in arranging with all public and private hospitals, clinics, dispensaries, health officers, and practicing physicians, to send to the state board for vocational education prompt and complete reports of any persons under treatment in such hospitals, clinics, dispensaries, or by such physicians or health officers, for any injury or disease that may render them permanently, physically, and vocationally handicapped to such an extent that they are or will be unable to support themselves, and (b) coöperate generally with the state board for vocational education in carrying out the provisions of this article. (1923, c. 136, s. 318.)

§ 5729. State appropriation.—The state of North Carolina appropriates for each fiscal year the sum of fifteen thousand dollars ($15,000.00), or as much thereof as is necessary, from the state treasury to the state board for vocational education for the purpose of assisting worthy persons who enter training under the federal vocational rehabilitation act: Provided, (1) that this fund shall be used only to pay for the actual living expenses of deserving persons, as determined by investigation of the board, who have no other means of paying said living expenses: (2) that this fund shall be paid out by the state treasurer on the order of the state board for vocational education; (3) that not to exceed ten dollars per week for not more than twenty weeks, unless an extension of time is granted by the board, be paid for the maintenance of any one person in training; (4) that the said state board for vocational education shall keep an accurate account of all expenditures, showing date, the person to whom paid, for what paid, and the amount of each warrant, and shall make a report of same to the governor on or before the first of January each year; and (5) that this law shall be in force from and after March 3, 1923. (1923, c. 136, s. 319.)

SUBCHAPTER XI. TEXT-BOOKS AND PUBLIC LIBRARIES

Art. 35. Text-Books for Elementary Grades

§ 5730. State board of education adopts.—The state board of education is hereby authorized to adopt, for the the exclusive use in the public elementary schools of North Carolina, supported wholly or in part out of the public funds, textbooks and publications, including instructional materials, to meet the needs of such schools in each grade and on each subject matter in which instruction is required to be given by law. And six months before the expiration of the contracts now in force it shall adopt for a period of five years from a multiple list submitted by the textbook commission, as hereinafter provided two basal primers for the first grade and two basal readers for each of the first three grades, and one basal book or series of books on all other subjects contained in the outline course of study for the

elementary grades where a basal book or books are recommended for use: Provided, the state board of education may enter into contract with a publisher for a period less than five years, if any advantage may accrue to the schools as a result of a shorter contract than five years. (1923, c. 136, s. 320; 1933, c. 464, s. 1.)

Editor's Note.—Prior to Public Laws of 1933, c. 464, the first sentence of this section read as follows: "The state board of education is hereby authorized to adopt text books for use in all elementary public schools of the state, supported wholly or in part out of public funds."

§ 5731. Books adopted for an indefinite period.—At the expiration of the contract now existing between the state board of education and the publisher for any particular book or books, the state board of education, upon satisfactory agreement with the publisher, may continue the contract for any particular book or books indefinitely; that is, for a period not less than one nor more than five years.

The state board of education may, at any time it finds a book unsatisfactory, call for a new report from the text-book commission on the subject adopted for an indefinite length of time. Moreover, the text-book commission at any time, with the approval of the state superintendent of public instruction, may recommend to the state board of education that a given book adopted indefinitely is unsatisfactory or may be greatly improved by the adoption of a new book or books.

In the event that a change of text-books contracted for for an indefinite length of time is deemed necessary by the state board of education or by the text-book commission, the publisher shall be given at least three months notice prior to the first day of May, and at the expiration of which time the state board of education is authorized to adopt from a list submitted by the text-book commission a new book or books on said subject. Moreover, the publisher of any text-book desiring to end a contract that has been extended indefinitely shall give the state board of education at least three months notice prior to the first day of May. In either event, when it becomes necessary to substitute a new book for an old one on the adopted list, the state board of education shall call for new recommendations from the text-book commission on that book, and proceed as in the first instance. (1923, c. 136, s. 321.)

§ 5732. Classification of text-books.—The text-books in use in the public schools are hereby divided into two classes: (1) major subjects, which include readers, arithmetics, language and grammar, history and geography; and (2) all other books on all other subjects shall be considered as minor subjects. (1923, c. 136, s. 322.)

§ 5733. Basal and supplementary books. — All textbooks to be adopted by the state board of education shall be basal books or supplementary books necessary to complete the course of study. (1923, c. 136, s. 322; 1933, c. 464, s. 2.)

Editor's Note.—Prior to the Amendment of 1933, the section read: "All subjects on which text-books are to be adopted by the state board of education shall be the basal books, and all other books necessary to complete the course of study shall be supplementary books."

§ 5734. Basal books not to be displaced by supplementary.—The state board of education is hereby authorized to select and adopt all supplementary books and instructional material necessary to complete the course of study for all schools. Such supplementary books shall neither displace or (nor) be used to the exclusion of basal books. (1923, c. 136, s. 323; 1933, c. 464, s. 3.)

Editor's Note.—Prior to Public Laws of 1933, c. 464, county boards of education selected the supplementary books.

§ 5735. The text-book commission.—The governor and the superintendent of public instruction shall appoint a text-book commission composed of seven members to be selected from among the teachers, supervisors, principals, and superintendents actually engaged in school work in the state, to serve for five years or until their successors are appointed and qualified, and the governor and superintendent of public instruction shall have authority to fill any vacancy that may occur in the text-book commission, or to remove for sufficient cause any member of the commission. (1923, c. 136, s. 325.)

§ 5736. Organization of commission.—Immediately after the appointment of the text-book commission the superintendent of public instruction shall cause said text-book commission to meet in his office and organize by electing a chairman and secretary, and shall adopt such rules and regulations to govern their work as may be deemed necessary, subject to the approval of the state superintendent of public instruction. The work of the text-book commission shall then be apportioned among the members, and the rules and regulations governing its work shall be published in the daily papers, and a copy shall be sent to all publishers that may submit bids and samples of books for adoption.

The several members of the text-book commission may work independently, seeking information from every legitimate source, but if the members of the text-book commission receive information from representatives of book companies they shall keep a record of each such visit and the purpose of the visit. (1923, c. 136, s. 326.)

§ 5737. Compensation of commission. — Each member of the text-book commission shall be paid out of any funds under the control of the State Board of Education upon the approval of the budget bureau, on the requisition of the superintendent of public instruction, two hundred dollars ($200) for services, and, in addition, the necessary traveling expenses authorized by the superintendent of public instruction: Provided, that the chairman of this commission shall be paid two hundred and twenty-five dollars ($225.00.). The members so appointed shall serve for a period of five years, or until their successors are appointed, and shall be subject to the call of the state board of education at any time during their term of service: Provided further, that for any service rendered more than one year after appointment each member shall be paid a per diem of five dollars ($5.00) and necessary traveling expenses. (1923, c. 136, s. 327; 1927, c. 249.)

Editor's Note.—Prior to amendment Public Laws 1927, payment was made out of "the state public school fund," instead of as now "any fund under the control of the State Board of Education upon the approval of the budget bureau."

§ 5738. Duties of commission. — The textbook commission shall first prepare, subject to the ap-

proval of the superintendent of public instruction, and publish at the expense of the state, an outline course of study setting forth what subjects shall be taught in each of the elementary grades. It shall give in outline the number of basal and supplementary books on each subject to be used in each grade in accordance with the law. All textbooks which are to be adopted by the state board of education shall be basal books or supplementary books.

After the outline course of study has been prepared and published, the textbook commission shall then prepare a multiple list of basal books to be submitted to the state board of education. The multiple list shall contain not less than four nor more than eight books or series of books on all subjects for each grade.

On or before February first, one thousand nine hundred and twenty-two, the chairman of the textbook commission shall submit to the superintendent of public instruction a report setting forth the multiple list of books that have been selected in conformity with the outline course of study. No book shall be included in the multiple list that a majority of the textbook commission deems unsuitable, or that does not conform to the outline course of study.

The textbook commission shall report whether any of the major subjects containing a series of books may be divided, taking one part from one series and another part from another series of books on the same subject, and the commission's report in this respect shall be binding on the state board of education. (1923, c. 136, s. 328; 1933, c. 464, s. 4.)

Editor's Note.—Public Laws of 1933, c. 464, substituted the first two paragraphs of this section for two former paragraphs. A comparison of these paragraphs is necessary to determine the changes.

§ 5739. State board of education makes all contracts. — (a) The state board of education shall make all needful rules and regulations governing the advertisement for bids, when and how prices shall be submitted, when and how sample books for adoption shall be submitted, the nature of the contract to be entered into between the state board of education and the publishers, the nature and kind of bond, if any is necessary, and all other needful rules and regulations governing the adoption of books for all public schools not otherwise specified in this act. After a contract has been entered into between the state board of education and the publisher, if the publisher shall fail to keep its contract as to prices, distribution of books, etc., the attorney-general shall bring suit against said company, when requested by the state board of education, for such amount as may be sufficient to enforce the contract or to compensate the state because of the loss sustained by a failure to keep this contract. (b) It shall be unlawful for any local distributing agency distributing State-adopted textbooks to charge or to make any deduction from the purchase price of such textbooks when returned by the purchaser without having been subjected to use or damage. Any person violating any of the provisions of this subsection shall be deemed guilty of a misdemeanor and upon conviction fined not less than fifty dollars or imprisoned (not) more than thirty days. (1923, c. 136, s. 329; 1925, c. 69; 1933, c. 464, s. 5.)

Editor's Note.—The word "not" should be inserted between the words "imprisoned" and "more." It was omitted in the Public Laws of 1925, which added subsection (b).

Prior to Public Laws 1933, c. 464, this section applied to rules and regulations for elementary schools only. It now applies to all public schools.

§ 5740. Not more than one major subject to be changed in any one year.—At the expiration of the present contracts between the state board of education and the publishers, not more than one major and two minor subjects shall be changed in any one year: Provided, satisfactory arrangements as to prices and distribution may be made. (1923, c. 136, s. 330.)

§ 5741. Publishers to register all agents or employees.—Publishers submitting books for adoption shall register in the office of the state superintendent of public instruction all agents or other employees of any kind authorized to represent said company in the state, and this registration list shall be open to the public for inspection. (1923, c. 136, s. 331.)

§ 5742. Contracts now in force not effected.— All contracts heretofore entered into between publishers and the state of North Carolina shall in no wise be affected by amendments to chapter one hundred forty-five, Public Laws one thousand nine hundred twenty-one. (1923, c. 136, s. 332.)

§ 5742(a). Acquisition of manuscripts for textbooks permitted.—The said board of education be and it is hereby authorized and empowered in its discretion to purchase and/or acquire a manuscript or manuscripts for school textbooks or supplementary books used or to be used in any or all grades of the public schools of North Carolina and to procure the printing and publishing of such books under contract through competitive bids or otherwise as it may in its discretion determine to be for the best interest of the public schools of the state; and if said board of education finds that by the acquisition of any such manuscript or manuscripts, and that by the making of any such contract for any such school books, either basal or supplementary, such books can be furnished to the public schools of the state at a price less than the same may be acquired from publishers, then it shall be the duty of said board of education to acquire such manuscripts and cause the same to be published and said books to be distributed in accordance with such rules and regulations and under such terms and conditions as it may deem advisable, having due regard to the standard of the school books so published, after taking into consideration the substance of such books and their adaptability for use in the schools of the state. (1933, c. 464, s. 6.)

§ 5742(b). Contracts for distribution of textbooks through depositories or a state agency. — The state board of education is authorized and empowered to make and enter into all such contracts as may be necessary to provide for the proper distribution of textbooks either through a depository or depositories, or through the state division of purchase and contract or other state agency, utilizing county boards of education or city boards of trustees, if found feasible for local

distribution, as to it may seem advisable; and is further authorized and empowered to make all needed rules, regulations, and contracts governing the disposition, sale, and return of school books as are not disposed of to the patrons of the schools, and to determine the nature of the contract or contracts to be entered into between the state board of education and the publisher or publishers, for the distribution of school textbooks adopted by it or in use in any of the public schools of the state. It may also determine the nature and kind of bond, if necessary, to be given by any depository or other agency carrying out the terms of this act, to the end that school textbooks shall be delivered to the patrons of the schools at the lowest possible net cost. (1933, c. 464, s. 7.)

Art. 36. Text-Books for High Schools

§§ 5743-5749. Superseded by §§ 5749(a)-5749(h).

§ 5749(a). State Board of Education may adopt.—The State Board of Education is hereby authorized to adopt textbooks for the use in all public high schools of the State, supported in whole or in part out of public funds, and the high school textbooks adopted by the State Board of Education in accordance with the provisions of this article shall be used by all the public high schools of the State. (1931, c. 359, s. 1.)

§ 5749(b). State committee on high school textbooks.—The Governor and the State Superintendent of Public Instruction, at the expiration of the present high school textbook contracts, shall appoint a State committee on high school textbooks, consisting of five members, five of whom are actively engaged in school work, who shall serve for a term of five years without compensation except for reimbursement out of the State Treasury upon the requisition of the State Superintendent of Public Instruction for actual expenses incurred by attendance upon meetings of the committee that may be called by or under the direction of the State Superintendent of Public Instruction. (1931, c. 359, s. 2.)

§ 5749(c). Grouping of high school instruction; examination of books; submission of multiple list and annual reports. — It shall be the duty of the State Committee of high school textbooks to list all the high school fields of instruction in five separate groups as nearly equal as possible in the cost of textbooks. The Committee on high school textbooks shall further arrange these groups in the order in which they will be considered, and notify the State Board of Education in its first report of this arrangement. During the first year of its term of office, it shall be the further duty of the State Committee on high school textbooks to make a thorough examination of any and all books submitted by any publisher in the first group of fields of instruction as arranged by said State Committee on high school textbooks, with a view of determining whether the contents, quality and price of said books are such as to make them suitable and desirable for use in the public high schools of the State, and submit, not later than the first day of January, one thousand nine hundred and thirty-four, a multiple list not exceeding three books in each field of instruction in the first group. Not later than January first in each succeeding year, the State Committee on high school textbooks shall make a similar report on the fields of instruction in the order fixed by it, unless it receives a notice from the State Board of Education prior to May first in said year that such report is not desired. (1931, c. 359, s. 3.)

§ 5749(d). Selection of one book per subject by State Board of Education; indefinite contract with publishers; annual report by publishers. — It shall be the duty of the State Board of Education to select one book in each field of instruction from the multiple list submitted by the State Committee on high school textbooks for exclusive use in the public high schools of the State for a period not less than five years. In case the State Board of Education finds it impossible to make a satisfactory contract for any one of the books on the multiple list, then it shall notify the State Committee on high school textbooks that it cannot make a satisfactory contract for any book on the multiple list in that field of instruction. The State Committee on high school textbooks shall then submit another multiple list in that field of instruction from which the State Board of Education shall make an adoption. It shall be the further duty of the State Board of Education to make an indefinite contract with all the publishers having books in groups two, three, four and five for a period not less than one year nor more than five years, and these books shall continue in use until the State Board of Education, in accordance with the provisions of this article, shall adopt a book for State-wide use in any given field of instruction: Provided, that the contract shall require each publisher to report annually to the State Board of Education the total sales of each book in the State of North Carolina. (1931, c. 359, s. 4.)

§ 5749(e). Attorney General to bring suit on publishers' contracts in event of failure to execute. —After a contract has been entered into between the State Board of Education and the publisher, if the publisher shall fail to keep its contract as to prices, distribution of books, an adequate supply of the edition of books as adopted, etc., the Attorney General shall bring suit against said company when requested by the State Board of Education, for such an amount as may be sufficient to enforce the contract or to compensate the State because of the loss sustained by failure to keep his contract. (1931, c. 359, s. 5.)

§ 5749(f). Sale of books at lower price elsewhere reduces price in State. — If the publishers of any high school textbook on the adopted list in this State shall contract with another state, or with any county, city or town or other municipality, or shall place its books on sale anywhere in the United States, for or at a less price than that in its contract with the State of North Carolina, it shall be, and is hereby, made a part of the contract of that company to furnish that book to the high schools of this State at a price not to exceed that for which the book is furnished, sold, or placed on sale in any other state, or in any such

other county, city, town or other municipality. (1931, c. 359, s. 6.)

§ 5749(g). Adoption made exclusive.—The textbooks for high school instruction adopted under the provisions of this article shall be for the exclusive use of the high schools of this State when so adopted and placed upon the approved list in the manner as set out in this article. (1931, c. 359, s. 7.)

§ 5749(h). Article part of public school laws; conflicting laws repealed.—This article shall become a part of the public school laws of the State of North Carolina, and any sections which conflict with sections herein are hereby repealed. (1931, c. 359, s. 8.)

Art. 37. Furnishing Text-Books

§ 5750. Free text-books.—On and after July first, one thousand nine hundred and twenty-three, any county board of education, the committee of any local tax district, or the board of trustees of any special charter district in the state is authorized to purchase books for the use of pupils in said county or district to be loaned to said pupils, without charge for the same, under such needful rules and regulations governing the loan of said textbooks as the said board may prescribe.

If instruction is given in the manual and domestic arts, the county board of education, the committee or board of trustees may, in its discretion, purchase and lend the necessary implements and material to the pupils. And it shall also in a similar manner procure such apparatus, reference books, and other means of illustration as may be needed in the school.

1. The board of county commissioners, in addition to levying taxes for the salary fund, the operating and equipment fund, and the fund for the repayment of loans, bonds, and notes, is hereby authorized to levy an additional tax to be known as the "tax for supplying free text-books," which shall be sufficient to pay the cost of purchasing and loaning text-books as provided in section one of this act, after an estimate has been submitted by the county board of education and approved by the commissioners. Any committee of a local tax district, or any board of trustees of a special charter district in a county not supplying free textbooks, is hereby authorized to use any part of the local tax funds, not otherwise appropriated in the district, to carry out the provisions of section one authorizing said district to supply free text-books.

2. In the event that the county board of education, or the board of county commissioners, or both, shall fail to provide in the budget a sum sufficient to supply free text-books in accordance with section 5383, or in the event that the sum derived from the local taxes in any local tax or special charter district is insufficient to provide free text-books in such district after other necessary expenses are met, the question of supplying free text-books may be submitted to the qualified voters in the following manner:

Whenever the written petition of one-fourth of the qualified voters of a county, or of a local tax or special charter district, setting forth the tax rate to be levied and calling for an election to be held upon the question of levying an additional special annual tax with which to purchase and supply free text-books, is presented to the governing board said board shall present the petition to the tax levying authority of said county or district, which body shall order an election and conduct the same as near as may be under the rules governing the election for local taxes: Provided, that in the election the voters shall cast a ballot on which shall be printed or written the words, "For free text-books," and those who oppose shall cast a ballot on which shall be printed or written the words "Against free text-books;" and if a majority of the qualified voters in said county or district shall cast their ballots "Free text-books," the tax shall be levied and collected as all other county or local taxes for schools are levied and collected. It shall be the duty of the governing body of the school to purchase books for the use of the pupils in said county or district, and loan the same to pupils without charge in accordance with section 5383. (1923, c. 136, s. 340.)

§ 5751. Rental of text-books.—The county board of education or the board of trustees of any local tax district or special charter district is hereby authorized to rent such books to the children of any school district at a rental price not to exceed fifty per cent of the publisher's contract price with the state; and wherever books are rented that have not been contracted for by the state, the rental price shall not exceed fifty per cent of the publisher's list prices. (C. S. 5735.) (1923, c. 136, s. 341.)

See § 5754(a) and note.

§ 5752. County and local boards to make rules; to use incidental expense fund.—The county board of education or the board of trustees of any local tax district or special charter district is hereby authorized to make all needful rules and regulations governing the rental of public school text-books, and to apply any funds of the operating and equipment fund remaining to the credit of the county or the special charter district to the purposes of this article: Provided, that before any amount is appropriated from this fund for these purposes, provisions shall be made for all needful expenses of said schools. (C. S. 5736.) (1923, c. 136, s. 342.)

See § 5754(a) and note.

§ 5753. Books for indigent children.—County boards of education or the board of trustees of any local district may set aside an amount not to exceed one hundred dollars ($100.00) from the incidental expense fund to be used in purchasing public school text-books, to be used in the manner designated, namely, that when it shall appear that the education of any child is limited because of the inability of said child to purchase necessary textbooks or to pay the rental price, said board or boards may loan free of cost all necessary books to any such child during the term of the school, subject to rules and regulations by the county board of education or the board of trustees of any local tax district or special charter school, and approved by the state superintendent of public instruction. (C. S. 5737.) (1923, c. 136, s. 343.)

§ 5754. State superintendent to inform local school authorities.—The state superintendent of public instruction is hereby requested to inform superintendents of county and all local tax schools of the provisions of this article. (C. S. 5739.) (1923, c. 136, s. 344.)

§ 5754(a). Local units authorized to establish capital fund for renting of text books.—The board of county commissioners in any county, upon the request of the county board of education therein, or of the board of trustees, or board of school commissioners of any special charter district therein, is hereby authorized and empowered to establish a capital fund in such county under the terms of and in accordance with the provisions of this act, which fund shall be used by the county board of education, or by the board of trustees, or board of commissioners of the special charter district making such request for the operation of a system of text book rentals to the patrons of the public schools of the county or special charter district, for which such capital fund may be established: Provided, however, that before any such request shall be presented to the board of county commissioners the county board of education, or the board of trustees, or board of commissioners of the special charter district, presenting the same shall obtain the approval of the State Board of Equalization as hereinafter provided. It shall be the duty of the State Board of Equalization to prepare rules and regulations governing the establishment of rental depositories in accordance with the provisions of this act. It shall be the duty of the State Superintendent of Public Instruction to acquaint the public school officials with the rules and regulations of the Board of Equalization and to present to said board for its approval or rejection all applications for such permission. (1931, c. 210, s. 1.)

Editor's Note.—The Act from which sections 5754(a)-(h) were taken provided: "All laws or clauses of laws in conflict with this act are hereby repealed or amended so as to make same conform to the provisions of this act." It seems that this act repeals sections 5751 and 5752 except as to the units and counties excepted in section 5754(g).

§ 5754(b). Computation of amount of fund. — The necessary amount of such capital fund shall be determined by the board of county commissioners upon the basis of a comprehensive budget estimate prepared by the county board of education, or the board of trustees, or board of commissioners of the special charter district making such request, not exceeding, however, the extent and amount thereof approved by the State Board of Equalization. (1931, c. 210, s. 2.)

§ 5754(c). Budget estimate to be made up; repayments to fund out of rental fees.—Before the board of commissioners of any county shall establish such capital fund it shall be the duty of the county board of education, or the board of trustees, or board of commissioners of the special charter district making request therefor to prepare a budget estimate covering a definite and specified period showing the estimated income from rentals for each year, the estimated cost of text books and supplies for each year and a balanced budget at the end of a specified and definite period. Such budget shall be prepared in accordance with rules and regulations to be adopted and promulgated by the State Board of Equalization. It shall be the duty of the county board of education, or the board of trustees, or board of commissioners of any special charter district requesting and securing the establishment of any such capital fund for its benefit to make provision for the payment out of rental fees of the principal fund of the capital fund and the interest arising thereon in the manner and within the term provided for in the certificate of approval granted by the State Board of Equalization, and it shall be the duty of the State Board of Equalization in granting the approval to any such request to specify in its order granting said approval the time within which said repayments shall be made and the amount of such repayment to be made during each year of such time. (1931, c. 210, s. 3.)

§ 5754(d). Details of administration of fund; record of receipts and disbursements; annual audit. — Any capital fund established under the provisions of this article shall be placed to the credit of the county board of education, or the board of trustees, or board of commissioners of any special charter district making request therefor, which board shall administer the fund under such rules and regulations as the said board may prescribe, with the approval of the State Board of Equalization, not in conflict, however, with the provisions of this act. It shall be the duty of the county board of education, or the board of trustees, or board of commissioners of any charter, district for whose benefit such capital fund is established, to keep accurate record of receipts and disbursements made from this fund and to cause such records and the accounts thereof to be audited in July of each and every year and a copy of said audit shall be kept as a part of the permanent records of the office of said board and one copy thereof shall be filed with the board of county commissioners of the county, one copy with the State Superintendent of Public Instruction and one copy with the State Board of Equalization. It shall be unlawful for the county board of education, or the board of trustees, or board of commissioners of any special charter district to use any part of the funds so provided for any purpose, even temporarily, other than the purposes for which said fund is established and in accordance with the provisions of this act. (1931, c. 210, s. 4.)

§ 5754(e). Purchase of books, etc., with fund; schedules of rentals; patrons may purchase at cost.—The county board of education, or board of trustees, or board of commissioners of any charter district for whose use and benefit such capital fund has been established is hereby authorized to purchase text books and instructional supplies and pay for same out of the said capital fund, together with such rental fees as said board may determine upon and to rent such text books and instructional supplies and to rent or furnish said text books and instructional supplies to the patrons of the public schools of such county, or such charter school district: Provided, that the rental fees charged therefor shall be in accordance with schedules submitted to and approved by the State Board of Equalization: Provided, further, that any patron of the public schools may purchase text books at net costs from any rental depository. (1931, c. 210, s. 5.)

§ 5754(f). Handling of fund by fiscal agent; warrants on fund. — Such capital fund so established shall be deposited with the fiscal agent of the county to the credit of the county board of

education, or board of trustees, or board of commissioners for such charter district for which said fund is established and shall be paid out upon a warrant signed by the chairman and secretary of such board and approved by such officer as the Local Government Act may require: Provided, that such officer required to approve the same by the Local Government Act shall receive no additional compensation for such services. (1931, c. 210, s. 6.)

§ 5754(g). Units and counties excepted.—This act shall not apply to any county, or special charter district which has heretofore established a fund for the purchase and rental of text books to patrons of the public schools of such county, or special charter district: Provided, however, that the county board of education, or the board of trustees, or board of commissioners of any such special charter district may, with the approval of the majority of any such board, bring themselves under the provisions of this act: Provided, further, that this act shall not apply to Caswell County and Richmond County. (1931, c. 210, s. 7.)

For provisions applicable to units and counties excepted, see §§ 5751 and 5752.

§ 5754(h). Fumigation and disinfection of books. — The State Superintendent of Public Instruction, in conjunction with the State Board of Health, shall adopt rules and regulations governing the use and fumigation and/or disposal of text books from quarantined homes and for the regular disinfection of all text books used in the public schools of the State: Provided, that said rules shall be attached to any rules and regulations that the State Board of Equalization may promulgate. (1031, c. 210, s. 8.)

Art. 37A. State Text Book Purchase and Rental Commission

§ 5754(1). Commission created; membership; compensation and expenses. — There is hereby created a state textbook purchase and rental commission of five members, as follows: The state superintendent of public instruction as ex-officio chairman, the attorney general, the director of the division of purchase and contract, and two members, to be appointed by the governor, for a term of two years each. Said appointive members to receive such compensation as the law provides for members of the state school commission. The expense and cost of said commission shall be paid out of the appropriation made available by this article. (1935, c. 422, s. 1.)

§ 5754(2). Powers and duties of commission.—The said textbook purchase and rental commission is hereby authorized, empowered, and directed to promulgate rules and regulations necessary to:

(1) Acquire by contract, and/or purchase, such textbooks and instructional supplies, which are, or may be on the adopted list of the state standard course of study, as the commission may find necessary to supply the needs of the children in the public schools of the State.

(2) Provide a system of distribution of said textbooks and supplies to the children in the public schools of the State, and shall distribute such books as are provided under the rental system without the use of any depository other than some agency of the State.

(3) Provide for uniform rental charge for said textbooks and supplies to the children in attendance upon the public schools of the State. Said rental charge shall be collected annually in an amount not to exceed one-third of the cost of said textbooks and supplies: Provided nothing herein shall be construed to prevent the purchase of textbooks from said commission needed for any child in the public schools of the State, by any parent, guardian, or person in loco parentis.

(4) Provide for the use of said textbooks without charge to the indigent children of the State.

(5) Adopt, provide and distribute all blanks, forms and reports necessary to keep a careful check and record of all the books, supplies distributed, rentals collected, indigents furnished, condition and repairs of books, and such other information as said commission may require, to the end that an accurate and complete inventory of the affairs of said commission may be available at all times to the governor and council of State.

(6) Cause an annual audit to be made of the affairs of the said commission and a certified copy of same to be furnished the governor and council of State.

(7) Books shall not be interchangeable between the white and colored schools, but shall continue to be used by the race first using same. (1935, c. 422, s. 2.)

§ 5754(3). Purchases through division of purchase and contract. — The purchase of all textbooks and supplies under the provisions of this article adopted as now provided by law shall be made through the division of purchase and contract. (1935, c. 422, s. 3.)

§ 5754(4). Rentals paid to state treasury; disinfecting books.—All sums of money collected as rentals under the provisions of this article shall be paid monthly as collected into the state treasury, to be entered as a separate item known as the "state textbook rental fund." Disbursement of said funds shall only be had by order of the council of State: Provided further that the state textbook purchase and rental commission in conjunction with the state board of health shall adopt rules and regulations governing the use and fumigation for the regular disinfection of all textbooks used in the public schools of the State. (1935, c. 422, s. 4.)

§ 5754(5). Local rental systems unaffected; rental fees limited; purchases from state commission allowed.—Any county or city board of education now operating a textbook rental system shall be permitted to continue such local rental system without interference from the state commission: Provided, that the rental fees charged by such local rental authority shall not exceed the rental charges set by the state commission: Provided, further, that such local textbook rental authority may purchase from the state commission textbooks for its local use. (1935, c. 422, s. 5.)

§ 5754(6). Appropriation and issuance of short term notes.—

(1) For the purpose of carrying out the provisions of this article there is hereby appropriated out of the public revenues of the State a sum of

one million five hundred thousand dollars ($1,500,000).

(2) The treasurer, with the approval of the council of State, is hereby authorized, empowered and directed to issue short term notes, pledging the full faith and credit of the State, in such amounts, length of term and rate of interest as shall be most advantageous to the State, but in no event shall the total sum of such notes exceed the sum of one million five hundred thousand dollars ($1,500,000).

(3) The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the notes herein authorized.

(4) The coupons, if any, appurtenant to such notes shall be receivable after maturity in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever.

(5) All of such notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on such notes shall not be subject to taxation as for income, nor shall such notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation.

(6) It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in such notes. (1935, c. 422, s. 6.)

Art. 38. Public Libraries

§ 5755. Rules and regulations governing their establishment.—The state board of education is hereby authorized to adopt such rules and regulations governing the establishment of public libraries receiving state aid as will best serve the educational interest of the people. It shall have authority to use all of the state appropriation for rural libraries, to encourage the establishment of county circulating libraries, or to coöperate with the state library commission in providing circulating libraries for schools. (1923, c. 136, s. 345.)

§ 5756. Aid in establishing local libraries.—The state board of education may use such portion of the state appropriation to rural libraries as it may deem necessary to aid the public schools in establishing local libraries as provided herein.

When the patrons and friends of any union school in which a standard high school is or is to be maintained shall raise by private subscription and tender to the treasurer of the county school fund for the establishment of a library to be connected with the school the sum of fifty dollars, the county board of education shall appropriate from the operating and equipment fund the sum of fifty dollars for this purpose.

As soon as the county board shall have made an appropriation for a library in the manner prescribed, the county superintendent shall inform the secretary of the state board of education of the fact, whereupon the state board, if the funds on hand are sufficient, shall remit to the treasurer of the county school fund the sum of fifty dollars additional for the purchase of books. (C. S. 5618, amended.) (1923, c. 136, s. 346.)

SUBCHAPTER XII. COMPULSORY ATTENDANCE IN SCHOOLS

Art. 39. General Compulsory Attendance Law

§ 5757. Parent or guardian required to keep child in school; exceptions.—Every parent, guardian or other person in the state having charge or control of a child between the ages of seven and fourteen years shall cause such child to attend school continuously for a period equal to the time which the public school in the district in which the child resides shall be in session. The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse the child from temporary attendance on account of sickness or distance of residence from the school, or other unavoidable cause which does not constitute truancy as defined by the state board of education. The term "school" as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the county superintendent of public instruction or the State Board of Education.

All private schools receiving and instructing children of compulsory school age shall be required to keep such records of attendance and render such reports of the attendance if such children as are required of public schools; and attendance upon such schools, if the school or tutor refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district, town or city which the child shall be entitled to attend: Provided, instruction in a private school or by private tutor shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term. (C. S. 5758.) (1923, c. 136, s. 347; 1925, c. 226.)

Editor's Note.—The last sentence of the first paragraph and all of the last paragraph of this section was added by the amendment, Public Laws 1925.

In 3 N. C. Law Rev. 149, in discussing this amendment, it is said: "ch. 226 is a step in making more effective the compulsory school attendance law by regulating the attendance of children of compulsory school age in private schools. The statute requires that private schools keep such records of attendance and render such reports as are required of public schools. If this is not done, attendance at a private school shall not be accepted in lieu of attendance upon a public school, and teachers and principals of private schools who violate this statute may be punished as for a misdemeanor. Authorized private schools must have courses of instruction which run concurrently with the term of the public school."

Failure to Charge as to Other Than District School.—For a conviction under the provision of this section it is necessary for the indictment to allege, and the State offer evidence tending to show not only that the parent or guardian of the children within the described age had failed or refused to send them to the public school within the district. but also that such child or children had not been sent to attend school periodically for a period equal to the time which the public school in the district in which they reside shall be in session. State v. Johnson, 188 N. C. 591, 125 S. E. 183.

Same—Burden Not on Parent.—Where the indictment is defective in failing to charge that a parent or guardian had also failed to send the child or children to another than the district school, etc., under the provisions of this section and the State offers no evidence in respect to it, it is not required that the parent or guardian offer evidence to show that he had complied with the proviso of the statute; and an instruction of the court to the jury placing the burden upon the

defendant to so show, is reversible error. State v. Johnson. 188 N. C. 591. 125 S. E. 183.

Validity of Expenditure for School Houses Emphasized.—See Lacy v. Fidelity Bank, 183 N. C. 373. 11 S. E. 612.

Applied in Hayes v. Benton, 193 N. C. 379, 384, 137 S. E. 169.

§ 5758. State board of education to make rules and regulations; method of enforcement.—It shall be the duty of the state board of education to formulate such rules and regulations as may be necessary for the proper enforcement of the provisions of this article. The board shall prescribe what shall constitute truancy, what causes may constitute legitimate excuses for temporary nonattendance due to physical or mental inability to attend, and under what circumstances teachers, principals, or superintendents may excuse pupils for nonattendance due to immediate demands of the farm or the home in certain seasons of the year in the several sections of the state. It shall be the duty of all school officials to carry out such instructions from the state board of education, and any school official failing to carry out such instructions shall be guilty of a misdemeanor: Provided, that the preceding section shall not be in force in any city or county that has a higher compulsory attendance law now in force than that provided herein; but in any such case it shall be the duty of state board of education to investigate the same and decide that any such law now in force has a higher compulsory attendance feature than that provided by this article: Provided further, that wherever any district is without adequate buildings for the proper enforcement of this article, the county boards of education may be allowed not more than two years from July the first, one thousand nine hundred and nineteen, to make full and ample provision in every district.

Mental incapacity shall be an excuse for nonattendance, and is interpreted to mean feeble-mindedness or such nervous disorder as to make it either impossible for such child to profit by instruction given in the school or impracticable for the teacher properly to instruct the normal pupils of the school. In the case of feeble-minded children the teacher shall designate the same in her reports to the County Superintendent of Public Welfare, and it shall be his duty to report all such cases to the State Board of Charities and Public Welfare. Whereupon said Board shall make, or cause to be made, an examination to ascertain the mental incapacity of said child and report the same to the county or city superintendent involved. Upon receipt of said report the local school authorities are hereby authorized, under such limitations and rules as the State Board of Education may adopt, to exclude said child from the public school when it is ascertained that the child can not benefit by said instruction and his presence becomes a source of disturbance to the rest of the children. In all such cases in which a child is excluded from school a complete record of the whole transaction shall be filed in the office of the county or city superintendent and kept as a public record. (C. S. 5759.) (1923, c. 136, s. 348; 1931, c. 453.)

Editor's Note.—The Act of 1931 added the second paragraph to this section.

Private Schools.—An indictment under the provisions of this section, charging a parent with unlawfully and wilfully failing to cause his children, between the ages of 8 and 14 years, to attend the public schools of the district of his and the children's residence, as required by the statute, is defective in not observing the distinction that the parent, having the custody of his children, may have them attend private schools for the required period, and no conviction may be had under the charge set out in the indictment. State v. Lewis, 194 N. C. 620, 140 S. E. 434.

§ 5759. Attendance officers; reports; prosecutions.—The state superintendent of public instruction shall prepare such rules and procedure and furnish such blanks for teachers and other school officials as may be necessary for reporting each case of truancy or lack of attendance to the chief attendance officer referred to in this article. Such rules shall provide, among other things, for a notification in writing to the person responsible for the nonattendance of any child, that the case is to be reported to the chief attendance officer of the county unless the law is immediately complied with. County boards of education and boards of trustees of special charter districts have the right to appoint district attendance officers when deemed by them necessary, to assist in carrying out the provisions of this article, and the rules and instructions which may be promulgated by the state superintendent of public instruction. But in every case in which it becomes necessary to prosecute for nonattendance the case shall be referred to the chief attendance officer of the county for further action: Provided, that in special charter districts having special attendance officers paid out of local funds, said officers shall have full authority to prosecute for violations of this article. (C. S. 5760.) (1923, c. 136, s. 349.)

§ 5760. Violation of law; penalty.—Any parent, guardian, or other person violating the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be liable to a fine not less than five dollars nor more than twenty-five dollars, and upon failure or refusal to pay such fine, the said parent, guardian or other person shall be imprisoned not exceeding thirty days in the county jail. (C. S. 5761.) (1923, c. 136, s. 350.)

§ 5761. Investigation and prosecution by county superintendent and attendance officer.—The county superintendent of public welfare or chief school attendance officer or truant officer provided for by law shall investigate and prosecute all violators of the provisions of this article. The reports of unlawful absence required to be made by teachers and principals to the chief attendance officer shall, in his hands, in case of any prosecution, constitute prima facie evidence of the violation of this article and the burden of proof shall be upon the defendant to show the lawful attendance of the child or children upon an authorized school. (C. S. 5762.) (1923, c. 136, s. 351; 1925, c. 226.)

Editor's Note.—The last sentence to this section was added by Public Laws 1925.

§ 5762. Investigation as to indigency of child.—If affidavit shall be made by the parent of a child or by any other person that any child between the ages of seven and fourteen years is not able to attend school by reason of necessity to work or labor for the support of itself or the support of the family, then the attendance officer shall diligently inquire into the matter and bring it to the attention of some court allowed by law to act as a juvenile court, and said court shall proceed to find whether as a matter of fact such parents, or per-

sons standing in loco parentis are unable to send said child to school for the term of compulsory attendance for the reasons given. If the court shall find, after careful investigation, that the parents have made or are making a bona fide effort to comply with the compulsory attendance act, and by reason of illness, lack of earning capacity, or any other cause which the court may deem valid and sufficient, are unable to send said child to school, then the court shall find and state what help is needed for the family to enable the attendance law to be complied with. The court shall transmit its findings to the county board of education of the county or, in special charter districts, to the board of trustees in which the case may arise. (C. S. 5763.) (1923, c. 136, s. 352.)

§ 5763. Aid to indigent child.—The county board of education shall in its discretion order aid to be given the family for the operating and equipment fund of the county school budget to an extent not to exceed ten dollars per month for such child during the continuance of the compulsory term; and shall at the same time require said officer to see that the money is used for the purpose for which it is appropriated and to report from time to time whether it shall be continued or withdrawn. And the county board of education is hereby authorized in making out the county budget to provide a sum to meet the provisions of this article. (C. S. 5764.) (1923, c. 136, s. 353.)

Art. 40. Compulsory Attendance of Deaf and Blind Children

§ 5764. Deaf and blind children to attend school; age limits; minimum attendance.—Every deaf and every blind child of sound mind in North Carolina who shall be qualified for admission into a state school for the deaf or the blind shall attend a school for the deaf or the blind for a term of nine months each year between the ages of seven and eighteen years. Parents, guardians, or custodians of every such blind or deaf child between the ages of seven and eighteen years shall send, or cause to be sent, such child to some school for the instruction of the blind or deaf as is herein provided: Provided, that the board of directors of any school for the deaf or blind may exempt any such child from attendance at any section or during any year, and may discharge from their custody any such blind or deaf child whenever such discharge seems necessary or proper. Whenever a deaf or blind child shall reach the age of eighteen and is still unable to become self-supporting because of its defects, such a child shall continue in said school until it reaches the age of twenty-one, unless it becomes self-supporting sooner. (C. S. 5765, 5769.) (1923, c. 136, s. 354.)

§ 5765. Parents, etc., failing to send to school guilty of misdemeanor; provisos.—The parents, guardians, or custodians of any deaf children between the ages of seven and eighteen years failing to send such deaf child or children to some school for instruction, as provided in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court, for each year said deaf child is kept out of school, between the ages herein provided, (1) that parents, guardians, or custodians may elect two years between the ages of seven and eighteen years that a deaf child or children may remain out of school, and (2) that this section shall not apply to or be enforced against the parent, guardian, or custodian of any deaf child until such time as the superintendent of any school for the instruction of the deaf, by and with the approval of the executive committee of such institution, shall in his and their discretion serve written notice on such parent, guardian, or custodian of any deaf child until such time as the superintendent of any school for the instruction of the deaf, by and with the approval of the executive committee of such institution, shall in his and their discretion serve written notice on such parent, guardian, or custodian, directing that child be sent to the institution whereof they have charge. (C. S. 5766.) (1923, c. 136, s. 355.)

§ 5766. Parents, etc., failing to send guilty of misdemeanor; provisos.—The parents, guardians, or custodians of any blind child or children between the ages of seven and eighteen years failing to send such child or children to some school for the instruction of the blind shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court, for each year that such child or children shall be kept out of school between the ages specified: Provided, (1) that this section shall not be enforced against the parents, guardians, or custodians of any blind child until such time as the authorities of some school for the instruction of the blind shall serve written notice on such parents, guardians, or custodians, directing that such child be sent to the school whereof they have charge; and (2) that the authorities of the state school for the blind and the deaf shall not be compelled to retain in their custody or under their instruction any incorrigible person or persons of confined immoral habits. (1923, c. 136, s. 356.)

§ 5767. To report defective children.—It shall be the duty of the superintendent to report through proper legal channels, the names and addresses of parents, guardians, or custodians, of deaf, dumb, blind, and feeble minded children to the principal of the institution provided for each, and upon the failure of the county superintendent to make such reports, he shall be fined five dollars for each child of the class mentioned above not so reported. (C. S. 5567, 5571.) (1923, c. 136, s. 357.)

SUBCHAPTER XIII. NORMAL SCHOOLS

Art. 41. State Board to Control Certain Normal Schools

§ 5768. State board of education shall prescribe rules and regulations for management of normal schools.—The state board of education shall have supervision and shall prescribe rules and regulations for the conduct, management, and enlargement of each of the following normal schools: the Appalachian training school, Boone, North Carolina; the Cullowhee state normal and industrial school, Cullowhee, North Carolina. (1921, c. 61, s. 1.)

§ 5769. State board of education shall appoint boards of trustees.—The state board of education shall, not later than May one, one thousand

nine hundred and twenty-one, appoint for each state normal school placed under its supervision a board of trustees consisting of seven members, who shall be chosen at large from the district which the respective school serves, for terms of five years, beginning with the first Thursday of May next succeeding their appointment, and shall hold office until their respective successors are appointed and qualified. They shall qualify by taking the constitutional oath or affirmation required of officers: Provided, that at the first appointment of members of normal school boards of trustees by the state board of education under the provisions of this section, the state board of education shall appoint from the respective board of trustees or other managing authorities in office February 24, 1921, seven members, appointing one to serve one year, one to serve two years, one to serve three years, two to serve four years, and two to serve five years, and until their respective successors are appointed and qualified. Thereafter the appointments shall be for the full term of five years.

The term of office of all members of boards of trustees or other managing authorities of the state normal schools placed under the supervision of the board of education shall automatically expire on the first Thursday in May, one thousand nine hundred and twenty-one: Provided, their successors have been appointed and qualified.

Any member who shall fail to attend two annual meetings of the board in succession shall automatically cease to be a member of the board of trustees, unless said member makes a written request to the chairman of the board to be continued as a member of said board, or unless said member sends his proxy to be voted by some member of the board present: Provided, that no proxy shall be recognized unless there is a majority of the board present. Vacancies for whatever cause in a board of trustees shall be filled by the state board of education, such appointees serving for the remainder of the respective unexpired term or terms.

The board of trustees of said school shall take and hold for the state of North Carolina all the property of every sort and kind belonging to said school placed under its supervision. But the board of trustees of the respective normal school shall not dispose of any real property without the consent of the state board of education. (1921, c. 61, s. 2.)

§ 5770. Boards of trustees; meetings.—The office of each board of trustees shall be at its respective normal school. The board of trustees of each normal school shall hold an annual meeting at its office. At this meeting the board shall each year elect one of its members as chairman, and one as vice chairman, and shall fix the time and place of its regular meetings, which shall be duly advertised. Such special meetings may be called at such terms as such places as the duties and business of the board may require. The rules generally adopted by deliberative bodies for their government shall be observed by boards of trustees, but no motion or adopted resolution shall be declared or adopted without the concurrence of a majority of the whole board.

Members of boards of trustees shall receive no compensation for their services, but shall be reimbursed for their necessary personal and traveling expenses incidental to performing their duties. (1921, c. 61, s. 3.)

§ 5771. Boards of trustees: powers, duties.— The board of trustees of the respective normal school shall elect at its annual meeting a president and all teachers and assistant teachers: Provided, that the election of all teachers and assistant teachers shall be made only on the nomination of the president or the acting president: Provided further, that the president may be authorized to fill vacancies that may occur between the annual meetings of the board of trustees, and select all employees, subject to confirmation by the board of trustees, not inconsistent with the budget for that ensuing year.

The board of trustees, upon recommendation of the president, shall authorize all departments of instruction and all positions and fix the salaries and tenure of all teachers and all assistants of whatever kind, and may discharge the president or any teacher or any assistant teacher for cause. But no president or teacher or professional assistant shall be dismissed without being given a copy of the charges against him and an opportunity of being heard in person or by counsel in his own defense.

The board of trustees, upon the recommendation of the president, shall, subject to the rules and regulations of the state board of education authorize the courses of study to be offered, including observation and practice in teaching, prescribe the entrance requirements, and divide the school year into terms or sessions. The board of trustees shall fix all fees, tuition, and rate of board for all students, and provide for the government and discipline of the school. (1921, c. 61, s. 4.)

§ 5772. President of normal schools; powers, duties. — The president of the respective normal school shall be the secretary of the given board of trustees. He shall conduct all correspondence of the board, issue calls for meetings, prepare the docket or calendar for the same, keep the minutes of the proceedings, preserve in the office of the board all of its records, make all reports requested of the board, receive all reports requested by it, seeing that they are in proper form, complete and accurate, and shall perform such other secretarial duties as may be imposed by the board: Provided, that in case of a vacancy in the presidency of the respective normal school, the board may elect one of its own members to act temporarily as secretary.

The president of the school, in his capacity as president and secretary, shall attend all meetings of the board of trustees, except when his own tenure, his salary, or the administration of his office is under discussion. He shall have the right to advise on any question under discussion, but shall have no vote. The president of each normal school may nominate for appointment by the board of trustees, and may recommend for dismissal by it, all heads of departments, teachers, and assistants of whatever kind. He shall submit, subject to the rules and regulations of the state board of education, to the board of trustees, for adop-

tion, courses of study and plans of work, and shall in every way take the initiative in working out of policies of his school and in promoting its development and efficiency. He shall each year submit an annual report to the board of trustees, a copy of which shall be sent to the secretary of the state board of education. This annual report shall include a statement of the condition of his normal school, of its achievements during the preceding school year, of its present and future needs, and his recommendations for its advancement. (1921, c. 61, s. 5.)

§ 5773. Expenditure state normal school funds.—The several and respective sums hereafter appropriated by the general assembly for the support and maintenance of each state normal school under the supervision of the state board of education shall be paid over to the treasurer of the state board of education and held by him as a separate fund, and placed to the credit of the respective state normal school. The treasurer of the state board of education shall pay out such funds only on proper warrant issued by the state auditor, on requisition signed by the secretary of the state board of education.

The state board of education shall prescribe how the funds for each normal school shall be received by the respective board of trustees, and how the same shall be paid out. (1921, c. 61, s. 6.)

§ 5774. State superintendent prepares annual budget.—The superintendent of public instruction shall in each even year prepare, in coöperation with the respective principal and board of trustees for each state normal school under the supervision of the state board of education, a budget setting forth the financial needs of each school for the succeeding two fiscal years, giving separately the requirements:

(a) For permanent improvements;
(b) For operation and maintenance of plant;
(c) For administration and supervision;
(d) For teachers' salaries.

And shall include these respective budgets in his biennial state school budget submitted to the general assembly. (1921, c. 61, s. 7.)

§ 5775. State board of education to control and manage negro normal schools.—The state board of education shall have supervision, and shall prescribe rules and regulations for the control, management, and enlargement of each of the following normal schools: the Elizabeth City state normal school, Elizabeth City; Fayetteville state normal school, Fayetteville; Slater state normal school, Winston-Salem.

The state board of education shall make all needful rules and regulations concerning the expenditure of funds, the selection of principals, teachers, and employees.

The state board of education, in its judgment, may organize the schools mentioned in this section on the same plane as that provided for the organization of the normal schools designated in section 5768; or it may change the organization to suit conditions: Provided, the needs of the school and the funds appropriated demand such a change. (1921, c. 61, s. 8; 1925, c. 306, s. 9; 1931, c. 276, s. 1.)

Editor's Note.—By the Public Laws of 1925 the words "and concerning the selection of members of the board of trustees" were stricken from the second paragraph of this section, to conform with section 5775(a).

A provision of the Act of 1931 struck out the words "Cherokee Indian State normal school, Pembroke" formerly appearing at the end of the first paragraph of this section. The Act then provided that, notwithstanding such provision "the State Board of Education shall make all needful rules and regulations concerning the expenditure of funds, the selection of principals, teachers and employees of said Cherokee Indian State Normal School. The State Board of Education shall control and supervise said school to the same extent substantially as that provided for the organization, control and supervision of the white normal and training schools; and it may change the organization to suit conditions in so far as the needs of the school and the funds appropriated demand such change."

§ 5775(a). Trustees for certain normal schools.—The Governor shall appoint for each of the following institutions: The Elizabeth City State Normal School at Elizabeth City; the Fayetteville State Normal School at Fayetteville; Cherokee Indian Normal School at Pembroke; State Teachers' College for Negroes at Winston-Salem, nine (9) trustees, five of whom shall be appointed within thirty days from March 10, 1925. At the time of making such appointment the Governor shall name which of the present boards are to be succeeded by his appointees. The terms of the said trustees shall be four years from the date of their appointment. The Governor shall fill all vacancies. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of persons appointed by him for confirmation. (1925, c. 306, s. 9.)

Editor's Note.—For removal of the officers provided for in this section, see section 5912(h).

§ 5775 (b). Appointment to Cherokee Indian Normal School; repeal of laws.—The Governor in making the appointment of Trustees for Cherokee Indian Normal School at Pembroke, shall not be limited or affected by any law enacted prior to the tenth day of March, nineteen hundred and twenty-five, relating to or prescribing qualifications of such Trustees, but such Trustees shall be such as the Governor shall determine, after such inquiry and consideration as he may desire to make, to be fit, competent and proper for the discharge of all the duties that shall devolve upon them as such Trustees. All laws enacted prior to the tenth day of March, nineteen hundred and twenty-five, prescribing qualifications or making limitations in reference to such appointments be and the same are hereby repealed; Provided, that from and after April first, one thousand nine hundred thirty-one, the Board of Trustees for the Cherokee Indian Normal School at Pembroke shall consist of eleven members. (1929, c. 238; 1931, c. 275.)

Editor's Note.—The Act of 1931 added the proviso to this section.

SUBCHAPTER XIV. RURAL RECREATION

Art. 42. School Extension Work

§ 5776. Moving pictures for rural communities; cost.—It shall be the duty of the state superintendent of public instruction to provide for a series of rural entertainments, varying in number and cost and consisting of moving pictures selected for their entertaining and educational value,

which entertainments may be given in the rural schoolhouses of the state as herein provided. The cost of such entertainment shall be borne one-third by the state and two-thirds by the county board of education or the rural school community desiring said entertainment. (C. S. 5629.) (1917, c. 186, ss. 1, 2.)

§ 5777. State superintendent to supply information and provide for entertainments; community deposit.—It shall be the duty of the state superintendent of public instruction to inform the various county boards of education of the number, character, and cost of the entertainments provided by him under the provisions of this article; and upon application of any county board of education, agreeing to pay two-thirds of the cost of any such entertainments, it shall be the duty of the state superintendent of public instruction to provide for the giving of such entertainments in the rural schoolhouse or houses designated in the application. Any rural school community shall be entitled to the benefits of this article by depositing with its county board of education two-thirds of the cost of entertainments desired, and in all cases it shall be the duty of the county board of education receiving such deposits to make immediate application to the state superintendent of public instruction as herein provided. (C. S. 5630.) (1917, c. 186, s. 3.)

§ 5778. Health and agricultural authorities to coöperate. — The state board of health and the commissioner of agriculture are hereby authorized and directed to coöperate with the state superintendent of public instruction in arranging for the entertainments provided for by this article, to the end that the entertainment may, if it is deemed advisable, include the subjects of public health and agriculture. (C. S. 5631.) (1917, c. 186, s. 4.)

SUBCHAPTER XV. HEALTH

Art. 3. Physical Examinations of Pupils

§ 5779. State board of health and state superintendent to make rules for physical examination.—It shall be the duty of the state board of health and the state superintendent of public instruction to prepare and distribute to the teachers in all public schools of the state instructions and rules and regulations for the physical examination of pupils attending the public schools. (C. S. 5747.) (1919, c. 192, s. 1.)

§ 5780. Teachers to make examinations; state covered every three years.—Upon receipt of such instructions, rules and regulations, it shall be the duty of every teacher in the public schools to make a physical examination of every child attending the school and enter on cards and official forms furnished by the state board of health a record of such examination. The examination shall be made at the time directed by the state board of health and the state superintendent of public instruction, but every child shall be examined at least once every three years. The state board of health and the state superintendent of public instruction shall so arrange the work as to cover the entire state once every three years. (C. S. 5748.) (1919, c. 192, s. 2.)

§ 5780(a). Record cards transmitted to state board of health; punishment for failure.—The teacher shall transmit the record cards and other blank forms made by him or her to the North Carolina state board of health, and if any teacher fails within sixty days, after receiving the aforesaid forms and requests for examination and report, to make such examination and report as herein provided, the teacher shall be guilty of a misdemeanor and subject to a fine of not less than ten dollars nor more than fifty dollars or thirty days in prison. (C. S. 5749.) (1919, c. 192, s. 3.)

§ 5780(b). Disposition of records; reexamination of pupils.—The North Carolina state board of health shall have the records filed by the teacher carefully studied and classified, and shall notify the parent or guardian of every child whose card shows a serious physical defect to bring such child before an agent of the state board of health on some day designated by the state board of health between the hours of nine a. m. and five p. m. for the purpose of having said child thoroughly examined; and if, upon receipt of such notice, any parent or guardian shall fail or refuse to bring said child before the agent of the state board of health without good cause shown, he shall be guilty of a misdemeanor, and shall be fined not less than five dollars nor more than fifty dollars or imprisoned not more than thirty days: Provided, that the distance the child must be carried shall not exceed ten miles.

No pupil or minor shall be compelled to submit to medical examination or treatment whose parent or guardian objects to the same. Such objection may be made by a written and signed statement delivered to the pupil's teacher or to any person who might conduct such examination or treatment in the absence of such objection. (C. S. 5750.) (1919, c. 192, s. 4.)

§ 5780(c). Treatment of pupils, expenses.—Within thirty days after the completion of the examination of the children by the agent of the state board of health and after written statement of the proper authority hereinafter designated, a sum not exceeding ten dollars per hundred children enrolled in the county or city shall be paid to the state board of health to be used exclusively for the purpose of treating school children for defects other than dental, the same to be paid by the county commissioners of the county, and in cities or towns having a separate school system, to be of aldermen, or city commissioners. Any funds paid by the city manager, city council, city board so paid and not needed in enforcing the provisions of this article shall be returned to the county or city from which it was received. (C. S. 5751.) (1919, c. 192, s. 5.)

§ 5780(d). Free dental treatment; appropriation.—For the purpose of providing free dental treatment for as many children as possible each year, and to aid the state board of health in making the examinations as provided for in this article, a special appropriation not to exceed fifty thousand dollars per annum shall be set aside from the state public school fund, and shall be paid by the treasurer of the state of North Carolina on properly signed requisition forms to the treasurer of North

Carolina state board of health. (C. S. 5752.) (1919, c. 102, s. 14; c. 192, s. 6.)

SUBCHAPTER XVI. STATE BOARD OF EDUCATION TO LICENSE CERTAIN INSTITUTIONS

Art. 44. State Board of Education to Regulate Degrees

§ 5780(e). Right to confer degrees restricted.—No educational institution hereafter created or established by any person, firm, or corporation in this state shall have power or authority to confer degrees upon any person except as herein provided. (C. S. 5398.) (1923, c. 136, s. 358.)

§ 5780(f). Powers to grant license to confer degrees.—The state board of education is authorized to issue its license to confer degrees in such form as it may prescribe to any educational institution hereafter established by any person, firm, or corporation in this state; but no educational institution hereafter established in the state shall be empowered to confer degrees unless it has income sufficient to maintain adequate faculty and equipment sufficient to provide adequate means of instruction in the arts and sciences, and unless its baccalaureate degree is conferred only upon students who have completed a four-year college course, preceded by the usual four-year high school course, or their equivalent. (C. S. 5400.) (1923, c. 136, s. 359.)

§ 5780(g). Inspection of institutions; revocation of license.—All institutions chartered under this article shall file such information with the state superintendent of public instruction as the state board of education may direct, and it shall have full authority to send an expert to visit any institution applying for a license to confer degrees under this article. And if any one of them shall fail to keep up the required standard the state board of education shall revoke the license to confer degrees, subject to a right of review of this decision by the judge of the superior court upon action instituted by the educational institution whose license had been revoked. (C. S. 5401.) (1923, c. 136, s. 360.)

Art. 45. Licensing of Commercial Schools

§ 5780(h). Licenses for commercial schools.—Before any business college or commercial school shall receive or solicit students, or open any business school for the purpose of giving instruction in this state, said school or college shall first secure a license from the state board of education to the effect that it has complied with the requirements of this article, which license shall be issued by the state board of education upon payment of an annual fee of ten dollars. (C. S. 5775.) (1923, c. 136, s. 361.)

§ 5780(i). Report to be filed before license.—Before any such business college or commercial school shall be entitled to receive such license it shall file with the state board of education a report setting forth:

1. That it is the owner or lessee of suitable building or rooms for the conduct of its work.

2. That it has acquired suitable equipment for the courses given by the school.

3. That the said school has secured a faculty of teachers whose training has not been less than that required of teachers engaged in similar work in public schools of the state.

4. That said school or college has adopted an approved course of study which includes at least the following subjects: bookkeeping, commercial law, commercial arithmetic, English, commercial correspondence, business writing, shorthand and typewriting.

5. The owner and manager of such school or college shall further file a certificate signed by the county superintendent of public instruction and the chairman of the county board of education of the county in which the school is situated, to the effect that the owner or manager of such school or college, after investigation, has shown satisfactory evidence of his or her efficiency and good moral character for fair and honest dealings with their students and the public. (C. S. 5776.) (1923, c. 136, s. 362.)

§ 5780(j). Advertising literature to be filed.—The institutions securing license under this article shall file with the state board of education copies of all advertising literature, including catalogue, pamphlets, circulars, etc., and an annual report on or before the first day of July of each year. (C. S. 5777.) (1923, c. 136, s. 363.)

§ 5780(k). Conducting school without license misdemeanor.—Any person who shall open or conduct any business college or commercial school within this state without having first procured the license herein provided for shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned at the discretion of the court. (C. S. 5778.) (1923, c. 136, s. 364.)

§ 5780(l). Blanks for reports and licenses; disposition of license tax.—The superintendent of public instruction is authorized to furnish all necessary blanks for reports and licenses provided for under the provisions of this article, and all funds received from the license tax herein provided for shall be paid to the state treasurer and shall be credited to the state public school fund. (C. S. 5779.) (1923, c. 137, s. 365.)

§ 5780(m). Application of article.—The provisions of this article shall apply to all existing chartered business colleges and commercial schools and all other business colleges and commercial schools now conducted or to be hereafter conducted in this state. (C. S. 5780.) (1923, c. 137, s. 366.)

SUBCHAPTER XVIA. STATE BOARD OF COMMERCIAL EDUCATION

Art. 45A. Requirement of Permit Bond

§ 5780(m1). Commercial college or business school defined.—A commercial college or business school shall be defined as follows: Any partnership, association of persons, or any corporation which teaches, publicly, for compensation, any or all the branches of accounting, bookkeeping, stenotype, stenography, typing, telegraphy, and other commercial subjects which are usually

taught in commercial colleges or business schools. (1935, c. 255, s. 1.)

§ 5780(m2). Securing permit before operating. —Any person, partnership, association of persons, or any corporation which may desire to open a commercial college or to establish a branch college or school in this State for the purpose of teaching bookkeeping, stenography, stenotype, typing, telegraphy, and other courses which are usually taught in commercial colleges, before commencing business, must secure a permit from the state board of commercial education of the State of North Carolina authorizing such persons, partnership, association of persons or corporation to open and conduct such commercial college or branch college or school. (1935, c. 255, s. 2.)

§ 5780(m3). State board of commercial education created; membership. — The state board of commercial education shall consist of the director of the division of instructional service, the director of the division of vocational education, and the owner and operator of an accredited business or commercial school that has been in operation within the state for five years, and the state superintendent of education, who having no vote, will be chairman of the board and ex-officio secretary. The member who is a commercial school owner or operator shall be appointed by the governor and shall serve for three years or until his successor has been appointed and taken office. (1935, c. 255, s. 2.)

§ 5780(m4). Application for permit; investigation by county superintendent of schools; fees.— Application for such permit to open and conduct a business school shall state specifically the name of such person, partnership or corporation, and said application shall be filed with the county superintendent of schools of the county in which the proposed commercial college or school is to operate. If, after due investigation on the part of the county superintendent of schools, it has been shown by satisfactory evidence of the applicant's efficiency and good moral character for fair and honest dealings with their students and with the public, then the county superintendent of schools shall endorse his approval of the application and forward it to the state board of commercial education at Raleigh for action thereon. Before such permit shall be issued, the applicant shall pay to the state board of commercial education a fee of ten ($10) dollars as a minimum, and twenty-five ($25) dollars as a maximum, the amount needed being left to the discretion of the board of commercial education, which fee shall be paid annually on the first day of July to the said board so long as said school shall continue to operate. Said fees shall be used for office and traveling expenses by said board or its authorized representatives for investigating applications for conducting commercial schools and also complaints against such schools, and the secretary of the board shall keep an account of all moneys received and disbursed which account shall be open at all times to inspection by all persons operating commercial schools and licensed by said board. (1935, c. 255, s. 3.)

§ 5780(m5). Execution of bond required; filing and recording.—Before the board of commercial education shall issue such permit, the person, partnership, association of persons, or corporation shall execute a bond in the sum of one thousand ($1,000) dollars, signed by a solvent guaranty company authorized to do business in the State of North Carolina, payable to the clerk of the superior court of the county in which such college, branch college, or school will be located and conduct its business, conditioned that the principal in said bond will carry out and comply with each and all contracts, made and entered into by said college or branch college or school, acting by and through its officers and agents, with any student who desires to enter such college and to take any course in commercial training, and to pay back to such student all amounts collected for tuition and fees in case of failure on the part of the parties obtaining a permit from the board of commercial education to open and conduct a commercial college, or branch college or school, to comply with its contracts to give the instructions contracted for, and for the full period evidenced by such contract. Such bond shall be filed with the clerk of superior court of the county in which the college or branch or school executing the bond is located, and recorded by such clerk in a book provided for that purpose. (1935, c. 255, s. 4.)

§ 5780(m6). Right of action upon bond in event of breach; revocation of permit; board generally to supervise schools.—In any and all cases where the party receiving the permit from the board of commercial education fails to comply with any contract made and entered into with any student or with the parents or guardian shall have a cause of action against the sureties on the bond as herein provided for the full amount of the payments made to such person, with six (6) per cent interest from the date of payment of said amount. For a proven violation of its contracts with its students, the board of commercial education is authorized to revoke the license issued to the offending school. Through periodic reports required of licensed commercial schools and by inspections made by the members of the board of commercial education or its authorized representatives, the board of commercial education shall have general supervision over commercial schools of the State, the object of said supervision being to protect the public welfare by having the licensed commercial schools to maintain proper school quarters, equipment and teaching forces and of having the school carry out its advertised promises and its contracts made with its students and patrons. (1935, c. 255, s. 5.)

§ 5780(m7). Operating school without permit made misdemeanor.—Any person, or each member of any partnership, or each member of any association of persons, or each officer of any corporation which opens and conducts a commercial college or branch college or school without first having obtained the permit required in section 5780(m2), and without first having executed the bond required in section 5780(m5), shall be guilty of misdemeanor and punishable by a fine of not less than one hundred ($100.00) dollars, nor more than five hundred ($500.00) dollars, and each day said college continues to be open and operated shall constitute a separate offense. (1935, c. 255, s. 6.)

§ 5780(m8). Institutions exempted.—The pro-

visions of this article shall not apply to any established university, commercial college, college, regular high school or any state institution which has heretofore adopted or which may hereafter adopt one or more commercial courses, provided the tuition fees and charges, if any, made by such university, commercial college, college, or regular high school shall be collected by their regular officers in accordance with the rules and regulations prescribed by the proprietors or by the board of trustees of such university, commercial college, college, or high school. (1935, c. 255, s. 7.)

§ 5780(m9). Application of article to non-residents, etc.—All persons, partnerships, associations of persons, which are non-residents of North Carolina, or corporations organized and chartered under the laws of any other state must comply with the provisions of this article before such can open and conduct a commercial college or branch college, or school in the State of North Carolina. (1935, c. 255, s. 8.)

SUBCHAPTER XVII. OBSERVANCE OF SPECIAL DAYS

Art. 46. Special Days to be Observed in Public Schools

§ 5780(n). North Carolina Day. — The twelfth day of October in each and every year, to be called "North Carolina Day." may be devoted, by appropriate exercises in the public schools of the state, to the consideration of some topic or topics of our state history, to be selected by the superintendent of public instruction: Provided, that if the said day shall fall on Saturday or Sunday, then the celebration shall occur on the Monday next following: Provided, further, that if the said day shall fall at a time when any such schools may not be in session, the celebration may be held within one month from the beginning of the term, unless the superintendent of public instruction shall designate some other time. (1923, c. 136, s. 367.)

§ 5780(o). Temperance or Law and Order Day. —There shall be one day in each scholastic year of the public high schools of the state of North Carolina, to be known as Temperance or Law and Order Day, and that the fourth Friday in January in each year, or some other day to be set by the superintendent of public instruction to suit local conditions, is hereby designated as Temperance or Law and Order Day. This day shall be observed as such in each public and high school of the state, or if preferred, in each subdivision thereof. The state superintendent of public instruction shall have prepared and furnished in due time to every teacher of said public and high school for the state a suitable program to be used on said Temperance or Law and Order Day.

The state superintendent of public instruction may have prepared and furnished to the teachers in the public and high schools placards printed in large type which shall set forth in attractive style statistics, epigrams, mottoes and up-to-date scientific truths showing the evils of intemperance and lawlessness.

When placards are distributed it shall be the duty of every teacher in the state, paid entirely or in part out of the public funds, to keep posted in a conspicuous place in the schoolroom occupied by said teacher one of said placards. (1923, c. 136, s. 368.)

§ 5780(p). Arbor Day.—Friday following the fifteenth day of March of each year shall be known as Arbor Day, to be appropriately observed by the public schools of the state. The superintendent of public instruction shall issue each year a program for its observance by the school children of the state in order that they may be taught to appreciate the true value of trees and forests to their State. The superintendent of public instruction is authorized to provide a suitable program and plan of instruction to county school officials under his charge for the appropriate observance of this day. (1923, c. 136, s. 369; 1927, c. 73.)

§ 5780(q). Other Days.—The superintendent of public instruction is hereby authorized to provide suitable material for the proper observance in schools of the birthday of Washington, Lee, Jackson, Armistice Day, Memorial Day, and such other days as may be deemed of educational and patriotic value not only to the children but to the citizens of the state. All literature necessary for the proper observance of the days specified in this article shall be prepared by the superintendent of public instruction and printed at the expense of the state. (1923, c. 136, s. 370.)

§ 5780(r). Combined programs.—The state superintendent of public instruction may fix a later or an earlier date for the observance of any special day the observance of which is required for a specific date if it shall appear to him to be more convenient; and he may combine the programs required to be issued in the foregoing sections so as to require the observance of any two or more of the special days at the same time. (1923, c. 136, s. 371.)

SUBCHAPTER XVIII. SCHOOL LAW OF 1933

§§ 5780(1)-5780(40). Superseded by Public Laws of 1935 c. 455, codified as §§ 5780(41)-5780(83).

SUBCHAPTER XIX. SCHOOL LAW OF 1935

§ 5780(41). Biennial appropriation for eight months term.—The appropriation made under title nine of "an act to make appropriations for the maintenance of the state's departments, bureaus, institutions, and agencies, and for other purposes" of the sum of twenty million thirty-one thousand ($20,031,000) dollars "for the support of the eight-months' term public schools" for the year ending June thirtieth, one thousand nine hundred thirty-six, and the sum of twenty million nine hundred thousand ($20,900,000) dollars "for the support of the eight months' term public schools" for the year ending June thirtieth, one thousand nine hundred thirty-seven, shall be apportioned for the operation of an eight-months' state-wide school term as hereinafter provided. (1935, c. 455, s. 1.)

Editor's Note.—The case treated below was decided under what formerly constituted section 5780(1). However, it seems applicable to the present law as the provisions of

former section 5780(1) are substantially set forth in this section.

Nothing in this section or those following militate against the authority of a county to issue without a vote bonds for sanitary improvements of its schoolhouses necessary to maintain the constitutional school term. See §§ 1334(8), 5475. Taylor v. Board of Education, 206 N. C. 263, 173 S. E. 608.

§ 5780(42). State School Commission membership; appointment; term of office and compensation; powers and duties; executive secretary; cost and expenses.—The state school commission shall be constituted as follows: The lieutenant-governor as ex-officio chairman, the state superintendent of public instruction as vice-chairman, the state treasurer, and one member from each congressional district to be appointed by the governor. The said appointive members shall serve for a period of two years from the time of their appointment and receive such compensation as now provided by law. All the powers and duties heretofore conferred by law upon the state board of equalization, and the state school commission, together with such other powers and duties as may be conferred by this subchapter, shall be vested in the state school commission. The said school commission may appoint an executive secretary who shall select other employees necessary for the proper administration of this subchapter, to be approved by the state school commission, subject to provisions of chapter two hundred seventy-seven, Public Laws of one thousand nine hundred and thirty-one [§§ 7521(k)-7521(y)]. The cost and expense of said commission shall be paid out of the appropriation made for the public schools as provided in section 5780(41). (1935, c. 455, s. 2.)

Editor's Note.—The following cases were decided under what formerly constituted section 5780(2). However, they seem applicable to the present law as the provisions of former section 5780(2) are substantially set forth in this section.

The purpose of this act is to promote efficiency in the organization and economy in the administration of the public schools, and to provide for the operation of a uniform system of schools for the entire State. This signifies that the State has adopted a policy of supporting its public schools and has consequently in part modified and in part abolished the former system. Evans v. Mecklenburg County, 205 N. C. 560, 563, 172 S. E. 323.

Other Statutes Are Subordinate to This Act.—This section and those following, including the clause which repeals all conflicting public, public-local, and private laws, indicate a legislative intent to annul or to subordinate to the new law all statutes relating to the public schools which were in effect at the time of its enactment and to establish a uniform system under which all the public schools of the State shall be conducted. Evans v. Mecklenburg County, 205 N. C. 560, 563, 172 S. E. 323.

§ 5780(43). Administration of funds for eight months' term. — In addition to the duties and powers vested in the state school commission as set out in section 5780(42), together with such other powers as may be conferred by law, it shall be the duty of the said commission, in accordance with the provisions of this subchapter, to administer funds for the operation of the schools of the State for one hundred sixty days on standards to be determined by said commission and within the total appropriation made available by the general assembly. (1935, c. 455, s. 3.)

§ 5780(44). Length of term; discontinuance for low average attendance; opening dates; re-allocation of appropriation not used.—The six months' school term required by article nine of the Constitution is hereby extended to embrace a total of one hundred sixty days of school in order that there shall be operated in every county and district in the State, which shall request the same, a uniform term of eight months: Provided, that the state school commission, or the governing body of any administrative unit, may suspend the operation of any school or schools in such unit, not to exceed a period of forty days of said consolidated term, when in the sound judgment of said commission, or the governing body of any administrative unit, the low average in any school does not justify its continuance, or necessity may require it: Provided, that all schools served by the same school bus or busses shall have the same opening date. Provided further, that any balance of the State funds which may have been allocated to operate the said consolidated term not actually operated as planned, shall be and remain in the state treasury and become a part of the state school fund for the next succeeding year. (1935, c. 455, s. 4.)

§ 5780(45). "School month" defined; salaries of teachers, etc., payable monthly.—A school month shall consist of four weeks and not less than twenty teaching days, no day of which shall be a Saturday, unless in case of emergency, and subject to the approval of the local committee; and salary warrants for the payment of all state teachers, principals, and others employed for the school term shall be issued each school month to such persons as are entitled to same. The salaries of superintendents and others employed on an annual basis shall be paid per calendar month. (1935, c. 455, s. 4.)

§ 5780(46). Counties as administrative units; minimum number of pupils for establishing schools; city administrative units; consolidation of units.—The state school commission, in making provision for the operation of the schools, shall classify each county as an administrative unit and shall, with the advice of the county board of education, make a careful study of the existing district organization in each county administrative unit and may modify such district organization when deemed necessary for the economical administration and operation of the state school system and shall determine whether there shall be operated in such district an elementary or a union school. Provisions shall not be made for a high school with an average daily attendance of less than sixty pupils, nor an elementary school with an average daily attendance of less than twenty-five pupils, unless geographic conditions make it impracticable to provide for them otherwise.

Any district having a school population of one thousand or more for the school year one thousand nine hundred thirty-four—one thousand nine hundred thirty-five in which a special charter district was operated for the school year one thousand nine hundred thirty-two — one thousand nine hundred thirty-three may, with the approval of the state school commission, be classified as a city administrative unit, and, together with such city administrative units as now constituted, shall be dealt with by the state school authorities in all matters of school administration in the same way and manner as are county administrative units: Provided, that in all city administrative units as

now constituted, or which may hereafter be established by the said school commission, the trustees of the said special charter district, and their duly elected successors, shall be retained as the governing body of such district; and the title to all property of the said special charter district shall remain with such trustees, or their successors: Provided, that nothing in this subchapter shall prevent city administrative units, as now established or which hereafter may be set up, from consolidating with the county administrative unit in which such city administrative unit is located, upon petition of the trustees of the said city administrative unit and the approval of the county board of education and the county board of commissioners in said county: Provided, further, that in the event of such consolidation, all property vested in the trustees of such city administrative units shall be transferred to and become the property of the county board of education in said county: Provided, further, that nothing in this subchapter shall affect the right of any special charter district, or special tax district which now exists for the purpose of retiring debt service, to have the indebtedness of such district taken over by the county as provided by existing law, and nothing herein shall be construed to restrict the county board of education and/or the board of county commissioners in causing such indebtedness to be assumed by the county as provided by existing law. Provided, that nothing in this subchapter shall be construed to prevent the state school commission from establishing a city administrative unit in school districts which have a resort town in said district: Provided, said district had a school enrollment of not less than eight hundred fifty for the school year one thousand nine hundred thirty-four—one thousand nine hundred thirty-five. (1935, c. 455, c. 5.)

Editor's Note.—The following cases were decided under what formerly constituted section 5780(4), which provided for the abolition of special school districts. These cases are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

Use of Unexpended Fund by New District.—Where, at the time of the abolition of the old district and the creation of the new, under this section, there is an unexpended sum in the fund created by the tax to supplement the school term, the new district, as successor to the old, has authority to expend the fund for the purpose of supplementing the six-months school term of the district, that being the purpose for which the tax providing the fund was levied, and this result is not affected by the provisions of § 5780(7), which requires certain funds to be placed in the debt service fund, this section applying only to funds collected from designated sources subsequent to the effective date of the statute, and not to funds on hand at the time of the creation of the new district. Board of Education v. Burgin, 206 N. C. 421, 174 S. E. 286.

Does Not Affect Policy under § 5599.—This section does not alter the policy that under the provisions of § 5599 a county may include in its debt service fund in its budget the indebtedness lawfully incurred by any of its school districts. See annotations to § 5599. Hickory v. Catawba County, 206 N. C. 165, 173 S. E. 56.

§ 5780(47). Administrative officers of school units; superintendents; selection of principals, teachers and other employees in city units.—The administrative officer in each of the units designated by the state school commission shall be a county superintendent of schools for a county administrative unit and a city superintendent of schools for a city administrative unit. The salaries of county superintendents and city superintendents shall be in accordance with a State standard salary schedule to be fixed and determined by the state board of education and the state school commission as provided for in section 5780(55): Provided, that it shall be lawful for the county superintendent of schools in any county, with the approval of the state superintendent of public instruction, to serve as principal of a high school of said county; and the sum of not exceeding three hundred dollars ($300.00), to be paid from State instructional service funds, may be added to his salary and shall be included in the budget approved by the state school commission: Provided, further, that a county superintendent may also be elected and serve as a city superintendent in any city administrative unit in the county which he serves as county superintendent: Provided further, that a county superintendent may serve as welfare officer and have such additional compensation as may be allowed by the county commissioners of such county, to be paid from county funds, subject to the approval of the state school commission.

At a meeting to be held the first Monday in May, one thousand nine hundred thirty-five, or as soon thereafter as practical, and biennially thereafter during the month of May, the various county boards of education shall meet and elect a county superintendent of schools, subject to the approval of the state superintendent of public instruction and the state school commission, who shall take office July first and shall serve for a period of two years, or until his successor is elected and qualified. A certification to the county board of education by the state superintendent of public instruction showing that the person proposed for the office of county superintendent of schools is a graduate of a four-year standard college, or at the present time holds a superintendent's certificate, and has had three years' experience in school work in the past ten years, together with a doctor's certificate showing the person to be free from any contagious disease, shall make any citizen of the State eligible for this office.

In all city administrative units, the superintendent of schools shall be elected by the board of trustees, or other school governing agency of such unit, to serve for a period of two years; and the qualifications, approval, and date of election shall be the same as for county superintendents. The city superintendent is hereby made ex-officio secretary to the governing body of said city administrative unit.

At its first regular meeting in April, or as soon thereafter as practicable, the board of trustees, or other governing board of a city administrative unit, shall elect principals, teachers, and other necessary employees of the schools within said unit on the recommendation of the city superintendent. (1935, c. 455, s. 6.)

§ 5780(48). School district committees; advisory boards.—At the first regular meeting during the month of May, one thousand nine hundred thirty-five, or as soon thereafter as practical, and biennially thereafter, the county boards of education shall elect and appoint school committees for each of the several districts in their counties consisting of not less than three nor more than five persons

for each school district, whose term of office shall be for two years: Provided, that in the event of death or resignation of any member of said school committee, the county board of education shall be empowered to select and appoint his or her successor to serve the remainder of the term. The said district committee shall select the teachers and principals for the schools of the districts subject to the approval of the county superintendent and the county boards of education: Provided further, that the county board of education may appoint an advisory committee of three members for each school building in the said school district, who shall care for the school property, advise with the district committee in recommending teachers, and such other duties as may be defined by the county board of education. (1935, c. 455, c. 7.)

§ 5780(49). Organization statement and allotment of teachers.—On or before the twentieth day of May in each year, the several administrative officers shall present to the state school commission a certified statement showing the organization of the schools in their respective units, together with such other information as said commission may require. The organization statement as filed for each administrative unit shall indicate the length of term the State is requested to operate the various schools for the following school year, and the State shall base its allotment of funds upon such request. On the basis of such organization statement, together with all other available information, and under such rules and regulations as the state school commission may promulgate, the state school commission shall determine for each administrative unit, by districts and races, the number of elementary and high school teachers to be included in the state budget.

It shall be the duty of the governing body in each administrative unit, after the opening of the schools in said unit, to make a careful check of the school organization and to request the state school commission to make changes in the allocation of teachers to meet requirements of the said unit. (1935, c. 455, s. 8.)

§ 5780(50). Items of school expenditures.—The appropriation of state funds, as provided under the provisions of this subchapter, shall be used for meeting the costs of the operation of the public schools, as determined by the state school commission, for the following items:

1. General control
   a. Salaries of superintendents
   b. Travel of superintendents
   c. Salaries of clerical assistants for superintendents
   d. Office expense of superintendents
   e. Per diem county boards of education in the sum of one hundred dollars to each county
   f. Audit of school funds
2. Instructional service
   a. Salaries for white teachers, both elementary and high school
   b. Salaries for colored teachers, both elementary and high school
   c. Salaries of white principals
   d. Salaries of colored principals
   e. Instructional supplies
3. Operation of plant
   a. Wages of janitors
   b. Fuel
   c. Water, light and power
   d. Janitors' supplies
   e. Telephone expense
4. Auxiliary agencies
   a. Transportation
      (1) Drivers; and contracts
      (2) Gas, oil, and grease
      (3) Mechanics
      (4) Parts, tires, and tubes
      (5) Replacement busses
      (6) Compensation for injuries and/or death of school children as now provided by law
   b. Libraries

In alloting funds for the items of expenditure hereinbefore enumerated, provision shall be made for a school term of only one hundred sixty days, and for those employees, only, who are paid wholly or in part from State funds, in accordance with the provisions of this subchapter. (1935, c. 455, s. 9.)

§ 5780(51). Effecting economies; increase or decrease in salary schedule. — The state school commission shall effect all economies possible in providing state funds for the objects of general control, operation of plant, and auxiliary agencies, and after such action shall have authority to increase or decrease on a uniform percentage basis the salary schedule of teachers, principals, and superintendents in order that the appropriation of State funds for the public schools may insure their operation for the length of term provided in this subchapter. (1935, c. 455, s. 9.)

§ 5780(52). Taxes permitted; expenditure for maintenance of plant and fixed charges.—It shall be unlawful for any ad valorem taxes to be levied for the operation of the public school term except as hereinafter provided.

The objects of expenditure designated as maintenance of plant and fixed charges shall be supplied from funds required by law to be placed to the credit of the public school fund of the county and derived from fines, forfeitures, penalties, dog taxes, and poll taxes, and from all other sources except state funds: Provided, that when necessity shall be shown, the state school commission may approve the use of such funds in any administrative unit to supplement any object or item of the current expense budget; and in such cases, the tax levying authorities of the county administrative unit shall make a sufficient tax levy to provide the necessary funds for maintenance of plant, fixed charges, and capital outlay: Provided, further, that the tax levying authorities in any county administrative unit, with the approval of the state school commission, may levy taxes to provide necessary funds for teaching vocational agriculture and home economics and trades and industrial vocational subjects supported in part from federal vocational education funds: Provided, that nothing in this subchapter shall prevent the use of federal and/or privately donated funds which may be made available for the operation of the public schools under such regulations as the state board of education may provide. (1935, c. 455, s. 9.)

§ 5780(53). State budget estimate. — The state budget estimate shall be determined by the state school commission for each county and city administrative unit by ascertaining the sum of the objects of expenditure according to and within the limits fixed by this subchapter, and within the meaning of the rules and regulations promulgated by the state school commission; and the certification of same shall be made to each county superintendent, city superintendent, and the state superintendent of public instruction on or before June first of each year. (1935, c. 455, s. 10.)

§ 5780(54). Salary costs.—Upon receipt of notice from the state school commission of the total number of teachers, by races and for county and city administrative units separately, the state superintendent of public instruction shall then determine, in accordance with the schedule of salaries established, the total salary cost in each and every administrative unit, for teachers, principals, and superintendents to be included in the state budget for the next succeeding fiscal year for the consolidated school term as herein defined. This amount, as determined from a check of the costs for the preceding year with adjustments resulting from changes in the allotment of teachers, shall be certified to the state school commission, together with the number of elementary and high school teachers and principals employed in accordance with the provisions of this subchapter, separately by races, and for city and county administrative units. (1935, c. 455, s. 11.)

§ 5780(55). Standard salary schedule to be fixed; summer school requirement suspended.—The state board of education and the state school commission shall fix and determine a state standard salary schedule for teachers, principals, and superintendents, which shall be the maximum standard state salaries to be paid from state funds to the teachers, principals, and superintendents; and all contracts with teachers and principals shall be made locally by the county boards of education and/or the governing authorities of city administrative units, giving due consideration to the peculiar conditions surrounding each employment, the competency and experience of the teacher or principal, the amount and character of work to be done, and any and all other things which might enter into the contract of employment, and shall also take into consideration the grade of certificate such teacher or principal holds: Provided, however, that the compensation contracted to be paid out of the state funds to any teacher or principal shall be within the maximum salary limit to be fixed by the state board of education and the state school commission, as above provided, and within the allotment of funds as made to the administrative unit for the item of instructional salaries: Provided, further, that no teacher or principal shall be required to attend summer school during the years one thousand nine hundred thirty-five and one thousand nine hundred thirty-six, and the certificate of such teacher or principal as may have been required to attend such school shall not lapse but shall remain in full force and effect, and all credits earned by summer school and/or completing extension course or courses shall not be impaired but shall continue in full force and effect. (1935, c. 455, s. 12.)

§ 5780(56). Notice to teachers, etc., failing of re-election.—It shall be the duty of the county boards of education and/or the governing bodies of city administrative units to cause written notice to be given to teachers, principals, and superintendents, within thirty days after the close of the school term, who have not been re-elected for the ensuing school term: Provided, that such notice shall not be required to be given in the year one thousand nine hundred thirty-five except within thirty days after the election of the district committees provided for in section 5780(48). (1935, c. 455, s. 12.)

§ 5780(57). No rule as to marriage enforced. —In the employment of teachers, no rule shall be made or enforced on the ground of marriage or non-marriage. (1935, c. 455, s. 12.)

§ 5780(58). Principals allowed.—In all schools with fewer than fifty teachers allowed under the provision of this subchapter, the principal shall be included in the number of teachers allowed. In schools with fifty or more teachers, one whole-time principal shall be allowed; and for each forty teachers in addition to the first fifty, one additional whole-time principal, when and if actually employed, shall be allowed: Provided, that in the allocation of state funds for principals, the salary of white principals shall be determined by the number of white teachers employed in the white schools; and the salary of colored principals shall be determined by the number of colored teachers employed in the colored schools. (1935, c. 455, s. 13.)

§ 5780(59). Local supplements. — The county board of education in any county administrative unit and the school governing board in any city administrative unit, with the approval of the tax levying authorities in said county or city administrative unit and the state school commission, in order to operate the schools of a higher standard than that provided by state support, but in no event to provide for a term of more than one hundred eighty days, may supplement any object or item of school expenditure: Provided, that before making any levy for supplementing state budget allotments, an election shall be held in each administrative unit to determine whether there shall be levied a tax to provide said supplemental funds, and to determine the maximum rate which may be levied therefor. Upon the request of the county board of education in a county administrative unit and/or the school governing authorities in a city administrative unit, the tax levying authorities of such unit shall provide for an election to be held under laws governing such elections as set forth in Articles XXIII, XXIV and XXVI of chapter ninety-five of the Consolidated Statutes of North Carolina, Volume Three: Provided, that the rate voted shall remain the maximum until revoked or changed by another election. (1935, c. 455, s. 14.)

Editor's Note.—The following cases were decided under what formerly constituted section 5780(21). However, they seem applicable to the present law as the provisions of former section 5780(21) are substantially set forth in this section.

Enjoining Collection of Special Tax. — Where the city school administrative unit as provided by this section, was not set up until after 15 June, 1933, and on 30 June, it filed written request with the board of commissioners of

the city for an election to vote on a proposed special supplementary school tax in the city, and notice of the registration and election were published substantially as required by law, the collection of the special tax voted for at the election will not be enjoined for failure of the administrative unit to file the written request for the election on or before 15 June, it appearing that the machinery for the election was commenced within a reasonable time under the facts and circumstances of the case. Forester v. North Wilkesboro, 206 N. C. 347, 174 S. E. 112.

Applied in Freeman v. Charlotte, 206 N. C. 913, 174 S. E. 453.

Cited in Evans v. Mecklenburg County, 205 N. C. 560, 564, 172 S. E. 323.

§ 5780(60). Local budgets.—a. The request for funds to supplement state school funds, as permitted under the above conditions, shall be filed with the tax levying authorities in each county and city administrative unit on or before the fifteenth day of June on forms provided by the state school commission. The tax levying authorities in such units may approve or disapprove this supplemental budget in whole or in part, and upon the approval being given, the same shall be submitted to the state school commission, which shall have the authority to approve or disapprove any object or item contained therein. In the event of approval, by the state school commission, the same shall be shown in detail upon the minutes of said tax levying body, and a special levy shall be made therefor, and the tax receipt shall show upon the face thereof the purpose of said levy.

b. In the same manner and at the same time, each county and/or city administrative unit may file a capital outlay budget, subject to the approval of the tax levying authorities and the state school commission.

c. In the same manner and at the same time, each county and/or city administrative unit shall file a debt service budget, which shall include debt service budgets of special bond tax districts, as set forth in section 5780(61), and which shall be subject to the approval of the tax levying authorities in each such unit and the state school commission: Provided, that nothing in this subchapter shall prevent counties, local taxing districts, and/or special charter districts from levying taxes to provide for debt service requirements.

The tax levying authorities in each of the above named units filing budgets from local funds shall report their action on said budgets on or before the fifteenth day of July, and the same shall be reported to the state school commission on or before the first day of August. The action of the state school commission on all requests for local funds budgets shall be reported to boards of education and/or school governing authorities of city administrative units and the tax levying authorities in such units on or before the first day of September.

All county-wide school funds shall be apportioned to county and city administrative units and distributed monthly on a per capita school enrollment basis. (1935, c. 455, s. 15.)

§ 5780(61). Special bond tax unaffected by divisions or consolidations; designation of districts.—If a boundary, territorial district, or unit in which a special bond tax has heretofore been voted or in any way assumed prior to July first, one thousand nine hundred thirty-three, has been or may be divided or consolidated, and the whole or a portion of which has been or may be otherwise integrated with a new district so established under any reorganization and/or redistricting, such territorial unit, boundary, or district, special taxing or special charter, which has been abolished for school operating purposes, shall remain as a district for the purpose of the levy and collection of the special taxes theretofore voted in any unit, boundary, or district, special taxing or special charter, for the payment of bonds issued and/or other obligations so assumed, the said territorial boundary, district, or unit shall be maintained until all necessary taxes have been levied and collected therein for the payment of such bonds and/or other indebtedness so assumed. Such boundary, unit, or district shall be known and designated as the..... "Special Bond Tax Unit" of.....County. (1935, c. 455, s. 16.)

§ 5780(62). Lien of taxes for operating costs; disposition of unused collections; lien of unpaid teachers' salaries; special taxes already voted.—All uncollected taxes which have been levied in the respective school districts for the purpose of meeting the operating costs of the schools shall remain as a lien against the property as originally assessed and shall be collectible as are other taxes so levied, and upon collection, shall be made a part of the debt service fund of the special bond tax unit, along with such other funds as may accrue to the credit of said unit; and in the event there is no debt service requirement upon such district, all amounts so collected for whatever purpose shall be covered into the county treasury to be used as a part of the county debt service for schools: Provided, that unpaid teachers' vouchers for the year in which the tax was levied shall be a prior lien: Provided, further, that nothing in this subchapter shall be construed as abolishing special taxes voted in any city administrative unit since July first, one thousand nine hundred thirty-three. (1935, c. 455, s. 16.)

§ 5780(63). Operating budgets.—It shall be the duty of the county board of education in each county and the school governing authorities in each city administrative unit, upon receipt of the tentative allotment of state funds for operating the schools and the approval of all local funds budgets, including supplements to state funds for operating schools of a higher standard, funds for extending the term, funds for debt service, and funds for capital outlay, to prepare an operating budget on forms provided by the State and file the same with the state superintendent of public instruction and the state school commission on or before the first day of October. Each operating budget shall be checked by the state school commission to ascertain if it is in accordance with the allotment of state funds and the approval of local funds; and when found to be in accordance with same, shall be the total school budget for said county or city administrative unit. (1935, c. 455, s. 17.)

§ 5780(64). Bonds for protection of school funds.—The state school commission, subject to the approval of the local government commission, shall determine and provide all bonds necessary for the protection of the state school funds. The tax levying authorities in each county and city

administrative unit, subject to the approval of the local government commission, shall provide such bonds as the state school commission may require for the protection of county and district school funds. (1935, c. 455, s. 18.)

§ 5780(65). Disbursement of state funds. — Payment of the state fund to the county and city administrative units may be made in monthly installments, at such time and in such amounts as may be practical to meet the needs and necessities of the eight-months' school term in the various county and city administrative units: Provided, that prior to the payment of any monthly installment, it shall be the duty of the county board of education or the board of trustees to file with the state superintendent of public instruction and the state school commission a certified statement of all salaries, together with all other obligations that may be due and payable, said statement to be filed on or before the fifteenth day of each month next preceding the maturity of the obligations.

When it shall appear to the state school commission from said certified statement that any amounts are due and necessary to be paid, such amounts shall be certified to the state superintendent, who shall draw a requisition on the state auditor covering the same; and upon receipt of notice from the state treasurer showing the amount placed to their credit, the duly constituted authorities may issue state warrants in the amount so certified: Provided, that no funds shall be released for payment of salaries of administrative officers of county or city units if any reports required to be filed by the state school authorities are more than thirty days over-due. (1935, c. 455, s. 19.)

§ 5780(66). Method of disbursing school funds. —School funds shall be paid out as follows:

1. State school funds. That school funds shall be released only on warrants drawn on the state treasurer signed by the chairman and the secretary of the county board of education for county administrative units and by the chairman and the secretary of the board of trustees for city administrative units and countersigned by such officer as the county government laws may require.

2. County and district funds. All county and district funds shall be paid out only on warrants signed by the chairman and the secretary of the board of education for counties and the chairman and the secretary of the board of trustees for city administrative units and countersigned by such officer as the county government laws may require. (1935, c. 455, s. 20.)

§ 5780(67). Audit. — The state school commission, in co-operation with the local government commission, shall cause to be made an audit of all school funds, State, county and district; and the cost of said audit shall be borne by each fund audited in proportion to the total funds audited, as determined by the state school commission. The tax levying authorities for county and city administrative units shall make provision for meeting their proportionate part of the cost of making said audit, as provided in this subchapter. (1935, c. 455, s. 21.)

§ 5780(68). Workmen's compensation and sick leave.—The provisions of the Workmen's Compensation Act shall be applicable to all school employees, and the state school commission shall make such arrangements as are necessary to carry out the provisions of the Workmen's Compensation Act as applicable to such employees. The state school commission is hereby authorized and empowered, in its discretion, to make provision for sick leave with pay for any teacher or principal not exceeding five days and to promulgate rules and regulations providing for necessary substitutes on account of said sick leave. (1935, c. 455, s. 22.)

§ 5780(69). Purchase of equipment and supplies. —It shall be the duty of the county boards of education and/or the governing bodies of city administrative units to purchase all supplies and materials in accordance with contracts awarded and/or with the approval of the state division of purchase and contract. (1935, c. 455, s. 23.)

§ 5780(70). School transportation.—The control and management of all facilities for the transportation of public school children shall be vested in the State of North Carolina under the direction and supervision of the state school commission, which shall have authority to promulgate rules and regulations governing the organization, maintenance, and operation of the school transportation facilities. The tax levying authorities in the various counties of the State are authorized and empowered to provide in the capital outlay budget adequate buildings and equipment for the storage and maintenance of all school busses. Provisions shall be made for the adequate inspection each thirty days of each vehicle used in the transportation of school children, and a record of such inspection shall be filed in the office of the superintendent of the administrative unit. It shall be the duty of the administrative officer of each administrative unit to require an adequate inspection of each bus at least once each thirty days, the report or reports of which inspection shall be filed with the administrative officer. Every principal upon being advised of any defect by the bus driver shall cause a report of such defect to be made to this administrative officer immediately, whose duty it shall be to cause such defect to be remedied before such bus can be further operated. The use of school busses shall be limited to the transportation of children to and from school for the regularly organized school day: Provided, that in the discretion of the county superintendent and the principal of the school, busses may be used to transport children entitled to attend commencement exercises. (1935, c. 455, s. 24.)

§ 5780(71). Bus routes. — In establishing the route to be followed by each school bus operated as a part of the state school transportation system, in all schools where transportation is now or may hereafter be provided, the state school commission shall, unless road or other conditions make it inadvisable, route the busses so as to get within one mile of all children who live more than one and one-half miles from the school to which they are assigned. The State shall not be required to provide transportation for children living within one and one-half miles of the school in which provision for their instruction has been made. (1935, c. 455, s. 25.)

§ 5780(72). Purchase of new equipment. — It

shall be the duty of the State of North Carolina to provide for the purchase of all school busses used as replacements for old public-owned busses which were operated by the State during the school year one thousand nine hundred thirty-four-thirty-five. It shall be the duty of the tax levying authorities in the various counties to make provision in the capital outlay budget for the purchase of new busses needed to relieve overcrowding and to provide for the transportation of children not transported in one thousand nine hundred thirty-four-thirty-five; and the State shall provide for the operation of all new busses purchased by the counties. It shall be the duty of the state school commission to promulgate rules and regulations that will insure the greatest safety for the children possible, including a standard signaling device for giving the public due notice that the bus is making a stop. Before purchasing any new school busses the state school commission shall cause to be made a thorough study of the most modern materials and construction for insuring the safest equipment possible within the funds available. (1935, c. 455, s. 26.)

§ 5780(73). Bus drivers. — The authority for selecting and employing the drivers of school busses shall be vested in the principal or superintendent of the school at the termination of the route, subject to the approval of the school committeemen or trustees of said school and the county or city superintendent of schools: Provided, that each driver shall be selected with a view to having him located as near the beginning of the truck route as possible; and it shall be lawful to employ student drivers wherever such is deemed advisable. The salary paid each employee in the operation of the school transportation system shall be in accordance with a salary schedule adopted by the state school commission for that particular type of employee. (1935, c. 455, s. 27.)

§ 5780(74). Contract transportation.—In counties where school transportation is provided by contract with private operators, the State shall provide funds for operating costs on the standards adopted for public-owned busses, and it shall be the duty of the tax levying authorities in the various counties to provide in the capital outlay budget the additional funds necessary to pay contracts. (1935, c. 455, s. 28.)

§ 5780(75). Coöperation with highway and public works commission in maintenance of equipment. — The state school commission is hereby authorized to negotiate with the highway and public works commission in coördinating all facilities for the repair, maintenance and upkeep of equipment to be used by the state school commission in the school transportation system. In all cases where this is done the state highway and public works commission shall be reimbursed in the amount of the actual cost involved for labor and parts to be determined by an itemized statement filed with the state school commission.

It is the purpose of this subchapter to repeal sections twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one of the School Machinery Act of one thousand nine hundred thirty-three, codified as §§ 5780(30)-5780(35) of 1933 Supplement. (1935, c. 455, s. 29.)

§ 5780(76). Lunch rooms in schools.—In such cases as may be deemed advisable by the trustees or school committee in any school, and where the same may be deemed necessary because of the distance of the said school from places where meals may be easily obtained, it shall be competent for the said trustees and the said school committees, as a part of the functions of the said public schools, to provide cafeterias and places where meals may be sold, and operate or cause the same to be operated for the convenience of teachers, school officers and pupils of the said schools. There shall be no personal liability upon the said trustees and school committees, or members thereof, arising out of the operation of the said eating places, and it is understood and declared that the same are carried on and conducted in connection with the public schools, and because of the necessities arising out of the consolidation of the said schools and the inconvenience and interruption of the school day caused by seeking meals elsewhere: Provided, that no part of the appropriation made by the State for the public schools shall be expended for the operation of said cafeterias or eating places, nor shall the provisions of section 5780(67) apply to the employees of the cafeterias or eating places, except such persons as are regularly employed otherwise in the schools. (1935, c. 455, s. 30.)

§ 5780(77). Accounting as to special school funds; reports to commission; diversion of special funds as misdemeanor.—It shall be the duty of the county superintendent of public instruction to examine the records of the county to see that the proceeds from the poll taxes and the dog taxes are correctly accounted for to the school fund each year, and to examine the records of the several courts of the county, including courts of justices of the peace, at least once every three months to see that all fines, forfeitures and penalties, and any other special funds accruing to the county school fund are correctly and promptly accounted for to the school fund; and if the county superintendent shall find that any such taxes or fines are not correctly and promptly accounted for to the school fund, it shall be his duty to make prompt report thereof to the state school commission and also to the solicitor of the superior court holding the courts in the district: Provided, that in any county having a county auditor, county accountant, or county manager, that the duties enjoined under the provisions of this section shall be performed by one of said officers; and if there are two or more such officers in any county, then by one of such officers in the order named.

It shall be unlawful for any of the proceeds of poll taxes, dog taxes, fines, forfeitures, and penalties to be used for other than school purposes, and the official responsible for any diversion of such funds to other purposes shall be guilty of a misdemeanor, and, upon conviction, shall be punishable by fine or imprisonment in the discretion of the court: Provided, however, that this section shall not be construed as making unlawful the use of such portions of said funds for other purposes as may be provided by the provisions of this subchapter. (1935, c. 455, s. 31.)

SUBCHAPTER XX. COMPENSATION TO CHILDREN INJURED IN SCHOOL BUSSES

§ 5780(78). School commission authorized to pay claims. — The school commission of North Carolina is hereby authorized and directed to set up in its budget for the operation of the public schools of the State a sum of money which it deems sufficient to pay the claims hereinafter authorized and provided for. (1935, c. 245, s. 1.)

§ 5780(79). Payment of medical or funeral expenses to parents or custodians of children.—The state school commission is hereby authorized and directed to pay out of said sum provided for this purpose to the parent, guardian, executor, or administrator of any school child, who may be injured and/or whose death results from injuries received while such child is riding on a school bus to and from the public schools of the State, medical, surgical, hospital, and funeral expenses incurred on account of such injuries and/or death of such child in an amount not to exceed the sum of six hundred and no one-hundredths dollars ($600.00). 1935, c. 245, s. 2.)

For act on this section applicable in Surry county only, see Public Laws of 1935, chapter 458.

§ 5780(80). Claim must be filed within one year.—The right to compensation as authorized under section 5780(79) shall be forever barred, unless a claim be filed with the state school commission within one year after the accident, and if death results from the accident, unless a claim be filed with the said commission within one year thereafter. (1935, c. 245, s. 3.)

§ 5780(81). Approval of claims by school commission final.—The state school commission is hereby authorized and empowered, under rules and regulations to be promulgated by said school commission, to approve any claim authorized by this subchapter, and when such claim is so approved, such action shall be final; any payment made by the school commission for hospital and medical treatment shall be deducted from the benefits provided in section 5780(79), and said commission is hereby authorized to pay medical and hospital and funeral bills provided for in this subchapter, not to exceed, however, the benefits herein provided for. (1935, c. 245, s. 4.)

§ 5780(82). Claims paid without regard to negligence of driver; amounts paid out declared lien upon civil recoveries for child.—The claims authorized in section 5780(79) shall be paid by the said school commission, regardless of whether or not the injury received by said school child shall have been due to the negligence of the driver of the said school bus; provided that whenever there is recovery on account of said accident by the father, mother, guardian, or administrator of such child, against any person, firm, or corporation, the amount expended by the state school commission hereunder shall constitute a paramount lien on any judgment recovered by said parent, guardian, or administrator, and shall be discharged before any money is paid to said parent, guardian, or administrator, on account of said judgment. (1935, c. 245, s. 5.)

§ 5780(83). Disease and injuries incurred while not riding on bus not compensable.—Nothing in this subchapter shall be construed to mean that the State shall be liable for sickness, disease, and for personal injuries sustained while not actually riding on the bus to and from the school, and for personal injuries received otherwise than by reason of the operation of such bus. (1935, c. 245, s. 6.)

CHAPTER 96

EDUCATIONAL INSTITUTIONS OF THE STATE

Art. 1. University of North Carolina

§ 5781. Constitutional provisions.—The general assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen shall be vested all the privileges, rights, franchises and endowments thereof, in any wise granted to or conferred upon the trustees of such University; and the general assembly may make provisions, laws, and regulations from time to time as may be necessary and expedient for the maintenance and management of such University. The general assembly shall provide that the benefits of the university, as far as practicable, be extended to the youth of the state free of expense for tuition; also that all the property which has heretofore accrued to the state, or shall hereafter accrue, from escheats unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the university, and the general assembly shall establish and maintain, in connection with the university, a department of agriculture, of mechanics, of mining and of normal instruction. (Rev., s. 4259; Const., art. 9, ss. 6, 7, 14.)

Construction of the Word "Dividend." — The word "dividend" as used in this section is synonymous with "distributive shares," and is used as a convertible term. Trustees v. North Carolina R. Co., 76 N. C. 103.

§ 5782. Incorporation and corporate powers.—The trustees of the university shall be a body politic and corporate, to be known and distinguished by the name of the University of North Carolina, and by that name shall have perpetual succession and a common seal; and by that name shall be able and capable in law to take, demand, receive and possess all moneys, goods and chattels that shall be given for the use of the university, and to apply the same according to the will of the donors; and by gift, purchase, or devise to receive, possess, enjoy, and retain forever any and all real and personal estate and funds, of whatsoever kind, nature, or quality the same may be, in special trust and confidence that the same, or the profits thereof, shall be applied to and for the use and purpose of establishing and endowing the university, and shall have power to receive donations from any source whatever, to be exclusively devoted to the purposes of the maintenance of the university or according to the terms of donation.

The corporation, by its corporate name, shall be able and capable in law to bargain, sell, grant, alien, or dispose of and convey and assure to the purchasers any and all such real and personal estate and funds as it may lawfully acquire when the condition of the grant to it or the will of the

devisor does not forbid it; and shall be able and capable in law to sue and be sued in all courts whatsoever; and shall have power to open and receive subscriptions, and in general may do all such things as are usually done by bodies corporate and politic, or such as may be necessary for the promotion of learning and virtue. (Rev., ss. 4260, 4261; Code, ss. 2610, 2611, 2630; R. S. vol. 2, pp. 424, 425; 1789, c. 305, ss. 1, 2; 1874-5, c. 236, s. 2.)

Devise to University—Capacity to Take.—See Brewer v. University, 110 N. C. 26, 14 S. E. 644.

§ 5783. Tax exemption.—The lands and other property belonging to the corporation shall be exempt from all kinds of public taxation. (Rev., s. 4262; Const., art. 6, s. 5; Code, s. 2614; R. S. vol. 2, p. 428; 1789, c. 306, s. 3.)

§ 5784. Escheats to university.—All real estate which has heretofore accrued to the state, or shall hereafter accrue from escheats, shall be vested in the University of North Carolina, and shall be appropriated to the use of that corporation. (Rev., s. 4282; Const., art. 9, s. 7; Code, s. 2626; R. C., c. 113, s. 11; 1789, c. 306, s. 2.)

Vested Right Cannot Be Impaired by Repeal of Section.—The legislature is without power under the due process clause of the constitution to deprive the trustees of such escheated property which by virture of this section has vested in them, by a subsequent act repealing this section. Trustees v. Foy, 5 N. C. 58.

Land held by incorporated town held to escheat upon repeal of town charter under the facts of this case. University of North Carolina v. High Point, 203 N. C. 558, 166 S. E. 511.

Applied in In re Will of Neal, 182 N. C. 405, 109 S. E. 70.
Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464.

§ 5784(a). Evidence making prima facie case.—In all cases where land situated in this state is claimed by the University of North Carolina by right of escheat, it shall be sufficient to prove, in order to make out a prima facie case of escheat, that the land claimed was granted by the state of North Carolina; that the grantee, or any subsequent owner thereof, died without disposing of said land either by conveyance or will, registered or probated prior to the institution of the action, and that for fifty (50) years subsequent to the death of the last known owner, no person has appeared to claim the land either as devisee, grantee, or heir. (Ex. Sess. 1920, c. 43.)

The provisions of this section, applies only to proof and not to pleading. University of North Carolina v. High Point, 203 N. C. 558, 166 S. E. 511.

§ 5785. Unclaimed personalty on settlements of decedents' estates to university.—All sums of money or other estate of whatever kind which shall remain in the hands of any executor, administrator, or collector for five years after his qualification, unrecovered or unclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator, or collector to the University of North Carolina; and that corporation is authorized to demand, sue for, recover, and collect such moneys or other estate of whatever kind, and hold the same without liability for profit or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto; and if no such claim be preferred within ten years after such money or other estate be received by such corporation, then the same shall be held by it absolutely. (Rev., s. 4283; Const., art. 9, s. 7; Code, ss. 2627, 1504; 1868-9, c. 113, s. 76; R. S., c. 46, s. 20; 1784, c. 205, s. 2; 1809, c. 763, s. 1.)

Applied in Warner v. Western North Carolina R. Co., 94 N. C. 250.

§ 5786. Other unclaimed personalty to university.—Personal property of every kind, including dividends of corporations, or of joint-stock companies or associations, choses in action, and sums of money in the hands of any person, which shall not be recovered or claimed by the parties entitled thereto for five years after the same shall become due and payable, shall be deemed derelict property, and shall be paid to the University of North Carolina and held by it without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto; and if no such claim shall be preferred within ten years after such property or dividend shall be received by it, then the same shall be held by it absolutely. (Rev., s. 4284; Code, ss. 2628, 2629.)

§ 5787. Application of receipts.—All receipts heretofore had or hereafter to be had from dividends, escheated property, derelict property, money or other property in the hands of executors, administrators, or collectors, and from any source whatever under authority of the state, and all interest thereon, shall be exclusively devoted by the trustees to the maintenance of the university. (Rev., s. 4285; Code. s. 2630; 1874-5, c. 236, s. 2.)

See notes to section 5781.

§ 5788. Governor to preside at trustees' meetings or appoint presiding officer.—The governor shall preside at all meetings of the board at which he may be present and if by indisposition or other cause, the governor shall be absent from any meeting of the board, he may appoint, in writing, some other person, being a trustee, to act in his stead for the time being, which appointee shall preside accordingly; and if at any time the governor shall be absent from the meeting of the board and shall not have appointed some trustee to act in his stead it shall be lawful for the board to appoint some one of their number to preside for the time being. (Rev., s. 4263; Code, s. 2615; R. S., vol. 2, p. 432; 1805, c. 678.)

§ 5789. Trustees; number, election, and term.—There shall be one hundred trustees of the University of North Carolina, whose term of office shall be eight years, and who shall be elected by joint ballot of both houses of the general assembly as and when the terms of the present incumbents respectively expire. Sixteen of such trustees shall be selected from points conviently accessible to the seat of government and the university. The superintendent of public instruction is ex officio a trustee of the university. In the trustees shall be vested all the rights, privileges, franchises, and endowments in any wise granted to or conferred upon the trustees of the University of North Carolina. (Rev., s. 4268; Const., art. 9, s. 6; Code, ss. 2620, 2625; 1873-4, c. 64; 1876-7, c. 121, ss. 1, 2; 1883, c. 124, ss. 1, 2; 1909, c. 432; 1917, c. 47.)

This section is constitutional. Trustees v. McIver, 72 N. C. 76.

§ 5790. Trustees may remove members of board.—The board of trustees shall have power to vacate the appointment and remove a trustee for improper conduct, stating the cause of such removal on the journal; but this shall not be done except at an annual meeting of the board, and there shall be present at the doing thereof at least twenty of the members of the board. (Rev., s. 4270; Code, s. 2619; R. S., vol. 2, p. 432.)

§ 5791. Filling vacancies in board.—Whenever any vacancy shall happen in the board of trustees it shall be the duty of the secretary of the board of trustees to communicate to the general assembly the existence of such vacancy, and thereupon shall be elected by joint ballot of both houses a suitable person to fill the same. Whenever a trustee shall fail to be present for two successive years at the regular meetings of the board, his place as trustee shall be deemed vacant within the meaning of this section. (Rev., ss. 4271, 4272; Code, s. 2622; 1804, c. 647; 1805, c. 678, s. 2; 1873-4, c. 64, s. 3; 1891, c. 98; 1907, c. 828.)

§ 5792. Meetings of trustees, annual and special; quorum.—There shall be an annual meeting of the board of trustees in the city of Raleigh, which meeting shall be held during the session of the general assembly the years that body convenes. There shall also be held another annual meeting at such time and place as the governor may appoint. At any of the annual meetings of the board any number of trustees, not less than ten, shall constitute a quorum and be competent to exercise full power and authority to do the business of the corporation; and the board or the governor shall have power to appoint special meetings of the trustees at such time and place as, in their opinion, the interest of the corporation may require; but no special meeting shall have power to revoke or alter any order, resolution, or vote of an annual meeting; and the board of trustees at the annual meeting may, by resolution, vote, or ordinance, from time to time, as to it shall seem meet, limit, control, and restrain the business to be transacted, and the power to be possessed and exercised by special meetings of the board, called according to law, and the powers of such special meetings shall be limited, controlled and restrained accordingly. And every order, vote, resolution, or other act done, made or adopted by any special meeting, contrary to any order, resolution, vote, or ordinance of the board at an annual meeting shall be absolutely, to all intents and purposes, null and void. (Rev., s. 4269; Code, ss. 2616, 2618, 2621; R. S., vol. 2, p. 433; 1873-4, c. 64, s. 2.)

§ 5793. Reports to general assembly.—It shall be the duty of the trustees to cause annual reports to be made to the governor, to be transmitted by him to the general assembly, showing the receipts of the corporation from all sources, and the expenditures thereof, with the object for which such expenditures were made. (Rev., s. 4276; 1885, c. 143, s. 4.)

§ 5794. Rules and regulations.—The trustees shall have power to make such rules and regulations for the management of the university as they may deem necessary and expedient, not inconsistent with the constitution and laws of the state. (Rev., s. 4273; Code, s. 2623; 1873-4, c. 64, s. 4.)

§ 5795. Executive committee.—The trustees shall have power to appoint from their own number an executive committee which shall be clothed with such powers as the trustees may confer. (Rev., s. 4267; Code, s. 2624; 1873-4, c. 64, s. 5.)

§ 5796. President and faculty; rules and discipline; degrees.—The trustees shall have the power of appointing a president of the University of North Carolina and such professors, tutors, and other officers as to them shall appear necessary and proper, whom they may remove for misbehavior, inability, or neglect of duty. They shall have the power to make all such laws and regulations for the government of the university and preservation of order and good morals therein as are usually made in such seminaries, and as to them may appear necessary, provided the same are not contrary to the inalienable liberty of a citizen or to the laws of the state. The faculty of the university, that is to say, the president and professors, by and with consent of the trustees, shall have the power of conferring all such degrees or marks of literary distinction as are usually conferred by colleges or universities. (Rev., s. 4264; Code, s. 2613; R. S., vol. 2, p. 427; 1789, c. 305, s. 7.)

§ 5797. Treasurer; duties and bond.—The trustees shall elect and commission some person to be treasurer for the corporation during the term of two years and until his successor shall be elected and qualified; which treasurer shall enter into bond, with sufficient sureties, payable to the state of North Carolina, in the sum of not less than ten thousand dollars, conditioned for the faithful discharge of his office and the trust reposed in him, and that all moneys and chattels belonging to the corporation that shall be in his hands at the expiration of his office shall then be immediately paid and delivered into the hands of the succeeding treasurer. Every treasurer shall receive all moneys, donations, gifts, bequests, and charities whatsoever that may belong or accrue to the corporation during his office, and at the expiration thereof shall account with the trustees for the same, and the same pay and deliver over to the succeeding treasurer; and on his neglect or refusal so to pay and deliver the same proceedings may be had against him as is or may be provided for the recovery of moneys from sheriffs or other persons chargeable with public moneys. (Rev., s. 4265; Code, s. 2612; R. S., vol. 2, p. 426; 1789, c. 305, s. 4.)

§ 5798. Vacancies in offices of secretary and treasurer.—In case the office of secretary or treasurer of the corporation shall be vacant from any cause whatever in the recess of the board of trustees the president shall appoint a suitable person to fill the same until the annual meeting of the board of trustees, at which time the board shall elect a proper person to fill such vacancy. (Rev., s. 4266; Code, s. 2617; R. S., vol. 2, p. 433.)

§ 5799. Normal department.—It shall be the duty of the trustees to use the appropriation hereinafter made, as far as may be practicable, in

carrying into effect sections seven and fourteen of article nine of the constitution; and particularly they shall provide such advanced instruction as may enable their students to learn the art of teaching in the university normal department and to be well qualified to become teachers of the schools of the state. (Rev., s. 4274; Code, s. 2639; 1881, c. 141, s. 2; 1887, c. 233, s. 3.)

§ 5800. Tuition fees, free tuition.—The trustees are authorized and directed to fix the tuition fees at the University in such amount or amounts as they may deem best, taking into consideration the nature of each department and the cost of equipment and maintaining the same, to be paid in cash or by good note, and are further instructed to charge and collect from each student at the beginning of each term an amount sufficient to pay room rent, servant's hire, etc., for the term; but no young man of good moral character shall be denied admission because of his inability to pay cash or give a good note. The trustees are further instructed to adopt such rules for the admission of ministers' sons, candidates for the ministry, young men afflicted with bodily infirmity, and students preparing themselves for the purpose of teaching, as are adopted by other colleges throughout the state. All students in the normal department shall receive free tuition in this department if they agree in writing to teach for one year after leaving the university; but they shall pay full tuition in other departments. All other students shall require to give their notes with the understanding that should they become able they shall pay the balance due the university at the time of their graduation in full. This section is applicable to the students of the North Carolina State College of Agriculture and Engineering so far as it relates to free tuition and the faculty of the state college are authorized and empowered to grant free tuition to students at said college under the same circumstances as free tuition is now granted to students of the University of North Carolina. (Rev., s. 4275; Code, ss. 2633, 2634, 2635; 1885, c. 143, ss. 2, 3; 1887, c. 233, ss. 1, 2, 3; 1925, c. 256, s. 1; 1924, c. 26.)

This section is repealed in so far as it conflicts with § 5912(k).

§ 5801. Prohibition of liquor selling.—Any license granted to retail spirituous or malt liquors, bitters, or any intoxicating drinks within four miles thereof, shall be void; and no person shall sell or deliver, or directly or indirectly receive any compensation for any spirituous liquors, bitters, or any intoxicating drinks within four miles of the corporate limits of Chapel Hill, Orange County, or within that village. No person shall erect, keep, maintain, or have at Chapel Hill, or within four miles thereof, any tippling house, establishment, or place for sale of wines, cordials, spirituous or malt liquors. It shall be unlawful for any person to sell or deliver, or offer to sell or deliver, or directly or indirectly receive any compensation for any spirituous or malt liquors, bitters, or any intoxicating drinks, for the purpose of being used, or with knowledge that the same will be used at Chapel Hill, or within four miles thereof, by any student of the university, without permission in writing from the president of the university or some other member of its faculty. No person, at or within four miles of Chapel Hill, shall give or furnish any electioneering treat or entertainment. (Rev., s. 4277; Code, ss. 2640, 2641, 2642, 2643; R. C., c. 113, ss. 1, 4; R. S., c. 116, ss. 1, 2; 1827, c. 4; 1879, c. 232, ss. 1, 2, 3; 1880, (sp. sess.) c. 45; 1893, cc. 398, 449.)

See State v. Sykes, 104 N. C. 694, 10 S. E. 191; State v. Taylor, 89 N. C. 577.

§ 5802. License for operating billiard tables, etc., to be approved by President of University.—No person, firm or corporation shall apply for or receive from the Board of Aldermen through the City Manager or other representative of the Town of Chapel Hill, any license or authorization to set up, maintain or keep in Chapel Hill, or within five miles thereof, any public billiard table or other public table of any kind, by whatever name called, at which games of chance or skill may be played, without first obtaining written permission therefor from the President of the University of North Carolina. Nor shall any person, firm or corporation apply for or receive a license from the Board of Alderman of the Town of Chapel Hill through the City Manager or other representative to keep, maintain or operate within the Town of Chapel Hill or within five miles of the boundaries thereof, any house, place or establishment wherein ten pin alleys, bowling alleys, or other games of chance or skill shall be operated or conducted without first obtaining written permission therefor from the President of the University of North Carolina. (Rev., s. 4278; Code, s. 2644; R. C., c. 113, s. 5; R. S., c. 116, s. 4; 1794, c. 429; 1931, c. 41.)

Editor's Note.—The Act of 1931 repealed the former prohibitory section and inserted the above in lieu thereof.

§ 5803. License for exhibiting any form of amusements and entertainments to be approved by President of University.—No person, firm or corporation shall apply for or obtain from the Board of Aldermen of the Town of Chapel Hill through the City Manager or other representative, any license or permit to exhibit within the Town of Chapel Hill or within five miles thereof any theatrical, sleight of hand, equestrian performance, or any dramatic recitation, or any rope or wire dancing, natural or artificial curiosities, or any concert, serenade or performance in music, singing or dancing, without first securing a written permission for said performance from the President of the University of North Carolina. A copy of the President's permission shall be filed with the City Manager or other duly authorized agent of the Board of Aldermen of the Town of Chapel Hill at the time said license or permit is applied for in all cases covered by this section. (Rev., s. 4279; Code, s. 2645; R. C., c. 113, s. 6; R. S. c. 116, s. 3; 1824, c. 1252; 1931, c. 41.)

Editor's Note.—The Act of 1931 repealed the former section and substituted the above in lieu thereof.

§ 5804. Violation of three preceding sections; misdemeanor; jurisdiction; participant must testify.—Any person violating any of the three next preceding sections shall be guilty of a misdemeanor, and fined not less than ten dollars nor more than fifty dollars, or be imprisoned not less than ten days nor more than thirty days; and if the offender is not brought to trial before some justice of the peace within twelve months after

the commission of the offense the superior court in term for the county in which the offense was committed may take jurisdiction of the same and punish the offender at the discretion of the court. No person shall be excused or incapacitated from testifying touching the violation of any of the three next preceding sections by reason of his having been a participant in the offenses; but the testimony of such person shall not be used against him in any criminal prosecution on account of such participation. (Rev., s. 4280; Code, s. 2646; R. C., c. 113, s. 7; 1879, c. 232, s. 3.)

§ 5805. Certain contracts of students void. — Every contract or agreement by any student of the university, being then a minor, with any shopkeeper, merchant, trader, or other person, upon the sale of any wine, cordial, spirituous or malt liquors, or of any goods, wares, or merchandise or any article of trade, or with the keeper of any livery stable shall be void unless the same is made at or within two miles of Chapel Hill, be made under the written permission of the president of the university or some other member of its faculty; or, if made at a greater distance from Chapel Hill, under the written consent of the person who may have the control and authority over such student. Every contract made with a student of the university contrary to this section shall be void, and may be avoided on account of any of the matters herein contained by answer denying the same. And on the trial, if it appear that the defendant was at the time of the alleged contract a student of the university it shall be presumed that he was at the making thereof a minor. Every such contract shall be incapable of being confirmed; and any promise or obligation to perform the same, given by such student after his arrival at full age, shall be void. (Rev., s. 4281; Code, ss. 2647, 2648, 2649; R. C., c. 113, ss. 9, 10.)

Art. 1A. Consolidation of State Institutions into University of North Carolina

§ 5805(a). State College of Agriculture and Engineering and College for Women.—The University of North Carolina, the North Carolina State College of Agriculture and Engineering, and the North Carolina College for Women are hereby consolidated and merged into "The University of North Carolina." (1931, c. 202, s. 1.)

§ 5805(b). Operation of State College at Raleigh.—The North Carolina State College of Agriculture and Engineering shall from and after the ratification of this article be conducted and operated as part of the University of North Carolina. It shall be located at Raleigh, North Carolina, and shall be known as the North Carolina State College of Agriculture and Engineering of the University of North Carolina. (1931, c. 202, s. 2.)

§ 5805(c). Operation of College for Women at Greensboro. — The North Carolina College for Women shall from and after the ratification of this article be conducted and operated as a part of the University of North Carolina. It shall be located at Greensboro, North Carolina, and shall be known as the Woman's College of the University of North Carolina. (1931, c. 202, s. 3.)

§ 5805(d). University Trustees incorporated; succeed to powers, etc., of present Boards of three institutions.—The trustees of the University of North Carolina, shall be a body politic incorporate, to be known and distinguished by the name of "The University of North Carolina." Upon this body politic incorporate there is hereby conferred all the powers, privileges, authority, and duties now imposed upon the trustees of the University, as it now exists, to be found in section 5782. In addition to these powers, etc., said elected board of trustees, as hereinafter constituted, shall succeed to all the rights, privileges, duties, and obligations now by law, or otherwise, enjoyed by or imposed upon the existing University of North Carolina, the North Carolina State College of Agriculture and Engineering, and the North Carolina College for Women. (1931, c. 202, s. 4.)

§ 5805(e). Present Boards to hold on till July 1, 1932; new Board of 100 members.—Notwithstanding the provision of section 5805(d) all present members of the board of trustees of the University of North Carolina and all members elected to fill vacancies on said board by the nineteen thirty-one session of the General Assembly, as provided in section 5789, all present members of the board of trustees of North Carolina State College of Agriculture and Engineering and all members to be elected to fill vacancies on said board by the nineteen hundred and thirty-one session of the General Assembly, as provided in sections 5825(a)-5825(c), and all present members of the board of trustees of the North Carolina College for Women, shall be and remain members of the board of trustees of the various schools of which they have heretofore been trustees with the same rights and powers which they have heretofore exercised until July first, one thousand nine hundred and thirty-two.

The General Assembly in one thousand nine hundred and thirty-one, shall elect trustees of the University of North Carolina, as herein provided, to the number of one hundred (100), of whom at least ten (10) shall be women, to succeed the consolidated board herein provided for. These trustees, on and after July first, one thousand nine hundred and thirty-two, shall take over and exercise all the powers, duties, privileges, authority, and obligations of the consolidated board which they succeed. They shall be elected in manner and form as now provided in section 5789, and as a corporate body in the management of its internal affairs shall have powers now imposed upon the existing board of trustees of the University by sections 5790 and 5791, and shall be subject to rules and regulations applicable to them in sections 5792 and 5793. (1931, c. 202, s. 5.)

§ 5805(f). Appointment of Commission on Consolidation.—Within sixty days after the ratification of this article, the Governor shall appoint a Commission of which he shall be Chairman and Member ex-officio to work out plans for the consolidation of the component parts of the University. This Commission shall be composed of twelve members in addition to the Governor, two of whom shall be appointed by the President of the University of North Carolina from the mem-

bers of the faculty of the University of North Carolina; two of whom shall be appointed by the President of the North Carolina State College of Agriculture and Engineering from the members of the faculty of the State College of Agriculture and Engineering and two of whom shall be appointed by the President of the North Carolina College for Women from the members of the faculty of said College: Provided, that the Presidents of said institutions may serve on said Commission in lieu of one member of the faculty; the six remaining members of the said commission shall be selected by the Governor from the State at large: Provided, that not more than one shall be a member of the board of trustees of any one of the institutions to be consolidated: Provided further, that two of said members shall be women. (1931, c. 202, s. 6.)

Editor's Note.—The act from which this aricle was codified was ratified March 27, 1931.

§ 5805(g). Duties of Commission.—Said commission shall be charged with the following duties:

1. To work out a scheme to bring about an unification of the executive control in the University of North Carolina, North Carolina State College of Agriculture and Engineering, and the North Carolina College for Women, so that each of said institutions may best serve the State and the needs of the people.

2. To unify and coördinate the general educational program of the University of North Carolina as herein provided for.

3. To work out a scheme in which, and through which, all the problems arising from the consolidation of the three existing institutions into the University of North Carolina may, in their opinion, be best solved.

4. That the final location of all schools, departments, and divisions of work now located at any of the three institutions shall be subject to the study and recommendations of the experts and the commission without prejudice by any provisions in this bill.

5. To consider the advisability of the awarding of diplomas or other certificates ex legis by the University of North Carolina to former graduates of the North Carolina State College of Agriculture and Engineering and the North Carolina College for Women, and to recommend the form or forms thereof. (1931, c. 202, s. 7.)

§ 5805(h). Term of office of Commission; employment of experts; report and recommendation; expenses.—The commission on consolidation, herein provided for, shall enter at the earliest reasonable time upon the performance of these mandatory duties, and so continue until they have provided a practical plan of consolidation, coördination, and unification and merger, as contemplated by this act. The report shall be completed and in the hands of the consolidated board of trustees, herein provided for, and those of the Governor, not later than July first, one thousand nine hundred and thirty-two. It shall employ distinguished and competent experts in the several pertinent fields of higher education in America. These experts shall take account of the experiences of the several American states in the various forms of unification, whether consolidation, coördination, or other forms of unified guidance and control of higher education and shall study the circumstances and needs of higher education in North Carolina. They shall on the basis of their expert studies and scientific findings make their report and recommendation to the commission with regard to the form, extent, procedure, and all details of unified guidance and control. The expenses of the commission, including compensation of such employees, shall be paid out of the contingency and emergency fund provided for in the general appropriation act of the session of one thousand nine hundred and thirty-one, in the manner provided by law. (1931, c. 202, s. 8.)

§ 5805(i). Submission of report to new Trustees.—The Governor, after receiving the report of the commission on consolidation as herein provided for, shall cause a meeting of the board of trustees to be called, and he shall submit said report to said board of trustees. If the board of trustees shall disapprove of any part of said report, then that part of the report disapproved of shall be modified in accordance with the views of the said board. The report, when approved by the said board, or when so modified by it, shall be and remain the rules and regulations under which the consolidated University and its component parts shall continue to function until such rules and regulations shall be changed, modified, or amended by the board of trustees. (1931, c. 202, s. 9.)

§ 5805(j). Present status of institutions retained; meetings of trustees.—Pending the bringing about of the unification, consolidation, and merger as herein provided for, the several institutions, herein consolidated and merged, shall continue to operate as separate institutions, in accordance with their present plan of operation. There shall, however, be not less than one meeting of the consolidated board of trustees as herein provided for, and not less than one meeting of the consolidated executive committee herein provided for in each year, such meetings to be called by the Governor. (1931, c. 202, s. 10.)

§ 5805(k). Awarding of degrees, etc., by consolidated University.—From and after the final adoption of the rules and regulations under which the consolidated University and its component colleges shall operate, all degrees or marks of literary distinction conferred by the University of North Carolina or any of its component colleges as herein specified, shall be conferred by the faculty of the University of North Carolina or the faculty of any one of its component colleges by and with the consent of the board of trustees, but degrees or marks of literary distinction conferred by the faculty of any one of the said colleges shall designate the college through or by which said degree or mark of literary distinction is conferred. (1931, c. 202, s. 11.)

§ 5805(l). Gifts and endowments belong to institution to which made; administration of such funds.—All gifts and endowments, whether moneys, goods or chattels, or real estate, heretofore or hereafter given or bestowed upon or conveyed to any one of the institutions, as existing before

the ratification of this act, shall continue thereafter to be used, enjoyed, and administered by the particular unit to which they were given or conveyed; but if there were trusts, they shall be administered by said unit in accordance with the provisions of the trust deed creating them, for the benefit of the particular institution to which such trust deed was executed. The administration of all these funds, endowments, gifts, and contributions shall, however, be under the control of the board of trustees of the University of North Carolina, as created in this act. (1931, c. 202, s. 12.)

§ 5805(m). Certain laws pertaining to institutions retained.—None of the provisions of this article shall be construed to modify or repeal or render invalid any of the provisions of Article one, relating to the University of North Carolina; Article two, relating to the North Carolina State College of Agriculture and Engineering; and Article four, relating to the North Carolina College for Women, of chapter ninety-six of the Consolidated Statutes of one thousand nine hundred and nineteen, as amended in any particular except where any of such provisions in these articles conflict with this article or the intent and purpose with which it is enacted, that is to say, to bring about an effective consolidation of the three institutions thus named into the University of North Carolina, organized as herein provided. (1931, c. 202, s. 13.)

Art. 2. North Carolina State College of Agriculture and Engineering.

§ 5806. Incorporation and corporate powers.—The North Carolina State College of Agriculture and Engineering shall under that name be a body politic and corporate, with the right to hold property for the benefit of such college. The corporation, by its corporate name, shall be able and capable in law to bargain, sell, grant, alien, or dispose of and convey and assure to the purchasers any and all such real and personal estate and funds as it may lawfully acquire when the condition of the grant to it or the will of the devisor does not forbid it; and shall be able and capable in law to sue and be sued; and shall have the power to receive subscriptions, and in general may do all such things as are usually done by bodies corporate and politic for educational purposes. (1907, c. 406, s. 2; 1917, c. 111.)

Editor's Note.—This college is now consolidated with the University of North Carolina and is to be managed by the board of trustees of the consolidated University. See §§ 5805(a)-5805(m).

§ 5807. Object of the college.—The object of this college shall be to teach the branches of learning relating to agricultural and mechanical arts and such other scientific and classical studies as the board of trustees may elect to have taught, and to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life. (1907, c. 406, s. 3.)

§ 5808. Share in appropriations by congress.—The appropriations made or which may hereafter be made by the congress for the benefit of colleges of agricultural and mechanical arts shall be divided between the white and colored institutions in this state in the ratio of the white population to the colored, as ascertained by the preceding national census. (1907, c. 406, s. 1.)

§ 5809. Tax exemption.—The lands and other property belonging to the corporation shall be exempt from taxation. (1907, c. 406, s. 7.)

§ 5810. Board of trustees; organization; terms of members.—The management and control of the college shall be vested in a board of trustees to consist of sixteen members, representing the agricultural and other industries of the state, who shall be appointed by the governor with the advice and consent of the senate. The governor shall be ex officio president of the board. The new members shall be appointed by the governor with the advice and consent of the senate. Four of the said trustees shall be appointed for a term of eight years; four for a term of six years; four for a term of four years; and four for a term of two years. The length of the term of each member shall be designated by the governor. As the terms of these members first appointed under this article expire, their successors and all trustees appointed thereafter shall be appointed for a term of eight years. The board may elect a president pro tem., who shall preside in the absence of the governor, and this board shall exercise all the powers and be subject to all the duties imposed by this act. The treasurer of the state shall be ex officio treasurer of the board of trustees. (1907, c. 406, ss. 4, 6.)

See note under § 5806.

§ 5811. Meetings of board; executive committee; compensation of members.—The board shall meet annually in the city of Raleigh, or at the college, at such time as it may fix and at such other times as it may deem expedient for the good of the college, but not oftener than three times a year. It shall elect from its members an executive committee of five persons, one of whom shall be president pro tem., which committee shall meet at the call of the president and perform such duties as may be assigned them. The governor or president of the board shall call the first meeting of the board at such time as he deems fit. The members of the board shall receive the same mileage and per diem as is allowed members of the board of agriculture. (1907, c. 406, s. 5.)

See note under § 5806.

§ 5812. Vacancies in board.—If any trustee shall fail to attend the sessions of the board for one year, without furnishing good excuse for his absence, his place shall be deemed vacant. All vacancies shall be filled by appointment by the governor, as provided by law in the chapter Agriculture, as to vacancies in the board of agriculture. (1907, c. 406, s. 15.)

See note under § 5806.

§ 5813. Reports of board.—The board of trustees shall annually make a report to the governor concerning the work and requirements of the institution and of the receipts and expenditures of all funds which he shall transmit biennially to the legislature. (1907, c. 406, s. 16.)

See note under § 5806.

§ 5814. Executive committee of board.—The executive committee, or special committee appointed for the purpose, shall annually, as soon after the first of July as practicable, investigate the affairs of each department of the college and of the entire institution, and report to the next session of the board its condition, with such recommendations as they may deem expedient. (1907, c. 406, s. 18.)

See note under § 5806.

§ 5815. Application of receipts and property.—All receipts shall be applied to the maintenance and promotion of the college and to the objects specified in any laws making appropriations for its support, or in accordance with the expressed wishes of any donor, as far as practicable. (1907, c. 406, s. 17.)

§ 5816. Board to accept gifts and congressional donations.—The board shall use, as in its judgment may be proper, for the purposes of such college and for the benefit of education in agriculture and mechanic arts, as well as in furtherance of the powers and duties now or which may hereafter be conferred upon such board by law, any funds, buildings, lands, laboratories, and other property which may be in its possession. The board of trustees shall have power to accept and receive on the part of the state, property, personal, real or mixed, and any donations from the United States congress to the several states and territories for the benefit of agricultural experiment stations or the agricultural and mechanical colleges in connection therewith, and shall expend the amount so received in accordance with the acts of the congress in relation thereto. (1907, c. 406, s. 6.)

See note under § 5806.

§ 5817. Land scrip fund.—The board of trustees shall own and hold the certificates of indebtedness, amounting to one hundred and twenty-five thousand dollars, issued for the principal of the land scrip fund, and the interest thereon shall be paid to them by the state treasurer semiannually on the first day of July and January in each year for the purpose of aiding in the support of such college in accordance with the act of the congress approved July second, one thousand eight hundred and sixty-two, entitled, "An act donating public lands to several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts." (1907, c. 406, s. 8.)

See note under § 5806.

§ 5818. Powers of board as to college government and officials.—The board shall have power to appoint the president, professors, instructors, and other officers and servants, as they deem necessary and proper, whom they may remove for misbehavior, inability, neglect of duty, or other good reason, and to make such laws and regulations for the government of the institution as may appear to them necessary for the preservation of order and good morals therein, and as are usually made in such institutions and are not contrary to the constitution and laws of this state. (1907, c. 406, s. 9.)

See note under § 5806.

§ 5819. Conferring of degrees.—The president and instructors, under the direction and supervision of the trustees, shall have power to confer such degrees or certificates of proficiency or marks of merit as may be deemed proper, and to arrange curriculum of college into courses of study necessary to be pursued in order to obtain the respective degrees provided for by the board. (1907, c. 406, s. 10.)

See note under § 5806.

§ 5820. Free scholarships.—The board of trustees shall admit to the privileges of the college, free of any charge for tuition, upon proper evidence of good moral character and of their inability and the inability of their parents or guardians to pay for their tuition, and of their capacity to receive instruction, one hundred and twenty youths, limited to one for each member of the house of representatives, and no more, and shall apportion the same to the different counties applying according to their respective number of members in the house of representatives of North Carolina. An appointment may be made for one year at a time for a county from which there is no applicant from any other county. And it shall be the duty of the superintendent of public instruction in each county, on the days fixed by law for the examination of teachers of the public schools, also to examine candidates for appointment as county students to such college; blanks for such purpose to be furnished annually by the president of the college to the superintendents in each county. The bursar shall keep a roll of the students receiving free tuition and upon whose recommendation appointed, and furnish a copy annually to the board of trustees. (1907, c. 406, s. 11.)

See note under § 5806.
This section is repealed in so far as it conflicts with § 5912(k).

§ 5821. Free tuition.—For the purpose of making it possible for a greater number of worthy and yet needy young men to advance the farming interest of the state by training themselves in modern agricultural methods, the trustees of the North Carolina state college of agriculture and engineering are hereby authorized, if they can do so, to admit free of tuition into that institution one needy farm boy from each county. This free tuition, if given, shall not interfere with the scholarships which the trustees are now required by law to give. All young men granted free tuition under this section must agree to farm at least two years or to teach agriculture in the state schools. (1913, c. 153.)

See note under § 5806.
This section is repealed in so far as it conflicts with § 5912(k).

§ 5821(a). Trustees to fix tuition fees.—The board of trustees of the North Carolina State College of Agriculture and Engineering are authorized and directed to fix the tuition fees at the said college in such amount or amounts as they may deem best, taking into consideration the nature of each department and the cost of equipment and maintaining the same: Provided, however, that this section shall not be held or construed to affect or modify the provisions of sections five thousand eight hundred and twenty

and five thousand eight hundred and twenty-one of the Consolidated Statutes of North Carolina. (1925, c. 256, s. 2.)

See note under § 5806.

§ 5822. Sewer connection.—The board is empowered to contract with owners of property in the vicinity of the college grounds, and allow them to connect with the sewer construction for the college under chapter seven hundred and four of the public laws of one thousand eight hundred and ninety-nine, upon payment of proper sums respectively for the privilege. (1907, c. 406, s. 13.)

See note under § 5806.

§ 5823. Water supply.—The board shall have the full power and authority to enter into any contract or agreement with any firm, person, or corporation in a sum not exceeding ten thousand dollars to furnish a permanent supply of water for the said college, and the executive committee hereinbefore mentioned is hereby authorized and empowered to carry out and make said contract for the purpose above set out. (Ex. Sess. 1908, c. 123, s. 1.)

See note under § 5806.

§ 5824. Use of agricultural buildings.—The agricultural building built under the authority of chapter six hundred of the laws of one thousand nine hundred and three shall be used for conducting investigations and for instruction in respect to milk and beef cattle, diseases of animals, trucking, fruit-growing, commercial fertilizers, diversified farming, and other subjects pertaining to practical agriculture. (1907, c. 406, s. 14.)

§ 5825. Agricultural experiment station.—The agricultural experiment and control station shall be connected with the college and controlled by the board of trustees thereof. (1907, c. 406, s. 12.)

§ 5825(a). Number of trustees; term of office; present trustees; election.—There shall be eighty-five trustees of the North Carolina state college of agriculture and engineering, whose terms of office shall be eight years and who shall be elected by jury ballot of both houses of the general assembly. Included in this number shall be the present board of trustees, who shall continue as such trustees until the expiration of their present terms. Such election shall be in the general assembly at the same time that the trustees of the University of North Carolina are elected. At the first election of said trustees fifteen shall be elected for a term of two years, fifteen for a term of four years, fifteen for a term of six years, and fifteen for a term of eight years, less such number of trustees as are continued in office under the terms hereof. Thereafter their successors shall be elected for a full term of eight years. At least three members of said board of trustees shall be elected from each congressional district in the state of North Carolina, but not more than ten (10) shall be elected from any one congressional district. The superintendent of public instruction is ex-officio a trustee of the North Carolina state college of agriculture and engineering. In the trustees shall be vested all the rights, privileges, franchises, endowments in any wise granted to or previously conferred upon the trustees of the North Carolina college of agriculture and engineering. Provided that twenty of the trustees of the State College shall be chosen from the state at large. (1923, c. 47, s. 1; 1929, c. 86, ss. 1, 2; c. 255, s. 1.)

See note under § 5806.

Editor's Note.—This statute was reviewed in 1 N. C. Law Rev. 308.

§ 5825(b). Removal of trustee for cause.—The board of trustees shall have power to vacate the appointment and remove a trustee for improper conduct, stating the cause of such removal on their journal; but this shall not be done except at an annual meeting of the board, and there shall be present at the doing thereof at least twenty members of the board. (1923, c. 47, s. 2.)

See note under § 5806.

§ 5825(c). Vacancies in office.—Whenever any vacancy shall happen in the board of trustees it shall be the duty of the secretary of the board of trustees to communicate to the general assembly the existence of such vacancy, and thereupon there shall be elected by joint ballot of both houses a suitable person to fill the same. Whenever a trustee shall fail to be present for two successive years at the annual meetings of the board his place as trustee shall be deemed vacant within the meaning of this section. (1923, c. 47, s. 3.)

See note under § 5806.

§ 5825(d). Annual meeting; quorum; special meetings; powers of trustees.—There shall be an annual meeting of the board of trustees in the city of Raleigh. At any of the annual meetings of the board any number of trustees, not less than twenty, shall constitute a quorum and be competent to exercise full power and authority to transact any of the business of the corporation, and the board or the governor shall have power to appoint special meetings of the trustees at such time and place as, in their opinion, the interest of the corporation may require; but no special meeting shall have power to revoke or alter any order, resolution, or vote of an annual meeting; and the board of trustees at the annual meeting may, by resolution, vote, or ordinance, from time to time, as to it shall seem meet, limit, control, and restrain the business to be transacted, and the power to be possessed and exercised by special meetings of the board, called according to law, and the powers of such special meetings shall be limited, controlled and restrained accordingly. And every order, vote, resolution, or other act done, made, or adopted by any special meeting contrary to any order, resolution, vote, or ordinance of the board at an annual meeting shall be absolutely, to all intents and purposes, null and void. (1923, c. 47, s. 4.)

See note under § 5806.

§ 5825(e). Governor to preside; chairman.—The governor shall preside at all the meetings of the board at which he may be present; and if, by indisposition or other cause, the governor shall be absent from any meeting of the board, he may appoint, in writing, some other person, being a trustee, to act in his stead for the time being, which appointee shall preside accordingly; and if at any time the governor shall be absent from

the meeting of the board and shall not have appointed some trustee to act in his stead, it shall be lawful for the board to appoint some one of their number to preside for the time being. (1923, c. 47, s. 5.)

See note under § 5806.

§ 5825(f). Annual reports.—It shall be the duty of the trustees to cause annual reports to be made to the governor, to be transmitted by him to the general assembly, showing the receipts of the corporation from all sources, and the expenditures thereof, with the objects for which such expenditures were made. (1923, c. 47, s. 6.)

See note under § 5806.

§ 5825(g). Regulations for management of college.—The trustees shall have power to make such rules and regulations for the management of the North Carolina state college of agriculture and engineering as they may deem necessary and expedient, not inconsistent with the constitution and laws of the state. (1923, c. 47, s. 7.)

See note under § 5806.

§ 5825(h). Executive committee; meetings, per diem and mileage.—The trustees shall have power to appoint from their own number an executive committee of seven members, which shall meet at the call of the governor or president of the board of trustees. The members of the executive committee shall receive the same mileage and per diem as is allowed members of the board of agriculture. (1923, c. 47, s. 8.)

See note under § 5806.

§ 5825(i). Appointment of president and other officers; degrees.—The trustees shall have the power of appointing a president of the North Carolina state college of agriculture and engineering and such professors, tutors, and other officers as to them shall appear necessary and proper, whom they may remove for misbehavior, inability, or neglect of duty. They shall have the power to make all such laws and regulations for the government of the North Carolina state college of agriculture and engineering and preservation of order and good morals therein as are usually made in such colleges, and as to them may appear necessary, provided the same are not contrary to the inalienable liberty of a citizen or to the laws of the state. The faculty of the North Carolina state college of agriculture and engineering, that is to say, the president and professors, by and with consent of the trustees, shall have the power of conferring all such degrees or marks of literary distinction as are usually conferred by colleges. (1923, c. 47, s. 9.)

See note under § 5806.

§ 5825(j). Land for experimental purposes.—The governing authorities of the State Prison and the board of trustees of North Carolina State College of Agriculture and Engineering are hereby authorized to enter into an agreement whereby a certain portion of the land located near Method, North Carolina, and in the possession of the governing authorities of the State Prison may be conveyed to the college for a term of years or in fee simple, to be used by said college for research, experimental or demonstration purposes, and whenever an agreement is entered into, the Governor and Secretary of State are authorized to execute a lease or deed conveying to the College the number of acres of land agreed upon subject to the provisions of the act for the reorganization of the State Prison, §§ 7698 and following. (1925, c. 198, s. 1.)

§ 5825(k). Joint employment by college and state.—Whenever it shall be to the advantage of the North Carolina State College of Agriculture and Engineering and any department of the State government to employ jointly any person, the board of trustees of the college, and the governing authority of the department, on the approval of the Governor, are hereby authorized to make such employment and to prorate the amount of the salary and other expenses that each shall be required to pay. (1925, c. 198, s. 2.)

Art. 3. Negro Agricultural and Technical College of North Carolina.

§ 5826. Establishment and name.—A college of agricultural and mechanical arts is hereby established for the colored race to be located at some eligible site within this state. Such institution shall be denominated The Negro Agricultural and Technical College of North Carolina. (Rev., s. 4221; 1891, c. 549, ss. 1, 2; 1915, c. 267.)

§ 5827. Object of college.—The leading object of the institution shall be to teach practical agriculture and the mechanic arts and such branches of learning as relate thereto, not excluding academical and classical instruction. (Rev., s. 4222; 1891, c. 549, s. 3.)

§ 5828. Board of trustees; appointment; vacancies; president. — The management and control of the college and the care and preservation of all of its property shall be vested in a board of trustees, who shall be elected by the general assembly. The board of trustees shall consist of fifteen members, five of whom shall be elected at each regular session of the general assembly and shall hold office for six years. Any vacancy which, for any cause, may occur, shall be filled by the governor for the unexpired term. The board shall annually elect one of their number to be president of the board of trustees. (Rev., s. 4223; 1891, c. 549, s. 4; 1899, c. 389, s. 1.)

§ 5829. Meetings of board; compensation; executive board.—The number and times of the meeting of the board of trustees shall be fixed by the board, and the trustees shall not receive any pay or per diem, but only their traveling expenses and hotel fare, and that only for four times in each year. The board of trustees shall have power to elect an executive board of three of their own number, who shall have the immediate management of the institution when the full board is not in session. (Rev., s. 4224; 1899, c. 389, ss. 2, 3.)

§ 5830. Powers of trustees.—The board of trustees shall have power to prescribe such rules for the management and preservation of good order and morals at the college as are usually made in such institutions; shall have power to appoint its president, instructors, and as many other officers or servants as to them shall appear

necessary and proper, and shall fix their salaries, and shall have charge of the disbursement of the funds, and have general and entire supervision of the establishment and maintenance of the college, and the president and instructors in the college, by and with the consent of the board of trustees, shall have the power of conferring such certificates of proficiency or marks of merit and diplomas as are usually conferred by such colleges. (Rev., s. 4225; 1891, c. 549, s. 5.)

§ 5831. Admission of pupils.—In addition to the powers hereinbefore granted, the board of trustees shall have power to make such rules and regulations with respect to the admission of pupils to the college for the various congressional districts of this state as they may deem equitable and right, having due regard to the colored population thereof. (Rev., s. 4226; 1891, c. 549, s. 7.)

This section is repealed in so far as it conflicts with § 5912(k).

§ 5832. Power to receive property, and proportion of congressional donations.—The board of trustees is empowered to receive any donation of property which may be made to the college, and shall have power to invest or expend the same for the benefit of the college; and shall have power to accept on behalf of this college such proportion of the fund granted by the congress of the United States to the state of North Carolina for industrial and agricultural training as is apportioned to the colored race, in accordance with the act or acts of the congress in relation thereto. (Rev., s. 4227; 1891, c. 549, ss. 6, 12.)

Art. 4. North Carolina College for Women

§ 5833. Incorporation and corporate powers.—The members of the board of directors of the institution for the education of young women of the white race, which institution is the property of the state and is now located at Greensboro, are and shall continue to be a corporation under the name of The North Carolina College for Women, with all the powers usually conferred upon such bodies, enabling it to receive, protect, and hold property, and do all things necessary for the purpose for which the corporation is created. (Rev., s. 4251; 1891, c. 139, s. 1; 1897, c. 230, s. 1; 1919, c. 199, s. 1.)

Editor's Note.—This college is now consolidated with the University of North Carolina and is to be managed by the board of trustees of the consolidated University. See §§ 5805(a)-5805(m).

§ 5834. Board of directors; election; qualification and number; the Governor of the State ex-officio chairman; the State Superintendent a member.—The corporation shall be managed by a board of twelve (12) directors, no two of the ten (10) appointive directors shall be chosen from the same Congressional District. The term of office of each appointive director shall be six years. The Governor, by and with the advice and consent of the Senate, shall appoint directors to fill vacancies as they may respectively occur, either by the expiration of the terms of office of the present incumbents or by death or resignation or removal from the Congressional District from which any director was appointed. The Governor of the State shall be ex-officio a member and chairman of the Board of Directors, and the State Superintendent of Public Instruction shall be ex-officio a member and vice-chairman of the Board, and shall preside over the meetings in the absence of the Governor. All directors shall take an oath faithfully to perform their duties as required by law, and shall hold office for the term for which they are appointed or until their appointment becomes vacant for the causes herein stated. The Board of Directors shall report biennially as required by section seven of the Constitution of North Carolina and the Executive Budget Act. (Rev. s. 4252; 1891, c. 139, s. 3; 1929, c. 223, s. 2.)

See note under § 5833.

§ 5835. Objects of institution; free tuition to teachers.—The objects of the institution shall be to teach young white women all branches of knowledge recognized as essential to a liberal education, such as will familiarize them with the world's best thought and achievement and prepare them for intelligent and useful citizenship; to make special provision for training in the science and art of teaching, school management, and school supervision; to provide women with such training in the arts, sciences, and industries as may be conducive to their self-support and community usefulness; to render to the people of the state such aid and encouragement as will tend to the dissemination of knowledge, the fostering of loyalty and patriotism, and the promotion of the general welfare. Tuition shall be free, upon such conditions as may be prescribed by the board of directors, to those who signify their intention to teach in the schools of North Carolina; and also, in the discretion of said board, to those who signify their intention to enter other fields of public service. (1919, c. 199, s. 2.)

This section is repealed in so far as it conflicts with § 5912(k).

§ 5836. Rules and regulations; admission of students.—The board of directors shall make rules and regulations for the government of the corporation and the admission of students, but shall not discriminate against any county in the number of students allowed it, in case all applicants cannot be accommodated. Each county shall have representation in proportion to its white school population, if it desires it; and, should any county fail to avail itself of its proportional number, the board of directors may recognize applicants from counties which already have their proportionate representation. (Rev., s. 4254; 1891, c. 139, s. 4.)

See note under § 5833.

§ 5837. Directors to appoint president and faculty; extension work.—The board of directors shall have the power of appointing a president and such professors, tutors, and other officers as to them shall appear necessary and proper, for such terms and under conditions as they may prescribe, and shall also have the power to make regulations for the government of said college as shall not conflict with the laws of the state. And the faculty of the college, by and with the consent of the board of directors, shall have the power of conferring such degrees as are usually conferred by colleges. It shall

be the duty of the faculty of the North Carolina college for women to extend its influence and usefulness as far as possible to the persons of the state who are unable to avail themselves of its advantages as resident students, by extension courses, by lectures, and by such other means as may seem to them most effective. (1919, c. 199, s. 3.)

See note under § 5833.

§ 5838. Matron's hall.—For the benefit of those who may desire to avail themselves of it a matron's hall shall be established at which board shall be furnished at actual cost. (Rev., s. 4257; 1891, c. 139, s. 12; 1905, c. 502; 1919, c. 199, s. 4.)

Art. 5. Western Carolina Teachers' College

§ 5839. Cullowhee Normal and Industrial School incorporated.—The Cullowhee Normal and Industrial School, having been created by chapter three hundred and sixty-nine of the private laws of nineteen hundred and five a public educational institution of the state, is and shall remain a corporation under the name of the Cullowhee Normal and Industrial School, with power to sue and be sued, to make contracts and to exercise all other corporate rights and privileges incident to a public educational institution of the state and necessary to the management of the school. (1905 [Pr.], c. 369.)

Editor's Note.—Public Laws 1925, c. 270, § 1, changed the name of this school to Cullowhee State Normal School. It is now the Western Carolina Teachers' College. See § 5842(d).

§ 5840. Board of directors: term; vacancies; state superintendent a member and chairman.—The board of directors of the Cullowhee normal and industrial college shall consist of the persons named in chapter sixty-seven of the public laws of nineteen hundred and fifteen and their successors elected by the general assembly for terms of six years as the terms of the directors named in that act expire. Vacancies occurring by death, resignation, or otherwise may be filled by the board. The state superintendent of public instruction is ex officio a member and chairman of the board. (1915, c. 27.)

See note under § 5839. As to board of trustees of present school, see § 5842(e).

§ 5841. Property transferred from Cullowhee high school.—All property belonging to the Cullowhee high school, established by chapter one hundred and seventy of the private laws of eighteen hundred and ninety-one, is from and after the establishment of the Cullowhee normal and industrial school, by chapter three hundred and sixty-nine of the private laws of nineteen hundred and five, transferred to the state board of education and its successors in office, to be under the control and care of the superintendent of public instruction. (1905 [Pr.], c. 369; 1909, c. 644.)

See note under § 5839.

§ 5842. Management and rules; free tuition.—The Cullowhee normal and industrial school shall be under the supervision of the state superintendent of public instruction, who shall have power to prescribe rules and regulations for the management of the same. Young men and women preparing themselves for teachers shall pay no charge for tuition in the school. (Rev., s. 4248.)

See note under § 5839.

This section is repealed in so far as it conflicts with § 5912(k).

§ 5842(a). Power to acquire real property.—For its further development and expansion, the Cullowhee normal and industrial school is authorized and empowered to acquire by gift, purchase or condemnation any adjacent real property of any character or kind whatsoever, whenever its board of directors, with the approval of the state board of education, shall determine that said real estate is needed for building sites, athletic or recreation grounds, pastures, or other needful purposes. (1923, c. 29, s. 1.)

See note under § 5839.

§ 5842(b). Land subject to condemnation; procedure.—If said board of directors, exercising the authority conferred upon it by section 5842(a), shall decide that any adjacent land now having a church or cemetery located upon it is needed for the proper expansion of such school, and its value cannot be fixed by agreement between said board and its present owners, then the said Cullowhee normal and industrial school shall proceed to condemn the same under chapter 33. (1923, c. 29, s. 2.)

See note under § 5839.

§ 5842(c). Removal of bodies if cemetery condemned; replacing of monuments.—In the event that a cemetery is taken over for condemnation under the authority contained in section 5842(b), the board of directors shall procure some other suitable site, and remove or cause to be removed the remains of bodies therein to this site, at the cost of said school, and have them reinterred therein, properly replacing such marks of identification as may exist at the time of removal; anything in sections four thousand three hundred and twenty-one and four thousand three hundred and twenty-two to the contrary notwithstanding. (1923, c. 29, s. 3.)

§ 5842 (d). Name changed to Western Carolina Teachers' College.—Sub-sec. (a) The Cullowhee State Normal School at Cullowhee, North Carolina, shall hereafter be known as Western Carolina Teachers' College.

Sub-sec. (b) The board of Trustees of the Cullowhee State Normal School shall be the Board of Trustees of Western Carolina Teachers' College. They shall be appointed in the same manner and shall have the same tenure of office as the present Board of Trustees, and shall have the same authority and control over the affairs of the institution as is now exercised by them or may hereafter be conferred upon them by the General Assembly.

Sub-sec. (c) All appropriations heretofore made or hereafter to be made, all gifts, accounts, notes, or property of whatever kind under the control of the Cullowhee State Normal School are hereby declared to be the property of Western Carolina Teachers' College and under the control of its Board of Trustees.

Sub-sec. (d) The trustees, upon the recommendation of the faculty, are hereby authorized and empowered to confer or cause to be conferred

such degrees as are usually conferred by similar institutions. (1925, c. 270, s. 1; 1929, c. 251, s. 1.)

§ 5842(e). Trustees; appointment; terms; to hold property.—The present board of trustees of the Cullowhee Normal and Industrial School shall continue in office until their terms shall expire under this article. The board of trustees of the Western Carolina Teachers' College shall consist of nine persons to be appointed by the Governor, and shall hold office for four years from and after their appointment. Within thirty days from March 10, 1925 the Governor shall appoint five members of the board. Within six months from March 10, 1925 the Governor shall appoint four others members of the board. At the time of making the appointments as herein provided for the Governor shall designate which members of the present board are to be succeeded by his appointees. Any vacancies occurring in the board shall be filled by the Governor. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. The said board is hereby created a body corporate, to be known as "the board of trustees of Western Carolina Teachers' College." All property, real, personal, or mixed, of every kind and character, now owned and under the control of the board of trustees of the Cullowhee Normal and Industrial School at Cullowhee, or owned and under the control of the State Board of Education or of any other person or corporation for the use and benefit of the Cullowhee Normal and Industrial School, is hereby transferred to and the title thereof is hereby vested in the board of trustees of the Western Carolina Teachers' College who shall take, receive and hold the same for the use and benefit of the Western Carolina Teachers' College; the trustee may purchase and hold real and personal property; receive donations, which donations shall be received by them for the purposes expressed by the donors thereof and shall be used for such purpose and no other, and do all other things necessary, proper and useful to carry out the provisions of this article. All property now owned by the Cullowhee Milling Company, a corporation, the stock of which is owned by the trustees, shall be transferred to the board of trustees of the Western Carolina Teachers' College and the said corporation shall be dissolved according to laws. The trustees shall take over the property of the Cullowhee Milling Company and use it for the benefit of the Western Carolina Teachers' College as fully as if it was now owned by the Cullowhee Normal and Industrial School and not by the Cullowhee Milling Company. (1925, c. 270, s. 2; 1929, c. 251, s. 2.)

§ 5842(f). Meeting and organization of trustees.—It shall be the duty of said board of trustees to hold at Cullowhee an annual meeting, at which meeting they shall qualify and organize, and consider recommendations of the president of the normal school, and such other business as may properly come before them. The board shall elect, at such meeting, a chairman and vice chairman, and appoint such committees among their membership as they may deem proper and wise for the conduct of this institution. They may also hold special meetings from time to time as they may deem necessary. (1925, c. 270, s. 3.)

§ 5842 (g). Trustees to hold property.—It shall be the duty of the board of trustees of the Western Carolina Teachers' College to take and hold all property, of whatever kind, heretofore held by the trustees of the Cullowhee Normal and Industrial School. The said boards of trustees and their successors in office shall hold in trust, for the State of North Carolina, all such property as is herein transferred to them, or to be later acquired by them for the purposes of said school. (1925, c. 270, s. 4; 1929, c. 251, s. 2.)

§ 5842 (h). Duties of trustees.—It shall be the duty of the board of trustees to provide for the spending of all moneys whatsoever belonging to, appropriated to, or in any way acquired by, the Western Carolina Teachers' College; they shall provide for the erection of all buildings, the making of all needed improvements, the maintenance and enlargement of physical plant of the said normal school, and may do all things deemed useful and wise by them for the good of the school: Provided, however, that before letting contracts for the erection of any new buildings, the plants for the same shall be approved by the State Superintendent of Public Instruction, by the Secretary of the State Board of Health, and by the Insurance Commissioner of North Carolina. (1925, c. 270, s. 5; 1929, c. 251, s. 2.))

§ 5842(i). Election of president, teachers, employees; qualifications of teachers.—It shall be the duty of the board of trustees to elect a president of the said normal school, to fix his salary, and his tenure of office. Upon the recommendation of the president, it shall be the duty of the board of trustees to elect other officers, teachers, and employees, to fix their duties, tenure of office and their respective salaries. No person shall be elected as a teacher or shall teach in the regular classes of the Western Carolina Teachers' College whose academic and professional qualifications are lower than that represented by graduation from a standard college or its undoubted equivalent: Provided, that persons who do not have such qualifications may be elected and may teach as a substitute or temporary teacher. (1925, c. 270, s. 6; 1929, c. 251, s. 2.)

§ 5842(j). Duties of president.—It shall be the duty of the president to act as secretary of the board of trustees, to keep, in a book to be provided for the purpose, a full and complete record of all meetings of said board, and he shall be the custodian of all records, deeds, contracts and the like. He shall, with the approval of the chairman of the board, call all meetings of the board, giving proper notice to each member of every such meeting. The president shall be the administrative and executive head of the institution. He shall prepare annually, for the board of trustees, a detailed report of the normal school for the preceding year, a copy of which report shall be sent to the State Superintendent of Public Instruction, and a copy shall be filed in the office of the president. (1925, c. 270, s. 7.)

§ 5842 (k). Purpose of school, standards.—The central purpose of the Western Carolina Teach-

ers' College shall be to prepare teachers for the public schools of North Carolina. To that end, the president shall prepare courses to study, subject to the approval of the State Superintendent of Public Instruction. It shall be the duty of the State Superintendent to visit the Western Carolina Teachers' College from time to time, and to advise with the president about standards, equipment and organization, to the end that a normal school of high grade shall be maintained. The standards shall not be lower in the main, than the average standard of normal schools of like rank in the United States. (1925, c. 170, s. 8; 1929, c. 251, s. 2.)

§ 5842 (l). Practice of demonstration school.—It shall be the duty of the board of education and county superintendent of Jackson County to cooperate with the board of trustees of the Western Carolina Teachers' College in maintaining a practice or demonstration school. It shall be the duty of board of trustees to furnish buildings, equipment, water and lights for such practice school; while the county board of education and the local school authorities shall furnish fuel and janitors, and shall pay all teachers in the practice school and regular State or county salary schedule, with the proviso that any excess in salaries on account of specially qualified teachers shall be paid by the board of trustees of the normal school. The qualifications of teachers in the practice school shall be fixed by the board of trustees; the nomination of such teachers shall be made jointly by the county superintendent and the president; but the practice teachers shall be elected by the school authorities of the local school district. The practice school, while under the general administration and control of the normal school authorities, shall remain an integral part of the county school system, and be subject to the same regulations as to supervision, standards, records, and the like as other graded schools of the county. In case of any disagreement between the officials herein referred to, said dispute shall be referred to the State Superintendent of Public Instruction, whose decision shall be final. (1925, c. 270, s. 9; 1929, c. 251, s. 2.)

§ 5842(m). Endowment fund.—The board of trustees are hereby authorized to establish a permanent endowment fund, to be loaned to needy and worthy students. The board may receive gifts and donations, and may, after furnishing lights and power to the normal school, sell excess current, if any there shall be, at a rate approved by the corporation commission, to the people in the community, and set aside for said endowment any moneys coming to the institution from such sources. The board of trustees are hereby empowered to make rules and regulations for the proper safeguarding and loaning of said funds. (1925, c. 270, s. 10.)

§ 5842 (n). Term of trustees; vacancy. — Except as herein otherwise provided, the trustees of the Western Carolina Teachers' College shall be appointed for the term of four years each. Whenever the term of office of any member or members of the board of trustees is about to expire, or should a vacancy occur for any reason, the president shall immediately notify the Governor, to the end that he may make appointment pursuant to this article. (1925, c. 270, s. 11; 1929, c. 251, s. 2.)

§ 5842(o). Appropriations paid to new corporation.—All appropriations made to the Cullowhee Normal and Industrial School for the fiscal year ending June the thirtieth, one thousand nine hundred and twenty-five, remaining unpaid, on March 10, 1925, shall be paid to the new corporation in the manner and form provided in the appropriation act of one thousand nine hundred and twenty-three. (1925, c. 270, s. 12.)

Art. 6. Cherokee Indian Normal School of Robeson County

§ 5843. Incorporation and corporate powers; location.—The Cherokee Indian Normal School of Robeson County shall be and remain a state institution for educational purposes, in the county of Robeson, under the name and style aforesaid, and by that name may have perpetual succession, sue and be sued, contract and be contracted with; have and hold school property, including buildings, lands, and all appurtenances thereto, situated in the county of Robeson, at any place in that county to be selected by the trustees between Bear swamp and Lumber river; acquire by purchase, donation, or otherwise, real and personal property for the purpose of establishing and maintaining a school of high grade for teachers of the race of Cherokee Indians of Robeson county in North Carolina. (Rev., s. 4236; 1887, c. 400, ss. 1, 6; 1911, cc. 168, ss. 1, 2, 215, s. 4; 1913, c. 123, ss. 4, 6.)

§ 5844. Appointment of trustees.—The state board of education shall appoint seven members of the Indian race, formerly called Croatans, and now known as the Cherokee Indians of Robeson County, to be constituted the board of trustees of said school, as follows: Two members for the term of two years, two for the term of four years, and three for the term of six years, and at the expiration of these terms their successors shall be appointed by the state board of education for a term of six years. (1911, c. 168, s. 2; 1913, c. 123, s. 4.)

§ 5845. President; election and duties.—The trustees shall elect one of their own number president of the corporation, whose duties shall be such as devolve upon such officers in similar cases, or such as shall be defined by the trustees. (Rev., s. 4237; 1887, c. 400, s. 2; 1911, c. 168, s. 2.)

§ 5846. Trustees to employ and discharge teachers and manage school.—The board of trustees of said Cherokee Indian normal school of Robeson county shall have the power to employ and discharge teachers, to prevent negroes from attending said school, and to exercise the usual functions of control and management of said school, their action being subject to the approval of the state board of education. (1911, c. 168, s. 2.)

§ 5846(1). Department for teaching of deaf, dumb and blind.—The board of trustees of the Cherokee Indian Normal School of Robeson county are hereby authorized, empowered and directed to employ some person trained in the teaching of the deaf and dumb or blind and to

provide a department in said school in which said deaf, dumb and/or blind Indian children of Robeson and surrounding counties may be taught, no provisions being now made for the teaching of said children, the said teacher to be employed in the same manner and under the same rules and regulations governing other teachers in the said school. (1935, c. 435.)

§ 5847. Admission and qualification of pupils.—Persons of the Indian race of Robeson County who are descendants of those that were determined to constitute those who were within the terms and contemplation of chapter fifty-one, Laws one thousand eighteen hundred and eighty-five, and within the census taken pursuant thereto by the County Board of Education of Robeson County, of either sex, resident in North Carolina, who are not under thirteen years of age, may attend the Cherokee Indian Normal School of Robeson County, and children not under eleven years of age may be admitted who can stand an approved examination in spelling, reading, writing, primary geography, and the fundamental rules of arithmetic. All those who shall enjoy the privileges of such school as students shall previously obligate themselves to teach the youth of the race of Cherokee Indians of Robeson County for a stated period. (Rev., s. 4241; 1887, c. 400, s. 10; 1893, c. 515, s. 2; 1911, c. 215, ss. 2, 3; 1913, c. 123, s. 4; 1929, c. 195, s. 6.)

This section is repealed in so far as it conflicts with § 5912(k).

This section applies to residents of Robeson who have come in since 1885. Goins v. Training School, 169 N. C. 736, 86 S. E. 629.

§ 5848. Tax exemption.—All property, real and personal, acquired by this corporation, by purchase, donation, or otherwise, as long as it is used for educational purposes, shall be exempt from taxation, whether on the part of the state or county. (Rev., s. 4239; 1887, c. 400, s. 8.)

§ 5849. Title to property of school conveyed to state board of education.—In accordance with the recent action of the trustees, in meeting assembled, of the Croatan state normal school, now known as the Cherokee Indian Normal School of Robeson County, situated near Pembroke, North Carolina, said school being incorporated under chapter four hundred, public laws of one thousand eight hundred and eighty-seven, which action of the trustees of said school has been duly certified to by the president, C. R. Sampson, and the secretary, A. A. Locklear, the said trustees are hereby empowered to convey by deed to the state board of education the title to all property of said school, and the state board of education is hereby authorized to accept same. (1911, c. 168, s. 1; 1911, c. 215, s. 2.)

Art. 7. Negro Normal Schools

§ 5850. Power of state board of education to establish.—The state board of education is hereby empowered to establish a normal school at any place it may deem most suitable, either in connection with one of the colored schools of high grade in the state, or otherwise, for teaching and training young men and women of the colored race, from the age of fifteen to twenty-five years, for teachers in the common schools of the state for the colored race. A preparatory department may be established in connection with the colored normal schools. And such board shall have the power to remove or close any of the existing state normal schools for the colored race. (Rev., s. 4180; Code, ss. 2651, 2652; 1881, cc. 91, 141, s. 5; 1879, c. 54, ss. 1, 2; 1876-7, c. 234, s. 2; 1901, c. 565, s. 1.)

§ 5851. Beneficiaries expected to teach three years.—It will be required and expected of all young persons who may be thus taught and trained for teachers of colored common schools at the cost of the state to apply themselves, as far as practicable, to the occupation of teaching, within the borders of this state, for a term of not less than three years after leaving school. (Rev., s. 4181; Code, s. 2653; 1876-7, c. 234, s. 3.)

This section is repealed in so far as it conflicts with § 5912(k).

§ 5852. Board of directors; appointment; powers; service without compensation.—The state board of education shall have power to appoint a board of seven directors, not more than five of whom shall reside in the county in which the school is located, for each of the colored normal schools. This board shall have the general management of such schools and shall have power to elect the teachers of the same and such other powers for the management of such schools as are not vested in the state board of education. These directors shall receive no compensation for their services other than actual expenses while attending meetings of the board. Two members of these boards of directors shall serve two years, two four years, and two six years; and they shall be appointed in May, one thousand nine hundred and seven, and thereafter, as vacancies occur by the expiration of the term of office of each, his successor shall be appointed by the state board of education for a term of six years, and vacancies occurring by resignation or death or otherwise of any member of said board of directors, before the expiration of his term of office, shall be filled by the state board of education for the unexpired term. The board of directors of each school shall elect one of their number chairman, one secretary, and one treasurer. All accounts or bills must be approved by the chairman and secretary before being paid by the treasurer. (Rev., s. 4182; 1903, c. 740; 1907, c. 856, s. 1; 1919, c. 309.)

§ 5853. Superintendent; election, duties, and salary.—The state board of education may elect a superintendent of these colored normal schools, and shall fix his salary. His duties shall be outlined by the state board of education, and he shall perform such other duties in the educational department of the state as the state superintendent of public instruction may direct. His salary and expenses shall be paid out of the annual appropriations for the state normal schools for the colored race upon the requisition of the state superintendent of public instruction. (Rev., s. 4182; 1903, c. 740; 1907, c. 856, s. 1; 1931, c. 276, s. 2.)

Editor's Note.—The Act of 1931 struck out the words "and of the Cherokee Indian normal school of Robeson County" formerly appearing in lines four and five of this section. See note to § 5775.

§ 5854. Special conditional appropriation to Slater school.—For the purpose of aiding the trustees of Slater industrial and state normal school, and for securing for the state the use of the buildings erected and now used by that corporation, the treasurer shall pay to the state board of education, out of any funds in the treasury not otherwise appropriated, a sum equal in amount to the sum annually raised by the trustees and officers of such corporation; but the amount to be so paid in any one year shall not exceed one thousand dollars. (Rev., s. 4185; 1899, c. 561, ss. 1, 8.)

Art. 8. Appalachian Training School

§ 5855. Incorporation and corporate powers; name; vacancies.—The person named in section one of chapter seven hundred and ninety-eight of the public laws of one thousand nine hundred and three, in section one of chapter five hundred and twenty-six of the public laws of one thousand nine hundred and seven, in section one of chapter five hundred and twenty-seven of the public laws of one thousand nine hundred and fifteen, and in section one of chapter one hundred of the public laws of one thousand nine hundred and seventeen, and their successors, are and shall continue to be a board of trustees, and as such constitute a corporation under the name of the Appalachian Training School for Teachers, and as such may sue and be sued, may purchase and hold real estate and personalty, receive donations, and do all things useful and necessary to carry out the true intent and meaning of said chapters. But all real property acquired for the purpose of such corporation under the provisions of said chapters shall be conveyed by deed to the state of North Carolina. The terms of office of all the trustees in office March tenth, one thousand nine hundred and nineteen, shall expire on May first, one thousand nine hundred and twenty-one, with their successors to be appointed by the governor and confirmed by the senate. The superintendent of public instruction of North Carolina is hereby declared to be a member ex officio of the board of trustees. (Rev., s. 4229; 1903, c. 798, ss. 1, 9, 11; 1907, c. 526, s. 1; 1915, c. 527, s. 1; 1917, c. 100, s. 1; 1919, c. 231, s. 1.)

§ 5856. Object of the corporation; free tuition provided.—The object in creating such corporation is the establishment of a training school for teachers in western North Carolina, to which end tuition in such school shall be free to all persons of the white race in the state who shall sign a pledge to teach in the schools of North Carolina for a term of not less than two years. (Rev., s. 4230; 1903, c. 798, s. 6.)

This section is repealed in so far as it conflicts with § 5912(k).

§ 5857. Corporate meetings and organization; treasurer's bond.—The board of trustees shall meet annually at a time and place to be fixed by them and elect a president and secretary and treasurer of the corporation. The president of said board and five members shall be a quorum to transact any and all business. The treasurer shall give a bond, with sufficient surety, to be approved by the corporators, payable to the state of North Carolina, in a sum not less than double the amount of money that shall go into his hands. (Rev., s. 4231; 1903, c. 798, ss. 2, 10; 1907, c. 526, s. 2.)

§ 5858. Solicitation of subscriptions. — The board of trustees shall open books of subscription, and shall have power to appoint an agent to solicit and collect subscriptions for the purpose of erecting buildings suitable and necessary for the establishment of such school. (Rev., s. 4232; 1903, c. 798, s. 3.)

§ 5859. Election of teachers; length of school term.—The board of trustees shall elect all teachers and fix their salaries and the length of the term of the school. (Rev., s. 4233; 1903, c. 798, s. 8.)

§ 5860. Appointment of police officer authorized.—The board of trustees of the Appalachian training school may appoint some suitable person as police officer for the premises of said training school and the highways passing through it, and he shall have the same power and authority therein as a police officer of an incorporated town. (1919, c. 231, s. 2.)

§ 5861. Annual reports to state superintendent.—Full reports of the work of the corporation and complete financial statements of the treasurer shall be made annually to the state superintendent of public instruction on or before the first day of October, and such other reports as such superintendent may require. (Rev., s. 4234; 1903, c. 798, s. 11.)

§ 5862. Trustees may dispose of land for railroad depot and right of way.—The trustees of the Appalachian training school at Boone, N. C., are empowered to sell or donate a site for a depot, not to exceed three acres, on the land now owned by the training school to the Watauga and Yadkin river railroad company, or any other railroad company, for the purpose of erecting a depot on same in the town of Boone, N. C., at whatever price may be agreed upon by the trustees and the railroad company. And the board of trustees are empowered to sell or donate to said railroad company, or any other railroad company, a right of way over their said property for the purpose of constructing a railroad over same. The board of trustees are further empowered to execute deeds to said railroad company, or any other railroad company, for the right of way and for the site for the construction of a depot. They are further empowered to apply any funds derived under this section to the permanent improvement of said Appalachian training school, in such way as may appear best to them. (1913, c. 115; 1917, c. 83.)

Art. 9. East Carolina Teachers' College

§ 5863. Incorporation and corporate powers.—The trustees of the East Carolina teachers' college, established by an act of the general assembly of North Carolina of one thousand nine hundred and seven, and located at Greenville, North Carolina, shall be and are hereby constituted a body corporate by and under the name and style of "The Board of Trustees of the East Carolina Teachers' College," and by that name may sue and be sued, make contracts, acquire real and personal property by gift, purchase, or devise, and exercise such other rights and privileges incident

to corporations of like character as are necessary for the proper administration of said college. (1907, c. 820, ss. 11, 12, 16; 1911, c. 159, s. 1; Ex. Sess. 1921, c. 27, s. 1.)

Editor's Note.—This section was amended by Ex. Sess. 1921, ch. 27, sec. 1, by substituting the word "college" for the original words "training school" twice appearing in this section.

Validity of Bond for Establishment.—See Cox v. Com., 146 N. C. 584, 60 S. E. 516.

§ 5864. Object of college.—The college shall be maintained by the state for the purpose of giving to young white men and women such education and training as shall fit and qualify them to teach in the public schools of North Carolina. (1907, c. 820, s. 15; 1911, c. 159, s. 2.)

§ 5865. Free tuition; diplomas and certificates.—Tuition in said college shall be free to those who signify their intention to teach for such time and upon such conditions as may be prescribed by the board of trustees; and the board of trustees, upon the recommendation of the faculty, shall give those students in said college who have completed the prescribed course of study a diploma of graduation, and shall have the power to confer degrees; and they may upon the recommendation of the faculty grant certificates of proficiency for the completion of special courses. (1907, c. 820, s. 14; 1911, c. 159, s. 5; Ex. Sess. 1920, c. 68, s. 1.)

Editor's Note.—The amendment (Ex. Sess. 1920, ch. 68, sec. 1) authorized the board of trustees to confer degrees upon students completing the course of said college.

This section is repealed in so far as it conflicts with § 5912(k).

§ 5866. Board of trustees; appointment and terms; removal; vacancies.—The Board of Trustees of East Carolina Teachers' College shall consist of twelve members to be appointed by the Governor and confirmed by the Senate and the State Superintendent of Public Instruction as ex officio chairman, making thirteen members of the Board in all: Provided, that the twelve members appointed by the Governor and confirmed by the Senate each shall serve for a period of six years or until his successor has been appointed: Provided, further, that the first board under this act shall be appointed as follows: one member for two years, four for four years and four for six years: Provided, further, that the term of office shall begin July first of the calendar years ending in an odd number, i. e., July first, nineteen hundred and twenty-nine: Provided, further, that all of the members of the present board appointed prior to nineteen hundred and twenty-seven shall hold office to June thirtieth, nineteen hundred and twenty-nine.

Members of the Board of Trustees shall not be removed from office except upon complaint filed by the Chairman of the Board and the case heard before the Governor and the Council of State: Provided, that whenever a Trustee shall fail to be present for one year at the regular meetings of the Board, his place as Trustee shall be deemed vacant and said vacancy shall be filled by the Governor subject to the approval of the Senate when it next convenes. (1907, cc. 820, 515; 1911, c. 159, s. 2; 1925, c. 306, s. 7; 1927, c. 164; 1929, c. 259.)

Editor's Note.—The amendment of 1925 provided that the board be appointed by the governor instead of the board of education. The amendment of 1927, increased the number of trustees from nine to twelve, and provided that these three additional members of the Board of Trustees shall be appointed by the Governor within thirty days from the ratification of the amendment; and that whenever a trustee shall fail to be present for one year at the regular meetings of the Board, his place as trustee shall be deemed vacant and said vacancy shall be filled by the Governor.

§ 5867. Course of study.—The board of trustees shall have power to prescribe the course of study of said college and shall lay special emphasis on those subjects taught in the public schools of the state, and on the art and science of teaching. (1907, c. 820, s. 13; 1911, c. 159, s. 4; Ex. Sess. 1920, c. 68, s. 2.)

Editor's Note.—The Laws of 1920 Extra Session 1920, ch. 68, sec. 2 struck out from the end of this section the prohibition upon the power of the board of trustees that they would not prescribe a curriculum beyond that which would fit and prepare a student for unconditional entrance into the freshman's class of the University of North Carolina.

§ 5868. Discrimination against counties.—The board of trustees shall make no rules that discriminate against one county in favor of another in the admission of pupils into said college. (1907, c. 820, s. 17.)

§ 5869. Power of exclusion from dormitories.—When, in the judgment of the board of trustees, the best interest of the college will be promoted thereby, the board may decline to admit young men into the rooms of the dormitories. (1911, c. 159, s. 6.)

§ 5870. Vesting the rights and titles.—All rights and titles heretofore acquired in any way for the use and benefit of said college shall vest and remain in the said board of trustees as herein incorporated. (1911, c. 159, s. 7; Ex. Sess. 1921, c. 27, s. 2.)

Editor's Note.—The amendment 1921 (Ex. Sess. 1921, ch. 27, sec. 2) substituted the word "college" for the words "training school."

§ 5871. Biennial reports to governor.—The trustees shall report biennially to the governor, before the meeting of each general assembly, the operation and condition of said college. (1907, c. 820, s. 15; 1911, c. 159, s. 8.)

Art. 10. State School for the Blind and the Deaf

§ 5872. Incorporation and management.—The institution for the education of the deaf and dumb and the blind, located in the city of Raleigh, on Caswell square, and on a lot located in the eastern part of the city, belonging to the state, and on which the institution for the colored children is located, shall be a corporation under the name and style of The State School for the Blind and the Deaf, and shall be under the management of a board of directors and superintendent. (Rev., 4187; Code, s. 2227; 1881, c. 211, s. 1; 1917, c. 35, s. 1.)

Cited in Hass v. Hass, 195 N. C. 734, 739, 143 S. E. 541.

§ 5873. Directors; appointment; terms; vacancies.—There shall be eleven (11) directors of the School for the Blind and Deaf at Raleigh, to be appointed by the Governor. Within thirty days from March 10, 1925 the Governor shall appoint six directors and within six months from March 10, 1925 the Governor shall appoint five directors. At the time of making the appointment the Governor shall designate which of the present members of the board are to be succeeded by his nominees and

appointees. The terms of the directors shall be four years from their appointment. The Governor shall fill all vacancies. The Governor shall transmit to the Senate at the next session of the General Assembly the names of his appointees for confirmation. (Rev., s. 4188; Code, s. 2228; 1889, cc. 311, 540; 1901, c. 707; 1905, c. 67; 1925, c. 306, s. 10.)

Editor's Note.—Two material changes were made by the Laws of 1925. The term of the directors was decreased from six to four years. There were formerly three classes, appointed at intervals of two years. All are now appointed in the same year. For removal of the officers provided for in this section see section 5912(h).

§ 5874. President, executive committee, and other officials; election, terms, and salaries.—The board of directors shall organize by electing one of its number president and three an executive committee. The terms of office in each case shall be for two years. The board shall elect a superintendent, who shall be ex officio secretary of the board, and whose term of office shall be for three years; also a steward and a physician whose terms of office shall be for two years; and such other officers, agents, and teachers as shall be deemed necessary. The compensation for officers and agents and teachers, mentioned in this section, shall be fixed by the board, and shall not be increased nor reduced during their term of service. The board shall have power to erect any buildings necessary, make improvements, and in general do all matters and things which may be beneficial to the good government of the institution, and to this end may make by-laws for the government of the same. The board of directors may term the head teacher of the white department "principal," and the chief officer of the colored department "principal of the colored department." (Rev., s. 4189; Code, s. 2229; 1881, c. 211, s. 3; 1917, c. 35, ss. 1, 2.)

§ 5875. Meetings of the board.—The board shall meet at stated times and also at such other times as it may deem necessary. The members of the board shall serve without reward, save their traveling expenses incurred in the discharge of their official duties. (Rev., s. 4190; Code, s. 2230; 1881, c. 211, s. 4.)

§ 5876. Admission of pupils; how admission obtained.—The board of directors shall, on application, receive in the institution for the purpose of education, in the main department, all white blind children, and in the department for the colored all colored deaf-mutes and blind children, residents of this state, not of confirmed immoral character, nor imbecile, nor unsound in mind, nor incapacitated by physical infirmity for useful instruction, who are between the ages of seven and twenty-one years: Provided, that application shall be made and applicants received at stated times, which shall be at the commencement of some scholastic year.

In case of deaf-mutes the following questions shall be answered:

Name?
Is the child white or colored?
When and where was he born?
Was he born deaf?
At what age did he lose his hearing?
By what disease or accident did he become deaf?
Is the deafness total or partial?
Have any attempts been made to remove the deafness?
Is there any ability to articulate or read on the lips?
Have any attempts been made to communicate instruction?
Is he laboring under any bodily infirmity?
Does he show any signs of mental imbecility or idiocy?
Has he had the smallpox or been vaccinated?
Has he had the scarlet fever?
Has he had the measles?
Has he had the mumps?
Has he had the whooping-cough?
Are there any other cases of deafness in the family?
Are there any cases of deafness among relatives or ancestors?
What is the name of the father?
What is the name of the mother?
What is the occupation of the father?
What is his postoffice address?
Is either of the parents dead?
Has a second connection been formed by marriage?
Was there any relationship between the parents previous to marriage?

In case of blind applicants the following questions shall be answered:

Name?
Is the child white or colored?
When and where was he born?
Was he born blind?
At what age did he become blind?
By what disease or accident did he become blind?
Is the blindness total or partial?
Have any attempts been made to remove the blindness?
Have any attempts been made to communicate instruction?
Is he laboring under any bodily infirmity?
Does he show any signs of mental inbecility or idiocy?
Has he had the smallpox or been vaccinated?
Has he had the scarlet fever?
Has he had the measles?
Has he had the mumps?
Has he had the whooping-cough?
Are there any other cases of blindness in the family?
Are there any cases of blindness among relatives or ancestors?
What is the name of the father?
What is the name of the mother?
What is the occupation of the father?
What is his postoffice address?
Is either of the parents dead?
Has a second connection been formed by marriage?
Was there any relationship between the parents previous to marriage?

When the application is made, it shall be filed in the office of the superintendent, and on reception of applicant a record of such pupil shall be made and entered in a book to be kept for that purpose. (Rev., s. 4191; Code, s. 2231; 1881, c. 211, s. 5; 1917, c. 35, s. 1.)

§ 5877. Admission of curable blind.—The di-

rectors of the institution for the blind, in the city of Raleigh, shall set apart two rooms in said institutions, one for males and one for females, for the use of the curable blind who, by reason of poverty, are unable to pay for treatment. It shall be the duty of the directors of the institutions for the blind in Raleigh to admit into such institutions, from time to time, such of the blind of the state as they may deem to be curable. (Rev., s. 4192; 1895, c. 461.)

§ 5878. Admission of pupils from other states.—The board may, on such terms as they deem proper, admit as pupils persons of like infirmity from any other state: Provided, such power shall not be exercised to the exclusion of any child of this state, and the person so admitted shall not acquire the condition of a resident of the state by virtue of such pupilage. (Rev., s. 4193; Code, s. 2232; 1881, c. 211, s. 6.)

§ 5879. Board may confer degrees.—The board may, upon the recommendation of the superintendent and faculty, confer such degree or marks of literary distinction as may be thought best to encourage merit. (Rev., s. 4194; Code, s. 2233; 1881, c. 211, s. 7; 1917, c. 35, s. 1.)

§ 5880. Election of officers.—The board of directors shall, on the second Monday in May, one thousand nine hundred and five, and every three years thereafter, elect an officer to be styled superintendent. They may elect all officers and teachers at the same time. The terms of office of the superintendent and the steward shall begin June first, and the terms of all other officers and teachers shall begin September first, and for the periods named in this article. The superintendent shall be a man of good moral character, and shall have experience as a teacher in the deaf, dumb, and blind school of North Carolina, or some similar institution, for the term of two or more years. He shall have charge of the institution in all its departments, and shall do and perform such duties and exercise such supervision as is incumbent upon such officer. (Rev., s. 4195; Code, s. 2234; 1881, c. 211, s. 8; 1889, c. 539, 1893, c. 137; 1901, c. 707, s. 2; 1917, c. 35, s. 1.)

§ 5881. State treasurer, treasurer of.—The state treasurer shall be ex officio treasurer of the institution. He shall report to the board at such times as they may call on him, showing the amount received on account of the institution, amount paid out, and amount on hand. (Rev., s. 4196; Code, s. 2235; 1881, c. 211, s. 9.)

§ 5882. Reports of board to governor. — The board shall make a report to the governor on the first of January next before the regular meeting of the general assembly, showing the condition of the institution in its various departments, and shall give any information the governor shall desire from time to time. (Rev., s. 4196; Code, s. 2235; 1881, c. 211, s. 9.)

§ 5883. Removal of officers.—The board shall have power to remove any officer, employee, or teacher for gross immorality, wilful neglect of duty, or any good and sufficient cause; but in any such case notice in writing of the charges shall be served on the accused, proved, and entered on record. The board shall fill all vacancies which may occur from any cause. (Rev., s. 4197; Code, s. 2236; 1881, c. 211, s. 10.)

§ 5884. Employees.—The superintendent, subject to the control of the board, shall have power to employ all employees and fix their compensation, and to discharge them at pleasure. (Rev., s. 4198; Code, s. 2237; 1881, c. 211, s. 11; 1917, c. 35, s. 1.)

§ 5885. When clothing etc., for pupils paid for by state.—Where it shall appear to the satisfaction of the Superintendent of Public Welfare and the Chairman of the Board of County Commissioners that the parents of any deaf or blind child of the county, are then unable to provide such child with clothing and/or traveling expenses to and from the State School for the Blind and the Deaf, and the North Carolina School for the Deaf, or where such child has no living parent, or any estate of its own, or any person, persons, upon which it is legally dependent who are able to provide expenses provided for herein, then, upon the demand of the institution which such child attends or has been accepted for attendance, said demand being made through the State Auditor, the Board of County Commissioners of the county in which such child resides shall issue or cause to be issued, its warrant payable to the State Auditor, same to be credited to the proper institution, for the payment of an amount sufficient to clothe and pay traveling expenses of said child; provided, that the amount, in no case, shall exceed forty-five dollars ($45.00) per annum for each child, in addition to such amounts as may be necessary to defray the actual traveling expenses to and from said institution. For such amount so furnished, the parents, or other person upon whom such child is, or may be, legally dependent, and such child, shall be and remain liable for the payment thereof, together with (5%) per annum interest thereon from the date of each payment by the county. At any time after any of such payments, in the discretion of the Board of Commissioners, or any succeeding board, a suit may be instituted in some court of competent jurisdiction in said county, or in any other county in the State according to the venue now or hereafter fixed by law for the recovery of the same, which suit shall be prosecuted by the person who may now or hereafter perform the duties of County Attorney, and the parents of such child shall be liable therefor jointly and severally, and all other persons who are made liable therefor herein shall be liable severally for such amounts and interest and the costs of suit. (Rev., s. 4199; Code, s. 2238; 1879, c. 332, s. 1; Ex. Sess. 1908, c. 69; 1917, c. 35, s. 3; 1919, c. 183; 1927, c. 86; 1929, c. 181, s. 1.)

Editor's Note.—Prior to the amendment of 1927, this section required that it must appear to the satisfaction of the governor, upon the affidavit of two respectable citizens, that the parents of such child were unable to defray his expenses, and the governor was to draw upon the auditor for such expenses.

§ 5886. Title to farm vested in directors.—The farm of one hundred acres, now held by the said school, west of the city of Raleigh, shall be held in fee simple by the board of directors of said institution, to be improved, or used, or disposed of, or exchanged for lands more convenient, as the

best interests of the said institution, in its judgment, may require or demand. (Rev., s. 4201; 1901, c. 707, s. 3.)

§§ 5887, 5887 (a), 5887 (b). Appropriations.—Repealed: (1925, c. 275, s. 6.)

Art. 11. North Carolina School for the Deaf

§ 5888. Incorporation and location.—There shall be maintained a school for the white deaf children of the state which shall be a corporation under the corporate name of The North Carolina School for the Deaf, to be located upon the grounds donated for that purpose near the town of Morganton. The North Carolina school for the deaf shall be classed and defined as an educational institution. (Rev., s. 4202; 1891, c. 399, s. 1; 1915, c. 14.)

§ 5889. Directors; terms; vacancies.—The North Carolina School for the Deaf at Morganton shall be under the control and management of a board of directors consisting of seven (7) members. Within thirty days from March 10, 1925 the Governor shall appoint four directors, and within six months from March 10, 1925 the Governor shall appoint three directors. At the time of making such appointment the Governor shall designate which of the present board are to be succeeded by his appointees. The terms of the said trustees shall be four years from the date of their appointment. The Governor shall fill all vacancies. The Governor shall transmit to Senate at the next session of the General Assembly the names of his appointees for confirmation. (Rev., s. 4203; 1891, c. 399, s. 2; 1901, c. 210; 1925, c. 306, s. 11.)

Editor's Note.—The changes effected in this section by the Laws of 1925 are the same as in section 5873. See the Editor's Note to section 5873.

Filling Vacancy by Governor.—See State v. Brestol, 122 N. C. 245, 30 S. E. 1.

§ 5890. Organization of board; other officials; salaries.—The board of directors shall organize by appointing one of its number president and three an executive committee, who shall hold office for two years; they shall elect a superintendent, who shall be ex officio secretary of the board and whose term of office shall be three years, and such other officers, teachers, and agents as shall be deemed necessary. The compensation for officers, teachers, and agents shall be fixed by the board, and shall not be increased or reduced during their term of service. (Rev., s. 4206; 1893, c. 131, ss. 1, 2; 1915, c. 14.)

§ 5891. Superintendent. — The superintendent shall be a teacher of knowledge, skill, and ability in his profession and experience in the management and instruction of the deaf. He shall possess good executive ability and shall be the chief executive officer of the institution. He shall devote his whole time to the supervision of the institution, and shall see that the pupils are properly instructed in the branches of learning and industrial pursuits as provided for in this article, and under the supervision of the board. The board shall elect all teachers and subordinate officers by and with the consent and recommendation of the superintendent. (Rev., s. 4206; 1893, c. 131, ss. 1, 2; 1915, c. 14.)

§ 5892. Pupils admitted; education.—The board of directors shall, according to such reasonable regulations as it may prescribe, on application, receive into the school for the purposes of education all white deaf children resident of the state not of confirmed immoral character, nor imbecile or unsound in mind or incapacitated by physical infirmity for useful instruction, who are between the ages of eight and twenty-three years. Only those who have been bona fide citizens of North Carolina for a period of two years shall be eligible to and entitled to receive free tuition and maintenance. The board of directors may fix charges and prescribe rules whereby nonresident deaf children may be admitted, but in no event shall the admission of nonresidents in any way prevent the attendance of any eligible deaf child, resident of North Carolina. The board shall provide for the instruction of all pupils in the branches of study now prescribed by law for the public schools of the state and in such other branches as may be of special benefit to the deaf. As soon as practicable, the boys shall be instructed and trained in such mechanical pursuits as may be suited to them, and in practical agriculture and subjects relating thereto; and the girls shall be instructed in sewing, housekeeping, and such arts and industrial branches as may be useful to them in making themselves self-supporting. (Rev., s. 4204; 1891, c. 399, ss. 7, 8; 1907, c. 929; 1915, c. 14.)

§ 5893. Powers of board.—The board shall have power to make such by-laws, rules, and regulations, not inconsistent with the laws of the state, as may be necessary for the proper management of said school and its officers; and shall conduct the school in such way, as far as practicable, as to make it self-sustaining. The board is further authorized to make such arrangements with the board of directors of the state hospital at Morganton as may be agreed upon to promote convenience and economy for joint water supply and lighting arrangements. (Rev., s. 4205; 1891, c. 399, ss. 8, 9, 10.)

Art. 12. The Caswell Training School

§ 5894. Incorporation and general corporate powers.—The Caswell Training School, formerly established as the North Carolina School for the Feeble-minded, by chapter eighty-seven of the public laws of nineteen hundred and eleven, shall be and remain a corporation invested with all property and rights of property heretofore held under the former name, and under this name may acquire and hold all such property as may be devised, bequeathed, or conveyed to it, and may use all the authority, privileges, and possessions that said corporation exercised under the former title and name, and shall be subject to all legal liability outstanding against it under the former title and name. (1915, c. 266, s. 1.)

§ 5895. Objects of the school. — The purpose and aim of the Caswell training school is to segregate, care for, train, and educate, as their mentality will permit, the state's mental defectives; to disseminate knowledge concerning the extent, nature, and menace of mental deficiency; to suggest and initiate methods for its control, reduction, and ultimate eradication from our people; and to maintain an extension bureau for instructing the public in the care of the mental defectives who remain in their homes and for the after-care of discharged inmates of the institution; and to create

and maintain a psychological clinic for the study and observation of mental defectives charged with crime, and to give expert advice in all cases of mental defect. (1919, c. 224, s. 1.)

§ 5896. (Repealed by Public Laws 1921, Chapter 183, section 1. See sections 6159(a)-6159(c).)

§ 5897. State treasurer to keep accounts and pay out moneys.—The state treasurer shall keep full accounts of said school and shall pay out all moneys upon the warrant of the superintendent thereof, countersigned by two members of the board of directors under such rules and regulations as the board of directors may establish. (1911, c. 87, s. 8; 1913, c. 191, s. 2; 1919, c. 295.)

§ 5898. Persons admitted; county commissioners to approve.—There shall be received into the Caswell training school, subject to such rules and regulations as the board of directors may adopt, feeble-minded and mentally defective persons of any age when in the judgment of the officer of public welfare and the board of directors of said institution it is deemed advisable. All applications for admission must be approved by the local county welfare officer and the judge of the juvenile court or the clerk of the court of the county wherein said applicant resides. (1911, c. 87, s. 3; 1915, c. 266, s. 2; 1919, c. 224, s. 2; 1923, c. 34.)

Editor's Note.—Prior to the amendment of 1923, this section specified pupils and their ages, who could be admitted to this institution. By the amendment any mentally defective or feeble minded person of any age may be admitted in the judgment of the officer of public welfare. The former section had also required that the person making an application for admission of pupils should first obtain written approval of the board of county commissioners of the pupil's legal residence. In lieu of this last provision the last sentence of this section was substituted.

§ 5899. Persons authorized to make application.—The application for the admission of a child between the ages of six and twenty-one years shall be made, first, by the father, if the father and mother are living together; second, by the one having custody of the child, if the father and mother are not living together; third, by a guardian duly appointed; fourth, by the superintendent of any county home, or by the person having the management of any orphanage, association, charity, society, children's home workers, ministers, teachers, or physicians, or other institutions where children are cared for. Under items third and fourth, consent of parents, if living, is not required. (1915, c. 266, s. 3.)

§ 5900. Procedure for admission of adult females.—1. Affidavit. In case of females between the ages of twenty-one and thirty years, any responsible person residing in the county may file in the office of the clerk of the superior court of the county an affidavit stating that some woman of the county is not being properly maintained or cared for by those having such person in charge; that such woman is feeble-minded, and is over twenty-one and under thirty years, and is in good bodily health, and is not helpless, is not afflicted with any chronic or contagious disease; that she is a legal resident of the state and county where the application is filed, together with such other statements as may be necessary to show that she is a proper person to be admitted to such institution, and that her admission thereto would be in conformity to the rules and regulations established by the board of directors for the admission and care of such person.

2. Summons upon affidavit. Upon the filing of the affidavit in the office of the clerk of the superior court by the proper person, the clerk shall issue a summons to such person named in the application or petition, requiring her to be and appear before said court, or the judge thereof, at some time to be fixed by the clerk, not more than ten days thereafter.

3. Action upon affidavit. The judge or clerk shall, as soon as convenient, pass upon said application or petition, and it shall be the duty of said court to examine such witnesses as may be necessary, among whom shall be at least one physician, to prove the truth or falsity of the statements in said application or petition.

4. Order of commitment. If the court finds that each and all of the allegations contained in said application or petition are true, and that said person is a proper person to be cared for in said institution, it shall be its duty to make an order committing the care and custody of said person to said institution.

5. Transcript to superintendent; costs paid by county. It shall be the duty of the clerk of said court to make a certified copy of said application or petition and the finding and judgment of said court, and transmit the same, together with a statement of such facts as can be ascertained concerning the personal and family history of such person, to the superintendent of the institution at Kinston, North Carolina. The costs of said proceedings shall be allowed and paid by the board of county commissioners of the county. (1915, c. 266, s. 4.)

§ 5901. Decision by superintendent and notice to clerk.—Upon receipt of such order of commitment, it shall be the duty of the superintendent of the institution at once to consider the application and to determine whether or not said person shall be admitted to the institution, and to notify the clerk of the court of his decision, and if there is room for any more inmates, or as soon thereafter as there shall be room in the institution, to notify the clerk that such person will be received in the institution. With such notice the superintendent shall send a list of such clothing as shall be prescribed by the board of trustees of the institution, and a blank form of certificate of health and freedom of exposure to contagious disease at such time. In case the parents or custodian of such person shall be financially unable to furnish the clothing as required, the clerk shall procure the clothing at a cost not to exceed twenty dollars, and the payment for same shall be made out of the county treasury by the board of county commissioners upon the certificate of the clerk of the court. (1915, c. 266, s. 5.)

§ 5902. Conveyance to and from school upon discharge.—Upon receiving notice that such person can be admitted to the institution, the clerk shall order the parents, custodian, or applicant to convey such person to the institution without expense to the institution or the county. In case such parents, custodian, or applicant is financially unable to bear such expense, the clerk shall cause the person to be conveyed to the institution in the same manner and in accordance with the same forms as are now provided by law for the trans-

fer of patients to insane hospitals, so far as they are applicable. And when any child or person, who is or has been an inmate of the institution, is dismissed or discharged from said institution in accordance with the rules and regulations of said institution, the parent or guardian of such child or person shall come, or send some responsible person, to receive said child or person and convey same to his or her legal residence, without cost to the institution; and in case the parent or guardian of said child or person is wholly unable to bear such expense, then the commissioners of said county shall allow such expense. (1915, c. 266, s. 6.)

§ 5903. Clothing and conveyance of children at cost of county.—In case the parents of a child between the ages of six and twenty-one are wholly unable to bear the expense of furnishing the clothing of said child as required by the rules and regulations of the board of directors of said school, or of furnishing the money for transportation of such child to the school, it shall be the duty of the county from which the child is sent to bear such cost, in the manner provided for adults in the other sections of this article. (1915, c. 266, s. 7.)

§ 5904. Discharge of pupils.—Any pupil of said school may be discharged or returned to his or her parents or guardian when in the judgment of the directors it will not be beneficial to such pupil, or will not be for the best interests of said school, to retain the pupil therein. (1915, c. 266, s. 9.)

§ 5905. Bond issue for establishment of school authorized.—For the purpose of carrying out the provisions of this article a sum of money not exceeding sixty thousand dollars shall be appropriated to be used and expended for the purposes herein mentioned within the next two years, and the state treasurer is hereby authorized and directed to issue bonds of the State of North Carolina, payable forty years after the first day of July, one thousand nine hundred and eleven, to an amount not exceeding the sum of sixty thousand dollars, such bonds to be issued and sold, after due advertising, on the best obtainable terms from time to time as the money is needed to meet the expenses of building the institution. All of said bonds shall bear interest at a rate not exceeding four per cent per annum, from the date of issue until paid, which said interest shall be paid semiannually the first days of January and July of each and every year, so long as any portion of the said bonds shall remain due and unpaid. If in the progress of the work funds should be needed at a time when financial conditions should seem unfavorable for the sale of bonds, then, in his discretion, the state treasurer may, and he is hereby fully authorized, to negotiate a temporary loan or loans upon the best obtainable terms, and, if necessary, to pledge any of the unsold bonds as collateral therefor. (1911, c. 87, s. 9.)

§ 5906. Form of such bonds and coupons.—The bonds authorized and directed to be issued by the preceding section shall be coupon bonds of the denomination of one hundred dollars, five hundred dollars, and one thousand dollars each, as may be determined by said state treasurer, and shall be signed by the governor and the state treasurer, and shall be sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the said bonds shall in all other respects be in such form as the said state treasurer may direct. (1911, c. 87, s. 10.)

§ 5907. Bonds exempt from taxation.—The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, but when constituting a part of such surplus shall be deducted from the total assets in order to ascertain the taxable value of such shares. (1911, c. 87, s. 11.)

§ 5908. State bonds for permanent improvements authorized.—For the purpose of making permanent improvements to the Caswell training school at Kinston, North Carolina, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable ten years after the first day of July, one thousand nine hundred and seventeen, to an amount not to exceed the sum of seventy-five thousand dollars. The appropriation provided for in this section shall not interfere with other appropriations made by the general assembly of nineteen hundred and seventeen, but if the income of the state is insufficient to meet all appropriations the treasurer of the state is hereby directed to borrow sufficient funds to meet the appropriation provided for in this section. (1917, c. 269, ss. 1, 6.)

§ 5909. Interest on such bonds.—All of said bonds shall bear interest at a rate not exceeding four per cent per annum from the first day of July, one thousand nine hundred and seventeen, until paid, which said interest shall be payable semiannually on the first day of January and July of each and every year so long as any portion of the said bonds shall remain due and unpaid. (1917, c. 269, s. 2.)

§ 5910. Terms of bonds and coupons; sale of bonds.—The bonds authorized and directed to be issued by the preceding section shall be coupon bonds of the denomination of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and they shall be signed by the governor and state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon, and the bonds shall in all other respects be in such form as the State treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina of any kind whatsoever, which shall be expressed on the face of the bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the best price. He is authorized to accept bids for the entire issue or any portion thereof, and when the conditions are

equal, he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. (1917, c. 269, s. 3.)

§ 5911. Bonds exempt from taxation.—The said bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1917, c. 269, s. 4.)

§ 5912. Expenditure of proceeds.—All expenditures of the proceeds of these bonds shall be under the direction and control of the state building commission provided for by Article 1 of the chapter State Departments, Institutions and Commissions, under the same terms and provisions as are therein set out. (1917, c. 269, s. 7.)

Art. 13. State Training School for Negro Boys

§ 5912(a). Creation of corporation; name; powers.—A corporation, to be kn wn and designated "The State Training School for Negro Boys," is hereby created, and as such corporation it is authorized and empowered to accept and use donations and appropriations, hold real estate by purchase or gift, and do all other things necessary and requisite to be done for the care, discipline and training of negro boys which may be received by said corporation. (1921, c. 190, s. 1.)

§ 5912(b). Control and management; trustees.—The State Training School for Negro Boys shall be under the control and management of a board of eight trustees. All of the trustees shall be appointed by the Governor. Within thirty days from March 10, 1925 the Governor shall appoint three of the trustees and within six months the remaining two. At the time of making the appointments the Governor shall designate which of the present trustees are to be succeeded by his appointees. The terms of the said trustees shall be four years from and after the date of their appointment. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. All vacancies shall be filled by the Governor. Each member of the board of trustees shall be entitled to receive actual expenses while engaged in the business of the institution. (1921, c. 190, s. 2; 1925, c. 306, s. 6.)

Editor's Note.—By the amendment of 1925 it was provided that all the trustees should be appointed in the same year. Formerly they were appointed at intervals of one year. For removal of the officers provided for in this section see section 5912(h).

Section two of the amendatory act provides that the term of the three additional trustees provided for by the amendment began at the time of their appointment by the Governor and shall be for a term of three years.

§ 5912(c). Trustees to meet and organize; location of school; powers of trustees; board of parole. — Immediately upon receiving notice of their appointment as trustees, the persons so designated shall meet and organize by electing from their number a chairman, and one as secretary, or the latter two offices may be combined. They shall thereupon undertake as expeditiously as possible the business of selecting a location and preparing for the opening and maintenance of the state training school for negro boys. The board shall have power to appoint and dismiss at will a superintendent and other employees, to make such rules for its own meetings and guidance as it deems necessary; to have the general superintendence, management, and control of the institution; of the grounds and buildings, officers, and employees thereof; of the inmates therein, and all matters relating to the government, discipline, contracts, and fiscal concerns thereof; and may make such rules and regulations as may seem to them necessary for carrying out the purposes of the institution. And the board shall have the right to keep, restrain, and control the inmates of the institution until such time as the board may deem proper for their discharge under such proper and humane rules and regulations as the board may adopt. The board of managers shall constitute a board of parole of the institution, and shall have power to parole and discharge the inmates under such rules and regulations as the board may prescribe, and to retake them upon failure to comply with any requirement of parole. (1921, c. 190, s. 3.)

§ 5912(d). Delinquents committed to institution; cost; age limit. — Delinquent negro boys, under the age of sixteen years, may be committed to the institution by any juvenile, state, or other court having jurisdiction over such boy, but no boy shall be sent to the institution until the committee agency has received notice from the superintendent that such person can be received. The cost of sending inmates shall be paid by the county or municipality sending the same, as the case may be. In special cases where the public good would seem to be subserved thereby the board shall have the right, upon the request of any court of proper jurisdiction, to receive an inmate above the age of sixteen, but this shall be a matter wholly within the discretion of the board. When any commitment to the institution is made, it shall not be for any specified time, but may continue or terminate at the discretion of the board, not to exceed the age of majority of the inmate. (1921, c. 190, s. 4.)

§ 5912(e). Appropriation; selection of location of institution; title; mental treatment.—For the purpose of preparing and opening the state training school for negro boys, the sum of twenty-five thousand dollars, as provided by an act passed by this general assembly, entitled "An act to issue bonds of the state for the permanent enlargement and improvement of the state's educational institutions," be used by said board of trustees for permanent improvements or equipment, or both, but no part thereof shall be spent until a suitable location has been acquired, either by purchase or otherwise. The location of the institution shall be recommended by the board of trustees and approved by the governor. In the event the location selected is upon property now owned by the state or any other state institution, then the governing body in whom the title is vested is hereby directed and authorized to transfer title to the board of trustees of the state training school for

negro boys, and turn over to them all or such portions of the said property as the governor may direct, without compensation, as the governor may deem proper for the best interests of the state. The sum of ten thousand dollars annually, as provided in the general appropriation bill passed by this general assembly, entitled "An act to make appropriations to the state institutions," or as much thereof as may be necessary shall be used for the maintenance and support of the said state training school for negro boys. The site for said school shall be selected with regard to the proper mental treatment of the inmates thereof, (1921, c. 190, s. 5.)

§ 5912(f). Apportionment of admissions; private or municipal contributions.—In receiving inmates of the institution, the trustees shall distribute such admissions as near as may be in relation to the negro population of the several counties until all the maintenance appropriation from the state is exhausted. If after such maintenance fund is exhausted it be found possible to provide housing space and control for additional inmates, then the trustees may receive such additional number of inmates as can be cared for upon the payment by private persons or municipal or county authorities of the actual cost of the maintenance of such inmates. County and municipal authorities are hereby given authority to pay such sums in their discretion. (1921, c. 190, s. 6.)

Art. 14. Miscellaneous Provisions as to Trustees, Directors, etc.

§ 5912(g). Trustees or directors of the North Carolina College for Negroes at Durham.—There shall be twelve (12) trustees for the North Carolina College for Negroes at Durham. Within thirty days from March 10, 1925 the Governor shall appoint seven (7) members for each of said boards and within six months from March 10, 1925 the Governor shall appoint five (5) members for each of said boards. At the time of making such appointments he shall designate the members of the present board who are to be succeeded by his appointees. All vacancies are to be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of the persons appointed by him for confirmation. (1925, c. 306, s. 9a.)

§ 5912(h). To hold office until successor appointed; removal.—Each of the directors, trustees, managers or other persons whose appointments are provided for in sections 5775(a), 5866, 5873, 5889, 5912(b), 5912(g), 6159, 6159(a), 7172, 7313, 7316, and 7330 shall hold office until his or her successor or successors have been appointed and qualified according to law. The Governor shall have the power to remove any member of any of the boards provided for in the above named sections, by whatsoever name called, whenever in his opinion it is to the best interest of the State to remove such person, and the Governor shall not be required to give any reason for such removal. (1925, c. 306, ss. 13, 14.)

§ 5912(i). Free tuition to child drawing federal compensation on account of death or disability of father. — Any child in North Carolina, who is drawing compensation from the United States Government, on account of the death or disability of its father, which death or disability was incurred while a member of the armed forces of the United States Government during the World War, and who has not attained the age of twenty-one years, may be entitled to and granted a scholarship of free tuition in any of the State's educational institutions. (1931, c. 370.)

Art. 15. Tuition Fees

§ 5912(j). State-supported institutions required to charge tuition fees.—The trustees of the University of North Carolina, including the University of North Carolina, the State College of Agriculture and Engineering, the North Carolina College for Women, and the trustees of the East Carolina Teachers' College, the Western Carolina Teachers' College, the Appalachian State Teachers' College, the Negro Agricultural and Technical College, the Winston-Salem Teachers' College, the Fayetteville State Normal School, the Elizabeth City Normal School, the North Carolina College for Negroes and the Cherokee Indian Normal School, be and they are hereby authorized and directed to fix the tuition fees for their several state supported institutions, each board of trustees acting separately for their respective institutions, in such amount or amounts as they may deem best taking into consideration the nature of each department and institution and the cost of equipment and maintaining the same; and are further instructed to charge and collect from each student, at the beginning of each semester, tuition fees and an amount sufficient to pay room rent, servants' hire and other expenses for the term. Indigent cripples are exempt from the provisions of this article.

In the event that said students are unable to pay the cost of tuition, as the same may become due, in cash, the said several boards of trustees are hereby authorized and empowered, in their discretion, to accept the obligation of the student or students together with such collateral or security as they may deem necessary and proper, it being the purpose of this article that all students in state institutions of higher learning shall be required to pay tuition, and that free tuition be and the same is hereby abolished, except such students as are physically disabled, and are so certified to be by the vocational rehabilitation division of the state board for vocational education, who shall be entitled to free tuition in any of the institutions named in this article. (1933, c. 320, s. 1.)

§ 5912(k). Sections repealed. — Sections 5800, 5820, 5821, 5831, 5835, 5842, 5847, 5851, 5856, 5865, and chapter 56, Private Laws 1925, be and the same are hereby repealed only in so far as they are in direct conflict with the provisions of this article, and that all other laws and clauses of laws in conflict with this article be and the same are hereby repealed. (1933, c. 320, s. 2.)

§ 5912(l). Higher fees from non-residents may be charged.—The provisions of this article shall not be construed to prohibit the several boards of trustees from charging non-resident students tuition in excess of that charged resident students. (1933, c. 320, s. 3.)

CHAPTER 97
ELECTIONS
SUBCHAPTER I. GENERAL ELECTIONS
Art. 1. Definitions

§ 5913. Political party defined; creation of new party.—A political party within the meaning of the election laws of this state shall be any group of voters which, at the last preceding general state election, polled for its candidate for governor, or for presidential electors, in the state at least three per cent of the entire vote cast therein for governor, or for presidential electors; or any group of voters which shall have filed with the state board of elections, at least ninety days before a general state election, a petition signed by ten thousand qualified voters, declaring their intention of organizing a state political party, the name of which shall be stated in the petition together with the name and address of the state chairman thereof, and also declaring their intention of participating in the next succeeding election. No such group of electors shall assume a name or designation which shall be so similar, in the opinion of the state board of elections, to that of an existing political party, as to confuse or mislead the voters at an election. When any new political party has qualified for participation in an election as herein required, and has furnished to the state board of elections the names of such of its nominees as is desired to be printed on the official ballots by the first day of September prior to the election, it shall be the duty of the state board of elections to cause to be printed on the official ballots furnished by it to the counties the names of such nominees. When any political party fails to cast three per cent of the total vote cast at an election for governor, or for presidential electors, it shall cease to be a political party within the meaning of this chapter. (Rev., s. 4292; 1901, c. 89, s. 85; 1933, c. 165, s. 1.)

See 11 N. C. Law Rev., 226, for review and comment on this section.

For an interesting note on the definition of political parties see 11 N. C. Law Rev. 148 et seq.

For definition of "political party" under the primary election law, see sec. 6052.

This chapter repeals prior laws on the same subject. Window v. Morton, 118 N. C. 486, 24 S. E. 417.

Art. 2. Time of Elections

§ 5914. For state officers.—On Tuesday next after the first Monday in November, in the year of our Lord one thousand nine hundred and four, and every four years thereafter, an election shall be held in the several election precincts in each county for the following officers: Governor, lieutenant-governor, secretary of state, auditor, treasurer, superintendent of public instruction, attorney-general, and other state officers whose terms last for four years, and at said time and every two years thereafter, elections shall be held in the several election precincts in each county for other state officers whose election is not otherwise provided for by law. (Rev. s. 4293; 1901, c. 89, s. 3.)

§ 5915. For presidential electors. — On the Tuesday next after the first Monday in the month of November, in the year of our Lord one thousand nine hundred and eight, and every four years thereafter, or on such days as the congress of the United States shall have directed, a poll shall be opened in each of the precincts of the state for the election of electors of president and vice president of the United States, the number of whom is to be equal to the number of senators and representatives in congress to which this state may be entitled, and the persons shall be electors for the state as aforesaid, and the voting place in each ward or precinct shall be the same as in elections for members of the general assembly, unless changed by the county board of elections. (Rev., s. 4294; 1901, c. 89, s. 77.)

§ 5916. For president and vice-president, by electors.—The persons elected and appointed as electors of the president and vice-president of the United States shall assemble on the first Monday after the second Wednesday in December next following their election, in the capitol at the city of Raleigh, and then and there give their votes on behalf of the State of North Carolina for president and vice-president of the United States, and proceed in relation thereto in all things conformably to the constitution of the United States and the acts of congress in that behalf. (Rev., s. 4295; 1901, c. 89, s. 82; 1935, c. 143, s. 1.)

Editor's Note.—Prior to the amendment of 1935 the electors were required to assemble on the second Monday in January.

§ 5917. For county officers, solicitors, and congressmen. — On the Tuesday next after the first Monday in November, in the year of our Lord one thousand nine hundred and six, and every two years thereafter, an election shall be held in the several election precincts in each county for members of congress in the several districts, members of the general assembly for their respective counties and districts, a register of deeds, county surveyor, coroner, sheriff, county commissioners, where the county commissioners are elected by the people, and in such counties as have one, a county treasurer, and other officers whose terms are for two years. And on the said first Tuesday after the first Monday in November, in the year of our Lord one thousand nine hundred and six, and every four years thereafter, an election shall be held in each county for clerk of the superior court, and at such times an election shall be held in the several judicial districts for the officer of solicitor. (Rev., s. 4296; 1901, c. 89, s. 1.)

For the time of election of United States Senates, see section 6005.

§ 5918. For township offices. — On the first Tuesday after the first Monday in November, in the year of our Lord one thousand nine hundred and six, and every two years thereafter, an election shall be held in each township for the office of constable, and also for justices of the peace in such counties as elect them by a vote of the people, and all other officers elected by a vote of the township. (Rev., s. 4297; 1901, c. 89, s. 2.)

Creation of New Township—Election upon Reasonable Notice.—Where the legislature has created a new township and the time for election has passed, as the public good requires the offices to be immediately filled, the commissioners may order an election upon reasonable notice. Grady v. County Comm., 74 N. C. 101.

§ 5919. Special election for members of general assembly.—When a vacancy occurs in the general assembly by death, resignation, or otherwise, it

shall be the duty of the chairman of the county board of elections, or of the sheriff of the county in which the late member resided, provided the general assembly shall not be in session, to notify the governor of such vacancy, and in case the general assembly shall be in session when such vacancy occurs, it shall be the duty of the presiding officer in the house in which the vacancy occurs to notify the governor of the same, who shall thereupon issue a writ of election to the chairman or chairmen of the district or county represented by the late member, said election to be held at such time as the governor may designate, and in such manner as may be prescribed by law. (Rev., s. 4298; 1901, c. 89, s. 74.)

§ 5920. For vacancies in state offices.—Whenever any vacancies shall exist by reason of death, resignation, or otherwise, in any of the following offices, to wit, secretary of state, auditor, treasurer, superintendent of public instruction, attorney-general, solicitor, justices of the supreme court, judges of the superior court, or any other state officer elected by the people, the same shall be filled by elections, to be held in the manner and places and under the same regulations and rules as prescribed for general elections, at the next regular election for members of the general assembly which shall occur more than thirty days after such vacancy, except as otherwise provided for in the constitution. (Rev., s. 4299; 1901, c. 89, ss. 4, 73.)

Art. 3. State Board of Elections

§ 5921. State board of elections; appointment; term of office.—There shall be a state board of elections, consisting of five electors, whose terms of office shall begin on the first day of January, nineteen hundred and thirty-four, and continue for four years and until their successors are appointed and qualified. The governor shall appoint the members of this board and likewise shall appoint their successors every four years at the expiration of each four-year term. Not more than three members of said board shall be of the same political party. The terms of the present members and officers of said board shall continue until January first, nineteen hundred and thirty-four, or until their successors are appointed and qualified. (Rev., s. 4300; 1901, c. 89, s. 5; 1933, c. 165, s. 1.)

The 1933 amendment changes this section and those following by increasing the term of office from two to four years and consolidating a number of provisions of the old law and conveniently enumerating the duties and powers of the state board in a single section of fifteen clauses. Several of these are new in whole or in part. See 11 N. C. Law Rev., 227.

§ 5922. Meetings of board; vacancies; pay.—The state board of elections shall meet in Raleigh whenever the chairman of said board shall call such meetings as may be necessary to discharge the duties and functions imposed upon said board by this chapter at such times and places as he may appoint. At the first meeting held after the appointment of members for a new term, the members shall take the oath of office and the board shall then organize by electing one of its members chairman and another secretary of said board.

The chairman of the state board of elections shall call a meeting of the board upon the application in writing of any two members thereof, or if there be no chairman, or if the chairman does not call such meeting, any three members of said board shall have power to call a meeting of the board and any duties imposed or power conferred by this chapter may be performed or exercised at such meeting, although the time for performing or exercising the same prescribed by this chapter may have expired; and if at any meeting any member of said board shall fail to attend, and by reason thereof there is a failure of a quorum, the members attending shall adjourn from day to day, for not more than three days, at the end of which time, if there should be no quorum, the governor may remove the members so failing to attend summarily and appoint their successors.

Any vacancy occurring in the said board shall be filled by the governor, and the person so appointed shall fill the unexpired term.

The members of the board shall receive in full compensation for their services four dollars per day for the time they are actually engaged in the discharge of their duties, together with their actual traveling expenses, and such other expenses as are necessary and incidental to the discharge of the duties imposed by this chapter. (Rev., ss. 2760, 4301; 1901, c. 89, s. 7; 1933, c. 165, s. 1.)

§ 5923. Duties of the state board of elections.—It shall be the duty of the state board of elections:

1. To appoint, in the manner provided by law, all members of the county boards of elections, and to advise such members of such boards as to the proper methods of conducting primaries and elections.

2. To prepare rules, regulations and instructions for the conduct of primaries and elections.

3. To publish and furnish to the county boards of elections and other election officials, from time to time, a sufficient number of indexed copies of all election laws then in force.

4. To publish, issue and distribute such explanatory pamphlets as in the opinion of the board should be issued to the electorate.

5. To furnish to the county boards of elections such registration and poll books, cards, blanks, instructions and forms as may be necessary for the registration of voters and holding elections in the respective counties.

6. To determine, in the manner provided by law, the forms of ballots, the forms of all blanks, instructions, poll books, tally sheets, abstract and return forms, and certificates of elections to be used in primaries and elections.

7. To prepare, print and distribute to the county boards of elections all ballots for the use in any primary or election held in the state which the law provides shall be printed and furnished by the state to the counties, and to instruct the county boards of elections as to the printing of their county and local ballots.

8. To certify to the several county boards of elections the names of such candidates for district offices who are required to file notice of candidacy with the state board of elections, but whose names are required to be printed on the county ballots.

9. To require such reports from the several county boards and election officers as are provided by law, or as may be deemed necessary.

10. To compel the observance, by election of-

ficers in the counties, of the requirements of the election laws, and the state board of elections shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws pertaining to their duties thereunder. And the state board of elections shall have power to remove any member of a county board of elections for neglect or failure in his duties and to appoint a successor.

11. To investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county, and to report violations of the election laws to the attorney general or solicitor of the district for further investigation and prosecution.

12. To tabulate the primary and election returns and to declare the results of same, and to prepare abstracts of the votes cast in each county in the state for such offices as is provided by law shall be tabulated by the state board of elections.

13. To keep a minute book showing a record of all proceedings and findings at each meeting of the state board of elections, which book shall be kept in the office of the state board of elections.

14. To make such recommendations to the governor and legislature relative to the conduct and administration of the primaries and the elections in the state as it may deem advisable.

15. To have the general supervision over the primaries and elections in the state and it shall have the authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable: Provided same shall not conflict with any provisions of the law.

In the performance of these enumerated duties, the chairman of the state board of elections shall have the power to administer oaths, issue subpoenas, summon witnesses, compel the production of papers, books, records and other evidence; and to fix the time and place for hearing any matter relating to the administration and the enforcement of the election laws: Provided, however, the place of hearing shall be had in the county where the irregularities are alleged to have been committed. (Rev., s. 4302; 1901, c. 89, s. 7; 1933, c. 165, s. 1.)

Art. 4. County Board of Elections

§ 5924. County boards of elections; appointments; term of office and qualifications.—There shall be in every county in the state a county board of elections to consist of three persons of good moral character, who are electors in the county in which they are to act, who shall be appointed by the state board of elections on the tenth Saturday preceding each primary election, and whose terms of office shall continue for two years from the time of their appointment and until their successors are appointed and qualified. Not more than two members of the county board of elections shall belong to the same political party, and the state chairman of each political party shall have the right to recommend three electors in each county for such offices, and it shall be the duty of the state board of elections to appoint said county board from the names thus recommended: Provided, that said chairman shall recommend such persons on or before the tenth Saturday before a primary election is to be held.

No person shall serve as a member of the county board of elections who holds any elective public office or who is a candidate for any office in the primary or election. (Rev., s. 4303; 1901, c. 89, s. 6; 1933, c. 165, s. 2.)

The 1933 amendment makes ineligible as a member of the County Board any office holder or candidate in a primary or general election. See 11 N. C. Law Rev., 228.

§ 5925. Meetings of county elections boards; vacancies; pay.—The county board of elections in each county in the state shall meet in their respective counties at the courthouse at noon on the seventh Saturday before each primary election, and a majority being present, they shall take the oath of office and shall then organize by electing one of its members chairman and another member secretary, and it may meet at such other times and places as the chairman of said board, or any two members thereof may direct, for the performance of such duties as required by law.

Vacancies in the membership of the county boards of elections shall be filled by the state board of elections and the persons so appointed shall fill the unexpired term.

The members of the county board of elections shall receive in full compensation for their services three dollars per day for the time they are actually engaged in the discharge of their duties, together with such other expenses as are necessary and incidental to the discharge of their duties. (Rev., s. 4304; 1901, c. 89, s. 11; 1923, c. 111, s. 1; 1933, c. 165, s. 2.)

Editor's Note.—Prior to the amendment of 1923, this section required that the board of electors would meet not later than the first Monday in September 1906. In lieu of this requirement the present section requires that it should meet on the seventh Saturday before each primary election.

§ 5926. Removal of member of county board of elections.—The state board of elections shall have the power to remove from office any member of the county board of elections for incompetency, failure of duty, fraud, or for any other satisfactory cause. When any member of the county board shall be removed by the state board, the vacancy occurring shall be filled by the state board of elections; a vacancy occurring in the county board of elections for any other cause than removal by the state board of elections may be filled by either the board or by the chairman of the state board of elections, but the person so appointed shall be of the same political party as his predecessor. (Rev., s. 4305; 1901, c. 89, s. 11; 1913, c. 138; 1921, c. 181, s. 1; 1923, c. 196; 1933, c. 165, s. 2.)

The 1933 amendment amends this section by adding fraud as a cause for removal of a member of the Board. See 11 N. C. Law Rev., 228.

§ 5927. Duties of county boards of elections. — The boards of elections within their respective jurisdictions by a majority vote shall exercise, in the manner herein provided, all powers granted to such boards in this chapter, and shall perform all the duties imposed by law which shall include the following:

1. To establish, define, provide, rearrange and combine election precincts.

2. To fix and provide the places for registration, when required, and for holding primaries and elections.

3. To provide for the purchase, preservation and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms,

papers and equipment as may be used in registration, nominations and elections.

4. To appoint and remove its clerk, assistant clerks, and employees, and all registrars, judges, clerks and other officers of elections, and to fill vacancies, and to designate the ward or district and precinct in which each shall serve.

5. To make and issue such rules and regulations and instructions, not inconsistent with law, or the rules established by the state board of elections as they may deem necessary for the guidance of election officers and voters.

6. To advertise and contract for the printing of ballots, and other supplies used in registrations and elections.

7. To provide for the issuance of all notices, advertisements, and publications concerning elections required by law.

8. To provide for the delivery of ballots, poll books and other required papers and materials to the polling places.

9. To cause the polling places to be suitably provided with stalls and other supplies required by law.

10. To investigate irregularities, non-performance of duties, or violations of laws by election officers and other persons; to administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and to report the facts to the prosecuting attorney.

11. To review, examine and certify the sufficiency and validity of petitions and nomination papers.

12. To receive the returns of primaries and elections, canvass the returns, make abstracts thereof and transmit such abstracts to the proper authorities provided by law.

13. To issue certificates of election to county officers and members of the general assembly, except state senators in districts composed of more than one county.

14. To keep minute book of proceedings of board.

15. To prepare and submit to the proper appropriating officers a budget estimating the cost of elections for the ensuing fiscal year.

16. To perform such other duties as may be prescribed by law or the rules of the state board of elections. (Rev., s. 4306; 1901, c. 89, s. 11; 1921, c. 181, s. 2; 1927, c. 260, s. 1; 1933, c. 165, s. 2.)

The 1933 amendment amends this section so as to consolidate and enumerate the duties and powers of the Board under sixteen clauses. Several of these are new or partly new. See 11 N. C. Law Rev., 228.

Art. 5. Precinct Election Officers and Election Precincts

§ 5928. Appointment of registrars and judges of elections; qualifications.—The county boards of elections, at the first meeting herein provided to be held on the seventh Saturday before each primary election, shall select one person of good repute who shall act as registrar and two other persons of good repute who shall act as judges of election for each election precinct in the respective counties for both the ensuing primary and general election, whose terms of office shall continue for two years from the time of their appointment, or until their successors are appointed and qualified, and who shall conduct the primaries and elections within their respective precincts. Each registrar and judge of election so appointed shall be able to read and write and they shall be residents of the precincts for which they are appointed. The chairman of each political party in each county shall have the right to recommend from three to five electors in each precinct, who are residents of the precinct, and who shall be of good moral character and able to read and write, for appointment as registrar and for judges of election in each precinct, and such appointments may be made from such names so recommended; Provided, such recommendations are made by the seventh Saturday before each primary election: Provided, further, that in any primary, when only one political party participates in such primary then all of the precinct officials selected for holding such primary shall be chosen only from such political party so participating. In a primary, where more than one political party participates, and in the general election, not more than one judge of election in each precinct shall be of the same political party with that of the registrar. The county boards of elections shall also have the right to appoint assistants for such precincts where there are more than three hundred registered voters when deemed advisable. No person holding any office or place of trust or profit under the government of the United States, or of the state of North Carolina, or any political sub-division thereof, except justices of the peace, shall be eligible to appointment as an election official. No person who is a candidate shall be eligible to serve as a registrar or judge or assistant.

The registrars, judges and assistants shall, before entering upon their duties, have the oath of office administered to them by some officer authorized to administer oaths. (Rev., s. 4307; 1901, c. 89, s. 8; 1933, c. 165, s. 3.)

Editor's Note.—This section was amended so as to add an additional requirement for election officials; they must be able to read and write. No political office holder, federal or state, except a Justice of Peace, may be appointed an election official. See 11 N. C. Law Rev., 228.

The following cases were decided under former section 5969, repealed by Public Laws of 1933, ch. 165, § 7. However, these cases seem applicable to the present law as the provisions of former section 5969 are substantially set forth in the instant section.

Appointment of Registrars by County Board of Elections.—Under the provisions of this section, the County Board of Elections is not required in all cases to appoint three registrars for each voting precinct, but to appoint one qualified voter of the precinct from each one of the political parties, and such board has no right or authority to appoint a member of one party for another party. Mullen v. Morrow, 123 N. C. 773, 31 S. E. 1003.

Party of Person Appointed by Board of Elections.—Upon failure of a Chairman of the State Executive Committee of a political party to designate judges of election on behalf of such party, the persons appointed by the board of elections must belong to the political party for which they are appointed. Harkins v. Cathey, 119 N. C. 649, 26 S. E. 136.

The board of elections has no authority to appoint two registrars from the same party in the same voting precinct. Mullen v. Morrow, 123 N. C. 773, 31 S. E. 1003.

Mandamus to Compel Board to Appoint Proper Persons.—Where the Chairman of the State Executive Committee of one political party fails to designate the judges of election for a particular county for and on behalf of such party, and under the exercise of the power of appointment given in this section, appoints persons not having the requisite qualifications, the Chairman of the Executive Committee of another political party in such county may bring mandamus to compel the board to appoint proper persons. Harkins v. Cathey, 119 N. C. 649, 26 S. E. 136.

§ 5929. Names of precinct officers published by board.—The county board of elections shall, im-

mediately after the appointment of the registrars and judges of elections as herein provided, publish the names of the persons so appointed, at the courthouse door of said county, and shall notify each person appointed of his or her appointment, either by letter or by having a notice to be served upon said persons by the sheriff. (Rev., s. 4308; 1901, c. 89, s. 16; 1923, c. 111, s. 2; 1933, c. 165, s. 3.)

§ 5930. Vacancies in precinct offices; how filled. —If any registrar or judge of election shall fail to perform the duties of his office, and for that, or for any other cause be removed from office, or shall die or resign, or if there shall for any other cause be a vacancy in said office, the chairman of the county board of elections may appoint another in his place, of the same political party, and have such person or persons notified of the appointment. If any person appointed judge of election shall fail to attend at the polls at the hour of opening the same, the registrar of the township, ward or precinct shall appoint some suitable elector of the same political party as the judge failing to attend, if practicable, to act in his stead, who shall be by him sworn before acting. If the registrar shall fail to appear at the polls, then the judges of election may appoint another to act as registrar, who shall also be sworn before acting. (Rev., s. 4309; 1901, c. 89, s. 9; 1933, c. 165, s. 3.)

§ 5931. Removal of precinct officers; reasons for. —The county board of elections shall have power to remove any registrar or judge of elections appointed by it for incompetency, failure to discharge the duties of office, failure to qualify within the time prescribed by law, fraud or for any other satisfactory cause. (Rev., s. 4310; 1901, c. 89, s. 10; 1933, c. 165, s. 3.)

§ 5932. Compensation of precinct officers. — Judges of elections and assistants shall each receive for their services on the day of a primary or election the sum of three dollars. The registrar shall receive the sum of three dollars per day for his services on the day of a primary or election, and shall also receive the sum of three dollars per day for each Saturday during the period of registration that he attends at the polling place for the purpose of registering voters, and said registrar shall receive no other compensation whatsoever. Any person sworn in to act as registrar or judge of election shall receive the same compensation as the registrar and judge: Provided, that markers appointed for assisting voters in marking their ballots shall not receive any compensation therefor. (Rev., s. 4311; 1901, c. 89, s. 42; 1927, c. 270, s. 2; 1931, c. 254, c. 16; 1933, c. 165, s. 3; 1935, c. 421, s. 1.)

Editor's Note.—The amendment of 1935 changes the compensation from 2 to 3 dollars but specifies that it shall not apply to the counties of Bladen, Hyde and Wake.

§ 5933. Duties of registrars and judges of election.—The registrars and judges of election shall perform such duties as is provided by law, which duties shall consist of:

1. The fair and impartial conduct of the primaries and elections within their respective precincts on the day of election.

2. The enforcement of peace and good order in and about the place of registration and voting. They shall especially keep the place of access of the electors to the polling place open and unobstructed, prevent and stop improper practices or attempts to obstruct, intimidate or interfere with any elector in registering or voting. They shall protect challengers and witnesses against molestation and violence in the performance of their duties, and may eject from the polling place any such challenger or witness for violation of any provisions of the election laws. They shall prevent riots, violence, tumult or disorder. In the discharge of these duties they may call upon the sheriff, police, or other peace officers to aid them in enforcing the law. They may order the arrest of any person violating any provision of the election law, but such arrest shall not prevent such person from registering or voting if he is entitled so to do. The sheriff, all constables, police officers and other officers of the peace, shall immediately obey and aid in the enforcement of any lawful order made by the precinct election officials in the enforcement of the election laws.

3. The registrar shall have in his charge the actual registration of voters within his precinct and shall attend the polling place on the days required for the registration of new voters and for hearing challenges, but in the performance of these duties the registrar shall be subject to the observance of such reasonable rules and regulations as the county board of elections may prescribe not inconsistent with the law.

4. The registrar shall have charge of the registration book on the day of election or primary for passing on the registration of voters who present themselves at the polls for the purpose of voting.

5. One of the judges of election shall keep a poll book in which shall be entered the name of every person who shall vote in the primary or election. The poll and registration books shall be signed by the registrar and judges of election at the close of any primary or election and filed with the clerk of the superior court.

6. The registrars and judges shall hear challenges on the right of electors to vote as provided by law.

The registrars and judges shall count the votes cast in their precinct and make such return of same as is required by law.

8. The precinct officers shall make such an accounting to the chairman of the county board of elections for ballots and for election supplies as required by law. (Rev., s. 4312; 1901, c. 89, s. 41; 1933, c. 165, s. 3.)

Editor's Note.—The case treated below was decided under former section 5971, now repealed, which provided for the duties of judges of elections. This case seems applicable to the present law as the provisions of former section 5971 are substantially set forth in the instant section.

Absence of Judges.—In the absence of fraud it is not material to the validity of an election that the persons appointed judges to hold it electioneered, or were absent from their posts at different times during the day. Wilson v. Peterson, 69 N. C. 113.

§ 5934. Election precincts established or altered. —The county board of elections may, in their respective counties, adopt the present election precincts, or they may establish new precincts, but the election precincts and polling places as now fixed in each county shall remain as they now are until altered. In the case of the alteration of the election precincts or polling places therein, they

shall give twenty days' notice thereof, prior to the beginning of the registration period, in some public journal, or in lieu thereof, in three public places in such county, and at the courthouse door. And the county board of elections shall have power from time to time, after dividing their counties into election precincts, to establish, alter, discontinue, or create such new election precincts in their respective counties as they may deem expedient, giving twenty days' notice thereof, prior to the beginning of registration period, by advertising in some public journal, or in lieu thereof, in three public places in such county, and at the courthouse door. If any polling place is changed in any precinct, like advertisement of such change shall be given. And there shall be at least one polling place in every township, conveniently located for a majority of the voters. (Rev., s. 4313; 1913, c. 53; 1921, c. 180; 1933, c. 165, s. 3.)

Editor's Note.—The following cases were decided under the section that appeared in Michie's Code of 1931 as § 5926, the provisions of which are substantially set forth in the instant section.

Erasing Voter's Name from Registration Books. — The registrar is without authority to erase the name of a qualified voter from the registration book, at his request, the registration book being in the nature of a public record, which may not be changed, except by some method provided by law. Williams v. County Comm'rs, 176 N. C. 554, 97 S. E. 478.

Correct Notice of Polling Place.—The requirement that a correct notice of the polling places be given, is fully met when the voting places have been established and are well known to the entire electorate of the county, and the voters were fully and formally notified that the election would be held on the specified date "at the various voting precincts of the county as they are now established." Board v. Security Trust Co., 164 N. C. 301, 80 S. E. 230.

The failure to give the full twenty day notice may be immaterial. See Board v. Malone, 179 N. C. 10, 101 S. E. 500.

Notice for New Registration.—The preliminary notice of twenty days for a new registration for an election provided by this section applies, under the general election law, to an election called by a school district to vote upon the issuance of bonds by the district for school purposes, and a tax levy to provide for the same. Miller v. Duke School Dist., 184 N. C. 1097, 113 S. E. 786.

§ 5935. New registration of voters or revision of registration books; how made.—The county board of elections shall have power from time to time to order a revision of the registration book of any precinct in any township and to order a new registration for any precinct; and if and when a new registration is ordered, notice shall be given as hereinbefore provided for the alteration of an election precinct or polling place: Provided, however, when a new registration or revision is ordered as herein provided for, the names of all persons who have been registered under the absentee voters' law shall remain upon the registration books unless the said persons so registered have died or otherwise become disqualified electors. The several county boards of elections shall have power to revise the registration books of any precinct and may require them to be purged of illegal or disqualified voters, after notice to such voters as herein directed. When an order for revision is made by said county board of elections, it shall be directed to the registrar and judges of election of the precinct to which it relates, directing said officials to meet at the polling place on the first Saturday for the registration of voters, before any primary or general election, and to prepare from the registration books a list of the names of registered voters, with their names and addresses as appearing on the registration book who are, in the opinion of said precinct officials, dead or disqualified by removal from said precinct or county for the length of time prescribed by law to be disqualified to vote in that particular precinct. When such list is prepared it shall, within forty-eight hours, be delivered to the chairman of the county board of elections, who shall cause to be mailed to each of the names on said list, at his or her address as shown on said list, a notice requiring such person to appear at the polling place for the precinct in which they are registered, on the Saturday prescribed for hearing challenges, and show that they are legally entitled to vote in that particular precinct, or in lieu of a personal appearance at the precinct on the day named for hearing challenges, such person may furnish such satisfactory evidence by mail or otherwise, that he or she is qualified to vote in said precinct. Upon failure of such person to make such personal appearance on challenge day, or upon failure of such person to offer satisfactory evidence that he or she is qualified and entitled to vote in said precinct in the approaching primary or general election, their names shall be stricken off the registration book. After due investigation, such precinct officers shall strike from the registration book the names of all such persons found by them to be dead or disqualified to vote by removal from the precinct for such time as prescribed by law shall disqualify them from voting in such precinct.

However, in the event that any person, whose name has been removed from the registration book by said county board of elections as having been disqualified to vote in that precinct, should appear at the polling place on election day and give satisfactory evidence to the registrar and judges that he had never received any notice by mail or otherwise of his name being placed among the list of disqualified voters in that precinct, and can satisfy said officials that he is qualified to vote in that precinct, then such person's name shall be placed back on the registration book and he shall be allowed to vote in said precinct as before. (Rev., s. 4314; 1905, c. 510; 1909, c. 894; 1921, c. 181, s. 3; 1933, c. 165, s. 3.)

The provision for new registrations of voters and revisions of the registration books, is rewritten by the 1933 amendment. See 11 N. C. Law Rev., 228.

Art. 6. Qualification of Voters

§ 5936. Persons excluded from electoral franchise.—The following classes of persons shall not be allowed to register or vote in this state, to wit: First, persons under twenty-one years of age; second, idiots and lunatics; third, persons who have been convicted or confessed their guilt in open court, upon indictment, of any crime the punishment of which is now or may hereafter be imprisonment in the state's prison, unless such person shall have been restored to citizenship in the manner prescribed by law. (Rev., s. 4315; 1901, c. 89, s. 14.)

Cross Reference.—For restoration to citizenship, see sections 385 et seq.

Teachers.—The right of teachers in a locality to vote therein is made to depend upon whether they were residents therein, only for the scholastic year. A question is incompetent that asks them of their intention to make the locality their legal residence, since the answer involves a question of law as to what constitutes a suffi-

ment legal residence to qualify them to vote. State v. Carter, 195 N. C. 697, 143 S. E. 513.

Infants and Aliens.—X was under 21 years of age and Y was a citizen of Syria, not of North Carolina, at the time they voted. They were therefore disqualified to vote in an election for Mayor. State v. Carter, 195 N. C. 697, 698, 143 S. E. 513.

Three Months Residence Prior to Election.—H testified that he had lived in C only three months before the election and that the defendant registered his name. For this reason he was not a qualified elector to vote in an election for mayor. State v. Carter, 195 N. C. 697, 698, 143 S. E. 513.

Conviction of Infamous Crime. See In re Reid, 119 N. C. 641, 26 S. E. 337.

Person Imprisoned for Misdemeanor.—See People v. Teague, 106 N. C. 576, 11 S. E. 665.

§ 5937. Qualifications of electors.—Subject to the exceptions contained in the preceding section, every person who has been naturalized, and who shall have resided in the state of North Carolina for one year and in the precinct, ward, or other election district in which he offers to vote, four months next preceding the election shall, if otherwise qualified as prescribed in this chapter, be a qualified elector in the precinct, or ward, or township in which he resides: Provided, that removal from one precinct, ward, or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the state prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.

All registrars and judges of elections, in determining the residence of a person offering to register or vote, shall be governed by the following rules, so far as they may apply:

a. That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

b. A person shall not be considered to have lost his residence who leaves his home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

c. A person shall not be considered to have gained a residence in any county of this state, into which he comes for temporary purposes only, without the intention of making such county his permanent place of abode.

d. The place where the family of a married man or woman resides shall be considered and held to be his or her place of residence; except that where the husband and wife have separated and live apart, the place where he or she resides the length of time required by the provisions of this article to entitle a person to vote, shall be considered and held to be his or her residence.

e. If a person remove to another state or county within this state, with the intention of making such state or county his permanent residence, he shall be considered to have lost his residence in the state or county from which he has removed.

f. If a person remove to another state or county within this state, with the intention of remaining there an indefinite time and making such state or county his place of residence, he shall be considered to have lost his place of residence in this state or county from which he has removed, notwithstanding, he may entertain an intention to return at some future time.

g. School teachers who remove to a county for the purpose only of teaching in the schools of that county temporarily and with the intention or expectation of returning to the county of their parents or other relatives during the vacation period to live, and who do not have the intention of becoming residents of the county in which they have moved to teach, shall be considered residents of that county of their parents or other relatives for the purpose of voting.

h. If a person remove to the District of Columbia, or other federal territory, to engage in the government service, he shall not be considered to have lost his residence in this state during the period of such service, and the place where such person resided at the time of his removal shall be considered and held to be his place of residence. This rule shall also apply to employees of the state government who remove from one county to another within the state, unless a contrary intention is shown by such employee.

i. If a person goes into another state or county, and while there exercises the right of a citizen by voting in an election, he shall be considered to have lost his residence in this state or county.

j. All questions of the right to vote shall, except as otherwise provided herein, be heard and determined by the registrar and judges of election in the precinct where the question arose. (Rev., s. 4316; 1901, c. 89, s. 15; 19th amendt. U. S. Const.; amendt. State Const., 1920; 1920 (Ex. Sess.), c. 18, s. 1; 1933, c. 165, s. 4.)

Editor's Note.—No changes are made in this section by the 1933 amendment as to the qualifications for suffrage, age, citizenship, literacy, and residence requirements, but ten rules are added to govern and aid Registrars and Judges of Elections in determining the difficult problem of the voter's legal residence. See 11 N. C. Law Rev., 229.

Change of Voting Qualifications by General Assembly.—The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections. People v. Canaday, 73 N. C. 198.

Qualification for Municipal Suffrage.—Quaere: Whether the General Assembly must require the same qualifications for municipal suffrage as for electors in State and county elections. State v. Viele, 164 N. C. 122, 80 S. E. 408.

But this question seems to have been decided in People v. Canaday, 73 N. C. 198 where it is held that cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same, to-wit, citizenship, twenty-one years of age, twelve months' residence in the State and thirty days in the city or town.

Length of Residence and Domicile—Evidence Thereof.—See People v. Teague, 106 N. C. 576, 11 S. E. 665.

§ 5937(a). Law not to be construed to prevent voting of women.—For the purpose of the registration and voting of women, the residence of a married woman living with her husband shall be where her husband resides, and of a woman living separate and apart from her husband or where for any reason her husband has no legal residence in this state, then the residence for such woman shall be where she actually resides. (Ex. Sess. 1920, c. 18, s. 3.)

§ 5937(b). Residence of women.—Nothing in any of the laws of North Carolina shall be so construed as to prevent the registration and voting of women twenty-one years of age and having the other qualifications for registration and

voting as provided for men for the year one thousand nine hundred and twenty. (Ex. Sess. 1920, c. 18, s. 4.)

§ 5938. Registration a prerequisite.—Only such persons as are registered shall be entitled to vote in any election held under this chapter. (Rev., s. 4317; 1901, c. 89, s. 12.)

See annotations to the next section.

General Consideration.—When duly made registration is prima facie evidence of the right to vote. State v. Waldrop, 104 N. C. 453, 10 S. E. 694; State v. Nicholson, 102 N. C. 465, 9 S. E. 545. This section must be complied with in order to constitute one a qualified voter. Smith v. Wilmington, 98 N. C. 343, 4 S. E. 489; Pace v. Raleigh, 140 N. C. 65, 52 S. E. 277.

§ 5939. Voter must be able to read and write; exceptions.—Every person presenting himself for registration shall be able to read and write any section of the constitution in the English language, and shall show to the satisfaction of the registrar his ability to read and write any such section when he applies for registration, and before he is registered: Provided, however, that no male person who was, on January first, one thousand eight hundred and sixty-seven, or at any time prior thereto, entitled to vote under the laws of any state in the United States where he then resided, and no lineal descendant of such person, shall be denied the right to register and vote at any election in this state by reason of his failure to possess the educational qualification aforesaid: Provided, that said elector shall have registered prior to December 1st, 1908, in accordance with article six, section four, of the constitution and the laws made in pursuance thereto. (Rev., s. 4318; 1901, c. 89, s. 12; 1927, c. 260, s. 3.)

Editor's Note.—In lieu of the last proviso now appearing at the end of this section, this section prior to its amendment by the Laws of 1927 contained a proviso that the voter should show to the registrar that he or his ancestor was entitled to vote prior to January 1, 1867, in any state in the United States as provided by Art. 6, sec. 4 of the Constitution, and that if such voter is otherwise qualified he shall be registered regardless of whether or not he could read or write.

Art. 7. Registration of Voters

§ 5940. Qualification as to residence for voters; oath to be taken.—In all cases the applicant for registration shall be sworn before being registered, and shall state as accurately as possible his name, age, place of birth, place of residence, stating ward if he resides in an incorporated town or city; and any other questions which may be material upon the question of identity and qualification of the said applicant to be admitted to registration. If the applicant has removed from another precinct, ward or election district in the same city, town or township since his last registration, such applicant shall, before being allowed to register, present to the registrar a written certificate signed by the registrar of the precinct, ward or election district from which he has so removed, showing that the applicant's name has been removed from the registration book of such precinct, ward or election district, and that he is no longer a registered voter therein. The registrar, if in doubt as to the right of the applicant to register, may require other evidence satisfactory to him as to the qualification of the applicant. And thereupon, if the applicant shall be found to be duly qualified and entitled to be registered as an elector, the registrar shall register the applicant, giving his race, opposite his name, and shall record his name, age, residence, place of birth, and the township, county, or state from which he has removed, in the event of a removal, in the appropriate column of the registration books, and the registration books containing the said record shall be evidence against the applicant in any court of law in a proceeding for false or fraudulent registration. Every person qualified as an elector shall take the following oath:

I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of North Carolina not inconsistent therewith; that I have been a resident of the state of North Carolina for two years, and of the county of.....for six months, and of.....township (precinct or ward) for four months; or that I was a resident of..... township (ward or precinct) on the..... day of..... (being four months, preceding the election) and removed therefrom to..... township (ward or precinct), where I have since resided; that I am twenty-one years of age; that I have not registered for this election in any other ward or precinct or township. So help me, God.

And thereupon the said person, if otherwise qualified, shall be entitled to register. (Rev., s. 4319; 1901, c. 89, s. 12; 1933, c. 165, s. 5.)

Cross References.—For full treatment of registration of voters, see 5 N. C. Enc. Dig. 82; 13 N. C. Enc. Dig. 827.

Editor's Note.—This section was amended, 1933, so as to require an applicant for registration removing from one precinct to another to present a certificate from the registrar of his former precinct showing that his name has been removed from the registration books of the former precinct before he is entitled to have his name placed on the registration books of another precinct. See 11 N. C. Law Rev., 229.

In General.—While the general assembly can not add to the qualifications prescribed by the constitution for voters, it has the power, and it is its duty, to enact such registration laws as will protect the rights of duly qualified voters, and no person is entitled to vote until he has complied with the requirements of those laws. Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Requirements Mandatory.—The requirements of the registration act are mandatory. Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Effect of Irregularities.—Where the disregard of constitutional or statutory directions does not affect the result it does not warrant a rejection of the vote. If none are incompetent to vote, the registration must be accepted as the act of a public officer, and entitles the electors to vote, notwithstanding irregularities as to administering the oath, the registrar's appointment, etc. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Administration of Oath.—Const. art. 6, § 2, is satisfied by an oath to support the constitution of the United States and that of the state. All valid laws, whether state or national, are included by implication. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

In the absence of direct evidence to the contrary it will be presumed that the oath was taken with uplifted hand. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Same—Failure to administer oath would not invalidate an election to determine whether a school tax should be levied in absence of fraud or improper motive. Gibson v. Board, 163 N. C. 510, 79 S. E. 976.

Registration by Other than Registrar.—The fact that a qualified voter was registered by a third person, with whom the registrar had left the books, does not disqualify him to vote, where such registration has been accepted as sufficient by the registrar. Quinn v. Lattimore, 120 N. C. 326, 26 S. E. 638.

Inquiry as to Qualifications of Voters.—Registrars of election may ask an elector if he had resided in the state twelve months next preceding the election, and four months in the district in which he offers to vote. They may ask an elector as to his age and residence, as well as the township and county from whence he removed, in the case of a removal since the last election, and that the name by which he is commonly known.

If, in reply to such questions, the elector answers that he is twenty-one years old, and has resided in the state twelve months and in the county ninety days preceding the election, it is the duty of the registrars, upon his taking the prescribed oath, to record his name as a voter; but bystanders may require him to be sworn as to his residence. In re Reid, 119 N. C. 641, 26 S. E. 337.

Sufficiency of Response.—In answer to the question of residence the designation of the county of residence is sufficient; but the designation of the state merely is insufficient. Harris v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Denial of registration and voting to persons qualified to vote, even though by accident or mistake vitiates the election particularly where it would affect the result. McDowell v. Massachusetts, etc., Constr. Co., 96 N. C. 514, 2 S. E. 351. See also, Perry v. Whitaker, 17 N. C. 475; People v. Canaday, 73 N. C. 198.

§ 5941. Poll tax must be paid before person can vote; receipt exhibited.—No person shall be entitled to vote unless he shall have paid his poll tax for the previous year, on or before the first day of May of the year in which he offers to vote, as prescribed under article five, section one, of the constitution. Every person liable for such poll tax shall, before being allowed to vote, exhibit to the registrar his poll tax receipt for the previous year, issued under the hand of the sheriff or tax collector of the county or township where he then resided and unless such poll tax receipt shall bear date on or before the first day of May of the year in which he offers to vote, such person shall not be allowed to vote: Provided, that in lieu of such poll tax receipt it shall be competent for the registrar and judges of election to allow such person to vote upon his taking and subscribing the following oath:

North Carolina.....County.

I do solemnly swear (or affirm) that on or before the first day of May of this year I paid my poll tax for the previous year, as required by article six, section four, of the constitution of North Carolina. .....

Sworn to and subscribed before me, this the .....day of ..... 19.....

.....

Registrar.

Which oath shall bear date on the day on which such election is held: Provided further, that if not satisfied, the registrar and judges of election may require other and further proof of such payment of poll tax. This section shall not apply to women. (Rev., s. 4320; 1901, c. 89, s. 13; Ex. Sess. 1920, c. 18, s. 2.)

Editor's Note.—The provision in the last sentence that this section shall not apply to women was added by the amendment of 1920.

The condition precedent that the voter must have paid his poll tax, which originally appeared in section 4 of article VI of the constitution, no more exists in that section, having been omitted by the amendment of 1920. This section was a confirmation of that constitutional provision and with the repeal of the latter, it is believed that the section is rendered obsolete.

Poll Tax for State and County Purposes.—See Perry v. Commissioners, 148 N. C. 521, 62 S. E. 608.

§ 5942. Who may vote without paying poll tax.—No person who has become of age since the first day of June of the previous year, or who was fifty years of age or over on the first day of June of the previous year, shall be required to produce any poll tax receipt, or take the oath as to payment of poll tax hereinbefore provided, in order to vote. No person who has been exempted by the commissioners of the county wherein he resides on account of poverty or infirmity shall be required to produce any poll tax receipt or to take said oath as to payment of poll tax in order to vote. No person shall be allowed to vote on any exemption granted by the board of commissioners unless the same shall have been granted on or before the first day of May of the year in which he offers to vote, and bears date on or before said date. This section shall not apply to women. (Rev., s. 4321; 1901, c. 89, s. 13; 1903, c. 479; Ex. Sess. 1920, c. 18, s. 2.)

Editor's Note.—The provision in the last sentence of this section that it shall not apply to women is new with the amendment of 1920.

§ 5943. Sheriff to give receipt for poll tax.—Every sheriff or tax collector upon payment of the poll tax, shall issue to the person paying the same a certificate showing the amount of such poll tax and the true date upon which the same was paid. (Rev., s. 4378; 1901, c. 89, s. 13.)

§ 5944. Sheriff to give duplicate when receipt lost.—Any person having paid his poll tax as required by law, and having lost his tax receipt, shall, upon making affidavit of such loss and satisfactory proof of his identity, be entitled to a duplicate thereof from the sheriff or tax collector. (Rev., s. 4379; 1901, c. 89, s. 13.)

§ 5945. Annual list of persons paying poll tax prepared and certified.—It shall be the duty of every sheriff and tax collector, between the first and tenth days of May of each year in which a general election occurs, to certify under oath a true and correct list of all persons who have paid their poll tax for the previous year on or before the first day of May, to the clerk of the superior court, who shall, within ten days, record the same in a book to be provided for that purpose, keeping each township separate, and certify a true copy thereof to the chairman of the board of elections for such county. (Rev., s. 4380; 1901, c. 89, s. 13.)

§ 5946. When person can register on election day.—No registration shall be allowed on the day of election, but if any person shall give satisfactory evidence to the registrar and judges of election that he has become qualified to register and vote after the time for registration has expired, he shall be allowed to register on that date. (Rev., s. 4322; 1901, c. 89, s. 21.)

Residence for One Year at Time of Election.—Where a person otherwise legally qualified, who had not been allowed to register because at that time he had not been a resident of the State for one year, but who became qualified in that respect on or before the day of election, asked to be allowed to register on election day and tendered his ballot, which was refused. Held, that such vote should have been received. State v. Lattimore, 120 N. C. 426, 26 S. E. 638.

§ 5947. Time when registration books shall be opened and closed; oath and duty of registrar.—The registration books shall be opened for the registration of voters at nine o'clock a. m., on the fourth Saturday before each election. The said books shall be closed at sunset on the second Saturday before each election. Every registrar, before entering upon the discharge of the duties of his office, shall take an oath before a justice of the peace or some other person authorized to administer oaths, that he will support the constitution of the United States and the constitution of North Carolina not inconsistent therewith, and that he

will honestly and impartially discharge his duties as registrar, and honestly and fairly conduct such election. The registrar of each township, ward or precinct shall be furnished with a registration book prepared as hereinbefore provided, and it shall be his duty, between the hours of nine o'clock a. m. and sunset on each day during the period when registration books are open, to keep open said books for the registration of any voters residing within such township, ward or precinct, and entitled to registration. On each Saturday during the period of registration the registrar shall attend with his registration books at the polling place of his precinct or ward, betwen the hours of nine o'clock a. m. and sunset, for the registration of voters. (Rev., s. 4323; 1901, c. 89, s. 18; 1923, c. 111, s. 3; 1933, c. 165, s. 5.)

Editor's Note.—The amendment of 1923 transposed the location of sentences and phrases of this section and introduced a few changes of phraseology, none of which changes affected the substance of the section.

The 1933 amendment changes the time for opening the registration books from the fifth Saturday to the fourth Saturday before each election. See 11 N. C. Law Rev., 229.

Time for Which Broker to Remain Open. — Where the charter of a city or town provides that the issuance of bonds an election shall be held "under the rules and regulations presented by law for regular elections," it refers to this section, requiring that the books of registration shall be kept open for twenty days (now two weeks); and construing this section in connection with section 2657, it is held, that the former is for the purpose of a new and original registration, and the latter, in providing for only seven days, is for the purpose of revising the registration books so that electors may be registered whose names are not on the former books. Hardee v. Henderson, 170 N. C. 527, 87 S. E. 498.

Same—Substantial Compliance is all That is Necessary.—The statutory requirement that the registration be kept open and accessible for a specified time, are regarded as essentials by the courts in passing upon the validity of bonds to be issued by a municipality; but where it appears that the books were afterwards opened for a time actually sufficient to afford all an opportunity to register, though short of the legal period, and it further appears that the election has been hotly contested by both sides, it shall be deemed sufficient. Hill v. Skinner, 169 N. C. 405, 86 S. E. 351.

Same—Effect of Non Compliance on Bond Issue.—The failure to keep the registry, for the question of the issuance of bonds in a special school district, open for twenty days (now two weeks), etc., required by this section, does not of itself render invalid the issuance of the bonds accordingly approved when it appears that the matter was fully known and discussed, opportunity offered every voter to register, there was nothing to show that every elector desiring to vote had not done so, and there was no opposition to the measure manifested. Hammond v. McRae, 182 N. C. 747, 110 S. E. 102.

Same—Presence of Registrar Every Moment of Time Not Necessary.—The requirements of this section do not require the registrar to be at his home or place of registration every moment of the twenty days (now two weeks) between the hours indicated, and a reasonable requirement is all that is necessary. Younts v. Commissioners, 151 N. C. 582, 66 S. E. 575.

§ 5948. Registration books deposited with clerk of court. — Immediately after any election, the registrar and judges of election shall deposit the registration books for their respective precincts with the clerk of the superior court of their respective counties. (Rev., s. 4324; 1901, c. 89, s. 25; 1923, c. 111, s. 4.)

Editor's Note.—Before the amendment of 1923 the registration books were required to be deposited with the registrar of deeds; now they are to be deposited with the clerk of the Superior Court.

Art. 8. Permanent Registration

§ 5949. Persons entitled to permanent registration.—Every person claiming the benefit of section four of article six of the constitution of North Carolina, as ratified at the general election on the second day of August, one thousand nine hundred, and who shall be entitled to register upon the permanent record for registration provided for under said section four shall, prior to December first, one thousand nine hundred and eight, apply for registration to the officer charged with the registration of voters as prescribed by law in each regular election to be held in the state for members of the general assembly, and such person shall take and subscribe before such officer an oath in the following form, viz.:

I am a citizen of the United States and of the state of North Carolina; I am .....years of age I was, on the first day of January, A. D. one thousand eight hundred and sixty-seven, or prior to said date, entitled to vote under the constitution and laws of the state of ....., in which I then resided (or, I am a lineal descendant of ....., who was, on January one thousand eight hundred and sixty-seven, or prior to that date, entitled to vote under the constitution and laws of the state of ....., Wherein he then resided.) (Rev., s. 4325; 1901, c. 550, s. 1.)

Registration on Permanent Roll Does Not Dispense with New Registration.—The fact that a voter is registered on the permanent roll does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever required by the statutes regulating the registration of voters. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52.

Object of Permanent Roll.—The making of a permanent roll or record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear thereon are not required to have the educational qualification. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52.

§ 5950. Oaths administered; names recorded.—It shall be the duty of the officer charged with the registration of voters in all such elections held in this state until November first, one thousand nine hundred and eight, to administer such oaths and to record the name of such person on his roll of registered and qualified voters; and all registration under this chapter and under the said section of the constitution shall be had and taken at the times and places provided by law for registration of voters for all such elections in this state until November first, one thousand nine hundred and eight. (Rev., s. 4326; 1901, c. 550, s. 2.)

§ 5951. Registrar to return list to clerk of court; record.—It shall be the duty of such registration officer, within five days after the close of the election, to return to the clerk of the superior court of the county in which he resides a list of the names of all the persons so registered by him, stating therein the name and age of such person, and the name of the person from whom descended, unless he himself was a voter on January first, one thousand eight hundred and sixty-seven, or prior thereto, and the state wherein he or his ancestor was a voter, and the date on which he applied for registration, and it shall be the duty of the clerk of the superior court, within ten days after receipt of said list, to make an alphabetical roll by townships of all persons taking such oath and registered by such registrar, and to record the same in a book to be provided for that purpose, which said book shall contain the name and age of such person, the name of the person from whom he was

mc descended, unless he himself was a voter on January first, one thousand eight hundred and sixty-seven, or prior thereto, the state in which he was such voter and the date he applied for registration. And the said roll shall, during the office hours of said clerk, be open to the inspection of the public. (Rev., s. 4327; 1901, c. 550, s. 3; 1903, c. 557.)

§ 5952. Clerks to certify list to secretary of state.—It shall be the duty of the several clerks of the superior courts of this state to certify to the secretary of state, within thirty days after the close of each election, a copy of the said roll in his office, and it shall be the duty of the secretary of the state to record, in a book provided for that purpose, the facts set out in uch certified copy, and keep the lists from each county separate. The clerk of the superior court shall keep the lists from each township in separate columns. The books kept by such clerks and the secretary of state shall be plainly lettered "Permanent Roll of Registered Voters," and they shall prepare a complete alphabetical index to the same. And for recording and indexing such names the clerks of the superior courts shall receive as compensation ten cents for each copy-sheet, to be paid by the court commissioners. (Rev., s. 4328; 1901, c. 550, s. 4; 1903, c. 557, s. 2.)

§ 5953. How permanent roll prepared and certified; certified copies from roll.—It shall be the duty of all officers charged with the registration of voters in any election held in the state to enter the name of such person on the registration book and voting lists of his township, ward, or precinct, and to give a certificate in the following form:

I, ..., registrar for ..... township (ward or precinct) of .....county, do hereby certify that on this day.....of..... race, of ..... county, ...township ..... precinct (or ward), age ..... years, took and subscribed the oath required by law, and he has this day been registered on the permanent roll as a voter in said township, (ward or precinct), in accordance with section four, article six, of the constitution of North Carolina.

This the ..... day of ....., 19....

.....,
Registrar.

And it shall be the duty of the clerk of the superior court to certify, under his hand and seal, to the genuiness of such certificate as follows: North Carolina ..... county.

I, ..., clerk of the superior court of the aforesaid county, do hereby certify that the foregoing certificate is in due form, and that the signature of said ....., registrar of said precinct (ward or township), is in his own proper handwriting.

Witness my hand and official seal, this the.... day of ....., 19.....

.....,
Clerk of the Superior Court.

And for furnishing such certificate and administering such oaths neither the said registrar nor clerk shall be paid any compensation by the person so applying for registration. In the event of the loss of such certificate the person entitled to the same, upon the payment of twenty-five cents, may obtain from the clerk of the superior court, or from the secretary of state, a certificate under his official seal to the effect that his name is on the permanent roll of registered voters from his county in his office and such certificate shall, in all respects, take the place of such original, and be used as such. (Rev., s. 4329; 1901, c. 550, s. 5.)

§ 5954. When copy of roll obtainable by clerk from secretary of state.—In the event of loss or destruction of such rolls in the clerk's office it shall be his duty to obtain from the secretary of state a certified copy of said roll for his county, and such certified copy shall be good and effectual for all purposes as the original would have been. (Rev., s. 4330; 1901, c. 550, s. 6.)

§ 5955. Copy of, certificate from roll evidence of voter's rights.—In all suits involving the right to vote, or trying the title to office, or other action in which such rolls are produced in evidence, all of the facts and recitals therein shall be taken as prima facie evidence of such facts and recitals, and if the right of any voter upon such rolls to vote is challenged, either his certificate or a certified copy of such permanent roll shall be deemed prima facie evidence of his right to vote. (Rev., s. 4331; 1901, c. 550, s. 7.)

§ 5956. Registration of voters removing residence.—Whenever any voter so registered shall remove from one precinct to another in the same county, or from one county to another in the state, he shall make application for registration, and upon production of his certificate of his being on the permanent roll, as provided in this chapter, under the hand and seal of either the clerk of the superior court or of the secretary of state, and proof of his identity, the proper officer charged with the registration of voters shall register his name and make record of the same as in cases of original registration under this chapter. (Rev., s. 4332; 1901, c. 550, s. 8.)

§ 5957. Educational qualification not applicable to permanent registrants.—Any person holding a certificate of registration, as herein provided, shall be entitled to register in any county in this state, notwithstanding his inability to read and write: Provided, that he shall be otherwise qualified as an elector. (Rev., s. 4333; 1901, c. 550, s. 9.)

§ 5958. State board of elections furnishes necessary blanks.—The state board of elections shall procure, provide, and furnish to the several officers named in this chapter and charged with duties under it, all such books, blanks, and other printed matter as may be necessary to carry into effect the provisions of this chapter. (Rev., s. 4334; 1901, c. 550, s. 10; 1921, c. 181, s. 4.)

Editor's Note.—The duties now devolving upon the board of elections, were, prior to the amendment of 1921, imposed upon the Secretary of State.

§ 5959. Books constitute roll in secretary of state's office.—The books containing the permanent roll of registered voters, sent to the office of the secretary of state by clerks of the courts of the several counties, shall be and constitute the permanent roll of registered voters, required by this chapter to be kept in the office of the secretary of state, and such books shall be deemed a full and complete compliance with the

requirements of this chapter. It shall be the duty of the several clerks of the court, within thirty days after the close of each registration hereafter to be held, up to the first day of December, one thousand nine hundred and eight, to forward to the secretary of state the names of all persons registering under article six, section four, of the constitution of North Carolina, as required by this chapter, and it shall be the duty of the secretary of state to record such names in the permanent roll of registered voters for the several counties. (Rev., s. 4335; 1903, c. 178.)

Art. 9. Absent Voters

§ 5960. Absent from county; or physically unable to attend; certificate, etc. — In all primaries and elections of every kind hereafter held in this State, any elector who may be absent from the county in which he is entitled to vote or who is physically unable to attend at the polling place for the purpose of voting in person shall be allowed to vote as hereinafter provided. When an elector desires to vote by absentee ballot because of his absence from the county on the day of the election he shall use the absentee certificate "A" hereinafter provided for both primary and general elections. He shall sign the certificate before an officer authorized to administer oaths, and if such officer have an official seal, he shall attach the seal of his office, enclose the certificate with the ballots which he wishes to vote in a return envelope provided therefor, and mail or send the same to the registrar of the precinct in which he is entitled to vote. An elector who is physically unable to attend the polling place on the day of election who desires to vote by absentee ballot shall use the absentee certificate "B" hereinafter provided for both primary and general elections. He shall sign said certificate and shall also furnish the certificate of a physician that he is physically unable to attend the regular polling place, or his own affidavit to that effect. He shall enclose this certificate with the ballots which he wishes to vote in a return envelope provided therefor, and mail or send the same to the registrar of the precinct in which he is entitled to vote. In all such cases, the absentee certificate must be accompanied by the voter's ballots. (1917, c. 23, s. 1; 1919, c. 332, s. 1; 1927, c. 260, s. 4; 1929, c. 329, s. 2.)

Editor's Note.—All but the first sentence of this section is new with the amendment of 1927. The first sentence also underwent certain changes of phraseology not affecting the substance.

Prior to the amendment of 1929, this section provided that the certificate should be signed "before a witness who shall also sign the same."

Public Laws 1931, c. 15, repealed this and §§ 5962-5968 in so far as they relate to the election of local officials in Buncombe County, that is, officials to serve the county or cities or townships in the county.

For amendment applicable in Graham, Jackson, Rutherford and Swain counties, see Public Laws 1933, c. 364.

By Public Laws 1935, chapter 262, Public Laws 1933, chapter 364, was amended by omitting "Graham". Public Laws 1935, chapter 239, inserted "Henderson" after "Rutherford" in the Public Laws of 1933, chapter 364.

Public Laws 1933, chapter 56, exempts Union county from the operation of sections 5960-5968. Public Laws 1933, chapter 65, exempts all but certain elections in Yancey county from the operation of these sections. This latter act is amended by Public Laws of 1935, chapter 261. Public Laws of 1933, chapter 83, section 1, exempts Randolph county. Public Laws 1933, chapter 141, exempts Yadkin county. Public Laws 1933, chapter 104, exempts certain elections in Mitchell county. Public Laws of 1935, chapter 433, exempts Anson county. Public Laws of 1935, chapter 434, exempts certain elections in Cherokee county. Public Laws of 1935, chapter 203, exempts McDowell county with the exception of certain elections in Marion. Public Laws 1935, chapter 223, exempts certain elections in Haywood county. Public Laws 1935, chapter 487, exempts certain elections in Wilkes county. Public Laws of 1935, chapter 308, exempts certain elections in Alleghany county. Public Laws of 1935, chapter 312, exempts certain elections in Sampson county. Public Laws 1935, chapter 323, exempts certain elections in Robeson county. Public Laws of 1935, chapter 373, exempts certain elections in Pitt county. Public Laws of 1935, chapter 285, exempts certain elections in Bladen county. For act applying in Davie county only, see Public Laws of 1935, chapter 327. For act applying in Wilson county only, see Public Laws of 1935, chapter 335.

Constitutionality.—This section and section 5962 are not void as being in contravention of our State Constitution, Art. VI, secs. 2, 3, and 6. Jenkins v. State Board, 180 N. C. 169, 104 S. E. 346.

Provision Requiring Certificate or Affidavit Mandatory.—Davis v. Board, 186 N. C. 227, 119 S. E. 372.

Persons within County Not Entitled to Vote as Absentee.—State v. Jackson, 183 N. C. 695, 110 S. E. 593.

Jurat Is Prima Facie Evidence Only that Ballots Have Been Sworn to.—In an action in the nature of quo warranto proceedings to test the right of the defendant to hold a municipal office of a city on the ground that ballots of absentee voters were cast for the encumbent that should have been excluded for the reason that contrary to the jurat on the ballots the voters thereof had not in fact been sworn, as required by this section, the jurat is but prima facie evidence that the ballots had been sworn to by the respective voters, which may be rebutted by parol evidence, in this case by the testimony of those who had cast them. Bouldin v. Davis, 200 N. C. 24, 156 S. E. 103.

§ 5961. Registration of voters expecting to be absent during registration period.—Any citizen of the state, not duly registered, who may be qualified to vote under the constitution and laws of this state, and who expects to be absent from the county in which he lives during the usual period provided for registration of voters, may be registered as herein provided. The secretary of state shall, on or before the seventh day of August, nineteen hundred and seventeen, furnish to the chairman of the county board of elections in each county a book for the registration of absent electors, which book shall contain separate columns for the name of elector, name of precinct in which elector resides, age, place of birth, race, and precinct in which elector last resided. It shall be the duty of the chairman of the board of elections in each county to register on said county registration book any qualified elector who presents himself for registration at any time other than the usual registration period, and who expects to be absent from the voting precinct in which he resides during the usual registration period, if found to be otherwise entitled to registration, in the same manner as now provided by law for the registration of voters before the precinct registrar in the usual registation period. The chairman of the county board of elections shall, immediately after the appointment of a registrar or registrars for any election to be held in his county, either legalized primary or general election, either for the county or for any political subdivision thereof certify to the respective registrars in each of such precincts the names, age and residence, place of birth, etc., of any electors registered on the said county registration books and thereby entitled to vote in such precinct; and it shall be the duty of the registrar in every such precinct to enter upon the regular registration book for such precinct the names of all such electors so certified to him by the chairman of the county board of

elections, marking opposite the names of such electors the words "Registered before chairman county board of elections;" and electors so registered shall be entitled to vote in any election in such precinct in the same manner as if registered by the precinct registrar. (1917, c. 23, s. 2.)

§ 5962. Blank certificates and envelopes.—The State Board of Elections shall furnish to the county board of elections in each county at the same time ballots are furnished for any primary or general election, and upon request from said county board of elections when any special election is to be held, certificates in blank and return envelopes to be used by absent voters, the said certificates to be in form as follows:

Certificate A

To be used when voter is absent from the County.

.....P. O. .....date.

To the Registrar and Judges of Election.....
.....Precinct .....County.

I.....do hereby solemnly swear that I am a duly qualified and registered elector in .... Precinct .....County, North Carolina, and that I enclose herewith ballots which I wish to vote in the election, (primary or general) to be held in said precinct on the.... day of....19....; and that I am the identical person who has heretofore applied for and received from the proper officer in said county or precinct the said ballots now enclosed to be voted; and that I will be absent from the county in which I am entitled to vote on the day of election.

(Signed) .....

Sworn to and subscribed before me on this .....day of.....19.....

(Seal)

If any (Official title to be written here.)

Certificate B.

To be used when voter is physically unable to attend polls.

.....P. O. .....date.

To the Registrar and Judges of Election.....
Precinct .....County, North Carolina.

I.....do solemnly swear that I am a duly qualified and registered elector in....Precinct, ...County, North Carolina, and I enclose herewith ballots which I wish to vote in the election to be held in .....Precinct, ...County, North Carolina, on the.....day of.....19...., and that my physical disability still exists and that I am the identical person who has heretofore received said ballots from the proper officer therein.

(Signed) .....
(Voter must sign here.)

Sworn to and subscribed before me on this the .....day of.....19....

(Seal) .....

If any. (Official character of officer.)

Physician's Certificate

I, ..., a regularly practicing physician in the County of ....., North Carolina, do hereby certify that I have this day made a personal examination of ....., the elector who has signed the above certificate, and I find, and do certify, that the said.....is physically unable to attend regular polling place in this precinct and vote in person thereat on the day of election.

This.....day of....., 19.....

(Signed) .....
Physician.

Affidavit

I, ..., being duly sworn, say that I am physically unable to attend in person the regular polling place of my pecinct on.....day of ....., 19...., for the purpose of voting.

(Signed) .....
Affiant.

Subscribed and sworn to before me this.....day of ....., 19....

(Signed) .....
Officer.

The return envelopes shall be printed in form as follows:

Upper left-hand corner, "Name.....
"Postoffice.....

"To be opened at 3 o'clock P. M. or any time thereafter before the polls close.

.....
Registrar
.....
Precinct
.....
Postoffice
.....North Carolina."
County

(1917, c. 23, s. 3; 1919, c. 322, s. 2; 1923, c. 111, s. 5; 1927, c. 260, s. 5; 1929, c. 329, ss. 3, 4.)

Editor's Note.—The amendment of 1923, changed a few words in the body of the section, which did not affect its substance, and provided for a new form of certificate. Prior to the amendment two forms of certificates were provided for, in one of which the voter stated that he was a qualified elector, and in the other, that he cast his vote for a certain nominee of a certain party. No other form of certificate besides these was provided for. By the amendment of 1927 the blank certificate and envelope to be used by absent voters shall be furnished upon the "request" of the county board. The latter amendment also effected certain alterations in the form of the various certificates appearing under this section.

As to repeal as to Buncombe County, see editor's note to § 5960.

§ 5962 (a). Absent voters ordering ballots; transmission of names to registrar; record of voters.—Any such person, wishing to take the benefit of this article, and vote as an absent elector thereunder, shall make application in person, or by mail or through another, by written order to the chairman of the county board of elections, or if he shall have distributed the official ballot before such application, then to the registrar of the precinct of such voter, for ballots to be cast in the approaching election or primary; and such chairman or registrar, as the case may be, shall furnish to the said voter in person, by mail, or to his agent duly authorized in writing, one of each ballots as are to be cast in said election or primary. The chairman of the board of elections shall transmit or deliver to the registrar of each voting precinct a list of absentee voters to, or for whom blanks and ballots have been supplied by him for electors in the respective precincts of each registrar; and the names of all such absentee voters in the precinct of the said registrar so furnished by the said chairman together with those to whom the registrar shall himself have provided blanks and ballots prior to the day of

election, shall be published or posted on the morning of the election by the said registrar in a public place at said voting precinct.

The chairman of the said board of elections, or the registrar as the case may be, shall enter in a book provided by said county board for that purpose, the day and date of such application, the name and residence of the voter and the day and date of furnishing said ballots; and they shall also enter in said book whether the ballots were delivered to the voter in person; or by mail, or through such duly authorized agents; and they shall also enter therein whether said voter is absent from the county; is physically disabled to attend, or a nurse or other person or attendant as herein provided for. (1929, c. 329, s. 1.)

Editor's Note.—The language of the last part of this section is somewhat confused, but it is an exact copy of the published act.

§ 5963. Ballots to be furnished to absent voters; records to be kept.—It shall be the duty of the chairman of the county board of elections or the registrar of the precinct to mail or send to any voter absent from the county, or who is physically unable to attend in person, upon application in writing for same, by such person or any person for him, as soon as received from the State Board of Elections, one only of each form of ballot applied for to be voted in such election, one blank certificate only of the kind applied for, and one return envelope. The said applications for such ballots, certificates, and envelopes shall be preserved by the chairman of the county board of elections or the registrar and shall be filed with the clerk of the Superior Court of the county. And all officers of this State before whom any affidavits shall be made in connection with the exercise of the right of absentee voting shall make report of the names of such persons so sworn to the chairman of the county board of elections who shall preserve the same in his record. (1917, c. 23, s. 4; 1919, c. 322, s. 3; 1927, c. 260, s. 6; 1929, c. 329, s. 5.)

See editor's note to § 5960.

Editor's Note.—The amendment of 1927 added the second sentence to this section, brought into the operation of the first sentence the registrar of precincts, and made certain other phraseological changes which did not affect the substance thereof. The amendment of 1929 added the last sentence.

§ 5964. Opening votes of absent voters.—It shall be the duty of the registrar in each precinct to open at 10 o'clock A. M. on the day of the election or at any time thereafter before the closing of the polls, all such letters received from such voters, and count the certificates as hereinbefore provided for. (1917, c. 23, s. 5; 1919, c. 322, s. 4; 1925, c. 204, s. 1; 1927, c. 260, s. 7.)

See editor's note to § 5960.

Editor's Note.—This section was first amended by the Laws of 1925 to change the time of opening letters from 3 p. m. to 8 a. m. or at any time during the election day selected by the registrar. But this change applied only to Transylvania County. Subsequently, by the amendment of 1927, the change was made of general application.

§ 5965. Challenges.—The right to vote of any such absent voter shall be subject to challenge in the same manner as if the elector proposing to vote were present in person, and if found entitled to vote under the provisions of this article and the laws of the state, every such vote so received shall be deposited and counted in the same manner as if the voter had been present and cast his vote in person. (1917, c. 23, s. 5.)

See editor's note to § 5960.

§ 5966. Absent voter may sign name on ballot; ballots and certificates to be kept; evidence.—In voting by the method prescribed in this article the voter shall sign, or cause to be signed, his name upon the margin or back of his ballot or ballots, for the purpose of identification. The ballot or ballots so voted, together with the accompanying certificates, shall be returned in a sealed envelope by the registrar and pollholders, with their certificates of the results of the election and kept for six months, or, in case of contest in the courts until the results are finally determined. And thereafter he or they shall deliver the same to the chairman of the board of elections, who shall preserve the same in the records of his office; and certified copies thereof shall be evidence in any action pending in said county or State involving the validity of any vote challenged therein. (1919, c. 322, s. 4 (a); 1929, c. 329, s. 7.)

See editor's note under § 5960.

Editor's Note.—By the amendment of 1929 the manner of return was made mandatory and the last sentence was added.

§ 5967. Fees allowed in connection with absentee's voting. — The following fees shall be allowed as compensation for services under this article: The chairman of the county board of elections for registering voters on the county registration book, and certifying same to precinct registrars, twenty cents. The precinct registrars for entering same on precinct registration book, the same fees allowed by law for registration of voters. The chairman of the county board of elections, for mailing form of certificate, ballots, and return envelope, including postage, five cents. The fees, including postage, shall be paid as provided in regard to the expenses of the election or primary. (1917, c. 23, s. 6.)

See editor's note to sec. 5960.

§ 5968. Construction in favor of absentee's right.—All the provisions of this article, and all of the other election laws of this state, shall be liberally construed in favor of the right of the elector to vote. (1917, c. 23, s. 7; 1919, c. 322, s. 5.)

See editor's note to sec. 5960.

When Not Applicable.—This section has no application when the elector desires to avail himself of a special privilege and does not, of his own volition, comply with the conditions precedent prescribed by the statute, which gives him the right to do so. Davis v. County Board, 186 N. C. 227, 119 S. E. 372.

§ 5968(a). False statements punishable as misdemeanor.—Any applicant, physician, elector, officer or other person, knowingly making any false oath or false certificate in connection with application for ballots, return of ballots, obtaining of ballots or otherwise relating thereto, or any election official violating any of the provisions of the absentee ballot law, shall be guilty of a misdemeanor and upon conviction, punished at the discretion of the court. (1929, c. 329, s. 6.)

Art. 9. (Old) Judges of Election

§§ 5969-5971: Repealed by Public Laws 1933, ch. 165, § 7.

Art. 10. Challenges

§ 5972. Registrar to attend polling place for challenges.—It shall be the duty of the registrar to attend the polling place of his township or precinct with the registration books on Saturday preceding the election, from the hour of nine o'clock a. m. till the hour of three o'clock p. m. when and where the said books shall be open for the inspection of the electors of the precinct or township, and any of said electors shall be allowed to object to the name of any person appearing on said books. In case of any such objection, the registrar shall enter upon his books opposite the name of the person so objected to, the word "Challenged," and shall appoint a time and place, before the election day, when he, together with said judges shall hear and decide said objection giving personal notice of such challenge to the voter so objected to; and if for any cause personal notice cannot be given, then it shall be sufficient notice to leave a copy thereof at his residence: Provided, nothing in this section shall prohibit any elector from challenging or objecting to the name of any person registered or offering to register at any time other than that above specified. If any person so challenged or objected to shall be found not duly qualified, the registrar shall erase his name from the books. (Rev., s. 4339; 1901, c. 89, s. 19.)

Absence of Officer in Charge for a Short Time.—That one of the officers appointed to conduct an election was absent a short time from the polls, during which time no vote was cast and the ballot boxes were not tampered with, nor was any opportunity afforded for tampering with them, does not vitiate the election. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Remedy for Irregular Registration.—Where it is alleged that the registration of voters in a primary municipial election was irregular and fraudulent, and the plaintiffs seek mandamus to compel a proper registration, and the statute and the charter of the city under which the election is to be held provided for challenge to voters so registered, mandamus being a proceeding in equity will not be issued, there being an adequate remedy at law by way of challenge provided by statute. Glenn v. Culbreth, 197 N. C. 675, 676, 152 S. E. 332.

§ 5973. How challenges heard.—When any person is challenged, the judges and registrar shall explain to him the qualifications of an elector, and shall examine him as to his qualifications; and if the person insists that he is qualified and shall prove his identity with the person in whose name he offers to vote, and his continued residence in the precinct since his name was placed upon the registration list, as the case may be, by the testimony under oath of at least one elector, one of the judges or the registrar shall tender to him the following oath or affirmation:

You do solemnly swear (or affirm) that you are a citizen of the United States; that you are twenty-one years old, and that you have resided in this state for two years, and in this county for six months next preceding this election, and that you are not disqualified from voting by the constitution and laws of this state; that your name is (here insert name given), and that in such name you were duly registered as a voter of this township; and that you are the identical person you represent yourself to be, and that you have not voted in this election at this or any other polling place. So help you, God.

And if he refuses to take such oath, when tendered, his vote shall be rejected; if, however, he does take the oath when tendered, his vote shall be received: Provided, that after such oath or affirmation shall have been taken, the registrar and judges may, nevertheless refuse to permit such person to vote, unless they be satisfied that he is a legal voter; and they are hereby authorized to administer the necessary oaths or affirmations to all witnesses brought before them to testify to the qualification of a person offering to vote. Whenever any person's vote shall be received, after having taken the oath or affirmation prescribed in this section, the registrar or one of the judges shall write on the poll books, at the end of such person's name the word "Sworn." The same powers as to the administration of oaths and affirmations and the examination of witnesses, as in this section granted to registrars and judges of election, may be exercised by the registrars in all cases where the names of persons registered or offering to register are objected to. (Rev., s. 4340; 1901, c. 89, s. 22.)

§ 5974. Challenge as felon; answer not used on prosecution.—If any person is challenged as being convicted of any crime which excludes him from the right of suffrage, he shall be required to answer any question in relation to such alleged conviction; but his answer to such questions shall not be used against him in any criminal prosecution. (Rev., s. 3388; 1901, c. 89, s. 71.)

Art. 11. Conduct of Elections

§ 5975. Special elections.—Every election held in pursuance of a writ from the governor shall be conducted in like manner as the regular biennial elections, so far as the particular case can be governed by general rules, and shall, to all intents and purposes, be as legal and valid, and subject the officers holding and the persons elected to the same penalties and liabilities as if the same had been held at the time and according to the rules and regulations prescribed for the regular biennial elections. (Rev., s. 4341; 1901, c. 89, s. 75.)

§ 5976. Repealed by Public Laws 1929, c. 164, s. 1.

§ 5977. Power of election officers to maintain order.—The registrar and judges of election in each ward or precinct, the board of county canvassers of each county, and the board of state canvassers shall respectively possess full power and authority to maintain order, and to enforce obedience to their lawful commands during their sessions, respectively, and shall be constituted inferior courts for that purpose, and if any person shall refuse to obey the lawful commands of any such registrar or judges of election, or board of county canvassers, or board of state canvassers, or by disorderly conduct in their hearing or presence shall interrupt or disturb their proceedings, they may, by an order in writing, signed by their chairman, and attested by their clerk, commit the person so offending to the common jail of the county for a period not exceeding thirty days, and such order shall be executed by any sheriff or constable to

whom the same shall be delivered, or if a sheriff or constable shall not be present, or shall refuse to act, by any other person who shall be deputed by such township or precinct board of elections, or board of county canvassers in writing, and the keeper of such jail shall receive the person so committed and safely keep him for such time as shall be mentioned in the commitment. (Rev., s. 4376; 1901, c. 89, s. 72.)

§ 5978. Repealed by Public Laws 1929, c. 164, s. 1.

§ 5979. Voter may deposit his own ballot.—The ballot may be deposited for the voter by the registrar, or one of the judges of election, or the voter may deposit it if he chooses. (Rev., s. 4343; 1901, c. 89, s. 24.)

Choice as to Voting.—The provisions of our State Constitution, Art. VI, sec. 6, making the distinction that the elector shall vote by ballot, and an election by the General Assembly shall be viva voce, gives under our statute, the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. Jenkins v. State Board, 180 N. C. 169, 104 S. E. 346.

§ 5980. Repealed by Public Laws 1929, c. 164, s. 1.

§ 5980(a)-5980(b). Repealed by Public Laws 1929, c. 164, s. 1.

§ 5981. Repealed by Public Laws 1929, c. 164, s. 1.

§ 5981(a). Ballots for voting constitutional amendments or referendums.—On the official ballot on Constitutional Amendments to the Constitution of North Carolina, on each referendum for vote of the people, submitted by the Legislature shall be printed each amendment to be submitted or referendum submitted in the form laid down by the Legislature. Each amendment or referendum shall be printed in a separate section and the sections shall be numbered consecutively, if there be more than one. At the left of each question shall be printed two voting squares, one above the other, each at least one-fourth (1/4) inch square. At the left of the upper square shall be printed the word "Yes," or "For," as the case may be, and at the left of the lower square, shall be printed the word "No," or "Against," as the case may be. At the top of the ballot shall be printed the following instructions:

1. To vote "Yes" or "For," as the case may be, on any question make a cross (X) mark in the square to the left of the word "Yes or for," as the case may be. (1927, c. 180, s. 1.)

§ 5982. Repealed by Public Laws 1929, c. 164, s. 1.

§ 5983. Repealed by Public Laws 1929, c. 164, s. 1.

Art. 12. Counting of Ballots; Precinct Returns; Canvass of Votes and Preparation of Abstracts; Certification of Results by County Board of Elections

§ 5984. Proceedings when polls close; counting of ballots.—At the time for closing the polls the registrar shall announce that the polls are closed, but any qualified electors who are in the process of voting, or are in line within the voting enclosure waiting to vote, shall be allowed to vote before the polls close. After the polls are closed the registrar shall then proceed to open one ballot box at a time for the purpose of counting the ballots in that box in the presence of all election officials, witnesses and watchers, if there are any present.

The counting of ballots shall be conducted as follows: One of the ballots shall be taken out of the ballot box by one of the judges and opened in full view of all the judges and witnesses. If the judges and registrar all agree as to how the ballot shall be counted, one of them shall place it where it can be seen by any one present and shall read aloud distinctly the names of the candidates voted for and the vote on any issue submitted; and the tally-man shall tally the same directly on the tally sheets. In the event the registrar and judges cannot agree as to how the ballot shall be counted, such ballot shall not be counted, but shall be placed in an envelope and marked "disputed ballots" and returned to the county board of elections.

No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice.

The counting of ballots shall be continuous until completed. From the time the ballot box is opened and the count of votes begun, until the votes are counted and returns are made out, signed and certified as herein required, and given to the presiding judge or registrar for delivery to the county board as required herein, the registrar and judges of election in each precinct shall not separate, nor shall a registrar or judge leave the polling place except from unavoidable necessity. In case of illness or unavoidable necessity, the board of elections may substitute another qualified person for any precinct official so incapacitated. (1933, c. 165, s. 8.)

Editor's Note.—The following cases were decided under former section 5983, now repealed, which provided for the counting of ballots. These cases seem applicable to the present law as the provisions of former section 5983 are substantially set forth in the instant section.

Counting by Other Persons than the Officers of Election.—While it is irregular to permit other persons than the officers of election to count the ballots, yet, unless it appears affirmatively that the count was not correct, that fact will not be allowed to vitiate the election, especially when the judges accepted and certified the result thus ascertained as true. State v. Calvert, 98 N. C. 580, 4 S. E. 127.

Facts Held Proper Counting.—Where votes were handed to the judges of election rolled up and secured by an elastic band and the judges distributed the votes among the boxes, such votes were properly received and counted. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Effect of Voting for Too Many Candidates.—This section does not contemplate throwing out the whole ballot for voting one ticket for too many candidates, its language distinguishing between the ballot and the ticket, of several of which (each office voted for being a separate ticket on the same ballot) the ballot is made up. Hence a ballot for one claiming the office of register of deeds, thrown out because containing two unmarked names, instead of one, for the office of recorder of the county, was improperly rejected as a vote for register, the elector's choice for such office being properly indicated. Bray v. Baxter, 171 N. C. 6, 86 S. E. 163.

A ballot the only defect of which was that it contained unmarked names of four persons for the office of county commissioner, while only three commissioners were to be elected, was improperly rejected. Bray v. Baxter, 171 N. C. 6, 86 S. E. 163.

Two Candidates with the Same Name—Evidence of Identification.—If there be two candidates for different offices having the same name, and a ticket be found in the ballot box having that name and no other on it, it may be proved by extrinsic evidence for which of the candidates it was given. Wilson v. Peterson, 69 N. C. 113.

§ 5985. How precinct returns are to be made and canvassed.—When the results of the counting of the ballots have been ascertained, such results shall be embodied in a duplicate statement to be prepared by the registrar and judges on forms provided by the county board of elections and certified to by said officers. One of the statements of the voting in the precinct shall be placed in a sealed envelope and delivered to the registrar or judge selected by them for the purpose of delivery to the county board of elections, at its meeting to be held on the second day after the election or primary. The other duplicate statement shall be mailed by one of the other precinct election officers to the chairman of the county board of elections immediately.

The county board of elections shall meet on the second day next after every primary or election, at eleven o'clock A. M. of that day, at the courthouse of the county, for the purpose of canvassing the votes cast in the county and the preparation of the county abstracts. Any registrar or judge appointed to deliver the certified precinct returns who shall fail to deliver those returns at the meeting of the county board of elections by twelve o'clock A. M. on the day of such board meeting shall be guilty of a misdemeanor, unless for illness or good cause shown for such failure. In the event any precinct returns have not been received by the county board by twelve o'clock M. on the first day of its meeting, or if any returns are incomplete or defective, it shall have authority to dispatch an officer to the residence of such precinct officials for the purpose of securing the proper returns for such precinct. (1933, c. 165, s. 8.)

This section and § 5986 are rewritten by acts of 1933, by abolishing the County Board of Canvassers and assigning the duties of canvassing the returns, preparing the abstracts and certificates of the results of the elections to the County Board of Elections. See 11 N. C. Law Rev., 228.

§ 5986. County board of elections to canvass returns and declare results. — The county board of elections at their said meeting required to be held on the second day after every primary or election, in the presence of such electors as choose to attend, shall open the returns and canvass and judicially determine the results of the voting in the respective counties, stating the number of legal ballots cast in each precinct for each candidate, the name of each person voted for and the political party with which he affiliated, and the number of votes given to each person for each different office, and shall sign the same. The said county board of elections shall have the power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall have power and authority to send for papers and persons and examine the same, and to pass upon the legality of any disputed ballots transmitted to them by any precinct officer. (1933, c. 165, s. 8.)

Judicial Powers of Board of Canvassers.—The county board of canvassers are vested with statutory authority to judicially pass upon all facts relative to the election and to judicially determine and declare the results, and with the exercise of this discretion the courts will not interfere, except by quo warranto, which is prohibited by the Federal Constitution relating to the election of Congressmen. Art. I, sec. 5. Britt v. Board, 172 N. C. 797, 90 S. E. 1005.

In the dissenting opinion of Rowland v. Board, 184 N. C. 78, 113 S. E. 629, Clark, C. J., said: "In this section the power and authority of the county board are broadened to judicially pass upon all facts relative to the election, not merely the returns, and to judicially determine and declare the results of the same. So that what the court below has held to be the whole duty of the board is stated by the Legislature to be in addition to the larger duty of passing upon "all facts" relative to the election, and there is the still further judicial function of sending for "papers and persons" and "examining the same."

Returns Prima Facie Correct.—In proceedings in the nature of a quo warranto, to determine the respective rights of the parties contesting for an office, the result of the election, as declared by the county board of canvassers, must be taken as prima facie correct. State v. Jackson, 183 N. C. 695, 110 S. E. 593.

Same—Subject to Collateral Attack.—The decision or judgments of the county board of canvassers are not of such conclusiveness of finality as to exclude collateral attack, and the use of the word "judicially" in this section does not affect the construction. State v. Midgett, 151 N. C. 1, 65 S. E. 441.

The correctness of the result of the election of a clerk of the superior court, determined and declared by the county board of canvassers, can be investigated, passed upon and determined in a civil action in the nature of a quo warranto, and such is the proper remedy. State v. Midgett, 151 N. C. 1, 65 S. E. 441.

Jurisdiction of Superior Court for Quo Warranto Not Ousted.—The act of the county canvassers in declaring the result of an election to public office, under this section, cannot have the effect of ousting the jurisdiction of the Superior Court in quo warranto or information in the nature thereof. Harkrader v. Lawrence, 190 N. C. 441, 130 S. E. 35.

Mandamus to Reconvene Board of Canvassers.—As to whether a board of canvassers can be compelled by mandamus to reconvene after its final adjournment, quere; and semble, it can be done theretofore only for the purpose of requiring it to complete its labors, but not to reconsider its action. Britt v. Board, 172 N. C. 797, 90 S. E. 1005.

Supplementary Returns after Adjournments of Registrar and Poll-holders.—Additional or supplemental returns made up by the county board of canvassers after the registrar and poll-holders had fully performed their duties and adjourned, and without calling them together for reconsideration as a body, should not be given effect by the courts. Britt v. Board, 172 N. C. 797, 90 S. E. 1005.

§ 5987. What returns placed on same abstract.—The abstract of votes for each of the following classes of officers shall be made on a different sheet:

1. President and vice president.
2. Governor and all state officers; justices of the supreme court; judges of the superior court; and United States senator.
3. Representatives in congress.
4. Solicitor.
5. Senators and representatives of the general assembly.
6. County officers.
7. Township officers.

(1933, c. 165, s. 8.)

§ 5988. Preparation of original abstracts; where filed.—When the canvass has been completed, the county board of elections shall prepare on forms furnished by the state original statements of the results showing:

1. Upon a single sheet an abstract of votes for president and vice-president of the United States, when a presidential election is held.
2. Upon another sheet an abstract of votes for Governor, and all state officers, judges of the supreme court, judges of the superior court and United States senator.
3. Upon another sheet an abstract of votes for representatives to congress.
4. Upon another sheet an abstract of votes for solicitor.
5. Upon another sheet an abstract of votes for state senators and representatives in the general assembly.

6. Upon another sheet an abstract of votes for county officers.

7. Upon another sheet an abstract of votes for township officers for each township in the county.

8. Upon another sheet an abstract of votes for all constitutional amendments and propositions submitted to the people. Each of these abstracts shall be so prepared as to show the total number of votes cast for each candidate of each political party for each office in each precinct in the county.

Each of these original abstracts shall be signed by the members of the county board of elections with their certificate as to their correctness, and each of the original abstracts together with the original precinct returns shall be filed with the clerk of the superior court to be recorded in the permanent file in his office. (1933, c. 165, s. 8.)

§ 5989. County elections board to prepare duplicate abstracts to be sent to state board of elections; penalty. — When the county boards of elections shall have completed the original abstracts, they shall also prepare separate duplicate abstracts for all offices for which the state board of elections is required to canvass the votes and declare the results, which shall include the following: For president and vice-president; for state officers and United States senator; for representatives to congress; for solicitors; and for state senators in senatorial districts composed of more than one county; and for amendments and propositions submitted.

When said duplicate abstracts shall have been prepared, the county board of elections shall sign an affidavit on each abstract that they are true and correct; then the chairman of said board shall mail said duplicate abstracts, within five days after the primary or election is held, to the chairman of the state board of elections at Raleigh, so that said abstracts shall be received by the chairman of the state board of elections within one week after the primary or election.

The chairman of the county board of elections, failing or neglecting to transmit said abstracts to the chairman of the state board of elections within the time above prescribed shall be guilty of a misdemeanor and subject to a fine of one thousand dollars: Provided, that the penalty herein prescribed shall not apply where said aforesaid officer was prevented from performing the duties herein prescribed because of sickness or other unavoidable delay, but the burden of proof shall be on such officer to show that his failure to perform his said duties was due to sickness or unavoidable delay. (1933, c. 165, s. 8.)

§ 5990. Clerk of superior court to send statement of votes to secretary of state in general election.—In a general election, the clerk of the superior court shall, within two days after the original abstracts are filed in his office by the county board of elections, certify under his official seal to the secretary of state, upon blanks furnished to him by the state for that purpose, a statement of the votes cast in his county for all national, state and district officers, and for and against constitutional amendments and propositions submitted to the people. The clerk of superior court shall at the same time also certify under his official seal to the secretary of state a list of all the persons voted for as members of the state senate and house of representatives and all county officers, together with the votes cast for each and their postoffice address.

The clerk of the superior court, failing or neglecting to transmit these returns to the secretary of state within the time herein provided, shall be subject to a fine of five hundred dollars and be guilty of a misdemeanor: Provided, that the penalty herein prescribed shall not apply where said aforesaid officer was prevented from performing the duties herein prescribed because of sickness or other unavoidable delay, but the burden of proof shall be on such officer to show that his failure to perform his said duties was due to sickness or unavoidable delay. (1933, c. 165, s. 8.)

§ 5991. Who declared elected by county board; proclamation of result.—In the general election, the person having the greatest number of legal votes for a county or township office, or for the house of representatives, or for the state senate in a district composed of only one county, shall be declared elected by the county board of elections. But, if two or more county candidates, having the greatest number of votes, shall have an equal number the county board of elections shall determine which shall be elected.

When the county board of elections shall have completed the canvass, they shall judicially determine the result of the election in their county for all persons voted for, and proclaim the same at the courthouse door with the number of votes cast for each. (1933, c. 165, s. 8.)

Editor's Note.—The cases discussed below were decided under section 5992 as it read prior to the act of 1933. The provisions of former section 5992 are now substantially set forth in the instant section.

Finding of Board Prima Facie Correct.—The finding by the board of canvassers as to the number of votes received by a contestant in an election is prima facie correct. State v. Flynt, 159 N. C. 87, 74 S. E. 817.

There is a final and conclusive presumption in favor of the correctness of the result of an election as declared by the proper officials, until the issues raised by the pleadings have been tried and disposed of before the jury. Wallace v. Salisbury, 147 N. C. 58, 60 S. E. 713.

§ 5992. Chairman of county board of elections to furnish county officers certificate of election. — The chairman of the county board of elections of each county shall furnish, within ten days, the member or members elected to the house of representatives and the county officers, a certificate of election under his hand and seal. He shall also immediately notify all persons elected to the county offices to meet at the courthouse on the first Monday in the ensuing December to be qualified. (1933, c. 165, s. 8.)

Art. 13. Canvass of Returns for Higher Offices and Preparation of State Abstracts

§ 5993. State board of elections to canvass returns for higher offices.—The state board of elections shall constitute the legal canvassing board for the state of all national, state and district offices, including the office of state senator in those districts consisting of more than one county. No member of the state board of elections shall take part in canvassing the votes for any office for which he himself is a candidate. (1933, c. 165, s. 9.)

This section and § 5999 were amended, 1933, to abolish the old State Board of Canvassers and transfer its functions to the State Board of Elections. See 11 N. C. Law Rev., 228.

§ 5994. Meeting of state board of elections to canvass returns of the election.—The state board

of elections shall meet in the city of Raleigh on the Tuesday following the third Monday after each general election held in this state under the provisions of this chapter, in the hall of the house of representatives, at eleven o'clock A. M. for the purpose of canvassing the votes cast in all the counties of the state for all national, state and district officers and to determine whom they ascertain and declare by the count to be elected to the respective offices, and shall prepare abstracts of same as hereinafter provided. At this meeting, the board shall examine the county abstracts, if they shall have been received from all of the counties, and if all have not been they may adjourn, not exceeding ten days for the purpose of obtaining the abstracts and returns from the missing counties, and when they have all been received the board shall proceed with the canvass, which shall be conducted publicly in the hall of the house of representatives. In obtaining the abstracts from the counties whose abstracts have not been received by the date of this meeting, the board is authorized to obtain from the clerk of the superior court or the county board of elections, at the expense of such counties, the original abstracts or returns, or if they have been forwarded, copies of them. The state board of elections shall be authorized to enforce the penalties provided by law for the failure of a clerk of a superior court or a chairman of the county board of elections to comply with the law in making their returns of an election. (1933, c. 165, s. 9.)

§ 5995. Meeting of state board of elections to canvass returns of a special election for congressmen.—In all cases of special elections ordered by the governor to fill vacancies in the representation of the state in congress as provided for in C. S. six thousand and seven, the state board of elections may meet as soon as the chairman of said board shall have received returns from all of the counties entitled to vote in said special elections for the purpose of canvassing the returns of said special election and for preparing an abstract of same. It shall be the duty of the chairman of the state board of elections to fix the day of meeting which shall not be later than ten days after such elections, and it shall be the duty of all returning officers to make their returns promptly so that the same may be received within the ten days. (1933, c. 165, s. 9.)

§ 5996. Board to prepare abstracts and declare results of elections.—The state board of elections, at the conclusion of its canvass of the general election, shall cause to be prepared the following abstracts:

1. Upon a single sheet an abstract of votes for president and vice-president of the United States when an election is held for same.

2. Upon another sheet an abstract of votes for governor and all state officers, justices of the supreme court, judges of the superior court, and United States senators.

3. Upon another sheet an abstract of votes for representatives to congress for the several congressional districts in the state.

4. Upon another sheet an abstract of votes for solicitor in the several judicial districts in the state.

5. Upon another sheet an abstract of votes for state senators in the several senatorial districts in the state, where such districts are composed of more than one county.

6. Upon another sheet an abstract of votes for and against any constitutional amendments or propositions submitted to the people.

These abstracts so prepared by said board shall state the number of legal ballots cast for each candidate, the names of all persons voted for, for what office they respectively receive the votes, the number of votes each receive, and whom said board shall ascertain and judicially determine and declare by the count to be elected to the office. These abstracts shall be signed by the state board of elections in their official capacity and have the great seal of the state affixed thereto. (1933, c. 165, s. 9.)

§ 5997. Results certified to the secretary of state; certificate of election issued. — After the state board of elections shall have ascertained the result of the election as hereinbefore provided, they shall cause the result to be certified to the secretary of state, who shall prepare a certificate for each person elected, and shall sign the same, which certificate he shall deliver to the person elected, when he shall demand the same.

The state board of elections shall also file with the secretary of state the original abstracts prepared by it, also the original county abstracts to be filed in his office. (1933, c. 165, s. 9.)

§ 5998. Secretary of state to record abstracts. — The secretary of state shall record the abstracts filed with him by the state board of elections in a book to be kept by him for recording the results of elections and to be called the election book, and shall also file the county abstracts. (1933, c. 165, s. 9.)

Art. 14. State Officers, Senators and Congressmen

§ 5999. Contested elections—how tie broken. — The person having the highest number of votes for each office, respectively, shall be declared duly elected thereto by the state board of elections but if two or more be equal and highest in votes for said office, then one of them shall be chosen by joint ballot of both houses of the general assembly. In contested elections, the state board of elections shall certify to the speaker of the house of representatives a statement of such facts as the board has relative thereto and such contests shall be determined by joint vote of both houses of the general assembly in the same manner and under the same rules as described in cases of contested elections for members of the general assembly. (Rev., s. 4363; 1901, c. 89, s. 44; 1915, c. 121, s. 1; 1927, c. 260, s. 14; 1933, c. 165, s. 10.)

Editor's Note.—By the amendment of 1927 some of the old provisions of this section were curtailed and one new provision was added thereto. Prior to the amendment the section contained provisions as to the opening in the house of representatives the returns of the executive officers of the State and of the United States' senators. Provisions was also made to cover the contingency of absence of returns or defective returns. None of these appear in the section as amended. The requirements that the state board of canvassers (now state board of elections) shall certify to the Speaker of the House a statement of facts, is new with this amendment.

§ 6000. Repealed: (1927, c. 260, s. 15.)

§ 6001. Regular elections for senators.—United States senators to fill vacancies caused by the expirations of regular terms shall be elected by the people at the last regular election before each vacancy shall occur as now provided for state officers, and tickets shall be furnished, blanks sent out and returns made as for state officers, and returns canvassed and results declared in the same way. (1913, c. 114, s. 3.)

§ 6002. Election of senator to fill unexpired term.—If such vacancy shall occur more than thirty days before any general state election, the governor shall issue his writ for the election by the people, at the next general election, of a senator to fill the unexpired part of the term, and said election shall take effect from the date of canvassing of the returns, which shall take place at the same time and in the same way as the canvassing of the returns for state officers. (1913, c. 114, s. 2.)

§ 6003. Governor to fill vacancies until general election.—Whenever there shall be a vacancy in the office of the United States senator from this state caused by death, resignation, or otherwise than by expiration of a term, the governor shall appoint to fill the vacancy till there shall be an election. (1913, c. 114, s. 1.)

Editor's Note.—Public Laws 1929, chap. 12, § 2, provided "that section six thousand and three of the Consolidated Statutes be and the same is hereby reenacted."

§ 6004. Congressional districts specified.— For the purpose of selecting representatives to the congress of the United States, the state of North Carolina shall be divided into eleven (11) districts as follows:

First District: Camden, Chowan, Currituck, Beaufort, Dare, Gates, Hertford, Perquimans, Pitt, Pasquotank, Hyde, Tyrrell, Martin, and Washington counties.

Second District: Bertie, Edgecombe, Greene, Halifax, Lenoir, Northampton, Warren, and Wilson counties.

Third District: Craven, Duplin, Jones, Onslow, Pender, Pamlico, Sampson, Wayne, and Carteret counties.

Fourth District: Chatham, Franklin, Johnston, Nash, Randolph, Wake, and Vance counties.

Fifth District: Caswell, Forsyth, Granville, Person, Rockingham, Stokes, and Surry counties.

Sixth District: Alamance, Durham, Guilford, and Orange counties.

Seventh District: Bladen, Brunswick, Columbus, Cumberland, Harnett, New Hanover, and Robeson counties.

Eighth District: Anson, Davie, Davidson, Hoke, Lee, Montgomery, Moore, Richmond, Scotland, Union, Wilkes, and Yadkin counties.

Ninth District: Ashe, Alleghany, Alexander, Cabarrus, Caldwell, Iredell, Rowan, Stanly, and Watauga counties.

Tenth District: Avery, Burke, Catawba, Cleveland, Gaston, Lincoln, Madison, Mecklenburg, Mitchell, and Yancey counties.

Eleventh District: Buncombe, Clay, Cherokee, Graham, Henderson, Haywood, Jackson, Macon, McDowell, Polk, Rutherford, Swain, and Transylvania counties. (Rev., s. 4366; 1911, c. 97; 1931, c. 216.)

Editor's Note.—Prior to the Act of 1931 there were ten congressional districts.

§ 6005. When election for congressmen held.— The election for United States senators whose terms will expire before the next general election and for members of congress shall be held on the Tuesday next after the first Monday in November, one thousand nine hundred and six, and biennially thereafter, unless congress shall prescribe a different time for holding such elections and shall be conducted by the officers provided for holding elections of members of the general assembly in this chapter and at the same place. (Rev., s. 4367; 1901, c. 89, s. 59.)

§ 6006. Election after reapportionment of congressmen.—Whenever, by a new apportionment of representatives among the several states, the number of representatives in the congress of the United States from North Carolina shall be either increased or decreased, and neither the congress nor the general assembly shall provide for the election of the same, then if the said representatives shall be increased, the increased number shall be elected by the qualified voters of the whole state, and shall be voted for on one ballot, and the representatives from the several congressional districts shall be elected by the voters of said districts, respectively, and shall each be voted for on another ballot; but if the number of said representatives shall be decreased as aforesaid, in that event all the representatives in congress shall be elected by the qualified voters of the whole state and shall be voted for on one ballot. (Rev., s. 4368; 1901, c. 89, s. 58.)

§ 6007. Special election for congressmen.—If at any time after the expiration of any congress and before another election, or if at any time after an election, there shall be a vacancy in the representation in congress, the governor shall issue a writ of election, and by proclamation shall require the voters to meet in the different townships in their respective counties at such times as may be appointed therein, and at the places established by law, then and there to vote for a representative in congress to fill the vacancy, and the election shall be conducted in like manner as regular elections. (Rev., s. 4369; 1901, c. 89, s. 60.)

§ 6008. Certificate of election for congressmen.—Every person duly elected a representative to congress, upon obtaining a certificate of his election from the secretary of state, shall procure from the governor a commission certifying his appointment as a representative of the state, which the governor shall issue on such certificate being produced. (Rev., s. 4370; 1901, c. 89, s. 61.)

Art. 15. Election of Presidential Electors

§ 6009. Conduct of presidential election. — The election of presidential electors shall be conducted and the returns made as nearly as may be directed in relation to the election of state officers, except as herein otherwise expressed. (Rev., s. 4369; 1901, c. 89, s. 60; 1933, c. 165, s. 11.)

§ 6010. Arrangement of names of presidential electors.—The names of candidates for electors

of president and vice-president of any political party or group of petitioners, shall not be placed on the ballot, but shall after nomination be filed with the secretary of state. In place of their names there shall be printed first on the ballot the names of the candidates for president and vice-president, respectively, of each party or group of petitioners and they shall be arranged under the title of the office. A vote for such candidates shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. (Rev., s. 4372; 1901, c. 89, s. 78; 1933, c. 165, s. 11.)

See 11 N. C. Law Rev., 229, for a discussion of changes made in this section by the Acts of 1933.

§ 6011. How returns for president shall be made.—The county board of elections shall meet at the courthouse on the second day next after every election for president and vice-president, and shall ascertain and determine the number of legal votes cast for the electors for president and vice-president and shall prepare abstracts and make their returns to the state board of elections in the same manner as hereinbefore provided for state officers. (Rev., s. 4373; 1901, c. 89, s. 80; 1927, c. 260, s. 16; 1933, c. 165, s. 11.)

§ 6012. Declaration and proclamation of results by state board; casting of state's votes for president and vice-president.—The state board of elections shall canvass the returns for electors for president and vice-president at the same time and place as hereinbefore required to be made for state officers, and an abstract for same shall be prepared and certified to the secretary of state in the same manner.

The secretary of state shall, under his hand and seal of his office, certify to the governor the names of as many persons receiving the highest number of votes for electors of president and vice-president of the United States as the state may be entitled to in the electoral college. The governor shall thereupon immediately issue his proclamation and cause the same to be published in such daily newspapers as may be published in the city of Raleigh, wherein he shall set forth the names of the persons duly elected as electors, and warn each of them to attend at the capitol in the city of Raleigh at noon on the first Monday after the second Wednesday in December next after his election, at which time the said electors shall meet, and in case of the absence or ineligibility of any elector chosen, or if the proper number of electors shall for any cause be deficient, those present shall forthwith elect from the citizens of the state so many persons as will supply the deficiency, and the persons so chosen shall be electors to vote for the president and vice-president of the United States. And the governor shall, on or before the said first Monday after the second Wednesday in December, make out six lists of the names of the said persons so elected and appointed electors and cause the same to be delivered to them, as directed by the act of congress. (Rev., s. 4347; 1917, c. 176, s. 2; 1901, c. 89, s. 81; 1923, c. 111, s. 12; 1927, c. 260, s. 17; 1933, c. 165, s. 11; 1935, c. 143, s. 2.)

Editor's Note.—By the amendment of 1935 the meetings were changed from the second Monday of January to the first Monday after the second Wednesday in December.

§ 6013. Penalty for presidential elector failing to attend and vote.—Each elector, with his own consent previously signified, failing to attend and vote for a president and vice-president of the United States, at the time and place herein directed (except in case of sickness or other unavoidable accident), shall forfeit and pay to the state five hundred dollars, to be recovered by the attorney-general in the superior court of Wake county. (Rev., s. 4375; 1901, c. 80, s. 83; 1933, c. 165, s. 11.)

Art. 16. Miscellaneous Provisions as to General Elections

§ 6014. Agreements for rotation of candidates senatorial districts of more than one county.—When any senatorial district consists of two or more counties, in one or more of which the manner of nominating candidates for legislative officers is regulated by statute, and the privilege of selecting the candidate for senator, or any one of the candidates for senator, of any political party (as the words "political party" are defined in the first section of this subchapter) in the senatorial district, is, by agreement of the several executive committees representing that political party in the counties constituting the district, conceded to one county therein, such candidate may be selected in the same manner as the party's candidates for county officers in the county, whether in pursuance of statute or under the plan of organization of such party. All nominations of party candidates for the office of senator, made as hereinbefore provided, shall be duly certified by the chairman and secretary of the executive committee of the party making the same, and for the county in which they are made, to the chairmen of the executive committees of such party in all other counties constituting the senatorial district; and no other action shall be deemed necessary to constitute such candidate the nominee of his party for such office. (1911, c. 192.)

§ 6015. Judges and solicitors; commission; when term begins. — Justices of the supreme court, judges of the superior court, and solicitors shall be commissioned by the governor, and their terms of office shall begin on the first day of January next succeeding their election. An election for officers, whose terms shall be about to expire, shall always be held at the general election next preceding the expiration of their terms of office. (Rev. s. 4379; 1901, c. 89, s. 69.)

§ 6016. Registrars to permit copying of poll and registration books.—In any primary or general election held in this State, and at any time prior to the holding of such primary or general election, and while the registration and poll books shall be in the hands of any Registrar, it shall be the duty of such Registrar, on application of any candidate or the chairman of any political party, to permit said poll book or registration book to be copied; provided, such poll book or registration book shall not be removed from the polling place if there, or the residence of such registrar, if there; provided, also, it shall be lawful for such registrar himself to furnish to such applicant, in lieu of the books themselves, a true copy of the same, for which service he shall be entitled to receive one cent per name.

Any person wilfully failing or refusing to comply with the provisions and requirements of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (Rev., s. 4382; 1901, c. 89, s. 83; 1931, c. 80.)

Editor's Note.—The Act of 1931 repealed the former section and enacted the above in lieu thereof.

§ 6017. Forms for returns sent to proper officers by state board of elections.—The state board of elections shall cause proper forms of returns to be prepared and printed, and send copies thereof, with plain directions as to the manner of endorsing, directing, and transmitting the same to the seat of government, to all of the returning officers of the state, at least thirty days before the time for holding any election. The said board shall also furnish to the clerk of the superior court of each county all such printed blanks as may be necessary for making the county returns. (Rev., s. 4383; 1901, c. 89, s. 43; 1921, c. 181, s. 5; 1927, c. 260, s. 18.)

Editor's Note.—The duties under this section now devolving upon the State Board of Elections, prior to the amendment of 1921 were to be performed by the Secretary of State.

Before the amendment of 1927, the printed blanks were to be furnished to the registrar of deeds instead of to the clerk of the superior court.

SUBCHAPTER II. PRIMARY ELECTIONS

Art. 17. Primary Elections

§ 6018. Date for holding primaries. — On the first Saturday in June next preceding each general election to be held in November for state officers, representatives in congress, district officers in districts composed of more than one county, and members of the general assembly of North Carolina, or any such officers, there shall be held in the several election precincts within the territory for which such officers are to be elected a primary election for the purpose of nominating candidates of each and every political party in the state of North Carolina for such offices as hereinafter provided; and at such primary election next preceding the time for the election of a senator for this state in the congress of the United States there shall likewise be nominated the candidate of each political party in this state for such office of United States senator. (1915, c. 101, s. 1; 1917, c. 218.)

§ 6019. Repealed by Public Laws 1927, c. 82.

§ 6020. Primaries governed by general election laws.—Unless otherwise provided in this article, such primary elections shall be conducted, as far as practicable, in all things and in all details in accordance with the general election laws of this state, and all the provisions of this chapter and of other laws governing elections not inconsistent with this article shall apply as fully to such primary elections and the acts and things done thereunder as to general elections; and that all acts made criminal if committed in connection with a general election shall likewise be criminal, with the same punishment, when committed in a primary election held hereunder. (1915, c. 101, s. 3; 1917, c. 218.)

§ 6021. Appointment of election boards.—On the tenth Saturday preceding each state or district primary election the state board of elections shall meet in the city of Raleigh and appoint the county boards of elections for the several counties; and on the seventh Saturday preceding the time for holding each primary election the county board of elections for each of the several counties shall meet at the courthouses of their respective counties and organize as provided by law; and shall appoint a registrar and judges of election for each election precinct as prescribed by law, and the registrars and judges so appointed shall likewise serve in the general election following their appointment, unless for good cause made to appear to the respective county boards of elections others shall be appointed by them: Provided, that such registrars and judges shall, before entering upon their duties, have the oath of office administered to them by some officer authorized to administer oaths. (1915, c. 101, s. 4; 1917, c. 218; 1919, c. 139.)

§ 6022. Notices and pledges of candidates; with whom filed.—Every candidate for selection as the nominee of any political party for the offices of governor and all state officers, justices of the supreme court, the judges of the superior court, United states senators, members of congress, and solicitors to be voted for in any primary election shall file with and place in the possession of the state board of elections, by six o'clock P. M. on or before the seventh Saturday before such primary election is to be held, a notice and pledge in the following form, the blanks being properly filled in and the same signed by the candidate:

"I hereby file my notice as a candidate for the nomination as ..... in the primary election to be held on ..... I affiliate with the ..... party, and I hereby pledge myself to abide by the results of said primary, and to support in the next general election all candidates nominated by the ..... party."

Every candidate for selection as the nominee of any political party for the office of state senator in a primary election, member of the house of representatives, and all county and township offices shall file with and place in the possession of the county board of elections of the county in which they reside by six o'clock P. M. on or before the fourth Saturday before such primary is to be held a like notice and pledge. (1915, c. 101, s. 6; 1917, c. 218; 1923, c. 111, s. 13; 1927, c. 260, s. 19; 1929, c. 26, s. 1; 1933, c. 165, s. 12.)

This section was amended in 1933 so as to change the time for filing the notice for candidacy from six weeks to the seventh Saturday before the primary date. See 11 N. C. Law Rev., 230.

§ 6023. Filing fees required of candidates in primary.—At the time of filing a notice of candidacy for nomination for any congressional or state office, including judges of the supreme and superior court and solicitors, each candidate for such office shall pay to the state board of elections a filing fee of one per-cent of the annual salary of such office. At the time of filing a notice of candidacy for nomination for any legislative or county office, each candidate for such office shall pay to the county board of elections of the county of their residence a filing fee of one-half of one per cent of the an-

nual salary of such office. Provided, that candidates for nomination for the office of surveyor, coroner, county commissioners, members of the county board of education, and for any township office shall be required to pay to the county board of elections a filing fee of one dollar. All such filing fees so received by the state board of elections shall be paid into the treasury of the state, and all such filing fees received by the county board of elections shall be paid into the treasury of the county. (1915, c. 101, s. 4; 1917, c. 218; 1919, c. 139; 1927, c. 260, s. 20; 1933, c. 165, s. 12.)

This section was amended in 1933 so as to change the basis of candidacy fees from a flat sum for each office to one per cent of the salary of the office. See 11 N. C. Law Rev., 230.

§ 6024. Fees erroneously paid refunded.—Where a candidate erroneously files a notice of candidacy, accompanied by the proper sum of money, with the state board of elections, instead of with the local county board, and the money is paid into the state treasury; or where a candidate files a notice, accompanied by the sum fixed by law with the state board, the money being paid into the state treasury, and afterwards, but before the time for filing such notices, as fixed by law, shall have expired, he wishes to withdraw his candidacy, then, in both these cases, the money may be refunded to the candidate, upon certificate from the chairman of the state board of elections that the facts exist which entitle him to such refunding. Upon such certificate, the auditor shall give his warrant upon the treasurer of the state, and the treasurer shall pay the same. (1919, c. 50.)

§ 6025: Repealed by Acts 1933, ch. 165, s. 13.

§ 6026. Payment of expense for primary elections.—The expense of printing and distributing the poll and registration books, blanks, ballots for those offices hereinafter provided to be furnished by the state, and the per diem and expenses of the state board of elections while engaged in the discharge of the duties herein imposed, shall be paid by the state; and the expenses of printing and distributing the ballots hereinafter provided to be furnished by the counties, and the per diem and expenses of the county board of elections, and the registrars and judges of election, while engaged in the discharge of the duties herein imposed, shall be paid by the counties, as is now provided by law to be paid for performing the duties imposed in connection with other elections. (1915, c. 101, s. 7; 1917, c. 218; 1927, c. 260, s. 21; 1933, c. 165, s. 14.)

§ 6027. Registration of voters.—The regular registration books shall be kept open before the primary election in the same manner and for the same time as is prescribed by law for general elections, and electors may be registered for both primary and general elections. At the first primary election held under the provisions of this article, new registration books shall be provided, in which on each page there shall be a column headed with the language, "With which political party are you affiliated?" and it shall be the duty of each registrar to transcribe the names of all formerly registered voters in his precinct into such book for such compensation as the state board of elections shall indicate, to be paid by the county; and when such voter, whose name has been thus transcribed, appears for the first time to vote in a primary provided for by this article, he shall answer the question stated above, and it shall be the duty of the registrar and judges of election to write opposite the name of each voter in such primary his answer to such question; and as to all other persons not already registered who shall register to vote in a party primary, it shall be the duty of the registrar, when such person registers, to propound to him the same question and to have the same answered, and write the answer of such elector on such book in such column.

No person shall be entitled to participate or vote in the primary election of any political party unless he be a legal voter, or shall become legally entitled to vote at the next general election, and has first declared and had recorded on the registration book that he affiliates with the political party in whose primary he proposes to vote and is in good faith a member thereof, meaning that he intends to affiliate with the political party in whose primary he proposes to vote and is in good faith a member thereof. (1915, c. 101, s. 5; 1917, c. 218.)

§ 6028. Notices filed by candidates to be certified; printing and distribution of ballots.—When the time for filing notices by candidates for nomination shall have expired, the chairman of the state board of elections shall within three days thereafter certify the facts as to such notices as have been filed with it to the secretary of state; and in the senatorial districts composed of more than one county where there is no agreement as provided for in section 6014, the chairman or secretary of the county board of elections of each county in such senatorial district shall, within three days after the time for filing such notice shall have expired, certify to every other chairman of the county board of elections in such senatorial district the names of all candidates who have filed notice of candidacy in their respective county for the office of the state senator; and said chairman, acting under the direction of the state board of elections and under such rules and regulations as may be prescribed by it, shall, without delay, at the expense of the state, cause a sufficient number of official ballots to be printed for each political party having candidates to be voted for in the primary and distributed to the chairman of the county boards of elections in the several counties, upon which ballot shall appear the names of candidates who shall, under the provisions of this article, have filed notice of their candidacy and otherwise complied with the requirements of this article, except candidates for offices ballots for which are herein provided to be printed by the several county boards of elections, so that such ballots shall be received by the respective county boards of elections, at least ten days before the date of holding such primaries. The expense of printing and distributing such official ballots shall be paid by the state treasurer out of funds not otherwise appropriated, upon the warrant of the chairman of the state board of elections. Said ballots so printed by the state board of elections shall be for each of the

several political parties in the state, as hereinafter defined and described, and the names of the respective parties and the candidates shall be printed on the ballots prepared for the respective parties with which the candidates affiliate, and upon the ballots the office for which each aspirant is a candidate shall be indicated. At least six days before the primary election the chairman of the county boards of election shall distribute the official ballots to the several registrars in their respective counties, and take a receipt therefor, and the registrars shall have them at the several polling places for the use of the electors at the time of holding the primary. Any election or other officer who shall accept appointment and who shall, without previously resigning, fail to perform in good faith the duties prescribed in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (1915, c. 101, s. 8; 1917, c. 218; 1927, c. 260, s. 22.)

Editor's Note.—By the amendment of 1927 a provision requiring the chairman of the State Board of Elections to certify to the appropriate county board of elections as to the facts of notice filed by the candidates for nomination for State Senate in districts composed of two or more counties, which originally appeared in the first part of this section, was stricken, and in lieu thereof the part of the section beginning with the phrase "and in the senatorial districts" and down through the words "office of the State Senators" was inserted.

§ 6029. Only official ballots to be voted; contents and printing of ballots.—There shall be voted in primary elections only the official ballots furnished to the chairmen of the county boards of elections and by them to the registrars; and if other ballots be voted in a party primary, they shall not be counted. There shall be as many kinds of official ballots as there are political parties members of which have filed notice of their candidacy for primary elections, and all ballots shall be printed on white paper in black ink and shall be of the same size and style of printing; and the name of the political party whose ballot it is shall be printed in bold-face type at the top of the ballot. (1915, c. 101, s. 9; 1917, c. 218.)

§ 6030. How choice indicated on ballot; how names of candidates placed thereon.—Each elector wishing to participate in such primary election shall be permitted to vote for his choice of candidates for the nomination for all other offices provided for by and subject to the provisions of this article, including candidates for the United States senate, by making a cross-mark in the small squares opposite the names of the respective candidates for whom he elects to vote. It shall be the duty of the board of elections having in charge the duty of printing the ballots for primary elections to be held under the provisions of this article to so print the ballots that the names of the opposing candidates for any office shall, as far as practicable, alternate in position upon the ballot, to the end that the name of each candidate shall occupy with reference to the name of every other candidate for the same office, first position, second position, and every other position, if any, upon an equal number of ballots, and distribute the said ballots, when so printed, impartially and without discrimination. (1915, c. 101, s. 10; 1917, c. 218; 1933, c. 165, s. 15.)

§ 6031. How primary conducted; ballot boxes; voter's rights; polling books; information given; observation allowed.—There shall be provided for each election precinct at the expense of the respective counties three ballot boxes, labeled respectively, "National Primary Box," "State Primary Box," and "Legislative and County Primary Box," for each political party; in the first whereof shall be deposited all ballots for president and vice-president of the United States and members of congress; in the second whereof shall be deposited all ballots for state and district offices other than senatorial districts; and in the third whereof shall be deposited all ballots for members of the general assembly and county officers.

When an elector offers himself and expresses the desire to vote at a primary held under this article, he shall declare the political party with which he affiliates and in whose primary he desires to vote, as hereinbefore provided, and he shall then be furnished by the registrar ballots, as desired by him, of the political party with which he affiliates, which he may vote, and he shall not in such primary be allowed to vote a ticket marked with the name of any political party of which he has not declared himself to be a member as herein defined; but any one may at any time any elector proposes to vote challenge his right to vote in the primary of any party upon the ground that he does not affiliate with such party or does not in good faith intend to support the candidates nominated in the primary of such party, and it shall be the duty of the registrar and judges of election upon such challenge to determine whether or not the elector has a right to vote in said primary: Provided, that he may vote for candidates for all or any of the offices printed on such ballot, as he shall elect, and he shall be required to disclose the name of the political party printed thereon and no more. He may in the manner hereinbefore prescribed mark such names as he desires, and these and only these shall be counted as being voted for by him, and he shall have the right to so vote for only one candidate as his choice for each office. If he be a qualified elector and has elected to vote in the primary of a party of which he has declared himself to be a member, as provided herein, he may deposit his ballots in the proper ballot boxes, or he may permit the registrar or a judge of election to so deposit them for him. Any person who has become of the age of twenty-one years between the time when the books closed for registration and the day of the primary election, and who is otherwise a qualified elector, and who desires to register and vote as a member of a political party, may do so in the manner herein provided.

At the time of voting, the name of the voter shall be entered on a primary polling book to be provided and kept for the purpose, under rules prescribed by the state board of elections, which said book shall be provided at the expense of the state for all state primaries and state elections, and upon said book shall be entered, opposite the name of such voter and in proper column provided for the purpose, the name of the political party whose ticket he shall have voted, and said books shall be filed for safe-keeping, until

the next election, in the clerk's office of the county in which the ballots are so cast.

It shall be the duty of the county board of elections and of the judges and registrar in each precinct to make all necessary arrangements by providing a proper number of places in each precinct whereby each voter shall have an opportunity, both at all primary and all general elections, to arrange his ballot in secret and without interference from any other person whatsoever; and it shall be the duty of the judges of election and registrars holding primary and general elections to give any voter any information he may desire in regard to the kind of ballot which he may be entitled to vote and the names of the candidates thereon, and in response to questions asked by him, they shall communicate to him any information which he may desire in regard to the kind of ballot which he may be entitled to vote and the names of the candidates thereon, and, in response to questions asked by him, they shall communicate to him any information necessary to enable him to mark his ballot as he desires.

At the written request of the chairman of any political party of any county, the judges and registrar of any precinct shall designate the name of some elector in each precinct, if there be such elector who affiliates with such political party, who shall be furnished the opportunity to observe the method of holding such primary election; but such elector shall in no manner interfere with the method of holding such election or interfere or communicate with or observe any voter in casting his ballot, but shall make such observation and notes of the manner of holding such election and the counting of the ballots as he may desire: Provided, nothing herein contained shall be construed to prevent any elector from casting at the general election a free and untrammeled ballot for the candidate or candidates of his choice. (1915, c. 101, s. 11; 1917, c. 218; 1921, c. 181, s. 6; 1923, c. 111, s. 14.)

See § 6055(a 34).

Editor's Note.—By the amendment of 1923 the name of the third ballot box was changed from "Legislative Primary Box" to "Legislative and County Primary Box," and in this box are to be deposited the ballots cast for the county officers also. Prior to the amendment of 1921 the polling book provided for by the third paragraph of this section was to be furnished at the expense of the state for the first election held under this article, and subsequently at the expense of the several counties. The amendment requires that it be furnished at the expense of the state for all the state primaries and state elections.

§ 6032. Counting ballots and certifying results.—When the polls have been closed, the primary ballot boxes shall be opened in the presence of the registrars and both judges of election at the several precincts and such electors as may desire to be present: Provided, the registrars and judges may fix such space as they may consider reasonable and necessary to enable them to count the ballots. The ballots of each of the several parties in the boxes in each precinct shall be counted and bound in separate packages, and the result shall be certified to the proper county board of elections and by them to the state board of elections upon blanks to be provided by the state board of elections at the expense of the state within the time and, as near as may be, in the manner provided for the certification of the result of general elections. (1915, c. 101, s. 12; 1917, c. 218.)

When Ballot Found in Wrong Box.—In primary elections for county officers the registrar and judges of election are authorized not only to pass upon the qualification of voters therein, but to determine whether a ballot found in the wrong box was placed there by mistake, and, if satisfied of the mistake, to count the ballots for the one for whom they had been cast, in making their returns to the county board. Bell v. County Board, 188 N. C. 311, 124 S. E. 311.

Distinguished from General Elections.—In primary elections the return for county officers must be certified as this section requires to the county board of elections, which shall publish the result, the distinction between elections of this character and general elections being that in the former there is no right to an election to public office which may be put in issue and determined by quo warranto, and no provision for a board of canvassers with power judicially to determine the precint return. Bell v. County Board, 188 N. C. 311, 124 S. E. 311.

§ 6033. Names of candidates successful at primaries printed on official ballot; where only one candidate.—Only those who have filed notice of their candidacy and who shall have complied with the requirements of law applicable to candidates before primaries with respect to such primary elections shall have their names printed on the official ballot of their respective political parties. In all cases where only one aspirant for nomination for a particular political office to be voted for by his political party on the state or district ballot of, for the state senate in districts composed of two or more counties shall have filed such notice, the board of elections of the state shall, upon the expiration of the time for filing such notices, declare him the nominee of his party, and his name shall not therefore be placed on the primary ballot, but shall be placed on the ballot to be voted at the general election as his party's candidate for such office. (1915, c. 101, s. 13; 1917, c. 218.)

§ 6034. Primaries for county offices; candidates to comply with requirements.—At the time of holding primary elections for state officers, as hereinbefore provided, there shall likewise be held primary elections for the nomination of the candidates of the several political parties in the state for county offices; and no one shall be voted for in such primary elections for the nomination of candidates for county offices unless he shall have filed a notice with the appropriate county board of elections and shall have taken the pledge required of candidates filing notice with the state board of elections, as hereinbefore provided, and shall have otherwise complied with the requirements applicable to such candidates for nomination for state offices, except in so far as such requirements are modified by the provisions of this article with reference to candidates for primary nominations for county offices. (1915, c. 101, s. 14; 1917, c. 218.)

§ 6035. Primaries for county offices; notices of candidacy and official ballots.—The state board of elections, prior to the time fixed by law for the appointment of registrars and judges of primary elections, shall prescribe, print, and furnish to the several county boards of elections; a sufficient number of notices to be filed by candidates desiring to be voted for nomination for county offices, which said notices shall be substantially the same in form as those required to be filed by candidates for pri-

mary nomination for state offices as hereinbefore provided; and the several county boards of elections shall have printed and shall provide official ballots for county officers similar in form and otherwise to the ballots hereinbefore provided for state officers, and shall distribute the same to the several precincts in the manner and at the time hereinbefore prescribed in the case of state offices. (1915, c. 101, s. 15; 1917, c. 218.)

§ 6036. Primaries for county offices; voting and returns.—In primary elections for the selection of candidates for county offices the voting shall be done in the manner hereinbefore prescribed for primary elections for state offices, and all of the provisions herein contained governing primary elections for state offices shall apply with equal force to primary elections for county offices when not inconsistent with other provisions herein with reference to such primary elections for county officers; and the returns in such primary elections for county officers, shall be certified to the appropriate county board of elections, which shall declare and publish the results. (1915, c. 101, s. 16; 1917, c. 218.)

§ 6037. Primary ballots; provisions as to names of candidates printed thereon. — It shall be the duty of the state board of elections to print and furnish to the counties for primary elections a sufficient number of official ballots for each political party having candidates to be voted for in the primary within the time prescribed for in C. S. six thousand and twenty-eight, which official ballots shall have printed thereon the names of candidates for the United States senate, for the national house of representatives, and for governor and for all other state offices, with the exception of the office of solicitor and judge of the superior court. All of these candidates, ballots for which are required to be furnished by the state, may be printed on one form of ballot or they may be printed on a number of forms of ballots as may be decided by the state board of elections.

It shall be the duty of the county board of elections to print and furnish to the voting precincts in the county for primary elections a sufficient number of official ballots for each political party having candidates to be voted for in the primary within the time prescribed in C. S. six thousand and twenty-eight, which official ballots shall have printed thereon the names of candidates for the following offices in the order in which they are named and shall be known as the "official primary ballot for judge superior court, solicitor, state senator and county and township offices" when candidates for all of said offices are participating in the primary within the county. Whenever there is no contest for any of the aforesaid offices, then such names will not appear on the county ballot. The county board of elections may print the township ballot separate from the county ballot if it should so desire.

The ballots to be printed by the counties shall be of such width, color, form and printed in such type and on such paper as the state board of elections may direct.

It shall be the duty of the chairman of the state board of elections to certify to the chairman of the county board of elections in each county, by the fourth Saturday before each primary election, the names of such candidates for the nomination for judge of the superior court and solicitor as have filed the required notice and pledge and filing fee with the state board of elections and entitled to have their names placed on the official county ballot, and it shall be the duty of each county chairman to acknowledge receipt within two days after the receipt of the letter of certification to the chairman of the state board of elections so that the state chairman will know that each candidate's name has been properly certified and received. (1915, c. 101, s. 17; 1917, c. 218; 1933, c. 165, s. 16.)

§ 6038. Boxes for county officers; how labeled. —All ballots for nominations for county officers shall be deposited in the box labeled "Legislative Primary Box" hereinbefore provided for, which box, in addition to bearing the label "Legislative Primary Box," shall also immediately thereunder be labeled "County Primary Box." (1915, c. 101, s. 18; 1917, c. 218.)

§ 6039. Sole candidate declared nominee. — In all cases where only one aspirant for nomination by the party with which he affiliates for the state senate in districts composed of only one county or for the house of representatives of the general assembly or for a county office shall have filed the notice of candidacy in this article required, the county board of elections shall, upon the expiration of the time fixed for filing such notice, declare him the nominee of his party, and his name shall therefore not be placed on the primary ballot, but shall be placed upon the ballot to be voted at the general election as his party's candidate for such office. (1915, c. 101, s. 19; 1917, c. 218.)

§ 6040. Primaries for township and precinct officers.—The several county boards of elections shall provide for holding in their respective counties primary elections for the choice of candidates for the nomination for township and precinct officers, which primary elections shall be held at the same time and places as the primaries for county officers: Provided, that in the counties exempt from the operation of the primary law for the nomination of county officers, township officers may also be nominated in the same manner as county officers within such counties. The expenses for holding primaries for township officers shall be paid for by the counties. (1915, c. 101, s. 19; 1917, c. 218; 1933, c. 165, s. 17.)

§ 6041. Returns of precinct primaries; preservation of ballot.—The registrar and judges of election at each precinct in the state of North Carolina shall certify upon blanks prepared and printed by the state board of elections and distributed through the county board of elections to the election officers of each of the several precincts the result of the primary election of each precinct; and there shall be made by the judges of election and registrar at each precinct two copies of their returns, one copy of which shall be filed by them with the clerk of the court of their county for public inspection, and one shall be filed with the county board of elections to be kept on file by it;

and it shall by the duty of the judges and registrars to preserve and keep for two months after each election the original ballots cast at such election, which ballots, after being counted, shall be placed in bundles, a separate and distinct bundle to be made of the ballots of each and every political party cast in each of the boxes, and each box in which ballots were cast shall be carefully sealed up before the election officers shall separate, so that nothing put in may be taken from them, and the signatures of the registrar and judges of each precinct shall be inscribed at the same time on a seal placed on each box of the precinct, and no box shall be opened except upon the written order of the county board of elections or a proper order of court. The state board of elections, in preparing the printed form for returns to be made by the judges and registrars of the several precincts to the county boards of elections, and in preparing the forms for the returns to be made by the county boards of elections to the state board of elections of the result of primary elections, shall prepare them in such form as will show the number of votes cast for each candidate for nomination for office. (1915, c. 101, s. 21; 1917, c. 179, s. 1; 1917, c. 218; 1923, c. 111, s. 15.)

Editor's Note.—Prior to the amendment of 1923 the judges and the registrars were required to preserve the original ballots for four months instead of two, as it is now provided.

Determination of Results of Primary for County Officers.—In a primary for county officers the registrar and judges of election have the sole power, acting in their ministerial capacity, to determine whether votes cast in the wrong ballot box should be counted; and they may correct their tabulation of the results thereof to the county board of elections before the latter has judicially determined the results; the duties of the latter board being continuous, under the provisions of the statute, and such powers not being functus officio until they have finally determined the results of the election. Bell v. County Board, 188 N. C. 311, 124 S. E. 311.

§ 6042. County board tabulates results of primaries; returns in duplicate.—The county boards of elections of the several counties shall tabulate the returns made by the judges and registrars of the several precincts in their respective counties with reference to candidates before the primaries, so as to show the total number of votes cast for each candidate of each political party for each office, and, when thus compiled on blanks to be prepared and furnished by the state board of elections for the purpose, these returns, in the case of officers other than the state senate in districts composed of only one county, the house of representatives and county offices, shall be made out for each county in duplicate, and one copy shall be forwarded to the state board of elections and one copy shall be filed with the clerk of the superior court of the county from which such returns are made; in the case of member of the state senate in district composed of only one county, member of the house of representatives and county officers, such returns shall be made out in duplicate, and one copy thereof filed with the clerk of the superior court and one copy retained by the county board of elections, which shall forthwith, as to such last mentioned offices, publish and declare the results. (1915, c. 101, s. 21½; 1917, c. 218.)

Sufficient Declaration of Result—Request for Second Primary.—When the provisions of this section have been complied with, the result posted at the courthouse door of the county, the result of the election is sufficiently declared, and the contestant receiving the next highest vote, less than a majority, must file his written request for a second primary within five days thereafter, in accordance with the proviso of section 6045. Johnston v. Board, 172 N. C. 162, 90 S. E. 143.

Mandamus by Candidate.—Where the county board of elections has assumed to pass upon the qualifications of the electors voting in a primary for the selection of a party candidate for a county office, and in so doing has declared certain of the electors disqualified, and has accordingly changed its returns and declared the one appearing to have received a smaller vote, the choice of the party as a candidate, an action will lie by the one appearing to have received the larger vote, against the county board, to compel them, by mandamus, to tabulate the returns made by the registrars and judges of the precinct, and then to publish and declare the same as the result of the election. Rowland v. Board, 184 N. C. 78, 113 S. E. 629.

Authority of County Board of Elections.—Under our primary law the right of a proposed elector to vote for the party's choice of a county official, in this case a register of deeds, is expressly referred to the precinct registrar and judges of election, without power of review, or otherwise, in the county board of elections, the authority of the county board extending only to supervise or to review "errors in tabulating returns or filling out blanks." Rowland v. Board, 184 N. C. 78, 113 S. E. 629.

Power to Pass on Qualification of Voters.—The primary law to select a party candidate for a county office repeals all laws inconsistent with its provisions, and by incorporating therein certain provisions of the general election law, confers no authority on the county board of electors to pass upon the qualifications of the voters of a precinct, and thereby change the result of the election from that appearing upon the face of the returns it had officially tabulated. Rowland v. Board, 184 N. C. 78, 113 S. E. 629.

§ 6043. State board tabulates returns and declares nominees.—The state board of elections shall compile and tabulate the returns for each candidate for each office for each political party voted for in the primary except in cases in which it is in this article provided that the result shall be declared by the several county boards of election, and if a majority of the entire votes cast for all the candidates of any political party for a particular office shall be for one candidate, he shall be declared by the state board of elections the nominee of his political party for a particular office shall be for one candidate, he shall be declared by the state board of elections the nominee of his political party for such office. (1915, c. 101, s. 22; 1917, c. 218.)

§ 6044. Returns of election boards to be under oath.—The chairman or secretary of each of the county boards of elections and the chairman or secretary of the state board of elections shall file with all returns and declarations of results of election required by law to be filed by such boards an affidavit that the same are true and correct according to the returns made to them; and a judge of election or registrar shall accompany the precinct returns as to results of primary elections with an affidavit that the same are true and correct, according to the votes cast and correctly counted by them. (1915, c. 101, s. 23; 1917, c. 218.)

§ 6045. When results determined by plurality or majority; second primaries. — Nominations for president and vice-president of the United States in the several congressional districts shall be determined by a plurality of the votes cast, and in the case of all other officers mentioned in this act nominations shall be determined by a majority of the votes cast.

If in the case of an office other than the offices

of president and vice-president no aspirant shall receive a majority of the votes cast, a second primary, subject to the conditions hereinafter set out, shall be held in which only the two aspirants who shall have received the highest and next highest number of votes shall be voted for: Provided, that if either of such two shall withdraw and decline to run, and shall file notice to the effect with the appropriate board of elections, such board shall declare the other aspirant nominated: Provided further, that unless the aspirant receiving the second highest number of votes shall, within five days after the result of such primary election shall have been officially declared, and such aspirant has been notified by the appropriate board of elections, file in writing with the appropriate board of elections a request that a second primary be called and held, the aspirant receiving the highest number of votes cast shall be declared nominated by such appropriate board.

If a second primary be ordered by the state or a county board of elections, it shall be held four weeks after the first primary, in which case such second primary shall be held under the same laws, rules, and regulations as are provided for the first primary, except that there shall be no further registration of voters other than such as may have become legally qualified after the first primary election, and such persons may register on the day of the second primary, and shall be entitled to vote therein under the provisions of this article. If a nominee for a single office is to be selected, with more than one candidate, then the majority of this section shall be ascertained by dividing the total vote cast for all candidates by two, and any excess of the sum so ascertained shall be a majority within the meaning of this section.

If nominees for two or more offices (constituting a group) are to be selected, and there are more candidates for nomination than there are such offices, then the majority of this section shall be ascertained by dividing the total vote cast for all of such candidates by the number of positions to be filled, and then dividing the result by two. Any excess of the sum so ascertained, shall be the majority of this section. If in ascertaining the result in this way, it appears that more candidates have obtained this majority than there are positions to be filled, then those having the highest vote, if beyond the majority just defined, shall be declared the nominee for the positions to be filled. Where candidates for all the offices within such group do not receive a majority as defined and set out in this section, those candidates equal in number to the positions to be filled and having the highest number of votes shall be declared nominated unless a second primary shall be demanded, which may be done by any one or all of the candidates equal in number to the positions remaining to be filled and having the second highest number of votes. When any one or all of such candidates in the group receiving the second highest number of votes demand a second primary, such second primary shall be held and the names of all those candidates in the group receiving the highest number of votes and all those in the group receiving the second highest number of votes and demanding a second primary shall be put on the ballot for such primary. In no case shall there be a third primary, but the candidates receiving the highest number of votes in the second primary shall be nominated. (1915, c. 101, s. 24; 1917, c. 179, s. 2; 1917, c. 218; 1927, c. 260, s. 23; 1931, c. 254, s. 17.)

Editor's Note.—The provisions contained in the last two paragraphs of this section were added by the amendment of 1927, except the last three sentences of the last paragraph which were added by the amendment of 1931.

Effect of Failure to Comply with Provisions within the Time.—Applying the rule of construction that every part of a statute should be given effect when possible, it is Held, that section 24 of the State Primary Law, ch. 101, Laws of 1915, providing, among other things, that the successful candidate for certain offices, shall receive a majority of the votes cast, when construed in connection with the proviso of the same section, that the one receiving the next highest vote, under a majority, shall file a request, in writing, with the appropriate board of elections for a second primary, entitles the one receiving the highest number of votes to be the candidate of the party to the office, upon the failure to the one receiving the next highest vote to comply with the provision within the time stated, i. e., within five days after the result of the primary has been officially declared. Johnston v. Board, 172 N. C. 162, 90 S. E. 143.

Same—Mandamus.—Where a candidate for membership in the General Assembly who has received the next highest vote in a legalized primary, but less than a majority of the votes cast, has failed to comply with the proviso of this section, in giving the written notice to the board of elections for a second primary within the time prescribed, and after duly declaring the result of the election, the board then orders the second primary, the ministerial duty of recognizing the one receiving the highest vote as the candidate and putting his name on the ticket as such will be enforced by mandamus. Johnston v. Board, 172 N. C. 162, 90 S. E. 143.

The plaintiff in proceedings for mandamus to compel the county board of elections to declare him the successful candidate of his party in a primary election, or that he is entitled to a second primary to select between himself and another candidate for the same office, must show the denial of a present, clear legal right, by the failure of such board to have done so. Umstead v. Board, 192 N. C. 139, 134 S. E. 409.

In order for a candidate for the party nomination for the Legislature to obtain a writ of mandamus against the county board of elections to compel the ordering of a second primary, he must show that his opponents receiving the larger number of votes have not received a majority of the votes cast for said nomination, and within five days after the result has been officially declared and he has been notified thereof, he must have filed with the county board of elections a written request that the second primary be called by it. Umstead v. Board, 192 N. C. 139, 134 S. E. 409.

§ 6046. Attorney-general to aid boards by advice and as to forms.—In the preparation and distribution of ballots, poll books, forms of returns to be made by registrars and judges, and forms of the returns to be made by the county boards of elections to the state board of elections and to be made by the state board of elections, and all other forms to be prepared by the attorney-general of the state of North Carolina, and it shall be the duty of the state board of elections to call to its aid the attorney-general of the state of North Carolina, and it shall be the duty of the attorney-general to advise and aid in the preparation of all such ballots, books, and forms. (1915, c. 101, s. 25; 1917, c. 218.)

§ 6047. Returns, canvasses, and other acts governed by general election law.—The returns to be made by the registrars and judges as to the results of primary elections, and the canvassing by the county boards of elections of such results and declarations of such results, and the reports to be made by the county boards of elections to the state board of elections and other acts and things to be done in ascertaining and declaring

the results of primary elections, unless otherwise provided herein, shall be done within the time before or after the primary election, and, as near as may be, under the circumstances prescribed for like acts and things done with reference to a general election, unless such acts and things prescribed to be done within certain times under the general election law shall, with respect to primary elections, be changed by general rules promulgated by the state board of elections for what may seem to them a good cause. (1915, c. 101, s. 26; 1917, c. 218.)

§ 6048. Election board may refer to ballot boxes to resolve doubts.—When, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the state board of elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results, which shall be done under such rules as the state board of elections shall establish to protect the integrity of the election and the rights of the voters. (1915, c. 101, s. 27; 1917, c. 218.)

Applicable in Case of Error.—This section applies only "when, on account of errors in tabulating returns or filling out blanks," the result of the election cannot be accurately known, and confers no authority on the courts, to investigate and pass upon the methods or manner in which the primary may have been conducted. Brown v. Costen, 176 N. C. 63, 67, 96 S. E. 659.

§ 6049. Official ballots for general election of state and district officers; preparation and distribution.—(This section was amended by Public Laws 1923, Chapter 111, section 17, by renumbering same "5980(a).")

§ 6050. Official ballots for general election of county officers; preparation and distribution.—(This section was amended by Public Laws 1923, Chapter 111, Section 18, by renumbering same "5980(b).")

§ 6051. Repealed by Public Laws 1929, c. 164, s. 1.

See § 6055(a 1), (a 34).

§ 6052. Political party defined for primary elections. — A political party within the meaning of the primary law shall mean any political group of voters which, at the last preceding general election, polled at least three per cent of the total vote cast therein for such offices as are described in section 5913 of the C. S. as amended. (1915, c. 101, s. 31; 1917, c. 218; 1933, c. 165, s. 17.)

For definition of "political party" under the general election law, see § 5913.

§ 6053. Filling vacancies occurring after primary.—In the event that any person nominated in any primary election as the candidate of a political party for a state office shall die, resign, or for any reason become ineligible or disqualified between the date of such primary election and ensuing general election, the vacancy caused thereby may be filled by the action of the state executive committee of such political party; in the event of such vacancy in the case of a district office, the same may be filled by the action of the executive committee for such district of such political party; and in the event of such vacancy in the case of a county office, or the house of representatives or the state in a district composed of only one county, the same may be filled by the action of the executive committee of the party affected thereby in the county wherein such vacancy occurs: Provided, that should a vacancy occur in any office after the primary has been held a nomination shall be made in like manner as above provided, and the name of the person so nominated shall be placed on the official ballot: Provided further, that after the time for filing notice of candidacy has expired and the candidate who has been declared the nominee for any office shall die before the date of the primary, the vacancy thus created may be filled by nomination in like manner as above provided, and the name of the person so nominated shall be placed on the official ballot: Provided further, that if, after the time for filing notice of candidacy has expired, any person who has filed notice of his candidacy in accordance with law, die, and there be only one other person who has filed notice of his candidacy for such office, the board of elections shall reopen the time for filing notice of candidacy, and fix a date upon which the primary election for such office shall be held. (1915, c. 101, s. 33; 1917, c. 179, s. 3; 1917, c. 218; 1923, c. 111, s. 16.)

Editor's Note.—The second and third provisos of this section were added by the amendment of 1923.

§ 6054. Certain counties excepted.—This article on primary elections shall not apply to nominations for candidates for county offices, members of the house of representatives, and for the state senate when there exist agreements for rotation of candidates in senatorial districts of more than one county under C. S. six thousand and fourteen, and when there is but one county in a senatorial district, in the following counties, to-wit: Alexander, Ashe, Burke, Cabarrus, Catawba, Cherokee, Clay, Dare, Duplin, Edgecombe, Graham, Hyde, Lee, New Hanover, Northampton, Stokes, Surry, Union: Provided, that in any county whose county offices are hereby exempted, if voters in number as great as one-fifth of the total vote cast for governor in such county at the preceding gubernatorial election shall petition the board of county commissioners of such county for an election thereon, it shall be the duty of the said board to order an election at the next succeeding general election upon the method of nominating county officers and member or members of the house of representatives. At such election those favoring the nomination of county and legislative officers by primary shall cast ballots on which is written or printed "for county primary;" those opposed shall cast ballots bearing the words "against county primary." If a majority of the votes cast in such election shall be "for county primary," then the provisions of this article shall thereafter apply to such county, and it shall be no longer exempted. Otherwise, such exceptions shall remain in force. (1915, c. 101, s. 34; 1915, c. 102; 1917, cc. 53, 86, 89, 90, 91, 92, 112, 137, 218, 222, 225; P. L. 1917, cc. 312, 327, 351, 373; 1919, cc. 41, 81, 95, 173, 278, 283, 337; Ex. Sess. 1920, cc. 16, 57; 1923, cc. 21, 30, 44, 50, 88, 137, 226; 1925, c. 20, s. 1; c. 147; c. 197; 1927, c. 106, ss. 1, 2; 1929, c. 70, s. 1; 1929, c. 77, s. 1; 1931, cc. 16, 93, 108, 190, 203, 450; 1933, c. 70; c. 165, s. 18; c. 327, s. 1; 1935, cc. 365, 391.)

Editor's Note.—This section originally excepted by name

39 counties from the operation of the law. The list was increased by the Extra Session, 1920, by two counties, Avery (Ex. 1920, c. 16) and Stokes (Ex. 1920, c. 57) and Martin was stricken out. R. L. 1921, c. 298. The 1923 Legislature struck out eight counties from the list of exceptions as follows: Alleghany, (P. L. 1923, c. 21); Avery (c. 137); Caldwell (c. 30); Halifax (c. 50); Johnson (c. 44); Polk (c. 88); Transylvania (c. 21); Tyrell (c. 226). The laws of 1925 added Randolph County and struck out Montgomery and Pender Counties and the laws of 1927 struck out the county of Brunswick. Public Local Laws 1927 struck out Alamance. The Acts of 1929 eliminated McDowell. The Acts of 1931 struck out Davidson (c. 16); Davie and Mitchell (c. 93); Wilkes (c. 108); Macon (c. 190); Gaston (c. 203); Sampson (c. 450). For statute relating to conduct of primary in Wilkes County, see P. L. 1931, c. 108.

P. L. 1933, c. 70 struck out Randolph from the list of excepted counties. P. L. 1933, c. 327, again adding Avery to the list of excepted counties, was repealed by P. L. 1935, c. 141. P. L. 1935, c. 365 struck out Stanley from the list of counties and c. 391 of P. L. 1935 struck out Watauga. P. L. 1935, c. 216 made an exception applicable to the town of Wilkesboro.

Same—Ashe County.—P. L. 1929, c. 319, eliminated Ashe County provided a petition of voters be presented within twelve months.

§ 6054(a). Contests over primary results. — All contests over the results of a primary election shall be determined according to the law applicable to similar contests over the results of a general election. (1933, c. 165, s. 19.)

§ 6055. Certain local acts repealed. — All laws and clauses of laws relating to primary elections in Wake county in conflict with this article be and the same are hereby repealed. All local laws regulating primaries as to county or legislative officers in those counties not excepted in the preceding section from the provisions of this article are hereby repealed. (1915, c. 101, s. 34½; 1917, c. 218.)

§ 6055(a). Notice of candidacy to indicate vacancy; votes only effective for vacancy indicated.—In any primary when there are two or more vacancies for chief justice and associate justices of the supreme court of North Carolina to be filled by nominations all candidates shall file with the state board of elections at the time of filing notice of candidacy a notice designating to which of said vacancies the respective candidate is asking the nomination. All votes cast for any candidate shall be effective only for the vacancy for which he has given notice of candidacy, as provided herein. (1921, c. 217.)

SUBCHAPTER III. GENERAL ELECTION LAWS

Art. 18. Election Laws of 1929

§ 6055 (a1). Former laws repealed; enactments in lieu thereof.—Sections five thousand nine hundred and seventy-six, five thousand nine hundred and seventy-eight, five thousand nine hundred and eighty, five thousand nine hundred and eighty (a), five thousand nine hundred and eighty (b), five thousand nine hundred and eighty-one, five thousand nine hundred and eighty-two, five thousand nine hundred and eighty-three, and six-thousand and fifty-one, of the Code of North Carolina, and all acts amendatory thereof, be and the same are hereby repealed, and in lieu thereof the following shall be and is hereby enacted and inserted. (1929, c. 164, s. 1.)

Chapter 557 of the Public Laws of 1933 provides that this subchapter shall not apply in Ashe county.

For an amendment to Public Laws of 1933, chapter 557 applicable only in Ashe county, see Public Laws of 1935, chapter 259.

§ 6055 (a2). Applicable to all subdivisions of State.—The provisions of this subchapter shall be applicable to all counties, cities, towns, townships and school districts in the State of North Carolina, without regard to population or number of inhabitants thereof. (1929, c. 164, s. 2.)

§ 6055(a3). Preparation and distribution; definitions.—All ballots cast in general elections for national, State, county, municipal, and district officers in the towns, counties, districts, cities and other political divisions, and in primaries for the nomination of candidates for such officers, shall be printed and distributed at public expense. The printing and distribution of all ballots other than the county or local ballots hereinafter designated and the ballots for elections in cities and towns and the ballots for elections on bonds or other local measures, shall be arranged and handled by the State Board of Elections and shall be paid for by the State; and the printing and distribution of ballots in all county and local elections or primaries shall be arranged and handled by the County Board of Elections and shall be paid for by the respective counties; the printing and distribution of ballots in all municipal elections shall be arranged and handled by municipal authorities conducting such elections or primary and shall be paid for by such municipality. The term "State elections" as used in this chapter shall apply to any election held for the choice of Presidential Electors, United States Senators, State, county or district officer or officers. The term "National elections" shall apply to any member of Congress of the United States. The term "city election" shall apply to any municipal election so held in a city or town, and the term "city officers" shall apply to any person to be chosen by the qualified voters at such an election. (1929, c. 164, s. 3.)

§ 6055 (a4). Applicable to all issues submitted to people; form of ballot.—This subchapter shall apply and control all elections for the issuance of bonds and to all other elections in which any question or issue is submitted to a vote of the people. And the form of ballot in such election shall be a statement of the question, with provisions to be answered "Yes" or "No" or "For" or "Against," as the case may be. (1929, c. 164, s. 4.)

§ 6055 (a5). Ballots, provisions as to; names of candidates and issue.—The ballots printed for use under the provisions of this subchapter shall be printed and delivered to the County Boards of Elections at least thirty days previous to the date of election, and shall contain the names of all candidates who have been put in nomination by any primary, convention, mass meeting, or other assembly of any political party in this State, or have duly filed notice of their independent candidacy, and all questions or issue to be voted on. It shall be the duty of the County Board of Elections to have printed all necessary ballots for use under the provisions of this subchapter for county, township, and district elections. It shall be the duty of the State Board of Elections to have printed all necessary ballots for use under the provisions hereof for State and national elections, constitutional amendments and proposi-

tions submitted to the vote of the people. (1929, c. 164, s. 5.)

§ 6055 (a6). Independent candidates put upon ballot, upon petition. — The Boards of Election shall cause to be printed upon said ballots as an independent or non-partisan candidate, the name of any qualified voter who has been requested to be a candidate for office by written petition signed by at least twenty-five per cent of those entitled to vote for a candidate for such office according to the vote cast in the last gubernatorial election in the political division in which such candidate may be voted for, when such petition is accompanied by an affidavit from such proposed candidate that he seeks to become an independent or non-partisan candidate and does not affiliate with any political party: Provided, such petition is filed with said Board of Elections at or before the time prescribed by law for the nomination of candidates by the political parties within the particular political division. The written petition provided herein, in municipal elections shall be signed by at least twenty-five per cent of the votes cast for the candidate running, in the last municipal election, for the particular office. (1929, c. 164, s. 6; 1931, c. 223; 1935, c. 236.)

Editor's Note.—The Act of 1931 added the last sentence to this section. The amendment, badly worded, apparently means that in municipal elections, the number who must sign the petition must be equal to ten per cent (now twenty-five per cent) of the votes cast for the successful candidate for that office in the last municipal election. 9 N. C. Law Rev., 373.

Prior to the amendment of 1935 the petition could be signed by at least ten per cent instead of twenty-five per cent.

§ 6055 (a7). Becoming candidate within ten days of election; provision as to ballot.—If any qualified citizen is nominated to fill any vacancy, in any primary or election, after the time fixed herein for the printing of the official ballots, then said names shall not be printed upon said ballots. But the candidate nominated may, at his own expense, have the Board of elections print a separate ticket upon which the title of the office for which he is a candidate and his own name shall be printed. Such ticket so printed as aforesaid shall be an official ticket. This section relates to all elections, whether nominating primaries, general elections, or others. (1929, c. 164, s. 7; 1931, c. 254, s. 1.)

Editor's Note.—The Act of 1931 struck out the following after the word "But," in line seven of this section "in addition to the names printed upon such ballots, there shall be at least one blank space under each office to be voted for in which may be written the candidate's name, or," and also struck out the word "County" before "Board" in line eight thereof.

§ 6055 (a8). Withdrawal of candidate. — After the proper officer has been notified of the nomination, as hereinbefore specified, of any candidate for any office, he shall not withdraw same unless upon the written request of the candidate so nominated, made at least thirty days before the day of the election. 1929, c. 164, s. 8.

§ 6055(a9). Number of ballots; what ballots shall contain; arrangement.—There shall be seven kinds of ballots, called respectively: official ballot for presidential electors; official ballot for United States senator; official ballot for members of congress; official state ballot; official county ballot; official township ballot; and official ballot on constitutional amendments or other proposition submitted. In addition to these, there shall be a definite form of ballot for primary elections as hereinafter provided and a ballot for municipal elections as hereinafter provided: Provided, further, that the state board of elections, or the county board of elections may, in their discretion, combine any one or more of the ballots for either the primary or the general election. The ballots herein provided for shall be used for the purpose for which their names severally indicate, and not otherwise, that is to say:

(a) On the official presidential ballot, the names of candidates for electors of president and vice-president of the United States of any political party or group of petitioners, shall not be placed on the ballot, but shall after nomination, be filed with the secretary of state. In place of their names, there shall be printed first on the ballot the names, of the candidates for president and vice-president of the United States respectively, of each such political party or group of petitioners, and they shall be arranged under the title of the offices. The party columns shall be separated by black ink lines. At the head of each party column shall be printed the party name in large type and below this a circle one-half inch in diameter, below this the names of the candidates for president and vice-president in the order prescribed. Each party circle shall be surrounded by the following instructions plainly printed: "For a straight ticket, mark within this circle."

If the state board of elections, in its discretion, should combine the presidential ballot with some other kind of ballots, such as the state, senatorial, or congressional ballots, then in that event, there shall be printed at the left of the names of such candidates for president and vice-president of each party or group, a single voting square large enough so that a voter, desiring to vote for candidates for other officers of another party, may vote for the candidates for president and vice-president together in the one single square. When the presidential ballot is combined with another ballot, instruction number two on the state ballot shall be included with the instructions given herein for the presidential ballot.

On the face of the ballot, at the top, shall be printed in heavy black type the following instructions:

1. To vote a straight ticket, make a cross (x) mark in the circle of the party you desire to vote for.

2. A vote for the names of candidates for president and vice-president is a vote for the electors of that party, the names of whom are on file with the secretary of state.

3. If you tear or deface or wrongly mark this ballot, return it and get another.

On the bottom of the ballot shall be printed the following:

.....

Facsimile of signature of chairman of state board of elections.

(aa) On the official ballot for United States senator the names of the nominees or candidates for United States senator, of each party, and of

each independent candidate, if any, shall be printed and so arranged in columns as to show above such names the party with which all such nominees or candidates are affiliated. At the head of each party column shall be printed the party name in large type, and below this a circle one-half inch in diameter, and below this the names of the respective nominees, or independent candidates, if any. At the left of each name shall be printed a voting square, and all voting squares shall be arranged in the same perpendicular line. Each party circle shall be surrounded by the following instructions plainly printed: "For a straight ticket mark within this circle." The column for any independent candidate or candidates shall be similar to the party columns, except that at the top of said column there shall be printed the words "independent candidates." The columns shall be arranged upon the ballots as directed by the state board of elections, as to all ballots herein required to be printed and distributed by such state board of elections, and by the county board of elections with respect to all ballots required to be printed and distributed by the county board of elections. On the face of the ballot, at the top, shall be printed in heavy type the following instructions:

1. To vote a straight ticket, make a cross (x) mark in the circle of the party you desire to vote for.

2. If you tear or deface or wrongly mark this ballot, return it and get another.

On the bottom of the ballot shall be printed the following:

.....

Facsimile of signature of chairman of state board of elections.

(aaa) On the official ballot for members of congress, the names of the nominees or candidates for members of congress, of each party, and of each independent candidate, if any, shall be printed and so arranged in columns as to show above such names the party with which all such nominees or candidates are affiliated. At the head of each party column shall be printed the party name in large type, and below this a circle one-half inch in diameter, and below this the names of the respective nominees, or independent candidates, if any. At the left of each name shall be printed a voting square, and all voting squares shall be arranged in the same perpendicular line. Each party circle shall be surrounded by the following instructions plainly printed: "For a straight ticket mark within this circle." The column for any independent candidate or candidates shall be similar to the party columns, except that at the top of said column there shall be printed the words "independent candidates." The columns shall be arranged upon the ballots as directed by the state board of elections, as to all ballots herein required to be printed and distributed by such state board of elections, and by the county board of elections, with respect to all ballots, required to be printed and distributed by the county board of elections. On the face of the ballot, at the top, shall be printed in heavy type the following instructions:

1. To vote a straight ticket, make a cross (x) mark in the circle of the party you desire to vote for.

2. If you tear or deface or wrongly mark this ballot, return it and get another.

On the bottom of the ballot shall be printed the following:

.....

Facsimile of signature of chairman of state board of elections.

(b) On the official state ballot shall be printed the names of all candidates for state public offices, including candidates for judges of the superior court, and all other candidates for state offices not otherwise provided for. The names of all such state candidates to go upon the said official ballot which is herein provided, of each party and group of independent candidates, if any, shall be printed in one column and the party column shall be parallel and shall be separated by distinct black lines. At the head of each party column shall be printed the party name and under this shall be a blank circle one-half of an inch in diameter, which party circle shall be surrounded by the following instructions plainly printed: "For a straight ticket, mark within this circle." The columns for the independent candidates shall be similar to the party columns, except that above each column shall be printed the words "independent candidate." In each party column the names of all nominees of that party shall be printed in the customary order of the office, and the names of all candidates of each party for any one office shall be printed in a separate section, and at the top of each section shall be printed on one line the title of the office and a direction as to the number of candidates for whom a vote may be cast, unless there shall not be room for the direction, in which case it shall be printed directly below the title. If two or more candidates are nominated for the same office for different terms the term for which each is nominated shall be printed as a part of the title for the office. Each section shall be blocked in by black lines and the voting squares shall be set in a perpendicular column or columns to the left of each candidate's name. The printing on said ballot shall be plain and legible, and in no case shall it exceed in size ten-point type.

On the face of the ballot, at the top, shall be printed in heavy type, the following instructions:

1. To vote a straight party ticket, make a cross (x) mark in the circle of the party you desire to vote for.

2. To vote for some but not all the candidates of one party, make a cross (x) mark in the square at the left of the name of every candidate printed on the ballot for whom you wish to vote. If you mark any one candidate you must mark all for whom you wish to vote. A mark in the circle will not be counted if any one candidate on the ballot is marked.

3. If you tear or deface or wrongly mark this ballot, return it and get another.

On the bottom of the ballot shall be printed the following:

.....

Facsimile of signature of chairman of state board of elections.

The instructions hereby given for the state ballot shall be used when there are two or more state offices to be filled at an election, or when two or more kinds of ballots as herein given are printed on one ballot.

(c) On the official county ballot shall be printed the names of all candidates for solicitor for the judicial district in which the county is situated; for member of the general assembly, and all county offices. It shall conform as nearly as possible to the rules prescribed for printing the state official ballot, but on the bottom thereof shall be printed the following:

.....

Facsimile of signature of chairman of county board of elections.

(d) The township ballot shall contain the names of the candidates for constable and justices of the peace, and the municipal ballot shall contain the names of all offices to be filled in the municipality at the election for which the ballot is to be used, and shall conform as near as may be to the provisions herein set out with respect to the county ballot.

(e) On the official ballot on constitutional amendements or other propositions submitted shall be printed each amendment or proposition submitted in the form laid down by the legislature, county commission, convention, or other body submitting such amendment or proposition. Each amendment or proposition shall be printed in a separate section and the section shall be numbered consecutively, if there be more than one. At the left of each question shall be printed two voting squares, one above the other, each at least one-fourth (¼) inch square. At the left of the upper square shall be printed the word "yes" and at the left of the lower square shall be printed the word "no." At the top of the ballot shall be printed the following instructions:

1. To vote "yes" on any question, make a cross (X) mark in the square to the right of the word "yes."

2. To vote "no" on any question, make a cross (X) mark in the square to the right of the word "no."

3. If you tear or deface or wrongly mark this ballot, return it and get another.

On the bottom of each ballot shall be printed the following:

.....

Facsimile of signature of chairman of state board of elections.

(f) In primary elections there shall be no provision for designating the choice of a party ticket by one act or mark, but there shall be a separate ballot for each party and of different colors. The ballots containing the names of the respective candidates shall be so printed that the names of the opposing candidates for any office shall, as far as practicable, alternate in position upon the ballot, to the end that the name of each candidate shall occupy with reference to the name of every other candidate for the same office, first position, second position and every other position, if any, upon an equal number of ballots, and the said ballots shall be distributed impartially and without discrimination. A square shall be to the left of the name of each candidate in which the voter may make a cross (X) mark indicating his choice for each candidate. On the bottom of each ballot in such primary election printed by the state board of elections shall be printed the following:

.....

Facsimile of signature of chairman of state board of elections.

And on the bottom of each ballot printed by the county board of elections shall be printed the following:

.....

Facsimile of signature of chairman of county board of elections.

(g) In all city or municipal elections and primaries there shall be an official ballot on which shall be printed the names of all candidates for city or town offices. It shall conform as nearly as possible to the rules prescribed for the printing of the official general ballot, but on the bottom thereof shall be printed the following:

.....

Facsimile of signature of city clerk. (1929, c. 164, s. 9; 1931, c. 254, ss. 2-10; 1933, c. 165, ss. 20, 21.)

Editor's Note.—This section was amended in several particulars by the Act of 1931. The provision as to combining ballots was inserted in the first paragraph, and changes were made as to the instructions, etc., to be printed on the ballots.

The following cases were decided under former section 5980, now repealed. However, these cases are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

Defect in Size a Mere Irregularity.—In a municipal election, under the provisions of its charter, the mere difference in sizes was held a mere irregularity and hence not to be regarded as a device or condemned and rejected as such. State v. Spires, 152 N. C. 4, 67 S. E. 41.

Part of Ballot Torn Off, the Rest Valid.—Where a voter had simply torn off the top part of a ballot, declining to vote for the first names, but cast the balance of the ballot intact, the vote was valid for the candidates indicated. Bray v. Baxter, 171 N. C. 6, 86 S. E. 163.

The term "device" in the statute regulating elections, means any distinguishing mark; and hence when certain ballots cast at an election had upon the outside or back of the letter "O. K." in pencil, they were within the prohibition of the statute and were properly rejected. Baxter v. Ellis, 111 N. C. 124, 15 S. E. 938.

Same—Application to Municipal Elections.—The statute prohibiting devices upon ballots embraces elections for town and city officers. Baxter v. Ellis, 111 N. C. 124, 15 S. E. 938.

§ 6055(a10). Ballots for each precinct wrapped separately.—All ballots for use in each precinct shall be wrapped in packages, each package to contain whatever number of ballots the chairman of the county board of elections may deem advisable for the respective precincts in his own county, but each package shall have written or stamped thereon the number of ballots contained therein so the registrar will know how many ballots to account for in his precinct. (1929, c. 164, s. 10; 1933, c. 165, s. 22.)

§ 6055(a11). Number of ballots to be furnished polling places.—There shall be provided for each voting place at which an election or primary is to be held such a number of ballots that there shall be at least one hundred and twenty-five ballots for every one hundred registered voters at each polling place, or an excess of ballots of twenty-five per cent over the registration at each precinct. (1929, c. 164, s. 11; 1933, c. 165, s. 22.)

§ 6055(a12). Ballot boxes.—The County Board of Elections shall provide for each precinct ballot boxes for the official ballots, as herein specified, which boxes shall respectively be plainly marked "Presidential Electors," "Ballot Box Members of Congress," "Ballot Box United States Senator," "Official State Ballot Box," "Official County Ballot Box," "Official Township Ballot Box," and "Official Propositions Ballot Box," and also one additional box for spoiled ballots, to be plainly marked "For Spoiled Ballots." Each box shall be supplied with a lock and key and with an opening in the top large enough to allow a single folded ballot to be easily passed through, but no larger. (1929, s. 164, s. 12; 1931, c. 254, s. 11.)

Editor's Note.—The Act of 1931 cut out the provision as to providing a box for ballot stubs.

§ 6055(a13). Sample ballots.—The State Board of Elections shall prepare sample ballots of each kind of ballot printed by the State for the purpose of instructing voters in marking their ballots, which sample ballots shall be printed on colored paper and with the words "Sample Ballots" printed conspicuously thereon and shall distribute the same to the County Boards of Elections. The County Boards of Elections shall likewise print on colored paper and distribute county and township sample ballots for instructing said voters. (1929, c. 164, s. 13; 1931, c. 254, s. 12.)

Editor's Note.—This section was amended and rewritten by the Act of 1931 to read as set out above.

§ 6055 (a14). Distribution of ballots and boxes.—The County Board of Elections shall deliver to the Registrar in each precinct the proper number of ballots and boxes, as required by the provisions of this subchapter, three days before the day of election, and shall obtain from each Registrar a receipt for same. (1929, c. 164, s. 14.)

§ 6055 (a15). Destroyed or stolen ballots; how replaced; reports as to.—In case the ballots furnished to any precinct in accordance with the provisions of this subchapter shall be destroyed or stolen, it shall be the duty of the County Board of Elections to cause other ballots to be prepared in the form of the ballots so wanting. Within three days after the close of the polls on election days, the Registrars having lost such ballots shall make a written report of the whole circumstances of the loss of the ballots, under oath, to the County Board of Elections. (1929, c. 164, s. 15.)

§ 6055(a16). Registrars, duties of, compensation; failure to serve.—In addition to the compensation for performance of the duties required in the registration of voters, each Registrar shall receive for his services on election day the sum of three dollars. If any Registrar or Judge of election fails or refuses to serve as herein provided, the officer holding the election shall swear in a bystander of the same political faith as the Registrar not serving, and if none such be present then any other qualified elector. The bystander sworn in to act as Registrar or Judge shall receive the same compensation as the Registrar is entitled to. One of the judges appointed for such purpose by the precinct election officers shall have charge of the ballots and furnish them to the voters in manner hereinafter set forth. The Registrar shall promptly, at the close of the registration period, certify to the County Board of Elections the number of voters registered in his precinct. (1929, c. 164, s. 16.)

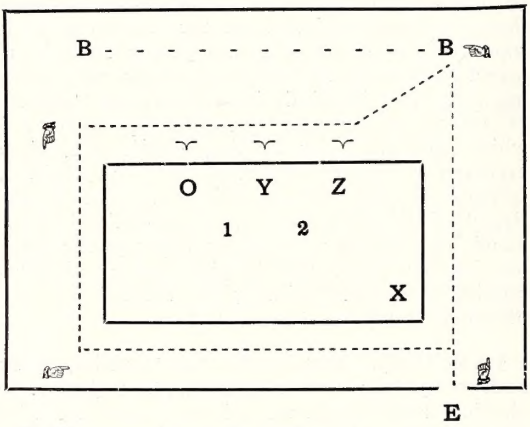
§ 6055 (a17). Voting booths; arrangement and number of; provisions as to.—The County Board of Elections in each county whose duty it is to hold the election and appoint polling places therein, as herein provided for, shall cause the same to be suitably provided with a sufficient number of voting booths, equipped with the tables or shelves on which voters may conveniently mark their ballots. Each voting booth shall be at least three feet square and six feet high and shall contain three sides and have a door or curtain in front, which door or curtain shall extend within two feet of the floor; and each booth shall be so arranged that it shall be impossible for one voter in one voting booth to see another voter at another voting booth in the act of marking his ballot. The arrangement shall be such that the ballot boxes and voting booths shall be in plain view of the judges of election. The number of such voting booths shall be not less than one for each hundred voters qualified to vote at such polling places. Each voting booth shall be kept properly lighted and provided with proper supplies and conveniences for making ballots. The County Board of Elections may provide buildings by lease or otherwise in which the elections are to be conducted, or they may cause a space not more than one hundred feet from the ballot box to be roped off, in which space no person shall be allowed to enter except through a way not exceeding three feet in width for the entrance and exit of voters. They may prescribe the manner in which the place for holding elections shall be prepared in every precinct so as to properly effectuate the purpose of this act. The County Board of Elections shall also be entitled to demand and use any school or other public building for the purpose of holding any election and require that such building be vacated for such purpose. (1929, c. 164, s. 17.)

§ 6055 (a18). Regulations for opening polls; oath of judges and registrars.—The Judges of election and Registrars of each precinct shall meet at the polling places therein at least one-half hour before the time set for opening polls for each election referred to in this subchapter, and shall proceed to arrange the space within the enclosures set apart for election, and to prepare the booths for the orderly and legal conduct of the election. They shall then and there have the official ballot boxes, herein referred to, together with the boxes for ballot stubs and the boxes for spoiled ballots as hereinbefore provided, the sealed packages of official ballots, the registration book, the polling book, and the required supplies. They shall see that the voting booths are supplied with pencils, or pen and ink; unlock the official ballot boxes; see that the same are empty; allow the authorized watchers present and any other electors who may be present to examine said boxes, and shall lock the same again while empty. After such official ballot boxes are relocked they shall not be unlocked or opened until the closing of the polls; and except as authorized by law no ballot or other matter shall be placed in such boxes. Each Judge of election

and Registrar shall before the opening of the polls take the following oath:

"I do solemnly swear that I will administer the duties of my office without fear or favor; that I will not in any manner request or seek to persuade or induce any voter to vote for or against any particular candidate or proposition, and that I will not keep or make any memorandum of anything occuring within the voting booths, except I be called upon to testify in a judicial proceeding for a violation of the election laws of this State: so help me God."

This oath shall be administered at the time hereinbefore prescribed by the Registrar to the two Judges of election and by one of them to the Registrar. The same oath shall be taken before the Registrar or Judge by every person rendering assistance. They shall then open the sealed package of ballots, and one of the Judges shall make proclamation that the polls are open and of the time when they will be closed. From the time of opening of the polls until the announcement of the result of the canvass of the votes after the close of the polls and the signing of the official returns the official ballot boxes and the other boxes herein provided for and all the official ballots herein provided for shall be kept within the precinct election enclosures. (1929, c. 164, s. 18.)



E. Entrance to voting place.
X. Judge with ballots and box for spoiled ballots.
B. Voting booths.
Y. Polls book.
Z. Ballot box.
O. Box for stubs.
1, 2, Other election officials.
Direction of entry and exit of voter.
(1929, c. 164, s. 19.)

§ 6055(a19). No loitering or electioneering allowed within 50 feet of polls; regulations for voting at polling places; banners or placards; guard rail; diagram.—No person shall, while the polls are open at polling places, loiter about or do any electioneering within such polling place or within fifty feet thereof, and no political banner, poster, or placard shall be allowed in or upon such polling places during the day of the election. The election officials and ballot boxes shall at all times be in plain view of the qualified voters who are present, and a guard rail shall be placed not nearer than ten feet nor further than twenty feet from the said election officials and ballot boxes.

The arrangement of the polling place shall be substantially according to the diagram, and shall conform as nearly thereto as the building or other place in which said election is held will permit. (1929, c. 164, s. 19.)

§ 6055 (a20). Delivery of ballot to voter; testing registration.—The voter shall enter through the entrance provided, and shall forthwith give to the Judge of election his name and residence. One of the Judges shall thereupon announce the name and residence of the voter in distinct tone of voice. The Registrar shall at once announce whether the name of such voter is duly registered. If he be registered, and be not challenged, or if he be challenged and the challenge decided in his favor, or if he take the requisite oath and be lawfully entitled to vote, the proper Judge of election shall prepare for him one official ballot of each kind, folded by such judge in the proper manner for voting, which is: first, bring the bottom of the ballot up to the margin of the printing at the top of the ballot, allowing the margin to overlap; and second, fold both sides of the center, so that when folded the face of the ballot, except the one inch margin at the top thereof, shall be concealed, and so that the ballot shall be not more than four inches wide. Such Judge shall then instruct the voter to refold the ballot in the same creases when he has marked it. (1929, c. 164, s. 20; 1931, c. 254, s. 13.)

Editor's Note.—The Act of 1931 cut out the last sentence of this section which read as follows: "Such judge shall then with pen and ink mark upon the top margin of the face thereof the number of the voter upon the polling list and the initials of such judge's name, and shall thereupon deliver the ballot or ballots to the voter. No person other than such designated judge shall deliver to any voter any ballot."

§ 6055 (a21). Marking ballots by voter.—The voter shall then go to one of the voting booths and shall therein prepare his ballot by marking in the appropriate margin or place a cross (X) mark opposite the name of the candidate or party of his choice for each office to be filled, or by filling the name of the candidate of his choice in the blank space provided therefor, and marking a cross (X) opposite thereto. The voter may designate choice of candidate by a cross (X) or by a check mark, or other clear indicative mark. (1929, c. 164, s. 21.)

§ 6055(a22). Folding and depositing of ballots; signature of voter if challenged; delivery of poll books to clerks of Superior Court.—When the voter shall have prepared his ballot or ballots, he shall leave the voting booth with his ballot folded so as to conceal the face of the ballot, and keep it so folded, shall proceed at once to the judge of election designated to receive ballots and shall offer them to such judge who shall then deposit the ballots in the proper boxes: Provided, however, that if the voter shall have been challenged and the challenge be decided in the voter's favor, before depositing the ballot or ballots in the proper boxes, the voter shall write his name on the ballot or ballots for identification in the event that any action should be taken later in regard to the voter's right to vote. After voting the voter shall forthwith pass outside the guard-rail, unless

he be one of the persons authorized to remain for purposes other than voting. No ballots except official ballots bearing the official endorsement shall be allowed to be deposited in the ballot boxes or to be counted. No official ballot folded shall be unfolded outside of the voting booth until it is to be counted. No person to whom any official ballot shall be delivered shall leave the space within the guard-rail until after he shall have delivered back all such ballots. When a person shall have received an official ballot from the judge, he shall be deemed to have begun the act of voting, and if he leave the guard-rail before the deposit of his ballot in the box he shall not be entitled to pass again within the guard-rail for the purpose of voting.

The poll books required to be kept by the judges of elections shall be signed by the judge at the close of the election, and delivered to the registrar, who shall deliver them to the Clerk of the Superior Court. (1929, c. 164, s. 22; 1931, c. 254, s. 14.)

Editor's Note.—The Act of 1931 amended and rewrote this section to read as set out above.

§ 6055(a23). Manner and time of voting.—On receiving his ballot the voter shall forthwith, and without leaving the enclosed space, retire alone, unless he be one that is entitled to assistance as hereinafter provided, to one of the voting booths, and without undue delay unfold and mark his ballots. No voter shall be allowed to occupy a booth already occupied by another, or to occupy a booth more than five minutes in case all the booths are in use and voters are waiting. It shall be unlawful purposely to deface or tear an official ballot in any manner, or to erase any name or mark written thereon by a voter. If a voter wrongly mark or deface or tear a ballot he may obtain others successively one at a time, but not more than three of any one kind, upon returning to the Judge each ballot so spoiled. (1929, c. 164, s. 23.)

§ 6055(a24). Who allowed in room or enclosure; peace officers.—No person other than voters in the act of voting shall be allowed in the room or enclosure in which said ballot box and booths are, except the officers of election and official markers as hereinafter provided. In case of cities having duly enrolled policemen or peace officers, the city authorities may designate the officers to keep the peace at the polls on the outside of the enclosure in which is the ballot box. But in no event shall said policemen or peace officers come nearer to said entrance than ten feet, or enter the room or enclosure in which is the ballot box, unless specially requested to do so by the officers holding the elections, and then only for the purpose of preventing disorder; and at any time when requested to do so by said officers holding elections, the said policemen shall retire from the room or enclosure in which is the ballot box, and to a point not nearer than ten feet to the aforesaid entrance. (1929, c. 164, s. 24.)

§ 6055(a25). Ballots not taken from polls; other ballots for spoiled ballots; delivery to County Board of Elections.—No person shall take or remove any ballots from the polling place before the close of the polls. If any voter spoils a ballot, he may successively obtain others, one at a time, not exceeding three in all, upon returning each spoiled one to the Registrar, and the Registrar shall deposit said spoiled ballot in the box kept for the purpose by him. Within three days after each election or primary the Registrar of each precinct shall deliver to the County Board of Elections in an envelope to be furnished by the County Board of Elections for such purpose the spoiled ballots so deposited at such precinct, and shall at the same time in another envelope furnished for such purpose, deliver to the said County Board of Elections the unused ballots from said precinct. The County Board of Elections shall thereupon make a check to ascertain whether the total of such spoiled ballots and such unused ballots when added to the number of ballots cast at such precinct shall equal the total number of ballots furnished to the Registrar of such precinct prior to such election or primary. (1929, c. 164, s. 25.)

§ 6055(a26). Assistance to voters.—Prior to the date of any election hereunder the county board of elections, together with the registrar of each precinct of each county, shall designate for each precinct therein a sufficient number of persons of good moral character and of the requisite educational qualifications, who shall be bona fide electors of the precinct for which they are appointed, to act as markers, whose duty it shall be to assist voters in the preparation of their ballots. The assistants or markers so appointed by the said county board of elections shall be so appointed as to give fair representation to each political party whose candidates appear upon the ballot. The chairman of the county organization of any political party may, not more than ten days before any election to be held, hereunder, submit to the county board of elections the names of not less than ten qualified voters in any voting precinct of the county, and thereupon the marker or markers appointed to represent such party in said election at said voting precinct shall be selected from among those so named. Such persons shall remain within the enclosure prepared for the holding of elections, but shall not come within ten feet of the guard-rail, except when going to or returning from the booth with any elector who has requested assistance. Such marker or assistant shall not in any manner seek to persuade or induce any voter to cast his vote in any particular way, and shall not make or keep any memorandum of anything occurring within such booth, and shall not directly, or indirectly, reveal to any other person how in any particular such voter marked his ballot, unless he, or they, be called upon to testify in a judicial proceeding for a violation of the election laws. Every such marker or assistant, together with the registrar and judge of election, shall, before the opening of the polls, take and subscribe an oath that he will not, in any manner, seek to persuade or induce any voter to vote for or against any particular candidate, or for or against any particular proposition, and that he will not make or keep any memorandum of anything occurring within the booth, and will not disclose the same, unless he be called upon to

testify in a judicial proceeding for a violation of the election laws of this state. The said oath, after first being taken by the registrar, may be administered by him to the two judges of election and to the markers or assistants, as herein provided: Provided however, that no markers shall be named for or permitted in primary elections conducted under the provisions of this subchapter: Provided further, that in any primary election held hereunder, any voter may ask and secure from any election official at his voting precinct, aid in the preparation of his ballot or in voting: Provided, that in all general and primary elections held under the provisions of this article any voter may select another member of his or her family who shall have the right to accompany such voter into the voting booth and assist in the preparation of the ballot, but immediately after rendering such assistance the person so assisting shall vacate the booth and withdraw from the voting arena: Provided, that any voter in primary elections may be accompanied into the voting booth by any member of his or her family for the purpose of aiding in the marking of his or her ballot or by any other person requested by the voter. (1929, c. 164, s. 26; 1933, c. 165, s. 24.)

Public Laws 1933, c. 164 exempts Brunswick county from the provision of this section and makes provisions for marking ballots for those asking aid in that county.

For an act exempting Cherokee county, see Public Laws of 1935, chapter 461. For an act amending Public Laws of 1933, chapter 164 which exempts Brunswick county, see Public Laws of 1935, chapter 221.

§ 6055(a27). Aid to persons suffering from physical disability or illiteracy.—Any person, who, on account of physical disability, is obviously unable to enter the booth without assistance, or who on account of such disability, or because of illiteracy, or for any other good reason, shall request assistance from the registrar or judges of election, may, upon such declaration and upon his own request, have assistance from any one of the markers or assistants provided for in § 6055(a26). The voter may indicate which of the markers he desires to assist him; whereupon the registrar shall direct that the marker or assistant so indicated by the voter accompany said voter into the booth and give him such aid as may be requested in the preparation of his ballot, whereupon said marker or assistant shall withdraw from said booth and to his place within the rail, and shall not accompany the voter to the ballot box unless assistance be required on account of physical infirmity and such assistance is requested by the voter, or have any further conversation with said voter prior to the time that he deposits his ballot. In the event the voter does not request the assistance of any particular marker or assistant, then the registrar shall appoint from among the official markers or assistants some person to aid the voter in preparing his ballot. (1929, c. 164, s. 27.)

Public Laws 1933, c. 164 exempts Brunswick county from the provision of this section and makes provisions for marking ballots for those asking aid in that county.

For an act exempting Cherokee county, see Public Laws of 1935, chapter 461. For an act amending Public Laws of 1933, chapter 164 which exempts Brunswick county, see Public Laws of 1935, chapter 221.

§ 6055(a28). Method of marking ballots; improperly marked ballots not counted; when.—The voter shall observe the following rules in marking his ballot:

1. If the elector desires to vote a straight ticket, or in other words, for each and every candidate of one party for whatever office nominated, he shall, either—

(a) Make a cross mark in the circular space below the name of the party at the head of the ticket; or

(b) Make a cross mark on the left of and opposite the name of each and every candidate of such party in the blank space provided therefor.

2. If the elector desires to vote a mixed ticket or in other words for candidates of different parties, he shall:

(a) Omit making a cross mark in the circular space above the name of any party and make a cross mark in the blank space before the name of each candidate for whom he desires to vote on whatever ticket he may be.

3. If the elector desires to vote for a person whose name does not appear on the ticket, he can substitute the name by writing it in with a pencil or ink in the proper place, and making a cross (x) mark in the blank space at the left of the name so written in. When a name is written in on the official ballot, the new name so written in is to be treated like any other name on the ballot. No sticker is to be used.

4. If the elector marks more names than there are persons to be elected to an office, or, if for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office but shall be returned as a blank vote for such office.

5. If a voter shall do any act extrinsic to the ballot itself, such as enclosing any paper or other article in the folded ballot, such ballot shall be void.

6. No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice.

7. Every elector who does not vote a ballot delivered by the election officer shall, before leaving the polling place, return such ballot to such officer.

8. A cross (x) mark shall consist of any straight line crossing any other straight line at an angle within a voting circle or square. A voter may designate his choice of candidate by the cross (x) mark or by a check mark, or any other clear indicative mark. Any ballot which is defaced or torn by the voter shall be void. (1929, c. 164, s. 28; 1931, c. 254, s. 15; 1933, c. 165, s. 23.)

§ 6055(a29). Offenses of voters; interference with voters; penalty.—A voter who shall, except as herein otherwise provided, allow his ballot to be seen by any person, or who shall take or remove, or attempt to take or remove, any ballot from the polling place or any person who shall interfere with, or attempt to interfere with any voter when inside said enclosed space, or when marking his ballot, or who shall remain longer than the specified time allowed by this subchapter in the booth, after being notified that his time has expired, or who shall endeavor to in-

duce any voter, while within the enclosure, before voting, to show how he marks or has marked his ballot, or aid, or attempt to aid, any voter by means of any mechanical device, or any other means whatever, while within the enclosure, in marking his ballot, shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court; and election officers shall cause any person committing any of the offenses herein set forth to be arrested and shall cause charges to be preferred against the person so offending, in a court of competent jurisdiction. (1929, c. 164, s. 29.)

§ 6055(a30). Offenses of election officers. — Any judge of election or registrar, or other election officer, after having qualified, who wilfully and knowingly refuses or fails to perform the duties herein prescribed, or who wilfully and knowingly violates the provisions of this subchapter, shall be guilty of a misdemeanor and subject to a fine, or to imprisonment in the county jail not less than ten nor more than ninety days, at the discretion of the court. (1929, c. 164, s. 30.)

§ 6055(a31). Imposition on voter; punishment.—No person shall wilfully and knowingly impose upon any blind or illiterate voter a ballot in any election, contrary to his wish and desire, by falsely representing to such voter that the ballot proposed to him is such as he desired; and any person convicted of falsely representing to such blind or illiterate voter that the ballot presented to him is such as he desired shall be fined not less than one hundred nor more than five hundred dollars, or be confined in the county jail for not less than thirty days nor more than twelve months, at the discretion of the court. (1929, c. 164, s. 31.)

§ 6055(a32). Reading and numbering the ballots; certificate of result; delivery of boxes to Board of Elections.—When the polls are closed the Registrar and Judge shall, in the presence of the watchers appointed by the respective executive committees of the several political parties and any other electors of the precinct who choose to be present open the box and count and record the number of the votes received by each candidate and on each question or measure. The said Judge of election and Registrar shall not adjourn or postpone the canvass of the vote in such precinct until it shall be fully completed. The Judges of election may, at their discretion, open the ballots of absent electors immediately after the close of the polls, subject to the rights of challenge now allowed by law. A certificate setting forth the results of such election shall be signed by the Registrar and Judges of election. Upon the close of the counting of the ballots, as herein provided, the said election official shall replace said ballots in the official ballot box and lock the same. The ballot box shall then be delivered to such place as may be designated by the county board of elections. (1929, c. 164, s. 32.)

§ 6055(a33). Hours of election. — In all elections in this State the polls shall be open from sunrise until sunset. (1929, c. 164, s. 33.)

§ 6055(a34). Application to all primary elections; repeal of conflicting law; one-party primary officials selected from party.—The provisions of this subchapter shall apply to any and all primary elections held in this State, or in any county thereof, as fully as it applies to general elections, as herein provided, and section six thousand and thirty-one of the Consolidated Statutes is hereby repealed, in so far as it conflicts with this subchapter, the intent being to provide the same laws for the conduct of primaries as for general elections.

Provided, further, that in any primary election held under the provisions of this subchapter, when only one political party participates in such primary, then, all of the election officials selected for holding such primary shall be chosen only from the political party so participating. (1929, c. 164, s. 34.)

§ 6055(a35). Assistants at polls; when allowed and amount to be paid. — The county board of elections may appoint one clerk or assistant at any precinct in the county which has as many as five hundred qualified registered voters on the registration books in such precinct, and one additional such clerk or assistant for each additional five hundred qualified registered voters at such precinct. No other clerk or assistant shall be appointed for any precinct except as herein set out. Such assistants and clerks shall, in all cases, be qualified voters of the ward, or precinct, for which they are appointed, and they shall be paid the same compensation as is provided by law for the judges of election to be paid. (1929, c. 134, s. 35; 1933, c. 165, s. 24.)

§ 6055(a36). Watchers.—Each political party or independent candidate named on the ballot may, by a writing signed by the county chairman of such political party, or, as the case may be, by the independent candidate or his manager, filed with one of the Judges of election, appoint two watchers to attend each polling place. Such watchers shall serve also as challengers; Provided, that no person shall be appointed as a watcher who is not of good moral character; and the Judges of election and registrar may for good cause shown reject any appointee and require that another be appointed. Such watchers shall in no case enter the guard-rail, but may be present at the opening of the boxes and the canvass of the ballots at the close of the election. Provided that any elector when the name of any elector is called by the judges of election, may exercise the right of challenging the elector's right to vote and when he or she does so then such challenger may enter the election space to make good such challenge and then retire at once when such challenge is heard. (1929, c. 164, s. 36.)

§ 6055(a37). Supervision over primaries and elections; regulations.—The State Board of Elections shall have general supervision over the primaries and elections provided for herein, and may delegate its authority to county boards appointed by it, and in case where sufficient provision may not appear to have been made herein may make such regulations and provisions as it may deem necessary: Provided, none of the same shall be in conflict with any of the

provisions of this subchapter. (1929, c. 164, s. 37.)

§ 6055(a38). Bribery of election officials. — Any registrar, pollholder, or other officer of an election, or member of the Board of Elections, who directly or indirectly seeks, receives, or accepts money or the promise of money, the promise of office, or other reward of compensation from a candidate in a primary or candidate in any election of a political party, or from any source other than as provided by law, shall be guilty of a felony, and, upon conviction, shall be punished by a fine or imprisonment, in the discretion of the court. (1929, c. 164, s. 38.)

§ 6055(a39). Ballots furnished absentee electors; when deemed voted before sunset; deposit in boxes.—The ballots to be furnished absentee electors under the provision of section five thousand nine hundred and sixty-three of the Consolidated Statutes of North Carolina and acts amendatory thereof shall be the same as the official ballots hereinbefore designated. No vote of an absent elector shall be counted unless upon the official ballot printed as prescribed in this act.

Any absentee ballots received by the registrar during the hours now fixed by law for the receipt thereof shall be deemed to be voted before sunset, and, if the convenience of the voters or officers holding the election will be promoted thereby, may in their discretion be opened and deposited in the box immediately after the closing of the polls. (1929, c. 164, s. 39.)

§ 6055(a40). Fraud in connection with absentee vote; forgery.—Any person attempting to aid and abet fraud in connection with any absentee vote cast, or to be cast, under the provisions of this subchapter, shall be guilty of a misdemeanor, and, upon conviction, be fined or imprisoned, in the discretion of the court. Any person attempting to vote by fraudulently signing the name of a regularly qualified voter shall be guilty of forgery, and be punished accordingly. (1929, c. 164, s. 40.)

§ 6055(a41). Public officials violating subchapter disqualified from holding office and voting.—Any public official who knowingly and wilfully violates any of the provisions of this subchapter, and thereby aids in any way the illegal casting or attempting to cast a vote, or who shall connive to nullify any provision of this subchapter in order that fraud may be perpetrated, shall upon conviction therefor be disqualified from holding office in the State of North Carolina, and shall be disqualified from exercising the right of franchise, as now provided in case of conviction for felony. (1929, c. 164, s. 41.)

§ 6055(a42). Definitions as applied to municipal primaries and elections.—With respect to all municipal primaries and elections, wherever in this subchapter appear the words "county board of elections" shall be deemed to be written the words "city or town governing body;" and wherever appear the words "chairman of board of elections" shall be deemed to be written the words "mayor of town or city." (1929, c. 164, s. 42.)

§ 6055(a43). Other laws repealed. — All county and local election laws, whether denominated as Australian ballots or otherwise, are hereby repealed; and all laws and clauses of laws in conflict with this act are hereby repealed. (1929, c. 164, s. 43.)

Art. 19. Corrupt Practices Act of 1931.

§ 6055(a44). Title of article.—This article may be cited as the Corrupt Practices Act of one thousand nine hundred thirty-one. (1931, c. 348, s. 1.)

Editor's Note.—This article makes more effective the control of the state over corrupt practices in primaries and elections. 9 N. C. Law Rev. 371.

§ 6055(a45). Definitions. — When used in this act:

(a) The term "Candidate" means an individual whose name is presented for any office to be voted upon on any ballot at any primary, general or special election;

(b) The term "campaign committee" includes any committee, association or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the nomination or election of any candidate at any primary, general or special election;

(c) The term "contribution" means any gift, payment, subscription, loan, advance, deposit of money, or anything of value, and includes any contract, promise or agreement to give, subscribe for, pay, loan, advance or deposit any money or other thing of value to or for the benefit of any candidate at any primary, general or special election, and whether or not said contract, promise or agreement is legally enforceable;

(d) The term "expenditure" means a payment, distribution, loan, advance, deposit or gift of money or anything else of value whatsoever, and includes a contract, promise or agreement to pay, distribute, give, loan, advance, or deposit any money or anything of value whatsoever, and whether or not such contract, promise or agreement is legally enforceable;

(e) The term "person" includes an individual, partnership, committee, association, corporation or any other organization or group of persons. (1931, c. 348, s. 2.)

§ 6055(a46). Detailed accounts to be kept by candidates and others.—It shall be the duty of every candidate and the chairman and treasurer of any and every campaign committee to keep a detailed and exact account of:

(1) All contributions made to or for such candidate or committee;

(2) The name and address of every person making any such contribution, and the date thereof;

(3) All expenditures made by or on behalf of such candidate or committee;

(4) The name and address of every person to whom any such expenditure is made, and the date thereof. (1931, c. 348, s. 3.)

§ 6055(a47). Detailed accounting to candidates of persons receiving contributions.—Every person who receives a contribution for a candidate or for a campaign committee in any primary, general or special election shall render such can-

didate or campaign committee, within five days after receipt of such contribution, a detailed account thereof, including the name and address of the person making such contribution. (1931, c. 348, s. 4.)

§ 6055(a48). Detailed accounting of persons making expenditures.—Every person who makes any expenditure in behalf of any candidate or campaign committee in any primary, general or special election shall render to such candidate or campaign committee, within five days after making such expenditure, a detailed account thereof, including the name and address of the person to whom such expenditure was made. (1931, c. 348, s. 5.)

§ 6055(a49). Statements under oath of pre-primary expenses of candidates; report after primary.—It shall be the duty of every person who shall be a candidate for nomination in any primary for any Federal, State or district office, or for the State Senate in a district composed of more than one county, except where there shall be agreement for rotation as provided in Consolidater Statutes, six thousand fourteen, to file, under oath, ten days before such primary, with the Secretary of State, an itemized statement of all expenditures made by him or which he knows to have been made by any one for him, and of all contributions made to him, directly or indirectly, and also to file, under oath, within twenty days after such primary, with the Secretary of State, an itemized statement of all expenditures made by him or which he knows to have been made by any one else for him, and also of all contributions made to him, directly or indirectly, by any person, with detailed account of such contributions and expenditure as set out in section 6055(a50). And it shall be the duty of every person who shall be a candidate for nomination for the State Senate, except those to whom the preceding sentence applies, for the House of Representatives, and for any county office, to file a like statement with the clerk of the Superior Court of the county of his residence at the times hereinbefore prescribed for filing such statements by candidates for Federal, State and district officers as set out in the preceding sentence. (1931, c. 348, s. 6.)

§ 6055(a50). Contents of such statements. — The statement of contributions and expenditures as required by the preceding section shall be itemized as follows:

(1) The name and address of each person who has made a contribution to or for such candidate or to or for his campaign committee within the calendar year, together with the amount and date of such contribution;

(2) The total sum of all contributions made to or for such candidate or to or for his campaign committee during the calendar year;

(3) The name and address of each person to whom, during the calendar year, an expenditure has been made by or in behalf of such candidate or by or in behalf of his campaign committee, and the amount, date, and purpose of such expenditure;

(4) The name and address of each person by whom an expenditure has been made during the calendar year in behalf of such candidate or his campaign committee and reported to such candidate or campaign committee, and the amount, date, and purpose of such expenditure;

(5) The total sum of all expenditures made during the calendar year in behalf of such candidate or his campaign committee by any person and reported to such candidate or his campaign committee, and the amount, date, and purpose of such expenditure;

(6) The total sum of all expenditures made by such candidate or his campaign committee, or any person in his behalf during the calendar year. (1931, c. 348, s. 7.)

§ 6055(a51). Statements required of campaign committees covering more than one county; verification of statements required.—A like statement as that required in the preceding section shall be filed by any and all campaign committees as hereinbefore defined with the Secretary of State not more than fifteen days nor less than ten days before any primary, general or special election, and not more than twenty days after such primary, general or special election, if said campaign committee is making expenditures in more than one county; and if such campaign committee is making expenditures in only one county, a like or similar report so itemized shall be made within the same periods to the clerk of the Superior Court of such county.

All of the statements or reports of contributions or expenditures as in this article required of any candidate or campaign committee must be verified by the oath or affirmation of the person filing such statement or report, taken before any officer authorized to administer oaths. (1931, c. 348, s. 8.)

§ 6055(a52). Certain acts declared misdemeanors.—Any person who shall, in connection with any primary or election in this State, do any of the acts and things declared in this section to be unlawful, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. It shall be unlawful:

(1) For any person to fail, as an officer or as a judge or registrar of a primary or election, or as a member of any board of elections or board of canvassers, to prepare the books, tickets and return blanks which it is his duty under the law to prepare, or to distribute the same as required by law, or to perform any other duty imposed upon him within the time and in the manner required by law;

(2) For any person to continue or attempt to act as a judge or registrar of a primary or election, or as a member of any board of elections, after having been legally removed from such position and after having been given notice of such removal;

(3) For any person to break up or by force or violence to stay or interfere with the holding of any primary or election, to interfere with the possession of any ballot box, election book, ticket or return sheet by those entitled to possession of the same under the law, or to interfere in any manner with the performance of any duty imposed by law upon any election officer or mem-

ber of any board of elections or board of canvassers;

(4) For any person to be guilty of any boisterous conduct so as to disturb any member of any election or canvassing board or any registrar or judge of elections in the performance of his duties as imposed by law;

(5) For any person to bet or wager any money or other thing of value on any election;

(6) For any person, directly or indirectly, to discharge or threaten to discharge from employment, or otherwise intimidate or oppress any legally qualified voter on account of any vote such voter may cast or consider or intend to cast, or not to cast, or which he may have failed to cast;

(7) For any person to make any contribution or expenditure to aid, or in behalf of any candidate or campaign committee, in any primary, general or special election, unless the same be reported immediately to such candidate or campaign committee, to the end that it may be included by him or it in the reports required of him by law;

(8) For any candidate or any chairman or treasurer of a campaign committee to fail to make under oath the report or reports required of him or it by sections 6055(a49)-6055(a51), or for any campaign committee to fail to furnish to a candidate a duplicate copy of the report to be made by it or its chairman or treasurer;

(9) For any candidate for any political office to receive contributions or to make expenditures, or to assent to or to permit contribution or expenditures in behalf of his candidacy in any primary, whether the same be done before or after said primary is held, in excess of the following sums:

A candidate for Governor and United States Senator	$12,000
A candidate for Congressman	6,000
A candidate for Lieutenant Governor	2,500
A candidate for any other elective State office, one-half of the amount of the annual salary of such office	
A candidate for the General Assembly, either the Senate or the House of Representatives	600

Any candidate for any district, county or other office not hereinbefore named, one-half the annual salary of that office as it may be at the time of such primary: Provided, however, all candidates may lawfully pay, in addition to these amounts, their transportation expenses, board and lodging bills while campaigning for nomination to such office, and the sums so expended need not be reported in the reports hereinbefore required: Provided further, that in any second primary for any of said offices, said candidate or candidates may spend in such second primary one-half of the amounts as above set out;

(10) For any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge;

(11) For any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election;

(12) For any person to give or promise, in return for political support or influence, any political appointment or support for political office;

(13) For any chairman of a county board of elections or other returning officer to fail or neglect, wilfully or of malice, to perform any duty, act, matter or thing required or directed in the time, manner and form in which said duty, matter or thing is required to be performed in relation to any primary, general or special election and the returns thereof;

(14) For any register of deeds or clerk of the Superior Court to refuse to make and give to any person applying in writing for the same a duly certified copy of the returns of any primary or election or of a tabulated statement in a primary or election, the returns of which are by law deposited in his office, upon the tender of the fees therefor;

(15) For any corporation doing business in this State, either under domestic or foreign charter, directly or indirectly, to make any contribution or expenditure in aid or in behalf of any candidate or campaign committee in any primary or election held in this State, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used, or for any contribution or expenditure so made; or for any officer, director, stockholder, attorney or agent of any corporation to aid, abet, advise or consent to any such contribution or expenditure, or for any person to solicit or knowingly receive any such contribution or expenditure.

Any officer, director, stockholder, attorney or agent of any corporation aiding or abetting in any contribution or expenditure made in violation of this sub-section shall, in addition to being guilty of a misdemeanor as hereinbefore set out, be liable to such corporation for the amount of such contribution or expenditure, and the same may be recovered of him upon suit by any stockholder thereof;

(16) For any person wilfully and knowingly to impose upon any blind or illiterate voter a ballot in any primary or election contrary to the wish or desire of such voter, by falsely representing to such voter that the ballot proposed to him is such as he desires. (1931, c. 348, s. 9.)

Editor's Note.—See note under § 6055(a 53). The statute does not make it clear whether the limitations in subsection (9) of this section are on the expenditures of the candidate personally or upon the total amount of the fund available for the conduct of the campaign. 9 N. C. Law Rev. 372.

§ 6055(a53). Certain acts declared felonies. — Any person who shall, in connection with any primary, general or special election held in this State, do any of the acts or things declared in this section to be unlawful, shall be guilty of a felony and upon conviction shall be imprisoned in the State's Prison not less than four months or fined not less than one thousand dollars, or both, in the discretion of the Court. It shall be unlawful:

(1) For any person fraudulently to cause his name to be placed upon the registration books of more than one election precinct or fraudulently to cause or procure his name or that of any other person to be placed upon the registration books in any precinct when such registration in that precinct does not qualify such person to vote legally therein, or to impersonate falsely another registered voted for the purpose of voting in the stead of such other voter;

(2) For any person to give or promise or request or accept at any time, before or after any such primary or election, any money, property or other thing of value whatsoever in return for the vote of any elector;

(3) For any person who is an election officer, a member of the canvassing or election board or other officer charged with any duty with respect to any primary or election, knowingly to make any false or fraudulent entry on any election book or any false or fraudulent returns, or knowingly to make or cause to be made any false statement on any ticket, or to do any fraudulent act, or knowingly and fraudulently omit to do any act or make any report legally required of such person;

(4) For any person knowingly to swear falsely with respect to any matter pertaining to any primary or election;

(5) For any person, convicted of a crime which excludes him from the right of suffrage, to vote at any primary or election without having been restored to the right of citizenship in due course and by the method provided by law;

(6) For any person to take corruptly the oath prescribed for voters, and the person so offending shall be guilty of perjury;

(7) For any person with intent to commit a fraud to register or vote at more than one box or more than one time, or to induce another to do so, in the same primary or election, or to vote illegally at any primary or election;

(8) For any registrar or any clerk or copyist to make any entry or copy with intent to commit a fraud;

(9) For any election official or other officer to make, certify, deliver or transmit any false returns of any primary or election, or to make any erasure or alteration in any registration or poll books with intent to commit a fraud;

(10) For any person to assault any registrar, judge of election or other election officer while in the discharge of his duty in the registration of voters or in conducting any primary or election;

(11) For any person, by threats, menaces or in any other manner, to intimidate or attempt to intimidate any registrar, judge of election or other election officer in the discharge of his duties in the registration of voters or in conducting any primary or election;

(12) For any registrar, poll holder, member of a board of elections, assistant, marker, or other election official, directly or indirectly, to seek, receive or accept money or the promise of money, the promise of office, or other reward or compensation from a candidate in any primary or election or from any source other than such compensation as may be provided by law for his services. (1931, c. 348, s. 10.)

Editor's Note.—It would seem that most of the subsections in this and the preceding section have been incorporated in the statute from sections 4185-4199(b); but there is no repealing clause in the act and there are certain sections in the Code clearly left unchanged. Limitations of space forbid a detailed collation. The necessity here presented for such a comparison seems to demonstrate clearly the desirability of a system of repeal by specific reference to the sections of the repealed law. 9 N. C. Law Rev. 373.

§ 6055(a54). Compelling self-incriminating testimony; person so testifying excused from prosecution. — No person shall be excused from attending or testifying or producting any books, papers or other documents before any Court or magistrate upon any investigation, proceeding or trial for the violation of any of the provisions of the two preceding sections, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him, but such person may be subpoenaed and required to testify by and for the State relative to any offense arising under the provisions of the said two preceding sections; but such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding, but such person so compelled to testify with respect to any acts of his own shall be immune from prosecution on account thereof, and shall be pardoned for any violation of law about which such person shall be so required to testify. (1931, c. 348, s. 11.)

§ 6055(a55). Duty of Attorney General and solicitors to prosecute violations of article. — It shall be the duty of the Attorney General, the solicitors of the several judicial districts, and all prosecuting attorneys of Courts inferior to the Superior Court, to make diligent inquiry and investigation with respect to any violations of this act, and said officers are authorized and empowered to subpoena and compel the attendance of any person or persons before them for the purpose of making such inquiry and investigation. (1931, c. 348, s. 12.)

§ 6055(a56). Duty of Secretary of State and Superior Court Clerks to call for required statements and report violations. — It shall be the duty of the Secretary of State and the several clerks of the Superior Court to call upon the candidates and chairmen and treasurers of campaign committees for the reports required to be made to them by sections 6055(a49)-6055(a51). If any candidate or chairman or treasurer of a campaign committee shall fail or neglect to make to the Secretary of State the reports required by said sections, then the Secretary of State shall bring such failure to the attention of the Attorney General, whose duty it shall then be to initiate a prosecution against such candidate or chairman or treasurer of such campaign committee for such violation of this act. If the Attorney General shall be a candidate in any such primary or election, such duty as herein required to be performed by him with respect to any contest in which he participates shall be performed by the solicitor of the judicial district of which Wake County is a part. If a candidate or the chairman or treasurer of a campaign committee fails to

make the report to the clerk of the Superior Court as required by said sections, then said clerk of the Superior Court shall bring such failure to the attention of the solicitor of the district in which such county is a part, and said solicitor shall institute a prosecution for violation of this article. (1931, c. 348, s. 13.)

CHAPTER 97(A)

ENGINEERING AND LAND SURVEYING

§ 6055(b). Qualification to practice; registration.—In order to safeguard life, health, and property, any person practicing or offering to practice engineering or land surveying in this state shall hereafter be required to submit evidence that he or she is qualified so to practice, and shall be registered as hereinafter provided; and from February 25, 1922, it shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this state, except as herein provided, unless such person has been duly registered under the provisions of this chapter. (1921, c. 1, s. 1.)

§ 6055(c). Private practice.—Nothing in this chapter shall be construed as requiring registration for the purpose of practicing engineering or land surveying by an individual, firm, or corporation on property owned or leased by said individual, firm, corporation, unless the same involves the public safety or health. (1921, c. 1, s. 2.)

§ 6055(d). State board of registration for engineers and surveyors.—There is hereby created a state board of registration for engineers and land surveyors, hereinafter called the "board," consisting of five members, who shall be appointed by the governor within sixty days after this chapter becomes effective. At least one member of such board shall be appointed from the engineering faculty of the North Carolina state college of agriculture and engineering, and at least one member from the engineering faculty of the university of North Carolina. Not more than three members of said board shall be from the same branch of the profession of engineering. The members of the first board shall be appointed to serve for the following terms: Two members for one year, two members for two years, and one member for four years; said teams ending on the thirty-first day of December of the succeeding year. On the expiration of each of said terms the term of office of each newly appointed or reappointed member of the board shall be for a period of four years and shall terminate on the thirty-first day of December. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. The governor may remove any member of the board for misconduct, incompetency, or neglect of duty. Vacancies in the membership of the board, however created, shall be filled by appointment by the governor for the unexpired term. (1921, c. 1, s. 3.)

§ 6055(e). Requisites for appointment; pay. — Each member of the board shall be a citizen of the United States and a resident of this state at the time of his appointment. He shall have been engaged in the practice or teaching of his profession for at least ten years. Each member of the board shall receive ten dollars ($10) per day for attending sessions of the board or of its committees, and for the time spent in necessary travel, and, in addition, shall be reimbursed for all necessary traveling, incidental, and clerical expenses incurred in carrying out the provisions of this chapter. (1921, c. 1, s. 4.)

§ 6055(f). Certificate of appointment; oath of registration; seal; by-laws.—Each member of the board shall receive a certificate of appointment from the governor, and before beginning his term of office he shall file with the secretary of state the constitutional oath of office. Each member of the board first created shall receive a certificate of registration under this chapter from the governor of the state. The board shall have power to compel the attendance of witnesses, may administer oaths and may take testimony and proofs concerning all matters within its jurisdiction. The board shall adopt and have an official seal, which shall be affixed to all certificates of registration granted; and shall make all by-laws and rules not inconsistent with law, needed in performing its duty. (1921, c. 1, s. 5.)

§ 6055(g). Meetings; notice; quorum.—The board shall hold a meeting within thirty days after its members are first appointed, and thereafter shall hold at least two regular meetings each year. Special meetings shall be held at such times as the by-laws of the board may provide. Notice of all meetings shall be given in such manner as the by-laws may provide. The board shall elect annually from its members a chairman, a vice-chairman, and a secretary. A quorum of the board shall consist of not less than three members. (1921, c. 1, s. 6.)

§ 6055(h). Fund of board; bond of secretary of board.—The secretary of the board shall receive and account for all moneys derived from the operation of this chapter and shall pay them to the state treasurer, who shall keep such moneys in a separte fund, to be known as the "Fund of the Board of Registration for Engineers and Land Surveyors," which fund shall be continued from year to year, and shall be drawn against only for the purpose of this chapter as herein provided. All expenses certified by the board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of said fund on the warrant of the auditor of the state, issued on requisition signed by the chairman and secretary of the board: Provided, however, that at no time shall the total of warrants issued exceed the total amount of funds accumulated under this chapter. The secretary of the board shall give a surety bond satisfactory to the state treasurer, conditioned upon the faithful performance of his duties. The premium on said bond shall be regarded as a proper and necessary expense of the board. (1921, c. 1, s. 7.)

§ 6055(i). Record of proceedings and register of applicants; roster of engineers and surveyors; annual report.—The board shall keep a record of its proceedings and a register of all applicants for registration showing for each the date of application, name, age, education and other qual-

ifications, place of business and place of residence, and whether the applicant was rejected or a certificate of registration granted, and the date of such action. The books and register of the board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all registered engineers and land surveyors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of the fund of the said board as provided in section 6055(h), and a copy mailed to and placed on file by the clerk of each incorporated city, town and county in the state. On or before the first day of March of each year the board shall submit to the governor a report of its transactions for the preceding year, and shall file with the secretary of state copy of such report, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of registered engineers and registered surveyors. (1921, c. 1, s. 8.)

§ 6055(j). Certificates; issuance; fees; eligibility of applicants.—The board shall, on application therefor, on prescribed form, and the payment of a fee of twenty-five dollars ($25) by engineers, or the payment of a fee of ten dollars ($10) by land surveyors, issue a certificate of registration:

(1) To any person who submits evidence satisfactory to the board that he or she is fully qualified to practice engineering, or land surveying, such evidence after January first, one thousand nine hundred and twenty-three, to include an examination, oral or written; or

(2) To any person who holds a like unexpired certificate of registration issued to him or her by proper authority in any state or territory of the United States in which the requirements for the registration of engineers or land surveyors are of a standard satisfactory to the board: Provided, however, that the engineering registration board of said states or territories shall grant full and equal reciprocal registration rights and privileges to North Carolina registrants: Provided, however, that no person shall be eligible for registration who is under twenty-one years of age, who is not a citizen of the United States, who does not speak and write the English language, who is not of good character and repute.

Unless disqualifying evidence be before the board, the following facts established in the application shall be regarded as prima facie "evidence satisfactory to the board," that the applicant is fully qualified to practice engineering or land surveying or both:

(a) Five (5) or more years of active engagement in engineering, or three or more years active practice in land surveying, February 25, 1921: Provided, however, each year of teaching, or of study satisfactorily completed, in a college of standing satisfactory to the board shall be considered as equivalent to one year of such active practice: Provided further, the period spent in the army, navy, marine corps, or other government service of the United States in the late war by any student whose engineering education was interrupted by such services shall also be counted as equivalent to an equal period of active practice: Provided, however, application for registration is made within twelve (12) months after February 25, 1921.

(b) Graduation, after a course of not less than four (4) years, in engineering from a school or college approved by the board as of satisfactory standing.

(c) Full membership in the American Society of Civil Engineers, American Institute of Chemical Engineers, American Institute of Electrical Engineers, American Society of Mechanical Engineers, American Institute of Mining and Metallurgical Engineers, American Society of Naval Architects and Marine Engineers, or such other national or state engineering or architectural societies as may be approved by the board, the requirements for full membership of which are not lower than the requirements for full membership in the professional societies or institutes named above.

Applicants for registration, in cases where the evidence originally presented in the application does not appear to the board conclusively or warranting the issuance of a certificate, may present further evidence which may include the results of a required examination, for the consideration of the board.

In case the board denies the issuance of a certificate to an applicant, the registration fee deposited shall be returned by the board of the applicant. (1921, c. 1, s. 9.)

§ 6055(k). Expiration and renewal of certificates.—Certificates of registration shall expire on the last day of the month of December following their issuance or renewal, and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the board to notify by mail every person registered hereunder of the date of the expiration of his certificate and the amount of the fee required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of January by the payment of a fee of five dollars ($5) to the secretary of the board. The failure on the part of any registrant to renew his certificate annually in the month of January, as required above, shall not deprive such person of the right of renewal thereafter, but the fee paid for the renewal of a certificate after the month of January shall be increased ten per cent for each month or fraction of a month that payment for renewal is delayed: Provided, however, that the maximum fee for a delayed renewal shall not exceed twice the normal fee. (1921, c. 1, s. 9.)

§ 6055(l). Revocation of license; reissue of revoked license; reinstatement; lost certificate. — The board shall have the power to revoke the certificate of registration of any engineer or land surveyor registered hereunder who is found guilty of any fraud or deceit in obtaining a certificate of registration, or gross negligence, incompetency or misconduct in the practice of engineering or land surveying. Any person may prefer charges of such fraud, deceit, negligence, incompetency or misconduct against any engineer

or land surveyor registered hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the board. Such charges, unless dismissed without hearing by the board as unfounded or trivial, shall be heard and determined by the board within three (3) months after the date on which they are preferred. A time and place for such hearing shall be fixed by the board and held in the county in which said charges originated. A copy of the charges, together with a notice of the time and place of hearing, shall be legally served on the accused at least thirty (30) days before the date fixed for the hearing, and in the event that such service cannot be effected thirty (30) days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him or her and to produce evidence or witnesses in his or her defense. If after said hearing the board unanimously votes in favor of finding the accused guilty of any fraud or deceit in obtaining the certificate or of gross negligence, incompetency, or misconduct in the practice of engineering or land surveying, the board shall revoke the certificate of registration of the accused. The board may reissue a certificate of registration to any person whose certificate has been revoked: Provided, three or more members of the board vote in favor of such reissuance for reasons the board may deem sufficient. The board shall immediately notify the secretary of state and the clerk of each incorporated city, town or county in the state of its findings in the case of the revocation of a certificate of registration or of its reissuance of a revoked certificate of registration. A new certificate of registration to replace any certificate lost, destroyed or mutilated may be issued, subject to the rules and regulations of the board. (1921, c. 1, s. 10.)

§ 6055(m). Evidence carried by certificate; seal of registrant.—The issuance of a certificate of registration by the board shall be evidence that the person named therein is entitled to all the rights and privileges of a registered engineer or registered land surveyor, or both, while the said certificate remains unrevoked or unexpired. Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the board, bearing the registrant's name and the legend "registered engineer," or "registered land surveyor." Plans, specifications, plats and reports issued by a registrant shall be stamped with said seal during the life of registrant's certificate, but it shall be unlawful for any one to stamp or seal any document or documents with said seal after the certificate of the registrant named thereon has expired or has been revoked unless said certificate has been renewed or reissued. (1921, c. 1, s. 11.)

§ 6055(n). Acts declared misdemeanor; punishment.—Any person, who, after this law has been in effect twelve (12) months, is not legally authorized to practice engineering or land surveying in this state, according to the provisions of this chapter, and shall practice or offer to practice engineering or land surveying in this state, except as provided in sections 6055(o) and 6055(q), and any person presenting or attempting to file as his own the certificate of registration of another, or who shall give false or forged evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate any other practitioner, of like or different name, or who shall use an expired or revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than one hundred dollars ($100) or by imprisonment for three (3) months, or by both fine and imprisonment, in the discretion of the court. (1921, c. 1, s. 12.)

§ 6055(o). Exemptions from operation of law.—The following shall be exempted from the provisions of this chapter:

(a) Any person or persons offering to practice in this state, as an engineer or land surveyor, not a resident of and having no established place of business in this state.

(b) Practice as an engineer or land surveyor in this state by any person not a resident of this state, and having no established place of business in this state, when this practice does not aggregate more than thirty (30) days in any calendar year: Provided, that said person is legally qualified for such professional service in his own state or country.

(c) Practice as an engineer or land surveyor in this state by any person not a resident of this state and having no established place of business in this state, or any person resident in this state but whose arrival in the state is recent: Provided, however, such person shall have filed an application for registration as an engineer or land surveyor and shall have paid the fee provided for in section 6055(j). Such exemption shall continue for only such reasonable time as the board requires in which to consider and grant or deny the said application for registration.

(d) Engaging in engineering and land surveying work as an employee, or assistant, of a registered engineer or a registered land surveyor, or as an employee or assistant of a nonresident engineer or a nonresident land surveyor, provided for in paragraphs (b) and (c) of this section, provided that said work as an employee may not include responsible charge of design or supervision.

(e) Practice of engineering or land surveying by any person not a resident of and having no established place of business in this state, as a consulting associate or an architect, engineer or a land surveyor registered under the provisions of this chapter: Provided, the nonresident is qualified for such professional service in his own state or country.

(f) Practice of engineering and land surveying solely as an officer or as an employee of the United States. (1921, c. 1, s. 13.)

§ 6055(p). Corporations and partnerships.—A corporation or partnership may engage in the practice of engineering or land surveying in this state: Provided, the person or persons con-

nected with such corporation or partnership in charge of the designing or supervision which constitutes such practice is or are registered as herein required of engineers and land surveyors. The same exemptions shall apply to corporations and partnerships as apply to individuals under this chapter. (1921, c. 1, s. 14.)

§ 6055(q). Land surveying.—Land surveying as covered by this chapter refers only to surveys for the determination of areas, or for the establishment or reëstablishment of land boundaries and the subdivision and platting of land, and making plats, maps, and drawing descriptions of the lands or lines so surveyed, platted or investigated. Nothing in this chapter shall be construed as prohibiting a duly qualified registered engineer from making land surveys; nor as prohibiting any person from doing land surveying provided he does not represent himself to be a registered land surveyor. (1921, c. 1, s. 15.)

CHAPTER 98

FIREMEN'S RELIEF FUND

Art. 1. State Appropriation

§§ 6056, 6057. Appropriation.—Repealed: (1925, c. 275, s. 6.)

§ 6058. Application of fund. — The money so paid into the hands of the treasurer of the North Carolina state firemen's association shall be known and remain as the "firemen's relief fund," of North Carolina, and shall be used as a fund for the relief of firemen, members of such association, who may be injured or rendered sick by disease contracted in the actual discharge of duty as firemen, and for the relief of widows, children, and if there be no widow or children, then dependent mothers of such firemen killed or dying from disease so contracted in such discharge of duty; to be paid in such manner and in such sums to such individuals of the classes herein named and described as may be provided for and determined upon in accordance with the constitution and by-laws of said association, and such provisions and determinations made pursuant to said constitution and by-laws shall be final and conclusive as to the persons entitled to benefits and as to the amount of benefit to be received, and no action at law shall be maintained against said association to enforce any claim or recover any benefit under this article or under the constitution and by-laws of said association; but if any officer or committee of said association omit or refuse to perform any duty imposed upon him or them, nothing herein contained shall be construed to prevent any proceedings against said officer or committee to compel him or them to perform such duty. No fireman shall be entitled to receive any benefits under this section until the firemen's relief fund of his city or town shall have been exhausted. (Rev., s. 4393; 1891, c. 468, s. 3; 1925, c. 41.)

Editor's Note.—The amendment of 1925 made the exhaustion of municipal firemen's fund a condition before a resort is had to the state firemen's relief fund provided under this section.

§ 6059. Treasurer to file report and give bond. —The treasurer of the North Carolina State Firemen's Association shall make a detailed report to the State Treasurer of the yearly expenditures of the appropriation under this chapter on or before the end of the fiscal year, showing the total amount of money in his hands at the time of the filing of the report, and shall give a bond to the State of North Carolina with good and sufficient sureties to the satisfaction of the treasurer of the State of North Carolina in a sum not less than the amount of money on hand as shown by said report. (Rev., s. 4394; 1891, c. 468, s. 4; 1925, c. 41.)

Editor's Note.—The provision for a report of expenditures is new with the Act of 1925.

§ 6060. Who shall participate in the fund.—The line of duty entitling one to participate in the fund shall be so construed as to mean actual fire duty only, and any actual duty connected with the fire department when directed to perform the same by an officer in charge. (Rev., s. 4395; 1891, c. 468, s. 5; 1925, c. 41.)

Editor's Note.—By the Act of 1925, the clause defining the time of actual fire duty as service from time of alarm until dismissal at roll-call, was omitted from the section.

§ 6061. Who may become members.—Any organized fire company in North Carolina, holding itself ready for duty, may, upon compliance with the requirements of said constitution and by-laws, become a member of the North Carolina State Firemen's Association, and any firemen of good moral character in North Carolina, and belonging to an organized fire company, who will comply with the requirements of the constitution and by-laws of the North Carolina State Firemen's Association, may become a member of said association. (Rev., s. 4396; 1891, c. 468, s. 6; 1925, c. 41.)

Editor's Note.—No change is made in the substance of this section by the Act of 1925.

§ 6062. Applied to members of regular fire company.—The provisions of this chapter shall apply to any fireman who is a member of a regularly organized fire company, and is a member in good standing of the North Carolina State Firemen's Association. (Rev., s. 4397; 1891, c. 468, s. 7; 1925, c. 41.)

Editor's Note.—By the amendment of 1925, it was required that the fireman be a member in good standing of the State Firemen's Association.

The volunteer firemen at the insane hospitals shall not share in the fund provided by this section, see section 6183.

Art. 2. Fund Derived from Fire Insurance Companies

§ 6063. Fire insurance companies to report premiums collected.—Every fire insurance company, corporation, or association doing business in any town or city in North Carolina that has, or may hereafter have, a regularly organized fire department under the control of the mayor and city council or other governing body of said town or city, and which has in serviceable condition for fire duty apparatus and equipment amounting in value to one thousand dollars or more, and which enforces the fire laws to the satisfaction of the insurance commissioner, shall return to the insurance commissioner of the state of North Carolina a just and true account of all premiums collected and received from all fire insurance business done within the corporate

limits of such town and cities during the year ending December thirty-first, or such portion thereof as they may have transacted such business in such towns and cities. Such companies, corporations, or associations shall make said returns within sixty days from and after the thirty-first day of December of each year. (1907, c. 831, s. 1; 1919, c. 180; 1929, c. 286, s. 1.)

Editor's Note.—Prior to the amendment of 1929, this section applied only to business done in an "incorporated" city or town. The amendatory act omitted the word just quoted. For an amendment of this section applicable only in Wilmington and New Hanover Counties, see Public Laws, 1929, c. 328, §§ 1, 2.

§ 6064. Tax on receipts for premiums.—Every fire insurance company, corporation, or association as aforesaid shall, within seventy-five days from December thirty-first of each year, deliver and pay to the state insurance commissioner the sum of fifty cents out of and from every one hundred dollars, and at that rate, upon the amount of all premiums written on fire and lightning policies covering property situated within the incorporated limits of such towns and cities during the year ending December thirty-first in each year, or for such portion of each year as said company, corporation, or association shall have done business in said towns and cities. (1907, c. 831, s. 2.)

§ 6065. Insurance commissioner to investigate returns and collect tax.—Every such company, corporation, or association shall make accurate returns of all business done, both on fire and lightning insurance, covering property situated within the limits of such towns and cities; and in case any fraud, misrepresentation, or mistake of any returns, as provided for in this article, be apparent, it shall be the duty of the insurance commissioner to investigate such returns and collect the amount which he shall find to be due. (1907, c. 831, s. 3.)

§ 6066. Penalty for failure to report and pay tax.—Every fire insurance company, association, or corporation aforesaid which shall knowingly or wilfully fail or neglect to report or pay over any of the moneys due on premiums as aforesaid, at the times and in the manner specified in this article, or shall be found upon examination to have made a false return of business done by them, shall for each offense forfeit and pay the sum of three hundred dollars for the use and benefit of the fire department of such town or city, to be recovered in a civil action in the name of the town or city. (1907, c. 831, s. 4.)

§ 6067. Insurance commissioner to pay fund to treasurer. — The insurance commissioner shall deduct the sum of five per cent from the money so collected from the insurance companies, corporations, or associations, as aforesaid, and pay the same over to the treasurer of the State Firemen's Association for general purposes, and the remainder of the money so collected from the insurance companies, corporations, or associations, as aforesaid, doing business in the several towns and cities in the State having or that may hereafter have organized fire departments as provided in this article, said insurance commissioner shall pay to the treasurer of each town or city to be held by him as a separate and distinct fund, and he shall immediately pay the same to the treasurer of the local board of trustees upon his election and qualification, for the use of the board of trustees of the firemen's local relief fund in each town or city, composed of five members, residents of said city or town as hereinafter provided for, to be used by them for the purposes as named in section six thousand and sixty-nine. (1907, c. 831, s. 5; 1925, c. 41.)

Editor's Note.—The provision as to the deduction and payment by the commissioner to the State Firemen's Association Treasurer, five percent of the moneys collected from the insurance companies; and the provision as to payment by the treasurers of towns to the treasurer of the local board of trustees of the rest of the moneys, were inserted by the amendment of 1925.

§ 6068. Trustees appointed; organization.—In each town or city complying with and deriving benefits from the provisions of this article there shall be appointed annually, in January, a local board of trustees, known as the trustees of the firemen's relief fund, to be composed of five members, two of whom shall be named by the members of the local fire department, two by the mayor and board of aldermen or other local governing body, and the remaining member by the state insurance commissioner, all to hold office for two years, or until their successors are appointed, and to serve without pay for their services. They shall immediately after appointment organize by electing from their members a chairman and a secretary and treasurer, which two last positions may be held by the same person. The treasurer of said board of trustees shall give a good and sufficient bond, as a sum equal to the amount of moneys in his hands to be approved by the insurance commissioner, for the faithful and proper discharge of the duties of his office. (1907, c. 831, s. 6; 1925, c. 41.)

Editor's Note. — The amendment of 1925 specified the amount of the bond which is required of the treasurer of the board of trustees.

§ 6069. Disbursement of fund by trustees.— The board of trustees shall have entire control of the funds derived from the provisions of this article, and shall disburse the funds only for the following purposes:

1. To safeguard any fireman in active service from financial loss, occasioned by sickness contracted or injury received while in the performance of his duties as fireman.

2. To provide a reasonable support for those actually dependent upon the services of any fireman who may lose his life in the fire service of his town, city, or state, either by accident or from disease contracted or injury received by reason of such service. The amount is to be determined according to the earning capacity of the deceased.

3. To safeguard any fireman who has honorably served for a period of five years in the fire service of his city or town from ever becoming an inmate of any almshouse or actually dependent upon charity.

4. To provide for any fireman or person dependent on any fireman from becoming a subject of charity due to other sickness or accident or condition not specified in this law; and to provide for the payment of any fireman's assess-

ment in the firemen's fraternal insurance fund of the State of North Carolina, if the board of trustees find as a fact that said fireman is unable to pay the said assessment by reason of disability. (1907, c. 831, s. 6; 1919, c. 180; Ex. Sess. 1921, c. 55; 1923, c. 22; 1925, c. 41.)

Editor's Note.—The laws of 1921 and 1925, reduced the number of years of service referred to in the third subdivision of this section from ten to five years; and the laws of 1923 added subdivision four.

This subdivision was re-added in somewhat different language by the laws of 1925.

§ 6070. Trustees to keep account and file report; effect of failure.—The board of trustees shall keep a correct account of all moneys received and disbursed by them, and shall at the annual meeting of the North Carolina state firemen's association render an itemized statement of the same, for publication in the annual report, a copy of which report shall be made annually to the state insurance commissioner; and in case any board of trustees in any of the towns and cities benefited by this article shall neglect or fail to perform their duties, or shall willfully misappropriate the funds entrusted to their care, or shall neglect or fail to report at the annual meeting of the state association, then the insurance commissioner shall withhold any and all further payments to such board of trustees, or their successors, until the matter has been fully investigated by an official of the state firemen's association, and adjusted to the satisfaction of the state insurance commissioner. Should such payments be unadjusted for a period of fifteen months from the time when such payment would otherwise have been made, then the insurance commissioner shall pay over the said amount to the treasurer of the North Carolina State Firemen's Association and it shall constitute a part of the firemen's relief fund. (1907, c. 831, s. 7; 1925, c. 11.)

Editor's Note.—Prior to the amendment of 1925 the corresponding provision in the last sentence that the amount be paid to the treasurer of the North Carolina State Firemen's Association to constitute a part of the firemen's relief fund, had read as follows: "commissioner shall pay over the said payment to the North Carolina State Firemen's Association to be used by the association as a general relief fund for the purpose of assisting any local board of trustees where bona fide claims for benefits arising under purpose one and two of the preceding section shall have exceeded the income arising from the local one half per cent tax."

§ 6071. Municipal clerk to certify list of fire companies; effect of failure.—The clerk of any city, town, village, or other municipal corporation having an organized fire department shall, on or before the thirty-first day of October in each year, make and file with the insurance commissioner his certificate, stating the existence of such department, the number of steam, hand, or other engines, hook and ladder trucks, and hose carts in actual use, the number of organized companies, and the system of water supply in use for such departments, together with such other facts as the insurance commissioner may require, on a blank to be furnished by him. If the certificate required by this section is not filed with the insurance commissioner on or before October thirty-first in any year, the city, town or village so failing to file such certificate shall forfeit the payment next due to be paid to said board of trustees, and the insurance commissioner shall pay over said amount to the treasurer of the North Carolina State Firemen's Association and same shall constitute a part of the firemen's relief fund. (1907, c. 831, s. 8; 1925, cc. 41, 309.)

Editor's Note.—The amendment of 1925, Pub. Laws 1925, c. 41 added the words "Effect of Failure," to the caption of this section. Prior to this amendment the town or city failing to file the certificate required to be filed before October 31, was deemed to have waived and relinquished its rights for that year to the appropriation provided in this chapter. In lieu of this provision the present provision was added to the end of the section, with a proviso that the failure of any department to have a representative sent to the annual meeting of the association shall not have the effect of forfeiture, which proviso was subsequently stricken out by chapter 309 of the same year.

§ 6072. Fire departments to be members of state association and send delegate to meeting.—For the purpose of supervision and as a guaranty that provisions of this article shall be honestly administered in a business-like manner, it is provided that every department enjoying the benefits of this law shall be a member of the North Carolina State Firemen's Association, and send at least one accredited delegate to the annual meeting of said association and comply with its constitution and by-laws. If the fire department of any city, town or village shall fail to send at least one delegate to the annual meeting of the State Firemen's Association and otherwise fails to comply with the constitution and by-laws of said association, said city, town or village shall forfeit its right to the next annual payment due from the funds mentioned in this article, and the Insurance Commissioner shall pay over said amount to the treasurer of the North Carolina State Firemen's Association and same shall constitute a part of the firemen's relief fund: Provided, however, that the failure of any department to have a delegate or representative present at the annual meeting of the association shall not have such effect if in the opinion of a majority of the executive committee of said association such delegate or representative had a valid excuse for his failure so to attend. (1907, c. 831, s. 9; 1919, c. 180; 1925, c. 41; 1925, c. 309, s. 2.)

Editor's Note.—The caption of this section was renewed to correspond to changes made, by the amendment of 1925. Prior to the amendment the section required that five per cent of the gross proceeds received by each town, etc., be turned over to the state firemen's association, and one fourth of this be paid to the colored fire association. None of these provisions appear any more. The provision as to sending delegates to the annual meeting of the association and the forfeiture incident to the failure to do so, with the proviso, is new with the amendment.

§ 6073. No discrimination on account of color.—Inasmuch as there are in a number of the towns and cities of this state fire companies composed exclusively of colored men, it is expressly provided that the local boards of trustees shall make no discrimination on account of color in the payment of benefits. The treasurer of the North Carolina State Firemen's Association shall pay to the treasurer of the North Carolina State Volunteer Firemen's Association one-sixth of the funds arising from the five per cent paid him by the Insurance Commissioner each year, to be used by said North Carolina State Volunteer Firemen's Association for general purposes. (1905, c. 831, s. 10; 1925, c. 41.)

Editor's Note. — The last sentence of this section was added by the amendment of 1925.

CHAPTER 99
FIRE PROTECTION

Art. 1. Investigation of Fires and Inspection of Premises

§ 6074. Fires investigated; reports; records.—The insurance commissioner and the chief of the fire department, or chief of police where there is no chief of fire department, in municipalities and towns, and the sheriff of the county where such fires occur outside of municipality, are hereby authorized to investigate the cause, origin, and circumstances of every fire occurring in such municipalities or counties in which property has been destroyed or damaged, and shall specially make investigation whether the fire was the result of carelessness or design. A preliminary investigation shall be made by the chief of fire department or chief of police, where there is no chief of fire department in municipalities, and by the sheriff of the county where such fires occur outside of a municipality, and must be begun within three days, exclusive of Sunday, of the occurrence of the fire, and the insurance commissioner shall have the right to supervise and direct the investigaton when he deems it expedient or necessary. The officer making the investigation of fires shall forthwith notify the insurance commissioner, and must within one week of the occurrence of the fire furnish to the commissioner a written statement of all the facts relating to the cause and origin of the fire, the kind, value, and ownership of the property destroyed, and such other information as is called for by the blanks provided by the commissioner. The insurance commissioner shall keep in his office a record of all fires occurring in the state, together with all facts, statistics, and circumstances, including the origin of the fires, which are determined by the investigations provided for by this article. This record shall at all times be open to public inspection. (Rev., s. 4818; 1899, c. 58; 1901, c. 387; 1903, c. 719.)

As to provision requiring the insurance company to notify the insurance commissioner of the losses to property by fire, before payment thereof, see sec. 6421.

§ 6075. Insurance commissioner to make examination; arrests and prosecution. — It is the duty of the insurance commissioner to examine, or cause examination to be made, into the cause, circumstances, and origin of all fires occurring within the state to which his attention has been called in accordance with the provisions of the next preceding section, or by interested parties, by which property is accidently or unlawfully burned, destroyed, or damaged, whenever in his judgment the evidence is sufficient, and to specially examine and decide whether the fire was the result of carelessness or the act of an incendiary. The commissioner shall, in person, by deputy or otherwise, fully investigate all circumstances surrounding such fire, and, when in his opinion such proceedings are necessary, take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts or to have means of knowledge in relation to the matters as to which an examination is herein required to be made, and shall cause the same to be reduced to writing. If he is of the opinion that there is evidence sufficient to charge any person with the crime of arson, or other wilful burning, he shall cause such person to be arrested, charged with such offense, and prosecuted, and shall furnish to the solicitor of the district all such evidence, together with the names of witnesses and all the information obtained by him, including a copy of all pertinent and material testimony taken in the case. (Rev., s. 4819; 1899, c. 58, s. 2; 1901, c. 387, s. 2; 1903, c. 719.)

§ 6076. Powers of commissioner in investigations.—The insurance commissioner, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in relation to any matter which is by provisions of this article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The commissioner or his deputy has authority at all times of the day or night, in performance of the duties imposed by the provisions of this article, to enter upon and examine any building or premises where any fire has occurred, and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the commissioner or his deputy may, in their discretion, be private, and persons other than those required to be present by the provisions of this article may be excluded from the place where the investigation is held, and witnesses may be kept apart from each other and not allowed to communicate with each other until they have been examined. (Rev., s. 4820; 1899, c. 58, s. 3; 1901, c. 387, s. 3.)

§ 6077. Inspection of premises; dangerous material removed.—The insurance commissioner, or the chief of fire department or chief of police where no chief of fire department, or local inspector of buildings in municipalities where such officer is elected or appointed, has the right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises in their jurisdiction. It is the duty of the insurance commissioner to require in all municipalities of the state that such officers make in their respective municipalities annual inspection of the buildings therein and quarterly inspection of all premises within the fire limits, and report in detail the results of their inspection to the insurance commissioner upon blanks furnished by him. When any of such officers find in any building or upon any premises combustible material or inflammable conditions dangerous to the safety of such building or premises they shall order the same to be removed or remedied, and this order shall be forthwith complied with by the owner or occupant of such building or premises. The owner or occupant may, within twenty-four hours, appeal to the insurance commissioner from the order, and the cause of the complaint shall be at once investigated by his direction, and unless by his authority the order of the officer above named is revoked it remains in force and must be forthwith complied with by the owner or occupant. The insurance commissioner, fire chief, or fire committee shall make an

immediate investigation as to the presence of combustible material or the existence of inflammable conditions in any building or upon any premises under their jurisdiction upon complaint of any person having an interest in such building or premises or property adjacent thereto. The commissioner may, in person or by deputy, visit any municipality and make such inspections alone or in company with the local officer. The local inspector shall be paid by the municipality a reasonable salary or proper fees to be fixed by its governing board. (Rev., s. 4821; 1899, c. 58, s. 4; 1901, c. 387, s. 4; 1903, c. 719.)

As to regulation of buildings by municipalities, see secs. 2738 et seq.

§ 6078. Payment of expenses.—The license tax imposed upon fire insurance companies shall be used by the insurance commissioner for the purpose of investigating all fires occurring in the state, for the payment of expenses, including in the counsel fees, expense of deputy, detectives and officers, incurred by him in the performance of the other duties imposed upon him by this article, for the employment of a competent man to give instructions to fire companies, and for the expense of a better inspection of buildings in cities and towns. It shall be the duty of the insurance commissioner to appoint two or more persons as deputies, whose particular duty it shall be to investigate forest fires and endeavor to ascertain the persons guilty of setting such fires and cause prosecution to be instituted against those who, as a result of such investigation, are deemed guilty. Any part of such fund unexpended at the end of the fiscal year, April first, shall be payed by the insurance commissioner into the state treasury for general purposes as other funds collected by him. (Rev., s. 4823; 1899, c. 58, s. 6; 1901, c. 387, s. 6; 1903, c. 719, s. 2; 1915, c. 109, s. 2; 1919, c. 186, s. 7; 1924, c. 119.)

Editor's Note.—The provision as to the appointment of deputies to investigate forest fires, and the prosecution of guilty persons, was inserted by the amendment of 1924.

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

§ 6079. Reports of insurance commissioner.—The insurance commissioner shall submit annually, as early as consistent with full and accurate preparation, and not later than the first day of June, a detailed report of his official action under this chapter, and it shall be embodied in his report to the general assembly. He shall, in his annual report, make a statement of the fires investigated, the value of property destroyed, the amount of insurance, if any, the origin of the fire, when ascertained, and the location of the property damaged or destroyed, whether in town, city, or country. He shall also file annually an itemized statement, under oath, of all money received by him and disbursed under this chapter. (Rev., s. 4824; 1899, c. 58, s. 7; 1901; c. 387, s. 7; 1915, c. 109, s. 1.)

§ 6080. Fire prevention and fire prevention day.—It is the duty of the insurance commissioner and superintendent of public instruction, as far as practicable, to provide, [a pamphlet containing printed instructions for properly conducting fire drills in schools, and the superintendent or principal of every public school in this State shall conduct at least one fire drill every month during the regular school session, such fire drills to include all children and teachers and the use of all ways of egress, and the Insurance Commission and Superintendent of Public Instruction shall further provide] for the teaching of "Fire Prevention" in the colleges and schools of the state, and to arrange for a text-book adapted to such use. The ninth day of October of every year shall be set aside and designated as "Fire Prevention Day," and the governor shall issue a proclamation urging the people to a proper observance of the day, and the insurance commissioner shall bring the day and its observance to the attention of the officials of the municipalities of the state, and especially to the firemen, and where possible arrange suitable programs to be followed in its observance. Provided, that the part of this section in brackets should not apply to schools taught in one-story houses. (1915, c. 166, s. 5; 1925, c. 130.)

Editor's Note.—The provision requiring the commissioner to provide for a pamphlet of fire drill instructions, and the provision making it a duty of the superintendent or principal of every public school to conduct monthly fire drills, are new with the amendment of 1925.

Section 5542 was specifically amended by the Acts of 1925. As in the recodification of the Education Laws, Vol. III, Consolidated Statute, the provisions of section 5542 were omitted, the amendment mentioned is inserted in this, the corresponding section.

Art. 2. Fire-Escapes

§ 6081. Construction of buildings regulated.—All hotels, lodging houses, school dormitories, hospitals, sanitariums, apartment houses, flats, tenement houses and all buildings other than private dwellings not over three stories in height, in which rooms are to be rented or leased or let or offered for rent, let or leased for living or sleeping purposes, hereafter constructed in this state shall be constructed so that the occupants of all rooms above the first floor shall have unobstructed access to two separate and distinct ways of egress extending from the uppermost floor to the ground, such ways of egress to be so arranged in reference to rooms that in case of fire on one stairway the other stairway can be reached by the occupant without his or her having to pass the stairway involved. Entrance to all such ways of egress aforementioned in this section shall be from corridors or hallways of not less than three feet in width, and in no case shall entrance to such ways of egress be through a room or closet, and where such building is in the opinion of the insurance commissioner of sufficient size to require more than two ways of egress the "National Fire Protection Association" standard governing corridors and stair areas shall be adhered to. Every hotel, lodging house, school, dormitory, hospital, sanatorium, apartment house, flat, tenement or other building, other than a private dwelling not over three stories in height, in which rooms are rented, leased, let, offered for rent, leased or let, shall forthwith, at the owner's expense, be provided with additional ways of egress as the insurance commissioner shall deem practicable in order that the object of this law may be accomplished and that existing dangers may not be perpetuated. (1909, c. 637, s. 1; 1923, c. 149, s. 4.)

Editor's Note.—Although the general subject matter of this section remains unaltered, its substance and provisions

have been so altered by the amendment 1923 as to leave no basis of comparison between the old and the new sections. For the provisions of the old section therefore, that section should be consulted to.

§ 6082. Places of public amusement, how constructed.—Every theater, opera house, or other like place of public amusement shall have as many doors for egress therefrom as may be necessary and can be made consistently with the proper strength of the building; all such doors shall be hung so as to open outwardly, or both outwardly and inwardly; and the seats therein shall be arranged in rows properly spaced, with aisles of adequate width, so as to afford easy egress therefrom. All scenery shall be made as secure against becoming inflamed as reasonably practical, and also all reasonably practical arrangements shall be made for the constant supply of water and other means for extinguishment of fires, and they shall be kept constantly effective during the presence of an audience. The insurance commissioner may require all theatres to be equipped with a front curtain of asbestos or other fireproof material, to be furnished by owners of the building, and this curtain shall be raised and lowered not less than twice before each performance, in order to guarantee its being in perfect working order. (1909, c. 637, s. 2.)

§ 6083. Doors in certain buildings to open outwardly.—In all public schoolhouses and other buildings, and also all theaters, assembly rooms, halls, churches, factories with more than ten employees, and all other buildings or places of public resort where people are accustomed to assemble (excepting schoolhouses and churches of one room on the ground floor) which shall hereafter be erected, together with all those heretofore erected and which are still in use as such buildings or places of resort, the door for ingress and egress shall be so hung as to open outwardly from the audience rooms, halls, or workshops of such buildings or places, or the doors may be hung on double hinges, so as to open with equal ease outwardly or inwardly. And if further provided that, in order to safeguard the public from the dangers of fire and contingencies arising and resulting therefrom in places of this kind, and the owner or owners from unnecessary confusion and expense, plans for all such theaters, opera houses, moving picture shows, and other like places of amusement to be hereafter erected shall be submitted to and approved, as to the safety of the building from fire and the occupants in case of fire, by the insurance commissioner before work is begun on the building. This requirement shall apply also where any building standing or part thereof is to be changed to use as a theater, opera house, moving picture show or other like place of amusement. (1909, c. 637, s. 3; 1923, c. 149, s. 1.)

Editor's Note.—The number of employees which would bring certain buildings enumerated near the beginning of the section within the operation of this section was reduced from twenty to ten, by the amendment of 1923. The provision, in the latter part of the section, that the plans of buildings to be erected shall be submitted to and approved by the insurance commissioner before work is begun, is also new with the amendment of 1923.

§ 6084. Fire-escapes to be provided.—All factories, manufacturing establishments or workshops of three or more stories in height, in which ten or more people are employed above the first floor thereof, shall be provided with one or (if the proper officials shall deem necessary) more outside fire-escapes, not less than six feet in length and three feet in width, properly and safely constructed, guarded by iron railings not less than three feet in length and taking in at least one door and one window or two windows at each story and connected with the interior by easily accessible and unobstructed openings; and the fire escapes shall connect by iron stairs not less than twenty-four inches wide, the steps to be not less than six inches tread, placed at not more than an angle of forty-five degrees slant, and protected by a well secured hand-rail on both sides, with a twelve-inch wide drop ladder from the lowest platform reaching to the ground. Each story of all factories, manufacturing establishments or workshops of three or more stories in height shall be amply supplied with means for extinguishing fires. All the main doors, both inside and outside, in factories, except fire doors, shall open outwardly, when the proper official shall so direct, and no outside or inside door of any building wherein operatives are employed shall be locked, bolted, or otherwise fastened during the hours of labor so as to prevent egress. (1909, c. 637, s. 4; 1923, c. 149, s. 2.)

Editor's Note.—The number of employees which would bring certain buildings enumerated near the beginning of the section within the operation of this section was reduced from thirty to ten, by the amendment of 1923.

§ 6085. Ways of escape provided.—Every building now or hereafter used, in whole or in part, as a public building, public or private institution, schoolhouse, church, theater, public hall, place of assembly or place of public resort, and every building in which twenty or more persons are employed, allowed or accustomed to assemble or accommodated above the second story in a factory, workshop, or mercantile or other establishment, when the owner or agent of the owner of the buildings is notified in writing by the insurance commissoner or one of his deputies, shall be provided with proper ways of egress or other means of escape from fire sufficient for the use of all persons accommodated, assembled, and employed, lodging or residing in such building or buildings, and such ways of egress and means of escape shall be kept free from obstructions, in good repair, and ready for use. Every room above the second story in any such building in which twenty or more persons are employed shall be provided with more than one way of egress by stairways on the inside or outside of the building. All doors in any building subject to the provisions of this article shall open outwardly, if the insurance commissioner or one of his deputies shall so direct in writing. (1909, c. 637, s. 5; 1923, c. 149, s. 3; 1927, c. 55, s. 1.)

Editor's Note.—By the amendment of 1923, buildings where people are "allowed or accustomed to assemble or accommodated," and by the amendment of 1927, office buildings where people are employed, are brought within the operation of this section.

§ 6086. Enforcement by insurance commissioner.—The insurance commissioner is charged with the execution of this law, and he or the chief of the fire department is vested with all privileges, duties, and obligations placed upon

them in this chapter, in regard to the inspection of buildings, for the purpose of enforcing the provisions of this article in regard to the buildings and requirements herein. Any owner or occupant of premises failing to comply with the provisions of this article, in accordance with the orders of the authorities above specified, shall be guilty of a misdemeanor and punished by a fine not less than ten dollars nor more than fifty dollars for each day's neglect. If any owner or lessee of any building referred to in this article shall deem himself aggrieved by any ruling or order of any chief of fire department or local inspector, he may within twenty-four hours appeal to the insurance commissioner, and the cause of complaint shall at once be investigated by the direction of the commissioner, and unless by his authority the order or ruling is revoked it shall remain in full force and effect and be forthwith complied with by the owner or lessee. (1909, c. 637, s. 6.)

CHAPTER 100

GENERAL ASSEMBLY

Art. 1. Apportionment of Members

§ 6087. Senators. — Until another apportionment of the state shall be had in accordance with the terms of the constitution and laws of North Carolina, the senate shall be composed of fifty members elected from districts constituted as follows:

First District — Camden, Chowan, Currituck, Gates, Hertford, Pasquotank, Perquimans counties shall elect two senators.

Second District—Beaufort, Dare, Hyde, Martin, Pamlico, Tyrrell, and Washington shall elect two senators.

Third District—Bertie and Northampton shall elect one senator.

Fourth District—Edgecombe and Halifax shall elect two senators.

Fifth District—Pitt shall elect one senator.

Sixth District — Franklin, Nash, and Wilson shall elect two senators.

Seventh District — Carteret, Craven, Greene, Jones, Lenoir, and Onslow shall elect two senators.

Eighth District—Johnston and Wayne shall elect two senators.

Ninth District—Duplin, New Hanover, Pender, and Sampson shall elect two senators.

Tenth District—Bladen, Brunswick, Columbus, and Cumberland shall elect two senators.

Eleventh District — Robeson shall elect one senator.

Twelfth District—Harnett, Hoke, Moore, and Randolph shall elect two senators.

Thirteenth District—Chatham, Lee, and Wake shall elect two senators.

Fourteenth District—Vance and Warren shall elect one senator.

Fifteenth District—Granville and Person shall elect one senator.

Sixteenth District — Alamance, Caswell, Durham, and Orange shall elect two senators.

Seventeenth District—Guilford and Rockingham shall elect two senators.

Eighteenth District — Davidson, Montgomery, Richmond, and Scotland shall elect two senators.

Nineteenth District—Anson, Stanly, and Union shall elect two senators.

Twentieth District — Cabarrus and Mecklenburg shall elect two senators.

Twenty-first District—Rowan shall elect one senator.

Twenty-second District — Forsyth shall elect one senator.

Twenty-third District—Stokes and Surry shall elect one senator.

Twenty-fourth District — Davie, Wilkes, and Yadkin shall elect one senator.

Twenty-fifth District — Catawba, Iredell, and Lincoln shall elect two senators.

Twenty-sixth District—Gaston shall elect one senator.

Twenty-seventh District — Cleveland, Henderson, McDowell, Polk and Rutherford shall elect two senators.

Twenty-eighth District — Alexander, Burke, and Caldwell shall elect one senator.

Twenty-ninth District — Alleghany, Ashe, and Watauga shall elect one senator.

Thirtieth District—Avery, Madison, Mitchell, and Yancey shall elect one senator.

Thirty-first District—Buncombe shall elect one senator.

Thirty-second District — Haywood, Jackson, and Transylvania shall elect one senator.

Thirty-third District—Cherokee, Clay, Graham, Macon, and Swain shall elect one senator. (Rev., s. 4398; Code, s. 2844; 1911, c. 150; 1921, c. 161.)

Editor's Note.—The amendment of 1921 somewhat changed the apportionment of senators. To some districts additional counties were inserted, and from others certain counties were taken out, and in certain instances the number of senators to be elected by the given district was increased or decreased, as the case may be.

§ 6088. House of representatives. — Until the general assembly shall make another apportionment as provided by the constitution and laws of North Carolina, the house of representatives shall be composed of members elected from the counties of the state in the following manner, to wit: The counties of Forsyth, Guilford, Mecklenburg, and Wake shall elect three members each; the counties of Buncombe, Durham, Gaston, Halifax, Johnston, Nash, New Hanover, Pitt, Robeson, Rockingham, Rowan, and Wayne shall elect two members each; and the counties of Alamance, Alexander, Alleghany, Anson, Ashe, Avery, Beaufort, Bladen, Brunswick, Burke, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Clay, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Edgecombe, Franklin, Gates, Graham, Granville, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Jones, Lee, Lenoir, Lincoln, Macon, Madison, Martin, McDowell, Mitchell, Montgomery, Moore, Northampton, Onslow, Orange Pamlico, Pasquotank, Pender, Perquimans, Person, Polk, Randolph, Richmond, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin, and Yancey shall elect

one member each. (Rev., s. 4399; Code, s. 2845; 1911, c. 151; 1921, c. 144.)

Editor's Note.—By the amendment of 1921 the number of representatives allotted certain counties was decreased or increased, as the case may be.

Art. 2. Duty and Privilege of Members

§ 6089. Presiding officers may administer oaths.—The president of the senate is authorized to administer oaths for the qualification of senators and officers of the senate, and the speaker of the house of representatives is authorized to administer oaths for the qualification of all officers of the house and all members who shall appear after the election of speaker. (Rev., s. 4400; Code, s. 2855; 1833, c. 19.)

§ 6090. Members to convene at appointed time and place.—Every person elected to represent any county or district in the general assembly shall appear at such time and place as may be appointed for the meeting thereof, on the first day, and attend to the public business as occasion shall require. (Rev., s. 4401; Code, s. 2847; R. C., c. 52, s. 27; 1787, c. 277, s. 1.)

§ 6091. Penalty for failure to discharge duty.—If any member shall fail to appear, or shall neglect to attend to the duties of his office, he shall forfeit and pay for not appearing ten dollars, and two dollars for every day he may be absent from his duties during the session, to be deducted from his pay as a member; but a majority of the members of either house of the general assembly may remit such fines and forfeitures, or any part thereof, where it shall appear that such member has been prevented from attending to his duties by sickness or other sufficient cause. (Rev., s. 4402; Code, s. 2848; R. C., c. 52, s. 28; 1787; c. 277, s. 2.)

§ 6092. Expulsion for corrupt practices in election.—If any person elected a member of the general assembly shall, by himself or any other person, directly or indirectly, give, or cause to be given, any money, property, reward or present whatsoever, or give, or cause to be given by himself or another, any treat or entertainment of meat or drink, at any public meeting or collection of the people, to any person for his vote or to influence him in his election, such person shall, on due proof, be expelled from his seat in the general assembly. (Rev., s. 4403; Code, s. 2846; R. C., c. 52, s. 24; 1801, c. 580, s. 2.)

§ 6093. Freedom of speech; protection from arrest. — The members shall have freedom of speech and debate in the general assembly, and shall not be liable to impeachment or question, in any court or place out of the general assembly, for words therein spoken; and shall be protected, except in cases of crime, from all arrest and imprisonment, or attachment of property, during the time of their going to, coming from, or attending the general assembly. (Rev., s. 4404; Code, s. 2849; R. C., c. 52, s. 29; 1787, c. 277, s. 3.)

§ 6094. Monuments for deceased members.—The governor shall have placed at the grave of any member of the general assembly, who may be interred at the city of Raleigh (whose remains are not intended to be removed by his friends, suitable grave stones, containing the name of the deceased, his age, and the county he represented; and the cost thereof shall be paid by the treasurer, on the warrant of the auditor. (Rev., s. 4405; Code, s. 2874; R. C., 1844, c. 52, s. 39; 1883, c. 71.)

Art. 3. Contests

§ 6095. Notice of contest.—No person shall be allowed to contest the seat of any member of the general assembly unless he shall have given to the member thirty days notice thereof in writing, prior to the meeting of the general assembly, which must state the particular grounds of such contest. If the seat is contested on account of the reception of illegal votes, the notice must set forth the number of such votes, by whom given, and the supposed disqualifications; and if the same is contested on account of the rejection of legal votes, the notice must give the names of the persons whose votes were rejected. No evidence shall be admitted to show that the contestant received illegal votes, unless he shall also have been notified the same number of days, and in the same manner. The same notice of time and place required in taking depositions shall be required and proved on the investigation. (Rev., s. 4406; Code, s. 2850; 1893, c. 192; R. C., c. 52, s. 31; 1796, c. 466, s. 1.)

§ 6096. Depositions taken; penalty and privilege of witnesses.—Any justice of the peace, or any person duly authorized to take depositions to be read before courts, may take depositions to be used on the investigation, and may issue subpœnas for witnesses, which shall be executed by any officer authorized to execute process. And if any witness shall fail to appear and give his deposition according to the subpœna, he shall forfeit and pay to the party causing him to be summoned, forty dollars. And on such investigation no witness in this or in the case of any other contested election shall be excused from discovering whether he voted at such election, or his qualification to vote, except as to his conviction for any offense which would disqualify him. And if he was not a qualified voter, he shall be compelled to discover for whom he voted; but any witness making such discovery shall not be subject to criminal or penal prosecution for having voted at such election. (Rev., s. 4407; Code, s. 2851; R. C., c. 52, s. 32; 1800, c. 557, s. 1; 1868-9, c. 270, s. 12.)

Art. 4. Reports of Officers to General Assembly

§ 6097. Treasurer's estimate of expenses and rate of taxation. — It shall be the duty of the State treasurer to furnish the general assembly, at the commencement of each session, with estimates of the expenses of the state government and the rates of taxation necessary to pay the same for two years next succeeding the close of the last fiscal year, and with a scheme in the form of a complete revenue bill to sustain such estimates. (Rev., s. 4408; Code, s. 2864; 1856-7, c. 30; 1883, c. 60, s. 3.)

§ 6098. State officers to furnish list of employees and salaries.—The governor and all other state officers, the superintendents of the various

state institutions, and the superintendents or heads of all institutions or departments of whatever kind that receive funds from the state, either directly or indirectly, shall furnish to each general assembly a full and complete list of names of superintendents or heads of their respective departments, assistants, secretaries, clerks, laborers, and employees of whatever kind, together with the annual or monthly salaries of each, and of any and all compensation of any kind that they may receive. Any state officer, superintendent, head of department or institution, who shall fail or refuse to furnish a full and complete list to the general assembly within ten days after the assembling of the same, shall forfeit and pay to the treasurer of the state the sum of twenty-five dollars for each day of delay in excess of ten days, recoverable by motion in the superior court of Wake county or before a justice of the peace, after twenty days notice to such defaulting officer. (Rev., s. 4409; 1893, c. 424.)

§ 6099. Reports from state institutions and departments.—It shall be the duty of the chief officer of each department of the state and of the boards of directors of all institutions supported in whole or in part by appropriations from the state, to submit to the general assembly, with their respective reports, bills providing for the support and management of their respective departments; these reports, with those of the other officers of the executive department, shall be submitted to the governor, to be transmitted by him with his message to the general assembly. (Rev., s. 4410; Code, s. 2865; 1800, c. 557, s. 2.)

§ 6099(a). Reports of commissions.—The Tax Commission, the Education Commission, the State Highway Commission, the Salary and Wage Commission, the State Board of Equalization, the Superintendent of Public Instruction, the Department of Agriculture, the State Board of Health, and the State Board of Charities and Public Health, and such other Boards, Departments and Commissions as the Governor may direct shall each make a full report of the operation of their respective Departments or Commissions together with their recommendations for the future operation of their Departments or Commissions to the members of the General Assembly.

All such reports shall be distributed as heretofore provided for, not later than twenty days after the general election in November preceding the conveying of the General Assembly.

Failure on the part of any of the above mentioned Commissions or Departments to distribute their reports to the members of the General Assembly within the time prescribed by section two shall be cause for impeachment and for removal from office. (1929, c. 248, s. 1.)

Art. 5. Investigating Committees

§ 6100. Power of committees.—Any committee of investigation raised either by joint resolution or resolution of either house of the general assembly has full power to send for persons and papers, and, if necessary, to compel attendance and production of papers by attachment or otherwise. (Rev., s. 4412; Code, s. 2853; 1868-9, c. 50, s. 1.)

Duration of Authority.—In the absence of express enactment otherwise the existence of a legislative committee necessarily determines upon the adjournment of the body to which it belongs. Bank v. Worth, 117 N. C. 146, 147, 23 S. E. 160.

§ 6101. Chairman may administer oaths. — The chairman of any committee or any person in his presence, and under his direction, shall have power and authority to administer oaths. (Rev., s. 4413; Code, s. 2856; 1869-70, c. 5, s. 3.)

§ 6102. Pay of witnesses. — Any witness appearing and giving testimony shall be entitled to receive from the person at whose instance he was summoned ten cents for every mile traveling to and from his residence, and ferriage, to be recovered before any justice of the peace upon the certificate of the commissioner. (Rev., s. 4414, Code, s. 2860; R. C., c. 52, s. 33; 1800, c. 557, s. 2.)

§ 6103. Appearance before committee.—Every person desiring to appear either in person or by attorney to introduce testimony, or to offer argument for or against the passage of an act or resolution, before any committee of either house of the general assembly, shall first make application to such committee, stating in writing his object, the number and names of his witnesses, and the nature of their testimony. If the committee consider the information likely to be important, or the interest of the applicant to be great, they shall appoint a time and place for hearing the same, with such limitations as may be deemed necessary. (Rev., s. 4415; Code, s. 2858; 1868-9, c. 270, s. 10.)

§ 6104. Appeal from denial of right to be heard.—If any committee shall refuse to grant the request of any citizen to be heard before it in a matter touching his interests, he may appeal to the house of which the committee is a part; and if he show good reason for his request the house shall order it to be granted. (Rev., s. 4416; Code, s. 2859; 1868-9, c. 270, s. 11.)

Art. 6. Acts and Journals

§ 6105. When acts take effect.—Acts of the general assembly shall be in force only from and after thirty days after the adjournment of the session in which they shall have passed, unless the commencement of the operation thereof be expressly otherwise directed. (Rev., s. 4417; Code, s. 2862; R. C., c. 52, s. 35; 1799, c. 527; 1868-9, c. 270, s. 1.)

Editor's Note. — This section abrogates the doctrine of Sumner v. Barksdale, 1 N. C. 328, and Smith v. Smith, 1 N. C. 30, in which it was held that Acts of Assembly take effect from the beginning of the session in which they are passed.

Takes Effect from First Day of Session When so Provided. —An act of the General Assembly which provides that it shall be in force from and after its passage is in force and takes effect from the first day of the session at which it was passed. Hamlet v. Taylor, 50 N. C. 36.

§ 6106. Notice given of private acts.—Any person who may desire the passage of a private law shall give notice of his intention to make application by advertisement in some newspaper of the state which circulates in the county where the applicant resides, or in which such private law will operate, or by advertisement at the door

of the courthouse and three other public places in such county for at least thirty days before the application; and when any private bill shall be introduced, a copy of such advertisement, with due proof of its having been so published, shall be produced before the second reading thereof. (Rev., s. 4418; Const., Art. II, s. 12; Code, s. 2861; R. C., c. 52, s. 34; 1796, c. 466, s. 2; 1835, c. 15.)

See annotations to Constitution, Art. II, sec. 12.

Conclusive Presumption as to Notice.—The courts will conclusively presume, from the ratification of a legislative act authorizing a county to issue bonds, that the notice of thirty days required by section 12, Article II of the Constitution, has been given. Cox v. Commissioners, 146 N. C. 584, 60 S. E. 516.

If the legislative journal is silent as to the fact, the presumptions would be that the Legislature obeyed the Constitution. Gatlin v. Tarboro, 78 N. C. 119.

The courts will not go behind the ratification of an act of the Legislature to inquire as to whether notice required by Art. II, § 12, of the Constitution of North Carolina, and this section has been given and will conclusively presume that this requirement binding upon the conscience of the Legislature has been observed. State v. Holmes, 207 N. C. 293, 176 S. E. 746.

§ 6107. Bills to pay teachers' salaries.—No bills for the payment of any claim for teachers' salaries shall be introduced in either house of the general assembly unless the claim shall have been approved by the chairman of the county board of education and by the county superintendent, and unless a certificate from the county superintendent stating that the debt was contracted by unavoidable mistake on the part of the teacher and the school committee shall be attached to and accompany the bill when introduced. (Rev., s. 4419; 1903, c. 435, s. 16.)

§ 6108. Enrollment of acts.—All bills passed by the general assembly shall be enrolled for ratification under the supervision and direction of the secretary of state. All bills so enrolled shall be typewritten and carefully proofread. The secretary of state is authorized and empowered to secure such equipment as may be required for this purpose, and from time to time during the sessions of the general assembly, to employ such number of competent and trained persons, not to exceed twelve at any one time, as may be necessary to perform this service. One of such number so employed shall be designated as chief enrolling clerk, and shall receive not to exceed the sum of six dollars ($6.00) per day for his services, and each of the others so employed shall receive not to exceed the sum of five dollars ($5.00) per day for his services: Provided, the rules committees of the house of representatives and senate in joint session may increase or decrease the number of persons so employed. (Rev., s. 4422; 1903, c. 5; 1933, c. 173, s. 1.)

Editor's Note.—Public Laws of 1933, c. 173, substituted the above section for the former reading. A comparison of the two sections is necessary to determine the changes.

§ 6109. Secretary of state to prepare index to acts.—The secretary of state shall biennially, at the beginning of each regular session of the general assembly, appoint an assistant, whose duties it shall be to prepare for publication the indexes, and side or marginal notes, to the acts and resolutions, both public and private, ratified by the general assembly. (Rev., s. 4423; 1903, c. 3; 1927, c. 217, s. 1.)

Editor's Note.—Prior to the amendment of 1927 the captions of the acts and resolution were also required to be indexed and published.

§ 6110. Repealed by the Public Laws of 1927, c. 217, s. 2.

§ 6111. Secretary of state to have laws printed.—The secretary of state, within thirty days after the termination of each session of the general assembly, shall cause to be published by the state printer all the laws and joint resolutions passed at such session; and each volume shall contain his certificate that it was printed under his direction from enrolled copies on file in his office. In the printing he shall omit the certificate required to be indorsed upon the original bills; but he shall insert immediately after the title of each law the word "ratified," adding the day, month, and year. (Rev., s. 4425; Code, s. 2869; 1868-9, c. 270, s. 14.)

§ 6111(a). Number to be printed.—There shall not be printed more than four thousand (4,000) volumes of Public Laws, twenty-five hundred (2500) to full bound and fifteen hundred (1500) to half bound; twelve hundred and fifty (1250) volumes of Public-Local and Private Laws; five hundred (500) volumes of House Journals and five hundred (500) volumes of Senate Journals of each session of the General Assembly. (1929, c. 85, s. 1.)

§ 6112. Journals indexed by clerks. — The principal clerks of the two houses of the general assembly shall provide full and complete indexes for the journals of their respective houses. (Rev., s. 4421; Code, s. 2868; 1866-7, c. 71; 1881, c. 292.)

§ 6113. Journals deposited with secretary of state. — The principal clerks of the senate and house of representatives, as soon as may be practicable after the close of each session, shall deposit in the office of the secretary of state the journals of the general assembly; and the secretary of the state shall make and certify copies of any part or entry of the journals, and may take for the copy of each entry made and certified the same fee as for the copy of a grant. (Rev., s. 4420; Code, s. 2867; R. C., c. 52, s. 36; 1819, c. 1020.)

§ 6113(a). Promotion of sale of Supreme Court Reports, Laws and Journals.—The Governor and Council of State be, and they are hereby authorized to fix such sale prices as, in their judgment, will promote the sale of Supreme Court Reports, Public Laws, Public-Local and Private Laws, Senate and House Journals belonging to the State of North Carolina on the first day of January, nineteen hundred and twenty-nine. (1929, c. 85, s. 2.)

Art. 7. Employees

§ 6114. Principal clerk; term of office; duties.—The principal clerk of each house of the general assembly shall hold his office for the term of two years, or until another is appointed; shall be present at such time and place and may be fixed for the meeting of the general assembly, and on the first day thereof, and perform the

duties of his office. (Rev., s. 4426; Code, s. 2870; R. C., c. 52, s. 37; 1846, c. 63.)

§ 6115. Temporary doorkeepers appointed. — The keeper of the capitol (and if there be none, then the secretary of state) shall employ two suitable persons to place the two halls, of the general assembly in order and wait upon the members, until doorkeepers can be regularly appointed. (Rev., s. 4427; Code, s. 2871; R. C., c. 52, s. 38; 1846, c. 63, s. 5.)

§ 6116. Doorkeeper's term of office. — The term of office of the doorkeeper of each house shall be two years, or until his successor is appointed. (Rev., s. 4428; Code, s. 2863; 1868-9, c. 270, s. 7.)

Art. 8. Preservation and Protection of Furniture and Fixtures

§ 6116(a). Principal clerks to take and publish inventory.—At the end of each and every session of the general assembly, the principal clerks of each house shall take inventory of the furniture, desks, fixtures, chairs, and other property belonging to their respective houses, and published said inventory in the appendix of their respective journals. (1921, c. 219, s. 1.)

§ 6116(b). Duty and responsibility of keeper of capitol.—The keeper of the capitol shall have charge and care of the said furniture and fixtures during the vacations of the general assembly, and it shall be his duty to see that said furniture remains in the offices and halls of the two houses from session to session, and he shall be responsible for the safe-keeping of said furniture and fixtures. (1921, c. 219, s. 2.)

§ 6116(c). Removal of furniture and fixtures a misdemeanor.—It shall be a misdemeanor for any person or persons to remove any of said furniture and fixtures from the halls of the general assembly between sessions of the legislature for any purpose whatever. (1921, c. 219, s. 3.)

Art. 9. Lobbying

§ 6116(d). Lobbying defined; registration of lobbyists.—Every person, corporation or association which employs any person to act as counsel or agent to promote or oppose in any manner the passage by the general assembly of any legislation affecting the pecuniary interests of any individual, association or corporation as distinct from those of the whole people of the state, or to act in any manner as a legislative counsel or agent in connection with any such legislation, shall, within one week after the date of such employment, cause the name of the person so employed, to be entered upon a legislative docket as hereinafter provided. It shall also be the duty of the person so employed to enter or cause to be entered his name upon such docket. Upon the termination of such employment such fact may be entered opposite the name of any person so employed either by the employer or employee. (1933, c. 11, s. 1.)

For a discussion of this and the following sections, see 11 N. C. Law Rev., 235.

§ 6116(e). Legislative docket for registration.—The secretary of state shall prepare and keep the legislative docket for the uses provided in this article. In such docket shall be entered the name, occupation or business, and business address of the employer, the name, residence and occupation of the person employed, the date of employment or agreement therefor, the length of time that the employment is to continue, if such time can be determined, and the subject or subjects of legislation to which the employment relates. Such docket shall be a public record and open to the inspection of any citizen at any time during the regular business hours of the office of the secretary of state. (1933, c. 11, s. 2.)

§ 6116(f). Contingent fees prohibited.—No person shall be employed as a legislative counsel or agent for a compensation dependent, in any manner, upon the passage or defeat of any proposed legislation or upon any other contingency connected with the action of the general assembly, or of either branch thereof, or any committee thereof. (1933, c. 11, s. 3.)

§ 6116(g). Written authority from employer to be filed.—Legislative counsel and agents required to have their names entered upon the legislative docket shall file with the secretary of state within ten days after the date of making such entry a written authorization to act as such, signed by the person or corporation employing them. (1933, c. 11, s. 4.)

§ 6116(h). Detailed statement of expenses to be filed.—Within thirty days after the final adjournment of the general assembly every person, corporation or association, whose name appears upon the legislative docket of the session, shall file with the secretary of state a complete and detailed statement, sworn to before a notary public or justice of the peace by the person making the same, or in the case of a corporation by its president or treasurer, of all expenses paid or incurred by such person, corporation or association, in connection with promoting or opposing in any manner the passage by the general assembly of any legislation coming within the terms of this article. Such statements shall be in such form as shall be prescribed by the secretary of state and shall be open to public inspection. (1933, c. 11, s. 5.)

§ 6116(i). Going upon floor during session prohibited.—It shall be unlawful for any person, employed for a pecuniary consideration to act as legislative counsel or agent, as defined by this article, to go upon the floor of either house of the general assembly while the same is in session, except upon invitation of such house. (1933, c. 11, s. 6.)

§ 6116(j). Application of article. — The provisions of this article shall not apply to any county, city, town or municipality, but shall apply to the executive officers of all other corporations who undertake, in such capacity, to perform services as legislative counsel or agent for such corporations, regardless of whether they receive additional compensation for such services. (1933, c. 11, s. 7.)

§ 6116(k). Punishment for violation.—Any legislative counsel or agent, and any employer of such legislative counsel or agent, violating any

provision of this article, shall be guilty of a misdemeanor and upon conviction, shall be fined not less than fifty nor more than one thousand dollars, or imprisoned not exceeding two years, or both. (1933, c. 11, s. 8.)

CHAPTER 101

GEOLOGICAL SURVEY AND FORESTS, ETC.

Art. 1. Organization and General Purposes

§§ 6117-6122(b). Organization and purposes. —Repealed: (Act 1925, c. 122, s. 24.)

Art. 1 (A). Department of Conservation and Development

§ 6122(c). Department created.—There is hereby created and established a department to be known as the "Department of Conservation and Development," with the organization, powers and duties hereafter defined in this article. (1925, c. 122, s. 2.)

Editor's Note. — This department has been consolidated with the Fisheries Commission, see sections 1901(a) et seq. The act is reviewed in 4 N. C. Law Rev. 17.

§ 6122(d). Meaning of terms.—In this article, unless the context otherwise requires, the expression "department" means the Department of Conservation and Development; "board" means the Board of Conservation and Development; and "director" means the Director of Conservation and Development. (1925, c. 122, s. 3.)

§ 6122(e). Objects of the department.—It shall be the objects of the department—

1. To take over the powers and duties exercised by the State Geological and Economic Survey, the State Geological Board, and the State Geologist, as provided for in chapter one hundred and one of the Consolidated Statutes of one thousand nine hundred and nineteen. and other statutes relating thereto.

2. By investigation, recommendation and publication, to aid

(a) In the promotion of the conservation and development of the natural resources of the State;

(b) In promoting a more profitable use of lands, forests and waters;

(c) In promoting the development of commerce and industry;

(d) In coördinating existing scientific investigations and other related agencies in formulating and promoting sound policies of conservation and development; and

(e) To collect and classify the facts derived from such investigations and from other agencies of the State as a source of information easily accessible to the citizens of the State and to the public generally, setting forth the natural, economic, industrial and commercial advantages of the State. (1925, c. 122, s. 4.)

§ 6122(f). Board of Conservation and Development.—The control and management of the department shall be vested in a board to be known as the "Board of Conservation and Development," to be composed of seven members, consisting of the Governor, as chairman, and six other members, citizens of the State, one of whom shall be selected from the staff of the University of North Carolina, and one from the staff of the North Carolina State College of Agriculture and Engineering. (1925, c. 122, s. 5.)

§ 6122(g). Appointment and terms of office.—After March 4, 1925, the Governor shall appoint, by and with the advice and consent of the Senate, the six members of the board, three of whom shall serve until the fifteenth day of January, one thousand nine hundred and twenty-nine, and three shall serve until the fifteenth day of July, one thousand nine hundred and twenty-five. The Governor shall designate, in his appointments, the members to serve for the terms mentioned, and at the expiration of such terms he shall appoint the members of the board to serve for a term of four years thereafter. The members of the board shall serve for the terms for which they are appointed and until their successors are appointed and qualified. The Governor shall also designate one member of the board as vice chairman, who shall preside at the meetings of the board in the absence of the Governor. (1925, c. 122, s. 6.)

§ 6122(h). Meetings of the board.—The board shall meet twice a year in the city of Raleigh, once in January and once in July, at the call of the Governor, and special meetings may be called at such other times as the Governor or director may consider necessary. The board may change the time and place of meeting as the circumstances may require. (1925, c. 122, s. 7.)

§ 6122(i). Compensation of board.—In attending the meetings, the members of the board shall be reimbursed their actual traveling expenses, and members not otherwise receiving a salary from the State may be paid in addition a per diem of four dollars a day for not exceeding eight days in any one year. (1925, c. 122, s. 8.)

§ 6122(j). Powers and duties of the board.—The board shall have control of the work of the department, and may make such rules and regulations as it may deem advisable to govern the work of the department and the duties of its employees.

It shall make investigations of the natural, industrial and commercial resources of the State, and take such measures as it may deem best suited to promote the conservation and development of such resources.

It shall have charge of the work of forest maintenance, forest fire prevention, reforestation, and the protection of lands and water supplies by the preservation of forests; it shall also have the care of State forests and parks, and other recreational areas now owned or to be acquired by the State, including the lakes referred to in section seven thousand five hundred and forty-four of the consolidated Statutes.

It shall make such examination, survey and mapping of the geology, mineralogy and topography of the State, including their industrial and economic utilization, as it may consider necessary; make investigations of water supplies and water-powers, with recommendations and plans for promoting their more profitable use, and take

such measures as it may consider necessary to promote their development.

It shall make investigations of the existing conditions of trade, commerce and industry in the State, with the causes which may hinder or encourage their growth, and may devise and recommend such plans as may be considered best suited to promote the development of these interests.

The board may take such other measures as it may deem advisable to obtain and make public a more complete knowledge of the State and its resources, and it is authorized to coöperate with other departments and agencies of the State in obtaining and making public such information.

It shall be the duty of the board to arrange and classify the facts derived from the investigations made, so as to provide a general source of information in regard to the State, its advantages and resources. (1925, c. 122, s. 9.)

As to powers and duties as to fish, fishing and fisheries, see note to § 1878, and §§ 2078(q)-2078(kk).

§ 6122(k). Power to examine witnesses.—The board, or the director, is authorized, in the performance of their duties, to administer oaths and to subpœna and examine witnesses. (1925, c. 122, s. 10.)

§ 6122(l). Reports and publications; transfer of geological documents to libraries of Greater University.—The board shall prepare a report to be submitted by the governor to each general assembly showing the nature and progress of the work and the expenditures of the department.

The board may also cause to be prepared for publication, from time to time, reports and statements, with illustrations, maps and other descriptions, which may adequately set forth the natural and material resources of the State and its industrial and commercial developments, with a view to furnishing information to educate the people with reference to the material advantages of the State, to encourage and foster existing industries, and to present inducements for investment in new enterprises. Such reports and information shall be published and distributed as the board may direct, at the expense of the State as other public documents.

The director and division heads of the state department of conservation and development are authorized, without expense to that department, to transfer to the libraries of the Greater University of North Carolina all reports, documents and publications relating to geology collected by the old North Carolina geological and economic survey and all duplicates of the reports, documents and publications issued by that survey and by the state department on conservation and development, not necessary for the files of or for distribution by that department. (1925, c. 122, s. 11; 1935, c. 175.)

Editor's Note.—Public Laws of 1935 added the last paragraph of this section.

§ 6122(m). Cooperation with agencies of the Federal government.—The board is authorized to arrange for and accept such aid and cooperation from the several United States Government bureaus and other sources as may assist in completing topographic surveys and in carrying out the other objects of the department, and to continue any arrangement which may have been heretofore made with such Federal agencies by the Geological and Economic Survey and by the Geological Board.

The board is further authorized and directed to cooperate with the Federal power commission in carrying out the rules and regulations promulgated by that commission; and to act in behalf of the State in carrying out any regulations that may be passed relating to water-powers in this State other than those related to making and regulating rates. The provisions of this section are extended to apply to cooperation with authorized agencies of other States. (1925, c. 122, s. 18; 1929, c. 297, s. 2.)

§ 6122(m1). Agreements, negotiations and conferences with Federal Government.—The Department of Conservation and Development is delegated as the State Agency to represent North Carolina in any agreements, negotiations, or conferences with authorized agencies of adjoining or other States, or agencies of the Federal Government, relating to the joint administration or control over the surface or underground waters passing or flowing from one State to another: Provided, that in all matters relating to pollution of said waters the Department of Conservation and Development and the State Board of Health, acting jointly, are hereby designated as the official agency under the provisions of this section. (1929, c. 297, s. 1.)

§ 6122(n). Coöperation with other State departments.—The board is authorized to coöperate with the North Carolina Corporation Commission in investigating the water-powers in the State, and to furnish the corporation Commission such information as is possible regarding the location of the water-power sites, developed water-powers, and such other information as may be desired in regard to water-power in the State; the board shall also coöperate as far as possible with the Department of Labor and Printing, the State Department of Agriculture, the Fisheries Commission board and other departments and institutions of the State in collecting information in regard to the resources of the State and in preparing the same for publication in such manner as may best advance the welfare and improvement of the State. (1925, c. 122, s. 16.)

§ 6122(o). Coöperation with counties and municipal corporations.—The board is authorized to coöperate with the counties of the State in any surveys to ascertain the natural resources of the county; and with the governing bodies of cities and towns, with boards of trade and other like civic organizations, in examining and locating water supplies and in advising and recommending plans for other municipal improvements and enterprises. Such coöperation is to be conducted upon such terms as the board may direct. (1925, c. 122, s. 17.)

§ 6122(p). Director of Conservation and Development.—The Governor shall appoint a suitable person as Director of Conservation and Development, who shall have charge of the work of the department, under the supervision of the board. The director shall serve for such time as

the Governor may designate in his appointment, not to exceed, however, the term of office of the Governor making the appointment, and until his successor is appointed and qualified. (1925, c. 122, s. 12.)

As to control over waterfowl food growing in public waters, see § 2105(c).

§ 6122(q). Duties of the director.—It shall be the duty of the director, under the supervision of the board and under such rules and regulations as the board may adopt, to make, or cause to be made, examinations and surveys of the economic and natural resources of the State and investigations of its industrial and commercial enterprise and advantages, and to perform such other duties as the board may prescribe in carrying out the objects of the department. (1925, c. 122, s. 13.)

§ 6122(r). Compensation of the director.—The director shall receive an annual salary, to be fixed by the Governor, not to exceed the salary heretofore paid to the State Geologist appointed under section six thousand one hundred and seventeen of the Consolidated Statutes of North Carolina. (1925, c. 122, s. 14.)

§ 6122(s). Experts and assistants.—The director shall appoint, subject to the approval of the board, such experts and assistants as may be found necessary to enable him to carry on successfully the work of the department, among whom he may appoint, subject to the approval of the board and as may be found necessary, a State geologist and a State forester; and the board shall fix the compensation of such experts and assistants. To the State forester and the State geologist such duties may be assigned by the said director, subject to the approval of the board, as may be desired, including those heretofore exercised by those officers so designated. (1925, c. 122, s. 15.)

§ 6122(t). Geological board and State Geologist abolished.—The geological board provided for in section six thousand one hundred and eighteen, and the office of State Geologist as provided for in section six thousand one hundred and seventeen, of Consolidated Statutes, chapter one hundred and one, entitled "Geological Survey and Forests," are hereby abolished : Provided, however, that the Geological Board and State Geologist shall perform the duties of such positions until the Board of Conservation and Development provided for in this article qualifies. (1925, c. 122, s. 19.)

§ 6122(u). Transfer of property. — Upon the organization of the department by the appointment and qualification of the board and director, all the property of the State in the hands of Geological Board and of the State Geologist shall be transferred to this department; and all valid contracts of the Geological Board and State Geologist, made in the discharge of their official duties, and still outstanding and unexecuted, shall be binding upon this department. (1925, c. 122, s. 20.)

§ 6122(v). Appropriations. — All appropriations heretofore made for the use of the North Carolina Geological and Economic Survey and which may be made at this meeting of the General Assembly shall be and are hereby transferred to the account and use of the Department of Conservation and Development, to be used by the board in control of the department; and all appropriations, or funds derived or which may be derived from the United States Government or from other sources of revenue which have been directed or may be directed to be applied to the general purposes of the Geological and Economic Survey in connection with forest protection, reforestation or otherwise shall be used by the board in carrying out the duties of this department. (1925, c. 122, s. 21.)

§ 6122(w). Control of State forests.—The board and director shall have charge of all State forests, measures for forest fire prevention, and all other duties relating to forests heretofore vested in the State Geologist and Economic Survey, the Geological board and the State Geologist. (1925, c. 122, s. 22.)

§ 6122(x). Control of Mount Mitchell Park and other State parks.—The board shall have the control and management of Mount Mitchell Park and of any other parks which have been or may be acquired by the State as State parks. (1925, c. 122, s. 23.)

§ 6122(y). Notification of intent to begin or continue business.—Every person, firm or corporation engaging in the manufacture or production of any product from any natural resources, classified as mineral products, shall before beginning such operation, or if already engaged in such business, within ninety days after the ratification of this section, notify the State Department of Conservation and Development at Raleigh of its intention to begin or continue such business, and also notify said department of the product or products it intends to produce.

Every person, firm or corporation now engaged or hereafter engaging in the manufacture or production of any product from any natural resources of the State classified as mineral products, shall notify the State Department of Conservation and Development at Raleigh when such person, firm or corporation shall discontinue such manufacture or production.

Any person, firm or corporation failing to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than twenty-five dollars and not less than five dollars, in the discretion of the court. (1927, c. 258.)

§ 6122(z). Investigation of coasts, ports and waterways of State. — The North Carolina Department of Conservation and Development is designated as the official State agency to investigate and cause investigations to be made of the coasts, ports and waterways of North Carolina and to coöperate with agencies of the Federal and State Government and other political sub-divisions in making such investigations. Provided, however, that the provisions of this section shall not be construed as in any way interfering with the powers and duties of the Transportation Advisory Commission, relating to the acquiring of rights-of-way for the Intra-Coastal Waterway; or to authorize the Department of Conservation and Development to rep-

resent the State in connection with such duties. (1931, cc. 139, 266.)

§ 6122(aa). Reimbursement of government for expense of emergency conservation work.—When and if, upon the sale of state land or its products, the director of conservation and development determines that the State has derived a direct profit as a result of work on the land sold, or on land the products of which are sold, done or to be done, under a project carried on pursuant to an act of Congress entitled, "An act for the relief of unemployment through the performance of useful public work, and for other purposes' approved March thirty-first, one thousand nine hundred and thirty-three, one-half of such profit from such sale of land, or one-half the proceeds of the sale of such products, or such lesser amount as may be sufficient, shall be applied to or toward reimbursing the United States government for monies expended by it under such act, for the work so done, to the extent and at the rate of one dollar per man per day, for the time spent in such work, but not exceeding in the aggregate three dollars per acre. The director of conservation and development shall fix and determine the amount of such profit or proceeds. Such one-half part of such proceeds or profits, as the case may be, shall be retained by the department of conservation and development, or paid over to it by any other authorized agency making the sale, to be so retained by such department until the account of the United States government, with respect to such sale, becomes liquidated. Upon completion of the sale, the department of conservation and development is hereby authorized to settle with the proper federal authority an account fixing the amount due the United States government and to pay over to it the amount so fixed. The unexpended remainder, if any, of such one-half part of such profit or proceeds shall then be paid over or applied by said department of conservation and development as now authorized and directed by law. This section shall not be construed to authorize the sale of state lands or products, but applies only to a sale now or hereafter authorized by other provisions of law. This section is enacted to procure a continuance of the emergency conservation work within the State, under such act of Congress. (1935, c. 115.)

Art. 2. Road Building and Development of Mineral Resources

§ 6123. Geological board to investigate and advise.—Repealed: (1925, c. 122, s. 24.)

Art. 3. State Forests, Parks, etc., by Donation, Lease or Purchase

§ 6124. Power to acquire lands as State forests, parks, etc.; donations or leases by United States. — The governor of the state is authorized upon recommendation of the Board of Conservation and Development to accept gifts of land to the state, the same to be held, protected, and administered by said board as state forests, and to be used so as to demonstrate the practical utility of timber culture and water conservation, and as refuges for game. Such gifts must be absolute except in such cases as where the mineral interest on the land has previously been sold. The State Board of Conservation and Development shall have the power to purchase lands in the name of the state, suitable chiefly for the production of timber, as state forests, for experimental, demonstration, educational, park, and protection purposes, using for such purposes any special appropriations or funds available. The attorney-general of the state is directed to see that all deeds to the state for land mentioned in this section are properly executed before the gift is accepted or payment of the purchase money is made. Such state forests shall be subject to county taxes assessed on the same basis as are private lands, to be paid out of money in the state treasury not otherwise appropriated.

The board of conservation and development is further authorized and empowered to accept as gifts to the State of North Carolina such forest and submarginal farm land acquired by said federal government as may be suitable for the purpose of creating and maintaining state-controlled forests, game refuges, public shooting grounds, state parks, state lakes, and other recreational areas or to enter into long-time leases with the federal government for such areas and administer them with such funds as may be secured from their administration in the best interest of long-time public use, supplemented by such necessary appropriations as may be made by the general assembly. The department of conservation and development is further empowered to segregate state hunting and fishing licenses, use permits, and concessions and other proper revenue secured through the administration of such forests, game refuges, public shooting grounds, state parks, state lakes, and other recreational areas to be deposited in the state treasury to the credit of the department to be used for the administration of these areas. (1915, c. 253, s. 1; 1925, c. 122, s. 22; 1935, c. 226.)

Editor's Note.—The amendment of 1935 adds the last paragraph of this section.

§ 6124(a). State timber may be sold by Department of Conservation and Development; forest nurseries; control over parks, etc. — Timber and other products of such State forest lands may be sold, cut and removed under rules and regulations of the Department of Conservation and Development. Said Department shall have authority to establish on these or other State lands under its charge forest nurseries for the growing of trees for planting on such State forest lands and to procure or acquire tree seeds for nursery for forest use. Such planting stock as is not required in the State forests may be sold at not less than cost to landowners within the State for planting purposes, but all such planting shall be done under plans approved by the Department. The Department shall make reasonable rules for the regulation of the use by the public of such and all State forests, State parks, State lakes, game refuges and public shooting grounds under its charge, which regulations, after having been posted in conspicuous places on and adjacent to such State properties and at the courthouse of the county or counties in which such properties are situated, shall have the force and effect of law and any violation of such regula-

tions shall constitute a misdemeanor and shall be punishable by a fine of not more than fifty dollars or by imprisonment for not exceeding thirty days. (1931, c. 111, s. 1.)

§ 6125. Application of proceeds from sale of products.—All money received from the sale of wood, timber, minerals, or other products from the state forests shall be paid into the state treasury and to the credit of the Board of Conservation and Development; and such money shall be expended in carrying out the purposes of this article and of forestry in general, under the direction of the Board of Conservation and Development. (1915, c. 253, s. 2; 1925, c. 122, s. 22.)

§ 6126. Legislative authority necessary for payment.—Nothing in this article shall operate or be constructed as authority for the payment of any money out of the state treasury for the purchase of lands or for other purposes unless by appropriation for said purpose by the general assembly. (1915, c. 253, s. 2½.)

§ 6126(a). Distribution of funds from sale of forest lands.—All funds paid by the National Forest Commission, by authority of act of Congress, approved May 23, 1908 (Thirty-five Stat., two hundred sixty), for the counties of Avery, Buncombe, Burke, Haywood, Henderson, Jackson, Macon, Swain, Transylvania, Watauga and Yancey, shall be paid to the treasurers, or to the men acting as such, of the above-named counties, for the use and benefit of the school fund and road fund of each county: Provided, that said funds in each county shall be divided equally between the road fund and the school fund. All funds which may hereafter come into the hands of the state treasurer from like sources shall be likewise distributed. (Ex. Sess. 1920, c. 6; 1921, c. 179, s. 17.)

§ 6126(b). Such monies directed to county general funds.—All funds paid by the national government to the various counties of North Carolina, under section 6126(a), shall hereafter be paid to the proper county officers and said funds shall, when received, be placed in the account of the general county funds. (1933, c. 537, s. 1.)

§ 6126(c). License fees for hunting and fishing on government-owned property unaffected.—No wording in section two thousand and ninety-nine, consolidated statutes, nineteen nineteen, or any other North Carolina statute or law, or special act, shall be construed to abrogate the vested rights of the state of North Carolina to collect fees for license for hunting and fishing on any government-owned land or in any government owned stream in North Carolina including the license for county, state or non-resident hunters or fishermen; or upon any lands or in any streams hereafter acquired by the federal government within the boundaries of the state of North Carolina. The lands and streams within the boundaries of the Great Smoky Mountains National Park to be excepted from this section. (1933, c. 537, s. 2.)

§ 6126(1). Donations of property for forestry or park purposes; agreements with federal government or agencies for acquisition. — The department of conservation and development is hereby authorized and empowered to accept gifts, donations or contributions of land suitable for forestry or park purposes and to enter into agreements with the federal government or other agencies for acquiring by lease, purchase or otherwise such lands as in the judgment of the department are desirable for state forests or state parks. (1935, c. 430, s. 1.)

§ 6126(2). Expenditure of funds for development, etc.; disposition of products from lands; rules and regulations.—When lands are acquired or leased under section 6126(1), the department is hereby authorized to make expenditures from any funds not otherwise obligated, for the management, development and utilization of such areas; to sell or otherwise dispose of products from such lands, and to make such rules and regulations as may be necessary to carry out the purposes of this law. (1935, c. 430, s. 2.)

§ 6126(3). Disposition of revenues received from lands acquired.—All revenues derived from lands now owned or later acquired under the provisions of this law shall be set aside for the use of the department in acquisition, management, development and use of such lands until all obligations incurred have been paid in full. Thereafter, fifty per cent of all net profits accruing from the administration of such lands shall be applicable for such purposes as the general assembly may prescribe, and fifty per cent shall be paid into the school fund to be used in the county or counties in which lands are located. (1935, c. 430, s. 3.)

§ 6126(4). State not obligated for debts created hereunder. — Obligations for the acquisition of land incurred by the department under the authority of this law shall be paid solely and exclusively from revenues derived from such lands and shall not impose any liability upon the general credit and taxing power of the State. (1935, c. 430, s. 4.)

§ 6126(5). Disposition of lands acquired.—The department shall have full power and authority to sell, exchange or lease lands under its jurisdiction when in its judgment it is advantageous to the State to do so in the highest orderly development and management of state forests and state parks: Provided, however, said sale, lease or exchange shall not be contrary to the terms of any contract which it has entered into. (1935, c. 430, s. 5.)

Art. 4. Private Lands Designated as State Forests

§ 6127. Governor may designate state forests.—The governor of the state, upon the written application of any owner or owners of wooded lands situated in North Carolina above contour line two thousand feet, may at his discretion declare the lands of such owner or owners, or such parts thereof as he may deem advisable, a "state forest of North Carolina." (1909, c. 89, s. 1.)

§ 6128. Publication of declaration.—The declaration of the governor shall be published, at the expense of the applicant, in three consecutive issues of any newspaper published in the county or counties wherein the lands declared a state forest reserve are situated, if there be one; if no paper

is published in the county or counties, then in a paper published in an adjoining county; and after such publication the said lands shall be a state forest of North Carolina for the term of thirty years. (1909, c. 89, s. 2.)

§ 6129. Duty of the landowners.—The owner or owners, when making such written application, shall agree in writing to treat in a conservative manner the proposed state forest described in the application, such manner to be in accordance with a working plan approved by the Department of Conservation and Development, and the owner or owners of such proposed state forest, when making such application, shall agree to pay annually into the school fund of the county wherein such proposed state forest or a part thereof is situated one-half cent for every acre of such proposed state forest situated within the county; and if the owner or owners thereafter shall fail to make such annual payment, then the declaration of the governor establishing the said state forest shall be null and void to all intents and purposes. (1909, c. 89, s. 3; 1925, c. 122, s. 22.)

§ 6130. State forest wardens appointed.—The governor shall appoint at his discretion, with the approval of the commissioners of the county wherein a state forest is situated, as state forest wardens such a man or men over twenty-one years of age as may be designated for appointment by the owner or owners of such state forest. Such state forest wardens are to receive no compensation other than that which the owner or owners of the state forest may pay to them. (1909, c. 89, s. 4.)

§ 6131. Powers of state forest wardens.—The state forest wardens may make arrest on sight, without warrant for any criminal offense, as provided in the chapter on Crimes, for setting fire to woods, for camp-fires, for hunting on lands without permission of the owner, for malicious injury to real property, for cutting or removing timber from the land of another, for trespass on land after being forbidden, or for other crime relating to real estate committed within the state forest. They shall safeguard against trespass, and notably against fire, the state forest for which they have been appointed; and, as far as the enforcement of the provisions of this article is concerned, the state forest warden shall have all the powers, privileges, and protection otherwise had by sheriffs under any law now in force. (1909, c. 89, s. 5.)

§ 6132. Fines imposed. — The minimum fine for any offense mentioned in the preceding section committed within any state forest shall be fifty dollars if within the jurisdiction of the superior court, and twenty-five dollars if within the jurisdiction of a justice of the peace. (1909, c. 89, s. 6.)

Art. 5. Protection against Forest Fires

§ 6133. Board of Conservation and Development.—The State Board of Conservation and Development may take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this state, and it is hereby authorized to enter into an agreement with the secretary of agriculture of the United States for the protection of the forested watersheds of streams in this state. (1915, c. 243, s. 1; 1925, c. 122, s. 22.)

§ 6134. State forester and forest wardens.—The forester of the Department of Conservation and Development, who shall be state forester, and shall be ex officio state forest warden, may appoint, with the approval of the Board of Conservation and Development, one county forest warden and one or more deputy forest wardens in each county of the state in which after careful investigation the amount of forest land and the risks from forest fires shall, in his judgment, warrant the establishment of a forest fire organization. (1915, c. 243, s. 2; 1925, c. 106, s. 1, c. 122, s. 22; 1927, c. 150, s. 1; 1935, c. 178, s. 1.)

Editor's Note.—The amendment of 1935 inserts the words "after careful investigation" and substitutes the words "warrant the establishment of a forest fire organization" for the words "make it advisable and necessary."

§ 6135. Duties of state forester. — The state forester, as the state forest warden, shall have supervision of forest wardens, shall instruct them in their duties, issue such regulations and instructions to all forest wardens as he may deem necessary for the purposes of this article, and cause violations of the laws regarding forest fires to be prosecuted. (1915, c. 243, s. 3; 1925, c. 106, s. 1; 1927, c. 150, s. 2.)

§ 6136. Duties of forest wardens; payment of expenses. — Forest wardens shall have charge of measures for controlling forest fires; shall make arrests for violation of forest laws; shall post along highways and in other conspicuous places copies of the forest fire laws and warnings against fires, which shall be supplied by the state forester; shall patrol and man lookout towers and other points during dry and dangerous seasons under the direction of the state forester, and shall perform such other acts and duties as shall be considered necessary by the state forester for the protection of the forested area of the counties from fire. The warden shall keep an itemized account of all expenses thus incurred and send such accounts, verified by affidavit, to the state forester monthly, for his examination. Upon approval by the state forester such accounts shall be sent by the state forester to the board of county commissioners of the county in which such expenses have been incurred, and upon approval by the board of the correctness of such accounts, the county commissioners shall issue or cause to have issued a warrant on the county treasury for the payment of one-half of such account, said payments of counties' share of such expenditures to be made within one month after receipt of such statements from the state forester, provided that the total payments by the county shall not exceed five (5) mills per acre of total woodland area in said county in any one calendar year, unless specifically authorized by the county commissioners to meet an emergency; appropriations for meeting the counties' share of the fire control costs to be set up annually by the commissioners in the county budget. (1915, c. 243, s. 4; 1925, c. 106, s. 1; 1927, c. 150, s. 3; 1935, c. 178, s. 2.)

Editor's Note.—The amendment of 1935 made many changes in this section. The provision for manning look-

out towers and other points is new as is the latter part of the section relating to payment of expenses.

§ 6137. Powers of forest wardens to prevent and extinguish fires.—Forest wardens shall prevent and extinguish forest fires and enforce all statutes of this state now in force or that hereafter may be enacted for the protection of forests and woodlands from fire, and they shall have control and direction of all persons and apparatus while engaged in extinguishing forest fires. Any forest warden may arrest, without a warrant, any person or persons taken by him in the act of violating any of the laws for the protection of forests and woodlands, and bring such person or persons forthwith before a justice of the peace or other officer having jurisdiction, who shall proceed without delay to hear, try, and determine the matter. During a season of drouth the state forester may establish a fire patrol in any district, and in case of fire in or threatening any forest or woodland the forest warden shall attend forthwith and use all necessary means to confine and extinguish such fire. The forest warden or his deputies may summon any male resident between the ages of eighteen and forty-five years to assist in extinguishing fires, and may require the use of horses and other property needed for such purpose; any person so summoned, and who is physically able, who refuses or neglects to assist or to allow the use of horses, wagons, or other material required, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than five dollars nor more than fifty dollars. No action for trespass shall lie against any forest warden or person summoned by him for crossing or working upon lands of another in connection with his duties as forest warden. (1915, c. 243, s. 6; 1925, c. 106, ss. 1, 2; 1925, c. 240; 1927, c. 150, s. 4.)

A forest warden of a county is given authority by this section to appoint persons between certain ages to assist him in fighting forest fires with pain of penalty upon refusal, and a person so appointed is entitled to receive a small hourly compensation for the services so rendered, and one so appointed is an employee of the state within the meaning of the Workmen's Compensation Act, and is entitled to compensation thereunder for an injury received in the course of and arising out of his duties imposed by such appointment. Moore v. State, 200 N. C. 300, 156 S. E. 806.

§ 6138. Compensation of forest wardens.—Forest wardens shall receive compensation from the Board of Conservation and Development at a reasonable rate to be fixed by said board not to exceed the sum of thirty cents per hour for the time actually engaged in the performance of their duties; and reasonable expenses for equipment, transportation, or food supplies incurred in fighting or extinguishing any fire, according to an itemized statement to be rendered the state forester every month, and approved by him. Forest wardens shall render to the state forester a statement of the services rendered by the men employed by them or their deputy wardens, as provided in this article, within one month of the date of service, which bill shall show in detail the amount and character of the service performed, the exact duration thereof, the name of each person employed, and any other information required by the state forester. If said bill be duly approved by the state forester, it shall be paid by direction of the Board of Conservation and Development out of any funds provided for that purpose. (1915, c. 243, s. 7; 1924, c. 60; 1925, c. 106, ss. 1, 3; c. 122, s. 22.)

§ 6139. Woodland defined. — For the purposes of this article, woodland is taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. (1915, c. 243, s. 11.)

§ 6140. Misdemeanor to destroy posted forestry notice.—Any person who shall maliciously or wilfully destroy, deface, remove, or disfigure any sign, poster, or warning notice, posted by order of the state forester, under the provisions of this article, or any other act which may be passed for the purpose of protecting the forests in this state from fire, shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or imprisoned not exceeding thirty days. (1915, c. 243, s. 5.)

§ 6140(a). Coöperation between counties and state in forest fire protection.—The board of county commissioners of any county are hereby authorized and empowered, in their discretion, to coöperate with the Department of Conservation and Development in the protection from fire of the forests within their respective counties, and to appropriate and pay out of the funds under their control for such protection an amount not to exceed one-half of the total expended by said survey in such county during any one year for such protection: Provided, that said board of county commissioners may in addition agree with the Department of Conservation and Development to pay any part of or all the expenses incurred in extinguishing forest fires within said county after satisfying themselves that such expenses were legitimate and proper. (1921, c. 26; 1925, c. 122, s. 22.)

§ 6140(b). Instructions on forest preservation.—It shall be the duty of all district, county, township wardens, and all deputy wardens provided for in this chapter to distribute in all of the public schools and high schools of the county in which they are serving as such fire wardens all such tracts, books, periodicals and other literature that may, from time to time, be sent out to such wardens by the State and Federal forestry agencies touching or dealing with forest fires and forest preservation.

It shall be the duty of the various wardens herein mentioned under the direction of the State Forester, and the duty of the teachers of the various schools, both public and high schools, to keep posted at some conspicuous place in the various classrooms of the school buildings such appropriate bulletins and posters as may be sent out from the forestry agencies herein named for that purpose and keep the same constantly before their pupils; and said teachers and wardens shall prepare lectures or talks to be made to the pupils of the various schools on the subject of forest fires, their origin and their destructive effect on the plant life and tree life of the forests of the State, and shall be prepared to give practical instruction to their pupils from time to time and as often as they shall find it possible so to do. (1925, c. 61, s. 3.)

Art. 6. Corporations for Protection and Development of Forests

§ 6140(c). Private limited dividend corporations may be thus formed. — Three or more persons, who associate themselves by an agreement in writing for the purpose, may become a private limited dividend corporation to finance and carry out projects for the protection and development of forests and for such other related purposes as the director of the department of conservation and development shall approve, subject to all the duties, restrictions and liabilities, and possessing all the rights, powers, and privileges, of corporations organized under the general corporation laws of state of North Carolina, except where such provisions are in conflict with this article. (1933, c. 178, s. 1.)

§ 6140(d). Manner of organizing.—A corporation formed under this article shall be organized and incorporated in the manner provided for organization of corporations under the general corporation laws of state of North Carolina, except where such provisions are in conflict with this article. The certificate of organization of any such corporation shall contain a statement that it is organized under the provisions of this article and that it consents to be and shall be at all times subject to the rules, regulations and supervision of the director of the department of conservation and development, and shall set forth as or among its purposes the protection and development of forests and the purchase, acquisition, sale, conveyance and other dealing in the same and the products therefrom, subject to the rules and regulations from time to time imposed by the director of the department of conservation and development. (1933, c. 178, s. 2.)

§ 6140(e). Directors. — There shall not be less than three directors, one of whom shall always be a person designated by the director of the department of conservation and development, which one need not be a stockholder. (1933, c. 178, s. 3.)

§ 6140(f). Duties of supervision by director of department of conservation and development. — Corporations formed under this article shall be regulated by the director of the department of conservation and development in the manner provided in this article. Traveling and other expenses incurred by him in the discharge of the duties imposed upon him by this article shall be charged to, and paid by, the particular corporation or corporations on account of which such expenses are incurred. His general expenses incurred in the discharge of such duties, which cannot be fairly charged to any particular corporation or corporations, shall be charged to and paid by, all the corporations then organized and existing under this article pro-rata according to their respective stock capitalizations. The director of the department of conservation and development shall:

(a) From time to time make, amend, and repeal rules and regulations for carrying into effect the provisions of this article and for the protection and development of forests subject to its jurisdiction.

(b) Order all corporations organized under this article to do such acts as may be necessary to comply with the provisions of law and the rules and regulations adopted by the director of the department of conservation and development, or to refrain from doing any acts in violation thereof.

(c) Keep informed as to the general condition of all such corporations, their capitalization and the manner in which their property is permitted, operated or managed with respect to their compliance with all provisions of law and orders of the director of the department of conservation and development.

(d) Require every such corporation to file with the director of the department of conservation and development annual reports and, if the director of the department of conservation and development shall consider it advisable, other periodic and special reports, setting forth such information as to its affairs as the director of the department of conservation and development may require. (1933, c. 178, s. 4.)

§ 6140(g). Powers of director. — The director of the department of conservation and development may

(a) Examine at any time all books, contracts, records, documents and papers of any such corporation.

(b) In his discretion prescribe uniform methods and forms of keeping accounts, records and books to be observed by such corporation, and prescribe by order accounts in which particular outlays and receipts are to be entered, charged or credited. The director of the department of conservation and development shall not, however, have authority to require any revaluation of the real property or other fixed assets of such corporations, but he shall allow proper charges for the depletion of timber due to cutting or destruction.

(c) Enforce the provisions of this article and his orders, rules and regulations thereunder by filing a petition for a writ of mandamus or application for an injunction in the superior court of the county in which the respondent corporation has its principal place of business. The final judgment in any such proceeding shall either dismiss the proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief. (1933, c. 178, s. 5.)

§ 6140(h). Provision for appeal by corporations to governor.—If any corporation organized under this article is dissatisfied with or aggrieved at any regulation, rule or order imposed upon it by the director of the department of conservation and development, or any valuation or appraisal of any of its property made by the director of the department of conservation and development, or any failure of or refusal by the director of the department of conservation and development to approve of or consent to any action which it can take only with such approval or consent, it may appeal to the governor by filing with him a claim of appeal upon which the decision of the governor shall be final. Such determination, if other than a dismissal of the appeal, shall be set forth by the

governor in a written mandate to the director of the department of conservation and development, who shall abide thereby and take such action as the same may direct. (1933, c. 178, s. 6.)

§ 6140(i). Limitations as to dividends. — The shares of stock of corporations organized under this article shall have a par value and, except as provided in section 6140(k) in respect to distributions in kind upon dissolution, no dividend shall be paid thereon at a rate in excess of six per centum per annum on stock having a preference as to dividends, or eight per centum per annum on stock not having a preference as to dividends, except that any such dividends may be cumulative without interest. (1933, c. 178, s. 7.)

§ 6140(j). Issuance of securities prohibited. — No such corporation shall issue stock, bonds or other securities except for money, timberlands, or interests therein, located in the state of North Carolina or other property, actually received, or services rendered, for its use and its lawful purposes. Timberlands, or interests therein, and other property or services so accepted therefor, shall be upon a valuation approved by the director of the department of conservation and development. (1933, c. 178, s. 8.)

§ 6140(k). Limitation on bounties to stockholders.—Stockholders shall at no time receive or accept from any such corporation in repayment of their investment in its stock any sums in excess of the par value of the stock together with cumulative dividends at the rate set forth in section 6140(i) except that nothing in this section contained shall be construed to prohibit the distribution of the assets of such corporation in kind to its stockholders upon dissolution thereof. (1933, c. 178, s. 9.)

§ 6140(l). Earnings above dividend requirements payable to state. — Any earnings of such corporation in excess of the amounts necessary to pay dividends to stockholders at the rate set forth in section 6140(i) shall be paid over to the state of North Carolina prior to the dissolution of such corporation. Net income or net losses (determined in such manner as the director of the department of conservation and development shall consider properly to show such income or losses) from the sale of the capital assets of such corporation, whether such sale be upon dissolution or otherwise, shall be considered in determining the earnings of such corporation for the purposes of this section. In determining such earnings unrealized appreciation or depreciation of real estate or other fixed assets shall not be considered. (1933, c. 178, s. 10.)

§ 6140(m). Dissolution of corporation. — Any such corporation may be dissolved at any time in the manner provided by and under the provisions of the general corporation laws of the state of North Carolina, except that the court shall dismiss any petition for dissolution of any such corporation filed within twenty years of the date of its organization unless the same is accompanied by a certificate of the director of the department of conservation and development consenting to such dissolution. (1933, c. 178, s. 11.)

§ 6140(n). Cutting and sale of timber. — Any such corporation may cut and sell the timber on its lands or permit the cutting thereof, but all such cuttings shall be in accordance with the regulations, restrictions and limitations imposed by the director of the department of conservation and development, who shall impose such regulations, restrictions and limitations with respect thereto as may reasonably conform to the accepted custom and usage of good forestry and forest economy, taking into consideration the situation, nature and condition of the tract so cut or to be cut, and the financial needs of such corporation from time to time. (1933, c. 178, s. 12.)

§ 6140(o). Corporation may not sell or convey without consent of director, or pay higher interest rate than 6%.—No such corporation shall:

(a) Sell, assign or convey any real property owned by it or any right, title or interest therein, except upon notice to the director of the department of conservation and development of the terms of such sale, transfer or assignment, and unless the director of the department of conservation and development shall consent thereto, and if the director of the department of conservation and development shall require it, unless the purchaser thereof shall agree that such real estate shall remain subject to the regulations and supervision of the director of the department of conservation and development for such period as the latter may require;

(b) Pay interest returns on its mortgage indebtedness at a higher rate than six per centum per annum without the consent of the director of the department of conservation and development.

(c) Mortgage any real property without first having obtained the consent of the director of the department of conservation and development. (1933, c. 178, s. 13.)

§ 6140(p). Power to borrow money limited. — Any such corporation formed under this article may, subject to the approval of the director of the department of conservation and development, borrow funds and secure their payment thereof by note or notes and mortgage or by the issue of bonds under a trust indenture. The notes or bonds so issued and secured and the mortgage or trust indenture relating thereto may contain such clauses and provisions as shall be approved by the director of the department of conservation and development, including the right to enter into possession in case of default; but the operations of the mortgagee or receiver entering in such event or of the purchaser of the property upon foreclosure shall be subject to the regulations of the director of the department of conservation and development for such period as the mortgage or trust indenture may specify. (1933, c. 178, s. 14.)

§ 6140(q). Director to approve development of forests. — No project for the protection and development of forests proposed by any such corporation shall be undertaken without the approval of the director of the department of conservation and development, and such approval shall not be given unless:

(1) The director of the department of conser-

vation and development shall have received a statement duly executed and acknowledged on behalf of the corporation proposing such project, in such adequate detail as the director of the department of conservation and development shall require of the activities to be included in the project, such statement to set forth the proposals as to (a) fire prevention and protection, (b) protection against insects and tree diseases, (c) protection against damage by livestock and game, (d) means, methods and rate of, and restrictions upon cutting, and other utilization of the forests, and (e) planting and spacing of trees.

(2) There shall be submitted to the director of the department of conservation and development a financial plan satisfactory to him setting forth in detail the amount of money needed to carry out the entire project, and how such sums are to be allocated, with adequate assurances to the director of the department of conservation and development as to where such funds are to be secured.

(3) The director of the department of conservation and development shall be satisfied that the project gives reasonable assurance of the operation of the forests involved on a sustained yield basis except in so far as the director of the department of conservation and development shall consider the same impracticable.

(4) The corporation proposing such project shall agree that the project shall at all times be subject to the supervision and inspection of the director of the department of conservation and development, and that it will at all times comply with such rules and regulations concerning the project as the director of the department of conservation and development shall from time to time impose. (1933, c. 178, s. 15.)

§ 6140(r). Application of corporate income. — The gross annual income of any such corporation, where received from sales of timber, timber operations, stumpage permits or other sources shall be applied as follows: first, to the payment of all fixed charges, and all operating and maintenance charges and expenses including taxes, assessments, insurances, amortization charges in amounts approved by the director of the department of conservation and development to amortize mortgage or other indebtedness and reserves essential to operation, second, to surplus and/or to the payment of dividends not exceeding the maximum fixed by this act, third, the balance, if any, in reduction of debts. (1933, c. 178, s. 16.)

§ 6140(s). Reorganization of corporations. — Reorganization of corporations organized under this article shall be subject to the supervision of the director of the department of conservation and development and no such reorganization shall be had without the authorization of the director of the department of conservation and development. (1933, c. 178, s. 17.)

CHAPTER 102
HISTORICAL COMMISSION

Art. 1. Creation and General Powers

§ 6141. Appointment; term of office; compensation.—The historical commission shall consist of not more than five persons, of whom three shall constitute a quorum. They shall be appointed by the governor on the first day of April, one thousand nine hundred and seven, who shall designate one member to serve for a term of two years, two members to serve for a term of four years, and two members to serve for a term of six years from the date of their appointments, and their successors shall be appointed by the governor and shall serve for a term of six years and until their successors are appointed and qualified. In case of a vacancy in any of the above terms the persons appointed to fill such vacancies shall be appointed only for the unexpired term. They shall serve without salary, but shall be allowed their actual expenses when attending to their official duties, to be paid out of any funds hereinafter appropriated for the maintenance of the commission: Provided, that such expenses shall not be allowed for more than four meetings annually nor for more than four days at each meeting. (Rev., s. 4539; 1903, c. 767, s. 2; 1907, c. 714, s. 1.)

§ 6142. Duties of commission.—It is the duty of the commission to have collected from the files of old newspapers, court records, church records, private collections, and elsewhere, historical data pertaining to the history of North Carolina and the territory included therein from the earliest times; to have such material properly edited, published by the state printer as other state printing, and distributed under the direction of the commission; to care for the proper marking and preservation of battlefields, houses, and other places celebrated in the history of the state; to diffuse knowledge in reference to the history and resources of North Carolina; to encourage the study of North Carolina history in the schools of the state, and to stimulate and encourage historical investigation and research among the people of the state; to make a biennial report of its receipts and disbursements, its work and needs, to the governor, to be by him transmitted to the general assembly. (Rev., ss. 4540, 4541; 1907, c. 714, s. 2; 1911, c. 211, s. 6; 1925, c. 275, s. 6.)

§ 6142(a). Markers on highway; coöperation of highway commission. — The State Highway Commission is hereby authorized to co-operate with the North Carolina Historical Commission in marking historic spots along the State highways. (1927, c. 226, s. 1.)

§ 6143. Powers of commission. — The commission shall have power to adopt a seal for use and official business; to adopt rules for its own government not inconsistent with the provisions of this chapter; to fix a reasonable price for its publications and to devote the revenue arising from such sales to extending the work of the commission; to employ a secretary; to control the expenditure of such funds as may be appropriated for its maintenance: Provided, that at least one copy of its publications shall be furnished free of charge to any public school library or public library in North Carolina, state officers, and members of the general assembly making application for the same through its properly constituted authorities.

The historical commission shall have power to accept gifts, bequests, and endowments for purposes which fall within the general legal powers and duties of the commission. The funds, if given as an endowment, shall be invested in such securities as those in which the state sinking fund may be invested. All such gifts and bequests and all of the proceeds of such invested endowments shall be used by the commission for carrying out the purposes for which the gift, bequest, or endowment was made. (1907, c. 714, s. 3; 1935, c. 40.)

Editor's Note.—The amendment of 1935 added the last paragraph of this section.

§ 6144. Office provided.—The second floor of the state administration building shall be occupied by the North Carolina historical commission. (1913, c. 99, s. 1.)

§ 6145. Preservation of documents; copies furnished.—Any state, county, town, or other public official in custody of public documents is hereby authorized and empowered in his discretion to turn over to the commission for preservation any official books, records, documents, original papers, newspapers, files, printed books or portraits, not in current use in his office, and the commission shall provide for their permanent preservation, and when so surrendered copies therefrom shall be made and certified under the seal of the commission upon application of any person, which certification shall have the same force and effect as if made by the officer originally in charge of them, and the commission shall charge for such copies the same fees as such officer is by law allowed to charge, to be collected in advance. (1907, c. 714, s. 5.)

§ 6146. Repealed: (1925, c. 275, s. 5.)

Art. 2. Legislative Reference Library

§ 6147. Appointment and duties of librarian.—The North Carolina historical commission is authorized and required to appoint a properly qualified person to be known as a legislative reference librarian, whose duty it shall be to collect, tabulate, annotate, and digest information for the use of members and committees of the general assembly, and other officials of the state and of the various counties and cities included therein, upon all questions of state, county, and municipal legislation; to make references and analytical comparisons of legislation upon similar questions in other states and nations; and to have at hand for the use of the members of the general assembly the laws of other states and nations as well as those of North Carolina, and such other books, papers, and articles as may throw light upon questions of consideration. It shall be his duty also to keep the compilations of the public laws of the state revised to date.

It shall also be the duty of the librarian to classify and arrange by proper indexes, so as to make them accessible, all public bills relating to the aforesaid matters heretofore introduced in the general assembly, and he shall perform such other duties as may be required of him by the North Carolina historical commission. He shall also, upon request by members of the general assembly, secure all available information on any particular subject named. (1915, c. 202, s. 1.)

§ 6148. Reports and publications for exchange.—The several departments of the state government shall, upon request of the historical commission, supply the commission with such copies of their reports and other publications as may be necessary to effect exchanges with other states for their publications of a similar character, for use of the legislative reference library. (1915, c. 202, s. 2.)

§ 6149. Reports and bulletins printed.—The reports, bulletins, and other publications of the legislative reference librarian shall be printed under the direction of the historical commission as other state printing. (1915, c. 202, s. 2.)

§ 6150. Repealed: (1925, c. 275, s. 6.)

§ 6150(a). Legislative reference librarian transferred to attorney-general's department; duties as assistant.—The department and office of the legislative reference librarian heretofore existing as a part of the historical commission shall be and the same is hereby transferred to the department of the attorney-general with all the duties and functions prescribed by section six thousand one hundred and forty-seven (6147) of the consolidated statutes.

In addition to the duties prescribed by section six thousand one hundred and forty-seven (6147) of the consolidated statutes for the legislative reference librarian, the said officer shall act as assistant in the office of the attorney-general and in addition to the duties required by section six thousand one hundred and forty-seven (6147) of the consolidated statutes, shall render to the attorney-general such assistance as he may be able to give in the conduct and administration of the office and duties of the said attorney-general, and shall perform such duties as may be assigned to him by the attorney-general consistent with and not to interfere with the duties now required of him by law. (1933, c. 21, ss. 1, 2.)

See 11 N. C. Law Rev., 251.

CHAPTER 103

HOSPITALS FOR THE INSANE

Art. 1. Organization and Management

§ 6151. Incorporation and names. — The hospital for the insane, located near Morganton, shall be and remain a corporation under this name: The State Hospital at Morganton. The hospital for the insane, located near Raleigh, shall be and remain a corporation under this name: The State Hospital at Raleigh. The hospital for the insane, located near Goldsboro, shall be and remain a corporation under this name: The State Hospital at Goldsboro. Under their respective names each corporation is invested with all the property and rights heretofore held by each, under whatsoever name called or incorporated, and all other corporate names are hereby abolished. Hereafter in this chapter, when the above names are used, they shall be deemed to relate back to and include the corporation under whatsoever name it might heretofore have had. (Rev., s. 4542; Code, ss. 2227, 2240; 1899, c. 1, s. 1.)

§ 6152. Power to acquire and hold property.—The state hospital at Morganton, and the state hospital at Raleigh, and the state hospital at Goldsboro, may each acquire and hold, for the purpose of its institution, real and personal property, by devise, bequest, or by any manner of gift, purchase, or conveyance whatsoever. (Rev., s. 4543; 1899, c. 1, s. 2.)

§ 6153. Division of territory; Goldsboro for colored insane.—The state hospital at Morganton and the state hospital at Raleigh shall be exclusively for the accommodation, maintenance, care and treatment of the white insane of this state, and the state hospital at Goldsboro shall be exclusively for the accommodation, maintenance, care and treatment of the colored insane and inebriates of this state. The line heretofore agreed upon by the directors of the state hospital at Morganton and the state hospital at Raleigh shall be the line of division between the territories of the said hospitals, and white insane persons and inebriates settled in counties west of said line shall be admitted only into the state hospital at Morganton, and white insane persons and inebriates settled in counties to the east of said line shall be admitted only into the state hospital at Raleigh. The board of directors hereinafter provided for may change said line from time to time whenever in their opinion such change may be proper, and they may transfer patients from one hospital to the other when such transfer may be deemed advantageous. That portion of the state which is or may hereafter be west of said division line shall be known as the western hospital district, and that portion of the state which is or may hereafter be east of said line shall be known as the eastern hospital district. (Rev., s. 4544; 1899, c. 1, ss. 3, 4; 1917, c. 150, s. 1.)

Editor's Note.—By Public Laws, 1929, c. 265 this section is repealed, insofar as it conflicts therewith. See §§ 6153(a), 6153(b).

§ 6153(a). Same; Raleigh and Morganton for white insane.—The state hospital at Raleigh and the state hospital at Morganton shall be exclusively for the accommodation, maintenance, care and treatment of the white insane of the state, and the state hospital at Goldsboro shall be exclusively for the accommodation, maintenance, care and treatment of the colored insane, epileptics, feebleminded and inebriates of the state. The line heretofore agreed upon by the directors of the state hospital at Raleigh and the state hospital at Morganton shall be the line of division between the territories of said hospitals, and white insane persons settled in counties east of said line shall be admitted to the state hospital at Raleigh, and white insane persons settled in counties west of said line shall be admitted to the state hospital at Morganton; epileptics shall be admitted as now provided by law. White inebriates shall be admitted to the state hospital at Raleigh. (1929, c. 265, s. 1; 1933, c. 342, s. 1.)

Editor's Note.—Public Laws of 1933, c. 342, places epileptic and feebleminded under the jurisdiction of the State Hospital at Goldsboro.

§ 6153(b). Same—Change of line.—A committee made up of two members, selected by the respective boards, from each Board of Directors of the State Hospital at Raleigh and the State Hospital at Morganton and the Governor may change said line from time to time whenever in their opinion such damage may be desirable and proper. The committee, or the Governor, may have patients transferred from and/or to the State Hospital at Raleigh and the State Hospital at Morganton when such transfer may be deemed advantageous. (1929, c. 265, s. 2.)

§ 6154. Cherokee Indians of Robeson county and Croatan Indians of other counties.—All the insane and inebriate Cherokee indians of Robeson county, and all the insane and inebriate Croatan indians of the other counties of the state, shall be cared for in the hospital for the insane at Raleigh in wards separate and apart from the white patients in said hospital, and all such Cherokee indians of Robeson county and Croatan indians of the other counties of the state shall be cared for and receive the same treatment as other patients in said hospital receive. (1919, c. 211.)

§ 6155. Epileptics cared for at Raleigh. — Whenever it becomes necessary for any white person of this state, afflicted with the disease known as epilepsy, to be confined or to receive hospital treatment, such person shall be accommodated, maintained, cared for, and treated at the state hospital at Raleigh. Such epileptics shall be committed by the clerks of the superior courts of the several counties to the state hospital at Raleigh in the manner now provided by law for the commitment of insane persons to the several hospitals for the insane; and when such persons shall be committed it shall be the duty of the superintendent of the state hospital at Raleigh, and he is required, to receive such persons and care for, maintain, and treat them at the hospital at Raleigh, if the superintendent shall find such persons to be afflicted to such extent as properly to become a public charge: Provided, that any person so committed who is able to pay shall be charged actual cost of maintenance.

All epileptics confined, cared for, and maintained at the state hospital at Morganton shall be transferred to the state hospital at Raleigh. (1909, c. 910, ss. 1, 2.)

§§ 6156-6159. (Repealed by Public Laws 1921, c. 183, s. 1.)

§ 6159(a). Management of certain charitable institutions by boards of trustees; appointment; quorum; term of office.—Each of the following charitable institutions of the State, to wit: The State Hospital at Morganton; the State Hospital at Raleigh; the State Hospital at Goldsboro, and the Caswell Training School at Kinston shall be under the management of a board of nine (9) directors or trustees to be appointed by the Governor, no two (2) of whom shall be residents of the same county. Within thirty days from March 10, 1925, the Governor shall appoint five (5) directors and within six months from March 10, 1925, the Governor shall appoint four (4) directors. At the time of making the appointment, the Governor shall designate which members of the present board are to be succeeded by his appointees. The term of office of said di-

rectors or trustees shall be four years from the date of appointment. All vacancies shall be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly the names of the persons appointed by him for confirmation. Five directors shall constitute a quorum, except when three are by law empowered to act for special purposes. (1921, c. 183, s. 2; 1925, c. 306, s. 3.)

Editor's Note.—The 1925 amendment revised this section. Formerly the appointment was by and with the consent of the senators elect.

The directors were divided into three classes appointed at intervals of two years, for a term of six years, prior to the Act of 1925. They are all appointed for four years now and are appointed during the same year. For removal of the officers provided for in this section see section 5912(h).

For additional directors, see sections 5896, 6159.

Consent of Senate to Fill Unexpired as Well as Full Terms.—It was the design and purpose of the Legislature that the consent and approval of the Senate, as stated, be required for a valid appointment by the Governor to fill unexpired terms as well as full terms, and the sole power of appointment of the Governor is derived under section 7636, par. 3, to fill vacancies when the Senate was not in session, and until it met and concurred in his appointment. Boynton v. Heartt, 158 N. C. 488, 74 S. E. 470, cited and distinguished; State Prison v. Day, 124 N. C. 362, 32 S. E. 748, overruled. State v. Croom, 167 N. C. 223, 83 S. E. 354.

§ 6159(b). Powers and duties; former boards.—Wherever in any of the sections of this chapter, and in the sections under article twelve, chapter ninety-six of the Consolidated Statutes, the said board of directors or board of trustees is referred to, it shall be construed that the board of trustees of each of said institutions herein in the preceding section mentioned, and that all the powers and duties imposed upon the consolidated boards of directors of the several respective institutions herein in the preceding section mentioned shall be performed and discharged as to each of the institutions by the separate boards appointed for said institutions, and the said board shall be held responsible for the management of the said institution and the disbursement of appropriations made for the maintenance and permanent enlargement and repairs of the said institution, and each of the said boards shall make annual reports to the governor of the state, and oftener if called for by him, of the condition of the said institution, and shall make biennial reports to the governor, to be transmitted by him to the general assembly of the state, of all moneys received and disbursed by said institution. Each of the boards of directors of the several institutions shall file with the governor, at least once every two months, a statement showing prices paid by the said institution for all classes of articles purchased by the said institution, and from whom purchased. (1921, c. 183, s. 3.)

§ 6159(c). Building committee; selection; duties.—It shall be the duty of each of the boards of directors or trustees of the institutions in the two preceding sections mentioned to select and appoint from their number a building committee, who shall be specially charged with the duty of the supervision of the buildings to be built or repaired from appropriations made to said institutions by the general assembly of this state. (1921, c. 183, s. 4.)

An architect selected by the building committee under the authority conferred by this section, and who is to bear all the expenses incidental to carrying out his work, being paid on the basis of a percentage of the moneys expended, is an independent contractor and not a state employee. Underwood v. Com'r of Internal Revenue, 56 F. (2d) 67.

§ 6160. A garden provided for the executive mansion.—The board of directors is authorized and directed to set apart two acres of land belonging to the state hospital at Raleigh to be used as a garden for the executive mansion. They are further authorized to have such garden cultivated, the actual expense of cultivation to be paid by the governor. (1917, c. 171.)

§ 6161. Meetings of directors.—The board of directors shall convene at each of the several hospitals herein named during the month of April in each year, at a time to be fixed by such board and at such other times as they shall appoint, and investigate the administration of its affairs, and report on the same to the general assembly, with such remarks and recommendations as to them shall seem expedient. (Rev., s. 4550; 1899, c. 1, s. 8; 1917, c. 150, s. 1.)

§ 6162. By-laws and rules made by directors.—The board of directors shall make all such by-laws and regulations for the government of these institutions as shall be necessary, among which regulations shall be such as shall make the institutions as nearly self-supporting as is consistent with the purpose of their creation. (Rev., s. 4551; 1899, c. 1, s. 14; 1917, c. 150, s. 1.)

This section declares the policy of the State with respect to the operation of the State Hospital for the Insane at Raleigh as well as for the operation of similar institutions. State v. Security Nat. Bank, 207 N. C. 697, 703, 178 S. E. 487.

§ 6163. Transfer of patients from one hospital to another; transfer of funds.—The board of directors are authorized to make such rules and regulations as in their discretion may seem best for the transfer of patients from one state hospital for the insane to another state hospital for the insane; and they are further authorized to transfer from one hospital for the insane to another hospital for the insane any funds appropriated for permanent improvement or maintenance if in their discretion and judgment it may become advisable or necessary. (1919, c. 330.)

§ 6163(a.) Delivery of inmates to Federal agencies.—The directors and superintendents of the State Hospital at Raleigh and the State Hospital at Goldsboro are hereby authorized, empowered and directed to transfer and deliver to the United States Veterans Bureau or other appropriate department or bureau of the United States Government or to the representatives or agents of such Veterans Bureau or other department or bureau of said government, all insane inmates or prisoners, being soldiers or sailors who have served at any time in any branch of the military or naval forces of the United States, who are now in or may hereafter be committed to said hospitals. And said directors and superintendents shall take from such Veterans Bureau or other department or bureau of said government, or its duly accredited representatives or agents, receipts of acknowledgments showing the delivery of such inmates or prisoners so transferred to the United States Government for the purpose of treatment under the laws and regula-

tions of said government with respect to insane persons who have served in the military or naval forces of the United States. (1925, c. 51, s. 1.)

Cited in State v. Security Nat. Bank, 207 N. C. 697, 702, 178 S. E. 487.

§ 6163(b). Transfer of inmates to general wards.—The directors and superintendents of the State Hospital at Raleigh and the State Hospital at Goldsboro are hereby authorized, empowered and directed to transfer from the wards in said hospitals set apart for the dangerous insane to the general wards any of the inmates or prisoners therein who, in the judgment of said directors and superintendents, have reached such a state of improvement in their mental condition as to justify such transfer. (1925, c. 51, s. 2.)

§ 6164. Board may make ordinances; penalties for violation.—Authority is hereby conferred upon the board of directors of the state hospitals for the insane and upon the board of directors and superintendent of the North Carolina school for the deaf to enact ordinances for the regulation and deportment of persons in the buildings and grounds of the institutions, and for the suppression of nuisances and disorder, and when adopted the ordinances shall be recorded in the proceedings of the said board and printed, and a copy posted at the entrance to the grounds, and not less than three copies posted at different places within the grounds, and when so adopted and printed, and posted up, the ordinances shall be binding upon all persons coming within the grounds. Such boards are empowered and directed to prescribe penalties for the violation of each section of the ordinances so adopted, and if any person violates a section of the ordinances, the penalty prescribed may be recovered in a civil action instituted in the name of the hospital against the person offending, before any justice of the peace in the county in which the hospital is situated, and the sum so recovered shall be used as the board of directors shall direct. Violation of any ordinances so made shall be a misdemeanor, punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (Rev., ss. 3695, 4559; 1899, c. 1, s. 54; 1901, c. 627; 1915, c. 14, s. 2; 1917, c. 150, s. 1.)

§ 6165. Executive committee appointed.—The board of directors shall, out of their number, appoint three members as an executive committee, who shall hold their respective offices as such for one year, and shall have such powers and be subject to such duties as the board of directors may delegate to them. (Rev., s. 4548; 1899, c. 1, s. 6; 1917, c. 150, s. 1.)

§ 6166. State treasurer to act as treasurer; payment of funds.—The state treasurer shall be treasurer of said corporations. The state treasurer shall keep all accounts of the institutions, and shall pay out all moneys upon the warrant of the respective superintendents, counter-signed by two members of the board of directors, under such rules and regulations as the board of directors may establish. (Rev., s. 4553; 1899, c. 1, s. 11; 1917, c. 150, s. 1.)

State treasurer is ex officio treasurer of certain institutions, see sec. 7689.

§ 6167. Application of funds belonging to hospitals.—All moneys and proceeds of property given to any hospitals, and all moneys arising from the sale of any real estate which may be owned by such hospital, shall be paid into the state treasury, and all donations in which there shall be special directions for their application shall be kept as a distinct fund and faithfully applied, as the donor may have directed; and the same hospital shall be supported by appropriations from the state treasury. But the proceeds arising from the sale of personal property belonging to a hospital, the board paid by private patients, rentals from real estate, and money from any other sources, except the sale of real estate, shall remain with the hospital and be used as the board of directors may determine. An account of the proceeds of all such income and its expenditure shall be carefully kept and published in the report to the general assembly. (Rev., s. 4552; 1899, c. 1, s. 34.)

§ 6168. Board of charities and general assembly, visitors; superintendent reports, to whom. — The state board of charities and public welfare and the members of the general assembly shall be ex officio visitors of all hospitals for the insane. It shall be the duty of the state board of charities to visit the hospitals from time to time, as they may deem expedient, to examine into their condition, and make report thereon to the general assembly, with such suggestions and remarks as they may think proper. (Rev., s. 4554; 1899, c. 1, s. 37; 1917, c. 150, s. 1.)

§ 6169. Fiscal year.—The close of the fiscal year shall be the thirtieth day of November in each year, and all accounts and estimates shall be made with reference thereto. (Rev., s. 4558; 1899, c. 1, s. 38.)

§ 6170. Court may remit penalties given under this chapter. — Whenever suit shall be brought against a sheriff or board of county commissioners for the recovery of a penalty prescribed for doing an act forbidden, or failure to do any act required by this chapter, the judge or justice of the peace before whom the action is tried may order so much of said penalty to be remitted as in his judgment should be remitted to meet the ends of justice, and he shall enter up judgment for the amount of the penalty, to be discharged by the payment of such a sum as he may think just, and the costs of the action. In fixing the amount to be remitted (if the judge or justice should think the remission of any part proper), he shall consider the costs and expenses that the plaintiff may have been put to, and he should also consider the conduct of the defendants; and there ought to be no remission when the act of the defendants is wanton or contumacious, or is grossly negligent. (Rev., s. 4557; 1899, c. 1, s. 57.)

§ 6171. Assisting inmates to escape misdemeanor.—If any person shall assist any inmate of any state hospital to escape therefrom he shall be guilty of a misdemeanor. (Rev., s. 3694; 1899, c. 1, s. 53.)

Art. 2. Officers and Employees

§ 6172. Directors and superintendent not personally liable.—No director or superintendent of any state hospital shall be personally liable for

any act or thing done under or in pursuance of any of the provisions of this chapter. (Rev., s. 4560; 1899, c. 1, s. 31.)

Liability of Directors, etc., for Wrongful Acts of Discharged Patient.—The directors and superintendent of a hospital for the insane acting under the provisions of section 6214, in discharging or releasing a patient therefrom, cannot be held responsible in damages by the subsequent killing by such patient of another under a charge of negligence. Bollinger v. Rader, 151 N. C. 383, 66 S. E. 314.

§ 6173. Superintendent; appointment, term of office, qualifications, and removal.—The board of directors shall appoint a superintendent of each of said institutions and prescribe his duties. He shall be a skilled physician, educated to his profession, of good moral character, of prompt business habits, and of kindly disposition. He shall hold office for six years from and after his appointment, unless sooner removed by said board, who may, for infidelity to his trust, gross immorality, or incompetency to discharge the duties of his office, fully proved and declared, and the proofs thereof recorded in the book of their proceedings, remove him and appoint another in his place. (Rev., s. 4561; 1899, c. 1, s. 69; 1917, c. 150, s. 1.)

§ 6174. Powers of superintendent.—The superintendent of each hospital shall exercise exclusive direction and control over all the subordinate officers and employees engaged in the service and labors of his hospital, and he may discharge such as have been employed by himself or his predecessors, and shall report to the board of directors the misconduct of all subordinates. (Rev., s. 4562; 1899, c. 1, s. 13; 1917, c. 150, s. 1.)

§ 6175. Superintendent to notify sheriff of escape.—Any superintendent may notify the sheriff within whose county any person sent from his hospital on probation, or escaped therefrom, may be found, and thereupon it shall be the duty of such sheriff forthwith to take such person and return him to such hospital at the expense of the county of the settlement of the patient. This section shall apply in cases of escape from Caswell training school. (Rev., s. 4563; 1899, c. 1, s. 27; 1927, c. 114.)

Editor's Note.—By the amendment of 1927 the superintendent of Caswell Training School may require the sheriff of the county to apprehend and return fugitives from that school.

§ 6176. Assistant physicians; appointment and removal.—Each superintendent shall appoint one or more assistant physicians, the number to be fixed by the board of directors. The superintendent shall have the power to prescribe the duties of each assistant physician, and may suspend him, or any employee, for thirty days, for insubordination, immorality, neglect of duty, or incompetence, and, by and with the advice of the executive committee of the board of directors, may remove such assistant physician, or employee, for like cause. Each assistant physician shall hold his office for two years, unless removed for cause, which shall be specified and the action of the superintendent and executive committee reported to the board of directors, which shall record the same on its minutes. (Rev., s. 4564; 1899, c. 1, s. 10.)

§ 6177. Steward and matron; appointment and removal.—Each superintendent shall appoint a steward, and if he shall think proper to do so, a matron also, who shall hold their places for one year, unless sooner suspended or removed by the superintendent or board of directors for good cause, in which case their successors shall be appointed for the unexpired terms of those removed. The method of procedure for the suspension and removal of assistant physicians, contained in the preceding section, shall be followed in the suspension and removal of any steward or matron. (Rev., s. 4565; 1899, c. 1, s. 11.)

§ 6178. Steward to give bond.—The steward, before entering upon the discharge of his duties, shall execute to the hospital a bond in the sum of two thousand five hundred dollars, with sureties, to be approved by the board of directors, conditioned for the faithful administration of his duties and the proper accounting for and disbursement of all money and property coming into his hands. (Rev., s. 4566; 1899, c. 1, s. 11.)

§ 6179. Salaries of employees fixed by directors.—The board of directors shall fix the salaries and compensation of the superintendent, and the officers and employees whose services may be necessary for the management of the hospitals under charge of said board. The salaries shall not be diminished during the term of the incumbents. The salary of the superintendent shall be a sum certain, without other compensation or allowance, except such rooms in the hospital for the use of his family, and such articles of food produced on the premises, as said board of directors may permit. (Rev., s. 4567; 1899, c. 1, s. 12; 1917, c. 150, s. 1.)

§ 6180. Directors to keep record of proceedings; clerk.—The board of directors shall cause all their proceedings to be faithfully and carefully written and recorded in books, and to this end may employ a clerk, and pay him a reasonable compensation for his services. The books shall, at all times, be open to the inspection of the general assembly. (Rev., s. 4568; 1899, c. 1, s. 36; 1917, c. 150, s. 1.)

§ 6181. Superintendent may appoint employees as policemen, who may arrest without warrant.—The superintendent of each hospital, the superintendent of the North Carolina School for the deaf and dumb, and the superintendent of the Caswell training school, in each hereby empowered to appoint such number of discreet employees of his hospital or school as he may think proper, special policemen, and within the grounds of such hospital or school the said employees so appointed policemen shall have all the powers of policemen of incorporated towns. They shall have the right to arrest without warrant persons committing violations of the state law or the ordinances of that hospital or school, in their presence, and within the grounds of their hospital or school, and carry the offenders before some justice of the peace for trial. The justice of the peace shall issue a warrant and proceed as in other criminal cases before him. (Rev., s. 4569; 1899, c. 1, s. 55; 1901, c. 627; 1921, c. 207.)

Editor's Note.—By the amendment of 1921 the superintendent of Caswell training school also was authorized to appoint persons whose appointment is authorized by this section, to act within the grounds of his school.

§ 6182. Oath of special policemen. — Before exercising the duties of a special policeman, the employees appointed, as in the preceding section, shall take an oath of office before some justice of the peace of the county, or other officer empowered to administer oaths, and the same shall be filed with the records of the board of directors. The oath of office shall be as follows:

State of North Carolina, ... County.

I, ..., do solemnly swear (or affirm) that I will well and truly execute the duties of office of special policeman in and for the state hospital at ....., according to the best of my skill and ability and according to law; and that I will use my best endeavors to enforce all the ordinances of said hospital, and to suppress nuisances, and to suppress and prevent disorderly conduct within said grounds. So help me, God.

Sworn and subscribed before me, this ..... day of ....., A. D. ..... (Rev., s. 4570; 1899, c. 1, s. 56; 1901, c. 627.)

§ 6183. Volunteer firemen among employees rewarded.—The board of directors shall have power to provide benefits, to be paid to any employee of the hospital who shall be injured while discharging the duties of a volunteer fireman. And the board may inaugurate a system by which a fund is raised to provide suitable benefits for said firemen, and may contribute from the funds of the hospital for that purpose. The volunteer firemen at the various hospitals shall not share in the state firemen's relief fund. (Rev., s. 4571; 1899, c. 1, s. 59; 1917, c. 150, s. 1.)

Art. 3. Admission of Patients

§ 6184. Persons adjudged insane entitled to immediate admission. — Any resident of North Carolina who has been legally adjudged to be insane by the clerk of the court or other properly authorized person, in accordance with the provisions of this chapter shall be entitled to immediate admission into the state hospital at Morganton, the state hospital at Raleigh, or the state hospital at Goldsboro, in accordance with the principles of division as to race and residence prescribed in this chapter; and no resident of the state who has been legally adjudged insane and who has been presented to the superintendent of the proper state hospital for the insane as provided in this article shall be refused admission thereto; but nothing in this article shall be construed to affect the discharge or transfer of patients as now provided by law. (1919, c. 326, ss. 1, 6.)

§ 6185. Idiots not admitted.—No idiot shall be admitted to any hospital, and for the purpose of this chapter an idiot is defined to be a person born deficient in mind, with the exception that the state hospital at Goldsboro shall admit feebleminded negroes, under such rules and regulations as the hospital board and the superintendent may prescribe, in such numbers as the capacity and the appropriations to the hospital will permit. (Rev., s. 4572; 1899, c. 1, s. 18; 1933, c. 342, s. 2.)

Editor's Note.—Public Laws of 1933, c. 342, added the exception appearing at the end of this section.

§ 6186. Priority given to indigent patients; payment required from others.—In the admission of patients to any state hospital, priority of admission shall be given to the indigent insane; but the board of directors may regulate admissions, having in view the curability of patients, the welfare of the institutions, and the exigencies of particular cases. The board of directors may, if there be sufficient room, admit other than indigent patients upon the payment of proper compensation. If any inmate of any state hospital shall require private apartments, extras, or private nurses, the directors, if practicable, shall provide the same at a fair price to be paid by such patient. Upon the death of any nonindigent patient, the state hospital may maintain an action against his estate for his support and maintenance for a period of five years prior to his death. (Rev., s. 4573; 1899, c. 1, s. 44; 1915, c. 254; 1917, c. 150, s. 1.)

The term "indigent insane," within the meaning of this section, includes all those who have no income over and above what is sufficient to support those who may be legally dependent on the estate. In re Hybart, 119 N. C. 359, 25 S. E. 963.

Free Admission of Person Able to Pay Expenses.—Under this section an insane person able to pay expenses at the state hospital is not entitled to free admission. Hospital v. Fountain, 128 N. C. 23, 38 S. E. 34.

Financial Status at Time of Admission Need Not Be Determined.—It is not required under this section that the directors of the hospital finally determine the status of a patient at the time of his admission, the financial status of the patient being subject to the vicissitudes of fortune. State v. Security Nat. Bank, 207 N. C. 697, 178 S. E. 487.

§ 6187. Only bona fide residents admitted to hospitals.—No clerk of the court or justice of the peace shall commit to a hospital any person who is not a bona fide citizen and resident of this state; and no person who shall have removed into this state from another state while insane shall be deemed a resident or citizen of this state, and no length of residence in this state of a person who was insane at the time he moved into this state shall be sufficient to make that person or citizen or resident of North Carolina within the meaning of this chapter. If any clerk or justice of the peace shall knowingly commit to any hospital a person who is not a bona fide citizen and resident of the state, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court. (Rev., ss. 3591, 4587; 1899, c. 1, s. 18.)

§ 6188. Findings as to residence in examination reported.—In every examination of an alleged insane person it shall be the duty of the clerk or justice of the peace to particularly inquire whether the alleged insane person is a resident of this state, as hereinbefore set forth, and he shall state his findings upon the subject in his report to the superintendent of the hospital. If it is not possible to ascertain the legal residence of the alleged insane person, and the clerk or justice of the peace shall be of the opinion that the insane person is a resident of this state, within the meaning of this law, he shall state that he was unable to ascertain the legal residence of the insane person, and shall commit him to the hospital of his district. (Rev., s. 4588; 1899, c. 1, s. 18.)

§ 6189. Settlement of patient determined. — For the purposes of this chapter the settlement of every person admitted to a state hospital as

insane shall be in the county where the actual place of residence at his admission may be situated, when such settlement comes in question, but no person can have a settlement in any county in this state unless he is a bona fide citizen and resident of this state, and was so before mental disease became manifest. (Rev., s. 4574; 1899, c. 1, s. 28.)

§ 6190. Affidavit of insanity to procure admission.—For admission into a state hospital the following proceedings shall be had: Some respectable citizen, residing in the county of the alleged insane person, shall make before and file with the clerk of the superior court of the county an affidavit in writing, which shall be substantially in the following form:

State of North Carolina, ...County.

The undersigned, residing in said county, makes oath that he has carefully examined ..... and believes him to be an insane person, and to be, in the opinion of the undersigned, a fit subject for admission into a hospital for the insane.

Dated .... day of ..... A. D. ....

....., Affiant.

Sworn and subscribed before me.

.....,

Clerk Superior Court.

(Rev., s. 4575; 1899, c. 1, s. 15.)

§ 6191. Clerk to issue order for examination.—Whereupon, unless the person in whose care or custody the insane person is will agree to bring him before the clerk without a warrant, or unless the clerk shall be of the opinion that it will be injurious to the insane person to be brought before him, the clerk shall issue a precept, directed to the sheriff or other lawful officer, substantially in the following form:

State of North Carolina,

To the Sheriff or Other Lawful Officer of .... County—Greeting:

Whereas information, on oath, has been laid before me that ..... is insane, you are hereby commanded to bring him before me within the next ten days, that necessary proceedings may be had thereon.

Given under my hand, ... day of ....., A. D. .....

.....,

Clerk Superior Court.

(Rev., s. 4576; 1899, c. 1, s. 15.)

§ 6192. Clerk and physician to make examination.—If the alleged insane person be confined in jail otherwise than for crime, the sheriff shall remove him from the jail upon the order from the clerk. Upon the bringing of the alleged insane person before the clerk by his friends, or upon the return of the precept with the body of the insane person, the clerk shall call to his assistance the county physician of the county, or some other licensed and reputable physician, resident of this state, and shall proceed to examine into the condition of mind of the alleged insane person. He shall take testimony of at least one licensed physician, resident of this state, and, if possible, a member of the family, or some friend or person acquainted with the alleged insane person, who has had opportunities to observe him after such insanity is said to have begun. (Rev., s. 4577; 1899, c. 1, s. 15.)

§ 6193. Clerk may discharge person, require bond, or commit to hospital.—If the clerk, after his examination of the alleged insane person, and the hearing of the testimony as aforesaid, shall decide that such person is sane, he shall forthwith discharge him. If he shall decide that such person is insane, and some friend, as he may do, will not become bound with good security in an amount to be fixed by the clerk to retain him from committing injuries, and to keep, support, and take care of him until the cause for confinement shall cease, he shall direct such insane person to be removed to the proper hospital as a patient, and to that end he shall transmit to the proper board of directors the examination of the witnesses, and the statement of such facts as he shall deem pertinent to the subject-matter. If the clerk (or justice under section six thousand one hundred and ninety-five) is satisfied, after the examination herein provided, that the person is insane or an inebriate within the definition of section 2304(a), he shall make the following order and commitment to the proper state hospital in substantially the following form:

State of North Carolina .....County.

State of North Carolina,

To the State Hospital at ..... N. C.—Greeting:

Whereas it has been made satisfactorily to appear to me, ..., Clerk of the Superior Court of said county, after a proper examination of.... ....., a person having his legal settlement in this county, that he is insane, epileptic or addicted to the use of drugs or alcohol (draw a pen through terms not applying), that he is a bona fide citizen of the state, and that he has a legal settlement in said county and is a fit subject for care and treatment in the state hospital at ....., and that he, being at large, is injurious to himself and disadvantageous if not dangerous to the community:

These are, therefore, to command you to receive said ..... into the State Hospital at .. .... for care and treatment as provided for by the laws of this State.

Given under my hand and official seal, this.... day of ....., 19....

.....

Clerk Superior Court .... County.

If the proceedings are to be before a justice of the peace under section six thousand one hundred and ninety-five, the following certificate shall be appended to the commitment by said justice of the peace:

I have examined the testimony as herein set forth, and am satisfied that..... is a fit subject for treatment in the State Hospital, and I hereby approve the foregoing commitment to the State Hospital at....., N. C.

Given under my hand and official seal, this.... day of ....., 19.....

.....

Clerk Superior Court.

If the patient is a pauper, the following shall be filled out and accompany the commitment:

State of North Carolina, ...County.

I, ..., Clerk of the Superior Court of the above county, do hereby certify

that ..... is a poor person and has no estate or property except .....
.....
.....
.....
nor has any one such property who is liable for his maintenance under article 5 of chapter 43.

Given under my hand and official seal, this.... day of ....., 19 ....
.....
Clerk Superior Court.

If the patient is not a pauper, the following shall be filled out and accompany the commitment of the patient:

State of North Carolina, ...County.

I, ..., Clerk of the Superior Court of said county, do hereby certify that ..... has property of his own and is financially able to pay for his maintenance, or has relatives who under chapter one hundred and fifty-six of the Public Laws of one thousand nine hundred and twenty-one are liable for his maintenance, who have adequate property to pay for the same in the State Hospital at ....., N. C.

Given under my hand and official seal, this.... day of...., 19.....
.....
Clerk Superior Court.

The application for admission and commitment to a particular hospital shall be forwarded to such hospital, and immediately upon receipt of said application, if there shall be room for said patient in said hospital, the superintendent shall immediately notify the clerk of the court that the patient will be admitted at once. The receipt of said notice by said clerk of the court, shall constitute his authority to convey said patient to said hospital for immediate admission: Provided, however, nothing herein shall prevent the superintendent of said hospital from sending immediately a representative of said hospital to convey said patient thereto. (Rev., s. 4578; 1899, c. 1, s. 15; 1915, c. 204, s. 1; 1923, c. 144, s. 1.)

Editor's Note.—That sentence of this section which authorized the clerk or justice to make an order of commitment, and the forms prescribing such order, and the last paragraph with respect to the admission of patients to the insane hospital, were added by the amendment of 1923.

§ 6194. Examination at home of patient. — If the clerk of the court shall be of the opinion that it will be injurious to the alleged insane person to be brought before him, the clerk shall proceed to the residence or habitation of said person and take the examination there. (Rev., s. 4579; 1899, c. 1, s. 15.)

§ 6195. When justice of the peace may make examination.—In case of emergency, when for any reason the clerk of the court cannot go or is absent from the county, then any justice of the peace is authorized to proceed in like manner by taking the testimony of the physician and other witnesses, as is before provided for in this chapter, and report the same to the clerk. If the clerk is satisfied that the alleged insane person is a fit subject for a hospital for the insane, he shall issue an order for his commitment. In cases of great emergency or inconvenience, the said justice may commit a patient to a hospital, and the superintendent is authorized to receive him, but the justice shall procure an order from the clerk to be forwarded to the superintendent within thirty days. (Rev., s. 4580; 1899, c. 1, s. 15.)

§ 6196. Questions to be answered and certified to superintendent.—The following questions, with their respective answers by at least one licensed physician, resident of this state, and such other competent witnesses as the clerk or justice shall determine, duly sworn and subscribed by them, and so certified by the clerk or justice, shall be transmitted with the other papers to the superintendent of the proper hospital, to be reported as soon as practicable to the board of directors. Pending the consideration of the application by the board of directors, the patient shall remain in the custody of the officer of such person as the clerk may designate until it can be ascertained if there is room for the patient at the hospital:

1. What is patient's name? A.....
2. When was patient born? A..... Present age .....
3. Where was patient born? A. .....
4. Is .... or .... married, single or divorced? A. .....
5. If married woman, give maiden name. A. .....
6. Name and birthplace of father. A.....
7. Maiden name and birthplace of mother. A. .....
8. Occupation of patient for past five years. A. .....
9. Present occupation. ..... If no occupation, how supported? A. .....
10. Education: Collegiate, common school, grammar, elementary, none. A. ..... Professional or technical .....
11. Were mother and father related? A.....
12. Was either parent or grandparent or any children of patient or other blood relation ever insane, epileptic, feeble-minded, inebriate, paralytic, physically deformed, tubercular, diabetic, etc.? Specify. A. .....
13. If any of them were ever in any institution, state where and when. A. .....
14. Was patient ever charged or convicted of any crime? If so, what and when? A.....
15. Is patient now charged with crime? If so, what? A. .....
16. Is patient now in jail? If so, how long? A. .....
17. Is patient now in county home? If so, how long? A. .....
18. When was the change first observed in the patient's appearance and conduct indicating insanity? A. .....
19. What were the principal mental changes and symptoms observed at that time? A.....
20. Did they develop rapidly or gradually? A. .....
21. What symptoms are present at the present time? A. .....
22. Has patient had previous attacks? If so, how many and was .... or .... treated in a hospital? If so, when and where? A. .....
23. What did the patient say or do in your presence indicating insanity? A.....
24. Has patient delusions or hallucinations? A. .....

25. Is patient destructive? If so, what has ... . or ..... destroyed? A. .....
26. Has patient ever attempted suicide? A....
27. Has patient ever threatened suicide? A...
28. Has patient ever attempted homicide? A. .....
29. Has patient ever threatened homicide? A. .....
30. Has patient injured or attempted to injure h....self or others? If so, whom, when and in what manner? A. .....
31. State any other facts relative to behavior of patient indicating insanity. A. .....
32. Is patient feeble-minded? A. .....
33. Is patient an idiot? A. .....
34. What is present salary of the patient? A. .....
35. How many dependent on ..... or ..... for support? A. .....
36. What is the value of ..... or ..... property? A. .....
37. What is ..... or ..... annual income? A. .....
38. If a minor, state occupation of patient's father. A. .....
39. What is father's salary? A. .....
40. What is the value of his property? A.....
41. What is his annual income? A. .....
42. The following questions should be answered if patient is a drug addict, or inebriate:

(1) Is patient addicted to the use of alcohol, morphine, cocaine, heroin or any other drugs? If so, what drug? A. .....

(2) In what manner (hypodermically or mouth), and how much does patient take? A. .....

(3) How long has patient been an addict? A. .....

(4) Has patient ever been treated for inebriety? If so, where and when? A. .....

43. The following questions should be answered if patient is an epileptic:

(1) At what age did epilepsy first appear? A. .....

(2) How long since first attack? A. .....

(3) Do seizures occur day or night, or both times? A. .....

(4) How often do attacks occur? A. .....

(5) Are attacks accompanied by frothing at the mouth ..... involuntary passage of urine ..... of feces ..... or biting of tongue? A. .....

(6) Has patient been burned or otherwise injured during seizures? A. .....

(7) Are seizures grand or petit mal, or both? A. .....

(8) What mental changes have taken place in patient? A. .....

(9) Is the patient incapable of protecting..... self against ordinary dangers without an attendant? A. .....

44. Give the name of nearest relative or friend with whom superintendent can correspond relative to condition of patient. A. .....
Relationship and address .....

45. How could the above party be communicated with quickest in case of emergency? A. .. ..

46. In case the hospital can accept patient, at what point could patient be delivered to representative of hospital? A. .....
.....M. D.
.....
.....
Witnesses
State of North Carolina, ...County.

Before ....., officer, ... duly authorized to administer an oath, this .... day of....., A. D. ..... came ..... M. D., and.... persons known to be credible and reliable witnesses, and make oath that the foregoing answers are true to the best of their knowledge and belief.

.....
.....

(Rev., s. 4589; 1899, c. 1, s. 19; 1923, c. 144, s. 2.)

Editor's Note.—By the amendment of 1923 certain alterations were made in the form and nature of questionnaire appearing at the end of this section.

§ 6197. Clerk to keep record of examinations and discharges.—The clerk will keep a record of all examinations of persons alleged to be insane, and he shall record in such record a brief summary of the proceedings and of his findings, and whenever a justice of the peace shall transmit to the clerk a report of his proceedings when he shall have examined a person under the powers granted under this chapter, the clerk shall make a record of his proceedings, and for recording the justice's proceedings he shall be entitled to a fee of twenty-five cents, to be paid by the county aforesaid, and he shall keep a record of all probations and discharges provided for in article four of this chapter. (Rev., s. 4586; 1899, c. 1, s. 17.)

§ 6198. Fees for examination.—The fees shall be allowed to the officers who make the examination, and they shall be paid by the county in which the alleged insane person is settled: To the clerk or justice who makes the examination, two dollars, and if the clerk goes to the home of the insane person he shall be entitled, in addition to this sum, to five cents a mile each way. This shall cover his entire costs in taking the examination and making out the necessary papers.

The physician called, in the absence of the county physician, shall be entitled to two dollars with mileage. The county physician, being a salaried officer, is not allowed any fee for his services in this examination. The sheriff shall be entitled to such fees as are now allowed by law for the service of process of similar character. (Rev., ss. 4580, 4581; 1899, c. 1, s. 15.)

§ 6199. Superintendent of hospital notified; attendant to convey patient.—Whenever any insane person shall be entitled to admission in any one of the hospitals of the state as prescribed by law, and the clerk of the superior court or other officer authorized by law to find such person insane has so found, it shall be the duty of the clerk or other officer forthwith to notify the superintendent of the proper hospital, giving the name, race, sex and age of patient; and it shall be the duty of such superintendent, unless said patient has been exposed to a contagious disease as hereinafter mentioned in this article, to send an attendant to bring such insane person to the hospital. Such attendant shall have all such rights as the sheriff or other officer has heretofore, and

to convey such insane person to the hospital. (1919, c. 326, s. 2.)

§ 6200. Bill of expense sent to county commissioners.—Upon the arrival of such insane person at the hospital, the superintendent shall send to the board of commissioners of the county in which such insane person had a settlement a bill covering the costs of conveying such insane person to the hospital, including any fees that would now be allowed an officer, and it shall be the duty of the board of commissioners forthwith to repay to such hospital the amount of such bill. (1915, c. 204, s. 2; 1919, c. 326, s. 3.)

§ 6201. Failure of superintendent to send attendant; sheriff to act.—If the superintendent of any hospital for the insane in this state shall, for ten days after receiving a notice as prescribed in section 6199, fail and neglect to send an attendant, as is prescribed by section 6199, to bring such insane person to the hospital, it shall be the duty of the sheriff of the county from which the notice was sent to bring at the expense of the county such insane person to the state hospital, whereupon it shall be the duty of the said superintendent to receive said insane person and relieve said sheriff of his care. (1919, c. 326, s. 4.)

§ 6202. Costs of conveying patients to and from hospital; how paid.—Cost and expenses of conveying every insane person to any hospital from any county, or of removing him from the hospital to his county, or of the return to the county, of his settlement, as sane, shall be paid by the treasurer of such county, upon the order of its board of county commissioners. Whenever the board of commissioners shall be satisfied that such person has property sufficient to pay such cost and expenses, or that some other person liable for his support and maintenance has property sufficient to pay such costs and expenses as aforesaid, they shall bring an action and recover the amount paid from the said person, or from the other person liable for his support and maintenance. (Rev., s. 4555; 1899, c. 1, s. 32.)

§ 6203. Preparation of patient for admission to hospital.—Every sheriff or other person bringing to a hospital a patient shall see that the patient is clean, free from contagious disease and vermin, and that he has clothing proper for the season of the year, and in all cases two full suits of underclothing. (Rev., s. 4556; 1899, c. 1, s. 24.)

§ 6204. Commitment in case of sudden or violent insanity.—Whenever any citizen or resident of this state becomes suddenly or violently insane, in some county other than that of his settlement, the proper authorities, as hereinbefore provided, of any county in which he shall be, shall have authority to examine him, and if necessary commit him to the hospital to which he would be sent had he been committed from the county of his own settlement. (Rev., s. 4582; 1899, c. 1, s. 16.)

§ 6205. Expense paid by county of settlement; penalty.—Immediately upon the commitment to a hospital of any such person, a transcript of the proceedings shall be sent to the clerk of the county in which he is settled, and that county shall pay over to that county from which he was committed all the cost of the examination and commitment, and if the board of commissioners of the county of the settlement shall fail to pay all proper expense of said proceedings within sixty days after the claim shall have been presented, they shall forfeit and pay to the county which committed the insane person the sum of two hundred and fifty dollars, to be recovered by the commissioners of that county in a civil action brought in the superior court of that county from which the patient was committed to the hospital, against the commissioners of the county. (Rev., s. 4583; 1899, c. 1, s. 16.)

§ 6206. Person conveying patient to hospital without authority.—No sheriff or other person shall convey a patient to any hospital without having ascertained that the patient will be admitted, and if any sheriff or other person shall carry a patient to a hospital without having ascertained that the patient will be admitted, and the patient it not admitted, he shall be required to convey the patient back to the county of his settlement, and he shall not be repaid by the county or hospital for the expenses incurred in carrying the patient to and from the hospital. (Rev., s. 4546; 1899, c. 1, s. 25.)

§ 6207. How admission determined, when superintendent is in doubt.—Whenever any insane person shall be conveyed to any hospital, and the superintendent is in doubt as to the propriety of his admission, he may convene any three of the board of directors, who shall constitute a board for the purpose of examining and deciding if such person is a proper subject for admission; and if a majority of such board so decide, such person shall be received into said hospital; but if a like board may at any time thereafter deliver such insane person to any friend who will become bound with good surety to restrain him from committing injuries, and to keep, maintain, and take care of him, in the same manner as he might have become bound under the authority of the clerk of the court. (Rev., s. 4590; 1899, c. 1, s. 21; 1917, c. 150, s. 1.)

§ 6208. Admission refused, if patient exposed to contagious disease. — The superintendent of the hospital may refuse to receive into his institution a patient when he shall have reliable information that the patient has recently been exposed to infectious or contagious disease, and there is danger of contagion and infection being conveyed by the patient, or where the patient comes from a quarantined community. Whenever a patient is rejected because of any of these reasons the superintendent shall make a record of the application and as soon as, in his opinion, the danger shall have been removed, he shall notify the sheriff of the county, and admit the patient into his hospital. (Rev., s. 4591; 1899, c. 1, s. 26.)

§ 6209. Commitment upon patient's own application.—Any person believing himself to be of unsound mind, or threatened with insanity, may voluntarily commit himself to the proper hospital. The application for commitment shall be in the form following:

State of North Carolina, County of .....

I, ..., a resident of ..... county,

North Carolina, being of mind capable of signifying my wishes, do hereby solicit admission as a patient in the state hospital at ..... for such a period of time as the board of directors and the superintendent may deem necessary. And I agree in all respects to conform to the rules and regulations of said institution during the period which shall be prescribed by the superintendent and board of directors. .....

Attest: .....

This application shall be accompanied by the certificate of a licensed physician, which certificate shall state that in the opinion of the physician the applicant is a fit subject for admission into a hospital, and that he recommends his admission. The certificate of the clerk of the superior court need not accompany this application. The superintendent may, if he think it a proper application, receive the patient thus voluntarily committed, and treat him until the next meeting of the board of directors or of the executive committee, and shall report the application and admission to the first meeting of said board, and if said board approve such admission, the patient shall be considered as having been regularly committed, and shall in all respects be treated as such. But no report need be made to the clerk of the court of his county of settlement. The superintendent and board of directors shall have the same control over patients who commit themselves voluntarily as they have over those committed under the regular proceedings hereinbefore provided and no voluntary patient shall be entitled to a discharge until he shall have given the superintendent ten days notice of his desire to be discharged. (Rev., s. 4593; 1899, c. 1, s. 49; 1917, c. 150, s. 1.)

§ 6210. Proceedings in case of insanity of citizen of another state.—If any person not a citizen or resident of this state, but a citizen and resident of another state of the United States, shall be ascertained to be insane, the clerk of the court shall immediately notify the governor of the state of which the insane person is a citizen of the facts and circumstances by letter (or telegraphic message if he think proper), and for a reasonable length of time the insane person shall be kept confined or restrained in said county, but shall not be committed to any state hospital, and if the state of his citizenship shall not provide for the removal from this state to his proper state of the insane person within a reasonable time, the county commissioners of the county in which he shall have been ascertained to be an insane person shall cause him to be conveyed to the state of which he is a citizen and delivered there to the sheriff of his county or to the superintendent of any state hospital. The cost of such proceedings and conveyance away from this state shall be borne by the county in which the person shall have been adjudged to be insane. (Rev., s. 4584; 1899, c. 1, s. 16.)

§ 6211. Proceedings in case of insanity of alien.—If any person, not a citizen of the United States, shall be ascertained to be insane, the clerk of the court shall immediately notify the governor of this state of the name of the insane person, the country of which he is a citizen, and his place of residence in said country if the same can be ascertained, and such other facts in the case as he may obtain, together with a copy of the examination taken; and the governor shall transmit such information and examination to the secretary of the state at Washington, D. C., with the request that he inform the minister resident or plenipotentiary of the country on which the insane person is supposed to be a citizen. (Rev., s. 4585; 1899, c. 1, s. 16.)

§ 6212. Insane person temporarily committed to jail.—When any person is found to be insane under any of the provisions of this chapter, and he cannot be immediately admitted to the proper hospital, and such person is also found to be subject to such acts of violence as threaten injury to himself and danger to the community, and he cannot otherwise be properly retained, he may be temporarily committed to the county jail until a more suitable provision can be made for his case. (Rev., s. 4594; 1899, c. 1, s. 45.)

Art. 4. Discharge of Patients

§ 6213. County commissioners may discharge insane person in county.—It shall be the duty of the board of county commissioners, by proper order to that effect, to discharge any ascertained insane person in their county, not admitted to the appropriate hospital, and not committed for crime, when it shall appear upon the certificate of two respectable physicians, and the chairman of their board, that such insane person ought to be discharged if in a hospital. (Rev., s. 4595; 1899, c. 1, s. 20.)

§ 6214. Discharge of patient from hospital; sheriff's duty; expense paid.—Any three of the board of directors, upon the superintendent certifying the facts (a copy of which certificate shall be sent to the clerk of the superior court of the county of settlement), shall be a board to discharge or remove from their hospital any person admitted as insane, when such person has become or is found to be of sane mind, or when such person is incurable, and in the opinion of the superintendent his being at large will not be injurious to himself or dangerous to the community, or the board may permit such person to go to the county of his settlement on probation, when in the opinion of the superintendent it will not be injurious to himself or dangerous to the community; and the board may discharge or remove such person, upon other sufficient causes appearing to them; and whenever any such person, admitted as indigent, may be so discharged or removed, except as sane, it shall be the duty of the sheriff of the county of his settlement to convey such person to his county at its expense, and any such person discharged as restored or probated shall receive from such hospital a sum of money sufficient to pay his transportation to the county of his settlement, which sum shall be repaid by said county, and, if necessary, the hospital shall provide the patient with a decent suit of clothes. When notified by the superintendent to come for and remove any insane person from the hospital, it shall be the duty of the sheriff of the county in which the insane person has a settlement forthwith to convey the insane person from the hospital to the county of his settlement. The cost of such removal shall

be advanced by the sheriff and repaid to him by the county of insane person's settlement; and if any sheriff, after having been notified by the superintendent to remove any insane person, as aforesaid, shall fail to do so within fifteen days from the time of the receipt of the letter of notice, he shall forfeit and pay to the hospital the sum of fifty dollars, to be collected in the manner provided for the collection of penalties given in this chapter; and if the commissioners of any county shall fail to repay to the hospital the money disbursed in paying for the necessary clothes and traveling expenses of any person discharged as cured from said hospital, within sixty days after the presentation of a claim therefor, the commissioners shall forfeit and pay to the hospital the sum of fifty dollars, to be collected in the manner provided for the collection of penalties in this chapter. (Rev., s. 4596; 1899, c. 1, s. 22; 1917, c. 150, s. 1.)

Liability of Directors for Torts Committed by Discharged Inmate.—See annotations 6172.

Discharge as Evidence of Sanity in Will Case.—Upon the issue of testamentary capacity an instruction that "a will duly probated in accordance with the formalities of law is presumed to be valid" is not objectionable, there being no presumption of mental incapacity by reason of commitment in an asylum when it has been shown that the testator had been discharged as restored or cured by a certificate issued in accordance with the provisions of this section. In re Crabtree, 200 N. C. 4, 156 S. E. 98.

§ 6215. Superintendent may discharge patient temporarily.—Each superintendent may, for the space of thirty days, or until the next meeting of the board of three directors provided for in the preceding section, discharge upon probation any patient, when in his opinion the same would not prove injurious to the patient or dangerous to the community. A report of all such probations shall be rendered to the said board of three directors at their first ensuing meeting. (Rev., s. 4597; 1899, c. 1, s. 23.)

§ 6216. Bonds for safe-keeping of insane persons; enforcement. — All bonds executed for restraining insane persons from committing injuries, and for their safe-keeping, support and care, shall be payable to the state of North Carolina, in the sum of five hundred dollars at least, and shall be transmitted to the clerk of the superior court of the county wherein said insane person is settled, for safe-keeping, and may be put in suit by any person injured by said insane person by reason of his insane condition; and shall be put in suit by the solicitor for the judicial district in which the county of said insane person's residence is situated, for any other breach thereof, wherein the damage received shall be for the use of said insane person. (Rev., s. 4598; 1899, c. 1, s. 29.)

§ 6217. Form of bond for safe-keeping of insane.—The form of bond mentioned in the preceding section shall be as follows:

State of North Carolina, County of .....

Know all men by these presents, that we, A.. .... B ....., principal, and C ..... D. ....., and E ..... F ....., sureties, are held and firmly bound unto the State of North Carolina in the sum of ..... dollars, for the payment whereof we bind ourselves and each of us.

Witness our hands and seals, this ..... day of ....., 19....

The condition of the above obligation is this:

Whereas, the said A ..... B ....., with the view of hindering G ..... H ....., an insane person resident in the county aforesaid, from being sent to ..... insane hospital (or to effect his release from the said hospital, as the case may be), hath undertaken to restrain him from committing injuries and to keep, maintain, support, and take care of the said G ..... H ..... Now, if the said A ..... B ..... shall faithfully comply with the conditions of this obligation, then the same shall be void, otherwise it shall be in full force.

A ..... B ..... (Seal)
C ..... D ..... (Seal)
E ..... F ..... (Seal)

(Rev., s. 4599; 1899, c. 1, s. 30.)

§ 6218. Patient returned, if condition of bond not complied with.—Whenever it shall be made to appear to the clerk of the superior court of the county of settlement of an insane person released on bond that the conditions of the bond are not faithfully complied with, said insane person shall be sent back to the proper hospital by him, unless some other responsible and discreet friend will undertake to fulfill the duties of said obligation; and whenever said insane person shall be sent back, he shall not be delivered on any new bond of the defaulting obligor. (Rev., s. 4592; 1899, c. 1, s. 33.)

Art. 5. Private Hospitals for the Insane

§ 6219. Established under license and subject to control of board of charities.—It shall be lawful for any person or corporation to establish private hospitals, homes, or schools for the cure and treatment of insane persons, idiots, and feeble-minded persons and inebriates; but license to establish such hospitals, homes, or schools must, before the same are opened for patronage, be obtained from the state board of charities and public welfare, and such hospitals, homes, or schools shall at all times be subject to the visitation of the said board or any member thereof, and each hospital, home, or school shall make to the board a semiannual report on the first days of January and July of each year. In said report shall be stated the number and residence of all patients admitted, the number discharged during the six months preceding, and the officers of the hospital, home, or school. Each hospital, home, or school shall file with the board a copy of its by-laws, rules, and regulations, and rates of charges. The books of each hospital, home, or school shall at all times be open to the inspection of the board or any member thereof. The state board of charities and public welfare is hereby given the authority to supervise and regulate all private hospitals, homes, and schools established hereafter in this state for the treatment of the above classes of people, and the board shall have power to prescribe all such rules and regulations as they may deem necessary, and shall exercise the power of visitation, and for that purpose may depute any number of their board to visit and supervise any private hospital, home, or school hereafter established under this article. The state board of charities may bring an action in

the superior court of Wake county to vacate and annul any license granted by the board, when it shall appear to the satisfaction of the board that the managers of any private hospital, home, or school have been guilty of gross neglect, cruelty, or immorality. (Rev., s. 4600; 1899, c. 1, s. 60.)

Demurrer.—Where an action is brought by the State Board of Charities and Public Welfare under this section to vacate and annul a license it had issued for the maintenance and operation of a private hospital for the insane, on the ground of immorality and cruelty of its principal owner or manager, in which the manager is joined, a demurrer of the individual is properly sustained. Board of Public Welfare v. Hospital, 196 N. C. 752, 147 S. E. 288.

Evidence.—Where there is allegation and evidence, in an action to annul and revoke the license of a private hospital for the insane, that immorality had been practiced among its employees by the manager and principal owner, and also cruel treatment had been used towards the patients by him, with separate issues as to each class of offense submitted to the jury, and the jury renders a partial verdict by leaving unanswered the issue as to gross immorality, the action of the court in directing a mistrial and refusing to sign judgment for defendant is not erroneous. Board of Public Welfare v. Hospital, 196 N. C. 752, 147 S. E. 288.

§ 6220. Counties and towns may establish hospitals.—Any county, city, or town may establish a hospital for the maintenance, care, and treatment of such insane persons as cannot be admitted into a state hospital, and of idiots and feeble-minded persons upon like conditions and requirements as are above prescribed for the institution of private hospitals; and the state board of charities and public welfare is given the same authority over such hospitals as is given them by the preceding section for private hospitals. (Rev., s. 4601; 1899, c. 1, s. 61.)

§ 6221. Private hospitals part of public charities.—All hospitals, homes, or schools for the care and treatment of insane persons, idiots, and feeble-minded persons and inebriates, formed in compliance with the two preceding sections and duly licensed by the board of public charities as in this article provided, shall, during the continuance of such license, become and be a part of the system of public charities of the state of North Carolina. (Rev., s. 4602; 1903, c. 329, s. 1.)

§ 6222. Insane persons placed in private hospital.—Whenever any person shall be found to be insane in the mode hereinbefore prescribed, and such person shall be possessed of an income sufficient to support those who may be legally dependent for support on the estate of such insane person, and, moreover, to support and maintain such insane person in any named hospital without the state, or any private hospital within the state, and such insane person, if of capable mind to signify such preference, shall, in writing, declare his wish to be placed in such hospital instead of being in a state hospital (or in case such insane person is incapable of declaring such preference, then the same may be declared by his guardian), and two respectable physicians who shall have examined such insane person, with the clerk of the court or justice of the peace who made the examination, shall deem it proper, then it may be lawful for the clerk or justice, together with said physicians, to recommend in writing that such insane person shall be placed in the hospital so chosen, as a patient thereof. (Rev., s. 4603; 1899, c. 1, s. 39.)

§ 6223. Justice of the peace to report to clerk.—It shall be the duty of the justice, when he shall act, to report the proceedings in such cases to the clerk of the superior court of the county in which such insane person may reside or be domiciled. (Rev., s. 4604; 1899, c. 1, s. 41.)

§ 6224. Clerk to report proceedings to judge.—The clerk of the court shall lay the proceedings before the judge of the superior court of the district in which such insane person may reside or be domiciled, and if he approve them, he shall so declare in writing, and such proceedings, with the approval thereof, shall be recorded by the clerk. (Rev., s. 4605; 1899, c. 1, s. 42.)

§ 6225. Certified copy and approval of judge sufficient authority.—A certified copy of such proceedings, with the approval of a judge, shall be sufficient warrant to authorize any friend of such insane person appointed by the judge to remove him to the hospital designated. (Rev., s. 4606; 1899, c. 1, s. 43.)

§ 6226. Examination and commitment to private hospital.—When it is deemed advisable that any person, a citizen of the state of North Carolina, or a citizen of another state or country temporarily sojourning in North Carolina, should be detained in any private hospital within the state, two persons, one of whom must be a physician, not connected with any private hospital, shall make affidavit before a justice of the peace or a clerk of the superior court of this state that they have carefully examined the alleged insane person; that they believe him to be a fit subject for commitment to a hospital for the insane, and that his detention and treatment will be for his advantage and benefit. This certificate shall be filed with and approved by the clerk of the superior court in the county in which the examination is held, or in the county in which the private hospital is located, and a certified copy of this certificate and approval of the clerk shall be deposited with the superintendent of the private hospital as his authority for holding the insane person. The clerk of the court may, if he sees fit, issue warrants and have the alleged insane person before him in manner prescribed in article three of this chapter for the examination and admission to state hospitals, and he may, if he see fit, order any insane person brought before him to be taken to a private hospital within the state instead of one of the state hospitals, and his warrant shall be sufficient authority for holding such insane person in such private hospital. Idiots, feeble-minded persons, and inebriates may be committed to and held in private hospitals or homes in this state in the manner hereinbefore prescribed for insane persons: Provided, that a period of detention in a private hospital or home of not less than one month and not more than six months shall be prescribed for inebriates, at the discretion of the clerk of the superior court approving the commitment. (Rev., s. 4607; 1903, c. 329, s. 2.)

§ 6227. Patients transferred from state hospital to private hospital.—When it is deemed desirable that any inmate of any state hospital be transferred to any licensed private hospital within the state, the executive committee may so or-

der, and a certified copy of the commitment on file at the state hospital and the order of the executive committee shall be sufficient warrant for holding the insane person, idiot, or inebriate by the officers of the private hospital. (Rev., s. 4608; 1903, c. 329, s. 3.)

§ 6228. Guardian of insane person to pay expenses out of estate.—It shall be the duty of any person having legal custody of the estate of an insane person, idiot, or inebriate legally held in a private hospital to supply funds for his support in the hospital during his stay therein and so long as there may be sufficient funds for that purpose over and beyond maintaining and supporting those persons who may be legally dependent on the estate. (Rev., s. 4610; 1899, c. 1, s. 40; 1903, c. 329, s. 4.)

§ 6229. Fees and charges for examinations.—The fees and charges for examination for admission to private hospitals shall be the same as for examinations for admission to the state hospitals. (Rev., s. 4611; 1903, c. 329, s. 5.)

Art. 6. Hospital for Dangerous Insane

§§ 6230-6235. Repealed by Public Laws 1923, c. 165, s. 1.

§ 6236. Insane persons charged with crime to be committed to hospital.—All persons who may hereafter commit crime while insane, and all persons who, being charged with crime, and are adjudged to be insane at the time of their arraignment, and for that reason cannot be put on trial for the crimes alleged against them, shall be sent by the court before whom they are or may be arraigned for trial, when it shall be ascertained by due course of law that such person is insane and cannot plead, to the state hospital at Raleigh, if the alleged criminal is white, or to the state hospital at Goldsboro if the alleged criminal is colored, and if the alleged criminal is an Indian from Robeson county, to the state hospital at Raleigh, as provided for insane Indians from Robeson county, and they shall be confined therein under the rules and regulations prescribed by the board of directors under the authority of this article, and they shall be treated, cared for, and maintained in said hospital. As a means of such care and treatment, the said boards of directors may make rules and regulations under which the persons so committed to said institutions may be employed in labor upon the farms of said institutions under such supervision as said boards of directors may direct: Provided, that the superintendent and medical director of the hospital shall determine, in each case, that such employment is advantageous in the physical or mental treatment of the particular inmate to be so employed. Their confinement in said hospital shall not be regarded as punishment for any offense. (Rev., s. 4617; 1899, c. 1, s. 63; 1923, c. 165, ss. 2, 3; 1927, c. 228.)

Editor's Note.—Prior to the amendment of 1923 an insane person who fell within the terms of this section was to be committed to the hospital for the dangerous insane. In lieu of this provision the amended section specifies the different hospitals to which such insane person shall be committed according to his race. A proviso, which originally appeared at the end of the section, that no insane person committed to the State hospitals at Morgantown, Raleigh or Goldsboro shall be transferred to the hospital for dangerous insanes, were stricken by the same amendment.

The laws of 1927 further amended the section by authorizing the board of directors to make rules and regulations with respect to the labor of inmates and by adding the proviso which qualifies that authorization.

§ 6237. Persons acquitted of certain crimes or incapable of being tried, on account of insanity, committed to hospital.—When a person accused of the crime of murder, attempt at murder, rape, assault with the intent to commit rape, highway robbery, train wrecking, arson, or other crime, shall have escaped indictment or shall have been acquitted upon trial upon the ground of insanity, or shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until an inquisition shall be had in regard to his mental condition. The judge shall, at the term of court at which such person is acquitted, cause notice to be given in writing to such person and his attorney, and, if in his good judgment it be necessary, to his nearest relative, naming the day upon which he shall proceed to make an inquisition in regard to the mental condition of such person. The judge shall cause such witness to be summoned and examined as he may deem proper or as the person so acquitted or his counsel may desire. At such inquisition the judge shall cause the testimony to be taken in writing and be preserved, and a copy of which shall be sent to the superintendent of the hospital designated in section 6236. If upon such inquisition the judge shall find that the mental condition or disease of such person is such as to render him dangerous either to himself or other persons, and that his confinement for care, treatment, and security demands it, he shall commit such persons to the hospital designated in section 6236, to be kept in custody therein for treatment and care as herein provided. Such person shall be kept therein, unless transferred under the previous provisions of this chapter, until restored to his right mind, in which event it shall be the duty of the authorities having the care of such person to notify the sheriff of the county from which he came, who shall order that he appear before the judge of the superior court of the district, to be dealt with according to law. The expense incident to such commitment and removal shall be paid by the county authorities from which such patient was sent. (Rev., s. 4618; 1899, c. 1, s. 65; 1923, c. 165, s. 4.)

Editor's Note.—The amendment of 1923 so amended this section as to conform it to the change affected by amendment of the preceding section, by making a reference to the hospitals designated in that section.

Constitutionality — Strict Construction. — This section is within the Legislature's constitutional authority, but, being a restraint upon the liberty of the prisoner within the constitutional guarantee for his protection, should be strictly construed in his favor. State v. Craig, 176 N. C. 740, 97 S. E. 400.

High Degree Crimes Contemplated by Section.—This section specifies a high degree of crime, such as murder, rape, and the like, indicating a class of criminals who may be dangerous to the public or individuals, if left at ward, and by the addition thereto of the words, "or other crimes," did not include the offense of resisting an officer when arrested, especially, the resistance was only by words, in the nature of a threat that the officer could not take him alive. State v. Craig, 176 N. C. 740, 97 S. E. 400.

Section Penal in Character.—This section is penal in its character. State v. Craig, 176 N. C. 740, 97 S. E. 400.

Release on Habeas Corpus.—A person illegally detained in a hospital for the dangerous insane cannot be released on habeas corpus if he is insane at the time of the return of the writ. In re Boyett, 136 N. C. 415, 48 S. E. 789.

Court May Bring Prisoner Back from Asylum to Examine Him.—See State v. Pritchett, 106 N. C. 667, 11 S. E. 357.

§ 6238. Convicts becoming insane committed to hospital.—All convicts becoming insane after commitment to the state prison, and the fact being certified as now required by law in the case of other insane persons, shall be admitted to the hospital designated in section 6236. In case of the expiration of the sentence of any convict, insane person, while such person is confined to the said hospital, such person shall be kept until restored to his right mind or such time as he may be considered harmless and incurable. (Rev., s. 4619; 1899, c. 1, s. 66; 1923, c. 165, s. 5.)

Editor's Note.—By the amendment of 1923 insane convicts are to be committed to the hospitals designated in section 6236.

§ 6239. Persons acquitted of crime on account of insanity; how discharged from hospital.—No person acquitted of a capital felony on the ground of insanity, and committed to the hospital designated in section 6236 shall be discharged therefrom unless an act authorizing his discharge be passed by the general assembly. No person acquitted of a crime of a less degree than a capital felony and committed to the hospital designated in section 6236 shall be discharged therefrom except upon an order from the governor. No person convicted of a crime, and upon whom judgment was suspended by the judge on account of insanity, shall be discharged from said hospital except upon the order of the judge of the district or of the judge holding the courts of the district in which he was tried: Provided, that nothing in this section shall be construed to prevent such person so confined in the hospitals designated in section 6236 from applying to any judge having jurisdiction for a writ of habeas corpus. No judge issuing a writ of habeas corpus upon the application of such person shall order his discharge until the superintendents of the several state hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public. (Rev., s. 4620; 1899, c. 1, s. 67; 1923, c. 165, s. 6.)

Editor's Note.—The amendment of 1923 amended this section so as to conform it to the changes effected by the amendment of the same year in section 6236.

§ 6240. Proceedings in case of recovery of patient charged with crime.—Whenever a person confined in any hospital for the insane, and against whom an indictment for crime is pending, has recovered or been restored to normal health and sanity, the superintendent of such hospital shall notify the clerk of the court of the county from which said person was sent, and the clerk will place the case against said person upon the docket of the superior or criminal court of his county for trial, and the person shall not be discharged without an order from said court. In all cases where such person confined in said hospital shall have recovered his mind, the clerk of the court of the county from which he was committed shall fix the amount of bail required for his appearance at the next term of the superior or criminal court of the county for trial, except in cases where the offense charged is a capital felony, and in this case only the judge of the superior court residing within or holding the courts of said district shall have the power to fix bail. If the person confined in the hospital, and reported sane as aforesaid, shall give the bond fixed by the clerk or judge as above provided for, he shall be discharged by the superintendent, and if he does not give the bond, he shall be transferred to the jail of the county from which he was committed. The superintendent will notify the sheriff of said county, and the sheriff will remove the person to the jail of his county. The sheriff will pay the expenses of such removal, and the county of the person's settlement will repay the sheriff for his expenses and services. (Rev., s. 4621; 1899, c. 1, s. 64; 1923, c. 165, s. 7.)

Editor's Note.—The amendment of 1923 amended this section so as to conform it to the changes effected by the amendment of the same year in section 6236.

§ 6241. Ex-convicts with homicidal mania committed to hospital.—Whenever any person who has been confined in the state prison under sentence for the felonious killing of another person, and who has been discharged therefrom at the expiration of his term of sentence, or as the result of executive clemency, shall thereafter so act as to justify the belief that he is possessed of a homicidal mania, and shall be duly adjudged insane, in accordance with the provisions of article three of this chapter, the clerk of the superior court or other officer having jurisdiction of the proceedings in which such person shall be adjudged insane may, in his discretion, commit such person to the state hospital designated in section 6236, as authorized and provided in this chapter. (1911, c. 169, s. 1; 1923, c. 165, s. 8.)

Editor's Note.—The amendment of 1923 amended this section so as to conform it to the changes effected by the amendment of the same year in section 6236.

§ 6242. Hospital authorities to receive and treat such patients.—It shall be the duty of the duly constituted authorities of the state hospitals designated in this act for the insane to receive all such insane persons as shall be committed to said institutions in accordance with the provisions of this law, and to treat and care properly for the same until discharged in accordance with the provisions of the law. (1911, c. 169, s. 2; 1923, c. 165, s. 9.)

Editor's Note.—The amendment of 1923 amended this section so as to conform it to the changes effected by the amendment of the same year in section 6236.

§ 6243. Annual appropriation for maintenance.—(Repealed by Public Laws 1923, Chapter 165, Section 10.)

As to appropriation for state hospitals for two fiscal years ending June 30, 1936 and June 30, 1937, see Public Laws 1935, chapter 306, section 1. As to supplementary appropriation for state hospital at Goldsboro, see Public Laws 1935, chapter 389.

§ 6243(a). Distribution of patients.—As soon as it may be, after March 6, 1923, all the dangerous insane now confined in the state hospital for dangerous insane at Raleigh shall be distributed to the hospitals designated in section 6236. The patients confined in the state hospital for the dangerous insane shall not, however, be transferred as herein provided from such hospital to the other hospitals until the superintendent of the

state hospital for the insane at Raleigh and the superintendent of the state hospital for the insane at Goldsboro notifies the superintendent of the state prison that they are ready to receive such patients. (1923, c. 165, ss. 11, 12.)

§ 6243(b). Readiness of hospitals.—Until said state hospitals for the insane at Raleigh and Goldsboro are ready to receive the dangerous insane, as defined in article six of chapter one hundred and three of the Consolidated Statutes, said dangerous insane shall continue to be subject to the rules and regulations as now contained in said article six, and the various courts in the state in a proper case shall continue to use the machinery provided in said article six in dealing with said dangerous insane. (1923, c. 165, s. 13.)

CHAPTER 103A

HOUSING AUTHORITIES AND PROJECTS

Art. 1. Housing Authorities Law

§ 6243(1). Title of article. — This article may be referred to as the housing authorities law. (1935, c. 456, s. 1.)

§ 6243(2). Finding and declaration of necessity. — It is hereby declared that unsanitary or unsafe dwelling accommodations exist in various cities and towns of the State having a population of more than fifteen thousand inhabitants and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in all such cities and towns many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in various cities and towns of the State having a population of more than fifteen thousand inhabitants there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that the aforesaid conditions also exist in certain areas surrounding such cities and towns; that these conditions cannot be remedied by the ordinary operations of private enterprises; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted is hereby declared as a matter of legislative determination. (1935, c. 456, s. 2.)

§ 6243(3). Definitions.—The following terms, wherever used or referred to in this article shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Authority" or "housing authority" shall mean a public body and a body corporate and politic organized in accordance with the provisions of this article for the purposes, with the powers and subject to the restrictions hereinafter set forth.

(2) "City" shall mean the city or town having a population of more than fifteen thousand inhabitants (according to the last federal census) which is, or is about to be, included in the territorial boundaries of an authority when created hereunder.

(3) "Council" shall mean the legislative body, council, board of commissioners, board of trustees, or other body charged with governing the city.

(4) "City clerk" and "mayor" shall mean the clerk and mayor, respectively, of the city or the officers thereof charged with the duties customarily imposed on the clerk and mayor respectively.

(5) "Municipality" shall mean any city, town or incorporated village, other than the city as defined above, which is located within the territorial boundaries of an authority.

(6) "Commissioner" shall mean one of the members of an authority appointed in accordance with the provisions of this article.

(7) "Government" shall include the state and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.

(8) "State" shall mean the State of North Carolina.

(9) "Federal government" shall include the United States of America, the federal emergency administration of public works or any agency, instrumentality, corporate or otherwise, of the United States of America.

(10) "Housing project" shall include all real and personal property, buildings and improvements, stores, offices, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan or undertaking (a) to demolish, clear, remove, alter or repair unsanitary or unsafe housing, and/or (b) to provide safe and sanitary dwelling accommodations for persons of low income. The term "housing project" may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith.

(11) "Community facilities" shall include real and personal property, and buildings and equipment for recreational or social assemblies, for educational, health or welfare purposes and necessary utilities, when designed primarily for the benefit and use of the housing authority and/or the occupants of the dwelling accommodation.

(12) "Bonds" shall mean any bonds, interim

certificates, notes, debentures, or other obligations of the authority issued pursuant to this article.

(13) "Mortgage" shall include deeds of trust, mortgages, building and loan contracts or other instruments conveying real or personal property as security for bonds and conferring a right to foreclose and cause a sale thereof.

(14) "Trust indenture" shall include instruments pledging the revenues of real or personal properties but not conveying such properties or conferring a right to foreclose and cause a sale thereof.

(15) "Contract" shall mean any agreement of an authority with or for the benefit of an obligee whether contained in a resolution, trust indenture, mortgage, lease, bond or other instrument.

(16) "Real property" shall include lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(17) "Obligee of the authority" or "obligee" shall include any bondholder, trustee or trustees for any bondholders, any lessor demising property to the authority used in connection with a housing project or any assignee or assignees of such lessor's interest or any part thereof, and the United States of America, when it is a party to any contract with the authority. (1935, c. 456, s. 3.)

§ 6243(4). Notice, hearing and creation of authority.—Any twenty-five residents of a city and of the area within ten miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. Upon the filing of such a petition the city clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city's expense by publishing a notice, at least ten days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area, or, if there be no such newspaper, by posting such notice in at least three public places within the city, at least ten days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the council shall determine:

(1) whether unsanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area, and/or

(2) whether there is a lack of safe or sanitary dwelling accommodations in the city and said surrounding area available for all the inhabitants thereof.

In determining whether dwelling accommodations are unsafe or unsanitary, the council shall take into consideration the following: the physical condition and age of the buildings; the degree of over-crowding, the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the council shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall cause notice of such determination to be given to the Mayor who shall thereupon appoint, as hereinafter provided, five commissioners to act as an authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the secretary of state an application signed by them, which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the council made the aforesaid determination after such hearing, and that the mayor has appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this article; (3) the term of office of each of the commissioners; (4) the name which is proposed for the corporation; and, (5) the location of the principal office of the proposed corporation. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The secretary of state shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this state or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners a certificate of incorporation pursuant to this article, under the seal of the state, and shall record the same with the application.

The boundaries of such authority shall include said city and the area within ten miles from the territorial boundaries of said city but in no event shall it include the whole or a part of any other city nor any area included within the boundaries of another authority. In case an area lies within ten miles of the boundaries of more than one city, such area shall be deemed to be within the boun-

daries of the authority embracing such area which was first established, all priorities to be determined on the basis of the time of the issuance of the aforesaid certificates by the secretary of state. After the creation of an authority, the subsequent existence within its territorial boundaries of more than one city shall in no way affect the territorial boundaries of such authority.

If the council, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this article upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate, duly certified by the secretary of state, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof. (1935, c. 456, s. 4.)

§ 6243(5). Appointment, qualifications and tenure of commissioners.—An authority shall consist of five commissioners appointed by the mayor and he shall designate the first chairman. No commissioner may be a city official.

The commissioners who are first appointed shall be designated by the mayor to serve for terms of one, two, three, four and five years respectively from the date of their appointment. Thereafter, the term of office shall be five years. A commissioner shall hold office until his successor has been appointed and has qualified. Vacancies shall be filled for the unexpired term. Three commissioners shall constitute a quorum. The mayor shall file with the city clerk a certificate of the appointment or reappointment of any commissioner and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his services but he shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his duties.

When the office of the first chairman of the authority becomes vacant, the authority shall select a chairman from among its members. An authority shall select from among its members a vice-chairman, and it may employ a secretary (who shall be executive director), technical experts and such other officers, agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation. An authority may call upon the corporation counsel or chief law officer of the city for such legal services as it may require or it may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper. (1935, c. 456, s. 5.)

§ 6243(6). Duty of authority and commissioners.—The authority and its commissioners shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this article and the laws of the State and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed. (1935, c. 456, s. 6.)

§ 6243(7). Interested commissioners or employees. — No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office. (1935, c. 456, s. 7.)

§ 6243(8). Removal of commissioners. — The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner shall have been given a copy of the charges against him (which may be made by the mayor) at least ten days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.

Any obligee of the authority may file with the mayor written charges that the authority is violating wilfully any law of the State or any term, provision or covenant in any contract to which the authority is a party. The mayor shall give each of the commissioners a copy of such charges at least ten days prior to the hearing thereon and an opportunity to be heard in person or by counsel and shall within fifteen days after receipt of such charges remove any commissioners of the authority who shall have been found to have acquiesced in any such wilful violation.

A commissioner shall be deemed to have acquiesced in a wilful violation by the authority of a law of this State or of any term, provision or covenant contained in a contract to which the authority is a party, if, before a hearing is held on the charges against him, he shall not have filed a written statement with the authority of his objections to, or lack of participation in, such violation.

In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk a record of the proceedings together with the charges made against the commissioners and the findings thereon. (1935, c. 456, s. 8.)

§ 6243(9). Powers of authority.—An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including the following powers in addition to others herein granted:

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where

unsafe, or unsanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe, or unsanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to coöperate with any city municipal or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project located within its boundaries undertaken by any government, or by any city or municipality located in whole or in part within its boundaries; to manage as agent of any city or municipality located in whole or in part within its boundaries any housing project constructed or owned by such city; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, roads, roadways, alleys, sidewalks or other places or facilities or for the acquisition by such city, municipality, or a government of property, options or property rights or for the furnishing of property or services in connection with a project; to arrange with the State, its subdivisions and agencies, and any county, city or municipality of the State to the extent that it is within the scope of each of their respective functions, (a) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (b) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (c) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality; to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government; to acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any property real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property; to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project; to borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its revenues, and (subject to the limitations hereinafter imposed) by mortgages upon property held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this article; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; to make and from time to time amend and repeal by-laws, rules and regulations not inconsistent with this article, to carry into effect the powers and purposes of the authority; to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information; to issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the authority, or excused from attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or unsanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, morals, safety or welfare. Any of the investigations or examinations provided for in this article may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions. An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this State, and for such purposes an authority may cause one or more corporations to be formed under the laws of this State or may acquire the capital stock of any corporation or corporations. Any corporate agent, all of the stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition

to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this article. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state. (1935, c. 456, s. 9.)

§ 6243(10). Coöperation between authorities.—Any two or more authorities may coöperate with one another in the exercise of any or all of the powers conferred hereby for the purpose of financing, planning, constructing or operating a housing project or projects located partly within the boundaries of each of said authorities. Any housing authority may construct and operate a housing project within the boundaries of any other housing authority provided that (1) such other housing authority consents thereto, and (2) said housing project is located within ten miles of the city which is included in the boundaries of the housing authority desiring to construct and operate such project. (1935, c. 456, s. 10.)

§ 6243(11). Eminent domain.—The authority shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this article after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use. The authority may exercise the power of eminent domain pursuant to the provisions of either:

(a) Consolidated Statutes, one thousand nine hundred and nineteen, sections 1715-1733, both inclusive.

(b) Any other applicable statutory provisions now in force or hereafter enacted for the exercise of the power of eminent domain.

Property already devoted to a public use may be acquired, provided, that no property belonging to any city or municipality or to any government may be acquired without its consent and that no property belonging to a public utility corporation may be acquired without the approval of the commission or other officer or tribunal, if any there be, having regulatory power over such corporation. (1935, c. 456, s. 11.)

§ 6243(12). Acquisition of land for government.—The authority may acquire by purchase or by the exercise of its power of eminent domain, as aforesaid, any property real or personal for any housing project being constructed or operated by a government. The authority upon such terms and conditions, with or without consideration, as it shall determine, may convey title or deliver possession of such property so acquired or purchased to such government for use in connection with such housing project. (1935, c. 456, s. 12.)

§ 6243(13). Zoning and building laws. — All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated. (1935, c. 456, s. 13.)

§ 6243(14). Types of bonds authority may issue.—The authority shall have power and is hereby authorized from time to time in its discretion to issue for any of its corporate purposes:

(a) Bonds on which the principal and interest are payable (1) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds or with such proceeds together with the proceeds of a grant from the federal government to aid in financing the construction thereof, or (2) exclusively from the income and revenues of certain designated housing projects whether or not they were financed in whole or in part with the proceeds of such bonds; provided, however, that the credit of the authority shall not be pledged to the payment of such bonds, but such bonds shall be payable only (and the bonds shall so state on their face) from the revenues of the designated housing project or projects and the funds received from the sale or disposal thereof and, if the authority so determines, shall be additionally secured by a trust indenture pledging such revenues or, in certain instances as hereinafter provided, by a mortgage of the property comprising such designated housing project or projects and the revenues therefrom.

(b) Bonds for the payment of the principal and interest of which the credit of the authority is pledged and which may be additionally secured by a pledge of the revenues of the authority or any part thereof pursuant to a resolution or trust indenture of the authority or, in certain instances as hereinafter provided, may be additionally secured by a mortgage of the property and revenues of the authority or any part thereof.

Neither the commissioners of the authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof.

The bonds and other obligations of the authority (and such bonds and obligations shall so state on their face) shall not be a debt of any city or municipality located within its boundaries or of the State and neither the State nor any such city or municipality shall be liable thereon, nor in any event shall they be payable out of any funds or properties other than those of the authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation of the laws of the State. Bonds may be issued under this article notwithstanding any debt or other limitation prescribed in any statute. (1935, c. 456, s. 14.)

§ 6243(15). Form and sale of bonds.—The bonds of the authority shall be authorized by its resolution and shall be issued in one or more series and shall bear such date or dates, mature at such time or times, not exceeding sixty years from their respective dates, bear interest at such rate or rates, not exceeding six per centum (6%) per annum payable semi-annually, be in such denominations (which may be made interchangeable) be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution or its trust indenture or mortgage may provide.

The bonds may be sold at public sale held after notice published once at least ten days prior to

such sale in a newspaper having a general circulation in the city and in a financial newspaper published in the city of New York, New York or in the city of Chicago, Illinois, provided, however, that such bonds may be sold to the federal government at private sale without any public advertisement. The bonds may be sold at such price or prices as the authority shall determine provided that the interest cost to maturity of the money received for any issue of said bonds shall not exceed six per centum (6%) per annum.

Pending the authorization, preparation, execution or delivery of definitive bonds, the authority may issue interim certificates, or other temporary obligations to the purchaser of such bonds. Such interim certificates, or other temporary obligations, shall be in such form, contain such terms, conditions and provisions, bear such date or dates, and evidence such agreements relating to their discharge or payment or the delivery of definitive bonds as the authority may by resolution, trust indenture or mortgage determine.

In case any of the officers whose signatures appear on any bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if they had remained in office until such delivery.

The authority shall have power out of any funds available therefor to purchase any bonds issued by it at a price not more than the principal amount thereof and the accrued interest; provided, however, that bonds payable exclusively from the revenues of a designated project or projects shall be purchased out of any such revenues available therefor. All bonds so purchased shall be cancelled. This paragraph shall not apply to the redemption of bonds.

Any provision of any law to the contrary notwithstanding, any bonds, interim certificates, or other obligations issued pursuant to this article shall be fully negotiable. (1935, c. 456, s. 15.)

§ 6243(16). Provisions of bonds, trust indentures, and mortgages.—In connection with the issuance of bonds and/or the incurring of any obligation under a lease and in order to secure the payment of such bonds and/or obligations, the authority shall have power:

(1) To pledge by resolution, trust indenture, mortgage (subject to the limitations hereinafter imposed), or other contract all or any part of its rents, fees, or revenues.

(2) To covenant against mortgaging all or any part of its property, real or personal, then owned or thereafter acquired, or against permitting or suffering any lien thereon.

(3) To covenant with respect to limitations on its right to sell, lease or otherwise dispose of any housing project or any part thereof, or with respect to limitations on its right to undertake additional housing projects.

(4) To covenant against pledging all or any part of its rents, fees and revenues to which its right then exists or the right to which may thereafter come into existence or against permitting or suffering any lien thereon.

(5) To provide for the release of property, rents, fees and revenues from any pledge or mortgage, and to reserve rights and powers in, or the right to dispose of, property which is subject to a pledge or mortgage.

(6) To covenant as to the bonds to be issued pursuant to any resolution, trust indenture, mortgage or other instrument and as to the issuance of such bonds in escrow or otherwise, and as to the use and disposition of the proceeds thereof.

(7) To covenant as to what other, or additional debt, may be incurred by it.

(8) To provide for the terms, form, registration, exchange, execution and authentication of bonds.

(9) To provide for the replacement of lost, destroyed or mutilated bonds.

(10) To covenant that the authority warrants the title to the premises.

(11) To covenant as to the rents and fees to be charged, the amount (calculated as may be determined) to be raised each year or other period of time by rents, fees, and other revenues and as to the use and disposition to be made thereof.

(12) To covenant as to the use of any or all of its property, real or personal.

(13) To create or to authorize the creation of special funds in which there shall be segregated (a) the proceeds of any loan and/or grant; (b) all of the rents, fees and revenues of any housing project or projects or parts thereof; (c) any monies held for the payment of the costs of operation and maintenance of any such housing projects or as a reserve for the meeting of contingencies in the operation and maintenance thereof; (d) any monies held for the payment of the principal and interest on its bonds or the sums due under its leases and/or as a reserve for such payments; and (e) any moneys held for any other reserves or contingencies; and to covenant as to the use and disposal of the monies held in such funds.

(14) To redeem the bonds, and to covenant for their redemption and to provide the terms and conditions thereof.

(15) To covenant against extending the time for the payment of its bonds or interest thereon, directly or indirectly, by any means or in any manner.

(16) To prescribe the procedure, if any, by which the terms of any contract with bond holders may be amended or abrogated, the amount of bonds the holders of which must consent thereto and the manner in which such consent may be given.

(17) To covenant as to the maintenance of its property, the replacement thereof, the insurance to be carried thereon and the use and disposition of insurance moneys.

(18) To vest in an obligee of the authority the right, in the event of the failure of the authority to observe or perform any covenant on its part to be kept or performed, to cure any such default and to advance any moneys necessary for such purpose, and the moneys so advanced may be made an additional obligation of the authority with such interest, security and priority as may be provided in any trust indenture, mortgage, lease or contract of the authority with reference thereto.

(19) To covenant and prescribe as to the events of default and terms and conditions upon which

any or all of its bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.

(20) To covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition, or obligation.

(21) To covenant to surrender possession of all or any part of any housing project or projects upon the happening of an event of default (as defined in the contract) and to vest in an obligee the right without judicial proceedings to take possession and to use, operate, manage and control such housing projects or any part thereof, and to collect and receive all rents, fees and revenues arising therefrom in the same manner as the authority itself might do and to dispose of the monies collected in accordance with the agreement of the authority with such obligee.

(22) To vest in a trustee or trustees the right to enforce any covenant made to secure, to pay, or in relation to the bonds, to provide for the powers and duties of such trustee or trustees, to limit liabilities thereof and to provide the terms and conditions upon which the trustee or trustees or the holders of bonds or any proportion of them may enforce any such covenant.

(23) To make covenants other than in addition to the covenants herein expressly authorized, of like or different character.

(24) To execute all instruments necessary or convenient in the exercise of the powers herein granted or in the performance of its covenants or duties, which may contain such covenants and provisions, in addition to those above specified as the government or any purchaser of the bonds of the authority may reasonably require.

(25) To make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds, or in the absolute discretion of the authority tend to make the bonds more marketable; notwithstanding that such covenants, acts or things may not be enumerated herein; it being the intention hereof to give the authority power to do all things in the issuance of bonds, in the provisions for their security that are not inconsistent with the constitution of the State and no consent or approval of any judge or court shall be required thereof; provided, however, that the authority shall have no power to mortgage all or any part of its property, real or personal, except as provided in section 6243(17). (1935, c. 456, s. 16.)

§ 6243(17). Power to mortgage when project financed with governmental aid.—In connection with any project financed in whole or in part by a government, the authority shall also have power to mortgage all or any part of its property, real or personal, then owned or thereafter acquired, and thereby:

(a) To vest in a government the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings, so long as a government shall be the holder of any of the bonds secured by such mortgage.

(b) To vest in a trustee or trustees the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings, but only with the consent of the government which aided in financing the housing project involved.

(c) To vest in other obligees the right to foreclose such mortgage by judicial proceedings, but only with the consent of the government which aided in financing the project involved.

(d) To vest in an obligee, including a government, the right in foreclosing any mortgage as aforesaid, to foreclose such mortgage as to all or such part or parts of the property covered thereby as such obligee (in its absolute discretion) shall elect; the institution, prosecution and conclusion of any such foreclosure proceedings and/or the sale of any such parts of the mortgaged property shall not affect in any manner or to any extent the lien of the mortgage on the parts of the mortgaged property not included in such proceedings or not sold as aforesaid. (1935, c. 456, s. 17.)

§ 6243(18). Remedies of an obligee of authority.—An obligee of the authority shall have the right in addition to all other rights which may be conferred on such obligee subject only to any contractual restrictions binding upon such obligee:

(a) By mandamus, suit, action or proceeding in law or equity (all of which may be joined in one action) to compel the authority, and the commissioners, officers, agents or employees thereof to perform each and every term, provision and covenant contained in any contract of the authority, and to require the carrying out of any or all covenants and agreements of the authority and the fulfillment of all duties imposed upon the authority by this article.

(b) By suit, action or proceeding in equity to enjoin any acts or things which may be unlawful, or the violation of any of the rights of such obligee of the authority.

(c) By suit, action or proceeding in any court of competent jurisdiction to cause possession of any housing project or any part thereof to be surrendered to any obligee having the right to such possession pursuant to any contract of the authority. (1935, c. 456, s. 18.)

§ 6243(19). Additional remedies conferrable by mortgage or trust indenture.—Any authority shall have power by its trust indenture, mortgage, lease or other contract to confer upon any obligee holding or representing a specified amount in bonds, lease or other obligations the right upon the happening of an "event of default" as defined in such instrument:

(a) By suit, action or proceeding in any court of competent jurisdiction to obtain the appointment of a receiver of any housing project of the authority or any part or parts thereof. If such receiver be appointed, he may enter and take possession of such housing project or any part or parts thereof and operate and maintain same, and collect and receive all fees, rents, revenues, or other charges thereafter arising therefrom in the same manner as the authority itself might do and shall keep such moneys in a separate account or

accounts and apply the same in accordance with the obligations of the authority as the court shall direct.

(b) By suit, action or proceeding in any court of competent jurisdiction to require the authority and the commissioners thereof to account as if it and they were the trustees of an express trust. (1935, c. 456, s. 19.)

§ 6243(20). Remedies cumulative. — All the rights and remedies hereinabove conferred shall be cumulative and in addition to all other rights and remedies that may be conferred upon such obligee of the authority by law or by any contract with the authority. (1935, c. 456, s. 20.)

§ 6243(21). Limitations on remedies of obligee. —No interest of the authority in any property, real or personal, shall be subject to sale by the foreclosure of a mortgage thereon, either through judicial proceedings or the exercise of a power of sale contained in such mortgage, except in the case of the mortgages provided for in section 6243(17). All property of the authority shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same. No judgment against the authority shall be a charge or lien upon its property, real or personal. The provisions of this section shall not apply to or limit the right of obligees to foreclose any mortgage of the authority provided for in section 6243(17), and in case of a foreclosure sale thereunder, to obtain a judgment or decree for any deficiency due on the indebtedness secured thereby and issued on the credit of the authority. Such deficiency judgment or decree shall be a lien and charge upon the property of the authority, which may be levied on and sold by virtue of an execution or other judicial process for the purpose of satisfying such deficiency judgment or decree. (1935, c. 456, s. 21.)

§ 6243(22). Foreclosure sale subject to agreement with government. — Notwithstanding anything in this article to the contrary, any purchaser or purchasers at a sale of real or personal property of the authority whether pursuant to any foreclosure of a mortgage, pursuant to judicial process or otherwise, shall obtain title subject to any contract between the authority and a government relating to the supervision by a government of the operation and maintenance of such property and the construction of improvements thereon. (1935, c. 456, s. 22.)

§ 6243(23). Contracts with federal government.—In addition to the powers conferred upon the authority by other provisions of this article, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this article to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. It is the purpose and intent of this article to authorize every authority to do any and all things necessary to secure the financial aid and the co-operation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this article to undertake. (1935, c. 456, s. 23.)

§ 6243(24). Security for funds deposited by authorities. — The authority may by resolution provide that (1) all moneys deposited by it shall be secured by obligations of the United States or of the State of a market value equal at all times to the amount of such deposits or (2) by any securities in which savings banks may legally invest funds within their control or (3) by an undertaking with such sureties as shall be approved by the authority faithfully to keep and pay over upon the order of the authority any such deposits and agreed interest thereon, and all banks and trust companies are authorized to give any such security for such deposits. (1935, c. 456, s. 24.)

§ 6243(25). Bonds are legal investments.—Any and all bonds of an authority are hereby declared to be securities in which the city, any municipality, or the state may invest. Bonds of the authority, when they are secured by a first pledge of the revenues of, or a first mortgage lien on, property, which pledge or lien does not exceed sixty-six and two-thirds per centum of the value of such property, are hereby declared to be securities in which all public officers and bodies of the State, other municipal corporations, municipal subdivisions, all insurance companies and associations, all savings banks and savings institutions, including savings and loan associations, all executors, administrators, guardians, trustees, and all other fiduciaries in the State may legally invest funds within their control. (1935, c. 456, s. 25.)

§ 6243(26). Tax exemptions. — The authority shall be exempt from the payment of any taxes or fees to the State or any subdivision thereof, or to any officer or employee of the State or any subdivision thereof. The property of an authority shall be exempt from all local and municipal taxes and for the purposes of such tax exemption, it is hereby declared as a matter of legislative determination that an authority is and shall be deemed to be a municipal corporation. Bonds, notes, debentures and other evidences of indebtedness of an authority are declared to be issued for a public purpose and to be public instrumentalities and, together with interest thereon, shall be exempt from taxes when same are held by the federal government or by any purchaser from the federal government or anyone acquiring title from or through such purchaser. (1935, c. 456, s. 26.)

§ 6243(27). Reports. — The authority shall at least once a year file with the mayor of the city a report of its activities for the preceding year, and shall make any recommendations with reference to any additional legislation or other action that may be necessary in order to carry out the purposes of this article. (1935, c. 456, s. 27.)

§ 6243(28). Restriction on right of eminent domain; right of appeal preserved; investigation by utilities commission. — Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. That in addition to the powers now granted by law to the utilities commission of North Carolina, the said utilities commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 456, s. 28.)

§ 6243(29). Article controlling.—In so far as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article shall be controlling. (1935, c. 456, s. 30.)

Art. 2. Municipal Coöperation and Aid

§ 6243(30). Finding and declaration of necessity. — It is hereby declared that unsanitary or unsafe dwelling accommodations exist in various areas of the State, and that consequently many persons of low income are forced to reside in such dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions hereinafter enacted, is hereby declared as a matter of legislative determination. (1935, c. 408, s. 1.)

§ 6243(31). Definitions.—The following terms, whenever used or referred to in this article shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Housing authority" shall mean any housing authority organized pursuant to the housing authorities law of this State.

(2) "City" shall mean any city of the State having a population of more than fifteen thousand inhabitants (according to the last federal census) which is, or is about to be, included in the territorial boundaries of a housing authority.

(3) "Municipality" shall mean any city, town or incorporated village of the State.

(4) "Housing project" shall mean any undertaking (a) to demolish, clear, remove, alter or repair unsafe or unsanitary housing, and/or (b) to provide dwelling accommodations for persons of low income, and said term may also include such buildings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the housing authority and/or the occupants of such dwelling accommodations. (1935, c. 408, s. 2.)

§ 6243(32). Conveyance, lease or agreement in aid of housing project.—For the purpose of aiding and coöperating in the planning, construction and operation of housing projects located within their respective territorial boundaries, the State, its subdivisions and agencies, and any county, city, or municipality of the State may, upon such terms, with or without consideration, as it may determine:

(a) grant, sell, convey or lease any of its property to a housing authority or the United States of America or any agency thereof; and

(b) to the extent that it is within the scope of each of their respective functions, (1) cause the services customarily provided by each of them to be rendered for the benefit of the housing authority and/or the occupants of such housing projects, and (2) provide and maintain parks and sewerage, water and others facilities adjacent to or in connection with housing projects, and (3) enter into any agreement to open, close, pave, install, or change the grade of streets, roads, roadways, alleys, sidewalks, or other such facilities, to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality.

In connection with the exercise of this power, any city or municipality may incur the entire expense of any such public improvements located within its territorial boundaries without assessment against abutting property owners. Any law or statute to the contrary notwithstanding, any gift, grant, sale, conveyance, lease or agreement provided for in this section may be made by the State, its subdivisions and agencies, and any county, city, or municipality of the State without appraisal, public notice, advertisement or public bidding. (1935, c. 408, s. 3.)

§ 6243(33). Advances and donations by the city and municipality.—The council or other governing body of the city included within the territorial boundaries of such authority is authorized to make an estimate of the amount of money necessary for the administrative expenses and overhead of the housing authority during the first year following the incorporation of such housing authority, and to appropriate such amount to the authority out of any moneys in the city treasury not appropriated to some other purposes, and to cause the moneys so appropriated to be paid the authority as a donation, and moneys so appropriated and paid to a housing authority by a city shall be deemed to be a necessary expense of such city. In addition thereto, the city and any municipality located in whole or in part within the boundaries of a housing authority shall have the power annually and from time to time to make donations or advances to the authority of such sums as the city or municipality in its

discretion may determine. The authority, when it has money available therefor, shall reimburse the city or municipality for all advances by way of loan made to it. (1935, c. 408, s. 5.)

§ 6243(34). Action of city or municipality by resolution.—Except as otherwise provided in this article or by the constitution of the State, all action authorized to be taken under this article by the council or other governing body of any city or of any municipality may be by resolution adopted by a majority of all the members of its council or other governing body, which resolution may be adopted at the meeting of the council or other governing body at which such resolution is introduced and shall take effect immediately upon such adoption, and no such resolution need be published or posted. (1935, c. 408, s. 5.)

§ 6243(35). Restrictions on exercise of right of eminent domain; duties of utilities commission; investigation of projects. — Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. That in addition to the powers now granted by law to the utilities commission of North Carolina, the said utilities commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of public convenience and necessity for said project. (1935, c. 408, s. 6.)

§ 6243(36). Purpose of article.—It is the purpose and intent of this article that the State, its subdivisions and agencies, and any county, city or municipality of the State shall be authorized, and are hereby authorized, to do any and all things necessary to aid and coöperate in the planning, construction and operation of housing projects by the United States of America and by housing authorities. (1935, c. 408, s. 7.)

§ 6243(37). Supplemental nature of article. — The powers conferred by this article shall be in addition and supplemental to the powers conferred by any other law. (1935, c. 408, s. 8.)

Art. 3. Eminent Domain

§ 6243(38). Finding and declaration of necessity.—It is hereby declared that unsanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside in such dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted, is hereby declared as a matter of legislative determination. (1935, c. 409, s. 1.)

§ 6243(39). Housing project.—The term "housing project" whenever used in this article shall mean any undertaking (a) to demolish, clear, remove, alter or repair unsafe or unsanitary housing and/or (b) to provide dwelling accommodations for persons of low income, and said term may also include such buiidings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the occupants of such dwelling accommodations. (1935, c. 409, s. 2.)

§ 6243(40). Eminent domain for housing projects.—Any corporation, which is an agency of the United States of America, shall have the right to acquire by eminent domain any real property, including improvements and fixtures thereon, which it may deem necessary for a housing project being constructed, operated or aided by it or the United States of America. Any corporation borrowing money or receiving other financial assistance from the United States of America or any agency thereof for the purpose of financing the construction or operation of any housing project or projects, the operation of which will be subject to public supervision or regulation, shall have the right to acquire by eminent domain any real property, including fixtures and improvements thereon, which it may deem necessary for such project. A housing project shall be deemed to be subject to public supervision or regulation within the meaning of this article if the rents to be charged by it are in any way subject to the supervision, regulation or approval of the United States of America, the State or any of their subdivisions or agencies, or by a housing authority, city, municipality or county, whether such right to supervise, regulate or approve be by virtue of any law, statute, contract or otherwise.

Any such corporate agency of the United States of America or any such corporation, upon the adoption of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use, may exercise the power of eminent domain pursuant to the provisions of either: (a) Consolidated Statutes of North Carolina, one thousand nine hundred and nineteen, section 1715-1733, both inclusive, (b) Any other applicable statutory provisions, now in force or hereafter enacted for the exercise of the power of eminent domain. (1935, c. 409, s. 3.)

§ 6243(41). Certificate of convenience of utilities commission required; right of appeal; investigation of projects. — Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be ex-

ercised unless and until a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. That in addition to the powers now granted by law to the utilities commission of North Carolina, the said utilities commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 409, s. 4.)

CHAPTER 104
IMPEACHMENT

Art. 1. The Court

§ 6244. Senate is court of impeachment; quorum.—The court for the trial of impeachments shall be the senate. A majority of the members shall be necessary to constitute a quorum. (Rev., s. 4623; Const., Art. IV, s. 3; Code, ss. 2923, 2924; 1868-9, c. 168, s. 1.)

§ 6245. Chief justice presides in impeachment of governor.—When the governor of the state, or lieutenant-governor, upon whom the powers and duties of the office of governor have devolved, is impeached, the chief justice of the supreme court shall preside; and in a case requiring the chief justice to preside, notice shall be given him by order of the senate, of the time and place fixed for the consideration of the articles of impeachment, with a request to attend; and the chief justice shall preside over the senate during the consideration of said articles upon the trial of the person impeached. But the chief justice shall not vote on any question during the trial, and shall pronounce decision only as the organ of the senate with its assent. (Rev., s. 4624; Const., Art. IV, s. 4; Code, s. 2927; 1868-9, c. 168, s. 6.)

§ 6246. Power of the senate as a court.—The senate, as a court, shall have power to compel the attendance of parties and witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, to punish, in a summary way, contempts of its authority, orders, mandates, writs, precepts, or judgments, to adjourn from time to time, and to make all lawful rules and regulations which it may deem essential or conducive to the ends of justice. (Rev., s. 4626; Code, s. 2926; 1868-9, c. 168, s. 4.)

§ 6247. Power of presiding officer.—The presiding officer of the senate shall have power—

1. To direct all necessary preparations in the senate chamber.
2. To make and issue by himself or by the clerk of the senate all orders, mandates, writs, and precepts authorized by law or by the senate.
3. To direct all forms of procedure during the trial not otherwise specially provided for.
4. To decide in the first instance, without a division, all questions of evidence and incidental questions; but the same shall, on demand of one-fifth of the members present, be decided by yeas and nays. (Rev., s. 4627; Code, s. 2927; 1868-9, c. 168, s. 5.)

§ 6248. Causes for impeachment.—Every officer in this state shall be liable to impeachment for—

1. Corruption or other misconduct in his official capacity.
2. Habitual drunkenness.
3. Intoxication while engaged in the exercise of his office.
4. Drunkenness in any public place.
5. Mental and physical incompetence to discharge the duties of his office.
6. Any criminal matter, the conviction whereof would tend to bring his office into public contempt. (Rev., s. 4628; Code, s. 2937; 1868-9, c. 168, s. 16.)

A judge of probate is not subject to impeachment under this section. People v. Heaton, 77 N. C. 18.

Art. 2. Procedure in Impeachment

§ 6249. Articles of impeachment preferred.—All impeachments must be delivered by the house of representatives to the presiding officer of the senate, who shall thereupon cause proclamation to be made in the following words:

All persons are commanded to keep silence, on pain of imprisonment, while the house of representatives is exhibiting to the senate of North Carolina articles of impeachment against.....

After which the articles shall be exhibited, and then the presiding officer of the senate shall inform the house of representatives that the senate will take proper order on the subject of impeachment, of which due notice shall be given to the house of representatives. (Rev., s. 4630; Code, s. 2925; 1868-9, c. 168, ss. 2, 3.)

§ 6250. When president of senate impeached, another officer chosen.—If the president of the senate be impeached, notice thereof shall immediately be given to the senate by the house of representatives, in order that another president may be chosen. (Rev., s. 4631; Code, s. 2935; 1868-9, c. 168, s. 14.)

§ 6251. Notice given to the accused.—The senate, upon the presentation of articles of impeachment and its organization as a court, shall forthwith cause the person impeached to appear and answer the articles exhibited, either in person or by attorney. He shall be entitled to a copy of the impeachment and have a reasonable time to answer the same. (Rev., s. 4632; Code, s. 2928; 1868-9, c. 168, s. 7.)

§ 6252. Accused entitled to counsel.—The person accused is entitled on the trial of impeachment to the aid of counsel. (Rev., s. 4629; Code, s. 2929; 1868-9, c. 168, s. 8.)

§ 6253. Time of hearing fixed.—When issue is joined in the trial of an impeachment the court shall fix a time and place for the trial thereof. (Rev., s. 4633; Code, s. 2930; 1868-9, c. 168, s. 9.)

§ 6254. Oath administered to members.—At the time and place appointed, and before the com-

mencement of the trial, the presiding officer of the senate shall administer to each member of the court then present, and to other members as they appear, an oath or affirmation truly and impartially to try and determine the charge in question, under the constitution and laws, according to the evidence. No member of the court shall sit or give his vote upon the trial until he shall have taken such oath or affirmation. (Rev., s. 4625; Code, s. 2931; 1868-9, c. 168, s. 10.)

Art. 3. Effect of Impeachment

§ 6255. Accused suspended during trial.—Every officer impeached shall be suspended from the exercise of his office until his acquittal. (Rev., s. 4634; Code, s. 2934; 1868-9, c. 168, s. 13.)

§ 6256. Manner of conviction; judgment; indictment.—No person shall be convicted on an impeachment without the concurrence of two-thirds of the senators present. Upon a conviction of the person impeached, judgment may be given that he be removed from office, or that he be disqualified to hold any office of honor, trust, or profit under this state, or both. Every person convicted on impeachment shall, nevertheless, be liable to indictment and punishment according to law. (Rev., s. 4635; Code, ss. 2932, 2933, 2936; 1868-9, c. 168, ss. 11, 12, 15; see Const., Art. IV, ss. 3, 4.)

CHAPTER 105
INDIANS

§ 6257. Cherokee Indians of Robeson County; rights and privileges.—The persons residing in Robeson, Richmond, and Sampson counties, who have heretofore been known as "Croatan Indians" or "Indians of Robeson County," together with their descendants, shall hereafter be known and designated as "Cherokee Indians of Robeson County," and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the state of North Carolina, upon the indians heretofore known as the "Croatan Indians" or "Indians of Robeson County." In all laws enacted by the General Assembly of North Carolina relating to said indians subsequent to the enactment of said chapter fifty-one of the Laws of eighteen hundred and eighty-five, the words "Croatan Indians" and "Indians of Robeson County" are stricken out and the words "Cherokee Indians of Robeson County" inserted in lieu thereof. (Rev., s. 4168; 1885, c. 51, s. 2; 1911, c. 215; P. L. 1911, c. 263; 1913, c. 123.)

See annotations to section 5847.

§ 6258. Separate privileges in schools and institutions.—Such Cherokee indians of Robeson county and the indians of Person county, defined in the chapter Education, section 5546, shall be entitled to the following rights and privileges:

1. Separate schools, with the educational privileges provided in the chapter Education.

2. Suitable accommodations in the state hospital for the insane at Raleigh, as provided in the chapter Hospitals for the Insane, in the article entitled Organization and Management.

3. That the sheriffs, jailers, or other properties of Robeson and Person counties shall provide in the common jails of said counties, and in the homes for the aged and infirm thereof, separate cells, wards, or apartments for such indians in all cases where it shall be necessary under the laws of this state to commit any of said indians to such jails or county homes. (1911, c. 215, s. 6; 1913, c. 123; P. L. 1913, c. 22.)

Cross References. — See annotations to section 5847. For separate schools in certain counties, see section 5546-5551; for care of insane, see section 6154.

§ 6259. Chapter not applicable to certain bands of Cherokees.—Neither this chapter nor any other act relating to said "Cherokee Indians of Robeson County" shall be construed so as to impose on said indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the eastern band of Cherokee indians residing in Cherokee, Graham, Swain, Jackson, and other adjoining counties in North Carolina, or any other band or tribe of Cherokee indians other than those now residing, or who have since the Revolutionary War resided, in Robeson county, nor shall said "Cherokee Indians of Robeson County," as herein designated, be subject to the limitations provided in the chapter Contracts Requiring Writing, in section 989, entitled Contracts with Cherokee Indians. (1913, c. 123, s. 5.)

CHAPTER 105A
INDIAN ANTIQUITIES

§ 6259(1). Private landowners urged to refrain from destruction.—Private owners of lands containing Indian relics, artifacts, mounds or burial grounds are urged to refrain from the excavation or destruction thereof and to forbid such conduct by others, without the cooperation of the director of the state museum and the secretary of the North Carolina Historical Commission or without the assistance or supervision of some person designated by either as qualified to make scientific archaeological explorations. (1935, c. 198, s. 1.)

§ 6259(2). Possessors of relics urged to commit them to custody of state agencies.—All persons having in their possession collections of Indian relics, artifacts, and antiquities which are in danger of being lost, destroyed or scattered are urged to commit them to the custody of the North Carolina state museum, the North Carolina Historical Commission, or some other public agency or institution within the State which is qualified to preserve and exhibit them for their historic, scientific and educational value to the people of the State. (1935, c. 198, s. 2.)

§ 6259(3). Preservation of relics on public lands. — It shall be the duty of any person in charge of any construction or excavation on any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, to report promptly to and preserve for the director of the state museum or the secretary of the North Carolina Historical Commission any Indian relic, artifact, mound, or burial ground discovered in the course of such construction or excavation. (1935, c. 198, s. 3.)

§ 6259(4). Destruction or sale of relic from public lands made misdemeanor. — Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the state museum or the secretary of the North Carolina Historical Commission, shall be guilty of a misdemeanor. (1935, c. 198, s. 4.)

CHAPTER 106
INSURANCE

SUBCHAPTER I. INSURANCE DEPARTMENT

Art. 1. Title and Definitions

§ 6260. Title of the chapter.—This chapter may be cited and shall be known as the Insurance Law. (Rev., s. 4677; 1890, c. 54.)

For full treatment of insurance see 7 N. C. Enc. Dig 765.

Purpose of Chapter. — Our statute-law makes elaborate and minute provisions for the protection of its people from imposition under the guise of insurance, and our insurance department is created and charged with the special duty of seeing that these provisions are complied with. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

§ 6261. Terms defined.—When consistent with the context and not obviously used in a different sense, the term "company" or "insurance company", as used in this chapter, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance; the word "'domestic" designates those companies incorporated or formed, and with home office, in this state; and the word "foreign," when used without limitation, includes all those formed by authority of any other state government, and whose home office is not located in this state. (Rev., s. 4678; 1899, c. 54, s. 1.)

Insurances Contemplated. — The insurance law clearly contemplates both incorporated and unincorporated companies. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

§ 6262. Contract of insurance.—A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity for, the destruction, loss, or injury of something in which the other party has an interest. (Rev., s. 4679; 1899, c. 54, s. 2.)

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

Art. 2. Insurance Commissioner

§ 6263. Department established.—The insurance department is hereby established as a separate and distinct department, which is charged with the execution of laws relating to insurance and other subjects placed under the department. (Rev., s. 4680; 1899, c. 54, s. 3; 1901, c. 391, s. 1.)

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

§ 6264. Commissioner's election and term of office.—The chief officer at the insurance department shall be called the insurance commissioner. He shall be elected by the people in the manner prescribed for the election of members of the general assembly and state officers, and the result of the election shall be declared in the same manner and at the same time as the election of state officers is now declared. His term of office begins on the first day of January next after his election, and is for four years or until his successor is elected and qualified. If a vacancy occurs during the term, it shall be filled by the governor for the unexpired term. (Rev., ss. 4680, 4681; 1907, c. 868.)

§ 6265. Bond of commissioner.—The insurance commissioner, before he enters upon the execution of his official duties, must give a bond to the state in the sum of twenty-five thousand dollars, with sufficient surety, to be approved by the state treasurer, conditioned upon the faithful performance of the duties of his office during his term of office; this bond extends to the faithful execution of the office of insurance commissioner by the person elected or appointed thereto until a new election or appointment of insurance commissioner is made and a new bond given. (Rev., s. 293; 1899, c. 54, s. 55; 1905, c. 430, s. 2.)

§ 6266. Seal of department.—The insurance commissioner, with the approval of the governor, shall devise a seal, with suitable inscription, for his office, a description of which, with the certificate of approval by the governor, shall be filed in the office of the secretary of state, with an impression thereof, which seal shall thereupon become the seal of office of the commissioner of the insurance department. The seal may be renewed whenever necessary. (Rev., s. 4682; 1899, c. 54, s. 11.)

§§ 6267, 6268. Repealed by 1925, c. 275, s. 6.

§ 6269. Duties of commissioner.—The insurance commisssioner shall:

(1) See that all laws relating to the companies, associations, and orders under the insurance department are faithfully executed.

(2) Furnish to each of the companies incorporated by this state and to the attorneys or general agents of companies and associations incorporated by other states and foreign governments, doing business in this state, printed forms for all statements required by law.

(3) On or before the tenth day of each month, and oftener should the sum to the credit of the state exceed $20,000, pay over all taxes, licenses, and fees received during the previous month to the state treasurer.

(4) Perform all duties now imposed upon him by law in regard to the examination, supervision, and conduct of companies and associations and orders.

(5) Upon a proper application by any citizen of this state, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.

He may administer the oaths in the discharge of his official duty. (Rev., s. 4689; 1899, c. 54, s. 8; 1905, c. 430, s. 3.)

§ 6270. Commissioner to provide books; make inspection; compensation.—The insurance commissioner shall provide all books and blanks of

every kind required to carry out the provisions of the law for inspection of buildings in towns and cities, and he or his deputy shall make inspections of the cities and towns of the state. Whenever the commissioner has reason to believe that the local inspectors are not doing their duty he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of law relative to the investigation of fires and the prevention of fire waste enforced. Out of the amount collected from fire waste insurance companies for the investigation of fires and the prevention of fire waste one-twentieth of one per cent on the premium receipts is allowed the commissioner for the extra duties required by this section. (Rev., s. 4690; 1905, c. 506, s. 6.)

§ 6271. Reports and records kept for public inspection.—The insurance commissioner shall keep on file in his office, for the inspection of the public, all the reports received by him in obedience to law. He shall keep and preserve in a permanent form a record of his proceedings, including a concise statement of the result of all official examinations of companies, a report of the condition of receiverships of insolvent companies, an exhibit of the financial condition and business methods as disclosed by the official examinations of the same, or by their several statements; and such other information and comments in relation to insurance and the public interest therein as he deems fit and proper to preserve. He shall keep the records of fires and matters connected therewith as required by section 6074 of the chapter on Fire Protection, a record of the policies insuring property of the state, as required by section 6449 of this chapter, and a record of the proceedings attending the service of process on him as agent for a foreign insurance company, as required by section 6415 of this chapter. (Rev., s. 4683; 1899, c. 54, ss. 9, 77; 1907, c. 1000, s. 1.)

§ 6272. Original documents and certified copies as evidence.—Every certificate, assignment, or conveyance executed by the commissioner, in pursuance of any authority conferred on him by law and sealed with his seal of office, may be used as evidence and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged or proved before an officer authorized by law to take the probate of deeds; and all copies of papers in the office of the commissioner, certified by him and authenticated by his official seal, shall be evidence as the original. (Rev., s. 4684; 1899, c. 54, s. 11.)

§ 6272(a). Admissibility as evidence of agent's authority. — In any case or controversy arising in any court of original jurisdiction within this State wherein it is necessary to establish the question as to whether any insurance or other corporation or agent thereof is or has been licensed by the State Insurance Department to do business in this State, the certificate of the Insurance Commissioner under the seal of his office shall be admissible in evidence as proof of such corporation or agent's authority as conferred by the State Insurance Department. (1929, c. 289, s. 1.)

§ 6273. Reports of commissioner to the governor and general assembly.—The commissioner shall biennially submit to the general assembly, thereof [through] the governor a report of his official act. The commissioner shall, from time to time, report to the general assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the general assembly is in session he shall make to the governor the recommendations called for in this section, to be transmitted to the general assembly, with the last annual report of this department, including receipts and disbursements; and there shall be printed by the public printer five hundred copies for the use of the commissioner and the usual number for the use of the general assembly. (Rev., ss. 4687, 4688; 1899, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; 1927, c. 217, s. 5.)

Editor's Note.—Before the amendment of 1927 the commissioners by this section were required to submit annually to the governor a report of their official acts, etc.

§ 6274. Authority over all insurance companies; no exemptions from license.—Every insurance company, association or order, as well as every bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company, as defined in the general insurance laws), must be licensed and supervised by the insurance commissioner, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the state for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the insurance commissioner to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his department and release for the payment of license, fees, and taxes. (Rev., s. 4691; 1903, c. 594, ss. 1, 2, 3.)

A fraternal insurance order incorporated under the laws of another state, but with branch offices, comes within the meaning of this section and must be licensed and supervised by the insurance commissioner. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

§ 6275. Examinations to be made.—Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the state to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stock-

holders, creditors, policyholders, or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the commissioner deems it prudent for the protection of policyholders in this state he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this state, and such company shall pay the proper charges incurred in this examination, including the expenses of the commissioner or his deputy and the expenses and compensation of his assistants employed therein. For these purposes the commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, and may summon, administer oaths to, and examine as witnesses, directors, officers, agents, and trustees of any such company, and any other person, in relation to its affairs, transactions, and condition. (Rev., s. 4692; 1899, c. 54, s. 13.)

§ 6276. Oath required for compliance with law.—Before issuing license to any insurance company to transact the business of insurance in this state, the insurance commissioner shall require, in every case, in addition to the other requirements provided for by law, that the company file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this chapter for the space of twelve months last past, and that it accepts the terms and obligations of this chapter as a part of the consideration of the license. (Rev., s. 4693; 1899, c. 54, s. 110; 1901, c. 391, s. 8.)

§ 6277. Investigation of charges.—Upon complaint being filed by a citizen of this state that a company authorized to do business in the state has violated any of the provisions of this chapter, the insurance commissioner shall diligently investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives, at the head office located in the United States, the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. He or his deputies shall have power to summon witnesses, and to compel them to appear before him, or either of them, and to testify under oath in relation to any matter which is, by the provisions of this law, a subject of inquiry and investigation, and may require the production of any book, paper, document, or other matter whatsoever deemed pertinent or necessary to such inquiry with the same force and effect as is possessed by courts of record in this state. (Rev., s. 4694; 1899, c. 54, s. 111; 1903, c. 438, s. 11; 1921, c. 136, s. 4; 1925, c. 275 s. 6.)

Editor's Note.—Prior to the amendment of 1921 this section provided that a bond to secure expense or cost could be required by the commissioner from the complaining party. By the amendment of 1921, $5000 was appropriated to carry out this section. By the amendment of 1925 the provisions for a bond and for an appropriation were omitted.

§ 6278. Collection of expenses of examination.—If any company, authorized to do business in this state under this chapter, fails or refuses to pay the expenses of examination upon the presentation of a bill therefor by the insurance commissioner, the commissioner shall at once institute appropriate action against the company for the recovery of the same. (Rev., s. 4695; 1899, c. 54, s. 113.)

§ 6279. Commissioner to prescribe forms and furnish blanks for returns.—It is the duty of the insurance commissioner to furnish blank forms for statements, which forms may be changed by him from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies under his department. The following, or such other forms as he prescribes, shall be used:

1. Return of Stock Companies, Other than Life Companies.—1. State the name of company. 2. Where located. 3. When incorporated, and for what period. 4. Amount of capital. 5. Amount of capital actually paid in. 6. Cash value of real estate owned. 7. Amount loaned on mortgage on real estate. 8. Amount and description of each kind of bonds and stocks owned, with par and market value. 9. Amount loaned on collateral, with par and market value of each security pledged. 10. Amount of cash on hand. 11. Amount of gross premiums in course of collection. 12. Amount of bills receivable, not matured, taken for premiums. 13. Amount of all other property or investments. 14. All outstanding losses. 15. Amount of unearned premiums on policies in force. 16. All other liabilities and claims against the company. 17. Amount of cash received for premiums. 18. Amount of notes received for premiums. 19. Amount received for interest and rents. 20. Amount of income received from all other sources. 21. Amount paid for losses. 22. Amount paid for dividends. 23. Amount paid for expenses. 24. All other expenditures. 25. Amount of risks written, terminated, and in force, with gross premiums thereon.

2. Return of Mutual Companies, Other than Life.—1. State the name of company. 2. Where located. 3. When incorporated, and for what period. 4. Amount of guarantee capital, if any. 5. Cash value of real estate owned. 6. Amount loaned on mortgage of real estate. 7. Amount and description of each kind of stocks and bonds owned, with par and market value. 8. Loans on collateral, with par and market value of each security pledged. 9. Cash in office and in bank. 10. Gross premiums in course of collection. 11. All other loans, investments, and property. 12. Premium notes liable to assessment. 13. Amount of scrip outstanding. 14. All outstanding losses. 15. Unearned premiums. 16. Dividends declared and unpaid. 17. Borrowed money. 18. All other liabilities and claims against the company. 19. Cash received for premiums. 20. Cash received for interest and rent. 21. Premium notes received. 22. Income from all other sources. 23. Amount paid for losses. 24. Amount paid for expenses. 25. Surplus returned to policyholders. 26. All other expenditures. 27. Scrip dividends declared. 28. Amount

of risks written, terminated, and in force, with gross premiums thereon.

3. Return of Life Insurance Companies.—1. The name of the company. 2. Where located. 3. When incorporated, and for what period. 4. Amount of capital stock or guarantee fund. 5. Cash value of real estate owned. 6. Amount loaned on mortgages of real estate. 7. Amount and description of each kind of bonds and stocks owned, with their par and market value. 8. Loans on collateral, with par and market value of each security pledged. 9. Cash in bank and in office. 10. Premium notes and loans on policies in force. 11. Outstanding and deferred premiums on policies in force. 12. All other loans, investments, and property. 13. All outstanding losses and policy claims. 14. Dividends of surplus due policyholders. 15. Forfeitures and surplus accrued, held for and to be divided to any special class of policyholders; surplus accrued in policies in force not yet distributed. 16. All other liabilities and claims against the company. 17. Cash received for premiums. 18. Cash received for interest and rents. 19. Income from all other sources. 20. Amount paid for losses and claims. 21. Dividends of surplus to policyholders. 22. Amount paid for expenses. 23. All other expenditures. 24. Number, date, amount, and kind of each outstanding policy not heretofore returned, gross premium thereon, and age of the insured. 25. Number, date, and amount of each policy which has within the year ceased to be in force, now terminated, what has been paid to the legal holder of the policy, and the age of the insured. (Rev., s. 4708; 1899, c. 54, s. 104.)

§ 6280. Annual statements to be filed with commissioner.—Every insurance company, association, or order—domestic, through its officers, and foreign, through its general agent—shall file in the office of the insurance commissioner, on or before the first day of March in each year, in form and detail as the insurance commissioner prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the insurance commissioner or some officer authorized by law to administer oaths. The insurance commissioner shall, in December of each year, furnish to each of the insurance companies authorized to do business in the state two or more blanks adapted for their annual statements. (Rev., s. 4698; 1899, c. 54, ss. 72, 73, 83, 97, 90; 1901, c. 706, s. 2; 1903, c. 438, s. 9.)

§ 6281. Punishment for making false statement.—If any insurance company in its annual or other statement required by law shall wilfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred nor more than one thousand dollars. (Rev., s. 3493; 1899, c. 54, s. 97.)

§ 6282. Commissioner to examine statements and publish abstracts.—It is the duty of the insurance commissioner to receive and thoroughly examine each annual statement required by this chapter, and, if made in compliance with the laws of this state, to publish, at the expense of the company, an abstract of the same in one of the newspapers of the state, which newspaper may be selected by the general agent making the statement, if within thirty days after the filing of the statement he notifies the insurance commissioner, in writing, of the name of the paper selected by him. (Rev., s. 4699; 1899, c. 54, s. 74; 1901, c. 391, s. 6.)

§ 6283. Certificate and reports sent to superior court clerks.—The insurance commissioner shall keep on file in his office, for the inspection of the public, all the reports received by him in obedience to this chapter, and shall certify to the clerk of the superior court of each county an abstract of each annual statement at the expense of the company making the same, and receive therefor from each company the sum of four dollars: Provided, the insurance commissioner may, in lieu of said abstract, file with the clerks of the courts a copy of the advance sheets of his report or the full report, or both; and he shall also certify, at like expense, to such clerks, on the first day of May each year, a list of the licenses in force at such dates and those that have expired without renewal or that have been revoked, and each clerk shall file such certified abstracts and lists in stub books, to be kept for that purpose, furnished by the insurance commissioner, which books shall be open for the inspection of the public. There shall be no tax for any seal on the certificates required by this section. (Rev., s. 4700; 1899, c. 54, s. 77; 1901, c. 391, s. 6; 1903, c. 438; s. 7; 1915, c. 166, s. 9; 1931, c. 74.)

Editor's Note.—The Act of 1931 struck out the words "each alternate month" formerly appearing in lines fourteen and fifteen of this section and inserted in lieu thereof "May each year."

§ 6284. Record of business kept by companies and agents; commissioner may inspect.—All companies, agents, or brokers doing any kind of insurance business in this state must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the insurance commissioner on demand, and the original books of records shall be open to the inspection of the commissioner, his deputy or clerk, when demanded. (Rev., s. 4696; 1899, c. 54, s. 108; 1903, c. 438, s. 11.)

§ 6285. Commissioner may employ actuary or accountant.—It is the duty of the insurance commissioner, when in his judgment it is necessary in order that he may be fully advised as to the exact financial condition of any insurance company and the manner in which its business has been or is being conducted, to employ an independent actuary to make a technical calculation of the business and policies of the company, or a skilled accountant to examine and check up the books of the company and the services shall be paid for as other bills against the state, out of the treasury, where payment is not otherwise provided for. (1907, c. 1000, s. 2.)

§ 6285(a). Employment, salary, and expenses of examiners.—To enable the insurance commis-

sioner to more effectually carry out the laws providing for the triennial examination of insurance companies, for the valuation of insurance policies, and the examination of other corporations under the supervision of the insurance department, he is hereby authorized to employ two examiners or accountants at a salary not to exceed twenty-five hundred dollars ($2,500) each, to be paid out of the general fund as other salaries are now paid, the traveling and other expenses of such examiners or accountants when engaged in the work of examination to be paid by the companies, associations, or orders under investigation. (1921, c. 218.)

§ 6286. Books and papers required to be exhibited.—It is the duty of any person having in his possession or control any books, accounts, or papers of any company, order, or person licensed under this chapter, to exhibit the same to the insurance commissioner or to any deputy, actuary, accountant, or person acting with or for the insurance commissioner. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or wilfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 3494, 4697; 1899, c. 54, s. 76; 1907, c. 1000, s. 3.)

Art. 3. General Regulations for Insurance

§ 6287. State law governs insurance contracts.—All contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein; and all contracts of insurance the applications for which are taken within the state shall be deemed to have been made within this state and are subject to the laws thereof. (Rev., s. 4806; 1899, c. 54, s. 2; 1901, c. 705, s. 1.)

See 13 N. C. Law Rev., 213, for note on "Validity of Statutes Localizing Insurance Contracts." See also page 41 for the law of contracts in general.

General Consideration. — The section is constitutional. Williams v. Life Ass'n, 145 N. C. 128, 28 S. E. 802. It did not have a retroactive effect. Id.

Application Taken out of State.—When neither party was a resident of the state at the time of the contract of insurance and the application was taken out of the state the rule of lex loci contractu will apply. Keesler v. Mutual Ben. Life Ins. Co., 177 N. C. 394, 99 S. E. 97.

Place Determined by Application. — Policies of insurance issued by foreign companies, the applications for which are taken in this State, are to be construed in accordance with the laws of this State. Horton v. Life Ins. Co., 122 N. C. 498, 29 S. E. 944. Although the Insurance Company may under its charter be allowed privileges which are contrary to statutes of this state. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Effect of Stipulation Making Policy a Foreign Contract.—A provision in a contract of insurance that, "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the home office of said association," is void in so far as the courts of this State are concerned. Blackwell v. Life Ass'n, 141 N. C. 117, 53 S. E. 833.

Applied in Fountain v. Mutual Life Ins. Co., 55 F. (2d) 120.

§ 6288. No insurance contracts except under this chapter.—It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this state, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this chapter. (Rev., s. 4807; 1899, c. 54, s. 2.)

Application to Foreign Contract Insuring Local Property.—The issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another State, not by or through any agent does not constitute "doing business" in the State of North Carolina, so as to require a resident process agent under section 1137. Ivy River Land, etc., Co. v. National Fire, etc., Co., 192 N. C. 115, 119, 133 S. E. 424.

Contract Valid as to Insured.—When a statute or valid regulation in restraint only of the company's action is made for protection of the policy holder, a recovery may ordinarily be had, though the contract is in breach of the regulation. Robinson v. Life, etc., Co., 163 N. C. 415, 79 S. E. 681; Blount v. Fraternal Ass'n, 163 N. C. 167, 79 S. E. 299; Morgan v. Fraternal Ass'n, 170 N. C. 75, 86 S. E. 975.

The statute does not impose on the insured the duty of showing the authority of the company or its agent, as the statute is for the protection of the policy holder, and a recovery can be had by the insured although as to the insurer the contract may be void. Gazzans v. Ins. Co., 155 N. C. 330, 71 S. E. 434.

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

§ 6289. Statements in application not warranties.—All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. (Rev., s. 4808; 1901, c. 705, s. 2.)

Cross References. — For full treatment of avoidance of policy for misrepresentation and fraud, see 7 N. C. Enc. Dig. 822; 14 N. C. Enc. Dig. 460.

Purpose.—The purpose of the statute is to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts. Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 261, 84 S. E. 274.

Material Representations.—In an application for a policy of life insurance every fact stated will be deemed material, which would materially influence the judgment of the insurance company either in accepting the risk or in fixing the premium rate. Bryant v. Metropolitan Life Ins. Co., 147 N. C. 181, 60 S. E. 983; Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

"The company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations." Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574, 576, citing Hancock Mut. Life Ins. Co. v. Houpt, (C. C.) 113 Fed. 572; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

It is not necessary, to defeat a recovery, that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed. Bryant v. Metropolitan Life Ins. Co., 147 N. C. 181, 60 S. E. 963.

The false representation of the relationship between insured and beneficiary is, as a matter of law, immaterial. Howell v. American Nat. Ins. Co., 189 N. C. 212, 218, 126 S. E. 605.

Where the application declares that the statements the applicant makes below are true and there is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, disease, surgical operations, and the like, are deemed material. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574; Alexander v. Metropolitan Life Ins. Co., 150 N. C. 536, 64 S. E. 432.

Answers made in response to questions in the application as to applications for other insurance, where the applicant declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law. Fountain v. Mutual Life Ins. Co., 55 F. (2d) 120, 123.

A representation by insured that he had never consulted a physician or been in a hospital is material, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy is competent on the issue of fraud. Potts v. Life Ins. Co., 206 N. C. 257, 174 S. E. 123.

Misrepresentations admitted, of which the court will take

judicial notice, must be deemed material as a matter of law; and their making is sufficient ground for canceling of the policy, whatever may be proved in extenuation of the conduct of insured in making them. Jeffress v. New York Life Ins. Co., 74 F. (2d) 874, 876.

A treatment for a mere temporary indisposition may well be regarded as immaterial where an applicant fully discloses medical treatment for a serious ailment administered at or about the same time. Id.

Same—Question for Jury.—Where the insured had hernia at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, "no exceptions," and there is evidence tending to show that the hernia did not affect the soundness of his health, it was for the jury to determine whether his representation was false and material. Hines v. New England Casualty Co., 172 N. C. 225, 90 S. E. 131.

Whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury. Harrison v. Metropolitan Life Ins. Co., 207 N. C. 487, 177 S. E. 423.

Sufficiency of Evidence.—Where the evidence shows that insured was suffering with an incurable disease, but the uncontradicted evidence shows he was ignorant of this fact, and that he had been assured by a physician whom he had consulted, that there was nothing the matter with him at the date of application, there is no evidence from which the jury could find that the statement made by the applicant in the application was fraudulent and this section is applicable. Missouri State Life Ins. Co. v. Hardin, 208 N. C. 22, 179 S. E. 2.

False Representations Known to Insurer.—If the insurance company knew that the representations made by the insured were false, it cannot take advantage of the misrepresentations and set this policy aside on the grounds that the representations were material or fraudulent. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 368, 79 S. E. 806.

Suppression of Material Facts.—Where insured, in her application failed to disclose that she had been treated within five years prior to the application by a physician, and the policy provided that insurer might cancel same for misleading statements in the application, the failure of plaintiff to disclose the treatment by the physician on the application was not a suppression of material fact in light of the evidence, and was not adequate cause for cancellation of the policy. Anthony v. Teachers' Protective Union, 206 N. C. 7, 173 S. E. 6.

Fraudulent Representations. — A material representation shall avoid the policy if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premiums. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 375, 79 S. E. 806.

After a contract of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor, as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

Same—Effect on Binding Slips.—Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the application for insurance is accepted, and as such slip does not insure of itself, it does not effect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentations made in the application for it. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

Fraternal Benefit Associations.—Fraternal benefit associations fall within the provision of this section as to representations. Gray v. Woodmen of the World, 179 N. C. 210, 102 S. E. 195.

§ 6290. Stipulations as to jurisdiction and limitation of actions.—No company or order, domestic or foreign, authorized to do business in this state under this chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void. (Rev., s. 4809; 1899, c. 54, ss. 23, 106, 1901, c. 391, s. 8.)

As to limitation of time in which action must be brought, see 7 N. C. Enc. Dig. 870.

Editor's Note.—The provision that limits the time to not less than one year after the cause of action accrues is construed by the court to mean not twelve months after loss but twelve months after all restriction preventing suit are removed. If sixty days are allowed for proof of loss the insured would have twelve months after the expiration of the sixty days in which to bring suit. Any restriction in the policy preventing the insured from bringing action prevents the twelve month limit in which action must be brought, from running against him.

Limitations Not in Conflict.—A stipulation in a policy as to time of bringing action is a contractual limitation, and has been held by the Supreme Court to be valid when it does not conflict with any provision of the statute. Parker v. Insurance Co., 143 N. C. 339, 344, 55 S. E. 717.

Construed with Standard Fire Insurance Policy.—The provisions of a standard fire insurance policy, as set out in section 6437, must be construed with the provision of this section, and when the action is brought within the time herein prescribed it will not be barred. Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 45, 65 S. E. 605. Under this policy the insured has sixty days to file his proof of loss and then, according to the provisions of this section and section 6437, he has twelve months within which to commence his suit. Muse v. London Ins. Co., 108 N. C. 240; Dibbrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783; Lowe v. United States Mut. Acci. Ass'n, 115 N. C. 18, 20 S. E. 169; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 414, 45 S. E. 773.

Not Construed as a Statute of Limitations.—The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute, have no effect upon it. Hence, the imprisonment of the insured will not give him right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. Holly v. London Assur. Co., 170 N. C. 4, 86 S. E. 694.

As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783.

Construed with Accident Policies. — The stipulations in accident insurance policies that proceedings shall not be begun until ninety days after proof of loss do not contravene this section, when the policy also states that the insured may bring his action within 12 months after the accident. This being construed to mean that he will have twelve months after the cause of action accrues. Heiling v. Aetna Life Ins. Co., 152 N. C. 358, 67 S. E. 927.

Fraternal Orders.—Provisions of the constitution and by-laws of a fraternal order of insurance, that suits shall not be brought or maintained for any cause or claim arising out of the benefit certificate of a member unless within one year from the time the right of action accrues, are valid. Faulk v. Fraternal Mystic Circle, 171 N. C. 301, 88 S. E. 431.

Surety Bond.—Contracts of indemnity against loss, or surety bonds for the faithful performance of a building contract are regarded in the nature of contracts of insurance and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 97 S. E. 732.

Limitation Must Be Plead.—A limitation in a surety bond as to the time in which an action may be maintained against the surety thereon, after notice of default, is contractual, and affects the remedy, and it is necessary that the surety plead it in the action for it to be available as a defense. Ideal Brick Co. v. Gentry, 191 N. C. 636, 132 S. E. 800.

Nonsuit.—In case a nonsuit is entered and it does not appear on record when the nonsuit was entered it will be presumed that it was within six months prior to the date on which action was commenced. Parker v. Insurance Co., 143 N. C. 339, 55 S. E. 717.

Bond and Investment Companies. — As to applicable to bond and investment companies, see sec. 6363.

§ 6291. Insurance as security for a loan by the company. — Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premiums shall not be considered as interest on such loans, nor will any loan be rendered usurious by reason of any such requirements, where the rate of interest charged for the loan does not exceed the legal rate and where the premiums charged for the insurance do not exceed the premiums charged to other persons for similar policies who do not obtain loans. (1915, c. 8; 1917, c. 61.)

§ 6292. Companies must do business in own name.—Every insurance company, foreign or domestic, must conduct its business in the state in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. (Rev., s. 4811; 1899, c. 54, s. 18.)

§ 6293. Publication of assets and liabilities; penalty for failure.—When any company publishes its assets it must in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements; and any publications purporting to show its capital must exhibit only the amount of such capital as has been actually paid in cash. Any company or agent thereof violating the provision of this section shall be punished by a fine of not less than fifty nor more than two hundred dollars. (Rev., ss. 3492, 4812; 1899, c. 54, ss. 18, 96.)

§ 6294. Liabilities and reserve fund determined.—To determine the liability of an insurance company, other than life and real estate title insurance, upon its contracts, and thence the amount such company must hold as a reserve for reinsurance, the insurance commissioner shall take the actual unearned portion of the premiums written in its policies. In case of the insolvency of any company, the reserve on outstanding policies may, with the consent of the commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4704; 1899, c. 54, s. 67; 1901, c. 391, s. 5; 1907, c. 1000, s. 4.)

§ 6295. Revocation of license of foreign company; publication of notice.—If the insurance commissioner is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or that it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligation in relation thereto, or if any foreign insurance company applies to have removed from the superior court of any county of this State to the United States circuit or district court any action instituted against it, or institutes any action at law or suit in equity in a United States court against any citizen of this state, growing out of or in any way connected with any policy of insurance issued by such insurance company, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers published in this state; and no new business may thereafter be done by it or its agents in this state while such default or disability continues, or until its authority to do business is restored by the commissioner. (Rev., s. 4701; 1899, c. 54, s. 14; 1901, c. 176, s. 1.)

As to making the corporation domestic and revocation of license, see 7 N. C. Enc. Dig. 778.

Editor's Note.—In the case of Pacific Mut. Life Ins. Co. v. Insurance Dept., 144 N. C. 442, 57 S. E. 120, it was held that this section is applicable only to suits growing out of or in some way connected with policies of insurance, and is not applicable to quarrels between an insurance company and its agent. It was conceded in the case that the statute was constitutional, citing Security Mut. Life Ins. Co. v. Previtt, 202 U. S. 246, 26 S. Ct. 619 (Ky.) This case holds that a statute prohibiting the removal of a case from the State Court to the Federal Court is constitutional. But in the case of Terral v. Burk Constr. Co., 257 U. S. 529, 66 L. Ed. 223, 42 S. Ct. 188 (Ark.) the case of Security Mut. Life Ins. Co. v. Prewitt is overruled and the court holds that the withdrawal of the privilege of doing business because of the exercise of the right to remove from the State to the Federal Court is unconstitutional.

In the case of Southern R. Co. v. Allison, 190 U. S. 326, 23 S. Ct. 713 (N. C.) the rule is laid down that a foreign railroad corporation has a right to remove from the State to the Federal Court although it is provided by statute that such corporation shall become a domestic corporation. It is further held that it does not become a domestic corporation.

Constitutionality of Restraint on Right to Removal.—A nonresident insurance company has the right to remove a suit brought against it from the State to the Federal Court under the Federal removal statute, and this section providing that upon its attempt to do so the insurance commissioner shall revoke its right to do business in this State is unconstitutional in this respect, and the right to removal obtains notwithstanding that under the statute the company has filed an application to do business in the State waiving its right to removal. Rhodes v. New York Life Insurance Co., 197 N. C. 337, 148 S. E. 439. See also note in 8 N. C. Law Rev. 218.

§ 6296. Revocation of license of domestic company; injunction and receiver.—If, upon examination, the insurance commissioner is of the opinion that any domestic insurance company is insolvent or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business. The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company and to settle its affairs, subject to such rules and orders as the court from time to time prescribes. (Rev., s. 4702; 1899, c. 54, s. 14.)

§ 6297. Revocation of license for violation of law or impaired assets.—1. The authority of a domestic or foreign insurance company may be revoked if it violates or neglects to comply with any provision of law obligatory upon it, and whenever in the opinion of the insurance commissioner its condition is unsound, or its assets above

its liabilities, exclusive of capital and inclusive of reserve or unearned premiums estimated as provided by this chapter, are less than the amount of its original capital or required unimpaired funds.

2. If the insurance commissioner is satisfied at any time that any statements made by any company licensed under this chapter are untrue, or if a general agent fails or refuses to obey the provisions of this chapter, the insurance commissioner may revoke and cancel such license.

An insurance company violating any provision of this chapter, or refusing to submit to the examination provided for in section eighteen of this chapter, when requested, forfeits its rights to do business in this state for twelve months thereafter, and the insurance commissioner shall immediately revoke the license issued to such insurance company to do business in this state. (Rev., ss. 4703, 4705; 1899, c. 54, ss. 66, 75, 1, 12; 1901; c. 391, s. 5.)

§ 6298. Agents and adjusters must procure license.—Every agent or adjuster of any insurance company authorized to do business in this state shall be required to obtain annually from the insurance commissioner a license under the seal of his office, showing that the company for which he is agent or proposes to adjust is licensed to do business in this state, and that he is an agent of such company and duly authorized to do business for it. And every such agent or adjuster, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit insurance. (Rev., s. 4706; 1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8, c. 774; 1915, c. 109, s. 7, c. 166, s. 1.)

As to punishment for violation of this section, see section 6305.

Validity of Contract When Agent Not Licensed.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of not having obtained the license required by law the policy is valid as to the right of action of the insured thereon. Hay v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241.

Agent of Fraternal Insurance Order.—This section is applicable to all agents including an organizer of a fraternal insurance order operating in North Carolina. State v. Arlington, 157 N. C. 640, 643, 73 S. E. 122.

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

§ 6299. Application for license.—Before a license is issued to an insurance agent or adjuster in this state, the agent or adjuster and the company for which he desires to act shall apply for the license on forms to be prescribed by the insurance commissioner; and before he issues a license to such agent or adjuster, the insurance commissioner shall satisfy himself that the person applying for license as an agent or adjuster is a person of good moral character, that he intends to hold himself out in good faith as an insurance agent or adjuster, and has sufficient knowledge of the business proposed to be done, that he has not willfully violated any of the insurance laws of the state, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interests. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7, c. 166, s. 7; 1931, c. 185.)

Editor's Note.—The Act of 1931 added at the end of this section the following: "and that such license, if issued, shall serve the public's interests."

§ 6300. Power of commissioner to revoke license.—When the insurance commissioner is satisfied that any insurance agent or adjuster licensed by this state has wilfully violated any of the insurance laws of this state, or has wilfully overinsured property of any of the citizens of the state or has wilfully misrepresented any policy of insurance or has dealt unjustly with or wilfully deceived any citizen of this state in regard to any insurance policies, or has failed or refused to pay over to the company which he represents, or has represented, any money or property in the hands of such agent or adjuster belonging to the company, when demanded, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in the next preceding section, or has in any other way become unfit for such position, the commissioner may revoke, and it shall be his duty to revoke, the license of such agent or adjuster for all the companies which he represents in this state for such length of time as he may decide, not exceeding one year. The insurance commissioner shall give to the agent or adjuster ten days notice of the revocation of such license, and shall give the reasons therefor; and the agent or adjuster shall have the right to have such revocation reviewed by any judge of the superior court of Wake county upon appeal. For the purpose of investigation under this section, the insurance commissioner shall have all the power conferred upon him by section 6431 of this chapter. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; 1929, c. 301, s. 1.)

Editor's Note.—The amendment of 1929 added disqualification because of nonresidence as set out in section 6301, to the grounds for revocation.

§ 6301. Nonresident agents forbidden; exception.—No nonresident of the state shall be licensed to do business in the state, except as a special agent or organizer, and then only when he reports his business for record as North Carolina business to some general or district agent of his company in the state, or having territory within the state. (Rev., s. 4707; 1899, c. 54, s. 108; 1903, c. 438; s. 11.)

§ 6302. Resident agents required; discrimination.—All business done in this state by steam-boiler, liability, accident, health, live-stock marine, leakage, credit, plate-glass, and fidelity insurance companies shall be by their regularly authorized agents residing in the state, or transacted through applications of such agents; and all policies so issued must be countersigned by such agents, who may pay not exceeding fifty per centum of the regular commissions allowed on the premiums collected on such business to a licensed nonresident broker. It shall be unlawful for any salaried officer, manager, or other representative of any company, unless a bona fide resident agent, to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent. It shall be unlawful for the Insurance Commissioner to license as a resident agent any person unless he is fully satisfied that such a person is a bona fide resident of this State, and is not being licensed for the purpose of evading the resident agent's law. No such companies nor

their agents may make any discrimination in favor of individuals or insurance, and the provisions hereafter set forth in this chapter with respect to discrimination by life insurance companies shall apply to the companies above named and their agents. (Rev., s. 4810; 1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; 1911, c. 196, s. 5; 1913, c. 140, s. 3; 1921, c. 136, s. 3; 1925, c. 70, s. 1.)

Editor's Note.—Prior to amendment of 1921, Public Laws, c. 136, section 3, no provision was made as to what brokerage fee should be paid by a resident agent. By amendment of 1921 five per cent was allowed for such fee.

The Public Laws of 1925 in amending this statute states that the section as amended by section 3 shall be changed without further designation of the amending act. Obviously this refers to section 3 of the Act of 1921, supra. This later amendment allows fifty per cent commission as brokage fee, and required that the local agent be a resident of the state, making it unlawful for the insurance commissioner to license as a resident agent anyone unless he is fully satisfied that such person is a bona fide resident of the state.

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

§ 6303. Agents personally liable, when.—An insurance agent is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the state. A person or citizen of the state who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this state, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (Rev., s. 4813; 1899, c. 54, s. 70; 1903, c. 438, s. 7.)

§ 6304. Payment of premium to agent valid; obtaining by fraud a crime.—An insurance agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year. (Rev., ss. 3486, 4814; 1899, c. 54, s. 69.)

Where the insurer has credited the amount of the unearned premium to its broker's account, who in turn has credited the amount to account of the broker who has procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premium not actually paid to the employer by the broker. Hughes v. Lewis, 203 N. C. 775, 166 S. E. 909.

§ 6305. Punishment for agent acting without license or violating law.—If any person shall assume to act as an insurance agent or broker without license therefor as required by law, or shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this state, or as principal or agent shall violate any provisions of law contained in this chapter, the punishment for which is not provided for elsewhere, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offense. (Rev., s. 3484; 1899, c. 54, s. 94; 1907, c. 1000, s. 8.)

Purpose of Section.—The entire, certainly the chief, purpose of this legislation is to protect people from harmful imposition in contracts and dealings of this character, and the evil which the statute is designated to prevent is as threatening in the case of a bogus as a real company, perhaps more so. State v. Arlington, 157 N. C. 640, 646, 73 S. E. 122.

Applicability to Fraternal Insurance Agents.—The agent of a fraternal insurance order is punishable under this section. State v. Arlington, 157 N. C. 640, 643, 73 S. E. 122.

Same—Acts Constituting Violation.—The conduct of a person in publishing advertisements circulating his cards, taking money, issuing receipts, assuming to represent a fraternal insurance order, comes within the permissible and proper meaning of the words used in the statute and clearly within the mischief contemplated. State v. Leeper, 146 N. C. 655, 61 S. E. 585; State v. Harrison, 145 N. C. 408, 417, 59 S. E. 867; State v. Arlington, 157 N. C. 640, 646, 73 S. E. 122.

Same—Indictment.—A bill of indictment for the offence provided for by this section will not be held fatally defective because it contains no direct averment that a fraternal order for which the business has been solicited is a company subject to the insurance regulations, when otherwise sufficient. State v. Arlington, 157 N. C. 640, 641, 73 S. E. 122.

§ 6306. Agent failing to exhibit license.—If any agent of any insurance company shall, on demand of any person from whom he shall solicit insurance, fail to exhibit a certificate from the insurance commissioner bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars or imprisoned ten days for each offense. (Rev., s. 3485; 1899, c. 54, s. 81.)

§ 6307. Agents making false statements.—If any solicitor, agent, examining physician, or other person shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any publication for insurance, or, shall make any such statement for the purpose of obtaining fee, commission, money, or benefit in any corporation transacting business in this state, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, at the discretion of the court. (Rev., s. 3487; 1899, c. 54, s. 60.)

§ 6308. Agents signing certain blank policies.—If any agent, commissioned or otherwise, of any fire marine, health, live-stock, leakage, credit, steam-boiler, liability, accident, plate-glass, or fidelity insurance company shall sign any blank contract or policy of insurance, upon conviction thereof he shall be fined for each offense not less than one hundrd dollars nor more than two hundred dollars. (Rev., s. 3488; 1899, c. 54, ss. 108, 109; 1911, c. 196, s. 6.)

§ 6309. Adjuster acting for unauthorized company.—If any person shall act as adjuster on a contract made otherwise than authorized by the laws of this state, or by any insurance company or other person not regularly licensed to do business in the state, or shall adjust or aid in the adjustment, either directly or indirectly, of a loss by fire on property located in this state, incurred on a contract not authorized by the laws of the state, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months

nor more than two years, or both, in the discretion of the court. (Rev., s. 3482; 1899, c. 54, s. 114.)

§ 6310. Agent violating insurance law.—If any person, either as principal or agent, or pretending to be such, shall solicit, examine, or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making, or executing any contract of insurance of any kind otherwise than the law permits, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or be imprisoned not less than one nor more than two years, or both, at the discretion of the court. (Rev., s. 3490; 1899, c. 54, s. 115.)

§ 6311. Informer to receive half of penalty.—The person, if other than the insurance commissioner or his deputy, upon whose complaint a conviction is had for violation of the law prohibiting insurance in or by foreign companies not authorized to do business in the state or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than authorized by the laws of this state, is entitled to one-half of the penalty recovered therefor. (Rev., s. 4831; 1899, c. 54, s. 93.)

§ 6312. Forms to be approved by insurance commissioner.—It is unlawful for any insurance company, association, order or society doing business in this state, to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the insurance commissioner of North Carolina, and copies filed in the insurance department. (1907, c. 879; 1913, c. 139.)

Validity of Unapproved Policy.—The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company. It does not say a policy shall be void unless approved by the Insurance Commissioner, but that it shall be unlawful for the company to issue such policy, and the reason for the language used is obvious. Blount v. Royal Fraternal Ass'n, 163 N. C. 167, 170, 79 S. E. 299.

Art. 4. Deposit of Securities

§ 6313. Deposits held in trust by commissioner or treasurer. — 1. Deposits by domestic company. — The insurance commissioner or the treasurer, in their official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the insurance commissioner or treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

2. Deposits by foreign company.—The commissioner or treasurer may return to the trustees or other representatives authorized for that purpose any deposit made by a foreign insurance company, when it appears that the company has ceased to do business in the state and is under no obligation to policyholders or other persons in the state for whose benefit the deposit was made.

3. Action to enforce or terminate the trust.—An insurance company which has made a deposit in this state pursuant to this chapter, or its trustees or resident managers in the United States, or the insurance commissioner, or any creditor of any company, may at any time bring an action in the superior court of Wake county against the state and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The process in this action shall be served on the officer of the state having the deposit, who shall appear and answer in behalf of the state and perform such orders and judgments as the court may make in such action. (Rev., s. 4709; 1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1; 1903, c. 536, s. 4.)

§ 6314. Deposits subject to approval and control of commissioner.—The deposits of securities required to be made by any insurance company of this state shall be approved by the insurance commissioner of the state, and he may examine them at all times, and may order all or any part thereof changed for better security, and no change or transfer of the same may be made without his assent. (Rev., s. 4710; 1903, c. 536, s. 5.)

§ 6315. Deposits by foreign companies required and regulated.—A foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States, shall not be admitted to do business in this state until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this state, it has made a deposit with the treasurer or insurance commissioner of this state, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, and may be made in the securities, but subject to the limitations, specified in this chapter with regard to the investment of the capital of domestic companies formed and organized under the provisions of this chapter. The deposit shall be deemed for all purposes of the insurance law the capital of the company making it. (Rev., s. 4711; 1899, c. 54, s. 64; 1903, c. 438, s. 6.)

§ 6316. Deposits by life companies not chartered in United States.—Every life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance depart-

ment or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars. (Rev., s. 4712; 1899, c. 54, s. 56.)

§ 6316(a). Registration of bonds deposited in name of treasurer.—The Insurance Commissioner is hereby empowered, upon the written consent of any insurance company depositing with the Insurance Commissioner or the State Treasurer under any law of this State, any state, county, city or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the Treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2.)

§ 6316(b). Notation of registration; release.—Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3.)

§ 6316(c). Expenses of registration.—The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4.)

Art. 5. License Fees and Taxes

§ 6317. Commissioner to report and pay monthly. — On or before the tenth day of each month the insurance commissioner shall furnish to the auditor a statement in detail of the taxes and license fees received by him under this chapter during the previous month, and shall pay to the treasurer the amount in full of such taxes and fees. The auditor may examine the accounts of the insurance commissioner and check them up with said statement. (Rev., s. 4714; 1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4.)

§ 6318. Schedule of license fees, taxes, and charges.—The insurance commissioner shall collect and pay into the state treasury fees, taxes, and charges as follows:

1. For each license issued to: a life insurance company or association, two hundred and fifty dollars; a fire insurance company or association, or to any company or association of companies operating a separate or distinct plant of agencies, two hundred dollars; an accident insurance company or association, two hundred dollars; a marine insurance company or association, two hundred dollars; a surety insurance company or association or mutual fire insurance company doing only one class of fire insurance business, one hundred dollars; a plate-glass insurance company or association, one hundred dollars; a boiler insurance company or association, one hundred dollars; a domestic mutual insurance company, fifty dollars; a domestic mutual insurance company, operating in not more than two counties, ten dollars; reciprocals or inter-insurers, fifty dollars; to a fraternal order, twenty-five dollars; a bond, investment, dividend, guarantee registry title guarantee or debenture company, one hundred dollars; all other insurance companies or associations, one hundred dollars. An underwriters agency, composed of two or more companies, proposing to do a reinsurance business only in the state may be licensed without a separate license for each company, upon filing with the insurance commissioner a statement of each company, the amount proposed to be assumed by them, and such other information as he may call for, showing that the companies are solvent and purpose to conduct the business in a way that would be safe and fair to the citizens of the state.

2. All of said companies shall pay a tax of two and one-half per centum upon the amount of their gross receipts in this state. But if any general agent files with the insurance commissioner a sworn statement showing that at least one-fourth of the entire assets of his company are invested and maintained in bonds of this state, or of any county, city, or town of this state, or any property situate in this state and taxable therein, the tax is one per centum upon the gross receipts aforesaid, and the license fee is one-half that named above, and if the amount so invested is three-fourths of the total assets, the tax is one-fourth of one per centum and the license fee one-fourth of that named above. Companies paying the taxes levied in this section are not liable for tax on their capital stock, and no county or corporation may impose any additional tax, license, or fee. The license fees and taxes imposed in this section must be paid to the insurance commissioner, and by him paid into the state treasury, as provided by law.

3. Annually for license issued to each general agent, five dollars; to each special or district agent or manager or organizer (including seal), three dollars; to each local or canvassing agent (including seal), one dollar; but any such company having assets invested and maintained in bonds of this state or of any county, city, or town of this state, or in any property situated in this state and taxable therein, amounting to three-fourths of its total assets, shall be charged only fifty cents for such license. In case of loss or destruction of the license the insurance commissioner, for a fee of fifty cents may certify to its issuance giving number, date, and form, which may be used by the original party named therein in lieu of the original license. There shall be no charge for the seal affixed to such certificate of said license.

4. Annually twenty dollars for each license issued to a resident broker, authorized to procure insurance in nonadmitted companies, and also a tax of five per centum on his gross premium receipts.

5. For filing and examining statement preliminary to admission, twenty dollars; for filing and auditing annual statement, ten dollars; for filing any other papers required by law, one dollar; for

each certificate of examination, condition or qualification of company or association, two dollars; for each seal when required, one dollar; for each examination of domestic company, twenty-five dollars; for each examination of foreign company, fifty dollars; for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars.

6. To be paid to the publisher, for the publication of each financial statement, nine dollars.

7. The commissioner shall receive for copy of any record or paper in his office ten cents per copy sheet and one dollar for certifying same, or any fact or data from the records of his office; for making and mailing abstracts to the clerks of the superior courts in the counties of the state, four dollars; for examination of any foreign company, twenty-five dollars per diem and all expenses, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars; also, to defray the expense of computing the value of the policies of domestic life insurance companies, one cent for every thousand dollars of the whole amount insured by its policies so valued. For the investigation of tax returns and the collection of any delinquent taxes disclosed by such investigation, the commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

8. He shall collect all other fees and charges due and payable into the state treasury by any company, association, order, or individual under his department. (Rev., s. 4715; 1899, c. 54, ss. 50, 68, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7, 706, s. 2; 1903, c. 438, ss. 7, 8; 1903, c. 536, s. 4; 1903, cc. 680, 774; 1905, c. 588, s. 68; 1913, c. 140, s. 1; 1919, c. 186, s. 6; 1935, c. 334.)

Editor's Note.—The amendment of 1935 added the last sentence of subsection 7 of this section.

Constitutionality.—Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporation may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax otherwise invalid. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

Fraternal Insurance Orders.—Subdivision (3) of this section is applicable to fraternal insurance companies organized under the laws of another state which is attempting to do business in this state. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

§ 6319. No additional charge by counties or towns.—No county or municipality may impose an additional tax, license, or fee upon any insurance company or agent. (Rev., s. 4716; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8.)

§ 6320. License fees for more than one class of insurance.—No insurance company admitted to do business in the state shall be authorized to transact more than one class or kind of insurance therein, unless it pays the license fees for each class. But upon the payment of the largest license fees provided in this chapter for any one business done a life insurance company may do a health business, and a fire insurance company may insure against loss or damage to property by lightning, wind, hail, or tornado, use and occupancy, and for nonoccupancy, and may insure vessels, freights, goods, money, effects, and money lent on bottomry or respondentia against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation; and may also insure against loss or damage by water to any goods or premises arising from leakage of sprinklers and water pipes. No insurance company may be required to pay license fees amounting in the aggregate to more than three hundred and fifty dollars per annum. (Rev., s. 4717; 1899, c. 54, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6.)

§ 6321. Licenses run from April first; pro rata payment.—The license required by this chapter shall continue for the next ensuing twelve months after April first of each year, unless revoked as provided in this chapter; but the insurance commissioner may, when the annual license tax exceeds twenty-five dollars, receive from applicants after April first so much of the license fee required by law as may be due pro rata for the remainder of the year, beginning with the first day of the current month. (Rev., s. 4718; 1899, c. 54, s. 78.)

§ 6322. Statements of gross receipts filed and tax paid.—Every general agent shall, within the first thirty days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business under this chapter obtained from residents of this state, or on property located therein during the preceding six months, and shall within the first fifteen days of February and August of each year, pay to the insurance commissioner the tax imposed by this chapter upon such gross receipts. (Rev., s. 4719; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438; s. 8.)

§ 6323. Policyholders to furnish information. — To enable the insurance commissioner the better to enforce the payment of the taxes imposed by this chapter, every corporation, firm, or individual doing business in the state shall, upon demand of the commissioner, furnish to him, upon blanks to be provided by him, a statement of the amount of all insurance held by them, giving the name of the company, number, and amount of policies and the premiums paid on each, and such other information as the commissioner calls for, or shall file an affidavit with the commissioner that all their insurance is placed in companies licensed to do business in this state. (Rev., s. 4720; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8.)

SUBCHAPTER II. INSURANCE COMPANIES

Art. 6. General Domestic Companies

§ 6324. Application of this chapter and general laws.—The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies

or with their charters. All insurance companies of this state shall be governed by this chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this chapter is filed with the insurance commissioner. (Rev., s. 4721, 1899, c. 54, s. 19.)

§ 6325. Extension of existing charters.—Domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after the limitation expires, and upon filing statement and paying the taxes and fees required for an amendment of the charter, continue to be bodies corporate, subject to all general laws applicable to such companies. (Rev., s. 4722; 1899, c. 54, s. 20.)

§ 6326. Certificate required before issuing policies.—No domestic insurance company may issue policies until upon examination of the insurance commissioner, his deputy or examiner, it is found to have complied with the laws of the state, and until it has obtained from the insurance commissioner a certificate setting forth that fact and authorizing it to issue policies. The issuing of policies in violation of this section renders the company liable for the forfeiture prescribed by law, but such policies are binding upon the company. (Rev., s. 4723; 1899, c. 54, ss. 21, 99; 1903, c. 438, s. 10.)

§ 6327. Purposes of organization. — Insurance companies, associations, or orders may be formed as provided in the two next succeeding sections for any one of the following purposes:

1. Fire and Storm.—To insure against loss or damage to property by fire, lightning, wind, hail or tornado, use and occupancy, and for nonoccupancy, upon the stock or mutual plan.

2. Marine.—To insure, upon the stock or mutual plan, vessel, freight, goods, money, effects and money lent on bottomry or respondentia against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation.

3. Life.—To carry on the business commonly known as the life insurance on the stock or mutual plan, contract for the payment of endowments or annuities, or make and enter into such other contracts conditioned upon the continuance or cessation of human life.

4. Sickness. — Against disablement resulting from sickness and every insurance appertaining thereto.

5. Accident. — Against injury, disablement, or death resulting from traveling or general accident and every insurance appertaining thereto.

6. Fidelity and Surety.—Guaranteeing the fidelity of persons holding places of public or private trust, and guaranteeing the performance of contracts other than insurance policies, and guaranteeing and executing all bonds, undertakings, and contracts of suretyship. And a company is authorized to execute such bonds, undertakings, and contracts of suretyship by itself, though a statute requires two or more sureties.

7. Plate-glass.—Upon glass against breakage.

8. Liability.—Insuring any one against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person, for and which the person insured is liable.

9. Boiler and Machinery.—Upon steam boilers and upon pipes, engines, and machinery connected therewith or operated thereby, against explosion and accident and against loss or damage to life, person, or property resulting therefrom. And a company is authorized to make inspection of and to issue certificate of inspection upon such boilers, pipes, engines, and machinery.

10. Burglary.—Against loss by burglary or theft, or both.

11. Credit.—To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts or otherwise to insure against loss or damage from the failure of persons indebted to the insured to meet their liabilities.

12. Sprinkler.—To insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers and water-pipes. And a company is authorized to make inspection of and to issue certificates of inspection upon such sprinklers and pipes.

13. Accidents to Vehicles.—To insure against loss or damage to property arising from accidents to elevators, automobiles, bicycles, and vehicles, except rolling stock of railways.

14. Live-stock. — To insure horses and other live-stock against death and damage.

15. Real estate title.—For the purpose of examining titles to real estate and furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrances and defective title.

16. Miscellaneous.—Against any other casualty authorized by the charter of the company, not included under the heads of life, fire, marine, or title insurance, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (Rev., s. 4726; 1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; 1911, c. 111, s. 1.)

§ 6328. Manner of creating such corporations.—The procedure for organizing such corporations is as follows: The proposed incorporators, not less than ten in number, a majority of whom must be resident of the state, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation doing business under the laws of this state as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact and on what business plan or principle; the place of its location within the state, and if on the stock plan, the amount of its capital stock. The words "insurance company," "insurance association," or "insurance society" must be a part of the title of any such corporation, and also the word "mutual," if it is organized upon the mutual principle. The certificate of incorporation must be subscribed and sworn to by the incorporators before an officer authorized to take acknowledgment of deeds, who shall forthwith certify the certificate of incorporation, as so made out and signed, to the insurance commissioner of the state at his office in the city of Raleigh. The insurance commissioner shall examine the certificate, and if he approves of it and finds that the requirements of the law have been

complied with, shall certify such facts, by certificate on such articles, to the secretary of state. Upon the filing in the office of the secretary of state of the certificate of incorporation and attached certificates, and the payment of a charter fee in the amount required for private corporations, and the same fees to the secretary of state, the secretary of state shall cause the certificate and accompanying certificates to be recorded in his office, and shall issue a certificate in the following form:

Be it known that, whereas (here the names of the subscribers to the articles of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation shall be inserted), for the purpose (here the purpose declared in the articles of association shall be inserted), with a capital (or with a permanent fund) of (here the amount of capital or permanent fund fixed in the articles of association shall be inserted), and have complied with the provisions of the statute of this state in such case made and provided, as appears from the following certified articles of association: (Here copy articles of association and accompanying certificates). Now, therefore, I (here the name of the secretary shall be inserted), secretary of state, hereby certify that (here the names of the subscribers to the articles of association shall be inserted), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (here the name of the corporation shall be inserted), with such articles of association, and have all the powers, rights, and privileges and subject to the duties, liabilities, and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed, and the seal of the state of North Carolina hereunto affixed, this the ..... day of ....., in the year ..... (in these blanks the day, month, and year of execution of this certificate shall be inserted; and in the case of purely mutual companies, so much as relates to capital stock shall be omitted).

The secretary of state shall sign the certificate and cause the seal of the state to be affixed to it, and such certificate of incorporation and certificate of the secretary of state has the effect of a special charter and is conclusive evidence of the organization and establishment of the corporation. The secretary of state shall also cause a record of his certificate to be made, and a certified copy of this record may be given in evidence with the same effect as the original certificate. (Rev., s. 4727; 1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3.)

§ 6329. First meeting; organization; license.—The first meeting for the purpose of organization under such charter shall be called by a notice signed by one or more of the subscribers to the certificate of incorporation, stating the time, place, and purpose of the meeting; and at least seven days before the appointed time a copy of this notice shall be given to each subscriber, left at his usual place of business or residence, or duly mailed to his postoffice address, unless the signers waive notice in writing. Whoever gives the notice must make affidavit thereof, which affidavit shall include a copy of the notice and be entered upon the records of the corporation. At the first meeting, or any adjournment thereof, an organization shall be effected by the choice of a temporary clerk, who shall be sworn; by the adoption of by-laws; and by the election of directors and such other officers as the by-laws required; but at this meeting no person may be elected director who has not signed the certificate of incorporation. The temporary clerk shall record the proceedings until the election and qualification of the secretary. The directors so chosen shall elect a president, secretary, and other officers which under the by-laws they are so authorized to choose. The president, secretary, and a majority of the directors shall forthwith make, sign, and swear to a certificate setting forth a copy of the certificate of incorporation, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the insurance commissioner, who shall examine the same, and who may require such other evidence as he deems necessary. If upon his examination the insurance commissioner approves of the by-laws and finds that the requirements of the law have been complied with, he shall issue a license to the company to do business in the state, as is provided for in this chapter. (Rev., s. 4728; 1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3.)

§ 6330. By-laws; classification and election of directors.—A domestic company may adopt by-laws for the conduct of its business not repugnant to law or its charter, and therein provide for the division of its board of directors into two, three, or four classes, and the election thereof at its annual meetings so that the members of one class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term. (Rev., s. 4724; 1899, c. 54, s. 22.)

§ 6331. Power to purchase, hold, and convey real estate.—Any company organized by special charter or under the provisions of the general insurance laws of this state may purchase, hold, convey real estate for the sole purposes and in the manner herein set forth:

1. Such as is necessary for its immediate use in the transaction of its business.

2. Property mortgaged to it in good faith as security for loans previously contracted or for money due.

3. Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

4. It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose; and such real estate acquired, and not necessary for the accommodation of the company in the convenient transaction of its business, shall be sold and disposed of within five years after the company has acquired title, and it is not lawful for it to hold the real estate for a longer period than that mentioned, unless it acquired such real estate prior to March sixth, one thousand eight hundred and ninety-nine, or procures a certificate from the insurance commis-

sioner that the interest of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such a time as the insurance commissioner directs in the certificate. Nothing contained herein prevents any insurance company from improving and conveying its real estate, notwithstanding the lapse of five years from its acquisition thereof, without having procured such certificate from the insurance commissioner. (Rev., s. 4725; 1899, c. 54, s. 22; 1903, c. 536, s. 2.)

§ 6332. Amount of capital required.—The amount of capital requisite to the formation and organization of companies under the provisions of this subchapter is as follows: Companies to insure plate-glass, not less than twenty-five thousand dollars. Companies issuing health policies, policies against damage by hail, or insuring marine risks or inland risks upon the stock plan, or insuring live-stock, not less than fifty thousand dollars. Companies for the purpose of transacting life or fire insurance on the stock plan, fidelity insurance, accident insurance, steamboiler insurance, credit insurance, sprinkler insurance, and insurance against loss by accident to vehicles, not less than one hundred thousand dollars; but life or accident companies on the industrial plan, issuing policies not over five hundred dollars, may be allowed to transact business with as little capital as fifty thousand dollars. Companies may be so formed to insure mechanics' tools and apparatus against loss by fire for an amount not exceeding two hundred and fifty dollars in a single risk, with a capital of not less than ten thousand dollars, divided into shares of the par value of ten dollars each. (Rev., s. 4729; 1899, c. 54, s. 26; 1903, c. 438, s. 4; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; 1929, c. 284, s. 1.)

Editor's Note.—By the amendment of 1929 the capital stock required was materially increased.

§ 6333. Capital stock fully paid in cash.—The capital stock shall be paid in cash within twelve months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is held as the capital of the company invested or to be invested as required by the next succeeding section. (Rev., s. 4730; 1899, c. 54, s. 27.)

§ 6334. Investment of capital.—Such capital shall be invested only as follows:

1. In first mortgage of real estate in this state.

2. In bonds of the United States or of any of the states whose bonds do not sell for less than par.

3. In the bonds or notes of any city, county, or town of this state whose net indebtedness does not exceed five per centum of the last preceding valuation of the property therein for purposes of taxation. The term "net indebtedness" excludes any debt created to provide an electric light plant and equipment, sewerage system, and a supply of water for general domestic use, and allows credit for the sinking fund of a county, city, town, or district available for the payment of its indebtedness.

4. Any insurance company having a capital stock of more than one hundred thousand dollars may, with the consent of the insurance commissioner, after investing one hundred thousand dollars of the capital as provided in this section, invest the balance in such other securities or in such safe manner as may be approved by the commissioner.

5. Any real-estate title insurance company organized for any of the purposes set forth in article fourteen of this chapter, and having a capital stock of more than fifty thousand dollars, may, with the consent of the insurance commissioner, after investing fifty thousand dollars of the capital, as provided in this section, invest the balance thereof in any such other securities including preferred stock in solvent corporations and including a reasonable investment not to exceed one-fourth of the total capital stock in abstract or title plants and no such company shall guarantee or insure in any one risk more than forty per cent of its combined capital and surplus without first having the approval of the insurance commissioner of North Carolina, which approval shall be endorsed upon the policy. If the capital stock of such company does not exceed fifty thousand dollars, it may, with the consent of the insurance commissioner, after having invested three-fourths of its capital stock as now provided by law, invest the balance hereof in abstracts of titles of property situated in one or more of the cities or counties of this state. (Rev., s. 4731; 1899, c. 54, s. 27; 1907, c. 798; 1907, c. 998; 1911, c. 32; 1913, c. 200; Ex. Sess. 1920, c. 54; 1923, c. 73; 1925, c. 187.)

§ 6334(a). Valuation of bonds and other evidences of debt; discretion of insurance commissioner.—All bonds or other evidences of debt having a fixed term and rate held by any life insurance company, assessment life association, or fraternal beneficiary association authorized to do business in this state may, if amply secured and not in default as to principal and interest, be valued as follows: If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made: Provided, that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the insurance commissioner shall have full discretion in determining the method of calculating values according to the foreign rule. (1921, c. 220.)

§ 6335. Authority to increase or reduce capital stock.—The insurance commissioner shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (Rev., s. 4732; 1899, c. 54, s. 15.)

§ 6336. Assessment of shares; revocation of license.—When the net assets of a company organized under this article do not amount to more than three-fourths of its original capital, it may make good its capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within sixty days and after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the insurance commissioner to that effect, make good its capital or reduce the same, as allowed by this article, its authority to transact new business of insurance shall be revoked by the commissioner. (Rev., s. 4733; 1899, c. 54, s. 28; 1903, c. 438, s. 4.)

§ 6337. Increase of capital stock.—Any company organized under this article may issue pro rata to its stockholders certificates of any portion of its actual net surplus it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the insurance commissioner a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the insurance commissioner finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the secretary of state, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the insurance commissioner shall issue his certificate to that effect. (Rev., s. 4734; 1899, c. 54, s. 29.)

§ 6338. Reduction of capital stock.—When the capital stock of a company organized under this article is impaired, the company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law, but no part of its assets and property shall be distributed to its stockholders. Within ten days after such meeting the company must submit to the insurance commissioner a certificate setting forth the proceedings thereof and the amount of the reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary, and a majority of its directors. The insurance commissioner shall examine the facts in the case, and if they conform to law, and in his judgment the proposed reduction may be made without prejudice to the public, he shall endorse his approval upon the certificate. Upon filing the certificate so endorsed with the secretary of state and paying a filing fee of five dollars, the company may transact business upon the basis of the reduced capital as though it were original capital, and its charter shall be deemed to be amended to conform thereto, and the insurance commissioner shall issue his certificate to that effect. The company may, by a majority vote of its directors, after the reduction, require the return of the original certificate of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. (Rev., s. 4735; 1899, c. 54, s. 30.)

§ 6339. Dividends declared; liability of stockholders for unlawful dividends.—No stock company organized under this article may pay a cash or stock dividend except from its actual net surplus computed as required by law in its annual statements, nor may any such company which has ceased to do new business of insurance divide any portion of its assets, except surplus, to its stockholders, until it has performed or canceled its policy obligations. No dividend shall be paid by any company incorporated in this state when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (Rev., s. 4736; 1899, c. 54, s. 31; 1903, c. 536, s. 3.)

§ 6340. Loans insufficiently secured.—Whenever it appears by examination, as authorized by law, that an insurance company, organized under the laws of this state, holds, as collateral security for the payment of any loan, any stock, bond, or security of whatever description, which has not a cash market value of at least twenty-five per centum more than the amount of such loan, the insurance commissioner may require the reduction of the loan or an increase of the collateral security, so that the security shall be at least twenty-five per centum in excess of the amount loaned. If the company fail to comply with this requirement within ten days after receiving written notice thereof from the commissioner, it is the duty of the commissioner to disallow the loan and to deduct the amount thereof from the assets of the company. If it appears, upon examination, that any such insurance company holds, as security for any loan, a mortgage upon real estate which is not a first lien or that the value of the real estate is less than fifty per centum in excess of the loan which it is mortgaged to secure, the insurance commissioner may disallow the loan and deduct the amount thereof from the assets of the company holding it, after having given the company at least twenty days notice, in writing, to change or conform the loan to the requirements of this section. (Rev., s. 4737; 1903, c. 536, ss. 6, 7, 8.)

Art. 7. Guaranty Fund for Domestic Companies

§ 6341. Guaranty fund established.—Any insurance company formed as provided in the preceding article, or now existing by virtue of any of the laws of North Carolina, may establish a guaranty fund of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, in the following manner: The company may receive from any person, firm, or corporation, money, bonds, or other securities, in such

amount as may be agreed upon, for the purpose of providing a guaranty fund, to be used as hereinafter provided, for payment of the claims of policyholders. Upon the receipt of such bonds, money or other securities by an insurance company, it shall issue its certificate, in writing, authenticated as required by law for certificates of stock, stating the amount, terms, and conditions of repayment of such money or the return of such bonds or other securities, the name of the payee or depositor, and the certificate shall also state upon its face that it is issued under the provisions of this section. The money, bonds, or other securities, when so paid to or deposited with such insurance company, becomes a part of the guaranty fund of the company, and are liable for all the claims of policyholders after the general assets of the company have been exhausted. This guaranty fund is not liable for the claims or debts due to stockholders or the general creditors of such insurance company. No insurance company shall create a guaranty fund, as provided in this article, except upon the approval of a majority of its stockholders authorized at any regular or special meeting called for the purpose. (1909, c. 922, s. 1.)

§ 6342. Separate accounts; application of fund.—Every insurance company which establishes a guaranty fund under the provisions of this article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund may be deposited with the insurance commissioner, as is now allowed by law, subject to the further provisions of this article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received a semi-annual dividend of not more than three and one-half per cent on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment if any are available. (1909, c. 922, s. 1.)

§ 6343. Reduction or retirement of fund.—The guarantee fund shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force and such guarantee fund may be reduced or retired by vote of the directors of the company and the assent of the insurance commissioner, if the net assets of the company above the reinsurance reserve and all other claims and obligations exclusive of the guaranty fund, for two years immediately preceding and including the date of its last annual statement, are not less than twenty-five per centum of the fund. Due notice of this proposed action on the part of the directors of the company must be mailed to each director of the company not less than thirty days before the meeting when such action may be taken, and must also be advertised in two newspapers of general circulation, to be approved by the insurance commissioner, not less than twice a week for a period of not less than four weeks before the meeting. No insurance company with a guaranty fund, as hereinbefore provided, which has ceased to do new business, may return or retire any part of the guaranty fund or divide to its stockholders any part of its general assets, except incomes from its investments, until it shall have performed, reinsured, or canceled its policy obligations. (1909, c. 922, s. 1.)

§ 6344. Insolvency; return of fund.—In the event of insolvency or voluntary liquidation of any such insurance company, the amount of the guaranty fund shall be returned to the persons, firms, or corporations, their heirs, executors, administrators, successors, or assigns, from which the same was received, in full or pro rata, as the case may be, before any amount shall be paid from the assets of said company to its stockholders. The intention of this section is that the liability of the company for the repayment or the return of its guaranty fund, as evidenced by its certificates therefor, as hereinbefore provided, shall be preferred in the distribution of its assets to the stockholders and general creditors of the company, other than its policy obligations. (1909, c. 922, s. 1.)

§ 6345. Conversion to guaranty fund.—Any insurance company now doing business as a domestic insurance company under the laws of this state which has received any money or securities to be held as a guaranty capital, guaranty surplus, or guaranty fund, may convert the same into a guaranty fund, as hereinbefore provided, by mutual agreement between the board of directors of the insurance company and the parties from whom the money or securities have been received, subject, however, to the approval of the insurance commissioner, and thereupon certificates shall be issued therefor, as hereinbefore provided, and the same shall thereafter be held subject to the rights and liabilities provided in this article. (1909, c. 922, s. 2.)

Art. 8. Mutual Insurance Companies

§ 6346. Mutual fire insurance companies organized; requisites for doing business.—Mutual fire insurance companies may be formed under this article, but no policy may be issued by a purely mutual fire insurance company, or by a mutual fire insurance company with a guaranty capital of less than fifty thousand dollars, until not less than two hundred thousand dollars of insurance, in not less than two hundred separate risks upon property located in North Carolina, has been subscribed for and entered on its books; but in the formation of mutual fire insurance companies to operate in no more than two counties of this state, whether town or farmers' mutuals, the requirement as to amount of insurance shall be twenty-five thousand dollars in risks owned by at least

twenty-five adult residents of such towns or counties; but where there is an association or corporation for the purpose of interinsurance or mutual protection between members of said association or corporation, which members or stockholders are engaged in the same line of business, the requirement shall be fifty instead of two hundred separate risks. No policy may be issued under this section until the president and the secretary of the company have certified under oath that every subscription for insurance in the list presented to the insurance commissioner for approval is genuine, and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days after the granting of a license to the company by the insurance commissioner to issue policies. (Rev., s. 4738; 1899, c. 54, ss. 25, 32, 34; 1901, c. 391, s. 3; 1903, c. 438, s. 4; 1911, c. 93.)

§ 6347. Assessments kept in treasury; certain officers debarred from commissions.—Every mutual or assessment company or association organized or doing business in the state on the assessment plan shall keep in its treasury at least one assessment sufficient to pay one average loss. No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected by a mutual fire insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (Rev., s. 4738; 1899, c. 54, s. 32; 1903, c. 438, s. 4.)

§ 6348. Policyholders are members of mutual fire companies.—Every person insured by a mutual fire insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the bank of each policy, receipt, or certificate of renewal, as follows:

The insured is hereby notified that by virtue of this policy he is a member of the ..... insurance company, and that the annual meetings of the company are held at its home office on the ..... day of ....., in each year, at ..... o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than twenty votes. (Rev., s. 4739; 1899, c. 54, s. 33.)

§ 6349. Directors in mutual fire companies.—Every mutual fire insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the by-laws provide and until their successors are qualified. Two-thirds at least of the directors must be citizens of the state, and after the first election members only are eligible, but no director is disqualified from serving the term he was chosen for by reason of the expiration or cancellation of his policy. In companies with a guaranty capital, one-half of the directors shall be chosen by and from the stockholders. (Rev., s. 4739; 1899, c. 54, s. 33.)

§ 6350. Mutual fire companies with a guaranty capital.—A mutual fire insurance company formed as provided in this article, or a mutual fire insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the same manner as is provided in this subchapter for the investment of the capital stock of certain insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to a semiannual dividend of not more than three and one-half per centum on their respective shares, if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve for reinsurance, as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force, and may be reduced or retired by vote of the policyholders of the company and the assent of the insurance commissioner, if the net assets of the company above its reinsurance reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than thirty days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the insurance commissioner, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus except income from investments, until it has per-

formed or canceled its policy obligations. (Rev., s. 4740; 1899, c. 54, s. 34; 1911, c. 196, s. 3.)

§ 6351. Dividends and assessments; liability of policyholders.—The directors of a mutual fire insurance company may from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year. Each policyholder is liable to pay his proportional share of any assessments which are made by the company in accordance with law and his contract on account of losses incurred while he was a member, if he is notified of such assessments within one year after the expiration of his policy. Any mutual fire insurance company doing business with a fixed annual premium may in its by-laws and policies fix the contingent liability of its members for the payment of losses and expenses not provided for by its cash funds, which contingent liability must not be less than a sum equal to the cash premium written in his policy and in addition thereto. The by-laws may also provide for policies to be issued for cash premiums without contingent liability of policyholders; provided, that no mutual fire insurance company shall issue any policy without contingent liability until and unless it possesses a surplus of at least one hundred thousand dollars. The total amount of the liability of the policyholder must be plainly and legibly stated upon the back of each policy. Whenever any reduction is made in the contingent liability of members, it applies proportionally to all policies in force: Provided this section shall not apply to farmers mutual fire insurance companies. (Rev., s. 4741; 1899, c. 54, s. 35; 1935, c. 89.)

Editor's Note.—Prior to the amendment the contingent liability was required to be not less than a sum equal to five times the cash written in its policy. The third from the last sentence of this section relating to provisions in by-laws was added by the amendment. The proviso at the end of the section was also added.

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N. C. 300, 306, 176 S. E. 585.

§ 6351(a). Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.—When any policy of insurance is issued by any mutual insurance company or association organized under the laws of this state and such policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attached thereto as a rider thereupon, a provision or provisions to be approved by the insurance commissioner, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than ten days notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the insurance commissioner, may agree with the assignee or mortgagee upon an assignment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagee, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess. 1920, c. 79.)

§ 6352. Guaranty against assessments prohibited.—If any director or other officer of a mutual fire insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3496; 1899, c. 54, s. 100.)

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N. C. 300, 306, 176 S. E. 585.

§ 6353. Manner of making assessments; rights and liabilties of policyholders.—When a mutual fire insurance company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to reinsure the unexpired term of his policy

at the same rate as the whole was insured at first. Each policyholder must pay or receive according to the first assessment, and his policy shall be canceled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the by-laws. (Rev., s. 4742; 1899, c. 54, ss. 36, 37.)

Forfeiture and Waiver.—It is clear that failure to pay assessments, in accordance with the terms of a contract works a forfeiture of the policy. It is equally well settled that a company may by acts of unequivocal character waive such forfeiture. Perry v. Farmers Mut. Life Ins. Co., 132 N. C. 283, 287, 43 S. E. 837.

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy. Perry v. Farmers Mut. Life Ins. Co., 132 N. C. 283, 43 S. E. 837.

Right of Insured to Withdraw.—Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. Perry v. Farmers Mut. Fire Ass'n, 139 N. C. 374, 51 S. E. 1025.

Payments of Claims.—The right of each policyholder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. Perry v. Farmers Mut. Fire Ass'n, 139 N. C. 374, 51 S. E. 1025.

§ 6354. Mutual life and health companies.—Life and health insurance companies and associations organized in this state to do business on the mutual plan shall be governed as to the commencement of business, election of members, guaranty capital, dividends, and assessments as provided in this article for mutual fire insurance companies, where applicable. (Rev., s. 4743; 1903, c. 536, s. 1.)

§ 6355. Dividends on, and redemption of, guaranty capital of life companies.—The stockholders of the guaranty capital of any domestic life insurance company are entitled to such annual dividends not exceeding eight per centum, payable from the net surplus, as have been agreed upon in the subscription thereof. Such company may redeem its guaranty capital by appropriation of net surplus for that purpose whenever its members so vote. (Rev., s. 4744; 1899, c. 54, s. 58; 1903, c. 338, s. 5.)

Art. 9. Assessment Companies

§ 6356. Copies of charter and by-laws filed.—Every corporation, society, or organization of this or any other state or country, transacting business under this department upon the coöperative or assessment plan, must file with the insurance commissioner, before beginning to do business in this state, a copy of its charter or articles of association, and the by-laws, rules, or regulations referred to in its policies or certificates and made a part of such contract. By-laws or regulations not so filed with the insurance commissioner will not avoid or affect any policy or certificate issued by such company or association. (Rev., s. 4790; 1899, c. 54, s. 86.)

§ 6357. Contracts must accord with charter and by-laws.—Every policy or certificate or renewal receipts issued to a resident of this state by any corporation, association, or order transacting therein the business of insurance upon the assessment plan must be in accord with the provisions of the charter and by-laws of such corporation, association, or order, as filed with the insurance commissioner. It is unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and the terms of its by-laws, or, through an agent or otherwise, to offer or issue any policy, renewal certificate, or other contract whose terms are not in clear accord with the powers, terms, and stipulations of its charter and by-laws. (Rev., s. 4791; 1899, c. 54, s. 84; 1903, c. 438, s. 9.)

Duty and Liability under By-laws.—The by-laws of an assessment association when assented to by the members, as provided in this chapter, constitute the measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. Duffy v. Fidelity Mut. Life Ins. Co., 142 N. C. 103, 55 S. E. 79.

Duty and Liability under Charter.—The contract of insurance must conform to the charter and by-laws, and these are as authorized by the state of its origin. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81; Caldwell Land, etc., Co. v. Board, 174 N. C. 634, 94 S. E. 406, cited and distinguished.

Assessment companies are prohibited from issuing policies or transacting business not authorized by its charter. Brenizer v. Royal Arcanum, 141 N. C. 409, 418, 53 S. E. 835.

§ 6358. "Assessment plan" printed on application and policy; waiver by commissioner. — Every policy or certificate issued to a resident of the state by any corporation transacting in the state the business of life insurance upon the assessment plan, or admitted to do business in this state on the assessment plan, shall print in bold type and red ink, near the top of the front page of the policy, upon every policy, or certificate issued upon the life of any such resident of the state, the words "issued upon the assessment plan"; and the words "assessment plan" shall be printed conspicuously in red ink in and upon every application, circular card, and any and all printed documents issued, circulated or caused to be circulated by such corporation within the state, save and except, however, in advertising in newspapers within the state, in which case the words may be printed in black. The insurance commissioner may waive the provisions of this section as to assessment companies or associations who conduct their business on an annual premium basis and maintain a full reserve of at least four per cent, based on any recognized table of mortality, and at all times maintain a net surplus over and above all liabilities and available for the payment of claims, sufficient to preclude the possibility of an extra assessment being levied against policyholders. Said waiver must be in writing and the insurance commissioner may revoke it at any time for cause. (1913, c. 159, s. 1; 1929, c. 93, s. 1; 1933, c. 34.)

Editor's Note.—The amendment of 1929 added the last sentence of this section.

Public Laws 1933, c. 34, changes the waiver provision of this section to apply to associations maintaining a reserve of four per cent., rather than three and one-half per cent., based on any recognized Mortality Table, rather than the American Experience Mortality Table.

§ 6359. Revocation for noncompliance.—If any corporation or association transacting insurance business in this state on the assessment plan or issuing any policy upon the life of a resident of North Carolina upon the assessment plan shall fail or refuse to comply with the foregoing sec-

tion, the insurance commissioner shall forthwith suspend or revoke all authority of such corporation or association and of its agents to do business in this state. (1913, c. 159, s. 2.)

§ 6360. Deposits and advance assessments required.—Every domestic insurance company, association, order, or fraternal benefit society doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss; and no such company, association, order, or fraternal benefit society shall be licensed by the insurance commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal loan banks, or in the bonds of some city, county, or town of North Carolina to be approved by the insurance commissioner, or deposit with him a good and sufficient bond, secured by a deed of trust on real estate situated in North Carolina and approved by him, or by depositing with the insurance commissioner a bond in an amount of not less than five thousand ($5,000) dollars, issued by any corporate surety company authorized to do business in this state. Such companies, association, orders, or societies now doing business in this state and not issuing policies or certificates for more than two hundred dollars, shall be permitted to deposit five hundred dollars on the first day of July, one thousand nine hundred and thirteen, and five hundred dollars each six months thereafter until the required amount is deposited; and the last named association when hereafter organized may be allowed by the insurance commissioner to make such deposit in like installments. The insurance commissioner may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the state and restricting their activities to not more than two adjacent counties. (Rev. s. 4792; 1913, c. 119, s. 1; 1917, c. 191, s. 2; 1933, c. 47.)

Editor's Note.—Public Laws of 1933, c. 47, inserted the clause at the end of the first sentence of the section and also added the sentence appearing at the end of the section.

§ 6361. Deposits by foreign assessment companies or order.—Each foreign insurance company, association, order, or fraternal benefit society doing business in this state on the assessment plan shall keep at all times deposited with the insurance commissioner or in its head office in this state, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this state during the time allowed by it for the collection of assessments and payment of losses. It shall notify the insurance commissioner of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the insurance commissioner, or a good and sufficient bond or note, secured by deed of trust on real estate situate in North Carolina, and approved by the commissioner. The provisions of this section do not apply to associations, orders, or fraternal benefit societies operating in not more than two adjacent counties in the state and paying a benefit of not exceeding two hundred dollars, but the amount to be deposited by said societies is within the discretion of the insurance commissioner, but must be not less than one-hundred dollars. (Rev., s. 4713; 1899, c. 54, s. 84; 1903, c. 438; s. 9; 1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2.)

§ 6362. Revocation of license.—If any such corporation, association, or order at any time fails to comply with the provisions of the two next preceding sections or shall issue policies or certificates not in accord with its charter and by-laws, as provided in this article, the insurance commissioner shall forthwith suspend or revoke all authority to it, and of all its agents or officers, to do business in this state, and shall publish such revocation in some newspaper published in this state. (Rev., s. 4793; 1899, c. 54, s. 85.)

Art. 10. Bond and Investment Companies

§§ 6363 to 6375. Repealed by Laws 1925 and 1927. See §§ 3924(a) to 3924(z).

I. Note to Section 6363.
II. Note to Section 6367.
III. Note to Section 6372.

I. NOTE TO SECTION 6363.

As to limitation of suit, see sec. 6290.

Constitutionality.—It is within the police powers of a state to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a reserved power in the state from that granted to the general government, and does not contravene either the State of Federal Constitution. State v. Fidelity, etc., Co., 191 N. C. 634, 132 S. E. 792.

The purpose is to protect the general public from "wild cat" organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling "blue-sky stock," without obtaining license and giving bond. State v. Fidelity, etc., Co., 191 N. C. 643, 645, 132 S. E. 792.

"The laws of Massachusetts on the subject have been copied with few exceptions throughout the county. This class of legislation has come to be known as the 'Blue Sky Laws.' The object, of course, of the 'Blue Sky Laws' is not only to keep worthless stock off the market but to make actual values and par values correspond. Thus, if the par value of a share of stock is one hundred dollars, the part of the assets of the corporation represented by a share of stock must be worth one hundred dollars." N. C. Law Rev. 1, 27.

Scope of Section.—It is an "investment company" offering to the public an investment in lands and fig orchards in Georgia. It is also offering the "obligation of said corporation" to cultivate said land, and giving its contract to make title in compliance with certain terms; and, lastly, it is offering for sale, such "evidences of property." Under all three of these provisions it is within the scope of this section. State v. Agey, 171 N. C. 831, 833, 88 S. E. 726.

Limitations of Suit. — Contracts of indemnity against loss, or surety bonds, for the faithful performance of a building contract are regarded in the nature of contracts of insurance coming under the provisions of this section and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 45, 97 S. E. 732.

Process and Service.—This section does not require service of process upon the insurance commissioner, in cases of bonding companies, although license is issued by the insur-

ance commissioner service on local agent is sufficient. Pardue v. Absher, 174 N. C. 676, 678, 94 S. E. 414.

Agent's Liability for Violation.—The failure or refusal of the corporation to comply with the requirements of our statutes to obtain license makes the defendant, its agent, guilty of the offense charged. State v. Agey, 171 N. C. 831, 88 S. E. 726.

One who sells certificates of shares of stock in a corporation upon a commission basis without having obtained a license to do so, comes within the inhibition of this statute, though the sale may have been effected by another acting through such solicitor without compensation. Burlington Hotel Corp. v. Bell, 192 N. C. 620, 621, 135 S. E. 616.

Enforcement of Contract.—Where a subscription contract for purchase of shares of stock in a corporation was procured by one who has not obtained a license from the Insurance Commissioner, the contract is not enforcible against such subscriber. Burlington Hotel Corp. v. Bell, 192 N. C. 620, 621, 135 S. E. 616.

Contracts To Be Executed Out of State.—Where a foreign corporation has issued a bond indemnifying a North Carolina concern against loss under a contract with an agency, located in another State, established to collect moneys, etc., for insurance premiums, which bond was delivered to the agent to be sent to the indemnified here for approval and acceptance, the contract of indemnity is to be construed and enforced in accordance with our own laws. Dixie Fire Ins. Co. v. American Bonding Co., 162 N. C. 384, 385, 78 S. E. 430.

Domestic Corporations.—This section applies to sales of stock in a domestic corporation as well as a foreign one, irrespective of whether the same was either fraudulently procured or falls within the intent and meaning of the "Blue-Sky" law. Burlington Hotel Corp. v. Bell, 192 N. C. 620, 135 S. E. 616.

Notes given for the purchase of shares of stock in a corporation being organized are not void for noncompliance with the provisions of sections 6363 and 6367, when the shares were not put upon the market by agents, or commissions paid to anyone for procuring subscriptions thereto. Hotel Corporation v. Bell, 192 N. C. 620, cited and distinguished. Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 420, 142 S. E. 578.

Cited in Hotel Corporation v. Dixon, 196 N. C. 265, 145 S. E. 244.

II. NOTE TO SECTION 6367.

See note to § 6363.

Fraudulent Representations. — If the agent selling the stock represents to the plaintiff that certain parties would devote their time to the business, and that the statute has been complied with, and that the stock would not be sold below a certain price, such representation if false within the knowledge of the defendant constitutes actionable fraud. McNair v. Southern States Finance Co., 191 N. C. 710, 133 S. E. 85.

Knowledge of the Plaintiff.—When plaintiff did not know, and was not in a position to know of the falsity of the representations as made to him the parties will not be considered in pari delicto. McNair v. Southern States Finance Co., 191 N. C. 710, 133 S. E. 85.

Recovery of Damages.—A purchaser of shares of stock may recover damages upon the false representations of the seller that all of the provisions of the Blue-Sky Law, this section, had been complied with, with the burden of proof on the purchaser, the plaintiff in the action, to show his damages arising therefrom. McNair v. Southern Finance Co., 191 N. C. 710, 711, 133 S. E. 85.

Domestic Corporations.—This law was at first applied only to foreign corporations but by chapter 121, Public Laws 1919, it was made to apply as well to domestic corporations. The law appears in toto in 6363-6375, and the provision which in itself is known as the "Blue-Sky" law, is section 6367. 3 N. C. Law Rev. 151.

The requirements of this section as to soliciting the purchase of shares of stock in a certain corporation in accordance with certain conditions, applies by statutory amendment of 1919, not only to corporations formed in other states, but also to domestic corporations. Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859. See also Burlington Hotel Corp. v. Bell, 192 N. C. 620, 135 S. E. 616.

Notes Given for Stock.—Where a negotiable note is given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, the note is voidable against a holder who has acquired it with notice of the illegality or fraud in the procurement of the instrument. Planters Bank, etc., Co. v. Felton, 188 N. C. 384, 124 S. E. 849.

III. NOTE TO SECTION 6372.

Liability for Principal's Act.—The State has a right to require evidence of good faith, of assets, and of responsibility from nonresident parties offering to sell to our people "investments" or "evidences of property" on contracts. An agent of a company who fails to do this, in defiance of our laws, is properly found guilty. State v. Agey, 171 N. C. 831, 836, 88 S. E. 726.

Art. 11. Fidelity Insurance Companies

§ 6376. May act as fiduciaries.—Any corporation licensed by the insurance commissioner, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this state without giving any bond; and the clerks of the superior courts or other officers charged with the duty, or clothed with the power of making such appointments, are authorized to appoint such corporation to any such office, whether the corporation is a resident of this state or not. (Rev., s. 4799; 1899, c. 54, s. 47; 1903, c. 438, s. 5.)

See § 6379 and note.

Applied in Quinton v. Cain, 203 N. C. 162, 165 S. E. 543.

§ 6377. License to do business.—Before any such corporation is authorized to execute any bond, obligation, or undertaking, or act in any fiduciary capacity without bond, it must be licensed by the insurance commissioner of the state, which the commissioner is authorized to do when satisfied that such company or corporation is safe and solvent and has complied with the laws of this state applicable to such companies, and if a foreign company, that it has also complied with the conditions, rules, and regulations governing the admission of foreign insurance companies to do business in this state; but if such corporation be engaged in the business of commercial banking then such license shall be issued by the Commissioner of Banks and all other provisions of this article pertaining to corporations engaged in the business of banking shall apply to such corporations but shall be exercised and enforced by the Commissioner of Banks. For such license the licensee shall pay to the Banking Commission an annual license fee of two hundred ($200.00) dollars, which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity in so far as it may be necessary and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State. (Rev., s. 4800; 1899, c. 54, s. 46; 1901, c. 706, s. 1; 1931, c. 387.)

See § 6379 and note.

Editor's Note.—The Act of 1931 added all of this section beginning with the word "but" in line thirteen.

Applied in Quinton v. Cain, 203 N. C. 162, 165 S. E. 543.

§ 6378. Examination as to solvency.—The commissioner shall examine into the solvency of such corporation, and shall, if he deem it necessary, at the expense of the corporation, make or cause to be made an examination at its home office of its assets and liabilities. (Rev., s. 4801; 1899, c. 54, s. 46; 1901, c. 706.)

See § 6379 and note.

§ 6379. Certificate of solvency equivalent to justification. — After any such corporation has been licensed by the commissioner, the certificate of the commissioner that it has been admitted to do business in the state and is licensed by the insurance commissioner and is solvent to an amount not less than one hundred thousand dollars, shall be, until revoked by him, equivalent to

the justification of sureties, and full evidence of its authority to give such bonds or undertakings. There shall be no charge for the seal of this certificate. (Rev., s. 4802; 1899, c. 54, s. 46; 1901, c. 706.)

There is a presumption that the Insurance Commissioner has complied with the law in licensing a bank to act as administrator, and where there is evidence that a bank, on the date it was appointed administrator, was solvent in an amount in excess of $100,000, the contention of an administrator d. b. n. appointed upon the bank's insolvency that the bank had not complied with the provisions of this section and those preceding it cannot be sustained. Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

§ 6380. Clerk of superior court notified of license and revocation.—The insurance commissioner, upon granting license to any such corporation, shall immediately notify the clerk of the superior court of each county in the state that such corporation has been licensed under this chapter; and whenever the commissioner is satisfied that any corporation licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to it, and notify the clerk of the superior court of each county of such revocation; and after such notification the right of such corporation to hold any office, or be surety on any bond, as permitted by this chapter, ceases. (Rev., s. 4803; 1899, c. 54, s. 50.)

§ 6381. Resident agents required.—All business done in this state by any fidelity insurance company must be done through regularly authorized agents residing in this state, or through applications of such agents; and all policies so issued must be countersigned by such agents. (Rev., s. 4804; 1899, c. 54, s. 108; 1903, c. 438, s. 11.)

§ 6382. Limitation of liability assumed. — No stock corporation transacting fidelity or surety business in this State shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum of its capital and surplus, unless it shall be protected in excess of that amount by

(a) Reinsurance in a corporation authorized to transact a fidelity and surety business in this State: Provided, that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(b) The co-suretyship of such a corporation similarly authorized; or

(c) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(d) By conveyance or mortgage for its protection; or

(e) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such corporation; except by decree or order of a court of competent jurisdiction;

Provided: (1) That such corporation may execute what are known as transportation or warehousing bonds for United States Internal Revenue taxes to an amount equal to fifty per centum of its capital and surplus; (2) that, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

No such corporation shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum of the capital and surplus of such corporate surety, unless it shall be protected in excess of that amount by credits in accordance with sub-division (a), (b), (c) or (d) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such corporation with another person, firm, corporation or municipal corporation notwithstanding any provisions of this section. (1911, c. 28; 1931, c. 285.)

Editor's Note.—The Act of 1931 struck out the former section and substituted in lieu thereof the above. That Act, which was ratified April 16, 1931, provided that nothing therein should affect, modify or qualify the liability of any such Fidelity or Surety Company with respect to any contract of such company in force at the time of its ratification. The old statute placed the limit at ten per centum of the capital and surplus of the surety company, unless "suitable and sufficient collateral agreements of indemnity" were made, mentioning ostensibly as such "suitable agreements" a pledge deposit or conveyances in trust. The new enactment provides the same per centum limit, but makes specific the necessary protective arrangement for a liability in excess of said per centum: reinsurance, co-suretyship, pledge deposits, or conveyance in trust on mortgage. It also provides that the actual amount involved in three types of secured transactions—appeal bond, executor's bond, and bond for performance contract—shall be the basis for estimating the risk, for the purpose of the statutory limitation, although the professed penalty of the suretyship obligation exceeds such actual amount. Depository bonds are specifically mentioned as coming within the limits set down. It seems advisable to have cleared up the ambiguity of the loose phrase in the old statute describing the conditions under which the limited liability could be exceeded and to have furnished a test for determining the amount of the risk in at least three transactions. But as to the test for the risk assumed in other types quaere. 9 N. C. Law Rev. 394.

Joint-Control Agreements.—It would seem that in cases coming within the purview of this section, and perforce to the extent thereof, joint-control agreements between fiduciaries and their sureties are sanctioned in this State by act of Assembly. Pierce v. Pierce, 197 N. C. 348, 148 S. E. 438; Leonard v. York, 202 N. C. 704, 706, 163 S. E. 878.

Art. 12. Promoting and Holding Companies

§ 6383. Terms defined.—As the terms are used in this article, "promoting corporation" means a corporation or joint-stock association, engaged in the business of organizing or promoting or endeavoring to organize or promote the organization of an insurance corporation or corporations, or in any way assisting therein; "holding corporation" means a corporation or joint-stock associa-

tion, which holds or is engaged in the acquisition of the capital stock or a major portion thereof of one or more insurance corporations for the purpose of controlling the management thereof, as voting trustees or otherwise; and "securities" means the shares of capital stock, subscription, certificates, debenture bonds, and any and all other contracts or evidences of ownership of or interest in insurance corporations, or in promoting or holding corporations. (1913, c. 182, s. 1.)

§ 6384. Certificate required. — No individual, partnership, association, or corporation, as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this state of the securities of any promoting or holding corporation, or of any insurance corporation, which is not at that time lawfully engaged or authorized to engage in the transaction of the business of insurance in this state, without first procuring, as hereinafter provided, a certificate of authority from the insurance department to sell such securities; nor shall any individual, partnership, association, or corporation sell or offer for sale in this state the securities of any promoting or holding corporation, or of any insurance corporation which is not at the time of such sale or offer of sale lawfully engaged or authorized to engage in the transaction of the business of insurance in the state, unless such corporation has first procured from the insurance commissioner as hereinafter provided, a certificate that the corporation has fully complied with the provisions of this article, and is authorized to sell the securities. Every certificate issued by the insurance commissioner pursuant to the provisions of this article shall state in bold type that the commissioner in no way recommends the securities thereby authorized to be sold, and shall be renewable annually, upon written application, filed on or before the first day of April of each year, and may be revoked for cause at any time by the commissioner. The commissioner shall prepare and furnish upon request suitable blank forms of application for the certificates required by this article. (1913, c. 182, s. 2.)

§ 6385. Application for certificate by agent. — Every individual, partnership, association, or corporation desiring or intending to sell or to offer for sale in this state the securities of insurance corporations or of any holding or promoting corporation shall file with the insurance commissioner an application for a certificate of such authority. This application must contain a statement, verified by oath, setting forth the name and address of the applicant's previous business experience, date and place of birth or organization, and such other information as the commissioner requires. It is the duty of the commissioner to examine the application and to make any further inquiry or examination of the applicant as he deems advisable. If upon examination the commissioner finds the applicant, or if a corporation, the officers and directors thereof, to be trustworthy persons of good business credit, he may issue to the applicant a certificate of authority to sell or offer for sale in this state the securities of any insurance corporation, and of any promoting or holding corporation previously authorized under this article, which shall be mentioned therein. (1913, c. 182, s. 3.)

§ 6386. Application for certificate by corporation.—Every such unauthorized insurance corporation, and every promoting or holding corporation, whose securities are offered for sale in this state, must file with the insurance commissioner copies of all securities to be offered for sale, and an application for certificate of authority under this article which shall contain a statement in detail of the plans and purposes of such corporation, the amount and par value of the securities to be offered for sale, and the selling price thereof, the manner in which the money paid in therefor is to be spent or employed, the rate of commission to be paid for the sale of such securities, the salaries to be paid to the officers of such corporation, and such other information as the insurance commissioner requires. No change shall thereafter be made in the form or character of the securities to be offered for sale, or in the plans or purposes of any such corporation, without the approval thereof in writing by the commissioner. It is the duty of the commissioner to examine the application and other documents filed, and to make any further inquiry or examination of the corporation as he deems advisable. If upon examination the commissioner finds that the plans and purposes of the corporation are proper, that its condition is satisfactory, that the amount of its securities is reasonable, that the price at which such securities are to be sold is adequate, and that the manner in which the money paid in therefor, the rate of commissions to be paid and the salaries of officers are fair, he may issue a certificate that the corporation has complied with all the provisions of this article, and is authorized to sell or offer its securities for sale in this state. (1913, c. 182, s. 4.)

§ 6387. Approval of advertising matter; misrepresentation.—No printed matter may be used in connection with the sale of securities of any such promoting, holding, or insurance corporation, for advertising purposes, or in the dissemination of information with reference thereto, unless it is first submitted to the insurance commissioner and approved by him in writing. No such corporation, and no officer, director, or agent thereof, or any other person, copartnership, association, or corporation may issue, circulate, or employ or cause or permit to be used, issued, circulated, or employed any circular or statement, whether printed or oral, misrepresenting or exaggerating the earnings of insurance corporations or the value of their corporate stock or other securities, or the profits to be derived either directly or indirectly from the organization and management of insurance corporations, or of organizing or holding corporations. No insurance or other corporation, and no individual, copartnership, or association transacting business in this state shall place or offer to place insurance in any corporation in connection with the sale or purchase of the securities of any insurance corporation or of any promoting or holding corporation. (1913, c. 182, s. 5.)

Art. 13. Rate-Making Companies

§ 6388. Information to be filed with insurance commissioner. — Every corporation, association, board, or bureau which now exists or hereafter may be formed, and every person who maintains, or hereafter may maintain, a bureau or office for the purpose of suggesting, approving or making rates to be used by more than one underwriter for insurance, including surety bonds, on property or risks of any kind located in this state, shall file with the insurance commissioner a copy of the articles of agreement, association or incorporation and the by-laws and all amendments thereto under which such person, association, or bureau operates or proposes to operate, together with his or its business address and a list of the members or insurance corporations represented or to be represented by him or it, as well as such other information concerning such rating organization and its operations as may be required by the insurance commissioner. (1913, c. 145, s. 1; 1915, c. 166, s. 8.)

§ 6389. Examination by insurance commissioner; reports.—Every such person, corporation, association, or bureau, whether before or after the filing of the information specified in the preceding section, shall be subject to the visitation, supervision, and examination of the insurance commissioner, who shall cause to be made an examination thereof as often as he deems it expedient, and at least once in three years. For such purpose he may appoint as examiners one or more competent persons, and upon such examination he, his deputy, or any examiner authorized by him shall have all the powers given to the insurance commissioner, his deputy, or any examiner authorized by him by law, including the power to examine under oath the officers and agents and all persons deemed to have material information regarding the business or manner of operation by every such person, corporation, association, bureau, or board. The insurance commissioner shall make public the results of such examination, and shall report to the legislature in his annual report on the methods of such rating organization and the manner of its operation. (1913, c. 145, s. 2.)

§ 6390. Schedule of rates filed.—Every such person, corporation, association, or bureau, as well as every insurance company doing business in the state, shall file with the insurance commissioner, whenever he may call therefor, any and every schedule of rates or such other information concerning such rates as may be suggested, approved, or made by any such rating organization for the purposes specified in section 6388, or by such company for its own use. (1913, c. 145, s. 3; 1915, c. 166, s. 8.)

§ 6391. Certain conditions forbidden; no discrimination.—No such person, corporation, association, or bureau shall fix or make any rate or schedule of rates which is to or may apply to any risk within this state, on the condition that the whole amount of insurance on such risk or any specified part thereof shall be placed at such rates, or with the members of or subscribers to such rating organization; nor shall any such person, association, or corporation authorized to transact the business of insurance within this state, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this state of essentially the same hazard, or if such rate be a fire insurance rate, which discriminates unfairly between the risks in the application of like charges or credits or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of public protection against fire. Whenever it is made to appear to the satisfaction of the insurance commissioner that such discrimination exists, he may, after a full hearing, either before himself or before any salaried employee of the insurance department whose report he may adopt, order such discrimination removed; and all such persons, corporations, associations, or bureaus affected thereby shall immediately comply therewith; nor shall such persons, corporations, associations, or bureaus remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the insurance commissioner that such increase is justifiable. (1913, c. 145, s. 4.)

§ 6392. Record to be kept; hearing on rates.—Every such rating organization shall keep a careful record of its proceedings and shall furnish upon demand to any person upon whose property or risk a rate has been made, or to his authorized agent, full information as to such rate, and if such property or risk be rated by schedule, a copy of such schedule; it shall also provide such means as may be approved by the insurance commissioner whereby any person affected by such rate may be heard, either in person or by agent, before the governing or rating committee or other proper executive of such rating organization on an application for a change in such rate. (1913, c. 145, s. 5.)

§ 6393. Hearing on rates before insurance commissioner.—Any person, firm, or corporation aggrieved by any rating of a fire insurance company, bureau, or board, may file a complaint in writing with the insurance commissioner stating in detail the grounds upon which the complainant asks relief. The commissioner shall set a time, not earlier than seven days after the date of the notice, and a place for a hearing upon the complaint. After due hearing the commissioner shall make a finding as to whether the established rate is excessive or unfair and shall make such recommendations as he deems advisable. The finding and recommendations in each case shall be made a matter of record, and shall be open to public inspection. (1915, c. 166, s. 8.)

§ 6394. Certain insurance contracts excepted.—This article shall not apply to any contract of life insurance, nor to any contract of insurance upon or in connection with marine or transportation risks or hazards other than contracts for automobile insurance, nor to contracts of insurance upon property or risks located without this state, nor title and credit insurance. (1913, c. 145, s. 6; 1935, c. 152.)

Editor's Note. — Prior to the amendment this section excepted contracts made on a mutual or coöperative plan. The act further provides that nothing therein shall au-

thorize the insurance commissioners to raise the rates of any mutual insurance company doing business in North Carolina, and that farmers mutual fire insurance companies shall not be required to file such rates.

Art. 14. Real-estate Title Insurance Companies

§ 6395. Purpose of organization.—Companies may be formed in the manner provided in this subchapter, with a capital of not less than fifty thousand dollars, for the purpose of examining titles to real estate, of furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrance and defective title. Such companies shall not be subject to the provisions of this chapter except as regards the manner of their formation and as provided in this article. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; 1923, c. 71.)

As to investment in bonds guaranteed by United States, see § 220(a) 1.

Where the agent for the insurer was notified prior to the issuance of the renewal policy sued on that the property had been sold by the former owner to another and was requested to issue the renewal policy in the name of the new owner, the policy containing a standard loss payable clause in favor of the holder of the mortgage on the property, the mortgagee was not required to notify the insurer of the change in ownership, it appearing to the mortgagee that such notice had been given the insurer's agent prior to the inception of the policy, the agent in such case being the insurer's alter ego. Mahler v. Milwaukee Mechanics' Ins. Co., 205 N. C. 692, 172 S. E. 204.

§ 6396. Certificate of authority to do business.—Before any such company may issue any policy or make any contract or guarantee of insurance, it shall file with the insurance commissioner a certified copy of the record or the certificate of its organization in the office of the secretary of state, and obtain from the insurance commissioner his certificate that it has complied with the laws applicable to it and that it is authorized to do business. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3.)

§ 6397. Annual statement and license required.—Every such corporation shall, on or before the thirtieth day of January of each year, file in the office of the insurance commissioner a statement, such as he may require, showing its condition and its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors. For neglect to file such annual statement or for making a wilfully false statement it shall be liable to the same penalties imposed upon other insurance companies. The insurance commissioner shall annually license such companies and their agents, and have the same power and authority to visit and examine such corporations as he has in the case of other domestic insurance companies; and the duties and liabilities of such corporations and their agents in reference to such examinations are the same as those of other domestic insurance companies. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3.)

Art. 14A. Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates

§ 6397(a). Supervision and control of insurance commissioner.—Any domestic land mortgage company or title insurance company having a paid in capital and surplus of at least two hundred thousand ($200,000.00) dollars, may, under the supervision and control of the Insurance Commissioner, issue collateral loan certificates, or other certificates of indebtedness secured by the deposit of first mortgages on real estate with the commissioner, or under his direction, or secured by the deposit with the commissioner, or under his direction, of collateral trust bonds secured by first mortgages, the principal and interest of which said mortgages is guaranteed by a surety company having assets of at least ten million ($10,000,000-.00) dollars, upon a basis not to exceed one hundred ($100.00) dollars for each one hundred ($100-.00) dollars of liability under the collateral loan certificates or other certificates of indebtedness outstanding and secured by such first mortgages or collateral trust bonds. (1927, c. 204, s. 1.)

§ 6397(b). License granted.—Any domestic land mortgage company, or title insurance company, wishing to do business under the provisions of this article upon making written application and submitting proof satisfactory to the Insurance Commissioner that its business, capital and other qualifications comply with the provisions of this article, upon paying to the Insurance Commissioner, the sum of two hundred dollars as a license fee and all other fees assessed against such company may be licensed to do business in this State under the provisions of this article until the first day of the following April and may have its license renewed for each year thereafter so long as it complies with the provisions of this article and such rules and regulations as may be promulgated by the Insurance Commissioner. For each such renewal such company shall pay to the Insurance Commissioner the sum of two hundred dollars and all other fees assessed against such company and such renewal shall continue in force and effect until a new license be issued or specifically refused unless revoked for good cause. The Insurance Commissioner, or any person appointed by him, shall have the power and authority to make such rules and regulations and examinations not inconsistent with the provisions of this article, as may be in his discretion necessary or proper to enforce the provisions hereof and secure compliance with the terms of this article. For any examination made hereunder the Insurance Commissioner shall charge the land mortgage companies or title insurance companies examined with the actual expense of such examination. (1927, c. 204, s. 2.)

§ 6397(c). Annual statements furnished.—Every such domestic land mortgage company or title insurance company doing business in this State under this article shall annually file with the Insurance Commissioner on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year and shall also exhibit the amount of real estate mortgages deposited by such land mortgage company or title insurance company for the protection of the certificates issued under

this article. The Insurance Commissioner is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statements are true and correct. (1927, c. 204, s. 3.)

Art. 15. Reciprocal or Inter-Insurance Exchanges

§ 6398. Exchange of insurance contracts authorized.—Individuals, partnerships, and corporations of this state hereby designated as subscribers, are authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships, and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. Such contracts may be executed by an attorney, agent, or other representative, herein designated attorney, duly authorized and acting for such subscribers. (1913, c. 183, ss. 1, 2.)

§ 6399. Statement to be filed with insurance commissioner.—The subscribers, so contracting among themselves, shall, through their attorney, file with the insurance commissioner of this state a declaration verified by oath of such attorney, setting forth:

1. The name or title of the office at which such subscribers propose to exchange such indemnity contracts. This name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the insurance commissioner is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

2. The kind or kinds of insurance to be effected or exchanged.

3. A copy of the form of policy, contract, or agreement under or by which the insurance is to be effected or exchanged.

4. A copy of the form of power of attorney or other authority of such attorney under which the insurance is to be effected or exchanged.

5. The location of the office or offices from which such contracts or agreements are to be issued.

6. That applications have been made for indemnity upon at least one hundred separate risks aggregating not less than one and one-half million dollars as represented by executed contracts or bona fide applications, to become concurrently effective, or, in case of liability or compensation insurance, covering a total pay roll of not less than one and one-half million dollars: Provided, that when the attorney maintains the central office in this state the insurance commissioner may authorize an exchange with a less number of risks and a smaller amount of indemnity to be exchanged and an amount of cash deposits less than twenty-five thousand dollars.

7. That there is on deposit with such attorney and available for payment of losses a sum of not less than twenty-five thousand dollars. (1913, c. 183, s. 3.)

§ 6400. Agreement for service of process. — At the time of filing the declaration provided for by the preceding section, the attorney shall file with the insurance commissioner an instrument in writing, executed by him for the subscribers, conditioned that upon the issuance of certificate of authority provided for in this article, service of process may be had upon the insurance commissioner in all suits in this state arising out of such policies, contracts, or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the insurance commissioner shall file one copy, forward one copy to the attorney, and return one copy with his admission of service. (1913, c. 183, s. 4.)

§ 6401. Statement as to amount of risks. — There shall be filed with the insurance commissioner of this state by such attorney a statement under his oath showing the maximum amount of indemnity upon any single risk, and the attorney shall, whenever and as often as the same shall be required, file with the insurance commissioner a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than ten per cent of the net worth of such subscriber. (1913, c. 183, s. 5.)

§ 6402. Certificate issued by commissioner. — Upon the filing of the foregoing papers, and upon the payment of fees as provided for in this article, the insurance commissioner shall examine and pass upon the same, and if found correct, and in accordance with this article, issue a certificate of authority, which shall expire on the first day of April next succeeding. (1913, c. 183, s. 6.)

§ 6403. Reserve fund.—There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than twenty-five thousand dollars, and if at any time fifty per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7.)

§ 6404. Annual reports; examination by commissioner.—The attorney shall make an annual report to the insurance commissioner for each calendar year, showing the financial condition of affairs at that office where such contracts are issued, and shall furnish such additional information and reports as may be required; but the attorney shall not be required to furnish the names

and addresses of any subscribers. The business affairs and assets of the reciprocal or inter-insurance exchanges shall be subject to examination by the insurance commissioner. (1913, c. 183, s. 8.)

§ 6405. Exchange insurance in other companies.—Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned through exchanges complying with this article. (1913, c. 183, s. 9.)

§ 6406. Punishment for failing to comply with law.—Any attorney or representative who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars. (1913, c. 183, s. 10.)

§ 6407. Certificate to attorney; revocation.—Each attorney by or through whom are issued any policies or contracts for indemnity of the character referred to in this article shall procure from the insurance commissioner annually a certificate of authority, stating that all the requirements of this article have been complied with, and upon such compliance and the payment of the fees and taxes required by this article, the insurance commissioner shall issue such certificate of authority. The insurance commissioner may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this article after reasonable notice has been given the attorney in writing so that he may appear and show cause why such action should not be taken. (1913, c. 183, s. 11.)

§ 6408. License fee and tax. — Individuals, firms, and corporations exchanging reciprocal or inter-insurance contracts as provided herein shall pay through their attorney an annual license of fifty dollars, and two and one-half per centum of the gross premium deposits, reduced by all sums distributed among the subscribers or credited to their accounts, and also other regular fees. (1914, c. 183, s. 12.)

§ 6409. Application of general insurance law.—Nothing in the general insurance laws, except as herein provided and as may specifically apply to such contracts and exchanges, shall be construed to extend to inter-insurance or reciprocal exchanges licensed under this article. (1913, c. 183, s. 13.)

Art. 16. Foreign Insurance Companies

§ 6410. Admitted to do business.—Foreign insurance companies, upon complying with the conditions herein set forth applicable to them, may be admitted to transact in this state, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign insurance companies, and their agents. (Rev., s. 4746; 1899, c. 54, s. 61.)

Rights of Insurer after Admission.—When a foreign insurance company has complied with all the laws of the state the courts of this state are open to it for the purpose of enforcing liabilities of policy holders. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

§ 6411. Conditions of admission. — A foreign insurance company may be admitted and authorized to do business when it:

1. Deposits with the insurance commissioner a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

2. Satisfies the insurance commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact; that it has, if a stock company, a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description, of an amount not less than $100,000 (but nothing in this subsection applies to companies now authorized to do business in this state); and if a mutual company, other than life, that its net cash assets are equal to the capital required of like companies on the stock plan or that it possesses net cash assets of not less than $100,000 or net cash assets of not less than $50,000, with, also, invested assets of not less than $100,000, and in each case with additional contingent assets of not less than $300,000, and that such capital or net assets are well invested and immediately available for the payment of losses in this state; and that it insures on any single hazard a sum no larger than one-tenth of its net assets.

3. By a duly executed instrument filed in his office constitutes and appoints the insurance commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company, and that it will not have removed from any court of this state to the United States circuit or district court any action instituted against it, and that it will not institute any action or suit in equity in the United States courts against any citizen of this state growing out of, or in any way connected with, any policy of insurance issued by it; and the authority thereof shall continue in force irrevocable as long as any liability of the company remains outstanding in this state. Copies of this instrument, certified by the insurance commissioner, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

4. Appoints as its agent or agents in this state some resident or residents thereof.

5. Obtains from the insurance commissioner a certificate that it has complied with the laws of the state and is authorized to make contracts of

insurance. If a fire insurance company, it must also comply with the provisions of this chapter as to deposits and reinsurance by such companies. (Rev., s. 4747; 1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6.)

Subsection 3—Power of Attorney Is Irrevocable.—The statute requires the power of attorney executed to the State Insurance Commissioner appointing him attorney upon whom process may be served to be irrevocable not "as long as the company continues to do business" in this State, but as long as "any liability of the company remains outstanding" in this State, and the contract with the State as expressed in the power of attorney filed by the company so specifies. No amount of authorities having a more or less fancied analogy can overcome these plain words of the statute and of the power of attorney drawn and filed in conformity thereto. Biggs v. Life Ass'n, 128 N. C. 7, 37 S. E. 955; Insurance Co. v. Scott, 136 N. C. 157, 48 S. E. 581.

Service of process upon State Commissioner is valid notwithstanding the insurance company attempted to annul the power of attorney conferred upon him under this section. Biggs v. Life Ass'n, 128 N. C. 5, 37 S. E. 955.

Same—Non-Resident Insured.—This section was intended to protect residents of this state and does not apply to policies issued before the statute and transferred to a resident of another state. The service on the commissioner is not valid when the insurance company has ceased doing business in the state and had no further liabilities therein. Williams v. Mutual Reserve Fund Life Ins. Ass'n, 145 N. C. 128, 58 S. E. 802.

Subsection 4—Brokerage Makes Agency.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

Subsection 5.—As to deposits required of a fire insurance company, see sec. 6442.

Power of Corporation to Sue and Be Sued.—Where a foreign insurance corporation has fully complied with the provisions of this section, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation. Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

§ 6412. Limitation as to classes of business.—No insurance company admitted to do business in the state may be authorized to transact more than one class or kind of insurance therein, unless it has the requisite capital for such business engaged in, and such a company may undertake two or more of the classes of insurance set out in article six, section 6327, of this chapter, upon providing for each additional kind at least fifty thousand dollars additional capital. But if life, fire, and credit insurance is added to any other line or lines, the additional capital shall be one hundred thousand dollars each, and the company shall pay the license taxes and fees for each class or kind of insurance provided by this chapter. (Rev., s. 4748; 1899, c. 54, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; 1911, c. 111, s. 2.)

§ 6413. Reciprocal laws.—When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this state doing business in such other state or nation or upon their agents therein greater than those imposed by this state upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, shall be imposed upon all such insurance companies of such other state or nation doing business within this state and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this state or to go into effect with the companies of any other state or nation unless some company of this state is actually doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this state, then and in such case the insurance commissioner is authorized and directed to refuse to grant a license to transact business in this state to such insurance company. (Rev., s. 4749; 1899, c. 54, s. 71; 1903, c. 536, s. 11; 1927, c. 32.)

Editor's Note.—The Public Laws of 1927 inserted in the first sentence of this section the clause reading: "greater than those imposed by this state upon insurance companies of such other state."

Not Repealed by Implication. — This section was not impliedly repealed by the Revenue Acts of 1923 or 1925 (Pub. Laws 1923, c. 4, § 903; 1925 c. 101, § 903). The amendment of the section by Pub. Laws 1927, c. 32 was legislative recognition that it is still in force. Atlantic Life Ins. Co. v. Wade, 195 N. C. 424, 142 S. E. 474.

§ 6414. Service of legal process upon insurance commissioner.—The service of legal process upon any insurance, bonding and/or surety company, admitted and authorized to do business in this state under the provisions of this chapter, shall be made by leaving the same in the hands or office of the insurance commissioner, and no service upon a company that is licensed to do business in this state is valid unless made upon the insurance commissioner, the general agent for service, or some officer of the company. As a condition precedent to a valid service of process and of the duty of the commissioner in the premises, the plaintiff shall pay to the insurance commissioner at the time of service the sum of one dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. In any action of which a justice of the peace has jurisdiction, summons may be served on any licensed agent of such company, returnable in not less than ten days from date of service; if there is no such agent in the county, then the summons may be served as provided for in other actions against foreign corporations in a court of a justice of the peace. (Rev., s. 4750; 1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; 1927, c. 168; 1931, c. 287.)

As to appointment of local agent for service, see 7 N. C. Enc. Dig. 779.

Editor's Note.—Prior to the amendment of 1927 this section applied only to foreign insurance companies. By this amendment the word "foreign" was struck out.

There are three ways in which a foreign insurance corporation may be served with a copy of process. Sections 483, 1137 and 6414. The cases which follow in this note indicate when the method provided by the particular section shall be employed. Reference should be made to secs. 483 and 1137 and the annotations thereto.

The Act of 1931 inserted the words "bonding and/or surety" in line three of this section.

Conditions Precedent to Doing Business in the State.—One of the conditions precedent upon which a foreign insurance company is authorized to do business in this State is that such company will file a duly executed instrument with the Insurance Commissioner, appointing him its attorney, upon whom all lawful process against said company can be served. Biggs v. Life Ass'n, 128 N. C. 5, 6, 37 S. E. 955.

Annullment of Power of Attorney.—The service of a li-

censed insurance company made upon the commissioner is valid although the insurance company may have attempted to annul the power of attorney, for the statute requires power of attorney to be irrevocable so long as the insurance company has any liabilities in the state. Biggs v. Life Ass'n, 128 N. C. 5, 37 S. E. 955; Moore v. Mutual Reserve Fund Life Ass'n, 129 N. C. 31, 39 S. E. 637; Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474.

Section Provides Cumulative Method.—Service of summons on a foreign insurance company doing business in this State is not restricted to the method prescribed by this section but may be made in the manner stated in section 1137 or section 483. Pardue v. Absher, 174 N. C. 676, 94 S. E. 414.

Unlicensed Companies.—Service can be made under this section only on licensed insurance companies. If it does not affirmatively appear that the insurance company is licensed service under section 483 may be made. Parker v. Insurance Co., 143 N. C. 339, 55 S. E. 717. And service under section 1137 or section 483 will not be invalid because of this section. Fisher v. Traders Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

However, a foreign insurance company that has no agent in this state and is not licensed or transacting business here cannot be served with process either under this section or 1137; Ivy River Land, etc., Co. v. National Fire, etc., 192 N. C. 115, 116, 133 S. E. 424. For this section only provides for service on licensed companies doing business in the state and sec. 1137 only provides for unlicensed companies doing business in the state.

Service on Fraternal Society.—In an action against a foreign fraternal insurance society doing business in this state, service of summons on the commissioner of insurance brings the corporation into court. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

Bonding Companies Not Included. — Service of summons upon the Commissioner of Insurance under this section, does not apply to bonding companies authorized under section 6363. Pardue v. Absher, 174 N. C. 676, 677, 94 S. E. 414.

§ 6415. Commissioner to notify company of service of process.—When legal process is served upon the insurance commissioner as attorney for an insurance company under the provisions of this chapter, he shall immediately notify the company of such service by registered letter directed to its secretary and shall state whether or not complaint was served with the process, or, in case of a foreign country, to its resident manager, if any in the United States; and must within two days after such service forward in the same manner a copy of the process, together with copy of complaint, if any, served on him to such secretary or manager designated by the company by written notice filed in the office of the Commissioner: Provided, that the thirty days fixed by statute within which to file answer when complaint is served with summons shall not begin to run until ten days after such service on the Insurance Commissioner. The Commissioner must keep a record of all such proceedings which shall show the day and hour of such service of process on such Commissioner, and whether complaint was served with such process. (Rev., s. 4751; 1899, c. 54, s. 16; 1927, c. 167, s. 1.)

§ 6416. Action to enforce compliance with this chapter.—Compliance with the provisions of this chapter as to deposits, obligations, and prohibitions, and the payment of taxes, fines, fees, and penalties by foreign insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the superior court of Wake county by the attorney-general in the name of the state upon the relation of the insurance commissioner. (Rev., s. 4752; 1899, c. 54, s. 102; 1903, c. 438, s. 10.)

SUBCHAPTER III. FIRE INSURANCE

Art. 17. General Regulations of Business

§ 6417. Risks carried as incidental to fire protection.—All insurance companies authorized to transact fire insurance business in this state may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps, and other apparatus erected or put in position for the purpose of extinguishing fires, against damage, loss, or injury resulting from accidental causes other than fire; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss, or injury by water or otherwise, resulting from the accidental breaking of or injury to such sprinklers, pumps, or other apparatus, arising from causes other than fire. Contracts of insurance of this kind, provided for in this section, shall not be incorporated in any contract of insurance against loss or damage by fire, but may be contained in riders attached thereto, the conditions of which shall be prescribed by the insurance commissioner. (Rev., s. 4754; 1899, c. 54, s. 24; 1907, c. 1000, s. 6.)

§ 6417(a). Performance of contracts as to devices not prohibited.—Nothing contained in this chapter shall be construed as prohibiting the performance of any contract hereafter made for the introduction or installation of automatic sprinklers or other betterments or improvements for reducing the risk by fire or water on any property located in this State, and containing provisions for obtaining insurance against loss or damage by fire or water, for a specified time at a fixed rate; provided, every policy issued under such contract shall be as provided by law. (1929, ch. 145, s. 1.)

§ 6418. Policies limited as to amount and term.—No insurance company or agent shall knowingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than seven years. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (Rev., s. 4755; 1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10.)

As to forfeiture prescribed see sec. 6433.

Determining Amount of Loss.—A statement of an agent acting for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in the action of the insured to recover upon the policy issued, especially as this section requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon. Queen v. Dixie Fire Ins. Co., 177 N. C. 34, 97 S. E. 741.

§ 6419. Limit of liability on total loss.—When buildings insured against loss by fire and situated within the state are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the

ascertained values, with interest at six per centum per annum from the date of issue. (Rev., s. 4756; 1899, c. 54, s. 40.)

§ 6420. Policies for the benefit of mortgagees. —Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee of the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. (Rev., s. 4757; 1899, c. 54, s. 41.)

See 13 N. C. Law Rev., 98.

Two or More Mortgages. — Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds to the one having the later registered security. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 147 S. E. 691.

Where mortgagor procured insurance for benefit of mortgagee, whose mortgage was registered December 14, 1920, and for the benefit of subsequent mortgagee whose mortgage was not executed until May 11, 1925, claim of first mortgagee should first be paid out of funds derived from policy under this section, providing that where, by terms of fire policy taken out by mortgagor, loss is payable to mortgagee for his benefit, company shall pay all mortgages in order of their priority of claim, and in view of section 3311, by which priority is given to mortgage which was first recorded. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 147 S. E. 691.

Where Neither Mortgagee Has Claim to Priority.—If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 147 S. E. 691.

Cited in Peeler v. United States Casualty Co., 197 N. C. 286, 291, 148 S. E. 261.

§ 6421. Fire loss reported to commissioner before payment.—Every insurance company transacting business in this state shall, upon receiving notice of loss by fire of property in North Carolina, on which it is liable under a policy of insurance, notify the insurance commissioner thereof, either directly or through some bureau or association approved by the commissioner, and no insurance upon any such property shall be paid by any company until one week after this notification. A company violating this section may be fined by the insurance commissioner the sum of ten dollars for each offense, and for refusal to comply with its provisions its license may be canceled by the commissioner. (Rev., s. 4822; 1899, c. 54, s. 40; 1903, c. 438, s. 4; 1915, c. 166, s. 4.)

§ 6422. Reinsurance restricted and regulated. —When an application for license, renewal of license, or for admission to this state, is made by a company, whether of this state, of another state of the United States, or of a foreign country, for the transaction of business of fire insurance herein, the company shall, as one of the prerequisites of license and admission, file a sworn declaration signed by its president and secretary, or officers corresponding thereto, that it will not reinsure any risk or part thereof taken by it on any property located in this state with any company not authorized to transact the business of fire insurance in the state. Every fire insurance company admitted shall annually and at such other times as the insurance commissioner requires, in addition to all returns now required by law of it or its agents or managers, make a return to the insurance commissioner, in such form and detail as is prescribed by him, of all reinsurance contracted for or effected by it directly or indirectly upon property located in this state, this return to be certified by the oath of its president and secretary, if a company of one of the United States, and if a company of a foreign country, by its president and secretary or by officers corresponding thereto, as to such reinsurance contracted for or effected through the foreign office, and by the United States manager as to such reinsurance effected by the United States branch. If any company, domestic or foreign, directly or indirectly, reinsure any risk taken by it on any property located in this state in any company not duly authorized to transact business herein, or if it refuses or neglects to make the returns required by this section, the insurance commissioner shall revoke its authority to transact business in this state. The provisions of this section also apply to companies licensed to do reinsurance business only. It is unlawful for any company reinsuring risks on property located in this state to reinsure such risks or parts thereof except in companies authorized by the laws of this state to do such business. (Rev., s. 4770; 1899, c. 54, s. 63; 1901, c. 391, s. 5.)

§ 6423. Penalty for reinsuring in unauthorized company.—If any fire insurance company shall, directly or indirectly, reinsure any risk taken by it on any property located in North Carolina in any company not duly authorized to transact business herein, the insurance agent and the company effecting or acting in the negotiation of such reinsurance shall severally be punished by a fine of five hundred dollars. (Rev., s. 3495; 1899, c. 54, ss. 63, 98.)

§ 6424. No action lies on policy of unlicensed company.—No action may be maintained in any court in the state upon a policy or contract of fire insurance issued upon property situated in the state by any company, association, partnership, individual, or individuals that have not been authorized by the insurance commissioner to transact such business. (Rev., s. 4763; 1899, c. 54, s. 105.)

Action by the Insured.—"The statute does not make the policy void in the hands of the assured. The defendant company could not take advantage of its own wrong by receiving the premium and not being responsible." Hay & Bro. v. Union Fire Ins. Co., 167 N. C. 82, 83, 85 S. E. 241.

Action by Licensed Companies.—When such foreign corporation has complied with our laws, our courts are open to it for the enforcement of its rights—and should it become insolvent and pass into the hands of a receiver—he, by comity, will be allowed to sue here to enforce the liability of a policy holder. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

Policies Issued by Brokers.—This section allows an outside company, that is, one that has not complied with our laws, to be sued but not to sue. Its evident purpose was to

allow such companies to adjust their fire losses without thereby making themselves liable for penalties or taxes. It certainly never intended to permit such companies to practically nullify our insurance laws by the legal fiction of doing business through a broker instead of an agent. Our insurance laws, applicable equally to domestic and to foreign corporations, are intended not simply for purposes of revenue, but primarily for the protection of our people. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 119, 32 S. E. 404.

§ 6425. Citizens authorized to procure policies in unlicensed foreign companies.

1. What applicant must show.—The insurance commissioner, upon the annual payment of a fee of twenty dollars, may issue licenses to citizens of this state, subject to revocation at any time, permitting the person named therein to procure policies of fire insurance on property in this state in foreign insurance companies not authorized to transact business in the state. Before the person named in such a license may procure any insurance in such companies or on any property in this state, he must execute and file with the insurance commissioner an affidavit that he is unable to procure in companies admitted to do business in the state the amount of insurance necessary to protect such property, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this state to the full amount which those companies are willing to write on the property; but such licensed person shall not be required to offer any portion of such insurance to any company which is not possessed of cash assets amounting to at least twenty-five thousand dollars, or one which has, within the preceding twelve months, been in an impaired condition.

2. Account and report.—Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the insurance commissioner, showing the exact amount of such insurance placed by any person, firm, or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the policies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

3. Bond filed.—Before receiving such license the applicant therefor shall execute and deliver to the insurance commissioner a bond in the penal sum of one thousand dollars, with such sureties as the insurance commissioner may approve, with a condition that the licensee will faithfully comply with all the requirements of this section, and will file with the insurance commissioner, in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the state a sum equal to five per centum of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies.

4. Broker may obtain license.—Any broker licensed under this section may, upon application to the insurance commissioner, be allowed to place policies of insurance with any mutual fire insurance company not doing or licensed to do business in this state, not paying commissions upon business, not having agents to solicit business, and doing only one class of fire insurance business, if he files with the insurance department a certified copy of the charter of each such company, a statement of its financial condition on a blank of the department, and certificate of its authority to do business at its home office, and also receives from the insurance commissioner a license for each company to do business through him on the payment by him of the license, taxes, and fees required by law. All such contracts of insurance placed through any such broker are valid and legal, and the risks upon which such policies are placed may be examined and inspected by regular agents or inspectors licensed by the insurance department upon the application of the broker writing the insurance. (Rev., s. 4769; 1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7, c. 680.)

Liability of the Insurer.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

An insurance company that issues policies to residents of this state, but does not issue them through a broker in this state is not subject to an action under this section. Ivy River Land, etc., Co. v. National Fire, etc. Co., 192 N. C. 115, 133 S. E 424.

§ 6426. Punishment for failure to file affidavit and statements.—If any person licensed to procure insurance in an unauthorized foreign company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign company, and shall neglect to make and file the affidavit and statements required by the preceding section, he shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both. (Rev., ss. 3483, 4769; 1899, c. 54, ss. 68, 95.)

Referred to in Ivy River Land, etc., Co. v. National Fire Ins. Co., 192 N. C. 115, 133 S. E. 424.

§ 6427. Tax deducted from premium; reports filed.—When any person or corporation shall insure any property located in this state with an insurance company not licensed to do business in this state, it shall be the duty of such person or corporation to deduct from the premium charged on the policy or policies issued for such insurance five per centum of the premium and remit the same to the insurance commissioner of the state, at the same time reporting to the insurance commissioner the name of the company or companies issuing the policy or policies, the location of the property insured, and the premium charged. The insurance commissioner shall pay the said amounts to the treasurer of the state. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July first and January first preceding, there shall be added to the amount of taxes thereon the sum of

one per centum on the first day of each month thereafter. (1915, c. 109, s. 8.)

Referred to in Ivy River Land, etc., Co. v. National Fire, etc., Co., 192 N. C. 115, 133 S. E. 424.

§ 6428. Resident agents required.—Foreign fire insurance companies legally authorized to do business in this state through regularly commissioned and licensed agents located in the state shall not make contracts of fire insurance on property herein, except through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this state. This section does not apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers. (Rev., s. 4764; 1899, c. 54, s. 107; 1901, c. 391, s. 8.)

§ 6429. Policies through nonresident agent prohibited.—Every fire insurance company authorized to do business in the state is prohibited from authorizing or allowing any person, agent, firm, or corporation who is a nonresident of this state, to issue or cause to be issued, except through a licensed agent, any policy of insurance on property located in the state. (Rev., s. 4765; 1903, c. 488, s. 1; 1905, c. 170.)

As to appointment and regulation of agents see 7 N. C. Enc. Dig. 779.

Validity as to Insured.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of this section, the policy is valid as to the right of action of the insured thereon. Hay & Bros. v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241.

§ 6430. Licensed agents not to pay commissions to nonresident or unlicensed persons.—Any person, firm, or corporation licensed by the insurance commissioner to act as a fire insurance agent in this state is prohibited from paying directly or indirectly any commission, brokerage, or other valuable consideration on account of any policy covering property in this state, to any person, firm, or corporation who is a nonresident of the state, or to any person, firm, or corporation not duly licensed by the insurance commissioner as a fire insurance agent; but a fire insurance agent licensed in the state may pay a commission not exceeding fifty per centum of the regular commissions allowed upon the issuance of such policies to a licensed nonresident broker. The insurance commissioner is authorized to license a non-resident as a broker, when he applies therefor on a proper blank of the department and makes affidavit that he will not during the fiscal year place directly or indirectly any fire insurance on any property located in North Carolina except through licensed resident agents of the state, that he is a broker in good faith and proposes to hold himself out as such. The fee for this license and seal is ten dollars. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6.)

§ 6431. Revocation of license for violation; power of commissioner.—When the insurance commissioner has information of a violation of any of the provisions of the next two preceding sections, he shall immediately investigate or cause to be investigated such violation, and if a fire insurance company has violated any of such provisions he shall immediately revoke its license for not less than three nor more than six months for a first offense, and for each offense thereafter for not less than one year. If a person, firm, or corporation licensed by the insurance commissioner as a fire insurance agent violates or causes to be violated any of the provisions of those sections, he shall for the first offense have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date of the revocation. For the purpose of enforcing the provisions of those sections the insurance commissioner is authorized and empowered to examine persons, administer oaths, and send for papers and records. A failure or refusal on the part of any fire insurance company, person, firm, or corporation licensed to do business in this state, to appear before the insurance commissioner when requested to do so, or to produce records and papers, or answer under oath subjects such company, person, firm or corporation to the penalties of this section. (Rev., s. 4767; 1903, c. 488, ss. 3, 4.)

§ 6432. Agreements restricting agent's compensation; penalty.—It is unlawful for any fire insurance company, association, or partnership doing business in this state employing an agent who is employed by another fire insurance company, association, or partnership, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in restraint of or limiting the compensation which said agent may receive from any other fire insurance company, association, or partnership, or forbidding or prohibiting reinsurance of the risks of a domestic fire insurance company in whole or in part by any company holding membership in or coöperating with such bureau or board. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty dollars nor more than five hundred dollars and the forfeiture of license to do business in this state for a period of twelve months thereafter. (Rev., ss. 3491, 4768; 1905, c. 424; 1915, c. 166, ss. 2, 3.)

§ 6433. Punishment for issuing fire policies contrary to law.—Any insurance company or agent who makes, issues, or delivers a policy of fire insurance in wilful violation of the provisions of this chapter which prohibit a domestic insurance company from issuing policies before obtaining certificate and authority from the insurance commissioner; or which prohibit the issuing of a fire insurance policy for more than the fair value of the property or for a longer term than seven years; or which prohibit stipulations in insurance contracts restricting the jurisdiction of courts, or limiting the time within which an action may be brought to less than one year after the cause of action accrues or to less than six months after a nonsuit by the plaintiff, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but the policy

shall be binding upon the company issuing it. (Rev., s. 4832; 1899, c. 54, s. 99; 1903, c. 438, s. 10.)

Art. 18. Fire Insurance Policies

§ 6434. Terms and conditions must be set out in policy.—In all insurance against loss by fire the conditions of insurance must be stated in full, and the rules and by-laws of the company are not a warranty or a part of the contract, except as incorporated in full into the policy. (Rev., s. 4758; 1899, c. 54, s. 42.)

§ 6435. Items to be expressed in policies; agent to inspect risks. — Upon request there shall be printed, stamped, or written on each fire policy issued in this state the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this state upon request a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative, with a notice to the effect that the rate is promulgated and filed with the insurance department. Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, in forming as to its value and insurable condition. (1915, c. 109, s. 3; 1925, c. 70, s. 3.)

§ 6436. Standard policy adopted.—No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form filed in the office of the insurance commissioner of the state, known and designated as the standard fire insurance policy of the state of North Carolina, except as follows: (a) A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and if it is issued through an agent, the words: "This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at ....," and after the words "Standard Fire Insurance Policy of the State of North Carolina," on the back of the form, the names of such other states as have adopted this standard form. (b) A company may use in its policies written or printed forms of description and specification of the property insured. (c) A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance, the words, "whether by fire, lightning, or both." (c-1) A company insuring against damage by windstorm, cyclones and tornadoes may print in the clause enumerating the perils insured against, the additional words, 'also any damage by windstorm, cyclones and tornadoes, whether fire ensues or not,' and in the clause providing for apportionment of loss in case of other insurance, the words, 'whether by fire, windstorm, cyclones, tornadoes or all.' Such company may also print after the other conditions of the standard fire policy such provisions and conditions especially applicable to windstorms, cyclones, and tornadoes. The company may also make such change in the heading and preliminary statements of such combined policy form as may be necessary, all in such form as may be approved by the Insurance Commissioner. (d) A company may write or print upon the margin or across the face of a policy, or write or print in type not smaller than primer or ten point Roman-faced, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement of losses on buildings, furniture and fixtures, or any property not subject to any change in bulk and value. (e) Every mutual company shall cause to appear in the body of its policy the total amount for which the assured may be liable under the charter of the company. (f) The company may print on or in its policy, with the approval of the insurance commissioner, if the same is not already included in such standard form, any provision which any such corporation is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to be Inserted in This Policy." (Rev., s. 4759; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1907, c. 800, s. 1; 1915, c. 109, s. 10; 1925, c. 70, s. 5.)

See notes to sec. 6437.

Validity and Binding Effect.—The terms and conditions of the standard form of a fire insurance policy, as provided for in this section and the section following, and the stipulations as to a valid waiver thereof, are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 147 S. E. 812.

§ 6437. Form of standard policy.—The standard form of policy must be plainly printed, no part of it may be in type smaller than that used in printing the form on file in the office of the insurance commissioner, and shall be as follows:

[Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.]

Amount $.... Rate .... Premium $ ....

In consideration of the stipulations herein named and of .... dollars premium does insure .... and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair

and without compensation for loss resulting from interruption of business or manufacture, for the term of ..... from the ..... day of ....., 19 ...., at noon, to the ..... day of ....., 19 ...., at noon, against all direct loss and damage by fire and by removal from premises endangered by fire except as herein provided, to an amount not exceeding ..... dollars to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

[Space for description of property.]

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of the policy, together with such other provisions, stipulations, and conditions as may be endorsed hereon or added hereto as herein provided.

In witness whereof, this company has executed and attested these presents.

[Space for date and for signatures and titles of officers and agent.]

Fraud, misrepresentation, etc.—This entire policy is void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Property which cannot be insured.—This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities.

Hazards not covered.—This company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy is void, unless otherwise provided by agreement in writing added hereto—

Ownership, etc.—(a) if the interest of the insured is other than unconditional and sole ownership; or (b) if the subject of insurance is a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings are commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy is assigned before a loss.

Unless otherwise provided by agreement in writing added hereto, this company is not liable for loss or damage occurring—

Other insurance.—(a) while the insured has any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard.—(b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc.—(c) while mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc.—(d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used, or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha, or any other product of petroleum of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories.—(e) if the subject of insurance is a manufacturing establishment while operated in whole or in part between the hours of ten p. m. and five a. m., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy.—(f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Excepted property.—(g) to bullion, manuscripts, mechanical drawings, dyes, or patterns; or

Explosion, lightning.—(h) by explosion or lightning, unless fire ensues, and, in that event, for loss or damage by fire only.

Chattel mortgage.—Unless otherwise provided by agreement in writing added hereto this company is not liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, and during the time of such encumbrance this company is liable only for loss or damage to any other property insured hereunder.

Fall of building.—If a building, or any material part thereof, falls, except as the result of fire, all insurance by this policy on such building or its contents immediately ceases.

Added clauses.—The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of the policy, may be provided for by rider added hereto.

Waiver.—No one has power to waive any provision or condition of this policy except such as by the terms of the policy is the subject of agreement added hereto, nor shall any such provision or condition be waived unless the waiver is in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be waived by any requirement, act, or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy.—This policy will be canceled at any time at the request of the insured, in which case the company shall, upon demand and surrender of the policy, refund the excess of paid premium above the customary short

rates for the expired time. The policy may be canceled at any time by the company by giving to the insured a five days written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation must state that the excess premium (if not tendered) will be refunded on demand.

Pro rata liability.—This company will not be liable for a greater proportion of any loss or damage than the amount hereby insured bears to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon.—The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgagee.—If loss or damage is made payable, in whole or in part, to a mortgagee, this policy may be canceled as to such interest by giving to the mortgagee a ten days written notice of cancellation. Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss and be subject to the provisions hereof as to appraisal and time of payment. On payment to a mortgagee of any sum for loss or damage hereunder, if this company claims that as to the mortgagor or owner no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Except as stated in this paragraph, the agreement between a mortgagee and this company shall be only as stated by rider added hereto.

Requirements in case of loss.—The insured shall give immediate notice, in writing, to this company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and the insured shall, within sixty days after the fire, unless such time is extended in writing by this company, render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss or damage thereto; all encumbrances thereon; all other contracts of insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured, as often as is reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as is reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals are lost, at such reasonable time and place as is designated by this company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.—In case the insured and this company fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two, when filed with this company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.—It is optional with this company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of the like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but

Abandonment.—There can be no abandonment to this company of any property.

When loss payable.—The amount of loss or damage for which this company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this company and ascertainment of the loss or damage is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.

Suit.—No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless the insured has complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire.

Subrogation. — This company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this company.

Standard Fire Insurance Policy of the State of .....

Expires .....

Property .....

Amount . . . . . $ .....

Premium . . . . . $ .....

No.....

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once. (Rev., s. 4760; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1915, c. 109, s. 9.)

I. The Application and Contract in General.
II. Title or Interest of Insured.
III. Certain Other Conditions.
IV. Liability of Company in Case of Loss.
V. Liability of Agent.

Cross References.

See notes to section 6290. As to waiver see section 7 N. C. Enc. Dig. pp. 786 and 845; as to mortgagor and mortgagee see 7 N. C. Enc. Dig. 790; as to iron safe clause see 7 N. C. Enc. Dig. 833. As to subrogation see 7 N. C. Enc. Dig. 866.

See 13 N. C. Law Rev., 98.

I. THE APPLICATION AND CONTRACT IN GENERAL.

Part of Law.—The material provisions of the standard form of a fire insurance policy written in accordance with this section are those of the law. Greene v. Insurance Co., 196 N. C. 335, 145 S. E. 616.

Rights of Parties Determined from Instrument.—When a policy of insurance, in the form prescribed by this section, has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provisions and conditions which are included in the policy. Both are ordinarily bound by them. Lancaster v. Ins. Co., 135 N. C. 285, 69 S. E. 214; Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 141, 147 S. E. 812.

Binder Slips Not Contrary to Law.—Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy. Lea v. Atlantic Fire Ins. Co., 168 N. C. 478, 84 S. E. 813.

Oral Contract with Agent.—In the absence of fraud an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent, which is contradictory of and totally inconsistent with the standard form prescribed by statute. Hardin v. Liverpool, etc., Ins. Co., 189 N. C. 423, 127 S. E. 353.

Right to Cancel.—Either party to the contract may cancel the standard form policies without the consent of the other, by following the provisions of the policy applicable; the expression in other forms of policies that the policy "may be canceled" is construed as reading, "shall be canceled." Roberta Mfg. Co. v. Royal Exch. Assur. Co., 161 N. C. 88, 76 S. E. 865.

The provision in this section is for the protection of the insured, and the insurer cannot effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff, and whether plaintiff intends to waive this provision and does waive it by returning the policy as requested is for the determination of the jury. Wilson v. National Union Fire Ins. Co., 206 N. C. 635, 174 S. E. 745.

II. TITLE OR INTEREST OF INSURED.

Unconditional Ownership.—The provision in a policy of fire insurance written in accordance with the standard statutory form, that the policy should be void if the insured was not the unconditional owner of the property in fee simple is not waived by a written agreement providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy. Sasser v. Pilot Fire Ins. Co., 203 N. C. 232, 165 S. E. 684.

Right of Insurer to Know of Encumbrances.—"In referring to this principle of law in Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271, Mr. Justice Walker says: 'The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances.'" Watson v. North Carolina Home Ins. Co., 159 N. C. 638, 640, 75 S. E. 1105.

Misrepresentations as to Title.—Misrepresentations as to title of part of the premises insured avoids the entire contract of insurance. Cuthberton v. North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258, citing note in 19 L. R. A. 212.

Existing Lien Will Not Violate Provision.—The stipulation in a fire policy for sale and unconditional ownership is not violated by the existence of a lien on the property. Lancaster v. Southern Ins. Co., 153 N. C. 285, 69 S. E. 214.

Mortgagee Not Liable for Premiums.—The provision in the loss payable clause of a fire insurance policy taken out by the mortgagor that the mortgagee will pay the premium on demand should the mortgagor not do so, is held to be a condition upon which the mortgagee may receive the benefit of the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he will pay the premium on demand of the insurer, upon the mortgagor's default; and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter may after ten days' written notice cancel the policy. Whitehead v. Knitting Mills, 194 N. C. 281, and cases there cited.

Title under Executory Contract.—A vendee of land occupying it under an executory contract, on which he has paid a portion of the price, and on which he has erected a building is an "unconditional and sole owner" in fee simple within the conditions of a fire policy providing that it shall be void if the interest of the insured is other than sole ownership of fee title. Jordan v. Hanover Fire Ins. Co., 151 N. C. 341, 66 S. E. 206.

Mortgage Invalidates Policy.—Where the insured fails to state that the property was mortgaged, when in fact it was mortgaged, the policy providing that the contract of insurance would be void if the insured property was mortgaged, invalidates the policy, though the omission was made without the intent to deceive. Hayes v. United States Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Execution of a mortgage on the insured property so affects title, as will avoid an insurance policy then existing thereon and forfeit its benefit, if made without the knowledge or consent of the insurance company, and not attested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements has waived the effect of the mortgage and is estopped to assert its forfeiture. Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 65 S. E. 605.

Assignment for Creditors.—Making an assignment for creditors avoids a policy containing an unconditional ownership clause. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

The commencement of foreclosure against insured property terminates the policy, there being in the policy a provision to that effect. Hayes v. United States Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Vesting Corporate Property in Receiver's Hands.—See note to § 1210.

Removal of Encumbrance before Loss.—Where the owner of an unencumbered automobile insures it under a statutory form of policy, stipulating, among other things, that the policy would be void if the interest of the assured be other than unconditional or sole ownership, or if the property be or become encumbered by a chattel mortgage, and thereafter gives a mortgage thereon which is canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revives the original status of the policy, the temporary violation of the stipulation being immaterial, and puts the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 84 S. E. 274.

Waiver.—Where a policy of fire insurance has been issued under the statutory standard form, the condition therein of sole and unconditional ownership of the insured cannot be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than stated in the policy contract. Hardin v. Liverpool, etc., Ins. Co., 189 N. C. 423, 127 S. E. 353. But where the agent issues the policy with full knowledge of the state of the title the condition is waived. Gerringer North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773. As to waiver of other conditions, see the next succeeding analysis line of this note.

A breach of the condition that the policy is void if the insured has not the sole and unconditional title is valid and

enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and inaction on its part in this respect is not a waiver thereof. Smith v. National Ben Franklin Fire Ins. Co., 193 N. C. 446, 137 S. E. 310.

III. CERTAIN OTHER CONDITIONS.

Additional Insurance—In General.—The condition against additional insurance on the property is valid and enforceable. Black v. Atlantic Home Ins. Co., 148 N. C. 169, 61 S. E. 672.

And when under a fire insurance policy the insured has violated the provision of the policy by placing more concurrent insurance on the property than the policy permits, the policy is invalid in accordance with the statutory form. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

Where a standard fire insurance policy under this section, provides that the policy should be void if the insured procures other contemporaneous insurance on the same property during the term covered, unless the insurer agrees thereto and a writing to that effect is attached to the policy contract, the provision is valid and binding. Johnson v. Aetna Ins. Co., 201 N. C. 362, 160 S. E. 454.

Same—Waiver of Condition by Agent.—Where the insured before taking out additional insurance mentioned his intention to the companies' subagent who had issued its policy to the insured, and was told that it was all right, this constituted a waiver of the condition. Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236.

The Iron-Safe Clause.—The "iron-safe clause" in policies of insurance is upheld by the courts as a reasonable contract limitation upon the insurer's risk. Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 S. E. 506.

A substantial compliance with this provision will suffice. Arnold v. Indemnity Fire Ins. Co., 152 N. C. 232, 67 S. E. 574. And an inventory of a stock of general merchandise containing the number of articles and cost of each class at a date made about one month before the fire, and testified to as being practically the same as on the date of the fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. Mortt v. Liverpool, etc., Ins. Co., 192 N. C. 8, 133 S. E. 337. See also, Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 S. E. 506.

Same—Waiver.—If the company, knowing the insured has not complied with this provision, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. Bullard v. Pilot Fire Ins. Co., 189 N. C. 34, 37, 126 S. E. 179.

Proof of Loss.—A clause in a policy requiring proof of loss and forbidding the bringing of any suit upon the policy until sixty days thereafter is a continuing one, and does not mean that failure to file proof within sixty days of the fire works a forfeiture of the policy. Higson v. North River Ins. Co., 152 N. C. 206, 209, 67 S. E. 509.

The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified. Profitt Mercantile Co. v. State Mut. Fire Ins. Co., 176 N. C. 545, 97 S. E. 476.

As to limitations, see post, this note, "Liability of Company in Case of Loss," IV.

Operating Mill at Night.—Where an insured mill was operated at night, in violation of a policy, but under a permit from the insurance agent, such operation was no defense to an action on the policy, for a loss happening three months after the violation had ceased. Strause v. Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256, cited in note in 45 L. R. A., N. S., 126.

Permit When House Unoccupied.—The statutory form of a standard fire insurance policy requiring a permit to be issued for the house insured when unoccupied for more than ten days is a provision materially affecting the risk, and must be obtained in accordance with the requirements of the policy to make the insurer liable for damages by fire occurring after ten days vacancy, and after the policy has been issued and is in binding effect, the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of the written instrument. Greene v. Insurance Co., 196 N. C. 335, 145 S. E. 616.

Waiver of Stipulations.—Argall v. Old North State Ins. Co., 84 N. C. 355, holds that a breach of a condition in the policy will not avoid it, if the insurer has knowledge thereof, and does not object, in which case the breach is considered as waived. Scottish Fire Ins. Co. v. Stuyvesant Ins. Co., 161 N. C. 485, 489, 76 S. E. 728.

An agent of a fire insurance company whether general or local, cannot waive the requirements of a standard policy except in the form prescribed by the statute. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

"The rule applying to a state of facts is thus stated in Bullard v. Pilot Fire Ins. Co., 189 N. C. 34, 126 S. E. 179: 'The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but to those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be in the knowledge of his principal.' Hayes v. United States Fire Ins. Co., 132 N. C. 702, 44 S. E. 404; Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271; Johnson v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124; Fireman's Fund Ins. Co. v. Rowland Lumber Co., 186 N. C. 269, 119 S. E. 362." Smith v. National Ben Franklin Fire Ins. Co., 193 N. C. 446, 448, 137 S. E. 310.

Sending a check in payment of the claim may constitute a waiver, whether received or not, of unfulfilled conditions. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869. As to waiver of stipulations as to title of property insured, see ante, this note, "Title or Interest of Insured," II.

The terms and conditions of standard form of a fire insurance policy and the stipulations as to a valid waiver thereof are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 147 S. E. 812.

IV. LIABILITY OF COMPANY IN CASE OF LOSS.

Companies Option.—A provision in a policy of fire insurance, by which, in case of loss, it is made optional with the insurer to repair, rebuild, or replace the property destroyed, by giving notice within a certain time, constitutes a contract exclusively between insurer and insured; and neither a judgment creditor nor a mortgagee can interpose to prevent its performance; and if the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead. Stamps v. Commercial Fire Ins. Co., 77 N. C. 209, 24 Am. Rep. 443, cited in note in 26 L. R. A. 857.

Damage by Water—An insurance company is liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352.

Loss by Theft.—Losses by theft consequent on the removal of goods are fairly within the contract to insure against fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352, cited in note in 35 L. R. A., N. S., 892.

Amount Recoverable.—In an action on a policy of insurance, the measure of the amount the insured is entitled to recover is the fair cash value of the property at the time and place of the loss. Fowler v. Old North State Ins. Co., 74 N. C. 89; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. 389.

Limitations.—Under the valid provision of a standard fire insurance policy, approved by statute, the period limited to twelve months from the time of loss by fire in which an action may be maintained is not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured. Tatham & Co. v. Liverpool, etc., Ins. Co., 181 N. C. 434, 107 S. E. 450.

Same—Construed with Section 6290.—See notes to section 6290.

Subrogation.—"It is held in Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176, that when goods injured are totally lost, actually, or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by law of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or privity with such person. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In the court of common law, it can only be asserted in his name; and even in a court of equity, or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured." Lumberman's Mut. Ins. Co. v.

Southern R. Co., 179 N. C. 255, 262, 102 S. E. 417; Cunningham v. Seaboard Air Line R. Co., 139 N. C. 427, 51 S. E. 1029; Fidelity Ins. Co. v. Atlantic Coast Line R. Co., 165 N. C. 136, 80 S. E. 1069; Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426.

Where the mortgagee has insured the mortgaged property, and where the mortgagor has assumed the risk of loss under his contract of purchase, the insurer having paid the loss is subrogated to the rights of the mortgagee. Stuyvesant Ins. Co. v. Reid, 171 N. C. 513, 88 S. E. 779.

V. LIABILITY OF AGENT.

Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on that ground, and not upon the invalid contract of insurance negligently issued by them. Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 140 S. E. 709.

Where a nonresident defendant fire insurance company has upon petition removed a cause from the State to the Federal Court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the court of this State, and the Federal Court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them occasioned by their own neglect in not inserting a provision in the policy that would have rendered it valid, the subject-matter of the latter action being based upon negligence and not on the policy contract, and the application of the doctrine of the election of remedies has no force. Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 140 S. E. 709.

§ 6438. Size of policy; notice; umpire; statement and blanks; policy issued to husband or wife on joint property.—No provisions of this chapter limit insurance companies to use of any particular size or manner of folding the paper upon which their policies are issued. If notice in writing signed by the insured, or his agent, is given before loss or damage by fire to the agent of the company of any fact or condition stated in paragraphs (a), (b), (c), (d), (e), (f), of the foregoing form of policy, it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the waiver; but this notice does not affect the right of the company to cancel the policy as herein stipulated.

The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the foregoing form of policy. When any company demands or requires the insured, under any fire insurance policy, to furnish a statement in writing as prescribed in the standard policy form, after a fire or loss occurs, the company or its representative shall furnish to the insured a blank or blanks in duplicate to be used for the purpose, which blanks shall be of standard form such as the insurance commissioner has approved. The failure to furnish these blanks is a waiver of the provision requiring such statement. Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the assured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof. (Rev. c. 54, s. 43; 1907, c. 575, s. 1; 1915, c. 109, s. 11; 1929, c. 60, s. 1.)

Editor's Note.—The amendment of 1929 added the last sentence to this section.

§ 6439. Penalty for issuing policy not of standard form.—Any insurance company which causes to be issued, and any agent who makes, issues, or delivers a policy of fire insurance other than of the standard form, in wilful violation of this chapter, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but the policy shall be binding upon the company issuing it. (Rev., ss. 4762, 4833; 1899, c. 54, s. 44.)

§ 6440. Effect of failure to give notice of encumbrance.—No policy of insurance issued upon any property shall be held void because of the failure to give notice to the company of a mortgage or deed of trust existing thereon or thereafter placed thereon, except during the life of the mortgage or deed of trust. (1915, c. 109, s. 4.)

See notes to sec. 6437, analysis line II.

§ 6441. Additional or coinsurance clause.—No fire insurance company licensed to do business in this state may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the insured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is stamped on the face of such policy the words "coinsurance contract." The rate for the insurance with and without the coinsurance clause shall be furnished the owner upon request. (1915, c. 109, s. 5; 1925, c. 70, s. 4.)

See notes to sec. 6437, analysis line, III.

Art. 19. Deposits by Foreign Fire Insurance Companies

§ 6442. Amount and nature of deposits required.—Unless otherwise provided in this article, every fire insurance company chartered by any other state or foreign government shall, by their general agent or through some authorized officer, deliver under oath to the insurance commissioner of this state a statement of the amount of capital stock of the company, and deposit with him bonds of the United States, or of the state of North Carolina, or of the cities or counties of this state, or first mortgages on real estate situated in this state to be approved by the insurance commissioner, as follows: Companies whose capital stock is five hundred thousand dollars or less, ten thousand dollars; companies whose capital stock is more than five hundred thousand dollars and not over one million dollars, twenty thousand dollars; companies whose capital stock is in excess of one million dollars, twenty-five thousand dollars, and every insurance company writing a fidelity, surety or casualty business in this state shall be required to deposit with the state securities of the same

class enumerated above in the following amounts: Companies whose premium income derived from this state is less than $100,000.00 per annum, $25,000.00; companies whose premium income is in excess of $100,000.00 per annum, $50,000.00; and the insurance commissioner shall thereupon give the agent a receipt for the same. With securities so deposited the company shall at the same time deliver to the insurance commissioner a power of attorney authorizing him to transfer said securities or any part thereof for the purpose of paying any of the liabilities provided for in this article. The insurance commissioner shall require each company to make good any depreciation or reduction in value of the securities. The securities required to be deposited by each insurance company in this article shall be delivered for safekeeping by the insurance commissioner to the treasurer of the state, who shall receipt him therefor. For securities so deposited the faith of the state is pledged that they shall be returned to the parties entitled to receive them or disposed of as hereinafter provided for. The securities deposited by any company under this article shall not, on account of such securities being in this state, be subjected to taxation, but shall be held exclusively and solely for the protection of contract holders. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; 1933, c. 60.)

See 11 N. C. Law Rev., 234, for brief review of this section as amended in 1933.

Editor's Note.—Public Laws of 1933, c. 60, inserted the clause, about the middle of the section, requiring special deposits from casualty and surety companies.

§ 6443. Right of company to receive interest on deposits.—The insurance commissioner, at the time of receiving the securities, shall give to the company authority to draw the interest thereon, as the same may become due and payable, for the use of the company, and this authority shall continue in force until the company fails to pay any liability arising upon any policy made in favor of any person, firm, or corporation which shall be, at the time the liability arises, a resident of this state, or which shall own property in the state covered by policies issued. In case of such failure the corporation charged with the payment of such interest shall be forthwith notified, and thereafter the interest, so long as the liability exists, shall be payable to the insurance commissioner, to be applied, if necessary, to the payment of such liability. (1909, c. 923, s. 2.)

§ 6444. Sale of deposits for payment of liabilities.—If the company fails to pay any of its liabilities on its contracts according to the terms thereof, after the liabilities have been adjusted between the parties in the manner prescribed by the contracts, if any manner is prescribed thereby, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the insurance commissioner shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this state twenty days notice of his intention to apply to the insurance commissioner for the sale of securities. The insurance commissioner shall advertise the sale of the securities for thirty days prior to the day of the sale in some daily newspaper published in the city of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3.)

§ 6445. Lien of policyholders; action to enforce.—Upon the securities deposited with the insurance commissioner by any such insurance company, the holders of all contracts of the company who are citizens or residents of this state at such time, or who hold policies issued upon property in the state, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the superior court of the county of Wake to enforce the lien for the benefit of all the holders of such contracts. The insurance commissioner shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the insurance commissioner. (1909, c. 923, s. 4.)

§ 6446. Substitution for securities paid. — Where the principal of any of the securities so deposited is paid to the insurance commissioner, he shall notify the company or its agent in this state, and pay the money so received to the company upon receiving other securities of the character named in this article to an equal amount, or, upon the failure of the company for thirty days after receiving notice to deliver such securities to an equal amount to the insurance commissioner, he may invest the money in any such securities and hold the same as he held those which were paid. (1909, c. 923, s. 5.)

§ 6447. Return of deposits.—If such company ceases to do business in this state, and its liabilities, whether fixed or contingent upon its contracts, to persons residing in this state or having policies upon property situated in this state have been satisfied or have been terminated, upon satisfactory evidence of this fact to the insurance commissioner the state treasurer shall deliver to such company, upon the order of the insurance commissioner, the securities in his possession belonging to it, or such of them as remain after paying the liabilities aforesaid. (1909, c. 923, s. 6.)

§ 6448. Deposit required before license granted; exception.—When any fire insurance company files an application with the insurance commis-

sioner to be admitted to do business in this state, he shall require of it a compliance with the provisions of this article before issuing a license to such company; but this article shall not apply to companies licensed to do a reinsurance business only. (1909, c. 923, s. 7; 1915, c. 166, s. 6.)

Art. 20. Insuring State Property

§ 6449. Insurance commissioner to procure insurance.—It is the duty of the insurance commissioner to prepare a schedule of the different properties of the state and to procure policies of insurance thereon according to these schedules for such amounts as he is able to provide for with the provisions and appropriations for the insurance of state property, and to inspect and pass upon all policies of insurance issued upon the public buildings or other property belonging to the state, as regards the form of contract, rate, description, and such other things as are necessary to have the policies in proper form. He shall keep a record in his department, showing the number and date of policy, the name of company, the amount insured, the amount of premium, date of expiration, the property insured, and its location. (Rev., s. 4825; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 1; 1905, c. 441.)

§ 6450. Payment of premiums by state treasurer.—When the insurance commissioner has placed the insurance on state property as provided for in this article and approved the bill for the same, the auditor shall issue his warrant on the state treasurer for the bill, and it is the duty of the treasurer to pay the same out of funds not otherwise appropriated to an amount as is necessary to insure said property to an amount equal to fifty per centum of the scheduled value of such property, but this shall not apply to insurance on property of, or in charge of, the agricultural department and state prison. (Rev., s. 4827; 1905, c. 441, s. 2; 1919, c. 155; Ex. Sess. 1921, c. 61; 1923, c. 248.)

§ 6451. Payment of premiums by officers in charge.—The insurance on the property of, or in charge of, the agricultural department and the state's prison shall be for the amount agreed upon by the insurance commissioner and the officer or officers having such property in charge, and the premiums shall be paid out of the special funds of the agricultural department and state's prison on the order of the insurance commissioner. Before such board, public officer, or other person charged with the custody or safekeeping of any public building or other property of the state may pay any sum of money as premium for a policy of insurance thereon, they shall receive and file among their records a certificate of the insurance commissioner that he has examined and approved of the policies of insurance, giving the number, amount, date, and term of such policies, the property covered, and the names of the companies in which they are written. (Rev., ss. 4826, 4827; 1901, c. 710, ss. 1, 2; 1903, c. 771, ss. 2, 3; 1905, c. 441, s. 2.)

§ 6452. Information furnished commissioner by officers in charge.—It is the duty of the different officers or boards having in their custody any property belonging to the state to inform the commissioner, giving him in detail a full description of same, and to keep him informed of any changes in such property or its location or surroundings. (Rev., s. 4828; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 2.)

§ 6453. Commissioner to inspect state property; plans submitted.—It is the duty of the commissioner at least once in each year, or oftener, if deemed necessary, to visit, inspect, and thoroughly examine each state institution or other state property with a view to its protection from fire, as well as to the safety of its inmates or the property therein in case of fire, and call to the attention of the board or officer having the same in charge any defect noted by him or any improvement deemed necessary. No board, commission, superintendent, or other person or persons authorized and directed by law to select plans and erect buildings for the use of the state of North Carolina or any institution thereof or for the use of any county, city, or incorporated town or school district shall receive and approve of any plans until they are submitted to and approved by the insurance commissioner of the state as to the safety of the proposed buildings from fire, as well as the protection of the inmates in case of fire. (Rev., s. 4829; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; 1909, c. 880; 1919, c. 186, s. 3.)

§ 6454. Report required of commissioner.—The insurance commissioner must submit annually to the governor a full report of his official action under this article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the general assembly. (Rev., s. 4830; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4.)

SUBCHAPTER IV. LIFE INSURANCE

Art. 21. General Regulations of Business

§ 6455. Life insurance company defined; requisites of contract.—All corporations, associations, partnerships, or individuals doing business in this state, under any charter, compact, agreement, or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments or annuities, or who employ agents to solicit business, are life insurance companies, in all respects subject to the laws herein made and provided for the government of life insurance companies, and shall not make any such insurance, guaranty, contract, or pledge in this state with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, and the consideration therefor. (Rev., s. 4773; 1899, c. 54, s. 55.)

Editor's Note.—Many of the decided cases pertaining to life insurance are necessarily determined by construing the particular policy issued in a given case, others depend upon the adjudication of certain principles of the law of contracts and agency. None of these cases directly construes any provision of this code and are consequently not set out here. The searcher will find a complete and comprehen-

sive treatment of the subject in the digests. See 7 N. C. Enc. Dig. 765, 14 N. C. Enc. Dig. 443.

§ 6456. Foreign companies; requirements for admission.—A company organized under the laws of any other of these United States for the transaction of life insurance may be admitted to do business in this state if it complies with the other provisions of this chapter regulating the terms and conditions upon which foreign life insurance companies may be admitted and authorized to do business in this state, and, in the opinion of the insurance commissioner, is in sound financial condition and has policies in force upon not less than five hundred lives for an aggregate amount of not less than five hundred thousand dollars. Any life company organized under the laws of any other country than the United States, in addition to the above requirements, must make and maintain the deposits required of such companies by article four of this chapter. (Rev., s. 4774; 1899, c. 54, s. 56.)

§ 6457. Soliciting agent represents the company.—A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company is suing a policy upon such application, is the agent of the company and not of the insured. (1907, c. 958, s. 1.)

This section does not attempt to prescribe the extent of the agent's authority or to convert a special or limited agency into one with general powers. Fountain v. Mutual Life Ins. Co., 55 F. (2d) 120, 125. See also Provident Mut. Life Ins. Co. v. Parsons, 70 F. (2d) 863.

Insurer Liable for Delay of Agent.—"If the defendant's agent wrongfully failed to deliver the policy within a reasonably short time after its receipt, during which time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate having thereafter become ill, the defendant could not withhold the delivery so as to release it from responsibility. American Trust Co. v. Life Ins. Co., 173 N. C. 558, 563, 92 S. E. 706." Fox v. Volunteer State Life Ins. Co., 185 N. C. 121, 124, 116 S. E. 266.

§ 6458. Discrimination between insurants forbidden.—A life insurance company doing business in this state shall not make any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance or in connection therewith any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue therein, or anything of value whatsoever not specified in the policy. (Rev., s. 4775; 1899, c. 54, s. 57; 1903, c. 438, ss. 5, 10; 1911, c. 196, s. 7.)

Purpose of Section.—"The express provision and obvious purpose and policy of the statute are to prevent discrimination among policy holders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurant and the company in reference thereto shall be plainly expressed in the policy." Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

Collateral Agreements with Agents of Insurer.—Transactions up to the issuance of a policy of life insurance merge therein upon its issuance and acceptance by the insured, and, under this section, the terms and conditions of the insurance must be plainly expressed in the policy as issued, and collateral agreements with local agents are not binding unless included in the policy. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6.

A valid contract or policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by statute. Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304.

When a collateral agreement delivered to insured with his policy of life insurance provided for the reduction of his premiums to be paid thereon, and is claimed to be the sole inducement moving him to take the policy, it is necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement is prohibited by the statute and not enforceable. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746.

Same—Effect on Note Given in Payment of Policy.—When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for deduction of certain amount by way or renewal commissions in violation of the provisions of this section. Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304.

Contract Not Void under Statute.—This section does not declare that contracts, made in violation of its provisions, shall be void. Security Life, etc., Co. v. Costner, 149 N. C. 293, 297, 63 S. E. 304.

"It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability under the contract by pleading his own infraction of law." Robinson v. Security Life, etc., Co., 163 N. C. 415, 421, 79 S. E. 681.

But a policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by this statute, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders when it appears that the agreement is executory in character and gives him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases, the parties are in pari delicto. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746.

"In Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304, the Court held that when a policy had been issued in connection with a contract of this character and retained by the beneficiary for a year, an action by the company on the notes executed for the annual premiums could be sustained, and this on the ground that, on the facts there appearing, the policy and the contract, which it was claimed conferred illegal benefits, were severable, and that defendant, having received the benefits of the policy as an executed consideration, could be made to pay the stipulated price." Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

The exercise of an option given by a mutual life insurance company to one of its policyholders of greater value than that given to the others is an illegal and void discrimination, prohibited by our statute and general principles of law. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6.

§ 6459. Misrepresentations of policy forbidden.—No life insurance company doing business in this state, and no officer, director, solicitor, or other agent thereof, shall make, issue or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies

misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any misrepresentation to any person insured in said company or in any other company for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95.)

§ 6460. Medical examination required.—No life insurance company organized under the laws of or doing business in this State shall enter into any contract of insurance in any twelve months' period in an amount in excess of five thousand dollars ($5,000) upon any one life within this State without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; and provided further, that where there has been no medical examination the policy shall not be rendered void nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud; and provided further, that this section shall not apply to contracts of insurance issued under the group plan. (Rev., s. 4779; 1899, c. 54, s. 58; 1903, c. 438, s. 5; 1919, c. 186, s. 5; 1925 c. 82; 1927, c. 13, s. 1.)

It was not the purpose of this section to permit a recovery on an insurance policy issued without medical examination irrespective of the facts surrounding the transaction; otherwise the expression "except in cases of fraud" would have neither meaning nor significance. Potts v. Life Ins. Co., 206 N. C. 257, 260, 174 S. E. 123.

"In cases of fraud" a policy issued without medical examination stands upon the same footing as policies issued upon such examination. Id.

Statute a Part of Contract.—The provisions of this section, that where a policy of life insurance in a sum less than $5,000 is issued without a medical examination, insurer may not avoid same for insured's misrepresentations as to health except in cases of fraud, enter into and become a part of all such policies written in this State after the enactment of the statute. Headen v. Metropolitan Life Ins. Co., 206 N. C. 270, 173 S. E. 349.

Policy Not Void.—The law is thus declared by Justice Hoke in Morgan v. Royal Fraternal Ass'n, 170 N. C. 75, 86 S. E. 975; "But the authorities are to the effect that, when a statute or valid regulation in restraint only of the company's action is made for the protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation."

In Blount v. Royal Fraternal Ass'n, 163 N. C. 167, 79 S. E. 299, Justice Allen says, referring to section 6312: "The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company." This section does not purport to invalidate the policy, but is a regulation of law imposed upon the insurance company. If it had been the intention of the Legislature, in enacting this section, to invalidate the contract and to deny recovery thereon, it would have so enacted. Ober v. Katzenstein, 160 N. C. 439, 440, 76 S. E. 476; Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 57 S. E. 5; Robinson v. Security Life, etc., Co., 163 N. C. 415, 79 S. E. 681; McNeal v. Life, etc., Ins. Co., 192 N. C. 450, 452, 135 S. E. 300.

The fact that the insured was not in sound health at the time the policy was issued (without medical examination) contrary to a provision in the policy is insufficient, to avoid the policy under this section. Holbrook v. Insurance Co., 196 N. C. 333, 145 S. E. 609.

Except in cases of fraud, the insurer may not declare a forfeiture under the provisions of a policy that the insurer should not be liable if insured was not in sound health at the time of the delivery of the policy, or had not been in good health for two years prior thereto, etc., since such provisions of the policy are in conflict with this section and therefore void. Headen v. Metropolitan Life Ins. Co., 206 N. C. 270, 173 S. E. 349.

Death by Apoplexy within One Year.—A provision in a policy of life insurance that the insurer would not be liable except for the return of the premium paid in case the insured died from apoplexy within one year from the date of the issuance of the policy is valid and enforceable in the insurer's favor, this section not being applicable to the facts of this case. Holbrook v. American Nat. Ins. Co., 196 N. C. 333, 145 S. E. 609, cited and distinguished. Gilmore v. Imperial Life Ins. Co., 199 N. C. 632, 155 S. E. 566.

Applied in Missouri State Life Ins. Co. v. Hardin, 208 N. C. 22, 179 S. E. 2.

Cited in Headen v. Metropolitan Life Ins. Co., 206 N. C. 860, 861, 175 S. E. 282.

§ 6461. Domestic companies to report outstanding policies; reinsurance fund calculated.—It is the duty of every life insurance company incorporated by the laws of this state to make returns in January of each year to the insurance commissioner, showing all its policies and annuity bonds in force on the first day of that month, with such particulars of the same as are necessary for the valuation thereof as hereinafer directed. The insurance commissioner shall thereupon compute, or cause to be computed, the value of such policies and bonds, or what is known as the reinsurance fund therefor, according to the American experience table of mortality and interest at the rate of four and a half per centum, or according to the actuaries' mortality and four per centum interest, or according to any other recognized standard of valuation as he deems best for the security of the business and the safety of the persons insured. Upon this valuation being made and a certificate thereof furnished by the insurance commissioner, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent for every thousand dollars of the whole amount insured by its policies so valued. The reserve fund hereinbefore provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve on outstanding policies may, with the consent of the insurance commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4777; 1903, c. 536, s. 4; 1905, c. 410; 1907, c. 1000, s. 7.)

§ 6462. Reinsurance of risks regulated.—No domestic life insurance company may reinsure its risks without the permission of the insurance commissioner, except to the extent of one-half of any individual risk. The receiver of any life insurance company organized under the laws of this state, when the assets of the company are sufficient for that purpose, and the consent of two thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will secure; but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the insurance commissioner of this state before it has effect. (Rev., s. 4778; 1899, c. 54, s. 58; 1903, c. 536, s. 9.)

§ 6463. Punishment for violation of law as to reinsurance and medical examination.—If any domestic life insurance company shall reinsure its risks, except by permission of the insurance com-

missioner, exceeding one-half of any individual risk, or if any life insurance company organized under the laws of, or doing business in, this state shall enter into any contract of insurance upon lives within this state without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner, such insurance company or any officer, agent or other person soliciting or attempting to effect, a contract of insurance contrary to this section, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3497; 1899, c. 54, s. 58.)

§ 6464. Rights of beneficiaries.—When a policy of insurance is affected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, are entitled to its proceeds against the creditors and representatives of the person affecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children if she dies in his lifetime. (Rev., ss. 4771, 4772; Const., Art. X, s. 7; 1899, c. 54, s. 59.)

See § 6464(a) and note thereto.

As to insurable interest, see 7 N. C. Enc. Dig. 791.

See 13 N. C. Law Rev., 95.

Change of Beneficiary by Insolvent Insured. — While formerly an insolvent insured could not change, according to a provision in his policy, the beneficiary of his policy of life insurance from his estate to his wife, without consideration, against the rights of his creditors, this is now changed by this section. Pearsall v. Bloodworth, 194 N. C. 628, 140 S. E. 303; Meadows Fert. Co. v. Godley, 204 N. C. 243, 167 S. E. 816.

A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. Teague v. Pilot Life Ins. Co., 200 N. C. 450, 157 S. E. 421.

Rights Vest on Delivery of Policy.—"A policy of insurance is essentially like a gift by will, the only difference being that in the case of a policy of insurance the beneficiary acquires a vested interest when the policy is delivered, which becomes vested in possession or enjoyment at the death of the assured; while in the case of a gift by will the interest does not vest until the death of the testator. In other respects, and for all practical purposes, they are alike. If a bequest is made to A. for life, with remainder to his children, those in esse at the death of the testator take a vested estate, which will open, however, and let in any after-born child during the life of A; and so it is with a policy of insurance payable to children: the interests of the beneficiaries become vested at the time of the delivery of the policy or when it takes effect, as a contract between the company and the assured, as to those then in esse, but will open and let in any after-born children, and, in this case, whether of the first or second marriage. If they come within the general description, they will share under the policy." And in case of death of one of the children his or her share will go to the personal representative of that child. Scull v. Aetna Life Ins. Co., 132 N. C. 30, 31, 43 S. E. 504.

Same—Beneficiary Dead.—When A. insured his life for the benefit of "his wife and children," and at the time the policy was issued he had no wife, but did have two children, one of whom died before A.: Held, that upon A.'s death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of "his wife" as a beneficiary, when he had no wife living, was a nullity. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919.

Relation of Beneficiary to Insurer.—The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiary, and create direct legal relations between them. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919; Simmons v. Biggs, 99 N. C. 236.

Under an ordinary policy the beneficiary has such an interest as entitled her to recover upon the death of the insured if the premiums has been paid and the policy is otherwise in force, unless the insurance company can show it had been lawfully surrendered by her consent, or that the insured had duly and legally exercised the power reserved in the clause quoted, entitled to "Change of Beneficairy." Lanier v. Eastern Life Ins. Co., 142 N. C. 14, 18, 54 S. E. 786.

Applied in Russell v. Owen, 203 N. C. 262, 165 S. E. 687.

§ 6464(a). Creditors deprived of benefits of life insurance policies except in cases of fraud.—If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed. (1931, c. 179, s. 1.)

Editor's Note.—This section, in form an independent statute, is actually an amendment of § 6464. It makes six changes in the statutory exemption of the beneficiary of a life insurance policy from the claims of creditors of the insured. It leaves out the requirement of § 6464 that the beneficiary to be so protected must have an insurable interest. This is undesirable in the case where the insurance is effected by one on the life of another for a third person. Vance, Insurance, (2d ed.) p. 154, n. 1. It extends the exemption to include beneficiaries made such by a change of beneficiaries (compare Pearsall v. Bloodworth, 194 N. C. 628, 140 S. E. 303, change of beneficiary from estate to wife while insolvent), and to include assignees of the policy. Compare, as to the need for an insurable interest in the assignee, Powell v. Dewey, 123 N. C. 103, 31 S. E. 381 (partnership); Hinton v. Mutual Reserve Fund Life Assn., 135 N. C. 314, 47 S. E. 474 (wife assigned insurance payable to her estate to her husband's creditors); Hardy v. Aetna Life Ins. Co., 152 N. C. 286, 67 S. E. 767; s. c., 154 N. C. 430, 70 S. E. 828 (uncle assigned insurance payable to his estate to nephew); Johnson v. Mutual Ben-

efit & Ins. Co., 157 N. C. 106, 72 S. E. 847 (bona fide sale); McNeal v. Life & Cas. Ins. Co. of Tenn., 192 N. C. 450, 135 S. E. 300. The creditors, where there has been an attempt to defraud them, may recover the premiums with interest, out of the proceeds of the policy. As to the confused state of the decisions, clarified by this clause, see Vance, note 1, at 621. The statute does not of course deal with the case where the premiums have been paid out of stolen funds and the victim of the theft seeks to reach the entire proceeds of the policy. As to that, see Vance, note 1, 618-621. The new statute expressly applies to policies of insurance heretofore or hereafter written. The courts, however, will not permit it to prejudice the rights of existing creditors in previously issued policies. Bank of Minden v. Clement, 256 U. S. 126, 41 Sup. Ct. 408, 65 L. Ed. 857, 9 N. C. Law Rev. 377.

Statute Not Retroactive.—This section cannot affect policies written before the effective date of the statute. Com'r of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505.

§ 6465. Notice of nonpayment of premium required before forfeiture.—No life insurance corporation doing business in this state shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his other last known postoffice address in this state, by the corporation, or by any officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than forty-five days prior to the day when the same is payable as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued.

No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a payroll deduction order executed by the assured and delivered to such insurance company or the assured's employer authorizing the deduction of such premium installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare forfeited or lapsed any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least fifteen days before said policy is cancelled or lapsed. (1909, c. 884; 1929, c. 305, s. 1; 1931, c. 317.)

Editor's Note.—The Act of 1929 added the last two sentences to the first paragraph of this section. The Act of 1931 added the second paragraph.

Construction of Provision for Forfeiture.—If there is any real ambiguity in the provisions of a policy for forfeiture for nonpayment of premiums, they will be resolved against the insurer; but, if their meaning to the ordinary reader is plain, there is no reason why they should not be enforced. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339.

Forfeiture by Unpaid Check.—"An agreement that a check is received in satisfaction of a note is not implied from the surrender or cancellation of the note. Until the check was paid the note was in force, and unless it was paid at the time to which it was extended, the policy was by its terms forfeited. Forfeitures, it is true, are not favored in the law, but promptness of payment is essential in the business of life insurance." Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339, 343.

Notice of Forfeiture.—It is incumbent upon the insurance company to give notice that the premiums are due and the policy is not subject to forfeiture until 30 days after such notice is given. Aiken v. Atlantic Life Ins. Co., 173 N. C. 400, 92 S. E. 184.

Same—Policy Issued before Statute.—Where an old policy issued before this statute was withdrawn and a new policy issued after this statute, notice must be given in accordance with the statute in order to have a legal forfeiture. Garland v. Jefferson Standard Life Ins. Co., 179 N. C. 67, 101 S. E. 616.

Same—After Reinstatement.—Where there has been a default and forfeiture and the insured was furnished a health certificate and secured a reinstatement and an extension of time for payment, it is not necessary to again give the statutory notice of the time when the extension notes will become due. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339.

Waiver of Forfeiture.—Where a policy of life insurance is forfeited for failure to pay at maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with this section, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture. Sellers v. Life Ins. Co., 205 N. C. 355, 171 S. E. 328.

Making Sufficient Tender.—After tender and failure of insurer to accept the tender the insured does not have to keep the tender open. An application for reinstatement does not alter the insured's rights, if the policy has not been forfeited. Aken v. Atlantic Life Ins. Co., 173 N. C. 400, 92 S. E. 184.

§ 6466. Distribution of surplus in mutual companies.—Every life insurance company doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, may distribute the surplus annually, or once in two, three, four, or five years, as its directors determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, this value to be computed by the American experience table of mortality with interest not exceeding four and one-half per cent. (Rev., s. 4776; 1903, c. 536, s. 10.)

§ 6466(a). Definition of group life insurance.—Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer: Provided, however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured. Such group policy may provide that the term 'employees' shall include the officers, managers and employees of subsidiary or affiliated corporations and the individual proprietors, partners and employees of affiliated individuals and firms, when the business of such subsidiary or affiliated corporations, firms or individuals is controlled by the common employer through stock ownership, contract or otherwise. (1925, c. 58, s. 1; 1931, c. 328.)

See 12 N. C. Law Rev., 167, for note "Recent Trends in Group Insurance."

Editor's Note.—Group life insurance is comparatively new, but seems to be increasing in favor. Its attractiveness lies largely in the fact that no medical examination is necessary. This is because the mortality rate in any given homogeneous group is only the average mortality rate as shown by the mortality tables. If the ordinary life insurance were issued without physical examination, the sickly and feeble would apply in great numbers, thus raising the death rate, as based on experience. This would not be so in a selected group and this is what group insurance does. For instance the University of North Carolina might take out a group life insurance policy on all its employees, insuring them against death, total and partial disability and old age. The average in this group would be about the same as the general average and, therefore, no unusual losses would result to the Company, even though they had required no medical examination.

This idea embodied in the New York Law in 1918 and Massachusetts in 1921, now appears in the North Carolina Law.

This section is copied verbatim from the New York Law requiring the group to include not less than fifty employees and that 75 per cent of them shall be insured where they pay the premium jointly with the insurer. See 3 N. C. Law Rev. 145.

The Act of 1931 added the last sentence to this section.

§ 6466(b). Standard provisions for policies of group life insurance.—No policy of group life insurance shall be issued or delivered in this State unless and until a copy of the form thereof has been filed with the Insurance Commissioner and formally approved by him; nor shall such policy be so issued or delivered unless it contains in substance the following provisions:

(a) A provision that the policy shall be incontestable after two years from its date of issue, except for nonpayment of premium and except for violation of the conditions of the policy relating to military or naval service in time of war.

(b) A provision that the policy, the application of the employer and the individual applicants, if any, of the employees insured, shall constitute the entire contract between the parties, and that all statements made by the employer or by the individual employees shall, in the absence of fraud be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

(c) A provision for the equitable adjustment of the premiums or the amount of insurance payable in the event of a misstatement in the age of the employee.

(d) A provision that the company will issue to the employer for the delivery to the employee, whose life is insured under such policy, an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom payable, together with provision to the effect that in case of the termination of the employment for any reason whatsoever the employee shall be entitled to have issued to him by the company, without evidence of insurability, and upon application made to the company within thirty-one days after such termination, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under such group insurance policy at the time of such termination.

(e) A provision that to the group or class thereof originally insured shall be added from time to time all new employees of the employer eligible to insurance in such group or class.

Except as provided in this chapter it shall be unlawful to make a contract of life insurance covering a group in this State. Policies of group life insurance, when issued in this State by any company not organized under the laws of this State, may contain, when issued, any provision required by the law of the state territory, or district of the United States under which the company is organized; and policies issued in other states or countries by companies organized in this State, may contain any provision required by the laws of the State, territory, district or county in which the same are issued, anything in this section to the contrary notwithstanding. Any such policy may be issued or delivered in this State which in the opinion of the Insurance Commissioner contains provisions on any one or more of the several foregoing requirements more favorable to the employer or to the employee than hereinbefore required. (1925, c. 58, s. 2.)

§ 6466(c). Voting power under policies of group life insurance.—In every group policy issued by a

domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes within the meaning of this chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

§ 6466(d). Exemption from execution.—No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of his debts. (1925, c. 58, s. 4.)

Art. 22. Registered Policies

§ 6467. Deposits to secure registered policies.—Any life insurance company, incorporated under the laws of this state, may deposit with the insurance commissioner securities of the kind described in article six of this chapter, for the investment of the capital of insurance companies, or farm loan bonds issued by the federal land banks, or notes secured by real estate situated in another state approved by the committee hereinafter designated, to any amount not less than ten thousand dollars, which shall be legally transferred by it to him as insurance commissioner and his successors for the common benefit of all the holders of its "registered" policies and annuity bonds issued under the provisions of this article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the insurance commissioner for deposit under its section shall, before acceptance by him, be approved by a committee, composed of the commissioner, the state treasurer, and the attorney-general; and when the securities are of the character prescribed by law and approved by a majority of the committee, the insurance commissioner shall list them in a book of records kept in his department for that purpose. The committee shall endorse on the record, at the end of the list of the securities, its approval of the securities named in the list. The record shall contain a separate list or account of the securities deposited by each insurance company, so kept as to show at all times the total value of all securities on deposit for each company. No security may be withdrawn or substituted except upon the approval of the committee. All the securities, after being approved and listed, shall be deposited with the state treasurer, who shall give his receipt to the insurance commissioner for them. The committee shall, twice a year, in the months of June and December, review and assess the value of all securities on deposit under this section. (Rev., s. 4780; 1905, c. 504, s. 12; 1009, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2.)

§ 6468. Additional deposits may be required.—Each company which has made deposits herein provided for shall make additional deposits from time to time, as the insurance commissioner prescribes, in amounts of not less than five thousand dollars and of such securities as are described in the preceding section, so that the market value of the securities deposited shall always equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. No company organized under this chapter shall be required to make such deposit until the net value of the policies in force, as ascertained by the insurance commissioner, exceeds the amount deposited by said company under the preceding section. As long as any licensed company maintains its deposits as herein prescribed at an amount equal to or in excess of the net value of its registered policies and annuity bonds, as aforesaid, it is the duty of the insurance commissioner to sign and affix his seal to the certificates, as required in this article, on every policy and annuity bond presented to him for that purpose by any company so depositing. (Rev., s. 4781; 1905, c. 504, s. 15; 1909, c. 920, s. 3; 1911, c. 140, s. 2; 1917, c. 191, s. 3.)

§ 6469. Withdrawal of deposits.—Any such company whose deposits exceed the net value of all registered policies and annuity bonds it has in force, less such liens not exceeding such value as the company holds against them, may withdraw such excess or it may withdraw any of such securities at any time by depositing in their place others of equal value and of the character authorized by law; and as long as such company remains solvent and keeps up its deposits, as herein required, it may collect the interest and coupons on the securities deposited as they accrue; and any life insurance company may withdraw such securities by and with the consent of the policyholder only; and in case of such withdrawal, the certificate of registration in each case must be surrendered for cancellation, or a receipt from the policyholder, satisfactory to the insurance commissioner, must be produced before such withdrawal of deposits shall be allowed. (Rev., s. 4782; 1905, c. 504, s. 18.; 1911, c. 134.)

§ 6470. Manner of keeping deposits. — The securities deposited under this article shall be deposited and kept in the manner required by law for the keeping of other deposits of insurance companies, but separate from other deposits of the company. (Rev., s. 4783; 1905, c. 504, s. 19.)

§ 6471. Record of securities kept by commissioner; deficit made good.—The insurance commissioner shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates of value hereafter required in this article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the insurance commissioner to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects

to make such deposits for sixty days it shall be deemed to be insolvent and shall be proceeded against in the manner provided by law in such cases. (Rev., s. 4784; 1905, c. 504, s. 16.)

§ 6472. Registered policies certified. — After making the deposits provided for in this article no company may issue a policy of insurance or endowment or an annuity bond known or designated as "registered" unless it has upon its face a certificate in the following words: "This policy or annuity bond is registered and secured by pledge of bond, stocks, or securities deposited with the department as provided by law," which certificate shall be signed by the insurance commissioner and sealed with the seal of his office. Such policies and bonds shall be known as "registered" policies and annuity bonds, and a sample copy of such kind, class, and issue shall be kept in the office of the insurance commissioner. All policies and bonds of each kind and class issued, and the copies thereof, filed in the office of the insurance commissioner must have imprinted thereon some appropriate designating letter, combination of letters or terms identifying the special forms of contract, together with the year of adoption of tracts, policy, or bond, the designating letters or terms and year of adoption thereon shall be changed accordingly. (Rev., s. 4785; 1905, c. 504, s. 13.)

§ 6473. Deposit for, and registration of, unregistered policies.—Every company which has made the deposit herein provided for may, at any time after the date on which it was made, deposit with the insurance commissioner securities of the kind herein mentioned and in accordance with the provisions hereof, in an amount, inclusive of any amount deposited under the provisions of this law equal to the net value of any nonregistered policies and annuity bonds which it has in force at that time, less such liens not exceeding such actual cash value as the company has against them, and the insurance commissioner shall when requested so to do, furnish such company with a certificate of the description mentioned in the preceding section, to be attached to each of said policies and annuity bonds. The insurance commissioner shall enter upon each of such certificates the number of the policy or annuity bond to which it belongs and make a record of the same in his department. (Rev., s. 4786; 1905, c. 504, s. 17.)

§ 6474. Record to be kept by commissioner; valuation; mutilated policies.—The insurance commissioner shall prepare and keep such registers thereof as will enable him to compute their value at any time. Upon sufficient proof, attested by the president or vice-president and secretary of the company which has issued such policies or annuity bonds, that any of them have been commuted or terminated, the insurance commissioner shall commute or cancel them upon such register. The net present value of every policy or annuity bond according to the standard prescribed in the laws of this state for the valuation of policies of life insurance companies when the first premium shall have been paid thereon, less the amount of such liens, not exceeding such value as the company has against it, shall be entered opposite the record of said policy or annuity bond in the register aforesaid at the time the record is made. On the thirty-first day of December of each year or within sixty days thereafter the insurance commissioner shall cause the registered policies and annuity bonds of each company to be carefully revalued, and the net present value thereof at the time fixed for such valuation, less such liens, not exceeding such value as the company has against it, shall be entered upon the register opposite the record of such policy or bond, and the insurance commissioner shall furnish a certificate of the aggregate of such value to the company. For the purpose of making this valuation the insurance commissioner may employ a competent actuary, who shall be paid by the company for which the services are rendered, but nothing herein shall prevent any company from having made such valuation herein contemplated, which may be received by the insurance commissioner upon such proof as he determines. Upon application of an insurance company, subject to the provisions of this article, it is the duty of the insurance commissioner to receive mutilated policies and annuity bonds issued by said companies and certify in lieu thereof other policies or bonds of like tenor and date. (Rev., s. 4787; 1905, c. 504, s. 14.)

§ 6475. Power of commissioner in case of insolvency.—If at any time the affairs of a life insurance company which has deposited securities under the provisions of this article, in the opinion of the insurance commissioner, appear in such condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the insurance commissioner may take such proceedings against the company as are authorized by law to be taken against other insolvent companies, and said companies are in all respects subject to the provisions of law affecting other companies. (Rev., s. 4788; 1905, c. 504, s. 20.)

§ 6476. Fees for registering policies.—Every company making deposits under the provisions of this article must pay to the insurance commissioner for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents for those exceeding ten thousand dollars in amount and twenty-five cents for all under ten thousand dollars in amount, except policies for one hundred dollars and not exceeding five hundred dollars the fee shall be fifteen cents; for policies of one hundred dollars or less the fee shall be ten cents; for each certificate including seal, for nonregistered policies issued in accordance with the provisions of such constitution, laws and/or twenty-five cents. (Rev., s. 4789; 1905, c. 504, s. 21.)

Art. 22A. Non-Profit Life Benefit Association

§ 6476(a). Cooperative non-profit life benefit association defined.—Any corporation or association, domestic or foreign, issuing benefit certificates or policies of life, health or accident insurance upon the lives or health of its members, having a representative form of government without capital stock and conducting its business without profit and for the sole benefit of its members and their beneficiaries and maintaining the reserves as herein provided and all contracts issued by it, which shall make acceptable written application to

become such and shall comply with the provisions of this article is defined as a "Cooperative Nonprofit Life Benefit Association." (1927, c. 30, s. 1.)

§ 6476(b). Form of corporate government.—Such association shall have a constitution, laws and/or by-laws providing for a representative form of government for the management of the association; providing for a legislative or governing body composed of its officers and representatives to be elected either by the adult members or by delegates elected directly or indirectly by the adult members and providing for the manner of selecting representatives of the members for membership in its legislative body. The elected members of the governing body shall have not less than two-thirds of the votes of said body, nor less than the votes required to amend its constitution, laws and by-laws, and the governing body shall meet as often as once in four years (or any time during the fourth year after a meeting). Meetings of its governing body may be held in any state, province or country where such association is authorized to do business. The members of the governing body shall not vote by proxy.

Officers to conduct the business of the association shall be elected by such body, but not for a longer period than four years or/and until the subsequent quadrennial meeting of said body. Such officers, by whatever name known, shall constitute the Board of Directors. (1927, c. 30, s. 2.)

§ 6476(c). Basis upon which insurance contracts may be issued.—Any such association maintaining reserves based upon the American Experience Table of Mortality, with an interest assumption of not more than 4% or some higher standard, or upon any minimum standard hereafter allowed by law in this State for legal reserve life insurance companies, may issue contracts of insurance, life, health, accident, annuities and endowments or all of them combined or separately, upon the health and lives of children and adults.

Any association licensed to do business under the provisions of this act, which has theretofore enacted a provision in its constitution, laws and /or by-laws in relation to the rates to be paid by its members, or lien and interest charges in lieu of such rates, or any part thereof, shall maintain the provisions of this article, the fee shall be by-laws in full force and effect or the equivalent thereof in all particulars as to such members.

Any such association desiring to do business in this State under the provisions of this article, which has all or any portion of its membership upon a rate or premium basis not producing the reserves herein required under the American Experience Table of Mortality with an interest assumption of not more than 4% and which also possesses the power to increase the rates or call extra assessments upon said membership, may be permitted to do business in this State as such association defined in this article if it shall, as to all business hereafter acquired by it, maintain reserves on such business based upon the American Experience Table of Mortality with an interest assumption of not more than four per cent, or upon any minimum standard allowed by law for legal reserve life insurance companies in this State or the state of its domicile; and the contracts of members theretofore admitted to membership shall be forever subject to increased rates or extra assessments and the association shall maintain the reserves on all of its prior business on a basis not less than the National Fraternal Congress Table of Mortality with an interest assumption of not more than four (4) per cent, or upon a table of mortality not less than that derived from its own experience covering a period of not less than twenty years and involving not less than one hundred thousand lives, with an interest assumption of not more than four per cent.; and the officers of such association shall provide for such increased rates or extra assessments as shall be necessary to maintain such reserves. (1927, c. 30, s. 3; 1927, c. 252.)

Editor's Note.—The 1927 amendment ch. 252, substituted four percent for three and one-half percent.

§ 6476(d). Contracts in writing; policy fee forbidden.—All contracts for insurance or benefits shall be in writing. It shall be unlawful for any such association or any officer or any agent to include in the sum charged a member, any fee, compensation, charge or perquisite whatsoever; not specified in the policy or certificate except that a local medical examiner's fee may be charged. (1927, c. 30, s. 4.)

§ 6476(e). All policies mutual and participating.—All beneficiary certificates or policies issued by such association on said American Experience Table of Mortality with said interest assumption or any higher standard, shall be mutual and participating, and the association may provide for automatic paid up or extended insurance for an amount not to exceed the amount the reserve to the credit of such member will purchase in the event of suspension after said certificate shall have been in force for not less than two full years or more from date of issue, and shall carry such liability on its books. (1927, c. 30, s. 5.)

§ 6476(f). Benefit not subject to seizure under process.—No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such association, shall be liable to attachment, garnishment or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member, or his beneficiary, or any other person who may have a right thereunder, either before or after payment. (1927, c. 30, s. 6.)

§ 6476(g). Officers and members not personally liable.—Officers and members of the supreme, grand or any subordinate body of such association, by whatever name known, shall not be individually liable for the payment of any disability or death or other benefits provided for in the laws and contracts of such association, but such benefits shall be payable out of the funds of such association and in the manner provided by its laws. (1927, c. 30, s. 7.)

§ 6476(h). Authority to make laws.—Every such association shall have the power to make a constitution, laws and / or by-laws for the government of the association, the admission of its members, the management of its affairs and the fixing

and readjustment of the rates of contribution of its members from time to time, and it shall have the power to change, add to or amend such constitution, laws or by-laws and shall have such other powers as are necessary to carry into effect the objects and purposes of the association; it may make refunds to its members equitably of any surplus funds of the association. (1927, c. 30, s. 8.)

§ 6476(i). Constitution, laws and by-laws must be filed.—Every such association transacting business under this act shall file with the Insurance Commissioner of this State, a duly certified copy of its constitution, laws or by-laws and all amendments or additions thereto. Copies of the same, certified to by the secretary or corresponding officer of the association, shall be prima facie evidence of the legal adoption and filing thereof. (1927, c. 30, s. 9.)

§ 6476(j). Benefits, loan values and dividends.—Such association may provide for stipulated premiums and death, annuity, endowment and disability benefits, and for cash surrender and loan values to an amount not exceeding the reserve or the equivalent thereof, in paid up or extended term insurance, based upon the mortality standards set forth in this article. (1927, c. 30, s. 10.)

§ 6476(k). May maintain hospitals and homes.—Such association may maintain homes for aged members, or children's homes, hospitals or recreational centers, or any or all of said features, or any other charitable institution, and may provide for the erection of monuments or memorials to deceased members: Provided, any such expenses may not be paid from the mortuary fund or reserves herein required. (1927, c. 30. s. 11.)

§ 6476(l). Organization of coöperative non-profit life benefit association.—When ten or more citizens of the United States, a majority of whom are citizens of this State, desire to form an association under the provisions of this article, they shall adopt articles of incorporation and a constitution, laws or by-laws and file the same with the Insurance Commissioner of this State who shall grant them temporary permission to solicit members and collect premiums therefrom, but without the right to issue contracts until licensed to do business; and when such incorporators have presented to the Insurance Commissioner proof that they have five hundred members or more, and have collected from them assessments or premiums sufficient to pay the maximum amount of any proposed policy to be issued, and upon depositing with the Insurance Commissioner ten thousand dollars ($10,000) in securities to be approved by him, then said Insurance Commissioner may grant to said association a certificate of authority and permission to do business under this article. (1927, c. 30. s. 12.)

§ 6476(m). Corporation now doing business in this State may qualify under this article.—Any association, domestic or foreign, now engaged in transacting business in this State, which can qualify under the provisions of this article as a "Coöperative Non-profit Life Benefit Association," may, upon making application therefor, be granted a license by the Insurance Commissioner to do business as such under this article, provided, it has accumulated reserves on its policies in force in a sum of not less than one hundred thousand dollars ($100,000), properly invested. (1927, c. 30, s. 13.)

§ 6476(n). License granted.—Any domestic or foreign association wishing to do business under the provisions of this article under whatever name it may conduct its business, upon making a written application and submitting proof satisfactory to the Insurance Commissioner of this State that its business, as conducted, and its reserves on hand comply with the provisions of this article upon paying to the Insurance Commissioner the sum of two hundred dollars ($200) as license fee and all other fees assessed against such company shall be licensed to do business in this State as such association until the first day of the following April. Any such association, admitted to do business under this article in this State, which shall fail to comply with the provisions of this article, may have its license revoked, and upon failing to maintain its reserves as herein required, may be liquidated by the courts or by the Insurance Commissioner as may be provided by law for the liquidation of legal reserve life insurance companies. (1927, c. 30, s. 14.)

§ 6476(o). Annual statement and license.—Every such association doing business in this State shall annually file with the Insurance Commissioner on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year. The Insurance Commissioner is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statement are true, and he may thereupon grant a renewal of such license to such association to do business in this State which shall continue in full force and effect until a new license be issued or specificially refused unless revoked for good cause. For each such license, or annual renewal thereof, the association shall pay the Insurance Commissioner two hundred ($200). Such license or a duplicate thereof shall be prima facie evidence that such association is a Coöperative Non-Profit Life Benefit Association within the meaning of this act. When the Insurance Commissioner refuses to license any such association or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to writing and file the same in his office and furnish a copy thereof, together with a statement of his reasons for his ruling to the officers of the association upon request, and the action of the Insurance Commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the State. Except as herein provided, such association shall be governed by the laws of this State relative to or affecting life insurance companies. (1927, c. 30, s. 15.)

§ 6476(p). Examination of association.—The

Insurance Commissioner or any person he may appoint shall have the power of visitation and examination into the affairs of any such association. He may employ assistants for such purpose and they shall have free access to all the books, papers and documents that relate to the business of the association, and may summon and qualify as witnesses under oath and examine its officers, agents and employees or other persons in relation to the condition of its business. The expenses of such examination shall be paid by the association examined upon a statement furnished by the Insurance Commissioner. As to all such foreign associations doing business in this State, the Insurance Commissioner, in his discretion, may accept in lieu of such examination the report of the examination of the Insurance Commissioner of the State, territory, district, province or country where such association is organized or a report of an examination made of such association by the Insurance Commissioner of any State. (1927, c. 30, s. 16.)

§ 6476(q). Investment. — The funds of such association shall be invested in the same securities as provided by law for other domestic companies, and if a foreign association, in such securities as may be provided by the laws of its domicile. (1927, c. 30, s. 17.)

§ 6476(r). Premium tax.—The officers of such association shall file the reports required by section six thousand three hundred and twenty-two of chapter one hundred and six, Consolidated Statutes, and shall pay the same premium tax as is now or shall hereafter be provided for other life insurance companies. (1927, c. 30, s. 18.)

§ 6476(s). Foreign association may incorporate under this article.—Any foreign association, now or hereafter doing business in this State or conducting a business enabling it to qualify to do business under this act in this State, may become incorporated in such state as such association under whatever name it shall select: Provided, it does not conflict with the name of some other organization doing business therein so as to cause confusion, upon filing with the Insurance Commissioner a resolution of its Board of Directors or of a similar body by whatever name known, or of its legislative body, requesting to be incorporated as such association of this State, and submitting proof of its financial qualifications under this article; and its officers shall thereupon retain their respective offices for the terms for which they were elected. Such association so reincorporated in this State shall maintain a general office within the State. (1927, c. 30, s. 19.)

§ 6476(t). To become a legal reserve life company.—Any such association filing with the Insurance Commissioner a resolution of its board of directors or similar body, by whatever name known, or of its legislative body, making a request to become a legal reserve life insurance company, upon submitting proof satisfactory to the Insurance Commissioner that the condition of its business qualifies it under the laws of this State, to be classed as a legal reserve life insurance company, shall thereupon become a legal reserve life insurance company under such name and such plan as may be approved by the Insurance Commissioner. (1927, c. 30, s. 20.)

§ 6476(u). Election of corporation to accept article.—This article shall not apply to any corporation, domestic or foreign, now or hereafter doing business in this State, unless said corporation, by action of its board of directors or other properly constituted body, elects to have said corporation come under the provisions hereof. (1927, c. 30, s. 21.)

§ 6476(v). Suit against association; where instituted.—Suit may be instituted against said association in any county in this State in any court having jurisdiction. (1927, c. 30, s. 22.)

§ 6476(w). Service of process on Insurance Commissioner.—Every coöperative non-profit life benefit association, whether domestic or foreign, before it shall be permitted to transact business in this State, shall appoint in writing the Insurance Commissioner and his successor in office to be its true and lawful attorney on whom all legal process and legal notices in any action or proceeding against it in this State shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon said association, and that the authority of such Insurance Commissioner shall continue in force so long as any liability remains outstanding in this State. (1927, c. 30, s. 23.)

§ 6476(x). Mode of service; time to file answer.—Copies of such appointment, certified by said Insurance Commissioner, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original. Service of process in all suits and proceedings against such association shall be made only upon such attorney and must be made in duplicate upon him, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon such association: Provided, however, that no such service shall be deemed valid or binding against such association when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of service upon such attorney. When legal process against such association is served upon said Insurance Commissioner, he shall forthwith forward by mail one of the duplicate copies, directed to its secretary or corresponding officer at the home office of the association. Legal process shall not be served upon any such association except in the manner herein provided. (1927, c. 30, s. 24.)

§ 6476(y). Insurance Commission defined.—The term "Insurance Commissioner," as used in this article, shall include the person, board or department of this State, under whatever name known, supervising the granting of licenses to insurance organizations to do business in this State. (1927, c. 30, s. 25.)

Art. 22B. Mutual Burial or Assessment Insurance Associations

§ 6476(z). Must pay death benefits in coin instead of services.—No corporation, society, or or-

ganization now doing business in this state or that may hereafter be authorized to do business in this state upon a mutual or assessment insurance plan and issuing contracts to its members providing benefits in excess of one hundred ($100) dollars in the event of death of its members or policy holders shall issue any contract to such members providing for the payment of benefits in merchandise or service to be rendered to such member or his beneficiary; but all contracts hereafter issued by any such corporation, society, or organization, shall provide by the terms of its contract for the payment of such benefits only in lawful currency or coin.

All funeral or burial associations, heretofore or hereafter organized, operating under what is known as the assessment plan, shall in their contracts, by-laws or other provisions provide:

(a) That in the event a member of such funeral or burial association, in good standing, shall die at a place so far removed from the home of such funeral or burial association that it is not deemed practicable by said association or its officers to provide a burial or funeral in services and merchandise, the said association shall cause to be paid in cash for the burial of such member the amount contracted for and stipulated in the rules, contracts or by-laws of such association not exceeding one hundred ($100.00) dollars, as provided for in said chapter, or cause such member to receive a funeral or burial equal to that agreed in such contracts, rules or by-laws of said association.

(b) If the membership of any association providing benefits of one hundred ($100.00) dollars or less, in funerals or burials, as permitted by chapter seventy-one of the public laws of one thousand nine hundred thirty-one, shall not prove sufficient at any time to yield the benefit contracted for, then such benefits as the amount of the assessment, according to such rules and by-laws made or levied on the total assessable membership, shall be paid or provided.

(c) That each contract shall contain a schedule of the merchandise and services to be supplied under the said contract.

(d) That such mutual burial association shall file semiannually on the first days of July and January of each year, beginning July first, one thousand nine hundred and thirty-three, with the insurance commissioner, a sworn statement of the number of its membership, and no funeral or burial association shall be permitted or allowed to continue in operation if its membership shall continue for three months to be below the number of eight hundred. (This shall not apply to burial associations operated for people of the colored race, but such association shall file with the commissioner of insurance a statement of its membership and assessments, and if in the opinion of the commissioner of insurance such association becomes at any time in such condition as to render it probably unable to carry out its provisions the commissioner of insurance is authorized to discontinue the operation of such association.)

(e) That in the report to be filed semi-annually with the insurance commissioner each mutual burial association providing benefits to its members of one hundred ($100.00) dollars or less shall embrace in its report the amount of assessments levied per member and a statement of each person buried last prior to such report wherever funeral or burial benefits were rendered by such association.

(f) If the insurance commissioner shall find at any time that any statements made by an association are untrue and falsely made or in case the association shall fail or refuse to obey the provisions of this said chapter, or if upon examination the insurance commissioner finds that such association is insolvent, that it has failed to or become unable to carry out its contract with its members, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of business is not feasible for the purposes of carrying out successfully its plans, or that its condition is such as to render its further proceedings hazardous to the members, he shall thereupon have power to revoke and cancel such license. The said association shall have the right to appeal from such revocation or cancellation by the insurance commissioner to the superior court of the county in which such association has its principal office. (1931, c. 71; 1933, c. 222, s. 1.)

Editor's Note.—Public Laws of 1933, c. 222, added the last paragraphs, numbered (a) to (f) to this section.

It is noteworthy that the commissioner may cancel the license of the organization if "its mode of business is not feasible for the purpose of carrying out successfully its plans, or its condition is such as to render its further proceedings hazardous to the members." Such broad provisions give the commissioner wide authority. See 11 N. C. Law Rev., 234.

SUBCHAPTER V. ACCIDENT AND HEALTH INSURANCE

Art. 23. Nature of Policies

§ 6477. Form, classification, and rates to be approved by insurance commissioner.—No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the commissioner of insurance; nor shall it be so issued or delivered until the expiration of thirty days after it has been so filed unless the commissioner shall sooner give his written approval thereto. If the commissioner shall notify, in writing, the company, society, or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1.)

§ 6478. Specifications as to form of policy.—No such policy shall be so issued or delivered (1) unless the entire money and other considerations therefor are expressed in the policy; nor (2) unless the time at which the insurance thereunder takes effect and terminates is stated in a portion of the policy preceding its execution by the insurer; nor (3) if the policy purports to insure more than one person; nor (4) unless every

printed portion thereof and of any endorsements or attached papers shall be plainly printed in type of which the face shall be not smaller than ten point; nor (5) unless a brief description thereof be printed on its first page, and on its filing back in type of which the face shall not be smaller than fourteen point; nor (6) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply: Provided, however, that any portion of such policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances under which loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy. (1913, c. 91, s. 2.)

For treatment of subject see 7 N. C. Enc. Dig. 853.

§ 6479. Standard provisions in policy.—Every such policy so issued shall contain certain standard provisions, which shall be in the words and in the order hereinafter set forth and be preceded in every policy by the caption "Standard Provisions." In each standard provision, wherever the the word "insurer" is used, there shall be substituted therefor "company" or "corporation" or "association" or "society" or such other word as will properly designate the insurer.

1. Provisions Relative to Contract.—A standard provision relative to the contract may be in either of the following two forms: Form (A) to be used in policies which do not provide for reduction of indemnity on account of change of occupation, and Form (B) to be used in policies which do so provide. If Form (B) is used and the policy provides indemnity against loss from sickness, the words "or contracts sickness" may be inserted therein immediately after the words "in the event that the insured is injured."

(A) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

(B) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the insurer's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the insurer as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the insurer will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the insurer for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the insurer in accordance with such law; but if such filing is not required by such law then they shall mean the insurer's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the insurer is liable.

2. Changes in the Contract.—A standard provision relative to changes in the contract shall be in the following form: No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the insurer and such approval be endorsed hereon.

3. Reinstatement of Policy.—A standard provision relative to reinstatement of policy after lapse may be in either of the three following forms: Form (A) to be used in policies which insure only against loss from accident; Form (B) to be used in policies which insure only against loss from sickness; and Form (C) to be used in policies which insure against loss from both accident and sickness.

(A) If default be made in the payment of the agreed premium for this policy the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

(B) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover such sickness as may begin more than ten days after the date of such acceptance.

(C) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Time of Notice of Claim.—A standard provision relative to time of notice of claim may be in either of the three following forms: Form (A) to be used in policies which insure only against loss from accident, Form (B) to be used in policies which insure only against loss from sickness, and Form (C) to be used in policies which insure against loss from both accident and sickness. If Form (A) or Form (C) is used the insurer may at its option add thereto the following sentence: "In event of accidental death immediate notice thereof must be given to the insurer."

(A) Written notice of injury on which claim may be based must be given to the insurer within twenty days after the date of the accident causing such injury.

(B) Written notice of sickness on which claim may be based must be given to the insurer within ten days after the commencement of the disability from such sickness.

(C) Written notice of injury or of sickness on which claim may be based must be given to the insurer within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness.

5. Sufficient Notice of Claim.—A standard provision relative to sufficiency of notice of claim shall be in the following form, and the insurer shall insert in the blank space such office and its location as it may desire to designate for the purpose of notice:

Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the insurer at ..... or to any authorized agent of the insurer, with particulars sufficient to identify the insured, shall be deemed notice to the insurer. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. Furnishing Forms for Proof of Loss.—A standard provision relative to furnishing forms for the convenience of the insured in submitting proof of loss shall be as follows:

The insurer, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made.

7. Filing Proof of Loss.—A standard provision relative to filing proof of loss which shall be in such one of the following forms as may be appropriate to the indemnities provided:

(A) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the date of the loss for which claim is made.

(B) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the termination of the period of disability for which the company is liable.

(C) Affirmative proof of loss must be furnished to the insurer at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the insurer is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. Examination of Person and Autopsy. — A standard provision relative to examination of the person of the insured and relative to autopsy shall be in the following form: The insurer shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. Time of Payments.—A standard provision relative to the time within which payments other than those for loss of time on account of disability shall be made may be in either of the following two forms, and which may be omitted from any policy providing only indemnity for loss of time on account of disability. The insurer shall insert in the blank space either word "immediately" or appropriate language to designate such period of time, not more than sixty days, as it may desire: Form (A) to be used in policies which do not provide indemnity for loss of time on account of disability, and Form (B) to be used in policies which do so provide.

(A) All indemnities provided in this policy will be paid ..... after receipt of due proof.

(B) All indemnities provided in this policy for loss other than that of time on account of disability will be paid ..... after receipt of due proof.

10. Periodical Payments.—A standard provision relative to periodical payments of indemnity for loss of time on account of disability shall be in the following form, and may be omitted from any policy not providing for such indemnity. The insurer shall insert in the first blank space of the form appropriate language to designate the proportion of accrued indemnity it may desire to pay, which proportion may be all or any part not less than one-half, and in the second blank space shall insert any period of time not exceeding sixty days:

Upon request of the insured and subject to due proof of loss ..... accrued indemnity for loss of time on account of disability will be paid at the expiration of each ..... during the continuance of the period for which the insurer is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity Payments.—A standard provision relative to indemnity payments may be in either of the two following forms: Form (A) to be used in policies which designate a beneficiary, and Form (B) to be used in policies which do not designate any beneficiary other than the insured:

(A) Indemnity for loss of life of the insured is payable to the beneficiary, if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

(B) All the indemnities of this policy are payable to the insured.

12. Cancellation of Policy by Insured.—A standard provision providing for cancellation of the policy at the instance of the insured shall be in the following form: If the insured shall at any time change his occupation to one classified by the insurer as less hazardous than that stated in the policy, the insurer, upon written request of the insured, and surrender of the policy, will cancel the same and return to the insured the unearned premium.

13. Rights of Beneficiary.—A standard provision relative to the rights of the beneficiary under the policy shall be in the following form and

may be omitted from any policy not designating a beneficiary: Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. Limiting Time of Action.—A standard provision limiting the time within which suit may be brought upon the policy shall be as follows: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. Time Limitations.—A standard provision relative to time limitations of the policy shall be as follows: If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law. (1911, c. 209, s. 1; 1913, c. 91, s. 3.)

Editor's Note.—Section 11 (A) provides that if beneficiary is dead the indemnity is to be paid to the estate of the insured. This provision is different from provisions in regard to beneficiaries in straight life policies, for in the latter case the rights of the beneficiary go to his or her heirs. See note to sec. 6464.

Action on Policy Not Delivered.—Where a policy of accident insurance has been issued before the accident in suit, and its delivery by error or oversight of the insurer has been delayed beyond that time, and the premiums have been paid, the action thereon may be maintained. Clark v. Federal Life Ins. Co., 193 N. C. 166, 136 S. E. 291.

Amputation—Time Limit.—Where among other things in a policy of accident insurance, that to recover for the loss of a foot, it is provided that the foot must have been amputated within thirty days from the date of the accident: Held, the stipulation is a valid and enforceable one, whatever the insured's reason for a delay in amputating the foot may have been, when not consented to by the insurer. Cark v. Federal Life Ins. Co., 193 N. C. 166, 136 S. E. 291.

Same—Loss of Time.—Where an accident insurance policy creates a liability for loss of time and a foot, but restricts the right of the insured to recover loss on only one of them: Held, the provision is valid, and he may not recover for both in his action. Clark v. Federal Life Ins. Co., 193 N. C. 166, 136 S. E. 291.

Waiver of Strict Performance.—If the insured is not required to pay his premiums promptly, and is injured when the premiums are not paid he can recover for injuries received for the act of the insurer in allowing the payments to get behind amount to a waiver. Moore v. General Accident, etc., Corp., 173 N. C. 532, 92 S. E. 362.

Waiver of Proof of Loss.—Where an insurer denies all liability under its policy of accident insurance, covering the death of the insured, and refuses to proceed with the investigation respecting it, its action is a waiver of its requirements as to the proof of death and the clause in the policy forbidding the bringing of any suit upon it until after the three months from the filing of the proofs. Moore v. General Accident, etc., Corp., 173 N. C. 432, 92 S. E. 362.

Subsection 5.—In Nelson v. Jefferson Standard Life Ins. Co., 199 N. C. 443, 154 S. E. 752, it was said that the General Assembly realizing that a hard and fast rule should not always be applied, put in the provision in this section, subsec. 5, relative to reasonable notice, to meet varying contingencies that might arise. Rand v. Home Ins. Co., 206 N. C. 760, 767, 174 S. E. 749.

Notice to Be Given by Beneficiary.—Where under the provisions of a policy of accident insurance certain benefits are to be paid to the insured, with distinct provision that in case of accident resulting in death a certain sum is to be paid a beneficiary, the latter, during the lifetime of the insured, is not required to give the ten days notice of the injury which resulted in his death, but only the notice provided for from the time of the latter event; the interpretation of the policy being that the assured and the beneficiary shall each be given notice of the event upon which his claim depends. Moore v. General Accident, etc., Corp., 173 N. C. 532, 92 S. E. 362.

Double Indemnity—Fault of Insured.—Where a policy of life insurance gives double indemnity if the death of the insured has been caused by "external, violent, and accidental means," no recovery can be had of the extra indemnity when such death is caused by the killing of the insured by a third person, and the insured was in the wrong in commencing the fight, and the aggressor, under such circumstances as would render a homicide likely as a result of his own misconduct. Clay v. State Ins. Co., 174 N. C. 642, 94 S. E. 289.

What Amounts to Total Disability.—A provision in an insurance policy that the insurer will pay a certain sum when the insured has become wholly disabled by bodily injuries and permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, will be construed as expressed, and the liability of the insurer thereunder will not be extended so as to include a total disability of the insured to perform his trade or vocation when other gainful occupations are still open to him. Buckner v. Jefferson Standard Life Ins. Co., 172 N. C. 762, 90 S. E. 897.

Cited in Nelson v. Jefferson Standard Life Ins. Co., 199 N. C. 443, 447, 154 S. E. 752.

§ 6480. Certain provisions forbidden in policy.—No such policy shall be issued or delivered which contains any provision (1) relative to cancellation at the instance of the insurer; or (2) limiting the amount of indemnity to a sum less than the amount stated in the policy and for which the premium has been paid; or, (3) providing for the deduction of any premium from the amount paid in settlement of claim; or, (4) relative to other insurance by the same insurer; or, (5) relative to the age limits of the policy; unless such provisions, which are hereby designated as optional standard provisions, shall be in the words and in the order in which they are set forth in the next section, but the insurer may at its option omit from the policy any such optional standard provisions. Such optional standard provisions if inserted in the policy shall immediately succeed the standard provisions named in this article. (1911, c. 209, s. 2; 1913, c. 91, s. 4.)

§ 6481. Optional standard provisions.—The optional standard provisions which may be used in the policy are as follows:

1. Cancellation of Policy by Insurer.—The insurer may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records of the insurer, together with cash or the insurer's check for the unearned portion of the premiums actually paid by the insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

2. Reduction of Indemnity.—If the insured shall carry with another company, corporation, association, or society other insurance covering the same loss without giving written notice to the insurer, then in that case the insurer shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premiums paid as shall exceed the pro rata for the indemnity thus determined.

3. Deduction of Premium.—Upon the payment of claim hereunder any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

4. Other Insurance.—An optional standard provision relative to other insurance by the same in-

surer which shall be in such one of the following forms as may be appropriate to the indemnities provided, and in the blank spaces of which the insurer shall insert such upward limits of indemnity as are specified by the insurer's classification of risks, filed as required by this article:

(A) If a like policy or policies, previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity in excess of $--------, the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(B) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity for loss of time on account of disability in excess of $-------- weekly, the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(C) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity for loss other than that of time on account of disability in excess of $--------, or the aggregate indemnity for loss of time on account of disability in excess of $-------- weekly, the excess insurance of either kind shall be void, and all premiums paid for such excess shall be returned to the insured.

5. Age Limits.—An optional standard provision relative to the age limits of the policy, which shall be in the following form and in the blank spaces of which the insurer shall insert such number of years as it may elect: The insurance under this policy shall not cover any person under the age of .....years nor over the age of..... years. Any premium paid to the insurer for any period not covered by this policy will be returned upon request. (1911, c. 209, s. 2; 1913, c. 91, s. 4.)

§ 6482. Conflicting provisions forbidden; terms in policy.—No such policy shall be issued or delivered if it contains any provision contradictory, in whole or part, of any provisions hereinbefore in this article designated as "Standard Provisions" or as "Optional Standard Provisions"; nor shall any endorsements or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with any of the "Standard Provisions" or the "Optional Standard Provisions"; nor shall such policy be issued or delivered if it contains any provision purporting to make any portion of the charter, constitution, or by-laws of the insurer a part of the policy unless such portion of the charter, constitution, or by-laws shall be set forth in full in the policy, but this prohibition shall not be deemed to apply to any statement of rates or classification of risks filed with the commissioner of insurance in accordance with the provisions of this article. (1911, c. 209, s. 3; 1913, c. 91, s. 5.)

Art. 24. General Regulations

§ 6483. False statement in application.—The falsity of any statement in the application for any policy covered by this subchapter shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. (1913, c. 91, s. 6.)

§ 6484. Waiver by insurer.—The acknowledgment by any insurer of the receipt of notice given under any policy covered by this subchapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim thereunder, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under such policy. (1913, c. 91, s. 7.)

§ 6485. Alteration of application.—No alteration of any written application for insurance by erasure, insertion, or otherwise, shall be made by any person other than the applicant without his written consent, and the making of any such alteration without the consent of the applicant shall be a misdemeanor. If such alteration shall be made by any officer of the insurer, or by any employee of the insurer, with the insurer's knowledge or consent, then such act shall be deemed to have been performed by the insurer thereafter issuing the policy upon such altered application. (1913, c. 91, s. 8.)

§ 6486. Construction of policy.—A policy issued in violation of this subchapter shall be held valid, but shall be construed as provided in this subchapter, and when any provision in such a policy is in conflict with any provision of this subchapter, the rights, duties, and obligations of the insurer, the policyholder, and the beneficiary shall be governed by the provisions of this subchapter. (1913, c. 91, s. 9.)

§ 6487. Provisions of laws of other states.—The policies of insurance against accidental bodily injury or sickness issued by an insurer not organized under the laws of this state may contain, when issued in this state, any provision which the law of state, territory, or district of the United States under which the insurer is organized, prescribed for insertion in such policies; and the policies of insurance against accidental bodily injury or sickness issued by an insurer organized under the laws of the state may contain, when issued or delivered in any other state, territory, district, or country, any provisions required by the laws of the state, territory, district, or country in which the same are issued, anything in this subchapter to the contrary notwithstanding. (1911, c. 209, s. 4; 1913, c. 91, s. 10.)

§ 6488. Discrimination forbidden.—Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or any other manner whatsoever, is prohibited. (1913, c. 91, s. 11.)

§ 6489. Certain policies of insurance not affected.—1. Nothing in this subchapter shall apply to or affect any policy of liability or workmen's compensation insurance or any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation, copartnership, association, or individual employer, police or fire department, underwriters' corps, salvage bureau, or like associations or organizations, where the officers, members, or employees or classes or departments thereof are in-

sured for their individual benefit against specified accidental bodily injuries or sickness while exposed to the hazards of the occupation or otherwise, in consideration of a premium intended to cover the risks of all the persons insured under such policy.

2. Nothing in this subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as to operate to safeguard such insurance against lapse or to provide a special surrender value therefor in the event that the insured shall be totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase the amount insured by such life or endowment contracts in the event that the death of the insured shall result from accidental bodily injuries: Provided, that no such supplemental contracts shall be issued or delivered to any person in this state unless and until a copy of the form thereof has been submitted to and approved by the insurance commissioner under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to an approval by him.

3. Nothing in this subchapter shall apply to or in any way affect fraternal benefit societies.

4. The provisions of this subchapter contained in clause (5) of section 6478, and clauses two, three, eight, and twelve of section 6479, may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; 1921, c. 136, s. 5.)

§ 6490. Punishment for violation.—Any company, association, society, or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this state any policy in wilful violation of the provisions of this subchapter shall be punished by a fine of not more than five hundred dollars for each offense, and the commissioner of insurance may revoke the license of any company, corporation, association, society, or other insurer of another state or country, or of the agent thereof, which or who wilfully violates any provision of this subchapter. (1911, c. 209, s. 6; 1913, c. 91, s. 13.)

SUBCHAPTER VI. FRATERNAL ORDERS AND SOCIETIES

Art. 25. Fraternal Orders

§ 6491. General insurance law not applicable.—Nothing in the general insurance laws, except such as apply to fraternal orders or fraternal societies, shall be construed to extend to benevolent associations, incorporated under the laws of this state that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents. Such benevolent associations providing death benefits in excess of three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, shall be known as "fraternal benefit societies"; and those providing benefits of three hundred dollars or less shall be known as "fraternal orders." (Rev., s. 4794; 1899, c. 54, s. 87; 1901, c. 706, s. 2; 1913, c. 46.)

See 12 N. C. Law Rev., 374.

Laws Governing.—Williams v. Supreme Conclave, 172 N. C. 787, 90 S. E. 888, and Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443, were decided in regard to policies issued before this act. This statute makes it clear that fraternal and assessment orders shall be governed by their own rules and regulations as authorized by the state of their origin. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81. This case gives a long discussion of the application of this law and alters the rule as applied in former cases.

Same—Fraternal Benefit Associations.—This section groups benevolent life insurance companies providing death benefits in excess of $300, in any year to any one person, as fraternal benefit associations, and those of $300 or less, as fraternal orders, and sec. 6492, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of sec. 6389, that statements or descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material. Gay v. Woodmen of the World, 179 N. C. 210, 102 S. E. 195.

§ 6492. Fraternal orders defined.—Every incorporated association, order, or society doing business in this state on the lodge system, with ritualistic form of work and representative form of government, for the purpose of making provision for the payment of benefits of three hundred dollars or less in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident, or old age, formed and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a "fraternal order." Societies and orders which do not make insurance contracts or collect dues or assessments therefor, but simply pay burial or other benefits out of the treasury of their orders, and use their funds for the purpose of building homes or asylums for the purpose of caring for and educating orphan children and aged and infirm people in this state, shall not be considered as "fraternal orders" or "fraternal benefit societies" under this subchapter; and such order or association paying death or disability benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or by-laws; but no profit or gain may be added to the payments made by a member. (Rev., s. 4795; 1899, c. 54, s. 88; 1901, c. 706, s. 3; 1907, c. 936; 1913, c. 46.)

See note to § 6491; as to other assessment insurance, see §§ 6356 et seq.

§ 6493. Funds derived from assessments and dues.—The fund from which the payment of benefits, as provided for in the next preceding section, shall be made, and the fund from which the expenses of such association, order or society shall be defrayed, shall be derived from assessments or dues collected from its members. Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the provisions of all general insurance laws of this state, and no law hereafter passed shall apply to such societies unless fraternal orders or societies are designated herein. (Rev., s. 4796; 1899, c. 54, s. 89; 1901, c. 706, s. 2; 1913, c. 46.)

Use of Funds Received.—The funds received from assess-

ment are trust funds for orphans and widows and are not subject to use for any other purpose, therefore attachment will not lie. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

Assessments Not Governed by Insurance Law.—A fraternal society or association is governed by its own charter and by-laws and an assessment in accordance with its own laws is valid. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81.

§ 6493(a). Appointment of member as receiver or collector; appointee as agent for order or society; rights of members.—Assessments and dues referred to in the two preceding sections may be collected, receipted, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amount so collected. Under no circumstances, regardless of any agreement, by-laws, contract, or notice shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or by-laws of said society; nor shall said member, regardless of any rules, regulations, or by-laws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting. (1921, c. 139.)

§ 6494. Meetings of governing body; principal office; separation of races.—Any such society or order incorporated and organized under the laws of this state may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this state; but the principal business office of such society shall always be kept in this state. No fraternal order or society or beneficiary association shall be authorized to do business in this state under the provisions of this article, whether incorporated under the laws of this or any other state, province, or territory, which associates with, or seeks in this state to associate with, as members of the same lodge, fraternity, society, association, the white and colored races with the objects and purposes provided in this article. (Rev., s. 4797; 1899, c. 54, s. 91; 1913, c. 46.)

§ 6495. Conditions precedent to doing business.—Any such fraternal, beneficiary order, society, or association as defined by this chapter, chartered and organized in this state or organized and doing business under the laws of any other state, district, province, or territory, having the qualifications required of domestic societies of like character, upon satisfying the insurance commissioner that its business is proper and legitimate and so conducted, may be admitted to transact business in this state upon the same conditions as are prescribed by this chapter for admitting and authorizing foreign insurance companies to do business in this state, except that such fraternal orders shall not be required to have the capital required of such insurance companies. (Rev., s. 4798; 1899, c. 54, s. 92; 1901, c. 706, s. 2; 1903, c. 439, s. 9; 1913, c. 46.)

Requirements for Admission to Do Business.—Fraternal insurance orders are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not required to make the deposit or have the paid up capital required of other companies. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

Attachment of Funds.—Assessments received are impressed with a trust for widows and orphans and cannot be reached by attachment. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835; Blackwell v. Mutual Reserve Fund Life Ass'n, 141 N. C. 117, 53 S. E. 833.

§ 6496. Certain lodge systems exempt.—Beneficial fraternal orders, or societies incorporated under the laws of this state which are conducted under the lodge system, having the supreme lodge or governing body located in this state, and so organized that the membership consists of members of subordinate lodges, and the subordinate lodges accept for membership none but residents of the county in which such subordinate lodge is located, and each subordinate lodge issues certificates, makes assessments, and collects a fund to pay benefits to the widows and orphans of its own deceased members and their families, each lodge, independently of the other, for itself, and independently of the supreme lodge, each lodge controlling the fund for this purpose, and in addition to the benefits paid by each subordinate lodge to its own members, the supreme lodge provides for an additional benefit for such of the members of the subordinate lodges as are qualified, at the option of the subordinate lodge member, and such organization is not conducted for profit, has no capital stock, and has been in operation for ten years in this state, such beneficial orders or societies shall be exempt from the requirements of this chapter, and shall not be required to pay any license tax or fees nor make any report to the insurance commissioner, unless the assessments collected for death benefits by the supreme lodge amount to at least three hundred dollars in one year. The insurance commissioner may require the chief or presiding officer, or the secretary, to file annually an affidavit that such organization is entitled to this exemption. (1911, c. 199.)

§ 6497. Fraternal benefit society defined.—Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of benefits as hereafter prescribed in this article, is declared to be a fraternal benefit society. (1913, c. 89, s. 1.)

Applied in Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 537, 177 S. E. 799.

§ 6498. Lodge system defined.—A society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name

known, into which members are elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches are required by the laws of such society to hold regular or stated meetings at least once in each month, is deemed to be operating on the lodge system. (1913, c. 89, s. 2.)

§ 6499. Representative form of government defined.—A society is deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided, that the elective members constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; and Provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates, are held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. (1913, c. 89, s. 3.)

§ 6500. Organization.—1. Application.—Ten or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation in which shall be stated:

a. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or lead to confusion.

b. The purpose for which it is formed—which shall not include more liberal powers than are granted by this article: Provided, that any lawful, social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised.

c. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

2. Papers and Bond Filed.—Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the insurance commissioner, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the insurance commissioner, who may require such further information as he deems necessary.

3. Preliminary License.—If the purpose of the society conform to the requirements of this article, and all provisions of law have been complied with, the insurance commissioner shall so certify to the secretary of state, and upon his issuing the articles of incorporation shall furnish the incorporators a preliminary license authorizing the society to solicit members as hereinafter provided.

4. Completion of Organization.—Upon receipt of such license from the insurance commissioner the society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, or the largest amount written on any one person, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the insurance commissioner under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the insurance commissioner by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars. Such advanced payments shall be credited to the mortuary or disability fund on account of such applicants, and no part thereof may be used for expenses, but such payments shall be

held in trust and returned to the applicants if the organization is not completed within one year as hereinafter provided.

5. License Issued.—The insurance commissioner may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate or license to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate.

6. One-year Limit.—No preliminary certificate or license granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the insurance commissioner, upon cause shown, unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at the expiration of such extended period, unless the society shall have completed its organization and commenced business as herein provided.

7. Discontinuance. — When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. (1913, c. 89, s. 11.)

§ 6501. Constitution and by-laws.—Each society shall have power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; it shall have the power to change or amend such constitution and by-laws, and it shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (1913, c. 89, s. 11.)

§ 6502. Amendments to constitution and by-laws.—Every society transacting business under this article shall file with the insurance commissioner a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (1913, c. 89, s. 19.)

§ 6503. Waiver of the provisions of the laws.—The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof, and on all beneficiaries of members. (1913, c. 89, s. 17.)

§ 6504. Place of meeting; location of office.—Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state; but its principal office shall be located in this state. (1913, c. 89, s. 15.)

§ 6505. No personal liability for benefits. — Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (1913, c. 89, s. 16.)

§ 6506. Qualifications for membership.—Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society: Provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (1913, c. 89, s. 6.)

§ 6507. Benefits.—1. Every society transacting business under this article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age: Provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years, and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; but nothing contained in this article shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life, which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; but this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

2. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American experience table and four per cent interest, may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; but such grants shall

in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1913, c. 89, s. 4.)

§ 6508. Beneficiaries.—The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, step-children, children by legal adoption, or to a person or persons dependent upon the member, or, with the consent of the society, any charitable institution maintained by the society; and if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes. (1913, c. 89, s. 5; 1931, c. 161.)

See 13 N. C. Law Rev., 95.

Editor's Note.—The Act of 1931 inserted the words "or with the consent of the society, any charitable institution maintained by the society," beginning in line seven of this section.

A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a Fraternal Benefit Society as defined by § 6497, is a Fraternal Benefit Contract, not an insurance policy, and governed by this section. Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 177 S. E. 799.

Right to Change Beneficiary.—The doctrine was fully set forth by the Court of Errors and Appeals of New Jersey, where the court said: "By the terms of such contracts (those of benefit societies) the beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere expectancy, dependant on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary. The cases, so far as I can discover, are agreed upon this doctrine. This principle is now so well settled that no further authorities need be cited." Pollock v. Hardy, 150 N. C. 211, 214, 63 S. E. 940.

Same—One Disqualified to Take.—A policy of life insurance of a fraternal order is limited to the wife, certain relations and dependents by this statute, with the right of the assured to change the beneficiary at any time, and where he has named his wife as beneficiary and afterwards substitutes the name of another, disqualified to take under the statute, such attempted change is not a revocation of the provisions of the policy first issued and leaves it in force. Andrews v. Most Worshipful Grand Lodge, 189 N. C. 697, 128 S. E. 4.

Bigamous Wife's Right to Recover.—A fraternal assessment benefit association having a representative form of government may, by its contract and constitution, confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the State wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife. Applebaum v. United Commercial Travelers, 171 N. C. 435, 88 S. E. 722.

An incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, may not be named beneficiary in a Fraternal Benefit Contract on the trustor's life, the trustee not being a natural person nor a charitable institution as defined by this section, and being empowered to use the funds for purposes other than for the benefit of the trustor's kindred. Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 177 S. E. 799.

§ 6509. Benefit certificates.—Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter, or articles of incorporation or, if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant and all amendments to each thereof, shall constitute the agreement between the society and the member; and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof. Any changes, additions, or amendments to the charter or articles of incorporation, or articles of association if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership. (1913, c. 89, s. 7.)

Recovery of Policy Holder When Policy Cancelled.—Where a fraternal benefit society has issued a policy of life insurance to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Altering Constitution or By-Laws.—A general consent of a policy-holder in an assessment fraternal benefit society that the company may thereafter alter or amend its constitution or by-laws does not authorize the society to make such changes therein as will impair the vested right of its members and policy-holders arising under their contract of insurance with the company. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Same—Suspension of Members.—Where fraternal benefit insurance societies are required to file certified copy of changes made in their constitution and by-laws with the Insurance Commission within 90 days, and fail to do so, they may not, while thus in default, suspend a member for noncompliance therewith. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Proof of Forfeiture of Benefits.—A stipulation in a policy of endowment in a fraternal order requiring the member to be in good standing at the time of his death, and that "the records of the Grand Lodge shall sustain the same," must be construed in reference to provisions in the charter and by-laws of the order, that the member can only be suspended for failure to pay his dues for six months, of which notice shall be given him; and an order or suspension made in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and by-laws. Wilkie v. National Council J. O. U. A. M., 151 N. C. 527, cited and distinguished. Lyons v. Knights of Pythias, 172 N. C. 408, 90 S. E. 423.

False Representations of Insured.—Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in the constitution and by-laws of the company, and there is evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the company is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that the agent of the company also knew that the applicant's statements were false. Robinson v. Brotherhood, 170 N. C. 545, 87 S. E. 537.

Nonpayment of Dues.—"It is well settled that in an action upon a life insurance policy the burden of proof is upon the insurance company to show nonpayment of dues or

other matters to avoid the policy, when the certificate of insurance has been put in evidence and the death has been shown. Wilkie v. National Council, J. O. U. A. M., 147 N. C. 637, 61 S. E. 580;" Harris v. National Council, J. O. U. A. M., 168 N. C. 357, 359, 84 S. E. 405.

Waiver of Defects in Policy.—A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and by-laws, unless the defect has been waived by the company or it is in some way estopped from insisting on the forfeiture. Robinson v. Brotherhood, 170 N. C. 545, 87 S. E. 537.

§ 6510. Benefits not subject to debts.—No money or other benefit, charity or relief or aid to be paid, provided, or rendered by any such society or society or association for the relief of employees including railroad and other relief association shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right, thereunder, either before or after payment. (1913, c. 89, s. 18; 1925, c. 83.)

Funds Become Trust Funds.—Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund is impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over to the society's treasurer, is not subject to an attachment by a creditor of the society. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

In 3 N. C. Law Rev. at p. 130 in considering this section it is said: it "provides that in the case of fraternal benefit societies, no money or other relief furnished by such societies shall be liable to attachment, garnishment, or other process, to pay any debt or liability of a member or beneficiary, 'either before or after payment.'" Chapter 83 extends this exemption so as to apply to any "society or association for the relief of employees, including railroad and other relief associations."

§ 6511. Funds provided.—1. Any society may create, maintain, invest, disburse and apply an emergency, surplus, or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection two of section 6507. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds. But no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or any higher standard, with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum.

2. Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (1913, c. 89, s. 8.)

§ 6512. Investment of funds.—Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies: Provided, that any foreign society permitted or seeking to do business in this state which invests its funds in accordance with the laws of the state in which it is incorporated where it has such laws, shall be held to meet the requirements of this article for the investment of funds. (1913, c. 89, s. 9.)

As to investment in bonds guaranteed by United States, see § 220(a) 1.

§ 6513. Application of funds.—Every provision of the laws of the society for payment by its members, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses. (1913, c. 89, s. 10.)

§ 6514. Powers of existing societies retained; reincorporation.—Any society now engaged in transacting business in this state may exercise, after the passage of this article, all of the rights conferred thereby, and all the rights, powers, and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this article, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided by law. (1913, c. 89, s. 12.)

§ 6515. Mergers and transfers.—No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and is filed with the insurance commissioner of this state, together with a sworn statement of the financial condition of each of the societies, by its president and secretary or corresponding officers, and a certificate duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of the societies.

Upon the submission of such contract, financial statements, and certificates, the insurance commissioner shall examine the same, and if he shall find such financial statements to be correct and the contract to be in conformity with the provisions of this section, and that such merger

or transfer is just and equitable to the members of each of the societies, he shall approve the merger or transfer, issue his certificate to that effect, and thereupon the contract of merger or transfer shall be of full force and effect.

In case such contact is not approved, the fact of its submission and its contents shall not be disclosed by the insurance commissioner. (1913, c. 89, s. 13.)

§ 6516. Annual license.—Societies authorized to transact business in this state may have their authority renewed annually, but in all cases to terminate on the first day of the succeeding April; and the license shall, upon payment of license fee, continue in full force and effect until the new license is issued or specifically refused. For each license or renewal the society shall pay the insurance commissioner twenty-five dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this article. (1913, c. 89, s. 14.)

§ 6517. Accident societies may be licensed.—Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in this article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this article, and shall have all the privileges and be subject to all the provisions and regulations of this article, except the provisions requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits. (1913, c. 89, s. 27.)

§ 6518. Certain societies not included.—Nothing contained in this article shall be construed to affect or apply to societies which limit their membership to any hazardous occupation, nor to an association of local lodges of a society now doing business in this state which provided death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts or reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The insurance commissioner may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article. (1913, c. 89, s. 26; 1925, c. 70, s. 2.)

Personal service on resident secretary of fraternal insurance association allowed to do business in the State without a license under this section and §§ 6274, 6474, and 6479, held valid service on the association in action on policy. Winchester v. Grand Lodge of Brotherhood of Railroad Trainmen, 203 N. C. 735, 167 S. E. 49.

§ 6519. Reports to insurance commissioner.

1. Annual Report.—Every society transacting business in this state shall annually, on or before the first day of March, file with the insurance commissioner, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

2. Valuation of Certificates.—In addition to the annual report herein required, each society shall annually report to the commissioner a valuation of its certificates in force on December thirty-first, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses: Provided, the first report of valuation shall be made as of December thirty-first, one thousand nine hundred and twelve. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and the net value when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

3. Valuation Ascertained.—Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

4. Test of Solvency.—The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

5. Report Mailed to Members.—A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June first of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. (1913, c. 99, s. 20.)

§ 6520. Additional or increased rates.—The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum. (1913, c. 89, s. 20.)

§ 6521. Provisions to insure future security.—If the valuation of the certificates, as hereinbefore provided, on December thirty-first one thousand nine hundred and seventeen, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of efficiency as shown in the valuation as of December thirty-first, one thousand nine hundred and seventeen. If at any succeeding triennial valuation such society does not show at least the same condition, the commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein the commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of this article, or in case of a foreign society, its license may be canceled in the manner provided in this article.

Any such society, shown by any triennial valuation, subsequent to December thirty-first, one thousand nine hundred and seventeen, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December thirty-first, one thousand nine hundred and seventeen, or thereafter, as to all new members admitted, to be subject so far as stated rates of contributions are concerned, to the provisions of this article, applicable in the organization of new societies: Provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. (1913, c. 89, s. 20(a).)

§ 6522. Valuation on accumulation basis; tabular basis.—In lieu of the requirements of the two preceding sections, any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated "accumulation basis," by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned and by charging him with his shares of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death, less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member of any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with the net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this state, shall be valued on such basis, herein designated the "Tabular Basis": Provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate the same shall be valued on the accumulation basis.

Whenever, in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide, the assets representing the reserves of any separate class of

members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this state and adopted by the society, shall be filed by the society with each annual report, and also be furnished to each member before July first of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. (1913, c. 89, s. 20(b).)

§ 6523. Examination of domestic societies.—The insurance commissioner, or any person he may appoint, shall have power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined upon statement furnished by the insurance commissioner, and the examination shall be made at least once in three years. (1913, c. 89, s. 21.)

§ 6524. Proceedings for dissolution.—When after examination the insurance commissioner is satisfied that any domestic society has failed to comply with any provision of this article, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred (or shall determine to discontinue business), the insurance commissioner may present the facts relating thereto to the attorney-general, who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, it shall be enjoined from carrying on any further business, and a receiver shall be appointed to take possession of its books, papers, moneys, and other assets and immediately, under the direction of the court, proceed to close its affairs and distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney-general against any such society until after notice has been duly served on its chief executive officers and a reasonable opportunity given to it, on a date to be named in the notice, to show cause why such proceedings should not be commenced. (1913, c. 89, s. 21.)

§ 6525. Proceedings only by attorney-general.—No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney-general. (1913, c. 89, s. 22.)

§ 6526. Examination of foreign societies.—The insurance commissioner or any person whom he may appoint may examine any foreign society transacting or applying for admission to transact business in this state. The commissioner may employ assistants, and he or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and other persons in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the insurance commissioner.

If any such society or its officers refuse to submit to such examination or to comply with the provisions of the section relative thereto, its authority to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the commissioner relating to its condition and affairs, and during such suspension the society shall not write new business in this state. (1913, c. 89, s. 23.)

§ 6527. No adverse publications.—Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the insurance commissioner shall make public no financial statement, report, or finding, nor shall he knowingly permit to become public any financial statement, report, or findng affecting the status, standing, or rights of any such society, until a copy thereof has been served upon the society, at its home office, nor until the society has been afforded a reasonable opportunity to answer any such financial statement, report, or finding, and to make such showing in connection therewith as it may desire. (1913, c. 89, s. 24.)

§ 6528. Revocation of license.—When the insur-

ance commissioner on investigation is satisfied that any foreign society transacting business under this article has exceeded its powers, or has failed to comply wth any provisions of this article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require the society, on a date named, to show cause why its license should not be revoked. If on the date named in the notice such objections have not been removed to the satisfaction of the commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in this article. (1913, c. 89, s. 25.)

§ 6529. Criminal offenses.—Any person, officer, member, or examining physician of any society authorized to do business under this article who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this state, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent, or employee thereof, neglecting or refusing to comply with, or violating, any of the provisions of this article, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (1913, c. 89, s. 28.)

§ 6529(a). Merger, consolidation, or reinsurance of risks, with other fraternal benefit societies.—No fraternal benefit society organized under the laws of this state to do the business of life, accident, or health insurance, shall consolidate or merge with any other fraternal benefit society, or reinsurance risks, or any part thereof with any other fraternal benefit society, or assume or reinsure the whole or any portion of the risks of any other fraternal benefit society, except as herein provided. No fraternal benefit society or subordinate body thereof shall merge, consolidate with, or be reinsured by any company or association not licensed to transact business as a fraternal beneficiary society. (1921, c. 60, s. 1.)

§ 6529(b). Contract approved by governing bodies of parties to same; approval by insurance commissioner.—When any such fraternal benefit society shall propose to consolidate or merge its business or to enter into any contract of reinsurance, or to assume or reinsure the whole or any portion of risks of any other fraternal benefit society, the proposed contract in writing setting forth the terms and conditions of such proposed consolidations, merger, or reinsurance shall be submitted to the legislative or governing bodies of each of said parties to said contract after due notice, and if approved, such contract as so approved, shall be submitted to the insurance commissioner of this state for his approval, and the parties to said contract shall at the same time submit a sworn statement showing the financial condition of each of such fraternal benefit societies as of the thirty-first day of December preceding the date of such contract: Provided, that such insurance commissioner may, within his discretion, require such financial statement to be submitted as of the last day of the month preceding the date of such contract. The insurance commissioner shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that the interests of the certificate holders of such fraternal benefit societies are properly protected, and that such contract is just and equitable to the members of each of such societies, and that no reasonable objection exists thereto, shall approve said contract as submitted. In case the parties corporate to such a contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the insurance commissioner of each of such incorporating states, or territories, to be considered and approved separately by each of such insurance commissioners. When said contract of consolidation, merger, or reinsurance shall have been approved as hereinabove provided, such insurance commissioner shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the insurance commissioner. (1921, c. 60, s. 2.)

§ 6529(c). Expenses; compensation to officers or employees of contracting parties and state employees.—All necessary and actual expenses and compensation incident to the proceedings provided in this law shall be paid as provided by such contract of consolidation, merger, or reinsurance: Provided, however, that no brokerage or commission shall be included in such expenses and compensation or shall be paid to any person by either of the parties to any such contract in connection with the negotiation therefor or execution thereof, nor shall any compensation be paid to any officer or employee of either of the parties to such contract for directly or indirectly aiding in effecting such contract of consolidation, merger, or reinsurance. An itemized statement of all such expenses shall be filed with

the insurance commissioner, or commissioners, as the case may be, subject to approval, and when approved the same shall be binding on the parties thereto. Except as fully expressed in the contract of consolidation, merger or reinsurance, or itemized statement of expenses, as approved by the insurance commissioner, or commissioners, as the case may be, no compensation shall be paid to any person or persons, and no officer or employee of the state shall receive any compensation, directly or indirectly, for in any manner aiding, promoting, or assisting any such consolidation, merger, or reinsurance. (1921, c. 60, s. 3.)

§ 6529(d). Violation of law a felony.—Any person violating the provisions of the three preceding sections shall be guilty of a felony, and upon conviction shall be liable to a fine of not more than five thousand dollars, or to imprisonment for not more than five years, or to both fine and imprisonment. (1921, c. 60, s. 4.)

Art. 27. Whole Family Protection

§ 6530. Insurance on children.—Any fraternal order or fraternal benefit society authorized to do business in this State and operating on the lodge plan may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of one and sixteen years at next birthday, for whose support and maintenance a member of such society is responsible. The society may at its option organize and operate branches for such children and membership in local lodges, and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: one year, twenty dollars; two years, fifty dollars; three years, seventy-five dollars; four years, one hundred dollars; five years, one hundred twenty-five dollars; six years, one hundred fifty dollars; seven years, two hundred dollars; eight years, two hundred fifty dollars; nine years, three hundred dollars; ten years, four hundred dollars; eleven years, five hundred dollars; twelve years, six hundred dollars; thirteen years, seven hundred dollars; fourteen years, eight hundred dollars; fifteen years, nine hundred dollars; sixteen years, one thousand dollars. (1917, c. 239, s. 1; 1931, c. 38.)

Editor's Note.—The Act of 1931 repealed the former section and substituted the above in lieu thereof. Formerly the ages were set at from two to eighteen and the amounts from $34 to $600.

§ 6531. Medical examination; certificates and contributions.—No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least five hundred such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Mortality Table" or the "English Life Table Number Six," and rate of interest not greater than four per cent per annum, or upon a higher standard; but contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws; and extra contributions shall be made if the reserves hereafter provided for become impaired. (1917, c. 239, s. 2.)

§ 6532. Reserve fund; exchange of certificates.—Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in the preceding section, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized. A society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society: Provided, that such surrender will not reduce the number of lives insured in the branch below five hundred; and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (1917, c. 239, s. 3.)

§ 6533. Separation of funds.—An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the insurance commissioner by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in the preceding section, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition or the status of the society. (1917, c. 239, s. 4.)

§ 6534. Payments to expense or general fund.—Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society, as its constitution and by-laws may provide. (1917, c. 239, s. 5.)

§ 6535. Continuation of certificates.—In the

event of the termination of membership in the society by the person responsible for the support of any child on whose account a certificate may have been issued as provided herein, the certificate may be continued, or for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child who shall assume the payment of the required contributions. (1917, c. 239, s. 6.)

Art. 28. General Provisions for Societies

§ 6536. Appointment of trustees to hold property. — The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the property in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. This shall not affect vested rights nor apply to suits pending on the ninth day of March, one thousand nine hundred and fifteen. (1907, c. 22; 1915, cc. 149, 186; 1923, c. 257.)

Suspension of Members.—Where a local fraternal and benevolent lodge has existed under the constitution and by-laws of the supreme lodge requiring written notice to be given to its members before suspension as a financial member, etc., for nonpayment of dues, etc., and such notice has not been given accordingly: Held, a resolution passed at a meeting of the local lodge authorizing a sale and conveyance of its property by trustees without complying with this requirement, is valid, and at the suit of such wrongfully suspended members, an injunction will lie. Tyler v. Howell, 192 N. C. 433, 135 S. E. 133.

§ 6537. Unauthorized wearing of badges, etc. —Any person who fraudulently and wilfully wears the badge or button of any secret or fraternal organization or society, either in the identical form or in such near resemblance thereto as to be a colorable imitation thereof, or who fraudulently and wilfully uses the name of any such order or organization, the titles of its officers, or its insignia, ritual, or ceremonies, unless entitled to wear or use the same under the constitution and by-laws, rules and regulations of such secret or fraternal organization or society, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of fifty dollars or imprisonment for thirty days, in the discretion of the court. (1907, c. 968; 1911, c. 37; 1915, c. 252.)

CHAPTER 107

INTERNAL IMPROVEMENTS

§§ 6538-6553. Board of internal improvements; duties and powers.—(Repealed: Public Laws 1925, c. 89, s. 23.)

§ 6553(a). Governor and council to control internal improvements.—The Governor and Council of State shall have charge of all the State's interest in all railroads, canals and other works of internal improvements. (1925, c. 157, s. 1.)

§ 6553(b). State deemed shareholder in corporation accepting appropriation.—When an appropriation is made by the State to any work of internal improvement conducted by a corporation, the State shall be considered, unless otherwise directed, a stockholder in such corporation, and shall have as many shares as may correspond with the amount of money appropriated; and the acceptance of such money shall be deemed to be a consent of the corporation to the terms herein expressed. (1925, c. 157, s. 2.)

§ 6553(c). Report of railroad; contents.—The president or other chief officer of every railroad, canal, or other public work of internal improvement in which the State owns an interest, shall, when required to do so by the Governor, make or cause to be made to the Governor and Council of State a written report of its affairs. This report shall show:

1. Number of shares owned by the State.
2. Number of shares owned otherwise.
3. Face value of such shares.
4. Market value of each of such shares.
5. Amount of bonded debt, and for what purpose contracted.
6. Amount of other debt, and how incurred.
7. If interest on bonded debt has been punctually paid as agreed; if not, how much in arrears.
8. Amount of gross receipts for past year, and from what sources derived.
9. An itemized account of expenditures for past year.
10. Any lease or sale of said property, or any part thereof, to whom made, for what consideration, and for what length of time.
11. Suits at law pending against his company concerning its bonded debt, or in which title to all or any part of such road or canal is concerned.
12. Any sales of stock owned by the State, by whose order made, and disposition of the proceeds.

Any person failing to report as required by this section shall be guilty of a misdemeanor and be fined or imprisoned at the discretion of the court. (1925, c. 157, s. 3.)

§ 6553(d). Report to general assembly; contents.—The Governor and Council of State shall biennially report to the General Assembly.

1. The condition of all railroads, canals, or other works of internal improvement in which the State has an interest, and they shall at the

same time suggest such improvement, enlargement, or extension of such work as they shall deem proper, and such new works of similar nature as shall seem to them to be demanded by the growth of trade or the general prosperity of the State.

2. The amount, condition, and character of the State's interest in other railroads, roads, canals, or other works of internal improvement in which the State has taken stock, to which she has loaned money, or whose bonds she holds as security.

3. The condition of such roads or other corporate bodies, in detail, as are referred to in the previous section, giving their entire financial condition, the amount and market value of the stock, receipts and disbursements for the previous year or since the last report; the amount of real and personal property of such corporations, its estimated value, and such suggestions with regard to the State's interest in the same as may to them seem warranted by the status of the roads or corporations.

4. The names of all persons failing or refusing to report as is required by law. (1925, c. 157, s. 4.)

§ 6553(e). Approval of encumbrance on state's interest in corporations. — No corporation or company in which the State has or owns any stock or any interest shall sell, lease, mortgage, or otherwise encumber its franchise, right of way, or other property, except by and with the approval and consent of the Governor and Council of State. (1925, c. 157, s. 5.)

§ 6553(f). Appointment of proxies, etc.—The Governor shall appoint on behalf of the State all such officers or agents as, by any act, incorporating a company for the purpose of internal improvement, are allowed to represent the stock or other interests which the State may have in such company; and such person or persons shall cast the vote to which the State may be entitled in all the meetings of the stockholders of such company under the direction of said Governor; and the said Governor may, if in his opinion the public interest so requires, remove or suspend such persons, officers, agents, proxies, or directors in his discretion. (1925, c. 157, s. 6.)

§ 6553(g). Power of investigation of corporations.—The Governor and Council of State shall have the power to investigate the affairs of any corporation or association described in section three of this act, and may require the Attorney-General or the Corporation Commission to assist in making such investigation under the rules and regulations prescribed in chapter twenty-two of the Consolidated Statutes of one thousand nine hundred and nineteen. (1925, c. 157, s. 7.)

CHAPTER 108

LABOR REGULATIONS

Art. 1. Various Regulations

§ 6554. Week's work of women to be fifty-five hours.—Not more than fifty-five hours shall constitute a week's work for women over sixteen in any laundry, dry-cleaning establishment, pressing club, work-shop, factory, manufacturing establishment, mill, of the State, and no woman over sixteen employed in any of the above-named places shall be worked exceeding eleven hours in any one day or over fifty-five hours in any one week. Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisonment not exceeding thirty days, and each day's work exceeding the said hours shall constitute a separate offense. Provided, further, that this section shall not apply to those employed in the operation of seasonal industries in their process of conditioning and of preserving perishable or semi-perishable commodities, or to those engaged in agricultural work. (1915, c. 148, s. 2; 1931, c. 289; 1935, c. 406.)

Editor's Note.—The Act of 1931 struck out the former section which provided a sixty hour week for men and women, permitting the men to exceed it under special contract for overtime, and substituted the above therefor, making no provision for male workers.

The amendment of 1935 made this section applicable to laundries, dry-cleaning establishments, pressing clubs and work-shops.

§ 6554(a). Hours of work for women in industry.—It shall be unlawful for any person, firm, or corporation, proprietor or owner of any retail, or wholesale mercantile establishment or other business where any female help is employed for the purpose of serving the public in the capacity of clerks, salesladies or waitresses and other employees of public eating places to employ or permit to work any female longer than ten hours in any one day or over fifty-five hours in any one week; nor shall any female be employed or permitted to work for more than six hours continuously at any one time without an interval of at least half an hour except where the terms of employment do not call for more than six and a half hours in any one day or period.

Nothing in this section shall be construed to apply to females whose full time is employed as bookkeepers, cashiers or office assistants or to any establishment that does not have in it employment three or more persons at any one time.

Every employer shall post in a conspicuous place in every room of the establishment in which females are employed a printed notice stating the provisions of this section and the hours of labor. The printed form of such notice shall be furnished, upon request, by the commissioner of labor.

Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars or imprisonment not exceeding sixty days and each day's work exceeding the said hours shall constitute a separate offense. (1933, c. 35; 1935, c. 407.)

Editor's Note.—The amendment of 1935 omitted a proviso, which formerly appeared in the second paragraph, stating that the section should not apply to establishments in towns of less than five thousand inhabitants.

§ 6554(b). Working hours of employees in state institutions.—It shall be unlawful for any person or official or foreman or other person in authority in the state hospital at Raleigh, the state hospital at Morganton, the state hospital

at Goldsboro, or any penal or correctional institution of the State of North Carolina, excepting the state prison and institutions under the control of the state commission of highways and public works, to require of any employee to work for a greater number of hours than twelve (12) during any twenty-four (24) hour period, or not more than eighty-four (84) hours during any one one week, or permit the same, during which period the said employee shall be permitted to take one continuous hour off duty; except in case of an emergency as determined by the superintendent, in which case the limitation of twelve (12) hours in any consecutive twenty-four (24) shall not apply. Nothing in this section shall be construed to effect the hours of doctors and superintendents in these hospitals. Any violation of this section shall be a misdemeanor, punishable within the discretion of the court. (1935, c. 136.)

§ 6555. Seats for women employees; failure to provide a misdemeanor.—All persons, firms, or corporations who employ females in a store, shop, office, or manufacturing establishment, as clerks, operatives, or helpers in any business, trade, or occupation carried on or operated in the state of North Carolina, shall be required to procure and provide proper and suitable seats for all such females, and shall permit the use of such seats, rests, or stools as may be necessary, and shall not make any rules, regulations, or orders preventing the use of such seats, stools, or rests when any such female employee or employees are not actively employed or engaged in their work in such business or employment.

If any employer of female help in the state of North Carolina shall fail, neglect, or refuse to provide seats, as provided in this article, on or before the first day of June, one thousand nine hundred and nine, or shall make any rules, orders, or regulations in his or its shop, store, or other place of business requiring females to remain standing when not necessarily employed or engaged in service or labor therein, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, in the discretion of the court. (1909, c. 857, ss. 1, 2.)

§ 6556. Medical chests in factories; failure to provide a misdemeanor.—Every person, firm, or corporation operating a factory or shop employing over twenty-five laborers, in which machinery is used for any manufacturing purpose, or for any purpose except for elevation or for heating or hoisting apparatus, shall at all times keep and maintain free of expense to the employees a medical or surgical chest which shall contain two porcelain pans, two tourniquets, gauze, absorbent cotton, adhesive plasters, bandages, antiseptic soap, one bottle of carbolic acid with directions on bottle, one bottle antiseptic tablets, one pair scissors, one folding stretcher, all of which shall not cost to exceed ten dollars, for the treatment of persons injured or taken ill upon the premises.

Any person, firm, or corporation violating this section shall be subject to a fine of not less than five dollars nor more than twenty-five dollars for every week during which such violation continues. (1911, c. 57.)

§ 6557. Shelter at railroad division points required; failure to provide a misdemeanor.—It shall be the duty of every person, firm, or corporation that may now or hereafter own, control, or operate any line of railroad in the state of North Carolina, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the corporation commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

On and after the first day of December, nineteen hundred and thirteen, any person, firm, or corporation failing to comply with the requirements of this section shall be guilty of a misdemeanor, and for each offense shall be fined not less than one hundred dollars nor more than five hundred dollars. Each day of such failure shall constitute a separate offense. (1913, c. 65; 1913, c. 117.)

§ 6558. Railroad employees to be paid twice a month.—All persons, firms, companies, corporations, or associations owning, leasing, or operating any railroad or railroads, wholly or partially within this state, shall pay and settle with their employees engaged or employed, in shops, round-houses, or repair shops within this state at least twice in each month, which settlements shall not be less than two weeks nor more than three weeks apart, and shall, in such settlements, pay such employees the full amounts due them for their work and services up to the date of the preceding settlement, and such payment shall be made in lawful money of the United States, or by check or cash order redeemable by the maker thereof for its face value in lawful money of the United States upon demand of or presentation by the lawful holder thereof: Provided, this section shall not apply to repair shops where less than ten employees are engaged. (1915, c. 92.)

§ 6558(a). Acceptance by employer of assignment of wages; counties excepted.—No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same: Provided, that the provisions of this section shall not apply to Rowan, Iredell, Rockingham and Cabarrus counties, except as to assignments given to secure usurious loans. (1935, c. 410.)

Art. 2. Separate Toilets for Sexes and Races

§ 6559. When separate toilets required.—All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more and where such employees are required to do indoor work chiefly, shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to separate the white and colored males and females of both sexes: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1.)

§ 6560. Location; intruding on toilets misdemeanor.—It shall be the duty of the persons or corporation mentioned under this article to locate their toilets for males and females, white and colored, in separate parts of their buildings or grounds, in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall wilfully intrude or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4.)

§ 6561. Failure to provide toilets a misdemeanor.—Any person or corporation refusing to comply with the provisions of the second preceding section shall be guilty of a misdemeanor, and upon conviction fined five dollars for the first offense and five dollars for each day they shall fail to make the provisions required under this article. (1913, c. 83, s. 2.)

§ 6562. Police in towns to enforce article.—It shall be the duty of the police officers of any town or city to investigate the places of business of any person or corporation employing males and females and see that the provisions of this article are put in force, and it shall be their duty to swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this article. (1913, c. 83, s. 3.)

§ 6563. Sheriff in county to enforce article.—When any persons or corporations locate outside of any city or town, its manufacturing plant or other business, it shall be the duty of the sheriff of the county to make investigation of the condition of the toilets used by such manufacturing plant or business and see that the provisions of this article are complied with, and it shall be his duty to swear out a warrant before a justice of the peace and prosecute any one violating the provisions of this article. (1913, c. 83, s. 5.)

§ 6564. Counties exempted from article.—This article shall not apply to Sampson, Harnett, Lee, Johnston, Northampton, Cleveland, Rutherford, Polk, and Henderson counties. (1913, c. 83, s. 6.)

Art. 3. Hours of Service for Employees of Carriers

§ 6565. Maximum continuous service.—It shall be unlawful for any common carrier, its officers or agents, subject to this article, to require or permit any employee, subject to this article, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a period longer than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, the corporation commission may, after a full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case. (1911, c. 112, s. 2.)

§ 6566. Penalty for violation.—Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be or remain on duty in violation of the last preceding section shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in suit or suits to be brought in the name of the state of North Carolina on relation of the corporation commission in the superior court of Wake county or of the county in which the violation of this article occurred; and it shall be the duty of the said corporation commission to bring such suits upon satisfactory information lodged with it; but no such suit shall be brought after the expiration of one year from the state, assign, or transfer the same, for value or otherwise, with intent to mission to lodge with the proper solicitor's information of any such violations as may come to its knowledge. In all prosecutions under this article the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this article shall not apply to any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the said employee left a terminal, and which could not have been foreseen: Provided further, that the provi-

sions of this article shall not apply to the crews of wrecking or relief trains: Provided further, this article shall not be construed to impose a penalty upon any common carrier for any act done in violation of the act of congress, ratified March the fourth, one thousand nine hundred and seven, and entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," or any acts amendatory thereof. (1911, c. 112, s. 3.)

§ 6567. Corporation commission's power. — It shall be the duty of the corporation commission to execute and enforce the provisions of this article, and all powers granted to the corporation commission are extended to it in the execution thereof. (1911, c. 112, s. 4.)

Art. 4. Earnings of Employees in Interstate Commerce

§ 6568. Collections out of state to avoid exemptions forbidden.—No resident creditor or other holder of any book account, negotiable instrument, duebill or other monetary demand arising out of contract, due by or chargeable against any resident wage-earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the state, assign, or transfer the same, for value or otherwise, with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the state of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this state, in such creditor's own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this state. (1909, c. 504, s. 1.)

§ 6569. Resident not to abet collection out of state.—No person residing or sojourning in this state shall counsel, aid, or abet any violation of the provisions of section 6568. (1909, c. 504, s. 2.)

§ 6570. Remedies for violation of two preceding sections; damages; indictment.—Any person violating any provision of the last two sections shall be answerable in damages to any debtor from whom any book account, negotiable instrument, duebill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of garnishment shall be issued, in violation of the provisions of section 6568, to the full amount of the debt thus collected, attached, or garnisheed, to be recovered by civil action in any court of competent jurisdiction in this state; and any person so offending shall likewise be guilty of a misdemeanor, punishable by a fine of not more than two hundred dollars. (1909, c. 504, s. 3.)

§ 6571. Institution of foreign suit, etc., evidence of intent to violate.—In any civil or criminal action instituted in any court of competent jurisdiction in this state for any violation of the provisions of sections 6568 and 6569, proof of the institution or prosecution of any action, suit, or proceeding in violation of the provisions of section 6568, or the issuance of service therein of any warrant of attachment, notice, or garnishment or other like writ for the garnishment of earnings of the defendant therein, or of the payment by the garnishee therein of any final judgment rendered in any such action, suit, or proceeding shall be deemed prima facie evidence of the intent of the creditor or other holder of the debt sued upon to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this state, in violation of the provisions of this article. (1909, c. 504, s. 4.)

§ 6572. Construction of article. — No provision of this article shall be so construed as to deprive any person entitled to its benefits of any legal or equitable remedy already possessed under the laws of this state. (1909, c. 504, s. 5.)

CHAPTER 109

LIBRARIES

Art. 1. State Library

§ 6573. Location.—The state library shall occupy the rooms set apart for it in the state administration building. (Rev., s. 5068; 1885, c. 121, s. 7; 1913, c. 99, s. 1.)

§ 6574. Trustees; duties and powers. — The governor, superintendent of public instruction, and secretary of state, and their respective successors in office, are appointed trustees of the state and document libraries. The board of trustees shall make rules and regulations by which the librarian shall be governed for the protection and preservation of the books and library; and may make such distribution of the books, reports, and publications belonging to the state as in the judgment of the board is advisable and proper. (Rev., s. 5069; Code, s. 3612; 1871-2, c. 169, s. 3; 1903, cc. 104, 133.)

§ 6575. Librarian's seal; certified copies of documents as evidence.—It shall be the duty of the secretary of state to furnish the state librarian with a seal of office. The state librarian is authorized to certify to the authenticity and genuineness of any document, paper, or extract from any document, paper, or book or other writing which may be on file in his office. When the certificate is made under his hand and attested by his official seal, it shall be received as prima facie evidence of the correctness of the matters therein contained, and as such shall receive full faith and credit. (Rev., s. 5070; 1905, c. 537.)

§ 6576. Records procured and published. — The trustees of the state library are directed to procure such of the records of this state, or copies of the same, or of other unpublished material illustrative of the history of the state down to January first, one thousand seven hundred

and ninety-one, as may be missing from the archives of the state, and to publish the same in such number of volumes of suitable size as they may deem proper. The trustees of the state library shall cause an index of these records, from the first volume of the colonial records down to January first, one thousand seven hundred and ninety-one, to be prepared and printed in the volume which shall embrace the year one thousand seven hundred and eighty-nine, and in case the library fund shall prove to be insufficient to meet the expenses incurred in carrying out the provisions of this section, the auditor is directed to draw his warrant for such sums as the trustees aforesaid shall certify to him to be needed in said work. (Rev., s. 5071; Code, ss. 3609, 3610; 1881, c. 88; 1883, pub. res., p. 619; 1895, c. 464; 1901, c. 632.)

§ 6577. Trustees may sell publications.—The trustees of the state library are authorized to sell, on such terms as they may deem proper, any volume printed under the provisions of this chapter that may not be reserved for the use of the public libraries. (Rev., s. 5072; Code, s. 3611; 1881, c. 88, s. 2.)

§ 6578. Colonial records sent to certain states.—The board of trustees are requested to have forwarded the colonial records of North Carolina to such states as may hereafter supply similar documents to this state. (Rev., s. 5073; 1893, pub. res., p. 489.)

§ 6579. Governor to designate documents to be preserved; books bound and labeled.—The governor shall designate such portions of the documents, journals, and acts of congress of the United States as he may deem proper to be preserved in the library; may designate which of them are to to be bound, of such pamphlets, acts, and journals of the general assembly, and works of periodical literature, laws of other states, and documents of the general assembly that may be added to the library; and the librarian shall have them bound. And all the books belonging to the library, or which may be added thereto, shall be labeled in gilt letters with the words "State Library." (Rev., s. 5074; Code, s. 3614; R. C., c. 92, s. 4; 1840, c. 46, s. 6; 1842, c. 68, s. 3.)

§ 6580. Penalty for injury to books. — Any person who shall damage, deface, or mutilate any book which he may be allowed to withdraw from the library, or who shall return any book so damaged, defaced, or mutilated while in his possession, shall forfeit and pay the full amount of the damage, which amount shall be determined by the librarian, but in no case to exceed double the value of the book; and the penalties and forfeitures accruing under this section shall be sued for and recovered by the librarian in the name of the state, before any justice of the peace, and shall be added to the fund for the increase of the library. (Rev., s. 5075; Code, s. 3615; R. C., c. 92, s. 5; 1842, c. 68, s. 1.)

§ 6581. Committee to purchase books.—The state librarian, superintendent of public instruction, together with three other persons to be selected by the trustees, shall constitute a committee to purchase books for the state library, and they are to serve without compensation in the matter of selecting and buying books. (Rev., s. 5076; 1901, c. 503, s. 3.)

§ 6582. Librarian; election and bond.—A librarian shall be elected quadrennially by the trustees of the state library, and shall give bond with security in such sum as the trustees may determine, payable to the state of North Carolina, conditioned for the safe-keeping of the books and the faithful discharge of his duties, and he shall hold his place till his successor shall be appointed and qualified. (Rev., s. 5077; Code, s. 3604; 1870-1, c. 70, s. 1; 1883, c. 216, s. 1; 1895, c. 351; 1903, c. 727.)

§ 6583. Assistant librarian.—The state librarian is authorized to employ an assistant in his office. (Rev., s. 5078; 1901, c. 503, s. 1.)

§ 6584. Librarian to receipt for laws of other states.—The state librarian is directed to keep a record of the published laws, reports, documents, etc., received from other states and territories by exchange for like documents from this state; to receipt for the same and to distribute them to the different departments to which they belong immediately on receipt. All states and territories exchanging such documents with this state are requested to forward all documents direct to the state librarian. (Rev., s. 5079; 1889, c. 535.)

§ 6585. Separate reading-room for colored people.—The state librarian is directed to fit up and maintain a separate place for the use of the colored people who may come to the library for the purpose of reading books or periodicals. (Rev., s. 5080; 1901, c. 503, s. 2.)

§ 6586. Open hours for library.—The library shall be kept open during the day for such time as the trustees may prescribe; and from seven to nine o'clock each evening, if the necessary expense of keeping the same open be voluntarily paid by the citizens of the city of Raleigh. (Rev., s. 5082; Code, s. 3605; 1870-1, c. 70, s. 2; 1881, c. 352; 1889, pub. res., p. 530.)

§ 6587. Appropriation. — Repealed: (Public Laws 1925, c. 275, s. 6.)

§ 6587(a). Members of state boards and commissions to use books.—Any member of a State board or commission residing in Raleigh shall be allowed the privilege of borrowing from the State Library, material, books or other publications, except reference books, and enjoy the same privileges in respect thereto as is allowed State officials. (1925, c. 115.)

Art. 2. Law Library

§ 6588. Location. — The law library shall occupy the rooms set apart for it in the state administration building. (Rev., s. 5083; 1885, c. 121, s. 7; 1913, c. 99, s. 1.)

§ 6589. Trustees; powers and duties. — The justices of the supreme court are appointed trustees of the law library, and all moneys appropriated for its increase shall be paid out under their direction and supervision. They shall have charge of the law library and may, in their dis-

cretion, employ a librarian, who shall perform his duties under such rules and regulations as they may prescribe. (Rev., s. 5084; Code, s. 3606; 1883, c. 100, ss. 1, 2; 1889, c. 482.)

§ 6590. Open hours for library.—The librarian of the law library shall keep it open during such hours as the trustees may prescribe; and he shall, upon application, admit attorneys to the library at night while they are in attendance upon the supreme court. (Rev., s. 5085; 1889, c. 482.)

Editor's Note.—By the act of 1925 a provision for the expenditure of $200 for the binding of books was omitted.

§ 6591. Appropriation.—The clerk of the supreme court, under the direction of the justices of that court, is authorized and directed to expend annually the amount paid in by applicants for license to practice law, who are examined by the court, in the purchase of such books as may be necessary to keep the law library well appointed, and no other appropriation shall be allowed for that purpose. (Rev., s. 5086; Code, s. 3613; res., 1872-3; 1925, c. 275, s. 6.)

Art. 3. Document Library

§ 6592. Location. — The document library shall occupy the rooms in the capitol formerly occupied by the superintendent of public instruction and the state library. (Rev., s. 5087; 1887, c. 258, s. 1.)

§ 6593. Librarian.—The librarian of the state library shall be the custodian of the document library. (Rev., s. 5088; 1887, c. 258, s. 3.)

§ 6594. Assistant librarian.—The librarian is authorized to employ an assistant in the document library during the sessions of the general assembly at a cost not exceeding one dollar per day. (Rev., s. 5089; 1891, pub. res., p. 652.)

§ 6595. Librarian to procure books.—It shall be the duty of the librarian to procure two copies each of the laws and journals of the general assembly, which shall be furnished to him by the secretary of the state, and to arrange them on shelves in chronological order for the use of the two houses of the general assembly respectively. (Rev., s. 5090; 1887, c. 258, s. 2.)

§ 6596. Library open, when.—The librarian shall keep the document library open during the sessions of the general assembly, in order that members may have access to records, and for use of committees of either house. At all other times the doors shall be kept securely locked, but the librarian shall, upon application, admit persons who wish to examine any of the books and records therein. (Rev., s. 5091; 1891, pub. res., p. 652.)

Art. 4. Library Commission

§ 6597. Commission established; members appointed.—There is hereby created a library commission to be known as the Library Commission of North Carolina, which shall consist of the superintendent of public instruction, the state librarian, two other persons who shall be appointed by the North Carolina library association, and one other person who shall be appointed by the governor, all of whom shall serve without compensation. After the ninth day of March, one thousand nine hundred and nine, the governor shall appoint at once one person to serve one year and the North Carolina library association one person to serve two years and one person to serve three years; and as these terms expire, annually thereafter one person shall be appointed for three years by the governor and by the North Carolina library association, according to the vacancy to be filled. The library commission may accept resignations and fill vacancies for unexpired terms. The term of office of the members of the commission shall begin April first. (1909, c. 873, s. 1.)

§ 6598. Election of officers. — The commission shall annually elect its own officers, who shall perform all the duties usually pertaining to such offices. (1909, c. 873, s. 2.)

§ 6599. Duties of commission; secretary employed.—The commission shall give assistance, advice, and counsel to all libraries in the state, to all communities which may propose to establish libraries and to all persons interested, as to the best means of establishing and administering such libraries, as to the selection of books, cataloguing, maintenance, and other details of library management as may be practicable. The commission may aid in organizing new libraries or in improving those already organized, and may establish and maintain traveling or other libraries, as may be practicable. The commission shall employ a secretary, not a member of the commission, who shall be a person trained in modern library methods, and who shall receive such compensation as the commission may decide, and who shall perform the usual duties of a secretary and such other duties as may be assigned by the commission, and who shall serve at the will of the commission. (1909, c. 973, s. 3.)

§ 6600. Public libraries to report to commission.—Every public library in the state shall make an annual report to the commission, in such form as may be prescribed by the commission. The term "public library" shall, for the purpose of this article, include free public libraries, subscription libraries, school, college, and university libraries, young men's christian association, legal association, medical association, supreme court, and state libraries. (1909, c. 873, s. 4.)

§ 6601. Commission to report to general assembly.—The commission shall make a biennial report to the governor, covering its work up to January first preceding each session of the general assembly. Five hundred copies of this report shall be published by the state printer, as other state official reports are published. (1909, c. 873, s. 5.)

§ 6602. Expenses of commission paid.—No member of the commission shall ever receive any compensation for service as a member, but the actual traveling expenses of members in attendance at meetings of the commission or in visiting or establishing libraries and other incidental and necessary expenses connected with the work of the commission may be paid. (1909, c. 873, s. 6.)

§ 6603. Appropriation.—There is annually appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of eight thousand dollars, to be paid to the treasurer of the commission for the use of the commission in carrying into effect the provisions of this article, and any balance not expended in any year may be used by the commission in any subsequent year. (1909, c. 873, s. 7; 1913, c. 175; 1915, c. 161; 1917, c. 221.)

§ 6604. Offices provided.—The board of public buildings and grounds may allow suitable offices and equipment in the capitol, the state library, or other state buildings, for the use of the library commission. (1909, c. 873, s. 8.)

CHAPTER 110
MEDICINE AND ALLIED OCCUPATIONS

Art. 1. Practice of Medicine

§ 6605. North Carolina medical society incorporated.—The association of regularly graduated physicians, calling themselves the state medical society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (Rev., s. 4491; Code, s. 3121; 1858-9, c. 258, s. 1.)

§ 6606. Board of examiners.—In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, which shall consist of seven regularly graduated physicians. (Rev. s. 4492; Code, s. 3123; 1858-9, c. 258, ss. 3, 4; Ex. Sess. 1921, c. 44, s. 1.)

§ 6607. Medical society appoints board.—The medical society shall have power to appoint the board of medical examiners. (Rev. s. 4493; Code s. 3126; 1858-9, c. 258, s. 9.)

§ 6608. Board elects officers and fills vacancies.—The board of medical examiners are authorized to elect all such officers and to frame all such by-laws as may be necessary, and in the event of any vacancy by death, resignation, or otherwise, of any member of said board, the board, or a quorum thereof, is empowered to fill such vacancy. (Rev., s. 4494; Code, s. 3128; 1858-9, c. 258, s. 11.)

§ 6609. Meetings of board.—The board of medical examiners may assemble once in every year in the city of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the state if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; 1935, c. 363.)

Editor's Note.—The amendment of 1935 substituted the word "may" for the word "shall" near the beginning of this section.

§ 6610. Regulations governing applicants for license, examinations, etc.—The board of medical examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper. (1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2.)

§ 6611. Bond of secretary.—The secretary of the board of medical examiners shall give bond with good surety, to the president of the board, for the safe-keeping and proper payment of all moneys that may come into his hands. (Rev., s. 4497; Code, 3134; s. 1858-9, c. 258, s. 17.)

§ 6612. Officers may swear applicants.—The president and secretary of the board of medical examiners of this state shall have power to administer oaths to all persons who may apply for examination before the board, or to any other persons deemed necessary in connection with performing the duties of the board as imposed by law. The board shall have power to summon any witnesses deemed necessary to testify under oath in connection with any cause to be heard before it; or to summon any licentiate against whom charges are preferred in writing, and the failure of the licentiate, against whom charges are preferred, to appear at the stated time and place to answer to the charges, after due notice or summons has been served in writing, shall be deemed a waiver of his right to said hearing, as provided in section six thousand six hundred and eighteen. (1913, c. 20, s. 7; Ex. Sess. 1921, c. 44, s. 3.)

§ 6613. Examination for license; scope; conditions and prerequisites.—It shall be the duty of the board of medical examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the board that he has an academic education equal to the entrance requirements of the university of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the state university. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than four years, and supplying such facilities for clinical and scientific instruction as shall meet the approval of the board; but the requirement of four years attendance at a school shall not apply to those graduating prior to January the first, nineteen hundred.

The examination shall cover the following branches of medical science: anatomy, embryology, histology, physiology, pathology, bacteriology, surgery, pediatrics, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, gynecology, and the practice of medicine.

If on such examination the applicant is found competent, the board shall grant him a license authorizing him to practice medicine or surgery or any of the branches thereof.

Five members of the board shall constitute a quorum, and four of those present shall be agreed as to the qualification of the applicant. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; 1921, c. 47, s. 1.)

Constitutional Discrimination.—"That the statute is not in violation of the State Constitution is thoroughly discussed

and held in State v. Vandoran, 109 N. C. 864, 14 S. E. 32. It is not to be questioned that the law making power of the State has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine." State v. Call, 121 N. C. 643, 645, 28 S. E. 517; State v. Siler, 169 N. C. 314, 84 S. E. 1015.

§ 6614. Two examinations, preliminary and final, allowed.—It shall be the duty of the state board of medical examiners to examine any applicant for license to practice medicine on the subjects of anatomy, histology, physiology, bacteriology, embryology, pathology, medical hygiene, and chemistry, upon his furnishing satisfactory evidence from a medical school in good standing and supplying such facilities for anatomical and laboratory instruction as shall meet with the approval of the board, that he has completed the course of study in the school upon the subjects mentioned. The board shall set to the credit of such applicant upon its record books the grade made by him upon the examination, which shall stand to the credit of such applicant; and when he has subsequently completed the full course in medicine and presents a diploma of graduation from a medical college in good standing, requiring a four years course of study of medicine for graduation and when he has completed the examination upon the further branches of medicine, to wit, pharmacy, materia medica, therapeutics, obstetrics, gynecology, pediatrics, practice of medicine and surgery, he shall have accounted to his credit the grade made upon the former examination, and if then upon such completed examination he be found competent, said board shall grant him a license to practice medicine and surgery, and any of the branches thereof. (1921, c. 47, s. 2; Ex. Sess. 1921, c. 44, s. 4.)

§ 6615. Qualifications of applicant for license.—Every person making application for a license to practice medicine or surgery in the state shall be not less than twenty-one years of age, and of good moral character, before any license can be granted by the board of medical examiners: Provided, that the age requirement shall not apply to students taking the examinations of the first two years in medicine. (1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5.)

§ 6616. Limited license.—The board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of the preceding sections, both as to application for examination and examination for license, as in its judgment the interests of the people living in that locality may demand, and may issue to such applicant a special license, to be entitled a "Limited License", authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the district as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each and every offense; and the board is empowered to revoke such limited license, in its discretion, after due notice. The clerk of the superior court, in registering the holder of a limited license, shall copy upon the certificate of registration and upon his record the description of the district given in the license. (1909, c. 218, s. 1.)

§ 6617. When license without examination allowed.—The board of medical examiners shall in their discretion issue a license to any applicant to practice medicine and surgery in this state without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical college in good standing, requiring an attendance of not less than four years and a license issued to him to practice medicine and surgery by the board of medical examiners of another state. (1907, c. 890; 1913, c. 20, s. 3.)

§ 6618. Board may rescind license.—The board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or has by false or fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds a license, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude. Upon the hearing before said board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. The findings and action of said board shall, in all such cases and hearings, be final and conclusive. And, for any of the above reasons, the said board of medical examiners may refuse to issue a license to an applicant. The said board of medical examiners may, in its discretion, restore a license so revoked and rescinded, upon due notice being given and hearing had, and satisfactory evidence produced of reformation of the licentiate. (1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32.)

Editor's Note.—Public Laws of 1933, c. 32, substituted the above section for the former reading. A comparison of the two sections is necessary to determine the changes.

Unprofessional Conduct. — While the board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, the board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the act. Board of Medical Examiners v. Gardner, 201 N. C. 123, 159 S. E. 8.

Appeal.—The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession, follows the procedure allowed in analogous cases, and the intent of the Legislature is interpreted to give a trial de novo in the Superior Court wherein the jury are to decide upon the evidence adduced before them the

facts involved in the issue. State v. Carroll, 194 N. C. 37, 138 S. E. 339.

§ 6619. License fee; salaries, fees, and expenses of board.—Each applicant for examinations shall pay to the treasurer of the board of medical examiners of the state of North Carolina a fee of fifteen dollars ($15) before being admitted to the examination: Provided, however, that in the case of applicants taking the examinations in two halves, as provided in section six thousand six hundred and fourteen, the fee shall be seven and one-half dollars ($7.50) for each of the two half examinations. Whenever any license is granted without examination, as authorized in section six thousand six hundred and seventeen, the applicant shall pay to the treasurer of the board a fee of fifty dollars ($50). Whenever a limited license is granted, as provided in section six thousand six hundred and sixteen, the person shall pay to the treasurer of the board a fee of fifteen dollars ($15). A fee of five dollars ($5) shall be paid for each duplicate license. All fees shall be paid in advance to the treasurer of the board of medical examiners of the state of North Carolina, to be by him held as a fund for the use of said board. The compensation and expenses of the members and officers of said board, and all expenses proper and necessary in the opinion of said board, to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of such funds, upon the warrant of the president and secretary of said board. The salaries and fees of the officers and members of the said board shall be fixed by the board, but shall not exceed ten dollars ($10) per day per member, and railroad fare and hotel expenses; and no expense shall be created to exceed the income from fees herein provided. Any unexpended sum or sums of money remaining in the treasury of the said board at the expiration of the terms of office of the members thereof, shall be paid over to their successors after their election and qualifications as such. (Rev., s. 4501; Code, s. 3130; 1858-9, c. 258, s. 13; 1913, c. 20, ss. 4, 5; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7.)

§ 6620. Board to keep record; publication of names of licentiates; transcript as evidence.—The board of examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the board present, the names of the applicants for license, and other information as to its actions. The board of examiners shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The board of examiners shall publish the names of those licensed in three daily newspapers published in the state of North Carolina within thirty days after granting the same. A transcript of any such entry in the record books, or a certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this article, certified under the hand of the secretary and the seals of the board of medical examiners of the state of North Carolina, shall be admitted as evidence in any court of this state when it is otherwise competent. (Rev., s. 4500; Code, s. 3129; 1858-9, c. 258, s. 12; 1921, c. 47, s. 6.)

§ 6621. Blanks furnished clerk.—It shall be the duty of the medical society of the state of North Carolina to prescribe proper forms of certificate required by this article and all such blanks and forms as the clerk may need to enable him to perform his duties under this chapter. (Rev., s. 4505; 1899, c. 181, s. 7; 1899, c. 94, s. 4.)

§ 6622. Practicing without license; practicing defined; penalties.—No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50) nor more than one hundred ($100), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this act who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

1. The administration of domestic or family remedies in cases of emergency.

2. The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

3. The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

4. The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

5. The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

6. The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

7. The practice of midwifery by any woman who pursues the vocation of midwife.

8. The practice of chiropody by any legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.

9. The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially six thousand seven hundred of the consolidated statutes.

10. The practice of chiropractic by any legally licensed chiropractor when engaged in the manual adjustment of the twenty-four spinal vertebrae of the human body and without the use of drugs.

11. The practice of medicine or surgery by any reputable physician or surgeon in a neighboring

state coming into this state for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this state.

12. Physicians who have a diploma from a regular medical college or were practicing medicine and surgery in this state prior to the seventh day of March, one thousand eight hundred and eighty-five, and who are properly registered as required by law. (Rev., ss. 3645, 4502; Code, s. 3122; 1858-9, c. 258, s. 2; 1885, c. 117, s. 2; 1885, c. 261; 1889, c. 181, ss. 1, 2; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8.)

For full treatment of physicians and surgeons, see 10 N. C. Enc. Dig. 137, 15 N. C. Enc. Dig. 199.

Editor's Note.—This section was amended in 1921. Before these changes it provided against practice without license, and that an unlicensed practitioner could not maintain an action to collect fees for service, $25 was the minimum fine for practicing without license. The section was not applicable to mid-wives, physicians with diplomas granted before March 7, 1883, and reputable physicians from out of the state called in for consultation only. Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767 holds that one not licensed to practice cannot collect for service. The contract was entered into before the act of 1885 which allowed one who graduated from a medical college before 1880 to practice.

Constitutionality.—This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N. C. 643, 28 S. E. 517.

Nonmedicine Physicians.—The statute is applicable only to one holding himself out as a medical physician. If one cures by other means he is not subject to this statute. State v. Biggs, 133 N. C. 729, 46 S. E. 401.

A patent medicine vendor cannot hold himself out as a physician, and then avoid the statute by only prescribing his own products. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

§ 6623. Practicing without registration; penalties.—Any person desiring to engage in the practice of medicine or surgery shall personally appear before the clerk of the superior court of the county in which he resides or practices, for registration as a physician or surgeon. The person so applying shall produce and exhibit before the clerk of the superior court a license obtained from the board of medical examiners of the state. The clerk shall thereupon register the date of registration, with the name and residence of such applicant, in a book to be kept for this purpose in his office marked "Register of Physicians and Surgeons," and shall issue to him a certificate of registration under the seal of the superior court of the county upon the form furnished him by the medical society of North Carolina, for which the clerk shall be entitled to collect from said applicant a fee of twenty-five cents. The person obtaining such certificate shall be entitled to practice medicine or surgery, or both, in the county where the same was obtained and in any other county in this state; but if he shall remove his residence to another county he shall exhibit said certificate to the clerk of such other county and be registered, which registration shall be made by said clerk without fee or charge.

Any person who practices or attempts to practice medicine or surgery in this state without first having registered and obtained the certificate required in this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the discretion of the court, for each and every offense: Provided, this section shall not apply to women pursuing the vocation of midwife, nor to reputable physicians or surgeons resident in a neighboring state coming into this state for consultation with a registered physician of this state. (Rev., ss. 3646, 4504; 1889, c. 181, ss. 4, 5; 1891, c. 420; Ex. Sess. 1921, c. 44, s. 9.)

Editor's Note.—By the amendment Ex. Sess. 1921 the part of this section allowing registration upon presentment of a diploma issued by a regular medical college prior to March 7, 1885 or making oath that he was practicing medicine or surgery in this state prior to the last mentioned date, was omitted.

What Constitutes Practicing.—To constitute the offense of practicing medicine without registration, etc., it is not necessary to allege or prove the person practiced upon; it is sufficient if the defendant held himself out to the public as a physician. State v. Van Doran, 109 N. C. 894, 14 S. E. 32.

§ 6624. Clerk punishable for illegally registering physician.—If any clerk of the superior court shall register, or issue a certificate to, any person practicing medicine or surgery in any other manner than that prescribed by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office. (Rev., s. 3647; 1889, c. 181, s. 6.)

§ 6625. Certain offenses prosecuted in superior court; duties of attorney-general.—In case of the violation of the criminal provisions of the last three sections preceding, the attorney-general of the state of North Carolina, upon complaint of the board of medical examiners of the state of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending persons. For his services in conducting such a prosecution the solicitor shall be allowed a fee of five dollars. The board of medical examiners may also employ, at their own expense, special counsel to assist the attorney-general or the solicitor.

Exclusive original jurisdiction of all criminal actions instituted for the violations of the last three sections preceding shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 202, s. 2.)

§ 6625(a) Clerks of court to furnish lists; time of mailing; failure to send blank or return lists a misdemeanor. — In order to provide for the compilation of a complete list of all physicians which have been or are qualified by law to practice medicine and surgery in this state, either by virtue of license and registration, or registration on presentation of diploma, or after oath of practice prior to March the seventh, one thousand eight hundred and eighty-five, the clerk of the superior court in every county in the state is hereby required to furnish to the board of medical examiners of the state of North Carolina a complete list of all persons registered in his office to practice medicine and surgery from February twenty-eighth, one thousand eight hundred and eighty-nine, to January first, one thousand nine hundred and twenty-two, on blank forms to be supplied to him by the secretary of the board of medical examiners. Such lists shall be mailed to the office of the secretary of the board of medical examiners not later than thirty days after the receipt of the blanks upon which the names

are to be entered. Failure of the secretary or the board to furnish the blank forms to the clerks, and failure of any clerk of superior court to furnish a complete list of the registered practitioners of medicine and surgery in his county, shall constitute a misdemeanor, and shall be punishable as such. (Ex. Sess. 1921, c. 44, s. 10.)

Art. 2. Dentistry

§§ 6626-6649. Superseded by Public Laws of 1935, c. 66, codified as §§ 6649(1)-6649(28).

§ 6649(1). Board of dental examiners continued; membership; term of office; vacancies; present members hold over.—The North Carolina state board of dental examiners heretofore created by chapter one hundred and thirty-nine, Public Laws, one thousand eight hundred and seventy-nine and by chapter one hundred and seventy-eight, Public Laws one thousand nine hundred and fifteen (former sections 6626-6649 of Code), is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State, said board to consist of six (6) members of the North Carolina dental society, to be elected by the said society at its annual meeting; said members so elected to be commissioned by the governor for a period of three years or until his successor is elected, commissioned and qualified. Any vacancy in the said board shall be filled by a member of the North Carolina dental society to be elected by said board by and with the consent and approval of the executive committee of the North Carolina dental society, and commissioned by the governor to hold office for the unexpired term to which elected. Nothing in this article and no provision of this section shall in any way change the terms of office of the members of the North Carolina state board of dental examiners as now constituted, and said members of said board shall hold their office for the term to which they have been elected. (1935, c. 66, s. 1.)

§ 6649(2). Officers; common seal.—The North Carolina state board of dental examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said board, pursuant to law, shall be continued as the seal of said board. (1935, c. 66. s. 2.)

§ 6649(3). Quorum; adjourned meetings. — Four (4) members of said board shall constitute a quorum for the transaction of business and at any meeting of the board, if four (4) members are not present at the time and the place appointed for the meeting, those members of the board present may adjourn from day to day until a quorum is present, and the action of the board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2.)

§ 6649(4). Records and transcripts.—The said board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the board may be necessary or proper. Said book shall be deemed a book of record of said board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina state board of dental examiners, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1935, c. 66, s. 2.)

§ 6649(5). Annual and special meetings.—The North Carolina state board of dental examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the board, and at such other times and places as may be determined by action of the board or by any four (4) members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given by advertising a copy of said notice in at least three daily newspapers published in this State at least ten days prior to said meeting. At the annual meeting or at any special or called meeting, the said board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3.)

§ 6649(6). Judicial powers; additional data for records. — The president of the North Carolina state board of dental examiners, and/or the secretary-treasurer of said board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said board pursuant to its requirements and in the same manner as process issued by any court of record. The said board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

The board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4.)

§ 6649(7). By-laws and regulations. — The North Carolina state board of dental examiners shall have the power to make necessary by-laws and regulations, not inconsistent with the provisions of this article, regarding any matter referred to in this article and for the purpose of facilitating the transaction of business by the said board. (1935, c. 66, s. 5.)

§ 6649(8). Necessity for license; dentistry defined; certain practices exempted. — No person shall engage in the practice of dentistry in this State or attempt to do so without first having applied for and obtained a license for such purpose from the said North Carolina state board of dental examiners, or without first having obtained from said board a certificate of renewal of license for the calendar year in which such person proposes to practice dentistry.

A person shall be deemed to practice dentistry in this State within the meaning of this article and this section of this article, who represents himself as being able to remove stains and accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums or maxillary bones and associated tissues or parts and/or who offers or undertakes by any means or methods to remove stains or accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same, or to take impressions of the teeth or jaws and/or who owns, maintains or operates an office for the practice of dentistry, and/or who engages in any of the practices included in the curricular of recognized and approved dental schools or colleges.

The fact that a person uses any dental degree or designation or any card, device, directory, poster, sign or other media whereby he represents himself to be a dentist practicing in the State, shall constitute prima facie evidence that such person is engaged in the practice of dentistry.

The following practices, acts, and operations, however, shall be exempt from the provisions of this article:

(a) Any act in the practice of his profession by a duly licensed physician or surgeon.

(b) The rendering of dental relief in emergency cases in the practice of his profession by a physician or surgeon licensed as such and registered under the laws of this State, unless he undertakes to reproduce or reproduces lost parts of the human teeth in the mouth, or to restore or replace in the human mouth, lost or missing teeth.

(c) The practice of dentistry in the discharge of their official duties by dentists in the United States army, the United States navy, the United States public health service, the United States veterans bureau, or other federal agency.

(d) The teaching of dentistry in dental schools or colleges as may be conducted in the State of North Carolina and approved by the said North Carolina state board of dental examiners, and the practice of dentistry by students in dental schools or colleges so approved when such students are acting under the direction and supervision of registered and licensed dentists acting as instructors.

(e) The practice of dentistry by licensed dentists of another state, territory or country at meetings of the North Carolina dental society, or component parts thereof, meetings of dental colleges or other like dental organizations while appearing as clinicians, or when appearing in emergency cases upon the specific call of dentist duly licensed under the provisions of this article.

(f) The making, either upon written orders, prescriptions, casts, models or impressions furnished by a duly licensed dentist of artificial restorations, substitutes, appliances or materials for the correction of disease, loss, deformity, malposition, discoloration, fracture, injury to the jaws, teeth, lips, gums, cheeks, palate or associated tissues or parts. (1935, c. 66, s. 6.)

§ 6649(9). Examination and licensing applicants; qualifications; causes for refusal to grant license; void licenses. — The North Carolina state board of dental examiners shall grant license to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this article.

The applicant shall be of good moral character, at least twenty-one years of age at the time the application for examination is filed. The application shall be made to the said board in writing and shall be accompanied by evidence satisfactory to said board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said board.

The North Carolina state board of dental examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the board, a deficiency in academic education.

The North Carolina state board of dental examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 7.)

Editor's Note.—The following cases were decided under section 6631, now repealed. However, these cases seem equally applicable to the present law as the provisions of former section 6631 are substantially set forth in the instant section.

Mandamus to Procure License.—The courts cannot by a mandamus compel the board of dental examiners to certify contrary to what they have declared to be truth. If the board refused to examine an applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. Burton v. Furman, 115 N. C. 166, 20 S. E. 443; Loughran v. Hickory, 129 N. C. 281, 40 S. E. 46; Ewbank v. Turner, 134 N. C. 77, 83, 46 S. E. 508.

Failure of Clerk to Furnish Blanks.—A defendant, under

an indictment for practicing dentistry without complying with the statute, is not excused because the designated officers had not furnished, as required of them, blanks upon which to make the statement. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

Delay in Filing Verified Statement.—Time for filing the statement to practice dentistry is not of the essence of the enactment; by a compliance therewith a person will be entitled to a certificate to be registered. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

Burden of Proof.—Under an indictment the burden of proof is upon the defendant to show he comes under the provision of this section and that he practiced dentistry in the State before the specified time, or has filed the required statement. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

§ 6649(10). Annual renewal of licenses. — The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina state board of dental examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina state board of dental examiners or hereafter issued by said board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina state board of dental examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina state board of dental examiners and receive from said board, subject to the further provisions of this section and of this article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said board from time to time may prescribe, at least six months prior to January first of any year. (1935, c. 66, s. 8.)

§ 6649(11). Contents of original license. — The original license granted by the North Carolina state board of dental examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said board and attested by the seal of said board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)

§ 6649(12). Displaying license and current certificate of renewal.—The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina state board of dental examiners or to its authorized agents. (1935, c. 66, s. 8.)

§ 6649(13). Refusal to grant renewal license. — For cause satisfactory to it or to a majority thereof, the North Carolina state board of dental examiners may refuse to issue a certificate of renewal of license upon any application made to it therefor, and the applicant whose certificate of renewal of license is refused, for cause by said board, shall not be authorized to practice dentistry in North Carolina until said board shall, in its discretion, renew the license of the applicant. (1935, c. 66, s. 8.)

§ 6649(14). Duplicate licenses.—When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina state board of dental examiners for the issuance of a copy or a duplicate thereof accompanied by a fee of two dollars. Upon the filing of the application and the payment of the fee, the said board shall issue a copy or duplicate. (1935, c. 66, s. 8.)

§ 6649(15). Licensing practitioners of other states.—The North Carolina state board of dental examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five (5) years, next preceding his or her removal and who has not, during his period of practice, been charged with violation of the ethics of his profession, nor with the violation of the laws of the state which issued license to him, or of the criminal laws of the United States, nor whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the State from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that State, and for a period of five (5) years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the State or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina state board of dental examiners within the six (6) months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this article with reference to the license issued by the North Carolina state board of dental examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the

conditions as imposed by this article on dentists originally examined by the North Carolina state board of dental examiners. (1935, c. 66, s. 9.)

§ 6649(16). Certificate issued to dentist moving out of state.—Any dentist duly licensed by the North Carolina state board of dental examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said board, upon application to said board and the payment to it of the fee in this article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the board against him. The board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)

§ 6649(17). Licensing former dentists who have moved back into state or resumed practice.—Any person who shall have been licensed by the North Carolina state board of dental examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the state and shall have returned to the state, may, upon a satisfactory showing to said board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said board a license to resume the practice of dentistry upon making application to the said board in such form as it may require and upon the payment of the fee of ten dollars. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this article. (1935, c. 66, s. 11.)

§ 6649(18). Fees collectible by board.—In order to provide the means of carrying out and enforcing the provisions of this article and the duties devolving upon the North Carolina state board of dental examiners, it shall charge and collect for: (a) each applicant for examination, a fee of twenty dollars; (b) each certificate of renewal of license, a fee of two dollars; (c) each certificate of practice to a resident dentist desiring to change to another state or territory, a fee of five dollars; (d) each license issued to a legal practitioner of another state or territory to practice in this State, a fee of twenty dollars; (e) each license to resume the practice issued to a dentist who has retired from the practice of dentistry, or has removed from and returned to the state, a fee of ten dollars. (1935, c. 66, s. 12.)

§ 6649(19). Practicing without license a misdemeanor. — If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina board of dental examiners; or, if a period of more than one year has elapsed since the issuance of his license, shall practice without first having obtained a certificate of renewal of license; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this article for which no specific penalty has been provided, or shall practice dentistry under any name other than his own name, said person shall be guilty of a misdemeanor, and, upon conviction, shall be fined in the sum of fifty ($50.00) dollars for the first offense.

Whenever any person shall have been convicted once in this State of the violation of chapter one hundred and thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and/or chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen (former sections 6626-6649 of Code), and/or amendments to said acts and/or of this article, and shall practice, or attempt to practice, dentistry in violation of the provisions of this article, he shall be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1935, c. 66, s. 13.)

Editor's Note.—The following case was decided under section 6647, now repealed. However, this case seems applicable to the present law as the provisions of former section 6647 are substantially set forth in the instant section.

Constitutionality.—The legislature has constitutional authority to regulate the practice of dentistry, and a conviction for violating this section is proper. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

§ 6649(20). Revocation or suspension of license.—Whenever it shall appear to the North Carolina state board of dental examiners that any dentist who has received license to practice dentistry in this State, or who has received from the said board of dental examiners a certificate of renewal of license, has been guilty of fraud, deceit or misrepresentation in obtaining his license, or of gross immorality, or is an habitual user of intoxicants or drugs, rendering him unfit for the practice of dentistry, or has been guilty of malpractice, or is grossly ignorant or incompetent or has been guilty of wilful neglect in the practice of dentistry, or has been employing unlicensed persons to perform work which, under this article, can be legally done or performed only by persons holding a license to practice dentistry in this State, or of practicing deceit or other fraud upon the public or individual patients in obtaining or attempting to obtain practice, or has been guilty of fraudulent and/or misleading statements of his art, skill or knowledge, or of his method of treatment or practice, or any offense involving moral turpitude, or has by himself or another, solicited or advertised in any manner for professional business; or has been guilty of any other unprofessional conduct in the practice of dentistry; or in the procurement of license has filed, as his own, a diploma or license of another, or a forged diploma or a forged or false affidavit of identification or qualification the board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of said board, will be commensurate with the offense committed; provided, however, it shall not be considered advertising within the meaning of this article for a dentist, duly authorized to practice in this State, to place a card containing his name, telephone number and office address and office hours in a registry or other publication, or to place upon the window or door of his office, his name followed by the word, "dentist."

The North Carolina state board of dental examiners is authorized and empowered to appoint an investigator to ascertain the facts with reference to any information coming to the attention of

the said board respecting the violation of any of the provisions of this article, or of any act heretofore in effect in this State.

Such investigator so appointed by the North Carolina state board of dental examiners is thereupon authorized and directed to make an investigation as to any information coming to his attention with reference to the violation of the provisions of this article or any act in force at the time of said violation, and formulate a statement of charges which the said board, upon presentation by the said investigator, shall cause to be served upon the dentist so accused. Said notice shall contain the statement of a time and place at which the charges against the accused shall be heard before the board or a quorum thereof, which time shall not be less then ten (10) days from the date of service of said statement and notice.

At the time and place named in said notice, the said board shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the board shall determine its action and announce the same.

From any action of the board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the board. The record of the hearing before the North Carolina state board of dental examiners shall constitute the record upon appeal in the superior court and the same shall be heard in the superior court as in the case of consent references. (1935, c. 66, s. 14.)

Editor's Note.—The case discussed below was decided under section 6649, now repealed. However, this case seems equally applicable to the present law as the provisions of former section 6649 are substantially set forth in the instant section.

This section only makes the use of false advertising, or the circulation of fraudulent and misleading statements, unlawful, and the corollary follows that the use of truthful advertising and circulation of truthful statements are not unlawful, solicitation and advertising not being synonymous terms. In re Owen, 207 N. C. 445, 447, 177 S. E. 403.

Advertising, or the circulation of statements, without the taint of falsity or fraud, either by newspaper or sign, although paid for, cannot be construed as a violation of this section. Id.

§ 6649(21). Restoration of revoked license. — Whenever any dentist has been deprived of his license, the North Carolina state board of dental examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration. (1935, c. 66, s. 14.)

§ 6649(22). Compensation and expenses of board. — Each member of the North Carolina state board of dental examiners shall receive as compensation for his services in the performance of his duties under this article a sum not exceeding ten dollars for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said board, and all legitimate and necessary expenses incurred in attending meetings of the said board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the board and a member thereof, be allowed a reasonable annual salary to be fixed by the board and shall in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the board and in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the board who shall likewise draw voucher payable to himself for the salary fixed for him by the board.

The board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this article. (1935, c. 66, s. 15.)

§ 6649(23). Annual report of board.—Said board, shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the governor of the State of North Carolina. (1935, c. 66, s. 15.)

§ 6649(24). Exemption from jury duty. — All dentists duly licensed by the North Carolina state board of dental examiners and/or the holders of certificate of renewal of license from said board shall be exempt from service as jurors in any of the courts of this State. (1935, c. 66, s. 16.)

§ 6649(25). Filling prescriptions. — Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina state board of dental examiners. (1935, c. 66, s. 17.)

§ 6649(26). Restrictions on lectures and teaching. — Lectures on the science of dentistry shall not be made in North Carolina in connection with the demonstration, promotion or distribution of any product or products used or claimed to be useful in the promotion of the health of the oral cavity, except after specific authority has been granted by the North Carolina state board of dental examiners, nor shall the science of dentistry be taught in North Carolina except by duly licensed dentists acting as teachers in a duly organized school or college of dentistry or a dental department of a college or university. (1935, c. 66, s. 18.)

§ 6649(27). Rules and regulations of board; violation a misdemeanor. — The North Carolina state board of dental examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules, and regulations are not inconsistent with the provisions of this article, and such rules and regulations shall become effective thirty days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any

rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or by-law shall be guilty of a misdemeanor, subject to a fine of not more than fifty ($50.00) dollars or imprisonment for not more than thirty days. (1935, c. 66, s. 19.)

§ 6649(28). Conflicting laws repealed; certain laws preserved.—All clauses and parts of clauses of chapter one hundred thirty-nine, Public Laws of one thousand eight hundred seventy-nine and of chapter one hundred seventy-eight, Public Laws of one thousand nine hundred and fifteen (former sections 6626-6649 of Code), and any amendments thereto inconsistent with the provisions of this article are hereby repealed; provided, however, that such clauses and parts of clauses shall remain in force for the prosecution and punishment of any person who, before the effective date of this article, shall have committed any act contrary to the provisions of any law in force at the time such act was done and such person may be prosecuted and punished under the law as it existed when such violation occurred; and provided, further, that any dentist who has committed any act in violation of the laws in force at the time such act was committed shall be subject to be deprived of his license as herein provided, it being hereby declared by the general assembly to be the intent of this article to provide, among other things, a method of procedure under which a licensed dentist charged with violation of this article or any preceding act, may be deprived of his license. (1935, c. 66, s. 21.)

Art. 2(A). The Licensing of Mouth Hygienists, to Teach and Practice Mouth Hygiene in Public Institutions

§ 6649(a). Qualifications and examinations of applicants.—Any person of good moral character who holds a grade "A" teacher's certificate issued by the Department of Education of the State of North Carolina, may be licensed to practice mouth hygiene in conjunction with the teaching of health subjects in the public institutions and public schools of the State as is hereinafter provided in this act.

Such person shall be a graduate in Mouth Hygiene from an approved school for such technical training, said approval to be by the North Carolina State Board of Dental Examiners. Upon the completion of such course or courses and upon the payment of a fee of ten dollars ($10.00), which shall not be returned, the applicant for such license shall apply to the North Carolina State Board of Dental Examiners, at their annual meeting which shall be held on the fourth Monday of June, or at any other such time as they deem necessary, for an examination on such subjects as said Board shall deem essential for the practice of mouth hygiene in this State; and if the examination is satisfactory to said Board of Dental Examiners, shall be registered and licensed by said Board as a mouth hygienist to practice as such only in the public institutions and public schools of the State. (1929, c. 304, s. 1.)

§ 6649(b). By whom employed; duties.—Only public institutions and public school authorities of the State may employ such licensed mouth hygienist, whose clinical work shall be under the direct supervision of the dentist who shall be at the head of the Bureau of Mouth Hygiene of the State Board of Health. The duties of a mouth hygienist shall be to examine mouths of inmates of said institutions and of pupils of said public schools without expense, to make such charts and records as the head of said Bureau shall require, and to furnish copies of the same to the guardians or teachers of those examined.

Such hygienist shall teach mouth hygiene and the proper care of the teeth and may recommend mouth washes, clean stains, remove deposits and accretion from the exposed surfaces of the teeth of said inmates and pupils, but shall not perform any other operation on the teeth or tissues of the mouth or body. Provided that no pupil may be so examined and treated over the written objection of such child's parents or guardian. (1929, c. 304, s. 2.)

§ 6649(c). Revocation or suspension of license.—The State Board of Dental Examiners shall have the power to revoke or suspend the license of any mouth hygienist, who shall violate the provisions of this act, and the proceedings to revoke or suspend said license shall be the same as are provided in the case of suspension or revoking the license of a dentist as set out in chapter one hundred and ten, article two of this Code. (1929, c. 304, s. 3.)

§ 6649(d). Penalty for violation of article.—Any person falsely claiming to have a mouth hygienist's license, or who shall practice or attempt to practice mouth hygiene without first having been duly licensed thereto, as provided in this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined twenty-five dollars for each and every offense; that any person, who, having been so licensed to practice mouth hygiene in said public institutions and public schools, fails to display the said license, or who practices or attempts to practice mouth hygiene elsewhere than in said public institutions and public schools, as hereinbefore provided, in this act, shall, upon conviction thereof, be fined twenty-five dollars for each and every offense and, shall also forfeit her license to practice mouth hygiene in the said institutions and schools. (1929, c. 304, s. 4.)

Art. 3. Pharmacy

Part 1. Practice of Pharmacy

§ 6650. North Carolina pharmaceutical association.—The North Carolina pharmaceutical association, and the persons composing the same, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by said name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do such other things and perform such other acts as appertain to bodies corporate and politic not inconsistent with the constitution and laws of the state. (Rev., s. 4471; Code, s. 3135; 1881, c. 355, s. 1.)

§ 6651. Object of pharmaceutical association.—The object of the association is to unite the pharmacists and druggists of this state for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought, and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries. (Rev., s. 4472; Code, s. 3136; 1881, c. 355, s. 2.)

§ 6652. Board of pharmacy; election; terms; vacancies.—The board of pharmacy shall consist of five persons licensed as pharmacists within this state, who shall be elected and commissioned by the governor as hereinafter provided. The members of the present board of pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and by-laws of said board, so far as they are not inconsistent with the provisions of this article, shall continue in effect. The North Carolina pharmaceutical association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said board, and the pharmacist so elected shall be commissioned by the governor and shall hold office for the term of five years and until his successor has been duly elected and qualified. In case of death, resignation, or removal from the state of any member of said board of pharmacy, the said board shall elect in his place a pharmacist who is a member of said North Carolina pharmaceutical association, who shall be commissioned by the governor as a member of the said board of pharmacy for the remainder of the term. It shall be the duty of a member of the board of pharmacy, within ten days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. (Rev., s. 4473; 1905, c. 108, ss. 5-7.)

§ 6653. Election of officers; bonds; annual meetings.—The board of pharmacy shall organize by the election of a president and a secretary and treasurer, both of whom shall be members of the said board, and they shall hold their offices until their successors shall have been elected and qualified. The secretary and treasurer shall give bond in such sum as may be prescribed by the board, conditioned for the faithful discharge of the duties of his office according to law, and said bond shall be made payable to the North Carolina board of pharmacy and approved by the president of said board. The said board shall hold an annual meeting at such time and place as it may provide by rule for the examination of candidates and for the discharge of such other business as may legally come before it, and said board may hold such additional meetings as may be necessary for the examination of candidates and for the discharge of any other business. (Rev., s. 4474; 1905, c. 108, s. 8; 1923, c. 82.)

§ 6654. Powers of board; reports; quorum; records.—The board of pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and by-laws, not inconsistent with this article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this article, and shall have power and authority to employ an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this article, and for any other purposes which said board may deem necessary. The said board of pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said board, or a copy of any part thereof, certified by the secretary, attested by the seal of said board, shall be taken and accepted as competent evidence in all the courts of the state. The said board of pharmacy shall make annually to the governor and to the North Carolina pharmaceutical association written reports of its proceedings and of its receipts and disbursements under this article, and of all persons licensed to practice as pharmacists in this state. A majority of the board shall constitute a quorum for the transaction of all business. (Rev., s. 4475; 1905, c. 108, s. 9; 1907, c. 113, s. 1.)

§ 6655. Compensation of secretary and board.—The secretary of the board of pharmacy shall receive such salary as may be prescribed by the board, and shall be paid his necessary expenses while engaged in the performance of his official duties. The other members of the said board shall receive the sum of ten dollars for each day actually employed in the discharge of their official duty and their necessary expenses while engaged therein: Provided, that the compensation and expenses of the secretary and members of the said board of pharmacy and all disbursements for expenses incurred by the said board in carrying into effect and executing the provisions of this article shall be paid out of the fees received by the said board. (Rev., s. 4476; 1905, c. 108, s. 10; 1921, c. 57, s. 2.)

§ 6656. Secretary to investigate and prosecute.—Upon information that any provision of this article has been or is being violated by any member, the secretary of the board of pharmacy or any one appointed by the said board of pharmacy shall promptly make investigations of such matters, and, upon probable cause appearing, shall file complaint and prosecute the offender. All fines and penalties prescribed in this article shall be recoverable by suit in the name of the people of the state. In all prosecutions for the violation of any of the provisions of this article, a certificate under oath by the secretary of the board of pharmacy shall be competent and admissible as evidence in any court of the state that the person so charged with the violation of this article is not a registered pharmacist or assistant pharmacist, as required by law. (Rev., s. 4477; 1905, c. 108, s. 11; 1923, c. 74, s. 1.)

Editor's Note.—Prior to the amendment to this section by Public Laws 1923 investigation and prosecution was restricted to the secretary of the board and there was no provision for admission as evidence of a certificate of the secretary under oath. The effect is to make more effective the provisions of this section by directing any member of the Board of

Pharmacy, or any person appointed by the Board to investigate and prosecute violations of the aforementioned article, in addition to the Secretary of the Board; and by making a certificate under oath by the secretary of the Board competent and admissible as evidence in any court of the state, a person charged with violation of such law is not duly licensed. See 1 N. C. Law Rev. 300.

§ 6657. Fees collectible by board.—The board of pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist or assistant pharmacist, ten dollars; for renewing the license as a pharmacist an assistant pharmacist, five dollars; for issuing a permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, ten dollars; for the renewal of permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, five dollars. All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists and assistant pharmacists, or before any license or permit, or any renewal thereof, may be issued by the board. (Rev., s. 4478; 1905, c. 108, s. 12; 1921, c. 57, s. 3.)

§ 6658. Application and examination for license, prerequisites.—Every person now licensed or registered as a pharmacist under the laws of this state shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist or assistant pharmacist shall file with the secretary of the board of pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the board of pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist or assistant pharmacist. The application referred to above shall be prepared and furnished by the board of pharmacy.

In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, he shall present to the board of pharmacy satisfactory evidence that he has had four years experience in pharmacy under the instruction of a licensed pharmacist, and that he is a graduate of a reputable school or college of pharmacy, and he shall also pass a satisfactory examination of the board of pharmacy: Provided, however, that the actual time of attendance at a reputable school or college of pharmacy, not to exceed three years, may be deducted from the time of experience required. In order to be licensed as an assistant pharmacist, within the meaning of this article, an applicant shall be not less than eighteen years of age; shall have had a sufficient preliminary general education, and shall have had not less than two years experience in pharmacy under the instruction of a licensed pharmacist, and shall also pass a satisfactory examination by, or under the direction of, the board of pharmacy: Provided, however, that applicants for licenses as assistant pharmacists, who have attended a reputable school or college of pharmacy, may have deducted from the time of experience required the actual time of attendance at such school or college of pharmacy, such time not to exceed one year: Provided, that any person legally registered or licensed as a pharmacist by another state board of pharmacy, and who has had fifteen years continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding his application shall be permitted to stand the examination to practice pharmacy in North Carolina upon application filed with said board prior to the first day of July, one thousand nine hundred and thirty-three. Any person who has had two years of college training and has been filling prescriptions in a drug store or stores for twenty years or longer may take the examination as provided in the above proviso. (Rev., ss. 4479, 4480; 1905, c. 108, s. 13; 1915, c. 165; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181.)

Editor's Note.—Public Laws of 1933, c. 206, inserted the last proviso of this section relative to pharmacists in another state taking the examination in North Carolina.

In the first proviso of the second paragraph of this section the maximum deductible time was increased from two to three years by Public Laws of 1935, c. 181.

The provisions of this section, as amended 1933, relative to a pharmacist licensed by another state, do not entitle a person meeting the qualifications of this act and being of the required age to be permitted to stand the examination upon his application therefor filed after 1 July, 1933, although he has previously made other applications therefor and has been permitted to stand examinations of the board held prior to 1 July, 1933, and has failed to pass such examinations, the request filed after 1 July, 1933, for a "re-examination" being in legal effect an application for an examination de novo, nor is this result affected by the fact that the board has permitted applicants who failed to pass the examination to stand a subsequent examination without filing a new application, and the issuance of a writ of mandamus directing the board to permit such applicant to stand the examination upon his application filed after 1 July, 1933, is error. McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 180 S. E. 78.

§ 6659. When license issued.—If an applicant for license as pharmacist or assistant pharmacist has complied with all the requirements of the two preceding sections, the board of pharmacy shall enroll his name upon the register of pharmacists and assistant pharmacists, and issue to him a license, which shall entitle him to practice as a pharmacist or assistant pharmacist up to the first day of January next ensuing, as provided in this article for the annual renewal of every registration. (Rev., s. 4481; 1905, c. 108, s. 15; 1921, c. 68, s. 1.)

§ 6659(a). World War Veterans may take examination under former requirements.—Any person who was called into or voluntarily entered the military service of the United States during the World War and who was at such time entitled according to the then requirements to stand the examination to practice pharmacy in North Carolina, shall now be permitted to stand the examination to enter the practice of pharmacy in this State: Provided, that such person shall make application to the Board of Pharmacy within twenty-four months from the ratification of this section and such examination shall be held within said twenty-four months thereafter; and if upon such examination such person is found com-

petent, license shall be granted him as in all other cases.

Provided, further, that such applicant shall have been engaged in the practice of pharmacy for a period of not less than five years since leaving the military service, and that this section shall apply only to legal residents in North Carolina at the time of their entrance into said military service. (1931, c. 121, s. 1.)

§ 6660. When license without examination issued.—The board of pharmacy may issue license to practice as pharmacists in this state, without examination, to such persons as have been legally registered or licensed as pharmacists by other boards of pharmacy, if the applicant for such license shall present satisfactory evidence of the same qualifications as are required from licentiates in this state, and that he was registered or licensed by examination by such other board of pharmacy, and that the standard of competence required by such board of pharmacy is not lower than that required in this state. All applicants for license under this section shall, with their application, forward to the secretary of the board of pharmacy the same fees as are required of other candidates for license. (Rev., s. 4482; 1905, c. 108, s. 16.)

§ 6661. When license refused or revoked; fraud.—The board of pharmacy may refuse to grant a license to any person guilty of felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy; and the board of pharmacy may, after due notice and hearing, revoke a license for like cause, or any license which has been procured by fraud, and any license or permit, or renewal thereof, obtained through fraud or by any fraudulent or false representations shall be void and of no effect in law. (Rev., s. 4483; 1905, c. 108, ss. 17, 25.)

§ 6662. Expiration and renewal of license; failure to renew misdemeanor.—Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession, and every physician holding a permit to sell drugs in a village of not more than five hundred inhabitants, shall within thirty days next preceding the expiration of his license or permit, file with the secretary and treasurer of the board of pharmacy an application for the renewal thereof, which application shall be accompanied by the fee hereinbefore prescribed. If the board of pharmacy shall find that an applicant has been legally licensed in this state, and is entitled to a renewal thereof, or to a renewal of a permit, it shall issue to him a certificate attesting that fact. And if any pharmacist or assistant pharmacist shall fail, for a period of six days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of original registration. And if any holder of a permit to sell drugs in a village of not more than five hundred inhabitants shall fail, for a period of sixty days after the expiration of his permit, to make application for the renewal thereof, his name shall be erased from the register of persons holding such permits, and he may be restored thereto only upon the payment of the fee required for the granting of original permit. The registration of every license and every permit issued by the board shall expire on the thirty-first day of December next ensuing the granting thereof: Provided, that all licenses and permits for the years one thousand nine hundred and twenty-one and one thousand nine hundred and twenty-two, shall expire on the thirty-first day of December, one thousand nine hundred and twenty-two: Provided, that the board of pharmacy, in its discretion, shall have the power to issue a license or permit, or renewals thereof, to any persons whose license or permit has been revoked by operation of law or by the board of pharmacy, or whose renewal thereof has been refused by the board of pharmacy, after the expiration of one year from the date of such revocation of license or permit, or refusal of a renewal thereof, upon satisfactory proof that such person is entitled to such license or permit, or to a renewal thereof.

Every holder of a license or permit as a pharmacist or assistant pharmacist, who after the expiration thereof continues to carry on the business for which the license or permit was granted, without renewing the same as required by this section, shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars. (Rev., ss. 3653, 4484; 1905, c. 108, ss. 18, 19, 27; 1911, c. 48; 1921, c. 68, s. 2.)

§ 6663. License to be displayed; penalty.—Every certificate or license to practice as a pharmacist or assistant pharmacist and every permit to a practicing physician to conduct a pharmacy or drug store in a village of not more than five hundred inhabitants, and every last renewal of such license or permit, shall be conspicuously exposed in the pharmacy or drug store or place of business of which the pharmacist, or other person to whom it is issued, is the owner or manager, or in which he is employed.

The holder of such license, permit, or renewal who fails to expose it as required by this section shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars, and each day that such license, permit, or renewal thereof shall not be exposed shall be held to constitute a separate and distinct offense. (Rev., ss. 3651, 4485; 1905, c. 108, ss. 18, 26; 1921, c. 68, s. 3.)

§ 6664. Unlicensed person not to use title of pharmacist; penalty.—It shall be unlawful for any person not legally licensed as a pharmacist or assistant pharmacist to take, use or exhibit the title of pharmacist or assistant pharmacist or licensed or registered pharmacist, or the title druggist or apothecary, or any other title, name, or description of like import.

Every person who violates this section shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than one hundred dollars. (Rev., ss. 3652, 4486; 1905, c. 108, ss. 22, 29; 1921, c. 68, s. 4.)

§ 6665. Purity of drugs protected; seller responsible; adulteration misdemeanor. — Every person who shall engage in the sale of drugs, chemicals, and medicines shall be held responsible for the quality of all drugs, chemicals, and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturers, and also those known as "patent or proprietary medicines."

If any person engaged in the sale of drugs, chemicals, and medicines shall intentionally adulterate, or cause to be adulterated, or exposed to sale knowing the same to be adulterated, any drugs, chemicals, or medical preparations, he shall be guilty of a misdemeanor and liable to a fine not exceeding one hundred dollars, and if he is a licensed pharmacist or assistant pharmacist his name shall be stricken from the register of licensed pharmacists and assistant pharmacists. (Rev., ss. 3648, 4488; Code, s. 3145; 1881, c. 355, s. 11; 1897, c. 182, s. 7; 1905, c. 108, s. 3; 1921, c. 68, s. 5.)

§ 6666. Prescriptions preserved; copies furnished.—Every proprietor or manager of a drug store or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drug store or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drug store or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examination of duly authorized officers of the law or other persons authorized and directed by the board of pharmacy to make such inspection and examination. (Rev., s. 4490; 1905, c. 108, s. 21.)

§ 6667. Selling drugs without license prohibited; drug trade regulated.—It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. [Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug store or chemical store, a licensed assistant pharmacist may conduct or have charge of said store.] And it shall be unlawful for any owner or manager of a pharmacy or drug store or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any legally registered practitioner of medicine in the compounding of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, [nor with the sale of paregoric, Godfrey's Cordial, Aspirin, alum, borax, bicarbonate of soda, calomel tablets, castor oil, compound carthartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract witch hazel, epsom salts, harlem oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly, saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine] nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than five hundred inhabitants the board of pharmacy may grant any legally registered practicing physician a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: Provided, that the board of pharmacy may, after due investigation, grant to any legally registered practicing physician in towns or villages of more than five hundred, and not exceeding six hundred, inhabitants a permit to conduct a drug store or pharmacy in such towns or villages subject to the provisions of this article. [The part of the section in brackets shall not apply to any city or town where there is located an established drug store, except in the counties of McDowell and Onslow]. (Rev., s. 4487; 1905, c. 108, s. 4; 1921, c. 68, s. 6; 1924, c. 116.)

Editor's Note.—In 3 N. C. Law Rev. in considering this section it is said: it "prohibits the sale of drugs without a license and regulates the drug trade. It excepts from the requirements of a license physicians who compound their own prescriptions, also the sale of non-poisonous domestic remedies and patent medicines containing no poisonous ingredients.

"Ch. 116 Act 1924 adds to these exceptions a list of some thirty drugs and remedies, such as paregoric, aspirin, bicarbonate of soda, calomel, castor oil, camphor, etc. These may be sold by anybody without a pharmaceutical license, provided there is no established drug store in the same town. The act does not apply in twenty-six counties, which further restricts it.

"Since most of the list of drugs named are harmless in ordinary use, it may be safe enough to allow the small, country store-keeper to sell them, but the statute makes an opening which might lead to worse things. There may be a question whether paregoric, a strong narcotic, should ever be sold except upon a doctor's prescription. Similarly with

other drugs in the list. It seems that the legislature would have done better to leave the details of drug-selling to the State Board of Pharmacy or to some other expert group who understand the nature and effect of drugs and the danger involved in allowing them to be sold by anybody."

By the amendment of 1929, c. 249, the legislature excepted Johnson county from the provision of the amendment of 1924.

§ 6668. Compounding prescriptions without license.—If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and any person being the owner or manager of a drug store, pharmacy, or other place of business, who shall cause or permit any one not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Rev., s. 3649; 1905, c. 108, s. 24; 1921, c. 68, s. 7.)

Editor's Note.—By the amendment Public Laws 1921 this section was made applicable to assistant pharmacists.

Sale by a Clerk.—Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. State v. Neal, 133 N. C. 689, 45 S. E. 756; State v. Kittelle, 110 N. C. 560, 15 S. E. 103, distinguished.

Stated in McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 282, 180 S. E. 78.

§ 6669. Conducting pharmacy without license.—If any person, not being licensed as a pharmacist, shall conduct or manage any drug store, pharmacy or other place or business for the compounding, dispensing, or sale at retail of any drugs, medicine, or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars, and each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. (Rev., s. 3650; 1905, c. 108, s. 23.)

§ 6670. Pharmacist obtaining license fraudulently.—If any person shall make any fraudulent or false representations for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars; and if any person shall wilfully make a false affidavit or any other false or fraudulent representation for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like punishment as is now prescribed for the crime of perjury. (Rev., s. 3654; 1905, c. 108, s. 25.)

§ 6670(a). Registration of drug stores and pharmacies.—That the Board of Pharmacy shall require and provide for the annual registration of every drug store and pharmacy doing business in this State; the proprietor of every drug store or pharmacy opening for business after the taking effect of this act shall apply to the Board of Pharmacy for registration and it shall be unlawful for any drug store or pharmacy to do business until so registered; the fee for such registration, whether original or annual, shall be one dollar ($1), and upon the payment thereof the Board of Pharmacy shall issue permit to applicant entitled to receive same. All permits issued under this section shall expire on December thirty-first of each year.

The terms "drug store" and "pharmacy" as used herein shall mean any store or other place in which drugs, medicines, chemicals, poisons, or prescriptions are compounded, dispensed, or sold "pharmacy" or "apothecary" or any combination at retail, or which uses the title "drug store," of such titles, or any title or description of like import: Provided, that nothing in this section shall apply to the sale of domestic remedies, patent and proprietary preparations, and insecticides as set out and provided for in paragraph two of section six thousand six hundred and sixty-seven of the Consolidated Statutes. (1927, s. 28, s. 1.)

Part 2. Dealing in Specific Drugs Regulated.

§ 6671. Poisons; sales regulated; label; penalties.—It shall be unlawful for any persons to sell or deliver to any person any of the following described substances or any poisonous compound, combination, or preparation thereof, to-wit: The compounds and salts of arsenic, antimony, lead, mercury, silver and zinc, oxide and hydrocyanic acids and their salts, the concentrated mineral acids, carbolic acid, the essential oils of almonds, pennyroyal, tansy and savine, croton oil, creosote, chloroform, chloral hydrate, cantharides, or any aconite, belladonna, bitter almonds, colchicum, cotton root, conium, cannabis indica, digitalis, hyoscyamus, nux vomica, opium, ergot, cannabis stramonius, or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from the foregoing, or cocaine or any other poisonous alkaloids or their salts, or any other virulent poisons, except in the manner following: It shall be first learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be plainly labeled with the name of the substance, the word "Poison," and the name of the person or firm dispensing the substance.

Before a delivery is made of any of the following substances, to wit, the compounds and salts of arsenic, antimony and mercury, hydrocyanic acid and its salts, strychnine and its salts, and the essential oil of bitter almonds, there shall be recorded in a book kept for the purpose the name of the article, the quantity delivered, the purpose for which it is required as represented by the purchaser, the date of delivery, the name and address of the purchaser, the name of the dispenser, which book shall be preserved for at least five years and shall at all times be open to the inspection of the proper officers of the law: Provided, that the foregoing provision shall not apply to articles dispensed upon the order of persons believed by the dispenser to be lawfully

authorized practitioners of medicine or dentistry: Provided, also, that the record of sale and delivery above mentioned shall not be required of manufacturers and wholesalers who shall sell any of the foregoing substances at wholesale; but the box, bottle, or other package containing such substances, when sold at wholesale, shall be properly labeled with the name of the substance, the word "Poison," and the name and address of the manufacturer or wholesaler: Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide of antimony or the dioxide or carbonate of zinc or lead, or of colors ground in oil and intended for use as paint, or paris green, when dispensed in the original package of the manufacturer or wholesaler, or calomel, paregoric, or other preparations of opium containing less than two grains of opium to the fluid ounce, nor in the case of preparations containing any of the substances named in this section when in a single box, bottle, or other package, or when the bulk of two fluid ounces or the weight of two avoirdupois ounces does not contain more than an adult medicinal dose of such poisonous substance.

If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Rev., ss. 3655, 4489; 1905, c. 108, ss. 20, 28.)

§§ 6672-6683(k). Repealed by Public Laws of 1935, c. 477, s. 27, the other sections of which chapter are codified as §§ 6686(1)-6686(28).

§ 6684. Certain patent cures and devices; sale and advertising forbidden.—It shall be unlawful for any person, firm, association, or corporation in the state, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and that it shall be unlawful for any person, firm, association, or corporation in the state, or agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the North Carolina board of health shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars for each offense. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. (1917, c. 27, ss. 1, 2, 3.)

Editor's Note.—In 4 N. C. Law Rev. it is said: "There is a statute in this State which makes it unlawful for any person to publish any advertisement of any patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found or any mechanical device for the treatment of disease when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease. This curious statute puts too heavy a burden on the advertising manager, for who is to say whether there is a cure for a disease or whether a device is of value in the treatment of disease."

§ 6685. Certain patent cures and devices; enforcement of law.—To provide for the efficient enforcement of the preceding section, the same shall be under the supervision and management of the North Carolina board of pharmacy, and it shall be the duty of all registered pharmacists to report immediately any violations thereof to the secretary of the board of pharmacy, and any wilful failure to make such report shall have the effect of revoking his license to practice pharmacy in this state. (1917, c. 27, ss. 4, 5.)

§ 6686. Department of agriculture to analyze patent medicines.—The chemists and other experts of the department of agriculture shall, under such rules and regulations as may be prescribed by the board of pharmacy, and upon request of the secretary of said board, make an analytical examination of all samples of drugs, preparations, and compounds sold or offered for sale in violation of the two preceding sections. (1917, c. 27, s. 6.)

§ 6686(a). Hypnotic drugs defined and enumerated.—In the following four sections, unless the context otherwise requires, the words "hypnotic drug" include:

Sulphonmethane (sulphonal).

Sulphonethylmethane (trional).

Diethyl sulphonedrethylmethane (tetronal).

Dietyl barbituric acid (barbital), or any of the foregoing by whatsoever trade name or designation; or any compound, preparation, mixture or solution thereof; or any salt or derivative thereof or of barbituric acid possessing hypnotic properties or effects.

Chloral hydrate or any mixture or solution thereof containing twenty grains or more thereof to the fluid ounce. (1931, c. 162, s. 1.)

§ 6686(b). Sale prohibited except by physicians and pharmacists.—No person other than a licensed pharmacist, a duly licensed physician, doctor of dental surgery, or doctor of veterinary surgery shall sell or offer to sell any hypnotic drug to consumers or have such drug in his possession with intent to sell or give away to consumers. (1931, c. 162, s. 2.)

§ 6686(c). Limitation on quantity that may be sold; exception; record of sales. — No hypnotic drug as defined in § 6686(a) may be sold in quantities exceeding twelve therapeutic doses, except to persons known to be suffering with epilepsy: Provided, however, that nothing in this act shall apply to prescriptions of duly licensed physicians,

doctors of dental surgery, or doctors of veterinary surgery.

Any person dispensing any hypnotic drug coming under the provisions of this act, other than upon prescription, shall record in a book kept for the purpose the name of the article sold, the quantity delivered, the date of delivery, the name and address of the purchaser and the name of the dispenser, which record shall at all times be open to the inspection of the proper officer of the law. (1931, c. 162, s. 3.)

§ 6686(d). Dispensing of drugs by physicians in lawful practice. — Nothing in this act shall be construed to limit the sale of hypnotic drugs to nor to the dispensing of hypnotic drugs in the course of their professional practice by, duly licensed physicians, doctors of dental surgery or doctors of veterinary surgery lawfully practicing their profession in this State, or to registered retail or wholesale pharmacists, or to hospitals and other institutions for the treatment of defective, afflicted, sick and injured persons. (1931, c. 162, s. 4.)

§ 6686(e). Violation of sections 6686(b) and 6686(c) a misdemeanor.—Any person who shall violate any provision of this act shall be deemed guilty of a misdemeanor and upon conviction therefor for the first offence shall be fined not more than twenty-five dollars, and upon conviction of the second offence shall be fined not more than one hundred dollars. (1931, c. 162, s. 5.)

Art. 3A. Narcotic Drug Act

§ 6686(1). Definitions. — The following words and phrases as used in this article shall have the following meanings unless the context otherwise requires:

(a) "Person" includes any corporation, association, copartnership or one or more individuals.

(b) "Physician" means any person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment.

(c) "Dentist" means any person authorized by law to practice dentistry in this State.

(d) "Veterinarian" means any person authorized by law to practice veterinary in this State.

(e) "Manufacturer" means a person who by compounding, mixing, cultivating, growing or other process produces or prepares narcotic drugs, but does not include a pharmacist who compounds narcotic drugs to be sold or dispensed on prescription.

(f) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced or prepared, on official written order, but not on prescription.

(g) "Pharmacist" means a registered pharmacist of this State.

(h) "Pharmacy owner" means the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a registered pharmacist; but nothing in this article contained shall be construed as conferring on a person who is not registered or licensed as a pharmacist any authority, right or privilege that is not granted to him by the pharmacy laws of this State.

(i) "Hospital" means an institution for the care and treatment of the sick and injured, approved by the state board of pharmacy as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist or veterinarian.

(j) "Laboratory" means a laboratory to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific, experimental and medical purposes and for purposes of instruction approved by the state board of pharmacy.

(k) "Sale" includes barter, exchange or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.

(l) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(m) "Opium" includes morphine, codeine and heroin and any compound, manufacture, salt, derivative, mixture or preparation of opium.

(n) "Cannabis" includes the following substances under whatever means they may be designated:

(1) The dried flowering or fruiting tops of the pistillate plant cannabis sativa L. from which the resin has not been extracted;

(2) The resin extracted from such tops; and

(3) Every compound, manufacture, salt, derivative, mixture, or preparation of such resin or of such tops from which the resin has not been extracted; and

(4) Peyote or mara huanna.

(o) "Narcotic drugs" means coca leaves, opium, cannabis, and every substance not chemically distinguishable from them.

(p) "Federal narcotic law" means the laws of the United States relating to opium, coca leaves and other narcotic drugs.

(q) "Official written order" means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law.

(r) "Dispense" includes distribute, leave with, give away, dispose of or deliver.

(s) "Registry number" means the number assigned to each person registered under the federal narcotic laws. (1935, c. 477, s. 1.)

§ 6686(2). Manufacture, sale, etc., of narcotic drugs regulated.—It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article. (1935, c. 477, s. 2.)

§ 6686(3). Conditions of sale of drugs.—A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons but only on official written orders:

(a) To a manufacturer, wholesaler, pharmacist or pharmacy owner.

(b) To a physician, dentist or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory but only for use in that laboratory for scientific and medicinal purposes.

A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territory, district, county, municipality, or insular government, purchasing, receiving, possessing or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any air craft upon which no physician is regularly employed for the actual medical needs of persons on board such ship or air craft when not in port, provided such narcotic drug shall be sold to the master of such ship or person in charge of such air craft only in pursuance of a special order form approved by a commanding medical officer or acting assistant surgeon of the United States public health service.

(c) To a person in a foreign country if the provisions of the federal narcotic laws are complied with. (1935, c. 477, s. 3.)

§ 6686(4). Execution of written orders; use in purchase; preserving copies for inspection. — An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In the event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years, in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article. It shall be deemed a compliance with this section if the parties to the transaction have complied with the federal narcotic laws respecting the requirements governing the use of order forms. (1935, c. 477, s. 4.)

§ 6686(5). Lawful possession of drugs. — Possession of or control of narcotic drugs obtained as authorized in this article shall be lawful if obtained in the regular course of business, occupation, profession, employment or duty of the possessor. (1935, c. 477, s. 5.)

§ 6686(6). Dispensing of drugs regulated. — A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivision thereof, and the master or other proper officer of a ship or air craft, who obtains narcotic drugs under the provisions of this article or otherwise shall not administer, nor dispense nor otherwise use such drugs within this State except within the scope of his employment or official duty and then only for scientific or medicinal purposes and subject to the provisions of this article. (1935, c. 477, s. 6.)

§ 6686(7). Sale of drugs on doctor's prescription.—A pharmacist in good faith may sell and dispense narcotic drugs to any person upon the written prescription of a physician, dentist or veterinarian, provided it is properly executed, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom or of the owner of the animal for which the drug is dispensed, and the full name, address and registry number under the federal narcotic laws of the person so prescribing if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. A person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this article. The prescription shall not be refilled.

The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, pharmacist or pharmacy owner but only upon an official written order.

A pharmacist only upon an official written order, may sell to a physician, dentist or veterinarian in quantities not exceeding one ounce at any one time, aqeous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per centum (20%) of the complete solution, to be used for medicinal purposes. (1935, c. 477, s. 7.)

Editor's Note.—The case treated below was decided under section 6677, now repealed. This case is made available to the practitioner as an aid in construing the present law, but it must be read in the light of the former law.

Liability to Husband for Injury to Wife.—One who, despite the protests and warnings of a husband, persistently sells drugs to the latter's wife, is liable in damages to the husband for the injuries so sustained. Holleman v. Harward, 119 N. C. 150, 25 S. E. 927.

§ 6686(8). Prescribing, administering or dispensing by physicians or dentists. — A physician or a dentist, in good faith and in the course of his professional practice, only, may prescribe on a written prescription, administer, or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the patient for whom the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, providing he is required by those laws to be so registered. (1935, c. 477, s. 8.)

§ 6686(9). Prescribing, administering or dispensing by veterinarians.—A veterinarian in good faith and in the course of his professional practice only not for use by a human being may prescribe on a written prescription, administer and dispense narcotic drugs and he may cause them to be administered by an assistant or orderly under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the owner of the animal, the species of the animal for which the narcotic drug is prescribed and the full

name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered. (1935, c. 477, s. 8.)

§ 6686(10). Returning unused portions of drugs. — Any person who has obtained from a physician, dentist or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient. (1935, c. 477, s. 8.)

§ 6686(11). Exceptions.—Except as otherwise herein specifically provided, this article shall not apply to the following cases:

(1) Prescribing, administering, compounding, dispensing or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce (a) not more than two grains of opium, (b) not more than one-quarter grain of morphine or of any of its salts, (c) not more than one grain of codeine, or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts, (e) not more than one-half of a grain of extract of cannabis nor more than one-half of a grain of any more potent derivative or preparation of cannabis.

(2) Prescribing, administering, compounding, dispensing or selling at retail of liniments, ointments, and other preparations that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments, or preparations, except that this act shall apply to all liniments, ointments, and other preparations that contain coca leaves in any quantity or combinations.

(3) The exemptions authorized by this section shall be subject to the following conditions:

(a) The medicinal preparation, or the liniment, ointment, or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.

(b) Such preparation shall be prescribed, administered, compounded, dispensed and sold in good faith as a medicine, and not for the purpose of evading the provisions of this article.

(4) Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, compounded, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, compounded, dispensed, or sold, in compliance with the general provisions of this article. (1935, c. 477, s. 9.)

§ 6686(12). Records of drugs dispensed; records of manufacturers and wholesalers; records of pharmacists; written orders unnecessary for certain drugs; invoices rendered with sales. — Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this section if any such person using small quantities or solutions or other preparations of such drugs for local application shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of this section.

Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of this article.

The keeping of a record required by or under the federal narcotic law shall constitute the only record required to be kept by every person who purchases for resale or who sells narcotic drug preparations exempted.

Written orders shall not be required for the sale of cannabis indica or cannabis sativa, or peyote and mara huanna, and the provisions of the article in respect to written orders and records shall not apply to cannabis indica, cannabis sativa, peyote and mara huanna, but manufacturers and wholesalers of cannabis indica, cannabis sativa, peyote and mara huanna shall be required to render with every sale of cannabis indica or cannabis sativa, peyote and mara huanna, an invoice, whether such sale be for cash or on credit; and such invoice shall contain the date of such sale, the name and address of the purchaser, and the amount of cannabis indica or cannabis sativa or peyote and mara huanna so sold.

Every purchaser of cannabis indica, cannabis sativa or peyote and mara huanna from a wholesaler or manufacturer shall be required to keep the invoice rendered with such purchase for a period of two years. (1935, c. 477, s. 10.)

§ 6686(13). Labeling packages containing drugs.—Whenever a manufacturer sells or disposes of a narcotic drug and whenever a wholesaler sells and dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person except a pharmacist for the purpose of filling a prescription under this article, shall alter, deface or remove any label so affixed. (1935, c. 477, s. 11.)

§ 6686(14). Labeling containers of drugs dispensed on prescriptions. — Whenever a pharmacist sells or dispenses any narcotic drug on prescription issued by a physician, dentist, or veterinarian he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address and registry num-

ber of the pharmacist or pharmacy owner for whom he is lawfully acting; the name and address of the patient, or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address and registry number of the physician, dentist or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface or remove any label so affixed as long as any of the original contents remain. (1935, c. 477, s. 11.)

§ 6686(15). Lawful possession in original containers. — A person to whom or for whose use any narcotic drug has been prescribed, sold or dispensed by a physician, dentist, pharmacist, or other person authorized under the provisions of this article; the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. (1935, c. 477, s. 12.)

§ 6686(16). Common carriers and warehousemen excepted; other persons exempt.—The provisions of this article restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen while engaged in lawfully transporting or storing such drugs, or to any employees of the same acting within the scope of his employment; or to public officers or employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties. (1935, c. 477, s. 13.)

§ 6686(17). Places possessing drugs unlawfully declared nuisances.—Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. No person shall keep or maintain such common nuisance. (1935, c. 477, s. 14.)

§ 6686(18). Forfeiture and disposition of drugs unlawfully possessed. — All narcotic drugs the lawful possession of which is not established, or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) The court or magistrate having jurisdiction shall immediately notify the state board of pharmacy and unless otherwise requested within fifteen days by the state board of pharmacy in accordance with sub-section (b) of this section shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States commissioner of narcotics; by the officer who destroys them.

(b) Upon written application by the state board of pharmacy the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of them except heroin and its salts and derivatives to said state board of pharmacy for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this State, not operated for private gain, the state board of pharmacy may in its discretion deliver any narcotic drugs that have come into its custody by authority of this section to the applicant for medicinal use. The state board of pharmacy may from time to time deliver excess stocks of such drugs to the United States commissioner of narcotics, or shall destroy the same.

(d) The state board of pharmacy shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal and state officers charged with the enforcement of federal and state narcotic laws. (1935, c. 477, s. 15.)

Editor's Note.—The case treated below was decided under section 6679, now repealed, which made the possession of certain drugs unlawful. This case is made available to the practitioner as an aid in construing the present law, but must be read in the light of the former law.

Constructive Possession.—"In State v. Lee, 164 N. C. 533, 80 S. E. 405, the Court held that under this statute the guilty possession was not necessarily actual possession, but that the statutory presumption could arise from the constructive possession; that the statute includes actual and constructive possession." State v. Ross, 168 N. C. 130, 131, 83 S. E. 307.

§ 6686(19). Prescriptions, stocks, etc., open to inspection by officials.—Prescriptions, orders and records, required by this article, and stocks of narcotic drugs shall be open for inspection only to federal, state, county and municipal officers, whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party. (1935, c. 477, s. 16.)

§ 6686(20). Fraudulent attempts to obtain drugs prohibited.—No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of false name or the giving of a false address.

(a) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(b) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this article.

(c) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, pharmacy owner, physician, dentist, veterinarian, or other authorized person.

(d) No person shall make or utter any false or forged prescription or written order.

(e) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs. (1935, c. 477, s. 17.)

§ 6686(21). Application of certain restrictions.—The provisions of section eighteen shall apply to all transactions relating to narcotic drugs under the provisions of section 6686(11) in the same way as they apply to transactions under all other sections. (1935, c. 477, s. 18.)

Editor's Note.—The word "eighteen" appearing in the above section was probably intended to be seventeen.

§ 6686(22). Possession of hypodermic syringes and needles regulated.—No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or impliment adapted for the use of habit forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior hereto. (1935, c. 477, s. 19.)

§ 6686(23). Burden on defendant to prove exemption. — In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (1935, c. 477, s. 20.)

§ 6686(24). State board of pharmacy and police officers to enforce article.—It is hereby made the duty of the state board of pharmacy, its officers, agents, inspectors and representatives, and of all peace officers within the State, and of all state's attorneys, to enforce all provisions of this article, except those specifically delegated, and to coöperate with all agencies charged with the enforcement of the laws of the United States, of this State and of all other states, relating to narcotic drugs. (1935, c. 477, s. 21.)

§ 6686(25). Penalties for violation.—Any person violating any provision of this article shall, upon conviction, be punished for the first offense by a fine not exceeding one thousand ($1,000.00) dollars or by imprisonment for not exceeding three years, or both; and for any subsequent offense by a fine not exceeding three thousand dollars ($3,000.00) or by imprisonment for not exceeding five years, or both. (1935, c. 477, s. 22.)

Editor's Note.—The cases discussed below were decided under section 6683, now repealed. These cases are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

This section confers no power on the Board to revoke the license of a physician who has been convicted of its violation. Board of Medical Examiners v. Gardner, 201 N. C. 123, 127, 159 S. E. 8.

Power of Board to Renew Revoked License.—When the license of a pharmacist convicted of the unlawful sale of cocaine, etc., is revoked, the board has no authority to renew the license upon the tender of the prescribed fee of $2. Thomas v. Board, 152 N. C. 373, 67 S. E. 925.

§ 6686(26). Double jeopardy.—No person shall be prosecuted for a violation of any provision of this article if such person has been acquitted or convicted under the federal narcotic laws of the same act or commission, which, it is alleged, constitutes a violation of this article. (1935, c. 477, s. 23.)

§ 6686(27). Construction of article.—This article shall be so interpreted and construed as to effectuate its general purpose and to make uniform the laws of those states which enact it. (1935, c. 477, s. 25.)

§ 6686(28). Title of article.—This article may be cited as the Uniform Narcotic Drug Act. (1935, c. 477, s. 26.)

Art. 4. Optometry

§ 6687. Optometry defined.—The practice of optometry is hereby defined to be the employment of any means, other than the use of drugs, medicines, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof; and in such practices as above defined, the optometrist may prescribe, give directions or advice as to the fitness or adaptation of a pair of spectacles, eyeglasses or lenses for another person to wear for the correction or relief of any condition for which a pair of spectacles, eyeglasses or lenses are used, or to use or permit or allow the use of instruments, test-cards, test types, test lenses, spectacles or eyeglasses or anything containing lenses, or any device for the purpose of aiding any person to select any spectacles, eyeglasses or lenses to be used or worn by such last mentioned person or by any other person. (1909, c. 444, s. 1; 1923, c. 42, s. 1.)

Editor's Note.—By the amendment Public Laws 1923 the part of this section following the semi-colon was added.

The purpose of the amendment "is to raise the standards of the practice of optometry in North Carolina. Its chief effect upon this section is the requirement of two years attendance at a recognized optical college, eliminating the option of two years under a registered optometrist, the raising of the examination fee from $10 to $20, and the raising of the compensation of the Board of Examiners from $5 to $10 for each day spent in the duties of the office." 1 N. C. Law Rev. 300.

§ 6688. Practice without registration unlawful.—After the passage of this article it shall be unlawful for any person to practice optometry in the state unless he has first obtained a certificate of registration and filed the same, or a certified copy thereof, with the clerk of the superior court of his residence, as hereinafter provided. Within the meaning of this section, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting or replaces same, or furnishes any kind of material or apparatus for ophthalmic use, without a written

prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; 1935, c. 63.)

Editor's Note.—The amendment of 1935 added all of this section except the first sentence.

§ 6689. Board of examiners in optometry.— There is hereby created a board, whose duty it shall be to carry out the purposes and enforce the provisions of this article, and which shall be styled the "North Carolina State Board of Examiners in Optometry." This board shall be appointed by the governor as soon as practicable, and shall consist of five regular optometrists who are members of the North Carolina state optometric society and who have been engaged in the practice of optometry in the state for five years. The terms of the members shall be as follows: One for one year, one for two years, one for three years, one for four years, one for five years. The terms of members thereafter appointed shall be for five years. The appointments to fill vacancies shall be for the unexpired terms. The members of the board, before entering upon their duties, shall respectively take all oaths taken and prescribed for other state officers, in the manner provided by law, which shall be filed in the office of the secretary of state, and the board shall have a common seal. Members of said board shall, from and after the adoption of this law, be elected by the North Carolina State Optometric Society, and shall be commissioned by the governor. The North Carolina State Optometric Society shall have the power to fill all vacancies on said board for unexpired terms, and members so elected shall be commissioned by the governor. (1909, c. 444, s. 3; 1915, c. 21, s. 1; 1935, c. 63.)

Editor's Note.—The amendment of 1935 added the last two sentences of the section.

§ 6690. Organization; meetings and powers thereat; records, witnesses and evidence. — The board of examiners shall choose, at the first regular meeting and annually thereafter, one of its members as president and one as secretary and treasurer. The board shall make such rules and regulations, not inconsistent with law, as may be necessary to the proper performance of its duties, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the board. A majority of the board shall constitute a quorum. The board shall meet at least once a year, the times and places of meeting to be designated by the president and secretary. The secretary of the board shall keep a full record of its proceedings, which shall at all reasonable times be open to public inspection. The president, secretary-treasurer, or any member of the board shall have power in connection with any matter within the jurisdiction of the board to summon and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the board and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to punishment for contempt by the board. Said board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held. (1909, c. 444, s. 4; 1935, c. 63.)

Editor's Note.—The amendment of 1935 reduced the number of meetings from twice a year to once a year and added the last three sentences.

§ 6691. Examination for practice; prerequisites; registration. — Every person, before beginning to practice optometry in this state after the passage of this article, shall pass an examination before the board of examiners. The examination shall be confined to such knowledge as is essential to practice of optometry. Every applicant for examination at the time of examination must comply with the following conditions:

1. He must be twenty-one years of age.

2. He shall file with the secretary of the board a certificate of good moral character, signed by two reputable citizens of this state; but an applicant from another state may have such certificate signed by any state officer of the state from which he comes.

3. He shall satisfy the board that he has been in actual attendance in approved school of optometry, and that he holds a certificate of graduation from said school, which school shall be approved by the North Carolina Board of Examiners in Optometry.

4. He must pay to the board for the use of the board the sum of twenty dollars, and if he shall successfully pass the examination he shall pay to the secretary for the use of the board a further sum of five dollars on the issuance to him of the certificate: Provided, the applicant may stand any subsequent examination by paying an additional fee of five dollars.

Every person successfully passing the examination shall be registered in the board registry, which shall be kept by the secretary, as licensed to practice optometry, and he shall also receive a certificate of registration, to be signed by the president and secretary of the board: Provided, that any person holding a certificate by examination to practice optometry in another state where the qualifications prescribed are equal to the qualifications required in this state may be licensed without examination on the same conditions and on the payment of the same fees as are required of other applicants.

(1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; 1923, c. 42, ss. 2, 3; 1935, c. 63.)

Editor's Note.—The amendment of 1935 changed the requirements of subsection 3 and substituted the last words of subsection 4 "by paying an additional fee of five dollars" for the words "without paying another fee."

Where one discontinues the practice of optometry and engages in other business for eighteen years, this will not constitute an abandonment of his license to practice so as to make him a "beginner" within the meaning of this section when no action was taken by the board as provided in § 6696 since such revocation of the certificate is the only method prescribed by statute for foreclosing the right to practice the profession after an optometrist has been admitted to such practice. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 855, 175 S. E. 281.

§ 6692. Persons in practice before passage of statute.—Every person who had been engaged in the practice of optometry in the state for two years prior to the date of the passage of this article shall hereafter file an affidavit as proof thereof with the board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section. Upon payment of three dollars he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this article to make written application to the board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this state, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein. (1909, c. 444, ss. 6, 7, 9.)

§ 6693. Filing of certificate by licensee; fees; failure to file, certified copies.—Each recipient of the certificate of registration shall present the same for record to the clerk of the superior court of the county in which he resides, and shall pay a fee of fifty cents for recording the same. The clerk shall record it in a book to be provided by him for that purpose. Any person so licensed, before engaging in the practice of optometry in any other county, shall file the certificate for record with the clerk of the superior court of the county in which he desires to practice, and pay the clerk for recording it a fee of fifty cents. Any failure, neglect, or refusal on the part of a person holding a certificate to file it for record, for thirty days after the issuance thereof, shall forfeit the certificate and it shall become null and void. Upon the request of any person entitled to a certificate of registration the board shall issue a certified copy thereof, and upon the fact of the loss of the original being made to appear, the certified copy shall be recorded in lieu of the original, and the board shall be entitled to a fee of one dollar for recording such certified copy. (1909, c. 444, s. 8.)

§ 6694. Certificate to be displayed at office.—Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted. (1909, c. 444, s. 10.)

§ 6695. Compensation of boards; surplus funds.—Out of the funds coming into possession of said board each member thereof may receive as compensation the sum of ten dollars for each day he is actually engaged in the duties of his office and mileage of five cents per mile for all distances necessarily traveled in going to and coming from the meetings of the board. Such expenses shall be paid from the fees and assessments received by the board under the provisions of this article, and no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of per diem allowance and mileage, as above provided, shall be held by the secretary as a special fund for meeting expenses of the board and carrying out the provisions of this article, and he shall give the state such bond as the board shall from time to time direct for the faithful performance of his duties, and the board shall make an annual report of its proceedings to the governor on the first Monday in January of each year, which report shall contain an account of all moneys received and disbursed by them pursuant to this article. The secretary-treasurer shall receive from the funds of the board such salary as may be determined by the board. (1909, c. 444, s. 11; 1923, c. 42, s. 4; 1935, c. 63.)

Editor's Note.—The amendment of 1935 added the last sentence of this section.

§ 6696. Annual fees; failure to pay; revocation of license; collection by suit.—For the use of the board in performing its duties under this article, every registered optometrist shall, in every year after the year one thousand nine hundred and thirty-two (1932) pay to the board of examiners the sum of not exceeding five and no/100 dollars ($5.00), the amount to be fixed by the board, as a license fee for the year. Such payments shall be made prior to the first day of April in each year, and in case of default in payment by any registered optometrist his certificate may be revoked by the board at the next regular meeting of the board after notice as herein provided. But no license shall be revoked for non-payment if the person so notified shall pay, before or at the time of consideration, his fee and such penalty as may be imposed by the board. The penalty imposed on any one person so notified as a condition of allowing his license to stand shall not exceed five and no/100 dollars ($5.00). The board of examiners may collect any dues or fees provided for in this section by suit in the name of the board. The notice hereinbefore mentioned shall be in writing, addressed to the person in default in the payment of dues or fees herein mentioned at his last known address as shown by the records of the board, and shall be sent by the secretary of the board by registered mail, with proper postage attached, at least twenty (20) days before the date upon which revocation of license is considered, and the secretary shall keep a record of the fact and of the date of such mailing. The notice herein provided for shall state the time and place of consideration of revocation of the license of the person to whom such notice is addressed. (1909, c. 444, s. 12; 1923, c. 42, s. 5; 1933, c. 492, s. 1.)

Editor's Note.—Public Laws of 1933, c. 42, struck out the former section and inserted the above in lieu thereof.

A comparison of the two sections is necessary to determine the changes.

The valid statutory method of revoking a license to practice optometry as provided by this section is exclusive and must be first resorted to and in the manner specified therein. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 855, 175 S. E. 281.

§ 6697. Revocation and regrant of certificate. —The board shall have the power to make such rules and regulations, not inconsistent with the laws of the State of North Carolina, as may be necessary and proper for the regulation of the practice of the profession of optometry, and for the performance of its duties. The board shall have the power to revoke any certificate of registration granted by it under this article for conviction of crime, habitual drunkenness, gross incompetence, contagious or infectious disease; and the board shall likewise have the power to revoke any such certificate of registration upon the finding by the board that the holder of such certificate has been guilty of unethical conduct or practice. Unethical practice as herein stipulated as a condition for revocation of license shall include the following:

(1) Advertising the "free examination of the eyes," "free consultation," "consultation without obligation," "free advice," or any words or phrases of similar import which convey, or are calculated to convey, the impression to the public that the eyes are examined free, or of a character tending to deceive or mislead the public, or in the nature of "bait advertising";

(2) Use of advertising, directly or indirectly, whether printed, radio, display, or of any other nature which seeks or solicits practice on any installment payment plan;

(3) House-to-house canvassing or peddling, directly or through any agent or employee, for the purpose of selling, fitting, or supplying frames, mounting, lenses, or other opthalmic products.

Before any certificate may be so revoked for any of the grounds or reasons herein set forth, the holder thereof shall be served with notice in writing by any officer authorized to serve civil summons informing such holder of the charge or charges against him, and at a day specified in said notice at least thirty days from the date of the issuance of said notice informing such holder of the date, time, and place of the hearing before the board, and have an opportunity to produce testimony in his behalf, and to confront the witnesses against him. Any person whose certificate has been revoked for any of the grounds or reasons herein set forth, or on account of nonpayment of dues, may, after the expiration of ninety days, and within two years, apply to the board to have same regranted, and upon a showing satisfactory to the said board, and at the discretion of the board, license to practice optometry may be restored to such person. (1909, c. 444, s. 13; 1935, c. 63.)

Editor's Note.—Public Laws of 1935, c. 63, struck out the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 6697(a). Practicing under other than own name or as a salaried or commissioned employee. —It shall be unlawful for any person licensed to practice optometry under the provisions of this article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the State of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individual to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one licensed to practice optometry in this State. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay body, organization group, or lay individual. (1935 c. 63.)

§ 6698. Violation of article forbidden.—Any person who shall violate any of the provisions of this article, and any person who shall hold himself out to the public as a practitioner of optometry without a certificate of registration provided for herein, shall be deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of not more than one hundred dollars or imprisonment for not more than four months, or both, in the discretion of the court. (1909, c. 444, s. 14.)

§ 6699. Application of article. — Nothing in this article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, or prohibit persons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located or established places of business. (1909, c. 444, s. 15.)

§ 6699(a). Citizens who have begun study of optometry; exemptions. — All citizens of this state who have begun the study of optometry before February 12, 1923, shall be exempt from the operation and provisions amending sections 6687, 6691, 6695, and 6696, until the regular June meeting of the state board of examiners in optometry to be held in one thousand nine hundred and twenty-four. (1923, c. 42, s. 6.)

§ 6699(b). Repeal of laws; exception.—Nothing in the provisions amending sections 6687, 6691, 6695, and 6696, or in section 6699(a), shall repeal any of the provisions of section 6699. (1923, c. 42, s. 7.)

Art. 5. Osteopathy

§ 6700. Osteopathy defined.—For the purpose of this article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3.)

§ 6701. Board of examiners; membership; officers; meetings.—There shall be a state board of osteopathic examination and registration, consisting of five members appointed by the governor, in the following manner, to wit: within thirty days after this article goes into effect the governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than ten who are recommended by the North Carolina osteopathic soci-

ety, and this number may be increased to fifteen, upon the request of the governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first board of osteopathic examination and registration. Their term of office shall be so designated by the governor that the term of one member shall expire each year. Thereafter in each year the governor shall in like manner appoint one person to fill the vacancy in the board thus created, from a number of not less than five, who are recommended by the state osteopathic society; the term of said appointee to be for five years. A vacancy occurring from any other cause shall be filled by the governor for the unexpired term in the same manner as last above stated. The board shall, within thirty days after appointment, meet in the city of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The treasurer and secretary shall each give bond, approved by the board, for the faithful performance of their respective duties, in such sum as the board may from time to time determine. The board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The board shall meet in the city of Raleigh at a call of the president, in the month following the election of officers, and in July of each succeeding year, and at such other times and places as a majority of the board may designate. Three members of the board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy or other nondrug-giving school of medical practice; the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1.)

§ 6702. Examination and certification of applicant; prerequisites.—Any person, before engaging in the practice of osteopathy in this state, shall, upon the payment of a fee of twenty-five dollars, make application for a certificate to practice osteopathy to the board of osteopathic examination and registration on a form prescribed by the board, giving, first, his name, age (which shall not be less than twenty-one years), and residence; second, evidence that such applicant shall have, previous to the beginning of his course in osteopathy, a certificate of examination for admission to the freshman class of a reputable literary or scientific college, a diploma from a high school, academy, state normal school, college, or university, approved by aforesaid board; third, the date of his diploma, and evidence that such diploma was granted on personal attendance and completion of a course of not less than four terms of five months each, and after July, one thousand nine hundred and seventeen, of four terms of not less than nine months each in three separate years; fourth, the name of the school or college of osteopathy from which said applicant was a graduate, and which shall have been in good repute as such at the time of the granting of his diploma, as determined by the board. The board may, in its discretion, accept as the equivalent of any part or all of the second, third, and fourth requirements evidence of five or more years reputable practice of osteopathy, provided such substitution be specified in the certificate, if the facts thus set forth, and to which the applicant shall be required to make affidavit, shall meet the requirements of the board, as prescribed by its qualifications for the practice of osteopathy, which shall include the subjects of anatomy, physiology, physiological chemistry, toxicology, osteopathic pathology, bacteriology, osteopathic diagnosis, hygiene, osteopathic obstetrics and gynecology, minor surgery, principals and practice of osteopathy, and such other subjects as the board may require. A physician's certificate issued by a reputable school of osteopathy to a graduate from a reputable school of medicine, after an attendance of not less than two terms of nine months each in two separate years, may be accepted by the board on the same terms as a diploma, and the holder thereof be subject to the same regulations in all other respects as other applicants before the board. The board may refuse to grant a certificate to any person convicted of a felony, or of gross unprofessional conduct, or who is addicted to any vice to such a degree as to render him unfit to practice osteopathy, and may, after due notice and hearing, revoke such certificate for like cause. (1907, c. 764, s. 2; 1913, c. 92, s. 1.)

In General.—Those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for by statute. State v. Siler, 169 N. C. 314, 84 S. E. 1015.

This case was decided before §§ 6710-6728 were passed.—Ed. Note.

§ 6703. When examination dispensed with; temporary permit.—The board may, upon the payment of a fee of two dollars, grant a certificate to practice osteopathy in this state without examination, if application therefor is filed within ninety days after the passage of this act, to any person having a diploma from a legally chartered school or college of osteopathy, which was in good standing at the time of issuing of such diploma as defined by the board, and who shall meet the requirements of the board in other respects, and who was in active practice in this state at the time of the passage of this act.

The board may, in its discretion, dispense with an examination in the case, first, of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this state; or, second, an osteopathic physician who has been in actual practice of osteopathy for five years, who is a graduate of a reputable

school of osteopathy, who may desire to change his residence to this state, and who makes application on a form to be prescribed by the board, accompanied by a fee of twenty-five dollars.

The secretary of the board may grant a temporary permit until a regular meeting of the board, or to such time as the board can conveniently meet, to one whom he considers eligible to practice in the state, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the board can be taken. In all the above provisions the fee shall be the same as charged to applicants for examination, except to those who are practicing in the state on the eighth day of March, 1907. (1907, c. 764, s. 2.)

§ 6704. Provisions of this article extended to nondrug-giving practitioners.—The provisions of the two preceding sections shall apply to all other nondrug-giving practitioners, except chiropractors, by whatever name they are known or call themselves, or of whatever school they claim to be graduates or hold diplomas, and to any one who holds himself out as being able to diagnose, treat, operate, or prescribe for any human diseases, pain, injury, deformity, or physical condition, and who shall offer or undertake by any means or method to diagnose, treat, operate, or prescribe therefor without the use of drugs, but shall not apply to those practicing their profession as licensed physicians, nor to Christian Scientists or masseurs or any one following in his or her practice the orders of licensed drug-giving physicians: Provided, however, that all such persons so applying to said board for examination shall be examined only on the subject of anatomy, physiology, pathology, and diagnosis, by said board, but no license shall be issued by such board to those who claim to be correspondence school course graduates to practice in this state. (1913, c. 92, s. 2.)

§ 6705. Fees held by board; salaries; payment of expenses.—All fees shall be paid in advance to the treasurer of the board, to be by him held as a fund for the use of the state board of osteopathic examination and registration. The compensation and expenses of the members and officers of said board, and all expenses proper and necessary, in the opinion of said board, to discharge its duties under and to enforce the law, shall be paid out of such fund, upon the warrant of the president and secretary of said board, and no expense shall be created to exceed the income of fees or fines as herein provided. The salaries shall be fixed by the board, but shall not exceed ten dollars per day per member, and railroad and hotel expenses. (1907, c. 764, s. 3.)

§ 6706. Subject to state and municipal regulations.—Osteopathic physicians shall observe and be subject to all state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4.)

§ 6707. Record of certificates; fees. — Every person holding a certificate from the state board of examination and registration shall have it recorded in the office of the county clerk of the county in which he or she expects to practice. Until such certificate is filed for record, the holder shall exercise none of the rights or privileges therein conferred. Said clerk of the county shall keep in a book for that purpose a complete list of all certificates recorded by him, with the date of the recording of each certificate. Each holder of a certificate shall pay to said clerk a fee of one dollar for making such record. (1907, c. 764, s. 5.)

§ 6708. Practice without compliance with law prohibited.—Any person who shall practice, or pretend or attempt to practice, or use the science or system of osteopathy in treating diseases of the human body by fraud or misrepresentation; or any person who shall buy, sell, or fraudulently obtain any diploma, license, record, or registration to practice osteopathy, illegally obtained, or signed or issued unlawfully, or under fraudulent representation; or who shall use any of the forms or letters, "Osteopathy," "Osteopath," or "Osteopathist," "Diplomate in Osteopathy," "D.O." "D. Sc.O.," "Osteopathic Physician," "Doctor of Osteopathy," or any title of letters, either alone or with other qualifying words or phrases, under such circumstances as to induce the belief that the person who uses such term or terms is engaged in the practice of osteopathy, without having complied with the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense, or imprisoned not less than three months nor more than six months in the county jail.

The punishment prescribed in this section shall likewise apply to other non-drug-giving practitioners to whom this article is extended by the fifth section [6704] thereof and who violates any of its provisions. (1907, c. 764, s. 6; 1913, c. 92, s. 5.)

§ 6709. Objects of North Carolina osteopathic society.—The object of the North Carolina osteopathic society shall be to unite the osteopaths of this state for mutual aid, encouragement, and improvement, to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the practice of osteopathy and to restrict the practice of osteopathy to persons educated and trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7.)

Art. 6. Chiropractic

§ 6710. Creation and membership of board of examiners.—There is hereby created and established a board to be known by the name and style of the state board of chiropractic examiners. The board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the state, and no more

than two members of said board shall be graduates from the same school or college of chiropractic. (1917, c. 73, s. 1.)

Editor's Note.—The case of State v. Gibson, 169 N. C. 381, 85 S. E. 7, was decided before this and following sections were passed. The above cited case applied the rule laid down in 6702 to all nondrug-giving practioners.

§ 6711. Appointment; term; successors; recommendations.—The governor shall appoint the members of the state board of chiropractic examiners, whose terms of office shall be as follows: One member shall be appointed for a term of one year from the close of the next regular annual meeting of the North Carolina chiropractic association; one member shall be appointed for a term of two years from such time, and one member shall be appointed for a term of three years from such time. Annually thereafter, at the time of the annual meeting or immediately thereafter, the governor shall appoint one member of the state board of chiropractic examiners, whose term of office shall be three years, and such members of the board of examiners shall be appointed from a number of not less than five who shall be recommended by the North Carolina board of chiropractors. (1917, c. 73, s. 2; 1933, c. 442, s. 1.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 6712. First appointments.—Until the members of the board are appointed as aforesaid the governor shall appoint the state board of chiropractic examiners, who shall hold office until the close of the next regular annual meeting of the North Carolina chiropractic association. (1917, c. 73, s. 3; 1933, c. 442, s. 1.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 6713. Organization and vacancies.—The board of chiropractic examiners shall elect such officers as they may deem necessary, and in case of a vacancy, caused by death or in any other manner, a majority of the board shall have the right to fill the vacancy by the election of some other member of the North Carolina chiropractic association. (1917, c. 73, s. 4; 1933, c. 442, s. 1.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 6714. Rules and regulations.—The state board of chiropractic examiners may adopt suitable rules and regulations for the performance of their duties. (1919, c. 148, s. 4.)

§ 6715. Definitions of chiropractic; examinations; educational requirements.—Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the twenty-four movable vertebrae of the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the board of examiners to examine all applicants who shall furnish satisfactory proof of good character and of graduation from a regular chiropractic school of good standing, and such examination shall embrace such branches of study as are usually included in the regular course of study for chiropractors in chiropractic schools or colleges of good standing, including especially an examination of each applicant in the science of chiropractic as herein defined. Every applicant for license shall, after the organization of the North Carolina chiropractic association which organization shall be perfected immediately after the passage of this law, furnish to said board of examiners sufficient and satisfactory evidence that, prior to the beginning of his course in chiropractic, he had obtained a high school education, or what is equivalent thereto, entitling him to admission in a reputable college or university; and he shall also exhibit to said board of chiropractic examiners, or satisfy them that he holds, a diploma from a reputable chiropractic college, and not a correspondence school, and that said diploma was granted to him on a personal attendance and completion of a regular four years' course in such chiropractic college, and such applicant shall be examined in the following studies: Chiropractic analysis, chiropractic philosophy, chiropractic neurology, palpation, nerve tracing, microscopy, histology, anatomy, gynecology, jurisprudence, chemistry, pathology, hygiene, physiology, embryology, eye, ear, nose, and throat, hermatology, symptomology, spinograph, chiropractic orghopogy, and the theory, teaching and practicing of chiropractic.

Any person who has been practicing chiropractic in this state prior to the first day of January, one thousand nine hundred and eighteen, may apply for and receive license to practice chiropractic in this state upon proof of good character and proper proficiency upon examination; and all those practicing chiropractic prior to the first day of January, one thousand nine hundred and seventeen, shall be granted license without an examination.

Any chiropractor holding license issued to him in another state by a regular board of chiropractic examiners may apply for and receive a license to practice chiropractic in this state upon proof of good moral character and that he has been practicing chiropractic under such license for one year. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; 1933, c. 442, s. 1.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association." The act also raised the personal attendance course from three to four years.

Discretionary Power of Board.—Chapter 73, Public Laws 1917, establishing a board of chiropractic examiners, gives this board large discretionary powers to examine and license applicants to practice this science, and to pass upon their other qualifications specified therein; and, construed with its amendatory act of 1919, ch. 148, under § 2, it is provided that those practicing chiropractics in this State prior to 1918 may receive their license upon proof of good character and proper proficiency upon examination; it is also provided that those so practicing prior to 1917 shall be granted a license without examination. Neither the proviso of the Laws of 1918 or 1917 dispenses with the discretionary power of the board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been bona fide practitioners for the requisite time, into which the courts will not inquire, and a mandamus will not lie. Hamlin v. Carlson, 178 N. C. 431, 101 S. E. 22.

§ 6716. Annual meetings.—The board of chiropractic examiners and the North Carolina chiropractic association shall hold their annual meetings at the same time and place. But the said board of examiners may, in their discretion, meet

not more than three days in advance of the annual meeting of the North Carolina chiropractic association. (1917, c. 73, s. 6; 1933, c. 442, s. 1.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 6717. Grant of license; temporary license. — The board of chiropractic examiners at such regular annual meeting of the board shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Any two members of said board may grant a temporary license to any applicant who shall comply with the requirements of this article as to proof of good character and of graduation from a chiropractic school or college as prescribed in this article; but such temporary license shall not continue in force longer than until the next annual meeting of the said board of examiners, and in no case shall a temporary license be granted to an applicant who has already been refused a license by the board of examiners at an annual meeting. (1917, c. 73, s. 7.)

§ 6718. Graduates from other states.—A graduate of a regular chiropractic school who comes into this state from another state may be granted a license by the board of examiners as required in this article. (1917, c. 73, s. 8.)

§ 6719. Practice without license a misdemeanor. —Any person practicing chiropractic in this state without having first obtained a license as provided in this article shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1917, c. 73, s. 9.)

§ 6720. Records of board.—The secretary of the board of chiropractic examiners shall keep a record of the proceedings of the board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10.)

§ 6721. Application fee.—Each applicant shall pay the secretary of said board a fee of twenty-five dollars. (1917, c. 73, s. 11.)

§ 6721(a). Exempt from jury service.—All duly licensed chiropractors of this state shall be exempt from service as jurors in any of the courts of this state. (1933, c. 442, s. 2.)

§ 6722. Extent and limitation of license.—Any person obtaining a license from the board of chiropractic examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; 1933, c. 442, s. 3.)

Editor's Note.—Public Laws of 1933, c. 442, inserted, near the middle of this section, the words "as taught in recognized chiropractic schools and colleges."

§ 6723. Registration of license.—Any person desiring to engage in the practice of chiropractic, having first obtained a license as herein provided, shall appear before the clerk of the superior court of the county in which he resides, or proposes to practice, for registration as a chiropractor. He shall produce and exhibit to the said clerk a license obtained from the board of chiropractic examiners, and upon such exhibition the clerk shall register the name and residence of the applicant, giving the date of such registration, in a book to be kept for the purpose of registering chiropractors, and shall issue to him a certification of such registration under the seal of the superior court of such county, for which the clerk shall be entitled to collect from said applicant a fee of fifty cents. The person obtaining such certificate shall be entitled to practice chiropractic anywhere in this state; but if he shall remove his residence to another county, he shall exhibit said certificate to the clerk of the superior court of such other county, and be registered. Any one receiving a temporary license as provided in this article shall not be entitled to register, but may practice anywhere in this state during the time such temporary license shall be in force. (1917, c. 73, s. 13.)

§ 6724. Licensed chiropractors may practice in public hospitals.—A licensed chiropractor in this state may have access to and practice chiropractic in any hospital or sanitarium in this state that receives aid or support from the public. (1919, c. 148, s. 3.)

§ 6725. Grounds for refusal or revocation of license.—The board of chiropractic examiners may refuse to grant or may revoke a license to practice chiropractic in this state, upon the following grounds; immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such extent as to incapacitate him or her for the performance of such professional duties. (1917, c. 73, s. 14.)

§ 6726. Annual fee for renewal of license.—All persons practicing chiropractic in this state shall, on or before the first Tuesday after the first Monday in January in each year after licenses issued to them as herein provided, pay to the secretary of the board of chiropractic examiners a renewal license fee of two dollars, the payment of which, and a receipt from the secretary of the board, shall work a renewal of the license fee for twelve months.

Any license or certificate granted by the board under this article shall automatically be cancelled if the holder thereof fails to secure a renewal within three months from the time herein provided; but any license thus cancelled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of ten ($10.00) dollars. (1917, c. 73, s. 15; 1933, c. 442, s. 4.)

Editor's Note.—Public Laws of 1933, c. 442, added the last sentence of this section as it now reads.

§ 6727. Pay of board and authorized expenditures.—The members of the board of chiropractic examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this article, such expenses to be paid by the treasurer of the board out of the moneys received by him as license fees, or from renewal fees. The board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, and all other necessary

expenses in connection with the duties of the board. (1917, c. 73, s. 16.)

§ 6728. Chiropractors subject to state and municipal regulations.—Chiropractors shall observe and be subject to all state and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17.)

Art. 7. Trained Nurses

§ 6729. Board of examiners.—A board of nurse examiners composed of five members, to consist of three registered nurses to be elected by the North Carolina State Nurses' Association, and, one representative each from the North Carolina State Medical Society and the North Carolina State Hospital Association, is hereby created to be known by the title "The North Carolina Board of Nurse Examiners."

Each member of said board shall serve a term of three years, or until his or her successor is appointed, except the first board elected under this article, the members of which shall be and serve as follows: For term expiring June the first, nineteen hundred and twenty-five, or until their successors are qualified, James M. Parrott, M. D., of Lenoir, and Oren Moore, M. D., of Mecklenburg; for term expiring June the first, nineteen hundred and twenty-six, until their successors are qualified, Mary P. Laxton, R. N., of Buncombe, E. A. Kelly, R. N., of Cumberland and Dorothy Conyers of Gilford. The board shall fill any vacancy for an unexpired term.

The Board of nurse examiners is hereby empowered to prescribe such regulations as it may deem proper, governing applicants for licenses; admission to examinations, the conduct of applicants during examinations, and the conduct of the examinations proper with the approval of the standardization board hereinafter created. (1917, c. 17, s. 1; 1925, c. 87, s. 2; 1931, c. 56.)

Editor's Note.—Prior to Public Laws of 1925 it was provided by this section that there be two physicians on the board elected by the state medical society. A provision for the appointment of an inspector of the training schools by the nurse association was omitted, and there is a new provision giving the board power to make rules and regulations, by the amendment.

The Act of 1931 merely changed "The Board of Nurse Examiners of North Carolina" to its present title.

§ 6729(a). Committee on standardization. — A joint committee on standardization, consisting of three members appointed from the North Carolina state nurses' association, and four members from the North Carolina state hospital association, whose members shall serve for a term of three years, or until their successors are elected, is hereby created. The joint committee on standardization shall advise with the board of nurse examiners herein created in the adoption of regulations governing the education of nurses, and shall jointly with the North Carolina board of nurse examiners have power to establish standards and provide minimum requirements for the conduct of schools of nursing of which applicants for examination for nurse's license under this chapter must be graduates before taking such examination. (1925, c. 87, s. 3; 1931, c. 56; 1933, c. 203, s. 2.)

Editor's Note.—The Act of 1931 struck out the second sentence of this section and inserted the one above in lieu thereof.

Public Laws of 1933, c. 203, changed the number of the North Carolina State Hospital Association from three to four, and inserted the provision making the exercise of power joint with the North Carolina board of nurse examiners.

§ 6729(b). Educational director of schools of nursing. — An educational director of schools of nursing shall be annually appointed by the North Carolina State Nurses' Association, who shall report annually to the board of nurse examiners, and to the North Carolina State Hospital Association. Such director shall be a registered nurse, her duties and compensation to be fixed by the board of nurse examiners and the standardization board. (1925, c. 87, s. 4.)

§ 6730. Organization of board; seal; officers; compensation.—Three members of the board shall constitute a quorum. Two of whom shall be nurses.

The board shall adopt and have custody of a seal and shall frame by-laws and regulations for its own government and for the execution of the provisions of this article. The officers of said board shall be a president and a secretary-treasurer, both to be elected from its nurse members. The treasurer shall give bond in such sum as may be fixed in the by-laws, and the premium therefor to be paid from the treasury of said board. The members of the board shall receive such compensation in addition to actual traveling and hotel expenses as shall be fixed by the board. The secretary-treasurer may receive an additional salary to be fixed by the board, said expenses and salaries to be paid from fees received by the board under the provisions of this article, and in no case to be charged upon the treasury of the State.

All moneys received in excess of said allowance, and other expenses provided for, shall be held by the secretary-treasurer for the expenses of the board and for extending nursing education in the State. (1917, c. 17, s 2.; 1925, c. 87, s. 5.)

Editor's Note.—Prior to Public Laws 1925 four dollars per diem and actual traveling and hotel expenses was the compensation of each member of the board.

§ 6731. Meetings for examination; prerequisites for applicants.—The board of nurse examiners of North Carolina shall convene not less frequently than once annually, and at any time ten or more applicants shall notify the secretary-treasurer that they desire an examination. Thirty days prior to such meetings notice stating time and place of examination shall be published in one nursing journal and three daily State papers.

At such meetings it shall be the duty of the board of nurse examiners to examine graduate nurses applying for license to practice their profession in North Carolina. An applicant must prove to the satisfaction of the board that he or she is twenty-one years of age, is of good moral character, and has graduated from high school or has equivalent credits.

Application shall have graduated from a school of nursing connected with a general hospital giving a three years' course of practical and theoretical instruction, which said hospital meets the minimum requirements and standards for the conduct of schools of nursing which may have been set up and established by the joint committee on standardization provided for in section

6729(a). Such schools of nursing may give credit for college work on the three years' course to the extent and as may be approved by the board of nurse examiners, such credits not to total more than one year for any one person. (1917, c. 17, s. 3; 1925, c. 87, s. 6; 1931, c. 56.)

Editor's Note.—Public Laws 1925 added a provision that schools shall meet the requirements of the American Nurse's Association formerly appearing in the third paragraph of this section. The Act of 1931 struck out this paragraph and inserted another in lieu thereof. This Act struck out from the second paragraph the words "receive at least one year of high school education or its equivalent," and inserted in lieu thereof the words: "graduated from high school or has equivalent credits."

§ 6732. Scope of examination; fees; licensing.—Examinations shall be held in anatomy and physiology, materia medicia, dietetics, hygiene, and elementary bacteriology, obstetrical, medical and surgical nursing, nursing of children, contagious diseases and ethics of nursing, and such other subjects as may be prescribed by the examining board. The subject of contagious diseases may be given in theory only. If on examination the applicant should be found competent, the board shall grant a license authorizing him or her to register as herein provided and to use the title "registered nurse," signified by the letters "R. N."

Before an applicant shall be permitted to take such an examination he or she shall pay to the secretary of the examining board an examination fee of ten dollars. In the event of the failure of the applicant to pass examination, one-half of the above named fee shall be returned to the applicant. (1917, c. 17, s. 4; 1925, c. 87, s. 7.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 6733. Licenses and certificates without examination; fee.—The board of nurse examiners shall have authority to issue licenses without examination to nurses registered in other states: Provided, that said states shall maintain an equivalent standard of registration requirements. The examination fee shall accompany each such application for license.

The board shall also have power in the exercise of its discretion to issue a certificate of registration without examination to any applicant who has been duly registered as a registered nurse under the laws of another state: Provided, said applicant possesses qualifications at least equal to those required by the State of North Carolina. The fee for license without examination shall be twenty-five dollars ($25.00). (1917, c. 17, s. 5; 1925, c. 87, s. 8.)

Editor's Note.—The second paragraph of this section is new with Public Laws 1925.

§ 6734. Only licensed nurses to practice.—On and after the ratification of this article all "trained," "graduate," "licensed," or "registered" nurses must obtain license from the board of nurse examiners before practicing their profession in this State, and before using the abbreviation "R. N." must obtain a certificate of registration from the clerk of the Superior Court of any county as hereinafter provided, but nothing in this section shall be construed to apply to any nurse who is now qualified and practicing her profession. (1917, c. 17, s. 6; 1917, c. 288; 1925, c. 87, s. 9.)

Editor's Note.—Public Laws 1925 omitted a former proviso preventing the section having retroactive effect, otherwise it is substantially the same.

§ 6735. Certain persons not affected by this article.—This article shall not be construed to affect or apply to the nursing of the sick by friends or members of the family. (1917, c. 17, s. 7; 1925, c. 87, s. 10; 1931, c. 56.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

The Act of 1931 struck out the whole of this section and inserted in lieu thereof the above.

§ 6735(a). Temporary nursing in state.—The board of nurse examiners may make reasonable rules of comity allowing registered nurses from other states to do temporary nursing in this State. (1925, c. 87, s. 10½.)

§ 6736. Registration of nurses.—The clerk of the Superior Court of any county, upon presentation to him of a license from the State Board of Nurse Examiners issued at a date not more than twelve months previous, shall enter the date of registration and the name and residence of the holder thereof in a book to be kept in his office for this purpose, and marked "record of registered nurses," and shall issue to the applicant a certificate of such registration, under the seal of the Superior Court of the county upon a form to be prescribed by the board of nurse examiners. For such registration he shall charge a fee of fifty cents. (1917, c. 17, s. 8; 1925, c. 87, s. 11.)

Editor's Note. — This section was re-enacted without change by the Public Laws 1925.

§ 6737. Revocation of license.—The board shall have power to revoke the license of any registered nurse upon conviction of gross incompetence, dishonesty, intemperance, or any act derogatory to the morals or standing of the profession of nursing. No license shall be revoked except upon charges preferred. The accused shall be furnished a written copy of such charges, and given not less than twenty days notice of the time and place when said board shall accord a full and fair hearing on the same. Upon the revocation of a license and certificate the name of the holder thereof shall be stricken from the roll of registered nurses in the hands of the secretary of the board, and by the clerk of the Superior Court from his register upon notification of such action by said secretary. (1917, c. 17, s. 9; 1925, c. 87, s. 12.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 6738. Violation of article misdemeanor.—That any person procuring license under this article by false representation, or who shall refuse to surrender a license which has been revoked in the manner prescribed in the preceding section, or who shall use the title "trained", "graduate," "licensed" or "registered nurse," or the abbreviation "R. N." without having first obtained a license, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Each act shall constitute a new offense. (1917, c. 17, s. 10; 1925, c. 87, s. 13.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 6739. Training school for nurses at Sanatorium.—The state sanatorium for the treatment of

tuberculosis, located at Sanatorium, North Carolina, is hereby authorized and power is hereby expressly given it to organize and conduct a training school for nurses in connection with the said sanatorium. The superintendent of the North Carolina sanatorium for the treatment of tuberculosis shall be ex officio dean of the training school for nurses, and he shall have power and authority to appoint such faculty, prescribe such course or courses of lectures, study and clinical work, and award such diplomas, certificates or other evidence of the completion of such course or courses as he may think wise and proper, and perform such other functions and do such other acts as he may think necessary in the conduct of the said training school. (1915, c. 163, ss. 1, 2.)

§ 6740. Colored nurses for colored patients.—(Repealed: 1925, c. 23.)

Art. 8. Female Students in Medical and Surgical Institutions

§ 6741. Definitions.—1. The words "medical and surgical institution" in this article shall mean any and all hospitals, sanitariums, sanatoriums, or any other institution whose purpose it is to care for the sick in this state.

2. The word "student" in this article shall mean any and all female persons engaged in the care of the sick in any medical or surgical institution in this state: Provided, this article shall not apply to registered nurses. (1917, c. 181, ss. 1, 2.)

§ 6742. Hours on duty per week and day.—No medical or surgical institution nor the agent or employee of the same in this state shall require, or cause to be required, any student to remain on duty for more than eighty hours in any week, or to remain on duty for a longer period than twelve hours in any day of twenty-four hours, except in special and emergency cases. In such cases any student may be required to remain on duty for a period of sixteen hours in twenty-four: Provided, that sleeping facilities are furnished in the room in which special duty is required, and that an opportunity is given to the student to sleep for at least half the period on special duty. (1917, c. 181, ss. 3, 4.)

§ 6743. Reduction of pay forbidden.—No medical or surgical institution, or the agent or employee of the same, in this state shall require or cause to be required any student to receive less for her services than she is receiving on June first, nineteen hundred and seventeen. (1917, c. 181, s. 6.)

§ 6744. Orders in conflict with articles forbidden.—No medical or surgical institution, or agent or employee of the same, in this state shall issue, orally or in writing, any orders conflicting in any way with the provisions of this article. (1917, c. 181, s. 7.)

§ 6745. Seats to be furnished.—It shall be the duty of every medical or surgical institution in this state, or the agent or employee in charge of the same, to furnish comfortable seats for all students for their use while not actively engaged in the care of their patients. (1917, c. 181, s. 8.)

§ 6746. Homes to be sanitary.—It shall be the duty of every medical or surgical institution in this State, or the agent or employee in charge of the same, maintaining a home for students of such institution, to keep such home properly heated, ventilated, and in a sanitary condition. (1917, c. 181, s. 9.)

§ 6747. Provisions of article to be posted.—It shall be the duty of every medical or surgical institution in this State, or the agent or employee in charge of the same, to print, or cause to be printed, all the provisions of this article upon cardboard, in type large enough that a person with normal sight can read the same at a distance of six feet. It shall be the further duty of such institution or persons in charge of the same to post or have posted a copy of this article upon the wall of every room and ward in which patients are placed. (1917, c. 181, s. 10.)

§ 6748. Violation of article misdemeanor.—Any medical or surgical institution, or the agent or employee of the same, in this state violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than two hundred dollars, or imprisoned, in the discretion of the judge presiding: Provided, that each violation of any of the provisions of this article shall constitute a separate offense. (1917, c. 181, s. 11.)

§ 6749. Health officer to inspect semiannually and report for prosecution.—The city health officer, if there is such an officer, and if not, the county health officer, in the city or county in which any medical or surgical institution is situated, is hereby empowered and authorized to make personal investigation and inspection semiannually, on or about the first day of July and the first day of January in each year next after the passage of this act, of such institutions and homes of students of such institutions, and it shall be the duty of such health officer to report to the prosecuting attorney in the city or county recorder's court, if there be such court, and if not, to the solicitor of the judicial district, any violations of any of the provisions of this article, furnishing to such prosecuting attorney or solicitor any and all information which will aid in the conviction of the institution or institutions, person or persons violating the provisions of this article. (1917, c. 181, s. 12.)

Art. 9. Midwives

§ 6750. Midwives to register. — All persons, other than regularly registered physicians, practicing midwifery in this state shall register, without fee, their names and addresses with the secretary of North Carolina state board of health, as required by the provisions of article 14, entitled Inflammation of Eyes of Newborn, of the chapter Public Health. (1917, c. 257, ss. 8, 9.)

§ 6751. Persons forbidden to practice midwifery.—It shall be unlawful for any person who habitually gets drunk, or who is addicted to the excessive use of cocaine or morphine or other opium derivative, to practice midwifery for a fee. (1911, c. 34, s. 1.)

§ 6752. Disinfection of hands of practitioners.—It shall be unlawful for any midwife or other person who practices midwifery for fees to touch or

otherwise handle the private parts of the person of any patient upon whom such person is in attendance unless the person so in attendance shall first and immediately previous thereto thoroughly wash and disinfect his or her hands. (1911, c. 34, s. 4.)

§ 6753. Violation of two preceding sections misdemeanor.—Any person violating the two preceding sections shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than ten dollars. (1911, c. 34, s. 4.)

§ 6753(1). Practice of midwifery regulated by state board of health.—The state board of health is hereby authorized, empowered and directed to adopt, promulgate and enforce rules and regulations governing the practice of midwifery in this State. (1935, c. 225, s. 1.)

§ 6753(2). Permit from state board of health.—No person shall practice midwifery in this State, except upon a permit granted and issued by the state board of health, under rules and regulations which it shall adopt with respect thereto, and upon forms which it shall prescribe. Provided that all persons who have practiced midwifery in this State for a period of five (5) years or more shall as a matter of right be entitled to the issuance of a permit to practice such occupation, if such person or persons shall make application therefor within one year from the date of the ratification of this law. (1935, c. 225, s. 2.)

§ 6753(3). Practicing without permit a misdemeanor; authority of local health officers unaffected; counties may exempt themselves from law.—Any person who shall practice midwifery in this State without such permit from the state board of health, or who, in such practice, shall violate any of the rules and regulations adopted and promulgated by the state board of health, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than fifty ($50.00) dollars, or imprisonment of not more than thirty (30) days, provided the provisions of this law shall not apply to licensed medical or osteopathic physicians. Provided nothing herein shall be construed to interfere with or supplant the authorty of the local health officers over the practice of midwifery in those counties and/or cities having organized health departments now controlling and regulating the practice of midwifery. Provided that any county in the State not desiring to remain under the provisions of this law may withdraw from same by resolution duly passed by the board of commissioners of said county and certified to state board of health. (1935, c. 225, s. 3.)

Art. 10. Veterinaries

§ 6754. State veterinary medical association incorporated.—The association of veterinary surgeons and physicians calling themselves the North Carolina state veterinary medical association is declared to be a body politic and corporate under the name and style of The North Carolina State Veterinary Medical Association. (Rev., s. 5431; 1903, c. 503.)

§ 6755. Board of veterinary medical examiners; appointment; membership organization.—In order to properly regulate the practice of veterinary medicine and surgery there shall be a board to be known as the North Carolina board of veterinary medical examiners, to consist of five members of the North Carolina veterinary medical association. The governor shall annually appoint one member of such board, who shall hold his office for five years, and until his successor is appointed and qualified. Every person so appointed shall, within thirty days after notice of appointment, appear before the clerk of the superior court of the county in which he resides and take oath to faithfully discharge the duties of his office. (Rev., s. 5432; 1903, c. 503, s. 2.)

§ 6756. Meeting of board; powers.—The board of examiners shall meet at least once a year at such times and places as the association may decide upon, and remain in session sufficiently long to examine all who make application at the appointed time for a license. Three members of said board shall constitute a quorum. The board of examiners shall elect a president and a secretary, who shall also perform the duties of a treasurer. They shall keep a regular record of their proceedings in a book to be kept for that purpose, which shall always be open for inspection, and shall keep a record of all applicants for a certificate and of all who are granted a certificate, and shall publish the names of the successful applicants at least once each year in two newspapers published in the state. The board shall have authority to adopt such by-laws and regulations as may be necessary. (Rev., s. 5433; 1903, c. 503, ss. 3, 4, 6, 7.)

§ 6757. Compensation of board.—The members of such board shall receive such compensation for their services, not to exceed four dollars per day, and their traveling expenses, as the association may decide upon, to be paid by the secretary of the board out of any money coming into his hands as secretary. None of the expenses of the board or of the members shall be paid by the state. (Rev., s. 5434; 1903, c. 503, s. 9.)

§ 6758. Examination and licensing of veterinaries.—The board of examiners shall, at their annual meeting, examine all applicants who desire license to practice veterinary medicine or surgery. If upon such examination the applicant be found to possess sufficient skill to practice veterinary medicine or surgery, and of good moral character, a license or certificate shall be issued to him. No certificate shall be granted except with a concurrence of a majority of the members present. To prevent delay and inconvenience two members of the board of examiners may grant a temporary certificate to practice veterinary medicine or surgery, which shall be in force only until the next regular meeting of the board of examiners, but in no case shall such temporary certificate be granted to any person who has been an unsuccessful applicant for a certificate before the board. The board shall have power to require each applicant to pay a fee of not more than ten dollars before issuing a certificate and five dollars before issuing a temporary certificate. (Rev., s. 5435; 1903, c. 503, ss. 3, 5, 8.)

§ 6759. Rescission of license.—The board shall have power to rescind any certificate that may have been granted by it or annul any registration made under this article, upon satisfactory proof that the person thus licensed has been guilty of grossly immoral conduct or malpractice as determined by the board. And it shall be the duty of said board to furnish any information pertaining to the practice of veterinary medicine or surgery upon application for same by any one practicing under this article. (Rev., s. 5436; 1903, c. 503, s. 10.)

§ 6760. Practitioners before one thousand nine hundred and thirty-five.—All persons who had, on the first day of January, one thousand nine hundred and thirty-five, been practicing veterinary medicine or surgery and who have for a period of twenty years paid all fees as are required by law shall be allowed to practice veterinary medicine or surgery in this State: Provided, they make affidavit to the effect that they have practiced veterinary medicine or surgery as a profession for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, and that they have for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, paid all fees as may have been required by law. (Rev., s. 5437; 1903, c. 503, s. 11; 1905, c. 320; 1913, c. 129; 1919, c. 94; 1921, c. 171; Ex. Sess. 1921, c. 68; 1924, c. 38; 1935, c. 387.)

Editor's Note.—Public Laws of 1935, c. 387, struck out the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 6761. When may practice without license.—Nothing in this article shall be construed to prohibit any member of the medical profession from prescribing for domestic animals in cases of emergency and collecting a fee therefor nor to prohibit gratuitous services by any person in an emergency, nor to prevent any person from practicing veterinary medicine or surgery on any animal belonging to himself, or to prevent any one from castrating or spaying any of the domestic animals. And this article shall not apply to commissioned veterinary surgeons in the United States army. (Rev., s. 5438; 1903, c. 503, s. 12.)

§ 6762. Violation of article misdemeanor.—Any person practicing veterinary surgery or medicine in this state, without first having complied with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. (1913, c. 129, s. 2.)

Art. 11. Chiropodists

§ 6763. Chiropody defined.—Chiropody (podiatry) as defined by this article is the surgical, medical and mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local. (1919, c. 79, s. 2.)

§ 6764. Unlawful to practice unless registered.—On and after the first of July, one thousand nine hundred and nineteen, it shall be unlawful for any person to practice or attempt to practice chiropody (podiatry) in this state or to hold himself out as a chiropodist (podiatrist) or to designate himself or describe his occupation by the use of any words or letters calculated to lead others to believe that he is a chiropodist (podiatrist) unless he is duly registered as provided in this article. (1919, c. 79, s. 1.)

§ 6765. Board of chiropody examiners; how appointed; terms of office.—There shall be established a board of chiropody (podiatry) examiners for the state of North Carolina. This board shall consist of three members who shall be appointed by the North Carolina pedic association. All of such members shall be chiropodists who have practiced chiropody in North Carolina for a period of not less than one year. The members of the board shall be appointed by said association for a term of three years: Provided, the members of the first board shall be appointed to hold office for one, two and three years respectively, and one member shall be appointed annually thereafter by said association. The board shall have authority to elect its own presiding and other officers. (1919, c. 78, s. 3.)

§ 6766. Applicants to be examined; examination fee; requirements.—Any person not heretofore authorized to practice chiropody (podiatry) in this state shall file with the board of chiropody examiners an application for examination accompanied by a fee of twenty-five dollars, together with proof that the applicant is more than twenty-one years of age, is of good moral character, and has obtained a preliminary education equivalent to two years instruction in a high school; on and after January first, one thousand nine hundred and twenty-two, three years instruction in a high school or its equivalent; and on and after January first, one thousand nine hundred and twenty-five four years instruction in a high school or its equivalent. Such applicant before presenting himself for examination, must be a graduate of a legally incorporated school of chiropody (podiatry) acceptable to the board. (1919, c. 78, s. 9.)

§ 6767. Examinations; subjects; certificates.—The board of chiropody examiners shall hold at least one examination annually for the purpose of examining applicants under this article. The examinations shall be held at such time and place as the board may see fit, and notice of the same shall be published in one or more newspapers in the state. The board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide such books, blanks and forms as may be necessary to conduct such examinations, and shall preserve and keep a complete record of all its transactions. Examinations for registration under this article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral, or clinical, as the board may determine, and shall be in the following subjects wholly or in part: Anatomy, physiology, pathology, bacteriology, chemistry, diagnosis and treatment, therapeutics, clinical chiropody and asepsis; limited in their scope to the treatment of

the foot. No applicant shall be granted a certificate unless he obtains a general average of seventy-five or over, and not less than fifty per cent in any one subject. After such examination the board shall, without unnecessary delay, act on same and issue certificates to the candidates, signed by each member of the board; and the board of chiropody examiners shall report annually to the North Carolina pedic association. (1919, c. 78, s. 4.)

§ 6768. Reëxamination of unsuccessful applicants.—An applicant failing to pass his examination shall within one year be entitled to examination upon the payment of two dollars, but not more than two reëxaminations shall be allowed any one applicant. Should he fail to pass his third examination he shall file a new application before he can again be examined. (1919, c. 78, s. 6.)

§ 6769. Practitioners before enactment of this article; certificates.—Every person who is engaged in the practice of chiropody (podiatry) in this state one year next prior to the enactment of this article shall file with the board of chiropody examiners on or before the first day of July, one thousand nine hundred and nineteen, a written application for a certificate to practice chiropody (podiatry), together with proof satisfactory to the board that the applicant is more than twenty-one years of age and has been practicing chiropody in this state for a period of more than one year next prior to the passage of this article, and upon the payment of a fee of ten dollars the said board of chiropody examiners shall issue to such applicant a certificate to practice chiropody (podiatry) in this state. (1919, c. 78, s. 5.)

§ 6770. Certificates to registered chiropodists of other states.—Applicants registered or certified by examiners of other states whose requirements are equal to those of this state may, upon the payment of a fee of twenty-five dollars, be granted a certificate without examination: Provided, that the provisions of this section shall be extended only to those states which extend to this state the same privilege. (1919, c. 78, s. 8.)

§ 6771. Certificates filed with clerk of court; clerk to keep record.—Every person receiving a certificate from the board shall file the same with the clerk of the court of the city or county in which he resides. It shall be the duty of the clerk to register the name and address and date of the certificate in a book kept for such purpose as a part of the records of his office, and the number of the book and the page therein containing said recorded copy shall appear on the face of the certificate over the name of the clerk recording the same. The person thus registering shall pay to the clerk a fee of fifty cents. (1919, c. 78, s. 7.)

§ 6772. Revocation of certificate; grounds for; suspension of certificate.—The board of chiropody examiners may revoke by a majority vote of its members any certificate it has issued, and cause the name of the holder to be stricken from the book of the registration by the clerk of the court in the city or county in which the name of the person whose certificate is revoked is registered, for any of the following causes:

1. The wilful betrayal of a professional secret.
2. Any person who in any affidavit required of the applicant for certificate, registration or examination under this article shall make a false statement.
3. Any person convicted of a crime involving moral turpitude.
4. Any person habitually indulging in the use of narcotics, ardent spirits, stimulants or any other substance which impairs intellect and judgment to such an extent as in the opinion of the board to incapacitate such person for the performance of his professional duties.

Any person against whom charges have been made shall be notified of the fact and a copy of the charges shall be sent him by the board and he shall be given a fair and impartial trial by the board, whose decisions shall be made by a majority vote of its members.

The board may suspend any certificate granted under this article for a period not exceeding six months on account of any misconduct on the part of the person registered which would not, in the judgment of the board, justify the revocation of his certificate. (1919, c. 78, ss. 12, 13.)

§ 6773. Fees for certificates and examinations; compensation of board.—To provide a fund in order to carry out the provisions of this article the board shall charge ten dollars for each certificate issued and fifteen dollars for each examination. From such funds all expenses and salaries, not exceeding four dollars per diem for each day actually spent and actual railroad expenses in addition, shall be paid by the board: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14.)

§ 6773(a). Annual fee of $10 required; cancellation or renewal of license. — On or before the first day of July of each year every chiropodist engaged in the practice of chiropody in this State shall transmit to the Secretary-Treasurer of the said North Carolina State Board of Chiropody Examiners his signature and post office address, the date and year of his or her certificate, together with a fee to be set by the Board of Chiropody Examiners not to exceed ten ($10.00) dollars, and receive therefor a renewal certificate. It shall be the duty of the Secretary of said Board of Chiropody Examiners to send a copy of this act to every chiropodist engaged in practicing chiropody in this State to his last address known by said Secretary. It shall also be the duty of said Board of Chiropody Examiners to publish an abstract thereof in two or more newspapers published in this State. Any license or certificate granted by said Board under or by virtue of this act, shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of thirty days after the thirty-first day of July of each year, and such delinquent chiropodist shall pay a penalty of five dollars for reinstatement: Provided, that any legal practicing chiropodist in this State who retires from practice or is absent from the State, if licensee shall furnish affidavit of having been out of the State or had retired from practicing, may reinstate himself by mere payment of fee or fees of lasped year or years,

such period not exceeding five years. (1931, c. 191.)

§ 6773(b). Issuance of license upon payment of fees.—Upon payment of the fees prescribed in the above section, by or before July first, nineteen hundred and thirty-one, by any person who has heretofore practiced chiropody in the State of North Carolina, for a period of five successive years regularly, it shall be the duty of the State Board of Chiropody Examiners to issue to said person a license which shall grant to such person all the rights and privileges of chiropodists now engaged in practicing chiropody. (1931, c. 191.)

§ 6774. Unlawful practice of chiropody a misdemeanor.—Any person who shall practice or attempt to practice chiropody (podiatry) in this state without having complied with the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than two hundred dollars, or shall be imprisoned for not less than thirty nor more than ninety days. Nothing in this article shall be construed to interfere with physicians in the discharge of their professional duties. (1919, c. 78, s. 10.)

§ 6775. Sheriffs and police to report violators of this article.—It shall be the duty of the police department of the cities and the sheriff of each county in the state to see that all practitioners of chiropody (podiatry) in the state are legally registered according to the provisions of this article, and to report to the state's attorney of the city or county all cases of violation of this article; whereupon the state's attorney shall promptly prosecute those violating the provisions of this article. (1919, c. 79, s. 11.)

§ 6776. Provisions of this article to be published.—Within thirty days after the enactment of this article the board of chiropody examiners shall give notice of the provisions of this article by publishing the same or an abstract thereof in two or more newspapers published in this state. (1919, c. 78, s. 4.)

Art. 12. Embalmers

§ 6777. State board; election; qualifications; term vacancies.—The State board of embalmers shall consist of five members, elected by the state board of health, all of whom shall be licensed and practical embalmers, having experience in the care and disposition of dead human bodies. One member of such board shall be elected in June, one thousand nine hundred and five, and annually thereafter during the month of June one member of such board shall be elected. The term of office shall begin on the first day of July next after the election, and continue for five years. The state board of health shall fill all vacancies in such board. (Rev., s. 4384; 1901, c. 338, ss. 1, 2, 3; 1931, c. 174.)

Editor's Note.—The Act of 1931 struck out the words "three of whom shall be members of the State Board of Health, the other two shall be" formerly appearing in lines four and five of this section and inserted in lieu thereof "all of whom shall be licensed and."

§ 6778. Members; removal; oath.—The state board of health shall have power to remove from office any member of said board for neglect of duty, incompetency, or improper conduct. The stat board of health shall furnish each person appointed to serve on the state board of embalmers a certificate of appointment. The appointees shall qualify by taking and subscribing to the usual oath of office before some person authorized to administer oaths, within ten days after said appointment has been made, which oath shall be filed with the board of embalmers. (Rev., s. 4385; 1901, c. 338, ss. 3, 4.)

§ 6779. Common seal; powers.—The board shall adopt a common seal, and shall have all the powers and privileges conferred on it by the laws of the state. (Rev., s. 4396; 1901, c. 338, s. 6.)

§ 6780. Meetings; quorum; by-laws; officers; president to administer oaths.—The board shall meet at least once every year, during the month of July, at such place as it may determine. Three members shall constitute a quorum. At each annual meeting the board from its members shall select a president and a secretary, who shall hold their offices for one year and until their successors are elected. The board shall, from time to time, adopt rules, regulations, and by-laws not inconsistent with the laws of this state or of the United States, whereby the performance of the duties of such board and the practice of embalming of dead human bodies shall be regulated. The president of the board (and in his absence a president pro tempore elected by the members present) is authorized to administer oaths to witnesses testifying before the board. (Rev., s. 4378; 1901, c. 338, ss. 5, 6, 7, 8.)

§ 6781. Grant and renewal of licenses; fees; licenses displayed.—Every person not licensed as an embalmer, now engaged or desiring to engage in the practice of embalming dead human bodies, shall make written application to the state board of embalmers for a license, accompanying the same with a license fee of five dollars, whereupon the applicant shall present himself before the board at a time and place to be fixed by the board, and if the board shall find, upon due examination, that the applicant is of good moral character, possessed of skill and knowledge of said science of embalming and the care and disposition of the dead, and has a responsible knowledge of sanitation and the disinfection of bodies of deceased persons and the apartment, clothing, and bedding, in case of death from infectious or contagious disease, and has had a special course in embalming in an approved school, or two years practical experience with a licensed and practical embalmer, who shall make affidavit upon the application that said applicant has had such experience under him, the board shall issue to such applicant a license to practice the art of embalming and the care and disposition of the dead, and shall register such applicant as a duly licensed embalmer. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving a license under the provisions of this article shall also register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or counties in which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such licentiate. Every registered embalmer who desires to con-

tinue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the board may determine, pay to the secretary of the board a fee of two dollars for the renewal registration. (Rev., s. 4388; 1901, c. 338, ss. 9, 10; 1917, c. 36; 1919, c. 88.)

§ 6782. Embalming without license.—If any person shall practice or hold himself out as practicing the art of embalming, without having complied with the provisions of this article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars for each offense. (Rev., s. 3644; 1901, c. 338, s. 14.)

§ 6783. Expenses and salaries of board.—All expenses, salary, and per diem to members of this board shall be paid from fees received under the provisions of this article, and shall in no manner be an expense to the state. All moneys received in excess of said per diem allowance and other expenses provided for shall be held by the secretary of said board as a special fund for meeting the expenses of said board. (Rev., s. 4389; 1901, c. 338, s. 11.)

§ 6784. Embalming schools have privileges of medical schools as to cadavers.—Schools for teaching embalming shall have extended to them the same privileges as to the use of bodies for dissection while teaching as those granted to medical colleges. (Rev., s. 4390; 1901, c. 338, s. 15.)

Art. 13. Cadavers for Medical Schools

§ 6785. Board for distribution.—The professors of anatomy of the several medical schools of the state shall be a board for the distribution of dead human bodies for the purpose of promoting the study of anatomy in this state, and shall have power to make proper rules for its government and the discharge of its functions under this article. (Rev., s. 4287; 1903, c. 666, s. 1.)

§ 6786. What bodies to be furnished.—All officers, agents, or servants of the state of North Carolina or of any county or town having charge or control of any dead human body required to be buried at public expense, or of the dead body of any person who at the time of death was under sentence of death or imprisonment at hard labor for the violation of the criminal laws of the state, shall, upon the request of the board or its authorized agent, deliver such dead body to any one designated by the board for the purpose aforesaid: Provided, such body be not claimed within thirty-six hours, to be disposed of without expense to the state, county, or town, by any relative within the second degree of consanguinity, or by the husband or wife of such deceased person: Provided further, that the body of a Confederate soldier or of the wife of a Confederate soldier, sailor or member of the marine corps of the world war who was honorably discharged from service, or the wife of such sailor or soldier, shall be excepted from the provisions of this article, and that the body of no white person shall be delivered to any school for the colored race.

This section shall not apply to the dead bodies of persons who are inmates of state hospitals, or to the bodies of travelers or strangers who die suddenly, or to the bodies of persons who die in the state schools for the blind or the deaf and dumb, or any other state school, or in county homes. (Rev., s. 4288; 1903, c. 666, s. 2; 1911, c. 188; 1923, c. 110.)

Editor's Note. — By amendment Public Laws 1923, the bodies of soldiers, sailors or members of the Marine Corps who were honorably discharged, and the bodies of their wives were prohibited from being furnished to medical schools. Stated in 1 N. C. Law Rev. 296.

§ 6787. How bodies distributed.— The bodies obtained under this article shall be distributed among the several medical schools in proportion to the number of students studying anatomy in such schools. Upon the written application of the professor of anatomy, or his accredited representatives, of any medical school established by law in the state, the person or persons having charge or control of said dead body or bodies, as specified, shall give such professor of anatomy, or his accredited representative, permission to take, at the expiration of twenty-four hours after death, the body or bodies of such persons, to be used within the state for the advancement of anatomical science; and it shall be the duty of any professor of anatomy receiving such body or bodies to immediately report this fact to the secretary of the anatomical board. If any medical school, in the operation of this section, shall obtain more than its equitable proportion of bodies, as determined by the said secretary, then two-thirds of such excess shall be shipped to some other medical school in the state, to be designated by the secretary of the anatomical board. (Rev., s. 4289; 1903, c. 666, s. 3; 1911, c. 188.)

§ 6788. Bodies to be embalmed.—The bodies obtained under this article shall be embalmed before being used for the purposes of dissection. (Rev., s. 4290; 1903, c. 666, s. 4.)

§ 6789. How expenses paid.—All expenses for the delivery, distribution, and embalming of such dead bodies shall be borne by the medical school receiving same, and in no case shall the state or any county or town be liable therefor. (Rev., s. 4291; 1903, c. 666, s. 5.)

§ 6790. Violation of article misdemeanor.—If any person shall fail or refuse to perform any duty imposed upon him by this article he shall be guilty of a misdemeanor and fined not exceeding one hundred dollars. (Rev., s. 3567; 1903, c. 666, s. 6.)

CHAPTER 111

MILITIA

Art. 1. Classification of Militia

§ 6791. Composition of militia.—The militia of the state shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and the militia shall be divided into three classes: the national guard, the naval militia, and the unorganized militia. (1917, c. 200, s. 1.)

§ 6792. Composition of national guard. — The national guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years, organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years. (1917, c. 200, s. 2.)

§ 6793. Composition of naval militia.—The naval militia shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years, organized, armed, and equipped as hereinafter provided and commissioned officers between the ages of twenty-one and sixty-two years (naval branch), and twenty-one and sixty-four years (marine corps branch); but enlisted men may continue in the service after the age of forty-five years, and until the age of sixty-two years (naval branch), or sixty-four years (Marine corps branch), provided the service is continuous. (1917, c. 200, s. 3.)

§ 6794. Composition of unorganized militia.— The unorganized militia shall consist of all other able-bodied male citizens of the state and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age, and, except as otherwise provided by law, not more than forty-five years of age. (1917, c. 200, s. 4.)

§ 6795. Exemption from military duty. — The officers, judicial and executive, of the government of the United States and the State of North Carolina, persons in the military or naval service of the United States, custom-house clerks, persons employed by the United States in the transmission of the mail, artificers and workmen employed in the armories, arsenals, and navy yards of the United States, pilots, mariners actually employed in the sea service of any citizen or merchant within the United States, shall be exempt from military duty without regard to age, and all persons who, because of religious belief, shall claim exemption from military service, if the conscientious holding of such belief by such person shall be established under such regulations as the president shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the president shall declare to be noncombatant. (1917, c. 200, s. 5.)

§ 6796. White and colored enrolled separately. —The white and colored militia shall be separately enrolled, and shall never be compelled to serve in the same organization. No organization of colored troops shall be permitted where white troops are available, and while pemitted to be organized, colored troops shall be under command of white officers. (1917, c. 200, s. 6.)

§ 6797. Maintenance of other troops.—In time of peace the state shall maintain only such troops as may be authorized by the president of the United States; but nothing contained in this chapter shall be construed as limiting the rights of the state in the use of the national guard within its borders in time of peace. Nothing contained in this chapter shall prevent the organization and maintenance of state police or constabulary. (1917, c. 200, s. 8.)

§ 6798. Corps entitled to retain privileges. — Any corps of artillery, cavalry, or infantry existing in the state on the passage of the act of congress of May eighth, one thousand seven hundred and ninety-two, which by the laws, customs, or usages of the state has been in continuous existence since the passage of such act, under its provisions and under the provisions of section two hundred and thirty-two and sections one thousand six hundred and twenty-five to one thousand six hundred and sixty, both inclusive, of title sixteen of the revised statutes of one thousand eight hundred and seventy-three and the act of congress of January twenty-first, one thousand nine hundred and three, relating to the militia, shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of the militia; but such organizations may be a part of the national guard, and entitled to all the privileges of this chapter, and shall conform in all respects to the organization, discipline, and training of the national guard in time of war. For purpose of training and when on active duty in the service of the United States they may be assigned to higher units, as the president may direct, and shall be subject to the order of officers under whom they shall be serving. (1917, c. 200, s. 87.)

Art. 2. General Administrative Officers

§ 6799. Governor as commander-in-chief.—The governor shall be commander-in-chief, and shall have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasions. (1917, c. 200, s. 11.)

As to commander-in-chief of the militia, see Art. III, sec. 8, Art. XII sec. 3 of the Constitution.

§ 6800. Commander-in-chief to prescribe regulations. — The commander-in-chief shall have the power and it shall be his duty from time to time to issue such orders and to prescribe such regulations relating to the organization of the national guard and naval militia as will cause the same at all times to conform to the federal requirements of the United States government relating thereto. (1917, c. 200, s. 36.)

§ 6801. Division of military staff. — The military staff shall be divided into two kinds: the personal staff of the governor and the administrative staff. The governor may detail from the active list not more than ten national guard officers and two naval military officers, who shall in addition to their regular duties perform the duties of aides-de-camp on the personal staff of the governor. There shall be an administrative staff which shall be as is now or may from time to time be authorized by the secretary of war for the national guard and the secretary of the navy for the naval militia. (1917, c. 200, s. 12.)

§ 6802. Adjutant general. — The governor shall appoint an adjutant general, who shall have had not less than five years commissioned service in the national guard, naval militia, regular army, United States navy or marine corps; who while holding such office may be a member of the ac-

tive national guard or naval militia. (1927, c. 200, s. 14; 1925, c. 54.)

§ 6803. Adjutant general's department.—There shall be an adjutant general's department. The adjutant general shall be the head of the department and as such subordinate only to the governor in matters pertaining thereto. He shall make such returns and reports to the secretary of war and secretary of the navy or to such officers as the secretary of war and secretary of the navy may designate, at such times and in such form as may from time to time be prescribed. He shall keep a record of all officers and enlisted men, and shall also keep in his office all records and papers required by law or regulations to be filed therein. He shall make an annual report to the governor on or before the thirty-first day of December of each year, including a detailed statement of all expenditures made for military purposes during that year. He shall also make a biennial report to the general assembly. He shall cause to be prepared and issued all books, blank forms, etc., required to carry into full effect the provisions of this statute. All such books and blank forms shall be and remain the property of the state. The adjutant general shall perform such other duties not herein specified as may be required by the military laws and regulations or by the governor. The adjutant general shall be allowed all such necessary expenses as may be incurred for printing, postage, stationery, blank books, orders, and reports required in his office, the same to constitute a charge against the general fund. The adjutant general may have an assistant who shall be detailed from the adjutant general's department of the administrative staff, and such clerks and employees as may be prescribed by the governor. An officer detailed as such assistant shall receive during the period of such service such compensation as may be authorized by the governor. The pay of such officer shall constitute a charge against the whole sum appropriated annually for the support of the national guard. (1917, c. 200, s. 13; 1927, c. 217, s. 4.)

§ 6804. Property and disbursing officer for the United States.—The governor of the state shall appoint, designate, or detail, subject to the approval of the secretary of war, an officer of the national guard of the state, who shall be regarded as property and disbursing officer for the United States. In consideration of his services, for the care, responsibility, and issue of federal property, the property and disbursing officer for the United States shall receive from the state such salary as the governor may authorize to be just and proper; the salary to constitute a charge upon the military fund of the state; but such salary shall in no case exceed the sum of one thousand dollars. When ordered into actual service and receiving the pay of his rank for such service, from either state or federal funds, he shall not be entitled to, or receive, any salary from the state for the period of time for which he shall receive the pay of his rank. (1917, c. 200, s. 24.)

§ 6805. Property and disbursing officer for North Carolina.—The Disbursing Officer for the National Guard shall be an employee of the Adjutant General's Department and he shall be required to give a good and sufficient bond to the State, the amount thereof, to be determined by the Governor, for the faithful performance of his duties and for the safe keeping and proper disposition of such funds and property entrusted to his care. He shall receipt for and account for all funds and property allotted to his custody from the appropriation for military purposes, by the State, and shall make such returns and reports through the Adjutant General concerning same as may be required by the Governor or State laws. All or any disbursement of such moneys will be made by the disbursing officer, only upon the approval of the Adjutant General, upon such forms and under such regulations as may be prescribed by proper authority. Blank forms, books, stationary, and other necessary equipment, for use of the disbursing officer will be furnished through or by the Adjutant General's Department. Funds from the appropriation for military purposes will be paid to the disbursing officer by the State Treasurer upon requisition of the Adjutant General on the State Treasurer in accordance with the State Laws, or regulations thereunder as prescribed by the State for the expenditure of appropriations made to the State Departments. (1917, c. 200, s. 25; 1929, c. 217, s. 1.)

§ 6806. Inspector general.—The inspector general shall annually inspect all organizations and departments in the militia at such times and places as the governor may order, and inspect and audit the accounts of all officers accountable or responsible for public funds; he will inquire as to necessity, economy, and propriety of all disbursements, their strict conformity to the law appropriating the money, and whether the property and disbursing officer complies with the law in keeping his accounts and making his deposits. He shall make an annual report to the governor of such audits and inspections, a copy of them to be furnished the advisory board. (1917, c. 200, s. 26.)

§ 6807. Advisory board. — There shall be an advisory board composed of the brigade commander, the commanding officer of each regiment of infantry, the commanding officer of the naval militia, the commanding officer of the coast artillery corps, the chief surgeon, the senior officer of engineers, the senior officer of cavalry, and the senior officer of field artillery, which shall meet once each year in Raleigh at such time as ordered by the governor, and at such other times and places as may be ordered by the governor. This board shall make such recommendations to the governor as it may deem for the best interests of the militia. The adjutant-general, the property and disbursing officers, and inspector general shall furnish such information as may be requested by the board. (1917, c. 200, s. 27; 1921, c. 120, s. 1.)

Art. 3. National Guard

§ 6808. Organization of national guard units.—Except as otherwise specifically provided by the laws of the United States, the organization of the national guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the

regular army, subject in time of peace to such general exceptions as may be authorized by the secretary of war. (1917, c. 200, s. 7.)

§ 6809. Location of units.—The governor shall determine and fix the location of the units and headquarters of the national guard within the state; but no organization of the national guard, members of which shall be entitled to and shall have received compensation under the provisions of the act of congress approved June third, one thousand nine hundred and sixteen as amended, shall be disbanded without the consent of the president, nor without such consent shall the commissioned or enlisted strength of any such organization be reduced below the minimum that is now or shall be hereafter prescribed therefor by the president. (1917, c. 200, s. 9; 1921, c. 120, s. 2.)

§ 6810. Reserve battalions for recruit training.—Under such rules and regulations as may be prescribed by the president, reserve battalions for infantry, cavalry, field artillery, and coast artillery may be organized by the commander-in-chief when organizations of the national guard have been called into the service of the United States in time of war. The organization of such reserve battalions shall be effected in the manner prescribed in section seventy-nine of the act of congress approved June third, one thousand nine hundred and sixteen, or subsequent federal enactments. (1917, c. 200, s. 10.)

§ 6811. Officers appointed and commissioned.—All officers of the national guard shall be appointed and commissioned by the governor as follows, viz:

1. The appointment and promotion of all officers below the grade of brigadier general shall be by seniority as far as practicable within the organization or department; but if the total commissioned service of the senior officer is less than the total commissioned service of the next ranking officer, the names of both officers shall be forwarded to the war department, and promotion shall be based upon the result of the prescribed examination.

2. Original appointments of second lieutenants in the line or staff shall be made from the enlisted men when practicable within the organization. Candidates for such appointment shall make written application, accompanied by their military record, to the commanding officer through intermediate commanders for comment by endorsements. The commanding officer shall forward the application of the three best qualified and most promising candidates with his endorsement to the adjutant-general's office for consideration by the governor. (1917, c. 200, s. 15; 1921, c. 120, s. 3.)

§ 6812. Commissions for commandants and student officers at educational institutions.—Whenever any university, college, academy or other educational institution, regularly incorporated under and by virtue of the laws of the State of North Carolina, wherein military science and instruction are made a part of the courses of study and are regularly taught in said institution, and wherein there is detailed by the War Department at Washington, D. C., an officer from the United States army as professor of military science and tactics, which is designated as an Essentially Military School by the War Department of Washington, D. C., and which has been made a unit of the Senior or Junior Reserve Officers' Training Corps by the War Department at Washington, D. C., the Governor of North Carolina, on the application of the said university, college, academy or other educational institution, signed by the chancellor, president, superintendent or other presiding officer, under the seal of the said institution, is hereby authorized and directed to commission as staff officers of the North Carolina Reserve Militia, the officers of the said university, college, academy or other educational institution, as follows: The chancellor, president, superintendent or other presiding officer, as colonel; the vice-president, principal or other officer second in authority, as lieutenant-colonel; the commandant, or officer in charge of the discipline, as major; and the male professors, members of the faculty, as captains. The persons to whom commissions are issued under this section shall have no connection with the National Guard or other military forces of the State, nor shall they, or any of them, exercise any military authority other than in the discharge of their duties in their respective institutions. The Governor may annually appoint a committee of three members, one of whom shall be appointed on the recommendation of the Adjutant-General, one on the recommendation of the State Superintendent of Public Instruction, and one on the recommendation of the Secretary of the State Board of Health, with a view to their proficiency in the several departments indicated, and the said committee shall during the school year, and while the said institutions are in session, visit all of the said educational institutions and make a thorough inspection of their military departments, their discipline, courses of study and educational departments, and their sanitary condition, and report to the Governor the result of said inspection. (1919, c. 265, ss. 1, 2, 3; 1929, c. 61, s. 1.)

§ 6813. Appointment of staff officers.—No person shall be appointed a staff officer, including officers of the pay, inspection, subsistence, and medical departments, unless he shall have had previous military experience, nor who shall fail to qualify as to fitness for military service under such regulations as the secretary of war shall prescribe; such officers shall hold their positions until they have reached the age of sixty-four years, unless separated from the service prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for the purpose. Vacancies among such officers shall be filled by appointment from the officers of the militia. (1917, c. 200, s. 16.)

§ 6814. Qualifications of national guard officers.—Persons hereinafter commissioned as officers of the national guard shall not be recognized as such under any of the provisions of this chapter unless they shall have been selected from the following classes and shall have taken and subscribed to the oath of office prescribed in this article, for officers: Officers or enlisted men of the national guard, officers active or retired, reserve officers,

and former officers of the army, navy, and marine corps, enlisted men and former enlisted men of the army, navy or marine corps, who have received an honorable discharge therefrom, graduates of the United States military and naval academies and graduates of schools, colleges, universities, and officers' training camps where they have received military instruction under the supervision of an officer of the regular army who certified their fitness for appointment as commissioned officers, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein. (1917, c. 200, s. 17; 1921, c. 120 s. 4.)

§ 6815. Test as to fitness for officers.—No person shall hereafter be appointed an officer of the national guard unless he first shall have successfully passed such test as to his physical, moral, and professional fitness as the president shall prescribe. The examination to determine such qualifications for commission shall be conducted by a board of three commissioned officers appointed by the secretary of war from the regular army or the national guard, or both. (1917, c. 200, s. 18.)

§ 6816. Precedence of relative rank among officers of same grade in active national guard.—Between officers of the same grade in the active national guard, precedence, or relative rank, is determined in the following manner:

"(a) According to the date of rank, which is the date of rank stated in his commission.—

"(b) When dates of rank are the same, according to length of active commissioned service, continuous or otherwise, in the National Guard of the United States and in the Army of the United States not counting as service time spent on any supernumerary or retired list, or in the national guard reserve or officers' reserve corps in an inactive status.

"(c) When dates of rank and length of active commissioned military service are the same, first, according to age, the older taking precedence; second, by lot." (1917, c. 200, s. 19; 1921, c. 120, s. 5; 1927, c. 227, s. 1.)

Editor's Note.—The caption of the printed act of 1927 ch. 227, purports to amend section 6316 but it does not mention that section in the body of the act. It amends section 6816. It is clearly evident that this error in the caption is clerical. This section was enacted in 1917, it was repealed and reenacted in 1921, and again in 1927. The changes were no doubt made with the intention of making the rules for promotion clear. The changes in each instance are such that a comparison of the acts will be necessary to note all.

§ 6817. Oath of national guard officers.—Commissioned officers of the national guard shall take and subscribe to the following oath of office: "I, ..., do solemnly swear that I will support and defend the constitution of the United States and the constitution of the state of North Carolina against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the president of the United States and of the governor of the state of North Carolina; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of..... in the national guard of the United States and of the state of North Carolina, upon which I am about to enter: so help me, God." (1917, c. 200, s. 20.)

§ 6818. Elimination and disposition of officers.—At any time the moral character, capacity, and general fitness for the service of any national guard officer may be determined by an efficiency board of three commissioned officers senior in rank to the officer whose fitness for service shall be under investigation, and if the findings of such board be unfavorable to such officer and be approved by the official authorized to appoint such officer, he shall be discharged. Commissions of officers of the national guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board, or pursuant to sentence of a court-martial. Officers of such guard rendered surplus by disbandment of their organization shall be placed in the national guard reserve. Officers may, upon their own application, be placed in the reserve. (1917, c. 200, s. 28.)

§ 6819. Retirement of officers.—When an officer reaches the age of sixty-four years he shall be retired. (1917, c. 200, s. 29.)

§ 6820. Enlistments in national guard.—Original enlistments in the national guard shall be for a period of three years and subsequent enlistments for a period of one year each, or for such periods as may be prescribed by the secretary of war: Provided, that persons who have served in the army for not less than six months, and have been honorably discharged therefrom, may, within two years after June four, one thousand nine hundred and twenty, enlist in the national guard for one year, and reënlist for like period: Provided, that qualifications for enlistment shall be the same as those prescribed for admission to the regular army. (1917, c. 200, s. 30; 1921, c. 120, s. 6.)

§ 6821. Enlistment contract.—Enlisted men shall not be recognized as members of the national guard until they shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment: "I do hereby acknowledge to have voluntarily enlisted, this ..... day of ....., 19...., as a soldier in the national guard of the United States and of the state of North Carolina, for the period of three, or one, years in service under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America, and to the state of North Carolina, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the president of the United States and of the governor of the state of North Carolina and of the officers appointed over me according to law and the rules and articles of war." (1917, c. 200, s. 31; 1921, c. 120, s. 7.)

§ 6822. Discharge of enlisted men.—An enlisted man discharged from service in the national guard shall receive a discharge in writing in such form and with such classification as is or shall be prescribed for the regular army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regula-

tions as may be prescribed by proper authority. (1917, c. 200, s. 32.)

§ 6822(a). Membership continued in the national guard.—When drafted into federal service and discharged from the army members shall resume their membership in the national guard, and shall continue to serve in the national guard until the date upon which their enlistments entered into prior to their draft would have expired if uninterrupted. (1921, c. 120, s. 8.)

§ 6823. Discipline of national guard.—The discipline of the national guard shall conform to the system which is now or may hereafter be prescribed for the regular army, and the training shall be carried out so as to conform to the provisions of an act of congress approved June third, one thousand nine hundred and sixteen, and subsequent federal enactments. (1917, c. 200, s. 33.)

§ 6824. Uniform and equipment of national guard.—The national guard shall, as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipment as is or shall be provided for the regular army. (1917, c. 200, s. 37.)

§ 6825. Courts-martial for national guard.—Courts-martial for organizations of the national guard not in the service of the United States shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted, having cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the law and regulations governing the army of the United States, and the proceedings of courts-martial of the national guard shall follow the forms and modes of procedure prescribed for such similar courts. (1917, c. 200, s. 55.)

§ 6826. General courts-martial.—General courts-martial of the national guard not in the service of the United States may be convened by orders of the president, or of the governor of the state, and such courts shall have the power to impose fines not exceeding two hundred dollars; sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts. (1917, c. 200, s. 56.)

§ 6827. Special courts-martial.—In the national guard, not in the service of the United States, the commanding officer of each garrison, fort, post, camp, or other place, brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. Special courts-martial shall have power to try any person subject to military law, except a commissioned officer, for any crime or offense made punishable by the military laws of the United States; and such special courts-martial shall have the same powers of punishment as the general courts-martial, except that fines imposed by such courts shall not exceed one hundred dollars. (1917, c. 200, s. 57.)

§ 6828. Summary courts-martial. — In the national guard, not in the service of the United States, the commanding officer of each garrison, fort, post, or other place, regiment, or corps, detached battalion, company, or other detachment of the national guard, may appoint for such place or command a summary court to consist of one officer, who shall have power to administer oaths and try the enlisted men of such place or command for breaches of discipline and violations of laws governing such organizations; and the court, when satisfied of the guilt of such soldier, may impose fines not exceeding twenty-five dollars for any single offense; may sentence noncommissioned officers to reduction to the ranks; may sentence to forfeiture of pay and allowances. The proceedings of such court shall be informal, and the minutes thereof shall be the same as prescribed for summary courts of the army of the United States. (1917. c, 200, s. 58.)

§ 6829. Powers of courts-martial.—All courts-martial of the national guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed, and shall have power to direct that upon the nonpayment of a fine the person convicted shall be confined in any county jail; but such sentences of confinement shall not exceed one day for each dollar of fine authorized. (1917, c. 200, s. 59.)

§ 6830. Procedure of courts-martial.—In the national guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue commitments in carrying out sentences of confinement, and to issue subpœnas and subpœnas duces tecum, and to enforce by attachment attendance of witnesses and the producton of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts. He shall also have power to punish for contempt occurring in the presence of the court. (1917, c. 200, s. 60.)

§ 6831. Manual of courts-martial.—Trials and proceedings by all courts and boards shall be in accordance with the plan and procedure laid down in the manual of courts-martial, courts of inquiry, and retiring boards, and other procedures under military law, as may from time to time be prescribed by the secretary of war. (1917, c. 200, s. 64.)

§ 6832. Sentences, where executed.—All sentences to confinement imposed by any military court of this state shall be executed in such prisons as the court may designate. (1917, c. 200, s. 61.)

§ 6833. Execution of process and sentences.—All processes and sentences of any of the military courts of this state shall be executed by any

sheriff, deputy sheriff, constable, or police officer into whose hands the same may be placed for service or execution, and such officer shall make return thereof to the officer issuing or imposing the same. Such service or execution of process or sentence shall be made by such officer without tender or advancement of fee therefor; but all costs in such cases shall be paid from funds appropriated for military purposes. The actual necessary expenses of conveying a prisoner from one county in the state to another, when the same is authorized and directed by the adjutant general of the state, shall be paid from the military fund of the state upon a warrant approved by the adjutant general. (1917, c. 200, s. 62.)

§ 6834. Commitments.—When any sentence to fine or imprisonment shall be imposed by any military court of this state, it shall be the duty of the president of said court, or summary court officer, upon the approval of the findings and sentence of such court, to make out and sign a certificate entitling the case, giving the name of the accused, the date and place of trial, the date of approval of sentence, the amount of fine, or manner, place, and duration of confinement, and deliver such certificate to the sheriff, or deputy sheriff, constable, or police officer of the county wherein the sentence is to be executed; and it shall thereupon be the duty of such officer to carry said sentence into execution in the manner prescribed by law for the collection of fines or commitment to service of terms of imprisonment in criminal cases determined in the courts of this state. (1917, c. 200, s. 63.)

§ 6835. Sentence of dismissal.—No sentence of dismissal from the service or dishonorable discharge, imposed by a national guard court-martial not in the service of the United States, shall be executed until approved by the governor. Any officer convicted by a general court-martial and dismissed from the service shall be forever disqualified from holding a commission in the militia. (1917, c. 200, s. 65.)

Art. 4. Naval Militia

§ 6836. Organization and equipment. — The organization of the naval militia shall be units of convenient size, in each of which the number and rank of officers and the distribution of the total enlisted strength among the several ratings of petty officers and other enlisted men shall be such as are prescribed by the secretary of the navy, who may also prescribe the number of officers and the number of petty officers and other enlisted men required for the organization of such units into large bodies for administrative and other purposes, and the arms and equipment of the naval militia shall be those which are now or may hereafter be prescribed by the secretary of the navy. (1917, c. 200, s. 66.)

§ 6837. Officers appointed to naval militia.—Officers of the United States navy and marine corps may, with the approval of the secretary of the navy, be elected or appointed and commissioned as officers of the naval militia. (1917, c. 200, s. 67.)

§ 6838. Officers assigned to duty.—Line officers of the naval militia may be for line duties only, for engineering duties only, or for aeronautic duties only. (1917, c. 200, s. 68.)

§ 6839. Discipline in naval militia.—The naval militia shall be subject to the system of discipline prescribed for the United States navy and marine corps, and the commanding officer of a naval militia battalion or brigade, or a naval militia officer in command of naval militia forces on shore or on any vessel of the navy loaned to the state, or on any vessel on which such forces are training, whether within or without the state, or wherever, either within or without the state, naval militia forces of the state shall be assembled pursuant to orders, shall have power without trial by courts-martial to impose upon members of the naval militia the punishments which the commanding officer of a vessel of the navy is authorized by law to impose. (1917, c. 200, s. 69.)

§ 6840. Disbursing and accounting officer.—The governor shall appoint a disbursing officer, approved by and of such rank as may be prescribed by the secretary of the navy, to perform such duties as the secretary of the navy may prescribe. The governor shall also appoint the above described disbursing officer, or such other officer of the pay corps of the naval militia as he may elect, as accounting officer for each battalion thereof, or at his option for each larger unit or combination of units of the same, who shall be responsible for the proper accounting for all public property issued to and for the use of such battalion or larger unit or combination of units. (1917, c. 200, s. 70.)

§ 6841. Rendition of accounts. — Accounting officers shall render accounts as prescribed by the governor or by the secretary of the navy, and shall be required to give good and sufficient bond to the state and to the United States, in such sums as the governor or the secretary of the navy may direct, and conditioned upon the faithful accounting for all public property and for the safekeeping of such part thereof as may be in the personal custody of such officer. Accounting officers may issue any or all such property to other officers or enlisted men of the naval militia under such rules and regulations as may be prescribed. (1917, c. 200, s. 71.)

§ 6842. Disbandment of naval militia. — No part of the naval militia which is entitled to compensation under the provisions of an act of congress approved August twenty-ninth, one thousand nine hundred and sixteen, shall be disbanded without the consent of the president. (1917, c. 200, s. 86.)

§ 6843. Courts-martial for naval militia.—Courts-martial in the naval militia shall consist of general courts-martial, summary courts-martial, and deck courts. (1917, c. 200, s. 72.)

§ 6844. General courts-martial.—General courts-martial shall consist of not less than three nor more than thirteen officers, and may be convened by order of the governor. (1917, c. 200, s. 73.)

§ 6845. Summary courts-martial. — Summary courts-martial may be ordered by the governor, or

by the commanding officers of a naval militia battalion or brigade. (1917, c. 200, s. 74.)

§ 6846. Deck courts.—Deck courts may be ordered by the commanding officer of a naval militia battalion or brigade, or by a naval militia officer in command of naval militia forces on shore or on any vessel loaned to the state or any vessel on which said forces may be serving. (1917, c. 209, s. 75.)

§ 6847. Jurisdiction and procedure of courts-martial and deck courts.—The above courts-martial and deck courts herein provided for shall be constituted and have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts-martial provided for in the navy of the United States; and the proceedings of the courts-martial of the naval militia shall follow the forms and modes of procedure prescribed for such courts in the navy of the United States. (1917, c. 200, s. 76.)

§ 6848. Place of holding courts.—Every precept or order for the convening of any such court may authorize the court to sit at any place or places within the territorial limits of the state as the convening authority may designate, and may further provide that any such court may be convened and sit on board any such naval or other vessel, wherever the same from time to time happens to be, or at such place or places ashore, outside the territorial limits referred to above, as in the judgment of the said convening authority may be convenient or desirable for the purposes of such courts-martial. (1917, c. 200, s. 77.)

§ 6849. Powers of general courts-martial.—General courts-martial shall have power to impose fines not exceeding two hundred dollars, to sentence to forfeiture of pay and allowances, to a reprimand, to dismissal or dishonorable discharge from the service, to reduction in rank or rating; or any two or more of such punishments may be conbined in the sentences imposed by such courts. (1917, c. 200, s. 78.)

§ 6850. Powers of summary courts-martial.—Summary courts-martial shall have the same powers of punishment as general courts-martial, except that fines imposed by summary courts-martial shall not exceed one hundred dollars. (1917, c. 200, s. 79.)

§ 6851. Powers of deck courts.—Deck courts may impose fines not exceeding fifty dollars for any single offense; may sentence enlisted men to reduction in rank or rating, to forfeiture of pay and allowances to a reprimand, to discharge with other than dishonorable discharge, or a fine in addition to any one of the other sentences specified. (1917, c. 200, s. 80.)

§ 6852. Process of courts-martial.—Presidents of general courts-martial, senior members of summary courts-martial, and deck court officers of the naval militia shall have the power to issue warrants to arrest accused persons, and to bring them before the court for trial whenever such persons have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue commitments in carrying out sentences of confinment, and to issue subpoenas and subpoenas duces tecum, and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer, all as authorized for similar proceedings for courts-martial in the navy of the United States. He shall also have power to punish for contempt occurring in the presence of the court. All processes, warrants, and sentences of such courts shall be executed by any sheriff or deputy sheriff or any constable or police officer of any township, county, city, or town who shall be authorized by law to execute or serve any civil or criminal process. (1917, c. 200, s. 83.)

§ 6853. Sentence to confinement in lieu of fines.—All courts-martial of the naval militia, including deck courts, shall have the power to sentence to confinement in lieu of fines authorized to be imposed, and shall have the power to direct that upon nonpayment of a fine the person convicted shall be confined in any county jail; but such sentences to confinement shall not exceed one day for each dollar of fine authorized. When naval militia forces are embarked on any vessel, the confinement in whole or in part may be had in prisons provided on said ship. (1917, c. 200, s. 81.)

§ 6854. Dismissal or dishonorable discharge.—No sentence of dismissal or dishonorable discharge from the naval militia shall, except when the naval militia shall have been called into the service of the United States, be executed without the approval of the governor. (1917, c. 200, s. 82.)

§ 6855. Collection of fines.—The amount of any fine imposed under sentence of the courts heretofore named on any member of the naval militia may be collected from him, or may be deducted from any amount due said member as accrued pay. (1917, c. 200, s. 94.)

§ 6856. Courts of inquiry.—Courts of inquiry in the naval militia shall be instituted, constituted, and conducted in the same manner and shall have like powers and duties as similar courts in the navy of the United States, except that they shall be ordered by the governor. (1917, c. 200, s. 85.)

Art. 5. Regulations as to Active Service

§ 6857. National guard and naval militia first ordered out.—In all cases the national guard and naval militia as provided for in this chapter shall be first ordered into service. (1917, c. 200, s. 44.)

§ 6858. Regulations enforced on actual service.—Whenever any portion of the militia shall be called into service to execute the law, suppress riot or insurrection, or to repel invasion, the articles of war, and articles for the government of the navy, governing the army and navy of the United States, and the regulations prescribed for the army and navy of the United States, and the registration issued thereunder, shall be enforced and regarded as a part of this chapter until said forces shall be duly relieved from such duty. As to offenses committed when such articles of war and articles for the government of the navy are so in force, courts-

martial shall possess, in addition to the jurisdiction and power of sentence and punishment herein vested in them, all additional jurisdiction and power of sentence and punishment exercisable by like courts under such articles of war and articles for the government of the navy or regulations or laws governing the United States army and navy or the customs and urges thereof; but no punishment under such rules and articles which will extend to the taking of life shall in any case be inflicted except in time of war, invasion, or insurrection, declared by a proclamation of the governor to exist, and then only after approval by the governor of the sentence inflicting such punishment. Imprisonment other than in guardhouse shall be executed in county jails or other prisons designated by the governor for that purpose. (1917, c. 200, s. 45.)

§ 6859. Regulations governing unorganized militia.—Whenever any part of the unorganized militia is ordered out, it shall be governed by the same rules and regulations and be subject to the same penalties as the national guard or naval militia. (1917, c. 200, s. 35.)

Art. 6. Unorganized Militia

§ 6860. Unorganized militia ordered out for service.—The commander-in-chief may at any time, in order to execute the law, suppress riots or insurrections, or repel invasions, in addition to the national guard, the national guard reserve, and the naval militia, order out the whole or any part of the unorganized militia. When the militia of this state or a part thereof is called forth under the constitution and laws of the United States, the governor shall first order out for service the national guard or naval militia, or such part thereof as may be necessary, and if the number available be insufficient, he shall then order out such a part of the unorganized militia as he may deem necessary. During the absence of organizations of the national guard or naval militia in the service of the United States, their state designations shall not be given to new organizations. (1917, c. 200, s. 46.)

§ 6861. Manner of ordering out unorganized militia.—The governor shall, when ordering out the unorganized militia, designate the number. He may order them out either by calling for volunteers or by draft. He may attach them to the several organizations of the national guard or naval militia, or organize them into separate brigades, regiments, battalions, companies, separate corps, batteries, troops, or divisions, as may be best for the service. (1917, c. 200, s. 47.)

§ 6862. Draft of unorganized militia.—If the unorganized militia is ordered out by draft, the governor shall designate the persons in each county to make the draft, and prescribe rules and regulations for conducting the same. (1917, c. 200, s. 48.)

§ 6863. Punishment for failure to appear.—Every member of the militia ordered out for duty, or who shall volunteer or be drafted, who does not appear at the time and place ordered, shall be liable to such punishment as a court-martial may determine. (1917, c. 200, s. 49.)

Art. 7. Pay of Militia

§ 6864. Rations and pay on service.—The militia of the state, both officers and enlisted men, when called into the service of the state, shall be rationed and receive the same pay as when called into the service of the United States. When called in aid of the civil authorities, enlisted men shall receive in addition to such pay the sum of one ($1.00) dollar per day. (Rev., s. 4856; Code, s. 3248; R. C., c. 70, s. 84; 1813, c. 850, s. 5; 1907, c. 316; 1917, c. 200, s. 50; 1935, c 452.)

Cross Reference. — As to National Guardsmen coming within the Workmen's Compensation Act when on duty, see § 6889 and the note thereto.

Editor's Note.—By the amendment of 1935 the fee was increased from sixty cents to one dollar per day.

§ 6865. Rate of pay for service.—The governor may, whenever the public service requires it, order upon special or regular duty any officer or enlisted man of the national guard or naval militia, and the expenses and compensation therefor of such officer and enlisted man shall be paid upon the approval of the governor and warrant of the auditor. Such officer and enlisted man shall receive the same pay as officers and enlisted men of the same grade and like service of the regular army or navy; but officers when on duty in connection with examining boards, efficiency boards, advisory boards and courts of inquiry shall be allowed actual expenses and four dollars per diem for such duty. Officers serving on general or special courts-martial shall receive the base pay of their rank. No staff officer who receives a salary from the state as such shall be entitled to any additional compensation other than actual and necessary expenses incurred while traveling upon orders issued by the proper authority. (1917, c. 200, s. 51; 1935, c. 451.)

Editor's Note. — The next to the last sentence of this section was inserted by the amendment of 1935.

§ 6866. Paid by the state.—When the militia or any portion thereof shall be called into service to execute the law, suppress riots or insurrections, and to repel invasions, the pay, subsistence, transportation, and other necessary expenses incident thereto shall be paid by the state treasurer, upon the approval of the governor and warrant of the auditor. (1917, c. 200, s. 52.)

Editor's Note.—In the case of Worth v. Commissioners, 118 N. C. 112, 24 S. E. 778 it was held in construing the prior law that the state should pay the cost of a militia when it is called out by the governor to aid a sheriff in executing a writ of possession; Clark and Montgomery J. dissenting on the grounds that the county should pay the expense as it was for the county, and the rest of the state should not have to pay for the privilege of serving the county. In the earlier case of Commissioners v. Commissioners, 75 N. C. 240 it was said that a county could not recover back money voluntarily paid for the upkeep of a militia while in its service, although there was no debt, and the county could not have been forced to pay.

§ 6867. Pay of general and field officers.—General and field officers when away from their home stations visiting the organizations of their commands, for inspection and instruction under orders from proper authority, shall receive actual necessary expenses and the pay of their rank. (1917, c. 200, s. 53.)

§ 6868. Pay and care of soldiers injured in service.—A member of the national guard and naval militia who shall, when on duty or assembled

therefor in case of riot, tumult, breach of peace, insurrection, or invasion, or to repel invasion or in aid of the civil authorities, receive any injury, or incur or contract any disability or disease, by reason of such duty or assembly therefor, or who shall without fault or neglect on his part be wounded or disabled while in line of duty, which shall temporarily incapacitate him from pursuing his usual business or occupation, shall during the period of such incapacity receive the actual necessary expenses for care and medicine and medical attendance, to be paid out of the state treasury from funds not otherwise appropriated, upon order of the governor and warrant of the auditor. (1917, c. 200, s. 54.)

Art. 8. Privilege of Organized Militia

§ 6869. Leaves of absence for state officers and employees.—All officers and employees of the state who shall be members of the national guard or naval militia shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this chapter. (1917, c. 200, s. 88.)

§ 6870. Exemption from road and jury duty.—All members of the national guard and naval militia who comply with and perform all duties required of them as members of the national guard and naval militia are hereby exempted from duty upon the public roads of the counties in which they reside, and shall also be exempt from service as jurors. On the first day of January and July of each year, beginning with the first day of July, one thousand nine hundred and seventeen, the commanding officer of each company, troop, battery, detachment, or division of the national guard and naval militia of North Carolina, residing in the above mentioned counties, shall file with the clerk of the superior court of the county in which such company, troop, battery, detachment, or division is located a statement giving the name and rank of each member of his organization who has performed all military duties during the preceding six months; and any member of such military organization whose name does not appear upon such statement shall not receive the benefit of the exemption provided for herein during the six months immediately following the filing of the statement. (1913, c. 103; 1915, c. 217; 1917, c. 200, s. 89.)

§ 6871. Contributing members.—Each organization of the national guard and naval militia may, besides its regular and active members, enroll twenty-five contributing members on payment in advance by each person desiring to become such contributing member of not less than ten dollars per annum, which money shall be paid into the company treasury. Each contributing member shall be entitled to receive from the commanding officer thereof a certificate of membership, which certificate shall exempt the holder from jury duty. (1917, c. 200, s. 90.)

§ 6872. Organizations may own property.—Organizations of the national guard and naval militia shall have the right to own and keep real and personal property, which shall belong to and be under the control of the members of the organization; and the commanding officer of any organization debts or effects belonging to it, or damages for injury to such property, action for such recovery to be brought in the name of the commanding officer thereof before any court of justice within the state having jurisdiction; and no suit or complaint pending in his name shall be abated by his ceasing to be commanding officer of the organization; but upon motion of the commander succeeding him such commander shall be admitted to prosecute the suit or complaint in like manner and with like effect as if it had been originally commenced by him. (1917, c. 200, s. 92.)

§ 6873. When families of soldiers supported by county.—When any citizen of the state is absent on duty as a member of the national guard or naval militia and his family are unable to support themselves during his absence, the board of commissioners of his county, on application, shall make towards their maintenance such allowances as may be deemed reasonable. (1917, c. 200, s. 93.)

Art. 9. Care of Military Property

§ 6874. Custody of military property.—All public military property, except when used in the performance of military duty, shall be kept in armories, or other properly designated places of deposit; and it shall be unlawful for any person charged with the care and safety of said public property to allow the same out of his custody, except as above specified. (1917, c. 200, s. 38.)

§ 6875. Property deposited in arsenal.—All the public arms of every description which may not be distibuted among the militia according to law shall be deposited and kept in the public arsenal established at Raleigh. (1917, c. 200, s. 39.)

§ 6876. Arsenal provided.—The board of public buildings and grounds shall provide a suitable building for an arsenal. The governor may make such provisions as he may deem necessary for the care and issue of property and for guarding and protecting the arsenal, and for the purpose of defraying the expenses under this section. He may, upon certificate of the adjutant general and warrant of the auditor, from time to time draw upon the treasurer for such sums as may be necessary. (1917, c. 200, s. 96.)

§ 6877. Property kept in good order.—Every noncommissioned officer and private belonging to any company equipped with public arms shall keep and preserve his arms and accoutrements in good order and in a soldierly manner; and for every neglect to do so may be punished as a court-martial may direct. (1917, c. 200, s. 40.)

§ 6878. Horses and vehicles used only for military purposes.—Horses, motor trucks, and other vehicles issued by the secretary of war to the national guard shall be used solely for military purposes. Necessary expense in maintaining such horses, trucks, or vehicles, not provided for by the federal government to include stables, storage, and other incidental expenses, shall be a proper charge against funds appropriated for the national guard: Provided, such expense shall be

specifically authorized by the governor and certified to by the adjutant general. (1917, c. 200, s. 41; 1921, c. 120, s. 9.)

§ 6879. Transfer of property.—All officers accountable or responsible for public funds, property, or books, before being relieved from the duty shall turn over the same according to the regulations prescribed by the governor. (1917, c. 200, s. 42.)

§ 6880. Replacement of lost or damaged property.—Whenever any military property issued to the militia of the state shall have been lost, damaged, or destroyed, and upon report of a disinterested survey officer of the regular army, navy, or the militia it shall appear that the loss, damage, or destruction of property was due to carelessness or neglect, or that its loss, damage, or destruction could have been avoided by the exercise of reasonable care, the money value of such property shall be charged to the accountable and responsible officer or enlisted man, and the pay of such officers and enlisted men from both federal and state funds at any time accruing may be stopped and applied to the payment of any such indebtedness until the same is discharged. In addition thereto any officer accountable or responsible for military property shall be liable on his bond to the state and the property and disbursing officer or accounting officer for any lost, damaged, or destroyed property for which he is accountable or responsible. (1917, c. 200, s. 43.)

§ 6881. Injuring military property.—If any person shall wantonly or wilfully injure or destroy any arms, equipment, or other military property of the state, and refuse to make good such injury or loss, or shall sell, dispose of, secrete, or remove the same with intent to sell or dispose thereof, he shall be fined not more than one hundred dollars or imprisoned not more than six months, or both. (Rev., s. 3536; Code, s. 3274; 1876-7, c. 272, s. 19.)

§ 6882. Member of national guard failing to return property.—If any member of the North Carolina national guard shall wilfully fail to return any property of the state or the United States to the armory or other place of deposit, when notified by competent authority so to do, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (Rev., s. 3537.)

§ 6883. Selling accoutrements.—If any person shall sell, dispose of, pawn or pledge, destroy or injure, or wilfully retain after demand made, any public property issued for the purpose of arming or equipping the militia of the state, he shall be guilty of a misdemeanor. (Rev., s. 3541; Code, s. 3274; 1893, c. 374, s. 30.)

§ 6884. Selling public arms.—If any person to whom shall be confided public arms or accoutrements shall sell, or in any manner embezzle the same, or any part thereof, or if any person shall purchase any of them, knowing them to be such, the person so offending shall be guilty of a misdemeanor. (Rev., s. 3542; Code, s. 3556; R. C., c. 89, s. 8; 1831, c. 45, s. 5.)

§ 6885. Refusing to deliver public arms on demand.—Every commissioned officer of the militia, whenever and wherever he shall see or learn that any of the arms or accoutrements or other military property belonging to the state is in the possession of any person other than in whose hands they may be placed for safekeeping, under the provisions of the law, shall make immediate demand for the same personally or in writing; and should such person refuse to deliver them to the officer he shall be guilty in like manner, and punished in like manner as for selling or embezzling public arms. (Rev., s. 3540; Code, s. 3558; R. C., c. 89, s. 10; 1831, c. 45, s. 7.)

§ 6886. Freight on property paid out of general fund.—The auditor of the state is hereby authorized and directed to issue his warrant upon the state treasurer for the payment of such sums as may be certified by the adjutant general and the governor to be actually necessary to pay freight upon ammunition, uniforms, and equipment shipped out from and returned to the state arsenal. (1917, c. 200, s. 95.)

Art. 10. Support of Militia

§ 6887. Requisition for funds.—The governor shall make requisition upon the secretary of war for such state allotment from federal funds as may be necessary for the support of the militia. (1917, c. 200, s. 23; 1921, c. 120, s. 10.)

§ 6888. County appropriations.—The county commissioners may appropriate such sums of money to the various organizations of the national guard or naval militia in their counties and at such times as the board may deem proper. (1917, c. 200, s. 91.)

§ 6889. Allowances made to different organizations; appropriation.—The commanding officer of each brigade, regiment, the coast artillery, and the naval militia, shall maintain a headquarters office, for which actual expense therefor shall be allowed, to include office rent, light, heat, stamps, stationery, printing, and other necessary expenses, not to exceed two hundred and twenty-five dollars per annum. The commanding officer of each squadron of cavalry, battalion of engineers, or other like units, duly authorized by the secretary of war, shall maintain a headquarters office, for which actual expenses therefor shall be allowed, to include office rent, light, heat, stamps, stationery, printing, and other necessary expenses, not to exceed the sum of one hundred and twenty-five dollars per annum. There shall be allowed to each major of the line not exceeding one hundred dollars per annum with which to defray the necessary expenses of their respective officers. The chief surgeon and the commanding officer of each company of infantry, headquarters company, supply company, machine-gun company, coast artillery company, company of engineers, battery of field artillery, signal corps company, troop of cavalry, field hospital, ambulance company, aero squadron, division of naval militia, company of marines, and aeronautic section, and similar units prescribed by the war department in its table of organization for the national guard, shall be allowed annually the sum of not exceeding two hundred dollars, to be determined by the adjutant-general of the state under rules and regulations

prescribed by him; each lieutenant of such organizations and other officers of corresponding grades and duties in the naval militia, the sum of not exceeding one hundred dollars ($100), to be determined by the Adjutant General of the State according to rules and regulations prescribed by him; regimental adjutants of separate battalion, squadrons and similar units, the sum of not exceeding one hundred dollars to be determined by the Adjutant General of the State according to rules and regulations prescribed by him; the commanding officer of each medical detachment, the sum of not exceeding one hundred dollars ($100), in accordance with rules and regulations prescribed by the Adjutant General of the State, for the purpose of defraying the necessary expenses of their respective offices. There shall be allowed annually to each company of infantry, headquarters company, supply company, machine-gun company, coast artillery company, company of engineers, battery of field artillery, signal corps company, troop of cavalry, field hospital, ambulance company, aero squadron, aeronautic section, division of naval militia, or company of marines, and similar units prescribed by the war department in its table of organization for the national guard, not to exceed the sum six hundred dollars, and to each regimental infirmary the sum of one hundred and fifty dollars, and to each sanitary detachment the sum of one hundred dollars, to be applied to the payment of armory rent, heat, light, stationery, printing, and other necessary expenses. There shall be allowed annually to the supply sergeant of each company of infantry, headquarters company, supply company, machine-gun company, coast artillery company, company of engineers, battery of field artillery, signal corps company, troop of cavalry, field hospital, ambulance company, aero squadron, and to a petty officer of each division of naval militia, aeronautic section, marine company, and supply sergeants of similar units, the sum of one hundred dollars and to corresponding warrant offices of each regimental infirmary and sanitary detachment the sum of twenty-five dollars. There shall be paid monthly to stable sergeants the sum of fifteen dollars, and to the horseshoers, ten dollars, of units entitled to and actually having animals to care for. Each enlisted man belonging to an organization of the national guard shall receive fifty cents as compensation for each armory drill, not exceeding sixty drills per annum, ordered for his organization, where he is officially present and in which he participates, the said compensation to be paid in the same manner and under such laws and regulations as now or hereafter may be prescribed by the United States government or by the war department thereof for pay for national guard enlisted men: and provided further, that the appropriation made by the state of North Carolina for the support of the national guard is sufficient after the payment of other necessary expenses of maintaining said guard, to make such payment.

All payments are to be made by the state disbursing officer in semiannual installments on the first day of July and the first day of January of each year; but no payment shall be made unless all drills and parades required by law are duly performed by all organizations named. No officer shall be entitled to receive any part of the amounts named herein unless he has performed satisfactorily all duties required of him by law and has pursued such course of instruction as may from time to time be required.

The commanding officers of all organizations participating in the appropriations herein made shall render an itemized statement of all funds received from any source whatsoever for the support of their respective organizations in such manner and on such forms as may be prescribed by the adjutant-general. Failure on the part of any officer to submit promptly when due the financial statement of his organization will be sufficient cause to withhold all appropriations for such organizations.

The sum of sixty-five thousand dollars is hereby appropriated annually, out of any moneys in the treasury not otherwise appropriated. All moneys not used by January first of each year shall be paid to the state treasurer and turned into the general fund of the state. (1917, c. 200, s. 97; 1919, c. 311; 1921, c. 120, s. 11; 1923, c. 24; 1924, c. 6; 1927, c. 227, s. 2.)

By this and § 6864 the State has provided for payment in a certain manner to privates who have enlisted in the North Carolina National Guard, and a private therein who has taken the prescribed oath is an employee of the State within the meaning of the Workmen's Compensation Act, and where he has sustained an injury arising out of and in the course of the performance of his duties as an enlisted man he is entitled to the compensation prescribed by the statute. Baker v. State, 200 N. C. 232, 156 S. E. 917.

Art. 11. General Provisions

§ 6890. Reports of officers.—All officers of the national guard and the naval militia shall make such returns and reports to the governor, secretary of war, secretary of the navy, or to such officers as they may designate, at such times and in such forms as may from time to time be prescribed. (1917, c. 200, s. 21.)

§ 6891. Officer to give notice of absence.—When any officer shall have occasion to be absent from his usual residence one week or more, he shall notify the officer next in command, and also his superior officer in command, of his intended absence, and shall arrange for the officer next in command to handle and attend to all official communications. (1917, c. 200, s. 22.)

§ 6892. Articles of war applicable in time of peace.—The national guard and naval militia, when not in the service of the United States, shall, except as to punishments, be governed respectively by the United States army regulations and articles of war, and the navy regulations and articles for the government of the navy. (1917, c. 200, s. 34.)

§ 6893. Commanding officer may prevent trespass and disorder.—The commanding officer upon any occasion of duty may place in arrest during the continuance thereof any person who shall trespass upon the camp ground, parade ground, armory, or other place devoted to such duty, or who shall in any way or manner interrupt or molest the orderly discharge of duty by those under arms or shall disturb or prevent the passage of troops going to or returning from any duty.

He may prohibit and prevent the sale or use of all spirituous liquors, wine, ale, beer or cider, the holding of huckster or auction sales, and all gambling within the limits of the post, camp ground, place of encampment, parade, or drill under his command, or within such limits not exceeding one mile therefrom as he may prescribe. And he may in his discretion abate as common nuisance all such sales. (1917, c. 200, s. 94.)

§ 6894. Organizing company without authority.—If any person shall organize a military company, or drill or parade under arms as a military body, except under the militia laws and regulations of the state, or shall exercise or attempt to exercise the power or authority of a military officer in this state, without holding a commission from the governor, he shall be guilty of a misdemeanor. (Rev., s. 3538; 1893, c. 374, s. 38.)

§ 6895. Placing name on muster roll wrongfully.—If any officer of the militia of the state shall knowingly or wilfully place, or cause to be placed, on any muster roll the name of any person not regularly or lawfully enlisted, or the name of any enlisted man who has been discharged, transferred, or has lost membership for any cause whatsoever, or who has been convicted of any infamous crime, he shall be guilty of a misdemeanor. (Rev., s. 3539; 1893, c. 374, s. 33.)

§ 6895(a). Protection of the uniform.—It shall be unlawful for any person not an officer or enlisted man in the United States army, navy, or marine corps, to wear the duly prescribed uniform of the United States army, navy, or marine corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States army, navy, or marine corps: Provided, that the foregoing provisions shall not be construed so as to prevent officers or enlisted men of the national guard from wearing, in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers or enlisted men of the national guard; nor to prevent members of the organization known as the Boy Scouts of America, or the naval militia, or such other organizations as the secretary of war may designate, from wearing their prescribed uniforms; nor to prevent persons who in time of war have served honorably as officers of the United States army, navy, or marine corps, regular or volunteer, and whose most recent service was terminated by an honorable discharge, mustered out, or resignation, from wearing, upon occasions of ceremony, the uniform of the highest grade they have held by brevet or other commission in such regular or volunteer sevice; nor to prevent any person who has been honorably discharged from the United States army, navy, or marine corps, regular or volunteers, from wearing his uniform from the place of his discharge to his home within three months after his discharge; nor to prevent the members of military societies composed entirely of honorably discharged officers and enlisted men, or both, of the United States army, navy or marine corps, regular or volunteers, from wearing, upon occasions of ceremony, the uniform duly prescribed by such societies to be worn by members thereof; nor to prevent the instructors and members of the duly organized cadet corps of a state university, state college, or public high school offering a regular course in military instruction from wearing the uniform duly prescribed by the authorities of such university, college, or public high school for wear by the instructors and members of such cadet corps; nor to prevent the instructors and members of a duly organized cadet corps of any other institution of learning offering a regular course in military instruction, and at which an officer or enlisted man of the United States army, navy, or marine corps is lawfully detailed for duty as instructor in military science and tactics, from wearing the uniform duly prescribed by the authorities of such institution of learning for wear by the instructors and members of such cadet corps; nor to prevent civilians attendant upon a course of military or naval instruction authorized and conducted by the military or naval authorities of the United States from wearing, while in attendance upon such course of instruction, the uniform authorized and prescribed by such military or naval authorities for wear during such course of instruction; nor to prevent any person from wearing the uniform of the United States army, navy, or marine corps, in any playhouse or theater, or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States army, navy, or marine corps: Provided further, that the uniform worn by officers or enlisted men of the national guard, or by the members of the military societies, or the instructors and members of the cadet corps referred to in the preceding proviso, shall include some distinctive mark or insignia to be prescribed by the secretary of war to distinguish such uniforms from the uniforms of the United States army, navy, or marine corps; and provided further, that the members of the military societies and the instructors and members of the cadet corps hereinbefore mentioned shall not wear the insignia of rank prescribed to be worn by the officers of the United States army, navy, or marine corps, or any insignia of rank similar thereto. Any person who offends against the provisions of this section, shall on conviction, be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment. (1921, c. 120, s. 12.)

§ 6895(b). Upkeep of camps.—There shall be paid from the appropriations from the national guard such amounts as may be necessary for the maintenance, upkeep, and improvement of the state camp or camps: Provided, such expenditures shall be approved and authorized by the governor. (1921, c. 120, s. 13.)

CHAPTER 112

MINES

Art. 1. Operation of Mines

§ 6896. Lessor not held partner of lessee.—No lessor of property, real or personal, for mining purposes, although the lessor may receive an uncertain sum of the proceeds or net profits, or any

other consideration, which, though uncertain at first, may afterwards become certain, shall be held as a partner of the lessee; nor shall any of the legal or equitable relations or liabilities of copartners exist between them, unless it is so stipulated in the contract between the lessor and lessee. (Rev., s. 4930; Code, s. 3292; R. C., c. 72; 1830, c. 46.)

§ 6897. Minors under sixteen not to be employed.—No minor under sixteen years of age shall be allowed to work in any mine, and in all cases of minors applying for work the agent of such mine shall see that the provisions of this section are not violated; and the inspector may, when doubt exists as to the age of any person found working in any mine, examine under oath such person and his parents, or other witnesses, as to his age. (Rev., s. 4931; 1897, c. 251, s. 7; 1919, c. 100, s. 6.)

§ 6898. Operator to furnish timber.—The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working place of the miner, and no miner shall be held responsible for accident which may occur in the mine where the provisions of this section have not been complied with by the owner, agent, or operator thereof, resulting directly or indirectly from the failure to deliver such timber. (Rev., s. 4932; 1897, c. 251, s. 8.)

§ 6899. Unused mines to be fenced.—All underground entrances to any place not in actual course of working or extension shall be properly fenced across the whole width of such entrance so as to prevent persons from inadvertently entering the same. (Rev., s. 4933; 1897, c. 251, s. 5.)

§ 6900. Means of ingress and egress provided.—No owner or agent of any coal mine worked by shaft shall permit any person to work therein unless there are, to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine; but is not necessary for the two outlets to belong to the same mine if the persons employed therein have safe, ready, and available means of ingress or egress by not less than two openings. This section shall not apply to opening a new mine while being worked for the purpose of making communications between the two outlets, so long as not more than twenty persons are employed at one time in such mine; neither shall it apply to any mine or part of a mine in which the second outlet has been rendered unavailable by reason of the final robbing of pillars previous to abandonment, as long as not more than twenty persons are employed therein at any one time. The cage or cages and other means of egress shall at all times be available for the persons employed when there is no second outlet. The escapement shafts shall be fitted with safe and available appliances, which shall always be kept in a safe condition, by which the persons employed in the mine may readily escape in case an accident occurs; and in no case shall an air shaft with a ventilating furnace at the bottom be construed to be an escapement shaft within the meaning of this section. To all other coal mines, whether slopes or drifts, two such openings or outlets must be provided within twelve months after shipments of coal have commenced from such mine; and in case such outlets are not provided as herein stipulated, it shall not be lawful for the agent or owner of such slope or drift to permit more than ten persons to work therein at any one time. (Rev., s. 4934; 1897, c. 251, s. 4.)

§ 6901. Hoisting engines; how operated.—No owner or agent of any mine operated by a shaft or slope shall place in charge of any engine used for lowering into or hoisting out of mines persons employed therein any but experienced, competent, and sober engineers, and no engineers in charge of such engine shall allow any persons except as may be deputed for such purposes by the owner or agent to interfere with it or any part of the machinery, and no person shall interfere or in any way intimidate the engineer in the discharge of his duties, and in no case shall more than six men ride on any cage or car at one time, and no person shall ride upon a loaded cage or car in any shaft or slope. (Rev., s. 4935; 1897, c. 251, s. 6; 1911, c. 183.)

§ 6902. Ventilation.—The owner or agent of any coal mine, whether shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet per minute per person employed in such mine, which shall be circulated and distributed throughout the mine in such a manner as to dilute, render harmless and expel the poisonous and noxious gases from every working place in the mine. No working place shall be driven more than sixty feet in advance of a break-through or airway, and all break-throughs or airways, except those last made near the working places of the mine, shall be closed up by brattice trap-doors, or otherwise, so that the currents of air in circulation in the mine may spread to the interior of the mine when the persons employed in such mine are at work. All mines governed by this chapter shall be provided with artificial means of producing ventilation, such as forcing or suction fans, exhaust steam furnaces, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air, and all mines generating fire damp shall be kept free from standing gas. (Rev., s. 4936; 1897, c. 251, s. 5.)

§ 6903. Daily examinations; safety lamps.—Every working place shall be examined every morning with a safety lamp by a competent person before any workmen are allowed to enter the mine. All safety lamps used in examining mines, or for working therein, shall be the property of the operator of the mine, and a competent person shall be appointed, who shall examine every safety lamp before it is taken into the workings for use, and ascertain it to be clean, safe, and securely locked, and safety lamps shall not be used until they have been so examined and found safe and clean and securely locked, unless permission be first given by the mine foreman to have the lamps used unlocked. No one except the duly authorized person shall have in

his possession a key, or any other contrivance, for the purpose of unlocking any safety lamp in any mine where locked lamps are used. No matches or any other apparatus for striking lights shall be taken into any mine, or parts thereof, except under the direction of the mine foreman. (Rev., s. 4937; 1897, c. 251, ss. 5, 6.)

§ 6904. Report of ventilation.—The mine foreman shall measure the ventilation at least once a week, at the inlet and outlet, and also at or near the face of all the entries, and the measurement of air so made shall be noted on blanks furnished by the inspector; and on the first day of each month the mine boss of each mine shall sign one of such blanks, properly filled with the actual measurement, and present the same to the inspector. (Rev., s. 4938; 1897, c. 251, s. 6.)

§ 6905. Notice of opening or changing mines given.—The owner, agent, or manager of any mine shall give notice to the inspector in the following cases: 1. When any working is commenced for the purpose of opening a new shaft, slope, or mine, to which this chapter applies. 2. When any mine is abandoned, or the working thereof discontinued. 3. When the working of any mine is recommenced after an abandonment or discontinuance for a period exceeding three months. 4. When a squeeze or crush, or any other cause or change, may seem to affect the safety of persons employed in the mine, or when fire occurs. (Rev., s. 4939; 1897, c. 251, s. 7.)

§ 6906. Notice of accidents given.—The owner, agent, or manager of every mine shall, within twenty-four hours next after any accident or explosion, whereby loss of life or personal injury may have been occasioned, send notice, in writing, by mail or otherwise, to the inspector, and shall specify in such notice the character and cause of the accident, and the name or names of the persons killed and injured, with the extent and nature of the injuries sustained. When any personal injury of which notice is required to be sent under this section results in the death of the person injured, notice in writing shall be sent to the inspector within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager; and when loss of life occurs in any mine by explosion, or accident, or results from personal injuries so received, the owner, agent, or manager of such mine shall notify the coroner of the county in which such mine is situated, and the coroner shall hold an inquest upon the body of the person whose death has been thus caused, and inquire carefully into the cause thereof, and return a copy of the finding of the jury and all the testimony to the inspector. (Rev., s. 4940; 1897, c. 251, s. 6.)

§ 6907. Report to inspector.—The owner, lessee, or agent in charge of any mine, any limestone quarry, or who is engaged in mining or producing any mineral whatsoever in this state, shall, on or before the thirtieth day of November in every year, send to the office of the inspector upon blanks to be furnished by him a correct return, specifying with respect to the year ending on the preceding first day of October the quantity of coal, iron ore, fire-clay, limestone, or other mineral product of such mine or quarry, and the number of persons ordinarily employed in or about such mine or quarry below and above ground, distinguishing the persons and labor below ground and above ground. (Rev., s. 4941; 1897, c. 251, s. 3.)

§ 6908. Liability for injuries.—For any injury to person or property occasioned by any wilful violation of this chapter, or any wilful failure to comply with its provisions, by any owner, agent, or manager of the mine, a right of action shall accrue to the party injured for any damage he may sustain thereby; and in any case of loss of life by reason of such wilful neglect or failure a right of action shall accrue to the personal representative of the deceased, as in other actions for wrongful death. (Rev., s. 4942; 1897, c. 251, s. 6.)

§ 6909. Punishment for violation.—If any person shall knowingly violate any of the provisions of the law relating to mines or shall do anything whereby the life or health of persons or the security of any mine and machinery is endangered, or if any miner or other person employed in any mine governed by the statutes shall intentionally or wilfully neglect or refuse to securely prop the roof of any working place under his control, or neglect or refuse to obey any orders given by the superintendent of a mine in relation to the security of a mine in the part thereof where he is at work and for fifteen feet back of his working place, or if any miner, workman, or other person shall knowingly injure any water-gauge, barometer, air-course, or brattice, or shall obstruct or throw open any airways, or shall handle or disturb any part of the machinery of the hoisting engine or signaling apparatus or wire connected therewith, or air pipes or fittings, or open a door of the mine and not have the same closed again, whereby danger is produced either to the mine or those that work therein, or shall enter any part of the mine against caution, or shall disobey any order given in pursuance of law, or shall do any wilful act whereby the lives and health of the persons working in the mine or the security of the mine or the machinery thereof is endangered, or if the person having charge of a mine whenever loss of life occurs by accident connected with the machinery of such mine or by explosion shall neglect or refuse to give notice thereof forthwith by mail or otherwise to the inspector and to the coroner of the county in which such mine is situated, or if any such coroner shall neglect or refuse to hold an inquest upon the body of the person whose death has been thus caused, and return a copy of his findings and a copy of all the testimony to the inspector, he shall be guilty of a misdemeanor, and upon conviction fined not more than fifty dollars or imprisoned in the county jail not more than thirty days, or both. (Rev., s. 3797; 1897, c. 251, s. 8.)

Art. 2. Inspection of Mines

§ 6910. Commissioner of labor and printing is inspector.—The commissioner of labor and printing shall perform the duties of mine inspector as provided in this chapter. (Rev., s. 4943; 1897, c. 251, s. 1.)

§ 6911. Inspector to examine mines.—It shall be the duty of the inspector te examine all the

mines in the state as often as possible to see that all the provisions and requirements of this chapter are strictly observed and carried out; he shall particularly examine the works and machinery belonging to any mine, examine into the state and condition of the mines as to ventilation, circulation, and condition of air, drainage, and general security. (Rev., s. 4944; 1897, c. 251, s. 2.)

§ 6912. May enter to make examinations. — For the purpose of making the inspection and examinations provided for in this chapter, the inspector shall have the right to enter any mine at all reasonable times, by night or by day, but in such manner as shall not unnecessarily obstruct the working of the mine; and the owner or agent of such mine is hereby required to furnish the means necessary for such entry and inspection; the inspection and examination herein provided for shall extend to fire-clay, iron ore, and other mines as well as coal mines. (Rev., s. 4945; 1897, c. 251, s. 2.)

§ 6913. Death by accident investigated. — Upon receiving notice of any death resulting from accident it shall be the duty of the inspector to go himself, or send a representative, at once to the mine in which the death occurred and inquire into the cause of the same, and to make a written report fully setting forth the condition of that part of the mine where such death occurred and the cause which led to the same; which report shall be filed by the inspector in his office as a matter of record and for future reference. (Rev., s. 4946; 1897, c. 251, s. 6.)

§ 6914. Record of examinations. — He shall make a record of all examinations of mines, showing the date when examination is made, the condition in which the mines are found, the extent to which the laws relating to mines and mining are observed or violated, the progress made in the improvements and security of life and health sought to be secured by the provisions of this chapter, number of accidents, injuries received, or deaths in or about the mines, the number of mines in the state, the number of persons employed in or about each mine, together with all such other facts and information of public interest, concerning the condition of mines, development and progress of mining in the state as he may think useful and proper, which record shall be filed in the office of the inspector, and as much thereof as may be of public interest to be included in his annual report. (Rev., s. 4947; 1897, c. 251, s. 2.)

§ 6915. Papers to be preserved. — He shall keep in his office and carefully preserve all maps, surveys, and other reports and papers required by law to be filed with him, and so arrange and preserve the same as shall make them a permanent record of ready, convenient, and connected reference. (Rev., s. 4948; 1897, c. 251, s. 3.)

§ 6916. Inspector to enforce law; counsel furnished.—In case of any controversy or disagreement between the inspector and the owner or operator of any mine or the persons working therein, or in case of conditions or emergencies requiring counsel, the inspector may call on the governor for such assistance and counsel as may be necessary. If the inspector finds any of the provisions of this chapter violated or not complied with by any owner, lessee, or agent in charge, unless the same is within a reasonable time rectified, and the provisions of this chapter fully complied with, he shall institute an action in the name of the state to compel the compliance therewith. The inspector shall exercise a sound discretion in the enforcement of this chapter. (Rev., s. 4949; 1897, c. 251, s. 2.)

§ 6917. Operation enjoined when law violated. —On application of the inspector, after suit brought as directed in the preceding section, any court of competent jurisdiction may enjoin or restrain the owner or agent from working or operating such mine until it is made to conform to the provisions of this chapter; and such remedy shall be cumulative, and shall not take the place of or affect any other proceedings against such owner or agent authorized by law for the matter complained of in such action. (Rev., s. 4950; 1897, c. 251, s. 7.)

§ 6918. Report to governor. — The inspector shall annually make report to the governor of all his proceedings, the condition and operation of the different mines of the state, and the number of mines and the number of persons employed in or about such mines, the amount of coal, iron ore, limestone, fire-clay, or other mineral mined in this state; and he shall enumerate all accidents in or about the mines, and the manner in which they occurred, and give all such other information as he thinks useful and proper, and make such suggestions as he deems important relative to mines and mining, and any legislation that may be necessary on the subject for the better preservation of the life and health of those engaged in such industry. (Rev., s. 4951; 1897, c. 251, s. 3.)

§ 6919. Application of law. — The provisions of this chapter shall not apply to or affect any mine in which not more than ten men are employed at the same time; but the inspector shall at all times have free ingress to such mines for the purpose of examination and inspection, and shall direct and enforce any regulation in accordance with the provisions of this chapter that he may deem necessary for the safety of the health and lives of the miners employed therein. (Rev., s. 4952; 1897, c. 251, s. 8.)

Art. 3. Waterways Obtained

§ 6920. Water and drainage rights obtained.— Any person or body corporate engaged or about to engage in mining, who may find it necessary for the furtherance of his operations to convey water either to or from his mine or mines over the lands of any other person or persons, may make application by petition in writing to the clerk of the superior court of the county in which the lands to be affected or the greater part are situate, for the right so to convey such water. The owner of the lands to be affected shall be made a party defendant, and the proceeding shall be conducted as other special pro-

ceedings. (Rev., s. 4953; Code, ss. 3293, 3294, 3300; 1871-2, c. 158, ss. 1, 3.)

§ 6921. The petition, what to contain. — The petition shall specify the lands to be affected, the name of the owner of such lands, and the character of the ditch or drain intended to be made. (Rev., s. 4954; Code, s. 3294; 1871-2, c. 158, s. 3.)

§ 6922. Appraisers; appointment and duties. — Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons, qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the lands by the contemplated work, and shall issue a notice to them to meet upon the premises at a day specified, not to exceed ten days from the date of such notice. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by such work, and assess the damage thereto, and make report thereof under their hands and seals to the clerk from whom the notice issued. (Rev., s. 4955; Code, ss. 3295, 3296, 3299; 1871-2, c. 158, ss. 4, 5, 9.)

§ 6923. Confirmation of report; payment of damages; rights of petitioner. — After the filing of the report and confirmation thereof by the clerk, who shall have power to confirm or, for good cause, set aside the same, the petitioner shall have full right and power to enter upon such lands and make such ditches, drains, or other necessary work: Provided, he has first paid or tendered the damages, assessed as above, to the owner of such lands or his known and recognized agent, if he be a resident of this state, or have such agent in this state. If the owner be a nonresident and have no known agent in this state, the amount so assessed shall be paid by the petition into the office of the clerk of the superior court of the county for the use of such owner. (Rev., s. 4957; Code, s. 3298; 1871-2, c. 158, s. 12.)

§ 6924. Registration of report.—The petitioner, or any other person interested, may have the report of the appraisers registered upon the certificate of the clerk and shall pay the register a fee of twenty-five cents therefor. (Rev., s. 4957; Code, s. 3298; 1871-2, c. 158, s. 8.)

§ 6925. Obstructing mining drains.—If any person shall obstruct any drain or ditch constructed under the provisions of this chapter, he shall be guilty of a misdemeanor. (Rev., s. 3380; Code, s. 3301; 1871-2, c. 158, s. 12.)

§ 6926. Disposition of waste.—In getting out and washing the products of kaolin mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams. (1917, c. 123.)

Art. 4. Adjustment of Conflicting Claims

§ 6927. Liability for damage for trespass.—If any owner or person in possession of any mine or mining claim shall enter upon, either on the surface or underground, any mine or mining claim, the property of another, and shall mine or carry away any valuable mineral therefrom, he shall be liable to the owner of the mine so trespassed upon for double the value of all such mineral mined or carried away and all other damages, and the value of the mineral mined or carried away shall be presumed to be the amount of the gross value ascertained by an average assay of the excavated material or vein or ledge from which it was taken. If such trespass is wrongfully and wilfully made, punitive damages may be allowed. (1913, c. 51, s. 1.)

§ 6928. Persons entitled to bring suit.—The owner of a mine in this state, or any person in possession under a lease or other contract, may maintain an action to recover damages to such property arising from the operation of any adjacent mine by the owner thereof or other person in possession and working the same under lease or contract, and also to prevent the continuance of the operation of the adjacent mine in such a manner as to injure or endanger the safty of the complainant's mine. (1913, c. 51, s. 1.)

§ 6929. Application and order for survey.—The person entitled to bring an action, as provided in the preceding section, may apply to any judge of the superior court having jurisdiction to grant injunctions and restraining orders, and obtain an order of survey in the following manner: He shall file an affidavit giving the names of the parties and the location of the plaintiff's mine, and that he has reason to believe that the defendant, or his agents or employees, are or have been trespassing upon his mine, or working the defendant's mine in such a manner as to damage or endanger the plaintiff's property. Upon the filing of the affidavit, the judge shall cause a notice to be issued to the defendant or his agents, stating the time and place before whom the application will be heard, and requiring them to appear, in not less than ten nor more than twenty days from the date thereof, and show cause why an order of survey should not be granted. Upon the hearing, and for good cause shown, the judge shall grant an order directed to some competent disinterested surveyor or mining engineer, or both, as the case may be, who shall proceed to make the necessary examination and surveys, as directed by the court, and report their action to the court. The persons selected by the judge to make the survey and examination shall be residents of the state, and, before entering upon the discharge of their duty, shall take and subscribe an oath that they will fairly and impartially survey the mines described in the petition. In all other respects, except as stated above, the surveyors appointed by the judge shall proceed as in surveys in disputed boundaries. (1913, c. 51, s. 2.)

§ 6930. Free access to mine for survey.—Upon the order made for the survey in the manner, at the time, and by the persons mentioned in the order, which shall include a representative of the party making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey,

and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2.)

§ 6931. Costs of the survey. — The cost of the order and survey shall be paid by the person making the application; but if he shall maintain action and recover damages for the injury done or threatened prior to such survey and examination, the costs of the order and survey shall be taxed against the defendant as other costs in the action. The party obtaining the survey shall be liable for any unnecessary injury done to the property examined and surveyed in making the survey. (1913, c. 51, s. 2.)

CHAPTER 113

MONUMENTS, MEMORIALS, AND PARKS

Art. 1. Confederate Monuments

§ 6932. Land at Appomattox Court House accepted.—Whereas all North Carolinians are justly proud of their state's glorious record in the war between the states, and that her heroic soldiers were "first at Bethel, farthest at Gettysburg and Chickamauga, last at Appomattox;" and whereas a deed has been generously given by a gallant officer of the Union army Major George A. Armes, U. S. A., retired, to Hon. Henry A. London, for three lots or parcels of land on the battlefield of Appomattox Court House for the purpose of placing thereon permanent memorials to commemmorate—

1. The last volley fired by Cox's brigade of Grimes's division.

2. The capture of a battery of artillery by Roberts's brigade of cavalry, and

3. The last skirmish by Captain W. T. Jenkins; and whereas a tender of said lots has been made by said London as a gift to the state of North Carolina: Now, therefore, the governor is authorized and directed to receive, for the state, a deed from said London (as a gift from said Armes) for the aforesaid three lots of land on the battlefield of Appomattox Court House in the state of Virginia. (Rev., s. 3925; 1905, c. 10.)

§ 6933. Appomattox commission. — The governor is authorized and directed to appoint every four years five special commissioners, to be known as The North Carolina Appomattox Commission, who shall serve for four years until their successors are appointed, with full power to select their chairman and to fill any vacancy in their number that may occur, and to serve without compensation, except their actual necessary expenses, for a time not exceeding six days in any one year, which are to be paid by the state treasurer upon the warrant of the auditor, who shall issue his warrant when approved by the governor. The commissioners shall have the charge and control of said lots, and of the erection thereon of such permanent memorials as they may deem proper, but no cost of such memorials shall be paid by the state, except a sum not exceeding one thousand dollars, which is hereby appropriated for the erection of a monument on the lot where the last volley was fired by Cox's brigade of Grimes's division. (Rev., s. 3926; 1905, c. 10, ss. 2, 3.)

§ 6934. County commissioners may protect monuments.—When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (Rev., s. 3928; 1905, c. 457.)

Art. 2. Memorials

§ 6935. Memorial building commission created. —A memorial building commission is hereby created, to consist of the governor, the president of the senate, the speaker of the house of representatives, and nine other well-qualified persons who shall be appointed by the governor, which shall be and is hereby created a body politic and corporate under the name and style of the North Carolina Memorial Building Commission. The governor shall be the chairman of the commission. (1919, c. 3, ss. 1, 2.)

§ 6936. Meetings of commission; term of office; successors.—The memorial building commission shall have power to fix the time and place of its meetings. The commissioners shall hold office until the work hereinafter provided for shall have been completed and they shall have made report of the same to the general assembly and shall have been discharged. In the event of the death or resignation of any member of the commission, his successor shall be appointed by the governor. The commissioners shall receive no compensation. The position of commissioner under the provisions of this article shall not be construed to be an office within the meaning of section seven, article fourteen, of the constitution of North Carolina. (1919, c. 3, s. 3.)

§ 6937. Commission to raise funds by voluntary contributions and erect memorial building. — As a recognition of the valor and distinguished service of the state's soldiers and sailors, and in the honor and to the memory of all

North Carolina citizens who gave their lives, services or property to the end that the war with Germany and her allies might be won, the commission is hereby authorized to formulate plans, rules and regulations and to raise by voluntary contributions sufficient funds, as soon as practicable, and to acquire, either by gift, purchase or condemnation, a suitable site at the state capital, and shall proceed to erect thereon, or, with the consent of the council of state, on land already owned by the state not otherwise used, a suitable, useful and fireproof memorial building to be used as a depository for preserving, exhibiting and administering the records, relics and memorials of said war, and other historical records and effects of this state, and when said building is completed the same shall be the property of the state of North Carolina. (1919, c. 3, s. 4.)

§ 6938. Counties, cities, and towns may contribute toward erection of memorials. — Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great world war, or who fought in the civil war, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contributions are made. (1919, c. 21, ss. 1, 2, 3; 1923, s. 200.)

Editor's Note.—By amendment Public Laws 1923, ch. 200 there was added to this section the provision for perpetuating the memory of the soldiers and sailors of the Civil War.

Art. 3. Mount Mitchell Park Commission

§ 6939. Commission created. — (Repealed by Public Laws 1921, Chapter 222, Section 1.)

§ 6940. Duties.—The Board of Conservation and Development shall exercise and perform all the rights, powers, duties, and obligations that have been heretofore exercised and performed by the Mount Mitchell park commission and the Mitchell Peak park commission, and said board shall be the lawful successor of said commissions. The board shall have complete control, care, protection and charge of that part of Mitchell's park acquired by the state. (1919, c. 316, s. 3; 1915, c. 76; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

Editor's Note.—Prior to Public Laws 1921, c. 22, sec. 1, this section read; "The commission shall have complete control, care, protection and charge of that part of Mitchell's Park acquired by the state."

§ 6941. Meetings; term of service; annual reports to governor; successors.—(Repealed: Public Laws 1925, c. 122, s. 23.)

§ 6942. Roads, trails, and fences authorized, protection of property.—The Board of Conservation and Development is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails, and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

Editor's Note.—By amendment, Public Laws 1921, ch. 222, sec. 1, the powers were vested in the "board" instead of the commission. By Public Laws 1925, ch. 122, sec. 23, the powers were vested in "The Board of Conservation and Development." See note to sec. 6940.

§ 6942(a). Fees for use of improvements; fees for other privileges; leases; rules and regulations.—The Board of Conservation and Development is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed or may hereafter be constructed, on the park, and for other privileges connected with the full use of the park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve, and increase the value and attractiveness of the park. (1921, c. 222, s. 2; 1925, c. 122, s. 23.)

Editor's Note.—The words "Board of Conservation and Development" were substituted for the words "Geological Board" by the 1925 amendment in this and the two next succeeding sections.

§ 6942(b). Use of fees and other collections. —All fees and other money collected and received by the Board of Conservation and Development in connection with its proper administration of Mount Mitchell state park shall be used by said board for the administration, protection, improvement, and maintenance of said park. (1921, c. 222, s. 3; 1925, c. 122, s. 23.)

§ 6942(c). Annual reports. — The Board of Conservation and development shall make an annual report to the governor of all money received and expended by it in the administration of Mount Mitchell state park, and of such other items as may be called for by him or by the general assembly. (1921, c. 222, s. 4; 1925, c. 122, s. 23.)

CHAPTER 114
NAVIGATION

Art. 1. Cape Fear River

(Sections 6943 to 6966, inclusive, seem to have been superseded by Chapter 79 of Public Laws of 1921, which is included herein as Sections 6943(a) to 6943(q), inclusive.)

§ 6943(a). Board of commissioners of navigation and pilotage. — A board of commissioners of navigation and pilotage for the Cape Fear river and bar, to consist of five members, at least four of whom shall be residents of New Hanover county, and none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the governor and their terms of office shall begin on the fifteenth day of April of the year in which they

are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of section seven, article fourteen, of the constitution of North Carolina. It shall be the duty of the governor to appoint, on or before the fifth day of April, one thousand nine hundred and twenty-one, and on or before the fifth day of April of every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from seven miles above Negro-head Point downwards, and out of the bar, and inlets. They shall annually, on the first Monday in May, appoint a harbor master for the port of Wilmington. (1921, c. 79, s. 1.)

Editor's Note.—The cases discussed below were decided under section 6943, now repealed. However, these cases seem applicable to the present law as the provisions of former section 6943 are substantially set forth in the instant section.

Constitutionality.—This article is constitutional as it is an exercise of the State's right to regulate pilotage, and should be construed liberally as a part of the maritime law. It does not create a monopoly or grant special priviliges, but only regulates for the protection of the public. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

The Legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats. Morse v. Heide, 152 N. C. 625, 68 S. E. 173.

Time of Appointment.—The time of making the appointment of commissioners is merely directory, and if appointment is made after the fifth day of April, but before the fifteenth day of April, it is valid. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 6943(b). Rules to regulate pilotage service.—The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements and station of pilots as to them shall seem most advisable, including the power and authority to prescribe, reduce, and limit the number of pilots necessary to maintain an efficient pilotage service for the Cape Fear river and bar, as in its discretion may be necessary: Provided, that the present number of eleven pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability or death, and shall impose such reasonable fines, forfeitures, and penalties as may be prescribed by the board for the purpose of enforcing the execution of such rules and regulations; the board shall have power and authority, when, in the opinion of a majority of the board, the best interests of the port of Wilmington, the state of North Carolina, and the pilotage service shall require, to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe, and any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board. (1921, c. 79, s. 2; 1927, c. 158, s. 1.)

Editor's Note.—The amendment of 1927 inserted the provisions relating to Cape Fear River.

Reasonable Regulations.—A rule and regulation of the board to the effect that pilots shall not cruise beyond certain territory and that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had laid off, is valid and reasonable. Morse v. Heide, 152 N. C. 625, 68 S. E. 173.

§ 6943(c). Examination and licensing of pilots.—The board, or a majority of them, may from time to time examine, or cause to examined, such persons as may offer themselves to be pilots for the Cape Fear river and bar, and shall give to such as are approved commission under their hands and the seal of the board, to act as pilots for the river and bar; and the number of pilots so commissioned, not exceeding fifteen at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this article. (1921, c. 79, s. 3; 1927, c. 158, s. 2.)

Editor's Note.—The 1927 amendment substituted the word "may" for the word "shall" near the first part of this section.

Limiting Number of Pilots.—The limiting of the number of pilots, and providing for examinations and qualifications, is a valid exercise of the police powers and is not such a grant of special privileges to certain persons as is provided against by the Constitution. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 6943(d). Appointment and regulation of pilots' apprentices.—The board, when it deems necessary for the best interests of the port, is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding fifteen feet, and one year thereafter for a license to pilot vessels of a draught of more than fifteen feet. No one shall be entered as an apprentice who is of the age of more than twenty-five years. (1921, c. 79, s. 4; 1927, c. 158, s. 3.)

Editor's Note.—The provisions of this section relating to the appointment of apprentices were inserted by the 1927 amendment.

§ 6943(e). Classes of licenses issued. — The board shall have authority to issue two classes of licenses as follows:

(1) A license to pilot vessels whose draught of water does not exceed eighteen feet, to such applicants above the age of twenty-one years who have served as apprentices for such length of time as required by the rules and regulations of the board to entitle such applicant to such license;

(2) An unlimited or full license to those who have served at least one year under a license of the first class; Provided, that the board shall have power to appoint pilots without reference to apprenticeship record as in its judgment the service may require. (1921, c. 79, s. 5; 1927, c. 158, s. 4.)

Editor's Note.—The word "eighteen" was substituted for "fifteen" in subsection one and the proviso at the end of subsection two was added, by the 1927 amendment.

§ 6943(f). Renewal of license; license fee.—All licenses shall be renewed annually upon

payment of a fee of five dollars ($5): Provided, the holder of such license shall have, during the year preceding the date for such renewal, complied with the provisions of this article and the reasonable rules and regulations prescribed by the board under authority hereof. (1921, c. 79, s. 6.)

§ 6943(g). Expenses of the board.— Each pilot, or the association of pilots, when organized as in this article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two per cent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. In the event that the total of the sums so paid over in any one year shall exceed the expenses of the board, the excess, upon being duly ascertained, shall be paid over to the fund for the benefit of widows and orphans of the deceased pilots, as said fund is now constituted and provided for by law. (1921, c. 79, s. 7.)

§ 6943(h). Pilots to give bond.—Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more sureties, payable to the state of North Carolina in the sum of five hundred dollars ($500); the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand dollars ($1,000). Every bond taken of a pilot shall be filed with and preserved by the board, in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation, so injured may severally bring suit for the damage by each one sustained. (1921, c. 79, s. 8.)

§ 6943(i). Permission to run as pilots on steamers; other ports.—The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between the port of Wilmington and other ports of the United States, under such rules and regulations as the board shall prescribe. (1921, c. 79, s. 9.)

§ 6943(j). Cancellation of licenses. — The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot for a period of six months in succession, and any pilot who has been absent from the state for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided in section 6943(i). (1921, c. 79, s. 10.)

§ 6943(k). Jurisdiction over disputes as to pilotage.—Each member of the board shall have power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves, respecting the pilotage of any vessel and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage on Cape Fear river and bar, or provided by any by-law or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff or any constable in New Hanover or Brunswick counties, shall execute together with any other process authorized by this article. On any warrant issued as herein provided any one of said commissioners may give judgment for any sum not exceeding five hundred dollars ($500), and may issue execution thereon, in like manner as is provided for the issuing of execution on judgments rendered by justices of the peace, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from courts of justices of the peace. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board of any matters as provided in this section shall conform as nearly as may be to procedure provided by law in courts of justices of the peace. From any judgment rendered by any member of the board, either party shall have the right of appeal to the superior court of New Hanover or Brunswick counties, in like manner as is provided for appeals on judgments of justices of the peace. (1921, c. 79, s. 11.)

§ 6943(l). Retirement of pilots from active service.—The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, except with his consent, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officers or county physicians of New Hanover or Brunswick counties, and such public health officers or physicians shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1921, c. 79, s. 12.)

§ 6943(m). When employment compulsory; rates of pilotage. — All vessels, coastwise or foreign, over sixty (60) gross tons, shall on and after the first day of May, one thousand nine hundred and twenty-one, take a state licensed pilot from sea to Southport, and from Southport to sea, and the rates of pilotage shall be the rates given in column number one below, designated "From sea to Southport, vice versa;" the employments of pilots from Southport to Wilmington and from Wilmington to Southport is optional, but any vessel taking a pilot from Southport to Wilmington, or from Wilmington to Southport, shall employ only a state licensed pilot, and the rate of pilotage shall be the rates in column number two below, designated "From Southport to Wilmington, or vice versa."

Column No. 1
From
Sea to Southport
or Vice Versa

Feet and under	Rate
6	$ 11.00
7	13.00
8	15.00
9	16.00
10	21.00
11	26.00
12	29.00
12–6	30.00
13	32.00
13–6	34.00
14	39.00
14–6	43.00
15	45.00
15–6	47.00
16	50.00
16–6	54.00
17	57.00
17–6	61.00
18	65.00
18–6	67.00
19	71.00
19–6	75.00
20	78.00
20–6	83.00
21	87.00
21–6	94.00
22	100.00
22–6	106.00
23	112.00
23–6	116.00
24	120.00
24–6	124.00
25	128.00
25–6	131.00
26	135.00
26–6	139.00
27	143.00
27–6	146.00
28	150.00
28–6	154.00
29	158.00
29–6	161.00
30	165.00

Column No. 2
From
Southport to Wilmington
or Vice Versa

Feet and under	Rate
6	$ 6.00
7	8.00
8	9.00
9	10.00
10	13.00
11	15.00
12	17.00
12–6	18.00
13	19.00
13–6	20.00
14	23.00
14–6	26.00
15	27.00
15–6	28.00
16	30.00
16–6	33.00
17	35.00
17–6	37.00
18	38.00
18–6	40.00
19	44.00
19–6	45.00
20	47.00
20–6	50.00
21	53.00
21–6	56.00
22	60,00
22–6	64.00
23	68.00
23-6	70.00
24	72.00
24–6	74.00
25	76.00
25–6	79.00
26	81.00
26–6	83.00
27	85.00
27–6	88.00
28	90.00
28–6	92.00
29	94.00
29–6	97.00
30	99.00

Vessels calling at the port solely for the purpose of obtaining bunker coal shall pay one-half the fees hereinbefore prescribed. (1921, c. 79, s. 13, 1927, c. 158, s. 5.)

Editor's Note.—A majority of the pilotage rates as fixed by this section were changed by the 1927 amendment, most of them having been raised.

Pilot Entitled to Pilotage.— The first pilot speaking a vessel shall be entitled to the pilotage fees over the bar to Southport and out to sea again, provided said pilot shall be ready and willing to serve as a pilot, etc. St. George v. Hardie, 147 N. C. 88, 92, 60 S. E. 920.

A barge of over sixty gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under this section upon entering North Carolina waters. Craig v. Gulf Barge, etc., Co., 201 N. C. 250, 159 S. E. 424.

§ 6943(n). Pay for detention of pilots. — Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars ($10) per day during the time of his actual detention, the pilot to have due notice from the master or agent of said vessel. (1921, c. 79, s. 14.)

§ 6943(o). Vessels not liable for pilotage.— Any vessel coming into Southport from sea without the assistance of a pilot, the wind and weather being such that such assistance or service could have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the services of a pilot be secured. (1921, c. 79, s. 15.)

Validity.—This section is valid, when construed with the other sections of said chapter, being an incentive to render pilots vigilant. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 6943(p). First pilot to speak vessel to get fees.—The first pilot speaking a vessel from a regularly numbered and licensed boat of this board shall be entitled to the pilotage fees over the bar to Southport, and out to sea again: Provided, said pilot shall be ready and willing to

serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1921, c. 79, s. 16.)

§ 6943(q). Vessels entering for harborage exempt.—Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1921, c. 79, s. 17.)

Art. 2. Beaufort Harbor

§ 6967. Commissioners of navigation; election.—The commissioners of navigation for Old Topsail inlet and Beaufort harbor shall be composed of three persons, to be elected as follows: The board of commissioners of Carteret county shall elect one, the commissioners of the town of Morehead City shall elect one. They shall be elected at the regular meeting of such boards in June, one thousand nine hundred and five, and every two years thereafter, and shall qualify by taking the oath required by law before the clerk of the superior court or some justice of the peace of Carteret county, and enter upon the discharge of their duties on the first Monday in July following their election. (Rev., s. 4964; 1899, c. 9, ss. 1, 2.)

§ 6968. Authority of commissioners.—They shall have authority in all matters that may concern the navigation of the harbor, Old Topsail inlet, and all the waters of the sound and rivers within ten miles of the town of Beaufort, and in the construction of wharves, and when there is no harbor master, the commissioners aforesaid shall decide all disputes about the moving of vessels and other matters which properly fall within the department of harbor master. (Rev., s. 4965; Code, s. 3528; 1868-9, c. 208, s. 3.)

§ 6969. Harbor master for Beaufort.—The said commissioners immediately after their election shall appoint a harbor master for the port of Beaufort, who shall hold his office for the term of one year, unless sooner removed by the commissioners for neglect of duty. He shall be entitled to receive of the master of each vessel that shall enter said port, and for other services, such fees as the commissioners may prescribe. (Rev., s. 4966; Code, s. 3529; 1868-9, c. 208, s. 4.)

§ 6970. Pilots; how appointed and licensed.—Such commissioners shall elect the pilots for said inlet and harbor, and may make such rules and regulations for their government as the commissioner may deem right and proper, not inconsistent with the constitution and laws of this state or of the United States: Provided, that all persons who may be licensed as pilots shall have had at least two years practical experience as apprentices under some regular licensed pilot of Beaufort Harbor and Old Topsail Inlet, and shall secure two pilots in good standing to endorse in writing each application for license. Application for pilot licenses or branches shall be made to the commissioners in writing, giving the name, age, and occupation of applicants for two years next preceding the date of application. The commissioners shall examine all applicants for pilot's licenses, and may also examine other persons as to qualifications of applicants to perform the duties of pilot, and may in their discretion reject any applicant whom they may deem incompetent. (Rev., s. 4967; 1899, c. 9, ss. 3, 4, 5; 1921, c. 74, s. 6.)

§ 6971. Fees for issuing pilot's license.—The said commissioners shall give to every pilot elected by them a license or branch under their hands and seals, which shall be and remain in force for one year unless, for good cause to said commissioners appearing, the same shall be sooner revoked by them. They shall charge for each license or branch, fifteen dollars, which they may retain for their expenses and services. (Rev., s. 4968; 1899, c. 9, s. 6; 1921, c. 74, s. 5.)

§ 6972. Expiration of pilot's license; reinstatement.—Each pilot shall forfeit his branch after fifteen days expiration of the same; however, such pilot may be reinstated by securing two pilots in good standing to sign his branch. (1915, c. 142, s. 3.)

§ 6973. Pilot boats to be numbered. — After the first day of April, one thousand nine hundred and fifteen, each and every pilot vessel in Carteret county shall be numbered; and any pilot after that date piloting a vessel or barge in or out of the territory as set out in this article, without a number, shall be guilty of a misdemeanor and be subject to a fine of not more than fifty dollars or imprisoned not more than thirty days, or both, in the discretion of the court. The commissioners of navigation of Beaufort harbor shall make provision for numbering of pilot vessels as required by this section. All said fines collected under this act to be applied to the public school fund of Carteret County. (1915, c. 142, ss. 2, 3.)

§ 6974. Rates of pilotage.—The pilotage for Old Topsail inlet and Beaufort harbor shall be as follows: For vessels drawing eight feet and under, two dollars and fifty cents per foot; ten feet and over eight, three dollars per foot; twelve feet and over ten, four dollars per foot; all over twelve feet, four dollars and fifty cents per foot. The above fees to be collectible in Beaufort harbor from Middle marsh to Lewis thoroughfare, and from the Neuse river side of the inland waterway through the said waterway and out of Beaufort inlet. For every vessel piloted without these bounds an additional charge of fifty cents per foot may be charged. The commissioners shall have the rates of pilotage printed or written on every license or branch issued by them, and every pilot shall exhibit his license to the master of every vessel he has in charge, when demanded by said master. The rates of pilotage as set out in this section shall apply to all vessels entering or leaving "Old Topsail Inlet" and "Beaufort Harbor." (Rev., s. 4969; 1899, c. 9, ss. 7, 8; 1901, c. 639; 1909, c. 250, s. 1; 1915, c. 142, s. 1; 1921, c. 74, ss. 1-3.)

§ 6974(a). Vessels required to take pilots.—All vessels, coastwise or foreign, over sixty gross tons shall take a state-licensed pilot from sea to Pier One, Morehead City, North Carolina, and from Pier One, Morehead City, North Carolina, to sea, and the rates of pilotage shall be the rates as is set out in section 6974. (1921, c. 74, s. 4.)

§ 6975. Vessel under sixty tons not liable for pilotage.—No pilot, acting under the authority of the commissioners of navigation for Old Topsail inlet, shall be entitled to pilotage for any vessel under sixty tons burden, unless such vessel shall have given a signal for a pilot, or otherwise shall have required the assistance of a pilot. (Rev., s. 4970; Code, s. 3523; R. C., c. 85, s. 33; 1801, c. 600, s. 3; 1806, c. 711, s. 1.)

Art. 3. Bogue Inlet

§ 6976. Commissioners of navigation for Bogue inlet.—The board of commissioners of the county of Onslow shall appoint five commissioners of navigation for Bogue inlet and its waters. When vacancies occur in said board, by refusal to act, by registration, or otherwise, the remaining members of such board shall fill the same until the same be supplied by the appointing board, which is directed to be done at the first meeting after the vacancy occurs. And the said board shall have the same powers and authority as to pilots and pilotage as the commissioners for Old Topsail inlet and Beaufort harbor. (Rev., s. 4971; Code, s. 3515; R. C., c. 85, s. 25; 1783, c. 194; 1784, c. 208, s. 2; 1879, c. 216, s. 4.)

§ 6977. Rates of pilotage.—The branch pilots for Bogue inlet shall be entitled to receive of the commander of such vessel as they may have charge of the following pilotage, namely: For bringing any vessel into the said inlet, drawing less than seven feet, from the outside of the bar to the anchorage before the town, or the customary place in Hill's channel, one dollar per foot; for a vessel drawing more than seven feet, one dollar and fifty cents per foot; and the same fees for pilotage outward as inward. (Rev., s. 4972; Code, s. 3535; 1889, c. 121.)

Art. 4. Hatteras and Ocracoke

§ 6978. Board of commissioners of navigation; organization; oath; pilots' licenses. — John W. Rolinson, R. R. Quidley, George L. Styron, William Balance, and Charles L. Odine shall constitute a board of commissioners of navigation for the port of Hatteras inlet, of the county of Dare; William E. Howard, Christopher O. Neal, Sr., and Gilbert O. Neal, of the county of Hyde; D. R. Roberts and J. W. Gilgo, of the county of Carteret, shall constitute a board of navigation for the port of Ocracoke inlet, whose duty it shall be to meet at Hatteras and Ocracoke respectively three times in each year, or a majority of the respective board, after giving at least twenty days notice of each meeting, and when any person is desirous of becoming a pilot at Hatteras or Ocracoke inlets, over the Swashes through Pamlico and Albemarle sounds, he shall be examined by said board, and when found competent to take charge of any ship or vessel as a pilot the board shall issue to him a branch and take the bond authorized by law, and no person shall be authorized to act as a bar or swash pilot unless he shall have a branch from said boards. The said boards shall have their offices at Hatteras and Ocracoke respectively, in which shall be filed the bonds of the pilots, and every pilot receiving a branch from said boards shall pay to the board from which he receives such branch two dollars and fifty cents, of which sum the commissioners of Ocracoke who live in Carteret county shall receive ten cents per mile traveling to and from the meeting of said board, and the residue shall be divided between all the members of said board, and the commissioners shall belong to each board respectively. When a vacancy shall occur in either board by death, resignation, or refusal to act, a majority thereof of each board shall appoint some suitable person thereto, whose residence shall be at the same place where the vacancy occured; said commissioners shall keep a regular journal of their proceedings, and before entering on the duties of their office they shall take and subscribe before any justice of the peace of the counties of Dare, Carteret, or Hyde the following oath:

I do solemnly swear that I will truly and faithfully and impartially examine every person who shall apply to me for a branch, to the best of my ability: So help me, God.

The branch shall expire in three years from the date thereof. (Rev., s. 4961; Code, s. 3512; R. C., c. 85, s. 24; 1871-2, c. 134; 1897, c. 211; 1879, c. 216.)

§ 6979. Rates of pilotage.—Branch pilots Ocracoke or Hatteras shall be entitled to receive of the commander of such vessel as they may have in charge the following pilotage, namely: For every vessel of sixty and not over one hundred and forty tons burden from the other side of the bar, at any place within the limits of the pilot ground, to Beacon Island road, or Wallace's channel, ten cents for each ton, and the further sum of two and a half cents for each ton over one hundred and forty, and two dollars for each vessel over either the swashes (that is, over said swashes either to or from Beacon Island road, or Wallace's channel, or over any shoal lying intermediate between either of said swashes and Beacon Island road or Wallace's channel); for every ship or vessel from the mouth of the swash to either of the ports of New Bern or Washington, one dollar per foot, and for every ship or vessel from the same place to the port of Edenton, twelve dollars; and to the port of Elizabeth City, ten dollars; and the same allowance down as up, and outward as inward. (Rev., s. 4962; Code, s. 3524; R. C., c. 85, s. 34; 1749, c. 426; 1806, c. 711; 1846, c. 49, ss. 1, 2, 3.)

§ 6980. Who may be pilots for Hatteras or Ocracoke inlet.—The said boards shall not issue or grant any branch to pilot vessels through Hatteras inlet to any person who does not reside in Hatteras precinct, which precinct extends from Cape Hatteras lighthouse to Hatteras inlet. And the said boards shall not issue or grant a branch to pilot vessels through or over Ocracoke inlet to any person who does not reside upon the island of Ocracoke or in the precinct of Portsmouth. (Rev., s. 4963; Code, s. 3541; 1856-7, c. 29; 1879, c. 216, s. 3.)

Art. 5. General Provisions

§ 6981. Obstructing navigable waters; removing beacons; penalty; pilot's liability.—If any person shall cast or throw from any vessel, into the navigable water of Carteret or Onslow counties, of Tar or Pamlico rivers, or into the navigable waters of the Cape Fear, or any other river

in the state, or into any channel of navigable water elsewhere than in a river, any ballast, stone, shells, earth, trash, or other substance likely to be injurious to the navigation of such waters, rivers, or channel; or if any person shall wilfully pull down any beacon, stake, or other mark, erected or placed by virtue of any by-law, order, or regulation passed or ordained by any commissioners of navigation, he shall be guilty of a misdemeanor and shall forfeit and pay two hundred dollars, to be recovered for the use of the commissioners in whose waters the offense was committed. If any pilot shall knowingly suffer any such unlawful act to be done, and shall not within ten days thereafter give to the said commissioners, or one of them, information thereof, such pilot shall likewise be guilty of a misdemeanor; and, besides the usual punishment of such offense, on conviction, shall be forever incapable of acting as a pilot in the state. (Rev., s. 3560; Code, ss. 3537, 3538; R. C., c. 85, ss. 40, 41; 1833, c. 146; 1784, c. 206, s. 11; R. S., c. 88, ss. 23, 24, 45; 1811, c. 839; 1842, c. 65, s. 4; 1846, c. 60, s. 3.)

Cited in State v. Eason, 114 N. C. 787, 796, 19 S. E. 88.

§ 6982. Local: Obstructing waters of Currituck sound.—It shall be unlawful for any person to obstruct navigation in the waters of Currituck sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore placed or caused to be placed any hedging across the mouth of a bay, creek, strait, or lead of water in Currituck sound or tributaries, made of iron, wire, or wood or other material, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of such bay, creek, strait, or lead of water, are required to forthwith remove the same. Any person, corporation, or club violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than ten dollars, or imprisoned not more than thirty days, at the discretion of the court. (Rev., s. 3553; 1897, c. 277.)

§ 6983. Local: Lumbermen to remove obstructions in Albemarle sound.—If any lumberman shall fail to remove all obstructions placed by him in the waters of Albemarle sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from all places where the water is not less than two feet deep, and also from all landing places on both sides, for the space of sixty feet from the shore outward, he shall be guilty of a misdemeanor, and fined not less than one dollar nor more than fifty dollars, at the discretion of the court. (Rev., s. 3551; Code, s. 3303; 1880, c. 37, ss. 1, 2.)

§ 6984. Anchoring in range of lighthouses.—If the master of any vessel shall anchor on the range line of any range of lights established by the United States lighthouse board, unless such anchorage is unavoidable, he shall be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars. (Rev., s. 3550; Code, s. 3086; 1883, c. 165, s. 2.)

§ 6985. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.—All vessels, barges, schooners, or other craft passing through the inland waterway of this state, when bound to a port or ports in this or any other state, be and the same are hereby exempt from the operations of the pilot laws of North Carolina and are not compelled to take a state licensed pilot: Provided, that steam vessels not having a United States licensed pilot for the waters navigated on board shall be subject to the state pilot laws. (1917, c. 33, s. 2.)

Under the Federal Law.—Vessels passing through the inland waterway of the State are exempt from the pilot laws by the State statutes, subject to the proviso of this section; and, under the Federal Statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the Federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons. Harris v. Slater, 187 N. C. 163, 121 S. E. 437.

§ 6986. Bond of pilot.—Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the state of North Carolina, in the sum of five hundred dollars, with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from time to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained. (Rev., s. 307; Code, s. 3487; R. C., c. 85, s. 6; 1784, c. 207, s. 3.)

As to action on official bond see sec. 354.

§ 6987. Pilots to have spyglasses.—Every pilot, within such convenient time as the commissioners may direct, who has control over the waters within which he acts, shall furnish himself with a good telescope or spyglass, under the penalty of fifty dollars, to be paid to the commissioners. (Rev., s. 4973; Code, s. 3517; R. C., c. 85, s. 27; 1790, c. 320, s. 3.)

§ 6988. Acting as pilot without license.—If any person shall act as a pilot, who is not qualified and licensed in the manner prescribed in this chapter, he shall be guilty of a misdemeanor and upon conviction shall be fined not more than $50.00 and not less than $25.00, or imprisoned not more than thirty days at the discretion of the court: Provided, that should there be no licensed pilot in attendance, any person may conduct into port any vessel in danger from stress of weather or in a leaky condition. (Rev., s. 4974; Code, s. 3519; R. C. c. 85, s. 29; 1783, c. 194, s. 3; 1784, c. 208, s. 1; 1933, c. 325, ss. 1, 2, 3.)

Editor's Note.—Public Laws of 1933, c. 325, struck out the former provision and inserted the present reading in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 6989. Penalty on pilot neglecting to go to vessel having signal set.—When any pilot shall see any vessel on the coast, having a signal for

a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to assistance of such vessel, such pilot shall forfeit and pay one hundred dollars, to be recovered in the name of the state, one-half to the use of the informer and the other half to the master of the vessel, unless such pilot is then actually in charge of another vessel. (Rev., s. 4975; Code, s. 3521; R. C., c. 85, s. 31; 1784, c. 207, s. 10; 1790, c. 207, s. 10; 1790, c. 320, s. 2; 1783, c. 194, s. 6.)

§ 6990. Pilots may be removed.—Unless otherwise provided in the first article of this chapter for the Cape Fear river, whenever any pilot appointed, as authorized in this chapter, shall, on trial, be found incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from the state for a period of six months, the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice of any vessel, he shall forfeit and pay two hundred dollars for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras inlet shall be required to surrender or forfeit his branch by reason of absence from the state for a period of less than six months. (Rev., s. 4976; Code, ss. 3518, 3, 490; 1868-70, c. 235, s. 7; 1881, c. 261, s. 2; R. C., c. 85, s. 28; R. S, c. 88, ss. 7, 31, 35; 1784, c. 207, s. 4; 1819, c. 1025, s. 4; 1800, c. 565; 1876-7, c. 22; 1881, c. 261, s. 1.)

Entitled to Fees Until Removed.—A duly licensed pilot may recover charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the service of such boat is recoverable by him until the commissioners of navigation and pilotage have acted thereon and revoked his license. Davis v. Heide & Co., 161 N. C. 476, 77 S. E. 691.

§ 6991. Pilots refused, entitled to pay.—If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered before a justice of the peace, if the sum be within his jurisdiction: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section. (Rev., s. 4978; Code, s. 3522; R. C., c. 85, s. 32; 1871-2, c. 117.)

§ 6992. Pay of pilots when detained by vessel.—Every master of a vessel who shall detain a pilot at the time appointed, so that he cannot proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars per day during the time of his actual detention. (Rev., s. 4979; Code, s. 3495; 1858-9, c. 23, s. 7.)

§ 6993. Rates of pilotage annexed to commission.—The commissioners of navigation for the several ports of this state shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled. (Rev., s. 4980; Code, ss. 3497, 3536; R. C., c. 85, ss. 9, 38; 1784, c. 208, s. 4; 1796, c. 470, s. 5.)

§ 6994. Harbor masters; how appointed.—The several boards of commissioners of navigation may appoint a harbor master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings. (Rev., s. 4981; Code, s. 3525; R. C., c. 85, s. 35.)

§ 6995. Commissioners of navigation may hold another office.—A commissioner of navigation and pilotage shall be deemed a commissioner for a special purpose within the meaning of section seven of article fourteen of the constitution of North Carolina, so as not to be prohibited from holding at the same time with his commissionership another office under the national or state governments. (Ex. Sess. 1913, c. 76.)

§ 6996. Commissioners of navigation to designate place for trash.—The several boards of commissioners established by this chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone, and like matter. (Rev., s. 4982; Code, s. 3537; R. C., c. 85, s. 40; R. S., c. 88, ss. 23, 24, 45; 1833, c. 146, ss. 1, 2, 3; 1846, c. 60, s. 3.)

Cited in State v. Eason, 114 N. C. 787, 796, 19 S. E. 88.

§ 6997. Harbor master; how appointed where no board of navigation.—Where no board of navigation exists the governing body of any incorporated town, situated on any navigable water course, shall have power to appoint a harbor master for the port, who shall have the same power and authority in their respective ports as the harbor master of Wilmington is by this chapter given for that port, and shall receive like fees and no others. (Rev., s. 4983.)

§ 6998. Rafts to exercise care in passing buoys, etc., penalty.—If any person having charge of any raft passing any buoy, beacon, or day-mark, shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon, or day-mark, he shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars. (Rev., s. 3545; Code, s. 3087; 1883, c. 165, s. 3.)

§ 6999. Interfering with buoys, beacons, and day-marks.—If any person shall moor any kind of vessel or any raft or any part of a raft, to any buoy, beacon, or day-mark placed in the waters of North Carolina by the authority of the United States lighthouse board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon, or day-mark, or shall wilfully remove, damage, or destroy any such buoy, beacon, or day-mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this state by the authority of the said United States lighthouse board, or through unavoidable run down, drag from its position, or in any way injure any buoy, beacon, or day-mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy,

beacon, or day-mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars, or imprisoned not to exceed three months, or both, at the discretion of the court. (Rev., s. 3546; Code, s. 3085; 1858-9, c. 58, ss. 2, 3; 1883, c. 165, s. 1.)

CHAPTER 115

PAWNBROKERS

§ 7000. Pawnbroker defined.—Any person, firm, or corporation who shall engage in the business of lending or advancing money on the pledge and possession of personal property, or dealing in the purchasing of personal property or valuable things on condition of selling the same back again at stipulated prices, is hereby declared and defined to be a pawnbroker. (1915, c. 198, s. 1.)

§ 7001. License; business confined to municipalities.—No person, firm, or corporation shall engage in the business of lending money, or other things, for profit or on account of specific articles of personal property deposited with the lender in pledge in this state, which business is commonly known as that of pawnbrokers, except in incorporated cities and towns, and by paying the county, state, and municipal license tax required by law, and otherwise complying with the requirements made in this and succeeding sections. (1915, c. 198, s. 1.)

As to License Tax, see sec. 7816.

§ 7002. Municipal authorities to grant and control license; bond.—The board of aldermen, or other governing body, of any city or town in this state may grant to such person, firm, or corporation as it may deem proper, and who shall produce satisfactory evidence of good character, a license authorizing such person, firm, or corporation to carry on the business of a pawnbroker, which said license shall designate the house in which such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such mayor, which said bond shall be for the faithful performance of the requirements and obligations pertaining to the business so licensed. The board of aldermen, or other governing body, shall have full power and authority to revoke such license and sue for forfeiture of the bond upon breach thereof. Any person who may obtain a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied, may maintain an action in his own name upon the said bond of said pawnbroker, in any court having jurisdiction of the amount demanded, to satisfy said judgment. (1915, c. 198, s. 2.)

§ 7003. Records to be kept.—Every pawnbroker shall keep a book in which shall be legibly written, at the time of the loan, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on said loan, and the name and residence of the person pawning or pledging the said goods, articles, or things. (1915, c. 198, s. 3.)

§ 7004. Pawn ticket.—And every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any goods, articles, or things a ticket or memorandum or note signed by him containing the substance of the entry required to be made by him in his book as aforesaid, and a copy of the said ticket, memorandum, or note so given to the person pawning or pledging any goods, articles, or things of value shall be filed within forty-eight hours in the office of the chief of police of the city or town issuing the license to such pawnbroker. The said tickets or memorandums so issued shall be numbered consecutively and dated the day issued. (1915, c. 198, s. 3.)

§ 7005. Sale of pledges.—No pawnbroker shall sell any pawn or pledge until the same shall have remained sixty days in his possession after the maturity of the debt for which the property was pledged. And no pawnbroker shall advertise or sell at his place of business as unredeemed pledges any articles of property other than those received by him as pawns or pledges in the usual course of his business at the place where he is licensed to do business. (1915, c. 198, s. 4.)

§ 7006. Usury law applicable.—The provisions of this chapter shall not be construed to relieve any person from the penalty incurred under the laws against usury in this state. (1915, c. 198, s. 5.)

§ 7007. Violation of chapter misdemeanor.—Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1915, c. 198, s. 5.)

CHAPTER 115A

PHOTOGRAPHERS

§ 7007(1). Definitions. — Words used in this chapter, unless otherwise expressly stated, shall have the following meaning:

"Board"—The board of photographic examiners.

"Persons"—Any individual person, firm, corporation or association.

"Photography" (a) The art or process of reproduction, recording the visible and invisible image through the action of light upon chemically sensitized substance or material. (b) The processes of projecting and registering images by means of lens and camera upon sensitized mate-

rials, development and fixation of the latent image to render same visible and permanent and the subsequent reproduction or transfer of such image, either negative or positive, upon sensitized material, by aid of light and chemical action.

"Photo finishing"—The process of reproducing or transferring any image made by means of camera and lens, either negative or positive, upon sentitized material by aid of light and chemical action.

"The practice of photography"—The profession, occupation, or avocation of taking or producing photographs or any part thereof for hire.

"Photographer" — Any individual, person, firm or corporation who shall practice photography.

"Apprentice" — Any individual or person who shall study, train or work under the guidance of a duly registered photographer for the purpose of acquiring the necessary knowledge to practice photography.

"Licensee"—A licensed photographer or apprentice. (1935, c. 155, art. 1.)

§ 7007(2). State board of photographic examiners created; terms of office.—A state board of photographic examiners is hereby created, which shall consist of five members, all of whom shall be residents of the State of North Carolina and shall have had not less than five (5) years experience as professional photographers, who shall be commissioned by the governor and hold office as follows: Two for one year, two for two years and one for three years, their successors to be commissioned by the governor for a term of three years. (1935, c. 155, art. 2, s. 1, c. 318.)

§ 7007(3). Chairman and secretary. — The members of the state board of photographic examiners shall annually elect one of their number to act as chairman, and appoint and at their pleasure remove a secretary, who need not be a member of the board, and whose compensation shall be fixed by the board. The said secretary shall also act as treasurer and shall perform the duties prescribed by this chapter and such other duties as the board may from time to time direct. (1935, c. 155, art. 2, ss. 2, 3.)

§ 7007(4). Pay and expenses; principal office; quorum.—The members of the board upon the certification by the majority of said members shall receive the sum of seven dollars and actual and necessary expenses for each day actually devoted to the performance of their duties under this chapter. The principal office of the board shall be at such place designated by a majority of the members of the board. Three members of the board shall constitute a quorum. (1935, c. 155, art. 2, ss. 4-6.)

§ 7007(5). Organization meeting; bond of secretary-treasurer; powers of board.—The board of photographic examiners shall within thirty days after its appointment, meet in the city of Raleigh, and organize and shall elect a chairman and appoint a secretary-treasurer. The secretary and treasurer shall give bond approved by the board for the faithful performance of his duties, in such sum as the board may, from time to time, determine. The board shall have a common seal and shall formulate rules to govern its actions, and it may take testimony and proof concerning all matters within its jurisdiction. (1935, c. 155, art. 3, s. 1.)

§ 7007(6). Record of proceedings.—The said board shall keep a record of its proceedings relating to issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business and residence of every registered photographer and registered apprentice, and the date and number of his certificate of registration. This record shall be opened to public inspection at all reasonable times. (1935, c. 155, art. 3, s. 2.)

§ 7007(7). Rules and orders.—The board may adopt and enforce all rules and orders necessary to carry out the provisions of this chapter. Every rule or order of the board shall be available for public inspection in the office of the board. (1935, c. 155, art. 3, s. 3.)

§ 7007(8). Conduct of hearings.—The board is authorized to conduct hearings in any part of the state or may designate any member of the board so to do, which hearing shall be held pursuant to the rules and regulations adopted and promulgated by the board. (1935, c. 155, art. 3, s. 4.)

§ 7007(9). Appointment and removal of assistants. — Said board shall have the power to appoint and at its pleasure remove any technical, legal, or other assistants as may be necessary to carry out the provisions of this chapter and to prescribe their powers and duties and fix their compensation. (1935, c. 155, art. 3, s. 5.)

§ 7007(10). Examination and licensing of applicants; temporary certificates.—The board shall provide for the examination of applicants who desire to practice photography in this state, and shall collect fees, as hereinafter provided, for such examinations and issue certificates of registration and licenses to practice photography to anyone who shall qualify as to competency, ability and integrity. The board may issue temporary certificates to practice photography until such time as the board shall hold an examination, provided such applicants are, in the opinion of the board, entitled thereto, and provided that application and deposit for examination is made at the time of application for such temporary license, and such certficate shall be null and void after the next examination held by the board, and provided further, that no such applicant shall, thereafter, be eligible to apply for and receive a temporary certificate. (1935, c. 155, art. 4, s. 1.)

§ 7007(11). Qualifications of applicants for examination.—Prior to any applicant being admitted to an examination or licensed, said board shall have the power to require proof as to the technical qualifications, business record and moral character of such applicant, and if an applicant shall fail to satisfy the board in any or all of these respects, the board may decline to admit said applicant to examination, or to issue license. (1935, c. 155, art. 4, s. 2.)

§ 7007(12). Semi-annual examinations; separate certificates for two branches of photography. —The board shall provide a place and give a written, and/or an oral and/or a practical examination at least twice a year to all duly qualified applicants covering the two branches of photography, to-wit: Photography and photo-finishing. Separate certificates shall be provided for each branch. A certificate for one branch shall not permit the practicing in the other branch, although any photographer may hold certificates in both branches if qualified under this chapter. All applicants may take the examination in either or both branches and the examination fee as herein set forth shall cover both branches if taken at the same time. (1935, c. 155, art. 4, s. 3.)

§ 7007(13). Application for license; examination fees; examination requirements.—Every person desiring to commence the practice of photography in this State shall file an application for a license with the board on a form prescribed by it. At the time of making such application the applicant shall deposit with the board an examination fee of twenty-five ($25.00) dollars: Provided, that the examination fees for persons engaged exclusively in the development, finishing, and/or enlarging of kodak pictures shall be in the sum of fifteen ($15.00) dollars. All applicants must appear for examination at the time and place designated by the board and shall present such references and credentials as the board may require, and shall give satisfactory evidence as to their competency and fitness to conduct the practice of photography based on their technical knowledge, their business record and their moral character. (1935, c. 155, art. 4, s. 4.)

§ 7007(14). No fees refunded; fees for additional examinations. — No fee for examination shall in any case be refunded, but in case the applicant fails in the first examination he may take three subsequent examinations in the branches in which he failed and the fee for each such subsequent examination shall be ten ($10.00) dollars. (1935, c. 155, art. 4, s. 5.)

§ 7007(15). Registration and licensing of successful applicants. — Exery applicant successfully passing such examination shall be registered in the records of the board as a qualified photographer in the branch or branches in which he has been successful, and shall receive a license signed by the chairman and secretary of said board authorizing the applicant to practice photography in the branch or branches in which he has been successful in this State. (1935, c. 155, art. 4, s. 6.)

§ 7007(16). Requirements for students or apprentices. — Every person desiring to commence the study of photography in this State for the purpose of practicing photography shall file a certificate signed by a duly licensed photographer that the said person has started to study photography with the said licensed photographer and that said student or apprentice commenced his studies or work prior to the date of the certificate, and such other information as the board may require. (1935, c. 155, art. 4, s. 7.)

§ 7007(17). Licenses not transferable.—No license shall be transferable nor shall it be issued to any person, firm or corporation, designed to operate under an assumed or fictitious name. (1935, c. 155, art. 4, s. 8.)

§ 7007(18). Licensing without examination of photographers now practicing; license fee. — The board shall, upon application, issue a license to every photographer who has been continuously engaged in the practice of photography and/or photo-finishing in this State for one year next preceding the passage of this chapter, without examination. All applications for license under this section shall be accompanied by a fee of five ($5.00) dollars, in addition to the annual license fee hereinafter prescribed, and such application must be made within thirty days after notification from the board. (1935, c. 155, art. 4, s. 9.)

§ 7007(19). Annual license fees for business establishments and employees.—All licensees who maintain an established place for the practice of photography and/or photo-finishing in the State of North Carolina, or who are not employees of an established place for the practice of photography and/or photo-finishing in the State of North Carolina, shall pay an annual license fee of five ($5.00) dollars. All licensees who are employees of an established place in the State of North Carolina, for the practice of photography and/or photo-finishing shall pay an annual license fee of three ($3.00) dollars. (1935, c. 155, art. 4, s. 10.)

§ 7007(20). Conduct of business unless registered prohibited.—No person, firm or corporation shall sell, offer for sale, or solicit orders for any product of photography unless duly registered under the terms of this chapter, or employed by a person, firm or corporation duly registered under the terms of this chapter. (1935, c. 155, art. 4, s. 11.)

§ 7007(21). Display of license. — Every recipient of a license to practice photography or photo-finishing shall keep such license conspicuously displayed on his business premises. (1935, c. 155, art. 4, s. 12.)

§ 7007(22). Time of payment of license fees; powers conferred by various fees.—All annual license fees prescribed by this chapter shall be paid to the board on or before the first day of July of each year. The board shall issue its receipt for every payment. The annual establishment fee of five ($5.00) dollars shall entitle the licensee, if otherwise qualified, to practice photography and photo-finishing. The annual employees' fee of three ($3.00) dollars shall entitle the licensee, if otherwise qualified to practice protography and photo-finishing, but only for and on behalf of a duly registered photographer or photo-finisher. (1935, c. 155, art. 4, s. 13.)

§ 7007(23). Revocation of license; reinstatement.—Should any licensee fail or neglect to pay his annual license on or before the first day of July of every year, the board shall notify him that his license will be revoked and unless said fee is paid in full on or before the first day of August of the same year, the board shall revoke said license.

(a) Any photographer and/or photo-finisher whose license has been revoked for failure to pay

the annual license fee may make application to the board for reinstatement. Such application shall be accompanied by a fee of five ($5.00) dollars, in addition to the regular license fee required. If the board shall find the applicant to be guilty of no violation of this chapter other than default in payment of annual license fees he may be immediately reinstated.

(b) The board shall have the power to revoke any license granted by it to any photographer and/or photo-finisher or apprentice found by the board to be guilty of fraud or unethical practices or of wilful misrepresentation, or found guilty under the laws of the State of North Carolina of any crime involving moral turpitude.

(c) Before any license is revoked, except for failure to pay the annual license fee, the holder thereof shall be given notice, in writing, either personally or by mailing to his last known address, setting forth the charges against him and the time and place for a hearing to be had on such charges, which such charges must be filed in writing under oath with said board, and the said hearing shall be not less than ten days from the time of the service of the said notice. The person charged shall be given a public hearing at which he may be represented by counsel and he shall have an opportunity to enter a defense and produce witnesses on his behalf. The board on such hearing shall provide a competent stenographer for the purpose of taking a complete record of such hearing, which record shall be filed with the board.

(d) If at such hearing of the accused the board shall be satisfied that the accused has been guilty of the offense charged it shall thereupon, without further notice, revoke the license of the person so accused: Provided, the accused shall not be barred the right of appeal to the superior court. (1935, c. 155, art. 4, s. 14.)

§ 7007(24). Violation of chapter a misdemeanor; separate offenses; disposition of fines and forfeitures.—Any person violating any of the provisions of this chapter, or engaging in any of the activities or practices herein defined without being duly licensed as herein provided, shall be guilty of a misdemeanor, and upon conviction shall be fined the sum of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars for the first offense, and shall be imprisoned not more than thirty days, and/or fined not exceeding two hundred ($200.00) dollars for any subsequent offense. Each and every violation hereof shall constitute a separate offense: Provided, all fines paid for violation of this chapter or bail forfeiture collected for appearances given by virtue of any process issued from any of the courts of this state shall be paid one-half to the treasurer of the county where such process was issued for the general fund of such county and one-half to the state treasurer to be by him deposited to the credit of the general funds of the State. (1935, c. 155, art. 5.)

§ 7007(25). Application and examination of non-residents. — All non-resident photographers and/or photo-finishers, desiring to do business in this State, shall apply to the board for examination at least thirty days prior to the next examination and obtain license before entering into said business, and no person, firm or corporation shall represent or in any way solicit or accept business for such non-resident photographers and/or photo-finishers, unless and until they have complied with the provisions of this chapter. (1935, c. 155, art. 6.)

§ 7007(26). Records of proceedings and moneys received.—The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this chapter. (1935, c. 155, art. 7, s. 1.)

§ 7007(27). Expenses of administration. — All expenses of administering this chapter shall be paid upon order of the board from the funds derived from the examination, license fees and penalties herein prescribed, and, in no event, shall such expense exceed the income from said sources. (1935, c. 155, art. 7, s. 2.)

§ 7007(28). Persons exempted. — Nothing in this chapter shall be construed to apply to:

(a) Any person in the employ of any newspaper or periodical publicaton, provided the negatives or photographs taken in such connection are not sold or offered for sale or otherwise disposed of in this state for profit.

(b) Any person who makes negatives or photographs for experimental purposes for his own personal use or pleasure, if such negatives or photographs are not sold or offered for sale in this state.

(c) Any person who is in the employ of the United States, the State of North Carolina, or any of its political subdivisions, or of any school, college, university or state institution, who makes negatives or any reproduction thereof solely for public use or for the use of such school, college, university or state institution, or educational or scientific purposes, provided such negatives or photographs are not sold or offered for sale in this state.

(d) Any duly licensed practitioner of medicine and allied occupations, hospitals or institutions who make negatives or photographs for clinical, surgical or medical purposes.

(e) Any motion picture photographer in the making of motion pictures. (1935, c. 155, art. 8.)

§ 7007(29). Excepted cities and towns and low priced photographers. — This chapter shall only apply to cities and towns having a population of more than twenty-five hundred: Provided this chapter shall not apply to those photographers whose product is retailed at a unit price not exceeding ten cents (10c) per picture. (1935, c. 155, art. 10.)

CHAPTER 116

PUBLIC ACCOUNTANTS

§§ 7008-7024. Public accountants.—(Repealed: Laws 1925, c. 261, s. 13.)

As to Municipal Accountants, see sec. 2840, 2841.

Editor's Note.—The Public Laws of 1913 from which these sections were codified, was expressly repealed by the Public Laws of 1925, c. 261. However, as many of the provisions of the old act were reenacted by the repealing act and will be found codified as sections 7024(a) to 7024(m), the constructions of the 1913 act are here inserted.

In General.—The provisions of § 7008 to 7024, inclusive,

creating and incorporating the State Board of Accountancy, confers upon its members continuous quasi-judicial powers as an arm of the State Government in which the people of the State are interested, both as to their administration and to a certain extent in the funds of the board, the compensation of members being paid by fees fixed by law, any surplus to be deposited in the State Treasury, and in these, and in other respects, its members are to be regarded as State officials to the extent of their duties specified in the statute. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Exercise of Police Power.—Our statutes creating a State Board of Accountancy and giving them authority to pass upon applications and issue licenses to those qualified as public accountants, are within the exercise of the police powers of the State, in which the public are interested, as well as one to whom a certificate has been issued, and the State is also interested in the requirement that moneys collected and not necessary to the purposes of the act be turned into the State Treasury. State v. Scott, 182 N. C. 865, 109 S. E. 789.

License Required.—Section 7023 does not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who send their representative to this state to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern is authorized to do business. Respass v. Rex Spinning Co., 191 N. C. 809, 133 S. E. 391.

Holding Examination Beyond State Boundaries.—The exercise of the powers of the State Board of Accountancy, the members of which are to be regarded as State officials, is coextensive with the State boundaries, and may not be exercised beyond them, the word jurisdiction embracing not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised. State v. Scott, 182 N. C. 865, 109 S. E. 789.

The legislative intent will not be construed by implication to extend the exercise of a quasi-judicial power by public officers to places beyond the State boundaries, as where the statute creates a State Board of Accountancy, gives it the power to examine and license applicants, and states that the board may do so "at such place as it may designate;" for the presumption being against the exercise of such extra territorial power, the discretion of the board in the exercise of this power will be confined to places within the boundaries of this State. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine upon examination whether applicants for license therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts ultra vires in holding an examination beyond the boundaries of the State upon the request of nonresident desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Same—Injunction. — The Attorney-General may of his own motion, or upon the complaint of a private party, become a party to a suit that seeks to prevent an ultra vires act or the misapplication of a fund in which the public is interested. State v. Scott, 182 N. C. 865, 109 S. E. 789.

The examination and granting license to applicants for certificates as public accountants, beyond the borders of our State, being the exercise of a quasi-judicial power, under the police powers of the State, is void. and an injunction will lie to prevent it, in a suit of the State ex rel. Attorney-General and an accountant holding a certificae from the board, who is also a citizen and taxpayer of North Carolina. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Where an injunction is sought to restrain an ultra vires act of the State Board of Public Accountancy in holding an examination for the applicants for license as public accountants, beyond the boundaries of the State, the courts, upon sufficient evidence or admissions, will continue the restraining order to the hearing, to prevent the commission of such acts in the future, and the objection cannot be successfully maintained, that the specific act complained of has been committed and leaves nothing for such order to operate upon, nor will the declaration by the board that they will not do so in the future affect the matter. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Same—Same—Parties. — Where an injunction is sought alleging that the defendant was attempting to do an ultra vires act in holding an examination beyond the boundaries of the State, and unlawfully diverting the funds, and exception has been taken in the lower court, that the suit should have been brought State ex rel. the Attorney-General, etc., an amendment to this effect may be allowed in the Supreme Court, so that the case may be heard on its merits, it appearing that the defendant will not thereby be prejudiced. State v. Scott, 182 N. C. 865, 109 S. E. 789.

§ 7024(a). "Public accounting" defined.—The term "Practice of Public Accounting" as used in this chapter is defined as follows:

A person engaged in the practice of public accounting, within the meaning and intent of this chapter, who offers his or her services to the public as one who is qualified to render professional service in the analysis, verification and audit of financial records and the interpretation of such service through statements and reports. (1925, c. 261, s. 1; 1929, c. 219, s. 1.)

In Scott v. Gillis, 197 N. C. 223, 226, 148 S. E. 315, it was held that plaintiff and defendant were certified Public Accountants, citing N. C. Code of 1927.

§ 7024(b). Qualifications.—Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over twenty one years of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2.)

§ 7024(c). Unlawful use of title "certified public accountant" by individual. — It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Editor's Note.—This section was reviewed in 3 N. C. Law Rev. 149.

This act was probably intended to cure defects and omissions of the former statutes. Respass v. Rex Spinning Co., 191 N. C. 809, 813, 133 S. E. 391.

As to construction of prior law, see notes under sections 7008-7024.

§ 7024(d). Use of title by firm.—It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

§ 7024(e). Use of title by corporation.—It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other

means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Accountancy admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

§ 7024(f). Unlawful practice; by corporation.—It shall be unlawful for any person, firm, copartnership or association to engage in the practice of public accounting in the State of North Carolina unless such person, or each of the members of such firm, copartnership or association first shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant. It shall be unlawful for any corporation to engage in the practice of public accounting in the State of North Carolina: Provided, however, that nothing herein contained shall be construed to prohibit the practicing of the profession of public accounting by any person, firm, copartnership, association, or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor. (1925, c. 261, s. 6.)

§ 7024(g). Registration of accountants already practicing.—Any person, firm, copartnership, association or corporation who shall on March 10, 1925 be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Accountancy for registration as a public accountant, and the State Board of Accountancy, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the pactice of public accounting in the State of North Carolina, but such registration shall not be construed in any way as indicating that the State of North Carolina or the State Board of Accountancy has approved the educational and professional experience and qualifications of the registrant. (1925, c. 261, s. 7.)

§ 7024(h). Use of title "public accountant" without qualification.—It shall be unlawful for any person, firm, copartnership, association or corporation, not having qualified under this chapter, to assume or use the style of title of public accountant, or other means of indentification to indicate that such person, firm, copartnership, or association or corporation is engaged in the practice of public accounting in the State of North Carolina: Provided, however, that the inhibitions of this section shall not be construed to apply to any person, firm, copartnership, association or corporation who in March 10, 1925 was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina. (1925, c. 261, s. 8.)

§ 7024(i). Assistants need not be certified.—Nothing contained in this chapter shall be construed to prohibit the employment by a certified public acountant, or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employees work under the control and supervision of certified public accountants or public accounts, and do not certify to any one the accuracy or verification of audits or statements; and provided further, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

§ 7024(j). Persons certified in other states.—A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

§ 7024(k). Not applicable to officers of state or municipality.—Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

§ 7024(l). Board of accountancy; powers and duties.—The State Board of Accountancy shall consist of four persons to be appointed by the Governor, all of whom shall be the holders of valid and unrevoked certificates as certified public accountants heretofore issued under the provision of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter. They shall hold office for the term of three years and until their successors are appointed: Provided, that no appointments to the board shall be made under the provisions of this chapter until the expiration of the terms of the members of the present board. The powers and duties of the board shall be as follows:

(1) To elect from its members a president, vice-president and secretary-treasurer. The members of the board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this chapter, an amount not exceeding ten dollars ($10) per day, and they shall be entitled to necessary traveling expenses.

(2) To employ legal counsel and clerical assistance and to fix the compensation of same, and to incur such other expenses as may be deemed necessary to carry into effect the provisions of this chapter.

(3) To formulate rules for the government of the board and for the examination of applicants for certificates of qualifications admitting such applicants to practice as certified public accountants.

(4) To hold written or oral examinations of applicants for certificates of qualification at least one

year, or oftener, as may be deemed necessary by the board.

(5) To issue certificates of qualification admitting to practice as certified public accountants to each applicant, who, being the graduate of an accredited high school or having an equivalent education, shall have had at least two years experience or its equivalent next preceding the date of his application on the field shaff of a certified public accountant or public accountant one of which shall have been as a senior or accountant in charge, and who shall receive the endorsement of three certified public accountants of any state as to his eligibility to become a certified public accountant; or who, in lieu of the two years experience or its equivalent, above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy; or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor, and who shall have passed a satisfactory examination in "theory of accounts," "practical accounting," "auditing," "commercial law" and other related subjects.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants to such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or its equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold a valid and unrevoked certificate or degree as certified public accountant or its equivalent issued under authority granted by a foreign nation; when in the judgment of the board the requirements for the issuing or granting of such certificate or degree are substantially equivalent to the requirements established by this chapter: Provided, however, that such applicants signify their intention of engaging in the practice of public accounting within the State.

(7) To charge for each examination and certificate provided for in this chapter a fee of twenty-five dollars. This fee shall be payable to the secretary-treasurer of the board by the applicant at the time of filing application. If at any examination an applicant shall have received a passing grade in one subject, he shall have the privilege of one reëxamination at any subsequent examination held within eighteen months from the date of his application upon payment of a reexamination fee of fifteen dollars. In no case shall the examination fee be refunded, unless in the discretion of the board the applicant shall be deemed ineligible for examination.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed five dollars for such renewal.

(9) The board shall have the power to revoke any certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter, for good and sufficient cause: Provided, that written notice shall have been mailed to the holder of such certificate at his last known address twenty days before any hearing thereof, stating the cause of such contemplated action, and appointing a time for a hearing thereon by the board; and provided further, that, except for failure to renew such certificate and to pay the renewal fee thereof, no certificate shall be revoked until such hearing shall have been had. At all such hearings the Attorney General of the State, or one of his assistants designated by him, shall sit with the board with all the powers of a member thereof.

(10) Within sixty days after March 10, 1925, the board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of section 7024 (g) apply to the board for registration as public accountants. The board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the board.

(11) Within sixty days after March 10, 1925 the board shall formulate rules for registration of these public accountants who are qualified to practice under this chapter and who under the provisions of section 7024 (j) are permitted to engage in work within the State of North Carolina. The board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.

(12) To submit to the Commissioner of Revenue the names of all persons who have qualified under this chapter as practitioners of public accountancy, and who have complied with the rules of the board. The Commissioner of Revenue shall issue only to those whose names are so submitted to him by the board of license for the privilege of practicing the profession of public accountancy, and the license so issued shall be evidence of his registration with the board.

(13) The board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the State Board of Accountancy, and all receipts of every kind and nature, as well as the compensation paid the members of the board and the necessary expenses incurred by them in the performance of the duties imposed upon them by this chapter, shall be reported annually to the State Treasurer. Any surplus remaining in the hands of the board over the amount of three hundred dollars shall be paid to the State Treasurer at the time of submitting the report, and shall go to the credit of the general fund: Provided, that no expense incurred under this chapter shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this chapter, or issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine

hundred and thirteen, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within thirty days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11.)

§ 7024(m). Violation of chapter; penalty.—Any violation of the provisions of this chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars and not exceeding two hundred dollars for each offense. (1925, c. 261, s. 11.)

§ 7024(n). Partial invalidity.—If any section, subsection, clause or phrase of this chapter is for any reason held to be unconstitutional by the courts of this State or the United States then such decision shall affect only that section, subsection, clause or phrase so declared to be unconstitutional, and shall not affect any other section, subsection, clause or phrase of this chapter. (1925, c. 261, s. 11.)

CHAPTER 117

PUBLIC BUILDINGS AND GROUNDS

Art. 1. Officers in Charge

§ 7025. Board of public buildings; keeper of capitol.—The Governor and Secretary of State, the Treasurer and Attorney-General shall constitute the board of public buildings and grounds, and they shall appoint a keeper of the capitol, public grounds and arsenal, and he shall hold his office until his successor is appointed and files his bond in accordance with the requirements of the board and the law relating to bonds. The keeper of the capitol shall perform all the duties and exercise all the power herein prescribed, in accordance with and pursuant to the judgment, discretion and resolutions of the board of public buildings and grounds, and shall perform such duties under their direction; and he shall appoint and control all assistants, help and subordinates, such as watchmen of the capitol, workmen on the grounds, domestic servants for the executive mansion, and servants about the capitol and its appurtenances, including the servants and messengers waiting and attending upon the Supreme Court, and janitors for the Supreme Court building. (Rev., 5006; Code, 2301; 1899, c. 482; 1870-1, cc. 8, 175; 1880, c. 61; 1909, c. 860; 1925, c. 315.)

Editor's Note.—By Public Laws of 1925 the keeper of the capitol is given authority to appoint servants and messengers of the Supreme Court, an authority formerly expressly prohibited. Provisions limiting the number of janitors of the supreme court building to one and the compensation of domestic servants to $750 per annum were omitted.

Keeper of Capitol Not a Constitutional Office.—The office of keeper of the capitol is not a constitutional office, and therefore does not have to be filled in a mode designated by the constitution, but may be filled in any way provided for by the Legislature. Cherry v. Burns, 124 N. C. 761, 33 S. E. 136.

§ 7026. Bond of keeper of capitol. — Before entering upon the duties of his office the keeper of the capitol shall execute a bond with good and sufficient surety or security, in the sum of at least two hundred fifty dollars, payable to the State of North Carolina, and conditioned for the faithful discharge of his duties, and the board of buildings and grounds may increase the penal sum of said bond, in their discretion. The bond shall be deposited in the office of the Secretary of State, and shall be renewed every two years, with such surety and in such amount as the board of public buildings and grounds may direct, and the same may be sued upon whenever in the judgment of said board the conditions thereof, or any of them, may have been broken; and the same shall not be discharged until the whole penalty is exhausted in damages. (Rev., 291; Code, 2306; R. C., c. 103, s. 6; 1925, c. 315.)

§ 7027. Duties of the board and the keeper.—The board of public buildings and grounds shall take charge of and keep in repair the public buildings of the State, in the city of Raleigh, and shall, from time to time as the same may be needed, procure, furnish and keep in repair for the halls of the Senate and House of Representatives, and the public offices of the capitol, all necessary furniture using for such purpose, only such funds as shall have been appropriated therefor by the Legislature. The keeper of the capitol, among his other duties, shall take care of the furniture, sweep and clean and dust all parts of such buildings, whether occupied or not, keep the keys of the several doors not occupied as offices, and conduct visitors through the capitol upon request, and shall, under the direction of the board, trim or remove trees standing in the public square, and remove the leaves and other rubbish as often as may be necessary; and shall perform any other duty in relation thereto of which he is capable, whenever directed by the said board so to do. The board shall, at all times, use such means as may, in their opinion, be effectual to secure the capitol and other public buildings, in the city of Raleigh, from fire. This chapter shall apply to and include all lots in the city of Raleigh belonging to the State and used as public parks, and the buildings and grounds formerly occupied by the Institution for the Blind, on Jones and McDowell streets, and to all other property within the city of Raleigh, not now used or devoted to the use of some institution or State agency. (Rev., 5008; Code, 2303; R. C., c. 103, s. 3; 1925, c. 315.)

§ 7028. Arsenal provided.—The board of public buildings and grounds shall provide a suitable building or space in some building for an arsenal. The Governor may make such provision as he may deem necessary for the care and issue of property and for guarding and protecting the arsenal. (Rev., 5007; Code, 2302; 1870-1, c. 175, s. 3; 1917, c. 200, s. 96; 1925, c. 315.)

§ 7029. Accounts for labor audited.—No account for work or labor done on the capital square or public grounds in the city of Raleigh, or in the public buildings, shall be audited and paid until the same is sworn to before the Secretary of State, or some other person authorized to administer oaths, to be just and true, and the same shall be so certified by the Secretary of State and the keeper of the capitol. Neither the Secretary of State nor the keeper of the capitol shall certify for payment the account of any laborer for work done or services rendered, pur-

suant to this chapter, in any of such buildings or any of such grounds, unless it appear to their satisfaction that such laborer or employee has been employed by the keeper of the capitol and that such work and services have been rendered in a satisfactory manner. (Rev., s. 5017; Code, s. 2310; 1870-1, c. 80, s. 2; 1925, c. 315.)

§ 7030. Accounts for fuel audited. — No account for fuel shall be audited or paid until the claimant makes oath, as in the preceding section, that the account is just and true, and that the number of cords of wood, or tons of coal charged for have been delivered to the authorities to receive the same at the public building. (Rev., 5018; Code, s. 2311; 1870-1, c. 80, s. 3; 1925, c. 315.)

Art. 2. Public Buildings

§ 7031. Rooms assigned in the capitol. — The rooms of the capitol, other than the Senate chamber and House of Representatives, shall be appropriated as follows: The two west rooms of the southern division of the capitol shall be appropriated to the Executive; the two east rooms in the southern division shall be appropriated to the Treasurer; the two east rooms in the northern division shall be appropriated to the Secretary of State, and the two rooms opposite, to the Auditor; and the room number three, in the west wing, shall be appropriated and set apart to the enrolling clerks of the General Assembly. The other rooms shall be used for State purposes under the direction of the Board of Public Buildings and Grounds. (Rev., s. 5010; Code, s. 2305; R. C., c. 103, s. 5; 1885, c. 121, s. 8; 1925, c. 315; 1927, c. 153, art. 2.)

§ 7032. Custodian of administration building.— The board of public buildings and grounds shall appoint a custodian of the administration building, who shall hold his office until his successor is appointed. The custodian shall, under the general direction of the officials above named and the keeper of the capitol, have the management and control of the administration building, take care of the furniture and keep clean all parts of the building, keep the keys to the several rooms not occupied as offices, conduct visitors through the buildings, upon request, and perform any other duty of which he is capable, whenever especially ordered by the keeper of the capitol or the board of public buildings and grounds to do so. (1913, c. 96, s. 1; 1925, c. 315.)

§ 7033. Keeper of the capitol to employ assistants.—The keeper of the capitol is empowered to employ such laborers and assistants as is needed to keep the administration building clean and, in order to run the elevators: Provided, that the number of laborers and the wages paid shall be approved by the board of public buildings and grounds and be paid as other laborers, under the direction of the keeper of the capitol. (Ex. Sess. 1913, c. 67; 1925, c. 315.)

§ 7034. Rooms assigned in administration building.—The first floor of the State administration building shall be occupied by the State Library; the second floor by the Hall of History, hall of records and portraits, and the North Carolina Historical Commission; the third floor by the Supreme Court, the clerk of the Supreme Court, and the Attorney-General; the fourth floor by the Supreme Court Library and the Supreme court records, and the basement of the building shall be used for storing the printed journals of the General Assembly, printed laws, Supreme Court reports, the publications of the board of trustees of the State Library and of the Historical Commission, and for such other purposes as the board of public buildings and grounds may direct. (1913, c. 99, s. 1; 1925, c. 315.)

§ 7035. Custodian and janitor of State Departments Building.—The building formerly occupied by the Supreme Court and the State Library and others shall be designated as the State Departments Building. The board of public buildings and grounds is authorized to employ a custodian and a janitor for such building. (1915, c. 187, ss. 1, 2; 1925, c. 315.)

§ 7036. Rooms assigned in State Departments Building.—The first floor of the State Departments Building shall be occupied by the Corporation Commission and the State Tax Commission, if created. The second floor shall be occupied by the departments of Labor and Printing and Public Instruction. The third floor shall be occupied by the Department of Insurance. The fourth floor shall be occupied by the Board of Health. The basement of the building shall be used as a storeroom for the departments occupying the building and used as may be necessary by them. (1913, c. 99, s. 2; 1915, c. 187, s. 1; 1925, c. 315.)

§ 7037. Building for Department of Agriculture.—The building which has been erected for the Department of Agriculture shall be occupied by the Department of Agriculture and for a museum, except the entire fourth floor of this building shall be fitted up and used for committee rooms for the committees of the General Assembly, with the necessary cloak room and lavatory; and ample space shall be provided on said fourth floor for the State Department of Public Welfare, including the State Board of Charities and Public Welfare and its executive staff, and the assignment of rooms to the said department shall be so arranged that the appropriate committees of the Legislature may meet in the respective rooms assigned to said department and be accessible to the information and coöperation of said department in their work. (1919, c. 203; 1925, c. 315.)

§ 7038. Other buildings and annexes. — The annex to the building for the Department of Agriculture, now used by the Department of Revenue, and the buildings on the lot on Jones and McDowell Streets, formerly used by the Institution for the Blind, may be assigned by the board of public buildings and grounds to such uses and purposes as may be proper and necessary; but as to the annex now used by the Department of Revenue the use of the same shall not be changed until and unless it may be necessary for said department to assume new debts, or be assigned to other quarters in other public buildings. (1925, c. 315.)

§ 7039. No sleeping apartments in certain buildings.—The rooms in the capitol and Supreme Court building shall not be used as sleeping apartments, and no beds shall be kept in any room save only that used by the keeper; and he shall remove all beds and sleeping couches which may be introduced by any person into any of the rooms; and shall take charge of and keep all the keys of the rooms, except only such as are used by the heads of the departments; and of them for such time as they are not so used. (Rev., s. 5013; Code, s. 2304; R. C., c. 103, s. 5; 1842, c. 54; 1925, c. 315.)

§ 7039(a). Rooms set apart for legislative committees.—The fourth and fifth floors of the Automobile or Revenue Building located on Morgan and Salisbury Streets in the city of Raleigh, together with all the offices therein, be set apart for the use of legislative committees pursuant to chapter seventy, Public Laws Extra Session of nineteen twenty-four, and they shall remain devoted to said use, but the said rooms may be used when the Legislature is not in session for such other uses as may be necessary and expedient in the opinion of the Board of Public Buildings and Grounds; provided, however, that offices on fourth and fifth floors of said building shall be vacated, cleaned, equipped and made ready for use by legislative committees at least twenty days prior to the convening of each session of the General Assembly, both regular and special, and the keeper of the Capitol and the janitor assigned to the said building shall, upon failure to comply with this provision, be guilty of a misdemeanor and be punishable by fine or imprisonment, or both, in the discretion of the Court; and provided, further, that the Board of Public Buildings and Grounds may allocate permanently the offices now used by the Budget Bureau to said bureau on the fifth floor of said building and may install on said floor a telephone exchange, in order to make the information in the possession of the Budget Bureau available to legislative committee and to make adequate space for said telephone exchange. (1927, c. 153, s. 2.)

Editor's Note.—The purpose of this act, as expressed in section four, is to confer upon the Board of Public Buildings and Grounds full and complete authority to use all space in said public buildings to the end that the cost of rental for State officers and agencies and institutions with the City of Raleigh shall be reduced to the minimum and finally eliminated.

§ 7039(b). Use of other buildings.—Except as herein otherwise provided all space in other State buildings in Raleigh, including the capitol, the administration and state departments building, the agricultural building and the automobile building, as well as the buildings on the lot formerly occupied by the School for the Blind lying on Jones Street in Raleigh, shall be used for such purposes and in such manner as may be directed or prescribed by the Board of Public Buildings and Grounds, and they shall have full power and authority to make such removals, readjustments and to provide such equipment as may be necessary to carry out the purposes of this act, and to that end may use the appropriations thereof made to the Board of Public Buildings and Grounds, the agricultural department shall be permanently located in the agricultural building. (1927, c. 153, s. 3.)

§ 7039(c). Construction of public buildings from contingency and emergency fund authorized.—It shall be lawful and competent to resort to the contingency and emergency fund, provided in the Appropriations Act, for financial aid in the construction of state public buildings, when in the opinion of the governor and the council of state a condition of emergency exists rendering it necessary to construct one or more buildings for the purpose of housing its bureaus, departments, and agencies. (1935, .c 481.)

Art. 3. Public Grounds

§ 7040. Keeper of capitol supervisor of public lots.—The keeper of the capitol is appointed supervisor of all the other public lots belonging to the State, in the city of Raleigh, including the square and buildings formerly occupied by the Institution for the Blind, on Jones and McDowell streets, and except such as may be occupied by the Institution for the Blind and the Deaf and Dumb, the public schools, and Moore and Nash squares, as hereinafter set out, and such other vacant lots as may be otherwise provided for herein; and he is authorized, upon the approval of the board of public buildings and grounds, to lease such lots, or parts thereof, as it may be proper to lease, and upon such terms as may be reasonable and proper, for a period of twelve months, and to collect the proceeds of such renting, and to pay the same to the Treasurer immediately upon the collection thereof. (Rev., s. 5009; Code, ss. 2312, 2314; 1870-1, c. 282; s. 3; 1871-2, c. 205; 1925, c. 315.)

§ 7041. Repair of walks.—Whenever the walks in and immediately around the capitol square become so worn by action of the weather or other causes that in the judgment of the board of public buildings and grounds they should be repaired, relocated, or resurveyed, the board is authorized to direct the keeper of the capitol to contract for suitable material for such repairs; but the work shall be done by convict labor as far as the same can be used; and the Auditor shall audit the accounts for said material and labor on the approval of the board of public buildings and grounds and the keeper of the capitol; and the board is authorized and empowered to use such material from the State Prison as may be contracted for with the board of directors of the State Prison Department upon such terms as may be reasonable and just; and the said material and convict labor shall be paid for, upon a warrant of the Auditor upon the State Treasurer, out of the appropriation for such purposes. (Rev., s. 5014; Code, s. 2316; 1881, c. 325, ss. 1, 2; 1905, c. 509; 1925, c. 315.)

§ 7042. Work of convicts on public grounds.—The superintendent and board of directors of the State Prison Department are authorized and directed, pursuant to agreement with the board of public buildings and grounds, to furnish such convict labor of the State Prison Department, to be worked under the supervision of the board of public buildings and grounds and the keeper of the capitol on such grounds of the capitol and mansion squares and public buildings, as may be deemed necessary by the board of public build-

ings and grounds, and the Governor is authorized to make such paroles, temporary or otherwise, of convicts in the custody of the keeper of the capitol as may be convenient for the proper and economic use of such convicts in such work, and the State Prison Department shall be compensated for such convict labor as per contract entered into with the board of directors of the State Prison by the board of public buildings and grounds; the same shall be paid for out of the appropriation to the board of public buildings and grounds. (1911, c. 149; 1925, c. 315.)

§ 7043. Appropriation for public grounds. — Such sums as may be appropriated by the General Assembly to the board of public buildings and grounds shall be used for the purposes stated in such appropriating acts, and unless so stated therein, shall be used by the board of public buildings and grounds for the care, maintenance, upkeep, preservation and repair of public buildings and grounds in the city of Raleigh, as herein specified. (Rev., s. 5016; Code, s. 2309; 1887, c. 409, s. 12; 1870-1, c. 80; 1925, c. 275, s. 6; 1925, c. 315.)

§ 7044. Moore and Nash squares and other public lots.—The board of aldermen of the city of Raleigh shall have power to grade, lay out in walks, plant with trees, shrubbery, and flowers, and otherwise adorn Moore Square and Nash Square, in said city, so as to make the same an ornament to the city, and at its own expense, and to that end, said board of aldermen, shall have the general charge and management of these squares, and the supervision and control of the same. Whenever, in the opinion of the board of public buildings and grounds, the board of aldermen of the city of Raleigh are not properly keeping said square or other public lots, which they have taken charge of for the purposes of this section, the board of buildings and grounds shall call the same to the attention of the said board of aldermen, and if the said board of aldermen fail for a period of sixty days, to take proper care of said lots, the said board of public buildings and grounds may repossess the same and proceed to manage and keep the same as may seem to them necessary for the preservation of such property. The board of aldermen of the city of Raleigh may improve in like manner any of the vacant lots belonging to the State within the city limits not otherwise specially appropriated or rented or used. The board of aldermen shall not have power, however, to prevent the free access of well-behaved persons to such squares or lots except at unreasonable hours or for some temporary purpose especially to be designated by the board. (Rev., s. 5015; Code, ss. 2314, 2315; 1871-2, c. 205, ss. 1, 2; 1925, c. 315.)

§ 7045. Trespass upon public grounds.—If any person shall willfully trespass upon any of the public lots belonging to the State in the city of Raleigh, or shall cut any timber or commit any waste, or shall refuse to surrender possession after the expiration of their leases, or if any person in possession of any of said lots above mentioned shall refuse to leave the same and shall further refuse to surrender possession within ten days after demand made by the keeper of the capitol, said person shall be guilty of a misdemeanor; and it shall be the duty of said keeper of the capitol to report all such violations of law to the Governor or to the Attorney-General, and if any of the said persons shall be convicted, they shall be fined or imprisoned at the discretion of the court. (Rev., s. 3745; Code, s. 2313; 1870-1, c. 282, s. 4; 1925, c. 315.)

§ 7046. Injuring trees in capitol square. — No person shall drive, screw or otherwise insert any nails, screws, or other devices into or upon any of the trees in the capitol square in the city of Raleigh for any purpose whatsoever, and any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars or imprisoned not more than ten days: Provided, this section shall not apply to preparing or repairing the small houses and drinking fountains for the squirrels in said park. (1907, c. 67, s. 1; 1925, c. 315.)

§ 7047. Metallic support for wires.—All electric light companies, telephone companies or any person requiring support for wires or cables, shall use such iron or metallic poles as may be prescribed by the board of public buildings and grounds for supporting said wires within the capitol square, or shall be required to place said wires or cables in underground conduits at the direction of the board of public buildings and grounds. (1907, c. 67, s. 3; 1925, c. 315.)

CHAPTER 118

PUBLIC HEALTH

SUBCHAPTER 1. ADMINISTRATION OF PUBLIC HEALTH LAW

Art. 1. State Board of Health

§ 7048. Membership of board. — The North Carolina board of health shall consist of nine members, four of which members shall be elected by the Medical Society of the State of North Carolina and five of which members shall be appointed by the Governor. (Rev., s. 4435; Code, s. 2875; 1879, c. 177, s. 1; 1885, c. 237, s. 1; 1893, c. 214, s. 1; 1911, c. 62, s. 1; 1931, c. 177, s. 1.)

For full treatment of health, see 7 N. C. Enc. Dig. 5; 14 N. C. Enc. Dig. 288.

§ 7049. Term of office: removal; vacancies; how filled. — The terms of all members of the present board of health shall expire on April first, one thousand nine hundred thirty-one, or as soon thereafter as their successors have been appointed and elected in the manner provided for herein and shall have duly qualified. The Medical Society of the State of North Carolina shall at its next annual meeting elect two members to serve for two years and two members to serve for four years, and the Governor on or before May first, one thousand nine hundred thirty-one, shall appoint five members, three of such members to serve for two years and two of such members to serve for four years. At the expiration of the terms of the members so elected and appointed their successors shall be elected or appointed for a term of four years and until their successors have been duly elected or appointed

and have qualified. The Medical Society of the State of North Carolina shall have the right to remove any member elected by it for cause, and the Governor shall have the right to remove any member appointed by him for cause. Vacancies on said board among the membership elected by the Medical Society of the State of North Carolina shall be filled by the executive committee of said Medical Society until the next meeting of the said Medical Society, when the said Medical Society shall fill the vacancy for the unexpired term. Vacancies on said board among the membership appointed by the Governor shall be filled by the Governor for the unexpired term. (Rev., s. 4436; Code, s. 2877; 1879, c. 117, s. 3; 1885, c. 237, s. 3; 1893, c. 214, s. 2; 1901, c. 245; 1911, c. 62, s. 2; 1931, c. 177, s. 2.)

Editor's Note.—The Act of 1931 repealed the former section and substituted the above in lieu thereof.

§ 7050. Duties of board.—The board of health shall take cognizance of the health interests of the people of the state; shall make sanitary investigations and inquiries in respect to the people, employing experts when necessary; shall investigate the causes of diseases dangerous to the public health, especially epidemics, the sources of mortality, the effect of location, employments, and conditions upon the public health. They shall gather such information upon these matters for distribution among the people, with the especial purpose of informing them about preventable diseases. They shall be the medical advisers of the state, and are herein specially provided, and shall advise the government in regard to the location, sanitary construction, and management of all state institutions, and shall direct the attention of the state to such sanitary matters as in their judgment affect the industries, prosperity, health, and lives of the people of the state. They shall make an inspection once in each year, and at such other times as they may be requested to do so by the state board of charities, of all public institutions, including all convict camps under the control of the state's prison, and make a report as to their sanitary conditions, with suggestions and recommendations, to their respective boards of directors or trustees; and it shall be the duty of the officials in immediate charge of said institutions to furnish all facilities necessary for a thorough inspection. The secretary of the board shall make biennially to the general assembly, through the governor, a report of their work. (Rev., s. 4437; Code, s. 2876; 1879, c. 117, s. 2; 1885, c. 237, s. 2; 1893, c. 214, s. 3; 1911, c. 62, s. 3.)

§ 7051. May make regulations in epidemics.—In times of epidemics of smallpox, yellow fever, typhoid fever, scarlet fever, diphtheria, typhus fever, bubonic plague, and cholera, the state board of health shall have sanitary jurisdiction in all cities and towns not having regularly organized local boards of health, and are hereby empowered to make all such regulations as they may deem necessary to protect the public health, and to enforce them by suitable penalties. (Rev., s. 4438; 1893, c. 214, s. 17; 1911, c. 62, s. 4.)

Validity.—Regulations and provisions for the vaccination of the inhabitants, and their enforcement by penalties, constitute a valid exercise of governmental police power for the public welfare, health and safety. State v. Hay, 126 N. C. 999, 35 S. E, 459.

§ 7052. To issue bulletins; to check diseases; compensation. — Bulletins of the outbreak of disease dangerous to the public health shall be issued by the state board whenever necessary, and such advice freely disseminated to prevent and check the invasion of disease into any part of the state. It shall also be the duty of the board to inquire into any outbreak of disease, by personal visits or by any method the board shall direct. The compensation of members on such duty shall be four dollars a day and all necessary traveling and hotel expenses. (Rev., s. 4439; 1893, c. 214, s. 26; 1911, c. 62, s. 5.)

§ 7053. Officers of; salary of secretary; pay of members.—The state board of health shall have a president, a secretary who shall also be treasurer, and an executive committee, said executive committee to have such powers and duties as may be assigned it by the board of health. The president shall be elected from the members of the board and shall serve six years. The secretary-treasurer shall be a registered physician of the State and he shall be elected by the board, subject to the approval of the Governor, and he shall serve for four years and until his successor has been elected and qualified. The board shall have the right to remove the secretary-treasurer from office for cause. The executive committee shall be composed of the president of the board, ex officio, and two other members of the board to be elected from those composing it. The executive office of the board shall be in the city of Raleigh, and the secretary shall reside there. The secretary shall be the executive officer of the board and shall, under its direction, devote his entire time to public-health work, and shall be known as the "state health officer." He shall receive for his services such yearly compensation as shall be fixed by the board, not to exceed eight thousand dollars and his actual traveling and hotel expenses when engaged in the work of the board. The said officer shall not receive any other compensation for the performance of his official duties than the salary herein stated. The board may in its discretion elect as a special assistant to the state health officer, for the antituberculosis work, the secretary of the state association for the prevention of tuberculosis, at an annual salary not to exceed six hundred dollars. The members of the board shall receive no pay, except that each member shall receive four dollars and necessary traveling and hotel expenses when on actual duty in attending the meetings of the board or of the executive committee or in pursuing special investigations in the state; but when attending important meetings beyond the limits of the state, the number of delegates thereto being limited to one in addition to the secretary, only actual traveling and hotel expenses shall be allowed. These sums shall be paid by the treasurer on authenticated requisition, approved and signed by the president. (Rev., s. 4440; Code, ss. 2878, 2881; 1879, c. 117, ss. 5, 7; 1885, c. 237, s. 4; 1893, c. 214, s. 4; 1911, c. 62, s. 6; 1913, c. 181, ss. 1, 2; 1921, c. 130; 1927, c. 143; 1931, c. 177, s. 3.)

Editor's Note.—By amendment, Public Laws 1921, ch. 130,

the salary of the secretary was raised from three thousand dollars per year to five thousand per year. The provision against receiving any other compensation was added at the same time. By Public Laws, 1927, ch. 143, the salary of the secretary was raised to eight thousand dollars per year.

The Laws of 1927, ch. 143, in amending this section refers to ch. 118, Art. 1, sec. 753. The reference to section 753 is a clerical error, sec. 7053 was intended.

The Act of 1931 changed the term of the secretary-treasurer from six to four years, and added the provision as to his removal for cause.

§ 7054. Meetings to elect officers.—The meeting of the state board of health for the election of officers shall be on the second day of the annual meeting of the medical society of the state of North Carolina in the year one thousand nine hundred and one and every six years thereafter. (Rev., s. 4441; 1901, c. 245, s. 4; 1911, c. 62, s. 7.)

§ 7055. Annual and special meetings.—Special meetings of the state board of health may be called by the president through the secretary. The regular annual meeting shall be held at the same time and place as the state medical society, at which time the secretary shall submit his annual report. The executive committee shall meet at such times as the president of the board may deem necessary, and he shall call such meetings through the secretary. (Rev., s. 4442; 1893, c. 214, s. 27; 1911, c. 62, s. 8.)

Art. 2. State Laboratory of Hygiene

§ 7056. Laboratory established under control of state board of health.—For the better protection of the public health and to prevent the spread of communicable diseases there shall be established a state laboratory of hygiene, the same to be under the control and management of the state board of health. (Rev., s. 3057; 1905, c. 415; 1907, cc. 721, 884; 1911, c. 62, s. 36.)

§ 7057. To analyze potable waters. — It shall be the duty of the state board of health to have made in such laboratory monthly examinations of samples from all the public water supplies of the state; of all waters sold in bottle or other package, and of all spring waters that are maintained and treated as an adjunct to any hotel, park, or resort for the accommodation or entertainment of the public. In the case of springs in connection with hotels, parks, or resorts intermittently operated, examinations of the water shall be made monthly during the period only that they are open for the accommodation or entertainment of the public; but if upon the examination of the water of any such spring it shall be found to be infected or contaminated with intestinal bacilli or other impurities dangerous to health, examinations shall be made weekly until its purity and safety are shown.

The board shall also cause examinations to be made of well and spring waters, when in the opinion of any county superintendent of health or any registered physician there is reason to suspect such waters of being contaminated and dangerous to health. (Rev., s. 3057; 1905, c. 415; 1907, cc. 712, 884; 1911, c. 62, s. 36.)

§ 7058. To make examination for communicable diseases. — The board shall likewise have made in this laboratory examinations of sputum in cases of suspected tuberculosis, of throat exudates in cases of suspected diphtheria, of blood in cases of suspected typhoid and malarial fever, of fæces in cases of suspected hookworm diseases, and such other examinations as the public health may require. (Rev., s. 3057; 1905, c. 415; 1907, cc. 721, 884; 1911, c. 62, s. 36.)

Effect upon Other Laws.—The provision in this section in regard to examination of sputum in cases of suspected tuberculosis, is not repealed or affected by other laws for "extension work" throughout the State against tuberculosis, nor does it affect these other laws. See sec. 7172, et seq. State Sanatorium v. Lacy, 173 N. C. 810, 92 S. E. 689.

§ 7059. Support of laboratory; tax on waters.—For the support of the state laboratory of hygiene in addition to the annual appropriation there is hereby appropriated an annual tax of sixty-four dollars, payable quarterly, by every water company, municipal, corporate, and private, selling water to the people. The annual tax for waters from springs or wells sold in bottles or otherwise shall be as follows: For springs or wells, the gross annual sales from which for the previous calendar year are less than two thousand dollars and more than one thousand five hundred dollars, fifty dollars; less than one thousand five hundred and more than one thousand dollars, forty dollars; less than one thousand and more than five hundred dollars, thirty dollars; less than five hundred and more than two hundred and fifty dollars, twenty dollars; less than two hundred and fifty dollars, fifteen dollars; for any spring maintained and treated as an adjunct to any hotel, park, or resort for the accommodation and entertainment of the public, fifteen dollars, and an additional tax for water sold in bottle or other package from such spring in accordance with the above schedule. The tax shall be collected quarterly by the sheriff, as other taxes, and shall be paid by the sheriff directly to the treasurer of the state board of health.

It shall be the duty of the secretary of the state board of health when any person, firm or corporation is delinquent in the payment of taxes and penalties due the state board of health for a period of six months to notify the attorney of such delinquency, stating the amount then due by said person, firm or corporation for taxes and penalties. It shall be the duty of the attorney general to immediately institute an action in the superior court of the county in which such delinquent person, firm or corporation for the collection of said delinquent taxes and penalties resides or is situated, and upon the final determination of said suit, the judgment rendered in favor of the state board of health shall be certified by the clerk of the superior court of the county in which the delinquent taxpayer lives and/or conducts his business, and such judgment shall be a lien as like judgments and be enforced under the general law of the State: Provided, however, that when any delinquent taxpayer has entered into an agreement with the state board of health to pay up his delinquent taxes and penalties in installments and is paying them according to said agreement, that the secretary of the state board of health may or may not in his discretion notify the attorney general to bring an action as provided in this section. (Rev.,

s. 3057; 1905, c. 415; 1907, cc. 721, 884; 1911, c. 62, s. 36; 1935, c. 340.)

Editor's Note.—The last paragraph of this section was added by the amendment of 1935.

§ 7060. Duty of seller to make reports and transmit samples; penalties.—Every corporation, firm, or person selling water in the manner set forth in the preceding section shall file with the treasurer of the state board of health, annually in the month of January, an affidavit as to the gross amount received from sales of water for the previous calendar year, and upon this affidavit the tax for the current year shall be based. Failure to file such affidavit within the time prescribed shall subject the corporation, firm, or person to double tax for the current year. Failure to transmit sample within five days after receipt of sterilized bottle or container from the laboratory of hygiene shall be a misdemeanor, and upon conviction shall subject the delinquent to a fine of twenty-five dollars. Transportation charges, by mail, shall be paid by the sender; by express, by the laboratory. When deemed advisable, the laboratory of hygiene shall analyze samples purchased by it in the open market in lieu of those sent direct from the spring. (1911, c. 62, s. 36.)

§ 7061. Nonresidents selling water. — Any person, firm, or corporation not a citizen of the state who shall sell or offer for sale any water in bottle or other package for consumption by the people of the state shall obtain a license from the treasurer of the state board of health and shall pay for said license the sum of sixty-four dollars per annum, or a less amount, equal to the tax paid by springs of the same class within the state, upon compliance with the conditions applying to them, payable in advance: Provided, that satisfactory evidence of purity furnished by the state hygienic laboratories of other states agreeing to reciprocate in the matter with this state shall be accepted in lieu of the license tax. (1911, c. 62, s. 36.)

§ 7062. Publication of dangerous waters. — If water sold by any person, firm, corporation or municipality shall be discovered by three successive analyses made by the state laboratory of hygiene to be dangerous to the public health, publication of that fact shall be made in the monthly bulletin of the state board of health. The result of said analyses shall be immediately forwarded by mail to the person, firm, corporation, or municipality selling the water so analyzed. When upon subsequent analysis the water shall be found to be no longer dangerous to health, a certificate thereof shall be furnished the person, firm, corporation, or municipality offering the water for sale, and publication of the fact shall be made in the monthly bulletin: Provided, that this shall not apply to therapeutic waters so medicated as to render them sterile, the question of their sterility to be decided by the director of the state laboratory of hygiene. (1911, c. 62, s. 36.)

§ 7063. Printing and stationery for laboratory. —The printing and stationery necessary for the laboratory shall be furnished upon requisition upon the state printer, and paid for out of the appropriation to the state board of health. (1911, c. 62, s. 36; 1913, c. 181, s. 14; 1917, c. 220, s. 1; 1919, c. 145, s. 25.)

Art. 3. County Organization

§ 7064. County board of health; organization; terms of members; chairman.—The chairman of the board of county commissioners, the mayor of the county town, and in county towns where there is no mayor the clerk of the superior court, and the county superintendent of schools shall meet together on the first Monday in April, one thousand nine hundred and thirty-one, and thereafter on the first Monday of January in the odd years of the calendar, and elect from the regularly registered physicians and dentists of the county two physicians and one dentist, who, with themselves, shall constitute the county board of health. The chairman of the board of county commissioners shall be the chairman of the county board of health, and the presence of three members at any regular or called meeting shall constitute a quorum. The term of office of members of the county board of health shall terminate on the first Monday in January in the odd years of the calendar. (Rev., s. 4444; 1901, c. 245, s. 3; 1911, c. 62, s. 9; 1931, c. 149.)

For an act applicable in Cumberland county only, see Public Laws of 1935, chapter 159.

Editor's Note.—The Act of 1931 amended this section by placing a dentist on the board. This Act omitted the words "and while on duty they shall receive four dollars per diem to be paid by the county" appearing at the end of the former section.

Constitutional.—This section is not repugnant to Article XIV, sec. 7, of the State Constitution, which forbids the holding of two offices by one man at the same time, but simply adds further duties to the offices already created, which expire with the term of office of each. McCullers v. Board, 158 N. C. 75, 73 S. E. 816.

§ 7065. Duties of county board of health; meetings; expenses.—The county board of health shall have the immediate care and responsibility of the health interests of their county. They shall meet annually in the county town, and three members of the board are authorized to call a meeting of the board whenever in their opinion the public health interest of the county requires it. They shall make such rules and regulations, pay such fees and salary, and impose such penalties as in their judgment may be necessary to protect and advance the public health. All expenditures shall be approved by the board of county commissioners before being paid. (Rev., s. 4444; 1901, c. 245, s. 3; 1911, c. 62, s. 9.)

As to fixing compensation of county physician and health, see note to § 7067.

The finding of the county board of health that the maintenance of a cemetery upon the watershed is a nuisance to the public health has not the same force as the positive declarations of statute, and it may be shown in answer to a notice to show cause why an injunction should not be continued to the final hearing that the particular cemetery, as maintained, was not a nuisance entitling the plaintiff to injunctive relief. Board of Health v. Lewis, 196 N. C. 641, 146 S. E. 592.

§ 7066. Violation of rules of county board a misdemeanor.—If any person shall violate the rules and regulations made by the county board of health he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3453; 1901, c. 245, s. 3; 1911, c. 62, s. 10.)

§ 7067. To elect county physician or health officer.—The board of health shall meet on the first Monday of July, one thousand nine hundred and thirteen, and thereafter on the second Monday of January in the odd years of the calendar, and elect either a county physician or a county health officer, whose tenure of service shall be terminable at the pleasure of the county board of health, and who shall serve thereafter until the second Monday in January of the odd years of the calendar. If the county board of health of any county shall fail to elect a county physician or county health officer within two calendar months of the time set in this section, the secretary of the state board of health shall appoint a registered physician, of good standing in the said county, to the office of county physician, who shall serve the remainder of the two years, and shall fix his compensation, to be paid by the said county, in proportion to the compensation paid by other counties for like service, having in view the amount of taxes collected by said county. (Rev., ss. 4444, 4446; 1897, c. 201, s. 1; 1901, c. 245, s. 3; 1911, c. 62, s. 9; 1913, c. 181, s. 1; 1915, cc. 214, 233.)

How Compensation of County Physician Fixed.—It is required that the board of county commissioners approve the expenditure for a county physician and pass upon its reasonableness, and upon their failure to do so mandamus will lie to compel them in good faith to pass upon it and in the exercise of a sound judgment say whether or not the compensation for the services as fixed are warranted by the statute. McCullers v. Board, 158 N. C. 75, 73 S. E. 816. But after a sum is fixed by them mandamus will not lie to compel payment of a greater sum. Halford v. Senter, 169 N. C. 546, 86 S. E. 525.

Validity of Appointment.—After the time expires in which the county board of health may appoint a county superintendent of health, one appointed by the Secretary of the State Board of Health takes the office, and one subsequently appointed by the county board of health has not a colorable title. McCullers v. Board, 158 N. C. 75, 73 S. E. 816.

§ 7068. Duties of county officer; nonperformance a misdemeanor.—The duties of the county health officer shall be to devote his entire time to the county public-health work, and he shall perform the duties of county physician, the duties of quarantine officer, and the following additional duties: he shall make a sanitary examination during the summer months of every public school building and grounds in the county, and no school committee or teacher shall make use of any school building or grounds until the county superintendent of health shall certify in writing that said building and grounds have been inspected and found to be in a satisfactory sanitary condition within four months of the date of the certificate. He shall examine every school child that has previously been examined by the teacher according to methods furnished said teacher by the county superintendent of schools, and reported to said county superintendent of schools as probably defective in the condition of its eyes, ears, nose, or throat, and he shall further endeavor to have examined the feces of every child whom he suspects of having hookworm disease. He shall notify on blank forms and in accordance with instructions furnished by the state department of public instruction, every parent or guardian of a child having any defect of the aforesaid organs, or hookworm disease, and he shall suggest to said parent or guardian the proper course of treatment and urge that such treatment be procured. He shall coöperate fully with the county board of education, the county superintendent of schools, and the teachers in the public schools, to the end that children may be better informed in regard to the importance of health and the methods of preventing disease. He shall, through the county press, public addresses, and in every available way, endeavor to educate the people of his county to set a higher value on health, and to adopt such public and private measures as will tend to a greater conservation of life. Any violation of this section shall constitute a misdemeanor, and shall subject the defendant to a fine of not less than ten dollars nor more than fifty dollars. (1911, c. 62, s. 11; 1913, c. 181, s. 2.)

§ 7069. Duties of county physician; may employ another physician. — The duties of the county physician shall be to make the medico-legal post-mortem examinations for the coroners' inquests, to make examination of lunatics for commitment, to render professional service to sick inmates of the convict camp, jail, and county home, upon request of the superintendent or keeper of these institutions, and to determine the nature of any particular disease, upon the request of the quarantine or deputy quarantine officer. The county physician shall have the right to employ any other regularly registered physician of his county, to perform any or all of the duties pertaining to the jail, county home, or convict camp, when in his judgment it is desirable to do so; but the terms under which such physician is employed by the county physician shall be approved by the board of county commissioners. (Rev., s. 4445; 1901, c. 245, s. 3; 1911, c. 62, s. 11; 1913, c. 181, s. 2.)

Right to Delegate Duties.—A county superintendent of health has no right to delegate the performance of his official duties to others, so as to give his employees the right to make their services a county charge. Copple v. Commissioners, 138 N. C. 127, 50 S. E. 574.

Same—Care of Smallpox Patient.—Under Laws 1893, ch. 214, sec. 9, providing that contagious diseases shall be promptly quarantined by the county superintendent of health, the services rendered by a person in removing a person afflicted with smallpox to a pesthouse, taking his meals to him and attending to him continually during his sickness, is a legitmate county charge, where the patient is insolvent and the services were rendered by the direction of the superintendent of health. Copple v. Commissioners, 138 N. C. 127, 50 S. E. 574.

§ 7070. County quarantine officer.—The election, term of office, and compensation of county quarantine officer are regulated as provided in article 9 of this chapter entitled Infectious Diseases Generally. The county physician, county health officer, municipal physician, or municipal health officer shall be eligible to the position of quarantine officer. The county board of health shall arrange with the quarantine officer to accept and discharge the duties assigned in this chapter to him and any other duties relating to the control of infectious diseases which may be assigned to him by the county board of health.

The quarantine officer is charged with the enforcement of article 9 of this chapter, entitled Infectious Diseases Generally, and nothing herein contained shall interfere with the performance of his duties under that article. He shall faithfully enforce all laws pertaining to inland quarantine and disinfection and the rules

and regulations governing these matters as prescribed by the local, county, or municipal boards of health, but any child or other person may remain in the custody and care of parents or family.

The quarantine of ports shall not be interfered with, but the officers of the local state boards shall render all aid in their power to quarantine officers in the discharge of their duties.

The failure of the quarantine officer to perform the duties imposed in this section shall be a misdemeanor, and he shall be punished for each offense, except as otherwise specifically provided, by a fine of not less than ten dollars nor more than fifty dollars. (1911, c. 62, ss. 16, 20.)

§ 7071. Abatement of nuisances. — Whenever and wherever a nuisance shall exist which in the opinion of the county physician or county health officer is dangerous to the public health, it shall be his duty to notify in writing the parties responsible for its continuance, of the character of the nuisance and the means of abating it. Upon this notification, the parties shall proceed to abate the nuisance: Provided, however, that if the party notified shall make oath or affirmation before a justice of the peace of his or her inability to carry out the directions of the county physician or county health officer, it shall be done at the expense of the town, city, or county in which the offender lives. In the latter case the limit of the expense chargeable to the city, town, or county shall not be more than one thousand dollars in any case: Provided further, that nothing in this section shall be construed to give the county physician or county health officer the power to destroy or injure property without a due process of law as now exists for the abatement of nuisances. (Rev., s. 4450; 1893, c. 214, s. 22; 1911, c. 62, s. 12; 1913, c. 181, s. 3.)

Sufficient Evidence of a Nuisance.—Evidence that a stable is within four feet of a dwelling house, and because of its filthy condition those occupying the house were unable to eat, and the health officer has given notice to abate the nuisance, is sufficient to convict under this section, and sufficient to sustain a fine under sec. 7072. State v. Wilkes, 170 N. C. 735, 87 S. E. 48.

Power to Burn Dwellings.—Neither town nor county commissioners have authority under this section to burn a residence house to prevent the spread of contagious and infectious diseases. But in case they exceed this authority and burn a house no action will lie against them, in their official capacity. Their liability, if any is personal. Prichard v. Board, 126 N. C. 908, 36 S. E. 353. This is a specific application of the general rule that a municipality is not liable for the torts committed by its agents or officers.

§ 7072. Failure to abate nuisance after notice misdemeanor.—If any person, firm, corporation, or municipality responsible for the existence and continuance of a nuisance, after being duly notified in writing by the county physician or county health officer to abate said nuisance, shall fail to abate the same for twenty-four hours after such notice prescribed, he shall be guilty of a misdemeanor, and shall be fined two dollars a day as long as said nuisance remains. (Rev., s. 3446; 1893, c. 214, s. 22; 1911, c. 62, s. 13; 1913, c. 181, s. 3.)

§ 7073. Certain nuisances in seaport towns.—All ponds of stagnant water, all cellars and foundations of houses, whose bottoms contain stagnant and putrid water; all dead and putrefied animals lying about docks, streets, lanes, alleys, vacant lots, or yards; all privies that have no wells sunk under them; all slaughter-houses, all docks whose bottoms are alternately wet and dry by the ebbing and flowing of the tide, all accumulations of vegetable and animal substances undergoing putrefactive fermentation, in any of the seaport towns of the state, are declared common nuisances, productive of offensive vapors and noxious exhalations, the causes of disease, and ought to be restrained, regulated, and removed. (Rev., s. 4462; Code, s. 2907; R. C., c. 94, s. 15; 1815, c. 893, s. 1.)

§ 7074. Duty of owners of sunken lots in seaport towns; penalty.—Every person possessed of a lot in any seaport town, which from its low or sunken situation is liable to retain tide or rain water, or on which cellars or foundations for buildings may be dug (whether a tenement be erected over the same or not), shall during the months of June, July, August, September, and October, preserve and keep the said lot, cellars, and foundations dry and free from stagnant or putrid water and other filth; and any person offending herein shall forfeit and pay five dollars for the use of the town for every week he shall suffer such stagnant or putrid water or other filth to remain therein. And if the said owner shall, notwithstanding the above provisions, neglect to remove such stagnant or putrid water or other filth, the commissioner of the town may employ any person, upon such terms as to them may seem reasonable and just, to remove such filth or stagnant or putrid waters; and the expense shall be considered as a further fine for not complying with this section, and shall be collected accordingly, and shall also be a lien upon which the same has been expended. (Rev., s. 4461; Code, s. 2908; R. C., c. 94, s. 16; 1815, c. 893, s. 2.)

§ 7075. County commissioners may levy special tax to protect health.—The board of county commissioners of each county is hereby authorized at any time to levy a special tax, to be expended under the direction of a committee composed of the chairman of the board of county commissioners and the county health officer or county physician for the preservation of the public health. (Rev., s. 4455.)

Establishing Public Hospitals.—This section should be construed in connection with the sections of Chapter 119, as to the maintenance of permanent public hospitals, and requires that the question of establishing such hospitals, as in this case for a county tuberculosis hospital, shall have the approval of the voters of the county in accordance to the methods and in the manner specified by the statute. Armstrong v. Board, 185 N. C. 405, 117 S. E. 388.

Maintenance of Public Welfare Departments.—No authority is given by this section to levy a special tax for the purpose of raising revenue for the maintenance of the public welfare departments. Atlantic Coast Line R. Co. v. Lenoir County, 200 N. C. 494, 157 S. E. 610.

Art. 4. Municipal Organization

§ 7076. Municipal physician or health officer; municipal regulations.—The authorities of any city or town, not already authorized in its charter, are hereby authorized to elect a municipal physician or municipal health officer when in their judgment municipal health would be improved thereby, and to make such regulations,

pay such fees and salaries, and impose such penalties as in their judgment may be necessary for the protection and the advancement of the public health. (Rev., s. 4454; 1893, c. 214, s. 25; 1911, c. 62, s. 14; 1913, c. 181, s. 4.)

§ 7077. Duties of the municipal physician or health officer; enforcement.—The duties of the municipal physician within the jurisdiction of the town or city for which he is elected shall be identical with those of the county physician for the county, with the exception of the duties of the county physician pertaining to the jail, convict camp, and county home. The authorities of any city or town shall have the power to assign the duties of quarantine officers to the municipal physician or health officer, and in such cases the municipal health officer shall faithfully perform the duties of the quarantine officers as prescribed in this chapter, and shall be subject to the penalties provided for the refusal or nonperformance of such duties. If the physician is employed to devote his entire time to the public health interests of his town or city, he shall be known as the municipal health officer, and shall discharge all duties pertaining to the public schools of his town or city which were assigned in this chapter to the county health officer and such other duties as may be assigned him by the municipal board of health.

Any one violating any of the provisions of this section shall be guilty of a misdemeanor, and subject to a fine of not less than ten dollars nor more than fifty dollars. (Rev., s. 4509; 1893, c. 214, s. 9; 1911, c. 62, s. 15; 1913, c. 181, s. 5.)

Cited in Board v. Henderson, 163 N. C. 114, 79 S. E. 442.

Art. 4A. Sanitary Districts in General

§ 7077(a). Creation by state board of health.—For the purpose of preserving and promoting the public health and welfare the State Board of Health may, as hereinafter provided, create sanitary districts without regard for county, township or municipal lines: Provided, however, that no municipal corporation or any part of the territory in a municipal corporation shall be included in a sanitary district except at the request of the governing board of such municipal corporation. (1927, c. 100, s. 1.)

§ 7077(b). Incorporation. — Such sanitary district shall be incorporated as hereinafter set out. (1927, c. 100, s. 2.)

§ 7077(c). Petition from freeholders. — Fifty one per cent or more of the resident freeholders within the proposed district may petition the board of county commissioners of the county in which all or the major portion of the proposed district is located setting forth the boundaries of the proposed sanitary district and the objects it is proposed to accomplish. Upon receipt of such petition the board of county commissioners if the same is approved by them, shall, through its chairman, transmit the petition to the State Board of Health requesting that the proposed sanitary district be created. Provided, however, that the board of county commissioners before passing upon said petition shall hold a public hearing upon the same and shall give prior notice of such hearing by advertising to be made by posting a notice at the court-house door of their county and also by publication in a newspaper published in said county at least once a week for four successive weeks; and in the event such hearing is to be before a joint meeting of the boards of county commissioners of more than one county, or in the event the land to be affected lies in more than one county, then in either of such events a like publication of notice shall be made and given in each of said counties. (1927, c. 100, s. 3.)

§ 7077(d). State board of health to hold public hearing.—The State Board of Health shall name a time and place within the proposed district at which the State Board of Health, through a representative, shall hold a public hearing concerning the creation of the proposed sanitary district. The State Board of Health shall cause at least twenty days' notice to be given of the time and place of such hearing by publishing this information at least five times in a newspaper or newspapers published in or near the proposed district and having a general circulation therein. In the event that all matters pertaining to the creation of this sanitary district cannot be concluded at the hearing, any such hearing may be continued at a time and place named by the representative of the State Board of Health. (1927, c. 100, s. 4.)

§ 7077(e). If state board of health comply with request by resolution.—If, after such hearing the State Board of Health shall deem it advisable to comply with the request of said petition and that a district for the purpose or purposes therein stated should be created and established, the State Board of Health shall adopt a resolution to that effect, defining the boundaries of such district and declaring the territory within such boundaries to be a sanitary district; Provided, however, that any industrial plant and its contiguous village shall be included from the area embraced within such sanitary district as expressed in the application of the person, persons or corporation owning or controlling such industrial plant and its contiguous village, said application to be filed with the State Board of Health on or before the date of the public hearing as hereinbefore provided. Each district when created shall be identified by a name or number assigned by the State Board of Health. (1927, c. 100, s. 5.)

§ 7077(f). Notice to county or counties affected by district.—The State Board of Health shall cause copies of the resolution adopted creating the sanitary district to be sent to the board or boards of county commissioners of the county or counties in which all or parts of the territory within the district is located, whereupon the said board or boards of county commissioners shall hold a meeting or joint meeting for the purpose of electing a sanitary district board of three members, freeholders within the district, which shall thereafter be the governing body of the sanitary district. At this meeting or joint meeting of said board or boards of county commissioners there shall be elected three members of said sanitary district boards who shall serve until their successors are elected

and qualified. At the next general election following said appointment by the board of county commissioners candidates for said district board shall be elected in the primary and elected at said general election as are county officers except that the nomination and election shall be confined to said district. The members of the board so nominated and elected shall be residents of the district. They shall qualify by taking the oaths of office on the first Monday in December following their election. The term of office shall be two years and until their successors qualify. All vacancies, whether original or not, occurring during the term shall be filled by the board of county commissioners. (1927, c. 100, s. 6.)

§ 7077(g). Corporate powers.—When a sanitary district is organized as herein provided the sanitary district board selected under the provisions of this article shall be a body politic and corporate and as such may sue and be sued in matters relating to such sanitary district. In addition, such board shall have the following powers:

1. Under the supervision of the state board of health to acquire, construct, maintain and operate a sewerage system, sewage disposal or treatment plant, water supply system, water purification or treatment plant or such other utilities as may be necessary for the preservation and promotion of the public health and sanitary welfare within the district.

2. To issue certificates of indebtedness against the district in the manner hereinafter provided.

3. To issue bonds of the district in the manner hereinafter provided.

4. To cause taxes to be levied and collected upon all the taxable property within the district sufficient to meet the obligations of the district evidenced by bonds, certificates of indebtedness and revenue anticipation notes issued against the district and to pay all obligations incurred by the district in the performance of all of its lawful undertakings.

5. To acquire, either by purchase, condemnation or otherwise and hold real and personal property, easements, rights-of-way and water rights in the name of the district within and/or without the corporate limits of the district, necessary or convenient for the construction or maintenance of the works of the district.

6. To employ such engineers, counsel and other such persons as may be necessary to carry into effect any projects undertaken and to fix compensation thereof.

7. To negotiate and enter into agreement with the owners of existing water supplies, sewerage systems or other such utilities as may be necessary to carry into effect the intent of this article.

8. To formulate rules and regulations necessary for proper functioning of the works of the district.

9. (a) To contract with any person, firm, corporation, city, town, village or political subdivision of the state both within and/or without the corporate limits of the district to supply raw water without charge to said person, firm, corporation, city, town, village or political subdivision of the state in consideration of said person, firm, corporation, city, town, village or political subdivision permitting the contamination of its source of water supply by discharging sewage therein and to construct all improvements necessary or convenient to effect the delivery of said water at the expense of the district, when in the opinion of the sanitary district board it will be for the best interest of the district and subject to the approval of the state board of health.

(b) To contract with any person, firm, corporation, city, town, village or political subdivision of the state within and/or without the corporate limits of the district to supply raw and/or filtered water to said person, firm, corporation, city, town, village, or political subdivision of the state where the service is available: Provided, however, that for service supplied outside the corporate limits of the districts, the sanitary district board may fix a different rate from that charged within the corporate limits but shall in no case be liable for damages for a failure to furnish a sufficient supply of water.

10. After the final approval and adoption of the plan as set forth in section 7077(m), and the election as provided in section 7077(n), and subject to the approval of the state board of health, to adopt a plan different from that adopted by said board and heretofore or hereafter voted upon by the qualified voters of the district, where the newly-adopted plan would not in the opinion of said board and the state board of health constitute a material deviation from the original plan, which new plan may provide among other things for the construction of a water line for the supply of any person, firm, corporation, city, town, village or political subdivision of the state either within and/or without the corporate limits of the district instead of a sewage disposal line and other improvements, where the change in said plans would permit the disposal of sewage at a point nearer the district either within and/or without the corporate limits, thereby contaminating the prevailing water supply of the person, firm, corporation, city, town, village or political subdivision of the state to whom the water is to be supplied and would effect a saving to the district, and to reappropriate for carrying out the new plan a sufficient amount of bond money theretofore appropriated by the vote of the qualified voters of the district to pay the costs of construction of the plan thereafter adopted.

11. Subject to the approval of the state board of health, to engage in and undertake the prevention and eradication of malaria within the district by the eradication of the mosquito and to that end the sanitary district board of said sanitary district is hereby empowered to employ sufficient employees suitable to the accomplishment of this work. (1927, c. 100, s. 7; 1933, c. 8, ss. 1, 2; 1935, c. 287, ss. 1, 2.)

Editor's Note.—Public Laws 1933, c. 8, struck out subsection 5 of this section and inserted the present reading in lieu thereof. The act also added subsection 9, consisting of clauses (a) and (b), and subsection 10.

Prior to the amendment of 1935 subsection 4 of this section required the taxes to be sufficient "to meet the obligations evidenced by bonds and certificates of indebtedness issued against the district." The amendment also added subsection 11 of the section.

§ 7077(h). Organization of board.—Upon election a sanitary district board shall meet and elect one of its members as chairman, and another member as secretary. Each member of

the board may receive a per diem compensation of five dollars when actually engaged in the business of the district payable from the funds of the district. The board may employ a clerk, stenographer, or such other assistance as it may deem necessary and may fix the duties and compensation thereof.

A sanitary district board may at any time remove any of its employees and may fill any vacancies however arising. (1927, c. 100, s. 8.)

§ 7077(i). Power to condemn property.—When, in the opinion of the sanitary district board, it is necessary to procure real estate, right-of-way or easement within and/or without the corporate limits of the district for any of the improvements authorized by this article, they may purchase the same or if the board and the owner or owners thereof are unable to agree upon its purchase and sale, or the amount of damage to be awarded therefor, the board may condemn such real estate, right-of-way or easement within and/or without the corporate limits of the district and in so doing the ways, means and method and procedure of chapter thirty-three of the consolidated statutes entitled "eminent domain" shall apply. Section one thousand seven hundred and fourteen, consolidated statutes, shall not, however, be applicable to such condemnation proceedings. In the event the owner or owners shall appeal from the report of the commissioners, it shall not be necessary for the sanitary board to deposit the money assessed with the clerk, but it may proceed and use the property to be condemned until the final determination of the action. (1927, c. 100, s. 9; 1933, c. 8, s. 3.)

Editor's Note.—Public Laws 1933, c. 8, inserted the clause appearing twice in this section, reading "within and/or without the corporate limits of the city."

§ 7077(j). Construction of systems by corporations or individuals.—Whenever a corporation or the residents of any locality within the sanitary district board shall desire a water supply, sewerage system or any part thereof and the sanitary district board shall deem it inadvisable or impracticable at that time, due to remoteness from its general system or other cause, for the sanitary district to build such system, such corporation or residents may nevertheless build and operate such system at its or their own expense but it shall be constructed and operated under plans, specifications and regulations approved by the district board. (1927, c. 100, s. 10.)

§ 7077(k). Reports.—Upon the election of any sanitary district board it shall become the duty of the board to employ competent engineers to make a report or reports on the problems of the sanitary district, which report or reports shall be prepared and filed with the sanitary district board. Such report or reports shall embrace the following:

1. Suitable comprehensive maps showing the boundaries of the sanitary district and in a general way the location of the various parts of the work that is proposed to be done and such information as may be useful for a thorough understanding of the proposed undertaking.

2. A general description of existing facilities for carrying out the objects of the district.

3. A general description of the various plans which might be adopted for accomplishment of the objects of the district.

4. General plans and specifications for such work.

5. General descriptions of property it is proposed to be acquired or which may be damaged in carrying out the work.

6. Comparative detail estimates of cost for the various construction plans.

7. Recommendations. (1927, c. 100, s. 11.)

§ 7077(l). Consideration of reports by sanitary district board.—The report or reports filed by the engineers shall be given careful consideration by the sanitary district board for adoption of a plan which they approve. If deemed advisable by the sanitary district board they may hold a public hearing, giving due and ample notice of the time and place thereof, for the purpose of considering objections to carrying out of the work according to the plan adopted by them. (1927, c. 100, s. 12.)

§ 7077(m). Resolution after adoption of plan.—After final approval of the plan adopted the sanitary district board shall adopt a resolution setting forth:

1. A general outline of the work that is proposed to be done.

2. A reference to the engineer's report for details as to the plan adopted.

3. The amount of bonds that the board proposes to issue to cover the cost of doing the proposed work.

4. The form and term of the proposed bonds and the interest rate thereon.

The resolution shall, immediately after adoption, be published at least three times in one or more newspapers having a general circulation within the district. (1927, c. 100, s. 13.)

§ 7077(n). Call for election.—Following the adoption of the resolution by the sanitary district board the said board shall call upon the board or boards of county commissioners in the county or counties in which the district or any portion thereof is located to name election officers, set date, name polling places, and cause to be held an election within the district on the proposition of issuing bonds to provide funds for doing the work as set forth in the resolution adopted by the sanitary board. If, at such election the majority of the registered voters vote in favor of incurring the indebtedness as proposed, the district board shall issue and sell bonds for the amount set forth in the resolution. Should the proposition of issuing bonds submitted at any election as provided under this article fail to receive the required number of votes, the sanitary district board may, at any time after the expiration of six months, cause another election to be held for the same objects and purposes or for any other objects and purposes. The expenses of holding bond election shall be paid from the funds of the sanitary district.

The board of commissioners of the county in which said sanitary district is located, if wholly located in a single county, may in their discretion at any special election held under the provisions of this act make the whole sanitary district a voting precinct, or may create therein one

or more voting precincts as to them seems best to suit the convenience of votes, the said precinct not to be the general election precinct unless the boundaries of the sanitary district are co-terminal with one or more whole general election precincts. If said sanitary district is located in more than one county, the election precincts therein shall be fixed by the board of the particular county in which the portion of the sanitary district is located.

The said board or boards of commissioners shall provide registration and polling books for each precinct in the sanitary district, the cost of the same to be paid from the fund of the sanitary district. The notice of the election shall be given by publication at least three times in some newspaper published or circulated in the district. It shall set forth the boundary lines of the district and the amount of bonds proposed to be issued. The first publication shall be at least thirty days before the election. At the first election after the organization of the sanitary district, a new registration of the qualified voters within the same shall be ordered and notice of such new registration shall be deemed to be sufficiently given if given by publication once in some newspaper published or circulated in said district at least thirty days before the close of the registration books. The notice of registration may be considered one of the three notices required of the election. Time of such registration shall as near as may be conform with that of the registration of voters in municipal elections as provided in section two thousand six hundred and fifty-seven of the Consolidated Statutes. The published notice of registration shall state the days on which the books shall be open for registration of voters and place or places on which they will be open on Saturdays. The books of such new registration shall close on the second Saturday before the election. The Saturday before the election shall be challenge day and except as to otherwise provided in this article, such election shall be held in accordance with the governing general elections.

At the election those who are in favor of the bond issue shall vote a ticket on which shall be printed or written or partly printed and partly written the words "For bond issue" and those who oppose shall vote a ticket on which shall be printed or written or partly printed and partly written the words "Against bond issue." After the election and after the vote has been counted, canvassed and returned to the board or boards of county commissioners, the election books shall be deposited in the office of the Clerk of the Superior Court as polling books for the particular sanitary district involved. At any subsequent election, whether upon the recall of an officer as provided in section 7077(u) or for an additional bond issue in the particular district, a new registration may or may not be ordered as may be determined by the board of county commissioners interested in said election. (1927, c. 100, s. 14.)

§ 7077(o). Bonds.—The sanitary district board shall, subject to the provisions of this article, and under competent legal and financial advice prescribe by resolution the form of bonds and the interest coupons attached thereto, the denominations of the bonds and the date and place at which they shall become payable. These bonds shall not be sold at less than par nor bear an interest rate in excess of six per cent. The bonds shall be signed by the chairman and secretary of the sanitary district board, and the seal of the board shall be affixed thereto. In the event coupon bonds are issued, the coupons thereto may be signed by the secretary alone, or he may have lithographed, engraved, or printed thereon a facsimile of his signature. The proceeds from the sale of such bonds shall be placed in a bank in the State of North Carolina to the credit of the sanitary district board, and payments therefrom shall be made by vouchers signed by the chairman and secretary of the sanitary district board. Said bank, however, shall be required to execute the proper bonds, giving as surety thereto some surety company authorized to do business in North Carolina, conditioned to account for and pay out upon said vouchers all funds so deposited in said bank. The penalty of said bond shall not be less than the amount of money so deposited in said bank. (1927, c. 100, s. 15.)

The validity of this article is not affected by the provisions that certain industrial enterprises and villages situate therein may be excluded upon application of the owners. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530.

This article constitutes a general law of Statewide application relating to health, and valid. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530.

Bonds Valid as General Tax.—Bonds issued by a sanitary district formed in accordance with this article, are a valid obligation, and binding upon the property within the district as a general tax and not an assessment of property according to benefits received. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530.

Differentiating between Property Benefited as Not Benefited.—Bonds issued by a sanitary district for sewerage and a water supply under the provision of this article, will not be declared invalid because not differentiating between property benefited and not benefited when the voters within the territory unanimously voted for their issuance, and having full notice and opportunity to do so, no one appeared to make objection on that ground. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 722.

§ 7077(p). Additional bonds. — Whenever the proceeds from the sale of bonds issued by any district as in this article authorized shall have been expended or contracted to be expended and the sanitary district board shall determine that the interest or necessity of the district demands that additional bonds are necessary for carrying out any of the objects of the district, the board may again proceed as in this article provided to have an election held for the issuance of such additional bonds and the issue and sale of such bonds and the expenditure of the proceeds therefrom shall be carried out as hereinbefore provided. In the event the proceeds from the sale of the bonds shall be in excess of the amount necessary to complete the costs of the completed works of the district and pay the interest and principal due on said bonds before the placing into service of the works of the district and the collection of taxes levied or to be levied for that purpose, then the sanitary district board shall be required to purchase with said surplus, at par and accrued interest, any part of the outstanding issue of said bonds. (1927, c. 100, s. 16; 1933, c. 8, s. 4.)

Editor's Note.—Public Laws of 1933, c. 8, added the last sentence of this section as it now appears.

§ 7077(q). Valuation of property; determining annual revenue needed.—Upon the creation of a sanitary district and after each assessment for taxes thereafter the boards or boards of county commissioners of the county or counties in which the sanitary district is located shall file with the sanitary district board the valuation of assessable property within the district. The sanitary district board shall then determine the amount of funds to be raised for the ensuing year in excess of the funds available from surplus operating revenues set aside as provided in section 7077(t) to provide payment of interest and the proportionate part of the principal of all outstanding bonds, and retire all outstanding certificates of indebtedness, revenue anticipation notes issued against the district and to pay all obligations incurred by the district in the performance of its lawful undertakings.

The sanitary district board shall determine the number of cents per $100 necessary to raise the said amount and so certify to the board or boards of county commissioners. The board or boards of county commissioners in their next annual levy shall include the number of cents per $100 so certified by the sanitary district board in the levy against all taxable property within the district, which tax shall be collected as other county taxes are collected and every ninety days the amount of tax so collected shall be remitted to the sanitary district board and deposited by said board in a bank in the State of North Carolina separately from other funds of the district. Said bank, however, before said funds are deposited in it is to execute a proper surety bond as described in section fifteen for the proper care and disbursement of and accounting for said taxes.

The sanitary district board of any sanitary district, in lieu of collecting the taxes in the manner as hereinbefore provided, may cause to be listed by all the taxpayers residing within the district with the person designated by the district board, all the taxable property located within the district, and after determining the amount of funds to be raised for the ensuing year in excess of the funds available from surplus operating revenues set aside as provided in section 7077(t) to provide payment of interest and the proportionate part of the principal of all outstanding bonds, certificates of indebtedness, revenue anticipation notes issued against the district and to pay all obligations incurred by the district in the performance of all of its lawful undertakings, to determine the number of cents per one hundred ($100.00) dollars necessary to raise said amount. The said sanitary district board in its next annual levy shall levy against all taxable property in the district the number of cents per one hundred ($100.00) dollars necessary to raise the amount with which to pay the obligations of the district, including principal and interest on bonds, certificates of indebtedness, revenue anticipation notes and other lawful obligations of the district, which tax shall be collected in the same manner as taxes of other political sub-divisions of the State of North Carolina are collected by a tax collector, to be selected by the sanitary district board of the sanitary district electing to assess, levy and collect its taxes in the manner herein provided. The tax collector selected by said sanitary district board and the depository, in which said taxes so collected are deposited, shall qualify in the same manner and give the necessary surety bonds as are required of tax collectors and depositories of county funds in the county or counties in which said sanitary districts are located. (1927, c. 100, s. 17; 1935, c. 287, ss. 3, 4.)

Editor's Note.—The amendment of 1935 added the clause beginning with the word "revenue" to the last sentence of the first paragraph of this section and added the last paragraph in its entirety.

§ 7077(r). Certificates of indebtedness in anticipation of taxes; loans under Local Government Act.—A sanitary district board may issue certificates of indebtedness in anticipation of the levying and collection of taxes to cover any or all expenses incurred by the board incident to the preparation of the engineers' report, holding of bond election or any other expenses incurred by the board. The amount of any certificates of indebtedness issued by the sanitary district board shall be included in the bond issue as hereinbefore provided. In the event that the election held within the district for the purpose of issuing bonds to provide funds for carrying out the objects of the district results in the defeat of said bonds the sanitary district board shall cause to be levied and collected a tax sufficient to pay such certificates of indebtedness or any other indebtedness incurred by the sanitary district board. Such tax shall be levied and collected in the same manner as provided in section seventeen.

A sanitary district board may borrow money under the provisions of the Local Government Act, for the purpose of paying appropriations made for the current fiscal year in anticipation of the collection of the taxes and other revenues of such fiscal year, payable at such time or times, not later than thirty days after the expiration of the current fiscal year, as the governing board may fix. No such loan shall be made if the amount thereof, together with the amount of similar previous loans remaining unpaid, shall exceed fifty per cent of the amount of uncollected taxes and other revenue for the fiscal year in which the loan is made, as estimated by the chief financial officer and certified in writing by him to the governing body. (1927, c. 100, s. 18; 1935, c. 250.)

Editor's Note.—The amendment of 1935 added the last paragraph of this section relative to loans under local government act.

§ 7077(s). Engineers to provide plans and supervise work.—The sanitary district board shall retain competent engineers to provide detail plans and specifications and to supervise the doing of the work undertaken by the district. As determined by the sanitary district board, such work or any portion thereof, may be done by the sanitary district board purchasing the material and letting a contract for the doing of the work or by letting a contract for furnishing all the material and the doing of the work.

Any contract shall be let to the lowest responsible bidder submitting a sealed bid in response to a notice calling for such bid and published at least five times over a period of at least fifteen

days in a newspaper or newspapers having a general circulation within the county or counties in which the district is located.

Any material to be purchased by the sanitary district board, the cost of which is in excess of one thousand dollars, shall be purchased from the lowest responsible bidder in the same manner as above provided.

All work done shall be in accordance with the plans and specifications prepared by the engineers in conformity with the plan adopted by the sanitary district board. (1927, c. 100, s. 19.)

§ 7077(t). Service charges and rates.—A sanitary district board shall immediately upon the placing into service of any of its works apply service charges and rates which shall, as nearly as practicable, be based upon the exact benefits derived. Such service charges and rates shall be sufficient to provide funds for the proper maintenance, adequate depreciation, and operation of the work of the district, and provided said service charges and rates would not be unreasonable, to include in said service charges and rates an amount sufficient to pay the principal and interest maturing on the outstanding bonds of the district and thereby make the project self-liquidating. Any surplus from operating revenues shall be set aside as a separate fund to be applied to the payment of interest on bonds, to the retirement of bonds or both. As the necessity arises the sanitary district board may modify and adjust such service charges and rates from time to time. (1927, c. 100, s. 20; 1933, c. 8, s. 5.)

Editor's Note.—Public Laws of 1933, c. 8, added the qualifying clause at the end of the second sentence of this section.

§ 7077(u). Removal of member of board.—A petition carrying the signatures of twenty-five per cent or more of the legal voters within a sanitary district requesting the removal from office of one or more members of a sanitary district board for malfeasance in office may be filed with the board of county commissioners of the county in which all or the greater portion of a sanitary district is located. Upon receipt of such petition the board of county commissioners, or in the event that the district is located in more than one county, a joint meeting of the boards of county commissioners shall be called, shall adopt a resolution calling an election, naming election officials, naming date, and giving due notice thereof for the purpose of removing from office the member or members of the sanitary district board named in the petition. In the event that more than one member of a sanitary district board is subjected to recall in an election, the names of each member of the board subjected to recall shall appear upon separate ballots. If in such recall election, a majority of the legal votes within the sanitary district shall be cast for the removal of any member or members of the sanitary district board subject to recall, such member or members shall cease to be a member or members of the sanitary district board, and the vacancy or vacancies so caused shall be immediately filled as hereinbefore provided. The expense of holding a recall election shall be paid from the funds of the sanitary district. (1927, c. 100, s. 21.)

§ 7077(v). Rights of way granted.—A right of-way in, along, or across any county or State highway, street or property within a sanitary district is hereby granted to a sanitary district in case such right-of-way is found by the sanitary district board to be necessary or convenient for carrying out any of the work of the district. Any work done in, along, or across any State highway shall be done in accordance with the rules and regulations of the State Highway Commission. (1927, c. 100, s. 22.)

§ 7077(w). Returns of elections.—In all elections provided for in this article the returns of such elections shall be made to the board or boards of county commissioners in which the sanitary district lies, and said board or boards of county commissioners shall canvass and declare the result of said election, and this determination of said board or boards of county commissioners upon the result of said election shall be by them certified to the sanitary district board for its action thereupon. (1927, c. 100, s. 23.)

§ 7077(x). Procedure for extension of district.—The boundaries of any sanitary district may, with the approval of the sanitary district board, be extended under the same procedure as herein provided for the creation of a sanitary district: Provided, however, that twenty-five per cent or more of the resident freeholders within the territory proposed to be annexed institute by petition the proceedings for annexation, and that ten per cent of the freeholders resident in the district to be annexed are authorized to petition for an election upon the subject of annexation, and if such petition is filed with the sanitary district board, such election shall be held within the territory to be annexed under the rules and regulations hereinbefore provided. (1927, c. 100, s. 24.)

§ 7077(y). Validation of creation of sanitary districts and of bond elections.—The action of the various boards of commissioners of the various counties of the State and the action of the state board of health heretofore had and taken in the formation and creation of sanitary districts in the State wheresoever situate and the formation and creation, or the attempted formation and creation, of all sanitary districts in the State by the acts of the various county commissioners of the State and the state board of health or other officers of the State, and all elections held in any sanitary district of the State or in any district purporting to be a legal sanitary district of the State by virtue of the purported acts and authority of any board of county commissioners and the state board of health, for the purpose of authorizing the issue and sale of bonds of the said sanitary districts in order to secure funds for the construction and maintenance of water and/or sewer systems and all of such bonds themselves, and all the acts and procedure in any wise had and taken by any and all officials and persons in relation to the formation and creation of such sanitary districts and the issue and sale of such bonds, are hereby in all respects legalized, ratified, approved, validated and confirmed, and all such bonds are declared to be legal and binding obligations of such sanitary districts, respectively, when issued and sold as such. (1935, c. 357, s. 1.)

§ 7077(z). Vacancy appointments to district boards.—Hereafter any vacancy that may exist in any sanitary district board of any sanitary district of the State for any cause shall be filled by the county commissioners of the county in which said sanitary district may be situate. (1935, c. 357, s. 2.)

Art. 5. Special-Tax Sanitary Districts

§ 7078. Question of special sanitary tax submitted; district formed.—Special-tax sanitary districts may be formed by the county board of health in any county, without regard to township lines, under the following conditions: Upon a petition of a majority of the freeholders within the proposed special sanitary district, in whose names real estate in such district is listed in the tax lists of the current fiscal year, endorsed by the county board of health, the board of county commissioners, after thirty days notice at the courthouse door and three public places in the proposed district, shall hold an election to ascertain the will of the people within the proposed special sanitary district, whether there shall be levied in such district a special annual tax of not more than the amount specified in the petition on the one hundred dollars valuation of property and on the poll to conduct the health work of the district as is hereinafter provided, in case such special tax is voted. The board of county commissioners shall appoint a registrar and two pollholders, and shall designate a polling place and order a new registration for such district, and the election shall he held in the district under the law governing general elections, as near as may be, and the registrar and pollholders shall canvass the vote cast and declare the result, and shall duly certify the returns to the board of county commissioners, and the same shall be recorded in the records of said board of commissioners. The expense of holding said election shall be paid out of the general funds of the county. At such election those who are in favor of the levy and collection of the tax shall vote a ticket on which shall be printed or written the words "For Special Tax," and those who are opposed shall vote a ticket on which shall be printed or written the words "Against Special Tax." In case a majority of the qualified voters at the election is in favor of the tax, the same shall be annually levied and collected in the manner prescribed for the levy and collection of other taxes. All moneys levied under the provisions of this section shall, upon collection, be placed to the credit of the health committee or board in such district, which committee shall be appointed by the county board of health, and such health committee shall have the authority to carry on the health work in the district as hereinafter provided. (1913, c. 154, s. 1.)

For an act providing for the creation of sanitary districts in Moore County, see Public Laws 1933, c. 453.

§ 7079. Election as to enlarging district.—Upon the written request of a majority of the health committee of any special-tax district, the county board of health may enlarge the boundaries of any special-tax district established under this article, so as to include any contiguous territory, and an election in such new territory may be ordered and held in the same manner as prescribed in this article for elections in special-tax districts; and in case a majority of the qualified voters in such new territory shall vote at such election in favor of a special tax of the same rate as that voted and levied in the special-tax district to which said territory is contiguous, then the new territory shall be added to and become a part of the said special-tax district; and in case a majority of the qualified voters shall vote against said tax, the district shall not be enlarged. (1913, c. 154, s. 1.)

§ 7080. Election to abolish or to restore district or increase tax.—Upon petition of two-thirds of the qualified voters residing in any special-tax sanitary district established under this article, endorsed and approved by the county board of health, the board of county commissioners shall order another election in said district, to be held under the provisions prescribed in this article for holding other elections. If at such election the majority of the qualified voters in said district shall vote "Against Special Tax," said tax shall be deemed revoked and shall not be levied, and said district shall be discontinued. No election for revoking a special tax in any special-tax district shall be ordered and held in such district within less than two years from the date of the election at which the tax was voted and the district established, nor at any time within less than two years after the date of the last election on said question in said district; and no petition revoking such tax shall be approved by the county board of health oftener than once in two years. These provisions for ordering a new election to revoke a special tax in any special-tax district shall not apply to elections in such districts for increasing or restoring the special-tax levy in such district, which elections may be ordered and held at any time in accordance with the provisions of this article for establishing new special-tax districts. (1913, c. 154, s. 1.)

§ 7081. Sanitary committee; appointment; qualifications; pay.—The courty board of health of each county shall immediately after the formation of a special-tax sanitary district, and on the first Monday in July of the odd years of the calendar thereafter, appoint in each sanitary district three intelligent men of good business qualifications, who are known to be in favor of public education, who shall serve for two years from the date of their appointment as health or sanitary committeemen in their respective district and until their successors are elected and qualified. If a vacancy shall occur at any time, by death, resignation, or otherwise, it shall be the duty of the county board of health to fill such vacancy. Such board shall have the power to pay out of the special-tax fund to each member of the committee thus appointed one dollar per day for not more than six days per annum. (1913, c. 154, s. 2.)

§ 7082. Election of chairman and secretary; records kept.—The sanitary committee as soon as practicable after their election and qualification, not to exceed twenty days, shall meet and elect from their number a chairman and secretary, and shall keep a record of their proceedings in a book to be kept for that purpose. The name and address of the chairman and secretary shall be reported to

the county health officer and to the state health officer. (1913, c. 154, s. 3.)

§ 7083. Powers of committee; may make rules.— The authority and duties of the special-tax sanitary committee shall be the same as those given by the public laws of the state to the county board of health in so far as they are applicable to the special-tax sanitary district. The committee shall have the immediate care and responsibility of the health interest of this district. They shall make such rules and regulations, pay such fees and salary, purchase supplies, and impose such penalties as in their judgment may be necessary to protect and advance the public health, but no rules or regulations they may promulgate shall conflict with the rules and regulations of the boards of health of the state and county of which the district is a part. (1913, c. 154, ss. 4, 5.)

§ 7084. Employment of health officer; disbursement of funds.—The committee shall have authority to employ a registered physician of the state as health officer, and if he should persistently neglect the performance of his full duties for a period of ninety days he may be dismissed by the committee and his successor employed to fill the unexpired term. If the committee is satisfied that the provisions of this act have been complied with they shall give an order approved by the chairman and secretary of the committee on the treasurer of the county, payable to the health officer for the full monthly amounts due for services in accordance with the contract, but monthly statements of the work done by the health officer shall be made to the committee; and he shall supply reports promptly of such information as he can on blanks supplied by and returnable to the state board of health. Orders for all funds to the credit of the special-tax sanitary district before it shall be a valid voucher on the county treasurer must be first approved by the chairman and secretary of committee for the sanitary district. (1913, c. 154, s. 4.)

§ 7085. Powers and duties of health officer.— The duties and powers of the health officer elected for the special-tax sanitary district shall be the same as those prescribed by the public laws of the state for the county health officer in so far as they are applicable to the sanitary district, and such additional duties as may be imposed on him by the special-tax sanitary committee. (1913, c. 154, s. 6.)

Art. 5A. Local and District Health Departments.

§ 7085(1). Local and district health departments authorized. — The state board of health is hereby authorized to use any available funds at its command, not otherwise appropriated, to establish full time local and district health department service for any town, city and county, or group of such units in the state where the local governing powers desire the formation of such a department and are willing to assist financially in the enterprise, to the amount at least equal to the amount of state financial assistance. (1935, c. 142, s. 1.)

§ 7085(2). Authority of district health officer; election of county physician unaffected. — Where there is a district health department, the district health officer shall have the authority now delegated to town, city and county health officers and town, city and county quarantine officers in each of the several counties or units comprising the district, by sections 7068 and 7070, Consolidated Statutes: Provided, that nothing in this article shall affect in any way the election of a county physician in counties comprising a district health department. (1935, c. 142, s. 2.)

§ 7085(3). Article not obligatory upon counties. — Nothing in this article shall be so construed as to require any county to enter into this agreement unless it so desires. (1935, c. 142, s. 3.)

§ 7085(4). Counties excepted from article. — This article shall not apply to the counties of Rockingham and Martin. (1935, c. 142, s. 4.)

SUBCHAPTER II. VITAL STATISTICS

Art. 6. Registration of Births and Deaths

§ 7086. State board of health to enforce regulations.—The state board of health shall have charge of the registration of births and deaths, shall prepare the necessary instructions, forms, and blanks for obtaining and preserving such records, and shall procure the faithful registration of the same in each local registration district as constituted in the succeeding section, and in the central bureau of vital statistics at the capital of the state. The said board shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall from time to time recommend to the general assembly any additional legislation that may be necessary for this purpose. (1913, c. 109, s. 1.)

§ 7087. State registrar.—The secretary of the state board of health shall be state registrar of vital statistics, and shall have general supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board. Adequate fireproof space in one of the state buildings for filing cases for the death and birth certificates made and returned under this article shall be provided by the committee on public buildings and grounds. (1913, c. 109, s. 2.)

§ 7088. Registration districts.—For the purposes of this article the state shall be divided into registration districts as follows: Each city, each incorporated town, and each township shall constitute a local registration district. (1913, c. 109, s. 3.)

§ 7088(a). Control of board over districts.—The state board of health shall have authority to abolish or consolidate existing registration districts, and/or create new districts when, in the judgment of the board, economy and efficiency and the interests of the public service may be promoted thereby. (1933, c. 9, s. 3.)

§ 7089. Appointment of local registrar.—Within ninety days after the taking effect of this article, or as soon thereafter as possible, the chairman of every board of county commissioners in the state shall appoint a local registrar of vital statistics for each township in his county, and the mayor

of every incorporated town or city in the state shall appoint a local registrar of vital statistics for his town or city, and the chairman of the boards of county commissioners and the mayors of the cities or towns shall notify the state registrar, in writing, of the name and address of each local registrar so appointed. The term of office of each local registrar so appointed shall be four years, beginning the first day of January of the year in which the local registrar is appointed, and until his successor has been appointed and has qualified, unless such office shall sooner become vacant by death, disqualification, operation of law, or other cause. In cities where health officers or other officials are, in the judgment of the state board of health, conducting effective registration of births and deaths under local ordinances at the time of the taking effect of this article, such officials may be appointed as registrars in and for such cities, and shall be subject to the rules and regulations of the state registrar, and to all the provisions of this article. Any vacancy occurring in the office of local registrar of vital statistics shall be filled for the unexpired term by a local registrar appointed by the same official who appointed the local registrar whose retirement creates the vacancy. Any chairman of a board of county commissioners or mayor of a city or town who appoints a local registrar to fill a vacancy in the office of local registrar shall notify the state registrar, in writing, of the name and address of the local registrar so appointed. At least ten days before the expiration of the term of office of any such local registrar, his successor shall be appointed by the chairman of the board of county commissioners for the township local registration office, and by the mayor of the city or town for the town or city registration office. Each local registrar shall be a bona fide resident of the township, city, or precinct for which he is appointed, and removal from the township, city, or precinct shall terminate the office. (1913, c. 109, s. 4; 1915, c. 20.)

§ 7089(a). County health officer may act as registrar.—The state board of health shall have authority and power to designate and appoint the whole-time health officer of the county as registrar for that county, or fractional part or parts thereof, when such action shall be deemed wise. In such case, the fees accruing from the vital statistics registration service, where such service is performed by the county health officer under such appointment, shall be used by the local board of health in its discretion for health service. (1933, c. 9, s. 3.)

§ 7090. Removal of local registrar.—Any local registrar who, in the judgment of the secretary of the state board of health, fails or neglects to discharge efficiently the duties of his office as laid down in this article, or who fails to make prompt and complete returns of all births and deaths, as required thereby, shall be forthwith removed from his office by the secretary of the state board of health, and such other penalties may be imposed as are provided under section 7113. (1913, c. 109, s. 4.)

§ 7091. Appointment of deputy and sub-registrars.—Each local registrar shall, immediately upon his acceptance of appointment as such, appoint a deputy, whose duty it shall be to act in his stead in case of absence, illness, or disability, and such deputy shall in writing accept such appointment, and be subject to all rules and regulations governing local registrars. And when it may appear necessary for the convenience of the people in any rural district, the local registrar is hereby authorized, with the approval of the state registrar, to appoint one or more suitable persons to act as sub-registrars, who shall be authorized to receive certificates and to issue burial or removal permits in and for such portions of the district as may be designated; and each sub-registrar shall note on each certificate, over his signature, the date of filing, and shall forward all certificates to the local registrar of the district within ten days, and in all cases before the third day of the following month: Provided, that each sub-registrar shall be subject to the supervision and control of the state registrar, and may be by him removed for neglect or failure to perform his duties in accordance with the provisions of this article or the rules and regulations of the state registrar, and he shall be subject to the same penalties for neglect of duties as the local registrar. (1913, c. 109, s. 4.)

§ 7092. Permit for burial or other disposition of body.—The body of any person whose death occurs in this state, or which shall be found dead therein, shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district, or be temporarily held pending further disposition more than seventy-two hours after death, unless a permit for a burial, removal, or other disposition thereof shall have been properly issued by the local registrar of the registration district in which the death occurred or the body was found. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him as hereinafter provided: Provided, that when a dead body is transported into a registration district in North Carolina for burial, the transit and removal permit, issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local registrar of the district into which the body has been transported for burial or other disposition, as a basis upon which he may issue a local burial permit. He shall note upon the face of the burial permit the fact that it was a body shipped in for interment, and give the actual place of death; and no local registrar shall receive any fee for the issuance of burial or removal permits under this article other than the compensation provided in section 7111. (1913, c. 109, s. 5; 1915, c. 164, s. 1.)

§ 7093. Stillborn children to be registered.—A stillborn child shall be registered as a birth and also as a death, but only one certificate shall be required of such birth and death, which shall be filed with the local registrar, the certificate to contain, in place of the name of the child, the word stillbirth; but no certificate of birth nor certificate of death shall be required for a child

that has not advanced to the fifth month of uterogestation. The medical certificate of the cause of death shall be signed by the attending physician, if any, and shall state the cause of death as "stillborn," with the cause of the stillbirth, if known, whether a premature birth, and, if born prematurely, the period of uterogestation, in months, if known; and a burial or removal permit of the prescribed form shall be required. Midwives shall not sign certificates of death for stillborn children; but such cases, and stillbirths occurring without attendance of either physician or midwife, shall be treated as deaths without medical attendance, as provided for in this article. (1913, c. 109, s. 6; 1933, c. 9, s. 2.)

Editor's Note.—Prior to Public Laws of 1933, c. 9, this section required a separate certificate of birth and death of a stillborn child.

§ 7094. Contents of death certificates.—The certificate of death shall contain the following items, which are hereby declared necessary for the legal, social, and sanitary purposes subserved by registration records:

1. Place of death, including state, county, township, or town, village or city. If in a city, the ward, street, and house number; if in a hospital or other institution, the name of the same to be given instead of the street and house number. If in an industrial camp, the name of the camp to be given.
2. Full name of decedent. If an unnamed child, the surname preceded by "Unnamed."
3. Sex.
4. Color or race—as white, black, mulatto (or other negro descent), Indian, Chinese, Japanese, or other.
5. Conjugal condition—as single, married, widowed, or divorced.
6. Educational attainments—as illiterate, able to read and write, common school education or equivalent, high school education or equivalent, college education or equivalent. If the deceased is less than fifteen years of age the educational attainments of the mother, if living, or of the father, if living, or of the guardian, in the order named, shall be given.
7. Date of birth, including the year, month and day.
8. Age, in years, months, and days. If less than one day, the hours or minutes. If exact information is unobtainable, give approximate age.
9. Occupation. The occupation to be reported of any person who had any remunerative employment, stating (a) trade, profession, or particular kind of work; (b) general nature of industry, business, or establishment in which employed (or employer).
10. Birthplace; at least state or foreign country, if known.
11. Name of father.
12. Birthplace of father; at least state or foreign country, if known.
13. Maiden name of mother.
14. Birthplace of mother; at least state or foreign country, if known.
15. Signature and address of informant.
16. Official signature of registrar, with the date when certificate was filed, and registered number.
17. Date of death—year, month, and day.
18. Certification as to medical attendance on decedent, fact and time of death, time last seen alive, and the cause of death, with contributory secondary cause or complication, if any, and duration of each, and whether attributed to dangerous or insanitary conditions of employment; signature, date of signature, and address of physician or official making the medical certificate.
19. Length of residence (for inmates of hospitals and other institutions; transients or recent residents) at place of death and in the state, together with the place where disease was contracted, if not at place of death, and former or usual residence.
20. Place of burial or removal; date of burial.
21. Signature and address of undertaker or person acting as such.

The personal and statistical particulars (items one to thirteen) shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts.

The statement of facts relating to the disposition of the body shall be signed by the undertaker or person acting as such.

The medical certificate shall be made and signed by the physician, if any, who last treated the deceased for the disease or injury which caused death, and such physician shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occurred, and he shall further state the cause of death, so as to show the course of disease or sequence of causes resulting in the death, giving first the name of the disease causing death (primary cause), and the contributory (secondary) cause, if any, and the duration of each. Indefinite and unsatisfactory terms, denoting only symptoms of disease or conditions resulting from disease, will not be held sufficient for the issuance of a burial or removal permit; and any certificate containing any such indefinite or unsatisfactory terms, as defined by the state registrar, shall be returned to the physician or person making the medical certificate for correction and more definite statement. Causes of death, which may be the result of either disease or violence, shall be carefully defined; and if from violence, the means of injury shall be stated, and whether (probably) accidental, suicidal, or homicidal. In deaths in hospitals, institutions, or of nonresidents, the physician shall supply the information required under subsection 18 above, if he is able to do so, and may state where, in his opinion, the disease was contracted. (1913, c. 109, s. 7.)

§ 7095. Death without medical attendance; duty of undertaker and officials.—In case of death occurring without medical attendance, it shall be the duty of the undertaker or person acting as such to notify the local registrar of such death, and when so notified the registrar shall, prior to the issuance of the permit, inform the local health officer and refer the case to him for immediate investigation and certification. When the local health officer is not a qualified physician, or when the death takes place in a township registration district, or where there is no such official, and in such cases only, the registrar is authorized to make the certificate and re-

turn from the statement of relatives or other persons having adequate knowledge of the facts. If the registrar has reason to believe that the death had been due to unlawful act or neglect, he shall refer the case to the coroner or other proper officer for investigation and certification, who shall make the certificate of death required for a burial permit, stating therein the name of the disease causing death; or, if from external causes, (1) the means of death, and (2) whether (probably) accidental, suicidal, or homicidal; and shall, in any case, furnish such information as may be required by the state registrar in order properly to classify the death. (1913, c. 109, s. 8.)

§ 7096. Undertaker to file death certificate and obtain permit.—The undertaker or person acting as undertaker shall file the certificate of death with the local registrar of the district in which the death occurred, and obtain a burial or removal permit, prior to any disposition of the body. He shall obtain the required personal and statistical particulars from the person best qualified to supply them, over the signature and address of his informant, and shall present the certificate to the attending physician, if any, or to the health officer or coroner, as directed by the local registrar, for the medical certificate of the cause of death and other particulars necessary to complete the record, as specified in sections 7094 and 7095. He shall then state the facts required relative to the date and place of burial, over his signature and with his address, and present the completed certificate to the local registrar in order to obtain a permit for burial, removal, or other disposition of the body. He shall deliver the burial permit to the person in charge of the place of burial, before interring or otherwise disposing of the body; or shall attach the removal permit to the box containing the corpse, when shipped by any transportation company, this permit to accompany the corpse to its destination, where, if within the state, it shall be delivered to the person in charge of the place of burial. (1913, c. 109, s. 9.)

§ 7097. Sales of caskets regulated.—Every person, firm, or corporation selling a casket shall keep a record showing the name of the purchaser, purchaser's post-office address, name of deceased, date of death, and place of death of deceased, which record shall be open to inspection of the state registrar or his agent at all times. On the first day of each month the person, firm, or corporation selling caskets shall report to the state registrar each sale for the preceding month, on a blank provided for that purpose. But no person, firm, or corporation selling caskets to dealers or undertakers only shall be required to keep such record, nor shall such report be required from undertakers when they have direct charge of the disposition of a dead body. Every person, firm, or corporation selling a casket at retail, and not having charge of the disposition of the body, shall enclose within the casket a notice furnished by the state registrar, calling attention to the requirements of the law, a blank certificate of death, and the rules and regulations of the state board of health concerning the burial or other disposition of a dead body. (1913, c. 109, s. 9.)

§ 7098. Permit for burial in state.—If the interment, or other disposition of the body is to be made within the state, the wording of the burial or removal permit may be limited to a statement by the registrar, over his signature, that a satisfactory certificate of death having been filed with him, as required by law, permission is granted to inter, remove, or dispose otherwise of the body, stating the name, age, sex, cause of death, and other necessary details upon the form prescribed by the state registrar. (1913, c. 109, s. 10.)

§ 7099. Interment without permit forbidden.—No person in charge of any premises in which interments are made shall inter or permit the interment or other disposition of any body unless it is accompanied by a burial, removal, or transit permit, as herein provided. Such person shall endorse upon the permit the date of interment, over his signature, and shall return all permits so endorsed to the local registrar of his district within ten days from the date of interment. He shall also keep a record of all bodies interred or otherwise disposed of on the premises under his charge, in each case stating the name of each deceased person, place of death, date of burial or disposal, and name and address of the undertaker; which record shall at all times be open to official inspection. When burying a body in a cemetery or burial ground having no person in charge, the undertaker, or person acting as such, shall sign the burial or removal permit, giving the date of burial, and shall write across the face of the permit the words "No person in charge," and file the burial or removal permit within ten days with the registrar of the district in which the cemetery is located. (1913, c. 109, s. 11.)

§ 7100. Registration of births. — The birth of every child born in this state shall be registered as hereinafter provided. (1913, c. 109, s. 12.)

§ 7101. Birth certificate to be filed within five days.—Within five days after the date of each birth there shall be filed with the local registrar of the district in which the birth occurred a certificate of such birth, which certificate shall be upon the form adopted by the state board of health with a view of procuring a full and accurate report with respect to each item of information enumerated in the following section. Where a physician, midwife, or person acting as midwife, was in attendance upon the birth, it shall be the duty of such person to file the required certificate. Where there was no physician, midwife, or person acting as midwife, in attendance upon the birth, it shall be the duty of the father or mother of the child, the householder or owner of the premises where the birth occurred, or the manager or superintendent of the public or private institution where the birth occurred, each in the order named, within five days after the date of the birth, to report the fact to the local registrar. In such case and in case the physician, midwife, or person acting as midwife, in attendance is unable, by diligent inquiry, to obtain any of the items specified in the following section, it is the duty of the local registrar to secure from the person reporting the birth, or

from any other person who knows the facts, information to enable him to prepare the required certificate of birth, and it is the duty of the person questioned to answer correctly to the best of his knowledge all such questions, and to verify his statement by his signature, when requested to do so by the local registrar. (1913, c. 109, s. 13; 1915, c. 85, s. 1.)

§ 7102. Contents of birth certificate.—The certificate of birth shall contain the following items, which are hereby declared necessary for the legal, social, and sanitary purposes subserved by registration records:

1. Place of birth, including state, county, township or town, village or city. If in a city, the ward, street, and house number; if in a hospital or other institution, the name of the same to be given, instead of the street and house number.

2. Full name of child. If the child dies without a name before the certificate is filed, enter the surname preceded by "Unnamed." If the living child has not yet been named at the date of filing certificate of birth, the space for "full name of child" is to be left blank, to be filled out subsequently by a supplemental report, as hereinafter provided.

3. Sex of child.

4. Whether a twin, triplet, or other plural birth. A separate certificate shall be required for each child in case of plural births.

5. For plural births, number of each child in order of birth.

6. Legitimate or illegitimate: Provided, that in illegitimate births the word "illegitimate" shall be written across the face of the certificate and all items on the certificate which would in any way reveal the identity of the father, mother, or illegitimate child itself shall be omitted.

7. Date of birth, including the year, month, and day.

8. Full name of father: Provided, that if the child is illegitimate, the name of the putative father shall not be entered without his consent, but the other particulars relating to the putative father (items nine to thirteen) may be entered if known, otherwise as "Unknown."

9. Residence of father.

10. Color or race of father.

11. Educational attainments—illiterate, able to read and write, common school education or equivalent, high school education or equivalent, college education or equivalent.

12. Age of father at last birthday, in years.

13. Birthplace of father; at least state or foreign country, if known.

14. Occupation of father. The occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work; (b) general nature of industry, business, or establishment in which employed (or employer).

15. Maiden name of mother.

16. Residence of mother.

17. Color or race of mother.

18. Educational attainments—illiterate, able to read and write, common school education or equivalent, high school education or equivalent, college education or equivalent.

19. Age of mother at last birthday, in years.

20. Birthplace of mother; at least state or foreign country, if known.

21. Occupation of mother. The occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work; (b) general nature of industry, business, or establishment in which employed (or employer).

22. Number of children born to this mother, including present birth.

23. Number of children of this mother living.

24. The certification of attending physician or midwife as to attendance at birth, including statement of year, month, day (as given in item seven), and hour of birth, and whether the child was born alive or stillborn. This certification shall be signed by the attending physician or midwife, with date of signature and address; if there is no physician or midwife in attendance, then by the father or mother of the child, householder, owner of the premises, or manager or superintendent of public or private institution where the birth occurred, or other competent person, each in the order named, whose duty it shall be to notify the local registrar of such birth, as required by section 7101.

25. Exact date of filing in office of local registrar, attested by his official signature, and registered number of birth, as hereinafter provided. (1913, c. 109, s. 14.)

§ 7103. Blank furnished for report of name.—When any certificate of birth of a living child is presented without the statement of the given name, then the local registrar shall make out and deliver to the parents of the child a special blank for the supplemental report of the given name of the child, which shall be filled out as directed, and returned to the local registrar as soon as the child shall have been named. (1913, c. 109, s. 15.)

§ 7104. Institutions to keep records of inmates.—All superintendents or managers, or other persons in charge of hospitals, almshouses, lying-in or other institutions, public or private, to which persons resort for treatment of diseases, confinement, or are committed by process of law, shall make a record of all the personal and statistical particulars relative to the inmates in their institutions at the date of approval of this article, which are required in the forms of the certificates provided for by this article, as directed by the state registrar; and thereafter such record shall be, by them, made for all future inmates at the time of their admittance. In case of persons admitted or committed for treatment of disease, the physician in charge shall specify for entry in the record the nature of the disease, and where, in his opinion, it was contracted. The personal particulars and information required by this section shall be obtained from the individual himself if it is practicable to do so; and when they cannot be so obtained, they shall be obtained in as complete a manner as possible from

relatives, friends, or other persons acquainted with the facts. (1913, c. 109, s. 16.)

See note 13 N. C. Law Rev., 326, 328, on "Admissibility of Medical Records in Evidence."

§ 7105. State registrar to supply blanks; to perfect and preserve birth certificate.—The state registrar shall prepare, have printed, and supply to all registrars all blanks and forms used in registering, recording, and preserving the returns, or in otherwise carrying out the purposes of this article; and shall prepare and issue such detailed instructions as may be required to procure the uniform observance of its provisions and the maintenance of a perfect system of registration; and no other blanks shall be used than those supplied by the state registrar. He shall carefully examine the certificates received monthly from the local registrars, and if any such are incomplete or unsatisfactory he shall require such further information to be supplied as may be necessary to make the record complete and satisfactory. And all physicians, midwives, informants, or undertakers, and all other persons having knowledge of the facts, are hereby required to supply, upon a form provided by the state registrar or upon the original certificate, such information as they may possess regarding any birth or death upon demand of the state registrar, in person, by mail, or through the local registrar. No certificate of birth or death, after its acceptance for registration by the local registrar, and no other record made in pursuance of this article, shall be altered or changed in any respect otherwise than by amendments properly dated, signed, and witnessed. The state registrar shall further arrange, bind, and permanently preserve the certificates in a systematic manner, and shall prepare and maintain a comprehensive and continuous card index of all births and deaths registered, such index to be arranged alphabetically, in the case of deaths, by the names of decedents, and in the case of births, by the names of fathers and mothers. (1913, c. 109, s. 17.)

§ 7106. To inform registrars as to dangerous diseases.—He shall inform all registrars what diseases are to be considered infectious, contagious, or communicable and dangerous to the public health, as decided by the state board of health, in order that when deaths occur from such diseases proper precautions may be taken to prevent their spread. (1913, c. 109, s. 17.)

§ 7107. Birth certificate as evidence.—At the expiration of five years after the ratification of this article, certified copies of birth registration certificates shall be accepted by public school authorities in this state as prima facie evidence of age of children registering for school attendance, and no other proof shall be required. At the expiration of fourteen years from the passage of this article certified copies of birth registration certificates shall be required by all factory inspectors, and employers of youthful labor, as prima facie proof of age, and no other proof shall be required from children born in this state or states which for fourteen years previous to the date of such certificate have had registration laws essentially identical with this article. When, however, it is not possible to secure such certified copy of birth registration certificate for any child, the school authorities and factory inspectors may accept as secondary proof of age any competent evidence by which the age of persons is usually established. (1913, c. 109, s. 17.)

§ 7108. Church and other records filed and indexed; fees for transcript.—If any cemetery company or association, or any church or historical society or association, or any other company, society, or association, or any individual, is in possession of any record of births or deaths which may be of value in establishing the genealogy of any resident of this state, such company, society, association, or individual may file such record or a duly authenticated transcript thereof with the state registrar, and it shall be the duty of the state registrar to preserve such record or transcript and to make a record and index thereof in such form as to facilitate the finding of any information contained therein. Such record and index shall be open to inspection by the public, subject to such reasonable conditions as the state registrar may prescribe. If any person desires a transcript of any record filed in accordance herewith, the state registrar shall furnish the same upon application, together with a certificate that it is a true copy of such record, as filed in his office, and for his services in so furnishing such transcript and certificate he shall be entitled to a fee of (fifty cents per hour or fraction of an hour necessarily consumed in making such transcript) and to a fee of fifty cents for the certificate, which fees shall be paid by the applicant. (1913, c. 109, s. 17.)

§ 7109. Duties of local registrar as to certificates; reports.—Each local registrar shall supply blank forms of certificates to such persons as require them. Each local registrar shall carefully examine each certificate of birth or death when presented for record in order to ascertain whether or not it has been made out in accordance with the provisions of this article and the instructions of the state registrar; and if any certificate of death is incomplete or unsatisfactory, it shall be his duty to call attention to the defects in the return, and to withhold the burial or removal permit until such defects are corrected. All certificates, either of birth or of death, shall be written legibly, in durable black ink, and no certificate shall be held to be complete and correct that does not supply all of the items of information called for therein, or satisfactorily account for their omission. If the certificate of death is properly executed and complete, he shall then issue a burial or removal permit to the undertaker: Provided, that in case the death occurred from some disease which is held by the state board of health to be infectious, contagious, or communicable and dangerous to the public health, no permit for the removal or other disposition of the body shall be issued by the registrar, except under such conditions as may be prescribed by the state board of health. If a certificate of birth is incomplete the local registrar shall immediately notify the informant, and require him to supply the missing items of information if they can be obtained. He shall number consecu-

tively the certificates of birth and death, in two separate series, beginning with number one for the first birth and the first death in each calendar year, and sign his name as registrar in attest of the date of filing in his office. He shall also make a complete and accurate copy of each birth and each death certificate registered by him in a record book supplied by the state registrar, which record book the local registrar shall deposit with the register of deeds of the county not later than the fifteenth of February each year. And the register of deeds shall make and keep an index, the form of which shall be of the births and deaths that have occurred in the county, and these records shall be open at all times to official inspection. And he shall, on the fifth day of each month, transmit to the state registrar all original certificates registered by him for the preceding month. And if no births or no deaths occurred in any month the local registrar shall, on the fifth day of the following month, report that fact to the state registrar, on a card provided for such purpose. (1931, c. 109, s. 18; 1915, c. 85, s. 2; 1915, c. 164, s. 2; Ex. Sess. 1920, c. 58, s. 1; 1931, c. 79; 1933, c. 9, s. 1.)

Editor's Note.—By amendment Ex. Sess. 1920, ch. 58, sec. 1 the date for depositing record books with the registers of deeds was changed from not later than January fifteenth to not later than February fifteenth.

The Act of 1931 inserted before the last sentence the following: "and he shall at the same time transmit to the Register of Deeds of the county in which such birth or death occurred an exact copy of each such certificate."

Public Laws of 1933, c. 9, omitted a provision, formerly appearing at the end of the next to the last sentence, that the registrar shall transmit an exact copy of the certificate to the register of deeds.

§ 7109(a). Delivery of data to health officer.—Each local registrar of vital statistics serving in any county or municipality of North Carolina in which there is employed a wholetime county or municipal health officer shall, on or before the fifth day of each month, deliver by mail or in person to the health officer of his respective county or municipality such data from birth and death certificates filed with such local registrar during the preceding calendar month as may be needed in the proper execution of the duties of the said whole-time county or municipal health officer, and as authorized by the State Registrar of Vital Statistics.

All forms necessary for the use of local registrars in complying with this section shall be supplied, without charge, by the State Registrar of Vital Statistics.

Any local registrar who shall fail, neglect, or refuse to perform the duties required by this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00). (1925, c. 53.)

§ 7110. Pay of local registrars.—Each local registrar shall be paid the sum of fifty cents for each birth certificate and each death certificate properly and completely made out and registered with him, correctly recorded and promptly returned by him to the state registrar, as required by this article. And in case no births or deaths were registered during any month, the local registrar shall be entitled to be paid the sum of fifty cents for each report to that effect, but only if such report be made promptly as required by this article. The compensation of local registrars for services required of them by this article shall be paid by the county treasurers for registration work outside of incorporated municipalities, and by the town or city treasurer for registration work in incorporated municipalities. The state registrar shall certify every six months to the treasurers of the several counties and incorporated municipalities the number of births and deaths properly registered, with the names of the local registrars and the amounts due each at the rates fixed herein. (1913, c. 109, s. 19; Ex. Sess. 1913, c. 15, s. 1; 1915, c. 85, s. 3; 1919, c. 210, s. 1; Ex. Sess. 1920, c. 58, s. 2.)

Editor's Note.—By amendment, Ex. Sess. 1920, ch. 58, sec. 2, the compensation for each certificate and report was raised from twenty-five cents to fifty cents.

§ 7111. Certified copy of records; fee.—The state registrar shall, upon request, supply to any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. The United States census bureau may, however, obtain, without expense to the state, transcripts or certified copies of births and deaths without payment of the fees herein prescribed, and for transcripts so furnished the state registrar may receive from the census bureau such compensation for this service, not exceeding two cents for each certificate, as the state board of health may approve. Any copy of the record of a birth or death, properly certified by the state registrar, shall be prima facie evidence in all courts and places of the facts therein stated. For any search of the files and records when no certified copy is made, the state registrar shall be entitled to a fee of fifty cents for each hour or fractional part of an hour of time of search, said fee to be paid by the applicant. And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the treasurer of the state board of health. (1913, c. 109, s. 20; Ex. Sess. 1913, c. 15, s. 2; 1919, c. 145, s. 25.)

§ 7111(a). Information furnished to officers of American Legion.—Upon application to the Bureau of Vital Statistics made by the Adjutant or any officer of a local post of the American Legion, it shall be the duty of the Bureau of Vital Statistics to furnish immediately to such applicant the vital statistical records and necessary copies thereof, made up in the necessary forms for the use of such applicant, without charge. This section shall apply only to ex-soldiers of the World War and members of their families and/or beneficiaries under Government insurance or adjusted compensation certificate issued to such ex-soldier. (1931, c. 318.)

§ 7112. Violations of article; penalty.—Any person, who for himself or as an officer, agent, or employee of any other person, or of any corporation or partnership, shall do or omit any of the following acts:

1. Inter, cremate, or otherwise finally dispose of the dead body of a human being, or permit the same to be done, or shall remove said body from the primary registration district in which

the death occurred or the body was found, without the authority of a burial or removal permit issued by the local registrar of the district in which the death occurred or in which the body was found;

2. Refuse or fail to furnish correctly any information in his possession, or shall furnish false information affecting any certificate or record, required by this article;

3. Wilfully alter, otherwise than as provided by section 7105, or shall falsify any certificate of birth or death, or any record established by this article;

4. Being required by this article to fill out a certificate of birth or death and file the same with the local registrar, or deliver it, upon request, to any person charged with the duty of filing the same, shall fail, neglect or refuse to perform such duty in the manner required;

5. Being a state registrar, a chairman of a board of county commissioners, a mayor of a city or town, a local registrar, a deputy registrar, or sub-registrar, shall fail, neglect, or refuse to perform his duty as required by this article and by the instructions and direction of the state registrar thereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for the first offense be fined not less than five dollars nor more than fifty dollars, and for each subsequent offense not less than ten dollars nor more than fifty dollars, or be imprisoned in the county jail not more than thirty days. (1913, c. 109, s. 21; 1919, c. 210, s. 2.)

§ 7113. Duties of registrars and others in enforcing this article.—Each local registrar is hereby charged with the strict and thorough enforcement of the provisions of this article in his registration district, under the supervision and direction of the state registrar. He shall make an immediate report to the state registrar of any violation of this article coming to his knowledge, by observation or upon complaint of any person or otherwise.

The state registrar is hereby charged with the thorough and efficient execution of the provisions of this article in every part of the state, and is hereby granted supervisory power over local registrars, deputy local registrars, and sub-registrars, to the end that all of its requirements shall be uniformly complied with. The state registrar, either personally or through an accredited representative, shall have authority to investigate cases of irregularity or violation of this article, and all registrars shall aid him, upon request, in such investigations. When he shall deem it necessary, he shall report cases of violation of the provisions of this article to the prosecuting attorney of the county, or the solicitor of the district, with a statement of the facts and circumstances; and when any such case is reported to him by the state registrar, the prosecuting attorney or solicitor of the district, as the case may be, shall forthwith initiate and promptly follow up the necessary court proceedings against the person or corporation responsible for the alleged violation of law. Upon request of the state registrar, the attorney-general shall likewise assist in the enforcement of the provisions of this article. (1913, c. 109, s. 22.)

§ 7114. Appropriations.—For the purposes of the thorough execution of this article the sum of ten thousand dollars, or as much thereof as may be necessary, is hereby annually appropriated to be paid by the state auditor on requisition signed by the president and secretary of the state board of health. (1913, c. 109, s. 23; 1915, c. 62.)

§ 7115. Local systems abrogated.—No systems for the registration of births and deaths shall be continued or maintained in any of the several municipalities of this state other than the one provided for and established by this article. (1913, c. 109, s. 24.)

SUBCHAPTER IIA. STATISTICS RELATING TO THE BLIND.

Art. 6A. Compilation and Report to General Assembly

§ 7115(a). County officials directed to compile statistics. — It shall be the duty of the chairman of the board of commissioners of each county of the State, with the assistance of the County Superintendent of Public Welfare and the County Health Officer, to inquire into and compile statistics concerning the number of blind persons and persons suffering with impaired visions likely to produce total blindness in each county, the ages of the same, their education and station in life, the cause of their blindness, and such other and further facts concerning the blind as the Superintendent of the State School for the Blind and Deaf at Raleigh shall deem expedient and necessary in order that facts and figures concerning the blind and persons suffering with impaired visions likely to produce total blindness may be available for the General Assembly of one thousand nine hundred and thirty-three; and that said statistics be reported to said Superintendent of School for the Blind and Deaf by the said chairman of the board of county commissioners of each county by July first, one thousand nine hundred and thirty-two. (1931, c. 155, s. 1.)

§ 7115(b). Statistics to be reported to General Assembly. — The Superintendent of the State School for the Blind and Deaf shall report to the one thousand nine hundred and thirty-three session of the General Assembly the summarized statistics of each respective county report, and shall make to the General Assembly at that time such recommendations as he may desire for the betterment of the blind of the State to the end that some constructive program of legislation may be adopted toward the further rehabilitation of the blind and toward the further prevention of blindness in the State. (1931, c. 155, s. 2.)

SUBCHAPTER III. SANITATION AND PROTECTION OF PUBLIC

Art. 7. Water Protection

§ 7116. Persons supplying water to protect its purity.—In the interest of the public health, every person, company, or municipal corporation or agency thereof selling water to the public for drinking and household purposes shall take every reasonable precaution to protect from contamination and assure the healthfulness of such

water, and any provisions in any charters heretofore granted to such persons, companies, or municipal corporations in conflict with the provisions of this article are hereby repealed. (Rev., s. 3058; 1899, c. 670, s. 1; 1903, c. 159, s. 1; 1911, c. 62, s. 24.)

See § 7123 and note thereto.

Cited in Hudson v. Morganton, 205 N. C. 353, 171 S. E. 329.

§ 7117. Board of health to control and examine waters; rules; penalties.—The state board of health shall have the general oversight and care of all inland waters, and shall from time to time, as it may deem advisable, cause examinations of said waters and their sources and surroundings to be made for the purpose of ascertaining whether the same are adapted for use as water supplies for drinking and other domestic purposes, or are in a condition likely to impair the interests of the public or of persons lawfully using the same, or to imperil the public health. For the purpose aforesaid, it may employ such expert assistants as may be necessary. The said board shall make such reasonable rules and regulations as in its judgment may be necessary to prevent contamination and to secure other purifications as may be required to safeguard the public health. Any individual, firm, corporation, or municipality, or person responsible for the management of water supply, failing to comply with said rules and regulations, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1911, c. 62, s. 24.)

§ 7118. Systems of water supply and sewerage; plans submitted; penalties.—The state board of health shall from time to time consult with and advise the boards of all state institutions, the authorities of cities and towns, corporations, or firms already having or intending to introduce systems of water supply, drainage or sewerage, as to the most appropriate source of supply, the best practical method of assuring the purity thereof, or of disposing of their drainage or sewage, having regard to the present and prospective needs and interests of other cities, towns, corporations, or firms which may be affected thereby. All such boards of directors, authorities, corporations, and firms are hereby required to give notice to said board of their intentions in the premises and to submit for its advice outlines of their proposed plans or schemes in relation to water supplies and disposal of sewage, and no contract shall be entered into by any state institution or town for the introduction of a system of water supply or sewage disposal until said advice shall have been received, considered, and approved by the said board. For the purpose of carrying out the general provisions of this and the preceding sections, every municipal or private corporation, company, or individual supplying or authorized to supply water for drinking or other domestic purposes to the public shall file with the secretary of the state board of health, within ninety days after the receipt of notice from said secretary, certified plans and surveys, in duplicate, pertaining to the source from which the water is derived, the possible source of infections thereof, and the means in use for the purification thereof, in accordance with the directions to be furnished by the said secretary. Failure on the part of any individual, firm, corporation, or municipality to comply with this section shall be a misdemeanor, and upon conviction those responsible therefor shall be fined not less than fifty dollars nor more than one hundred dollars, at the discretion of the court. (1911, c. 62, s. 24.)

§ 7119. Condemnation of lands for water supply.—All municipalities operating water systems and sewer systems, and all water companies operating under charter from the state or license from municipalities, which may maintain public water supplies, may acquire by condemnation such lands and rights in lands and water as are necessary for the successful operation and protection of their plants, said proceedings to be the same as prescribed by law under the chapter Eminent Domain. (Rev., s. 3060; 1903, c. 159, s. 16; 1905, c. 287, s. 2; c. 544; 1911, c. 62, s. 25.)

§ 7120. Compensation for land.—If damages shall be claimed for the use of such lands, and the parties cannot agree as to the amount of compensation to be paid, they may proceed in the manner now provided by law under the chapter Eminent Domain. (1911, c. 62, s. 27.)

§ 7121. Inspection of watersheds.—The municipality or water company shall have quarterly sanitary inspections made of the entire watershed of any waterworks that derives its water from a surface supply, except in those cases where the supply is taken from large creeks or rivers that have a minimum daily flow of ten million gallons, in which case the inspection shall apply to the fifteen miles of watershed above the waterworks intake. Whenever in the opinion of the board of health of the city or town to which the water is supplied, or, where there is no such local board of health, in the opinion of the county board of health, or county physician or county health officer, or in the opinion of the state board of health, there is special reason to apprehend the infection of the water from any particular locality by the germs of typhoid fever or cholera, then the municipality or water company shall cause to be made at least once in every week a sanitary inspection of that particular locality. The inspection of the entire watershed as herein provided for shall include a particular examination of the premises of every inhabited house on the watershed, and, in passing from house to house, a general inspection for dead bodies of animals or accumulations of filth. It is not intended that the term "entire watershed" shall include uninhabited fields and wooded tracts that are free from suspicion. The sanitary inspector shall give in person to the head of each household on the watershed, or, in his absence, to some member of the household, the necessary directions for the proper sanitary care of his premises, and shall deliver to each family residing on the watershed such literature on pertinent sanitary subjects as may be supplied him by the municipal health officer or by the secretary of the state board of health. Full report in duplicate of all such inspections shall

be made promptly by the sanitary inspector to the secretary of the state board of health, and their accuracy certified to by the affidavit of the inspector.

The authorities of any town or city that makes use of a public surface water supply or the officers of a public surface water supply company may make such additional inspections as such officials may deem necessary. (Rev., ss. 3045, 3046; 1899, c. 670; 1903, c. 159, s. 2; 1911, c. 62, s. 28; 1919, c. 71, s. 14; Ex. Sess. 1921, c. 49, s. 1.)

As to inspection by water companies, see sec. 7142; as to discharge of sewerage into water supply, see sec. 2125.

Editor's Note.—By amendment, Ex. Sess. 1921, ch. 49, sec. 1, it was provided that the inspection should be by the municipality or water company. Formerly this duty was on the state board of health.

Cited in Hudson v. Morganton, 205 N. C. 353, 355, 171 S. E. 329.

§ 7122. Inspectors may enter premises.—Each sanitary inspector is authorized and empowered to enter upon any premises and into any building upon his respective watershed for the purpose of making the inspections required. (Rev., s. 3050; 1899, c. 670, s. 8; 1903, c. 159, s. 10; 1911, c. 62, s. 30.)

§ 7123. Control of residents on watersheds.—Every person residing or owning property on the watershed of a lake, pond, or stream from which a drinking supply is obtained shall carry out such reasonable instructions as may be furnished him in the matter hereinbefore set forth directly by the municipal health officer or by the state board of health. Any one refusing or neglecting to comply with the requirements of this section shall be guilty of a misdemeanor and fined not less than ten nor more than fifty dollars, or imprisoned for not less than ten nor more than thirty days. (Rev., ss. 3049, 3859; 1903, c. 159, s. 7; 1911, c. 62, s. 31.)

If the instructions as to sanitation required by this section are not furnished, one is not subject to a penalty, since this is a condition precedent to the enforcement of this section. Hudson v. Morganton, 205 N. C. 353, 355, 171 S. E. 329.

It is not necessary to allege that defendant owned or lived upon the land embraced in the municipal watershed, to state a cause of action under this section and § 7116. Morganton v. Hudson, 207 N. C. 360, 177 S. E. 169.

§ 7124. Defiling water supply misdemeanor.—If any person shall defile, corrupt, or make impure any well, spring, drain, branch, brook, creek, or other source of public water supply by collecting and depositing human excreta on the watershed, or depositing or allowing to remain the body of a dead animal on the watershed, or in any other manner, and if any person shall destroy or injure any pipe, conductor of water, or other property pertaining to an aqueduct, or shall aid and abet therein, he shall be guilty of a misdemeanor. (Rev., ss. 3457, 3857; Code, s. 1114; R. C., c. 34, s. 97; 1893, c. 214; 1850, c. 104; 1903, c. 159, s. 12; 1911, c. 62, s. 32.)

§ 7125. Discharge of sewage into water supply prohibited.—No person, firm, corporation, or municipality shall flow or discharge sewage above the intake into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the state board of health; and the continued flow and discharge of such sewage may be enjoined upon application of any person.

If any person, firm, or corporation, or officer of any municipality having a sewerage system in charge shall violate the provisions of this section he shall be guilty of a misdemeanor. (Rev., ss. 3051, 3858; 1903, c. 159, s. 13; 1911, c. 62, ss. 33, 34.)

Constitutionality.—This section is not unconstitutional as a taking of property without condemnation and without compensation, but is a valid exercise of the police power of the State to secure the public health. Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453; Shelby v. Cleveland Mill, etc., Co., 155 N. C. 196, 71 S. E. 218; North Carolina State Board v. Commissioners, 173 N. C. 250, 91 S. E. 1019.

Sewerage Defined.—The meaning of "sewerage," under this section, is confined to the liquid and solid matter flowing from the water-closets through the sewer and drain. Durham v. Eno Cotton Mills, 144 N. C. 705, 57 S. E. 465.

Dyestuff of fecal matter from privies, which were not passed through sewer to the river from which water supply was received does not come within the meaning of this section. Durham v. Eno Cotton Mills, 144 N. C. 705, 57 S. E. 465.

This section does not impose the mandatory duty upon the trial judge of enjoining a municipality from discharging raw sewage into a stream from which another municipality takes its water supply, and where the order prayed for would cause untold hardship upon the inhabitants of defendant municipality, the court's order denying the injunctive relief but providing that the judgment should not prevent the bringing of another suit for the same relief upon a change in the fundamental conditions, will be upheld on appeal. Smithfield v. Raleigh, 207 N. C. 597, 178 S. E. 114.

And Surrounding Facts Are to Be Considered. — The words "may be enjoined" as used in this section, clearly demonstrate that surrounding facts and circumstances must be considered in entering a peremptory order of injunctive relief. Smithfield v. Raleigh, 207 N. C. 597, 600, 178 S. E. 114.

Injurious Effects Unnecessary.—An injunction will issue under this section against emptying sewerage into a river, without proof of any injurious effect on plaintiff's water supply. Durham v. Eno Cotton Mills, 144 N. C. 705, 57 S. E. 465.

No Right by Prescription Acquired.—The unlawful emptying of untreated sewage into a stream without hindrance or question on the part of the health authorities or others, cannot confer upon a town the right to continue emptying therein contrary to the express provision of the statutes, or acquire for it a prescriptive right as against the public, however long the same may have continued; nor can the town acquire a vested right therein to defeat the enforcement of the provisions of the statute subsequently passed. North Carolina State Board v. Commissioners, 173 N. C. 250, 91 S. E. 1019.

Nor can title be lost to the public by non-user, unless by legislative enactment. Shelby v. Cleveland Mill, etc., Co., 155 N. C. 196, 197, 71 S. E. 218.

No Special Treatment for Sewage Prescribed.—This section does not require that an arbitrary or fixed method of treating sewage before emptying into a stream, etc., should be established in advance, but that the defendant confer with the State Board of Health and obtain and follow the reasonable requirements prescribed for the conditions presented. North Carolina State Board v. Commissioners, 173 N. C. 250, 91 S. E. 1019.

Not Confined to Watershed Distance.—This section is not confined to the watershed of 15 miles above the intake as defined in section 7121, but extends beyond 15 miles from the intake of any stream from which water is taken to be supplied to the public for drinking purposes. Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453. In case of menace to a lower town seventy-five miles below the place where the sewer empties, an injunction will be granted. North Carolina State Board v. Commissioners, 173 N. C. 250, 91 S. E. 1019.

Action by Secretary of the State Board of Health.—In a suit to enjoin a town from emptying untreated sewage into a stream, the Secretary of the State Board of Health, in his individual name, comes within the meaning of the statute, that the act "may be enjoined on the application of any person," and the question is not presented as to the authority of the board, acting as such, to maintain the action. North

Carolina State Board v. Commissioners, 173 N. C. 250, 91 S. E. 1019.

§ 7126. Cemeteries on watersheds forbidden. —No burying ground or cemetery shall be established on the watershed of any public water supply nearer than five hundred yards of the source of supply, nor in violation of the rules and regulations of the state board of health as authorized by this article. (Rev., s. 3053; 1903, c. 159, s. 15.)

§ 7127. Water supply of communities without sewerage systems.—All schools, hamlets, villages, towns, or industrial settlements which are now located or may be hereafter located on the shed of any public water supply not provided with a sewerage system shall provide and maintain a reasonable system approved by the state board of health for collecting and disposing of all accumulations of human excrement within their respective jurisdiction or control. Any one refusing or neglecting to comply with the requirements of this section shall be guilty of a misdemeanor and fined not less than ten dollars nor more than fifty dollars, or imprisoned for not less than ten nor more than thirty days. (Rev., ss. 3052, 3860; 1903, c. 159, s. 14; 1907, c. 585; 1911, c. 62, s. 35.)

When Injunction Granted.—An injunction will not be granted under this section except when it is shown that there are special damages, or that such conditions existed as to render the water unfit for the usage to which it was applied. Durham v. Eno Cotton Mills, 144 N. C. 705, 57 S. E. 465.

§ 7128. Damage to private water supply misdemeanor.—If any person shall wilfully put into the well, spring, or cistern of water of any other person any substance or thing whereby such well, spring, or cistern may be endamaged, or the water thereof be made less wholesome or fit for use, he shall be guilty of a misdemeanor. (Rev., s. 3456; Code, s. 1114; R. C., c. 34, s. 97; 1850, c. 104.)

§ 7128(a). Coöperation of counties with state in making water resource survey.—The board of county commissioners of any county of North Carolina is authorized and empowered, in their discretion, to coöperate with the North Carolina geological and economic survey or other association, organizations, or corporation in making surveys of any of the natural resources of their county, and to appropriate and pay out of the funds under their control such proportional part of the cost of such survey as they may deem proper and just. (1921, c. 208.)

Art. 7A. State Housing Law

§ 7128(1). Title.—This article shall be known as the "state housing law." (1933, c. 384, § 1.)

§ 7128(2). Public interest demands housing for families of low income. — It is hereby declared that it is necessary in the public interest to make provision for housing for families of low income, and that, the providing of such housing being now otherwise impossible, it is essential that provision be made for the investment of private and public funds at low interest rates, the acquisition at fair prices of adequate parcels of land and the construction of new housing facilities under public supervision in accord with proper standards of sanitation and safety, at a cost which will permit their rental or sale at prices which families of low income can afford to pay. Therefore, there are created and established the agencies and instrumentalities hereinafter prescribed which are declared to be the agencies and instrumentalities of the state for the purpose of attaining the ends herein recited, and their necessity in the public interest is hereby declared a matter of legislative determination. (1933, c. 384, s. 2.)

§ 7128(3). State board of housing created. — There is hereby created a state board of housing of the state of North Carolina, which will consist of five (5) members, to be appointed by the governor. Two of the five members shall be appointed for two years, and three for four years, and at the expiration of these terms their successors shall be appointed for a term of four years. All vacancies which may occur for any unexpired term shall be filled by the governor. The members of the board shall receive no salary, but shall be entitled to the necessary traveling and other expenses incurred in the discharges of their duties. (1933, c. 384, s. 3.)

§ 7128(4). Choosing officers and employees. — The members of the board shall choose from among their number a chairman and vice-chairman, and the board may appoint such other officers and employees, including a secretary, as it may require, for the performance of its duties, and shall fix and determine their qualifications, duties and salaries. (1933, c. 384, s. 4.)

§ 7128(5). Approval of housing projects.—No housing project proposed by a limited dividend housing corporation incorporated under this article shall be undertaken, and no building or other construction shall be placed under contract or started without the approval of the board. No housing project shall be approved by the board unless:

(a) It shall appear practicable to rent or sell the housing accommodations to be created at prices not exceeding those prescribed by the board. No such project shall be approved in contravention of any zoning or building ordinance in effect in the locality in which designated areas are located.

(b) There shall be submitted to the board a financial plan in such form and with such assurances as the board may prescribe to raise the actual cost of the lands and projected improvements by subscriptions to or the sale of the stock, income debentures and mortgage bonds of such corporation. Whenever reference is made in this act to cost of projects or of buildings and improvements in projects, such cost shall include charges for financing and supervision approved by the board and carrying charges during construction required in the project including interest on borrowed and, where approved by the board, on invested capital.

(c) There shall be such plans of site development and buildings as show conformity to reasonable standards of health, sanitation, safety and provisions for light and air, accompanied by proper specifications and estimates of cost. Such plans and specification shall not in any case fall below the requirements of the health, sanitation,

safety and housing laws of the state and shall meet superior requirements if prescribed by local laws and ordinances.

(d) The corporation agrees to accept a designee of the board of housing as a member of the board of directors of said corporation.

(e) If required by the board, the corporation shall deposit all monies received by it as proceeds of its mortgage bonds, notes, income debentures, or stock, with a trustee which shall be a banking corporation authorized to do business in the state of North Carolina and to perform trust functions, and such trustee shall receive such monies and make payment therefrom for the acquisition of land, the construction of improvements and other items entering into cost of land improvements upon presentation of draft, check or order signed by a proper officer of the corporation, and, if required by the board, countersigned by the said board or a person designated by it for said purpose. Any funds remaining in the custody of said trustee after the completion of the said project and payment or arrangement in a manner satisfactory to the board for payment in full thereof shall be paid to the corporation. (1933, c. 384, s. 5.)

§ 7128(6). Investigation into limited dividend housing corporations.—The board shall have power to investigate into the affairs of limited dividend housing companies, incorporated under this article, and into the dealings, transactions or relationships of such companies with other persons. Any of the investigations provided for in this article may be conducted by the board or by a committee to be appointed by the board consisting of one or more members of the board. Each member of the board or a committee thereof shall have power to administer oaths, take affidavits and to make personal inspections of all places to which their duties relate. The board or a committee thereof shall have power to subpoena and require the attendance of witnesses and the production of books and papers relating to the investigations and inquiries authorized in this article, and to examine them in relation to any matter it has power to investigate, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before the board or excused from attendance. (1933, c. 384, s. 6.)

§ 7128(7). Powers of board as to study of housing conditions and approval of housing projects.—The board is hereby empowered to (a) study housing conditions and needs throughout the state to determine in what areas congested and insanitary housing conditions constitute a menace to the health, safety, morals, welfare and reasonable comfort of the citizens of the state, (b) prepare programs for correcting such conditions, (c) collect and distribute information relating to housing, (d) investigate all matters affecting the cost of construction or production of dwellings, (e) study means of securing economy in the construction and arrangement of buildings, (f) recommend and approve the areas within which or adjacent to which the construction of housing projects by limited dividend housing companies may be undertaken, and (g) cooperate with local housing officials and planning commissions or similar bodies in cities and other localities in developments of projects they at any time may have under consideration. (1933, c. 384, s. 7.)

§ 7128(8). Consolidation of projects. — The board may permit the consolidation of two or more approved projects or the extension or amendment of any approved project or the consolidation of any approved project with a proposed project. In any of these events, the consolidation project shall be treated as an original project and an application shall be submitted as in the case of an original project and rents may be averaged throughout the consolidated or extended project. The board may likewise permit or decline to permit any limited dividend corporation to organize and operate more than one project or to take over any project heretofore approved by the board and to operate it independently of other projects of the corporation. (1933, c. 384, s. 8.)

§ 7128(9). Powers of board over housing corporations.—In pursuance of its power and authority to supervise and regulate the operations of limited dividend housing companies incorporated under this article the board may:

(a) Order any such corporation to make, at its expense, such repairs and improvements as will preserve or promote the health and safety of the occupants of buildings and structures owned or operated by such corporations.

(b) Order all such corporations to do such acts as may be necessary to comply with the provisions of the law, the rules and regulations adopted by the board or by the terms of any project approved by the board, or to refrain from doing any acts in violation thereof.

(c) Examine all such corporations and keep informed as to their general condition, their capitalization and the manner in which their property is constructed, leased, operated or managed.

(d) Either through its members or agents duly authorized by it, enter in or upon and inspect the property, equipment, buildings, plants, offices, apparatus and devices of any such corporation, examine all books, contracts, records, documents and papers of any such corporation and by subpoena duces tecum compel the production thereof.

(e) In its discretion prescribe uniform methods and forms of keeping accounts, records and books to be observed by such companies and to prescribe by order accounts in which particular outlays and receipt shall be entered, charged or credited.

(f) Require every such corporation to file with the board an annual report setting forth such information as the board may require verified by the oath of the president and general manager or receiver if any thereof or by the person required to file the same. Such report shall be in the form, cover the period and be filed at the time prescribed by the board. The board may further require specific answers to questions upon which the board may desire information and may also require such corporation to file periodic reports in the form covering the period and at the time prescribed by the board.

(g) From time to time make, amend and repeal

rules and regulations for carrying into effect the provisions of this article. (1933, c. 384, s. 9.)

§ 7128(10). Fixing of rental and purchase prices.—The board shall fix the maximum rental or purchase price to be charged for the housing accommodations furnished by such corporation. Such maximum rental or purchase price shall be determined upon the basis of the actual final cost of the project so as to secure, together with all other income of the corporation, a sufficient income to meet all necessary payments to be made by said corporations, as hereinafter prescribed, and such rental or purchase price shall be subject to revision by the board from time to time. The payments to be made by such corporation shall be (a) all fixed charges, and all operating and maintenance charges and expenses which shall include taxes, assessments, insurance, amortization charges in amounts approved by the board to amortize the mortgage indebtedness in whole or in part, depreciation charges if, when and to the extent deemed necessary by the board; reserves, sinking funds and corporate expenses essential to operation and management of the project in amounts approved by the board. (b) A dividend not exceeding the maximum fixed by this article upon the stock of the corporation allotted to the project by the board. (c) Where feasible in the discretion of the board, a sinking fund in an amount to be fixed by the board for the gradual retirement of the stock, and income debentures of the corporation to the extent permitted by this article.

Letting, subletting or assignment of leases of apartments in such buildings or structures at greater rentals than prescribed by the order of the board are prohibited and all such leases will be voted for all purposes. (1933, c. 384, s. 10.)

§ 7128(11). Reorganization of limited dividend corporations.—(1) Reorganization of limited dividend housing companies shall be subject to the supervision and control of the board and no such reorganization shall be had without the authorization of such board.

(2) Upon all such reorganizations the amount of capitalization, including therein all stocks, income debentures and bonds and other evidence of indebtedness shall be such as is authorized by the board which in making its determination, shall not exceed the fair value of the property involved. (1933, c. 384, s. 11.)

§ 7128(12). Injunction against corporations violating law.—Whenever the board shall be of the opinion that any such limited dividend housing company is failing or omitting, or about to fail or omit, to do anything required of it by law or by order of the board and is doing or about to do anything, or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the board, or which is improvident or prejudicial to the interests of the public, the lienholders or the stockholders, it may commence an action or proceeding in the superior court of the county in which the said company is located, in the name of the board for the purpose of having such violations or threatened violations stopped and prevented by mandatory injunction. The board shall begin such action or proceeding by a petition and complaint to the said superior court, alleging the violation complained of and praying for appropriate relief by way of mandatory injunction. It shall thereupon be the duty of the court to specify the time, not exceeding thirty days after service of a copy of the petition and complaint, within which the corporation complained of must answer the petition and complaint.

In case of default in answer or after answer the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirements. Such other persons or corporations as it shall seem to the court necessary or proper to join as parties in order to make its order or judgment effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a mandatory injunction be issued as prayed for in the petition and complaint or in such modified or other form as the court may determine will afford appropriate relief. (1933, c. 384, s. 12.)

§ 7128(13). Acquisition of housing property after approval of project.—When the board shall have approved a project for the construction of housing accommodations presented to it by a limited dividend housing company, such company may undertake the acquisition of the property needed for said project. Such property may be acquired by gift, bequest, or purchase. (1933, c. 384, s. 13.)

§ 7128(14). Articles of incorporation. — Any number of natural persons, not less than three, a majority of whom are citizens of the United States, may become a corporation by subscribing, acknowledging and filing in the office of the secretary of state, articles of incorporation, hereinafter called "articles," setting forth the information required by the general corporation act of the state, except as herein modified or changed.

(a) The purposes for which a limited dividend housing company is to be formed shall be as follows: To acquire, construct, maintain and operate housing projects when authorized by and subject to the supervision of the board of housing.

(b) The shares of which the capital shall consist shall have a par value.

(c) Articles of incorporation shall contain a declaration that the corporation has been organized to serve a public purpose and that it shall remain at all times subject to the supervision and control of the board or of other appropriate state authority; that all real estate acquired by it and all structures erected by it shall be deemed to be acquired for the purpose of promoting the public health and safety and subject to the provisions of the state housing law and that the stockholders of this corporation shall be deemed, when they subscribe to and receive the stock thereof, to have agreed that they shall at no time receive or accept from the company, in repayment of their investment in its stock, any sums in excess of the par value of the stock, together with cumulative dividends at the rate of six per centum per an-

num, and that any surplus in excess of such amount if said company shall be dissolved shall revert to the state of North Carolina.

(d) The provisions of the general corporation act, as hereafter from time to time amended, shall apply to limited dividend housing companies, except where such provisions are in conflict therewith. (1933, c. 384, s. 14.)

§ 7128(15). Further limitation on dividends. — No stockholder in any company formed hereunder shall receive any dividend, or other distribution based on stock ownership, in any one year in excess of six per centum per annum except that when in any preceding year dividends in the amount prescribed in the articles of incorporation shall not have been paid on the said stock, the stockholders may be paid such deficiency without interest out of any surplus earned in any succeeding years. (1933, c. 384, s. 15.)

§ 7128(16). Limit on stocks and bonds. — No limited dividend housing company incorporated under this article shall issue stock, bonds or income debentures, except for money, services or property actually received for the use and lawful purpose of the corporation. No stock, bonds or income debentures shall be issued for property or services except upon a valuation approved by the board of housing and such valuation shall be used in computing actual or estimated cost. (1933, c. 384, s. 16.)

§ 7128(17). Income debenture certificates. — The articles of incorporation may authorize the issuance of income debenture certificates bearing no greater interest than six per centum per annum. After the incorporation of a limited dividend housing company, the directors thereof may, with the consent of two-thirds of the holders of any preferred stock that may be issued and outstanding, offer to the stockholders of the company the privilege of exchanging their preferred and common stock in such quantities and at such times as may be approved by the board of housing for such income debenture certificates, whose face value shall not exceed the par value of the stock exchanges therefor. (1933, c. 384, s. 17.)

§ 7128(18). Powers of corporations limited. — No limited dividend housing company incorporated shall under this article:

(1) Acquire any real property or interest therein unless it shall first have obtained from the board a certificate that such acquisition is necessary or convenient for the public purpose defined in this article.

(2) Sell, transfer, assign or lease any real property without first having obtained the consent of the board: Provided, however, that leases conforming to the regulations and rules of the board and for actual occupancy by the lessees may be made without the consent of the board. Any conveyance, incumbrance, lease or sub-lease made in violation of the provisions of this section and any transfer or assignment thereof shall be void.

(3) Pay interest returns on its mortgage indebtedness and its income debenture certificates at a higher rate than six per centum per annum.

(4) Issue its stock, debentures and bonds covering any project undertaken by it in an amount greater in the aggregate than the total actual final cost of such project, including the lands, improvements, charges for financing and supervision approved by the board and interest and other carrying charges during construction.

(5) Mortgage any real property without first having obtained the consent of the board.

(6) Issue any securities or evidences of indebtedness without first having obtained the approval of the board.

(7) Use any building erected or acquired by it for other than housing purposes, except that when permitted by law the story of the building above the cellar or basement and the space below such story may be used for stores, commercial, coöperative or community purposes, and when permitted by law the roof may be used for coöperative or community purposes.

(8) Charge or accept any rental, purchase price or other charge in excess of the amounts prescribed by the board.

(9) Enter into contracts for the construction of housing projects, or for the payments of salaries to officers or employees except subject to the inspection and revision of the board and under such regulations as the board from time to time may prescribe.

(10) Voluntarily dissolve without first having obtained the consent of the board.

(11) Make any guaranty without the approval of the board. (1933, c. 384, s. 18.)

§ 7128(19). Loans and security therefor regulated.—Any company formed under this article may, subject to the approval of the board, borrow funds and secure the repayment thereof by bonds and mortgage or by an issue of bonds under trust indenture. The bonds so issued and secured and the mortgage or trust indentures relating thereto may create a first or senior lien and a second or junior lien upon the real property embraced in any project. Such bonds and mortgages may contain such other clauses and provisions as shall be approved by the board, including the right to assignment of rents and entry into possession in case of default; but the operation of the housing projects in the event of such entry by mortgagee or receiver shall be subject to the regulations of the board under this article. Provisions for the amortization of the bonded indebtedness of companies formed under this article shall be subject to the approval of the board. (1933, c. 384, s. 19.)

§ 7128(20). Earnings transferred to surplus.— The amount of net earnings transferable to surplus in any year after making or providing for the payments specified in subdivisions (a), (b) and (c) of section 7128(10) shall be subject to the approval of the board. The amount of such surplus shall not exceed fifteen per centum of the outstanding capital stock and income debentures of the corporation, but the surplus so limited shall not be deemed to include any increase in assets due to the reduction of mortgage or amortization or similar payments. On dissolution of any limited dividend housing company, the stockholders and income debenture certificate holders shall in no event receive more than the par value of their stock and debentures plus accumulated, accrued and unpaid dividends of interest, less any payment or distributions theretofore made other than by dividends provided in

section 7128(15), and any remaining surplus or other undistributed earnings shall be paid into the general fund of the state of North Carolina, or shall be disposed of in such other manner as the board may direct and the then governor may approve. (1933, c. 384, s. 20.)

§ 7128(21). Annual surpluses applied to rent reductions.—If in any calendar or fiscal year the gross receipts of any company formed hereunder should exceed the payments or charges specified in section 7128(10), the sums necessary to pay dividends, interest accrued or unpaid on any stock or income debentures, and the authorized transfer to surplus, the balance shall, unless the board of directors with the approval of the board of housing shall deem such balance too small for the purposes, be applied to the reduction of rentals. (1933, c. 384, s. 21.)

§ 7128(22). Board as defendant in foreclosure actions.—(1) In any foreclosure action the board shall be made a party defendant; and such board shall take all steps in such action necessary to project the interest of the public therein, and no costs shall be awarded against the board. Foreclosure shall not be decreed unless the court to which application therefor is made shall be satisfied that the interests of the lien-holder or holders cannot be adequately secured or safeguarded except by the sale of the property. In any such proceeding, the court shall be authorized to make an order increasing the rental to be charged for the housing accommodations in the project involved in such foreclosure, or appoint a receiver of the property or grant such other and further relief as may be reasonable and proper. In the event of a foreclosure sale or other judicial sale, the property shall, except as provided in the next succeeding paragraph of this section, be sold to a limited dividend housing corporation organized under this article: Provided such corporation shall bid and pay a price for the property sufficient to pay court costs and all liens on the property with interest. Otherwise the property shall be sold free of all restrictions imposed by this article.

(2) Notwithstanding the foregoing provisions of this section, wherever it shall appear that a corporation, subject to the supervision either of the state insurance department or state banking department, or the federal government or any agency or department of the federal government, shall have loaned on a mortgage which is a lien upon any such property such corporation shall have all the remedies available to a mortgagee under the laws of the state of North Carolina, free from any restrictions contained in this section, except that the board shall be made a party defendant and that such board shall take all steps necessary to protect the interests of the public and no costs shall be awarded against it. (1933, c. 384, s. 22.)

§ 7128(23). Application to, and approval of board as to transfer of housing property.—Before any limited dividend housing corporation incorporated under this article shall purchase the property of any other limited dividend housing corporation, it shall file an application with the board in the manner hereinbefore provided as for a new project and shall obtain the consent of the board to the purchase and agree to be bound by the provisions of this article, and the board shall not give its consent unless it is shown to the satisfaction of the board that the project is one that can be successfully operated according to the provisions of this article. (1933, c. 384, s. 23.)

§ 7128(24). Notice to board before execution on judgments. — In the event of a judgment against a limited dividend housing corporation in any action not pertaining to the collection of a mortgage indebtedness, there shall be no sale of any of the real property of such corporation except upon sixty days' written notice to the board. Upon receipt of such notice the board shall take such steps as in its judgment may be necessary to protect the rights of all parties. (1933, c. 384, s. 24.)

§ 7128(25). Fees of board for examination chargeable against housing corporation. — The board may charge and collect for a limited dividend housing corporation, incorporated under this article, reasonable fees in accordance with rates to be established by the rules of the board for the examination of plans and specifications and the supervision of construction in an amount not to exceed one-half of one per cent of the cost of the project; for the holding of a public hearing upon application of a housing corporation an amount sufficient to meet the reasonable cost of advertising the notice thereof and of the transcript of testimony taken thereat; for any examination or investigation made upon application of a housing corporation and for any act done by the board, or any of its employees, in performance of their duties under this act an amount reasonably calculated to meet the expense of the board incurred in connection therewith. In no event shall any part of the expenses of the board ever be paid out of the state treasury. The board may authorize a housing corporation to include such fees as part of the cost of a project, or as part of the charges specified in section 7128(10) pursuant to rules to be established by the board. (1933, c. 384, s. 25.)

§ 7128(26). Limit of existence of housing corporations.—The corporate existence of any corporation authorized hereunder shall not extend beyond twenty-five years from the date of incorporation, and promptly upon such termination the corporation shall be liquidated and its assets distributed as provided herein, unless the incorporation board, by approval of the state board of housing, should grant an extension for an additional period of time. (1933, c. 384, s. 27.)

Art. 8. Privies

§ 7129. Privy defined.—The term "privy" as used in this article shall be understood to include any and all buildings which are not connected with a system of sewerage, or with septic tanks of such construction and maintenance as approved by the state board of health and which are used for affording privacy in acts of urination or defecation. (1919, c. 71, s. 1.)

§ 7130. Sewerage, septic tank or approved privy required, when.—No person shall maintain or use a residence, located within three hundred yards of another residence, that is not provided with sewerage, or with septic tanks ap-

proved by the state board of health, or with a sanitary privy which complies in construction and maintenance with the requirements of this article: Provided, however, that nothing in this law shall curtail the right of a municipality to require and enforce immediate sewer connection. Provided, that plans and specifications for construction of privy buildings prescribed by the state board of health, by authority of this article shall be construed as recommendatory but not mendatory as to exact size, architecture and dimensions of same: Provided further, that privy buildings as used in this act shall not be construed to include any item pertaining to the exclusion of flies from excreta. (1919, c. 71, s. 2; Ex. Sess. 1921, c. 49, s. 2; 1927, c. 244.)

Editor's Note.—All of this section including and following the phrase "Provided that plans," was added by Public Laws 1927, ch. 244.

§ 7131. License form to be fastened on certain privies.—The state board of health, through its officers and inspectors, shall fasten a license form on all privies within three hundred yards of the residence of any person other than that of the owner or tenant thereof during the last three calendar months of every year, when, on inspection, the said privy is approved by the officer making the inspection as constructed in a sanitary manner and to be in good repair, in accordance with reasonable rules and regulations to be prescribed by the state board of health for the sanitary construction and maintenance of privies. The license shall apply to the calendar year following its issuance, except as hereinafter provided. (1919, c. 71, s. 3.)

§ 7132. Certain privies to be maintained in accordance with regulations.—Every privy located within three hundred yards of the residence of any person other than that of the owner or tenant thereof shall be maintained in a sanitary manner and in accordance with reasonable rules and regulations to be prescribed by the state board of health and posted in suitable form inside of the privy by an officer of the said board. (1919, c. 71, s. 4.)

§ 7133. Responsibility for sanitary maintenance of privy.—The head of a family or household, the proprietor of a boarding-house, hotel, restaurant, or store, the principal or superintendent of a school, the agent or station-master of a railroad station or depot, or the person in charge of an office building, establishment, or institution, shall be responsible for the sanitary maintenance, as prescribed in section 7132, of such privy or privies as may be used by his or her household, guests, customers, pupils, passengers, occupants, employees, workers or other persons. (1919, c. 71, s. 5.)

§ 7134. Supervision of privies by board of health.—The state board of health, through its officers and inspectors, shall exercise such supervision over the sanitary construction and maintenance of privies as may be necessary to enforce the provisions of this article. (1919, c. 71, s. 6.)

§ 7135. Use of insanitary privies prohibited.—If an officer or an inspector of the state board of health shall find a privy located within three hundred yards of the residence of a person other than that of the owner or tenant thereof which is not constructed in accordance with the provisions of section 7131 of this article, he shall securely fasten on the said privy a notice reading, "Insanitary; unlawful to use"; and if the inspector or officer of the board shall find, in the course of his inspection, a privy not being maintained in a sanitary manner and in accordance with the reasonable rules and regulations of the state board of health for the maintenance of privies, he shall remove the license from the privy and securely fasten on the privy a notice, reading, "Insanitary; unlawful to use." (1919, c. 71, s. 7.)

§ 7136. Privy license not to be removed or defaced.—No person shall remove or deface a privy license or other official notice fastened on or in a privy by an officer of the state board of health. (1919, c. 71, s. 8.)

§ 7137. Violation of this article.—Any person who violates any of the provisions of this article, and any person who is responsible for the sanitary maintenance of a privy, and who permits such privy after an official notice reading, "Insanitary; unlawful to use," has been fastened on it, to be used, shall be guilty of a misdemeanor and fined not less than five dollars nor more than fifty dollars or imprisoned not exceeding thirty days. (1919, c. 71, s. 9.)

§ 7138. Privy license fees.—(Repealed by Public Laws 1921, Chapter 44.)

§ 7139. Bureau of sanitary engineering and inspection; duties.—For the faithful execution of this article, the state board of health shall organize and maintain a bureau of sanitary engineering and inspection which shall (1) study, ascertain, and recommend for installation suitable types of privies for the variety of geologic, sociologic, and economic conditions found in the state of North Carolina; (2) exercise such oversight over the construction and maintenance of privies coming within the meaning of this article as may be necessary for the protection of public health; (3) organize, supervise, and direct a force of sanitary inspectors who shall (a) inspect, license, and close privies in accordance with the provisions of this article and the rules and regulations of the state board of health, as provided for in this article; (b) make such other sanitary inspections as are required of the state board of health by law; (c) assist in the enforcement of the public health laws of the state, more especially the vital statistics law and the quarantine law; (d) collect samples of water from public water supplies for analyses by the state laboratory of hygiene when such analyses are deemed necessary by the state board of health. (1919, c. 71, s. 11.)

§ 7140. Powers of board of health and inspectors; penalty for interference.—The members of the executive staff of the state board of health, and such additional state sanitary inspectors as shall be appointed for the enforcement of this article, are hereby authorized and are empowered to enter upon any premises and into any buildings or institutions for the purposes of in-

spection as provided for or required by state laws or regulations of the state board of health pursuant to such laws, but the privacy of no person shall be violated. Any person or persons who wilfully interfere with or obstruct the officers of the state board of health in the discharge of any of the aforementioned duties shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment at the discretion of the court. (1919, c. 71, s. 12.)

When Judge May Direct Verdict. — In an indictment against one who is charged with willfully obstructing a sanitary inspector of the State Board of Health in the discharge of his duties, the trial judge may not direct a verdict, and it is only when uncontradicted evidence, if accepted as true, establishes the defendant's guilt that he may properly instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. State v. Estes, 185 N. C. 752, 117 S. E. 581.

Mere words or opprobrious language with an expression of an intention to resist are not sufficient to sustain an indictment for willfully interfering with or obstructing an officer of the law in the performance of his duties, as prescribed by this section, unless spoken under circumstances which are calculated to deter an officer of ordinary courage and reasonable prudence in the discharge of his duty pertaining to his office, which raises an issue of facts for the jury to determine. State v. Estes, 185 N. C. 752, 117 S. E. 581.

§ 7141. Provisions of this article applicable to all privies on watersheds.—That the provisions of this article shall apply to all residences, institutions, and establishments, and all privies without regard to their distance from the homes of persons other than that of the owners or tenants thereof, which are located on the watershed of a public surface water supply. For the purpose of this article, the term "watershed" shall include the entire watershed of all streams, creeks, and rivers that have a daily average flow of less than ten million gallons, but for watersheds of streams, creeks or rivers that have a daily average flow of more than ten million gallons, the watershed shall include only such drainage areas as lie within fifteen miles of the waterworks intake. (1919, c. 71, s. 13.)

§ 7142. Water companies using surface supply relieved of inspections.—(Repealed by Public Laws, Extra Session 1921, Chapter 49, Section 3.)

§ 7143. Repealed by Public Laws 1921, c. 44.

§ 7144. Exceptions to provisions of this article.—This article shall not apply to any city the population of which shall be in excess of twenty thousand according to the latest official estimates of the bureau of the census, if the authorities of such city, before October first, one thousand nine hundred and nineteen, shall officially request the state board of health to exempt it from its provisions. This article shall not apply to the residence of farmers and the homes of their tenants that are located more than one mile from the corporate limits of a town or city or the geographic center of a village. (1919, c. 71, s. 16; Ex. Sess. 1920, c. 71.)

Editor's Note.—Prior to the amendment, Ex. Sess, 1920, ch. 71, this section was by its last sentence made not to apply to residents and homes of farmers and tenants located more than three hundred yards from residents that come within the meaning of this article.

Art. 9. Infectious Diseases Generally

§ 7145. County quarantine officers enforce article; oath.—On the second Tuesday of July, one thousand nine hundred and seventeen, all county quarantine officers and all county health officers to whom the duties of county quarantine officer have been assigned, as provided in this chapter, shall appear before the clerk of the superior court in their respective counties and make official oath or affirmation to faithfully enforce the provisions of this article. In those counties where a county board of health fails or neglects to elect a county quarantine officer on or before the second Tuesday of July, one thousand nine hundred and seventeen, the secretary of the North Carolina state board of health shall appoint a quarantine officer for the county. On refusal or neglect of any quarantine officer, or county health officer acting as quarantine officer to make, within a period of ten days of the time named in this section, the aforesaid official oath or affirmation, the secretary of the North Carolina state board of health is hereby empowered to remove such quarantine or county health officer and to appoint a quarantine officer to enforce the provisions of this article, and on the appointee are conferred all the powers, privileges, and compensation herein provided for the county quarantine officer. (1917, c. 263, s. 1.)

§ 7146. Quarantine officers; election; term; vacancies.—The official term of service of a county quarantine officer, including those in office and serving on June first, one thousand nine hundred and seventeen, except in those counties where there is a county health officer, shall expire on the first Monday in January of the fourth year from the year of their appointment or election. In those counties having a county health officer who makes official oath or affirmation to enforce this article, the office of county quarantine officer shall be coterminous with the office of the said county health officer. The county board of health shall elect a successor to the county quarantine officer, or the county health officer acting as county quarantine officer, on or before the expiration of the term of service of said officer as herein defined. If the county quarantine officer, or the county health officer acting as such, is disqualified to continue in office by resignation, death, or otherwise, the county board of health shall, within five days thereafter, elect a county health officer or county quarantine officer to fill out the unexpired term. If the county board of health fails so to elect a successor to complete the unexpired term, the secretary of the North Carolina state board of health shall immediately appoint a county quarantine officer who shall make official oath or affirmation to enforce this article. (1917, c. 263, s. 2.)

§ 7147. Election notified to state board of health; officer to qualify.—The county board of health on electing a county quarantine officer shall promptly notify, in writing, the secretary of the North Carolina state board of health of such action, and failure to do so shall nullify the election. The officer-elect shall promptly notify the secretary of the North Carolina state board of health, in writing, of his having taken the

oath or affirmation of office, inclosing a certified copy thereof, and failure to do so shall be construed as failure to have taken such official oath or affirmation. (1917, c. 263, s. 3.)

§ 7148. Failure of officer to enforce article; penalty.—Any county quarantine officer, or county health officer acting as county quarantine officer, who fails or refuses to enforce this article in his county shall be guilty of a misdemeanor, and, on conviction, fined not exceeding fifty dollars, and may, if the secretary of the North Carolina state board of health so decide, be disqualified for continuance in office. (1917, c. 263, s. 4.)

§ 7149. Municipalities; how far included.—This article shall not apply to incorporated towns and cities of the state having a population, according to the last decennial census, of ten thousand or over; nor shall it apply to those counties the sanitary administration of which is directed by a joint board of health presiding over both the county and a town or city having a population, according to the last federal decennial census, of ten thousand or more; but the system of quarantine in force in such cities and counties shall be approved by the North Carolina state board of health, and reports of the occurrence of contagious diseases therein shall be made to the North Carolina state board of health as from all other cities and counties in the state. (1917, c. 263, s. 5.)

§ 7150. Compensation of quarantine officers.—For his services the county quarantine officer shall be paid monthly, on certification from the secretary of the North Carolina state board of health that he has performed the duties of his office in a satisfactory manner, out of the county funds by the county treasurer, or in those counties that have no county treasurer by that official who performs the usual duties of the treasurer's office. The said certification and the sum paid the quarantine officer by the county authority shall be in accordance with a system of fees determined by the North Carolina state board of health for each item of work involved in the duties of the quarantine officer: Provided, however, that the total annual payment for any county shall not be in excess of the sum stated for such county classified according to population as follows:

	Per month.
Counties with a population less than 10,000	$15.00
Counties with a population of from 10,000 to 15,000	17.50
Counties with a population of from 15,000 to 25,000	25.00
Counties with a population of from 25,000 to 40,000	35.00
Counties with a population of from 40,000 to 50,000	45.00
Counties with a population over 50,000	50.00

In addition to such monthly salary, the county treasurer, or the person acting as county treasurer, shall pay to the quarintine officer all financial statements with receipted bills attached for sums paid out for pilotage [postage] registration of letters, and disinfectants, the total sum not to exceed ten dollars in any month nor one hundred dollars in any one year. The secretary of the North Carolina state board of health shall supply the county quarantine officer, without cost to the county, with all forms, placards, and literature necessary for carrying out the provisions of this article. County authorities may revise their undertakings with those county physicians who are acting as both physicians to county charges and as quarantine officers, and whose terms of office as quarintine officer shall expire in January, one thousand nine hundred and twenty-one, unless discontinued by death, resignation, or other disqualification, on a basis of compensation adequate to the new duties herein required; but in no case shall the compensation allowed for the services required of quarantine officers be less than that herein named. (1917, c. 263, s. 6; 1921, c. 53.)

Editor's Note.—Prior to the amendment, Public Laws 1921, ch. 53 which installed the fee system in this section, a salary was paid under the scale in this section, which now, because of the amendment, limits the amount of fees to be paid.

The word postage appearing in brackets should be substituted for pilotage immediately preceding it as it was used prior to the amendment of 1921, and as this amendment did not change this part of this section it is clear that the use of the word pilotage was a clerical error.

§ 7151. Physicians to report infectious diseases.—It shall be the duty of every physician to notify the county quarantine office of the name, address, including the name of the school district, of any person living or residing, permanently or temporarily, in the county about whom such physician is consulted professionally and whom he has reason to suspect of being afflicted with whooping-cough, measels, diphtheria, scarlet fever, smallpox, infantile paralysis, typhoid fever, typhus fever, Asiatic cholera, bubonic plague, yellow fever, or other disease declared by the North Carolina state board of health to be preventable, within twenty-four hours after obtaining reasonable evidence for believing that such person is so afflicted. If the afflicted person is a minor, the physician consulted professionally about him shall notify the county quarantine officer of the name and address of the parent or guardian of the minor in addition to the name, address, and school district of the minor himself. (Rev., s. 3448; 1893, c. 214, s. 11; 1917, c. 263, s. 7; 1921, c. 223, s. 1.)

Editor's Note.—By amendment, Public Laws 1921, ch. 223, sec. 1 the part of this section reading as follows: "or other disease declared by the North Carolina state board of health to be preventable" replaced a part reading as follows: "or other disease declared by the North Carolina state board of health to be infectious or contagious."

§ 7152. Parents and householders to report.—It shall be the duty of every parent, guardian, or householder in the order named to notify the county quarantine office of the name, address, including the name of the school district, of any person in their family or household about whom no physician has been consulted but whom they have reason to suspect of being afflicted with whooping-cough, measles, diphtheria, scarlet fever, smallpox, infantile paralysis, typhoid fever, Asiatic cholera, typhus fever, bubonic plague, yellow fever, or other disease declared by the North Carolina state board of health to be preventable. (1917, c. 263, s. 8; 1921, c. 223, s. 2.)

Editor's Note.—By amendment Public Laws, 1921, ch. 223, sec. 1 the last words of this section, i. e. "preventable" replaced the words "infectious or contagious."

§ 7153. Quarantine officers to report cases to state board of health.—It shall be the duty of the county quarantine officer to report all cases of whooping-cough, measles, diphtheria, scarlet fever, smallpox, infantile paralysis, typhoid fever, Asiatic cholera, typhus fever, bubonic plague, yellow fever, or other disease declared by the North Carolina state board of health to be preventable, reported to him by physicians and parents, guardians, or householders, within twenty-four hours of the receipt of such report to the secretary of the North Carolina state board of health at Raleigh, and to make this report on forms supplied him by the secretary and in accordance with the rules and regulations adopted by the North Carolina state board of health. (1917, c. 263, s. 9; 1921, c. 223, s. 3.)

Editor's Note.—By amendment, Public Laws, 1921, ch. 223, sec. 3, the following words, "declared by the North Carolina state board of health to be preventable" replaced, "declared by the North Carolina state board of health to be infectious and contagious."

§ 7154. Rules of state board of health; rules of local authorities. — The North Carolina state board of health shall adopt what in their judgment seems to be the necessary rules and regulations governing the management, supervision, or control of the diseases coming within the meaning of this article, and shall cause the rules and regulations adopted to be published in the North Carolina state board of health bulletin and to be supplied in suitable quantities to all concerned with the execution of this article, and the North Carolina state board of health shall revise such rules and regulations from time to time to adjust their requirements to new discoveries and improved methods for dealing with the sources and modes of infection of the diseases specified. The rules and regulations so adopted shall be regarded as the minimum requirements, and the authorities of any county, town, or city may adopt such additional rules and regulations for the control of the diseases mentioned in this article, and pay such additional fees and salaries as in their judgment seem necessary. (1917, c. 263, s. 10.)

§ 7155. Violation of article or rules misdemeanor.—Any person wilfully violating any of the provisions of this article and any person violating any of the rules and regulations adopted by the North Carolina state board of health, as provided in the preceding section, shall, in the absence of specific provisions in other sections of this article, be guilty of a misdemeanor and fined not exceeding fifty dollars, or imprisoned not more than thirty days, at the discretion of the court. In case the offender be stricken with the disease for which he is quarantinable, he shall be subject to the penalty on recovery, unless in the opinion of the secretary of the North Carolina state board of health the penalty should be omitted. (Rev., s. 3448; 1893, c. 214, s. 11; 1917, c. 263, s. 11.)

§ 7156. Bureau of epidemiology; appropriations.—For the purpose of seeing that this article and the rules and regulations adopted by the North Carolina state board of health, as provided in this article, are faithfully executed, a bureau of epidemiology and the office of state epidemiologist is hereby created, and an appropriation of four thousand dollars for the fiscal year of one thousand nine hundred and seventeen, and thereafter an annual appropriation of six thousand dollars is hereby appropriated. The aforesaid bureau and the state epidemiologist shall be under the control and supervision of the North Carolina state board of health. (1917, c. 263, s. 12.)

§ 7157. Contingent fund in case of pestilence.—A contingent fund of five thousand dollars is appropriated, subject to the auditor's warrant, upon the recommendation of the governor, to be expended in pursuance of the provisions of this chapter, when rendered necessary by the visitation of cholera or any other pestilential disease. (1911, c. 62, s. 39.)

§ 7158. Disposal of bowel discharges in typhoid and cholera; penalties.—Any householder in whose family there is to his knowledge a person sick of cholera or typhoid fever, who shall permit the bowel discharges of such sick person to be emptied without first having disinfected them according to instructions to be obtained from the attending physician or county superintendent of health, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two nor more than twenty-five dollars, or imprisoned not less than ten nor more than thirty days. In cases where such undisinfected discharges are emptied on the watershed of any stream or pond furnishing the source of water supply for any public institution, city, or town, the penalty shall be a fine of not less than twenty-five dollars nor more than fifty dollars, or imprisonment for not more than thirty days. And any physician attending a case of cholera or typhoid fever who refuses or neglects to give the proper instructions for such disinfection as soon as the diagnosis is made shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less then ten dollars nor more than fifty dollars.

During an epidemic of cholera all common carriers shall so arrange their water-closets as to catch in water-tight receptacles the dejections of all persons using the same, and shall disinfect the said dejections in a manner satisfactory to the state board of health before emptying them. (Rev., s. 4459; 1893, c. 214, s. 16; 1909, c. 793, s. 8.)

§ 7159. Travel of infected persons regulated; inspectors; penalty.—The county or municipal boards of health in counties, cities, or towns near to or bordering upon either of the neighboring states, may appoint, by writing, suitable persons to attend at places by which travelers may pass from infected places in other states, who may examine such travelers as may be suspected of bringing any infection dangerous to the public health, and, if need be, may restrain them from traveling until licensed thereto by the quarantine officer or by the proper municipal health authorities of the city or town to which they may come. A traveler coming from such infected place who, without such license, travels within this state, except to return by the most direct route to the state whence he came, after he has been cautioned to depart by the persons so appointed, shall be isolated or ejected, at the discretion of the quarantine officer or of the municipal health authorities last mentioned. And all common carriers bringing into this state any such persons as named above are hereby required to return them to some point without this state, if required by the

quarantine officer or municipal health authorities above specified; and upon refusal to comply with the regulations of such boards of health or municipal health authorities upon this subject, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than fifty dollars, or imprisoned not more than thirty days. Nothing in this section shall prevent the state board of health in time of epidemics from appointing such additional examiners as they may deem necessary to the preservation of the public health. (Rev., ss. 3454, 4506; 1893, c. 214, s. 15; 1901, c. 245, s. 6.)

§ 7160. Quarantine of infected travelers.—When a person comes to a city or town from abroad or from some other place in this state which is infected or has lately been infected with either of the diseases specified in this article or other disease declared by the North Carolina state board of health to be infectious or contagious, the quarantine officer or lawful municipal authority specified in this article shall make effective provision in the manner deemed best for the safety of the inhabitants by removing such person to a separate house or otherwise, and by providing nurses and other assistance and necessaries, which shall be at the charge of the person himself or his parents, where able, otherwise at the charge of the city, town, or county to which he belongs. (Rev., s. 4507; 1893, c. 214, s. 14; 1901, c. 245, s. 5.)

§ 7161. Transportation of bodies of persons dying of infectious diseases.—No railroad corporation or other common carrier or persons shall convey or cause to be conveyed through or from any city, town, or county in this state the remains of any person who has died of smallpox, measles, scarlet fever, diphtheria, typhus fever, yellow fever, or cholera until such body has been disinfected and encased in such manner as shall be directed by the state board of health, so as to preclude any danger of communicating the disease to others by its transportation; and no local registrar, clerk, or health officer or any other person shall give a permit for the removal of such body until he has received from the local board of health or other proper health authorities of the city, town, or county where the death occurred a certificate stating the cause of death and that the said body has been prepared in the manner set forth in this section; which certificate shall be delivered in duplicate to the agent or person who receives the body, and one copy shall be pasted on the box containing the corpse; said certificate shall be furnished in blank by the transportation company when no local board of health exists. (Rev., s. 4459; 1893, c. 214, s. 16.)

Art. 10. Smallpox

§ 7162. Notification of occurrence required; vaccination of school children.—On the appearance of a case of smallpox in any neighborhood, town, or city, the quarantine officer shall use all due diligence to warn the public of its existence and to notify the public of the proper means for preventing its spread; the said warning and notification to be according to the instructions of the state health officer. The board of health of any town, city, or county shall have authority to require children attending the public schools to present certificate of immunity from smallpox either through recent vaccination or previous attack of the disease. If any parent, guardian, school committee, principal, or teacher shall permit a child to violate such a requirement of the aforesaid authorities, he or she shall be guilty of a misdemeanor, and fined not less than ten dollars nor more than fifty dollars. (1911, c. 62, s. 23; 1913, c. 181, s. 11.)

Prior to this section, under a regulation providing for vaccination of all the inhabitants of a town the school children were subject to vaccination the same as other persons in the town. Morgan v. Stewart, 144 N. C. 424, 57 S. E. 149.

Power to Require Vaccination.—Where a school board has entire and exclusive control of the public schools, they may require vaccination as a prerequisite to attendance. Hutchins v. School Committee, 137 N. C. 68, 49 S. E. 46.

§ 7163. Free vaccination.—On the appearance of a case of smallpox in any neighborhood due warning of the existence of the disease shall be given, and all persons not able to pay shall be vaccinated free of charge by the county physician or health officer or by the municipal physician or health officer, and the county physician or health officer shall vaccinate every person admitted into a public institution, jail, or county home as soon as practicable, unless he is satisfied, upon examination, that the person is already successfully vaccinated; the money for vaccine to be furnished by the county commissioners. (Rev., s. 4451; 1913, c. 181, s. 12.)

Constitutional.—There is no provision of the Constitution which forbids the Legislature to enact laws for the preservation of the health of the inhabitants of the state, and it is indeed an exercise of that governmental police power to legislate for the public welfare which is inherent in the General Assembly, except when restrained by some express constitutional provision. State v. Hay, 126 N. C. 999, 1000, 35 S. E. 459.

Such rules and regulations as provided for by this section, when reasonable and relevant to the purpose, are a valid exercise of authority. Morgan v. Stewart, 144 N. C. 424, 57 S. E. 149.

Reasonableness.—Clark, J., in State v. Hay, 126 N. C. 999, 1003, 35 S. E. 459, in discussing the vaccination laws says: "But even if we were of opinion with the small number of medical men who contend that vaccination is dangerous to health, and not a preventive of the disease, the Court is not a paternal despot, gifted with infallable wisdom, whose function is to correct the errors and mistakes of the Legislature."

Douglas J., concurring, in State v. Hay, 126 N. C. 999, 1004, 35 S. E. 459, says: "Compulsory vaccination is not an unreasonable requirement, as experience has shown that it is in times of epidemic necessary for the protection of the community and equally so of the individual."

Arrest of Persons Exposed. — A city is not liable to one arrested on the ground of having been exposed to smallpox, where the officers act without malice. Levin v. Burlington, 129 N. C. 184, 39 S. E. 822.

§ 7164. Rules as to vaccination; violations punished.—The board of health of any city, town, or county may make such regulations and provisions for the vaccination of the inhabitants of their city, town, or county, and impose such penalties as they may deem necessary to protect the public health, and the violations of such rules shall be a misdemeanor, punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (Rev., s. 3455; 1913, c. 181, s. 12.)

As to constitutionality see note to preceding section.

Punishment Valid.—The punishment provided for by this section when administered for the violation of a reasonable regulation, is a valid exercise of authority. Morgan v. Stewart, 144 N. C. 424, 57 S. E. 149.

When Vaccination Would Be Dangerous.—The general law

embraces all, leaving it optional to no one's private judgment whether to render compliance or not. If there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, that would be matter of defense, the burden of which would be on the defendant, and a fact to be found by the jury. State v. Hay, 126 N. C. 999, 35 S. E. 459.

Cited in 1 N. C. Law Rev. in discussion of Legislative Power to Penalize Violation of Administrative Rule.

Art. 11. Diphtheria

§ 7165. Antitoxin furnished to indigents.—The state board of health is hereby authorized and directed to arrange for a sufficient supply of diphtheria antitoxin for the treatment therewith, free of charge, of indigent persons sick of diphtheria, and for immunizing against infection such indigent persons as may be exposed to the disease, and to extend the facilities for making the diagnosis of the disease. (1909, c. 389, s. 1.)

§ 7166. Laboratory of hygiene to furnish antitoxin to counties.—The board of health shall keep on hand in the state laboratory of hygiene a supply of reliable diphtheria antitoxin, and shall distribute it, through the said laboratory, to the several counties of the state, whenever the boards of county commissioners thereof shall request it, and shall notify the secretary of the state board of health that they will pay for the same upon presentation of a bill, and shall designate the person or persons with whom it shall be deposited. The antitoxin shall be furnished at the lowest figure obtainable for a reliable preparation. (1909, c. 389, s. 2.)

§ 7167. Physician's requisitions for antitoxin.—Whenever a physician is called to a case of diphtheria in an indigent person or one in immediate need and unable to pay for antitoxin, he may obtain the same from one of the depositories or diphtheria stations by filling out and signing in duplicate the blank requisition form to be supplied with the antitoxin by the said board of health, and presenting the same to the county superintendent of health or any member of the county sanitary committee, or to such person as the said county sanitary committee may appoint, who, after satisfying himself as to the indigency of the person or persons for whom the antitoxin is intended, shall approve and countersign in duplicate the requisition. The person dispensing the antitoxin shall retain one copy of the requisition and shall mail the duplicate promptly to director of the laboratory of hygiene. He shall also return to the said director all packages of antitoxin in his possession as soon as they become out of date. (1909, c. 389, s. 3.)

§ 7168. Article applicable to cities and towns.—The provisions of this article shall apply to cities and towns upon the same conditions as it does to counties. (1909, c. 389, s. 4.)

§ 7169. Use of certain state lands for preparation of sera.—(Repealed by Public Laws, 1923, Chapter, 224, Section 1.)

Art. 12. Hydrophobia

§ 7170. Board of health to provide treatment.—The state board of health is hereby authorized and empowered to provide for and have conducted under its direction the preventive treatment of hydrophobia or rabies, whenever in its judgment circumstances, financial and other, will justify it. To meet the expenses of this treatment the said board is hereby given authority to supplement the revenue derived from the fees for the treatment by such sums from the treasury of the state laboratory of hygiene as may be necessary: Provided, that the usefulness and efficiency of the said laboratory is not thereby impaired. (1907, c. 891, s. 1.)

§ 7171. Treatment to be without charge.—The benefits of said treatment shall be given free of charge to all residents of the state who shall present to the secretary of the state board of health or its representative having in charge the management of this special work, an affidavit of inability to pay, duly sworn to and subscribed before a justice of the peace, or, if the case be a minor, such an affidavit by the parent or guardian. To meet as far as may be the expenses of this special work the said state board of health is hereby authorized and directed to demand from those able to do so the payment in advance of a reasonable fee, not to exceed in any case the usual charge made by the reputable Pasteur institutes of this country. (1907, c. 891, s. 2.)

Art. 13. Tuberculosis

§ 7172. Directors of State Sanatorium for tuberculosis.—The body politic and corporate existing under the name and style of the North Carolina Sanitorium for the Treatment of Tuberculosis shall be controlled and managed by a board of directors composed of nine (9) members to be appointed by the Governor. Within thirty days after March 10, 1925, the Governor shall name five (5) of said directors and within six months after March 10, 1925, the Governor shall name the remaining four (4) of said directors. At the time of naming the directors the Governor shall designate which of the present board his appointees are to succeed. All vacancies shall be filled by the Governor. The terms of the directors shall be four years from and after the date of their appointment. The Governor shall transmit to the Senate at the next session of the General Assembly the names of his appointees for confirmation. (1907, c. 964; Ex. Sess. 1913, c. 40, s. 1; 1925, c. 306, s. 12.)

As to effect on prior law, see note to sec. 7058.

See sections 7179(1) et seq., and note to 7179(2).

Editor's Note.—Prior to the amendment, Public Laws 1923, ch. 96 control was in the board of health. By this amendment a board of directors composed of nine members was created. This board was appointed in three classes at intervals of two years, the term being six years. By amendment Public Laws, 1925, ch. 306, sec. 12 it is provided that the board be appointed all in the same year, and the term is fixed at four years. For removal, as provided for in this section, see 5912, (b).

§ 7173. Powers of directors; election of officers.—The North Carolina sanatorium for the treatment of tuberculosis is hereby empowered and authorized to elect and employ such officials and to pay such fees and salaries (provided the appropriation is not exceeded) as the directors shall find necessary for the proper management and maintenance of the institution; the directors shall determine the qualifications for admission of those applying as patients to the institution; the directors shall make all such by-laws and regulations for the government of the said institution as shall be necessary, among which shall be such as shall make the institution as nearly self-sup-

porting as shall be consistent with the purpose of its creation; and the directors shall do such other things as seem reasonably necessary and incident to the proper management and maintenance of the institution. (1907, c. 964; Ex. Sess. 1913, c. 40, s. 2.)

§ 7173(a). Indigent patients; recovery of charges from those able to pay.—The said directors in determining the qualifications for admission for those applying as patients to the institution and in making by-laws and regulations for the governing therein shall not provide or make any by-law, regulation, or qualification for admission therein which shall exclude any patient, otherwise properly qualified for admission, on account of inability to pay for examination and treatment, or either, at said institution. That all indigent patients who otherwise are proper patients for admission in said institution when there is space and accommodation for such patient, shall be received without regard to their indigent condition; but the directors of said institution shall require of all patients who are able to pay, including those having persons upon whom they are legally dependent who are able to pay the reasonable cost of treatment and care of said institution, and they shall make such by-laws and regulations as shall most equitably carry out the directions contained in section seven thousand one hundred and seventy-three of this article. In case those persons upon whom patients are legally dependent or patients not indigent shall refuse to pay such charges for treatment and care, then said directors are authorized and empowered to institute an action in the name of the said Sanatorium in the Superior Court of Hoke County for the collection thereof, and if the amount so charged is less than two hundred dollars ($200), then said action shall be instituted in the county where the defendant resides in a court having jurisdiction thereof; and upon said trial the charges so made shall be collectible, as upon express promise to pay the same. Provided, that nothing in this section shall be interpreted to conflict with or interfere with the provisions contained in section seven thousand one hundred and seventy-nine of the Consolidated Statutes. (1924, c. 86, s. 1; 1925, c. 291.)

Editor's Note.—The proviso at the end of this section was added by the 1925 amendment.

§ 7174. Bureau for tuberculosis; register of tuberculous persons.—The directors shall equip, operate, and maintain a bureau for tuberculosis, located in their offices in Raleigh, to which bureau the reports of cases of tuberculosis, as hereinafter provided, shall be made; and the bureau of tuberculosis shall keep a register of all persons in this state known to be afflicted with tuberculosis. The bureau shall have exclusive control of such register and shall not permit the inspection thereof, nor disclose any of its personal particulars, except to representatives of municipal or county governments, the state government, or organizations, orders, churches, or corporations interested in and contemplating making financial provision in the institution for the care and treatment of afflicted citizens or members of their respective organizations, orders, churches, or corporations. (Ex. Sess. 1913, c. 40, s. 3.)

§ 7175. Bureau to maintain correspondence school.—The bureau of tuberculosis shall develop and maintain a correspondence school with those of the state's tuberculous population, to the end that the tuberculous population of this state shall be properly advised and directed both as to methods for obtaining cures and as to methods for preventing the spread of the disease to other persons. (Ex. Sess. 1913, c. 40, s. 4.)

§ 7176. Cases of tuberculosis reported to bureau.—All physicians and the executive officers of every private or public hospital, institution for the treatment of disease, or dispensary shall report, on blank forms and in accordance with the instructions of the bureau of tuberculosis, the names and other particulars of all persons afflicted with tuberculosis whom they are called upon to examine or treat or who are to be examined or treated in the hospital, institution, or dispensary of which he or she is the executive head, within seven days after the disease is recognized by such physician or executive officer. Any violation of this section shall be a misdemeanor and subject to a fine of not less than ten dollars nor more than one hundred dollars, and the judge, in addition to imposing the said fine, may, upon the evidence produced in the trial or upon such further evidence as may be produced before him, find and cause to be entered upon the records of the court that the physician deliberately and falsely diagnosed the disease, tuberculosis, as some other disease in order to avoid the requirements of this section, and the North Carolina board of medical examiners upon such record shall revoke the license of such physician. Nothing in this section shall abrogate the rights and powers of municipalities and counties to require the reporting of cases of tuberculosis by physicians to the local authorities; but municipalities and counties may, when desired, in lieu of such reports by physicians, call upon the bureau of tuberculosis for notification of cases of tuberculosis reported to the bureau from the municipality or county. (Ex. Sess. 1913, c. 40, s. 5.)

§ 7177. Directors may receive gifts for sanatorium.—The directors shall be empowered to receive or accept the gifts or donations for the benefit of the state sanatorium, and the directors shall, in their discretion, use the same for carrying out the purpose for which the sanatorium is established. (1907, c. 964, s. 14; Ex. Sess. 1913, c. 40, s. 6.)

§ 7178. Pay of directors.—Each director shall be entitled to receive, as compensation, the sum of four dollars per day while engaged in conducting the affairs of the sanatorium, in addition to his necessary traveling expenses. (1907, c. 964, s. 15; Ex. Sess. 1913, c. 40, s. 7.)

§ 7179. Indigent tuberculous to be treated at state sanatorium.—Any city or town in the state of North Carolina, through its board of aldermen, town council, or other governing body, and any county in the state, through its board of commissioners, is hereby authorized and empowered to provide for the treatment of any tubercular person or persons resident in and who is a bona fide citizen of said city, town, or county, at

the North Carolina sanatorium for the treatment of tuberculosis, and pay therefor to the North Carolina sanatorium for the treatment of tuberculosis an amount which shall not be more than one dollar per day per patient. (1915, c. 181, s. 1.)

§ 7179(1). Tubercular sanatorium established in western North Carolina.—There shall be established in western North Carolina in the manner hereinafter set out a sanatorium for the treatment of persons afflicted with tuberculosis. (1935, c. 91, s. 1.)

§ 7179(2). Control of both tubercular sanatoriums vested in one board.—Control of said sanatorium and the control of the "North Carolina sanatorium for the treatment of tuberculosis" established under the provisions of chapter nine hundred and sixty-four, Public Laws, one thousand nine hundred and seven (§§ 7172 et seq.), shall be vested in a board of directors composed of twelve members to be appointed by the governor of North Carolina and approved by the state senate of the session of the general assembly of one thousand nine hundred and thirty-five. (1935, c. 91, s. 2, c. 138, s. 1.)

Editor's Note.—Section 3 of the Public Laws of 1935, from whence this section was codified, provides that sections 7172 and 7173 et seq., relating to the number, appointment, organization, etc., of the North Carolina sanatorium for the treatment of tuberculosis are repealed insofar as in conflict with the present law, "it being the intent and purpose of this act to place the control and management of the 'North Carolina Sanatorium for the Treatment of Tuberculosis' and the 'Western North Carolina Sanatorium for the Treatment of Tuberculosis' under the board of directors herein provided for."

Section 4 of the new act also provides for the appointment of the committee who shall recommend to the board of directors a site for the new hospital.

§ 7179(3). Terms of directors; ex-officio director.—The said board of directors shall be divided into four classes of three directors each, the first class to serve for a period of two years, the second class for a period of four years and the third class for a period of six years, and at the expiration of the terms of the several classes, shall be appointed for a period of six years. The secretary of the North Carolina state board of health shall be ex-officio a member of the board of directors. (1935, c. 91, s. 3, c. 138, s. 2.)

§ 7179(4). Vacancy appointments.—In case of a vacancy or vacancies in the board of directors for any cause, their successor or successors shall be appointed by the governor, and their appointment will be reported to the next succeeding session of the senate of the general assembly of North Carolina for confirmation. (1935, c. 91, s. 4.)

§ 7179(5). Directors incorporated. — The said board of directors shall be, and they are hereby constituted a body politic and corporate, under the name and style of the "western North Carolina sanatorium for the treatment of tuberculosis," and upon them, as such, are hereby conferred all the duties, powers, privileges and obligations incident to bodies corporate. (1935, c. 91, s. 5.)

§ 7179(6). Organization of directors; acquisition of site; appropriation.—Said board of directors are hereby given full power and authority to meet and organize and from their number select a chairman to purchase a site or sites in western North Carolina, to purchase, renovate, remodel or erect buildings and provide such apparatus and equipment as may be necessary to establish said sanatorium and prepare it for the reception of patients, such expenditure not to exceed the sum of two hundred and fifty thousand ($250,000) dollars hereinabove appropriated. (1935, c. 91, s. 6.)

§ 7179(7). Superintendent.—The board of directors shall have the power to elect a superintendent and prescribe his duties. The said superintendent shall be a skilled physician, trained and experienced in the treatment of tuberculosis, of good moral character, and good business habits, and otherwise qualified to discharge the duties of his office. He shall hold office for a period of two years from and after the date of his election, unless sooner removed therefrom by the board for incompetence or misconduct in office, and shall keep a record of his transactions and duly enter the same in a book or books for that purpose. (1935, c. 91, s. 7.)

§ 7179(8). Subordinate officers and employees.—Said superintendent shall employ such subordinate officers and employees of said sanatorium as may be necessary, and fix their compensation, subject to the approval of said board, and within the appropriation made to said institution; the said superintendent shall have the power to discharge any of the employees for incompetence or misconduct in office, and his proceedings in regard to any act of this character shall be reported to the said board of directors. (1935, c. 91, s. 8.)

§ 7179(9). Reports of superintendent; board meetings; reports to legislature. — The superintendent shall make monthly reports to the chairman of the board of directors, clearly setting forth the conditions and workings of the institution, and upon receipt of said report, said chairman shall have the authority to convene said board if, in his discretion, he deems it necessary to do so. Said superintendent shall make a detailed report of the conditions and workings of the institution every three months to the board of directors, and he shall annually make a detailed report to the governor of North Carolina. The board of directors shall be required to hold meetings of their board every three months or oftener if the chairman of said board shall call them together, and the said board shall be required to make biennial reports of the conditions and workings of the hospital to the governor and general assembly. (1935, c. 91, s. 9.)

§ 7179(10). Executive committee.—The board of directors shall at their first meeting select from their number an executive committee composed of the chairman of said board and two other members, who, in the absence of the board of directors, shall have the direction of the affairs of said hospital. The successors to the members of the executive committee and the manner and time of their election shall be provided by the by-laws and regulations made for the said institution. (1935, c. 91, s. 10.)

§ 7179(11). By-laws and regulations. — The board of directors shall make all by-laws and regulations for the government of said institution as shall be necessary, among which regulations shall be such as shall make said sanatorium as nearly self-supporting as shall be consistent with the purpose of its creation. (1935, c. 91, s. 11.)

§ 7179(12). Gifts and grants from governments or agencies; bond issues.—In addition to the powers generally granted to bodies corporate in North Carolina, the "western North Carolina sanatorium for the treatment of tuberculosis" shall have and is hereby granted authority to receive gift or grant from the United States government or any other agency or government, and shall have the right by vote of the board of directors, approved by the treasurer of the state of North Carolina, to issue bonds of said institution payable solely out of the receipts or revenues of any undertaking engaged in or undertaken by said board for which said bonds were issued, but shall not have the right to pledge any property of the institution or to make said bonds an obligation of said institution further than the revenue derived from the projects for which the bonds were issued, and said bonds so issued shall not be a charge upon the general property of the western North Carolina sanatorium for the treatment of tuberculosis, nor any obligation of the State of North Carolina. (1935, c. 91, s. 12.)

§ 7179(13). State treasurer as treasurer of sanatorium. — The treasurer of the State of North Carolina shall be ex-officio treasurer of said corporation and shall keep all accounts of said sanatorium and pay out all monies to its credit in the way and manner as now or hereafter may be provided by law for the disbursement of funds of the State of North Carolina specifically allotted to any institution or for any specified purpose. (1935, c. 91, s. 13.)

§ 7179(14). Appropriation for construction; disbursement of bond proceeds.—For the purpose of securing a site or sites and purchasing, renovating, remodeling or erecting the necessary buildings for the western North Carolina sanatorium for the treatment of tuberculosis there is hereby appropriated the sum of two hundred and fifty thousand ($250,000) dollars, or so much thereof as may be needed, which is hereby denominated a building fund, said sum to be raised by the issuance of the bonds of the State of North Carolina in the sum of two hundred and fifty thousand ($250,000) dollars, or so much thereof as may be needed. The proceeds from the sale of said bonds shall be deposited with the treasurer of the State of North Carolina for the credit of the building fund of the western North Carolina sanatorium for the treatment of tuberculosis. (1935, c. 91, s. 14.)

§ 7179(15). Appropriation for biennial maintenance. — For the purpose of maintaining and defraying the running expenses of said sanatorium, there is hereby appropriated for the year one thousand nine hundred thirty-five-thirty-six the sum of ten thousand ($10,000) dollars, and for the year one thousand nine hundred thirty-six-thirty-seven the sum of one hundred thousand ($100,000) dollars from the general funds of the State of North Carolina, and which shall be deposited with the treasurer of the State and disbursed in the manner all other appropriations to State institutions are disbursed. (1935, c. 91, s. 15.)

§ 7179(16). Gifts and donations for benefit of sanatorium.—The said board of directors shall be empowered to receive or accept gifts or donations for the benefit of said sanatorium which shall be used by said board in their discretion for the purpose of carrying out the work for which the sanatorium is established. (1935, c. 91, s. 16.)

§ 7179(17). Pay of directors. — Each member of the board of directors shall be entitled to receive as compensation the sum of five ($5.00) dollars per day while engaged in attending to the affairs of said sanatorium and in addition thereto his necessary traveling expenses and hotel bills. (1935, c. 91, s. 17.)

Art. 14. Inflammation of Eyes of Newborn

§ 7180. Ophthalmia neonatorum described.—Any inflammation, swelling, or unusual redness in either one or both eyes of any infant, either apart from or together with any unnatural discharge from the eye or eyes of such infant, independent of the nature of the infection, if any, occurring any time within two weeks after the birth of such infant, shall be known as "inflammation of the eyes of the newborn" (ophthalmia neonatorum). (1917, c. 257, s. 1.)

§ 7181. Inflammation of eyes of newborn to be reported.—It shall be the duty of any physician, surgeon, obstetrician, midwife, nurse, maternity home, or hospital of any nature, parent, relative, and any persons attendant on or assisting in any way whatsoever any infant, or the mother of any infant at childbirth or any time within two weeks after childbirth, knowing the condition, hereinabove defined, to exist, immediately to report such fact, as the state board of health shall direct, to the local health officer of the county, city, town, village, or whatever other political division there may be within which the infant or the mother of any such infant may reside. For such services the attending physician, surgeon, obstetrician, midwife, nurse, maternity home, or hospital shall receive from the state treasurer a fee of fifty cents. In the event of there being no health officer in the city, village, or town in which the infant resides, midwives shall immediately report the condition to some qualified practitioner of medicine, and thereupon withdraw from the case, except as she may act under a physician's instructions. On receipt of such receipt, the health officer, or the physician notified by a midwife where no health officer exists, shall immediately give to the parents or persons having charge of such infant a warning of the dangers to the eye or eyes of said infant, and shall for indigent cases provide the necessary treatment at the expense of the said county, city, village, or town. (1917, c. 257, s. 2.)

§ 7182. Eyes of newborn to be treated; penalty for omission.—It shall be unlawful for any physician or midwife practicing midwifery in the state of North Carolina to neglect or otherwise

fail to instill or have instilled, immediately upon its birth, in the eyes of the newborn babe, two drops of a solution prescribed or furnished by the state board of health. (1917, c. 257, s. 3.)

This section does not impose upon the physician attempting in good faith to obey the statute the absolute duty of ascertaining the percentage of the solution furnished by a hospital for this purpose, and he is not liable for damages resulting from the use of a larger per cent of such solution when so furnished by the hospital. Covington v. Wyatt, 196 N. C. 367, 145 S. E. 673.

§ 7183. Duties of local health officer.—It shall be the duty of the local health officer:

1. To investigate or to have investigated each case as filed with him in pursuance with the law, and any other such cases as may come to his attention.

2. To report all cases of inflammation of the eyes of the newborn and the result of all such investigations as the state board of health shall direct.

3. To conform to such other rules and regulations as the state board of health shall promulgate for his further guidance. (1917, c. 257, s. 4.)

§ 7184. Duties of state board of health.—It shall be the duty of the North Carolina state board of health:

1. To enforce the provisions of this article.

2. To promulgate such rules and regulations as shall, under this article, be necessary for the purposes of this article, and such as the state board of health may deem necessary for the further and proper guidance of local health officers.

3. To provide for the gratuitous distribution of the scientific prophylactic for inflammation of the eyes of the newborn, as designated in section 7182, together with proper directions for the use and administration thereof, to all physicians and midwives as may be engaged in the practice of obstetrics or assisting at childbirth.

4. To publish and promulgate such further advice and information concerning the dangers of inflammation of the eyes of the newborn, and the necessity for prompt and effective treatment.

5. To furnish copies of this law to all physicians and midwives as may be engaged in the practice of obstetrics or assisting at childbirth.

6. To keep a proper record of any and all cases of inflammation of the eyes of the newborn as shall be filed in the office of the state board of health in pursuance with this law and as may come to their attention in any way, and to constitute such records a part of the biennial report to the governor and the legislature. (1917, c. 257, s. 5.)

§ 7185. Treatment in hospitals and institutions.—It shall be the duty of physicians, midwives, or other persons in attendance upon a case of childbirth in a maternity home, hospital, public or charitable institution, in every infant's eyes, within two hours after birth, to use the prophylactic against inflammation of the eyes of the newborn specified in this article, and to make record of the prophylactic used. It shall also be the duty of such institution to maintain such records of cases of inflammation of the eyes of the newborn as the state board of health shall direct. (1917, c. 257, s. 6.)

§ 7186. Violations of article; penalties.—Whoever being a physician, surgeon, midwife, obstetrician, nurse, manager, or person in charge of a maternity home or hospital, parent, relative, or person attendant upon or assisting at the birth of any infant, violates any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than ten dollars nor more than fifty dollars, and, if possessed of the required amount of property, subject to suit by the parent or guardian of the child for damages resulting to the child; and if such a suit shall be brought the establishment of the fact that the physician or midwife did not place the drops in the child's eyes within two hours of its birth shall be accepted as prima facie evidence of the physician's or midwife's responsibility for the injury of the disease to the eye or eyes of the child. It shall be the duty of the prosecuting attorney to prosecute all violations of this article. (1917, c. 257, s. 7.)

§ 7187. Registration of midwives.—All midwives who now practice midwifery in North Carolina, other than regularly registered physicians, shall register, without fee, their names and addresses with the secretary of the North Carolina state board of health on or before the first day of July, one thousand nine hundred and seventeen, in order that the prophylactic solution and necessary instructions may be furnished them. After the aforesaid date no person, physician, or midwife shall practice midwifery in North Carolina until at least ten days have elapsed following the registration of the name and address of the person who intends to engage in the practice of midwifery, and in this period of ten days elapsing between the registration and beginning of the practice of midwifery by the registered person the state board of health shall furnish the necessary directions and solution to the physician or midwife for compliance with this article. (1917, c. 257, s. 8.)

§ 7188. Failure to register; penalty.—Any physician or midwife failing to register their names and addresses with the North Carolina state board of health as required in the preceding section shall be guilty of a misdemeanor and subject to a fine of from ten dollars to fifty dollars. (1917, c. 257, s. 9.)

§ 7189. Appropriation, disposal of fines and penalties; expenses.—The sum of three thousand dollars shall be annually appropriated for the use of the state board of health in enforcing and carrying out the provisions of this article. Any and all necessary and legitimate expenses that may be incurred in prosecuting a case under this article shall, on proper showing, be met by the state board of health out of this appropriation. In addition thereto, all fines and penalties recovered hereunder shall be paid into the state treasury and shall constitute a special fund for the use and purposes of the state board of health as herein enacted. (1917, c. 257, s. 10.)

§ 7190. Copies of article to be distributed.—Every health officer shall furnish a copy of this article to each person who is known to him to act as midwife or nurse in the county, city, or

town for which such health officer is appointed, and the secretary of state shall cause a sufficient number of copies of this article to be printed and supply the same to the health officer of the county, city, or town, and the state board of health, on application. (1917, c. 257, s. 11.)

Art. 15. Venereal Diseases

Part 1. Control and Treatment

§ 7191. Venereal infection.—Syphilis, gonorrhea, and chancroid, hereinafter designated as venereal diseases, are hereby declared to be contagious, infectious, communicable, and dangerous to the public health. It shall be unlawful for any one infected with these diseases or any of them to expose another person to infection. (1919, c. 206, s. 1.)

§ 7192. Physicians and superintendents of institutions to report cases.—Any physician or other person who makes a diagnosis in or treats a case of venereal disease, and any superintendent or manager of a hospital, dispensary, or charitable institution in which there is a case of venereal disease, shall make a report of such case to the health authorities according to such form and manner as the North Carolina state board of health shall direct. (1919, c. 206, s. 2.)

§ 7193. Sources of infection investigated; suspected persons examined.—State, county, and municipal health officers, or their authorized deputies, within their respective jurisdictions are hereby directed and empowered, when in their judgment it is necessary to protect the public health, to make examinations of persons reasonably suspected of being infected with venereal disease, and to detain such persons until the results of such examinations are known; to require persons infected with venereal disease to report for treatment to a reputable physician and continue treatment until cured or to submit to treatment provided at public expense until cured; and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons infected with venereal disease. It shall be the duty of all local and state health officers to investigate sources of infection of venereal disease, to coöperate with the proper officials whose duty it is to enforce laws directed against prostitution, and otherwise to use every proper means for the repression of prostitution. Provided, that no examination of any person for venereal diseases under this section shall be made by any one except a licensed physician. (1919, c. 206, s. 3; 1925, c. 217, s. 1.)

Editor's Note.—By amendment, Public Laws 1925, ch. 217, sec. 1 the provision for examination by only licensed physicians, was added.

§ 7194. Prisoners examined and treated; isolation of patients.—All persons who shall be confined or imprisoned in any state, county, or city prison in the state shall be examined for and, if infected, treated for venereal diseases by the health authorities or their deputies. The prison authorities of any state, county, or city prison are directed to make available to the health authorities such portion of any state, county, or city prison as may be necessary for a clinic or hospital wherein all persons who may be confined or imprisoned in any such prison and who are infected with venereal disease, and all such persons who are suffering with venereal disease at the time of the expiration of their terms of imprisonment, and, in case no other suitable place for isolation or quarantine is available, such other persons as may be isolated or quarantined under the provisions of the first preceding section, shall be isolated and treated at public expense until cured; or, in lieu of such isolation, any of such persons may, in the direction of the North Carolina state board of health, be required to report for treatment to a licensed physician or submit to treatment provided at public expense as provided in section 7193. Nothing herein contained shall be construed to interfere with the service of any sentence imposed by a court as a punishment for the commission of crime. Provided, that no examination of any person for venereal disease under this section shall be made by any one except a licensed physician. (1919, c. 206, s. 4; 1925, c. 217, s. 2.)

Editor's Note.—By amendment, Public Laws 1925, ch. 217, sec. 2 the provision for examination by only licensed physicians was added.

§ 7195. Board of health may make rules and regulations to enforce this article.—The North Carolina state board of health is hereby empowered and directed to make such rules and regulations as shall in its judgment be necessary for the carrying out of the provisions of this article, including rules and regulations providing for the control and treatment of persons isolated or quarantined under the provisions of section 7193, and such other rules and regulations, not in conflict with provisions of this article, concerning the control of venereal diseases, and concerning the care, treatment, and quarantine of persons infected therewith, as it may from time to time deem advisable. All such rules and regulations so made shall be of force and binding upon all county and municipal health officers and other persons affected by this article, and shall have the force and effect of law. (1919, c. 206, s. 5.)

§ 7196. Expenses authorized.—The North Carolina state board of health, through its officers, are hereby empowered and authorized to incur such expenses in the examination, detention, quarantine, and treatment of persons suspected of having, or having, venereal diseases as in their judgment is necessary. (1919, c. 206, s. 6.)

§ 7197. Statements of expenses to county commissioners; payment of expenses.—The North Carolina state board of health shall submit to the county commissioners of the county in which persons suspected of having, or having, venereal diseases are suspected of having spread the disease, an itemized statement of expenses incurred in the examination, detention, quarantine, or treatment of such persons, and the county commissioners shall, within thirty days after the receipt of such statement of expenses, pay to the treasurer of the North Carolina state board of health a sum equal to that expended. (1919, c. 206, s. 7.)

§ 7198. Violation of this article or authority pursuant thereto a misdemeanor.—Any person who shall violate any of the provisions of this part of this article or any lawful rule or regulation made by the North Carolina state board of health pursuant to the authority herein granted, or who shall fail or refuse to obey any lawful order issued by any state, county, or municipal health officer, pursuant to the authority granted in this article, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars, nor more than fifty dollars, or by imprisonment for not more than thirty days. (1919, c. 206, s. 8.)

Part 2. Prescriptions and Reports

§ 7199. Treatment except by physician unlawful.—It shall be unlawful for any person except a regularly licensed physician to prescribe or give away any medicine for the treatment of any person afflicted with venereal disease. (1919, c. 214, s. 1.)

§ 7200. Patented and proprietary remedies; druggists to report sales of.—Any druggist or other person who sells at retail any patented, proprietary, or trade-mark remedy or alleged remedy advertised or recommended or sold for or used in the treatment of venereal diseases (gonorrhea, syphilis, or chancroid) or lost manhood, impotency, or sterility, or medicinal preparations containing the oils of cubebs, copaiba, sandalwood, or the oils themselves, iodides of mercury, or preparations compounded for urethral injections, shall report weekly on forms and in accordance with instructions supplied by the North Carolina state board of health the sale of such remedies or alleged remedies to the bureau of venereal diseases of the North Carolina state board of health. (1919, c. 214, s. 2.)

§ 7201. Obtaining prescription or remedy under false name a misdemeanor.—Any person who, in obtaining a prescription from a physician under section 7199, or in obtaining drugs or remedies mentioned in section 7200, gives a false or assumed name or address, shall be guilty of a misdemeanor and subject to the penalties imposed in section 7206. (1919, c. 214, s. 3.)

§ 7202. Quarantine officer may appoint physicians as agents to issue prescriptions.—For the convenience of the public, a quarantine officer, either municipal or county, shall appoint, on the official request of the North Carolina state board of health, from the regularly registered physicians of the county one or more agents to issue prescriptions for drugs or remedies, necessary for treatment of such diseases. (1919, c. 214, s. 4.)

§ 7203. Fees of quarantine officer and agents.—A quarantine officer or agent of a quarantine officer who issues a prescription for any such drug, remedy, or alleged remedy, and who instructs a person infected with venereal disease as required by the state laws and reports by number but without identification as now prescribed for reports by physicians for such diseases to the North Carolina state board of health, shall be entitled to a fee of fifty cents, twenty-five cents of which shall be paid by the bureau of venereal diseases of the North Carolina state board of health, and twenty-five cents of which shall be paid by the county commissioners of the county in which the quarantine officer has jurisdiction, on a certification of the bureau of venereal diseases of the North Carolina state board of health of the number of prescription issued by the quarantine officer or the quarantine officer's agent: Provided, that the municipal authorities shall pay the above amount for prescriptions issued by a municipal quarantine officer or his agent. No quarantine officer shall be entitled to any pay from either county or city for issuing prescriptions to persons who pay the quarantine officer in part or in full for the issuance of prescriptions. Several prescriptions issued on a single visit of the infected person to the quarantine officer shall entitle the said officer to not more than the fee for a single prescription. (1919, c. 214, s. 5.)

§ 7204. Druggists to keep record of prescriptions; subject to inspection.—Any and all prescriptions for venereal diseases (gonorrhea, syphilis, or chancroid), or impotency, sterility, or lost manhood, or prescriptions containing the drugs, remedies, or alleged remedies mentioned in section 7200, shall be kept by a druggist on a separate file, and shall be subject at any reasonable hour to inspection by an officer of the North Carolina state board of health. (1919, c. 214, s. 6.)

§ 7205. Purchaser of remedies may be examined.—The state health officer or his deputy or agent may require any purchaser of remedies or alleged remedies designated in section 7200, and who may be reasonably supposed to be infected with a venereal disease, to appear before a regularly licensed physician, quarantine officer or agent, for an examination for such disease. (1919, c. 214, s. 7.)

§ 7206. Violation of this article a misdemeanor.—Any person violating any of the provisions of this part of this article shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned for not exceeding thirty days. (1919, c. 214, s. 8.)

Art. 16. Health of Prisoners

Part 1. Segregation of Tuberculous Prisoners

§ 7207. Tuberculous county prisoners to be segregated.—The board of county commissioners of the respective counties of North Carolina shall provide in the jail-house or in any camp or place where prisoners are committed for keeping or sentenced to a term of imprisonment in any county in the state of North Carolina, separate cells or rooms or a place in which shall be confined any prisoner or prisoners who may be committed for keeping or sentenced to said prison or place of confinement for a term of imprisonment, who has been examined by the county physician or county health officer and pronounced to be affected with tuberculosis. (1907, c. 567, s. 1.)

§ 7208. Sheriff to have prisoners suspected to be tuberculous examined and separated.—When a prisoner is placed in the custody of a sheriff for the purpose of being committed to jail or to

any place where prisoners are kept, and the sheriff has reason to believe or suspect that the prisoner is suffering with tuberculosis, it shall be the duty of the sheriff to have such prisoner examined by the county physician or county health officer, and if upon examination the prisoner is pronounced tubercular, then he shall be separated from other prisoners and confined in a separate cell or other place of confinement. (1907, c. 567, s. 2.)

§ 7209. Tuberculous state prisoners to be segregated.—It shall be the duty of the board of directors of the state's prison to provide separate cells or apartments for the confinement of prisoners sentenced to that institution for a term of imprisonment, who have been examined and pronounced by the physician in charge to be affected with tuberculosis. (1907, c. 567, s. 3.)

§ 7210. Separate cells for tuberculous prisoners; fumigation.—Cells or places of confinement provided for prisoners affected with tuberculosis must be kept exclusively for such prisoners, and when they have been occupied by tuberculous prisoners they shall not be used for other prisoners until the county physician or county health officer, or the physician in charge and the health authorities of the state's prison, have been notified, and until such cells or places of confinement have been thoroughly fumigated and disinfected under the supervision of such officials in the manner required by the state board of health. (1907, c. 567, s. 4.)

§ 7211. Prison authorities to have prisoners suspected to be tuberculous examined.—When a prisoner is committed to any prison or place of confinement designated in this article, and the sheriff of the county, the warden of the state's prison or other authorities of the prison know or suspect the prisoner to be suffering with tuberculosis, it shall be the duty of such authorities to cause the prisoners to be examined by the county physician, the county health officer, or the physician in charge within five days after the prisoner has been committed or sentenced to the prison. (1907, c. 567, s. 5.)

§ 7212. Prisoners may be worked together.—Nothing contained in any of the preceding sections of this article shall be so construed as to interfere with or prevent the county or state authorities from working together all prisoners on public works as now provided for by law. (1907, c. 567, s. 6.)

Part 2. Prevention of Tuberculosis Among Prisoners

§ 7213. Tuberculous prisoners to be sent to state farm; prisoner's consent.—No prisoner suffering with tuberculosis shall be kept in any county convict camp, or on any public or private works, or in any jail (except, in the latter case, when said prisoner is awaiting trial), but such prisoner suffering with tuberculosis shall be sent to the state farm within forty-eight hours after the physician in charge shall have made a diagnosis of tuberculosis, the county in which said prisoner is confined bearing the expense of transfer, and it shall be the duty of the sheriff to make such transfer. But no such prisoner shall be sent to the state farm unless he has first consented thereto in writing in the presence of the sheriff of the county where the prisoner may be under sentence. The sheriff shall subscribe his name as a witness thereto and shall take and file the same with the clerk of the superior court of the county, who shall enter the same in a book to be kept for that purpose: Provided, that no such prisoner shall be kept at the state farm or central prison for a longer term than the length of his original sentence. (1917, c. 262, s. 1.)

§ 7214. Provision for care and cure of prisoners.—The board of directors of the central prison and state farm and the superintendent of the said central prison and state farm shall without delay make such provision for the care of such prisoners suffering with tuberculosis as will prevent their communicating the disease to the other prisoners, and to the end that such prisoners suffering with tuberculosis may be restored to health, if it be possible. (1917, c. 262, s. 2.)

§ 7215. Board of health must approve plans for prisoners.—It shall be the duty of the prison management to submit the plans for carrying into effect the two preceding sections to the state board of health for its approval, and they are required to make their plans, both for buildings and care of patients, conform to the recommendations of the state board of health. (1917, c. 262, s. 3.)

§ 7216. Health authorities to examine all prisoners.—It shall be the duty of every county physician or city physician, or county health officer, or city health officer, or other physician having in charge the medical care of prisoners in any city or county in this state, or on any public or private works where prisoners or convicts are employed, to make a thorough physical examination of every prisoner committed to the county or city jail or to the county or city chain-gang or road force, or any public or private works within forty-eight hours after the admission of such prisoner; and when he finds a prisoner suffering with tuberculosis, he shall make a written report of same to the state board of health, stating in detail the conditions found and the stage of the disease, within twenty-four hours after making such diagnosis, and he shall also report same to the superintendent of the chain-gang or the jailer or the superintendent of the public or private works, and to the sheriff of the county, in writing, within twenty-four hours after having made such diagnosis of tuberculosis. (1917, c. 262, s. 4.)

§ 7217. Officials in charge of prisoners to report on health.—Every superintendent of convicts, or superintendent of public or private works where convicts are employed, and the superintendent of the central prison and state farm, and every jailer, shall make such reports as to the existence of cases of tuberculosis or suspected cases of tuberculosis, or other disease or diseases, and loss of time on account of sickness, and the disease or diseases causing such loss of time and such other things that may have a bearing on the health of the prisoners and the sanitation of the camp, prison, or jail,

to the state board of health at such stated periods and on such stated forms as may be requested by the state board of health. And every health officer or other physician having charge of prisoners in county convict camps, on county or city roads or streets or public or private works, or in jails or prisons, state, city, or county, shall likewise make such reports to the state board of health as to the physical condition and transfer of prisoners and as to the sanitary condition of camps, jails, or prisons, as may be requested by the state board of health. (1917, c. 262, s. 5.)

§ 7218. Reports to include transference and particulars as to tuberculous. — The superintendent of the central prison or state farm, convict camp, or of any public or private works where convicts are used, and the jailers of the county jails and the sheriff of the county, and the medical officer connected with any of the above mentioned places where convicts are kept or worked, shall make such reports to the state board of health as to transference of prisoners suffering with tuberculosis, giving name of prisoner, length of time said prisoner had been under his jurisdiction, the stage of the disease, point or place to which he was transferred, name and address and official title of the person to whom he was transferred, and such other information as may be requested by the state board of health. (1917, c. 262, s. 6.)

§ 7219. Food and work of tuberculous prisoners.—In order more effectively to promote the recovery of tuberculous prisoners, it shall be the duty of the superintendent of the central prison and state farm and such other officers as may have jurisdiction under him to provide such additional food for prisoners suffering with tuberculosis as may be prescribed or requested by the physician in charge. And such prisoners suffering with tuberculosis shall only do such work as may be prescribed by the prison physician. (1917, c. 262, s. 7.)

§ 7220. Violation of article misdemeanor.— Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be punished in the discretion of the court. (1907, c. 567, s. 7; 1917, c. 262, s. 8.)

Art. 16. Health of Prisoners

Part. 3. Sanatorium for Tubercular Prisoners

§ 7220(a). Establishment of sanatorium; power and authority of directors.—There shall be established at, or as near to as feasible, the North Carolina sanatorium for the treatment of tuberculosis, a sanatorium for the treatment of tubercular prisoners or convicts. The board of directors of the North Carolina sanatorium for the treatment of tuberculosis shall have all authority and power over said sanatorium as that conferred upon the state board of health over the said North Carolina sanatorium in section seven thousand one hundred and seventy-two, et seq. (1923, c. 127, s. 2.)

Editor's Note.—This act was reviewed in 1 N. C. Law Rev. 269.

§ 7220(b). Reports from county physicians or health officers; history of case, etc.—The county physician or county health officer of the various counties of the state who has examined any prisoner, or convict upon the public roads, and has pronounced him to be affected with tuberculosis, is required to report such case to the board of directors of the North Carolina sanatorium for the treatment of tuberculosis, giving a history of the same and such other facts as the board of directors of the North Carolina sanatorium for the treatment of tuberculosis may determine in its rules and regulations. (1923, c. 127, s. 3.)

Editor's Note.—The last sentence was added by the 1927 amendment.

§ 7220(c). Physician at state prison and convict camp.—The physician in charge of the state prison or any particular convict camp of state prisoners shall make similar reports under similar rules and regulations to the board of directors of the North Carolina sanatorium for the treatment of tuberculosis of all state prisoners who upon examination by him have been determined to be affected with tuberculosis. (1923, c. 127, s. 4.)

§ 7220(d). Examination by directors of sanatorium; transfer to sanatorium.—The board of directors of the North Carolina sanatorium for the treatment of tuberculosis, upon receiving such reports, shall examine into the condition of these prisoners or convicts, and, if it is determined that such condition justifies it, shall direct their transfer from either county authorities, if a county prisoner, or the state prison, if a state prisoner, to the sanatorium herein provided. The cost of such transfer, if it is a county prisoner, shall be paid by the county from which he is transferred; if a state prisoner, the cost shall be paid by the state prison. If a tuberculous prisoner is thus transferred to the sanatorium, the county from which he is sent shall, upon notice from the sanatorium that the prisoner has recovered or is in such condition that it would be safe to return him to the county, within five days after such notice, send for such prisoner and return him to the county from which he was committed. Any failure on the part of the county to send for such prisoner as herein provided after such notice shall render the county liable for the expenses of maintaining the prisoner. (1923, c. 127, s. 5; 1927, c. 127.)

§ 7220(e). Care and safekeeping of convicts.—In addition to the authority to make rules and regulations hereinbefore conferred upon the board of directors of the North Carolina sanatorium for the treatment of tuberculosis, it is further authorized to make such rules and regulations as in its judgment may seem wise in relation to the care and safe-keeping of the prisoners and convicts so transferred to the state sanatorium for tubercular prisoners. (1923, c. 127, s. 6.)

§ 7220(f). Administration of article; rules and regulations.—The administration of this article is given exclusively to the board of directors of the North Carolina sanatorium for the treatment

of tuberculosis, which board is expressly authorized and empowered to make such rules and regulations not inconsistent with this article as it may deem wise: first, as to the determination of whether a particular convict is suffering with tuberculosis, and second, whether or not the disease is in such a stage as to require special treatment. (1923, c. 127, s. 1.)

Art. 17. Surgical Operations on Inmates of State Institutions

§ 7221. Operations for improvement of mental, moral, or physical condition.—The medical staff of any penal or charitable hospital or institution of the state of North Carolina is hereby permitted and instructed to have any surgical operation performed by competent and skillful surgeons upon any inmate of any such penal or charitable hospital or institution when, in the judgment of the board hereinafter created in the next succeeding section, such operation would be for the improvement of the mental, moral, or physical condition of such inmate of any such institution: Provided, such operation shall not be performed until same shall have been affirmed by the governor and the secretary of the state board of health. (1919, c. 281, s. 1.)

§ 7222. Board of consultation for carrying out provisions of this article.—At least one representative of the medical staff of the several charitable and penal institutions of the state, and one from the state board of health, such representatives to be designated by the governing bodies of the several institutions, shall constitute a board of consultation for the carrying out of the provisions of this article. Such board shall cause a permanent record to be kept by one of its members, designated as secretary, of all its actions and judgments, taken at a meeting held only after due notice has been issued to all its members. (1919, c. 281, s. 2.)

Art. 18. Maritime Quarantine

Part. 1. Quarantine on Cape Fear River

§ 7223. North Carolina station for maritime quarantine.—There shall be established, at the nearest suitable site, opposite the present quarantine anchorage at Deepwater Point, a station to be known and designated as The North Carolina Station for Maritime Sanitation. For the purpose of selecting a suitable site, the quarantine board, the chairman of the board of commissioners of navigation and pilotage of the port of Wilmington, and the mayor of Southport shall constitute a board, who shall acquire by purchase, or otherwise, sufficient land and water privileges for the purpose—the title to which shall be vested in the quarantine board and their successors in office, who are hereby constituted trustees to hold said quarantine site for the state of North Carolina. Upon the site so acquired shall be erected such wharves, buildings, apparatus, and machinery as are necessary for all the purposes of maritime sanitation, and the system of sanitation to be used shall be devised by and subject to the approval of a board to consist of the quarantine board and the president and secretary of the state board of health. The said station, with its wharves, buildings, apparatus, and machinery, shall be erected under the direction and be under the supervision of the quarantine board, and they shall prescribe all such rules and regulations as are necessary for its government and its maintenance. (Rev., s. 4530; 1893, c. 505.)

§ 7224. North Carolina station available for all state ports.—Such quarantine station, established as provided in the preceding section, shall be and the same is hereby made a relief station to which vessels having on board persons who have been or are sick with infectious diseases, or the baggage of persons who have died of infectious disease during the voyage of said vessels, applying at any other port or ports of North Carolina, shall come for disinfection, whenever so directed by the quarantine officer of such other port or ports. (Rev., s. 4531; 1893, c. 505, s. 3.)

§ 7225. Appropriation for North Carolina station.—For the purpose of carrying into effect the provisions of the preceding section the sum of twenty thousand dollars is appropriated out of any moneys in the state treasury not otherwise appropriated, to be paid from time to time as required in the prosecution of the work, on the requisition of the treasurer of the quarantine board and approved by its president: Provided, that the funds appropriated by this section shall not be paid over by the treasurer until the governor and state board of health of North Carolina shall certify to the treasurer that there is imminent danger of cholera visiting the city of Wilmington or other sections of the state. (Rev., s. 4532; 1893, c. 505, s. 5.)

§ 7226. Fees and penalties for upkeep of North Carolina station.—All fees collected from vessels, as provided in section four thousand five hundred and twenty-two, and all penalties and forfeitures collected for violations of the quarantine regulations of the port of Wilmington, shall constitute a fund in the hands of the quarantine board, and shall be used by them for the purpose of preserving the site established on the Cape Fear river, improving the buildings and wharves and keeping them in repair, and for such other purposes as may be necessary for the efficient management of the quarantine service. (Rev., s. 4533; 1889, c. 521, s. 6.)

§ 7227. Cape Fear quarantine station; quarantine board and officer.—For the preservation of the public health there shall be established opposite Deepwater Point, near the mouth of the Cape Fear river, a quarantine station, where all vessels subject to quarantine shall be brought to anchor, and await the inspection of the quarantine medical officer, appointed as provided in the following section, and he may prescribe rules and regulations to which vessels subject to quarantine shall conform. The rules and regulations so prescribed may be revised and added to from time to time as circumstances require by the quarantine medical officer and two physicians of skill and experience, residing in the city of Wilmington, who shall be designated by the president of the state board of health, and they shall meet annually on the first Monday in

May, or as soon thereafter as practicable, and organize for the purposes before mentioned by the election of a president and secretary; and it shall be the duty of the president to call meetings whenever any special emergency shall arise requiring new quarantine rules and regulations, and of the secretary to keep a record of all such proceedings; and they shall be entitled to compensation for their services at the rate of one hundred dollars per year. (Rev., s. 4526; Code, s. 2912; 1889, c. 521; 1868, c. 33, s. 1; 1879, c. 123.)

§ 7228. Governor to appoint quarantine officer; duties.—It shall be the duty of the governor to designate some physician of experience, who shall act as medical quarantine officer for the station referred to in the preceding section, and who shall prescribe such regulations as may be necessary for the protection of the inhabitants from infectious diseases, and all persons shall be bound by such regulations, under penalties to be hereafter designated. The quarantine officer shall duly advertise all quarantine regulations and cause the pilots to be especially notified of them. He shall make a monthly report of all receipts and disbursements, and shall pay over all moneys to the treasurer of the state, and shall be removable at the pleasure of the governor. (Rev., s. 4527; Code, s. 2913; 1868, c. 33, s. 2.)

§ 7229. Boat and crew for use of officer.—There shall be provided for the use of the quarantine officer on the Cape Fear river a suitable boat furnished with all necessary materials, and he shall employ a crew of four men, at such seasons as quarantine regulations are in force, or when the public health may require it. He shall cause the boat to be kept in repair and always ready for service, and may employ some competent person for the service, who shall be paid by the state treasurer, on the certificate of the medical officer that the services were necessary and the charges just and reasonable. (Rev., s. 4529; Code, s. 2914; 1868, c. 33, s. 3.)

§ 7230. Pay of quarantine officer and boat's crew.—The compensation of the quarantine medical officer on the Cape Fear river shall be six hundred dollars per year, and the compensation of the boat's crew shall be thirty dollars per month each, while regularly employed: Provided, one of the crew may be designated by the quarantine officer to take care of the buildings, boats, and materials at an extra compensation of ten dollars per month while so employed. (Rev., s. 4528; Code, s. 2921; 1889, c. 521, s. 4; 1868, c. 33, s. 10.)

§ 7231. Fees charged on vessels.—Every vessel subject to visit and inspection shall pay a fee of five dollars, if of no less than two hundred and fifty tons burden; if of more than two hundred and fifty and less than five hundred tons burden, eight dollars; if of more than five hundred and less than one thousand tons burden, ten dollars; if over one thousand tons, fifteen dollars, which shall be collected and accounted for by the quarantine officer, as provided for in this article, and every person taken to the hospital shall pay a fee not exceeding three dollars per day, until discharged by the quarantine officer, for the payment of which the vessel shall be responsible, and only such vessel shall be subject to visit and inspection as may be from ports designated, from time to time, by the medical officer, except that all vessels having sickness on board shall be brought to the visiting station for examination. (Rev., s. 4522; Code, s. 2916; 1868, c. 33, s. 5; 1891, c. 533.)

§ 7232. Pilots to bring vessels to station; penalty.—It shall be the duty of all pilots to bring vessels to the visiting station, as they may be required from time to time by the quarantine officer, and they shall not take any vessel subject to quarantine or visitation, past the station, until released by the quarantine officer; and any pilot who shall wilfully violate any quarantine regulation shall forfeit his branch or commission, and thence be incapable to act as a pilot in any port in the state. (Rev., s. 4512; Code, s. 2917; 1868, c. 33, s. 6.)

§ 7233. Master refusing to obey regulations; penalty.—Any master of a vessel who shall refuse to obey the quarantine regulations shall forfeit and pay a fine of two hundred dollars for each day he shall refuse to obey the same, for which forfeiture the property of the captain, together with the vessel and cargo, shall be held responsible. (Rev., s. 4523; Code, s. 2918; 1868, c. 33, s. 7.)

§ 7234. Violating quarantine regulations; penalty.—Any person who shall violate the quarantine regulations, as prescribed from time to time by the quarantine officers, shall forfeit and pay the sum of two hundred dollars for each offense; and all penalties and forfeitures imposed by this chapter may be recovered before any court having jurisdiction, one-half to the informer, the other half to the payment of the expenses of the quarantine establishment. Any person who shall violate any of the rules and regulations made by the quarantine board for the control, government, and maintenance of the quarantine station on Cape Fear river, as provided for in this part of this article, shall be guilty of a misdemeanor. (Rev., ss. 3450, 4524; Code, s. 2919; 1868, c. 33, s. 8.)

§ 7235. Quarantine officer may issue warrants.—The quarantine medical officer may issue a warrant to any sheriff or other officer, commanding him to arrest the body of any person violating the quarantine, and have him without delay before some competent jurisdiction for trial. (Rev., s. 4525; Code, s. 2920; 1868, c. 33, s. 9.)

§ 7236. Site may be sold and new site purchased.—If the quarantine board, on investigation, shall consider a site further removed from inhabited places as essential to the public safety and shall so recommend, it shall be the duty of the governor to sell the present hospital site at Price's Creek in such manner as he may deem best, and make title to the purchaser thereof, and the moneys received for said site to turn over to the quarantine board, to be used by them for quarantine purposes at some other point as convenient as possible to the quarantine anchorage off

Deepwater Point. (Rev., s. 4534; 1889, c. 521, s. 5.)

Part 2. General Provisions

§ 7237. Control of maritime quarantine; rules.—Except as otherwise provided in this chapter, the commissioners of navigation in the respective ports and inlets of the state, or where there are no commissioners of navigation, the governing authorities of any seaport town, may appoint such place or places as they may think proper for vessels to perform quarantine; and when a vessel shall arrive at any port or inlet of this state, having an infectious distemper on board, or shall come from any place or port which at the time of her sailing, or shortly before, was infected with any malignant disorder, the master and pilot of such vessel shall anchor her at the place so appointed, and give immediate information thereof to the county physician or health officer of the county in which such port is situated to the municipal physician or health officer of such town, who shall thereupon cause such vessel and her crew to be examined by the county or municipal health authorities, who shall have power to order and command the master of the vessel, crew, and passengers to perform such quarantine as shall be deemed most proper and reasonable to check or prevent any infectious distemper from spreading in this state, and to require every person on board such vessel strictly to perform quarantine, and to obey the orders given by the health authorities aforesaid respecting the victualing, purifying, and cleansing of such vessel and all articles on board, and regulate and control the intercourse of such persons with the inhabitants of the state, the receiving any person on board or the putting them on shore; and if any pilot or master neglect to give such information as above required, the pilot for such neglect shall forfeit and pay one hundred dollars, and the master for a like neglect shall forfeit and pay two hundred dollars. In case the master of any vessel ordered to perform quarantine should refuse to comply with or fail to fulfill the orders for performing quarantine with his vessel, he shall forfeit and pay two hundred dollars for each day he shall fail to perform the quarantine. The property of the captain, together with the vessel and cargo, whether owned by the captain or not, shall be liable for the penalty therein imposed. If there be at the port where the vessel enters a port physician, as provided for in this article, he shall perform the duties and have all the power by this section conferred upon the health authorities aforesaid. The state authorities shall coöperate in all matters of quarantine with the federal authorities. (Rev., s. 4510; Code, s. 2893; R. C., c. 94, s. 1; 1783, c. 194, s. 12; 1793, c. 379, s. 1; 1802, c. 624.)

§ 7238. Commissioners of navigation; appoint harbor master and health officer.—The commissioners of navigation of the several seaport towns in the state shall have power to appoint a harbor and health officer, to prescribe their duties and authority, to make rules and regulations for their government, allow them a reasonable compensation for their services, and determine how such compensation is to be paid. And they shall have power to pass such by-laws (not inconsistent with the laws of the land) for the better regulation of the quarantine to be performed by vessels arriving from ports infected or suspected to be infected with any infectious disease, and for preventing all intercourse between such vessels and persons on shore, as to them may seem meet and proper, and to enforce obedience to such by-laws by imposing such penalties as they may think proper. (Rev., s. 4537; Code, s. 2905; R. C., c. 94, s. 13.)

§ 7239. Governing authorities of seaport towns; powers.—The governing authorities of the several seaport towns and towns having a port of entry, where there are no commissioners of navigation, shall have the same power and authority and be subject to the same duties as are prescribed for the commissioners of navigation in relation to the quarantine of vessels in the ports of their respective towns; and all persons offending against the regulations of such governing authorities shall be subject to the same fines, penalties, and forfeitures as though the said regulations had been made by the commissioners of navigation. (Rev., s. 4536; Code, s. 2906; R. C., c. 94, s. 14.)

§ 7240. Port physician; appointment.—The commissioners of navigation in the several ports of the state, and, where there are no such commissioners, the governing authorities of the several seaport towns, may appoint port physicians, and regulate and prescribe the fees to which they shall be respectively entitled, according to the different quarantine stations, which they shall be bound to attend for the purpose of inspecting vessels, as required by this article, and giving certificates of their situation and condition, in regard to the health of their respective crews and passengers. (Rev., s. 4517; Code, s. 2896; R. C., c. 94, s. 3; 1817, c. 946, s. 2.)

§ 7241. Vessels from infected ports to anchor at quarantine; punishment for failure.—If any vessel shall be brought into the state from a place which at the time of her departure was infected with the yellow fever, smallpox, or other infectious disorder, or if any vessel, arriving in the state, shall have the smallpox or yellow fever or other infectious disorder on board, or shall have had such disorder on board during her passage to the state, such vessel shall be anchored at the place appointed for quarantine, and there remain until permitted to remove by the commissioners of navigation, or by the municipal authorities of the town to which the vessel is bound, or by the county physician or health officer. If such vessel shall come to any town or harbor without permission obtained as herein required, the pilot or master conducting the vessel or permitting her to be so conducted shall be guilty of a misdemeanor, and fined not less than one thousand dollars and imprisoned not exceeding one year. (Rev., ss. 3451, 4511; Code, s. 2894; R. C., c. 94, s. 2; 1817, c. 946, s. 1.)

§ 7242. Pilots bringing in vessels without certificate; penalty.—If any pilot shall bring any vessel beyond the place fixed and limited by the commissioners of navigation without a certificate of

the health officer declaring that there is no danger to be apprehended from any infectious disease on board said vessel, such pilot shall forfeit his branch or commission, and thence be incapable to act as pilot in any port of the state. (Rev., s. 4513; Code, s. 2904; R. C., c. 94, s. 12; 1797, c. 486, s. 2.)

§ 7243. Master must declare health of crew.—The commissioners of navigation or the county physician or health officer may, whenever they think proper, require the master of a vessel, on his arrival in the state, to declare on oath the state of the health of himself, crew, and passengers, and the place whence he came. And if any master shall give a false declaration, or any physician shall wilfully give a false certificate of the health of the persons on board any such vessel, he shall forfeit and pay two thousand dollars. (Rev., s. 4514; Code, s. 2901; R. C., c. 94, s. 9; 1793, c. 379, s. 6.)

§ 7244. Vessel removed to quarantine.—The commissioners of navigation or (where there are no such commissioners) the governing authorities of the town in the harbor of which any vessel has arrived in violation of this article, or the county physician or county health officer as aforesaid, may use such force as shall be necessary to remove said vessel to the place of quarantine; their reasonable charge for which service shall be paid by the master or owner of the vessel, and may be recovered of either of them before any court having jurisdiction. (Rev., s. 4515; Code, s. 2895; R. C., c. 94, s. 3; 1817, c. 946, s. 2.)

§ 7245. Vessel furnished with provisions.—The commissioners of navigation or (where there are no such commissioners) the govening authorities of the seaport town are empowered and directed to furnish any vessel, ordered to ride quarantine, with a sufficient quantity of good wholesome provisions, for the expense of which the master, vessel, and cargo shall be liable. (Rev., s. 4516; Code, s. 2902; R. C., c. 94, s. 10; 1793, c. 379, s. 7.)

§ 7246. Going on quarantined vessel; penalty.—When any vessel shall be directed to perform quarantine, and any person knowing of such order, by the information of the master or otherwise, shall go on board of such vessel without permission of the commissioners of navigation or the county physician or county health officer aforesaid, such person shall forfeit and pay one hundred dollars. If any person shall be permitted by the master to come on board without informing him of the orders as to quarantine and intercourse given as provided in section 7237 of this article, the master shall forfeit and pay two hundred dollars for every person so offending, and four hundred dollars for suffering any person so on board to depart his vessel without permission as provided in this article, and the commissioners of navigation or the county physician or county health officer are empowered to order every person who shall go on board any such vessel to remain there for such length of time as they may think proper; and if he disobey such order, he shall pay one hundred dollars. (Rev., s. 4518; Code, s. 2898; R. C., c. 94, s. 6; 1793, c. 397, s. 3.)

§ 7247. Landing goods from quarantined vessels; penalty.—If any master of a vessel ordered to ride quarantine shall convey, or cause or permit to be conveyed, any article of goods, wares, and merchandise from his vessel on any other lands or into any other boat or vessel than the commissioners or navigation or the county physician or county health officer shall authorize, he shall forfeit and pay two hundred dollars for every such offense. And any other person so conveying, or causing to be conveyed, any articles as above mentioned, shall be liable to the like penalty. (Rev., s. 4519; Code, s. 2900; R. C., c. 94, s. 8; 1793, c. 379, s. 5.)

§ 7248. Person breaking quarantine to be returned.—The commissioners of navigation or the county physician or county health officer, respectively, may issue their warrant to any sheriff or other officer, commanding him to take the body of any person that may have left any vessel ordered to ride quarantine, and carry him on board of said vessel; and the officer may summon such persons to assist him in the execution of the warrant as he may see fit. (Rev., s. 4520; Code, s. 2899; R. C., c. 94, s. 7; 1793, c. 379, s. 4.)

§ 7249. Penalty for breaking quarantine. —When a vessel shall be directed to perform quarantine, any seaman or passenger shall, contrary to the order and direction of the commissioners of navigation or the county physician or county health officer, leave the vessel and land on any other place than they shall allow, the seaman or passenger offending shall forfeit and pay two hundred dollars for each offense; and when he has left the vessel with the master's consent, the master shall pay a like penalty of two hundred dollars for every such offense of any of his passengers or seamen. (Rev., s. 4521; Code, s. 2897; R. C., c. 94, s. 5; 1793, c. 379, s. 2.)

§ 7250. Disposition of penalties and forfeitures. —All penalties and forfeitures imposed by this article may be recovered and applied, one-half to the use of the informer, the other half by the commissioners of navigation for the use and benefit of the navigation of the port within whose jurisdiction the penalty or forfeiture may have been incurred. (Rev., s. 4538; Code, s. 2903; R. C., c. 94, s. 11; 1793, c. 379, s. 8.)

Art. 19. Chapter Not to Affect Powers Under Special Laws

§ 7251. Powers of local boards not affected.—Nothing in this chapter shall operate as a repeal or abridgment of powers conferred by any special act on any local board of health. (Rev., s. 4458; 1893, c. 214, s. 30.)

Art. 20. Ice Cream Plants, Creameries, and Cheese Factories

§ 7251(a). Cleanliness and sanitation enjoined; wash rooms and toilets, living and sleeping rooms; animals.—For the protection of the health of the people of the state, all places where ice-cream, frozen custard, milk sherbet, sherbet, water ices, and other similar frozen food products are made for sale, all creameries, butter and cheese factories, when in operation, shall be kept clean and in a sanitary condition. The floors, walls, and ceiling of all work rooms where the products

of plants named herein are made, mixed, stored or handled shall be such that same can be kept in a clean and sanitary condition. All windows, doors, and other openings shall be effectively screened during fly season. Suitable wash rooms shall be maintained, and if a toilet is attached, it shall be of sanitary construction and kept in a sanitary condition. No person shall be allowed to live or sleep in such factory unless rooms so occupied are separate and apart from the work or storage rooms. No horses, cows, or other animal shall be kept in such factories or close enough to contaminate products of same unless separated by impenetrable wall without doors, windows, or other openings. (1921, c. 169, s. 1; 1933, c. 431, s. 1.)

Editor's Note.—Public Laws of 1933, c. 431, made this section applicable to frozen custard, milk sherbet, etc. Section 5 of the amendatory act provides that the amendment shall not apply to Mecklenburg and Cabarrus counties.

§ 7251(b). Cleaning and sterilization of vessels and utensils.—Suitable means or appliances shall be provided for the proper cleaning or sterilizing of freezers, vats, mixing cans or tanks, conveyors, and all utensils, tools and implements used in making or handling cream, ice-cream, butter or cheese and all such apparatus shall be thoroughly cleaned as promptly after use as practicable. (1921, c. 169, s. 2.)

§ 7251(c). Purity of products.—All cream, ice-cream, butter, cheese, or other products produced in places named herein shall be pure, wholesome, and not deleterious to health, and shall comply with the standards of purity, sanitation, and rules and regulations of the board of agriculture provided for in section 7251(h), and whole milk, sweet cream, and ice cream mix shipped into this state from other states shall meet the same requirements and be subject to the same regulations and shall carry a tag or label showing grade or standard of quality of product. (1921, c. 169, s. 3; 1933, c. 431, s. 2.)

Editor's Note.—Public Laws 1933, c. 431, added the last clause of the section relating to products shipped into the state. Section 5 of the amendatory act provides that the amendment shall not apply to Mecklenburg and Cabarrus counties.

§ 7251(d). Receivers of products to clean utensils before return.—Every person, company, or corporation who shall receive milk, cream, or ice-cream which is delivered in cans, bottles, or other receptacles, shall thoroughly clean same as soon as practicable after the contents are removed and before the said receptacles are returned to shipper or person from whom the same was received or before such receptacles are delivered to any carrier to be returned to shipper. (1921, c. 169, s. 4.)

§ 7251(e). Correct tests of butter fat; tests by board of agriculture.—Creameries and factories that purchase milk and cream from products of same on a butter-fat basis, and pay for same on their own test, shall make and pay on correct test, and any failure to do so shall constitute a violation of this act. The board of agriculture, under regulations provided for in section 7251(h) shall have such test made of milk and cream sold to factories named herein that will show if dishonest tests and practices are used by the purchasers of such products. (1921, c. 169, s. 5.)

§ 7251(f). Department of agriculture to enforce law; examinations.—It shall be the duty of the department of agriculture to enforce this article, and the board of agriculture shall cause to be made by the experts of the department such examinations of plants and products named herein as are necessary to insure the compliance with the provisions of this article. For the purpose of inspection, the authorized experts of the department shall have authority, during business hours, to enter all plants or storage rooms where cream, ice-cream, butter, or cheese or ingredients used in the same are made, stored, or kept, and any person who shall hinder, prevent, or attempt to prevent any duly authorized expert of the department in the performance of his duty in connection with this article shall be guilty of a violation of the article. (1921, c. 169, s. 6.)

§ 7251(g). Closure of plants for violation of article; certificate to sclicitor of district.—If it shall appear from the examinations that any provision of this article has been violated, the commissioner of agriculture shall have authority to order the plant or place of manufacture closed until the law is complied with. If the owner or operator of place refuses or fails to comply with the order, law, or regulations, the commissioner shall then certify the facts in the case to the solicitor in the district in which the violtaion was committed. (1921, c. 169, s. 7.)

§ 7251(h). Standards of purity and sanitation.—The board of agriculture is authorized to make such definitions and to establish such standards of purity for products and sanitation for plants or places of manufacture named herein with such regulations, not in conflict with this article, as shall be necessary to make provisions of this article effective and insure the proper enforcement of same, and the violation of said standards of purity or regulations shall be deemed to be a violation of this article. (1921, c. 169, s. 8; 1933, c. 431, s. 3.)

Editor's Note.—Public Laws 1933, c. 431, added the clause "to make such definitions and." Section 5 of the amendatory act provides that the amendment shall not apply to Mecklenburg and Cabarrus counties.

§ 7251(i). Inspection fees; wholesalers; retailers and cheese factories.—For the purpose of defraying the expenses incurred in the enforcement of this article, the owner, proprietor, or operator of each ice-cream factory where ice cream, frozen custard, milk sherbet, sherbet, water ices and/or other similar frozen food products are made or stored or cheese factory or creamery in this state that disposes of its product at wholeseale to retail dealers, to be resold, shall pay to the commissioner of agriculture during the month of July of each year an inspection fee of twenty dollars ($20), and each maker of ice-cream, frozen custard, milk sherbet, sherbet, water ices, and/or other similar frozen food products who disposes of his product at retail only, and cheese factories, shall pay to the commissioner of agriculture an inspection fee of five dollars ($5) during the month of July of each year. (1921, c. 169, s. 9; 1933, c. 431, s. 4.)

Editor's Note.—Public Laws of 1933, c. 433, made this

section applicable to frozen custards, milk sherbets, etc. Section 5 of the amendatory act provides that the amendment shall not apply to Mecklenburg and Cabarrus counties.

§ 7251(j). Violation of law a misdemeanor; punishment.—Any person, firm, or corporation who shall violate any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed twenty-five dollars for the first offense, and for each subsequent offense in the discretion of the court. (1921, c. 169, s. 10.)

Art. 21. Public Bakeries

§ 7251(k). Sanitary condition of rooms; drainage; toilets.—Every room or other place occupied or used as a bakery for the preparation, production, storage, or display of bread, cakes, or other bakery products intended for sale for human consumption, shall be clean, properly lighted, and ventilated. The floors, walls, and ceilings of the rooms in which the dough or pastry is mixed, handled, or prepared for baking, or in which the bakery products or ingredients of such products are otherwise handled, stored, or displayed, shall be kept and maintained in a clean and sanitary condition. All openings into such rooms, including windows and doors, shall be properly screened to exclude flies. Every such bakery shall be provided with adequate drainage and suitable wash sinks. If a toilet or water closet is maintained in connection with such bakery, it must be of sanitary construction, and such toilet or water closet shall be well ventilated and kept in a sanitary condition. (1921, c. 173, s. 1.)

§ 7251(l). Tables, shelves, and implements; refuse; sleeping rooms.—All tables, shelves, troughs, trays, receptacles, utensils, implements, and machinery used in preparing, mixing or handling bakery products or the ingredients of same, must be thoroughly cleaned daily when in use, and kept in a clean, sanitary condition. All refuse, dirt, and waste matter subject to decomposition and decay incident to the production of bakery products must be removed from the bakery daily. The work rooms of bakeries, where bakery products are made, stored or displayed, shall not be used as sleeping or living rooms, and shall at all times be separate and closed from any such room. (1921, c. 173, s. 2.)

§ 7251(m). Employees; sitting or lying on tables; cleanliness.—No employee or other person shall sit or lie upon any of the tables, troughs, shelves, etc., which are used for the dough or other bakery products. Before beginning the work of preparing or mixing the ingredients, or after using toilet or water closet, every person engaged in the preparation or handling of bakery products shall wash the hands and arms thoroughly, and for this purpose sufficient wash basins or sinks, together with soap and clean towels, shall be provided by the bakery. (1921, c. 173, s. 3.)

§ 7251(n). Use of tobacco.—No person shall use tobacco in any form in any bakery or bread manufacturing plant where bread or other bakery products are manufactured or stored. (1921, c. 173, s. 3a.)

§ 7251(o). Ingredients and materials.—All ingredients used in the manufacture or making of bread or any other bakery products shall be pure and wholesome, and shall contain no substance that is poisonous or deleterious to health. All materials and ingredients used in bakery products shall be stored, handled, and kept in a way to protect them from spoilage and contamination, and no material shall be used which is spoiled or contaminated, or which may render the product unwholesome or unfit for food. (1921, c. 173, s. 4.)

§ 7251(p). Adulterants; stale products; infections.—No material or ingredient may be used which may deceive the purchaser, or which lowers or lessens the nutritive value of the product. No bread or other bakery products shall be sold or offered for sale for human food that has by age or otherwise become stale. All handling or sale of bread or other bakery products and all practices connected therewith shall be conducted so as to prevent the distribution of contamination or diseases and so as to prevent the distribution of the bakery infection in bread commonly known as "rope" or other bakery infections. No bread or other bakery products shall be returned by any dealer, restaurant, cafe or hotel keeper to bakery or distributor after same has been in stock where it may have been subject to contamination, no bakery or distributor shall directly or indirectly accept any such bread or other bakery products or make any allowance for such products. (1921, c. 173, s. 5; 1925, c. 286.)

Editor's Note. — The last two sentences were added by the 1925 amendment.

§ 7251(q). Department of agriculture to enforce law; examination of plant and products.—It shall be the duty of the department of agriculture to enforce this article, and the board of agriculture shall cause to be made by the experts of the department such examinations of plants and products named herein as are necessary to insure proper compliance with the provisions of this article. For the purpose of inspection, the authorized experts of the department shall have authority, during business hours, to enter all bakeries or storage rooms where bakery products are made, stored, or kept, and any person who shall prevent or attempt to prevent any duly authorized expert in the performance of his duty in connection with this article, shall be guilty of a violation of this article. (1921, c. 173, s. 6.)

§ 7251(r). Closing of plant; report of violation of law to solicitor.—If it shall appear fom examination that any provision of this article has been violated, the commissioner of agriculture shall have authority to order the bakery or place closed until the law has been complied with. If the owner or operator of same refuses or fails to comply with the law, the commissioners shall then certify the facts in the case to the solicitor in the district in which the violation was committed. (1921, c. 173, s. 7.)

§ 7251(s). Regulations; establishment; violation.—The board of agriculture is authorized to establish such regulations, not in conflict with this article, as may be necessary to make provisions of this article effective, and to insure the proper compliance of same, and a violation of the

regulations shall be deemed to be a violation of this article. (1921, s. 173, s. 8.)

§ 7251(t). Inspection fee.—For the purpose of defraying expenses incurred in the enforcement of this article the owner or operator of each public bakery or bakery furnishing bakery products to the public operated in this state shall pay to the commissioner of agriculture during the month of May of each year, an inspection fee of ten dollars. (1921, c. 173, s. 9.)

§ 7251(u). Violation of law a misdemeanor.—Any person, firm, or corporation who shall violate any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed twenty-five dollars for the first offense, and for each subsequent offense in the discretion of the court. (1921, c. 173, s. 10.)

§ 7251(v). Inspectors.—The inspectors who shall carry out the provisions of this article shall be the same inspectors who shall be sent out by the department of agriculture to inspect bottling works and general food inspections. (1921, c. 173, s. 10a.)

§ 7251(w). Repeal of laws; town ordinances.—All laws and clauses of laws in conflict with this article are hereby repealed: Provided, nothing in this article shall have the effect of repealing or rendering void ordinances upon this subject now in force in any municipality in North Carolina, but this article shall be construed to be supplemental and in addition thereto. (1921, c. 173, s. 11.)

Art. 21A. Milk and Milk Bottles, Crates, Cans and Other Containers of Dairy Products

§ 7251(w) 1. Regulation of use of milk containers.—No person, firm or corporation shall use, or permit to be used a milk bottle, or other receptacle designed as a milk container, or container of dairy products, and having the name, brand or trade mark of any other person, firm or corporation thereon, for any purpose other than as a milk container, or as a container of dairy products.

It shall be unlawful for any person, firm or corporation to use or permit to be used any milk bottle, can, crate, or any other container for milk or milk products which has the name, label, trade name or inscription of any other person, firm or corporation blown, embossed or marked thereon. (1933, c. 284, ss. 1, 2.)

§ 7251(w) 2. Purchase of containers regulated.—It shall be unlawful for any person, firm or corporation to purchase milk bottles except from a wholesale dealer, retail store or dairyman having the same for sale and it shall also be unlawful for any person, firm or corporation, other than dealers having the same for sale, to sell any milk bottles: Provided, that this section shall not apply to judicial sales. (1933, c. 284, s. 3.)

§ 7251(w) 3. Violation made misdemeanor.—Any person, firm or corporation or agent willfully violating any of the sections of this statute shall be guilty of a misdemeanor, and shall be subject to a penalty of a fine of not more than fifty ($50.00) dollars, or imprisonment of not more than thirty days for each and every violation thereof. (1933, c. 284, s. 4.)

§ 7251(w) 4. Supervision of dairy products by department of agriculture.—The state department of agriculture shall have full power to make and promulgate rules and regulations for the dairy division of the department of agriculture in its inspection and control of the purchase and sale of milk and other dairy products in North Carolina; to make and establish definitions, not inconsistent with the laws pertaining thereto; to qualify and determine the grade and contents of milk and of other dairy products sold in this state; to regulate the manner of testing the same not inconsistent with the standard methods as promulgated by the American public health association, and of all inspections which may be lawfully made except those relating to public health and sanitation, in the handling, treatment, and sale of the said milk products, and such other rules and regulations not inconsistent with the law as may be necessary in connection with the authority hereby given to the commissioner of agriculture on this subject, and may license Babcock testers and revoke license.

The commissioner of agriculture shall be given authority to inspect all Babcock testers, glassware, and scales, as provided for in these regulations, and condemn such as are not found accurate and in good repair. He shall visit either in person, or by a deputy, all creameries, cheese factories, milk depots, etc., where milk and cream, and milk products are sold in this state, as often as may be necessary, and shall supervise in any practical way, the work of all licensed testers as provided for in this section.

The commissioner of agriculture and his deputies shall be authorized and empowered to make such tests as are necessary to settle disputes when called upon by either buyer or seller of milk, cream, or other dairy products where such disputes arise over dissatisfaction regarding weight or tests of dairy products. Such tests shall be regarded as correct, and shall be used as a basis for settlement in such disputes. (1933, c. 550, ss. 1-3.)

§ 7251(w) 5. Misbranding milk or cream prohibited.—It shall be unlawful for any person, firm, association or corporation to sell or offer for sale in any city, county, or other unit of local government which has adopted the public health service milk ordinance, or within one mile of the boundaries thereof, milk or cream in any container, bottle, or can bearing any legend, letter or symbol likely to be misleading, or indicating that such milk or cream has been graded, unless said milk or cream does conform in every respect with the requirements of said public health service milk ordinance. Any person violating the provisions of this section is guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $50.00, nor less than $10.00. (1933, c. 343, s. 1.)

Art. 22. Manufacture, etc., of Bedding

§ 7251(x). Definitions.—The term "bedding" as used in this article shall be construed to mean any mattress, upholstered spring, comforter, pad,

cushion or pillow designed and made for use in sleeping or reclining, except where the filling thereof consists exclusively of sterilized feathers.

The word "person" as used in this article shall be construed to import the plural and the singular, as the case demands, and shall include individuals, corporations, partnerships, joint-stock companies, societies, and associations. (1923, c. 2, s. 1.)

§ 7251(y). Responsibility of principals for acts of employees.—When construing and enforcing the provisions of this article, the act, omission, or failure of any officer, agent, or other person acting for or employed by any individual, corporation, partnership, joint-stock company, society, or association, within the scope of his employment or office, shall in every case be also deemed the act, ommission or failure of such individual, corporation, partnership, joint-stock company, society, or association as well as that of the person. (1923, c. 2, s. 1.)

§ 7251(z). Use of material exposed to infection; "shoddy."—No person shall, in the making or remaking of any article of bedding as herein defined, for sale within the State of North Carolina use any material of any kind that has been used by or about any person having an infectious or contagious disease or has formed a part of any article of bedding which has been so used, or use in said manufacture any material known as "shoddy" and consisting in whole or part of old or worn clothing, carpets, or other fabric or material previously used, or use in said manufacture any other fabric or material from which shoddy is constructed. The word "shoddy" shall mean any material which has been spun into yarn knit or woven into fabric and subsequently cut up, torn up, broken up, or ground up. (1923, c. 2, s. 2; 1925, c. 191, s. 1.)

§ 7251(aa). Bedding exposed to infection.—No person shall sell, offer for sale, deliver, or consign for sale, or have in his possession with intent to sell, deliver, or consign for sale, any article of bedding that has been used by or about any person having an infectious or contagious disease. (1923, c. 2, s. 3.)

§ 7251(bb). Remaking or renovating of bedding; sale of used bedding without disinfection.—No person shall remake or renovate any article of bedding unless all the material to be used in said remade or renovated bedding shall first be thoroughly sterilized and disinfected by a process approved by the state board of health. No person shall sell, offer for sale, deliver, consign for sale, or have in his possession with intent to sell, deliver, or consign for sale, any article of bedding which has been previously used, unless the said article of bedding shall first be thoroughly sterilized and disinfected by a process approved by the state board of health. (1923, c. 2, s. 4.)

§ 7251(cc). Labeling or tagging bedding; fraud.—No person shall sell, offer for sale, consign for sale, or have in his possession with intent to sell, offer for sale, or consign for sale any article of bedding as herein designated, unless the same be labeled or tagged as follows:

Upon each of such articles of bedding there shall be securely sewed upon the outside thereof a muslin or linen label to be procured from the State Board of Health as hereinafter provided upon which shall be legibly written or printed, in the English language, a description of the material used as the filling of such article of bedding; if any and all the material used as the filling of such article of bedding shall not have been previously used, the words "Manufactured of new material" shall appear upon said tag, together with the name and address of the maker or vender thereof.

It shall be unlawful to use in the said statement concerning any mattress the word "felt" or words of like import, if there has been used in filling said mattress any materials which are not felted and filled in layers.

If any of the material used in the making or remaking of such article of bedding shall have been previously used, [and when sterilized in conformity with section 7251(bb)] the words "Manufactured of previously used material" or "Remade of previously used material," as the case may be, shall appear upon said tag or label, together with the name and address of the maker or vender thereof, and also a description of the material used in the filing of such article of bedding. The tag or label required under this section shall contain a replica of the seal of North Carolina printed thereon and shall be in the following form:

"OFFICIAL STATEMENT

Manufactured of New Material

Materials used in filling .....
Made by .....
Vender .....
Address .....

This article is made in compliance with an act of the general assembly of North Carolina of the session of one thousand nine hundred and twenty-three."

The statement of compliance required in the foregoing "official statement" shall not be construed to imply that it is prohibited to state, also, that the article of bedding is made in compliance with an act or acts of other states.

The words "Manufactured of new material," or "Manufactured of previously used material," or "Remade of previously used material," together with the description of the material used as the filling of an article of bedding, shall be in letters not less than one-eighth (⅛) of an inch in height.

In the case of all articles of bedding, the sewing of any edge of the tag securely into an outside seam of the article shall be deemed a compliance with that portion of the act requiring that the tag be "securely sewed" upon the article.

No term of description likely to mislead shall be used on any tag or label required by this article in the description of the materials used in the filling of any article of bedding. This article shall not be construed to prevent a person from making or having made any bedding out of materials furnished by said person for his or her own use, or to any person who does not make

over six mattresses per week, provided said label is attached. The State Board of Health is hereby authorized and directed to contract for the printing of tags or labels required by this section and shall, upon the application of any person, firm or corporation, furnish the said tags or labels fashioned and formed in accordance with the provisions hereof in lots not less than one thousand (1,000) at a cost of twenty dollars ($20) per thousand to such person, firm or corporation. The said fees or charges for said tags shall be paid directly to the State Board of Health and when so collected shall constitute a separate fund, known as the bedding fund, and shall be expended and used solely by the Board of Health in carrying out the provisions of this article, and such moneys and funds collected by the State Board of Health are hereby specifically appropriated to the use of said Board of Health for the purposes herein enumerated, and the said State Board of Health is specifically charged with the enforcement of this article in the interest of the health of the people of the State. State Institutions engaged in manufacture of bedding shall not be required to pay a fee for the tags. All moneys collected under the provisions of this article shall be paid into the General Fund of the State. (1923, c. 2, s. 5; 1925, c. 191, ss. 2, 3; 1931, c. 225.)

Editor's Note.—The Act of 1931 added the last two sentences to this section, and changed the price of the tags refered to in the last paragraph from ten to twenty dollars.

§ 7251(dd). Tampering with tags.—Any person other than a purchaser for his own use who shall remove, deface, alter, or shall cause to be removed, defaced, or altered any label or tag upon any article of bedding so labeled or tagged under the provisions of this article shall be guilty of a violation thereof. (1923, c. 2, s. 6.)

§ 7251(ee). Failure to comply with law; unit for separate and distinct offense.—Any person who shall fail to comply with any of the provisions of this article shall be guilty of a violation thereof. The unit for separate and distinct offense in violation of this article shall be each and every article of bedding made, remade, sold, offered for sale, delivered, consigned, or possessed with an intent to sell, offer for sale, deliver or consign, contrary to the provisions hereof.

Any person who violates any provision of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five and not more than one thousand dollars or be imprisoned in the county jail not to exceed six months, or be both fined and imprisoned. (1923, c. 2, s. 7.)

§ 7251(ff). Supervision and inspection by state board of health; time to remedy unsanitary conditions.—Every place where articles of bedding are made, remade, or renovated, or held for sale, consignment, or delivery, shall be subject to supervision and inspection by the state board of health, whose duty it shall be to supervise and inspect the manufacture and sale of articles of bedding as defined in this act. Should said board of health find articles of bedding being made, remade, or renovated, or held for sale, consigment, or delivery, in other than sanitary conditions, then said state board of health shall give the person responsible for this unsanitary condition a definite length of time within the discretion of said board of health, said time, however, not to exceed sixty days, in which to remedy the said unsanitary condition or conditions, and in the event of failure to do so on the part of the person responsible therefor, the said failure shall become a violation of this article. Said state board of health shall have the power to prosecute all violations of this article. Should said state board of health have reason to believe that any person is violating or has violated any provisions of this article, it shall be the duty of said state board of health to prosecute such person therefor. (1923, c. 2, s. 8.)

§ 7251(gg). Power of state board of health to examine bedding; invoices and records.—If and when any officer of the state board of health has reason to believe that any article of bedding sold, offered for sale, delivered, consigned, or possessed with intent to sell, offer for sale, deliver, or consign, is not correctly labeled as to contents, the said officer shall be empowered to open such article of bedding to examine the material used in filling the same; and if said officer after examination of the material used as filling is unable to determine definitely whether the material used as filling is new or has been previously used, or whether the material used in filling such article of bedding is of the kind it is stated to be on the label, or in the case of feather pillows, whether the feathers used in filling same have been sterilized or not, the said officer shall have power to examine the purchase invoice or invoices of such material and such other records of the business as are necessary to determine definitely the kind and character of the material used in such articles of bedding. (1923, c. 2, s. 9.)

§ 7251(hh). Reports to solicitors; action by individuals.—Any person who has reason to believe that this article has been or is being violated may present the facts to the solicitor of the judicial district wherein such violation occurs. and it shall thereupon be the duty of said solicitor to investigate the said violation and to institute a prosecution if he finds reasonable cause to believe that there has been such violation. Any individual may institute proceedings to enforce this article and punish any violation thereof in the county where such violation occurs. (1923, c. 2, s. 10.)

§§ 7251(hh)1-7251(hh)12. Repealed by Public Laws of 1935, c. 167, s. 13, codified as § 7251-(hh)24.

§ 7251(hh)13. Definitions; possession as evidence of intent to sell; construction of words. — As used in this law:

The word "mattress" means: Any mattress, upholstered spring, comforter, pad, cushion, or pillow to be used in sleeping. This law shall not apply to any mattress smaller than twelve inches in its greatest dimension.

The word "person" means: Any individual, corporation, partnership, or association.

The term "new material" means: Any material which has not been used in the manufacture of another article or used for any other purpose; provided this shall not exclude by-products of industry that have not been in human use, unless included in the following paragraph.

The term "previously used material" means: (a) Any material which has been used in the manufacture of another article or used for any other purpose; (b) any material made into thread, yarn, or fabric, and subsequently torn, shredded, picked apart, or otherwise disintegrated, including jute and shearings.

The word "sell" or "sold" shall, in the corresponding tense, include; sell, offer to sell, or deliver or consign in sale, or possess with intent to sell, deliver, or consign in sale.

Possession of one or more articles covered by this law when found in any store, warehouse, or place of business, other than a private home, hotel, or other place where such articles are ordinarily used, shall constitute prima facie evidence that the article or articles so possessed are possessed with intent to sell, or sterilize and sell.

All words shall include plural and singular, masculine and feminine, as the case demands. (1935, c. 167, s. 1.)

§ 7251(hh)14. Sterilization; tagging mattresses received for renovation.—No person shall in making, remaking or renovating a mattress for another person, use any previously used material which, since last used, was not sterilized by a process approved by the state health officer.

No person shall sell a used mattress unless sterilized, since last used, by a process approved by the state health officer, but nothing in this law shall be construed or interpreted as preventing a sale by an executor or administrator of the mattresses of a decedent.

A detailed drawing and description of any sterilizing apparatus and process to be used under this law shall be submitted to the state health officer who shall, if the process effectively sterilizes, approve such process and give the person submitting it a dated sterilizing license expiring at the end of the calendar year in which issued, and the fee for which shall be twenty-five dollars a year.

Any person who receives a mattress for renovation or storage shall keep attached thereto, from the time received, a tag on which is legibly written the date of receipt and the name and address of the owner. (1935, c. 167, s. 2.)

§ 7251(hh)15. Tagging before sale.—No person shall sell a mattress to which is not securely sewed a cloth or cloth-backed tag at least two inches by three inches in size, to which is affixed the adhesive stamp provided in section 7251(hh)17.

Upon said tag shall be legibly stamped or printed with ink, in English (a) the name of the material or materials used to fill such mattress; (b) the name and address of the maker or vendor of the mattress; (c) in letters at least one-eighth inch high the words "made of new material," if such mattress contains no previously used material; or the words "made of previously used material" if such mattress contains any previously used material; or the word "second-hand" on any mattress which has been used but not remade.

Nothing likely to mislead shall appear on said tag and it shall contain all statements required by this law, and shall be sewed to the outside covering of every mattress being manufactured, before the filling material has been inserted.

Material known in the cotton waste trade as "sweeps" or "oily-sweeps" shall be named "mill floor sweepings" on the tag required by this law and shall not be used unless previously sterilized by a process approved by the state health officer.

The name "felt" shall not be used unless the material has been carded in layers by a garnett machine. (1935, c. 167, s. 3.)

§ 7251(hh)16. Alteration, etc., of tags prohibited.—No person, other than a purchaser for his own use, shall remove from a mattress, or deface or alter the tag required by this law. (1935, c. 167, s. 4.)

§ 7251(hh)17. Enforcement funds.—The state health officer is hereby charged with the administration and enforcement of this law and he shall provide specially designed adhesive stamps for use under section 7251(hh)15. Upon request he shall furnish no less than five hundred said stamps to any person paying in advance ten dollars per five hundred stamps. State institutions engaged in the manufacture of mattresses for their own use or that of any other state institution shall not be required to use such stamps.

All money collected under this law shall be paid to the state health officer who shall place all such money in a special "bedding law fund," which is hereby created and specifically appropriated to the state board of health, solely for expenses in furtherance of the enforcement of this law. The state health officer shall semi-annually render to the state auditor a true statement of all receipts and disbursements under said fund, and the state auditor shall furnish a true copy of said statement to any person requesting it.

All money in the "bedding law fund" shall be expended solely for (a) salaries and expenses of inspectors and other employees who devote their time to the enforcement of this law or (b) expenses directly connected with the enforcement of this law, including attorney's fees, which are expressly authorized to be incurred when in the opinion of the state health officer it is advisable to employ an attorney to prosecute any person; provided, however, that a sum not exceeding twenty per cent of such salaries and expenses may be used for supervision and general expenses of the state board of health. (1935, c. 167, s. 5.)

§ 7251(hh)18. Enforcement. — The state board of health, through its duly authorized representatives, is hereby authorized and empowered to enforce the provisions of this law.

Every place where mattresses are made, remade, renovated, or sold or where material, which is to be used in the manufacture of mattresses, is mixed, worked, or stored, shall be inspected by duly authorized representatives of the state board of health.

Any person supplying material to a mattress manufacturer shall furnish an itemized invoice of

all material so furnished. Each material entering into willowed or other mixtures shall be shown on such invoice. The mattress manufacturer shall keep such invoice on file for one year subject to inspection by any representative of the board of health.

When an authorized representative of the state board of health has reason to believe that a mattress is not tagged or filled as required by this law, he shall have authority to open a seam of such mattress to examine the filling; and if unable, after such examination, to determine if the filling is of the kind stated on the tag, he shall have power to examine any purchase records necessary to determine definitely the kind of material used in such mattress, and he shall have power to seize and hold for evidence any mattress or material made, possessed, or offered for sale contrary to this law. (1935, c. 167, s. 6.)

§ 7251(hh)19. Licenses. — No person, except for his own use, shall make, remake or renovate mattresses until he has secured a license from and has paid to the state health officer an annual inspection fee of twenty-five dollars. The license so issued shall be valid until the end of the calendar year in which issued, or until voided for violation of this law.

The state health officer may revoke and void the aforesaid licenses of any persons convicted a second time of violating this law; and such person shall not thereafter make, remake, renovate, or sell a mattress for a period of six months after such revocation, and then only when he has paid another inspection fee of twenty-five dollars for new license. (1935, c. 167, s. 7.)

§ 7251(hh)20. Unit of offense. — Any person who fails to comply with any provision of this law, or who counterfeits the stamp provided in section 7251(hh)17, shall be guilty of a violation of this law. Each stamp so counterfeited and each mattress made, remade or renovated or sold contrary to this law shall be a separate violation. (1935, c. 167, s. 8.)

§ 7251(hh)21. Swearing out warrants.—If any person submits reasonable proof to any officer, or a representative of the state board of health, it shall be the duty of said officer or representative of the state board of health to swear out a warrant against the offender. (1935, c. 167, s. 9.)

§ 7251(hh)22. Penalty.—A person who violates this law shall upon conviction thereof be fined fifty dollars, or imprisoned in the county jail not to exceed thirty days. (1935, c. 167, s. 10.)

§ 7251(hh)23. Exceptions in cases of blind persons.—In the cases where mattresses are made or renovated in a plant or place of business owned solely by blind persons, in which place of business not more than one seeing assistant is employed in the manufacture or renovation, neither the payment of tax nor the purchase of stamps shall be required. (1935, c. 167, s. 11.)

§ 7251(hh)24. Exceptions; refund of part of current license fee. — Chapter three hundred and thirty-nine of the Public Laws of one thousand nine hundred and thirty-three [§§ 7251(hh)1-7251(hh)11] is repealed, such repeal to be effective upon the ratification of this law: Provided, however, that such repeal shall not bar the prosecution of persons who have violated the provisions of chapter three hundred and thirty-nine of the Public Laws of one thousand nine hundred and thirty-three prior to its repeal. In case of any persons who have paid a license or inspection fee of fifty dollars for the calendar year one thousand nine hundred and thirty-five, a refund of twenty-five dollars shall be made immediately upon the ratification of this law. (1935, c. 167, s. 13.)

Editor's Note.—Public Laws of 1933, ch. 349, was amended by Public Laws of 1933, ch. 538, formerly codified as § 7251(hh) 12, which added the proviso that in cases where mattresses are made solely by blind persons they shall be exempt from paying the tax provided in said chapter 349. However, the subject of the amendatory act was not covered by its caption which stated that it was an act to amend the former act so as to exempt Edgecombe, Wilson and Lenoir counties.

Art. 23. Transportation of Foodstuffs

§ 7251(ii). Sanitation of cars.—From and after March 4, 1925, it shall be unlawful for any carrier transporting food intended for human consumption to transport the same knowingly in cars or other vehicles which have been defiled by livestock or by human beings without having first put said car or vehicle in a sanitary condition.

It shall be unlawful for any person to defile any railroad car by urinating therein or by passing therein excreta.

Any person, firm, or corporation who shall violate any provision of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not to exceed thirty days. (1925, cc. 114, 213.)

Art. 24. Electrical Materials, Devices, Appliances and Equipment

§ 7251(jj). Sale of electrical goods regulated.—Every person, firm or corporation before selling, offering for sale or exposing for sale, at retail to the general public or disposing of by gift as premiums or in any similar manner any electrical material, devices, appliances or equipment shall first determine if such electrical materials, devices, appliances and equipment complies with the provision of this law. (1933, c. 555, s. 1.)

§ 7251(kk). Identification marks required.—All electrical materials, devices, appliances and equipment offered for sale, exposed for sale at retail to the general public or disposed of by gift, as premiums or in any similar manner shall have the maker's name, trademark, or other identification symbol placed thereon, together with such other markings giving voltage, current, wattage, or other appropriate ratings as may be necessary to determine the character of the material, device, appliance or equipment and the use for which it is intended; and it shall be unlawful for any person, firm or corporation to remove, alter, change or deface the maker's name, trademark or other identification symbol. (1933, c. 555, s. 2.)

§ 7251(ll). Acceptable listings as to safety of goods.—The electrical inspector shall accept, without further examination or test, the listings of Underwriters' Laboratories, Inc., as evidence

of safety of such materials, etc. (so long as the listing continues in effect to his knowledge and), so long as information and experience have not demonstrated, in his judgment, that any specific listed materials, etc., are not safe.

The electrical inspector may accept as evidence of safety of such materials, etc., where not of types for which such Underwriters' laboratories listings are in effect, such evidence by way of records of tests and examinations by bodies he deems properly qualified, as he deems necessary to assure him of the safety of such materials, etc. But such acceptance cannot be made to apply to other than the stock of materials, etc., for which such evidence has been specifically secure. One body whose evidence of safety shall be accepted by the electrical inspector for specific stocks is the insurance commission of the state of North Carolina, if the stock in question has been submitted to the examinations and tests required by that commission, and that commission has certified that in its judgment the stock conforms to the state law, to the requirements of this law, and to any additional requirements deemed necessary for safety in the judgment of that commission.

The electrical inspector may decline to accept any evidence of safety other than that provided by Underwriters' laboratories listings, for specific materials, etc., of types for which such listings are available.

The electrical inspector, in accepting listings of Underwriters' laboratories, shall keep in file as far as practicable, copies of all Underwriters' laboratories listings in effect, and copies of the recorded standards, requirements, test and examinations of Underwriters' laboratories for such materials, etc., or shall when necessary refer to the files of such information maintained by the insurance commission of North Carolina. The words "electrical inspector" when used in this act shall be construed to refer to any duly licensed and employed electrical inspector of the state or any governmental agency thereof. (1933, c. 555, s. 3.)

§ 7251(mm). Legal responsibility of proper installations unaffected.—This article shall not be construed to relieve from or to lessen the responsibility or liability of any party owning, operating, controlling or installing any electrical materials, devices, appliances or equipment for damages to persons or property caused by any defect therein, nor shall the electrical inspector be held as assuming any such liability by reason of the approval of any material, device, appliance or equipment authorized herein. (1933, c. 555, s. 4.)

§ 7251(nn). Violation made misdemeanor.—Any person, firm or corporation who shall violate any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than fifty ($50.00) dollars or imprisonment for not more than thirty days. (1933, c. 555, s. 5.)

CHAPTER 119

PUBLIC HOSPITALS

Art. 1. Orthopædic Hospital

§ 7252. Appropriation for buildings; condition.—There is hereby appropriated out of the money in the treasury not otherwise appropriated the sum of twenty thousand dollars for the purpose of the erection of buildings and the furnishing of the same to the North Carolina orthopædic hospital: Provided, that this sum shall not be available until twenty thousand dollars shall have been subscribed in good faith, for the same purpose, from sources other than the state of North Carolina. (1917, c. 199, s. 1.)

§ 7253. Committee to select site.—The governor shall appoint a committee of five to select a proper site for the location of said orthopædic hospital, which committee, in making its selection, shall be governed by the advantages offered for the maintenance and support of the institution, and the board of trustees hereinafter named shall thereupon proceed to erect suitable buildings necessary to carry out the purposes of said orthopædic hospital. (1917, c. 199, s. 3.)

§ 7254. Board of trustees; term of office; organization and powers.—The governor shall appoint a board of trustees, consisting of nine members, for said institution, and they shall be divided into three classes of three members each. The first class shall be appointed for two years, the second for four years, and the third class for six years. They shall hold their offices until their successors have been appointed, and the term of office of each shall begin from the date of the selection of the site as above mentioned. The governor shall fill all vacancies occurring by reason of death, resignation, or otherwise. The board of trustees shall organize by electing from its members a president, a secretary, and a treasurer, and three of its members as an executive committee. The board shall have power to erect any buildings necessary, make improvements, or in general do all matters and things that may be beneficial to the good government of the institution, and to this end they may make by-laws for the government of the same. (1917, c. 199, s. 4.)

§ 7254(a). Authorized to accept donations.—The board of trustees of the North Carolina Orthopædic Hospital are hereby authorized and empowered to accept gifts, grants, donations, devices, and bequests of money, lands, goods and other property for and on behalf of said institution. (1927, c. 188, s. 1.)

Art. 2. Municipal Hospitals

Part 1. Hospitals in Counties, Townships, and Towns

§ 7255. Establishment of public hospitals; election, tax, and bond issue.—Any county, township, or town may establish a public hospital in the following manner:

1. Petition presented.—A petition may be presented to the governing body of any county, township, or town, signed by two hundred resident freeholders of such county, township, or town, one hundred and fifty of whom, in the case of a county, shall not be residents of the city, town, or village where it is proposed to locate such hospital, asking that an annual tax may be levied for the establishment and maintenance of a public hospital at a place in the county, town-

ship, or town named therein, or to be thereafter selected by the governing body of such county, township or town, and specifying the maximum amount proposed to be expended in purchasing or building such hospital.

2. Election ordered.—Upon the filing of such petition the governing body of the county, township, or town shall order a new registration and shall submit the question to the qualified electors at the next general election to be held in the county, township, or town, or at a special election called for that purpose, first giving ninety days' notice thereof by publication once a week for four successive weeks beginning ninety days before the day of said election in one or more newspapers published in the county, township, or town, if any be published therein, and by posting such notice, written or printed, in each township of the county, in case of a county hospital, which notice shall include the text of the petition and state the amount of the tax to be levied upon the assessed property of the county, township, or town. The election shall be held at the usual places in such county, township or town for electing officers, the election officers shall be appointed by the Board of county commissioners and the vote shall be canvassed in the same manner as in elections for officers for such county, township, or town.

No action to question the validity of any such election shall be brought or maintained after the expiration of sixty days from the canvassing of said vote, and after the expiration of said period it shall be conclusively presumed that said election has been held in accordance with the requirements of this section, unless within said period such action is instituted.

3. Tax to be levied.—The tax to be levied under such election shall not exceed one-fifteenth of one cent on the dollar for a period of time not exceeding thirty years, and shall be for the issue of county, township, or town bonds to provide funds for the purchase of a site and the erection thereon of a public hospital and hospital buildings. (1923, c. 42, s. 1; 1917, cc. 98, 268; 1919, c. 332, s. 1; 1923, c. 244, s. 1; 1929, c. 247, ss. 1, 2.)

Editor's Note.—By amendment Public Laws 1923, ch. 244, sec. 1 the provision in the first paragraph for soliciting a location after presenting the petition, was added, and in paragraph 3 the time for the bonds to run was extended from twenty to thirty years. See 1 N. C. Law Rev. 273.

§ 7256. Election on tax levy; collection and application of funds.—The governing body of such county, township, or town shall submit to the qualified electors thereof, at a regular or special election, the question whether there shall be levied upon the assessed property of such county, township, or town a tax of one-fifteenth of one cent on the dollar for the purchase of real estate for hospital purposes, for the construction of hospital buildings, and for maintaining same, or for either or all of such purposes. The ballots to be used at any election at which the hospital question is submitted shall be printed with a statement substantially as follows:

☐ Yes.

For a ..... cent tax for a bond issue for a public hospital and for maintenance of same.

☐ No.

If a majority of the qualified voters at such election on the proposition shall be in favor of a tax as submitted for a bond issue for a public hospital and for maintenance of same, the governing body shall levy the tax so authorized, which shall be collected in the same manner as other taxes are collected, and credited to the "Hospital Fund," and shall be paid out on the order of the hospital trustees for the purposes authorized by this article, and for no other purposes whatever. (1913, c. 42, s. 2; 1917, c. 268; 1919, c. 332, s. 2.)

§ 7256 (a). Curative statute. — All elections heretofore called or held under the provisions of this article, as amended, where notice has been given in accordance with section 7255, and the election officers have been appointed either in compliance with section three hereof or by the County Board of Elections are hereby validated and declared to be in accordance with the requirements of the statute on said subject. (1929, c. 247, s. 3.)

§ 7257. Trustees; term of office; qualification and election.—Should a majority of the qualified voters upon the question be in favor of establishing such county, township, or town hospital, the governing body shall proceed at once to appoint seven trustees chosen from the citizens at large with reference to their fitness for such office, three of whom may be women, all residents of the county, township, or town, not more than four of said trutsees to be residents of the city, town, or village in which said hospital is to be located, in case of a county hospital, who shall constitute a board of trustees for such public hospital. The trustees shall hold their offices until the next following general election, when seven hospital trustees shall be elected and hold their offices, two for two years, two for four years, three for six years, and who shall by lot determine their respective terms. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the nomination and election of hospital trustees in the same manner as other officers are elected, none of whom shall be practicing physicians. (1913, c. 42, s. 3; 1917, c. 98, s. 2; 1917, c. 268.)

Editor's Note. — For amendment applicable in Yancey County, see Public Laws, 1929, c. 117, § 2.

§ 7258. Officers elected by trustees; compensation. — The trustees shall, within ten days after their appointment or election, qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of one of their number as chairman, one as secretary, and by the election of such other officers as they may deem necessary, but no bond shall be required of them. The treasurer of the county, township, or town in which such hospital is located shall be treasurer of the board of trustees. The treasurer shall receive and pay out all moneys under the control of said board, as directed by it, but shall receive no compensation from such board. No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement

of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary, and allowed only by the affirmative vote of all the trustees present at a meeting of the board. (1913, c. 42, s. 4; 1917, c. 268.)

§ 7259. Trustees to have control, and to make regulations.—The board of hospital trustees shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with this article and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditure of all money collected to the credit of the hospital fund, and the purchase of the site or sites, the purchase or construction of any hospital buildings, and of the supervision, care, and custody of the grounds, rooms, or buildings purchased, constructed, leased, or set apart for that purpose. (1913, c. 42, s. 4.)

§ 7260. Power of board to appoint superintendent and assistants.—The board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants, and fix their compensation, and shall also have power to remove such appointees; and they shall in general carry out the spirit and intent of this article in establishing and maintaining a county, township, or town public hospital with equal rights to all and special privileges to none. (1913, c. 42, s. 4; 1917, c. 268.)

§ 7261. Meetings of board; reports required.—The board of hospital trustees shall hold meetings at least once each month, and shall keep a complete record of all its proceedings. Four members of the board shall constitute a quorum for the transaction of business. One of the trustees shall visit and examine the hospital at least twice each month, and the board shall, during the first week in January of each year, file with the governing body of the county, township, or town a report of their proceedings with reference to such hospital, and a statement of all receipts and expenditures during the year; and they shall at such time certify the amount necessary to maintain and improve the hospital for the ensuing year. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for such hospital, unless the same are purchased by competitive bidding. (1913, c. 42, s. 4; 1917, c. 268.)

§ 7262. Vacancies filled.—Vacancies in the board of trustees occasioned by removals, resignations, or otherwise shall be reported to the governing body of the county, township, or town and be filled in like manner as original appointments, appointees to hold office until the next following general election, when such vacancies shall be filled by election in the usual manner. (1913, c. 42, s. 5; 1917, c. 268.)

§ 7263. Deposit and payment of funds.—All money received for such hospital shall be deposited in the treasury of the county, township, or town to the credit of the hospital fund, and paid out only upon warrants drawn by the auditor, or other proper officer, of such county, or township, or town upon the properly authenticated vouchers of the hospital board. (1913, c. 42, s. 4; 1917, c. 268.)

§ 7264. Regulations as to bond issue.—Whenever any county, township, or town in this state shall have provided for the appointment and election of hospital trustees, and voted a tax for a term not exceeding thirty years for hospital purposes, as authorized by law, the county, township, or town may issue bonds in anticipation of the collection of such tax in such sums and amounts as the board of hospital trustees shall certify to the governing body of such county, township, or town to be necessary for the purpose, contemplated by such tax, but such bonds in the aggregate shall not exceed the amount which might be realized by said tax, based on the amount which may be yielded on the property valuation of the year in which the tax is voted. Such bonds shall mature in thirty years from date and shall be in sums not less than one hundred dollars nor more than one thousand dollars, drawing interest at a rate not exceeding five per cent per annum, payable annually or semiannually; the bonds shall be payable at pleasure of county, township, or town after five years, and each of said bonds shall provide that it is subject to this condition, and shall not be sold for less than par, and shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the provisions of this article, and be numbered consecutively and redeemable in the order of their issuance. The governing body shall have power and option of issuing, instead of long-term bonds, as above provided for, serial bonds in such forms and denominations as said governing body may determine, subject to the restrictions of this section. Said serial bonds may be issued as one issue or divided into two or more separate issues, and in either case may be issued all at one time or in blocks from time to time, and each issue thereof shall so mature that the aggregate principal amount of the issue shall be payable in annual installments or series, beginning not more than three years after the date of the bonds of such issue and ending not more than thirty years after such date. No installments shall be more than two and one-half times as great in amount as the smallest prior installment of the same bond issue. Said bonds, if said governing body shall elect to issue serial bonds instead of long-term bonds, may be either coupon bonds or registered bonds, and if issued in coupon form may be registerable as to principal, or as to both principal and interest, and shall be substantially in the form provided for county bonds as aforesaid, and likewise subject to changes that will conform them to the provisions of this article. (1913, c. 42, s. 6; 1917, c. 268; 1923, c. 244, ss. 3, 4.)

Editor's Note.—By amendment Public Law 1923, ch. 244, sec. 3 and 4, the tax term and time in which bonds should mature was raised from twenty to thirty years. The provision at the end of the section for issuing several bonds was added by this amendment.

§ 7265. Condemnation of land.—If the board of hospital trustees and the owners of any property desired by them for hospital purposes cannot agree as to the price to be paid therefor, they shall report the fact to the governing body of the county, township, or town, and condemnation proceedings shall be instituted by such governing body and prosecuted in the name of the county, township, or town wherein such public hospital is to be located, by the attorney for such county, township, or town, under the provisions of law for the condemnation of land for railroads. (1913, c. 42, s. 7; 1917, c. 268.)

§ 7266. Plans to be approved; advertisement for bids.—No hospital buildings shall be erected or constructed until the plans and specifications have been made therefor and adopted by the board of hospital trustees, and bids advertised for other county buildings. (1913, c. 42, s. 8.)

§ 7267. Additional appropriation. — In the counties, townships, or towns exercising the rights conferred by this article, the governing body may appropriate each year, in addition to tax for hospital fund hereinbefore provided for, not exceeding five per cent of its general fund for the improvement and maintenance of any public hospital so established. (1913, c. 42, s. 10; 1917, c. 268.)

§ 7268. Power to accept donations.—Any person, firm, corporation, or society desiring to make donations of money, personal property, or real estate for the benefit of such hospital shall have the right to vest title of the property so donated in said county, township, or town, to be controlled, when accepted, by the board of hospital trustees according to the terms of the deed, gift, devise, or bequest of such property. (1913, c. 42, s. 13; 1917, c. 268.)

§ 7269. Persons entitled to benefit of hospital. — Every hospital established under this article shall be for the benefit of the inhabitants of such county, township, or town, and of any person falling sick or being injured or maimed within its limits; but every person who is not a pauper shall pay to such board of hospital trustees, or such officers as it shall designate, for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendance, according to the rules and regulations prescribed by the board, such hospital always being subject to such reasonable rules and regulations as the board may adopt, in order to render the use of the hospital of the greatest benefit to the greatest number. The board may exclude from the use of such hospital all persons who shall wilfully violate such rules and regulations; the board may extend the privileges and use of such hospital to persons residing outside of such county, township, or town, upon such terms and conditions as may be prescribed from time to time by its rules and regulations. (1913, c. 42, s. 11; 1917, c. 268.)

§ 7270. All persons subject to hospital regulations.—When such hospital is established, the physicians, nurses, attendants, the persons sick therein, and all persons approaching or coming within the limits of same, and all furniture and other articles used or brought there, shall be subject to such rules and regulations as said board may prescribe. (1913, c. 42, s. 12.)

§ 7271. Municipal jurisdiction extended.—The jurisdiction of the city, town, or village in or near which a public hospital is located shall extend over all lands used for hospital purposes outside the corporate limits, if so located, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such public hospital. (1913, c. 42, s. 9.)

§ 7272. Conditions and privileges of physicians to practice in public hospitals to be determined by the trustees.—The board of trustees of such hospitals shall determine the conditions under which the privileges of practice within the hospital may be available to physicians, and shall promulgate reasonable rules and regulations governing the conduct of physicians and nurses while on duty in said hospital. (1913, c. 42, s. 14; 1925, c. 177.)

Editor's Note. — Prior to the amendment Public Laws 1925, ch. 177 this section provided that no discrimination should be made and that a patient might employ his own physician.

§ 7273. Training school for nurses. — The board of trustees of such county, township, or town public hospital may establish and maintain, in connection therewith and as a part of said public hospital, a training school for nurses. (1913, c. 42, s. 15; 1917, c. 268.)

§ 7274. Room for examination of insane persons.—The board of trustees shall at all times provide a suitable room for the detention and examination of all persons who are brought before the commissioners of insanity for such county, provided that such public hospital is located at the county-seat. (1913, c. 42, s. 16.)

§ 7275. Charity patients determined. — The board of hospital trustees shall have the power to determine whether or not patients presented at the public hospital for treatment are subjects for charity, and shall fix the compensation to be paid by patients other than those unable to assist themselves. (1913, c. 42, s. 18.)

§ 7276. Department for tuberculous patients.— The board of trustees are authorized to provide as a department of the public hospital, but not necessarily attached thereto, suitable accommodations and means for the care and treatment of persons suffering from tuberculosis, and to formulate such rules and regulations for the government of such persons, and for the protection from infection of other patients and of nurses and attendants in such public hospital, as they may deem necessary; and it shall be the duty of all persons in charge of or employed at such hospitals, or residents thereof, to faithfully obey and comply with all such rules and regulations. The board of hospital trustees shall, if practicable, employ as head nurse to be placed in charge of the public tuberculosis sanatorium one who has had experience in the management and care of tuberculous persons. (1913, c. 42, s. 17.)

§ 7277. Plans for county and municipal tubercular sanatoria.—Any county or town desiring

to erect a sanatorium or hospital, shack, tent, or other structure in which it is intended to keep persons suffering with tuberculosis shall first submit to the state board of health for its approval or rejection the plans of said sanatorium, hospital, shack, tent, or other structure, and it shall be unlawful for any county or town to begin the erection of any structure referred to above without the consent or approval of the state board of health.

Any person, firm, or corporation failing, neglecting, or refusing to comply with the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (1917, c. 216, ss. 1, 2.)

§ 7278. Nonresident tuberculous patients. — The governing body of any county, township, or town where no suitable provision has been made for the care of indigent tuberculous residents may contract with the board of hospital trustees of any public hospital for the care of such persons in the sanatorium department of such hospital, upon such reasonable terms as may be agreed upon. (1913, c. 12, s. 19; 1917, c. 268.)

Part 2. County Tuberculosis Hospitals

§ 7279. Power to establish.—Any county within the state shall have power and authority at any time to establish, erect, and maintain a hospital for the care and treatment of persons suffering with the disease known as tuberculosis, as hereinafter provided in this article. (1917, c. 99, s. 1.)

Proceedings under Conflicting Local Act Invalid. Where the county commissioners have proceeded under a special local act to submit to its electorate the question of erecting and maintaining a tuberculosis hospital, to issue $150,000 in bonds therefor, and levy an additional tax of eight cents on the $100 valuation of its property for maintenance, their action thus taken cannot be sustained under the provisions of the general law, ch. 119. this section et seq., authorizing an expenditure for the purpose of not exceeding $100,000, and a maintenance tax not to exceed five cents, the balloting also under the general law differing from that in the special act in requiring separate ballots to be taken in two boxes instead of one. Proctor v. Board, 182 N. C. 56, 108 S. E. 360, cited and distinguished. Armstrong v. Board, 185 N. C. 405, 117 S. E. 388.

§ 7280. Election for bond issue; special tax.— The board of county commissioners of any county in the state may, by majority vote of the board, or upon petition of one-fourth of the freeholders of the county shall, after thirty days notice at the courthouse door and publication in one or more newspapers published in the county, order an election to be held at the next general election, or order a special election to be held at such time as they may fix, to determine the will of the people of the county whether there shall be issued and sold bonds to an amount not to exceed two hundred and fifty thousand dollars, to bear interest at such rate as the board may fix and to be payable, both principal and interest, when and where they may decide. The proceeds of the bonds to be used in securing lands and erecting or altering buildings and equipping same, to be used as a hospital for the treatment of tuberculosis. If the majority of the qualified voters at said election shall vote in favor of the issuing of such bonds, then the bonds shall be issued and sold by the board and a special tax shall be levied to pay the interest and to provide a sinking fund to pay the bonds at maturity. The board of commissioners are also authorized to levy a special annual tax not to exceed five cents on the one hundred dollars valuation of property and fifteen cents on the poll to be used as a maintenance fund for the hospital for tuberculosis. The question of levying such special tax shall be submitted to the qualified voters of such county at an election to be held as hereinbefore provided. In the event the board of commissioners shall order a special election to determine the will of the people of the county upon the question of the issuance of the bonds or the levy of the special maintenance tax as herein provided, they may order a new registration of the qualified voters of the county for said election, and notice of said new registration shall be deemed to be sufficiently given by publication once in some newspaper published in said county at least thirty days before the close of the registration books. If both questions are submitted at the same election, only one registration need be ordered. The published notice of registration shall state the days on which the books will be open for registration of voters and the places at which they will be open on Saturdays. The books of such new registration shall close on the second Saturday before election. The Saturday before the election shall be challenge day. (1917, c. 99, s. 2; 1919, c. 159, s. 2; Ex. Sess. 1924, c. 74; 1925, c. 75; 1927, c. 34, s. 2.)

Editor's Note.—By amendment, Ex. Sess. 1924, ch. 47, the provision for holding special election was added. By Public Laws 1925, ch. 75, the bond limit was raised from one hundred thousand to two hundred and fifty thousand.

In Public Laws of 1927, ch. 34, sec. 1 and 2 the same amendment as was made in 1925, that is raising the bond limit from one hundred thousand to two hundred and fifty thousand was made without reference to the amendment of 1925. Evidently the Legislature overlooked the amendment of 1925 in making the amendment of 1927.

§ 7281. Manner of holding election. — The county commissioners at the next general election or special election shall cause to be placed at each voting precinct in the county a ballot box marked "County Tuberculosis Hospital," and cause to be printed and distributed official ballots labeled "For County Tuberculosis Hospital," and official ballots labeled "Against County Tuberculosis Hospital," said election to be governed by the laws of the state. The county commissioners shall, if they propose to levy the tax for maintenance fund as hereinbefore provided, also cause to be placed at each voting precinct in the county a ballot box marked "Maintenance of County Tuberculosis Hospital," and cause to be printed and distributed official ballots labeled "For Maintenance of County Tuberculosis Hospital," and official ballots labeled "Against Maintenance of County Tuberculosis Hospital," such election to be held as hereinbefore provided. (1917, c. 99, s. 3; 1919, c. 159, s. 3; 1927, c. 34.)

Editor's Note.—By amendment, Public Laws, 1927, ch. 34, sec. 3 the word "a" was inserted before the words "special election" in the first sentence.

§ 7282. Board of managers; term of office; compensation. — For each hospital so established, the board of county commissioners shall, by a majority, elect a board of managers to con-

sist of five members, of whom one shall be a member of said board of commissioners and shall be chairman of said board of managers. None of the remaining four members of said board of managers shall be a member of the board of commissioners. The chairman of said board of managers shall be elected for a term of two years, and the other members of said board of managers shall be elected for terms of four years: Provided, that at the first election of said board of managers the chairman shall be elected for a term equal to the unexpired portion of his term as a member of the board of commissioners, and of the remaining members of said board of managers one member shall be elected for a term of one year, one member for a term of two years, one member for a term of three years, and one member for a term of four years: Provided, also, that any vacancy in said board, occurring at any time, shall be filled by the board of commissioners for the unexpired term. In all counties having a health officer, such health officer, in addition to the five elected members, shall be ex officio a member of such board of managers. Women shall be eligible to said board of managers. The compensation of the members of said board of managers shall be the same as that of the members of the board of commissioners: Provided, that in counties in which the chairman of the board of commissioners receives a fixed salary, and the remaining members of said board are compensated upon the basis of per diem and mileage, the compensation of the members of the board of managers shall be equal to that of the members of the board of commissioners, paid upon a per diem and mileage basis. The chairman of the board of managers shall be entitled to the same compensation as other members of said board, in addition to his compensation as a member of the board of commissioners. The county health officer, however, shall not receive compensation as a member of said board of managers: Provided, that this section shall not affect the present term of office of any member of a board of managers elected prior to the passage of this section, but as to such members this section shall become effective as their present term of office, respectively, shall expire. (1917, c. 99, s. 4; 1925, c. 313, s. 1.)

Editor's Note.—The provisions as to the membership of one of the commissioners, and the proviso as to per diem compensation are new with Public Laws 1925, c. 313, sec. 1.

§ 7283. Powers of board; title to property.—Authority in regard to the purchase of lands, election and maintenance of buildings, selection of officers, employees, and attendants, formulation of rules and regulations for the admission and government of patients, and general conduct of the hospital, shall vest in the board of managers. No one related by blood or marriage to any member of the board of managers shall be appointed to any office or position in connection with the hospital, except by unanimous vote of the board of managers. All property, both real and personal, pertaining to such hospital, shall be vested in the county: Provided, however, that any donations, bequests, or devises made for the use of such hospital shall be held by the county in trust according to the terms of such donation, devise, or bequest. Provided, that the board of commissioners, in their discretion, either may appoint the board of managers following the official determination of the election, in which event said board of managers shall have the sole authority as to the selection of a site for such hospital, the purchase of lands therefor, and the erecting and equipping of the buildings for such hospital; or the said board of commissioners may defer the appointment of said board of managers until such hospital is constructed, in which event said board of commissioners shall, themselves, select the site for such hospital, purchase lands therefor, erect and equip, or make contracts for erecting and equipping the buildings for such hospital, and shall thereafter turn such hospital over to said board of managers to be operated and maintained in accordance with this article. (1917, c. 99, s. 5; 1925, c. 313.)

Editor's Note.—By amendment, Public Laws 1925, ch. 313, the provision for appointment of a board of managers, their powers and the powers of the board of commissioners in regard to the appointment was added.

§ 7284. Contract power; regulations for admission.—The board of county commissioners, or the board of managers, according to the authority vested in them by the board of county commissioners or by this article, shall have power and authority to purchase property, both real and personal, to make contracts, to formulate, change, and alter rules and regulations for the admission and government of patients, and to do all things reasonably incidental or necessary to carry out the true intent and purpose of this article. Patients may be admitted and kept without charge or for such compensation as may be deemed just and proper in each particular case: Provided, that no person who is not a bona fide resident of the county maintaining such hospital shall be kept for less than actual cost. The county commissioners of any county may, instead of erecting the institution in the county where the vote is taken, use a part or all of the funds in erecting and maintaining a building or buildings at the state sanatorium at Montrose, or the county commissioners may in their discretion erect and maintain a tuberculosis hospital in the county where the bonds are issued, and may also use part of the funds to erect and maintain a building or buildings at Montrose, as they may deem best. Before erecting any building or buildings at Montrose the county commissioners shall make due arrangements and enter into the necessary contract or contracts with the board having charge of the state sanatorium at Montrose. And the board having in charge the state sanatorium at Montrose is hereby authorized and empowered to make contracts with any county in the state, specifying the terms upon which such building or buildings may be erected and making such arrangements as it may deem wise for the maintenance of such buildings and the care and support of such county patients. In case the board of commissioners of any county, or the people of any county, do not decide to issue bonds for the erection of such hospital, but do decide to levy the special tax provided for in section seven thousand two hundred and eighty (7280) of the Consolidated Statutes, they may

make arrangements with the board having in charge the State Sanatorium at Montrose for the maintenance and care of tubercular patients of such county. (1917, c. 99, s. 6; 1919, c. 159, s. 3; 1921, c. 178; 1925, c. 313.)

Editor's Note.—By amendment Public Laws 1921, ch. 178 power was given the board of county commissioners to erect or maintain in their county a tuberculosis hospital. This power was repealed by Public Laws 1925, ch. 313 which also repealed a former provision for the use of the general funds of the county for maintenance of patients at Montrose.

Art. 3. Joint County General and Tuberculosis Hospitals

§ 7284(a). Authorization.—Any group of counties within the State of North Carolina shall have power and authority at any time hereafter to establish, erect, and maintain a hospital for the care and treatment of persons suffering with the disease known as tuberculosis, or a hospital for the general treatment of medical and surgical cases, one or both, as hereinafter provided in this article. (1925, c. 154, s. 1; 1927, c. 58, s. 1.)

Editor's Note.—This section was amended in 1927 so as to include hospitals for the general treatment of medical or surgical cases.

§ 7284(b). Vote on bond issue.—The boards of commissioners of each group of counties in North Carolina may, by majority vote of said boards or upon petition of five per cent (5%) of the freeholders of said counties, shall, after thirty days notice at the courthouse door of each of the counties and publication in one or more newspapers published in each of said counties, order an election to be held at the next general election, or order a special election to be held at such time as they may fix, to determine the will of the people in each of the counties in the group whether there shall be issued and sold bonds to an amount not to exceed two hundred thousand dollars ($200,000) for each county in the group, to bear interest at such rate as said boards may fix and to be payable, both principal and interest, when and where they may decide. The proceeds of said bonds to be used in securing lands and erecting or altering buildings and equipping same to be used as a hospital for the treatment of tuberculosis or as a general hospital for the treatment of medical or surgical cases, one or both as the case may be. If the majority of the qualified voters in each county of the group at said election shall vote in favor of the issuing of said bonds, then said bonds shall be issued and sold by said boards and a special tax shall be levied to pay the interest on said bonds and provide a sinking fund to pay said bonds at maturity. Said boards of commissioners are hereby also authorized to levy a special annual tax not to exceed five cents on the one hundred dollars valuation of property and fifteen cents on the poll to be used as a maintenance fund for said hospital for tuberculosis or general hospital for the treatment of medical and surgical cases, one or both, as the case may be. Provided that wherever there shall be donated to any group of counties within the State, land or buildings or equipment suitable and appropriate for the care and treatment of tuberculosis, in such cases the Boards of Commissioners of said counties are authorized and empowered to operate and maintain such hospital for the purposes donated, and shall have all power and rights conferred by this act without the necessity of an election as provided in this and the following sections. (1925, c. 154, s. 2; 1927, c. 58, s. 2.)

Editor's Note.—The provisions relating to general hospitals for the treatment of medical and surgical cases were inserted by the 1927 amendment. It was provided that the application of this amendment should be limited to the counties of Halifax, Martin and Edgecombe.

§ 7284(c). Ballots and boxes.—The county commissioners at the next general election or special election shall cause to be placed at each voting precinct in the counties of the group a ballot box marked "Joint County Hospital," and cause to be printed and distributed official ballots labeled "For Joint County Hospital," and official ballots labeled "Against Joint County Hospital," said election to be governed by the laws of the State. (1925, c. 154, s. 3; 1927, c. 58, s. 5.)

Editor's Note. — The 1927 amendment struck the word "tuberculosis" from before the word "hospital" wherever it appeared in the section.

§ 7284(d). Board of managers.—For each hospital so established there shall be elected a board of managers, consisting of two members from each county in the group and of one member at large. The two members from each county shall be elected by a majority vote of their respective board of county commissioners, and the one member at large shall be elected from any one of the counties in the group at a meeting of and by a majority vote of the combined boards of commissioners of the several counties in the group. The member at large shall hold office for two years and the other members shall hold office for four years where there are only two counties in the group, and for six years where there are more than two counties in the group, unless sooner removed for cause by the combined boards of commissioners of the several counties in the group: Provided, that the commissioners of all the counties of the group at a joint meeting shall determine the length of the term of office of the various members of the board of managers first elected; one member to serve one, two, three and four years, respectively, if there are only two counties in the group; one member to serve one, two, three, four, five and six years, respectively, if there are three counties in the group; one member to serve for one, two, three and four years, respectively, and two members to serve for five and six years, respectively, where there are four counties in the group; one member to serve for one year, and one for two years, and two members for three, four, five and six years, respectively, where there are five counties in the group: Provided, also, that any vacancies in such board may be filled by the boards of county commissioners for the unexpired term, unless the vacancy is for the office of member at large, in which case the vacancy shall be filled for the unexpired term by the commissioners of all the counties of the group at a joint meeting. In all counties having health officers, such health officers shall, in addition to the other members, be ex officio members of such board of managers. Women shall be eligible for election to such board of managers. The compensation for such

board shall be the same as that of the county commissioners. (1925, c. 154, s. 4.)

§ 7284(e). Authority of board.—Authority in regard to the purchase of lands, erection and maintenance of buildings, selection of officers, employees and attendants, formulation of rules and regulations for the admission and government of patients, and general conduct of the hospital, shall vest in the board of managers; that no one related by blood or marriage to any member of the board of managers shall be appointed to any office or position in connection with the hospital, except by unanimous vote of the board of managers; that all property, both real and personal, pertaining to such hospital shall be vested jointly in the counties of the group: Provided, however, that any donations, bequests, or devises made for the use of such hospital shall be held by the counties in the group in trust according to the terms of such donation, devise, or bequest. (1925, c. 154, s. 5.)

§ 7284(f). Purchasing property; charges.—The boards of county commissioners of the group, or the board of managers, according to the authority vested in them by the boards of county commissioners of the group or by this article, shall have power and authority to purchase property, both real and personal, to make contracts, to formulate, change, and alter rules and regulations for the admission and government of patients, and to do all things reasonably incidental or necessary to carry out the true intent and purpose of this article. Patients may be admitted and kept without charge or for such compensation as may be deemed just and proper in each particular case: Provided, that no person who is not a bona fide resident of the counties maintaining such hospital shall be kept for less than actual cost. (1925, c. 154, s. 6.)

§ 7284(1). Additional method of establishing; election.—The board of commissioners for each county in the State shall have power to cause to be held in their county an election wherein §§ 7284(1)-7284(7) shall be submitted to the qualified voters of said county for their approval or disapproval. Said election shall be in all respects as nearly as may be, held and conducted conformably to the rules for the election of members of the General Assembly. The said board of commissioners shall provide registration and polling books, and shall publish due notice of said election. They shall cause a new registration of voters to be made for said election, and shall publish due notice of the time and place for such registration to be made, and of the time when challenges of such registered voters may be made, all of which shall conform as near as may be, to the general laws regulating the election of members of the General Assembly. At the election those who are in favor of §§ 7284(1)-7284(7) and the issuance of bonds and the levying of taxes as herein provided shall vote a ticket on which shall be printed or written, or partly printed or partly written the words "For County Tubercular Hospital," and those who oppose §§ 7284(1)-7284(7) and said bonds and tax shall vote a ticket on which shall be printed or written, or partly printed or written the words "Against County Tubercular Hospital." If in said election a majority of the voters of said county registered for said election, vote for said county tubercular hospital, then §§ 7284(1)-7284(7) and the following provisions thereof, shall thenceforth be in full force and effect in said county; but if in said election a majority of the said registered voters shall not vote for said county tubercular hospital, then the provisions of §§ 7284(1)-7284(7) shall be in no further force and effect in said county. (1927, c. 208, s. 1.)

§ 7284(2). County commissioners to appoint trustees.—In the event said election shall have been carried in favor of said county tubercular hospital, the board of commissioners for the county in which election shall have been held shall within thirty days after a declaration of such result of such election, appoint a board of trustees for said county tubercular hospital, consisting of twelve residents of said county, three of whom shall be physicians regularly practicing in said county, and three others of said trustees shall be women. Said trustees shall be appointed in four classes, one class to serve for one year, another for two years, another for three years, and the other for four years; (thereafter as their successors are appointed or elected, the term of office of such successors, except unexpired vacancies, shall be for four years). The successors of such trustees shall be appointed by the chairman of the board of commissioners for said county, the county superintendent of health, the Clerk of the Superior Court of said county, and the mayor of the municipality constituting the county seat of said county acting jointly, and by a majority vote. Vacancies in the offices of such trustees shall be filled by the same body of public officers last mentioned. (1927, c. 208, s. 2.)

§ 7284(3). Meeting for qualification and organization.—These said trustees shall within ten days after their appointment, meet and qualify by taking the oath of civil officers, and organize their board by the election of one of their members as chairman, and one as secretary, and by the election of such other officers as may be necessary. The treasurer of the county for which said trustees are appointed shall be treasurer of the said board of trustees, and such treasurer shall receive and pay out all moneys under the control of said board as directed by it, but shall receive no compensation from said board, and no trustee shall receive any compensation whatsoever for services performed as such trustee. Said board of trustees shall make and adopt such by-laws, rules and regulations for their own guidance and the government of the said hospital, as it may deem proper, not inconsistent with this act. It shall have the control of the expenditure of all moneys collected to the credit of the hospital, including the proceeds from the sale of such bonds, hereinafter mentioned, and said board of trustees shall have the supervisions, care and custody of the grounds, buildings and rooms purchased, constructed, leased or set apart for the purposes of such hospital, and they may employ such assistants, including

a superintendent and matron and such other employees as they may deem necessary for the operation of said hospital, insofar as funds available for such purposes will permit. (1927, c. 208, s. 3.)

§ 7284(4). Counties to issue bonds.—The board of commissioners for any county in which this act shall have been approved as aforesaid shall issue bonds of said county in an amount not to exceed the principal sum of two hundred fifty thousand ($250,000.00) dollars, for the purpose of purchasing a site, constructing the necessary buildings, and equipping said hospital with the necessary equipment. Such bonds shall be payable at such time or times not to exceed forty years from the date thereof, and at such place or places and bear such rate of interest not to exceed six per cent per annum and be of such denominations as the board of commissioners for said county may in its discretion determine. Said bonds shall be sold by the said board of commissioners at public or private sale at not less than par, as said board may determine. Said bonds shall be signed by the chairman of the said board of commissioners, and bear the impressed seal of the said board, attested by the clerk of the said board; the interest coupons shall bear the lithographed or engraved facsimile of the signature of the said clerk of said board. The proceeds of the sale of said bonds as received, shall be at once deposited by the said board of commissioners with the treasurer of said county, to the credit of said board of trustees for said county tubercular hospital, the official name of said board of trustees shall be "Board of Trustees for the .....County Tubercular Hospital," the name of the county for which said board is appointed to be inserted in the blank space. (1927, c. 208, s. 4.)

§ 7284(5). Special tax for bonds.—The board of commissioners for any county issuing bonds under this act shall annually levy an ad valorem tax on the taxable property in such county sufficient to pay the interest on said bonds so issued, and provide a sinking fund for the payment of principal thereof, as the same may become due. Said board of commissioners shall further levy annually an additional tax not exceeding five cents on the dollar on taxable property in said county, for the purpose of providing funds sufficient when supplementing other income of said hospital, for the necessary maintenance and operation of said hospital. Said board of commissioners for such county shall also annually levy a sufficient tax to provide a sum equivalent to that expended out of moneys raised by taxes for the maintenance of said hospital, which funds so to be provided shall be disbursed by the board of commissioners for such county in the care of indigent residents of said county ill with diseases other than tuberculosis in other hospitals in such county. (1927, c. 208, s. 5.)

§ 7284(6). Hospital erected for benefit or residents.—The hospital established under §§ 7284(1)-7284(7), shall be for the benefit of the residents of the county in which it is situated who are or become sick with tuberculosis, but every such resident admitted to said hospital who is not a pauper, shall pay to such board of trustees of said hospital, or such other officers as it may designate, reasonable compensation for occupancy and attendance within said hospital, the amount thereof to be fixed by said board of trustees, and in the event a patient in said hospital is not able to pay in full, charges for treatment, but can pay some part thereof, arrangement may be made accordingly by said board of trustees in its discretion and as it deems right and just. (1927, c. 208, s. 6.)

§ 7284(7). Sections 7282(1) to 7282(7) cumulative of existing powers.—The powers conferred by §§ 7284(1)-7284(7) are conferred in addition to and not in substitution for the existing powers of counties. Any county may at its option proceed either under this act or under any other act conferring similar powers upon such county. (1927, c. 208, s. 7.)

Art. 4. Funds of Deceased Inmates

§ 7284(8). Applied to debts due by such inmates to such hospitals or institutions.—Whenever any funds shall be placed or deposited with the officials of any state hospital or other charitable institution by or for any patient or inmate thereof, and the person by or for whom such deposit is made dies while a patient or inmate of such state hospital or other charitable institution or who shall leave such institution and at the time of such death, or departure, such patient or inmate is indebted to said hospital or other charitable institution for care and maintenance while such patient or inmate, the board of directors or trustees of such state hospital or other charitable institution are hereby authorized, empowered and directed to apply such deposit, or so much thereof as may be necessary, and which may remain in their hands unclaimed for the space of three years after such death or departure on and in satisfaction of the indebtedness of such patient or inmate, to said state hospital or other charitable institution for said care and maintenance. If the whole of such amount so on deposit shall not be required or necessary for the payment in full of such indebtedness for such care and maintenance, the remainder shall continue to be held by said officials, and paid and applied as may be by law required. (1933, c. 352, s. 1.)

CHAPTER 120

PUBLIC PRINTING AND DEPARTMENT OF LABOR

Art. 1. Regulation of Public Printing

§ 7285. Public printing defined.—For the purposes of this chapter the term "Public Printing" shall be construed to mean all printing done directly for the state and paid for out of the general fund, and included in the following: All annual or biennial reports required to be made under laws that now or may hereafter exist, all blanks and blank books and office stationery required, and no more: Provided, that special bulletins and publications except for divisions of the government supported by state appropriations,

may be allowed by order of the printing commission. (1911, c. 211, s. 1.)

§ 7286. Repealed by Public Laws 1931, c. 312, s. 14.

Editor's Note.—The Act of 1931 abolished the printing commission established under this section. See § 7310(j).

§ 7286(a). Powers and duties under article vested in director of purchase and contract.—All powers, authority, and duties vested in and imposed upon the printing commission, the commissioner of labor and printing, the governor and council of state, and the attorney general under and by virtue of this article are hereby transferred to, vested in, and imposed upon the Division of purchase and contract and the director of purchase and contract, subject to the provisions of the act of the general assembly creating said division of purchase and contract [§§ 7502(b)-7502(q)], and the said article of the Consolidated Statutes and the several sections of the Consolidated Statutes included in said articles are hereby amended so as to effect said transfer of authorities and duties. (1931, c. 312, s. 15.)

See sec. 7502(c).

§ 7287. Contract for state printing and binding.—The printing commission shall contract for having all printing and binding done for the state upon the best possible terms for the state; and the commissioner of labor and printing shall superintend the same. In any contract which they may make, they may fix and determine the times for the delivery of the public and private laws, and the journals and documents of the general assembly, or any part thereof, according to their judgment and discretion. The person with whom such contract is made is designated in this chapter as the public printer. (Rev., s. 5092; 1901, cc. 280, 401, 667; 1893, c. 161; 1917, c. 126.)

Editor's Note.—The powers and duties under this article are now vested in the division and director of purchase and contract. See section 7286(a).

Public Printer Not a Constitutional Officer.—The Act of 1869-'70, chap. 43, repeals the act establishing the office of Public Printer; and the Public Printer as now provided for is not an officer within the meaning of the Constitution. Brown v. Turner, 70 N. C. 93.

Contract Must Be in Writing.—An acceptance of a bid for public printing does not become a contract until reduced to writing. Capital Printing Co. v. Hocy, 124 N. C. 767, 33 S. E. 160.

Contract Covers All Departments. — A person who contracts for the state printing is entitled to all the printing and binding required by the State in its several departments. Stewart v. State, 118 N. C. 624, 24 S. E. 114.

Not Applicable to Supreme Court.—This section does not apply to printing, for the Supreme Court as that is provided for in section 7296. In re Printing of the Supreme Court Reports, 153 N. C. 649, 70 S. E. 620.

§ 7288. Bond of public printer.—Any person to whom may be awarded the public printing and binding shall give bond, with approved surety, payable to the state of North Carolina, in the sum of five thousand dollars, conditioned for the faithful performance of his duties and undertakings under his contract. The surety herein required shall justify before some person authorized to administer oaths. (Rev., s. 292; Code, s. 3621; 1899, c. 250, s. 2.)

§ 7289. Public printer failing to perform contract; course pursued.—If any person who has contracted to do the public printing for the state shall fail to perform his contract according to the terms thereof, the governor, council of state, attorney-general, and commissioner of labor and printing shall procure the public printing to be done by other parties, and the attorney-general shall institute suit in the superior court of Wake county in the name of the state to recover of the public printer and his bond any damages for failure to perform the contract. (Rev., s. 5094; 1899, c. 724; 1901, cc. 280, 401, 667.)

See editor's note under § 7287.

§ 7290. Work to be examined and approved; accounts audited.—The commissioner of labor and printing, aided by the assistant commissioner, shall carefully examine all printing and binding done for the state, or any department thereof, by the public printer, and shall certify that the workmanship of the printing and binding is properly executed and that the accounts rendered by the public printer for the same are accurate and just before the auditor shall issue any warrant for the payment thereof. Such accounts shall not be approved by the commissioner nor audited by the state auditor oftener than forty-eight times in a year. (Rev., s. 5095; Code, ss. 3622, 3623; 1871-2, c. 180, s. 4; 1885, c. 331; 1899, c. 373, s. 5, c. 622.)

See editor's note under § 7287.

Recovery of Money Wrongfully Paid.—The examination of the printing is only a prerequisite to payment of the account by the auditor and is not the action of a special tribunal provided for passing upon such accounts. The act of examining is not res judicata, and any money paid in excess of what is justly due for public printing may be recovered. Worth v. Stewart, 122 N. C. 258, 29 S. E. 579.

Application to Supreme Court Reports. — The Supreme Court Reports are a part of the public printing, and the Commissioner of Labor and Printing is charged with the same duty of furnishing paper and stationary therefor, and in the examination and superintendence thereof, as is required for the other public printing. See section 7296. In re Printing of the Supreme Court Reports, 153 N. C. 649, 70 S. E. 620.

§ 7291. Paper and stationery for public printing.—The commissioner of labor and printing shall purchase for the use of the state the paper and stationery used for public printing. (Rev., s. 5095.)

See editor's note under § 7287.

§ 7292. Binding of laws regulated.—The public laws shall be bound separately. The public-local and private laws shall be bound together in one volume, or in two volumes, according to the size of such volumes, in the discretion of the printing commission. Some of the volumes shall be bound in sheep or buckram and the residue in half-binding. The number to be bound in each shall be determined by the officials authorized by this chapter to contract for state printing and binding. (Rev., s. 5096; Code, s. 3633; 1893, c. 146; 1919, c. 314, s. 4.)

§ 7293. Size and style of state publications.—The printing commission shall regulate the sizes of books and publications and the general style of publication, the style of type and the paper to be used, to the end that a uniform standard may be established for state publications. (1911, c. 211, s. 8.)

See editor's note under § 7287.

§ 7294. Reports and publications; conciseness.—The reports and publications of every kind now authorized or required to be printed by the several state departments and state institutions shall be as compact and concise as is consistent with an intelligent understanding of the work of the department. The details of the work of the department shall not be printed when not necessary to an intelligent understanding of the work of the departments, but totals and results shall be tabulated and printed in said reports. It shall be the duty of the governor and council of state, the attorney-general and the commissioner of labor and printing to determine what details of the work of any departments or state institution shall be printed. The details shall be kept on file and subject to the inspection of the public. (1911, c. 211, s. 2.)

See editor's note under § 7287.

§ 7295. Laws and resolutions; number printed.—The printing commission shall have power to determine the number of public, public-local and private laws and the resolutions to be printed not to exceed, however, the number provided in this chapter. Of the public laws there shall be printed eight thousand and five hundred copies, and of the public-local and private laws one thousand and fifty copies. All of which copies shall be delivered to the secretary of state. (Rev., s. 5097; Code, s. 3632; 1893, c. 146, s. 2; 1897, c. 135; 1901, c. 401, s. 2; 1919, c. 314, s. 4.)

See editor's note under § 7287.

§ 7296. Supreme court reports; contract for printing.—The Supreme Court is authorized to contract from time to time for the printing of its reports; to select a printer for the same and to prescribe such terms of contract as will insure, under the supervision of the Court, the prompt issue of the reports as soon as practicable after a sufficient number of opinions are filed. Such contract shall be made after consultation with the State Printing Commission, or such other authority or commission as may hereafter perform the duties now performed by the State Printing Commission, after a comparison of prices for similar work in other states to such an extent as may be practicable. (Rev. s. 5003; 1905, c. 400; 1929, c. 39, s. 1.)

See §§ 7286(a), 7502(c).

In General.—Upon the Supreme Court devolves the duty only of selecting the printer and directing the style and general execution of the work, the price of which is restricted to that allowed and fixed by the committee. See section 7290. In re Printing of the Supreme Court Reports, 153 N. C. 649, 70 S. E. 620.

§ 7297. Supreme court reports; number printed.—Of the supreme court reports there shall be printed and bound in full sheep or buckram as many copies, not less than seven hundred and fifty, as in the opinion of the attorney-general and secretary of state may be sufficient to supply the demand. All such copies shall be delivered to the secretary of state. Advance sheets of the supreme court reports are hereby authorized to be printed, and to be sold, under the rules of the supreme court. (Rev., s. 5097; Code, s. 3632; 1893, c. 146, s. 2; 1897, c. 135; 1901, c. 401, s. 2; 1919, c. 314, s. 4; 1923, c. 25.)

Editor's Note.—By amendment, Public Laws 1923, c. 234 s. 1, the last sentence, providing for the printing and sale of advance sheets of the Supreme Court, was added.

§ 7298. Journals; number printed and bound.—Of each the senate and house journals there shall be printed four hundred and fifty copies in separate volumes, bound in sheep or buckram; all of which copies shall be delivered to the secretary of state. (Rev., s. 5099; Code, s. 3636; 1881, c. 16; 1872-3, c. 45, s. 10; 1919, c. 314, s. 4.)

§ 7299. Journals; preparation and filing by clerks of houses.—It shall be the duty of the principal clerks of the two houses of the general assembly to hasten the preparation of their journals for the public printer, so that in no case at any time shall the journal of either house of any one day's proceedings remain unprepared for the printer by the clerk for a longer period than six days after its approval, and such clerks shall, immediately after the preparation of any and every day's proceedings of their respective houses, send the same to the office of the secretary of state. (Rev., s. 5100; Code, ss. 3627, 3628; 1872-3, c. 45, ss. 2, 3.)

§ 7300. Public documents.—Of the reports of state officers, constituting a part of the public documents, the secretary of state shall be and is hereby required to file and keep in his office one copy of each, and the state librarian shall likewise be required to keep five copies of each, in the best binding in which any such report is issued; and these files shall take the place of these same reports as have heretofore been bound in the volumes known as the "Public Documents." The volumes known as the public documents shall contain only the reports of the various state institutions that are aided or sustained by special appropriations. Of these, there shall be bound not to exceed four hundred copies, one copy of which shall be furnished to each of the members and officers of the general assembly, and to the various state officers, and one copy to each of the state institutions, and one copy to the secretary of state, and five copies to the state librarian for filing. The remainder, if any, shall be delivered to the secretary of state. (Rev., s. 5101; 1911, c. 211, s. 7.)

§ 7301. Bills and legislative documents.—The bills and all other documents ordered to be printed by either branch of the general assembly shall be printed in octavo form without a title page. But the first page shall be printed as follows: At the head of the page there shall be four rules, one double, two single, and one parallel, extending across the page. Between said rules shall be printed, first, the name of the house where the bill originated, with the year and date of the session, the name of the introducer, and the name of the printer; after leaving a space the width of two-line pica, a synopsis, or caption of the bill, or report of the committee, or whatever it may be, shall be set up with pica capitals. After such heading, the said document to follow immediately, commencing with a paragraph, allowing a space the width of small pica between the heading and commencement of the same. (Rev., s. 5102; Code, s. 3644; R. C., c. 93, s. 3.)

§ 7302. Departmental reports to legislature; number printed. — Not to exceed eight hundred copies each of the annual or biennial reports of

the several departments of the state government shall be printed, a copy of each of these to be furnished to each of the members and officers of the general assembly, one copy to each state officer, and five copies to the state librarian for filing, the remaining copies to be distributed in the discretion of the officer making such report: Provided, that the printing commission may permit the publication of a greater number of reports if in their judgment the same are necessary. (1911, c. 211, s. 2.)

See editor's note under § 7287.

§ 7303. Reports and blanks for state offices.—The governor, secretary of state, auditor, treasurer, superintendent of public instruction, attorney-general, insurance commissioner and adjutant general may have printed and prepared for their several offices such blank-books, blank forms, and other necessary printing as may be suitable and proper to enable them to discharge their official duties. They shall also be allowed all necessary postage, telephone, telegraph, post-office box, and express charges; and the auditor and treasurer shall each have two hundred copies of their respective reports printed for the use of their offices. The printing herein authorized shall be done by the public printer according to the rates prescribed by law; and charges for all items shall be approved by the commissioner of labor and printing. (Rev., s. 5103; Code, s. 3646; 1873-4, c. 174; R. C., c. 93, s. 10; 1891, c. 352; 1919, c. 16.)

See editor's note under § 7287.

§ 7304. Agricultural department, printing for.—The North Carolina agricultural experiment station is allowed to have the bulletins of the agricultural department printed as other state printing and paid for out of the general fund to an amount not to exceed two thousand five hundred dollars for each biennial period, the first biennial period ending on the first day of December, nineteen hundred and sixteen. (1915, c. 209.)

§ 7305. Department of public instruction, printing for.—The department of the superintendent of public instruction is hereby allowed to expend for the necessary printing of its department a sum not to exceed thirty-five thousand dollars for each biennial period, the first period beginning on the first day of July, one thousand nine hundred and twenty-three, and ending June thirtieth, one thousand nine hundred and twenty-five. (1915, c. 209; 1923, c. 234, s. 1.)

Editor's Note.—By amendment, Public Laws 1923, c. 234, s. 1, the sum allowed for each biennial period was raised from eighteen thousand dollars to thirty-five thousand dollars. The former provision for the first period to end on the first day of December 1916, was replaced by the provision for it to begin the first day of July 1923 and end June thirtieth 1925.

§ 7306. State institutions, printing of reports of.—The following institutions, and all other sustained by appropriations from the state treasury, are required to furnish to the commissioner of labor and printing, not later than December fifteenth of each biennial period, duplicates of the reports required to be furnished to the governor for his use and for the records of his office, for inclusion in the public documents; not to exceed two hundred copies of such reports may be furnished to the executive head of such institutions: The university of North Carolina, Chapel Hill; the North Carolina state college of agriculture and engineering, Raleigh; the North Carolina agricultural experiment station, Raleigh; the negro agricultural and technical college of North Carolina, Greensboro; the state school for the blind and the deaf, Raleigh; the Cullowhee normal and industrial school, Painter; the Appalachain training school, Boone; the Nortn Carolina school for the deaf, Morganton; the central hospital, Raleigh; the state hospital, Morganton; the state hospital (colored) Goldsboro; the state prison, Raleigh; the East Carolina teachers' college Greenville; the state board of health, including the bureau of vital statistics, the state laboratory of hygiene, and the North Carolina sanatorium for the treatment of tuberculosis, Sanatorium; Provided, that these reports shall carry only such matters as are essential to a proper understanding of the work and purposes of the institution, together with a financial statement covering the previous biennial period ending December first. (1915, c. 62, s. 5; Ex. Sess. 1921, c. 27.)

See editor's note under § 7287.

Editor's Note.—By amendment, Ex. Sess. 1921 c. 27 the name of The East Carolina Teachers' Training School was changed to East Carolina Teachers' College.

§ 7307. Printer's duties during session of general assembly.—It shall be the duty of the printer aforesaid, in person or by agent, to call on the secretary of state, or his chief clerk at the office of said secretary daily, within office hours, and apply for such certified copies of the acts and resolutions of said assembly, and for such proceedings of the two houses as have been filed by the clerks aforesaid in the office of said secretary; and these applications shall be continued daily by the public printer until all of the acts, resolutions, and proceedings aforesaid of the session have been received by him. (Rev., s. 5105; Code, s. 3629; 1872-3, c. 45, s. 4.)

§ 7308. How amount of printing for state departments settled. — Whenever in the judgment of the commissioner of labor and printing any requisition received by him from any state office or department goes beyond the intent of the laws allowing printing, he may decline to allow the expenditure required to cover the cost of printing or other similar matter required. The officer or department making the requisition shall have the right of appeal from the decision of the commissioner of labor and printing to the printing commission, whose decision shall be final. A full account of such appeal shall be filed with the joint committee on printing of the general assembly at the succeeding session. (1911, c. 211, s. 8; 1915, c. 61.)

See editor's note under § 7287.

§ 7308(a). Printing for state departments. — All printing for each department of the State, except the General Assembly, the Supreme Court, the State Highway Commission, the automobile License Bureau, the Department of Agriculture, and such other departments or divisions of departments operating on special funds, shall be furnished by the Commissioner of Labor and Printing, and paid for by him by warrants

drawn by the Auditor upon the State Treasury out of the appropriation made for public printing: Provided, that the printing for the State Highway Commission, the Automobile License Bureau, the Department of Agriculture, and other departments and divisions of such departments operating on special funds be paid for out of such funds; and it is further provided, that the printing for the General Assembly and the Supreme Court be paid for as now provided by law. (1925, c. 247, s. 1.)

See editor's note under § 7287.

§ 7308(b). How supplies furnished; requisition. —Such printing and supplies shall be furnished to each department upon a requisition, in writing, therefor, which shall be made out and signed by the department or person requiring the same, on forms prescribed and furnished by the Commissioner of Labor and Printing, and in such requisition such department, or person, shall plainly state the amount and kind of printing and supplies desired, and, as far as may be possible, shall estimate the amount of the same needed, as a six months supply, and such requisition shall be filed with the Commissioner of Labor and Printing at least sixty days before the printing and supplies asked for are needed, and the said requisition shall be so filled, and a copy thereof furnished by the Commissioner of Labor and Printing to the Budget Bureau. (1925, c. 134, s. 2.)

See editor's note under § 7287.

§ 7308(c). Allocation of appropriation. — The said Commissioner of Labor and Printing and the Budget Bureau, in consultation with the heads of the several departments of State, shall, immediately upon the adjournment of each regular session of the General Assembly, allocate to the several departments the appropriations for public printing. (1925, c. 134, s. 3.)

See editor's note under § 7287.

§ 7308(d). Paper and form of printing. — The Commissioner of Labor and Printing and the Budget Bureau, in allocating such funds and in furnishing such printing and stationery supplies, shall use their best efforts to conserve the interest of the State, and to that end shall have authority and power to use such paper and such standard forms of printing, so that the best interest of the State may be promoted, and its funds economically conserved. (1925, c. 134, s. 4.)

See editor's note under § 7287.

§ 7308(e). Accounts of requisitions.—The said Commissioner of Labor and Printing shall keep an account in his office in which each department shall be credited with its allocation for printing and stationery supplies and shall be charged with the amount of each requisition therefor, when filled, and immediately upon the filling of each requisition such department shall be advised by the Commissioner of Labor and Printing as to the status of such account, and no requisition shall be filled, or allowed, in whole or in part, so as to exceed said allotment. (1925, c. 134, s. 5.)

See editor's note under § 7287.

§ 7308(f). Application of preceding sections.— Sections 7308(a) to 7308(e) shall apply to all legislative appropriations for public printing made by the regular session of the General Assembly one thousand nine hundred and twenty-five, and thereafter, and the allocations or allotments of the same shall be made so as to allot, immediately after the adjournment of the present session of the General Assembly, the said public printing appropriation, and to the end that the requisition of the first six months of the next fiscal biennium shall be made and filled hereunder. The said sections shall not apply to the needs of the several departments for printing and stationery supplies for the period ending June thirtieth, one thousand nine hundred twenty-five. The said sections shall not apply to issuance and the printing of the current volumes of the Supreme Court reports and the sheets containing the opinions of the Supreme Court, which shall remain under the supervision of the Chief Justice of the Supreme Court. (1295, c. 134, ss. 6, 6a.)

Art. 2. Department of Labor

§ 7309. Department of labor established. — A Department of Labor is hereby created and established. The duties of said department shall be exercised and discharged under the supervision and direction of a commissioner, to be known as the Commissioner of Labor. (Rev., s. 3309; 1919, c. 314, s. 4; 1931, c. 312, s. 1.)

Editor's Note.—Public Laws 1931, c. 312, effected a reorganization of the Department of Labor and Printing, henceforth to be known as the Department of Labor. Sec. 17 of the act provided: "This act shall be in force and effect from and after April first, one thousand nine hundred and thirty-one: Provided, that the Child Welfare Commission shall continue operating under existing laws until June thirtieth in order to complete the year's program of inspections, use printed material and complete statistical studies, but the Executive Secretary, the Commissioner of Labor, with the approval of the Governor, shall proceed to complete plans for reorganization of Department of Labor to be made effective promptly July first, one thousand nine hundred and thirty-one."

In 9 N. C. Law Rev. 413, 414, it is said: "There are some disappointing features and omissions in connection with the plan of reorganization. In the first place, the writer is of the opinion that the Commissioner of Labor should be appointed by the Governor rather than elected by popular vote. This office calls for an expert, and there is little reason to think that the person who is likely to be elected will possess the necessary qualifications. Secondly, there is complete absence of advisory boards to confer with and advise the Commissioner or heads of any of the several divisions. There seems little justification for burdening the Division of Standards and Inspections with the duty of collecting information and statistics concerning water-power, agriculture, dairying, etc. To be sure, these matters are important, and have a bearing, directly or indirectly, on the welfare of the working classes of the State. But so does almost any other aspect of economic activity that could be mentioned. Such inquiry properly belongs to other departments, and should not be required of a department that is going to have its hands full with matters with which it should properly concern itself. The practice of making the labor department a catch-all for all sorts of duties which other departments should, but do not do, is one that is altogether too common, and one that is not conducive to effective administration. Finally, the absence of machinery of any sort for the settlement of industrial disputes is a matter of some surprise. In view of the recent experiences in Gastonia, Marion, and elsewhere within the State it is almost incomprehensible. While the presence of such machinery by no means guarantees that disputes will be settled promptly and effectively, or at all, for that matter, the experience of other states which have such machinery, with competent men administering it, would seem to fully warrant its establishment. This omission, together with the above duties imposed upon the Division of Statistics and Inspections which are somewhat foreign to its primary purpose, seem to the writer the

most serious defects in the plan of the reorganization which in most other respects is fairly satisfactory."

§ 7310. Election of Commissioner; term; Vacancy. — The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. His term of office shall be four years, and he shall receive a salary of four thousand, five hundred dollars per annum. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; 1931, c. 312, s. 2.)

Editor's Note.—The Act of 1931 amended this section by adding the provisions as to salary and filling vacancies, and omitting a former provision as to the assistant commissioner. Sec. 3 of the Act provided that nothing in the above section "shall be construed as affecting or in any way interfering with the term of office of the present Commissioner of Labor and Printing, who shall hereafter be known as the Commissioner of Labor and who shall hold office until the expiration of his present term, to which he was elected, and until his successor has been elected and qualified" under the provisions of the above section.

As to criticism of election by the people, see editor's note to sec. 7309.

§ 7310(a). Divisions of department; commissioner; administrative officers.—The Department of Labor shall consist of the following officers, divisions and sections:

A Commissioner of Labor.

A Division of Workmen's Compensation, as a separate and distinct unit, the officers of the Industrial Commission or the Division of Workmen's Compensation acting separately and independently of the other officers, divisions and sections herein provided for.

A Division of Standards and Inspections.

A Division of Statistics.

Each division, except the Division of Workmen's Compensation, shall be in charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor, the head of the division concerned, and with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions, except the Industrial Commission, shall be appointed by the Commissioner of Labor with the approval of the Governor, and he shall fix their compensation, subject to the approval of the Salary and Wage Commission, or such other agency of the government as shall succeed to the powers and duties of the Salary and Wage Commission. The Commission of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the departments except the Division of Workmen's Compensation, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the department. (1931, c. 312, s. 4.)

§ 7310(b). Authority, powers and duties of commissioner.—The commissioner of labor shall be the executive and administrative head of the department of labor. He shall be vested with all of the authority and powers and charged with the performance of all the duties vested in and imposed upon the commissioner of labor and printing and the assistant commissioner under sections 7312(a) to 7312(x).

In addition to the other powers and duties conferred upon the commissioner of labor by this article, the said commissioner shall have authority and be charged with the duty:

(a) To appoint and assign to duty such clerks, stenographers, and other employers in the various divisions of the department, with approval of said director of division as may be necessary to perform the work of the department, and fix their compensation, subject to the approval of the salary and wage commission or such other agency of government as shall succeed to the powers and duties of the salary and wage commission. The commissioner of labor may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one division assistance in the work of another division, as he may consider necessary and advisable: Provided, however, the provisions of this subsection shall not apply to the industrial commission, or the division of workmen's compensation.

(b) To make such rules and regulations with reference to the work of the department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said commissioner and the work of the department; such rules and regulations to be made subject to the approval of the governor.

(c) The commissioner of labor shall have power to take and preserve testimony, examine witnesses, administer oaths, and under proper restriction enter any public institution of the state, any factory, store, workshop, laundry, public eating-house or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within thirty days of the receipt of said list of questions.

(d) He shall secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating-places, and commercial institutions in the state and to aid him in the work shall have power to appoint factory inspectors and other assistants. The duties of such inspectors and other assistants shall be prescribed by the commissioner of labor.

(e) The commissioner of labor, his assistants and factory inspectors, shall visit and inspect at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating-places, and commercial institutions in the state, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.

(f) It shall be the duty of the commissioner of labor to enforce the provisions of this section, and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments,

mills, workshops, public eating-houses, and commercial institutions in this state before any justice of the peace or court of competent jurisdiction.

(g) It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions. The commissioner of labor shall furnish the printed form of such notice upon request.

(h) It shall be the duty of the solicitor of the proper district or the prosecuting attorney of any city or county court, upon the request of the commissioner of labor, or any of his assistants or deputies, to prosecute any violation of law, which is made the duty of the said commissioner of labor to enforce. (1931, c. 312, ss. 5, 6; 1933, s. 24.)

See 11 N. C. Law Rev., 234, for changes made in this section by Public Laws 1933.

Editor's Note.—Public Laws of 1933, c. 244, added subsections (c) to (h) of this section as they now appear.

§ 7310(c). Annual report to Governor; recommendation as to legislation needed. — The commissioner of labor shall annually, on or before the first day of January, file with the governor a report covering the activities of the department, and the report so made on or before January first of the years in which the general assembly shall be in session shall be accompanied by recommendations of the commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the commissioner may deem advisable. The report of the commissioner of labor shall be printed and distributed in such manner and form as the director of the budget shall authorize. (1931, c. 312, s. 7.)

§ 7310(d). Statistical report to Governor; no publication of information given by employers.— It shall be the duty of the commissioner of labor to collect in the manner herein provided for, and to assort, systematize, and present to the governor as a part of the report provided for in section 7310(c), statistical details relating to all divisions of labor in the State, and particularly concerning the following: The extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

§ 7310(e). Power of commissioner to compel the giving of such information; refusal as contempt. — The commissioner of labor, or his authorized representative, for the purpose of securing the statistical details referred to in section 7310(d), shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the commissioner of labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the commissioner of labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)

§ 7310(f). Employers required to make statistical report to Commissioner; refusal as contempt.—It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the department, upon blanks furnished by said department, such reports and returns as the said department may require, for the purpose of compiling such labor statistics as are authorized by this article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any person, firm, or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the commissioner or by any representative of the department authorized by him, to order the person, firm, or corporation to show cause why he or it should not comply with the provisions of this section. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 10.)

§ 7310(g). Division of workmen's compensation.—The North Carolina industrial commission, created under the provisions of the workmen's compensation act [sections 8081(h)-8081(ffff)], is hereby transferred to the department of labor as one of its integral units. The powers, duties, and personnel of the said industrial commission shall continue as provided for in the workmen's compensation act, except and: Provided, however, that such adjustments shall be made in connection with the statistical work and the work of inspection of said industrial commission and the statistical work and work of inspection of other divisions of the department of labor as the commissioner of labor, with the advice of the industrial commission and of the heads of the divisions directly concerned, may, with the approval of the Governor, prescribe, for the purpose of facilitat-

ing, expediting, and improving the work of the department as a whole. (1931, c. 312, s. 11.)

§ 7310(h). Division of Standards and Inspection.—(a) The Division of Standards and Inspection shall succeed to and is hereby vested with all the duties, powers, purposes, responsibilities and jurisdiction heretofore vested in the North Carolina Child Welfare Commission under article one, chapter ninety, of the Consolidated Statutes, and said article and the several sections of the Consolidated Statutes included in said article are hereby amended to the extent necessary to make said transfer of duties, power, purposes, responsibilities and jurisdiction effective and to carry out the provisions, purposes and intent of this act. The organization and personnel of the Child Welfare Commission shall be continued subject to such changes therein as shall be made by the Commissioner of Labor, and the Director of said Division, with the approval of the Governor. Transfer of duties and power shall not, however, in any degree affect the validity of the rules and regulations heretofore adopted by said Child Welfare Commission, but the same shall remain in force and effect and be administered by said Division of Standards and Inspections. The Director of said Division, together with the Commissioner of Labor, with approval of the Governor, shall have authority to amend or abolish old rules and make such new rules and regulations as they may deem necessary not inconsistent with this act or existing law.

(b) To make studies and investigations of special problems connected with the labor of women and children, and to create the necessary organization, and to appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor, with relation to the enforcement of laws, rules, and regulations governing the employment of women and children.

(c) To report annually to the Commissioner of Labor the activities of the division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children.

(d) Shall also collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water-powers, developed and undeveloped, in this State; also concerning farm lands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as he may deem to be of interest and benefit to the public, and shall also perform the duties of mine inspector as prescribed in the chapter entitled Mines.

(e) The chief administrative officer of the Division of Standards and Inspection shall be known as the director of division. It shall be his duty, under the direction and supervision of the Commissioner of Labor, under rules and regulations to be adopted by the Department as herein provided, to make or cause to be made all necessary inspections to see that all laws, rules, and regulations concerning the safety and well-being of labor are promptly and effectively carried out.

(f) It shall further be the duty of the Division of Standards and Inspection to conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State. The findings of such investigations, with the approval of the Commissioner of Labor and the Governor and the coöperation of the chief administrative officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection.

(g) The division of standards and inspection shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12, c. 426; 1935, c. 131.)

Editor's Note.—Subsection (g) was added by the 1935 amendment.

§ 7310(i). Division of Statistics.—The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in section 7310(d). (1931, c. 312, s. 13.)

§ 7310(j). Abolition of commissions. — The Printing Commission, established under section 7286, Consolidated Statutes, one thousand nine hundred and nineteen, and the State Child Welfare Commission, established under section 5031 of the Consolidated Statutes, one thousand nine hundred and nineteen, are hereby abolished. (1931, c. 312, s. 14.)

§ 7311. Commissioner to collect information.—The commissioners shall collect such information and statistics as he may deem advisable in connection with the work of his department. (Rev., s. 3910; 1897, c. 251; 1899, c. 373, ss. 3. 4; 1899, c. 622, ss. 1, 2; 1901, c. 280, s. 2; 1901, c. 401, s. 2; 1927, c. 217, s. 6.)

Editor's Note.—Prior to the amendment of this section by Public Laws 1927 c. 217, s. 6 there was a provision for aid by the assistant commissioner in collecting certain specified information besides the power to collect such information as he deemed advisable. The former law enumerated a number of things on which the commissioner should collect statistics.

§ 7312. Report of commissioner.—The commissioners shall make a full report to the Governor

as other State officers are required to do, embodying therein such recommendations as he may deem calculated to promote the efficiency. (Rev., s. 3911; 1899, c. 373, s. 6; 1927, c. 217, s. 6.)

Editor's Note.—By amendment, Public Laws 1927 c. 217, s. 7 there was omitted a former provision for printing and paying for reports that were to be sent to every newspaper, state and county officer, member of the general assembly, labor organization, and citizen that applied for a copy within the state.

Art. 2A. Board of Boiler Rules and Bureau of Boiler Inspection

§ 7312(1) Board of boiler rules created; members, appointment; and qualifications; terms of office; vacancies; meetings.—There is hereby created the North Carolina board of boiler rules consisting of five members, of whom four shall be appointed to the board by the governor, one for a term of one year, one for a term of two years, one for a term of three years and one for a term of four years. At the expiration of their respective terms of office, their successors shall be appointed for terms of four years each. Upon the death or incapacity of any member, the vacancy for the remainder of the term shall be filled with a representative of the same class. Of these four appointed members, one shall be a representative of the owners and users of steam boilers within the State of North Carolina, one a representative of the boiler manufacturers or a boiler maker who has had not less than five years practical experience as a boilermaker within the State of North Carolina, one a representative of a boiler inspection and insurance company licensed to do business within the State of North Carolina, and one a representative of the operating steam engineers in the State of North Carolina. The fifth member shall be the commissioner of labor, who shall be chairman of the board. The board shall meet at least twice yearly at the state capitol or other place designated by the board. (1935, c. 326, s. 1.)

§ 7312(2). Formulation of rules and regulations.—The board shall formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the society. (1935, c. 326, s. 1.)

§ 7312(3). Approval of rules and regulations by governor. — The rules and regulations formulated by the board of boiler rules shall become effective upon approval by the governor, except that rules applying to the construction of new boilers shall not become effective to prevent the installation of such new boilers until six months after approval by the governor. Changes in the rules which would raise the standards governing the methods of construction of new boilers or the quality of material used in them shall not become effective until six months after approval by the governor. (1935, c. 326, s. 2.)

§ 7312(4). Appropriation for printing and distribution; pay and expenses.—A sum not exceeding five hundred dollars ($500.00) shall immediately be allotted from the state emergency fund to the North Carolina board of boiler rules for the printing and distribution of the rules promulgated by the said board and to cover expenses incidental to the preparation thereof, and said sum shall be repaid out of the fees collected by the said board of boiler rules to said emergency fund within a period of twelve months after the said allocation has been made. The members of the board of boiler rules, exclusive of the chairman thereof, shall serve without salary and shall receive their actual expenses, not to exceed their actual railroad fare plus four dollars ($4.00) per day each, for not to exceed twenty days in any year while in the performance of their duties as members of the board, to be paid in the same manner as in case of other state officers. The chairman of the board of boiler rules shall countersign all vouchers for expenditures under this section. (1935, c. 326, s. 3.)

§ 7312(5). Boilers now in use unaffected. — This article shall not be construed as in any way preventing the use or sale of steam boilers in this State which shall have been installed or in use in this State prior to the taking effect of this article and which shall have been made to conform to the rules and regulations of the board of boiler rules governing existing installations as provided in section 7312(13). (1935, c. 326, s. 4.)

§ 7312(6). Commissioner of labor empowered to appoint chief inspector; qualifications; salary.—After the passage of this article and at any time thereafter that the office may become vacant, the commissioner of labor shall appoint, and may remove for cause when so appointed, a citizen of this State who shall have had at the time of such appointment not less than five years' practical experience with steam boilers as a steam engineer, boilermaker or boiler inspector, or who has passed the same kind of examination as that prescribed for deputy or special inspectors in section 7312(10), to be chief inspector for a term of two years or until his successor shall have been appointed, at an annual salary of two thousand dollars ($2,000.00). (1935, c. 326, s. 5.)

§ 7312(7). Certain boilers excepted.—This article shall not apply to boilers under federal control or to stationary boilers used by railroads which are inspected regularly by competent inspectors, or to boilers used solely for propelling motor road vehicles; or to boilers of steam fire engines brought into the State for temporary use in times of emergency to check conflagrations; or to portable boilers used for agricultural purposes only or for pumping or drilling in the open field for water, gas or coal, gold, talc or other minerals and metals; or to steam heating boilers which carry pressures not exceeding fifteen pounds per square inch, built in accordance with the boiler code of the American Society of Mechanical Engineers. This article shall not apply to any boiler used for heating purposes. (1935, c. 326, s. 6.)

§ 7312(8). Powers of commissioner of labor; creation of bureau of boiler inspection. — The commissioner of labor is hereby charged, directed and empowered:

(a) To set up in the division of standards and inspections of the department of labor, a bureau

of boiler inspection to be supervised by the chief inspector provided for in section 7312(6) and one or more deputy inspectors of boilers, who shall have passed the examination provided for in section 7312(10), at a salary not to exceed the salary of a senior factory inspector, and such office help as may be necessary.

(b) To have free access for himself and his chief boiler inspector and deputies, during reasonable hours, to any premises in the State where a steam boiler is built or where a steam boiler or power plant apparatus is being installed or operated, for the purpose of ascertaining whether such boiler is built, installed and operated in accordance with the provisions of this article.

(c) To prosecute all violators of the provisions of this article.

(d) To issue, suspend and revoke inspection certificates allowing steam boilers to be operated, as provided in this article.

(e) To enforce the laws of the State governing the use of steam boilers and to enforce the rules and regulations of the board of boiler rules.

(f) To keep a complete record of the type, dimensions, age, condition, pressure allowed upon, location and date of the last inspection of all steam boilers to which this article applies.

(g) To publish and distribute among boiler manufacturers and others requesting them, copies of the rules and regulations adopted by the board of boiler rules. (1935, c. 326, s. 7.)

§ 7312(9). Provision for special inspectors; examination required. — In addition to the deputy boiler inspectors authorized by section 7312(8), the commissioner of labor shall, upon the request of any company authorized to insure against loss from explosion of boilers in this State, issue to any boiler inspectors of said company commissions as special inspectors: Provided, that each such inspector before receiving his commission shall pass satisfactorily the examination provided for in section 7312(10), or, in lieu of such examination, shall hold a certificate of competency as an inspector of steam boilers for a state that has a standard of examination equal to that of the State of North Carolina, or a certificate from the national board of boiler and pressure vessel inspectors. The fee for such commission shall be one dollar ($1.00) and one dollar ($1.00) for each annual renewal thereof. Such special inspectors shall receive no salary from, nor shall any of their expenses be paid by the State, and the continuance of a special inspector's commission shall be conditioned upon his continuing in the employ of a boiler inspection and insurance company duly authorized as aforesaid and upon his maintenance of the standards imposed by this article. Such special inspectors shall inspect all steam boilers insured by their respective companies, and the owners of such insured boilers shall be exempt from the payment of the fees provided for in section 7312(15). Each company employing such special inspectors shall, within thirty days following each annual internal inspection made by such inspectors, file a report of such inspection with the commissioner of labor. (1935, c. 326, s. 8.)

§ 7312(10). Examination for inspectors; revocation of commission. — Examination for deputy or special inspectors shall be given by the board of boiler rules or by at least two examiners to be appointed by said board and must be written or part written and part oral recorded in writing and must be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and must be of uniform grade throughout the State. In case an applicant for an inspector's appointment or commission fails to pass this examination, he may appeal to the board of boiler rules for a second examination which shall be given by said board, or if by examiners appointed by said board, then by examiners other than those by whom the first examination was given and these examiners shall be appointed forthwith to give said second examination. Upon the result of this examination on appeal, the board shall determine whether the applicant be qualified. The record of any applicant's examination, whether original or on appeal, shall be accessible to him and his employer.

A commission may be revoked by the commissioner of labor upon the recommendation of the chief inspector of steam boilers, for the incompetence or untrustworthiness of the holder thereof or for wilful falsification of any matter or statement contained in his application or in a report of any inspection. A person whose commission is revoked may appeal from the revocation to the board of boiler rules which shall hear the appeal and either set aside or affirm the revocation and its decision shall be final. The person whose commission has been revoked shall be entitled to be present in person and by counsel on the hearing of the appeal. If a certificate or commission is lost or destroyed, a new certificate or commission shall be issued in its place without another examination. A person who has failed to pass the examination for a commission or whose commission has been revoked shall be entitled to apply for a new examination and commission after ninety days from such failure or revocation. (1935, c. 326, s. 9.)

§ 7312(11). Boiler inspections; fee; certificate; suspension. — On and after April first, nineteen hundred and thirty-five, each steam boiler used or proposed to be used within this State, except boilers exempt under section 7312(7), shall be thoroughly inspected internally and externally while not under pressure by the chief inspector or by one of the deputy inspectors or special inspectors provided for herein, as to its design, construction, installation, condition and operation; and if it shall be found to be suitable, and to conform to the rules and regulations of the board of boiler rules, the owner or user of a steam boiler as required in this article to be inspected shall pay to the chief inspector the sum of one dollar ($1.00) for each inspection certificate issued, and the chief inspector shall issue to the owner or user thereof an inspection certificate specifying the maximum pressure which it may be allowed to carry. Such inspection certificate shall be valid for not more than fourteen months from its date, and it shall be posted under glass in the engine or boiler room containing such boiler, or an engine operated by it, or, in the case of a portable boiler, in the of-

fice of the plant where it is located for the time being. No inspection certificate issued for a boiler inspected by a special inspector shall be valid after the boiler for which it was issued shall cease to be insured by a duly authorized insurance company. The chief inspector or any deputy inspector may, at any time, suspend an inspection certificate when, in his opinion, the boiler for which it was issued may not continue to be operated without menace to the public safety, or when the boiler is found not to comply with the rules herein provided for and a special inspector shall have corresponding powers with respect to inspection certificates for boilers insured by the company employing him. Such suspension of an inspection certificate shall continue in effect until said boiler shall have been made to conform to the rules and regulations of the board of boiler rules and until said inspection certificate shall have been reinstated by a state inspector, if the inspection certificate was suspended by a state inspector, or by a special inspector, if it was suspended by a special inspector. Not more than fourteen months shall elapse between such inspections and there shall be at least four such inspections in thirty-seven consecutive months. Each such boiler shall also be inspected externally while under pressure with at least the same frequency, and at no greater intervals. (1935, c. 326, s. 10.)

§ 7312(12). Operation of uninspected boiler prohibited. — On and after July first, nineteen hundred and thirty-five, it shall be unlawful for any person, firm, partnership or corporation to operate under pressure in this State a steam boiler to which this article applies without a valid inspection certificate as provided for in this article. The operation of a steam boiler without an inspection certificate, shall constitute a misdemeanor on the part of the owner, user or operator thereof and be punishable by a fine not exceeding one hundred dollars ($100) or imprisonment not to exceed thirty days, or both, in the discretion of the court. (1935, c. 326, s. 11.)

§ 7312(13). Installation of boilers not conforming to requirements prohibited; boilers now in use to conform.—No steam boiler which does not conform to the rules and regulations formulated by the board of boiler rules governing new installations shall be installed in this State after six months from the date upon which the said rules and regulations shall become effective by the approval of the governor.

All steam boilers installed and ready for use, or being used, before the said six months shall have elapsed, shall be made to conform to the rules and regulations of the board of boiler rules governing existing installations and the formula therein prescribed shall be used in determining the maximum allowable working pressure for such boilers. (1935, c. 326, s. 12.)

§ 7312(14). Inspection of boilers during construction in state; outside state.—All boilers to be installed after six months from the date upon which the rules and regulations of the board of boiler rules shall become effective by the approval of the governor shall be inspected during construction by an inspector authorized to inspect boilers in this State, or if constructed outside the State, by an inspector holding a certificate of authority from the commissioner of labor of this State, which certificate shall be issued by the said commissioner of labor to any inspector who holds a certificate of authority to inspect steam boilers issued by a State which shall have adopted boiler rules that require standards of construction and operation substantially equal to those of this State, or an inspector who holds a certificate of inspection issued by the national board of boiler and pressure vessel inspectors. (1935, c. 326, s. 12.)

§ 7312(15). Fee for internal and external inspections.—The owner or user of a steam boiler required by this article to be inspected by the chief boiler inspector, or a deputy inspector, shall pay to the inspector three dollars ($3.00) for each boiler internally inspected and two dollars ($2.00) for each steam boiler externally inspected while under pressure: Provided, that not more than five dollars ($5.00) shall be collected for such inspection of any boiler made for any one year. The inspector shall give receipts for said fees and shall pay all sums so received to the commissioner of labor, who shall pay the same to the treasurer of the state. The treasurer of the state shall hold the fees collected under this section and under section 7312(11) in a special account to pay the salaries and expenses incident to the administration of this article, the surplus, with the approval of the director of the budget, to be added to the appropriation of the division of standards and inspections of the department of labor for its general inspectional service. (1935, c. 326, s. 13.)

§ 7312(16). Bonds of chief inspector and deputy inspectors; counties excepted; ground sawmills excepted. — The chief inspector shall furnish a bond in the sum of five thousand dollars ($5,000), and each of the deputy inspectors shall furnish a bond in the sum of one thousand dollars ($1,000), conditioned upon the faithful performance of their duties and upon a true account of moneys handled by them respectively, and the payment thereof to the proper recipient. The cost of said bonds shall be paid by the state treasurer out of the special fund provided for in section 7312(15): Provided, this article shall not apply to Cleveland, Montgomery, McDowell, Rockingham, Moore, Swain, Bertie, Wayne, Halifax, Yancey, Franklin, Granville, Person, Martin, Robeson, Gaston, Lincoln, Mecklenburg, Cabarrus and Iredell Counties, Provided further, that this article shall not apply to ground sawmills. (1935, c. 326, s. 14.)

Art. 3. Free Employment Bureau

§ 7312(a). Creation of bureau; officer in charge; assistants and employees.—In order to promote the establishment and maintenance of free employment offices for men, women, and juniors, who are legally qualified, seeking employment, and for employers desiring workers, there is hereby created in the department of labor and printing a free employment bureau to be known as the state employment service. Such bureau shall be in charge of an officer to be known as the state employment director, ap-

pointed by the commissioner of labor in accordance with the regulations prescribed by the director of the United States employment service, said state director to receive an annual salary not to exceed three thousand dollars to be fixed by the commissioner of labor. There shall also be appointed in said bureau, by the commissioner of labor and printing, such assistants and other employees as are necessary to carry out the provisions of this article. (1921, c. 131, s. 1; 1935, c. 106, s. 1.)

Editor's Note.—The department referred to in this section is now the department of labor, and the commissioner of labor is vested with the powers and duties under this and the next two articles formerly vested in the commissioner of labor and printing. See §§ 7309, 7310(b).

Prior to the amendment of 1935 this section provided for an assistant to the commissioner instead of the state employment director.

§ 7312(a1). Acceptance by state of federal act establishing national employment system. — In order to achieve the purposes of this article, the State of North Carolina accepts the provisions of the Wagner-Peyser Act, approved June sixth, one thousand nine hundred and thirty-three (48 Stat. 113; U. S. C. Title 29, Section 49), "An Act to provide for the establishment of the national employment system and for co-operation with the States in the promotion of such system, and for other purposes" in conformity with section four thereof. The state department of labor is hereby designated and constituted the agency of the State of North Carolina for the purposes of such act, and the commissioner of said department of labor is hereby given full power to co-operate with all authorities of the United States having powers or duties under such act and do and perform all things necessary to secure to the State of North Carolina the benefits of such act in the promotion and maintenance of a system of public employment offices. (1935, c. 106, s. 2.)

§ 7312(b). Duty of commissioner of labor and printing. — It shall be the duty of the commissioner of labor and printing and he shall have the power, jurisdiction, and authority:

To establish and conduct free employment offices in the state where in the opinion of the commissioner such action may be deemed advisable and expedient; to in all proper ways within the limitations of this article bring together employers seeking employees and applicants for employment seeking employers; to make known the opportunities of self-employment in the state; to devise and adopt the most efficient means to avoid unemployment; and to extend vocational guidance through the facilities of such service. (1921, c. 131, s. 2; 1925, c. 288; 1935, c. 106, s. 3.)

See note under § 7312(a).

Editor's Note.—Prior to the amendment the last clause of the second paragraph read: "to co-operate with the existing state and federal agencies in extending vocational guidance to minors seeking employment." By the amendment two paragraphs were omitted, relating to the maintenance of such sections as would best serve the public welfare and assist veterans in securing an adjustment of claims.

§ 7312(c). Coöperation with federal board for vocational education.—The employment bureau shall coöperate with the federal board for vocational education, division for rehabilitation of crippled soldiers and sailors, in endeavoring to secure suitable employment and fair treatment of the veterans of the world war. (1921, c. 131, s. 3.)

§ 7312(d). Employment of minors; farm employment; Promotion of Americanism.—The employment bureau shall have jurisdiction over all matters contemplated in this article pertaining to securing employment for all minors who avail themselves of the free employment service; to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over sixteen, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adopted; to aid in securing vocational employment on farms for town and city boys who are interested in agricultural work, and particularly town and city high school boys who include agriculture as an elective study; to coöperate with various social agencies, schools, etc., in group organization of employed minors, particularly those of foreign parentage, in order to promote the development of real, practical Americanism through a broader knowledge of the duties of citizenship; to investigate methods or vocational rehabilitation of boys and girls who are maimed or crippled and ways and means for minimizing such handicap. (1921, c. 131, s. 4.)

Editor's Note.—This section is summorized in 1 N. C. Law Rev. 308.

§ 7312(e). Information to be disseminated; collection of information.—The employment bureau shall make public, through the newspapers and other media, information as to situations, it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The bureau shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of employment and remedies therefor within and without the state, with the view of preparing for the information of the general assembly such facts as in its opinion may make further legislation desirable. (1921, c. 131, s. 5.)

§ 7312(f). Local offices; coöperation with United States service; financial aid from United States.—The commissioner of labor and printing is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the state for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and for the extension of vocational guidance in co-operation with the United States employment service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the state for the purposes of this article, any part or the

whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; 1935, c. 106, s. 4.)

See note under § 7312(a).

Editor's Note. — Prior to the amendment of 1935, this section applied to vocational guidance of minors. The section was extended by the amendment.

§ 7312(g). Acceptance and use of donations.— It shall be lawful for the commissioner of labor and printing to receive, accept, and use, in the name of the people of the state, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this article and for the purpose of giving assistance to deserving maimed or crippled boys and girls through vocational rehabilitation. (1921, c. 131, s. 7.)

See note under § 7312(a).

§ 7312(h). Coöperation of towns, townships, and counties with bureau.—It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the state to enter into coöperative agreement with the commissioner of labor and printing, and to appropriate and expend the necessary money upon such conditions as may be approved by the commissioner of labor and to permit the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this article. (1921, c. 131, s. 8; 1935, c. 106, s. 5.)

See note under § 7312(a).

Editor's Note.—The amendment of 1935 inserted the clause reading "upon such conditions as may be approved by the commissioner of labor."

§ 7312(i). Appropriation.—For the purpose of carrying out the provisions of this article there is hereby appropriated out of the general funds of the state not otherwise appropriated the sum of seventy-five thousand dollars ($75,000.00) per annum for the purpose of maintaining the public employment offices created under this article and for the purpose of co-operating with the U. S. employment service. (1921, c. 131, s. 9; 1935, c. 106, s. 6.)

See note under § 7312(a).

Editor's Note.—The appropriation was increased by the amendment of 1935 from ten thousand to seventy-five thousand dollars.

§ 7312(i1). Manner of disbursing appropriation. — The funds appropriated herein, together with all federal funds made available to this state under said act of congress, shall be paid into the general treasury of this State, and said funds are hereby appropriated and made available for carrying out the provisions of this article in accordance with the provisions of the said act of congress. Upon the voucher of the commissioner of labor the auditor shall audit and the treasurer pay the expenses of the said free employment service not in excess of the funds available under the provisions of this article. (1935, c. 106, s. 7.)

Art. 4. Bureau of Labor for the Deaf

§ 7312(j). Creation.—There shall be created in the department of labor and printing a division devoted to the deaf. (1923, c. 122, s. 1.)

See note under § 7312(a).

§ 7312(k). Appointment of chief of bureau; duties.—The commissioner of labor and printing shall appoint a competent deaf man to take charge of such division, who shall devote his time to the special work of labor for the deaf under the supervision of the commission of labor and printing, and who shall be designated chief of the bureau of labor for the deaf. He shall collect statistics of the deaf, ascertain what trades or occupations are most suitable for them and best adapted to promote their interest, and use his best efforts to aid them in securing such employment as they may be fitted to engage in. He shall study the methods in use in the education of the deaf as exemplified in the deaf themselves, with a view to determining their practicability and respective values in lifting them to become self-supporting, useful citizens and enabling them to obtain the greatest amount of happiness in life. He shall keep a census of the deaf and obtain facts, information and statistics as to their condition in life, with a view to the betterment of their lot. He shall endeavor to obtain statistics and information of the condition of labor and employment and education of the deaf in other states, with a view to promoting the general welfare of the deaf in this state. He shall make reports and recommendations from time to time as may be provided by law, and he shall also issue special reports or pamphlets as may be deemed necessary, giving results and information that may be helpful. (1923, c. 122, ss. 2, 3.)

See note under § 7312(a).

§ 7312(l). Salary of chief; expenses.—The chief of the bureau of labor for the deaf shall receive a salary which shall not exceed the sum of two thousand dollars ($2,000.00) per annum, payable monthly on the certificate of the commissioner of labor and printing. Expenses necessarily incurred by such chief of the bureau of labor for the deaf, under the direction of the commissioner of labor and printing, not to exceed the sum of one thousand dollars ($1,000.00) per annum, shall also be paid out of the state treasury on the certificate of the commissioner of labor and printing. (1923, c. 122, s. 4.)

§ 7312(m). Assignment of other duties.—In case the duties herein enumerated should not occupy all of the time of such chief of the bureau of labor for the deaf, he shall perform such other duties in the department of labor and printing as may be assigned him by the commissioner of labor and printing. (1923, c. 122, s. 5.)

Art. 5. Regulation of Employment Agencies

§ 7312 (n). Employment agency defined.—Employment agency within the meaning of this article shall include any business operated by any person, firm or corporation for profit and engaged in procuring employment for any individual, for any person, firm or corporation in the State of North Carolina and making a charge on the employee or employer for the service. (1929, c. 178, s. 1.)

Editor's Note.—This article supersedes Public Laws 1925, c. 127 formerly regulating employment agencies.

§ 7312 (o). License from Commissioner of Labor; investigation of applicant. — No person, firm or corporation shall engage in the business

of operating any employment agency, as designated in section 7312(n), in North Carolina without first making a written application to the Commissioner of Labor and Printing and being licensed by him as herein provided, to engage in such business. Upon receiving an application from such person, firm or corporation it shall be the duty of the Commissioner of Labor and Printing to make an investigation into the character and moral standing of the person, firm or corporation. If after such investigation, the Commissioner of Labor and Printing shall be satisfied that such person, firm or corporation is of such character and moral standing as to warrant the issuance of a license to engage in the business covered by this act then he shall issue a license to such person, firm or corporation as provided herein. (1929, c. 178, s. 2.)

See note under § 7312(a).

§ 7312 (p). Rules and regulations governing issuance of licenses.—The Commissioner of Labor and Printing is authorized and empowered to make general rules and regulations in relation to the licensing of such employment agencies and for the general supervision thereof in accordance with this act. (1929, c. 178, s. 3.)

See note under § 7312(a).

§ 7312 (q). Investigation of books and records of agencies licensed; power to rescind license for cause.—The Commissioner of Labor and Printing is authorized and empowered by himself, his assistant, or agents, duly authorized by him to that effect, to investigate the books and records of any employment agency licensed under this act, when he deems it best for the public interest to do so to effectuate the purposes of this act and for cause to rescind the license theretofore granted by him if upon such investigation he finds that such employment agency is not complying with the terms and conditions of this act, under which it was licensed by him, to engage in such business. Before rescinding the licenses issued hereunder, after such investigation the Commissioner of Labor and Printing, after first giving ten days' notice to the holder of such licenses, to appear and show cause why such license should not be revoked, shall hold a hearing at the County Court House of the County in which such licensee is doing business, when and where the results of the investigation of the Commissioner of Labor and Printing or his duly authorized agents shall be presented under oath, before the Commissioner of Labor and Printing and the said licensee may also and in accordance with said notice, present evidence to show why such license should not be revoked; and the licensee shall have the right of appeal within ten days to the Superior Court. (1929, c. 178, s. 4.)

See note under § 7312(a).

§ 7312 (r). Hearing. — The Commissioner of Labor and Printing, his Assistant or deputy shall be empowered to subpoena witnesses and administer oaths in making investigations and taking testimony to be presented at the hearing to be held before the Commissioner of Labor and Printing as hereinbefore provided for. (1929, c. 178, s. 5.)

See note under § 7312(a).

§ 7312 (s). Service of subpoenas and fees for, governed by general law.—The County Sheriffs and their respective deputies shall serve all subpoenas of the Commissioner of Labor and Printing, and shall receive the same fees as are now provided by law for like services, and each witness who appears in obedience to such subpoena shall receive for attendance the fees and mileage for witnesses in civil cases of courts of the County in which the hearing is held. (1929, c. 178, s. 6.)

See note under § 7312(a).

§ 7312 (t). Production of books, papers and records.—The Superior Court shall, on the application of the Commissioner of Labor and Printing, his assistant or duly authorized deputy, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 178, s. 7.)

See note under § 7312(a).

§ 7312 (u). License fee to be paid into special fund.—The license fee, charged under the provisions of this act, shall be paid into a special fund of the Department of Labor, and the proceeds of such license fees shall be used for the purpose of the supervision and regulation of the employment agencies, including costs of investigations or hearings to revoke licenses and the necessary traveling expenses and other expenditures incurred in administering this act. (1929, c. 178, s. 8.)

§ 7312 (v). Violations.—Any person, firm or corporation conducting an employment agency in the State of North Carolina, in violation of this act shall be guilty of a misdemeanor, and if a person punishable by a fine of not less than five hundred dollars, or imprisonment of not less than six months, or both; and if a corporation by a fine of not less than five hundred dollars and not more than one thousand dollars. (1929, c. 178, s. 9.)

§ 7312 (w). Government employment agencies unaffected.—This act shall not in any manner affect or apply to any employment agency operated by the State of North Carolina, the Government of the United States, or any City, County or Town, or any agency thereof. (1929, c. 178, s. 10.)

§ 7312 (x). License taxes placed upon agencies under Revenue Act, not affected.—This act shall in no wise conflict with or affect any license tax placed upon such employment agencies by the General Revenue Act of North Carolina but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11.)

CHAPTER 120A

PUBLIC WORKS

§ 7312 (y). Employment of architects, etc., on public works when interested in sale of materials prohibited.—It shall be unlawful for any person, firm or corporation to employ on any city, county or state work, supported wholly or in part with public funds, any architect, engineer, designer or draftsman, who is in any way connected with the sale or promotion of or in the manufacture of any

material or items used in the construction of such works, or who is a stockholder, officer, partner, or owner of any manufacturing concern, or of any sales organization, engaged in the manufacture or sale of such material, or items, which may be used in the construction of such works. (1933, c. 66, s. 1.)

§ 7312(z). Drawing of plans by material furnisher prohibited.—It shall be unlawful for any architect, engineer, designer or draftsman, employed on county, state, or city works, to employ or allow any manufacturer, his representatives or agents, to write, plan, draw, or make specifications for such works or any part thereof. (1933, c. 66, s. 2.)

§ 7312(aa). Specifications to carry competitive items.—All architects, engineers, designers, or draftsmen, when designing, or writing specifications for materials to be used in any city, county or state work, shall specify in their plans at least three items of equal design or their equivalent design, which would be acceptable upon such works. Where it is impossible to specify three items due to the fact that there are not that many items in competition, then as many items as are available shall be specified. (1933, c. 66, s. 3.)

§ 7312(bb). Violation of chapter made misdemeanor.—Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and upon conviction, license to practice his profession in this state shall be withdrawn for a period of one year and he shall be subject to a fine of not more than five hundred dollars. (1933, c. 66, s. 4.)

CHAPTER 121
REFORMATORIES

Art. 1. Stonewall Jackson Manual Training and Industrial School

§ 7313. Incorporation.—The board of trustees of the Stonewall Jackson Manual Training and Industrial School is hereby declared a body corporate, by which name they may sue and be sued, plead and be impleaded, hold, use, sell and convey real estate, receive donations, gifts and appropriations and do all other things necessary and requisite for the purpose of carrying out the intent and purposes for which it is organized. (1907, c. 509, s. 1; 1907, c. 955; 1925, c. 306, s. 1.)

Editor's Note.—No material change is made in this section by the Public Laws 1925, except the omission of the names of certain individual trustees.

Constitutional.—This article is constitutional and committing a child to the institution is not imprisonment as for the punishment of crime, but is a paternal restraint exercised by the state for the protection of society and for the interest of the child. In re Watson, 175 N. C. 340, 72 S. E. 1049.

Detention Cannot Be for Punishment.—The punishment for vagrancy cannot exceed thirty days under our statute, and a legislative act which provides for a longer detention of a child in a reformatory for that offense, if merely for the purpose of punishment, would be violative of section 14 of the Bill of Rights. In re Watson, 157 N. C. 340, 72 S. E. 1049.

§ 7314. Purpose of the school.—The trustees are empowered to establish and operate a school for the training and moral and industrial development of the criminally delinquent children of the state; and when such school has been organized the trustees may, in their discretion, receive therein such delinquent and criminal children under the age of sixteen years as may be sent or committed thereto under any order or commitment by the judges of the superior courts, the judges of the juvenile courts, or the recorders or other presiding officers of the city or criminal courts, and shall have the sole right and authority to keep, restrain, and control them during their minority, or until such time as they shall deem proper for their discharge, under such proper and humane rules and regulations as may be adopted by the trustees. All laws and clauses of law in conflict with this section are hereby repealed. (1907, c. 509, s. 2; 1907, c. 955, s. 1.)

§ 7315. Power to purchase land and locate school.—The board of trustees shall select a suitable place outside of and away from any city, town, or village, for the location of such school, and they are empowered to purchase, at some suitable and convenient place in this state, not less than one hundred acres nor more than five hundred acres of land whereon to erect and operate such school. (1907, c. 509, ss. 2, 15.)

§ 7316. Appointment of trustees; vacancies. — The board of trustees of the Stonewall Jackson Manual Training and Industrial School shall consist of eleven (11) persons, whose terms of office shall be four years from the date of their appointment as herein provided for. Within thirty days after March 10, 1925 the Governor shall name and appoint six (6) members of the board of trustees, and within six months from March 10, 1925 the Governor shall name five (5) other members of the said board. At the time of naming and appointing the members as herein provided the Governor shall designate which of the present board are to be succeeded by his nominees and appointees. Should any vacancy occur in the said board, the Governor shall fill the same by appointment. The superintendent of the school shall from time to time notify the Governor as to any vacancies which shall occur and the expiration of the term of office of the members of the board. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of the persons appointed by him for confirmation. (1907, c. 509, s. 6; 1907, c. 955, s. 2; 1925, c. 306, s. 2.)

Editor's Note.—Prior to the amendment by Public Laws 1925, c. 306, sec. 2 the board consisted of 15 trustees divided into classes according to the expiration of their terms, which were for six years. Some of the trustees were elected by the board. Now there are eleven trustees, all appointed by the governor in the same year for the term of four years. For removal of the officers provided for in this section see section 5912(h).

§ 7317. Application of funds; account required. —All moneys received by the trustees by private gifts, donations, or otherwise shall be expended in the establishment, operation, and maintenance of the school for the training and the moral and industrial development of such delinquent children, and in securing homes for them; and in case the trustees receive or are allowed any state aid for said school, it shall be their duty to duly account for all moneys so received by them and to make report of the manner of its expenditure

and of the work done by them as hereinafter more particularly provided for. (1907, c. 509, s. 3.)

§ 7318. Trustees to employ superintendent and assistants, and make regulations.—The board of trustees shall have the management and control of the school, and shall have authority to employ a superintendent and such other assistants as they may deem necessary; to fix their salaries, to define their duties, to discharge any employees, and to make any and all rules and regulations as they may deem necessary for the management and conducting of such reformatory under the provisions of this article, and not inconsistent therewith. (1907, c. 509, s. 8.)

§ 7319. Treasurer and superintendent to give bond. — The treasurer and superintendent shall, before receiving any of said funds, make a good and sufficient bond, payable to the state of North Carolina, in such sums as may be named by the governor and approved by the state treasurer. (1907, c. 509, s. 7.)

§ 7320. Powers of superintendent. — The superintendent employed by the board is authorized to require obedience from all the inmates of the school, and is intrusted with the authority for correcting and punishing any inmate thereof to the same extent as a parent may under the law impose upon his own child, and the trustees shall have the right at any time to discharge the superintendent for cause. (1907, c. 509, s. 9.)

§ 7321. Governor to visit reformatory.—It shall be the duty of the governor of the state to visit the reformatory at least once in each year, and oftener if he deem it necessary, and to make such suggestions to the board of trustees as he may deem wise and for the best interests of the school or reformatory. (1907, c. 509, s. 10.)

§ 7322. Courts may commit offenders to reformatory. — The judges of the superior courts, recorders, or other presiding officers of the city or criminal courts of this state, shall have authority, and it shall be their duty, to sentence to the school all persons under the age of sixteen years convicted in any court of this state of any violation of the criminal laws: Provided, that such judge or other of said officers shall be of the opinion that it would be best for such person and the community in which he may be convicted, that he should be so sentenced. Any commitment under this article, whether by judge or court, as hereinbefore provided, shall be full, sufficient, and competent authority to the officers and agents of the school for the detention and keeping therein of the child so committed. (1907, c. 509, ss. 11, 17; 1907, c. 955, s. 1.)

In General.—The act creating the Stonewall Jackson Training School is "for the training and moral development of the criminally delinquent children of the State," and the superintendent is "intrusted with the authority for correcting and punishing any inmate thereof to the same extent as a parent may, under the law, impose upon his own child," and in its general scheme and purposes is for the benefit of a child therein detained. Hence, the provisions in the act that the child committed thereto must be "convicted" and "sentenced" by the court, construing the act as a whole, does not mean that detention therein is an imprisonment as a punishment for a crime, but that the "conviction" is merely evidence that the child needs the care and nurture of the State, and that the sentence is an order of detention. In re Watson, 157 N. C. 340, 72 S. E. 1049.

§ 7323. Governor may transfer prisoners to reformatory.—The governor of the state may by order transfer any person under the age of sixteen years from any jail, chain-gang, or penitentiary in this state to such reformatory. (1907, c. 509, s. 12.)

§ 7324. Department first established; sexes separated. — The board of trustees shall first establish and maintain such departments of the manual training school as shall be adopted to the use of such class of boys as in the discretion of the board may be most in need of such care and training and will probably be most benefited thereby. When both sexes are admitted, the males and females shall be kept in separate apartments or buildings. (1907, c. 509, ss. 17, 18.)

§ 7325. Industrial training provided. — There shall be established and conducted on such lands as may be owned in connection with the school such agriculture, horticulture, workshops, and other pursuits as the board of trustees may deem expedient so as to keep regularly at work all able-bodied inmates. (1907, c. 509, s. 4.)

§ 7326. General instruction and training given.—The officers of the school shall receive and take into it all children committed thereto by competent authority, or received therein as aforesaid, and shall cause all such children in the school to be instructed in such rudimentary branches of useful knowledge as may be suited to their various ages and capacities. The children shall be taught such useful trades and given such manual training as the board may direct, and shall perform such manual labor as the principal or other superintending officers, subject to the direction of the board, may order. All the inmates shall, if possible, be taught the precepts of the Holy Bible, good moral conduct, how to work and to be industrious. (1907, c. 509, ss. 5, 14.)

§ 7327. Ungovernable inmates removed.—If it shall appear to the board of trustees that any inmate of the school is or becomes ungovernable and is exerting an unwholesome influence over any other inmate, it shall be their duty to certify the same to the governor of the state, and he may order such inmate to the state's prison or to the jail or chain-gang in the county in which such inmate was convicted, where such person shall serve out his unexpired term. (1907, c. 509, s. 13.)

§ 7328. General legislative control. — Nothing contained in this article shall be construed to prevent the general assembly from altering, changing, and modifying the law and regulations governing such school and its officers and directors in such manner and at such time as to it may seem best. (1907, c. 509, s. 19.)

§ 7328(a). Trustees to receive gifts for cottages.—The board of trustees of the Stonewall Jackson training school are hereby empowered to receive specific gifts for individuals or other sources for the exclusive purpose of erecting and equipping cottages on the grounds of the institution under such rules and regulations as may be

fixed by the said board of trustees. (Ex. Sess. 1920, c. 48, s. 1.)

§ 7328(b). Boys from counties making gifts; designation of cottage. — When such gifts, sufficient to erect or to erect and equip a cottage sufficient to accommodate thirty boys, are received from individuals or other sources from any given county of the state, the trustees of the Stonewall Jackson training school may enter into an obligation to receive and maintain in the institution only according to their fixed rules and regulations for entrance, maintenance and discharge, a number of boys from the said county equal to the number which may be accommodated in such building. Such cottage may be designated..... county cottage. (Ex. Sess. 1920, c. 48, s. 2.)

§ 7328(c). Cottages erected by two or more counties.—Should two or more counties desire to combine for the purpose of erecting such buildings, the same may be done under like conditions as stated in section 7328(b), and such cottage may be known by the names of the counties so combining. (Ex. Sess. 1920, c. 48, s. 3.)

§ 7328(d). Approval of state building commission; plans.—All buildings erected under this law shall receive the approval of the state building commission from plans prepared by the state architect. (Ex. Sess. 1920, c. 48, s. 3½.)

§ 7328(e). Contributions from public funds; bond issues.—It shall be lawful for county commissioners or the governing bodies of cities and towns to contribute from the public funds such amounts as they may deem proper for the purpose stated in sections 7328(b) and 7328(c), and such funds may be lawfully devoted from any public funds of said bodies or secured by bond issue under such rules of issue as may be ordained by said boards of county commissioners or governing bodies of towns and cities. (Ex. Sess. 1920, c. 48, s. 4.)

§ 7328(f). Cherokee Indians admitted. — The governing authorities of the Stonewall Jackson Training School at Concord and the state home and industrial school for girls at Samarcand are hereby authorized and directed to make proper provisions for admitting delinquent boys and girls respectively of the Cherokee Indian Race of Robeson county to these institutions under the same rules and regulations as are now provided for admitting delinquent boys and girls of the white race: Provided, however, that the boys and girls so admitted shall be separated from the white inmates of the said institutions. (1933, c. 490, s. 1.)

Editor's Note.—Section 2 of Public Laws of 1933, chapter 490, provided for an appropriation for carrying out the purpose of this section. This appropriation was extended and enlarged by Public Laws 1935, chapter 316.

Art. 2. State Home and Industrial School for Girls and Women

§ 7329. Incorporation and name.—A corporation to be known and designated as the State Home and Industrial School for Girls and Women is hereby created, and as such corporation it is authorized and empowered to accept and use donations and appropriations and to do all other things necessary and requisite to be done in furtherance of the purpose of its organizations and existence as hereinafter set forth. (1917, c. 255, s. 1.)

§ 7330. Board of managers; term of office.— The State Home and Industrial School for Girls and Women shall be under the control and Management of a board of ten managers, at least five of whom shall be women, all managers shall be appointed by the Governor and the term of each manager shall be four years from and after the date of his or her appointment. Within thirty days of the ratification of this act the Governor shall appoint six managers and within six months he shall appoint the remaining four. All vacancies occurring shall be filled by the Governor. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. (1925, c. 306, s. 4; 1927, c. 255, s. 2; 1929, c. 279, s. 1)

Editor's Note.—Under this section prior to Public Laws 1925, c. 306, s. 4, one of the then five managers was appointed each year for a term of five years. Under this act all were appointed in the same year for a term of four years. The Act of 1929 changed the number of managers to ten. For removal of the officers provided for in this section see § 5912(h).

§ 7331. Power to purchase land and erect buildings.—The board of managers is authorized to secure by gift or purchase suitable to real estate within the state, not less than fifty acres, at such place as the board may deem best, and with the money or other property which the corporation may have received for that purpose, either by donations from individuals or by appropriation from the state, the board shall proceed to erect on such real estate buildings suitable for carrying out the purposes for which the corporation is created. (1917, c. 255, s. 3.)

§ 7332. Power of control.—The board of managers shall have the general superintendence, management, and control of the institution; of the grounds and buildings, officers, and employees thereof; of the inmates therein and all matters relating to the government, discipline, contracts, and fiscal concerns thereof; and may make such rules and regulations as may seem to them necessary for carrying out the purposes of the institution. And the board shall have the right to keep, restrain, and control the inmates of the institution until such time as the board may deem proper for their discharge under such proper and humane rules and regulations as the board may adopt. The board shall endeavor as far as possible to classify the inmates and keep the different classes in separate wards or divisions, so as to produce the best results in the reformatory work. The board of managers shall constitute a board of parole of the institution and shall have power to parole and discharge the inmates under such rules and regulations as the board may prescribe. (1917, c. 255, s. 4.)

§ 7333. Appointment of officers; compensation; by-laws.—The board of managers shall appoint from among its members a president, secretary, and a treasurer, who shall hold office for one year from the date of appointment; and if the board deem it proper to do so, the office of secretary and treasurer may be combined in one. The board shall also appoint a superintendent,

who shall be a woman of experience and training. The board shall fix the compensation of the superintendent and all officers and employees of the institution, and shall prescribe the duties of each. The board shall further adopt such by-laws as, in the judgment of the board, may be necessary, fixing the time and place of the meetings of the board and making such other provisions as may be necessary for the proper management of the institution. (1917, c. 255, s. 5.)

§ 7334. Persons committed to the reformatory; time of detention.—Any girl or woman who may come or be brought before any court of the state, and may either have confessed herself guilty or have been convicted of being a habitual drunkard, or being a prostitute, or of frequenting disorderly houses or houses of prostitution, or of vagrancy, or of any other misdemeanor, may be committed by such court for confinement in the institution aforesaid: Provided, such person is not insane or mentally or physically incapable of being substantially benefited by the discipline of such institution: and provided further, that before sentencing such person to confinement in the institution the court shall ascertain whether the institution is in position to care for such person; and it shall be at all times within the discretion of the board of directors as to whether the board will receive any person in the institution. No commitment shall be for any definite term, but any person so committed may be paroled or discharged at any time after her commitment by the board of managers, but no inmate shall in any case be detained longer than three years: Provided, that when any girl under twenty-one years of age shall have been committed to the institution the trustees shall have the sole right and authority to keep, restrain and control her until she is twenty-one years old, or until such time as they shall deem proper for her discharge, under such proper and humane rules and regulations as may be adopted by the trustees. When any such person shall come before any court for the purpose of confessing guilt or for trial, the court shall, as far as feasible and as far as consistent with public policy, give a private hearing, and in all respects avoid unnecessary publicity in connection with the proceedings before the court. (1917, c. 255, ss. 6, 12; Ex. Sess. 1921, c. 69.)

Editor's Note.—The provision allowing the restraining of girls under twenty one was added by Ex. Sess. 1921 c. 69.

§ 7335. Delivery of inmates to institution; expenses. — It shall be the duty of the county authorities of the county from which any girl or woman is sent to the home, or the city authorities, if any girl or woman is ordered to be sent to the home by any city court, to see that such girl or woman is safely and duly delivered to the home, and to pay all the expenses incident to her conveyance and delivery to the home. (1919, c. 122.)

§ 7336. Voluntary application for admission; care of children.—In addition to caring for such persons as may be committed to the institution by order of court, the board of managers may, in their discretion, receive into the institution any such person who may have in writing confessed herself guilty of any offense or any wayward conduct and may in writing express her desire to become an inmate of the institution; but the board shall not admit any such person unless upon examination of such person, freely and voluntarily held under the direction of the board, the board shall conclude that confinement in the institution will probably aid in the reformation of such person. Any person becoming an inmate of the institution under the provisions of this section shall be subject to the same rules and regulations as those who have been committed by order of court, and shall be detained for such time as the board, in its judgment, may deem best, not exceeding, however, the term of three years. And it shall further be the duty of the board of managers to make suitable provision for the care and maintenance of children born in the institution, and also of the infant children that any woman may have when she is committed to the institution. (1917, c. 255, s. 7.)

§ 7337. Law as to juvenile delinquents applied. —The provisions of the chapter pertaining to the reclamation and training of juvenile delinquents shall apply to young girls, and any court before whom a young girl is brought pursuant to the provisions of said chapter may be by order of court placed in the institution herein established, and shall be subject to all the provisions of law relating thereto: Provided, however, that no girl shall be admitted to the institution under this provision without the previous consent of the board of managers. (1917, c. 255, s. 8.)

§ 7338. Discharge on parole; arrest for escape or violation of parole.—The board of managers may conditionally discharge any person at any time, and if any such person shall violate any condition of her parole or shall violate any condition upon which she has been discharged, or if any inmate escape from the institution, the board of managers may cause any such person to be rearrested and returned to the institution and be detained therein for the unexpired portion of her term, dating from the time of her parole, conditional discharge, or escape. The board of managers is empowered to issue to any person designated by the board a commitment signed by the president and attested by the secretary, and having attached thereto the common seal of the corporation, by the terms of which commitment such person may be authorized and empowered to apprehend any such person who may have violated her parole or any condition of her discharge or that may have escaped, and carry such person back to the institution. Such commitment shall briefly state the reason for the issuance of the same, and the person designated to execute the same may execute it in any county in the state. (1917, c. 255, s. 9.)

§ 7339. Industrial training; compensation; power to detain. — The board of managers is authorized and empowered to establish and maintain within the institution an industrial school, and shall provide for the safe-keeping and employment of the inmates for the purpose of teaching each of them a useful trade or profession and improving her mental and moral

condition. If the board of managers sees fit, they may pay each inmate reasonable compensation for labor performed, after deducting such sum as they may deem reasonable for necessary expenses of her maintenance and discipline. To secure the safe-keeping, obedience, and good order of the inmates, the superintendent shall have the same power as to such inmates as keepers of jails and other penal institutions possess as to persons committed to their custody. (1917, c. 255, s. 10.)

§ 7340. Bond issue authorized. — For the purpose of purchasing land and erecting buildings for a state home and industrial school for girls and women, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable ten years after the first day of July, one thousand nine hundred and seventeen, to an amount not to exceed the sum of twenty-five thousand dollars. (1917, c. 265, s. 1.)

§ 7341. Rate of interest on bonds. — All of such bonds shall bear interest at a rate not exceeding four per cent per annum from the first day of July, one thousand nine hundred and seventeen, until paid, which interest shall be payable semiannually on the first days of January and July of each year, so long as any portion of the bonds shall remain due and unpaid. (1917, c. 265, s. 2.)

§ 7342. Manner of issue and sale of bonds.— The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars and one thousand each, as may be determined by the state treasurer, and shall be signed by the governor and state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone or may have a facsimile of his signature printed, engraved, or lithographed thereon, and the bonds shall in all other respects be in such form as the state treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina of any kind whatsoever, which shall be expressed on the face of the bonds. Before selling the bonds herein authorized to be issued, the treasurer shall authorize the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the best price. He is authorized to accept bids for the entire issue or of any portion thereof, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. (1917, c. 265, s. 3.)

§ 7343. Bonds exempt from taxation; investment for fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall the bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. It shall be lawful for all executors, administrators, guardians, and fiduciaries generally to invest in said bonds. (1917, c. 265, ss. 4, 5.)

§ 7343(a). Unlawful acts of inmates and others; escape; prostitution, etc.—It shall be unlawful:

(a) For any inmate of the state home and industrial school for girls and women to escape from said school, or for any person to aid and abet any inmate to escape therefrom;

(b) For any person to advise, or solicit, or to offer to advise, or solicit, any inmate of said school to escape therefrom;

(c) For any person to transport, or to offer to transport, in automobile or other vehicle or conveyance, any inmate of said school to or from any place: Provided, this shall not apply to the superintendent and teachers of said school, or to employees acting under the superintendent and teachers thereof;

(d) For any person to engage in, or to offer to engage in prostitution with any inmate of said school;

(e) For any person to receive, or to offer to receive any inmate of said school into any place, structure, building or conveyance for the purpose of prostitution, or to solicit any inmate of said school to engage in prostitution;

(f) For any person to conceal an escaped inmate of said school, or to furnish clothing to an escaped inmate thereof to enable her to conceal her identity. (Ex. Sess. 1920, c. 40, s. 1.)

§ 7343(b). "Inmate" and "prostitution" defined. — The term "inmate" as used in section 7343(a) shall be construed to include any and all girls and women committed to, or received into said state home and industrial school for girls and women under the provisions of this article; and the term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse. (Ex. Sess. 1920, c. 40, s. 2.)

§ 7343(c). Punishment for violation of section 7343(a). — Any person who shall knowingly and willfully violate any one of the provisions of section 7343(a) shall be guilty of a misdemeanor, shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court. (Ex. Sess. 1920, c. 40, s. 3.)

2A. The Industrial Farm Colony for Women

§ 7343(d). Name and establishment.—A State institution for women, to be known as the Industrial Farm Colony for Women, is hereby established. (1927, c. 219, s. 1.)

§ 7343(e). Management; directors to be appointed by governor.—The State Industrial Farm for Women shall be under the management of a board of five directors, who shall be appointed by the Governor. At least two members of the board shall be women. Immediately upon the passage of this article the Governor shall appoint five directors for four years each, and their successors shall be appointed for terms of four years each, except that any person chosen to fill a vacancy shall be

appointed only for the unexpired term of the person whom he shall succeed. The directors shall receive no compensation for their services, but shall be paid their necessary expenses incurred while engaged in the performance of their official duties.

The board shall hold an organization within thirty days after appointment and shall elect from among its members a president, secretary and treasurer. The treasurer shall before receiving any funds, make a good and sufficient bond payable to the State of North Carolina in such sum as may be named by the Governor and approved by the State Treasurer. (1927, c. 219, s. 2.)

§ 7343(f). Located in healthful section.—The board of directors is authorized to use for the purpose of said institution, any site already owned by the State, when approved by the Governor and Council of State. Such land shall be located in a healthful section of the State and shall have natural drainage and adequate natural water supply. It shall also include woodland and arable land to the end that, as far as practicable, the food for the inmates may be produced on such land. The farm must also be accessible by rail or road to all sections of the State. (1927, c. 219, s. 3.)

§ 7343(g). Plans for buildings.—The directors shall cause to be prepared plans and specifications for remodeling or erecting on such site necessary buildings for a suitable plant for the institution. The directors shall furnish and equip the same ready for use. Contracts shall be made by the directors and those calling for an expenditure of over five hundred dollars shall be duly advertised and competitive bids received thereon, but whenever possible convict labor shall be used, the compensation for such to be agreed upon by the directors and Superintendent of the State Prison. When such buildings have been prepared and equipped, and the necessary staff of officers has been organized, the directors shall make announcement that the institution is ready for the reception of inmates. (1927, c. 219, s. 4.)

§ 7343(h). Authority of directors.—The directors shall have control of the institution; determine the policy of the same and make necessary rules for the discipline, instruction, mental and physicial examination and treatment of the inmates and for the labor of the inmates; cause to be kept proper records, including those of inmates; hold regular meetings, at least quarterly, at said institution and audit the accounts of the superintendent quarterly. They shall report biennially to the Governor the general and financial condition of said institution, with such recommendations as they desire to make. (1927, c. 219, s. 5.)

§ 7343(i). Power to appoint and remove.—The directors shall appoint and remove at their discretion, a superintendent of said institution who shall be a woman of liberal education and special training and who has had experience in institutional management or social work, not of their number, and who, before entering upon the duties of her office, shall be sworn to a faithful performance of her duties. The superintendent shall receive such compensation as shall be fixed by the directors and shall reside at said institution. (1927, c. 219, s. 6.)

§ 7343(j). Management of institution.—The superintendent shall manage such institution and have control over the inmates thereof, and shall make rules and regulations for the administration of said institution, subject to the approval of the board of directors. The superintendent shall, also, subject to the approval of the board of directors, determine the number, select, appoint and assign duties of all subordinate officers of said institution, who shall be women, as far as practicable, and shall be sworn to a faithful performance of their duties. As soon as the size of the institution demands it, a resident woman physician shall be employed. The superintendent may remove any officer appointed by her. (1927, c. 219, s. 7.)

§ 7343(k). Women subject to committal.—Women sixteen years of age and older belonging to the following classes and who are not eligible for admission to Samarcand may be committed by any court of competent jurisdiction to said institution, and not otherwise; persons convicted of, or who plead guilty to the commission of misdemeanors, including prostitution, habitual drunkenness, drug-using, disorderly conduct. The board of directors may in its discretion receive and detain as an inmate of the institution any woman or girl, not otherwise provided for, who may be sentenced by any court of the United States within this State. Immediately upon commitment, a careful physical and mental examination by a competent physician and a psychologist shall be made of each person committed. The court imposing sentence upon offenders of either class shall not fix the term of such commitment except as hereinafter provided. Commitment to said institution shall be made within one week after sentence is imposed, by the sheriff when sentenced by the Superior Court, and by a police officer when sentence is imposed by any city, town or inferior court, but no offender shall be committed to such institution without being accompanied by a woman in addition to the officer. The expenses of such commitment shall be paid the same as commitments to other penal institutions in the State. The trial court shall cause a record of the case to be set with the commitment papers on blanks furnished by the institution. The duration of such commitment, including the time spent on parole, shall not exceed three years, except where the maximum term specified by law for the crime for which the offender was sentenced shall exceed that period, in which event such maximum term shall be the limit of detention under the provisions of this act, and in such cases it shall be the duty of the trial court to specify the maximum term for which the offender may be held under such commitment. (1927, c. 219, s. 8.)

As to admission of Cherokee Indians, see § 7328(f).

§ 7343(l). Parole.—Any inmate of the institution may, upon recommendation of the board of directors to the Governor, be allowed to go on

parole under the following conditions: That she is in good physicial condition, has ability to earn an honest living, has a satisfactory institutional record, based on the merit system, and a proper home to which she may go, or that suitable employment has been secured in advance. Each person paroled or discharged from said institution shall be given, if the superintendent deems it best, suitable clothing, transportation expenses and a sum of money not exceeding thirty dollars. Authority is conferred on said board of directors to establish such rules and regulations as it may deem necessary, setting forth the conditions upon which inmates may be discharged or recommended for parole, and to enforce such rules and regulations. (1927, c. 219, s. 9.)

§ 7343(m). Effect of parole.—While upon parole, each inmate of said institution shall remain in the legal custody and under the control of the board of directors, and subject at any time to be taken to said institution for any reason that shall seem sufficient to said board. Whenever any paroled inmate of said institution shall violate her parole and be returned to the institution, she may be required to serve the unexpired term of her maximum sentence, including the time she was out on parole or any part thereof, in the discretion of the board of directors, or she may be paroled again if said board of directors shall so recommend. The request of said board of directors or of any person authorized by the rules of said board, shall be sufficient warrant to authorize any officer of said institution or any officer authorized by law to serve criminal process within the State, to return any inmate on parole into actual custody; and it shall be the duty of police officers, constables and sheriffs to arrest and hold any paroled inmate when so requested, without any written warrant, and for the performance of such duty, the officer performing the same, except officers of said institution, shall be paid by the board of directors of said institution out of the institution funds such reasonable compensation as is provided by law for similar services in other cases. (1927, c. 219, s. 10.)

§ 7343(n). Escape of inmate.—If any inmate shall escape from said institution or from any keeper or officer having her in charge or from her place of work while engaged in working outside the walls of said institution, she shall be returned to said institution when arrested, and may be disciplined in such manner as the board of directors may determine. Any person who shall advise, induce, aid or abet any woman committed to the State Industrial Farm or to the charge of guardianship of the directors of said institution to escape from said farm, or from the custody of any person to whom such women shall have been entrusted by said directors or by their authority, shall be fined not more than five hundred dollars or imprisoned not more than one year, and any woman who shall have so escaped may, whether the limit of her original sentence shall have expired or not, be arrested and detained without warrant, by any officer authorized to serve criminal process, for a reasonable time to enable the superintendent or a director of said farm, or a person authorized in writing by the superintendent of said farm or said directors and provided with the mittimus by which such woman was committed, or with a certified copy thereof, to take such woman for the purpose of returning her to said institution, and the officer arresting her shall be paid by the State a reasonable compensation for her arrest and keeping. Any woman lawfully committed to said institution who shall escape therefrom may be imprisoned in said institution for not more than one year from the expiration of the term for which she was originally committed. Prosecutions under this article may be instituted in any county in which such woman may be arrested. (1927, c. 219, s. 11.)

§ 7343(o). Recommendation for discharge. — If it shall appear to said board of directors, that any inmate on parole, although not having completed her maximum term, has maintained a satisfactory parole record, and will continue to lead an orderly life if discharged, said board may recommend to the Governor that such inmate be discharged from said institution. (1927, c. 219, s. 12.)

§ 7343(p). General and industrial training.— The board of directors, in making rules and regulations for the government of said institution, shall make provision for a system of general and industrial training, including useful trades and home economics, and for proper recreation facilities. (1927, c. 219, s. 13.)

§ 7343(q). Bond issue.—In order to provide funds for the purposes of this article the State Treasurer is hereby authorized and directed at the request of the board of directors to be appointed hereunder and by and with the consent of the Governor and Council of State, to issue and sell not exceeding sixty thousand dollars ($60,000) in bonds of the State, properly designated and bearing such date or dates and such rate or rates of interest not exceeding five (5%) per cent per annum, payable semi-annually, as may be fixed by the Governor and Council of State, all of which bonds shall mature at one date in the year of nineteen hundred and sixty-seven. (1927, c. 219, s. 14.)

§ 7343(r). Interest coupons.—Said bonds shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denomination thereof shall be such as the State Treasurer may determine in conformity with this article. (1927, c. 219, s. 15.)

§ 7343(s). Sale of bonds.—Before selling the bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price. He is authorized to accept bids for the entire amount of said bonds, or any portion thereof, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is empowered to sell the bonds herein authorized in such manner as in his judgment will pro-

duce the best price, but not for less than par and accrued interest. (1927, c. 219, s. 16.)

§ 7343(t). Special fund.—The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds, the issuance of which has been anticipated by such bond anticipation notes), shall be placed by the Treasurer in a special fund to be designated "Farm Colony Building Fund 1927" and be disbursed only for the purposes of this act upon warrants drawn by the State Auditor. (1927, c. 219, s. 17.)

§ 7343(u). Borrowing on Notes.—By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State shall have given consent, if the Treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or principal of any of said bonds then outstanding if there shall not be sufficient funds in the State Treasury with which to pay such interest or principal as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1927, c. 219, s. 18.)

§ 7343(v). Funds used in payment of notes.—Funds derived from the sale of bonds shall be used in the payment of any bond anticipation notes that may have been issued in anticipation of the sale of such bonds and any renewal of such notes, and funds provided by the General Assembly for the payment of interest and/or principal of such bonds shall be used in paying the interest and/or principal of any notes or renewals thereof, the proceeds of which shall have been used in paying interest and/or principal of such bonds. Interest payments upon said notes may be evidenced by interest coupons in the Treasurer's discretion. (1927, c. 219, s. 19.)

§ 7343(w). Credit of state.—The full faith credit, and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1927, c. 219, s. 20.)

§ 7343(x). Coupons receivable against claims of state.—The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, dues, licenses, fines and demands due the State of any kind whatsoever. (1927, c. 219, s. 21.)

§ 7343(y). Exemption from taxation. — All of the said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income; nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1927, c. 219, s. 22.)

§ 7343(z). Lawful investment for trust funds. —It shall be lawful for all executors, administrators, guardians, and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds or notes. (1927, c. 219, s. 23.)

§ 7343(aa). Sinking fund created. — For the retirement of the principal of said bonds at maturity a sinking fund is hereby created, into which fund the State Treasurer shall pay during each fiscal year, beginning with the year ending June thirtieth, one thousand nine hundred and thirty-three, from any funds not heretofore pledged or appropriated, an amount equal to one and one-half (1½%) per cent of the face value of the bonds theretofore issued under this article. (1927, c. 219, s. 24; 1931, c. 128.)

Editor's Note.—The Act of 1931 changed the date in lines six and seven of this section from 1929 to 1933, and changed the amount to be paid into the sinking fund from one to one and one-half percent.

Art. 3. Reformatories or Homes for Fallen Women

§ 7344. Counties and cities authorized to establish reformatories. — In all cities that have a population of over twenty thousand people the governing body of such city and the board of county commissioners of the county in which the city is situated are authorized and empowered to establish jointly a reformatory or home for fallen women. (1917, c. 264, s. 1.)

§ 7345. Power to purchase land, erect buildings, and maintain the institution. — The said city and county are authorized jointly to purchase a tract of land, not exceeding one hundred acres, for the use of such reformatory or home, the title to which shall be vested jointly in the city and county, and the reformatory shall be managed jointly by such city and county. The city and county are authorized to build such buildings and improvements on the land so purchased, to keep and maintain such reformatory or home for fallen women, and to make all necessary appropriations for buildings and keeping and caring for the inmates thereof: Provided, however, the cost of said buildings shall not exceed the sum of forty thousand dollars, and the maintenance and upkeep and operating expenses per annum shall not exceed the sum of twenty thousand dollars. (1917, c. 264 s. 1; 1919, c. 33; 1925, c. 176.)

Editor's Note.—By amendment, Public Laws 1925 c. 176 the cost allowed for the building was raised from twenty thousand dollars to forty thousand dollars, and the cost of operating was raised from ten thousand dollars to twenty thousand dollars.

§ 7346. Board of directors elected; officers; regulations. — The governing body of the city, at its annual election of officers for the city in May, shall elect for the term of two years two men as directors for such institution, and the board of county commissioners shall, in the same year, at their meeting in May, elect two men as directors for such institution to serve for two years. The mayor of the city and the chairman of the board of county commissioners

shall be ex officio members of such board with equal right to vote, and the six directors shall have entire management and control of such reformatory for fallen women. The board shall elect one of their number president, and also elect a secretary and treasurer, and they shall have and exercise the usual powers incident to such officers. They shall make such rules and regulations as they see fit for the government and management of such institution. The directors shall take an oath to perform their service faithfully, and they shall continue as directors until their successors are duly elected and qualified. (1917, c. 264, s. 1.)

Editor's Note.—Public Laws, c. 253, applicable to Mecklenburg county only, struck out the first two sentences of this section and inserted in lieu thereof the following:

"The governing body of the City, at its annual election of officers for the City in May, shall elect, from the members of such governing body, two men as directors for such institution, and the Board of County Commissioners shall elect, at its meeting in May the same year the governing body of the City elects, two members of the Board of Commissioners as directors for such institution. The Mayor of the City and the Chairman of the Board of Commissioners of said County shall be ex-officio members of said Board with equal right to vote, and the said six directors shall have entire management and control of the reformatory for fallen women, and the Chairman of the Board of County Commissioners shall be purchasing agent for said institution. Such directors shall serve for the term of one year, and until their successors are elected and qualified: Provided, however, that in the event any of such directors elected by the governing body of the city shall cease to be a member of such governing body, or in the event any of such directors elected by the Board of County Commissioners shall cease to be a member of such board of County Commissioners, the term of office of such director shall expire and the governing body of the City or the Board of County Commissioners, as the case may be, at the first regular or special meeting thereafter, shall elect the successors of such directors whose terms have expired."

§ 7347. Advisory board of women. — The directors are authorized to appoint as an advisory board not more than twenty-five nor less than twelve discreet women to supervise and attend to the actual running of such institution. The advisory board of women shall be appointed for such term, not exceeding four years, as the directors may in their discretion think best. (1917, c. 264, s. 1.)

§ 7348. Special tax authorized. — To assist in carrying out the provisions of this article the county commissioners and governing body of the city shall each levy annually a tax not exceeding two cents on each one hundred dollars valuation of real and personal property in such city and county respectively. The tax shall be levied and collected in the same manner as the other county and city taxes are collected. This fund shall be used exclusively for the purposes contemplated and set forth in this article, and shall be kept separate from all other funds. (1917, c. 264, s. 2.)

§ 7349. Employment of superintendent and assistants; rules and regulations.—The board of directors shall have the management and control of the institution and shall have authority to employ superintendents and such other assistants as they may deem necessary; to fix their salaries, to define their duties, and to discharge any employee; and to make any and all rules and regulations as they may deem necessary for the management and conducting of the institution under the provisions of this article and not inconsistent therewith. (1917, c. 264, s. 5.)

§ 7350. Power of superintendent. — The superintendent of the institution employed by the board of directors shall have the right to require obedience from all the inmates of the institution, and to use such lawful measures as may be necessary to enforce the same to the same extent as the superintendent of any other penal institution in this state is empowered in like case. (1917, c. 264, s. 6.)

§ 7351. Physician employed. — For the purpose of treating the inmates of the institution for the whiskey, drug, or other habit or disease, the directors shall employ a competent physician or physicians to attend and treat said inmates. (1917, c. 264, s. 14.)

§ 7352. Purpose of home; persons to be admitted.—The reformatory or home shall be conducted for the correction of fallen women, and for the moral and industrial training of criminally delinquent women and girls, by teaching them useful trades and domestic science, etc., and the directors may, in their discretion, receive into the institution such women or girls as shall be committed thereto by the judge or other presiding officer of any superior or recorder's court held anywhere in the state of North Carolina within that judicial district in which county the reformatory is now or may hereafter be situated, as hereinafter provided: Provided, that the reasonable cost of maintaining any woman or girl committed to such institution from any county other than that in which such reformatory shall be located shall be borne by the county from which such person shall have been committed. (1917, c. 264, s. 3.)

§ 7353. Right of directors to control inmates. —The board of directors shall have the sole right to keep, restrain, and control the persons committed or otherwise received into the institution as hereinafter provided, during the term of their commitment thereto, under such proper and humane rules and regulations as may be adopted by the directors. (1917, c. 264, s. 4.)

§ 7354. Power of courts to commit persons to reformatory. — When the institution is ready to receive and care for inmates, the board of directors shall notify the clerks of the courts hereinbefore specified; and the judges or other presiding officers of the superior, recorders', county, or other courts having like criminal jurisdiction, in that judicial district in which the reformatory is now or may hereafter be situated and established, shall have authority to sentence to the reformatory for fallen women for a term of not less than thirty days nor more than one year all those women who are convicted in their several courts of drunkenness or the drug habit, where it appears that they are habitual drunkards or drug fiends; and the judges or other presiding officers of such courts shall have authority to sentence to the "Reformatory for Women" for a term of not less than thirty days nor more than three years all female persons convicted in the said courts of any violation of the criminal laws of this state prohibiting and punishing fornication

and adultery, keeping a house of ill-fame, or a bawdy-house, or disorderly house, or violating the criminal laws of this state as to chastity or vagrancy: Provided, that such judge or other presiding officer as aforesaid shall be of the opinion that it would be best for such persons and the community in which such persons may be convicted hereunder. The order of commitment of such judge or other presiding officer as hereinbefore provided shall be full, sufficient, and competent authority to the officers and agents of the institution for the detention and keeping therein of the persons so committed: Provided, that nothing herein shall authorize a justice of the peace to impose a sentence of longer than thirty days: Provided further, that judges and recorders holding courts in counties other than that in which the reformatory is located shall have power to commit such persons to the institution on the conditions heretofore set forth in this article. (1917, c. 264, s. 7; 1919, c. 302.)

§ 7355. Clerk of superior court may commit in certain cases. — The clerk of the superior court shall have power and authority to commit to the institution for treatment any female person found by such clerk to be a habitual drunkard or habitually addicted to the drug habit, as such clerk is now authorized by law to commit to the hospital for the insane, private hospital, persons adjudged to be of unsound mind, and to that end such clerk of the court shall have all the power and authority conferred upon him by law with reference to insane persons. (1917, c. 264, s. 15.)

§ 7356. Voluntary application for admission. — Any person fulfilling the requirements as to sex and age as hereinbefore provided may, upon written application to the directors, setting forth that the applicant wishes to reform and the term for which such applicant wishes to be detained, be admitted to such institution, in the discretion of the board of directors; and any inmate so admitted shall be subject to the same restraint, control, and treatment as persons committed thereto, and such applications signed by the applicants shall be full and sufficient authority for the detention and control of the applicants in the institution for and during the full term as set out in the application: Provided, that the directors may, in their discretion, discharge any inmate so admitted at any time. (1917, c. 264, s. 8.)

§ 7357. Instruction and training to be given.— The officers of the institution shall take into the reformatory or home all persons committed thereto by competent authority, and shall cause all such persons to be instructed in such rudimentary branches of useful knowledge as may be suited to their various ages and capacities, and to be taught such useful trades and occupations as the board may direct; and such persons shall perform such labor as the principal and other superintending officers may order, subject to the discretion of the board of directors. All inmates of the institution shall, if possible, be taught the precepts of the Holy Bible, good moral conduct, how to work and be industrious. (1917, c. 264, s. 11.)

§ 7358. Industrial training; assistance to discharged inmates.—There shall be established and conducted on such lands as may be owned in connection with the institution such useful pursuits as the board of directors may deem expedient, so as to keep regularly at work all able-bodied inmates thereof, and as far as may be practicable the board of directors shall assist the inmates, when paroled or discharged, in procuring suitable homes and honorable and respectable employment. (1917, c. 264, s. 12.)

§ 7359. Discharge on parole; rearrest for escape or violation of parole.—The board of directors of the institution may detain therein, under the rules and regulations adopted by them, any person legally committed thereto, according to the terms of sentence and commitment; and with the approval and concurrence of the governor of the state first had and obtained, may conditionally parole or discharge such person at any time prior to the expiration of the term of commitment. If, however, any inmate shall escape or be conditionally paroled, or be conditionally discharged from the institution as aforesaid, and violate and break the condition of her parole or conditional discharge, the board of directors may, by and through their superintendent, cause her to be arrested and returned to the institution, to be detained therein for the unexpired portion of the commitment, dating from the time of escape or parole or conditional discharge. The superintendent of the institution, or any employee thereof under his control and direction, may rearrest, without a warrant, any inmate of the institution who may have escaped therefrom, in any county of this state, and shall forthwith convey her back to the institution from which she escaped; and a justice of the peace or any judicial officer may cause an escaped inmate from the institution to be rearrested and held in custody until she can be returned to the institution as in case of the first commitment thereto. Any person conditionally paroled or conditionally discharged from the institution may be also rearrested and returned thereto upon a warrant issued by the chairman of the board of directors, the warrant specifying briefly the reason for such rearrest and return, and such warrant of rearrest shall be directed and delivered to a person employed by the board of directors, and may be executed by such person in any county of this state where the paroled or conditionally discharged inmate may be found. (1917, c. 264, s. 13.)

§ 7360. Ungovernable inmates removed.—If it shall appear to the board of directors that any inmate of the institution is or becomes ungovernable, or is exerting an unwholesome influence over any other inmate of the institution, it shall be their duty to certify the same to the governor of the state, and he thereupon may order such inmate to the state's prison or to the county jail or to the workhouse in the county in which the inmate was convicted and sentenced, where such person shall serve out her unexpired term of imprisonment. (1917, c. 264, s. 10.)

§ 7361. Reports to be made by directors; inspection by grand jury.—The board of directors shall at least once a year file with the city and the

board of county commissioners of the county in which the institution is situated a full detailed report of the institution, together with the superintendent's reports thereon. It shall be the duty of the grand jury to personally visit and inspect such institutions once every six months, and report to the court the conditions prevailing therein. (1917, c. 264, s. 9.)

§ 7362. General legislative control.—Nothing in this article shall prevent the general assembly from altering, changing, and modifying the laws and regulations governing such institutions, and their officers and directors, in such manner and at such time as it may deem best. (1917, c. 264, s. 16.)

Art. 4. Eastern Carolina Industrial Training School for Boys

§ 7362(a). Corporation created; name; powers.—A corporation to be known and designated as the eastern Carolina industrial training school for boys is hereby created, and as such corporation and under said name it may sue and be sued, plead and be impleaded, hold, use, and sell and convey real estate, receive gifts and donations and appropriations, and do all other things necessary and requisite for the purposes of its organization as hereinafter specified. (1923, c. 254, s. 1.)

§ 7362(b). Trustees; appointments; terms; expenses.—The Eastern Carolina Industrial School for Boys shall be under the control and management of a board of five trustees. The said trustees shall be appointed by the Governor of the State and the term of each trustee shall be four years from and after the date of his or her appointment. Within thirty days after March 10, 1925 the Governor shall appoint three of the trustees and within six months after March 10, 1925 the Governor shall appoint the remaining two. At the time of making the appointment the Governor shall designate which of the present trustees are to be succeeded by his appointees. All vacancies occurring in the board shall be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly the names of his appointees for confirmation. Each member of the board shall be entitled to receive necessary expenses for each and every day engaged in the business of the institution. (1923, c. 254, s. 2; 1925, c. 306, s. 5.)

Editor's Note.—This school is of the same nature as the Stonewall Jackson Training School. 1 N. C. Law Rev. 269. This section was revised by the 1925 amendment, the manner of appointment being changed in some respects; the provisions requiring the submissions of names to the senate for ratification being inserted.

§ 7362(c). Establishment and operation of school; boys subject to committal; control; term of detention.—The trustees are empowered to establish and operate a school for the training and moral and industrial development of the criminally delinquent white boys of the state; and when such school has been organized the trustees may, in their discretion, receive therein such delinquent and criminal boys under the age of eighteen years as may be sent or committed thereto under any order or commitment by the judges of the superior courts, the judges of the juvenile courts, or the recorders, or other presiding officers of the city or criminal courts, and shall have the sole right and authority to keep, restrain, and control them during their minority, or until such time as they shall deem proper for their discharge, under such proper and humane rules and regulations as may be adopted by the trustees. All laws and clauses of laws in conflict with the provisions of this section are hereby repealed. (1923, c. 254, s. 3.)

§ 7362(d). Selection of location; power and size of purchase.—The board of trustees shall select a suitable place outside of and away from any city, town or village for the erection of such school, such location to be in the eastern part of North Carolina not farther west than twenty miles west of the main line of the Atlantic Coast Line Railroad, and said board of trustees is empowered to purchase, at some suitable and convenient place, not less than one hundred acres nor more than five hundred acres of land whereon to erect and operate such school. (1923, c. 254, s. 4.)

§ 7362(e). Naming of trustees; meeting; officers.—It shall be the duty of the governor to name the board of trustees hereinbefore provided for and to call, not later than the first day of September, one thousand nine hundred and twenty-three, a meeting of the trustees herein named, at his office in Raleigh, and at such meeting the trustees shall proceed to the election of a treasurer, superintendent for the school, and such other officers for the board and school as they deem proper. (1923, c. 254, s. 5.)

§ 7362(f). Receipts expended for school; accounting and reports.—All moneys received by the trustees by private gifts, donations, or otherwise shall be expended in the establishment, operation and maintenance of the school for the training and the moral and industrial development of such delinquent boys, and in securing homes for them; and it shall be their duty to duly account for all moneys so received by them and to make report of the manner of its expenditure and of the work done by them as hereinafter more particularly provided for. (1923, c. 254, s. 6.)

§ 7362(g). Bonds of superintendent and treasurer.—The treasurer and superintendent shall, before receiving any of said funds, make a good and sufficient bond, payable to the state of North Carolina, in such sums as may be named by the governor and approved by the state treasurer. (1923, c 254, s. 7.)

§ 7362(h). Enforcement of discipline; discharge of superintendent.—The superintendent employed by the board is authorized to require obedience from all the inmates of the school, and is entrusted with the authority for correcting and punishing any inmate thereof to the same extent as a parent may under the law impose upon his own child; and the trustees shall have the right at any time to discharge the superintendent for cause. (1923, c. 254, s. 8.)

§ 7362(i). Repealed by Public Laws 1931, c. 213.

§ 7362(j). Transfer by order of governor.—The governor of the state may by order trans-

fer any boy under the age of eighteen years from any jail, chain-gang or penitentiary in this state to such school. (1923, c. 254, s. 10.)

§ 7362(k). Work to be conducted. — There shall be established and conducted on such lands as may be owned in connection with the school, such agriculture, horticulture, workshops, and other pursuits as the board of trustees may deem expedient so as to keep regularly at work all able-bodied inmates. (1923, c. 254, s. 11.)

§ 7362(l). Boys to be received; subjects of instruction.—The officers of the school shall receive and take into it all boys committed thereto by competent authority, or received therein as aforesaid, and shall cause all such boys in the school to be instructed in such rudimentary branches of useful knowledge as may be suited to their various ages and capacities. The boys shall be taught such useful trades and given such manual training as the board may direct, and shall perform such manual labor as the principal or other superintending officers, subject to the direction of the board, may order. All the inmates shall, if possible, be taught the precepts of the Holy Bible, good moral conduct, how to work and to be industrious. (1923, c. 254 s. 12.)

§ 7362(m). Management and control of school; rules and regulations.—The board of trustees shall have the management and control of the school, and shall have authority to employ a superintendent and such other assistants as they may deem necessary; to fix their salaries, to define their duties, to discharge any employees, and to make any and all rules and regulations as they may deem necessary for the management and conducting of such school under the provisions of this article and not inconsistent therewith. (1923, c. 254, s. 13.)

§ 7362(n). Certificate for removal from school; order or removal.—If it shall appear to the board of trustees that any inmate of the school is or becomes ungovernable and is exerting an unwholesome influence over any other inmate, it shall be their duty to certify the same to the governor of the state, and he may order such inmate to the state prison or to the jail or chain-gang in the county in which such inmate was convicted, where such person shall serve out his unexpired term. (1923, c. 254, s. 14.)

§ 7362(o). General legislative control.—Nothing contained in this article shall be construed to prevent the general assembly from altering, changing, and modifying the law and regulations governing such school and its officers and directors in such manner and at such time as to it may seem best. (1923, c. 254, s. 16.)

CHAPTER 121A

PUBLIC RECORDS

§ 7362(1). Public records defined.—Public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business. (1935, c. 265, s. 1.)

§ 7362(2). Custodian designated. — The public official in charge of an office having public records shall be custodian thereof. (1935, c. 265, s. 2.)

§ 7362(3). Destruction of records regulated. — No public official may destroy, sell, loan, or otherwise dispose of any public record, except in accordance with chapter one hundred and two, article one, section six thousand one hundred and forty-five of the Consolidated Statutes, without the consent of the North Carolina historical commission. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars nor more than five hundred dollars. (1935, c. 265, s. 3.)

§ 7362(4). Disposition of records at end of official's term. — Whoever has the custody of any public records shall, at the expiration of his term of office, deliver to his successor, or, if there be none, to the North Carolina historical commission, all records, books, writings, letters and documents kept or received by him in the transaction of his official business; and any such person who shall refuse or neglect for the space of ten days after request made in writing by any citizen of the State to deliver as herein required such public records to the person authorized to receive them shall be guilty of a misdemeanor and upon conviction fined not exceeding five hundred dollars. (1935, c. 265, s. 4.)

§ 7362(5). Demanding custody. — Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall forthwith deliver the same to him. If the person who unlawfully possesses public records shall without just cause refuse or neglect for ten days after a request made in writing by any citizen of the State to deliver such records to their lawful custodian, he shall be guilty of a misdemeanor and upon conviction fined not exceeding five hundred dollars. (1935, c. 265, s. 5.)

§ 7362(6). Inspection and examination of records.—Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law. (1935, c. 265, s. 6.)

§ 7362(7). Keeping records in safe places; copying or repairing; certified copies.—In so far as possible, custodians of public records shall keep them in fireproof safes, vaults, or rooms fitted with non-combustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used. Record books should be copied or repaired, renovated or rebound if worn, mutilated, damaged or difficult to read. Any public official who causes a record book to be copied shall attest it and shall certify on oath that it is an accurate copy of the original book. The copy shall then have the force of the original. (1935, c. 265, s. 7.)

§ 7362(8). Assistance of historical commission. —The North Carolina historical commission shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, filing and making available the public records in their custody. (1935, c. 265, s. 8.)

§ 7362(9). Violation of chapter a misdemeanor. —Any public official who refuses or neglects to perform any duty required of him by this chapter shall be guilty of a misdemeanor and upon conviction fined not more than twenty dollars for each month of such refusal or neglect. (1935, c. 265, s. 9.)

CHAPTER 122

RIVERS AND CREEKS

Art. 1. Commissioners for Opening and Clearing Streams

§ 7363. County Commissioners to appoint commissioners. — Where any inland river or stream runs through the county, or is a line of their county, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same is deemed within the ability of the county, and to be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner in opening and clearing the same, by taking such hands from the public roads as the board of county commissioners shall permit and direct to be allotted to such work; which hands shall be placed under overseers in companies, every overseer and company to have a distinct portion of such river or stream to be laid off by the board of commissioners. (Rev., s. 5297; Code, s. 3706; 1887, c. 370.)

As to building bridges, see section 3795 et seq.

Compared to Public Roads. — Avery, J., dissenting in Gwaltney v. Scottish Carolina Timber Co., 111 N. C. 547, 564, 16 S. E. 692, referring to this section and those following, etc., says: "it clearly recognizes the doctrine that all streams that are susceptible of use for commerce, are public highways, which may be taken in charge by the County Commissioners and cleared out and improved at the expense of the county, and placed in charge of overseers with certain designated hands subject to their orders just as is done in reference to public roads."

§ 7364. Overseers; appointment and duty.— Every overseer shall be appointed by the board of county commissioners; and the clerk shall issue a notice, expressing therein the name of the stream, the distance he is to work thereon, and the hands appointed under him, and the sheriff shall serve the same upon him, under the same rules as notices are served upon overseers of roads. The overseer and hands, upon receiving three days previous notice from the commissioners, shall proceed to work upon and clear out such river or stream, subject to the same rules and double penalties imposed upon overseers and hands working upon public roads; and no overseer or hands appointed to open and clear out navigable rivers and streams shall be compelled to work on public roads. And the board of county commissioners thereafter shall annually appoint overseers, and assign such hands as they may judge proper, to work on rivers and creeks, and keep in repair any slopes erected or to be erected; and such overseers, and the hands assigned, for a failure of duty shall be subject to all the penalties imposed upon overseers of roads and the hands liable to work thereon. (Rev., s. 5298; Code, s. 3707; R. C., c. 100, s. 2; 1784, c. 227, s. 16; 1796, c. 460, s. 2; 1809, c. 782, s. 3; 1812, c. 845, ss. 1, 2, 3; 1813, c. 859, ss. 1, 2; 1844, c. 66.)

Cited in Hutton v. Webb, 124 N. C. 749, 757, 33 S. E. 169.

§ 7365. Flats and appurtenances procured.— The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds. (Rev., s. 5299; Code, s. 3708; R. C., c. 100, s. 3; 1785, c. 242, s. 2.)

§ 7366. Neuse river in certain counties.—The boards of commissioners of the counties of Johnston, Wayne, Lenoir, and Craven, at the first meeting which shall be held for their respective counties after the first day of July, may yearly appoint and lay off, in convenient districts, all the inhabitants of their counties, respectively, resident above Spring Garden on both sides of Neuse river, within such distances of the river as the boards of county commissioners shall appoint; and for each district appoint some person as overseer, who shall cause all persons within the district allotted to him, liable to work on public roads, to work at least six days in every year on the river, unless the boards of county commissioners shall otherwise direct; during which time he shall cause them to be employed in removing all logs, brush, and other obstructions to navigation; and for neglect he shall be guilty of a misdemeanor; and every person liable to work as aforesaid, or send hands, who shall fail when warned (as hands are for working on roads) to appear and work, with such tools as the overseer shall direct, shall pay for each day one dollar, to be recovered and applied in the same manner as fines for failing to work on public roads: Provided, that nothing in this section shall abridge or interfere with the rights and privileges of the Neuse river navigation company. (Rev., s. 5300; Code, s. 3709; R. C., c. 100, s. 4; 1823, c. 1197.)

§ 7367. Laid off in districts; passage for fish.— The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three-fourths for the owners of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes may be necessary, the commissioners shall lay off such slopes,

and determine the length of time they shall be kept open; and such commissioners shall return to their respective boards of county commissioners a plan of such slopes, dams, and other parts of streams viewed and surveyed. (Rev., s. 5301; Code, s. 3710; R. C., c. 100, s. 5; 1787, c. 272, s. 1.)

See notes to § 7368.

Cited in Hutton v. Webb, 124 N. C. 749, 757, 33 S. E. 169; Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 447, 550, 566, 16 S. E. 692.

§ 7368. Commissioners to examine streams.— The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, or where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes, and dams in writing. (Rev., s. 5302; Code, s. 3712; 1858-9, c. 26, s. 1.)

Only Applicable to Floatable Streams.—It would seem that these sections were passed entirely with reference to floatable streams because, without condemnation the Commissioners would have no right to enter upon and clean out beds of streams which were not natural highways. Commissioners v. Catawba Lumber Co., 116 N. C. 731, 744, 21 S. E. 941.

Dams Built under Permit.—Authority over streams, conferred upon county commissioners while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a steam, when he is proceeding under the permit and direction of the commissioners. McLaughlin v. Hope Mfg. Co., 103 N. C. 100, 9 S. E. 307.

Cited in Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 550, 566, 16 S. E. 692.

§ 7369. Report made and confirmed. — Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until othewise ordered by the board of county commissioners. (Rev., s. 5303; Code, s. 3713; 1858-9, c. 26, s. 2.)

§ 7370. Gates and dams discontinued. — The commissioners at any time thereafter, appointed as aforesaid, when they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued. (Rev., s. 5304; Code, s. 3714; 1858-9, c. 26, s. 3.)

§ 7371. Failure of owner of dam to keep gates, etc.—If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a misdemeanor. (Rev., s. 3383; Code, s. 3715; 1858-9, c. 26, s. 4.)

§ 7372. Repairing breaks. — Wherever any stream of water which is used to propel machinery shall be by freshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel. (Rev., s. 5305; Code, s. 3716; 1879, c. 53, s. 1.)

§ 7373. Entry upon lands of another to make repairs.—In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road if necessary by which said person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the stream to return to its original channel, and assess any damage which may thereby be occasioned: Provided, the party upon whose land the work is proposed to be done shall have five days notice in writing served on him or left at his place of residence: Provided further, that it shall be the duty of said commissioners to assess the damages of any one on whose land the road shall be laid off to be paid by the applicant for said road: Provided, also, that either party shall have the right of appeal to the superior court. (Rev., s. 5306; Code, s. 3717; 1879, c. 53, s. 2.)

§ 7374. Draws in bridges.— Whenever the navigation of any river or creek which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, it shall be lawful for any person owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible. (Rev., s. 5307; Code, s. 3719; 1879, c. 279, ss. 1, 2.)

Cited in Staton v. Wimberly, 122 N. C. 107, 29 S. E. 63.

§ 7375. Public landings.—The board of county commissioners may establish public landings on any navigable stream or water-course in the same manner that public roads are laid out and established. The board of county commissioners, on any petition for a public landing, shall order how the costs shall be paid. All places heretofore established as public landings shall remain such. (Rev., s. 5308; Code, s. 2982.)

Art. 2. Obstructions in Streams

§ 7376. Obstructing passage of boats.—If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor. (Rev., s. 3561; Code, s. 3711; R. C., 100, s. 6; 1796, c. 460, s. 2.)

See notes under following section.

Cited in Hutton v. Webb, 124 N. C. 749, 757, 33 S. E. 169.

§ 7377. Obstructing streams a misdemeanor.—If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish-dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach. (Rev., s. 3559; Code, s. 1123; 1872-3, c. 107, ss. 1, 2.)

Motive Power Defined.—Water used in "sluicing" is not used as a "motive power" within the meaning of this section. The section has obvious reference to the use of the energies of water dammed, as a moving force, and not to the operation of the current in motion. State v. Duplin Canal Co., 91 N. C. 637.

Applicable only to Navigable Streams.—The word "and" between the words "retarded" and "whereby" replaced "or" by judicial construction. The Supreme Court saying "But it cannot be supposed that an intelligent Legislature meant that every obstruction of a stream, no matter how insignificant, private, or removed from public access or use, shall be indictable and subject the offender to fine and imprisonment." State v. Pool, 74 N. C. 402.

Applicable Though Stream is Private Property.—The bed of a lake or water course may be private property, but if the waters are navigable in their natural state the public have an easement of navigation in them, which easement the owner of the soil cannot obstruct. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411.

When Malice Must Be Shown. — In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by this section, it was held that to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. Warren v. Coharie Lumber Co., 154 N. C. 34, 69 S. E. 685.

Indictment. — The indictment under this section must charge that the obstruction was not "for the purpose of utilizing." Such a charge is not necessary in an indictment for obstructing waters, at common law. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411.

Same—Compared with Common Law Rule.—At common law it was an offense to obstruct any navigable stream, but by this section, unless the act is wilful and not for the purpose of utilizing the water as a motive power the offense is not indictable. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411; State v. Baum, 128 N. C. 600, 38 S. E. 900.

Railroad Bridges.—A railroad bridge built over a navigable stream, if obstructing passage of vessels is a nuisance, and tearing a portion of it down so that vessels may pass is not indictable. State v. Parrott, 71 N. C. 311.

Cited in Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 550, 571, 16 S. E. 692.

§ 7378. Local; sawdust in streams.—If any person shall throw sawdust into any stream he shall be guilty of a misdemeanor and punished as indicated in this section.

1. By a fine not exceeding fifty dollars, or imprisonment not exceeding thirty days, in the counties of Alexander, Guilford, Henderson, Lincoln, Madison, Pamlico, Transylvania, Warren, and Yancey; in Catawba county, not to apply to sawmills run by water-power established prior to the first day of January, one thousand eight hundred and ninety-nine; in Davidson, not to apply to mills erected prior to the eighth day of February, one thousand nine hundred and five; in Jackson, not to apply to sawmills run by water-power; in Clay and Haywood, as to all streams which contain mountain or brook trout; in Anson county, to throw timber, slabs, or sawdust into any stream.

By the same penalty as regards the streams specified in the following counties and localities: Drowning creek and its tributaries in Cumberland, Moore, and Robeson; South river in Bladere, Cumberland and Sampson; Sawyer's creek or its tributaries in Graham; North and South Muddy creek in McDowell; Buffalo creek in Stokes; Eno river in Orange, from the head of Faucett millpond to the Durham county line; Brushy creek in Cleveland; Banner Elk and all streams in Watauga county which contain mountain or brook trout, but not to apply to sawmills run by water-power erected prior to the first day of January, one thousand eight hundred and ninety-nine, except in streams in which rainbow trout have been placed, and not to apply to Blue Ridge township, to Meadow creek and Gap creek in Stony Fork township, Elk creek in Elk Creek township, nor to Beaver Dam creek in Beaver Dam township. (Rev., s. 3382a; 1889, c. 52; (Pr.) 1895, c. 327; 1897, cc. 130, 285; 1899, cc. 285, 453, 656; 1901, c. 158; 1903, cc. 245, 627, 711, 741, 760; 1905, cc. 139, 191, 206, 214, 247, 474, 578, 775; 1907, cc. 27, 234, 266, 280, 370, 403, 683, 756; 1909, cc. 186, 267, 280, 600, 765; P. L. 1911, c. 568; P. L. 1913, cc. 36, 484, 532; P. L. 1915, c. 318.)

2. By a fine not exceeding five dollars or imprisonment not exceeding thirty days, in Edgecombe and Wilkes; and in Iredell, except as to the Big Rocky creek. (1907, c. 593; 1909, cc. 209, 242, 272; P. L. 1915, c. 699.)

3. By a fine not less than ten dollars and not more than fifty dollars, in Johnston, and each time is a separate offense; and in Montgomery, and each day is a separate offense. (Rev., s. 3382a; 1905, c. 206; 1909, c. 656; P. L. 1911, c. 75.)

4. By a fine of fifty dollars for each offense, in Rutherford. (1907, c. 255; P. L. 1911, c. 644.)

5. By a fine of not less than fifty nor more than one hundred dollars, or imprisonment for not less than thirty days nor more than sixty days, for throwing sawdust in or near any stream in Wake. (1907, c. 621; P. L. 1911, cc. 519, 611; P. L. 1915, c. 373.)

6. By punishment in the discretion of the court in Swain county, and as to North Fork and its tributaries above the iron bridge in McDowell county. (Rev., s. 3382a; 1899, c. 453; 1905, c. 206; 1909, c. 763; P. L. 1911, c. 296.)

§ 7378(a). Sawdust in streams in Avery county.—It shall be unlawful for any person, firm, or corporation to dump any sawdust into any of the streams of Avery county, North Carolina, or in such a place or within thirty feet of said streams. Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and fined not exceeding fifty dollars. Every day that the provisions of this section are violated shall constitute a separate offense. (1921, c. 82.)

§ 7379. Local; Owners of mills throwing sawdust or other material into streams.—1. If any person owning or operating a sawmill shall throw sawdust, or permit it to be thrown, into any stream he shall be guilty of a misdemeanor and punished as indicated in this section.

a. By fine or imprisonment in the discretion of the court, in Rockingham county; in Stanly county as to all rivers and creeks; in Surry county as to all rivers and creeks, but not to apply to mills run by water-power; as to any stream in Cheoah and Yellow Creek townships in Graham county; as to Cub creek or its tributaries, Bush creek and Pokeberry creek, in Riggsbee township in Chatham county, and as to any creek or branch in said county which empties into Cape Fear river. (Rev., s. 3382a; 1899, cc. 285, 741; 1905, cc. 206, 214; 1907, cc. 254, 601, 740; 1909, cc. 280, 323, 549, 693; P. L. 1911, cc. 443, 523, 755; P. L. Ex. Sess. 1913, c. 27.)

b. By a fine not exceeding fifty dollars or imprisonment not exceeding thirty days, in Polk county; in Franklin county, except Tar river; in Harnett county, except Cape Fear river; in Yadkin county, but not to apply to mills run by water-power; in Cleveland county, First Board river, Duncan's creek, Wards' creek, Hinton's creek, or their tributaries, and each day's violation is a separate offense, but this section does not apply to sawmills run by water-power. (Rev., s. 3382a; 1903, cc. 243, 721; 1907, cc. 255, 866, 873; 1909, c. 581; P. L. 1911, cc. 181, 611; P. L. 1913, c. 484.)

c. By a fine of not more than ten dollars or imprisonment not more than ten days, in Macon county, but not to apply to mills run by water-power established and in operation before the twenty-ninth day of January, one thousand nine hundred and nine. (Rev., s. 3382a; 1899, c. 285, 1905, c. 206; 1907, c. 266; 1909, s. 36.)

d. By a fine of not less than twenty dollars, or imprisonment, or both, in the discretion of the court, one half the fine to go to the informer, in Burke county, as to Cranberry creek, Linville river above gorge, Upper creek and Steele's creek, or their tributaries above the mill near Smyrna church. (Rev., s. 3382a; 1899, c. 656; 1905, c. 238; 1907, c. 430; P. L. 1913, c. 484.)

2. If any person owning or operating a sawmill or other woodworking machinery shall throw, or permit to be thrown, any sawdust or other refuse from the mill into any stream, or place such material where it will wash into any stream, he shall be guilty of a misdemeanor and punished as indicated in this section.

a. By a fine of not less than ten nor more than fifty dollars, or imprisoned not more than thirty days, in the counties of Avery, Caldwell, Forsyth, and Richmond; and in Mitchell county, but not to apply to sawmills which saw less than three thousand feet per day. (Rev., s. 3382a; 1905, cc. 775, 776; 1907, cc. 26, 371; P. L. 1911, c. 568; P. L. 1913, c. 484.)

b. By a fine or imprisonment in the discretion of the court, in Burke county, but not to apply to saw mills run by water-power prior to one thousand nine hundred and seven, not located in the fishing districts unless removed to a new site. (1909, c. 765.)

c. By a fine of not less than five nor more than twenty-five dollars or imprisonment for twenty days, in Alamance county, as to Haw river, Big Alamance creek and little Alamance creek, or their tributaries. (1909, c. 467.)

d. By a fine of not more than fifty dollars, or imprisonment not more than thirty days, in Nash county, except as to Tar river, Fishing, Swift, Turkey, Pigbasket, Stony, and Saponey creeks in said county, but not to apply to mills operated by water-power which have no means of hauling dust from the streams. (1909, c. 34.)

CHAPTER 123

RURAL COMMUNITIES

Art. 1. Organized Rural Communities

§§ 7380-7393: Repealed by Public Laws 1923, c. 136, s. 376.

Art. 2. Establishment of Conveniences in Rural Communities

§ 7394. Assistance by state highway commission.—In order to assist in providing for better and more comfortable living conditions in the rural sections throughout the state, by means of utilization of the many small water-powers that abound in many parts of the state, and by the installation of water systems in rural homes, and by the construction of rural telephone lines, the state highway commission is herewith authorized to advise and assist in providing a water supply and electric power and electric lights for rural communities and individuals outside of incorporated towns, by investigating water-powers and preparing plans for their development and the installation of such apparatus as may be needed to utilize such water-power in developing electric power and for supplying a water system and electric light system, and to furnish plans and specifications for the installation of rural telephone lines and to advise and assist in the formation of rural mutual telephone systems. (1917, c. 267, s. 1.)

§ 7395. Appropriation made.—For the purpose of carrying out the provisions of this article there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of five thousand dollars annually, the sum to be drawn upon as directed by the state highway commission. (1917, c. 267, s. 2.)

CHAPTER 123A

RURAL REHABILITATION

Art. 1. State Rural Rehabilitation Law

§ 7395(1). Title of article.—This article shall be known as the "State Rural Rehabilitation Law." (1935, c. 459, s. 1.)

§ 7395(2). Declaration of necessity for subsistence homesteads; agencies established to effect purpose.—It is hereby declared that it is necessary in the public interest to make provision for the establishment of small individual farms or subsistence homesteads with the neces-

sary dwellings and other structures in planned rural communities, together with livestock, farm implements, equipment and initial materials and supplies to enable success of the applicant and his family, and that the providing of such subsistence homesteads or farm homes and operating facilities in community settlements, being now otherwise impossible, it is essential that provision be made for the investment of private and public funds at low interest rates, the acquisition at fair prices of adequate parcels of land (not classed as sub-marginal lands) the construction of new agricultural facilities, the clearing, grading, draining of lands, and building of planned rural communities under public supervision in accord with proper standards of sanitation and safety at a cost which will permit their use or sale at prices which families of low income and/or families of agricultural experience or ability can afford to pay. Therefore, there are created and established the agencies and instrumentalities hereinafter prescribed which are declared to be the agencies and instrumentalities of the State of North Carolina and/or the agencies and instrumentalities of the United States government when and if designated by it as such, for the purpose of attending the ends herein recited and their necessity in the public interest. (1935, c. 459, s. 2.)

§ 7395(3). State board of rural rehabilitation created; appointment and terms of members; vacancies; compensation. — There is hereby created a state board of rural rehabilitation of the State of North Carolina, which will consist of three (3) members, to be appointed by the governor. Two of the three members shall be appointed for two years, and one for four years, and at the expiration of these terms their successors shall be appointed for a term of four years. All vacancies which may occur for any unexpired term shall be filled by the governor. The members of the board shall receive no salary, but shall be entitled to a per diem of not in excess of $10.00 when attending meetings of the corporation and the necessary traveling and other expenses incurred in the discharge of their duties, which shall be paid by the corporation. (1935, c. 459, s. 3.)

§ 7395(4). Officers and employees.—The members of the board shall choose from among their number a chairman, and the board may appoint such other officers and employees, including a secretary, as it may require, for the performance of its duties, and shall fix and determine their qualifications, duties and salaries. (1935, c. 459, s. 4.)

§ 7395(5). Submission to board of projects; community corporations; supervision of board over monies of such corporations; naming of trustee; duties; disbursement of funds.—No rural community project proposed by a corporation incorporated under this article shall be undertaken without the approval of the board.

(a) There shall be submitted to the board a community plan and financial plan in such forms and with such assurances as the board may prescribe to raise the actual cost of the lands and projected improvements and operating facilities by subscriptions to or the sale of the stock, income debentures, and/or mortgage bonds of such corporation. Whenever reference is made in this article to cost of projects or of buildings and improvements in projects, such cost shall include the necessary personal property in farm units and community buildings, charges for financing and supervision approved by the board, and carrying charges during construction required in the project, including interest on borrowed and, where approved by the board, on invested capital.

(b) The corporation agrees to accept a designee of the board of rural rehabilitation as a member of the board of directors of said corporation, which designee may be a representative of the United States or of the principal creditor of said corporation.

(c) If required by the board, the corporation shall deposit all monies received by it as proceeds of its mortgage bonds, notes, income debentures, or stock, with a trustee which shall be a banking corporation authorized to do business in the State of North Carolina and to perform trust functions, and such trustee shall receive such monies and make payment therefrom for the acquisition of land, the construction of improvements and other items entering into cost of land improvements and the personal property and supervision necessary for successful independent farm units and rural community centers, upon presentation of draft, check, or order signed by a proper officer of the corporation and, if required by the board, countersigned by the said board of a person designated by it for said purpose. Any funds remaining in the custody of said trustee after the completion of the said project and payment or arrangement in a manner satisfactory to the board for payment in full thereof, shall be paid to the corporation. (1935, c. 459, s. 5.)

§ 7395(6). Investigation into affairs of corporations; judicial powers. — The board shall have power to investigate into the affairs of limited dividend and/or non-dividend companies incorporated under this article, and into the dealings, transactions, or relationships of such companies with other persons. Any of the investigations provided for in this article may be conducted by the board or by a committee to be appointed by the board consisting of one or more members of the board. Each member of the board or a committee thereof shall have power to administer oaths, take affidavits, and to make personal inspections of all places to which their duties relate. The board or a committee thereof shall have power to subpoena and require the attendance of witnesses and the production of books and papers relating to the investigations and inquiries authorized in this article, and to examine them in relation to any matter it has power to investigate, and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the board or excused from attendance. (1935, c. 459, s. 6.)

§ 7395(7). Study of rural conditions; programs for betterment; dissemination of information; approval of community projects; coöperation with local officials. — The board is hereby empowered to (a) study rural conditions and farm tenancy

throughout the State, to determine in what areas unhealthful and unsanitary conditions constitute a menace to health, and reasonable comfort of the citizens of the State; (b) prepare programs for correcting such conditions as may be relieved by the purposes of this article: (c) collect and distribute information relating to rural development; (d) recommend and approve the areas within which or adjacent to which the construction of rural community projects by limited dividend and/or non-dividend companies may be undertaken, and (e) co-operate with local officials and planning commissions or similar bodies in the development of projects they may have under consideration. (1935, c. 459, s. 7.)

§ 7395(8). Consolidation of projects. — The board may permit the consolidation of two or more approved projects or the extension or amendment of any approved project, or the consolidation of any approved project with a proposed project. In any of these events the consolidation project shall be treated as an original project and an application shall be submitted as in the case of an original project, and sale prices may be averaged throughout the consolidated or extended project. The board may by approval of its charter likewise permit any limited dividend and/or non-dividend corporation to organize and operate one or more rural community projects which may be organized and operated independently of each other under such by-laws, rules and regulations authorized by the board, not inconsistent with the provisions of this article, as may be necessary for the proper conduct of the affairs of the corporation. (1935, c. 459, s. 8.)

§ 7395(9). Other powers of board.—In pursuance of its power and authority to supervise and regulate the operations of limited dividend and/or non-dividend companies incorporated under this article the board may in its discretion:

(a) Order all such corporations to do such acts as may be necessary to comply with the provisions of the law, the rules and regulations adopted by the board, or by the terms of any project approved by the board for protection of its security holders or creditors, or to refrain from doing any acts in violation thereof.

(b) Examine all such corporations and keep informed as to their general condition, their capitalization, and the manner in which their property is constructed, operated, or managed and sold.

(c) Either through its members or agents duly authorized by it, enter in or upon and inspect the property, equipment, buildings, plants, offices, apparatus, and devices of any such corporation, examine all books, contracts, records, documents, and papers of any such corporation, and by subpoena duces tecum compel the production thereof.

(d) In its discretion prescribe uniform methods and forms of keeping accounts, records, and books to be observed by such companies and to prescribe by order accounts in which particular outlays and receipt shall be entered, charged, or credited.

(e) Require every such corporation to file with the board an annual report setting forth such information as the board may require, verified by the oath of the president and general manager or receiver, if any, thereof, or by the person required to file the same. Such report shall be in the form, cover the period, and be filed at the time prescribed by the board.

(f) From time to time make, amend, and repeal rules and regulations for carrying into effect the provisions of this article. (1935, c. 459, s. 9.)

§ 7395(10). Price fixing for farms sold; determination of payments made by corporations; dividends; sinking funds.—The board shall fix the maximum and minimum purchase price to be charged for the farms sold by such corporation. Such purchase price shall be determined upon the basis of the actual final cost of the project so as to secure, together with all other income of the corporation, a sufficient income to meet all necessary payments to be made by said corporations, as herein prescribed, and such purchase prices shall be subject to revision by the board from time to time. The payments to be made by such corporation shall be (a) all fixed charges and all operating and maintenance charges and expenses, which shall include taxes, assessments, insurance, amortization charges in amounts approved by the board to amortize the mortgage indebtedness in whole or in part, depreciation charge, if, when, and to the extent deemed necessary by the board; reserves, sinking funds, and corporate expenses essential to operation and management of the project in amounts approved by the board. (b) A dividend, if any, not exceeding all the maximum fixed by this article upon the stock of the corporation allotted to the project by the board. (c) Where feasible, in the discretion of the board, a sinking fund in an amount to be fixed by the board for the general retirement of the stock and income debentures of the corporation to the extent permitted by this article, or specified in the issues outstanding. (1935, c. 459, s. 10.)

§ 7395(11). Reorganization of corporations. — (1) Reorganization of limited dividend and/or non-dividend companies incorporated under this article shall be subject to the supervision and control of the board and no such reorganization shall be had without its authorization.

(2) Upon all such reorganizations the amount of capitalization, including therein all stocks, income debentures and bonds and other evidence of indebtedness, shall be such as is authorized by the board, which, in making its determination, shall not exceed the fair value of the property involved. (1935, c. 459, s. 11.)

§ 7395(12). Power of board to enjoin illegal acts of corporations.—Whenever the board shall be of opinion that any such limited dividend and/or non-dividend company is failing or omitting, or about to fail or omit, to do anything required of it by law or by order of the board, and is doing or about to do anything, or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the board, or which is improvident or prejudicial to the interests of the public, the lien holders or the stockholders, it may commence

an action or proceeding in the superior court of the county in which the said company is located, in the name of the board for the purpose of having such violations or threatened violations stopped and prevented by mandatory injunction. The board shall begin such action or proceeding by a petition and complaint to the said superior court, alleging the violation complained of and praying for appropriate relief by way of mandatory injunction. It shall thereupon be the duty of the court to specify the time, not exceeding thirty days after service of a copy of the petition and complaint, within which the corporation complained of must answer the petition and complaint.

In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirements. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a mandatory injunction be issued as prayed for in the petition and complaint, or in such modified or other form as the court may determine will afford appropriate relief. (1935, c. 459, s. 12.)

§ 7395(13). Acquisition by corporations of property for projects; power of eminent domain. —When the board shall have approved a project for the construction or establishment of a rural community or communities presented it by a limited dividend and/or non-dividend company, such company may undertake the acquisition of the property needed for said project. Such property may be acquired by gift, bequest, or purchase, or, in the case of limited dividend and/or non-dividend companies engaged in the construction and development of rural communities, by the exercise of the power of eminent domain under and pursuant to the law providing for the appropriation or condemnation of private property by corporations with specific authorization by the board to be in the public interest and necessary for the public use. (1935, c. 459, s. 13.)

§ 7395(14). Application for charter.—Any number of natural persons, not less than three, a majority of whom are citizens of the United States, may become a corporation by subscribing, acknowledging, and filing in the office of the secretary of state articles of incorporation, hereinafter called "articles," setting forth the information required by the general corporation act of the State, except as herein modified or changed. (1935, c. 459, s. 14.)

§ 7395(15). Purposes of incorporation enumerated.—The purposes for which a limited dividend and/or non-dividend rural development company is to be formed shall be as follows: To acquire, construct, maintain, and operate housing projects, subsistence homesteads and organized rural rehabilitation or community projects, and to establish, loan, make loans for, and to assist in the establishment of small individual farms and farm homes, together with the necessary buildings and other structures, livestock, equipment, implements and machinery, materials, supplies, facilities, medical, social and educational centers, cooperative enterprises and commercial establishments essential to the growth and development of said rural rehabilitation or community projects, when authorized by and subject to the supervision of the board of rural rehabilitation. (1935, c. 459, s. 14.)

§ 7395(16). Preference to applicants possessing certain qualifications. — Preference shall be given to applicants who are married or who have dependent families, have good moral character, and are experienced in farming and familiar with farm operations, or who are or recently were farmers, farm tenants, share croppers, or farm laborers or good families of small incomes who will contribute to social advantages of the community, and each of whom may be approved by designated representatives of the federal and state agricultural extention service. (1935, c. 459, s. 14.)

§ 7395(17). Capital stock.—The capital stock may consist of one or more classes, the shares of which shall have a par value. (1935, c. 459, s. 14.)

§ 7395(18). Declaration as to serving a public purpose; restriction on income from stock; disposition of surplus.—Articles of incorporation shall contain a declaration that the corporation has been organized to serve a public purpose, and that it shall remain at all times subject to the supervision and control of the board or of other appropriate state authority; that all real estate acquired by it and all structures erected by it shall be deemed to be acquired for the purpose of promoting the public health and safety and satisfactory social and agricultural conditions, subject to the provision of the State Rural Rehabilitation Law; and that the stockholders of this corporation shall be deemed, when they subscribe to and receive the stock thereof, to have agreed that they shall at no time receive or accept from the company, in repayment of their investment in its stock, any sums in excess of the par value of the stock, together with cumulative dividends at a rate not in excess of six per centum per annum, and that any surplus of such amount, if said company shall be dissolved, shall revert to the State of North Carolina, or to such federal department or agency that may have provided the funds for establishing a rural community as herein contemplated. (1935, c. 459, s. 14.)

§ 7395(19). Power to borrow money and issue bonds secured by mortgage; amortization.—Any company formed under this article may, subject to the approval of the board, borrow funds and secure the repayment thereof by bonds and mortgages, or by an issue of bonds under trust indenture. The bonds so issued and secured and the mortgage or trust indentures relating thereto may create a first or senior lien and a second or junior lien upon the real property embraced in any project or projects. Such bonds and mortgages may contain such other clauses and provisions as shall be approved by the board, including the right to assignment of rents and entry into possession in case of default; but the operation of the rural community projects in the event of such entry by mortgagee or receiver shall be subject to the regulation of the board under this article. Provisions for the amortiza-

tion of the bonded indebtedness of companies formed under this article shall be subject to the approval of the board, and the amortization period shall begin three years after the farm family or families are established on the land and continue semi-annually up to a limit of forty years. (1935, c. 459, s. 14.)

§ 7395(20). Application of general corporation laws.—The provisions of the general corporation act, as hereafter from time to time amended, shall apply to limited dividend and/or non-dividend rural rehabilitation companies, except where such provisions are in conflict therewith. (1935, c. 459, s. 14.)

§ 7395(21). Dividends on stock restricted.—No stockholder in any company formed hereunder shall receive any dividend, or other distribution based on stock ownership, in any one year in excess of six per centum per annum, except that when in any preceding year dividends, the amount prescribed in the articles of incorporation, shall not have been paid on the said stock, the stockholders may be paid such deficiency without interest out of any surplus earned in any succeeding years. (1935, c. 459, s. 15.)

§ 7395(22). Issuance of stock and bonds regulated.—No limited dividend and/or non-dividend company incorporate under this article shall issue stock bonds, or income debentures except for money, services, or property actually received for the use and lawful purpose of the corporation. No stock, bonds, or income debentures shall be issued for property or services except upon a valuation approved by the board of rural rehabilitation and such valuation shall be used in computing actual or estimated cost. (1935, c. 459, s. 16.)

§ 7395(23). Exchange of stock and bonds for income debenture certificates.—The articles of incorporation may authorize the issuance of income debenture certificates bearing no greater interest than five per centum per annum. After the incorporation of a limited dividend rural rehabilitation company, the directors thereof may, with the consent of two-thirds of the holders of any preferred stock that may be issued and outstanding, offer to the stockholders of the company the privilege of exchanging their preferred and common stock in such quantities and at such times as may be approved by the board of rural rehabilitation for such income debenture certificates, whose face value shall not exceed the par value of the stock exchanged therefor. (1935, c. 459, s. 17.)

§ 7395(24). Restrictions on corporations.—No limited dividend nor non-dividend company incorporated shall under this article:

(1) Acquire any real property or interest therein unless it shall first have obtained from the board a certificate that such acquisition is necessary or convenient for the public purposes defined in this article.

(2) Sell, transfer, assign, or lease any real or personal property without first having obtained the consent of the board, Provided, however, that leases and/or sales conforming to the regulations and rules of the board and for actual occupancy by the lessees and/or purchasers may be made without the further consent of the board. Any conveyance, incumbrance, lease or sub-lease made in violation of the provisions of this section, and any transfer or assignment thereof, shall be void.

(3) Charge or accept any rental, purchase price, or other charge in excess of the amounts prescribed by the board, except for the insurance of mortgage loans as provided under the Federal Housing Act.

(4) Pay interest returns on its mortgage indebtedness and its income debenture certificates at a higher rate than six per centum per annum.

(5) Issue its stock debentures and bonds covering any project or projects undertaken by it in an amount greater in the aggregate than the total actual final cost of such project, including the lands, improvements, charges for financing and supervision approved by the board and interest and other carrying charges during construction and the necessary supervision of the project or projects thereafter.

(6) Mortgage any real property or issue any securities or evidences of indebtedness without first having obtained the approval of the board.

(7) Enter into contracts for the construction of rural community projects or for the payments of salaries to officers or employees except subject to the inspection and revision of the board and under such regulations as the board from time to time may prescribe.

(8) Voluntarily dissolve without first having obtained the consent of the board.

(9) Make any guaranty without the approval of the board. (1935, c. 459, s. 18.)

§ 7395(25). Earnings transferable to surplus; distribution upon dissolution; surplus paid into general fund of state.—The amount of net earnings transferable to surplus in any year after making or providing for the payments specified in subdivisions (a), (b), and (c) of section 7395-(10) shall be subject to the approval of the board. The amount of such surplus shall not exceed fifteen per centum of the outstanding capital stock and/or income debentures of the corporation, but the surplus so limited shall not be deemed to include any increase in assets due to the reduction of mortgage or amortization or similar payments. On dissolution of any limited dividend and/or non-dividend company the stockholders and income debenture certificate holders shall in no event receive more than the par value of their stock and debentures plus accumulated, accrued, and unpaid dividends or interest thereon less any payment or distributions theretofore made other than by dividends provided in section 7395(21), and any remaining surplus or other undistributed earnings shall be paid into the general fund of the State of North Carolina, or shall be disposed of in such other manner as the board may direct and the governor may approve. (1935, c. 459, s. 19.)

§ 7395(26). Foreclosure actions; foreclosure or other judicial sale; unrestricted rights of mortgagees.—(1) In any foreclosure action the board shall be a party defendant; and such board shall take all steps in such action necessary to protect the interest of the public therein, and no costs shall be awarded against the board. Foreclosure shall not be decreed unless the court to

which application therefor is made shall be satisfied that the interests of the lienholder or holders cannot be adequately secured or safeguarded except by the sale of the property. In any such proceeding the court shall be authorized to make an order increasing the sale price to be charged for the farms, etc., in the project involved in such foreclosure, or appoint a receiver of the property, or grant such other and further relief as may be reasonable and proper. In the event of a foreclosure sale or other judicial sale, the property shall, except as provided in the next succeeding paragraph of this section, be sold to a limited dividend and/or non-dividend corporation organized under this article, provided such corporation shall bid and pay a price for the property sufficient to pay court costs and all liens on the property with interest. Otherwise the property shall be sold free of all restrictions imposed by this article.

(2) Notwithstanding the foregoing provisions of this section, wherever it shall appear that a corporation, subject to the supervision either of the state insurance department or state banking department, or the federal government or any agency or department of the federal government, shall have loaned on a mortgage, which is a lien upon any such property, such corporation shall have all the remedies available to a mortgagee under the laws of the State of North Carolina, free from any restrictions contained in this section, except that the board shall be made a party defendant and that such board shall take all steps necessary to protect the interests of the public, and no costs shall be awarded against it. (1935, c. 459, s. 20.)

§ 7395(27). Application to board for one corporation to purchase property of another. — Before any limited dividend or non-dividend corporation incorporated under this article shall purchase the property of any other limited dividend or non-dividend corporation, it shall file an application with the board in the manner hereinbefore provided as for a new project, and shall obtain the consent of the board to the purchase and agree to be bound by the provisions of this article, and the board shall not give its consent unless it is shown to the satisfaction of the board that the project is one that can be successfully operated according to the provisions of this article. (1935, c. 459, s. 21.)

§ 7395(28). Notice to board required before execution of judgment against corporation.—In the event of a judgment against a limited dividend or non-dividend corporation in any action not pertaining to the collection of a mortgage indebtedness, there shall be no sale of any of the real property of such corporation except upon sixty days' written notice to the board. Upon receipt of such notice the board shall take such steps as in its judgment may be necessary to protect the rights of all parties. (1935, c. 459, s. 22.)

§ 7395(29). Fees for examination of plans and supervision of construction and for other purposes; state not liable for board expenses. — The board may charge and collect from a limited dividend or non-dividend corporation, incorporated under this article, reasonable fees in accordance with rates to be established by the rules of the board for the examination of plans and specifications and the supervision of construction in an amount not to exceed one-quarter of one per cent of the cost of the project; for the holding of a public hearing upon application of a limited dividend or non-dividend corporation an amount sufficient to meet the reasonable cost of advertising the notice thereof and of the transcript of testimony taken thereat; for any examination or investigation made upon application of a limited dividend or non-dividend corporation and for any act done by the board, or any of its employees, in performance of their duties under this article an amount reasonably calculated to meet the expense of the board incurred in connection therewith. In no event shall any part of the expenses of the board ever be paid out of the state treasury. The board may authorize a limited dividend or non-dividend corporation to include such fees as part of the cost of a project, or as part of the charges specified in section 7395(10), pursuant to rules to be established by the board. (1935, c. 459, s. 23.)

§ 7395(30). Corporate existence limited; extension. — The corporation existence of any corporation authorized hereunder shall not extend beyond sixty years from the date of incorporation, and promptly upon such termination the corporation shall be liquidated and its assets distributed as provided herein, unless general corporation laws, by approval of the state board of rural rehabilitation should grant an extension for an additional period of time. (1935, c. 459, s. 25.)

Art. 2. North Carolina Rural Rehabilitation Corporation

§ 7395(31). Designated a state agency. — The North Carolina rural rehabilitation corporation, a non-profit corporation, organized by the members of the commission of the North Carolina emergency relief administration, and chartered by the State to serve as a social and financial instrumentality in assisting to rehabilitate individuals and families by enabling them to secure subsistence and gainful employment from the soil and co-ordinated and other enterprises in order to restore them as self sustaining citizens and thereby reduce the burden of public relief for the needy and unemployed, is hereby recognized and designated as an agency of the State of North Carolina and of the North Carolina emergency relief administration and its successor within the powers and limitations of its charter for the carrying out of said objects and purposes. (1935, c. 314, s. 1.)

§ 7395(32). Powers of corporation.—The corporation is hereby authorized to accept and receive loans, grants and other assistance from the United States government, departments and/or agencies thereof for its use or for relief and rehabilitation purposes as well as to receive like financial and other aid when extended by the State of North Carolina or any of its departments, political subdivisions or agencies or any municipality, or from other sources, either public or private, and to employ the same in carrying out its rehabilitation purposes and activities; to utilize such means and agencies as shall be found use-

ful or necessary to carry out the purposes of this article and which will facilitate the securing of co-operation and financial assistance from the government of the United States, its departments or agencies, in aid thereof. (1935, c. 314, s. 2.)

§ 7395(33). Coöperation by state officers, boards, etc.—The various officers, boards, courts and governing bodies of the State engaged in any way in the relief of destitution and unemployment are hereby authorized to co-operate with the North Carolina rural rehabilitation corporation for the purposes specified in section 7395(31). (1935, c. 314, s. 3.)

CHAPTER 124

STATE BOUNDARIES

§ 7396. Governor to cause boundaries to be established and protected. — The governor of North Carolina is hereby authorized to appoint two competent commissioners and a surveyor and a sufficient number of chainbearers, on the part of the state of North Carolina, to act with the commissioners or surveyors appointed or to be appointed by any of the contiguous states of Virginia, Tennessee, South Carolina, and Georgia, to rerun and remark by some permanent monuments at convenient intervals, not greater than five miles, the boundary lines between this state and any of the said states.

The governor is also anthorized, whenever in his judgment it shall be deemed necessary to protect or establish the boundary lines between this state and any other state, to institute and prosecute in the name of the state of North Carolina any and all such actions, suits, or proceedings at law or in equity, and to direct the attorney-general or such other person as he may designate to conduct and prosecute such actions, suits, or proceedings. (Rev., s. 5315; Code, s. 2289; 1889, c. 475, s. 1; 1881, c. 347, s. 1; 1909, c. 51, s. 1.)

State Boundaries — Line Between North Carolina and Tennessee.—Under the acts of 1821 of the states of North Carolina and Tennessee confirming the boundary line between the two states "as run and marked" by the joint commission, when it is clearly shown where the line between two known points but a few miles apart was run and marked by the commission, such line must be accepted by the courts, in a suit between private persons, as the true and ancient boundary, even though it now appears that a different line between such points might more accurately conform to a general call in the act of cession for "the extreme height" of a certain mountain for a distance of 100 miles. Stevenson v. Fein, 116 Fed. 147.

§ 7397. Payment of expenses of establishing boundaries.—When the line has been rerun and remarked as above provided between this state and any of the contiguous states, or such portion of said lines as shall be mutually agreed by the commissioners, the governor is authorized to issue his warrant upon the state treasurer for such portion of the expenses as shall fall to the share of this state. (Rev., s. 5316; Code, s. 2290; 1889, c. 475, s. 2; 1881, c. 347, s. 2.)

§ 7398. Appointment of arbitrators.—If any disagreement shall arise between the commissioners, the governor of this state is hereby authorized to appoint arbitrators to act with similar officers to be appointed by the other states in the settlement of the exact boundary. (Rev., s. 5317; Code, s. 2291; 1889, c. 475, s. 3; 1881, c. 347, s. 3.)

§ 7399. Disagreement of arbitrators reported to general assembly.—In case of any serious disagreement and inability on the part of the said arbitrators to agree upon said boundary, such fact shall be reported by the governor to the next general assembly for their action. (Rev., s. 5318; Code, s. 2282; 1889, c. 475, s. 4; 1881, c. 347, s. 4.)

§ 7400. Survey, how approved to be effective.—When the commissioners shall have completed the survey, or so much as shall be necessary, they shall report the same to the governor, who shall lay the same before the council of state; and when the governor and the council of state shall have approved the same the governor shall issue his proclamation, declaring said lines to be the true boundary line or lines, and the same shall be the true boundary line or lines between this and the states above referred to. (Rev., s. 5319; Code, s. 2293; 1889, c. 475, s. 5; 1881, c. 347, s. 5.)

CHAPTER 125

STATE DEBT

Art. 1. Funded Debt

§ 7401. How bonds executed; interest coupons attached; where payable; minimum amount.—All bonds or certificates of debt of the state, hereafter to be issued as originals, or as substitutes for such as may be surrendered for transfer, by virtue of any act now or to be hereafter passed, shall be signed by the governor, and countersigned by the state treasurer, and sealed with the great seal of the state, and shall be made payable to bearer unless registered as hereinafter provided; and the principal shall be made payable by the state at a day named in the bond or certificate. Interest coupons shall be attached to the bonds or certificates unless they be bonds or certificates registered as to both principal and interest, and the bonds, certificates and coupons shall be made payable either at a bank in the city of New York to be designated by the state treasurer, or at the office of the state treasurer in Raleigh, as may be designated by the treasurer, or shall be made payable at the option of the holder, either at such bank in New York or at the office of the said treasurer: Provided, that no original bond or certificate of debt of the state shall be sold for a sum less than par value; nor shall any such bond or certificate, issuing in lieu of a transferred bond or certificate, be payable elsewhere than may be the original, except by the consent of the holder it may be made payable at the state treasury. (Rev., s. 5020; Code, s. 3563; R. C., c. 90, s. 3; 1848, c. 89, s. 22; 1852, cc. 9, 10, s. 10; Ex. Sess. 1921, c. 66, ss. 1, 2.)

Editor's Note.—By amendment, Ex. Sess. 1921 c. 66 ss. 1, 2 the provision for all bonds being made payable to bearer unless registered replaced a provision that they should be payable to the purchaser or to bearer. The provision in regard to not attaching registered interest coupons, and the provision for optional place of payment was added at the

same time. The provision for no bonds below par replaced a provision for no bonds below one thousand dollars.

Cited in Galloway v. Jenkins, 53 N. C. 147, 174.

§ 7402. Title of act and year of enactment recited in bonds.—In every bond or certificate of debt issued by the state, and in the body thereof, shall be set forth the title of the act, with the year of its enactment, under the authority of which the same may be issued; or reference shall be made thereto by the number of the chapter, and the year of the legislative session. (Rev., s. 5023; Code, s. 3566; R. C., c. 90, s. 6; 1850, c. 90, s. 6.)

§ 7403. Record of Bonds kept by state treasurer.—The state treasurer shall enter in a book to be kept for that purpose a memorandum of every bond or certificate of debt of the state, issued or to be issued under any act whatever, together with the numbers, dates of issue, when and where payable, at what premium, and to whom the same may have been sold or issued. (Rev., s. 5021; Code, s. 3564; R. C., c. 90, s. 4; 1852, c. 10, s. 2.)

§ 7404. Books for registration and transfer.—The state treasurer shall keep in his office a register or registers for the registration and transfer of all bonds and certificates of the state heretofore or hereafter issued, in which he may register any bond or certificate at the time of its issue or at the request of the holder. When any bond or certificate shall have been registered as hereinafter provided, the state treasurer shall enter in a manner to be of easy and ready reference, a description of said bond, or certificates giving the number, series, date of issue, denomination, by whom signed, and such other data as may be necessary for the ready identification thereof, together with the name of the person in whose name the same is then to be registered and whether in his individual capacity or in a fiduciary relation, and if the latter, for whose benefit the same is to be registered. (Rev., s. 5019; Code, s. 3562; R. C., c. 90, s. 2; 1848, c. 37, s. 5; 1850, c. 58, s. 4; 1852, c. 11; Ex. Sess. 1921, c. 66, s. 3.)

Editor's Note.—Prior to the amendment of this section, Ex. Sess. 1921 ch. 66 s. 3, it provided for transfer by delivery, of bonds payable to bearer, but those payable to holder by name alone were transferred by delivery to the state treasury for cancellation, where new bonds were issued.

§ 7405. Registration as to principal.—Upon the presentation at the office of the state treasurer of any bond or certificate that has heretofore been or may hereafter be issued by the state, or upon the first issuance of any bond or certificate, the same may be registered as to principal in the name of the holder upon such register, such registration to be noted on the reverse of the bond or certificate by the state treasurer. The principal of any bond or certificate so registered shall be payable only to the registered payee or his legal representative, and such bond or certificate shall be transferrable to another holder or back to bearer only upon presentation to the state treasurer with a written assignment acknowledged or approved in a form satisfactory to the treasurer. The name of the registered assignee shall be written in said register and upon any bond or certificate so transferred. A bond or certificate so transferred to bearer shall be subject to future registration and transfer as before. (Rev., s. 5025; Code, s. 3568; 1883, c. 25; 1887, c. 287; Ex. Sess., 1921, c. 66, s. 4.)

Editor's Note.—Prior to the amendment Ex. Sess. 1921, ch. 66, sec. 4 registered bonds were issued in exchange for coupon bonds, and coupon bonds were issued in exchange for registered bonds on application. The denomination of such bonds to be issued was also specified and the time of maturity and rate of interest was to be the same as on the bond surrendered.

§ 7406. Registration as to principal and interest.—If, upon the registration of any such bond or certificate, or at any time thereafter, the coupons thereto attached, evidencing all interests to be paid thereon to the date of maturity, shall be surrendered, such coupons shall be canceled by the treasurer, and he shall sign a statement endorsed upon such bond or certificate of the cancellation of all unmatured coupons and of the fact that such bond has been converted into a fully registered bond, and shall make like entry in the said register. Thereafter the interest evidenced by such canceled coupons shall be paid at the times provided therein, to the registered owner or his legal representatives, in New York exchange, mailed to his address, unless he shall have requested the state treasurer to pay such interest in funds current at the state capital, which request shall be entered in the said register. (Rev., s. 5026; Code, s. 3569; 1856, c. 16; 1883, c. 25, s. 2; 1887, c. 287, s. 2; Ex. Sess. 1921, c. 66, s. 5.)

Editor's Note.—Prior to the amendment Ex. Sess. 1921 ch. 65 sec. 5 this section provided for registration of bonds, and the admission in evidence of the registry in case the bonds were lost, also a provision for signing and sealing registered bonds, and exemption for them from taxation. For registration of bonds now, see section 7404.

§ 7407. No charge for registration.—There shall be no charge for the registration of any bond or certificate whether registered at the time of issuance thereof or subsequently registered, and no charge for the transfer of registered bonds and certificates shall be made. (Rev., s. 5027; 1887, c. 2887, ss. 4, 5; Ex. Sess. 1921, c. 66, s. 6; 1925, c. 49.)

Editor's Note.—Prior to the amendment, Ex. Sess. 1921 ch. 66 sec. 6 a fee of two dollars was charged for exchange of bonds (which was for registration), All bonds surrendered were destroyed by the treasurer in the presence of the governor and attorney-general. By the amendment of 1921 a fee of twenty-five cents was charged for each registration or transfer. By the Public Laws 1925 ch. 49 it was provided that no fees be charged.

§ 7408. Application of sections seven thousand four hundred and one to seven thousand four hundred and nine.—Sections seven thousand four hundred and one to seven thousand four hundred and nine, both inclusive, as amended by this law, shall be applicable to all bonds or certificates of the state heretofore issued and now outstanding, and to all bonds or certificates of the state that may hereafter be issued in accordance with any law now in force or hereafter to be enacted. (Rev., s. 5028; Code, s. 3570; 1887, c. 287, s. 3; Ex. Sess. 1921, c. 66, s. 7.)

Editor's Note.—Prior to the amendment Ex. Sess. 1921 ch. 66 sec. 7 this section provided for negotiation of bonds by surrender, cancellation, and the issuance of a new bond.

§ 7409. Duties performed by other officers.—If the council of state shall at any time find that either the governor or the state treasurer is unable by reason of absence, disability, or otherwise, to sign any bonds or certificates, the

lieutenant-governor may sign the same in lieu of the governor, and they may be signed in lieu of the treasurer by any member of the council of state designated by it. (Rev., s. 5024; Code, s. 3567; 1864-5, c. 24; Ex. Sess. 1921, c. 66, s. 8.)

Editor's Note.—Prior to the amendment by Ex. Sess. 1921, ch. 66, sec. 8, this section provided for a registration and transfer by the chief clerk in case the treasurer was absent.

§ 7410. State bonds exempt from taxation. — The original bonds or certificates of debt of the state, which have been issued since the first day of January, one thousand eight hundred and fifty-three, or which may hereafter be issued under the authority of any act whatever, as likewise the bonds and certificates substituted for such original bonds and certificates, shall be, they and the interest accruing thereon, exempt from taxation. (Rev., s. 5022; Code, s. 3565; R. C., c. 90, s. 5; 1852, c. 10, s. 4.)

§ 7411. What bonds are fundable.—When any person holding and owning any bond or bonds of the state, issued in pursuance of any act of assembly passed at any time before the twentieth day of May, one thousand eight hundred and sixty-one, exclusive of bonds issued for the construction of the North Carolina railroad, or in pursuance of the act of the general assembly passed at its session in one thousand eight hundred and sixty-five, it being chapter three of the laws of one thousand eight hundred and sixty-five, or in pursuance of an act passed by the general assembly at its session in one thousand eight hundred and sixty-seven, it being chapter fifty-six of the laws of one thousand eight hundred and sixty-seven, or in pursuance of an act entitled "An act to provide for the payment of the state debt contracted before the war," ratified on the tenth day of March, one thousand eight hundred and sixty-six, or in pursuance of an act entitled "An act to provide for funding the matured interest on the public debt," ratified the tenth day of August, one thousand eight hundred and sixty-eight; or any registered certificate or certificates belonging to the board of education, issued in pursuance of an act of the general assembly of one thousand eight hundred and sixty-seven, shall surrender and deliver, such bond or bonds, with the coupons attached thereto, or registered certificate or certificates, to the state treasurer, then and in that case it shall be the duty of the treasurer to issue and deliver to the person surrendering such bond or bonds, certificate or certificates, a new bond or bonds of the state, due and payable thirty years from the first day of July, one thousand eight hundred and eighty, bearing interest from date at the rate of four per cent per annum, payable semiannually on the first days of January and July in each successive year at the office of the state treasurer. (Rev., s. 5029; Code, s. 3571; 1879, c. 98, s. 1.)

§ 7412. Denomination and execution of bonds.—The said bonds to be issued in place of the bonds surrendered are to be coupon bonds of the denomination of fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, and are to be numbered from one upwards, in accordance with the order of issue. They shall be signed by the governor and treasurer, and sealed with the great seal of the state; but the coupons thereon may be signed by the treasurer alone, or have a facsimile of his signature printed, engraved, or lithographed thereon. (Rev., s. 5030; Code, s. 3572; 1879, c. 98, s. 2.)

§ 7412(a). What officers may sign bonds.— State bonds duly authorized by law and approved by the Governor and Council of State shall be regarded as duly executed by proper officers if signed and sealed while in office by the officer or officers then authorized to sign and seal the same, notwithstanding one or more of such officers shall not be in office at the time of actual delivery of such bonds. (1925, c. 2.)

§ 7413. Form of bonds.—The bonds so issued shall be in the usual form of bonds of this state, except as modified and provided by this chapter, and shall have printed on the face of the same the words:

Issued in pursuance of an act entitled "An act to compromise, commute, and settle the state debt," ratified the .... day of ....., Anno Domini one thousand eight hundred and seventy-nine.

And in large red letters—

"The Consolidated Debt of the State." (Rev., s. 5033; Code, s. 3575; 1879, c. 98, s. 5.)

§ 7413(a). Issuance of temporary bonds.— Whenever the State Treasurer shall be authorized by law to issue bonds or notes of the State, and all acts, conditions and things required by law to happen, exist and be performed, before the delivery thereof for value, shall have happened, shall exist and shall have been performed, except the printing, lithographing or engraving of the definite bonds or notes authorized and the execution thereof, the State Treasurer is authorized, by and with the consent of the Governor and Council of State, to issue and deliver for value temporary bonds or notes, with or without coupons, which may be printed or lithographed in any denomination or denominations which may be a multiple of one thousand dollars, and shall be signed and sealed as shall be provided for the signing and sealing of such definite bonds or notes, and shall be substantially of the tenor of such definite bonds or notes except as herein otherwise provided and except that such temporary bonds or notes shall contain such provisions as the treasurer may elect as to the conditions of payment of the semiannual interest thereon. Every such temporary bond or note shall bear upon its face the words "Temporary Bond (or Note) Exchangeable for Definite Bond." Upon the completion and execution of the definite bonds or notes, such temporary bonds or notes shall be exchangeable without charge therefor to the holder of such temporary bonds or notes for definite bonds or notes of an equal amount of principal. Such exchange shall be made by the treasurer or by a bank or trust company in North Carolina or elsewhere appointed by him as agent which shall have a capital and surplus of not less than the amount of the definite bonds or notes to be so exchanged, and in making such exchange the treasurer shall detach from the definite bonds or

notes all coupons which represent interest theretofore paid upon the temporary bonds or notes to be exchanged therefor, and shall cancel all such coupons; and upon such exchange such temporary bonds or notes and coupons attached thereto, if any, shall be forthwith canceled by the treasurer or such agent. Until so exchanged, temporary bonds and notes issued under the authority hereof shall in all respects be entitled to all the rights and privileges of the definite securities. (1925, c. 43.)

§ 7414. Rate of exchange of bonds.—The said bonds shall be exchanged for the old bonds of the state, mentioned in section 7411, at the following rates:

Class 1. Bonds exchangeable at forty per cent:

For the bonds issued before the twentieth day of May, eighteen hundred and sixty-one, forty per cent of the principal of the bond or bonds so surrendered.

Class 2. Bonds exchangeable at twenty-five per cent:

For the bonds issued since the close of the war, by authority of acts passed before the war, to aid in the construction of the Western North Carolina railroad, and the bonds issued in pursuance of the said act of assembly of eighteen hundred and sixty-five, chapter three, and act of assembly, eighteen hundred and sixty-seven, chapter fifty-six; the bonds issued October first, eighteen hundred and sixty-one, by authority of the act of eighteen hundred and sixty-one, chapter one hundred and thirty-seven, for Western (Coalfield) railroad; the bonds issued October first, eighteen hundred and sixty-one, by authority of the act of eighteen hundred and fifty-four and fifty-five, chapter two hundred and twenty-eight, section thirty-five, and resolution September the twelfth, eighteen hundred and sixty-one; and the said registered certificates of the literary fund, for the bonds issued July the first, eighteen hundred and sixty-two, by authority of act of eighteen hundred and sixty and sixty-one, chapter one thousand and forty-two, for the construction of the Wilmington, Charlotte and Rutherford railroad, twenty-five per cent of the principal of the bonds or certificates so surrendered.

Class 3. Bonds exchangeable at fifteen per cent; proviso:

And those issued in pursuance of said funding acts of March tenth, eighteen hundred and sixty-six, and August twentieth, eighteen hundred and sixty-eight, fifteen per cent of the principal of the bond or bonds so surrendered: Provided, that all bonds issued in exchange for the new bonds shall be surrendered with all the coupons attached. (Rev., s. 5032; Code, s. 3574; 1879, c. 98, s. 4.)

§ 7415. List of surrendered bonds kept; bonds destroyed.—The treasurer shall provide a substantially bound book for the purpose, in which he shall make a correct description list of all bonds of the state surrendered, which list shall embrace the number, date and amount of each, and the purpose for which the same was issued, when this can be ascertained, and the names of the persons surrendering the same; and after such list shall be made, such surrendered bonds, being ascertained to be present, shall be consumed by fire in the presence of the governor, the treasurer, the auditor, the attorney-general, the secretary of state and superintendent of public instruction, who shall each certify under his hand respectively in such book that he saw such described bonds so consumed and destroyed. (Rev., s. 5035; Code, s. 3578; 1879, c. 98, s. 8.)

§ 7416. List kept of bonds issued.—The treasurer shall provide a well-bound book, in which shall be kept an accurate account and descriptive list of all the new bonds to be issued, and such descriptive list shall embrace the date, number, and amount of such bond or bonds for which the same was issued, and the name of the person to whom issued. (Rev., s. 5036; Code, s. 3579; 1879, c. 98, s. 9.)

§ 7417. Bonds exempt from taxation. — The said bonds shall be exempt from all state, county, or corporate taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise. The said coupons shall be receivable in payment of any and all state taxes, and the same shall be expressed on the face of each coupon. The coupon shall bear the same number as the bonds to which they are attached, and in addition be numbered from one upwards, in accordance with the date of their maturity. (Rev., s. 5031; Code, s. 3573; 1879, c. 98, s. 3.)

§ 7418. Fiduciaries may exchange bonds.—It shall be lawful for any executor, administrator, guardian, trustee, director of any corporation, and any and all other persons acting in a fiduciary capacity, holding bonds of the state, to make the exchange provided in this chapter, and they shall be absolved from all liability on account of said exchange. (Rev., s. 5037; Code, s. 3580; 1879, c. 98, s. 10.)

§ 7419. Extension of time to compromise state debt.—So much of this chapter as authorizes the exchange of bonds and the issue of new bonds in compromise and settlement of the state debt, being section 7411 of this chapter, shall continue in force until the first day of July, one thousand nine hundred and ten. The governor is directed to resist the collection of all such bonds as are not funded by the time specified herein: Provided, that in issuing such bonds under this extension the public treasurer shall, before delivering any new bonds thereunder, cut off and cancel all coupons whose date of maturity is prior to the time of such delivery. (Rev., s. 5038; Code, s. 3581; 1879, c. 98, s. 11; 1883, c. 6, ss. 1, 2; 1893, c. 47; 1901, c. 126; 1903, c. 39; 1907, c. 96; 1909, c. 703; 1919, c. 314, s. 5.)

§ 7420. Treasurer to give notice.—The state treasurer is authorized to give public notice of this plan for a settlement of the state's indebtedness by advertising in such newspapers as he may select. (Rev., s. 5045; Code, s. 3587; 1879, c. 98, s. 17.)

§ 7421. Certain taxes applied to interest on bonds.—All state taxes levied and collected from professions, trades, incomes, merchants, dealers in cigars, and three-fourths of all the

taxes collected from wholesale and retail dealers in spirituous vinous, and malt liquors, shall be held and applied to the payment of the interest on said bonds, and the provisions of this section shall be deemed and taken to be a material part of the consideration for which the bonds of the state shall or may be surrendered. (Rev., s. 5039; Code, s. 3576; 1879, c. 98, s. 6.)

§ 7422. Interest also paid out of general funds.—As a further proviso for the purpose of paying the interest on the consolidated bonds, if the taxes for any one year upon the subjects of taxation hereinbefore mentioned shall be insufficient to pay said interest, then and in that case the state treasurer is authorized to apply any funds in the treasury not otherwise appropriated to that purpose. (Rev., s. 5040; Code, s. 3582; 1879, c. 98, s. 12.)

§ 7423. Excess funds invested in bonds.—If the whole fund raised by such taxes shall not in any one year be required to pay such accruing interest, then and in that case it shall be the duty of the treasurer, with the sanction of the governor and the auditor, to invest the surplus in such of the consolidated bonds or the state bonds issued in aid of the North Carolina railroad, known as construction bonds, or in the state's prison bonds of the issue of one thousand nine hundred and three, as he can buy at the lowest price; and the treasurer may, with the approval of the governor and auditor, sell any portion of the bonds so purchased if necessary to enable him to pay promptly the interest on the consolidated debt of the state. And the treasurer may, with the approval of the governor and auditor, sell any of the consolidated bonds in which he has heretofore invested such surplus and invest the proceeds in the state bonds in aid of the North Carolina railroad, known as construction bonds, to be held by the treasurer for the purpose of protecting the interest on the consolidated debt of the state and sold by him if necessary for that purpose. (Rev., s. 5034; Code, s. 3577; 1879, c. 98, s. 7; 1885, c. 403; 1887, c. 231.)

§ 7424. Contingent bonds to pay interest.—In the event that the taxes collected in any one year upon the aforesaid subjects of taxation and the funds not otherwise appropriated in the treasury, when added together, shall be inadequate to pay said interest, then, in order to provide for the deficiency, the state treasurer is authorized to issue coupon bonds of the denomination of five hundred dollars, bearing date the first day of October or April of the year of the issue, according as one or the other of said dates shall be nearest in point of time to the date of the issue. Said bonds shall be payable forty years after date, but redeemable after ten years at the option of the state, with interest at the rate of six per centum per annum, payable semiannually on the first days of April and October. Said bonds shall bear upon their face in red letters the words "Contingent Bonds," and shall be numbered from one upwards, in accordance with the order of their issue. They shall be signed by the governor and treasurer and sealed with the great seal of the state; but the coupons thereon may be signed by the treasurer alone, or have a facsimile of his signature printed, engraved, or lithographed thereon. The said bonds and coupons shall be exempt from all state, county, or corporate taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and they shall be lawful investments by all executors, administrators, guardians, and fiduciaries generally. The coupons on said bonds shall bear the same number as the bonds to which they are attached, and shall in addition be numbered from one upwards in accordance with the date of their maturity, and they shall be, and shall so express upon their face that they are, receivable at and after maturity in payment of all taxes, debts, demands, and dues to the state of every nature and kind whatsoever. (Rev., s. 5041; Code, s. 3583; 1879, c. 98, s. 13.)

§ 7425. Treasurer may sell bonds.—The state treasurer shall be authorized to sell so many of said bonds at par as shall be necessary to provide for the deficiencies aforesaid: Provided, that he shall not issue and sell in the aggregate more than six hundred of these bonds. (Rev., s. 5042; Code, s. 3584; 1879, c. 98, s. 14.)

§ 7426. Payment of interest on contingent bonds.—The provisions of this chapter for paying the interest on the consolidated bonds shall apply as well to the payment of the interest of the said contingent bonds. (Rev., s. 5043; Code, s. 3585; 1879, c. 98, s. 15.)

§ 7427. Appropriation to carry out this chapter.—For the purpose of carrying out the provisions of this chapter in relation to the furnishing of proper blank bonds and coupons, and for the purpose of advertising through the public journals, or otherwise, the details of exchange, for the information of the holders of the bonds, the state treasurer is authorized, with the approval of the governor, to use any funds not otherwise appropriated in the treasury, not exceeding the sum of five thousand dollars, and the public treasurer is authorized to use so much of such sum as may be necessary for the purpose of advertising through the public journals, or otherwise, the details of exchange for the information of holders of said bonds. (Rev., s. 5044; Code, s. 3586; 1879, c. 98, s. 16; 1901, c. 126, s. 3.)

§ 7428. New bond issue authorized.—For the purpose of paying off the consolidated debt bonds of the state, issued by virtue of chapter ninety-eight of the laws of one thousand eight hundred and seventy-nine, which bonds are outstanding in the sum of three million four hundred and twenty-seven thousand dollars, and mature on the first day of July, one thousand nine hundred and ten, the state treasurer is authorized and directed to issue bonds of the state of North Carolina, payable forty years after the first day of July, one thousand nine hundred and ten, to an amount not to exceed the sum of three million four hundred and thirty thousand dollars. (1909, c. 399, s. 1.)

§ 7429. Rate of interest on bonds.—All of said bonds shall bear interest at a rate not exceeding

four per cent per annum from the first day of July, one thousand nine hundred and ten, until paid, which interest shall be payable semi-annually on the first days of January and July of each year, so long as any portion of the bonds shall remain due and unpaid. (1909, c. 399, s. 2.)

§ 7430. Denomination of bonds; application of proceeds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and the state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the bonds shall in all other respects be in such form as the state treasurer may direct, and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina of any kind whatsoever, which shall be expressed on the face of the bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the best price. He is authorized to accept bids for the entire issue or of any portion thereof, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. Any balance left in the hands of the state treasurer from the sale of said bonds, after paying the consolidated debt bonds and the costs of issuing the bonds herein provided for, shall be covered into the general fund. (1909, c. 399, s. 3; 1919, c. 314, s. 5.)

§ 7431. Exemption from taxation; investment by fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians, and fiduciaries generally may invest in said bonds. (1909, c. 399, ss. 4, 5.)

§ 7432. Payment of compromise bonds.—The state treasurer is authorized to pay cash instead of issuing bonds to take up the outstanding compromise bonds according to the provisions of chapter ninety-eight, laws of one thousand eight hundred and seventy-nine, at fifteen, twenty-five, and forty cents on the principal only. (1913, c. 131.)

Art. 1A. General Fund Notes

§ 7432(a). Note issue authorized.—For the purpose of balancing the revenues and disbursements of the general fund at the close of the current fiscal year on June thirty, one thousand nine hundred and twenty-five, and of facilitating the placing of the fiscal operations of the State upon a budgetary basis, whereby the cash revenues collected in each fiscal year may be made applicable to and sufficient for the cash expense disbursements of the same period, the State Treasurer is hereby authorized and directed, by and with the consent of the Governor and Council of State, to issue and sell notes of the State, to be designated "General Fund Notes," bearing such date or dates and such rate or rates of interest, not exceeding five per cent per annum payable semi-annually, as may be fixed by the Governor and Council of State. The notes hereby authorized shall mature in such amounts and in annual series, beginning not more than two years nor running longer than ten years from their date or respective dates of issue, as may be fixed by the Governor and Council of State. The aggregate principal amount of said notes shall not exceed the amount the State Auditor shall certify to the Governor and Council of State to be the debit balance resulting from current operations of the general fund June thirty, one thousand nine hundred and twenty-five, after deducting therefrom the sum of (one million two hundred fifty-four thousand five hundred dollars) representing the amount of disbursements from the general fund for permanent improvements to various State institutions and the interest upon such disbursements; Provided, however, that such notes may be issued in the aggregate amount of five million dollars, notwithstanding the State Auditor shall not have so certified, it now being known that said debit balance will at least equal the sum of five million dollars. (1925, c. 112, s. 2.)

§ 7432(b). Interest; form; denomination.—Said notes shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said notes shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denomination thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 112, s. 3.)

§ 7432(c). Sale of notes.—Subject to determination by the Governor and Council of State as to the manner in which said notes shall be offered for sale, whether by publishing notices in certain newspapers and financial journals or by mailing notices or by inviting bids by correspondence or otherwise, the State Treasurer is authorized to sell said notes at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina. All expenses necessarily incurred in the preparation and sale of the notes shall be paid from the proceeds of such sale. (1925, c. 112, s. 4.)

§ 7432(d). Proceeds of notes.—The proceeds of said notes shall be placed by the Treasurer in the general fund. (1925, c. 112, s. 5.)

§ 7432(e). Borrowing money to pay interest.—By and with the consent of the Governor and Council of State, who shall determine the rate

or maximum rate of interest and the date or approximate date of interest, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, for the payment of interest upon or any installment of principal of any of the notes authorized by section 7432(a) then outstanding, if there shall not be sufficient funds in the State Treasury with which to pay such interest or installment as they respectively fall due, and for the renewal, from time to time, of any loan evidenced by the notes authorized by this section. Interest payments upon the notes authorized by this section may be evidenced by interest coupons in the Treasurer's discretion. (1925, c. 112, s. 6.)

§ 7432(f). Faith of state pledged. — The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of all the notes herein authorized. (1925, c. 112, s. 7.)

§ 7432(g). Coupons receivable for debts due state.—The coupons of all said notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 172, s. 8.)

§ 7432(h). Exemption from taxation.—All of said notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said notes shall not be subject to taxation as for income, nor shall said notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. (1925, c. 112, s. 9.)

§ 7432(i). Fiduciaries may invest in notes.— It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in any of said notes. (1925, c. 112, s. 10.)

§ 7432(j). Finding by Governor and Council. —Whenever it shall appear by formal finding of the Governor and Council of State, within seven days before any bonds or notes of the State or any interest thereon shall fall due, that it is advisable to issue notes of the State to provide for the renewal or payment of such bonds, notes or interest and that the State Treasurer is unable for any reason to negotiate or to issue such notes, it shall be the duty of the chief clerk of the State treasury, if the issuance of such notes shall have been authorized by law, upon certification to him of such finding, and in the name of the State Treasurer, to make all necessary negotiations and to sign and deliver such notes for value and to attach thereto the seal of the State Treasurer. (1927, c. 12, s. 1.)

§ 7432(k). Notes of State issued for balancing revenues and disbursements and in anticipation of taxes.—For the purpose of balancing the revenues and disbursements of the general fund at the close of the current fiscal year on June thirtieth, one thousand nine hundred thirty-one, so as to place the fiscal operations of the State for the biennium one thousand nine hundred thirty-one —one thousand nine hundred thirty-three upon a budgetary basis for said biennium without relation to preceding fiscal operations, and in anticipation of the collection of taxes from time to time so that such sums as may be necessary to make the payments of appropriations to the various institutions, departments and agencies of the State as even as possible during the biennium of one thousand nine hundred thirty-one—one thousand nine hundred thirty-three, and to preserve the best interest of the State in the conduct of its various departments, institutions and agencies during each fiscal year and said biennium, the state treasurer, upon direction of the director of the budget, by and with the consent of the governor and council of state, shall have authority to borrow, in the name of the State, and pledge the credit of the State for the payment thereof, such sum or sums as may be necessary for such purposes and as may be determined by the governor and council of state. General fund notes of the State, and renewals of such notes, bearing such date or dates and such rate or rates of interest, and maturing in such amounts and at such time or times as may be determined by the governor and council of state, shall be executed by the state treasurer and negotiated and disposed of by him in such manner as may be determined by the governor and council of state. (1931, c. 371, s. 2.)

See § 7472(zz).

Art. 2. Bonds for the Care of the Insane. 1909

§ 7433. Bond issue authorized.—For the purpose of paying the two hundred and fifty thousand dollars already borrowed by the state treasurer and to make provision for the two hundred and fifty thousand dollars yet to be expended by the state hospital commission by virtue of chapter one hundred and ninety-one of the public laws of one thousand nine hundred and seven, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable forty years after the first day of July, one thousand nine hundred and nine, to an amount not to exceed the sum of five hundred thousand dollars: Provided, that out of the proceeds of said bonds shall be paid the sum of twenty thousand dollars deficit existing in the accounts of the state hospital at Morganton, and also the sum of eleven thousand dollars deficit existing in the accounts of the eastern hospital at Goldsboro. (1909, c. 510, s. 1.)

Constitutional. — This article is constitutional and the amendment directing that some of the funds be applied to pay deficits in the accounts of the state hospital at Morganton, and the eastern hospital at Goldsboro, although added after the second reading and not passing all the aye and no vote, does not make the article unconstitutional, at the other constitutional requirements have been met. Raleigh Sav. Bank v. Lacy, 151 N. C. 3, 65 S. E. 441.

§ 7434. Rate of interest on bonds.—All of such bonds shall bear interest at a rate not exceeding four per cent per annum from the first day of July, one thousand nine hundred and nine, until paid, payable semiannually on the first days of January and July of each year, so long as any portion of the bonds remain due and unpaid. (1909, c. 510, s. 2.)

§ 7435. Formal execution and sale of bonds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds, of the denomination of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone or may have a facsimile of his signature printed, engraved, or lithographed thereon, and the bonds shall in all other respects be in such form as the state treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, which shall be expressed on the face of the bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids, in such manner as in his judgment may seem to be most effectual to secure the best price. He is authorized to accept bids for the entire issue or of any portion thereof, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. (1909, c. 510, s. 3.)

§ 7436. Exemption from taxation; investment by fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall the bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians, and fiduciaries generally may invest in such bonds. (1909, c. 510, ss. 4, 5.)

Bank Capital Invested in Bonds.—All bank stock is taxable at its value less the assessed value of the bank's real and personal property, although the capital is invested in bonds issued under section 7433. But so much of the surplus over and above the capital as is invested in such nontaxable bonds is exempt and must be deducted from the surplus in assessing the value of the stock for taxation. Pullen v. Corporation Comm., 152 N. C. 548, 68 S. E 155.

Art. 3. Bonds for State Building. 1911

§ 7437. Bond issue authorized.—For the purpose of erecting a state building as provided for in chapter sixty-six of the public laws of one thousand nine hundred and eleven, the state treasurer is authorized and directed to issue bonds of the state of North Carolina, payable forty years after the first day of July, one thousand nine hundred and eleven, to an amount not exceeding the sum of two hundred and fifty thousand dollars, such bonds to be issued and sold, after due advertisement, on the best obtainable terms from time to time as the money is needed to meet the expenses of the building commission. Said bonds shall not be sold for less than par. All of said bonds shall bear interest at a rate not exceeding four per cent per annum, from the date of issue until paid, which interest shall be paid semiannually on the first days of January and July of each year, so long as any portion of the bonds shall remain due and unpaid. If in the progress of the work funds should be needed at a time when financial conditions should seem unfavorable for the sale of bonds, then, in his discretion, the state treasurer may negotiate a temporary loan or loans upon the best obtainable terms, and, if necessary, pledge any of the unsold bonds as collateral therefor. (1911, c. 66, s. 8.)

§ 7438. Formal execution of bonds. — The bonds authorized to be issued by the preceding section shall be coupon bonds of the denomination of one hundred dollars, five hundred dollars, and one thousand dollars, as may be determined by the state treasurer, and shall be signed by the governor and the state treasurer, and sealed with the great seal of state. The coupons thereon may be signed by the state treasurer, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the bonds shall in all other respects be in such form as the state treasurer may direct. (1911, c. 66, s. 9.)

§ 7439. Exemption from taxation; investment by fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall the bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, but when constituting a part of such surplus shall be deducted from the total assets in order to ascertain the taxable value of such shares. All executors, administrators, guardians, and fiduciaries generally may invest in such bonds. (1911, c. 66, ss. 10, 11.)

Art. 4. Bonds for Payment of State Debt (1903) and South Dakota Bonds. 1911

§ 7440. New bond issue authorized.—For the purpose of paying off the bonds of the state by virtue of chapter seven hundred and fifty of the public laws of one thousand nine hundred and three, and chapter five hundred and forty-three of the public laws of one thousand nine hundred and five, all of which bonds fall due on the first day of January, one thousand nine hundred and thirteen, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable forty years after the first day of January, one thousand nine hundred and thirteen, to an amount not to exceed the sum of five hundred and fifty thousand dollars. (1911, c. 73, s. 1.)

§ 7441. Rate of interest on bonds.—All of said bonds shall bear interest at a rate not exceeding four per cent per annum from the first day of January, one thousand nine hundred and thirteen, until paid, which interest shall be payable semiannually on the first days of January and July of each year, so long as any portion of the said bonds shall remain due and unpaid. (1911, c. 73, s. 2.)

§ 7442. Formal execution of bonds; application of proceeds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and the state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the bonds shall in all other respects be in such form as the state treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, which shall be expressed on the face of said bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be the most effectual to secure the best price. He is authorized to accept bids for the entire issue or of any portion thereof, and, where the conditions are equal, he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. Any balance left in the hands of the state treasurer from the sale of the bonds, after paying the bonds falling due January first, one thousand nine hundred and thirteen, and the costs of issuing the bonds herein provided for, shall be covered into the general fund. (1911, c. 73, s. 3.)

§ 7443. Exemption from taxation; investment by fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall the bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians, and fiduciaries generally may invest in such bonds. (1911, c. 73, ss. 4, 5.)

§ 7444. Payment of bonds similar to South Dakota bonds.—The state treasurer is authorized to pay to any other holder and owner of the bonds of the issue upon which the South Dakota judgment was rendered, payment of which was provided for in chapter five hundred and forty-three of the public laws of one thousand nine hundred and five, the same price per bond as he is herein authorized to pay to Schaffer Brothers, to-wit, twenty-five per cent of said bonds, with interest on said twenty-five per cent. (1909, c. 718.)

Art. 5. Bonds for Central Heating Plant. 1913

§ 7445. Bond issue authorized.—For the purpose of providing a central heating plant as directed in chapter one hundred and forty-three of the public laws of one thousand nine hundred and thirteen, the state treasurer is authorized and directed to issue bonds of the state of North Carolina, payable forty years after the first day of July, one thousand nine hundred and thirteen, to an amount not exceeding the sum of forty thousand dollars, such bonds to be issued and sold, after due advertisement, on the best obtainable terms from time to time as the money is needed to meet the expenses of the board of public buildings and grounds. Said bonds shall not be sold for less than par. All of said bonds shall bear interest at a rate not exceeding four per centum per annum from the date of issue until paid, which interest shall be paid semiannually on the first days of January and July of each year, so long as any portion of the bonds remain due and unpaid. If in the progress of the work funds should be needed at a time when financial conditions should seem unfavorable for the sale of bonds, then, in his discretion, the state treasurer may negotiate a temporary loan or loans upon the best obtainable terms and, if necessary, pledge any of the unsold bonds as collateral therefor. (1913, c. 143, s. 3.)

§ 7446. Formal execution of bonds. — The bonds authorized and directed to be issued by the preceding section shall be coupon bonds of the denominations of one hundred dollars, five hundred dollars, or one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and the state treasurer, and shall be sealed with the the great seal of the state. The coupons thereon may be signed by the state treasurer, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the bonds shall in all other respects be in such form as the state treasurer may direct. (1913, c. 143, s. 4.)

§ 7447. Exemption from taxation.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall the bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, but when constituting a part of such surplus shall be deducted from the total assets in order to ascertain the taxable value of such shares. (1913, c. 143, s. 5.)

Art. 6. Improvement Bonds. 1913

§ 7448. Bond issue authorized.—For the purpose of relieving the deficit in the state treasury, for furnishing, painting, and heating the new state building, for rearranging and furnishing the supreme court building, and installing a new equipment in the office of the state treasurer, and for meeting the appropriations made for permanent improvements for the several state institutions hereinafter mentioned, the state treasurer is authorized and directed to issue bonds of the state of North Carolina, payable forty years after the first day of July, one thousand nine hundred and thirteen, to an amount not to exceed the sum of one million one hundred and

forty-two thousand and five hundred dollars. (1913, c. 102, s. 1.)

§ 7449. Rate of interest on bonds.—All of said bonds shall bear interest at a rate not exceeding four per centum per annum from the first day of July, one thousand nine hundred and thirteen, until paid, which interest shall be payable semiannually on the first days of January and July of each year so long as any portion of the bonds remain unpaid. (1913, c. 102, s. 2.)

§ 7450. Formal execution and sale of bonds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and the state treasurer, and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the bonds shall in all other respects be in such form as the state treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, which shall be expressed on the face of the bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be the most effectual to secure the best price. He is authorized to accept bids for the entire issue or of any portion thereof, and, where the conditions are equal, he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. (1913, c. 102, s. 3.)

§ 7451. Exemption from taxation; investment by fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians, and fiduciaries generally may invest in such bonds. (1913, c. 102, ss. 4, 5.)

§ 7452. Application of proceeds.—The proceeds from the sale of said bonds are to be expended in accordance with the provisions of the general appropriation bill, enacted at the session of the general assembly of one thousand nine hundred and thirteen, as follows: To cover the deficit in the state treasury, six hundred thousand dollars; for equipping and painting the new administration building, seventy-five thousand dollars; for remodeling and refurnishing the supreme court building and furnishing the office of the state treasurer, forty thousand dollars; for a central heating plant, forty thousand dollars; for permanent improvements at the several state institutions, as follows: state hospital at Morganton, fifty thousand dollars; state hospital at Goldsboro, twenty-five thousand dollars; North Carolina state college of agriculture and engineering at Raleigh, twenty-five thousand dollars; university of North Carolina, one hundred thousand dollars; the state normal and industrial college at Greensboro, fifty thousand dollars; the negro agricultural and technical college at Greensboro, seventeen thousand five hundred dollars; the Appalachian training school at Boone, fifteen thousand dollars; the Cullowhee normal and industrial school, fifteen thousand dollars; East Carolina teachers' training school at Greenville, forty thousand dollars; the North Carolina sanatorium for the treatment of tuberculosis, at Sanatorium, twenty thousand dollars; for the purchase of land for the state school for the blind and the deaf, near Raleigh, thirty thousand dollars. (1913, c. 102, s. 7.)

Art. 7. Bonds for Payment of North Carolina Railroad Bonds. 1919

§ 7453. New bond issue authorized.—For the purpose of paying off the bonds issued for the purpose of renewing and adjusting a portion of the state debt incurred to aid in the construction of the North Carolina railroad, issued by virtue of chapter one hundred and thirty-eight of the laws of one thousand eight hundred and seventy-nine, which bonds are now outstanding in the sum of two million seven hundred and twenty thousand dollars and will mature on the first day of April, one thousand nine hundred and nineteen, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina to an amount not to exceed the sum of two million seven hundred and twenty thousand dollars, which said bonds may be issued, in the discretion of the state treasurer, in one or more series, payable and maturing not exceeding forty years after the first day of April, one thousand nine hundred and nineteen. (1919, c. 1, s. 1.)

§ 7454. Rate of interest on bonds.—All of said bonds shall bear interest at a rate not exceeding four per cent per annum from the first day of April, one thousand nine hundred and nineteen, until paid, which said interest shall be payable semi-annually on the first days of October and April of each and every year, so long as any portion of the said bonds shall remain due and unpaid. (1919, c. 1, s. 2.)

§ 7455. Execution and sale of bonds; application of proceeds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denominations of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and the state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the said bonds shall in all respects be in such form as the said treasurer may direct and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, of any kind whatsoever, which

shall be expressed on the face of said bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such manner as will secure the sale of the bonds at the highest price, not less than their par value. He is authorized to accept bids for the entire issue or for any portion thereof, and where the conditions are equal, he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as will secure the sale of the bonds at the best price, not less than their par value. Any balance left in the hands of the state treasurer from the sale of these said bonds, after paying the said bonds issued for the purpose of renewing and adjusting a portion of the state debt incurred to aid in the construction of the North Carolina railroad, and the cost of issuing the bonds herein provided for, shall be covered into the general fund. (1919, c. 1, s. 3.)

§ 7456. Exemption from taxation; investment by fiduciaries.—Such bonds and coupons shall be exempt from all state, county, and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians, and fiduciaries generally may invest in such bonds. (1919, c. 1, ss. 4, 5.)

§ 7457. Treasurer may borrow and execute notes if bonds not sold.—In the event the state treasurer shall not be able to sell any or all of the state bonds herein authorized to be issued, and shall not be able to sell the bonds authorized to be issued under article 8 of this chapter, then the state treasurer is hereby authorized, empowered and directed, by and with the advice of the governor and his council of state, to borrow for a period not exceeding two years and at the lowest rate of interest obtainable, such sum of money as shall be required to pay in full the bonds of the state of North Carolina payable on April first, one thousand nine hundred and nineteen, and also to the amount of the bonds authorized to be issued under article 8 of this chapter, and the state treasurer is authorized and empowered, to execute and deliver, in the name of the state, notes for the money so borrowed, and to renew the same from time to time, if necessary, but, however, for a total period not longer than two years from April first, one thousand nine hundred and nineteen. And the said treasurer, in the event he shall not be able to sell, by the advertisement in this article directed, all of said bonds in this article authorized to be issued and the bonds authorized to be issued under article 8 of this chapter, is authorized, empowered and directed to sell thereafter any of said bonds from time to time, as he may be able, until the entire issues are sold, at the best price, but not less than the par value thereof and accrued interest. (1919, c. 1, s. 6.)

§ 7458. Notes exempted from taxation; investment by fiduciaries.—All notes authorized under this article to be issued by the state treasurer in lieu of bonds for borrowed money shall be exempt from all state, county, and municipal taxation or assessment, direct or indirect, general or special whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said notes be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians or other fiduciaries generally may invest in such notes. (1919, c. 11, ss. 1, 2.)

Art. 8. Improvement Bonds. 1917

§ 7459. Bond issue authorized.—For the purpose of permanently enlarging the state's educational and charitable institutions to make them adequate to the demands and necessities of the people of the state, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable in the manner and at the date hereinafter described, to an amount not exceeding three million dollars, and said bonds shall be issued in the following amounts, to wit:

To be issued in the year 1917	$500,000.00
To be issued in the year 1918	$500,000.00
To be issued in the year 1919	$500,000.00
To be issued in the year 1920	$500,000.00
To be issued in the year 1921	$500,000.00
To be issued in the year 1922	$500,000.00

(1917, c. 154, s. 1.)

As to effect of this section on prior tuberculosis laws, see note to section 7058.

§ 7460. Rate of interest on bonds.—All of said bonds shall bear interest at a rate not exceeding four per centum per annum from the date of issue until paid, and the bonds shall bear date as of the first day of July of each year in which they are authorized to be issued from the year one thousand nine hundred and seventeen to the year one thousand nine hundred and twenty-two, both inclusive, which interest shall be payable semiannually on the first days of January and of July of each year so long as any portion of the bonds shall remain due and unpaid. (1917, c. 154, s. 2.)

§ 7461. Execution and sale of bonds. — The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of fifty dollars and of one hundred dollars and of five hundred dollars and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and state treasurer and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon, and the bonds shall in all other respects be in such form as the state treasurer may direct. The coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, which shall be expressed on the face of the bonds. Before selling any of the series of bonds herein authorized to be issued, the state treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the

par of the bonds at the lowest rate of interest. He is authorized to accept bids for the entire issue of the bonds in any one year, or of any portion thereof, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the par value of the bonds at the lowest rate of interest. He is further authorized to sell the bonds at not less than par and accrued interest at any time on and after the first day of July of each and every year until the full issue authorized to be issued under this article shall have been issued; and he may prescribe and publish the terms of payment for the bonds and receive subscriptions therefor: Provided, the state shall receive not less than the par value of the bonds, plus accrued interest thereon at the time of delivery. The bonds shall be due and payable, one hundred thousand dollars on July first, one thousand nine hundred and twenty-three, and one hundred thousand dollars on July first of each year thereafter until the whole series authorized by this article to be issued shall be paid. (1917, c. 154, s. 3; 1919, c. 44, ss. 1, 2.)

§ 7462. Exemption from taxation; investment by fiduciaries.—The bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall the bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. All executors, administrators, guardians, and fiduciaries generally may invest in such bonds. (1917, c. 154, ss. 4, 5.)

§ 7463. Application of proceeds.—The proceeds derived from the sale of said bonds shall be used entirely and exclusively for the permanent improvement and equipment of the following institutions of the state and in the following amounts, to wit:

The state hospital at Raleigh, two hundred thousand dollars.

The state hospital at Morganton, two hundred thousand dollars.

The state hospital at Goldsboro, one hundred and twenty-five thousand dollars.

The North Carolina school for the deaf, located at Morganton, sixty thousand dollars.

The Stonewall Jackson training school, near Concord, fifty thousand dollars.

The university of North Carolina, five hundred thousand dollars.

North Carolina sanatorium for the treatment of tuberculosis, located at Sanatorium, one hundred and fifty thousand dollars.

East Carolina teachers' training school at Greenville, two hundred thousand dollars.

Appalachian training school, at Boone, fifty thousand dollars.

Cullowhee normal and industrial school at Cullowhee, forty thousand dollars.

North Carolina state college of agriculture and engineering, located at Raleigh, three hundred thousand dollars.

The state normal and industrial college, located at Greensboro, five hundred thousand dollars.

For the negro agricultural and technical college at Greensboro, twenty-five thousand dollars.

For the state normal school for negroes, ten thousand dollars.

For the state board of education, for the purpose of aiding in building public schoolhouses in the state, five hundred thousand dollars.

For the erection of a state's storage warehouse in the city of Raleigh, and the purchase of land therefor, fifty thousand dollars.

For the installation of approved apparatus for the protection of the state's institutions against fire, forty thousand dollars.

The proceeds of the sale of bonds herein authorized shall be used solely and exclusively for the permanent enlargement and improvement of the state's institutions herein named and for the other purposes herein named; but the building commission is authorized and directed, if they shall deem it necessary, to use such part of the amount appropriated to any institution herein named for the repair or repairs of said institution which may in their judgment be necessary to preserve the buildings for all use.

The building commission is directed to prorate the proceeds of the sale of bonds issued each year under this article according to the amount appropriated to each institution or object. And the building commission shall not approve any expenditure or contract during the years one thousand nine hundred and seventeen and one thousand nine hundred and eighteen in excess of the appropriations for said years. (1917, c. 154, ss. 6, 8 joint resolution No. 40, 1917, 1919, c. 314, s. 5.)

Art. 9. Debt for Certain Institutions Authorized

§ 7464. Treasurer authorized to borrow and execute notes.—Whereas certain of the educational and charitable institutions of the state are inadequate to meet the demands of the people of the state, and it is required by the public interests that these institutions be permanently enlarged; and

Whereas the institutions for whose permanent enlargement bonds were authorized to be issued under article 8 of this chapter are now in great need of the amount of the bonds in said article apportioned to them, therefore for the purposes recited the state treasurer is hereby authorized, empowered, and directed, by and with the advice of the governor and his council of state, to borrow for a period of two years and at the lowest rate of interest obtainable, the sum of nine hundred and forty-six thousand dollars; and he is further authorized and empowered to execute in the name of the state of North Carolina and deliver notes for the money herein authorized to be borrowed, and to renew the same from time to time, if necessary, for a total period of not longer than two years from the date of the original notes. (1919, c. 328, s. 1.)

§ 7465. Disposition of proceeds.—The proceeds derived from the sale of such notes are appropriated and set apart for the permanent enlargement and improvement of the following educational and charitable institutions of the state and in the following amounts, to wit:

For the Caswell training school, three hundred thousand dollars.

For the state hospital at Raleigh, eighty thousand dollars.

For the agricultural and technical college for the negroes, at Greensboro, six thousand dollars.

For the state normal for the negroes, at Elizabeth City, thirty thousand dollars.

For the state normal for the negroes, at Fayetteville, thirty thousand dollars.

For the state sanatorium for tuberculosis, one hundred thousand dollars.

For the orthopedic hospital, twenty-thousand dollars.

For the erection and construction of a suitable and adequate building for the agricultural department on the lot now owned by it in the city of Raleigh, two hundred and fifty thousand dollars.

For the erection of suitable buildings for the state prison on the state farm or other place selected, one hundred thousand dollars.

For the Slater normal and industrial school at Winston-Salem, thirty thousand dollars: Provided, that of this amount only the sum of twenty-thousand dollars shall be immediately available, and the remainder, ten thousand dollars, shall become available only when the said Slater normal and industrial school shall raise from other sources and have available the sum of ten thousand dollars, which fact shall be certified to the state treasurer by the president and treasurer of said school, verified before a notary public. Out of said sum the trustees are authorized to buy such additional land and buildings for said school as may, in their judgment, be deemed necessary, not exceeding fifteen thousand dollars. (1919, c. 328, s. 2.)

§ 7466. Treasurer may borrow in anticipation of certain bonds.—The state treasurer is further authorized, empowered, and directed to borrow, by and with the advice of the governor and his council of state, in anticipation of the bonds authorized to be issued under article 8 of this chapter, and for the institutions therein named, but, however, not exceeding the total amount of the bonds authorized thereunder, such sums of money from time to time as the trustees or directors of the said institutions therein named may need and shall be approved by the state building commission; the said sums of money to be borrowed at the lowest rate of interest obtainable, and the state treasurer is authorized and empowered to execute in the name of the state of North Carolina and deliver notes for the money in this section authorized to be borrowed, and to renew the same from time to time, if necesary, until the bonds authorized to be issued under article 8 of this chapter are issued and sold as directed; and the said treasurer is directed to pay the notes issued pursuant to the authority conferred upon him in this section with the proceeds of the sale of said bonds as fast as and as soon as the said bonds are sold. (1919, c. 328, s. 5.)

§ 7466(a). Reimbursement of treasurer for interest.—Whenever it shall become necessary for the state treasurer to borrow money to provide the maintenance fund for any state institution, the said treasurer is authorized to deduct from the sum appropriated for maintenance of said institution the amount of interest the treasurer shall have to pay for the use of said fund. This section shall apply to all future laws creating a maintenance fund for any state institution, unless said laws shall specifically state otherwise. (1923, c. 210.)

§ 7467. Exemption from taxation; investment by fiduciaries.—Any and all notes issued by the state treasurer under the provisions of this article shall be exempt from all state, county, and municipal taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said notes be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation; and it shall be lawful for all executors, administrators, guardians, and fiduciaries generally to invest in said notes. (1919, c. 328, s. 6.)

§ 7468. Construction from proceeds under supervision of state building commission. — All buildings built, improved, or constructed with the proceeds of the money herein authorized to be borrowed for and on account of the institutions named shall be constructed and built by and under the supervision of the state building commission. (1919, c. 328, s. 3.)

§ 7469. Liquidation of notes.—The state treasurer is further authorized and directed to apply the surplus in the treasury not otherwise appropriated at the end of the fiscal year of one thousand nine hundred and twenty to the liquidation, payment, and settlement of the notes herein in section 7464 authorized to be issued to the amount the same will pay. (1919, c. 328, s. 4.)

§ 7470. State prison converted to hospital from proceeds of hospital bonds.—The directors of the state hospitals are authorized to use and expend, under the supervision and direction of the state building commission as much of the proceeds of the bonds apportioned to the state hospital at Raleigh and the state hospital at Morganton, under article 8 of this chapter, as may be required to make available and suitable the property and buildings of the state prison at Raleigh, which have been, by an act of the general assembly of one thousand nine hundred and nineteen, directed to be turned over to and incorporated with the property of the state hospital at Raleigh. (1919, c. 328, s. 7.)

§ 7471. All construction as near fireproof as practicable; exception.—All buildings improved, constructed, or built for any of the institutions of the state from the proceeds of the sale of bonds authorized to be issued under article 8 of this chapter, or from the money borrowed under the provisions of this article, shall be improved, built, and constructed as near fireproof as in the judgment of the state building commission is practicable or possible, except the buildings erected by the state prison; and the approval by the state building commission of the plans furnished to it by the state institutions shall be final and conclusive. (1919, c. 328, s. 9.)

§ 7472. Sale of state blind institution property. —The governor and his council of state are hereby authorized, empowered, and directed to sell for the highest obtainable price the square and the buildings thereon now occupied in the city of Raleigh by the state blind institution, and the proceeds of such sale shall be paid to the state treasurer for the use of the blind institution for the completion of its new buildings and equipment thereof. Until such sale can be made, the state treasurer is authorized and empowered to borrow a sum not exceeding one hundred and fifty thousand dollars at the lowest obtainable rate of interest, and the said state treasurer is authorized to execute in the name of the state of North Carolina and deliver notes for the money herein authorized to be borrowed, and to renew the same from time to time, if necessary, until the said square and buildings are sold and paid for, when the said notes shall be discharged and paid for from such proceeds; and the surplus of said proceeds shall be placed to the credit of said blind institution. (1919, c. 328, s. 10.)

Art. 10. Bonds for Permanent Enlargement and Improvement of Educational and Charitable Institutions. 1921

§ 7472(a). Purpose of bond issue; issue authorized; amount and dates of issue.—For the purpose of permanently enlarging the state's educational and charitable institutions, to make them adequate to the demands and necessities of the people of the state, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable in the manner and at the dates hereinafter described, to an amount not exceeding six million seven hundred and forty-five thousand dollars ($6,745,000), and said bonds shall be issued in the following amounts to wit:

To be issued in the year 1921.....$3,372,500
To be issued in the year 1922.....$3,372,500

(1921, c. 165, s. 1.)

§ 7472(b). Interest and date.—All of said bonds shall bear interest at a rate not exceeding five per centum per annum from the date of said issue until paid, and the said bonds shall bear date as of the first day of July and January of each year in which they are authorized to be issued in the year one thousand nine hundred and twenty-one and one thousand nine hundred and twenty-two, both inclusive, which said interest shall be payable semiannually on the first day of July and January of each and every year so long as any one of said bonds shall remain due and unpaid. (1921, c. 165, s. 2; Ex. Sess. 1921, c. 82, s. 1.)

§ 7472(c). Nature of bonds; authentication; advertisement; sales below par. — The bonds authorized and directed to be issued by the preceding section shall be either coupon bonds or registered bonds of the denominations of five hundred dollars ($500) and one thousand dollars ($1,000) each, as may be determined by said state treasurer, and shall be signed by the governor of the state and the state treasurer, and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone or may, have a facsimile of his signature printed, engraved, or lithographed thereon, and the said bonds shall in all other respects be in such form as the state treasurer shall direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, of any kind whatsoever, which shall be expressed on the face of said bonds. Before selling any of the series of bonds herein authorized to be issued, the state treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the par of said bonds at the lowest rate of interest not exceeding five per centum: Provided, that no bids shall be received, and none of the bonds herein authorized to be issued shall be sold at less than par value of the bonds plus the accrued interest thereon. He is authorized to accept bids for the entire issue of said bonds in any one year, or of any portion thereof, and where the conditions are equal he shall give preference of purchase to the citizens of North Carolina. The said bonds issued as of July first, one thousand nine hundred and twenty-one, shall be due and payable forty years from their date, and the said bonds issued as of January first, one thousand nine hundred and twenty two, shall be due and payable forty years from that date. (1921, c. 165, s. 3; Ex. Sess. 1921, c. 82, s. 2.)

Editor's Note.—This amendment of 1921 inserted in the words "and January" wherever they now appear in the section.

§ 7472(d). Exemption from taxation. — The said bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1921, c. 165, s. 4.)

§ 7472(e.) Investment for trust funds.—It shall be lawful for all executors, administrators, guardians, and fiduciaries generally to invest in said bonds. (1921, c. 165, s. 5.)

§ 7472(f). Appropriation of proceeds. — The proceeds derived from the sale of said bonds shall be used for the permanent improvement and equipment as hereinafter set out of the following institutions of the state, and in the following amounts, to wit:

The state hospital for the insane at Morganton, three hundred thousand dollars (300,000), for fire protection, heating, and repairs. (This amount to be in addition to and supplement the sum already on hand.)

The state hospital for the insane at Goldsboro, three hundred thousand dollars ($300,000), for used for the following purposes:

(a) New boiler house and stack, electric plant and ice house .....$ 70,000
(b) Cold storage, new heating plant, heating mains, reconstruction heating in buildings and water supply 200,000

(c) Complete woman's building 20,000
(d) Furniture for woman's building 10,000

The state hospital for the insane at Raleigh, seven hundred and sixty-five thousand dollars ($765,000), to be used for the following purposes:

(a) Barn and silos .....$ 15,000
(b) Laundry and machinery 25,000
(c) New dining-room 100,000
(d) Repairs to men's ward, plumbing, etc. 40,000
(e) Repairs to epileptic colony 20,000
(f) For the purchase of cows 15,000
(g) For the erection of other buildings and equipment of the same sufficient to take care of five hundred and seventy-five patients, this amount being in lieu of and in substitution of three hundred thousand ($300,000), which was appropriated by the general assembly of one thousand nine hundred and nineteen to convert the state prison at Raleigh into a hospital for the insane .....$ 550,000

The North Carolina school for the deaf and dumb at Morganton, twenty-thousand dollars ($20,000), to be used for the following purposes:

(a) Remodeling refrigerating system and making necessary repairs .....$ 4,000
(b) Sprinkler system 2,000
(c) Two cottages for help 4,000
(d) General repairs to floor and plumbing 10,000

The North Carolina school for the blind at Raleigh, two hundred and fifty thousand dollars ($250,000), to be used for the following purposes:

(a) Cottages for pupils .....$ 85,000
(b) To complete administration building, and auditorium and music rooms 60,000
(c) Plumbing in buildings already erected 20,000
(d) Water mains, sewer, storm water, and fire protection 30,000
(e) Improvements to grounds 5,000
(f) Teachers' dormitory and apartment for superintendent 30,000
(g) Boiler house and laundry building 30,000
(h) Laundry equipment 15,000
(i) Boilers and boiler-house equipment, tunnels, mains, piping in buildings, and return hot and cold water for each building 80,000
(j) Industrial building 10,000
(k) Furniture 10,000

Total $375,000
Balance from previous bond issue 125,000

Amount required and appropriated herein $250,000

The North Carolina sanatorium for tuberculosis at sanatorium, three hundred thirty thousand dollars ($330,000), to be used for the following purposes:

(a) New dining-room and kitchen.....$ 90,000
(b) Power house and laundry building and addition to equipment 45,000
(c) Deep well 5,000
(d) Ambulatory cottages 30,000
(e) Cottage and furniture for servants 12,000
(f) Cottage 10,000
(g) Sewerage 3,000
(h) Negro division for sanatorium..... 100,00
(i) Cow barn and silo 5,000
(j) For equipment and repairs on old buildings 30,000

The state home and industrial school for girls and women at Samarcand, one hundred and sixty-five thousand dollars ($165,000), to be used for the following purposes:

(a) Sewerage disposal and water supply $ 20,000
(b) One receiving cottage .....$ 25,000
(c) Four honor cottages, $20,000 each.... 80,000
(d) Dairy barn, silo and stable 5,000
(e) Central heating plant 20,000
(f) For equipment and farm development..15,000

The Stonewall Jackson training school at Concord, one hundred and forty thousand dollars ($140,000), to be used for the following purposes:

(a) Four cottages .....$ 80,000
(b) Two additional cottages 40,000
(c) Other permanent buildings and furniture 20,000

The Caswell training school at Kinston, two hundred and forty thousand dollars, ($240,000), to be used for the following purposes:

(a) Low grade boys' building .....$ 60,000
(b) Addition to present middle grade boys' building 50,000
(c) Addition to new dining-room, etc. 25,000
(d) Electrical equipment and electric wiring 25,000
(e) Water supply 20,000
(f) Cold storage and refrigeration 25,000
(g) Furniture 25,000
(h) Equipment of a new building 10,000

The university of North Carolina at Chapel Hill one million four hundred and ninety thousand dollars ($1,490,000), to be used for the following purposes:

(a) Dormitories for additional students..$ 265,000
(b) Dining-room, kitchen and storage .. 150,000
(c) Two class-room buildings 300,000
(d) Heating, light and water 100,000
(e) Furniture 50,000
(f) Faculty houses 50,000
(g) Departmental equipment 50,000
(h) Fire protection 25,000

The state college of agriculture and engineering at Raleigh, six hundred thousand dollars ($600,000), to be used for the following purposes:

(a) Agricultural extension building .... $ 200,000
(b) Two new dormitories 140,000
(c) Laundry building 20,000
(d) General repairs 15,000
(e) Fire-proof boiler house, extending heating mains, and new sewer extension 50,000
(f) Extention to dining-room, kitchen, and cold storage equipment .....$ 75,000
(g) To complete the mechanical and engineering building 50,000

The North Carolina college for women at Greensboro, eight hundred and seventy-five thousand dollars ($875,000), to be used for the following purposes:

(a) One new dormintory for additional students .....$ 150,000
(b) Equipment for kitchen 40,000
(c) Heating and laundry 130,000

(d) Furniture and fixtures	30,000
(e) Improvement of grounds	25,000
(f) Domestic science building	100,000
(g) Fire protection	25,000
(h) General repairs	10,000
(i) Reimbursement of maintenance fund for money spent for permanent improvements	30,000
(j) To pay indebtedness on the faculty home	35,000

The east Carolina teacher training school at Greenville, three hundred and twenty-five thousand dollars ($325,000), to be used for the following purposes:

(a) To complete administration building, dining-rooms, music rooms, toilet rooms, etc.	$ 120,000
(b) Remodeling power and heating plant, and furnishing new edectrical equipment..	50,000
(c) Furniture for administration and dormitory buildings	15,000
(d) New dormitories for additional students	80,000
(e) New heating mains, tunnels, etc., and reconstructing the model training school, making it safe	60,000

The Cullowhee normal and industrial school at Cullowhee, and the Appalachian training school at Boone, two hundred thousand dollars ($200,000), for buildings and repairs, to be apportioned by the state board of education.

The state normal school for negroes at Elizabeth City, the colored normal school at Fayetteville, the Slatter colored normal school at Winston-Salem, four hundred thousand dollars ($400,000), for buildings and repairs, to be apportioned by the state board of education: Provided, that of said sum four thousand dollars ($4,000) shall be paid to the trustees of Union Chapel school for Indians of Robeson county, and two thousand dollars ($2,000) to the trustees of Pembroke Normal school for Indians of Robeson county, to be used by them for permanent improvements and equipment.

The negro reformatory for boys, twenty-five thousand dollars ($25,000). Location of this institution to be decided upon.

The North Carolina orthpædic hospital, for buildings and equipment, one hundred thousand dollars ($100,000).

The agricultural building for the department of agriculture, seventy-five thousand dollars ($75,000), which said sum is in addition to the two hundred and fifty thousand dollars ($250,000) provided by the general assembly of one thousand nine hundred and nineteen.

The soldiers' home at Raleigh, thirty thousand dollars ($30,000), for repairs of buildings, heating and laundry.

The negro agricultural and technical college at Greensboro, one hundred and fifteen thousand dollars ($115,000), to be used for the following purposes:

(a) For agricultural and auto mechanics buildings	$ 100,000
(b) For the purchase of addition land....	15,000

(1921, c. 165, s. 6.)

§ 7472(g). Supervision and direction of work; material and character of construction; diversion of appropriation.—The state building commission shall have the control, supervision and direction of the buildings to be built, altered and repaired for the several institutions for which appropriations are made in this article, and shall prescribe the material and character of construction to be used: Provided, that both shall be permanent, substantial and durable, and conform as near as may be to the character of construction of the buildings at present at such institutions, and shall, as speedily as possible, have the plans and specifications for such buildings, alterations, and repairs as herein specified to be prepared by the state architect and let to contract by competitive buildings, taking sufficient bonds from the contractors securing the faithful performance of the said contracts and the payment of all material used and labor furnished in the carrying out of the same, authority is hereby given to the said state building commission, by and with the consent and approval of the governor of the state, when it is ascertained by them that any institution is more urgently in need of other permanent improvements than those herein specified in this article, to divert such part of the appropriations herein made to said institutions for the purpose of this article as may be needed to provide the permanent improvements more urgently needed in the judgment of said building commission and the governor of the state. (1921, c. 165, s. 7.)

§ 7472(h). Purpose of article.—It is the purpose of this article that the proceeds of the sale, of bonds herein authorized shall be used for the permanent enlargement and improvement of the state's institutions herein named, and for the other purposes herein specified. (1921, c. 165, s. 8.)

§ 7472(i). State treasurer to negotiate bonds; notes for money borrowed; renewals; notes exempt from taxation; investments of trust funds.—In the event that the state treasurer shall not be able to sell any or all of the state bonds herein authorized to be issued, then the said state treasurer is hereby authorized, empowered, and directed, by and with the advice of the governor and council of state, to borrow for a period not exceeding two years, and at the lowest rate of interest obtainable, such sum of money as shall be required to meet the appropriations made in this article not exceeding the aggregate amount in any year of the bonds herein authorized to be issued in said year. And the said state treasurer is authorized and empowered to execute and deliver, in the name of the state, notes for the money so borrowed, and to renew the same, or borrow from time to time, if necessary, but, however, for a total period not longer than two years from July first, one thousand nine hundred and twenty-one, and July first one thousand nine hundred and twenty-two, and the said notes so issued shall be exempt from all state, county, and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be sub-

ject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, and it shall be lawful for all executors, administrators, guardians, and fiduciaries generally to invest in said notes. (1921, c. 165, s. 9.)

Art. 11. Bonds for Permanent Enlargement and Improvement of Educational and Charitable Institutions. 1923 and Subsequently

§ 7472(j). Purpose of bond issue; amount and dates of issue.—For the purpose of permanently enlarging the state's educational and charitable institutions, to make them adequate to the demands and necessities of the state, and for the purpose of opening inlets and encouraging the fish industry, and the improvement of the state's property, the state treasurer is authorized and directed to issue bonds of the state of North Carolina payable in the manner and at the date herein described, to an amount not exceeding ten million six hundred seventy-seven thousand five hundred dollars ($10,677,500.00). Said bonds shall be issued from time to time at the request of the board of directors of the various institutions for which the bonds are to be provided, upon the approval of the governor and council of state. (1923, c. 162, s. 1.)

Editor's Note.—Similar bond issues were authorized by Public Laws 1925, c. 192; 1927, c. 147; 1929, c. 295. The unallotted balances of the appropriations made under such acts were reappropriated and reallocated by Public Laws 1931, c. 40.

Public Laws of 1935, chapter 439, authorized bond issue for the purpose of permanently enlarging the State Hospital, Goldsboro; State Hospital, Raleigh; State Hospital, Morganton, and Caswell Training School, Kinston.

§ 7472(k). Interest and date. — All of said bonds shall bear interest at the rate not exceeding five per cent per annum from the date of said issue until paid, and the said bonds shall bear such date as may be fixed by the governor and council of state. Interest shall be paid semiannually on the date fixed by the governor and council of state. (1923, c. 162, s. 2.)

§ 7472(l). Nature of bonds; authentication; advertisement; sales below par.—The bonds authorized and directed to be issued by the preceding section shall be either coupon bonds or registered bonds of the denomination of five hundred dollars ($500) and one thousand dollars ($1,000) each, as may be determined by said state treasurer, and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved and/or lithographed thereon, and the said bonds shall in all other respects be in such form as the state treasurer shall direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, of any kind whatsoever, which shall be expressed on the face of said bonds. Before selling any of the series of bonds herein authorized to be issued, the state treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the par of said bonds at the lowest rate of interest, not exceeding five per centum: Provided, that no bids shall be received and none of the bonds herein authorized to be issued shall be sold at less than par value of the bonds, plus the accrued interest thereon. He is authorized to accept bids for the entire issue of said bonds in any one year, or of any portion thereof, and where the conditions are equal he shall give preference of purchase to the citizens of North Carolina. The bonds shall be due and payable forty years from their date and the date of issue. (1923, c. 162, s. 3.)

§ 7472(m). Exemption from taxation. — The said bonds and coupons shall be exempt from all state, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as from income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1923, c. 162, s. 4.)

§ 7472(n). Investment for trust funds. — It shall be lawful for all executors, administrators, guardians, and fiduciaries generally to invest in said bonds. (1923, c. 162, s. 5.)

§ 7472(o). Appropriation of proceeds. — The proceeds derived from the sale of said bonds shall be used for the permanent improvement and equipment as hereinafter set out for the following institutions of the state, and in following amounts, to wit:

State hospital, Raleigh, N. C. .....$	394,000.00
State hospital, Morganton, N. C. ..	415,000.00
State hospital, Goldsboro, N. C. ...	313,000.00
Caswell training school (to complete a plant to care for 400 inmates, and to provide for the payment of outstanding notes in the amount of $75,598.00 incurred on a previous building account)	500,000.00
School for the deaf at Morganton ..	23,000.00
School for the blind and deaf at Raleigh	326,000.00
State sanatorium for the treatment of tuberculosis	219,000.00
Orthopædic hospital	25,000.00
Stonewall Jackson training school (plant for 400 students)	135,000.00
Home and industrial school for girls and women (plant for 350 students)	232,500.00
Colored reformatory and training school. (In lieu of $25,000.00 provided in chapter one hundred sixty-five, Public Laws of one thousand nine hundred and twenty-one	50,000.00
Soldiers home	5,000.00
University of North Carolina	1,650,000.00
State college of agriculture and engineering	1,350,000.00
North Carolina college for women ..	1,350,000.00
East Carolina teachers college	1,025,000.00
The negro agricultural and technical college	455,000.00
Board of education for teachers training school	1,194,000.00

Distribution of appropriation for teachers training schools to be as follows:	
Slater normal school, Winston-Salem	$ 173,000.00
Negro Normal school, Elizabeth City, N. C.	173,000.00
Negro normal school, Fayetteville, N. C.	123,000.00
Cherokee Indian normal	37,000.00
Appalachian training school	300,000.00
Cullowhee normal and industrial school	388,000.00
Total for teachers training schools	$ 1,194,000.00
School buildings for Cherokee Indians to be expended under the direction of the state superintendent of public instruction, for the purpose of building, equipping, repairing and enlarging school buildings for the Indians of Robeson county at the Dial school in Saddle Creek township, Prospect school, Green Grove school, Laurel institute, also called Union Chapel, and such other schools for the Indians in Robeson county as may be directed by said superintendent, including the purchase of lands and other equipment for said school	30,000.00
Completion and equipment of the agricultural building, and the remodeling of the state museum building — equipment to include furnishing of the legislative committee rooms	100,000.00
Permanent office equipment for the library commission's offices	8,000.00
For eastern Carolina industrial training school	25,000.00
Additional story to agricultural building to provide for offices for department of revenue	125,000.00
Fisheries commission	500,000.00
(Or so much thereof as may be necessary to open inlets, plant oysters, build hatcheries, provide equipment, and for such other necessary improvement of the fish and sea-food industry of the state.)	
To provide buildings for the criminal insane if removed from the state penitentiary:	
State hospital, Raleigh	50,000.00
State hospital, Goldsboro	50,000.00
To provide buildings for prisoners and employees' quarters at the Caledonia farm	50,000.00
To build sanatorium for tubercular prisoners	50,000.00

The board of public buildings and grounds is authorized and empowered, in its discretion, to have the sum of one hundred and twenty-five thousand dollars used in the construction of an addition to the agricultural building upon the property now owned by the state, in lieu of providing an additional story upon said building. Said addition, when constructed, to be used as follows: First two floors by the state museum and the third, fourth and fifth floors by the state department of revenue. (1923, c. 162, s. 6; 1923, c. 164.)

Editor's Note. — The last paragraph of this section was taken from the ch. 164 of the Public Laws 1923.

§ 7472(p). Purpose of law; direction of expenditures.—It is the purpose of this article that the proceeds of the sale of bonds herein authorized shall be used for the permanent enlargement and improvement of the state's institutions herein named and for the purpose of opening inlets and providing necessary improvements to aid the fish and sea-food industry of the state, and the amount allowed to each industry to be spent by the governing body at each institution, namely, board of directors, trustees, or commissioners, as the case may be. (1923, c. 162, s. 7.)

§ 7472(q). Removal of director, trustee or commissioner voting for or aiding expense in excess of appropriation.—Any executive head of any institution or any director, trustee or commissioner, in any state institution or commission, who votes for or aids in spending more money for his institution than is herein appropriated, may be removed from office by the governor. (1923, c. 162, s. 8.)

Art. 11 (A). Sinking Fund Commission

§ 7472(q) 1. Creation; duties.—A State Sinking Fund Commission is hereby created, the members of which shall be the Governor, State Treasurer and Auditor, who shall serve without additional compensation. It shall be the duty of the commission to see that the provisions of all sinking fund laws are complied with and to provide for the custody, investment and application of all sinking funds. The commission and its members may call upon the Attorney-General for legal advice as to their duties, powers and responsibilities hereunder. (1925, c. 62, s. 2.)

§ 7472(q) 2. To adopt rules; organization. — The commission shall adopt rules for its organization and government and the conduct of its affairs. Its chairman shall be the Governor and its secretary the Auditor. All clerks and employees in the office of the Governor, Auditor and Treasurer may be called upon to assist the commission. (1925, c. 62, s. 3.)

§ 7472(q) 3. Treasurer of commission; liability.—The State Treasurer shall be ex officio treasurer of the commission and the custodian of the sinking fund and the investments thereof. He and the sureties upon his official bond as State Treasurer shall be liable for any breach of faithful performance of his duties under this article as well as his duties as State Treasurer, and his official bond shall be made to comply with this requirement. (1925, c. 62, s. 4.)

§ 7472(q) 4. Investment of sinking funds. — Moneys in the sinking funds herein shall not be loaned to any department of the State, but shall be invested by the commission in:

(a) Bonds of the United States;

(b) Bonds or notes of the State of North Carolina, and in the obligations of any quasi-

public corporation in which the State of North Carolina owns not less than fifty-one per cent of its capital stock.

(c) Bonds of any other state whose full faith and credit are pledged to the payment of the principal and interest thereof;

(d) Bonds of any county in North Carolina, any city or town in North Carolina and any school district in North Carolina, provided such bonds are general obligations of the subdivision or municipality issuing the same and provided that there is no limitation of the rate of taxation for the payment of principal and interest of the bonds. (1925, c. 62, s. 5; 1931, c. 415; 1935, c. 146.)

Editor's Note.—The Act of 1931 amended this section by striking out all references to population.

The amendment of 1935 adds the last clause to subsection (b) relating to obligations to quasi public corporations. As to investment of bonds guaranteed by the United States, see section 220(a)1.

§ 7472(q) 5. Purchase of securities.—No such securities shall be purchased at more than the market price thereof, nor sold at less than the market price thereof. No securities shall be purchased except bonds of the United States or bonds or notes of the State of North Carolina unless the vendor shall deliver with the securities the opinion of an attorney believed by the commission to be competent and to be recognized by investment dealers as an authority upon the law of public securities, to the effect that the securities purchased are valid obligations and are securities which the commission is authorized to purchase, it being the intention of this requirement to assure the commission not only that such securities are valid and eligible for purchase under this act but that the same shall not be unsalable by the commission because of doubts as to the validity thereof. The commission is empowered to appoint one or more of its members for the purpose of making purchases and sale of securities. (1925, c. 62, s. 6.)

§ 7472(q) 6. Interest of securities held as part of sinking fund.—The interest and revenues received upon securities held for any sinking fund and any profit made on the resale thereof shall become and be a part of such sinking fund. Bonds and notes of the State of North Carolina purchased for any sinking fund shall not be canceled before maturity, but shall be kept alive, and the interest and principal thereof shall be paid into the sinking fund for which the same are held. (1925, c. 62, s. 7.)

§ 7472(q) 7. Registration of securities; custody thereof.—Where practicable securities purchased for sinking funds shall be registered as to the principal thereof in the name of "The State of North Carolina for the sinking fund for" (here briefly identify the sinking fund) and may be released from such registration by the signature of the State Treasurer, but the treasurer shall not make such release unless and until the securities to be so released shall have been sold by the commission or until the commission shall have ordered such release. The treasurer shall rent a safety deposit box or boxes in some responsible bank in Raleigh in which he may keep all securities purchased for sinking funds and in which it shall be his duty to keep all such securities not registered as to the principal thereof. (1925, c. 62, s. 8.)

§ 7472(q) 8. Expenses of commission. — The necessary expense of the commission for the rental of a safety deposit box, publication of advertisements, postage, insurance upon securities in transit, etc., not exceeding one-twentieth of one per cent of the amount in all sinking funds at the end of any fiscal year, shall be a charge upon the general fund. (1925, c. 62, s. 9.)

§ 7472(q) 9. Report of commission. — The commission shall make a report in writing to the General Assembly not later than the tenth day of each regular and extraordinary session thereof, stating the nature and amount of all receipts and disbursements of each sinking fund since the last preceding report, and the amount contained in each fund, and giving an itemized statement of all investments of each fund as to name of security, purpose of issuance, date of maturity and interest rate, which report shall be spread upon the journals of the Senate and House of Representatives. (1925, c. 62, s. 10.)

§ 7472(q) 10. Embezzlement by member of commission.—If any member of the commission shall embezzle or otherwise willfully and corruptly use or misapply any funds or securities in any sinking fund for any purpose other than that for which the same are held, such member shall be guilty of a felony, and shall be fined not more than ten thousand dollars, or imprisoned in the State's Prison not more than twenty years, or both, at the discretion of the court. (1925, c. 62, s. 11.)

§ 7472(q) 11. False entry by secretary or treasurer.—If the secretary or treasurer of the commission shall wittingly or falsely make, or cause to be made, any false entry or charge in any book kept by him as such officer, or shall wittingly or falsely form, or cause to be formed, any statement of the condition of any sinking fund, or any statement required by this article to be made, with intent in any of said instances to defraud the State, or any person or persons, such secretary or treasurer, as the case may be, shall be guilty of a misdemeanor and fined at the discretion of the court not exceeding three thousand dollars, and imprisoned for not exceeding three years. (1925, c. 62, s. 12.)

§ 7472(q) 12. Interest of member in securities; removal.—If any member of the commission shall have any pecuniary interest, either directly or indirectly, proximately or remotely, in any securities purchased or sold by the commission, or shall act as agent for any investor or dealer for any securities to be purchased or sold by the commission, or shall receive directly or indirectly any gift, emolument, reward, or promise of reward for his influence in recommending or procuring any such purchase or sale, he shall forthwith be removed from his position, and shall upon conviction be guilty of a misdemeanor, and fined not less than fifty dollars nor more than five hundred dollars, and be imprisoned, in the discretion of the court. (1925, c. 62, s. 13.)

§ 7472(q) 13. Report of sufficiency of sinking fund.—When the funds or securities in sinking fund shall be found by the sinking fund commission to be sufficient with interest accretions reasonably to be expected for the retirement at maturity of all bonds for which such sinking fund is held, and when the commission shall file a statement of such finding in the office of the Auditor and in the office of the State Treasurer, further payments into such sinking fund shall be suspended and shall not again be made unless such fund should thereafter become insufficient for any reason. (1925, c. 62, s. 18.)

Art. 12. Sinking Funds for Certain State Bonds

§ 7472 (r). Institution bonds; annual payments into fund.—For the retirement of the principal of bonds of the state for permanent enlargement of its educational and charitable institutions issued and to be issued under articles 10 and 11 of this chapter, a sinking fund is created into which fund the state treasurer shall pay during the fiscal year ending June 30, 1924, from any fund not heretofore pledged or appropriated, the sum of one hundred and sixty-three thousand dollars or such greater amount as may be necessary to retire said bonds. (1923, c. 188, s. 1; 1925, c. 62, s. 14.)

Editor's Note.—The 1925 amendment substituted the words "fiscal years ending June 30, 1924" for "Calender Year."

This section reviewed and summarized in 1 N. C. Law Rev. 267.

As the section now reads it would seem to be obsolete.

§ 7472 (s). Highway bonds; annual payments.—For the retirement of the principal of nineteen million five hundred thousand dollars highway serial bonds heretofore issued under chapter two, Public Laws of one thousand nine hundred and twenty-one, Regular Session, a sinking fund is created, into which fund the state treasurer shall pay during the fiscal year ending June 30, 1924, from any funds not heretofore pledged or appropriated, the sum of one hundred thousand dollars. (1923, c. 188, s. 2; 1925, c. 62, s. 15.)

Editor's Note.—The words "fiscal year ending June 30, 1924" was substituted for the word year. As the section now reads it seems to be obsolete.

§ 7472 (t). Highway bonds not issued; annual payments.—For the retirement of the principal of bonds issued for highway purposes, chapter two, Public Laws of one thousand nine hundred and twenty-one, Regular Session, over and above the nineteen million five hundred thousand dollars heretofore issued, a sinking fund is hereby created into which fund the state treasurer shall pay during the fiscal year ending June 30, 1924, from any funds not heretofore pledged or appropriated, the sum of four hundred thousand dollars. (1923, c. 188, s. 3; 1925, c. 62, s. 16.)

Editor's Note. — The 1928 amendment substituted the words "the fiscal year ending June 30, 1924" for the word "year" as the section now reads it seems to be obsolete.

§ 7472 (u). Source of funds.—All of the highway bond sinking fund payments to be made under sections 7472(s) and 7472(t), aggregating five hundred thousand dollars ($500,000) annually, shall be made from the revenues collected under the provisions of said chapter two (2) public law of one thousand nine hundred and twenty-one, if such revenues are sufficient therefor after setting aside therefrom the moneys provided by said chapter two (2) for the maintenance of the State Highway Commission and the expenses of collecting highway revenues, and after setting aside moneys necessary for the payment of maturing principal of and interest upon highway bonds of the State: Provided, however, that no holder of any highway bonds of the State shall be prejudiced by this amendment or by any act amendatory of this section passed subsequent to the issuance of such bonds, and any such bondholder shall be entitled to all rights to which he would be entitled if no such amendment had been made. (1923, c. 188, s. 4; 1925, c. 45, s. 4; 1925, c. 133, s. 4.)

Editor's Note.—Originally this section provided for a payment of $250,000 instead of $500,000 as changed by the first amendment of 1925. The section was renewed by the second act of 1925.

§§ 7472(v)-7472(y). Repealed by Public Laws 1925, c. 62, s. 17.

Art. 13. Bonds to Pay off Certain Short-term Notes

§ 7472(z). Bond issue authorized; amount.—In order to enable the state of North Carolina to pay off notes aggregating four million five hundred thousand dollars, authorized by chapter forty-three of the laws of one thousand nine hundred twenty-one, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina to an amount not to exceed the sum of four million five hundred thousand dollars. (1921, c. 107, s. 1.)

§ 7472(aa). Interest.—All of said bonds, when issued as hereinafter provided, shall bear interest at a rate not to exceed five per cent per annum from the date of issue until paid, which interest shall be payable semiannually at such time and place as shall be named in the face of the bonds and coupons attached thereto as hereinafter provided. (1921, c. 107, s. 2.)

§ 7472(bb). Form; denominations; authentication; receipt of coupons for taxes. — The bonds authorized and directed to be issued by this article shall be either coupon bonds or registered bonds, of the denomination of one hundred dollars, five hundred dollars, and one thousand dollars each, as may be determined by the state treasurer, and shall be signed by the governor and state treasurer, and sealed with the great seal of the state. The coupons thereon may be signed by the state treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the said bonds shall in all respects be in such form as the said treasurer may direct in conformity with this article, and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines, and demands due the state of North Carolina, of any kind whatsoever, which shall be expressed on the face of the said bonds. (1921, c. 107, s. 3.)

§ 7472(cc). Registration of bonds; conversion of coupon bonds. — If the bonds issued are registered bonds, they shall be made payable to the legal holder thereof, and shall be registered either in the office of the state treasurer or in the office of such transfer agent as shall be named in the bonds, which shall be agreed upon by the state treasurer, by and with the consent

of the council of state. Any coupon bond may be converted into a registered bond by the lawful holder thereof, which privilege shall be expressed in the face of the bond, and when such coupon bond is presented for registration, with all coupons attached thereto which have not fallen due, a registered bond shall be issued in lieu thereof to the lawful holder thereof, and the coupon bond with all attached coupons shall be canceled as in case the bond had been paid by the state treasurer. (1921, c. 107, s. 4.)

§ 7472(dd). Serial bonds; maturity. — The said bonds, when issued, shall be serial bonds, and payable in not less than three nor more than thirty years after date of issue. (1921, c. 107, s. 4.)

§ 7472(ee). Sale; interest; exemption from taxation; exemption of interest.—The said bonds herein authorized to be issued shall be sold by the state treasurer by and with the consent of the governor and the council of state at such time and in such amounts and at such a rate of interest, not to exceed five per cent per annum, as shall be fixed and agreed upon by the governor and council of state. The state treasurer is authorized to accept bids for the entire issue or any portion thereof, and to sell the bonds herein authorized in such manner as will secure the sale of the bonds at the best price not less than their par value. All bonds herein authorized when issued shall constitute valid obligations of the state of North Carolina, and the full faith, credit, and taxing power of the state of North Carolina is hereby pledged for the payment of the said bonds and the interest thereon, and the said bonds and coupons thereon, when issued, shall be exempt from all state, county, and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1921, c. 107, s. 5.)

§ 7472(ff). Investment of trust funds.—It shall be lawful for all executors, administrators, guardians, sinking fund commissioners, and fiduciaries generally to invest in said bonds, and when funds in their hands are so invested, such executors, administrators, guardians, sinking fund commissioners, and fiduciaries shall not be liable for any loss which may be incurred by reason of investing therein. (1921, c. 107, s. 6.)

§ 7472(gg). Appropriation of proceeds of sale; deficiency; expense. — All of the funds received from the sale of said bonds shall be used to retire the notes authorized to be issued under the act heretofore cited and referred to, and for no other purpose except to defray the expenses incident to the issuance and sale of said bonds, and if the said bonds are not sold for a sufficient sum to pay the said notes authorized to be issued and the expenses incident to the issuance and sale of the bonds authorized to be issued then such expenses shall be paid for out of funds in the state treasury not otherwise appropriated, the amount of expense incident to the issuance and sale of said bonds to be approved by the governor and council of state. (1921, c. 107, s. 7.)

§ 7472(hh). Aid and advice of citizens; sale commissioners; sale at par.—The governor is authorized to call in for aid and advice such citizens of North Carolina as in his opinion will aid in the selling of the bonds herein authorized to be sold, and who will from a patriotic sense of duty, be willing to render such aid and advice as may be requested and required of them, and if in the opinion of the governor and council of state it is proper so to do, the governor may appoint a commission of business men to take charge of the selling of the said bonds, and to make sale thereof, provided always the said bonds shall be sold at par and at the rate of interest fixed by the governor and council of state. (1921, c. 107, s. 8.)

§ 7472(ii). Repeal of laws.—In the event the bonds authorized by this article to be issued and sold are issued and sold, all other laws authorizing the sale of bonds for which the notes provided for in this article heretofore recited and referred to were issued, are repealed, it being the intent and purpose of the general assembly that if the bonds are sold under this article, this article shall take the place of and stand for all other laws under which the bonds called for are to be sold. (1921, c. 107, s. 9.)

Art. 14. Notes for Funding Prison Debt

§ 7472(jj). Debt transferred to treasury.—Inasmuch as the debit balance in the operating account of the State Prison, hereafter to be known as "The State Prison Department," has accumulated until it has now been ascertained that such debit balance is, as of January first, one thousand nine hundred twenty-five, two hundred and ninety-eight thousand eight hundred and forty-seven and forty-two one hundred dollars and since the operation of the said State Prison Department, from January first, one thousand nine hundred twenty-five to June thirtieth, one thousand nine hundred twenty-five, will further increase the said debit balance, the said total debit balance as finally ascertained, as of June thirtieth, one thousand nine hundred twenty-five, is hereby transferred to and declared to be a part of the debit balance of the State treasury, and that the same is a charge upon the general fund of the State; and since it is necessary to operate the State Prison Department out of the general fund of the State until July first, one thousand nine hundred twenty-five, the State Treasurer is vested with authority to pay for the operating of the State Prison Department until June thirtieth, one thousand nine hundred twenty-five, out of the general fund of the State, and the said State Treasurer shall have and use all authority and power which has been, or may be, at this session of the General Assembly, or hereafter, vested in the State Treasurer, to fund the debit balance of the treasury, by whatever name called, and such power and authority so to fund the same shall include full power and authority to fund the debit balance accruing in the State treasury, from the operation of the State Prison Department on June thirtieth, one thousand nine

hundred twenty-five. All obligations issued to fund the same shall carry all the powers, privileges, exemptions and immunities as other obligations to fund the State debit balance. (1925, c. 132, s. 1.)

§ 7472(kk). Note issue authorized. — Inasmuch as it appears necessary to purchase industrial machinery for the use in the State Prison Department, from time to time, in such sum or sums as may be approved by the board of directors of the State Prison Department, not to exceed the sum of one hundred thousand dollars, and since it appears necessary to purchase fertilizer supplies for the farming operations of the State Prison Department, and that said purchase must be made and paid for prior to June thirtieth, one thousand nine hundred twenty-five, in such sums as may be approved by the board of directors of this department, not to exceed the sum of forty thousand dollars, the State Treasurer is hereby authorized an directed, by and with the consent of the Governor and Council of State, to borrow money, temporarily, or for such length of time as may be determined by the Governor and Council of State, not to exceed the sum of one hundred forty thousand dollars, for said purposes, and to agree to pay, and to pay, such rate or rates of interest at such times and places as may be fixed by the Governor and Council of State, and to execute and issue the notes of the State for same. (1925, c. 132, s. 2.)

§ 7472(ll). Faith of state pledged.—The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the obligations herein authorized. (1925, c. 132, s. 3.)

§ 7472(mm). Obligations receivable for debts due state.—The obligations hereby authorized, after maturity, shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 132, s. 4.)

§ 7472(nn). Exemption from taxation; investment by fiduciaries.—All of the obligations of the State issued pursuant to this article shall be exempt from all State, county and muncipal taxation, or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue, or otherwise, and the interest on such obligations shall not be subject to taxation, as for income fund, nor shall said obligations be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. and it shall be lawful for all executors, administrators, guardians and fiduciary generally, and all sinking fund commissions, to invest any money in their hands in said obligations. (1925, c. 132, s. 5.)

Art. 15. Borrowing Money in Emergency

§ 7472(oo). Governor and Council of State may borrow on notes.—The Governor and Council of the State may authorize and empower the State Treasurer in the intervals between sessions of the General Assembly, to borrow money on short term notes to meet any emergency arising from the destruction of the State's property, whether used by department or institution, or from some unforeseen calamity not amounting to its destruction. (1927, c. 49, s. 1.)

Editor's Note.—Section four of the act from which this section was taken repeals a prior law which was similar to this section.

Public Laws 1931, c. 28, authorized the State Treasurer by and with the consent of the Governor and Council of State to borrow money on short term notes for paying obligation incurred under this section.

§ 7472(pp). Recital of facts entered on minutes; directions to treasurer; limit of amount.—The Council of State, when such emergency arises during such interval, shall recite upon its minutes the facts out of which it does arise, and thereupon direct the State Treasurer to borrow from time to time money needed to meet such emergency or calamity, not exceeding, however in the whole, five hundred thousand ($500,000) dollars in the aggregate in the period between the adjournment of the present session of the General Assembly and the convening of the General Assembly in regular session in one thousand nine hundred and twenty-nine and not exceeding five hundred thousand ($500,000) dollars in the aggregate in any succeeding interval between regular sessions of the General Assembly, and to execute in behalf of the State of North Carolina notes for said money so borrowed to run not exceeding two years, and to bear interest not exceeding five per cent per annum, payable semiannually. Said notes shall be in such forms as the State Treasurer may determine, and the obligations for the interest thereupon after maturity shall be receivable in payment of taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. The said notes shall be exempt from all State, County and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for income, nor shall said notes be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1927, c. 49, s. 2.)

§ 7472(qq). Report to General Assembly. — At each, the next regular or extra session of the General Assembly, the Governor and Council of State shall report to it the proceedings of the Governor and Council of State in borrowing money under this article, setting out fully the facts upon which they held that the emergency existed which authorized such borrowing. (1927, c. 49, s. 3.)

Art. 16. Special Building Fund to Aid Counties in Erection of Schoolhouses

§ 7472(rr). Bond issue authorized.—For the purpose of providing "a special building fund," to be loaned to the county boards of education for maintaining a six months school term, the treasurer is authorized and directed to issue bonds of the State of North Carolina, payable in the manner and on the date hereinafter described, to an amount not to exceed two million five hundred thousand dollars ($2,500,000.00). All of said bonds shall bear interest at a rate not to exceed four and one-half (4½) per cent per annum, payable semiannually on the first days

of January and July of each year, and the said bonds shall bear date as of the first day of January of each and every year in which they may be issued, under the provisions of this article.

(a) Special building fund a separate fund. That the proceeds from the sale of these bonds shall be a separate fund in the hands of the State Treasurer and shall be kept distinct from all other funds of the State. The funds shall be paid out upon the warrant of the State Auditor, but no warrant shall be issued by the auditor except upon the requisition of the State Superintendent of Public Instruction, with the approval and at the direction of the State Board of Education. The bank or banks in which any money belonging to this fund is deposited by the State Treasurer shall be required to pay interest on monthly balances on said money at the rate of three per cent per annum, and all such money so collected shall be credited monthly by the State Treasurer to this fund.

(b) State Board of Education authorized to make loans. That the State Board of Education, under such rules and regulations as it may deem advisable, not inconsistent with the provisions of this chapter, may make loans from "The Special Building Fund" to the county board of education of any county for building, equipping and repairing public school buildings, dormitories, teacherages, and for the purchase of suitable sites: Provided, that no loan shall be made from this fund until the application for said loan has been made by the county board of education and approved by the county commissioners, nor until said commissioners shall certify that the loan is necessary to maintain a six months' school term: Provided, further, that no loan shall be made from this fund for erecting or repairing any school building containing less than seven rooms, nor shall any building be erected in whole or in part from funds borrowed from the State unless the plans for said building shall have been approved by the State Superintendent of Public Instruction.

(c) The first four installments paid back to the State by the counties, as contemplated in this article, are hereby declared to be a part of the special building fund and may, in the discretion of the State Board of Education, be loaned to the counties on the same terms and in accordance with the same rules as provided for an original loan. (1927, c. 199, s. 1.)

Editor's Note. — Attention is called to the prior sections that this section seems to supplement. Section 5688, et seq., was enacted in 1923, section 5694(a) et seq. was enacted in 1925, and this and the following sections in 1927. Reference should be made to all of these sections for a clear understanding of the law on this subject.

§ 7472(ss). Maturity of loans; interest. — Loans to county boards of education made under the provisions of this article shall be payable in twenty equal installments, shall bear interest payable annually in advance at the same rate that the State had to pay on the bonds issued under this article for securing "The Special Building Fund," and said loans shall be evidenced by the note or notes of the county board of education, executed by the chairman and secretary thereof, and deposited with the State Treasurer. The first installment of such loan, together with the interest on the balance of the principal remaining unpaid, shall be paid by the county board of education on or before the fifteenth day of December subsequent to the making of such loan, and the remaining installments, together with the interest, shall be paid, one each year, on the fifteenth day of December of each subsequent year until all shall have been paid: Provided, if at the end of any five-year period it shall appear the earnings of said fund are more than sufficient to retire said bonds the State Board may direct the State Treasurer to transfer such surplus to the State literary fund, and after all bonds are retired any balance remaining shall be turned over to the State literary fund. (1927, c. 199, s. 2.)

§ 7472(tt). Special building fund tax. — The county board of education shall provide in its May budget for a special tax, to be styled "A Special Building Fund Tax," sufficient to repay the annual installment, together with the interest due, and shall issue its order upon the treasurer of the county school fund therefor, who, prior to the fifteenth day of December, shall pay over to the State Treasurer the amount then due. Any amount loaned under the provisions of this article shall be a lien upon the total school fund of such county, in whatsoever hands such funds may be; and if the board of county commissioners fail to provide for a sufficient tax for the fund for the repayment of notes, loans and bonds to pay the loans and interest when due, so long as any part of said loan and the interest are due, the board of county commissioners shall borrow the money in order that the six months school term may be maintained in accordance with the Constitution. Upon failure of any county to pay any installment or interest, or part of either, when due, the State Treasurer may deduct a sufficient amount for the payment of the same out of any fund due such county from any special State appropriation for public schools, and if the amount necessary to conduct a six months school term has been decreased thereby, thus making it impossible to provide the funds for a six months term in every district in said county in accordance with law and the Constitution, the county commissioners shall borrow the amount necessary to meet the deficit caused thereby.

The State Treasurer may bring action against the county board of education of such county, or against any person in whose possession may be any part of the school funds of the county, or against the tax collector of such county; and if the amount of school fund then on hand be insufficient to pay in full the sum so due, then the State Treasurer shall be entitled to an order directing the tax collector of such county to pay over to the State Treasurer all moneys collected for school purposes until such debt and interest shall have been paid: Provided, this lien shall not lie against taxes collected to pay interest and principal on bonds issued by the authorities of any county or any district. (1927, c. 199, s. 3.)

§ 7472(uu). State board of education to approve all applications for loans. — The State Board of Education shall approve all applica-

tions for loans and the amount to be loaned to each county. When said board has received and approved applications for loans in an amount of not less than five hundred thousand dollars ($500,000), the State Board of Education shall direct the State Treasurer to sell, and he shall sell, in accordance with the provisions of this article, North Carolina bonds to provide funds for making the loans in accordance with the applications approved: Provided, that whenever applications are received and approved, in accordance with the provisions of this article, if the State Board of Education shall deem it unwise to sell bonds at that time, the State Treasurer, by and with the consent of the Governor and the Council of State, is hereby authorized to borrow money at the lowest rate of interest obtainable, in anticipation of the sale of the bonds herein authorized, and for the purposes for which said bonds are authorized. The State Treasurer shall execute and issue notes of the State for the money so borrowed, and he is hereby authorized to renew any such notes from time to time by issuing new notes. The rate of interest, the date of payment of said notes or renewals, and all matters and details in connection with the issuance and sale thereof shall be fixed and determined by the Governor and Council of State. Such notes when issued shall be entitled to all privileges, immunities and exemptions that the bonds authorized to be issued are entitled to. The full faith, credit and taxpower of the State are hereby pledged for the payment of such notes as may be issued, and interest thereon. The proceeds received from said notes shall be used for making loans to county boards of education in accordance with this article. The notes issued in anticipation of the sale of bonds shall be paid with the funds derived from the sale of said bonds whenever said bonds are sold. (1927, c. 199, s. 4.)

§ 7472(vv). Character and denomination of bonds.—The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars ($500) and one thousand dollars ($1,000) each, as may be determined by said State Treasurer, and shall be signed by the Governor of the State and State Treasurer and sealed with the Great Seal of the State. The coupons thereon may be signed by the State Treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon, and the said bonds shall in all other respects be in such form as the State Treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of North Carolina, of any kind whatsoever, which shall be expressed on the face of said bonds. Before selling any of the series of bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the par of said bonds at the lowest rate of interest.

He is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the par value of said bonds at the lowest rate of interest, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina.

One-twentieth of the total bonds issued under date of January first, one thousand nine hundred and twenty-eight, shall be due and payable on the first day of January, one thousand nine hundred and thirty-three, and another one twentieth of the amount of said bonds shall be due and payable on January first of each year thereafter until the whole series shall be paid, and any bonds issued under this act on any subsequent January first shall be due and payable as follows: One-twentieth of the total amount of said bonds shall be due and payable on the first day of January five years after the date of issuance of said bonds, and one-twentieth on each subsequent January first of each year thereafter until the whole series authorized by this article shall be paid in full. (1927, c. 199, s. 5.)

§ 7472(ww). Exemption from taxation.—The said bonds and coupons shall be exempt from all State, county of municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, and it shall be lawful for all executors, administrators, guardians, or other fiduciaries generally to invest in said bonds. (1927, c. 199, s. 6.)

§ 7472(xx). Loans by county board of education.—The county board of education, from any amount borrowed under the provisions of this article, may make loans to special charter, local tax or special school taxing districts, and the amount so loaned to any such district shall be payable in twenty annual installments, with interest thereon at the rate the county is required to pay, payable annually in advance. Any amount loaned under the provisions of this article shall be a lien upon the total tax funds produced in the district. Whenever the local taxes at any time may not be sufficient to pay the installments with the interest, the county board of education must supply the remainder out of the operating and equipment fund, and shall make provisions for the same when the county budget is made and presented to the commissioners in May: Provided, nothing in this section shall prevent the county board of education from assuming the entire expense of erecting said building or buildings in any district of the county.

All loans made to such districts, under the provisions of this act, shall be made upon the written petition of a majority of the committee, or board of trustees, of the said district asking for the loan and authorizing the county board of education to deduct a sufficient amount from the local taxes or other funds belonging to said district, other than the teacher's salary fund, to meet the indebtedness to the county board of education. Otherwise, the county board of education shall have no lien upon the local taxes for the repayment of this loan: Provided, this lien shall not lie against taxes collected or here-

after levied to pay interest and principal on bonds issued by the authority of any district. (1927, c. 199, s. 7.)

§ 7472(yy). Statement of expenditures to be filed; liability of members of county boards; or diverting expenditures.—Upon the completion of project for which the loan was made, the county board of education, upon blanks prepared for this purpose, shall file with the State Board of Education an itemized sworn statement of all expenditures on said project, including the loan from the State and all other funds invested in such building. Members of the county board of education and the county superintendent refusing or failing to make such report or authorizing the expenditure of said loan otherwise than upon the specific project, set forth in the approved application, or otherwise than as set out in the plans and specifications, approved by the State Board of Education, except upon the written approval of the State Board of Education, shall be severally guilty of a misdemeanor, punishable by a fine or imprisonment, or both, in the discretion of the court. (1927, c. 199, s. 8.)

Art. 17. Borrowing Money in Anticipation of Collection of Taxes

§ 7472(zz). Power given to director of budget to authorize State treasurer to borrow money.—The director of the budget by and with the consent of the Governor and Council of State shall have authority to authorize and direct the State Treasurer to borrow, in the name of the State and pledge the credit of the State for the payment thereof, in anticipation of the collection of taxes, such sums as may be necessary to make the payment on appropriations to the various institutions, departments and agencies of the State as even as possible so as to preserve the best interest of the State in the conduct of the various institutions, departments and agencies of the State during each fiscal year. (1927, c. 195, s. 1.)

See § 7432(k).

Editor's Note.—Public Laws of 1935, chapter 129, contains a section similar to the above with reference to borrowing to meet the appropriation for each biennium for the years 1935 and 1937.

Art. 18. Refunding Bonds

§ 7472(1). Title of article.—This article shall be known and may be cited as the "State Refunding Bond Act." (1935, c. 445, s. 1.)

§ 7472(2). Refunding bonds authorized for state.—The state treasurer is hereby authorized, by and with the consent of the governor and council of State, to issue at one time or from time to time bonds of the State for the purpose of refunding any or all bonds of the State then outstanding, but no such refunding bonds shall be issued except when such refunding may be accomplished at a saving to the State of North Carolina by securing a lower rate of interest than the interest rate on the bonds to be refunded. (1935, c. 445, s. 2.)

§ 7472(3). Date and rate of interest; maturity.—Such refunding bonds shall bear such date or dates and such rate or rates of interest, not exceeding six per cent per annum, payable semi-annually, and shall mature at such time or times, not more than forty years from date, as may be fixed by the governor and council of state. (1935, c. 445, s. 3.)

§ 7472(4). Execution; interest coupons; registration; form and denomination.—Such refunding bonds shall be signed by the governor and the state treasurer, and sealed with the great seal of the State, and shall carry interest coupons which shall bear the signature of the state treasurer, or a facsimile thereof, and such bonds shall be subject to registration as is now or may hereafter be provided by law for state bonds, and the form and denomination thereof shall be such as the state treasurer may determine in conformity with this article. (1935, c. 445, s. 4.)

§ 7472(5). Sale of bonds. — Subject to determination by the governor and council of state as to the manner in which such bonds shall be offered for sale, whether by publishing notices in certain newspapers and financial journals or by mailing notices or by inviting bids by correspondence or otherwise, the state treasurer is authorized to sell such bonds at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest. (1935, c. 445, s. 5.)

§ 7472(6). Proceeds directed to separate fund; use limited.—The proceeds of such bonds shall be placed by the state treasurer in a separate fund and used solely for the purpose specified in section 7472(2). (1935, c. 445, s. 6.)

§ 7472(7). State's credit and taxing power pledged.—The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds herein authorized. (1935, c. 445, s. 7.)

§ 7472(8). Coupons receivable for debts due state.—The coupons of said bonds after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1935, c. 445, s. 8.)

§ 7472(9). Exemption from taxation. — All of such bonds and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on such bonds shall not be subject to taxation as for income, nor shall such bonds or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1935, c. 445, s. 9.)

§ 7472(10). Investment in bonds made lawful for fiduciaries.—It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in such bonds. (1935, c. 445, s. 10.)

CHAPTER 126

STATE DEPARTMENTS, INSTITUTIONS, AND COMMISSIONS

Art. 1. State Budget Commission

§§ 7473-7486(i). Budget provisions.—(Repealed: Act 1925, c. 89, s. 21.)

Art. 1A. Executive Budget Act

§ 7486(j). Scope and definitions. — This act amends and reenacts and codifies chapters eighty-nine and two hundred and thirty, Public Laws of one thousand nine hundred and twenty-five. [Articles 1(A), and 1(B) of the Code of 1927.] It is intended hereby to combine in one law all of the provisions relating to the Budget Bureau, and in addition to the powers and duties heretofore prescribed for the Budget Bureau, it is desired that such changes and increase in its duties and powers shall be made as experience has suggested. This act shall be known, and may be cited, as "The Executive Budget Act." Whenever the word "Director" is used herein, it shall be construed to mean "Director of the Budget." Whenever the word "Commission" is used herein, it shall be construed to mean "Advisory Budget Commission," if the context shows that it is used with reference to any power or duty belonging to the Budget Bureau and to be performed by it, but it shall mean when used otherwise any state agency, and any other agency, person or commission by whatever name called, that uses or expends or receives any state funds. "State funds" are hereby defined to mean any and all moneys appropriated by the General Assembly of North Carolina, or moneys collected by or for the state, or any agency thereof, pursuant to the authority granted in any of its laws. (1925, c. 89, s. 1; 1929, c. 100, s. 1.)

§ 7486(k). Purposes.—It is the purpose of this act to vest in the Governor of the State a direct and effective supervision of all agencies, institutions, departments, bureaus, boards, commissions, and every State agency by whatsoever name now or hereafter called, including the same power and supervision over such private corporations and persons and organizations of all kinds that may receive, pursuant to statute, any funds either appropriated by, or collected for, the State of North Carolina, or any of its departments, boards, divisions, agencies, institutions and commissions; for the efficient and economical administration of all agencies, institutions, departments, bureaus, boards, commissions, persons or corporations that receive or use State funds; and for the initiation and preparation of a balanced budget of any and all revenues and expenditures for each session of the General Assembly.

The Governor shall be Ex-officio Director of the Budget and shall be the responsible head of the Budget Bureau, which Bureau is a part of the Governor's office. The Governor shall on or before the first day of July next after his inauguration appoint a budget officer, who shall be known as the "Assistant to the Director," and such officer shall serve for a term of four years beginning on the first day of July next after the inauguration of each Governor, at a salary to be fixed by the Director, who makes the appointment. The purpose of this act is to include within the powers of the Budget Bureau all agencies, institutions, departments, bureaus, boards, and commissions of the State of North Carolina under whatever name now or hereafter known, and the change of the name of such agencies hereafter shall not affect or lessen the powers and duties of the Budget Bureau in respect thereto.

The test as to whether an institution, department, agency, board, commission, or corporation or person is included within the purpose and powers and duties of the Budget Bureau shall be whether such agency or person receives for use, or expends, any of the funds of the State of North Carolina, including funds appropriated by the General Assembly and funds arising from the collection of fees, taxes, donations appropriative, or otherwise. (1925, c. 89, s. 2; 1929, c. 100, s. 2.)

Editor's Note.—As director of the budget, the Governor has large powers in supervising the expenditure of State funds and in determining what appropriations shall be made by the General Assembly. The idea that our governments, Federal, State and local, should be run in a business-like fashion is gaining prevalence and the budget system in government is an attempt to carry out the wishes of the people that government shall be administered economically and efficiently. 4 N. C. Law Rev. 17.

§ 7486(l). Examination of officers and agencies; disbursements.—The Director shall have power to examine under oath any officer or any head, and clerk or employee, of any department, institution, bureau, division, board, commission, corporation, association, or any agency; to cause the attendance of all such persons, requiring such persons to furnish any and all information desired relating to the affairs of such agency; to compel the production of books, papers, accounts, or other documents in the possession or under the control of such person so required to attend. The Director or his authorized representative shall have the right and the power to examine any State institution or agency, board, bureau, division, commission, corporation, person, and to inspect its property, and inquire into the method of operation and management.

The Director shall have power to have the books and accounts of any such agencies or persons audited; to supervise generally the accounting and auditing systems thereof now in force, and to inaugurate such changes in respect thereto which may be necessary, in his opinion, to exhibit and to furnish complete and correct information as to its financial condition, including the budget accounts of such departments, bureaus or associations within the terms of this act. The cost of making all audits and effecting all necessary changes in the system of accounting shall be paid from the regular maintenance appropriation made by the General Assembly for such bureaus, departments, divisions, institutions, commissions, persons or agencies that may be thus audited.

It shall be the duty of the Director to recommend to the General Assembly at each session such changes in the organization, management and general conduct of the various departments, institutions and other agencies of the State, and included within the terms of this act, as in his judgment will promote the more efficient and economical operation and management thereof.

The Director of the Budget under the provisions of the Executive Budget Act shall prescribe the manner in which disbursements of the several institutions and departments shall be made and may require that all warrants, vouchers or checks, except those drawn by the State Auditor and the State Treasurer, shall bear two signatures and of such officers as will be designated

by the Director of the Budget. (1925, c. 89, s. 3; 1929, cc. 100, 337, ss. 3, 4.)

§ 7486(m). Advisory Budget Commission. — The Chairman of the Appropriations and the Finance Committees of the House and of the Senate, and two other persons to be appointed by the Governor, shall constitute the Advisory Budget Commission, whose duties shall be such as are hereinafter defined.

The members of the Advisory Budget Commission shall receive as full compensation for their services ten dollars per day for each day which they shall serve and their expenses. The Advisory Budget Commission shall be called in conference in January and July of each year, upon ten days' notice by the Director or Assistant to the Director of the Budget, and at such other times as in the opinion of the Director may be for the public interest.

Vacancies on the Commission shall be filled by the Governor: Provided, any vacancy caused by the death, resignation, or other removal from office of any member of the Commission by virtue of his office as a member of the General Assembly shall be filled by the Governor upon the recommendation of the presiding officer of that branch of the General Assembly in which such member holds office. (1925, c. 89, s. 4; 1929, c. 100, s. 4; 1931, c. 295.)

Editor's Note.—The Act of 1931 added the last paragraph to this section.

§ 7486(n). Appropriation Rules.—All moneys heretofore and hereafter appropriated shall be deemed and held to be within the terms of this act and subject to its provisions unless it shall be otherwise provided in the act appropriating the same; and no money shall be disbursed from the State Treasury except as herein provided. (1925, c. 89, s. 5; 1929, c. 100, s. 5.)

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28, 29.

§ 7486(o). Information from departments and agencies asking state aid.—On or before the first day of September biennially, in the even numbered years, each of the departments, bureaus, divisions, officers, boards, commissions, institutions, and other State agencies and undertakings receiving or asking financial aid from the State, or receiving or collecting funds under the authority of any general law of the State, shall furnish the Director all the information, data and estimates which he may request with reference to past, present and future appropriations and expenditures, receipts, revenue, and income.

Since it is not practicable to require the members of the Judicial system who preside over courts to attend and furnish such information, upon request of the Director, the Attorney-General shall furnish such information, data and estimates and expenditures as may be desired in reference to the Judicial Department of this State. (1925, c. 89, s. 6; 1929, c. 100, s. 6.)

§ 7486(p). Itemized statements and forms.— The statements and estimates required under the preceding section shall be itemized in accordance with the Budget Classification adopted by the Director, and upon forms prescribed by him, and shall be approved and certified by the respective heads or responsible officer of each department, bureau, board, commission, institution, or agency submitting same. Official estimate blanks which shall be used in making these reports shall be furnished by the Budget Bureau. (1925, c. 89, s. 7; 1929, c. 100, s. 7.)

§ 7486(q). Statements of Auditor as to legislative expenditures.—On or before the first day of September, biennially, in the even numbered years, the State Auditor shall furnish the Director a detailed statement of expenditures of the General Assembly for the current fiscal biennium, and an estimate of its financial needs, itemized in accordance with the Budget Classification adopted by the Director and approved and certified by the presiding officer of each House for each year of the ensuing biennium, beginning with the first day of July thereafter; and a detailed statement of expenditures of the Judiciary and any other institution or commission that may be requested by the Director for each year of the current fiscal biennium, and upon such request by the Director an estimate of its financial needs as provided by law, itemized in accordance with the Budget Classification adopted by the Director for each year of the ensuing biennium, beginning with the first day of July thereafter. The State Auditor shall transmit to the Director with these estimates an explanation of all increases or decreases. These estimates and accompanying explanations shall be included in the Budget by the Director with such recommendations as the Director may desire to make in reference thereto. (1925, c. 89, s. 8; 1929, c. 100, s. 8.)

§ 7486(r). Contents of statement.—On or before the first day of September, biennially in the even-numbered years, the State Auditor shall furnish the Director the following statements itemized in accordance with the budget classification adopted by the Director.

(1) A statement showing the balance standing to the credit of the several appropriations for each department, bureau, division, officer, board, commission, institution, or other State agency or undertaking of the State at the end of the last preceding appropriation year;

(2) A statement showing the quarterly expenditures and revenues from each appropriation account, and the total quarterly expenditures and revenues from all the appropriation accounts, including special and all other appropriations, in the twelve months of the last preceding appropriation year;

(3) A statement showing the annual expenditures in each appropriation account, and the revenue from all sources for each year of the last two appropriation years, with the increase or decrease for each source;

(4) An itemized and complete financial balance sheet for the State at the close of the last preceding fiscal year ending June thirtieth;

(5) Such other statements as the Director shall request. (1925, c. 89, s. 9.)

§ 7486(s). Information to be furnished upon request.—The departments, bureaus, divisions, officers, commissions, institutions, or other State agencies or undertakings of the State, upon request, shall furnish the Director, in such form

and at such time as he may direct, any information desired by him in relation to their respective activities or fiscal affairs. The State Auditor shall also furnish the Director any special, periodic, or other financial statements as the Director may request. (1925, c. 89, s. 10; 1929, c. 100, s. 9.)

§ 7486(t). Preparation of budget and public hearing. — The members of the Commission shall, at the request of the Director, attend such public hearing and other meeting as may be held in the preparation of the Budget. Said Commission shall act at all times in an advisory capacity to the Director on matters relating to the plan of proposed expenditures of the State Government and the means of financing the same.

The Director, together with the Commission, shall provide for public hearings on any and all estimates to be included in the Budget, which shall be held during the months of October and/or November and/or such other times as the Director may fix in the even numbered years, and may require the attendance at these hearings of the heads or responsible representatives of all State departments, bureaus, divisions, officers, boards, commissions, institutions, or other State agencies or undertakings, and such other persons, corporations and associations, using or receiving or asking for any State funds. (1925, c. 89, s. 11; 1929, c. 100, s. 10.)

§ 7486(u). Survey of departments.—On or before the fifteenth day of December, biennially in the even numbered years, the Director shall make a complete, careful survey of the operation and management of all the departments, bureaus, divisions, officers, boards, commissions, institutions, and agencies and undertakings of the State and all persons or corporations who use or expend funds as hereinbefore defined, in the interest of economy and efficiency, and a working knowledge upon which to base recommendations to the General Assembly as to appropriations for maintenance and special funds and capital expenditures for the succeeding biennium. If the Director and the Commission shall agree in their recommendations for the Budget for the next biennial period, he shall prepare their report in the form of a proposed Budget, together with such comment and recommendations as they may deem proper to make. If the Director and Commisson shall not agree in substantial particulars, the Director shall prepare the proposed Budget based on his own conclusions and judgment and shall cause to be incorporated therein, such statement of disagreement and the particulars thereof, as the Commission or any of its members shall deem proper to submit as representing their views. The Budget report shall contain a complete and itemized plan of all proposed expenditures for each State department, bureau, board, division, institution, commission, State agency or undertaking, person or corporation who receive or may receive for use and expenditure any State funds as hereinbefore defined, in accordance with the Classification adopted by the Director, and of the estimated revenues and borrowings for each year in the ensuing biennial period beginning with the first day of July thereafter. Opposite each item of the proposed expenditures, the Budget shall show in separate parallel columns the amount expended for the last preceding appropriation year, for the current appropriation year, and the increase or decrease. The Budget shall clearly differentiate between General Fund expenditures for operating and maintenance, special fund expenditures for any purpose, and proposed capital outlays.

The Director shall accompany the Budget with:

(1) A Budget message supporting his recommendations and outlining a financial policy and program for the ensuing biennium. The message will include an explanation of increase or decrease over past expenditures, a discussion of proposed changes in existing revenue laws and proposed bond issues, their purpose, the amount, rate of interest, term, the requirements to be attached to their issuance and the effect such issues will have upon the redemption and annual interest charges of the State debt.

(2) An itemized and complete financial statement for the State at the close of the last preceding fiscal year ending June thirtieth.

(3) A statement of special funds.

(4) A statement showing the itemized estimates of the condition of the State Treasury as of the beginning and end of each of the next two appropriation years.

It shall be a compliance with this section by each incoming Governor, at the first session of the General Assembly in his term, to submit the Budget report with the message of the outgoing Governor, if he shall deem it proper to prepare such message, together with any comments or recommendations thereon that he may see fit to make, either at the time of the submission of the said report to the General Assembly, or at such other time, or times, as he may elect and fix. (1925, c. 89, s. 12; 1929, c. 100, s. 11.)

§ 7486(v). Bills containing proposed appropriations.—The Director, by and with the advice of the Commission, shall cause to be prepared and submitted to the General Assembly the following bills:

(a) A bill containing all proposed appropriations of the Budget for each year in the ensuing biennium, which shall be known as the "Budget Appropriation Bill."

(b) A bill containing the view of the Budget Bureau with respect to revenue for the ensuing biennium, which shall be known as the "Budget Revenue Bill," which will in the opinion of the Director and the Commission provide an amount of revenue for the ensuing biennium, sufficient to meet the appropriations contained in the Budget Appropriation Bill.

(c) A bill containing proposed methods and machinery for the collection of taxes and the listing of property for taxation, in the several counties of the State, and municipalities, which shall be known as the "Budget Machinery Bill," and such bill shall contain the judgment and the result of all the latest, most improved methods of listing and collection of taxes, for counties and municipalities, according to the best information obtainable by the Commission and the Director, with a view to the ease and simplification of the methods of the listing of property for such tax-

ation and for the collection of the same, having in view the necessity of counties and municipalities to collect the highest percentage possible of taxes levied at the minimum cost.

To the end that all expenses of the State may be brought and kept within the Budget, the Budget Appropriation Bill shall contain a specific sum as a contingent or emergency appropriation. The manner of the allocation of such contingent or emergency appropriation shall be as follows: Any institution, department, commission, or other agency or activity of the State, or other activity in which the State is interested, desiring an allotment out of such contingent or emergency appropriation, shall upon forms prescribed and furnished by the Budget Bureau, present such request in writing to the Director of the Budget, with such information as he may require, and if the Director of the Budget shall approve such request, in whole or in part, he shall forthwith present the same to the Governor and Council of State, and upon their order only shall such allotment be made. If the Director shall disapprove the request of such an allotment out of the emergency or contingent appropriation, he shall transmit his refusal and his reason therefor to the Governor and Council of State for their information.

If the director and the commission shall not agree as to the appropriation, revenue and machinery bills in substantial particulars, the Director shall prepare the same, based on his conclusions and judgment, and shall cause to be submitted therewith such statements of disagreement, and the particulars thereof, as the Commission, or any of its members, shall find proper to submit as representing their own views. (1925, c. 89, s. 13; 1929, c. 100, ss. 12, 13, 14.)

§ 7486 (w). Printing copies of budget report and bills and rules for the introduction of the same.—The Director shall cause to be printed one thousand copies each of the Budget report, the Budget Appropriation Bill, the Budget Revenue Bill, and the Budget Machinery Bill. The Governor shall present copies thereof to the General Assembly, together with the biennial message, except incoming Governors may, at the first session of the General Assembly in their respective terms, submit the same after the biennial message has been presented to the General Assembly. The Budget Appropriation Bill shall be introduced by the Chairman of the Committee on Appropriations in each House of the General Assembly, and the Budget Revenue Bill and the Budget Machinery Bill shall be introduced by the Chairmen of the Finance Committees in each branch of the General Assembly: Provided, that for the years in which the Governor is elected, the Director shall deliver the Budget report and the Budget Appropriation Bill and the Budget Revenue Bill and the Budget Machinery Bill to the Governor-elect, on or before the fifteenth day of December, and the said Budget report, Appropriation, Revenue and Machinery Bills, shall be presented by the Governor to the General Assembly with such recommendations in the way of amendments, or other modifications, together with such criticism as he may determine. The provisions herein contained as to the introduction of the bills mentioned in this section shall be considered and treated as a rule of procedure in the Senate and House of Representatives until otherwise expressly provided for by a rule in either, or both, of said branches of the General Assembly. (1925, c. 89, s. 14; 1929, c. 100, s. 15.)

§ 7486 (x). Joint meetings of committees considering the budget report and appropriation bill. —The Appropriations Committees of the House of Representatives and the Senate and sub-committees thereof shall sit jointly in open sessions while considering the Budget and such consideration shall embrace the entire Budget plan, including appropriations for all purposes, revenue, borrowings and other means of financing expenditures. Such joint meetings shall begin within five days after the Budget has been presented to the General Assembly by the Governor. This joint committee shall have power to examine under oath any officer or head of any department or any clerk or employee thereof; and to compel the production of papers, books of account, and other documents in the possession or under the control of such officer or head of department. This joint committee may also cause the attendance of heads or responsible representatives of a department, institution, division, boards, commission, and agencies of the State, to furnish such information and answer such questions as the joint committee shall require. To these sessions of the joint committee or sub-committees shall be admitted, with the right to be heard, all taxpayers or other persons interested in the estimates under consideration. The Director or a designated representative shall have the right to sit at these public hearings and to be heard on all matters coming before the joint committee or sub-committees thereof. The said joint committee or any sub-committee thereof shall have full power and authority to punish for disobedience of its writs or orders requiring persons to attend such hearings and to answer under oath such questions as may be put to them by such committee or anyone acting in its behalf, such punishment shall be such as is now, and may hereafter be prescribed for direct contempt, but with the right of such offender to appeal from the judgment of such committee to the Superior Court of Wake County, upon the giving of such bond as may be required by such committee. In so far as this section prescribes the method and manner of hearings before such committees this section shall be considered and have the force of a rule of each branch of the General Assembly until and unless a change has been made by an express rule of such branch thereof. (1925, c. 89, s. 15; 1929, c. 100, s. 16.)

§ 7486 (y). Reduction and increase of items by general assembly. — The provisions of this act shall continue to be the legislative policy with reference to the making of appropriations and shall be treated as rules of both branches of the General Assembly until and unless the same may be changed by the General Assembly either by express enactment or by rule adopted by either branch of the General Assembly.

The General Assembly may reduce or strike

out such item in the Budget Appropriation Bill as it may deem to be the interest of the public service, but neither House shall consider further or special appropriations until the Budget Appropriation Bill shall have been enacted in whole or in part or rejected, unless the Governor shall submit and recommend an Emergency Appropriation Bill or Emergency Appropriation Bills, which may be amended in the manner set out herein, and such Emergency Appropriation Bill, or Bills, when enacted, shall continue in force only until the Budget Appropriation Bill shall become effective, unless otherwise provided by the General Assembly.

The General Assembly may also increase any appropriation set out in the Budget Appropriation Bill and may provide additional appropriations for other purposes if additional revenue or revenues, equal to the amount of such additional appropriations and increases are provided for by corresponding amendment to the Budget Revenue Bill. No bill carrying an appropriation shall thereafter be enacted by the General Assembly, unless it be for a single object therein described and shall provide an adequate source of revenue for defraying such appropriation, or unless it appears from the Budget Report or the Budget Revenue Bill that there is sufficient revenue available therefor. The appropriation, or appropriations, in such bills shall be in accordance with the classification used in the Budget. (1925, c. 89, s. 16; 1929, c. 100, s. 17.)

§ 7486 (z). Operation of state departments and state agencies on maintenance appropriations. — Every State department, bureau, division, officer, board, commission, institution, State agency, or undertaking, shall operate under an appropriation made in accordance with the provisions of this act; and no State department, bureau, division, officer, board, commission, institution or other State agency or undertaking shall expend any money, except in pursuance of such appropriation and the rules, requirements and regulations made pursuant to this act. (1925, c. 89, s. 17; 1929, c. 100, s. 18.)

§ 7486 (aa). Requisition for allotment.—Before an appropriation to any spending agency shall become available, such agency shall submit to the Director, not less than twenty days before the beginning of each quarter of each fiscal year a requisition for an allotment of the amount estimated to be required to carry on the work of the agency during the ensuing quarter and such requisition to contain such details of proposed expenditures as may be required by the Director. The Director shall approve such allotments, or modifications of them, as he may deem necessary to make, and he shall submit the same to the State Auditor who shall be governed in his control of expenditures by said allotments. No allotment shall be changed nor shall transfers be made except upon the written request of the responsible head of the spending agency and by approval of the Director in writing. (1925, c. 89, s. 18; 1929, c. 100, s. 19.)

§ 7486 (bb). Expenditures of appropriations.—All incumbered balances of maintenance appropriations shall revert to the State Treasury to the credit of the general fund or special funds from which the appropriation and/or appropriations, were made and/or expended, at the end of the biennial fiscal period; except that capital expenditures for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made. (1925, c. 18, s. 19; 1929, c. 100, s. 20.)

§ 7486 (cc). Help to director.—The Director is hereby authorized to secure such special help, expert accountants, draftsmen and clerical help as he may deem necessary to carry out his duties under this act; and shall fix the compensation of all persons employed under this act; which shall be paid by the State Treasurer upon the warrant of the State Auditor. A statement in detail of all persons employed, time employed, compensation paid, and itemized statement of all other expenditures made under the terms of this act, shall be reported to the General Assembly by the Director, and all payments made under this act shall be charged against and paid out of the emergency contingent fund and/or such appropriations as may be made for the use of the Budget Bureau. (1925, c. 89, s. 20; 1929, c. 100, s. 21.)

§ 7486 (dd). Examination accounts state departments.—The Director shall examine or cause to be examined annually before and/or after the close of each fiscal year, the accounts of the State Treasurer and the Auditor and shall examine or cause to be examined, the accounts and vouchers relating to all money received into and paid out of the State Treasury during the preceding fiscal year, and shall cause a complete audit to be made annually of the condition of the State Treasury and shall certify and report to the Budget Bureau such audits and the Budget Bureau, through the Governor, shall transmit such reports to the General Assembly at its next session. (1925, c. 89, s. 22; 1929, c. 100, s. 22.)

§ 7486(ee). Power to administer oaths.—The Director, the assistant to the Director, and any member of the Advisory Budget Commission shall have full authority to administer oaths to any person for any purpose in connection with the performance of the duties of the said commissions, and such oath, when taken before said persons, shall be sufficient in all respects to support an indictment for perjury when the other elements of said crime exist. (1925, c. 89, s. 24.)

§ 7486(ff). Issuance of subpoenas. — The Director shall have and is hereby given full power and authority to issue the writ of subpœna for any and all persons who may be desired as witnesses concerning any matters being inquired into by the Director of the Commission, and such writs when signed by the Director shall run anywhere in this State and be served by any civil process officer without fees or compensation. Any failure to serve writs promptly and with due diligence, shall subject such officer to the usual penalties and liabilities and punishment as are now provided in the cases of like kind applying to sheriffs, and any persons who shall fail to obey said writ shall be subject to punishment for con-

tempt in the discretion of the court and to be fined as witnesses summoned to attend the Superior Court, and such remedies shall be enforced against such offending witnesses upon motion and notice filed in the Superior Court of Wake County by the Attorney-General under the direction of the Director. Any and all persons who shall be subpœnæd and required to appear before the Director or the Commission as witnesses concerning any matters being inquired into shall be compellable and required to testify, but such persons shall be immune from prosecution and shall be forever pardoned for violation of law about which such person is so required to testify. (1925, c. 89, s. 26; 1929, c. 100, s. 23.)

§ 7486 (gg). Surveys, studies and examinations of departments and institutions.—The Director is hereby given full power and authority to make such surveys, studies, examinations of departments, institutions and agencies of this State, as well as its problems, so as to determine whether there may be an overlapping in the performance of the duties of the several departments and institutions and agencies of the State, and for the purpose of determining whether the proper system of modern accounting is had in such departments, institutions, commissions and agencies and to require and direct the installation of the same whenever, in his opinion, it is necessary and proper in order to acquire and to secure a perfect correlated and control system in the accounting of all departments, institutions, commissions, divisions, and State agencies including every department or agency handling or expending State funds, and to make surveys, examinations and inquiries into the matter of the various activities of the State, and to survey, appraise, examine and inspect and determine the true condition of all property of the State, and what may be necessary to protect it against fire hazard, deterioration, and to conserve its use for State purposes, and to make and issue and to enforce all necessary, needful or convenient rules and regulations for the enforcement of this act. All auditing systems or uses prescribed, or to be prescribed hereunder, shall be administered by the Auditor. (1925, c. 89, s. 26; 1929, c. 100, s. 23.)

§ 7486 (gg1). General regulation of the use of maintenance appropriated and authority to provide funds to insure an even availability thereof.—All appropriations now or hereafter made for the maintenance of the various departments, institutions and other spending agencies of the State, are for the purposes and/or objects enumerated in the itemized requirements of such departments, institutions and other spending agencies submitted to the General Assembly by the Director of the Budget and the Advisory Budget Commission, and/or as amended by the General Assembly. Transfers or changes as between objects and items in the Budget of any department, institution or other spending agency, may be made at the request in writing of the head of such department, institution or other spending agency by the Director of the Budget. (1929, c. 100, s. 24.)

§ 7486 (gg2). Borrowing of money by State Treasurer.—The Director of the Budget, by and with the consent of the Governor and Council of State, shall have authority to authorize and direct the State Treasurer to borrow in the name of the State, in anticipation of the collection of taxes, such sum or sums as may be necessary to make the payments on the appropriations as even as possible and to preserve the best interest of the State in the conduct of the various State institutions, departments, bureaus, and agencies during each fiscal year. (1929, c. 100, s. 25.)

§ 7486 (gg3). Maintenance appropriations dependent upon adequacy of revenues to support them.—All maintenance appropriations now or hereafter made are hereby declared to be maximum, conditional and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named herein if necessary and then only in the event of the aggregate revenues collected and available during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full; otherwise, the said appropriations shall be deemed to be payable in such proportion as the total sum of all appropriations bears to the total amount of revenue available in each of said fiscal years. The Director of the Budget is hereby given full power and authority to examine and survey the progress of the collection of the revenue out of which such appropriations are to be made, and by and with the advice and consent of a majority of the Advisory Budget Commission to declare and determine the amounts that can be, during each quarter of each of the fiscal years of the biennium properly allocated to each respective appropriation. In making such examination and survey, he shall receive estimates of the prospective collection of revenues from the Commissioner of Revenue and every other revenue collecting agency of the State. The Director of the Budget, by and with the advice and consent of a majority of the Advisory Budget Commission, may reduce all of said appropriations pro rata when necessary to prevent an overdraft or deficit for the fiscal period for which such appropriations are made. The purpose and policy of this act are to provide and insure that there shall be no overdraft or deficit in the General Fund of the State at the end of the fiscal period, growing out of appropriations for maintenance and the Director of the Budget is directed and required to so administer this act as to prevent any such overdraft or deficit. (1929, c. 100, s. 26.)

§ 7486 (gg4). Director to exercise discretion in disbursement of appropriations.—The discretion exercised by the State Treasurer as to the manner of disbursing appropriations prescribed by section seven thousand six hundred and eighty-three of the Consolidated Statutes shall be exercised by the Director of the Budget subject to the provisions of this act and of the Executive Budget Act of one thousand nine hundred and twenty-five and amendments thereto. (1929, c. 100, s. 27.)

§ 7486 (gg5). Appropriations to educational charitable and correctional institutions are in addition to receipts by them.—All appropria-

tions now or hereafter made to the educational institutions, and to the charitable and correctional institutions, and to such other departments and agencies of the State as receive moneys available for expenditure by them, are declared to be in addition to such receipts of said institutions, departments or agencies, and are to be available as and to the extent that such receipts are insufficient to meet the costs of maintenance of such institutions, departments, and agencies. (1929, c. 100, s. 28.)

§ 7486 (gg6). All State agencies under provisions of this act.—Section 7486 (ii) of this article as it formerly appeared is hereby repealed, and the following inserted in lieu thereof:

It is the intent and purpose of this act that every department, institution, bureau, division, board, commission, State agency, person, corporation, or undertaking, by whatsoever name now or hereafter called, that expends money appropriated by the General Assembly or money collected by or for such departments, institutions, bureaus, boards, commissions, persons, corporations, or agencies, under any general law of this State, shall be subject to and under the control of every provision of this act. Any power expressed in this act or necessarily implied from the language hereof or from the nature and character of the duties imposed, in addition to the powers and duties heretofore expressly conferred herein, shall be held and construed to be given hereby to the end that any and all duties herein imposed and made and all purposes herein expressed may be fully performed and completely accomplished, and to that end this act shall be liberally construed. (1929, c. 100, s. 29.)

§ 7486(hh). Request for appropriations for budget bureau.—The Budget Bureau shall make to the Director its request for appropriations for the biennium beginning June thirtieth, nineteen hundred and twenty-seven, and for each succeeding biennium thereafter, and the appropriations for the Budget Bureau shall be included in the emergency or contingent appropriation. (1925, c. 89, s. 27.)

§ 7486(ii). Act inapplicable to highways. — Nothing in this article shall be held or construed to apply to the State highway. (1925, c. 89, s. 28.)

§ 7486(jj). Delegation of power by director.— Any power or duty herein conferred on the Governor as Director may be exercised and performed by such person or persons as may be designated or appointed by him from time to time in writing. (1925, c. 89, s. 29; 1929, c. 100, s. 30.)

§ 7486(jj1). Laws repealed by 1925 Budget Acts remain repealed.—All laws repealed in whole or in part by chapters eighty-nine, two hundred and thirty and two hundred and seventy-five, Public Laws of one thousand nine hundred and twenty-five, shall remain repealed, and this act shall not be held to constitute a repeal of the repealing provisions thereof, but shall be held and constituted to be a reenactment of the same. (1929, c. 100, s. 31.)

Art. 1(B). Budget of State Institutions

§ 7486 (kk). Institution improvement and maintenance.—The several institutions of the State, boards, departments, commissions, agencies, persons or corporations, included with the terms hereof to which appropriations are made now or hereafter for permanent improvements or for maintenance, shall, before any of such appropriations, whether for permanent improvements or for maintenance, are available or paid to them or any one of them, budget their requirements and present the same to the Director of the Budget on or before the first day of June of each odd numbered year hereafter. There shall be a separate Budget presented for permanent improvements and for maintenance. Each of said Budgets shall contain the requirements of said institutions, boards, commissions, and agencies, persons or corporations, and undertakings, as hereinbefore defined, for the succeeding two years. Each institution, board, department, commission, agency, person or corporation, in the preparation of such Budget, shall follow as nearly as may be the itemized recommendations of the Director of the Budget and Advisory Budget Commission and/or as amended by the General Assembly. The forms, except when modified and changed by authority of the Director of the Budget, shall be the forms used in presenting the requests. (1925, c. 230, s. 2; 1929, c. 100, s. 32.)

§ 7486 (ll). Building and permanent improvement funds spent in accordance with budget.— All buildings and other permanent improvements, which shall be erected and/or constructed, shall be erected and/or constructed, and carried on and the money spent therefor in strict accordance with the Budget requests of such institution, board, commission, agency, person, or corporation filed with Director of the Budget. The expenditure of appropriations for maintenance shall be in strict accordance with the Budget recommendations for such institution, board, commission, agency, person or corporation and/or as amended or changed by the General Assembly. It shall be the duty of the Director of the Budget to see that all money appropriated for either permanent improvements or maintenance shall be expended in strict accordance with the Budget recommendations and/or as amended by the General Assembly for each department, institution, board, commission, agency, person or corporation. If the Director of the Budget shall ascertain that any department, institution, board, commission, agency, person or corporation has used any of the moneys appropriated to it for any purpose other than that for which it was appropriated and budgeted, as herein required, and not in strict accordance with the terms of this act, the Director of the Budget shall have the power and he is hereby authorized to notify such institution, board, commission, agency, person or corporation that no further sums from any appropriation made to it will be available to such department, institution, board, commission, agency, person or corporation until and after the persons responsible for the diversion of the said funds shall have replaced the same, and the Director of the Budget shall have the power

and he is hereby authorized to notify the Auditor of the State not to approve or issue any further warrants for such department, institution, board, commission, agency, person or corporation for any unexpended appropriation and the Auditor is hereby prohibited from approving or issuing any further warrants for such department, institution, board, commission, agency, person or corporation until he shall have been otherwise directed by the Director of the Budget. (1925, c. 230, s. 3; 1929, c. 100, s. 33.)

§ 7486(mm). Person expending an appropriation wrongfully.—Any trustee, director, manager, building committee or other officer or person connected with any institution, or other State agency as herein defined, to which an appropriation is made, who shall expend any appropriation for any purpose other than that for which the money was appropriated and budgeted or who shall consent thereto, shall be liable to the State of North Carolina for such sum so spent and the sum so spent, together with interest and costs, shall be recoverable in an action to be instituted by the Attorney-General for the use of the State of North Carolina, which action may be instituted in the Superior Court of Wake County, or any other county, subject to the power of the court to remove such action for trial to any other county, as provided in the Consolidated Statutes four hundred and seventy, sub-section two thereof. (1925, c. 230, s. 4; 1929, c. 100, s. 34.)

§ 7486 (nn). Intent.—It is an intent and purpose of this act that all departments, institutions, boards, commissions, agencies, persons or corporations to which appropriations for permanent improvements and/or maintenance are made, shall submit to the Director of the Budget their requests for the payment of such appropriations in the form of a budget, following the recommendations made by the Director of the Budget and the Advisory Budget Commission and/or as amended by the General Assembly. (1925, c. 230, s. 5; 1929, c. 100, s. 35.)

§ 7486 (nn1). Penalties and punishment for violations.—That a refusal to perform any of the requirements of this act, and the refusal to perform any rule or requirement or request of the Director of the Budget made pursuant to, or under authority of, the Executive Budget Act, shall subject the offender to penalty of two hundred and fifty ($250.00) dollars, to be recovered in an action instituted either in Wake County Superior Court, or any other county, by the Attorney-General for the use of the State of North Carolina, and shall also constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. If such offender be not an officer elected by vote of the people, such offense shall be sufficient cause for removal from office or dismissal from employment by the Governor upon thirty days' notice in writing to such offender. (1929, c. 100, s. 36.)

§ 7486(oo). Wrongful expenditure; procedure.—If any appropriation or any part thereof is used or expended for any purpose other than the purpose specified in the act making such appropriation, then, at the request of the Director of the Budget, a suit shall be instituted in the name of the State by the Attorney-General in Wake County for the purpose of recovering from each superintendent, director or trustee who voted for such diversion or aided and abetted in the same, the amount so diverted, with six per cent (6 per cent) interest thereon from the date of such diversion, together with the costs of such action and all expenses and costs incurred by the State in prosecuting such action, including any attorney's fees, to be fixed by the judge trying the action, and the Director of the Budget is authorized to notify the State Auditor and the State Treasurer not to issue any warrant for or to pay any warrant for the expenditure of the unexpended balance of such appropriation until the replacement of the funds so diverted, together with interest and costs and allowances as above provided, and upon the complete replacement of the same, such notice shall be given to the Auditor and State Treasurer of such replacement, to the end that the use of such appropriation may be resumed, as set out in the appropriating act, and in such cases the statute or statutes causing the lapse of unexpended balances, the appropriation for maintenance shall be suspended in the meantime as to any appropriation made to such institution or institutions. (1925, c. 275, s. 7.)

Art. 2. State Building Commission

§§ 7487-7494. Repealed by Public Laws 1921, c. 213.

Editor's Note.—The caption of the act of 1921, ch. 213, repealing the sections under this article stated that the power of control of building is thereby restored to the boards of trustees, directors, etc., which formerly controlled them.

The act specifically repeals sections 7492, 7493, and 7494, and recites "it being chapter three hundred and three of the Public Laws of one thousand nine hundred and nineteen, be and the same is hereby repealed." It would seem that it was the intent of the legislature to repeal all the sections of this article section 7487 to 7494.

Art. 2A. Building Code

§ 7494(1). N. C. building code.—This law shall be known and may be cited as the North Carolina building code. (1933, c. 392, s. 1.)

§ 7494(2). Purpose of article.—It is the purpose of this article to protect life, health, and property and all its provisions shall be construed liberally to that end. (1933, c. 392, s. 2.)

§ 7494(3). Administration by insurance commissioner.—The administration of such reasonable rules and regulations which may be hereafter adopted by the building code council which is herein provided for shall be enforced by the insurance commissioner or his deputy or deputies in coöperation with local officials in accordance with the consolidated statutes of North Carolina, sections 2738 to 2745, inclusive.

City ordinances may go more into detail, if desired, or may contain more stringent requirements, provided the same do not conflict with the rules and regulations hereafter adopted by the said building code council. (1933, c. 392, s. 3.)

§ 7494(4). Building code council created.—There is hereby created a building code council which shall consist of the following members

registered in accordance with the laws of North Carolina where registration laws apply: One architect, one general contractor, one structural engineer, one plumbing and heating contractor, and one representative of organized labor. Members of the building code council shall be appointed or removed by the governor. The terms of office shall be as follows: One architect five years, one general contractor four years, one structural engineer three years, one plumbing and heating contractor two years and one representative of organized labor one year. Vacancies caused by expiration of term of office shall be filled by the governor and appointments made for a period of five years. Vacancies caused by resignation or otherwise shall be filled by the governor for the unexpired term of the person leaving office.

Within thirty days after the passage and publication of this article, the building code council shall meet and organize and shall have power to elect its own officers, to fix the times and places for its meetings, to adopt necessary rules of procedure, and to adopt all other rules and regulations not inconsistent herewith which may be necessary for the proper discharge of its duties and it shall keep an accurate record of all its proceedings. (1933, c. 392, s. 4.)

§ 7494(5). Appeals to council.—An appeal from the decision of the insurance commissioner upon any matter affecting the building code may be taken to the building code council as hereinafter provided. (1933, c. 392, s. 5.)

§ 7494(6). Pay of members.—The members of the building code council may each receive five dollars per day as compensation for the time given in the performance of his duty and may be reimbursed for compensation and actual traveling expenses from funds of the organization which he represents.

When the insurance commissioner shall reject or refuse to approve the mode or manner of construction proposed to be followed, or materials to be used in the erection or alteration of any building or structure, or when it is claimed that the provisions of this code do not apply, or that an equally good or more desirable form of construction can be employed in any specific case, the owner of such building or structure, or his duly authorized agent, may demand that the decision of the insurance commissioner be reviewed by the chairman and two or more members of the building code council who are qualified to render a fair and impartial decision where the amount in question shall exceed the sum of $1,000.00. The members best qualified in the opinion of the chairman shall be selected to review the decision of the insurance commissioner.

After a review of the decision of the insurance commissioner the chairman shall forward the findings and recommendations to the insurance commissioner immediately. It is understood that the building code council shall serve in an advisory capacity only and that the final decision and responsibility for such decision shall rest upon the insurance commissioner: Provided, nothing in this article shall prohibit the owner his right of appeal to the superior courts.

It shall be the duty of the council not only to make recommendations to the insurance commissioner relative to the proper construction of the pertinent provisions of the building code but it shall also recommend that he shall allow materials and methods of construction other than those required by the building code to be used, when in its opinion such other material and methods of construction are as good as those required by the code, and for this purpose the requirements of the building code as to such matters shall be considered simply as a standard to which construction shall conform. (1933, c. 392, s. 6.)

§ 7494(7). Violation of act subjects offender to fine.—If any employer, owner or other person shall violate any of the provisions of this article, or shall do any act prohibited herein, or shall fail to perform any duty lawfully enjoined within the time prescribed by the insurance commissioner or his deputy or shall fail, neglect, or refuse, to obey any lawful order given or made by the insurance commissioner, for each such violation, failure, or refusal, such employer, owner or other person upon conviction thereof shall be fined in any sum not less than ten dollars ($10.00), nor more than fifty dollars ($50.00) for each offense. Each seven days neglect shall constitute a separate and distinct offense. (1933, c. 392, s. 7.)

Art. 3. Coöperative Purchasing Committee for Certain Institutions

§§ 7495-7502. Repealed by Public Laws 1921, c. 193.

Editor's Note.—The repealing Act was codified as § 7502(a).

§ 7502(a). Repealed by Public Laws 1931, c. 261, s. 2.

See sec. 7502(c).

Art. 3(A). Division of Purchase and Contract

§ 7502(b). Creation of Division of Purchase and Contract; Director.—There is hereby created in the Governor's office a division to be known as the Division of Purchase and Contract, which division shall be under the supervision and control, subject to provisions of this article of a Director of Purchase and Contract. (1931, c. 261, s. 1; c. 396.)

§ 7502(c). Power and authority of Director. — The Director of Purchase and Contract provided for in this article shall have power and authority, and it shall be his duty, subject to the provisions of this article:

(a) To canvass all sources of supply, and to contract for the purchase of all supplies, materials and equipment required by the State Government, or any of its departments, institutions or agencies under competitve bidding in the manner hereinafter provided for.

(b) To establish and enforce standard specifications which shall apply to all supplies, materials and equipment, purchased or to be purchased for the use of the State Government for any of its departments, institutions or agencies.

(c) To purchase or contract for all telephones, telegraph, electric light power, postal and any and all other contractual services and needs of the State Government, or any of its departments, institutions, or agencies; or in lieu of such pur-

chase or contract to authorize any department, institution or agency to purchase or contract for any or all such services.

(d) To rent or lease all grounds, buildings, offices, or other space required by any department, institution, or agency of the State Government: Provided, this shall not include temporary quarters for State Highway field forces or convict camps, or temporary places of storages for road materials.

(e) To have general supervision of all storerooms and stores operated by the State Government, or any of its departments, institutions or agencies; to provide for transfer and/or exchange to or between all State Departments, institutions and agencies, or to sell all supplies, materials and equipment which are surplus, obsolete or unused; and to maintain inventories of all fixed property and of all moveable equipment, supplies and materials belonging to the State Government, or any of its departments, institutions or agencies.

(f) To make provision for and to contract for all State printing, including all printing, binding, paper stock and supplies or materials in connection with the same. (1931, c. 261, s. 2.)

See § 7286(a).

§ 7502(d). Certain contractual powers exercised by other departments transferred to Director.—All rights, powers, duties and authority relating to State printing, or to the purchase of supplies, materials and equipment now imposed upon and exercised by the State Printing Commission, and/or the Commissioner of Labor and Printing and/or any other State department, institution, or agency under the several statutes relating thereto, are hereby transferred to the Director of Purchase and Contract and all said rights, powers, duty and authority are hereby imposed upon and shall hereafter be exercised by the Director of Purchase and Contract under the provisions of this article. (1931, c. 261, s. 3.)

§ 7502(e). Reports to Director required of all agencies as to needs.—It shall be the duty of all departments, institutions, or agencies of the State Government to furnish to the Director of Purchase and Contract when requested, and on blanks to be approved by him, tabulated estimates of all supplies, materials and equipment needed and required by such department, institution or agency for such periods in advance as may be designated by the Director of Purchase and Contract. (1931, c. 261, s. 4.)

§ 7502(f). Consolidation of estimates by director; bids; awarding of contract.—The director of purchase and contract shall compile and consolidate all such estimates of supplies, materials and equipment needed and required by all state departments, institutions and agencies to determine the total requirements for any given commodity. If the total requirements of any given commodity will involve an expenditure in excess of two thousand dollars, sealed bids shall be solicited by advertisement in a newspaper of state-wide circulation at least once and at least ten days prior to the date fixed for opening of the bids and awarding of the contract: Provided, other methods of advertisement may be adopted by the division of purchase and contract, with the approval of the advisory budget commission, when such other method is deemed more advantageous for the particular item to be purchased. Regardless of the amount of the expenditure, it shall be the duty of the director of purchase and contract to solicit bids direct by mail from reputable sources of supply. Except as otherwise provided for in this article, all contracts for the purchase of supplies, materials or equipment made under the provisions of this article shall wherever possible be based on competitive bids and shall be awarded to the lowest responsible bidder, taking into consideration the quality of the articles to be supplied, their conformity with the standard specifications which have been established and prescribed, the purpose for which said articles are required, the discount allowed for prompt payment, the transportation charges, and the date or dates of delivery specified in the bid. Competitive bids on such contracts shall be received in accordance with rules and regulations to be adopted by the director of purchase and contract with the approval of the advisory budget commission, which rules and regulations shall prescribe among other things the manner, time and place for proper advertisement for such bids, indicating the time and place when such bids will be received, the articles for which such bids are to be submitted and the standard specifications prescribed for such articles, the amount or number of the articles desired and for which the bids are to be made and the amount, if any, of bonds or certified checks to accompany the bids. Any and all bids received may be rejected. Each and every bid conforming to the terms of the advertisement herein provided for, together with the name of the bidder, shall be entered on the records, and all such records with the name of the successful bidder indicated thereon shall, after the award or letting of the contract, be open to public inspection. Bids shall be opened in public. A bond for the faithful performance of any contract may be required of the successful bidder in the discretion of the director of purchase and contract. After the contracts have been awarded, the director of purchase and contract shall certify to the several departments, institutions and agencies of the state government the sources of supply and the contract price of the various supplies, materials and equipment so contracted for.

The advisory budget commission shall have the necessary authority to adopt rules and regulations governing the following:

(a) Designating a board of award, composed of members of the budget commission, or other regular employees of the state or its institutions (who shall serve without added compensation), to act with the director in canvassing bids and awarding contracts.

(b) Fixing a quorum of the board of award and prescribing the routine and conditions to be followed in canvassing bids and awarding contracts.

(c) Prescribing routine for securing bids and awarding contracts on items that do not exceed $2,000 in value.

(d) Prescribing items and quantities to be purchased locally.

(e) Providing that where bids are unsatisfactory the division, with the approval and consent

of the budget commission, may reject all bids and purchase the article in the open market, but only at a lower price.

(f) Prescribing procedure to encourage the purchase of North Carolina farm products, and products of North Carolina manufacturing enterprises.

(g) Adopting any other rules and regulations necessary to carry out the purpose of this article. (1931, c. 261, s. 5; 1933, c. 441, s. 1.)

Editor's Note.—Public Laws of 1933, c. 441, added to this section the part containing subsections (a) to (g).

§ 7502(g). Requisitioning for supplies by agencies; must purchase through sources certified.—After sources of supply have been established by contract under competitive bidding and certified by the Director of Purchase and Contracts to the said departments, institutions and agencies as herein provided for, it shall be the duty of all departments, institutions and agencies to make requisition on blanks to be approved by the Director of Purchase and Contract, for all supplies, materials and equipment required by them upon the sources of supply so certified, and, except as herein otherwise provided for, it shall be unlawful for them, or any of them, to purchase any supplies, materials or equipment from other sources than those certified by the Director of of Purchase and Contract. One copy of such requisition shall be sent to the Director of Purchase and Contract when the requisition is issued. (1931, c. 261, s. 6.)

§ 7502(h). Certain purchases excepted from provisions of article.—Unless otherwise ordered by the Director of Purchase and Contract, with the approval of the Advisory Budget Commission, the purchase of supplies, materials and equipment through the Director of Purchase and Contract shall not be mandatory in the following cases:

(a) Technical instruments and supplies and technical books and other printed matter on technical subjects; also manuscripts, maps, books, pamphlets and periodicals for the use of the State Library or any other library in the State supported in whole or in part by State funds.

(b) Perishable articles and such as fresh vegetables, fresh fish, fresh meat, eggs and milk: Provided, that no other article shall be considered perishable within the meaning of this clause, unless so classified by the Director of Purchase and Contract with the approval of the Advisory Budget Commission.

All purchases of the above articles made directly by the departments, institutions and agencies of the State Government shall wherever possible be based on at least three competitive bids. Whenever an order or contract for such articles is awarded by any of the departments, institutions and agencies of the State Government a copy of such order or contract, together with a record of the competitive bids upon which it was based, shall be forwarded to the Director of Purchase and Contract. (1931, c. 261, s. 7.)

§ 7502(i). Purchase of articles in certain emergencies.—In case of any emergency arising from any unforeseen causes, including delay by contractors, delay in transportation, breakdown in machinery, or unanticipated volume of work. the Director of Purchase and Contract shall have power to purchase in the open market any necessary supplies, materials or equipment for immediate delivery to any department, institution or agency of the State Government. A report on the circumstances of such emergency and his transactions thereunder shall be transmitted in writing by the Director of Purchase and Contract to the Advisory Budget Commission at its next meeting and shall be entered in the minutes of the Commission. (1931, c. 261, s. 8.)

§ 7502(j). Contracts contrary to provisions of article made void. — Whenever any department, institution or agency of the State Government, required by this article and the rules and regulations adopted pursuant thereto applying to the purchase of supplies, materials, or equipment through the Director of Purchase and Contract shall contract for the purchase of such supplies, materials, or equipment contrary to the provisions of this article or the rules and regulations made hereunder, such contract shall be void and of no effect. If any such department, institution or agency purchases any supplies, materials, or equipment contrary to the provisions of this article or the rules and regulations made hereunder, the executive officer of such department, institution or agency shall be personally liable for the costs thereof, and if such supplies, materials, or equipment are so unlawfully purchased and paid for out of State moneys, the amount thereof may be recovered in the name of the State in an appropriate action instituted therefor. (1931, c. 261, s. 9.)

§ 7502(k). Preference given to North Carolina products and articles manufactured by state agencies; sales tax considered.—The director of purchase and contract shall in the purchase of and/or in the contracting for supplies, materials, equipment, and/or printing give preference as far as may be practicable to materials, supplies, equipment and/or printing manufactured or produced in North Carolina: Provided, however, that in giving such preference no sacrifice or loss in price or quality shall be permitted: and, Provided further, that preference in all cases shall be given to surplus products or articles produced and manufactured by other state departments, institutions, or agencies which are available for distribution:

Provided further, that in canvassing and comparing bids there shall be taken into consideration any sales tax or excise tax that will accrue to the state of North Carolina which is levied now or hereafter may be levied and in no case shall a bidder subject to such tax suffer in comparison with bids from those to whom such tax would not apply. (1931, c. 261, s. 10; 1933, c. 441, s. 2.)

Editor's Note.—Public Laws of 1933, c. 441, added the last proviso of this section as it now reads.

§ 7502(l). Rules and regulations covering certain purposes.—The Director of Purchase and Contract, with the approval of the Advisory Budget Commission, may adopt, modify, or abrogate rules and regulations covering the following purposes, in addition to those authorized elsewhere in this article:

(a) Requiring monthly reports by State de-

partments, institutions or agencies of stocks of supplies and materials and equipment on hand and prescribing the form of such reports.

(b) Prescribing the manner in which supplies, materials and equipment shall be delivered, stored and distributed.

(c) Prescribing the manner of inspecting deliveries of supplies, materials and equipment and making chemical and/or physical tests of samples submitted with bids and samples of deliveries to determine whether deliveries have been made to the departments, institutions or agencies in compliance with specifications.

(d) Prescribing the manner in which purchases shall be made by the Director of Purchase and Contract in all emergencies as defined in section 7502(i).

(e) Providing for such other matters as may be necessary to give effect to the foregoing rules and the provisions of this article. (1931, c. 261, s. 11.)

§ 7502(m). Standardization Committee. — It shall be the duty of the Governor to appoint a standardization committee to consist of seven members as follows: The Director of Purchase and Contract, who shall be Chairman of said Committee; and engineer from the State Highway Commission to be appointed by the Governor upon the recommendation of the Chairman of the State Highway Commission; a representative of the State educational institutions to be appointed by the Governor, a representative of the State Departments to be appointed by the Governor, a representative of the State Charitable and Correctional Institutions to be appointed by the Governor, and two members of the Advisory Budget Commission to be designated by the Governor. Four members of said committee shall constitute a quorum for the transaction of business, or the performance of any duties imposed upon the committee by this article. The Committee shall meet at such time, or times, as it shall by rule or regulation prescribe, but it may meet at other times at the call of the Chairman. The Committee shall keep official minutes and such minutes shall be open to public inspection. It shall be the duty of the Standardization Committee to formulate, adopt, establish and/or modify standard specifications applying to State contracts. In the formulation, adoption and/or modification of any standard specifications, the Standardization Committee shall seek the advice, assistance and coöperation of any State department, institution or agency to ascertain its precise requirements in any given commodity. Each specification adopted for any commodity shall in so far as possible satisfy the requirements of the majority of the State departments, institutions or agencies which use the same in common. After its adoption each standard specification shall until revised or rescinded apply alike in terms and effect, to every State purchase of the commodity described in such specifications. In the preparation of any standard specifications the Standardization Committee shall have power to make use of any State laboratory for chemical and physical tests in the determination of quality. (1931, c. 261, s. 12.)

§ 7502(n). Law applicable to printing Supreme Court Reports not affected.—Nothing in this article shall be construed as amending or repealing section 7296, relating to the printing of the Supreme Court Reports, or in any way changing or interfering with the method of printing or contracting for the printing of the Supreme Court Reports as provided for in said section. (1931, c. 261, s. 13.)

§ 7502(o). Appointment of Director and compensation; qualifications; assistants; bond.—The Director of Purchase and Contract shall be appointed by the Governor, who shall fix his compensation subject to the approval of the Advisory Budget Commission. The Director shall have had at least two years experience in buying supplies, materials and equipment for governmental agencies, or for a private concern or corporation. He shall serve at the pleasure of the Governor and he shall have authority to employ such assistants as he shall deem necessary and fix their compensation, subject to the approval of the Salary and Wage Commission or such other department or agency as the duties of the Salary and Wage Commission shall be transferred to by law. The Director shall give such bond for the faithful performance of his duties as shall be fixed by the Governor. (1931, c. 261, s. 14.)

§ 7502(p). Financial interest of officers in sources of supply; acceptance of bribes.—Neither the Director of Purchase and Contract, nor any assistant of his, nor any member of the Advisory Budget Commission, nor of the Standardization Committee shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in the purchase of, or contract for, any materials, equipment or supplies, nor in any firm, corporation, partnership or association furnishing any such supplies, materials, or equipment to the State Government, or any of its departments, institutions or agencies, nor shall such Director, assistant, or member of the Commission or Committee accept or receive, directly or indirectly, from any person, firm or corporation to whom any contract may be awarded, by rebate, gifts or otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation. Any violation of this section shall be deemed a felony and shall be punishable by fine or imprisonment, or both. Upon conviction thereof, any such Director, assistant or member of the Commission or Committee shall be removed from office. (1931, c. 261, s. 15.)

§ 7502(q). Conflicting laws repealed; Executive Budget Act unaffected; date article effective. — All laws and clauses of laws in conflict with the provisions of this article, in so far as they conflict herewith, are hereby repealed, but nothing in this article shall be construed as repealing, amending or in any way changing any of the provisions of the Executive Budget Act, codified as sections 7486(j) et seq. This article shall be in force and effect from and after April first, one thousand nine hundred and thirty-one, except as to the provisions of sections 7502(g)-7502(j), which said sections and provisions thereof shall be in force and effect after July first, one

thousand nine hundred and thirty-one. (1931, c. 261, ss. 16, 17.)

Art. 4. State Reconstruction Commission

§ 7503. Commission created.—A commission is hereby created to be known as the state reconstruction commission, consisting of twenty-five men from the state at large, and representing as far as practicable all the various industries and employments of the state. The members of the said commission shall be appointed by the governor, who shall be ex officio chairman of the commission; and the said commission shall have the power to elect an executive chairman or secretary to carry on the details of the work. (1919, c. 261, s. 1.)

§ 7504. Duties.—It shall be the duty of such commission to make investigations and to report in reference to the industrial, commercial, economic, sociological, and military needs and requirements of the state which have been produced by the world war and the readjustment of the state to conditions of peace; to take such advisory measures as it may deem fit in reference to such matters; to consult with the several state and federal departments and such civic organizations as may offer information or recommendations in reference to such matters; to make investigation and suggest plans for the coördination and coöperation of the resources of the state during the period of adjustment after such war, and to make investigations and recommendations on all matters requiring the cooperation of federal and state governments, and to plan methods of coöperating with the federal authorities in devising and carrying out national policies during the period of war reconstruction. (1919, c. 261, s. 2.)

§ 7505. Reports.—This commission shall make written reports to the governor at such times and upon such subjects as in its discretion it may deem proper, and publish same in the newspapers of the state. (1919, c. 261, s. 3.)

§ 7506. Appropriation.—The members of the commission shall serve without compensation; but a sum of not exceeding five hundred dollars per annum for the years one thousand nine hundred and nineteen and one thousand nine hundred and twenty be and the same is hereby appropriated out of the public funds of the state to be used for the payment of postage and clerical assistance in the carrying out of the work of the commission; such sum to be paid upon warrant of the state auditor by the state treasurer, upon request of the executive chairman or secretary of the said commission. (1919, c. 261, s. 4.)

Art. 5. Soldier Settlement Board

§ 7507. Object of article.—The object of this article is, in recognition of military services, to provide useful employment and rural homes for soldiers, sailors, marines, and others who have served with the armed forces of the United States in the European war or other wars of the United States, including former American citizens who served in allied armies against central powers and have been repatriated, and who have been honorably discharged; and to accomplish such purpose by coöperation with the agencies of the United States engaged in work of a similar character. This article may be cited as "The North Carolina Soldier Settlement Act." (1919, c. 266, s. 1.)

Editor's Note.—The first act passed in North Carolina reserving land for officers and soldiers serving in the army of this state was passed in 1780. This act was lost. In 1782 another act for relief of officers and soldiers in the continental line, was passed. This act gave specified quantities of land to the officers and soldiers. By this act 25,000 acres was given to Major General Nathaniel Green. The title of Major General Green's heirs was questioned by others claiming title, but Marshall Ch. J. for the entire court in Rutherford v. Green, 2 Wheat. 196, 4 L. Ed. 218, held that the grant by the legislature vested a valid title in Major Gen. Green and his heirs.

§ 7508. Soldier settlement board created.—A soldier settlement board is hereby created, composed of three members to be appointed by the governor, one of whom shall be chairman, and whose terms of service shall be as follows: one for two years, one for four years, and one for six years; and thereafter, on the expiration of their terms, for a period of six years, and until their successors have been appointed and qualified. The attorney-general shall be the legal adviser of the board and represent the board in any suits or actions which may arise out of the discharge of its duties. (1919, c. 266, s. 2.)

§ 7509. Coöperation with federal agencies.—The board shall satisfy itself of the practicability of each project to be undertaken hereunder, utilizing all state agencies to such end. Projects may be undertaken in coöperation with the United States, involving the reclamation of the lands within this state by drainage, irrigation, and removal of trees and stumps, the building of levees, sea walls, necessary roads, land leveling, fertilization, sanitation, or involving such other means as may be found practicable and desirable to make the land suitable for agricultural purposes and rural homes. The board may acquire, in the name of the state, by purchase, gift, all lands and other property needed for the purposes hereof, and may take title in trust. With the consent of the coöperating federal agencies, the board may sell any land or other property acquired hereunder found not to be required for any project. The board may also utilize all lands of the state for the purposes of this article: Provided, that nothing in this section contained shall be construed to repeal any law relating to the price of state lands. The periods during which payment for state lands may be made and the rates of interest under existing statutory law may be modified by the board, if deemed advisable in order properly to coöperate with federal agencies. (1919, c. 266, s. 3.)

§ 7510. Power to contract with federal government and with other states.—The board is authorized to contract with the United States pursuant to acts of congress and the rules and regulations thereunder for soldier settlement and related purposes. For the purposes of general coöperation with the federal government hereunder, the board may also contract with other states, and with municipal, quasi-municipal, and

public corporations and private corporations and individuals. (1919, c. 266, s. 4.)

§ 7511. Powers under contract with federal government.—The board may also, under contract with the United States, undertake any work of farm improvement, subdivision of the land, supervision of settlement, the selection of settlers, the agricultural training of prospective settlers, the supervision of short-term loans, the rejection of applicants for allotments, the collection of moneys, the operation and maintenance of the projects undertaken, and may perform such other acts as may be necessary to effectuate full coöperation with federal agencies. (1919, c. 266, s. 5.)

§ 7512. Additional powers; proceeds of operations.—The board may also lease or assent to the lease of any lands pending receipt of application for the purchase thereof; may dedicate lands for schools, churches, roads, cemeteries, and other public purposes; may establish, develop, and open for sale such town-sites as may be desirable and provided by contract with the United States. The proceeds of all operations under this act shall be covered into the North Carolina soldier settlement fund. (1919, c. 266, s. 6.)

§ 7513. State reimbursable as provided for federal government.—The board, in coöperation with the United States, is authorized to obtain suitable security by lien, by coöperation with public corporations or otherwise for the reimbursement of moneys expended hereunder by the United States, or by the state or by both jointly, or otherwise. All moneys expended by the state upon any project undertaken shall be reimbursable to the state in manner similar and to the same extent that moneys disbursed by the United States for coöperation with the state shall be reimbursable, and with the same interest, if any, upon such plan of amortization or other method or reimbursement as may be agreed upon pursuant to such acts of congress. (1919, c. 266, s. 7.)

§ 7514. State lands and lands acquired subject to taxation.—State lands utilized hereunder and lands acquired pursuant to this article shall be subject to state and local taxation and assessment for improvement purposes from the date of the execution of the contract for the purchase thereof by settlers upon any project undertaken hereunder. If the contracting purchaser shall fail to pay such taxes and assessments, the same may be paid from the fund hereby provided and charged to the purchaser, with interest at the rate of ten per cent per annum from the date of payment. (1919, c. 266, s. 8.)

§ 7515. Reports of board.—The board shall make annual report to the governor, with a full statement of its operations and the results of its investigations and experience resulting from operations under this article, together with recommendations for legislation, and shall furnish a copy of its report to the secretary of the interior. (1919, c. 266, s. 9.)

§ 7516. Board to make necessary rules and regulations.—The board is hereby authorized to perform such acts and make such rules and regulations as it may deem necessary and proper to carry this article into full force and effect. (1919, c. 266, s. 10.)

Art. 5(A). Ship and Water Transportation Commission

§ 7516(a). Creation; number; appointment and removal; organization; seal; rules.—A state ship and water transportation commission is hereby created to consist of nine members, who shall be appointed by the governor and confirmed by the senate, who shall be known as the state ship and water transportation commission: Provided, that any commissioner appointed under this article may be removed by the governor for cause. In the case of death, resignation, removal by the governor for cause, or mental disability of any commissioner during his term of office, his successor shall be appointed by the governor to fill out his unexpired term. If the senate shall refuse to confirm any appointee of the governor, then it shall be the duty of the governor to appoint another and send his name to the senate for its action. The board of commissioners shall at their first meeting, to be held not later than April fifteenth, one thousand nine hundred and twenty-three, at a place in the city of Raleigh to be designated by the governor, elect one of their number chairman and another secretary, who shall hold for one year and until their successors are elected. The headquarters and main office of the commission shall be located in the state capitol. The members of the said commission at their first meeting shall organize and adopt a common seal. They shall keep minutes of their meetings, which shall be open to public inspection. They shall have the power to adopt and enforce rules and regulations for the government of their meetings and proceedings, and for the transaction of the business of the commission, and shall have the power and authority to make all rules and regulations for the carrying out the true intend and purposes of this article. They shall meet at the offices of the commission at such regular times, not less than quarterly, as they may by rule provide, and may hold special meetings at any time and place at the call of the chairman or any four members. (1923, c. 94, s. 1.)

Editor's Note. — This act is summarized in 1 N. C. Law Rev. 292.

§ 7516(b). Duties; reports.—The commission shall, as soon as practicable after its first meeting, carefully inquire, investigate and ascertain:

1. If it is feasible and will be reasonably profitable to operate, freight rates and other advantages being considered, one or more lines of ship and water transportation on the navigable rivers, sounds, and other navigable waters within the boundaries of the state and between the towns located on such navigable waters and towns and cities located beyond the boundaries of the state to the north and to the south, along the Atlantic seaboard and elsewhere.

2. The cost of purchasing suitable and adequate boats and ships and the cost of maintaining and operating the same.

3. The practicability of obtaining docks,

wharves and other landing places along the banks of the said navigable rivers, and at towns located thereon within the state, and the feasibility of obtaining terminal facilities at towns or cities without the boundaries of the state, and the cost of building, buying or renting the same.

4. The reasonable estimate of the earnings of said one or more lines of water transportation to be operated and maintained by said commission.

The commission shall, after said investigation hereinbefore provided, report in writing its findings and conclusions to the governor and council of state, and shall cause to be printed a complete report of their findings of facts and conclusions and mail copy of same to each member of the general assembly, and if the said governor and the council of state, after considering the said report, shall conclude that it is feasible, practicable and will be reasonably profitable to operate the said one or more lines of water transportation recommended, if any, by the said commission, then the governor shall report the findings of said commission and council of state to a subsequent general or special meeting of the general assembly. But if the said governor and council of state shall from said report find that it is not feasible or advisable for the said lines of water transportation to be established and operated, then nothing further shall be done under this article, but the governor shall report to the next general assembly of North Carolina the action of the governor and the council of state, and shall transmit the report of the said commission. (1923, c. 94, s. 2.)

§ 7516(c). Oath of office.—The members of the commission shall each before entering upon the discharge of his duties take an oath that he will faithfully and honestly execute the duties of the office during his continuance in office. (1923, c. 94, s. 3.)

§ 7516(d). Pay of commissioners.—The members of the commission shall each receive ten dollars ($10.00) per day while engaged in the discharge of the duties of their offices and their actual traveling expenses, and the same shall be paid upon voucher signed by the commissioner and approved by the chairman and secretary of the commission. (1923, c. 94, s. 5.)

Art. 5(B). Transportation Advisory Commission

§ 7516(e). Commission created.—An advisory commission is hereby created to be known as the Transportation Advisory Commission. The commission shall consist of twelve citizens of the State of North Carolina, whose experience and knowledge as business men and shippers are such as to enable them to give intelligent consideration to the problems assigned them by this article for investigation. The members of the commission shall be appointed by the Governor, who shall also appoint the chairman and vice chairman of the commission, and shall fill any vacancies that may occur in the membership of the commission. (1925, c. 266, s. 2.)

§ 7516(f). Organization meeting.—It shall be the duty of the chairman to call the commission into session at an early time and at a place to be designated by him, at which session the commission shall organize and adopt rules for its administration and the conduct of its proceedings. The commission shall elect a secretary, and is authorized to employ clerks, assistants, competent counsel and experts. (1925, c. 266, s. 3.)

§ 7516(g). Compensation; expenses. — The members of the commission shall be allowed the same per diem as members of the General Assembly for such time as actually engaged in the performance of their duties under this article and actual traveling expenses. The chairman and secretary of the commission may be allowed such special compensation as may be approved by the Governor and Council of State. Upon recommendation of the commission, an allotment of funds shall be made from time to time by the director of the budget, from the contingent fund in the general appropriation bill, to meet the necessary expenses incurred under this article, which necessary expenses shall not exceed twenty-five thousand dollars ($25,000) in the biennial period following March 10, 1925. Such necessary expenses shall be paid by the State Treasurer upon warrant of the State Auditor, to be issued upon the filing with the Auditor of a statement of such expenses, sworn to by the member or members incurring the same, or upon requisition by the chairman and secretary for necessary expenses other than that of members of the commission. (1925, c. 266, s. 4.)

§ 7516(h). Duties of commission.—It shall be the duty of the commission to make a complete and thorough survey of the entire structure of freight rates to, from and within North Carolina to ascertain if there is discrimination against receivers and shippers of freight in this State in any of such schedules of freight rates, the probable causes thereof, together with the recommendations as to the action which, in the judgment of the commission, will afford a remedy for any such discrimination found to exist; and in particular what action, if any, the State can safely and properly take in co-operation with the Federal government or otherwise, to aid in the development of water transportation to and from North Carolina ports. (1925, c. 266, s. 5.)

§ 7516(i). Commission to take testimony.—It shall be the duty of the commission, or of a committee appointed by it, to take testimony of any interested parties, upon any or all phases of the subject-matter assigned to them by this article for investigation, or which may have a bearing upon the questions which they are directed to investigate. (1925, c. 266, s. 6.)

§ 7516(j). Hearings; production of books and papers.—The commission may hold hearings at such times and places in this State as it may find convenient, and may designate one or more members to take testimony outside the borders of the State, and within the State of North Carolina may compel the production of books and papers by the same process and proceedings authorized by law to compel the production of books and papers in the Superior Court. (1925, c. 266, s. 7.)

§ 7516(k). Report to governor; proceedings before interstate commission and shipping board.—The commission shall from time to time make report to the Governor, setting forth the facts ascertained and conclusions reached from its investigations, including recommendations as to any course to be taken either by the institution of proceedings before the Interstate Commerce Commission, the Shipping Board or in the courts in respect to freight rates, or recommendations for legislative measures which in their judgment should be enacted by the General Assembly. If any recommendation for institution of proceedings as aforesaid shall be approved by the Governor, it shall be the duty of the Corporation Commission to institute and prosecute, by and with the advice of the Transportation Advisory Commission, such acts and proceedings as may be so recommended and approved. (1925, c. 266, s. 8.)

§ 7516(l). Recommendations involving expenditures.—No recommendations that involve expenditures not authorized by this article shall become effective unless such recommendation is adopted by, and an appropriation for such purpose made by the General Assembly, but it shall be the duty of the Governor to lay before the General Assembly any recommendation of the commission for further legislative action, and to indicate at the same time his own opinions concerning such recommendations. (1925, c. 266, s. 9.)

Art. 6. Officers of State Institutions

§ 7517. Secretary to be elected from directors.—The board of directors of the various state institutions shall elect one of their number as secretary, who shall act as such at all regular or special meetings of such boards. (1907, c. 883, s. 1.)

As to treasurer, see section 7689.

§ 7518. Directors to elect officers and employees.—All officers and employees of the various state institutions who hold elective positions shall be nominated and elected by the board of directors of the respective institutions. (1907, c. 883, s. 3.)

§ 7518(a). Places vacated for failure to attend meetings.—Unless otherwise specially provided by law, whenever a trustee or director of any institution supported in whole or in part by State appropriation, shall fail to be present for two successive years at the regular meetings of the board, his place as trustee or director shall be deemed vacant and shall be filled as provided by law for other vacancies on such boards.

This section shall not apply to any trustee or director who holds office as such by virtue of another public office held by him and shall not apply to any trustee or director chosen by any agency or authority other than the State of North Carolina. (1927, c. 225.)

§ 7519. Director not to be elected to position under board.—It shall be unlawful for any board of directors, board of trustees or other governing body of any of the various state institutions (penal, charitable, or otherwise) to appoint or elect any person who may be or has been at any time within six months a member of such board of directors, board of trustees, or other governing body, to any position in the institution, which position may be under the control of such board of directors, board of trustees, or other governing body. (1909, c. 831.)

§ 7520. Superintendents to be within call of board meetings.—The superintendent of each of the various state institutions shall be present on the premises of his institution and within the call of the board of directors during all regular or special meetings of the board, and shall respond to all calls of the board for any information which it may wish at his hands. (1907, c. 883, s. 1.)

§ 7521. Trading by interested officials forbidden.—The directors, stewards, and superintendents of the state institutions shall not trade directly or indirectly with or among themselves, or with any concern in which they are interested, for any supplies needed by any such institutions. (1907, c. 883, s. 2.)

§ 7521(a). Diversion of appropriations to state institutions.—It shall be unlawful for the board of trustees, board of directors, or other body controlling any state institution, to divert, use, or expend any moneys appropriated for the use of said institutions for its permanent improvement and enlargement to the payment of any of the current expenses of said institution or for the payment of the cost of the maintenance thereof; it shall likewise be unlawful for any board of trustees, board of directors, or other controlling body of any state institution to which money is appropriated for its maintenance by the state to divert, use, or expend any money so appropriated for maintenance, for the permanent enlargement or permanent equipment, or the purchase of land for said institution. (1921, c. 232, s. 1.)

§ 7521(b). Trustee, director, officer or employee violating law guilty of misdemeanor.—Any member or members of any board of trustees, board of directors, or other controlling body governing any of the institutions of the state, or any officer, employee of, or person holding any position with any of the institutions of the state, violating any of the provisions of the preceding section, shall be guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction judgment shall be rendered by such court removing such member, officer, employee, or person holding any position from his place, office or position, and shall be fined or imprisoned, in the discretion of the court. (1921, c. 232, s. 2.)

§ 7521(c). Venue for trial of offenses.— All offenses against this law shall be held to have been committed in the county of Wake and shall be tried and disposed of by the courts of said county having jurisdiction thereof. (1921, c. 232, s. 3.)

Art. 6(A). Accounting by State Departments and Institutions

§ 7521(d). System to be devised and established; controlling accounts; use of books of account.—The state auditor shall have the power and authority, and it shall be his duty, to

devise and establish accounting procedures for the state, its departments and institutions, to record in detail all transactions affecting the acquisition, custodianship, and disposition of values, including cash receipts and disbursements, so that the recorded facts can be presented periodically to the public in such summaries and analytical schedules in detailed support thereof as shall be necessary to show the full effect of such transactions upon the finances of the state; to devise systems for control and disbursement of funds of the state, its departments and institutions; to devise and establish a general set of books of accounts with controlling accounts of all the assets and liabilities of the state departments and institutions, and of revenues and expenses of the state, its departments and institutions, and of all appropriations of the state, and such books and accounts generally as are necessary and proper to carry out and put into effect the systems of accounting procedures and control and disbursement of funds devised for state departments and institutions; to establish the date for the beginning of the fiscal year of the state, and to require all officers of the state, its departments, and institutions, at such time or any other time he may select, to put into effect the systems of accounting procedure and control and disbursement of funds, and to use the books of accounts in accordance with system devised. (1921, c. 163, s. 1.)

§ 7521(e). Employment and compensation of accountants.—The state auditor shall have the power and the authority to employ accountants to assist in the work in devising a system of accounting procedures and control and disbursement of funds and books of accounts mentioned in this article, and to pay to such accountants such compensation as may be agreed upon between him and such accountants: Provided, such compensation shall be considered and approved by the governor. (1921, c. 163, s. 2.)

§ 7521(f). Systems to be used by state and institutions.—The officers of the state and its institutions shall, at the time selected by the state auditor, put into effect the systems of accounting procedures and control of funds and disbursement thereof, and begin the use of the sets of books and accounts devised and selected for them. (1921, c. 163, s. 3.)

§ 7521(g). State auditor may require reports; examination of departments and institutions. — The state auditor may require all state departments and institutions to make reports from time to time, and is empowered to have all departments of the state government and state institutions examined and audited from time to time, and shall employ such experts to make audits and examinations and analyze the reports of such institutions and departments as he may deem to be necessary. (1921, c. 163, s. 4.)

§ 7521(h). Commission for examination of departments and institutions.—At any time, upon complaint made to him or upon his own motion, the governor may appoint a special commission to investigate any state department or institution which commission shall have power to subpœna witnesses, require the production of books and papers, and to do all things necessary to a full and thorough investigation, and shall submit its findings to the governor. The members of such commission shall, while engaged in the performance of their duties, receive their actual expenses and four dollars per diem. (1921, c. 163, s. 5.)

Art. 6(B). Check on License Forms, Tags and Certificate Used or Issued

§ 7521(i). Blank forms of licenses, etc., to be delivered to State Auditor; monthly report to Auditor; spoiled and damaged forms.—In all cases where blank forms of licenses, tags or certificates are prepared and delivered to any State department or agency for the use of any State department or agency in issuing such license, tag or certificate upon the payment of any fees prescribed by law, a sample of the same, together with a list of the numbers of all such license forms, tags or certificates, and the type of business or privilege to which they relate, shall be delivered to the State Auditor. On or before the tenth day of each calendar month each State department or agency issuing and delivering licenses, tags or certificates shall make report to the State Auditor of all such licenses, tags or certificates delivered during the preceding calendar month, showing the numbers thereof, the business or privilege for which issued, and the person or persons or corporations to whom such licenses, tags or certificates have been so issued. If there be any of such blank license forms, tags or certificates spoiled or in any way damaged so as to be incapable of being used, all such spoiled license forms, tags, or certificates shall be transmitted to the State Auditor and by him securely kept. (1931, c. 398, s. 1.)

§ 7521(j). Auditor to check forms monthly; report of discrepancies. — It shall be the duty of the State Auditor, as soon as practicable after the tenth day of each calendar month and not later than the thirtieth of such month, to thoroughly examine and check the reports so received, together with all such spoiled forms, tags or certificates, and the remaining such blank license forms, tags or certificates then in the hands of the department or agency to which they have heretofore been delivered. If any discrepancy be found by the State Auditor upon such checking and examination, he shall at once report the same to the Director of the Budget. (1931, c. 398, ss. 2, 3.)

Art. 6(C). Division of Personnel under the Budget Bureau

§ 7521(k). Division established.—There is hereby established in the governor's office under the budget bureau a division of personnel, to be under the supervision of the assistant director of the budget, who shall, subject to the provisions of this article, be vested with the powers and authorities and charged with duties and obligations herein described: Provided, that no additional compensation shall be allowed said assistant director of the budget on account of the duties per-

formed hereunder. (1931, c. 277, s. 1; 1933, c. 46, s. 1.)

See 11 N. C. Law Rev., 250, for criticism of change made in this section in 1933.

Editor's Note.—Public Acts 1931, c. 277, s. 15, abolished the Salary and Wage Commission established under Public Laws 1925, c. 125.

Public Laws of 1933, c. 46, repealed the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 7521(l): Repealed by Public Laws 1933, c. 46, s. 2.

§ 7521(m). Survey of needs for personal service in all branches of state government.—The assistant director of the budget, together with the head of each and every department, bureau and/or commission of the state, shall make a survey and investigation of the needs for personal service in all state departments and bureaus and of the cost in value of the services rendered by all subordinates and employees of such departments and bureaus, and from time to time publish the information so assembled. (1931, c. 277, s. 3; 1933, c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(n). Classification of number of employees needed; nature of work; standard of salaries and wages; hours of labor, etc.—The assistant director of the budget shall, after making such survey and investigation and upon the information so assembled, together with the head of each and every department, bureau and/or commission, fix, determine and classify the necessary number of subordinates and employees in any and all departments and bureaus, the type and nature of work to be performed by such subordinates and employees, and/or positions to be filled by subordinates and employees in said departments and bureaus, and together with the head of each and every department, bureau and/or commission, and with the approval of the advisory budget commission fix, establish and classify a standard of salaries and wages with a minimum salary rate and a maximum salary rate and/or such intermediate salary rate or rates as may be deemed necessary and equitable, to be paid for all such services and positions and to all such subordinates and employees of said departments and bureaus. The assistant director of the budget, together with the head of each and every department, bureau and commission shall also fix, determine and establish the hours of labor in such department and/or bureau and make all such rules and regulations with respect to holidays, vacations or sick leave, and any and all other matters having direct relationship to services to be performed and the salaries and wages to be paid therefor as shall be approved as herein provided: Provided that the provisions of this article shall not apply to the maintenance or construction forces of the state highway commission employed on an hourly basis of wages: Provided further, the provisos of this article shall not apply to the supreme court. (1931, c. 277, s. 4; 1933, c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(o). Report of survey to governor and agency heads.—As such survey and investigation proceeds and is completed with respect to a particular department or bureau, the assistant director of the budget shall file a report with the governor and with the head of such department or bureau, setting out in such report the number of allowable subordinates and employees, the services to be performed, and/or the positions to be filled and the salaries or wages to be paid to each of the subordinates and employees in said department or bureau. (1931, c. 277, s. 5; 1933, c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(p). Findings in such report standard as to personal service.—When said report with respect to any such department or bureau has been so completed and filed with the Governor, and the head of such department or bureau, the findings in such report shall then become the fixed standard for the number of, the services to be performed, and/or the positions to be filled by, and the salaries or wages to be paid to, any and all subordinates and employees in the department or bureau to which said report relates, and it shall thereupon be the duty of the head of such department or bureau on the first day of the next month, beginning not less than thirty days subsequent to the reception of said report by him, to put the same into effect, and thereupon, with respect to such department or bureau, the number of employees, the services to be performed, and/or the positions to be filled, and the salaries and wages specified in said report, shall become the only allowable standard for, and with respect to such department or bureau. (1931, c. 277, s. 6.)

§ 7521(q). Changes in need for personal service made by assistant director of the budget. — It shall be the duty of the assistant director of the budget to keep informed from time to time of changes in the needs for personal services in the several state departments and bureaus and to reconsider the report hereinbefore provided for, and with the approval of the advisory budget commission to make changes therein in accordance with his findings; and upon report by him to the head of any department or bureau, setting out such findings and changes, it shall be the duty of the head thereof to put such findings and changes into effect on the first day of the next month, beginning not less than thirty days after the receipt by him of such report. (1931, c. 277, s. 7; 1933, c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(r). Employment of persons by certification of name to assistant director of the budget and by his investigation.—All persons employed in any bureau, department or commission on the first day of July, one thousand nine hundred and thirty-one, shall be deemed qualified. From and after the first day of July, one thousand nine hundred and thirty-one, if the head of any department or bureau shall desire to fill any vacancy or to employ other and further subordinates or employees, such head may certify the name or

names of any applicant or applicants to the assistant director of the budget who shall immediately inquire into the qualifications of such person and if such person is found duly qualified and the assistant director of the budget shall deem it necessary that the employment be made, the said assistant director of the budget shall fix the salary and approve of the employment. (1931, c. 277, s. 8; 1933, c. 46, ss. 3, 4.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(s). Applications for employment to be filed with assistant director of the budget; list of qualified applicants.—The assistant director of the budget may adopt rules and regulations to the end that applicants for positions in the various departments, bureaus, and/or commissions, may file with the assistant director of the budget such application for employment and the assistant director of the budget shall examine into the qualifications of such person and may certify for and keep a list of such persons so qualified, which said list shall be open to the inspection of the heads of the various departments, bureaus and commissions and such heads may from time to time fill the positions from such list. (1931, c. 277, s. 9; 1933, c. 46, ss. 3, 5.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(t). Copies of personnel reports to state auditor. — The assistant director of the budget shall transmit to the state auditor copies of his report or reports with respect to the various departments and bureaus, and the salaries and wages for such subordinates and employees in the several departments and bureaus shall be paid out of the appropriations for such purpose and in accordance with the schedule set out in said report or reports. (1931, c. 277, s. 10; 1933; c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(u). Disputes between assistant director of the budget and agency heads settled by advisory budget commission. — In the event there shall be disagreement between the assistant director of the budget and the head of any department or bureau over the ruling of the assistant director of the budget upon any question involving such department or bureau or any of its subordinates or employees, the matters in dispute shall be heard by the advisory budget commission and the action of said commission thereon shall be final. (1931, c. 277, s. 11; 1933, c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(v). Payrolls submitted to assistant director of the budget; approval of payment of vouchers.—From and after July first, one thousand nine hundred and thirty-one, all payrolls of all departments, institutions, and agencies of the state government shall prior to the issuance of vouchers in payment therefor be submitted in triplicate to the assistant director of the budget, who shall check the same against the budget allotments to such departments, institutions and agencies for such purposes, and if found to be within said budget allotments, he shall approve the same and return one to the department, institution or agency submitting same and transmit one copy to the state auditor, and no voucher in payment of said payroll or any item thereon shall be honored or paid except and to the extent that the same has been approved by the assistant director of the budget. (1931, c. 277, s. 12; 1933, c. 46, s. 3.)

Editor's Note.—Public Laws of 1933, c. 46, substituted "assistant director of the budget" for "director of personnel."

§ 7521(w): Repealed by Public Laws 1933, c. 46, s. 6.

§ 7521(x). Quorum of Advisory Budget Commission.—In all matters where action on the part of the Advisory Budget Commission is required by this article, three members of said Commission shall constitute a quorum for performing the duties or acts required of said Commission. (1931, c. 277, s. 14.)

§ 7521(y). Appropriation for expenses of division of personnel.—The necessary expenses of the division of personnel under the budget bureau as authorized by this article shall be paid in accordance with the appropriation act of one thousand nine hundred thirty-one; but for lack thereof, or of a sufficient appropriation, said expenses shall be paid out of the contingency and emergency fund. (1931, c. 277, s. 16; 1933, c. 46, s. 7.)

Editor's Note.—Formerly this section provided for the expenses of the department of personnel.

Art. 7. Various Powers and Regulations

§ 7522. State institutions may exercise eminent domain.—Whenever the directors or managers of any state institution find it necessary to acquire lands in order to carry out the purposes of the institution, or to acquire lands, rights of way, or easements for the purposes of obtaining and protecting water supplies, or for constructing and maintaining dams, reservoirs, standpipes, pipe lines, flumes, or conduits for water-supply purposes, and are unable to purchase the same from the owners at a reasonable price, or are unable to obtain a good and sufficient title therefor by purchase from the owners, then such state institution may exercise the right of eminent domain and acquire any such lands, rights of way, or easements necessary for the aforesaid purposes by condemnation in the manner prescribed by law under the chapter Eminent Domain. (Rev., s. 3062; 1917, cc. 51, 132.)

§ 7523. Entry on land to lay water pipes.—For the purpose of providing water supplies, the directors or other lawful managers of any public institution of the state may enter upon the lands through which they may desire to conduct their pipes for such purpose, and lay them under ground, and they, at all times, shall have the right to enter upon such lands for the purpose of keeping the water line in repair and do all things necessary to that end. (Rev., s. 3061; 1893, c. 63, s. 1; 1911, c. 62, s. 26.)

§ 7524. Governor to execute deeds of state lands held for institutions.—The governor of

the state is hereby authorized and empowered to execute a deed under the great seal of the state to any lands the title to which is now vested in the state, for the use of any state institution, upon application of the trustees or directors of such institution shall show such conveyance is for the best interests of the institution, and shall be approved by the council of state. (1917, c. 129.)

§ 7524(a). Method of alienation of real property held by any State agency.—Wherever the power and authority to convey real property held or owned by any State institution, agency, board, commission, person, or corporation that exercises State functions, have been or may be hereafter given by the General Assembly, then the method and manner of conveying the same shall be as herein provided. (1929, c. 143, s. 1.)

§ 7524(b). Execution; signature; attestation; seal.—Such conveyance shall be in the usual form of deeds of conveyance of real property and shall be executed in the name of the State of North Carolina, and signed in the name of the State of North Carolina by the Governor and attested by the Secretary of State, and the Great Seal of the State of North Carolina shall be affixed thereto. (1929, c. 143, s. 2.)

§ 7524(c). Admission to registration in Counties.—Such conveyances shall be admitted to registration in the several counties of the State upon the probate required by law for deeds of corporations. (1929, c. 143, s. 3.)

§ 7524(d). Exclusive method of conveying such property.—The manner and method of conveying real property in the State of North Carolina herein set out shall be the exclusive and only method of conveying same. Any conveyance thereof by any other person and/or executed in any other manner or method shall not be effectual to convey the State's interest or estate in such real property. (1929, c. 143, s 4.)

§ 7524(e). Act not applicable to State Board of Education as to its lands.—This act shall not be held or construed to apply to the State Board of Education insofar as it relates to the authority to convey lands held by the State Board of Education, but when the State Board of Education shall have determined to convey any of its real property in accordance with the statutes now or hereafter applying to lands held by the State Board of Education, then the method of conveying the same shall be as herein set out and not otherwise. (1929, c. 143, s. 5.)

§ 7525. Grant of easements to public-service corporations.—The directors of the various state institutions are authorized and empowered to grant privileges and easements to individuals or companies to run telegraph, telephone, or power transmission lines over lands belonging to such institutions, when in their judgment it is right and proper to do so, and subject to such terms and conditions as they may impose, and subject in each case to the approval of the attorney-general of the state. (1909, c. 484.)

§ 7526. Injury to water supply misdemeanor.—If any person shall in any way intentionally or maliciously damage or obstruct any water line of any public institution, or in any way contaminate or render the water impure or injurious, he shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (Rev., s. 3458; 1893, c. 63, s. 3.)

§ 7527. Keeping swine near state institutions; penalty.—On the petition of a majority of the legal voters living within a radius of one-quarter of a mile of the administrative building of any state educational or charitable institution, it shall be unlawful for any person to keep swine or swine pens within such radius of one-quarter of a mile. Any person violating this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten nor more than fifty dollars. (1909, c. 706.)

§ 7528. Expenditures for departments and institutions; accounting and warrants.—All expenditures of any character allowed by the general assembly in making appropriations and not covered in the appropriations named shall be charged against the department or institution for which the expense is incurred, and the state auditor's warrant shall be made to show clearly for what purpose the expenditure is made. The warrant shall be charged against the department or institution, thereby showing the total amount expended for the maintenance and expenses of such department or institution. (1917, c. 289.)

§ 7529. Institutions to file monthly statements with auditor.—On the fifteenth of each month it shall be the duty of the head of each state institution to prepare an itemized statement of all the disbursements of such institution for the preceding month, and file the same with the state auditor on blanks to be prepared and furnished to him by the auditor. (1911, c. 99.)

§ 7530. Certain institutions to report to governor and general assembly.—It shall be the duty of the boards of directors, managers, or trustees of the several state institutions for the insane, or the several institutions for the deaf, dumb, and blind, and of the state prison to submit their respective reports to the governor, to be transmitted by him with his message to the general assembly. (Rev., s. 5373; 1883, c. 60, ss. 2, 4.)

§ 7531. Reports of departments and institutions; investigations and audits. — All state departments and state institutions shall make reports to the governor from time to time as may be required by him, and the governor is empowered to have all departments of the state government and state institutions examined and audited from time to time, and shall employ such experts to make audits and examinations and to analyze the reports of such institutions and departments as he may deem to be necessary. (1917, c. 58, s. 7.)

§ 7532. Special investigations.—At any time, upon complaint made to him or upon his own motion, the governor may appoint a special commission to investigate any state department or state institution, which commission shall have power to subpœna witnesses, require the production of books and papers, and to do all things

necessary to a full and thorough investigation, and shall submit its findings to the governor. The members of such special commission shall, while engaged in the performance of their duties, receive their actual expenses and per diem of four dollars. (1917, c. 58, s. 8.)

§ 7532(a). Governor given authority to direct investigation.—The Governor is hereby authorized and empowered to call upon and direct the Attorney-General to investigate the management of or condition within any department, agency, bureau, division or institution of the State, or any other matters pertaining to the administration of the Executive Department, when the Governor shall determine that such an investigation shall be necessary. (1927, c. 234, s. 1.)

§ 7532(b). Conduct of investigation.—Whenever called upon and requested by the Governor as in the preceding section set out, the Attorney-General shall conduct such investigation at such reasonable time and place as may be determined by him. He shall have power to issue subpœnas, administer oaths, compel the attendance of witnesses and the production of papers necessary and material in such investigation. All subpœnas issued by him shall be served by the sheriff or other officer of any county to which they may be directed. Parties interested in such investigation may appear at the hearing and be represented by counsel, who shall have the right to examine or cross-examine witnesses.

All persons subpœnaed to attend any hearing before the Attorney-General shall, for a failure so to attend and testify, be subject to the same penalties as prescribed by law for such failure in the Superior Court. (1927, c. 234, s. 2.)

§ 7532(c). Stenographic record of proceedings.—A stenographic record of the proceedings had in such investigation shall be taken and copy thereof forwarded by the Attorney General to the Governor with his report. (1927, c. 234, s. 3.)

§ 7533. Commission to determine scope of reports.—There is hereby established a commission to be composed of the governor, the attorney-general, and the commissioner of labor and printing, the duty of which commission shall be to confer with the various departments and to subscribe the scope of the matter to be published in any report now prescribed, required, or permitted, to the end that unnecessary matter may be eliminated. (1917, c. 202, s. 2.)

Editor's Note.—While the act of 1927, ch. 217 (by the caption thereof) purports to amend this section, there is no mention of the section contained therein. The amendment was either omitted from the act, or reference to this section was inserted in the caption by mistake.

§ 7534. Reports of departments to be printed biennially.—All laws requiring reports to be made, published, and printed by any department oftener than once in two years are hereby amended to the extent that the report of any department is required or permitted to be printed only once in any biennial period: Provided, that this section shall not apply to the report of the state auditor and of the state treasurer. (1917, c. 202, s. 1.)

§ 7534(a). State institutions to mail copies of reports.—Each state institution required by law to file biennial reports with the governor and general assembly shall prepare, print and mail copies thereof to each of the members of the general assembly elect on or before the twentieth day of November preceding the meeting of the general assembly. Said biennial reports to embrace all receipts and disbursements up to the thirtieth of June preceding the election of said general assembly. (1923, c. 197, s. 1.)

§ 7534(b). Budget requests.—Each state institution shall, at the time of the mailing of the biennial reports, also furnish each member elect of the general assembly a budget request, together with the needs and requirements in such words, facts and figures as will enable any one to figure out the cost of said requirements in their budget request. (1923, c. 197, s. 2.)

§ 7534(c). Dismissal for failure to comply with two preceding sections.—Any officer of a state institution whose duty it is to make these reports, failing to file said biennial report or budget request as required in sections 7534(a) and 7534(b), unless an extension of time is given by the governor, shall be subject to dismissal from office. (1923, c. 197, s. 3.)

Art. 8. Inmates of State Institutions to Pay Costs

§ 7534(d). Institutions included.—All persons admitted to the State Hospital at Raleigh, State Hospital at Morganton, State Hospital at Goldsboro, Caswell Training School at Kinston, Stonewall Jackson Training School for Boys at Concord, the State Home and Industrial School for Girls at Samarcand, the East Carolina Training School at Rocky Mount, the Morrison Training School for Negro Boys in Richmond County, the School for the Deaf at Morganton, the School for the Blind and Deaf at Raleigh, and the North Carolina Sanatorium for the Treatment of Tuberculosis at Sanatorium, be and they are hereby required to pay the actual cost of their care, treatment, training and maintenance at such institutions, (1925, c. 120, s. 1.)

Editor's Note.—This act is an attempt to place all State charitable institutions on the same basis, with similar policies, so that the expense which the State bears will be lightened by requiring those who are able to pay to bear the expense of their care, maintenance and treatment. Suits may be brought in favor of the State for the recovery of the cost of caring for patients who are able to pay, and such patients may be removed from State institutions if no payment is made. 4 N. C. Law Rev. 17.

§ 7534(e). Governing board to fix cost and charges.—The respective boards of trustees or directors of each of said institutions, by whatever name they may be called, are hereby empowered with the final authority to determine and fix the actual cost of such training, treatment, care and maintenance, to be paid for by or for each inmate or patient, and the said boards of trustees or directors shall, to the best of their ability, fix such cost so as to include all the cost of such care, maintenance, treatment and training at such institutions, for each respective inmate, pupil or patient thereof, and the said sum, when so fixed, shall be the actual cost thereof: Provided, that the respective boards of directors

of each of said institutions above named, in determining and fixing the actual cost of such care, maintenance and treatment to be paid for by non-indigent inmates thereof, are hereby given full and final authority to fix a general rate of charge, to be paid on a monthly basis by inmates able to pay same, or in cases where indigent inmates later are found to be non-indigent, then such cost for past care and maintenance of such inmates shall be paid in one or more payments based on the monthly rates of cost in effect for the period or periods of time during which such inmates have been confined in said institutions. The past acts of the boards of directors in fixing a monthly rate to be paid by non-indigent inmates for their care and maintenance in such institutions are hereby in every respect ratified and validated, and on all claims and causes of actions for such purpose now pending and are unsettled, or which hereafter may be made or begun for the payment of said past indebtedness for care, maintenance and treatment, the rates so fixed by said board of directors shall prevail and said collections shall be made in accordance therewith. In any action by any of said state's charitable institutions for the recovery of the cost of the care, maintenance and treatment of any inmate, now pending or which may hereafter be instituted, a verified and itemized statement of the account, showing the period of time during which the said non-indigent inmate was confined to the institution, the monthly rate of charge as fixed by said board of directors of such institution for the period of time that the inmate was confined therein, the total amount claimed to be due thereon as predicated upon said rate of charge, and the proper credits for any payments which may have been made on said account, shall be filed with the complaint and shall constitute a prima facie case, and such state institution shall be entitled to a judgment thereon in the absence of allegation and proof on the part of the inmate's guardian, trustee, administrator, executor, or other fiduciary, that said verified and itemized statement of the superintendent or bookkeeper of said institution is not correct because of—

(a) an error in the calculation of the amount due as predicated upon said monthly rate or charge fixed by the board of directors, or

(b) an error as to the period of time during which the inmate was confined in said state institution or

(c) an error in not properly crediting the account with any cash payment, or payments, which may have been made thereon. (1925, c. 120, s. 2; 1935, c. 186, s. 1.)

Editor's Note.—The proviso at the end of this section relating to the right to fix general rate charges was added by the 1935 amendment.

§ 7534(f). Payments.—Such cost, when so fixed and determined by the respective boards of trustees or directors of each institution, shall be paid by the patient, pupil or inmate thereof, or by his parent, guardian, trustee or other person legally responsible therefor, and the payment thereof shall constitute a valid expenditure of the funds of any such pupil, patient or inmate by any fiduciary who may be in the control of such fund, and a receipt for the payment of such cost in the hands of such fiduciary shall be a valid voucher to the extent thereof in the settlement of his accounts of his trust. Immediately upon the determination of the cost, as herein provided for, the superintendent of the institution shall notify the patient, pupil, inmate, parent, guardian, trustee, or such other person who shall be legally responsible for the payment thereof, of the monthly amount thereof, and such statement shall be rendered from month to month. The respective boards of trustees or directors of the various institutions are vested with full and complete authority to arrange with the patient, pupil, inmate, parent, guardian, trustee, or other person legally responsible for the cost, for the payment of any portion of such cost monthly or otherwise, in the event such patient, pupil, inmate, parent, guardian, trustee or other person legally responsible therefor shall not be able to pay the total cost. The head of the various institutions shall annually file with the Auditor of the State a list of all unpaid accounts. The provisions of this article directing the boards of directors of the various institutions of this State above named to ascertain which of the inmates are non-indigent and able to pay for their care, maintenance and treatment, and also directing said boards of directors to make certain periodical demands upon the guardians or other persons responsible for said inmates for the payment of said charges, and which further directs them to remove all of those inmates found able to pay but who refuse to pay, and all of the other provisions of this article relating to the manner in which said board shall collect said costs, shall be construed to be directory provisions on the part of the authorities of said institutions and not mandatory, and the failure on the part of said authorities of such institutions to perform any or all of said provisions shall not affect the right of the state institutions so named to recover in any action brought for that purpose, either during the life-time of said inmates or after their death, in an action against their guardian if alive, or other fiduciary, or against the inmate himself, and if dead, against their personal representatives for the cost of their care, maintenance and treatment in said institutions. (1925, c. 120, s. 3; 1935, c. 186, s. 2.)

Editor's Note.—The last sentence of this section was added by the 1935 amendment.

§ 7534(g). Determining who is able to pay.—From and after March 4, 1925, the respective boards of trustees or directors of each institution shall ascertain which of the various patients, pupils or inmates thereof, or which of the parents, guardians, trustees, or other persons legally responsible therefor, are financially able to pay the cost, to be fixed and determined by this article, and so soon as it shall be ascertained such patient, pupil, inmate, parent, guardian, trustee or other person legally responsible therefor, shall be notified of such cost, and in general of the provisions of this article and such patient, pupil, inmate or the parent, guardian, trustee, or other person legally responsible therefor, shall have the option to pay the same or to remove the patient, pupil or inmate from

such institution, unless such person was committed by an order of a court of competent jurisdiction, in which event, the liability for the cost as fixed by this article shall be fixed or determined and payment shall be made in accordance with the terms of this article. (1925, c. 120, s. 4.)

Where patient is indigent at time of admission to state hospital and later becomes nonindigent, under this section, the hospital is entitled to recover the actual cost of the ward's care and maintenance for the whole period the ward was an inmate of the hospital, including the time the ward was indigent as well as the time he was nonindigent, and including the period both before and after demand by the hospital for the cost of his maintenance, and this is true even though this section was ratified after the admission of the ward. State v. Security Nat. Bank, 207 N. C. 697, 698, 178 S. E. 487.

§ 7534(h). Action to recover costs.—Immediately upon the fixing of the amount of such actual cost, as herein provided, a cause of action shall accrue therefor in favor of the State for the use of the institution in which such patient, pupil or inmate is receiving training, treatment, maintenance or care, and the State for the use of such institution may sue upon such cause of action in the courts of Wake County, or in the courts of the county in which such institution is located, against said patient, pupil or inmate, or his parents, or either of them, or guardian, trustee, committee, or other person legally responsible therefor, or in whose possession and control there may be any funds or property belonging to either the said pupil, patient or inmate, or to any person upon whom the said patient, pupil, or inmate may be legally dependent, including both parents. (1925, c. 120, s. 5.)

Applied in State v. Security Nat. Bank, 207 N. C. 697, 178 S. E. 487.

§ 7534(i). No limitation of such action.—No statute of limitation shall apply to or constitute a defense to any cause of action asserted by any of the above-named institutions for the collection of the cost of care, treatment, training or maintenance, or any or all of these against any person liable therefor, as herein provided, and all statutes containing limitations which might apply to the same are hereby pro tanto repealed, as to all such causes of action or claims, and this section shall apply to all claims, and causes of action for like cost heretofore incurred with such institutions and now remaining unpaid. (1925, c. 120, s. 6.)

Applied in State v. Security Nat. Bank, 207 N. C. 697, 178 S. E. 487.

§ 7534(j). Power of trustees to admit indigent persons.—This article shall not be held or construed to interfere with or to limit the authority and power of the management of the boards of trustees, or directors of any of the institutions named herein, to make provision for the care, custody, treatment and maintenance of all indigent persons who may be otherwise entitled to admission in any of the said institutions, and as to indigent pupils, inmates, and patients, the same provisions now contained in the several statutes relating thereto shall continue in force, but if at any time any of the said indigent patients, pupils or inmates shall succeed to or inherit, or acquire, in any manner, property, or any of the persons named above as legally responsible for the cost of care, treatment and maintenance of the pupil, inmate and patient at the above named institutions, shall acquire property, or shall otherwise be reputed to be solvent, then each of said institutions shall have the full right and authority to collect and sue for the entire cost and maintenance of such inmate, pupil or patient, without let or hindrance on account of any statute of limitation whatsoever. (1925, c. 120, s. 7.)

Applied in State v. Security Nat. Bank, 207 N. C. 697, 178 S. E. 487.

§ 7534(k). Suit by attorney general; venue.—At the request of such institution, all actions and suits shall be sued upon and prosecuted by the Attorney General, and such institution shall have the right to elect as to whether it will institute such action in the courts of Wake County or in the courts of the county in which such institution is located. (1925, c. 120, s. 8.)

§ 7534(l). Judgment; never barred.—Any judgment obtained by the State for the use of any of the above named institutions shall never be barred by any statute of limitation, but shall continue in force, and, at the request of the Attorney General or the superintendent of any of said institutions, an execution shall issue therefor at any time without requiring such institution to revive the said judgment, as is now provided by statute, but in case any judgment debtor, or any fiduciary responsible for the payment thereof, shall make affidavit and file the same with the clerk of the Superior Court from which such execution is issued, that payments have been made upon the said judgments, then the clerk shall recall said execution and proceed to hear and determine what is the true amount due thereon, if anything, in the same manner as is now required in motions to revive dormant judgments with the right of appeal to the judge of the Superior Court, as now provided in such motions, and the clerk of the Superior Court and the judge thereof shall have authority, in their discretion, to require security for the payment of the amount of said judgment pending such appeal. (1925, c. 120, s. 9.)

§ 7534(m). Death of inmate; lien on estate.—In the event of the death of any inmate, pupil or patient, or either of said institutions above named, leaving any such cost of care, maintenance, training and treatment unpaid, in whole or in part, then such unpaid cost shall constitute a first lien on all the property, both real and personal, of the said decedent, subject only to the payment of funeral expenses and taxes to the State of North Carolina. (1925, c. 120, s. 10.)

§ 7534(n). Money paid into state treasury.—All money collected by any institution pursuant to this article shall be by such institution paid into the State treasury, and shall be by the State Treasurer credited to the account of the institution collecting and turning the same into the treasury, and shall be paid out by warrants drawn by the Auditor as in cases of appropriations made for the maintenance of such institutions and shall be used by such institution as it uses and is authorized by law to use appropriations made for maintenance. (1925, c. 120, s. 11.)

Art. 9. State Building Contracts

§ 7534(o). Separate specifications for building contracts.—Every officer, board, department, commission or commissions charged with the duty of preparing specifications or awarding or entering into contract for the erection, construction or altering of buildings for the State, when the entire cost of such work shall exceed ten thousand dollars, must have prepared separate specifications for each of the following branches of work to be performed: 1. Heating and ventilating. 2. Plumbing and gas fitting. All specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by the State or a department, board, commissioner, or officer thereof, for the erection, construction or alteration of buildings, or any part thereof, shall award the respective work specified in the above subdivisions separately to responsible and reliable persons, firms or corporations regularly engaged in their respective line of work. (1925, c. 141, s. 2; 1929, c. 339, s. 2; 1931, c. 46.)

Editor's Note.—This section applies only to public contracts with counties and cities and also in case of the State itself. 4 N. C. Law Rev. 14.

The Act of 1929 which substituted "may" for the words "must" and "shall" in lines eight and eighteen of this section, was repealed by the Act of 1931.

§ 7534(o) 1. Competitive bids required before letting public construction contracts. — No construction or repair work, or purchase of apparatus, supplies, materials, or equipment requiring the expenditure of public money, the estimated cost of which equals or exceeds one thousand ($1,000.00) dollars, except in cases of special emergency involving the health and safety of the people or their property: Provided that nothing in this section shall operate so as to require any public agency to enter into a contract that will prevent the use of unemployment relief labor paid for in whole or in part by appropriations or funds furnished by the state or federal government, shall be performed or contract awarded by any board or governing body of the state or sub-divisions thereof, unless proposals shall have been invited by advertisement at least one week before the time specified for opening of said proposals in a newspaper having circulation in the state of North Carolina. Such advertisement shall state the time and place where plans and specifications of proposed work or complete description of apparatus, supplies, materials or equipment may be had, and the time and place for opening the proposals, and shall reserve to said board or governing body the right to reject any or all such proposals. Proposals shall not be rejected for the purpose of evading the provisions of this act and no board or governing body of the state or subdivision thereof shall assume responsibility for construction or purchase contracts or guarantee the payments of labor or materials therefor. All proposals shall be opened in public and shall be recorded on the minutes of the board or governing body and the award shall be made to the lowest responsible bidder, taking into consideration quality and the time specified in the proposals for the performance of the contract. Each proposal shall be accompanied with a deposit to the board or governing body of cash or a certified check on some bank or trust company authorized to do business under the laws of the state of North Carolina in an amount equal to not less than two per centum of the proposal; said deposit to be retained in the event of failure to execute the contract within ten days after the award, or to give satisfactory security as required herein. All contracts required herein shall be executed in writing, and where the amount involved is one thousand ($1,000.00) dollars or more, the board or governing body shall require the person, firm or corporation to whom the award of contract is made to furnish bond in some surety company authorized to do business in the state, or require a deposit of money, certified check or government securities for the full amount of said contract for the faithful performance of the terms of said contract; and no such contract shall be altered except by written agreement of the contractor, the sureties on his bond and the board or governing body. Such surety bond or securities required herein shall be deposited with the treasurer of the branch of the government for which the work is to be performed until the contract has been carried out in all respects. (1933, c. 400, s. 1.)

§ 7534(o) 2. Allowance for convict labor must be specified.—In cases where the board or governing body may furnish convict or other labor to the contractor, manufacturer or others entering into contracts for the performance of construction work, installation of apparatus, supplies, materials or equipment, the specifications covering such projects shall carry full information as to what wages shall be paid for such labor or the amount of allowance for same. (1933, c. 400, s. 2.)

§ 7534(o) 3. No evasion permitted.—No bill or contract shall be divided for the purpose of evading the provisions of this article. (1933, c. 400, s. 3.)

§ 7534(o) 4. Highway and prison departments excepted.—This article shall not apply to the state highway and prison department of the state of North Carolina. (1933, c. 400 s. 3-A.)

§ 7534(o) 5. Limitation of application of sections.—Sections 7534(o) 1 to 7534(o) 4 shall not apply in so far as they affect governmental agencies of sub-divisions of the state of North Carolina doing or performing by or through its or their duly elected officers or agents work for such agency up to and including an amount not to exceed five thousand ($5.000.00) dollars. (1933, c. 552, ss. 1, 2.)

Art. 10. Construction Contracts of State Institutions

§ 7534(p). Must be awarded after competitive bidding where cost exceeds $1,000.—No contract for construction or repair work involving the expenditure of public money, the estimated cost of which amounts to or exceeds $1,000.00 (one thousand dollars) except in cases of special emergency involving the health or safety of the people or their property, shall be awarded by any

board or governing body of any institution of the State Government unless proposals for same shall have been invited by advertisement in at least one newspaper having general daily circulation in the State of North Carolina, publication to be not less than ten days before the time specified for the opening of said proposals. Such advertisement shall state the time and place where plans and specifications of the proposed work may be had and the time and place for the opening of proposals in answer to such advertisement, and shall reserve to said board or governing body the right to reject any and all such proposals. All such proposals shall be opened in public, shall be recorded on the minutes of the board of governing body, and the award, if any be made, shall be made to the lowest responsible bidder. Each proposal shall be accompanied by a deposit with the board or governing body of cash or a certified check on some bank or trust company organized under the laws of this State in an amount equal to not less than two per centum of the proposals; said deposit to be retained in the event of failure on the part of the successful bidder to execute the contract within ten days after the award, or to give satisfactory security as required herein. All contracts required herein shall be executed in writing and the contractor shall furnish bond in some surety company authorized to do business in this State for the full amount of the contract for the faithful performance of the terms thereof. No such contract shall be altered except by written agreement of the contractor, the sureties on his bond and the board or governing body of the institution. (1931, c. 291, s. 1.)

§ 7534(q). Division of contracts prohibited. — No contract for construction or repair work upon any permanent improvement of any institution of the State shall be divided for the purpose of evading any provisions of this article. (1931, c. 291, s. 2.)

§ 7534(r). Three proposals necessary for contracts up to $5,000; five proposals, where contract exceeds $5,000. — No contracts covered by the provisions of this article for construction or repair work on any permanent improvement of any institution of the State shall be awarded by any board or governing body of such institution unless proposals shall have been made by at least three reputable contractors where the estimated cost thereof shall not exceed $5,000.00 (five thousand dollars) and by at least five reputable contractors where the estimated cost thereof shall exceed $5,000.00 (five thousand dollars). (1931, c. 291, s. 3.)

§ 7534(s). State and county prison projects excepted. — The provisions of this article shall not apply to any construction by or for the State Prison or county prison projects. (1931, c. 291, s. 4.)

§ 7534(t). Conflicting laws repealed; Executive Budget Act preserved.—All laws and clauses of laws in conflict with the provisions of this article in so far as they conflict herewith are hereby repealed: Provided, that nothing herein shall be considered as in any way affecting or repealing any of the provisions of the Executive Budget Act, chapter one hundred, Public Laws one thousand nine hundred and twenty-nine [§§ 7486(j) et seq.], the provisions of which act shall be continued in full force and effect. (1931, c. 291, s. 5.)

Art. 11. State Fair

§ 7534(u). Land set apart.—For the purpose of the holding annually of a State Fair and exposition which will properly represent the agricultural, manufacturing, industrial and other interests of the State of North Carolina, there is hereby dedicated and set apart two hundred acres of land owned by the State or any department thereof within five miles of the State Capitol, the particular acreage to be selected, set apart, and approved by the Governor and Council of the State of North Carolina. (1927, c. 209, s. 1.)

§ 7534(v). Board of agriculture. — The State Fair provided for in section 7534(u), shall be managed, operated and conducted by the board of agriculture established in section 4667. To that end, said board of agriculture shall, at its first meeting after the ratification of this section, take over said State Fair, together with all the lands, buildings, machinery, etc., located thereon, now belonging to said State Fair and shall hold and conduct said State Fair with all the authority and power conferred upon the former board of directors, and it shall make such rules and regulations as it may deem necessary for the holding and conducting of said Fair, and/or lease said Fair properties so as to provide a State Fair. (1931, c. 360, s. 3.)

Editor's Note.—This section repealed Public Laws 1927, c. 209, s. 2, providing for the management and operation of the fair by a board of directors.

§ 7534(w). Conditions of dedication of land.—The dedication and setting apart of the two hundred acres of land above referred to is conditioned upon the city or citizens of Raleigh and the North Carolina Agricultural Society donating not less than two hundred thousand dollars to be used in the erection of buildings or proper development of the two hundred acres as a State Fair Grounds site, and the conducting of a fair thereon. (1927, c. 209, s. 3.)

§ 7534(x). Funds from sale of old fair grounds to be made available.—The city of Raleigh and the North Carolina Agricultural Society are hereby authorized and empowered to give and deliver over unto the State of North Carolina in complete and perfect ownership in furtherance of said object, any and all funds or properties received or at any time available from the sale of the old State Fair Grounds. (1927, c. 209, s. 4.)

§ 7534(y). Lands dedicated by State may be repossessed at will of general assembly.—Any lands which may be dedicated and set apart under the provisions of this article may be taken possession of and repossessed by the State of North Carolina, at the will of the General Assembly. (1927, c. 209, s. 4(a).)

Art. 12. Commission to Study Departments

§ 7534(z). Governor to appoint commission to make study of administrative government.—The Governor may appoint a commission, the number of which shall be fixed by him, and such

commission, when appointed, shall be charged with and directed to perform the following duties:

(a) The study of all departments, divisions and agencies of the State of North Carolina.

(b) To collect and codify all available information and thought upon the performance of the duties of each department, board or agency in the State of North Carolina.

(c) To study and collect information and advise the extent of all overlapping in the duties enjoined upon all boards, departments, divisions or agencies and the overlapping, if any, in the actual performance of these duties.

(d) To use all the information collected by the boards and commissions and agencies who have heretofore studied and reported about the matters included in this act, as well as all cognate matters to the end that the work of this commission shall be in furtherance of the work on these subjects already done.

(e) The said commission shall make its report to the Governor who shall transmit the same to the General Assembly with such recommendations as he shall see fit to make in regard thereto.

(f) That the report of the said commission shall contain and include separate studies and recommendations as to all departments, boards and agencies that are statutory, either in their creation or in the fixing of their duties, and shall draft and present therewith such bills for legislative consideration as may to it seem proper and sufficient to carry out their recommendations in regard thereto.

The said report shall also contain, as a distinct part thereof, its studies and recommendation as to all constitutional offices, departments, boards or agencies, and their recommendations thereon, together with a draft of such constitutional amendments as may, in their opinion, be necessary, in order to bring about the recommended changes therein. (1929, c. 104, s. 1.)

§ 7534(aa). Commission to serve without compensation.—Inasmuch as the duties of such commission are such as all good citizens desire to promote, a performance of the duties of the members of this commission shall be considered a contribution to the welfare of the State and shall, therefore, be without compensation. (1929, c. 104, s. 2.)

§ 7534(bb). Power to serve subpoenas and examine witnesses; execution of writs.—Said commission is given full power to issue subpoenas or any other writs necessary or required to compel the attendance of witnesses and such process shall run anywhere in the State and be served by all officers now charged with the duty of serving civil process, without fees for such service. Said commission shall have full power to punish for disobedience to any of its writs or subpoenas in the same manner as the Superior Court may now punish in like offenses but the offender shall have the right of appeal to the Superior Court of Wake County upon the giving of such security for his attendance therein as may be required by the commission. All persons shall be bound to obey such writs, except the Governor and the Judiciary. All writs shall be executed in the name of the chairman of the commission and a seal thereto shall not be necessary or required. (1929, c. 104, s. 3.)

Art. 13. Commission to Study Control of Alcoholic Beverages

§ 7534(1). Governor directed to appoint special commission; report to general assembly. — The governor of North Carolina is hereby authorized and directed to appoint a commission of seven (7) citizens of North Carolina, whose duty it shall be to meet as soon as practicable after their appointment and make a thorough investigation of conditions in North Carolina relative to the sale, manufacture and use of alcohol for beverage purposes, and said commission shall further consider the control laws of other states of the United States or other political sub-divisions. The commission shall meet from time to time, shall hold hearings, and shall be authorized to make public its findings and conclusions and shall report all of its findings together with any conclusions or recommendations which it deems advisable respecting laws or changes in the present law for the control of alcohol for beverage purposes. Said report shall be made to the next session of the general assembly whether it be any special session of the one thousand nine hundred and thirty-five general assembly or the general assembly of one thousand nine hundred and thirty-seven. (1935, c. 476, s. 1.)

§ 7534(2). Pay and expenses limited. — Said commission shall not be authorized to pledge the credit of the State of North Carolina or to incur any expenses, nor shall its members receive any compensation for their services other than the compensation now paid the members of the budget commission as provided by law. (1935, c. 476, s. 2.)

Art. 14. State Planning Board

§ 7534(3). Board approved as advisory agency of state; membership; vacancies; compensation.— The state planning board as designated by the governor, on January twenty-sixth, one thousand nine hundred and thirty-five, is hereby approved as an advisory agency of the State, under direction of the governor, and that membership on said board shall constitute "commissioner for special purposes" within the meaning of section seven of article fourteen of the Constitution. The persons named upon the said state planning board by the governor on January twenty-sixth, one thousand nine hundred and thirty-five, shall constitute the membership of said board during the pleasure of the governor, and all vacancies on the board may be filled by the governor. The members of the said board shall serve without pay. (1935, c. 488, s. 1.)

§ 7534(4). Duties of board as to public projects; investigations and assembling of data. — It shall be the duty of the said board to collect and arrange data concerning various projects in the State of North Carolina that in the opinion of the board may constitute proper and useful projects for development within the scope of the various agencies of the State or agencies of the federal government for which funds are now or may hereafter be made available. The said board

shall have authority to make investigations and to correlate information on all such matters as may be referred to it by the governor or the various agencies of the State. (1935, c. 488, s. 2.)

§ 7534(5). Provision for expenses out of contingent fund.—In order to carry out the purposes of the board, the governor may from time to time make provision for any necessary expenses thereof, not provided by the federal government, out of the contingent fund appropriated for the use of the governor's office, and the said board may be authorized to accept and disburse under the approval of the director of the budget any contributions that may be made available for the work in which it is engaged by any state or federal agency or private or public endowment. (1935, c. 488, s. 3.)

Art. 15. Revenue Bonds and Governmental Aid

§ 7534(6). State agencies may issue bonds to finance certain public undertakings.—The several departments, institutions, agencies and commissions of the State of North Carolina, acting at the suggestion of the governor of North Carolina, with the approval of the council of state, are hereby authorized to issue bonds of several departments, agencies or commissions of the state, in such sum or sums, not to exceed in the aggregate two million dollars, at such time or times, in such denominations as may be determined, and at such rate of interest as may be most advantageous to the several departments, institutions, agencies and commissions of the State, the said bonds to run for a period not exceeding thirty years from date, which bonds may be sold and delivered as other like bonds of the State of North Carolina: Provided, however, that the credit of the State of North Carolina, or any of its departments, institutions, agencies or commissions, shall not be pledged further in the payment of such bonds, except with respect to the rentals, profits and proceeds received in connection with the undertaking, for which said bonds are issued, and said bonds and interest so issued shall be payable solely out of the receipts from the undertaking for which they were issued, without further obligation on the part of the State of North Carolina, or any of its departments, institutions, agencies or commissions, provided that no state department or institution issuing any of said bonds shall be allowed to pledge any of its appropriations received from the State as security for these bonds; Provided, further, that no state department, institution, agency or commission of the State shall make application for or issue any bonds, as provided in this section, after December thirty-one, one thousand nine hundred thirty-six. (1935, c. 479, s. 1.)

§ 7534(7). Acceptance of federal loans and grants permitted.—The said State of North Carolina, and its several departments, institutions, agencies and commissions, is hereby authorized to accept and receive loans, grants, and other assistance from the United States government, departments and/or agencies thereof, for its use, and to receive like financial and other aid from other agencies in carrying out any undertaking which has been authorized by the governor of North Carolina, with the approval of the council of state. (1935, c. 479, s. 2.)

§ 7534(8). Approval by governor and council of state necessary.—The several departments, institutions, agencies and commissions of the State of North Carolina, before issuing any revenue bonds as herein provided for any undertaking, shall first receive the approval of the undertaking from the governor of North Carolina, which action shall be approved by the council of state before such undertaking shall be entered into and revenue bonds issued in payment therefor in whole or in part. (1935, c. 479, s. 3.)

CHAPTER 127
STATE FLAG

§ 7535. State flag.—The flag of North Carolina shall consist of a blue union, containing in the center thereof a white star with the letter "N" in gilt on the left and the letter "C" in gilt on the right of said star, the circle containing the same to be one-third the width of said union. The fly of the flag shall consist of two equally proportioned bars, the upper bar to be red, the lower bar to be white; the length of the bars horizontally shall be equal to the perpendicular length of the union, the total length of the flag shall be one-third more than its width. Above the center of the union there shall be a gilt scroll in semicircular form, containing in black letters this inscription: "May 20th, 1775," and below the star there shall be a similar scroll containing in black letters the inscription: "April 12th, 1776." (Rev., s. 5321; 1885, c. 291.)

§ 7536. State Motto.—The words "esse quam videri" are hereby adopted as the motto of this state, and as such shall be engraved on the great seal of North Carolina and likewise at the foot of the coat-of-arms of the state as a part thereof. On the coat-of-arms, in addition to the motto, at the bottom, there shall be inscribed at the top the words, "May 20th, 1775." (Rev., s. 5320; 1983, c. 145.)

§ 7537. Flags to be displayed on public buildings and institutions.—The board of trustees or managers of the several state institutions and public buildings shall provide a North Carolina flag, of such dimensions and material as they may deem best, and the same shall be displayed from a staff upon the top of each and every such building, at all times except during inclement weather, and upon the death of any state officer or any prominent citizen the flag shall be put at half-mast until the burial of such person has taken place. (1907, c. 838, s. 2.)

§ 7538. Flags to be displayed at county courthouses.—The board of county commissioners of the several counties in this state shall likewise authorize the procuring of a North Carolina flag, to be displayed either on a staff upon the top or draped behind the judge's stand, in each and every courthouse in the state, and that the state flag shall be displayed at each and every term of court held, and on such other public occasions as the commissioners may deem proper. (1907, c. 838, s. 3.)

§ 7539. Flags to conform to law.—No state flag shall be allowed in or over any building here mentioned unless such flag conforms to the description of the state flag contained in this chapter. (1907, c. 938, s. 4.)

CHAPTER 127A

STATE SONG

§ 7539(a). "The Old North State."—The song known as "The Old North State," as hereinafter written, adopted and declared to be the official song of the State of North Carolina, said song being in words as follows:

"Carolina! Carolina! Heaven's blessings attend her!
While we live we will cherish, protect and defend her;
Though the scorner may sneer at and witlings defame her,
Our hearts swell with gladness whenever we name her.
Hurrah! Hurrah! The Old North State forever!
Hurrah! Hurrah! the good Old North State!

Though she envies not others their merited glory,
Say, whose name stands the foremost in Liberty's story!
Though too true to herself e'er to crouch to oppression,
Who can yield to just rule more loyal submission?

Plain and artless her sons, but whose doors open faster
At the knock of a stranger, or the tale of disaster?
How like to the rudeness of their dear native mountains,
With rich ore in their bosoms and life in their fountains.
And her daughters, the Queen of the Forest resembling—
So graceful, so constant, yet to gentlest breath trembling;
And true lightwood at heart, let the match be applied them,
How they kindle and flame! Oh! none know but who've tried them.

Then let all who love us, love the land that we live in
(As happy a region as on this side of Heaven),
Where Plenty and Freedom, Love and Peace smile before us,
Raise aloud, raise together, the heart-thrilling chorus!"

(1927, c. 26, s. 1.)

CHAPTER 128

STATE LANDS

SUBCHAPTER I. ENTRIES AND GRANTS

Art. 1. Lands Subject to Grant

§ 7540. Vacant lands; exceptions.—All vacant and unappropriated lands belonging to the state shall be subject to entry by any citizen thereof, in the manner hereinafter provided, except—

1. Lands covered by navigable waters.

2. Lands covered by the waters of any lake, or which, though now covered, may hereafter be gained therefrom by the recession, draining, or diminution of such waters, or have been so gained heretofore and not lawfully entered.

3. Marsh or swamp land, where the quantity of land in any one marsh or swamp exceeds two thousand acres, or where, if of less quantity, the same has been surveyed by the state, or by the state board of education, with a view to draining and reclaiming the same. (Rev., s. 1693; Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21.)

Cross Reference.—As to "land covered by navigable water" see sec. 7543 and notes; as to Indian lands see 7 N. C. Enc. Dig. 472, 10 N. C. Enc. Dig. 575, 583; as to land in general not subject to entry see 10 N. C. Enc. Dig. 597.

Effect of Grant.—Lands once granted by the state to individual citizens do not become "vacant lands" within the meaning of the statute, where the state subsequently acquires title to them but abandons the actual use to which they were put. State v. Bevers, 86 N. C. 588.

Swamp lands, within the meaning of this section are those too wet for cultivation except by drainage. Beer v. Whiteville Lumber Co., 170 N. C. 337, 86 S. E. 1024.

Swamp lands of two creeks may be separate and not subject to the same application of this section though it appears that sometimes during freshets and high water these are all covered with one sheet of water. Beer v. Whiteville Lumber Co., 170 N. C. 337, 86 S. E. 1024.

A tract of land within the area of swamp lands coming within the meaning of this section need not necessarily be free from knolls or higher and drier places. State Board v. Roanoke R. Co., 158 N. C. 313, 73 S. E. 994.

Grants to Land Not Subject to Entry.—An entry made to swamp land when the body contains more than 2,000 acres is void, and a grant under such entry is void. State Board v. Roanoke R. Co., 158 N. C. 313, 73 S. E. 994.

§ 7541. What swamp lands subject to grant.—Marsh or swamp lands, lying in a swamp where the quantity of land does not in the whole swamp or marsh exceed two thousand acres, and which has not been surveyed by the state or state board of education, and marsh or swamp lands, unsurveyed as aforesaid, not exceeding fifty acres in one body, though lying within a marsh or swamp of a greater number of acres than two thousand, may be entered, when the same shall be situated altogether between the lines of tracts heretofore granted. (Rev., s. 1694; Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21.)

§ 7541(a). Department of conservation and development to locate land subject to entry.—"The State Department of Conservation and Development is hereby directed to investigate and locate all vacant and unappropriated lands now subject to entry and grant as described in sections seven thousand five hundred and forty and seven thousand five hundred and forty-one of the Consolidated Statutes, and determine what parcels of land among them seem suitable for State parks, State forests, State game refugees or shooting grounds, and report at once the result of their investigation to the Governor of the State, together with their findings thereupon, and such recommendations as to the disposition of the particular parcels of land within the meaning of this section as they may determine best. If upon such report the Governor should determine that it is to the interest of the State that any particular parcel of such land should be devoted to such purposes, he shall recommend to the next succeeding session of the General Assembly the withdrawal of such parcel or parcels of land from entry, and immediately upon publica-

tion of such proclamation, such parcel or parcels of land shall be devoted to the public purpose designed and specified. Upon such withdrawal from entry such parcel or parcels of land shall be administered for the purposes to which it is devoted by the said State Department of Conservation and Development." (1927, c. 83, s. 1.)

§ 7542. Swamp lands defined. — The words "marsh and swamp land" wherever employed in this chapter, and the words "swamp lands" employed in the statutes creating the literary fund and literary board of North Carolina and the state board of education of North Carolina, or in any act in relation thereto, shall be construed to include all those lands which have been or may now be known and called "swamp" or "marsh" lands, "pocosin bay," "briary bay," and "savanna." and all lands which may be covered by the waters of any lake or pond. (Rev., s. 1695; 1891, c. 302.)

§ 7542(a). Investigating and locating marsh or swamp lands. — The State Department of Conservation and Development is hereby directed to investigate and locate the body or bodies, or parcel or parcels of marsh or swamp land, the title to which is now vested in the State Board of Education under sections seven thousand five hundred and forty and seven thousand five hundred and forty-two of the Consolidated Statutes, and determine what parcels of land among them seem suitable for State parks, State forests, State game refuges or shooting grounds, and report at once the result of their investigation to the Governor of the State, together with their findings thereupon and such recommendations as to the disposition of the particular parcels of land within the meaning of this section as they may determine best. Upon such report to the Governor, he shall bring the matter to the attention of the next succeeding session of the General Assembly and if his recommendation thereupon is approved by the General Assembly, said parcel or parcels of marsh or swamp lands shall be withdrawn from sale and shall be administered for the benefit of the people of the State for the purposes set out in this act by said Department of Conservation and Development. (1927, c. 83.)

§ 7543. Land covered by water, for wharves. —Persons owning lands on any navigable sound, river, creek or arm of the sea, for the purpose of erecting wharves on the side of the deep waters thereof, next to their lands, may make entries of the lands covered by water, adjacent to their own, as far as the deep water of such sound, river, creek, or arm of the sea, and obtain title as in other cases. But persons making such entries shall be confined to straight lines, including only the fronts of their own tracts, and shall in no respect obstruct or impair navigation. When any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water to which wharves may be built. This shall not affect existing rights. For all lands thus entered there shall be paid into the treasury not less than one dollar per acre. When any person has erected a wharf on public lands of the description aforesaid, before the first of January, one thousand nine hundred and three, such person shall have liberty to enter such land, including his wharf, under the restrictions and upon the terms above set forth: Provided, no land covered by water shall be subject to entry within thirty feet of any wharf, pier or stand used as a wharf in existence, or which may hereafter be erected by any person on his own land or land under his control, or on an extended line thereof; but land covered by water as aforesaid for the space of thirty feet from the landing place or line of any wharf, pier or stand used as a wharf, as aforesaid, shall remain open for free ingress and egress of the owner and other persons to and from such wharf, pier, or stand: Provided further, no person shall be allowed to enter and obtain a grant for any land in the waters of Onslow county, in which the tide ebbs and flows, within thirty feet of the shore at low-water mark, unless the enterer shall be the owner of the adjacent shore. (Rev., s. 1696; Code, s. 2751; R. C., c. 42, s. 1; 1854-5, c. 21; 1889, c. 555; 1891, c. 532; 1893, c. 4; 1893, c. 17; 1893, c. 349; 1901, c. 364.)

As to rights in general see Wharves 12 N. C. Enc. Dig. 363.

Editor's Note.—In State v. Eason, 114 N. C. 787, 19 S. E. 88 it was held that a city whose limits extended to a navigable stream has jurisdiction only to the low water mark. In view of this case it would seem that a city can only regulate the deep water line, for the purpose of entry when the stream is in the city, and it has not the power of regulating the deep water line when it extends only to the stream, unless so provided by its charter or express legislation.

Entry by Riparian Owner.—Navigable waters may be entered to the deep water line, for wharfage purposes, Barfoot v. Willis, 178 N. C. 200, 100 S. E. 303, but this right of entry is restricted to riparian owner, and applies only to this immediate water front. Bond v. Wood, 107 N. C. 139, 12 S. E. 281.

A grant to a riparian owner of land covered by navigable water conveys only an easement therein, and a deed of the land adjoining the navigable water conveys the easement in the land covered by the water. Shephard's Point Land Co. v. Atlantic Hotel, 132 N. C. 517, 44 S. E. 39.

Regulating Deep Water Line by Mandamus.—Mandamus will lie by a riparian owner of land lying within the limits of an incorporated town, or city, to compel the town or city to "regulate the deep water line to which wharves may be built" as required by this section. Wool v. Edenton, 115 N. C. 10, 20 S. E. 165.

Prior to this case the court had held, because of statute that a riparian owner in a city could not make an entry and the secretary of state could not issue a grant until the line of deep water had been regulated by the municipal corporation. Wool v. Saunders, 108 N. C. 729, 13 S. E. 294. But by statute now the duty of the town is "when any such entry is made," not in terms to fit the line of deep water to which entry may be extended, but to, "regulate the line of deep water to which wharves may be built."—Ed. Note.

Rights go with Land.—Riparian rights being incident to land abutting on navigable water can not be conveyed without a conveyance of such land, and lands covered by navigable water are subject to entry only by the owner of the land abutting thereon. Zimmerman v. Robinson, 114 N. C. 39, 19 S. E. 102; Land Co. v. Hotel, 134 N. C. 397, 46 S. E. 749. A plaintiff acquires only an easement in the bed of navigable waters in front of its shore lots, for the purpose of building a wharf. Atlantic, etc., R. Co. v. Way, 172 N. C. 774, 779, 90 S. E. 937.

Same—Fishing Rights.—The right to build a wharf in front of riparian property does not give the riparian owner exclusive fishing privilege in the navigable part of the stream on which his property fronts. But the riparian owner will be protected from wrongful interference. Beil v. Smith, 171 N. C. 116, 87 S. E. 987.

Erroneous Survey of the Deep Water Line.—In case the line marked out is not the deep water line a riparian owner has a right to have the error corrected, and he will not be estopped because of a grant had under the erroneous survey. Wool v. Edenton, 117 N. C. 1, 23 S. E. 40.

§ 7544. Certain lakes not to be sold.—White lake, Black lake, Waccamaw lake, and any other lake in Bladen, Columbus, or Cumberland counties, containing five hundred acres or more, shall never be sold nor conveyed to any person, firm, or corporation, but shall always be and remain the property of the state of North Carolina for the use and benefit of all the people of the state. (1911, c. 8.)

For an act to preserve the recreational advantages of the State Lakes, see Public Laws 1933, c. 516.

§ 7544(a). State lakes of 50 acres or more prohibited from ever being sold.—All lakes now belonging to the State, having an area of fifty acres or more, shall never be sold nor conveyed to any person, firm or corporation, but shall always be and remain the property of the State of North Carolina for the use and benefit of all the people of the State to be administered as provided for other recreational areas now owned or to be acquired by the State. (1929, c. 165, s. 1.)

§ 7545. Void grants; not color of title.—Every entry made, and every grant issued, for any lands not authorized by this subchapter to be entered or granted, shall be void; and every grant of land made since the sixth day of March, one thousand eight hundred and ninety-three, in pursuance of the statutes regulating entries and grants, shall, if such land or any portion thereof has been heretofore granted by this state, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights upon the grantee therein or those claiming under such grantee, and shall in no case and under no circumstances constitute any color of title to any person. (Rev., s. 1699; Code, s. 2755; R. C., c. 42, s. 2; 1893, c. 490.)

As to void grants because of prior grants, in general see 10 N. C. Enc. Dig. 597.

In General. — Where there are two or more conflicting titles derived from the State, the elder shall be preferred, upon the familiar maxim that he who is prior in time shall be prior in right and shall be adjudged to have the better title. Berry v. Lumber Co., 141 N. C. 386, 54 S. E. 278.

Under the express provisions of this statute where land in controversy has been previously granted to plaintiff's predecessor in title, a subsequent grant of the same land, under which defendants claimed title, was void for all purposes. Johnston v. Kramer Bros., 203 Fed. 733, 734.

State Not Interested in Conflicting Grants.—A protest to the entry raises the issue of title solely between the enterer and protestant, in which the State is not interested. The burden being on the enterer to prove the protestants grant does not cover the land described in his entry. Walker v. Parker, 169 N. C. 150, 151, 85 S. E. 306.

Title by Adverse Possession.—Where upon protest to the entry of State's lands it is ascertained that the lands described in the entry are not contained in the former grant, the protestant may show, that the lands are not vacant and unappropriated by sufficient adverse possession to take the title out of the State and vest it in himself. Walker v. Parker, 169 N. C. 150, 151, 85 S. E. 306.

Title to Lappage by Adverse Possession.—To mature a title under the junior grant, there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. Land Co. v. Floyd, 167 N. C. 686; 83 S. E. 687; Currie v. Gilchrist, 147 N. C. 648, 61 S. E. 581; McLean v. Smith, 106 N. C. 172, 11 S. E. 184; Boomer v. Gibbs, 114 N. C. 76, 19 S. E. 226; Carolina Central Land Co. v. Potter, 189 N. C. 56, 127 S. E. 343.

Application to Grants Prior to March 6, 1893.—This section providing that a junior grant shall not be color of title so far as it covers land previously granted, applies, by the terms of that section, only to grants issued since March 6, 1893. Weaver v. Love, 146 N. C. 414, 415, 417, 59 S. E. 1041; Land Co. v. Western, 177 N. C. 248, 98 S. E. 706.

Art. 2. Entry-Taker

§ 7546. Election and term of office. — The board of commissioners of the several counties shall elect one person to receive entries of claims for lands within each county; and such entry-taker shall hold his office for four years. (Rev., s. 1700; Code, s. 2756.)

Deputies Not Allowed.—The duties of the entry-taker are personal and cannot be performed by a deputy or any other person. Pearson v. Powell, 100 N. C. 86, 6 S. E. 188; Maxwell v. Wallace, 38 N. C. 593.

§ 7547. Oath of office; fees.—The entry-taker shall take the oath of office and receive the fees, and no other, prescribed in the chapters respectively entitled Oaths and Salaries and Fees. (Rev., s. 1703; Code, s. 2760; 1868-9, c. 173, s. 5.)

§ 7548. Bond required. — Every entry-taker shall enter into bond in the sum of five hundred dollars, payable to the state, with sufficient surety, approved by the county commissioners, for the faithful discharge of the duties of his office. (Rev., s. 304; Code, s. 2758; 1868-9, c. 173, s. 3.)

§ 7549. Office of entry-taker at courthouse.— The entry-taker shall keep his office at the courthouse of his county, or within one mile thereof, on pain of forfeiting one hundred dollars to the county, to be sued for by the county treasurer. (Rev., s. 1704; Code, s. 2759; 1868-9, c. 173, s. 4.)

§ 7550. Annual returns. — Every entry-taker shall make return to the secretary of state annually, on the first day of January, of all lands entered with him, under a penalty of two hundred dollars. (Rev., s. 1705; Code, s. 2775; R. C., c. 42, s. 18; 1796, c. 455, s. 9; 1881, c. 265.)

§ 7551. Penalty for failure to make returns; how recovered.—The secretary of state shall furnish the attorney-general, at every spring term of the superior court of Wake county, with a certificate of failure in every case where an entry-taker shall fail to make return according to law; and the attorney-general shall move for judgment against such entry-taker and his sureties, and the courts shall give judgment accordingly. (Rev., s. 1706; Code, s. 2776; R. C., c. 42, s. 19; 1833, c. 15.)

§ 7552. Warrants issued by successor in office. —In all cases where an entry is made, and the entry-taker dies or resigns before a warrant is issued thereupon, his successor shall issue a warrant. (Rev., s. 1702; Code, s. 2772; R. C., c. 42, s. 15; 1835, c. 19.)

§ 7553. Register of deeds acts in case of vacancy.—When a vacancy exists in the office of entry-taker, the register of deeds shall act as entry-taker until such vacancy is filled by an election by the commissioners. The register of deeds, in such case, shall take charge of the books belonging to the office, shall discharge all the duties and receive the emoluments, and shall be subject to the rules, regulations, and penalties prescribed for entry-takers. (Rev., s. 1701; Code, s. 2757; 1868-9, c. 100, s. 2; 1868-9, c. 173, s. 2.)

Art. 3. Entries

§ 7554. Who entitled to make entries.—Any citizen of this state, and all persons who come into the state with the bona fide intent of becoming residents and citizens thereof, have the right and privilege of making entries of, and obtaining grants for, vacant and unappropriated lands. (Rev., s. 1692; Code, s. 2754; 1869-70, c. 19, s. 1.)

As to entries in general, see, 10 N. C. Enc. Dig. 578-590.

Title of Nonresident Grantee. — A nonresident claiming under a state grant has a valid title, unless it appears that he did not conform the statute in procuring the grant. The burden of proof is upon the plaintiff in setting aside a grant for any cause not appearing upon the face. Weaver v. Love, 146 N. C. 414, 415, 59 S. E. 1041.

How Title of Nonresident Questioned. — An alien has capacity to take, but not capacity to hold land; . . . he cannot hold it against the sovereign, should the sovereign choose to assert his claim thereto as forfeited. But against all the rest of the world the alien has full capacity to hold, and he can hold even against the sovereign until the estate be divested by an office found or some other equally solemn sovereign act. Rouche v. Williamson, 25 N. C. 141, 146; Wilson v. Land Co., 77 N. C. 457; Johnson v. Eversole Lumber Co., 144 N. C. 717, 720, 57 S. E. 518.

Rights of Alien Bona-Fide Entered.—A resident of another State coming into this State with the intention of becoming a bona fide resident, and entering vacant land, is of right entitled to recover grants for the same, provided he moved and settled here within the time required to perfect his entries. Mockridge v. Howerton, 72 N. C. 221.

Railroads Not Included.—A railroad company having no power to acquire lands except that which is limited to railroad purposes, does not come within the intent and meaning of this section. Wallace v. Moore, 178 N. C. 114, 100 S. E. 237.

Enterer Must Show Land is Vacant.—The burden is upon the enterer to sustain his right to make entry by showing such to be in substantial form a compliance with the statute, that the lands were vacant and unappropriated. Walker v. Carpenter, 144 N. C. 674, 57 S. E. 461.

§ 7555. Entries in writing, with description of land.—The claimant of land shall produce to the entry-taker a writing, signed by such claimant, setting forth where the land is situated, the nearest water-courses and remarkable places, and such water-courses and remarkable places as may be therein, the natural boundaries and the lines of any other person, if any, which divide it from other lands; and every such writing shall be one-quarter sheet of paper at least. (Rev., s. 1707; Code, s. 2765; R. C., c. 42, s. 11; 1777, c. 114, s. 5; 1783, c. 185, s. 11; 1885, c. 132; 1891, c. 70; 1893, cc. 120, 270; 1903, c. 272, s. 3.)

Rights Acquired by Entry.—By making the entry as prescribed by law the enterer does not acquire any title to the land, but only the right to call for a grant upon compliance with the statute. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857; Wool v. Saunders, 108 N. C. 729, 13 S. E. 294.

Rights Acquired by Floating Entry.—An entry that is so vague that the land claimed is not identified is a "floating entry" and unless the land is identified by survey in the required time such entry is not good against subsequent entry. Fisher v. Owen, 144 N. C. 649, 57 S. E. 393.

It was said in an early decision, Harris v. Ewing, 21 N. C. 369, that an entry is not absolutely void in any case, merely because it is not as "special" as the party could have made it by the use of all the indicia, internal and external, supplied by the act as evidence of identity, but it is valid or invalid in respect of a subsequent enterer according to the fact that he may or may not have sustained loss by the want of particularity in it. Cain v. Downing, 161 N. C. 592, 594, 77 S. E. 764.

Applied in Walker v. Parker, 169 N. C. 150, 85 S. E. 306.

§ 7556. Duty of entry-taker.—The entry-taker shall immediately endorse the same with the name of the claimant, the number of acres claimed, and date of the entry; and shall copy the same in a book well bound, and ruled with a large margin into spaces of equal distance, each space to contain one entry only, and every entry to be made in the order of time in which it shall be received, and numbered in the margin. The entry-taker shall thereupon cause a copy of the entry to be posted for thirty days at three public places in the township or townships in which the land covered by the entry is located. A copy of the entry shall also be posted for thirty days at the courthouse door of the county in which such land lies, and advertised for thirty days in a newspaper published at the county-seat of such county. If there be no newspaper published in such county, then the advertisement provided for shall be made in the nearest newspaper. (Rev., s. 1708; Code, s. 2765; 1903, c. 272, s. 3.)

Purpose of Notice.—The purpose of this notice is to give information to the public, any person who claims title or interest in the land covered by the entry has the right within the time provided for the publication of the notice and the advertisement, and not thereafter, to file his protest (Garrison v. Williams, 150 N. C. 674, 677, 64 S. E. 783), which should contain a denial that the land is vacant and unappropriated land belonging to the State, and allegations as to his claim or interest therein. Walker v. Parker, 169 N. C. 150, 152, 85 S. E. 306.

Entry Must Be Made by the Entry-Taker.—The entry must be made by the entry-taker and an entry made, as in this case by the claimant is void. The entry-taker is not authorized by Statute to appoint a deputy. Pearson v. Powell, 100 N. C. 86, 87, 6 S. E. 188.

An entry made by the wife of the entry-taker in his absence is void, although he allowed her to make entries, and subsequently acquiesced to what she had done. Maxwell v. Wallace, 38 N. C. 593.

§ 7557. Protest filed; bonds required.—If any person shall claim title to or an interest in the land covered by the entry, or any part thereof, he shall, within the time of the advertisement as above provided, file his protest in writing with the entry-taker against the issuing of a warrant thereon; and upon the filing of such protest, the entry-taker shall certify copies of the entry and protest to the superior court; thereupon a notice shall be issued by the clerk of the superior court to both parties, commanding them to appear before the clerk in twenty days and file their respective bonds for costs as in other cases where the title to real estate is in controversy, and to the claimant to appear at the next term of the court and show cause why the entry shall not be declared inoperative and void. This section shall not deprive either party of the advantage of prosecuting or defending without giving bond, as provided in other cases. (Rev., s. 1709; Code, s. 2765; 1903, c. 272, s. 3; 1907, c. 66, s. 1.)

As to protest, right of protest, and time of filing see 10 N. C. Enc. Dig. 586-589.

Purpose of Section.—The purpose of this statute is to protect a landowner's estate from irreparable damages by subsequent entries that might be fraudulent or mistaken. In re Drewery, 130 N. C. 342, 41 S. E. 937.

This case as decided In re Drewery, 129 N. C. 457, 40 S. E. 208, and McNeil v. Lewis, 4 N. C. 517, are overruled.—Ed. Note.

Grounds for Filing Protest. — Unless the entry by the claimant is to land claimed by the protestant protest will not lie. This is the only grounds for filing protest. Cain v. Downing, 161 N. C. 592, 77 S. E. 764.

Burden on Protestant.—"The right to protest is not given to intermeddlers, but to those who claim title to or interest in the land (Lumber Co. v. Clarke, 162 N. C. 544, 546, 67 S. E. 1057), and the protestant is therefore required to assert his title or interest." Walker v. Parker, 168 N. C. 150, 153, 85 S. E. 306.

If a protestant shows that he claims under a grant from the state and the claimant's entry is to the same land, the entry will be set aside. The protestant does not have to show a perfect claim of title as he would have to do in ejectment. Lumber Co. v. Coffey, 144 N. C. 560, 57 S. E. 344.

Protestant Can Only Show His Title.—A protestant can only enter evidence as to his title. A grant to land out side of his grant under which he claims no interest or title cannot be put in evidence to disprove claimant's right to enter the land in question. Lumber Co. v. Clarke, 152 N. C. 544, 67 S. E. 1057.

Title by Adverse Possessions.—It is not necessary that the protestant claim title by grant, he may claim title by adverse possession. When a claim of adverse possession is interposed the burden of proof shifts to the protestant. Walker v. Parker, 169 N. C. 150, 85 S. E. 306.

Floating Entry Not Notice.—An entry that is so vague that the land entered cannot be identified is a floating entry and is not sufficient notice for filing protest as provided by this section. Cain v. Downing, 161 N. C. 592, 77 S. E. 764.

Applied in Walker v. Parker, 169 N. C. 150, 85 S. E. 306.

§ 7558. Payment of price; lapse of entry.—All entries of land shall, in every event, be paid for within one year from the date of entry, unless a protest be filed to the entry, in which event they shall be paid for within twelve months after final judgment on the protest; and all entries of land not thus paid for shall become null and void, and may be entered by any other person. (Rev., s. 1731; Code, s. 2766; R. C., c. 42, s. 8; 1854-5, c. 49.)

Editor's Note.—Prior to 1905 this section, provided that "all entries to land, made in the course of one year, shall, in every event, be paid for, on or before the thirty-first day of December, which shall happen, in the second year thereafter; and all entries of land, not thus paid for, shall become null and void, and may be entered by other person."

In Barker v. Donton, 150 N. C. 723, 64 S. E. 774, the section is construed and prior cases cited. This case construes the section in a different light to the construction given in some of the early cases.

As the section was made clear by the code of 1905 the question of payment of entry will more often arise in regard to entries prior to that time.

This section is not applicable to Cherokee Lands as the entry and grant of this land is governed by chapter 11 of the code of 1883. Frasier v. Gibson, 140 N. C. 272, 52 S. E. 1035; Kimsey v. Munday, 112 N. C. 816, 17 S. E. 583.

§ 7559. When entry lapses, subsequent entry valid.—Whenever an entry of land shall be made in any entry-taker's office, and the enterer shall fail to have the land surveyed and pay the price for the same within the time limited by law, any person who may have made a subsequent entry for the same land may have the same surveyed and pay the price and have a grant. (Rev., s. 1710; Code, s. 2767; R. C., c. 42, s. 9; 1809, c. 771.)

As to subject in general, see 10 Enc. Dig. 598.

In General.—"Where an enterer allows his entry to lapse, before taking out his grant the entry becomes null, and any grant founded upon it is also void on its face, and, even without a direct proceeding to impeach it, will be treated by the courts as inoperative and insufficient to divest title out of the State, because it is apparent on inspection that it was issued without authority of law, when the efficacy of the entry was gone by the efflux of time, and, after the right of another, who had shown more diligence, accrued. Stanly v. Biddle, 57 N. C. 383; Wilson v. Land Co., 77 N. C. 457; Horton v. Cook, 54 N. C. 270; Bryson v. Dobson, 38 N. C. 138." Gilchrist v. Middleton, 107 N. C. 663, 678, 12 S. E. 85.

By failure to have a grant issued on an entry in the required time, the entry will lapse and a junior entry will give good title. Kimsey v. Munday, 112 N. C. 816, 17 S. E. 583.

When Senior Enterer Trustee for Junior Enterer.—Under an entry where the purchase-money has been paid to the state in due time the enterer has a right to call on the state for a grant even 46 years after the entry. But if there has been a subsequent entry by an innocent person without notice the senior enterer will hold as trustee for the junior enterer with senior grant. Gilchrist v. Middleton, 108 N. C. 705, 13 S. E. 227.

§ 7560. Lapsed entries not renewed within one year.—No lands entered on the books of the entry-taker, the entry of which shall be suffered to lapse by nonpayment of the price thereof, shall be reëntered within one year after the time at which such entry shall lapse, by the person in whose name such entry was made, but such reëntry shall be void. (Rev., s. 1712; Code, s. 2768; R. C., c. 42, s. 10.)

§ 7561. Entry for benefit of entry-taker.—If any entry-taker shall desire to make an entry in his own name, the same shall be made in its proper place, before a justice of the peace of the county, not being a surveyor or assistant; which entry the justice shall return to the next meeting of the board of county commissioners, who shall insert it; and every entry made by or for such entry-taker, in any other manner, shall be void. (Rev., s. 1711; Code, s. 2773; R. C., c. 42, s. 16; 1777, c. 114, s. 17.)

Strictly Construed.—This section was passed to prohibit improper practice and therefore must be followed. An entry by an entry-taker in any other manner is void. Terrell v. Manney, 6 N. C. 375, 377.

Art. 4. Surveys

§ 7562. Warrant for survey issued.—If no protest be filed, or where the protest is filed and the right of the claimant to make the entry is sustained, the entry-taker shall deliver to the party a copy of the entry with its proper number and a warrant to the surveyor to survey the same, which warrant shall contain a copy of the entry with its number and date, and a certificate that notice has been given as above provided, and that no protest has been filed, or that protest has been filed and that the court has decided in favor of the claimant. Each warrant shall be delivered to the surveyor in the order of time in which the entry was made. (Rev., s. 1713; Code, s. 2765; 1903, c. 272, s. 3.)

§ 7563. Duplicate warrants.—When any person duly makes an entry of lands which has not become void by lapse of time, and upon which the entry-taker has issued his warrant of survey, and the same be lost by accident, the entry-taker, on due proof being made to his satisfaction, by affidavit of the claimant or the surveyor or deputy surveyor, may issue a duplicate warrant of survey, of the same tenor and date, taking care to set forth, on the face of such warrant, that the same is a duplicate; in which case such warrant shall be made as valid as the original. (Rev., s. 1714; Code, s. 2771; R. C., c. 42, s. 14; 1814, c. 878, s. 1.)

§ 7564. Surveys according to priority of entry.—The surveyor shall survey all entries of land according to the priority of entry, paying due respect to the number of each warrant; and every grant obtained by any subsequent entry otherwise than is by this chapter directed, shall be void: Provided, nothing herein shall be construed to prevent any person who shall make a subsequent entry from surveying and obtaining a grant, as the law directs, for all such surplus land as shall remain, after the enterer of such land has surveyed his entry as aforesaid. (Rev.,

s. 1715; Code, s. 2770; R. C., c. 42, s. 13; 1787, c. 279.)

Time of Junior Entry.—It is not necessary that the prior entry lapse before the junior entry is made, for the junior entry is only good as to what remains after the survey of the prior entry, or by lapse of the prior entry. Stanly v. Biddle, 57 N. C. 383, 384.

Survey by a Deputy.—A survey by a deputy not duly sworn is not sufficient to give enterer good title under the survey. Avery v. Walker, 8 N. C. 140.

§ 7565. Chainbearers sworn.—No survey for the purpose of obtaining a grant shall be made until the chainbearers shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor. The chainbearers shall actually measure the land surveyed. The surveyor is empowered to administer the oath. (Rev., s. 1717; Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.)

In General.—It is necessary that the chain-carrier be sworn before a bill for relief and conveyance of legal title will lie, against one claiming under a junior entry and grant. Avery v. Walker, 8 N. C. 140.

§ 7566. Survey made and plots prepared.—Every county surveyor, upon receiving the copy of the entry and order of survey for any claim of lands, shall, within ninety days, lay off and survey the same agreeably to this chapter; and make thereof two fair plots, the scale whereof and the number of the entry shall be mentioned on such plots; and shall set down in words the beginning, angles, distances, marks, and watercourses, and other remarkable places crossed or touched by or near to the lines of such lands, and also the quantity of acres; and land lying on any navigable water shall be surveyed in such manner that the water shall form one side of the survey, and the land be paid off back from the water. (Rev., s. 1716; Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10; 1903, c. 272, s. 4.)

Plots Evidence of Land Actually Surveyed.—The plots are evidence of the survey and in case of a mistake of the draughtsman in drawing the deed they are admissible to show the land actually surveyed, and intended to be included in the grant and deed. Higdon v. Rice, 119 N. C. 623, 26 S. E. 256.

A plat may be introduced to show that the grant does not include the land surveyed. Dugger v. McKesson, 100 N. C. 1, 6 S. E. 746.

The original plat is made a part of the grant for the purpose of indicating the shape and location of the boundary, and is, of course, evidence, though not conclusive, to be submitted to the jury as to the true shape and location of the land. Redmond v. Mullenax, 113 N. C. 505, 512, 18 S. E. 708.

Line on Navigable Waters.—A grant of riparian property running with a navigable stream, will be construed to grant only to the low water mark. This rule applies to municipal corporations as well as to individuals. State v. Eason, 114 N. C. 787, 791, 19 S. E. 88.

§ 7567. Plots and warrants sent to secretary of state.—The surveyor shall, within one year, transmit the plots, together with the warrant or order of survey, to the office of the secretary of state, or deliver them to the claimant. The secretary of state shall, on receipt of the plots, file one in his office, and attach the other to the grant. (Rev., ss. 1718, 1734; Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114.)

See notes to preceding section.

Plots as Evidence.—As the county surveyor is required to send two plats to the Secretary of State, a certified copy can be used in evidence to show the shape of the land surveyed. Such evidence is not conclusive. Higdon v. Rice, 119 N. C. 623, 26 S. E. 256.

§ 7568. Special surveyor appointed, if no county surveyor.—When the office of county surveyor is vacant, the county commissioners may appoint a special surveyor to survey any lands that may be entered; and the plots and certificates of such special surveyor, accompanied by a copy of the order of the county commissioners appointing him, shall be held valid, as if done by a county surveyor duly elected. (Rev., s. 1719; Code, s. 2769; R. C., c. 42, s. 12; 1777, c. 114, s. 10.)

§ 7569. Special surveyor, when county surveyor interested.—When a county surveyor wishes to have lands surveyed in a county where he acts as principal surveyor, for the purpose of obtaining a grant, the board of county commissioners of the county shall appoint some person to make the survey, and the entry-taker shall direct his warrant of survey to such person; and all certificates, surveys, and plots of the same shall be made under the same regulations as prescribe the duty of the county surveyor in similar cases. (Rev., s. 1721; Code, s. 2774; R. C., c. 42, s. 17; 1828, c. 23.)

A deputy surveyor cannot be appointed by a county surveyor, and if properly appointed a deputy cannot survey his own land. Avery v. Walker, 8 N. C. 140.

§ 7570. Record of surveys to be kept.—The county commissioners of the several counties of the state shall provide a suitable book or books for recording of surveys of entries of land, to be known as Record of Surveys, to be kept in the office or register of deeds as other records are kept. And such record shall have an alphabetical and numerical index to run consecutively. And it shall be the duty of every county surveyor or his deputy surveyor who makes a survey to record in such book a perfect and complete record of all surveys of land made upon any warrant issued upon any entry, and date and sign same as of the day such survey was made. (Rev., s. 1722; 1905, c. 242.)

Vague Record Not Good against Junior Enterer.—Prior to this section an entry of the State's vacant and unappropriated lands too vague to give notice of the boundaries of the land intended to be entered was not sufficient notice to a second enterer who has perfected his grant in ignorance of the first; and the mere running of the lines of the lands by survey or the making of a map by the first enterer which he could keep in his possession, or the warrant to the county surveyor, necessarily no more definite than the original entry, did not remedy the defective description of the entry. This section provides for notice of all surveys and such will not hereafter arise. Lovin v. Carver, 150 N. C. 710, 64 S. E. 775.

§ 7571. Former surveys recorded.—Where any ex-county surveyor is alive and has correct minutes or notes of surveys of land on entries made by him during his term of office, it shall be lawful for him to record and index such survey in such record of surveys, and the county commissioners shall pay for such services ten cents for each survey so recorded and indexed. (Rev., s. 1725; 1905, c. 242, s. 2.)

§ 7572. What record must show; received as evidence.—All surveys so recorded in such book shall show the number of the tract of land, the name of the party entering, and the name of the assignee if there be any assignee, and shall be duly indexed, both alphabetically and numerically in such record in the name of the party making

the entry, and the name of the assignee if there be any assignee. Such record of any surveyor or deputy surveyor when so made shall be read in evidence in any action or proceeding in any court: Provided, that if such record differs from the original certificates of survey heretofore made or on file in office of secretary of state, such original or certified copy of the certificate in secretary or state's office shall control. (Rev., s. 1723; 1905, c. 242, ss. 2, 3, 6.)

§ 7573. Fees for recording.—For recording and indexing such surveys the surveyor may charge twenty-five cents, which shall be paid by the party for whom the survey is made; and any surveyor shall not be required to make any survey until his fees provided by law are paid, including the twenty-five cents for recording and indexing. (Rev., s. 1724; 1905, c. 242, s. 4.)

§ 7574. Penalty for failure to make record.—Any county surveyor or deputy surveyor failing to make such record of any survey within sixty days after he makes a survey shall forfeit and pay to any party who may sue for the same two hundred dollars, and be subject to be removed from office by the board of county commissioners, and if any surveyor is removed the county commissioners shall appoint his successor, and all papers and records of a public nature in the possession of such surveyor so removed, or who may die, shall be turned over to his successor in office. (Rev., s. 1726; 1905, c. 242, s. 5; 1907, c. 579, s. 1.)

Art. 5. Grants

§ 7575. Price to be paid for land. — Whenever an entry and survey of any vacant and unappropriated land belonging to the state shall be filed in the office of the secretary of state, he shall immediately investigate the character of the land and determine its market value from its character and location, and thereupon fix the price per acre for said lands. Said price so fixed by the secretary of state shall be paid by the enterer to the treasurer of the state before any grant of the same is made by the secretary of state: Provided, that for each acre of land entered in Cherokee, Clay, Graham, Macon and Swain counties, there shall be paid to the state treasurer the sum of one and one-half dollars. (Rev., s. 1733; 1909, c. 447; 1927, cc. 8, 83; 1929, cc. 78, 210; 1931, c. 119; 1933, c. 72.)

Editor's Note.—By Public Laws 1927, c. 8, this section was amended by adding at the end thereof the following. "Provided that for each acre of land entered in Moore County, North Carolina, there shall be paid to the State Treasurer the sum of seven dollars." By Public Laws 1927, c. 83, which made no reference to the former amendment, this section was amended to read as it appears above. Public Laws 1929, c. 78, amended Public Laws 1927, c. 8, by adding Cherokee County to the proviso. Subsequently Public Laws 1929, c. 210, amended this section by adding the proviso, "that for each acre of land in Cherokee County, North Carolina, there shall be paid to the State Treasurer the sum of seven dollars." Public Laws 1931, c. 119, repealed Public Laws 1929, c. 210.

Public Laws of 1933, c. 72, added the proviso of the section as it now reads.

Prior Grants Not Affected by Subsequent Grant.—If a person lay an entry upon and procure a grant for land covered by a grant, he acquires no title thereto, as the state by the senior grant parted with its title. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857.

§ 7576. Price paid state treasurer.—The state treasurer shall receive the money for vacant and unappropriated lands upon the presentation to him of the certificate of the secretary of state, setting forth the number and date of the entry, and the quantity of acres found by the surveyor to be vacant, as the same may appear by the returns made to him from the surveyor or entry-taker, or from the entry-taker's warrant, or the plots of survey. (Rev., s. 1732; Code, s. 2777; R. C., c. 42, s. 20; 1827, c. 23; 1829, c. 30.)

Payment into the state treasury without the certificate of the Secretary of State is a voluntary unauthorized act and does not entitle the party to a grant, under his entry. Buchannan v. Fitzgerald, 41 N. C. 121.

§ 7577. Grant issued on auditor's certificate.—No grant shall issue on the treasurer's receipt for the money; but the auditor shall make out and deliver to the secretary of state a certificate, conformable to each receipt by him countersigned, on which the secretary shall issue the grant. (Rev., s. 1728; Code, s. 2778; R. C., c. 42, s. 21; 1799, c. 525, s. 4.)

§ 7578. Manner of issuing grant.—The secretary of state, on application of claimants, shall make out grants for all surveys returned to his office, which grants shall be authenticated by the governor, countersigned by the secretary, and recorded in his office. The date of the entry,.... the number of the survey from the certificate of survey upon which the grant is founded shall be inserted in every grant, and a copy of the plot shall be attached to the grant; and no grant shall issue upon any survey unless the same be signed by the surveyor of the county. Upon certificate from the entry-taker that the claimant has assigned his interest under the entry, a grant shall be issued in the name of the assignee: Provided, that the assignee is a citizen and resident of this state, or has come into the state with the bona fide intent of becoming a resident and citizen thereof. (Rev., ss. 1729, 1734, 1735; Code, s. 2779, c. 522; R. C., c. 42, s. 22; 1783, c. 185, s. 14; 1796, c. 455; 1799, c. 525, s. 2.)

Grants under the State Seal. — A grant without the Great Seal of the State affixed does not show title under that grant, as it is mandatory that the seal be affixed to authenticate the signature of the Governor and Secretary of State. Howell v. Hurley, 170 N. C. 798, 83 S. E. 699.

A paper signed by the Governor and countersigned by the Secretary of State, although not bearing the Great Seal of the State, is admissible in evidence to show title. Howell v. Hurley, 170 N. C. 401, 87 S. E. 107.

This case came up twice to be heard, and it was decided that as a grant it was not admissible in evidence but as an abstract of grant it was admissible as it was entered on record, and it will be presumed that the officers performed their duty in issuing the grant. Ed. Note.

Secretary of State Must Sign.—A grant of land if not signed by the Secretary of State is void. Hunter v. Williams, 8 N. C. 221.

Deputy Signing.—It is necessary that the Secretary of State sign the grant, and if he signs it it is valid no matter if there has been an attempt to sign by one of the deputies. Fowler v. Development Co., 158 N. C. 48, 73 S. E. 488.

Section 7592 makes valid grants signed by a deputy of the Secretary of State, provided no vested rights are interferred with. Ed. Note.

Place of Signature Immaterial.—It is not necessary that the Secretary of State countersign at any especial place on the grant to make it valid. Richards v. Lumber Co., 158 N. C. 54, 73 S. E. 485.

Secretary of State Must Issue.—Where the claimant has complied with the law, and it appears from the warrant and survey that the entry taker and surveyor have discharged their duties, the Secretary must issue the grant, and has

no discretion in the matter. Wool v. Saunders, 108 N. C. 729, 13 S. E. 294.

§ 7579. Registration of grants.—Every person obtaining a grant shall, within two years after such grant is perfected, cause the same to be registered in the county where the land lies; and any person may cause to be there registered any certified copy of a grant from the office of the secretary of state, which shall have the same effect as if the original had been registered. (Rev., s. 1729; Code, s. 2779; R. C., c. 42, s. 22; R. S., c. 42, s. 24; 1793, c. 185, s. 14; 1796, c. 455; 1799, c. 525, s. 2.)

As to extension of time for registration of grants, see sec. 7593; as to registration in general, see 10 N. C. Enc. Dig. 599.

Grant Not Void for Failure to Register it.—A grant is not void because of failure to record it. A junior grant that is recorded is not valid until there has been seven years adverse possession. North Carolina Mining Co. v. Westfeldt, 151 Fed. 290.

Sufficient Evidence for Registration.—The certificate of the Secretary of State of North Carolina, attached to a grant of land and attested by the great seal of the State, is sufficient evidence of its official character to warrant its registration without further proof. Barcello v. Hapgood, 118 N. C. 712, 732, 24 S. E. 124; Wyman v. Taylor, 124 N. C. 426, 32 S. E. 740; Ray v. Stewart, 105 N. C. 472, 11 S. E. 182.

Extension of Time for Registration.—"Prior to 1885 the statutes provided that all grants, deeds, etc., be registered in the county wherein the land was situated within two years from the date thereof. With one or two omissions, the Legislature uniformly extended the time for registration for two years. The Supreme Court with equal uniformity held that such instruments, when registered within two years from their date or within the extended period, were good and valid for all purposes from their date by relation." Janney v. Blackwell, 138 N. C. 437, 438, 439, 50 S. E. 857.

§ 7580. Grant issued in case of claimant's death.—In case of the death of any person having made an entry of lands, pending the same or before making out the grant, the secretary shall issue the grant in the name of the decedent; and those interested, as heirs at law, devisees, tenants in dower, by the curtesy, or otherwise, shall have the same estate as if the land had been granted during the life of the decedent. (Rev., s. 1730; Code, s. 2780; R. C., c. 42, s. 23; 1715, c. 44, s. 6; 1789, c. 439, s. 6.)

§ 7581. When secretary of state may withhold grant.—When application is made for a grant, if the secretary of state has reason to believe that the land covered by any entry and the surveys made in pursuance of the same is the property of the state board of education, he may, in his discretion, withhold the issuance of a grant for same until the engineer of the state board of education or surveyor appointed by the board shall have examined into the matter and made his report. And if the engineer or surveyor shall report that the lands in question are the property of the state board of education and not subject to entry, the secretary of state shall not issue a grant on such entry and surveys. If the secretary of state has reason to believe that the land for which a grant is sought has already been granted and does not belong to the state, he shall not issue grant for the same until it appears to his satisfaction that the land does belong to the state and is subject to entry.

The secretary of state shall withhold a grant to any and all vacant and unappropriated lands lying within or immediately adjacent to the boundaries of any and all national forest purchase areas; also to lands within or near state forests and parks, and such other areas as the department of conservation and development may request to be withheld for dedication to public use as state forests, state parks, game refuges or other recreational areas. The secretory of state is further authorized to furnish to the department of conservation and development all available information on such tracts or parcels of vacant land. The department of conservation and development, after proper investigation, may then request the permanent dedication of these lands to the State as state forests and parks, game and wild life refuges or other type of economic or recreational areas. If the department of conservation and development should decide that the lands in question are too small or in other ways unsuitable for administration as such state forests and parks but are more suitable for the consolidation of publicly owned forests, parks, game refuges or other recreational areas, it may upon approval by the governor request the secretary of state and the said secretary is hereby directed, payment of the usual official and service fees therefor to be made in such manner as the said secretary may direct, to issue a grant for said land to such agency as may have the direction and supervision over such publicly owned forests, parks, game refuges or other recreational areas, or it may enter into agreement with federal or other public and private agencies for exchange of lands in order to bring about the consolidation of publicly owned forests, parks, game refuges or other recreational areas; and on approval of such agreements for exchange by the governor, the secretary of state, on request of the department of conservation and development, shall issue grants in accordance with such agreements. (Rev., s. 1727; 1903, c. 272, s. 3; 1935, c. 173.)

Editor's Note.—The case of Wool v. Saunders, 108 N. C. 729, 13 S. E. 294, laid down the rule that the Secretary of State must issue a grant when enterer had complied with all requirements. But by this section the rule is changed.

The last paragraph of this section was added by the 1935 amendment.

§ 7582. Cutting timber on land before obtaining a grant.—If any person shall make an entry of any lands, and before perfecting title to same shall enter upon such lands and cut therefrom any wood, trees, or timber, he shall be guilty of a misdemeanor. One-half of any fine collected under this section shall be paid to the informer and one-half to the school fund of the county in which the land is situated. Any person found guilty under the provisions of this section shall further pay to the state double the value of the wood, trees, or timber taken from the land, and it shall be the duty of the solicitor of the district in which the land lies to sue for the same. (Rev., s. 3741; 1903, c. 272, s. 4.)

§ 7583. Lands conveyed to United States for inland waterway.—For the purpose of aiding in the construction of a proposed inland waterway by the United States from the city of Norfolk, in the state of Virginia, to Beaufort inlet, in the state of North Carolina, the secretary of state is hereby authorized to issue to the United States of America a grant to the land located within a dis-

tance of one thousand feet on either side of the center of the said inland waterway, in so far as such land is subject to grant by the state of North Carolina, the said grant to issue upon a certificate furnished to the secretary of state by the secretary of war, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway or in the improvement of any other waterway within this state, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of one thousand feet on either side of the center of such canal or channel, and the secretary of state is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the secretary of state by some authorized official of the United States as above provided. (1913, c. 197.)

§ 7584. Card index system for grants.—The secretary of state shall install in his office a card index system for grants, and every warrant, plot, and survey that can be found shall be encased in separate envelopes. Each card and envelope shall show substantially the following:

..... County. ..... Acres.
Name .....
Grant No. ..... Issued .....
Grant Book ..... Page .....
Entry No. ..... Entered .....
File No. .....
Location .....
Remarks: .....

Such grant books as are old and falling to pieces shall be recopied, and whenever any part of the record of a grant is partly gone or destroyed the secretary of state shall restore same, if he can do so with accuracy from the description in the plot and survey upon which the grant was issued and original record made. (1909, c. 505, ss. 1, 2, 3.)

§ 7584(a). Grant of Moore's Creek battlefield authorized.—In the event that Congress passes the bill now pending in Congress introduced by Congressman C. L. Abernethy authorizing the United States Government to take title to Moore's Creek Battlefield, Pender County, preserving the same as an historic battlefield, the Governor of the State of North Carolina is hereby authorized to execute to the United States Government a deed vesting the title in said United States Government on behalf of the State of North Carolina: Provided, that the consent of the State of North Carolina to such acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such battlefield as that all civil and criminal processes issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given: Provided further, that the title to said battlefield so conveyed to the United States shall revert to the State of North Carolina unless land is used for the purpose for which it is ceded. (1925, c. 40; 1927, c. 56.)

Editor's Note.—The 1927 amendment struck the words "and that the state of North Carolina also reserves authority to prevent all violation of its criminal laws committed on said tract of land so ceded" which immediately preceded the last proviso.

Art. 6. Correction of Grants

§ 7585. Change of county line before grant issued or registered.—All grants issued on entries for land which were entered in one county, and before the issuing of the grants therefor, or the registration of the grants, by the change of former county lines, or the establishment of new lines, the lands so entered were placed in a county, or in counties different from that in which they were situated, and the grants were registered in the county where the entries were made, shall be good and valid, and the registration of the grants shall have the same force and effect as if they had been registered in the county where the lands were situated; and all persons claiming under and by such grants may have them, or a certified copy of the same, from the office of the secretary of state, or from the office of the register of deeds when they had been erroneously registered, recorded in the office of the register of deeds of the county or counties where the lands lie, and such registration shall have the same force and effect as if the grants had been duly registered in such county or counties. (Rev., s. 1736; 1897, c. 37.)

When the entry and survey are made in one county, the registering of the deed in that county gives good title although a new county may have been organized including the land granted before the grant was registered. Wyman v. Taylor, 124 N. C. 426, 32 S. E. 740; McMillan v. Gombill, 106 N. C. 359, 11 S. E. 273.

§ 7586. Entries in wrong county.—Whereas many citizens of the state, on making entries of lands near the lines of the county wherein they reside, either for want of proper knowledge of the land laws of the state or not knowing the county lines, have frequently made entries and extended their surveys on such entries into other counties than those wherein they were made, and obtained grants on the same; and whereas doubts have existed with respect to the validity of the titles to lands situated as aforesaid, so far as they extend into other counties than those where the entries were made; for remedy whereof it is hereby declared that all grants issued on entries made for lands situated as aforesaid shall be good and valid against any entries thereafter made or grants issued thereon. (Rev., s. 1737; Code, s. 2784; R. C., c. 42, s. 27; 1805, c. 675; 1834, c. 17.)

Entry in County Where No Part of Land Lies.—Land can only be entered in the county when it lies, and entry and grant in another county is void. Lunsford v. Bostion, 16 N. C. 483; Harris v. Norman, 96 N. C. 59, 2 S. E. 72; Avery v. Strother, 1 N. C. 558.

Found in Two Counties.—This section only extends to cases where the entry of land lying partly in two counties, which is unknown to the grantee, is made only in one county. In such cases the statute cures the defect. Harris v. Norman, 96 N. C. 59, 2 S. E. 72.

§ 7587. Errors in surveys of plots corrected.—Whenever there may be an error by the surveyor in plotting or making out the certificate for the secretary's office, or the secretary shall make a

mistake in making out the courses agreeable to such returns, or misname the claimant, or make other mistake, so as such claimant shall be injured thereby, the claimant may prefer a petition to the superior court of the county in which the land lies, setting forth the injury which he might sustain in consequence of such error or mistake, with all the matters and things relative thereto; and the court may hear testimony respecting the truth of the allegations set forth in the petition; and if it shall appear by the testimony, from the return of the surveyor or the error of the secretary, that the patentee is liable to be injured thereby, the court shall direct the clerk to certify the facts to the secretary of state, who shall file the name in his office, and correct the error in the patent, and likewise in the records of his office. The costs of such suit shall be paid by the petitioner, except when any person may have made himself a party to prevent the prayer of the petitioner being granted, in which case the costs shall be paid as the court may decree. The benefits granted by this section to the patentees of land shall be extended in all cases to persons claiming by, from, or under their grants, by descent, devise, or purchase. When any error is ordered to be rectified, and the same has been carried through from the grant into mesne conveyances, the court shall direct a copy of the order to be recorded in the register's book of the county: Provided, no such petition shall be brought but within three years after the date of the patent; and if brought after that time, the court shall dismiss the same, and all proceedings had thereon shall be null and of no effect: Provided further, nothing herein shall affect the rights or interest of any person claiming under a patent issued between the period of the date of the grant alleged to be erroneous and the time of filing the petition, unless such person shall have had due notice of the filing of the petition, by service of a copy thereof, and an opportunity of defending his rights before the court according to the course of the common law. (Rev., s. 1738; Code, s. 2785; R. C., c. 42, s. 28; 1790, c. 326; 1798, c. 504; 1804, c. 655; 1814, c. 876.)

§ 7588. Resurvey of lands to correct grants.—Persons who have heretofore entered or may hereafter enter vacant lands shall not be defeated in their just claims by mistakes or errors in the surveys and plots furnished by surveyors, but in every case where the purchase money has been paid into the state treasury within the time prescribed by law after entry and survey or plot furnished shall be found to be defective or erroneous, the party having thus made entry and paid the purchase price may obtain another warrant of survey from the entry-taker of the county where the land lies, and have his entry surveyed as is directed by existing laws, and on presenting a certificate of survey and two fair plots thereof to the secretary of state within six months after the payment of the purchase money, the party making such entry and paying such purchase price shall be entitled to receive, and it shall be the duty of the secretary of state to issue to him, the proper grant for the lands so entered. (Rev., s. 1739; 1901, c. 734.)

§ 7589. Lost seal replaced.—In all cases where the seal annexed to a grant is lost or destroyed the governor may, on the certificate of the secretary of state that the grant was fairly obtained, cause the seal of the state to be affixed thereto. (Rev., s. 1740; Code, s. 2781; R. C., c. 42, s. 24; 1807, c. 727.)

§ 7590. Errors in grants corrected.—If in issuing any grant the number of the grant or the name of the grantee or any material words or figures suggested by the context have been omitted or not correctly written or given, or the description in the body of the grant does not correspond with the plot and description in the surveyor's certificate attached to the grant, or if in recording the grant in his office the secretary of state has heretofore made or may hereafter make any mistake or omission by which any part of any grant has not been correctly recorded, the secretary of state shall, upon the application of any party interested and the payment to him of his lawful fees, correct the original grant by inserting in the proper place the words, figures, or names omitted or not correctly given or suggested by the context; or if the description in the grant does not correspond with the surveyor's plot or certificate, he shall make the former correspond with the latter as the true facts may require. In case the party interested prefer it, the secretary of state shall issue a duplicate of the original grant, including therein the correction made; and in those cases in which grants have not been correctly recorded he shall make the proper corrections upon his records, or by rerecording, as he may prefer; and any grant corrected as aforesaid may be recorded in any county of the state as other grants are recorded, and have relation to the time of the entry and date of the grants as in other cases. (Rev., s. 1741; 1889, c. 460.)

The power conferred upon the Secretary of State to correct errors in grants of State's land, by supplying omissions, or correcting the names of grantees, material words or figures, etc., confers on him only a ministerial authority and not a judicial power. Herbert v. Union Development Co., 179 N. C. 662, 103 S. E. 380.

§ 7591. Irregular entries validated.—Wherever persons have prior to January first, one thousand eight hundred and eighty-three, irregularly entered lands and have paid the fees required by law to the secretary of state, and have obtained grants for such lands duly executed, the title to the lands shall not be affected by reason of such irregular entries; and the grants are hereby declared to be as valid as if such entries had been properly made. (Rev., s. 1743; Code, s. 2761; 1868-9, c. 100, s. 4; 1868-9, c. 173, s. 6; 1874-5, c. 49.)

In General.—An irregularity in receiving grants from the state is cured by this act. Wyman v. Taylor, 124 N. C. 426, 32 S. E. 740.

§ 7592. Grant signed by deputy secretary of state validated.—Where state grants have heretofore been issued and the name of the secretary of state has been affixed thereto by his deputy or chief clerk, or by any one purporting to act in such capacity, such grants are hereby declared valid; but nothing herein contained shall inter-

fere with vested rights. (Rev., s. 1744; 1905, c. 512.)

As to holdings prior to this section, see sec. 7578.

This section does not interfere with vested rights, therefore a grant countersigned by a clerk is not valid if it conflicts with a prior grant, but is valid as between the state and the grantee, if there was no prior grant. Richard v. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485.

§ 7593. Time for registering grants extended.—All grants from the state of North Carolina of lands and interests in lands heretofore made, which were required or allowed to be registered within a time specified by law, or in the grants themselves, may be registered in the counties in which the lands lie respectively at any time within six years from the first day of January, nineteen hundred and eighteen, notwithstanding the fact that such specified time has already expired, and all such grants heretofore registered after the expiration of such specified time shall be taken and treated as if they had been registered within such specified time: Provided, that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants, or any of them, acquired by any person from the state of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (Rev., s. 1747; 1893, c. 40; 1901, c. 175; 1905, c. 6; 1907, c. 805; 1909, c. 167; 1911, c. 182; Ex. Sess. 1913, c. 27; Ex. Sess. 1913, c. 45; 1915, c. 170; 1917, c. 84; Ex. Sess. 1920, c. 78; 1921, c. 153.)

Editor's Note.—By the Public Laws of Extra Session 1920 the time for registration was extended two years. The Public Laws of 1921 extended this time two years more.

Registration against Junior Grant.—Where neither party has possession the senior grant is valid against a junior grant duly recorded no matter how long registration may have been delayed by senior grantee. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857.

It is not necessary that a grant from the state be registered to make it valid. The retroactive statutes making grants registered after the time prescribed, valid, gives good title against a junior grant duly recorded. Dew v. Pyke, 145 N. C. 300, 59 S. E. 76.

§ 7593(a). Time for registering grants extended.—That the time is hereby extended until September first, one thousand nine hundred and twenty-six, for the proving and registering of all deeds of gift, grants from the State, or other instruments of writing heretofore executed and which are permitted or required by law to be registered, and which were or are required to be proved and registered within a limited time from the date of their execution; and all such instruments which have heretofore been or may be probated and registered before the expiration of the period herein limited shall be held and deemed, from and after the date of such registration, to have been probated and registered in due time, if proved in due form, and registration thereof be in other respects valid: Provided, that nothing in this section shall be held or deemed to validate or attempt to validate or give effect to any informal instrument; and Provided further, that this section shall not affect pending litigation: Provided further, that nothing herein contained shall be held deemed to place any limitation upon the time allowed for the registration of any instrument where no such limit is now fixed by law. (1924, c. 20.)

For editorial comment upon this section as affecting section 3315, see the notes to section 3315.

§ 7593(b). Time for registering grants extended.—The time for the registration of grants issued by the State of North Carolina be and the same is hereby extended for a period of two years from January first, nineteen hundred and twenty-five: Provided, that nothing herein contained shall be held or have the effect to divest any rights, titles or equities in or to the land covered by such grants, or any of them, acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1925, c. 97.)

§ 7593(c). Further Extention.—The time for the registration of grants issued by the State of North Carolina, or copies of such grants duly certified by the Secretary of State under his official seal, be and the same hereby is extended for a period of two years from the first day of January, nineteen hundred twenty-seven, and such grants or copies thereof duly certified as the original might have been registered at any time heretofore: Provided, that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants or any of them, acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1927, c. 140, s. 1.)

Art. 7. Grants Vacated

§ 7594. Civil action to vacate grant.—When any person claiming title to lands under a grant or patent from the king of Great Britain, any of the lords proprietors of North Carolina, or from the state of North Carolina, shall consider himself aggrieved by any grant or patent issued or made since the fourth day of July, one thousand seven hundred and seventy-six, to any other person, against law or obtained by false suggestions, surprise, or fraud, the person aggrieved may bring a civil action in the superior court for the county in which such land may be, together with an authenticated copy of such grant or patent, briefly stating the grounds whereon such patent should be repealed and vacated, whereupon the grantee, patentee, or the person, owner, or claimant under such grant or patent, shall be required to show cause why the same shall not be repealed and vacated. (Rev., s. 1748; Code, s. 2786; R. C., c. 42, s. 29.)

As to colonial grants, see 10 N. C. Enc. Dig. 627.

Collateral Attack of Grant.—If the land be not subject to entry, the grant is void and may be attacked collaterally. Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857.

Plaintiff Must Claim an Interest in Land.—An action cannot be had under this section unless it is made to appear that the plaintiff has an interest in the land claimed by the defendant. Wadsworth v. Cozard, 175 N. C. 15, 94 S. E. 670. Jones v. Riggs, 104 N. C. 281, 70 S. E. 465.

Where the state has no interest in the land an action to vacate a grant must be brought by the party in interest in his own name and at his own expense. State v. Bland, 123 N. C. 739, 31 S. E. 475.

A grant cannot be set aside at the suit of a junior grantee on the ground of fraud practiced on the state. Henry v. McCoy, 131 N. C. 586, 42 S. E. 955.

Action for Land in Several Counties.—When it appears in an action for the cancellation of several grants brought under the provisions of this section, some of which lay in a different county from that wherein the action was brought, that the allegation of fraud and false suggestion involve one and the same transaction, affecting each and all the grants, the subject of the litigation. It is unnecessary to bring a separate action in respect to the grants issued in the other county, some of the lands, the subject of the action lying in the county wherein the action was brought. Hardwood v. Waldo, 161 N. C. 196, 76 S. E. 680.

Only Means of Attacking Grants.—It is well settled that a grant can only be vacated by proceedings under the statute secs. 7594, 7596. Crow v. Holland, 15 N. C. 417. Kimsey v. Munday, 112 N. C. 816, 830, 17 S. E. 583. McNamee v. Alexander, 109 N. C. 242, 13 S. E. 777.

§ 7595. Judgment recorded in secretary of state's office.—If, upon verdict or demurrer, the court believe that the patent or grant was made against law or obtained by fraud, surprise, or upon untrue suggestions, they may vacate the same; and a copy of such judgment, after being recorded at large, shall be filed by the petitioner in the secretary's office, where it shall be recorded in a book kept for that purpose; and the secretary shall note in the margin of the original record of the grant the entry of the judgment, with a reference to the record in his office. (Rev., s. 1749; Code, s. 2787; R. C., c. 423, s. 39.)

§ 7596. Action by state to vacate grants.—An action may be brought by the attorney-general, in the name of the state, for the purpose of vacating or annulling letters patent granted by the state, in the following cases:

1. When he has reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or

2. When he has reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When he has reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same. (Rev., s. 1750; Code, s. 2788; C. C. P., s. 367.)

State Must Be a Party Interested.—The state can only bring action under this section to vacate a grant, when title would vest in the state upon cancellation of the grant. State v. Bland, 123 N. C. 739, 31 S. E. 475.

Attorney-General Must Bring Action.—The right to bring action to set aside a grant because of fraud practiced on the state must be brought by the attorney-general in the name of the state, and cannot be brought by any other person. Henry v. McCoy, 131 N. C. 586, 42 S. E. 955; Jones v. Riggs, 154 N. C. 281, 70 S. E. 465.

Grounds for Vacating.—Where a grant has been in strict compliance with the law, rights of property have been acquired which can not be taken away, even by the state, in the absence of an allegation of fraud or mistake, except after compensation and under the principle of eminent domain. State v. Spencer, 114 N. C. 770, 19 S. E. 93.

Applicable Only to Land Grants.—A license to sell liquor is not a letter patent to be vacated by quo warranto under this section. Hargett v. Bell, 134 N. C. 394, 46 S. E. 959.

Proceeding by the attorney-general to vacate a charter of a corporation cannot be brought under this section, or because of any authority vested by this section, but must be brought under section 1187. Attorney-General v. Holly Shelter R. Co., 134 N. C. 481, 46 S. E. 959.

Art. 8. Phosphate Beds

§ 7597. Phosphate beds in navigable waters entered.—Any resident of this state who shall make affidavit before the clerk of the superior court of any county through which such navigable stream may flow, that he has discovered in any navigable stream or waters of this state any phosphate rock or phosphate deposit therein shall have authority and power to enter under the entry laws of this state so much of the bed of any such navigable stream or waters as shall not exceed in any one entry two miles in length up the middle of any such stream or water for the purpose of digging, or removing any such deposit or rock. (Rev., s. 1751; 1891, c. 476.)

§ 7598. Grant obtained; term; royalty.—Upon such affidavit being filed with the entry-taker, and upon a survey and plot being made of such entry by the county surveyor as is now required by law in cases of entry of land, being made and certified to the secretary of state with a copy of such affidavit and entry so made, the secretary of state shall issue a patent or grant to such person, his heirs or assigns, for a term of twenty-five years for the land, with the proviso and condition inserted therein that the grantee therein shall pay to the treasurer of the state at the end of every three months a royalty of one dollar per ton for every ton of the crude phosphate rock or deposit mined, dug, or removed. (Rev., s. 1752; 1891, c. 476, s. 2.)

§ 7599. Exclusive right to mine; bond for royalty.—Such grantee, his heirs or assigns, shall have the exclusive right to mine, dig, or remove any such phosphate rock or deposit for the term of twenty-five years from the date of the patent upon paying the royalty of one dollar specified in the patent: Provided, however, that as a condition precedent to the granting of any such patent each company or person making any such entry shall enter into bond with sufficient surety in the penal sum of five thousand dollars, conditioned for the making of faithful and true returns to the treasurer of the state of the number of tons of phosphate rock and phosphate deposit so dug, mined, or removed, at the end of every month, and the punctual payment to the treasurer of the royalty of one dollar per ton upon every ton of the crude rock, without being steamed or dried, at the end of every three months, and the bond and sureties shall be subject to the approval now required by law for the bonds of state officers. (Rev., s. 1753; 1891, c. 476, s. 3.)

§ 7600. Navigation not obstructed by grantee.—No grant issued under the provisions of this article shall confer upon the person receiving the same the right to obstruct the navigation of any such stream or water, nor confer upon such person or his assigns any other right than that granted to take, mine, or dig phosphate rock or deposit therefrom. (Rev., s. 1754; 1891, c. 476, s. 4.)

§ 7601. Fees for issuing grant for phosphate beds.—No fee or cost shall be charged or collected by the secretary of state of any person or corporation receiving any patent or grant

under this article, except the fee allowed by law to the secretary of state for issuing a patent under the entry laws of the state. (Rev., s. 1755; 1891, c. 476, s. 5.)

§ 7602. Failure to operate for two years vacates grant.—Any person or corporation who shall fail to dig, mine or remove phosphate rock or deposit from any such stream or water to which he or it may be entitled under any patent or grant issued under the provisions of this article for the period of two years from the date of the patent, or after beginning digging, mining, or removing the same, shall fail to continue to so dig, mine, or remove the same for the period of two years, shall forfeit all rights therein granted, and the territory shall immediately thereupon become subject to entry under the provisions of this article without making the affidavit of the discovery of any such deposits or rocks. (Rev., s. 1756; 1891, c. 476, s. 6.)

§ 7603. Mining phosphate without grant.—Any person or corporation resident of this state shall have the right to mine, dig, or remove phosphate rock or deposits from any of the navigable streams or waters in this state to which no exclusive patent or grant may have been issued, upon such person or corporation first entering into bond in the penal sum of five thousand dollars, payable to the treasurer of the state, for the payment of the same royalty, in the same manner and under the same regulations as are prescribed in this article for persons operating under a grant; but nothing in this section shall be construed to give to any such person or corporation any exclusive franchise or privilege to dig, mine, or remove any such phosphate rock or deposit from any stream or water of this state. (Rev., s. 1757; 1891, c. 476, s. 7.)

§ 7604. Mining phosphate rock in rivers.—If any person shall dig, mine, or remove any phosphate rock or deposit from any of the navigable waters of this state, except for the purpose of prospecting and discovering as allowed by law, he shall be guilty of a misdemeanor, and shall also forfeit and pay ten dollars per ton for every ton of phosphate rock or deposit so mined, dug, or removed, one-half to the use of the state and the other one-half to go to the informer. (Rev., s. 3744; 1891, c. 476, s. 8.)

SUBCHAPTER II. LANDS CONTROLLED BY STATE BOARD OF EDUCATION

Art. 9. Swamp Lands Reclaimed

§ 7605. Power in state board of education.—The state board of education is invested with full power to adopt all necessary ways and means for causing so much of the swamp lands to be surveyed as it may deem capable of being reclaimed, and shall cause to be constructed such canals, ditches, roads, and other necessary works of improvement as it may deem proper and necessary. (Rev., s. 4036; Code, s. 2508; R. C., c. 66, s. 5; R. S., c. 6, 7, s. 5; 1885, c. 70, ss. 1, 2, 4; 1899, c. 253, s. 5.)

§ 7606. Expenditures limited.—The state board of education shall not lend or expend any part of the public moneys, stocks, funds or property vested in it by law, or under its control for, the purpose of reclaiming lands, or for any other purpose whatsoever, except by the direction of the general assembly. (Rev., s. 4037; Code, ss. 2515, 2530; R. C., c. 66, s. 12; 1870-1, c. 279.)

§ 7607. Purchase and exchange of land.—Whenever, in the process of drainage, it may be necessary, in order to prevent a sacrifice of the interests of the state, to purchase small tracts owned by individuals, the corporation may buy them, or exchange for them some other portions of the swamp lands; and the lands thus acquired by the corporation shall be held by it as other swamp lands. (Rev., s. 4038; Code, s. 2517; R. C., c. 66, s. 14.)

§ 7608. Title vested in board by written consent.—Whenever it is necessary to construct any such works on the lands of any individual proprietor, his written consent, without any formal deed of conveyance of the lands necessary to the work and its future enjoyment, shall vest the title thereof in the corporation forever; and when any infant or person non compos mentis or feme convert is owner thereof, his guardian is authorized to give such consent; and the feme convert and her husband may do so without any private examination; and the consent so given shall be valid for all purposes. (Rev., s. 4039; Code, s. 2509; R. C., c. 66, s. 6; R. S., c. 67, s. 6.)

§ 7609. Condemnation of lands.—Whenever the consent of the proprietor shall be withheld, the corporation's agents may enter on the lands and lay off so much as may be necessary to be used in such work, the value of which shall be assessed to the proprietor according to law; and, upon the payment thereof, the title shall be vested in the corporation forever. In the assessment of valuation, the benefit that will accrue to the proprietor by reason of the improvement may be likewise reckoned and set off against the damages. The proceedings for such condemnation shall be the same as are provided for condemnation of lands by railroad corporations. And the corporation's officers and agents shall have a right to enter upon the lands of all persons whomsoever, for the purpose of surveying. (Rev., s. 4040; Code, ss. 2510, 2513; R. C., c. 66, s. 7; R. S., c. 67. s. 7.)

§ 7610. Private lands assessed for benefits.—When there are lands owned by individuals which can be reclaimed by reason of the canals, ditches, or other works of the corporation, the same shall be assessed to contribute an equitable proportion of the cost of such works; which assessment shall be made by the board or a board of commissioners appointed by them, and the same shall be charged on the lands; but the corporation, by contract with individual proprietors, may agree upon the assessment, and accept payment thereof in labor or money. (Rev., s. 4041; Code, s. 2511; R. C., c. 66, s. 8; R. S., c. 67, s. 8.)

§ 7611. Regulations for surveying, reclaiming, and assessing.—The state board of education may enact all necessary rules and regulations for surveying and reclaiming the swamp lands; for assessing the lands of individuals which may be improved by the works, and for collecting assess-

ments; and the assessments shall be published weekly for five weeks in one of the newspapers published in Raleigh, and also filed in the office of the clerk of the superior court of the county wherein the lands assessed are situate. If no objections are filed at the court next after such advertisement, the assessments shall be confirmed by the court and the lands adjudged liable for the amount, and execution may be issued for the sale thereof to satisfy the same, on motion to the court for that purpose; and if any reasons be shown against the assessments, they shall be heard and determined by the court, and the assessments shall be increased or diminished, as the court shall adjudge. (Rev., s. 4042; Code, s. 2512; R. C., c. 66, s. 9; R. S., c. 67, s. 9; 1899, c. 253, 1901, c. 529.)

§ 7612. Engineer, surveyor, and other servants employed.—The state board of education may appoint an engineer and surveyor and other servants to plan the works directed by this subchapter, and such board may annually apoint an agent to superintend and supervise all the swamp lands belonging to the state board of education. (Rev., s. 4043; Code, ss. 2512, 2523; R. C., c. 66, ss. 9, 20; R. S., c. 67, s. 9; 1854, c. 48; 1899, s. 253, s. 1, 2, 5; 1901, c. 529.)

§ 7613. Agent's duties. — Such agent shall devote his entire attention to the business; abandon all prior engagements that may conflict with the interest of the state board of education; aid and assist counsel in the preparation and trial of all suits that may be directed by the corporation; collect information as to the location and value of all such lands; survey or have surveyed such tracts of such lands, or such other lands necessary to ascertain the location of lands belonging to the corporation as he may deem necessary, under the direction of the corporation. He shall make reports from time to time to the corporation of all the information he obtains, with such suggestions as he may deem proper; and shall prepare a statement of each tract of land owned by the corporation and its location, quantity, as well as ascertained and probable value, distinguishing between those tracts the title to which is doubtful or good; and this statement shall be recorded by him in a book to be kept by the corporation and in a manner, by index or otherwise, easy for reference. (Rev., s. 4044; Code, s. 2524; R. C., c. 66, s. 21; 1899, c. 253, s. 3.)

§ 7614. Agent may be removed.—The agent may be removed by the state board of education at any time and another appointed to supply the vacancy, the agent removed being paid a pro rata compensation. The agency may be continued in the discretion of the board. (Rev., s. 4045; Code, s. 2525; R. C., c. 66, s. 22; 1899, c. 253, s. 4; 1901, c. 529.)

Art. 10. Lands Sold for Taxes

§ 7615. Title vested in state board of education.—The title of all lands acquired by the state by virtue of being sold for taxes hereby vested in the state board of education. (1917, c. 209.)

§ 7616. Protection of interest in lands sold for taxes.—Whenever any lands in which the state board of education has an interest, by way of mortgage or otherwise, are advertised to be sold for any taxes, special assessment, or under any lien, the state board of education is authorized, if in its judgment it is necessary to protect the interest of the board, to appear at any sale of such lands and to buy the same as any other person would, and for the purpose of paying therefor use any funds which the state board of education may have on hand, or, if necessary, borrow the money with which to make such purchase and to execute its notes therefor, and may use any funds coming to the state board of education from the sale of any property or otherwise to pay such notes. (1917, c. 246.)

Art. 11. Controversies Concerning Lands

§ 7617. Title presumed in the board; tax titles.—In all controversies and suits for any of the swamp lands to which the state board of education or its assigns shall be a party, the title to such lands shall be taken and deemed to be in that corporation or its assigns until the other party shall show that he has a good and valid title to such lands in himself.

In all controversies touching the title to or the right of possession to any lands claimed by the state, the state board of education or the university of North Carolina, under any sale for taxes at any time heretofore made or which hereafter may be made, the deed of conveyance made by the sheriff or other officer or person making such sale or who have been authorized to execute such deed shall be presumptive evidence that the lands therein mentioned were, at the time the lien for such taxes attached and at the time of the sale, the property of the person therein designated as the delinquent owner; that such lands were subject to taxation; that the taxes were duly levied and assessed; that the lands were duly listed; that the taxes were due and unpaid; that the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; that all the prerequisites of the law were duly complied with by all officers or persons who had or whose duty it was to have had any part or action in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive; and that all things whatsoever required by law to make a good and valid sale and vest the title in the purchaser were done, and that all recitals in such deed contained are true as to each and every of the matters so recited.

In all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially as above the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat such title, either that the real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of law, and that such redemption was had or made for the use or benefit of persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property or to levy the taxes or

to sell the property; but no person shall be permitted to question the title acquired under such sale and deed without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title. (Rev., s. 4047; Code, s. 2527; R. C., c. 66, s. 24; 1842-3, c. 36, s. 3; 1889, c. 243.)

Title Presumed to Be in the Board. — When it is shown that the land is swamp land and within a swamp of more than 2,000 acres the law persumes that the Board of Education is the owner thereof, because grants of such land are void and unauthorized. Board v. Makely, 139 N. C. 31, 34, 51 S. E. 784. State Board v. Roanoke R. Co., 158 N. C. 313, 317, 73 S. E. 994.

Presumption Rebuttable.—The presumption of title in the Board of Education lasts only until good title is shown to be in another party. Shingle Co. v. Lumber Co., 178 N. C. 221, 100 S. E. 332.

Presumption That Officers Do Their Duty.—It is entirely proper and competent for the state to provide that the presumption that public officials have done their duty should apply, and throw upon any adverse claimant the burden of proving the contrary. This decision does not, in any way, conflict with the cases of King v. Cooper, 128 N. C. 347, 38 S. E. 924; Warren v. Williford, 148 N. C. 474, 62 S. E. 697; Matthews v. Fry, 141 N. C. 582, 54 S. E. 379, and Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337, the facts in those cases and this one being very different. State v. Remick, 160 N. C. 562, 570, 76 S. E. 627.

§ 7618. Statute of limitations.—No statute of limitation shall affect the title or bar the action of the state board of education or its assigns, unless the same would protect the person holding and claiming adversely against the state; and no statute of limitation shall be a bar to the state board of education or of its assigns in the trial of any action in any court of competent jurisdiction against any person, firm, or corporation for damages for timber heretofore or hereafter cut and removed from lands owned by the board of education or for any other acts of trespass committed on such lands. (Rev., s. 4048; Code, s. 2528; R. C., c. 66, s. 25; 1842, c. 36, s. 5; 1917, c. 287.)

Editor's Note.—Tillery v. Lumber Co., 172 N. C. 296, 90 S. E. 196 laid down the rule that this statute was not intended to protect an assignee of the state against the statute of limitations when the action was for damage to timber. By amendment 1917 the part of the section following the semi-colon was added making it clear that the statute of limitations was not to be applied in actions for damages to timber.

Assignee Not Barred by Statute of Limitations.—In an action for land the plaintiff is not barred by the statute of limitations, which does not run in such cases, unless the state would have been barred by adverse possession. State Board v. Roanoke R. Co., 158 N. C. 313, 315, 73 S. E. 994.

§ 7619. Actions by board; counsel; compromise.—The state board of education may employ counsel learned in the law to aid and assist it in the investigation and prosecution of its title to any of the swamp lands; and may compromise upon such terms as to it shall seem reasonable and just, for the title, so as to secure the corporation an indefeasible right in such lands. (Rev., s. 4051; Code, s. 2516; R. C., c. 66, s. 13.)

§ 7620. Agreement with others to prosecute or survey.—The state board of education has full power and authority to agree with any person to prosecute its claim to any swamp lands in any county or counties, or to survey and indentify its lands in such counties, and allow to such person a share of any such land as a compensation for his services. (Rev., s. 4052; Code, s. 2526; R. C., c. 66, s. 23; 1854, c. 48.)

Art. 12. Sale of Lands

§ 7621. Sale of swamp lands.—The state board of education is authorized and directed to sell and convey the swamp lands at public or private sale at such times, for such prices, in such portions, and on such terms as to it may seem proper; but it shall not sell at a price less than twelve and one-half cents per acre. It shall report each sale to the next session of the general assembly. The proceeds, as also money received on entries of vacant land, shall become a part of the state literary fund. The corporation shall not sell any canal by it constructed under this subchapter. (Rev., s. 4049; Code, ss. 2514, 2515, 2529; R. C., c. 66, s. 12; 1872-3, c. 194, s. 2; 1889, c. 243, s. 4.)

§ 7622. Reservation to the state.—In any sale which shall be made by the state board of education the following powers shall be expressly reserved to the state, to be exercised under such laws as are now or may be enacted by the general assembly: 1. To make any expedient regulations respecting the repairs of the canals which have been cut by the state, or enlargement of such canals. 2. To impose taxes on the lands benefited by those canals for their repair, and which shall not be closed. 3. That the navigation of the canal shall be free to all persons, subject to a right in the state to impose tolls. 4. That all landowners on the canals may drain into them, subject only to such general regulations as now are or hereafter may be made by the general assembly in such cases. 5. That the roads along the banks of the canal shall be public roads. (Rev., s. 4050; Code, s. 2534; 1872-3, c. 118.)

§ 7623. Forfeiture for failure to register deeds.—All the grants and deeds for swamp lands, heretofore made must have been proved and registered in the county where the lands are situate, within twelve months from November first, one thousand eight hundred and eighty-three, and every such grant or deed, not being so registered within that time, shall be void, and the title of the proprietor in such lands shall revert to the state; but the provisions of this section shall be applicable to the swamp lands only which have been surveyed or taken possession of by, or are vested in, the state board of education or its agents. (Rev., s. 4046; Code, ss. 2513, 3866; R. C., c. 66, s. 10; R. S., c. 67, s. 10.)

§ 7623(1). Withdrawal of swamp lands from sale under certain conditions; lease or sale to department of conservation and development. — When it shall be reported to the state board of education, after investigation by the department of conservation and development, that any part of the lands now known as "swamp lands" should be retained and reserved from sale in the public interest because of the suitability of the waters thereupon for oyster culture, or for game refuge, or other purposes consistent with public use, the board of education shall, if upon examination it is found that the reservation of the said lands for such purpose is proper and to the public interest, reserve the same and make such disposition as will best conserve the public interest by lease or sale to the department of conservation and development as may be thought

proper. Such lease or sale to the department of conservation and development may be upon such terms as may be determined upon by the board of education: Provided, that no lands now belonging to the state board of education upon which there is any natural oyster bed, or which is suitable for oyster culture, shall be subject to sale by the said board of education without first giving to the department of conservation and development an opportunity to investigate and to report to the board of education as to whether it is desirable to make a reservation thereof under this section. (1935, c. 342.)

CHAPTER 129
STATE OFFICERS

Art. 1. Classification and General Provisions

§ 7624. Public state officials classified.—The public officers of the state are legislative, executive, and judicial. But this classification shall not be construed as defining the legal powers of either class. (Rev., s. 5323; Code, s. 3317; 1868-9, c. 270, ss. 1, 2.)

For full treatment of officers see 9 N. C. Enc. Dig. 774, 11 N. C. Enc. Dig. 414, 15 N. C. Enc. Dig. 132, and 490.

§ 7625. Legislative officers.—The legislative officers are:

1. Fifty senators; 2. One hundred and twenty members of the house of representatives. 3. A speaker of the house of representatives; 4. A clerk and assistants in each house; 5. A doorkeeper and assistants in each house; 6. As many subordinates in each house as may be deemed necessary. (Rev., s. 5324; Code, s. 3318; 1868-9, c. 117, s. 2.)

§ 7626. Executive officers.—Executive officers are either: 1. Civil. 2. Military. Civil executive officers are: 1. General, or for the whole state. 2. Special, or for special duties in different parts of the state. 3. Local, or for a particular part of the state.

The general civil executive officers of this state are as follows: 1. A governor. 2. A lieutenant governor. 3. Private secretary for the governor. 4. A secretary of state. 5. An auditor. 6. A treasurer. 7. An attorney-general. 8. A superintendent of public instruction. 9. The members of the governor's council. 10. A commissioner of agriculture. 11. A commissioner of labor and printing. 12. An insurance commissioner. (Rev., s. 5352; Code, s. 3319; 1868-9, c. 270, ss. 24, 25, 26; 1899, c. 373, c. 54, ss. 3, 4; 1901, c. 479, s. 4.)

§ 7627. Executive officers; election; term; induction into office.—The executive department shall consist of a governor, a lieutenant governor, a secretary of state, an auditor, a treasurer, a superintendent of public instruction, and an attorney-general, who shall be elected for a term of four years by the qualified electors of the state, at the same time and places and in the same manner as members of the general assembly are elected. Their term of office shall commence on the first day of January next after their election and continue until their successors are elected and qualified. The return of every election for officers of the executive department shall be sealed up and transmitted to the seat of government by the returning officers, directed to the speaker of the house of representatives, who shall open and publish the same in the presence of a majority of the members of both houses of the general assembly. The persons having the highest number of votes respectively shall be declared duly elected; but if two or more be equal and highest in votes for the same office, then one of them shall be chosen by joint ballot of both houses of the general assembly. Contested elections shall be determined by a joint ballot of both houses of the general assembly in such manner as shall be prescribed by law. On the first Tuesday after the convening of the general assembly, following the election of any or all state officers of the executive department and of the commissioner of agriculture and the commissioner of labor and printing, there shall be a joint session of the house of representatives and senate in the hall of the house of representatives, at eleven o'clock in the forenoon, when and where the speaker of the house of representatives shall proceed, in compliance with the provisions of the constitution above set forth, to open and publish the vote for governor and other officers of the executive department and for the commissioner of agriculture and the commissioner of labor and printing cast at the last preceding election, and as soon as the result of the election shall be ascertained and published, as provided in this section, the person so ascertained and published to be elected governor at such election shall, in the presence of the joint session of the two houses of the general assembly, held as herein provided, take the oath of office prescribed by law and be immediately inducted into the office of governor. Should the governor-elect not be present at such joint session, then he may, as soon thereafter as he may deem proper, take the oath of office before some justice of the supreme or judge of the superior court and be inducted into office. As soon as the result of such election as to other officers of the executive department named in article three, section one, of the constitution, and as the commissioner of agriculture and the commissioner of labor and printing, shall be ascertained and published as provided herein, the officers elected to such offices shall, as soon as may be, take oath of office prescribed by law for such officers and be inducted into the offices to which they have been elected. (Rev., s. 5326; Const., art. 3, ss. 1, 3; 1897, c. 1, ss. 1, 2, 3.)

For cases see notes Art. III, secs. 1 and 3 of the Constitution.

§ 7628. Executive officers and certain boards report to governor; reports transmitted to general assembly.—It shall be the duty of the officers of the executive department to submit their respective reports to the governor to be transmitted by him with his message to the general assembly. (Rev., s. 5373; 1813, c. 60, s. 2.)

Art. 2. Payment of Moneys Collected

§ 7629. Officers collecting state moneys pay to state treasury monthly.—Each and every officer of the state or of any department thereof who is authorized by law to collect any fee, li-

cense tax, tag tax, or who collects money from any corporation or person, or partnership, by authority of any statute of this state, shall pay the same to the state treasurer on the tenth day of the calendar month next following, which payment shall be accompanied by an itemized statement showing from what sources and under what statutes such amounts have been collected, and a copy of said statement shall at the same time be filed in the office of the state auditor. (1919, c. 117, s. 1.)

§ 7630. Expenses paid by warrants of state auditor; statements filed. — All salaries, purchases of equipment and expenses authorized by law to be paid out of the various funds herebefore mentioned shall be paid by warrant drawn by the state auditor on the state treasurer. The officer of state or the head of any department thereof shall file with the state auditor an itemized statement of the salaries, bills for purchases of equipment and other expenses of his department, and the state auditor shall draw warrants on the state treasurer for the payment of all salaries, purchases of equipment, and expenses as authorized by law, to be paid by the said officer of state or head of any department thereof, as evidenced by statements so approved and filed. The state treasurer is hereby authorized and directed to pay said warrants. (1919, c. 117, s. 2.)

§ 7631. Traveling expenses on state's business. —When, to efficiently and properly carry into effect and execute any of the duties imposed by his appointment or by the provision of any statute of this state and provide for the expenses thereof, it is required that any officer of the state or any employee of any department thereof shall travel from place to place, such traveling and other expenses as shall be required shall be approved by said officer or head of the department whose employee incurs such expenses, and certified monthly to the state auditor in itemized form, and the state auditor is directed to draw his warrants upon the treasurer for such amounts. (1919, c. 117, s. 3.)

§ 7632. Emergency traveling fund; heads of departments may retain.—For the purpose of providing an emergency or contingent fund to cover the traveling expenses or other authorized expenses of any officer of state or of any department of state falling within the provisions of section 7631, such officer or head of the department is permitted to retain in his hands, from the moneys, fees, or licenses so collected or received by him from the sources named in section 7629, or draw from the state treasury an amount not to exceed at any one time the sum of two thousand dollars, and from this emergency or contingent fund such officer or head of department is authorized to advance and pay the traveling expenses of himself or other employees, when the same shall be required, until vouchers covering said expense accounts can be issued by the auditor and paid by the treasurer monthly as in section 7631 provided. At the expiration of his term of office the said officer of the state or head of department shall pay to the state treasurer the money retained by him under this section. (1919, c. 117, s. 4.)

§ 7633. Contingent funds accounted for and statements filed with budget commission.—Each and every official of the state, or of any department thereof, to whom is given by law any special contingent or other fund to be used in the work of the said official or department for contingent or other purposes, shall on or before the first day of November of each year file with each member of the legislative examining committee and with the budget committee a full and itemized statement in detail of all amounts received, with the source and date thereof, and amounts expended, to whom and for what purpose paid out, with a statement of any balance unexpended. It shall be the duty of any such official or head of the department to give to the said legislative examining committee or budget committee, any further information or details that they may desire. (1919, c. 117, s. 5.)

§ 7634. Construction.—This article shall not be construed as requiring the payment to the state treasurer of any money or funds collected for and directed to be paid to any party other than the state. (1919, c. 117, s. 6.)

§ 7634(a). Mileage allowance to officers or employees using public or private automobiles. — Where it is provided by any law affecting the State of North Carolina, or any sub-division thereof, whereby any employee or officer of the same is allowed to charge mileage for the use of any motor vehicle when owned by the State or any sub-division thereof or by any such employee or officer of the State or any sub-division thereof, when in the discharge of any duties imposed upon him by reason of his employment or office, the same is hereby repealed to the extent that said charge shall be limited to the actual miles traveled by said motor vehicle and no mileage charge shall be allowed for but one occupant of any motor vehicle so used, and provided further, that no such mileage charge shall exceed six cents per mile. (1931, c. 382, s. 1.)

§ 7634(b). Unlawful to pay more than allowance.—It shall be unlawful for any officer, auditor, bookkeeper, clerk or other employee of the State of North Carolina or any sub-division thereof to knowingly approve any claim or charge on the part of any person for mileage by reason of the use of any motor vehicle owned by the State or any sub-division thereof or by any person and used in the pursuit of his employment or office in excess of six cents per mile as set out in section 7634(a) and any officer, auditor, bookkeeper, clerk or other employee violating the provisions of this section shall be guilty of a misdemeanor. (1931, c. 382, s. 2.)

Art. 3. The Governor

§ 7635. Governor to reside in Raleigh; mansion and accessories.—The governor shall reside in the city of Raleigh during his continuance in office. A convenient and commodious furnished dwelling-house, supplied with necessary lights, fuel, and water, shall be provided for his accommodation; and an automobile and driver shall be provided and maintained for the use of the executive mansion. (Rev., s. 5327;

Code, ss. 3325, 3326; 1868-69, c. 270, ss. 32, 33; 1885, c. 244; 1919, c. 307.)

§ 7636. Powers and duties of governor.—In addition to the powers and duties prescribed by the constitution, the governor has the powers and duties prescribed in this and the following sections:

1. He is to supervise the official conduct of all executive and ministerial officers; and when he shall deem it advisable he shall visit all state institutions for the purpose of inquiring into the management and needs of the same, and for the purpose of paying the expenses of such visitation the auditor is hereby directed to draw an order on the treasurer in favor of the governor to pay his expenses for each visitation.

2. He is to see that all offices are filled, and the duties thereof performed, or in default thereof apply such remedy as the law allows, and if the remedy is imperfect, acquaint the general assembly therewith.

3. He is to make the appointments and supply the vacancies not otherwise provided for in all departments.

4. He is the sole official organ between the government of this state and other states, or the government of the United States.

5. He has the custody of the great seal of the state.

6. If he be apprised by the affidavits of two responsible citizens of the state that there is imminent danger that the statute of this state forbidding prize fighting is about to be violated, he shall use, as far as necessary, the civil and military power of the state to prevent it, and to have the offenders arrested and bound to keep the peace. (Rev., s. 5328; Code, s. 3320; 1868-9, c. 270, s. 27; 1870-1, c. 111; 1883, c. 71; 1895, c 28, s. 5; 1905, c. 446.)

As to governor's power to appoint, see Art. III, secs. 10, and 13; Art. IV. secs. 25 and 28; Art. XIV, sec. 5 of the State Constitution.

Editor's Note.—Public Laws of 1935, chapter 492, makes provision for the governor to set up machinery for administering unemployment compensation fund.

Mandamus to Compel Performance of Duties.—Under par. 1 and 2 of this section the Governor has the right to bring mandamus proceedings against the State Auditor to compel the performance of the ministerial duties prescribed by statute which do not involve any official discretion. Russell v. Ayer, 120 N. C. 180, 27 S. E. 133.

Par. 3—Appointments.—The governor making appointments under par. 3 of this section, can only do so when the Senate is not in session, and then the appointment is only for the interval until the Senate meets. And an appointment made in accordance with Art. III, sec. 10 of the Constitution. Salisbury v. Croom, 167 N. C. 223, 83 S. E. 354.

The right of the governor to appoint officers is limited to constitutional officers, and then only when the constitution expressly provides for such an appointment. Salisbury v. Croom, 167 N. C. 223, 83 S. E. 354.

§ 7637. May convene council of state.—The governor may convene his council for consultation whenever he may deem it proper. (Rev., s. 5329; Code, s. 3335; 1868-9, c. 270, s. 40.)

§ 7638. Private secretary; official correspondence preserved; books produced before general assembly.—The governor shall appoint a private secretary, who shall enter in books kept for that purpose all such letters, written by and to the governor, as are official and important, and such other letters as the governor shall think necessary. Such books shall be deposited in the office of the executive by the private secretary, and there carefully preserved, and the governor shall produce the same before the general assembly whenever requested. (Rev., s. 5330; Code, ss. 3326, 3327; 1868-9, c. 270, ss. 33, 34.)

§ 7639. Records kept; certain original applications preserved.—The governor shall cause to be kept the following records:

1. A register of all applications for pardon, or for commutation of any sentence, with a list of the official signatures and recommendations in favor of such application.

2. An account of all his official expenses and disbursements, including the incidental expenses of his department, and the rewards offered by him for the apprehension of criminals, which shall be paid upon the warrant of the auditor.

These records and the originals of all applications, petitions, and recommendations and reports therein mentioned shall be preserved in the office of the governor, but when applications for offices are refused he may, in his discretion, return the papers referring to the application. (Rev., s. 5331; Code, ss. 3322, 3323; 1868-9, c. 270, ss. 29, 30; 1870-1, c. 111.)

§ 7640. May employ counsel in cases wherein state is interested.—No department, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except by and with the consent and approval of the Governor. In any case, civil or criminal, in any court in the State or in any other state or territory or in any United States court, or in any other matter, thing, or controversy, of whatever nature or kind, in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and he may direct the Auditor to draw his warrant upon the Treasurer for such compensation as he may fix for their services. The Attorney-General, with his assistants, shall be counsel for all such departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State, and whenever the Attorney-General shall advise the Governor that it is impracticable for him and his assistants to render legal services to any State agency, institution, commission, bureau or other organized activity, the Governor may employ such counsel as, in his judgment, should be employed to render such services, and he may direct the Auditor to draw his warrant upon the Treasurer for such compensation for their services as he may fix, and he may direct that such warrant be paid out of the appropriations to such department, agency, institution, commission, bureau or other organized activity of the State, or out of the contingent fund. (1925, c. 207, s. 3.)

Editor's Note.—No material change in the effect of this section is made by the Public Laws of 1925, ch. 207, sec. 3, although the wording is greatly altered.

§ 7641. To appoint a day of thanksgiving.—The governor is directed to set apart a day in every year, and by proclamation give notice thereof, as a day of solemn and public thanks-

giving to Almighty God for past blessings and of supplication for His continued kindness and care over us as a state and a nation. (Rev., s. 5333; Code, s. 3334; 1868-9, c. 270, s. 39.)

§ 7641(a). Governor granted exclusive pardon power over inmates of state's institutions. — To the end that greater efficiency and uniformity may be observed in the matter of paroling persons imprisoned or detained under authority of law, exclusive authority is hereby given to the governor with respect to parole of all persons confined, held, or detained in any prison, reformatory, penal or corrective institution, in the State of North Carolina, by whatsoever name called, where such person is held in such institution by virtue of any final order or judgment of any court in this State, including juvenile courts. (1935, c. 273.)

§ 7642. Form and contents of applications for pardon.—Every application for pardon must be made to the governor in writing, signed by the party convicted, or by some person in his behalf. And every application shall contain the grounds and reasons upon which the executive pardon is asked, and shall be in every case accompanied by a certified copy of the indictment, and the verdict and judgment of the court thereon. (Rev., s. 5334; Code, s. 3336; 1869-70, c. 171; 1870-1, c. 61.)

Cross Reference.—As to application containing prison record, see section 7739. As to governor's power to pardon, see Art. III, sec. 6 of the Constitution. For notes under this section, see notes to section 7644. As to pardon from state prison, see section 7753.

§§ 7642(a)-7642(c): Repealed by Public Laws 1933, c. 30.

§ 7643. Conditional pardons may be granted. —In any case in which the governor is authorized by the constitution to grant a pardon he may, upon the petition of the prisoner, grant it, subject to such conditions, restrictions, and limitations as he considers proper and necessary, and he may issue his warrant to all proper officers to carry such pardon into effect in such manner as he thinks proper, (Rev., s. 5335; 1905, c. 356.)

See notes under section 7644.

§ 7644. Governor's duties when conditions of pardon violated.—If a prisoner who has been pardoned upon conditions to be observed and performed by him violates such conditions, or any of them, the governor, upon receiving information of such violation, shall forthwith cause him to be arrested and detained until the case can be examined by him. The governor shall examine the case of such prisoner, and if it appears by his own admission or by such evidence as the governor may require that he has violated the condition of his pardon, the governor shall order him remanded and confined for the unexpired term of his sentence; said confinement, if the prisoner is under any other sentence of imprisonment at the time of said order, to begin upon expiration of such sentence. In computing the period of his confinement the time between the conditional pardon and subsequent arrest shall not be taken to be a part of the time of his sentence. If it appears to the governor that he has not broken the conditions of his conditional pardon he shall be released and his conditional pardon shall remain in force. (Rev., s. 5336; 1905, c. 356, ss. 2, 3.)

Editor's Note.—This section is reviewed and its merits considered in an able article appearing in 1 N. C. Law Rev. 47, 48, when the law of parol generally is fully discussed.

Conditional Pardon.—The Governor may grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. See Constitution, sec. 6, Art. 3. In re Williams, 149 N. C. 436, 63 S. E. 108.

Same—Revocation.—After delivery and acceptance of a pardon with conditions precedent and subsequent, it is irrevocable upon the compliance by the prisoner with the condition precedent, unless he shall violate the conditions subsequent by his conduct after the release. In re Williams, 149 N. C. 436, 63 S. E. 108.

Rearrest of Paroled Prisoner.—Under the provisions of our State Constitution and Statutes, a "parole" granted by the governor to a prisoner imports a conditional pardon, and the governor may cause his rearrest either upon his own admissions, or on such evidence as he may require, for violating the conditions which the prisoner has accepted under the terms of the parole. State v. Yates, 183 N. C. 753, 111 S. E. 337.

Reasonable Conditions Imposed.—The power of the governor to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral or impossible of performance, which does not apply to cases wherein he is only required not to violate the statute law, and remain of good conduct. State v. Yates, 183 N. C. 753, 111 S. E. 337.

Same—Breach by Prisoner.—Where the prisoner has accepted his freedom upon the terms of the conditional pardon from the governor, his breach of such conditions avoids the pardon and cancels his right to further immunity from punishment. State v. Yates, 183 N. C. 753, 111 S. E. 337.

The essential part of a sentence for a violation of the criminal law is the punishment for the offense committed, and not the time the sentence shall begin and end; and where the prisoner has accepted a conditional pardon from the governor and has obtained his freedom, the breaking of the condition after the term would have otherwise expired, affords no legal excuse why he should not be recommitted to serve out the balance of his sentence. State v. Yates, 183 N. C. 753, 111 S. E. 337.

§ 7645. Duty of sheriff and clerk on pardon granted.—If a prisoner is pardoned conditionally or unconditionally, or his punishment is commuted, the officer to whom the warrant for such purpose is issued shall, as soon as may be after executing it, make return thereof, signed by him, with his doing thereon, to the governor's office, and shall file in the office of the clerk of the court in which the offender was convicted an attested copy of the warrant and return, and the clerk shall file the same in his office and subjoin a brief abstract thereof to the record of the conviction and sentence, and at the next regular term of said court said warrant shall be entered upon the minutes of the court. (Rev., s. 5337; 1905, c. 356, s. 4.)

When Sheriff Cannot Defeat Pardon.—The sheriff, by returning a pardon after its delivery and acceptance by the prisoner, cannot defeat or impair its legal results. In re Williams, 149 N. C. 436, 63 S. E. 108.

Recovery of Fine Paid before Pardon.—Where one convicted of a crime has paid the fine imposed by the court and then has obtained a pardon from the Governor, it is the duty of the court to return the fine upon his application and presenting the pardon, so long as the money remains in its possession and the rights of third persons have not intervened; but where the fine collected has reached its final destination, it is beyond the reach of Executive clemency, and may not be recovered. Bynum v. Turner, 171 N. C. 86, 87 S. E. 975.

§ 7646. To procure great seal of state; its description.—The governor shall procure for the state a seal, which shall be called the great seal of the state of North Carolina, and shall be two and one-quarter inches in diameter, and its de-

sign shall be a representation of the figures of Liberty and plenty, looking toward each other, but not more than half fronting each other and otherwise disposed as follows: Liberty, the first figure, standing, her pole with cap on it in her left hand and a scroll with the word "Constitution" inscribed thereon in her right hand. Plenty, the second figure, sitting down, her right arm half extended towards Liberty, three heads of wheat in her right hand, and in her left, the small end of her horn, the mouth of which is resting at her feet, and the contents of the horn rolling out; there shall also be inserted thereon the words "esse quam videri." It shall be the duty of the governor to file in the office of secretary of state an impression of the great seal, certified to under his hand and attested by the secretary of state, which impression so certified the secretary of state shall carefully preserve among the records of his office. (Rev., s. 5339; Code, ss. 3328, 3329; 1868-9, c. 270, s. 35; 1883, c. 392; 1893, c. 145.)

§ 7647. Affixing great seal a second time to public papers.—In all cases where any person may find it necessary to have the great seal of the state put again to any public paper, other than a grant for lands, he may prefer his petition to the governor and council, who shall, if they deem the same proper, direct the seal to be put thereto. (Rev., s. 5338; Code, s. 3333; 1868-9, c. 270, s. 38.)

§ 7648. To procure seals for departments and courts.—The governor shall also procure a seal for each department of the state government to be used for attesting and authenticating grants, proclamations, commissions, and other public acts, in such manner as may be directed by law and the usage established in the public offices; also a seal for every court of record in the state, for the purpose of authenticating the papers and records of such court. All such seals shall be delivered to the proper officers, who shall give a receipt therefor and be accountable for their safe-keeping. (Rev., s. 5340; Code, ss. 3328, 3332; 1868-9, c. 270, ss. 35, 37; 1883, c. 71.)

§ 7649. Seal of department of state described.—The seal of the department of state shall be two inches in diameter and shall be of the same design as the great seal of the state, with the words "State of North Carolina, Department of State," surrounding the figures. (Rev., s. 5341; Code, s. 3330; 1883, c. 238.)

§ 7650. To provide new seals when necessary.—Whenever the great seal of the state, the seal of any department or any seal of a court of record shall be lost, or so worn or defaced as to render it unfit for use, the governor shall provide a new one, and when new seals are provided the former ones shall not be used. (Rev., s. 5342; Code, s. 3331; 1868-9, c. 270, s. 36.)

§ 7651. Payment for seals. — The treasurer shall pay the expense of procuring all seals provided for in this chapter, upon the warrant of the auditor. (Rev., s. 5343; Code, s. 3332; 1868-9, c. 270, s. 37; 1883, c. 71.)

Art. 4. Secretary of State

§ 7652. Office and office hours.—The secretary of state shall attend at his office, in the city of Raleigh, between the hours of ten o'clock a. m. and three o'clock p. m., on every day of the year, Sundays and legal holidays excepted. (Rev., s. 5344; Code, s. 3339; 1868-9, c. 270, s. 44; 1870-1, c. 111.)

§ 7653. Bond of secretary of state.—The secretary of state shall give bond with sufficient surety, approved by the governor and auditor, for the sum of one hundred thousand dollars, payable to the state, and conditioned for the faithful performance of his duties. And the bond of the secretary of state shall be deposited in the treasurer's office for safe-keeping; and he shall take the oath prescribed for public officers. (Rev., s. 287; Code, s. 3338; 1868-9, c. 270, ss. 42, 43; 1923, c. 91.)

Editor's Note.—By amendment Public Laws 1923, c. 91 the bond was raised from twenty thousand dollars to one hundred thousand dollars.

§ 7654. Duties of secretary of state.—It is the duty of the secretary of state:

1. To attend at every session of the legislature for the purpose of receiving bills which shall have become laws, and to perform such other duties as may then be devolved upon him by resolution of the two houses, or either of them. 2. To attend the governor, whenever required by him, for the purpose of receiving documents which have passed the great seal. 3. To receive and keep all conveyances and mortgages belonging to the state. 4. To distribute annually the statutes, the legislative journals and documents, and the reports of the supreme court. 5. To distribute the acts of congress received at his office in the manner prescribed for the statutes of the state. 6. To keep a receipt book, in which he shall take from every person to whom a grant shall be delivered a receipt for the same; but he may inclose grants by mail in a registered letter at the expense of the grantee, unless otherwise directed, first entering the same upon the receipt book. (Rev., s. 5345; Code, s. 3340; 1868-9, c. 270, s. 45; 1881, c. 63.)

As to issuing grants, see section 7578.

§ 7655. To purchase stationery and fuel.—The secretary of the state shall purchase suitable stationery for the general assembly, the supreme court, and state library upon the best terms the same can be procured. And he shall contract with the lowest bidder, under sealed proposals, for the necessary lights and fuel for the general assembly, the public offices, and the governor's dwelling. (Rev., s. 5346; Code, s. 3341; R. C., c. 104, s. 6; 1842, cc. 48, 68; 1873-4, c. 129.)

§ 7656. Custodian of statutes, records, deeds, etc.—The secretary of state is charged with the custody of all statutes and joint resolutions of the legislature, all documents which pass under the great seal, and of all the books, records, deeds, parchments, maps, and papers now deposited in his office or which may hereafter be there deposited pursuant to law, and he shall from time to time make all necessary provisions for their arrangement and preservation. (Rev., s. 5347; Code, s. 3337; R. C., c. 104, s. 105; 1868-9, c. 270, s. 41; 1873-4, c. 129.)

§ 7657. To keep records of oyster grants.—The secretary of state shall keep books of records in which shall be recorded a full description of all grounds granted for oyster beds under the provisions of chapter one hundred and nineteen of the laws of one thousand eight hundred eighty-seven, and laws amendatory thereof, and shall keep a map or maps showing the position and limits of all public and private grounds. (Rev., s. 2381; 1887, c. 119, s. 14.)

§ 7658. Binding original statutes, resolutions, and documents.—The original statutes and joint resolutions passed at each session of the general assembly the secretary of state shall immediately thereafter cause to be bound in volumes of convenient size. Each such volume shall be lettered on the back with its title and the date of its session. (Rev., s. 5348; Code, s. 3343; 1866-7, c. 71; 1868-9, c. 270, s. 46.)

§ 7659. Public, public-local, and private laws.—The secretary of state shall divide the laws into three classes—public, public-local, and private laws; and it shall be his duty, at the time of making the marginal notes, to mark on the upper right-hand corner of each act the words "public" or "public-local" or "private," and acts thus marked shall be kept separate by the state printer. The public laws and resolutions shall be published in one volume to themselves. The public-local and private laws shall be kept separate and indexed separately, but may, in the discretion of the secretary of state, be bound together in one or more volume or volumes, which volume or volumes shall be published and distributed as are now the private laws. (Rev., s. 5349; 1909, c. 473.)

Whether an act of the Legislature is public or private, general or special, within the meaning of a constitutional provision affecting its validity for that reason, depends upon its purpose and not its classification by the public official charged with the duty of making such classification under this section. Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

§ 7660. Supplies departments of general government with laws and documents.—The secretary of state shall supply and transmit to the different departments of the general government and the New York historical society copies of the acts, both private and public, and the public documents and journals of the general assembly, and with the reports of the supreme court of this state. (Rev., s. 5350; Code, ss. 3601, 3603, 3344; R. C., c. 91, s. 2; 1868-9, c. 270, s. 48; 1885, c. 382.)

§ 7661. Transmits statutes and reports to other states.—The secretary of state, as soon as published, shall transmit, at the expense of this state, to the executive of every state and territory in the union, one copy of the statutes of each year, and of the reports of the supreme court, and request a similar transmission to be made to him of the statutes and reports of the higher courts of the several states and territories. When the statutes of any state or territory are received, he shall deposit one copy in the executive library, but in case only one copy is received it shall be deposited in the supreme court library.

The secretary of state shall furnish the library of the University of North Carolina at Chapel Hill twenty-five copies, in addition to all now furnished, of the public, public-local, and private laws of the house and senate journals, legislative documents and all reports and publications of the state of North Carolina and its several agencies, institutions and departments, for use in exchange with other southern states, municipalities and institutions and with a selected list of states outside of the south. In order to enable the library of the University of North Carolina at Chapel Hill to complete the project for exchange of public documents with other states undertaken pursuant to this section, the secretary of state shall furnish that library with fifteen (15) additional volumes of the current annual supreme court reports of North Carolina beginning with the 12th day of March, 1935: Provided that no re-printing of the public, public-local, and private laws of the house and senate journals, legislative documents and reports and publications of the State of North Carolina and its several agencies, institutions and departments shall be made to comply with the provisions hereof. (Rev., s. 5351; Code, ss. 3321, 3344; 1868-9, c. 270, ss. 28, 48; 1933, c. 355; 1935, c. 88.)

Editor's Note.—Public Laws of 1933, c. 355, added the last paragraph to this section relating to exchanging documents for libraries.

The clause immediately preceding the proviso in the second paragraph, requiring furnishing fifteen additional copies to the library, was inserted by the 1935 amendment.

§ 7662. Furnishes laws and documents to institutions of learning.—The secretary of state, upon application made by any chartered institution of learning in this state, for which provision is not elsewhere made in this article, having a library of not less than five thousand volumes, shall furnish and transmit to each of such institutions, to be kept in its library, a copy of all future current supreme court reports, public and private acts of the general assembly and journals of both houses and public documents, whenever the same shall be ready for distribution. He shall also furnish to each of such institutions, if he have them on hand, or when reprinted or otherwise obtained, one volume each of such of the supreme court reports as have not been heretofore furnished. (Rev., s. 5352; Code, s. 3619; 1881, c. 277; 1889, c. 249.)

§ 7663. Distribution of statutes.—The secretary of state shall distribute copies of the public, public-local, and private laws, as follows: To the governor, lieutenant governor, treasurer, secretary of state, auditor, superintendent of public instruction, attorney-general, commissioner of agriculture, commissioner of labor and printing, insurance commissioner, corporation commission, legislative reference library, state board of health, state highway commission, state board of charities and public welfare, state geologist, superintendents of the several state hospitals for the insane, and of the several institutions for the deaf, dumb, and the blind, and of the state's prison, to the North Carolina state college of agriculture and engineering, to the several justices of the supreme court, the judges of the superior courts, the judges of the United States courts, the several solicitors and United States district attorneys, the clerks of the superior and federal

courts, the sheriffs of the several counties, the several registers of deeds, members and clerks of the general assembly, and county commissioners, one copy each; to the state library, twenty copies; to the library of the University, ten copies of the public laws and four copies of the public-local laws, and private laws; to the supreme court library, eleven copies; to the library of the supreme court of the United States, one copy; to the several states and territories of the Union, including the District of Columbia, and to the Dominion of Canada, to the provinces of Canada, to Australia and to New Zealand, one copy each, and to each of said states, territories, districts, dominions and provinces which shall be willing to exchange their own similar publications therefor, an additional copy of the public laws, such publications received in exchange to be sent to the library of the University for the use of the school of law; and two copies to be deposited in the offices of each department of the state government; to the clerks of the superior court of the several counties of the state for distribution among such justices of the peace as said clerk may deem advisable, the number of copies to be furnished in their respective counties being as follows: five copies in each county with a population under ten thousand according to the last Federal census, fifteen copies for each county with a population of more than ten thousand and less than thirty thousand, and twenty copies for each county with a population over thirty-five thousand: Provided, however, that no copies of the public-local and private laws shall be distributed to clerks of the superior court for the justices of the peace of the county. (Rev., s. 5353; Code, s. 3632; R. C., c. 93, ss. 8, 19; 1870-1, c. 111, s. 2; 1872-3, c. 45, ss. 7, 8; 1879, c. 271; 1881, c. 107; 1885, c. 82; 1891, c. 471; 1893, c. 146, s. 2; 1897, c. 135; 1901, cc. 88, 401, s. 2; 1903, c. 801; 1919, c. 195, s. 1; 1927, c. 87, s. 1, c. 217, s. 3; 1933, c. 2.)

Editor's Note.—By amendment Public Laws 1927, ch. 217, sec. 3, the last part of this section, in regard to distribution to justices of the peace through the clerks of the superior court to the several counties, replaces a provision for furnishing a copy "to the several justices of the peace."

Public Laws of 1933, c. 2, provided for twenty instead of two copies to the state library.

§ 7664. Distribution of senate and house journals.—The senate and house journals shall be distributed by the secretary of state, as follows: One each to the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney-general, superintendent of public instruction, commissioner of agriculture, commissioner of labor and printing, insurance commissioner, corporation commission, legislative reference library, the North Carolina state college of agriculture and engineering; each senator and representative, principal, assistant, engrossing clerks, the several registers of deeds and clerks of the superior court; to the state library, twenty copies; to the library of the University, three copies. (Rev., s. 5354; Code, s. 3636; 1872-3, c. 45, s. 10; 1881, c. 16; 1901, c. 88; 1903, c. 5; 1919, c. 195, s. 2; 1919, c. 314, s. 6.)

§ 7665. Distribution of public documents.—Of the public documents, seventy copies shall be delivered by the secretary of state to the secretary of the senate, as soon as printed, for the use of the senate, and one hundred and fifty to the clerk of the house for the use of the house, and the residue, three hundred and sixty-five copies, shall be distributed as follows: To the governor, lieutenant governor, treasurer, attorney general, secretary of state, auditor, superintendent of public instruction, commissioner of agriculture, commissioner of labor and printing, insurance commissioner, each clerk of the superior court, the superintendent of the several state hospitals for the insane, of the several ininstitutions for the deaf, dumb, and the blind, and of the state's prison, to the North Carolina state college of agriculture and engineering, each representative and senator, and each judge of the supreme and superior courts, one copy each; to the state library, ten copies; to the senate library, ten copies; to the house library, twelve copies; to the supreme court library, five copies; to the library of the university, three copies. (Rev., s. 5355; Code, s. 3637; 1872-3, c. 45, s. 11; 1881, c. 16; 1901, c. 88; 1919, c. 314, s. 6.)

§ 7666. First copies of laws and reports to go to judiciary and solicitors.—The secretary of state, immediately upon the receipt of the first bound copies of the laws and reports, shall transmit the same by mail, one each to the justices of the supreme court, and the judges, solicitors, and clerks of the superior court, and may then, in his discretion, expose for sale a limited number of each. The residue of the laws, reports, documents, and journals, as soon as they are delivered to the secretary of state, shall be transmitted and distributed by him according to this article, by express or otherwise, as he may deem best. (Rev., s. 5356; Code, ss. 3640, 3641; 1872-3, c. 45, ss. 14, 15; 1919, c. 314, s. 6.)

§ 7667. Distribution of supreme court reports.—The supreme court reports shall be distributed by the secretary of state as follows: To the governor, lieutenant governor, attorney-general, treasurer, secretary of state, auditor, superintendent of public instruction, commissioner of labor and printing, commissioner of agriculture, and insurance commissioner, corporation commission, legislative reference library, the justices of the supreme court and judges of the superior courts, the judges of the federal courts residing in the state, the clerks of the supreme and superior courts, and of the United States courts for North Carolina, one copy each; to the supreme court library, twelve copies; to the state library, two copies; to the library of the supreme court of the United States, one copy; to the library of the university ten copies, whereof eight shall be for the use of the school of law, and to the library of Wake Forest and Trinity colleges, five copies; to North Carolina State College of Agriculture and Engineering, one copy; and Lenoir Rhyne College and Elon College and Guilford College and to each state and territory in the Union, including the District of Columbia, one copy; and to the Dominion of Canada, to the provinces of Canada, and Australia, and to New Zealand, one copy each, and to each of said states, territories, districts, provinces and dominions which shall be willing to exchange

their own similar publications therefor, an additional copy, such publications received in exchange to be sent direct to the library of the University for the use of the school of law, and one copy each to each court in foreign states as the supreme court may direct. (Rev., s. 5357; Code, s. 3635; 1873-4, c. 34, s. 2; 1876-7, c. 164, s. 2; 1881, c. 107; 1881, c. 104, s. 2; 1885, c. 82; 1891, c. 471; 1899, cc. 37, 667; 1903, c. 689; 1919, c. 195, s. 3; 1925, c. 52; 1927, cc. 36, 87; 1931, c. 113.)

§ 7667(a). Allotment of laws, reports, etc., to universities and colleges for completion of sets.—Upon written request of the librarian of the University of North Carolina or of the librarian of Duke University or the librarian of the Law School of Wake Forest College, the secretary shall furnish to each of such schools making such requests from the publication of the State now available, such volumes as may be necessary to complete such incomplete sets as said schools now have in the main library or law library of such schools, of Supreme Court Reports, public, public-local and private laws, Senate and House Journals and public documents; and in addition thereto, three complete sets of the State Supreme Court Reports for the use of the law schools of said schools. (1927, c. 87, s. 2.)

§ 7667(b). Reports, etc., allotted Wake Forest College and Duke University.—The secretary of State is hereby authorized and directed to furnish to the law library at Duke University and the law library at Wake Forest College, each, three complete sets of the Supreme Court Reports and Consolidated Statutes; also such volumes as may be necessary to complete three other broken sets of North Carolina reports now on hand in said schools. The volumes necessary to complete the broken sets aforesaid to be furnished upon lists presented by the deans of the respective schools. (1927, c. 218, s. 1.)

§ 7667(c). Clerks of superior courts to furnish inventory of reports; lending prohibited.—On or before the first Monday in June of each and every year hereafter, the clerks of the Superior Courts of the State are required to furnish to the Secretary of State an inventory of the volumes of the reports of the Supreme Court of North Carolina which they have on hand.

The clerks of the Superior Courts of the State of North Carolina are held officially responsible for the volumes of the North Carolina Supreme Court reports furnished and to be furnished them by the said State.

The said clerks of the various courts shall not lend or permit to be taken from their custody the said reports, nor shall any person with or without the permission of the said clerks take them from their possession. (1927, c. 259.)

§ 7667(d). North Carolina reports for Justices of Supreme Court.—To each of the Justices of the Supreme Court there shall be furnished for use in his chambers in the Supreme Court building, one complete set of North Carolina Supreme Court reports for use in his home, or private office, and the set so provided for the members of the court for use in their private office shall be and remain their property. (1929, c. 30, s. 1.)

§ 7668. Transmission of laws, etc., for use of counties and members of general assembly.—The statutes, journals, and documents for the use of each county, and for members of the general assembly and other officers therein shall be transmitted to the clerk of the court of each county in such manner as the secretary of state may think best; the statutes to be transmitted as soon as practicable after adjournment of the general assembly. (Rev., s. 5358; Code, s. 3344; 1868-9, c. 270, s. 48.)

§ 7668(a). Secretary of state to send copies of laws changing procedure to superior court judges and clerks.—Upon the ratification of any act changing the procedure in civil actions or special proceedings, it shall be the duty of the secretary of state forthwith to send copies of such parts of such acts as change the procedure to all judges and clerks of the superior courts. (1921, c. 162.)

§ 7669. Expenses of transmitting publications.—The transmission of all publications directed by this article to be distributed shall be at the expense of the state. (Rev., s. 5359; Code, s. 3344; 1868-9, c. 270, s. 48.)

§ 7670. Sale of laws, journals, and documents.—Such laws, journals, and documents as may be printed under the provisions of this article in excess of the number directed to be distributed, the secretary of the state may sell at such price as he deems reasonable, not exceeding two dollars for full bound copies of the public laws; and he shall pay the proceeds into the treasury. In his annual report he shall give an account of the number sold and number on hand. He may sell such number of copies of the journals and public documents as the general assembly may by joint resolution direct at a price not exceeding ten per centum in advance of the cost. (Rev., s. 5360; Code, ss. 3344, 3642; 1868-9, c. 270, s. 48; 1872-3, c. 45, s. 16; 1881, c. 104; 1921, c. 221; Ex. Sess. 1921, c. 84.)

§ 7671. Reprints of Supreme Court reports.—The Supreme Court is authorized to have such of the reports of the Supreme Court of the State of North Carolina as are not on hand for sale, republished and numbered consecutively, retaining the present numbers and names of the reporters and by means of star pages in the margin retaining the original numbering of the pages. The Supreme Court is authorized and directed to have such reports reprinted without any alteration from the original edition thereof, except as may be directed by the Supreme Court. The contract for such reprinting and republishing shall be made by the Supreme Court in the manner prescribed in section one of this act. Such republication shall thus continue until the State shall have for sale all of such reports; and hereafter when the editions of any number or volume of the Supreme Court reports shall be exhausted, it shall be the duty of the Supreme Court to have the same reprinted under the provisions of this act. In reprinting the reports that have already been annotated, the annotations and the

additional indexes therein shall be retained and such reports shall be further annotated so as to make the annotations in all reprints complete up to the date of the reprinting thereof. In reprinting reports the Supreme Court is authorized to provide for, and to secure, such further annotations for reports that have been heretofore annotated and for the annotating of the reports that have not been heretofore annotated and the costs thereof as provided in the contract made by the Supreme Court with the annotator selected by it, shall be paid as a part of the cost of reprinting the said reports. (Rev., s. 5361; Code, s. 3634; 1885, c. 309; 1899, c. 473, ss. 1-4, 6; 1907, c. 503; 1917, cc. 201, 292; 1923, c. 176; 1929, c. 39, s. 2.)

§ 7672. Sale of supreme court reports.—The secretary of state shall sell any and all of the supreme court reports, both the current reports and the reprints, at such price as he deems reasonable, not less than one dollar and fifty cents per volume, but he may allow to regular licensed book-sellers in this state such discount as to him may seem reasonable and just. For his services in making such sales he shall receive a commission of five per centum upon his receipts, which commission he may deduct when he settles with the state treasurer, to whom he shall pay over, monthly, the moneys arising from such sales. (Rev., s. 5362; Code, s. 3635; 1889, c. 473, s. 5; 1899, c. 37; 1919, c. 195, s. 4.)

As to sale to a bookseller, see Smith v. Thompson, 122 N. C. 215, 29 S. E. 223.

§ 7673. Payment of accounts and expenses of secretary of state.—The accounts of the secretary of sate for the expenditures provided for in this subchapter, and all other expenses which he may incur, the payment whereof is not otherwise provided for, shall be passed on by the governor and council of state, and if allowed, shall be paid by the treasurer, on a warrant which the auditor shall draw. (Rev., s. 5363; Code, s. 3342; R. C., c. 104, s. 7; 1842, c. 48, s. 1; 1842, c. 68, s. 3; 1873-4, c. 129.)

§ 7673(a). Sale of justices' edition of Consolidated Statutes.—The secretary of state is hereby authorized and empowered to sell to any one desiring the same a copy of said justices' edition of the Consolidated Statutes of North Carolina, charging therefor the sum of three dollars and fifty cents. (Ex. Sess. 1920, c. 59, s. 2.)

§ 7673(b). Commission allowed dealers.—The secretary of state shall allow to all licensed book dealers handling said books the commissions now allowed by law to said book dealers handling the publications of the state. (Ex. Sess. 1920, c. 59, s. 3.)

Art. 5. Auditor

§ 7674. Office and office hours.—The auditor shall keep his office at the city of Raleigh, and shall attend thereat between the hours of ten o'clock a. m. and three o'clock p. m., Sundays and legal holidays excepted. (Rev., s. 5364; Code, s. 3353; 1868-9, c. 270, ss. 69, 70.)

§ 7674(a). Bond.—The State Auditor shall be placed under an official bond in a penal sum to be fixed by the Governor and Council of State at not less than fifty thousand ($50,000) dollars. Such official bond shall be corporate surety and furnished by a company admitted to do business in the State. The premiums will be paid by the State out of the appropriations to the State Auditor's Office. (1929, c. 337, s. 1.)

§ 7675. Duties of auditor.—It is the duty of the auditor:

1. To superintend the fiscal concerns of the state.

2. To report to the governor, annually, and to the general assembly at the beginning of each biennial session thereof; a complete statement of the funds of the state, of its revenues and of the public expenditures during the preceding fiscal year, and, as far as practicable, an account of the same down to the termination of the current calendar year, together with a detailed estimate of the expenditures to be defrayed from the treasury for the ensuing fiscal year, specifying therein each object of expenditure and distinguishing between such as are provided for by permanent or temporary appropriations, and such as must be provided for by a new statute, and suggesting the means from which such expenditures are to be defrayed.

3. To suggest plans for the improvement and management of the public revenue.

4. To keep and state all accounts in which the state is interested.

5. To examine and settle the accounts of all persons indebted to the state, and to certify the amount of balance to the treasurer.

6. To direct and superintend the collection of all moneys due to the state.

7. To examine and liquidate the claims of all persons against the state, in cases where there is sufficient provision of law for the payment thereof; and where there is no sufficient provision, to examine the claim and report the fact, with his opinion thereon, to the general assembly.

8. To require all persons who have received any moneys belonging to the state, and have not accounted therefor, to settle their accounts.

9. To have the exclusive power and authority to issue all warrants for the payment of money upon the state treasurer; and it shall be the auditor's duty, before issuing the same, to examine the laws authorizing the payment thereof, and satisfy himself of the correctness of the accounts of persons applying for warrants; and to this end he shall have power to administer oaths, and he shall also file in his office the voucher upon which the warrant is drawn and cite the law upon said warrant.

10. To procure from the books of the banks in which the treasurer makes his deposits, monthly statements of the moneys received and paid on account of the treasurer.

11. To keep an account between the state and the treasurer, and therein charge the treasurer with the balance in the treasury when he came into office, and with all moneys received by him, and credit him with all warrants drawn or paid by him.

12. To examine carefully on the first Tuesday of every month, or oftener if he deems it necessary, the accounts of the debts and credits in the

bank book kept by the treasurer, and if he discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, to report the same forthwith, in writing, to the governor.

13. To require, from time to time, all persons who have received moneys or securities, or have had the disposition or management of any property of the state, of which an account is kept in his office, to render statements thereof to him; and all such persons shall render such statements at such time and in such form as he shall require.

14. To require any person presenting an account for settlement to be sworn before him and to answer orally as to any facts relating to its correctness.

15. To annually audit the accounts of the county officers of Washington county. (Rev., s. 5365; Code, s. 3350; 1868-9, c. 270, ss. 63, 64, 65; 1883, c. 71; 1919, c. 153.)

As to being constitutional office, see Art. III, sec. 1 and 13 of the Constitution; as to mandamus by governor to compel performance of certain duties, see note to section 7636.

Par. 7—Mandamus to Compel Payment.—The duty of the auditor under par. 7 is not a ministerial duty but is one involving judgment and discretion, and mandamus will not lie against him for refusal to issue a warrant for payment of a claim he does not approve. Burton v. Furnam, 115 N. C. 166, 20 S. E. 443.

Where a Clerk of the General Assembly had received a warrant for the entire number of days to which he was entitled, at seven dollars per day, he had no right to a writ of mandamus against the Auditor of the State because he refused to give him a warrant for three dollars per day additional for the same number of days for which he had heretofore obtained a warrant. Boner v. Adams, 65 N. C. 639.

Report to the General Assembly.—The Auditor of the State is not a mere minsterial officer, when a claim is presented to him against the state, he is to decide whether there is a sufficient provision of law for its payment, and if in his opinion there is not sufficient provision of law, he must examine the claim and report the fact, with his opinion, to the General Assembly. Boner v. Adams, 65 N. C. 639.

Cited in Bank v. Worth, 117 N. C. 146, 147, 155, 23 S. E. 160.

§ 7675(a). Warrants to bear limitations; presented within sixty days.—From and after March 10, 1925 all warrants drawn by the State Auditor on the Treasurer shall bear, and there shall be printed upon the face thereof in plain type so as to be easily read, the following words, to-wit: "This warrant will not be paid if presented to the Treasurer after the expiration of sixty days from the date hereof;" and the State Treasurer shall not and he is hereby prohibited from paying any warrant drawn by the Auditor unless the same shall be presented within sixty days from the date of such warrant. (1925, c. 246, s. 1.)

§ 7675(b). Surrender of barred warrant; issue of new warrant.—Any person, firm or corporation holding a warrant drawn by the State Auditor which cannot be paid because of the provisions of section 7675(a) may present the same to the State Auditor, and upon satisfactory proof that such person, firm or corporation is the owner thereof and is entitled to have and receive the proceeds of such warrant and that the obligations for which the warrant is drawn is a subsisting obligation against the State of North Carolina, may surrender said warrant to the Auditor and cancel the same, whereupon the Auditor is authorized and empowered to issue another warrant for like amount in lieu thereof. (1925, c. 246, s. 2.)

§ 7675(c). Warrants issued before March 10, 1925.—Every person, firm or corporation holding a warrant, drawn and issued by the State Auditor prior to March 10, 1925, shall present the same for payment on or before the first day of May, one thousand nine hundred twenty-five. If such warrant is not presented to the State Treasurer for payment prior to the first day of May, one thousand nine hundred twenty-five, the same shall not be paid, but the holder thereof shall be notified of the provision of sections 7675(a) to 7675(c), and upon satisfactory proof that the holder thereof is the proper owner and is entitled to have and receive the proceeds of such warrant and that the obligation for which the warrant is drawn is a subsisting obligation against the State of North Carolina, the warrant may be surrendered to the Auditor and cancelled and the Auditor is authorized and empowered to issue another and new warrant for like amount in lieu thereof. (1925, c. 246, s. 3.)

§ 7675(d). Assignments of claims against state.—All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment or any such claim or any part or share thereof, shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein: Provided that this section shall not apply to assignments made in favor of hospitals, building and loan associations, and life insurance companies. (1925, c. 249; 1935, c. 19.)

For assignments in general, see 13 N. C. Law Rev., 113, 118.

Editor's Note.—The proviso at the end of this section was added by the 1935 amendment.

§ 7676. Warrants for money paid into treasury by mistake.—Whenever the governor and council of state are satisfied that moneys have been paid into the treasury through mistake, they may direct the auditor to draw his warrant therefor on the treasurer, in favor of the person who made such payment; but this provision shall not extend to payments on account of taxes nor to payments on bonds and mortgages. (Rev., s. 5366; Code, s. 3351; 1868-9, c. 270, s. 66.)

§ 7677. Accounts to be examined. — His accounts shall be closed on the thirtieth day of November of each year, and shall be examined at the same time and by the same officials as provided for examination of the treasurer's accounts. (Rev., s. 5367; Code, s. 3360; 1885, c. 334.)

§ 7678. Warrants for surplus proceeds of sale of property mortgaged to state.—Whenever any real property mortgaged to the state, or bought in for the benefit of the state, of which a certificate shall have been given to a former purchaser,

is sold by the attorney-general on a foreclosure by notice, or under a judgment, for a greater sum than the amount due to the state, with costs and expenses, the surplus money received into the treasury, after a conveyance has been executed to the purchaser, shall be paid to the person legally entitled to such real property at the time of the foreclosure on the forfeiture of the original contract. The auditor shall not draw his warrant for such surplus money but upon satisfactory proof, by affidavit or otherwise, of the legal rights of such person. (Rev., s. 5368; Code, s. 3352; 1868-9, c. 270, s. 68.)

Art. 6. Treasurer

§ 7679. Office and office hours.—The treasurer shall keep his office at the city of Raleigh, and shall attend there between the hours of ten o'clock a. m. and three o'clock p. m., Sundays and legal holidays excepted. He shall be allowed such office room as may be necessary. (Rev., s. 5369; Code, s. 3362; 1868-9, c. 270, ss. 80, 81.)

§ 7680. Bond of treasurer. — The state treasurer-elect, before qualifying, shall file with the secretary of state a bond to the state in some reliable company, or companies, in the sum of two hundred and fifty thousand dollars, conditioned that he will faithfully execute the duties of his office, and the premium on such bond shall be paid out of the general state funds. Such bond, before acceptance, shall be approved by the speaker of the house of representatives and the president of the senate, and shall be deemed to extend to the faithful execution of the office of treasurer by the person elected thereto until a new election of treasurer be made and a new bond given by the person elected. (Rev., s. 288; Code, s. 3357; 1868-9, c. 270, s. 74; 1915, c. 168, s. 2.)

In General.—The treasurer's bond is a safeguard not only against his misuse or misappropriation of the funds committed to him, but against his payment of illegal claims, for the bond provides for the "faithful execution of the duties of his office," and one of those duties is to pay out no money except on warrant drawn by the auditor and to pay all legal warrants drawn by him. Illegal warrants, not authorized by law, the treasurer pays at his peril. Bank v. Worth, 117 N. C. 146, 147, 156, 23 S. E. 160.

§ 7681. Bonds of treasurer's clerks. — The clerks in the treasurer's office shall enter into good and sufficient bonds, payable to the state of North Carolina, each in such sums as the treasurer shall require, conditioned upon the faithful performance of the duties of their respective offices and the faithful accounting for all moneys and things of value which may come into their hands by virtue or color of their respective offices. These several bonds shall be in addition and cumulative to the official bond of the state treasurer, and shall not be construed to affect in any way the liability of the state treasurer upon his official bond. The bonds shall be approved by the treasurer, and, if given in a surety company, the costs thereof, not to exceed the current costs of similar bonds, may be paid by the state. (Rev., s. 289; 1919, c. 8; 1921, s. 175.)

Editor's Note.—By amendment, Public Laws 1921, c. 175, the discretion of the treasurer in fixing the bond replaced a provision for a ten thousand dollar bond for the chief clerk, and five thousand dollars for other clerks. Allowing current rates to surety companies replace a rate of not exceeding forty cents on the one hundred dollar penalty.

Bond to Treasurer Individually.—A bond by a clerk executed to the State Treasurer individually is not an official bond and does not extend beyond the term during which the clerk was appointed. Jackson v. Martin, 136 N. C. 196, 48 S. E. 672.

§ 7682. To receive and disburse moneys; to make reports.—It is the duty of the treasurer to receive all moneys which shall from time to time be paid into the treasury of this state; to pay all warrants legally drawn on the treasurer by the auditor; and no moneys shall be paid out of the treasury except on the warrant of the auditor; to report to the governor annually and to the general assembly at the beginning of each biennial session thereof the exact balance in the treasury to the credit of the state, with a summary of the receipts and payments of the treasury during the preceding fiscal year, and so far as practicable an account of the same down to the termination of the current calendar year. (Rev., s. 5370; Code, s. 3356; 1868-9, c. 270, s. 71.)

Editor's Note.—For an act providing that the state treasurer shall settle with counties for the ad valorem school taxes for 1931, see Public Laws of 1935, chapter 397.

Duty to Pay Warrants.—As it is the duty of the State Treasurer to keep his accounts, showing the transactions of each fiscal year ending December 31st, he has no right to pay out money except upon proper warrants drawn upon the proper funds in the treasury. Arendell v. Worth, 125 N. C. 111, 34 S. E. 232.

The public treasurer is not required to pay any and every warrant which the auditor may sign, but only those which are legally drawn, and the fact that the auditor finds that a claim for which he issues a warrant on the public treasurer is authorized by law is not binding upon or a protection to the latter. Bank v. Worth, 117 N. C. 146, 147, 23 S. E. 160.

Mandamus for Payment of Warrant.—The State Treasurer is not liable to a mandamus for refusing to pay a warrant improperly drawn, and he is entitled to a mandamus to enforce the drawing of proper warrants upon the proper funds before paying them, as they are his vouchers. Arendell v. Worth, 125 N. C. 111, 34 S. E. 232.

Same—When Fraud Is Alleged.—Where the State Treasurer denies the correctness of a claim audited by the State Auditor and alleges fraud in the creation of the indebtedness or that the services for which a warrant was issued were not rendered, mandamus will not lie to compel him to pay it, the question raised by such claim being for the Legislature, and not the courts, to determine. Garner v. Worth, 122 N. C. 250, 29 S. E. 364.

Mandamus without Warrant.—Mandamus will not lie to compel the treasurer to pay a claim as he can only pay on the warrant of the auditor. See 7675 as to auditor. Burton v. Furnam, 115 N. C. 166, 20 S. E. 443.

Court Compelling Payment of Claim.—The courts cannot direct the State Treasurer to pay a claim against the State, however just and unquestioned, when there is no legislative appropriation to pay the same; and when there is such an appropriation the coercive power is applied not to compel the payment of the State liability but to compel a public servant to discharge his duty by obedience to a legislative enactment. Garner v. Worth, 122 N. C. 250, 29 S. E. 364.

§ 7683. Discretion as to manner of paying annual appropriations.—Unless otherwise provided, it shall be discretionary with the treasurer whether he shall pay any annual appropriation in monthly, quarterly or semiannual installments or in a single payment. (Rev., s. 5372; 1897, c. 368.)

Editor's Note.—The discretion exercised by the State Treasurer as to the manner of disbursing appropriations prescribed by this section shall be exercised subject to the provisions of the act of 1927, c. 79, and the executive budget act of one thousand nine hundred and twenty-five.

§ 7683(a). Discretion vested in director of budget.—The discretion as to the manner of paying annual appropriations prescribed in section seven thousand six hundred and eighty-three is

hereby vested in the Director of the Budget. (1925, c. 275, s. 9.)

Editor's Note.—For the corresponding provisions replacing these sections, see section 7472(zz).

§ 7684. Deposits of state funds in banks regulated.—Banks having state deposits shall furnish to the auditor of the state, upon his request, a statement of the moneys which have been received and paid by them on account of the treasury. The treasurer shall keep in his office a full account of all moneys deposited in and drawn from all banks in which he may deposit or cause to be deposited any of the public funds, and such account shall be open to the inspection of the auditor. The treasurer shall sign all checks, and no depository bank shall be authorized to pay checks not bearing his official signature. No depository bank shall make any charge for exchange or for the collection of the treasurer's checks or for the transmission of any funds which may come into his hands as state treasurer. The corporation commission and the bank examiners, when so required by the state treasurer, shall keep the state treasurer fully informed at all times as to the condition of all such depository banks, so as to fully protect the state from loss. The state treasurer shall, before making deposits in any bank, require ample security from the bank for such deposit.

The payment of interest on deposits of state money in any bank or banks shall be controlled by the governor and council of state, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon. The interest collected on the bank balances from time to time shall be paid into the state's general fund; but the treasurer shall credit to the funds of the agricultural department all money which is received as interest on the funds of the department, and he shall notify the commissioner of agriculture when such amounts are paid. (Rev., s. 5371; 1905, c. 520; 1915, c. 168; 1917, c. 159; 1933, c. 175, s. 1.)

Editor's Note.—In conformity to § 221(s) the words "commissioner of banks" should be substituted for "corporation commission" in the first paragraph of this section.

Public Laws of 1933, c. 175, struck out the first sentence of the last paragraph of this section and substituted the present reading in lieu thereof.

The interest rate on state deposits which was temporarily fixed by P. L. 1931, ch. 127 at 2½% is by the 1933 amendment left to determination of the Governor's Council of State and a corresponding change is made in relation to deposit by the Commissioner of Banks of funds from the liquidation of banks. See 11 N. C. Law Rev., 202.

§ 7684(a). Investment of state funds in government bonds. — As now, on account of conditions in the State, the State Treasurer has, from time to time, large cash balances on hand, which cannot be adequately secured under section 7691(b), he is hereby authorized and empowered to invest said cash balances, when, in his discretion, conditions are such as to require it, temporarily in United States bonds or North Carolina State bonds, which are to be registered in the name of the State. From time to time, as demand may be made upon the Treasurer for cash payments and it is necessary to do so, he is authorized and empowered to sell and transfer to the purchaser a sufficient number of such United States bonds or State bonds to meet the cash demand upon the State Treasurer. If there is any loss accruing to the State from such transaction, the State Treasurer shall be, and he is, hereby exonerated from said loss, whenever he has exercised a sound business judgment in the premises, and said loss shall be regarded as insurance for the safety of the funds. If there is any profit in the transaction, it shall accrue for the benefit of the State Treasury.

This section shall cease to be effective from and after the first day of February, one thousand nine hundred and thirty-three. (1931, c. 127, ss. 2, 3.)

As to investment in bonds guaranteed by United States, see section 220(a) 1.

Editor's Note.—The first sentence of this temporary section suggests that the investment in bonds is to be made only when adequate security cannot be obtained but the clause giving the treasurer discretion contains no such condition. He is exonerated from any loss which may accrue, provided he "has exercised sound business judgment in the premises." Since the test is by this language not made one of good faith, some risk is thrown on him and he will hesitate to buy bonds on a falling market. 9 N. C. Law Rev. 393.

§ 7685. To make short-term notes in emergencies.—Subject to the approval of the governor and council of state, the state treasurer is authorized to make short-term notes for temporary emergencies, but such notes must only be made to provide for appropriations already made by the general asembly. (1915, c. 168, s. 3.)

§§ 7685(a) to 7685(c): (Repealed by Laws 1927, c. 49, s. 4.)

§ 7686. To furnish estimates of expenses of state; to draft revenue bill.—It shall be the duty of the treasurer to furnish the general asembly, at the commencement of each session, with estimates of the expenses of the state government and the rates of taxation necessary to pay the same for two years next succeeding the close of the last fiscal year, and with a scheme in the form of a complete revenue bill to sustain such estimates. (Rev., s. 5373; Code, s. 2864; 1856-7, c. 30; 1883, c. 60, s. 3.)

§ 7687. To construe revenue and machinery acts.—It shall be the duty of the state treasurer to decide all questions presented to him which may arise upon the construction and execution of all acts of the general assembly to raise revenue, commonly called revenue acts, and all acts providing for the assessment of property and collection of taxes, commonly called machinery acts, except where the decision of such questions is expressly conferred upon some other official or department. Such decisions of the treasurer shall be prima facie correct and a protection to the officers affected thereby. (Rev., s. 5374; 1895, c. 119, s. 17.)

§ 7688. May demand and sue for money and property of state.—The treasurer is authorized to demand, sue for, collect and receive all money and property of the state not held by some person under authority of law. (Rev., s. 5375; Code, s. 3359; 1866, c. 46.)

Action in Name of Treasurer.—An action for the collection of the license tax imposed by this section and made payable directly to the State Treasurer, was properly brought by that officer in his own name, although it might

have been brought in the name of the State. Worth v. Wright, 122 N. C. 335, 29 S. E. 361.

Same—Change of Treasurers.—Where a State Treasurer goes out of office pending a suit by him in his official capacity, the incoming Treasurer is entitled to be made a party in his stead. Lacy v. Webb, 130 N. C. 545, 41 S. E. 549.

§ 7689. Ex officio treasurer of state institutions; duties as such.—The treasurer shall be ex-officio the treasurer of the department of agriculture, of the North Carolina state college of agriculture and engineering, of the North Carolina school for the deaf and dumb at Morganton, of the North Carolina institution for the deaf and dumb and the blind at Raleigh, for the state hospitals (for the insane) at Raleigh, Morganton, and Goldsboro, for the state's prison and soldiers home. He may appoint deputies to act for him at Morganton and Goldsboro, and may pay such deputies reasonable compensation. He shall keep all accounts of the institutions, and shall pay out all moneys, upon the warrant of the respective chief officiers or superintendents, countersigned by two members of the board of directors, managers, or trustees. He shall report to the respective boards at such times as they may call on him, showing the amount received on account of the institution, amount paid out, and amount on hand. He shall perform his duties as treasurer of these several institutions under such regulation as shall be prescribed in each case by their respective boards of managers, trustees, or directors, with the approval of the governor; and shall be responsible on his official bond for the faithful discharge of his duties as treasurer of each of the several institutions. As treasurer of such institutions he shall, annually, after the examination, verification, and cancellation of his vouchers, deposit the same with the respective institutions, and the superintendents thereof shall be responsible for their safekeeping. (Rev., s. 5376; Code, ss. 2235, 2251, 3723; 1879, c. 240, s. 2; 1881, c. 211, s. 9, c. 128; 1883, c. 156, s. 12, c. 405; 1895, c. 434; 1899, c. 1, s. 11; 1919, c. 314, s. 6.)

As to separation of prison funds, see § 7711. As to abolition of office of treasurer of state institutions, see § 7689(a).

§ 7689(a). Office of treasurer of each State Institution abolished.—The office of Treasurer of each of the several State institutions of which the State Treasurer is ex-officio Treasurer is hereby abolished. (1929, c. 337, s. 3.)

§ 7689(b). Office of State Treasurer declared office of deposit and disbursement.—The office of the State Treasurer is declared to be an office of deposit and disbursement and only such records and accounts as may be necessary to disclose the accountability of the State Treasurer shall be kept. The purpose of this section is to prevent duplication in account and record keeping and such accounts as may be necessary shall be prescribed by the Director of the Budget under the terms of the Executive Budget Act. (1929, c. 337, s. 2.)

§ 7690. May authorize chief clerk to act for him; treasurer liable.—The treasurer may authorize his chief clerk to perform any duties pertaining to the office, except signing checks; but the treasurer is responsible for the conduct of all his clerks. (Rev., s. 5377; Code, s. 3358; 1868-9, c. 270, s. 76.)

As to clerk's liability on bond, see section 7681, and note.

§ 7691. Liability for false entries in his books.—If the treasurer of the state shall wittingly or falsely make, or cause to be made, any false entry or charge in any book kept by him as treasurer, or shall wittingly or falsely form, or procure to be formed, any statement of the treasury, to be by him laid before the governor, the general assembly, or committee thereof, or to be by him used in any settlement which he is required to make with the auditor, with intent, in any of said instances, to defraud the state or any person, such treasurer shall be guilty of a misdemeanor, and fined, at the discretion of the court, not exceeding three thousand dollars, and imprisoned not exceeding three years. (Rev., s. 3606; Code, s. 1119; R. C., c. 34, s. 68.)

§ 7691(a). Daily deposit of funds to credit of treasurer.—All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever, and every institution, agency, officer, employee, or representative of the State, or any agency, department, division or commission thereof, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, or other designated depository, selected or designated by the State Treasurer, in the name of the State Treasurer, at noon, or as near thereto as may be, and shall report the same daily to said Treasurer: Provided, that the Treasurer may refund the amount of any bad checks which have been returned to the department by the Treasurer when the same have not been collected after thirty days trial. (1925, c. 128, s. 1.)

§ 7691(b). Treasurer to select depositories; bond.—The State Treasurer is hereby authorized and empowered to select and designate, whereever necessary, in this State some bank or banks or trust company as an official depository of the State, and the said Treasurer shall require of such depository a bond, or in lieu there of collaterial security for such deposit, consisting of such bonds as are approved for investment by the State sinking fund, as provided for in sections 7472(q) 13 to 7472(q) 25, payable to the State of North Carolina, in a sufficient amount to protect the State on account of any deposit of State funds made therein. (1925, c. 128, s. 2.)

§ 7691(b) 1. Deposits of state funds in banks that have provided for safety of deposits without requiring depository bonds.—Where any bank or trust company, state or national, has come within the provisions of the national banking laws, providing guarantee or insurance on security, in full, for the deposits in such bank or trust company, and for payment thereof upon demand of the depositor, and when thereby such protection is afforded depositors of such bank or trust company, and where any such bank or trust company may be properly designated as a depository for the deposits of moneys of the state of North

Carolina, or of any county, city, town, or other political subdivision of the state of North Carolina, it shall be permissible and lawful to deposit the moneys of the state, or of such county, city, town, or other political subdivision therein, without requiring of the said bank or trust company to furnish any additional security for the protection of such deposits, or the payment thereof upon demand, as now required by law: Provided, however, that the council of state shall have previously passed upon the character and extent of the guarantee afforded by the United States banking laws, and shall have approved the same as satisfactory: Provided further, that the approval of such bank or trust company as a depository for moneys of the state of North Carolina must be given by the council of state, and approval by the local government commission must be secured for such bank or trust company to act as a depository for any county, city, town, or other political subdivision of the state: Provided further, that any action in regard to these matters shall be discretionary with the council of state as far as this section applies to them, and with the local government commission as far as this section applies to it.

Where the deposits are guaranteed or insured only in part, the bank or trust company receiving such deposits shall be required to deposit bonds or security only to the extent of the unguaranteed portion of said deposits. (1933, c. 461, ss. 1, 1½.)

See 11 N. C. Law Rev., 201, for review of this section.

§ 7691(c). Deposit in other banks unlawful; liability.—It shall be unlawful for any funds of the State to be deposited by any person, institution, or department or agency in any place or bank or trust company, other than those so selected and designated as official depositories of the State of North Carolina by the State Treasurer, and any person so offending or aiding and abetting in such offense shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court, and any person so offending or aiding and abetting in such offense shall also immediately become civilly liable to the State of North Carolina in the amount of the money or funds unlawfully deposited, and, at the instance of the State Treasurer, or at the instance of the Governor, the Attorney-General shall forthwith institute the civil action in the name of the State of North Carolina against such person or persons, either in the courts of Wake County, according to their respective jurisdiction, or in the county in which said unlawful deposit has been made, according to the selection made by the officer requesting the institution of such action, for the purpose of recovering the amount of the money so unlawfully deposited, with interest thereon at six per cent per annum, and for the cost of said action, and the court in which said action is tried may also tax, as a part of the cost in said action, to the use of the State of North Carolina, a sum sufficient to reimburse the State of North Carolina for all expense incidental to or connected with the preparation and prosecution of such action. (1925, c. 128, s. 3.)

§ 7691(d). Number of depositories; contract.—The State Treasurer is authorized and empowered to select as many depositories in one place and in the State as may appear to him to be necessary and convenient for the various officers representatives and employees of the State, to comply with the purposes of sections 7691(a) to 7691(g), and may make such contracts with said depositories for the payment of interest on average daily or monthly balances as may appear advantageous to the State in the opinion of such treasurer and the Governor. (1925, c. 128, s. 4.)

§ 7691(e). Accounts of funds kept separate.—In order to preserve and keep separate all funds that are now required by law to be kept separately administered, both by State departments, institutions, commissions, and other agencies or divisions of the State which collect or receive funds belonging to the State, or handle or maintained as trust funds in any form by such department, division, or institutions, shall be evidenced in daily reports by distribution sheets, which shall reflect and show an exact copy of the accounts, showing the distribution of said money kept by such collecting departments, institutions and agencies, and the same shall be entered in the records of the office of the State Treasurer, so as to keep and maintain in the office where the same is first collected or received the same account thereof, and of the distribution thereof, the same records and accounts as are kept in the office of the State Treasurer relating thereto. (1925, c. 128, s. 5.)

§ 7691(f). Receipts from Federal government and gifts not affected.—Sections 7691(a) to 7691(g) shall not be held or construed to affect or interfere with the receipts and disbursements of any funds received by any institution or department of this State from the Federal Government or any gift or donation to any institution or department of the State or commission or agency thereof when either in the act of Congress, relating to such funds received from the Federal government, or in the instrument evidencing the said private donation or gift, a contrary disposition or handling is prescribed or required, and the said sections shall not apply to any moneys paid to any department, institution or agency, or undertaking of the State of North Carolina, as a part of any legislative appropriation, or allotment from any contingent fund, as provided by law, after the same has been paid out of the State treasury. (1925, c. 128, s. 6.)

§ 7691(g). Auditor to furnish forms; reports; refund of excess payments.—The State Auditor, by and with the advice, consent and approval of the Governor, shall prescribe and furnish all forms necessary for full compliance with sections 7691(a) to 7691(g), and the cost of printing and furnishing the same shall be charged in the printing account of the several departments, institutions and agencies receiving and using such forms and such daily reports shall be made by mail by those departments, institutions and collecting agencies and officers and employees who are not in the city of Raleigh, when required to make such daily deposits and reports, and, in addition to such daily reports, the treas-

urer may require a report, as to the amount deposited, by wire, and all such departments, institutions, agencies, officers and employees, who are at or in the city of Raleigh, when required to make such deposits and reports, shall deliver the same, in person or by messenger, to the State Treasurer, whenever taxes of any kind have been by clerical error, misinterpretation of the law, or otherwise, collected and paid into the State Treasurer in excess of the amount found to be legally due the State. The State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate from the head of the department through which said tax was collected, or his successor in the performance of the functions of that department, and the Treasurer shall pay said warrant. (1925, c. 128, s. 7.)

§ 7692. Fiscal year.—The fiscal year of the state government shall annually close on the thirtieth day of June. The accounts of the treasurer, the auditor and the charitable and penal institutions of the state shall be annually closed on the date. (Rev., s. 5378; Code, s. 3360; 1868-9, c. 270, s. 77; 1883, c. 60; 185, c. 334; 1905, c. 430; 1921, c. 229; Ex. Sess. 1921, c. 7; 1925, c. 89, s. 21.)

Editor's Note.—Prior to the amendment Ex. Sess. 1921, ch. 7, the fiscal year closed on the thirtieth day of November, by that amendment it was changed to June thirtieth. By Public Laws 1925, ch. 89, sec. 21, a sentence providing for examination of the accounts of the treasurer, auditor and insurance commissioner by commissioner appointed by the legislature, was omitted.

Section 2 of Chapter 229, Public Laws 1921, provides that "All appropriations made by the general assembly of one thousand nine hundred and twenty-one for the support and maintenance of the institutions of the state where the said appropriations are made for the years one thousand nine hundred and twenty-one and one thousand nine hundred and twenty-two shall be continued until the end of the fiscal year one thousand nine hundred and twenty-three, and for the months following the present ending of the fiscal year shall be in proportion to the appropriation for the year one thousand nine hundred and twenty-two."

Applied, as fixing salary of sheriff, in Martin v. Swain County, 201 N. C. 68, 158 S. E. 843.

§ 7693. Duties of the attorney-general and of the director of the budget.—The Attorney-General shall, as soon as may be after the first day of each month, compare the warrants drawn by the Auditor on the Treasury during the preceding month with the several laws under which the same purport to have been drawn, and shall certify whether the Auditor had power to draw such warrants, such certificate to be filed with the warrants of the appropriate month. If any are found which, in the opinion of the Attorney-General, the Auditor had no power to draw, such warrants shall be specified in such certificate, accompanied by his reason for the opinion, and a copy of the certificate shall in each instance be furnished forthwith to the director of the budget. Whenever the Treasurer dies or resigns during his term, or is succeeded at the expiration of his term by another, the director of the budget shall examine or cause to be examined his accounts. The director of the budget shall also examine the warrants drawn on the Treasurer by the officials of the various public institutions of the State whose duty it is to draw such warrants, and the director of the budget shall have the same authority over the warrants drawn by the officials of all public institutions as over the warrants drawn by the Auditor. (Rev., s. 5379; Code, s. 3361; 1868-9, c. 270, ss. 78, 79; 1903, c. 738; 1919, c. 27; 1925, c. 89, s. 21, c. 121, s. 1.)

Editor's Note.—This section was repealed in toto by chapter 89 of the Public Laws of 1925 and reenacted in part by chapter 121, omitting the portion referring to an annual examination of accounts, and in the part which is reenacted substitution "director of the budget" for the "legislative commission."

§ 7693(a). Additional clerical assistance authorized; compensation and duties.—The state treasurer, by and with the consent and advice of the governor and council of state, is authorized to employ an additional clerk in the treasury department whose compensation and duties shall be fixed by the state treasurer, by and with the consent and advice of the governor and council of state. The compensation of such additional clerk as may be employed pursuant to this section shall be paid as other officers and clerks are paid. (1923, c. 172.)

Art. 7. Attorney-General

§ 7694. Duties.—It shall be the duty of the attorney-general—

1. To defend all actions in the supreme court in which the state shall be interested, or is a party; and also when requested by the governor or either branch of the general assembly to appear for the state in any court or tribunal in any cause or matter, civil or criminal, in which the state may be a party or interested.

2. At the request of the governor, secretary of state, treasurer auditor, corporation commissioners, insurance commissioner or superintendent of public instruction, he shall prosecute and defend all suits relating to matters connected with their departments.

3. To represent all state institutions, including the state's prison, whenever requested so to do by the official head of any such institution.

4. To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office.

5. To give when required, his opinion upon all questions of law submitted to him by the general assembly, or by either branch thereof, or by the governor, auditor, treasurer, or any other state officer.

6. To pay all moneys received for debts due or penalties to the state immediately after the receipt thereof into the treasury.

7. To compare the warrants drawn by the auditor on the state treasury with the laws under which they purport to be drawn. (Rev., s. 5380; Code, s. 3363; 1868-9, c. 270, s. 82; 1871-2, c. 112, s. 2; 1893, c. 379; 1901, c. 744.)

As to proceedings against corporations when reports filed by corporation commission, see section 1062; as to actions by the attorney-general, see section 870.

§ 7694(a). To devote whole time to duties.—The Attorney-General shall devote his whole time to the duties of the office and shall not engage in the private practice of law. (1929, c. 1, s. 1.)

§ 7695. Superseded by sec. 7695(a).

§ 7695(a). Assistants; compensation; assignments.—The Attorney-General shall be allowed three assistants, to be appointed by him, and each of said assistants shall receive a salary of three thousand six hundred dollars per year, payable monthly. One of said assistants shall be assigned to the State Highway Commission, and shall be paid by said State Highway Commission; another of said assistants shall be assigned to State Department of Revenue and the salary of said assistants so assigned shall be paid by said Department of Revenue; and the other assistant shall perform such duties as may be assigned by the Attorney-General: Provided, however, the provisions of this section shall not be construed as preventing the Attorney-General from assigning additional duties to the assistants assigned to the Highway Commission and the State Department of Revenue as above set forth. (1925, c. 207, s. 1.)

As to dispensing with one assistant, see § 7695(c).

§ 7695(b). Additional clerical help.—Since it appears probable that the clerical work in the office of the Attorney-General will be gradually increased by the provisions of section 7695 (a), the Attorney-General shall be allowed such additional clerical help as shall be necessary; the amount of such help and the salary therefor shall be fixed by the Budget Bureau and the Attorney-General. (1925, c. 207, s. 2.)

§ 7695(c). Dispensing with one assistant. — The Attorney-General shall dispense with one Assistant to his office. (1929, c. 1, s. 2.)

Art. 8. Solicitors

§ 7696. To prosecute cases removed to federal courts.—It shall be the duty of the solicitors of this state, in whose jurisdiction the circuit and district courts of the United States are held, having first obtained the permission of the judges of said courts, to prosecute, or assist in the prosecution of, all criminal cases in said courts where the defendants are charged with violations of the laws of this state and have moved their cases from the state to the federal courts under the provisions of the various acts of congress on such subjects. (Rev,. s. 5381; Code, s. 1239; 1874-5, c. 164, s. 1.)

§ 7697. Compensation of solicitors in federal courts.—For every such case in which the solicitor shall appear and prosecute, or assist in prosecuting, he shall be allowed twenty dollars; and if he cannot appear himself, by reason of a conflict of the time of holding his courts, or other good cause, he may appoint some one to act in his stead, who shall receive like compensation, and the prosecuting attorney shall be paid said fee by the treasurer of the state, upon the warrant of the auditor. (Rev., s. 5382; Code, s. 1240; 1874-5, c. 164, s. 2.)

Art. 9. Payment of Premiums on Bonds

§§ 7697(a), 7697(b) Repealed: Laws 1925, c. 275, s. 6.

CHAPTER 130
STATE PRISON

Art. 1. Government by Highway and Public Works Commission

Editor's Note.—The state prison, which was formerly governed by a board of directors, is now under the control of the highway and public works commission. See note to § 7703.

§§ 7698 to 7702: Repealed by Acts 1933, ch. 172, § 12.

§ 7703. Directors to employ servants and agents.—The board of directors, by and with the consent and approval of the Governor, are authorized to employ such managers, superintendents and wardens as they may deem necessary; and the board of directors are further authorized to employ such physicians, supervisors, overseers and other servants and agents as they may deem necessary for the management of the affairs of the State Prison Department, and the safekeeping and employment of the convicts therein confined. The compensation and duties of the managers, superintendents and wardens shall be fixed by the board of directors, by and with the consent and advice of the Governor. The board of directors shall fix the compensation of all physicians, supervisors, overseers and other servants and agents, prescribe their duties by proper rules and regulations, and may discharge them at will. Any manager, superintendent or warden may be discharge by the board of directors, by and with the consent and approval of the Governor. (Rev., s. 5387; 1901, c. 472, s. 10; 1925, c. 163.)

Editor's Note.—Public Laws of 1933, c. 172, §§ 2, 18, codified as sections 7748(b) and 7748(n), created the state highway and public works commission and conferred upon it all the powers and duties formerly exercised by the state prison department. And section 18 of said chapter further provided for the substitution of the terms "highway and public works commission," etc. for "prison department," etc., throughout this chapter.

§ 7704. Employees' bonds; money paid to state treasurer.—The board of directors shall require of its officers, employees, or agents, who may be authorized by law, or hereafter authorized by the board of directors, to collect or receive the moneys and earnings of said institution, to enter into bonds payable to the State of North Carolina in such penal sums as may be approved by the board, with such security or securities, conditioned upon the faithful performance of the duties of such officers, employees or agents in collecting and receiving, and paying over the moneys and earnings of the State Prison. Only such corporate security shall be accepted by the said board as is licensed to do business within the State of North Carolina. (Rev., s. 5389; 1901, c. 472, s. 7; 1923, c. 156; 1925, c. 163.)

See note under section 7703.

§ 7705. Acquisition and alienation of property.—Whenever it may be necessary or convenient in the conduct of the operations of the State Prison Department, or when hereafter expressly authorized by law, such property, both real and personal, as may be desired by the board of directors, by and with the advice, consent and approval of the Budget Bureau, and Governor, and Council of State, may be acquired by gift, devise, purchase, or lease; and all such gifts, devises, purchase or

lease shall be made to the State of North Carolina; and whenever it may be necessary or convenient, in the opinion of the said board of directors, by and with the advice, consent and approval of the Budget and the Governor, and Council of State to dispose of any such property, either real or personal, or any interest or estate therein by lease, subletting, sale or conveyance, such disposal may be effected upon the adoption of the resolution of the board of directors by vote of majority of the board of directors, and approved by the Budget Bureau, and Governor and Council of State. All leases, bills of sale, and conveyance necessary to execute such powers of lease, subletting, sale and conveyance shall be executed in the name of the State of North Carolina by the Governor, attested by the Secretary of State, with the Great Seal of the State of North Carolina affixed thereto; and such conveyance shall be admitted to registration in the several counties of the State upon such probate as is now required by law for other corporate conveyances. (Rev., s. 5392; 1901, c. 472, ss. 2, 6; 1925, c. 163.)

See note under section 7703.

§ 7706. Directors manage property and convicts.—The board of directors shall have charge of, and, through its agents and employees, manage all the property and effects of the State Prison Department, and conduct the operation of all its affairs subject to the provisions of this chapter. The board of directors may adopt and enforce such rules and regulations for the government of the State Prison Department, its agents and employees and the convicts therein confined as to them may seem just and proper. (Rev., s. 5390; 1901, c. 472, s. 4; 1925, c. 163.)

See note under section 7703.

As to subsequent statutes on this subject, see §§ 7748(c) and 7748(d).

§ 7707. Custody, employment, hiring out and recapture of convicts. — The board of directors shall make provision for receiving, keeping in custody until discharging by law, all such convicts as may be now confined in said prison and such as may be hereafter sentenced to imprisonment therein by the several courts of this State. The board of directors shall have full power and authority to provide for the employment of such convicts, either in the prison or on farms leased or owned by the State of North Carolina, or elsewhere, or otherwise; and may contract for the hire or employment of any able-bodied convicts upon such terms as may be just and fair, but such convicts so hired, or employed, shall remain under the actual management, control and care of the board of directors, or its employees, agents and servants: Provided, however, that no female convict shall be worked on public roads or streets in any manner. (Rev., s. 5391; 1895, c. 194, s. 5; 1897, c. 270; 1901, c. 472, ss. 5, 6; 1925, c. 163.)

See note under section 7703.

As to subsequent statute on this subject, see § 7748(e).

Editor's Note.—By amendment, Public Laws 1925, the provision for work on any property owned by the state replaced a provision for work on property owned by the state prison. There was also a former provision restricting prisoners to be hired out to those not necessary to be detained in the prison near Raleigh, which was omitted by the Public Laws 1925. The provision for recapture in section 7707(a) was separated from this section by the Public Laws 1925.

§ 7707(a). Recapture of convicts.—The board of directors may provide for the recapture of convicts that may escape from such prison and may pay such reward and expense of recapture to any person making the same. Any citizen of North Carolina shall have authority without warrant to apprehend any convict who may escape before the expiration of the term of his imprisonment, and to retain him in custody and redeliver him to the State Prison Department. (1925, c. 163.)

See note under section 7703.

As to subsequent statute on this subject, see § 7748(q).

§ 7707(b). Inspection of mines.—The board of directors of the State's Prison is hereby authorized, in its discretion, to have monthly inspection made of all mines in North Carolina in which State convicts are or may be employed and to employ for this purpose the services of an accredited mine inspector approved by the United States Bureau of Mines.

In order to carry out the provision of this section, the said board of directors of the State's Prison is authorized to expend not more than twenty-five hundred dollars of any moneys in the hands of the State Treasurer to the credit of the State's Prison, not otherwise appropriated. (1929, c. 292, ss. 1, 2.)

See note under section 7703.

§§ 7708 to 7711: Repealed by Acts 1933, ch. 172, § 12.

§ 7712. Work of convicts on public roads.—The board of directors of the State Prison Department are authorized to work the prisoners committed to their charge on the public roads of the State by organizing State camps for housing and feeding the prisoners while at work on such roads, but the construction of such camps must be in accordance with plans approved by the State Highway Commission and the State Board of Health, but if worked upon the public roads of any county or subdivision thereof, then such county or subdivision shall pay to the State Prison such compensation as may be agreed upon by such county, or subdivision thereof, and the board of prison directors. (1917, c. 286, s. 11; 1919, c. 80, s. 6; 1925, c. 163.)

See note under section 7703.

As to subsequent statute on subject, see § 3846(27). And see § 3846(19) et seq. See also § 7748(a).

§ 7712(a). Automobile license tags to be manufactured at State Prison.—The State Prison Department is hereby authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags and for such other purposes as the State Prison Department may direct.

The Commissioner of Revenue or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Prison Department for the State automobile license tag requirements from year to year.

The price to be paid to the State Prison Department for such tags shall be fixed and agreed upon by the Governor, the Directors of the State Prison Department and the Revenue Commissioner or such authority as may be authorized to purchase such supplies.

The State Prison Department is authorized

to expend the sum of thirty thousand dollars ($30,000) or so much thereof as may be necessary, for the establishment, equipment and installation of an automobile license tag plant in the State's Prison, and out of the balances and the receipts of the State's Prison at the credit of the State Prison Department with the State Treasurer. (1929, c. 221, s. 1.)

See note under section 7703.

§ 7712(b). Shoe factory authorized for central prison. — The state highway and public works commission is hereby authorized to purchase and install at the central prison in Raleigh, North Carolina, a shoe factory equipped for the purpose of manufacturing shoes for the inmates of the various state institutions.

The director of the division of purchase and contract for the State of North Carolina, or such other authority as may exercise the right to purchase shoes for the various state institutions, is hereby directed to purchase from, and to contract with, the state highway and public works commission for the shoe requirements for said institutions from year to year.

The price to be paid to the state highway and public works commission for such shoes shall be fixed and agreed upon by the governor, the state highway and public works commission, and the director of the division of purchase and contract, or such other authority as may be authorized to purchase shoes for the inmates of the various state institutions.

The state highway and public works commission is authorized to spend the sum of twenty-five thousand dollars, or so much thereof as may be necessary, for the establishment, equipment, and installation of said shoe factory at the central prison, and out of the balances and receipts of the state highway and public works commission at the credit of the state highway and public works commission with the state treasurer. (1935, c. 165.)

§ 7713. Supervision of jails and camps by board of health.—The State Board of Health shall have the same supervision of all jails, county camps or other places of confinement of county or city prisoners in regard to the method of construction, sanitary or hygienic care as they have over the State Prison Department, and no jail, county camp, or other place of confinement of county or city prisons shall be construed or used as such for a period of six months, unless the State Board of Health shall have approved the same, and the violation of this section shall constitute a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1917, c. 286, s. 11½; 1925, c. 163.)

See note under section 7703.

§ 7714. Sanitary and hygienic care of prisoners. —The sanitary and hygienic care of the prisoners shall be under the direction, supervision, and regulation of the State Board of Health, and all camps and camp equipment shall conform to the plans and specifications of and be approved by the State Board of Health; and the board of directors of the State Prison shall do such things as may be necessary to carry out the recommendations of the State Board of Health. The supervision of the State Board of Health shall apply to the State Prison, the State farms, and county or State camps or other places where the prisoners are confined or housed, and such recommendations as shall be made by the State Board of Health regarding clothes, bedding, tableware, and bathing for the prisoners shall be carried out by the board of directors of the State Prison. (1917, c. 286, s. 8; 1919, c. 80, s. 4; 1925, c. 163.)

See note under section 7703.

As to subsequent statute on this subject, see section 7748(r).

§ 7715. Quarters at state farm.—In order to erect suitable quarters for the prisoners kept at the State farms, the board of directors of the State Prison Department is authorized and directed to spend a sufficient amount of the funds, under the control of the board, for permanent improvements, to pay for the erection of sanitary quarters for the prisoners with individual cells, when cells are deemed necessary, for each prisoner, and the plans and specifications for the erection of such quarters shall be approved by the State Board of Health. (1917, c. 286, s. 14; 1925, c. 163.)

See note under section 7703.

Art. 2. Prisoners Sent to State Prison

§ 7716. Quarters and work for women prisoners; what prisoners assigned to work under state highway and public works commission.—The state highway and public works commission may provide within the bounds of the central prison at Raleigh, or elsewhere in the State, suitable quarters for women prisoners, and arrange for work suitable to their capacity; and the several courts of the State may assign women convicted of offenses, whether felonies or misdemeanors, to such quarters so provided. No woman prisoner, however, shall be assigned to work under the supervision of the state highway and public works commission whose term of imprisonment is less than six months, or who is under eighteen year of age. No male person shall be assigned to labor under the supervision of the state highway and public works commission whose term of imprisonment as fixed by the judgment of the court is less than thirty days. (1935, c. 257, s. 3.)

Editor's Note.—Prior to the amendment of 1935, this section provided for sentencing persons for felonies and misdemeanors. The section is so radically changed that no comparison can be made.

§ 7717. Convicts sent to place of labor.—The board of directors shall, as far as practicable, make arrangements for the conveying of convicts from the places where convicted direct to the place where they are to be worked, when it would be to the interest of the State so to do. (Rev., s. 5379; Code, s. 3428; 1879, c. 333, s. 5; 1881, c. 289, s. 2; 1925, c. 163.)

See note under section 7703.

Editor's Note.—This section and the remainder of this article though section 7720 was reenacted without change by Public Laws 1925.

§ 7718. To be sent within five days.—The sheriff, having in charge any prisoner sentenced to the State Prison Department shall proceed to send him to the State Prison Department or place of assignment within five days after the adjournment of the court at which he was sentenced, if

no appeal has been taken. (Rev., s. 5398; Code, s. 3432; 1869-70, c. 180, s. 3; 1925, c. 163.)

See note under section 7703.

§ 7719. Copy of affidavit filed with commissioners.—The sheriff shall file with the board of commissioners of his county a copy of his affidavit as to necessary guard, together with a copy of his itemized account of expenses, both certified to by the auditor as true copies of those on file in his office. (Rev., s. 5399; Code, s. 3437; 1874-5, c. 107, s. 3; 1925, c. 163.)

As to failure to file reports, see section 4384, 4386.

§ 7720. State not liable for expenses before convicts received.—The State is not liable for the expenses of maintaining convicts until they have been received by the State Prison Department authorities, nor shall any moneys be paid out of the treasury for support of convicts prior to such reception. (Rev., s. 5400; Code, s. 3438; 1870-1, c. 124, s. 3; 1925, c. 163.)

See note under section 7703.

Expense of Conveying.—This section only applies to expense of maintenance and does not apply to expense of conveying convicts to the penitentiary. By the Acts of 1869-70 it was especially provided that the expense of conveying should be paid by the state and this section did not repeal that act. Taylor v. Adams, 66 N. C. 338.

Art. 3. Prison Regulations

§ 7721. Board to make regulations.—The board of directors is authorized to adopt such rules and regulations for enforcing discipline as their judgment may indicate, not inconsistent with the constitution and laws of the State. And they shall print and post the same in the cells of the convicts, and the same shall be read to every convict in the State Prison Department when received. (Rev., s. 5401; Code, s. 3444; 1873-4, c. 158, s. 15; 1925, c. 163.)

See note under section 7703.

Editor's Note.—This section and sections 7722, 7723, and 7724, were re-enacted, without material change, by Public Laws 1925.

§ 7722. Infraction of rules recorded.—The board of directors shall require to be kept a book in which shall be entered a record of every infraction of the published rules of discipline, with the name of the prisoner so guilty, and the punishment inflicted therefor, which record shall be submitted to the directors at their monthly meeting. (Rev., s. 5402; Code, s. 3445; 1873-4, c. 158, s. 16; 1899, c. 457; 1925, c. 163.)

See note under section 7703.

§ 7723. Prisoners classified and distinguished.—The board of directors of the State Prison Department shall direct the classification of all male prisoners committed to their charge into three classes or grades, as follows: In the first class shall be included all those prisoners who have given evidence that they will, or whom it is believed will, observe the rules and regulations and work diligently, and are likely to maintain themselves by honest industry after their discharge; in the second class shall be included those prisoners who have not as yet given evidence that they can be trusted, but are competent to work and are reasonably obedient to the rules and regulations of the institution; and in the third class shall be those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations, and seriously interfere with the discipline and the effectiveness of the labor of the other prisoners. The men of the first class shall be known as honor men, and when grouped together in camps as hereinafter provided for the camp shall be known as "honor camp," and shall wear a distinctive but not very conspicuous uniform, and shall be worked without guards, and when in prison or camps, or in any other place of detention, they shall not be chained or under armed guards at night. The men of the second class shall wear a conspicuous uniform, and shall be worked under armed guards, but shall not wear chains, while at work, but may or may not be chained at night, in the discretion of the superintendent. The men of the third class shall be dressed in stripes, shall be worked under armed guards, wear chains during the day, whenever this is considered necessary, and be chained at night when in camp, and shall be worked as far as possible in stockades, inclosing rock quarries, but may be worked on public roads in camps containing only this class of men, at the discretion of the superintendent, or that may hereafter be made by the General Assembly. The classification of male prisoners shall apply to female prisoners so far as it relates to commutation of time and pay for their work. Honor men may be worked wherever any work is being carried on by the prison, provided their privileges and immunities as set forth in this section are in no wise abridged. (1917, c. 286, s. 4; 1919, c. 80, s. 2; 1925, c. 163.)

See note under section 7703.

See notes to 7728.

As to subsequent statutes on this subject, see §§ 7748(s) and 7757(17).

§ 7724. Assignment to classes and changes.—Persons sentenced to the penitentiary, or State Prison Department, for the first time shall be placed in the first or second class, but the assignment of a prisoner to any one of the three classes referred to in this article shall not be considered to mean that such prisoner must remain in such class, but a prisoner may be changed from a lower to a higher class or from a higher class to a lower class, depending upon his behavior, and it is the purpose and intent of this section to direct the board of directors of the State Prison to encourage and assist the men to improve themselves that they can be transferred from a lower to a higher class or grade. (1917, c. 286, s. 5; 1925, c. 163.)

See note under section 7703.

As to subsequent statutes on this subject, see §§ 7748(s) and 7757(17).

§ 7725. Commutation of time.—The men of the first class shall be allowed a commutation of their sentence of one hundred and four days for each year served, and the men of the second class shall be allowed a commutation of their sentence of seventy-eight days for each year they serve, and the men of the third class shall be allowed a commutation of their sentence of fifty-two days for each year they serve. If a man remains in the third class for three continuous years, he shall not be allowed any further commutation of time. In the event any prisoner shall be sen-

tenced for a less period of time than one year, said prisoner shall be entitled to a proportionate commutation of his sentence. The board of directors of the State Prison Department, by and with the advice and consent and approval of the Governor, and Commissioner of Public Welfare, may make such regulations and pay such sums to prisoners at the expiration of their sentence as may in their judgment adequately aid such prisoners in securing employment and in defraying their expenses to the place of such employment within this State, or to the place from which said prisoners were sent to the State Prison, having due regard to article eleven, section eleven, of the Constitution, "that all penal and charitable institutions shall be made as nearly self-supporting as is consistent with the purposes of their creation." (Rev., ss. 5402, 5403; Code, s. 3445; 1873-4, c. 158, s. 16; 1899, c. 457; 1901, c. 726; 1911, c. 153; 1917, c. 286, s. 6; 1919, c. 80, s. 3; 1925, c. 163.)

See note under section 7703.

As to subsequent statutes on this subject, see §§ 7757(17) and 7757(18).

Editor's Note.—The provision for adequate compensation at the discretion of the board, governor, and commissioner of Public Welfare, by Public Laws 1925 replaced a former scale of daily compensation for the different grades of prisoners.

Prisoners for Life.—A prisoner for life is not entitled to diminution of imprisonment on account of good behavior. But a prisoner whose term has been commuted from a life sentence to a term of years is so entitled, from and after the date of such commutation, but not before. In re McMahon, 125 N. C. 38, 34 S. E. 193.

§ 7726. Employment at useful labor.—The board of directors of the State Prison Department shall, through the superintendent, wardens, managers, or officials of the penitentiary, state farms, or reformatories in the State, so far as is practicable, cause all the prisoners in such institutions who are physically capable thereof to be employed at useful labor. (1917, c. 286, s. 3; 1925, c. 163.)

See note under section 7703.

Editor's Note.—By Public Laws 1925 a former provision for a ten hour day in the prison and nine hour day when hired to persons or corporations, Sundays and public holidays excepted, was omitted.

§ 7727. Prisoners examined for assignment to work.—Each prisoner committed to the charge of the board of directors of the State Prison Department shall be carefully examined by a competent physician in order to determine his physical and mental condition, and his assignment to labor and the work he is required to do shall be dependent upon the report of said physician as to his physical and mental capacity. (1917, c. 286, s. 22; 1925, c. 163.)

See note under section 7703.

Editor's Note.—This section and sections 7728, 7729, 7730, 7731, 7732, 7733, and 7734 were reenacted without material change by Public Laws 1925. Except in the use of "State Prison Department" where formerly "board" was used these sections are copied almost verbatim.

§ 7728. Whipping or flogging prisoners.—It is unlawful for the board of directors of the State Prison to whip or flog, or have whipped or flogged, any prisoner committed to their charge until twenty-four hours after the report of the offense or disobedience, and only then in the presence of the prison physician or prison chaplain; and no prisoner other than those of the third class as defined in this article shall be whipped or flogged at any time. (1917, c. 286, s. 7; 1925, c. 163.)

See note under section 7703.

As to control of county convicts, see section 1361.

Editor's Note.—In State v. Nipper, 166 N. C. 272, 81 S. E. 164 decided in 1914 it was held that there was no law which allowed flogging of convicts to enforce discipline, and its infliction was contrary to law. Clark, C. J., in writing the opinion discusses prison conditions in other countries and how most of them have abolished flogging in all cases, where formerly they allowed it in the armies, navies, school and homes. Although it seemed that flogging had been a custom so well established in controlling prisons that the right to administer it had never been formerly questioned, there was no direct statute allowing it. The above section was enacted in 1917 and though the right and power to punish by flogging is guarded and limited it shows that the legislature still leaves flogging power in the guards as means of control, and enforcing discipline.

Constitutionality.—Where a public-local law provides for whipping to be administered to convicts sentenced to work upon the roads as an extreme necessary means to enforce discipline, safeguarded in respect to its being humanely administered after due notice to the offender, under proper rules and regulations, with report to the commissioners of the county to which the local law applies, making it a misdemeanor for the one designated to do so brutally or without mercy: Held, the statute is not inhibited by any provision of our Constitution and is a valid enactment. Constitution, Art. XI, sec. 1. State v. Revis, 193 N. C. 192, 193, 136 S. E. 346. This case was quoted from in Oct. 1927 no. of Law Notes Vol. 31 No. 7, published by The Edward Thompson Co.

Excessive Punishment.—Where a guard is charged with an assault upon a convict, and it is shown that his superior officer instructed him to take the convict over the hill away from the rest of the prisoners and give him five or six licks for refractory conduct; but that the guard used a leather strap 2½ inches wide, 2½ feet long, and ¼ inch thick, upon the prisoner's bare back, with other prisoners holding his head, legs, and feet, in the presence of the "whole crowd," and administered "fifteen or twenty licks," it is held that the guard exceeded his authority, and the punishment inflicted was excessive and unnecessarily humiliating. State v. Mincher, 172 N. C. 895, 896, 90 S. E. 429.

§ 7729. Prisoner's supplies and clothes to be marked.—The prisoner's number shall be used for marking all clothes, bedclothing, beds, and other supplies used by prisoners, so that when such clothes, bedclothing, and supplies are washed and cleaned they shall be always returned for the use of the same prisoner. (1917, c. 286, s. 9; 1925, c. 163.)

§ 7730. Uniform for prisoners; felon's stripes.—It is the duty of the several judicial officers of the State, in assigning any person to work the public roads of any county, to designate in each judgment that such as may be convicted of a felony shall wear felon's stripes, and such as are convicted of a misdemeanor shall not wear felon's stripes. In order to carry into effect the provisions of this section, the State Prison Board shall prescribe a uniform to be worn by persons convicted of felony, and a uniform to be worn by persons convicted of a misdemeanor which shall be different and easily distinguished from the uniform of the felon; but the board of directors of the State Prison Department or other governing authority may in their discretion allow prisoners sentenced for misdemeanor only to wear clothes similar to that worn by the ordinary citizen. The board of commissioners of the respective counties in which convicts are worked on the public roads shall provide uniforms of each kind, except in those cases exempted in this section. (1911, c. 64, ss. 1, 2, 3; 1925, c. 163.)

See note under section 7703.

See notes to following section.

§ 7731. Violation as to work in felon's uniform; officer liable.—It shall be unlawful to work persons convicted of a felony in other than the uniform of a felon, or to clothe a person convicted of a misdemeanor in the uniform of a felon. Any superintendent of convicts or other persons in authority who shall violate this law shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court; and, moreover, be liable in damage to the party aggrieved, to be recovered in a civil action, which may be brought in either the county from which the party was sentenced or the county in which the wrong was done. (1911, c. 64, ss. 4, 5; 1925, c. 163.)

Purpose and Result of Section.—One of the intentions of the Legislature in enacting secs. 7730, 7731, requiring a district difference in dress between those convicted of a felony and misdemeanants, was to apprise the guard over them of this difference, and where the guard has unlawfully killed one in the latter class while endeavoring to escape, he may not avoid the consequences of his act upon the ground that he could not tell for which offense the prisoner had been sentenced. Holloway v. Moser, 193 N. C. 185, 136 S. E. 375.

Judge Must Designate Offense.—It is necessary that the judge imposing the sentence designate in the judgment whether the person was convicted of a felony or misdemeanor, or the kind of clothes the convict should wear; and where the judge has failed to do so, the one in charge of the person convicted is not indictable when the conviction is for manslaughter, though a well known felony, and the prisoner is not clothed in the garb required for one guilty of this offense. State v. Earnhardt, 170 N. C. 725, 86 S. E. 960.

Cited in State v. Nipper, 166 N. C. 272, 279, 81 S. E. 164.

§ 7732. Recreation and instruction of prisoners.—The board of directors of the State Prison Department is authorized and directed to arrange certain forms of recreation for the prisoners, and to arrange so that the prisoners during their leisure hours between work and time to retire shall have an opportunity to take part in games, and attend lectures, and take part in other forms of amusements as may be provided by the board. The board is also authorized to enable classes to be organized amongst the prisoners so that those who desire may receive instruction in various lines of educational pursuits. The board of directors shall utilize, where possible, the services of the prisoners who are sufficiently educated to act as instructors for such classes in education; such services, however, shall be voluntary on the part of the prisoner. The board of directors of the State Prison Department is further authorized and directed to make such arrangements as will be necessary so that religious services may be held for the prisoners on Sunday and at such other times as they may deem wise. The attendance of the prisoners at such religious services shall be voluntary. The provisions of this section shall apply to the State Prison Department, State Farms and State Camps. (1917, c. 286, s. 15; 1925, c. 163.)

See note under section 7703.

§ 7733. Use of intoxicants forbidden to employees.—No one addicted to the use of intoxicating liquors shall be employed as superintendent, warden, guard, or in any other position connected with the State Prison Department, where such position requires the incumbent thereof to have any charge or direction of the prisoners; and any one holding such position, or any one who may be employed in any other capacity in the State Prison Department, who shall come under the influence of intoxicating liquors, shall at once cease to be an employee of any of the institutions and shall not be eligible for reinstatement to such position or be employed in any other position in any of the institutions. Any superintendent, warden, guard, supervisor, or other person holding any position in the State Prison Department who curses a prisoner under his charge shall at once cease to be an employee of the institution and shall not be eligible for reinstatement. (1917, c. 286, s. 16; 1919, c. 80, s. 8; 1925, c. 163.)

See note under section 7703.

§ 7734. Correspondence of prisoners regulated.—The prisoners confined at any State Prison, State Farm, or State Camp who are in the first class or grade authorized by this article shall be allowed general correspondence privileges in so far as such correspondence does not interfere with the work and discipline of the prison, farm, or camp; prisoners who are in the second class or grade shall be allowed similar correspondence privileges, but somewhat more restricted than those in the third class or grade; and prisoners who are in the third class or grade shall only be allowed such correspondence privileges as may be deemed best by the superintendent. Any prisoner shall be permitted to write a letter to the Governor of the State at any time he desires, and such letter shall be mailed for him as other letters are mailed. (1917, c. 286, s. 17; 1925, c. 163.)

§ 7735. Divine services; Sunday school.—The board of directors is authorized to provide for divine service for the convicts each Sunday, if possible, and to secure the visits of some minister at the hospital to administer to the spiritual wants of the sick. (Rev., s. 5405; Code, s. 3446; 1873-4, c. 158, s. 18; 1883, c. 349; 1925, c. 163; 1925, c. 275, s. 6.)

See note under section 7703.

Editor's Note.—A former provision for five hundred dollars appropriation for administering to the spiritual wants of the sick, and fifty dollars for the Sunday school was omitted by the Public Laws 1925.

§ 7736. Religious instruction at Caledonia farm.—The board of directors of the State Prison Department is authorized and directed, in order to provide religious worship for the prisoners confined in the State's Prison, known as the Caledonia farm, to employ a resident minister of the gospel and to provide for his residence and support in such manner as the board may determine. (1915, c. 125, ss. 1, 2; 1925, c. 163.)

See note under section 7703.

Editor's Note.—This section was not materially changed by the reenactment, Public Laws 1925.

§ 7737. (Obsolete: Laws 1925, c. 163. See §§ 7749 et seq.)

§ 7738. Indeterminate sentence and discharge.—The various judges of the Superior Courts of North Carolina are authorized and directed, in their discretion, in sentencing prisoners to the State Prison, to pass upon such prisoner a minimum and maximum sentence, thus making the sentence of the prisoner an indeterminate sentence, and the board of directors of the State

Prison Department is authorized and directed to consider at least once every six months the cases of such prisoners as have been committed to the State Prison with an indeterminate sentence, as to whether such prisoner is entitled to a discharge, and to take into consideration the prisoner's record since committed to the charge of the board of directors of the State Prison Department: Provided, that the prisoner has served the minimum time to which he was sentenced after the allowing credit for good behavior as authorized by law. (1917, c. 286, s. 19; 1925, c. 163.)

See note under section 7703.

Editor's Note. — This section and the following sections through section 7746 were not materially changed by the reenactment, Public Laws 1925.

Work on Public Roads.—This section applies only to the State Prison; it does not authorize an indeterminate sentence to work on the public roads. State v. Barnhardt, 194 N. C. 622, 140 S. E. 435.

Misdemeanors.—An indictment charging separately the unlawful manufacture of spirituous liquor, permitting the operation of a distillery on his land, the unlawful possession, and the unlawful manufacture after conviction for the same offense, charges only misdemeanors except as to the last count, and when there is no evidence as to the former conviction, a general verdict of guilty should be set aside as to this count, and a judgment imposing a maximum sentence is reversible error. State v. Barnhardt, 194 N. C. 622, 140 S. E. 435.

§ 7739. Application for pardon to include record.—Any application for the pardon of a prisoner committed to the discharge of the board of directors of the State Prison shall include a record of such prisoner since he was committed to the charge of the board; and in determining whether or not a parole or pardon shall be granted, consideration shall be given to the record of such prisoner; and the record of such prisoner shall be available to those making the application. (1917, c. 286, s. 20; 1925, c. 163.)

As to form and contents of application, see section 7642.

§ 7740. Prisoners of different races kept separate.—White and colored prisoners shall not be confined or shackled together in the same room of any building or tent, either in the State Prison or at any State or county convict camp, during the eating or sleeping hours, and at all other times the separation of the two races shall be as complete as practicable. Any officer or employee of either the State or any county in the State having charge of convicts or prisoners who shall violate or permit the violation of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1909, c. 832, ss. 1, 2; 1917, c. 286, s. 24; 1925, c. 163.)

As to subsequent statute on this subject, see, § 7748(u).

§ 7741. Separation of youthful prisoners.—Youthful convicts shall be kept separate from old and hardened criminals in sleeping quarters. (1917, c. 286, s. 24; 1925, c. 163.)

As to subsequent statute on this subject, see § 7748(u).

§ 7742. Punshment for recaptured prisoners.—If a prisoner of the first or second class or grade attempts to escape or leaves the State Prison, State Farm, or State Camp without permission, he shall, upon being recaptured, be reduced to the third class or grade and shall permanently loose all his accumulated time and money; and the board of directors of the State Prison Department is authorized and directed to use every means possible to recapture any escaping or leaving without permission, any of the State Prisons, Camps, or Farms, regardless of expense. (Rev., s. 5407; Code, s. 3442; 1873-4, c. 158, s. 13; 1917, c. 286, s. 73; 1925, c. 163.)

See note under section 7703.

Time Convict is Free Not Counted.—Both on precedent and, by express provision of our statute, the time when he was wrongfully out of prison by reason of his escape is not to be counted. Clark v. Commonwealth, 62 Va. 777; State v. Finch, 177. N. C. 599, 603, 99 S. E. 409.

Pursuit by Officer.—Russel on Crimes, 586, the principle is given as follows: "It seems to be clearly agreed by all of the books that an officer, making fresh pursuit after a prisoner who has escaped through his negligence, may retake him at any time afterwards whether he find him in the same or a different county, and it is said generally in some books that an officer who has negligently suffered a prisoner to escape may retake him whenever he finds him without mentioning any fresh pursuit, and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong there seems to be no reason why he should have any manner of advantage from it." State v. Finch, 177 N. C. 599, 606, 99 S. E. 409.

§ 7743. Recapture of escaping felons; reward.—It is the duty of the superintendent of the State Prison Department, when any person escapes from the State Prison Department who has been confined or placed to work, to immediately notify the Governor, and to accompany such notice with a full description of the escaped, together with such information as will be of service in the recapture. The Governor is authorized to offer such rewards as he may deem advisable and necessary for the recapture and return to the State Prison Department of any person who may escape or who heretofore has escaped therefrom. Such reward earned shall be paid by the Treasurer of the State upon the warrant of the Governor and charged to the penitentiary board, and by said board to be repaid to the State Treasurer, and accounted for as a part of the expense of maintaining the State's prisoners. (1917, c. 236; 1925, c. 163.)

See note under section 7703.

As to subsequent statute on this subject, see § 7748(q).

§ 7744. Copy of this article supplied to prisoners.—This article shall be printed in pamplet form and each prisoner committed to the charge of the board of directors of the State Prison Department shall be supplied with a copy, and its contents shall be explained to him at the time he is brought to the State Prison. (1917, c. 286, s. 21; 1925, c. 163.)

See note under section 7703.

§ 7745. Overseers and guards may maintain discipline.—When a convict or several combined shall offer violence to any officer, overseer or guard, or to any convict, or attempt to do any injury to the prison building or the workshops, or shall attempt to escape, or shall resist, or disobey any lawful command, the officer, overseer, or guard shall use any means necessary to defend himself, to enforce the observance of discipline, to secure the person of the offender and to prevent an escape. (Rev., s. 5408; Code, s. 3443; 1873-4, c. 158, s. 14; 1925, c. 163.)

As to power to flog, see section 7728; as to furnishing convicts with arms and liquor, see sections 4508, 4406.

Killing Misdemeanants.—The superintendent of a convict gang, not known to be an officer, has no right to shoot or

kill one who, having committed petty larceny and having escaped from prison, is running away to avoid arrest. State v. Stancill, 128 N. C. 606, 38 S. E. 926.

The court in discussing the liability of a guard for killing a misdemeanant after citing this section says; "Under this enactment it is no doubt the law that a guard or overseer of penitentiary convicts would be justified in using any means necessary to prevent an escape, even to the taking of the convict's life, if need be. Jackson v. State, 76 Ga. 743, 30 C. J., 42. But this statute, we apprehend, was intended to apply only to the management of convicts who are felons, or who have been sentenced to the State prison—all of whom are felons, section 4171—and has no application to the discipline of misdemeanants who have been sentenced to the county roads." Holloway v. Moser, 193 N. C. 185, 136 S. E. 375.

§ 7746. Death of convict investigated by directors.—It shall be the duty of the board of directors, or some member thereof, upon information of the death of a convict other than by natural causes, to investigate the cause thereof and report the result of such investigation to the Governor, and for his purpose the board of directors, or any member thereof, shall have power to administer oaths, and send for persons and papers. (Rev., s. 5409; 1885, c. 379, s. 2; 1925, c. 163.)

See note under section 7703.

§ 7747. Convict furnished transportation.—The Superintendent of the State Prison Department shall furnish to every convict, upon the expiration of his sentence, such transportation and such other money, or property, as may be prescribed by the rules and regulations of the board of directors adopted pursuant to the provisions of section seven thousand seven hundred and twenty-five of the Consolidated Statutes. (Rev., s. 5404; 1893, c. 370; 1925, c. 163.)

See note under section 7703.

As to subsequent statute on this subject, see § 7757(20).

§ 7748. Children born in state prison department.—Any child born of a female convict while she is in the custody of the State Prison Department that shall not be taken in charge upon arrival at an age suitable to be separate from the mother by some of its kindred or other responsible party, shall, on the application of the deputy warden to the clerk of the Superior Court of the county of Wake, be disposed of as the law provides in the case of children whose parents are dead or unable to provide for them. (Rev., s. 5406; Code, s. 3447; 1873-4, c. 158, s. 19; 1925, c. 163.)

See note under section 7703.

As to subsequent statute on this subject, see § 7748(x).

Art. 3A. Labor on Roads

§ 7748(a). Intent of State to maintain public roads with prison labor.—It is hereby declared to be the public policy of this state to build and maintain a state system of dependable highways and to maintain and improve the public roads in the several counties at the state's expense; and to that end to make the most economical use of the prison labor of the state in the construction, improvement and maintenance of said highways and roads. (1933, c. 172, s. 1.)

For review of this section and those following, see 11 N. C. Law Rev., 252.

§ 7748(b). State highway and public works commission created.—A highway and public works commission is hereby created, to be and continue a department of the state government and to be known as "state highway and public works commission." Said commission shall consist of a chairman and six (6) members, the chairman and three of said commissioners shall be appointed by the governor for a term of four years and three of said commissioners shall be appointed for a term of two years, and until their successors are appointed and qualified: Provided, that the chairman, or any commissioner, appointed pursuant to this article may be removed by the governor for cause. In case of the death, resignation or removal from office of said chairman or any commissioner prior to the expiration of his term of office, his successor shall be appointed by the governor to fill out the unexpired term. At the expiration of the term for which said chairman and commissioners are first appointed, their successors shall be appointed for a term of four (4) years each. The chairman shall devote his entire time and attention to the work of the commission, and shall receive as compensation not exceeding six thousand ($6,000.00) dollars per annum, to be fixed by the governor and advisory budget commission, payable monthly, and his actual traveling expenses when engaged in the discharge of his duties. Said chairman shall be vested with all authority of the commission when same is not in session, and shall be the executive officer of said commission, and shall execute all orders, rules and regulations established by said commission. The members of said commission, other than the chairman, shall each receive seven ($7.00) dollars per day while engaged in the discharge of the duties of his office, and his actual traveling expenses. The governor and the state treasurer shall be privileged to attend any and all meetings of said commission in an advisory capacity, but they shall not have the authority to vote upon any question before said commission. The headquarters and main office of said commission shall be located at the state capital, Raleigh. The first meeting of said commission shall be called by the governor, and at said meeting the commission shall organize and adopt a common seal, and shall automatically succeed to all the rights, powers, duties and obligations of the present state highway commission and of the present state prison department. Said commission shall keep minutes of all of its meetings, which shall at all times be open to public inspection; it shall have the power to adopt and enforce rules and regulations for the government of its meetings and proceedings, and for the transaction of all business of the commission; and to make all necessary rules and regulations for carrying out the intent and purposes of this article, and the duties and powers heretofore conferred by law upon the state highway commission and the state prison department. Said commission shall meet at its main office at least once in each ninety days, or at such regular time as the commission may by rule provide, and may hold special meetings at any time and place within the state at the call of the chairman, or the governor, or any three members of the commission. It is the intent and purpose of this article that all of said commissioners and the chairman shall represent the state at large and not be representative of any particular district. The commission may, with the ap-

proval of the governor, designate a member of the commission or some other suitable person as acting chairman and confer upon the said acting chairman all authority of the chairman, or such restricted authority as the commission may by resolution determine to be exercised, in the event the chairman, on account of absence from the State, illness, or other cause, may be unable temporarily to discharge the duties of his office. (1933, c. 172, s. 2; 1935, c. 257, s. 1.)

Editor's Note.—The amendment of 1935 added the last sentence to the section.

§ 7748(c). Surrender of highway and prison property to new commission. — It shall be the duty of the superintendent of the state's prison and the directors of the present state prison department, and of the chairman and commissioners of the present state highway commission, to turn over and to deliver to state highway and public works commission, created by this article, immediately upon its organization, all of their respective books, accounts, records and property of every kind and description; and to facilitate the transfer of said books, records, accounts and property state highway and public works commission is authorized and empowered to adopt and enforce such rules and regulations as it may deem necessary. (1933, c. 172, s. 3.)

§ 7748(d). Control of prison property to new commission.—The control and custody of all state highway prison camps, together with all property of every kind assigned thereto, the central prison at Raleigh, and all farms, camps and places of whatever kind now under the control of the state prison department, together with all property of every kind and description, together with all books, accounts and records, shall pass to the control and management of state highway and public works commission herein created; and it shall be the duty of every person connected with either the state highway commission or the state prison department in any wise exercising any control or authority over said property to relinquish said control to the duly appointed agents of said commission. (1933, c. 172, s. 4.)

§ 7748(e). Control and custody of prisoners.— The control and custody of all prisoners serving sentence either in the state's prison or in the prison camps now under the control of the state highway commission shall pass under the control of state highway and public works commission, herein provided for, and subject to all the rules and regulations of said commission legally adopted. The authorized agents of the commission shall have all the authority of peace officers for the purpose of transferring prisoners from place to place in the State as their duties might require for apprehending, arresting, and returning to prison escaped prisoners, and may be commissioned by the governor, either generally or specially, as special officers for returning escaped prisoners or other fugitives from justice from outside the State, when such persons have been extradited or voluntarily surrendered. (1933, c. 172, s. 5; 1935, c. 257, s. 2.)

Editor's Note.—The amendment of 1935 added the last sentence of the section.

§ 7748(f). Prisoners previously sentenced. — Any prisoners in any of the jails of the several counties, or out on bail, or who have escaped custody and are thereafter captured, who have been previously sentenced by any court of competent jurisdiction to serve a term either in the state's prison or in a common jail to be assigned to work on the public roads, shall thereafter, with proper commitments, be delivered to state highway and public works commission herein created at such place as their respective sentences may require, according to the terms of this article. (1933, c. 172, s. 6.)

§ 7748(g). Sentencing of prisoners to central prison.—The several judges of the superior courts of this state are hereby given express authority in passing sentence upon persons convicted of a felony, when, in their opinion, the nature of the offence or the character or condition of the defendant makes it advisable to do so, to sentence such person to the central prison at Raleigh, and thereupon a sheriff or other appropriate officer of the county shall cause such prisoner to be delivered with the proper commitment papers to the warden of the central prison. (1933, c. 172, s. 7.)

§ 7748(h). Sentencing to public roads.—In all cases not provided for in the preceding sections, the courts sentencing defendants to imprisonment with hard labor shall sentence such prisoners to jail, to be assigned to work under state highway and public works commission, and the clerks of the several courts in which such sentences are pronounced shall notify the superintendent of the nearest highway prison camp, or such other agent of the commission as he may be advised by them is the proper person to receive such notice. Whereupon, the commission shall cause some duly authorized agent thereof to take such prisoners into custody, with the proper commitments therefor, and deliver them to such camp or station as the proper authorities of the commission shall designate: Provided, however, the commission shall not be required to accept any prisoner from any court inferior to the superior court when an appeal has been taken to the superior court, or when the judge of such inferior court shall retain control over the sentence for the purpose of modifying or changing the same. (1933, c. 172, s. 8.)

§ 7748(i). Existing prison and highway departments abolished. — State prison department and the present state highway commission are hereby abolished, but each shall continue in operation as heretofore provided by law until the governor, by executive order, declares state highway and public works commission organized as provided by this article and ready to function. (1933, c. 172, s. 9.)

§ 7748(j). Oath of office of new commission members.—Before entering upon the performance of their duties, the chairman and each member of state highway and public works commission shall take and subscribe to oath of office before some person authorized to administer oaths that he will faithfully support the constitution of the state of North Carolina and all laws enacted pursuant thereto and not inconsistent therewith, and that he will faithfully perform the duties of said office.

Said oath shall be filed and preserved by the commission as a part of its permanent records. No member of the highway and public works commission shall be eligible to any other employment in connection with said commission, and no member of said commission, or any salaried employee thereof, shall furnish or sell any supplies or materials, directly or indirectly, to said commission. (1933, c. 172, s. 10.)

§ 7748(k). Annual reports to governor.—State highway and public works commission shall make to the budget bureau, or to the governor, a full report of its finances and the physical condition of the state's prison, prison camps, and other buildings, depots and properties under its supervision and control, on the first day of July of each year, and at such other times as the governor or directors of the budget may call for the same. (1933, c. 172. s. 11.)

§ 7748(l). Central prison at Raleigh retained; warden to be named; powers and duties; gainful employment of prisoners intended.—It is intended and directed that provisions shall be made under the provisions of this article for the maintenance of the central prison at Raleigh in such manner as to conform to all of the requirements of the constitution, article eleven, relating to a state's prison, and that a suitable person shall be selected and appointed, under the terms of this act, as a warden of said central prison, and such warden shall succeed to and be invested with all the rights, duties, and powers now invested by law in the superintendent of the state's prison or the warden thereof with respect to capital punishment, or any matter of discipline of the inmates of said prison not herein otherwise provided for.

It is further declared to be the intent and purpose of this act to provide for the gainful employment of all able-bodied prisoners of the state; and to this end state highway and public works commission is directed to provide for the employment in the maintenance and construction of the public roads of the state of as many of the male prisoners as, under the terms of their sentences, may be thus employed and who are physically fit for such work, the commission can arrange economically to use for such purpose, and that the remainder of the inmates of such prison division shall be employed as far as practicable, with due regard to their physical condition, in agriculture, prison industries, and forestry work, giving preference to the production of food supplies and necessary articles of use in state highway department and other state supported institutions or activities, and the development and improvement of state-owned properties. (1933, c. 172, s. 14.)

§ 7748(m). Chapter 2, Pubilc Laws 1921, amended.—Chapter two, public laws of 1921, and all acts amendatory thereof and additional thereto relating to the state highway system and the state highway commission, and not expressly repealed by this article, are hereby amended conformably to this article, so that wherever in said laws reference is made to "state highway commission," "highway commission," "chairman of the state highway commission," there shall be substituted for such words the appropriate terms "highway and public works commission" or "chairman of state highway and public works commission" as the context may require to the end that state highway and public works commission and the chairman of state highway and public works commission shall have and exercise all the powers and duties heretofore conferred by law upon the state highway commission or the chairman of the state highway commission. (1933, c. 172, s. 17.)

§ 7748(n). Consolidated statutes ch. 130, likewise amended.—Chapter one hundred thirty of the consolidated statutes relating to the state's prison and/or state's prison department, and all acts amendatory thereof and additional thereto and not expressly repealed by this article, are hereby amended so that wherever, in said laws, reference is made to "the state prison department," "prison department," "superintendent of state's prison," "superintendent of prison department," "board of directors," "directors of the state's prison," "directors of the prison department," there shall be substituted for such words the appropriate terms "highway and public works commission," "chairman of state highway and public works commission" as the context may require, to the end that state highway and public works commission and the chairman of state highway and public works commission shall have and exercise all the powers and duties heretofore conferred by law upon the state prison department and the board of directors of the state prison department and the superintendent of the state prison department. (1933, c. 172, s. 18.)

§ 7748(o). Additional prison camps authorized.—In addition to the highway prison camps now operated by the state highway commission and the farms now operated by the state's prison, the commission is hereby authorized to establish such additional camps for use for the division of prisons as are necessary, such camps to be either of a permanent type of construction, or of temporary or movable type as the commission may find most advantageous to the particular needs, to the end that work to be done by the prisoners under its supervision may be so distributed throughout the state as to render their employment most economical and profitable, the said commission to be the sole judges of the type and character of such buildings without the control of any other department. To this end, and for this purpose state highway and public works commission shall have authority to purchase or lease camp sites and suitable lands adjacent thereto, and to erect necessary buildings thereon, all within the limits of allotments as approved from time to time by the budget bureau for this purpose. (1933, c. 172, s. 19.)

§ 7748(p). Nineteen hundred and twenty seven bond issue directed to providing needed prison facilities.—In order to provide for the necessary employment of the prisoners under the control of the division of prisons the proceeds of the four hundred thousand dollars bond issue authorized by chapter one hundred and fifty-two (152) of the public laws of 1927, and amendments thereto, shall be made available from time to time in such allotments as the governor and advisory budget bureau may authorize for use by state

highway and public works commission in providing for the purchase or lease of additional lands the erection of additional buildings, or the remodeling of existing buildings, and for the establishment and installation of industries suitable for prison employment, and the proper stocking and equipment of prison farms, and the establishments of plants for storage, and/or processing of supplies and farm products for use in the state's several institutions, and for the production of agricultural lime, with the right to sell the surplus either directly or through the department of agriculture to the farmers of the state. (1933, c. 172, s. 20.)

§ 7748(q). Recapture of escaped prisoners. — State highway and public works commission may, in the rules and regulations to be adopted by it, provide for the recapture of convicts that may escape, or any convicts that may have prior to the effect of this article escaped from the state's prison or highway prison camps, or county road camps of this state, and may pay such reward or expense of recapture as the commission may by regulation provide to any person making the same. Any citizen of North Carolina shall have authority to apprehend any convict who may escape before the expiration of his term of imprisonment whether he be guilty of a felony or misdemeanor, and retain him in custody and deliver him to the division of prisons. (1933, c. 172, s. 21.)

§ 7748(r). Sanitary and health conditions supervised by board of health.—The state board of health shall have general supervision over the sanitary and health conditions of the central prison, over the prison camps, or other places of confinement of prisoners under the jurisdiction of the division of prisons and shall make periodic examinations of same and report to the commission the conditions found there with respect to the sanitary and hygienic care of such prisoners. (1933, c. 172, s. 22.)

§ 7748(s). Grading prisoners. — State highway and public works commission in the adoption of rules and regulations hereinbefore provided for shall provide for the classification of prisoners according to conduct into at least three classes known and designated as "A," "B" and "C" grade prisoners. The several classes of prisoners may be designated by appropriate and distinguishing uniforms, but no person not convicted of a felony shall be required to wear a uniform of stripes such as are usually used to designate felons. A system of rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct may be adopted, and the commutation of time within the maximum limits of the provisions now provided by law in consolidated statutes 7725 may be included in said rules and regulations. (1933, c. 172, s. 23.)

As to subsequent statute on this subject, see § 7757(17).

§ 7748(t). Indeterminate sentences.—The several judges of the superior court are authorized in their discretion in sentencing prisoners for a term in excess of twelve months to provide for a minimum and maximum sentence, and the commission is authorized to consider at least once in every six (6) months the cases of such prisoners that have thus been committed with indeterminate sentences, and to take into consideration the prisoners' conduct, and to authorize his discharge at any time after the service of the minimum term subject to his earned allowance for good behavior which his conduct may justify. (1933, c. 172, s. 24.)

§ 7748(u). Segregation as to race, sex and age. —The commission shall provide separate sleeping quarters and separate eating space for the different races and the different sexes; and, in so far as it is practical to do so, shall provide for youthful convicts to segregate to themselves. (1933, c. 172, s. 25.)

§ 7748(v). Penalty for escaping or assisting in. —Any prisoner who escapes or attempts to escape, or in any manner connives, aids or assists in helping other persons to escape or attempt to escape shall be guilty of a misdemeanor, and upon conviction shall be imprisoned at the discretion of the court, such term of imprisonment to commence at the termination of the sentence being served at the time of the offense, and such offending prisoner shall likewise forfeit all gained time that he has earned by previous good conduct. (1933, c. 172, s. 26.)

§ 7748(w). Degree of protection against violence allowed.—When any prisoner, or several combined shall offer violence to any officer, overseer, or guard, or to any fellow prisoner, or attempt to do any injury to the prison building, or to any workshop, or other equipment, or shall attempt to escape, or shall resist, or disobey any lawful command, the officer, overseer, or guard shall use any means necessary to defend himself, or to enforce the observance of discipline, or to secure the person of the offender, and to prevent an escape. (1933, c. 172, s. 27.)

§ 7748(x). Disposition of child born of female prisoner.—Any child born of a female convict while she is in custody shall upon the arrival of a suitable age be surrendered to the clerk of the superior court of Wake county for disposition as the law provides in the case of children whose parents are dead or unable to provide for them. (1933, c. 172, s. 28.)

§ 7748(y). Parole powers of governor unaffected. — But nothing herein contained shall be construed to limit or restrict the power of the governor to parole prisoners under such conditions as he may himself impose or prevent the reimprisonment of such prisoners upon the violation of the conditions of such parole, as now provided by law. (1933, c. 172, s. 29.)

As to subsequent statute on this subject, see § 7757(21).

§ 7748(z). Prison labor furnished other state agencies.—State highway and public works commission may furnish to any of the other state departments, state institutions, or agencies, upon such conditions as may be agreed upon from time to time between the commission and the governing authorities of such department, institution or agency, prison labor for carrying on any work where it is practical and desirable to use prison labor in the furtherance of the purposes of any state department, institution or agency, and such other employment as is now provided by law for

inmates of the state's prison under the provisions of consolidated statutes 7707: Provided that such prisoners shall at all times be under the custody and controlled by the duly authorized agent of such commission. (1933, c. 172, s. 30.)

§ 7748(aa). Power of sentencing prisoners to work on county property unaffected.—But nothing contained in this act shall be construed to prevent the courts of appropriate jurisdiction from sentencing prisoners to the county jail to be assigned to work at the county home, at the county farm or other county supported institution, and the commission may in its discretion provide prison labor upon terms and conditions agreed upon from time to time for doing specific tasks of work for the several county homes, county farms, or other county owned properties, but prisoners assigned to such work shall be at all times under the control and custody of a duly authorized agent or agents of the division of prisons. (1933, c. 172, s. 31.)

§ 7748(bb). Purpose of act as to consolidation, explained.—It is hereby declared to be the purpose of this article to effect a consolidation of the present state prison department and the present state highway commission into a single department to be known as state highway and public works commission, and this article and all laws heretofore enacted relating to the state prison department and/or to the state highway commission, and not expressly repealed by this article shall be liberally construed so as to confer upon state highway and public works commission all the powers, duties and responsibilities heretofore exercised by or conferred upon the state prison department and/or the state highway commission. All laws inconsistent and in conflict with the purpose of this article are hereby repealed. (1933, c. 172, s. 32.)

§ 7748(cc). Prison indebtedness not assumed by highway commission.—Nothing in this article shall be construed to permit the state highway commission to assume or pay off any part of the present deficit of the state prison, nor to convert or use any part of the funds derived from the sale of the four hundred thousand ($400,000.00) dollar prison building bonds except in accordance with the provisions of section 7748(p) both of which are expressly prohibited by this article. (1933, c. 172, s. 33.)

Art. 4. Paroles

§ 7749. Governor may parole.—The Governor may and it shall be his duty to parole such of the convicts in the State Prison Department as may be in his opinion necessary or useful in the upkeep of the State buildings and grounds in Raleigh, and for such other work in connection with any activities in which the State, its departments, or institutions may be engaged, with full power and authority to place such convicts under custody of any person, or persons designated by the Governor, and to cause such convicts to be managed and controlled under his direction, and to be returned to the State Prison at such times as he may direct, and to make such regulations, or arrangements by which the State Prison Department shall be properly compensated for the labor of such convicts so used. (1925, c. 163.)

As to subsequent statutes on this subject, see § 7757(1) et seq.

§ 7750. Record of conduct of prisoners.—It is the duty of the superintendent of the State Prison Department and superintendents of county chain gangs or road forces, under rules and regulations to be made and promulgated by the board of directors of the State Prison Department, to keep a record of the conduct and demeanor of all prisoners held in the State Prison Department and on county chain gangs. (1917, c. 278, s. 2; 1919, c. 191, s. 2; 1925, c. 163.)

§§ 7751-7753. (Obsolete: Laws 1925, c. 163.)

§ 7754. No female prison work on streets or roads.—Nothing in this article shall be held or construed to permit the working or hiring of female convicts for work upon any street, road or highway. (1925, c. 163.)

As to subsequent statute on this subject, see § 7716.

§ 7755. Reimprisonment. — If the Governor shall order the reimprisonment of any person discharged on parole, he may issue his order directly to the sheriff of any county in the State, directing the arrest of such person and his return by such officer to the State Prison Department, the expense of which shall be paid by the State Treasurer upon a warrant issued by the State Auditor on an order made by the superintendent of the State Prison Department. (1917, c. 278, s. 7; 1925, c. 163.)

§ 7756. No deduction of time.—If any such person be reimprisoned by order of the Governor for violation of the conditions of his parole, the time such person has been out on parole shall not be deducted from the term of imprisonment to which he was originally sentenced by the court, but the time of his imprisonment shall be understood as continuing from the time he was discharged on his parole. (1917, c. 278, s. 8; 1925, c. 163.)

§ 7757. No impairment of Governor's powers.—Nothing herein is to be taken as in any way attempting to interfere with, or regulate the power of the Governor to grant reprieves, commutations, and pardons and paroles. (1917, c. 278, s. 9; 1925, c. 163.)

As to subsequent statutes on this subject, see §§ 7748(y) and 7757(21).

§ 7757(a). Governor empowered to set up new parole system.—The governor of North Carolina is hereby authorized and empowered to set up rules and regulations according to which he will hear applications for pardons, reprieves, and commutations or by which such proceedings may be initiated. He may designate some one as commissioner of parole who shall, under his direction, aid him in more fully performing all the duties required of him in examining, hearing, sorting and arranging such material as is presented in connection with this article and to do such other service as the governor may assign him. Such person shall be paid a salary, to be fixed by the governor, of not more than four thousand and five hundred

dollars per annum, with reasonable clerical assistance, and shall serve at the will of the governor. (1933, c. 111, s. 1; 1935, c. 275, s. 1.)

See 11 N. C. Law Rev., 250.

Editor's Note.—Prior to the amendment of 1935 the section provided for a salary of not more than three thousand dollars.

§ 7757(b). Method of paroling prisoners.—Such rules and regulations shall include a system of parole whereby prisoners who have served a reasonable part of their sentences and have shown their worthiness of such consideration may be allowed to complete their terms outside the custody of the prison or prison camps, and without expense thereto, but under supervision and in accordance with conditions set forth in their parole. And such conditions shall include one whereby the released person may be immediately retaken and returned to prison in case of his willful violation of the conditions under which he has been paroled, and be required to complete his original term. (1933, c. 111, s. 2.)

§ 7757(c). Appointment of parole supervisors.—For the purpose of exercising authority over paroled prisoners, to assist paroled prisoners or those about to be paroled to find and retain self-supporting means, to maintain contact with such prisoners to see that they observe the conditions of their parole and assist them in so doing, the governor is hereby authorized to require the support by the state prison and the state highway commission of not more than four competent parole supervisors, particularly adapted for such work, one to be selected by the commissioner of parole as soon as needed and the others when the number of paroled prisoners to be supervised requires their services. Such parole supervisors are to be designated by the governor from among personnel now maintained by the state prison and/or the highway commission, or are to replace a like number of the present personnel, and in no case are to be an addition to the number of persons now maintained by the said state prison and highway commission. Each of the said parole supervisors shall perform his duties under the sole direction of the governor. (1933, c. 111, s. 3.)

As to subsequent statute on this subject, see § 7757(5).

§ 7757(d). Case histories of prisoners provided for.—The governor is authorized and empowered to direct any employee of the state department of public welfare, the state prison, or the state highway commission, and any county superintendent of public welfare, to prepare and submit case histories or other information in connection with any case under consideration for parole, such work to be done without extra compensation and as a part of the regular duties of such employees or county superintendents. (1933, c. 111, s. 4.)

As to subsequent statute on this subject, see § 7757(7).

Art. 4A. Advisory Board of Paroles

§ 7757(1). Advisory board of paroles created; term of office; vacancy appointments. — The governor of North Carolina is hereby authorized and empowered to name an advisory board of paroles of six members, consisting of the attorney general, the chairman of the state highway and public works commission, the superintendent of public welfare, and three others, who are not state office holders and who are not connected officially with the state highway and public works commission, to be selected by the governor and to serve for the term of his appointment, and to perform such duties in the state prison program as may be assigned to them by the governor. The members of the board, other than ex-officio members, shall be appointed as follows: One for a term of one year, one for a term of two years, and one for a term of three years. Appointments to fill any and all vacancies shall be made by the governor. (1935, c. 414, s. 1.)

§ 7757(2). Board meetings; quorum; chairman and secretary; pay of members.—The board shall meet at the call of the governor at times and places designated by him. At said meetings three members shall constitute a quorum. The governor shall be chairman and the commissioner of paroles shall be secretary of the board. The governor and other ex-officio members may designate some other person to act for them at the meetings of the board. The members of the board, other than the ex-officio members, shall receive as compensation the sum of seven dollars per day and actual expenses while attending the meetings of the board, or while performing such other duties as may be assigned to them by the governor: Provided, however, the compensation may be raised to the sum of ten dollars per day by the governor at his discretion. (1935, c. 414, s. 1.)

§ 7757(3). Commissioner of paroles; assistants.—The governor of North Carolina is authorized and empowered to appoint a commissioner of paroles and one or more assistants to said commissioner as he may deem wise and expedient, who shall, under the governor's direction, aid the governor in more fully performing all of the duties required of him in the exercise of the powers contemplated herein, and to perform such other services as may be assigned by the governor. The parole commissioner shall be provided with reasonable clerical assistance, whose compensation shall be fixed in accordance with the provisions of section 7775(6). (1935, c. 414, s. 2.)

§ 7757(4). Investigators and investigations of cases of prisoners, prisons and prison camps. — For the purpose of investigating the cases of all prisoners serving both determinate and indeterminate sentences in the state prison, in prison camps, and on prison farms, the governor is hereby authorized and empowered to appoint an adequate staff of competent investigators, particularly qualified for such work, with such reasonable clerical assistance as may be required, who shall, under the governor's direction, investigate all cases designated by him, and otherwise aid the governor in passing upon the question of the parole of prisoners, to the end that every prisoner in the custodial care of the State may receive full, fair and just consideration. The governor may cause an investigation to be made by the said investigators of any prison, prison camp, prison farm, and/or any penal and correctional institution in the State when, in his judgment, the situation warrants an investigation. Each

and every investigator provided for herein shall perform his duties under the sole direction of the governor. (1935, c. 414, s. 3.)

§ 7757(5). Parole supervisors provided for; duties.—The governor is hereby authorized to appoint a sufficient number of competent parole supervisors, who shall be particularly qualified for and adapted to the work required of them, and who shall, under the direction of the governor and under regulations prescribed by him exercise supervision and authority over paroled prisoners, assist paroled prisoners, and those who are to be paroled in finding and retaining self-supporting employment, and to promote rehabilitation work with paroled prisoners, to the end that they may become law abiding citizens. The supervisors shall also, under the direction of the governor, maintain frequent contacts with paroled prisoners and find out whether or not they are observing the conditions of their paroles, and assist them in every possible way toward compliance with the conditions of their paroles, and they shall perform such other duties in connection with paroled prisoners as the governor may require. The number of supervisors may be increased by the governor as and when the number of paroled prisoners to be supervised requires or justifies such increase. (1935, c. 414, s. 4.)

§ 7757(6). Pay and expenses of assistants, investigators and supervisors.—The salaries and expense allowances of all personnel appointed under sections 7757(3)-7757(5) shall be fixed by the governor with the approval of the advisory budget commission, and all such salaries and expenses, other than that of the parole commissioner, shall be paid by the state highway and public works commission upon vouchers approved by the commissioner of paroles. (1935, c. 414, s. 5.)

§ 7757(7). Preparation of case histories for commissioner of paroles. — The governor is authorized and empowered to direct any employees of the state department of public welfare, and of the state highway and public works commission, and any county superintendent of public welfare, and any member of the staff investigators provided for in this article to prepare and submit to the commissioner of paroles case histories or other information in connection with any case under consideration for parole, such work to be done without extra compensation and such work shall be considered as a part of the regular duties of such employees or superintendents of welfare. (1935, c. 414, s. 6.)

§ 7757(8). Rules and regulations for parole applications. — The governor of North Carolina is hereby authorized and empowered to set up and establish rules and regulations, in accordance with which applications for paroles may be heard and by which such proceedings may be initiated and heard. (1935, c. 414, s. 7.)

§ 7757(9). Time of eligibility of prisoners for hearing on applications.—All prisoners shall be eligible for a hearing on application for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate: Provided, that any prisoner serving a sentence for life shall be eligible for such hearing when he has served ten years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner, but shall be construed only as guaranteeing to every prisoner a hearing of his case upon its merits. (1935, c. 414, s. 8.)

§ 7757(10). Duties of clerks of all courts as to commitments; statements filed with commissioner of paroles.—The several clerks of the superior courts and the clerks of all inferior courts shall attach to the commitment of each prisoner sentenced in such courts a statement furnishing such information as the governor shall by regulations prescribe, which information shall contain, among other things, the following: (1) The court in which the prisoner was tried; (2) the name of the prsioner and of all co-defendants; (3) the date or term when the prisoner was tried; (4) the offense with which the prisoner was charged and the offense for which convicted; (5) the judgment of the court and the date of the beginning of the sentence; (6) the name and address of the presiding judge; (7) the name and address of the prosecuting solicitor; (8) the name and address of private prosecuting attorney, if any; (9) the name and address of the arresting officer; and (10) all available information of the previous criminal record of the prisoner.

The prison authorities receiving the prisoner for the beginning of the service of sentence shall detach from the commitment the statement furnishing such information and forward it to the commissioner of paroles, together with any additional information in the possession of such prison authorities relating to the previous criminal record of such prisoner, and the information thus furnished shall constitute the foundation and file of the prisoner's case. Forms for furnishing the information required by this section shall, upon request, be furnished to the said clerks by the state highway and public works commission without charge. (1935, c. 414, s. 9.)

§ 7757(11). Time for release of prisoners discretionary.—The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner. (1935, c. 414, s. 10.)

§ 7757(12). Contents of release order.—When a prisoner is released on parole, the parole instrument shall specify in writing the conditions of the parole, the place of residence of the parolee, within or without the State, the name and address of the party to whom the parolee is to report, and times and places when and where the

said parolee shall report to the said party during the entire period of the parole. (1935, c. 414, s. 11.)

§ 7757(13). Automatic revocation of parole upon conviction of crime.—Upon the parolee's conviction and sentence to a term of imprisonment in any court of record in the State of North Carolina and/or in any other State, and/or in any federal court, the parole of the parolee shall become automatically revoked and the parolee, if without the State of North Carolina, shall become forthwith a fugitive from justice. (1935, c. 414, s. 12.)

§ 7757(14). Arrest powers of police officers. — Any officer who is authorized to make arrests of fugitives from justice shall have full authority and power to arrest any parolee whose parole has been revoked. (1935 c. 414, s. 13.)

§ 7757(15). Coöperation of prison officials; information to be furnished. — The warden of each prison and the superintendent of each camp and farm and all officers and employees thereof and all other public officials shall at all times coöperate with the governer and parole commissioner and shall furnish to them all information that may be requested from time to time that will assist them in performing their functions, and all such wardens and other employees shall at all times give to the governor and parole commissioner and his staff free access to all prisoners. (1935, c. 414, s. 14.)

§ 7757(16). Rules and regulations as to grades, allowance of time for good behavior, etc. — The state highway and public works commission is hereby granted full power and authority, with the approval of the governor, to make and promulgate rules and regulatons relating to grades of prisoners, allowances of time for their good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole; and until such rules are so made and promulgated by the state highway and public works commission, with the approval of the governor, the regulations set out in sections 7757(17)-7757(20) shall be the regulations governing these matters. (1935, c. 414, s. 15.)

§ 7757(17). Three grades for prisoners established; good-time allowances.—All prisoners shall be divided into three grades, "A," "B," and "C"; that "A" grade shall be the highest grade. No prisoner shall be placed in this grade until after he has demonstrated by his conduct that he is obedient to prison rules and regulations, respectful to prison officers and employees, considerate of fellow prisoners, trustworthy, and will assist in preserving prison morale and discipline.

"B" grade shall be the second highest grade. No prisoner shall be placed in this grade until after he has demonstrated by his conduct that he is seeking to make a good prisoner and has proved obedient to all prison rules and regulations.

"C" grade is the third grade, and shall be the lowest grade. All prisoners shall be placed in this grade when they are first admitted to prison, and all prisoners under discipline shall be placed in this grade.

The good-time allowances shall be nine days per month for prisoners in "A" grade, and seven days per month for prisoners in "B" grade. Prisoners in "C" grade shall receive no good-time allowance.

Prisoners who have not been subject to discipline may have their good time computed in their highest grade from the date of their admission into prison. (1935, c. 414, s. 16.)

§ 7757(18). Double time allowances.—Every prisoner who works on Sunday or any of the legal holidays in the State of North Carolina shall earn double time allowance. (1935, c. 414, s. 17.)

§ 7757(19). "Governor's good time." — A grant of good time, to be known as the "governor's good time," shall be given to each prisoner at the end of each and every year of prison servitude as follows: To each and every prisoner in "A" grade forty-five days; to each and every prisoner in "B" grade thirty-five days: Provided, that no prisoner who has been disciplined during that year of prison servitude may receive the "governor's good time" grant. (1935, c. 414, s. 18.)

§ 7757(20). Money and other allowances for prisoners discharged; certificates of competency.—All prisoners upon being discharged, except short-term prisoners convicted of misdemeanors, paroled or pardoned from prison, shall be given a small sum of money, transportation to the place in North Carolina designated in parole or discharge papers, and sufficient clothing for neat and comfortable appearance. If any prisoner demonstrated during his prison service that he is competent or proficient in any gainful trade, he shall also be given upon his discharge, parole, or pardon a certificate of competency in such trade signed by the proper authorities. (1935, c. 414, s. 19.)

§ 7757(21). Pardon power of governor unimpaired. — Nothing herein contained shall be construed to impair the power of the governor of North Carolina in granting a pardon, conditional pardon, or commutation in any case or in any way to impair, limit, or revoke his constitutional power of pardon or commutation. (1935, c. 414, s. 20.)

§ 7757(22). Time of appointments by governor; board meetings. — The appointments provided herein to be made by the governor shall be made by the governor as soon as he conveniently can after this article takes effect. The board shall meet at the call of the governor at times and places designated by him. (1935, c. 414, s. 21.)

Art. 5. Farming out Convicts

§ 7758. Counties and towns may employ.—It shall be lawful for the board of commissioners of any county, and likewise for the corporate authorities of any city or town to contract, in writing, with the board of directors of the State Prison Department for the employment of convicts in the State Prison Department upon the highways or streets of such county, city or town, and such contracts when so exercised shall be valid and enforcible against such county, city or town, and in the name of the State the Attorney-General may prosecute an action in the Superior

Court of Wake County for the enforcement thereof. (Rev., s. 5410; Code, s. 3449; 1881, c. 127, s. 1; 1925, c. 163.)

See note under section 7703.

Cited in Watson v. Durham, 207 N. C. 624, 625, 178 S. E. 218.

§ 7759. Duty to hire to counties and towns.—Upon application to them, it shall be the duty of the board of directors of the State Prison Department, in their discretion, to hire to the board of commissioners of any county, and to the corporate authorities of any city, or town, for purposes specified in the preceding section, such convicts as may be mentally and physically capable of performing the work or labor contemplated and shall not at the time of such application be so hired, or otherwise engaged in labor under the direction of said board of directors; but the convicts hired for services under the preceding section shall be fed, clothed and quartered while so employed by the board of directors, or managers of the State Prison Department. (Rev., s. 5411; Code, s. 3450; 1881, c. 127, s. 2; 1925, c. 163.)

See note under section 7703.

§ 7760. Contract for hire; how enforced.—The board of commissioners of any county, the corporate authorities of any city or town, so hiring such convicts shall pay into the treasury of the State for the labor of any convict so hired such a sum or sums of money at such time, or times, as may be agreed upon in the contract of hire; and if any such county, city or town, fail to pay the State money due for such hiring, the same shall bear interest from the time it shall become due until paid at the rate of six per cent per annum; and an action to recover the same may be instituted by the Attorney-General in the name of the State in the courts of Wake County. (Rev., s. 5412; Code, s. 3451; 1881, c. 127, s. 3; 1925, c. 163.)

§ 7761. Counties to appoint superintendent.—The board of commissioners of any county and the corporate authorities of any city or town so hiring such convicts shall have power to appoint and remove at will all such necessary agents to superintend the construction or improvement of such highways and streets as they may deem proper, or to pay the costs and expenses incident to such hiring may levy taxes and raise money as in other respects. (Rev., s. 5413; Code, s. 3452; 1881, c. 127, s. 4; 1925, c. 163.)

§ 7762. Contracts for labor, or products of labor regulated.—The board of directors of the State Prison Department shall in the case of any and all contracts for labor provide under their direction and management for the feeding and clothing of such convicts by the State Prison Department and shall maintain, control, and guard the quarters in which such convicts live during the time of such contracts; and the said board shall provide for the guarding and working of such convicts under its sole supervision and control. The board of directors of the State Prison Department may make such contract for the hire of the convicts confined in the State Prison as may, in its discretion, be proper and will promote the purpose and duty to make the State Prison Department as nearly self-supporting as is consistent with the purpose of its creation, as set forth in section eleven, article eleven of the Constitution; and the said board of directors may engage in and use the labor of convicts confined in the State Prison Department in such work on farms, in manufacturing, either within or without the State Prison, as the board of directors may hereafter determine to be proper and profitable to be carried on by the State Prison Department; and the said board of directors may dispose of the products of the labor of said convicts either in farming, or in other industry at the State Prison or to or for any public institution owned, managed, or controlled by the State, to or for any county, city or town within this State; and may sell or dispose of the same elsewhere and in the open markets or otherwise, as in its discretion may seem profitable. (1917, c. 286, s. 2; 1919, c. 80, s. 1; 1925, c. 163.)

See note under section 7703.

§ 7763. To make state prison department self-supporting.—It is the purpose of this chapter to make the State Prison Department self-supporting as contemplated by the Constitution, and to that end the directors thereof are hereby authorized and empowered to employ the convicts therein in such form of work and to transfer such convicts from one form of work and employment to another when in the opinion of such board of directors such form of employment shall best serve the purpose.

It is further declared to be the State's policy in the conduct of the State Prison Department that convict labor shall be devoted primarily to State use, and to that end the board of directors of the State Prison Department shall as a primary purpose employ labor of such convicts in farming and in the production of such material as may be necessarily used by said State Prison Department and other institutions and departments, having due regard at all times to the promotion of the purpose set out in article eleven, of the Constitution. (1919, c. 10; 1925, c. 163.)

See note under section 7703.

Art. 5a. Prison Farms

§ 7763(a). Title.—This article shall be known and may be cited as "The Prison Farm Act of 1927." (1927, c. 152, s. 1.)

§ 7763(b). Acquisition of land.—Upon resolution of the majority of the Board of Directors of the State's Prison, approved by a majority of the Budget Advisory Commission and the Director of the Budget, the Board of Directors of the State Prison, by and with the consent and approval of the Governor and Council of State, are hereby authorized and empowered to purchase and take deed for in fee simple not exceeding 3000 acres of land suited for a prison farm, said acreage to include cleared and uncleared lands, and are further authorized by and with the consent and approval of the Governor and Council of State, to erect such buildings and make such improvements and purchase such equipment as may be necessary and proper for the use of said farm. (1927, c. 152, s. 2.)

See note under section 7703.

Editor's Note.—The appropriation under this section

was reallocated for the purpose of making improvements on property already owned by the State Prison. See § 7763(n).

§ 7763(c). Bonds.—In order to acquire land for a farm and for buildings and equipment thereon to be used as a State Prison to confine convicts committed thereto by the courts of the State, the State Treasurer is hereby authorized and directed, at the request of the Board of Directors of the State Prison and by and with the consent of the Governor and Council of State, to issue and sell not exceeding four hundred thousand dollars ($400,000.00) in bonds of the State, properly designated and bearing such date or dates and such rate or rates of interest not exceeding five (5%) per cent per annum payable semi-annually as may be fixed by the Governor and Council of State, all of which bonds shall mature at one date in the year nineteen hundred and sixty-seven. (1927, c 152, s. 3.)

See note under section 7703.

§ 7763(d). Interest coupons; registration.—That said bonds shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for state bonds, and the form and denomination thereof shall be such as the State Treasurer may determine in conformity with this article. (1927, c. 152, s. 4.)

§ 7763(e). Sale of bonds.—Before selling the bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price. He is authorized to accept bids for the entire amount of said bonds, or any portion thereof, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is empowered to sell the bonds herein authorized in such manner as in his judgment will produce the best price, but not for less than par and accrued interest. (1927, c. 152, s. 5.)

§ 7763(f). Proceeds constitute special fund.—The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds, the issuance of which has been anticipated by such bond anticipation notes), shall be placed by the Treasurer in a special fund to be designated "Prison Building Fund 1927" and be disbursed only for the purposes of this act upon warrants drawn by the State Auditor. (1927, c 152, s. 6.)

§ 7763(g). Loans on anticipation notes.—By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State shall have given consent, if the Treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or principal of any of said bonds then outstanding if there shall not be sufficient funds in the State Treasury with which to pay such interest or principal as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1927, c. 152, s. 7.)

§ 7763(h). Payment of anticipation notes.—Funds derived from the sale of bonds shall be used in the payment of any bond anticipation notes that may have been issued in anticipation of the sale of such bonds and any renewal of such notes, and funds provided by the General Assembly for the payment of interest and/or principal of such bonds shall be used in paying the interest and/or principal of any notes or renewals thereof, the proceeds of which shall have been used in paying interest and/or principal of such bonds. Interest payments upon said notes may be evidenced by interest coupons in the Treasurer's discretion. (1927, c. 152, s. 8.)

§ 7763(i). Faith, credit and taxing power of state pledged.—The full faith, credit, and taxing power of the state are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1927, c. 152, s. 9.)

§ 7763(j). Bonds, notes and coupons exempt from taxation.—All of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income; nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1927, c. 152, s. 11.)

§ 7763(k). Lawful investment for trust funds.—It shall be lawful for all executors, administrators, guardians, and fiduciaries, generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1927, c. 152, s. 12.)

§ 7763(l). Sinking fund.—For the retirement of the principal of said bonds at maturity a sinking fund is hereby created, into which fund the State Treasurer shall pay during each fiscal year, beginning with the year ending June thirtieth, one thousand nine hundred and twenty-nine, from any funds not heretofore pledged or appropriated, an amount equal to one (1%) percent of the face value of the bonds theretofore issued under this article. (1927, c. 152, s. 13.)

§ 7763(m). Funds appropriated.—The proceeds of bonds or notes herein authorized as well as the unused balances from appropriations for permanent improvements heretofore made for the State's Prison, may be used for the purposes of this article. (1927, c. 152, s. 14.)

§ 7763(n). Appropriation reallocated for improvements on property now owned.—The appropriation of four hundred thousand ($400,000)

dollars made to the State's Prison under chapter one hundred fifty-two, Public Laws of one thousand nine hundred twenty-seven [§§ 7763(a)-7763(m)], is reappropriated and reallocated for the purpose of carrying out the recommendations of the Prison Advisory Commission and for making improvements on property now owned by the State's Prison in lieu of the purposes stated and provided for in the said act of one thousand nine hundred twenty-seven, as follows:

(1) Erecting a prison building on the Cary farm or lands to be acquired contiguous to the Cary farm, and supplying the same with proper plumbing, heating and necessary equipment, providing a proper stockade and supplying tanks, wells and water system;

(2) Erecting the necessary buildings now owned or to be acquired by the State's Prison and installing therein ice making plant or plants and/or cold storage and packing plant or plants together with the necessary machinery;

(3) Erecting and installing canning plant or plants on property now owned or to be acquired by the State's Prison and installing the necessary machinery for the purpose of canning and preserving fruits and vegetables;

(4) Erecting a house or houses on property now owned or to be acquired by the State's Prison for the dry storage of potatoes, seeds, etc.;

(5) Erecting and equipping on property now owned, or to be acquired, by the State's Prison a new dairy barn, silos, poultry and swine houses, and adding to the present dairy barn on the Caledonia farm and acquiring additional cows, swine and poultry;

(6) Erecting on property now owned, or to be acquired, by the State's Prison proper buildings for vocational work among prisoners and supplying same with necessary tools and equipment for teaching shoe repairing and/or auto and tractor repairing and/or printing and/or tailoring, and/or woodworking, and/or blacksmith work, and/or plumbing, and/or electrical work, and/or painting, and/or masonry.

(7) The acquisition or purchase of such lands as shall be necessary for the proper provision for the erection and establishment of the improvements above enumerated: Provided, that the acquisition of such additional lands shall only be made with the approval of the Governor and the Prison Advisory Commission hereinafter established. (1931, c. 110, s. 1.)

§ 7763(o). Preparation of plans; expenditures.—The plans for the improvements provided for in section 7763(n) shall be prepared by the board of directors of the State's Prison, subject to the approval of the director of the budget and of the Prison Advisory Commission provided for in section 7763(q); and the expenditures for such improvements shall be made under the joint supervision of the board of directors of the State's Prison and of the said Prison Advisory Commission, subject to the approval of the director of the budget. (1931, c. 110, s. 2.)

§ 7763(p). Preference given among improvements if sum insufficient for all.—The board of directors of the State's Prison and the Prison Advisory Commission shall be vested with the discretion and power to give preference among the several items of improvements enumerated above in the event it shall be determined that the appropriation of the four hundred thousand dollars ($400,000) provided for these purposes under the provisions of section 7763(n) shall be insufficient to make all of such improvements. (1931, c. 110, s. 3.)

§ 7763(q). Appointment of Prison Advisory Commission by Governor. — Within sixty days after the ratification of this act the Governor shall appoint a Prison Advisory Commission composed of five members, to serve during the will of the Governor and until the duties imposed upon said Prison Advisory Commission under this act have been performed and discharged. The said Prison Advisory Commission shall be vested with all the rights and powers, and charged with all the duties imposed upon said commission under sections 7763(o) and 7763(p). (1931, c. 110, s. 4.)

Editor's Note.—The Act provided that this appointment should be within sixty days after the ratification, which was on March 13, 1931.

Art. 6. Reformatory

§ 7764. Directors may establish reformatory.—There may be established in connection with the North Carolina State Prison Department, under the control and direction of the board of directors of that institution, a reformatory either within the enclosure of the penitentiary or elsewhere as said board shall deem most practicable and economical, in which reformatory convicts under the age of eighteen years sentenced to the penitentiary shall be confined separate and apart from other convicts. (Rev., s. 5414; 1887, c. 356, s. 1; 1913, c. 72; 1925, c. 163.)

See note under section 7703.

§ 7765. May exempt from convict garb.—It shall be in the discretion of the board to exempt the convicts confined in the reformatory from the requirements of wearing the usual convict garb. (Rev., s. 5415; 1887, c. 356, s. 2; 1925, c. 163.)

See note under section 7703.

§ 7766. Not to apply to certain crimes.—Nothing in the two preceding sections shall apply to convicts sentenced for crimes of murder, arson, rape, or burglary. (Rev., s. 5416; 1887, c. 356, s. 3; 1925, c. 163.)

§ 7766(a). Supervision and visitation of the state prison department.—It shall be the duty of the State Board of Charities and Public Welfare to exercise a supervision over the State Prison Department, as contemplated by the Constitution, under proper rules and regulations; and that the rules and regulations be prescribed by the Governor. (1925, c. 163.)

See note under section 7703.

Art. 7. Bureau of Identification

§ 7766(b). Bureau established.—The State bureau to be entitled a Bureau of Identification be and the same is hereby established. (1925, c. 228, s. 1.)

§ 7766(c). Director.—A deputy warden of the State Prison is hereby designated as director of said bureau, who shall be a finger-print expert

and familiar with other means of identifying criminals and who shall have complete control of said bureau within the limits hereinafter prescribed, said director to devote a sufficient portion of his time to the purposes of said bureau and shall maintain the principal offices of the same at the State Prison, and the said bureau with full equipment as herein provided for shall be established and maintained by the board of trustees of the penitentiary out of the general appropriation to the State Prison. (1925, c. 228, s. 2.)

§ 7766(d). Duty of bureau.—It shall be the duty of the said bureau of identification to receive and collect police information, to assist in locating, identifying, and keeping records of criminals in this State, and from other states, and to compare, classify, compile, publish, make available and disseminate any and all such information to the sheriffs, constables, police authorities, courts or any other officials of the State requiring such criminal identification, crime statistics and other information respecting crimes local and national, and to conduct surveys and studies for the purpose of determining so far as is possible the source of any criminal conspiracy crime wave, movement or coöperative action on the part of the criminals reporting such conditions and to coöperate with all officials in detecting and preventing. (1925, c. 228, s. 3.)

§ 7766(e). Henry system maintained. — The director is required to use and maintain the Henry system. (1925, c. 228, s. 4.)

§ 7766(f). Annual report. — The director of the bureau is directed to submit in his report for the fiscal year ending February first, nineteen hundred and twenty-six, and annually thereafter as a part of the report of the State Prison, a full account of all funds received and expenses to the Governor, and an estimate of what is necessary to carry out the provisions of this article. (1925, c. 228, s. 5.)

§ 7766(g). Finger prints taken.—Every chief of police and sheriff in the State of North Carolina is hereby required to take or cause to be taken on forms furnished by this bureau the finger prints of every person convicted of a felony, and to forward the same immediately by mail to the said bureau of identification. That the said officers are hereby required to take the finger prints of any other person when arrested for a crime when the same is deemed advisable by any chief of police or sheriff, and forward the same for record to the said bureau. (1925, c. 228, s. 6.)

Editor's Note.—The discretion given the police officials seem to be a fairly large discretion to leave in the hands of the average police official, when a person has merely been arrested. 3 N. C. Law Rev. 144.

§ 7766(h). Seal of bureau; certification of records.—The director shall provide a seal to be affixed to any paper, record, copy or form or true copy of any of the same in the files or records of said bureau of identification and when so certified under seal such record or copy shall be evidenced in any court of the State. (1925, c. 228, s. 7.)

§ 7766(i). Report of disposition of persons finger printed.—Every chief of police and sheriff shall advise said bureau of final disposition of all persons finger printed. (1925, c. 228, s. 8.)

CHAPTER 131

TAXATION

SUBCHAPTER I. LEVY OF TAXES (REVENUE ACT OF 1935)

§§ 7767-7780: Superseded by §§ 7880(1) et seq.

Editor's Note.—Public Laws of 1935, c. 23, expressly repealed section 7843 of the Consolidated Statutes relating to the promotion of stock raising.

Art. 1. Schedule A. Inheritance Tax

§ 7880(1). General provisions.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

First. When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State.

Second. When the transfer is by will or intestate laws of this or any other State of real property or of goods, wares and merchandise within this State, or of any property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has a taxing jurisdiction, including State and municipal bonds, and the decedent was a resident of the State at the time of death; when the transfer is of real property or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, and the decedent was a non-resident of the State at the time of death.

Third. When the transfer of property made by a resident, or non-resident, is of real property within this State, or of goods, wares and merchandise within this State, or of any other property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of, or the income from, the property or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three per cent of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section,

Fourth. When any person or corporation

comes into possession or enjoyment, by a transfer from a resident, or from a non-resident decedent when such non-resident decedent's property consists of real property within this State or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by any instrument taking effect after the passage of this act, or of any property transferred pursuant to a power of appointment contained in any instrument.

Fifth. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related and succeeded thereto by will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

Sixth. Whenever any real or personal property, or both, of whatever kind or nature, tangible or intangible, is disposed of by will or by deed to any person or persons for life, or the life of the survivor, or for a term of years, or to any corporation for a term of years, with the power of appointment in such person or persons, or in such corporation, or reserving to the grantor or devisor the power of revocation, the tax, upon the death of the person making such will or deed, shall, on the whole amount of property so disposed of, be due and payable as in other cases, and the said tax shall be computed according to the relationship of the first donee, or devisee, to the devisor.

Seventh. Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable only on one-half of the value of the property so transferred, unless, where it shall appear that the husband supplied the entire purchase money and the husband predeceases the wife, the wife shall be chargeable with the entire value of the property for inheritance tax; and where it appears that the wife supplied the entire purchase money and the wife predeceases the husband, the husband is chargeable with the value of the property for inheritance tax; and in the absence of evidence as to the proportions of the purchase price paid by the husband and wife, the presumption will be that each paid equal amounts, and only one-half of the value of the property shall be charged to the survivor for inheritance tax. (1935, c. 371, s. 1.)

Cross Reference.—For general treatment of the subject, see 11 N. C. Enc. Dig. 656 et seq., 15 N. C. Enc. Dig. 573 et seq. For history of the inheritance tax statute, see State v. Scales, 172 N. C. 915, 90 S. E. 439.

See note 12 N. C. Law Rev., 180, on "Fate of the Trust as Device to Escape Inheritance Taxes."

Editor's Note.—The annotations under this and the following sections are constructions of the corresponding sections (sections 7772 et seq.) of the Consolidated Statutes and of subsequent revenue acts.

Public Laws 1935, c. 371, herein codified, superseded all revenue laws enacted subsequent to the Consolidated Statutes.

Constitutionality.—The provisions of section 7772 of the prior law was held not in conflict with Art. I, § 17, of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741, discussed in 3 N. C. Law Rev. 107. The judgment of this court, however, was reversed, on a writ of error, by the Supreme Court of the United States. Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374. It was there held that the statute under which the tax was assessed and collected was invalid, upon the principle that the subject to be taxed must be within the jurisdiction of the state assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

Liberal Construction.—A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. State v. Scales, 172 N. C. 915, 90 S. E. 439. See, also, Norris v. Durfey, 168 N. C. 321, 84 S. E. 687.

Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687.

Basis of Inheritance Tax.—"The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law." Brown, J., in In re Morris, Estate, 138 N. C. 259, 262, 50 S. E. 682, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 267, 131 S. E. 741. See Waddell v. Doughton, 194 N. C. 537, 140 S. E. 160.

Situs for Taxation.—"The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the State in which its owner was a resident at the time of his death. Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473. This position is upheld upon the principle that the situs of personal property, for the purpose of taxation, is said to be in the State where the owner resides and has his domicile. Mobila sequuntur personam." Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 268, 121 S. E. 741.

Thus if the testator or intestate has his domicile abroad and his personal estate were also, no tax would be demanded of the legatee or next of kin, though they might be resident in the state. State v. Brim, 57 N. C. 300, 301. After the legacy or distributive share has been received, it then becomes a part of the property of one of the citizens of the state, and then it may be taxed in common with any other property of the like kind. Id.

Transfers Subject to Tax.—The right to impose an inheritance tax does not depend upon the kind of property transferred. In re Morris Estate, 138 N. C. 259, 50 S. E. 682.

A widow's dower and year's allowance allotted to her upon her dissent from her husband's will, is property passing by will or by intestate laws within the meaning of this statute. State v. Dunn, 174 N. C. 679, 94 S. E. 481.

The corresponding section of the prior law includes and lays a tax upon an interest made subject by will to the appointment of a third person. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203.

Same—Shares of Corporate Stock.—Under the provisions of the prior law an inheritance or transfer tax is imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in a corporation of another State domiciled here, under the laws of this State, as a condition precedent to the right to have said stock transferred on the books of the corporation

having the statutory proportion of its property located within this State and conducting its business here. The constitutionality was upheld. Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741. See dissenting opinion as to constitutionality. A discussion of this case may be found in a note contained in 3 N. C. Law Rev. 107.

§ 7880(2). Property exempt. — The following property shall be exempt from taxation under this article:

(a) Property passing to or for the use of the State of North Carolina, or to or for the use of municipal corporations within the State or other political subdivisions thereof, for exclusively public purposes.

(b) Property passing to religious, charitable, or educational corporations, or to churches, hospitals, orphan asylums, public libraries, religious, benevolent, or charitable organizations, or passing to any trustee or trustees for religious, benevolent, or charitable purposes, where such religious, charitable, or educational institutions, corporations, churches, trusts, etc., are located within the State and not conducted for profit.

(c) Property passing to religious, educational, or charitable corporations not conducted for profit, incorporated under the laws of any other State, and receiving and disbursing funds donated in this State for religious, educational, or charitable purposes.

(d) Proceeds of life insurance policies, not exceeding in the aggregate twenty thousand dollars, when payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in section 7880(3), subsection (a), and also proceeds of all life insurance policies payable to beneficiaries named in subsections (a), (b), and (c) of this section. And also proceeds of all policies of insurance paid by the United States government to the beneficiary or beneficiaries or heirs at law of any deceased soldier of the World War under the present laws of congress or any amendment that may be hereafter made thereto. (1935, c. 371, s. 2.)

See note to following section. Section 7773 was the corresponding provision of the consolidated statutes.

§ 7880(3). Rate of tax—Class A.—(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of this State or of any of the United States, or of any foreign kingdom or nation, at the following rates of tax (for each one hundred dollars or fraction thereof) of the value of such interest:

First $10,000, above exemption	1 per cent
Over $10,000 and to $25,000	2 per cent
Over $25,000 and to $50,000	3 per cent
Over $50,000 and to $100,000	4 per cent
Over $100,000 and to $200,000	5 per cent
Over $200,000 and to $500,000	6 per cent
Over $500,000 and to $1,000,000	7 per cent
Over $1,000,000 and to $1,500,000	8 per cent
Over $1,500,000 and to $2,000,000	9 per cent
Over $2,000,000 and to $2,500,000	10 per cent
Over $2,500,000 and to $3,000,000	11 per cent
Over $3,000,000	12 per cent

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars; each child under twenty-one (21) years of age, five thousand dollars; all other beneficiaries mentioned in this subsection, two thousand dollars each: Provided, a grandchild or grandchildren shall be allowed the single exemption or pro rata part of the exemption of the parent which he or they represent. The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise: Provided, that when any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of his property by will to his wife, the wife shall be allowed an additional exemption of five thousand dollars for each child under twenty-one years of age. (1935, c. 371, s. 3.)

Real Property, as well as personal, is included in this section. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687. See section 7880(1).

Who Entitled to Exemption.—The court in State v. Scales, 172 N. C. 915, 90 S. E. 439, in construing the words "all other beneficiaries in this section," contained in sub-division one of the corresponding section of the prior law holds that the word "section" was intended and meant for the subdivision in which it was placed and does not apply to the whole section to exempt strangers of the blood of the testator along with the beneficiaries of the first class. It is to be noted, however, that the word "section" is not longer included in this clause, the word "subchapter" having been substituted therefor.

Formerly a bequest to a church or college could be taxed. Barringer v. Cowan, 55 N. C. 436.

The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its mother. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203.

§ 7880(4). Rate of Tax—Class B.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of the person who died possessed as aforesaid, at the following rates of tax (for each one hundred dollars or fraction thereof) of the value of such interest:

First $5,000	4 per cent
Over $5,000 and to $10,000	5 per cent
Over $10,000 and to $25,000	6 per cent
Over $25,000 and to $50,000	7 per cent
Over $50,000 and to $100,000	8 per cent
Over $100,000 and to $250,000	10 per cent
Over $250,000 and to $500,000	12 per cent
Over $500,000 and to $1,000,000	14 per cent
Over $1,000,000 and to $1,500,000	16 per cent
Over $1,500,000 and to $2,000,000	18 per cent
Over $2,000,000 and to $2,500,000	20 per cent
Over $2,500,000 and to $3,000,000	22 per cent
Over $3,000,000	24 per cent

(1935, c. 371, s. 4.)

§ 7880(5). Rate of tax—Class C.—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars or fraction thereof) of the value of such interest:

First $10,000	8 per cent
Over $10,000 and to $25,000	9 per cent

Over $25,000 and to $50,000.....10 per cent
Over $50,000 and to $100,000.....11 per cent
Over $100,000 and to $250,000.....13 per cent
Over $250,000 and to $500,000.....15 per cent
Over $500,000 and to $1,000,000.....17 per cent
Over $1,000,000 and to $1,500,000....19 per cent
Over $1,000,000 and to $2,000,000....21 per cent
Over $2,000,000 and to $2,500,000....23 per cent
Over $2,500,000 .....25 per cent

(1935, c. 371, s. 5.)

§ 7880(6). Estate tax.—(a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this schedule, whether a resident or nonresident of the State, where the inheritance tax imposed by this schedule is in the aggregate of a lesser amount than the maximum credit of eighty per cent of the federal estate tax allowed by the Federal Estate Tax Act as contained in the Federal Revenue Act of 1926, or subsequent acts and amendments, because of said tax herein imposed, then the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this State shall be the maximum amount of credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.

(b) Where no tax is imposed by this schedule because of the exemptions herein or otherwise, and a tax is due the United States under the Federal Estate Tax Act, then a tax shall be due this State equal to the maximum amount of the credit allowed under said Federal Estate Tax Act.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the Federal Revenue Act of 1926, or subsequent acts and amendments.

(d) If this section, or any subsection, phrase or clause thereof, is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion or portions of this schedule in force at the time of the enactment of this section, nor shall such decision affect the validity of the remaining portion or portions of this section. (1935, c. 371, s. 6.)

See 13 N. C. Law Rev., 271, 281, for article on "The Federal Estate Credit Clause."

Editor's Note.—In 1924 the Federal Government provided in its estate tax act that the estate of the decedent should be credited up to 25% of Federal tax therein imposed for any payment of estate, inheritance, legacy, or succession taxes actually made to any of the several states, in respect of any property included in the gross estate. See Federal Revenue Act of 1924, Title III, part I, section 301(b). Since such credit is made to the estate, the Federal Government does not collect the 25% or less for the state, but leaves it to the state to make such collections under its own laws.

As a result, the legislatures of the several states, including New York, Massachusetts, Georgia and Pennsylvania, have amended their inheritance tax statutes to take advantage of such provisions. And this section was enacted with that view.

§ 7880(7). Deductions. — In determining the clear market value of property taxed under this article, or schedule, the following deductions, and no others, shall be allowed:

(a) Taxes that have become due and payable, and the pro rata part of taxes accrued for the fiscal year that have not become due and payable.

(b) Drainage and street assessments (fiscal year in which death occurred.)

(c) Reasonable funeral and burial expenses.

(d) Debts of decedent.

(e) Estate and inheritance taxes paid to other States, and death duties paid to foreign countries, and Federal estates taxes, except additional estate taxes levied by act of congress, effective June 6, 1932.

(f) Amount actually expended for monuments not exceeding the sum of five hundred dollars ($500).

(g) Commissions of executors and administrators actually allowed and paid.

(h) Costs of administration, including reasonable attorneys' fees. (1935, c. 371, s. 7.)

§ 7880(8). Where no personal representative appointed, clerk of superior court to certify same to commissioner of revenue. — Whenever an estate subject to the tax under this act shall be settled or divided among the heirs at law, legatees or devisees, without the qualification and appointment of a personal representative, the clerk of the superior court of the county wherein the estate is situated shall certify the same to the commissioner of revenue, whereupon the commissioner of revenue shall proceed to appraise said estate and collect the inheritance tax thereon as prescribed by this act. (1935, c. 371, s. 8.)

§ 7880(9). Tax to be paid on shares of stock before transferred, and penalty for violation. — (a) Property taxable within the meaning of this act shall include bonds or shares of stock in any incorporated company incorporated in this State, regardless of whether or not any such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this State, and the tax on the transfer of any bonds and/or shares of stock in any such incorporated company owning property and doing business outside of the State shall be paid before waivers are issued for the transfer of such shares of stock. No corporation of this State shall transfer any bonds or stock of said corporation standing in the name of or belonging to a decedent or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such transfer is served upon the commissioner of revenue at least ten days prior to such transfer, nor until said commissioner of revenue shall consent thereto in writing. Any corporation making such a transfer without first obtaining consent of the commissioner of revenue as aforesaid shall be liable for the amount of any tax which may thereafter be assessed on account of the transfer of such bonds and/or stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars, which liability for such tax, interest, and penalty may be enforced by an action brought by the State in the name of the commissioner of revenue. The word "transfer" as

used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, or by statute, descent, devise, bequest, grant, deed, bargain, sale, gift, or otherwise. A waiver signed by the commissioner of revenue of North Carolina shall be full protection for any such company in the transfer of any such stock.

(b) Any incorporated company not incorporated in this State and owning property in this State which shall transfer on its books the shares of stock of any resident decedent holder of bonds and/or shares of stock in such company exceeding in value two hundred dollars before the inheritance tax, if any, has been paid, shall become liable for the payment of said tax; and any property held by such company in this State shall be subject to execution to satisfy same. A receipt or waiver signed by the commissioner of revenue of North Carolina shall be full protection for any such company in the transfer of any such stock. (1935, c. 371, s. 9.)

§ 7880(10). Commissioner of revenue to furnish blanks and require reports of value of shares of stock. — (a) The commissioner of revenue shall prepare and furnish, upon application, blank forms covering such information as may be necessary to determine the amount of inheritance tax due the State of North Carolina on the transfer of any such bonds and/or stock; he shall determine the value of such bonds and/or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due or to become due.

(b) The commissioner of revenue shall have authority, under penalties provided in this act, to require that any reports necessary to a proper enforcement of this act be made by any such incorporated company owning property in this State. (1935, c. 371, s. 10.)

§ 7880(11). Life insurance policies.—The proceeds of all life insurance policies payable at or after the death of the insured, when the premiums have been paid by the insured, and whether payable to the estate of the insured or to a beneficiary or beneficiaries named in the policy, shall be taxable at the rates provided for in this article, subject to the exemptions in section 7880(2). (1935, c. 371, s. 11.)

§ 7880(12). Recurring taxes.—Where property transferred has been taxed under the provisions of this article, such property shall not be assessed and/or taxed on account of any other transfer of like kind occurring within two (2) years from the date of the death of the former decedent: Provided, that this section shall apply only to the transferees designated in sections 7880(3) and 7880(4). (1935, c. 371, s. 12.)

§ 7880(13). Reciprocal provisions of other states. — (a) The terms "death tax" and "death taxes," as used in the five following sub-sections, shall include inheritance, succession, transfer and estate taxes and any taxes levied against the estate of a decedent upon the occasion of his death.

(b) At any time before the expiration of eighteen months after the qualification in any probate court in this commonwealth of any executor of the will or administrator of the estate of any non-resident decedent, such executor or administrator shall file with such court proof that all death taxes, together with interest or penalties thereon, which are due to the state of domicile of such decedent, or to any political subdivision thereof, have been paid or secured, or that no such taxes, interest or penalties are due as the case may be, unless it appears that letters testamentary or of administration have been issued on the estate of such decedent in the state of his domicile in the four following sub-sections called the domiciliary state.

(c) The proof required by sub-section (b) may be in the form of a certificate issued by the official or body charged with the administration of the death tax laws of the domiciliary state. If such proof has not been filed within the time limited in sub-section (b), and if within such time it does not appear that letters testamentary or of administration have been issued in the domiciliary state, the register of probate shall forthwith upon the expiration of such time notify by mail the official or body of the domiciliary state charged with the administration of the death tax laws thereof with respect to such estate, and shall state in such notice so far as is known to him (a) the name, date of death and last domicile of such decedent, (b) the name and address of each executor or administrator, (c) a summary of the values of the real estate, tangible personalty, and intangible personalty, wherever situated, belonging to such decedent at the time of his death, and (d) the fact that such executor or administrator has not filed theretofore the proof required in subsection (b). Such register shall attach to such notice a plain copy of the will and codicils of such decedent, if he died testate, or, if he died intestate, a list of his heirs and next of kin, so far as is known to such register. Within sixty days after the mailing of such notice the official or body charged with the administration of the death tax laws of the domiciliary state may file with such probate court in this commonweath a petition for an accounting in such estate, and such official or body of the domiciliary state shall, for the purposes of this section, be a party interested for the purpose of petitioning such probate court for such accounting. If such petition be filed within said period of sixty days, such probate court shall decree such accounting, and upon such accounting being filed and approved shall decree either the payment of any such tax found to be due to the domiciliary state or subdivision thereof or the remission to a fiduciary appointed or to be appointed by the probate court, or other court charged with the administration of estates of decedents, of the domiciliary state, of the balance of the intangible personalty after the payment of creditors and expenses of administration in this commonwealth.

(d) No final account of an executor or administrator of a non-resident decedent shall be allowed unless either (1) proof has been filed as required by sub-section (b), or (2) notice under sub-section (c) has been given to the official or body charged with the administration of the death tax laws of the domiciliary state, and such official or body has not petitioned for an account-

ing under said sub-section within sixty days after the mailing of such notice, or (3) an accounting has been had under said sub-section (c), a decree has been made upon such accounting and it appears that the executor or administrator has been paid such sums and remitted such securities, if any, as he was required to pay or remit by such decree, or (4) it appears that letters testamentary or of administration have been issued by the domiciliary state and that no notice has been given under said sub-section (c).

(e) Sub-sections (a) to (d), inclusive, shall apply to the estate of a non-resident decedent, only in case the laws of the domiciliary state contain a provision, of any nature or however expressed, whereby this commonwealth is given reasonable assurance, as finally determined by the commissioner, of the collection of its death taxes, interest and penalties from the estates of decedents dying domiciled in this commonwealth, when such estates are administered in whole or in part by a probate court, or other court charged with the administration of estates of decedents, in such other state.

(f) The provisions of sub-sections (a) to (e), inclusive, shall be liberally construed in order to insure that the domiciliary state of any non-resident decedent whose estate is administered in this commonwealth shall receive any death taxes, together with interest and penalties thereon, due to it from the estate of such decedent. (1935, c. 371, s. 29.)

§ 7880(14). When all heirs, legatees, etc., are discharged from liability.—All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided. (1935, c. 371, s. 13.)

§ 7880(15). Discount for payment in six months; interest after twelve months; penalty after two years.—All taxes imposed by this act shall be due and payable at the death of the testator, intestate, grantor, donor or vendor, and if the same are paid within six months from the date of the death of the testator, intestate, grantor, donor, vendor, a discount of three per centum shall be allowed and deducted from such taxes; if not paid within twelve months from date of death of the testator, intestate, grantor, donor or vendor, such tax shall bear interest at the rate of six per centum per annum, to be computed from the expiration of twelve months from the date of the death of such testator, intestate, grantor, donor, or vendor until paid: Provided, that if the taxes herein levied shall not be paid in full within two years from date of death of testator, intestate, grantor, donor, or vendor, then and in such case a penalty of five per centum upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per centum herein imposed may be remitted by the commissioner of revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the commissioner of revenue is further authorized, in case of protracted litigation or other delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay: Provided, that time for payment and collection of such tax may be extended by the commissioner of revenue for good reasons shown. (1935, c. 371, s. 14.)

§ 7880(16). Collection to be made by sheriff if not paid in two years.—If taxes imposed by this act are not paid within two years after the death of the decedent, it shall be the duty of the commissioner of revenue to certify to the sheriff of the county in which the estate is located the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half per cent as sheriff's fees for collecting same, which fees shall be in addition to any salary or other compensation allowed by law to the sheriffs for their services; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as is given in the Machinery Act for the collection of other taxes. The sheriff shall make return to the commissioner of revenue of all such taxes within thirty days after collection. (1935, c. 371, s. 15.)

§ 7880(17). Executor, etc., shall deduct tax. — The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the State; and no executor or administrator shall pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or paid into his hands on account of any legacy or distributive share for the use of the State shall be paid by him to the proper officer without delay. (1935, c. 371, s. 16.)

§ 7880(18). Legacy for life, etc., tax to be retained, etc., upon the whole amount.—If the legacy or devise subject to said tax be given to a beneficiary for life or for a term of years, or upon the condition or contingency, with remainder to take effect upon the termination of the life estate or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out as sections one thousand seven hundred and ninety and one thousand seven hundred and ninety-one of the Consolidated

Statutes, and upon the basis of six per centum of the gross value of the estate for the period of expectancy of the life tenant in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the revenue commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith out of the property tranferred, and the commissioner of revenue shall assess the tax on such property. (1935, c. 371, s. 17.)

§ 7880(19). Legacy charged upon real estate, heir or devisee to deduct and pay to executor, etc.—Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee of such real estate, before paying the same to such legatee, shall deduct the tax therefrom at the rates aforesaid, and pay the amount so deducted to the executor or administrator or the commissioner of revenue, and the same shall remain a charge upon such real estate until paid, and in default thereof the same shall be enforced by the decrees of the court in the same manner as the payment of such legacy may be enforced: Provided, that all taxes imposed by this act shall be a lien upon the real and personal property of the estate on which the tax is imposed or upon the proceeds arising from the sale of such property from the time said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the State: Provided further, that no lien for inheritance or estate taxes which accrued prior to May first, one thousand nine hundred twenty-three, shall attach or affect the land. (1935, c. 371, s. 18.)

§ 7880(20). Computation of tax on non-resident decedents.—A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this State of a non-resident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such non-resident decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the commissioner of revenue such information as may be necessary or required to enable the commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this State liable to tax under this act shall be taxed at the highest rate applicable to those who are strangers in blood. (1935, c. 371, s. 19.)

§ 7880(21). Regulations governing access to safe deposits of a decedent.—No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or in control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this act; but the commissioner of revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank, or other institution, person or persons from the obligation herein imposed. Every safe deposit company, trust company, corporation, bank or other institution, person or persons engaged in the business of renting lock boxes for the safe keeping of valuable papers and personal effects or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative, or cotenant of such deceased person, require the presence of the clerk of the superior court, or deputy, or representative of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the commissioner of revenue, to the executor, administrator, personal representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank, or other institution, person or persons having possession of such lock box. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the commissioner of revenue a notice, in such form as the commissioner of revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this act on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense

that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1935, c. 371, s. 21½.)

§ 7880(22). Duties of the clerks of the superior court.—(a) It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs at law, legatees, distributees, devisees, etc., as far as practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs at law, legatees, devisees, etc., to the decedent, and forward the same to the commissioner of revenue on or before the tenth day of each month; and the commissioner of revenue shall furnish the several clerks blanks upon which to make said report, but the failure to so furnish blanks shall not relieve the clerk from the duty herein imposed. The clerk shall make no report of a death where the estate of a decedent is less than two thousand dollars in value, when the beneficiary is husband or wife or child or grandchild of the decedent. Any clerk of the superior court who shall fail, neglect or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars ($100) to be recovered by the commissioner of revenue in an action to be brought by the commissioner of revenue.

(b) It shall also be the duty of the clerk of the superior court of each of the several counties of the State to enter in a book, prepared and furnished by the commissioner of revenue, to be kept for that purpose, and which shall be a public record, a condensed copy of the settlement of inheritance taxes of each estate, together with a copy of the receipt showing payment, or a certificate showing no tax due, as shall be certified to him by the commissioner of revenue.

(c) For these services, where performed by the clerk, the clerk shall be paid by the commissioner of revenue, when certificates and receipts are sent in to be recorded, as follows: For recording the certificate of the commissioner of revenue showing no tax due, the sum of fifty cents ($.50). For recording the certificate of the commissioner of revenue showing that the tax received by the State is one hundred dollars ($100) or less he shall be paid the sum of one dollar ($1.00). For recording the certificate of the commissioner of revenue showing that the tax received by the State is more than one hundred dollars ($100) and not over five hundred dollars ($500) he shall be paid the sum of two dollars ($2.00). For recording the certificate of the commissioner of revenue showing that the tax received by the State is more than five hunred dollars ($500) he shall be paid the sum of five dollars ($5.00), which sum shall be the maximum amount paid for recording the certificate of the commissioner of revenue for any one estate: Provided, that where the decedent owns real estate in one or more counties, other than the county in which the administration of the estate is had, then the fee of the clerks of the court of such other counties for recording the certificate of the commissioner of revenue shall be fifty cents ($.50) each, and the same fee shall be paid for like service by the clerks in case of the settlement of the estates of nonresidents. The clerk of the superior court shall receive the sum of fifty cents for making up and transmitting to the commissioner of revenue the report required in this section, containing a list of persons who died leaving property in his county during the preceding month, etc.: Provided further, that where the clerk of the superior court has failed or neglected to make the report required of him in this section, in that case he shall only receive for recording the certificate of the commissioner of revenue the sum of fifty cents ($.50).

The clerks of the superior court of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this act are hereby repealed. (1935, c. 371, s. 20.)

§ 7880(23). Information by administrator and executor. — Every administrator shall prepare a statement in duplicate, showing as far as can be ascertained the names of all the heirs at law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the postoffice address of executor, administrator, or trustee. If any of the heirs at law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in the State, and of all personal property of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation in trust or otherwise within three years prior to the death of the decedent. The statement herein provided for shall be filed with the commissioner of revenue at Raleigh, N. C., within ninety days after the qualification of the executor or administrator, upon blank forms to be prepared by the commissioner of revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars, to be recovered by the commissioner of revenue in action to be brought by the commissioner of revenue to collect such

sum in the superior court of Wake county against such administrator or executor. The commissioner of revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the commissioner of revenue, based on the sworn inventory provided in this section: Provided, that this does not apply to estates of less than two thousand dollars in value when the beneficiaries are husband or wife or children or grandchildren, or parent or parents of the decedent. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this act, shall fail to file the statements herein required, within the times herein required, the commissioner of revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided. (1935, c. 371, s. 21.)

§ 7880(24). Supervision by commissioner of revenue. — The commissioner of revenue shall have complete supervision of the enforcement of all provisions of the Inheritance Tax Act and the collections of all inheritance taxes found to be due thereunder, and shall make all necessary rules and regulations for the just and equitable administration thereof. He shall regularly employ such deputies, attorneys, examiners, or special agents as may be necessary for the reasonable carrying out of its full intent and purpose. Such deputies, attorneys, examiners, or special agents shall, as often as required to do so, visit the several counties of the State to inquire and ascertain if all inheritance taxes due from estates of decedents, or heirs at law, legatees, devisees, or distributees thereof have been paid; to see that all statements required by this act are filed by administrators and executors, or by the beneficiaries under wills where no executor is appointed; to examine into all statements filed by such administrators and executors; to require such administrators and executors to furnish any additional information that may be deemed necessary to determine the amount of tax that should be paid by such estate. If not satisfied, after investigation, with valuation returned by the administrator or executor, the deputy, attorney, examiner, or appraiser shall make an additional appraisal after proper examination and inquiry, or may, in special cases, recommend the appointment by the commissioner of revenue of a special appraiser, who, in such case, shall be paid five dollars per day and expenses for his services. The administrator or executor, if not satisfied with such additional appraisal, may appeal within thirty days to the commissioner of revenue, which appeal shall be heard and determined as other cases. From this decision the administrator or executor shall have the right to appeal to the superior court of the county in which said estate is situated for the purpose of having said issue tried; said appeal to be made in the same way and manner as is now provided by law for appeals from the decisions of the public utilities commission: Provided, that the tax shall first be paid, or satisfactory surety bond in double the amount of any alleged deficiency shall be filed with the commissioner pending an appeal; and if it shall be determined upon trial that said tax or any part thereof was illegal or excessive, judgment shall be rendered therefor with interest, and the amount of tax so adjudged overpaid or declared invalid shall be certified by the clerk of court to the commissioner of revenue, who is authorized and directed to draw his account on the state treasurer for the amount thereof. (1935, c. 371, s. 22.)

§ 7880(25). Proportion of tax to be repaid upon certain conditions. — Whenever debts shall be proven against the estate of a decedent after the distribution of legacies from which the inheritance tax has been deducted in compliance with this act, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the state treasury, or shall be refunded by the state treasurer, if it has been so paid in, upon certificate of the commissioner of revenue. (1935, c. 371, s. 23.)

§ 7880(26). Commissioner of revenue may order executor, etc., to file account, etc.—If the commissioner of revenue shall discover that reports and accounts have not been filed, and the tax, if any, has not been paid as provided in this act, he shall issue a citation to the executor, administrator, or trustee of the decedent whose estate is subject to tax, to appear at a time and place therein mentioned, not to exceed twenty days from the date thereof, and show cause why said report and account should not be filed and said tax paid; and when personal service cannot be had, notice shall be given as provided for service of summons by publication in the county in which said estate is located; and if said tax shall be found to be due, the said delinquent shall be adjudged to pay said tax, interest and cost; if said tax shall remain due and unpaid for a period of thirty days after notice thereof, the commissioner of revenue shall certify the same to the sheriff, who shall make collection of said tax, cost and commissions for collection, as provided in section 7880(15). (1935, c. 371, s. 24.)

§ 7880(27). Failure of administrator, executor, or trustee to pay tax.—Any administrator, executor, or trustee who shall fail to pay the lawful inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of the said taxes, and the same may be recovered in an action against such administrator, executor, or trustee, and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor, or trustee to make a final settlement of his estate without having paid the inheritance tax due by law, and exhibiting his receipt from the commissioner of revenue therefor, shall be liable upon his official bond for the amount of such taxes. (1935, c. 371, s. 25.)

§ 7880(28). Uniform valuation. — (a) If the value of any estate taxed under this schedule shall have been assessed and fixed by the federal government for the purpose of determining the federal taxes due thereon prior to the time the report from the executor or administrator is made to the commissioner of revenue under the provisions of this act, the amount or value of such estate so fixed, assessed, and determined by the federal government shall be stated in such report. If the assessment of the estate by the federal government shall be made after the filing of the report by the executor or administrator with the commissioner of revenue, as provided in this act, the said executor or administrator shall, within thirty days after receipt of notice of the final determination by the federal government of the value or amount of said estate as assessed and determined for the purpose of fixing federal taxes thereon, make report of the amount so fixed and assessed by the federal government, under oath or affirmation, to the commissioner of revenue. If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the State from said estate, then the commissioner of revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government, unless the said executor or administrator shall, within thirty days after notice to him from the commissioner of revenue, show cause why the valuation and assessment of said estate as theretofore made should not be changed or increased. If the valuation placed upon said estate by the federal government shall be less than that theretofore fixed or assessed under this act, the executor or administrator may, within thirty days after filing his return of the amount so fixed or assessed by the federal government, file with the commissioner of revenue a petition to have the value of said estate reassessed and the same reduced to the amount as fixed or assessed by the federal government. In either event the commissioner of revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate, and if valuation is changed, he shall reassess the taxes due by said estate under this act and notify the executor or administrator of such fact. In the event the valuation on said estate shall be decreased, and if there shall have been an overpayment of the tax, the said commissioner shall, within sixty days after the final determination of the value of said estate and the assessment of the correct amount of tax against the same, refund the amount of such excess tax theretofore paid.

(b) If the executor or administrator shall fail to file with the commissioner of revenue the return under oath or affirmation, stating the amount of value at which the estate was assessed by the federal government as provided for in this section, the commissioner of revenue shall assess and collect from the executor or administrator a penalty equal to twenty-five per cent of the amount of any additional tax which may be found to be due by such estate upon reassessment and reappraisal thereof, which penalty shall under no condition be less than twenty-five dollars ($25.00) or more than five hundred dollars ($500.00), and which cannot be remitted by the commissioner of revenue except for good cause shown. The commissioner of revenue is authorized and directed to confer quarterly with the department of internal revenue of the United States government to ascertain the value of estates in North Carolina which have been assessed for taxation by the federal government, and he shall co-operate with the said department of internal revenue, furnishing to said department such information concerning estates in North Carolina as said department may request. (1935, c. 371, s. 26.)

§ 7880(29). Executor defined.—Wherever the word "executor" appears in this act, it shall include executors, administrators, collectors, committees, trustees, and all fiduciaries. (1935, c. 371, s. 27.)

§ 7880(29)a. Additional remedies for enforcement of tax. — In addition to all other remedies which may now exist under the law, or may hereafter be established, for the collection of the taxes imposed by the preceding sections of this article, the tax so imposed shall be a lien upon all of the property and upon all of the estate, with respect to which the taxes are levied, as well as collectible out of any other property, resort to which may be had for their payment; and the said taxes shall constitute a debt, which may be recovered in an action brought by the commissioner of revenue in any court of competent jurisdiction in this State, and/or in any court having jurisdiction of actions of debt in any State of the United States, and/or in any court of the United States against an administrator, executor, trustee, or personal representative, and/or any person, corporation, or concern having in hand any property, funds, or assets of any nature, with respect to which such tax has been imposed. No title or interest to such estate, funds, assets, or property shall pass, and no disposition thereof shall be made by any person claiming an interest therein, until the said taxes have been fully paid. (1935, c. 371, s. 28.)

Art. 2. Schedule B. License Taxes

§ 7880(30). Taxes under this article. — Taxes in this article or schedule shall be imposed as a state license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this act shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule.

(a) If the business made taxable or the privilege to be exercised under this article or schedule is carried on at two or more separate places, a separate state license for each place or location of such business shall be required.

(b) Every state license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of the tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such

business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The state license thus obtained shall be and constitute a personal privilege to conduct the business named in the state license, shall not be transferable to any other person, firm, or corporation, and shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the state license to the county and/or city and location specified in the state license, unless otherwise provided in this article or schedule: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location, for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars ($5.00) for each license certificate reissued.

(d) Whenever, in any section of this article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in unincorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

(e) All State taxes imposed by this article shall be paid to the commissioner of revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent state license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a state license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such state license shall be and constitute a delinquent payment of the state license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(f) The taxes imposed and the rates specified in this article or schedule shall apply to the subjects taxed on and after the first day of June, one thousand nine hundred thirty-five, and prior to said date the taxes imposed and the rates specified in the Revenue Act of one thousand nine hundred thirty-three shall apply.

(g) It shall be the duty of a grantee, transferee, or purchaser of any business or property subject to the state license taxes imposed in this article to make diligent inquiry as to whether the state license tax has been paid, but when such business or property has been granted, sold, transferred, or conveyed to an innocent purchaser for value and without notice that the vendor owed or is liable for any of the state license taxes imposed under this article, such property, while in the possession of such innocent purchaser, shall not be subject to any lien for such state license taxes.

(h) All county or municipal taxes levied by the board of county commissioners of any county, or by the board of aldermen or other governing body of any municipality within this State, under the authority conferred in this act, shall be collected by the sheriff or tax collector of such county and by the tax collector of such city, and the county or municipal license shall be issued by such officer.

(i) Any person, firm, or corporation who shall wilfully make any false statement in an application for a license under any section of this article or schedule shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, which fine shall not be less than the amount of tax specified under such section, and shall be in addition to the amount of such tax.

(j) Wherever the business taxed in sections 7880(57)a, 7880(58), 7880(76), and 7880(81) is of a seasonal character at summer or winter resorts, license may be issued for such seasonal business at one-half of the annual license tax for the four months' period from June 1st to October 1st in summer resorts and from December 1st to April 1st in winter resorts. (1935, c. 371, s. 100, c. 454.)

Several Kinds of Business Conducted by Individual.—Where several occupations are conducted in a town by the same individual, a privilege tax on one does not prevent a similar

tax on another. Guano Co. v. Tarboro, 126 N. C. 68, 35 S. E. 231.

Where Goods Manufactured in Another State.—The right of a state to tax traders, professions and avocations within the borders of the state is unquestionable, though the goods dealt in be manufactured in another state. State v. Gorham, 115 N. C. 721, 20 S. E. 179.

§ 7880(31). Amusement parks.—Every person, firm, or corporation engaged in the business of operating a park, open to the public as a place of amusement, and in which there may be either a bowling alley, trained animal show, penny or nickel machine for exhibiting pictures, theatrical performance, or similar entertainment, shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such amusement park, and shall pay for such license the following tax:

State license for two months.....$200.00
State license for four months..... 400.00
State license for eight months..... 600.00
State license for twelve months..... 800.00

This section shall not apply to bathing beaches which are not operated for more than four months each year.

(a) The licensee shall have the privilege of doing any or all the things set out in this section; but the operation of a carnival, circus, or a show of any kind that moves from place to place shall not be allowed under the state license provided for in this section.

(b) Counties shall not levy a license tax on the business taxed under this section. (1935, c. 371, s. 102.)

§ 7880(32). Amusements — traveling theatrical companies, etc.—Every person, firm, or corporation engaged in the business of a traveling theatrical, traveling moving picture, and/or traveling vaudeville company, giving exhibitions or performances in any hall, tent, or other place not licensed under sections 7880(31) or 7880(34), whether on account of municipal ownership or otherwise, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and pay for such license a tax of twenty-five dollars ($25.00) for each day or part of a day's exhibits or performances: Provided, that

(a) Artists exhibiting paintings or statuary work of their own hands shall only pay two dollars ($2.00) for such state license.

(b) Such places of amusement as do not charge more than a total of fifty (50) cents for admission at the door, including a reserved seat, and shall perform or exhibit continuously in any given place as much as one week, shall be required to pay for such state license twenty-five dollars ($25.00) for the first day and a total of twenty-five dollars ($25.00) for the next succeeding five days, or any part thereof, and thirty dollars ($30.00) per week or any part thereof thereafter.

(c) The owner of the hall, tent, or other place where such amusements are exhibited or performances held shall be liable for the tax.

(d) In lieu of the State license tax, hereinbefore provided for in this section, such amusement companies, consisting of not more than ten performers, may apply for an annual State-wide license, and the same may be issued by the commissioner of revenue for the sum of three hundred dollars ($300.00), paid in advance, prior to the first exhibition in the State, and shall be valid in any county of this State, and shall be in full payment of all state license taxes imposed in this section.

(e) Any traveling organization which exhibits animals or conducts sideshows in connection with its exhibitions or performances shall not be taxed under this section, but shall be taxed as herein otherwise provided.

(f) The owner, manager, or proprietor of any such amusements described in this section shall apply in advance to the commissioner of revenue for a state license for each county in which a performance is to be given.

That upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w] upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this act.

(g) Counties, cities and towns may levy a license tax not in excess of the license tax levied by the State. (1935, c. 371, s. 103.)

§ 7880(33). Amusements—manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows.—Every person, firm, or corporation engaged in the business of manufacturing, selling, or leasing, furnishing, and/or distributing films to be used in moving pictures within this State shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of six hundred and twenty-five dollars ($625.00).

Any person, firm, or corporation engaged under contract or for compensation in the business of checking the attendance at any moving picture or show for the purpose of ascertaining attendance or amount of admission receipts at any theatre or theatres shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax of two hundred and fifty dollars ($250.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1935, c. 371, s. 104.)

§ 7880(34). Amusements—moving pictures or vaudeville shows — admissions. — Every person, firm, or corporation engaged in the business of operating a moving picture show or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for com-

pensation shall apply for and obtain in advance from the commissioner of revenue a state license for the privilege of engaging in such business and shall pay for such state license for each room, hall, or tent used the following base tax:

In cities or towns of less than 1,500 population	$ 25.00
In cities or towns of 1,500 and less than 3,000 population	62.50
In cities or towns of 3,000 and less than 5,000 population	125.00
In cities or towns of 5,000 and less than 10,000 population	175.00
In cities or towns of 10,000 and less than 15,000 population	275.00
In cities or towns of 15,000 and less than 25,000 population	375.00
In cities or towns of 25,000 population or over	425.00

(a) For any moving picture show operated more than two miles from the business center of any city having a population of 25,000 or over (for the purpose of this provision, the term "business center" to be defined as the intersection of the two principal business streets of the city), the base tax levied shall be two hundred dollars ($200.00).

In addition to the base tax levied in the above schedule of this section, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax upon all such gross receipts levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w] upon retail sales of merchandise. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

(b) Upon any and all other forms of entertainment and amusement not otherwise taxed or specifically exempted in this act, including athletic contests of all kinds, high school and elementary school contests, for which an admission is charged in excess of fifty cents (50c), including football, baseball, basketball, wrestling and boxing contests, an annual license tax of $5.00 shall be paid for each location where such charges are made, and an additional charge upon the gross receipts at the rate of tax levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w] upon retail sales of merchandise, the additional tax upon gross receipts to be levied and collected as provided in this section for motion picture shows, or in accordance with such regulations of payment as may be made by the commissioner of revenue. The tax levied in this subsection shall apply to all privately-owned toll bridges, including all charges made for all vehicles, freight and passenger, and the minimum charge of twenty-five cents for admission shall not apply to bridge tolls.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half the base tax levied in this section. (1935, c. 371, s. 105.)

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for the opera-house tax herein provided. Markham v. Southern Conservatory, 130 N. C. 276, 277, 41 S. E. 531.

The Federal Census in use at the time is the basis of determining the population for the purposes of this section. State v. Prevo, 178 N. C. 740, 101 S. E. 370.

§ 7880(35). Amusements — circuses, menageries, wild west, dog and/or pony shows, etc.—Every person, firm, or corporation engaged in the business of exhibiting performances, such as a circus, menagerie, wild west show, dog and/or pony show, or any other show, exhibition or performance similar thereto, or not taxed in other sections of this article, shall apply for and obtain a state license from the commissioner of revenue for the privilege of engaging in such business, and pay for such license the following tax for each day or part of a day:

(a) Such shows and/or exhibitions traveling on railroads and requiring transportation of:

Not more than two cars	$ 30.00
Three to five cars, inclusive	45.00
Six to ten cars, inclusive	90.00
Eleven to twenty cars, inclusive	125.00
Twenty-one to thirty cars, inclusive	175.00
Thirty-one to fifty cars, inclusive	250.00
Over fifty cars	300.00

(b) Such shows and/or exhibitions traveling by automobiles, trucks, or other vehicles, other than railroad cars, and requiring transportation by:

Not over two vehicles	$ 7.50
Three to five vehicles	10.00
Six to ten vehicles	15.00
Eleven to twenty vehicles	20.00
Twenty to thirty vehicles	40.00
Thirty to fifty vehicles	55.00
Over fifty vehicles, per vehicle in excess thereof	5.00

It is the intent of this subsection that every vehicle used in transporting circus property or personnel, whether owned by the circus or by others, shall be counted in computing the tax.

(c) Each sideshow, curiosity show, or other similar show, exhibiting on the same or contiguous lots with a circus, the tax shall be fifteen dollars ($15.00) per day or part of a day.

(d) Every person, firm, or corporation by whom any show or exhibition taxed under this section is owned or controlled shall file with the commissioner of revenue, not less than five days before entering this State for the purpose of such exhibitions or performances therein a statement under oath, setting out in detail such information as may be required by the commissioner of revenue covering the places in the State where exhibitions or performances are to be given, the character of the exhibition, the mode of travel, the number of cars or other conveyances used in transferring such shows, and such other and further information as may be required. Upon receipt of such statement, the commissioner of revenue shall fix and determine the amount

of state license tax with which such person, firm, or corporation is chargeable, shall endorse his findings upon such statement, and shall transmit a copy of such statement and findings to each such person, firm, or corporation to be charged, to the sheriff or tax collector of each county in which exhibitions or performances are to be given, and to the division deputy of the commissioner of revenue, with full and particular instructions as to the state license tax to be paid. Before giving any of the exhibitions or performances provided for in such statement, the person, firm, or corporation making such statement shall pay the commissioner of revenue the tax so fixed and determined. If one or more of such exhibitions or performances included in such statement and for which the tax has been paid shall be canceled, the commissioner of revenue may, upon proper application made to him, refund the tax for such canceled exhibitions or performances. Every such person, firm, or corporation shall give to the commissioner of revenue a notice of not less than five days before giving any of such exhibitions or performances in each county.

(e) The sheriff of each county in which such exhibitions or performances are advertised to be exhibited shall promptly communicate such information to the commissioner of revenue; and if the statement required in this section has not been filed as provided for herein, or not filed in time for certified copies thereof, with proper instructions, to be transmitted to the sheriffs of the several counties and the division deputy commissioner, the commissioner of revenue shall cause his division deputy to attend at one or more points in the State where such exhibitions or performances are advertised or expected to exhibit, for the purpose of securing such statement prescribed in this section, of fixing and determining the amount of state license tax with which such person, firm, or corporation is taxable, and to collect such tax or give proper instructions for the collection of such tax.

(f) Every such person, firm, or corporation by whom or which any such exhibition or performance described in this section is given in any county, city, or town, or within five miles thereof, wherein is held an annual agricultural fair, during the week of such annual agricultural fair, shall pay a state license of one thousand dollars ($1,000.00) for each exhibition or performance, in addition to the license tax first levied in this section, to be assessed and collected by the commissioner of revenue or his duly authorized deputy.

(g) The provisions of this section, or any other section of this act, shall not be construed to allow, without the payment of the tax imposed in this section, any exhibition or performance described in this section for charitable, benevolent, educational, or any other purpose whatsoever, by any person, firm, or corporation who is engaged in giving such exhibitions or performances, no matter what terms of contract may be entered into or under what auspices such exhibitions or performances are given. It being the intent and purpose of this section that every person, firm, or corporation who or which is engaged in the business of giving such exhibitions or performances, whether a part or all of the proceeds are for charitable, benevolent, educational, or other purposes or not, shall pay the state license tax imposed in this section.

(h) Every such person, firm, or corporation who shall give any of such exhibitions or performances mentioned in this section within this State, before the statement provided for has been filed with the commissioner of revenue, or before the state license tax has been paid, or which shall after the filing of such statement give any such exhibition or performance taxable at a higher rate than the exhibition or performance authorized by the commissioner of revenue upon the statement filed, shall pay a state license tax of fifty per cent greater than the tax hereinbefore prescribed, to be assessed and collected either by the commissioner of revenue or by his division deputy.

That upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w] upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this act.

(i) In lieu of the tax levied in section 7880(83), each circus, or other form of amusement taxed under this section, advertising by means of outdoor advertising displays, a bill posting or as otherwise defined in section 7880(83), shall pay a tax of one hundred dollars ($100.00) for a State-wide license for the privilege of advertising in this manner, said tax to be in addition to the other taxes levied in this section.

(j) Counties, cities and towns may levy a license tax on the business taxed under this section not in excess of one-half of the license tax levied by the State, but shall not levy a parade tax or a tax under subsection (i) of this section. (1935, c. 371, s. 106.)

§ 7880(36). Amusements — carnival companies, etc.—Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, moving pictures and vaudeville shows, museums and menageries, merry-go-rounds, ferris wheels, riding devices, and other like amusements and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the commissioner of revenue a state license

for the privilege of engaging in such business or amusements, and shall pay for such license for each week, or part of a week, the following tax:

Consisting of not more than two distinct attractions, per week or part thereof $200.00
Consisting of more than two and not more than five distinct attractions, per week or part thereof 300.00
Consisting of more than five distinct attractions, per week or part thereof.... 400.00

Provided, that when a person, firm, or corporation exhibits only riding devices which are not a part of, nor used in connection with, any carnival company the tax shall be ten dollars ($10.00) per week for each such riding device, and no additional tax shall be levied by counties, cities and towns under this proviso.

(a) This section shall not repeal any local act prohibiting any of the shows, exhibitions, or performances mentioned in this section, or to limit the authority of the board of county commissioners of any county, or the board of aldermen or other governing body of any city or town, in prohibiting such shows, exhibitions, or performances.

If the commissioner of revenue shall issue a state license for any such show, exhibition, or performance in any county or municipality having a local statute prohibiting the same, then the said state license shall not authorize such show, exhibition, or performance to be held in such county or municipality, but the commissioner of revenue shall refund, upon proper application, the tax paid for such state license.

(b) No person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances, shall be relieved from the payment of the tax levied in this or pursuant to this section or any part thereof, for the benefit of the State, by reason of the donation or appropriation of the whole or any part of the proceeds arising from charitable, educational, or other cause whatsoever. It being the intent and purpose of this section that every person, firm, or corporation, or aggregation of same, who is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the state license taxes provided for in this section.

That upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w] upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this act.

Section 4944 of the Consolidated Statutes is hereby amended by striking out all of said section and substituting in lieu thereof the following: Any society or association organized under the provisions of this chapter, desiring to be exempted from the payment of State, county, and city license taxes on its exhibits, shows, attractions, and amusements, shall each year, not later than sixty (60) days prior to the opening date of its fair, file an application with the commissioner of revenue for a permit to operate without the payment of said tax; said application shall state the various types of exhibits and amusements for which the exemption is asked, and also the date and place they are to be exhibited. The commissioner of revenue shall immediately refer said application to a committee consisting of the president of the North Carolina association of agricultural fairs, the commissioner of agriculture, and the director of the extension service of North Carolina State College for approval or rejection. If the application is approved by said committee, the commissioner of revenue shall issue a permit to said society or association authorizing it to exhibit within its fair grounds and during the period of its fair, without the payment of any State, county, or city license tax, all exhibits, shows, attractions, and amusements as were approved: Provided, however, that the commissioner of revenue shall have the right to cancel said permit at any time upon the recommendation of said committee. Any society or association failing to so obtain a permit from the commissioner of revenue or having its permit canceled shall pay the same State, county, and city license taxes as may be fixed by law for all other persons or corporations exhibiting for profit within the State, shows, carnivals, or other attractions.

(c) Counties may levy and collect the same license tax as the State, and cities and towns may levy a license tax not in excess of the aggregate amount of license tax levied by State and county. (1935, c. 371, s. 107.)

§ 7880(37). Amusements — certain exhibitions, performances, and entertainments exempt from license tax.—All exhibitions, performances, and entertainments, except as in this article expressly mentioned as not exempt, produced by local talent exclusively and for the benefit of religious, charitable, benevolent, or educational purposes, and where no compensation is paid to such local talent, shall be exempt from the state license tax. (1935, c. 371, s. 108.)

See note of Markham v. Southern Conservatory, 130 N. C. 276, 41 S. E. 531, under § 7880(34).

§ 7880(38). Attorneys at law and other professions.—Every practicing attorney at law, practicing physician, veterinary surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, civil engineer, electrical engineer, mining engineer, mechanical engineer, architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged, or colored (including all persons enumerated in this section employed by the State, county, mu-

nicipality, a corporation, firm, or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars ($25.00).

Every person engaged in the public practice of accounting as a principal, or as a manager of the business of a public accountant, shall pay for such license twenty-five dollars ($25.00), and in addition shall pay a license of twelve and 50/100 ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

Every licensed mortician or embalmer shall in like manner apply for and obtain from the commissioner of revenue a state-wide license for practicing his profession, whether for himself or in the employ of another, of ten dollars ($10.00).

(a) Only one-half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did not exceed one thousand dollars ($1,000.00).

(b) Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the commissioner of revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to show cause by the next term of court why such person should not be deprived of license to practice such profession for failure to pay such professional tax. Such rule shall be served by the sheriff upon said person twenty days before the next term of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this State with respect to the granting or continuing of license to practice any such profession.

(c) Counties, cities, or towns shall not levy any license tax on the business or professions taxed under this section; and the state-wide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city, or town in this State, except the same shall not apply to photographers, canvassers of any photographers, agents of a photographer in transmitting pictures or photographs to be copied, enlarged, or colored, as set out in the first paragraph of this section, and counties, cities or towns may levy a tax not in excess of that levied by the State. (1935, c. 371, s. 109.)

§ 7880(39). Detectives.—Every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in business as a detective or what is ordinarily known as "secret service work," or who is engaged in the business of soliciting such business, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business, and shall pay for such license a tax of twenty-five dollars ($25.00): Provided, any such person regularly employed by United States government, any State or political sub-division of any State shall not be required to pay license herein provided for. (1935, c. 371, s. 110.)

§ 7880(40). Obsolete.

Failure to Pay Tax as Barring Recovery of Commission.—A real estate agent may not recover his commission from the owner in making a sale when he has not paid his license tax as required by the statute, but in the action it must be shown that the services rendered come within the meaning of the statute. Roberts v. Burton, 194 N. C. 19, 138 S. E. 348.

§ 7880(41). Real estate auction sales. — (a) Every person, firm, or corporation engaged in the business of conducting auction sales of real estate for profit or compensation shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of one hundred and fifty dollars ($150.00).

(b) This section shall not apply to sales for foreclosure of liens or sales made by order of court.

(c) Counties, cities, and towns in which the auction sale is held may levy a license tax on the business taxed under this section not in excess of fifty dollars ($50.00). (1935, c. 371, s. 111.)

§ 7880(42). Coal and coke dealers.—(a) Every person, firm, or corporation, either as agent or principal, engaged in and conducting the business of selling coal or coke in carload lots, or in greater quantities, shall be deemed a wholesale dealer, and shall apply for and procure from the revenue commissioner a state license, and pay for such license the sum of seventy-five dollars ($75.00): Provided, that if such wholesale dealer shall also sell coal or coke in less than carload lots, he shall not be subject to the retailer's license tax provided in this section.

(b) Every person, firm, or corporation engaged in and conducting the business of selling coal or coke at retail shall apply for and procure from the commissioner of revenue a state license and shall pay for such license a tax for each city or

town in which such coal or coke is sold or delivered, as follows:

In cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 25,000 population	50.00
In cities or towns of 25,000 and over	75.00

(c) No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State.

(d) The provisions of this section shall not apply to those engaged in mining coal upon their own or leased property and selling the same either at wholesale or retail. Provided further, that any person, firm or corporation soliciting orders for pool cars of coal to be distributed without profit shall be subject to license tax. (1935, c. 371, s. 112.)

§ 7880(43). Collecting agencies. — Every person, firm, or corporation engaged in the business of collecting, for a profit, claims, accounts, bills, notes, or other money obligations for others, and of rendering an account for same, shall be deemed a collection agency, and shall apply for and receive from the commissioner of revenue a state license for the privilege of engaging in such business, and pay for such license a tax of fifty dollars ($50.00).

(a) This section shall not apply to a regularly licensed practicing attorney at law.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 113.)

§ 7880(44). Undertakers, embalmers, and retail dealers in coffins.—Every person, firm, or corporation engaged in the business of burying and/or embalming the dead, or in the retail of coffins, shall apply for and procure from the revenue commissioner a state license for transacting such business within this State, and shall pay for such license the following tax:

In cities or towns of less than 500 population	$ 10.00
In cities or towns of 500 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	40.00
In cities or towns of 10,000 and less than 15,000 population	50.00
In cities or towns of 15,000 and less than 25,000 population	75.00
In cities or towns of 25,000 population or over	100.00

(a) This section shall not apply to a cabinetmaker, (who is not an undertaker) who makes coffins to order.

No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 114.)

§ 7880(45). Dealers in horses and mules. —(a) Any person, firm, or corporation engaged in the business of buying and selling horses and/or mules, and who continuously for the last three years listed a poll or property for taxation in this State, shall apply for and procure from the commissioner of revenue a state license for conducting such business, and pay for such license a tax of twelve dollars and fifty cents ($12.50), which amount of tax, however, shall only be for the privilege of buying and/or selling one carload, and for each additional carload purchased an additional tax of five dollars ($5.00) per car shall be paid semi-annually to the commissioner of revenue.

(b) Every person, firm, or corporation engaged in the business of buying and selling horses and/or mules, who or which has not continuously for the last three years listed a poll or property for taxation in this State, shall apply for and procure from the commissioner of revenue a state license for conducting such business, and pay for such license a tax of fifty dollars ($50.00), which amount of tax, however, shall only be for the privilege of buying and/or selling one carload, and for each additional carload purchased an additional tax of ten dollars ($10.00) per car shall be paid semiannually to the commissioner of revenue.

(c) For the purpose of computing this tax, twenty-five horses and/or mules shall be considered a carload, and for cars containing more than this number the tax shall be twenty cents per head for such horses and/or mules purchased under subsection (a) of this section, and forty cents per head for such horses and/or mules purchased under subsection (b) of this section.

(d) The tax imposed in this section shall apply to all purchases by such dealers, whether shipped into this State by railroad or brought in otherwise.

(e) Every person, firm, or corporation engaged in the business described in this section shall keep a full, true, and accurate record of all sales, invoices, and freight bills covering such purchases and sales of all horses and/or mules, until such sales, invoices, and freight bills have been checked by a deputy commissioner of revenue.

(f) A separate license shall be required for each county and for each place in each county where a separate place of business is maintained: Provided, however, any such person, firm, or corporation engaging in such business described in this section in more than one place or county in this State may, upon the payment of one hundred and twenty-five dollars ($125.00) to the commissioner of revenue, procure a state-wide license, good in any county of the State, and shall also pay the tax herein provided for each carload.

(g) This section shall not apply to persons dealing solely and exclusively in horses and/or mules of their own raising, if such horses and/or mules were raised in this State.

(h) Any person, firm, or corporation required to procure from the commissioner of revenue a license under this section, who shall sell or offer for sale, by principal or agent, any horse

and/or mule without having obtained such license, or shall fail, neglect, or refuse to pay the taxes specified in this section when due and payable, shall, in addition to other penalties imposed by this act, be deemed guilty of a misdemeanor, and upon conviction shall be fined one hundred dollars ($100.00) and/or imprisoned not less than thirty days, in the discretion of the court.

(i) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 115.)

§ 7880(46). Phrenologists.—Any person engaged in the practice of phrenology for compensation shall procure from the commissioner of revenue a state license for engaging in such practice, and shall pay for same a tax of one hundred dollars ($100.00) for each county in which such person does business.

Counties, cities, and towns may levy any license tax on the business taxed in this section. (1935, c. 371, s. 116.)

§ 7880(47). Bicycle dealers. — Any person, firm, or corporation engaged in the business of buying and/or selling bicycles, supplies and accessories shall apply for and procure a state license from the commissioner of revenue for the privilege of transacting such business, and shall pay a tax for such license as follows:

In cities or towns of less than 10,000 population	$10.00
In cities or towns of 10,000 and less than 20,000 population	20.00
In cities or towns of 20,000 population or more	25.00

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 117.)

§ 7880(48). Pawnbrokers. — Every person, firm, or corporation engaged in and conducting the business of lending or advancing money or other things of value for a profit, and taking as a pledge for such loan specific articles of personal property, to be forfeited if payment is not made within a definite time, shall be deemed a pawnbroker, and shall pay for the privilege of transacting such business an annual license as follows:

In cities or towns of less than 10,000 population	$200.00
In cities or towns of 10,000 and less than 15,000 population	250.00
In cities or towns of 15,000 and less than 20,000 population	300.00
In cities or towns of 20,000 and less than 25,000 population	350.00
In cities or towns of 25,000 population or more	400.00

(b) Before such pawnbroker shall receive any article or thing of value from any person or persons, on which a loan or advance is made, he shall issue a duplicate ticket, one to be delivered to the owner of said personal property and the other to be attached to the article, and said ticket shall have an identifying number on the one side, together with the date at the expiration of which the pledger forfeits his right to redeem, and on the other a full and complete copy of this subsection; but such pawnbroker may, after the pledger has forfeited his right to redeem the specific property pledged, sell the same at public auction, deducting from the proceeds of sale the money or fair value of the thing advanced, the interest accrued, and the cost of making sale, and shall pay the surplus remaining to the pledger.

(c) Any person, firm, or corporation transacting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 118.)

Broker and Pawnbroker Distinguished.—There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one who lends money upon personalty pledged as security. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them. Schaul & Co. v. Charlotte, 118 N. C. 733, 24 S. E. 526.

§ 7880(49). Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc. — Every person, firm, or corporation engaged in the business of selling and/or delivering, and/or renting, cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors or protectographs, kelvinators, frigidaires, or other refrigerating machines, lighting systems, washing machines, mechanically or electrically operated burglar alarms, addressograph machines, multigraph and other duplicating machines, vacuum cleaners, mechanically or electrically operated oil burners and coal stokers, card punching, assorting and tabulating machinery, shall apply for and procure from the commissioner of revenue a state license for each place where such business is transacted in this State, and shall pay for such license a tax of ten dollars ($10.00).

(a) Counties, cities, and towns shall not levy a license tax on the business taxed in this section. (1935, c. 371, s. 119.)

§ 7880(50). Sewing machines.—(a) Every person, firm, or corporation engaged in the business of selling sewing machines within this State shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business and shall pay for such license a tax of one hundred dollars ($100.00) per annum for each such make of machines sold or offered for sale.

(b) In addition to the annual license tax imposed in subsection (a) of this section, such person, firm, or corporation engaged in the business taxed under this section shall pay a tax at the rate of tax levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w], on retail sales of merchandise on the total receipts during the preceding year from the sale, lease, or exchange of sewing machines and/or accessories within the State, which said tax shall be paid to the commissioner of revenue at the time of securing the annual license provided for in

subsection (a) of this section: Provided, that the tax on sales in the preceding year, levied in this subsection, shall apply only for the fiscal year ending May 31, 1935: Provided further, that on and after June 1, 1935, the additional tax on sales levied in this subsection shall be assessed and collected under the provisions of Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w], the same as the tax on the sales of other merchandise.

(c) Any person, firm, or corporation obtaining a license under the foregoing sections may employ agents and secure a duplicate copy of such license for each such agent by paying a tax of ten dollars ($10.00) to the commissioner of revenue. Each such duplicate license so issued shall contain the name of the agent to whom it is issued, shall not be transferable, and shall license the licensee to sell or offer for sale only the sewing machine sold by the holder of the original license.

(d) Any merchant or dealer who shall purchase sewing machines from a manufacturer or a dealer who has paid the license tax provided for in this section may sell such sewing machines without paying the annual state-wide license tax provided for in subsection (a), but shall procure the duplicate license provided for in subsection (c) of this section: Provided, that the tax imposed by this subsection shall be the only tax required to be paid by dealers in second-hand sewing machines exclusively.

(e) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties imposed in this act, pay an additional tax of double the state-wide annual license, and the duplicate tax imposed in this section.

(f) No county shall levy a license on the business taxed under this section, except that the county may levy a license tax not in excess of five dollars ($5.00) on each agent in a county who holds a duplicate license provided for in this section.

Cities and towns shall not levy a license tax on the business taxed under this section. (1935, c. 371, s. 120.)

§ 7880(51). Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

Peddler, on foot, for each county	$10.00
Peddler, with horse or other animal, and with or without vehicle, each county, for each vehicle	15.00
Peddler, with vehicle propelled by motor or other mechanical power, for each county, for each vehicle	25.00

(b) Any person, firm, or corporation employing the service of another as a peddler, whether on a salary or commission basis, shall be liable for the payment of taxes levied in this section: Provided, however, any person peddling fruits, vegetables or product of the farm shall pay a license tax of $25.00 per year, which license shall be state-wide. No county shall levy an additional tax under this subsection, but cities and towns may levy a tax under this subsection equal to the state tax.

(c) Any person, firm, or corporation who or which sells or offers for sale from any railway car fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section, and shall pay an annual tax of twenty-five dollars ($25.00). Nothing in this section shall apply to the sale of all farm products raised on the premises owned or occupied by the person, firm, or corporation, his or its bona fide agent or employee selling same.

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a house rented temporarily for that purpose, any goods, wares, or merchandise, bankrupt stock, or fire stock, not being a regular merchant in such county, shall apply for in advance and procure a state license from the commissioner of revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business.

(e) The provisions of this section shall not apply to any person, firm, or corporation who sells or offers for sale books, periodicals, printed music, ice, coal, wood for fuel, fish, beef, mutton, pork, bread, cakes, pies, products of the dairy, poultry, eggs, livestock, or articles of their own individual manufacture, but shall apply to medicines, drugs, or articles assembled.

(f) The board of county commissioners of any county in this State, upon proper application, may exempt from the annual license tax levied in this section Confederate soldiers, disabled veterans of the Spanish-American War, disabled soldiers of the World War, who have been bona fide residents of this State for twelve or more months continuously, and the blind who have been bona fide residents of the State for twelve or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the state.

(g) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the state. But the board of county commissioners of any county may levy a license tax on the business taxed in this section not in excess of that levied by the State for each unincorporated town or village in the county with a population of one thousand or more within a radius of one mile in which such business is engaged in.

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale: Provided, the Public-Local Laws relating to any county or city in this State

in conflict with this section is hereby repealed. (1935, c. 371, s. 121, c. 468.)

Cited in Kohn v. Elizabeth City, 199 N. C. 529, 531, 155 S. E. 152.

For general treatment, see 7 N. C. Enc. Dig. 1 et seq., 14 N. C. Enc. Dig. 287.

Peddler Defined.—A peddler is one who sells and delivers the identical goods he carries about with him. State v. Lee, 113 N. C. 681, 18 S. E. 713.

A peddler is primarily one who travels round on foot, selling or bartering the identical goods he carries. State v. Frank, 130 N. C. 724, 41 S. E. 785.

Nature of Peddling.—To peddle is not a matter of right under our laws, which any person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the applicant, and is not assignable. State v. Rhyne, 119 N. C. 905, 907, 26 S. E. 126.

Power of Legislature.—Under the N. C. Const. Art. V., sec. 3, the General Assembly may tax trades, etc. The term "trade" includes the business of peddling. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

Nature of Tax.—Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other. A peddlers tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. State v. Rhyne, 119 N. C. 905, 907, 26 S. E. 126.

Presumption as to Having License.—The case of State v. Crump, 104 N. C. 763, 10 S. E. 468, contains a dictum to the effect that if a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none.

Discretion of County Commissioners.—The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

Not Applicable to Citizens of Other States.—The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, thus regulating interstate commerce. In re Spain, 47 Fed. 208. See also, In re Flinn, 57 Fed. 496.

Sales by Samples.—This section does not apply to sales by sample of goods not at the time of sale within the state, and ready for immediate delivery, but applies only where goods are actually exposed and offered for sale, and ready for delivery at once to the purchaser. In re Flinn, 57 Fed. 496. See 7 N. C. Enc. Dig. 2 et seq.

Applications.—A picture dealer, who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler. Greensboro v. Williams, 124 N. C. 167, 32 S. E. 492.

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler. State v. Frank, 130 N. C. 724, 41 S. E. 785.

The words "any articles of the farm" are used to embrace all the products of the farm and a farmer who butchers cattle raised on his farm and sells the beef is not a peddler. State v. Smith, 173 N. C. 772, 92 S. E. 325. See 14 N. C. Enc. Dig. 287.

This section does not apply to a person selling watermelons in wholesale lots in the city of Salisbury, to be shipped from a nearby town, and only delivered to those from whom he had taken orders. State v. Ninestein, 132 N. C. 1039, 43 S. E. 936.

One who sells goods by sample, which goods are shipped to purchaser in care of one who sold them and delivered by him, is a peddler. State v. Franks, 127 N. C. 510, 37 S. E. 70.

§ 7880(52). Peddlers of fruits and vegetables.

The tax imposed by this section (as it appeared in the Act of 1931, c. 427, § 121½) is clearly unconstitutional in that it discriminates against and burdens interstate commerce, and equity has jurisdiction to enjoin its enforcement on the ground of avoiding a multiplicity of suits. Gramling v. Maxwell, 52 F. (2d) 256, 258.

§ 7880(53). Contractors and construction companies. — (a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the State of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars ($10,000), shall apply for and obtain from the commissioner of revenue an annual state-wide license and shall pay for such license a tax of one hundred dollars ($100.00) at the time of or prior to offering or submitting any bid on any of the above enumerated projects.

(b) In addition to the tax levied in subsection (a) of this section, every person, firm, or corporation who, for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any of the above enumerated projects, shall before or at the time of entering into such projects, and/or such contract apply for and procure from the commissioner of revenue a state-wide license, and shall pay for such license the following tax:

When the total contract price or estimated cost of such project is over:

$ 5,000	and not more than	$ 10,000	$ 50.00
10,000	and not more than	50,000	100.00
50,000	and not more than	100,000	250.00
100,000	and not more than	250,000	350.00
250,000	and not more than	500,000	600.00
500,000	and not more than	750,000	800.00
750,000	and not more than	1,000,000	1,000.00
1,000,000	.....		1,250.00

(c) The application for license under subsection (b) of this section shall be made to the commissioner of revenue and shall be accompanied by the affidavit of the applicant, stating the contract price, if known, and if the contract price is not known, his estimate of the entire cost of the said improvement or structure, and if the applicant proposes to construct only a part of said improvement or structure, the contract price, if known, or his estimated cost of the part of the project he proposes to superintend or construct.

In the event the construction of any of the above mentioned improvements or structures shall be divided and let under two or more contracts to the same person, firm, or corporation, the several contracts shall be considered as one contract for the purpose of this act, and the commissioner of revenue shall collect from such person, firm, or corporation the license tax herein imposed as if only one contract had been entered into for the entire improvement or structure.

(d) In the event any person, firm, or corporation has procured a license in one of the lower classes provided for in subsection (b) of this section, and constructs or undertakes to construct or to superintend any of the above mentioned improvements or structures or parts thereof, the completed cost of which is greater than that covered by the license already secured, application shall be made to the commissioner of revenue, accompanied by the license certificate held by the applicant, which shall be surrendered to the commissioner of revenue, and upon paying the difference between the cost of the license surrendered and the price of the license applied for,

the commissioner of revenue shall issue to the applicant the annual state-wide license applied for, showing thereon that it was issued on the surrender of the former license, and payment of the additional tax.

(e) No employee or sub-contractor of any person, firm, or corporation, who or which has paid the tax herein provided for, shall be required to pay the license tax provided for in this section while so employed by such person, firm, or corporation.

(f) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax as a fee for a builder's permit or otherwise not in excess of ten dollars ($10.00) when the license provided for under this section has been paid: Provided, that this subsection shall not be construed to prevent the collection of building, electrical, and plumbing inspection charges by municipalities to cover the actual cost of said inspection.

(g) The tax under this section shall not apply to the business taxed in section 7880(86). (1935, c. 371, s. 122.)

§ 7880(53)a. Installing elevators and automatic sprinkler systems. — Every person, firm, or corporation engaged in the business of selling or installing cable-hoist passenger or freight elevators, or automatic sprinkler systems shall apply for and procure from the commissioner of revenue an annual state-wide license for the transaction of such business in this State, and shall pay for such license a tax of $50.00. Counties, cities, and towns may levy a tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 122½.)

§ 7880(54). Mercantile agencies. — Every person, firm, or corporation engaged in the regular business of reporting the financial standing of persons, firms, or corporations for compensation shall be deemed a mercantile agency, and shall apply for and procure from the commissioner of revenue a state-wide license for the privilege of transacting such business within this State, and shall pay for such license a tax of five hundred dollars ($500.00), the said tax to be paid by the principal office in the State, and if no such principal office in this State, then by the agent of such mercantile agency operating in this State: Provided, the taxes for the mercantile agency doing special service for not more than one industry shall be $250.00.

(a) Any person representing any mercantile agency which has failed to pay the license tax provided for in this section shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(b) Counties, cities, or towns shall not levy any license tax under this section. (1935, c. 371, s. 123.)

§ 7880(55). Gypsies and fortune-tellers. — (a) Every company of gypsies or strolling bands of persons, living in wagons, tents, or otherwise, who or any of whom trade horses, mules, or other things of value, or receive reward for telling or pretending to tell fortunes, shall apply for in advance and procure from the commissioner of revenue a state license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars ($500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts. The amount of such license tax shall be recoverable out of any property belonging to any member of such company.

(b) Any person or persons, other than those mentioned in subsection (a) of this section, receiving rewards for pretending to tell and/or telling fortunes, practicing the art of palmistry, clairvoyance and other crafts of similar kind, shall apply for in advance and procure from the commissioner of revenue a state license for the privilege of practicing such arts or crafts, and shall pay for such license a tax of two hundred dollars ($200.00) for each county in which they offer to practice their profession or crafts: Provided, that the tax levied under this section shall not apply to fortune-tellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theaters taxed under section 7880(34).

(c) Any county, city, or town may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 124.)

§ 7880(56). Lightning-rod agents. — (a) No manufacturer or dealer, whether person, firm, or corporation, shall sell, or offer for sale, in this State any brand of lightning rod, and no agent of such manufacturer or dealer shall sell, or offer for sale, or erect any brand of lightning rod until such brand has been submitted to and approved by the insurance commissioner and a license granted for its sale in this State. The fee for such license, including seal, shall be fifty dollars.

(b) Upon written notice from any manufacturer or dealer licensed under the preceding subsection of the appointment of a suitable person to act as his agent in this State, and upon filing an application for license upon the prescribed form, the insurance commissioner may, if he is satisfied as to the reputation and moral character of such applicant, issue him a license as general agent of such manufacturer or dealer. Said license shall set forth the brand of lightning rod licensed to be sold, and the fee for such license, including seal, shall be fifty dollars.

(c) Such general agent may appoint local agents to represent him in any county in the State by paying to the insurance commissioner a fee of ten dollars ($10.00) for each such county. Upon filing application for license of such local agent on a prescribed form and paying a fee of three dollars ($3.00) for each county in which said applicant is to operate, the insurance commissioner may, if he is satisfied that such applicant is of good repute and moral character, and is a suitable person to act in such capacity, issue him a license to sell and erect any brand of lightning rod approved for sale by the general agent in such county applied for.

(d) Each general agent shall submit to the insurance commissioner semi-annually, on January thirty-first and July thirty-first, upon pre-

scribed forms, a sworn statement of gross receipts from the sale of lightning rods in this State during the preceding six months, and pay a tax thereon of eighty (80) cents on each one hundred dollars ($100.00), such returns to be accompanied by an itemized list showing each sale, the county in which sold, and the agent making the sale.

(e) No county, city, or town shall levy a license or privilege tax exceeding twenty dollars ($20.00) on any dealer having a general office or selling from a receiving point.

(f) Licenses issued under this section are not transferable, are valid for only one person, and revocable by the insurance commissioner for good cause after a hearing.

(g) Every agent licensed under this section shall, upon demand, exhibit his license to any officer of the law or citizen, and any person, firm, or corporation acting without a license or selling or offering for sale any brand of lightning rod not approved by the insurance commissioner, or otherwise violating any of the provisions of this act, shall be punished by a fine of not more than two hundred dollars ($200.00) and/or six months' imprisonment for each offense. (1935, c. 371, s. 125.)

§ 7880(57). Hotels.—Every person, firm, or corporation engaged in the operation of any hotel in this State shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

(a) For hotels operating on the American plan for rooms in which rates per person per day are:

Less than two dollars	$ .60
Two dollars and less than three dollars	.90
Three dollars and less than four dollars and fifty cents	1.80
Four dollars and fifty cents and less than six dollars	4.20
Six dollars and less than seven dollars and fifty cents	5.40
Seven dollars and fifty cents and less than fifteen dollars	6.00
Over fifteen dollars	7.20

(b) For hotels operating on the European plan for rooms in which the rates per person per day are:

Less than two dollars	$1.25
Two dollars and less than three dollars	3.00
Three dollars and less than four dollars and fifty cents	4.50
Four dollars and fifty cents and less than six dollars	5.50
Six dollars and less than seven dollars and fifty cents	6.50
Seven dollars and fifty cents and less than ten dollars	7.50
Over ten dollars	8.50

(c) The office, dining-room, one parlor, kitchen and two other rooms shall not be counted when calculating the number of rooms in the hotel.

(d) Only one-half of the annual license tax levied in this section shall be levied or collected from resort hotels and boarding houses which are open for only six months or less in the year: Provided, that the minimum tax under any schedule in the section shall be $5.00.

(e) In addition to the base license tax levied in this section there is hereby levied for the privilege of engaging in such business a license tax measured by the gross receipts of meals served at the rate of tax levied in Article V of this Act [§§ 7880(156)a-7880(156)w] upon the retail sale of merchandise and to be collected in the same manner as other taxes levied in such article. Such additional tax may be passed on to the purchaser and reported and paid under the same rules and regulations as applies to other retail sales in Article V of this Act [§§ 7880(156)a-7880(156)w]. A credit may be allowed upon the tax levied in this paragraph equal to the amount of sales tax levied in article V of this Act [§§ 7880(156)a-7880(156)w] and paid by the taxpayer on articles of merchandise used in the preparation of taxable meals. No credit shall be allowed unless the taxpayer's claim of credit is supported by invoices, or memorandum in some printed or written form, showing the amount and value of materials purchased, name of vendor and amount of sales tax paid.

(f) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1935, c. 371, s. 126.)

Tax May Be Exacted of Lessee.—Where a corporation chartered for the purpose of owning and conducting a hotel has paid the franchise tax, the lessee of such corporation is not relieved thereby from paying the tax imposed upon the business of conducting a hotel. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338.

§ 7880(57)a. Tourist homes and boarding houses.—(a) Every person, firm, or corporation engaged in the business of operating a tourist home, tourist camp, boarding-house, or similar place advertising in any manner for transient patronage, or soliciting such business, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business and shall pay the following tax: Homes or camps having five rooms or less, $10.00; homes or camps having more than five rooms, $2.00 per room. For the purpose of this section, the sitting-room, dining-room, kitchen, and rooms occupied by the owner or lessee of the premises, or members of his family, for his or their personal or private use, shall not be counted in determining the number of rooms for the basis of the tax. The tax herein levied shall be in addition to any tax levied in section 7880(58) for the sale of prepared food.

(b) Every person, firm, or corporation engaged in the business of operating a boarding house using no form of advertising or solicitation for transient patronage and having seating capacity of a dining room in excess of sixteen (16) shall apply for, and procure, from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license a tax of ten dollars ($10.00) per year, plus a tax of one dollar ($1.00) per seat of dining room seating capacity. The tax levied in this subsection shall be in lieu of the tax levied in section 7880(58).

(c) In addition to the base license levied in subsection (a) of this section there is hereby levied for the privilege of engaging in said

business a license tax measured by the gross receipts of meals served at the rate of tax levied in Article V of this Act [§§ 7880(156)a-7880(156)w] upon the retail sale of merchandise and may be collected in the same manner as other taxes levied in such article. Such additional tax may be passed on to the purchaser and reported and paid under the same rules and regulations as applies to other retail sales in Article V of this Act [§§ 7880(156)a-7880(156)w]. A credit may be allowed upon the tax levied in this paragraph equal to the amount of sales tax levied in Article V of this Act [§§ 7880(156)a-7880(156)w] and paid by the taxpayer on articles of merchandise used in the preparation of taxable meals. No credit shall be allowed unless the taxpayer's claim of credit is supported by invoices, or memorandum in some printed or written form, showing the amount and value of materials purchased, name of vendor and amount of sales tax paid.

(d) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1935, c. 371, s. 126½.)

§ 7880(58). Restaurants.—Every person, firm, or corporation engaged in the business of operating a restaurant, café, cafeteria, hotel, with dining service on the European plan, drug store, or other place where prepared food is sold, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business. The tax for such license shall be based on the number of persons provided for with chairs, stools, or benches, and shall be $1.00 per person, with a minimum tax of $5.00: Provided that the tax levied in this paragraph shall not apply to industrial plants maintaining a non-profit restaurant, café or cafeteria solely for the convenience of its employees.

(a) All other stands or places where prepared food is sold as a business, and drug stores, service stations, and all other stands or places where prepared sandwiches only are served, shall pay a tax of five dollars ($5.00).

(b) In addition to the base license tax levied in this section there is hereby levied for the privilege of engaging in said business a license tax measured by the gross receipts of meals served at the rate of tax levied in Article V of this Act [§§ 7880(156)a-7880(156)w] upon the retail sale of merchandise, and to be collected in the same manner as other taxes levied in such article. Such additional tax may be passed on to the purchaser and reported and paid under the same rules and regulations as applies to other retail sales in Article V of this Act [§§ 7880(156)a-7880(156)w]. A credit may be allowed upon the tax levied in this paragraph equal to the amount of sales tax levied in Article V of this Act [§§ 7880(156)a-7880(156)w] and paid by the taxpayer on articles of merchandise used in the preparation of taxable meals. No credit shall be allowed unless the taxpayer's claim of credit is supported by invoices or memorandum in some printed or written form showing the amount and value of materials purchased, name of vendor and amount of sales tax paid: Provided, this tax shall not apply to meals served to teachers and pupils in cafés or cafeterias operated on a non-profit basis by the public schools and colleges.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1935, c. 371, s. 127.)

§ 7880(59). Cotton compresses.—Every person, firm, or corporation engaged in the business of compressing cotton shall pay an annual license tax of three hundred dollars ($300.00) on each and every compress.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 128.)

§ 7880(60). Billiard and pool tables, and bowling alleys. — Every person, firm, or corporation who shall rent, maintain, or own a building wherein there is a table or tables at which billiards or pool is played, whether operated by slot or otherwise, shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such billiard or pool tables, and shall pay for such license a tax for each table, as follows:

Tables measuring not more than 2 feet wide and 4 feet long	$ 5.00
Tables measuring not more than 2½ feet wide and 5 feet long	10.00
Tables measuring not more than 3 feet wide and 6 feet long	15.00
Tables measuring not more than 3½ feet wide and 8 feet long	20.00
Tables measuring more than 3½ feet wide and 8 feet long	25.00

Every person, firm, or corporation who shall rent, maintain, own a building wherein there is a bowling alley or alleys of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of $12.50 for each alley kept or operated.

Provided, each such billiard or pool table so licensed shall receive a number and receipt from the commissioner of revenue when the license is issued, and it shall be the duty of each operator to attach said numbered license to said table or machine and shall display the same at all times. Failure to have such license and receipt on display attached to said machine or table shall be prima facie evidence that the tax has not been paid hereunder.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations.

(b) The commissioner of revenue shall not issue a license under this section to any person, firm, or corporation to maintain a billiard or pool table or bowling alley outside of the corporate limits of incorporated cities or towns, except with the approval of the board of county commissioners of the county for which the application is made, and all applications for such licenses are hereby required to be filed with such

board of county commissioners at least seven days before being acted upon, and notice thereof published in some newspaper published in the county once a week for two weeks, or if no newspaper is published in such county, then posted at the courthouse door and three other public and conspicuous places in the community where the license is to be exercised for two weeks prior to the action of the board of county commissioners thereon.

(c) If the commissioner of revenue shall have issued any such state license to any person, firm, or corporation to operate any billiard or pool tables, bowling alley or alleys in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such state license, to prohibit any billiard or pool tables, bowling alley or alleys of like kind within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such billiard or pool tables, bowling alley or alleys of like kind, the commissioner of revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to to the time for which the tax is paid.

(d) Counties may levy a license tax on the business taxed under this section upon such billiard or pool tables, bowling alleys as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the State. (1935, c. 371, s. 129.)

Constitutionality.—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

Same—License without City Limits.—Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

§ 7880(61). Slot machines and slot locks. — Every person, firm, or corporation owning, operating or maintaining any place of business, or other place, wherein or in connection with which is operated or located any slot machine in which is kept any article to be purchased by depositing any coin or thing of value and for which may be had any article of merchandise, or any machine wherein may be seen any picture or heard any music by depositing therein any coin or thing of value, or any slot weighing machine, or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, or any machine for the playing of games or amusement operated by slot wherein is deposited any coin or thing of value, except those enumerated in section 7880(60), shall apply for and procure from the commissioner of revenue a state-wide license for the privilege of operating each and every such machine, and shall pay for such license the following tax: Any such machine except as hereinafter provided,

that requires a deposit of less than five cents	$10.00
Five cents and not less than ten cents	20.00
Ten cents and not more than twenty cents	40.00
More than twenty cents	80.00

Provided, that weighing machines requiring a deposit of one cent, penny food vending machines and slot machines from which drinking cups are delivered at not more than one cent per cup, shall require payment of a tax of only $2.50: Provided further, that any such machines mentioned in this section giving or equipped to give trade checks, tokens, or similar articles or devices, whether redeemable or having any value or not, or whether given in addition to merchandise or not, shall require payment as in the above schedule, except the minimum tax on any such machine shall be $10.00: Provided further, that the tax on checker-board devices operated by slot machines and requiring deposits of not more than five cents shall be $5.00.

(a) In making application for license under this section, the applicant shall specify the manufacturer's serial number of the machine for which license is desired. The license shall carry the serial number to correspond with that on the application, and no such license shall be transferable to any other machine. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper state license is attached to the bottom of the machine before its operation shall commence. Failure to do so shall make such person liable for the additional tax imposed in section 7880(107).

(b) This section shall not apply to any automatic locker used as a depository for parcels, clothing, or luggage, nor to machines owned and operated by any retail merchant in his own place of business for delivering merchandise of the market value of the coin deposited, unless trade checks or tokens, whether or not redeemable or of any value, are given in addition to merchandise, in which event the tax herein provided shall apply. This section shall not apply to any coin operated lock used on toilets in hotels or other public places.

(c) Upon application being made for a license to operate any machine or apparatus under this section, the commissioner of revenue is hereby authorized to presume that the operation of such machine or apparatus is lawful, and when a state license has been issued for the operation thereof, the sum paid for such state license shall not be refunded, notwithstanding that the operation of

such machine or apparatus shall afterwards be prohibited: Provided further, that it shall be within the discretion of the commissioner of revenue as to whether he shall issue any duplicate license under this section when it is represented to him that the original license has been lost, misplaced, destroyed, or otherwise left the possession of the licensee.

(d) If any person, firm, or corporation shall fail, neglect, or refuse to comply with the terms and provisions of this section, and shall fail to attach the proper state license to any machine or apparatus as herein provided, the commissioner of revenue, or his agents or deputies, shall forthwith seize and remove, or order removed, such machine or machines, and shall hold the same until the provisions of this section have been complied with.

(e) Nothing in this section shall be construed to relieve the owner of any such machine or apparatus of liability for the tax.

(f) Counties may levy a license tax on the business taxed in this section upon slot machines, and cities or towns may levy a tax on such machines within their limits, but in neither case shall the tax so levied exceed the tax levied by the State. (1935, c. 371, s. 130, c. 482.)

§ 7880(62). Bagatelle tables, merry-go-rounds, etc.—(a) Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round or other riding devices, hobby horse, switchback railway, shooting gallery, swimming pool, skating rink, other amusement devices of a like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such objects of amusements, and shall pay for each such subject enumerated the following tax:

In cities or towns of less than 10,000 population	$10.00
In cities or towns of 10,000 population and over	25.00

(b) Counties, cities or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 131.)

§ 7880(63). Security dealers.—(a) Every person, firm, or corporation who or which is engaged in the business of dealing in securities as defined in "An act to provide laws governing the sale of stocks, bonds, and other securities in the State of North Carolina," etc., or who or which maintains a place for or engaged in the business of buying and/or selling shares of stock in any corporation, bonds, or any other securities on commission or brokerage, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 25.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 15,000 population	100.00
In cities or towns of 15,000 population and less than 25,000	200.00
In cities or towns of 25,000 population and above	300.00

(b) Every dealer, as defined herein, who shall maintain in the State of North Carolina more than one office for dealing in securities, as hereinbefore defined, shall apply for and procure from the commissioner of revenue a license for the privilege of transacting such business at each such office, and shall pay for such license the same tax as hereinbefore fixed.

(c) Every foreign dealer, as dealer is hereinbefore defined, who shall maintain an office in this State, or have a salesman in this State, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business and shall pay for such license the tax hereinbefore imposed.

(d) If such person, firm, or corporation described in subsection (a) of this section maintains and/or operates a leased or private wire and/or ticker service in connection with such business the annual license tax shall be as follows:

In cities and towns of less than 10,000 population	$ 150.00
In cities and towns of 10,000 and less than 15,000 population	250.00
In cities and towns of 15,000 and less than 20,000 population	500.00
In cities and towns of 20,000 to 25,000 population	750.00
In cities and towns of 25,000 or more	1,000.00

Providing that the tax levied in sub-section (d) shall not apply to private wire service not connected with or handling quotations of a stock exchange, grain or cotton exchange.

(e) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy license tax not in excess of fifty dollars ($50.00). (1935, c. 371, s. 132.)

§ 7880(64). Cotton buyers and sellers on commission.—(1) Every person, firm, or corporation who or which engages in the business of buying and/or selling on commission any cotton, grain, provisions, or other commodities, either for actual, spot, or instant delivery, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business in this State, and shall pay for such license a tax of fifty dollars ($50.00).

(2) Every person, firm, or corporation who or which engages in the business of buying or selling any cotton, grain, provisions, or other commodities, either for actual, spot, instant, or future delivery, and also maintains and/or operates a private or leased wire and/or ticker service in connection with such business, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business in this State and shall pay for such license the following tax:

In cities and towns of less than 10,000 population	$100.00

In cities and towns of 10,000 and less than 15,000 population 200.00
In cities and towns of 15,000 and less than 25,000 population 400.00
In cities and towns of 25,000 population or more 600.00

Persons, firms, and corporations who pay the tax imposed in subsection (d) of section 7880(63) shall not be required to pay the tax imposed in this subsection.

(3) Every person, firm, or corporation, domestic or foreign, who or which is engaged in the business of selling any cotton, either for actual, spot, instant, or future delivery, in excess of five thousand bales per annum, shall be deemed to be a cotton merchant, shall apply for and obtain from the commissioner of revenue a statewide license for each office or agency maintained in this State for the sale of cotton and shall pay for each such license the following tax:

In cities and towns of less than 10,000 population .....$ 50.00
In cities and towns of 10,000 and less than 15,000 population 100.00
In cities and towns of 15,000 and less than 25,000 population 200.00
In cities and towns of 25,000 population and over 300.00

(4) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1935, c. 371, s. 133.)

§ 7880(65). Manufacturers, producers, bottlers and distributors of soft drinks.—(a) Every person, firm, or corporation, or association manufacturing, producing, bottling and/or distributing in bottles or other closed containers, soda water, coca-cola, pepsi-cola, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations, or preparations of any nature whatever commonly known as soft drinks, shall apply for and obtain from the commissioner of revenue a state license for the privilege of doing business in this State and shall pay for such license the following base tax for each place of business:

Low-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above named beverage is a:

36 spouts, or greater capacity, low-pressure filler $600.00
32 and less than 36 spouts, low-pressure filler 500.00
24 and less than 32 spouts, low-pressure filler 450.00
18 and less than 24 spouts, low-pressure filler 350.00
12 and less than 18 spouts, low-pressure filler 250.00

High-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above-named beverages is a Royal (8-head), Shields (6-head), Adriance (6-head), or other high-pressure equipment having manufacturer's rating capacity of over sixty bottles per minute, six hundred dollars ($600.00).

Royal (4-head), Adriance (2-head), Shields (2-head), full equipment having manufacturer's rating capacity of over fifty and less than sixty bottles per minute, five hundred dollars ($500.00).

Royal (4-head), Adriance (2-head), Shields (2-head) (full automatic), or other high-pressure equipment having manufacturer's rating capacity of more than forty and less than fifty bottles per minute, four hundred and fifty dollars ($450.00).

Dixie (automatic), Shields (2-head hand feed), Adriance (1-head), Calleson (1-head), Senior (high-pressure), Junior (high-pressure), or Burns or other high-pressure equipment having manufacturer's rating capacity of more than twenty-four bottles and less than forty bottles per minute, one hundred and fifty dollars ($150.00).

Single-head Shields, Modern Bond (power), Baltimore (semi-automatic), and all other machines or equipment having manufacturer's rating capacity of less than twenty-four bottles per minute and all foot-power bottling machines, one hundred dollars ($100.00).

Provided, that any bottling machine or equipment unit not herein specifically mentioned shall bear the same tax as a bottling machine or equipment unit of the nearest rated capacity as herein enumerated: Provided further, that where any person, firm, corporation, or association has within his or its bottling plant or place of manufacture more than one bottling machine or equipment unit, then such person, firm, corporation, or association shall pay the tax as herein specified upon every such bottling machine or equipment unit, whether in actual operation or not: Provided further, that where no standard high or low pressure bottling machine is used to fill the containers, a tax of fifty dollars ($50.00) shall apply.

The tax levied in this section shall not apply to any product containing more than fifty per cent of milk, put up in containers for sale as food rather than soft drink preparations.

(b) Every person, firm, corporation, or association distributing, selling at wholesale or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this State, as follows:

In cities or towns of 30,000 inhabitants or more $100.00
In cities or towns of 20,000 inhabitants and less than 30,000 inhabitants..... 90.00
In cities or towns of 10,000 inhabitants and less than 20,000 inhabitants..... 80.00
In cities or towns of 5,000 inhabitants and less than 10,000 inhabitants..... 70.00
In cities or towns of 2,500 inhabitants and less than 5,000 inhabitants..... 60.00
In rural districts and towns of less than 2,500 inhabitants 50.00

The tax levied in this subsection shall not include the right to sell products authorized to be sold under Senate Bill No. 367, enacted at the present session of the general assembly.

(c) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages manufactured or bottled within the State but outside of the county in which such cereal or carbonated beverages are manu-

factured or bottled shall pay one-half of the annual license tax for the privilege of doing business in this State provided for in subsection (b) of this section.

(d) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay the annual license tax for the privilege of doing business in the State provided in subsection (b) of this section.

(e) Each truck, automobile, or other vehicle coming into this State from another state, and selling and/or delivering carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay an annual license tax, for the privilege of doing business in this State, in the sum of one hundred dollars ($100.00) per truck, automobile, or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile, or vehicle.

(f) No county shall levy a tax on any business taxed under the provisions of this section, nor shall any city or town in which any person, firm, corporation, or association taxed hereunder has its principal place of business levy and collect more than one-fourth of the state tax levied under this section; nor shall any tax be levied or collected by any county, city, or town on account of the delivery of the products, beverages, or articles enumerated in subsection (a) or (b) or (c) or (d) of this section when a tax has been paid under any of those subsections. (1935, c. 371, s. 134.)

When Each Distributing Point Liable for Tax.—Under the prior law, it was held that where the bottling of the beverage was done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points was liable for the payment of the license tax, and did not come within the intent and meaning of the exempting provision. Bottling Co. v. Doughton, 196 N. C. 791, 147 S. E. 289.

§ 7880(66). Packing houses. — Every person, firm, or corporation engaged in or operating a meat packing house in this State, and every wholesale dealer in meat packing house products who owns, leases, or rents and operates a cold-storage room or warehouse in connection with such wholesale business, shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business in this State, and shall pay for such license the sum of one hundred dollars ($100.00) for each county in which is located such a packing house or a cold-storage room or warehouse.

Every person, firm or corporation maintaining a cold-storage room or warehouse and distributing such products to other stores owned in whole or in part by the distributor for sale at retail shall be deemed a wholesale dealer or distributor in the meaning of this act.

Counties shall not levy any tax on business taxed under this section. (1935, c. 371, s. 135.)

Cross References.—See generally the annotations to N. C. Const. Art. V, sec. 3. As to constitutionality of section, see note under N. C. Const. Art. V, sec. 3.

§ 7880(67). Newspaper contests. — Every person, firm, or corporation that conducts contests and offers a prize, prizes, or other compensation to obtain subscriptions to newspapers, magazines, or other periodicals in this State shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such contests, and shall pay for such license the following tax for each such contest:

Monthly, weekly, simi-weekly newspaper, magazine, or other periodical .....$ 50.00
Daily newspaper or other daily periodical 200.00

Counties, cities and towns may levy a tax not to exceed one-half of that levied by the State under the provisions of this act. (1935, c. 371, s. 136.)

§ 7880(68). Persons, firms, or corporations selling certain oils.—(a) Every person, firm, or corporation engaged in the business of selling illuminating or lubricating oil or greases, or benzine, naphtha, gasoline, or other products of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for the same a tax of two dollars and fifty cents ($2.50).

(b) In addition to the tax herein levied under subsection (a) of this section, such person, firm, or corporation shall pay to the commissioner of revenue, on or before the first day of July of each year, an annual additional license tax equal to five per cent of the total gross sales for the preceding year or part of the year that the business is so conducted or the privilege so exercised, when the total gross sales of such commodities exceed five thousand dollars ($5,000.00), or pro rata for a part of the year.

(c) The amount of such total gross sales shall be returned to the commissioner of revenue on or before the date specified in subsection (b) of this section by such person, firm, or corporation, verified by the oath of the person making the return, upon such forms and in such detail as may be required by the commissioner of revenue.

(d) Counties shall not levy any license tax on the business taxed under this section; but cities or towns in which there is located an agency, station, or warehouse for the distribution or sale of such commodities enumerated in this section may levy the following license tax:

In incorporated towns and cities of less than 10,000 population $25.00
In cities and towns of 10,000 population and over 50.00

(e) Any person, firm, or corporation subject to this license tax, and doing business in this State without having paid such license tax, shall be fined one thousand dollars ($1,000.00) and in addition thereto double the tax imposed by this section.

(f) No license or privilege tax, other than the license tax permitted in this section to cities or towns, shall be levied or collected for the privilege of engaging in or doing the business named in this section from any person, firm, or corporation paying the inspection fees and charges provided for under Article fourteen of Chapter eighty-four of the Consolidated Statutes of one thousand nine hundred and nineteen and the amendments thereto, except license taxes levied

in sections 7880(84) and 7880(93)a. (1935, c. 371, s. 137.)

§ 7880(69). Building and loan associations. — Every building and loan association, domestic or foreign, operating under a charter granted by authority of the laws of this State or any other State, or the United States, for the purpose of making loans to its members only and of enabling its members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, shall pay to the insurance commissioner on or before the first day of April of each year the following annual license tax for the privilege of doing business in the State:

(a) A tax of thirteen cents on each one hundred dollars ($100.00) of liability on actual book value of shares of stock outstanding on the thirty-first day of December of the preceding year, as shown by reports of such association to be made to the insurance commissioner. The tax levied herein shall be in addition to the license fee required under section 5186, Consolidated Statutes, and expenses and cost of examination required under section 5190, Consolidated Statutes.

(b) Counties, cities, and towns shall not levy any license tax on the business taxed in this section. (1935, c. 371, s. 138.)

§ 7880(70). Pressing clubs, dry cleaning plants, and hat blockers.—Every person, firm, or corporation engaged in the business of pressing and/or dry cleaning any articles of clothing, reshaping, cleaning, and/or reblocking any hats shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business and pay for the same the following tax:

In cities or towns of less than 10,000 population—	
Where not more than three persons are employed	$12.50
Where more than three persons are employed	25.00
In cities and towns of 10,000 population and over—	
Where not more than three persons are employed	25.00
Where more than three persons are employed	50.00

Every person, firm, or corporation soliciting pressing and/or cleaning work in any city or town to be done outside of the city wherein said pressing and/or cleaning business is established shall procure from the commissioner of revenue a state license for the privilege of soliciting in said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the pressing and/or cleaning work shall and the same is hereby construed to be engaging in said business, and the person, firm, or corporation soliciting in said city or town shall procure from the revenue commissioner a state license for the privilege of soliciting in said city and town, said tax to be in a sum equal to the amount which would be paid by such establishments actually engaged in such business in said city or town.

(a) This section shall not apply to any bona fide student of any college or university in this State operating such pressing or dry cleaning business at such college or university during the school term of such college or university.

(b) Cities and towns, respectively, may levy a license tax not in excess of that levied by the State: Provided, that persons soliciting business for services to be performed outside the county a tax may be levied by such county, city or town not in excess of one hundred dollars ($100.00).

In addition to the annual tax levied in this section, it is hereby required with respect to every such concern herein referred to that with each delivery of articles of clothing or other articles herein referred to and cleaned or otherwise processed as herein referred to there shall be issued a charge ticket, to each of which tickets there shall be affixed a service stamp tax of one cent on all packages on which the charge is one dollar or less, and for packages of more than one dollar, one cent for each dollar or fraction thereof, the amount of such tax to be added to such charge ticket and to be paid for by the customer. The stamps for such purpose are to be made available by the commissioner of revenue and by him sold to pressing and/or cleaning concerns at par and for cash only, as the same may be needed by the pressing and/or cleaning concerns of the State in order to meet the requirements of this act. It shall be unlawful for any person, firm, or corporation engaged in such business to make any delivery except in compliance with this section, and the violation of any of the provisions hereof is hereby declared to be a misdemeanor. (1935, c. 371, s. 139.)

§ 7880(71). Barber shops.—Every person, firm, or corporation engaged in the business of conducting a barber shop, beauty shop or parlor, or other shop of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license the following tax:

For each barber chair maintained in a barber shop	$2.50
For each barber, manicurist, cosmetologist, beautician, or operator in beauty parlor, or other shop of like kind in any office, hotel, or other place	5.00

Counties shall not levy a license tax under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 140.)

§ 7880(72). Shoeshine parlors.—Every person, firm, or corporation who or which maintains or operates a place of business wherein is operated a shoeshine parlor, stand, or chair or other device shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business and shall pay for such license the following tax:

Where the number of chairs or stools are not more than two	$ 5.00
Where the number of chairs or stools are more than two and less than six	10.00

Where the number of chairs or stools are six and less than ten 20.00
Where the number of chairs or stools are ten or more 30.00

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 141.)

§ 7880(73). Tobacco warehouses.—Every person, firm, or corporation engaged in the business of operating a warehouse for the sale of leaf tobacco upon commission shall, on or before the first day of June of each year, apply for and obtain from the commissioner of revenue a state license for the privilege of operating such warehouse for the next ensuing year, and shall pay for such license the following tax:

For a warehouse in which was sold during the preceding year ending the first day of June—

Less than 1,000,000 pounds .....$ 50.00
1,000,000 pounds and less than 2,000,000... 75.00
2,000,000 pounds and less than 3,000,000.. 175.00
3,000,000 pounds and less than 4,000,000.. 250.00
4,000,000 pounds and less than 5,000,000.. 400.00
5,000,000 pounds and less than 6,000,000.. 500.00
For all in excess of 6,000,000 pounds, $500.00 and six cents per thousand pounds.

(a) If a new warehouse not in operation the previous year, the person, firm, or corporation operating such warehouse may procure a license by payment of the minimum tax provided in the foregoing schedule, and at the close of the season for sales of tobacco in such warehouse shall furnish the commissioner of revenue a statement of the number of pounds of tobacco sold in such warehouse for the current year, and shall pay an additional license tax for the current year based on such total volume of sales in accordance with the schedule in this section.

If an old warehouse with new or changed ownership or management, the tax shall be paid according to the schedule in this section, based on the sales during the preceding year, just as if the old ownership or management had continued its operation.

(b) The commissioner of agriculture shall certify to the commissioner of revenue, on or before the first day of June of each year, the name of each person, firm, or corporation operating a tobacco warehouse in each county in the State, together with the number of pounds of leaf tobacco sold by such person, firm, or corporation in each warehouse for the preceding year, ending on the first day of June of the current year.

(c) The commissioner of agriculture shall report to the solicitor of any judicial district in which a tobacco warehouse is located which the owner or operator thereof shall have failed to make a report of the leaf tobacco sold in such warehouse during the preceding year, ending the first day of June of the current year, and such solicitor shall prosecute any such person, firm, or corporation under the provisions of this section.

(d) The tax levied in this section shall be based on official reports of each tobacco warehouse to the state department of agriculture showing amount of sales for each warehouse for the previous year.

(e) The commissioner of revenue or his deputies shall have the right, and are hereby authorized, to examine the books and records of any person, firm, or corporation operating such warehouse, for the purpose of verifying the reports made and of ascertaining the number of pounds of leaf tobacco sold during the preceding year, or other years, in such warehouse.

(f) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties provided for in this act, be guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars ($500.00) and/or imprisoned, in the discretion of the court.

(g) No county shall levy any license tax on the business taxed under this section. Cities and towns may levy a tax not in excess of fifty dollars ($50.00) for each warehouse. (1935, c. 371, s. 142.)

§ 7880(74). Obsolete. As to subsequent statutes relating to the taxation of scrap tobacco, see § 5126(a1), et seq.

§ 7880(75). Newsdealers on trains. — Every person, firm, or corporation engaged in the business of selling books, magazines, papers, fruits, confections, or other articles of merchandise on railroad trains or other common carriers in this State shall apply for and obtain a state license from the commissioner of revenue for the privilege of conducting such business, and shall pay for such license the following tax:

Where such person, firm, or corporation operates on railroads or other common carriers on—

Less than 300 miles .....$ 250.00
Three hundred and less than 500 miles.. 500.00
Five hundred miles or more..... 1,000.00

This section shall not apply to any railroad company engaged in selling such articles to passengers on its train and paying the tax upon the retail sales of merchandise levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w].

Counties, cities, and towns shall not levy any license tax on the business taxed under this section. (1935, c. 371, s. 143.)

§ 7880(76). Soda fountains, soft-drink stands. —Every person, firm, or corporation engaged in the business of operating a soda fountain or soft-drink stand shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license the following tax:

(a) On soda fountains—

On each carbonated draft arm of each soda fountain a tax of $10.00.

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place of business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00).

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Article V, Schedule E, of this act [§§ 7880(156)a-7880(156)w] upon the retail sales of merchandise, such tax to be paid at the time and in the manner required for the sales of other merchandise.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the State. (1935, c. 371, s. 144.)

§ 7880(77). Dealers in pistols, etc.—Every person, firm, or corporation who is engaged in the business of keeping in stock, selling, and/or offering for sale any of the articles or commodities enumerated in this section shall apply for and obtain a state license from the commissioner of revenue for the privilege of conducting such business, and shall pay for such license the following tax:

For pistols .....$ 50.00
For bowie knives, dirks, daggers, slingshots, leaded canes, iron or metallic knuckles, or articles of like kind 200.00
For blank cartridge pistols 200.00

(a) If such person, firm, or corporation deal only in metallic cartridges, the tax shall be ten dollars ($10.00).

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 145.)

§ 7880(78). Dealers in cap pistols, fireworks, etc.—Every person, firm, or corporation engaged in the business of selling or offering for sale firecrackers, fireworks, or other articles of like kind, cap pistols, or pistols so constructed that they can by treatment to release the hammer be used to fire caps, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for the same a tax of one hundred dollars ($100.00).

Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of twice that levied by the State. (1935, c. 371, s. 146.)

§ 7880(79). Pianos, organs, victrolas, records, radios, accessories. — Every person, firm, or corporation engaged in the business of selling, offering or ordering for sale any of the articles hereinafter enumerated in this section shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for each license the following tax:

For pianos and/or organs, graphophones, victrolas, or other instruments using discs or cylinder records, and/or the sale of records for either or all of these instruments, radios or radio accessories, an annual license tax of ten dollars ($10.00).

(e) Any person, firm, or corporation applying for and obtaining a license under this section may employ traveling representatives, or agents, but such traveling agent or representative shall obtain from the commissioner of revenue a duplicate license of such person, firm, or corporation who or which he represents, and pay for the same a tax of ten dollars ($10.00).

Each duplicate copy so issued is to contain the name of the agent to whom it is issued, the instrument to be sold, and the same shall not be transferable.

Representatives or agents holding such duplicate copy of such license are licensed thereby to sell or offer for sale only the instrument and/or articles authorized to be sold by the person, firm, or corporation holding the original license, and such license shall be good and valid in any county in the State.

(f) Every person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and shall pay a penalty of two hundred and fifty dollars ($250.00), and in addition thereto double the state license tax levied in this section for the then current year.

(g) Counties shall not levy any license tax on the business taxed under this section, except that the county in which the agent or representative holding a duplicate copy of the license aforesaid may impose a license tax not in excess of five dollars ($5.00). Cities or towns may levy a license tax on the business taxed under this section not in excess of one-half of that levied by the State. (1935, c. 371, s. 147.)

Sales by Sample.—An act requiring every one, before engaging in selling pianos or organs by sample, list or otherwise, in the state to pay a certain sum for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, as a regulation of interstate commerce. Ex parte Hough, 69 Fed. 330. See note of In re Flinn, 57 Fed. 496, under section 7820.

Employment of Several Agents.—If the licensee employs more than one salesman he must take out and furnish each salesman with an additional license. This because the license authorizes only the person having it in possession to sell under it. State v. Morrison, 126 N. C. 1123, 36 S. E. 329.

§ 7880(80). Installment paper dealers. — (a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the revenue commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of one-fourth of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business or dealing in such obligations, or shall fail,

refuse, or neglect to pay the taxes levied in this section, such obligations shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this State until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this act for the non-payment of taxes.

(d) This section shall not apply to corporations organized under the State or National banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section. (1935, c. 371, s. 148.)

§ 7880(81). Tobacco and cigarette retailers and jobbers.—Every person, firm, or corporation engaged in the business of retailing and/or jobbing cigarettes, cigars, chewing tobacco, smoking tobacco, snuff, or any other tobacco products shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax:

Outside of incorporated cities or towns and cities or towns of less than 1,000 population	$ 5.00
Cities or towns of 1,000 population and over	10.00

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 149.)

§ 7880(82). Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 12.50
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	37.50
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 and less than 30,000 population	72.50
In cities or towns of 30,000 and less than 35,000 population	85.00
In cities or towns of 35,000 and less than 40,000 population	100.00
In cities or towns of 40,000 and less than 45,000 population	112.50
In cities or towns of 45,000 population and above	125.00

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than four persons are employed including the owners, the license tax shall be one-third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work, or supplying or renting clean linen or towels, in any city or town, to be done outside of the city wherein said laundry or linen supply or towel supply business is established, shall procure from the commissioner of revenue a state license for the privilege of soliciting in said city or town.

The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels shall and the same is hereby construed to be engaging in said business, and the person, firm, or corporation soliciting in said city or town shall procure from the revenue commissioner a state license for the privilege of soliciting in said city or town, said tax to be in a sum equal to the amount which would be paid if the solicitor had an establishment actually engaged in such business in said city or town.

Counties, cities and towns, respectively, may levy a license tax not in excess of one-half of that levied by the State: Provided, that persons soliciting business for services to be performed outside the county a tax may be levied by such county, city or town not in excess of fifty dollars ($50.00) upon such persons.

In addition to the annual tax levied in this section, it is hereby required with respect to every laundry, including wet or damp wash laundries, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, that with each delivery of laundry for which there is a charge made there shall be issued a charge ticket, to each of which tickets there shall be affixed a service stamp tax of one cent on all packages on which the charge is one dollar or less, and for packages of more than one dollar, one cent for each dollar or fraction thereof, the amount of such tax to be added to such charge ticket and to be paid for by the customer. The stamps for such purpose are to be made available by the commissioner of revenue and by him sold to said laundries at par and for cash only, as the same may be needed by the laundries of the State in order to meet the requirements of this act. It shall be unlawful for any person, firm, or corporation engaged in such business to make any delivery except in compliance with this section, and the violation of any of the provisions hereof is hereby declared to be a misdemeanor. (1935, c. 371, s. 150.)

§ 7880(83). Outdoor advertising. — (a) Every person, firm, or corporation who or which is engaged in the business of outdoor advertising by placing, erecting, or maintaining one or more outdoor advertising signs or structures of any nature by means of signboards, poster boards, or printed bulletins, or other printed or painted matter, or any other outdoor advertising devices, erected upon the grounds, walls, or roofs of buildings, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State, and shall pay for said license as follows:

For posting or erecting 50 or more signs or panels $100.00
For posting or erecting 20 to 50 signs or panels 50.00
For posting or erecting less than 20 signs or panels, one dollar for each sign or panel.

And in addition thereto the following license tax for each city, town, or other place in which such signboards, poster boards, painted bulletins, and other painted or printed matter or other outdoor advertising devices are maintained, in cities and towns of:

Less than 500 population	$ 5.00
500 to 999 population	7.50
1,000 to 1,999 population	10.00
2,000 to 2,999 population	15.00
3,000 to 3,999 population	20.00
4,000 to 4,999 population	25.00
5,000 to 9,999 population	40.00
10,000 to 14,999 population	50.00
15,000 to 19,999 population	75.00
20,000 to 24,999 population	100.00
25,000 to 34,999 population	125.00
35,000 population and over	150.00
In each county outside of cities and towns	25.00

Provided, that the tax levied in this act shall not apply to regularly licensed motion picture theatres taxed under section 7880(34) upon any advertising signs, structures, boards, bulletins, or other devices erected by or placed by the theatre upon property which the theatre has secured by permission of the owner.

Every person, firm, or corporation who or which places, erects, or maintains one or more outdoor advertising signs, structures, boards, bulletins, or devices as specified in this section shall be deemed to be engaged in the business of outdoor advertising, but when the applicant intends to advertise his own business exclusively by the erection or placement of such outdoor advertising signs, structures, boards, bulletins, or devices as specified in this section, he may be licensed to do so upon the payment annually of one dollar ($1.00) for each sign up to five hundred (500) in number, and for five hundred (500) or more, the sum of five hundred dollars ($500.00) for the privilege in lieu of all other taxation as provided in this section, except such further taxation as may be imposed upon him by cities or towns, acting under the power to levy not in excess of one-half of that specified in paragraph two of subsection (a) of this section.

(b) Every person, firm, or corporation shall show in its application for the State license herein provided for the name of each incorporated city or town within which, and the county within which, it is maintaining or proposes to maintain said signboards, poster boards, painted bulletins or other painted or printed signs or other outdoor advertising devices within the State of North Carolina.

(c) It shall be unlawful for any person engaged in business of outdoor advertising to in any manner paint, print, place, post, tack, or affix or cause to be painted, printed, placed, posted, tacked, or affixed any sign or other printed or painted advertisement on or to any stone, tree, fence, stump, pole, building, or other object which is upon the property of another without first obtaining the written consent of such owner thereof, and any person, firm, or corporation who in any manner paints, prints, places, posts, tacks, or affixes or causes same to be painted, printed, posted, placed, tacked, or affixed such advertisement on the property of another except as herein provided shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars ($50.00) or imprisonment of thirty days: Provided, that the provisions of this section shall not apply to legal notices.

(d) It shall be unlawful for any person, firm, or corporation to paint, print, place, post, tack, or affix any advertising matter within the limits of the right of way of public highways of the State without permission of the state highway commission, or upon the streets of the incorporated towns of the State without permission of the governing authority, and if and when signs of any nature are placed without permission within the highways of the State or within the streets of incorporated towns it shall be the duty of the highway commission or other administrative body or other governing authorities of the cities and towns of said State to remove said advertising matter therefrom.

(e) Every person, firm, or corporation owning or maintaining signboards, poster boards, printed bulletins, or other outdoor advertisements of any nature within this State shall have imprinted on the same the name of such person, firm, or corporation in sufficient size to be plainly visible and permanently affixed thereto.

(f) A license shall not be granted any person, firm, or corporation having his or its principal place of business outside the State for the display of any advertising of any nature whatsoever, designed or intended for the display of advertising matter, until such person, firm, or corporation shall have furnished and filed with the commissioner of revenue a surety bond to the State, approved by him, in such sum as he may fix, not exceeding five thousand dollars ($5,000), conditioned that such licensee shall fulfill all requirements of law, and lawful regulations and orders of said commissioner of revenue, relative to the display of advertisements. Such surety bond shall remain in full force and effect as long as any obligations of such licensee to the State shall remain unsatisfied.

(g) No advertising or other signs specified in this act shall be erected on the highway right of way so as to obstruct the vision or otherwise to increase the hazard, and all signs upon the highways shall be placed in a manner to be approved by the said highway commission.

(h) Any person, firm, or corporation who or which shall fail, refuse, or neglect to comply with the terms and provisions of this section, and who shall fail to pay the tax herein provided for within thirty days after the same shall become due, the commissioner of revenue or his agents or deputies shall forthwith seize and remove, or order removed, the structures erected by such delinquent person, firm, or corporation, and shall sell the same either at public or private sale, and apply the proceeds thereof to the payment of the delinquent taxes and the penalty due and unpaid.

(i) The said highway commission or other governing body having jurisdiction over the roads and highways of the State, and the governing authorities of cities and towns, and its agents and employees, and the board of county commissioners of the various counties in said State, shall remove or cause to be removed any advertisement, sign,

or other matter displayed contrary to the provisions of this section.

(j) Every person, firm, or corporation who violates any of the provisions of this section shall be guilty of a misdemeanor, and in addition to the license tax and penalties provided for herein shall be fined not more than one hundred dollars ($100.-00) for each sign so displayed, or imprisoned, in the discretion of the court.

(k) Counties shall not levy any license tax under this section, but cities and towns may levy license tax not in excess of one-half of that levied by the State under paragraph 2 of subsection (a).

(l) Every person, firm, or corporation applying for a license as required in subsection (a) hereof shall state in his application the number of advertisements, advertising spaces or devices he proposes to erect and/or maintain. Upon issuing license to any applicant the commissioner of revenue shall issue a metal tag for each of the advertisements, advertising spaces or devices mentioned in the application, to be valid for one year from its issuance and showing on its face the date of its expiration. Such metal tag shall be attached by the advertiser in such way as to be plainly visible to the front of each advertisement, advertising space or device erected, maintained or used by him.

(m) Any advertisement, advertising space or device not bearing such a tag or bearing a tag which shows that it has expired, or otherwise erected or maintained contrary to the provisions of this section, shall be deemed a public nuisance and shall be summarily removed or destroyed by the state highway department.

(n) The following signs and announcements are exempted from the provisions of this section: signs upon property advertising the business conducted thereon; notice or advertisements erected by public authority or required by law in any legal proceedings; any signs containing sixty (60) square feet or less bearing an announcement of any town or city advertising itself, provided the same is maintained at public expense.

No tax shall be levied under this section against any person, firm, or corporation erecting, painting, posting, or otherwise displaying signs or panels advertising his or its own business containing twelve (12) square feet or less of advertising surface: Provided, that this exemption shall not apply if the signs or panels are displayed in more than five counties; and provided further, that subsection (m) shall not apply to signs and panels displayed hereunder. (1935, c. 371, s. 151.)

§ 7880(83)a. Motor advertisers. — (a) Every person, firm, or corporation operating over the streets or highways of this State any motor vehicle or other mechanical conveyance equipped with radio, phonograph, or other similar mechanism to produce music, or having any loud speaker attachment or other sound magnifying device to produce sound effects, for advertising purposes, whether advertising his or its own products or those of others, shall be deemed a motor advertiser, shall procure from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this State and shall pay for such license a tax of $100.00 for each vehicle or conveyance so used: Provided, that any such advertiser owning a located placed of business in this State and advertising in not more than five counties shall pay one-fourth the tax provided in this section.

(b) Counties may levy a license tax on the business taxed under this section not in excess of one-fourth of that levied by the State, and cities and towns may levy a tax not in excess of $10.00. (1935, c. 371, s. 151½.)

§ 7880(83)b. Loan agencies or brokers.—Every person, firm, or corporation engaged in the regular business of making loans or lending money, and accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidences of debt for repayment of such loans in installment payments or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay for such license a tax of $500.00.

(a) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, co-operative credit unions, nor installment paper dealers defined and taxed under other sections of this act, nor shall it apply to business of negotiating loans on real estate as described in section 7880(38), nor to pawnbrokers lending or advancing money on specific articles of personal property. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages, or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture.

(b) At the time of making any such loan, the person, or officer of the firm or corporation making same, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back by the borrower, and the time in which said amount is to be paid, and the rate of interest and discount agreed upon.

(c) Any such person, firm, or corporation failing, refusing, or neglecting to pay the tax herein levied shall be guilty of a misdemeanor and in addition to double the tax due shall be fined not less than $250.00 and/or imprisoned, in the discretion of the court. No such loan shall be collectible at law in the courts of this State in any case where the person making such loan has failed to pay the tax levied herein, and/or otherwise complied with the provisions of this section.

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of $100.00. (1935, c. 371, s. 152.)

§ 7880(84). Automobile and motorcycle dealers and service stations.—1. Automotive service stations.—Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering of motor vehicles, trailers, or semi-trailers, or engaged in the

business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor fuels and/or lubricants, or any of such commodities, in this State shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

(a) In rural sections where a service station is operated the tax shall be five dollars ($5.00) unless more than one pump is operated, in which event the tax shall be five dollars ($5.00) per pump.

(b) The tax levied in this section shall in no case be less than five dollars ($5.00) per pump.

(c) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(d) The tax imposed in section 7880(51) shall not apply to the sale of gasoline to dealers for resale.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein under this subsection not in excess of one-fourth of that levied by the State.

2. Motorcycle dealers.—Every person, firm, or corporation, foreign or domestic, engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities in this State shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	25.00
In cities or towns of 20,000 and less than 30,000 population	30.00
In cities or towns of 30,000 population or more	40.00

(a) A motorcycle dealer paying the license tax under this subsection may buy, sell and/or deal in bicycles and bicycle supplies without the payment of an additional license tax.

(b) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection.

(c) No motorcycle dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid.

(d) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the State, with the exception that the minimum tax may be as much as ten dollars ($10.00).

3. Automotive equipment and supply dealers at wholesale.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, exchanging, and/or delivering automotive accessories, including radios designed for exclusive use in automobiles, parts, tires, tools, batteries, and/or other automotive equipment or supplies or any of such commodities at wholesale shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, any person, firm, or corporation engaged in the business enumerated in this section and having no located place of business, but selling to retail dealers by use of some form of vehicle, shall obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each vehicle used in carrying on such business fifty dollars ($50.00).

(a) For the purpose of this section, the word "wholesale" shall apply to manufacturers, jobbers, and such others who sell to retail dealers, except manufacturers of batteries.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(c) Counties, cities and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-half of that levied by the State, with the exception that the minimum tax may be as much as ten dollars ($10.00).

4. Motor vehicle dealers.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semi-trailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles, and supplies in this State shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population ..	$25.00
In cities or towns of 1,000 and less than 2,500 population	50.00
In cities or towns of 2,500 and less than 5,000 population	75.00
In cities or towns of 5,000 and less than 10,000 population	110.00
In cities or towns of 10,000 and less than 20,000 population	140.00
In cities or towns of 20,000 and less than 30,000 population	175.00
In cities or towns of 30,000 or more	200.00

Provided, that persons, firms, or corporations dealing in second-hand or used motor vehicles exclusively shall be liable for only one-half the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient or itinerant nature, in which event the tax shall be one hundred dollars ($100.00) for each location where such business is carried on.

(a) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection 1 of this section, shall not be subject to any license tax under subsections 2, 3, and 4 of this section.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection; nor shall the tax apply to dealers in semi-trailers weighing not more than 500 pounds and carrying not more than 1,000 pound load, and to be towed by passenger cars.

(c) No dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid.

(d) Premises on which used cars are stored or sold when owned or operated by a licensed new-car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such new-car business is conducted.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the State, with the exception that the minimum tax may be as much as twenty dollars ($20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of one hundred dollars ($100.00) for each location where such business is carried on. (1935, c. 371, s. 153.)

Constitutionality.—A provision in a former statute as to the reduction of the license tax if three-fourths of the assets are invested in this state was held constitutional in Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

The decision in this case was appealed from, and the question was presented to the United States Supreme Court. The court construed the statute as discriminating against nonresident manufacturers doing business in the state by reducing the tax from $500 to $100 if the manufacturer of automobiles has three-fourths of his entire assets invested in bonds of the state or any of its counties, cities or towns, or in other property situated therein and returned for taxation, and as discriminating in favor of the product of resident manufacturers by attempting to regulate interstate commerce. See Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 65 L. Ed. 1029, 41 S. Ct. 571. But this decision has not been understood as to invalidate the entire statute since the proviso in question was separable from the remainder of the statute. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 28, 123 S. E. 475.—Ed. Note.

Auto trucks come within the designation of automobiles used in this section in taxing manufacturers of automobiles. Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

Bank as "Dealer."—Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475.

Tax on Operators of Gasoline Pumps.—The provision of this section, prescribing that no county, city or town shall levy a license tax on the business of selling gasoline at retail in excess of one-fourth of the State license tax does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N. C. 434, 171 S. E. 640. Note this case is construing the 1931 Revenue Act, which would be the same, however, under the 1933 act.

§ 7880(85). Emigrant and employment agents.—(a) Every person, firm, or corporation, either as agent or principal, engaged in soliciting, hiring, and/or contracting with laborers, male or female, in this State for employment out of the State shall apply for and obtain from the commissioner of revenue a state license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars ($500.00) for each county in which such business is carried on.

(b) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State and shall pay for such license the following annual tax for each location in which such business is carried on:

In unincorporated communities and in cities and towns of less than 2,500 population	$100.00
In cities or towns of 2,500 and less than 5,000 population	200.00
In cities or towns of 5,000 and less than 10,000 population	300.00
In cities or towns of 10,000 or more population	500.00

Provided, that this section shall not apply to any employment agency operated by the federal government, the State, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the State.

(c) Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and fined, in addition to other penalties, not less than one thousand dollars ($1,000.00) and/or imprisoned, in the discretion of the court.

(d) Counties, cities and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 154.)

Generally.—This statute is a severe measure imposing a tax upon the business of hiring hands, and its validity can

be sustained only upon this view. Lane v. Commissioners, 139 N. C. 443, 445, 52 S. E. 140. See also State v. Hunt, 129 N. C. 686, 40 S. E. 216.

The occupation of an "emigrant agent," as defined in chapter 75, Acts of 1891, similar to this section, does not belong to that class of trades or occupations which are so inherently harmful or dangerous to the public that they may, either directly or indirectly, be restricted or prohibited. State v. Moore, 113 N. C. 697, 698, 18 S. E. 342.

Scope of Section.—In Theus v. State, 114 Ga. 53, Lewis, J., construing a section worded exactly as this, says, "The legislative enactment imposing a tax upon emigrant agents, and providing a penalty for the failure to register and pay such tax, was clearly intended to apply to persons who, as agents of others, make it their business to hire laborers in this state to be sent beyond the limits of the state and then employed by others. To extend its application to a resident of another state, who, being in this state, incidentally employs laborers on his own behalf to work for him beyond the limits of this state, would be entirely unwarranted." Cited and approved in Carr v. Commissioners, 136 N. C. 125, 127, 48 S. E. 597.

Employment of Laborers for Work in Another State.—This section does not apply to a person who comes into this state and employs laborers to work for him in another state. Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597.

An officer of a foreign corporation coming into this state and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business of hiring hands," etc., and is not liable for the tax on emigrant agents, under this section. Lane v. Commissioners, 139 N. C. 443, 52 S. E. 140.

Amount of Tax Not Reviewable.—A tax on the business of procuring laborers for employment outside the state being an exercise of the power of the state to levy taxes, the amount is not reviewable by the courts. State v. Roberson, 136 N. C. 587, 48 S. E. 595. The court said: "When the constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise."

§ 7880(86). Plumbers, heating contractors, and electricians. — Every person, firm, or corporation engaged in the business of a plumber, installing plumbing fixtures, piping or equipment, steam or gas fitter, or installing hot-air heating systems, or installing electrical equipment or offering to perform such services, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business and shall pay for such license the following tax based on population:

Municipalities of less than two thousand population	$10.00
Municipalities of more than two thousand and less than five thousand population	15.00
Municipalities of more than five thousand and less than ten thousand population	20.00
Municipalities of more than ten thousand and less than twenty thousand population	25.00
Municipalities of more than twenty thousand and less than thirty thousand population	30.00
Municipalities of more than thirty thousand and less than forty thousand population	35.00
Municipalities of more than forty thousand and less than fifty thousand population	40.00
Municipalities of more than fifty thousand population	50.00

Provided, that any person, firm, or corporation engaged exclusively in the business enumerated in and licensed under this section shall not be liable for the tax provided in section 7880(53). All plumbing inspectors in cities or towns shall make a monthly report to the commissioner of revenue of all installation or repair permits issued for plumbing or heating.

(a) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 155.)

§ 7880(87). Trading stamps. — Every person, firm, or corporation engaged in the business of issuing, selling, and/or delivering trading stamps, checks, receipts, certificates, tokens, or other similar devices, to persons, firms, or corporations engaged in trade or business, with the understanding or agreement, expressed or implied, that the same shall be presented or given by the latter to their patrons as a discount, bonus, premium, or as an inducement to secure trade or patronage, and that the person, firm, or corporation selling and/or delivering the same will give to the persons presenting or promising the same, money or other thing of value, or any commission or preference in any way on account of the possession or presentation thereof, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license a tax of two hundred dollars ($200.00).

(a) This section shall not be construed to apply to a manufacturer or to a merchant who sells the goods, wares, or merchandise of such manufacturer, offering to present to the purchaser or customer a gift of certain value as an inducement to purchase such goods, wares, or merchandise.

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, s. 156.)

Trading Stamp Dealers.—Dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." Winston v. Beeson, 135 N. C. 271, 47 S. E. 457.

§ 7880(88). Process tax.—(a) In every indictment or criminal proceeding finally disposed of in the superior court, the party convicted or adjudged to pay the cost shall pay a tax of two dollars ($2.00): Provided, that this tax shall not be levied in cases where the county is required to pay the cost.

(b) At the time of suing out the summons in a civil action in the superior court or other court of record, or the docketing of an appeal from a lower court in the superior court, the plaintiff or the appellant shall pay a tax of two dollars: Provided, that this tax shall not be demanded of any plaintiff or appellant who has been duly authorized to sue or appeal in forma pauperis; but when in cases brought or in appeals in forma pauperis the costs are taxed against the defendants, the tax shall be included in the bill of costs: Provided, that this tax shall not be levied in cases where the county is required to pay the cost, and in tax foreclosure suits.

(c) No county, city, town, or other municipal corporation shall be required to pay said tax upon the institution of any action brought by it, but whenever such plaintiff shall recover in such action, the said tax shall be included in the bill of costs, and collected from the defendant.

(d) In any case where the party has paid the aforesaid cost in a civil action and shall recover in the final decision of the case, then such cost so paid by him shall be retaxed against the losing party adjudged to pay the cost, plus five per cent which the clerk of the superior court may retain for his services, and this shall be received by him, whether he is serving on a salary or a fee basis, and if on a salary basis, shall be in addition to such salary.

(e) This section shall not apply to cases in the

jurisdiction of magistrates' courts, whether civil or criminal, except upon appeals to the superior court from the judgment of such magistrate; and shall not apply for the docketing in the superior court of a transcript of a judgment rendered in any other court, whether of record or not.

(f) The tax provided for in this section shall be levied and assessed by the clerk of the superior or other court in all cases described herein; and on the first Monday in January, April, July, and October of each and every year he shall make to the commissioner of revenue a sworn statement and report in detail, showing the number of the case on the docket, the name of the plaintiff or appellant in civil action or the defendant in criminal action, and accompany such report and statement with the amount of such taxes collected or should have been collected by him in the preceding three months. Any clerk of the superior court failing to make the report and pay the amount of tax due under this section within the first fifteen days of the month in which such report is required to be made shall be liable for a penalty of ten per cent (10%) on the amount of tax that may be due at the time such report should be made. (1935, c. 371, s. 157.)

Where an appeal is taken from an order of the clerk of the Superior Court to the judge thereof, the judge has jurisdiction by mandate of § 637, and no "docketing" is involved within the meaning of this section, nor is the clerk a "lower court," so the two dollar tax as here provided is inapplicable to the Superior Court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83.

§ 7880(89). Morris Plan or industrial banks.—Every person, firm, or corporation engaged in the business of operating a Morris Plan or industrial bank in the State shall apply for and obtain a state license from the commissioner of revenue for the privilege of engaging in such business, and shall pay for such license the following tax:

When the total resources as of December thirty-first of the previous calendar year are—

Less than $250,000	$ 75.00
$250,000 and less than $500,000	150.00
$500,000 and less than $1,000,000	225.00
$1,000,000 and less than $2,000,000	300.00
$2,000,000 and less than $5,000,000	450.00
$5,000,000 and over	600.00

(a) Any such bank that shall begin business during the current tax year applicable to this article, the tax shall be calculated on the total resources at the beginning of business.

(b) Every person, firm, or corporation engaged in the business of soliciting loans or deposits for a Morris Plan or other industrial bank not licensed as such by the State for the county in which such person, firm, or corporation solicits business shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license a tax of fifty dollars ($50.00) per annum, in each county in which business is solicited.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half (½) of that levied by the State. (1935, c. 371, s. 158.)

§ 7880(90). Marriage license.—There shall be levied on all marriage licenses a state license tax of three dollars on each such license, which shall be assessed and collected by the register of deeds of the county in which the license is issued.

The register of deeds of each county shall submit to the commissioner of revenue, on the first Monday in January, April, July, and October of each year, a sworn statement or report in detail, showing the names of the persons to whom such license has been issued during the preceding three months, and accompany such sworn report or statement with the amount of such State taxes collected by him or that should have been collected by him in the preceding three months.

The counties may levy one dollar ($1.00) upon such marriage license, to be assessed and collected by the register of deeds and accounted for to the county treasurer at the same time and in the same manner as he accounts to the commissioner of revenue for the state tax. (1935, c. 371, s. 159.)

§ 7880(91). Marble yards.—Every person, firm, or corporation engaged in the business of manufacturing, erecting, jobbing, selling, or offering for sale monuments, marble tablets, gravestones or articles of like kind, or, if a nonresident, selling and erecting monuments, marble tablets, or gravestones, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this State, and shall pay for such license the following tax:

In unincorporated communities and cities or towns of less than 2,000 population ..	$15.00
In cities or towns of 2,000 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	30.00
In cities or towns of 10,000 and less than 15,000 population	40.00
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 population or over	70.00

In addition to the license tax levied in this section an additional tax shall be paid by the person, firm, or corporation engaged in the business taxed under this section of ten dollars ($10.00) for each person soliciting or selling.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns in which the principal office or plant of any such business is located may levy a license tax not in excess of that levied by the State. (1935, c. 371, s. 160.)

§ 7880(92). Manufacturers of ice cream. — (a) Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the commissioner of revenue a state license for each factory or place where manufactured and/or stored for distribution, and shall pay an annual state license tax of ten dollars ($10.00) in cities and towns of less than 2,500 population; twenty-five dollars ($25.00) in cities and towns having population between 2,500 and 10,000, and in cities and towns having a population of more than 10,000, fifty dollars ($50.00) and an additional tax of one-half cent for each gallon manufactured, sold, and/or distributed. Reports shall be made to the commissioner of revenue in such form as he may pre-

scribe within the first ten days of each month covering all such gross sales for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made.

(b) For the purpose of this section the words "ice cream" shall apply to ice cream, frozen custards, sherbets, water ices and/or similar frozen products.

(c) Every retail dealer selling at retail ice cream purchased from a manufacturer other than a manufacturer who has paid the tax imposed in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this State of ten dollars ($10.00).

(d) Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-fourth of the above. (1935, c. 371, s. 161.)

§ 7880(93). Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at wholesale or retail, or controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the commissioner of revenue a state license for the purpose of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every such store operated in this State in excess of one:

For not more than four additional stores, for each such additional store	$50.00
For five additional stores and not more than eight, for each such additional store	70.00
For nine additional stores and not more than twelve, for each such additional store	80.00
For thirteen additional stores and not more than sixteen, for each such additional store	90.00
For seventeen additional stores and not more than twenty, for each such additional store	100.00
For twenty-one additional stores and not more than thirty, for each such additional store	125.00
For thirty-one additional stores and not more than fifty, for each such additional store	150.00
For fifty-one additional stores and not more than one hundred, for each such additional store	175.00
For one hundred and one additional stores and not more than two hundred, for each such additional store	200.00
For two hundred and one additional stores and over, for each such additional store	225.00

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies, and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of $50.00 for each chain store located in such city or town. For the purpose of ascertaining the particular unit in each chain of stores not subject to taxation by the State under this section, and therefore not liable for city license tax, the particular store in which the principal office of the chain in this State is located shall be designated as the unit in the chain not subject to this tax.

In enforcing the provisions of this section, the commissioner of revenue may prorate the total amount of tax for the chain to the several units and the amount so prorated may be recovered from each unit in the chain in the same way as other taxes levied in this act.

This section shall not apply to retail or wholesale dealers in motor vehicles and automotive equipment and supply dealers at wholesale who are not liable for tax hereunder on account of the sale of other merchandise. (1935, c. 371, s. 162.)

Constitutionality and Nature of Tax.—The classification in this section is a reasonable one based upon a substantial difference. The statute applies equally to all within the class, and it is constitutional and valid. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838.

This section, imposes a license tax for the purpose of raising revenue, and not an ad valorem tax. Nor does the statute seek to regulate chain stores under the police power, and the tax is in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support ad valorem taxes on real and personal property. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838.

Prior Law Invalid.—The prior law, which imposed a license tax of fifty dollars each on stores operated in this State when there were six or more such stores under the same management, but which imposed no such tax on other mercantile establishments doing the same business when there less than six stores under one management, was held an arbitrary classification, and unconstitutional. Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701.

§ 7880(93)a. Branch or chain automotive service stations.—Every person, firm or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision or ownership, two or more automotive service stations, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, or motor fuels and/or lubricants, or any of such commodities, or who controls by lease either a lessor or lessee, or by contract, the manner in which any such automotive service station is operated, or the kind or kinds, character or brand or brands of merchandise which are sold therein, shall be deemed a branch or chain automotive service station operator, and shall apply for and obtain from the commissioner of revenue a state license for the purpose of engaging in such business of a branch or chain automotive service station operator, and shall pay for such license a tax according to the following schedule:

On each and every such automotive service station in this State in excess of one:

For not more than four additional automotive service stations, for each such station $10.00
For five additional automotive service stations and not more than eight, for each such additional station 15.00
For nine additional automotive service stations and not more than twelve, for each such additional station 20.00
For thirteen additional automotive service stations and not more than sixteen, for each such additional station 25.00
For seventeen additional automotive service stations and not more than twenty, for each such additional station 30.00
For twenty-one additional automotive service stations and not more than thirty, for each such additional station 35.00
For thirty-one additional automotive service stations, and not more than fifty, for each such additional station 47.50
For fifty-one additional automotive service stations and not more than one hundred, for each such additional station 60.00
For one hundred and one automotive service stations and over, for each such additional station 85.00

The term "chain automotive service stations," as used in this section, shall include automotive service stations operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies, and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management; and in like manner the term "chain automotive service station" shall apply to any group of automotive service stations where a majority interest is owned by an individual or partnership.

Nothing herein contained shall be construed as placing this tax on lessors or sub-lessors of such automotive service stations who have no control over the operation or management thereof and do not control or restrict the kind or kinds, character, brand or brands of merchandise or price of said brands of merchandise sold or offered for sale therein either in the lease, sub-lease, or by separate contract.

Counties, cities and towns shall not levy a license tax on the business taxed under this section, but this shall in no way affect the right given to counties, cities and towns to levy taxes under section 7880(84).

Any contract or agreemtnt which has been, or may hereafter be, entered into including separate contracts or portions of contracts, between any chain automotive service station operator and the operator of any unit in the chain operated by such branch or chain operator, by the terms of which the operator of any such unit shall be required to pay the tax levied in this section, or to reimburse the branch or chain automotive service station operator for tax paid under this section, is hereby declared to be contrary to public policy, and shall be null, void, and of no effect.

In enforcing this provision of this section the commissioner of revenue may prorate the total amount of tax for the chain to the several units, and the amount so prorated may be recovered from each unit in the chain in the same way as other taxes levied in this act.

Business taxed under this section shall not be taxed under section 7880(93). (1935, c. 371, s. 162½.)

§ 7880(94). Patent rights and formulas.—Every person, firm, or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the commissioner of revenue a separate state license for each and every county in this State where such patent right or formula is to be sold or offered for sale, and shall pay for each such separate license a tax of ten dollars ($10.00).

Counties, cities or towns may levy a license on the business taxed under this section not in excess of the taxes levied by the State. (1935, c. 371, s. 163.)

See section 7796 and the notes thereto.

In General.—It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative. Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423.

License Tax by State Exclusive.—The general assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other license tax or fee. Loan Ass'n v. Commissioners, 115 N. C. 410, 414, 20 S. E. 526.

§ 7880(95). Obsolete. As to subsequent statute relating to the taxation of merchants, see § 7880(156)g.

§ 7880(96). Obsolete. As to subsequent statute relating to the taxation of motor vehicles for hire, see § 2621(29).

Constitutionality.—The former section classifying trucks, etc., hauling freight for hire was held to be upon a reasonable and substantial basis, and not discriminatory contrary to the provisions of Const., Art. V, sec. 3, or sec. 1. Fourteenth Amendment to the Constitution of the United States. Clark v. Maxwell, 197 N. C. 604, 150 S. E. 190. See also 8 N. C. Law Rev. 218.

Persons operating motor vehicles for hire without regard to fixed termini are required to obtain only the "for hire" license prescribed by this section and not a franchise as required by § 2613(k). See Winborne v. Mackey, 206 N. C. 554, 174 S. E. 577. Followed in Winborne v. Browning, 206 N. C. 557, 174 S. E. 579; Winborne v. Sutton, 206 N. C. 559, 174 S. E. 580.

§ 7880(97). Tax on seals affixed by officers. — Whenever the seal of the State, of the state treasurer, the secretary of state, or of any other public officer required by law to keep a seal (not including clerks of courts, notaries public, and other county officers) shall be affixed to any paper, the tax to be paid by the party applying for same shall be as follows:

For the Great Seal of the State, on any commission $2.50
For the Great Seal of the State on warrants of extradition for fugitives from justice from other States, the same fee and seal tax shall be collected from the State

making the requisition which is charged in this State for like service.

For the seal of the state department, to be collected by the secretary of state $1.00

For the seal of the state treasurer, to be collected by him 1.00

For a scroll, when used in the absence of a seal, the tax shall be on the scroll, and the same as for the seal.

(a) All officers shall keep a true, full, and accurate account of the number of times any of such seals or scrolls are used, and shall deliver to the governor of the State a sworn statement thereof.

(b) All seals affixed for the use of any county of the State, used on the commissions of officers of the national guard, and any other public officer not having a salary, under the pension law, or under any process of court, shall be exempt from taxation, or to any commission issued by the governor to any person in the employ of the State, or to be employed by the State. (1935, c. 371, s. 166.)

§ 7880(98). Unlawful to operate without license.—When a license tax is required by law, and whenever the general assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license. (1935, c. 371, s. 181.)

See § 7880(104).

§ 7880(99). Manner of obtaining license from the commissioner of revenue.—(a) Every person, firm, or corporation desiring to obtain a state license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a state license is required shall, unless otherwise provided by law, make application therefor in writing to the commissioner of revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the commissioner of revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a state license with the tax prescribed by this article, the commissioner of revenue, if satisfied of its correctness, shall issue a state license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the commissioner of revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license. (1935, c. 371, s. 182.)

§ 7880(100). Persons, firms, and corporations engaged in more than one business to pay tax on each.—Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this article subject to state license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this article for each separate business, trade, employment, or profession. (1935, c. 371, s. 183.)

§ 7880(101). Effect of change in name of firm.—No change in the name of the firm nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, the business shall be regarded as continuing. (1935, c. 371, s. 184.)

§ 7880(102). License may be changed when place of business is changed. — When a person, firm, or corporation has obtained a state license to engage in any business, trade, employment, or profession at any definite location in a county, and desires to remove to another location in the same county, the commissioner of revenue may, upon proper application, grant such person, firm, or corporation permission to make such move, and may endorse upon the state license his approval of change in location. (1935, c. 371, s. 185.)

§ 7880(103). Property used in a licensed business not exempt from taxation.—A state license, issued under any of the provisions of this article, shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1935, c. 371, s. 186.)

§ 7880(104). Engaging in business without a license.—(a) All state license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty percent of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm, or corporation shall pay additional tax of five per centum of the amount of the state license tax which was due and payable on the first day of June of the current year, in addition to the state license tax imposed by this article, for each and every thirty days that such state license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the commissioner of revenue and paid with the state license tax,

and shall become a part of the state license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this act in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a state license under this article without such state license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such state license be continued, such person, firm, or corporation shall pay an additional tax of five per centum of the amount of such state license tax which was due and payable at the commencement of the business, trade, employment, or profession, or doing the act, in addition to the state license tax imposed by this article, for each and every thirty (30) days that such state license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the commissioner of revenue and paid with the state license tax, and shall become a part of the state license tax.

(d) If any person, firm, or corporation shall fail, refuse, or neglect to make immediate payment of any taxes due and payable under this article, additional taxes, and/or any penalties imposed pursuant thereto, upon demand, the commissioner of revenue shall certify the same to the sheriff of the county in which such delinquent lives or has his place of business, and such sheriff shall have the power and shall levy upon any personal or real property owned by such delinquent person, firm, or corporation, and sell the same for the payment of the said tax or taxes, penalty and costs, in the same manner as provided by law for the levy and sale of property for the collection of other taxes; and if sufficient property is not found, the said sheriff shall swear out a warrant before some justice of the peace or recorder in the county for the violation of the provisions of this act and as provided in this act. (1935, c. 371, s. 187.)

See § 7880(98).

§ 7880(105). Each day's continuance in business without a state license a separate offense.—Each and every day that any person, firm, or corporation shall continue to exercise or engage in any business, trade, employment, or profession, or do any act in violation of the provisions of this article, shall be and constitute a distinct and a separate offense. (1935, c. 371, s. 188.)

§ 7880(106). Duties of commissioner of revenue.—(a) Except where otherwise provided, the commissioner of revenue shall be the duly authorized agent of this State for the issuing of all state licenses and the collection of all license taxes under this article, and it shall be his duty and the duty of his deputies to make diligent inquiry to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the state license and paid the tax thereon levied.

(b) The commissioner of revenue shall continually keep in his possession a sufficient supply of blank state license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each state license certificate that is to be good and valid in each and every county of the State the words "state-wide license," and shall stamp or imprint on each and every license certificate the words, "issued by the commissioner of revenue."

(c) Neither the commissioner of revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the commissioner of revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate." (1935, c. 371, s. 189.)

§ 7880(107). License to be procured before beginning business.—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a state license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade, and/or profession, or do the act for which a state license is required in this article or schedule, without having such state license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that such license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the state license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense. (1935, c. 371, s. 190.)

§ 7880(108). Sheriff and city clerk to report.—The sheriff of each county and the clerk of the board of aldermen of each city or town in the State shall, on or before the fifteenth day of June of each year, make a report to the commissioner

of revenue, containing the names and the business, trade, and/or profession of every person, firm, or corporation in his county or city who or which is required to apply for and obtain a State license under the provisions of this article or schedule, and upon such forms as shall be provided and in such detail as may be required by the commissioner of revenue. (1935, c. 371, s. 191.)

Art. 3. Schedule C. Franchise Tax

§ 7880(109). Defining taxes in this article. — The taxes levied and assessed in this article or schedule shall be paid as specifically herein provided, and shall be for the privilege of engaging in or carrying on the business or doing the act named; and if a corporation, shall be a tax for the continuance of its corporate rights and privileges granted under its charter, if incorporated in this State, or by reason of any act of domestication if incorporated in another State, and shall be subject to other regulations mentioned in this act. (1935, c. 371, s. 201.)

See 11 N. C. Law Rev., 258, for general amount of increase made in these taxes by the 1933 act.

Franchise Tax on Corporation.—The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338.

Whenever a tax, is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, and is a franchise tax. Burroughs on Tax., 169. Worth v. Petersburg R. Co., 89 N. C. 301, 302, 306.

Tax on Gross Receipts.—A tax on the gross receipts of an insurance company is a privilege tax. Insurance Co. v. Stedman, 130 N. C. 221, 41 S. E. 279.

§ 7880(110). Franchise or privilege tax on railroads. — Every person, firm, or corporation, domestic or foreign, owning and/or operating a railroad in this State, shall, in addition to all other taxes levied and assessed in the State, pay to the commissioner of revenue a franchise, license, or privilege tax for the privilege of engaging in such railroad business within the State of North Carolina, as follows:

(a) Such person, firm, or corporation shall furnish to the commissioner of revenue a copy of the report and statement required to be made to the state board of assessment in the Machinery Act and such other and further information as the commissioner of revenue may require; and upon such report and statement the commissioner of revenue shall ascertain the value upon which the tax to be paid by such person, firm, or corporation as a license or privilege tax shall be calculated.

(b) The value upon which such calculations shall be made by the commissioner of revenue and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina shall be the value of the total property, tangible and intangible, in this State, for each such railroad company as assessed for ad valorem taxation for the year in which such report is made.

(c) The franchise or privilege tax which every such railroad company shall pay for the privilege of carrying on or engaging in intrastate commerce within this State shall be ninety one-hundredths of one per cent of the value ascertained as above by the commissioner of revenue, and tax shall be due and payable on or before the first day of October of each year, or within thirty days after notice of statement of such tax.

(d) If any such person, firm, or corporation shall fail, neglect, or refuse to make and deliver the report and statement provided for in this section, the commissioner of revenue shall estimate, from the reports and records on file in the department of the state board of assessment, the value upon which the amount of tax due by such company under this section shall be computed, shall levy and assess the franchise or privilege tax upon such estimate, and shall collect the same, together with such penalties herein imposed for failure to make the report and statement.

(e) It is the intention of this section to levy upon railroad companies a license, franchise, or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within this State, and not a part of interstate commerce; that the tax provided for in this section is not intended to be a tax for the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

(f) No county, city or town shall levy a license, franchise, or privilege tax on the business taxed under this section. (1935, c. 371, s. 202.)

Uniformity in Mode of Assessment.—See note of Worth v. Petersburg R. Co., 89 N. C. 301, under section 7880(174).

§ 7880(111). Franchise or privilege tax on electric light, power, street railway, gas, water, sewerage, and other similar public-service companies not otherwise taxed.—(1) Every person, firm, or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or gas, owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, including automobile busses, for the transportation of freight or passengers for hire, shall annually, on or before the first day of August, make and deliver to the commissioner of revenue, upon such forms and blanks as required by him, a report and statement, verified by the oath of the officer or agent making such report and statement, containing the following information as of the first day of July of the current calendar year:

(a) The total gross receipts for the year ending the thirtieth day of June of the next preceding fiscal year from such business within and without this State.

(b) The total gross receipts for the same period from such business within this State.

(c) The total gross receipts from the commodities described in this section sold to any other person, firm, or corporation engaged in selling such commodities to the public, and actually

sold by such vendee, to the public, for consumption and tax paid by the vendee, together with the name of such vendee, with the amount sold and the price paid by each.

(d) The total amount and price paid for such commodities purchased from another public-service company doing business in this State, and the name or names of the vendor.

(2) From the total gross receipts within this State there shall be deducted the gross receipts reported in subsection (1) (c) of this section: Provided, that this deduction shall not be allowed where the sale of such commodities were made to any person, firm, or corporation or municipality which is exempted by law from the payment of the tax herein imposed upon such commodities when sold or used by it.

(3) Such person, firm, or corporation shall pay an annual franchise or privilege tax of six per cent of the total gross receipts derived from such business within this State, after the deductions allowed as herein provided for, which said tax shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the commissioner of revenue at the time of filing the report herein provided for: Provided, the tax upon privately owned water companies shall be four (4) per cent of the total gross receipts derived from such business within this State.

(3a) Any person, firm, or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section on or before August first of each year shall in addition to all other penalties prescribed in this act pay an additional tax of ten per cent and interest at the rate of six per cent per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(4) The report herein required of gross receipts within and without the State, to be made in each year on the first day of August, shall include the total gross receipts for the previous year ending June thirtieth of all properties owned and operated by the reporting company on the first day of August in each year, whether operated by it for the previous annual period, or whether intermediately acquired by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each year with reference to the gross receipts of the property operated for the previous year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of August in each year.

(5) Companies taxed under this section shall not be required to pay the franchise tax imposed by sections 7880(118) or 7880(119), unless the tax levied by sections 7880(118) and 7880(119) exceed the tax levied in this section, and no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than that which is now imposed by any such city or town. (1935, c. 371, s. 203.)

§ 7880(112). Franchise or privilege tax on Pullman, sleeping, chair, and dining cars.—Every person, firm, or corporation, domestic or foreign, engaged in the business of operating any Pullman, sleeping, chair, dining, or other similar cars, where an extra charge is made for the use or occupancy of same, shall annually, on or before the first day of August, make and deliver to the commissioner of revenue, upon such forms, blanks, and in such manner as may be required by him, a full, accurate, and true report and statement, verified by the oath of the officer or agent making such report, of the total gross receipts of such person, firm, or corporation from such business wholly within this State during the year ending the thirtieth day of June of the current year.

(1) Such person, firm, or corporation shall pay an annual privilege, license, or franchise tax of ten (10) per cent of the total gross receipts derived from such business wholly within this State; which said tax shall be paid for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the commissioner of revenue at the time of filing the report and statements herein provided for.

(2) No county, city or town shall impose any franchise or privilege tax on the business taxed under this section. (1935, c. 371, s. 204.)

§ 7880(113). Franchise or privilege tax on express companies.—Every person, firm, or corporation, domestic or foreign, engaged in this State in the business of an express company as defined in this act, shall, in addition to a copy of the report required in the Machinery Act, annually, on or before the first day of August, make and deliver to the commissioner of revenue a report and statement, verified by the oath of the officer or agent making such report or statement, containing the following information as of the first day of July of the current year:

(a) The average amount of invested capital employed within and without the State in such business during the year ending the thirtieth day of June of the current year.

(b) The total net income earned on such invested capital from such business during the year ending the thirtieth day of June of the current year.

(c) The total number of miles of railroad lines or other common carriers over which such express companies operate in this State during the year ending the thirtieth day of June of the current year.

(1) Every such person, firm, or corporation, domestic or foreign, engaged in such express business within this State shall pay to the commissioner of revenue, at the time of filing the report required in this section, the following annual franchise or privilege tax for the privilege of engaging in such express business within this State:

Where the net income on the average capital invested during the year ending the thirtieth day of June of the current year is six per cent or less, eighteen dollars ($18.00) per mile of railroad lines.

More than six per cent and less than eight per

cent, twenty-one dollars ($21.00) per mile of railroad lines.

Eight per cent and over, twenty-five dollars ($25.00) per mile of railroad lines operated over.

(2) Every such person, firm, or corporation, domestic or foreign, who or which engages in such business without having had previous receipts upon which to levy the franchise or privilege tax, shall report to the commissioner at the time of beginning business in this State and pay for such privilege of engaging in business in this State a tax of seven dollars and fifty cents ($7.50) per mile of the railroad lines operated over or proposed to operate over.

(3) Counties shall not levy a franchise, privilege, or license tax on the business taxed under this section, and municipalities may levy an annual franchise, privilege, or license tax on such express companies for the privilege of doing business within the municipal limits as follows:

Municipalities of less than 500 population	$ 5.00
Municipalities of 500 and less than 1,000 population	10.00
Municipalities of 1,000 and less than 5,000 population	20.00
Municipalities of 5,000 and less than 10,000 population	30.00
Municipalities of 10,000 and less than 20,000 population	50.00
Municipalities of 20,000 and over	75.00

(1935, c. 371, s. 205.)

Constitutionality.—A tax upon express companies of $15.00 per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of the former statute, was held valid under the provisions of our State Constitution, Art. V, sec. 3. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553.

Where a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from intrastate business, not taking into account large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. Railway Express Agency v. Maxwell, 199 N. C. 637, 638, 155 S. E. 553.

Question of Earnings within and without State Immaterial.—Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six per cent or less, $18.00 when the net income does not exceed eight per cent, and $21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other States, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision. Railway Express Agency v. Maxwell, 199 N. C. 637, 638, 155 S. E. 553.

Uniformity Required.—See note of Worth v. Petersburg R. Co., 89 N. C. 301, under section 7880(174).

§ 7880(114). Franchise or privilege tax on telegraph companies.—Every person, firm, or corporation, domestic or foreign, engaged in operating the apparatus necessary to communication by telegraph between points within this State shall annually, on or before the first day of August, furnish the commissioner of revenue a copy of the report and statement required to be filed with the state board of assessment in the Machinery Act; and at the same time such report and statement is filed with the commissioner of revenue shall pay to him for the privilege of engaging in such business within the State an annual franchise or privilege tax of seven dollars ($7.00) per mile of line of poles or conduits owned and/or operated by such persons, firms, or corporations in this State: Provided, that the annual franchise or privilege tax on any telegraph company, the annual gross receipts of which do not exceed one thousand dollars ($1,000.00), shall be two dollars ($2.00) per mile of line of poles or conduits owned and operated by such company.

(a) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce or upon any business transacted by the federal government.

(b) Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section, and municipalities may levy the following license tax:

Less than 5,000 population	$10.00
5,000 and less than 10,000 population	15.00
10,000 and less than 20,000 population	20.00
20,000 population and over	50.00

(1935, c. 371, s. 206.)

§ 7880(115). Franchise or privilege tax on telephone companies. — Every person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in, or across this State, shall, within thirty days after the first day of January, April, July, and October of each year, make a quarterly return, verified by the oath of the officer or agent making such return, to the commissioner of revenue, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay the license or privilege tax herein imposed at the time of making such return.

(a) An annual franchise or privilege tax of six per cent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of this State or not, in the proportion that the pole mileage of such company in the State bears to the pole mileage in another state through which the message is transmitted: Provided, that such telephone companies whose records show their gross receipts within this State upon a basis other than the pole mileage proportion may, with the approval of the commissioner of revenue, make return of their gross receipts upon such other basis: Provided further, where any city or town in this State has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue or tax not exceeding one per cent of such revenues, the amount so

paid by such operating company, upon being certified by the treasurer of such municipality to the commissioner of revenue, shall be from time to time credited by the department of revenue to such telephone company upon the tax imposed by the State under this section of this act.

(b) Any such person, firm, or corporation, domestic or foreign, who or which fails, neglects, or refuses to make the return, and/or pay the tax at the time provided for in this section shall pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax.

(c) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(d) Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section. (1935, c. 371, s. 207.)

See section 7880(174) and note thereunder.

§ 7880(116). Franchise or privilege tax on insurance companies.—Every person, firm, or corporation, domestic or foreign, which contracts on his, their, or its account to issue any policies for or agreements for life, fire, marine, surety, guaranty, fidelity, employers' liability, liability, credit, health, accident, livestock, plate glass, tornado, automobile, automatic sprinkler, burglary, steam boiler, and all other forms of insurance shall apply for and obtain from the insurance commissioner a state license for the privilege of engaging in such business within this State, and shall pay for such state license the following tax:

(1) The annual license or privilege tax, due and payable on or before the first day of April of each year, shall be for each such license issued to:

An insurance rate-making company or association	$350.00
A life insurance company or association	250.00
A fire insurance company or association of companies operating a separate or distinct plant of agencies	200.00
An accident or health insurance company or association	200.00
A marine insurance company or association	200.00
A fidelity or surety company or association	200.00
A plate-glass insurance company or association	200.00
A boiler insurance company or association	200.00
A foreign mutual insurance company or association	200.00
A domestic farmers' mutual insurance company or association	10.00
A fraternal order	25.00
A bond, investment, dividend, guaranty, registry, title guaranty, credit, fidelity, liability, or debenture company or association	200.00
All other insurance companies or associations except domestic mutual burial associations	200.00

On all domestic mutual burial associations, and on each additional branch thereof operated (and where any mutual burial association has designated more than one undertaker to operate for it), the tax shall be in each instance as upon a separate branch thereof:

With a membership of less than 5,000	$ 50.00
With a membership of 5,000 or less than 15,000	75.00
With a membership of 15,000 or more	100.00

(a) When the paid-in capital stock and/or surplus of a life insurance company does not exceed one hundred thousand dollars ($100,000.00) the license tax levied in subsection (1) shall be one-half the amount named.

(2) Every such person, firm, or corporation, domestic or foreign, engaged in the business hereinbefore described in this section, shall by its general agent, president, or secretary, within the first thirty days of January and July of each year, file with the insurance commissioner of this State a full, accurate, and correct report and statement, verified by the oath of such general agent or president, secretary, or some officer at the home or head office of the company or association in this country, of the total gross premium receipts including premiums or deposits on annuity contracts derived from such insurance business from the residents of this State, or on property located therein, during the preceding six months of the previous calendar year, and at the time of making such report and statement shall, except as hereinafter provided, pay to the insurance commissioner, in addition to other license taxes imposed in this section, a license or privilege tax for the privilege of engaging in such business in this State, a license tax of two and one-half per cent (2½%) upon the amount of such gross premium receipts, with no deduction for dividends, whether returned in cash or allowed in payment or reduction of premium or for additional insurance, and without any deduction except for return premiums or return assessments. The rate of tax on premiums for liability under the Workmen's Compensation Act for all insurance companies collecting such premiums shall be four per cent (4%) on all premiums collected in this State on such liability insurance, and a corresponding rate of tax shall be collected from self-insurers: Provided, if any general agent shall file with the insurance commissioner a sworn statement showing that one-fifth of the entire assets of his company are invested and are maintained in any of the following securities or property, to-wit: bonds of this State or any county, city, town, or school district of this State, or in loans to citizens or corporations or organizations of this State, then such tax shall be three-fourths per centum of such gross premium receipts: Provided, that the provisions herein as to tax and premium receipts shall not apply to domestic farmers' mutual fire insurance companies, nor to fraternal orders or societies that do not operate for a profit and do not issue policies on any persons except its members.

(3) Every special or district agent, manager or

organizer, general agent, local canvassing agent, resident or nonresident adjuster, or nonresident broker, representing any company referred to in this section, shall on or before the first day of April of each year apply for and obtain from the insurance commissioner a license for the privilege of engaging in such business in this State, and shall pay for such license for each company represented the following annual tax:

Special or district agent, manager, or organizer (including seal)	$ 5.00
General agent	6.00
Local or canvassing agent (including seal)	2.50
Resident fire insurance adjuster	2.00
Nonresident fire insurance adjuster	5.00
Nonresident broker	10.00

But any such company having assets invested and maintained in this State as provided in subsection (3) of this section shall pay the following license fees: for

Special agent (including seal)	$2.50
Local canvassing agent (including seal)	1.00

Any person not licensed as an insurance agent on April first, one thousand nine hundred and thirty-three, and applying for license thereafter, shall pay an examination fee of ten dollars ($10.00), to be paid to the insurance commissioner as other license fees and taxes: Provided, agents for farm mutual fire insurance companies shall not be required to take an examination and pay the examination fee.

In the event a license issued under this subsection is lost or destroyed, the insurance commissioner, for a fee of fifty cents ($.50), may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the said original license. There shall be no charge for the seal affixed to such certificate of said license.

(4) Any person, firm, or corporation, domestic or foreign, exchanging reciprocal or inter-insurance contracts as provided herein, shall pay through their attorneys an annual license fee, due and payable on the first day of April of each year, of two hundred dollars ($200.00) and two and one-half per cent (2½%) of the gross premium deposits, and also all other regular fees prescribed by law, to be reported, assessed, and paid as other gross premium taxes provided for in this section: Provided, the tax on workmen's compensation insurance premiums shall be the same as that fixed in subsection (2) of this section.

(5) Companies paying the tax levied in this section shall not be liable for franchise tax on their capital stock, and no county, city or town shall be allowed to impose any additional tax, license or fee, other than ad valorem taxes, upon any insurance company or association paying the tax levied in this section. The license fees and taxes imposed in this section shall be paid to the insurance commissioner. (1935, c. 371, s. 208.)

Constitutionality.—Foreign corporations do business here by comity of the state, and the latter may impose a license tax as a condition upon which such corporation may do business here under the protection of our laws, where such is not an interference with interstate commerce, or that tax otherwise invalid. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568; and it is no valid objection that such tax is higher than that imposed on similar domestic corporations. Id.

The license tax imposed upon the gross receipts of insurance companies on business written within the borders of our State, is not in contravention of the fourteenth amendment to the Constitution of the United States, as to due process and equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

The determination of the question as to just how far a state legislature could go in prohibiting foreign corporation from doing business within the state or just what restrictions and condition could be validly imposed has given rise to many conflicting decisions. The cases, over a long period of time, were far from being harmonious and the various courts could not agree as to where the line of demarcation should be drawn. Finally the question was presented to the United States Supreme Court and the substance of the present rules in regard to this subject appears to be this: (1) a state may validly close her doors to a foreign corporation and prohibit it from coming within her borders to do business. (2) A state, upon granting admittance to a foreign corporation, may validly impose any and all restrictions and conditions it sees fit, and such corporation cannot object that a compliance with the same conditions is not exacted of a domestic corporation.

This seems to be the limit of the state's power, and the line is drawn when (3) it is held that a state, upon permitting a foreign corporation to do business within her borders, cannot require that if a suit or action is brought against such corporation, then the corporation cannot carry the case to a federal court.—Ed. Note.

Tax on Gross Earnings.—The tax on gross receipts means all receipts from business done in the state, whether the money is paid here or forwarded to the main office. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

Same—A License Tax.—The tax imposed upon the gross earnings of foreign life insurance companies doing business within this state, derived within this state, is a license or occupation tax. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

§ 7880(117). Obsolete.

§ 7880(118). Franchise tax on domestic corporations. — (1) Every domestic corporation, except as otherwise provided in this article, or schedule, organized under the laws of this State, shall annually on or before the first day of July of each year make and deliver to the commissioner of revenue in such form as he may prescribe a full, accurate, and complete report and statement, verified by the oath of the president, vice-president, secretary, or general manager, containing such facts and information as may be required by the commissioner of revenue as shown by the books and records of the corporation as at the close of its last calendar or fiscal year.

(2) Upon the filing of the report and statement provided for in this section the commissioner of revenue shall determine the amount of the issued and outstanding capital stock, surplus and undivided profits of each such domestic corporation, which in no case shall be less than the assessed value of all the property of such domestic corporation in this State for the year in which report and statement is made nor less than the amount of issued and outstanding capital stock. No reservation or allocation from surplus and undivided profits shall be allowed other than for definite and accrued legal liabilities. Taxes accrued and dividends declared shall be treated as deductible liabilities.

After ascertaining and determining the amount of the capital stock, surplus and undivided profits as herein provided, there is hereby levied and the commissioner of revenue shall assess a franchise tax for the privilege of carrying on, do-

ing business, and/or the continuance of its charter within the State, on each and every such corporation at the rate of one dollar and seventy-five cents ($1.75) for each one thousand dollars ($1,000.00) of the determined amount of its capital stock, surplus and undivided profits; and such tax shall not be less than $10.00 in any case, and shall be paid to the commissioner of revenue within thirty days after date of notice of such tax. The provisions of this section that the basis of franchise tax shall not be less than the amount of issued and outstanding capital stock shall not apply to corporations in receivership, but such franchise tax shall be based upon the other factors set out in this section. The provisions of this subsection that the basis for franchise tax shall not be less than the amount of issued and outstanding capital stock shall not apply to domestic corporations, ninety per cent of whose stock is owned by persons or corporations to whom or to which such stock was issued prior to January 1, 1935, in part payment or settlement of their respective deposits in any closed bank in the State of North Carolina.

(3) Counties, cities, and towns shall not levy a franchise tax on the corporations taxed under this section. (1935, c. 371, s. 210.)

See 12 N. C. Law Rev., 35.

§ 7880(119). Franchise tax on foreign corporations.—(1) Every foreign corporation permitted to do business in this State and owning or using any part or all of its capital or plant in this State and subject to compliance with all other provisions of law and in addition to all other statements required by law shall annually on or before the first day of July make and deliver to the commissioner of revenue, in such form as he may prescribe, a full, accurate and complete report and statement, verified by the oath of the president, vice-president, secretary, or general manager, containing such facts and information as may be required by the commissioner of revenue, as shown by the books and records of the corporation as at the close of its last calendar or fiscal year.

(2) Upon the filing of the report and statement provided for in this section the commissioner of revenue shall determine the amount of the issued and outstanding capital stock, surplus and undivided profits of each such foreign corporation, less the book value of good-will, including brands, except such brands as have been purchased by the corporation. No reservation or allocation from surplus and undivided profits shall be allowed other than for definite and accrued legal liabilities. Taxes accrued and dividends declared shall be treated as deductible liabilities.

After ascertaining and determining the amount of the capital stock, surplus and undivided profits as herein provided, the commissioner of revenue shall allocate to the business of each such corporation permitted to do business in this State a proportion of the amount of the capital stock, surplus and undivided profits of each such foreign corporation in accordance with the general rules set out in section 7880(128) as the basis for allocating the proportion of the total net income of each such corporation taxable as income earned in this State. The proportion of the total capital stock, surplus and undivided profits of each such foreign corporation allocated in accordance with the general rules of allocation set out in section 7880(128) shall be deemed to be the proportion of the capital stock, surplus and undivided profits of each such foreign corporation used in connection with its business in this State and liable for an annual franchise tax under this section. After determining the amount of the capital stock, surplus and undivided profits of each such foreign corporation allocated for franchise tax under this section, there is hereby levied and the commissioner of revenue shall assess for the privilege of exercising and/or the continuance of its franchise, or doing and continuing business within this State, a franchise tax at the rate of one dollar and seventy-five cents ($1.75) for each one thousand dollars ($1,000.00) of the amount of capital stock, surplus and undivided profits so allocated to the business of each such foreign corporation in this State. The proportion of the total capital stock, surplus and undivided profits allocated for franchise taxation under this section shall in no case be less than the total assessed value of the real and personal property in this State of each such foreign corporation, nor less than its investment and/or actual book value of real and personal property in this State. The tax imposed in this section shall in no case be less than ten dollars ($10.00) and shall be paid to the commissioner of revenue within thirty days after date of notice of such tax.

(3) Counties, cities, and towns shall not levy a franchise tax on the corporations taxed under this section. (1935, c. 371, s. 211.)

§ 7880(119)a. Subsidiary corporations.—(a) If in the opinion of the commissioner the capital stock of a corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership is inadequate for its business needs apart from credit extended or indebtedness guaranteed by the parent or an affiliated corporation, the commissioner shall, in determining the amount of capital, surplus and undivided profits of such corporation with respect to its liability for franchise tax under sections 7880(118) and 7880(119) include its indebtedness owed to or guaranteed by the parent or an affiliated corporation in the amount of capital, surplus and undivided profits of such corporation in determining the basis for its franchise tax liability under this act.

(b) Every report required under sections 7880(118) and 7880(119) shall contain a copy of the last comparative balance sheet statement filed with the federal government for income tax purposes. (1935, c. 371, s. 211½.)

§ 7880(119)b. New corporations.—(a) No corporation, domestic or foreign, shall be permitted to do business in this State without paying the franchise tax assessed in this act. When such domestic corporation is organized under laws of this State or such foreign corporation is domesticated in this State, and has not heretofore done business in the State, upon which a report might be filed under sections 7880(118) and 7880(119), notice thereof shall be given to the commissioner of revenue by such corporation, and it shall be compe-

tent for the commissioner of revenue and he is hereby authorized to obtain such information concerning the basis for the levy of the tax from such other information he can obtain, and to that end may require of such corporation to furnish him such a report as may clearly reflect and disclose the amount of its issued and outstanding capital stock, surplus and undivided profits as set out in sections 7880(118) and 7880(119), and information as to such other factors as may be necessary to determine the basis of the tax. When this has been determined, in accordance with the provisions of sections 7880(118) and 7880(119), respectively, as far as the same may be applicable, and upon the information which he has secured, the commissioner of revenue shall thereupon determine the amount of franchise tax to be paid by such corporation, which, in no event, shall be less than a ratable proportion of the tax for the franchise privilege extended for one year on the determined basis, nor less than the minimum tax of ten dollars ($10.00).

(b) Any corporation failing to notify the commissioner of revenue as provided for in sub-section (a) of this section within twenty (20) days after date of the incorporation or domestication of such corporation in this State shall be subject to all penalties and remedies imposed for failure to file any report required under this article or schedule. (1935, c. 371, s. 211¾.)

§ 7880(120). Notice of franchise tax assessed.— After fixing and determining the amount of issued and outstanding capital stock, surplus and undivided profits of a domestic corporation and the proportion of the amount of issued and outstanding capital stock, surplus and undivided profits of a foreign corporation as prescribed in sections 7880(118) and 7880(119) the commissioner of revenue shall notify such corporation of the amount fixed and determined by him as a basis for the franchise tax, and each such corporation may at any time within ten days after date of such notice apply to the commissioner of revenue for a review and reassessment, and the commissioner of revenue shall hear such evidence as may be offered and shall make such findings as the case may demand. (1935, c. 371, s. 212.)

§ 7880(121). Corporations not mentioned. — None of the provisions in sections 7880(118) and 7880(119) shall apply to fraternal, benevolent, or educational corporations not operating for a profit; nor to banking and insurance companies. The provisions of sections 7880(118) and 7880(119) shall apply to railroad, electric light, power, street railway, gas, water, pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise tax levied in sections 7880(118) and 7880(119) exceed the franchise taxes levied in other sections of this article or schedule. The exemptions in this section shall apply only to those corporations specifically mentioned, and no other. (1935, c. 371, s. 213.)

§ 7880(122). Penalty for non-payment. — Any person, firm, or corporation, domestic or foreign, failing to pay the license, privilege, or franchise tax levied and assessed under this article or schedule when due and payable shall, in addition to all other penalties prescribed in this act, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax: Provided further, that any person, firm, or corporation failing to file the report required in this article or schedule on or before the date specified shall pay a penalty of ten per centum (10%) of the tax found to be due, which penalty shall in no case be less than ten dollars ($10.00). (1935, c. 371, s. 214.)

§ 7880(123). When franchise or privilege taxes payable.—(a) Every corporation, domestic or foreign, from which a report is required by law to be made to the commissioner of revenue shall, unless otherwise provided, pay to said commissioner annually the franchise tax imposed by sections 7880(118) and 7880(119).

(b) It shall be the duty of the commissioner of revenue to mail every such corporation a statement of the amount of such taxes, which statement shall contain a copy of so much of this and other sections of this act as relates to penalties for failure to pay said taxes.

(c) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is imposed, to transmit the amount of the tax to the commissioner of revenue within thirty days from the date of such notice.

(d) Individual stockholders in any corporation, joint stock association, limited partnership, or company paying a tax on its entire capital stock shall not be required to list or pay ad valorem tax on the shares of stock owned by them.

(e) Corporations in the State legally holding shares of stock in other corporations, upon which the tax has been paid to this State by the corporation issuing the same, shall not be required to list or pay an ad valorem tax on said shares of stock.

(f) No individual stockholder of shares of stock in any foreign corporation who has complied with section 7880(129) by paying a tax of six per cent on the income received from such shares of stock shall be required to list or pay any ad valorem tax on any shares of its capital stock in this State, and the situs of such shares of stock in foreign corporations owned by residents of this State who have complied with section 7880(129) for the purposes of this act is hereby declared to be at the place where such corporation undertakes and carries on its principal business. The situs of shares of stock in any foreign corporation owned by residents of this State who fail to comply with the provisions of section 7880(129) is hereby declared to be the place of residence of such shareholders resident in this State. If any such resident shareholders of stocks in foreign corporations shall fail or refuse to comply with the provisions of section 7880(129), it shall be the duty of the commissioner of revenue to certify to the board of commissioners of the county or of the county and city where such shareholder resides the amount and value of such shares of stock, the company or companies in which such shares of stock are held,

and upon such certification it shall be the duty of the board of commissioners of such county, or of such county and city, to enter the value of such shares of stock on the tax books of the county, or of the county and city, and to compute against the value of such shares of stock the rates of taxation levied by such county or county and city, and the taxes so computed shall become a lien upon any property owned by such shareholder and subject to all the legal remedies provided for collection of other property taxes. (1935, c. 371, s. 215.)

§ 7880(123)a. Additional taxes. — If the commissioner of revenue discovers from the examination of the return, or otherwise, that franchise or privilege tax of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice, in writing, to the taxpayer of such deficiency. The commissioner of revenue, in the case of any taxpayer who has failed to file any return required under this article or schedule, shall, from facts and information in his knowledge, prepare a tentative return for such taxpayer, and shall assess the taxes, penalties, and interest upon these findings; this provision shall not be construed to relieve the said taxpayer from any penalties and remedies imposed for failure to file proper return. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is made such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision by registered mail, and such amount shall be due within ten days after notice is given. The provisions of this act with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or additional tax shall not apply to the assessment of additional taxes upon fraudulent return. Any officer or agent of a corporation who shall knowingly make a fraudulent return under this article or schedule shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned at the discretion of the court. (1935, c. 371, s. 216.)

§ 7880(123)b. Power of attorney. — The commissioner of revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this act. (1935, c. 371, s. 217.)

Art. 4. Schedule D. Income Tax

§ 7880(124). Short title. — This act shall be known and may be cited as the income tax act of one thousand nine hundred and thirty-five. (1935, c. 371, s. 300.)

§ 7880(125). Purpose.—The general purpose of this act is to impose a tax for the use of the state government, upon the net income for the calendar year one thousand nine hundred and thirty-five in excess of exemptions herein set out, collectible in the year one thousand nine hundred and thirty-six and annually thereafter—

(a) Of every resident of the State.

(b) Of every domestic corporation.

(c) Of every foreign corporation and of every non-resident individual having a business or agency in this State or income from property owned and from every business, trade, profession or occupation carried on in this State.

(d) The tax imposed upon the net income of corporations in this schedule is in addition to the tax imposed under Schedule C [§§ 7880(109)-7880(123)b] of this act. (1935, c. 371, s. 301.)

§ 7880(126). Definitions.—For the purpose of this act, and unless otherwise required by the context:

1. The word "taxpayer" includes any individual, corporation, or fiduciary subject to the tax imposed by this act.

2. The word "individual" means a natural person.

3. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting in any fiduciary capacity for any person, estate, or trust.

4. The word "person" includes individuals, fiduciaries, partnerships.

5. The word "corporation" includes joint stock companies or associations and insurance companies.

6. The words "domestic corporation" mean any corporation organized under the laws of this State.

7. The words "foreign corporation" mean any corporation other than a domestic corporation.

8. The words "tax year" mean the calendar year in which the tax is payable.

9. The words "income year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this act; if no fiscal year has been established, they mean the calendar year.

10. The words "fiscal year" mean an income year, ending on the last day of any month other than December.

11. The word "paid," for the purposes of the deductions under this act, means "paid or accrued" and the words "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this act. The word "received," for the purpose of the computation of the net income under this act, means "received or accrued" and the words "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this act.

12. The word "resident" applies only to individuals, and includes, for the purpose of determining liability to the tax imposed by this act, with reference to the income of any income year, any individual who shall be a resident of the State on the first day of the tax year and shall include all income earned while a resident of this State.

13. The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States,"

when used in a geographical sense, includes the States, and Territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States. (1935, c. 371, s. 302.)

Salary of Federal Officer Not Taxable.—A state cannot tax the salary of a federal officer, nor of a state officer whose office is created by the constitution. Purnell v. Page, 133 N. C. 125, 45 S. E. 534.

§ 7880 (127). Individuals. — A tax is hereby imposed upon every resident of the State, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as herein defined, and upon income earned within the State of every non-resident having a business or agency in this State or income from property owned and from every business, trade, profession or occupation carried on in this State, computed at the following rates, after deducting the exemptions provided in this act:

On the excess over the amount legally exempted, up to two thousand dollars, three per cent.

On the excess above two thousand dollars, and up to four thousand dollars, four per cent.

On the excess above four thousand dollars, and up to six thousand dollars, five per cent.

On the excess over six thousand dollars, six per cent. (1935, c. 371, s. 310.)

§ 7880(128). Corporations.

I. Domestic corporations. — Every corporation organized under the laws of this State shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, received by such corporation during the income year.

II. Foreign corporations.—Every foreign corporation doing business in this State shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules:

1. If the principal business of a company in this State is manufacturing, or if it is any form of collecting, assembling, or processing goods and materials within this State, the entire net income of such corporation shall be apportioned by North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such corporation in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, assembling, or processing within this State during the income year to the total cost of manufacturing, collecting, assembling, or processing within and without the State. The term "cost of manufacturing, collecting, assembling, or processing within and without this State" as used herein shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this State the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or incurred during the income year in such manufacturing, assembling, or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities.

(f) The term "fair cash value" as used herein shall be taken to mean cost less reserve for depreciation on the date of the close of the fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word "manufacturing" shall be taken to mean mining and all processes of fabricating or of curing raw materials.

2. If the principal business of a company in this State is selling, distributing, dealing in or use of tangible personal property within this State, the entire net income of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word "sales" as used in this section shall be taken to mean sale or rental of real estate and sale or rental of tangible properties.

(d) The term "fair cash value" as used herein shall be taken to mean cost less reserve for depreciation on the date of the close of the fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(e) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(f) Foreign insurance companies doing business in this State and returning premium receipts to the insurance commissioner, and paying the tax upon such premium receipts as provided in section 7880(116), shall be exempt from this tax.

3. If a company deriving profits principally from sources other than holding or sale of tangi-

ble property, such proportion as its gross receipts in this State during the income year is to its gross receipts for such year within and without the State.

(a) The words "gross receipts" as used in this section shall be taken to mean and include the entire receipts for business done by such company. (1935, c. 371, s. 311.)

For an excellent note on constitutionality of income allocation formulae as applied to corporations, see 9 N. C. Law Rev. 470, et seq.

For case construing the early income tax laws, see Hans Rees' Sons v. North Carolina, 283 U. S. 123, 51 S. Ct. 385.

Where the commissioner of revenue has assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of this section, without regard to its intangible property, the commissioner's assessment will be upheld by the courts upon appeal where the corporation has failed to show that such method of allocation is unconstitutional in its application to the corporation. State v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397.

§ 7880(129). Income from stock in foreign corporations.—Income from stock in foreign corporations, either in cash or stock dividends, received by individuals, fiduciaries, partnership, or corporations, resident in this State, or by a non-resident fiduciary if held for a resident of this State, as a condition of exemption of such shares of stock from ad valorem taxation, conditionally provided in section 7880(123), shall be subject to a tax of six per cent, without exemption or deduction for any cause, except as provided in this section, and upon failure to report such income and pay the tax herein imposed the holder of such shares of stock shall be liable for the ad valorem tax on such stock at the place of residence of the owner. Every individual, fiduciary, partnership, or corporation owning such shares of stock, and receiving dividends from same, shall report such income to the commissioner of revenue, at the time required by this act for reporting other income, and in a separate schedule on the income tax blanks to be provided by the commissioner of revenue for that purpose, and shall pay the tax herein imposed at the same time and in the same way as tax upon other income is payable. With respect to foreign corporations domesticated in North Carolina, and paying a tax in this State on a proportionate part of their total income, the holder of shares of stock in such corporations shall be entitled to deduct from the total dividends received an amount equaling the percentage of the corporation's income on which it paid an income tax to the State of North Carolina for the year in which said dividends are received by the taxpayer. (1935, c. 371, s. 311½.)

§ 7880(130). Railroads and public-service corporations.—The basis of ascertaining the net income of every corporation engaged in the business of operating a steam electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the interstate commerce commission to keep records according to its standard classification of accounting, shall be the "net revenue from operations" of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this State, and when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross "operating revenues" within this State, including in their gross "operating revenues" within this State the equal mileage proportion within this State of their interstate business, and deducting from their gross "operating revenue" the proportionate average of "operating expenses" or "operating ratio" for their whole business, as shown by the interstate commerce commission standard classification of accounts: Provided, that if the standard classification of operating expenses prescribed by the interstate commerce commission for railroads differs from the standard classification of operating expenses prescribed by the interstate commerce commission for other public-service corporations, such other public-service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted "uncollectible revenue" and taxes paid in this State for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this act.

In determining the taxable income of a corporation engaged in the business of operating a railroad under this section, in the case of a railroad located entirely within this State, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this State, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this State of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

For the purposes of this section the words "interstate business" shall mean, as to transportation companies, operating revenue earned within the State by reason of the interstate transportation of persons or property into, out of, or through this State, and as to transmission companies the interstate transmission of messages into, out of, or through this State.

The words "equal mileage proportion within the State" shall mean the proportion of revenue received by the company operating in this State from interstate business as defined in the preceding paragraph, which the distance of movement over lines in this State bears to the total distance of movement over lines of the company receiving such revenue. If the commissioner of revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the commissioner of revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State.

The words "proportionate average of 'operating expenses' or 'operating ratio' " shall mean the proportion of gross revenue of a company, on its whole business absorbed in operating expenses, as defined in the interstate commerce commission classification of accounts.

In determining the taxable income of a railroad

company operating two or more lines of railroad not physically connected, and when one of such railroad lines is located wholly within this State, the actual earnings and expenses of such line in this State, in so far as they may be severable, shall be used in determining net income taxable in this State.

All other public-service corporations shall file under section 7880(128). (1935, c. 371, s. 312.)

§ 7880(131). Taxable year. — The tax imposed by this article shall be levied, collected, and paid in the year one thousand nine hundred and thirty-six, and with respect to the net income received during the calendar year of one thousand nine hundred and thirty-five, and annually thereafter. (1935, c. 371, s. 313.)

§ 7880(132). Conditional and other exemptions. —The following organizations shall be exempt from taxation under this act:

1. Fraternal beneficiary societies, orders or associations, (a) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (b) providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents.

2. Building and loan associations and co-operative banks without capital stock, organized and operated for mutual purposes and without profit.

3. Cemetery corporations and corporations organized for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

4. Business leagues, chambers of commerce, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.

5. Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare.

6. Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member.

7. Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or co-operative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses.

8. Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them.

9. Mutual associations formed under Consolidated Statutes 5255 et seq. (Chapter 144, Public Laws of 1915 and amendments), formed to conduct agricultural business on the mutual plan; or to marketing associations organized under Subchapter five, Chapter 93, Consolidated Statutes Article XVI, Section 5259 (a) and following. (1935, c. 371, s. 314.)

§ 7880(133). Fiduciaries.—The tax imposed by this act shall be imposed upon resident fiduciaries and upon non-resident fiduciaries having in charge funds or property for the benefit of a resident of this State, which tax shall be levied, collected, and paid annually, with respect to:

(a) That part of the net income of estates or trusts which has not become distributable during the income year.

(b) The net income received during the income year by deceased individuals who, at the time of death, were residents and who have died during the tax year or the income year without having made a return.

(c) The entire net income of resident, insolvent, or incompetent individuals, whether or not any portion thereof is held for the future use of the beneficiaries, where the fiduciary has complete charge of such net income.

(d) The tax imposed upon a fiduciary by this act shall be a charge against the estate or trust. (1935, c. 371, s. 315.)

§ 7880(134). Net income defined.—The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this act. (1935, c. 371, s. 316.)

§ 7880(135). Gross income defined.—1. The words "gross income" mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer, unless, under the methods of accounting permitted under this act, any such amounts are to be properly accounted for as of a different period. The term "gross income" as used in this act shall include the salaries of all constitutional state officials taking office after the date of the enactment of this act, by election, re-election or appointment, and all acts fixing the compensation of such constitutional state officials are hereby amended accordingly.

2. The words "gross income" do not include the following items, which shall be exempt from taxation under this act, but shall be reported in such form and manner as may be prescribed by the commissioner of revenue:

(a) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.

(b) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.

(c) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

(d) Interest upon the obligations of the United

States or its possessions, or of the State of North Carolina, or of a political subdivision thereof.

(e) Salaries, wages, or other compensation received from the United States by officials or employees thereof, including persons in the military or naval forces of the United States.

(f) Any amounts received through accident or health insurance or under the workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received, whether by suit or agreement, on account of such injuries or sickness.

(g) In case of domestic insurance companies or associations paying a tax on their gross premium receipts, in addition to the above, (a) the net addition required by law to be made within the taxable year to reserve funds, including the actual deposit of sums with the commissioner of insurance or the treasurer of the State, pursuant to the law, as additions to guarantee or reserve funds for the benefit of policyholders, and (b) the sums paid within the taxable year on policy and annuity contracts to policyholders. (1935, c. 371, s. 317.)

The provision of this section exempting from income tax that part of gross income received from salaries, wages, or other compensation from the Federal Government applies to individuals only and not to corporations, foreign or domestic. Atlantic Coast Line R. Co. v. Maxwell, 207 N. C. 746, 178 S. E. 592.

§ 7880(136). Basis of return of net income.—1. The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the commissioner does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this act. Taxpayers whose accounting period of twelve months ends as of the last day of some month other than December, and the books of such taxpayer are kept accordingly, may, with the approval of the commissioner of revenue and subject to such rules and regulations as he may establish, return their net income under this act on the basis of such fiscal year in lieu of that of the calendar year.

2. A taxpayer may, with the approval of the commissioner of revenue, and under such regulations as he may prescribe, change the income year from fiscal year to calendar year or otherwise, in which case his net income shall be computed upon the basis of such new income year: Provided, that such approval must be obtained from the commissioner at least thirty days prior to the end of such income year.

3. An individual carrying on business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income his distributive share of the net income of the partnership for each income year, whether distributed or not.

4. Every individual taxable under this act who is a beneficiary of an estate or trust shall include in his gross income the distributive share of the net income of the estate or trust received by him or distributable to him during the income year. Unless otherwise provided in the law, the will, the deed, or other instrument creating the estate, trust, or fiduciary relation, the net income shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribution), ratable in proportion to their respective interest. (1935, c. 371, s. 318.)

§ 7880(136)a. Subsidiary corporations.—The net income of a corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporations in excess of fair value and by including fair compensation to such foreign corporation for all commodities sold to or service performed for the parent corporation or affiliated corporations. For the purposes of determining such net income the commissioner may, in the absence of satisfactory evidence to the contrary, presume that an apportionment by reasonable rules of the consolidated net income of corporations participating in the filing of a consolidated return of net income to the federal government fairly reflects the net income taxable under this chapter, or may otherwise equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof.

If in the opinion of the commissioner the capital of a corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership is inadequate for its business needs apart from credit extended or indebtedness guaranteed by the parent or affiliated corporation, the commissioner shall in determining the net income of such corporation disregard its indebtedness owed to or guaranteed by the parent or an affiliated corporation in determining the net income taxable under this act.

Such subsidiary or affiliated corporation shall incorporate in its return required under this act such information as the commissioner may reasonably require for determination of the net income taxable under this act, and failure to so incorporate such information or to furnish such additional information when required within thirty days shall subject the corporation and its officers to the penalties provided in section 7880(154) for failure to file such return. (1935, c. 371, s. 318½.)

§ 7880(137). Determination of gain or loss.—For the purpose of ascertaining the gain or loss from the sale or other disposition of property, real, personal, or mixed, the basis shall be, in the case of property acquired before January first, one thousand nine hundred and twenty-one, the fair market price of the value of such property as of that date, and in all other cases the cost thereof: Provided, that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this act, such inventory value shall be taken in lieu of costs or market value. The final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly. (1935, c. 371, s. 319.)

§ 7880(138). Exchanges of property.—1. When property is exchanged for other property of like kind, the property received in exchange shall be considered as a conversion of assets from one form to another, from which no gain or loss shall be deemed to arise.

2. In the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor, and no gain or loss shall be deemed to arise therefrom.

3. When, in connection with the reorganization, merger or consolidation of a corporation, a taxpayer receives in place of stock or securities owned by him, new stock or securities, the basis of computing the gain or loss, if any, shall be, in case the stock or securities owned were acquired before January first, one thousand nine hundred and twenty-one, the fair market price or value thereof as of that date, and in all other cases the cost thereof. (1935, c. 371, s. 320.)

§ 7880(139). Inventory.—Whenever, in the opinion of the commissioner of revenue, it is necessary, in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the commissioner of revenue may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income. (1935, c. 371, s. 321.)

§ 7880(140). Deductions.—In computing net incomes there shall be allowed as deductions the following items:

1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:

(a) As to individuals, reasonable wages of employees for services rendered in producing such income.

(b) As to partnerships, reasonable wages of employees and a reasonable allowance for co-partners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the co-partner receiving same.

(c) As to corporations, wages of employees and salaries of officers, if reasonable in amount, for services actually rendered in producing such income.

2. Rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade of property to which the taxpayer has not taken or is not taking title, or in which he has no equity.

3. Unearned discount and all interest paid during the income year or indebtedness except interest paid or accrued in connection with the ownership of real or personal property the current income from which is not taxable under this act. Interest on indebtedness incurred for the purchase of stock of corporations paying a tax on their entire net income under this act shall be deductible, and a ratable proportion of such interest with respect to corporations paying a tax on a proportion of their net income.

4. Taxes paid or accrued during the income year, except federal and state income taxes, taxes levied under section 7880(129), inheritance and estate taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed. No deduction shall be allowed under this section for gasoline tax, automobile license or registration fee by individuals not engaged in trade or business, nor shall deduction be allowed for taxes paid or accrued in connection with the ownership of property the current income from which is not taxable under this act.

5. Dividends from stock in any corporation, the income of which shall have been assessed, and the tax on such income paid by the corporation under the provisions of this act: Provided, that when only part of the income of any corporation shall have been assessed under this act, only a corresponding part of the dividends received therefrom shall be deducted.

6. Losses actually sustained during the income year of property used in trade or business or of property not connected with trade or business, if arising from fire, storm, shipwreck, or other casualties or theft and if not compensated for by insurance or otherwise. No deduction shall be allowed under this subsection for losses arising from personal loans or endorsements or other transactions of a personal nature not entered into for profit. A taxpayer shall be allowed to deduct losses in connection with the sale of securities only to the extent of the security gains during the income year, unless such losses resulted from the sale of stocks or bonds held by the taxpayer for a period of not less than two years prior to the sale of such stocks or bonds.

7. Debts ascertained to be worthless and actually charged off within the income year, if the amount has previously been included in gross income in a return under this act.

8. A reasonable allowance for depreciation and obsolescence of property used in the trade or business shall be measured by the estimated life of such property; and in case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion. The cost of property acquired since January 1st, 1921, plus additions and improvements, shall be the basis for determining the amount of depreciation, and if acquired prior to that date the book value of the property shall be the cost basis for determining depreciation.

In case of mines, oil and gas wells, and other natural deposits, the cost of development not otherwise deducted will be allowed as depletion, and in the case of leases, the deduction allowed may be equitably apportioned between the lessor and the lessee.

In case the federal government determines depreciation or depletion of property for income tax purposes upon the basis of book value instead of original cost, the depreciation allowed under this act shall be upon the same basis.

9. Contributions or gifts made by individuals within the income year to corporations or associations operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, to an amount not in excess of ten per centum of the

tax-payer's net income, as computed without the benefit of this subdivision.

10. Resident individuals and domestic corporations having an established business in another State, or investment in property in another State, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income. The deduction herein authorized shall in no case operate to reduce the taxable income in this State below the income actually earned in this State or properly allocable as income earned in this State. Nor shall the deduction in any way relate to income received by individuals or domestic corporations from personal services or income from mortgages, stocks, bonds, securities, and deposits.

11. In the case of a non-resident individual, the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the State; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the State shall be determined under rules and regulations prescribed by the commissioner of revenue. (1935, c. 371, s. 322.)

§ 7880(141). Items not deductible.—In computing net income no deduction shall in any case be allowed in respect of:

(a) Personal, living, or family expenses.

(b) Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

(c) Any amount expended in restoring property for which an allowance is or has been made.

(d) Premiums paid on any life insurance policy.

(e) Contributions or gifts made by corporations. (1935, c. 371, s. 323.)

§ 7880(142). Exemptions.—1. There shall be deducted from the net income the following exemptions:

(a) In the case of a single individual, a personal exemption of one thousand dollars ($1,000.00).

(b) In the case of a married man with a wife living with him, two thousand dollars ($2,000.00), or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, two thousand dollars ($2,000.00).

(c) In the case of a widow or widower having minor child or children, natural or adopted, two thousand dollars.

(d) Two hundred dollars ($200.00) for each individual (other than husband and wife) dependent upon and receiving his chief support from the taxpayer, if such dependent individual is under eighteen years of age or is incapable of self-support because mentally or physically defective.

(e) In the case of a fiduciary, if taxable under clause (a) of paragraph one of section 7880(133), a personal exemption of one thousand dollars ($1,000.00); if taxable under clause (b) of said paragraph, an exemption of one thousand dollars ($1,000.00): Provided, that the surviving husband or wife shall be entitled to exemption as provided in paragraph three of this section; if taxable under clause (c) of said paragraph, the same exemptions to which the beneficiary would be entitled.

(f) A married woman having a separate and independent income, one thousand dollars ($1,000.00).

2. The exemptions allowed by this section shall not be allowed with respect to a resident of this State having income from a business or agency in another state, or with respect to non-resident having a taxable income in this State unless the entire income of such resident or non-resident individual is shown in the return of such resident or non-resident; and if the entire income is so shown, the exemption shall be prorated in the proportion of the income of this State to the total income.

3. The status on the last day of the income year shall determine the right to the exemptions provided in this section: Provided, that a taxpayer shall be entitled to such exemption for husband or wife or dependents who have died during the income year. (1935, c. 371, s. 324.)

§ 7880(143). Credit for taxes in case of taxpayers other than residents of the state.—Whenever a taxpayer other than a resident of the State has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this State and subject to taxation under this article, the commissioner of revenue shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed: Provided, that such credit shall be allowed only if the laws of said state or country (1) grant a substantially similar credit to residents of this State subject to income tax under such laws, or (2) impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of this State. No credit shall be allowed against the amount of the tax on any income taxable under this article which is exempt from taxation under the laws of such other state or country. (1935, c. 371, s. 325.)

§ 7880(144). Returns.—1. Every resident or non-resident having a net income during the income year taxable in this State of one thousand dollars ($1,000.00) and over, if single, or if married and not living with husband or wife, or having a net income for the income year of two thousand dollars ($2,000.00) or over, if married and living with husband or wife, and every corporation doing business in the State shall make a return under oath, stating specifically the items of gross income and the deductions allowed by this act, and such other facts as the commissioner of revenue may require for the purpose of making any computation required by this act. Every resident of the State having gross income in excess of five thousand dollars ($5,000.00) and every non-resident having gross income within this State in excess of five thousand ($5,000.00) shall be required to make a return. When the commissioner of revenue has reason to believe any person or corporation is liable for tax under this act, he may

require any such person or corporation to make a return.

2. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.

3. The return by a corporation shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer.

4. (a) The return of an individual, who, while living, received income in excess of the exemption during the income year, and who has died before making the return, shall be made in his name and behalf by the administrator or executor of the estate, and that the tax shall be levied upon and collected from his estate.

(b) Before a corporation shall be dissolved and its assets distributed it shall make a return for and settlement of tax for any income earned in the income year up to its period of dissolution.

5. When the commissioner of revenue has reason to believe that any taxpayer so conducts the trade or business as either directly or indirectly to distort his true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining same the commissioner of revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business.

6. When any corporation liable to taxation under this act conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of said corporations, or where a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock, in such manner as to create a loss or improper net income for either of said corporations, the commissioner of revenue may determine the amount of taxable income of either or any such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporation or corporations liable to taxation under this act from dealing in such products, goods or commodities. (1935, c. 371, s. 326.)

§ 7880(145). Fiduciary returns.—1. Every fiduciary subject to taxation under the provisions of this act, as provided in section 7880(133), shall make a return under oath for the individual, estate, or trust for whom or for which he acts, if the net income thereof amounts to one thousand dollars or over; or, if any dividends are received from stock in corporations not incorporated in this State.

2. The return made by a fiduciary shall state specifically the items of gross income and the deductions and exemptions allowed by this act, and such other facts as the commissioner of revenue may prescribe.

3. Fiduciaries required to make returns under this act shall be subject to all the provisions of this act which apply to individuals. (1935, c. 371, s. 327.)

§ 7880(146). Information at the source.—1. Every individual, partnership, corporation, joint-stock company or association, or insurance company, being a resident or having a place of business in this State, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the State or of any political subdivision of the State, having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes above exemptions allowed in this act, paid or payable during any year to any taxpayer, shall make complete return thereof to the commissioner of revenue under such regulations and in such form and manner and to such extent as may be prescribed by him.

2. Every partnership having a place of business in the State shall make a return, stating specifically the items of its gross income and the deductions allowed by this act, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed, and the amount of the distributive share of each individual. The return shall be sworn to by one of the partners.

3. Every fiduciary shall make, under oath, a return for the individual, estate, or trust for whom or for which he acts if the net income thereof, distributed or distributable to beneficiaries during the year, is one thousand dollars or over, in which case the fiduciary shall set forth in such return the items of the gross income, the deductions allowed by this act, and the net income, the names and addresses of the beneficiaries, the amounts distributed or distributable to each, and the amount, if any, lawfully retained by him for future distribution.

4. Every corporation doing business or having a place of business in this State shall file with the commissioner of revenue on such form and in such manner as he may prescribe the names and addresses of all taxpayers, residents of North Carolina, to whom dividends have been paid and the amount of such dividends during the income year. (1935, c. 371, s. 328.)

§ 7880(147). Time and place of filing returns.—Returns shall be in such form as the commissioner

of revenue may from time to time prescribe, and shall be filed with the commissioner at his main office, or at any branch office which he may establish, on or before the fifteenth day of March in each year, and for all taxpayers using a fiscal year, within seventy-five days after expiration of the fiscal year. In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the commissioner may allow further time for filing returns. There shall be annexed to the return the affidavit or affirmation of the taxpayer making the return, to the effect that the statements contained therein are true. The commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any return herein required. (1935, c. 371, s. 329.)

§ 7880(148). Obsolete.

§ 7880(149). Failure to file returns; supplementary returns.—If the commissioner of revenue shall be of the opinion that any taxpayer has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income, he may require from such taxpayer a return or supplementary return, under oath, in such form as he shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this act. If from a supplementary return or otherwise the commissioner finds that any items of income, taxable under this act, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income overstated, he may require the items so omitted to be disclosed to him under oath of the taxpayer, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provision of this act. The commissioner may proceed under the provisions of section 7880(152), whether or not he requires a return or a supplementary return under this section. (1935, c. 371, s. 331.)

§ 7880(150). Time and place of payment of tax.—(1) The full amount of the tax payable, as the same shall appear from the face of the return, shall be paid to the commissioner of revenue at the office where the return is filed at the time fixed by law for filing the return. If the amount of the tax exceeds one hundred dollars ($100.00), payment may be made in two installments: One-half on the date the return is filed, one-half on or before September fifteenth following, with interest on the deferred payment at the rate of six per cent per annum.

(2) If the time for filing the return be extended, interest at the rate of six per cent per annum from the time when the return was originally required to be filed to the time of payment shall be added and paid.

(3) The tax may be paid with uncertified check during such time and under such regulations as the commissioner of revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1935, c. 371, s. 332.)

§ 7880(151). Examination of returns.—1. As soon as practicable after the return is filed the commissioner of revenue shall examine and compute the tax, and the amount so computed by the commissioner shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the excess shall be paid to the commissioner within thirty days after notice of the amount shall be mailed by the commissioner, and any overpayment of tax shall be returned within thirty days after it is ascertained.

2. If the return is made in good faith and the understatement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such understatement, but interest shall be added to the amount of the deficiency at the rate of six per cent per annum until paid.

3. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent thereof, and, in addition, interest at the rate of six per cent per annum until paid.

4. If the understatement is found by the commissioner of revenue to be false or fraudulent, with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and six per centum per annum upon the amount of tax so found. The provisions of this act with respect to revision and appeal shall apply to a tax thus assessed.

5. The interest provided for in this section shall in all cases be computed from the date the tax was originally due to the date of payment. (1935, c. 371, s. 333.)

§ 7880(152). Corrections and changes.—If the amount of the net income for any year of any taxpayer under this article, as returned to the United States treasury department, is changed and corrected by the commissioner of internal revenue or other officer of the United States of competent authority, such taxpayer, within thirty days after receipt of internal revenue agent's report or supplemental report reflecting the corrected net income shall make return under oath or affirmation to the commissioner of revenue of such corrected net income. The commissioner of revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected; and if there shall have been an overpayment of the tax the said commissioner shall, within thirty days after the final determination of the net income of such taxpayer, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by federal government within the time specified shall be subject to

all penalties as provided in section 7880(154), in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change. (1935, c. 371, s. 334.)

The procedure prescribed by this section, that such new return be made within thirty days of redetermination by the Federal Government is exclusive and must be followed to entitle the taxpayer to the relief therein provided. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847.

§ 7880(153). Additional taxes.—If the commissioner of revenue discovers from the examination of the return or otherwise that the income of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision by registered mail and such amount shall be due within ten days after notice is given. The provisions of this act with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns. (1935, c. 371, s. 335.)

See 12 N. C. Law Rev., 21, 35.

§ 7880(154). Penalties.—If any taxpayer, without intent to evade any tax imposed by this act, shall fail to file a return of income and pay the tax, if one is due, at the time required by or under the provisions of this act, but shall voluntarily file a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to five per cent thereof, but such additional amount shall in no case be less than one dollar and interest at the rate of one-half of one per centum per month or fraction thereof from the time said return was required by law to be filed, until paid.

2. If any taxpayer fails voluntarily to file a return of income or pay the tax, if one is due, within sixty days of the time required by or under the provisions of this act, there shall be added to the tax an additional amount equal to twenty-five per cent thereof and interest at the rate of one-half of one per cent per month or fraction thereof, from the time such return was required to be filed, until paid, but the additional amount shall not be less than five dollars ($5.00).

3. If any taxpayer fails to file a return within sixty days of the time prescribed by this act, any judge of the superior court, upon petition of the commissioner of revenue or of any ten taxable residents of the State, shall issue a writ of mandamus requiring such person to file a return. The order of notice upon the petition shall be returnable not later than ten days after the filing of the petition. The petition shall be heard and determined on the return day or such day thereafter as the court shall fix, having regard to the speediest possible determination of the case consistent with the rights of the parties. The judgment shall include costs in favor of the prevailing party. All writs and processes may be issued from the clerk's offices in any county, and, except as aforesaid, shall be returnable as the court shall order.

4. The failure to do any act required by or under the provisions of this act shall be deemed an act committed in part at the office of the commissioner of revenue in Raleigh. The certificate of the commissioner of revenue to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this act, shall be prima facie evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

5. If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and has been notified by the commissioner of revenue of his delinquency, refuses or neglects within twenty days after such notice to file a proper return, or files a fraudulent return, the commissioner shall determine the income of such taxpayer, according to his best information and belief, and assess the same at not more than double the amount so determined. The commissioner may, in his discretion, allow further time for the filing of a return in such case.

6. Any person required under this act to pay any tax or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information for the purposes of computation, assessment or collection of any tax imposed by this act, who wilfully fails to pay this tax, make such return, keep such records or supply such information at the time or times required by law or regulations, shall, in addition to other penalties provided by law be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than $500.00 or imprisoned not exceeding six months, or punished by both such fine and imprisonment at the discretion of the court, within the limitations aforesaid. (1935, c. 371, s. 336.)

§ 7880(155). Revision by commissioner of revenue.—A taxpayer may apply to the commissioner of revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. (1935, c. 371, s. 340.)

Where a taxpayer fails to apply to the Commissioner of Revenue for a revision within three years from the filing of its return, its claim is barred, under this section, and the fact that the application for a revision is made within three years of redetermination of income tax by the Federal Government, will not avail the taxpayer where he does not make a new return within thirty days after such redetermination by the Federal Government, as provided by § 7880(152), since the limitation prescribed by the instant section is explicit and unequivocal. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847.

§ 7880(156). Appeal.—Any taxpayer may file formal exceptions to a finding by the commissioner of revenue, under the provisions of this article with respect to his taxable income, either to a matter of fact or law, as far as possible stating such exceptions separately. After they are filed the commissioner shall pass upon the same formally, and notify the taxpayer immediately of his findings upon these exceptions. The taxpayer may, within ten days after notification of the commissioner's ruling upon these exceptions, appeal to the superior court of Wake county, upon paying the tax assessed by the commissioner and giving a bond for costs in the sum of two hundred dollars ($200.00): Provided, the taxpayer may within the above prescribed time first appeal to the state Board of assessment on the exceptions to the findings of the commissioner; and provided further, that the commissioner may in his discretion require a surety bond or a deposit of state or government bonds in double the amount of the alleged deficiency. Appeal may then be taken by either the taxpayer or the commissioner to the superior court of Wake county as provided herein. Upon receipt of such notice and the taxes paid, and the filing of the cost bond in the sum of two hundred dollars ($200.00), the commissioner shall certify the record to the superior court of Wake county. In the superior court the proceedings shall be as follows:

The cause shall be entitled, "State of North Carolina on Relation of the Commissioner of Revenue vs. Appellant" (giving name). If there are exceptions to facts found by the commissioner, it shall be placed on the civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of such civil actions, except that the findings of the commissioner shall be prima facie correct. If only issues of law, or if issues of fact are raised, and the appellant shall waive jury trial at the time of taking the appeal, the appeal may be had to the superior court of the county in which the appellant resides, and the cause shall be heard by the judge holding court in the judicial district in which the appeal is docketed, at chambers, upon ten days' notice to the parties of the time and place of hearing, and the said judge shall pass upon and determine all issues, both of law and fact, the State hereby waiving in such cases a trial by jury. Either party may appeal to the supreme court from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the State, if it should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and the supreme court may advance the cause on its docket so as to give the same a speedy hearing. Any taxes, interest, or penalties paid, found by the court to be in excess of those which can be legally assessed, shall be ordered refunded to the taxpayer, with interest from the time of payment. (1935, c. 371, s. 341.)

Art. 5. Schedule E. Emergency Revenue

§ 7880(156)a. Short title.—This act shall be known and may be cited as the Emergency Revenue Act of one thousand nine hundred and thirty-five. (1935, c. 371, s. 400.)

§ 7880(156)b. Purpose.—The taxes levied in this article are to provide emergency revenue for the support of the public schools of the State in substitution for the taxes formerly levied on property for this purpose. They are levied for the biennium of fiscal years beginning July 1, 1935, and ending June 30, 1937.

The tax upon the retail sale of merchandise to persons in this State is levied as a license or privilege tax for engaging or continuing in the business of merchandising as defined in this act, but merchants may add to the price of merchandise the amount of the tax on the sale thereof, and when so added shall constitute a part of such price, shall be a debt from purchaser to merchant until paid, and shall be recoverable at law in the same manner as other debts. It is the purpose and intent of this act that the tax levied hereunder shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant.

Any retail merchant who shall by any character of public advertisement offer to absorb the tax levied in this article upon the retail sale of merchandise, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered as an element in the price to the consumer, shall be guilty of a misdemeanor. The provisions of this section are deemed necessary to prevent fraud and unfair trade practices, but it is the intent of the general assembly that if one or both of such provisions be held unconstitutional and void, that such invalid provision or provisions be considered separable and that the balance of this act be given effect. ((1935, c. 371, s. 401.)

§ 7880(156)c. Contingency.—If the government of the United States shall, at any time during the biennium for which taxes are levied in this article, enact any form of sales or production tax distributable in whole or in part to the several states, the governor and council of State shall estimate the proportion of such tax distribution to this State, and shall by proclamation of the governor abate a uniform percentage of all the taxes levied in this article equal in estimated revenue yield to the estimated proportion of yield of such federal tax, and from and after the effective date of such proclamation the commissioner of revenue shall enforce and collect only the remaining percentage of taxes levied in this article. (1935, c. 371, s. 402.)

§ 7880(156)d. Obsolete.

§ 7880(156)e. Definitions.—For the purposes of this article:

1. The word "person" shall mean any person, firm, partnership, association, or corporation.

2. The word "commissioner" shall mean the commissioner of revenue of the State of North Carolina.

3. The word "merchant" shall include any individual, firm, or corporation, domestic or foreign, subject to the tax imposed by this article.

4. The words "wholesale merchant" shall mean every person who engages in the business of buying any articles of commerce and selling same to merchants for resale. The sale of any article of merchandise by any "wholesale merchant" to anyone other than a merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this act the sale of any articles of commerce by

any wholesale merchant to anyone not taxable under this act as a retail merchant, except as otherwise provided in this act, shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sales of merchandise. The commissioner of revenue is authorized to make appropriate regulations, consistent with this act, to prevent abuse with respect to existing regulations defining transactions entitled to the rate of tax levied on sales at wholesale.

5. Any person, firm, or corporation engaged in the business of selling mill machinery, mill machinery parts and accessories, or selling machinery and machinery parts and accessories for manufacturing industries and plants, and the sale of cotton and tobacco and other farm products by others than producers to others for processing or manufacture, shall be considered a "wholesale merchant" for the purposes of this act to the extent of such sale of machinery parts and accessories and cotton and tobacco and other farm products to manufacturers.

6. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring by consignment or otherwise any articles of commerce and selling same at retail.

7. The word "retail" shall mean the sale of any articles of commerce in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.

8. The word "sale" shall mean any transfer of the ownership or title of tangible personal property to the consumer for use and not for purposes of resale, for any kind of consideration. Transactions whereby the title is ultimately to pass, and whether such transactions are called leases, conditional sales, or by any other name, and although possession is retained for security, shall be sales.

9. It is not the purpose of this section to impose a tax upon the business of producing, manufacturing, mixing, blending, or processing any articles of commerce, or upon the sale of such articles of commerce by anyone who engages in the business of producing, manufacturing, mixing, blending, or processing, but shall apply to anyone engaged in either of those businesses if and to the extent that articles of commerce are bought and sold at retail in connection with such business in substantially the same form in which they are bought. The exemptions in this section shall not extend to manufacturers or producers who become merchants in the ordinary meaning of that term and who maintain a store or stores for the retail sale of merchandise, nor to the sale of their own products through such retail stores, nor shall it extend to the sale of their products through merchants acting as agents for the manufacturer, nor to the sale of products by peddlers.

10. The words "gross sales" shall mean the gross sales price at which such sales were made, whether for cash or on time, and if on time, the price charged on the books for such sales, without allowance for cash discount, and shall be reported as sales with reference to the time of delivery to the purchaser, except as this provision is modified by section 7880(156)i.

11. When in the sale of a new article, a second-hand or used article is taken in part payment, the sale of the new article shall be reported at the full gross sale price. The resale of second-hand or used articles, taken in part payment in the sale of new articles, or the resale of articles repossessed by the vendor, may be excluded from gross sales taxable under this act if separate record is kept of all such transactions in such manner as may be prescribed or approved by the commissioner of revenue, it being the purpose herein that the used article accepted as part payment for a new article be excluded from the gross sales taxable, and that articles repossessed by the vendor and resold be excluded.

12. The maximum tax that shall be imposed upon any single article of merchandise shall be ten dollars ($10), and as an additional means of enforcement of the payment of the tax herein levied the department of revenue shall not issue a license plate or a certificate of title for any new or used motor vehicle sold by any merchant or licensed dealer until the tax levied for the sale of same under this act has been paid, or a certificate duly signed by a licensed dealer is filed at the time the application for license plate or title is made for such motor vehicle; such certificate to be on such form as may be prescribed by the commissioner of revenue and that such certificate shall show that the said licensed dealer has assumed the responsibility for the payment of the tax levied under this act and agrees to report and remit the tax in his next regular monthly sales tax report required to be filed under this act.

13. In addition to the taxes levied in this act or in any other law there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this State, a tax of three per cent of the sales price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this State requiring registration thereof under Section 2621 (6), Consolidated Statutes, which said amount shall be paid to the commissioner of revenue at the time of applying for registration of such motor vehicle, or certificate of title for same. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person, so applying for registration and license plate for such motor vehicle, or certificate of title therefor, shall furnish to the commissioner of revenue a certificate from a licensed motor vehicle dealer in this State upon a form furnished by the commissioner certifying that such person has paid the tax thereon levied in this act, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this act. The term "motor vehicle" as used in this section shall include trailers. (1935, c. 371, s. 404, c. 447, s. 2.)

§ 7880(156)f. Exemptions.—The taxes imposed in this article shall not apply to the sale of the following merchandise and articles of commerce:

(a) It is not the intent of this act to exempt gasoline from the retail sales tax levied in this act, nor is it considered expedient to levy a tax upon the wholesale distribution of gasoline, payable at the source of distribution, and an additional tax upon the retail sale. Therefore, to carry out the intent of this act, a proportion of the tax of six cents per gallon, to be determined in the manner herein set out, shall be deemed in satisfaction of the tax upon retail sales levied in this act. The director of the budget, the chairman of the highway commission and the commissioner of revenue shall in the first fifteen days of each quarterly pe-

riod determine the total amount of gasoline sold in the State in the preceding three months, and the average retail price, inclusive of gasoline tax, and shall on this basis compute the amount of tax liability at the rate of tax levied in this act on retail sales, and the sum so computed shall be deducted from the tax of six cents per gallon, and credited by the state treasurer to the sales tax revenue levied in this act. The allocation from the highway fund to the general fund herein provided for, insofar as it may exceed the sum of one million dollars per year, shall not be made to any extent that violates the provisions of the Hayden-Cartwright Act of congress, ratified on the 18th day of June, 1934, and that has the effect of reducing the allotment of federal funds for construction and improvement of highways in this State. These sums shall be available only after full provision is made for the expense of collecting highway revenues, for the administration of the highway and public works commission, for the service of the debt, and for reasonable maintenance of state and county highways and federal aid construction, (as set out under titles XII and XIII of Section III of the appropriation act), and there then remains a sufficient balance or surplus, nor shall the application herein made become available to the general fund unless the director of the budget shall find such sum to be reasonably necessary to meet appropriations from the general fund, (not including the contingent increase in salaries beyond twenty per cent provided in the appropriation bill for the first year of the biennium). In construing this provision the director of the budget shall not be required to take into account an incidental credit balance of the general fund.

(b) Sale of commercial fertilizer on which the inspection tax is paid.

(c) Sales of products of farms, forests, waters and mines, when such sales are made by the producers, manufacturers, or fishermen. The exemptions in this article shall not extend to producers, manufacturers, or fishermen who become merchants, or who maintain a store or stores to sell or dispose of their products, nor to the sale of their products through merchants, and others acting as agents, nor sales made by peddlers. The exemptions in this subsection shall include fresh liquid milk, whether sold by the producer or purchaser for re-sale.

(d) Sales made to the State of North Carolina or any of its subdivisions, including sales of merchandise and articles of commerce to agencies of state or local governments for distribution in public welfare or relief work. This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the state or local governments.

(e) Accounts of purchasers, representing taxable sales, on which the tax imposed has been paid, that are found to be worthless and actually charged off for income tax purposes may at corresponding periods be deducted from gross sales in so far as they represent taxable sales made after July 1, 1933, and to be added to gross sales if afterwards collected.

(f) Sales of public school books on the adopted list and the selling price of which is fixed by state contract.

(g) Every merchant, selling merchandise to other merchants for resale, shall deliver to the customer a bill of sale for each sale of merchandise, whether sold for cash or on credit, and shall make and retain a duplicate or carbon copy of each such bill of sale, and shall keep a file of all such duplicate bills of sale for at least two years from date of sale, or until inspected and audited by a representative of the department of revenue. Failure to comply with the provisions of this subsection shall subject the seller to liability for tax upon such sales at the rate of tax levied in this act upon retail sales.

Unless records are kept in such manner as will accurately disclose separate accounting of sales of taxable and non-taxable merchandise the exemptions herein made shall not be allowed, and it shall be the duty of the commissioner to assess a tax upon the total gross sales, and if records are not kept showing total gross sales it shall be the duty of the commissioner or his agents to assess a tax upon an estimation of sales upon the best information obtainable. (1935, c. 371, s. 405, c. 447, s. 1.)

§ 7880(156)g. Must obtain license; additional tax on merchants.—If any person, after the 30th day of June, 1935, shall engage or continue in any business for which a privilege tax is imposed by this article, such person shall apply for and obtain from the commissioner, upon the payment of the sum of one dollar ($1.00), a license to engage in and conduct such business for the current tax year upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this article; and he shall thereby be duly licensed to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this article. License issued under Article V, Chapter 445, Public Laws of 1933, for the year 1934-1935, shall be deemed a continuing license under this section.

An additional tax is hereby levied for the privilege of engaging in the business of selling tangible personal property as follows:

Wholesale merchants. — Upon every wholesale merchant as defined in this act an annual license tax of ten dollars ($10.00). Such annual license shall be paid in advance within the first fifteen days of July in each year. There is also levied on each wholesale merchant an additional tax of one-twentieth of one per cent (1/20 of 1%) of the total gross sales of the business. The annual license tax herein levied may be applied as a credit against the tax on gross sales.

Retail merchants.—Upon every retail merchant as defined in this article, a tax of three per cent (3%) of the total gross sales of the business of every such retail merchant. (1935, c. 371, s. 406.)

§ 7880(156)h. Taxes payable.—The taxes levied in the preceding section shall be due and payable in monthly installments or on or before the 15th day of the month next succeeding the month in which the tax accrues. Every taxpayer liable for the tax imposed by this section shall on or before the 15th day of the month make out or prepare a return on the blank report form furnished by the department of revenue, showing the total gross sales, the sales exempted from the tax, the net taxable sales, the amount of tax covering sales in the preceding month, and shall mail same, together

with the remittance for the amount of the tax, to the commission. Such monthly return shall be signed by the taxpayer or a duly authorized agent of the taxpayer. (1935, c. 371, s. 407.)

§ 7880(156)i. Credit sales. — Any person taxable under this act having cash and credit sales may report such cash and credit sales separately, and upon making application therefor may obtain from the commissioner an extension of time for the payment of taxes due on such credit sales. Such extension shall be granted under such rules and regulations as the commissioner may prescribe. When such extension is granted, the taxpayer shall thereafter include in each monthly report all collections made during the month next preceding and shall pay taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in determining the measure of the tax to be paid until collection of such credit sales shall have been made. (1935, c. 371, s. 408.)

§ 7880(156)j. Obsolete.

§ 7880(156)k. Obsolete.

§ 7880(156)l. Forms for making returns.—The monthly returns required under this act shall be made upon forms to be prescribed by the commissioner. (1935, c. 371, s. 411.)

§ 7880(156)m. Extension of time for making returns.—The commissioner for good cause may extend the time for making any return required under the provisions of this act, and may grant such additional time within which to make such return as the commissioner may deem proper, but the time for filing any such return shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such return. (1935, c. 371, s. 412.)

§ 7880(156)n. Obsolete.

§ 7880(156)o. Commissioner to correct error.— As soon as practicable after the return is filed the commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed.

Excessive payments. — If the amount already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this act.

Deficiency of amount.—(a) If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this act, together with interest thereon at the rate of one-half of one per centum per month from the time the tax was due, shall be paid upon notice and demand by the commissioner.

(b) If any part of the deficiency is due to negligence or intentional disregard to authorized rules and regulations, with knowledge thereof, but without intent to defraud, there shall be added as damages ten per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of one per centum per month of the amount of such deficiency in the tax from the time it was due, which interest and damages shall become due and payable upon notice and demand by the commissioner.

(c) If any part of the deficiency is due to fraud with intent to evade the tax, then there shall be added as damages not more than one hundred per centum of the total amount of the deficiency in the tax, and in such case the whole amount of tax unpaid, including charges so added, shall become due and payable upon notice and demand by the commissioner, and an additional one per centum per month on the tax shall be added from the date such tax was due until paid.

(d) If the amount already paid is less than the amount which should have been paid, the commissioner or his duly authorized agents shall notify the taxpayer of the balance due, plus such interest and damages as are set forth in (a), (b) and (c) just preceding, and if this total amount is not paid or no appeal is taken within thirty (30) days from the date of notice, such action shall be considered as a refusal on the part of the taxpayer to make a return, and the taxpayer shall be subject to such penalties or provisions as are provided in this act for failure to make a return.

If any taxpayer under this act goes into bankruptcy, receivership, or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this article shall constitute a prior lien on such stock of merchandise, subject to execution, and/or it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales from such stock of merchandise and to pay same to the commissioner of revenue. (1935, c. 371, s. 414.)

§ 7880(156)p. Taxpayer must keep records; failure to make returns; duty and power of commissioner.—It shall be the duty of every person engaging or continuing in this State in any business for which a privilege tax is imposed by this act to keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business, and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this act. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices, and other records shall be open for examination at any time by the commissioner or his duly authorized agent.

(a) Delayed returns.—If a delinquent return is received by the commissioner or his duly authorized agents, the taxpayer shall be assessed with a five per centum penalty plus interest at one per centum per month from the date the tax was due. The penalty provided in this subsection shall not be less than one dollar ($1.00).

(b) Failure to make returns.—If the taxpayer shall fail to make or refuse to make the returns required under this act, then such returns shall be made by the commissioner or his duly authorized agents from the best information available, and such returns shall be prima facie correct for the purposes of this act and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payment, and if payment not be made within thirty days after demand therefor by the commissioner or his duly au-

thorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added ten per centum as damages, and interest at the rate of one per centum from the time such tax was due until paid. (1935, c. 371, s. 415.)

§ 7880(156)q. Tax shall be lien.—The tax imposed by this act shall be a lien upon the stock of goods and/or any other property of any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, and such person shall be required to make out the return provided for under section 7880-(156)g within thirty days after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the commissioner showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, and the taxes shall be due and unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. (1935, c. 371, s. 416.)

§ 7880(156)r. Aggrieved person may file petition.—If any person having made the return and paid the tax as provided by this act feels aggrieved by the assessment made upon him for any year by the commissioner, or in the absence of a report if an assessment has been made by the commissioner under the provisions of this act, the taxpayer may apply to the commissioner by petition, in writing, within thirty days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearings should be granted and the amount in which such tax should be reduced. The commissioner shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the commissioner shall notify the petitioner of the time and place fixed for such hearing. After such hearing the commissioner may make such order in the matter as may appear to him just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the supreme court of North Carolina as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest, and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. (1935, c. 371, s. 417.)

§ 7880(156)s. Warrant for collection of tax; tax shall constitute debt due state.—If any tax imposed or any portion of such tax be not paid within thirty days after the same becomes due, the commissioner shall proceed to enforce the payment of such tax in the manner provided by section 7880(169). (1935, c. 371, s. 418.)

§ 7880(156)t. Obsolete.

§ 7880(156)u. Additional tax; remittances made to commissioner; records.—The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided. But no county, municipality, or district shall be authorized to levy any tax by virtue of the provisions of this article.

All remittances of taxes imposed by this act shall be made to the commissioner by bank draft, check, cashier's check, money order, or money, who shall issue his receipts therefor to the taxpayers, when requested, and shall deposit daily all moneys received to the credit of the state treasurer as required by law for other taxes: Provided, no payment other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the commissioner.

The commissioner shall keep full and accurate records of all moneys received by him, and how disbursed; and shall preserve all returns filed with him under this article for a period of three years. (1935, c. 371, s. 420.)

§ 7880(156)v. Letters in report not to be divulged.—Unless in accordance with the judicial order or as herein provided, the state department of revenue, its agents, clerks or stenographers, shall not divulge the gross income, gross proceeds of sales, or the amount of tax paid by any person as shown by the reports filed under the provisions of this act, except to members and employees of the state department of revenue, and the income tax department thereof, for the purpose of checking, comparing, and correcting returns, or to the governor, or to the attorney general, or any other legal representative of the State in any action in respect to the amount of tax due under the provisions of this act.

(a) The secretary of state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this State, or organized under the laws of another state and admitted to do business in this State, until the receipt of a notice from the commissioner to the effect that the tax

levied under this act against any such corporation has been paid, if any such corporation is a taxpayer under the law, or until he shall be notified by the commissioner that the applicant is not subject to pay a tax hereunder. (1935, c. 371, s. 421.)

§ 7880(156)w. Unlawful to refuse to make returns; penalty.—It shall be unlawful for any person to fail or refuse to make the return provided to be made in this act, or to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this act; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this act; or for the president, vice-president, secretary, or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this act, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner or his duly appointed agent, as required by this act; or to fail or refuse to permit the inspection or appraisal of any property by the commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required in this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law. Any company for which a false return, or a return containing a false statement as aforesaid, shall be made shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars ($1,000.00). (1935, c. 371, s. 422.)

§ 7880(156)x. Commissioner to make regulations.—The commissioner shall from time to time promulgate such rules and regulations not inconsistent with this act for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions, and upon request shall furnish any taxpayer with a copy of such rules and regulations. (1935, c. 371, s. 423.)

§ 7880(156)y. Commissioner or agent may examine books, etc.—The commissioner, or his authorized agents, may examine any books, papers, record, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required by this article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the attorney general or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the commissioner, or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this act. (1935, c. 371, s. 424.)

§ 7880(156)z. Excess payment; refund.—If upon examination of any monthly return made under this act it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent monthly return, or shall be refunded to the taxpayer by certificate of overpayment issued by the commissioner to the state auditor, which shall be investigated and approved by the attorney general, and the auditor shall issue his warrant on the treasurer, which warrant shall be payable out of any funds appropriated for that purpose. (1935, c. 371, s. 425.)

§ 7880(156)aa. Prior rights or actions not affected by this act.—Nothing in this act shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under the Revenue Act of 1931, prior to the date on which this act becomes effective, whether such assessment, appeal, suit, claim or action shall have been begun before the date on which this act becomes effective or shall thereafter be begun; and the sections of the Revenue Act of 1931 amended or repealed by this act are expressly continued in full force, effect, and operation for the purpose of the assessment and collection of any taxes due under any such laws prior to the date on which this act becomes effective, and for the imposition of any penalties, forfeitures, or claims for a failure to comply therewith. (1935, c. 371, s. 426.)

§ 7880(156)bb. Obsolete.

§ 7880(156)cc. To prevent unfair trade practices, commissioner of revenue may require tax passed on to consumer.—In order that fair trade practices may be encouraged and any deleterious effect of the retail sales tax levy may be minimized, the commissioner of revenue is empowered and directed to devise, promulgate and enforce regulations under which retail merchants shall collect from the consumers, by rule uniform as to classes of business, the sales tax levied upon their business by the retail sales tax article: Provided, that the commissioner of revenue shall have the power to change the regulations and methods under which the merchants shall collect the tax from the consumers, from time to time, as experience may prove expedient and advisable. Methods for the passing on by merchants to their customers the retail sales tax on sales to said customers may include plans which require both more and less than three (3%) per cent of the sale price, the purpose being to enable the merchants to collect approximately the amount of three (3%) per cent on their total sales volume. The commissioner of revenue

is hereby authorized and empowered to make and adopt rules and regulations requiring merchants to use tokens or stamps, or other means, if found to be practical, which may be determined by the commissioner to provide a method whereby the amount of tax collected by the merchant from the customer shall be as nearly as possible three per cent of each purchase. Such regulations as herein authorized shall be promulgated by the commissioner of revenue to become effective after reasonable notice to the retail merchants and when so promulgated they shall have the full force and effect of law. Any merchant who violates such rules and regulations shall be guilty of a misdemeanor and upon conviction shall be fined not less than five ($5.00) dollars nor more than five hundred ($500.00) dollars or be imprisoned for not more than six months, or be both fined and imprisoned in the discretion of the court; provided, however, that every such violation shall be a separate offense hereunder. It shall be the duty of the solicitors of the several judicial districts of the State to prosecute violations of this section.

The provisions of this section shall not affect in any manner the character or validity of the sales tax levy as a merchants license tax, and they may not be pleaded or considered in the event any provision of the general revenue act is attacked as unconstitutional. (1935, c. 325..)

See 12 N. C. Law Rev., 99, 102, for an article on "Sales Tax and Transactions."

Art. 6. General Administration—Penalties

§ 7880(157). Failure of a person, public utility and/or public-service corporation to file report.—If any person, firm, or corporation required to file a report under any of the provisions of Schedules B and C of this act [§§ 7880(30)-7880(123)b] fails, refuses, or neglects to make such report as required herein within the time limited in said schedules for making such report, he or it shall pay a penalty of ten dollars ($10.00) for each day's omission. (1935, c. 371, s. 450.)

§ 7880(158). Charter cancelled for failure to report.—If a corporation required by the provisions of this act to file any report or return or to pay any tax or fee, either as a public utility (not an agency of interstate commerce) or a corporation organized under the laws of this State, or as a foreign corporation doing business in this State for profit, or owning and using a part or all of its capital or plant in this State, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return, or for paying such tax or fee, the commissioner of revenue shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this State by appropriate entry upon the records of his office, or cancel the certificate of authority of any such foreign corporation to do business in this State by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The secretary of state shall immediately notify by registered mail such domestic or foreign corporation of the action taken by him. (1935, c. 371, s. 451.)

§ 7880(159). Penalty for exercising corporate functions after cancellation of charter.—Any person or persons who shall exercise or attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are cancelled, as provided in any section of this act, shall pay a penalty of not less than one hundred dollars nor more than one thousand, to be recovered in an action to be brought by the commissioner of revenue in the superior court of Wake county. (1935, c. 371, s. 452.)

§ 7880(160). Corporate rights restored. — Any corporation whose articles of incorporation or certificate of authority to do business in this State have been cancelled by the secretary of state, as provided in section 7880(158), or similar provisions of prior revenue acts, upon the filing, within ten years after such cancellation, with the secretary of state, of a certificate from the commissioner of revenue that it has complied with all the requirements of this act and paid all state taxes, fees, or penalties due from it, and upon the payment to the secretary of state of an additional penalty of ten dollars, shall be entitled to again exercise its rights, privileges, and franchises in this State; and the secretary of state shall cancel the entry made by him under the provisions of section 7880(158) or similar provisions of prior revenue acts, and shall issue his certificate entitling such corporation to exercise its rights, privileges, and franchises. (1935, c. 371, s. 453.)

§ 7880(161). Officers, agents, and employees; misdemeanor failing to comply with tax law.—If any officer, agent, and/or employee of any person, firm, or corporation subject to the provisions of this act shall wilfully fail, refuse, or neglect to make out, file, and/or deliver any reports or blanks, as required by such law, or to answer any question therein propounded, or to knowingly and willfully give a false answer to any such question wherein the fact inquired of is within his knowledge, or upon proper demand to exhibit to such commissioner of revenue or any person duly authorized by such commissioner any book, paper, account, record, memorandum of such person, firm, or corporation in his possession and/or under his control, he shall be guilty of a misdemeanor and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense. (1935, c. 371, s. 454.)

§ 7880(162). Aiding and/or abetting officers, agents, or employees in violation of this act a misdemeanor. — If any person, firm, or corporation shall aid, abet, direct, cause or procure any of his or its officers, agents, or employees to violate any of the provisions of this act he or it shall be guilty of a misdemeanor, and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense. (1935, c. 371, s. 455.)

§ 7880(163). Each day's failure a separate offense.—Every day during which any person, firm, or corporation subject to the provisions of this

act, or any officer, agent, or employee thereof, shall wilfully fail, refuse, or neglect to observe and comply with any order, direction, or mandate of the commissioner of revenue, or to perform any duty enjoined by this act, shall constitute a separate and distinct offense. (1935, c. 371, s. 456.)

§ 7880(164). Penalty for bad checks.—When any uncertified check is tendered in payment of any obligation to the department of revenue and such check shall have been returned to the office of the commissioner of revenue unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, then and in that event an additional tax shall be imposed equal to ten per cent of the tax due; and in no case shall the increase of said tax because of such failure be less than one dollar nor exceeding two hundred dollars ($200.00), and the said additional tax shall not be waived or diminished by the commissioner of revenue. This section shall also apply to all taxes levied or assessed by the State. (1935, c. 371, s. 457.)

§ 7880(165). Discretion of commissioner over penalties.—The commissioner of revenue shall have power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this act, except the penalty provided in section 7880(164) relating to unpaid checks. (1935, c. 371, s. 458.)

§ 7880(166). Tax a debt.—Every tax imposed by this act, and all increases, interest, and penalties thereon, shall become, from the time it is due and payable, a debt from the person, firm, or corporation liable to pay the same to the State of North Carolina. (1935, c. 371, s. 470.)

For prior law see Worth v. Wright, 122 N. C. 335, 29 S. E. 361; Gatling v. Commissioners, 92 N. C. 536; Commissioners v. Hall, 177 N. C. 490, 491, 99 S. E. 372. As to taxes not being subject to set-off and counterclaim, see note to section 7990.

§ 7880(167). Action for recovery of taxes.—Action may be brought at any time by the attorney general of the State at the instance of the commissioner of revenue, in the name of the State, to recover the amount of any taxes, penalties, and interest due under this act. (1935, c. 371, s. 471.)

§ 7880(168). Tax upon settlement of fiduciary's account.—1. No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this act upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the commissioner of revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax, to the extent of said certificate.

2. For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the commissioner of revenue, with the approval of the attorney general, may, on behalf of the State, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this act, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1935, c. 371, s. 472.)

§ 7880(169). Warrant for the collection of taxes.—If any tax imposed by this act or any other tax levied by the State and payable to the commissioner of revenue, or any portion of such tax, and/or penalties duly assessed for the nonpayment thereof, shall not be paid within thirty days after the same becomes due and has been assessed, the commissioner of revenue shall certify the same in duplicate and forward one copy thereof to the clerk of the superior court of the county in which the delinquent taxpayer resides or has property, and additional copies for each county in which the commissioner of revenue has reason to believe the delinquent taxpayer has property located, which copy so forwarded to the clerk of the superior court shall be immediately docketed by said clerk and indexed on the cross-index of judgments, and from the date of such docketing shall constitute a preferred lien upon any real property which the delinquent taxpayer may own in said county, with the same force and effect as a judgment rendered by the superior court. The duplicate of said certificate shall be forwarded by the commissioner of revenue to the sheriff or sheriffs of such county or counties, and in the hands of such sheriff shall have all the force and effect of an execution issued to him by the clerk of the superior court upon the judgment of the superior court duly docketed in said county. The said certificate shall state a return day of not less than thirty nor more than sixty days, and the sheriff receiving the same shall thereupon proceed with the collection of the sum therein set out in all respects and with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of the superior court, and shall be entitled to the same fees for his services in executing the order as is allowed by law upon executions. The sheriff shall make his return in duplicate, filing one copy with the clerk of the superior court in said county and the other copy he shall forward to the commissioner of revenue, together with the money collected thereon, less his lawful expenses and fees: Provided, that all taxes herein designated and levied, except those designated and levied under Schedule "A" of this act [§§ 7880(1)-7880(29)a], shall not become a lien on the real estate of any taxpayer until a warrant for the collection of the tax has been filed in the office of the clerk of superior court of the county where the real estate subject to such lien is situate in accordance with the provisions of this act.

The provisions of this section are intended to be cumulative and not in substitution for any other remedies now or hereafter provided by law for the collection of taxes. All of the rights and remedies provided for taxpayers in section 7880(194) for the recovery of any tax improperly collected are hereby expressly reserved to such taxpayers, but the provisions therein shall not hinder or delay the execution of the process in this section. (1935, c. 371, s. 473.)

§ 7880(170). Taxes recoverable by action.—Upon the failure of any corporation to pay the taxes, fees, and penalties prescribed by Schedules "B"

and "C" of this act [§§ 7880(30)-7880(123)b], the commissioner of revenue may certify same to the sheriff of the county in which such company may own property, for collection as provided in this act; and if collection is not made, such taxes or fees and penalties thereon may be recovered in an action in the name of the State, which may be brought in the superior court of Wake county, or in any county in which such corporation is doing business, or in any county in which such corporation owns property. The attorney general, on request of the commissioner of revenue, shall institute such action in the superior court of Wake county, or of any such county as the commissioner of revenue may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered stands charged on the delinquent duplicate of the commissioner of revenue, and that the same has been unpaid for the period of thirty days after having been placed thereon. (1935, c. 371, s. 474.)

§ 7880(171). Additional remedies.—In addition to all other remedies for the collection of any taxes or fees due under the provisions of this act, the attorney general shall, upon request of the commissioner of revenue, whenever any taxes, fees, or penalties due under this act from any public utility (not an agency of interstate commerce) or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility (not an agency of interstate commerce) has failed or neglected for ninety days to make or file any report or return required by this act, or to pay any penalty for failure to make or file such report or return, apply to the superior court of Wake county, or of any county in the State in which such public utility (not an agency of interstate commerce) or corporation is located or has an office or place of business, for an injunction to restrain such public utility (not an agency of interstate commerce) or corporation from the transaction of any business within the State until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the court. Such petition shall be in the name of the State; and if it is made to appear to the court, upon hearing, that such public utility (not an agency of interstate commerce) or corporation has failed or neglected, for ninety days, to pay such taxes, fees, or penalties thereon, or to make and file such reports, or to pay such penalties, for failure to make or file such reports or returns, such court shall grant and issue such injunction. (1935, c. 371, s. 475.)

§ 7880(172). Failure of sheriff to execute order.—If any sheriff of this State shall wilfully fail, refuse, or neglect to execute any order directed to him by the commissioner of revenue and within the time provided in this act, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1935, c. 371, s. 476.)

§ 7880(173). Actions, when tried.—All actions or processes brought in any of the superior courts of this State, under provisions of this act, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein. (1935, c. 371, s. 477.)

§ 7880(174). Taxes payable in national currency; for what period, and when a lien.—The taxes herein designated and levied shall be payable in the existing national currency. State, county, and municipal taxes levied for any and all purposes pursuant to this act shall be for the fiscal year in which they become due, except as otherwise provided, and the lien of such taxes shall attach to all real estate of the taxpayer within the State, which shall attach annually on the date that such taxes are due and payable, and shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall be paid. (1935, c. 371, s. 490.)

Cross Reference.—For full treatment of the subject, see 11 N. C. Enc. Dig. 557 et seq.; 15 N. C. Enc. Dig. 552 et seq. As to tax sales, see section 8006 et seq., and the notes thereto.

Power to Tax and Manner of Exercise.—The subject of taxation is regulated entirely by statute, and the revenues of this state are collected under the operation of what is known as the Machinery act. Wade v. Commissioners, 74 N. C. 81.

The general assembly have an unlimited right to tax all persons domiciled within the state, and all property within the state, except so far as this right has been limited by the provisions of the constitution, either express words or by necessary implication. Pullen v. Commissioners, 66 N. C. 361.

Same—Delegation of Power.—The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town, though they have a residence also out of town. Worth v. Commissioners, 60 N. C. 617.

Statement of Object.—The North Carolina Const. Art. V, section 7, requires that every act levying taxes shall state the objects to which they shall be appropriated. This provision, however, has no application to taxes levied by county authorities for county purposes. Parker v. Commissioners, 104 N. C. 166, 10 S. E. 137.

Equality and Uniformity.—See 11 N. C. Enc. Dig. 562 et seq. See also N. C. Const Art. V, section 3 and the notes there placed.

Constitutional Provisions—Uniformity Required. — Under North Carolina Const. Art. V, section 3, the same rule of uniformity applies as to the taxing of "traders, professions, franchises and incomes" as to the other species of property therein named; and there must be also uniformity in the mode of assessment. Worth v. Petersburg R. Co., 89 N. C. 301. See generally the annotations under North Carolina Const. Art. V, section 3. Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on traders, professions, etc. State v. Moore, 113 N. C. 597, 698, 18 S. E. 342.

Tax Laws as Ex Post Facto.—See the title Constitutional Law, 3 N. C. Enc. Dig. section 123.

Fiscal Year and Tax Year.—Welding this and § 1334(53) together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and coincident, and the liability of the landowner for taxes for any year arises and begins on 1 July, of that year. State v. Champion Fibre Co., 204 N. C. 295, 297, 168 S. E. 207.

§ 7880(175). Municipalities not to levy income and inheritance tax.—No city, town, township, or county shall levy any tax on income or inheritance. (1935, c. 371, s. 491.)

§ 7880(176). State taxes.—The taxes levied in this act are for the expenses of the state government, the appropriations to its educational, charitable, and penal institutions, pensions for confederate soldiers and widows, the interest on the debt of the State, for public schools, and other specific appropriations made by law, and shall be collected

and paid into the general fund of the state treasurer.

The taxes levied under authority of section 492 of chapter 427 of the Public Laws of 1931, and remaining unpaid, shall be collected in the same manner as other county taxes and accounted for in the same manner as other taxes under the Daily Deposit Act. The county treasurer or other officer receiving such taxes in each county shall remit to the treasurer of the state on the first and fifteenth days of each month all taxes collected up to the time of such remittance under the levy therein provided for, and such remittance to the state treasurer shall also include the proportion of all poll taxes collected required by the constitution of the State to be used for educational purposes.

The tax levy therein provided for shall be subject to the same discounts and penalties as provided by law for other county taxes and there shall be allowed the same percentage for collecting such taxes as for other county taxes. The obligation to the State under the levy therein provided for shall run against all taxes that become delinquent; and with respect to any property that may be sold for taxes, any public officer receiving such delinquent taxes when and if such property may be redeemed or such tax obligations in any manner satisfied, shall remit such proportionate part of such tax levy to the state treasurer within fifteen days after receipt of same. At the end of each fiscal year the county accountant shall furnish the state treasurer a statement of the total amount of taxes levied in accordance with the provisions of this section that are uncollected at the end of the fiscal year. (1935, c. 371, s. 492.)

See the North Carolina Const. Art. V, and the notes thereto. See the Editor's Note at Art. VII, section 9.

See 12 N. C. Law Rev., 23.

This section construed with § 5603 et seq. seems to authorize the board of county commissioners to levy a tax to supply the deficiency when the necessary State funds are not available and it is not possible otherwise to comply with the imperative requirement to maintain the schools for a term of six months. Powell v. Bladen County, 206 N. C. 46, 51, 173 S. E. 50.

A county tax rate of 16½ cents for the support of the constitutional six months school term for the tax year of 1931, is held valid, a levy of 16 cents on the valuations of 1931 being equal to a levy of 15 cents on the valuations of the county for the year 1930, as provided by this section, and the taxable values being uncertain at the time of its levy, and it appearing that the tax rate was reasonably accurate and that the surplus collected therefrom for the purpose was carried over to the next year and the tax rate reduced accordingly. Id.

§ 7880(177). Tax exemption repealed.—Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent shall be exempt, other than bonds of this State and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions. (1935, c. 371, s. 493.)

Cross Reference.—See general treatment in 11 N. C. Enc. Dig. 580 et seq.; 15 N. C. Dig. 558 et seq. For history of tax exemption statute, see 1 N. C. Law Rev. 183.

Editor's Note.—This section is based on Art. V, section 5 of the state constitution. In fact, portions of the section are verbatim enactments of the provisions of the constitutional article just mentioned. In view of this fact, the notes placed under that section of the consitution will be a direct aid to the practitioner in construing this section of the code. See also note to section 7971(17).

Enumerated Exemption Exclusive of Others.—No exemption is permitted except in the specified instances and where such property is **exclusively** devoted to those purposes. Southern Assembly v. Palmer, 166 N. C. 75, 82 S. E. 18.

Same—Rentals.—The exemption specified as to rents applies only to those "used exclusively for charitable or benevolent purposes," and a devise of lands to trustees directing that the rents be applied to "charitable, benevolent, and religious purposes," does not come within the statutory exemption. Davis v. Salisbury, 161 N. C. 56, 76 S. E. 687.

An institution created by statute to provide for the Christian education of boys and girls in a certain locality, and to do other institutional work, in which its property is exempt from taxation as long as it shall be used for "church, school, or charitable purposes," does not include within its tax exemption terms, either under its charter or under this section, lands from which the rentals are applied to educational purposes alone; in this case, a tract of land three miles distant from that upon which the corporation conducts its operations, a portion of which has been cleared and rented out for a part of the crop, and also used for grazing purposes. Trustees v. Avery County, 184 N. C. 469, 114 S. E. 696.

Assessments for Street Improvements.—While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, or this section and section 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. Tarboro v. Forbes, 815 N. C. 59, 116 S. E. 81.

Presumptions as to Exemption.—The power of taxation being essential to the life of government, exemptions therefrom are regarded as in derogation of sovereign authority and common right, and will never be presumed. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652.

Grant of Exemption Constitute a Privilege.—The grant of an exemption from taxation without some consideration or equivalent therefor received by the state does not constitute a contract, but a privilege merely, which may be recalled at the pleasure of the legislature. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652.

§ 7880(177) a. Free privilege licenses for blind people.—Any blind person of the age of twenty-one years or more, desiring to operate a legitimate business of any kind to provide a livelihood for himself and dependents, if any, may apply to the welfare officer of the county in which he resides for free privilege license.

No one shall be eligible to the benefits provided for in this section who is not a blind person (the term "blind person" shall for the purposes of this act be construed to mean one who has suffered the total loss of his eyesight, or whose eyesight is so impaired as to unfit the person applying for the benefits under this act to engage in any labor, profession, or ordinary work in competition with his fellowmen with any degree of success, and/or any person suffering with impaired visions likely to produce total blindness), or who has an income of any kind amounting to twelve hundred ($1200.00) dollars, or more net per annum, or whose husband or wife has an

income of any kind amounting to twelve hundred ($1200.00) dollars or more net per annum.

It shall be the duty of the county commissioners upon receipt of application from anyone applying for the benefits under this section, to make a thorough investigation to determine whether or not the applicant is entitled to the privilege license as provided for in this section. When the commissioners are satisfied that the applicant is capable of operating the business for which said privilege license is asked and that he is a deserving person, the commissioners shall then present to the state license department a letter requesting necessary privilege license to operate the aforesaid business, and the state license department shall issue free of charge the license requested. The commissioners shall present to the county license department a letter requesting county privilege license necessary to operate the aforesaid business, and the county license department shall likewise issue free of charge the privilege license requested. The county commissioners shall also present, when necessary, to the municipal license department a letter requesting city privilege license necessary to operate aforesaid business, and the municipal license department shall issue free of charge privilege license requested: Provided, that the free privilege license of this section shall not apply to the sale of any kind of fireworks. (1933, c. 53; 1935, c. 162.)

Editor's Note.—The amendment of 1935 adds the proviso at the end of this section.

§ 7880(177)b. Hospital property exempt from local taxes.—For and in consideration of the services rendered the public without charge and on account of the free use of their facilities by indigent patients, all property used exclusively for hospital purposes by said general hospitals operating in North Carolina which furnish the use of their facilities to indigent patients shall be exempt from ad valorem taxation in the counties, cities and towns of this State: Provided, however, that before any such hospital shall be exempted, it shall be required by the local governing boards of the counties, cities and towns that there be filed with such board a certificate from the state board of health, certifying that such general hospital is approved by said state board of health. Provided, further, that every such general hospital desiring to be exempted from ad valorem tax shall present to the governing bodies of any county, city or town duly itemized and sworn statements which have been approved by the county physician or health officer, as necessary or proper, showing the performance of service to indigent patients, and such statements shall be allowed as payments on and credits against all taxes which may be or become due to any such county, city or town by such hospital on property strictly used for hospital purposes, and such exemption from taxes shall not in any case exceed the total amount of such statements. Nothing in this section shall create a liability upon any county, city or town for hospital bill. (1935, c. 480, s. 1.)

Editor's Note.—Sections 2 and 3 of Public Laws of 1935, chapter 480, from which the above section is codified, provides that the acts shall not apply to Gaston county and that it shall not repeal any public-local laws affecting Buncombe county and the city of Asheville.

§ 7880(178). Law applicable to foreign corporations.—All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. (1935, c. 371, s. 494.)

§ 7880(179). Information must be furnished.—Each company, firm, corporation, person, association, co-partnership, or public utility shall furnish the commissioner of revenue, in the form of returns prescribed by him, all information required by law and all other facts and information, in addition to the facts and information in this act specifically required to be given, which the commissioner of revenue may require to enable him to carry into effect the provisions of the laws which the said commissioner is required to administer, and shall make specific answers to all questions submitted by the commissioner of revenue. (1935, c. 371, s. 495.)

§ 7880(180). Returns required.—Any company, firm, corporation, person, association, co-partnership, or public utility receiving from the commissioner of revenue any blanks, requiring information, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure.

The answers to such questions shall be verified under oath by such persons, or by the president, secretary, superintendent, general manager, principal accounting officer, partner, or agent, and returned to the commissioner of revenue at his office within the period fixed by the commissioner of revenue. (1935, c. 371, s. 496.)

§ 7880(181). Personal liability of officers, trustees, or receivers.—Any officer, trustee, or receiver of any corporation required to file report with the commissioner of revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the state board of assessment or commissioner of revenue for any state taxes which are due or have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to a penalty of not more than the amount of the tax, nor less than twenty-five per cent of such tax found to be due or accrued. (1935, c. 371, s. 497.)

§ 7880(182). Blanks furnished by commissioner of revenue.—The commissioner of revenue shall cause to be prepared suitable blanks for carrying out the purposes of the laws which he is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, co-partnership, or public utility subject thereto. (1935, c. 371, s. 498.)

§ 7880(183). Commissioner of revenue to keep records.—The commissioner of revenue shall keep books of account and records of collections of taxes as may be prescribed by the director of the budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this act, show-

ing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the director of the budget and to the auditor and/or state treasurer of all collections of taxes on such forms as prescribed by the director of the budget. (1935, c. 371, s. 499.)

§ 7880(184). Publication of statistics.—The commissioner of revenue shall prepare and publish annually statistics reasonably available, with respect to the operation of this act, including amounts collected, classifications of taxpayers, income and exemptions, and such other facts as are deemed pertinent and valuable. (1935, c. 371, s. 500.)

§ 7880(184) a. Report on system of other states.—The commissioner of revenue shall biennially make report to the general assembly, the said report to contain all available data that may be assembled by his department with respect to the tax laws and systems of this and other states, and making such recommendations as may be useful in improving the tax laws and system of this state. (1933, c. 88, s. 2.)

For the compiling of such report, outside assistance seems almost a necessity, in view of the present load of the Commissioner of Revenue. See 11 N. C. Law Rev., 250.

§ 7880(185). Powers of commissioner of revenue.—The commissioner of revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the tax due by any taxpayer under this act, shall have power to examine or cause to be examined, by any agent or representative designated by him for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the taxpayer or of any other person having knowledge in the premises, and may take testimony and require proof material for his information, with power to administer oaths to such person or persons. (1935, c. 371, s. 501.)

§ 7880(186). Secrecy required of officials—penalty for violation.—(a) Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the commissioner of revenue, any deputy, agent, clerk, other officer, employee, or former officer or employee, to divulge and make known in any manner the amount of income, income tax or other taxes, or any particulars set forth or disclosed in any report or return required under this act.

(b) Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the governor, attorney general, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this act; nor shall the provisions of this section prohibit the department of revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B of this act [§§ 7880(30)-7880(108)].

(c) Reports and returns shall be preserved for three years, and thereafter until the commissioner of revenue shall order the same to be destroyed.

(d) Any person, officer, agent, clerk, employee, or former officer or employee, violating the provisions of this section shall be guilty of a misdemeanor, and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned, in the discretion of the court; and if such offending person be an officer or employee of the State, he shall be dismissed from such office or employment, and shall not hold any public office or employment in this State for a period of five years thereafter.

(e) Notwithstanding the provisions of this section, the commissioner of revenue may permit the commissioner of internal revenue of the United States, or the revenue officer of any state imposing any of the taxes imposed in this act, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representative, only if the statutes of the United States or of such other state grants substantially similar privilege to the commissioner of revenue of this State or his duly authorized representative. (1935, c. 371, s. 502.)

§ 7880(187). Deputies and clerks.—The commissioner of revenue may appoint such deputies, clerks, and assistants under his direction as may be necessary to administer the laws relating to the assessment and collection of all taxes provided for in this act; may remove and discharge same at his discretion, and shall fix their compensation within the rules and regulations prescribed by law. (1935, c. 371, s. 503.)

§ 7880(188). Commissioner and deputies to administer oaths.—The commissioner of revenue and such deputies as he may designate shall have the power to administer an oath to any person or to take the acknowledgment of any person in respect to any return or report required by this act or under the rules and regulations of the commissioner of revenue, and shall have access to the books and records of any person, firm, corporation, county, or municipality in this State. (1935, c. 371, s. 504.)

§ 7880(189). Rules and regulations.—The commissioner of revenue may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with this act, as may be needful to enforce its provisions. (1935, c. 371, s. 505.)

§ 7880(190). Time for filing reports extended.—The commissioner of revenue, when he deems the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report

required by law to be filed with the commissioner of revenue, in which event the attaching or taking effect of any penalty for failure to file such report or to pay any tax or fee shall be extended or postponed accordingly. (1935, c. 371, s. 506.)

§ 7880(191). Construction of the act; population.—It shall be the duty of the commissioner of revenue to construe all sections of this subchapter imposing either license, inheritance, income, or other taxes. Such decisions by the commissioner of revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby. Where the license tax is graduated in this act according to the population, the population shall be the number of inhabitants as determined by the last census of the United States government: Provided, that if any city or town in this State has extended its limits since the last census period, and thereafter has taken a census of its population in these increased limits by an official enumeration either through the aid of the United States government or otherwise, the population thus ascertained shall be that upon which the license tax is to be graduated. (1935, c. 371, s. 507.)

§ 7880(192). When increases operative.—In all instances in which the taxes are increased or decreased or new taxes imposed under Schedules B and C of this act [§§ 7880(30)-7880(123)b], and which shall become due between the ratification of this act and the first day of June, one thousand nine hundred and thirty-five, such increase or decrease shall become operative only from and after the thirty-first day of May, one thousand nine hundred and thirty-five. (1935, c. 371, s. 508.)

§ 7880(193). Authority for imposition of tax.—This act, after its ratification, shall constitute authority for the imposition of taxes upon the subjects herein revised, and all laws in conflict with it are hereby repealed, but such repeal shall not affect taxes listed or which ought or should have been listed, or which may have been due, or penalties or fines incurred from failure to make the proper reports, or to pay the taxes at the proper time under any of the schedules of existing law, but such taxes and penalties may be collected, and criminal offenses prosecuted, under such law existing at the time of the ratification of this act, notwithstanding this repeal. (1935, c. 371, s. 509.)

§ 7880(194). Taxes to be paid.—No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this act. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the commissioner of revenue of the state, if a state tax, or if a county, city, or town tax, from the treasurer thereof, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such official for the amount so demanded; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the State. (1935, c. 371, s. 510.)

See § 7979(a) and note thereto. See also 12 N. C. Law Rev., 23.

Editor's Note.—For similar provision see § 7979 which seems to have been superseded by this section.

To Recover Tax Illegally Collected Statutory Procedure Must Be Complied with.—In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with the procedure provided in the statute and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within thirty days demand its refund from the State Commissioner in writing, and if not refunded in ninety days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is fatal; section 7979(a), requiring the State Auditor to issue his warrant in certain instances, has no application. Bunn v. Maxwell, 199 N. C. 557, 155 S. E. 250.

Suit in Equity.—The remedy provided by this section cannot, in case of a class suit instituted in behalf of a large number of taxpayers, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation. Gramling v. Maxwell, 52 F. (2d) 256, 261.

A suit in equity to enjoin the collection of state tax, alleged to be violative of the Fourteenth Amendment on the ground of an arbitrary and excessive assessment, will not lie in the federal court, since the plaintiff has a plain, adequate, and complete remedy at law by first paying the tax and then suing to recover it. Catholic Society, etc. v. Madison County, 74 F. (2d) 848, 850.

§ 7880(194)a. Reciprocal comity.—The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this State. (1935, c. 371, s. 511.)

§ 7880(194)b. Extraterritorial authority to enforce payment.—The commissioner of revenue, with the assistance of the attorney general, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this State. The officials of other states which extend a like comity to this State are empowered to sue for the collection of such taxes in the courts of this State. A certificate by the secretary of state, under the great seal of the State, that such officers have authority to collect the tax shall be conclusive evidence of such authority. (1935, c. 371, s. 512.)

§ 7880(195). Unconstitutionality or invalidity; captions of sections not to affect interpretation.—If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this subchapter or any part thereof. (1935, c. 371, s. 513.)

Art. 7. Liability for Failure to Levy Taxes

§ 7880(196). Repeal of laws imposing liability upon governing bodies of local units.—All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability heretofore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418, s. 1.)

SUBCHAPTER II. ASSESSMENT AND LISTING OF TAXES.

§§ 7881-7971: Superseded by §§ 7971(1) et seq.

Art. 1. Machinery Act of 1935 in General

§ 7971(1). Official title.—This act may be cited as the Machinery Act of one thousand nine hundred thirty-five. (1935, c. 417, s. 1.)

§ 7971(2). Definitions.—When used in this act:

(1) The term "person" means an individual, trust, estate, a partnership, or company.

(2) The term "corporation" includes associations, joint-stock companies, insurance companies, and limited partnerships where shares of stock are issued.

(3) The term "domestic" when applied to corporations or partnerships means created or organized under the laws of the State of North Carolina.

(4) The term "foreign" when applied to a corporation or partnership means a corporation or partnership not domestic.

(5) The term "commissioner" means the commissioner of revenue.

(6) The term "deputy" means an authorized representative of the commissioner of revenue or other commissioner.

(7) The term "taxpayer" means any person, firm, or corporation subject to a tax or duty imposed by the Revenue or Machinery Act.

(8) The term "state license" means a license issued by the commissioner of revenue, usable, good and valid in the county or counties named in the license.

(9) The term "state-wide license" means a license issued by the commissioner of revenue, usable, good and valid in each and every county in this State.

(10) The term "intangible property" means patents, copy-rights, secret processes and formulae, good-will, trade-marks, trade-brands, franchises, stocks, bonds, notes, evidences of debt, bills and accounts receivable, and other like property.

(11) The term "tangible property" means all property other than intangible.

(12) The term "public utility" as used in this act means and includes each person, firm, company, corporation, and association, their lessees, trustees, or receivers, elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, Pullman-car company, freight-line company, equipment company, electric power company, gas company, railroad company, union depot company, water transportation company, street railway company, railroad company, and other companies exercising the right of eminent domain, and such term "public utility" shall include any plant or property owned and/or operated by any such persons, firms, corporations, companies, or associations.

(13) The term "express company" means a public utility company engaged in the business of conveying to, from, or through this State, or part thereof, money, packages, gold, silver, plate, or other articles and commodities by express, not including the ordinary freight lines of transportation of merchandise and property in this State.

(14) The term "telephone company" means a public utility company engaged in the business of transmitting to, from, through, or in this State, or part thereof, telephone messages or conversations.

(15) The term "telegraph company" means a public utility company engaged in the business of transmitting to, from, through, or in this State, or a part thereof, telegraphic messages.

(16) The term "Pullman-car company" means a public utility company engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railroad line or lines or other common carrier lines, in whole or in part within this State, such line or lines not being owned, leased and /or operated by such railroad company, whether such cars be termed sleeping, Pullman, palace, parlor, observation, chair, dining, or buffet cars, or by any other name.

(17) The term "freight-line company" means a public utility company engaged in the business of operating cars for the transportation of freight or commodities, whether such freight and/or commodities is owned by such company or any other person or company, over any railroad or other common carrier line or lines in whole or in part within this State, such line or lines not being owned, leased, and/or operated by such railroad company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, refrigerator, fruit, meat, oil or by any other name.

(18) The term "equipment company" means a public utility company engaged in the business of furnishing and/or leasing cars of whatsoever kind or description to be used in the operation of any railroad or other common carrier line or lines, in whole or in part within this State, such line or lines not being owned, leased, or operated by such railroad company.

(19) The term "electric power company" means a public utility company engaging in the business of supplying electricity for light, heat, and/or power purposes to consumers within this State.

(20) The term "gas company" means a public utility company engaged in the business of supplying gas for light, heat, and/or power purposes to consumers within this State.

(21) The term "waterworks company" means a public utility company engaged in the business of supplying water through pipes or tubing and/or similar manner to consumers within this State.

(22) The term "union depot company" means

a public utility company engaged in the business of operating a union depot or station for railroads or other common carrier purposes.

(23) The term "water transportation company" means a public utility company engaged in the transportation of passengers and/or property by boat or other water craft, over any waterway, whether natural or artificial, from one point within this State to another point within this State, or between points within this State and points without this State.

(24) The term "street railway company" means a public utility company engaged in the business of operating a street, suburban or interurban railway, either wholly or partially within this State, whether cars are propelled by steam, cable, electricity, or other motive power.

(25) The term "railroad company" means a public utility company engaged in the business of operating a railroad, either wholly or partially within this State, or rights of way acquired or leased and held exclusively by such company or otherwise.

(26) The terms "gross receipts" or "gross earnings" mean and include the entire receipts for business done by any person, firm, or corporation, domestic or foreign, from the operating of business or incidental thereto, or in connection therewith. The gross receipts or gross earnings for business done by a corporation, engaged in the operation of a public utility, shall mean and include the entire receipts for business done by such corporation, whether from the operation of the public utility itself or from any other business done whatsoever.

(27) The terms "bank," "banker," "broker," "stock jobber," mean and include any person, firm, or corporation who or which has money employed in the business of dealing in coin, notes, bills of exchange, or in any business of dealing, or in buying or selling any kind of bills of exchange, checks, drafts, bank notes, acceptances, promissory notes, bonds, warrants, or other written obligations, or stocks of any kind or description whatsoever, or receiving money on deposit.

(28) The terms "collector" or "collectors" mean and include county, township, city or town tax collectors, and sheriffs.

(29) The term "list takers and/or assessors" means and includes either list takers, assessors, or assistants.

(30) The terms "real property," "real estate," "land," "tract," or "lot" mean and include not only the land itself, but also all buildings, structures, improvements, and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto, except where the same may be otherwise denominated by this or the Revenue Act.

(31) The terms "shares of stock" or "shares of capital stock" mean and include the shares into which the capital or capital stock of any incorporated company or association may be divided.

(32) The terms "tax" or "taxes" mean and include any taxes, special assessments, cost penalties, and/or interest imposed upon property, or other subjects of taxation. (1935, c. 417, s. 2.)

See §§ 7880(197), 7994.

Art. 2. State Board of Assessment

§ 7971(3). Creation; Officers.—The governor, or some person designated by him, the commissioner of revenue, the public utilities commissioner, the attorney general, and the director of local government shall be and are hereby created the state board of assessment, with all the powers and duties prescribed in the act. The commissioner of revenue shall be the chairman of the said board, and shall in addition to presiding at the meetings of the board, exercise the functions, duties, and powers of the board when not in session. The board may employ an executive secretary, whose entire time may be given to the work of the said board, and is authorized to employ such clerical assistance as may be needed for the performance of its duties. (1935, c. 417, s. 200.)

Suits against State Board of Assessment.—The corporation commission (under the prior law constituting the board) acts as a body and in a corporate capacity and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions are not individual or personal, but corporate. Hence, mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not be against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036. This would seem to be applicable to the board as now constituted.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848.

§ 7971(4). Oath.—The members of the said board shall take and subscribe to the constitutional oath of office and file the same with the secretary of state. (1935, c. 417, s. 201.)

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848, 849.

§ 7971(5). Supervision over valuation and taxation.—The state board of assessment shall exercise general and specific supervision of the systems of valuation and taxation throughout the State, including counties and municipalities, and in addition they shall be and constitute a state board of equalization and review of valuation and taxation in this State. It shall be the duty of said board:

(1) To confer with and advise boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation and assessment of property, in the preparation and keeping of suitable records, and in the levying and collection of taxes and revenues, as to their duties under this act or any other act passed for the purpose of valuation of property, assessing, levying, and/or the collection of revenue for counties, municipalities, and other subdivisions of the State, to insure that proper proceedings shall be brought to enforce such revenue acts and for the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals failing, refusing, or neglecting to comply with this act; and to call upon the attorney general or any prosecuting attorney in the State to assist in the execution of the powers herein conferred.

(2) To prepare a pamphlet or booklet for the instruction of the boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation of property, preparing and keeping records, and in the levying and collecting of taxes and revenue, and have the same ready for distribution at least thirty (30) days prior to the date fixed for listing taxes. The said pamphlet or booklet shall, in as plain terms as

possible, explain the proper meaning of the revenue laws and the Machinery Act of this State; shall call particular attention to any points in the law and/or in the administration of the laws which may be or which have been overlooked or neglected; shall advise as to the practical working of the revenue laws and Machinery Act, and shall explain and interpret any points that seem to be intricate and upon which county or state officials may differ.

(3) To hear and to adjudicate appeals from boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and, if error, inequality, and/or fraud is found to exist, to take such proceedings and to make such orders as to correct the same. In case it shall be made to appear to the state board of assessment that any tax list or assessment roll in any county in this State is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said board shall correct such irregularities, inequalities, and lack of uniformity, and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it, not inconsistent with this act: Provided, that no appeals shall be considered or fixed values changed, unless notice of same is filed within sixty (60) days after the final values are fixed and determined by the board of county commissioners or the board of equalization and review.

(4) To require from the register of deeds, auditor, county accountant, tax clerk, clerk of the court, and/or other officer of each county, and the mayor, clerk, and/or other officer of each municipality, on forms prepared and prescribed by the said board, such annual and other reports as shall enable said board to ascertain the assessed valuation of all property listed for taxation in this State under this or any other act, the rate and amount of taxes assessed and collected, the amount returned delinquent, tax sales, certificates of purchase at such tax sales held by the State, county, or municipality, and such other information as the board may require, to the end that it may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the State.

(5) To require the secretary of state, and it shall be his duty, to furnish monthly to the said board a list of all domestic corporations incorporated, charter amended, or dissolved, all foreign corporations domesticated, charter amended, dissolved, or domestication withdrawn during the preceding month, in such detail as may be prescribed by said board.

(6) To make diligent investigation and inquiry concerning the revenue laws and systems of taxation of other states so far as the same are made known by published reports and statistics, and can be ascertained by correspondence with offices thereof.

(7) To report to the general assembly at each regular session, or at such other times as it may direct, the total amount of revenue or taxes collected in this State for state, county, and municipal purposes, classified as to state, county, township, and municipality, with the sources thereof; to report to the general assembly the proceedings of the board and such other information and recommendations concerning the public revenues as required by the general assembly or that may be of public interest; to cause two thousand (2,000) copies of said report to be printed on or before the first day of January in the year of the regular session of the general assembly, and place at the disposal of the state librarian one hundred (100) copies of said report for distribution and exchange; and to forward a copy of said report to each member of the general assembly as soon as printed.

(8) To discharge such other duties as may be prescribed by law, and take such action, do such things, and prescribe such rules and regulations as may be needful and proper to enforce the provisions of this and the Revenue Act.

(9) To prepare for the legislative committee of succeeding general assemblies such suggestions of revision of the revenue laws, including the Machinery Act, as it may find by experience, investigation, and study to be expedient and wise. (1935, c. 417, s. 202.)

Unless the land is so properly listed for taxation it is not subject to sale by the sheriff for non-payment of taxes. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375. As to listing in wrong name see section 8019 and the notes there placed.

In Rexford v. Phillips, 159 N. C. 213, 74 S. E. 213, neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. This case is discussed with approval in the Stone case, supra.—Ed. Note.

Review of Assessment. — Under the prior law original proceedings before the State Board of Assessment to have the value of property reduced for taxation will be disregarded and considered as a nullity when the question involved is solely as to whether such value theretofore fixed and agreed upon be reduced. Caldwell County v. Doughton, 195 N. C. 62, 141 S. E. 289.

Appeal from Assessment—Sufficiency of Board's Report. —The method provided by statute for assessment and appeal from the assessment must be followed. In the instant case the Board reported results of the appraisement and did not report the individual items upon which the appraisement was made, and the appraisement of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284.

Applied in Catholic Society, etc. v. Madison County, 74 F. (2d) 848.

§ 7971(6). Annual report to governor. — The state board of assessment shall annually, on or before the first day of January of each year, make a report to the governor of the proceedings of the said board during the preceding year, with its recommendations in relation to all matters of taxation and revenue. (1935, c. 417, s. 203.)

§ 7971(7). Board to prescribe forms, books, and records, require abstracts to be filed, and to make rules and regulations.—The state board of assessment is authorized and empowered to prescribe the forms, books, and records that shall be used in the valuation of property and in the levying and collection of taxes, and how the same shall be kept; to require the county tax supervisors, clerk of board of county commissioners, or auditor of each county to file with it, when called for, complete abstracts of all real and personal property in the county, itemized by townships and as equalized by the county board of equalization and review; and to make such other rules and regulations, not included in this or the Revenue Act, as the said board may deem needful to effectually promote the pur-

poses for which the board is constituted and the systems of taxation provided for in this and the Revenue Act. (1935, c. 417, s. 204.)

§ 7971(8). Sessions of board, where to be held.—The regular sessions of the state board of assessment shall be held in the city of Raleigh at the office of the chairman, and other sessions may be called at any place in the State to be decided by the board. (1935, c. 417, s. 205.)

§ 7971(9). Board has access to public books and records and empowered to subpoena witnesses.—The state board of assessment, the members thereof, and/or any duly authorized deputy shall have access to all books, papers, documents, statements, records, and accounts on file or of record in any department of state, county, or municipality, and is authorized and empowered to subpoena witnesses upon a subpoena signed by the chairman of the board, directed to such witnesses, and to be served by any officer authorized to serve subpoenas: to compel the attendance of witnesses by attachment to be issued by any superior court upon proper showing that such witness or witnesses have been duly subpoenaed and have refused to obey such subpoena or subpoenas; and to examine witnesses under oath to be administered by any member of the board. (1935, c. 417, s. 206.)

§ 7971(10). Board to have access to books and records of persons, firms, and corporations.—The state board of assessment, the members thereof, or any duly authorized deputy are authorized and empowered to examine all books, papers, records, and/or accounts of persons, firms, and corporations, domestic or foreign, owning property liable to assessment for taxation, general or specific, under the laws of this State. (1935, c. 417, s. 207.)

§ 7971(11). Board to direct members to hear complaints.—The state board of assessment is authorized and empowered to direct any member or members of the board to hear complaints, to make examinations and investigations, and to report his or their findings of fact and conclusion to the board. (1935, c. 417, s. 208.)

§ 7971(12). Board to keep records.—The state board of assessment shall keep full, correct, and accurate record of its official proceedings, and certified copies of its records, attested with its official seal, shall be received in evidence in all courts of the State with like effect as certified copies of other public records. (1935, c. 417, s. 209.)

Art. 3. Property Subject to Taxation

§ 7971(13). General provision. — All property, real and personal, within jurisdiction of the State, not especially exempted, shall be subject to taxation. (1935, c. 417, s. 300.)

§ 7971(14). Real property defined. — For the purposes of taxation, real property shall include all lands within the State and all buildings and fixtures thereon and appurtenances thereto. (1935, c. 417, s. 301.)

§ 7971(15). Real property—where and to whom assessed.—(1) Real property shall be assessed in the township or place where situated, to the owner, if known; if the owner be not known and there be an occupant, then to such occupant, and either or both shall be liable for taxes assessed on such property; and if there be no owner or occupant known, then as unknown.

(2) A trustee, guardian, executor, administrator, assignee, or agent having control or possession of real property may be considered as the owner.

(3) The real property which belongs to a person deceased, not being in control of an executor or administrator, may be assessed to his heirs or devisees jointly without naming them until they shall have given notice of the respective names to the supervisor of taxation or chairman of the board of county commissioners and of the division of the estate, and undivided interests in real property owned by tenants in common, not being co-partners, may be assessed to the owners if so requested and in the discretion of the supervisors of taxation.

(4) Lease property in which the lessee has a capital investment, by using improvements or structures erected, may be listed separately by lessor or lessee with reference to the degree of ownership of each party, or may, in accordance with contractual relation between parties, be listed as a whole by either of them. (1935, c. 417, s. 302.)

See § 8037 and annotations.

§ 7971(16). Corporate real property.—The real property of a corporation or association shall be assessed to the name of the corporation or association, the same as to an individual, if known, in the township or place where situated, or may be assessed to the occupant or to an authorized agent if so requested of the supervisor of taxation. (1935, c. 417, s. 303.)

§ 7971(17). Real property exemptions. — The following real property, and no other, shall be exempted from taxation:

(1) Real property, if directly or indirectly owned by the United States or this State, however held, and real property lawfully owned and held by counties, cities, townships, or school districts, used wholly and exclusively for public or school purposes.

(2) Real property, tombs, vaults, and mausoleums, set apart for burial purposes, except such as are owned and held for purposes of sale or rental.

(3) Buildings, with the land upon which they are situated lawfully owned and held by churches or religious bodies wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building; and also buildings and lands lawfully owned and held by churches or religious bodies if the income from the said property is used exclusively for religious, charitable, or benevolent purposes.

(4) Buildings, with the land actually occupied, wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, incorporated colleges, academies, industrial schools, seminaries, or any other incorporated institutions of learning, together with such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also the buildings thereon used as residences by the officers or instructors of such educational institutions.

(4-A) Property belonging to or held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or or-

ders, where the rent, interest or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions.

(5) Real property belonging to, actually and exclusively occupied by Young Men's Christian Associations and other similar religious associations, orphanages, or other similar homes, hospitals and nunneries, not conducted for profit, but entirely and completely as charitable.

(5-A) Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper; and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided, that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing boards of cities and towns shall require a sworn statement to the effect that such bills have not and will not be presented to any board of county commissioners as a debt against that county, or as a credit on taxes due that county. The provisions of this sub-section shall not apply to the counties of Rockingham and Gaston, nor to the cities and towns in said counties.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon; and also the profits arising from rents, leases, etc., for rooms in said buildings, whether occupied for meeting places or not, when such rents, proceeds, and profits are used wholly and exclusively for charitable and benevolent purposes.

(7) The real property of Indians who are not citizens, except lands held by them by purchase. (1935, c. 417, s. 304.)

Cross References.—For full treatment as to exemptions, see 11 N. C. Enc. Dig. 580 et seq.; 15 N. C. Enc. Dig. 558 et seq.; as to extent of power of the legislature, see note of United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626. under N. C. Const. Art. V, sec. 5. See section 7880(177) and note thereto.

Property Used for Religious, Charitable, etc., Purposes.—It is fundamental that the property of these institutions, to be exempt, must be used exclusively for the purposes enumerated. See note of Southern Assembly v. Palmer, 166 N. C. 75, 82 S. E. 18, and the rents arising from such property must be so applied. Id. See also, United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626. See also, treatment in 11 N. C. Enc. Dig. 589.

Same—Income from Solvent Credits.—The income from the solvent credits held by a religious society, if devoted and applied exclusively to educational, religious and charitable purposes, are exempt from taxation. United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626.

Property of Hospital Not Exempt.—The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is not exempt from taxation, under this section or those immediately following, although patients unable to pay were relieved of payment and classed as charity patients, and although its stockholders, though not waiving their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes. Salisbury Hospital v. Rowan County 205 N. C. 8, 169 S. E. 805.

Presumption as to Exemption.—See note of Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652, under section 7768.

Use to Which Property Devoted Controlling.—See note of State v. Oxford Seminary Constr. Co., 160 N. C. 582, 76 S. E. 640, under N. C. Const., Art. V, section 5.

Interest of State in Business Enterprises.—See note of Atlantic, etc., R. Co. v. Board, 75 N. C. 474, under N. C. Const., Art. V, section 5.

Property of Municipal or Other Public Corporations.—See 11 N. C. Enc. Dig. 584.

Increase of Capital Stock.—See 11 N. C. Enc. Dig. 585 et seq.

Assessment for Street Improvement.—See note of Tarboro v. Forbes, 185 N. C. 59, 116 S. E. 81, under section 7768.

§ 7971(18). Personal property, what it includes.—Personal property shall include:

(1) All money.

(2) All annuities and royalties.

(3) All goods, chattels, merchandise, commodities, and effects within the State.

(4) All ships, boats, vessels, automobiles, flying machines, and their appliances belonging to citizens of this State, whether at home or abroad.

(5) All goods, chattels, merchandise, commodities, and effects situated within this State belonging to citizens of this State, except that personal property, actually and permanently invested in business in another state, shall not be included.

(6) All notes, bonds, accounts receivable, money on deposit, postal savings, securities and other credits of every kind belonging to citizens of this State over and above the amounts respectively owed by them, whether such indebtedness is due them from individuals or from corporations, public or private, and whether such debtors reside within or without the State.

(7) All buildings and improvements situated upon leased lands, except where the value of the land is also assessed to the lessee or the owner of such buildings and improvements, unless otherwise assessed.

(8) All tombs, vaults, and mausoleums, built within any burial grounds and held for rent or hire or for sale in whole or in part.

(9) All produce, seeds, grain, forage and feed on hand, stored in warehouses, in mills, or in transit, owned within this State.

(10) All other personal property not herein enumerated and not expressly exempted by law. (1935, c. 417, s. 305.)

§ 7971(19). Personal property exempted.—The following personal property, and no other, shall be exempted from taxation:

(1) Bonds of this State, of the United States, federal farm loan bonds, joint-stock land bank bonds, and bonds of political subdivisions of this State, hereafter issued: Provided, that the purchase of tax-exempted bonds within sixty days before the tax-listing date and sale of the same within sixty days after the tax-listing date shall be prima facie evidence that said bonds were pur-

chased for the purpose of evading taxation, and a solvent credit in the amount of the value of the same will be listed and liable for taxation.

(2) Personal property, directly or indirectly owned by this State and by the United States, and that lawfully owned and held by the counties, cities, towns, and school districts of the State, used wholly and exclusively for county, city, town, or public school purposes.

(3) The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, and private libraries of such ministers and the teachers of the public schools of this State.

(4) The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to and exclusively used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions.

(5) The endowment and invested funds of churches and other religious associations, public libraries, incorporated colleges, academies, industrial schools, and seminaries, when the income or interest from said funds shall be used exclusively for religious, charitable, educational, or benevolent purposes.

(6) Personal property, including endowment funds, belonging to Young Men's Christian Associations and other similar religious associations, orphan and other similar homes, reformatories, hospitals, and nunneries which are not conducted for profit and entirely and completely used for charitable and benevolent purposes.

(7) The furniture, furnishings, and other personal property belonging to any American Legion, or Post of American Legion, patriotic, historical, or any benevolent or charitable association, and used wholly for lodge purposes and meeting rooms by said association, when such personal property is used for charitable or benevolent purposes.

(8) Wearing apparel, household and kitchen furniture, the mechanical and agricultural instruments of farmers and mechanics, libraries and scientific instruments, provisions and livestock, not exceeding the total value of three hundred dollars ($300), and all growing crops.

(9) Shares of stock owned by individual stockholders in any domestic corporation, joint-stock association, limited partnership, or company paying a tax on its capital stock or a franchise tax shall not be required to be listed or to pay an ad valorem tax; nor shares of stock owned and legally held on and continuously held for at least ninety days just prior to the first day of April of the tax year by a corporation in other corporations paying a tax on its capital stock shall not be required to be listed, or to pay an ad valorem tax. Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock in this State, providing the owner of such shares of stock has complied with the provisions of section 7880(129) of the Revenue Act, and the situs of such shares of stock in foreign corporations, owned by resident of this State, for the purposes of this act, is hereby declared to be at the place where said corporation undertakes and carries on its principal business. (1935, c. 417, s. 306.)

See note under section 7971(17).

It may be questioned whether postal savings are not a federal governmental instrumentality immune from state taxation. However, the postal savings system seems more of a business function than of a governmental function. See 11 N. C. Law Rev., 260.

Art. 4. Quadrennial Assessments

§ 7971(20). All property to be listed with reference to ownership on April first of each year.— All property of every kind and nature, real and personal, shall be listed for taxation with reference to its ownership and value as of the first day of April of each year, except that for the purpose of providing sufficient time for a thorough reassessment of real property in the year one thousand nine hundred thirty-seven, and quadrennially thereafter, real property shall be valued by the assessors with reference to its value as of the first day of April and shall be listed in the name of the owner as of the first day of April. The following machinery is provided for valuing real property of every kind and nature and for listing and valuing real and personal property in each year of the quadrennial assessment:

(1) The board of county commissioners of each county shall, on the first Monday in April, one thousand nine hundred thirty-seven, meet and determine whether or not the real estate of the respective counties shall be revalued by horizontal increases or reductions, or by the appointment of assessors and appraisers as hereinafter set out, and in the event it is decided to revalue other than by horizontal reduction, or increase, then the board of county commissioners may, and every fourth year thereafter, appoint a county supervisor of taxation, who shall be a freeholder in the county, an experienced and practical business man with the knowledge of the valuation of real and personal property in the county, and who shall be a bona fide resident in the county for at least twelve months. He shall receive such compensation for his services as the board of county commissioners shall designate, not to exceed four dollars per day for such time as he may be actually and necessarily engaged in the performance of his duties in his office, and necessary traveling expenses for each day's services, and shall serve for such time as the board of county commissioners in their discretion shall designate: Provided, in the event of the office becoming vacant the board of commissioners shall appoint another person to act and perform the duties of the county assessor for the remainder of the term.

(2) In counties in which there is an auditor, tax clerk, county accountant, all-time chairman of the board of county commissioners, or other similar officer, either may be designated by the board of county commissioners as the supervisor of taxation for the county: Provided, that when the duties of the office of county supervisor of taxation are performed by any auditor, tax clerk, county accountant, all-time chairman of the board of county commissioners, or other similar officer who is receiving a regular salary, the board of county commissioners may in their discretion allow such additional compensation and expense allowance as they may designate.

(3) The county supervisor of taxation shall have general supervision of the listing and assessment

of all real and personal property for taxation in the county, shall visit the list takers and assessors in each township while they are engaged in listing and assessing property for taxation, and shall advise and confer with such list takers and assessors to the end that all property subject to taxation shall be listed and that the assessed valuation of all property in the several townships shall be fair and uniform. (1935, c. 417, s. 400.)

§ 7971(21). Appointment of list takers and assessors; duties.—(1) Supervisors to Appoint List Takers and Assessors.—The county supervisor of taxation shall appoint, on or before the second Monday in April, three discreet freeholders in each township each of whom shall have been a resident freeholder in his county for not less than twelve months, and who shall be known and designated as the township board of list takers and assessors. They shall serve for such time and shall receive such compensation for their services while actually employed as the board of county commissioners shall designate, not more than five dollars per day.

(2) Board of County Commissioners May Appoint List Takers and Assessors.—Instead of the appointment of three freeholders in each township, as provided in this section, the board of county commissioners may, in their discretion, appoint for any township wherein is situated an incorporated city or town one resident freeholder for each ward or district in such cities or towns. Such persons so appointed shall have been resident freeholders for not less than twelve months prior to their appointment.

(3) List Takers and Assessors to List and Value Property.—The list takers and assessors of each township, ward or district, under the supervision of the county supervisor of taxation, shall list and assess all real and personal property in their respective townships, wards or districts; shall ascertain the true value in money of all personal property and every tract, lot or parcel of land or other real estate with all improvements thereon; shall have authority to personally visit, inspect and view any property, real or personal, which is to be assessed, and shall make diligent inquiry as to its value; shall have authority to subpoena and examine under oath witnesses who may have knowledge of the real or personal property that has or should be listed and assessed and who may have knowledge of the actual cash value of such property; shall value all property, real and personal, at its true value in money as defined in this act; and shall make a detailed statement of each piece and kind of real and personal property, together with its true value in money, and return the same to the county supervisor of taxation upon blanks furnished for that purpose. It shall be the duty of all tax listers and/or tax assessors in the several counties, cities, and towns of the State, when listing or assessing real estate for taxes, to ascertain from the owner of the real estate being so listed and assessed, or someone who has an interest therein, whether the same is encumbered, and if so, to whom, and the postoffice address of such landowner and lienholder. Each tract of land shall be listed separately, and this separate abstract or list shall show the acreage, at least two adjoining landowners for each tract, or such other description as shall be sufficient to locate and identify said land by parol testimony. Town lots and other small lots shall be listed in the same way, except the acreage need not be given, but the number of said lot on any town map or plat, or the street number, shall be given. The county supervisor of taxation or other person charged with supervision of the listing and assessment of property for the county, city, or town shall inspect the tax abstracts as returned by the list taker or assessor, and if the above requirements have not been complied with, shall refuse approval of the bill or account of such list taker or assessor for payment for his services until the record with respect to such listing and assessment of property as herein required shall have been complied with. (1935, c. 417, s. 401.)

§ 7971(22). First meeting of county supervisors of taxation and list takers and assessors. — The county supervisor of taxation, the list takers and assessors of each township, ward, or district, shall meet in the courthouse in each county on the third Monday in April upon the call of the county supervisor of taxation for the general consideration of methods for securing a complete list of all real and personal property in the county and for valuing and assessing the same in a uniform manner in the several townships. They shall begin on the third Monday in April to make a memorandum list of each tract or parcel of real property in the township, with the name of the owner and description or location of the property, and after inspection and inquiry shall find the fair market value of same, such value to be used as the value of the property when listed, after giving effect to any change of ownership or the erection or construction of structures exceeding one hundred dollars ($100.00) in value. They shall begin on the first Monday in May to list real and personal property, and shall complete the same as early as practicable, or within such time as may be prescribed by the board of county commissioners, but not later than the first Monday in July. (1935, c. 417, s. 402.)

§ 7971(23). Oath of county supervisor, list taker and assessor. — (1) Before entering upon their respective duties, the county supervisor of taxation or members of the board of supervisors of taxation, the list takers and assessors shall take and subscribe to an oath as follows:

I,....., County Supervisor of Taxation for ..... Township, do solemnly swear (or affirm) that I will faithfully discharge the duties devolving upon me as County Supervisor of Taxation according to the laws in force governing such office: so help me, God.

.....
Signature.

(2) Upon making the complete returns for any township, ward, or district the list takers or assessors for each township, ward, or district shall annex to such returns the following affidavit:

I, (or we), ..., the assessor (or assessors) for..... Township, make oath that the foregoing list of returns contain to the best of my (or our) knowledge and belief all the real and personal property required by law to be assessed for taxation in said township, and that I (or we) have assessed such personal property and each tract, lot, or parcel of real estate at its true value in money and to the best of my (or our) ability have

done equal justice to the public and to the taxpayers concerned.

.....

Signature.

(1935, c. 417, s. 403.)

§ 7971(24). Appointment of experts to assess specific classes of property.—The board of county commissioners in each county, at the request of the county supervisor of taxation, may in their discretion employ one or more persons having expert knowledge of the value of specific kinds or classes of property within the county, such as mines, factories, mills and other similar property, to aid and assist the county supervisor of taxation, the list takers and assessors in the respective townships, wards or districts, or to advise with, aid and assist the board of equalization and review in arriving at the true value in money of the property in the county. Such expert, or experts, so employed by the board of county commissioners shall receive for their services such compensation as the board of county commissioners shall designate. (1935, c. 417, s. 404.)

§ 7971(25). Methods of determining values. — All real and personal property shall be valued by the assessors of each township, ward, or district under the supervision of the county supervisor of taxation. In determining the value of real property, the assessors shall consider as to each tract, lot, or parcel of land, its advantages as to location, quality of soil, quantity of timber, water power, water privileges, mineral, quarries, and other valuable deposits known to be available therein, the fertility and adaptability for agriculture or commercial uses; and shall consider the past income derived therefrom, its probable future income, the present assessed value, and any other facts which may affect the value of such real property. In order to arrive at the true value in money of personal property, or of each tract, lot, or parcel of real estate, the county supervisor and the assessors may examine the owner and may subpoena other persons to be examined under oath. (1935, c. 417, s. 405.)

§ 7971(26). County supervisors and assessors to jointly review the valuations and assessments and make tentative scroll.—(a) As soon as practicable after the list takers and assessors have completed the listing and assessment and made return for each township as by this act required, and before the meeting of the county board of equalization and review, the county supervisor of taxation shall convene all of the list takers and assessors and they shall jointly review the valuations and assessments in the several townships, wards, and districts to the end that it may be ascertained whether the several assessors have applied the same methods of valuing property, real and personal, in the several townships, wards, and districts, and whether the valuations and assessments in the several townships, wards, and districts have been assessed at their true value in money and are uniform; and to correct any errors that have been committed, clerical or otherwise, and to equalize the assessments in the townships, wards, and districts.

(b) For the purpose of this section, the list takers and assessors of the several townships, wards, and districts of each county shall prepare a tentative scroll, roll, or list by races, showing in alphabetical order the names of the taxpayers who have listed property for taxation in their respective townships, the items of each class of property listed and the valuation as fixed by the assessors for the current year, and the items and valuation of same for the preceding year. All columns should be added, the totals entered for the township, and the average value of each class of property shall be computed by dividing the total number of items in each class into the total valuation of the respective items.

(c) At the joint meeting of review of the county supervisor of taxation, the list takers and assessors, as provided for in this section, such adjustments and corrections of the valuation of the several items of property listed and assessed shall be made as may be necessary to equalize the valuation of items of the same class in all of the townships, wards, and districts of the county. If any such adjustments or corrections are made at such joint meeting of review, the adjusted or corrected values shall be extended to and entered in a column on the tentative scroll, roll, or list provided for that purpose. The county supervisor of taxation shall preserve such tentative scroll, roll, or list of each township, ward, or district, and shall present the same to the county board of equalization and review at their next meeting and for their inspection and consideration. (1935, c. 417, s. 406.)

§ 7971(27). Appropriate county officer to prepare final scroll. — After the county board of equalization and review shall have completed their duties as prescribed in this act and shall have adjourned, and not later than the fourth Monday in July, the county accountant, auditor, or tax clerk shall prepare a final and complete scroll, roll, or list for each of the several townships, wards, and districts in the county and for each race thereof showing the names in alphabetical order of the several owners of real and personal property and the valuation of same as fixed and declared by the county board of equalization and review. Such scroll, roll, or list, together with the same tentative scroll, roll, or list, shall be filed as the fixed, determined and permanent roll for the quadrennial period either with the board of county commissioners, the county auditor, tax clerk, accountant, or other similar officers. (1935, c. 417, s. 407.)

§ 7971(28). Further powers and duties of supervisor of taxation and other officers.—The powers and duties of the state board of assessment, board of county commissioners, supervisor of taxation, list takers and assessors, auditor, clerk of the board of county commissioners, register of deeds, and all other officers named in this article for listing, valuing, and assessing of real and personal property, filing returns and making reports, or fixed with any duty whatsoever under the provisions of this article shall exercise the powers conferred and perform all the duties prescribed in article five [§§ 7971(29) et seq.] except wherein the specific duties prescribed in this article are in conflict with the duties prescribed and the powers conferred in article five, and said article five is hereby referred to for other and further duties of the officers named in this section:

Provided, that in all counties having a tax commission, said tax commission shall do and perform all the duties required by this act, to be performed by boards of county commissioners, except the levying of the tax as set forth in section 7971(56), and all expenses incurred by said tax commission or its appointees in accordance with this act shall be paid for by the county board of commissioners out of the general county funds. (1935, c. 417, s. 408.)

Art. 5. Annual Assessments

§ 7971(29). Machinery for annual assessments. —For the annual listing and assessing of property in years other than the quadrennial assessment years, property shall be listed for taxation with reference to ownership and value as of the first day of April, as provided in section 7971(20). The following machinery is provided for listing property for taxation in such years:

(1) The board of county commissioners of each county, on the first Monday in March of each year other than the year for the quadrennial assessment of real and personal property, shall appoint a resident freeholder as county supervisor of taxation. In counties which have an auditor, county accountant, tax clerk, all-time chairman of the board of county commissioners, or other like officers, such officer may be the county supervisor of taxation.

(2) The county supervisor of taxation shall have general supervision of:

(a) The listing and assessing of all personal property for taxation.

(b) The listing of all real property that was listed and assessed at the last quadrennial assessment.

(c) The listing and assessing of all real property that was not assessed at the last quadrennial assessment.

(d) The listing and assessing of all real property to the extent of the value of improvements added in excess of one hundred dollars ($100.00) since the last assessment.

(e) The listing and assessing of all real property to the extent of the value of any building or other appurtenance in excess of one hundred dollars ($100.00) which has been removed or destroyed since the last assessment.

(f) The listing and assessing of all real property to the extent that some extraordinary circumstances have occurred since the last quadrennial assessment to increase or decrease the value of such real property, such circumstances being those of unusual occurrence in trade or business.

(g) The listing and assessing of all real property which has been subdivided into lots, streets laid out and map recorded, or which has been subdivided into lots on any street or streets already laid out and determined, since the last quadrennial assessment; and the said lots sold or offered for sale.

(3) County Supervisors to Appoint List Takers and Assessors.—

The county supervisor of taxation, upon approval of the board of county commissioners, shall appoint a competent assistant for each township in the county, and in townships where are situated cities and towns of an unusually large amount of property, more than one assistant may be appointed. The county supervisor of taxation and the assistants shall be and constitute the county board of list takers and assessors. (1935, c. 417, s. 500.)

§ 7971(30). Oath of supervisor and assistant. —(1) Before entering upon the duties of their office, the county supervisor and the assistants herein provided for shall take and subscribe to the following oath before the chairman of the board of county commissioners or some other officer qualified to administer oaths, and shall file the same with the clerk of the board of county commissioners.

Oath of County Supervisor

I, ..., County Supervisor of Taxation for ..... County, in the State of North Carolina, for the year ....., do solemnly swear (or affirm) that I will discharge the duties of my office as County Supervisor, according to the laws in force that govern that office: so help me, God.

.....
Signature.

Oath of Assistant

I, ..., Assistant Supervisor of Taxation for ..... Township, County of ....., State of North Carolina, for the year ....., do solemnly swear (or affirm) that I will discharge the duties of my office as Assistant Supervisor of Taxation according to the laws in force that govern said office: so help me, God.

.....
Signature.

(2) Assistant Supervisor to Make Scroll, List or Roll.—An assistant supervisor, upon making his complete returns of his listing and assessments, embracing the list or scroll of the taxable property in his township, to the county supervisor of taxation, shall annex the following affidavit, subscribed and sworn to before the clerk of the superior court or some other officer qualified to administer oaths:

I, ..., the Assistant Supervisor for ..... Township, County of ....., State of North Carolina, for the year....., make oath that the foregoing list contains, to the best of my knowledge and belief, all the real and personal property required by law to be listed and/or assessed in said township, and that I have listed and/or assessed every tract or parcel of land, or other real estate, required to be assessed, and all personal property, at its true value in money, and have endeavored to do equal justice to the public and to the taxpayers concerned.

.....
Signature.

(1935, c. 417, s. 501.)

§ 7971(31). Compensation of county supervisors of taxation and assistants.—The county supervisors of taxation and each assistant shall receive such compensation for their services as the board of county commissioners shall designate, not more than five dollars per day, and necessary traveling expenses for each day of service; shall serve for such time as the board of county commissioners in their discretion may designate; shall make out their accounts in detail, giving the date of each day's service, which account shall be verified and audited by the county accountant and ap-

proved by the board of county commissioners. (1935, c. 417, s. 502.)

§ 7971(32). Meeting of county supervisors and assistants. — The county supervisor of taxation and assistants shall meet in the courthouse of the county on the third Monday in March for general consideration of methods for securing a complete list of all real estate and personal property in the county, and for valuing in a uniform manner in the several townships the different classes of personal property, shall begin the listing and assessing on the first Monday in April of each year, and shall complete the same on or before the first Monday in May next following, but the board of county commissioners may extend the time to the first Monday of June next following, or so much of said extension as such board of county commissioners may deem necessary; and after the listing and assessing has been completed, shall perform the duties imposed in sections 7971(26) and 7971(27). (1935, c. 417, s. 503.)

§ 7971(33). Advertising time and place of list taking.—Each township list taker, successor, and/or assistant to the county supervisor shall advertise in five or more public places within the township, not later than the twentieth day of March, notifying all persons owning property subject to taxation within the county to return to him all the real and personal property which such persons own on the first day of April, that said return must be made during the month of April or within the time designated by the board of county commissioners under the penalties imposed by law, and that he will be present to receive the tax lists at the times and places named in the advertisement; and in a like manner said list taker, his successor, and/or assistant to the county supervisor shall advertise any extension of time granted to taxpayers. (1935, c. 417, s. 504.)

§ 7971(34). Supervisors, listers and assessors for cities and towns lying in two or more counties. —For the purpose of municipal taxation all real and personal property subject to taxation to be levied by the several boards of aldermen, boards of commissioners, or other governing bodies of cities or towns, lying and being in two or more counties, shall be listed and assessed by the supervisor of taxation, list takers and assessors appointed, and the valuation of such real and personal property shall be equalized by the board of equalization and review, constituted as hereinafter set out, and in the following manner:

(1) The board of aldermen, the board of commissioners, or other governing bodies of each and every such city or town shall at the first regular meeting of such board or other governing bodies in the month of April in the year one thousand nine hundred and thirty-seven, and every fourth year thereafter, appoint a supervisor of taxation and two discreet freeholders, each of whom shall have been a resident freeholder in such city or town for a period of not less than twelve months, who shall constitute the board of list takers and assessors for said city or town; and such city supervisor of taxation, list takers and assessors shall in like manner and during the same period of time as in this act provided for listing and assessing real and personal property by county supervisors of taxation, township list takers and assessors, for all purposes of municipal taxation by said city or town, list and assess at its true value in money all the real and personal property in such city or town without reference to the valuation placed thereon by the county supervisor of taxation and township assessors, or by the county board of equalization and review; and such board of aldermen, board of commissioners or other governing body, board of list takers and/or tax assessors and board of equalization and review of such cities and towns, in listing, assessing, and equalizing the real and personal property in such cities or towns for the purposes of municipal taxation as aforesaid, shall exercise any powers conferred and perform every duty imposed upon boards of county commissioners, county supervisors of taxation, township list takers and assessors in the listing and assessing of property for the purposes of state and county taxation.

(2) The board of aldermen, board of commissioners, or other governing body of each and every such city, together with the city supervisor of taxation as chairman, shall constitute the board of equalization and review for such city or town, and shall in like manner and during the same period of time as in this act provided for the equalization of the valuation placed upon real and personal property by county supervisors, township list takers and assessors equalize the valuation placed upon the real and personal property in such city or town by such municipal supervisors and tax assessors; and such board of equalization and review, in the equalization of the valuation of such real and personal property as aforesaid, shall exercise every power conferred and perform every duty imposed by this act upon county boards of equalization and review in the equalization of the valuation placed upon property by the county supervisors of taxation, the county list takers and assessors, for the purposes of state and county taxation.

(3) The board of aldermen, the board of commissioners, or other governing body of each and every such city or town shall, at the first regular meeting of such board or governing body, held in March of each year other than the year of the quadrennial assessment, appoint one discreet freeholder as supervisor of taxation, in their discretion one or more assistants, each of whom shall have been a resident of such city or town for not less than twelve months, and who shall be known as the tax assessor or tax assessors; who shall list and assess all the real and personal property in such city or town for the purposes of municipal taxation by said city or town in like manner and during the same period of time as in this act provided for the listing and assessing of property by the county supervisor, list takers and assessors for state and county purposes; and who shall list the land in such city or town at the valuation assessed in the last quadrennial assessment, except—

(a) Where improvements have been made in excess of one hundred dollars ($100.00) upon the real property since the last assessment, and in that event the assessor shall find the actual value in money of such improvements and add to the value of the property as appraised at the last assessment.

(b) Where a building, timber, or some other appurtenance of value in excess of one hundred dollars ($100.00) has been removed or destroyed since the last assessment, then the tax assessors shall find the value of such buildings or appurtenances so removed or destroyed since the last assessment, and shall deduct such value from the appraised value of the real estate in the last assessment.

(c) Where some extraordinary circumstances have occurred to increase or reduce the actual value of the property since the last assessment, such circumstances as are of unusual occurrence in trade or business.

(d) Where real property has been subdivided into lots, streets laid out and map registered, or where land has been subdivided into lots on any street or streets already laid out and determined, since the last quadrennial assessment, and the said lots have been sold or offered for sale with reference to said street, streets, and/or map registered, then and in that case the assessors shall re-value and re-appraise the said real property and find and determine the value in money of each lot thereof; shall list and assess all personal property in such city or town, and shall, on the listing and assessing such real and personal property for the purpose of municipal taxation as aforesaid, possess and exercise all the duties imposed in this act upon county supervisors, list takers and assessors in listing and assessing property for taxation.

(4) The intent and purpose of this section is to provide such cities and towns as lie in two or more counties only with the machinery necessary for listing and assessing taxes for municipal purposes. The powers to be exercised by and the duties imposed on such boards of aldermen, boards of commissioners or other governing bodies, boards of equalization and review, city supervisor of taxation, list takers and assessors, city clerk and taxpayers shall be the same and they shall be subjected to the same penalties as provided in this act for all boards of county commissioners, county auditors, registers of deeds, clerks of boards of county commissioners, county supervisors, list takers and assessors. The county commissioners in their discretion may adopt the tax lists, scroll, or assessment roll of such city or town as are fixed and determined by the board of equalization and review of such cities or towns, and when so adopted shall be considered to all intent and purpose the correct and valid list and the fixed and determined assessment roll for the purpose of county taxation. All petitions by taxpayers for increase or decrease in the valuation of property within such city or town fixed and determined by the board of equalization and review of such city or town shall be made to the board of aldermen, the board of commissioners, or other governing body of such city or town; and all appeals to the state board of assessment on account of the valuation of such property shall be from the city board of equalization and review in such manner and within such times as are provided in this act for petitions to and appeals from the county board of equalization and review.

(5) That all expenses incident to the listing and assessing of the property for the purposes of municipal taxation as aforesaid shall be borne by the city or town for whose benefit the same is undertaken: Provided, that where the county or counties in which such city or town lies shall adopt the list and the fixed, determined assessment of the city board of equalization and review, the county board of commissioners may reimburse the governing body in such amounts as in their discretion may be proper. (1935, c. 417, s. 505.)

§ 7971(35). Township assistant to make tax list.—(1) Each township assistant to the county supervisor shall obtain from every person owning property subject to taxation in his township a full, complete, and detailed statement of each and every piece and kind of property, real and personal, which said person or persons shall own on the first day of April, together with the true value in money of all such property as belongs to such person or persons, or shall be under his control as agent, guardian, administrator, executor, trustee, or otherwise which should be listed for taxation; shall ascertain by visitation, investigation, or otherwise property not listed, the actual cash value in money of each piece or class of property in his township, and list such property at its actual value for taxation; and is hereby authorized and empowered to administer oaths in all cases necessary to obtain any information concerning taxable real or personal property.

(2) After any tax list or abstract has been delivered to an assessor, to the supervisor of taxation, or to the board of county commissioners, and such assessor, supervisor of taxation, or board of county commissioners shall have reason to believe or sufficient evidence upon which to form a belief that the person, firm, or corporation making such list or abstract, in person or by agent, has other personal property, tangible or intangible, money, solvent credits, or other thing liable for taxation, they or either of them shall take such action as may be needful to get such property on the tax list. (1935, c. 417, s. 506.)

§ 7971(36). How to list property.—(1) Every person owning property, real or personal, is required to list and shall make out, sign and deliver to the assistant supervisor, list taker, or assessor a statement, verified by his oath, of all the real and personal property, money, credits, investments in bonds, annuities, or other things of value, and the value of all improvements on or changes in real property since same was assessed at the last quadrennial assessment, which was in the possession or control of such person or persons on the first day of April, either as owner or holder thereof, or as parent, guardian, trustee, executor, administrator, agent, factor, or in any other capacity. It shall be the duty of all tax listers and/or tax assessors in the several counties, cities, and towns of the State, when listing or assessing real estate for taxes, to ascertain the owner of the real estate being listed and assessed, or someone who has an interest therein, whether the same is encumbered, and if so, to whom, and the postoffice address of such landowner and lienholder. Each tract of land shall be listed separately, and this separate abstract or list shall show the acreage, at least two adjoining landowners for each tract, or such other description as shall be sufficient to locate and identify said land by parol testimony. Town lots and other small lots shall be listed in the same way, except the acreage need not be given, but

the number of said lot on any town map or plat or the street number of said lot shall be given. The county supervisor of taxation or other person charged with supervision of the listing and assessment of property for the county, city, or town shall inspect the tax abstracts as returned by the list taker or assessor, and if the above requirements have not been complied with, shall refuse approval of the bill for his services until the record with respect to such listing and assessment of property as herein required shall have been complied with.

It shall be the duty of the list taker or assessor to carry forward on the tax list of any person the real estate owned by them at the same assessed value as said property was valued at in the last quadrennial assessment of taxes, unless the value thereof has been changed by the board of county commissioners as provided by law, and the real property thus brought forward by the tax lister or assessor at the said assessed value shall be a legal and valid listing of the same as if listed by the owner, or owner's agent, or by the chairman of the board of county commissioners.

The board of county commissioners in any county may require the register of deeds, when any transfer of title is made, except mortgages and deeds of trust, or like liens recorded in his office, to certify the same to the auditor or county accountant, or supervisor of taxation, and the record of such transfer shall be entered upon the tax list of the county to the end that the property so transferred may be listed in the name of the party to whom said property is transferred. The said register of deeds shall include in his notice to the auditor, county accountant, or supervisor of taxation the name of the person conveying said property, the person to whom it is conveyed, the township in which it is situated, a short description of said property, and whether it is conveyed in whole or in part: Provided, however, that said register of deeds shall be allowed, when on fees, the sum of ten cents per entry for such transfer, to be paid by the county, and if on salary, such an allowance as may be made by the governing body.

(2) When personal property has been conveyed in trust and the trustee resides without the State, but the trustor resides within the State, then in that case such property shall be listed and assessed for taxation in this State by said trustor where the property is situated.

(3) Where a guardian, executor or executrix, administrator or administratrix lives in a city or incorporated town, all personal property in the hands of such fiduciary shall be listed and assessed for taxation where the ward or wards resided on the first day of April and where deceased persons resided on the day of their death; however, if such wards of such deceased persons are non-residents of the State on the first day of April, then such fiduciary shall list the property where he or she resides on the first day of April.

(4) Whenever personal property is held in trust for another by any person, firm, or corporation in this State either as guardian, trustee, or otherwise, and the ward or cestui que trust is a resident of this State, then the same shall be listed for taxation in the township and county where the ward or cestui que trust lived on the first day of April, and if the ward or cestui que trust lived on the first day of April in a county in this State other than the county of the guardian, trustee, or other person so holding said property, then the property so held in trust may be listed for taxation by forwarding a list thereof during the month of April, verified by oath, to the county supervisor of taxation in the county wherein the ward or cestui que trust lived on the first day of April, and such supervisor of taxation shall enter the same on the tax list of the township in which the ward or cestui que trust lived. (1935, c. 417, s. 507.)

See § 8037 and annotations.

Compliance with Statutory Procedure Essential. — The listing of property must be done in the manner prescribed by this section. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337. This means that the listing must be done by the owner or by his duly accredited agent (see section 7971(37)) in cases where listing by an agent is permissible. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375.

Listing by Guardian or Executor—Removal of Cestui Que Trustent.—Where a testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who in May of a certain year moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing, it was held, the personal property should have been listed at the place of residence of the beneficiaries in June of that year; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by section 7924. Smith v. Dunn, 160 N. C. 174, 76 S. E. 242.

Funds in Custodia Legis—Listing by Clerk.—The clerk of the court is both a "receiver" and "accounting officer" of funds paid into his hands in the course of litigation, within the meaning of the statute, and thereunder should properly list such funds for taxation on May first of each year, when no adjudication as to the rightful owners has been made. Edgecombe County v. Walston, 174 N. C. 55, 93 S. E. 460.

Time of Making List.—Property can be listed for taxation only in the year, and for the year, in which taxes are due. North Carolina R. Co. v. Commissioners, 77 N. C. 4; Johnson v. Royster, 88 N. C. 194.

As to suits against board, see note of Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036, under section 7971(3).

Place of Listing Personalty.—See section 7912 and notes thereto.

Sufficiency of Description.—The listing of land as a certain number of acres lying in a named township is too vague to support a valid assessment, the land being insufficiently described. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337. As to what the list must show, see section 7971(46) and notes thereto.

Same—As between Taxpayer and Purchaser.—A description on a tax list made under the direction of the taxpayer in the words, "Tax list in No. 2 township, C. county, for the year 1893," was held sufficient, as between the taxpayer and a purchaser of his land at a tax sale, where it was the only land owned by the former in the townships. Fulcher v. Fulcher, 122 N. C. 101, 29 S. E. 91.

Under the Act of 1784 if the owner fails to attend at the time and place appointed to receive the lists of taxable property, the justice may make out a list for himself to the best of his knowledge. Tores v. Justices, 6 N. C. 167.

Where land, listed in the name of one person, belonging to another, has been sold for unpaid taxes and it is discovered, before the deed has been accepted, that the real owner has not listed it as required by this section, the deed is insufficient to pass title, for the methods provided by this and § 7971(50) must be followed. Wake County v. Faison, 204 N. C. 55, 167 S. E. 391.

§ 7971(37). Who may list through agents.—Females or non-residents of the township where the property is situated, and persons physically unable to attend and file a list of their property, may appoint agents for the purpose of listing their property. Such agent shall be required to qualify by stating under oath that he knows the extent and has knowledge of the true valuation of the property to be listed. The property of corporations shall be listed by the president, cashier, treasurer,

or any other person appointed for that purpose. (1935, c. 417, s. 508.)

As to irregularity in listing taxes by agent as affecting tax sales, see Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337.

§ 7971(38). What statements of private banks, bankers, brokers or security brokers must show.—Every bank (not incorporated), banker, broker, or security broker, at the time fixed by this act for listing and assessing all real and personal property, shall make out and furnish the list takers and assessors a sworn statement showing:

(1) The amount of property on hand and in transit.

(2) The amount of funds owned in the hands of other banks, bankers, or brokers.

(3) The amount of checks or other cash items, the amount of which was not included in either of the preceding items.

(4) The amount of bills receivable, discounted or purchased, bonds and other credits due or to become due, including interest receivable and accrued, but not due, and interest due and unpaid.

(5) All other property appertaining to said business, other than real estate, which real estate shall be listed under this act.

(6) The amount of deposit made by them with any other person, firm, or corporation.

(7) The amount of all accounts payable, other than current deposit accounts.

(8) The aggregate amount of the first, second, and third items in said statement shall be listed the same as other similar personal property is listed under this chapter. The aggregate amount of the sixth and seventh items shall be deducted from the aggregate amount of the fourth item of said statement, and the remainder, if any, shall be listed as a credit. (1935, c. 417, s. 509.)

§ 7971(39). Persons, firms, banks, and corporations dealing in securities on commission taxed as a private banker.—No person, bank, or corporation without a license authorized by law shall act as a stock broker or private banker. Any person, bank, or corporation that deals in foreign or domestic exchange, certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation or who negotiates loans upon real estate securities, shall be deemed a security broker. Any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying, or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere, shall be deemed to be a private banker. Any person, firm, or corporation violating this section shall pay a fine of not less than one hundred nor more than five hundred dollars for each offense. (1935, c. 417, s. 510.)

§ 7971(40). List takers and assessors furnish list of exempt property.—Each list taker and assessor, when making the assessment roll and scroll for his township, shall enter on the blanks so furnished, in regular order, the name of the owner, a clear description of all real and personal property exempt from taxation, together with statement of its value, for what purpose used, and the rent, if any, obtained therefrom. The list of such exempt property, when completed, shall be delivered by the county supervisor of taxation to the register of deeds of the county, on or before the first day of October, and the register of deeds on or before the first day of November shall make duplicates thereof and transmit such duplicates to the state board of assessment and shall file the original list of exempt property in his office. (1935, c. 417, s. 511.)

§ 7971(41). Listing in years other than quadrennial.—Except in the year of the quadrennial assessment the township list takers and assessors shall list the real property in their respective townships at the valuation of the last quadrennial assessment; shall correct the valuation of any tract, lot, or parcel of land on which any structure or other thing of value over one hundred dollars has been erected or upon which any structure or other thing of value over one hundred dollars has been destroyed since the last quadrennial assessment; and shall assess for taxation all real estate which, since the last quadrennial assessment, has been discovered, increased or reduced in value by reason of the occurrence of extraordinary circumstances or subdivided into lots and such lots or any part of same sold or offered for sale. (1935, c. 417, s. 512.)

§ 7971(42). List takers and assessors administer oath.—(a) It shall be the duty of the list takers and assessors of the several townships in each county of the State, before receiving the returns of any taxpayer, to actually administer the oath required by law, the oath read by the taxpayer in the presence and in the hearing of the list taker and assessor or by the list taker and assessor in the hearing and presence of the taxpayer, and the failure of any list taker or assessor to administer said oath except in cases where by law said oath may be made before some other person, such list taker and assessor shall be guilty of a misdemeanor.

(b) The list taker, assessor, and/or assistant may in his discretion accept the return of any taxpayer by mail, if duly verified before a notary public or other officer authorized to administer oaths and in the form of the oath prescribed in this act, and if the list taker and/or assessor is satisfied that a full, accurate and complete list of all taxable property of the taxpayer has been returned at a fair cash value. (1935, c. 417, s. 513.)

§ 7971(43). Oath of taxpayer.—The list taker and assessor shall require the owner, agent, guardian, personal representative, or other person having control of and listing property to make and subscribe to the following oath, which shall be attached to each and every schedule:

I do solemnly swear (or affirm) that the above and foregoing list contains all the property, is a full, true, and complete list of all and each kind of property owned by me or under my control as agent, guardian, personal representative, or otherwise, and that I have not neglected to list for taxation for the year all of each and every kind of property of which I am the owner or of which I have control as agent, guardian, personal representative, or otherwise in the county of ....., State of North Carolina, and that I have not in any way connived at the violation or evasion of requirements of law in relation to the assessment

of property, so help me, God. (1935, c. 417, s. 514.)

§ 7971(44). Where to list real estate, mineral and quarry lands.—All real property subject to taxation shall be listed in the township in which said property was situated on the first day of April. When the fee of the soil of any tract, lot, or parcel of land is vested in any person, firm, or corporation and the right to any improvements, leasehold estate, minerals, quarry, or timber therein is vested in another person, firm, or corporation, the said tract, lot, or parcel of land may be listed and valued to separate ownership, in separate entries, specifying the interest listed, and may be taxed to the parties owning the different interests respectively. In listing improvements, leasehold estate, mineral, quarry, or timber interests, the owner thereof shall describe the same in his list, together with the separate value of each separate tract, lot, or parcel of land in or on which the same shall be situated or located, and the list taker shall be particular to enter the same on the tax list according to the returns. An owner of separate timber interests shall list the same, whether the timber shall be attached to or detached from the soil. (1935, c. 417, s. 515.)

In Whose Name Listed.—Land should be listed for taxation in the name of the individual owners and not in the name of the "estate" of one deceased. Morrison v. McLauchlin, 88 N. C. 251.

Same—Improper Listing as Affecting Purchaser's Title.—A tax-title devised by a purchaser at a sheriff's sale of land listed in the name of the "estate" of one deceased is defective. Morrison v. McLauchlin, 88 N. C. 251.

§ 7971(45). Where polls and personal property shall be listed.—All taxable polls and all personal property shall be listed in the township in which the taxpayer resided on the first day of April, subject to the following exceptions:

(1) All goods and chattels situated in a township, town, or city other than that in which the owner resides shall be listed where situated, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for sale of property, shop, office, mine, farm, place of storage, manufactory, or warehouse therein for use in connection with such goods and chattels; and farm products owned by the producers shall be listed where produced and all manufactured goods, consigned or stored out of the State, shall be listed where the owner resides.

(2) The residence of a person who has two or more places in which he occasionally dwells shall be that in which he resided for the longest period of time during the year preceding the first day of April.

(3) The place where the principal office is situated in this State shall be deemed the residence of the corporation, but if there is no principal office in the State, then the personal property of the corporation shall be listed, assessed, and taxed at any place in the State where the corporation transacts business.

(4) For the purpose of listing and assessing property, a copartnership shall be treated as an individual, and the property, real and personal, shall be listed in the name of the firm. A copartnership shall be deemed to be located in the township, town, or city in which its business is principally carried on. Each partnership shall be held liable for the whole tax. (1935, c. 417, s. 516.)

Cross Reference.—For general treatment, see 11 N. C. Enc. Dig. 590 et seq; as to listing and taxing bank stocks, see section 7948 and the notes thereto.

Generally.—The rules and regulations fixed by the "Revenue Act" and the "Machinery Act" for the guidance of the officers charged with the listing and assessment of property for purposes of state taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. Wiley v. Commissioners, 111 N. C. 397, 400, 16 S. E. 542 and cases there cited. The conclusion, therefore, is that the legislature has adopted a "uniform rule" which must be observed. Id.

Fixing Situs of Property.—It is for the legislature to determine the situs of personal property for purposes of taxation, and it may provide different rules for different kinds of property, change them from time to time, and the courts may not, for consideration of expediency, disregard the legislative will. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629.

Same—Application of Maxim Mobilia Personam Sequentur.—In Alvany v. Powell, 55 N. C. 51, Chief Justice Pearson declares that the true principle upon which to determine whether personal property is liable to be taxed, is the situs of the property, and that the distinction attempted to be made between personalty and real estate, depending upon the domicile of the owner, is based upon a fiction which has no application to questions of revenue.

Where Domicile and Residence Separate.—This section clearly makes the residence of the taxpayer the place where his personalty shall be listed. Ordinarily a person's residence is at the place of domicile, but this is not necessarily true, and where they are at separate and distinct places then he is to list his property at the place at which he has resided the greater part of the year regardless of whether such place is considered as his domicile or residence. In view of this fact it is doubtful whether or not the distinction between the two terms can ever be material with reference to this section, and this notwithstanding that the court has drawn the distinction in its reasoning in at least one case. See the decision in Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603, which turned upon the fact that the defendant had actually dwelt at one place a greater part of the year. See also Ransom v. Board, 194 N. C. 237, 139 S. E. 232, to the same effect.

Property of Corporation Taxable at Principal Office.—Where a corporation has its place of business in one town, with a part of the personal property located in another town, such property is only taxable in the town where its place of business is located. Winston v. Salem, 131 N. C. 404, 42 S. E. 889. The same is true of a partnership. Id.

Shares of Stock—Taxable at Principal Office.—The property in shares of stock in a corporation doing business outside the corporate limits of a town, and owned by persons residing therein does not follow and is not fixed by the situs of the residence of its owner, but is fixed by the legislature prescribing where and how it shall be listed and taxed, i. e., at its principal place of business. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542.

Rolling Stock of Railroad.—See 11 N. C. Enc. Dig. 592.

§ 7971(46). What tax list shall contain.—The tax list shall state the name, address, and age of taxpayer and a full and complete itemized list of all the property, real and personal, of the taxpayer as of the first day of April, as follows:

(1) The amount of real estate owned or under control in the township, together with the number of acres cleared for cultivation, waste lands, woods and timber, quarry lands, and lands susceptible of development for water power. The real property shall be described by name, if it has one, or in such way as to be identified, and each separate tract, lot, or parcel of real estate shall be separately listed, described, and valued, and whether located inside or outside of incorporated cities or towns.

(2) Manufacturing property outside or inside of incorporated cities or towns.

(3) The number of acres of mineral, timber, and quarry lands susceptible of development.

(4) Number of town lots, the dimensions and location of each.

(5) The number and value of horses.

(6) The number and value of mules.

(7) The number and value of jacks and jennets.

(8) The number and value of cattle.

(9) The number and value of hogs.

(10) The number and value of sheep.

(11) The number and value of goats and other livestock.

(12) The number and value of poultry.

(13) The number and value of dogs.

(14) The value of farming utensils, farming machinery, and all kinds of carriages, carts, wagons, buggies, or other vehicles and harness.

(15) The value of warehouses, their office furnishings and fixtures.

(16) The value of tools of mechanics.

(17) The value of household and kitchen furnishings, musical instruments, firearms, provisions of all kinds, and other products on hand.

(18) The value of libraries and other scientific implements.

(19) The amount of money on hand.

(20) The amount and value of all cotton, tobacco, and other farm products of every kind owned by the original producer or held by the original producer in any public warehouse and represented by warehouse receipts, or held by original producer for any co-operative marketing or cotton growers association, together with a statement of the amount of any advance against said cotton, tobacco, or other products, and fertilizer and fertilizer materials.

(21) All solvent credits, with accrued interest thereon, whether money on deposit, postal savings, mortgages, bonds, notes, bills of exchange, certified checks, accounts receivable, or in whatever other form or credit, and whether owing by any state or government, county, city, town, township, person, persons, company, firm, or corporation within or without the State.

(22) All automobiles, tractors, trailers, bicycles, trucks, flying machines, and pleasure boats of any and all kinds.

(23) The number and value of all seines, nets, fishing tackle, boats, barges, schooners, vessels, and all other floating property.

(24) All other personal property whatsoever, including all cotton in seed or lint, tobacco either in leaf or manufactured, rosin, tar, plated and silverware, watches and jewelry, goods, wares and merchandise of all kinds and descriptions, whether possessed by the taxpayer or any child.

(25) It is the purpose of this section to require, and it shall be the duty of each and every taxpayer to furnish, a complete and itemized list of the solvent credits, property, or things of value owned or possessed by him or in his control.

(26) Billboards, signboards, and other property used in outdoor advertising.

(27) Any and all persons, firms, or corporations liable for Schedule "B" taxes. (1935, c. 417, s. 517.)

§ 7971(47). Deduction of bona fide indebtedness; recovery on notes, etc., not listed.—(1) All bona fide indebtedness owing by any taxpayer as principal debtor may be deducted by the list taker or assessor from the aggregate amount of the taxpayer's credits shown in items nineteen, twenty, and twenty-one of section 7971(46): Provided, that the credits enumerated in item twenty of this section shall be available only for tax deduction of indebtedness by the original producer of the articles named, and in the case of fertilizer or fertilizer material such only as are held by the farmer to be used during the current year.

(2) The board of county commissioners and/or county supervisor of taxation shall have the power to summons any taxpayer or other person at some place designated by them in the county to answer relative to the amount of solvent credits owned by him, the persons owing the same, as well as the nature of any indebtedness which has been deducted from solvent credits and the name of the person to whom indebtedness is due.

(3) If any person, firm, or corporation, with a view to evading the payment of taxes, shall fail or refuse to list with the list taker or assessors any bonds, notes, accounts receivable and/or any other solvent credits subject to taxation under this act, the same shall not be recoverable at law or by suit in equity in any court in this State until they have been listed for taxation and the tax and the penalty prescribed by law for the nonlisting and non-payment of taxes have been completely paid. (1935, c. 417, s. 518.)

Failure to List Solvent Credits.—The failure to list solvent credits does not destroy the cause of action, but postpones recovery thereon until they are listed and the tax thereon is paid; this is because the statute does not make the failure to list an absolute bar to their recovery. Martin v. Knight, 147 N. C. 564, 61 S. E. 447. The court said: "It was not the purpose of the legislature to release the debtor for failure to list on the creditor, but to postpone the recovery of the debt, if subject to taxation, until the tax is paid."

Subsection 3 of this section will not be construed to work a forfeiture, and does not prevent a recovery on evidence of debt not listed, but postpones the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense is pleaded, the trial court has the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment. Wooten v. Bell, 196 N. C. 654, 146 S. E. 705.

Same—How Pleaded.—Unless the failure to list a note and due bill for taxation, "with a view to evade the payment of taxes thereon," is pleaded, it may not be made the subject of an issue. Martin v. Knight, 147 N. C. 564, 61 S. E. 447. Whether or not this is an affirmative defense which must be set up in the answer or whether it may be taken advantage of upon the general denial is left undecided.

Payment into Court.—The amount of taxes due upon solvent credits may be paid into court, Corey v. Hooker, 171 N. C. 229, 232, 88 S. E. 236, and when this is done it permits the party to proceed to judgment. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407.

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the mortgagee had sold the horse, is not an action upon the note upon which the statute requires that the taxes be given in and paid before the owner may be permitted to sue thereon. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407.

§ 7971(48). Warehouses and coöperative associations to furnish lists of property stored, etc.—(1) Every warehouse company or corporation and every growers' or marketing association receiving for storage cotton, tobacco, or other products, commodities or property, and issuing warehouse receipts for same, shall, on the day as of which property is assessed, furnish to the supervisor of the county in which such property is stored a full and complete list of all persons, corporations, partnerships, firms, or associations for whom such property is stored, except in cases in which farm produce is stored for its original pro-

ducer who is a resident of another county in this State, together with the amount of such property stored for each owner and the amount advanced against such property by the warehouse or association. In all cases in which farm produce is stored for its original producer who is a resident of another county in this State, the names of such producers shall be sent to the supervisors of the respective counties in which such producers reside, together with the amount of such produce stored for them and the amount advanced against such produce by the warehouse or association.

(2) Warehouse companies and corporations and growers' and marketing associations shall not be liable for taxation on the property stored with them by others, provided lists of the owners and amounts of such property are furnished to the respective supervisors under the provisions of subdivision (1) of this section. If such lists are not so furnished within fifteen days after the day as of which property is assessed, such warehouse or association shall be liable to the respective counties for the tax upon the full value of such property; and if failure to furnish such list is continued for ten days after demand for same by the supervisor of any county, such warehouse or association shall be liable for a penalty of $250, in addition to the taxes, to be recovered by the proper county in an action in the superior court, and both tax and penalty may be recovered in the same action.

(3) The commissioner of revenue shall, upon request of any county, send to the supervisor of taxation a list of automobiles and trucks in such county as appears from the record for the current year, and shall charge the county thirty cents per hundred names for same, said amount to be paid to the commissioner of revenue and to be used by him as compensation for the preparation of said list. (1935, c. 417, s. 519.)

§ 7971(48)a. Reports by consignees and brokers.—Every person, corporation, partnership, or unincorporated association in possession of property on consignment and all brokers dealing in tangible personal property who have in their possession such property belonging to others shall file with the supervisor of taxation of the county in which such property is located a full and complete list of the owners of such property, together with the amount of such property owned by each: Provided, that if such property is farm produce owned by the original producer who is a resident of this State, the name of the owner and the amount of such property shall be reported to the supervisor of the county of which such owner is a resident. Consignees and brokers failing to make such reports shall be liable to payment of the tax and a penalty of two hundred and fifty dollars ($250) in the same manner and under the conditions set forth in subdivision (2) of section 7971(48). (1935, c. 417, s. 519½.)

§ 7971(48)b. Information to be given by motor vehicle owners applying for license tags.—Every motor vehicle owner applying to the state department of revenue for motor vehicle license tags shall specify in the application the county and township in which each such motor vehicle is subject to ad valorem taxation. If any such vehicle is not subject to ad valorem taxation in any county of this State, such fact, with the reason therefor, shall be stated in the application. No state license tags shall be issued to any applicant until the requirements of this section have been met. The commissioner of revenue shall upon request from any county, send to the supervisor of such county a list of motor vehicles subject to ad valorem taxation in such county as shown by the commissioner's records for the year preceding the day as of which property is to be assessed, and shall charge the county the sum of thirty cents per hundred names for the same, said amount to be used by the commissioner as compensation for the preparation of said list. (1935, c. 417, s. 519¾.)

§ 7971(49). Forms for listing and assessing property.—(a) The state board of assessment shall design forms and tax books to be used in listing and assessing property for taxation by the county supervisors, list takers and assessors, which forms shall contain such classification of real and personal property as in the judgment of the state board of assessment may be necessary to a full disclosure of the property owned by each taxpayer; shall transmit said forms to the division of purchase and contract, which shall ascertain from boards of county commissioners of the several counties the number of forms desired by each county and cause same to be printed and transmitted to the board of county commissioners of each county upon their order by the first day of March in each year, and the clerk of the board of county commissioners shall deliver to the county supervisor of taxation the necessary number of forms and books for their respective use. The division of purchase and contract shall furnish the board of county commissioners of the several counties with an invoice covering the actual cost of the said forms and county tax books furnished the county; and the board of county commissioners of each county so furnished shall audit such bill and shall cause the payment of same to be made to the division of purchase and contract within forty days of the receipt of the account for such forms and for such county tax books.

(b) The forms designed by the state board of assessment shall be the standard forms for use in all counties of the State, and no variation from the said forms so prescribed shall be used in any county, unless submitted to and approved by the state board of assessment. (1935, c. 417, s. 520.)

§ 7971(50). Board of county commissioners to list property escaping taxation in previous years.—(1) The chairman of the board of county commissioners and the county supervisor of taxation shall examine the tax list and assessment roll for each township for the current year and the preceding year and shall enter in said list and on said assessment roll or scroll a description of all property not listed, the name of the owner or occupant thereof, and the value of the same.

(2) It shall be the duty of the members of the board of county commissioners, the county supervisor of taxation, the list takers and assessors of each township to be constantly looking out for property which has not been listed for taxation,

and when so discovered, to have such property placed on the tax list and assessment roll.

(3) After the discovery and listing of such unlisted property, the clerk of the board of county commissioners shall mail a notice to the owner at his last known address, or, if unknown, to the occupant of such unlisted property, that such property had been discovered and listed for taxation and that the board of county commissioners will proceed to assess the same at its next regular meeting. The board of county commissioners, at its next regular meeting after such notice to the owner or occupant of such unlisted property, shall proceed to assess same for taxation.

(4) The board of county commissioners, after such unlisted property has been assessed for taxation for the several years, not exceeding five, that such unlisted property has escaped taxation, shall add to the taxes of the current year in which such property is discovered the simple taxes of each and every preceding year that it has escaped taxation, not exceeding five, with ten per cent per annum in addition, but no addition shall be less than two dollars ($2.00).

(5) Whenever the board of county commissioners shall find any person in possession of any personal property, money, or choses in action which shall not have been listed for taxation on the preceding first day of April, it shall be presumed that the person in possession thereof was the owner and in possession of same on the first day of each April for five preceding years, and they shall cause the same to be placed upon the list and assess the taxes and penalties thereof as herein provided in this act. The board of county commissioners or the governing body of any municipal corporation is hereby authorized and empowered to settle and adjust all claims for taxation arising under this section or any other section authorizing them to place on the tax list any property omitted therefrom.

(6) The provisions of this section shall extend and apply to all cities, towns, and like municipal corporations having powers under their charters to tax the property aforesaid, and the powers conferred and the duties imposed upon the board of county commissioners shall be exercised and performed by the board of commissioners or the board of aldermen or other governing body, as the case may be, of the city, town, or municipal corporation.

(7) The board of county commissioners, whether separately or in connection with any municipality in the same county, may employ a competent man to make diligent search and to discover and to report to the board of county commissioners or to the county supervisor of taxation any unlisted property within the county, to the end that the same may be listed and property assessed for taxation as provided in this section: Provided, that the cost of listing such unlisted property shall not exceed ten per cent of the revenue so derived in the current year in which discovered; and further provided, that nothing in this section shall be construed as authorizing or empowering the county commissioners to appoint tax collectors.

(8) Any time before or after the tax list has been turned over to the sheriff or tax collectors as provided in this act, such unlisted property so discovered shall be listed and assessed for taxation by the board of county commissioners as aforesaid; and the clerk of the board of county commissioners, county accountant, or auditor shall enter such property in the tax book, making out a tax account, placing the same in the hands of the sheriff or tax collector and charge him with such tax account. Such order shall have the force and effect of a judgment and execution against the real and personal property of the person charged with such tax as provided in this act for the regular lists.

(9) In addition to the ten per cent added to the tax as herein provided, any person, firm, or corporation owning or controlling any property, real or personal, and willfully failing to list the same within the time allowed with the list takers or assessors, shall be guilty of a misdemeanor. The failure to so list shall be prima facie evidence that such failure was willful, and the board of county commissioners shall present the names of all such persons, firms, and corporations to the grand jury.

(10) All assessments made under the provisions of this section shall be subject to appeal by the party assessed to the supreme court upon notice given within ten days after the assessment is made, to be served upon the chairman of the board of commissioners. Upon the service of such notice the clerk to the board shall transmit to the clerk of the superior court of the county wherein the property assessed is located all notices, orders, and other records, together with all the findings of the board with respect to the assessment, and the clerk shall enter such appeal upon the civil-issue docket of the county, when a trial de novo shall be had, the hearing of which shall take priority over all other civil actions. The superior court shall, upon such appeal, have the right to modify, confirm, or reject in full any such assessment as may have been made by the board of commissioners under and by virtue of the section hereinabove referred to, and shall have the right and power to find all facts connected with such assessment or to re-refer any question of fact that may arise back to the board of commissioners for further finding, and shall pass upon all matters of law relating to the legality of the assessment fixed by such board of commissioners, and from such rulings upon matters of law either party shall have the right of appeal to the supreme court.

(11) After assessment is made under the provisions of this section, no levies of taxes shall be collectible in cases where the taxpayer appeals to the superior court, pending the appeal: Provided, however, before any appeal can be perfected under the provisions of this act the taxpayer shall enter into a bond payable to the board of commissioners in an amount equal to the taxes levied, plus twenty-five per cent of the amount of the levy, but in no case shall the bond be for less than $200.00 (two hundred dollars), and the said bond shall be conditioned upon the payment of all taxes levied by said board of commissioners under this section legally determined to be due,

and the costs of the appeal in case the assessment or any part thereof is made effective by the court. (1935, c. 417, s. 521.)

Construed as Whole.—The court in Madison County v. Coxe, 204 N. C. 58, 167 S. E. 486, construing Public Laws, 1927, c. 71, § 73, (superseded by this section) declared that the section must be construed as a whole, not piecemeal.

Rebuttal of Presumption.—The presumption created by statute, that the person, who was in possession of the personal property involved in this controversy, was the owner and in possession of said property on 1 April of the five preceding years, is rebutted by the facts of this case. Coltrane v. Donnell, 203 N. C. 515, 516, 166 S. E. 397.

Stated in Poconoke Co. v. New Bern, 172 N. C. 258, 90 S. E. 202.

Applied in Smith v. Dunn, 160 U. C. 174, 76 S. E. 242.

§ 7971(51). Poll tax levied; commissioners' power to exempt.—(1) There shall be levied by the board of county commissioners in each county a tax of two dollars ($2.00) on each taxable poll or male person between the ages of twenty-one and fifty years, and the taxes levied and collected under this section shall be for the benefit of the public school fund and the poor of the county.

(2) The board of county commissioners of every county shall have the power to exempt any person from the payment of poll taxes on account of indigency, and when any such person has been once exempted he shall not be required to renew his application unless the commissioners shall revoke the exemption. When such exemption shall have been made, the clerk of the board of county commissioners shall furnish the person with a certificate of such exemption, and the person to whom it is issued shall be required to list his poll, but upon exhibition of such certificate the list taker shall annually enter in the column intended for the poll the word "exempt," and the poll shall not be charged in computing the list. (1935, c. 417, s. 522.)

Cross References.—See 11 N. C. Enc. Dig. 571 et seq.; 15 N. C. Enc. Dig. 556. See also N. C. Const. Art. V, section 1.

See 12 N. C. Law Rev., 23, 33.

§ 7971(51a). What veterans exempt from poll tax; world war veterans. — Any honorably discharged veteran of any of the wars of the United States, now a resident of, and subject to capitation or poll tax in this State, and who received injuries in the line of duty in the military service, whether compensable or not, and all such honorably discharged veterans that have been, or are now, receiving compensation from the Federal Government for disability of service connected origin, shall be conclusively considered and presumed as having physical infirmities sufficient to warrant exemption from the payment of the capitation or poll tax under Article five, section one, of the Constitution of North Carolina: Provided, however, that with respect to veterans of the World War, this act shall apply only to those who served not less than ninety days during the period between April sixth, one thousand nine hundred seventeen, and November eleventh, one thousand nine hundred eighteen, or to those of such veterans who served with the United States forces in Russia during the period between April sixth, one thousand nine hundred seventeen, and April first, one thousand nine hundred twenty. (1931, c. 193, s. 1.)

§ 7971(51b). Proof of service and injury must be furnished; exemption by county commissioners. — The veteran or soldier claiming exemption under the preceding section shall furnish proof of such service and injury by producing to the board of commissioners of his county his or her discharge or release or certificate of such service or injury, signed by a recognized official of the United States War Department or the Adjutant General's office of this State, and said discharge, release or certificate shall be recorded with the register of deeds of such county prior to tax listing date in the year in which exemption is claimed under this act. It shall be the duty of the register of deeds at or before tax listing time in each county, to notify the board of county commissioners of the registration with him of such discharge, release or certificate and thereupon, upon application of the veteran, said board of county commissioners may take the action authorized by this act. (1931, c. 193, s. 2.)

§ 7971(52). County board of equalization and review.—(1) The board of county commissioners of each county shall be and is hereby constituted the board of equalization and review for its county, whose duty shall be to equalize the valuation in said county so that each tract, lot, or parcel of real estate and each article of personal property shall be listed on the tax list and assessment roll uniformly and at its true value in money, and shall correct such tax list and assessment roll of each township, so that it shall conform to the provisions of this act, and the clerk of the board of equalization and review shall make and enter such adjustments and corrections on the tentative scroll presented by the county supervisors of taxation as the board may authorize.

(2) The members of the board of county commissioners, each as a member of the board of equalization and review, shall be paid by the county their usual compensation per diem and necessary traveling expenses for the number of days actually engaged in the performance of their duties as members of the board of equalization and review.

(3) The county board of equalization and review may designate the register of deeds, county auditor, county accountant, or other officer having in charge the making of the county tax books, as clerk of such board.

(4) The county supervisor of taxation, at least ten days prior to the meeting of the board of equalization and review, to the address appearing on the tax list and assessment roll, and in the year of the quadrennial assessment, shall mail to every person owning taxable property listed and assessed in the county a notice of the valuation at which such property has been assessed for taxation and the time and place of the meeting of the board of equalization and review; and in the years other than the year for the quadrennial assessment shall mail such notices only to the taxpayer whose real property has been increased or reduced in value, as provided in this section for the increase or reduction of assessments on real estate in years other than the year of the quadrennial assessment, but the failure to mail or to receive such notices shall not affect the validity of the tax list and assessment roll. The county supervisor of taxation shall submit to the board of equalization and review the tentative scroll,

roll, or list of each township, ward, or district for the current year as prepared by him, his assistants and assessors, shall meet with the board of equalization and review at all its meetings and shall give such information as he may have or can obtain with respect to the valuation of taxable property in the county.

(5) The said board of equalization and review shall meet on the third Monday in June of each and every year, first giving ten days notice by publication of the time, place, and purpose of the meeting, and may adjourn from day to day while engaged in the equalization and review of the property on the tax list and assessment roll, but shall complete their duties on or before the first Monday in July of each and every year.

(6) The said board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valuation of such property or the property of others.

(7) The said board shall examine and review the tax list and assessment roll of each township for the current year; shall of its own motion or on sufficient cause shown by any person add to said list and assessment roll the names of any persons, the value and description of real and personal property liable to assessment in each township, omitted from such tax list and tax roll; shall correct all errors in the names of persons, in the description of the property, and in the assessment and valuation of taxable property on said list or roll; shall increase or reduce the assessed valuation of such tracts, lots, or parcels of real property or articles of personal property as in their opinion have been returned and assessed below or above the true value in money; shall cause to be done whatever else may be necessary to make said lists and roll or scroll comply with the provisions of this act; and, after the completion of the equalizing and review of said tax lists and rolls of each township, a majority of said board shall endorse thereon and sign a statement to the effect that the same is the fixed and permanent tax list and assessment roll of said township for the current year in which it has been prepared and approved by the board of equalization and review. The omission, however, of such an endorsement shall not effect the validity of any such tax list or assessment roll.

(8) The board of equalization and review in the years other than the year of the quadrennial assessment, provided for in this act, shall not increase or reduce the assessed valuation of any real property, but the same shall be listed and assessed at the same valuation as listed and assessed at the last quadrennial assessment:

(a) Except where real property has been discovered and not listed or assessed at the last quadrennial assessment.

(b) Except where clerical errors have occurred in the making out and transcribing of the tax list and assessment rolls.

(c) Except where improvements and appurtenances have been added to the value of more than one hundred dollars, or where there has been removed or destroyed a thing of value since the last quadrennial assessment exceeding one hundred dollars, and in that event the board of equalization and review shall find the value of the improvements, appurtenances, or thing of value added to, removed, or destroyed, and shall increase or reduce the appraised value of such real property accordingly.

(d) Except where the valuation of the real property since the last quadrennial assessment shall have been affected by some extraordinary circumstances, the facts in connection with which shall be found by such board in each case and entered upon the proceedings of said board.

(e) Except where real property has been subdivided into lots, streets laid out and map registered, or where land has been subdivided into lots on any street or streets already laid out and determined, since the last quadrennial assessment, and the said lots have been sold or offered for sale with reference to said street, streets, and/or map registered, then and in that case they shall determine the value in money of each lot thereof: Provided, that where lands located outside of an incorporated municipality have been subdivided into lots, and where more than five acres of any such subdivision remain unsold by the owner of such subdivision, such unsold lands may be listed as land acreage, according to its actual market value.

(9) After the board of equalization and review shall have completed its duties and adjourned and before the second Monday in August, the register of deeds, auditor, tax clerk, or other officer performing such duties shall prepare a final and complete scroll, roll, or list for each of the several townships, wards, and districts in the county, and for each race thereof, showing the names, in alphabetical order, of the several owners of real and personal property and the valuation fixed and determined by the board of equalization and review. Such scroll, roll, or list, together with the tentative scroll, roll, or list on which the values of property were fixed and determined, shall be filed as the fixed, determined, and permanent roll, either with the board of county commissioners, auditor, tax clerk, county accountant, or other similar officer. It shall be the duty of the register of deeds or other person making out the tax books to report to the commissioner of revenue a list of the persons, firms, or corporations, with their postoffice addresses, who are liable for Schedule "B" taxes. Said register of deeds or other person having possession of said tax list shall make and forward to the commissioner of revenue within thirty days after the return of said list a list of all persons, with their postoffice and business, which are liable to Schedule "B" taxes, and the revenue commissioner shall pay the said officer the sum of two cents per name, and said compensation to be in addition to any compensation said officer now receives. (1935, c. 417, s. 523.)

Cross Reference.—See general treatment in 11 N. C. Enc. Dig. 603 et seq.

Purpose of Notice.—The notice required before the meeting in June is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commissioners v. Atlanta, etc., Ry. Co., 86 N. C. 541, 544.

Valuation by Owner Subject to Review by Board.—The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list-

taker, but it may be corrected by the county commissioner or board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 260, 90 S. E. 202.

Revision without Notice Void.—Where the value of the solvent credits of a taxpayer are increased without due notice to him or his agent, such increase in value is a nullity. Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Designated Date of Meeting Exclusive of Others.—See note of Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Before Whom Complaint Made.—The complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to charge such valuation. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 261, 90 S. E. 202.

Requisites of Complaint.—The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202.

Decision of Board Final.—The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and unless they proceed upon some erroneous principle, there is no appeal. Wade v. Commissioners, 74 N. C. 81 and cases cited.

When Duties and Powers Cease.—After the board of county commissioners has completed the revision of the tax lists as authorized by this section its duties and power as a revising board, cease and determine until the time appointed by the statute for the next succeeding year. Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

§ 7971(53). Board of commissioners not to change valuations.—(1) The board of county commissioners shall not increase, reduce, change, or modify in any manner whatsoever the valuations assessed and certified to by the board of equalization and review at their annual session for the current year and as appears on the tax list and assessment roll or scroll so certified by them, except clerical errors appearing on said lists and rolls. (1935, c. 417, s. 524.)

§ 7971(54). Appeal from board of equalization and review. — Any property owner, taxpayer, or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the state board of assessment by filing a written notice of such appeal with the board of county commissioners within sixty days after the first Monday in July of the current year, or after the adjournment of the board of equalization and review. At the time of filing such notice of appeal, the appellant shall file with the board of county commissioners a statement in writing of the grounds of appeal, and shall, within ten days after filing such notice of appeal with the board of county commissioners, file with the state board of assessment a notice of such appeal and attach thereto a copy of the statement of the grounds of appeal filed with the board of county commissioners. (1935, c. 417, s. 525.)

§ 7971(55). State board of assessment fix day and hear appeal.—The state board of assessment shall fix a time for the hearing of such appeal provided for in the preceding section, and shall hear the same in the city of Raleigh, or such other place within the State as the said board may designate; shall give notice of time and place of such hearing to the applicant, appellee, and to the chairman of the board of county commissioners at least ten days prior to the said hearing; shall hear all the evidence or affidavits offered by the appellant, appellee, and the board of county commissioners; shall reduce, increase, or confirm the valuation fixed by the board of equalization and review and enter it accordingly, and shall deliver to the clerk of the board of county commissioners a certified copy of such order, which valuation shall be entered upon the fixed and permanent assessment roll and shall constitute the valuation for taxation. (1935, c. 417, s. 526.)

§ 7971(56). County commissioners to levy tax; date of levy.—The boards of county commissioners of the several counties shall, not later than the second Monday in August, levy such rate of tax for general county purposes as may be necessary to meet the general expense of the county, not exceeding the legal limitation, and such rates for other purposes as may be authorized by law. (1935, c. 417, s. 527.)

§ 7971(57). County commissioners to cause tax duplicates to be made. — (1) The board of county commissioners shall cause the register of deeds, county accountant, county auditor, tax clerk, or other official performing such duties to make out two copies of the tax list for each township, as revised, fixed, and determined by the county board of equalization and review, according to a form to be prepared and furnished to said board or approved by the state board of assessment. Such form shall show in different columns at least the following:

(a) The name of each person whose property is listed and assessed for taxation, entered in alphabetical order.

(b) The amount of valuation of real property assessed for county-wide purposes.

(c) The amount of valuation of personal property assessed for county-wide purposes.

(d) The total amount of real and personal property valuation assessed for county-wide purposes.

(e) The amount of ad valorem tax due by each taxpayer for county-wide purposes.

(f) The amount of poll tax due by each taxpayer.

(g) The amount of dog tax due by each taxpayer.

(h) The amount of valuation of property assessed in any special district or subdivision of the county for taxation.

(i) The amount of tax due by each taxpayer to any special district or subdivision of the county.

(j) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

(2) Such official shall also fill out the receipts and stubs for all taxes charged on the tax books so made out on a form prescribed or approved by the state board of assessment and furnished by the county, which form shall show at least the following:

(a) The name of the taxpayer charged with taxes.

(b) The amount of valuation of real property assessed for county-wide purposes.

(c) The amount of valuation of personal property assessed for county-wide purposes.

(d) The total amount of valuation of real and personal property assessed for county-wide purposes.

(e) The rate of tax levied for each county-wide

purpose, the total rate for all county-wide purposes, and the rate levied for any special district or subdivision of the county, which tax is charged to the taxpayer.

(f) The amount of the valuation of property assessed in any special district or subdivision of the county.

(g) The amount of ad valorem tax due by the taxpayer for county-wide purposes.

(h) The amount of poll tax due by the taxpayer.

(i) The amount of dog tax due by the taxpayer.

(j) The amount of tax due by the taxpayer to any special districts or subdivisions of the county.

(k) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

(l) Amount of discounts.

(m) Amount of penalties.

(3) One of said copies of the tax list shall remain in the office of the clerk to the board of county commissioners, the county accountant, the county auditor, or tax clerk, and the other shall be delivered to the sheriff or tax collector, who shall receipt for the same, on the first Monday in October. The clerk to the board of county commissioners, county accountant, county auditor, tax clerk, or other official performing such duties shall endorse on the copy delivered to the sheriff or tax collector an order to collect the taxes therein mentioned, and such order shall have the force and effect of a judgment and execution against the real and personal property charged in such list. In such list the clerk or other official shall note all appeals from the board of equalization and review which have been perfected by the giving of a bond. Said order shall be in the following or similar form:

North Carolina, ... County, ... City, ...

To the Sheriff or Tax Collector of ..... County, or ..... Town, or ..... City:

You are hereby authorized, empowered, and commanded to collect the taxes from the persons and taxpayers in the amounts as herein set forth, and said taxes in the amounts set forth are declared to be a first lien on real property of such taxpayer in ..... County, or ..... Town, and this book and order shall be a full and sufficient authority to direct, require, and enable you to levy on and sell any and all real or personal property of persons and taxpayers herein named for and on account of the taxes due by and herein charged to said persons and taxpayers, and all interest and cost on account thereof.

Witness my hand and official seal, this ..... day of ....., 193...

.....
Chairman, Board of Commissioners.

Attest:

.....
Clerk of Board.

(4) The board of county commissioners shall make any order for the payment to the register of deed, auditor, tax clerk, or like official, as the case may be, such sum as may be in their discretion a proper compensation for the work of computing the taxes, making out the tax list, and the necessary copies thereof, and the making of such abstracts and returns as may be required by the state board of assessment; but the compensation allowed for computing the taxes and making out the tax list is not to exceed ten cents for each name appearing on the tax list, which shall include the original and duplicate tax list and also the receipts and stubs provided for in this section. (1935, c. 417, s. 528.)

§ 7971(57)a. Date of attaching of lien. — The lien of taxes levied pursuant to this act shall attach to real estate as of the first day of July of each year. (1935, c. 417, s. 528½.)

§ 7971(58). Abstracts of property furnished state board of assessment.—The clerk of the board of county commissioners, auditor, tax clerk, county accountant, or other officer performing such duties shall, on or before the first Monday in November of the current year, return to the state board of assessment, on forms prescribed by said board, an abstract of the real and personal property of the county by townships, showing the number of acres of land and their value, the number of town lots and their value, the value of the several classes of livestock, the number of white and negro polls, separately, and specify every other subject of taxation and the amount of county tax payable on each subject and the amount payable on the whole. At the same time said clerk, auditor, tax clerk, or other like officer shall return to the state board of assessment an abstract or list of the poll, county and school taxes payable in the county, setting forth separately the tax levied on each poll and on each hundred dollars value of real and personal property for each purpose, and also the gross amount of every kind levied for county purposes, and such other and further information as the state board of assessment may require. (1935, c. 417, s. 529.)

Art. 6. Taxation of Banks, Banking Associations, and Trust Companies

§ 7971(59). Banks, banking associations and trust companies.—The value of shares of stock of banks, banking associations, and trust companies, shall be determined as follows:

(1) Every bank, banking association, industrial bank, savings institution, trust company, or joint stock land bank located in this State shall list its real estate and tangible personal property, except money on hand, in the county in which such real estate and tangible personal property is located, for the purpose of county and municipal taxation, and shall during the month of June of each year list with the state board of assessment, on forms provided by the said state board, in the name of and for its shareholders, all the shares of its capital stock, whether held by residents or non-residents, at its actual value on the first day of April of each year.

(2) The actual value of such shares for the purpose of this section shall be ascertained by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the assessed value of such real and tangible personal property which such banking institutions shall have listed for taxation in the county or counties wherein such real and tangible personal property is located, together with an amount according to its proportion of tax value of any buildings and lands wholly or partially occupied

by such banking associations, institutions, or trust companies, owned and listed for taxation by a North Carolina corporation in which such banking associations or institutions own ninety-nine per cent of the capital stock.

(3) In addition to the deductions allowed in item two of this section, there may be deducted from the items of surplus and undivided profits an amount not exceeding five per cent of the bills and notes receivable of such banking associations, institutions, or trust companies to cover bad or insolvent debts, investments in North Carolina state bonds, United States government bonds, joint-stock land bank bonds, and federal land bank bonds, at the actual cost of said bonds owned on land and continuously for at least ninety days prior to the first day of April of the current year. The value of such shares of capital stock of such banking associations, institutions, or trust companies shall be found by dividing the net amount ascertained above by the number of shares in the said banking associations, institutions, or trust companies.

(4) If the state board of assessment shall have reason to believe that the actual value of such shares of stock of such banking associations, institutions, or trust companies, as listed with it, is not the true value in money, then the said board shall ascertain such true value by such an examination and investigation as seems proper, and increase or reduce the value as so listed to such an amount as it ascertains to be the true value for the purposes of this section.

(5) The value of the capital stock of all such banking associations, institutions, and trust companies as found by the state board of assessment, in the manner herein described, shall be certified to the county in which such bank or institution is located: Provided, that if any such banking association, institution, or trust company shall have one or more branches, the state board of assessment shall make an allocation of the value of the capital stock so found as between the parent and branch bank or banks or trust company in proportion to the deposits of the parent and branch bank, banks, or trust company, and certify the allocated values so found to the counties in which the parent and branch bank, banks, or trust company are located.

(6) The taxes assessed upon the shares of stock of any such banking association, institutions, or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer, as well as such banking association, institution, or trust company, shall be liable for such taxes, and in addition thereto for a sum equal to ten per cent thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company, or officers thereof paying them, or may be deducted from the dividends accruing on such shares. The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State, coming in competion with the business of such banking associations, institutions, or trust companies. (1935, c. 417, s. 600.)

As to return by private banks and bankers, see section 7921.

Where Capital Invested in State Bonds.—Bank stock is taxable at its full value after deducting the assessed value of the bank's real and personal property, though the capital of the bank be invested in North Carolina state bonds. Pullen v. Corporation Comm., 152 N. C. 548, 68 S. E. 155.

Listing Bank Stock.—This section changes the policy of the State as declared in ch. 234. sec. 42, Laws of 1917, as to the listing shares of bank stock by the holders where they reside, and fixing the situs of the shares for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the Act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the cashier of the bank, requiring him to pay the State, county, special and municipal taxes, the intent of the statute being to receive the bank to pay all taxes on the shares of its stock where it is located, and to relieve the owners from listing or paying them, except as he may be required to reimburse the bank. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629.

Deduction of Indebtedness.—In the taxation of shares of stock in a national bank, under the Revenue Act of 1885, the owner of such shares has the right to deduct from the assessed value thereof the amount of his bona fide indebtedness, as in case of other investments of moneyed capital. McAden v. Board, 97 N. C. 355, 2 S. E. 670.

Fixing Amount of Capital Stock.—Notes due a corporation are to be considered in estimating the value of the capital stock, and not as a separate item for taxation. Caldwell Land, etc., Co. v. Smith, 151 N. C. 70, 65 S. E. 641.

Assessment by Corporate Stock.—See 11 N. C. Enc. Dig. 598 et seq.; 15 N. C. Enc. Dig. 560.

The imposition upon a corporation of a tax on its "capital stock" in addition to a requirement that it shall list for taxation and pay the taxes assessed on the shares of its stock-holders, does not make "double taxation." Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423.

The tax on shares of stock of a bank is payable by the bank under the provisions of this section, it being required that the cashier or other proper officer of the bank pay the tax to the municipality levying it. Rockingham v. Hood, 204 N. C. 618, 169 S. E. 191.

Effect of Failure to Follow Prescribed Procedure. — Where the method prescribed by this section for determining the value of bank stock for taxation, has not been followed, a bank may retain the board of commissioners of a county from listing its shares of stock for taxation. Virginia-Carolina Joint Stock Land Bank v. Board of County Com'rs, 207 N. C. 50, 175 S. E. 705.

§ 7971(60). Building and loan associations. — The secretary of each building and loan association organized and/or doing business in this State shall list with the local assessors all the tangible real and personal property owned on the first day of April of each year, including all cash on hand or in bank on that date, which shall be assessed and taxed as like property of individuals. (1935, c. 417, s. 601.)

Capital Stock as Property.—The capital stock of a building and loan association is property and hence is taxable according to the uniform ad valorem system established by the constitution. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526.

The payment of a privilege tax under section 7880(64) does not bar the ad valorem tax imposed by this section. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526.

§ 7971(61). Foreign building and loan associations.—(1) All foreign building and loan associations doing business in this State shall list for taxation during the month of June of each year with the state board of assessment, through their respective agents, its stock held by citizens of this State, with the name of the county, city, or town in which the owners of said stock reside. In listing said stock for taxation the withdrawal value as fixed by the by-laws of each such association shall be furnished to the said board, and the stock

shall be value for taxation at such withdrawal value.

(2) Any association or officer of such association doing business in the State who shall fail, refuse, or neglect to so list shares owned by citizens of this State for taxation shall be barred from doing business in this State; any local officer or other person who shall collect dues, assessments, premiums, fines, or interest from any citizen of this State for any such association which has failed, neglected, or refused to so list for taxation the stock held by citizens of this State shall be guilty of a misdemeanor, and fined and/or imprisoned in the discretion of the court.

(3) The value of the shares of stock so held by citizens of this State, as found by the state board of assessment, shall be certified to the register of deeds of the county in which such shareholders reside, shall be placed on the assessment roll in the name of such holders thereof, and taxed as other property is taxed. (1935, c. 417, s. 602.)

§ 7971(62). Obsolete.

§ 7971(63). State board of assessment to keep record of corporations, associations, banks; secrecy directed.—The state board of assessment shall prepare and keep a record book on which it shall enter a correct list of all the corporations, limited partnerships, joint-stock associations, banks, banking associations, industrial banks, saving institutions, and trust companies which it has assessed for taxation, and said record shall show the assessed valuation placed upon them; and the state board of assessment shall not divulge or make public any report of such corporation, partnership, or association required to be made to it by this section, except to the governor or his authorized agent, the solicitor of the State for the district in which such corporation, partnership, association, bank or banking association or trust company has its principal office, or his authorized agent, or by the board of county commissioners or their authorized agents, of such corporation, partnership, association as have their principal office in such county. (1935, c. 417, s. 604.)

Art. 7. Public Utilities

§ 7971(64). Telegraph companies.—Every joint-stock association, company, co-partnership, or corporation, whether incorporated under the laws of this State or any other State or of any foreign nation, engaged in transmitting to, from, through, in, or across the State of North Carolina telegraph messages shall be deemed and held to be a telegraph company; and every such telegraph company shall during the month of June of each year make out and deliver to the state board of assessment a statement, verified by oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, co-partnership, or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, co-partnership, or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, co-partnership, or corporation situated outside the State of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the State of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the State of North Carolina. (1935, c. 417, s. 700.)

See 12 N. C. Law Rev., 34.

§ 7971(65). Telephone companies.—Every telephone company doing business in this State, whether incorporated under the laws of this State or any other state, or of any foreign nation, shall during the month of June of each year make out and deliver to the state board of assessment of this State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, co-partnership, or corporation invested in the operation of such telephone business.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, co-partnership, or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, co-partnership, or corporation, situated outside the State of North Carolina, and used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of

so much of their lines as is outside of the State of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the State of North Carolina. (1935, c. 417, s. 701.)

§ 7971(66). Express companies.—Every joint-stock association, company, co-partnership, or corporation, incorporated or acting under the laws of this State or any other state, or any foreign nation, engaged in carrying to, from, through, in, or across this State, or any part thereof, money, packages, gold, silver, plate, merchandise, freight, or other articles, under any contract, expressed or implied with any railroad company, or the managers, lessees, agents, or receivers thereof, (provided such joint-stock association, company, co-partnership, or corporation is not a railroad company), shall be deemed and held to be an express company within the meaning of this act; and every such express company shall during the month of June of each year make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such association, company, co-partnership, or corporation making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock or capital of said association, co-partnership, or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share; and in case no shares of capital stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding; and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by the said association, company, co-partnership, or corporation, and subject to local taxation within the State of North Carolina, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the improvements thereon, owned by the association, company, co-partnership, or corporation situated outside the State of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines or routes over which such association, company, co-partnership, or corporation transports such merchandise, freight, or express matter; (b) the total length of such lines or routes as are outside the State of North Carolina; (c) the length of such lines or routes within each of the counties and townships within the State of North Carolina. (1935, c. 417, s. 702.)

§ 7971(67). Sleeping-car companies. — Every joint-stock association, company, co-partnership, or corporation incorporated or acting under the laws of this or any other state, or of any foreign nation, and conveying to, from, through, in, or across this State, or any part thereof, passengers or travelers in palace cars, drawing-room cars, sleeping-cars, dining-cars, or chair-cars, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents, or receivers thereof, shall be deemed and held to be a sleeping-car company for the purposes of this act, and shall hereinafter be called "sleeping-car company"; and every such sleeping-car company doing business in this State shall during the month of June of each year make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such sleeping-car company, invested in its sleeping-car business.

Second. The number of shares of such capital stock devoted to the sleeping-car business issued and outstanding, and the par or face value of each share.

Third. Under the laws of what state it is incorporated.

Fourth. Its principal place of business.

Fifth. The names and postoffice address of its president and secretary.

Sixth. The actual cash value of the shares of such capital stock devoted to its sleeping-car business on the first day of April next preceding such report.

Seventh. The real estate, structures, machinery, fixtures, and appliances owned by said sleeping-car company and subject to local taxation within this State, and the location and assessed value thereof in each county within this State where the same is assessed for local taxation.

Eighth. All mortgages upon the whole or any part of its property, and the amounts thereof, devoted to its sleeping-car business.

Ninth. (a) The total length of the main line of railroad over which cars are run; (b) the total length of so much of the main lines of railroad over which the said cars are run outside of the State of North Carolina; (c) the length of the lines of railroads over which said cars are run within the State of North Carolina: Provided, that where the railroads over which said cars run have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but single tracks; and in case it shall be required, such statement shall show in detail the number of miles of each or any particular railroad or system within the State. When the assessment shall have been made by the state board of assessment in accordance with section 7971(72), the clerk of the board shall thereupon notify the officer attesting such report of the amount assessed against it, and such sleeping-car company shall have thirty days within which to appear and make objection, if any it shall have, to said assessment. If no objection be made within thirty days, the commissioner of revenue

shall assess the state tax against such company and send by letter to the officer attesting such report a bill for the State taxes upon said assessment, and such sleeping-car company shall have thirty days within which to pay said taxes; and the clerk of the state board of assessment shall certify to the county commissioners of the several counties through which such cars are used the value of the property of such sleeping-car company within such county in the proportion that the number of miles of railroad over which such cars are used in said county bears to the number of miles of railroad over which such cars are used within the State, together with the name and postoffice address of the officers attesting such report of such sleeping-car company, with the information that tax bills, when assessed are to be sent him by mail; and such value, so certified, shall be assessed and taxed the same as other property within said county. And when the assessment shall have been made in such county, the sheriff or county tax collector shall send to the address given by the clerk of the state board of assessment to the county commissioners a bill for the total amount of all taxes due to such county, and such sleeping-car company shall have sixty days thereafter within which to pay said taxes; and upon failure of and refusal to do such taxes shall be collected the same as other delinquent taxes are, together with a penalty of fifty per cent added thereto, and costs of collection. (1935, c. 417, s. 703.)

§ 7971(68). Refrigerator and freight-car companies.—Every person, firm, or corporation owning refrigerator or freight cars operated over or leased to any railroad company in this State or operating in the State shall be taxed in the same manner as hereinbefore provided for the tax of sleeping-car companies, and the collection of the tax hereon shall be followed in assessing and collecting the tax on the refrigerator and freight cars taxed under this section: Provided, if it appears that the owner does not lease the cars to any railroad company, or make any contract to furnish it with cars, but they are furnished to be run indiscriminately over any lines on which shipper or railroad companies may desire to send them, and the owner receives compensation from each road over which the cars run, the state board of assessment shall ascertain and assess the value of the average number of cars which are in use within the State as a part of the necessary equipment of any railroad company for the year ending April first, next preceding, and the tax shall be computed upon this assessment. (1935, c. 417, s. 704.)

§ 7971(69). Street railway, waterworks, electric light and power, gas, ferry, bridge, and other public utility companies.—Every street railway company, waterworks company, electric light and power company, gas company, ferry company, bridge company, canal company, and other corporations exercising the right of eminent domain, shall during the month of June of each year make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the co-partnership or corporation, showing:

First. The total capital stock of such association, company, co-partnership, or corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, co-partnership, or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, co-partnership, or corporation situate outside of the State of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situate.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the State of North Carolina; (c) the length of lines whithin each of the counties and townships within the State of North Carolina. (1935, c. 417, s. 705.)

§ 7971(70). State board of assessment may require additional information.—Upon the filing of the statements required in the preceding sections the state board of assessment shall examine them and each of them; and if the board shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer to make such other and further statements as said board may call for. In case of the failure or refusal of any association, company, co-partnership, or corporation to make out and deliver to the state board of assessment any statement or statments required by this act, such association, company, co-partnership, or corporation shall forfeit and pay to the State of North Carolina one hundred dollars ($100) for each additional day such report is delayed beyond the last day of June, to be sued for and recovered in any proper form of action in the name of the State of North Carolina on the relation of the state board of assessment, and such penalty, when collected, shall be paid into the general fund of the State. (1935, c. 417, s. 706.)

§ 7971(71). State board of assessment shall examine statements.—The state board of assessment shall thereupon value and assess the property of each association, company, co-partnership, or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom and upon such other information as the board may have or obtain. For that purpose it may require the agents or officers of said association, company, co-partnership, or corporation to appear before it with such books, papers, and statements as it may require or may require additional statements to be made, and may compel the attendance of witnesses

in case the board shall deem it necessary to enable it to ascertain the true cash value of such property. (1935, c. 417, s. 707.)

§ 7971(72). Manner of assessment.—Said state board of assessment shall first ascertain the true cash value of the entire property owned by the said association, company, co-partnership, or corporation from said statement or otherwise for the purpose, taking the aggregate value of all the shares of capital stock, in case shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, co-partnership, or corporation in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, co-partnership, or corporation shall be encumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock or to the value of the capital in case there should be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, co-partnership, or corporation. Such state board of assessment shall, for the purpose of ascertaining the true cash value of property within the State of North Carolina, next ascertain from such statements or otherwise the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situated within the State of North Carolina, and not specifically used in the general business of such associations, companies, co-partnerships, or corporations, which assessed value for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of assessment shall next ascertain and assess the true cash value of the property of the associations, companies, co-partnerships, or corporations within the State of North Carolina by taking as a guide, as far as practicable, the proportion of the whole aggregate value of said associations, companies, co-partnerships as above ascertained, after deducting the assessed value of such real estate without the State which the length of lines of said associations, companies, co-partnerships, or corporations, in the case of telegraph and telephone companies, within the State of North Carolina bears to the total length thereof, and in the case of express companies and sleeping-car companies the proportion shall be in proportion of the whole aggregate value, after such deduction, which the length of lines or routes within the State of North Carolina bears to the whole length of lines or routes of such associations, companies, co-partnerships, or corporations, and such amounts so ascertained shall be deemed and held as the entire value of the property of said associations, companies, co-partnerships, or corporations within the State of North Carolina. From the entire value of the property within the State so ascertained there shall be deducted by the commissioners the assessed value for taxation of all real estate, structures, machinery, and appliances within the State and subject to local taxation in the counties as hereinbefore described in sections 7971(66) to 7971(71), inclusive, and the residue of such value as ascertained, after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said associations: Provided, the state board of assessment shall also assess the value for taxation of all structures, machinery, appliances, pole lines, wire and conduit of telephone and telegraph companies within the State subject to local taxation, but land and buildings located thereon owned by said companies shall be assessed in like manner and by the same officials as though such property was owned by individuals in this State. (1935, c. 417, s. 708.)

§ 7971(73). Value per mile.—Said state board of assessment shall thereupon ascertain the value per mile of the property within the State by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the State, by the number of miles within the State, and the result shall be deemed and held as value per mile of the property of such association, company, co-partnership, or corporation within the State of North Carolina: Provided, the value per mile of telephone companies shall be determined on a wire mileage basis. (1935, c. 417, s. 709.)

§ 7971(74). Total value for each county.—Said state board of assessment shall thereupon for the purpose of determining what amount shall be assessed by it to said association, company, co-partnership, or corporation in each county in the State through, across, and into or over which the lines of said association, company, co-partnership, or corporation extends, multiply the value per mile, as above ascertained, by the number of miles in each of such counties as reported in said statements or as otherwise ascertained, and the result thereof shall be by the clerk of said board certified to the chairman of the board of county commissioners, respectively, of the several counties through, into, over, or across which the lines or routes of said association, company, co-partnership, or corporation extend: Provided, the total value of street railways, electric light, power, and gas companies, as determined in section 7971(72) to be certified to each county, shall be the proportion which the assessed value of the physical property in each county bears to the total assessed value of the physical property in the State. All taxes due the State from any corporation taxes under the preceding sections shall be paid by the treasurer of each company direct to the commissioner of revenue. (1935, c. 417, s. 710.)

§ 7971(75). Companies failing to pay tax.—In case any such association, company, co-partnership, or corporation as named in this act shall fail or refuse to pay any taxes assessed against it in any county in this State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of North Carolina by the solicitors of the different judicial districts of the State on the relation of the board of commissioners of the different counties of this State, and the judgment in said action shall include a penalty of fifty per cent of the amount of taxes as assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prose-

cuted in any county into, through, over, or across which the lines or routes of any association, company, co-partnership, or corporation shall extend, or in any county where such association, company, co-partnership, or corporation shall have an office or agent for the transaction of business. In case such association, company, co-partnership, or corporation shall have refused to pay the whole of the taxes assessed against the same by the state board of assessment, or, in case such association, company, co-partnership, or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, such action may include the whole or any portion of the taxes so unpaid in any county or counties; but the attorney general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions to each separate county or adjoining counties, as he may prefer. All collections of taxes for or on account of any particular county made in any such suit or suits shall be by said board accounted for as a credit to the respective counties for or on account of which such collections were made by the said board at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the State, and upon such settlement being made the treasurer of the several counties shall at their next settlement enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: Provided, that in any such action the amount of the assessments fixed by said state board of assessment and apportioned to such county shall not be controverted. (1935, c. 417, s. 711.)

§ 7971(76). State board made appraisers for public utilities.—The state board of assessment herein established is constituted a board of appraisers and assessors for railroad, canal, steamboat, hydro-electric, street railway, and all other companies exercising the right of eminent domain. (1935, c. 417, s. 712.)

§ 7971(77). Returns to state board by railroad, etc., companies.—The president, secretary, superintendent, or other principal accounting officer within this State of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this State or not, shall during the month of June of each year return to the said board of assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within the State, viz.: The number of miles of such railroad lines in each county in this State, and the total number of miles in the State, including the roadbed, right of way and superstructures thereon, main and sidetracks, depot buildings and depot grounds, section and tool houses and the land upon which they are situated and necessary to their use, water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right of way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the state board of assessment, pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: Provided, however, that all machines and repair shops, general office buildings, storehouses and contents thereof, located outside of the right of way shall be listed for purposes of taxation by the principal officers or agents of such companies with the list-takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the state board of assessment. It shall be the duty of the register of deeds, if requested so to do by the state board of assessment, to certify and send to the said board a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the board in accordance with section 7971(79), before the apportionment is made to the counties and municipalities. The register of deeds shall also certify to the board the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their offices as the said board shall require of them; and the mayor of each city or town shall cause to be sent to the said board the local rate of taxation for municipal purposes. (1935, c. 417, s. 713.)

Section Constitutional.—This section is not in conflict with N. C. Const., Art. V, sec. 3, providing that such assessment be uniform and ad valorem. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925.

Taxation of Accessories, etc.—The railroad, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, etc., by reasonable interpretation and under constitutional powers, are included in the language of this section, delegating to the Corporation Commission the power to assess railroad properties, and such are excluded from the power of local tax assessors. Atlantic, etc., R Co. v. New Bern, 147 N. C. 165, 60 S. E. 825.

The word "superstructures" covers all buildings situated on the right of way. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 169, 60 S. E. 925.

Province of Local Officers.—In assessing railroad property, local officers only list and assess such property as is off the right of way. Caldwell Land Co. v. Smith, 151 N. C. 70, 74, 65 S. E. 641.

§ 7971(78). Railroads; annual schedule of rolling stock, etc., to be furnished state board.—The movable property belonging to a railroad company shall be denominated, for the purpose of taxation, "rolling stock." Every person, company, or corporation owning, constructing, or operating a railroad in this State shall, during the month of June of each year, return a list or schedule to the state board of assessment which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand-cars, and all other kinds of cars, and the value thereof, and a statement or schedule as follows: (1) The amount of capital stock authorized and the number of shares into which such capital stock

is divided; (2) the amount of capital stock paid up; (3) the market value, or, if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the State; (5) the total assessed value of all tangible property in the State; (6) and, if desired, all the information heretofore required to be annually reported by section seven thousand nine hundred and sixty-four of the Consolidated Statutes. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the board, and with reference to amounts and value on the first day of April of the year for which the return is made. (1935, c. 417, s. 714.)

The rolling stock of a railroad company, used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length thereof to the whole time is liable to taxation. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652, construing prior law.

§ 7971(79). Railroads; tangible and intangible property assessed separately.—(a) At such dates as real estate is required to be assessed for taxation the said board of assessment shall first determine the value of the tangible property of each division or branch of such railroad or rolling stock and all the other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted) as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

(c) The aggregate value of the physical or tangible property and the franchise, as thus determined, shall be the true value of the property for the purpose of an ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof, and the state board of assessment shall certify, on or before the first day of September, to the chairman of the county commissioners and the mayor of each city or incorporated town the amounts apportioned to his county, city, or town; all taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the commissioner of revenue within thirty days after notice of assessment and tax due, and upon failure to pay the commissioner of revenue as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located, adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts. (1935, c. 417, s. 715.)

§ 7971(80). Railroads; where road both within and without state.—When any railroad has part of its road in this State and part thereof in any other state, the board shall ascertain the value of railroad stock, rolling stock, and all other property liable to assessment by the state board of assessment of such company as provided in the next preceding section, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road and determine the value in this State accordingly: Provided, the board shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. On or after the first Monday in July the said board shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said board may, if they see fit, require all argument and communications to be presented in writing. (1935, c. 417, s. 716.)

§ 7971(81). Railroads; in cases of leased roads.—If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this State other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company. (1935, c. 417, s. 717.)

§ 7971(82). Railroads; board may subpoena witnesses and compel production of records; violation a misdemeanor.—The state board of assessment shall have power to summon and examine witnesses and require that books and papers shall be presented to them for the purpose of obtaining such information as may be necessary to aid in determining the valuation of any railroad company. Any president, secretary, receiver, or accounting officer, servant or agent of any railroad or steamboat company having any proportion of its property or roadway in this State, who shall refuse to attend before the said board when required to do so, or refuse to submit to the inspection of said board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said board, or order touching the business or property, moneys and credits, and the value thereof, of said railroad company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be confined in the jail of the county not exceeding thirty days, and shall be fined in any sum not exceeding five hundred dollars and costs, and any president, secretary, accounting officer, servant, or agent aforesaid so refusing as aforesaid shall be deemed guilty of contempt of such board, and may be confined by order of said board, in the jail of the proper county until he shall comply

with such order and pay the cost of his imprisonment. (1935, c. 417, s. 718.)

§ 7971(83). Taxes on railroads shall be a lien on property of the same.—The taxes upon any and all railroads in this State, including roadbed, right of way, depots, sidetracks, ties, and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of April in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this State, and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this State. (1935, c. 417, s. 719.)

§ 7971(84). Board of assessment to certify; when tax payable.—The state board of assessment shall, upon completion of the assessment directed in the preceding sections, certify to the register of deeds of the counties and the clerk of the board of commissioners of the municipalities through which said companies operate, the apportionment of the valuations as hereinbefore determined and apportioned by the board, and the board of county commissioners shall assess against such valuation the same tax imposed for county, township, town, or other tax district purposes, as that levied on all other property in such county, township, town, or other taxing districts. This tax shall be paid to the sheriff or tax collector of the county and municipality. (1935, c. 417, s. 720.)

§ 7971(85). Obsolete.

§ 7971(86). Canal and steamboat companies.—The property of all canal and steamboat companies in this State shall be assessed for taxation as above provided for railroads. In case any officer fails to return the property provided in this section, the board shall ascertain the length of such property in this State, and shall assess the same in proportion to the length at the highest rate at which property of that kind is assessed by them. (1935, c. 417, s. 721.)

Art. 8. General Provisions

§ 7971(87). Foreign corporations not exempt.—Nothing in this act shall be construed to exempt from taxation at its actual cash value any property situated in the State belonging to any foreign corporation. (1935, c. 417, s. 800.)

Determining Liability.—A nonresident corporation is liable for taxation for such proportion of its capital stock as the value of its tangible property within the state bears to the value of all its tangible property. Commissioners v. Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18.

§ 7971(88). Defining actual value in money.—All property, real and personal, shall, as far as practicable, be valued at its true value in money. The intent and purpose of the tax laws of the State is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such property and subjects are usually sold, but not by forced sale thereof, and the words "market value," "true value," or "cash value," whenever used in the tax laws of this State, shall be held to mean for what property and subjects can be transmuted into cash when sold in such manner as such property and subjects are usually sold. (1935, c. 417, s. 801.)

§ 7971(89). Clerk of cities and towns to furnish information as to valuation, taxes levied, and indebtedness.—The clerk or auditor of each city and town in this State shall annually make and transmit to the state board of assessment, on blanks furnished by the said board, a full, correct, and accurate statement showing the assessed valuation of all property, tangible and intangible, within his city or town, and separately the amount of all taxes levied therein by said city or town, including school district, highway, street, sidewalk, and other similar improvement taxes for the current year, and the purpose for which the same were levied; and shall annually furnish to the local government commission a complete and detailed statement of the bonded and other indebtedness of the city or town, the accrued interest on same, whether not due or due and unpaid, and the purposes for which said indebtedness was incurred. (1935, c. 417, s. 802.)

§ 7971(90). County indebtedness to be reported.—The auditor or county accountant of each county in this State shall make and deliver annually to the local government commission a full, correct, and accurate statement of the bonded and other indebtedness of his county, including township, school districts, and special tax districts, the purposes for which same was incurred, and all accrued interest, whether not due or due and unpaid. (1935, c. 417, s. 803.)

§ 7971(91). Correction of assessment roll.—If on the assessment roll of any county there is an error either in the name of the person assessed, or any taxable property shall not have been listed, or any error that has been made in the transfer, the name may be changed, the property entered on the roll, or the error corrected by the county supervisor of taxation after the roll has been returned to the clerk of the board of county commissioners; or such name may be changed, omission supplied, entry made, or error corrected by the board of county commissioners, upon satisfactory evidence of such error or omission, at a regular meeting of the board, and the board, upon reasonable notice, may require the person or persons affected to show cause, on a day to be appointed, why the error should not be corrected or omission supplied; and the board of county commissioners is empowered and authorized to correct any error arising from the fact that property appears on the assessment roll which has been conveyed to another before the listing period, or did not belong to the taxpayer on the first day of April of the current year. (1935, c. 417, s. 804.)

§ 7971(92). Discounts and penalties in payment of taxes.—All taxes assessed and/or levied by any county in this State, in accordance with the provisions of this act, shall be due and payable on the first Monday of October of the year in which so assessed and levied, and if actually paid in cash.

(1) On or before the first day of November next after due and payable, there shall be deducted a discount of one per cent.

(2) After the first day of November and on or before the first day of December next after due and payable, there shall be deducted a discount of one-half of one per cent.

(3) After the first day of December and on or before the first day of February next after due and payable, the tax shall be paid at par or face value.

(4) After the first day of February and on or before the first day of March next after due and payable, there shall be added to the tax a penalty of one per cent.

(5) After the first day of March and on or before the first day of April next after due and payable, there shall be added to the tax a penalty of two per cent.

(6) After the first day of April and on or before the first day of May next after due and payable, there shall be added a penalty of three per cent.

(7) After the first day of May and on or before the first day of June next after due and payable, there shall be added a penalty of four per cent.

(8) Should any taxpayer desire to make a prepayment of his taxes between July first and October first of any year, he may do so by making payment to the county or city accountant, city clerk, auditor, or treasurer, as the governing body may determine, and shall be entitled to the following discounts: if paid on or before July first, a deduction of three per cent; if paid on or before August first, a deduction of two and one-half per cent; if paid on or before September first, a deduction of two per cent; if paid on or before October first, a deduction of one and one-half per cent. Whenever any such payments are made, the auditor or county accountant shall certify the same to the clerk to the board of county commissioners, and the same shall be credited, together with the discount, to the taxes levied to the person, firm, or corporation, which credit shall include the discount upon the above basis. The board of commissioners of any county or municipality may by resolution adopted prior to the first day of October, one thousand nine hundred thirty-three, eliminate the penalties provided in this section on payment of taxes delayed beyond the first day of February, and may adopt as applicable to such county or municipality, in lieu of the discounts and penalties provided in this section, a schedule of discounts not in excess of the following:

On taxes paid on or before October first a discount of two per cent.

On taxes paid on or before November first a discount of one per cent.

On taxes paid on or before January first a discount of one-half of one per cent.

(9) The county commissioners of any county may order and direct the payment of taxes in installments of not less than twenty-five per cent of the amount due, at such time as the county commissioners may determine, the final installment to be made payable not later than May first, subject to the discounts and penalties as herein provided.

Provided, nothing herein shall be construed to repeal any of the provisions of House bill one thousand and sixty-two, relating to Pender county. (1935, c. 417, s. 805.)

§ 7971(93). Failure to list personal property a misdemeanor.—If any person, firm, or corporation whose duty it is to list any personal property whatsoever for taxation shall fail, refuse, or neglect to list same, shall remove or conceal same, or cause same to be removed or concealed, or shall aid or abet in removing or concealing property that should be listed, such person, firm, or corporation shall be guilty of a misdemeanor. (1935, c. 417, s. 806.)

A former statute which made it a misdemeanor for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securities" did not apply to the purchase before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction was made in good faith and the bonds were bought and sold on the open market and the title thereto passed absolutely in both transactions, and the purchaser of the bonds could not be taxed on the purchase price. Trust Co. v. Nash County, 196 N. C. 704, 146 S. E. 861.

§ 7971(94). Penalty for failure to make report.—Every register of deeds, auditor, county accountant, supervisor of taxation, assessor, sheriff, clerk of superior court, clerk of board of county commissioners, county commissioners, board of aldermen, or other governing body of a city or town, mayor, clerk of city or town, or any other public officer, who shall wilfully fail, refuse, or neglect to perform any duty required, to furnish any report to the state board of assessment or local government commission as prescribed in this or the Revenue Act, or who shall wilfully and unlawfully hinder, delay, or obstruct said board in the discharge of its duties, shall for every such failure, neglect, refusal, hindrance, and/or delay, in addition to the other penalties imposed in this and the Revenue Act, pay to the state board of assessment and/or local government commission for the general fund of the State the sum of one hundred dollars ($100.00), such sum to be collected by said board or local government commission. A delay of thirty days to make and furnish any report required or to perform a duty imposed shall be prima facie evidence that such delay was wilful. (1935, c. 417, s. 807.)

§ 7971(95). Misdemeanor for refusal to allow inspection of records or to respond to subpoena.—Any person, persons, member of a firm, or any officer, director or stockholder of a corporation, who shall refuse permission to inspect any books, papers, documents, statements, accounts, or records demanded by the state board of assessment, the members thereof, or any duly authorized deputy provided for in this act or the Revenue Act, or who shall wilfully fail, refuse, or neglect to appear before said board in response to its subpoena or to testify as provided for in this act and the Revenue Act, shall, in addition to all other penalties imposed in this or the Revenue Act, be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court. (1935, c. 417, s. 808.)

§ 7971(96). Unconstitutionality or invalidity.—If any clause, sentence, paragraph, subsection, section, or any part of this act shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, subsection, section, or part thereof directly involved in such judgment. No caption of any section or sections shall in any way affect the validity of this subchapter or any part thereof. (1935, c. 417, s. 809.)

§ 7971(97). Purpose of act.—It is the purpose of this act to provide the machinery for the listing and valuing of property, and the levy and collection of taxes, for the year one thousand nine hundred

and thirty-five, and annually thereafter. (1935, c. 417, s. 810.)

§ 7971(98). Effective date of act. — This act shall be in full force and effect from and after its ratification. Ratified this the 11 day of May, A. D. 1935. (1935, c. 417, s. 812.)

Art. 9. Listing of Automobiles in Certain Counties

§ 7971(99). Listing by owner required.—Every owner of a motor vehicle in the counties specified herein shall list such motor vehicle for taxes in such counties at the same time residents of such counties are or may be required by law to list real and/or personal property for taxation. (1931, c. 392, s. 1.)

§ 7971(100). Commissioner of Revenue to furnish list of registered automobiles to counties. — The Commissioner of Revenue of the State of North Carolina, or other officer in charge of motor vehicle registration shall upon the ratification of this act furnish to the tax listing authorities of the counties specified herein or to the tax collectors thereof a list showing the names and addresses of all owners of motor vehicles in such counties as of May first, one thousand nine hundred and thirty-one, and as soon after the first day of April in each year as the same can be prepared and furnished, a list showing the names and addresses of all owners of motor vehicles in such counties the first day of April in each year, together with the make, type and character of such motor vehicle, and the date of registration thereof, provided, the cost of preparing such lists shall be paid by the authorities of such counties. (1931, c. 392, s. 2.)

§ 7971(101). Listing by county authorities where owners fail to list.—The tax listing authorities of the counties specified herein shall compare said list of motor vehicle owners with the tax lists of such counties and if it appears that any owner of a motor vehicle has failed to list any motor vehicle registered in his name, it shall be the duty of such tax listing authorities or of the tax collectors of such counties to list such motor vehicle for purposes of taxation, together with any other property of such person, and the tax collectors of such counties shall collect the taxes thereon in the same manner as other taxes of such counties, including taxes for the year one thousand nine hundred and thirty-one. (1931, c. 392, s. 3.)

§ 7971(102). Basis of tax valuation.—All motor vehicles shall be valued or appraised for purposes of taxation upon the rule or standard of valuation established by "The Automobile Blue Book," or any other standard of value which may be reasonable, equitable and just. (1931, c. 392, s. 4.)

§ 7971(103). Counties to which article applicable. — This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Currituck, Cleveland, Columbus, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Johnston, Iredell, Lee, Nash, Moore, McDowell, Orange, Pasquotank, Perquimans, Pitt, Polk, Rowan, Rutherford, Swain, Wayne and Watauga. (1931, c. 392, s. 5.)

SUBCHAPTER III. COLLECTION OF TAXES

Art. 10. General Provisions

§ 7972. Subchapter to remain in force.—The provisions of this subchapter shall continue in force whether or not brought forward in subsequent acts to raise revenue or acts to provide for the assessment and collection of taxes, commonly called "revenue acts" and "machinery acts," unless and until expressly repealed or amended by, or clearly inconsistent with, subsequent legislation; it being the intention of the general assembly that this subchapter shall be a standing provision for the government of the matters embraced herein, and not to be repealed by implication because omitted in whole or in part from subsequent legislation on the subject of taxation. (Rev., s. 2849.)

§ 7973. Application and construction. — The provisions of this subchapter shall apply to all taxes as defined in this chapter, whether state, county, town, city, or other municipal subdivision; and shall be liberally construed in favor of, and in furtherance of, the collection of such taxes. (Rev., s. 2850.)

§ 7974. Terms defined.—Unless such construction or definition would be manifestly inconsistent with or repugnant to the context, the words and phrases following, whenever used in this subchapter, shall be construed to include in their meaning the definitions set opposite the same in this section:

1. "Tax," "taxes." Any taxes, special assessments or costs, interest or penalty imposed upon property or polls.
2. "He." Male, female, company, corporation, firm, society, singular or plural number.
3. "Real property." Real estate, land, tract, lot—not only the land itself, whether laid out in town or city lots or otherwise with all things therein, but also all buildings, structures, and improvements and other permanent fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto, and all estates therein.
4. "Sheriff." Every person who is by law authorized to collect taxes, either state or municipal. (Rev., s. 2851.)

§ 7975. Sheriff includes tax collector.—Whenever in this chapter a duty is imposed upon the sheriff of a county of which a tax collector has been or may be appointed, it shall be incumbent upon the tax collector to perform such office instead of the sheriff, and such tax collector shall collect all the taxes, have all the emoluments and be subject to all the penalties as provided in case of sheriffs in this chapter, and it shall be the duty of all persons having tax moneys in hand to account for and settle with such tax collector. (Rev., 5263; 1917, c. 234, s. 111; 1919, c. 92, s. 111.)

§ 7976. No taxes released. — No board of county commissioners, or council, or board of aldermen or commissioners of any city or town shall have power to release, discharge, remit, or commute any portion of the taxes assessed and levied against any person or property within

their respective jurisdictions for any reason whatever; and any tax so discharged, released, remitted, or commuted may be recovered by civil action from the members of any such board at the suit of any citizen of the county, city, or town, as the case may be, and when collected shall be paid to the proper treasurer. Nothing in this section shall be construed to prevent the proper authorities from refunding taxes as provided in this chapter; nor to interfere with the powers of any officers or boards sitting as a board of equalization of taxes; nor construed to exempt any taxpayer or property from liability for taxes released, discharged, remitted, or commuted in violation of this section. (Rev., s. 2854; 1901, c. 558, s. 31.)

Duty of Commissioner to Rescind.—It is not only competent, but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. Lemly v. Commissioners, 85 N. C. 379.

§ 7976(a). Uncollected inheritance taxes remitted after 20 years.—All inheritance taxes levied by the State which remain uncollected twenty years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. (1935, c. 483.)

§ 7977. Taxes payable in national currency.—Taxes are payable in the existing national currency, and shall be collected as prescribed by this chapter, except where otherwise provided by law. (Rev., s. 2853; Code, s. 3674; 1917, c. 231, s. 1; 1919, c. 90, s. 1.)

Legal Tender Exclusive Medium.—A tax collector has no right to receive anything in payment of taxes except legal tender money, unless the tax collector is instructed by competent authority to take county script, or other lawful indebtedness of the county for county taxes. Kerner v. Boston Cottage Co., 123 N. C. 294, 31 S. E. 718. Giving a note to the sheriff will not serve as payment. Id.

If the tax collector pays or accounts for the taxes under an agreement with the tax debtor to do so, this will discharge the tax and the lien; and he may recover the amount back from the tax debtor. Kerner v. Boston Cottage Co., 123 N. C. 294, 31 S. E. 718.

If a sheriff accepts a note in payment for taxes for the accommodation of the taxpayer, marking the records in his office paid and detaching the original receipt from the record, and thereafter pays said taxes to the county, neither such sheriff nor the bondsman can assert or establish a lien upon the land. United States Fidelity, etc., Co. v. McGougan, 204 N. C. 13, 16, 167 S. E. 387.

§ 7978. Enforcement of taxes payable to state treasurer.—Upon failure to pay the state treasurer within thirty days after the same shall have become due any tax which by law is made payable direct to the state treasurer, it shall be the duty of the state treasurer to enforce payment of the same, and to this end shall have the same rights of levy and sale of any property owned by any such person as given in section 7869 to the sheriffs in collection of schedule B taxes, and upon application by the state treasurer it shall be the duty of the sheriff in any county to levy upon and sell such property to satisfy the tax due, together with any costs and penalties. The state treasurer may also institute an action to enforce the same in the county of Wake or in the county in which the property is located. (Rev., s. 5266; 1917, c. 234, s. 116; 1919, c. 92, s. 116.)

§ 7979. Remedy of taxpayer for unauthorized tax.—Unless a tax or assessment, or some part thereof, be illegal or invalid or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer. (Rev., s. 2855; 1901, c. 558, s. 30.)

Editor's Note.—For similar provision see § 7880(194) which seems to have superseded this section.

Cross Reference.—For full treatment, see 11 N. C. Enc. Dig. 609 et seq.; 15 N. C. Enc. Dig. 563 et seq. See also, Editor's Note to § 7904. And see note under Const. Art. 5, § 6. As to original jurisdiction of Supreme Court, see note under § 1409.

See 12 N. C. Law Rev., 22.

For a case in which injunctive relief against the collection of taxes was granted, see Barber v. Benson, 200 N. C. 683, 158 S. E. 245.

Constitutionality.—This section is constitutional. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Adequate Remedy at Law.—Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rotherford County, 381 U. S. 121, 50 S. Ct. 270.

Exclusiveness of Statutory Remedy.—The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. Wilson v. Green, 135 N. C. 343, 47 S. E. 469; Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865. Assumpsit for money had and received does not lie to recover improperly listed taxables. Huggins v. Hinson, 61 N. C. 126. See also cases dealt with in 11 N. C. Enc. Dig. 610; 15 N. C. Enc. Dig. 563.

Burden on Taxpayer.—Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. Norfolk-Southern R. Co. v. Board, 188 N. C. 265, 124 S. E. 560.

Payment under Protest.—Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. Carstarphen v. Plymouth, 168 N. C. 90, 118 S. E. 905; Galloway v. Board of Education, 184 N. C. 245, 114 S. E. 165. See also, State v. Snipes, 161 N. C. 242, 76 S. E. 243.

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the

provisions of this section. Southeastern Express Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475.

Same—Necessary Allegations.—In order to recover money paid under protest to the sheriff as taxes on land within the county, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected, and in the absence of such allegation an injunction against the sale of the land for the payment of the taxes due will be denied. Hunt v. Cooper, 194 N. C. 265, 139 S. E. 446.

Same—When Not Recoverable.—Where a corporation under Public Laws of 1925, ch. 102, submits its report to the State Board of Assessment and the board in accordance with the statute certifies to the register of deeds of the county where the property is situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the board is to file exceptions with the board in accordance with the statute, with the right of appeal from the board upon a hearing by it, and the corporation may not pay the tax under protest and seek to recover it under the provisions of this section. Manufacturing Co. v. Commissioners of Penders, 196 N. C. 744, 147 S. E. 284.

Same—Written Demand within Thirty Days.—The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within thirty days after payment, and it was held in Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865, and Teeter v. Wallace, 138 N. C. 264, 50 S. E. 701, that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. Blackwell v. Gastonia, 181 N. C. 378, 379, 107 S. E. 218. The requirement of making a demand within the prescribed time is mandatory. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865. It must also be made in writing. Bristol v. Morganton, 125 N. C. 365, 34 S. E. 512.

The requirement of demand is not confined to claim for refunding any particular taxes or taxes alleged to be invalid on any particular account. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Same—Alleging Demand to Refund.—A complaint which fails to allege that the demand was made within thirty days is insufficient in demurrer. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Same—Right to Sue.—Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the state and county taxes. Brunswick-Balke Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

When the party has complied with the condition of this section he has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in section 1330. Atlantic Coast Line R. Co. v. Brunswick Co., 178 N. C. 254, 100 S. E. 428; Sou. R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758.

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling therein, and provides that its violation be punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. Loose-Wiles Biscuit Co. v. Sanford, 200 N. C. 467, 157 S. E. 432.

Exception—Injunction.—Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (See Purnell v. Page, 133 N. C. 125, 45 S. E. 534) to test the validity of a tax, Range Co. v. Carver, 118 N. C. 328, 331, 24 S. E. 352, but only the collection of the tax will be enjoined, until the merits of the controversy can be determined. North Carolina Railroad Co. v. Commr's, 82 N. C. 260.

Same—When Granted.—An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Purnell v. Page, 133 N. C. 125, 45 S. E. 534; Sherrod v. Dawson, 154 N. C. 525, 528, 70 S. E. 739.

Same—Portion of Levy Enjoined.—The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. Railroad v. Commissioners, 148 N. C. 220, 61 S. E. 690.

Same—Failure to Give Taxpayer Notice.—An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess much property. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653. As to requirement of notice, see Editor's Note to section 7924.

Same—Same—Parties.—The sheriff is the proper party defendant, but the commissioner may make thereunder parties if they think the rights of the county require it. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653.

Same—Special Assessment for Improvements.—Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Marion v. Pilot Mountain, 170 N. C. 118, 87 S. E. 53.

Same—Levy for School Purposes.—Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to this suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. Galloway v. Board, 184 N. C. 245, 114 S. E. 165.

Applied in Hilton v. Harris, 207 N. C. 465, 177 S. E. 411.

Cited in Bottling Co. v. Doughton, 196 N. C. 791, 793, 147 S. E. 289; Seaboard Air Line Railway Co. v. Brunswick County, 191 N. C. 550, 152 S. E. 627; Henrietta Mills v. Rutherford County, 32 F. (2d) 570.

§ 7979(a). Refund of taxes illegally collected and paid into state treasury.—Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the state treasury in excess of the amount legally due the state, the state auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the attorney-general, and the treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment: Provided further, that claims which have arisen within the five years next preceding December 19, 1921, shall be presented and made within two years from said date. (Ex. Sess. 1921, c. 96.)

The difference between this section and § 7880(194) is this: When a refund is ordered, simply upon demand and notice by the taxpayer, no interest is allowed, but when the demand for a refund is denied, and the taxpayer is required to bring suit, and recovers, it is provided that "judgment shall be rendered therefor, with interest." This is a reasonable difference between the two statutes. Cannon v. Maxwell, 205 N. C. 420, 422, 171 S. E. 624.

Where the Commissioner of Revenue, with the approval of the Attorney-General, orders a refund of taxes paid under protest in accordance with this section, merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded. Id.

§ 7979(b). Refund to sellers of farm and dairy products.—The Commissioner of Revenue shall investigate particular cases brought to his attention and if and after such investigation he finds that the particular license tax has been collected of sellers of farm and dairy products to merchants, he is authorized and empowered upon

such finding to refund the tax so collected to the individuals from whom it was collected. (1925, c. 56.)

§ 7979(c). Amendments of certain acts.—Wherever the words, "the Secretary of State" occur in chapter fifty-five of the Consolidated Statutes of one thousand nine hundred and nineteen, or sections twenty-eight, twenty-nine, thirty, thirty-two, thirty-three, thirty-four, thirty-five, and thirty-six of chapter two of the Public Laws of one thousand nine hundred and twenty-one, or chapter ninety-seven of the Public Laws, extra session of one thousand nine hundred and twenty-one, or chapter two hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, or in any law enacted, or to be enacted, at the present (one thousand nine hundred and twenty-five) session of the General Assembly, amending any of the laws enumerated herein, or relating to the subject matter thereof, they shall be stricken out and the words "Commissioner of Revenue" be substituted in their stead, to the end that the administration of all the laws relating to the licensing and taxing of motor vehicles, to the taxing of motor vehicle fuels, and to the protection of title of motor vehicles, may be committed to said Commissioner of Revenue. (1925, c. 158, s. 1; 1925, c. 258, ss. 1, 2.)

§ 7979(d). Transfer of duties to commissioner of revenue.—All the duties, authority and powers conferred upon the Secretary of State in the acts, recited in the preceding section or in any other act relating to the same subject, are hereby expressly conferred upon said Commissioner of Revenue. (1925, c. 158, s. 2; 1925, c. 258, ss. 1, 2.)

§ 7979(e). Building for department of revenue.—When the Department of Revenue shall have moved to the building authorized by chapter 70 of the Public Laws, Extra Session of 1924, then the board of public buildings and grounds shall, in their discretion, assign the present quarters of the Department of Revenue, to such uses as may appear proper, in order to use the same to the best interests of the State. (1925, c. 158, s. 4.)

§ 7979(f). Transfer of duties from insurance commissioner.—All the duties, powers and privileges which heretofore have been, or which may be, at this session of the General Assembly, imposed upon the Insurance Department and the Insurance Commissioner and his subordinates with reference to the collection of any taxes, licenses or fees, including any and all funds for the benefit of the State revenue, are hereby transferred to and imposed upon the Revenue Department and the Commissioner of Revenue, with the same force and effect as if the same had been originally imposed upon him. This section shall not deprive or take from the Insurance Department the imposition, computation, or assessment, or determination of the amount of any tax, license, or requirement to pay money for the benefit of the State, and the said Insurance Department shall continue to exercise said duties, powers and privileges, but when the same shall have been determined or fixed, or computed, or assessed, or due, the said Insurance Department shall immediately notify, in writing, the Revenue Department, stating the amount and the purpose thereof, and the firms, persons or corporations by whom the same may be due, and the said Revenue Department shall immediately proceed in the collection thereof, with all the powers, privileges and authorities heretofore imposed upon the Insurance Department. (1925, c. 158, s. 5.)

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

§ 7979(g). Collection of motor "bus" licenses, fees, and taxes.—All fees, taxes, licenses, or other charges, to be paid, pursuant to laws enacted at the present session of the General Assembly or hereafter, by any and all "bus" lines, "for hire" cars, jitneys, including all such carriers by whatever name called, shall be collected by the Commissioner of Revenue, and the words "Commissioner of Revenue" are hereby inserted in such laws, and all amendments thereto, in the place and stead of the words "Secretary of State," in so far as the collecting of such fees, licenses, taxes or other charges which are to be paid by the said "bus" lines, "for hire" cars, jitneys and such carriers, by whatever name called, is provided for, and the Corporation Commission shall perform all other duties therein provided for, including the approval and acceptance of forms and bonds, except such duties as are to be performed by the State Highway Commission, and which are prescribed in an act ratified February twenty, nineteen hundred and twenty-five, entitled "An act providing for the regulation, supervision and control of persons, firms, corporations and associations owning, controlling, operating or managing motor vehicles used in the business of transporting persons or property for compensation (Sections 2613(j) et seq.). (1915, c. 158, s. 5a.)

Art. 11. Rights of Parties Adjusted

§ 7980. Taxes paid in judicial sales and sales under powers.—In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid, and for the payment of such sums as may be required to redeem the property, if it has been sold for taxes and such redemption can be had; all of which payments shall be adjudged to be made out of the proceeds of sale. The judgment shall adjust the disbursements for such taxes and expenses of redemption from tax sales between the parties to the action or proceeding in accordance with their respective rights. And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable. This section shall apply both to taxes and special assessments for paving, drainage, or other improvements; provided, that the person making such sale, whether under order of court or in the exercise of a power, shall be required, in cases where

special assessments are payable in installments, to pay only such installments of special assessments as have become due at the date of such sale. The failure to comply with this section and pay such taxes or assessments shall not vacate or affect the lien of such taxes or assessments, but such lien shall be discharged only to the extent payment is actually made. (Rev., s. 2857; 1901, c. 558, s. 47; 1929, c. 231, s. 1.)

Editor's Note.—The Act of 1929 added the last two sentences to this section and provided that the act should not apply to sales already advertised at the time of its ratification, which was on March 18, 1929.

Purpose of Section.—The object of the law embraced in this and section 7982 is not only to preserve the property for the benefit of all interested parties, but to pass a clear title to the purchaser when it is sold. Smith v. Miller, 158 N. C. 98, 103, 73 S. E. 118. This being the true purpose, an order directing a commissioner to pay "all such taxes and assessments as are and have been levied" thereon is valid. Id.

Foreclosure of Mortgage.—Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148.

The rule that taxes assessed at the death of decedent come within the third class for payment is not affected by the provisions of this section, requiring that taxes assessed against the property should be paid from the proceeds of foreclosure sale. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368.

Same—Respective Duty of Mortgagor and Mortgagee.—It is the duty of the mortgagor in possession to list the land for taxation and to pay to the proper officer the tax levied on it for each year, and it is incumbent on the mortgagee, the owner of the legal title, to see to it that this is done. Wooten v. Sugg, 114 N. C. 295, 297, 19 S. E. 148. Section 7981 provides a method whereby he may pay such taxes without loss to himself, and he should take advantage of their privilege to save his security, where the mortgagor fails to discharge the lien. Exum v. Baker, 115 N. C. 242, 243, 20 S. E. 448. But it seems that he does not have to do this even though his lien is secondary to the lien for taxes. Insurance Co. v. Day, 127 N. C. 133, 37 S. E. 158. As to lien of mortgagee who pays such taxes see sec. 7981 and note thereto.

Authority to Collect Arrears.—See 11 N. C. Enc. Dig. 615 et seq.

Tax Sales of Realty.—See sec. 8010 and note thereto.

§ 7981. Tax paid by holder of lien; remedy.—Any person having a lien or encumbrance of any kind upon real estate may pay the taxes due by the owner thereof in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate in preference to all other liens, which lien may be enforced by action in the superior court in term. The money so paid may also be recovered by action for moneys paid to his use against the person legally liable for the payment of such taxes. (Rev., s. 2858; Code, s. 3700; 1901, c. 558, s. 46; 1879, c. 71, s. 55.)

See section 7980 and the note thereto.

Lien of Mortgagee.—Money paid by a mortgagee to acquire a tax title on the mortgaged lands becomes a lien on the land. Cauley v. Sutton, 150 N. C. 327, 64 S. E. 3. But his purchase of the tax title does not deprive the mortgagor of his equity of redemption. Id. As to duty of mortgagee to pay taxes, see note of Wooten v. Sugg, 114 N. C. 295, 297, 19 S. E. 148, under sec. 7980.

§ 7982. Forfeiture by life tenant failing to pay.—Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner. (Rev., s. 2859; Code, ss. 3698, 3699; 1901, c. 558, s. 45; 1879, c. 71, ss. 53, 54.)

As to time and manner of redemption, see section 8038 and the note thereto.

Forfeiture Occurs before Tax-Sale Certificate Is Foreclosed.—By the express terms of this section, a life tenant forfeits his interest in lands to the remainderman when he fails and refuses to pay taxes thereon and suffers the lands to be sold for taxes and fails to redeem same within one year from such sale, and the contention that the estate of the life tenant is not forfeited until the tax-sale certificate is foreclosed and the land sold by a commissioner is untenable. Sibley v. Townsend, 206 N. C. 648, 175 S. E. 107.

When Remainderman May Exercise Right.—In Smith v. Miller, 158 N. C. 98, 102, 73 S. E. 118, the court raises the question whether or not the remainderman or reversioner, in operating under this section, must wait until there is a sale and the accumulation of costs and expenses, before he can exercise his right to redeem. The court says that the evident purpose of this section is that if the life tenant does not pay, and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax.

It is not required that a remainderman should settle for the taxes against the property before bringing action against the life tenant under this section, to have her estate forfeited for allowing the property to be sold for taxes and failing to redeem same within the time prescribed by law. Bryan v. Bryan, 206 N. C. 464, 174 S. E. 269.

What Interest Passes—Prior Law.—Under the old law a sale and conveyance by the sheriff, of lands of a life tenant for default in payment of taxes on his part, operated to convey only the interest of the life tenant and did not convey the interest of the remainderman. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889. Under the present law the property itself passes and not simply the interest of the delinquent. This section, however, protects the right of the remainderman.

A widow who has a homestead allotted her in the lands of her deceased husband in lieu of dower is a tenant for life thereof, within the meaning of this section. Tucker v. Tucker, 180 N. C. 235, 237, 13 S. E. 5.

Relation of Life Tenant to Remainderman.—See 8 N. C. Enc. Dig. 757 et seq.

Cited in Hutchins v. Mangum, 198 N. C. 774, 153 S. E. 409.

§ 7983. Remedies of cotenants and joint owners.—Any one of several tenants in common, or joint tenants or copartners shall have the right to pay his share of the taxes assessed or due upon the real estate held jointly or in common, or, if such estate has been sold for taxes, he may redeem his share by paying his proportionate part of the amount required for redeeming the whole. Where he has paid his share of the taxes or amount required for the redemption and the land has been or shall be divided by actual partition the share set apart to him in severalty shall be free from the lien of, and shall not be liable to be subjected in any manner to, the payment of the residue of taxes assessed upon such property; but such residue of taxes and the costs and penalties incident thereto shall be a lien upon the residue of such real estate, which residue shall be subjected to the satisfaction thereof; and when he has paid his share of the

taxes, or amount necessary to redeem, and the real estate is sold under judicial proceedings for partition, his share of the proceeds shall not be diminished by disbursements for the residue of such taxes or for redeeming the property, and the costs and penalties incident thereto. Any such part owner in real estate shall have the right to pay the whole of the taxes assessed thereon and all costs and penalties incident to such taxes, and to redeem such real estate as a whole when it has been sold for taxes, and all sums by him so paid in excess of his share of such taxes, costs, and penalties and amounts required for redemption, shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in proceedings for partition, actual or by sale, or in any other appropriate judicial proceeding. When one tenant in common, joint tenant, or copartner shall have paid his proportionate part of the taxes, as allowed by this section, before a sale for taxes, the sheriff shall except his undivided interest from the sale and in the certificate of sale and deed for the property. (Rev., s. 2860; 1901, c. 558, ss. 13, 14, 47.)

Payment of Share by One Tenant.—One tenant in common may pay his or her part of the tax and let the other share go, and three years possession by the purchaser under the tax deed bars the former rightful owner, under section 441, sub-section 10. Ruork v. Harper, 178 N. C. 249, 100 S. E. 584.

Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator's administrator. Everton v. Rodgers, 206 N. C. 115, 173 S. E. 48.

Where One Tenant in Possession.—This section refers to cases where all the tenants are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case where one tenant was in possession. Smith v. Smith, 150 N. C. 81, 83, 63 S. E. 177.

§ 7984. Taxes against infants and lunatics.—The lands of a minor, lunatic, or other person non compos mentis, shall in no case be liable to be sold for taxes, but the personal property of such persons may be levied upon and sold for all taxes due upon the estates of such persons; and their real estate shall be and remain subject to a lien for all such taxes, with interest thereon at six per centum per annum, from the time such taxes fall due until paid. (Rev., s. 2861; Code, s. 3691.)

The provisions of this section in so far as they relate to minors are now ineffective. Forsyth County v. Joyce, 204 N. C. 734, 169 S. E. 655.

§ 7985. Fiduciaries to pay taxes.—It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fail so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust under the control of fiduciaries from the lien of such taxes. (Rev., s. 2862; Code, ss. 3698, 1595; 1879, c. 71, s. 53; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1762, c. 69, s. 14.)

In General.—The method prescribed by this section for collection of taxes from a decedent's estate is a deduction from the ancillary method for collecting taxes. Sherrod v. Dawson, 154 N. C. 525, 529, 70 S. E. 739.

Cited in Headman v. Commissioner, 177 N. C. 261, 98 S. E. 776; Cross v. Craven, 120 N. C. 331, 333, 26 S. E. 940; Coltrane v. Donnell, 203 N. C. 515, 166 S. E. 397; Hood v. McGill, 206 N. C. 83, 85, 173 S. E. 20.

Art. 12. Tax Liens

§ 7986. No lien on personalty.—Taxes shall not be a lien upon personal property, except where otherwise provided by law, but from a levy thereon: Provided, that no mortgage or deed of trust executed upon personal property shall have the effect of creating a lien thereon superior to the lien acquired by a subsequent levy upon said property for the payment of the state, county, and municipal taxes, assessed against the same; but the sheriff or other tax collector levying upon such property, for the purpose of collecting the taxes due thereon, shall give due notice to the mortgagee or trustee of such property of the amount of such taxes at least ten days before the sale of the same, and such trustee or mortgagee shall have the right to pay said taxes and the costs incident to making the levy, when the sheriff or tax collector shall release the same to such trustee or mortgagee, and the amount so paid by said trustee or mortgagee shall constitute a part of the debt secured in the mortgage or deed of trust. (Rev., s. 2863; Code, s. 3682; 1911, c. 207.)

For full treatment, see 11 N. C. Enc. Dig. 606 et seq.

Constitutionality.—This section is constitutional. Berry v. Davis, 158 N. C. 170, 73 S. E. 900.

Lien Attaches at Levy.—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon, subject to certain exemptions specified in Const., Art. V, secs. 3 and 5. Carstarphen v. Plymouth, 186 N. C. 90, 118 S. E. 905.

Tax lien attaches to personalty only from levy, and owner is not liable for taxes for years prior to his possession. Coltrane v. Donnell, 203 N. C. 515, 166 S. E. 397.

Provision as to Notice Mandatory.—The requirements of this section that the sheriff give the mortgagee due notice of a sale is mandatory and not merely directory, and where no notice of the tax sale has been given the mortgagee of a duly registered mortgage, his right to the possession of the property is superior to that of the purchaser at the tax sale, but his possession is solely for the purpose of foreclosing the mortgage by sale of the property. Northern Mach. Works v. Hubbard, 202 N. C. 723, 164 S. E. 113.

Enforcement of Lien.—The express statutory methods for collecting taxes on personal property is by seizure and sale, and in the absence of some exceptional conditions rendering such remedies inadequate and unavailing, an executive officer holding the tax list and charged with the duty of collecting is confined to them; and the tax list being in the nature of an execution, he may not under ordinary conditions resort to the process of claim and delivery in enforcement of his claim. Berry v. Davis, 158 N. C. 170, 73 S. E. 900. Shelby v. Tiddy, 118 N. C. 792, 24 S. E. 521. Claim and delivery is inappropriate due to the fact that no lien for taxes is given by this section or personal property before actual levy is made. Cherokee v. McClelland, 179 N. C. 127, 130, 101 S. E. 492.

Where Lien Subordinate to Deed of Assignment.—The sheriff and tax collector of a county are not entitled to priority of payment of taxes by the trustee of a corporation under a deed of assignment over creditors who reduced their claims to judgment and had execution issued before the assignment was executed and recorded, the property being personal and they having failed to levy for the taxes due them, respectively. Alexander v. Farrow, 151 N. C. 320, 66 S. E. 209.

§ 7987. Lien on realty.—The lien of the State, County and Municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality in which the tax list is made and placed in the hands of the duly authorized officer for collection, which lien shall attach on the first day of June, annually, and shall continue until such taxes, with any and all penalties and cost which shall accrue thereon, shall be paid, and which lien shall be preferred to any other lien upon the real estate of the taxpayer within the county, whether the same shall have attached prior or subsequent to the said first day of June; and which said lien shall be preferred to the inchoate right of dower of the wife of the taxpayer or to the curtesy initiate of the husband of the taxpayer. The word "taxpayer" herein used, is hereby defined to mean and include the person who has or should have listed the said property for taxation. All persons who have any claim to or interest in said land so listed, are hereby charged with the notice that the said land should be and is listed for taxation, that the taxes are due thereupon, and that the taxes are paid or not paid, as the case may be, and with notice of all the remedies provided by law for the sale of property for the purpose of collecting the taxes, whether such persons shall have actual notice or not. Provided: That when more than one tract or lot of land is returned, charged or assessed against a tax-payer in any county, municipality, or other subdivision of the State, that the sheriff or other tax collecting officer of any such county, municipality or other subdivision of the State, at any time prior to the commencement of the advertisement of such property for sale for taxes prior to the sale of said property for taxes and upon the full payment of the taxes charged and assessed against any particular tract or lot of land and the ratable share of the tax charged and assessed against the personal property of the party in whose name the land is charged and assessed, shall release said tract or lot of land from said tax lien. However, the tax collector or sheriff shall require the owner, upon his application for a release, to pay all of his personal property tax charged on the return.

Provided further: That in all cases where tracts of land have been subdivided into lots, but have been returned, charged and assessed as a whole tract, that the sheriff or other tax collecting officer, together with the auditor, county accountant or other agency performing the duties of such auditor or accountant, shall, upon application of any person interested, make an investigation and determine the pro-rata part of said assessment justly applicable to any lot or lots, and shall thereupon, upon the payment of the tax, fairly ascertained to be due against such lot or lots, together with a ratable share of the tax charged against the personal property of the party in whose name the land is charged and assessed at any time prior to the commencement of the advertisement of such property for sale for taxes prior to the sale of said property for taxes, release the said lot from the tax lien. However, the tax collector or sheriff shall require the owner, upon his application for a release, to pay all of his personal property tax charged on the return.

And further provided: That in all cases where any sheriff or other tax collecting officer of any county, municipality or other subdivision of the State has collected from any tax-payer or other interested party the pro rata tax charged and assessed against any particular tract or lot of land and has thereupon released said tract or lot of land from the lien of the other taxes charged and assessed against the person in whose name said tract or lot of land so released was charged, the act of said sheriff or other tax collecting officer in releasing said land from the lien of the remaining taxes charged and assessed against the person in whose name the land was charged and assessed is hereby approved, confirmed and validated. (Rev., s. 2864; Code, s. 3682; 1879, c. 71, s. 26; 1929, c. 306, s. 1; 1931, c. 83.)

Editor's Note.—The Act of 1929 inserted the above section in lieu of the former one, and provided that it should be construed as if it had been enacted and ratified on March 9, 1927.

The Act of 1931 added the provisos to this section.

The provision in Public Laws of 1931, ch. 389 (see Editor's Note to § 8037), joining the county and city or town in a foreclosure suit for the tax "shall be apportioned by the court to the parties according to their respective liens" must be construed in pari materia with this section. Saluda v. Polk County, 207 N. C. 180, 187, 176 S. E. 298.

Construing ch. 389, Public Laws of 1931, with this section, the liens for taxes due a city and the liens for taxes due the county against property, situated in the city within the county are on a parity and are equal, and the proceeds of sale of the property in a tax foreclosure suit instituted by the city and county should be applied equally to the payment of city and county tax liens against the property, and the remainder, if any, should then be applied to the payment of a lien for street assessments against the property levied by the city. Id.

Nature of the Lien.—The lien is in rem and not in personam, and the land upon which it attaches is the sole security for the satisfaction thereof. Commission v. Epley, 190 N. C. 672, 673, 130 S. E. 497.

The tax on shares of stock of a bank is a lien upon the land. Rockingham v. Hood, 204 N. C. 618, 169 S. E. 191.

Superior to Right of Mortgagor and Mortgagee.—The lien of a tax on land, or against a person without notice, is generally to the right of either mortgagor or mortgagee. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148. Therefore, the mortgagee should avail himself of the privilege given by sec. 7981. See cases dealt with in 11 N. C. Enc. Dig. 607.

Bona Fide Purchaser Not Protected.—The court in Vaughan v. Lacy, 188 N. C. 123, 125, 123 S. E. 478, after stating that by virtue of this section the lien of the taxes for each year attaches to the land on 1 June says, "It is immaterial that the plaintiff is a bona fide purchaser of the land for value and without actual notice."

It is lawful for the taxing authorities under the provisions of this section to apportion the taxes upon application of the owners even though the application is made after the land has been sold for taxes but before foreclosure of the tax certificate, and a judgment ordering that the lot optioned be released from the tax lien upon the payment of the taxes apportioned against it together with the payment of the personal property tax assessed against the owners will be upheld, the statute applying to cases in which a subdivision of property has been made and the land assessed as an entity and it being immaterial whether the subdivision was made before or after the adoption of the amendment of 1931. Bryan v. Craven County, 204 N. C. 728, 169 S. E. 625.

Where an option on certain land is executed to the Government on 20 May of a certain year and is followed by deed delivered to the Government 29 July, the land is subject to the taxes for the year. Bryan v. Craven County, 204 N. C. 728, 169 S. E. 625.

Referred to in Berry v. Davis, 158 N. C. 170, 73 S. E 900; American Agricultural Chemical Co. v. Brock, 198 N. C. 342, 344, 151 S. E. 869.

§ 7987(a). Interested party paying taxes after sale, subrogated to rights of governmental agency as to other tracts.—Where any sheriff or tax col-

lector has sold, or shall sell one or more pieces or parcels of real estate for taxes of any person, firm or corporation for the taxes on said property and other property listed by said tax-payer on the same return, and such taxes shall have been or may be paid by another than the person listing the property for taxation, either as owner, or other interested person, firm or corporation, and such person, firm or corporation so paying tax has taken or shall take an assignment of the tax sales certificates and the lien of the taxes thereby represented, either to himself or to a trustee, for the benefit of such person, firm or corporation, then in that event, the person, firm or corporation so paying said taxes shall be subrogated to the lien of the governmental agency levying the tax for which said real estate has been or may be sold, and such person, firm or corporation shall have a cause of action for contribution from the other pieces or parcels of real estate listed on the return upon which the tax was levied for such proportion of the taxes so paid as the tax value of such pieces or parcels of real estate bear to the whole tax value of the property embraced in said return. Provided: That nothing herein contained shall be construed to abridge or shorten the time in which a tax payer whose land has been, or may hereafter be, sold for taxes, has to redeem said land from said sale. (1931, c. 83.)

§ 7987(b). Interested party may redeem part of land.—Where more than one piece or parcel of real estate has been listed for taxes and the sheriff or tax collector charged with the collection of the tax levied by the governmental agency to whom the return is or has been made shall have advertised or sold one or more pieces or parcels of real estate so returned for such taxes and such property has been bid in at the tax sale by the governmental agency levying the tax, such governmental agency is hereby authorized and directed to issue a receipt for taxes to any owner, or other interested person of or in property who shall pay the proportionate amount of tax for which said property has been advertised or sold, plus cost and penalties due by the property which such payer owns or has an interest in, the amount being determined by the proportion which the tax value of the property upon which the tax is paid bears to the whole tax value of the property embraced in said return: Provided, however, that if less than all of the property listed has been advertised or sold, then in that event nothing herein shall be construed to permit the release of any piece(s) or parcel(s) of real estate already sold for taxes or whose advertisement for sale for taxes shall have been commenced by the sheriff or tax collector charged with the collection of such taxes, until the whole of the taxes for which said piece(s) or parcels(s) of real estate has been advertised or sold shall have been paid. (1931, c. 83.)

§ 7988. Lien of agent paying tax.—When property is assessed to any person as agent for another or in a representative capacity, such person shall have a lien upon such property or any property of his principal in his possession until he is indemnified against the payment thereof, or, if he has paid the tax, until he is reimbursed for such payment. (Rev., s. 5254; 1917, c. 234, s. 84; 1919, c. 92, s. 84.)

§ 7989. Tax lien on railroad property.—The taxes upon any and all railroads in this state, including roadbed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of all persons or bodies corporate, except the United States and this state; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against such railroad company in the several counties in this state. (Rev., ss. 2865, 5296; 1917, c. 234, s. 98; 1919, c. 92, s. 98.)

§ 7990. Tax lien enforced by action to foreclose.—A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the state or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation. When such lien is in favor of any private individual or private corporation holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof, such action shall be prosecuted in the name of the real party in interest. (Rev., s. 2866; 1901, c. 558, ss. 42, 43.)

See § 8028 and note thereto.

As to foreclosure of tax-sale certificate see section 8037 and the note thereto.

Summary Proceeding Unnecessary.—Where the Legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes, of the defendant are due, were properly assessed against lots of land within the limits of the municipality subject to the lien therefor, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien, under this section. Wilmington v. Moore, 170 N. C. 52, 86 S. E. 775. Commission v. Epley, 190 N. C. 672, 130 S. E. 497.

Prescribed Remedy Optional with State.—The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the Superior Court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10.

Statute of Limitation.—The action provided by this section to collect the assessment is as one upon a judgment to foreclose a lien and is not barred within ten years. The statute providing that an action or a liability created on statute shall be brought within three years has no application. Drainage District v. Huffstetler, 173 N. C. 523, 525, 92 S. E. 368. This is on the well settled principle that statutes of limitation, even if applicable to a given case, do not apply to the sovereign unless expressly named therein. New Hanover County v. Whitman, 190 N. C. 332, 334, 129 S. E. 808.

Whether such lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under this section to foreclose the lien, in which event no statute of limitations is applicable. Logan v. Griffith, 205 N. C. 580, 582, 172 S. E. 348.

Same—Foreclosure by County.—Where a county proceeds to foreclose a tax lien under the provisions of this section, as distinguished from an action to foreclose the tax-sale certificate, instead of under those of section 8037, which it may elect to do, it proceeds as a part of the state sovereignty, and there is no bar of the statute of limitations, that of section 8037 not applying. New Hanover County v. Whitman, 190 N. C. 332, 129 S. E. 808.

Same—Same—Complaint.—Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of section 7990, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. New Hanover County v. Whiteman, 190 N. C. 332, 129 S. E. 808.

Taxes Not Subject to Set-Off or Counterclaim.—Taxes are not debts in the ordinary sense of the word and they do not rest upon contract or consent of the tax payer. Pleas of set-off and counter-claim are not allowed because to do so would delay the collection and payment of taxes, and would deprive the Government of means of performing its functions. Commissioners v. Hall. 177 N. C. 490, 491, 99 S. E. 372; Graded School v. McDowell, 157 N. C. 316, 72 S. E. 1083.

Amount of Interest Recoverable.—Since no note of interest is fixed by the section, only six per cent interest can be recovered. Wilmington v. State, 122 N. C. 395, 30 S. E. 12.

§ 7990(1). Provision for facsimile signatures of proper officers on pleadings in tax forclosure actions.—In the institution and the prosecution of all suits by any county, city or town for the sale of any land or other property for failure to pay taxes, either under laws now in force or those hereafter enacted, and in the giving of any notice preliminary to the institution of such suits, it shall be sufficient and a compliance with law that where the clerk of the court, the county accountant, the sheriff or other officer or attorney is required to sign summons, complaints, verifications of pleadings, judgments or other papers in said suits or notices, that the name of said officer or attorney respectively may be affixed to said document, respectively, by stamping thereon the facsimile of the signature of said officer or attorney with a rubber stamp by any person authorized by said officer or attorney to do so; and said documents so stamped shall have the same legal force and effect as if said signature had been written by said officer or attorney with his own hand, and all such signatures stamped as aforesaid to said documents shall be conclusively presumed to have been so stamped at the direction of the officer or attorney whose signature it purports to be. (1935, c. 321.)

§ 7991. Lien of endorsed tax list.—Every tax list before being placed in the hands of the sheriff shall be endorsed by the authorities levying the taxes with an order for their collection. The tax list, when thus endorsed, shall have the force and effect of a duly docketed judgment and of an execution against the real and personal property of the persons charged with taxes on such list. (Rev., ss. 2856, 5238; Code, s. 3681; 1917, c. 234, s. 83; 1919, c. 92, s. 83.)

Cross Reference.—See generally, 11 N. C. Enc. Dig. 624 et seq., 15 N. C. Enc. Dig. 567; as to form of endorsement see section 7930; as to creation and requisites of lien on personalty see section 7986 and the note thereto.

Tax List Authority of Sheriff.—The sheriff or tax collector is not authorized to enforce the tax lien of his own motion. The only authority he has for its enforcement is the tax list with the endorsement thereon. Peebles v. Taylor, 121 N. C. 38, 42, 27 S. E. 999. As to exhibiting tax list upon collection, see note of State v. Lutz, 65 N. C. 503, under section 7992.

Tax List as Evidence.—See note of Hamilton v. Seaboard Air Line R. Co., 150 N. C. 193, 63 S. E. 730, under section 7904. See also, State v. Champion, 116 N. C. 987, 21 S. E. 700.

Tax List as Judgment.—The tax list, placed in the hands of the sheriff for collection, has the force of a judgment and execution. Wilmington v. Sprunt, 114 N. C. 310, 312, 19 S. E. 348. But this effect exists only as between the sheriff and the tax-payer. Davis v. Blackburn, 117 N. C. 383, 385, 23 S. E. 321.

Same—Seizure Thereunder.—The sheriff is authorized to make seizure under the tax list as fully as an execution issued from a court of competent jurisdiction. State v. Lutz, 65 N. C. 503. But the sheriff can sell or distrain only that property which actually appears on the tax list and which has been duly assessed. Peebles v. Taylor, 121 N. C. 38, 27 S. E. 999.

Persons Authorized to Collect Taxes.—See 11 N. C. Enc. Dig. 612.

Cited in State v. Gauge, 157 N. C. 602, 72 S. E. 994.

Art. 13. Time and Manner of Collection

§ 7992. Sheriff to collect taxes due; duty to furnish certificate of taxes, etc., against land.—Whenever any taxes shall be due and unpaid, the sheriff, who by law is required to collect the same, shall, immediately proceed to collect them as prescribed by this chapter. And the sheriff, auditor, county accountant or other tax collecting officer of any county or municipal corporation of this State shall, at the request of the owner or occupant of any land within the boundaries of said corporation, county or any person having a lien thereon or interest or estate therein or the duly authorized agent or attorney of such person, furnish to such applicant a written certificate of the amount of the taxes and assessments due or levied upon said land for the current year, if ascertained, and for all prior years including any amount that may be necessary to redeem the land from sale for taxes or assessments, with all interest, costs and charges thereon, provided such information is available in said office. Any such officer failing or refusing to furnish such certificate upon request made in good faith as herein provided shall be liable for a penalty of fifty dollars ($50.00). (Rev., s. 2867; Code, s. 3686; 1872-3, c. 115, s. 28; 1929, c. 330, s. 1.)

Cross Reference.—For full treatment of subject regarding personalty, see 11 N. C. Enc. Dig. 611 et seq., 15 N. C. Enc. Dig. 564 et seq. As to sale of land for nonpayment of taxes, see 11 N. C. Enc. Dig. 632 et seq., 15 N. C. Enc. Dig. 568 et seq. As to endorsed tax list as constituting a lien, see § 7991 and note thereto. As to local modification as to Mitchell County, see § 1389(a) and note thereto.

Editor's Note.—The Act of 1929 added all of this section except the first sentence.

Resignation of Sheriff.—If a sheriff resign his office he is still bound as tax collector and he still has ample authority to perform such duty. Perry v. Campbell, 63 N. C. 257, 258.

When Sheriff Becomes Insane.—Upon the prima facie ascertainment of the insanity of the sheriff, and the failure of the commissioner to declare his office vacant, which they may do, the coroner is authorized to perform the duties of the sheriff proper. Greer v. Ashevile, 114 N. C. 678, 19 S. E. 635. But this does not cost upon the coroner the right to collect the taxes which went to the sheriff's bondsmen for the current list, and after the declaration of vacancy of the sheriff's office the duty devolves upon a tax collector chosen by the county commissioners. Somers v. Board, 123 N. C. 582, 584, 31 S. E. 873.

Upon the declaration of insanity the sureties of the sheriff have no more right than would have gone to them upon his death, that is, to collect the tax list then in his hands. Perry v. Campbell, 63 N. C. 257; State v. Somers, 96 N. C. 467, 2 S. E. 161. As to right of sureties upon death of sheriff, see following section.

After Expiration of Office.—See 11 N. C. Enc. Dig. 612.

Taxes of Year Prior to Election.—A sheriff who was elected in January, 1820, and to whom, before the 1st of April ensuing the tax Lists of 1819 were delivered, is bound for their collection. Dickel v. Alley, 12 N. C. 453.

Taxes on Unlisted Property.—After making an assessment for taxes on unlisted property the county commissioner have implied power to authorize collection by the sheriff. Caldwell Land etc., Co. v. Smith, 146 N. C. 199, 59 S. E. 653.

Exhibiting Tax List Not Required. — A deputy sheriff, who in his deputation is authorized to collect State and county taxes out of the persons named in said deputation, is not required to exhibit a certified copy of the tax lists from the officer required to make out said list, before he distrains property to enforce the payment thereof. State v. Lutz, 65 N. C. 503.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§ 7993. Sureties of sheriff may collect, when.—If any sheriff shall die during the time appointed for collecting taxes, his surities may collect them, and for that purpose shall have all power and means for collecting the same from the collectors and taxpayers as the sheriff would have had, and shall be subject to all the remedies for collecting and settling the taxes, on their bond or otherwise, as might have been had against the sheriff if he had lived. (Rev., ss. 2868, 5264; 1917, c. 234, s. 112; 1919, c. 92, s. 112.)

Cross Reference.—See general treatment in 11 N. C. Enc. Dig. 613; see also the note placed under section 7992 together with reference there made.

§ 7994. Payment of taxes.—1. When due. All taxes shall be due on the first Monday in October in each year.

2. Discounts and penalties in payments. On all taxes paid in the months of October and November a discount shall be given to the taxpayer of one per cent. All taxes paid in the month of December shall be paid at the net amount charged, and from and after the first day of January a penalty of one per cent per month shall be charged and collected by the sheriff or tax collector; that is to say, that on all taxes paid in the month of January, after the first day of January, a penalty of one per cent shall be added on the taxes paid, and in the month of February, after the first day of February, a penalty of two per cent shall be added, and an additional penalty of one per cent for each additional month of delay in settlement of same. Upon all taxes paid into the state treasury and upon all county taxes paid into the county by any sheriff or tax collector on or before the fifth day of December, the state auditor and county treasurer shall credit against the total amount of taxes charged against any such sheriff or tax collector a discount of one per cent, and upon all payments made into the state treasury and upon all county taxes paid into the county treasury by the sheriff or tax collector between the fifth day of December and the fifth day of January payments shall be credited at the net amount of such payments. Upon all taxes charged against any such sheriff or tax collector and remaining unpaid on the fifth day of January a penalty of one per cent shall be added, and an additional penalty of one per cent shall be added to so much of said taxes as remain charged against such sheriff or tax collector and unpaid on the fifth day of each succeeding month thereafter until paid. Any provisions in any local act prescribing a different schedule of discounts and penalties than that provided here is hereby repealed.

3. Receipt for payment. The sheriff or tax collector shall note on the tax duplicate against the name of the party the date of payment and the amount paid. He shall also give receipt to the parties, stating the amount of the state and county tax separately, and the date of payment; and for failure to give such receipt, stating the state and county tax separately, he shall be guilty of a misdemeanor and, on conviction, shall be fined at the discretion of the court.

4. When sheriff entitled to tax books. The sheriff or tax collector shall not collect the taxes for any year until he shall have settled in full with the state and county for the taxes of the previous year (if he was sheriff or tax collector) and given the bonds required by law; and if upon examination the commissioners are not satisfied with the solvency of the surety to said bonds, they may require new bonds to be given. The sheriff or collecting officer shall produce receipts for the state and county taxes for the previous year, if he was sheriff or tax collector, before receiving the tax duplicate from the board of commissioners, and in the event the sheriff fails to produce the aforesaid receipts or give the required bond, the board of commissioners shall appoint a tax collector who shall give bond as required of the sheriff to faithfully collect and pay over the taxes according to law. (Rev., ss. 2852, 5241; 1917, c. 234, s. 88; 1919, c. 92, s. 88.)

Cross Reference.—As to sheriff accepting note in payment and marking records paid, see § 7977 and the note thereto.

Discrimination between Different Counties.—A statute which discriminates between the different counties of the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities, to which they are applicable and contain no violation of the principle of equation of taxation. State v. Jones, 121 N. C. 616, 28 S. E. 347.

As to liability of county commissioners for defaults of sheriff, see section 3931 and the note thereto.

§ 7994(a). Taxes payable in installments in certain counties.—The sheriff, tax collectors, deputy tax collectors and tax collecting officers of the following counties, and the tax collectors of each and every municipality situate in said counties are hereby authorized, empowered and directed to accept partial payments on taxes of not less than twenty-five per cent of the total amount of taxes due said counties or municipalities by any taxpayer thereof: Provided, that the time for paying said installments shall not be extended beyond the time now provided by law for the advertisement and sale of property for taxes: Provided further, no installment payment or payments shall operate as a discharge of the tax lien provided by law until the amount of the taxes of the taxpayers making such installment payment or payments shall have been paid in full. This section shall apply to the following counties and municipalities located therein: Alexander, Avery, Beaufort, Bertie, Bladen, Carteret, Chowan, Columbus, Edgecombe, Duplin, Franklin, Gates, Greene, Guilford, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Madison, Martin, Mitchell, Nash, Northampton, Onslow, Pamlico, Perquimans, Pitt, Randolph, Robeson, Rockingham, Surry, Stokes, Transylvania, Tyrrell, Union, Vance, Washington, Warren, Wayne, Yancey, Haywood, Rowan and Swain. (1931, c. 402; 1933, c. 198.)

Editor's Note.—Haywood, Rowan, and Swain, were added

to the list of counties to which this section applies by Public Laws 1933, c. 198.

§ 7995. Sheriff collecting by deputy.—When the sheriff shall collect by his deputies they shall, before the clerk of the board of commissioners or before a justice of the peace of the county, take and subscribe an oath faithfully and honestly to account for the taxes with the sheriff or other person authorized to receive the same. Such oath shall be filed with the register of deeds and kept in the office of the board of commissioners, and for failure of any deputy sheriff to pay over such taxes as he may collect he shall be guilty of a misdemeanor. (Rev., s. 5241; 1917, c. 234, s. 88; 1919, c. 92, s. 88.)

§ 7996. Sheriff to attend for collection.—The sheriff or his deputy or tax collector shall attend at the courthouse or his office in the county town during the months of October and November for the purpose of receiving taxes. He shall also in like manner attend at least one day during the month of October at some one or more places in each township, of which fifteen days notice shall be given by advertisement at three or more public places and in a newspaper, if one is published in the county: Provided, that nothing in this section shall be construed to prevent the collecting officer from levying and selling after the first day of November, but he shall not sell before that day unless he has reason to believe the taxpayer is preparing to leave the county or state.

Chapter one hundred and fifty of the laws of one thousand eight hundred and eighty-three, and amendments thereto, and all special acts prescribing or authorizing a time for collection and settlement of state taxes differing from the general provisions of this chapter for the collection and settlement of state taxes, are hereby repealed. (Rev., ss. 2870, 2882, 5242; 1903, c. 251, s. 80; 1905, c. 590, s. 80; 1917, c. 234, s. 89; 1919, c. 92, s. 89.)

§ 7997. Commissioners may change the time for attending in townships.—The board of Commissioners of any county shall have the right, by resolution spread upon the minutes of the board, to abolish altogether or to change the time or times upon which the sheriff or other tax collector is now, or hereafter may be, required to attend each township in the county for the collection of the taxes levied and placed in his hands. Upon the passage of said resolution by the board of commissioners the sheriff or other tax collector shall attend in each township in his county at such times as shall be fixed by said board for the collection of taxes thereof: Provided, that fifteen days notice of the time and place of such attendance shall be given by the sheriff or other tax collector by advertisements in some newspaper published in said county, if one is published therein, or by advertisements posted at three or more public places, if no newspaper is published therein. (1919, c. 52.)

§ 7998. Time limited for collection of taxes.—The sheriff and, in case of his death, the sureties, shall have one year and no longer from the day prescribed for his settlement and payment of the state taxes to finish the collection of all taxes; but the extension of time for collection shall not extend the time of his settlement of the taxes. (Rev., ss. 2869, 5265; 1917, c. 234, s. 113; 1919, c. 92, s. 113.)

Legislative Power to Penalize. — The Legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time. State v. Gentry, 183 N. C. 825, 112 S. E. 427. The court said: "The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government."

An extension of time within which a sheriff may settle state taxes, does not exonerate the sureties upon his bond. Worth v. Cox, 89 N. C. 44.

Applied in Berry v. Davis, 158 N. C. 170, 73 S. E. 900.

§ 7999. Abstract of tax due sent to another county.—If any person liable for taxes has no property in the county in which such taxes are due, but has property in any other county, the sheriff may make and certify under his hand an abstract of the taxes due by such person, as shown by the tax lists in his hands, and forward the same to the sheriff of any county in which property of such taxpayer may be found, with directions to collect such taxes. Such abstract shall have the force and effect of a tax list in any county to which it is sent, and the sheriff to whom it is sent shall collect the taxes in the same manner as he collects taxes appearing on the regular tax list of his county, and shall pay over to the sheriff from whom he receives such abstract the amount collected, less his lawful commissions. He shall make return of his proceedings under such abstract within thirty days after its receipt. Such abstract or a copy or duplicate thereof may be sent for collection to the same or some other county until the amount due shall be collected. (Rev., s. 2871; Code, s. 3692; 1872-3, c. 115, s. 28.)

§ 8000. Diligent inquiry as to removals. — It shall be the duty of every sheriff or every tax collecting officer of any county, city, or town, whenever he is informed that a taxpayer has removed from his county, city, or town without paying the taxes listed for that year, to make diligent inquiry to what county, city, or town the said taxpayer has removed, and in the settlement of the sheriff or other tax-collecting officer for any county, city, or town he shall state, under oath, that he has used due diligence and made faithful inquiry for the location of all taxpayers who have removed from his county, city, or town owing tax for said fiscal year, or the same shall be charged to him and not be allowed in his insolvent list; and the board of county commissioners, or other officers with whom said sheriff or other tax-collecting officer is required by law to make his settlement, shall carefully inspect the insolvent list filed for said fiscal year, and if said sheriff or other tax-collecting officer has not complied with the law to enforce collection of taxes at all times he shall be charged with the same. (Rev., s. 2872; 1905, c. 355.)

§ 8001. Register's certificate upon removal of taxpayer.—It shall be the duty of the sheriff or other tax-collecting officer of any county, city, or town, when he is informed that any taxpayer has removed from his county, city, or town without paying his taxes listed for that year and has no property in the county, city or town, or no property in any county known to the collecting officer,

to make a report of the same, with a return of the tax receipt, to the register of deeds of his county, who shall make out a certificate, under his hand and seal, that such taxes were listed for that year, that the same are due and reported unpaid by the collecting officer for such county, city, or town. The sheriff or other collecting officer of any county, city, or town shall send the receipt, with the certificate, to the collecting officer of the county, city, or town to which the taxpayer has removed, and the same shall be a tax list in his hands for the collection of such taxes. (Rev., ss. 2873, 2874; 1905, c. 355, ss. 2, 3.)

§ 8002. Tax collected upon certificate.—The tax collector to whom such tax receipt has been sent shall proceed to the collection of the taxes according to the rules and regulations provided for the collection of taxes in his own county, city, or town, and shall report his proceedings to the officer from whom he received the said receipt within sixty days thereof. If such taxpayer is insolvent and the collecting officer cannot collect the tax as provided by law in his county, city, or town, he shall return the tax receipt, and shall state under his oath that he has used due diligence in making collection by levy, garnishment, or otherwise, that the taxpayer is insolvent and same cannot be collected; otherwise he shall be liable on his official bond for the tax, to be collected in a suit in any court in this state in the corporate name of the county, city, or town to which such taxes are due. The collecting officer shall be allowed a compensation of ten per centum for making collection of such taxes, and the register of deeds shall be allowed ten cents for making the above certificate, to be paid by the county, city, or town to which the taxes are due. (Rev., s. 2875; 1905, c. 355, ss. 4-6.)

§ 8003. Property in hands of receiver.—Whenever taxes are duly assessed against any corporation having chartered rights, or doing business in this state, or having property in this state, or against any person resident in this state or doing business, or having property in this state, and the tax list is in the hands of the sheriff, it shall be competent for such sheriff whenever such taxes, whether listed or unlisted, are due and unpaid, to levy upon and sell such part of the property, real and personal, belonging to such person or corporation as may be necessary to pay such taxes, listed or unlisted, whether the property of such corporation or person be in the hands of a receiver duly appointed or not; and in such cases it shall not be necessary for such officer to apply to and obtain from the court appointing such receiver, or having jurisdiction of the property or of the receiver, an order for the payment of such taxes, but the same may be collected as if the property was not in the hands of a receiver or in the custody of the law. The powers conferred by this section upon the sheriff shall not have the effect to relieve the receiver from his duties and liabilities to pay taxes as provided elsewhere in this chapter. (Rev., s. 2879; Code, ss. 699, 700; 1879, c. 2451, ss. 1-4.)

Cross Reference.—As to tax liens continuing on the property regardless into whose hands it passes, see § 1220 and the note thereto.

Nature of Right to Sell.—The statutory right to sell lands in a receiver's hands is cumulative to that given the sheriff against the owner, and the latter is not deprived of his right to pay or tender payment of the taxes due where it is necessary to protect himself against loss. Headman v. Commissioners, 177 N. C. 261, 98 S. E. 776.

Listing in Receiver's Name or Affecting Sale.—Listing the land in the name of the receiver instead of the true owner does not invalidate the sale of the land for taxes. Headman v. Commissioners, 177 N. C. 261, 264, 98 S. E. 776.

Applied in Hood v. McGill, 206 N. C. 83, 173 S. E. 20.

§ 8004. Attachment and garnishment proceedings.—If any poll tax or other tax shall not be paid within sixty days after the same shall be demandable, it shall be the duty of the sheriff, if he can find no property of the person liable sufficient to satisfy the same, to attach any debt or other property incapable of manual delivery, due or belonging to the person liable, or that may be come due before the expiration of the calendar year, and the person owing such debt or having such property in possession shall be liable for such tax. Any corporation, firm, or person who shall, on demand made, refuse to give to the tax collector of any county, city, or town a list giving the names of all persons employed by them who are liable for tax, shall be guilty of a misdemeanor. For the purpose of carrying into effect the provisions of this section, the following form shall be used as an attachment, viz.:

To A. B. .....: Take notice, that this is to attach any debt that is now due or may become due to C. D., a delinquent in his poll (or property) tax for the year of nineteen hundred and ....., and you are hereby summoned to appear before E. F., an acting justice of the peace for ..... county, and disclose any indebtedness which is or may be due said delinquent by you during the present calendar year, and to show cause why judgment should not be rendered against you for said delinquent tax and costs of this proceeding ..... day of ....., 19...

..... E. F.,
Justice of the Peace

For serving notice the sheriff shall receive twenty-five cents, and if judgment is rendered, the justice shall receive twenty-five cents as costs. The justice shall hear and determine the matter as in other civil actions, and, if he find that the garnishee owes the delinquent any sum due or to become due during the calendar year, or has property or effects belonging to such delinquent, he shall give judgment against the garnishee for the taxes due by the delinquent and for costs, or for so much of such taxes and costs as the facts will warrant. If the amount of the tax be beyond the jurisdiction of the court of a justice of the peace, the sheriff may proceed by action and attachment in the superior court. All actions and proceedings instituted under this section shall be in the name of the sheriff. In no case shall the garnishee be adjudged to pay a greater sum than his indebtedness to the taxpayer or the value of the property of such taxpayer in his hands or under his control. (Rev., ss. 2880, 5201; Code, s. 3675; 1917, c. 234, s. 41; 1919, c. 92, s. 41.)

Sale by Assignee Prior to Levy.—Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for

the payment of the tax, but belong to the creditors. Shelby v. Tiddy, 118 N. C. 792, 24 S. E. 521.

§ 8004(a). Garnishment of pay of state employees for taxes.—When any agent or officer of the State shall have in his hands any money or funds due any employee of the State for salary or wages, it shall be competent and permissible for any county or city in the State, and/or the proper officer or officers thereof having in charge the collection of taxes, to proceed against the said State agent or officer, and the fund and the moneys in his hands, by way of garnishment for the collection of said taxes, as now provided by law for the garnishment of private persons. (1935, c. 112.)

§ 8005. Corporation failing to pay taxes; garnishment; penalty.—Whenever any corporation doing business in this state shall be delinquent in the payment of any taxes assessed or charged against it, the sheriff may notify any agent or officer of such corporation, or any person indebted thereto, of the amount of taxes due and unpaid by such corporation, and thereupon such agent, officer, or debtor shall pay to such sheriff or tax collector the amount he has in hand for, or of his indebtedness to, such corporation, or so much thereof as will satisfy such taxes and costs. The amount so paid shall be a discharge pro tanto of such agent, or officer, or debtor from his liability to such corporation. Any such agent, officer, or debtor who shall fail to pay over to the sheriff as required by this section shall be liable for such money in civil action to be brought by such sheriff in his name and official capacity; and such officer or agent of such corporation shall also be guilty of a misdemeanor, and fined not less than fifty nor more than five hundred dollars. If any corporation be delinquent for six months in the payment of the taxes lawfully assessed and charged upon or against it or its property, its charter shall be forfeited and a receiver shall be appointed to wind up its affairs in an action to be prosecuted by the attorney-general in the name of the state. (Rev., ss. 2881, 3786; 1901, c. 558, s. 29.)

§ 8005(a). Collection of arrears of tax for years 1921 to 1929; authority of personal representatives.—All Sheriffs and Tax Collectors who, by virtue of their office, have had the tax lists for the purpose of collecting taxes of their respective counties, towns and school districts, in their hands for the years one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two, one thousand nine hundred and twenty-three, one thousand nine hundred and twenty-four, one thousand nine hundred and twenty-five, one thousand nine hundred and twenty-six, one thousand nine hundred and twenty-seven, one thousand nine hundred and twenty-eight, and one thousand nine hundred and twenty-nine, and in case of death or default in collection, their personal representatives, bondsmen, or any agent or agents that they may designate, are authorized and empowered to collect arrears of taxes for each of the years aforesaid, under such rules and regulations as are now, or may hereafter be provided for the collection of taxes. (1923, c. 108, s. 1; 1925, c. 80, s. 1; 1929, c. 105, s. 1; 1931, c. 197, s. 1.)

Legislative Power to Enact.—The legislature had the power to enact this law. Hunt v. Cooper, 194 N. C. 265.

Remedies of Taxpayer.—Where the owner has neglected to pay back taxes he may not pay under protest and recover them, or successfully seek injunctive relief against the sheriff's sale, in the absence of allegation that the taxes collected by the sheriff were illegal or unlawfully collected. Hunt v. Cooper, 194 N. C. 265.

§ 8005(b). Payment of back taxes by fiduciaries; purchasers for value and encumbrances protected.—No executor or guardian shall be compelled to pay any tax under the provisions of section 8005(a) after he shall have made final settlement: Provided, that this law shall not authorize a sale of any land for taxes which has been conveyed prior to January first, one thousand nine hundred and twenty-seven, to a purchaser for value, and without actual notice of the non-payment of such taxes: Provided, further, that all lands sold for the non-payment of taxes, under the provisions of this law, shall be sold subject to encumbrances by mortgages or deeds in trust, executed prior to January first, one thousand nine hundred and twenty-seven. (1923, c. 108, s. 2; 1929, c. 105, s. 2; 1931, c. 197, s. 2.)

§ 8005(c). Liability not relieved by preceding sections.—Nothing in the two preceding sections contained shall be construed to relieve sheriffs, tax collectors, their representatives or bondsmen, from the liability imposed by law to pay the state, county, town and other taxes at the time and place required by law. (1923, c. 108, s. 3; 1929, c. 105, s. 3; 1931, c. 197, s. 3.)

§ 8005(d). Term of authority.—The authority given in sections 8005(a) and 8005(b) shall cease and determine on the first day of January, one thousand nine hundred and thirty-three. (1923, c. 108, s. 4; 1925, c. 80, s. 2; 1927, c. 89; 1929, c. 105, s. 5; 1931, c. 197, s. 5.)

§ 8005(e). Pending litigation unaffected.—This law shall not apply to taxes now involved in litigation. (1929, c. 105, s. 4; 1931, c. 197, s. 4.)

§ 8005(f). Collection of arrears of tax for years 1923 to 1931 by personal representative. — All sheriffs and tax collectors who, by virtue of their office, have had the tax lists for the purpose of collecting taxes of their respective counties, towns and school districts, in their hands for the years one thousand nine hundred twenty-three, one thousand nine hundred twenty-four, one thousand nine hundred twenty-five, one thousand nine hundred twenty-six, one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred twenty-nine, one thousand nine hundred thirty and one thousand nine hundred thirty-one, and in case of death or default in collection, their personal representatives, bondsmen, or any agent or agents that they may designate, are authorized and empowered to collect arrears of taxes for each of the years aforesaid, under such rules and regulations as are now, or may hereafter be provided for the collection of taxes.

No executor or guardian shall be compelled to pay any tax under the provisions of this section after he shall have made final settlement: Provided, that this section shall not authorize a sale of any land for taxes which has been conveyed prior to January first, one thousand nine hundred and thirty-one, to a purchaser for value, and without actual notice of the non-payment of such

taxes: Provided, further, that all lands sold for the non-payment of taxes, under the provisions of this section, shall be sold subject to encumbrances by mortgages or deeds in trust, executed prior to January first, one thousand nine hundred and thirty-one.

Nothing herein contained shall be construed to relieve sheriffs, tax collectors, their representatives or bondsmen, from the liability imposed by the law to pay the state, county, town any other taxes at the time and place required by law.

This section shall not apply to taxes now involved in litigation.

The authority herein given shall cease and determine on the first day of January, one thousand nine hundred and thirty-five. (1933, c. 97.)

Art. 14. Tax Sales

Part 1. Sale of Personalty

§ 8006. Personalty first exhausted.—The personal property of the taxpayer shall be levied upon and shall be sold for the satisfaction of his taxes before resorting to his real estate, if sufficient personalty subject to levy and sale can be found in the county of the sheriff having the tax list in hand: Provided, it shall be incumbent upon the taxpayer, mortgagee or other lien holder on taxpayer's realty, if said mortgage or other lienholder has notified the sheriff that he holds such mortgage or other lien, to point out to the sheriff personalty out of which the taxes may be made or else such taxpayer shall forfeit his rights under this section and his real estate shall be subject to the lien for taxes as if no other property had been listed by him. (Rev., s. 2884; Code, s. 3688; 1901, c. 558, s. 1; 1927, c. 221, s. 1.)

Editor's Note.—The proviso contained in this section was substituted for the last clause formerly found herein, which provided for pointing out personalty only by the taxpayer. The new proviso requires all lien holders to do this provided they have notified the sheriff of the lien which they hold on the taxpayer's realty.

As to creation and requisite of lien, see section 7986 and the note thereto, together with references there made.

Where Failure to Give Proper Notice.—Where the owner of real and personal property has not paid the taxes thereon assessed by a county, a mortgagee who has not received the statutory notice, may maintain his suit in equity against the sale of the personalty for the payment of the total taxes due. Section 8008, not applying. American Agricultural Chemical Co. v. Williamson, 191 N. C. 484, 132 S. E. 146.

Sale of Realty Valid Although Personalty Available.—See section 8011. Sheriff liable, however, to the taxpayer, see note of Geer v. Brown, 126 N. C. 238, 35 S. E. 470, under section 8010. Purchaser takes good title though personalty not first exhausted, see note of Stanley v. Board, 118 N. C. 75, 24 S. E. 12, under section 8030.

Failure to Comply with Section as Affecting Purchaser's Title.—This section is for the benefit of the taxpayer, and the failure of the sheriff to comply herewith does not affect the title of the purchaser at the sale under foreclosure of the realty for taxes. Craven County v. Parker, 194 N. C. 561, 140 S. E. 155.

Priority of Levies.—Where personal property is seized under a valid writ of attachment prior to the time it is pointed out by a mortgagee or purchaser of real property from the owner of the personalty for the collection of taxes levied against the realty, as provided by this section, the levy on the personalty for taxes is subject to the prior levy under attachment, and the attaching creditors are entitled to a prior claim on the proceeds of sale of the personalty. Henderson Bldg., etc., Ass'n v. Burwell, 206 N. C. 358, 174 S. E. 125.

Remedies for Wrongful Enforcement of Tax.—See 11 N. C. Enc. Dig. 627 et seq.; 15 N. C. Enc. Dig. 568. See also Code section 7979 and the note thereto.

Applied in Hood v. McGill, 206 N. C. 83, 173 S. E. 20.

Referred to in McNair v. Boyd, 163 N. C. 478, 79 S. E. 966.

Stated in Reichland Shale Products Co. v. Southern Steel, etc., Co., 200 N. C. 226, 156 S. E. 777.

§ 8007. Levy as under execution.—The seizure and sale of personal property for taxes shall be governed by the laws regulating levy and sale under execution. (Rev., s. 2885; Code, s. 3688; 1901, c. 558, s. 1.)

§ 8008. What subject to levy. — All personal property subject to taxation shall be liable to be seized and sold for taxes, and the personal property of any deceased person shall be liable in the hands of any executor or administrator for any tax due by any testator or intestate; and all transfers of personal property by any taxpayer, made after his taxes are due, by way of gift, or mortgage, or deed of trust, or of assignment for creditors, or bequest by will, or in any other way or for any other purpose than a bona fide sale for value, in the ordinary course of dealing, shall be null and void as to such taxes and shall have no effect upon the rights, powers, and duties of the sheriff to levy upon and sell such property for such taxes: Provided, such levy be made within sixty days after such transfer. (Rev., s. 2886; Code, s. 3682.)

This section does not impinge on the creditor's claim of priority to the proceeds from a sale of personalty, where the creditor makes his attachment before the purchaser of realty points out the personalty for payment of taxes as provided in § 8006. Henderson Bldg., etc., Ass'n v. Burwell, 206 N. C. 358, 361, 174 S. E. 125.

§ 8009. Fees of sheriff and expenses of sale of personalty and realty.—The sheriff shall be entitled to fifty cents for each actual levy and sale of personalty and fifty cents for each advertisement of such sale, but in no case shall such sums be collected where no levy or sale or advertisement is made. For advertising lands for sale for taxes, twenty cents for each parcel advertised. For making each certificate of the sale and purchase of real estate, and for each deed for real estate, fifty cents. For entering memorandum or redemption on sale book, twenty-five cents. The county commissioners shall allow him in settlement such other sums as he has actually expended which were necessary for the due execution of his duties under this chapter. (Rev., s. 2883; 1903, c. 251, ss. 80, 87; 1901, c. 558, ss. 10, 11; 1917, c. 234, s. 89; 1919, c. 92, s. 89.)

Cited in Lane v. Graham County, 194 N. C. 723, 726, 140 S. E. 712.

Part 2. Sale of Realty

§ 8010. When land is liable.—If personal property of any taxpayer, sufficient for the satisfaction of his taxes and subject to levy, is not to be found in the county of the sheriff having the tax list in hand for collection, it shall be the duty of such sheriff to sell the real estate of such taxpayer, if delinquent in the payment of his taxes, under the directions set forth in this chapter. (Rev., s. 2887; Code, ss. 3688, 3691; 1901, c. 588, s. 1.)

Cross Reference.—For full treatment, see 11 N. C. Enc. Dig. 568 et seq.; 15 N. C. Enc. Dig. 632 et seq. As to creation of lien, see section 7978; as to nature of action for enforcement thereof, see section 7990.

For an act to regulate the foreclosure of tax liens in

Duplin county and the municipalities thereof, see Public Laws of 1935, chapter 189.

Power Strictly Construed.—In selling lands for taxes, the sheriff acts under a statutory power which must be strictly pursued, and he must not only do the acts which are required to bring his sale within the power, but he must do them within the time prescribed. Taylor v. Allen, 67 N. C. 346.

Liability of Sheriff Failing to Exhaust Personalty.—The sale of land for taxes, before resorting to personal property, may render the sheriff liable to the tax debtor, but does not affect the title of the purchaser. Geer v. Brown, 126 N. C. 238, 35 S. E. 470, citing Stanley v. Baird, 118 N. C. 75, 24 S. E. 12. As to duty to exhaust personalty first, see section 8006.

Real Property Subject to Sale—Less Than Fee Simple.—The nonpayment of taxes by a delinquent holding an estate less than a fee simple, does not subject the fee to sale. Tucker v. Tucker, 108 N. C. 235, 13 S. E. 5.

Dower land is subject to sale for nonpayment of taxes, and may be purchased by the owner of the reversionary interest after dower right is over. Geer v. Brown, 126 N. C. 238, 35 S. E. 470.

Homesteads are made liable for sale for taxes by N. C. Const., Art. X, sec. 2. Tucker v. Tucker, 110 N. C. 333, 334, 14 S. E. 860.

Proper Listing of Lands Required.—Lands may be sold for taxes and a valid deed made therefor only when the lands are listed according to the requirements of the statute. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337. As to tax list affording authority to sheriff for the sale, see note of Peebler v. Taylor, 121 N. C. 38, 27 S. E. 999, under section 7991.

Time and Place of Sale.—See section 8012.

When and by Whom Tax Deed Made.—See section 8030 and note thereto.

Right to Enforce Lien in Equity.—See 11 N. C. Enc. Dig. 633.

Redemption from Tax Sale.—See 11 N. C. Enc. Dig. 637. See also, section 8038, 8039 and the notes thereto.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§ 8011. Sale conclusive as to liability.—Where actual sales of real estate are made for taxes under the general laws of the state, the taxpayer whose real estate has been sold for taxes shall be precluded thereafter from attacking such sale on the ground that the tax could have been procured from personal property. (1917, c. 234, s. 119; 1919, c. 92, s. 120.)

§ 8012. Time and place of sale.—The sale of real estate for taxes shall, unless otherwise expressly provided by law, be made at the courthouse door of the county, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of the first Monday in May of each year, or upon the first Monday of any subsequent month, after giving the required notice of sale, but, if necessary, the sale may be continued from day to day until all the property advertised shall be disposed of. If, for any reason, the sale is not made on the day prescribed, another day may be set by the county commissioners at a regular meeting, and the sale shall be had on such day after advertisement and notice as required by this subchapter. (Rev., s. 2888; Code, s. 459; 1901, c. 558, s. 3; 1919, c. 92, s. 119.)

Cited in Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§ 8012(a) Sales on dates other than first Monday in June validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales, are hereby, approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty. (1931, c. 160.)

§ 8012(b). Tax sales for 1931-32 on day other than law provides and certificates validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty-one and one thousand nine hundred thirty-two, on any day subsequent to or other than the first Monday in June of said year, be, and the same are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales, be, and they are hereby, approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two: Provided, this section shall not apply to Mecklenburg county and Durham county. (1933, c. 177, s. 1.)

§ 8012(c). Tax sales for 1933-34 and certificates validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the years one thousand nine hundred and thirty-three and one thousand nine hundred thirty-four or on any date subsequent to or other than the date prescribed by law and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September, one thousand nine hundred thirty-five, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such sales shall be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town or other municipality for the foreclosure of certificates of sale issued for the taxes of the years one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred twenty-nine, one thousand nine hundred thirty, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two subsequent to October first, one thousand nine hundred thirty-four, and all such actions instituted before October first, one thousand nine hundred thirty-five, shall be and the same are hereby approved, validated and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October first, one thousand nine hundred thirty-four: Provided, that this section shall not be construed to repeal any private or local act passed by the general assembly of one thousand nine hundred thirty-five. (1935, c. 331.)

§ 8013. Repealed by acs of 1927, c. 221, s. 2.

§ 8014. Sale advertised.—Before any real estate shall be sold for taxes the sheriff shall give public notice of the time, place, and cause of such sale by advertisement at the courthouse door and in some newspaper published in the county [or in any city or town nearest the property advertised], if any there be, for four successive weeks immediately preceding the day of sale. If there be no newspaper published in the county [or in any city or town nearest the property advertised], such advertisement must be posted for four weeks at some public place in each township of the county, except that in which the courthouse is located, in addition to posting at the courthouse door. Such advertisement must contain a notice that all the lands whose owners are delinquent in payment of their taxes of the preceding year will be sold, and shall set out a list of the lands to be sold and the amount of taxes, expenses, and costs due by each delinquent owner, giving his name. (Rev., s. 2890; Code, s. 3691; 1901, c. 558, s. 3.)

Editor's Note.—Public Laws 1931, c. 126. which amended this section by inserting the words in brackets provided, "This Act shall apply only in Nash and Edgecombe Counties."

Public Laws 1933, c. 415 omitted Edgecombe from the exemption of the Amendatory Act of 1931.

For an act providing for advertisement of delinquent taxes for the years 1932 and 1933 where such advertisements have not been made, see Public Laws 1935, chapter 68.

Description of Lands—Parol Evidence.—The description of real property advertised to be sold for nonpayment of taxes giving delinquent's name and the number of acres "Washington Road, No. One Township," is not too vague for or uncertain to admit of parol testimony of identification, when the designated owner has but one tract of real estate in the county advertising the sale in its proceedings to foreclose. Craven County v. Parker, 194 N. C. 561, 140 S. E. 155.

Liability of Sheriff to Advertising Medium.—Publication of sale of real property for unpaid taxes is the official duty of the sheriff, and to be made on the day directed by the county commissioners; and the newspaper in which these notices are published has a right of action against the sheriff contracting for their publication, and not against the board of county commissioners, which only makes an allowance to the sheriff to cover such charges. Lane v. Graham County, 194 N. C. 723, 140 S. E. 712.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Craven County v. Parker, 194 N. C. 561, 140 S. E. 155; Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§ 8015. Manner of sale. — All sales of real estate for taxes shall be at public outcry of the highest bidder. All the advertised real estate of each delinquent shall be sold at the same time as one body, and no bid therefor shall be received unless sufficient in amount to discharge all the taxes due by the delinquent, together with all costs and expenses of sale. If no such bid be received, the county, city, or town, as the case may be, shall be deemed the purchaser, and the sheriff shall so record it on his sales book. If any bidder fail to pay the amount of his bid immediately upon his being declared the purchaser, the sheriff shall resell at once if he deem it proper to do so. (Rev., s. 2891; Code, ss. 3693, 3694; 1901, c. 558, ss. 37, 4.)

Cited in Lane v. Graham County, 194 N. C. 723, 726, 140 S. E. 712.

§ 8016. Sheriff failing to attend; selling property not liable for tax.—If any sheriff shall fail to attend any sale of lands as required by law in regard to tax sales, either in person or by competent deputy, he shall be guilty of a misdemeanor and liable to a penalty of three hundred dollars, to be recovered by an action in the superior court against the sheriff and his bondsmen. And if such officer or deputy shall sell or assist in selling any real property, knowing the same not to be subject to taxation, or that the taxes for which the same is sold have been paid, or shall knowingly and willingly sell or assist in selling any real property for payment of taxes to defraud the owner of such real property, or shall knowingly or willingly execute a deed for property so sold, he shall be guilty of a misdemeanor, and be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay to the injured party all damages sustained by such wrongful act, and all such sales shall be void. (Rev., s. 3790; 1901, c. 558, s. 6.)

§ 8017. Record of sale kept. — It shall be the duty of the sheriff or tax collector of a county or municipality, immediately after the sale of land for taxes, to prepare a book containing a list of the names of all persons whose land has been sold for taxes showing the names of each delinquent taxpayer, the amount of taxes, penalty, cost of sale, the total amount of the certificate of sale and the name of the purchaser. If the county or municipality become the purchaser under the provisions of law, he shall record the fact in such book. The sheriff or tax collector shall certify such book and file the same in the office of register of deeds and said register of deeds shall keep and preserve said book. Said book and record of certificates of sale shall be sufficient notice to lien holders and other parties interested in the property sold for taxes. Any delinquent taxpayer, lien holder or party interested in said property may, upon presentation to the register of deeds of the certificates of sale marked paid and signed by the proper collecting officer, cause the register of deeds upon payment of a fee of ten cents to make an entry on said record giving the amount paid, the description of the property, whether in whole or a part thereof, and by whom said taxes were paid. Where the word "sheriff" appears in this

act, it shall mean "the sheriff or tax collector of each county," or, "the tax collector of each city or town." (Rev., s. 2892; 1901, c. 558, ss. 5, 10; 1931, c. 260, s. 7.)

Editor's Note.—The Act of 1931, which struck out the former section and inserted the above in lieu thereof and also amended section 8037, provided: "This act shall not affect pending litigation, nor contracts made by the county commissioner with attorneys prior to the passage of this act. This act shall apply to all taxes and tax certificates up to and including the nineteen and twenty-nine levy but subject to pending litigation and contracts with attorneys as above set out and subject to section seven of chapter two hundred four, laws of one thousand nine hundred twenty-nine. Nothing in this act shall affect pending actions brought by any holder of a tax certificate other than a county, city or town."

This act, which was ratified on April 8, 1931, was amended by Public Laws 1931, c. 324, which added the following: "this act shall also apply to all taxes and tax certificates including the one thousand nine hundred and thirty levy and subsequent years."

§ 8018. Records sufficient proof of sale.—The books and records belonging to the offices of the register or sheriff, or copies thereof properly certified, shall be deemed sufficient evidence to prove the sale of any real property for taxes, the redemption thereof or the payment of the taxes thereon. (Rev., s. 2893; 1901, c. 558, s. 26.)

§ 8019. Land listed in wrong name.—No sale of real estate shall be void because such real estate was charged in the name of any other person than the rightful owner, if such real estate be in other respects sufficiently described. But no sale of property so listed in the name of the wrong person shall be held valid where the rightful owner has listed the same and paid the taxes thereon. (Rev., s. 2894; 1901, c. 558, s. 25.)

Sufficient Description Necessary.—This section distinctly says, and by clear implication implies, that the listing of the real estate is void if it is not sufficiently described. Bryson v. McCoy, 194 N. C. 91, 97, 138 S. E. 420.

Where a suit to foreclose a tax certificate is instituted against the person listing the property for taxation and the property is sufficiently described, the action is maintainable although the title to the land is in another. Forsyth County v. Joyce, 204 N. C. 734, 169 S. E. 655.

Insufficient Description.—A description of land in a list of sale for taxes as "Beaverdam Township name T. D. Bryson heirs, acres 400, amount $10.00," when the land consisted of an undivided one-half interest in 70 acres, in 200 acres, in 331 acres, and in 200 acres, under separate State grants, is not a sufficient description and a sale thereunder will be void. Bryson v. McCoy, 194 N. C. 91, 138 S. E. 420.

When Listed in Husband's Name. — When the land had been listed in the name of the husband, which belonged to the wife, and the husband had no interest therein, the tender to redeem made by the husband, notwithstanding birth of issue, when he is not acting for her or claiming under her, is not a sufficient one to invalidate the tax deed. Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165.

Stated in Headman v. Commissioner, 177 N. C. 261, 98 S. E. 776; Stone v. Phillips, 176 N. C. 457, 97 S. E. 375.

§ 8020. Irregularities immaterial. — No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement of law, shall invalidate the sale of any real estate when sold by the sheriff for delinquent taxes, nor in any manner invalidate the tax levied on any property or charged against any person. (Rev., s. 2895; 1901, c. 558, s. 27.)

See section 8021 and the note thereto.

§ 8021. Irregularities defined. — The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, up to and including the execution and delivery of the deed for property sold for taxes, shall be taken and deemed to be mere irregularities within the meaning of the next preceding section: The failure of the assessors to take or subscribe an oath or attach one to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied, or charged against any property or the valuation of any property upon any record; the failure to make or serve any notice mentioned in this chapter; the failure or neglect of the sheriff to offer any real estate for sale for delinquent taxes thereon at the time mentioned in the advertisement or notice of such sale; failure of the sheriff to adjourn such sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the manner or order in which real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time provided by law; any irregularity, informality, or omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the sheriff, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description, on any book, list, or record, or in any notice or advertisement, may be made definite by the sheriff in the deed by which he may convey such property, if sold for taxes, by inserting in such deed a proper and definite description of the property so defectively or indefinitely described; any other irregularity, informality, or omission or neglect on the part of any person or in any proceedings, whether mentioned in this section or not; the omission of a seal to the sheriff's deed; the neglect or omission to tax or assess for taxation any person or property; the overtaxation of persons or property liable to be taxed. (Rev., s. 2896; 1901, c. 558, s. 28.)

Applied in Stone v. Phillips, 176 N. C. 457, 97 S. E. 375; Sanders v. Earp, 118 N. C. 275, 24 S. E. 8.

§ 8022. Acts of de facto officer valid. — In all actions, proceedings and controversies involving the question of title to real property held under and by virtue of a sheriff's certificate of sale for taxes or tax deed, and all acts of assessors, sheriffs, clerks, supervisors, commissioners, and other officers, de facto, shall be deemed and construed to be of the same validity as acts of officers de jure. (Rev., s. 2897; 1901, c. 558, s. 24.)

§ 8023. Cancellation of void sales and deeds.— Whenever it shall be made to appear to the satisfaction of the sheriff, either before the execution of a deed for real property sold for taxes or upon the deed being returned by the purchaser, that any real estate was sold which was not subject to taxation or upon which the taxes had been paid previous to the sale, he shall make an entry opposite such tract or lot on the record of same that the same was erroneously sold, and

such entry shall be evidence of the fact therein stated; and in such cases the purchase money shall be refunded to the purchaser as provided by this chapter. If such deed has been registered, the sheriff may nullify the same by writing on the margin of the register's book, at the page on which the deed appears, that the same is canceled pursuant to this section and for the causes herein set forth. (Rev., s. 2898; 1901, c. 558, s. 22.)

§ 8024. Certificate of sale.—The sheriff shall give to the purchaser of real estate sold for taxes a written certificate, under his official signature, to the effect and in the form following:

North Carolina, ... County.

I, ..., sheriff of the county of ....., do hereby certify that the following described real estate in said county and state, to wit (describing the same and stating in whose name it was listed on the tax lists), was, on the ..... day of ....., 19...., duly sold by me, in the manner provided by law for the delinquent taxes of ..... for the year 19...., amounting to ..... dollars, including interest and penalty thereon and the cost allowed by law, when and where (name of the purchaser) purchased said real estate at the price of ..... dollars, he being the highest and best bidder for the same. And I further certify that unless redemption is made of said estate in the manner provided by law, the said ....., his heirs or assigns, will be entitled to a deed in fee therefor on and after the ..... day of ....., A. D. 19...., on surrender of this certificate.

In witness whereof, I have hereunto set my hand, this ..... day of ..... A. D. 19..... ....., Sheriff.

(Rev., s. 2899; 1901, c. 558, s. 9.)

As to presumptive evidence of certificate, see section 8027.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Headman v. Commissioners, 177 N. C. 261, 98 S. E. 776; Townsend v. Drainage Commissioners, 174 N. C. 556, 94 S. E. 104.

§ 8025. Separate certificates required. — The real estate of each delinquent shall be inserted in a separate certificate notwithstanding the fact that the same person may have purchased the real estate of several delinquents. But this shall not apply to lands held in cotenancy or joint tenancy. Such lands may be inserted in one certificate, no matter how many delinquents may be interested therein. (Rev., s. 2900; 1901, c. 558, s. 9.)

Cited in Buncombe County v. Arbogast, 205 N. C. 745, 748, 172 S. E. 364.

§ 8026. Certificate to county, city, etc.; right to transfer.—When the county or other municipal corporation becomes the purchaser, under the provisions of this chapter, of any real estate sold for taxes, the sheriff shall issue a certificate of purchase in the name of such corporation substantially in the form provided by the two preceding sections. Such certificates shall remain in the custody of the sheriff, and at any time the county commissioners may assign such certificates to any person wishing to buy, for the amount expressed on the face of the certificate and interest thereon at the rate per centum which the taxes were drawing at the time of the purchase, or for the total amount of all tax on such real estate. Such assignment may be made by the endorsement of the name of the county by the chairman of the board of county commissioners, and such endorsement shall be made when ordered by the county commissioners. The commissioners or other governing body of the municipal corporation other than a county shall have the same right of transfer as is above conferred, such transfer to be made by the major or treasurer of such corporation and in its name. (Rev., s. 2901; 1901, c. 558, ss. 37, 39.)

Right of Assignee.—The assignee of the county commissioners of the certificate obtains only such interest as the county possessed, which was, by the statute under which this case was decided, the right to foreclosure. McNair v. Boyd, 163 N. C. 478, 79 S. E. 966. As to procedure for foreclosure, see section 8037.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§ 8027. Certificate presumptive evidence of validity.—The sheriff's certificate of sale and purchase shall be presumptive evidence of the regularity of all prior proceedings incident to such sale and purchase and of the due performance of all things essential to the validity thereof. (Rev., s. 2902; 1901, c. 558, s. 9.)

Stated in Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

Part 2A. Sale When Payment Attempted by Worthless Check

§ 8027(a). Tax collecting officers authorized to sell property for non-payment of taxes. — In all cases in which the various tax collectors of the State, or any subdivision thereof, have received checks in payment of taxes for the years one thousand nine hundred and twenty-eight, one thousand nine hundred and twenty-nine, one thousand nine hundred and thirty, or any subsequent years, and receipts have been issued for same, and said checks have been returned unpaid, without negligence on the part of the said tax collectors in presenting said checks for payment, the taxes for which said checks may have been received and for which receipts may have been issued shall be deemed not to have been paid and the said tax collectors are hereby empowered to advertise and sell the real estate and/or personal property on which said taxes were levied and for the payment of which said checks were given, and said tax collectors shall have full power and authority to sell said property, whether real or personal, as is now provided for the sale of property for taxes. (1931, c. 151, s. 1.)

§ 8027(b). Entry that taxes unpaid; innocent purchasers protected.—It shall be the duty of the various tax collectors of this State and all subdivisions thereof to enter upon their records or stubs of such receipts the fact that the taxes are unpaid. Provided, that nothing herein contained shall affect the rights of innocent purchasers for value. (1931, c. 151, s. 2.)

Part 3. Tax Deeds

§ 8028. Remedy of holder of certificates of sale. —Every county, person, firm or corporation, private or municipal, who has purchased any lands

or interest in the same at any tax sale, as evidenced by sheriff's certificate of sale, or becomes a holder of any sheriff's certificate of sale referred to in section 8024, Consolidated Statutes, shall have the right of foreclosure of said certificate of sale by civil action and this shall constitute his sole right and only remedy to foreclose the same. (1927, c. 221, s. 4.)

Cross Reference.—As to county being required to foreclose within eighteen months when proceeding under this section, see § 8037 and the note thereto.

Editor's Note.—Formerly the holder of a sheriff's certificate of sale could obtain a deed for the real estate purchased by complying with the requirements heretofore found in this section, or he could proceed to foreclose his lien in an action in the nature of action to foreclose a mortgage. Now the holder of such certificate is no longer put to his election for by this section, his right of sale by foreclosure constitutes his sole right. As to the procedure for this right, see section 8037.

This section provides an exclusive remedy of an individual on a tax sale certificate, and the limitation prescribed for bringing action thereon applies, and an individual bringing action based on a tax sale certificate may not avail himself of the fact that no limitation is prescribed in § 7990, by alleging that the tax certificate was assigned him by the county and that the action was brought under § 7990. Logan v. Griffith, 205 N. C. 580, 172 S. E. 348.

Cited in Craven County v. Parker, 194 N. C. 561, 140 S. E. 155; Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§§ 8029-8034: Repealed by Act 1927, c. 221, s. 3.

Part 3A. Refund of Tax Sales Certificates.

§ 8034(a). Local units directed to extend payment of taxes over period of five years and to remit penalties; time limit; payment of 1932 taxes as condition precedent. — The several counties, municipalities and other agencies of government owning taxes, or tax sales certificates for lands in their several units for the years one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred twenty-nine, one thousand nine hundred thirty, and one thousand nine hundred thirty-one, at the request of the owner or owners of the land, are hereby authorized, empowered and directed to enter into agreements with the owners of the lands covered by said tax sales certificates whereby said taxes, or tax sales certificates, exclusive of interest and penalties, may be paid in installments covering a period not to exceed five years and bearing interest at the rate of six per cent per annum, payable annually from and after the first day of April, 1933: Provided, that unless the said counties and the owners of lands covered by said taxes, or tax sales certificates, enter into said agreements on or before the first day of April, 1934, this section shall become inoperative and the said counties are authorized to proceed with foreclosure proceedings as hereinafter set out: Provided, that as a condition precedent to this settlement the several agencies of government are authorized and empowered in their discretion to require the payment of the 1932 taxes by resolution duly passed by the governmental agencies. (1933, c. 181, s. 1.)

For review of this section and those immediately following, see 11 N. C. Law Rev., 261.

For amendments applicable in Johnston County only, see Public Laws 1933, c. 459; in Scotland County, c. 218; in Columbus County, c. 486.

For amendment affecting Brunswick and Caswell counties only, see Public Laws 1935, chapter 370. For an act affecting Caswell county only, see Public Laws 1935, chapter 354.

§ 8034(b). Note given by landowner. — When said agreement is entered into between the counties, municipalities, and other governing agencies and the owner of said land covered by said taxes, or tax sales certificates, they shall take from the owner a note in substantially the following form: $.....

For the taxes for the years 192.., 192.., 192.., 193 .., and 193 .., on those lands in ..... Township, ... County, North Carolina, adjoining the lands of ..... (brief description of land) ..... I or we promise to pay to the order of ..... County, the sum of ..... Dollars, with interest from April 1st, 1933, at the rate of six per cent per annum, payable annually, and payable as to principal in ..... annual payments of ..... on the ..... day of ..... in each of the years ..... respectively. Upon my failure to pay any installment of principal or interest, the whole amount shall immediately become due and payable. This note shall constitute a lien on the lands above described and said land shall be subject to foreclosure sale at the option of said county, municipality or other government agency under the law providing for foreclosure sales under tax sales certificates upon my failure to make the payments as above set out. WITNESS my hand and seal, this the ..... day of ....., 193 ... (1933, c. 181, s. 2.)

§ 8034(c). Note constitutes superior lien; not a novation; right of foreclosure preserved; default of single installment.—The said note, when given and received as above set out, shall constitute a first lien on the lands described, superior to all other liens except current taxes, and shall be of the same dignity as those, and said notes shall be construed as a continuing lien on the land from the time the lien of the taxes first attached against said land and shall not be considered a novation, and the said county or municipality and other governing agency taking said note shall have the right of foreclosure on said land under the law governing foreclosure of sale of lands under tax sales certificates at any time after said note or any installment thereof is due and within twelve months thereafter. The said county, municipality or other governing agency shall have a right at its option to foreclose after the failure of any one of the payments as provided in said note but shall not be compelled to foreclose until the whole note is due and within twelve months thereafter. (1933, c. 181, s. 3.)

§ 8034(d). Notes are continuing lien. — All notes taken for taxes, or tax sales certificates hereunder, shall be and constitute a continuing lien from the time the taxes were originally assessed on the lands therein described, but the said notes shall not be subject to be reduced to a personal judgment. (1933, c. 181, s. 4.)

§ 8034(e). Notation to be made on record of certificates. — Upon taking notes for taxes as above described, the auditor or county accountant, or other officer having charge of tax sales certificates, shall enter a notation of the same on the record of the tax sales certificates, and shall state on said record, the amount of said note and the time the said installments thereof are payable, and the said officers shall endorse said tax sales certificates as follows: "Absorbed in a note given this day as provided by chapter

one hundred and eighty-one Laws of one thousand nine hundred thirty-three," and shall be signed by the said county accountant or other officer, and the said tax sales certificate shall be kept by the county accountant or other officer until the note taken therefor is paid or foreclosure proceedings thereon are completed. (1933, c. 181, s. 5.)

For amendment affecting Caswell county only, see Public Laws 1935, chapter 354.

§ 8034(f). Notes to be recorded in office of register of deeds.—Whenever a note is given and taken as heretofore provided, the same shall be registered in the office of the register of deeds of the county, in a book to be kept by him and marked "tax liens," said notes shall be prepared and recorded at the cost of the maker, and the fees for the same are hereby fixed as follows: For all work up to and including the drawing and execution of the note the sum of fifty cents to be paid to the county accountant or other officer doing the work. For probating the said note the clerk shall receive the sum of ten cents, and for recording and indexing same, the register of deeds shall receive the sum of fifteen cents: Provided, however, that in any county or city having such officials upon a salary basis, the above named fees shall be collected and paid into the general fund of such county or city. (1933, c. 181, s. 6.)

§ 8034(g). Tax liens for 1926 and prior years, not yet foreclosed, barred.—All tax liens held by counties, municipalities, and other governing agencies for the year one thousand nine hundred twenty-six and the years prior thereto, whether evidenced by the original tax certificates, or tax sales certificates, and upon which no foreclosure proceedings have been instituted, are hereby declared to be barred and uncollectible: Provided that no part of this section or of this part shall be construed as applying to liens for street and/or sidewalk improvements: Provided that this section shall not apply to Pamlico, Richmond and McDowell counties. (1933, c. 181, s. 7; c. 399.)

§ 8034(h). Extension of foreclosure on other taxes till October 1, 1934.—All counties, municipalities or other governing agencies holding tax sales certificates for lands for the years one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred twenty-nine, one thousand nine hundred thirty, and one thousand nine hundred thirty-one, whether foreclosure proceedings have been instituted or not, are hereby given until October first, one thousand nine hundred thirty-four, to institute said proceedings, with all the rights and privileges and liens which they had at any time heretofore, which rights shall be in addition to and not in abrogation of the rights heretofore granted for foreclosure in the event a note is taken as hereinbefore provided. (1933, c. 181, s. 8.)

Editor's Note.—For amendment affecting Caswell county only, see Public Laws 1935, chapter 354. For amendment affecting Brunswick and Caswell counties only, see Public Laws 1935, chapter 370. For amendment applicable only to the town of Clayton, see Public Laws 1935, chapter 419.

§ 8034(i). Schedule of discounts on delinquent taxes; interest and penalties to be remitted.—The governing authorities of the counties, municipalities or other subdivisions holding any claim for delinquent taxes upon lands for any of the years 1927, 1928, 1929, 1930 and/or 1931 are hereby authorized and directed to accept from any person or persons owning any interest in or holding any lien upon lands the principal amount of the taxes, less interest and penalties, in cash, less 10% if paid before April 1, 1934, or upon the installment plan provided for in section 8034(a): Provided the maker of any installment note may anticipate the payment thereof in whole or in part by paying the same in cash less 10% discount, if paid before installment is due: Provided further that a ten per cent discount shall be allowed on all delinquent taxes paid on or before December 1, 1933; seven and one-half per cent on all delinquent taxes paid after December 1, 1933, and before January 1, 1934; five per cent on all delinquent taxes paid after January 1, 1934, and before February 1, 1934; two and one-half per cent on all delinquent taxes paid after February 1, 1934, and before March 1, 1934. Provided, however, that this section shall not apply to taxes for the year 1932-1933: Provided that nothing in this section shall be construed to eliminate any costs of advertising or costs of foreclosure, it being the purpose and intention to only eliminate interest and penalties.

The provisos except the first shall not apply to any of those counties or municipalities which have by public, private or public-local laws amended this act in its application to said counties or municipalities. (1933, c. 181, s. 9; cc. 402, 548.)

For local amendments see, as to Alamance, c. 402, Public Laws 1933; as to Pitt, c. 513; as to Dare, c. 505; as to Nash, c. 389; as to Scotland, c. 218.

For amendment affecting Brunswick and Caswell county only, see Public Laws of 1935, chapter 370.

§ 8034(j). Provision as to lands of minors and tenants in common.—Whenever any lands, for which the counties, municipalities, or other governing agencies own tax sales certificates, or taxes are owned by minors or by several persons as tenants in common, the note heretofore provided for may be made and executed by either one or more of the tenants in common, and in case of a minor, by his or her guardian, or receiver, and the note when so executed, whether by one tenant in common alone or by a guardian, or receiver, shall constitute a lien on the whole interest in said land, if the taxes for which the tax sales certificates are held were taxes on the whole of said property. (1933, c. 181, s. 10.)

§ 8034(k). Rights of mortgagees to take title after notice to owners.—Any person, firm or corporation, who at the time of the purchase of any lands of any county or municipality at any tax sale is the bona fide owner or holder of a first mortgage or deed of trust covering the same, or any part thereof, for the payment of money or other valuable consideration, shall upon failure of the former owner or owners to take title thereto under this part within the time specified and after giving thirty days notice by registered mail to the last known address of said owner or owners be entitled to receive a deed therefor from the county or municipality in the same manner and under the same terms as provided for said owner or owners under this part. (1933, c. 181, s. 11.)

§ 8034(1). Lands already foreclosed and purchased by local units redeemable on five-year note; note secured by deed of trust. — Any county, municipality or other governmental agency which has heretofore bought lands under foreclosure proceedings are hereby authorized and empowered to convey the said land to the former owner for the amount of taxes, costs and charges which the said county, municipality or other governmental agency has paid for said lands and for the purchase price of said lands are hereby authorized and empowered to take a note from said former owner, payable in installments not to exceed five years and bearing interest at the rate of six per cent per annum. Said notes shall be secured by a deed of trust prepared and registered at the cost of the former owner, and providing for foreclosure upon default in the payment of any payment of principal or interest, provided that the said owner or owners or other persons interested shall take advantage of this option on or before the first day of April, 1934; and provided further that the county is still the bona fide holder of said lands; and provided further that the said owner or owners shall also include in said notes all subsequent taxes due on said land and that might have become due on said land if the said county, municipality or other governmental agency had not become the purchaser thereof under foreclosure proceedings. (1933, c. 181, s. 12.)

For amendment affecting Brunswick and Caswell counties only, see Public Laws 1935, chapter 370. For amendment affecting Caswell county only, see Public Laws 1935, chapter 354.

§ 8034(m). Redemption where certificate is in hands of third person.—Where any person has purchased a tax certificate in good faith, the owner is allowed to redeem same until April 1, 1934, by reimbursing the purchaser of the full amount paid with all necessary and proper expenses incurred, together with six per cent interest thereon. (1933, c. 181, s. 13.)

For amendment affecting Brunswick and Caswell counties only, see Public Laws of 1935, chapter 370.

§ 8034(n). Counties excepted.—None of the provisions of this part shall apply to Davidson, Forsyth, Orange, Hyde and Mecklenburg Counties: Provided, that this part shall not be mandatory in the following counties or municipalities therein, but within the discretion of the governing bodies of the said counties or municipalities therein, to-wit: Alleghany, Beauford, Cleveland, Gaston, Polk, Granville, Catawba, Lincoln, Wilkes, Guilford, Surry, Moore, Richmond, Camden, Durham, Rockingham, Burke, Caldwell, New Hanover, Halifax, Union and Hertford. (1933, c. 181, s. 14, cc. 226, 314, 329, 351, 377, 391, 424, 427, 471, 502.)

By section 2, c. 427, Public Laws of 1933 it is provided that the Tax Sales Certificates Refunding Act of 1933 shall not apply in Mecklenburg county. For amendments applicable in Chatham county only, see Public Laws 1933, c. 536; in Granville county, c. 304; in Beaufort, c. 314; and in Catawba, c. 315.

Part 4. Remedies of Purchasers at Tax Sales

§ 8035. Adjustment on sale by mistake.—When by mistake or wrongful act of the sheriff real estate has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing said land in the tax receipt, the county or other municipal corporation, shall reimburse the purchaser by paying to him the amount of principal and costs by him expended in such purchase, with interest thereon at six per centum per annum; and the sheriff shall be liable to the county, or other municipal corporation, upon his tax bond, for all amounts so expended by it, or the purchaser and assigns may recover such amount and interest directly from the sheriff in an action upon his tax bond. But the sheriff and his sureties in all such cases as are provided for in this section shall be liable only for the wrongful acts of the sheriff and his deputies. Any amount paid by the county under this section for State taxes shall, on proper certificate from the chairman of the board of county commissioners, be allowed by the auditor and paid by the State Treasurer. (1927, c. 221, s. 4.)

Editor's Note.—This section, with several others, was repealed by the Public Laws of 1927, but was re-enacted without change except for the word "said" after the word "describing" and preceding the word "land," in the first clause, being substituted for the word "such," formerly found at the place designated.

The provisions of this section do not apply to certificates of sale of land for taxes made prior to May 1, 1927, until May 1, 1928, and then only to such certificates of sale dated prior to May 1, 1927, as have not been the basis of sheriff's deeds executed prior to May 1, 1928.

§ 8036. Lien of purchaser.—The purchaser at a sale for taxes, and his heirs and assigns, shall have a lien on the real estate by him purchased at such sale for the amount of the purchase money paid and all interest, penalties, costs and charges allowed him by law; and if, after his purchase, he pays any taxes or assessments levied upon or which constitute an encumbrance upon such real estate, whether assessed before or after such purchase, he shall have a lien for all sums so paid out and for all interest, penalties, costs and charges allowed him by law. (1927, c. 221, s. 4.)

Editor's Note.—This section was one of the group repealed by the Public Laws of 1927, but it was re-enacted without change save for the addition of the words "or assessments" found near the middle of the section.

Amount Paid under Irregular Deed Recoverable.—A purchaser of land at a tax sale under the statute, subsequently acquiring an invalid title by reason of insufficient description, or void for not having been made within the statutory time, is entitled to have the amount he has paid therefor declared a lien on the land in his favor. Southern Immigration Improvement, etc., Co. v. Rosey, 144 N. C. 370, 57 S. E. 2.

Cited in Orange County v. Wilson, 202 N. C. 424, 163 S. E. 113.

§ 8037. Purchaser shall foreclose. — Every holder of a sheriff's certificate of sale or real estate for taxes shall have the right of lien against all real estate described in the certificate as in case of mortgage, and shall be subrogated to the rights of the state and of the county, or other municipal corporation, for the taxes for which such real estate was sold, and shall be entitled to a judgment for the sale of such real estate for the satisfaction of whatever sums may be due to him upon such certificate of sale and for any other amounts expended by him upon any other such certificate of sale of such real estate, or for taxes or assessments paid which were a lien upon such real estate, whether paid prior or subsequent to the acquisition of such certificate of sale. Such relief shall be afforded only in an action in the nature of an action to foreclose a mortgage, which action must be commenced as herein provided. Such action shall be governed in all re-

spects as near as may be, by the rules governing actions to foreclose a mortgage. The person in whose name said real estate has been listed for taxation, together with the wife or husband, if married, shall be made defendants in said action and shall be served with process as in civil actions.

Notice, by posting at the courthouse door, shall be given to all other persons claiming any interest in the subject matter of the action to appear, present and defend their claims. Said notice shall describe the nature of the action and shall require such persons to set up their claims in six months from the date of the final appearance of the general advertisement of such notice as required herein or at any time before the order to make deed is made, otherwise they shall be forever barred and foreclosed of any and all interest or claims in/or to the property or the proceeds received from the sale thereof. General advertisement shall be made of such notice by publication, which advertisement shall appear once a week for four successive weeks and shall contain substantially the following:

FORECLOSURE SUITS FOR TAXES

ACTIONS INSTITUTED DURING THE MONTH OF

....., 19.....

..... Advertisement.

(First, second, third, or final)

Names of Plaintiffs. Names of Defendants. Township. Year Taxes Delinquent.

The cost of the general advertisement shall be prorated and taxed against each defendant. Upon the return of the summons executed upon the taxpayer, his/her wife or husband, the court shall proceed to judgment without awaiting the six months allowed to other claimants. In case the action is prosecuted by the state, county or other municipality, no prosecuting bond shall be required to be deposited or paid any officer; costs shall be taxed against the defendant or defendants as in other cases and after and when collected shall be paid to the officers entitled to receive the same: Provided, the fees allowed any officer shall not exceed one-half such fees allowed in other civil actions. The deed which shall be made to the purchaser as hereinafter provided for, shall convey the real estate to the purchaser in fee simple free from any and all claims or interest of the taxpayer his/her wife or husband or of any other person.

In the complaint filed in such action each certificate of sale held by the plaintiff and each sum expended by him for taxes or assessments on such real estate, or claimed by him as a lien on same, shall be set out separately. The description set out in the tax sale certificate shall be sufficient to support the lien and certificate of sale and the court shall require a description which is in fact and in law sufficient description of the real estate to be set out in the published notice, if any, as above provided, and in the interlocutory judgment of sale and in the final judgment of confirmation and to the end that such description may be obtained, the resident or presiding judge may order a survey of said real estate, if in his opinion a survey is necessary.

Every county, or political subdivision of the state which is now, or may hereafter become, the holder by purchase at sheriff's sale of land for taxes of any certificate of sale, shall bring action to foreclose the same within twenty-four months from the date of the certificate: Provided, however, the board of commissioners of any county or the governing body of any municipality shall employ an attorney to conduct such actions and shall fix his compensation which shall be paid out of the general fund and shall cause to be taxed in the bill of costs a fee which in no event shall exceed ten dollars ($10.00) in each suit for foreclosure for the purpose of reimbursing the general fund for the compensation of said attorney, and: Provided, further, no process tax shall be taxed for the use of the state against the defendant in any action to foreclose a certificate of sale.

The certificate of sale shall bear interest at the rate of ten per centum per annum on the entire amount of taxes and sheriff's cost, for a period of twelve months from the date of sale and thereafter shall bear interest at the rate of eight per centum per annum until paid, or until the final judgment of confirmation is rendered, but every holder of a certificate other than county, municipal corporation or other political subdivision, shall, in case said action is not instituted within eighteen months from the date of the first certificate of sale, only receive after the expiration of eighteen months on all amounts expended on, or in connection with, said purchase interest at the rate of 6 per centum per annum. In any action to foreclose the cost shall be taxed as in other civil actions and shall include an allowance for the commissioner appointed to make the sale, which shall not be more than 5 per centum of the amount at which the land is sold and one reasonable attorney's fee for plaintiff.

All certificates of sale evidencing purchases by counties shall immediately, upon being allowed as a credit in the settlement with the sheriff of the county, be delivered to the county accountant, county auditor, or other officer, specifically designated by the board of county commissioners, or other governing board of the county, except sheriff or tax collecting officer, and it shall be the duty of the officer, or such officer designated, to collect the same. In making the collection he shall collect interest at the rate provided in this chapter, which shall not be remitted either by said officer or the governing board of the county, or other political subdivision. If, at the end of sixteen months from the date of the certificate of sale, full collection of the tax, interest and cost has not been made, such officer shall proceed to foreclose the certificate of sale under the provisions of this article, and said action shall be instituted within twenty-four months from the date of the certificate of sale. Such officer shall call upon the county attorney to conduct the action to foreclose the certificate of sale and it shall be his duty to prosecute said action as vigorously as may be necessary to obtain early final action. After the institution of the action by counties or municipalities, the taxpayer shall have no right of redemption except upon the payment of the full tax, interest and other sums, and all cost and allowances, provided that the institution of the action to foreclose, shall not affect the rate of interest to be collected and the governing board of the county, or municipality, shall have no authority to remit or reduce the interest due un-

der the certificate of sale, or otherwise interfere with the action to foreclose. Where the certificate of sale is taken by a municipality, all the provisions of this section shall apply to the foreclosure of such certificate of sale and to its collection and the governing authorities of the municipality may place such certificates of sale in the hands of one of its officers for collection and he shall have the same authority to collect them as the officer herein provided for counties. (1927, c. 221, s. 4; 1929, c. 204, ss. 2, 4; 1929, c. 334, s. 2; 1931, c. 260, ss. 1-5; 1933, c. 532, s. 1; 1935, c. 313.)

Cross Reference.—As to the constitutionality of Public Laws 1931, c. 260, § 3, if it attempts to revive a right of action, see Wilkes County v. Forester, 204 N. C. 163, 167 S. E. 691.

As to enforcement of tax lien in foreclosure, see section 7990 and the note thereto.

Editor's Note.—Before the act of 1927, c. 221, the purchaser of land at a tax sale could take a deed from the sheriff or bring a suit for foreclosure as in case of a mortgage. This was changed by that act, and the remedy was limited to a foreclosure (§ 8028) according to the method provided in the act. This was found to be rather burdensome and expensive, and the acts of 1929 made the procedure somewhat shorter and simpler and reduced the expense. This, however, was still found to be expensive and gave rise to much complaint, especially since in the great majority of sales the county or the municipality was forced to become the purchaser and then to bring the suits for foreclosure. The Act of 1931 also made some important changes in the practice, as will be seen from a comparison of the present with the former section. 9 N. C. Law Rev. 396.

The Act of 1931 as amended by Public Laws 1931, c. 389, provided: "Any person, corporation or firm, or the board of commissioners of any county or the governing body of any municipality holding a certificate of sale on which an action to foreclose has not been brought but according to the terms of chapter two hundred twenty-one of the Public Laws of one thousand nine hundred and twenty-seven as amended should have been brought, shall have until the first day of December, one thousand nine hundred thirty-one, to institute such action. This section and extension shall include all certificates executed for the sales prior to and including sales for the tax levy of the year one thousand nine hundred twenty-eight. The board of commissioners or the governing body of any county or municipality holding any certificate upon which action, has been brought, but upon which final judgment of confirmation has not been rendered, may, by recorded resolution, cause such action to be held in abeyance until the first day of December, one thousand nine hundred thirty-one, and the court shall abide by such resolution: Provided, however, that where any action to foreclose has heretofore been instituted or brought for the collection of any tax certificate, prior to the ratification of this act, under the then existing laws, nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action. When a certificate of sale is held by a county and also by a city or town for the same tract or parcel of real property, both of such governmental units may be joined as parties plaintiff in the same foreclosure action, and in such event the proceeds derived from a foreclosure sale of such real property, or so much thereof as may be necessary to satisfy the claims, shall be apportioned by the Court to the parties according to their respective liens."

As to provision excepting pending litigation, etc., see note to section 8017.

The provision in the third paragraph that the deed executed under the order of foreclosure shall convey to the purchaser the land free from the claims of all persons, probably means the claims of the defendants served with process will be immediately barred by the judgment, and the claims of others notified by publication will be barred after the expiration of the six months. 9 N. C. Law Rev. 399.

Public Laws of 1929 ch. 207, applicable only to Caldwell County, struck out all of paragraph five of this section and the words "and said action shall be instituted within eighteen months from the date of the certificate of sale" formerly appearing in lines 19 to 20 of the last paragraph of the section. Public Laws 1929 ch. 151 made the same amendments as to Bladen County.

Public Laws 1929 ch. 207 provided: "Whenever Buncombe County or any municipal corporation or political sub-division of the state therein, is required to institute actions for the foreclosure of tax sale certificates under the provisions of this section, the County Attorney shall be and he is hereby relieved of any duty to institute and prosecute such actions, and the Board of County Commissioners of said county, is authorized to institute and prosecute such actions through counsel to be designated by said Board or governing body, or the governing body of such municipal corporation or political sub-division.

Public Laws of 1933, c. 532, inserted, near the middle of the second paragraph of this section, the words "or at any time before the order to make deed is made."

Public Laws 1933, c. 560, in repealing Public Laws 1933, c. 148, provides: In no event shall the attorney fee exceed two dollars and fifty cents in each suit for foreclosure; the total cost of the taxpayer including attorneys' fee shall not exceed six dollars, including the newspaper advertisement which shall not exceed three dollars, and the interest and penalty on tax sale certificates shall be eight per centum per annum. So far as the provisions of laws in force on January 1, 1933, relate to taxes levied in 1932 and 1933, all actions and proceedings required to be taken in the months of May, June, and July, in the years 1933 and 1934, shall be taken in the months of August, September, and October, respectively. Suits to foreclose certificates evidencing sales in 1931 and prior years for taxes or special assessments on real property may be brought at any time not later than October 1, 1934. The act also provides that nothing therein shall be construed as repealing any of the provisions of sections 2492(36), 7880-(196), 8034(a)-8034(n), any part of the Machinery Act of 1933, or any private or public-local act of 1933, relating to the levy or collection of taxes in Mecklenburg, Gaston, Ashe, Macon, Davidson, Swain, Wayne, Pitt, Guilford, Lee, Yancey, Craven, and Henderson counties. The act further provides that it shall not effect Wake county or any suit pending in Guilford county on the 8th day of April, 1931, in which the real estate affected shall not be redeemed before the final sale.

Public Laws of 1933, chapter 560, is amended by Public Laws of 1935, chapters 108, 305, 368, 428, 448.

For an act applicable in Northampton County only, see Public Laws of 1935, chapter 103. For an act applicable in Mitchell county only, see Public Laws of 1935, chapter 217, as amended by chapter 349. For amendment limiting the time to the years 1935 and 1936, see Public Laws of 1935, chapter 234, as amended by chapters 336, 366, 395; Public Laws of 1931, chapter 260, as amended by Public Laws of 1935, chapter 368. For an act relating to Granville county only, see Public Laws of 1935, chapter 286.

Requirements Mandatory.—Under this section, a good tax title can be obtained by sale, but the statute must be strictly followed. Bryson v. McCoy, 194 N. C. 91, 97.

This section is intended to facilitate the collection of taxes and to assure purchasers at tax sales that there is such a thing as "a good tax deed." Buncombe County v. Arbogast, 205 N. C. 745, 748, 172 S. E. 364.

The limitation on the time for bringing the action under this section has no application to the foreclosure of the lien of taxes under section 7990. New Hanover County v. Whiteman, 190 N. C. 332, 129 S. E. 808. See note of this case under section 7990.

The State as a sovereign power has the right to prescribe by statute the notice to be given to those interested in lands to be foreclosed under tax sale certificates except where the manner of notice interferes with the provisions of the Federal Constitution, and a statutory provision that substitutes notice by publication to be given in the newspapers as in an action in rem does not violate the "due process" clause of the Federal Constitution, and the purchaser at the judicial foreclosure sale, when fairly made in conformity with the provisions of this and following sections acquires title free from the claims of those who may have an interest in the locus in quo who do not appear and defend their rights. Orange County v. Jenkins, 200 N. C. 202, 156 S. E. 774.

Service Is Complete upon Compliance with Section.—This section designates those upon whom original process must be served and requires nothing more than constructive service upon all other persons who claim an interest in the subject-matter; and when these provisions are complied with the service is complete. Orange County v. Wilson, 202 N. C. 424, 427, 163 S. E. 113.

Legal and Equitable Owners May Appear and Move That Deed Be Cancelled.—The legal and equitable owners of land, although not parties to the suit to foreclose a tax certificate on the land, as provided by this section, may appear and make a motion to cancel the deed to the purchaser at the sale, and to make the purchaser at the sale a party to the action, on the grounds that the land was not listed in the name of the true owner, as provided by §§ 7971(15), (36), and that the service by publication obtained in the action was void because the listed owner was a resident of

the county. Buncombe County v. Penland, 206 N. C. 299, 173 S. E. 609.

Rights of Mortgage Lien Holders.—Where those claiming a mortgage lien on lands have their mortgage on record before the beginning of proceedings to enforce the tax lien on the lands and have been served by publication in the action to foreclose the tax certificate, in accordance with the provisions of this section, and within six months from the service by publication they appear and file answers, their mortgage liens are not affected by the sale of the lands by a commissioner appointed by the court in the action to foreclose the tax certificate, and upon establishing their interest in the land, they are entitled to have the judgment and sale of the land declared void, and the deed to the purchaser at the sale set aside upon reimbursing the purchaser for the amount of taxes paid plus interest, penalties and costs. Street v. Hildebrand, 205 N. C. 208, 171 S. E. 58.

It is necessary that the holders of liens under prior registered mortgages be made parties and be duly served with summons in proceedings to foreclose a tax sale certificate in order for the purchaser at the sale to obtain title free from the lien of the encumbrances, the holders of such liens being entitled to notice and an opportunity to be heard under the fundamental law of the land as a part of due process, and the provisions of this section cannot affect this fundamental right of notice and hearing. Beaufort County v. Mayo, 207 N. C. 211, 176 S. E. 753.

This section eliminates the purchaser's right to demand a deed and provides that relief shall be afforded only in an action in the nature of a suit to foreclose a mortgage. For historical background, see Forsyth County v. Joyce, 204 N. C. 734, 738, 169 S. E. 655.

When Owner Is Minor.—Under the provisions of this section an action instituted in September, 1929, against the person in whose name the land was listed to foreclose tax certificates for the years of 1924, 1925, 1926, and 1928, in which the minor owner was made a party by summons issued in February, 1932, is not barred by the statute of limitations. Forsyth County v. Joyce, 204 N. C. 734, 169 S. E. 655.

As to actions against minors, see § 451 and notes thereto.

Remedy Is Ineffective after Eighteen Months.—Even if the sovereign elects or chooses to foreclose the sale certificate, this section sets the time clock on eighteen months from the date of the certificate, and after the lapse of that period, the remedy is ineffective. Logan v. Griffith, 205 N. C. 580, 582, 172 S. E. 348.

County Bound by Limitation. — Where a county has purchased certain land at a tax sale and elects to proceed to foreclose its tax certificate under the provisions of § 8028, the county is bound by the limitation prescribed by this section, and its action to foreclose such certificate is barred after the elapse of eighteen months from the date of the purchase of the certificates when the limitation prescribed by the statute is properly pleaded. Wilkes County v. Forester, 204 N. C. 163, 167 S. E. 691.

The lien for taxes can be enforced by the State or its political subdivisions under § 7990, and no statute of limitations applies to the sovereign in such action, but where the State or its political subdivisions elect to proceed under this section, the limitations therein prescribed apply. Reichland Shale Products Co. v. Southern Steel, etc., Co., 200 N. C. 226, 156 S. E. 777.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Craven County v. Parker, 194 N. C. 561, 140 S. E. 155.

§ 8037(a). Neglect of duty by officer misdemeanor. — Any officer required by this act to collect certificates of sale, or foreclose the same, or designated by the governing board of any county to perform said duties, who shall neglect his duties with respect thereto, shall upon conviction be guilty of a misdemeanor and subject to such fine or imprisonment as may be imposed by the court in its discretion and, in addition thereto, shall be liable for any loss resulting from his negligence. (1927, c. 221, s. 4.)

Public Laws 1929, ch. 149, § 2, repealed this section as to Buncombe County.

§ 8037(a½). Judgments pro confesso by clerk as to non-answering defendants.—In any action to foreclose the certificate of sale under the provisions of this act when it has been properly instituted and all party defendants have been properly served and the complaint is duly verified and and no answer is filed by some or all of said defendants, the clerk of the superior court in which such action is instituted may give a judgment pro confesso in which all the essential facts alleged in the complaint are recited against those defendants not answering. If none of the defendants, so properly served, file any answer, said clerk may proceed and make the orders provided for in this section without transferring the cause to the superior court in term time, and the same jurisdiction in such cases to make such orders as that conferred upon the resident judge of the superior court or the judge riding the district, is conferred upon the clerk. Where any of the parties, however, have answered and the answer creates any issue as to those parties, the subsequent proceedings shall be as provided in § 8037 as amended, except that the judgment pro confesso shall bind the parties who have not answered, and the facts so found shall be taken by the judge of the superior court as binding upon those particular defendants. But no such judgment shall be effective, or be made to become effective, until final order to make deed is made. (1929, c. 204, s. 3; 1933, c. 532, s. 2.)

Editor's Note.—Public Laws of 1933, c. 532, added the last sentence of this section as it now reads.

Judgment by Default as Creating Estoppel.—Where the county has bid in land sold by it for nonpayment of taxes and assigned the certificate to another for value, and the assignee has brought action to foreclose his certificate in which summons has been served on the owners of the land in whose name the lands had been listed, a judgment by default final for the want of an answer will estop the original owners of the land or those claiming under them from claiming title as against the purchaser at the sale of the lands by the commissioner appointed by the court in the foreclosure proceedings. Street v. Hildebrand, 205 N. C. 208, 171 S. E. 58.

§ 8037(b). Filing of list of liens by lien holder with registers of deeds. — Between the first day of December and the first day of May after taxes are due, any lien holder or interested party may file a list with the register of deeds containing the names of taxpayers on whose property a lien or interest is held showing such information with respect to each of such taxpayers as is hereinafter required to be recorded by said register of deeds. Such list shall be accompanied by a fee of ten cents for each name contained therein and may be filed with the register of deeds by registered mail with a return receipt requested therefor. It shall thereupon be the duty of the register of deeds to record such list in a book designated as "Record of Taxes for Mortgagees" and such record shall contain with respect to each taxpayer included in such list as filed the following:

The date when the list was filed,

The name of the taxpayer,

The name and address of the lien holder or other interested party,

The book and page in his office wherein such lien or liens are recorded, and

If said property is subject to taxes of a municipality, the name of such municipality.

The register of deeds shall keep a cross-index of such "Records of Taxes for Mortgagees" and in any action to foreclose a certificate of sale, all lien holders or other interested parties having filed a list as provided herein and if such list

contains the name of the defendant in the action, shall be made parties to said action and the cost of the service of the summons shall be taxed against the lien holder. The rights of such lien holders shall not be affected unless made parties to the action. (1931, c. 260, s. 6.)

This section cannot affect the fundamental law requiring notice and opportunity to be heard. Beaufort County v. Mayo, 207 N. C. 211, 216, 176 S. E. 753.

Part 5. Redemption from Tax Sales

§ 8038. Manner of redemption.—The owner or occupant of any land sold for taxes, or any person having a lien thereon or any interest or estate therein, may redeem the same, at any time within one year after the day of such sale, by paying the sheriff for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest thereon at the rate of twenty per centum per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year previous or subsequent to such sale, and interest thereon at the same rate from the date of such payment, together with all costs and provisions of this chapter. The sheriff shall enter a memorandum of the redemption in the list of sales and give a receipt therefor to the person redeeming the same, for which he may charge a fee of twenty-five cents, to be paid by the person redeeming, and shall hold the redemption money paid, subject to the order of the purchaser, his agent or attorney. But if any such purchaser, other than a county or other municipal corporation, shall suffer such real estate to be again sold for taxes, he shall be entitled to only ten per cent interest, instead of twenty per cent, as allowed in this and the next preceding section. Infants, idiots, and insane persons may redeem any land belonging to them within one year after the expiration of such disability on like terms as if the redemption had been made within one year from the date of said sale and from the date of each subsequent payment of taxes thereon at the rate of twenty per centum per annum on the several amounts so paid by the purchaser until redemption. (Rev., s. 2913; 1901, c. 558, ss. 11, 12.)

Cross Reference.—For full treatment of the subject, see 11 N. C. Enc. Dig. 637 et seq.; 15 N. C. Enc. Dig. 569 et seq. As to forfeiture by life tenant failing to redeem, see section 7982 and the note thereto; as to redemption by remaindermen, see note of Smith v. Miller, 158 N. C. 98, 102, 73 S. E. 118, under section 7982.

Editor's Note.—For an act, purporting in its caption to be applicable in Buncombe county only but general in its terms, providing for the redemption of land sold during 1928, 1929, and 1930, see Public Laws 1933, c. 280.

Statutory Requirements Mandatory.—To be entitled to redeem land from a tax sale, the person must comply with the requirements of this section, and the right exists only when this is done. Jones v. Schull, 153 N. C. 517, 69 S. E. 498.

Sole Remedy of Landowner.—The right of redemption given by this section constitutes the sole remedy of the landowner or occupant. Townsend v. Drainage Commissioners, 174 N. C. 556, 560, 94 S. E. 104. Citing and approving, Beck v. Meroney, 135 N. C. 532, 47 S. E. 613.

Exercise of Right on Last Day.—Where an owner of land has until a certain day to redeem land sold for taxes, a tender of the tax on that day by the owner or his agent, is in time. Thomas v. Nichols, 127 N. C. 319, 37 S. E. 327.

Erroneous Calculation by Sheriff.—When the amount necessary to redeem is erroneously calculated by the sheriff, and the amount so computed is paid by the owner, such payment constitutes a redemption, as the party redeeming has the right to rely on the statement of the state's officer as to the amount due. Beck v. Meroney, 135 N. C. 532, 47 S. E. 613.

Error of Few Cents in Fixing Amount.—Where the owner or his agent inquires of the sheriff, or his deputy in charge, the amount to be paid for the redemption, such owner or his agent has a right to regard the amount so stated as correct, and an error of a few cents made by the sheriff in fixing the amount will not be held fatal. Thompson v. Whitehall Co., 203 N. C. 652, 166 S. E. 807.

Medium of Payment.—It is sufficient to make payment to the sheriff by check. Beck v. Meroney, 135 N. C. 532, 47 S. E. 613.

Applicability to Minors.—The last clause of this section so far as it affects minors, is not now effective. Forsyth County v. Joyce, 204 N. C. 734, 739, 169 S. E. 655.

Redemption by Infants—Extension of Time.—For a minor to be entitled to an extension of time, beyond the statutory period, he must have been the owner of the property at the time of the sale. McMillan v. Hogan, 129 N. C. 314, 40 S. E. 63. Failure to redeem after one year of the removal of his disability, will bar the infant's right to redeem. Jones v. Schull, 153 N. C. 517, 69 S. E. 498.

Same—Death of Owner During Redemption Period.—The death of the owner of land, sold for taxes, before the expiration of the period given for redemption, does not extend the time for redemption until the owner's infant heirs become of age. McMillan v. Hogan, 129 N. C. 314, 40 S. E. 63.

Effect of Redemption on Subsequent Deed.—Where the property owner exercises his right to redeem before the county commissioners direct the execution of a deed to the purchaser, the deed is ineffectual. Merrimon v. Lyman, 124 N. C. 434, 32 S. E. 732. As to effect of husband's tender to redeem land belonging to his wife, see note of Eames v. Armstrong, 146 N. C. 1, 59 S. E. 165, under section 8019.

Applied in Braswell v. Richmond County, 206 N. C. 74, 173 S. E. 41.

Cited in Hines v. Williams, 198 N. C. 420, 152 S. E. 39; Buncombe County v. Arbogast, 205 N. C. 745, 749, 172 S. E. 364.

§ 8039. To whose benefit it inures.—Any redemption made shall inure to the benefit of the person having the legal or equitable title to the property redeemed, subject to the right of the person making the same to be reimbursed by the person benefited, which reimbursement is hereby made a condition precedent to the vesting of any interest or estate, under the benefits of this section, in the real estate redeemed in the person whose duty it is to make such reimbursement. (Rev., s. 2914; 1901, c. 558, s. 11.)

Art. 15. Sheriff's Settlement of Taxes

Part 1. Settlements with State Treasurer

§ 8040. Record of settlement of taxes kept.—Every sheriff shall keep a record of the taxes collected by him from the clerk of the court, register of deeds, and under schedule B of license taxes in this chapter. A suitable book for the purpose shall be provided by the state auditor for recording all forfeitures, arrears from insolvents, double taxes and taxes on unlisted subjects; and on the first Monday in December in each year the sheriff shall deliver, on oath, to the board of commissioners a statement setting forth all sums received to that date not previously accounted for, the date of such receipts, the person from whom received, the amount received from each person, the subjects on which received, and the aggregate amounts, accompanied by an affidavit taken and subscribed before the clerk of the commissioners and attested by him, that the statement is correct, and that no receipts have been omitted; and the register of deeds shall record the same in a book to be kept for that purpose, and shall, before the second Monday in December, send an abstract of such statement, with the affidavit, to the state auditor,

on a blank to be furnished by the state auditor, record the same in a book kept in his office for that purpose, and keep a copy of the same in a conspicuous place in the courthouse until the first day of January next ensuing. (Rev., s. 5244; 1917, c. 234, s. 89; 1919, c. 92, s. 100.)

§ 8041. How insolvents allowed.—No tax due from insolvents shall be credited to the sheriff in settlements with the state auditor except such as shall be allowed by the board of commissioners, a list whereof, containing the names and amounts and subscribed by the sheriff, shall be returned by him to the board of commissioners, and the same shall be allowed only on his making oath that he has been at the dwelling-house or usual place of abode of each of the taxpayers and could not there or elsewhere in the county find any property wherewith to discharge his taxes or such part thereof as is returned unpaid, and that the persons named in the list were insolvent at the time when by law he ought to have endeavored to collect the taxes. Such list shall be recorded in the commissioners' docket and a copy thereof shall be returned to the state auditor on or before the day of the settlement of the sheriff with the treasurer. (1917, c. 234, s. 89; 1919, c. 92, s. 89.)

§ 8042. Time and manner of settlement.—The sheriff or other accounting officer shall, on or before the second Monday of January in each year, settle his estate tax account with the commissioners of his county and pay the amount for which said sheriff or collector is liable to the treasurer of the state, in such manner or at such place as he shall direct, on or before the third Monday of said month: Provided, the state treasurer may extend the time on a sufficient amount to cover the state tax on the land sales in each county to the first Monday in May. The commissioners shall forthwith report to the state auditor the amount due from such accounting officer, setting forth therein the net amount due to each fund; and the treasurer, upon a statement from the state auditor, shall open an account against such officer and debit him accordingly. Upon the failure of the board of county commissioners to make this report to the state auditor on or before the third Monday of January of each year, or if a report has been filed which is not correct and the commissioners fail to file an amended and corrected report within thirty days after being notified so to do by the state auditor, the commissioners of such county shall each personally be liable to a penalty of one hundred dollars, and it shall be the duty of the state auditor forthwith to institute an action in the county of Wake to enforce the same. The sheriff or tax collector, in making his settlements as aforesaid, shall file with the commissioners a duplicate of the list required in this chapter. In such settlement the sheriff or other officer shall be charged with the amount of public tax as the same appears by the abstract of the taxables transmitted to the state auditor; also with all double taxes on unlisted property by him received, and with other tax which he may have collected or for which he is chargeable. The state auditor shall give to each sheriff or tax collector a certified statement embracing the subjects of taxation contained in both lists and the amount of tax on each subject which the sheriff or tax collector shall deposit with the clerk of the commissioners of his county for public inspection. The sheriffs and tax collectors shall receive five per cent on all taxes collected by them for state, county, township, school district, or other purposes whatsoever, up to the sum of fifty thousand dollars, and upon all such sums so collected by him in excess thereof he shall receive two and one-half per cent commission, and the sheriffs or tax collectors shall receive for their own use, in addition to other fees or salary received by them, commission of five per cent on all privilege and license taxes collected under schedule B of the revenue act, and any provision in any local act in conflict with this provision is hereby repealed. All laws and clauses of laws, whether general or special, in conflict herewith are hereby repealed: Provided further, that this section shall not apply so as to affect the compensation of the sheriff or tax collector of Buncombe county as fixed by private statute. (Rev., s. 5245; 1917, c. 234, s. 101; 1919, c. 92, s. 101.)

As to sheriff's duty to settle school tax, and penalty for failure to do so, see section 5500 and note thereto.

The Settlement Has Attributes of Contract.—An account stated and settlement between a county and its tax collector have the force of a contract, and operate as a bar to a subsequent accounting, except upon a specific allegation of fraud or mistake. Settle v. Doggett, 87 N. C. 203.

Failure of Sheriff to Pay—Action by Commissioners.—It was held in Commissioners v. Clarke, 73 N. C. 255, that no action upon the bond of a sheriff for a failure to pay taxes could be brought on the relation of the commissioner except on the failure or refusal of the county treasurer to bring the action.

Fees of Sheriff Regulated by Legislature.—The regulation of the sheriff's fees is within the control of the legislature and may be reduced during the term of the incumbent. Commissioner v. Stedman, 141 N. C. 448, 54 S. E. 269.

Same—Basis of Compensation Changed—(1) Right of Out-Going Sheriff.—A sheriff whose term of office expires is entitled to collect the taxes on the lists in his hands and to receive commissioner therefor, notwithstanding the office has been placed upon a salary basis for his successor. Commissioner v. Bain, 173 N. C. 377, 92 S. E. 176. As to presumption surrounding such an act of the legislature, see note of this case under section 3207.

Same—Same—(2) Where Sheriff Re-Elected.—Upon the re-election of the sheriff he receives only the salary fixed by the act of legislature changing the basis of compensation. Miller v. Deaton, 170 N. C. 386, 87 S. E. 123.

Same—Drainage Districts.—This section, allowing sheriffs a commission of 5 per cent on "assessments collected," refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein, and commissions on assessments for maintenance are limited to 2 per cent by Laws 1909; and this construction is not affected by the repeal of sec. 36, Laws 1909, by ch. 152, sec. 2, Laws 1917. Commissioners v. Davis, 182 N. C. 140, 108 S. E. 506.

§ 8043. Deductions allowed sheriff.—The state auditor, in making the settlement of the amount due from the sheriff or tax collector aforesaid, shall deduct from the list returned—

1. Taxes on personal property certified by the clerk of the commissioners of the county, by order of the commissioners, to be insolvent and uncollectible.

2. All overpayments made in former settlements by reason of any error in the clerk's abstracts of taxables.

3. The commission allowed by law. (Rev., s. 5246; 1917, c. 234, s. 102; 1919, c. 92, s. 102.)

Scope of Deduction.—The State Auditor is permitted under this section to make deduction of over-payment in the

settlement for taxes collected when there is error in the "clerk's abstract of taxables," and the sheriff is "charged with more than the true amount," etc. (section 8047) and though the same deductions and corrections are permitted the county in making settlement under section 1322, these statutes are inapplicable when the credits claimed are not for either of these causes. Commissioners v. Hall, 177 N. C. 490, 99 S. E. 372.

The foregoing decision was placed on the ground that "to do otherwise would be to permit an offset or counterclaim." It is to be noted that by the 1927 amendment, taxes are made a debt for all purposes. It would seem that offset and counterclaim are now applicable to taxes.—Ed. Note.

§ 8044. Sheriff's compensation for settlement.—For his settlement with the state treasurer the sheriff or tax collector shall be allowed by said board of commissioners, and deducted from the amount due the state, three dollars for each day he may be actually necessarily engaged therein with the commissioners at the county-seat. (Rev., s. 5247; 1917, c. 234, s. 103; 1919, c. 92, s. 103.)

§ 8045. Penalty for failure to settle.—In every case of failure by the sheriff or other accounting officer to settle his account within sixty days from the time prescribed by section 8042 for such settlement, and to take the oath required in his settlement and pay the amount due to the treasurer, the state auditor shall forthwith report to the treasurer the account of such sheriff or officer, as shown by abstract of listed and unlisted taxables furnished by the register of deeds or auditor for such county, deducting therefrom for commissions, but adding thereto one thousand dollars and ten per centum of the amount of taxes with which said sheriff is charged for the amount of taxes supposed not to appear in the list transmitted by the register of deeds or auditor, and furnish him a copy of the official bond of the said officer and his sureties; and if the whole amount be not paid, the treasurer, on motion of the solicitor in superior court of Wake county, before the clerk thereof, within thirty days after default shall have occurred, shall recover judgment against him and his sureties, without other notice than is given by the delinquency of the officer; and to the end that obligations and names may be known, the clerk of the superior court shall, on or before the second Monday in each year, transmit to the state auditor a copy, certified under the seal of the court, of the bond of the sheriff and his sureties, upon pain for his default of forfeitng to the state one thousand dollars, which the state auditor shall and is hereby specially charged to collect in like manner and at such times as is provided in this section. (Rev., 5248; 1917, c. 234, s. 104; 1919, c. 92, s. 104.)

Constitutionality.—This section is constitutional. Worth v. Cox, 89 N. C. 44.

Where Payment Obtained before Clerk.—It is no valid objection to a judgment obtained on a sheriff's bond, for his failure to collect and pay over the public taxes, that the judgment was obtained before the Clerk of the Superior Court, and that the same was also taken without notice to the sureties. Prairie v. Jenkins, 75 N. C. 545. Nor is it essential that a demand be made. McGuire v. Williams, 123 N. C. 349, 31 S. E. 627.

§ 8046. Penalties may be released.—The treasurer of the state, with the advice and approval of the attorney-general, is hereby authorized, when in the judgment of these officers it may be best to secure the interest of the state and will not lose any lien held by the state, to grant indulgence to defendants in execution and relinquish penalties upon payment of amount of dues owing to the state; and likewise to bid for in behalf of the state and purchase property of said defendants when deemed necessary to secure the payment of the dues. (Rev., s. 5252; 1917, c. 234, s. 106; 1919, c. 92, s. 106.)

§ 8047. Sheriff may recover overpayment.—If a sheriff or tax collector shall, in consequence of an error in the abstract of taxes sent to the state auditor, or otherwise, be charged with more than the true amount with which he should be chargeable, and pay the amount so charged in excess to the treasurer of the state, the auditor shall, upon the certificate of the board of commissioners setting forth the nature of such error, give his warrant upon the treasurer of the state for the amount so paid in excess, and the treasurer shall pay the same. (Rev., s. 5261; 1917, c. 234, s. 80; 1919, c. 92, s. 80.)

The errors under this section are confined to those causing the sheriff to be "charged with more than the true amount with which he should be chargeable." Commissioners v. Hall, 177 N. C. 490, 492, 99 S. E. 372.

Part 2. Settlement of County Taxes

§ 8048. Time for settlement of county taxes.—The sheriff or tax collector shall pay the county taxes to the county treasurer or other lawful officer. He shall at no time retain over three thousand dollars for a longer time than ten days under a penalty of two per centum per month to the county upon all sums so unlawfully retained, and shall, on oath, render a statement to the board of commissioners at their monthly meeting of the amount in his hands. On or before the first Monday of February in each year the sheriff shall account to the county treasurer or other lawful officer for all taxes due the county for the fiscal year, and on failing to do so he shall pay the county treasurer a penalty of two per centum per month on all sums unpaid, and this shall be continued until final settlement: Provided, the board of county commissioners may in their discretion relieve the sheriff or tax collector of said penalty of two per centum per month upon payment in full of the county taxes: Provided further, the county commissioners may extend the time of settlement of county taxes by the sheriff of the county to the first Monday in May. (Rev., s. 5249; 1917, c. 234, s. 105; 1919, c. 92, s. 105.)

§ 8049. Manner of settlement.—The sheriff or tax collector shall be charged with the sums appearing by the tax list as due for the county taxes, and shall be allowed to deduct therefrom, in like manner as is prescribed by law in regard to his settlement of the state taxes, all insolvents and uncollectible poll taxes, and also the amount of county tax on the lands bid off by the county, and costs and fees, which shall be, for making a deed, fifty cents; for registering, twenty-five cents; and such other necessary sums as were actually paid by the sheriff: Provided, a majority of any board of county commissioners may extend the time for collecting and settlement of county taxes in the respective counties to such time as they may deem expedient, not to extend beyond the first of May in the year following in

which taxes were levied: Provided further, that any sheriff, tax collector or county treasurer who shall use any part of the county or state taxes otherwise than as directed by law shall forfeit double the amount of his commission on county and state taxes for the year in which he so misused said taxes. No mortgage or lien on any property shall be superior to the taxes on such property, whether said mortgage or lien was given prior or subsequent to the levy of the taxes. (Rev., s. 5250; 1917, c. 234, s. 107; 1919, c. 92, s. 107.)

Liability of Commissioners to Sureties.—The county commissioners are not liable to the sureties in a sheriff's bond where such sureties have been compelled to pay for the failure of the sheriff to comply with this section. Hudson v. McArthur, 152 N. C. 445, 67 S. E. 995.

As to right of sheriff to have granted him allowance for insolvents, where he fails to settle for taxes within appointed time, see note of Board v. Wall, 117 N. C. 378, 23 S. E. 358, under section 3930.

§ 8050. Auditing accounts of officers. — The board of county commissioners, at their last regular or other subsequent meeting in each year, shall appoint one or more of their number, not to exceed three, to be present at the accounting and settlements between the sheriff and county treasurer provided for in the preceding section, and also to audit and settle accounts of the county treasurer and all other county officers authorized to receive or disburse county funds. The account so audited shall be reported to the board of county commissioners, and when approved by them shall be filed with the clerk and recorded on his book, and shall be prima facie evidence of their correctness, and impeachable only for fraud or special error: Provided, the compensation allowed the committee for their services shall not exceed three dollars per day each for the time actually spent in said settlements, and there shall be no allowance for extra clerical aid. Whenever any ex-sheriff or ex-tax collector, of any county, or tax district, has collected taxes for said county or district for more than one year and has settled in full with the proper officers for said taxes for any and all previous year or years, as provided by law, and it shall be made to appear that there were specific errors or mistakes made against said ex-sheriff or ex-tax collector in any such settlement or settlements, the county commissioners shall have authority to correct any such errors or mistakes or give said ex-sheriff or ex-tax collector credit for the amount of any such errors or mistakes so made against him on his final settlement upon his going out of said office.

In all actions for settlement for taxes due any county or special tax district by any ex-sheriff or ex-tax collector for taxes collected for the last year such ex-sheriff or ex-tax collector collecting said taxes shall receive as a credit by way of set-off or counter claim against any amount for which he may be found liable for such year, any amount that he may have overpaid such county or tax district for any previous year. (Rev., s. 5251; 1917, c. 234, s. 108; 1919, c. 92, s. 108; 1925, c. 254.)

Editor's Note.—The last two clauses contained in this section, providing for the correction of error, etc., found in the settlement of an ex-sheriff or ex-tax collector, are new with the Public Laws 1925.

Untrue Account Prima Facie Fraudulent.—When a public officer renders an account which is not true, it is prima facie fraudulent. Commissioner v. Taylor, 77 N. C. 404.

School Taxes Included in Accounting.—See note of Tillery v. Candler, 118 N. C. 888, 24 S. E. 709, under section 1322.

Stated in Williamson v. Jones, 127 N. C. 178, 37 S. E. 202.

§ 8051. Penalty for failure to account with county.—In case the sheriff of a county shall fail, neglect, or refuse to account with the county treasurer and auditing committee as above required, or to pay what may rightfully be found due on such accounts, he shall forfeit and pay to the state for the use of the county a penalty of twenty-five hundred dollars. It shall be the duty of the county treasurer, and if he neglect or refuse to perform it, it shall be the duty of the chairman of the board of commissioners to cause an action to be brought in the superior court of the county on the bond of the sheriff, against him and his sureties, to recover the amount owing by him and the penalty aforesaid. If the sheriff shall fraudulently and corruptly fail to account as aforesaid, he shall be criminally liable thereupon in like manner and with same penalties imposed for such criminal defalcation as provided in section 8045 for failure to settle the state taxes. (Rev., s. 5253; 1917, c. 234, s. 109; 1919, c. 92, s. 109.)

As to action on sheriff's bond, see section 3930 and the note thereto.

When Penalty Recoverable.—The penalty of $2,500 recoverable as a forfeiture against a sheriff under the provisions of this section is where he fails, neglects, or refuses to make settlement or to render an account to the county treasurer and auditing committee upon demand; or his failure, neglect or refusal to pay over the amount rightfully found to be due after account had or settlement made; and a recovery of such penalty may not be properly allowed in a judgment upon an affirmative finding, in an action where the cause was heard and determined upon the single question as to whether the defendant sheriff had failed to pay over the amount which the sheriff claimed to be due. State v. Gentry, 183 N. C. 825, 112 S. E. 427.

As to account having force of a contract, see note of Suttle v. Doggett, 87 N. C. 203, under section 8042.

Who Entitled to Sue.—It is not the imperative duty of the board of county commissioners to institute suits against a delinquent officer for failure to account and pay over public moneys. Under sec. 1402, the Code, they may do so, but the county treasurer is regularly the proper officer to bring such action; and in an action against a commissioner for failure to perform his duty in that respect, it is necessary to allege and prove that the commissioners negligently failed or willfully refused to exercise their authority. Bray v. Barnard, 109 N. C. 44, 13 S. E. 729.

Defenses—Failure to Appoint Auditing Committee.—Where a sheriff of a county has failed to make settlement of money collected for taxes, as required by law, but has unsuccessfully sought to obtain an extension of time from the county commissioners, he may not successfully resist the statutory penalty under the provisions of this section on the ground that the county board of commissioners had not appointed a committee to audit the account between him and the treasurer, especially when the commissioners had appointed a special auditor who could have acted on the account at any time. State v. Gentry, 183 N. C. 825, 112 S. E. 427.

Same—Tax Books Attached by Creditors.—The fact that the tax books were attached in a suit brought against the sheriff by his creditors subsequently to the time when he should have settled with the commissioners was no defense to the action instituted for the collection of the balance of the taxes due, nor can the sheriff be excused upon the ground that he misunderstood the order of reference made in the action. Board v. Wall, 117 N. C. 378, 23 S. E. 358.

Same—Denial of Credits Due.—Where a sheriff is sued on his bond for taxes due by him, and he defends upon the ground that he has been denied certain credits to which he claims he is due, he must set out such credits specifically in his answer. Williamson v. Jones, 127 N. C. 178, 37 S. E. 202.

Discharge of Part Payment—Burden of Proof.—Where an action is brought against a sheriff for failure to collect and pay over taxes he is properly chargeable with the

amount of the tax list, and the burden of proving a discharge of any part thereof is upon him. Board v. Wall, 117 N. C. 378, 23 S. E. 358.

Liability of Deputy's Sureties.—Where a party is deputized for the purpose of collecting taxes, the sureties upon his bond are liable to the county for the money collected by the deputy after the registration of his principal. Perry v. Campbell, 63 N. C. 257.

Action on Bond—Essentials of Complaint.—Where a sheriff had rendered an account of the taxes collected by him in a settlement with the county treasurer, which account was not itemized, it was held, in an action upon his bond that it was not necessary for the complaint to specify any errors in such settlement. Commissioners v. Taylor, 77 N. C. 404.

§ 8052. County treasurer to fix day for settlement.—In each year the county treasurer shall give five days notice to all county officers (except the sheriff) authorized to receive or disburse the county funds, to appear at the courthouse on a certain day in January, before him and the committee appointed by the board of commissioners, and present an account of all sums received or disbursed for the county, with their vouchers, and any officer failing to attend and account shall be deemed guilty of a misdemeanor. The accounts, when audited, shall be reported to the board of commissioners at their next meeting, and if approved, shall be filed with the clerk and recorded in their proceedings, together with their approval, and shall be deemed prima facie correct. (Rev., s. 5262; 1917, c. 234, s. 110; 1919, c. 92, s. 110.)

CHAPTER 132.

UNITED STATES LANDS

§ 8053. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.—The United States is authorized, by purchase or otherwise, to acquire title to any tract or parcel of land in the state of North Caroilna, not exceeding twenty-five acres, for the purpose of erecting thereon any customhouse, courthouse, postoffice, or other building, including lighthouse, lightkeepers' dwellings, life-saving stations, buoys and coal depots and buildings connected therewith, or for the establishment of a fishcultural station and the erection thereon of such buildings and improvements as may be necessary for the successful operations of such fishcultural station. The consent to acquisition by the United States is upon the express condition that the state of North Carolina shall so far retain a concurrent jurisdiction with the United States over such lands as that all civil and criminal process issued from the courts of the state of North Carolina may be executed thereon in like manner as if this authority had not been given, and that the state of North Carolina also retains authority to punish all violations of its criminal laws committed on any such tract of land. (Rev., s. 5426; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; 1870-1, c. 44, s. 5.)

§ 8054. Unused lands to revert to state.—The consent given in the preceding section is upon consideration of the United States building lighthouses, lighthousekeepers, dwellings, life-saving stations, buoys, coal depots, fish stations, postoffices, customhouses, and other buildings connected therewith, on the tracts or parcels of land so purchased, or that may be purchased and that the title to land so conveyed to the United States shall revert to the state unless the construction of the aforementioned buildings be completed thereon within ten years from the date of the conveyance from the grantor. (Rev., s. 5426; Code, ss. 3080, 3083; 1899, c. 10; 1887, c. 136; 1870-1, c. 44, s. 5.)

§ 8055. Exemption of such lands from taxation.—The lots, parcels, or tracts of land acquired under this chapter, together with the tenements and appurtenances for the purpose mentioned in this chapter, shall be exempt from taxation. (Rev., s. 5428; Code, s. 3082; 1870-1, c. 44, s. 3.)

When Exemption Begins.—A contract to convey lands to the United States Government reservation, under the Federal statute, does not vest the title in the Government until survey made, acreage determined, purchase price paid, or conveyance made and title approved by the Attorney-General, and until then the land is subject to State taxes under the State statutes. Caldwell Land, etc., Co. v. Commissioners, 174 N. C. 634, 94 S. E. 406.

§ 8056. Conveyances of such lands to be recorded.—All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (Rev., s. 5429; Code, s. 3081; 1870-1, c. 44, s. 2; 1872-3, c. 201.)

§ 8057. Forest reserve in North Carolina authorized; powers conferred.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the state of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the state of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Power is hereby conferred upon the congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such national forest reserve such forest-covered lands lying in North Carolina as in the opinion of the federal government may be needed for this purpose, but as much as two hundred acres of any tract of land occupied as a home by bona fide residents in this state on the eighteenth day of January, one thousand nine hundred and one, shall be exempt from the provisions of this section. Power is hereby conferred upon congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to

provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United State under the provisions of this section. (Rev., s. 5430; 1901, c. 17; 1929, c. 67, s. 1.)

Editor's Note.—The Act of 1929 struck out the word "Western" whenever appearing in this section and inserted "North" in the title.

§ 8058. Acquisition of lands for river and harbor improvement; reservation of right to serve process.—The consent of the legislature of the state is hereby given to the acquisition by the United States of any tracts, pieces, or parcels of land within the limits of the state, by purchase or condemnation, for use as sites for locks and dams, or for any other purpose in connection with the improvement of rivers and harbors within and on the borders of the state. The consent hereby given is in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of congress in such cases made and provided; and this state retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this section, so far as that all civil and criminal process issued under authority of any law of this state may be executed in any part of the premises so acquired or the buildings or structures thereon erected. (1907, c. 681.)

§ 8059. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.—The consent of the state is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the state required for the sites for customhouses, courthouses, postoffices, arsenals or other public buildings whatever, or for any other purposes of the government.

Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or otherwise.

So long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state. (1907, c. 25.)

§ 8059(a). Further authorization of acquisition of land.—The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for National Park purposes: Provided, that this section and the following section shall in no wise affect the authority conferred upon the United States and reserved to the State in sections eight thousand fifty-seven (8057) and eight thousand fifty-eight (8058) of the Consolidated Statutes. (1925, c. 152, s. 1.)

§ 8059(b). Condition of consent granted in preceding section.—This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

§ 8059(c). Migratory bird sanctuaries or other wild life refuges.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the Federal Government may be needed for the establishment of one or more migratory bird sanctuaries or other wild life refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such sanctuaries or refuges such lands lying in North Carolina as in the opinion of the Federal Government may be suitable and needed for this purpose. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1929, c. 163, s. 1.)

§ 8059(d). Acquisition of land for inland waterway from Cape Fear River; grant of state lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet to seventeen hundred fifty feet wide in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the construction

of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet to seventeen hundred fifty feet and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, or sound lands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, both to the State and to the United States Government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1931, c. 2, s. 1.)

§ 8059(e). Transportation Advisory Commission to secure right-of-way over private lands; condemnation by United States. — If the title to any part of the lands required by the United States Government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned for any public use by any political sub-division of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Transportation Advisory Commission, created under chapter two hundred and sixty-six. Public Laws of one thousand nine hundred and twenty-five, in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand to seventeen hundred fifty feet wide for said inland waterway across and through such lands or any part thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of chapter thirty-three of the Consolidated Statutes of one thousand nine hundred nineteen, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this act, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Transportation Advisory Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States Government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said commission, acting in behalf of the State of North Carolina, the State of North Carolina, or the United States Government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State of such lands or property to the extent of the interest to be acquired and the order of the Clerk of the Superior Court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Transportation Advisory Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this act provided.

If the United States Government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in paragraph next preceding, under the authority of said United States Government, and according to the provisions existing in the Federal Statutes for condemning lands and property for the use of the United States Government. In case the United States Government shall so condemn said land and property, the said Transportation Advisory Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes.

All sums which may be agreed upon between

the said Transportation Advisory Commission and the owner of any property needed by the United States Government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property. (1931, c. 2, s. 2.)

§ 8059(f). Use declared paramount public purpose. — In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States Government, to proceed and condemn such land and property as hereinbefore provided. (1931, c. 2, s. 3.)

§ 8059(g). Method of payment of expenses and awards. — Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)

§ 8059(h). State and United States may enter upon lands for survey, etc.—For the purpose of determining the lands necessary for the uses herein set out, the Transportation Advisory Commission or the United States Government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this act specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5.)

§ 8059(i). Appropriation for purpose and method of expending.—A sum not to exceed fifty thousand dollars ($50,000) shall be appropriated for the purposes of this act in the Act to Make Appropriations and upon proper certificate and itemized statement, attested by the chairman and executive secretary of the Transporation Advisory Commission to the State Auditor, the State Auditor shall issue his warrant and the State Treasurer shall pay upon such warrant such expenses and sums for the purchase price of or damage assessed for land or property necessary and such expenses as may be necessary in connection with procuring surveys, titles and condemnations. (1931, c. 2, s. 6.)

§ 8059(j). Maintenance of bridges over waterway. — The State Highway Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7.)

§ 8059(k). Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)

§ 8059(l). Transportation advisory commission to secure rights-of-way, etc., for waterway improvements by use of federal funds. — Hereafter whenever any waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the state or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the transportation advisory commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such understanding, the transportation advisory commission may follow the same procedure provided in this article for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear river to the South Carolina line: Provided, however, that said transportation advisory commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceed through condemnation or otherwise without the express approval of the governor and council of state. (1935, c. 240.)

CHAPTER 133

WEIGHTS AND MEASURES

Art. 1. Establishment and Use of Standards

§ 8060. Standard weights and measures, exception; penalty.—The standard weight of the following seeds and other articles named shall be as stated in this section, viz:

Alfalfa shall be 60 lbs. per bu.; apples, dried, shall be 24 lbs. per bu.; apples seed shall be 40 lbs. per bu.; barley shall be 48 lbs. per bu.; beans, castor, shall be 46 lbs. per bu.; beans, dry, shall be 60 lbs. per bu.; beans, green in pod, shall be 30 lbs. per bu.; beans, soy, shall be 60 lbs.

per bu.; beef, net, shall be 200 lbs, per bbl.; beets shall be 50 lbs, per bu.; blackberries shall be 48 lbs. per bu.; blackberries, dried, shall be 28 lbs. per bu.; bran shall be 20 lbs. per bu.; broomcorn shall be 44 lbs. per bu.; buckwheat shall be 50 lbs. per bu.; cabbage shall be 50 lbs. per bu.; canary seed shall be 60 lbs. per bu.; carrots shall be 50 lbs. per bu.; cherries, with stems, shall be 56 lbs. per bu.; cherries, without stems, shall be 64 lbs. per bu.; clover seed, red and white, shall be 60 lbs, per bu.; clover, burr, shall be 8 lbs. per bu.; clover, German, shall be 60 lbs. per bu.; clover, Japan, Lespedeza, shall be, in hull 25 lbs. per bu.; corn in ear, shucked, shall be 66 lbs. per bu.; corn, shelled, shall be 56 lbs. per bu.; corn in ear, with shucks, shall be 70 lbs. per bu.; corn, Kaffir, shall be 50 lbs. per bu.; corn, pop, shall be 70 lbs. per bu.; cotton seed shall be 30 lbs. per bu.; cotton seed, Sea Island, shall be 44 lbs. per bu.; cucumbers shall be 48 lbs. per bu.; fish shall be, half-barrel 100 lbs. per ½ bbl.; flax seed shall be 56 lbs. per bu.; grapes, with stems, shall be 48 lbs. per bu.; grapes, without stems, shall be 60 lbs. per bu.; gooseberries shall be 48 lbs. per bu.; grass seed, Bermuda, shall be 14 lbs. per bu.; Grass seed, blue, shall be 14 lbs. per bu.; Grass seed, Hungarian, shall be 48 lbs. per bu.; Grass seed, Johnson, shall be 25 lbs. per bu.; Grass seed, Italian rye, shall be 20 lbs. per bu.; Grass seed orchard, shall be 14 lbs. per bu.; Grass seed, tall meadow and tall fescue 24 lbs. per bu.; Grass seed, all meadow and fescue except tall 14 lbs. per bu.; Grass seed, perennial rye, shall be 14 lbs. per bu.; Grass seed, timothy, shall be 45 lbs. per bu.; Grass seed, velvet, shall be 7 lbs. per bu.; Grass, red top, shall be 14 lbs. per bu.; Hemp seed shall be 44 lbs. per bu.; Hominy shall be 62 lbs. per bu.; Horseradish shall be 50 lbs. per bu.; Liquids shall be 42 gals. per bbl.; Meal, corn, whether bolted or unbolted 48 lbs. per bu.; Melon, cantaloupe, shall be 50 lbs. per bu.; Millet shall be 50 lbs. per bu.; Mustard shall be 58 lbs. per bu.; Nuts, chestnuts, shall be 50 lbs. per bu.; Nuts, hickory, without hulls, shall be 50 lbs. per bu.; Nuts, walnuts without hulls, shall be 50 lbs. per bu.; Oats, seed, shall be 32 lbs. per bu.; Onions, button sets, shall be 32 lbs.; Onions, top buttons, shall be 28 lbs. per bu.; Onions, matured, shall be 57 lbs. per bu.; Osage orange seed shall be 33 lbs. per bu.; Peaches, matured, shall be 50 lbs. per bu.; Peaches, dried, shall be 25 lbs. per bu.; Peanuts shall be 22 lbs. per bu.; Peach seed shall be 50 lbs. per bu.; Peanuts, Spanish, shall be 30 lbs. per bus.; Parsnips, shall be 50 lbs. per bu.; Pears, matured, shall be 56 lbs. per bu.; Pears, dried, shall be 26 lbs. per bu.; Peas, dry, shall be 60 lbs. per bu.; Peas, green, shall be, in hull 30 lbs. per bu.; Pieplant shall be 50 lbs. per bu.; Plums shall be 64 lbs. per bu.; Pork, net, shall be 200 lbs. per bbl.; Potatoes, Irish, shall be 56 lbs. per bu.; Potatoes, sweet, green, shall be 56 lbs. per bu., and the dry weight 47 lbs. per bu.; Quinces, matured, shall be 48 lbs. per bu.; Raspberries shall be 48 lbs. per bu.; Rice, rough, shall be 44 lbs. per bu.; Rye seed shall be 56 lbs. per bu.; Sage shall be 4 lbs. per bu.; Salads, mustard, spinach, turnips, kale 10 lbs. per bu.; Salt shall be 50 lbs. per bu.; Sorghum seed shall be 50 lbs per bu.; Sorghum molasses shall be 12 lbs. per bu.; Strawberries shall be 48 lbs. per bu.; Sunflower seed shall be 24 lbs. per bu.; Teosinte shall be 59 lbs. per bu.; Tomatoes shall be 56 lbs. per bu.; Turnips shall be 50 lbs. per bu.; Wheat shall be 60 lbs. per bu.; Cement shall be 80 lbs. per bu.; Charcoal shall be 22 lbs. per bu.; Coal, stone, shall be 80 lbs. per bu.; Coke shall be 40 lbs. per bu.; Hair, plastering, shall be 8 lbs. per bu.; Land plaster shall be 100 lbs. per bu.; Lime, unslaked, shall be 80 lbs. per bu.; Lime, slaked, shall be 40 lbs. per bu.

But this section shall not be construed to prevent the purchase and sale by measure.

If any person shall take any greater weight than is specified for any of the items named herein, he shall forfeit and pay the sum of twenty dollars for each separate case to any person who may sue for same. (1915, c. 230, s. 1; 1909, c. 555, s. 1; 1917, c. 34; Ex. Sess. 1921, c. 87; 1931, c. 76.)

Editor's Note.—By Ex. Sess. 1921 corn in ear shucked, was changed from 70 lbs. per bushel to 66 lbs. per bushel, and corn in ear with shucks was changed from 74 lbs, per bushel to 70 lbs. per bushel. There were no other changes by this amendment.

The Act of 1931 amended this section as follows: "The standard weight of green sweet potatoes shall be fifty-six (56) pounds per bushel, and the dry weight forty-seven (47) pounds per bushel."

§ 8061. Congressional standards adopted.—No trader or other person shall buy or sell, or otherwise use in trading, any other weights and measures than are made and used according to the standard prescribed by the congress of the United States: Provided, that this chapter shall not prevent the citizens of the state from buying and selling grain by measure as may be agreed upon between the parties. (Rev., s. 3063; Code, s. 3837; R. C., c. 117, s. 1; 1741, c. 32, s. 2; 1866, c. 125.)

Cited in Nance v. Sou. Ry., 149 N. C. 366, 63 S. E. 116.

§ 8062. Area of acre.—The measure of an acre of land shall be equal to a rectangle of sixteen poles or perches in length and ten in breadth, and shall contain one hundred and sixty square perches or poles, or four thousand eight hundred and forty square yards, six hundred and forty such acres being contained in a square mile. (Rev., s. 3065; Code, s. 3843; R. C., c. 117, s. 7; 33 Edw. I, c. 6.)

§ 8063. County commissioners to provide standards.—The board of commissioners of each county shall, at the charge of their county, procure standard sealed weights of half hundred, quarter hundred, ten pounds, five pounds, two pounds, and one pound, one-half pound, one-quarter pound, two ounces, one ounce, one-half ounce, gauging rod and waist sticks, yardsticks, half-bushel, peck, half-peck, quarter-peck, and one-eighth peck; gallon, half-gallon, quart, pint, half-pint, and gill measure, of the United States standard, sealed and branded "N. C.". (Rev., s. 3064; Code, s. 3838; 1866-7, c. 126; 1881, c. 199.)

§ 8064. Penalty for using untested standards.—If any person, after demand by the standard-keeper for permission to examine and adjust the same, shall buy, sell or barter by any weight or measure which shall not be tried by the standard, and sealed or stamped as aforesaid, he shall,

for every such offense, forfeit and pay forty dollars, and if any person shall sell and deliver by less measure than the standard, he shall forfeit and pay for each offense forty dollars to the person suing therefor. (Rev., s. 3067; Code, s. 3842; 1893, c. 100.)

Constitutional.—This section is not in conflict with sec. 5 Art. 9, of the Constitution, which provides that the net proceeds of all penalties, etc., shall go to the school fund. Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968.

Clark, J., in delivering the opinion of the court in Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968, uses this language: "While the courts have the power, and it is their duty in a proper case, to declare an act of the legislature unconstitutional, it is a well recognized principle that the court will not declare that this co-ordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of them by the representatives of the people." McDonald v. Morrow, 119 N. C. 66, 26 S. E. 132, 135.

Indictment.—This section providing for a penalty for selling by unauthorized weights and measures, and for selling by other measures than the standard (the word "weight" which appears in the first clause being omitted), a finding for plaintiff on the second ground is error where the article sold was meat, because meat is an article which is not sold by measure. Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968.

Art. 1A. Uniform Weights and Measures

§ 8064(a). Office of superintendent of weights and measures.—In order to protect the purchasers of any commodity and to provide one standard of measure of length and surface throughout the State, which must be in conformity with the standard of measure of length, surface, weight and capacity established by Congress, the office of the Superintendent of Weights and Measures for the State of North Carolina is hereby established as hereinafter provided. (1927, c. 261, s. 1.)

§ 8064(b). Administration of article.—The provisions of this article shall be administered by the State Department of Agriculture through a suitable person to be selected by the Commissioner of Agriculture and known as the Superintendent of Weights and Measures. In administering the provisions of this article, the rules and codes of specifications and tolerances as adopted by the National Conference of Weights and Measures and recommended by the United States Bureau of Standards are hereby adopted; however, the Department of Agriculture is empowered to make such rules and regulations as may be necessary to make effective the purposes and provisions of this act and to fix and prescribe reasonable charges and fees for examining, testing, adjusting and certifying the correct, or incorrect, equipment used in the buying or selling of any commodity or thing, or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight and measure when a charge is made for such determination. Such rules and regulations and fees and charges shall be published thirty days before such rules, regulations, fees and charges become effective. (1927, c. 261, s. 2; 1931, c. 150.)

Editor's Note.—The Act of 1931 amended this section by adding the provision as to rules adopted by the National Conference of Weights and Measures.

§ 8064(c). Repealed by Public Laws 1931, c. 150.

§ 8064(d). Employment of superintendent of weights and measures. — The Commissioner of Agriculture shall have authority to employ a superintendent of weights and measures and necessary assistants, local inspectors and such other employees as may be necessary in carrying out the provisions of this article, and fix and regulate their duties.

The person named as superintendent of weights and measures shall give bond to the State of North Carolina in the sum of ten thousand dollars to guarantee the faithful performance of his duties, the expense of said bond to be paid by the State to be approved as other bonds for the State officers. The superintendent of weights and measures shall, to safeguard the interests of the buyer and seller, require bond from other employees authorized under the first paragraph of this section in the amounts of not less than one thousand dollars for each employee designated as a local inspector or sealer of weights and measures. (1927, c. 261, ss. 3, 4.)

§ 8064(e). Salaries and expenses.—All salaries and necessary expenses shall be provided as now provided for the other departments and agencies of the State government. (1927, c. 261, s. 5; 1931, c. 150.)

Editor's Note.—Prior to the 1931 Amendment this section provided for the payment of salaries, etc., from the fees collected under this article.

§ 8064(f). Standard of work for local standard keepers.—When any town or county wishes to appoint a local standard keeper or inspector or sealer of weights and measures the appointment and regulation of his work must be in keeping with the rules and regulations of the State Department of Agriculture and his work subject to supervision of the State Superintendent of Weights and Measures. (1927, c. 261, s. 6.)

§ 8064(g). Receipts to be given for fees collected.—The State Superintendent of Weights and Measures, or his deputies, or inspectors on his direction, shall, after examining any standards of weights or measures or other apparatus used for determining the weight or measure of anything, issue to the owner of such measuring device or apparatus a receipt for any fees collected and, when such measuring device or apparatus is found to be accurate, stamp upon, or tag, the measuring instrument with the letters "N.C." and two figures representing the year in which the inspection was made. (1927, c. 261, s. 7.)

§ 8064(h). Standard equipment. — There shall be issued to each deputy inspector, or local sealer of weights and measures, such standard equipment as may be necessary. (1927, c. 261, s. 8.)

§ 8064(i). Standards of weights and measures.—The weights and measures received from the United States under joint resolution of Congress, approved June fourteenth, one thousand eight hundred and twenty-six, and July twenty-seventh, one thousand eight hundred and sixty-six, and such new weights and measures as shall be received from the United States as standards of weights and measures in addition thereto, or in renewal thereof, and such as shall be supplied

by the State in conformity therewith and certified by the National Bureau of Standards shall be the State standards of weights and measures, and in addition thereto shall be supplied from time to time such copies of these as may be deemed necessary. The Superintendent of Weights and Measures shall take charge of the standards adopted by this article as the standards of the State and cause them to be kept in a fire proof building belonging to the State, from which they shall not be removed except for repairs or for certification, and he shall take all other necessary precautions for their safe keeping. He shall maintain the State standard in good order and shall submit them at least once in ten years to the National Bureau of Standards for certification. He shall keep complete record of the standards, balances and other apparatus belonging to the State and take a receipt for same from his successor in office. He shall annually, on the first day of December, make to the Commissioner of Agriculture a report of all work done in his office. (1927, c. 261, s. 9.)

§ 8064(j). Supervision of devices offered for.—The State Superintendent of Weights and Measures shall have and keep a general supervision of the weights and measures and weighing or measuring devices offered for sale, sold, or in use in the State. He, or his deputies, or inspectors at his direction, shall, upon written request of any citizen, firm, or corporation, or educational institution in the State, test or calibrate weights, measures and weighing or measuring devices used as standards in the State. (1927, c. 261, s. 10.)

§ 8064(k). Authority of deputy or local inspector. — Each deputy or local inspector shall have the power, and it shall be his duty, under the direction of the State Superintendent of Weights and Measures, to inspect, test, try and ascertain if they are correct all weights and measures and weighing and measuring devices kept, offered, or exposed for sale, sold, or used or employed within the State by any proprietor, agent, lessee, or employee in proving the size, quantity, extent, area, or measurement of quantities, things produced, or articles for distribution or consumption, purchased or offered or submitted by any person or persons for sale, hire, or award, and he shall have the power, and shall, from time to time, weigh or measure and inspect packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered, or exposed for sale, or sold, or in the process of delivery, in order to determine whether the same contain the amount represented, or whether they be kept, offered or exposed for sale, or sold in a manner in accordance with law. He may, for the purpose above mentioned and in the general performance of his duties, enter and go into, or open, and without formal warrant, any stand, place, building, or premises, or stop any vendor, peddler, junk dealer, coal wagon, ice wagon, delivery wagon, or any person whomsoever and require him, if necessary, to proceed to some place which the dealer may specify for the purpose of making the proper test. (1927, c. 261, s. 11.)

§ 8064(l). Condemnation and destruction of incorrect weights, measures or devices.—The deputy or local inspector shall condemn, seize, and may destroy incorrect weights and measures or weighing and measuring devices, which in his best judgment are not susceptible of satisfactory repair, but such as are incorrect and yet in his best judgment may be repaired, he shall mark or tag as "Condemned for Repairs" in a manner prescribed by the State Superintendent of Weights and Measures. The owners or users of any weights, measures or weighing or measuring devices of which such disposition is made shall have the same repaired and corrected within ten days and they may neither use nor dispose of same in any way, but shall hold the same at the disposal of the sealer. Any weights, measures, or weighing or measuring devices which have been condemned for repairs and have not been repaired as required shall be confiscated by the sealer. (1927, c. 261, s. 12.)

§ 8064(m). Special policemen.—The Superintendent of Weights and Measures, his deputies and inspectors are hereby made special policemen and are authorized and empowered to arrest without formal warrant, any violator of the statute in relation to weights and measures and to seize as use for evidence without formal warrant any false or unsealed weights, measures, or weighing or measuring devices or package or amount of commodity found to be used, retained, or offered or exposed for sale, or sold in violation of law. (1927, c. 261, s. 13.)

§ 8064(n). Obstruction to officers misdemeanor.—Any person who shall hinder or obstruct in any way the Superintendent of Weights and Measures, his deputies or inspectors, in the performance of his official duties shall be guilty of misdemeanor and, upon conviction in any court of competent jurisdiction, shall be punished by fine of not less than ten dollars or more than two hundred dollars, or by imprisonment in the county jail for not more than three months, or by both fine and imprisonment. (1927, c. 261, s. 14.)

§ 8064(o). Impersonation of superintendent of weights and measures or deputies misdemeanor.—Any person who shall impersonate in any way the Superintendent of Weights and Measures, his deputies or inspectors, by the use of his seal or counterfeit of his seal or otherwise, shall be guilty of a misdemeanor and upon conviction therefor in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 15.)

§ 8064(p). Weights of goods sold in packages to be stated on package.—It shall be unlawful to keep for the purpose of sale, or expose for sale, or sell any commodity in package form unless the net quantity of the contests are plainly or conspicuously marked on the outside of the package in terms of weight, measure, or numerical court: Provided, however, that reasonable variations or tolerance shall be permitted and that these reasonable variations or tolerances, and also exemp-

tions as to small packages shall be established by rules and regulations made by and published with other rules and regulations approved by the Department of Agriculture. (1927, c. 261, s. 16.)

§ 8064(q). Sales when no claim of weight or measure made.—Nothing in this article shall be construed to prohibit the sale by farmers, dealers or merchants, of fruits and vegetables when sold by the piece, head or bunch, and there is no claim made as to its weight or measure. (1927, c. 261, s. 17.)

§ 8064(r). Net weight basis of sales by weight. —Whenever any commodity if sold on a basis of weight, it shall be unlawful to employ any other weight in such sale than the net weight of the commodity and all contracts concerning goods sold on a basis of weight shall be understood and construed accordingly Whenever the weight of a commodity is mentioned in this article, it shall be understood and construed to mean the net weight of the commodity. (1927, c. 261, s. 18.)

§ 8064(s). Acts and omissions declared misdemeanor.—Any person who, by himself, or his servant or agent, or as the servant or agent of any other person, shall offer, or expose for sale, sell, use in the buying or selling of any commodity or thing or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination, or retain in his possession a false weight or measure or weighing or measuring device or any weight or measuring or weighing or measuring device which has not been sealed by the State Superintendent, or his deputy, or inspectors, or by a sealer or deputy sealer of weights and measures within one year, or shall dispose of any condemned weight, measure, or weighing or measuring device contrary to law, or remove the tag placed thereon by the State Superintendent, or his deputy, or inspectors, or who shall sell or offer or expose for sale less than the quantity he represents on any commodity, thing, or service, or shall take or attempt to take more than the quantity he represents, when as the buyer, he furnishes the weight, measure, or weighing or measuring device by means of which the amount of any commodity, thing, or service is determined; or who shall keep for the purpose of sale, offer or expose for sale, or sell any commodity in a manner contrary to law; or who shall violate any provisions of this act for which a specific penalty has not been provided; or who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using any device or instrument to be used to, or calculated to, falsify any weight or measure, shall be guilty of a misdemeanor, and shall be punished by fine of not less than ten dollars or more than two hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, upon a first conviction in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than fifty dollars or more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 19.)

§ 8064(t). "Person" construed. — The word "person" as used in this article shall be construed to impart both the plural and singular as the case demands and shall include corporations, companies, societies and associations. (1927, c. 261, s. 20.)

§ 8064(u). "Weights, measures, weighing or measuring devices" construed. — The words "weights, measures, or (and) weighing or (and) measuring devices" as used in this article, shall be construed to include all weights, scales, beams, measures of every kind, instruments, mechanical devices for weighing or measuring any other appliances and accessories connected with any or all such instruments. The words "sale or sell" as used in this act shall be construed to include barter and exchange. (1927, c. 261, s. 21.)

§ 8064(v). Transfer of division of weights and measures to department of revenue. — The governor of North Carolina is hereby authorized by executive order to transfer the superintendent of weights and measures, as set up by chapter 261, Public Laws 1927, and the laws amendatory thereto, codified as section 8064(a) et seq., to the department of revenue.

In the case of the transfer of the superintendent of weights and measures as set forth in the preceding section, the governor, together with the commissioner of revenue, are hereby authorized and empowered to promulgate and enforce such rules and regulations as he or they may deem necessary or advisable to effectuate section 3846(kkk), as well as chapter 261 of the Public Laws of 1927 as amended, and all appointive and elective authority now vested in the commissioner of agriculture by chapter 261 of the Public Laws of 1927 pertaining to weights and measures, are hereby transferred to the governor of North Carolina; and the governor is specifically authorized and empowered to appoint a superintendent of weights and measures to serve at the will of the governor. (1933, c. 523, ss. 1, 2.)

§ 8064(w). Certain measures regulated.—Whenever any commodity now named in section 8060, Consolidated Statutes, shall be quoted or sold by the bushel, the bushel shall consist of the number of pounds stated in said section; and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall consist of the fractional part of the number of pounds as set forth therein for the bushel; and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels. (1933, c. 523, s. 3.)

Art. 2. State Standard-Keeper

§ 8065. Appointment; bond; keeper of capital to act.—The governor is authorized to appoint a suitable person to take care of the balances, weights and measures, and perform the duties relating to weights and measures heretofore imposed on the governor, and such other duties as the governor may prescribe, touching said balances and weights and measures; and he shall take from such person a bond with surety, to be approved by the governor, in the penal sum of five hundred dollars, for the safe-keeping of said weights and measures and for the performance of all his duties. And in case the governor fails to appoint, or the persons appointed fails to qualify or dis-

charge said duties, the keeper of the capitol shall be ex officio the keeper of weights and measures, and discharge the duties and receive the compensation provided. (Rev., s. 3068; Code, s. 3844; 1866-7, res., p. 228; 1881, c. 199, s. 3.)

§ 8066. To procure and supply standards to counties.—It shall be the duty of the keeper of weights and measures, under the direction of the governor, to procure and furnish, at prime cost, to any of the counties, upon an order of the board of county commissioners, any of the standard sealed weights and measures required by law to be kept, and he is hereby authorized, by and with the approval of the governor, to contract for the manufacture of plain sealed weights substantially made of iron, steel or brass, as the county ordering may direct; yard stick made of substantial wood each end neatly covered with metal, sealed, marked and stamped "N. C."; half-bushel, peck, half-peck, quarter-peck, and one-eighth peck, made of substantial, well seasoned wood, with secure metallic binding and casing; gallon, half-gallon, quart, pint, half-pint, and gill measure, made of light sheet copper with iron handles. He shall procure and furnish as herein provided to the board of commissioners of any county ordering the same, dry and liquid sealed measures and yardstick made of brass or copper. (Rev., s. 3069; Code, s. 3839; 1881, c. 199, s. 2.)

§ 8067. Counties to pay costs of standards.—It shall be the duty of the state standard-keeper to supply to each county which shall call for the same such standard weights as the standard-keeper of such county shall demand, duly sealed, such county paying to the state treasurer the actual cost of such weights, upon the certificate of the state standard-keeper. (Rev., s. 3070; Code, s. 3846; 1866-7, c. 126, s. 1.)

§ 8068. To keep record.—It shall be the duty of the state standard-keeper to keep a book, in which he shall keep an accurate account of all the weights and measures by him delivered, and the expenses incurred by him in the purchase of such weights and measures, subject to the inspection of the state treasurer and the general assembly. (Rev., s. 3071; Code, s. 3847; 1866-7, c. 126, s. 2.)

Art. 3. County Standard-Keeper

§ 8069. Appointment; term; oath; bond.—The weights and measures, stamps and brands thus provided shall be kept at the courthouse of the respective counties by a standard-keeper, to be elected by the board of commissioners for the term of two years; the person thus elected shall, before the board of county commissioners, take the oath required for public officers and also an oath of office, and shall give bond, with good and sufficient surety, payable to the state of North Carolina, in the sum of two hundred dollars, conditioned for the safe-keeping of weights and measures, stamps and brands of said county, and for the faithful performance of the duties of his office. (Rev., ss. 306, 3072; Code, s. 3840; R. C., c. 117, s. 4; 1741, c. 32, s. 3; 1816, c. 901, s. 2; 1827, c. 22, s. 3.)

§ 8070. Removal of standards.—The standard-keeper may remove the weights and measures, stamps and brands from the courthouse, not to exceed sixty days in any one year, for the purpose of testing weights and measures throughout the county. (Rev., s. 3072.)

§ 8071. Testing and marking standards; penalty.—Every person, firm, or corporation using weights and measures of any and every kind which shall be used in buying or selling or bartering, or for hire, or in fixing or determining the amount of toll or charge or rate for any service shall allow or permit the standard-keeper of the county to try, examine, and adjust by the standard, at least once every year, all the said weights and measures of any and every kind used as aforesaid, and every person, firm, or corporation who shall neglect to comply with the requirements of this section shall forfeit and pay fifty dollars, to be recovered at the suit of the standard-keeper, one-half to his use and the other half to the use of the county wherein the default occurs. It shall be the duty of the standard-keeper, when practicable, to mark, by stamp or brand, the weights or measures found or made to agree with the standard, and shall give a certificate of such examination and adjustment, stating the weights and measures examined and adjusted. (Rev., s. 3073; 1909, s. 695; 1925, c. 299.)

As to penalty, see notes to section 8064.

Editor's Note.—In the case of Nance v. Sou. Ry., 149 N. C. 366, 63 S. E. 116, it was held under the Revisal section 3073 that this section as it then appeared applied only to those "buying and selling by weights and measures" and did not apply to weights and measures used by railroads in charging toll. By amendment of 1909 this section by its express terms was made to apply to weights used for "toll or charge of rate." By amendment Public Laws 1925 testing was changed from "every two years" to every year.

§ 8072. Destruction of unadjusted standards.—In every instance where the standard-keeper shall have before him for adjustment, or shall find in the possession of any person, intending to use the same, any weight or measure that cannot be adjusted so as to meet the requirements of the law, it shall be the duty of the standard-keeper to destroy the same. (Rev., s. 3074; Code, s. 3848; 1866-7, c. 126, s. 4.)

§ 8073. Local: Office abolished in certain counties.—The office of county standard-keeper is abolished in the following counties, and in these counties the section regulating that office and its duties do not apply: Ashe, Beaufort, Bertie, Bladen, Brunswick, Camden, Cumberland, Currituck, Gaston, Halifax, Lincoln, Montgomery, Moore, Northampton, Rockingham, Rutherford, Swain, Vance, Warren, Yadkin, Yancey. (Rev., ss. 3072, 3073; 1909, c. 106 (Ashe); 1909, s. 354 (Camden); 1909, c. 695 (Swain); P. L. 1911, c. 153 (Vance); P. L. 1911, c. 593 (Brunswick, Cumberland, Yadkin); 1929, c. 136, s. 1 (Rockingham).

Art. 4. Surveyors

§ 8074. Standard surveyor's chain; tests.—The standard measure for a surveyor's chain shall be twenty-two standard yards, a standard half or two-pole chain shall be eleven standard yards, a standard quarter or one-pole chain shall be five and one-half standard yards; but every person using a surveyor's chain, half-chain, or quarter-chain for measuring land shall every two years test the same in the manner hereinafter provided. (Rev., s. 3075; 1889, c. 409; 1899, c. 665.)

§ 8075. Using untested chain misdemeanor.— If any person who shall use any chain for measuring land without having the same first measured and sealed by the standard-keeper, or who shall use the same for a longer period than two years without bringing it to the standard-keeper and having the same measured and sealed by him, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars. (Rev., s. 3684; 1889, c. 409, s. 2.)

§ 8076. Tests for magnetic variation and for chain.—Every surveyor operating in any of the counties of this state with magnetic instruments, whether in a public or private capacity, shall, between the first day of January and thirty-first day of December in each and every year, carefully test his needle upon the official meridian monuments in the county in which he resides or the nearest county in which such monuments have been erected, by adjusting his instrument over the intersection of the lines cut into the top of one of the meridian monuments so established and sighting to the intersection of the lines cut into the top of the other meridian monument, noting the variation of the magnetic from the true meridian and the direction thereof, and shall test the chain or other instrument of linear measure upon the distance from center to center as indicated by intersecting lines of the two beams, tablets, or other official monuments set at or near the county courthouse for this purpose, noting the error of such instrument as compared with the standard of the monuments. (Rev., s. 3076; 1899, c. 665, s. 1; 1901, c. 642.)

§ 8077. Magnetic variation to be recorded with survey.—On every official record of a survey of lands made after the first day in July, nineteen hundred and one, in any county in which meridian monuments have been erected, there shall be entered by the surveyor making such survey a record as to the date of testing the magnetic instrument used, and the amount of declination or variation of the magnetic needle indicated at such test. (Rev., s. 3076.)

§ 8078. Surveys in another county; data as to variation recorded.—Before making surveys in any county other than the one in which the magnetic instrument and instruments for linear measure to be used have already been tested, said surveyor shall procure in writing from the register of deeds of the county in which said monuments have been established, nearest to the point where the survey is to be made, a statement giving the declination of the magnetic needle for the year in which it was last determined, and the rate and discretion of the variation of said magnetic needle since that time, and this data shall be recorded as a part of the record of his survey. But no surveyor shall be required to go outside of the county in which he resides for the purpose of testing the instruments herein named. (Rev., s. 3077; 1899, c. 665, s. 1.)

§ 8079. Tests returned to register; records kept.—Such tests and the correction, if any, resulting therefrom shall be returned by the surveyor in writing and under oath to the register of deeds for the county in which such meridian is situate within ten days from the taking of the observations, setting forth the name of the surveyor, his residence, the character of the instrument tested, the date of the observations, the declination east or west of the magnetic needle from the true meridian, together with a fee of ten cents for filing and registering the same; and such return shall be filed and registered by the register of deeds in a book property ruled and lettered, to be furnished by the board of commissioners of the county, to be used for such purpose exclusively and entitled "The Meridian Record." (Rev., s. 3078; 1899, c. 665, s. 1.)

§ 8080. Meridian monuments protected by county commissioners.—It shall be the duty of the board of county commissioners to maintain and protect the meridian monuments and tablets or monuments for the testing of chains or other instruments of linear measure established by the state, or national surveys coöperating with the county authorities, in good order and condition as the official standards of the county. (Rev., s. 3079; 1899, c. 665, s. 2.)

§ 8081. Defacing meridian monuments misdemeanor.—If any person shall in any manner injure, deface, remove, or destroy any meridian monument or tablets, or any part thereof, or shall fail, neglect, or refuse to do and perform any act, matter, or thing by law required of him to be done in connection with such monuments or tablets, he shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine or be imprisoned, or both, at the discretion of the court. (Rev., s. 3743; 1899, c. 665, s. 3; 1893, c. 282, s. 4.)

Art. 5. Standard Weight Packages of Grits, Meal and Flour

§ 8081(a). Corn meal. — It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in this state corn meal except in packages containing one pound, two pounds, three pounds, five pounds, ten pounds, twenty-five pounds, fifty pounds, or one hundred pounds, or multiple of one hundred pounds, and whether the meal is bolted or unbolted shall be stated on the package. (1921, c. 170, s. 1.)

Editor's Note.—Public Laws 1931, c. 299, repealed this section as to Clay, Lenoir, Transylvania and Swain Counties.

Public Laws 1931, c. 122, applicable only to Jackson County, amended this section by changing the words "twenty-five pounds, fifty pounds, or one hundred pounds, or multiple of one hundred pounds," to "twenty-four pounds, forty-eight pounds, or ninety-six pounds, and that all multiples thereof shall be in like proportion."

The acts of 1933, c. 82 repealed this section as to Macon county.

§ 8081(b). Hominy or grits. — It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale any hominy or grits except in packages of one pound, one and one-half pounds, two pounds, three pounds, five pounds, ten pounds, twenty-five pounds, fifty pounds, or one hundred pounds, or multiples of one hundred pounds. (1921, c. 170, s. 2; 1933, c. 162.)

Editor's Note.— Public Laws of 1933, c. 162, added "two pounds" and "twenty-five pounds" to the list of weights enumerated in this section.

§ 8081(c). Flour; sales from bulk.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in this state flour, except in packages containing six pounds, twelve pounds, twenty-four pounds, forty-eight pounds, ninety-eight pounds, or one hun-

dred and ninety-six pounds of flour, and the net weight of all grits, meal, or flour shall be stated on the package of such meal, flour, or grits, with the name and address of the maker or jobber: Provided, the provisions of this article shall not apply to the retailing of grits, meal or flour direct to customers from bulk, when the same is priced and delivered by actual weight. (1921, c. 170, s. 3.)

§ 8081(c1). Packages of corn meal, grits or flour weighing five pounds or less. — The provisions of the above three sections shall not apply to packages of corn meal, grits and/or flour weighing five pounds or less but same may be packed for sale, sold or offered for sale when and if the said packages are plainly and conspicuously marked, which said marking must show the net contents by avoirdupois weight, and said packages must be so filled that the size will not tend to deceive or aid in the perpetration of fraud in the sale thereof. (1935, c. 269.)

§ 8081(d). Inspections for discovery of violations of law; certification of violations to solicitor. —The board of agriculture shall cause to be made from time to time such inspections as may be necessary to determine whether the provisions of this article have been violated. If it shall appear from such inspection that any provisions of this article have been violated, the commissioner of agriculture shall certify the facts to the solicitor in the district in which the violation was committed, and furnish that officer with the facts in the case. (1921, c. 170, s. 4.)

§ 8081(e). Violation of law a misdemeanor; seizure and sale of goods; release by commissioner.—Any person or persons violating any provision of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment in the discretion of the court, and the meal or flour offered for sale in violation of this article shall be subject to seizure, condemnation, and sale by the commissioner of agriculture, as is provided for the seizure, condemnation, and sale of commercial fertilizers; and the proceeds thereof, if sold, less the legal cost and charges, shall be paid into the treasury for the use of the department of agriculture in executing the provisions of this article: Provided, that the commissioner of agriculture may in his discretion order the release of the grits, meal, or flour seized when the owner of same shall offer to pack it in accordance with the provisions of this article, and it shall appear to the satisfaction of the commissioner that said owner did not intend to violate the provisions of the law. (1921, c. 170, s. 5.)

§ 8081(f). Meal and flour on hand.—The provisions of this article shall not apply to meal or flour on hand March 9, 1921. (1921, c. 170, s. 6.)

§ 8081(g). Article effective, when. — Except as provided in section 8081(f) this article shall be in force from and after April first, one thousand nine hundred and twenty-one. (1921, c. 170, s. 7.)

CHAPTER 133A
WORKMEN'S COMPENSATION ACT

Art. 1. General Provisions

§ 8081(h). Official title.—This article shall be known and cited as "The North Carolina Workmen's Compensation Act." (1929, c. 120, s. 1.)

Construction.—The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591.

The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66.

The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the Legislature to provide compensation to an employee for injury arising out of and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69.

Basis of Liability.—The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

State Statute Governs Rights of Parties.—The rights of employer, employee, and insurance carrier under a workmen's compensation statute are governed by the law of the state of the statute. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

§ 8081(i). Definitions. — When used in this article, unless the context otherwise requires —

(a) The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service and sawmills and logging operators in which less than fifteen employees are regularly employed.

(b) The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable.

(c) The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every per-

son carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person.

(d) The term "person" means individual, partnership, association or corporation.

(e) "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

(f) "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

(g) The term "carrier" or "insurer" means any person or fund authorized under § 8081(www) to insure under this article and includes self-insurers.

(h) The term "commission" means the North Carolina Industrial Commission, to be created under the provisions of this act.

(i) The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(j) The term "death" as a basis for a right to compensation means only death resulting from an injury.

(k) The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this act, and includes funeral benefits provided herein.

(l) The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrother and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under eighteen years of age.

(m) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(n) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(o) The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(p) The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(q) The singular includes the plural and the masculine includes the feminine and neuter.

(r) In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

First. That there was an injury resulting in hernia or rupture.

Second. That the hernia or rupture appeared suddenly.

Third. That it was accompanied by pain.

Fourth. That the hernia or rupture immediately followed an accident.

Fifth. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femeral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of § 8081(ss). In non-fatal cases, if it is shown by special examination, as provided in § 8081(hh), that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this act.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such

physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this article. (1929, c. 120, s. 2; 1933, c. 448.)

Editor's Note.—Public Laws of 1933, c. 448, added, to subsection (a) of this section, the clause applicable to saw-mills and logging operators.

Injury Arising out of and in the Course of Employment.—In construing this act the words "out of and in the course of the employment," used in connection with injuries compensable thereunder, is not to be determined by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

This definition presents a double aspect. "In the course of" refers to the time, place and circumstances under which the accident occurred. This is, in most cases, a fairly simple question. The real difficulty arises in determining whether the accident is one "arising out of the employment." That this is considered as a mixed question of law and fact makes the problem all the more difficult. In the final analysis it means that there must be apparent "to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." For instance, an injury occasioned by an assault of a co-employee and growing out of differences in regard to the employment was held to be within the definition. But where the assault grew out of personal malice unconnected with the employment, no compensation was awarded. In the further case of an unprovoked assault by a third person upon an employee, the risk having arisen out of the employment, a recovery was allowed. Moreover, if the injury occurs from a prank played by a fellow workman, compensation is given. But if the injured employee engaged in the play, no recovery is permitted. 8 N. C. L. Rev. 418.

The definition of injury given in § 2(f) also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." In applying this to the following case the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea opthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed. The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely inescapable," but that "a thing is generally considered unavoidable when common prudence and foresight cannot prevent it." And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no reason to suspect a possible infection of this nature, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act. 8 N. C. L. Rev. 421.

In construing sub-section (f) of this Act the words "arising out of the employment" in regard to injuries compensable is broad and comprehensive, and must be determined in the light and circumstances of each case, and the act, applying only to industries employing more than four workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, is an incident to the business and grow out of it, and is an ordinary risk assumed by the employer under the act. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594.

The question of whether compensation is recoverable under this act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law, and general definitions are unsatisfactory. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728.

Where in a proceeding under this act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, is sufficient within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

In order for compensation to be recovered for the death of an employee under this act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728.

An injury compensable under such sections (f) of this section, is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Ridout v. Rose's 5-10-25c. Stores, 205 N. C. 423, 171 S. E. 642.

Where a deliveryman was driving a truck in the course of his employment and, while passing a group of boys playing baseball, a baseball struck the windshield and a piece of glass from the windshield struck him in the eye, resulting in serious injury, it was held that the injury resulted from an accident arising out of and in the course of the employment, within the meaning of this section. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404.

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury is sufficient to support the finding that the injury resulted from an accident arising out of and in the course of his employment. Gordon v. Thomasville Chair Co., 205 N. C. 739, 172 S. E. 485.

As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment. Bray v. Weatherly & Co., 203 N. C. 160, 165 S. E. 332.

Casual Employment.—Section 8081(u) of this act providing that the act shall not apply to casual employees, is not totally repugnant to this section providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual if he is injured in the course of the trade, business, etc. Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591.

By § 8081(u) and sub-section (b) of this section, the act does not apply to casual employees. But in sub-section (e) of this section it is provided that where because of the short duration of the employment or casual nature or terms of the employment it is impractical to compute the average weekly wage a different mode of reckoning may be used. Yet this seeming conflict appears not to have been brought to the Commission's attention. 8 N. C. L. Rev. 423.

The restriction of this act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an injury received by a workman engaged in such painting. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591.

Employment is not casual because intermittent. The Commission has said: ". . . we must conclude that the legislature did not contemplate an employment to be continuous in order to bring it within the act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction." Employment that is definite, whether for a day or for a year, is not casual. 8 N. C. L. Rev. 422.

The word "accident" within the meaning of this act is defined to be an unlooked for or untoward event which is not expected or designed by the person who suffers the injury, and the mere fact that the injury is the result of a wilful and criminal assault of a fellow-servant does not of itself prevent the injury from being accidental. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

The word "accident" within the meaning of this act should be construed in its wide and practical sense to give effect to the intent of the act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of this section, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509.

If an employee is injured as a result of the horse-play of a fellow-workman the injured employee is not precluded from recovering his damages under this act if he did not participate therein. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594.

A newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408.

The secretary and treasurer of an automobile sales company who was injured while traveling to collect accounts due the company was an employee of the company within the intent and meaning of this section at the time of the injury. Hunter v. Hunter Auto Co., 204 N. C. 723, 169 S. E. 648.

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Forest City, 207 N. C. 168, 176 S. E. 270.

Person Receiving Federal Relief Not an Employee.—A person furnished work for the relief of himself and family and paid with funds provided by the Federal Relief Administration is not an "employee" of the relief administrative agencies within the meaning of this section. Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580.

A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the Compensation Act under this section. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396.

Whether an injured person is an executive officer or an employee within the meaning of this section, is to be determined by the nature of the act performed by him at the time of the injury, but mere desultory, disconnected, and infrequent acts of manual labor not reasonably required by the exigencies of the situation will not classify an executive officer as an employee in the performance fo such acts. Nissen v. Winston-Salem, 206 N. C. 888, 175 S. E. 310.

Deputy Sheriff as Employee.—Where a deputy sheriff acting upon his own responsibility and contrary to the instructions of the sheriff received a fatal injury by a person whom he had arrested, he was not an employee of the county within the meaning of this act. Saunders v. Allen, 208 N. C. 189, 179 S. E. 754.

Employee Collecting Accounts. — Where there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, the evidence is sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and such a finding of fact is conclusive and binding. Winberry v. Farley Stores, 204 N. C. 79, 167 S. E. 475.

Hernia.—It is sufficient for the Commission to find the facts required under this section and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter. Ussery v. Erlanger Cotton Mills, 201 N. C. 688, 161 S. E. 307.

Review of Decision.—If there was no conflicting evidence and the Industrial Commission decided as a matter of law that there was no sufficient competent evidence that the injury to plaintiff was "by accident arising out of and in the course of employment", the question is one of law and is reviewable by the court upon appeal. Massey v. Board of Education, 204 N. C. 193, 167 S. E. 695.

Where Record Silent as to Material Fact at Issue.—Where in proceedings under this act there is no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his wilful intention to injure his assailant, a fellow-servant, the cause will be remanded for a definite determination of the question. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

Quoted, sub-sec. (a), in the dissenting opinion of Clarkson, J., in Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 804, 172 S. E. 500.

§ 8081 (j). Pending litigation unaffected. — The provisions of this article shall not affect pending litigations. (1929, c. 120, s. 3.)

§ 8081 (k). Presumption that all employers and employees have come under provisions of chapter. — From and after the taking effect of this article every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided. (1929, c. 120, s. 4.)

An allegation that the intestate had not accepted the provisions of the Workmen's Compensation Act is immaterial for the reason that this section provides in substance that every employer and employee coming within the purview of the act is presumed to have accepted the provisions thereof. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 156, 167 S. E. 560.

Where the evidence does not show that the employer has regularly in service as many as five employees in the same business within this State, the presumption under this section is not operative. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 803, 172 S. E. 500.

Applied in Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719; McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509.

§ 8081 (l). Notice of non-acceptance and waiver of exemption. — Either an employer or an employee, who has exempted himself by proper notice from the operation of this article, may at any time waive such exemption, and thereby accept the provisions of this article by giving notice as herein provided.

The notice of non-acceptance of the provisions of this article and notice of waiver of exemption heretofore referred to shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof. The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee

who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption. (1929, c. 120, s. 5.)

§ 8081(m). Presumption as to contract of service.—Every contract of service between any employer and employee covered by this article, written or implied, now in operation or made or implied prior to the taking effect of this article, shall, after the act has taken effect, be presumed to continue, subject to the provisions of this article; and every such contract made subsequent to the taking of this act shall be presumed to have been made subject to the provisions of this article, unless either party shall give notice, as provided in § 8081 (l), to the other party to such contract that the provisions of this act other than Sections 8081 (v), 8081 (w), 8081 (x), and 8081 (vvv) are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor. (1929, c. 120, s. 6.)

§ 8081 (n). No special contract can relieve an employer of obligations.—No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

§ 8081(o). State or subdivision and employees thereof.—Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of §§ 8081(l), 8081(m), 8081(v), 8081(w), and 8081(x) shall not apply to them: Provided, however, that any county or special school district may, at its option, by action of the governing body of such county or school district at a regular meeting of such governing body, exempt itself entirely from the operation of this article: Provided, however, that such action on the part of such governing body shall not become effective until thirty days after such action is taken, and notice thereof filed with the Industrial Commission: and, Provided further, that such action on the part of any county or special school district exempting itself from the operation of this article shall not have the effect of relieving such county or school district in any degree from any liability against such county or school district already accrued prior to the taking of such action, or accruing during the said thirty-day period after the taking of such action. (1929, c. 120, s. 8; 1931, c. 274, s. 1.)

Editor's Note.—The Act of 1931 added the provisos to this section.

Applied in Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396.

§ 8081 (p). Prior injuries and deaths unaffected. — The provisions of this article shall not apply to injuries or deaths, nor to accidents which occurred prior to the taking effect of this article. (1929, c. 120, s. 9.)

Applied in Hafleigh & Co. v. Crossingham, 206 N. C. 333, 173 S. E. 619.

§ 8081 (q). Employer to secure payment of compensation. — Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified. (1929, c. 120, s. 10.)

§ 8081(r). Other rights and remedies excluded; right to sue tort feasors; minor illegally employed; subrogation; amount of compensation as evidence; compromise. — The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter: Provided, further, that after the industrial commission shall have issued an award, the employer may commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First to the payment of actual court costs, then to the payment of attorneys' fees when approved by the industrial commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the industrial commission; if there then remain any excess, the amount thereof shall be paid to the injured employee or other person entitled thereto. If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative shall thereafter have the right to bring the action in his own name, and the employer, and any amount recovered shall be paid in the same manner as if the employer had brought the action.

The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action against a third party.

When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such

rights in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer at the time of the injury to or death of the employee, anything in the policy of insurance to the contrary notwithstanding.

In all cases where an employer and employee have accepted the workmen's compensation act, any injury to a minor while employed contrary to the laws of this state shall be compensable under this article the same and to the same extent as if said minor were an adult. (1929, c. 120, s. 11; 1933, c. 449.)

Editor's Note.—Public Laws of 1933, c. 449, struck out this section as it formerly appeared and inserted the above in lieu thereof. A comparison of the old with the new is necessary to determine the changes.

In General.—This section assigns the injured person's right of action against a tort-feasor to the employer or to the employer's insurer and enables the assignee to maintain the action which the employee could have maintained had no such assignment been made. Phifer v. Berry, 202 N. C. 388, 392, 163 S. E. 119.

The remedy under the Workmen's Compensation Act is exclusive and under the express terms of this section an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, the motion of the defendants that the deceased's employer be made a party as a joint tort-feasor with them should be denied. Brown v. Southern R. Co., 202 N. C. 256, 162 S. E. 613.

Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who had made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. Moreover, the statute was not designed as a city of refuge for a negligent third party. Brown v. Southern R. Co., 204 N. C. 668, 671, 169 S. E. 419.

Remedy Is Exclusive.—Where the allegations and evidence in an action for damages at common law show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, defendant's motion of nonsuit will be granted, as plaintiff's remedy under this act is exclusive of all other remedies. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509.

But the right of the administrator to maintain an action for death by wrongful act is not defeated, in view of this section, as a result of the widow's acceptance of compensation. Betts v. Southern Ry. Co., 71 F. (2d) 787.

Right under Death by Wrongful Act Statute of Another State Not Affected.—The acceptance of compensation under this act cannot affect the right to pursue a remedy against a third person under the wrongful death statute of another state, unless there is something in the law of the latter state which so provides. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

But Assignment of Such Claim Is Governed by Law of This State.—The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the compensation act of this state, in the absence of any provision to the contrary in the law of the state of the injury, is governed by the law of this state. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

Necessity for New Action against Third Person.—Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted against a third person by an injured employee or his personal representative, or must institute a new and independent action, is a question of procedure and under the law of this state it is proper to proceed in the action which has been instituted. Betts v. Southern Ry. Co., 71 F. (2d) 787, 791.

Because of the provisions of this section, the employer is not a joint tort-feasor, and an acceptance of an award against said employer for compensation would not discharge a third person whose negligence had contributed to the injury or death of the employee. Id.

Setting up Employer's Negligence.—In an action begun under this section a third person tort-feasor may set up the employer's negligence in bar of recovery, since the employer will not be allowed to profit by his own wrong in causing the employee's death. Brown v. Southern R. Co., 204 N. C. 668, 169 S. E. 419.

Double Recovery.—It would seem that by inadvertence no provision was inserted to bar the employee in the event he made settlement with a third party-tort-feasor. That the Commission has construed the act to include a settlement is rather a tribute to its liberal policy, for under a strict interpretation a double recovery by the injured employee would be possible. 8 N. C. L. Rev. 424.

This section might be construed to deny compensation to an employee who had received a settlement from the third party who caused the injury, but to deny to the third person, who paid for the supposed discharge, the power to set this fact up by way of defense to the claims of the employer who, in ignorance of the settlement, paid compensation. This is not quite a paradox. The employee should not be allowed a double recovery. The employer paying compensation should not be denied his remedy against the third person who made the settlement. To allow the settlement with employees (often secured through the improvidence and ignorance of the injured employee) to exonerate the third party-tort-feasor would deny to the employer paying compensation the full protection contemplated by the act in such a situation, for settlements are not always as much as compensation would be. It would seem that when a third party takes a release or settles a claim, he should secure the approval of the person or corporation liable for compensation, and that failure to do so should destroy the effect of the release as a defense to a claim by an employer who had paid compensation for the same injury. 8 N. C. L. Rev. 425.

Applied in Lincoln v. Atlantic Coast Line R. Co., 207 N. C. 787, 178 S. E. 601.

§ 8081 (s). Employer not relieved of statutory duty. — Nothing in this article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (1929, c. 120, s. 12.)

§ 8081 (t). Intoxication or willful neglect of employee; wilful disobedience of statutory duty. —No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another. When the injury or death is caused by the wilful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten per cent. When the injury or death is caused by the wilful failure of the employee to use a safety appliance or perform a statutory duty or by the wilful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section. (1929, c. 120, s. 13.)

§ 8081(u). Exceptions from provisions of article.—(a) This article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect article seven (7) of chapter sixty-seven (67) of the code, or any section thereof, relating to liability of railroads for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this article, shall any provision herein be placed in evidence or be permitted to be argued to the jury: Provided, however, that the foregoing exemption to railroads and railroad employees shall not apply to electric street railroads or employees thereof; and this article shall apply to electric street railroads and employees thereof, and to this extent the provisions of article seven, of chapter sixty-seven of the consolidated statutes is hereby amended: Provided fur-

ther, that the proviso shall not apply to Mecklenburg county.

(b) This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this state, unless such employees and their employers voluntarily elect, in the manner hereinafter specified, to be bound by this article: Provided, however, that when an employee files a claim with the North Carolina industrial commission and it shall appear that the employer has insured his liability under the Workmen's Compensation Act in any authorized corporation, association, or in any mutual insurance association formed by a group of employers so authorized, this shall be prima facie evidence that such employer and his employees have elected to be bound by this act, and, in such cases upon failure of the defendant and/or the insurance carrier to show by competent and sufficient evidence that the defendant employer was not bound by, or subject to the provisions of, the Workmen's Compensation Act at the time of the injury, compensation may be awarded by the industrial commission without any express findings in their award as to accepance of the act by the parties.

(c) This article shall not apply to state prisoners nor to county convicts.

(d) This article shall not apply to persons, firms or corporations engaged in selling agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer. (1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150.)

Editor's Note. — Public Laws of 1933, c. 401, inserted the proviso at the end of subsection (a) of this section.

The proviso to subsection (b) was added by the 1935 amendment.

Number of Regular Employees.—Where in a hearing before the Industrial Commission the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding that the parties were bound by this act, since the evidence tends to show that the employer regularly employed less than five employees. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500.

Where the findings of fact of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the Superior Court the award should be set aside and vacated. Poole v. Sigmon, 202 N. C. 172, 162 S. E. 198.

A demurrer to an action for death of an employee, on the ground that the action is cognizable only by the Industrial Commission, is properly overruled when it does not appear on the face of the complaint that the defendant employed more than five men in this State. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 167 S. E. 560. See also Allen v. American Cotton Mills, 206 N. C. 704, 175 S. E. 98.

Applied in Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569.

§ 8081(v). Employers not bound by article may not use certain defenses in damage suit.— An employer who elects not to operate under this article shall not, in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:

(a) That the employee was negligent.

(b) That the injury was caused by the negligence of a fellow employee.

(c) That the employee has assumed the risk of the injury. (1929, c. 120, s. 15.)

This section cannot be held to have abolished the simple tool doctrine as a ground of defense. Newbern v. Great Atlantic, etc., Tea Co., 68 F. (2d) 523, 526, 91 A. L. R. 781.

§ 8081(w). Adhering employer may use such defenses against non-adhering employee. — An employee who elects not to operate under this article shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this article, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law. (1929, c. 120, s. 16.)

§ 8081(x). Defenses denied to non-adhering employer as against non-adhering employee.— When both the employer and employee elect not to operate under this article, the liability of the employer shall be the same as though he alone rejected the terms of this article, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of the common-law defenses cited in section § 8081(v): Provided, however, that any sheriff may exempt himself and any and all deputies appointed by him from the provisions of this act by notice in writing to the Industrial Commission, such notice to be made on forms prescribed by the Industrial Commission. (1929, c. 120, s. 17; 1931, c. 274, s. 2.)

Editor's Note.—The Act of 1931 added the proviso to this section.

§ 8081(y). Settlements allowed in accordance with article.—Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission. (1929, c. 120, s. 18.)

§ 8081(z). Prompt payment of compensation required; installments; notice to commission; penalties. — Compensation under this article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(a) The first installment of compensation payable under the terms of an agreement shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period.

(b) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensa-

tion then due shall be paid. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the Commission, in accordance with the form prescribed by the Commission, that payment of compensation has begun or has been suspended, as the case may be.

(d) If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in sub-division [illegible] this section, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless such non-payment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(e) Within sixteen days after final payment of compensation has been made, the employer shall send to the Commission a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission within such time, the Commission shall assess against such employer a civil penalty in the amount of $25.00. (1929, c. 120, s. 18½.)

§ 8081(aa). Liability of principal contractors; certificate that sub-contractor has complied with law; right to recover compensation of those who would have been liable; order of liability.—Any principal contractor, intermediate contractor, or sub-contractor who shall sublet any contract for the performance of any work without requiring from such sub-contractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such sub-contractor has complied with § 8081(www) hereof, shall be liable to the same extent as such sub-contractor for the payment of compensation and other benefits under this article on account of the injury or death of any employee of such sub-contractor, due to an accident arising out of and in the course of the performance of the work covered by such sub-contract. If the principal contractor, intermediate contractor, or sub-contractor shall obtain such certificate at the time of sub-letting such contract to sub-contractor, they shall not thereafter be held liable to any employee of such sub-contractor for compensation or other benefits under this chapter. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five (25) cents.

Any principal contractor, intermediate contractor, or sub-contractor paying compensation or other benefits under this article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer. (1929, c. 120, s. 19.)

§ 8081(bb). Priority of compensation claims against assets of employer.—All rights of compensation granted by this article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s. 20.)

§ 8081(cc). Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation; unlawful deduction by employer. — No claim for compensation under this article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00. No agreement by an employee to waive his right to compensation under this chapter shall be valid. (1929, c. 120, s. 21.)

For a discussion of this section, see 8 N. C. L. Rev. 477, et seq.

§ 8081(dd). Written notice of accident to employer.—Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving

such notice, and the Commission is satisfied that the employer has not been prejudiced thereby. (1929, c. 120, s. 22.)

Cited in Wilson v. Clement Co., 207 N. C. 541, 542, 177 S. E. 797.

§ 8081(ee). What notice is to contain; defects no bar; notice personally or by registered letter.—The notice provided in the foregoing section shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice.

Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23.)

Cited in Wilson v. Clement Co., 207 N. C. 541, 542, 177 S. E. 797.

§ 8081(ff). Right to compensation barred after one year.—(a) The right to compensation under this article shall be forever barred unless a claim be filed with the industrial commission within one year after the accident, and if death results from the accident, unless a claim be filed with the commission within one year thereafter.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the industrial commission under the provisions of this article, and if the commission, or the supreme court on appeal, shall adjudge that such claim is not within the act, the claimant, or if he dies, his personal representative shall have one year after the rendition of a final judgment in the case within which to commence an action at law. (1929, c. 120, s. 24; 1933, c. 449, s. 2.)

Editor's Note. — Public Laws of 1933, c. 449, added subsection (b) to this section.

When the employer has filed with the Commission a report of the accident and claim of the injured employee, the claim is filed with the Commission within the meaning of this section. Hardison v. Hampton, 203 N. C. 187, 188, 165 S. E. 355.

Implied Agreement Not to Plead Statute.—Where the injured party was led to believe that his wages were accruing to his benefit, and he delayed filing his claim for more than twelve months, it was held that the doctrine of equitable estoppel would not apply so as to defeat the application of this section, there being no request by defendant that claimant delay the pursuit of his rights, nor an express or implied agreement not to plead the statute. Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797.

Effect of Dismissal on Rights of Dependents.—Where the claim of an employee under the Compensation Act is dismissed because not filed within one year of the accident, as provided by this section, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforceable only after his death. Wray v. Carolina Cotton, etc., Co., 205 N. C. 782, 172 S. E. 487. Note.—This case was decided under this section as it stood prior to the 1933 amendment.

§ 8081(gg). Medical treatment and supplies.—Medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the industrial commission may order such further treatments as may in the discretion of the commission be necessary.

The commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment when ordered by the industrial commission, shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the industrial commission the circumstances justified the refusal, in which case, the industrial commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified, a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the industrial commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the industrial commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506.)

Editor's Note.—The Act of 1931 amended this section by striking out all of the provisions on voluntary treatment furnished by the employer and inserting a sentence empowering the commission on request of the employee to order a change of treatment at the employer's expense. 9 N. C. Law Rev. 405.

Public Laws of 1933, c. 506, inserted the proviso at the end of this section relating to the selection of a physician.

§ 8081(hh). Liability for medical treatment measured by average cost in community; malpractice of physician.—The pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the

injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26.)

Injury or suffering sustained by an employee in consequence of the malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee's injury for which he is entitled to compensation. In such event the employer and the carrier are primarily liable and the question of secondary liability is eliminated. Hoover v. Globe Indemnity Co., 202 N. C. 655, 657, 163 S. E. 758.

§ 8081(ii). Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.—After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this article or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this article. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same. (1929, c. 120, s. 27.)

§ 8081(jj). Compensation allowed for first seven days.—No compensation shall be allowed for the first seven calendar days of disability resulting fron an injury, except the benefits provided for in § 8081(gg). Provided, however, that in the case the injury results in disability of more than twenty eight (28) days, the compensation shall be allowed from the date of the disability. (1929, c. 120, s. 28.)

§ 8081(kk). Compensation for total incapacity or death.—Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased. (1929, c. 120, s. 29.)

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

Construction.—Construing this act as a whole to effectuate the intent and purpose of the Legislature, it is held that the purpose of the act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the last clause of this section purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the act, and should be disregarded in giving effect to its other provisions, §§ 8081(tt) and 8081(vv) providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under said sections she is not entitled to the maximum award as administratrix under this section. Smith v. Carolina Power & Light Co., 198 N. C. 614, 152 S. E. 805.

This section should be construed in pari materia with § 8081(mm) allowing compensation for the loss of members, and so construed it is held that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under § 29 for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under § 31, there being no provision in the act that the latter should preclude the former, compensation for the latter to begin upon expiration of the compensation for the former. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69.

§ 8081(ll). Partial incapacity; pro-rating where total disability results in partial. — Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. (1929, c. 120, s. 30.)

§ 8081(mm). Other rates of compensation.—In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, to-wit:

(a) For the loss of a thumb, sixty per centum of the average weekly wages during sixty weeks.

(b) For the loss of a first finger, commonly called the index finger, sixty per centum of the average weekly wages during thirty-five weeks.

(c) For the loss of a second finger, sixty per centum of average weekly during thirty weeks.

(d) For the loss of a third finger, sixty per centum of average weekly wages during twenty weeks.

(e) For the loss of a fourth finger, commonly called the little finger, sixty per centum of average weekly wages during fifteen weeks.

(f) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and

the compensation shall be for one-half of the periods of time above specified.

(g) The loss of more than one phalange shall be considered the loss of the entire finger or thumb; Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(h) For the loss of a great toe, sixty per centum of the average weekly wages during thirty weeks.

(j) For the loss of one of the toes other than a great toe, sixty per centum of average weekly wages during ten weeks.

(k) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and the compensation shall be for one-half of the periods of time above specified.

(l) The loss of more than one phalange shall be considered as the loss of the entire toe.

(m) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and fifty weeks.

(n) For the loss of an arm, sixty per centum of average weekly wages during two hundred weeks.

(o) For the loss of a foot, sixty per centum of average weekly wages during one hundred and twenty-five weeks.

(p) For the loss of a leg, sixty per centum of average weekly wages during one hundred and seventy-five weeks.

(q) For the loss of an eye, sixty per centum of the average weekly wages during one hundred weeks.

(r) The loss of both hands or both arms, or both feet, or both legs or both eyes, or any two thereof shall constitute total and permanent disability, to be compensated according to the provisions of § 8081(kk).

(s) For the complete loss of hearing in one ear, sixty per centum of average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of average weekly wages during one hundred and fifty weeks.

(t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss. Loss of both arms, hands, legs, or vision in both eyes shall be deemed permanent total disability, and shall be compensated under § 8081(k)

In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed $2,500.00.

The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in § 8081(kk); provided, however, that the foregoing schedule of compensation shall not be deemed to apply and compensate for serious disfigurement resulting from any injury to any employee received while in and about the duties of his employment. And provided, further, that the Industrial Commission created by this article shall have power and authority to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this article, not to exceed twenty-five hundred ($2500) dollars. And provided, further, that disfigurement shall also include the loss or serious or permanent injury of any member or organ of the body for which no compensation is payable under the schedule of specific injuries set out in this section. (1929, c. 120, s. 31; 1931, c. 164.)

Editor's Note.—The Act of 1931 added the last proviso to this section in an apparent effort to meet the decisions in the cases of Henninger v. Industrial Commission, 1 N. C. I. C. 3; Porter v. Jennings Cotton Mills, 1 N. C. I. C. 218. See 8 N. C. Law Rev. 423-424, 9 N. C. Law Rev. 405.

The effect of the proviso in subsec. (t) of this section relating to serious disfigurement is to exclude the compensation for facial and head disfigurement only from the "weekly compensation payments" contained in the "foregoing schedule of compensation," and does not exclude such compensation from the limitation upon total compensation under the act. Arp v. Wood & Co., 207 N. C. 41, 42, 175 S. E. 719.

§ 8081(nn). Refusal of injured employee to accept suitable employment as suspending compensation.—If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

§ 8081(oo). Prorating permanent disability received in other employment. — If any employee has a permanent disablity or has sustained a permanent injury in service in the Army or Navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in § 8081(mm) he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33.)

§ 8081(pp). Employee receiving an injury when being compensated for former injury.—If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in § 8081(mm); but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this article. (1929, c. 120, s. 34.)

§ 8081(qq). How compensation paid for two injuries; employer liable only for subsequent injury.—If any employee receives a permanent injury as specified in § 8081(mm) after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

§ 8081(rr). Accidents taking place outside state; employee receiving compensation from another state. — Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other State nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article. (1929, c. 120, s. 36.)

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

§ 8081(ss). Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this article for an injury covered by § 8081(mm) and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37.)

An award inadvertently entered by the Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate, this section providing that payment of the unpaid balance should be made to his next of kin dependent upon him at the time of his death. Butts v. Montague, 204 N. C. 389, 168 S. E. 215.

§ 8081(tt). Where death results proximately from accident; prorating as to persons partially dependent; compensation to aliens.—If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this article in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars. If the employee leaves dependents only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred and fifty weeks from the date of the injury. Compensation under this article to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child, or children, to surviving father or mother whom the employee has supported, either wholly or in part for the period of one year prior to the date of the injury, and except that the Commission may, at its option, or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission. (1929, c. 120, s. 38.)

For a discussion of this section, see 8 N. C. Law Rev. 427, et seq.

Cited in Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809.

§ 8081(uu). Spouse and child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent. — A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this article for the full periods specified herein. (1929, c. 120, s. 39.)

See § 8081(i) for statutory definition of the term "child."

The determination of the extent of the dependency of partial dependents has proven troublesome. See 8 N. C. L. Rev. 426.

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this act. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 154 S. E. 66.

An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the meaning of this section, and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under this act to his dependents. Lippard v. Southeastern Exp. Co., 207 N. C. 507, 177 S. E. 801.

Cited in Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809.

§ 8081(vv). Commutation of benefit and payment on failure of dependents; second injury fund. — If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in section 8081(tt) for whole dependents; but if the deceased left no next of kin as herein defined, then said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the Statutes of Distribution; but if there be no next of kin as defined in the Statutes of Distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration. For the purpose of this section the term "next of kin" shall include only the father, mother, widow, child, brother or sister of the deceased.

Amounts paid to the Industrial Commission under this section shall constitute a Second Injury Fund, to be held by the commission and disbursed by it in unusual cases of second injuries as follows: (1) To provide additional compensation in case of second injuries referred to in section 8081(oo): Provided, however, such additional compensation when added to the compensation awarded under said section shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident. (2) To provide for an injured employee who has sustained permanent total disability, in the manner referred to in section 8081(qq), compensation in addition to the compensation which shall be awarded under said section; such additional compensation, however, when added to the compensation awarded under said section shall not exceed the compensation for permanent total disability as provided in section 8081(kk).

The additional compensation herein provided for is to be paid out of the Second Injury Fund exclusively and only to the extent which the assets of said fund shall permit. (1929, c. 120, s. 40; 1931, c. 274, s. 5.)

Editor's Note.—This section formerly provided for a payment to the personal representative of a deceased employee who left no dependents. It was amended by the Act of 1931 so as to direct payment to a narrow class of next of kin specially defined by the section. Failing such persons, a more complicated arrangement is provided. The original Act was criticised as providing an unjustifiable windfall for non-dependent next of kin. The present amendment makes a half-hearted move toward cutting off this bounty for relatives at the expense of the employer, the industry and eventually the public, by turning a part of the money over to the Commission in some cases. A clerical error in the amending Act was corrected by Public Laws 1931, c. 319. 9 N. C. Law Rev. 406.

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

While there is no computed amount provided by this section for payment to the personal representative of a deceased employee for death resulting from an injury compensable thereunder, the act provides the method by which such amount can be commuted, which is payable to the personal representative for the benefit of the heirs at law of the deceased employee. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 154 S. E. 66.

§ 8081(ww). Total compensation not to exceed $6,000. — The total compensation payable under this article shall in no case exceed Six Thousand ($6,000) Dollars. (1929, c. 120, s. 41.)

The amount allowed by the Industrial Commission for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. Arp. v. Wood & Co., 207 N. C. 41, 175 S. E. 719.

§ 8081(xx). Deduction of unauthorized payments. — Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation: Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment. (1929, c. 120, s. 42.)

§ 8081(yy). Commission may prescribe monthly or quarterly payments.—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)

§ 8081(zz). Lump sums. — Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the parties agree and the Industrial Commission deems it to be the best interest of the employee of his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. (1929, c. 120, s. 44.)

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

§ 8081(zz) 1. Reducing to judgment outstanding liability of insurance carriers withdrawing from state.—Upon the withdrawal of any insurance carrier from doing business in the state that has any outstanding liability under the

workmen's compensation act, the insurance commissioner shall immediately notify the North Carolina industrial commission, and thereupon the said North Carolina industrial commission shall issue an award against said insurance carrier and commute the installments due the injured employee, or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina industrial commission shall then cause suit to be brought on said judgment in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474.)

§ 8081(aaa). To receive lump sum payments; receipt to discharge employer. — Whenever the Industrial Commission deems it expedient, any lump sum, subject to the provisions of the foregoing section, shall be paid by the employer to some suitable person or corporation appointed by the Superior Court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or any one else who is liable therefor. (1929, c. 120, s. 45.)

§ 8081(bbb). Right of Commission to review awards and change same.—Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article. (1929, c. 120, s. 46; 1931, c. 274, s. 6.)

Editor's Note.—The Act of 1931 struck out the words "last award" formerly ending this section and inserted in lieu thereof the words "last payment" of compensation pursuant to an award under this chapter.

Delay in Seeking Review.—Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than twelve months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts in view of this section. Lee v. Rose's 5-10-25c. Stores, 205 N. C. 310, 171 S. E. 87.

Stated in Russell v. Western Oil Co., 206 N. C. 341, 346, 174 S. E. 101.

Cited in Butts v. Montague Bros., 208 N. C. 186, 188, 179 S. E. 799.

§ 8081(ccc). Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer. —(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.

(b) Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer.

(c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them. (1929, c. 120, s. 47; 1931, c. 274, s. 7.)

Editor's Note.—The Act of 1931 struck out the former section and substituted the above.

§ 8081(ddd). Benefits of mentally incompetent or minor employees under 18 to be paid to a trustee, etc.—If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this article, his guardian, trustee, or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

§ 8081(eee). Limitation as against minors or mentally incompetent.—No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

§ 8081(fff). Contribution allowed employers of same injured employee.—Whenever an employee, for whose injury or death compensation is payable under this article, shall at the time of the injury be in joint service of two or more employers subject to this article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)

§ 8081(ggg). North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.—There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting ot three commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned, the Governor shall appointed a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employers, and not more than one appointee shall be a person who, on account of his previous vocation, employment or affilia-

tions, can be classed as a representative of employees. One member, to be designated by the Governor, shall act as chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8.)

Editor's Note.—The Act of 1931 struck out the following words formerly appearing at the end of this section: "And such member so selected as chairman shall not be one who, on account of his previous vocation, employment or affiliations, can be classed either as representative of employers or as representative of employees."

§ 8081(hhh). Salaries and expenses; secretary and other clerical assistance; annual report.—(a) The salaries of the chairman and each of the other Commissioners shall be fixed by the Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthly installments.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and whose salary shall be not more than thirty-six hundred ($3600) dollars a year and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be sworn to by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State Treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the general appropriation act as made to other departments, commissions and agencies of the State government.

(e) The Commission shall publish annually for free distribution a report of the administration of this article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9.)

Editor's Note.—Prior to the 1931 amendment the salary of the chairman was fixed at $4500 a year and each of the other commissioners received $4000.

§ 8081(iii). Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.—(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies, who shall have the power to subpoena witnesses and administer oaths, and who may take testimony in such cases as the Commission may deem proper. Such testimony shall be transmitted in writing to the Commission, and the Commission shall fix the compensation of such deputies.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. (1929, c. 120, s. 53; 1931, c. 274, s. 10.)

Editor's Note.—The Act of 1931 amended subsection (a) of this section by striking out after the word "offices" the following: "in the capitol, or some other suitable building in the City of Raleigh."

§ 8081(jjj). Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.—(a) The Commission may make rules, not inconsistent with this article, for carrying out the provisions of this article. Processes and procedure under this article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this article, to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in actions at law, except that they shall be directed to the Commission, the Commissioner, or the Deputy Commissioner before whom the proceedings may be pending.

(b) The County Sheriffs and their respective deputies shall serve all subpoenas of the Commission or its deputies, and shall receive the same fees as are now provided by law for like services; each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(c) The Superior Court shall, on application of the Commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 120, s. 54.)

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its rules and regulations, as provided by this section, it being the intent of the Legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the Superior Court on matters of law only. Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799.

§ 8081(kkk). Blank forms and literature; accident reports; Studies and investigations and recommendations to General Assembly; to co-operate with agencies of U. S. for prevention of

injury.—(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this act.

(b) The Commission shall tabulate the accident reports received from employers in accordance with section 8081(vvv) and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes for injuries in employments covered by this article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission is authorized (1) to co-operate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this chapter, or any State agency engaged in enforcing any laws to assure safety for employees, and (2) to permit any such agency to have access to the records of the Commission. In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this article is being carried on, and to examine any tool, appliance, or machinery used in such employment. (1929, c. 120, s. 55.)

§ 8081(lll). Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.—If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified. (1929, c. 120, s. 56.)

§ 8081(mmm). In event of disagreement, Commission is to make award after hearing.—If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this article within fourteen days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the city or county where the injury occurred, unless otherwise agreed to by the parties and authorized by the Industrial Commission. (1929, c. 120, s. 57.)

§ 8081(nnn). Determination of disputes by Commission.—The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn, and shall transmit all testimony to the Commission for its determination and award. (1929, c. 120, s. 58.)

§ 8081(ooo). Review of award. — If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. (1929, c. 120, s. 59.)

§ 8081(ppp). Award conclusive as to facts; or certified questions of law.—The award of the Commission, as provided in § 8081(nnn), if not reviewed in due time, or an award of the Commission upon such review, as provided in § 8081(ooo) shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of said Commission to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions. The Commission, of its own motion, may certify questions of law to the Supreme Court, for decision and determination by the said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Supreme Court, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make

payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this article. (1929, c. 120, s. 60.)

Jurisdictional Facts Not Conclusive on Appeal.—Both a proper construction of the language of this section, and well-settled principles of law lead to the conclusion that where the jurisdiction of the Industrial Commission to hear and consider a claim for compensation under the provisions of the Workmen's Compensation Act, is challenged by an employer, on the ground that he is not subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N. C. 500, 505, 163 S. E. 569.

Evidence Not Considered on Appeal.—Under this section an award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, and neither the Supreme Court nor the Superior Court can consider the evidence for the purpose of determining the facts on appeal. Reed v. Lavender Bros., 206 N. C. 898, 172 S. E. 877.

The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396.

The jurisdiction of the Superior Court is limited to questions of law only. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 176 S. E. 572.

Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck after he and the plaintiff had joked about whether the pistol would shoot, the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594.

The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the Superior Court, this section failing to provide the procedure for such appeals. Higdon v. Nantahala Power, etc., Co., 207 N. C. 39, 175 S. E. 710.

Newly Discovered Evidence.—When a proceeding for compensation under the provisions of this act has been duly docketed in the Superior Court, upon an appeal from an award of the Industrial Commission, the Superior Court has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 255, 176 S. E. 572.

Right to Reverse and Remand Cause.—Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the Superior Court, on appeal, has jurisdiction, in view of this section, to reverse the Industrial Commission and remand the cause. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404.

Applied in Smith v. Hauser & Co., 206 N. C. 562, 174 S. E. 455.

§ 8081(qqq). Agreements approved by Commission or awards may be filed as judgments; discharge or restoration of lien.—Any party in interest may file in the Superior Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission, showing compliance with § 8081(www) of this chapter, with the Clerk of the Superior Court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment roll an entry showing the filing of such certificate, which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause and after ten days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due. (1929, c. 120, s. 61.)

§ 8081(rrr). Expenses of appeals brought by insurers. — If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings, including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11.)

Editor's Note.—This section was radically changed by the Act of 1931. It formerly allowed costs in any proceeding found to have been prosecuted or defended without reasonable grounds to be thrown on the party so acting unreasonably. 9 N. C. Law Rev. 407.

This section is valid. Russell v. Western Oil Co., 206 N. C. 341, 174 S. E. 101.

Discretion of Court.—The power given the court under this section to order that the cost to the injured employee of such proceedings, including a reasonable attorney's fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by this Court. State v. Davidson, 205 N. C. 735, 172 S. E. 489.

Applied in Williams v. Thompson, 203 N. C. 717, 166 S. E. 906.

§ 8081(sss). Commission may appoint qualified physician to make necessary examinations; expenses; fees.—The Commission or any member thereof, may upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission, not exceeding ten dollars for each examination and report, but the Commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the employer. (1929, c. 120, s. 63; 1931, c. 274, s. 12.)

Editor's Note.—The Act of 1931 substituted the word "employer" for the word "state" formerly ending this section.

§ 8081(ttt). Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims.—(a) Fees for attorneys and physicians and charges of hospitals for services under this article shall be subject to the approval of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case.

(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than $500 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (1929, c. 120, s. 64.)

§ 8081(uuu). Commission to determine all questions.—All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

§ 8081(vvv). Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.—(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within ten days after the occurrence and knowledge thereof, as provided in § 8081(dd), on an injury to an employee, causing his absence from work for more than three days, a report thereof shall be made in writing and mailed to the Industrial Commission on blanks to be procured from the Commission for this purpose.

(b) The records of the Commission, in so far as they refer to accidents, injuries, and settlements, shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of sixty days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer, and name, age, sex, and wages and occupation of the injured employee; and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars and not more than twenty-five dollars for each refusal or neglect. The fine not herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier wilfully neglecting or failing to transmit the report shall be liable for the said penalty. (1929, c. 120, s. 66.)

§ 8081(www). Adhering employers required to carry group insurance; prove financial ability to pay for benefits.—Every employer who accepts the provisions of this article relative to the payment of compensation shall insure and keep insured his ability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this article. In the latter case the Commission may require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred. (1929, c. 120, s. 67.)

For comment on the provisions of this section through section (cccc) in relation to the law of contracts, see 13 N. C. Law Rev., 102.

Stated in Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 807, 172 S. E. 500.

§ 8081(xxx). Adhering employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation. — (a) Every employer accepting the compensation provisions of this article shall, within thirty days, after this article takes affect, file with the Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of § 8081(www) and all others relating thereto.

(b) Any employer required to secure the payment of compensation under this article who refuses or neglects to secure such compensation shall be punished by a fine of ten cents for each employee at the time of the insurance becoming due, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this article or at law in the same manner as provided in § 8081(v).

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. (1929, c. 120, s. 68.)

§ 8081(yyy). Certificate of compliance with law; revocation and new certificate.—Whenever an employer has complied with the provisions of § 8081(www), relating to self-insurance, the Industrial Commission shall issue to such employer a certificate, which shall remain in force for a period fixed by the Commission, but the Commission may, upon at least sixty days' notice and

a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition. (1929, c. 120, s. 69.)

§ 8081(zzz). Insurance policies must contain clause that notice of employer is notice to insurer; etc.—All policies insuring the payment of compensation under this article must contain a clause to the effect that, as between the employer and the insurer, the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)

§ 8081(aaaa). Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.—No policy of insurance against liability arising under this article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this article, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

§ 8081(bbbb). Law written into each insurance policy; form of policy to be approved by Insurance Commissioner; law inapplicable to single catastrophe hazards.—(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this chapter. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Insurance Commissioner.

(b) This article shall not apply to policies of insurance against loss from explosion of boilers or fly-wheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72.)

§ 8081(cccc). Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.—(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this article, shall be fair, reasonable, and adequate, with due allowance for merit rating; and all risks of the same kind and degree of hazard shall be written at the same rate by the same carrier. No policy of insurance against liability for compensation under this article shall be valid until the rate thereof has been approved by the Commissioner of Insurance; nor shall any such carrier of insurance write any such policy or contract until its basic and merit rating schedules have been filed with, approved, and not subsequently disapproved by the Commissioner of Insurance.

(b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this article, shall, as hereinafter provided, pay a tax upon the premium received, whether in cash or notes, in this State, or on account of business done in this State, for such insurance in this State, at the rate provided in the Revenue Act then in force, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.

(d) Every such insurance carrier shall, for the six months ending December thirty-first, nineteen hundred and twenty-nine, and semi-annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance within thirty days after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such premium ascertained, as provided in sub-section (c) hereof, less returned premium on canceled policies.

(e) If any such insurance carrier shall fail or refuse to make the return required by this article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State Treasury. The suit may be brought by the Commissioner of Insurance, in his official capacity, in any court of this State having jurisdiction. Reasonable attorney's fees may be taxed as costs therein, and process may issue to any county of the State, and may be served as in civil actions, or in case of unincorporated associations, partnerships, inter-indemnity contracts, upon any agent of the parties thereto upon whom process may be served under the laws of this State.

(g) Any person or persons who shall in this State act or assume to act as agent for any such insurance carrier whose authority to do business in this State has been suspended, while such suspension remains in force, or shall neglect or refuse to comply with any of the provisions of this section obligatory upon such person or party, or who shall wilfully make a false or fraudulent statement of the business or condition of any such insurance carrier or false or fraudulent return as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not less than ten nor more than ninety days, or both such fine and imprisonment in the discretion of the court.

(h) Whenever by this article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the same may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of such insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer thereof in the United States, or the State Insurance Commissioner.

(i) Any insurance carrier liable to pay a tax upon premiums under this article shall not be liable to pay any other or further tax upon such premiums, under any other law of this State.

(j) Every employer carring his own risk under the provisions of § 8081(www) shall, under oath, report to the Commission his payroll, subject to the provisions of this chapter. Such report shall be made in form prescribed by the Commission, and at the times herein provided for premium reports by insurer. The Commission shall assess against such payroll a maintenance fund tax computed by taking such per cent of the basic premiums charged against the same or most similar industry or business taken from the manual insurance rate then in force in this State as is assessed in the Revenue Act against the insurance carriers for premiums collected on compensation insurance policies. (1929, c. 120, s. 73; 1931, c. 274, s. 13.)

Construction.—The moneys received under sub-section (j) of this section is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed in pari materia, and the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said sub-section as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose. North Carolina Industrial Commission v. O'Berry, 197 N. C. 595, 150 S. E. 44.

§ 8081(dddd). Collection of fines and penalties. —The Industrial Commission shall have the power by civil action brought in its own name to enforce the collection of any fines or penalties provided by this article, and fines or penalties collected by the Commission shall become a part of the maintenance fund referred to in sub-section (j) of section 8081(cccc). (1931, c. 274, s. 14.)

§ 8081(eeee). Salaries and expenses to be paid out of Contingency and Emergency Fund.— For the purpose of paying salaries and expenses of the Commission and its necessary employees in making preparations and putting this article into operation such sums as may be necessary shall be paid out of allotments by the Governor and Council of State out of the Contingency and Emergency appropriation under § 7486(v) of the Code. (1929, c. 120, s. 75.)

Art. 2. Compensation Rating and Inspection Bureau

§ 8081(ffff). Compensation Rating and Inspection Bureau created; objects, functions, etc. — There is hereby created a Bureau to be known as the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix premium rates for Workmen's Compensation Insurance and equitably adjust the same as far as practicable, in accordance with the hazards of individual risks by inspection by the Bureau.

(b) To furnish upon request of any employer in the State of North Carolina or to any member of the compensation rating and Inspection Bureau of North Carolina, upon whose risk a compensation rate has been promulgated, information as to the rating, including the method of its compilation, and to encourage employers to reduce the number and severity of accidents by offering reduced premium rates for improved working conditions under such uniform system of merit or schedule rating as may be approved by the Insurance Commissioner of the State of North Carolina.

(c) The Bureau shall make a rating survey of each risk inspected which survey shall clearly show the location of all ratable items: Provided, however, that the Bureau shall not describe the items or make any recommendations for accident prevention, such service being reserved as a proper and essential field for the competitive enterprise of its individual members. (1931, c. 279, s. 1.)

§ 8081(gggg). Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex-officio Chairman. — Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organ-

ization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the compensation rating and inspection bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the compensation rating and inspection bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the bureau shall fix the initial premium therefor, (subject to the approval of the insurance commissioner), and upon its payment said bureau shall designate a member whose duty it shall be to issue a standard workmen's compensation policy of insurance containing the usual and customary provisions found in such policies therefor. Before any such risk shall be assigned under the provisions of this section such risk shall, if demanded, furnish the bureau a certificate of the division of standards and inspection of the department of labor that he is complying with the rules and regulations of that department. The bureau shall within thirty days after the approval of this law, make and adopt such rules as may be necessary to carry this law into effect, subject to final approval of the insurance commissioner. As a prerequisite to the transaction of workmen's compensation insurance in this State every member of said bureau shall file with the insurance commissioner written authority permitting said bureau to act in its behalf as provided in this section, and an agreement to accept such risks as are assigned to said insurance by said bureau, as provided in this section.

(a) Each member of the Compensation Rating and Inspection Bureau writing compensation insurance in the State of North Carolina shall, as a requisite thereto, be represented in the aforesaid Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee, which governing committee shall be composed of equal representation by participating and non-participating members.

(b) The Bureau, when created, shall adopt such rules and regulations for its procedure as may be necessary for its maintenance and operation. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such necessary expense to be advanced by prorating such expense among the members in accordance with the amount of gross Workmen's Compensation premiums written in North Carolina during the preceding year ending December the thirty-first, one thousand nine hundred and thirty, and members entering since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expenses of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The Insurance Commissioner of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the Compensation Rating and Inspection Bureau of North Carolina, and the Insurance Commissioner or such deputy designated by him shall preside over all meetings of the governing committee or other meetings of the Bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1931, c. 279, s. 2; 1935, c. 76.)

Editor's Note.—All of this section preceding subsection (a) except the first sentence was inserted by the 1935 amendment.

§ 8081(hhhh). Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.—In order to carry into effect the objects of the two preceding sections the Bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistance as is necessary, subject to the approval of the Insurance Commissioner, and the Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of Workmen's Compensation Insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the compilation and promulgation of rates on Workmen's Compensation Insurance. All such rates compiled and promulgated by such Bureau shall be submitted to the Insurance Commissioner for approval as provided in section 8081(cccc). (1931, c. 279, s. 3.)

Art. 3. Occupational Diseases

§ 8081(1). Occupational disease made compensable; "accident" defined; diseases excepted under certain conditions. — Disablement or death of an employee resulting from an occupational disease described in § 8081(2) shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word "accident," as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented

himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis (1935, c. 123.)

§ 8081(2). Occupational diseases enumerated; when due to exposure to chemicals.—The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article:

1. Anthrax.
2. Arsenic poisoning.
3. Brass poisoning.
4. Zinc poisoning.
5. Manganese poisoning.
6. Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least thirty days in the preceding twelve months' period, and; provided further only the employer in whose employment such employee was last injuriously exposed shall be liable.
7. Mercury poisoning.
8. Phosphorus poisoning.
9. Poisoning by carbon bisulphide, methanol, naphtha or volatile halogenated hydrocarbons.
10. Chrome ulceration.
11. Compressed-air illness.
12. Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrol-benzol, anilin, and others).
13. Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors.
14. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances.
15. Radium poisoning or injury by X-rays.
16. Blisters due to use of tools or appliances in the employment.
17. Bursitis, of the knee or elbow, due to intermittant pressure in the employment.
18. Miner's nystagmus.
19. Bone felon due to constant or intermittent pressure in employment.
20. Synovitis, caused by trauma in employment.
21. Tenosynovitis, caused by trauma in employment.
22. Carbon monoxide poisoning.
23. Poisoning by sulphuric, hydrochloric or hydroflouric acid.
24. Asbestosis.
25. Silicosis.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123.)

§ 8081(3). "Disablement" defined. — The term "disablement" as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed; but in all other cases of occupational disease shall be equivalent to "disability" as defined in § 8081(i), paragraph (i). (1935, c. 123.)

§ 8081(4). "Disability" defined. — The term "disability" as used in this article means the state of being incapacitated as the term is used in defining "disablement" in § 8081(3). (1935, c. 123.)

§ 8081(5). Limitation on compensable diseases. —The provisions of this article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such disease occurred on or after the date on which this article shall have taken effect. (1935, c. 123.)

§ 8081(6). Persons liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable. (1935, c. 123.)

§ 8081(7). Claims for certain diseases restricted; time limit for filing claims.—An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within three years after the last exposure to such disease, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of three years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure. Claims for all other occupational diseases shall be barred unless claims shall be filed with the industrial commission within one year from the disablement or death caused by such occupational disease. (1935, c. 123.)

§ 8081(8). Employer to provide treatment.—In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the industrial commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of three hundred thirty-four ($334.00) dollars in any one year; and, provided further, all such treatment shall be first authorized by the industrial commission after consulting with the advisory medical committee. (1935, c. 123.)

§ 8081(9). Compulsory examination of employees. — The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the industrial commission to expose them to the hazards of asbestosis and/or silicosis. The industrial commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after the date on which this article becomes operative it shall be the duty of every employer, in the conduct of whose business his employees or any of

them are subjected to the hazards of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the industrial commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the industrial commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the industrial commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a misdemeanor and shall be punishable as such. (1935, c. 123.)

§ 8081(10). Compensation for employee temporarily removed from hazardous employment; payment for training for readjustment to other work; waiver of right to compensation.—Where an employee, though not actually disabled, is found by the industrial commission to be affected by asbestosis and/or silicosis, and it is also found by the industrial commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the industrial commission, he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease: Provided, however, compensation in no such case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents, and in either case said period shall begin from the date of removal from the employment, unless actual disablement from such disease results later and within the time limited in § 8081(7). When in any such case the forced change of occupation shall in the opinion of the industrial commission require that the employee be given special training in order to properly readjust himself there shall be paid for such training and incidental traveling and living expenses an additional sum which shall not exceed three hundred ($300.00) dollars, in the case of an employee without dependents, and which shall not exceed five hundred ($500.00) dollars in the case of an employee with dependents, such payment to be made for the benefit of the employee to such person or persons as the industrial commission may direct; provided, however, no such payment shall be made unless the employee accepts the special training herein provided, nor shall payment be made for a longer period of time than the employee shall accept such special training. If an employee has been so compensated, and whether or not specially trained for another occupation, and he thereafter engages in any occupation which exposes him to hazards of silicosis and/or asbestosis without first having obtained the written approval of the industrial commission, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death from silicosis and/or asbestosis: Provided, however, that an employee so affected, as an alternative to forced change of occupation, may, subject to the approval of the industrial commission, waive in writing his right to compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement and/or death as a result of asbestosis and/or silicosis with which the employee was so affected compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than one hundred (100) weeks. Such written waiver must be filed with the industrial commission, and the commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123.)

§ 8081(11). "Silicosis" and "asbestosis" defined.—The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. (1935, c. 123.)

§ 8081(12). Period necessary for employee to be exposed.—Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this state, provided no part of such period of two years shall have been more than ten years prior to the last exposure. (1935, c. 123.)

§ 8081(13). General act to control as regards benefits. — Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act. (1935, c. 123.)

§ 8081(14) Reduction of rate where tuberculosis develops. — In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one-sixth. (1935, c. 123.)

§ 8081(15). Requirement as to written notice of disease to employer or industrial commission;

waiver of notice and claim where payments are made; claim where benefits are discontinued. — Unless written notice of the first distinct manifestation of an occupational disease shall be given to the employer in whose employment the employee was last injuriously exposed to the hazards of such disease or to the industrial commission within thirty (30) days after such manifestation, and, in case of death, unless also written notice of such death shall be given by the beneficiary hereunder to the employer or the industrial commission within ninety (90) days after occurrence, and unless claim for disability and/or death shall be made within one (1) year after the disablement or death, respectively, all rights to compensation for disability or death from an occupational disease shall be forever barred: Provided, however, that notice and/or claim shall be deemed waived in case of disability or death where the employer or insurance carrier voluntarily makes compensation payments therefor, or, within the time above limited, has actual knowledge of the incurrence of the disease or of the death and its cause, or by his or its conduct misleads the injured employee or claimant reasonably to believe that notice and/or claim has or have been waived; and, Provided further, that where compensation payments have been made and discontinued, and further compensation is claimed, whether for disability or death from asbestosis, silicosis or lead poisoning, the claim for such further compensation shall be made within two years after the last payment, but in all other cases of occupational disease claim for further compensation shall be made within one year after the last payment. (1935, c. 123.)

§ 8081(16). Post-mortem examinations; notice to next of kin and insurance carrier.—Upon the filing of a claim for death from an occupational disease where in the opinion of the industrial commission a post-mortem examination is necessary to accurately ascertain the cause of death, such examination shall be ordered by the industrial commission. A full report of such examination shall be certified to the industrial commission. The surviving spouse or next kin and the employer or his insurance carrier, if their identity and whereabouts can be reasonably ascertained, shall be given reasonable notice of the time and place of such post-mortem examination, and, if present at such examination, shall be given an opportunity to witness the same. Any such person may be present at and witness such examination either in person or through a duly authorized representative. If such examination is not consented to by the surviving husband or wife or next of kin, all right to compensation shall cease. (1935, c. 123.)

§ 8081(17). Controverted medical questions. — If on the hearing of a claim for compensation for asbestosis and/or silicosis, any controverted medical question or questions shall arise, the industrial commission shall reserve its decision and award until it shall have received a report from the advisory medical committee; and the industrial commission may in its discretion refer to said committee controverted medical questions arising out of other occupational disease claims. (1935, c. 123.)

§ 8081(18). Hearing before advisory medical committee; inspection of medical reports. — The advisory medical committee, upon reference to it of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and x-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the state who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the state shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the industrial commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and x-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. (1935, c. 123.)

§ 8081(19). Report of committee to industrial commission. — The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the industrial commission its opinion regarding all medical questions involved in the case. The advisory medical committtee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and x-rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)

§ 8081(20). Filing report; right of hearing on report.—The advisory medical committee shall file its report in triplicate with the industrial commission, which shall send one copy thereof to the claimant and one copy to the employer by registered mail. Unless within thirty days from receipt of the copy of said report the claimant and/or employer shall request the industrial commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, said report shall become a part of the record of the case and shall be accepted by the industrial commission as expert medical testimony to be considered as such in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

§ 8081(21). Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.—There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis and/or treatment of occupational diseases. They shall be appointed by the industrial commission with the approval of the governor, and one of them shall be designated as chairman of the committee by the industrial commission. The members of committee shall be appointed to serve terms as follows: One for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the industrial commission shall appoint a successor for a term of six years; except that the terms of the members first appointed shall expire June thirtieth, one thousand nine hundred thirty-six. The function of the committee shall be to conduct examinations and make reports as required by §§ 8081(17)-8081(20), and to assist in any post-mortem examinations provided for in § 8081(16) when so directed by the industrial commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the industrial commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

The members of the advisory medical committee shall be paid such salaries and/or fees and expenses, and in monthly installments or in such other manner as may be determined by the governor and approved by the advisory budget commission. (1935, c. 123.)

§ 8081(22). Expenses of making examinations.—The industrial commission shall establish a schedule of reasonable charges to defray expenses incurred in making examinations pursuant to §§ 8081(9) and 8081(16), such charges to be collected in accordance with rules and regulations which shall be adopted by the industrial commission. Said charges shall be collected from employers who by order of the industrial commission are determined to be subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 8081(23). Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund.—In hearings arising out of claims for disability and/or death resulting from occupational diseases the industrial commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the industrial commission shall be paid into the general fund of the state treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)

§ 8081(24). Making up deficiency by assessment upon employers in hazardous industries; provision for annual fund. — In the event the amount appropriated by the general assembly and the charges, fees and allowances so assessed and collected and paid into the state treasury shall not be sufficient to pay the full cost incurred by the advisory medical committee in making examinations of employees, and conducting post-mortem examinations, and in making investigations of claims arising under this article, and in testifying before the industrial commission, the industrial commission shall assess against the employers found by the industrial commission to be subject to the hazards of asbestosis and/or silicosis an amount sufficient to pay such cost, said amount to be assessed against such employers pro rata on the basis of annual payroll. The industrial commission is authorized to assess and collect in advance in the beginning of any year from the employers subject to such hazard an amount estimated as necessary to pay such cost. Said amount when so assessed shall be paid by such employers within ten days after the notice of assessment, and when collected by the industrial commission shall be paid into the state treasury as a part of the fund out of which to pay the expenses of the advisory medical committee. In the event such amount so assessed shall be found to be in excess of the cost incurred by such advisory medical committee in the performance of its duties under this article, such excess shall be credited against the estimate of the cost to be incurred by said committee for the succeeding year. In case the amount so assessed shall be insufficient to pay such cost the industrial commission is authorized to make an additional assessment to be made at the end of the regular assessment period and to be collected from the employers subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 8081(25). Inspection of hazardous employments; refusal to allow inspection made misdemeanor.—The industrial commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The industrial commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of an employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a misdemeanor. (1935, c. 123.)

Art. 4. Security Funds

§ 8081(26). Title of article.—This article shall be known as the Workmen's Compensation Security Fund Act. (1935, c. 228, s. 1.)

§ 8081(27). Definitions.—As hereafter used in this article, unless the context or subject matter otherwise require:

"Stock fund" means the stock workmen's compensation security fund created by this article.

"Mutual fund" means the mutual workmen's compensation security fund created by this article.

"Funds" means the stock fund and the mutual fund.

"Fund" means either the stock fund or the mutual fund as the context may require.

"Fund year" means the calendar year.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Mutual carrier" means any mutual corporation or association authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Carrier" means either a stock carrier or a mutual carrier, as the context may require.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Commissioner" means the Insurance Commissioner of this State.

"Workmen's compensation act" means the workmen's compensation act of the State of North Carolina, being Chapter one hundred twenty Public Laws of North Carolina of one thousand nine hundred and twenty-nine, all supplements and amendments thereto, codified as §§ 8081(h) et seq. (1935, c. 228, s. 2.)

§ 8081(28). Stock workmen's compensation security fund created.—There is hereby created a fund to be known as "The Stock Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the workmen's compensation act for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the workmen's compensation act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of this State in accordance with the provisions of this article. (1935, c. 228, s. 3.)

§ 8081(29). Verified report of premiums to be filed by stock carrier.—Every stock carrier shall, on or before the first day of September, nineteen hundred and thirty-five, file with the treasurer of the State and with the commissioner identical returns, under oath, on a form to be prescribed and furnished by the commissioner, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the workmen's compensation act. For the purposes of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken, and on policies canceled. Thereafter, on or before the first day of March and September of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' period ending, respectively, on the preceding December thirty-first and June thirtieth, on policies issued, renewed or extended by such carrier. (1935, c. 228, s. 4.)

§ 8081(30). Contributions by stock carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every stock carrier shall pay into the stock fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such stock carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums for the period covered by such return. (1935, c. 228, s. 5.)

§ 8081(31). Contributions to stop when stock fund equals 5% of loss reserves; resumption of contributions. — When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum (5%) of the loss reserves of all stock carriers for the payment of benefits under the workmen's compensation act as of December thirty-first, next preceding, no further contributions to said fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum (5%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to five per centum (5%) of such reserves. (1935, c. 228, s. 6.)

§ 8081(32). Rules and regulations for administration of stock fund; examination of books and records; penalty for failure to file report or pay assessment; revocation of license.—The commissioner may adopt, amend and enforce the rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this article, or in case the commissioner shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any

sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum (5%) of the amount of unpaid contribution determined to be due as provided by this article plus one per centum (1%) of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the commissioner may upon good cause shown extend the time for filing of such return or payment. The commissioner shall revoke the certificate of authority to do business in this State of any carrier which shall fail to comply with the provisions of this article or to pay any penalty imposed in accordance with this article. (1935, c. 228, s. 7.)

§ 8081(33). Separation of stock fund; disbursements; investment; sale of securities.—The stock fund created by this article shall be separate and apart from any other fund so created and from all other state moneys. The state treasurer shall be the custodian of said fund; and all disbursements from said fund shall be made by the state treasurer upon vouchers signed by the commissioner as hereinafter provided. The moneys of said fund may be invested by the state treasurer only in the bonds or securities which are the direct obligations or which are guaranteed as to principal and interest by the United States or of this State. The state treasurer may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. (1935, c. 228, s. 8.)

§ 8081(34). Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier.—A. A valid claim for compensation or death benefits, or installments thereof, heretofore or hereafter made pursuant to the workmen's compensation act, which has remained or shall remain due and unpaid for sixty days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the commissioner an application for payment of compensation or death benefits from the stock fund on a form prescribed and furnished by the commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The commissioner shall thereupon certify to the state treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the state treasurer.

B. Payment of compensation from the stock fund shall give the fund no right of recovery against the employer.

C. An employer may pay such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount so paid.

D. The state treasurer as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceedings shall forthwith be placed to the credit of the stock fund by the state treasurer to reimburse the stock fund to the extent of the moneys so recovered and paid. (1935, c. 228, s. 9.)

§ 8081(35). Mutual workmen's compensation security fund created. — There is hereby created a fund to be known as "The Mutual Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the workmen's compensation act for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the workmen's compensation act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner in accordance with the provisions of this article. (1935, c. 228, s. 10.)

§ 8081(36). Verified report of premiums to be filed by mutual carrier. — Every mutual carrier shall, on or before the first day of September, nineteen hundred thirty-five, file with the treasurer of the State and with the commissioner identical returns, under oath, on a form to be prescribed and furnished by the commissioner of insurance, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five, on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the workmen's compensation act during said period. For the purpose of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken and on policies cancelled. Thereafter, on or before the first day of March and September, of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' periods ending, respectively, on the preceding December thirty-first and June thirtieth, on such policies issued, renewed or extended by such carrier. (1935, c. 228, s. 11.)

§ 8081(37). Contributions by mutual carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every mutual carrier shall pay into the mutual fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums, as shown by the return hereinbefore prescribed for the period ending June thir-

tieth, nineteen hundred thirty-five, and thereafter each such mutual carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown for the period covered by such return. (1935, c. 228, s. 12.)

§ 8081(38). Distribution of excess when mutual fund equals to 5% of loss reserves; distribution of fund when liabilities liquidated. — Whenever the mutual fund, less all its known liabilities, shall exceed five percentum (5%) of the loss reserves of all mutual carriers for the payments of losses under the workmen's compensation act, as of December thirty-first next preceding, distribution of such excess shall be made as repayments for successive fund years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year: Provided, however, no such distribution shall reduce the fund, less all its known liabilities, below an amount equal to five per centum (5%) of such loss reserves as of said date. Such repayments shall be made from time to time until the mutual carriers for the first fund year shall have received their proportionate shares of the contributions for the first fund year including interest, if any. Such repayments for succeeding fund years in their order shall be made on the same basis. The insolvency of any mutual carrier shall automatically terminate its right to such repayments and the withdrawal of any mutual carrier from the transaction of workmen's compensation insurance business in this State shall automatically suspend its right to such repayments until all its liabilities for workmen's compensation losses in this State shall have been fully liquidated. If and when all liabilities of all mutual carriers for workmen's compensation losses in this State shall have been fully liquidated, distribution shall be made of the remaining balance of the mutual fund in the proportion in which each such mutual carrier made contributions to the mutual fund. (1935, c. 228, s. 13.)

§ 8081(39). Administration, custody, etc., of mutual fund. — The provisions of §§ 8081(32), 8081(33) and 8081(34) shall apply, mutatis mutandis, to the administration, custody and investment of and payments from the mutual fund. (1935, c. 228, s. 14.)

§ 8081(40). Notice of insolvency; report of claims and unpaid awards.—Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the commissioner shall so notify the North Carolina industrial commission, and the North Carolina industrial commission shall immediately advise the commissioner (a) of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier, or against such insolvent carrier; (b) of all unpaid or continuing agreements, awards or decisions made upon claims prior to or after the date of such notice from the commissioner; and (c) of all appeals from or applications for modifications or recision or review of such agreements, awards or decisions. (1935, c. 228, s. 15.)

§ 8081(41). Right of commissioner to defend claims against insolvent carriers; arrangement with other carriers to pay claims.—The commissioner or his duly authorized representative may investigate and may defend before the North Carolina industrial commission or any court any or all claims for compensation against an employer insured by an insolvent carrier or against such insolvent carrier and may prosecute any pending appeal or may appeal from or make application for modification or recision or review of an agreement, award or decision against such employer or insolvent carrier. Until all such claims for compensation are closed and all such awards thereon are paid the commissioner, the administrator of the funds, shall be a party in interest in respect to all such claims, agreements and awards. For the purposes of this article the commissioner shall have exclusive power to select and employ such counsel, clerks and assistants as may be deemed necessary and to fix and determine their powers and duties, and he may also, in his discretion, arrange with any carrier or carriers to investigate and defend any or all such claims and to liquidate and pay such as are valid and the commissioner may from time to time reimburse, from the appropriate fund, such carrier or carriers for compensation payments so made, together with reasonable allowance for the services so rendered. (1935, c. 228, s. 16.)

§ 8081(42). Expenses of administering funds.—The expense of administering the stock fund shall be paid out of the stock fund and the expense of administering the mutual fund shall be paid out of the mutual fund. The commissioner shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the commissioner shall be deemed administration expenses payable from the fund in the manner provided in § 8081(33). The commissioner shall include in his regular report to the legislature a statement of the expense of administering each of such funds for the preceding year. (1935, c. 228, s. 17.)

§ 8081(43). Contributions relieving carrier of posting bond or making special deposit.—Contributions made by any stock or mutual carrier to the funds created by this article shall relieve such carriers from filing any surety bond or making any deposit of securities required under the provisions of any law of this State for the purpose of securing the payment of workmen's compensation benefits only. (1935, c. 228, s. 18.)

CHAPTER 134

WRECKS

§ 8082. Number and boundaries of wreck districts.—The counties of Currituck, Dare, Hyde, Carteret, Onslow, Brunswick, and New Hanover are hereby divided into the following wreck districts, namely:

Currituck.—The first to extend from the Virginia state line to Judy's cove; the second to extend from the Judy's cove to Josephus Baum's

fish house; the third to extend from Josephus Baum's fish-house to the county line of Dare.

Dare.—The first to extend from the county line of Currituck to the north point of Oregon inlet; the second to extend from the north point of Oregon inlet to the south point of New inlet; the third to extend from the south point of New inlet to the patrol house between Gull Shoal and Little Kennakeet life-saving stations; the fourth to extend from the last named patrol house to the patrol house between Big Kennakeet and Cape Hatteras life-saving stations; the fifth to extend from the last named patrol house to Creed's Hill life-saving stations; the sixth to extend from Creed's Hill life-saving stations to the county line of Hyde county.

Hyde.—The county of Hyde shall constitute one wreck district, which shall extend from the Dare county line to the Carteret county line.

Carteret.—The first from the Hyde county line to Core Banks life-saving station; the second from Core Banks life-saving station to Old Topsail inlet; the third from Old Topsail inlet to the Onslow county line.

Onslow.—The first from Bogue inlet to New River inlet; the second from New River inlet to the New Hanover county line.

New Hanover and Brunswick.—To extend from the Onslow county line to the South Carolina state line. (Rev., s. 5439; 1899, c. 79, ss. 1-9; 1903, c. 85; 1905, c. 199; 1915, c. 42.)

Editor's Note.—In the early case of Etheridge v. Jones, 30 N. C. 100, the question arose as to the right of the commissioners to take possession of a stranded ship without the consent of the master. It was held in that case that the commissioners did not have exclusive control of a wrecked vessel and the master or owner could take control of and dispose of a wrecked vessel without any responsibility to the commissioners.

The case of Hitfield v. Baum, 35 N. C. 394, 395 lays down the rule that there is an easement or right of way reserved by necessity for any person to enter over the land of another for the purpose of reaching and carrying away the cargo of a wrecked vessel.

§ 8083. Commissioners of wrecks; appointment, residence and term of office. — The governor, whenever it may be necessary, shall appoint a commissioner of wrecks for each of the districts designated in the preceding section. Each commissioner shall reside in the district for which he is appointed, unless separated by navigable waters, in which case the distance shall not exceed three miles. The restrictions as to residence shall not apply to Hyde county. No person who holds any office of profit or trust under the laws of the United States or the state of North Carolina, nor any person who is a pilot, shall hold the office of commissioner of wrecks. The term of office shall be for two years. (Rev., s. 5440; 1899, c. 79, ss. 10, 12, 13; 1903, c. 85; 1907, c. 398.)

§ 8084. Commissioners to give bond. — Every person appointed a commissioner of wrecks shall enter into a bond, with good and sufficient surety, in the sum of two thousand dollars, payable to the state of North Carolina and conditioned for the faithful performance of his duties. This bond shall be approved by the board of county commissioners and deposited in the office of the clerk of the superior court. (Rev., s. 305; 1899, c. 79, s. 10.)

§ 8085. Commissioners to take oath of office.— Every person appointed a commissioner of wrecks, before entering upon the duties of his office, shall go before some officer duly authorized to administer oaths and take an oath to perform faithfully the duties of his office, and the oaths to support the constitution of the state and of the United States. (Rev., s. 5441; 1899, c. 79, s. 11.)

§ 8086. Duty of commissioners. — Upon the earliest intelligence given that any ship or vessel is stranded, it shall be the duty of the commissioner in whose district the same is stranded, or his duly authorized agent, to repair at once to such wrecked ship or vessel, and upon the permission of its master to summon immediately a sufficient number of men who, acting under the direction of the commissioner or his agent, shall at once proceed to save the cargo and material of such wrecked vessel. As soon as any such stranded property is saved it shall be immediately placed under guard, one guard to be selected by the commissioner or owner representing the same, and one other guard to be selected by the salvors. Such goods or stranded property shall be kept under strict guard until sold or the salvors are paid as provided in this chapter. (Rev., s. 5442; 1899, c. 79, s. 14; 1901, c. 178.)

§ 8087. Salvage to be paid, or its payment secured, before release of goods. — Every person who assists in saving such cargo or material shall, within thirty days after saving the same, be paid a reasonable reward by the owner or master of the stranded vessel, or by the merchant whose vessel or goods are saved. In default of payment of a reasonable compensation the goods or other property so saved shall remain in the joint custody of the commissioner and salvors until all such charges are paid, or until the payment thereof is secured to the satisfaction of the parties saving such goods or other property. (Rev., s. 5443; 1899, c. 79, ss. 14, 15.)

§ 8088. Adjustment of salvage when the parties cannot agree.—If the parties shall disagree touching the amount of reward or salvage to be paid to the persons employed, the commander, owner, or commissioner who represents the property saved shall choose one disinterested person, and the salvors shall nominate one other, who shall adjust and ascertain the same. If the persons thus chosen cannot agree, they shall choose one other indifferent person as umpire to decide between them: Provided, that the amount to be paid the salvors shall be determined and agreed upon before sale is made of such property. (Rev., s. 5444; 1899, c. 79, s. 16.)

§ 8089. Sale of wrecked property for salvage; compensation of commissioner.—If the owner of the vessel, or the property which has been saved, shall fail for thirty days after the salvage has been ascertained, either by agreement or as provided for in the preceding section, to pay such salvage, it shall be the duty of the commissioner of wrecks in charge of such stranded or wrecked vessel or other property to sell the same at public sale, after first advertising such sale in the same manner as is required for sales of personal property under execution. Each commissioner shall provide himself with books and shall record in them all such sales by him made. He

shall receive for selling any such wrecked or stranded property five per centum on the amount of sales, and in addition thereto he shall receive his actual expenses incurred in going to and returning from the place of the wreck, or where the property is stranded, to be paid out of the gross amount of such sales. At any public sale of stranded property, the salvors may select one person and the commissioner one other, who shall keep an accurate account of the sales, make the collections, settle with the commissioner his fees, and pay to the salvors the amount agreed on or awarded by the refrees. (Rev., s. 5445; 1899, c. 79, s. 17; 1901, c. 178; 1905, c. 66.)

§ 8090. Compensation of commissioner when there is no sale.—If any owner or merchant shall remove any such goods or other stranded property from the custody of any commissioner without a sale, then such commissioner shall receive, in addition to his actual expenses incurred for the purposes mentioned in the preceding section, two and one-half per centum on the amount of the value of such property, which amount shall be ascertained in the same manner as is provided for ascertaining the amount of the reward to be paid salvors in those cases where such reward cannot be determined by agreement. No commissioner shall receive any salvage or other reward except the commission prescribed in this chapter. (Rev., s. 5446; 1899, c. 79, ss. 17, 18; 1905, c. 66.)

§ 8091. Sale of unclaimed property.—Whenever any vessel, cargo, or material of any ship or vessel or any other property shall be cast ashore or taken up at sea and brought to shore, and no person is present to claim the same as owner, it shall be the duty of the commissioner of the district where the same is brought or cast ashore to take charge of such property and to proceed to advertise and sell it at public sale, first giving twenty days notice of such sale at three public places. On making any such sale the commissioner shall, out of the gross proceeds thereof, retain a commission of five per centum as his compensation and the amount awarded to the salvors pursuant to the provisions of this chapter. (Rev., s. 5447; 1899, c. 79, ss. 19, 20.)

§ 8092. Proceeds of sale to be paid to clerk of superior court.—When any commissioner shall undertake to sell any property where no person is or has been present to claim the same, it shall be his duty to notify the clerk of the superior court of his county of such sale. After any such sale is made, the commissioner shall forward to such clerk the proceeds of the sale, after deducting his commission of five per centum and paying the salvors the amount awarded to them as provided in this chapter. (Rev., s. 5448; 1899, c. 79, s. 21.)

§ 8093. Disposition of proceeds of sale by clerk.—It shall be the duty of the clerk of the superior court to make a record and keep an account of all moneys received by him from any commissioner of wrecks, and he shall advertise in some weekly newspaper in North Carolina the amount so received, giving a true description of the marks, numbers, and kinds of goods or other stranded property for which the same was sold. Each commissioner shall give the clerk of the superior court all necessary information for the proper enforcement of this section in each return made by him to the clerk. The clerk shall advertise for the space of sixty days, and if no person shall come to claim the money within a year and a day from the date of advertisement, then the clerk holding such money shall transmit the same, after deducting one per centum for his trouble and also after deducting the cost of advertising, to the treasurer of the state for the benefit of the public school funds. (Rev., s. 5449; 1899, c. 79, s. 22.)

§ 8094. Proof of ownership of property sold.—If any person shall claim to be the owner of any property sold as provided in the third preceding section and shall present his claim to the clerk holding the money arising from the sale of such property, it shall be the duty of such person to prove his title to the satisfaction of the clerk. If any person making a claim to such property be unknown to the clerk, then the clerk shall submit such claim to the consideration of three disinterested persons, one of whom shall be chosen by the claimant, and the decision of such referees shall always be final. (Rev., s. 5450; 1899, c. 79, s. 23.)

§ 8095. Stranded property to be reported; failure to report misdemeanor.—If any person shall find any wrecked or stranded property on or near the seashore, no person being present to claim the same, he shall as soon as possible give information thereof to the nearest commissioner of wrecks, who shall advertise and sell the same as provided in this chapter. If such finder shall refuse to report the goods so found, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (Rev., ss. 3548, 5451; 1899, c. 79, s. 24.)

§ 8096. Expenses to be deducted from proceeds of sales.—All necessary expenses shall be deducted from the gross proceeds of any sales made under this chapter. Such necessary expenses shall include only the cost of advertising, guarding, and surveying, when a survey is called by a notary public, as is provided by the Revised Statutes of the United States. (Rev., s. 5452; 1899, c. 79, s. 19.)

§ 8097. Violation of chapter a misdemeanor.—If any person shall violate any of the provisions of this chapter he shall be guilty of a misdemeanor. (Rev., s. 3562; 1899, c. 79, s. 26.)

§ 8098. Commissioner violating chapter liable for double damages and guilty of a misdemeanor.—If any commissioner of wrecks shall by fraud or wilful neglect violate any of the provisions of this chapter, or abuse the trust reposed in him, he shall forfeit and pay double the amount of damages to the party aggrieved. He shall also be guilty of a misdemeanor, and upon conviction shall forfeit his office and shall thereafter be incapable of acting as commissioner. (Rev., s. 3563; 1899, c. 79, s. 25.)

§ 8099. Interfering with commissioner in the discharge of his duties.—If any person shall wilfully and unlawfully resist, delay, or obstruct any commissioner of wrecks in discharging or

attempting to discharge his duties as such commissioner, he shall be guilty of a misdemeanor. (Rev., s. 3564; 1905, c. 66, s. 2.)

CHAPTER 135

CONCERNING THE CONSOLIDATED STATUTES

§ 8100. Title of revision.—This revision of the statutes may be known and cited as The Consolidated Statutes.

§ 8101. Effect as to repealing other statutes.—All public and general statutes not contained in the Consolidated Statutes are hereby repealed, with the exceptions and limitations hereinafter mentioned. No statute or law which has been heretofore repealed shall be revived by the repeal contained in any of the sections of the Consolidated Statutes. All public and general statutes passed at the present session of the general assembly shall be deemed to repeal any conflicting provisions containd in the Consolidated Statutes.

Cited in 2 N. C. Law Rev. 175.

§ 8102. Repeal not to affect rights accrued, nor suits commenced.—The repeal of the statutes mentioned in the preceding section shall not affect any act done, or any right accruing, accrued or established, or any action or proceeding had or commenced in any case before the time when such repeal shall take effect; but the proceedings in every such case shall be conformed, when necessary, to the provisions of the Consolidated Statutes.

§ 8103. Offenses and penalties not affected.—No offense committed and no penalty or forfeiture incurred under any of the statutes hereby repealed, and before the time when such repeal shall take effect, shall be affected by the repeal.

§ 8104. Pending actions and proceedings not affected.—No action or proceedings pending at the time of the repeal, for any offense committed, or for the recovery of any penalty or forfeiture incurred under any of the statutes hereby repealed shall be affected by such repeal, except that the proceedings in such action or proceeding shall be conformed, when necessary, to the provisions of the Consolidated Statutes.

§ 8105. Effect of repeal on persons holding office.—All persons who at this time shall hold any office under any of the acts hereby repealed shall continue to hold the same according to the tenure thereof.

§ 8106. What statutes not repealed.—The Consolidated Statutes shall not have the effect to repeal any public-local statute, any public statute which affects only a particular locality, any private statute, any statute relating to the boundary of the state or of any county, any act ceding the lands of the state to the general government, or any statute relating to the Cherokee lands, if the statute referred to was in force on the first day of January in the year one thousand nine hundred and nineteen.

Creating a Special County Court.—The provisions of a special local law creating a county court relating to the filing of pleading, etc., are not repealed by the general statute. Union Guano Co. v. Middlesex Supply Co., 181 N. C. 210, 106 S. E. 832.

A special public-local statute, providing for the drawing of grand juries, has not been repealed or modified by this section. State v. Davis, 203 N. C. 47, 52, 164 S. E. 732.

§ 8107. Consolidated Statutes effective August 1, 1919.—All provisions, chapters, subdivisions of chapters and sections contained in the Consolidated Statutes shall be in force from and after the first day of August, one thousand nine hundred and nineteen. (1919, c. 238, s. 8.)

Applied in Seminile Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859.

§ 8108. Adoption of volume three of the consolidated statutes.—The chapters, subchapters and sections of the codification of the Public Laws enacted since the compilation of the Consolidated Statutes of North Carolina, as set out and contained in the publication known as volume three of the Consolidated Statutes of North Carolina, which codification and publication is provided for under chapter eighty-six, Public Laws of nineteen hundred and twenty-three, be adopted as constituting the Public Laws enacted since the publication of the Consolidated Statutes of North Carolina and previous to April first, nineteen hundred and twenty-three: Provided, that this section shall not have the effect of repealing any existing law and that it shall not be necessary to republish said statutes.

That such chapters, subchapters and sections as are referred to above shall be and constitute volume three, Consolidated Statutes of North Carolina. (1925, c. 99.)

§ 8108(1). References in statutes to Michie's North Carolina Code.—All acts of the general assembly of one thousand, nine hundred thirty-three, containing references to, or amendments of, any section or sections of "the North Carolina Code," or "The North Carolina Code of one thousand nine hundred thirty-one," or "Michie's North Carolina Code," are hereby declared to be intended as references to, and amendments of, the apposite, related, or cognate section or sections of the consolidated statutes, and all such references and amendments shall be liberally construed as intending to amend or relate to said apposite, related, or cognate sections of the said consolidated statutes. (1933, c. 443.)

APPENDICES

I. Constitution of the State of North Carolina

II. Constitution of the United States of America

III. Authentication of Records

IV. Removal of Causes

V. Naturalization Laws

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APPENDIX I

CONSTITUTION OF THE STATE OF NORTH CAROLINA

Adopted April 24, 1868, with Amendments to 1935

PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution.

ARTICLE I

Declaration of Rights

That the great, general and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and Government of the United States, and those of the people of this State to the rest of the American people, may be defined and affirmed, we do declare:

§ 1. The equality and rights of men.—That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

"Liberty" Qualified by Common Law Doctrines.—It is a recognized principle that a personal liberty is a constitutional right, and any act of Assembly which violates this right is not the law of the land and would be void by Art. I, sec. 17, of the Constitution. However, the meaning of general expressions such as "liberty" is qualified by the doctrines of the common law, and which as modified to suit our institutions, have been held a part of the law of this state. London v. Headen, 76 N. C. 72, 73, 75.

Same—Penalty for Refusing to Accept Office.—It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the state when they are demanded, and a legislative enactment prescribing a penalty of $25 against any person who is duly elected or appointed town constable and who refuses to qualify is not violative of Art. I, sec. 17, which is a protective provision of the personal liberty referred to in this section. London v. Headen, 76 N. C. 72, 73, 75.

Exercise of Police Power Not Unlimited.—Compulsory vaccination is a valid exercise of governmental police power for the public welfare, health and safety, but if there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, then the legislature cannot validly compel the person to submit to such protective measure, since this would be in violation of the rights recognized by this section as pre-existing and inherent in the individual. State v. Hay, 126 N. C. 999, 1006, 35 S. E. 459. For further limitations on police power, see 3 N. C. Enc. Dig. 238 et seq.

Personal Liberty and Security, Political Rights, etc.—See 3 N. C. Enc. Dig. 241 et seq.

§ 2. Political power and government.—That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

In General.—In construing the provisions of the constitution in regard to elections (see Art. VI sec. I.) it should be kept in mind that this is a government of the people in which the will of the people—the majority—legally expressed, must govern and that these provisions should be liberally construed, that tend to promote a fair election, or expression of this popular will. Quinn v. Lattimore, 120 N. C. 426, 429, 26 S. E. 638.

Cited in State v. Hickey, 198 N. C. 45, 49, 150 S. E. 615.

§ 3. Internal government of the State. That the people of this State have the inherent, sole and exclusive right of regulating the internal government and policies thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary for their safety and happiness; but every such right should be exercised in pursuance of the law, and consistently with the Constitution of the United States.

Cross Reference.—For general treatment of police power including illustrative cases, see 3 N. C. Enc. Dig. 238 et seq.; 13 N. C. Enc. Dig. 419 et seq. As to regulation of public school system, see section 5537.

Duty to Follow Decisions of Supreme Court.—It is the duty of the Supreme Court of the state to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce where Congress has assumed control of the matter relating thereto, and involved in the litigation. Norris v. Telegraph Co., 174 N. C. 92, 93 S. E. 465. But in intrastate cases, the decisions of the state Supreme Court are binding and will be followed in the U. S. Supreme Court though they appear "absured and illogical." Id.

Regulation of Criminal Practice. — The legislature has power to shape the criminal procedure of the state to provide remedies required by the exigencies of the present time. State v. Lewis, 142 N. C. 626, 634, 55 S. E. 600.

§ 4. That there is no right to secede.—That this State shall ever remain a member of the American Union; that the people thereof are a part of the American nation; that there is no right on the part of the State to secede, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation, ought to be resisted with the whole power of the State.

§ 5. Of allegiance to the United States Government.—That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State in contravention or subversion thereof can have any binding force.

§ 6. Public debt; bonds issued under ordinance of Convention of 1868-, '68-'69, '69-'70, declared invalid; exception. — The State shall never assume or pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; nor shall the General Assembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred, or issued, by authority of the Convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond incurred or issued by the Legislature of the year one thousand eight hundred and sixty-eight, either at its special session of the year one thousand eight hundred and sixty-eight, or at its regular sessions of the years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, and one thousand eight hundred and sixty-nine and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debt of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State, at a regular election held for that purpose.

§ 7. Exclusive emoluments, etc.—No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

See § 2593(b) of the Code and the note thereto.

Editor's Note.—The majority of the cases wherein the litigating parties have relied on this section as the chief factor in the case which they make out, involve the determination of the question whether the particular grant or privilege given to a certain body can be construed as a valid exercise of the police power, and if so then the case is taken beyond the operative force of this section, since its provisions are not applicable to those powers and privileges, the exercise of which is for the benefit and good of the public. A few of the cases bearing on this point are given below; a full treatment of the subject of police power will be found in 3 N. C. Enc. Dig. 238 et seq; 13 N. C. Enc. Dig. 419 et seq.

Purpose.—In summarizing the purpose of this section the court in Simonton v. Lanier, 71 N. C. 498, 503, speaking through Justice Bynum, says: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government."

Public Service Corporations.—The grant of a special charter to a railroad or other like corporation is not in conflict with this section of the constitution, the decisions in this state being to the effect that the charters of public-service corporations come directly within the exception contained in this provision. Reid v. Norfolk Sou. R. Co., 162 N. C. 355, 78 S. E. 306. This principle will be applied in behalf of municipal corporations, an agency of the state, created for the benefit of the public. Kornegay v. Goldsboro, 180 N. C. 441, 451, 105 S. E. 187.

Private Corporations.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional under this section. Motley v. Warehouse Co., 122 N. C. 347, 30 S. E. 3; Motley v. Finishing Co., 124 N. C. 232, 32 S. E. 555.

A provision in a bank's charter allowing it to charge more than the legal rate of interest is void under this section of the constitution, where no public services are rendered in consideration of the grant. Simonton v. Lanier, 71 N. C. 498, 503.

A local public law which provides that the provisions of § 2445, should be read into private construction bonds, is in contravention of this section and 31 of our State Constitution, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688.

Public Local Law as to Sale of Claims against Closed Banks Held Invalid.—Public-Local Laws and § 218(b), providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of their closing, and that the liquidation agents of such banks should accept such purchased claims as their face value in payment of the purchasers' debts to the banks, were held unconstitutional and void, being in violation of this section, in Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481.

Regulation as to Maintenance of Market House.—It is within the power of a city or town to provide, by contract with its citizens, a market house and exclude with certain reasonable exceptions, the sale of fish at other places, it appearing that, under the contract, the market house was to remain under the full control of the municipal authorities,

and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. State v. Perry, 151 N. C. 661, 65 S. E. 915.

Regulation as to the Practice of Medicine.—An act prohibiting the practice of medicine without registration is not brought within the inhibition of this section of the constitution because it contains a proviso to the effect that the act shall not apply to midwives nor to non-resident consulting physicians, as this does not constitute an exclusive privilege within the meaning of the section. State v. Van Doran, 109 N. C. 864, 869, 14 S. E. 32. See also, State v. Biggs, 133 N. C. 729, 46 S. E. 401.

Regulation of Vehicles for Hire.—A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, is in contravention of this section and § 31, in that the ordinance fails to provide that the security required might be furnished by one or more solvent individual sureties. State v. Sasseen, 206 N. C. 644, 175 S. E. 142. See 13 N. C. Law Rev., 222, for a note on this case.

Exemption from Jury Service.—In State v. Cantwell, 142 N. C. 604, 614, 55 S. E. 820, Mr. Justice Walker in a dissenting opinion says that exemption from jury service by virtue of services in a fire department for five years is within the meaning of the word "privilege" as used in the constitution, which may be conferred in consideration of public services, and is not subject to revocation by the legislature.

§ 8. The legislative, executive, and judicial powers distinct.—The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other.

For full discussion of the subject, see 3 N. C. Enc. Dig. 221 et seq.; 13 N. C. Enc. Dig. 414 et seq.

See § 483 and notes.

Generally.—Each of these coördinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional power and duty. State v. Holden, 64 N. C. 829; Person v. Tax Com'rs, 184 N. C. 499, 115 S. E. 336.

The propriety of ordering sales of lands upon petition of the owner is purely a judicial duty and any private act of the General Assembly attempting to regulate the same is void under this section. Miller v. Alexander, 122 N. C. 718, 30 S. E. 125. For treatment as to encroachment on judiciary, see 3 N. C. Enc. Dig. 223 et seq.

Where Office Created by Legislature.—It is competent for the legislature in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the governor to suspend, the incumbent of the office. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

Court Practice Regulated by Judicial Department.—Under the present constitution, the supreme judicial power being independent of the other departments, the legislature cannot prescribe rules of practice for the Supreme Court; nevertheless, the courts have copied, almost verbatim, the provisions of the Code. Bird v. Gilliam, 125 N. C. 76, 79, 34 S. E. 196; Herndon v. Insurance Co., 111 N. C. 384, 16 S. E. 465. And where there is conflict, the rules made by the court will be observed, Cooper v. Com'rs, 184 N. C. 615; 113 S. E. 569. However, Art. 4, sec. 12 of the constitution gives to the General Assembly power to regulate proceedings in all the courts "below the Supreme Court." Horton v. Green, 104 N. C. 400, 401, 10 S. E. 470.

The independence of the Supreme Court only (and not of the entire judicial department) is provided for by this section. Wilson v. Jordan, 124 N. C. 683, 705, 33 S. E. 139. But there is nothing which gives the Supreme Court supervisory control over the legislature. Id.

Judicial Power as Aid to Legislative Act.—The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. State v. Robinson, 81 N. C. 409, 426. For treatment as to encroachment on legislature, see 3 N. C. Enc. Dig. 240 et seq.; 13 N. C. Enc. Dig. 417 et seq.

§ 9. Of the power of suspending laws.—All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

§ 10. Elections free.—All elections ought to be free.

Cited in Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481.

§ 11. In criminal prosecutions.—In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

As to counsel, see § 4515 and notes; as to separation and exclusion of witnesses, see 3 N. C. Enc. Dig. 143 et seq.

Information as to Accusation.—This section of the constitution does not require that the accused be informed of the charge against him in any special form or particular words, except it must be by presentment or indictment. State v. Carpenter, 173 N. C. 767, 92 S. E. 373; State v. Gibson, 169 N. C. 318, 85 S. E. 7. As to necessity for indictment, see N. C. Const., Art. I, sec. 12, and notes thereto.

Where a defendant convicted of a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered at a later time find the facts upon which a sentence has been imposed and specify the findings of a certain criminal offense the defendant is found to have committed, in order to show that the defendant had been informed of the offense before sentence. State v. Gooding, 194 N. C. 271, 139 S. E. 436.

A charge to the jury which virtually puts the defendant upon trial for an additional offense to that named in the bill, in this case, conspiring with others than those alleged, violates the provisions of this section that "in all criminal prosecutions every man has the right to be informed of the accusation against him." State v. Mickey, 207 N. C. 608, 609, 178 S. E. 220.

Confrontation—Definition.—In State v. Thomas, 64 N. C. 74, 76, it is said that the word "confront" as used in this section does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the common law rule that in trials by jury the witness must be present before the jury and the accused, so that he may be confronted, that is put face to face. It extends also to the right to require the witnesses to be placed under oath, subject to the test of a competent cross-examination. State v. Dixon, 185 N. C. 727, 119 S. E. 170. See also State v. Breece, 206 N. C. 92, 94, 173 S. E. 9. For full treatment of confrontation, see 4 N. C. Dig. 143 et seq.; 13 N. C. Dig. 613 et seq.

Under this construction it is held that entries in the course of business, upon the books of a railroad company by one at the time an agent of the company, and still living, but absent from the State, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime. State v. Thomas, 64 N. C. 74.

By construing this section, which gives the accused the right to be confronted by witnesses, with the right to be present at the trial, the conclusion reached in this state is that the prisoner does not have to accompany the jury when it views the scene of the crime. Apparently the right to accompany the jury has never been raised in this state. 12 N. C. Law Rev., 268.

Same—Deposition.—Depositions taken in the absence of a criminal cannot be read against him. State v. Webb, 2 N. C. 103.

Same—Waiver of Right.—The accused has the right to insist upon the production of his accusers but this is a right which may be and is waived by a failure to assert it in proper time. State v. Mitchell, 119 N. C. 784, 25 S. E. 783, 1020. The right must be insisted upon in express terms and a general objection to the evidence is not sufficient. Id.

Self-Incrimination—Scope of Protection.—For fair interpretation of the clause that the defendant "shall not be compelled to give evidence against himself" seems to be to secure one who is or may be accused of crime from making any compulsory revelations which may be given in evidence against him on his trial for the offense. LaFontaine v. Southern Underwriters, 83 N. C. 133, 138.

This immunity extends, not only to one who actually testifies as a witness, but to the defendant in the trial, even though he decline to testify as a witness in his own behalf. State v. Hollingsworth, 191 N. C. 595, 132 S. E. 667.

As to witness testifying to any unlawful gaming done by himself or others, see section 1800 and note thereto.

Upon the trial of the defendant for violating the prohibi-

tion law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

The constitutional guarantee that a defendant shall not be compelled to testify against himself, as provided by this section, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime. State v. Riddle, 205 N. C. 591, 172 S. E. 400.

The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without objection does not violate defendant's constitutional right not to be compelled to give evidence against herself, as provided in this section. State v. Eccles, 205 N. C. 825, 172 S. E. 415.

Same—Demonstration of Act of Killing.—Upon trial for murder in the first degree when there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place himself in such position as to show he could have fired the fatal shot from a window and killed the deceased, as this is not considered as making a person furnish evidence against himself, it being dependent upon physical facts and conditions and not upon confessions or statements of the prisoner. State v. Thompson, 161 N. C. 238, 76 S. E. 249.

Same—Forced Production of Incriminating Documents Not Allowed.—The protection afforded to defendants in criminal action by this section is a matter of absolute right to them, and extends to the forced production of letters and other papers in their possession that may tend to incriminate them upon the trial. State v. Hollingsworth, 191 N. C. 595, 132 S. E. 667.

Same—Waiver of Privilege.—The defendant waives his constitutional privilege not to answer questions tending to incriminate himself when he voluntarily testifies in his own behalf. State v. Allen, 107 N. C. 805, 11 S. E. 1016.

Same—Defendant Voluntarily Taking Stand.—See section 1799 of the code and notes thereto.

Must Have Opportunity to Prepare and Present Defense.—The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse witnesses with other testimony, as provided by this section, includes the right to a fair opportunity to prepare and present his defenses, which right must be accorded him not only in form, but in substance as well. State v. Whitfield, 206 N. C. 696, 175 S. E. 93.

Arrest and Search of Person Suspected of Carrying Intoxicants.—Where an officer sees a person leave his automobile with his appearance indicating that he had something concealed on his person and reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and search such person, and where a half-gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of this section. State v. Hickey, 198 N. C. 45, 46, 150 S. E. 615.

Payment of Witnesses' Fees Not Placed on Public.—This provision, exempting an acquitted defendant from payment of necessary witness fees of the defense, does not require that they shall be paid by the public; the section operates only to deprive the witnesses of their common law right to look to the defendant for payment. State v. Hicks, 124 N. C. 829, 32 S. E. 957.

Cited in State v. Wadford, 194 N. C. 336, 139 S. E. 608; State v. Goff, 205 N. C. 545, 552, 172 S. E. 407.

§ 12. Answers to criminal charges.—No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment.

For comprehensive treatment of this provision, see 3 N. C. Enc. Dig. 331 et seq.; 13 N. C. Enc. Dig. 427 et seq.

Generally.—The words "except as hereinafter allowed" have reference to the last clause of section 13, and are intended to harmonize the two sections and let both operate. State v. Crook, 91 N. C. 536, 540.

A justice of the peace has no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and by the provisions of this section, the Superior Court may proceed to trial only upon indictment duly found and returned, the words in this section "except as hereinafter allowed" referring to the latter clause of section 13 relating to trial of petty misdemeanors and not to an assault with a deadly weapon. State v. Myrick, 202 N. C. 688, 163 S. E. 803.

The word "indictment" means indictment by a grand jury as defined by the common law. State v. Mitchell, 202 N. C. 439, 443, 163 S. E. 581.

Necessity for Order for Grand Jury During Special Term.—Where defendant is tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but there is no order by the Governor that a grand jury be drawn from such term, as provided by § 1450 of the Code, defendant's motion in arrest of judgment, made the first time in the Supreme Court upon appeal, must be allowed, pursuant to this section. State v. Baxter, 208 N. C. 90, 179 S. E. 450.

Applied in State v. Rawls, 203 N. C. 436, 166 S. E. 332

§ 13. Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal.

Cross References.—For general treatment of the subject, see 3 N. C. Enc. Dig. 333 et seq.; 13 N. C. Enc. Dig. 428. For general provisions as to jurors, see sec. 2312 et seq.

The essential attributes of trial by jury guaranteed by this section, are the number of jurors, their impartiality and a unanimous verdict, and § 2330(a), providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon this constitutional provision. State v. Dalton, 206 N. C. 507, 174 S. E. 422.

Unanimous Verdict Required.—A verdict of guilty rendered by a less number than twelve is unconstitutional. State v. Berry, 190 N. C. 363, 130 S. E. 12. The verdict must be rendered in open court before the presiding judge. State v. Bazemore, 193 N. C. 336, 137 S. E. 172.

The defendant is entitled as a matter of right to know whether each juror assented to the verdict, announced by the juror who undertook to answer for the jury, and to that end he had the right to insist that a specific question be addressed to and answered by each juror in open court as to whether he assented to said verdict. State v. Boger, 202 N. C. 702, 704, 163 S. E. 877.

Poll of Jury.—The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the "unanimous verdict of a jury of good and lawful men in open court," as prescribed by this section. Lipscomb v. Cox, 195 N. C. 502, 505, 142 S. E. 779. See Art. I, § 19.

See notes to section 585.

Jury Trial Preserved on Appeal.—The right of a trial by jury in a criminal action is preserved to the accused by the statutory requirement of a trial de novo in the Superior Court on appeal from a court of subordinate jurisdiction, and conviction in the Superior Court cannot be had unless upon the verdict of the jury, in accordance with the provisions of this section of our Constitution. State v. Pulliam, 184 N. C. 681, 114 S. E. 394.

Jury Trial Not Waivable.—A jury trial cannot be waived in a criminal action; hence where the facts were agreed upon by the state and the accused and submitted to the judge for his decision, it was held, that such a procedure is not warranted by the law. State v. Holt, 90 N. C. 749. The only exception being for the trial of petty misdemeanors. State v. Stewart, 89 N. C. 563. As to waiver in civil cases, see section 568 of the code and notes thereto.

Separate Provisions for Petty Misdemeanors.—The very purpose of conferring on the legislative power to provide means of trial other than by jury in the ordinary way, as to petty misdemeanors, is to avoid the inconvenience, expense and delay attendant upon indictment by the grand jury, the trial by the jury where the parties choose to waive it, in the ordinary course of criminal procedure. State v. Crook, 91 N. C. 536, 540.

Under this section indictment by grand jury is dispensed with in the trial of petty misdemeanors. State v. Lytle, 138 N. C. 738, 51 S. E. 66.

Same—Right of Appeal.—The right of appeal mentioned in the last clause of this section must be with the right in the party to appeal to the Supreme Court, and with power and jurisdiction in that court to review the decision of the court below in matters of law. State v. Ham, 83 N. C. 590, 591, 593.

The constitutional guaranty of a jury trial is met by the right of appeal which is given from the police court, in all cases, to the Superior Court. State v. Lytle, 138 N. C. 738, 51 S. E. 66. And this is true where the appeal is from a recorder's court. State v. Hyman, 164 N. C. 411, 79 S. E. 284.

Same—Waiver of Right.—A person on trial for a misdemeanor in a municipal court with right of appeal to the Superior Court, may waive his constitutional right to a trial

by jury by consenting to the judgment therein entered, or by not appealing therefrom, and his afterwards employing an attorney and moving for the appeal within the time allowed by the statute applicable will not affect the fact that he had personally acquiesced in the judgment entered. State v. Lakey, 191 N. C. 571, 132 S. E. 570. State v. Pasley, 180 N. C. 695, 104 S. E. 533.

§ 14. Excessive bail.—Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

For general provisions as to bail, see sections 4574 et seq., of the code.

Bail—Test as to Reasonableness.—There are two things which have been looked upon as very good guides in determining the reasonableness of punishment; (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion then to consider that which comes nearest to it. State v. Driver, 78 N. C. 423, 430.

It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be interferred with, except when the abuse is palpable. State v. Driver, supra; cited and approved in State v. Reid, 106 N. C. 714, 716, 11 S. E. 315.

Cruel and Unusual Punishment.—This section has been considered by the Supreme Court as an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes, however, there is a decided intimation that in extraordinary and exceptional cases it may be held to affect legislative enactments as well. State v. Smith, 174 N. C. 804, 93 S. E. 910.

Same—Punishment for Two Offenses.—Where there is a conviction of the violation of two separate criminal statutes consolidated and tried as two counts under one bill of indictment, a sentence for each offense—the one to begin upon the expiration of the other term—confining the punishment as to each within that prescribed in the statute relating to it, cannot be considered under the facts of the case as cruel and unusual within the inhibition of this section. State v. Malpass, 189 N. C. 349, 127 S. E. 248.

Cruel and Unusual Punishment—Violation of Prohibition Law.—A sentence prescribed by statute for the violation of prohibition law is held not to be cruel or unusual within the meaning of this section. State v. Daniels, 197 N. C. 285, 148 S. E. 244.

§ 15. General warrants.—General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

See section 4530 of the Code.

Cited in Rhodes v. Collins, 198 N. C. 23, 26, 150 S. E. 492.

§ 16. Imprisonment for debt.—There shall be no imprisonment for debt in this State, except in cases of fraud.

For treatment of subject generally, see 3 N. C. Enc. Dig. 242 et seq. See also Code section 768 and the notes thereto.

What Constitutes Debt.—A fine or penalty imposed by a municipal ordinance is treated as a debt and under this section of the constitution, a person from whom it is attempted to be collected is exempt from arrest. State v. Earnhardt, 107 N. C. 789, 12 S. E. 426. A judgment on a note is likewise a debt and the defendant cannot be arrested therefor. Stewart v. Bryan, 121 N. C. 46, 28 S. E. 18.

But costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of this section of the constitution, and hence the defendant may be imprisoned for non-payment of the same. State v. Wallin, 89 N. C. 578, 579. See section 1267. Nor is the duty of maintaining a bastard child imposed upon the father, such a debt as is contemplated by this section. State v. Palin, 63 N. C. 472, cited and approved in State v. Beasley, 75 N. C. 211, 212.

The words "except in cases of fraud," in this section of the Constitution, comprehend not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devises, but embraces also fraud in making the contract—false representations for instance, and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like. Melvin v. Melvin, 72 N. C. 384. See further for arrests in cases of fraud, section 768, par. 4, of the Code and notes thereto.

Not Applicable To Tort Actions.—The provision of this section of the constitution has no application to actions for tort; it is confined to causes of action arising ex-contractu. Long v. McLean, 88 N. C. 3. As to arrest for damages arising from tort, see Code 768, par. 1 and the notes thereto.

Section 4284 Constitutional.—Section 4284 of the Code does not contravene this section of the Constitution. See the notes to section 4284 of the code.

Section 4480 Unconstitutional.—Section 4480 of the Code is unconstitutional because it contravenes this section of the constitution. See the annotations under section 4480 of the code.

§ 17. No person taken, etc., but by law of land.—No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

Cross Reference.—For full treatment of the subject-matter, see 3 N. C. Enc. Dig. 328 et seq; 13 N. C. Enc. Dig. 427 et seq. As to qualification on term "liberty" see note of London v. Headen, under Art. I, sec. I.

What Constitutes "Law of the Land."—It is said by Mr. Webster in Dartmouth College v. Woodward, 4 Wheat. 518, 519, 4 L. Ed. 629, "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." Caldwell v. Wilson, 121 N. C. 425, 477, 28 S. E. 554.

In Hoke v. Henderson, 15 N. C. 1, 16, Chief Justice Ruffin said: "The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of rights, as determined by the laws under which is vested, according to the course, mode and usage of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." State v. Cutshell, 110 N. C. 538, 545, 15 S. E. 261.

Double Jeopardy.—A person cannot be tried twice for the same offense under this section. State v. Mansfield, 207 N. C. 233, 176 S. E. 761.

What Constitutes Due Process of Law.—See 3 N. C. Enc. Dig. 328.

The obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for the enforcement of the contract at the time of its execution. Bateman v. Sterrett, 201 N. C. 59, 61, 159 S. E. 14.

An Office as Vested Property.—Whether or not an officer appointed for a definite time to a legislative office has a vested property therein or contract right thereto has given rise to conflicting views and inharmonious decisions. In the early case of Hoke v. Henderson, 15 N. C. 1, it is held that an office is property and is the subject of protection like any other property under the provisions of this section of the constitution. The reasoning used by the court in this case, which is to the effect that a public office exists by contracts between the state and the holder, has been the foundation for the decisions of the courts adhering to this view. See King v. Hunter, 65 N. C. 603; Cotten v. Ellis, 52 N. C. 545; Bailey v. Caldwell, 68 N. C. 472; State v. Gales, 77 N. C. 283; Wood v. Bellamy, 120 N. C. 212, 27 S. E. 113. The general trend of American authority appears to have always maintained the opposite view. See Taylor v. Beckham, 178 U. S. 548, 577, 44 L. Ed. 1187, 20 S. Ct. 890, 1009; Butler v. Pennsylvania, 10 How (U. S.) 402, 13 L. Ed. 472, the North Carolina doctrine being criticized in many of the cases. However, North Carolina has now gotten away from the view to which it adhered over a long period of time and is now in line with the general current of American authority, Hoke v. Henderson being expressly overruled in Mial v. Ellington, 134 N. C. 131, 46 S. E. 961. See historical treatment of this question contained in the Editor's Note to section 3200—Ed. Note.

Infringement of Rights of Litigating Party.—The discretion

of the trial judge given him over the trial of a cause is rarely interferred with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party. State v. Sauls, 190 N. C. 810, 130 S. E. 848. However, the right of appeal is not always essential to the "due process" clauses of the state or Federal constitutions. Gunter v. Sanford, 186 N. C. 452, 120 S. E. 41.

The question as to whether the defendant in a criminal action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under the provisions of Article I, section 17, of our State Constitution, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him. State v. Burnett, 184 N. C. 783, 784, 115 S. E. 57.

Right of Cross Examination.—The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by this section of the Constitution and a denial thereof may not be held as merely a technicality and harmless; or is this error cured by the fact that he has an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusions was based, especially when the other witness is to be regarded as the most important one. State v. Hightower, 187 N. C. 300, 301, 121 S. E. 616.

License of Attorney Protected.—This section constitutes the basis of the decision in those cases holding that an attorney who has been duly licensed to practice law cannot be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offense, or after confession in open court. See Ex-Parte Schenck, 65 N. C. 353, 354 and cases there cited.

A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the provision of this section. Charlotte Consolidated Constr. Co. v. Brockenbrough, 187 N. C. 65, 121 S. E. 7.

Irregular Taxation.—"In Commissioners v. Lacy, 174 N. C. 141, 93 S. E. 482, the court said: 'It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, sec. 17, which forbids that any person shall be disseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land.' " Cited and approved in Board v. Hanchett Bond Co., 194 N. C. 137, 139; Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669.

Eminent Domain by Park Commission.—The exercise of the power of eminent domain by the North Carolina National Park Commission under Public Laws 1927, ch. 48, is not contrary to the "due process" clause of the State Constitution. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Only those whose interests in the particular lands sought to be taken for the national park contemplated by chapter 48, Public Laws of 1927, sec. 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of the Fourteenth Amendment to the Federal Constitution and of this section. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

The exercise of the power of eminent domain by a corporation authorized by its charter to generate and sell electricity, and given power of eminent domain to acquire the necessary rights of way and lands for its dams cannot be said to be exercising this power in a private capacity in contravention of this section. Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 175 S. E. 698.

Approval of Law Authorizing Issue of Bonds.—Where a valid act authorizing a county to issue bonds has been passed in accordance with the provisions of the State Constitution, Art. II, sec. 14, leaving out the requirement that the question must first be submitted to the qualified voters, and another act ratified a few days later makes this requirement, the two acts will be construed in pari materia, and the later as not having a retroactive effect, and the county does not acquire a vested right under the first ratified act. Graham County v. Terry, 194 N. C. 22, 138 S. E. 443.

Sale of Land for Taxes.—For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to be notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, and as taking property without giving notice and as not affording those whose property is sold an opportunity to be heard. Bryson v. McCoy, 194 N. C. 91, 138 S. E. 420.

Sale of Property at Foreclosure.—This section is not violated by sections 2593(b) (c) regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 173 S. E. 587.

The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is not a taking of property inhibited by this section. Orange County v. Jenkins, 200 N. C. 202, 156 S. E. 774.

The statute, authorizing the State Highway Commission to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infraction of constitutional rights and does not deprive an owner of notice and opportunity to be heard. North Carolina State Highway Comm. v. Young, 200 N. C. 603, 158 S. E. 925.

Cited in Kenilworth v. Hyder, 197 N. C. 85, 86, 147 S. E. 736.

§ 18. Persons restrained of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed.

Stated in State v. Herndon, 107 N. C. 934, 12 S. E. 268; Harkins v. Cathy, 119 N. C. 649, 26 S. E. 136; In re Schenck, 74 N. C. 607.

§ 19. Controversies at law respecting property.—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

Cross Reference.—For a comprehensive treatment of the subject, see 8 N. C. Enc. Dig. 320 et seq; 14 N. C. Enc. Dig. 598 et seq. As to courts in which jury trial required, see 8 N. C. Enc. Dig. 321. As to waiver of jury trial see section 568 and note thereto. See also, 8 N. C. Enc. Dig. 328.

In General.—This section guaranteeing the right of trial by jury in "controversies at law regarding property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. Commissioners v. George, 182 N. C. 414, 109 S. E. 77.

Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so expected to as a basis for issues. State v. Featherstone, 120 N. C. 446, 27 S. E. 124.

Right to a jury trial is guaranteed by this section, and where the parties do not consent to trial by the court, it may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. Hershey Corp. v. Atlantic Coast Line R. Co., 207 N. C. 122, 176 S. E. 265.

The policy for the preservation of the right to a trial by jury provided for by this section of the constitution is ordinarily for the Legislature to declare. Board v. Forrest, 193 N. C. 519, 137 S. E. 431.

Right Not Unqualified.—This section does not confer the right to demand the intervention of a jury absolutely and unqualifiedly, but only in cases involving issues of fact. McQueen v. People's Nat. Bank, 111 N. C. 509, 513, 515, 16 S. E. 270.

This constitutional provision applies only to cases in which the prerogative existed at common law or by statute at the time the constitution was adopted. Groves v. Ware, 182 N. C. 553, 109 S. E. 568; Chowan & Southern R. Co. v. Parker, 105 N. C. 246, 11 S. E. 328.

Under Workmen's Compensation Act trial by jury is not

a constitutional right. Hagler v. Mecklenburg Highway Comm., 200 N. C. 733, 734, 158 S. E. 383.

"Trial" refers to a dispute and issue of fact, and the expression "trial by jury," as used in this section does not necessarily signify that every legal controversy is to be determined by a jury. Com'rs v. George, 182 N. C. 414, 417, 109 S. E. 77.

Polling Jury in Civil Actions.—Under this section the losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. Culbreth v. Mfg. Co., 189 N. C. 208, 126 S. E. 419.

Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. In re Will of Sugg, 194 N. C. 638, 140 S. E. 604. See note under Art. I, § 13.

Affect of Fourteenth Amendment of Federal Constitution.—A trial by jury in suits at common law pending in the State Courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge, and the requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State Courts affecting property must be by jury, but it is met if the trial be had according to the settled course of Judicial Proceedings. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

§ 20. Freedom of the press.—The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same.

Contract Prohibiting Entering into Business.—A contract upon the sale of a newspaper that the seller shall not for a period of ten years be connected with any newspaper in the state without obtaining the consent of the purchaser is not void under this section. Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212.

This decision is placed on the ground that the framers of the constitution did not intend to restrict the power of any person to dispose of anything of value which, as the creature of his own mental or physical exertions, has become his property.—Ed. Note.

Applied in Pentuff v. Park, 194 N. C. 146, 138 S. E. 616; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

§ 21. Habeas corpus.—The privileges of the writ of habeas corpus shall not be suspended.

See § 2205 of the code, and notes thereto.

§ 22. Property qualification.—As political rights and privileges are not dependent upon, or modified by, property, therefore no property qualification ought to affect the right to vote or hold office.

§ 23. Representation and taxation.—The people of State ought not to be taxed, or made subject to the payment of any impost or duty, without the consent of themselves, or their representatives in General Assembly, freely given.

§ 24. Militia and the right to bear arms.—A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice.

Cross Reference.—For a comprehensive treatment of this section, see 12 N. C. Enc. Dig. 350 et seq.; 15 N. C. Enc. Dig. 740 et seq. As to what weapons prohibited, see 12 N. C. Enc. Dig. 353 et seq.

Generally.—This provision of the constitution plainly observes the distinction between the "right to keep and bear arms," and "the practice of carrying concealed weapons." The first, it is declared, shall not be infringed, while the latter may be prohibited. State v. Speller, 86 N. C. 697, 700. The court in this case say that even without this constitutional provision, the Legislature may by law regulate the right to bear arms in a manner conducive to the public place. Cited and approved in State v. Reams, 121 N. C. 556, 27 S. E. 1004. As to code provision regulating concealed weapons, see sec. 4410 of the Code, and notes thereto.

Power of Legislature Limited.—The last clause of this provision, constitutes an exception to the first and indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further. State v. Kerner, 181 N. C. 574, 107 S. E. 222.

§ 25. Right of the people to assemble together.—The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances. But secret political societies are dangerous to the liberties of a free people, and should not be tolerated.

§ 26. Religious liberty.—All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience.

Applied in Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669; Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19.

§ 27. Education.—The people have the right to the privilege of education, and it is the duty of the State to guard and maintain that right.

Stated in Bear v. Commissioners, 124 N. C. 204, 32 S. E. 558; Collie v. Commissioners, 145 N. C. 170, 171, 59 S. E. 44.

§ 28. Elections should be frequent.—For redress of grievances, and for amending and strengthening the laws, elections should be often held.

§ 29. Recurrence to fundamental principles.—A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

Cited in Beaufort v. Mayo, 207 N. C. 211, 214, 176 S. E. 753.

§ 30. Hereditary emoluments, etc.—No hereditary emoluments, privileges, or honors ought to be granted or conferred in this State.

Editor's Note.—This provision is usually construed in connection with section 31 of this article. Reference is here made to the cases placed under that section.

§ 31. Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed.

Cross Reference.—For full treatment of subject, see 3 N. C. Enc. Dig. 300 et seq.; 13 N. C. Enc. Dig. 424 et seq.; see also Art. I, sec. 7.

As to invalidity of a local statute providing that the provisions of C. S. § 2445 should be read into private construction bonds under this section see Art. I, § 7 and notes thereto.

Early Vesting of Estates Favored.—Where, by a correct interpretation of the will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. Walker v. Trollinger, 192 N. C. 744, 135 S. E. 871.

Applied to right to operate a public ferry in Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29; and to right to operate filling station in certain designated districts, in Clinton v. Standard Oil Co., 193 N. C. 432, 137 S. E. 183; and to right to tax a bakery in Hilton v. Harris, 207 N. C. 465, 177 S. E. 411.

Quoted in Security Nat. Bank v. Sternberger, 207 N. C. 811, 820, 178 S. E. 595.

§ 32. Ex post facto laws.—Retrospective laws, punishing acts committed before the existence

of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no ex post facto law ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed.

Cross Reference.—For full treatment of the subject, see 3 N. C. Enc. Dig. 296 et seq.; 13 N. C. Enc. Dig. 423 et seq. As affecting rules of evidence, see 3 N. C. Enc. Dig. 299. As to nature or extent of punishment, see 3 N. C. Enc. Dig. 299.

See annotations to § 276(a).

Definition.—An ex post facto law is one which either makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed by law at that time. State v. Broadway, 157 N. C. 598, 72 S. E. 987. But a retrospective statute is not necessarily void. Tabor v. Ward, 83 N. C. 291. For other cases substantiating this principle, see 3 N. C. Enc. Dig. 291 et seq.

Applies only to Criminal Statutes. — An ex post facto statute prohibited by this section relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingent determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by § 996, of the Code is not objectionable as falling within the Constitutional inhibition. Stanback v. Citizens Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Whenever a retrospective statute applies to crimes and penalties, it is an ex post facto law. State v. Bell, 61 N. C. 76, 82; State v. Bond, 49 N. C. 9. See also, 3 N. C. Enc. Dig. 296 for other cases.

§ 33. Slavery prohibited.—Slavery and involuntary servitude, otherwise than for crime, whereof the parties shall have been duly convicted, shall be, and are hereby forever prohibited within the State.

§ 34. State boundaries.—The limits and boundaries of the State shall be and remain as they now are.

§ 35. Courts shall be open.—All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

Delay Caused by Irregular Pleading.—Under the provisions of this section an adversary party ought not to be delayed in the final adjudication of the controversy by the fact that the exceptions taken by the opposite party are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. Driller Co. v. Worth, 118 N. C. 746, 747, 748, 24 S. E. 517. Nor ought he to be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. Id. So also, the rights of the appellee will be protected when the appellant failed to print the record as required, and motion to reinstate the case, after dismissal, came too late. Cowan v. Layburn, 116 N. C. 526, 20 S. E. 965.

The creation of inferior courts by the legislature has been useful in having justice administered without "delay" in accordance with this section. Albertson v. Albertson, 207 N. C. 547, 551, 178 S. E. 352.

Foreclosure of Mortgages.—This section is not violated by sections 2593(b) (c) regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 173 S. E. 587.

Applied in Myers v. Barnhardt, 202 N. C. 49, 161 S. E. 715.

§ 36. Soldiers in time of peace.—No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner prescribed by law.

§ 37. Other rights of the people.—This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.

Stated in Nichols v. McKee, 68 N. C. 429, 431; State v. Lewis, 142 N. C. 626, 646, 55 S. E. 600.

ARTICLE II

Legislative Department

§ 1. Two branches.—The legislative authority shall be vested in two distinct branches, both dependent on the people, to-wit: a Senate and a House of Representatives.

As to the legislative power, generally, see 3 Enc. Dig. 221 et seq.; 13 Enc. Dig. 414 et seq.

Cited in Wilson v. Jordan, 124 N. C. 683, 719, 33 S. E. 139; Saluda v. Polk County, 207 N. C. 180, 183, 176 S. E. 298.

§ 2. Time of assembly. — The Senate and House of Representatives shall meet biennially on the first Wednesday after the first Monday in January next after their election; and when assembled, shall be denominated the General Assembly. Neither house shall proceed upon public business unless a majority of all the members are actually present.

§ 3. Number of senators.—The Senate shall be composed of fifty senators, biennially chosen by ballot.

§ 4. Regulations in relation to districting the State for senators.—The Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration by order of Congress, that each Senate district shall contain, as near as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more senators.

§ 5. Regulations in relation to apportionment of representatives.—The House of Representatives shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one representative in the House of Representatives, although it may not contain the requisite ratio of representation; this apportionment shall be made by the General Assembly at the respective times and periods when the districts of the Senate are hereinbefore directed to be laid off.

See note to the next succeeding section of this article.

§ 6. Ratio of representation.—In making the apportionment in the House of Representatives the ratio of representation shall be ascertained by dividing the amount of the population of the State, exclusive of that comprehended within those counties which do not severally contain the one hundred and twentieth part of the population of the State, by the number of representatives, less the number assigned to such counties; and in ascertaining the number of the population of the State, aliens and Indians not taxed shall not be included. To each county containing the said ratio and not twice the said

ratio there shall be assigned one representative; to each county containing two but not three times the said ratio there shall be assigned two representatives, and so on progressively, and then the remaining representatives shall be assigned severally to the counties having the largest fractions.

Changing Dividing Line of Counties.—An act which changes the dividing line between two counties is not in conflict with this section. Commissioners v. Ballard, 69 N. C. 18.

§ 7. Qualifications for senators.—Each member of the Senate shall not be less than twenty-five years of age, shall have resided in the State as a citizen two years, and shall have usually resided in the district for which he was chosen one year immediately preceding his election.

§ 8. Qualifications for representatives.—Each member of the House of Representatives shall be a qualified elector of the State, and shall have resided in the county for which he is chosen for one year immediately preceding his election.

§ 9. Election of officers.—In the election of all officers, whose appointment shall be conferred upon the General Assembly by the Constitution, the vote shall be viva voce.

Presumption of Regularity.—Where a certificate shows that there was a legislative election of an officer and nothing else appearing, the law presumes a quorum and that the election was regular. Cherry v. Burns, 124 N. C. 761, 766, 33 S. E. 136.

§ 10. Powers in relation to divorce and alimony.—The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case.

Cross Reference.—For the legislative enactments passed pursuant to this section and the constructions thereof, see §§ 1655 et seq. of the code, and the notes thereto.

Only Limitation on Legislative Power.—The only limitation on powers in enacting statutes relating to divorce is found in this section. Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178.

§ 11. Private laws in relation to names of persons, etc.—The General Assembly shall not have power to pass any private law to alter the name of any person, or to legitimate any person not born in lawful wedlock, to restore to the rights of citizenship any person convicted of an infamous crime, but shall have power to pass general laws regulating the same.

§ 12. Thirty days' notice shall be given anterior to passage of private laws.—The General Assembly shall not pass any private laws, unless it shall be made to appear that thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law.

Notice Presumed to Be Given.—The courts will conclusively presume from the ratification of a private act that the notice required by this section has been given. Matthews v. Blowing Rock, 207 N. C. 450, 177 S. E. 429.

In Cox v. Commissioners of Pitt County, 146 N. C. 584, 585, 60 S. E. 516, 16 L. R. A. (N. S.) 253, is the following: The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with this section, but will conclusively presume, from ratification, that the notice has been given. State v. Holmes, 207 N. C. 293, 299, 176 S. E. 746.

When Testimony Heard.—Except in case of bills coming within the provisions of section 14, the Supreme Court will not hear testimony for the purpose of showing that the notice required by this section was not given. Brodnax v. Groom, 64 N. C. 244; Gatlin v. Tarboro, 78 N. C. 119; Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023; Bray v. Williams, 137 N. C. 387, 390, 49 S. E. 887.

No Ground for Collateral Impeachment.—Where an act granting a charter to a private corporation has been duly ratified, it may not be collaterally impeached in an action between it and another on the ground that the notice had not been made as required by this section. Carolina-Tennessee Power Co. v. Hiawassee River Co., 175 N. C. 668, 669, 96 S. E. 99.

The act creating the North Carolina National Park Commission (Laws 1927, ch. 48) is a public act and does not fall within the purview of this section requiring notice that applicaton to the General Assembly for the passage of a private act be made. Yarbrough v. Park Commission, 196 N. E. 284, 145 S. E. 563.

Cited in Commissioners v. Snuggs, 121 N. C. 394, 408, 28 S. E. 539.

§ 13. Vacancies.—If vacancies shall occur in the General Assembly by death, resignation, or otherwise, writs of election shall be issued by the Governor under such regulations as may be prescribed by law.

§ 14. Revenue.—No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

I. Editor's Note.
II. General Considerations.
III. Necessity of Following Section.
IV. The Journal—Speakers' Certificates.
V. Substituted Bills—Amendments.

Cross Reference.

As to subscription to railroad stock by counties, see §§ 3431, 3432.

I. EDITOR'S NOTE.

Editor's Note.—The authorities as to the power of county taxation are thus analyzed and summarized in Tate v. Commissioners, 122 N. C. 812, 815, 30 S. E. 352.

A. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

B. For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority, without a vote of the people.

C. For other purposes than necessary expenses, a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.

II. GENERAL CONSIDERATIONS.

Section Mandatory.—This section is mandatory. Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539; Union Bank v. Commissioners, 119 N. C. 214, 25 S. E. 966; and must be strictly complied with. Smothers v. Com., 125 N. C. 480, 34 S. E. 554.

The adoption of this section, annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711.

Burden of Proof.—Parties objecting have the burden of showing that acts had not been passed according to the requirements of this section. Slocomb v. Fayetteville, 125 N. C. 362, 365, 34 S. E. 436.

Section Not Retroactive.—See Board v. Travelers' Ins. Co., 128 Fed. 817.

Applies to Townships.—The restrictions are by necessary implication applicable to townships, as they are but constituent parts of the county organization. Wittkowsky v. Commissioners, 150 N. C. 90, 63 S. E. 275; Township Road Commission v. Commissioners, 178 N. C. 61, 100 S. E. 122.

Not Applicable to Necessary County Expense.—It is not

necessary to enter the yeas and nays on an act to raise revenue for a necessary county expense. Black v. Commissioners, 129 N. C. 121, 122, 39 S. E. 818.

Issuing bonds for road purposes is a necessary expense to which the section does not apply. Leonard v. Commissioners, 185 N. C. 527, 117 S. E. 580. See Woodall v. Western Wake Commission, 176 N. C. 377, 97 S. E. 226.

An act authorizing treasurer to deliver state bonds is not within this section. Battle v. Lacy, 150 N. C. 573, 64 S. E. 505.

A motion to reconsider violates the efficacy of the original passage according to this section; for the act to be valid the final result must comply with this section. Allen v. Raleigh, 181 N. C. 453, 454, 107 S. E. 463.

A statute for the revaluation of property is not in its strict sense a revenue act within the meaning of this section. Hart v. Com., 192 N. C. 161, 134 S. E. 403.

Changing of County Agencies.—The Legislature has the power and authority to change the county tax agencies without further observing the requirements of the section. State v. Jennette, 190 N. C. 96, 129 S. E. 184.

Submission to People Not Required.—An act of the Legislature authorizing a bond issue for public roads is valid if conforming to this section of the State Constitution, without submitting the proposition to a vote of the people. Hargrave v. Commissioners, 168 N. C. 626, 84 S. E. 1044.

Cited in Nixon v. Asheville, 199 N. C. 217, 218, 154 S. E. 93; Penland v. Bryson City, 199 N. C. 140, 154 S. E. 88; Starmount v. Hamilton Lakes, 205 N. C. 514, 518, 171 S. E. 909.

III. NECESSITY OF FOLLOWING SECTION.

No Authority Conferred Unless Section Followed.—An act not having been passed with the formalities required by this section is void, and confers no authority upon a city to create the debt and issue the bonds therein provided for. Charlotte v. Shepard & Co., 122 N. C. 602, 29 S. E. 842; Glenn v. Wray, 126 N. C. 730, 36 S. E. 167; Cottrell v. Lenoir, 173 N. C. 138, 91 S. E. 827.

Valid and Invalid Act on Same Subject.—An act passed according to the requirements of this section cannot be construed with an act not so passed. Pritchard v. Com., 160 N. C. 476, 76 S. E. 488.

Where a town charter is not passed in accordance with this section, such town cannot levy any tax under said charter, but it may levy taxes for necessary expense. Rodman-Heath Cotton Mills v. Waxhaw, 130 N. C. 293, 41 S. E. 488.

Effect on Bonds on Failure to Comply with Section.—This section is mandatory; and, not having been complied with in the passage of certain laws authorizing certain counties, to subscribe for stock in a railroad company and issue bonds in payment therefor, bonds issued by a city pursuant thereto were void. Burlingham v. New Bern, 213 Fed. 1014.

A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority given in conformity with the requirements of this section, or unless for necessary expenses. Storm v. Wrightsville Beach, 189 N. C. 679, 127 S. E. 17.

Estoppel To Deny Invalidity of Bonds.—Where township bonds are invalid because issued without authority, the township is not estopped from asserting such fact by recitals in the bonds that they are issued in compliance with the constitution and laws of the state. Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3.

The payment of interest does not preclude the inquiry as to the validity of the bonds. Glenn v. Wray, 126 N. C. 730, 36 S. E. 167.

Who May Enjoin Bond Issue.—It is competent for a taxpayer to file a complaint on behalf of himself and all other taxpayers in the State, whereby to enjoin the issue of State bonds under an unconstitutional act of Assembly. Galloway v. Jenkins, 63 N. C. 147.

Readings on Same Day.—Where the journal of the state senate affirmatively shows that the first and second readings of a bill took place on the same day of the act is unconstitutional. Storm v. Wrightsville Beach, 189 N. C. 679, 127 S. E. 17.

IV. THE JOURNAL—SPEAKERS' CERTIFICATES.

See notes under § 23 of this article.

What Journal Must Show.—The journal must show who voted for the bill, and that the requisite number of Senators and members did so, and no other source of evidence can be invoked, and the certificate of the presiding officers that a bill has been read three times does not obviate the necessity of examining the journal. Burlingham v. New Bern, 213 Fed. 1014.

Omission of Negative Vote.—Where the journal of the house does not give the names of any members, as voting in the negative on a bill authorizing a township to issue bonds, and it does not affirmatively appear that there were none so voting, the statute is invalid. Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3.

As this section requires that on the voting of a bill before the legislature the yeas and nays shall be entered on the journals, either the nays must be on the journal, or it must affirmatively appear that there were none. Commissioners v. De Rosset, 129 N. C. 275, 40 S. E. 43.

Where the House Journal showed that a certain law, authorizing the issuance of county bonds, was passed by the following vote: "Ayes 94, nays . . . ; total . . ."—such record sufficiently showed that there was no negative vote cast, under the presumption that the clerk of the House charged with the recording of the vote performed his duty, and hence such record constituted a sufficient compliance with this section. Commissioners v. Tollman, 145 Fed. 753, 754.

A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, is not invalid for the failure to meet the requirements of this section, by reason of the failure to record on the journal on the second reading in one of the branches of the legislature the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none. Leonard v. Commissioners, 185 N. C. 527, 117 S. E. 580, citing Commissioners v. Trust Co., 143 N. C. 110, 55 S. E. 442.

Journals Conclusive.—The journals of the General Assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023. They are the sole evidence as to whether the ayes and noes on a vote on a bill were entered on such journals. Commissioners v. De Rosset, 129 N. C. 275, 40 S. E. 43; Com'rs v. Coles, 96 Fed. 284; Allen v. Raleigh, 181 N. C. 453, 107 S. E. 463. And are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act. Union Bank v. Commissioners, 119 N. C. 214, 25 S. E. 966; Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539. See especially the concurring opinion of J. Furches in Commissioners v. Snuggs.

Correction of Journals.—A subsequent special session of the same Legislature may correct it journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions. Commissioners v. Farmers Bank, 152 N. C. 387, 67 S. E. 969.

Certificate of Speakers.—The certificate of the speakers of each house of the legislature is conclusive evidence that a bill was read and passed three several readings in each house. Commissioners v. De Rosset, 129 N. C. 275, 40 S. E. 43.

Effect of Certificate of Ratification.—The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with this section of the Constitution. Smathers v. Commissioners, 125 N. C. 480, 34 S. E. 554.

V. SUBSTITUTED BILLS—AMENDMENTS.

Substituted Bill. — Where a bill, authorizing a levy of taxes for road purposes, has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of legislation, and otherwise conforming to the requirements of this section, in both branches of legislation, the substitute is to be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act may not successfully be questioned as not having passed on the several separate days required of a bill of this character. Edwards v. Commissioners, 183 N. C. 58, 110 S. E. 600.

Where a valid charter of a municipality authorizing the issuance of its bonds has been subsequently amended with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the Legislature attempts to pass a still later law amending the former act but which has not been done in accordance with the requirements of this section, the later acts are of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds may yet be issued. Cottrell v. Lenoir, 173 N. C. 138, 91 S. E. 827.

Validation by Later Act.—Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of this section is therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been submitted to and approved by the voters of the State, as the

statute required, are valid. Hinton v. Lacy, 193 N. C. 496, 497, 137 S. E. 669.

In a suit by the commissioners of a school district to compel the county commissioners to deliver to it certain school bonds for negotiation that the voters of the district had approved at an election held according to the statutory provisions affecting them, it appeared that the issue was $50,000 in excess of the amount authorized by § 5678, and that the original act had not been passed in accordance with the requirements of this section but was later ratified by the Legislature in conformity therewith. There being no intervening vested rights the former infirmity of the bonds was cured by the later act. Board v. Commissioners, 183 N. C. 300, 111 S. E. 531.

When Amendment will Affect Constitutionality.—An act passed in accordance with this section is not rendered invalid by an amendment not passed in accordance with the constitutional provision, when it does not affect the taxing or other financial features of the act, or increase either the taxes or impose any additional burden on the taxpayer. Wagstaff v. Central Highway Commission, 174 N. C. 377, 93 S. E. 908.

No Change Effected.—Where the Legislature has passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by later ratification of an act requiring the question to be submitted to the qualified voters: Held, it is not required that the later ratified act be also passed in accordance with the constitutional requirement, and in the absence of a proper election, the bond issue will be declared invalid. Graham County v. Terry & Co., 194 N. C. 22, 138 S. E. 443.

Where the Legislature has passed an act authorizing a county to issue bonds according to the provisions of this section it is within its power to add a provision that the question be first submitted to the electorate of the county. Graham County v. Terry & Co., 94 N. C. 22, 138 S. E. 443.

No Presumption of Materiality.—Where the journal does not show the effect of the amendment there is no presumption that it was material. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433.

Evidence of Materiality.—Slips of paper attached by a rubber band to the cover of the original bill when it was engrossed are not admissible in determining whether an amendment was material. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433.

Material Amendment.—A material amendment made by one branch of the Legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of this section. Claywell v. Commissioners, 173 N. C. 657, 92 S. E. 481; Glenn v. Wray, 126 N. C. 730, 36 S. E. 167. This rule applies with greater force, when the amendment is by separate act. Guire v. Com'rs, 177 N. C. 516, 99 S. E. 430.

An amendment which made a material change in the valid act it proposed to amend is unconstitutional, and the commissioners are without authority to levy the tax specified in the later act. Township Road Commissioners v. Commissioners, 178 N. C. 61, 62, 100 S. E. 122.

Same—Increasing Interest Rate.—An amendment to an act authorizing a county to issue bonds for road construction, which increases the rate of interest from 5 per cent to 6 per cent, is to effect a material change in the former law. Guire v. Commissioners, 177 N. C. 516, 99 S. E. 430.

Same—Increasing Tax Rate. — When an act has been passed by the Legislature authorizing a graded school district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to this section, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid in toto when the later act is not likewise passed in accordance with this section. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021.

The bonds are invalid even as to the amount authorized to be issued under the valid act, for that amount was only authorized at a less rate of taxation, etc., as to which the voters upon the proposition have not assented. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021.

Same—Curtailing Territory to Which Applicable.—Where a bill is introduced in one branch of the Legislature for the issuance of bonds, and amendments have been made by the other branch, withdrawing certain of the more wealthy and popular townships from the liability for the indebtedness to be created, except under condition requiring the approval of the voters, the amendment is a material one, requiring for the validity of the act that it be passed in accordance with the requirements of this section. Claywell v. Commissioners, 173 N. C. 657, 92 S. E. 481.

But an act empowering special school districts of the State to issue bonds which followed the requirements of this section except that upon its last reading, by amendment, it was made to apply only to one district in the State, the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, is valid as to that district. Gregg v. Commissioners, 162 N. C. 479, 78 S. E. 301.

Immaterial Amendment.—When an act has been passed in accordance with this section, an amendment, which does not increase the amount of the bonds or the taxes to be levied or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. Commissioners v. Stafford, 138 N. C. 453, 50 S. E. 862.

An amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill is immaterial. Gregg v. Commissioners, 162 N. C. 479, 78 S. E. 301.

It is only when a material amendment is affected that a rereading is necessary. Frazier v. Board of Comm'rs, 194 N. C. 49, 138 S. E. 433.

Same—Substituting Name of Commissioner.—An amendment in the second branch of the Legislature substituting the name of a commissioner does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with this section will not alone affect its validity. Brown v. Commissioners, 173 N. C. 598, 92 S. E. 502.

Same—Charge in Caption.—A slightly different caption retaining the number of the original bill is an immaterial amendment. Brown v. Commissioners, 173 N. C. 598, 92 S. E. 502.

Materiality a Judicial Question.—Whether an amendment is material and required to be passed in accordance with this section is a question of law for the court, under the facts, and not controlled by an agreement between the parties. Wagstaff v. Central Highway Commission, 174 N. C. 377, 93 S. E. 908.

Cited in Fortune v. Commissioners, 140 N. C. 322, 329, 52 S. E. 950; Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669.

§ **15. Entails.**—The General Assembly shall regulate entails in such a manner as to prevent perpetuities.

§ **16. Journals.**—Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly.

§ **17. Protest.**—Any member of either house may dissent from, and protest against, any act or resolve which he may think injurious to the public, or any individual, and have the reasons of his dissent entered on the journal.

§ **18. Officers of the House.**—The House of Representatives shall choose their own speaker and other officers.

This is the only express grant of appointing power to the House of Representatives. People v. McKee, 68 N. C. 429, 432.

§ **19. President of the Senate.**—The Lieutenant-Governor shall preside in the Senate, but shall have no vote unless it may be equally divided.

§ **20. Other senatorial officers.**—The Senate shall choose its other officers and also a speaker (pro tempore) in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor.

This is the only express grant of appointing power to the Senate. People v. McKee, 68 N. C. 429, 432.

§ **21. Style of the acts.**—The style of the acts shall be: "The General Assembly of North Carolina do enact."

§ 22. Powers of the General Assembly.—Each house shall be judge of the qualifications and election of its own members, shall sit upon its own adjournment from day to day, prepare bills to be passed into laws; and the two houses may also jointly adjourn to any future day, or other place.

Effect of Section.—This section withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly. State v. Pharr, 179 N. C. 699, 103 S. E. 8.

§ 23. Bills and resolutions to be read three times, etc.—All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses.

Necessity of Signature.—The signatures of the presiding officers, by the Constitution, must be affixed to an act of legislation during the session of the general assembly, and are necessary to its completeness and efficacy. Scarborough v. Robinson, 81 N. C. 409.

Where an office was created by an act of the General Assembly but was not signed by the presiding officers until the three days data, an election in the interim to fill such office was void. State v. Meares, 116 N. C. 582, 583, 21 S. E. 973.

The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. Scarborough v. Robinson, 81 N. C. 409.

In the absence of the signature journals are not competent to prove compliance with this section. Frazier v. Board of Com'rs. 194 N. C. 49, 138 S. E. 433.

Effect of Signature.—When an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. Union Bank v. Commissioners, 119 N. C. 214, 222, 25 S. E. 966.

The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with Art. II, sec. 14, of the Constitution. Smathers v. Commissioners, 125 N. C. 480, 34 S. E. 554; Commissioners v. DeRassett, 129 N. C. 275, 40 S. E. 43.

Effect of Certificate.—The certificate is not sufficient to show that the bill was passed in compliance with section 14 of this article. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433.

But the signature is conclusive of passage according to this section. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433.

And the journals are not admissible to contradict such signature. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433.

Cited in Russell v. Ayer, 120 N. C. 180, 211, 27 S. E. 133; Commissioners v. Snuggs, 121 N. C. 394, 400, 28 S. E. 539; State v. Patterson, 134 N. C. 612, 620, 47 S. E. 808.

§ 24. Oath of members.—Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States, and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives.

§ 25. Terms of office.—The terms of office for senators and members of the house of representatives shall commence at the time of their election.

§ 26. Yeas and nays.—Upon motion made and seconded in either house by one-fifth of the members present, the yeas and nays upon any question shall be taken and entered upon the journals.

§ 27. Election for members of the General Assembly.—The election for members of the General Assembly shall be held for the respective districts and counties, at the places where they are now held, or may be directed hereafter to be held, in such manner as may be prescribed by law, on the first Thursday in August, in the year one thousand eight hundred and seventy, and every two years thereafter. But the General Assembly may change the time of holding the elections.

See Legislative Term of Office, 64 N. C. 785.

§ 28. Pay of members and officers of the General Assembly.—The members of the General Assembly for the term of their office shall receive a salary for their services of six hundred dollars each. The salaries of the presiding officers of the two houses shall be seven hundred dollars each: Provided, that in addition to the salaries herein provied for, should an extra session of the General Assembly be called, the members shall receive eight dollars per day each, and the presiding officers of the two houses ten dollars per day each, for every day of such extra session not exceeding twenty days; and should an extra session continue more than twenty days, the members and officers shall serve thereafter without pay.

Editor's Note.—Prior to the amendment to this section, proposed by Public Laws of 1927, c. 203 and ratified at the next general election, the members of the general assembly were paid four dollars per day, for a period not exceeding sixty days, and mileage. The presiding officers were paid six dollars per day and mileage. Both received a like rate of compensation for an extra session.

Special Committee of Investigation.—In as much as per diem of members of the General Assembly is allowed only during its session, which is limited to sixty days, the members of the legislative committee appointed to investigate certain facts and report to the General Assembly before its adjournment if possible, otherwise to the superior court, are not entitled to per diem for services rendered after adjournment when the resolution appointing them only provided for the necessary expenses of the committee while engaged in the investigation. Commercial, etc., Bank v. Worth, 117 N. C. 147, 23 S. E. 160. This case was decided prior to the amendment to this section fixing a salary for the members of the general assembly.—Ed. Note.

§ 29. Limitations upon power of General Assembly to enact private or special legislation.—The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to nonnavigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private, or special laws enacted by it. Any local, private or

special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section.

What Are Local Laws.—The interpretation of a statute, as to whether it is a local one, prohibited by this section of our Constitution should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. In re Harris, 183 N. C. 633, 112 S. E. 425.

Scope of Legislative Power.—See generally Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Establishment of Recorders' Courts.—A general law permitting the establishment of Recorders' courts in the State, excepting certain counties to the number of 44, leaving 56 within the provisions of the statute, is not a local law within the intent and meaning of this section nor is a statute amending the former general law taking a certain county and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a reenactment of the general law including the particular counties. In re Harris, 183 N. C. 633, 112 S. E. 425.

Increasing Jurisdiction of Certain Court.—An act which authorizes the county commissioners to increase the jurisdiction of a certain recorder's courts in civil matters is unconstitutional. Durham Provision Co. v. Daves, 190 N. C. 7, 8, 128 S. E. 593.

Same—Courts Already Established.—This section does not apply to increasing the jurisdiction of such courts as are already established. State v. Horne, 191 N. C. 375, 131 S. E. 753.

Same—Effect on Emoluments.—Where the Legislature, in contravention of this section of the Constitution of this State, has established a court inferior to the superior court, an incumbent judge thereof, duly elected, may not successfully contend that he was deprived of the emoluments of his office by an unconstitutional statute, abolishing the court. Queen v. Commissioners, 193 N. C. 821, 138 S. E. 310.

Erection of Hospital.—An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and provide a tax for its maintenance, upon the approval of the voters, is both a special and local act and void under this section. Armstrong v. Board, 185 N. C. 405, 117 S. E. 388.

National Park Act. — The provisions of the statute (Laws 1927, ch. 48) for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Extending Limits of School.—It is true that the boundaries of a "district" may be coterminous with those of a city or town but it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of the constitutional provision. Hailey v. Winston-Salem, 196 N. C. 17, 22, 144 S. E. 377.

Sanitary Districts.—An act of the Legislature (Private Laws 1927, c. 229) attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assessments or taxing powers for the purpose is void, being in violation of the provisions of this section. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530.

Building Bridges.—A legislative enactment relating to the building of bridges by a county over a nonnavigable stream or river does not necessarily come within the purview and control of this section. Mills v. Commissioners, 175 N. C. 215, 95 S. E. 481.

While authority given by statute to a county or other political agency of a state, to issue bonds for highways in aid to their maintenance or construction is not direct, local or special legislation as is prohibited by this section, it is otherwise where the statute directs the building of a bridge at a specified place across a stream between two counties, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State. Day v. Commissioners, 191 N. C. 780, 133 S. E. 164.

Maintenance of Streets within City Limits.—The unlimited power in the General Assembly to provide for the creation and extension of corporate limits of municipal corporations, would seem to include the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations, and such private act would not seem to contravene this section. Matthews v. Blowing Rock, 207 N. C. 450, 452, 177 S. E. 429.

Formation of Sewerage Districts.—A statute authorizing the formation of sanitary sewerage districts within county-wide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute is not a "local, private or special act relating to health, sanitation, etc." Reed v. Howerton Engineering Co., 188 N. C. 39, 40, 123 S. E. 479.

Drainage District.—A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of Art. VII, § 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by this section. Kenilworth v. Hyder, 197 N. C. 85, 86, 147 S. E. 736.

Establishing or Changing Lines of School Districts.—Since the enforcement of this section, special act of the Legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. Galloway v. Board, 184 N. C. 245, 114 S. E. 165.

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the provision of this section. Board v. Mutual Loan, etc., Co., 181 N. C. 306, 107 S. E. 130.

Same—Creation of Public School District.—A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by this section. Robinson v. Board, 182 N. C. 590, 109 S. E. 855.

Same—Incorporation of Existing Districts.—Incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, and not in contravention to this section. Board v. Mutual Loan, etc., Co., 181 N. C. 306, 107 S. E. 130; Paschal v. Johnson, 183 N. C. 129, 110 S. E. 841.

Same—Increase of Bonds by Existing District.—Where a school district has been defined as to its boundaries, etc., and created under the provisions of a statute valid before the adoption of the amendment to our State Constitution, this section, and which authorized a bond issue in a certain sum, a statute passed since the adoption of this constitutional amendment authorizing an increase of the bonds to be issued, upon the approval of the voters according to the statutory amendment, does not contravene the provision of this section. Roebuck v. Board, 184 N. C. 144, 113 S. E. 676.

Same—Recognizing School District in Changed City Limits.—A public-local act that enlarged the city limits and recognized therein the independent existence of a public-school district within the former limits is not contrary to the provisions of our recent amendment to our Constitution, this section, as an attempt to establish a school district, or to change the limits of those already established. Duffy v. Greensboro, 186 N. C. 470, 120 S. E. 53.

Same—Submitting Question of Taxation.—A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by this section. Burney v. Bladen County, 184 N. C. 274, 275, 114 S. E. 298.

Machinery to Effect Void Act.—Where an act to create a public school district is unconstitutional, because it violates this section, the provision for bonds and taxation to carry out the purpose of the act are likewise void. Sechrist v. Commissioners, 181 N. C. 511, 107 S. E. 503.

Poll Tax for School Purposes Unconstitutional.—Since the adoption of this section a special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election held for the purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts. Board v. Bray, 184 N. C. 484, 485, 115 S. E. 47.

Ratifying Ordinance to Issue Bonds.—An act for the purpose of ratifying an ordinance, of county commissioners, to issue bonds and levy taxes for school purposes passed since the adoption of this section of the Constitution, is a local, private, or special act thereby prohibited; and the issuance of such bonds and levy of such taxes, will be permanently

enjoined. Woosley v. Commissioners, 182 N. C. 429, 109 S. E. 368.

Maintenance of County Highways.—A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of this section, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. State v. Kelly, 186 N. C. 365, 119 S. E. 755.

Substitution of Road Control.—A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, does not violate this section of our State Constitution. Honeycutt v. Commissioners, 182 N. C. 319, 109 S. E. 4.

A public-local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of this section. Hill v. Commissioners, 190 N. C. 123, 129 S. E. 154.

Issuance of County Road Bonds.—An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. Road Comm'rs v. Bank, 181 N. C. 347, 107 S. E. 245.

An act of the legislature authorizing the issuance of county bonds for public roads is not in contravention of this section of the Constitution. Commissioners v. Wachovia Bank & Trust Co., 178 N. C. 170, 100 S. E. 421.

An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. Road Commissioners v. Bank, 181 N. C. 347, 107 S. E. 245.

Same—May Provide for Distributor of Fund.—An act of the legislature may prescribe a rule by which the proceeds of the sales of bonds it authorizes a county to issue for road purposes, shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by this section over "the laying out, opening, or discontinuance of highways." Commissioners v. Pruden & Co., 178 N. C. 394, 100 S. E. 695.

Collection of Tax Liens.—An act relating to establishment and collection of tax liens, which applies to only one county of the State, is void as a violation of this section. Wake Forest v. Holding, 207 N. C. 808, 178 S. E. 594.

Cited in Albertson v. Albertson, 207 N. C. 547, 551, 178 S. E. 352; Edgerton v. Hood, 205 N. C. 816, 821, 172 S. E. 481.

§ 30. Inviolability of sinking funds. — The General Assembly shall not use nor authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which said sinking fund has been created.

Sum Erroneously Placed in Sinking Fund.—While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the city may by ordinance correct the error of the clerk and use the funds for other lawful municipal purposes. Mewborn v. Kinston, 199 N. C. 72, 154 S. E. 76.

ARTICLE III

Executive Department

§ 1. Officers of the executive department; terms of office.—The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January.

Duty of Governor.—The Governor as the constituted head of the executive department is changed with the duty of seeing that legislative acts are carried into effect. Winslow v. Morton, 118 N. C. 487, 490, 24 S. E. 417.

As to public officers generally, see 9 Enc. Dig. 774 et seq.; 15 Enc. Dig. 132 et seq.

Cited in People v. McKee, 65 N. C. 257; Pemberton v. McRae, 75 N. C. 497, 504; Caldwell v. Wilson, 121 N. C. 425, 476, 28 S. E. 554 (Dissenting opinion of C. J. Faircloth); Wilson v. Jordan, 124 N. C. 683, 719, 33 S. E. 139.

§ 2. Qualifications of Governor and Lieutenant-Governor.—No person shall be eligible as Governor or Lieutenant-Governor unless he shall have attained the age of thirty years, shall have been a citizen of the United States five years, and shall have been a resident of this State for two years next before the election; nor shall the person elected to either of these two offices be eligible to the same office more than four years in any term of eight years, unless the office shall have been cast upon him as Lieutenant-Governor or president of the State.

§ 3. Returns of elections.—The returns of every election for officers of the executive department shall be sealed up and transmitted to the seat of government by the returning officer, directed to the Secretary of State. The return shall be canvassed and the result declared in such manner as may be prescribed by law. Contested elections shall be determined by a joint ballot of both houses of the General Assembly in such manner as shall be prescribed by law.

Editor's Note.—This section was amended in 1926 and the returns ordered sent to the Secretary of State instead of the speaker of the house of representatives as formerly.

As to elections generally, see 5 Enc. Dig. 76 et seq.; 13 Enc. Dig. 823 et seq.

Where Returns Have Been Acted on.—In a proceeding to compel by mandamus a reassembling of a Board of County Canvassers and a recount of the votes cast in the county for candidates for the House of Representatives, where, since the institution of the action, the Board of State Canvassers has acted upon the returns transmitted to them, and issued a commission to the person elected on the face of the return, judicial action in the premises would be wholly unavailing, as the matter has passed beyond the jurisdiction of the court. O'Hara v. Powell, 80 N. C. 104.

§ 4. Oath of office for Governor.—The Governor, before entering upon the duties of his office, shall, in the presence of the members of both branches of the General Assembly, or before any justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States, and of the State of North Carolina, and that he will faithfully perform the duties appertaining to the office of Governor, to which he has been elected.

§ 5. Duties of Governor.—The Governor shall reside at the seat of government of this State, and he shall, from time to time, give the General Assembly information of the affairs of the State, and recommend to their consideration such measures as he shall deem expedient.

§ 6. Reprieves, commutations, and pardons.—The Governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall biennially communicate to the General Assembly each case of reprieve, commutation, or pardon granted, stating the name of each convict, the crime for which he was convicted, the sentence and its date, the date of commutation, pardon, or reprieve, and the reasons therefor.

As to pardons generally, see 9 Enc. Dig. 807 et seq., 15 Enc. Dig. 142 et seq.

Pardon Pending Appeal.—The term "conviction," in this section denotes a verdict of guilty rendered by a jury: Therefore, when defendant, after verdict and judgment in the court below, appealed to the supreme court and, pending such appeal, was pardoned by the Governor, such pardon is authorized by this section and is valid. State v. Alexander, 76 N. C. 231; State v. Mathis, 109 N. C. 815, 13 S. E. 917.

Cited in State v. Mooney, 74 N. C. 98. In re McMahon, 125 N. C. 38, 34 S. E. 193; Herring v. Pugh, 126 N. C. 852, 862, 36 S. E. 287.

§ 7. Annual reports from officers of executive department and of public institutions.—The officers of the executive department and of the public institutions of the State shall, at least five days previous to each regular session of the General Assembly, severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly; and the Governor may, at any time, require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed.

Applied in Arendell v. Worth, 125 N. C. 111, 34 S. E. 232. Cited in Nichols v. McKee, 68 N. C. 429, 435; Walker v. Bledsoe, 68 N. C. 457, 463.

§ 8. Commander-in-chief. — The Governor shall be Commander-in-chief of the militia of the State, except when they shall be called into the service of the United States.

Supremacy of Governor's Control.—Under this section the Governor's control is supreme, in the absence of legislation, "to provide for the organization," etc., of the militia, enacted pursuant to Article XII, section 3 of this constitution. Winslow v. Morton, 118 N. C. 486, 24 S. E. 417.

§ 9. Extra sessions of General Assembly.—The Governor shall have power on extraordinary occasions, by and with the advise of the Council of State, to convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened.

§ 10. Officers whose appointments are not otherwise provided for.—The Governor shall nominate, and by and with the advice and consent of a majority of the senators-elect, appoint all officers whose offices are esablished by this Constitution and whose appointments are not otherwise provided for.

Editor's Note.—In the Constitution of 1868 this section prohibited the general assembly from appointing or electing such officers, as herein provided for, but in 1875 this section was amended and this express prohibition removed. For a case decided under the former rule see State v. Stanley, 66 N. C. 60.

The words "whose appointments are not otherwise provided for," mean provided for by the Constitution. State v. Stanley, 66 N. C. 60.

The correct reading of this section is "not otherwise provided for by law." Nichols v. McKee, 68 N. C. 429, 435.

Filling Vacancy and Appointing for Regular Term.—The Governor never nominates to the Senate to fill vacancies. He does that alone, in all cases. But where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless it be an officer who is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over), until the people can elect. Battle v. McIver, 68 N. C. 467 470.

The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone and that, whether the Legislature is in session or not, and without calling the Senate. Nichols v. McKee, 68 N. C. 429.

Appointment Limited to Constitutional Affairs.—The inherent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in this section. Salisbury v. Croom, 167 N. C. 223, 83 S. E. 354.

Legislature Cannot Appoint Officers.—The Legislature can not authorize the presiding officers of its two branches to appoint proxies and directors in behalf of the State in corporations in which the State had an interest: nor can the Legislature itself make such appointments, for the reason that it would be an usurpation of executive power. Howerton v. Tate, 68 N. C. 546.

Same—When Legislature Assumes Appointment. — The Legislature having assumed to take the appointment of Directors for the State of the Western North Carolina Railroad from the Governor, it thereby dispensed with the necessity of his sending nominations to those officers to the Senate and left the Governor to pursue the law as far as he could. Howerton v. Tate, 68 N. C. 546.

Creation of New Office.—Where the General Assembly established a Court and, provided that the General Assembly should "elect a person to fill the vacancy in said office, which shall be caused by the ratification of this Act," the act was ratified, but the election of plaintiff to fill the office of Judge was not held until four days later, and the Governor refused the application of the plaintiff for a commission as Judge and appointed the defendant to the office between the time of the ratification of the Act and the election of the plaintiff to fill the office no such vacancy existed as is contemplated in this section. Ewart v. Jones, 116 N. C. 570, 21 S. E. 787.

Transfer of Duties of Office.—While the General Assembly has the power to abolish an office created by legislative authority, it cannot by mere transfer to others of the duties, connected with an institution, necessary and useful to the public, to be exercised by them, oust the incumbent from an office belonging to him under a contract with the State. State Prison v. Day, 124 N. C. 362, 32 S. E. 748.

Trustee's of University, Etc.—The trustees of the University, the Directors of the Penitentiary and of the Lunatic Asylum are public officers. Walker v. Bledsoe, 68 N. C. 457.

Directors of Institution for Deaf, Dumb and Blind.—The Directors of the Institution for the Deaf and Dumb and the Blind are officers made so by the Constitution and so called. Nichols v. McKee, 68 N. C. 429.

Superintendent of State Prison.—The place of superintendent of the State Prison, with its attendant duties, is a public office, not created by the Constitution but by a statute. State Prison v. Day, 124 N. C. 362, 32 S. E. 748.

Members of Board of Agriculture.—Members of the board of agriculture are not constitutional officers, but being of legislative creation, are within the power of legislative appointment, and are not exclusively, nor of necessity, within the power of executive appointment. Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138.

Cited in Concurring opinion of Rodman in University Railroad Co., v. Holder, 63 N. C. 410, 421. Dissenting opinion of

C. J. Faircloth in Caldwell v. Wilson, 121 N. C. 425, 474, 28 S. E. 554; Rodwell v. Rowland, 137 N. C. 617, 626, 50 S. E. 319.

§ 11. Duties of the Lieutenant-Governor.— The Lieutenant-Governor shall be president of the Senate, but shall have no vote unless the Senate be equally divided. He shall, whilst acting as president of the Senate receive for his services the same pay which shall, for the same period, be allowed to the speaker of the House of Representatives; and he shall receive no other compensation except when he is acting as Governor.

§ 12. In case of impeachment of Governor, or vacancy caused by death or resignation.—In case of the impeachment of the Governor, his failure to qualify, his absence from the State, his inability to discharge the duties of his office, or, in case the office of Governor shall in anywise become vacant, the powers, duties and emoluments of the office shall devolve upon the Lieutenant-Governor until the disabilities shall cease or a new Governor shall be elected and qualified. In every case in which the Lieutenant-Governor shall be unable to preside over the Senate, the senators shall elect one of their own number president of their body; and the powers, duties and emoluments of the office of Governor shall devolve upon him whenever the Lieutenant-Governor shall, for any reason, be prevented from discharging the duties of such office as above provided, and he shall continue as acting Governor until the disabilities are removed, or a new Governor or Lieutenant-Governor shall be elected and qualified. Whenever, during the recess of the General Assembly, it shall become necessary for the president of the Senate to administer the government, the Secretary of State shall convene the Senate, that they may elect such president.

§ 13. Duties of other executive officers.—The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article.

Cited in People v. Wilson, 72 N. C. 155, 163; State v. Bullock, 80 N. C. 132 135.

§ 14. Council of State.— The Secretary of State, Auditor, Treasurer, and Superintendent of Public Instruction shall constitute, ex officio, the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney-General shall be, ex officio, the legal adviser of the executive department.

§ 15. Compensation for executive officers.— The officers mentioned in this article shall, at stated periods, receive for their services a compensation to be established by law, which shall neither be increased nor diminished during the time for which they shall have been elected, and the said officers shall receive no other emolument or allowance whatever.

The legislature may designate the compensation of these officials prior to the beginning of their terms and it should follow that the compensation may be declared a certain amount less the income tax on that amount. See § 7880(135). See 11 N. C. Law Rev., 256.

§ 16. Seal of State.—There shall be a seal of the State, which shall be kept by the Governor, and used by him, as occasion may require and shall be called "The Great Seal of the State of North Carolina." All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State," signed by the Governor, and countersigned by the Secretary of State.

Countersign Defined.—The verb "countersign" means "to sign on the opposite side" or in addition to the signature of another, and the noun means "the signature of a secretary or other officer to a writing, or writings, added to that by the principal or superior to attest its authenticity." Richards v. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485.

Countersignature Need Not Be in Any Particular Place.— Within the intent and meaning of this section it is not required that the Secretary of State "countersign" grants of lands and commissions in any particular place or position thereon, and when a grant to the land in controversy is put in evidence by one of the parties and in all respects appears to be regular and authentic upon its face, it will not be held to be defective because the countersignature of the Secretary of State appears on the opposite side of the sheet from the signature of the Governor. Richards v. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485.

§ 17. Department of Agriculture, Immigration, and Statistics.—The General Assembly shall establish a Department of Agriculture, Immigration, and Statistics, under such regulations as may best promote the agricultural interests of the State, and shall enact laws for the adequate protection and encouragement of sheep husbandry.

Section Mandatory.—This section is not self-executing, but is mandatory upon the Legislature. Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138. See section 7646 of the Code for legislation passed pursuant to this section of the constitution.

Act Enlarging Board of Agriculture.—An act which enlarges the number of the board of agriculture, naming the additional members, is not in conflict with this section. Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138.

ARTICLE IV

Judicial Department

§ 1. Abolishes the distinctions between actions at law and suits in equity, and feigned issues.— The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the State as a party, against a person charged with a public offence

for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the facts at issue tried by order of court before a jury.

As to actions generally see 1 Enc. Dig. 124 et seq.; 13 Enc. Dig. 21 et seq.

Effect of Section.—This section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. Peebles v. Gay, 115 N. C. 38, 39, 41, 20 S. E. 173.

Under this section and Art. IV, § 20 the Superior Courts became the successors of the Courts of Equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. In re Smith, 200 N. C. 272, 274, 156 S. E. 494.

Legal and equitable rights and remedies are now determined in one and the same action. Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428, 160 S. E. 475.

Feigned Issues. — Under the provisions of this section feigned issues are abolished. Hyatt v. McCoy, 194 N. C. 25, 138 S. E. 405.

Distinction between Principles Not Abolished.—Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles have not been abolished. Waters v. Garris, 188 N. C. 305, 124 S. E. 334; Page Trust Co. v. Godwin, 190 N. C. 512, 130 S. E. 323; Furst v. Merritt, 190 N. C. 397, 130 S. E. 40.

This section abolishing the distinctions between actions at law and suits in equity, does not imply that the distinctions as between law and equity, are abolished. Principles of law, principles and doctrines of equity, remain the same they have ever been; the change wrought is in the method of administering them and, in some degree, the extent of the application of them. The abolition does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. Scales v. Wachovia Bank, etc., Co., 195 N. C. 772, 775, 143 S. E. 868.

Equitable Rights Enforced by Civil Action. — Since the passage of this section the enforcement of an equitable right, as that of subrogation, can only be maintained by a civil action. Calvert v. Peebles, 82 N. C. 334, 338.

Rights of Prior Lienor Not Affected.—This section does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. Rowland Hardware, etc., Co. v. Lewis, 173 N. C. 290, 92 S. E. 13.

"Criminal Action" and "Indictment" Synonymous. — The term "Criminal action" and "Indictment" as used in the Constitution, and in the Code are synonymous: Therefore, it would be equally regular to entitle a case upon the records of the Court, either as "the People v. A. B.—Criminal action," or the "State v. A. B.—Indictment." State v. Simons, 68 N. C. 378.

Defendant's Right to Know Nature of Demand.—The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when the form of suits was abolished by this section. But one who is brought into Court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. Conley v. Richmond, etc., Ry. Co., 109 N. C. 692, 693, 14 S. E. 303.

Asking for Ancilliary Remedy.—There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled, does not affect the action itself, which will go on if he is entitled to any other of the remedies. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

Pleadings Amended by Court.—Where a good cause of action is stated for equitable relief, but defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdiction matters being abolished by this section. Green v. Harshaw, 187 N. C. 213, 121 S. E. 456.

Justices of the Peace.—This section does not give to courts of justices of the peace jurisdiction over the equity of correcting an account and settlement stated and had between the parties, so as to surcharge or falsify it for fraud or specified error, nor will the Superior Court acquire jurisdiction on appeal. Morganton v. Miller, 181 N. C. 364, 107 S. E. 209. But see the dissenting opinion of J. Clark.

Enforcement of Contracts.—The remedy for the enforcement of all kinds of contracts is now a civil action. Boles v. Caudle, 133 N. C. 528, 533, 45 S. E. 835.

This section providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinction in the principles applicable to each; and an action to force the provisions of a contract, being one at law, the equity that time is not the essence of the contract has no application. Makuen v. Elder, 170 N. C. 510, 87 S. E. 334.

Bastardy Proceedings.—By this section a proceeding in bastardy is a civil action, as distinguished from a criminal action. State v. McIntosh, 64 N. C. 607. For a full discussion of this subject see the Editor's Note to section 265 of the Code.

Action for Seduction.—To give this constitutional provision its common sense construction, it would see that the "feigned issue" in actions for seduction, of a loss of services and for damages based thereon, was abolished, and the action should and does rest on the true issue of damages for the wrong done. Hood v. Sudderth, 111 N. C. 215, 219, 16 S. E. 397.

This fictitious relation denied to a woman the right to maintain an action under the common law for her seduction. In some of the States the right has been conferred by statute; with us it has been recognized by judicial decision on the theory that feigned issues are abolished and that the woman is the real party in interest. Hyatt v. McCoy, 194 N. C. 25, 27, 138 S. E. 405.

Action for Money Had and Received.—Under this section an exception to a complaint that by its form it is for money had and received, and that the action cannot be maintained unless the money has been actually received, is untenable. Staton v. Webb, 137 N. C. 35, 36, 49 S. E. 55.

Action for Claim and Delivery.—There is no such thing as an action for claim and delivery. Under this section there is but one form of action in civil cases. Hargrove v. Harris, 116 N. C. 418, 419, 21 S. E. 916.

Mandamus.—There is now in this state, but one form of action, and the writ of mandamus is but a process of the court in that action. Belmont v. Reilly, 71 N. C. 260, 262.

Cited in Mitchell v. Henderson, 63 N. C. 643; Harkey v. Houston, 65 N. C. 137, 139; Abrams v. Cureton, 74 N. C. 523; Jones v. Mial, 79 N. C. 164, 167; dissenting opinion of Justice Walker in Turner v. McKee, 137 N. C. 251, 259, 49 S. E. 330; Henrietta Mills v. Rutherford County, 32 F. (2d) 570.

§ 2. Division of judicial powers.—The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.

As to judicial power generally see 3 Enc. Dig. 232, 13 Enc. Dig. 417 et seq; as to courts generally see 3 Enc. Dig. 826 et seq.; 13 Enc. Dig. 534 et seq.

Judicial Power Vested in These Courts.—By this section the judicial power of the State is vested in a court for the trial of impeachments, a Supreme Court, Superior Court and special courts; the jurisdiction of special courts is defined by section 19 of this Article. State v. Pender, 66 N. C. 314.

General county courts must be ranked among the "other courts" alluded to in this section and Art. 4, § 30. Meador v. Thomas, 205 N. C. 142, 146, 170 S. E. 110.

The Industrial Commission is primarily an administrative agency of the State in the administration of the Compensation Act and its judicial powers are but incidental thereto, and the administration of the powers conferred by the statute is not in contravention of this section and Art. IV, § 12, of the Constitution. Heavner v. Lincolnton, 202 N. C. 400, 162 S. E. 909.

Assembly Cannot Abolish Superior Courts or Courts of the Justices of Peace.—The Superior Courts and Courts of Justices of the Peace were created by the Constitution, and the General Assembly cannot abolish them. Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57.

Legislature Can Establish Criminal Courts.—Under this section, the Legislature can establish criminal courts. State v. Weddington, 103 N. C. 364, 9 S. E. 577.

An act of the General Assembly establishing a criminal court for a certain county, is constitutional. State v. Gales, 77 N. C. 283.

Cited in State v. Davis, 69 N. C. 495; State v. Spurtin, 80 N. C. 362; Ewart v. Jones, 116 N. C. 570, 21 S. E. 787; McDonald v. Morrow, 119 N. C. 666, 670, 26 S. E. 132; dissenting opinion of C. J. Faircloth in Caldwell v. Wilson, 121 N. C. 425, 476, 28 S. E. 554; Mott v. Commissioners, 126 N. C. 866, 869, 36 S. E. 330; State v. Baskerville, 141 N. C. 811, 813, 53 S. E. 742.

§ 3. Trial court of impeachment.—The court for the trial of impeachments shall be the Senate. A majority of the members shall be necessary to a quorum, and the judgment shall not extend beyond removal from and disqualification to hold office in this State; but the party shall be liable to indictment and punishment according to law.

Cited in dissenting opinion of C. J. Faircloth in Caldwell v. Wilson, 121 N. C. 425, 476, 28 S. E. 554.

§ 4. Impeachment.—The House of Representatives solely shall have the power of impeaching. No person shall be convicted without the concurrence of two-thirds of the senators present, when the Governor is impeached the Chief Justice shall preside.

As to removal of officers generally, see 9 Enc. Dig. 780, et seq.

Cited in dissenting opinion of C. J. Faircloth in Caldwell v. Wilson, 121 N. C. 425, 476, 28 S. E. 545; dissenting opinion of J. Clark in Mott v. Commissioners, 126 N. C. 866, 878, 36 S. E. 330.

§ 5. Treason against the State.—Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture.

As to reason generally, see 11 Enc. Dig. 810.

§ 6. Supreme Court Justices.—The Supreme Court shall consist of a Chief Justice and four associate justices.

Proposed Amendment.—Public Laws 1935, ch. 444, s. 1, proposed an amendment to this section to be voted on at the next general election. This amendment would strike out this section and insert in lieu thereof the following: "Supreme Court. The Supreme Court shall consist of a Chief Justice and four Associate Justices. The General Assembly may increase the number of Associate Justices to not more than six when the work of the Court so requires. The Court shall have power to sit in divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of cases by the full Court. No decision of any division shall become the judgment of the Court unless concurred in by a majority of all the justices; and no case involving a construction of the Constitution of the State or of the United States shall be decided except by the Court in banc. All sessions of the Court shall be held in the City of Raleigh. This amendment made to the Constitution of North Carolina shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled or held by virtue of any election or appointment under the said Constitution, and the laws of the State made in pursuance thereof."

§ 7. Terms of the Supreme Court.—The terms of the Supreme Court shall be held in the city of Raleigh, as now, until otherwise provided by the General Assembly.

Cited in dissenting opinion of J. Walker in State v. Marsh, 134 N. C. 184, 197, 47 S. E. 6.

§ 8. Jurisdiction of Supreme Court.—The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

Cross Reference.—For a thorough treatment of the appellate jurisdiction of the supreme court, see sections 638 and 1411 of the code and annotations thereunder. As to appeals generally see 1 Enc. Dig. 346 et seq., 13 Enc. Dig. 70 et seq.

What Reviewable.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Merchants Nat. Bank v. Howard, 188 N. C. 543, 125 S. E. 126; Const. Art. IV, sec. 8.

The Supreme Court on appeal in a criminal action can review only matters of law or legal inference. State v. Brewer, 202 N. C. 187, 162 S. E. 363.

The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. State v. Harrell, 203 N. C. 210, 165 S. E. 551; Debnam v. Rouse, 201 N. C. 459, 160 S. E. 471; Carter v. Mullinax, 201 N. C. 783, 161 S. E. 486; State v. Casey, 201 N. C. 185, 159 S. E. 337; Woody Brothers Bakery v. Greensboro Life Ins. Co., 201 N. C. 816, 161 S. E. 554; State v. Whiteside, 204 N. C. 710, 169 S. E. 711.

This section empowers the Supreme Court to review on appeal any decision of the courts below, upon any matter of law or legal inference; and this is to be presented in accordance with the mandatory rules of the Supreme Court. State v. Bittings, 206 N. C. 798, 801, 175 S. E. 299.

Theory of Trial in Lower Court Is Adhered to.—The principle that an appeal will be determined in accordance with the theory of trial in the lower court, is enforced by this court because of its limited jurisdiction as an appellate court under this section. Apostle v. Acacia Mut. Life Ins. Co., 208 N. C. 95, 179 S. E. 444.

"Issues of Fact" Defined.—Issues of fact has been defined by the Court to mean "such matters of fact as are put in issue by the pleadings, and a decision of which would be final and conclude the parties upon the matters in controversy in the issue." Battle v. Mayo, 102 N. C. 413, 435, 9 S. E. 384.

Review of Issues of Fact.—The jurisdiction of the supreme court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary, and in all respects the same as they were when the judge of the court below passed upon them. Worthy v. Shields, 90 N. C. 192. See Keener v. Finger, 70 N. C. 35.

This prohibition of trials of "issues of fact" by the Supreme Courts extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction. Heilig v. Stokes, 63 N. C. 612.

The Supreme Court cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of facts after the adjournment as to the recitals set forth in the commission given the presiding judge. State v. Graham, 194 N. C. 459, 465, 140 S. E. 26.

Habeas Corpus.—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which lies in the discretion of the appellate court. State v. Hooker, 183 N. C. 763, 111 S. E. 351; State v. Yates, 183 N. C. 753, 111 S. E. 337. In re Blake, 184 N. C. 278, 114 N. C. 294.

Caveat to Will.—Under the provisions of this section the Supreme Court on appeal from an issue of devisavit vel non, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in matters of law and legal inference. In re Will of Brown, 194 N. C. 583, 140 S. E. 192.

Reduction of verdict by the trial court involves a matter of law reviewable by the Superior Court. Hyatt v. McCoy, 194 N. C. 760, 140 S. E. 807.

Applied in Hardy v. Heath, 188 N. C. 271, 277, 124 S. E. 564; King v. Taylor, 188 N. C. 450, 124 S. E. 751; Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329; Newton v. State Highway Commission, 194 N. C. 303; State v. Leonard, 195 N. C. 242, 141 S. E. 736; Gross v. Williams, 196 N. C. 213, 145 S. E. 169; Lacy v. State, 195 N. C. 284, 141 S. E. 886; State v. Lawrence, 199 N. C. 481, 154 S. E. 741; Mehaffey v. Provident Life, etc., Ins. Co., 205 N. C. 701, 172 S. E. 331; Misskelley v. Home Life Ins. Co., 205 N. C. 496, 171 S. E. 862; Lightner v. Raleigh, 206 N. C. 496, 174 S. E. 272; Alston v. Southern Ry. Co., 207 N. C. 114, 176 S. E. 922.

Cited in Bledsoe v. Nixon, 69 N. C. 82, 85; State v. Swep-

son, 82 N. C. 541; State v. Garrell, 82 N. C. 581, 583; McDonald v. Morrow, 119 N. C. 666, 670, 26 S. E. 132; dissenting opinion of J. Clark in Wilson v. Jordan, 124 N. C. 683, 705, 33 S. E. 139; Seaboard Air Line Railway Co v. Brunswick County, 198 N. C. 549, 152 S. E. 627; Tallassee Power Co. v. Peacock, 197 N. C. 735, 736, 150 S. E. 510; State v. Freeman, 197 N. C. 376, 148 S. E. 450.

§ 9. Claims against the State.—The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall isue thereon; they shall be reported to the next session of the General Assembly for its action.

See notes under § 1409 of the Code.

Purpose of Section.—The original jurisdiction conferred upon the supreme court by this section, is for the benefit only of such plaintiffs, and to be used only in such cases, as cannot otherwise obtain a footing in court by reason of the State's being a party. Bain v. State, 86 N. C. 49.

It was intended by the provision of this section that persons who asserted that they held legal claims aganist the sovereign State, should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated—a tribunal before which the sovereign State would, for a certain purpose, abdicate the privilege of exemption from liability to be sued and appear as any other litigant, to the end that its liability to the petitioner might be determined by the law. Cowles v. State, 115 N. C. 173, 174, 179, 20 S. E. 384.

Only Way State Can Be Sued.—The State cannot be sued, except as provided in this section. Burton v. Furman, 115 N. C. 166, 171, 20 S. E. 443; Carpenter v. Atlantic, etc., R. Co., 184 N. C. 400, 114 S. E. 693.

Neither the State nor its subordinate agencies of government may be subject to suits or actions against it or them in its own courts or the courts of other states unless it has expressly consented to such suit. Dredging Company v. State, 191 N. C. 243, 131 S. E. 665.

The jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by this section and is not enlarged by the rules of procedure prescribed by statute, and where the complaint presents only an issue of fact the proceeding will be dismissed. Cahoon v. State, 201 N. C. 312, 160 S. E. 183.

Jurisdiction Recommendatory Only.—The original jurisdiction given the Supreme Court to pass upon claims against the State or its subordinate agencies of government, which are not subject to suit or execution under judgment, are recommendatory to the Legislature only, as to the matters of law involved upon facts agreed to, or made to appear, and this Court does not pass upon conflicting evidence to determine the facts at issue. Dredging Co. v. State, 191 N. C. 243, 131 S. E. 665.

What Examination Confined To.—The jurisdiction conferred upon the Supreme Court by this section to hear claims against the State is confined to an examination of and adjudication of the legal validity of such claims; no power to enforce its judgment is given the court; its decisions are merely recommendatory to the Legislature, who may provide for the judgment of the claims, if it sees proper to do so. Baltzer v. State, 104 N. C. 265, 10 S. E. 153.

Kind of Claims Reviewed. — The claim against the State must be such as, against any other defendant, could be reduced to judgment and enforced by execution. Bain v. State, 86 N. C. 49.

Necessity of Question of Law.—The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved. Miller v. State, 134 N. C. 270, 46 S. E. 514; Bledsoe v. State, 64 N. C. 392.

The Supreme Court will not recommend to the Legislature the payment of a claim against the State, when no questions of law are involved, or when such questions are resolved against the claimant. Dredging Company v. State, 191 N. C. 243, 131 S. E. 665.

A claimant against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of this section when no question of law is presented by the facts in the petition. Warren v. State, 199 N. C. 211, 153 S. E. 864.

Repeal of Statute.—The repeal of statute under which a contract has been made between the plaintiff and the State in no way affects the plaintiff's rights under the contract. Clements v. State, 76 N. C. 199.

Matters of Small Value.—This section ought not to be invoked in matters of small value, particularly when there is no doubt about the law. The claimant should apply at once to the Legislature for relief. Sinclair v. State, 69 N. C. 47.

Suit against Agent of State.—A suit prosecuted against an officer or agent who represented the State in conduct and liability, and wherein the State is the real party whose action will be controlled by the judgment and against which relief is sought, is a suit against the State, and not against its officer or agent, whose acts are alleged to have caused the injury complained of. Carpenter v. Atlanta, etc., R. Co., 184 N. C. 400, 114 S. E. 693.

Action by Clerk for Fees.—The Supreme Court has not original jurisdiction of an action against the State by a clerk of the Superior Court for fees in an action instituted by the State and for which it has been adjudged liable. Miller v. State, 134 N. C. 270, 46 S. E. 514.

Holder of State Bonds.—An owner and holder of a bond of the State and coupons past due thereon has a right to invoke the recommendatory jurisdiction of the Supreme Court to pass upon the validity of the coupons as a claim against the State, under this section. Horne v. State, 82 N. C. 382.

Issues of Fact.—The Supreme Court in the exercise of its recommendatory original jurisdiction to hear claims against the State will dismiss any action brought against the State where the sole issue is one of fact. Lacy v. State, 195 N. C. 284, 141 S. E. 886.

A claim against the State Highway Commission for damages arising from an alleged breach of contract in the building of a State highway is a claim against the State, but when the only issues presented therein are ones of fact, the Supreme Court will not exercise its recommendatory original jurisdiction, and the action will be dismissed. Lacy v. State, 195 N. C. 284, 141 S. E. 886.

Stated in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

Applied in Rand v. State, 65 N. C. 194. Newton v. State Highway Commission, 194 N. C. 303.

Cited in Battle v. Thompson, 65 N. C. 406; Boner v. Adams, 65 N. C. 639, 644; Baltzer v. State, 109 N. C. 187, 13 S. E. 724; Blount v. Simmons, 119 N. C. 50, 25 S. E. 789; Pate v. Wilmington, etc., R. Co., 122 N. C. 877, 881, 29 S. E. 334; dissenting opinion of J. Clark in Atlantic & N. C. R. Co. v. Dortch, 124 N. C. 663, 675, 33 S. E. 1014. Concurring opinion of J. Clark in Capital Printing Co. v. Hoey, 124 N. C. 767, 795, 33 S. E. 160; dissenting opinion of J. Clark in White v. Auditor, 126 N. C. 570, 598, 36 S. E. 132.

§ 10. Judicial districts for Superior Courts.—The State shall be divided into nine judicial districts, for each of which a judge shall be chosen; and there shall be held a Superior Court in each county at least twice in each year to continue for such time in each county as may be prescribed by law. But the General Assembly may reduce or increase the number of districts.

Cited in Shepherd v. Commissioners, 90 N. C. 115; McAdoo v. Banbow, 63 N. C. 461; State v. Adair, 66 N. C. 298; State v. Taylor, 176 N. C. 64; Rhyne v. Lipscomb, 122 N. C. 650, 29 S. E. 57. Dissenting opinion of J. Clark in Wilson v. Jordan, 124 N. C. 683, 705, 33 S. E. 139.

§ 11. Residences of judges; rotation in judicial districts; and special terms.—Every judge of the Superior Court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years; but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the Governor may require any judge to hold one or more specified terms in said district, in lieu of the judge assigned to hold the courts of the said district; and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county, or district, when the judge assigned thereto, by reason of sickness, disability,

or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold; and the General Assembly shall provide for their reasonable compensation.

As to judgment authorized to be entered by the clerk, see section 593 of the code and notes thereto.

Proper Interpretation of Section.—The proper interpretation of this section is, that while the Governor is taking a reasonable time for deliberation and acquiring information that will aid him in choosing a competent and worthy officer, he may require an unoccupied judge to hold a specified term or terms of the courts of the district to which the successor of the deceased judge will be assigned by the general law immediately upon such successor's qualification. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Creation of Extra Term of Court.—The provisions of this section requiring the Judges to preside in the different districts successively, and prohibiting them from holding the courts in the same district oftener than once in four years, applies to the series of successive courts constituting a circuit or riding, and does not restrict the Legislature from creating an extra term of the superior court of a county and designating the resident judge to hold the same. State v. Monroe, 80 N. C. 373.

An act authorizing the Governor of the State to appoint special terms of the superior courts, is not unconstitutional. State v. Ketchey, 70 N. C. 621.

Inhibition Does Not Apply to Exchange Judges on Special Terms.—The inhibition contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the governor nor to the holding of special terms under the order contemplated in said provision. State v. Turner, 119 N. C. 841, 25 S. E. 810.

The governor under this section, can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the governor so authorizes and empowers a judge to hold such court, expressing in the commission that it is done with his consent, and under that authority the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the governor is equivalent to a command. State v. Watson, 75 N. C. 136.

Appointment upon Death of Judge.—Upon the death of one of the judges of the superior courts, the governor has the authority under this section to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

When Regular Judge Able to Hold Court.—Objection by the defendant charged with a capital felony to the authority of the judge assigned by the governor of the state to hold a special term of the superior court, upon the ground that the judge assigned to hold the courts of the district was in good health, and holding a term of the court in another county within the district, cannot be sustained as repugnant to or unauthorized by this section. State v. Montague, 190 N. C. 841, 130 S. E. 838.

Emergency judges, appointed under the provisions of our statute as to Supreme and superior court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, a matter of mandamus, or when not holding a term of court assigned to them. Dunn v. Taylor, 186 N. C. 254, 119 S. E. 495. Const. Art. IV, sec. 11.

While this section provides for the appointment of emergency judges by statute, and our statute confers the power of their appointment upon the governor under the restrictions of the Constitution that it may be done when the judge assigned thereto, by reason of sickness, disability or other cause, is unable to attend and hold the court, and when no other judge is available, the validity of the trial for a homicide during the designated term may not be maintained by the defendant upon his affidavit filed subsequent to the trial, raising an issue as to whether the resident judge of the district was available at the time of the trial. State v. Graham, 194 N. C. 459, 140 S. E. 26.

The power of special and emergency judges is defined and bounded by the words "in the court which they are so appointed to hold," and if not holding, they are without authority to approve special proceedings. Ipock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 796, 175 S. E. 127.

Cited in State v. McGimsey, 80 N. C. 377; Delafield v. Mercer Construction Co., 115 N. C. 21, 20 S. E. 167; McDonald v. Morrow, 119 N. C. 666, 670, 26 S. E. 132; Rhyne v. Lipscomb, 122 N. C. 650, 29 S. E. 57; Mott v. Commissioners, 126 N. C. 866, 869, 36 S. E. 330; Ward v. Agrillo, 194 N. C. 321, 139 S. E. 451.

§ 12. Jurisdiction of courts inferior to Supreme Court.—The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution.

Cross References.—As to courts generally, see 3 Enc. Dig. 826 et seq.; 13 Enc. Dig. 534 et seq.; as to jurisdiction of superior courts, see § 1436 of the code and notes thereto; as to jurisdiction of justices, see § 1473 et seq.; as to criminal jurisdiction of Recorder's Court, see § 1541; jurisdiction in municipal court, see § 1568; civil jurisdiction, §§ 1589 et seq.

As to constitutionality of Compensation Act under this section see Art. IV, § 2 and notes thereto.

The General Assembly may create inferior courts to Superior Court if provision is made for appeal to the Superior Court, subject to review by the Supreme Court upon further appeal, there being no conflict with other provisions of the Constitution. Jones v. Standard Oil Co., 202 N. C. 328, 162 S. E. 741.

Cannot Delegate Power.—The provisions of this section giving the Legislature the authority to distribute that portion of the judicial power and jurisdiction of courts not pertaining to the Supreme Court, among other courts is restricted in its exercise to the Legislature itself, and may not be delegated by it; and where a recorder's court has been already established, an act which authorizes the county commissioners to increase its jurisdiction in civil matters is unconstitutional. Durham Provision Co. v. Daves, 190 N. C. 7, 128 S. E. 593.

Under the authority of this section, the General Assembly may create courts inferior to the Supreme Court by private act or by general statute which does not delegate its discretion, and provided such inferior courts do not have substantially the same powers as those of the Superior Courts, and are given a less extensive jurisdiction, with provisions for appeal from such inferior court to the Superior Courts, so that the constitutional powers and provisions relative to the Superior Courts are not invaded. Albertson v. Albertson, 207 N. C. 547, 178 S. E. 352.

Acts Must Not Interfere with Vested Rights.—This section provides for the establishment of inferior courts by the Legislature; the acts passed for such purpose must not interfere with vested rights, or the constitutional rights of other parties. State v. Webb, 125 N. C. 243, 34 S. E. 430.

Recorder's Court.—The jurisdiction of the recorder's court is bestowed by the legislature under the authority of this section. Jones v. Brinkley, 174 N. C. 23, 25, 93 S. E. 372.

Supreme Court Rules.—The Supreme Court is given, by this section of the Constitution, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Court will be observed. Cooper v. Commissioners, 184 N. C. 615, 113 S. E. 569; State v. Ward, 184 N. C. 618, 113 S. E. 775; Hardy v. Heath, 188 N. C. 271, 124 S. E. 564.

The Supreme Court is an organic branch of the State government, and not bound by acts of the Legislature undertaking to regulate its rules of practice. Herndon v. Imperial Fire Ins. Co., 111 N. C. 384, 16 S. E. 465.

This section gives to the General Assembly power to regulate proceedings in all the courts "below the Supreme Court," but confers on the supreme court the exclusive power to regulate its own procedure. Horton v. Green, 104 N. C. 400, 10 S. E. 470.

Cited in State v. Waldrop, 63 N. C. 507, 508; State v. Jarvis, 63 N. C. 556; Wilmington v. Davis, 63 N. C. 582; Simpson v. Jones, 82 N. C. 323; State v. Moore, 82 N. C. 660; State v. Moore, 104 N. C. 743, 751, 10 S. E. 183; dissenting opinion of C. J. Faircloth in Caldwell v. Wilson, 121 N. C. 425, 476, 28 S. E. 554; dissenting opinion of J. Clark in Wilson v. Jordon, 124 N. C. 683, 689, 33 S. E. 139; concurring opinion of J. Clark in In Re Gorham, 129 N. C. 481, 491, 40 S. E. 311; Brinkley v. Smith, 130 N. C. 224, 41 S. E. 106; Rockwell v. Rowland, 137 N. C. 617, 626, 50 S. E. 319; State v. Lytle, 138 N. C. 738, 745, 51 S. E. 66; Settle v. Settle, 141 N. C. 553, 564, 54 S. E. 445; State v. Baskerville, 141 N. C. 811, 813, 53 S. E. 742.

§ 13. In case of waiver of trial by jury.—In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury.

For a thorough treatment of waiver of jury trial, see code section 568 and 572 and annotations thereunder.

Waiver of Indictment.—Section 4610 of the code, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. State v. Jones, 181 N. C. 543, 106 S. E. 827; Const. Art. IV, Sec. 13.

Attachment Proceedings.—In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Pasour v. Linberger, 90 N. C. 159.

Findings of Court Are Conclusive.—Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive under this section, and are not subject to review upon appeal. Barringer v. Wilmington Sav., etc., Co., 207 N. C. 505, 177 S. E. 795.

Cited in Lee v. Pearce, 68 N. C. 76, 89; Wilson v. Featherstone, 120 N. C. 446, 27 S. E. 124; Rodwell v. Rowland, 137 N. C. 61, 617, 626, 50 S. E. 319.

§ 14. Special courts in cities.—The General Assembly shall provide for the establishment of special courts, for the trial of misdemeanors, in cities and towns, where the same may be necessary.

See sections 1536 et seq., of the Code.

In General.—This section was construed with Art. IV, § 2 and Art. IV, § 30 in determining the meaning of "other courts" in the case of Meador v. Thomas, 205 N. C. 142, 170 S. E. 110.

Constitutionality of Act Establishing Court.—A legislative enactment creating a municipal court for an incorporated city or town, and conferring thereon jurisdiction in a territory extending one mile beyond its corporate limits over criminal cases concurrently cognizable in a justice's court, is valid and does not contravene this section. State v. Brown, 159 N. C. 467, 74 S. E. 580. See also, Washington v. Hammond, 76 N. C. 33.

Jurisdiction Confined to Misdemeanors.—This jurisdiction of courts established under this section is confined to misdemeanors. State v. Walker, 65 N. C. 461; State v. Baskerville, 141 N. C. 811, 53 S. E. 742.

Appeal.—The legislature cannot give to courts established under this section a right of appeal direct to the Supreme Court. State v. Lytle, 138 N. C. 738, 51 S. E. 66.

Cited in Wilmington v. Davis, 63 N. C. 582; Delafield v. Mercer Construction Co., 115 N. C. 21, 20 S. E. 167; State v. Higgs, 126 N. C. 1014, 1019, 35 S. E. 473.

§ 15. Clerk of the Supreme Court.—The clerk of the Supreme Court shall be appointed by the Court, and shall hold his office for eight years.

§ 16. Election of Superior Court clerk.—A clerk of the Superior Court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general Assembly.

See section 926 of the Code. As to clerks generally, see 3 Enc. Dig. 108, et seq., 13 Enc. Dig. 383 et seq.

When Term Begins.—The term of office of a superior court clerk, elected in August, 1878, began on the first Monday of September following. Clarke v. Carpenter, 81 N. C. 309.

Cited in Trustees v. McIver, 75 N. C. 76, 86; Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57; Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319.

§ 17. Term of office.—Clerks of the Superior Courts shall hold their offices for four years.

See section 926 of the Code.

Cited in Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319.

§ 18. Fees, salaries and emoluments.—The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office.

See secs. 3847 et seq., and the notes thereto.

The legislature may designate the compensation of these officials prior to the beginning of their terms and it should follow that the compensation may be declared a certain amount less the income tax on that amount. See § 7880(135). See 11 N. C. Law Rev., 256.

Salaries Exempt From Taxation.—Where the constitution provides that the salaries of judges shall not be diminished during their continuance in office, the salaries are exempt from taxation. In the Matter of Taxation of Salaries of Judges, 131 N. C. 692, 42 S. E. 970.

The constitutional restriction on the legislature not to diminish salaries of the judges during their continuance in office is still in force, unaffected or disturbed by the amendment of 1920, (as to income tax), and though their income from other sources may be taxed, a tax on their salarises during their term of office is to diminish their income from such source in contravention of the express terms of this section. Long v. Watts, 183 N. C. 99, 110 S. E. 765.

See Note in 1 N. C. Law Rev. 39.

Same—When Salaries Increased.—An increase of the salaries of the judges during a term of office is the fixing of their salary by the Legislature in such amount as in its judgment is a proper compensation for their services, and an attempt by an agency of the Legislature, either under actual or mistaken authority, to impose a tax thereon is an attempt to diminish these salaries during the term of office. Long v. Watts, 183 N. C. 99, 110 S. E. 765.

Same—Duty of Supreme Court to Pass upon Rights.—It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges, being in contravention of this section, prohibiting the Legislature from diminishing the salaries of the judges during their continuance in office. Long v. Watts, 183 N. C. 99, 110 S. E. 765.

Same—Compensation for Holding Extra Term.—The additional compensation of one hundred dollars given to a Superior Court Judge for services in holding a special term is a part of his salary. Buxton v. Commissioners, 82 N. C. 91.

§ 19. What laws are, and shall be, in force.—The laws of North Carolina, not repugnant to this Constitution or the Constitution and laws of the United State, shall be in force until lawfully altered.

Cited in State v. Hairston, 63 N. C. 451.

§ 20. Disposition of actions at law and suits in equity, pending when this Constitution shall go into effect, etc.—Actions at law and suits in equity pending when this Constitution shall go into effect shall be transferred to the courts having jurisdiction thereof, without prejudice by reason of the change; and all such actions and suits commenced before, and pending at the adoption by the General Assembly of the rules of practice and procedure herein provided for, shall be heard and determined according to the practice now in use, unless otherwise provided for by said rules.

As to Superior Courts becoming the successors of Courts of Equity see § 1 of this Article and notes thereto.

Applied in Johnson v. Sedberry, 65 N. C. 1.

Cited in Foard v. Alexander, 64 N. C. 69; Patton v. Shipman, 81 N. C. 347.

§ 21. Election, terms of office, etc., of justices of the Supreme and judges of the Superior courts.—The justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The judges of the Superior Courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the Supreme Court, and shall hold their offices for eight years. The General Assembly may, from time to time, provide by law that the judges of the Superior Courts, chosen at succeeding elections, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective districts.

See section 1404 of the Code.

Cited in Trustees v. McIver, 72 N. C. 76, 86; Opinion of of judges, 114 N. C. Appx. 992, 927; Rhyne v. Libscombe; 122 N. C. 650, 29 S. E. 57; Rodwell v. Rowland, 137 N. C. 617, 626, 50 S. E. 319.

§ 22. Transaction of business in the Superior Courts. — The Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury.

Does Not Apply to Terms of Courts.—This section must be construed in connection with section 11 of this article, and does not apply to the terms of courts and matters connected therewith. Delfield v. Mercer Construction Co., 115 N. C. 21, 20 S. E. 167.

Court of Clerk Not Included.—The phrase "superior court" in this section does not mean the court of the clerk. McAdoo v. Benbow, 63 N. C. 461.

Rendition of Judgment After Term.—Where the issues of fact had been disposed of by a consent verdict, and the court having jurisdiction of the case, clearly, and being always open, there is nothing in this clause of the Constitution which forbids the rendition of a judgment upon verdict after the expiration of the term, as well as during the term. Harrell v. Peebles, 79 N. C. 26, 31. See, also, Shackelford v. Miller, 91 N. C. 181.

Cited in Foard v. Alexander, 64 N. C. 69; dissenting opinion of Rodman v. Keener v. Finger, 70 N. C. 35, 52; Blue v. Blue, 79 N. C. 69, 73; Mott v. Commissioners, 126 N. C. 866, 869, 36 S. E. 330.

§ 23. Solicitors for each judicial district. — A solicitor shall be elected for each judicial district, by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State, in all criminal actions in the Superior Courts, and advise the officers of justices in his district.

Editor's Note.—Public Laws 1927, c. 99, and Public Laws 1929, c. 140 proposed amendments to this section which were defeated. Public Laws 1931, c. 367, proposed another amendment identical in language with the proposal of 1929 as follows:

"The State shall be divided into twenty solicitorial districts, for each of which a solicitor shall be chosen by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State, in all criminal actions in the Superior Courts, and advise the officers of justices in his district. But the General Assembly may reduce or increase the number of districts."

Issuance of Capias.—A solicitor is the most responsible officer of the court and has been spoken of as "its right arm." He is a constitutional officer and his duties are presented by the constitution. The court has not authority to give the solicitor discretion as to when a capias shall issue, this not being within his duties. State v. McAbee, 189 N. C. 320, 127 S. E. 204.

Cited in Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57; Wilson v. Jordan, 124 N. C. 683, 691, 33 S. E. 139; Rodwell v. Rowland, 137 N. C. 617, 626, 50 S. E. 319.

§ 24. Sheriffs and coroners. — In each county a sheriff and coroner shall be elected by the qualified voters thereof, as is prescribed for members of the General Assembly, and shall hold their offices for two years. In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for two years. When there is no coroner in a county, the clerk of the Superior Court for the county may appoint one for special cases. In case of a vacancy existing for any cause in any of the offices created by this section, the commissioners of the county may appoint to such office for the unexpired term.

As to sheriffs and constables, see sections 3925, 971. As to coroners, see section 1014 of the Code.

Editor's Note.—Public Laws 1931, c. 47, proposed an amendment to this section to be voted on at the next general election providing that sheriffs and coroners "shall hold their offices for a period of four years."

Intention Was Not to Restrict Powers of Constables.—The intention of those who drafted this section, when they wrote, "In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for two years," was not to restrict the powers and duties of the constables to the township in which they were elected, but to intersperse the constables throughout every part of the county. State v. Corpening, 207 N. C. 805, 806, 178 S. E. 564.

Vacancy after Expiration of Term.—Where a constable was elected in 1875 for two years, and no election was had in 1877 a vacancy occurred which the county commissioners had the power to fill under this section. State v. McLure, 84 N. C. 153.

Where, before the expiration of his term a sheriff is re-elected but dies before the expiration of that term, the commissioners are entitled to appoint someone to fill the vacancy for the remainder of the first term and at the beginning of the next term should fill by appointment that vacancy also. People v. Smith, 81 N. C. 304.

Cited in Boyle v. New Bern, 64 N. C. 664; Loftin v. Sowers, 65 N. C. 251; State v. Sigman, 106 N. C. 728, 730, 11 S. E. 520; Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319.

§ 25. Vacancies. — All vacancies occuring in the offices provided for by this article of the Constitution shall be filled by the appointments of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices. If any person, elected or appointed to any of said offices, shall neglect and fail to qualify, such offices shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of said offices shall hold until their successors are qualified.

Limitation on Term Appointed For.—The provisions added to the original section were manifestly made, in view of the decision of the Supreme Court in People v. Wilson, 72 N. C. 155, and were intended to limit the tenure of the appointers of the Chief Executive, whether to fill a vacancy caused by the death or resignation of an incumbent, or by the refusal of a person elected to qualify, to the time intervening between the making of the appointment and the next regular election for members of the General Assembly, together with a reasonable interval for qualification. State v. Jones, 116 N. C. 570, 575, 21 S. E. 787.

Concurrence of Senate Unnecessary.—The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the Legislature is in session or not, and without calling the Senate. N. C. v. Nichols, 68 N. C. 429.

Meaning of "Until the Next Regular Election." — The words "until the next regular election," in this section mean until the next regular election for the office in which a vacancy has occurred. People v. Wilson, 72 N. C. 155.

Refusal of Judge to Accept Office.—Where a person was elected judge of the Superior Court and declined to accept the office and never qualified there was a vacancy within the meaning of this section and the Governor had the power to fill such vacancy by appointing a successor. People v. Wilson, 72 N. C. 155.

Constables Not Included. — The provision in this section that "all incumbents of said offices shall hold until their successors are qualified," does not embrace the office of constable. State v. McLure, 84 N. C. 153.

Cited in State v. Lewis, 107 N. C. 967, 976, 12 S. E. 457; 13 S. E. 247; Ewart v. Jones, 116 N. C. 570, 21 S. E. 787; Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319.

§ 26. Terms of office of first officers.—The officers elected at the first election held under this Constitution shall hold their offices for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. But their terms shall begin upon the approval of this constitution by the Congress of the United States.

Time of First Election.—The next regular election for members of the General Assembly is to be held on the first Thursday in August 1870. Legislative Term of Office, 64 N. C. Appx. 787.

Cited in Loftin v. Sowers, 65 N. C. 251; People v. McKee, 65 N. C. 257; Opinion of Judges, 114 N. C. Appx. 922, 927.

§ 27. Jurisdiction of justices of the peace. — The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to the justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases of a criminal nature the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice, he shall make a record of the proceedings, and file the same with the clerk of the Superior Court for his county.

Cross References.—For a thorough treatment of the civil jurisdiction justice of the peace, see annotations under sections 1473 and 1474. As to their criminal jurisdiction, see annotations under section 1481.

Editor's Note.—While under the provisions of this section of the Constitution of 1868, the courts of the justice of the peace were given "exclusive original" jurisdiction in matters founded on contract when the amount involved did not exceed two hundred dollars, etc., the Convention of 1875 removed the restriction of legislative powers as to the jurisdiction of the Superior Court by eliminating the words "exclusive original" relating to the powers of justices courts. Const. Art. IV, section 27.

Jurisdiction of Justice.—A justice of the peace can only exercise such powers as are conferred upon him by this section of the Constitution, and the statutes in harmony therewith. His jurisdiction is special, not general, and his authority is not to be enlarged by principles of law applicable to courts of general jurisdiction; nor can he adopt methods of procedure not strictly allowed by law. State v. Jones, 100 N. C. 438, 6 S. E. 655.

Same—Jurisdiction Concurrent.—The jurisdiction conferred upon justices of the peace to try civil actions, where the property in controversy does not exceed fifty dollars, is concurrent with that possessed by the superior court. Montague v. Mial, 89 N. C. 137.

Same—Waiver of Objection by Appearance. — Where the defendant is sued on two accounts before a justice of the peace separately stated, each appearing to be in amount coming within his jurisdiction, but together exceeding it, by his appearing and acknowledging his liability for the sum total he thereafter waives his right on appeal to set up the defense that in fact the two accounts were but one. Honig v. Hawa, 194 N. C. 208, 139 S. E. 222.

Section Does Not Embrace Damages.—The provisions in this section, authorizing the General Assembly to give the Justices of the Peace "jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars," is not a restriction, even by implication, to forbid conferring jurisdiction where damages and not property is in controversy. Malloy v. Fayetteville, 122 N. C. 480, 29 S. E. 880.

Contempt.—The constitutional restriction imposed by this section applies only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority. C. S., 981, 983. State v. Hooker, 183 N. C. 763, 111 S. E. 351.

Criminal Appeals.—The clause of this section providing that in criminal cases in a justice's court, "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," is for the benefit only of the party accused. State v. Powell, 86 N. C. 640.

Appeal May Be Direct to Superior Court.—It is not required that an appeal from a judgment of the justice of the peace be first taken to the general county court of the county, but the appeal may be taken directly to the Superior Court. McNeeley v. Anderson, 206 N. C. 481, 174 S. E. 305.

"Thirty Days."—"Thirty days," as used in this section, is not synonymous with "one month:" It may be more or less. State v. Upchurch, 72 N. C. 146.

Legislature Cannot Confer Justice's Powers on Mayor. —The Legislature cannot confer on the Mayor of a town the judicial powers of a justice of the peace in civil actions. This section confers exclusive original jurisdiction on justice of the peace wherever the sum demanded does not exceed two hundred dollars. Edenton v. Wool, 65 N. C. 379. But see Editor's Note, supra.

Establishment of Special Courts.—This section should be construed with section 12 and 14, and the latter sections modify the first named so as to authorize and empower the Legislature to establish special courts in cities and towns and confer jurisdiction upon them without regard to its provisions and limitations. Farmers Cotton Oil Co. v. Blue Ridge Grocery Co., 169 N. C. 521, 86 S. E. 338; State v. Baskerville, 141 N. C. 811, 53 S. E. 742.

Justice's Courts are Not Courts of Record.—Justice's courts are not courts of record. Williams v. Bowling, 111 N. C. 295, 16 S. E. 176.

Applied in State v. Vermington, 71 N. C. 264; State v. Dudley, 83 N. C. 660; Froelich v. Southern Express Co., 67 N. C. 1; Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14.

Cited in Wilmington v. Davis, 63 N. C. 582; State v. Deaton, 65 N. C. 496; Froelick v. Express Co., 67 N. C. 1, 5; State v. Perry, 71 N. C. 522; State v. Buck, 73 N. C. 630; Pullen v. Green, 75 N. C. 215; State v. Threadgill, 76 N. C. 17; Heyer v. Beatty, 76 N. C. 28; London v. Headen, 76 N. C. 72; State v. Edney, 80 N. C. 360; State v. Moore, 82 N. C. 660; State v. Watts, 85 N. C. 517; State v. Crook, 91 N. C. 536, 541; Durham v. Wilson, 104 N. C. 595, 598, 10 S. E. 683; State v. Burton, 113 N. C. 655, 661, 18 S. E. 657; State v. Ivie, 118 N. C. 1227, 1230 24 S. E. 539; McDonald v. Morrow, 119 N. C. 66, 26 S. E. 132; Wilson v. Jordan, 124 N. C. 683, 689, 3 S. E. 39; Mott v. Commissioners, 126 N. C. 866, 880, 36 S. E. 330; State v. Lytle, 138 N. C. 738, 745, 51 S. E. 66; Higgs-Loft Furniture Co. v. Clark, 191 N. C. 369, 131 S. E. 731; Roebuck v. Short, 196 N. C. 61, 144 S. E. 515; Miles v. Powell, 205 N. C. 30, 31, 169 S. E. 828.

§ 28. Vacancies in office of justices.—When the office of justice of the peace shall become vacant otherwise than by expiration of the term, and in case of a failure by the voters of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy for the unexpired term.

Conferring Authority on Governor.—A statute, conferring authority upon the Governor to fill vacancies in the office of justices of the peace, caused by the failure of the appointees of the General Assembly to qualify within the time therein prescribed, is not unconstitutional. Gilmer v. Holton, 98 N. C. 26, 3 S. E. 812.

§ 29. Vacancies in office of Superior Court

clerk.—In case the office of clerk of a Superior Court for a county shall become vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the Superior Court for the county shall appoint to fill the vacancy until an election can be regularly held.

Term of Appointee.—Under this section the appointee of the judge holds only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

Cited in Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319.

§ 30. Officers of other courts inferior to Supreme Court. — In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years.

Legislature May Elect Clerk.—Where a criminal court is created the legislature could either elect the clerk itself or devolve his election upon the people, or other constituency. White v. Murray, 126 N. C. 153, 157, 35 S. E. 256.

May Provide for Election of Officers of County Courts.—Under the provisions of this section, the Legislature is authorized to provide for the election of officers and clerks of General County Courts established by it, such courts being "other courts inferior to the Supreme Court" referred to in Art. IV, §§ 2 and 14. Meador v. Thomas, 205 N. C. 142, 170 S. E. 110.

The word "election" does not necessarily import a popular election by the qualified electors, and the delegation of the power to elect judges of the general county courts to the county commissioners is not an unlawful delegation of legislative power, this section providing that they "shall be elected in such manner as the general assembly may prescribe." Meador v. Thomas, 205 N. C. 142, 170 S. E. 110.

Deprivation of Inferior Judge's Office.—Where the Legislature has abolished a court inferior to the superior court of this state, the incumbent judge takes subject to this legislative right, and cannot successfully maintain that during the term of his office he has been thus deprived of his right of property guaranteed him by this section. Queen v. Comm'rs, 193 N. C. 821, 138 S. E. 310.

Cited in Ewart v. Jones, 116 N. C. 570, 21 S. E.787.

§ 31. Removal of judges of the various courts for inability.—Any judge of the Supreme Court, or of the Superior Courts, and the presiding officers of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability, upon a concurrent resolution of two thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon.

Cited in People v. Smith, 81 N. C. 304.

§ 32. Removal of clerks of the various courts for inability.—Any clerk of the Supreme Court, or of the Superior Courts, or of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability; the clerk of the Supreme Court by the judges of said court, the clerks of the Superior Courts by the judge riding the district, and the clerks of such courts inferior to the Supreme Court as may be established by law by the presiding officers of said courts. The clerks against whom proceedings are instituted shall receive notice thereof, accompanied by a copy of the cause alleged for his removal, at least ten days before the day appointed to act thereon, and the clerk shall be entitled to an appeal to the next term of the Superior Court and thence to the Supreme Court as provided in other cases of appeals.

§ 33. Amendments not to vacate existing offices.—The amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled, or held, by virtue of any election or appointment under the said Constitution and the laws of the State made in pursuance thereof.

Legislature May Diminish Emoluments.—The Legislature has the constitutional power to diminish the emoluments of an office by the transfer of a portion of its duties to another office, and in such case the incumbent must submit. State v. Gales, 77 N. C. 283.

Cited in Opinion of Judges, 114 N. C. Appx. 922, 928.

ARTICLE V

Revenue and Taxation

§ 1. Capitation tax; exemptions. — The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which said tax shall not exceed two dollars, and cities and towns may levy a capitation tax which shall not exceed one dollar. No other capitation tax shall be levied. The commissioners of the several counties and of the cities and towns may exempt from the capitation tax any special cases on account of poverty or infirmity.

See section 7769 of the Code. As to taxation generally, see 11 Enc. Dig. 545, et seq., 15 Enc. Dig. 548 et seq.

Editor's Note. — Prior to 1920 this section contained an equalization clause which provided that the poll tax should equal the tax on property valued at three hundred dollars. This clause was struck out by the amendment of 1920.

Effect of Amendment on Bonds Purchased Prior Thereto.—The amendment will not have the effect of relating back and invalidating taxation on the polls in a school district which had met the constitutional requirement before the amendment had become the law; for such would have the effect of impairing vested rights existing under a valid contract. Board v. Bray Bros. Co., 184 N. C. 484, 115 S. E. 47; Hammond v. McRae, 182 N. C. 747, 110 S. E. 102.

The amendment will invalidate taxation of the polls in a township where the electors therein voted for the levy of a poll tax of six dollars in addition to the regular poll tax of two dollars although the election was held and the tax in question was voted before the amendment of this section. Dixon v. Board of County Com'rs, 200 N. C. 215, 156 S. E. 852.

Taxation for State and County Purposes Limited.—Taxation, for State and county purposes combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. French v. Board, 74 N. C. 692; Southern R. Co. v. Board, 148 N. C. 220, 61 S. E. 690.

No Limit on Taxation for Payment of Debts.—There is no limitation, however, of the power of taxation, upon either State or county, for the payment of their lawful debts, created before the adoption of the Constitution. French v. Board, 74 N. C. 692; Brothers v. Commissioners, 70 N. C. 726.

When Limitation May Be Exceeded.—Without special legislation a county may not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to provided for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. It is otherwise as to a six months period of public schools required by Article IX, sec. 3. Bennett v. Board, 173 N. C. 625, 92 S. E. 603. See, also, Ballou v. Board, 182 N. C. 473, 475, 109 S. E. 628.

The limitation as to the levy on poll tax prescribed by this

section, does not apply to the levy of a special tax by a county for road purposes, authorized by the Legislature submitted to the vote of the electors of the county and duly approved by them. Moose v. Board, 172 N. C. 419, 90 S. E. 441.

Working Road Not a Poll Tax.—The requirement to work the roads is not a poll or capitation tax. State v. Wheeler, 141 N. C. 773, 53 S. E. 358.

Section Does Not Apply to Municipal Corporations.—The restriction that the State and county tax combined shall never exceed $2 on the poll, applies only to State and county taxation, and not to municipal or quasi public corporations other than counties. Perry v. Commissioners, 148 N. C. 521, 62 S. E. 608.

Cited in Concurring opinion of J. Dick in University R. Co. v. Holden, 63 N. C. 410, 431; Street v. Board, 70 N. C. 664; Clifton v. Wynne, 80 N. C. 146; Cromartie v. Commissioners, 85 N. C. 211, 217; Parker v. Board, 104 N. C. 166, 168, 10 S. E. 137; Redmound v. Tarboro, 106 N. C. 122, 137; 10 S. E. 845; Board v. Commissioners, 137 N. C. 310, 313, 49 S. E. 353; Pace v. Raleigh, 140 N. C. 65, 52 S. E. 277; Kitchen v. Wood, 154 N. C. 565, 70 S. E. 995; Ingram v. Johnson, 172 N. C. 676, 90 S. E. 805; Parvin v. Board, 177 N. C. 508, 99 S. E. 432; Director General v. Commissioners, 178 N. C. 449, 101 S. E. 91.

§ 2. Application of proceeds of State and county capitation tax. — The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cents thereof be appropriated to the latter purpose.

Section Only Applies to General Purposes. — An objection that an act applies a part of the county capitation tax to the use of the public roads in violation of this section, which appropriates the State and county poll tax "to the purposes of education and the support of the poor," can not be sustained, as that provision applies to the levy of taxation for general, not special, purposes. Crocker v. Moore, 140 N. C. 429, 53 S. E. 229.

Percentage Denoted to School Purpose.—Not less than 75 per cent of the capitation tax must be devoted to school purposes. Board v. Board, 127 N. C. 263, 37 S. E. 261.

Power of Legislature as to Indigents.—It is the exclusive right of the Legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. Board v. Commissioners, 113 N. C. 379, 18 S. E. 661.

Cited in Parker v. Board, 104 N. C. 166, 168, 10 S. E. 137; Redmond v. Tarboro, 106 N. C. 122, 137, 10 S. E. 845; Board v. Commissioners, 137 N. C. 310, 311, 49 S. E. 353; County Board v. Board, 150 N. C. 116, 63 S. E. 724, concurring opinion of C. J. Clark in Waystaff v. Central Highway Comm., 177 N. C. 354, 358, 99 S. E. 1.

§ 3. Taxation shall be by uniform rule and ad-valorem; exemptions.—Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money: Provided, notes, mortgages, and all other evidences of indebtedness or any renewal thereof, given in good faith to build, repair, or purchase a home, when said loan does not exceed eight thousand dollars ($8,000), and said notes and mortgages and other evidences of indebtedness, or any renewal thereof, shall be made to run for not less than one nor more than thirty-three years, shall be exempt from taxation of every kind for fifty per cent of the value of the notes and mortgages; Provided, the holder of said note or notes must reside in the county where the land lies and there list it for taxation: Provided, further, that when said notes and mortgages are held and taxed in the county where the home is situated, then the owner of the home shall be exempt from taxation of every kind for fifty per cent of the value of said notes and mortgages. The word "home" is defined to mean lands, whether consisting of a building lot or larger tract, together with all the buildings and outbuildings which the owner in good faith intends to use as a dwelling place for himself or herself, which shall be conclusively established by the actual use and occupancy of such premises as a dwelling place of the purchaser or owner for a period of three months. The General Assembly may also tax trades, professions, franchises, and incomes: Provided, the rate of tax on incomes shall not in any case exceed six per cent (6%), and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to-wit: for married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than $2,000; to all other persons not less than $1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed.

Editor's Note.—This section was amended in 1920 so as to permit the taxing of incomes although the property from which the income was derived was already taxed. At the same time the exemption from taxation of home mortgages and notes was added.

Proposed Amendments.—Public Laws 1935, ch. 248, s. 2, proposed an amendment to this section to be voted on at the next general election. This amendment would strike out in line thirty-seven the words and figures "six per cent (6%)," and insert in lieu thereof the words and figures "ten per cent (10%)."

Public Laws 1935, ch. 248, s. 1, proposed an amendment to this section to be voted on at the next general election. This amendment would strike out all of this section down to, and including, the word "months," in line thirty-three, and substitute in lieu thereof the following:

"Sec. 3. State Taxation. The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied."

This section provides that the General Assembly may tax trades and professions; and while this clause does not expressly apply the rule of uniformity to taxes imposed on trades and professions it has been judicially determined that the rule applies to these taxes as well as to taxes on property. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

What May Be Taxed.—All taxes must be levied upon the poll or upon property; or, in the nature of a license, upon "trades, professions, franchises and incomes." State v. Ballard, 122 N. C. 1024, 1026, 29 S. E. 899.

What "Property" Includes.—It seems that the word "property" is used by the Constitution in a sense to make it exclude "money, credits, investments in bonds," etc. Pullen v. Raleigh, 68 N. C. 451.

The words "all real and personal property," in this section are to be taken in their most comprehensive legal import, and include every kind of real and personal property whatever, not excepting the several classes of personal property expressly mentioned in the first clause of the section. Redmond v. Commissioners, 106 N. C. 123, 10 S. E. 845.

This section includes both tangible property, and taxes on "trades, professions, franchises, and incomes." Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701.

Property Is Taxable without Regard to Ownership.—In Latta v. Jenkins, 200 N. C. 255, 156 S. E. 857, it is said: By virtue of the provisions of this section, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless exempted by or under the provisions of section 5 of this article. Salisbury Hospital v. Rowan County, 205 N. C. 8, 10, 169 S. E. 805.

The tax on income, imposed by the Revenue Acts of this State, is not a tax on property, within the meaning of

the requirement of this section that property shall be taxed according to its true value in money. State v. Kent-Coffey Mfg. Co., 204 N. C. 365, 371, 168 S. E. 397.

Under this section which limits income taxes to a maximum of six per cent, any attempted increase in productivity of this field of revenue had to come at the expense of the small income man, and this is what has happened. See 11 N. C. Law Rev., 255.

Tax Must Be Uniform.—This section imperatively requires that all real and personal property be taxed by a uniform rule according to its true value in money. Pocomoke Guano Co. v. Biddle, 158 N. C. 212, 73 S. E. 996.

The only constitutional restriction upon the power of the Legislature in classifying vocations and laying a tax of a different amount upon the different occupations is that the tax shall be uniform upon all in each classification. Dalton v. Brown, 159 N. C. 175, 75 S. E. 40.

When Tax Is Uniform.—A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. Gatlin v. Tarboro, 78 N. C. 119.

A tax is uniform and consistent with this section when it is equal on all persons in the same class, and hence a tax imposed on hotel keepers, which exempts from taxation those whose yearly receipts are less than $1,000, is not unconstitutional. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338.

Who Tax on Occupation Must Reach.—A tax upon an occupation must reach all who follow it—all of a class, either of persons or things. Worth v. Petersburg R. Co., 89 N. C. 301, 302.

Reasonableness of Classification.—See notes under sections 7880(93), 7880(96), 7880(113).

The power of the Legislature to classify subjects for the purpose of taxation is flexible, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class, and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handle only canned meats not requiring refrigeration, is a reasonable classification imposing an equal burden upon all of the class, and is constitutional and valid. Southern Grain Provision Co. v. Maxwell, 199 N. C. 661, 155 S. E. 557.

The classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes. Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701.

While the provisions of this section do not expressly apply to taxes on trades, professions, franchises and incomes, it does apply to such taxes from its inherent justice, but the General Assembly has the power to classify trades, professions, franchises and incomes for taxation where the classifications are reasonable and not arbitrary and are based upon substantial differences between the classes and apply equally to all within the classification. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838.

Classifying Dealers in Different Kinds of Merchandise.—The requirement of this section that all taxes shall be uniform does not prohibit a municipality, which is empowered to tax persons engaged in mercantile business, from classifying dealers in a particular kind of merchandise, separately from those whose business it is to sell other articles falling within the same generic terms. Rosenbaum v. New Bern, 118 N. C. 83, 24 S. E. 1.

Tax Based on Volume of Business.—A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, "of $1 for every $1,000 worth of goods sold during the preceding quarter," is uniform and constitutional. Gatlin v. Tarboro, 78 N. C. 119.

Tax Based on Counties in Which a Firm Does Business.—An act taxing every meat packing house doing business in the State $100 for each county in which such business is carried on is valid. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

Basing Taxes on Size of City in Which Business Located.—In act imposing an annual graduated license tax on the business of buying and selling fresh meats from offices, stores, vehicles, etc., in cities of 12,000, 8,000, and under 8,000 inhabitants, respectively, is not unconstitutional, as not being uniform and in not imposing a license if the business is carried on outside a city or town; it being uniform as to all within each class. State v. Carter, 129 N. C. 560, 40 S. E. 11.

Taxing Shares of Stock in a National Bank.—Shares of stock in a National Bank are proper subjects of State, county and municipal taxation. Such shares owned by nonresidents are to be taxed in the city or town where the Bank is located and not elsewhere. Kyle v. Commissioners, 75 N. C. 445.

Taxing Cotton by Bale.—An act to provide improved marketing facilities for cotton, which enacts that on each bale of cotton ginned in North Carolina for two years, twenty-five cents shall be collected to specially guarantee the State warehouse system against loss, is not in derogation of this section. Bickett v. State Tax Comm., 177 N. C. 433, 99 S. E. 415.

Tax on Indictments.—A tax on indictments, civil suits, etc., is not a tax within the meaning of this section. State v. Nutt, 79 N. C. 263.

Inheritance Tax.—An inheritance tax is in the nature of an excise tax, or one on acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed and its imposition rests with the legislative power. In re Davis, 190 N. C. 358, 130 S. E. 22.

License on Business of Hauling Timber.—An act requiring a license of anyone who carried on the business of hauling timber in a certain county, grading the license with reference to the number of horses driven to the wagon used is not repugnant to this section. State v. Bullock, 161 N. C. 223, 75 S. E. 942.

Zoning Cities.—An act authorizing the division of a city into several zones for the purpose of fixing an ad valorem basis of real estate for taxation, uniform within each zone, but classified in accordance with destiny of population, character of building, etc., violates the mandatory provisions of our Constitution that within its corporate limits all taxable property shall be by a uniform rule and ad valorem. Anderson v. Asheville, 194 N. C. 117, 138 S. E. 715.

Exception of Farm Products.—The exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for a license tax in not a discrimination against the products or citizens of other States; nor is it in violation of the provisions of this section which requires uniformity of taxation. State v. Stevenson, 109 N. C. 730, 14 S. E. 385; Ex Parte Brown, 48 Fed. 435.

Railroad Property May Be Assessed by Corporation Commission.—An act providing for the assessment of railroad property by the Corporation Commission, is not in conflict with this section providing that such assessment be uniform and ad valorem. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925.

Requiring Railroads to Pay State Taxes Earlier.—The provisions requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, is a uniform legislative classification applying equally to all within its terms and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by this section. Norfolk Southern R. R. Co. v. Lacy, 187 N. C. 615, 122 S. E. 763.

Exempting Bonds of Drainage District from Taxation.—Drainage districts are not regarded as municipal corporations, and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by this section. Commissioners v. Webb & Co., 160 N. C. 594, 76 S. E. 552.

Exemption of Property and Bonds of Municipality.—A legislative provision exempting the property and bonds of a city from taxation is valid when the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the United States Government, or are held by a purchaser from such Federal agency. Any doubt as to the validity of this provision under this section must be resolved in favor of its validity. Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377. See § 5 of this article.

Taxes Reduced if Assets Returned for Taxes.—An act imposing license taxes on the business of selling automobiles reducing the rate if three-fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every state, and being for the object of reducing the license tax for selling automobiles in this state when the seller is already paying a tax here on three-fourths of his assets, is not violative. Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

Local Assessment Based on Benefits.—The constitutional provision that taxation shall be equal, uniform, and within certain limits, does not apply to local assessments imposed upon owners of property, who in respect to such ownership are to derive a special benefit in the local improvements for which the tax is expended. Cain v. Commissioners, 86 N. C. 8.

While assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, and in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. Gastonia v. Cloninger, 187 N. C. 765, 123 S. E. 76.

Charter Making Taxing District of Each Improved.—Where the charter of a city provides that each street or portion of a street improved shall be a taxing district, by requiring the total cost of improvement on each street or portion of street improved to be ascertained and one-third thereof assessed on the property abutting on each side of the street, according to the frontage of each lot, and also provides methods whereby each lot owner may contest the assessment, such charter is not in violation of this section, requiring a uniform rule of taxing an estate according to its value in money. Hillard v. Asheville, 118 N. C. 845, 24 S. E. 738.

Providing for Collection of Taxes for Past Years.—A law to provide for the collection of taxes for past years does not violate the provisions of this section in regard to uniformity of taxation. North Carolina R. Co. v. Commissioners, 82 N. C. 260.

When Lien Attaches.—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon. Carstarphen v. Plymouth, 186 N. C. 90, 118 S. E. 905.

Enjoining Collection of Income Tax.—A bill of equity to restrain the assessment and collection of the income tax provided by this section, and the collection and enforcement of certain franchise or privilege taxes as unconstitutional, does not warrant interlocutory injunctions. Southern R. Co. v. Watts, 289 Fed. 301.

Interference by Courts.—This section of the Constitution vests exclusive authority in the Legislature to levy taxes, which may not be interfered with by the courts. Person v. Board, 184 N. C. 499, 115 S. E. 336.

Applied in Hilton v. Harris, 207 N. C. 465, 177 S. E. 411.

Cited in Carolina Cent. R. Co. v. Wilmington, 72 N. C. 73; Wilson v. Board, 74 N. C. 748; Albertson v. Wallace, 81 N. C. 479, 481; concurring opinion of C. J. Smith in Richmond, etc., R. Co. v. Commissioners, 84 N. C. 504, 512; Raleigh v. Peace, 110 N. C. 32, 38, 14 S. E. 521; Wiley v. Board, 111 N. C. 397, 399, 16 S. E. 542; Charlotte Bldg., etc., Ass'n v. Commissioners, 115 N. C. 410, 413, 20 S. E. 526; Schaul v. Charlotte, 118 N. C. 733, 24 S. E. 526; dissenting opinion of J. Clark in Collins v. Pettitt, 124 N. C. 726, 32 S. E. 975; State v. Roberson, 136 N. C. 587, 588, 48 S. E. 595; Wolfender v. Board, 152 N. C. 83, 67 S. E. 319; State v. Williams, 158 N. C. 610, 73 S. E. 1000; Southern R. Co. v. Watts, 260 U. S. 519, 43 S. Ct. 192; Leonard v. Sink, 198 N. C. 114, 150 S. E. 813; Hickory v. Catawba County, 206 N. C. 165, 173 S. E. 56; Saluda v. Polk County, 207 N. C. 180, 184, 176 S. E. 298.

§ 4. Restrictions upon the increase of the public debt except in certain contingencies.—Except for refunding of valid bonded debt, and except to supply a casual deficit, or for suppressing invasions or insurrections, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State to an amount exceeding in the aggregate, including the then existing debt recognized by the State, and deducting sinking funds then on hand, and the par value of the stock in the Carolina Railroad Company and the Atlantic and North Carolina Railroad Company owned by the State, seven and one-half per cent of the assessed valuation of taxable property within the State as last fixed for taxation. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon.

As to the purpose of this section, see dissenting opinion of C. J. Clark in Pennington v. Tarboro, 180 N. C. 438, 105 S. E. 199.

Proposed Amendment.—Public Laws 1935, ch. 248, s. 3, proposed an amendment to this section to be voted on at the next general election. This amendment would strike out all of this section down to and including the word "taxation" in line sixteen, and substitute in lieu thereof the following:

"Sec. 4. Limitations upon the increase of public debts. The General Assembly shall have the power to contract debts and to pledge the faith and credit of the State and to authorize counties and municipalities to contract debts and pledge their faith and credit for the following purposes:

"To fund or refund a valid existing debt;

"To borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding fifty per centum of such taxes;

"To supply a casual deficit;

"To suppress riots or insurrections, or to repel invasions.

"For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts on behalf of the State to an amount in excess of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium, unless the subject be submitted to a vote of the people of the State; and for any purpose other than these enumerated the General Assembly shall have no power to authorize counties or municipalities to contract debts, and counties and municipalities shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality. In any election held in the State or in any county or municipality under the provisions of this section, the proposed indebtedness must be approved by a majority of those who shall vote thereon."

Issuing Bonds to Aid War Veterans.—A statute for the purpose of issuing bonds, passed by the Legislature and which has been approved by the vote of the people of the State at an election duly had for the purpose, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669.

Section Does Not Apply to School System.—This section is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provisions of Article IX as to the maintenance of a State-wide school system by legislative enactment. Lacy v. Fidelity Bank, 183 N. C. 373, 111 S. E. 612.

Vote of People Necessary to Aid New Railroad. — The General Assembly has no power to contract a debt, without a vote of the people, to aid in the construction of, or build a new railroad. University R. Co. v. Holden, 63 N. C. 410, 412.

Same—Issuing Bonds to Pay for Stock.—A subscription for stock in a corporation and issuing bonds to pay for such stock, is a gift of the credit of the State, within the meaning of this section. Galloway v. Jenkins, 63 N. C. 147.

When Counties May Subscribe to Railroad Stock. — This section could not be construed as limited in application to cases where railroads had been commenced and were unfinished at the time the constitution was adopted, and in which the counties, as such, had a direct pecuniary interest, but that it conferred power on counties to subscribe for stock, in the manner prescribed, in any railroad company which had been duly incorporated to build a projected road in which the citizens of the county, as a body, have a general interest because of the supposed benefits to be derived from it. Board v. Coler, 113 Fed. 705.

Test of Bonds Being at Par.—The test of bonds being at par is, whenever in the particular transaction the State receives in legal money the sum which she becomes liable to pay. Concurring opinion of J. Rodman in Galloway v. Jenkins, 63 N. C. 147.

National Park Act.—The statute establishing the North Carolina National Park Commission (Laws 1927, ch. 48) with the certain powers therein enumerated is for the benefit of the public of the State and not that of some third person, and does not fall within the provision of this section. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Cited in Northwestern North Carolina R. Co. v. Jenkins, 65 N. C. 173; Commissioners v. Snuggs, 121 N. C. 394, 402, 28 S. E. 539.

§ 5. Property exempt from taxation. — Property belonging to the State, or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers; libraries and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars.

As to exemption from taxation generally, see 11 Enc. Dig. 580 et seq.; 15 Enc. Dig. 558 et seq. See also sections 7768 and 7901 of the Code and the notes thereto.

Proposed Amendment.—Public Laws 1935, ch. 444, s. 2, proposed an amendment to this section to be voted on at the next general election. This amendment would add at the end of this section the following: "The General Assembly may exempt from taxation not exceeding one thousand dollars ($1,000.00) in value of property held and used as the place of residence of the owner."

Property Exempted by Constitution.—Only one class of property is exempted from taxation by the Constitution itself, to-wit, "property belonging to the State or to municipal corporations." Charlotte Bldg., etc., Ass'n v. Commissioners, 115 N. C. 410, 413, 20 S. E. 526.

Statutes Exempting Specific Property Are Construed Strictly.—Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. Salisbury Hospital v. Rowan County, 205 N. C. 8, 11, 169 S. E. 805.

Same—Corporation Composed of Stockholder Not a Municipal Corporation.—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions and this section, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose. Southern Assembly v. Palmer, 116 N. C. 75, 82 S. E. 18.

Same—Drainage Districts Are Not Municipal Corporations.—Drainage districts are not regarded as municipal corporation in purview of this section and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by section 3 of this article. Drainage Comm. v. Webb & Co., 160 N. C. 594, 76 S. E. 552.

Same—Local Assessment for Paving Street.—Local assessments against lands along the streets of a city for paving and improving the streets do not fall within the intent and meaning of this section. Tarboro v. Forbes, 185 N. C. 59, 116 S. E. 81.

Interest of State in Business Enterprises Not Included.—The provision contained in this section exempting property belonging to the State from taxation, does not embrace the interest of the State in business enterprises, such as railroads and the like, but applies to the property of the State held for State purposes. Atlantic R. Co. v. Board, 75 N. C. 474.

Section Permissive.—Under this section the Legislature may exercise, to the full extent or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, or may decline to exempt at all. The constitutional provision being in the disjunctive, the Legislature can exempt the property up to a certain value and tax all above it, and may also tax property held for one of the purposes named and exempt that held for others. United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626. See also Salisbury Hospital v. Rowan County, 205 N. C. 8, 169 S. E. 805.

It Is Self-Executing.—The provisions of this section that property belonging to or owned by the State or municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. Salisbury Hospital v. Rowan County, 205 N. C. 8, 10, 169 S. E. 805.

When Exemption Attaches.—The quality of exemption attaches to property, as soon as it is lawfully acquired and remains with such property so long as it is owned by the municipal corporation, without regard to the purpose for which it was acquired or was held. Andrews v. Clay County, 200 N. C. 280, 283, 156 S. E. 855.

Use to Which Property Is Devoted.—Under this section it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. Corporation Comm. v. Oxford Seminary Constr. Co., 160 N. C. 582, 76 S. E. 640.

Lands in Hands of Trustee.—Where in construing a devise of various property in a city the courts have decreed that the lands be sold within a period of five years and fifty-five per cent of the proceeds distributed among several beneficiaries of the class exempted by this section, the property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and the exemption does not apply except to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation under Art. V, § 3. Latta v. Jenkins, 200 N. C. 255, 156 S. E. 857.

Weight of Fact that Institution Has Not Been Paying.—The fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive department of the Government is deserving of great weight by the court in construing this section. Corporation Comm. v. Oxford Seminary Constr. Co., 160 N. C. 582, 76 S. E. 640.

No Distinction Between Public and Private Institutions.—The provisions of this section make no distinction between public and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the work. Corporation Comm. v. Oxford Seminary Constr. Co., 160 N. C. 582, 76 S. E. 640.

Cited in Dissenting opinion of C. J. Merrimon in Redmond v. Commissioners, 106 N. C. 122, 147, 10 S. E. 845; Board v. Commissioners, 137 N. C. 310, 314, 49 S. E. 353; Davis v. Salisbury, 161 N. C. 56, 76 S. E. 687. Concurring opinion of C. J. Clark in Wagstaff v. Central Highway Comm., 177 N. C. 354, 358, 99 S. E. 1.

§ 6. Taxes levied for counties. — The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: Provided, further, the State tax shall not exceed five cents on the one hundred dollars value of property.

General or Special Act Suffices.—The legislative authority necessary to the validity of an assessment of taxes by a county for a special purpose in excess of the constitutional limit for general county purposes may be conferred by special or general act. Atlantic Coast Line R. Co. v. Lenoir County, 200 N. C. 494, 157 S. E. 610.

County Tax for Necessary Expenses.—Within the limitations of this section the county commissioners of the respective counties may levy a tax for necessary expenses without a vote of the people or special legislative authority. Glenn v. Board of County Com'r, 201 N. C. 233, 159 S. E. 439.

Supremacy of Legislative Power.—The constitutional power conferred on the Legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in the exercise of this power the Legislature is supreme. Moose v. Board, 172 N. C. 419, 90 S. E. 441.

When Vote and Legislative Authority Necessary.—Cities and towns may levy a tax for necessary expenses up to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters: but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25.

Levy Beyond Limitation Void.—A levy beyond the limita-

tion is void. County Board v. Commissioners, 107 N. C. 110, 12 S. E. 190.

Levy Partly for Special and Partly for General Purposes.—Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is infra vires, the taxes collected beyond the requirements of the special purposes may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a "special purpose" and partly for general purposes it is ultra vires and no part of the levy can be collected. Williams v. Commissioners, 119 N. C. 520, 26 S. E. 150.

Where Act Severable, Valid Part Effective.—An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitations by this section of the Constitution, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts. Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534.

Giving County Commissioners Authority to Issue Bonds.—The authority conferred upon the board of county commissioners to build its road and bridges in any way that may seem practicable, and issue bonds not to exceed the actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with this section excepting from the limitation of 15 cents on the $100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act." Norfolk Southern R. Co. v. McArtan, 185 N. C. 201, 116 S. E. 731.

Special Approval for Necessary Expenditures.—This section, of the State Constitution, authorizes the Legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute. Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534. As to necessary expenses see note to Art. VII, sec. 7.

Tax for Road Purposes.—Authority may be given by the Legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. State v. Kelly, 186 N. C. 365, 119 S. E. 755.

An act authorizing counties to issue bonds for the purpose of laying out and operating, altering and improving the public roads of the county, etc., is for a special purpose within the intent and meaning of this section. Parvin v. Board, 177 N. C. 508, 99 S. E. 432.

Details Unnecessary.—An act giving the special approval of the Legislature to county taxation for special purposes need not specify the sum to be raised by such taxation, nor a limit beyond which it cannot be carried; details are not proper in such statutes—these should be left to the commissioners. Brodnax v. Groom, 64 N. C. 244.

A tax levied by the county commissioners for the aged and infirm, to pay jurors, for feeding and caring for the county prisoners are expenses to be paid from the general county fund as current expenses, and fall within the limitations of this section. Southern Ry. Co. v. Cherokee County, 195 N. C. 756, 143 S. E. 467.

Statutory Validation of Excessive Levy.—Where a county has levied a tax for general purposes in excess of that permitted by our Constitution, Art. V, sec. 6, which a property owner has paid under protest, and has reserved his right under the provisions of § 7979, it may not be validated by an act passed after the assessment had been passed upon or levied under the former statute. Southern Ry. Co. v. Cherokee County, 195 N. C. 756, 781, 143 S. E. 467.

Correction of Minutes of Levy.—The board of commissioners of a county may correct the minutes of a levy of taxes formerly made by it to show separately the items relating to current county expenses and the items of levy for unauthorized special purposes when no change in the former levies are thereby made. Southern Ry. Co. v. Cherokee County, 195 N. C. 756, 143 S. E. 467.

Public-Local Laws 1927, ch. 201, applicable to Cherokee County, cannot validate a void levy. R. R. v. Cherokee, 194 N. C., 781. It may be that the General Assembly could pass a special act or general law allowing a levy for special purposes of this kind in emergency cases. Southern Ry. Co. v. Cherokee County, 195 N. C. 756, 759, 143 S. E. 467.

Bonds Issued to Refund Other Bonds.—Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the Legislature: Held, the bonds later authorized by the Legislature and issued by the county to refund the indebtedness to the general county fund are for a special purpose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution. Barbour v. Wake County, 197 N. C. 314, 148 S. E. 470.

A county has authority to issue funding and refunding bonds with the approval of the local government commission to take up valid, outstanding indebtednesses of the county which were incurred for necessary county expenses. Brooks v. Avery County, 206 N. C. 840, 175 S. E. 199.

Cited in Cromartie v. Commissioners, 85 N. C. 211, 217; Parker v. Board, 104 N. C. 166, 168, 10 S. E. 137; Redmond v. Commissioners, 106 N. C. 122, 130, 145, 10 S. E. 845; Board v. Board, 111 N. C. 578, 579, 16 S. E. 621; Herring v. Dixon. 122 N. C. 420, 423, 29 S. E. 368; Jones v. Commissioners, 135 N. C. 218, 224, 47 S. E. 753; Board v. Commissioners, 137 N. C. 310, 311, 49 S. E. 353; Director-General v. Commissioners, 178 N. C. 449, 101 S. E. 91; Board v. Assell, 194 N. C. 412, 140 S. E. 34; Moore v. Caldwell County, 207 N. C. 311, 176 S. E. 580.

§ 7. Acts levying taxes shall state objects, etc.—Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

Section Does Not Apply to Counties or Towns.—The provisions of this section does not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. Cabe v. Board, 185 N. C. 158, 116 S. E. 419.

This section has not application to taxes levied by the county authorities for county purposes. Parker v. Board, 104 N. C. 166, 10 S. E. 137.

Act Providing for Levy to Pay County Bonds.—Where an act authorizes the levy and collection of a special tax for the payment of certain county bonds; and a later act directed that the special tax collected under the first act should be turned into the general county fund, the first act is in conflict with this section which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied. McCless v. Meekins, 117 N. C. 34, 35, 23 S. E. 99.

Statute Authorizing County to Impose Tax.—Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied, nor is the tax itself invalid if this constitutonal requirement has been observed by the county authority in the imposition of the special tax. Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534.

Cited in University R. Co. v. Holden, 63 N. C. 410; Kyle v. Commissioners, 75 N. C. 445.

ARTICLE VI

Suffrage and Eligibility to Office

§ 1. Who may Vote.—Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State, except as herein otherwise provided.

Cross References.—See annotations under section 2. As to elections generally, see 5 Enc. Dig. 76 et seq., 13 Enc. Dig. 823 et seq. For statutory provisions regarding elections and the qualifications of voters therein, see section 5913 et seq.

Cited in Chester, etc., R. Co. v. Commissioners, 72 N. C. 486, 493; Foard v. Hall, 111 N. C. 369, 372, 16 S. E. 420; Quinn v. Lattimore, 120 N. C. 426, 26 S. E. 638.

§ 2. Qualifications of voters.—He shall reside in the State of North Carolina for one year, and in the precinct, ward, or other election district in which he offers to vote four months next preceding the election: Provided, that removal from one precinct, ward or other election district to another

in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.

Editor's Note. — Suffrage is not a natural or inherent right. It is a privilege conferred by the State and it may be taken away by the State at any time. This section excludes females from the exercise of suffrage and the exclusion has been upheld as valid in many decisions. See State v. Knight, 169 N. C. 333, 85 S. E. 418.

However, the nineteenth amendment to the Federal Constitution, passed in 1920, and since then the supreme law of the land, invalidating so much of this section as excluded females from voting and extended the franchise to both sexes equally.

Qualifications Same for Municipal Election.—The qualification of voters in a municipal election is the same as in a general one. State v. Carter, 194 N. C. 293.

Cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same, to-wit, citizenship, twenty-one years of age, twelve months (now two years) residence in the State and thirty days (now four months) in the city or town. People v. Canaday, 73 N. C. 198.

A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the town is unconstitutional. Smith v. Carolina Beach, 206 N. C. 834, 175 S. E. 313.

"Residence" Defined.—Residence, as used in this section defining political rights, is synonymous with domicile, denoting a permanent dwelling place, to which the party, when absent, intends to return. State v. Grizzard, 89 N. C. 115.

A person, in order to become a qualified elector in this State, must have come into the State a year (now two years) before the election, or have been domiciled within it for twelve months after forming the purpose to remain, and the same intent must be concurrent with the actual occupation of a domicile in the county in order to entitle him to the rights of an elector within its limits. Boyer v. Teague, 106 N. C. 576, 11 S. E. 665.

In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent, and not of a temporary character, corresponding with the word domicile. State v. Carter, 195 N. C. 697, 143 S. E. 513.

Protracted Residence Abroad. — A protracted residence abroad of one engaged in business and with no home in this state, is not consistent with the idea of a residence here. State v. Grizzard, 89 N. C. 115.

Conviction of Crime.—In a contested election case, a conviction of an offense under a local law prescribing punishment in the State's Prison, renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. State v. Jackson, 183 N. C. 695, 110 S. E. 593.

Vote of Escaped Prisoner.—If a person in jail for misdemeanor (not infamous), and sentenced to imprisonment, escapes, and, before he is recaptured, his term or sentence expires, and he votes in his own precinct, in which he resided before he was sentenced, such vote is valid if the voter be otherwise qualified; but, if the voter is a fugitive from justice, and hiding from one part of the county to another, and voted in the precinct he happened to be in, and not in the precinct of his residence when sentenced, such vote is illegal. Boyer v. Teague, 106 N. C. 576, 11 S. E. 665.

Where Voter Resides Near Precinct Line.—When a voter resides on or so near the precinct line, or the line be so uncertain that it is doubtful in which precinct the voter lives, and the voter, honestly and in good faith, bona fide, registers and voters in the precinct he, in good faith, alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, such vote is legal. Boyer v. Teague, 106 N. C. 576, 11 S. E. 665.

Mere Failure to Administer Oath.—The mere failure of the registrars to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. Woodall v. Highway Commission, 176 N. C. 377, 97 S. E. 226.

Oath Does Not Embrace all Qualifications.—The oath prescribed for electors by section 5940 of the Code, omits some of the essential requisites to voting contained in the Constitution, and is confined to those indispensable qualifications set out in this section. The oath does not extend to disqualification incident upon conviction for crime. State v. Houston, 103 N. C. 383, 9 S. E. 699.

Same—Increasing Length of Residence.—The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections; an act which requires a longer residence in the county than this section requires, is unconstitutional. People v. Canaday, 73 N. C. 198.

Provision That Commissioners Come from Different Parties.—A provision in a statute that township highway commissioners shall be selected for their fitness, and not for political faith, and to remove the position from partisan politics, one each of the two members to be elected shall, "so far as feasible and practicable, come from each of the two leading political parties of the township," is too indefinite and uncertain to affix a qualification to the position, being recommendatory only to the voters, whose action is not reviewable by the courts. State v. Sanders, 174 N. C. 112, 93 S. E. 476.

Cited in Quinn v. Lattimore, 120 N. C. 426, 26 S. E. 638; State v. Windley, 178 N. C. 670, 673, 100 S. E. 116.

§ 3. Voters to be registered.—Every person so offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article.

As to registration of voters generally, see 5 Enc. Dig. 82 et seq.; 15 Enc. Dig. 827 et seq. For statutory provision as to registration, see section 5939 of the code et seq.

Power of General Assembly.—While the General Assembly cannot add to the qualifications prescribed by the Constitution for voters, it has the power, and, it is the duty, to enact such registration laws as will protect the rights of duly qualified voters, and no person is entitled to vote until he has complied with the requirements of those laws. State v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Act Requiring New Registration.—An act authorizing a bond issue by a county is not objectionable as violating this section, upon the ground that it empowered the county commissioners to order a new registration. Cox v. Commissioners, 146 N. C. 584, 60 S. E. 516.

§ 4. Qualification for registration.—Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section two of this article.

Registration Essential.—Registration is essential to the exercise by a citizen, possessed of the other legal qualifications, of his right to vote, and, when duly made, is prima facie evidence of the right. State v. Waldrop, 104 N. C. 453, 10 S. E. 694.

Same—Act of Public Officer.—The registration of an elec-

tor, who is qualified to vote, must be accepted as the act of a public officer, and entitles the elector to cast his vote. State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

What Registrars May Ask.—Registrars may ask the elector his age and residence, the township or county from whence he removed, in case of such removal since the last election, and whether he has resided in the State two years, and in the county in which he proposes to vote four months, preceding the election. If, in reply to such questions, the elector answers that he is twenty-one years old, and has resided in the State two years and in the county four months preceding the election, it is the duty of the registrars, upon his taking the prescribed oath, to record his name as a voter; but bystanders may require him to be sworn as to his residence. In re Reid, 119 N. C. 641, 26 S. E. 337.

As to the oath, see State v. Nicholson, 102 N. C. 465, 9 S. E. 545.

Permanent Roll Does Not Dispense with Further Registration.—The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever required by the statutes regulating the registration of voters. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52.

Purpose of Permanent Roll.—The making of a permanent roll of record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear thereon are not required to have the educational qualification. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52.

Registration Book Lost.—Where the registration book of an election precinct had been lost, and could not be replaced, but the registrar procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently and it appeared that, at the election following, no one voted whose name did not appear on the registration book, that no one voted who was not entitled to vote, and no one who was entitled to vote was excluded the election was valid. State v. Waldrop, 104 N. C. 453, 10 S. E. 694.

When No Registration at All.—Where there has been no registration at all, the votes cast cannot be counted by proving that none but duly qualified electors voted; possibly this principle might be relaxed where a fraudulent conspiracy to deprive the voters of the right of suffrage is shown; and it does not apply where the Legislature has failed to provide means for registration. State v. Scarborough, 110 N. C. 232, 14 S. E. 737.

When Prevented from Registering by Registrars.—Where a voter offers to comply with the laws in reference to registration, but is prevented by the wrongful conduct of the registrar, his vote should be received and counted, but a vote cast upon an invalid registration should be rejected. State v. Scarborough, 110 N. C. 232, 14 S. E. 737.

Necessity of Having Paid Taxes.—Where the validity of a special tax depends upon whether certain persons who had voted had paid their taxes for the previous year according to the requirements of this section the constitutional requirements must be met in order that they may exercise the privilege of voting, though they are permitted to wait until May 1st to pay them, if they so choose. Ingram v. Johnson, 172 N. C. 676, 90 S. E. 805.

Same—Taxes Required.—This section depriving a citizen of the right to vote unless he has paid his tax for the previous year, refers to the poll tax prescribed by Article V, sec. 1, to-wit, that for State and county purposes, and it can never exceed $2. This right of suffrage is therefore in no way affected by any increase of taxation imposed on these special-tax districts. Perry v. Commissioners, 148 N. C. 521, 62 S. E. 608.

Cited in State v. Grizzard, 89 N. C. 115, 119; Pace v. Raleigh, 140 N. C. 65, 67, 52 S. E. 277.

§ 5. Indivisible plan; legislative intent.—That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together.

§ 6. Elections by people and General Assembly.—All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce.

How Elector May Vote.—The provisions of this section give the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. Jenkins v. State Board, 180 N. C. 169, 104 S. E. 346.

Secret Ballot.—The provisions of this section imply that in elections by the people the ballot shall be a secret one. Withers v. Commissioners of Harnett, 196 N. C. 535, 146 S. E. 225.

It is not necessary to show undue influence or intimidation for the courts to declare an election void when the votes have been deprived of their right to a secret ballot. Withers v. Commissioners of Harnett, 196 N. C. 535, 146 S. E. 225.

A voter at an election does not waive his constitutional right to a secret ballot by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting. Withers v. Commissioners of Harnett, 196 N. C. 535, 146 S. E. 225.

§ 7. Eligibility to office; official oath.—Every voter in North Carolina, except as in this article disqualified, shall be eligible to office, but before entering upon the duties of the office he shall take and subscribe the following oath:

"I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as ....., so help me, God."

As to officers generally, see 9 Enc. Dig. 774 et seq.; 15 Enc. Dig. 112 et seq.

Legislature Cannot Increase Qualifications.—This section provides "every voter in North Carolina, except in this article disqualified, shall be eligible to office," and the Legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." State v. Bateman, 162 N. C. 588, 77 S. E. 768.

Woman as Public Officers.—A woman is qualified to act as a notary public since the adoption of the 19th amendment to the Constitution of the United States, and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the superior court under the provisions of our statute. Preston v. Roberts, 183 N. C. 62, 110 S. E. 586. For the former rule, see State v. Knight, 169 N. C. 333, 85 S. E. 418.

§ 8. Disqualification for office.—The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony, or of any other crime for which the punishment may be imprisoned in the penitentiary, since becoming citizens of the United States, or of corruption or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law.

Disqualification Not Part of Judgment.—The disqualification for office and the loss of the right of suffrage imposed by this section upon persons convicted of infamous offenses constitute no part of the judgment of the court, but are mere consequences of such judgment. State v. Jones, 82 N. C. 685.

Removal of Prosecuting Attorney.—A prosecuting attorney is removable from office as a matter of law or legal inference upon findings of his willful misconduct or maladministration in office, supported by evidence. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

Same—Appeal.—An appeal from the judgment of the superior court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inference, if justified by the findings of facts supported by evidence. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

Cited in dissenting opinion of C. J. Clark in Bank v. Redwine, 171 N. C. 559, 572, 88 S. E. 878; State v. Windley, 178 N. C. 670, 673, 100 S. E. 116.

§ 9. When this chapter operative.—That this amendment to the Constitution shall go into effect on the first day of July, nineteen hundred and two, if a majority of votes cast at the next general election shall be cast in favor of this suffrage amendment.

ARTICLE VII

Municipal Corporations

§ 1. County officers.—In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the General Assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners.

Cross References.—As to municipal corporations generally, see 9 Enc. Dig. 376 et seq.; 15 Enc. Dig. 31 et seq. See, also, section 2622 of the code et seq.; as to the duties and liabilities of the county treasurer generally, see 3 Enc. Dig. 796 et seq.; 13 Enc. Dig. 523 et seq.; as to the register of deeds, see section 3543 et seq. of the code; as to the county surveyor, see section 1384 et seq. of the code; as to the county commission, see section 1290 et seq. of the code.

Applied in Rhodes v. Lewis, 80 N. C. 136.

Cited in People v. McKee, 65 N. C. 257; People v. Canaday, 73 N. C. 198, 221.

§ 2. Duty of county commissioners.—It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of the county, as may be prescribed by law. The register of deeds shall be ex officio clerk of the board of commissioners.

As to the powers and duties of county commissioners generally, see 3 Enc. Dig. 784 et seq.; 13 Enc. Dig. 522 et seq. See, also, section 1290 et seq. of the code and notes thereto.

Authority to Borrow from General County Fund.—The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, have the authority by proper resolution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction. Barbour v. Wake County, 197 N. C. 314, 315, 148 S. E. 470.

How School Fund Disbursed.—This section gives the "supervision of schools" to the county commissioners; they levy the school tax, and in their treasury is kept the school fund, and their treasurer disburses the fund, upon the order of the school committee. Lane v. Stanly, 65 N. C. 153, 156. See notes to § 1297, par. 2.

When Commissioners Fail to Qualify.—If from any cause the newly elected commissioners of a county fail to qualify at the time prescribed by law, the old board, as de facto officers, have the power to qualify a county treasurer-elect and induct him into office; or upon his default in filing the required bond, they have the power to declare a vacancy and fill the same by appointment. State v. Jones, 80 N. C. 127.

General Assembly May Authorize Ferry.—This section does not deprive the general assembly of the power to pass an act authorizing the establishment of a public ferry at a certain point. In re Spease Ferry, 138 N. C. 219, 50 S. E. 625.

As to the power of General Assembly to abrogate the provisions of the section, see section 14 of the article and annotations thereunder.

Cited in Flat Swamp, etc., Co. v. McAlister, 74 N. C. 159, 163; Board v. Commissioners, 111 N. C. 578, 586, 16 S. E. 621; Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283; Commissioners v. Road Com'rs, 165 N. C. 632, 81 S. E. 1001; Wilson v. Holding, 170 N. C. 352, 86 S. E. 1043; Holmes v. Bullock, 178 N. C. 376, 378, 100 S. E. 530; Lenoir County v. Taylor, 190 N. C. 336, 130 S. E. 25; Day v. Commissioners, 191 N. C. 780, 133 S. E. 164.

§ 3. Counties to be divided into districts.—It shall be the duty of the commissioners first elected in each county to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and to report the same to the General Assembly before the first day of January, 1869.

Alteration of Township after First Division.—The creation or alteration of townships in the several counties of the State, after the first division by the county commissioners under this section is left with the Legislature. Grady v. County Comm'rs, 74 N. C. 101. See § 1297, par. 2 and notes thereto.

Cited in Wilson v. Board, 74 N. C. 748, 754; Wallace v. Board, 84 N. C. 164; Wittkowsky v. Board, 150 N. C. 90, 94, 63 S. E. 275; Road Comm. v. Commissioners, 178 N. C. 61, 100 S. E. 122.

§ 4. Townships have corporate powers.—Upon the approval of the reports provided for in the foregoing section of the General Assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships.

Township Powers Must Be Conferred.—Townships are corporate bodies and have no corporate powers when not specially conferred by statute. Wittkowsky v. Board, 150 N. C. 90, 63 S. E. 275. See notes to section 1297 par. 33.

Township Trustees Not a Municipal Corporation. — The board of township trustees has no existence as a municipal corporation, and hence it cannot be a party to a suit. Wallace v. Board, 84 N. C. 164.

Townships Not Given Power of Taxation.—This section does not give townships the power of taxation for school purposes either through their trustees or committees. Lane v. Stanly, 65 N. C. 153. See section 2677 and notes thereto.

Cited in Mann v. Allen, 171 N. C. 219, 88 S. E. 235; Road Comm. v. Commissioners, 178 N. C. 61, 64, 100 S. E. 122.

§ 5. Officers of townships.—In each township there shall be biennially elected, by the qualified voters thereof, a clerk and two justices of the peace, who shall constitute a board of trustees, and shall, under the supervisions of the county commissioners, have control of the taxes and finances, roads and bridges of the townships, as may be prescribed by law. The General Assembly may provide for the election of a larger number of justices of the peace in cities and towns, and in those townships in which cities and towns are situated. In every township there shall also be biennially elected a school committee, consisting of three persons, whose duty shall be prescribed by law.

Cross References.—As to the election, powers and duties of the clerk generally see section 925 et seq., of the code. As to the justices see section 1462 et seq. As to the school committee see section 5457 et seq.

Justice Elected.—This section requires that justices of the peace shall be elected by townships. Edenton v. Wool, 65 N. C. 379.

Same—Power Cannot Be Conferred.—An attempt to confer the power of a justice of the peace on the Judge of a Special Court cannot avail, for this section requires justices of the peace to be elected by the several townships, and the Legislature cannot change the mode of their appointment. Wilmington v. Davis, 63 N. C. 582.

All Justices Members of Board of Trustees.—Where an act of the General Assemby authorized the election, in townships containing cities and towns, of a larger number of justices than two, all such justices are members of the Township Board of Trustees. Conoley v. Harris, 64 N. C. 662.

Trustees without Authority to Build Bridges.—Township trustees have no authority to contract for building bridges; when such a contract is entered into without the sanction and supervision of the County Commissioners, it is a nullity. Paine v. Caldwell, 65 N. C. 488.

Legislature May Create Highway Commission.—The Legislature has the constitutional authority to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, etc., or subdivide this agency into several parts over defined territory. Ellis v. Greene, 191 N. C. 761, 133 S. E. 395.

Cited in Wallace v. Board, 84 N. C. 164; Jones, etc., Co.

v. Commissioners, 85 N. C. 278, 282; Road Comm. v. Commissioners, 178 N. C. 61, 64, 100 S. E. 122.

§ 6. Trustees shall assess property.—The township board of trustees shall assess the taxable property of their townships and make return to the county commissioners for revision, as may be prescribed by law. The clerk shall be, ex-officio, treasurer of the township.

As to taxation generally see section 7767 et seq., of the code.

Assessment by Mayor and Commissioners.—An assessment of the property subject to taxation by a muncipal corporation, made by the mayor and commissioners of such corporation, is void. Such assessment, under the provision of the Constitution, must be made by the township board of trustees. Cobb v. Corporation, 75 N. C. 1.

When Appeal Lies From Commissioners Decision.—The County Commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation; and from their decision, upon a petition for that purpose, there is no appeal, unless it appears from the facts found by them as to the valuation of property, that they have proceeded upon some erroneous principle; for the reason that the statute give no appeal. Wade v. Commissioners, 74 N. C. 81.

Legislative Power when Section Abrogated.—The general assembly, during the abrogation of this section could constitute other agencies to perform the duties herein imposed upon the township board of trustees. North Carolina R. Co. v. Commissioners, 82 N. C. 260.

Cited in Carolina Cent. R. Co. v. Wilmington, 72 N. C. 73, 75; Richmond, etc., R. Co. v. Commissioners, 84 N. C. 504, 508; Jones v. Commissioners, 107 N. C. 248, 261, 12 S. E. 69; Board v. Commissioners, 111 N. C. 578, 586, 16 S. E. 621; Road Com. v. Commissioners, 178 N. C. 61, 64, 100 S. E. 122.

§ 7. No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

I. Editor's Note.
II. General Consideration.
III. Necessary Expenses.
  A. General Consideration and Application.
  B. School Taxation.

Cross References.

As to municipal taxation see section 2677 of the code; as to taxation generally, see 11 Enc. Dig. 545 et seq.; 15 Enc. Dig. 548 et seq. See, also, section 7767 et seq., of the code; as to election on question of county aid to railroads, see section 3432.

I. EDITOR'S NOTE.

Municipal corporations may levy a tax for necessary expenses to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters; but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. The constitutionality of a legislative act exceeding the constitutional limitation depends upon whether or not the bill passed each branch of the legislature on three separate days. with the "aye" not "no" vote both entered on the journals of the second and third readings. See Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25.

II. GENERAL CONSIDERATION.

Intent of Section.—This section was intended to present another check to the imprudence of county and municipal officers. Paine v. Caldwell, 65 N. C. 488, 491.

This section is an absolute prohibition. It is cumulative and adds another restraint to section 7 of article V. Brodnax v. Groom, 64 N. C. 244.

Cannot Be Evaded by Legislature.—This section prohibits any county, city, town or other municipal corporation, from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote and a Legislative Act which attempts to evade the restriction which this section puts on counties, etc., to contract debts, is unconstitutional and void. Chester, etc., R. Co. v. Commissioners, 72 N. C. 486.

No Vested Right by Former Construction of Section.—A public service corporation, which was granted a franchise and entered into a contract with a city when, under this section as then construed, the city was without power to construct competing works, but which constitutional provision was subsequently construed to grant such power, held to have no standing, after its franchise and contract had expired by limitation, to invoke the rule that one acquiring rights under one construction of the state law may not be deprived of them by a subsequent different construction. Hill v. Elizabeth City, 298 Fed. 67.

School Districts as Municipal Corporation.—School districts are public quasi-corporations, included in the term municipal corporations as used in this section. Smith v. School Trustees, 141 N. C. 143, 53 S. E. 524. See post, this note, "School Taxation," III, B.

A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of this section. Hollowell v. Borden, 148 N. C. 255, 61 S. E. 638.

Majority of Qualified Voters Necessary.—An issue of county bonds is invalid, though a majority of those voting thereon have expressed themselves by ballot in their favor, if such majority be not also that of the qualified voters of the county. Sprague v. Board, 165 N. C. 603, 81 S. E. 915; Long v. Commissioners, 181 N. C. 146, 106 S. E. 481.

Same—Act Need Not State Necessity of Majority Vote.—An issue of bonds for a school district will not be declared invalid because the special act under which they were approved by the voters did not expressly require for their validity that a majority of the qualified voters of the district must vote in their favor, when it appears that such majority, as ascertained from a valid registry, was cast in favor of the issue. Hammond v. McRae, 182 N. C. 747, 110 S. E. 102.

General Districts Debts Voted for in One Ballot Box.—An issue of municipal bonds, when approved by the majority of the qualified voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. This section does not require that the vote upon each distinct proposition must be in a separate ballot box. Smith v. Bellhaven, 150 N. C. 156, 63 S. E. 610.

But a legislative act which authorizes an election to be held upon the question of levying a special school tax providing that if any township should cast a majority of its votes in its favor it should apply only to the township, should the county as a whole reject the proposition, and requiring but a single ballot upon two propositions, is contrary to this section and void. Hill v. Lenoir County, 176 N. C. 572, 97 S. E. 498.

When Act Does Not Limit Bond Issue.—An exception to the constitutionality of an act submitting the question of a bond issue to the voters cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. Waters v. Board, 186 N. C. 719, 120 S. E. 450.

When Funds Are Already on Hand.—This provision, has no application where, the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. Adams v. Durham, 189 N. C. 232, 126 S. E. 611, 612. See note of this case under section 2622 of the code.

When Indebtedness Already Voted on.—That part of this section forbidding the levy of any taxes by a municipal corporation except for necessary expenses, unless by a vote of the majority of the qualified voters, applies only to such indebtedness as has not been submitted to a vote of the people. Charlotte v. Shepard & Co., 122 N. C. 602, 29 S. E. 842.

Endorsement of Township Bonds by County. — Where townships are permitted to call an election for the purpose of voting upon the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships, and contrary to this section. Commissioners v. Boring, 175 N. C. 105, 95 S. E. 43.

Authorization of Bonds without Tax to Pay Them.—The power given by a statute to a city to issue bonds with the approval of a majority of the qualified voters of the city does not confer, by implication, the power to levy a tax to pay them unless the power to levy such tax has been con-

ferred by the act authorizing the issue and ratified by a vote of the people, as required by this section. Charlotte v. Shepard, 120 N. C. 411, 412, 27 S. E. 109.

Taxes to Pay New Debts.—The commissioners of a town have no authority to collect taxes to pay "new debts" unless the proposition is submitted to the voters of the town, even though commanded by mandamus. Weinstein v. Commissioners, 71 N. C. 535.

Railroad Aid Bonds.—It is essential to the validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships and other municipal organizations, that the proposition shall have first had the assent of a majority of the qualified voters in the territory affected, to be duly ascertained by an election regularly held for that purpose. Lynchburg, etc., R. Co. v. Board, 109 N. C. 159, 13 S. E. 783. See section 3432 of the code. As to constitutional provision regarding state aid of railroads see Art. V, sec. 4.

Bonds to Refund Bonds.—A municipal corporation does not contract a debt, within the meaning of this section, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. Bolich v. Winston-Salem, 202 N. C. 786, 788, 164 S. E. 361.

Local Assessments to Drain Land. — No vote of the people is required on the proposition of apportioning the burden of draining lands by local assessments. Sanderlin v. Luken, 152 N. C. 738, 68 S. E. 225.

Appropriation of Taxes by Chamber of Commerce.—This section refers to the county, city, or town as a State governmental agency, and does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein. Ketchie v. Hedrick, 186 N. C. 392, 119 S. E. 767.

Where a city sells land used for recreation purposes and turns the proceeds of the sale over to its park and recreation commission the action is not a pleading of its faith and credit so as to involve the application of this section. Hall v. Redd, 196 N. C. 622, 146 S. E. 583.

Cited in Lane v. Stanley, 65 N. C. 153; People v. Canaday, 73 N. C. 198, 221; Parker v. Board, 104 N. C. 166, 168, 10 S. E. 137; Goldsboro Graded School v. Broadhurst, 109 N. C. 228, 13 S. E. 781; Railroad Co. v. Commissioners, 116 N. C. 563, 21 S. E. 205; McCless v. Meekins, 117 N. C. 34, 35, 23 S. E. 99; Vaughn v. Board, 117 N. C. 429, 432, 23 S. E. 354; Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711; Slocum v. Fayetteville, 125 N. C. 362, 34 S. E. 436; State v. Irvin, 126 N. C. 989, 992, 35 S. E. 430; Rodman-Heath Cotton Mills v. Waxhaw, 130 N. C. 293, 295, 41 S. E. 488; Commissioners v. MacDonald, 148 N. C. 125, 61 S. E. 690; Commissioners v. Road Comm'rs, 165 N. C. 632, 81 S. E. 1001; Moran v. Board, 168 N. C. 289, 84 S. E. 402; Bickett v. State Tax Comm., 177 N. C. 433, 99 S. E. 415; Waters v. Board, 186 N. C. 719, 120 S. E. 450; Yarbrough v. Park Commission, 196 N. C. 284, 293, 145 S. E. 563.

III. NECESSARY EXPENSES.

A. General Considerations and Applications.

In General.—This section does not require that a debt, to be contracted for necessary expenses by a city or town, shall be submitted to a vote of the qualified voters therein. Tucker v. Raleigh, 75 N. C. 267; Jones v. New Bern, 152 N. C. 64, 67 S. E. 173.

Under this section as construed with Art. V, § 6 a municipality may issue valid bonds for its necessary expenses without the approval of its voters within the constitutional limitation in the absence of statutory authority, and with statutory authority and the approval of its voters it may issue bonds in excess of this limitation. Burleson v. Spruce Pine, 200 N. C. 30, 156 S. E. 241.

For purposes other than necessary expenses, whether special or not, taxes may not be levied by a county either within or in excess of the limitation fixed by our Constitution, Art. V, § 6, except by a vote of the people under special legislative authority. Glenn v. Board of County Com'r, 201 N. C. 233, 159 S. E. 439.

Legislative Discretion.—It is within the discretion of the Legislature to authorize a county to issue bonds for necessary expenses, either with or without the approval of its voters, or to require only the approval by a majority of the votes cast at a special election authorized for the purpose, and the approval by the majority of the qualified voters is not required for their validity. Davis v. Lenoir County, 178 N. C. 668, 101 S. E. 260.

Same—Presumption.—Under legislative authority a county may issue bonds to refund its existing floating debt for necessary county expenses, in excess of the 15 cents limitation upon the $100 valuation of its taxable property according to Art. V, sec. 6, when coming within the provisions of the municipal Finance Act, ch. 81, sec. 8, Public Laws of 1927, and where the record on appeal states that the issuance of the bonds is for necessary county purposes, and for taking care of its floating indebtedness, it will be assumed on appeal that the excess over the 15 cents valuation was for necessary county expenses, coming within the provision of this section, not requiring the question of the issuance of the bonds to be submitted to the voters of the county. Board v. Assell, 194 N. C. 412, 140 S. E. 34.

What Are "Necessary Expenses."—The term, "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17, 18.

The county commissioners are the sole judges of what are "necessary expenses." Evans v. Commissioners, 87 N. C. 154; Williams v. Commissioners, 119 N. C. 520, 26 S. E. 150.

Bonds issued for the following purposes have been held to have been issued for necessary expenses: For the payment of interest on bonds already issued for necessary purposes (Wilson v. Board, 74 N. C. 748); the building and maintenance of public roads (Lassiter v. Board, 188 N. C. 379, 124 N. C. 738; Ellis v. Greene, 191 N. C. 761, 133 S. E. 395; Woodall v. Western Wake Highway Commission, 176 N. C. 377, 97 S. E. 226; Hill v. Board, 190 N. C. 123, 129 S. E. 154); Paving streets (Brown v. Hillsboro, 185 N. C. 368, 117 S. E. 41; Hendersonville v. Jordan, 150 N. C. 35, 63 S. E. 167); lighting streets (Ellison v. Williamston, 152 N. C. 147, 67 S. E. 255) to the extent of furnishing a plant for that purpose. (Fawcett v. Mt. Avy, 134 N. C. 125, 45 S. E. 1029; Swindell v. Belhaven, 173 N. C. 1, 91 S. E. 369); furnishing sidewalks (Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17, 18); building bridges (Herring v. Dixon, 122 N. C. 420, 29 S. E. 368; Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534) even though the bridge is interstate (Emery v. Commissioners, 181 N. C. 420, 107 S. E. 443); Brockenbrough v. Board, 134 N. C. 1, 46 S. E. 28; Greensboro v. Scott, 138 N. C. 181, 50 S. E. 589; Underwood v. Asheboro, 152 N. C. 641, 68 S. E. 147; Reed v. Howerton Engineering Co., 188 N. C. 39, 123 N. C. 479; erection of a courthouse (Halcomb v. Commissioners, 89 N. C. 346); erection of a municipal building in a large city (Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279); and the building of county homes (Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534.)

Other projects which have sustained the issuance of bonds as necessary expenses, tho of less frequent occurrence than those just enumerated, are: For the installation of an electric fire-alarm system (Kinston v. Security Trust Co., 169 N. C. 207, 85 S. E. 399); purchase of an incinerator for the destruction of garbage (Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17, 19); erection of an abbatoir (Moore v. Greensboro, 191 N. C. 592, 132 S. E. 565); and of jetties (Storm v. Wrightsville, supra.)

The establishment of a wharf is not a necessary expense, Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25. Nor is the erection a maintenance of a dispensary such an expense. Garsed v. Greensboro, 126 N. C. 159, 355 S. E. 254.

The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a necessary expense within the meaning of this section. Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640.

But laying an assessment for building a stock-law fence in territory where the law is effective is not taxation requiring its submission to a vote of the people of the district. Tripp v. Commissioners, 158 N. C. 180, 73 S. E. 896; Shuford v. Commissioners, 86 N. C. 552.

It has long been decided that water and sewer are "necessary expenses," within the meaning of section 7, Article VII, Constitution of North Carolina, and "a vote of the majority of the qualified voters" is not necessary. Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17. So, also, are roads. See Davis v. Lenoir, 178 N. C. 668, 101 S. E. 260; Drysdale v. Prudden, 195 N. C. 722, 730, 143 S. E. 530. See also Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 171 S. E. 909; Lamb v. Randleman, 206 N. C. 837, 175 S. E. 293.

The building of a drilling tower to train the city's firemen is not a necessary expense within the meaning of this section. Wilson v. Charlotte, 206 N. C. 856, 175 S. E. 306.

Borrowing money to pay judgments for salaries owing to the employees of a city school in anticipation of collection of taxes levied thereon is not in contravention of this section. Hammond v. Charlotte, 206 N. C. 604, 175 S. E. 148.

What May Be Included in Tax for Expense.—A municipal platform is not a public market and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom

is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. Walker v. Faison, 202 N. C. 694, 163 S. E. 875.

Where a vote of the qualified electors is not necessary to the validity of the bonds proposed to be issued if an election should be called and the tax approved by the qualified electors of the town, such tax would be valid regardless whether it was levied for a necessary expense. Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Province of Court.—It has become the accepted meaning of this section that it is the province of the courts to decide whether a particular municipal expense falls within the category of necessary expenses, leaving to the municipal authorities the power to determine whether a proposed expense within that category is necessary in a given case. Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649, 653.

The courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality. Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 520, 171 S. E. 909.

Expansion of City's Power Lines.—Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of this section, nor is it in violation of the Fourteenth Amendment to the Federal Constitution. Holmes v. Fayetteville, 197 N. C. 740, 741, 150 S. E. 624.

Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of this section, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. Barbour v. Wake County, 197 N. C. 314, 148 S. E. 470.

B. School Taxation.

Editor's Note.—It has been held in several cases that the erection of school buildings is not a necessary expense within the purview of this section, and therefore a county cannot be brought under this indebtedness without the approval of the qualified voters. Jones v. Board, 185 N. C. 303, 117 S. E. 37; Davis v. Board, 186 N. C. 227, 119 S. E. 372. However these cases did not involve an indebtedness incurred by legislative authority in carrying on the public school system of the state and the necessary maintenance of a six month's school term, as required by section 3 of art. 9 of the Constitution, and it has been held that the question of taxation for this purpose need not be submitted to the voters. Tate v. Board, 192 N. C. 516, 135 S. E. 336; Hartsfield v. Craven County, 194 N. C. 358, 139 S. E. 698.

The better reason advanced for this distinction is that each part of the Constitution is of equal weight and merit and this section should be construed so as not to nullify any other portion of the Constitution. In Lacy v. Fidelity Bank, 183 N. C. 373, 111 S. E. 612, the court said: "The restrictions contained in this section . . . must be understood to refer to the debts and taxes in furtherance of local measures and do not extend to a state-wide measure . . . , undertaken in obedience to a separate provision of the Constitution, and in which the counties are . . . expressly recognized as the governmental units through which the general purpose may be made effective." See annotations under section 5483 of the code.

As to estoppel of taxpayers to deny the invalidity of a special school tax, see Carr v. Little, 188 N. C. 100, 123 S. E. 625.

The limitations of this section are not applicable to bonds or notes issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act (§ 1334(8)), for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. Hall v. Commissioners, 194 N. C. 768, 770, 140 S. E. 739.

This section applies to local matters relating to the affairs of the county separately considered, and not to a State-wide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made mandatory by the Constitution, Art. IX, secs. 1, 2, 3, requiring the maintenance of a six month term of public schools. Owens v. Wake County, 195 N. C. 132, 141 S. E. 546.

But the power is not giving the county to issue bonds for the erection and purchase of schoolhouses without a popular vote except where such schoolhouses and necessary land therefor are required for the establishment and maintenance of a six months school term as provided by the Constitution. Lovelace v. Pratt, 187 N. C. 686, 122 S. E. 661; Frazier v. Commissioners, 194 N. C. 49, 138 S. E. 433; Owens v. Wake County, 195 N. C. 132, 141 S. E. 546; Hall v. Commissioners, 195 S. E. 367, 369, 142 S. E. 315.

Where by special act the Legislature grants a charter to an existing city, enlarging the city limits to take in territory within one or more nonlocal tax districts, it is not necessary, nor contrary to this section, that a vote of the people within the added territory be had either upon the question of annexing such territory or upon the question of levying school taxes therein, the object of the charter being to provide for the government, welfare and improvement of the city, and not primarily for the mere maintenance of schools. Hailey v. Winston-Salem, 196 N. C. 17, 144 S. E. 377.

§ 8. No money drawn except by law. — No money shall be drawn from any county or township treasury, except by authority of law.

Cited in Faison v. Commissioners, 171 N. C. 411, 88 S. E. 761; Winslow v. Commissoners, 64 N. C. 218.

§ 9. Taxes to be ad valorem.—All taxes levied by any county, city, town, or township shall be uniform and ad valorem upon all property in the same, except property exempted by this Constitution.

Cross References.—As to uniformity of taxation generally, see 11 Enc. Dig. 562 et seq.; 15 Enc. Dig. 553 et seq. See, also, note to the various sections of Article V of this Constitution.

Proposed Amendment.—Public Laws 1935, ch. 248, s. 1, proposed an amendment to this article to be voted on at the next general election. This amendment would strike out this section and re-number the remaining sections.

This section imperatively required that all real and personal property in county, city, town or township be taxed by a uniform rule, according to its true value in money. Saluda v. Polk County, 207 N. C. 180, 184, 176 S. E. 298, citing Pocomoke Guano Co. v. Biddle, 158 N. C. 212, 73 S. E. 996.

Relation to § 2713 of Code.—Section 2713, making an assessment "a lien on the real property against which the same is assessed superior to all other liens and encumbrances" is subject to the constitutional provision of this section, that "taxation shall be by uniform rule and ad valorem." Thus limited, it is prior to mortgages, deeds of trust, etc., on the property, but subject to the governmental taxes. Saluda v. Polk County, 207 N. C. 180, 185, 176 S. E. 298.

Restraint on Power of City.—This section does not confer on cities a power to tax, or on the Legislature a power to give them that power. Its purpose and intent was to restrain the power of the city by requiring an uniformity of taxation upon all property ad valorem, notwithstanding any possible attempt by the Legislature to give the power without such restraint. The terms of the section do not profess to give a power, but to regulate what is supposed to exist by virtue of a legislative act of incorporation. If the power be not derived entirely from the charter of incorporation, either as expressly given or by necessary implication, it cannot be derived elsewhere, for the Constitution nowhere confers this power on cities, either expressly or by necessary implication. Wilson v. Board, 74 N. C. 748, 755.

When Tax Is Uniform.—A tax is uniform when it is equal upon persons belonging to the described class upon which it is imposed. Gatlin v. Tarboro, 78 N. C. 119.

What "Property" Includes. — The word "property," as used in this section includes moneys, credits, investments and other choses in action, Redmond v. Commissioners, 106 N. C. 122, 10 S. E. 845, such as bonds, stocks, solvent notes, etc. Cobb v. Corporation, 75 N. C. 1.

All Property in Municipality Must Be Taxed.—This section was not intended to apply the rules of uniformity and equality to the subject alone selected by the Legislature for taxation in granting a municipal charter, but requires that all property (whether real or personal, Cobb v. Corporation, 75 N. C. 1; London v. Wilmington, 78 N. C. 109, in the municipality shall be taxed, and taxed uniformally and equally. Redmond v. Commissioners, 106 N. C. 122, 10 S. E. 845. So a tax on real property alone to defray fencing expenses violates the section. Harper v. Commissioners, 133 N. C. 106, 45 S. E. 526. And the same is true of a tax for the same purpose levied on natural persons alone. Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640.

Valuation Assessed by Trustees.—This section clearly im-

plies that the valuation upon which city taxes are to be uniformly levied is to be that assessed by the Township Trustees. Carolina Cent. R. Co. v. Wilmington, 72 N. C. 73.

Taxation by Independent School District.—Where a city has created debts in view of a bond issue for its public schools, and thereafter the limits of the city are enlarged, but the independent school district, within old limits is recognized and having previously issued part of the bonds, proceeds to issue more of them to meet the obligations already incurred, its proposed action is not contrary to the provisions of this section, as the authority previously conferred imports a liability to taxation. Duffy v. Greensboro, 186 N. C. 470, 120 S. E. 53.

Local Improvement.—Special assessment for local municipal improvements are not within the restraints imposed by this section, but the rule of uniformity must be observed. Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521.

Same—Impounding Streets.—While assessments of lands abutting on streets improved are not required to be uniform with all other subjects of taxation, in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. Gastonia v. Cloninger, 187 N. C. 765, 123 S. E. 76. Can v. Commissioners, 86 N. C. 8. See also Hillard v. Asheville, 118 N. C. 845, 24 S. E. 738.

County Aid in Construction of City Street. — Where a county has paid a part of the cost of paving a certain street within the city, and the city has paid the balance, each out of its general funds, the owners of land abutting on this street cannot maintain the position that from the assessment of their land abutting on the street there should proportionately be deducted the amount paid by the county, the same being contrary to the requirement for the uniformity of taxation in the same class or subject matter. Gastonia v. Cloninger, 187 N. C. 765, 123 S. E. 76.

Tax on Property of Insurance Company.—A tax on the gross receipts of an insurance company is a privilege tax, and a county may levy an ad valorem tax on the property of such company. Wilmington Underwriters Ins. Co. v. Stedman, 130 N. C. 221, 41 S. E. 279.

Shares of Stock in National Bank.—Shares of stock in a national bank are proper subjects of state, county and municipal taxation. Such shares owned by nonresidents are to be taxed in the city or town where the bank is located and not elsewhere. Kyle v. Mayor, 75 N. C. 445.

Limitation on Amount.—The constitution, while it requires taxation to be uniform on all property within the city, contains no limitation on the amount of tax which cities and towns may impose. French v. Wilmington, 75 N. C. 477.

Cited in Pullen v. Raleigh, 68 N. C. 451; Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542; Loan Ass'n v. Commissioners, 115 N. C. 410, 413, 20 S. E. 526; State v. Irvin, 126 N. C. 989, 993, 35 S. E. 430; Smith v. School Trustees, 141 N. C. 143, 156, 53 S. E. 524; Commissioners v. Webb & Co., 160 N. C. 594, 76 S. E. 552; Souhern R. Co. v. Watts, 260 U. S. 519, 43 S. Ct. 192.

§ 10. When officers enter on duty.—The county officers first elected under the provisions of this article, shall enter upon their duties ten days after the approval of this Constitution by the Congress of the United States.

Cited in Pemberton v. McRea, 75 N. C. 497, 504.
See note as to proposed amendment under § 9.

§ 11. Governor to appoint justices.—The Governor shall appoint a sufficient number of justices of the peace in each county, who shall hold their places until sections four, five, and six of this article shall have been carried into effect.

See note as to proposed amendment under § 9.
See sections 1462 et seq., of the code.
Cited in Nichols v. McKee, 68 N. C. 429, 433.

§ 12. Charters to remain in force until legally changed.—All charters, ordinances, and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this Constitution.

See note as to proposed amendment under § 9.

Municipality Subject to Legislative Control.—A municipality, such as a city, town or county, is subject to the control of the General Assembly even in respect to necessary expenses. Jones v. New Bern, 152 N. C. 64, 65, 67 S. E. 173.

And the General Assembly may, at its discretion, abolish municipal as well as other corporations. Ward v. Elizabeth City, 121 N. C. 1, 27 S. E. 993.

Control of Municipal Contract.—The power conferred by its charter upon a city to provide water and lights, and to contract for same, provide for cleansing and repairing the streets, regulate the market, take proper means to prevent and extinguish fires, is subject to the police power of the state, with respect to rates to be charged under such contracts as the city may make under its charter with a public service corporation. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 128 S. E. 465.

Cited in O'Neal v. Mann, 193 N. C. 153, 161, 136 S. E. 379.

§ 13. Debts in aid of the rebellion not to be paid.—No county, city, town, or other municipal corporation shall assume to pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion.

See note as to proposed amendment under § 9.
See Southern R. Co. v. Board, 148 N. C. 220, 232, 61 S. E. 690; Brickwell v. Commissoners, 81 N. C. 240; Weith v. Wilmington, 68 N. C. 24; Poindexter v. Davis, 67 N. C. 112; Leake v. Commissioners, 64 N. C. 133; Logan v. Plummer, 70 N. C. 388, 392; Davis v. Board, 72 N. C. 441; Wingate v. Parker, 136 N. C. 369, 48 S. E. 774; Jones v. Commissioners, 137 N. C. 579, 600, 50 S. E. 291; Smith v. School Trustees, 141 N. C. 143, 157, 53 S. E. 524; Board v. Webb, 155 N. C. 379, 71 S. E. 520.

§ 14. Powers of General Assembly over municipal corporations.—The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine, and thirteen.

See note as to proposed amendment under § 9.
See §§ 1462 et seq. of the code.

Act Need Not Be General.—It is not required that the power conferred in this section should be general in its operation, or that it should in terms formally abrogate any given section therein, and substitute another in its stead, for the act making such change, local in its operation, must be given effect under its provisions, if otherwise valid. Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 337; Smith v. School Trustees, 141 N. C. 143, 53 S. E. 524.

Charters and Ordinances Entrusted to Legislature.—Under this section all charters, ordinances and provisions relating to municipal corporations are entrusted to the discretion of the Legislature. Harriss v. Wright, 121 N. C. 172, 28 S. E. 269.

Creation of Highway Commission.—The Legislature has authority under this section to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, etc., or subdivide this agency into several parts over defined territory. Ellis v. Greene, 191 N. C. 761, 133 S. E. 395; Commissions v. Road Comm'rs, 165 N. C. 632, 81 S. E. 1001.

The powers given to county commissioners over public highways, may be taken away from them and conferred by statute upon other political agencies of the State. Day v. Commissioners, 191 N. C. 780, 133 S. E. 164.

Appointing City Alderman.—The delegation by the legislature to the Governor of the State of the power of appointing a portion of the alderman of a city is within the scope of the power entrusted to the discretion of the Legislature by this section. Harriss v. Wright, 121 N. C. 172, 28 S. E. 269.

Compelling County to Issue Bonds.—The Legislature has power to pass an act compelling a county to issue bonds to fund its existing indebtedness incurred for necessary expenses. Jones v. Commissioners, 137 N. C. 579, 50 S. E. 291.

Establishment of School District.—The establishing a school district relates to public municipal corporations, which may be done by special legislative enactment under this section. Dickson v. Brewer, 180 N. C. 403, 104 S. E. 887.

Creating County Board of Audit and Finance.—The Legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 S. E. 283.

Cited in Rhodes v. Hampton, 101 N. C. 629, 632, 8 S. E. 219; Board v. Commissioners, 111 N. C. 578, 586, 16 S. E. 621. Dissenting opinion of J. Clark in Gattis v. Griffin, 125 N. C.

332, 34 S. E. 429; In re Spease Ferry, 138 N. C. 219, 220, 50 S. E. 625; Crocker v. Moore, 140 N. C. 429, 433, 53 S. E. 229; Bunch v. Commissioners, 159 N. C. 335, 74 S. E. 1048; Mann v. Allen, 171 N. C. 219, 88 S. E. 235; Township Road Comm. v. Board, 178 N. C. 61, 100 S. E. 122.

ARTICLE VIII

Corporations Other Than Municipal

§ 1. Corporations under general laws.—No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation.

In General.—Except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of Government, and except, also, in the instances expressly designated in this section, this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi-public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which while having at times and to some extent powers appertaining to government are in fact and in truth business corporations for the purpose principally of promoting private interests. Watts v. Lenoir, etc., Turnpike Co., 181 N. C. 129, 135, 106 S. E. 497.

Before the constitutional prohibition of this section, against creating corporations or amending their charters by special act, the General Assembly had granted numerous charters to utility companies giving them authority to set their own rates. However, such charter authority does not preclude rate regulation under the power of the state. Contracts between utilities and consumers setting the price of current are also subject to rate regulation. See 12 N. C. Law Rev., 296.

Purpose of Section.—"The purpose and effect of this section is to enable the state to control, modify or repeal corporate powers, thus avoiding the effect of the doctrine announced in Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518." Connor & Cheshire Const. of N. C. (anno.) pages 339, 340, cited and approved in Elizabeth City Water, etc., Co. v. Elizabeth City, 188 N. C. 278, 124 S. E. 611. See also, Railroad Co. v. Dortch, 124 N. C. 663, 673, 33 S. E. 1014.

Applicable to Private Corporation.—The prohibition contained in this section refers only to private or business corporation, and does not refer to public or quasi-public corporation acting as governmental agencies. Dickson v. Brewer, 180 N. C. 403, 104 S. E. 887; Mills v. Com'rs, 175 N. C. 215, 95 S. E. 481. See also Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Under this interpretation, the section should be construed in connection with sec. 2, dealing with "dues from corporations;" sec. 3, defining corporations as including "associations and joint stock companies," and it should be noted that if sec. 4 (properly belonging in Art. VII) included corporations as governmental agencies, it would be meaningless. Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187.

The provisions of this section, prohibiting the Legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the Legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. Holmes v. Fayetteville, 197 N. C. 740, 741, 150 S. E. 624.

A commission created as an agency of the State to perform the governmental function of providing port facilities for the commerce of the State in the public interest, and not for private gain, is a public corporation, and the Legislature is not prohibited from creating such corporation by this section, nor is the act creating it a special act within the meaning of this section, and the Commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Power to Extinguish Corporations.—The General Assembly may, at its discretion, abolish municipal as well as other corporations, because they are all alike creatures of its will, and exist only at its pleasure. Ward v. Elizabeth City, 121 N. C. 1, 3, 27 S. E. 993.

Right of Alteration a Part of Every Charter.—The provisions of this section, affecting the organization of corporations, and specifically providing that all "such laws or special acts may be altered from time to time or repealed," etc., enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. Elizabeth City Water, etc., Co. v. Elizabeth City, 188 N. C. 278., 124 S. E. 611; State v. Cantwell, 142 N. C. 604, 55 S. E. 820; Power Co. v. Whitney Co., 150 N. C. 31, 63 S. E. 188.

"Special Act" Only Prohibited.—This section only prohibits the enactment of a special act and an act which relates to all municipal corporations of a county, including cities, town, townships, and school districts is not a special act within its meaning and intent. Kornegay v. Goldsboro, 180 N. C. 441, 446, 105 S. E. 187.

Effect of Dissolution upon Corporate Property.—Upon the dissolution or extinction of a corporation under this section for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the state; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, overruling Fox v. Horah, 36 N. C. 358.

Applied in Coleman v. Sou. R. Co., 138 N. C. 351, 50 S. E. 690.

Cited in the dissenting opinion of Brandeis, J., in Liggett Co. v. Lee, 288 U. S. 517, 550, 53 S. Ct. 481, 77 L. Ed. 929, 85 A. L. R. 699.

§ 2. Debts of corporations, how secured.—Dues from corporations shall be secured by such individual liabilities of the corporations, and other means, as may be prescribed by law.

§ 3. What corporations shall include.—The term "Corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.

Where Corporate Powers Extinguished.—Where the Legislature deprived the board of township trustees of its existence as a municipal corporation, the right to sue and be sued are likewise extinguished, and hence it cannot thereafter be a party to a suit. Wallace v. Trustees, 84 N. C. 164. As to power to extinguish corporations, see note of Ward v. Elizabeth City, 121 N. C. 1, 3, 27 S. E. 993 under section 1.

Stated in Barker v. Southern R. Co., 137 N. C. 214, 223, 49 S. E. 115.

§ 4. Legislature to provide for organizing cities, towns, etc.—It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations.

Editor's Note.—This section, in substance, constitutes a limitation on the provision of Art. VII, section 7 and must be construed therewith. One court has said that this section properly belongs in Art. VII. Kornegay v. Goldsboro, 180 N.

C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article.

In General.—The court in Pullen v. Raleigh, 68 N. C. 451, 454, said: "This (section) seems to give a general control to the Legislature on the subject of municipal corporations, and the Legislature may, under it, restrict the power of taxation by corporations as it may think proper, due regard being had to other parts of the constitution."

Although a municipality may ordinarily levy a tax, as a necessary expense in the cases mentioned in Art. 7, section 7, without submitting the question to the qualified voter, it may not do so where the Legislature by statute requires the consent of such voter. Ellison v. Williamston, 152 N. C. 147, 67 S. E. 255; Robinson v. Goldsboro, 135 N. C. 382, 47 S. E. 462; Wadsworth v. Concord, 133 N. C. 587, 45 S. E. 948. It is for the Legislature to decide when it is necessary to pass a restrictive statute. State v. Irvin, 126 N. C. 989, 994, 35 S. E. 430. As to specific cases wherein it is necessary to secure the consent of the voters, see Art. 7, section 7 and note thereto.

The provisions of this section relate to municipal corporations as originally formed under legislative enactment, and is more restrictive in limiting the municipality in contracting debts or pledging their credit than Article VII, section 7, which requires an election by its voters to do so, when not for necessary expenses. Waters v. Comrs., 186 N. C. 719, 120 S. E. 450.

Not Applicable to Special Assessments.—It seems that this section does not apply to special assessments for local municipal improvements, Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521. It is said by the court in this case: "Even if it did apply, an act of the Legislature authorizing an assessment is not void because it does not prescribe all of the particulars relating to such assessment. It is sufficient if it authorizes a fair and equitable method of ascertaining the peculiar benefits conferred upon the property, and apportioning the costs between the abutting owners."

School District Not Included.—A school district is not within the perview of the provisions of this section, it being not a city, town or incorporated village. Felmet v. Commissioners, 186 N. C. 251, 254, 119 S. E. 353; Waters v. Comrs., 186 N. C. 719, 120 S. E. 450.

Alteration of Charter Not Forbidden.—This section does not forbid altering or amending charter of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. Holton v. Mocksville, 189 N. C. 144, 149, 126 S. E. 326.

Applied in Hutton v. Webb, 124 N. C. 749, 33 S. E. 169; Brockenbrough v. Commissioners, 134 N. C. 1, 17, 46 S. E. 28.

Cited in Holmes v. Fayetteville, 197 N. C. 740, 746, 150 S. E. 624; Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649; Saluda v. Polk County, 207 N. C. 180, 186, 176 S. E. 298; Webb v. Port Comm., 205 N. C. 663, 679, 172 S. E. 377.

ARTICLE IX

Education

§ 1. Education shall be encouraged.—Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Editor's Note.—This section constitutes the corner-stone in the foundation on which rest the provisions of the following sections, the courts in practically all the cases referring to the provision hereof and using them as a supplemental basis for the decisions primarily falling under one or more of the subsequent sections. Reference, therefore, is here made to the notes placed under the sections following in this article.

Cited in Julian v. Ward, 198 N. C. 480, 482, 152 S. E. 401.

§ 2. General Assembly shall provide for schools; separation of the races.—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.

Cross Reference.—For full treatment of the subject, see 11 N. C. Enc. Dig. 129 et seq.; 15 N. C. Enc. Dig. 431 et seq. As to school funds, see 11 N. C. Enc. Dig. 130; 15 N. C. Enc. Dig. 432; see also Art. IX, sec. 5.

In General.—It was said by the court in Lane v. Stanly, 65 N. C. 153, 157: "It will be seen that the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State Board of Education, by the aid of school committees, manage it. It will be observed that it is to be a 'system'; it is to be 'general', and it is to be 'uniform'. It is not to be subject to the caprices of localities, but every locality, yea, every child, is to have the same advantage and be subject to the same rules and regulations."

The requirement of this section of the Constitution, that our public-school system shall be uniform by legislative authority, relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools;" and thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. Board v. County Com'rs, 174 N. C. 469, 93 S. E. 1001.

This and the following section of the Constitution require that at least one elementary school be maintained in each district, but the constitutional mandate does not extend to high schools. Elliott v. Board of Equalization, 203 N. C. 749.

Duty on Legislature.—It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools. Board v. State Board, 114 N. C. 313, 19 S. E. 277.

Same—Mandatory.—The provisions of our Constitution, Art. IX, secs. 1, 2, 3, are mandatory that the Legislature provide by "taxation and otherwise for general and uniform system of public education, free of charge, to all of the children of the State from six to twenty-one years," etc., and for the continuance of the school term in the various districts for at least six months in each and every year, recognizing the counties of the State and designating them as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measure effective. Lacy v. Fidelity Bank, 183 N. C. 373, 111 S. E. 612.

Method of Distribution of Allowance.—County high schools are entitled to have a special allowance made to them in the yearly estimate of the county board of education for a four-months term (now six); but it is otherwise as to a school which is in strictness one of a town or city, governed by local authority and accessible only to the school population of the specified district, for such is not a part of our public-school system; and this class of high schools may only receive their per capita or pro rata share of the estimate according to average an actual attendance and according to the provision of the statute or authoritative regulations applicable. Board v. County Commissioners, 174 N. C. 469, 93 S. E. 1001.

All of the funds raised in the state for common school purposes should be distributed per capita among the beneficiaries and not be retained in the counties where it is raised. School Commissioners v. Board, 169 N. C. 196, 85 S. E. 138; Board v. State Board, 114 N. C. 313, 19 S. E. 277. And in the distribution of the fund the General Assembly may not discriminate in favor, or to the prejudice of either the white or colored races. Hooker v. Greenville, 130 N. C. 472, 42 S. E. 141.

Separate Buildings, Teachers, etc.—This section commands that the children of each race are to be taught in separate buildings and by separate teachers. Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267.

Under this section the school building now provided for the colored children cannot be taken for use of white children. Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267.

Cited in Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393; Julian v. Ward, 198 N. C. 480, 482, 152 S. E. 401.

§ 3. Counties to be divided into districts.—Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment.

Editor's Note.—In the constitution of 1917 the words "six months" were inserted for the words "four months."

Generally.—In discharging the duty, imposed by this section, to keep the public schools open for at least four months (now six) every year, the county Commissioners cannot dis-

regard the limitations imposed by Article V, Section 1, as to the amount of tax to be levied. Board v. Commrs. 111 N. C. 578, 579, 16 S. E. 621. But see Board v. County Commissioners, 174 N. C. 469, 93 S. E. 1001.

This section is mandatory, but the mode of performance is prescribed by statute. See §§ 5596(c), 5599. Hickory v. Catawba County, 206 N. C. 165, 172, 173 S. E. 56.

Counties May Be Directed to Provide Funds.—By reason of this constitutional mandate it is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to provide the necessary funds by taxation or otherwise. Harrell v. Board of Com'rs, 206 N. C. 225, 229, 173 S. E. 614.

Legislative Function.—It is a legislative function to formulate the means of carrying out the provisions of this section. Wilkinson v. Board of Education, 199 N. C. 669, 155 S. E. 562.

Legislative Discretion.—This section having required a public school system of the State to have at least six months terms in each year, leaves it to the discretionary power of the Legislature to fix terms in excess of that period. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433.

Assumption of Indebtedness.—When necessary to maintain the six-months term of public schools required by this section it is within the legislative authority in establishing its State-wide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public-school system of the State. Lovelace v. Pratt, 187 N. C. 686, 122 S. E. 661.

The fact that this section provides that county commissioners failing to perform their duties in regard to the maintenance of the required school term shall be guilty of a misdemeanor, does not preclude a writ of mandamus to compel the assumption by the county of indebtedness incurred by the districts for the erection and equipment of school buildings necessary to the constitutional school term. Hickory v. Catawba County, 206 N. C. 165, 173 S. E. 56.

Issuance of Mandamus.—The section of the Constitution have committed to the judgment and discretion of the county commissioners the manner and method of levying taxes to maintain a four-months minimum period (now six) of the public schools, and in the exercise thereof the courts will not interfere by civil process, mandamus or otherwise, unless their action is so unreasonable as to amount to a manifest abuse of power. County Board v. Board, 150 N. C. 116, 63 S. E. 724.

Immediately after filing the opinion in this case, the Legislature (of 1909), then in session, passed an act giving the county boards of education the right to sue out a mandamus in such cases.—Ed. Note.

Applied in Powell v. Bladen County, 206 N. C. 46, 173 S. E. 50.

Cited in Julian v. Ward, 198 N. C. 480, 482, 152 S. E. 401.

§ 4. What property devoted to educational purposes.—The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also all moneys, stocks, bonds, and other property now belonging to any State fund for purposes of education; also the net proceeds of all sales of the swamp lands belonging to the State, and all other grants, gifts or devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State, or by the terms of the grant, gift, or devise, shall be paid into the State treasury, and, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever.

Stated in McDonald v. Morrow, 119 N. C. 666, 26 S. E. 132; Bear v. Commissioners, 124 N. C. 204, 32 S. E. 558.

§ 5. County school fund; proviso.—All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: Provided, that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction.

In General.—This section appropriaties all fines for violation of the criminal laws of the state for establishing and maintaining free public schools in the several counties, whether the fines are for violation of town ordinances made misdemeanors by statute or other criminal statutes. Board v. Henderson, 126 N. C. 689, 36 S. E. 158.

Fines, etc., Must Be Given by Law.—Under this section penalties and forfeitures belong to the state for free school purposes only when given by law to the state. Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 446, 36 S. E. 14, and cases there cited.

Parties.—A suit to compel a city to pay fines and penalties to the county board of education should be brought against the city or the board of aldermen, and not against the chief of police. Bearden v. Fullam, 129 N. C. 477, 40 S. E. 204.

Applied in In re Wiggins, 171 N. C. 372, 88 S. E. 508.

§ 6. Election of trustees, and provisions for maintenance, of University.—The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises and endowments thereof in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws, and regulations from time to time as may be necessary and expedient for the maintenance and management of said University.

§ 7. Benefits of the University.—The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue, from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University.

Applied in In re Neal, 182 N. C. 405, 109 S. E. 70; University of North Carolina v. High Point, 203 N. C. 558, 166 S. E. 511.

§ 8. Board of Education. — The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Instruction, and Attorney-General shall constitute a State Board of Education.

§ 9. President and secretary.—The Governor shall be president and the Superintendent of Public Instruction shall be secretary of the Board of Education.

§ 10. Powers of the board.—The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said board may be altered, amended, or repealed by the General As-

sembly, and when so altered, amended, or repealed they shall not be re-enacted by the board.

§ 11. First session of the board.—The first session of the Board of Education shall be held at the capital of the State within fifteen days after the organization of the State government under this Constitution; the time of future meetings may be determined by the board.

§ 12. Quorum.—A majority of the board shall constitute a quorum for the transaction of business.

§ 13. Expenses.—The contingent expenses of the board shall be provided by the General Assembly.

§ 14. Agricultural department. — As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a department of agriculture, of mechanics, of mining, and of normal instruction.

The Board a Department of State Government.—The Board of Agriculture is a department of the State Government, and an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained, the state not having given its consent to be sued in that respect. Chemical Co. v. Board, 111 N. C. 135, 136, 15 S. E. 1032.

§ 15. Children must attend school.—The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means.

Stated and Applied in State v. Wolf, 145 N. C. 440, 441, 59 S. E. 40.

ARTICLE X

Homesteads and Exemptions

§ 1. Exemptions of personal property.—The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt.

Editor's Note.—It is thought more proper to place the main annotations regarding the homestead and personal property exemption under section 728 et seq., of the code. The notes placed thereunder together with the references compose a comprehensive treatment of the subject—reference to which is here made. The note found under this section is meant to embrace only direct construction of the provisions hereof, and may be of aid to the practitioner in dealing with the sections above mentioned.

Section Liberally Construed.—Hyman v. Stern, 43 F. (2d) 666.

The Marital Duty of Husband.—The husband's duty to protect and provide for his wife is more than a debt in its ordinary acceptation of the word, or within the contemplation of this and the following section of the consitution. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

A Constitutional Right.—The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution which confers it and attaches the protection to the debtor before the allotment or appraisal. Lockhart v. Bear, 117 N. C. 298, 23 S. E. 484.

Meaning of "Final Process."—A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. Befarrah v. Spell, 178 N. C. 231, 100 S. E. 321.

Diminution in Value of Property.—In the well considered opinion in Campbell v. White, 95 N. C. 344, it was said: "Though the debtor's personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit," Smith, C. J., saying that this section of the Constitution, is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and, of course, the diminution from use, loss, or other cause must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him as not liable to sale. Gardner v. McConnaughey, 157 N. C. 481, 483, 73 S. E. 125.

Exemption Ceases at Death of Claimant. — The personal property exemption provided for by this section and the laws passed pursuant thereto, exists only during the life of the homesteader and after his death passes to his personal representative, to be disposed of in a due course of administration. Johnson v. Cross, 66 N. C. 167.

It is to be noted that by sections 3 and 5, after the death of the owner of a homestead, the exemption is continued on for the benefit of his children or widow; but there is no such provision in regard to the "personal property exemption."—Ed. Note.

Forfeiture of Exemption.—A bankrupt who conceals assets exceeding in value his statutory exemption forfeits his right to such exemption. Hyman v. Stern, 43 F. (2d) 666.

§ 2. Homestead.—Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes or for payment of obligations contracted for the purchase of said premises.

Cross Reference.—For full treatment of the subject, see 7 N. C. Enc. Dig. 90 et seq.; 14 N. C. Enc. Dig. 308 et seq.; see the title "Constitutional Law," 3 N. C. Enc. Dig. 290 et seq. See also, section 728 et seq. and notes placed thereunder.

Homestead and Personal Property Exemptions Distinguished.—The homestead exemption is permanent unless there is a reallotment by reason of an increase in value in the manner provided by section 732. But the personal property exemption is to be reassigned, whenever, at subsequent dates, executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in quantity, between the levy of executions. Gardner v. McConnaughey, 157 N. C. 481, 483, 73 S. E. 125.

In view of this section the doctrine of estoppel cannot deny the bankrupt his right to a homestead in lands which were subject to his debts. In selecting the land for his homestead exemption, he is not restricted to the tract on which he lives. In re Hamrick, 56 F. (2d) 240, 241.

Right May Be Sold or Assigned.—The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. Gardner v. Batts, 114 N. C. 496, 19 S. E. 794. As to requisites of deed, see section 8 and note thereto.

Where there is a homestead right in land, the homesteader may alienate the same only with the joinder and private examination of the wife. Farris v. Hendricks, 196 N. C. 439, 146 S. E. 73, 77.

The owner of lands loses his right to a homestead therein allowed by this section upon his conveying the title to the same, by deed, though he may select a homestead thereafter in other of his lands under the provisions of section 729 of the Code. Duplin County v. Harrell, 195 N. C. 445, 142 S. E. 481.

Allotment Unnecessary.—The title to the homestead is vested in the owner by the Constitution of this State, and no allotment by the sheriff is necessary to vest the title thereto. The allotment by the sheriff is only for the purpose of ascertaining whether there be an excess of property over the homestead which is subject to execution. Lambert v. Kinnery, 74 N. C. 348.

Where a mortgage on land is foreclosed and the land

brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the Constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has not been waived. Farris v. Hendricks, 196 N. C. 439, 146 S. E. 73, 77.

A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Cheek v. Walden, 195 N. C. 752, 143 S. E. 465.

A duly docketed judgment is a lien on the lands of the judgment debtor but is subject to the homestead interest in the lands as provided by this section. Farris v. Hendricks, 196 N. C. 439, 146 S. E. 73, 77.

Cited in Vannoy v. Green, 206 N. C. 77, 80, 173 S. E. 277.

§ 3. Homestead exemption from debt.—The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any of them.

See Editor's Note to section 5.

Only Infant Children Included.—An heir twenty-one years old is not entitled to homestead in the lands of his ancestor, his right thereto ceased as soon as he attained his majority. Saylor v. Powell, 90 N. C. 202.

The widow by a second marriage of one who died seized and possessed of land leaving no children by her, is not entitled to the benefit of a homestead therein, when he has left children by his first marriage, though they are adult. The meaning of the language of this and section 5 too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. Simmons v. Respass, 151 N. C. 5, 65 S. E. 516.

Same—Where Only One Minor.—Where the owner of a homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. Simpson v. Wallace, 83 N. C. 477.

Pecuniary Standing of Children Not Considered.—The right to a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances. Allen v. Shields, 72 N. C. 504; Spence v. Goodwin, 128 N. C. 273, 38 S. E. 859.

Right Not Waivable by Guardian Ad Litem.—A guardian ad litem cannot waive the homestead rights of infant heirs, especially when there is no consideration therefor, for such waiver would affect the substantial rights of the infants. Spence v. Goodwin, 128 N. C. 273, 38 S. E. 859.

The debt referred to in this section means the debt of the owner of the homestead, and not the debt of the infant children. Bruton v. McRae, 125 N. C. 206, 207, 210, 34 S. E. 397.

Right Not to Be Sold for Assets.—In a proceeding to sell land for assets, the executor can not sell the homestead interest of a minor child and devisee of the testator. Bruton v. McRae, 125 N. C. 206, 207, 34 S. E. 397.

§ 4. Laborer's lien.—The provisions of section one and two of this article shall not be so construed as to prevent a laborers lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises.

Cross References.—See section 2433 et seq. and notes thereto. For other exceptions to the exemptions, see note of Mebane v. Layton, 89 N. C. 396, under section 728.

Definition of Terms.—A "laborer's lien" is solely for labor performed, while a "mechanic's lien" is broader and includes the "work done," i. e., the "building built" or superstructure put on the premises. Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31.

Lien for Materials Furnished.—See note of Cumming v. Bloodworth, 87 N. C. 83, under section 2433. See also, Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31.

Applied in Sugg v. Pollard, 184 N. C. 494, 115 S. E. 153; Isler v. Dixon, 140 N. C. 529, 53 S. E. 348; McMillan v. Williams, 109 N. C. 252, 13 S. E. 764.

Quoted in Roper Lumber Co. v. Lawson, 195 N. C. 840, 844, 143 S. E. 847.

§ 5. Benefit of widow.—If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right.

Cross Reference.—See section 728, analysis line "Who Entitled to Homestead and Exemptions," II, B. As to allotment after death of homesteader, see section 748 and notes thereto; as to right of widow whose deceased husband leaves adult children by a former marriage, see note of Simmons v. Respass, 151 N. C. 5, 65 S. E. 516, under section 3 of this article.

Editor's Note.—It is to be noted that the widow's right to the homestead provided for by this section is expressly conditioned upon her not being the owner of a homestead in her own right. Such a clause is not contained in section 3 which gives the right to the children during minority. On this point it was said in Spence v. Goodwin, 128 N. C. 273, 277, 38 S. E. 859: "This ———— emphasizes by direct implication the unconditional right of exemption given to the children by section 3."

Ownership at Death Essential.—It is only in the contingency that the husband is the owner of a homestead at the time of his death that the exemption from debts inures to her benefit. Thomas v. Bunch, 158 N. C. 175, 178, 73 S. E. 899.

Heirs Prior to Widow Where There Are No Creditors.—A widow is not entitled to homestead against the heirs at law where there are no creditors, but only to dower. Caudle v. Morris, 160 N. C. 168, 76 S. E. 17. See also, Tucker v. Tucker, 103 N. C. 170, 9 S. E. 299.

§ 6. Property of married women secured to them.—The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried.

See notes to § 2506.

Editor's Note.—To give effect to the provisions of the organic law as embodied in this section, the legislature from time to time has enacted statutes whose essence may be boiled down in substance to what is contained in this section. In fact some of those statutes are a verbatim confirmation of these provisions, while others are corollaries thereof deducible by necessary inference from those provisions through judicial construction.

For example section 997 et seq. deals with the execution and proof of instruments affecting a married woman's title to her property; section 2506, secures to her all property acquired before and after marriage as her separate estate free from the claims of her husband; section 2507 authorizes her to contract, with certain qualifications, as if she were unmarried, sections 2511, 4129, 2506, empower her to dispose of her property by will, and there are many other sections in the code which are directly or indirectly offsprings of, or satellites to, this section.

By virtue of the community of source of these statutes, the instances are rare where this constitutional section has been construed apart from its satellites, or where the construction placed upon the latter is not applicable to the former, or vice versa. These constructions have been placed under the respective subordinate sections to which they refer, and all of them radiate a light upon the provisions of the organic law contained in this section. To the end that repetition may be avoided the counsel is urged to refer to those sections for no less direct constructions of this section than the sections under which they are placed, while he will find hereunder the more or less independent constructions of this section which do not appear under its subordinates.

In General.—There is no "beneficient provision of the Constitution" which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing. Strouse v. Cohen, 113 N. C. 349, 353, 18 S. E. 323.

General Policy of Section.—This section is intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and femes sole. McLeod v. Williams, 122 N. C. 451, 454, 30 S. E. 129.

Common Law Rule Changed.—The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving to the wife the sole ownership of her separate estate. Turlington v. Lucas, 186 N. C. 283, 119 S. E. 366.

Husband's Consent Necessary Only in Conveyances.—Under this section a married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

No Formal Conveyance to Transfer Note or Bond.—No formal conveyance is necessary under the requirement of this section of the Constitution in the transfer of a note or bond. The delivery of the note or bond to the endorsee after it has been endorsed in blank by the wife, the owner, and the husband, is a sufficient conveyance of the note or bond to satisfy the constitutional requirement. Coffin v. Smith, 128 N. C. 252, 255, 38 S. E. 864.

Legislative Power to Declare Wife Free Trader.—There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, this section being intended to protect instead of disabling her. Hall v. Walker, 118 N. C. 377, 24 S. E. 6.

Legislative Control over Capacity to Make Will.—This section conferring upon married women the right to make a will, etc., "as if she were unmarried," was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation. Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936.

May Devise or Bequeath Property as if Sole.—Under the provisions of this section, and as later declared by our statutes, a married woman may now devise and bequeath her separate real and personal property as if she were a feme sole, which does not apply to a conveyance of her realty by deed. Freeman v. Lide, 176 N. C. 434, 97 S. E. 402.

Liability of Husband for Rents Paid Wife after Foreclosure.—Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land are paid to the wife, the husband may not be held responsible for such rents by the person entitled to the rent by virtue of the foreclosure, since, under this section a wife is given sole ownership of her separate estate. In re Longley, 205 N. C. 488, 171 S. E. 788.

May Bar Husband's Curtesy by Devising the Property.—By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child born of the marriage was after the adoption of the Constitution, which gives a married woman the power, among other things, of disposing, by will, of her property acquired before marriage, she may accordingly dispose of it by will and deprive him of his interest therein as tenant by the curtesy. Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510.

Where a feme covert dies intestate her husband is entitled to his common law right of curtesy; where she devises her land, under this section, the estate of curtesy is destroyed. Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127.

Vested curtesy rights of the husband at the time of the adoption of the constitution were not impaired by this section. Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510.

Devise of Equitable Separate Estate.—She may devise her equitable separate estate, in the absence of contrary provisions in the instrument creating it, where the trustee is a passive trustee; and, whether the trust be passive or active, where the trust is to terminate with her life, and the estate to become absolute thereafter. Freeman v. Lide, 176 N. C. 434, 97 S. E. 402.

Same—Provisions of Instrument Creating the Estate Still Controls.—Married women have no greater estates, by operation of this section of the Constitution, than those conveyed by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates changed by that instrument. Long v. Barnes, 87 N. C. 329, 330.

The constitution imposes no limitation upon the right of a grantor or devisor to restrict or enlarge, by the terms of the instrument through which title passes, her jus disponendi. Kirby v. Boyette, 118 N. C. 244, 24 S. E. 18.

Not Applicable to Obligations of Wife as Surety to Her Husband.—This section, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself. Royal v. Southerland, 168 N. C. 405, 84 S. E. 708.

Extent of Veto Power of Husband.—The veto power of the husband does not extend to devises and bequests, nor to any other disposition of her property, save in those cases which under the law must be made by a "conveyance," i. e., deeds and mortgages of realty and such mortgages of personalty as are made by deed. To hold that the husband's veto power, by reason of the requirement of his written assent, extends to all gifts, sales, transfers and assignments of her personal property, oral or written, is to make the veto as broad as the enfranchisement. It is to say that her property shall remain hers, as before marriage, but that in no case whatever shall she own it as if she had remained single. It would be to require the husband's written assent in cases where no writing would be necessary on the part of the wife. Jennings v. Hinton, 126 N. C. 48, 53, 35 S. E. 187.

Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties, and execution may be issued against them. Martin v. Lewis, 187 N. C. 473, 122 S. E. 180.

Action for Tort.—The husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. If the husband could maintain an action to recover damages for torts on the wife she would be able to maintain an action on account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in favor of both, or neither, but in view of the constitution of 1868 and our statute on the subject, such action cannot be maintained by either on account of the injury to the other. Hipp v. Dupont, 182 N. C. 9, 108 S. E. 318.

Power to Contract by Virtue of This Section.—Where it was contended that when the Constitution gave married women separate estates in their property, it gave them by a necessary implication an unrestricted dominion over the property, to bind it directly or indirectly, except when expressly forbidden, and an unrestricted right to contract, such as a feme sole or a man has, it was held that there was no such grant implied, that the terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and that it must be taken that they were used in that instrument in the sense which had been affixed to them by prior decisions of the court. Pippen v. Wesson, 74 N. C. 437, 444. But this power is now expressly accorded to married women by the terms of statute known as Martin Act embodied in section 2507.—Ed. Note.

Prohibitions of Sections 2529, Not Inhibited by This Section.—The provisions of section 2529, dispensing with the necessity of the written consent of the husband to the conveyance by the wife of her lands when he has "been declared an idiot or a lunatic" is not inhibited by this section of the constitution. Lancaster v. Lancaster, 178 N. C. 22, 100 S. E. 120.

Conveyance by Submitting Title to Arbitrators.—If a married woman could dispose of her real estate, without the joinder of her husband, by submitting her title to arbitrators, that part of this section which ordains that a married woman, with the written assent of her husband, may convey her real estate, would be a dead letter. If such were the law, married woman, from design or by means or fraud and deceit, might by arbitrators, be deprived of their real estate and the husband deprived of his rights therein before he had knowledge of the matter, or the power to prevent it in either case. If a married woman could dispose of her real estate through arbitration, she would be enabled by an indirect method to do that which the Constitution and the laws prohibit, and that will never be allowed. Smith v. Bruton, 137 N. C. 79, 83, 49 S. E. 64.

Conveyances between Husband and Wife.—A deed executed by husband to wife in 1841, even if a fee simple deed, would have been void in law, and sustainable in equity only upon meritorious consideration; it is otherwise, as to such deed executed now, which is rendered valid under this section. McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.

Assignment of Insurance Policy.—The signature of the husband, as witness, to a written assignment by the wife, of her interest in an insurance policy on his life, taken out by him for her benefit, is equivalent to an assignment by the wife, "with the written assent of her husband," as provided by this section. Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187.

§ 7. Husband may insure his life for the benefit of wife and children.—The husband may insure his own life for the sole use and benefit of

his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors. And the policy shall not be subject to claims of creditors of the insured during the life of the insured, if the insurance issued is for the sole use and benefit of the wife and/or children.

Editor's Note.—The amendment proposed by Public Laws of 1931, c. 262, and ratified at the next succeeding general election, added the last sentence to this section.

Generally.—This section clearly looks to the provision for the wife and children so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919.

The purpose is to enable the husband to make valuable provision for his wife and children after his death, above, beyond and unaffected by his estate, personal and real, and the conditions of the same remaining at the time of his death. Burwell v. Snow, 107 N. C. 82, 87, 11 S. E. 1090.

Not a Part of Insured's Estate.—Where a life insurance policy is issued to one in the name and for the benefit of the wife and children it does not upon his death become a part of his estate. Burton v. Farinholt, 86 N. C. 260, 261. See also the discussion of this point contained in the dissenting opinion in Herring v. Sutton, 129 N. C. 107, 113, 39 S. E. 772.

Under this section the proceeds from the insurance policy payable to the wife and children is not a part of the insured's estate so that it may be claimed by an heir or next of kin. Burwell v. Snow, 107 N. C. 82, 87, 11 S. E. 1090.

This section "means, in the absence of fraud, that payment of premiums, even by an insolvent husband, shall not defeat payment at the death of the husband to the beneficiaries named in the policy." Whiting v. Squires, 6 F. (2d) 100, 101, reversing In re Pittman, 275 F. 686.

"The limit of the constitutional exemption of an insurance policy on the life of the husband against the claims of his creditors is that the wife or the wife and children take the benefits of a policy payable to her or them as beneficiaries at the death of the insured. The exemption may cover a policy payable to the wife and children with no power of the insured to change the beneficiaries, because in such a policy the wife or the wife and children have a vested interest, and the policy, if paid at all, must be paid to them at the death of the husband. But the exemption does not embrace the surrender value, the property of the husband, of a policy in which he can change the beneficiary at will." Whiting v. Squires, 6 F. (2d) 100, 101, reversing In re Pittman, 275 F. 686.

"The legislature could not by statute add to the constitutional exemption. Wharton v. Taylor, 88 N. C. 230. Therefore it could not make an exemption of the surrender value of the policy which might or might not, according to the will of the husband, fall to the wife or the wife and children as a policy of which they were beneficiaries at the death of the husband. It follows that, if the statute be construed as embracing the surrender value of a policy like these, it would be invalid as a legislative attempt to enlarge the insurance exemption to the wife and children provided by the Constitution." Whiting v. Squires, 6 F. (2d) 100, 102, reversing In re Pittman, 275 F. 686.

If § 6464 stood alone, with its language unrestrained by the constitutional provision, the argument would be strong in favor of the view that every possible value of a policy including cash surrender value, though the husband retained the right to change the beneficiary, inures to the benefit and use of the wife or her children. This is the view taken of somewhat similar statutes where no constitutional limitation was involved. But, as this construction of the statute of North Carolina is doubtful, it should not be adopted when opposed to the provision of the Constitution, for every presumption must be indulged that the Legislature did not intend to attempt by statute to confer an exemption beyond that provided by the Constitution. Taking this view, we hold that the last sentence of the statute is but a repetition of the constitutional provision on the same subject, and is limited in its application to a policy of insurance standing in the name of the wife or her children as beneficiaries at the death of the husband. Whiting v. Squires, 6 F. (2d) 100, 102, reversing In re Pittman, 275 F. 686.

"The rule laid down by the Supreme Court is that under § 70a of the bankruptcy statute (Comp. St. § 9654) the cash surrender value of a policy of insurance is an asset of a bankrupt's estate, even when the policy is payable to a beneficiary other than the bankrupt, his estate, or his personal representative, if the bankrupt has reserved absolute power to change the beneficiary. Cohen v. Samuels. 245 U. S. 50, 38 S. Ct. 36, 62 L. Ed. 143; Cohn v. Malone, 248 U. S. 450, 39 S. Ct. 141, 63 L. Ed. 352. The court has further held that insurance policies embraced within the exemption laws of the state do not become assets in the hands of the trustee for the benefit of creditors. Holden v. Stratton, 198 U. S. 202, 25 S. Ct. 656, 49 L. Ed. 1018." Whiting v. Squires, 6 F. (2d) 100, reversing In re Pittman, 275 F. 686.

Cited in Peoples Building & Loan Assn. v. Swaim. 198 N. C. 14, 150 S. E. 668; Russell v. Owen, 203 N. C. 262, 165 S. E. 687.

§ 8. How deed for homestead may be made.—Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law.

Cross Reference.—See section 997 et seq. and notes thereto. As to form of private examination, see sections 3324, 3325. See also note of Dalrymple v. Cole, 170 N. C. 102, 86 S. E. 988, under section 729.

Section Applies After Allotment of Homestead.—This section applies only to a conveyance of the homestead after it has been laid off. Mayho v. Cotton, 69 N. C. 289, 292, cited and approved in Dalrymple v. Cole, 170 N. C. 102, 104, 86 S. E. 988. See also, Hager v. Nixon, 69 N. C. 108.

General Rule.—A deed executed by the homesteader without the joinder of his wife is invalid and passes no interest. Wittkowsky v. Gidney, 124 N. C. 437, 438, 441, 32 S. E. 731.

The title to a homestead can be divested from the owner only in the mode prescribed by law, to-wit, by deed, with the consent of the wife evidenced by her privy examination. Lambert v. Kinnery, 74 N. C. 348.

Right of Grantee upon Non-Jointure of Wife.—Where a husband conveys his land without having his wife join in the deed, the grantee acquires the land free from the right of the wife to a homestead, unless the same has been laid off therein to the husband, but subject to the wife's right of dower, should she survive him. Dalrymple v. Cole, 170 N. C. 102, 104, 86 S. E. 988. For other enumerated instances wherein the assent of the wife is not necessary, see note of Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437, under section 999. See also, Simmons v. McCullin, 163 N. C. 409, 79 S. E. 625.

It will be seen that the provisions of this section do not become effective, and do not begin to operate until an allotment of the homestead is made to the husband. On this point the cases appear to be entirely in accord. A full discussion containing a minute detail of the reasons therefor may be found in Dalrymple v. Cole, 170 N. C. 102, 104, 86 S. E. 988, cited supra.—Ed. Note.

Jointure of Wife Unnecessary in Conveyance of Estate in Reversion.—A married woman has no interest or estate in the reversion which takes effect after a homestead estate; therefore the assent of the wife is not necessary to give validity to a deed of the husband conveying such estate in reversion. Jenkins v. Bobbitt, 77 N. C. 385.

This holding is based on the construction placed on this section which is to the effect that the assent of the wife is necessary to a disposition of the homestead estate, and does not embrace the reversion.—Ed. Note.

Same—Unnecessary as to Residue. — The general power of alienation incident to ordinary ownership of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, this section of the Constitution applying alone to the homestead interest, and none other. Davenport v. Fleming, 154 N. C. 291, 70 S. E. 472.

Private Examination Hereunder Indispensable.—The private examination of a married woman is a mere statutory requirement and may be dispensed with or modified by the Legislature except in the cases embraced in the provisions of this section. Barrett v. Barrett, 120 N. C. 127, 131, 26 S. E. 691.

Land Acquired Prior to 1868.—The husband may convey land acquired before the Constitution of 1868 without the joinder of the wife and thereby bar the wife of dower or homestead. Cawfield v. Owens, 129 N. C. 286, 40 S. E. 62.

Cited in Corporation Commission v. Transportation Committee, 198 N. C. 317, 323, 151 S. E. 648; Boyd v. Brooks, 197 N. C. 644, 649, 150 S. E. 178.

ARTICLE XI

Punishments, Penal Institutions, and Public Charities

§ 1. Punishments; convict labor; proviso.—The following punishments only shall be known to the laws of this State, viz; death, imprisonment with or without hard labor, fines, removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under this State. The foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson: Provided, that no convict whose labor may be farmed out shall be punished for any failure of duty as a laborer, except by a responsible officer of the State; but the convicts so farmed out shall be at all times under the supervision and control, as to their government and discipline, of the penitentiary board or some officer of this State.

Editor's Note.—This section of the constitution constitutes the basis for the legislative enactments regulating the punishment of violation of the criminal law found in the specific sections in the code. It sets definite boundaries beyond which the legislature, in the exercise of the power to prescribe the punishment for the various crimes, cannot transgress. The cases placed in the notes found under the specific sections in the chapter, "Crimes and Punishments," of the code, will necessarily throw some light on this section of the constitution. This fact renders it needless to repeat, at this point, a citation of those cases, and it is only necessary to refer the counsel to the sections of the above mentioned chapter.

Working Convicts—Section Not Basis of Disciplinary Rules.—This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries. State v. Nipper, 166 N. C. 272, 274, 81 S. E. 164. But officers are civilly and criminally liable for an abuse or oppression of the adopted regulations under which the convicts are kept. State v. Young, 138 N. C. 571, 575, 50 S. E. 213.

Same—Regulations Must Be Reasonable.—Whether the prisoners are worked on the public road or kept in jail the regulations under which they must live must be reasonable. State v. Young, 138 N. C. 571, 575, 50 S. E. 213.

Stated in State v. Burnett, 179 N. C. 735, 102 S. E. 711.

§ 2. Death punishment.—The object of punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, rape, and these only, may be punishable with death, if the General Assembly shall so enact.

Cross Reference.—See editor's note to section 1 of this article. As to punishment for murder, see section 4200 and note thereto; as to punishment for arson, see section 4238 and note thereto; as to burning of buildings other than dwelling houses, see sections 4239 et seq., and notes thereto; as to punishment for burglary, see section 4233 and note thereto; as to punishment for rape, see section 4204 and note thereto.

Power of Legislature.—The punishment to be inflicted for any crime is left entirely to the general assembly, which can in its discretion affix lesser punishments, even for the four crimes, mentioned in this section, which are now visited with capital punishment. State v. Lytle, 138 N. C. 738, 744, 51 S. E. 66.

Under the discretionary power given by the constitution, the legislature has divided the crimes murder and burglary into two degrees and has affixed thereto the punishment for each enumerated offense. See specific cross references.—Ed. Note.

Applied to repeal portion of statute prescribing punishment of death for burning mill house, in State v. King, 69 N. C. 419.

§ 3. Penitentiary.—The General Assembly shall, at its first meeting, make provision for the erection and conduct of a States prison or penitentiary, at some central and accessible point within the State.

Legislative Duties.—This provision imposes upon the Legislature the duty of attending to the details as to the erection of the necessary buildings, the purchase of such property, real and personal, as may be necessary for the uses of the prison; and also to form such regulations for the government and conduct of the prison as may seem proper. The officers or placement, their salaries and the distribution of their duties are all left with the General Assembly. State Prison v. Day, 124 N. C. 362, 367, 32 S. E. 748.

As to appointment of the directors of the penitentiary and filling vacancies, see N. C. Const., Art. III, section 10.

Referred to in Railroad v. Holden, 63 N. C. 410, 436; Sedberry v. Carver, 77 N. C. 319, 320.

§ 4. Houses of correction.—The General Assembly may provide for the erection of houses of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed.

Cross Reference.—See section 7313 et seq. of the code. See also section 1365 et seq. of the code.

Definition.—A house of correction, "as the name indicates, is designed for the reformation of youthful criminals, those who have not yet become hardened in crime." Ex parte Moore, 72 Cal. 11, cited In re Watson, 157 N. C. 340, 351, 72 S. E. 1049.

§ 5. Houses of refuge.—A house or houses of refuge may be established whenever the public interest may require it, for the correction and instruction of other classes or offenders.

§ 6. The sexes to be separated.—It shall be required, by competent legislation, that the structure and superintendence of penal institutions of the State, the county jails, and city police prisons secure the health and comfort of the prisoners, and that male and female prisoners be never confined in the same room or cell.

The word "superintendence," as used in this section, was intended to impose upon the governing officials of municipal corporations the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695.

Liability of the City.—Under this section a city is liable in damages only for a failure to so construct its prison, or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things necessary, as to secure to prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the Aldermen of a city comply with the above requirements, the city is not liable in damages for sickness and suffering endured by a prisoner, and caused by the neglect of the jailer, policeman or attendants, to properly minister to his wants and necessities. Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695.

§ 7. Provision for the poor and orphans.—Beneficent provisions for the poor, the unfortunate and orphan, being one of the first duties of a civilized and Christian state, the General Assembly shall, at its first session, appoint and define the duties of a board of public charities, to whom shall be entrusted the suprevision of all charitable and penal State institutions, and who shall annually report to the Governor upon their condition, with suggestions for their improvement.

Cross Reference.—As to corporate powers of a county

generally, as exercised by the board of commissioners, see section 1297 of the code; as to limitation on county indebtedness, see section 1291 of the code; as to the corporate powers of a municipal corporation, see section 2623 of the code; as to maintenance of the county poor, see section 1335 of the code, and notes thereto; as to allowance of pensions, see section 1340 of the code.

Editor's Note.—This section of the constitution has been the source of numerous legislative enactments, some of the most important of which are referred to above. The notes placed under these sections of the code contain many cases which will throw an illuminating light on the substantive law embodied in this section of the constitution. It is believed to be more helpful and beneficial to the practioner to make reference to these specific sections of the code, and the notes placed thereunder, where the constructions of the code sections are given in connection with basic constitutional provisions, than to segregate them and leave it to the searcher to find the connecting links.

Erection of County Home—Issuing Bonds.—The building of a county home is for a class of citizens without a place of residence, and beneficient provision for whom is recommended by this section, "as one of the first duties of a civilized and Christian State;" therefore, providing for such a home being included in the idea of their support, a county may pledge its faith and credit and issue valid bonds for that purpose, as a necessary expense, without the approval of its voters. Commissioners v. Spitzer & Co., 173 N. C. 147, 91 S. E. 707.

There is no contractual duty on the part of the State to care for and maintain insane persons, the State Hospital being a charitable institution of the State, maintained voluntarily in recognition of Christian principles, as set out in this section. See § 7534(g) et seq. State v. Security Nat. Bank, 207 N. C. 697, 178 S. E. 487.

Referred to in Board v. Commissioners, 113 N. C. 379, 383, 18 S. E. 661; Board v. Commissioners, 137 N. C. 310, 315, 49 S. E. 353.

§ 8. Orphan houses.—There shall also, as soon as practicable, be measures devised by the State for the establishment of one or more orphan houses, where destitute orphans may be cared for, educated and taught some business or trade.

§ 9. Inebriates and idiots.—It shall be the duty of the Legislature, as soon as practicable, to devise means for the education of idiots and inebriates.

§ 10. Deaf-mutes, blind, and insane.—The General Assembly may provide that indigent deaf-mute, blind, and insane of the State shall be cared for at the charge of the State.

Cross Reference.—As to construction of the term "indigent," see note of In re Hybart, 119 N. C. 359, 25 S. E. 963, under section 6186 of the code. See also, Hospital v. Fountain, 128 N. C. 23, 38 S. E. 34. As to statutory provision for indigent patients in hospital for the insane, see section 6186 et seq. of the code.

Referred to in In re Boyett, 136 N. C. 415, 419, 48 S. E. 789; State v. Security Nat. Bank, 207 N. C. 697, 704, 178 S. E. 487.

§ 11. Self-supporting.—It shall be steadily kept in view by the Legislature and the board of public charities that all penal and charitable institutions should be made as nearly self-supporting as is consistent with the purposes of their creation.

ARTICLE XII

Militia

§ 1. Who are liable to militia duty.—All able-bodied male citizens of the State of North Carolina, between the ages of twenty-one and forty years, who are citizens of the United States, shall be liable to duty in the militia: Provided, that all persons who may be averse to bearing arms, from religious scruples, shall be exempt therefrom.

Stated in Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669.

§ 2. Organizing, etc.—The General Assembly shall provide for the organizing, arming, equipping, and discipline of the militia, and for paying the same, when called into active service.

Cross Reference.—For the numerous legislative enactments on the subject, see the chapter "Militia", section 6791 et seq. As to support of families of indigent militiamen, see section 1340 of the code.

By Whom Militia Paid.—The legislature may provide, if it think proper to do so, how and by whom the militia shall be paid. Worth v. Commissioners, 118 N. C. 112, 120, 24 S. E. 778. And in the absence of any special provision, they are to be paid by the state—the "power" that calls them out. Id. See section 6866 of the code and the note thereto.

Cited in Baker v. State, 200 N. C. 232, 156 S. E. 917.

§ 3. Governor Commander-in-chief.—The Governor shall be commander-in-chief and shall have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion.

Governor May Call Out Militia.—In the absence of legislation, the governor, as commander-in-chief, has the power to call out the militia, and the state guard being made a part of the militia, he has the power to call them out. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the causes mentioned in this section of the constitution. Worth v. Commissioners, 118 N. C. 112, 120, 24 S. E. 778.

Same—Not Subject to Legislative Restriction.—The legislature has no authority to restrict the power of the governor to call out the militia. Worth v. Commissioners, 118 N. C. 112, 124, 24 S. E. 778.

When Called into Service of United States.—See N. C. Const., Art. III, section 8.

§ 4. Exemptions.—The General Assembly shall have power to make such exemptions as may be deemed necessary, and to enact laws that may be expedient for the government of the militia.

ARTICLE XIII

Amendments

§ 1. Convention, how called.—No convention of the people of this State shall ever be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it shall assemble on such day as may be prescribed by the General Assembly.

See 11 N. C. Law Rev., 242, for discussion as to whether the provisions of this section apply to the calling of a convention to consider a proposed federal amendment. This question was said to perplex the legislature and served to divide the Supreme Court.

General Assembly may call convention to consider proposed amendment to the U. S. Constitution either under this section or in the exercise of its plenary powers. See "Opinions of the Justices," 204 N. C., Appendix, p. IX, par. 3.

§ 2. How the Constitution may be altered.—No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State.

Editor's Note. — Public Laws 1931, c. 104, proposed an

amendment to this section whereby the submission could be at a special election called for the purpose which was defeated.

Generally.—While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendments to be submitted to them, it is likewise necessary to the validity of the election that the Legislature enact the proposition to amend into a statute by a three-fifths vote of each branch; and the constitutional provision that they be submitted "in such manner as may be prescribed by law" includes within its intent and meaning the time at which the amendments will be effective, if approved, the Constitution being silent on this point. Reade v. Durham, 173 N. C. 668, 91 S. E. 712.

Applied in University v. McIver, 72 N. C. 76.

ARTICLE XIV

Miscellaneous

§ 1. Indictments.—All indictments which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon in the proper courts, but no punishment shall be inflicted which is forbidden by this Constitution.

Cross Reference.—See sections 4610-4625 of the code and the notes thereto. As to punishments, see N. C. Const. Art. XI, sections 1 et seq., and the references there made.

Cited in Debham v. Telephone Co., 126 N. C. 831, 835, 36 S. E. 269.

§ 2. Penalty for fighting duel.—No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of the State to fight a duel, shall hold any office in this State.

Stated in Cole v. Sanders, 174 N. C. 112, 114, 93 S. E. 476.

§ 3. Drawing money.—No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published.

Editor's Note.—This section is an exact repetition of the United States Constitution, Art. I, section 9, cl. 7.

Legislative Authority Required.—This section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. White v. Hill, 125 N. C. 194, 200, 34 S. E. 432, citing Garner v. Worth, 122 N. C. 250, 29, S. E. 364.

Section as Bar to Judicial Action.—This section effectually bars any judicial action to enforce collection of liabilities against the state, and the courts cannot direct the state treasurer to pay such claims, however just and unquestioned, when there is no legislative appropriation to pay the same. Garner v. Worth, 122 N. C. 250, 252, 29 S. E. 364.

When Mandamus Will Lie.—It is only when the legislative department has appropriated a certain fund to the payment of a liability incurred or to be incurred and the Auditor or Treasurer refuses to obey the legislative mandate that the Court can issue its mandamus to compel him to do so. Garner v. Worth, 122 N. C. 250, 253, 29 S. E. 364.

The state treasurer may refuse to pay a warrant of the auditor if it appear that the law under which it is issued is unconstitutional or the claim is not within the terms of the statute under which it is brought. Martin v. Clark, 135 N. C. 178, 180, 47 S. E. 397.

Mandamus to Enforce Payment against County.—See section 1330 of the code and the notes thereto.

§ 4. Mechanic's lien.—The General Assembly shall provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor.

Editor's Note.—Under the power given by this section of the constitution the legislature has passed numerous enactments which secure to mechanics and laborers adequate liens, and means for their enforcement. These provisions may be found in section 2433 et seq. of the code. Since the language of this constitutional section is clear and unobscure, merely giving to the general assembly a well-defined power, little judicial construction will be found, all the cases merely stating this provision of the constitution as the foundation of the code sections above referred to. Whatever seemingly ambiguous terms that may be found in the code sections which have sprung out of this section of the constitution are explained in the note to the specific section in the code.

Quoted in Roper Lumber Co. v. Lawson, 195 N. C. 840, 844, 143 S. E. 847; Boykin v. Logan, 203 N. C. 196, 165 S. E. 680.

§ 5. Governor to make appointments.—In the absence of any contrary provision, all officers of this State, whether heretofore elected or appointed by the Governor, shall hold their positions only until other appointments are made by the Governor, or, if the officers are elective, until their successors shall have been chosen and duly qualified according to the provisions of this Constitution.

Cited in Markham v. Simpson, 175 N. C. 135, 95 S. E. 106.

§ 6. Seat of government.—The seat of government in this State shall remain at the city of Raleigh.

§ 7. Holding office. — No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes.

Cross Reference.—As to what constitutes a public office and numerous illustrations thereof, see note to section 870. As to form and nature of the action to declare an office vacant, see sections 870 et seq. and the notes there placed.

Purpose.—The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in any single person—and the superadded words of "places of trust or profit" were put there to avoid evasion in giving too technical a meaning to the preceding words. Doyle v. Raleigh, 89 N. C. 133, cited and approved in Groves v. Borden, 169 N. C. 8, 84 S. E. 1042.

Effect of Acceptance of Similar Office.—Where one holding an "office or place of profit" accepts another such office or position in contravention of this section of the Constitution, the first is vacated eo instanti, and any further acts done by him in connection with the first office are without color, and cannot be de facto. Whitehead v. Pittman, 165 N. C. 89, 80 S. E. 976.

In Barnhill v Thompson, 122 N. C. 493, 29 S. E. 720, it is said: "The acceptance of a second office by holding a public office operates ipso facto to vacate the first. While the officer has a right to elect which he will retain, his election is deemed to have been made when he accepts and qualifies for the second." The acceptance of the second office is of itself a resignation of the first. Cited with approval in Whitehead v. Pittman, 165 N. C. 89, 90, 80 S. E. 976.

Where one holding an office as county commissioner accepts a commission from the Governor as a notary public his position as county commissioner is eo instanti vacated, and where he continues to exercise the duties of county commissioner he may be removed therefrom in an action in the nature of a quo warranto. Harris v. Watson, 201 N. C. 661, 161 S. E. 215.

Delegation of Duties.—A statute which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed ex officio as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, is held not to contravene this section. State v. Holmes, 207 N. C. 293, 176 S. E. 746.

Applied in McCullers v. Commissioners, 158 N. C. 75, 73 S. E. 816; Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720.

§ 8. Intermarriage of whites and negroes prohibited.—All marriages between a white person and a negro, or between a white person and a person descent to the third generation, inclusive, are hereby forever prohibited.

Editor's Note.—This section of the constitution constitutes the first clause of section 4340 of the code. Reference is therefore made to the note placed under that section.

APPENDIX II

CONSTITUTION OF THE UNITED STATES OF AMERICA

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I

§ 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. [1.] The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The first sentence of this clause (art. I, sec. 1, cl. 3) is amended by amendment XIV, § 2.

[4.] When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The house of representatives shall chuse their speaker and other officers; and shall have the sole power of impeachment.

§ 3. [1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Art. I, s. 3, cl. 1, is superseded by amendment XVII.

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4.] The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

[5.] The senate shall chuse their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

[6.] The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. [1.] The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

[2.] The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. [1.] Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

[4.] Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other pace than that in which the two houses shall be sitting.

§ 6. [1]. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

[2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. [1.] All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States. If he approve, he shall sign it; but if not, he shall return it with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. The congress shall have power [1.] To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and exercises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the indian tribes;

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the supreme court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;— and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. [1.] The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by

the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.

[4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any state.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7.] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

§ 10. [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

[3.] No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

§ 1. [1.] The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected, as follows:

[2.] Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall chuse from them by ballot the vice president.

Art. II, s. 1, cl. 3, is superseded by amendment XII.

[4.] The congress may determine the time of chusing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person except a natural born citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

[7.] The president shall, at stated times, receive for his services a compensation, which shall neither be increased or diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of

the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States."

§ 2. [1.] The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

[3.] The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

§ 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states,—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizen thereof, and foreign states, citizens or subjects.

See amendment XI, as to suits against a state by citizens of another state or citizens or subjects of a foreign state.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committted; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV

§ 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. [1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3.] No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

§ 3. [1.] New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

[2.] The congress shall have power to dis-

pose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that not state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI

[1.] All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

[3.] The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON
Presidt. and deputy from Virginia.

New Hampshire.
John Langdon and Nicholas Gilman.

Massachusetts.
Nathaniel Gorham and Rufus King.

Connecticut.
Wm. Saml. Johnson and Roger Sherman.

New York.
Alexander Hamilton.

New Jersey.
Wil: Livingston, David Brearley, Wm. Patterson and Jona: Dayton.

Pennsylvania.
B. Franklin, Robt. Morris, Thos. Fitzsimmons, James Wilson, Thomas Mifflin, Geo. Clymer, Jared Ingersoll and Gouv Morris.

Delaware.
Geo. Read, John Dickinson, Jaco: Broom, Gunning Bedford Jun, and Richard Bassett.

Maryland.
James McHenry, Danl. Carroll and Dan: of St. Thos. Jenifer.

Virginia.
John Blair—James Madison, Jr.

North Carolina.
Wm. Blount, Hu Williamson and Richd. Dobbs Spaight.

South Carolina.
Charles Pinckney, J. Rutledge, Charles Cotesworth Pinckney and Pierce Butler.

Georgia.
William Few and Abr. Baldwin.
Attest: William Jackson, Secretary.

The states ratified the Constitution in the following order:

Delaware	December 7, 1787
Pennsylvania	December 12, 1787
New Jersey	December 18, 1787
Georgia	January 2, 1788
Connecticut	January 9, 1788
Massachusetts	February 6, 1788
Maryland	April 26, 1788
South Carolina	May 23, 1788
New Hampshire	June 21, 1788
Virginia	June 26, 1788
New York	July 26, 1788
North Carolina	November 21, 1789
Rhode Island	May 29, 1790

AMENDMENTS

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

The first ten amendments were proposed by congress on September 25, 1789, and became effective on December 15, 1791.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II.

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law of or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

AMENDMENT XII.

The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

AMENDMENT XIII.

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

AMENDMENT XVII

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

AMENDMENT XVIII

§ 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

§ 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

AMENDMENT XIX

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

§ 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

§ 3. If, at the time fixed for the beginning of the term of the president, the president elect shall have died, the vice president elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the vice president elect

shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

§ 4. The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the senate may choose a vice president whenever the right of choice shall have devolved upon them.

§ 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

§ 6. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislature of three-fourths of the several States within seven years from the date of its submission.

The twentieth amendment was declared in a proclamation of the Secretary of State, dated February 6, 1933, to have been ratified by thirty-nine of the forty-eight States.

AMENDMENT XXI

§ 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The twenty-first amendment was declared in a proclamation of the Acting Secretary of State, dated December 5, 1933, to have been ratified by thirty-six of the forty-eight States.

By his proclamation of December 5, 1933, the President proclaimed that the eighteenth amendment to the Constitution was repealed on December 5, 1933.

APPENDIX III

AUTHENTICATION OF RECORDS

§ (1). Authentication of legislative acts and proof of judicial proceedings.—The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. (U. S. Rev., Stat., s. 905.)

§ (2). Proof of records not pertaining to courts.—All records and exemplifications of books, which may be kept in any public office of any state or territory or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the state, or territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory, or country aforesaid, in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken. (U. S. Rev. Stat., s. 906.)

§ (3). Copies of foreign records, etc., relating to land titles in United States.—It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to title to lands claimed by or under the United States, on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general land office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the solicitor of the treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals. (U. S. Rev. Stat., s. 907.)

APPENDIX IV

REMOVAL OF CAUSES

From the State Courts to the Districts Courts of the United States

Federal enactments constituting chapter III, sections 28-39, of the Federal Judicial Code, Act of March 3, 1911, c. 231, "An act to codify, revise and amend the laws relating to the judiciary," 36 U. S. Stat. L. 1087.

§ 28. Removal of suits from state to United States district courts.—Any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein.

At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said state court, it shall cause the same to be remanded thereto.

Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: Provided, that no case arising under an act entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States: and Provided further, that no suit brought in any state court of competent jurisdiction against a railroad company, or other corporation, or person engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of or injury to property received for transportation by such common carrier under section twenty of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.

§ 29. Procedure for removal.—Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said

district court of the United States, the parties so removing the said cause shall within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

§ 30. Suits under grants of land from different states.—If in any action commenced in a state court the title of land be concerned and the parties are citizens of the same state and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

§ 31. Removal of causes against persons denied any civil rights, etc.—When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, in any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. It shall be the duty of the clerk of the state court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit, and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said state court the cause shall proceed therein as if no petition for removal had been filed.

§ 32. When petitioner is in actual custody of state court.—When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ.

§ 33. Suits and prosecutions against revenue officers, etc. — When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer; or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either house of congress in the discharge of his official duty, in executing any order of such house, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon

the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or other process except capias, the clerk of the district court shall issue a writ of certiorari to the state court, requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceedings by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district or his deputy, or by some other person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the state court shall be void. If the defendant in the suit or prosecution be in the actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt within the cause according to law and the order of the district court, or in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the state court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitor may be rendered against him, with costs for the defendant.

§ **34. Removal of suits by aliens.**—Whenever a personal action has been or shall be brought in any state court by an alien against any citizen of a state who is, or at the time the alleged action accrued was, a civil officer of the United States, being a nonresident of that state wherein jurisdiction is obtained by the state court, by personal service or process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a state court by the provisions of the preceding section.

§ **35. When copies of records are refused by clerk of state court.** — If any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a state court, to be used in any court of the United States, if the clerk of said state court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said state court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

§ **36. Previous attachment bonds, orders, etc., remain valid.**—When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

§ **37. Suits improperly in district court may be dismissed or remanded.**—If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed hereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

§ **38. Proceedings in suits removed.** — The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the

same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal.

§ 39. Time for filing record; return of record, how enforced. — In all causes removable under this chapter, if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State Court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

APPENDIX V

NATURALIZATION LAWS

Act to Provide for Naturalization and Establishing the Bureau of Naturalization

I

AN ACT TO PROVIDE FOR A UNIFORM RULE FOR THE NATURALIZATION OF ALIENS THROUGHOUT THE UNITED STATES, AND ESTABLISHING THE BUREAU OF NATURALIZATION

Act, of June 29, 1906, 34 Stat. L. 596, as amended in sections 16, 17, and 19 by the act of congress approved March 4, 1909 (35 Stat. L., Part 1, p. 1102); in section 13 by the act of congress approved June 25, 1901 (36 State. L., Part 1, p. 830); by the act of congress approved March 4, 1913 (37 Stat. L., Part 1, p. 736), creating the department of labor; and by the act of congress approved May 9, 1918 (Public, No. 144, 65th Cong., 2d sess.)

§ 1. The bureau of naturalization. — That the bureau of naturalization, under the direction and control of secretary of labor, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the bureau of immigration to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry with the particulars thereof.

§ 2. [Omitted; authorizes the secretary of commerce and labor to provide necessary offices, etc.]

§ 3. Courts which may naturalize. — That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit and district courts now existing, or which may hereafter be established by congress in any state, United States district courts for the territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the naturalization jurisdiction of all courts herein specified—state, territorial, and federal—shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the bureau of naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said bureau.

§ 4. Method of naturalization. — That an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

Declaration of Intention

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona

fide his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

Petition for citizenship; contents; verification accompanying certificate

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time where and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly, by name, to the prince, potentate, state or sovereignty of which he at the time of filing his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or the District of Columbia, in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the department of labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Declaration on oath in open court.—Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the constitution of the United States, and that he absolutely and entirely renounces and adjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Evidence of residence, etc.—Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Renunciation of Titles, etc.

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisite, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Widows and Minor Children

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

Honorable Discharge from or Certain Service in Army or Navy; Effect

Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States navy or marine corps or the naval auxiliary service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the regular or the volunteer forces, or the national army, the national guard or naval militia of any state, territory, or the District of Columbia, or the state militia in federal service, or in the United States navy or marine corps, or in the United States coast guard, or who has served for three years on board of any vessel of the United States government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the army reserve or regular army reserve after honorable service, may, on presentation of the required declaration of intention, petition for naturalization without proof of the required five years residence within the United States if upon examnation by the representative of the bureau of naturalization, in accordance with the requirements of this subdivision, it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years residence within the United States; any alien declarant who has served in the United States army or navy, or the Philippine constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for the purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the bureau of naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the government from the bureau of naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the state, territory, of the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate or arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance may be taken in accordance with the terms of section seventeen hundred and fifty of the revised statutes of the United States after notice from and under regulations of the bureau of naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the government from the bureau of naturalization of the hearing as provided by section eleven of the act of June twenty-ninth, nineteen hundred and six. Members of the naturalization bureau and service may be designated by the secretary of labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty

they perform under section fifteen of the act of (thirty-fourth statute at large, part one, page five hundred and ninety-six), may also be performed by the commissioner or naturalization: Provided, that it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: Provided further, that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry.

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any state court shall charge or collect any fee for this service unless the laws of the state require such to be made, in which case nothing more than the portion of the fee required to be paid to the state shall be charged or collected. A full accounting for all of these transactions shall be made to the bureau of naturalization in the manner provided by section thirteen of the act of June twenty-ninth, nineteen hundred and six.

American Seaman

Eighth. That every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States, anything to the contrary in any act of congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen: Provided, that nothing contained in this act shall be taken or construed to repeal or modify any portion of the act approved March fourth, nineteen hundred and fifteen (thirty-eight statutes at large, part one, page eleven hundred and sixty-four, chapter one hundred and fifty-three), being an act to promote the welfare of American seamen.

Training for Citizenship Provided for

Ninth. That for the purpose of carrying on the work of the bureau of naturalization of sending the names of the candidates for citizenship to the public schools and otherwise promoting instruction and training in citizenship responsibilities of applicants for naturalization, as provided in this subdivision, authority is hereby given for the reimbursement of the printing and binding appropriation of the department of labor upon the records of the treasury department from the naturalization fees deposited in the treasury through the bureau of naturalization for the cost of publishing the citizenship textbook prepared and to be distributed by the bureau of naturalization to those candidates for citizenship only who are in attendance upon the public schools such reimbursement to be made upon statements by the commissioner of naturalization of books actually delivered to such student candidates for citizenship, and a monthly naturalization bulletin, and in this duty to secure the aid of and cooperate with the official state and national organizations, including those concerned with vocational education and including personal services in the District of Columbia, and to aid the local army exemption boards and cooperate with the war department in locating declarants subject to the army draft and expenses incidental thereto.

Five Years Residence and Mistaken Exercise of Citizenship before July 1, 1914

Tenth. That any person not an alien enemy, who resided uninterruptedly within the United States during the period of five years next preceding July first, nineteen hundred and fourteen, and was on that date otherwise qualified to become a citizen of the United States, except that he had not made the declaration of intention required by law, and who during or prior to that time, because of misinformation regarding his citizenship status, erroneously exercised the rights and performed the duties of a citizen of the United States in good faith, may file the petition for naturalization prescribed by law without making the preliminary declaration of intention required of other aliens and upon satisfactory proof of the court that he has so acted may be admitted as a citizen of the United States upon complying in all respects with the other requirements of the naturalization law.

Alien Enemies

Eleventh. No alien who is a native, citizen, subject, or denizen of any country, state, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States unless he made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war, or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or unless his petition for naturalization shall then be pending and is otherwise entitled to admission, notwithstanding he shall be an alien enemy at the time and in the manner prescribed by the laws passed upon that subject: Provided, that no alien embraced within this subdivision shall have his petition for naturalization called for a hearing, or heard, except after ninety days notice given by the clerk of the court to the commissioner or deputy commissioner of naturalization to be present, and the petition shall be given no final hearing except in open court and after such notice to the representative of the government from the bureau of naturalization, whose objection shall cause the petition to be continued from time to time for so long as the government may require: Provided, however, that nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, or any alien enemy at any time previous to the actual naturalization of such alien; and section twenty-one hundred and seventy-one of the revised statutes of the United States is hereby repealed: Provided further, that

the president of the United States may, in his discretion, upon investigation and report by the department of justice fully establishng the loyalty of any alien enemy not included in the foregoing exemption, except such alien enemy from the classification of alien enemy, and thereupon he shall have the privilege of applying for naturalization; and for the purposes of carrying into effect the provisions of this section, including personal services in the District of Columbia, the sum of $400,000 is hereby appropriated to be available until June thirtieth, nineteen hundred and nineteen, including travel expenses for members of the bureau of naturalization and its field service only, and the provisions of section thirty-six hundred and seventy-nine of the revised statutes shall not be applicable in any way to this appropriation.

Citizens in Military or Naval Service of Allies of United States

Twelfth. That any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any state authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul of the United States, and certified copies thereof shall be sent by such court or consul to the department of state and the bureau of naturalization, and the act (public fifty-five, sixty-fifth congress, approved October fifth, ninteen hundred and seventeen) is hereby repealed.

Persons in Military or Naval Service of United States at End of War or Honorably Discharged for Disability

Thirteenth. That any person who is serving in the military or naval forces of the United States at the termination of the existing war, and any person who before the termination of the existing war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the state, territory, or the District, of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the affidavits of two credible witnesses, citizens of the United States, indentifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral characted required by law, and he shall comply with the other requirements of the naturalization law.

§ 5. **Notice of petition by clerk.**—That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate hearing, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

§ 6. **Docketing petition; naturalization before election.**—That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: Provided, that no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith.

§ 7. **Anarchists and polygamists.**—That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

§ 8. **Must speak English.**—That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language: Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: and provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, that the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United

States and comply in all respects with the laws providing for homestead entries.

§ 9. Final hearing.—That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

§ 10. Proof of residence.—That in case the petitioner has not resided in the state, territory, or the District of Columbia for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the bureau of naturalization.

§ 11. Examinations, etc., in opposition.—That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

§ 12. Clerk to file declarations, etc., with bureau of naturalization. — That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this act to keep and file a duplicate of each declaration of intention made before him and to send to the bureau of naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization or aliens as may be required from time to time by said bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or ommission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the bureau of naturalization, and shall account for the same to the said bureau whenever required so to do by such bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned.

§ 13. Fees, etc.—That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the bureau of naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the department of labor, who shall thereupon deposit them in the treasury of the United States, rendering an account therefor quarterly to the auditor for the state and other departments, and the disbursing clerk shall be held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such purpose, and the residue, if any, shall be returned by the clerk to the petitioner. Provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in natural-

ization proceedings in excess of such amount shall be accounted for and paid over to said bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings.

And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the secretary of labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said secretary the naturalization business of such clerk warrants further additional assistance: Provided, that in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one-half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: Provided further, that when, at the close of any fiscal year, the business of such clerk of court indicates in the opinion of the secretary of labor that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars the secretary of labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of the fiscal year until such time as the remittances indicate in the opinion of said secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the secretary of labor may prescribe.

§ 14. Binding of petitions and declarations.—That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificate was issued, and the volume number and page number of the stub of such certificate.

§ 15. Suits to set aside citizenship.—That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by laws of the state or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the department of state, furnish the department of justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the bureau of naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the bureau of naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

§ 16-25. [Omitted: Declare various act to be crimes.—In part superseded by U. S. Crim. Code, Act of March 4, 1909.]

§ 26. Laws repealed.—That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three of the revised statutes of the United States of America, and section thirty-nine of chapter one thousand

and twelve of the statutes at large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed.

§ 27. Forms.—That substantially the following forms shall be used in the proceedings to which they relate:

Declaration of Intention

(Invalid for all purposes seven years after the date hereof.)

....., ss:

I, ..., aged ..... years, occupation ....., do declare on oath (affirm) that my personal description is: Color....., complexion ....., height....., weight ....., color of hair ....., ..., color of eyes ....., other visible distinctive marks .....; I was born in ....., on the ..... day of ....., anno Domini .....; I now reside at .....; I emigrated to the United States of America from ....., on the vessel .....; my last foreign residence was ..... It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ....., of which I am now a citizen (subject); I arrived at the (port) of ....., in the state (territory or the District of Columbia) of ...., on or about the ..... day of ....., anno Domini .....; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me, God.

(Original signature of declarant).....

Subscribed and sworn to (affirmed) before me this ..... day of ....., anno Domini .....

[L. S.]

....., ...,

(Official character of attestor.)

Petition for Naturalization

..... Court of .....

In the matter of the petition of .... to be admitted as a citizen of the United States of America. ....

To the ..... Court:

The petition of .... respectfully shows:

First. My full name is ....

Second. My place of residence is number .... street, city of ....., state (territory or the District of Columbia) of .....

Third. My occupation is .....

Fourth. I was born on the ..... day of ..... at .....

Fifth. I emigrated to the United States from ....., on or about the ..... day of ....., anno Domini ....., and arrived at the port of ....., in the United States, on the vessel .....

Sixth. I declared my intention to become a citizen of the United States on the ..... day of ....., at ....., in the ....court of .....

Seventh. I am ... married. My wife's name is .... She was born in ..... and now resides at ..... I have ..... children, and the name, date, and place of birth and place of residence of each of said children is as follows: ....; ....

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ....., of which at this time I am citizen (or subject,) and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since ....., anno Domini ....., and in the state (territory or the District of Columbia) of ..... for one year at least next preceding the date of this petition, to wit, since ..... day of ....., anno Domini .....

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the ..... court of ..... at ....., and the said petition was denied by the said court for the following reasons and causes, to wit, ..., and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the department of labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated. .....

(Signature of petitioner) .....

....., ..., ss:

....., ..., being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this .... day of ....., anno Domini .....

[L. S.]

....., ...,

Clerk of the ..... Court.

Affidavit of Witnesses

..... Court of .....

In the matter of the petition of ....

to be admitted a citizen of the United States of America.

...., ss:

...., occupation ....., residing at ....., and ....., occupation ....., residing at ....., each being severally, duly and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known ...., the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the state (territory or the District of Columbia) in which the above-entitled application is made for a period of ..... years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

....,
....

Subscribed and sworn to before me this .... day of ....., nineteen hundred and .....

[L. S.] ....,
(Official character of attestor.)

Certificate of Naturalization

Number .....
Petition, volume ....., page .....
Stub, volume ....., page .....
(Signature of holder) ....
Description of holder: Age, ...; height, ...; color, ...; complexion, ...; color of eyes, ...; color of hair; .....; visible distinguishing marks, ... Name, age, and place of residence of wife, ..., ..., ... Name, ages, and places of residence of minor children, ..., ..., ...; .....; ....; .....; .....; ...., ss:

Be it remembered, that at a ..... term of the ..... court of ....., held at .... on the ..... day of ....., in the year of our Lord nineteen hundred and ....., who previous to his (her) naturalization was a citizen or subject of ....., at present residing at number .... street, ... city (town), ... state (territory or the District of Columbia), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this state for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that he was entitled to be so admitted, it was thereupon ordered by the court that ..he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the ..... day of ....., in the year of our Lord nineteen hundred and ..... and of our independence the .....

[L. S.]

....,
(Official character of attestor.)

Stub of Certificate of Naturalization

No. of certificate .....
Name ....; age .....
Declaration of intention, volume ....., page .....
Petition, volume ....., page .....
Name, age, and place of residence of wife, ..., ..., ... Names, ages, and places of residence of minor children, ..., ..., ..., ..., ..., ..., ...
Date of order, volume ....., page ....

(Signature of holder) ....

§ 28. Naturalization regulations to be made by secretary of labor.—That the secretary of labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this act shall be admitted in evidence equally with the originals in any and all proceedings under this act and in all cases in which the originals thereof might be admissible as evidence.

§ 29. [Omitted: Provides temporary appropriation.]

§ 30. Naturalization of persons owning allegiance, but citizens.—That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States, with the following modifications; the applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least to years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years residence clause of the existing law.

§ 31. Date when act effective.—That this act shall take effect and be in force from and after ninety days from the date of its passage: Provided, that sections one, two, twenty-eight, and twenty-nine shall go into effect from and after the passage of this act. Approved June 29, 1906.

II

OTHER ACTS AFFECTING NATURALIZATION AND CITIZENSHIP

§ 32. Naturalization Limited To White Persons

and Those of the African Race.—§ 2169 The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African decent. (R. S. 1979, p. 380; 1 Comp. Stat. 1901, p. 1333.)

§ 33. Naturalization of Chinese Prohibited.—§ 14 That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed. (22 Stat, L., p. 71.)

§ 34. Residence within the United States Required for five years continuously.—§ 2170 No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States. (R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1333.)

§ 35. Naturalization of Alien Enemies Prohibited.—§ 2171. R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1334. This section repealed by the act of May 9, 1918 (Pub., No. 144, 65th. Cong.) (See sec. 4, subdivision 11th, supra, p. 1185.)

§ 36. Alien Seamen of Merchant Vessels.—§ 2174. R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1334. This section repealed by the act of May 9, 1918 (Pub. No. 144, 65th Cong.). (See sec. 4, subdivisions 7th and 8th, supra, pp. 1182, 1184.)

§ 37. Naturalization of Declarants Who Have Served in the Naval Reserve Force in Time of War.—Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, be, and the same is hereby, amended by adding after the proviso under the heading "naval reserve force," which reads as follows: Provided, that citizens of the insular possessions of the United States may enroll in the naval auxiliary reserve," a further proviso as follows: Provided further, that such persons who are not citizens of the United States, but who have or shall have declared their intention to become citizens of the United States, and who are citizens of countries which are at peace with the United State may enroll in the naval reserve force subject to the condition that they may be discharged from such enrollment at any time within the discretion of the secretary of the navy, and such persons who may, under existing law, become citizens of the United States, and who render honorable service in the naval reserve force in time of war for a period of not less than one year may become citizens of the United States without proof of residence on shore and without further requirement than proof of good moral character and certificate from the secretary of the navy that such honorable service was actually rendered. (Public Laws, 65th Cong., 1st sess., 1917, p. 84.)

§ 38. Honorably Discharged Soldiers Exempt From Certain Formalities.—Sec. 2166. R. S. 1878, p. 370; 1 Comp. Stat., 1901, p. 1332. This section repealed by act of May 9, 1918 (Pub. No. 144, 65th Cong.), except as to honorably discharged soldiers who served in U. S. armies prior to January 1, 1900. (See sec. 4, subdivision 7th, supra, act May 9, 1918, sec. 2, infra.)

§ 39. Aliens Honorably Discharged from Service in Navy or Marine Corp.—(See sec. 4, subdivision 7th, supra, act May 9, 1918, sec. 2, infra.)

Aliens Honorably Discharged from Service in Navy, Marine Corps, Revenue Cutter Service or Naval Auxiliary Service

(See sec. 4, subdivision 7th, supra, May 9, 1919; sec. 2, infra.)

Aliens Honorably Discharged from Military or Naval Forces of the United States after Service during the Present War

Any person of foreign birth who served in the Military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4, of the act of June 29, 1906, 34 statutes at large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American Troops are returned to the United States.

§ 40. Aliens Who Erroneously Believed Themselves Citizens Exempt from Certain Formalities.—Sec. 3. 36 Stat. L., pt. 1, p. 830. This section repealed by act of May 9, 1919 (Pub. No. 144, 65th Cong.). (See sec. 4, subdivision 10, p. 1184; act May 9, 1918, sec. 2, infra.)

§ 41. Naturalization of Wife and Minor Children of Insane Aliens Making Homestead Entries Under Land Laws of the United States.—Be it enacted by the senate and house of representatives of the United States of America in Congress Assembled, that when any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws, be naturalized without making any declaration of intention. (36 Stat. L., pt. 1, p. 929.)

§ 42. Naturalization of Deserters or Persons Who go Abroad to Avoid Draft Prohibited.—Sec. 3954. [Amending Sec. 1998, U. S. R. S.] Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section 1996 of the revised statutes: Provided, that the provisions of this section and said section 1996 [infra] shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace * * * (4 Comp. Stat. 1916, p. 4828.)

§ 43. Sec. 1996. All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost marshal within sixty days after the issuance of the proclamation by the president, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizenship thereof. (R. S. 1878, p. 350; 1 Comp. Stat. 1901, p. 1269.)

§ 44. Official Mail to Be Forwarded by Clerks of Courts to Bureau Free of Postage, and by Registered Mail Necessary. — * * * That all mail matter, of whatever class, relating to naturalization, including duplicate papers required by law or regulation to be sent to the bureau of naturalization by clerks of state or federal courts, addressed to the department of labor, or the bureau of naturalization, or to any official thereof, and indorsed "Official Business," shall be transmitted free of postage, and by registered mail if necessary, and so marked: Provided further, that if any person shall make use of indorsement to avoid payment of postage or registry fee on his or her private letter, package or other matter in the mail, the person so offending shall be guilty of a misdemeanor and subject to a fine of $300, to be prosecuted in any court of competent jurisdiction.

* * * * * * * *

(Pub. Laws, 65th Cong., 1st Sess., 1917, p. 376. Postal Laws and Regs., sec. 278, par. 3½, and sec. 498, par. 2.)

§ 45. Validating Certain Certificates of Naturalization Where Declaration were Filed Prior to September 27, 1906

Sec. 3. That all certificates of naturalization granted by courts of competent jurisdiction prior to December thirty-first, nineteen hundred and eighteen, upon petitions for naturalization filed prior to January thirty-first, nineteen hundred and eighteen, upon declaration of intention filed prior to September twenty-seventh, nineteen hundred and six, are hereby declared to be valid in so far as the declaration of intention is concerned, but shall not be by this act further validated or legalized.

§ 46. Laws Repealed by Act of May 9, 1918. —The act of May 9, 1918, Public No. 144, sixty-fifth congress, contained the following provisions:

Sec. 2. * * * That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the revised statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined: Provided, that for the purposes of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to this act the statutes and laws hereby repealed shall remain in full force and effect: Provided further, that as to all aliens who, prior to January first, nineteen hundred, served in the armies of the United States and were honorably discharged therefrom, section twenty-one hundred and sixty-six of the revised statutes of the United States shall be and remain in full force and effect, anything in this act to the contrary notwithstanding.

[And specifically repealed the following Sections 2166, 2171, 2174, United States Revised Statutes; and so much of an act approved June 26, 1894, entitled "An act making provision for the naval service for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat. L., p. 124), as relates to naturalization; and so much of an act approved June 30, 1914, entitled "An act making appropriations for the naval service for the fiscal year ending June 30, 1915, and for other purposes" (39 Stat. L., pt. 1, p. 392), as relates to naturalization; and so much of section 3 of an act approved June 25, 1910 (36 Stat. L., pt. 1, p. 830), as relates to naturalization; and public act, No. 55, sixty-fifth congress, approved October 5, 1917.]

§ 47. Citizenship of Birth.—Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. * * * *
(Constitution, Art. XIV.)

§ 48. Citizenship of Children Born Abroad of Citizens.—Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States. (R. S. 1878, p. 350; 1 Comp. Stat. 1901, p. 1268.)

§ 49. Citizenship of Women by Marriage.—Sec. 1994. Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen. (R. S. 1878, p. 350; 1 Comp. Stat. 1901, p. 1268.)

§ 50. Children of Persons Naturalized under Certain Laws to be Citizens.—Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed. (R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1334.)

§ 51. Expatriation of Citizens and Their Protection Abroad.—Be it enacted by the senate and house of representatives of the United States of America in congress assembled. That the secretary of state be authorized, in his discretion, to issue passports to person not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the government in any foreign country: Provided, that such passports shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention.

§ 52. Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the department of state may prescribe: and Provided, also, that no American citizen shall be allowed to expatriate himself when this country is at war.

§ 53. Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

§ 54. Sec. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

§ 55. Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizen by the parent: Provided, that such naturalization or resumption takes place during the minority of such child: and Provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

§ 56. Sec. 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the revised statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take oath of allegiance to the United States upon attaining their majority.

§ 57. Sec. 7. That duplicates of any evidence, registration, or other acts required by this act shall be filed with the department of state for record. (34 Stat. L., pt. 1, p. 1228.)

APPENDIX VI

EXTRADITION

Rules of Practice of the Executive Department of North Carolina in Making Requisitions

(These rules were adopted by the Interstate Extradition Conference and recommended to the states, and have been adopted by North Carolina.)

As to the uniform extradition Act, see §§ 4556(a)-4556(y).

The application for the requisition must be made by the district or prosecuting attorney for the county or district in which the offense was committed, and must be in duplicate original papers or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in Roman capital letters, for example: JOHN DOE.

(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal

proceeding shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretense, embezzlement, or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purposes, and will not directly nor indirectly use the same for any of said purposes, shall be required or a sufficient reason be given for the absence of such affidavit.

2. Proof or affidavit of facts and circumstances satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is found in the same state upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes), and that a warrant has been issued and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon application.

5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrant must be duly certified.

6. Upon the renewal of an application, for example, on the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new or certified copies of papers in conformity with the above rules must be furnished.

7. In the case of any person who has been convicted of any crime and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradiction of any fugitive except in compliance with these rules.

FORM OF REQUISITION

To His Excellency, the Governor of .....

The Annexed Papers, Duly authenticated in accordance with the law show that by ..... in the county of ..... State of North Carolina, ... stands charged with .... which is a crime against the laws of this State; and it appearing that the said .... has fled from justice and has taken refuge in the State of .....

Therefor, In pursuance of justice, and by authority of the Constitution and Laws of the United States I ..... Governor of the State of North Carolina hereby require that the said ..... be apprehended and delivered to ..... who is hereby authorized and commissioned as the agent of this State to receive said fugitive and convey him to the county of ....., in the State of North Carolina, to be dealt with according to law.

In Witness Thereof, I have hereunto set my hand and caused to be fixed the Great of State.

Done at our City of Raleigh, this ..... day of ..... in the year of our Lord one thousand nine hundred and ....., and in the one hundred and forty-..... year of our American Independence .....

[L. S.]

By the Governor: .....

FORM OF WARRANT

The Governor of North Carolina

To the Sheriff or other Officer of the State of North Carolina to whom these Presents shall come——Greeting:

Whereas, it has been represented to me by the Governor of ..... that ..... stand ..... charged with the crime of .... which he certifies to be a crime under the laws of said State, committed in the county of ..... in the said State, and has ..... taken refuge in the State of North Carolina, and the said Governor of ..... having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said ..... to be arrested and delivered to ..... who is duly authorized to receive .... into his custody and convey ..... back to the said state of .....;

And, Whereas, That said representation and demand is accompanied by ..... whereby the said ..... shown to have been duly charged with the said crime, and with having fled from the said State of ....., and taken refuge in the State of North Carolina, which ..... duly certified by the said Governor of ..... to be authentic and duly authenticated;

Therefore, You are hereby required to arrest and secure the said ..... wherever ..... may be found within the State of North Carolina, and afford ..... such opportunity to sue out a writ of Habeas Corpus as is prescribed by the laws of this State, and to thereafter deliver ..... into the custody of the said .... to be taken back to the said State, from which ..... fled, pursuant to the

said requisition; and also to return this warrant and make return to the Governor of North Carolina, within thirty days from the date hereof, of all your proceedings had thereunder, and of all the facts and circumstances relating thereto.

In witness whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State.

Done at our City of Raleigh, this .... day of ....., in the year of our Lord one thousand nine hundred and ...., and in the one hundred and .... year of our American Independence.

[L. S.]

By the Governor: .....

AGENT'S AUTHORITY

To All Men to Whom these Presents May Come ——Greeting:

Know All Men, That I, ... Governor of the State of North Carolina, by virture of authority in me vested by the Constitution and Laws of the United States, and the Constitution and Laws of North Carolina passed in pursuance thereof, do hereby authorize, commission and appoint ..... Agent of the State of North Carolina to convey .... fugitive from justice from the said State of North Carolina, to the county of ..... therein, to be dealt with according to law.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed.

Done at our City of Raleigh, this .... day of ..... in the year of our Lord one thousand nine hundred and ....., and in the one hundred and forty ..... year of our American Independence.

[L. S.]

By the Governor: .....

APPENDIX VII

RULES OF COURT

PART I

RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA

As they appear in Vols. 200 and 203 N. C. Reports with Full Annotations.

Editor's Note to Rules Generally.—The impression seems to prevail among some lawyers that the rules of practice prescribed by the Supreme Court are merely directory, and that they may be disregarded, or at least waived by the consent of parties. Nothing could be further from the truth. The Supreme Court has ample authority to make the rules. Constitution, Art. I, Sec. 8, Art. IV, Sec. 12; Code sec. 1421. The rules were passed for the protection of litigants and to hasten the administration of justice. They are mandatory and there is no power, aside from the Supreme Court itself, to change or suspend them. The legislature has no authority to interfere, and in case of conflict the rules by the court will be observed. See Cooper v. Comm'rs, 184 N. C. 615, 113 S. E. 569. Ordinarily where the appellant fails to comply with the rule the court will dismiss the appeal without discussing the merits of the case. Davis v. Wall, 142 N. C. 450, 451, 55 S. E. 350.

1. Applicants For License To Practice Law.

Applicants for license to practice law will be examined on the last Monday in January and Monday preceding the last Monday in August of each year, and at no other time. All examinations will be in writing.

Admission to practice is now regulated by section 215(10) of the code.

2. Course of Study Prescribed for Applicants for License to Practice Law.

Each applicant must have attained the age of 21 years, or will arrive at that age before the next examination, and must have studied:

Constitution of United States; Constitution of North Carolina; Creasy's English Constitution; Sheppard's Constitutional Text-book; Cooley's Principles of Constitutional Law; Blackstone's Commentaries, as contained in Vol. 1 of Ewell's Essentials of the Law; Bispham's Equity; Sharswood's Legal Ethics; Consolidated Statutes N. C. (Vol. 1). Also some approved text-book on:

Agency, Bailments, Carriers, Corporations, Contracts, Evidence, Executors, Negotiable Instruments, Partnership and Sales.

(1) Requirements of Applicants for Law License. Applicants must have studied the course prescribed for two years at least, and shall file with the clerk a certificate of good moral character signed by two members of the bar who are practicing attorneys of this court, and also a certificate of the dean of a law school or a member of the bar of this Court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency. An applicant from another State may file a certificate of good moral character signed by any State official of the State in which he resides. If the applicant has been licensed to practice law in another State, but is not entitled to be admitted in this State under Rule 3, based on the act of 1920, such applicant may file in lieu of the certificate of proficiency and time of study the law license which has been issued to him, with leave to withdraw the same after he has been examined. The foregoing certificates as to character and proficiency, and also $23.50, must be deposited with the clerk not later than Tuesday noon preceding the day of examination. The applicant in filing his certificates, which may be done personally or by mail must give the clerk the applicant's full name and permanent postoffice address. If the applicant shall fail to entitle himself to receive a license, $22 of the money deposited by him (the $20 required by the statute and $2 price of parchment) shall be returned to him, but the $1.50

registration fee required by the statute shall be retained by the clerk.

See note to section 3½a. See, also, sections 194, 196 and 215(10) of the code.

3. Nonresident Lawyers—When Admitted.

Any person duly licensed to practice law in another state may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the state from which he comes, upon said applicant furnishing to the Supreme Court a certificate from a member of the court of last resort of such state that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such state, practicing in said court of last resort, as to the applicant's good moral character, whose signatures shall be attested by the clerk of said Court, and upon said applicant satisfying the Court that he is a bona fide resident and citizen of North Carolina, or intends immediately to become such: Provided further, that said applicant shall be required to deposit with the clerk of the Supreme Court the same amount required of applicants who stand the examination.

Any such nonresident lawyer must comply with all preliminary requirements of application for license not later than noon Tuesday preceding the day of examination.

Admission by examination is now regulated by § 215(10) which makes no reference to attorneys from other states but apparently gives law examiners authority to provide for their admission.

3½. Notice of Intention to Apply for License

As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the clerk of his intention to become an applicant on or before noon of the 15th day of December next immediately preceding the January examination if he wish to apply for license at the January examination, and on or before noon of the 15th day of July next immediately preceding the August examination if he wish to apply for license at the August examination. This notice must be in the Clerk's office within the time specified, and mailing it in time to reach his office will not suffice unless actually received by him before the expiration of the time herein designated. Immediately upon receipt of such notice, the clerk shall furnish said applicant with blank forms for his certificates, as required by Rules 2 and 3. The names of those who have thus signified their intention of becoming applicants for license to practice law shall be open to inspection in the clerk's office during the thirty-day period prior to the examination. This notice to the clerk is not in lieu of, but in addition to, the requirements relating to certificates of proficiency and good moral character.

3½(a). Protests—When and How Made

Protest against the issuance of license in any case may be filed with the clerk on or before Saturday noon preceding the day of examination; and the applicant, so protested, shall be notified of such action immediately upon receipt of same, but the protest shall not be made public by the clerk unless and until said applicant shall have successfully passed the examination or met every other requirement necessary to the issuance of license. Any protested applicant may withdraw his application for license to practice law in this State at any time prior to tendering his paper for examination or his credentials for approval under the Comity Act, and, in which event, the protest will not be heard. But upon the tender of a satisfactory examination paper or satisfactory credentials under the Comity Act, in the face of a protest, the matter then passes beyond the control of such applicant, and the Court will set a day for the hearing of said protest, first giving the protested applicant an opportunity to answer the charges preferred against him by issuing notices to all interested parties of the hearing.

"Upright Character."—See section 194 of the Code, and notes thereto.

Same—Reformation of Twelve Months.—Where protest has been made in the Supreme Court to granting applicant a license to practice law, and the protestant has shown that the applicant has been convicted in the near past of violating the criminal law of the State, which is not denied, evidence offered by him tending to show that he has since for a period of twelve months lived a proper life is insufficient to show that his character has been restored or that he is now entitled to his license. In re Dillingham, 188 N. C. 162, 124 S. E. 130. See, also, note in 2 N. C. Law. Rev. 233.

Same—Burden of Proof.—When the application is resisted the burden is upon the applicant to show that he is of upright character. In re applications for license, 191 N. C. 235, 131 S. E. 661. But when the applicant has complied with the preliminaries of the statute and the rules of Court relating thereto, the burden is upon the protestants to show the moral unfitness of applicant. In re Dillingham, 188 N. C. 162, 124 S. E. 130.

Withdrawal Denied.—Where an applicant has complied with the preliminary requirements as to his ability and moral character, and pending his examination a protest has been filed as to his moral fitness, the matter of granting him a license becomes one of general interest, and he may not then voluntarily withdraw his application. In re Dillingham, 188 N. C. 162, 124 S. E. 130.

3½(b). Reapplication for License Not to Be Made in Two Years Following Denial for Want of Upright Character

When an applicant has been denied license to practice law in this State on the ground of want of upright or good moral character as required by the statute, said applicant shall not be permitted to apply again for such license until two years have elapsed following the date of application which has been denied.

4. Appeals—How Docketed

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

5. Appeals—When Heard

The transcript of the record on appeal from a judgment rendered before the commencement of

a term of this Court must be docketed at such term fourteen days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed fourteen days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: Provided, however, that an appeal in a civil case from the First, Second, Nineteenth and Twentieth districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said term, the appeal will stand regularly for argument.

Cross References.—As to the dismissal of appeals when not docketed within the time required by this section, see rule 17 and notes thereto. As to certiorari as a substitute for appeal, see rule 34 and notes thereto. As to appeals generally, see section 629 et seq. of the code. As to the requisites of the transcript, see section 645 of the code and notes thereto. As to docketing appeals generally, see 1 Enc. Dig. 509 et seq.; 13 Enc. Dig. 98 et seq.

In General.—The rules in regard to the time in which appeals should be docketed have been construed often, and the decisions may be summarized as follows: (1) Appeals in causes tried before the commencement of a term of the supreme court must be docketed at such term, before the completion of the call of causes from the district to which they belong. (2) If not docketed before the call of causes from that district is concluded, the appellee may docket a certificate under Rule 17, and have the appeal dismissed. (3) If the appellant does not do this, and the appeal is docketed at such term of the supreme court which begins next after the trial below, but after the perusal of the district to which it belongs, the appellee can not then move to dismiss. But the appellee's negligence extends no further, and, if the appeal is docketed at a term of the supreme court after the one which it is required to be filed, the appeal will be dismissed on motion. (4) Appeals taken from judgments rendered below during the progress of a term of the supreme court are not necessarily to be docketed at such term, but are in time if docketed at the first term of the supreme court beginning next after the trial below. If, by reason of observance of the statutory time allowed for settling the case on appeal, it is docketed here before the perusal of the district to which it belongs, at the term of the court which was in progress when the trial below was had, it stands for trial. (5) Appeals in criminal cases, and civil cases submitted upon printed arguments under Rule 10, are heard at the first term, though docketed after the perusal of the district to which they belong. (6) If, by neglect of the judge, clerk, or cause other than neglect of the appellant, the "case on appeal" can not be docketed at the term at which it is required to be filed, it is the duty of the appellant to docket the rest of the transcript and move for a certiorari, or he will lose his appeal. Porter v. Western, etc., R. Co., 106 N. C. 478, 11 S. E. 515. See Howard v. Speight, 180 N. C. 653, 104 S. E. 35.

Rules Mandatory.—The rule of Court requiring the docketing of the appeal within a certain time, etc., is mandatory. State v. National Surety Co., 192 N. C. 52, 133 S. E. 172; State v. Farmer, 188 N. C. 243, 124 S. E. 562; Pruitt v. Wood, 199 N. C. 788, 156 S. E. 126.

The rules of the Supreme Court regulating appeals are mandatory. Womble v. Moncure Mill, etc., Co., 194 N. C. 577, 140 S. E. 230; Pentuff v. Park, 195 N. C. 609, 143 S. E. 139. And must be equally observed, or the case will be dismissed. Covington v. Hanes Hosiery Mills Co., 195 N. C. 478, 142 S. E. 705.

The rules may not be disregarded by the Legislature, the judge of a Superior Court, or by litigants or counsel. The Supreme Court has found it necessary to enforce them uniformly. Pentuff v. Park, 195 N. C. 609, 611, 143 S. E. 139.

And Dismissal Results Where Agreement of Parties Prohibits Compliance Therewith.—Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of this rule of the procedure, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. Pruitt v. Wood, 199 N. C. 788, 156 S. E. 126.

Rules 5 and 7 may not be varied, either in criminal or civil cases, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the Court for a certiorari. State v. Trull, 169 N. C. 363, 85 S. E. 133.

Legislature Cannot Change Rule.—The power of the Legislature to permit an extension of the time for settling on the case on appeal, does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof, within a prescribed time, or the issuance by the court of a certiorari, in its discretion. State v. Butner, 185 N. C. 731, 117 S. E. 163.

Same—Cannot Be Changed by Parties or Trial Judge.—The rules of the Supreme Court regulating the time of docketing appeals are uniformly enforced by the court, without authority to the judges or parties to the action to change them by agreement or otherwise. Stone v. Ledbetter, 191 N. C. 777, 133 S. E. 162; Finch v. Commissioners, 190 N. C. 154, 129 S. E. 195; Rose v. Rocky Mount, 184 N. C. 609, 113 S. E. 506.

Trial Term Adjourns After Beginning on Supreme Court Term.—Where the trial term begins before, but is not adjourned until after, the first day of the term of the Supreme Court, appellant need not docket his appeal until the ensuing term of the Supreme Court; the rule that judgments date as of the first day of the term at which they are rendered having no application to appeals, as to which the rule is that judgments date as of the last day of the term. Davison v. West Oxford Land Co., 120 N. C. 259, 26 S. E. 782.

But where the case is tried below since the beginning of a term of the Supreme Court, and the appeal is filed in proper time at such term it stands regularly for argument. Clegg v. Southern R. Co., 132 N. C. 292, 43 S. E. 836, rehearing denied in Clegg v. Sou. R. Co., 133 N. C. 303, 45 S. E. 657; Avery v. Pritchard, 106 N. C. 344, 11 S. E. 281.

No Requirement That Term End Ten Days before Supreme Court Term.—There is no requirement, as a prerequisite for perfecting appeals, that the term at which the judgment was rendered should end ten days before the commencement of the term of this Court. The head-note in Gregory v. Hobbs, 92 N. C. 39, which so indicates, is misleading. Avery v. Pritchard, 106 N. C. 344, 11 S. E. 281.

When Two Districts Called Same Week.—Where cases from two districts are docketed the same week, transcripts from both districts are required to be filed fourteen days before entering upon the call of the docket. Carroll v. Victory Mfg. Co., 180 N. C. 660, 104 S. E. 528.

Case Dismissed for Failure to Docket.—An appeal will be dismissed when the appellant has not docketed it fourteen days before the call of the district, at the first term of the Supreme Court beginning after the trail, and has failed to apply for a certiorari on good cause shown. State v. Brown, 183 N. C. 789, 111 S. E. 780; Mimms v. Seaboard Air Line R. Co., 183 N. C. 436, 111 S. E. 778; State v. Ward, 180 N. C. 693, 104 S. E. 531.

It will be dismissed on motion, notwithstanding the appellee did not docket the certificate and dismiss the appeal, as he might have done under Rule 17. Hinton v. Pritchard, 108 N. C. 412, 12 S. E. 838; Corbett Buggy Co. v. McLamb, 182 N. C. 762, 108 S. E. 344; Stone v. Ledbetter, 191 N. C. 777, 133 S. E. 162.

Cannot Be Docketed Next Term.—When an appeal is not docketed in accordance with this Rule it is too late to do so at a subsequent term of the Court. Hewitt v. Beck, 152 N. C. 757, 67 S. E. 586.

May Be Dismissed During Term.—Where the appellant failed to have his appeal docketed at the proper term, it may be dismissed at the call of the district to which it belonged, or at any time thereafter during that term. McNeil v. Virginia-Carolina R. Co., 173 N. C. 729, 92 S. E. 484.

Agreements of Counsel.—The requirement of this section will be enforced uniformly regardless of any agreement to the contrary that the attorneys for the parties may have made in any particular case. State v. Farmer, 188 N. C. 243, 124 S. E. 562. Formerly the rule was contra. Morrison v. Craven, 120 N. C. 327, 26 S. E. 940.

Neglect of Attorney.—In one case where a farmer employed an attorney to attend to an appeal in the Supreme Court but the attorney failed to have the record printed, and the appeal was dismissed, it was held a case of execusable negligence on the client's part, and that the appeal should be reinstated. Wiley v. Logan, 94 N. C. 564.

But later cases hold the negligence of counsel sending up, docketing, and printing the transcript is that of the client. Truelove v. Norris, 152 N. C. 755, 67 S. E. 487; Howard v. Speight, 180 N. C. 653, 104 S. E. 35. See, also, Carroll v. Victory Mfg. Co., 180 N. C. 660, 104 S. E. 528; Kear v. Drake, 182 N. C. 764, 108 S. E. 393.

Failure to Docket.—The motion for a certiorari in the Supreme Court by appellant who has failed to docket his case in time under the requirements of this section may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches. State v. Taylor, 194 N. C. 738, 140 S. E. 728.

Failure to Docket Entire Record.—Though the court, without appellant's fault, fails to settle the case, appellant must within the time allowed by this section docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as to why the entire record can not be docketed; otherwise the appeal will be dismissed. Caudle v. Morris, 158 N. C. 594, 74 S. E. 98.

When Appellant Files Original Papers.—Where the appellant failed to file a transcript of the record, but attempted to file the original papers from the trial court, his motion for reinstatement after dismissal of appeal will be denied for laches. Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Transcript Mailed in Time.—Where the transcript of a record is deposited in the postoffice in ample time to reach the Supreme Court within the time required by this section, but by some delay in the mails does not reach its destination until after the time has expired the excuse is reasonable, and the appeal will not be dismissed. Walker v. Scott, 104 N. C. 481, 10 S. E. 523.

Fees Must Be Paid before Transcript Docketed.—The clerk of the Supreme Court is not required to docket a transcript of an appeal before appellant has paid him the required fee therefor. Dunn v. Clerk's Office, 176 N. C. 50, 96 S. E. 738. But see West v. Reynolds, 94 N. C. 333. See § 1257 of the code and notes thereto.

Same—Failure to Pay Costs.—Where a transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, as he is bound to do, the appellee may move to docket and dismiss the appeal. Bailey v. Brown, 105 N. C. 127, 10 S. E. 1054.

Negotiations for Compromise of Action.—The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal. British, etc., Mortg. Co. v. Long, 116 N. C. 77, 20 S. E. 964.

Delay of Clerk.—Failure to docket the transcript on appeal within the time required by this rule can not be excused by delay of the clerk, in which case appellant should docket the title of the case with affidavit as to the cause of delay. Carroll v. Victory Mfg. Co., 180 N. C. 660, 104 S. E. 528.

It is no sufficient excuse for the appellant's failure to docket his appeal under this Rule that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript. Hewitt v. Beck, 152 N. C. 757, 67 S. E. 586.

The mere fact that appellant tendered payment to the Superior Court Clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment is no sufficient legal excuse for the failure to docket under this Rule. Truelove v. Norris, 152 N. C. 755, 67 S. E. 487.

Case Not Settled.—It is no excuse for failure to docket the appeal that the case on appeal was not settled by the judge until too late to docket the case at the proper term it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript. Kerr v. Drake, 182 N. C. 764, 108 S. E. 393; State v. Telfair, 139 N. C. 555, 51 S. E. 911; Pittman v. Kimberly, 92 N. C. 562.

When Prisoner Has Fled State.—Upon the failure of appellant to docket his appeal from the conviction of a capital felony, within the time prescribed, it will be docketed and dismissed unless a motion is made for a certiorari at the next succeeding term, and sufficient cause shown for the failure to docket in time; and the fact that he had fled the state and remained absent until arrested and brought back entitles him to no special favor. State v. Dalton, 185 N. C. 606, 115 S. E. 881; State v. Devane, 166 N. C. 281, 81 S. E. 293.

Docketing Removes Case from Litigants Control.—When the case on appeal has been agreed upon by the parties and at the request of either party the clerk of the superior court has sent it up to the clerk of the Supreme Court and there docketed promptly, and in time for argument of the call of the district under the rule of court, though otherwise the case would not then have stood for argument, it being thus docketed takes it from the control of the parties litigant, and the hearing will accordingly be regularly heard as placed. Carswell v. Talley, 192 N. C. 37, 133 S. E. 181.

Abandonment.—The part of this rule allowing the convicted defendant to abandon his appeal in a criminal action in the court below, commented upon. State v. Taylor, 194 N. C. 738, 140 S. E. 728.

Trial Court May Adjudge Appeal Abandoned.—When the appellant does not docket his transcript on appeal in the Supreme Court, the trial judge may adjudge the appeal abandoned and proceed as if no appeal had been taken. Cline v. Bryson City Mfg. Co., 116 N. C. 837, 21 S. E. 791. When, however, it is doubtful whether an appeal lies, it is best that the court below should await the action of the Supreme Court. Dunn v. Marks, 141 N. C. 232, 234, 53 S. E. 845; Avery v. Pritchard, 93 N. C. 266.

Where appellant has failed to docket the record on appeal and no writ of certiorari has been allowed in the Supreme Court, the court below may adjudge, upon proper notice, upon proof of such facts, that the appeal has been abandoned. Pruitt v. Wood, 199 N. C. 788, 156 S. E. 126.

Renewing of Withdrawn Appeal.—A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statutes and rules for perfecting appeals. State v. Chastain, 104 N. C. 900, 10 S. E. 519.

Case Is Dismissed If Moot Question Presented.—Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed. Rousseau v. Bullis, 201 N. C. 12, 158 S. E. 553.

Applied in Vivian v. Mitchell, 144 N. C. 472, 57 S. E. 167; Cozart v. Assurance Co., 142 N. C. 522, 523, 55 S. E. 411; Barber v. Justice, 138 N. C. 20, 21, 50 S. E. 445; Parker v. Southern Ry. Co., 121 N. C. 501, 28 S. E. 347; Officers v. Bland, 90 N. C. 6.

6. Appeals—Criminal Actions

Appeals in criminal cases, docketed fourteen days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Eleventh District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

As to appeals in criminal actions generally, see section 4647 et seq. of the code, and notes thereto.

Editor's Note.—The rules for the docketing of criminal appeals are the same, and will be enforced as rigidly, as in civil appeals. See State v. O'Kelly, 88 N. C. 609. And see notes to the preceding section.

Case Dismissed If Appeal Abandoned.—When the defendant in a criminal action appeals to the Supreme Court, but, pending appeal, breaks jail and flees the jurisdiction of the court, this is an abandonment of the appeal; and, upon motion of the Attorney-General, the appeal will be dismissed, or case continued, or judgment affirmed, in the discretion of the Court. State v. Keebler, 145 N. C. 560, 59 S. E. 872, following State v. Jacobs, 107 N. C. 772, 11 S. E. 962, 22 Am. St. Rep. 912.

(1) Appeal Bond.—If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by sec. 647 of the Code, the appeal will be dismissed.

Cross Reference.—As to the appeal bond, see section 646 et seq. of the code. See, also, 1 Enc. Dig. 489 et seq. As to costs on appeal generally, see section 1256 of the code.

(2) Pauper Appeals.—See Rule 22 and notes thereto.

(3) When Appeal Abates.—See Rule 37.

(4) Appeal Dismissed if Transcript Not

Printed or Mimeographed.—See Rule 24 and notes thereto.

7. Call of Judicial Districts

Appeals from the several districts will be called for hearing in the following order:

From the First and Twentieth Districts, the first week of the term.

From the Second and Nineteenth Districts, the second week of the term.

From the Third and Eighteenth Districts, the fourth week of the term.

From the Fourth and Seventeenth Districts, the fifth week of the term.

From the Fifth and Sixteenth Districts, the seventh week of the term.

From the Sixth and Fifteenth Districts, the eighth week of the term.

From the Seventh District, the tenth week of the term.

From the Fourteenth District, the eleventh week of the term.

From the Eighth and Thirteenth Districts, the thirteenth week of the term.

From the Ninth and Twelfth Districts, the fourteenth week of the term.

From the Tenth and Eleventh Districts, the sixteenth week of the term.

In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on Tuesday of the week to which the district is allotted, and those from the district last named will not be called before Wednesday of said week, but appeals from the district last named must nevertheless be docketed not later than 14 days preceding the call for the week.

See rule 9.

Applied in State v. Edwards, 205 N. C. 443, 171 S. E. 608.

8. End of Docket

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Eleventh District, and each cause, in its order, tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

As to the terms of the Supreme Court, see section 1408 of the code.

9. Call of Docket

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

As to the docket generally, see 1 Enc. Dig. 667 et seq.

Counsel Must Attend All Week.—The Supreme Court has no daily calendar, and counsel must attend during the week for which the case is set under our rules. Lunsford v. Alexander, 162 N. C. 528, 78 S. E. 275.

10. Submission on Printed Arguments

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Ninth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(Note—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

Necessity of Brief.—A case can not be submittted in Supreme Court without oral argument unless a printed argument or brief for each party is filed. Mills v. Guaranty Co., 136 N. C. 255, 48 S. E. 652.

11. Briefs Not Received After Argument

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

Opposition to Continuance.—The party filing a printed brief is to be taken as asking a decision at such term, and as opposing a continuance, and a motion by the opposite party to continue the case till next term will not be granted unless expressly assented to or for good cause shown. Dibbrell v. Georgia Home Ins. Co., 109 N. C. 314, 13 S. E. 739.

13. When Case May Be Heard Out of Order

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a pub-

lic office, or at the instance of a party arrested in civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

Title to Public Office.—Where an action involving title to public office is begun after the term of the Supreme Court, and on appeal has come to such term of the Supreme Court after the call of the district to which the cause belongs, the court can, under this rule, set the same down for argument, though it was not entitled to be heard as of right. Caldwell v. Wilson, 121 N. C. 423, 28 S. E. 363.

Enjoining Issue of County Bonds.—An injunction suit to restrain a county from issuing bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money. Black v. Commissioners, 129 N. C. 121, 39 S. E. 818.

14. When Cases May Be Heard Together

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. Appeal Dismissed if Not Prosecuted

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

Cross References.—As to when appeals will be dismissed, see note to section 645 of the code, analysis line IV. B; as to judgment on appeal generally, see section 658 of the code and notes thereto.

Dismissal of Appeal.—Failure to prosecute an appeal for two terms, is sufficient ground for dismissal, unless, for sufficient cause shown, the case shall be continued. The motion to reinstate, upon notice, may be heard not later than the next term. Wiseman v. Commissioners, 104 N. C. 330, 10 S. E. 481; Brantley v. Jordan, 92 N. C. 291. See, also, Briggs v. Jernis, 98 N. C. 454, 4 S. E. 631.

Sickness of Attorney.—Where an appeal after being on the docket for two terms was dismissed, when reached in its order at the third term, for want of prosecution, it will not be reinstated on appellant's affidavit that his attorney was sick, it not appearing that the appellant made any inquiry of his attorney regarding the appeal or sought to get other counsel to prosecute it. Martin v. Chambers, 116 N. C. 673, 21 S. E. 402.

When Cause Remanded.—An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the Rules of Court, but the record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea of "not guilty," the cause will be remanded to the Superior Court for trial according to law. State v. Straughn, 197 N. C. 691, 150 S. E. 330.

16. Motion to Dismiss Appeal—When Made

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

See notes to the succeeding section.

Although the statement of case on appeal is subject to the plea of "nul tiel record," the Supreme Court will examine it, and upon the absence of reversible error appearing therein or on the face of the record proper, the judgment will be affirmed and the appeal dismissed. State v. Goldston, 201 N. C. 89, 158 S. E. 926.

17. Appeal Dismissed for Failure to Docket in Time

If the appellant in a civil action shall fail to bring up and file a transcript of the record fourteen days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause: Provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

Cross Reference.—See rule 5 and notes thereto as to the time within which the record must be docketed. As to certiorari as a substitute for appeal, see rule 34 and notes thereto; as to the motion for dismissal generally, see 1 Enc. Dig. 651 et seq.; 13 Enc. Dig. 112 et seq.

Right of Appellee.—When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee, upon filing the certificate required by this section, is entitled, upon motion, to have the appeal docketed and dismissed. Rose v. Shaw, 105 N. C. 126, 10 S. E. 1055.

It is not discretionary with the Supreme Court to refuse to dismiss an appeal where appellant has failed to docket the case within the time required by rule 5, but such refusal can only be based on sufficient legal excuse for the delay. Carroll v. Victory Mfg. Co., 180 N. C. 660, 104 S. E. 528; Hewitt v. Beck, 152 N. C. 757, 67 S. E. 586.

An appeal from the conviction of a capital felony, will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the rules of Court regulating such matters, after an examination of the record for errors appearing on its face. State v. Taylor, 194 N. C. 738, 140 S. E. 728; S. v. Thomas, 195 N. C. 458, 142 S. E. 474; State v. Clyburn, 195 N. C. 618, 143 S. E. 129; State v. Newsome, 196 N. C. 16, 144 S. E. 300; State v. Sentell, 208 N. C. 140, 179 S. E. 456.

Appellee Must Obey Rules.—A motion to dismiss an appeal, upon the ground that the appellant did not cause the same to be docketed in accordance with rule 5 will not be granted, where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the rule must himself observe it. Barbee v. Green, 91 N. C. 158.

When Motion May Be Made.—A motion to docket and dismiss an appeal may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term. In re Burwell's Will, 123 N. C. 125, 31 S. E. 382.

A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of court to which the appeal is returnable, and before the case is docketed. Stan-

dard Mirror Co. v. Philadelphia Casualty Co., 157 N. C. 28, 72 S. E. 826.

Same—Need Not Be at First Opportunity.—A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed. Worth v. Wilmington, 131 N. C. 532, 42 S. E. 964.

Appellant Not Entitled to Notice.—An appellee entitled to move for the dismissal of an appeal because of appellants' failure to file transcript of record within the required time, is not required to give appellants notice of such motion. Kerr v. Drake, 182 N. C. 764, 108 S. E. 393; Johnston v. Whitehead, 109 N. C. 207, 13 S. E. 731.

Laches of Appellant.—Where the appellant was guilty of laches for putting off his application for the transcript of record until just before the time when it should have been sent up for hearing, and he was further in laches that when the clerk delayed in making out the transcript, he did not take steps to have it made out himself and certified by the clerk, the motion to dismiss under this rule will be granted. Johnson v. Covington, 178 N. C. 658, 100 S. E. 881.

Case Docketed before Motion to Dismiss.—Though an appeal is not docketed fourteen days before the call of the district to which it belongs, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss. McLean v. McDonald, 175 N. C. 418, 95 S. E. 769; Gupton v. Sledge, 161 N. C. 213, 76 S. E. 527; Standard Mirror Co. v. Philadelphia Casualty Co., 157 N. C. 28, 72 S. E. 826. See, also, Laney v. Mackey, 144 N. C. 630, 57 S. E. 386; Benedict v. Jones, 131 N. C. 473, 42 S. E. 909.

Same—Applies to First District.—The rule that though an appeal is not docketed fourteen days before the call of the district to which it belongs, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss, applies to the first as well as the other districts, as the appellee can file his motion to dismiss with the clerk whether the court is in session or not. Craddock v. Barnes, 140 N. C. 427, 53 S. E. 239.

Failure to Make Motion No Waiver.—This rule applies only to that term of the Supreme Court next ensuing the trial; and where the appellant has docketed his case after that term the case will, on motion, be dismissed at the following term of the Supreme Court, and the failure of the appellee to have previously moved to dismiss is not a waiver of his right. Howard v. Speight, 180 N. C. 653, 104 S. E. 35.

Necessity of Clerk's Certificate.—A motion to dismiss an appeal for appellant's failure to file the transcript fourteen days before entering on the call of the docket as required by rule 5, where not accompanied by the certificate of the clerk of court as required by this rule is defective. Mitchell v. Melton, 178 N. C. 87, 100 S. E. 124.

Certificate Need Not Be Duplicated.—Where the appellant has filed a certificate of the clerk below that the case has been tried there, giving the names of the parties, and unsuccessfully applied for a certiorari in the Supreme Court, it is not necessary to appellee's motion to dismiss, that he should duplicate the certificate. Lindsay v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Duty of Clerk Where Judgment Stayed But Appeal Not Docketed.—Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed by Rule 5, the clerk of the Superior Court wherein the case is tried should certify the facts to the Attorney-General of the State, to the end that he may move to docket and dismiss the appeal under this rule. State v. Watson, 208 N. C. 70, 71, 179 S. E. 455.

Clerk Cannot Refuse to Sign Certificate.—Where the transcript of appeal was not docketed in the time required, and the appellee prepared the certificate required by this rule, for motion to dismiss, and forwarded it to the clerk of the trial court, with a request that he sign the same, the clerk had no right to decline to sign and return the certificate because plaintiff's counsel had two weeks previously paid him $20 on account for the making out of a transcript and requested that he prepare the same. Johnson v. Covington, 178 N. C. 658, 100 S. E. 881.

Case on Appeal Unnecessary.—A motion to docket and dismiss an appeal will be allowed, where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal. Fowle & Son v. Mitchell, 149 N. C. 581, 62 S. E. 311.

Time of Stating Excuse.—Where a motion to docket and dismiss an appeal is made by appellee, for appellant's failure to docket the case, excuses for failure to docket should be then made. British, etc., Mortg. Co. v. Long, 116 N. C. 77, 20 S. E. 964; McNeil v. Virginia-Carolina R. Co., 173 N. C. 729, 92 S. E. 484.

Agreement of Parties.—Where the parties have entered into a written agreement or an oral agreement not denied, that the appellee will not move to dismiss under this section the court will uphold the agreement and a motion to dismiss will be denied. See McNeil v. Virginia-Carolina R. Co., 173 N. C. 729, 92 S. E. 484 and cases there cited.

When Appellant Has Abandoned Appeal.—When it appeared from the record on file in the Supreme Court, that the appellant had abandoned his appeal below, no motion to dismiss was necessary, and it will therefore be disallowed. Standard Mirror Co v. Philadelphia Casualty Co., 157 N. C. 28, 72 S. E. 826.

Requisites of Motion to Reinstate.—A motion to reinstate an appeal dismissed for failure to docket the record at the first term of this Court after the trial below, is fatally defective where it does not show that the delay was without laches on the part of the appellant. Pipkin v. Green, 112 N. C. 355, 17 S. E. 534.

Where an appeal has been dismissed under this rule, the appellant, applying for a reinstatement upon the ground that the trial judge has failed to settle the case, must show that he has had his record proper docketed in this court, as required by the rules, or his motion will be denied. Caudle v. Morris, 158 N. C. 594, 74 S. E. 98.

Same—Motion Based on Same Grounds as Dismissed.—A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed. McDowell v. Kent, 153 N. C. 555, 69 S. E. 626.

Same—Based on Absence of Counsel.—Where an appeal has been dismissed for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial Judge, on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. Parker v. Southern Ry. Co., 121 N. C. 501, 28 S. E. 347.

Applied in Barbee v. Green, 91 N. C. 158; Avery v. Pritchard, 106 N. C. 344, 11 S. E. 281; Porter v. Western, etc., R. Co., 106 N. C. 478, 11 S. E. 515; Rollins v. Love, 97 N. C. 210, 2 S. E. 166; Bailey v. Brown, 105 N. C. 127, 10 S. E. 1054; Hinton v. Pritchard, 108 N. C. 412, 12 S. E. 838; Graham v. Edwards, 114 N. C. 228, 19 S. E. 150; Truelove v. Norris, 152 N. C. 755, 67 S. E. 487; Rosemond v. McPherson, 156 N. C. 593, 72 S. E. 570; Jordan v. Simmons, 175 N. C. 537, 95 S. E. 919.

(1) Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.—The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

Cross References.—As to what appeals the supreme court will consider see notes to section 638 of the code, analyze line II. C. See, also, 1 Enc. Dig. 411 et seq.; 13 Enc. Dig. 84 et seq.

Frivolous Appeal Dismissed.—While ordinarily an appeal lies to the Supreme from the Superior Court as a matter of right, it is required that it must be bona fide for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion. Ludwick v. Unwarra Min. Co., 171 N. C. 60, 87 S. E. 949; Blount v. Jones, 175 N. C. 708, 95 S. E. 541; Headman v. Commissioners, 177 N. C. 261, 98 S. E. 776; Ross v. Robinson, 185 N. C. 548, 118 S. E. 4.

Instant Relief for Appellee.—Where the appellee has moved to dismiss the appeal, showing that appellant's defense was frivolous and only for advantages to be gained by delay to the appellee's loss, and that the appellant had lost the right to have the case settled on appeal for the Supreme Court, and his answer to the motion is also frivolous, the supreme court will affirm the judgment in appellee's favor rendered in the trial court, and order the judgment to be certified down instanter to afford the appellee relief from the appellant's abuse of the court's process and procedure. Slewyn Hotel Co. v. Griffin, 182 N. C. 539, 109 S. E. 371.

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for

that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

Cross References.—As to costs on appeal generally, see code sections 1256 et seq., see, also, code sections 646 et seq.

19. Transcripts

(1) What to Contain and How Arranged.—In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	Page
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action ..	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other process and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: Provided, that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: Provided further, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

As to the contents of the case on appeal, see code secs. 643 and 644 and notes thereto. See, also, 1 Enc. Dig. 521 et seq.; 13 Enc. Dig. 100 et seq.

Editor's Note.—The transcript is necessary to give the supreme court jurisdiction of a case, see notes to code sec. 645, analysis line I.

Pleadings, Issues and Judgment a Part of Record.—The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the Court, consequently not being informed as to the nature of the action is dismissed. Waters v. Waters, 199 N. C. 667, 155 S. E. 564.

Where the pleadings and the referee's report have been omitted from the record, the appeal must be dismissed as not conforming to subsec. (1) of this rule. Payne v. Brown, 205 N. C. 785, 786, 172 S. E. 348.

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. State v. Ravensford Lbr. Co., 207 N. C. 47, 175 S. E. 713.

Dismissal of Appeal.—The case on appeal to the Supreme Court will be dimissed when the transcript does not conform to the rules of Court regulating appeals. Bridgers v. Griffin, 195 N. C. 862, 142 S. E. 221.

Under Rule 19, section 1, the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. Schwarberg v. Howard, 197 N. C. 126, 147 S. E. 741; Plott Co. v Ferguson Const. Co., 198 N. C. 782, 153 S. E. 396.

Where on appeal the record contains only a synopsis of the complaint the appeal will be dismissed. Plott Co. v. Ferguson Const. Co., 198 N. C. 782, 153 S. E. 396.

Purpose of Rule.—It is the duty of the courts to prevent the imposition by either party of unnecessary costs upon the other. It is for the reason that this rule designates what matter is unnecessary to be sent up, and prescribes that the evidence on appeal shall be set out in narrative form. Waldo v. Wilson, 177 N. C. 461, 463, 100 S. E. 182.

Failure to Index.—Appeals will be dismissed where no index is sent up in the record and printed and no marginal references prepared. Kearnes v. Gray, 173 N. C. 717, 92 S. E. 149; Sigman v. Sou. Railroad Co., 135 N. C. 181, 47 S. E. 420. See, also, Pretzfelder v. Merchants Ins. Co., 123 N. C. 164, 31 S. E. 470; Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121.

Proceedings Not Set Forth in Regular Order.—Where the transcript does not set forth the proceedings in the order of time which they occur, and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion. Hobbs v. Cashwell, 158 N. C. 597, 74 S. E. 23.

Transcript of Indictment Must Appear in Record.—Where an appeal is taken to the refusal of the trial court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the Superior Court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a certiorari to give him opportunity to move in the court below. State v. McDraughon, 168 N. C. 131, 83 S. E. 181.

Copy of Judgment Omitted.—Where on appeal no printed copy of the judgment accompanies the record, the appeal will be dismissed under this Rule. Wiley v. Bessemer City Mining Co., 117 N. C. 489, 23 S. E. 448.

Case Decided on False Record.—Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record. State v. Marsh, 134 N. C. 184, 47 S. E. 6.

Motion to Reinstate.—A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of the court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error in accordance with the manner specified, will be denied, when the granting of the motion would not cure the defects. Redding v. Dunn, 185 N. C. 311, 117 S. E. 26.

(2) Two Appeals. When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

Editor's Note.—Formerly when two or more appeals were taken in the same action a separate transcript was required for each appeal. This rule has only been recently changed. For cases decided under the former rule, see Pope v. Lumber Co., 162 N. C. 208, 78 S. E. 65; Candle v. Morris, 158 N. C. 594, 74 S. E. 98; Mills v. Guaranty Co., 136 N. C. 255, 48 S. E. 652

Marginal References.—There must be printed on the margin, or as subheads, of each transcript of record a brief statement of the subject-matter contained therein, and such marginal references or subheads embrace also the duty of numbering the exceptions. Brinkley v. Smith, 130 N. C. 224, 41 S. E. 106.

(3) Exceptions Grouped. All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made,

to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

See notes to rule 21. As to exceptions generally see sections 570 and 590 of the code and notes thereto.

Rule Strictly Adhered to.—The requirement that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. Owens v. Hines, 178 N. C. 325, 100 S. E. 617. Pegram v. Hester, 152 N. C. 765, 68 S. E. 8; Sigman v. Sou. R. Co., 135 N. C. 181, 47 S. E. 420.

Not Sufficient to Show Exceptions in Record.—This rule is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed. Jones v. Atlantic, etc., R. Co., 153 N. C. 419, 69 S. E. 427.

When Only Correctness of Judgment Questioned.—When the appeal calls in question only the correctness of the judgment no summary of exceptions is required, because it is error on the face of the record. Ullery v. Guthrie, 148 N. C. 417, 62 S. E. 552. Wilson v. Beaufort County Lumber Co., 131 N. C. 163, 42 S. E. 565.

When Error Plainly Apparent.—Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied if the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

When Only One Exception Taken.—An appeal will not be dismissed for noncompliance with this rule, requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where the appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly. Wall v. Holloman, 156 N. C. 275, 72 S. E. 369.

Transcript Filed Too Late for Hearing.—Where transcript was filed too late for hearing at term on appeal, a motion to dismiss, on the ground that assignments of error were not grouped and numbered as required by the rule, could not be entertained until the following term. McLean v. McDonald, 175 N. C. 418, 95 S. E. 769.

Appeal Dismissed for Failure to Follow Rule.—Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the Superior Court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of discovery through the record, Rule 19, § 3, and otherwise the appeal will be dismissed on the appellee's motion. Cecil v. Snow Lumber Company, 197 N. C. 81, 147 S. E. 735.

Assignments of error which only group the exceptions, as, "Group 1 includes the first assignment," etc., give no indication of the error complained of, and are far from being a compliance with the rule, and will be dismissed under this rule. Merritt v. Dick, 169 N. C. 244, 85 S. E. 2; see, also, Smith v. Globe Home Furn. Mfg. Co., 151 N. C. 260, 65 S. E. 1009; McDonald v. Kent, 153 N. C. 555, 69 S. E. 626.

(4) Evidence to Be Stated in Narrative Form. The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant is the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

See code sections 643 and 644 and notes thereto.

Stenographer's Notes Insufficient.—When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare a concise statement of the case as required by this section, and his appeal will be dismissed, when upon examination no error is found in the record proper. Skipper v. Kingsdale Lumber Co., 158 N. C. 322, 74 S. E. 342; Bucken v. South, etc., R. Co., 157 N. C. 443, 73 S. E. 137.

Cannot Be Waived.—The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by the parties. Bank v. Fries, 162 N. C. 516, 77 S. E. 678; Bucken v. Sou., etc., R. Co., 157 N. C. 443, 73 S. E. 137.

Same—Appeal in Forma Pauperis.—That the action is in forma pauperis, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. Skipper v. Kingsdale Lumber Co., 158 N. C. 322, 74 S. E. 342.

Effect of Failure to Comply.—Where the appellant has failed to make a concise statement of the evidence according to the Rules of Practice, but gives the entire evidence in the form of questions to and answers of witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. Casey v. East Carolina Ry., 198 N. C. 432, 152 S. E. 38.

(5) Unnecessary Portions of Transcript — How Taxed. The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

See note to rule 26.

(6) Transcripts in Pauper Appeals. See Rule 22.

(7) Maps. Seven copies of every map or diagram which is a part of the trancript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

Filing Copies of Plat.—Where a plat is referred to in the pleadings and evidence, and is necessary to the understanding of an appeal, the same number of copies of the plat must be filed as is required of the printed record and briefs, or the judgment below will be affirmed or appeal dismissed. Stephens v. McDonald, 132 N. C. 135, 43 S. E. 592.

This is also true of an exhibit made part of the case on appeal. Fleming v. McPhail, 121 N. C. 183, 28 S. E. 258; Hicks v. Royal, 122 N. C. 405, 29 S. E. 413.

But where the map or plat is irrelevant its exclusion will not be held error. Fulwood v. Fulwood, 161 N. C. 601, 77 S. E. 763.

(8) Appeal Bond. See Rule 6 (1).

Cross References.—See rule 6(1). As to the appeal bond generally, see code sections 646 et seq. See, also, code secs. 1256 et seq.

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) Insufficient Transcription. If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

20. Pleadings

(1) When Deemed Frivolous. Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

(2) When Containing More Than One Cause Of Action. Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

(3) When Scandalous. Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

(4) Amendments. The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

Cross References.—As to amendments to pleading generally, see code section 548 et seq. As to the power of the Supreme Court to order amendment see section 1414 of the code and notes thereto.

The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the questions will not be decided. Plott Co. v. Ferguson Const. Co., 198 N. C. 782, 153 S. E. 396.

Impertinent Matter Is Stricken. — Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Court, to be stricken out at the expense of the party introducing it. Powell v. Cobb, 56 N. C. 1.

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue. Id.

21. Exceptions. (See also, Rule 19 (3).)

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes but not all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

I. Exceptions.
II. Corroborative and Contradictory Evidence.

I. EXCEPTIONS.

Cross References.—See rule 19 (3). As to exceptions generally see code sections 570 and 590 et seq., and notes thereto. See, also, notes to code section 643, analysis line III.

Assignment of Error Must Be Clearly Stated.—Assignments of error must be clearly and intelligently stated so that the Court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. Myrose v. Swain, 172 N. C. 223, 90 S. E. 118.

Duty to Prepare Assignment of Error.—The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and, if there is an assignment of error not supported by an exception, it will be disregarded. Worley v. Laurel River Logging Co., 157 N. C. 490, 73 S. E. 107; McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4; Allred v. Kirkman, 160 N. C 392, 76 S. E. 244.

Appeal Dismissed for Failure to Follow Rule.—The court will dismiss the appellant's case when he fails to assign error as required by this rule. In re Bailey, 180 N. C. 30, 103 S. E. 896; Thresher Co. v. Thomas, 170 N. C. 680, 87 S. E. 327; Hobbs v. Cashwell, 158 N. C. 597, 74 S. E. 23.

The appellee's motion to dismiss the appeal because, (1) the exceptions are not "briefly and clearly stated and numbered," (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal, (3) the index is not placed at the front of the record, will be allowed. Davis v. Wall, 142 N. C. 450, 451, 55 S. E. 350. See, also, Jones v. Atlantic, etc., R. Co., 153 N. C. 419, 69 S. E. 427.

Rule Cannot Be Waived.—The rule requiring the assignment of error in the record on appeal is for the benefit of the court, and counsel cannot waive it; Parrott v. Hardesty, 169 N. C. 667, 86 S. E. 582; Southern Spruce Co. v. Hunnicutt, 166 N. C. 202, 81 S. E. 1079.

General Exception.—Where the plaintiff filed a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings, adverse to it and appeals," is too general to be considered. Commissioners v. Erwin, 140 N. C. 193, 52 S. E. 785.

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail. Buie v. Kennedy, 164 N. C. 290, 80 S. E. 445.

Reference by Number Insufficient.—This rule must be complied with to have the appeal considered by the court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. Porter v. American Cigar Box Lumber Co., 164 N. C. 396, 80 S. E. 443.

A statement purporting to be assignments of error appearing in the record just after the statement of case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on the trial, such exceptions themselves not being sufficiently stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed. Thompson v. Seaboard Air Line R. Co., 147 N. C. 412, 61 S. E. 286.

Reference to Page.—Where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page———of the record;" and the giving of proper page will not cure its insufficiency. Rogers v. Jones, 172 N. C. 156, 90 S. E. 117.

Exceptions to Evidence.—The assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occurring at the trial, the ruling itself

or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves. Thompson v. Seaboard Air Line R. Co., 147 N. C. 412, 61 S. E. 286; Carter v. Reaves, 167 N. C. 131, 83 S. E. 248.

Exceptions to Unanswered Questions.—Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency. Hamlet Ice Co. v. Jones Constr. Co., 194 N. C. 407, 139 S. E. 771; Wallace v. Barlow, 165 N. C. 676, 81 S. E. 924.

Exception to Issues Submitted.—Where a cause was tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of court regulating appeals. McNairy v. Norfolk etc., R. Co., 172 N. C. 505, 90 S. E. 497.

Exception to Directed Verdict.—It is not required that an exception to the direction of a verdict by the court upon the evidence should conform to the particulars of Rules 19, 21 and 28, for it is analogous to instances of nonsuit, which require that the court examine into the pertinent evidence in the record. Wynn v. Grant, 166 N. C. 39, 81 S. E. 949.

Questions Discussed in Brief Only.—A question discussed in the brief but not presented by any exception or assignment of error can not be considered. Coon v. Southern R. Co., 171 N. C. 759, 88 S. E. 510; Needham v. Southern R. Co., 171 N. C. 765, 88 S. E. 511.

When Complaint Does Not State Cause of Action.—A defendant, without filing exception on appeal from an adverse judgment, may move to dismiss the action on the ground that the complaint does not state a cause of action. Lloyd v. North Carolina R. Co., 151 N. C. 536, 66 S. E. 604.

This is not time of an objection for misjoinder of cause of action. Wright v. Kinney, 123 N. C. 618, 31 S. E. 874.

Applied in Chamblee v. Baker, 95 N. C. 98; Davenport v. Leary, 95 N. C. 203; Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521; Greensboro v. McAdoo, 110 N. C. 430, 14 S. E. 974; Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178; Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121; Lucas v. Carolina Cent. R. Co., 121 N. C. 506, 28 S. E. 265; Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253; McDowell v. Kent, 153 N. C. 555, 69 S. E. 626.

II. CORROBORATIVE AND CONTRADICTORY EVIDENCES.

Effect of Rule.—This rule relieves the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested. Westfeldt v. Adams, 135 N. C. 591, 47 S. E. 816.

Exception Not Considered.—A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. Perry v. Branning Mfg. Co., 176 N. C. 68, 97 S. E. 162; Whitehurst v. Padgett, 157 N. C. 424, 73 S. E. 240; Singleton v. Roebuck, 178 N. C. 201, 100 S. E. 313.

When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. Chrisco v. Yow, 153 N. C. 434, 69 S. E. 422; Cooper v. Seaboard Air Line R. Co., 163 N. C. 150, 79 S. E. 418.

Where several witnesses testified to certain facts which the trial judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all of the testimony of that class. Liles v. Lumber Co., 142 N. C. 39, 54 S. E. 795.

Evidence Competent for Some Purpose.—When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. Tise v. Thomasville, 151 N. C. 281, 65 S. E. 1007.

When evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. Hill v. Bean, 150 N. C. 436, 64 S. E. 212.

Objection That Instruction Insufficient.—Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. Plemmons v. Murphey, 176 N. C. 671, 97 S. E. 648.

Error in Restricting Evidence Harmless.—In view of this rule, a charge which informed the jury that the testimony was to be considered solely in impeachment of a witness, even if error, was harmless. Medlin v. County Board, 167 N. C. 239, 83 S. E. 483.

Unsupported Statements of Appellant.—A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. State v. Freeze, 170 N. C. 710, 86 S. E. 1000.

Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. State v. Jones, 182 N. C. 781, 108 S. E. 376.

22. Printing Transcripts. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file seven typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies if he so elects, seven typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided statement of such cost is given the clerk of this Court before the case is decided. The arrangment of the matter in the printed transcript shall follow the order prescribed by Rule 19.

See notes to rule 24. As to appeals in forma pauperis generally, see code, § 649 and notes thereto.

See also § 4651 of the Code and the note thereto.

Pauper Appeals—Rule Mandatory.—The rule of practice in the Supreme Court requiring appellant in appeals in forma pauperis to file seven typewritten copies of his brief and of the transcript, in addition to the original transcript, is mandatory, and a compliance with its provisions is necessary to entitle the appellant to have his appeal decided on its merits. Wachovia Bank, etc., Co. v. Miller, 191 N. C. 787, 133 S. E. 97.

Upon appeal to the Supreme Court in forma pauperis, the appellant is required to file seven typewritten copies of his brief upon penalty of having his case dismissed, and printed briefs must be filed by the appellee for him to be heard on the oral argument. Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887.

Same—Dismissal for Failure to Follow Rule.—An appeal of the Supreme Court will be dismissed if the appellant fails to comply with the rule, requiring the appellant, in pauper appeals, when docketing the appeal, to file seven typewritten copies of the record, including case on appeal and briefs; and that the brief of the appellant be prefaced by a clear and concise statement, showing the nature of the case and the facts bearing upon the assignments of error; and this is required whether the appellant may have received notice of the

rule from the Supreme Court clerk or not. Estes v. Rash, 170 N. C. 341, 87 S. E. 109.

Same—Dismissal for Failure to Follow Rule.—The omission in an affidavit to appeal in forma pauperis of the averment that it was made "in good faith" is of a matter of jurisdiction; and the appeal must be dismissed on motion, as a matter of right, and is not one of discretion. State v. Smith, 152 N. C. 842, 67 S. E. 965.

23. How Printed

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash depost, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

As to the form of the transcript generally, see 1 Enc. Dig. 564 et seq.

Purpose of Rule.—This rule is for the purpose of preserving them in bound volumes of uniform size, for the use of the court, and must be complied with. Howard v. Western Union Teleg. Co., 170 N. C. 495, 87 S. E. 313.

Appeal Dismissed if Deposit Not Made.—If the record has not been printed, and appellant has failed to make the deposit in the clerk's office required to cover the cost of printing the same, on motion duly made, under the rule of this court, the appeal will be dismissed for failure to print the record as required by the rule, the laches in the case being imputable to the party appealing and not to his attorney. State v. Charles, 161 N. C. 286, 76 S. E. 715.

24. Appeal Dismissed if Transcript Not Printed

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

Necessity of Printed Record.—The requirement as to printing the parts of the record which are essential to be considered on appeal is a necessity, demonstrated by the experience of the court, and hence is not a purely arbitrary matter, to be dispensed with at will. It was not adopted without full consideration, and its nonobservance will not be excused without a good cause. Barnes v. Crawford, 119 N. C. 127, 25 S. E. 791.

Appeal Dismissed When Record Not Printed.—If the record has not been printed, and appellant has failed to make the deposit in the clerk's office required to cover the cost of printing the same, on motion duly made, under the rule of this court, the appeal will be dismissed for failure to print the record. State v. Charles, 161 N. C. 286, 76 S. E. 715; Stroud v. Western Union Tel. Co., 133 N. C. 253, 45 S. E. 592.

Same—Judgment for Costs Final.—A judgment in the Supreme Court dismissing an appeal for the failure of appellant to print the record and taxing him with cost, is final, without authority in the lower court to permit him to recover them. Midgett v. Vann, 158 N. C. 128, 73 S. E. 801.

Appellant Not in Default.—Denial of a motion to dismiss because the appeal was not docketed and printed ready for argument within the time prescribed is proper only where appellant is not in default. Board v. Chapman, 151 N. C. 327, 66 S. E. 221.

Negligence of Counsel No Excuse.—The printing of a record on appeal requires no legal skill and, hence, the negligence of counsel is no excuse for the failure to print and where an appeal has been dismissed for such failure a motion to reinstate will not be allowed. Dunn v. Underwood, 116 N. C. 525, 20 S. E. 965; Griffin v. Nelson, 106 N. C. 235, 11 S. E. 414; Neal v. Old North State Land Co., 112 N. C. 841, 17 S. E. 538. For an earlier case holding contra, see Wiley v. Logan, 94 N. C. 564.

Delay of Appellant No Excuse.—If a party will delay sending up his transcript to the last minute, he should either send it up with the requisite parts of the record printed, or arrange to have it promptly done here. It is no excuse for an appellant that he delays docketing his appeal till the time left between the docketing and calling the case for argument is perhaps a very brief one in which to print the record. Stainback v. Harris, 119 N. C. 107, 25 S. E. 858; Truelove v. Norris, 152 N. C. 755, 67 S. E. 487.

Ignorance of Requirement as to Printed Record.—Where, in the absence of appellant's counsel, an appeal was dismissed because of appellant's failure to have the record printed, a motion to reinstate, because the appellant did not know that a printed record was required in an appeal like this from an order in the case, will be denied, where it appears that appellant has been otherwise guilty of laches in the prosecution of his appeal. Stephens v. Koonce, 106 N. C. 255, 11 S. E. 282.

Request That Clerk Print Record.—A mere request by appellant of the clerk of the court to have the record printed, and the bill sent appellant, without further attention by appellant, though he receives no bill, will not justify a reinstatement of his appeal, dismissed for lack of printed record. Carter v. Long, 116 N. C. 44, 46, 20 S. E. 1013.

Lack of Money as Excuse for Failure to Print.—One not appealing in forma pauperis must comply, notwithstanding his inability to raise the money necessary for the printing of the record, with the rule of court requiring such printing. Rencher v. Anderson, 93 N. C. 105. And a motion to reinstate the case will be denied. Turner v. Tate, 112 N. C. 457, 17 S. E. 72.

Time within Which Record Must Be Printed.—The rule requiring a printed record is satisfied if the record has been printed when the cause is called for argument. Smith v. Montague, 121 N. C. 92, 28 S. E. 137; Armour Packing Co. v. Williams, 122 N. C. 406, 29 S. E. 366.

Misunderstanding as to Time of Printing.—Where there was an honest misunderstanding between counsel in regard to making up the case on appeal, and the case had not been made up when the case was heard in the appellate court, the record having been docketed without a case, and counsel for appellant supposed that there was no necessity of printing the record until the case came up, and the appellee moved to dismiss, which was allowed, it was proper to reinstate the appeal. Rencher v. Anderson, 94 N. C. 661.

When Cause Docketed too Late for Hearing.—Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to print the record must be denied. Gupton v. Sledge, 161 N. C. 213, 76 S. E. 527; Bumgarner v. Thornton Light, etc., Co., (N. C.) 76 S. E. 528.

Printing Index.—When any part of the record on appeal is printed, the indexes and marginal references should also be printed. Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121; Pretzfelder v. Merchants Ins. Co., 123 N. C. 164, 31 S. E. 470; Lucas v. Carolina Central R. Co., 121 N. C. 506, 28 S. E. 265.

Attorney Absent When Appeal Dismissed.—Where, in the absence of appellant's counsel, an appeal was dismissed because of appellant's failure to have the record printed as therein required, the cause will not be reinstated. Avery v. Pritchard, 106 N. C. 344, 11 S. E. 281.

Failure to Transmit Sufficient Copies.—An appeal which has been dismissed for appellant's failure to print the copies of the record will be reinstated on affidavits of appellant and others that he caused the requisite number of copies to be printed, but, owing to a misunderstanding of the instructions given him by his counsel and the clerk of the superior court, to whom he applied for information, he sent only one printed copy to the Supreme Court. Smith v. Summerfield, 107 N. C. 580, 12 S. E. 465.

When Motion to Reinstate Made.—A motion to reinstate an appeal dismissed for failure to print must be made at the same term, and will only then be allowed for good cause shown. Pipkin v. Green, 112 N. C. 355, 17 S. E. 534.

Applied in Witt v. Long, 93 N. C. 388; Horton v. Green, 104 N. C. 400, 10 S. E. 470; Whitehurst v. Pettipher, 105 N. C. 39, 10 S. E. 857; Hunt v. Richmond, etc., Ry. Co., 107 N. C. 447, 12 S. E. 378; In re Berry, 107 N. C. 326, 12 S. E. 125; Rodman v. Archbell, 108 N. C. 413, 13 S. E. 111; Hinton v. Pritchard, 108 N. C. 412, 12 S. E. 838; Edwards v. Henderson, 109 N. C. 83, 13 S. E. 779; Dunn v. Underwood, 116 N. C. 525, 20 S. E. 965; Wiley v. Bessemer City Min. Co., 117 N. C. 489, 23 S. E. 448; Thurber v. Eastern Bldg., etc., Ass'n, 118 N. C. 129, 24 S. E. 730; Walters v. Starnes, 118 N. C. 842, 24 S. E. 713; Barnes v. Crawford, 119 N. C. 127, 25 S. E. 791; Hicks v. Royal, 122 N. C. 405, 29 S. E. 413; Bradshaw v. Stansberry, 164 N. C. 356, 79 S. E. 302.

25. Mimeographed Records and Briefs

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.10 per page of an average of 40 lines and 400 words to the page: Provided, however, that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, to carefully read the proof, and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

26. Cost of Printing and Mimeographing Transcripts and Briefs to Be Recovered

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

As to costs on appeal, see section 1256 of the code.

Evidence Not Sent up in Narrative Form.—Upon objection duly entered to the sending up on appeal of the stenographer's notes with questions and answers, instead of in a narrative form, the unnecessary additional pages thus made will be taxed against the party at whose instance it is done. Overman v. Lanier, 157 N. C. 544, 73 S. E. 192; Brazille v. Carolina Barytes Co., 157 N. C. 454, 73 S. E. 215.

Same—When Settlement of Case Delayed.—Stenographer's notes of the trial should be sent up on appeal only as to matters involved in the inquiry; but when settlement of the case was delayed so long that the trial judge could not separate the material parts, a motion that costs of such should not be taxed against appellee will not be granted. Asheville, etc., Co. v. Machin, 150 N. C. 738, 64 S. E. 887.

Charge Uselessly Included.—Where a party insists that the entire charge of the trial judge should be sent up on appeal as a part of the record, and this has been uselessly done over the objection of the opposing party, being unnecessary to the proper presentation of the matters of law involved, the motion of the latter, upon notice, to retax the cost for the full amount of the printed record, will be sustained. Roanoke R., etc., Co. v. Privette, 179 N. C. 1, 101 S. E. 489. See, also, Waldo v. Wilson, 177 N. C. 461, 100 S. E. 182; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

Excess over Limitation Not Taxed against Losing Party.—Costs of brief exceeding twenty pages will not be taxed against the unsuccessful party, under the rule of the Supreme Court. Brown v. Harding, 172 N. C. 835, 90 S. E. 3.

When Excess Taxed against Losing Party.—The successful party on appeal will not be allowed to recover costs for printing record in excess of the amount prescribed by this Rule, except in extraordinary cases where the necessity for such printing is made to appear. Roberts v. Lewald, 108 N. C. 405, 12 S. E. 1028; Durham v. Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040; 13 S. E. 1.

Where the defendant is the successful party on appeal, and on his motion to retax costs in the Supreme Court it appears that there was no unnecessary or superfluous matter in the transcript, and that the whole thereof was pertinent and necessary to a proper statement of the facts upon which the assignments of error was based, and the allowance specifically made in this rule was not sufficient to pay for the cost of printing, which is not denied by the other party, it presents a proper instance for the court to specially order that the full cost of printing the transcript be taxed against the plaintiff and the surety on his prosecution bond. Hardy v. Phoenix Mutual Life Ins. Co., 167 N. C. 569, 83 S. E. 801.

Where the record was in excess of that required to properly present the appeal, the appellee at whose instance it was done was taxed with the cost of mimeographing it for the excess over the sixty pages allowed by this rule. Page Trust Co. v. Pumpelly, 194 N. C. 580, 140 S. E. 212.

When Subject Matter of Appeal Destroyed.—Where the subject-matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. Taylor v. Vann, 127 N. C. 243, 37 S. E. 263.

27. Briefs

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authority may be cited if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the marshal to be placed by him with the papers in the case, but counsel will not be permitted to con-

sume time on the argument in the citation of additional authorities.

Cross Reference.—See notes to Rule 28. As to briefs generally, see 1 Enc. Dig. 640 et seq.; 13 Enc. Dig. 110 et seq.

Brief Not in Accordance with Rules.—An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court. Bradshaw v. Stansberry, 164 N. C. 356, 79 S. E. 302.

When No Brief Filed.—Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the records proper no error appears. Board v. Dickson & Co., 190 N. C. 330, 129 S. E. 726; Rowe v. Campbell, (N. C.) 76 S. E. 474.

27½. Statement of the Question Involved

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

Statement of Case.—A fair and succinct statement of the case should be made at the beginning of the brief, so that the Supreme Court may understand the issues and more expeditiously hear the argument and decide the case. Balfour Quarry Co. v. West Constr. Co., 151 N. C. 345, 66 S. E. 217.

Applied in Kugler Lbr. Co. v. Latham, 199 N. C. 820, 156 S. E. 128. See also, Pruitt v. Wood, 199 N. C. 788, 156 S. E. 126.

Cited in Acme Mfg Co. v. Kornegay, 195 N. C. 373, 142 S. E. 224.

28. Appellant's Brief

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the second Sautrday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

Pass Briefs Insufficient.—Briefs which merely state with reference to the exceptions taken of record, "Exceptions No. 1. This question and answer are incompetent," etc., afford no assistance to the court. They are merely pass briefs, and do not conform to the rules. Jones v. Southern R. Co., 164 N. C. 392, 80 S. E. 408.

Failure to File in Time.—Where appellant failed to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss will be granted. Rosemond v. McPherson, 156 N. C. 593, 72 S. E. 570; In re Bailey, 180 N. C. 30, 103 S. E. 896.

Where an appellant knew that his brief must be prepared, printed, and filed by noon of a certain day, and he took no steps to this end, a motion to dismiss the appeal under rule 17 will be granted. Truelove v. Norris, 152 N. C. 755, 67 S. E. 487.

Same—Delay in Docketing Transcript.—Although the transcript was not docketed till the Saturday preceding the Tuesday on which the brief should have been filed, yet, it not being clear that a brief could not be printed in one or two days, and appellant not having moved during the week preceding the call for longer time in which to print the brief, and not having had it printed at the time of the call, when the appeal was dismissed, his subsequent motion to reinstate will not be granted. Calvert v. Carstarphen, 133 N. C. 25, 45 S. E. 353.

When Cause Docketed Too Late for Hearing.—Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to file printed briefs must be denied. Gupton v. Sledge, 161 N. C. 213, 76 S. E. 527; Bumgarner v. Thornton Light, etc., Co. (N. C.) 76 S. E. 528; McLean v. McDonald, 175 N. C. 418, 95 S. E. 769.

When Appellant Must Discuss Appellees' Exceptions.—On an appeal from an order of a trial judge setting aside a verdict of the jury in favor of the plaintiff because of error committed against the defendant, the brief of appellant must refer to exceptions taken by defendant. Powers v. Wilmington, 177 N. C. 361, 99 S. E. 102.

Exceptions Not Discussed Deemed Abandoned.—It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the court, for otherwise they are taken as abandoned. In re Fuller, 189 N. C. 509, 127 S. E. 549; State v. Barnhill, 186 N. C. 446, 119 S. E. 894; Austin v. Crisp, 186 N. C. 616, 120 S. E. 199.

Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with this rule. Ingle v. Southern Ry. Co., 167 N. C. 636, 83 S. E. 744.

Exceptions not set up in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. Gray v. Cartwright, 174 N. C. 49, 93 S. E. 432.

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within this rule, and they will not be considered; the requirements being that there must be some reason or argument in their support set out in the brief. Watkins v. Lawson, 166 N. C. 216, 81 S. E. 623.

Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. Ludford v. Combs, 195 N. C. 851, 141 S. E. 541; Hyatt v. McCoy, 194 N. C. 760, 762, 140 S. E. 807; Andrews Music Store v. Boone, 197 N. C. 174, 175, 148 S. E. 39; Grant v. Tallassee Power Company, 196 N. C. 617, 146 S. E. 531.

Same—Question Discussed in Oral Argument.—A question discussed on oral argument, but not embraced in the assignments of error referred to in the brief, will not be considered. Mitchem v. Mitchem, 169 N. C. 48, 85 S. E. 146.

Where briefs do not contain the exceptions and assignments of error, properly numbered, with references to the printed record, they do not conform to the rules. It is impossible to determine just what exceptions or assignments

of error are referred to. State v. Newton, 207 N. C. 323, 177 S. E. 184.

Failure to Furnish Appellee with Copy of Brief.—The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the appellant to furnish him a copy of his briefs when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. Turnage v. Dunn, 196 N. C. 105, 144 S. E. 521.

Applied in Merrimon v. Lyman, 124 N. C. 434, 32 S. E. 732; Smith v. Atlantic, etc., R. Co., 142 N. C. 21, 54 S. E. 786; Liles v. Lumber Co., 142 N. C. 39, 54 S E. 795; Johnson, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683; Rushing v. Seaboard, etc., R. Co., 149 N. C. 158, 62 S. E. 890; White v. Lane, 153 N. C. 14, 68 S. E. 895; Edwards v. Price, 162 N. C. 243, 78 S. E. 145; State v. Smith, 164 N. C. 475, 79 S. E. 979; In re Parker, 165 N. C. 130, 80 S. E. 1057; Lloyd v. Southern R. Co., 166 N. C. 24, 81 S. E. 1003; Lynch v. Rosemary Mfg. Co., 167 N. C. 98, 83 S. E. 6; Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744; Winborne Guano Co. v. Plymouth Mercantile Co., 168 N. C 223, 84 S. E. 272; Starnes v. Raleigh, etc., R. Co., 170 N. C. 222, 87 S. E. 43; Estes v. Rash, 170 N. C. 341, 87 S. E. 109; Campbell v. Sigmon, 170 N. C. 348, 87 S. E. 116; Lovelace v. Atlantic, etc., R. Co., 172 N. C. 12, 89 S. E. 797; State v. Bryson, 173 N. C. 803, 92 S. E. 698; Gray v. Cartwright, 174 N. C. 49, 93 S. E. 432; Borden v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 442; State v. Coble, 177 N. C. 588, 99 S. E. 339; Allen v. Reidsville, 178 N. C. 513, 101 S. E. 267; Hill v. Aman, 181 N. C. 483, 106 S. E. 214; Baker v. Winslow, 184 N. C. 1, 113 S. E. 570; Harrison v. Norfolk Southern R. Co., 184 N. C. 86, 113 S. E. 678; Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628; Bunn v. Dunn, 185 N. C. 108, 116 S. E. 172; Avery County Bank v. Smith, 186 N. C. 635, 120 S. E. 215; In re Westfeldt's Will, 188 N. C. 702, 125 S. E. 531.

29. Appellee's Brief

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Saturday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

Appellee's Brief Dismissal When Not Filed in Time.—Upon motion of appellant aptly made at the call of the district to which the case belongs, the appellee's brief will be dismissed if not filed on the preceding Saturday by noon, and disposed of without argument by appellee, unless for good cause shown, the time should be extended. Phillips v. Junior Order U. A. M., 175 N. C. 133, 95 S. E. 91.

Contents of Appellee's Brief.—All material exceptions not abandoned by appellants should be considered with care, and appellee's counsel should call court's attention to such portions of the record as tend to sustain the validity of the trial. Marshall v. Interstate Tel. etc., Co., 181 N. C. 410, 107 S. E. 498.

30. Arguments

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. Reargruments

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

Court May Order Reargument.—It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been—especially where the record is voluminous and assignments of error indefinite—the court will require it to be reargued. Lenoir v. Valley River Mining Co., 104 N. C. 490, 10 S. E. 525.

Petition Need Not Be Filed.—Where a new trial is granted without passing upon certain exceptions, and, upon a rehearing of the exceptions upon which new trial was granted, is reversed, the supreme court may order a reargument of the exceptions not passed upon, without a petition for the same being filed. Fleming v. Southern R. Co., 132 N. C. 714, 44 S. E. 551.

32. Arguments of Counsel

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

Verbal Agreements Not Considered When Denied.—The Supreme Court will not consider appellant's alleged verbal agreement between the parties when such is denied. McNeil v. Virginia-Carolina R. Co., 173 N. C. 729, 92 S. E. 484, and cases there cited. Brewer v. Mineola Mfg. Co., 161 N. C. 211, 76 S. E. 237; Standard Mirror Co. v. Philadelphia Casualty Co., 157 N. C. 28, 72 S. E. 826.

When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Standard Mirror Co. v. Philadelphia Casualty Co., 157 N. C. 28, 72 S. E. 826; State v. Black, 162 N. C. 637, 78 S E. 210.

33. Appearances

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari

(1) When Applied for.—Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) How Applied for.—The writs of certiorari and supersedeas shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases the

adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) Notice of.—No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

As to certiorari generally see Code section 630 and notes thereto.

When Certiorari Should Be Applied for.—Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not therein at fault, he should file a transcript of the record proper and move for a certiorari for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. McNeil v. Virginia-Carolina R. R. Co., 173 N. C. 729, 92 S. E. 484. Rose v. Rocky Mount, 184 N. C. 609, 113 S. E. 506.

Not a Matter of Right.—Where the record of a case on appeal is not docketed in the Supreme Court at the time required by rule 5, it will be dismissed, but the Court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a certiorari, showing that the delay was not attributable to himself. State v. National Surety Co., 192 N. C. 52, 133 S. E. 172; Pruitt v. Wood, 199 N. C. 788, 156 S. E. 126.

When he has depended solely upon a void order of the trial judge attending the time for the service of his case, which is excepted to, the case will be dismissed. State v. Crowder, 195 N. C. 335, 142 S. E. 222.

Legal Excuse Decided by Supreme Court.—Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a certiorari under the rule. State v. Johnson, 183 N. C. 730, 110 S. E. 782.

Motion Too Late after Argument.—Where the plaintiff's motion for a certiorari was disallowed at a former term of the supreme court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case, the plaintiff should again move the court for a writ before the call of the district to which the case belonged, and it comes too late after argument of the case. Todd v. Mackie, 160 N. C. 352, 76 S. E. 245.

Motion Denied after Appeal Dismissed.—A motion for a certiorari to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed under Rule 17. Cox v. Kinston Carolina R., etc., Co., 177 N. C. 227, 98 S. E. 704.

Application for Certiorari.—Where the appellant in a criminal action has failed to have his case docketed in the time required by the Rules of Practice in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a certiorari, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. State v. Harris, 199 N. C. 377, 154 S. E. 628.

Appellant Must Docket All Available Record.—When the appeal is not docketed at or before the time prescribed in Rule 5 the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit, as to why the entire record can not be docketed and move at that time for a certiorari. If he fails to do so, the appellee has the right to docket the certificate prescribed by Rule 17 and have the appeal dismissed. Caudle v. Morris, 158 N. C. 594, 74 S. E. 98; State v. Johnson, 183 N. C. 730, 110 S. E. 782; Hardy v. Heath, 188 N. C. 271, 124 S. E. 564.

Appellant's motion for a writ of certiorari will be denied where the petition is not verified and no transcript of the record has been filed, nor any good reason shown for failure to file it. Rothchild v. McNichol, 121 N. C. 284, 28 S. E. 364; Critz v. Sparger, 121 N. C. 283, 28 S. E. 365.

In order to support a motion for certiorari it is required that appellant file transcript of the record proper and give appellee notice of the motion, and appellee's transcript of record filed on motion to docket and dismiss, under rule 17, cannot avail the appellant on his motion for certiorari. Hinnant v. American Fire, etc., Ins. Co., 204 N. C. 306, 168 S. E. 199.

Filing of Original Papers Insufficient.—A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a certiorari; and the filing of the original papers, which should remain in the office of the Superior Court, is insufficient. Lindsey v. Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

Writ Not Applied for at First Term.—Where the transcript is not filed at the first term after trial, on the failure of the appellant to apply at such term for a writ of certiorari to procure it, he is not entitled to such writ. Graham v. Edwards, 114 N. C. 228, 19 S. E. 150; Haynes v. Coward, 116 N. C. 840, 21 S. E. 690; State v. Dawkins, 190 N. C. 443, 129 S. E. 814.

Due Diligence Shown by Party—If it appears that the unexpected indisposition of the clerk of the superior court was the cause of the failure to docket an appeal in time at the next ensuing term of this court, and that appellant was not guilty of any lack of diligence, and that he promptly applied for a certiorari, the writ should be granted. Howerton v. Henderson, 86 N. C. 718.

Effect of Agreement for Extension of Time.—Where the parties have agreed upon such extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move in the Supreme Court for a certiorari upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. Baker v. Hare, 192 N. C. 788, 136 S. E. 113.

Question of Laches May Be Heard.—Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon. Stone v. Ledbetter, 191 N. C. 777, 133 S. E. 162.

Where an appeal was dismissed because not docketed before the perusal of the district to which it belongs, and appellant moved to reinstate on the allegation that he had directed the Clerk to send up the transcript and paid the fees therefor in advance, the motion will be denied, for, although such allegation would have been a sufficient answer to the motion to dismiss if affidavit had been filed to such effect and a certiorari applied for, yet if was laches not to interpose such affidavit and show excuse for the failure. Paine v. Cureton, 114 N. C. 606, 19 S. E. 631.

When Case on Appeal Not Prepared.—Where a case and counter case are served within the time as extended by agreement, but neither is accepted, appellant must immediately request a settlement, file the record proper, and sue out certiorari; otherwise appellee may move to docket and dismiss under rule 17. Waynesville Transp. Co. v. Waynesville Lumber Co., 168 N. C. 60, 84 S. E. 54; Washam, etc., Motor Co. v. Reep, 186 N. C. 509, 119 S. E. 821.

Certiorari Denied When Case Unsettled by Agreement.—Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and counter-case, etc., that will prevent its being docketed in the time prescribed by Rule 5, and consequently no case has been yet settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. Waller v. Dudley, 193 N. C. 354, 137 S. E. 149.

When Appellee Prevents Docketing of Appeal.—Where the appellant is prevented from docketing his appeal within the time prescribed by Rule 5, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of certiorari to bring up the case. Briggs v. Jervis, 98 N. C. 454, 4 S. E. 631.

Failure to Pay Clerk's Fees.—The failure of the Clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from laches. Critz v. Sparger, 121 N. C. 283, 28 S. E. 365.

Extent of Waiver by Consent.—The parties to an appeal, without the consent of the court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that he may be had, shall be filed therein as the basis for the motion for a certiorari; but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. Murphy v. Carolina Electric Co., 174 N. C. 782, 93 S. E. 456.

May Docket Appeal Though Certiorari Denied.—Although appellant's motion for a writ of certiorari is denied, he may docket his appeal during the term, or, if the case was tried since the term to which the appeal is taken began, he may docket it at the next term. Rothchild v. McNichol, 121 N. C. 284, 28 S. E. 364; Critz v. Sparger, 121 N. C. 283, 28 S. E. 365.

Applied in Causey v. Snow, 116 N. C. 497, 21 S. E. 179; Brown v. House, 119 N. C. 622, 26 S. E. 160; Burrell v. Hughes, 120 N. C. 277, 26 S. E. 782; Parker v. Southern Ry. Co., 121 N. C. 501, 28 S. E. 347; Rothchild v. McNichol, 121 N. C. 284, 28 S. E. 364.

35. Additional Issues

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. Motions

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

Only Motions in Writing Entertained.—This Court will not entertain any motion, unless reduced to writing. McCoy v. Lassiter, 94 N. C. 131.

37. Abatement and Revivor

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: Provided, such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. Certification of Decisions

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

See sections 1413 and 1417 of the code.

39. Judgment and Minute Dockets

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

As to the docket generally see 1 Enc. Dig. 667 et seq.

Cited in Corporation Comm. v. Railroad, 137 N. C. 1, 29, 49 S. E. 191.

40. Clerk and Commissioners

The clerk and every commissioner of this court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissoner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

As to the clerk's bond see section 1425 of the code, see, also, section 1426.

41. Librarian

(1) Report by Him. The Librarian shall

keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) Books Taken Out. No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requirng the same, the name and number of the volume taken, when taken, and when returned.

42. Court's Opinions

After the Court has decided a cause, the judge assigned to write it shall hand the opinion when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

See section 1416 of the code and note thereto.

43. Executions

(1) Teste of Executions. When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) Issuing and Return of. Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the Clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

Cross References. — As to execution generally see code section 665 et seq. As to judgments on appeal see 658. As to stay of execution see 654 et seq.

Execution a Lien From its Teste.—An execution issuing from the Supreme Court, upon a judgment obtained therein, to a county in which the defendant has land, is a lien upon the land from its teste. Rhyne v. McKee, 73 N. C. 259.

Cited in Corporation Comm. v. Railroad, 137 N. C. 29, 49 S. E. 191.

44. Petition to Rehear

(1) When Filed. Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

Cross Reference.—As to the petition to rehear generally see section 1419 of the code and notes thereto. See, also, 1 Enc. Dig. 669 et seq.; 13 Enc. Dig. 114.

See section 1419 of the code and notes thereto.

Rule Mandatory.—The requirement that a petition for a rehearing be filed within forty days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. Cooper v. Board of Comm'rs, 184 N. C. 615, 113 S. E. 569.

Time of Filing Affidavit in Support of Motion.—Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and per contra, the Court will not thereafter allow a motion retaining the case on its docket for the purpose of correcting the amount of the judgment. Moore v. Tidwell, 194 N. C. 186, 138 S. E. 541.

When Time Begins to Run.—The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that Court. McGeorge v. Nicola, 173 N. C. 733, 92 S. E. 610.

Distinction Between Filing and Docketing. — The petition is said to be filed when it is received by the clerk, and this must be done within forty days after the filing of the opinion; it is docketed when the clerk enters it upon the records at the order of the Justice, who grants the rehearing. Bird v. Gilliam, 123 N. C. 63, 31 S. E. 267.

(2) What to Contain. The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

Failure to File Certificate.—Where the applicant has failed to file the certificates of two disinterested members of the bar, indorsed by two members of the Court, the application will not be considered, except in certain instances where the Court may reconsider the case ex meru motu. Teeter v. Southern Express Co., 172 N. C. 620, 90 S. E. 927.

(3) Two Copies to be Filed, How Endorsed. The petitioner shall endorse upon the petition,

of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: Provided, however, that when there have been two dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) Justices to Act in Thirty Days. The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

Cross Reference.—See section 1419 of the code and note thereto. For general consideration of the subject, see 1 Enc. Dig. 668 et seq.

When Rehearing Allowed.—No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the court. Haywood v. Daves, 81 N. C. 8; Mullen v. Norfolk, etc., Canal Co., 115 N. C. 15, 20 S. E. 167.

In an action for construction of a will, a former decision of this court, rendered when the court was differently constituted from what it is at present, should not be reversed because the present members of the court might infer differently as to the intention of the testatrix from the words and context of the will. Devereux v. Devereux, 81 N. C. 12.

This petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already passed upon in well considered opinions of this Court, and no new fact has been called to the attention of the Court, or new case or authority cited, or new position assumed, the petition is dismissed. Weston v. Roper Lumber Co., 168 N. C. 98, 83 S. E. 693.

Rehearing a Matter of Discretion.—Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. Moore v. Harkins, 179 N. C. 525, 103 S. E. 12.

Presumption in Favor of Judgment.—Rehearings of decisions of cases of this Court are granted only in exceptional cases and, when granted, every presumption is in favor of the judgment already rendered. Weisel v. Cobb, 122 N. C. 67, 30 S. E. 312.

Rehearing by Means of Second Appeal Not Allowed.—A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being by a motion to rehear. Gainesville etc., Hospital Ass'n v. Atlantic Coast Line R. Co., 157 N. C. 460, 73 S. E. 242; LaRogue v. Kennedy, 161 N. C. 459, 77 S. E. 695.

Where a carrier does not take the proper steps to have a judgment rendered against it in the State court reviewed in the United States court upon a defense set up in denial of its rights under the Federal law, and seeks to enjoin the enforcement of the judgment in the State courts, it is an endeavor to obtain a rehearing of the case by means of a second suit, which is not permissible. North Carolina R. Co. v. Story, 187 N. C. 184, 121 S. E. 433.

Same State of Facts Will Not Warrant Second Appeal.—A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decisions having become the law of the case. Strunks v. Southern R. Co., 188 N. C. 567, 125 S. E. 182.

No Rehearing on Summary Motion.—A rehearing will not be granted upon a summary motion to modify a final judgment of this court. Ruffin v. Harrison, 91 N. C. 398.

Only Points Certified as Erroneous Considered.—Upon a rehearing, the Supreme Court will not consider any point not certified as erroneous by counsel making the certificate. Kerr v. Hicks, 133 N. C. 175, 45 S. E. 529.

When Conclusion Assigned as Error.—It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the Court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the Court in its opinion is erroneous." Bunn v. Braswell, 142 N. C. 113, 55 S. E. 85.

When Error Committed in Former Decision.—The doctrine of stare decisis has no application, when it clearly appears that error has been committed in the decision of the former case by the Supreme Court; and where the exceptions present, on the second appeal, under different and somewhat similar statutes, the question as to whether a mandamus will lie for the failure of the county commissioners to make a special levy for the payment of the principal of the sinking funds for road bonds of a certain district, and the Supreme Court has erroneously decided that it was unnecessary as to another road district within the same county, on the appeal in the later case the position is untenable, that it was an attempt to obtain a rehearing contrary to the rules on the subject. Spitzer & Co. v. Commissioners, 188 N. C. 30, 123 S. E. 636.

When Petitioner Guilty of Laches.—A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him. Battle v. Mercer, 188 N. C. 116, 123 S. E. 258.

Immaterial Assumption.—It is no ground for the rehearing of a case that the defendant was assumed to be a citizen of North Carolina, whereas, in fact, he was not when the place of his residence is immaterial. Blackwell v. Wright, 74 N. C. 733.

When Everything Considered on First Hearing.—Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed. Weisel v. Cobb, 122 N. C. 67, 30 S. E. 312.

New Trial for Newly Discovered Evidence.—A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full Court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the Justices of the Court, under the rule, put the case in the Supreme Court. Smith v. Moore, 150 N. C. 158, 63 S. E. 735.

Contents of Affidavit.—It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear by affidavit that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail. Johnson v. Seaboard Air Line R. Co., 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598.

In criminal actions, the Supreme Court will deny a motion for a new trial made upon the ground of newly discovered evidence. State v. Griffin, 190 N. C. 133, 129 S. E. 410. See also § 4644.

When Petitioner Erroneously Deprived of Property.—Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. State v. Martin, etc., Casualty Co., 188 N. C. 119, 123 S. E. 631.

Omission of Questions Not Discussed in Brief.—A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief according to Rule 28, and he has not appealed from the judgment. Greene v. Lyles, 187 N. C. 598, 122 S. E. 297.

When No Error Assigned.—Where no exception is taken in trial court to a ruling, and no error is assigned upon re-

hearing, the Supreme Court will not review the ruling. Faison v. Grandy, 128 N. C. 438, 38 S. E. 897.

Second Petition to Rehear.—Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof. Moore v. Harkins, 179 N. C. 525, 103 S. E. 12.

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the court in reaching the same conclusion. Moore v. Harkins, 179 N. C. 525, 103 S. E. 12.

Costs When New Trial Granted.—Where, upon a rehearing, the court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. Waldo v. Wilson, 174 N. C. 767, 94 S. E. 715.

Reasons for Denying Petition Not Usually Set out.—The reasons for denying a petition to rehear in the Supreme Court are not usually set out. Crowell v. Crowell, 181 N. C. 66, 106 S. E. 149.

Applied in Etheridge v. Vernoy, 71 N. C. 184; Neal v. Cowles, 71 N. C. 266; Grant v. Edwards, 88 N. C. 246; Wilson v. Lineberger, 90 N. C. 180; McDonald v. Carson, 95 N. C. 377; Manufacturing Co. v. Gray, 126 N. C. 108, 35 S. E. 236; Hendon v. North Carolina R. Co., 127 N. C. 110, 37 S. E. 155; Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583.

(5) New Briefs to be Filed. There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) When Petition Docketed for Rehearing. The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(7) Stay of Execution. When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

45. Sitting of the Court

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.

46. Citation of Reports

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1	and 2 Martin, Taylor & Conf.	as	1 N. C.
1	Haywood		2
2			3
1	and 2 Car. Law Repository & N. C. Term		4
1	Murphey		5
2			6
3			7
1	Hawks		8
2			9
3			10
4			11
1	Devereux Law		12
2			13
3			14
4			15
1	Eq.		16
2			17
1	Dev. & Bat. Law		18
2			19
3 & 4			20
1	Dev. & Bat. Eq		21
2			22
1	Iredell Law		23
2			24
3			25
4			26
5			27
6			28
7			29
8			30
9	Iredell Law	as	31
10			32
11			33
12			34
13			35
1	Eq.		36
2			37
3			38
4			39
5			40
6			41
7			42

8	43	
Busbee Law	44	
Eq.	45	
1 Jones Law	46	
2	47	
3	48	N. C.
4	49	
5	50	
6	51	
7	52	
8	53	
1 Eq.	54	
2	55	
3	56	
4	57	
5	58	
6	59	
1 and 2 Winston	60	
Phillips Law	61	
Eq.	62	

In quoting from the reprinted Reports counsel will cite always the marginal (i. e., the original) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

47. Court Reconvened

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

Rules 52 and 53

These rules are now part of rule 44 and references from the Code should be looked up thereunder.

PART II

RULES OF PRACTICE IN THE NORTH CAROLINA SUPERIOR COURTS

Revised and Adopted by the Justices of the Supreme Court

RULES

1. Entries on Records

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by another person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on Prosecution Bond and Bail

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides.

3. Opening and Conclusion

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of Witnesses

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance

When a party in a civil suit moves for continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. Decision of Right to Conclude Not Appealable

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. Issues

Issues shall be made up as provided and directed in sec. 584 of the Code.

8. Judgments

Judgments shall be docketed as provided and directed in secs. 613 and 614 of the Code.

9. Transcript of Judgment

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall

be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of certiorari as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

	Page
Summons—date	1
Complaint—first cause of action.....	2
Complaint—second cause of action...	3
Affidavit of attachment.....	4

and so on to the end.

12. Transcript on Appeal—When Sent Up

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Sec. 645 of the Code.

13. Reports of Clerks and Commissioners

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinions as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari

The Superior Court shall grant the writ of recordari only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of supersedeas, if prayed for as required by section 630 of the Code. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of certiorari in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestily appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to Require Bonds to Be Filed

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belongink to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. Guardians Ad Litem—How Appointed

All motions for a guardian ad litem shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. Cases Put at Foot of Docket

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion Is Certified

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Sec. 4656 of the code.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calender has been adopted by the court.

22. Calendar Under Control of Court.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Nonjury Cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from Justices of the Peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On Consent Continuance—Judgment for Costs.

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel Not Sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments nisi have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. Books.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

APPENDIX VIII

TABLE SHOWING CODIFICATION OF LAWS ENACTED SUBSEQUENT TO 1919

EXTRAORDINARY SESSION OF 1920

Ch.	Sec.	Code
3	6	1291(a)
6		6126(a)
18	3, 4	5937(a), 5937(b)
27		2584(a)
40	1-3	7343(a)-7343(c)
43		5784(a)
46		5030(a)
48	1-4	7328(a)-7328(e)
56		1066(a)
59	2, 3	7673(a), 7673(b)
60	1	3748(a)-3748(f)
79		6351(a)
83		3889(a)
95	1, 2	3861(c) 3861(d)

PUBLIC LAWS OF 1921

Ch.	Sec.	Code
1	1-15	6055(b)-6055(q)
2	2, et seq.	3846(a) et seq.
2	30	2613(a), 2621(a), 3794(a)
2	31	2613(b)
4	1	216(a)
4	2-14	217(a)-217(m)
4	15-17	218(a)-218(c)
4	19, 20	218(e), 218(f)
4	21-25	219(a)-219(e)
4	26-48	220(a)-220(w)
4	49-62	221(a)-221(n)
4	63-71	222(a)-222(i)
4	72-78	223(a)-223(g)
4	79-87	224(a)-224(j)
5		4237(a)
11	2	3847(a)
12	1, 2	4606(a), 4606(b)
15	1, 2	3366(a)
18		221(m)
19	1, 4	3366(b)
19	2, 4	3366(c)
19	3, 4	3366(d)
20	1	220(z)
20	2-5	220(aa)-220(dd)
21		3366(e)
23	1-5	4499(a)-4499(e)
23	6	4606(c)
23	7, 7a	4400(f) 4499(g)
26		6140(a)
32	1-3	934(a)-934(c)
46		4426(a)
47	9	220(t)
50	1-2	1864(a) 1864(b)
58		858(a)
60	1-4	6529(a)-6529(d)
66		4157(a)
74	4	6974(a)
79	1-17	6943(a)-6943(q)
82		7378(a)
84		4426(b)
87	1-5	5259(a)-5259(e)
87	6	5259(x)
87	7	5259(r)
87	8-11	5259(f)-5259(i)
87	12-19	5259(s)-5259(aa)
87	20-21	5259(j) 5259(k)
87	22-23	5259(bb) 5259(cc)
87	24	5259(l)
87	25	5259(dd)
87	26-30	5259(m) 5259(q)
93		65(a)
107	1-9	7472(z)-7472(ii)
108	2	4146(a)
110	5	1570(a)
110	13	1598(a)
111		2283(v)
112		4511(a)
116	1-7	1167(a)-1167(g)
118		2702(a)
119		4245(a)
120	8	6822(a)
120	12-13	6895(a) 6895(b)
124	1-3	3534(a)-3534(c)
125	1	3884(a)
125	2, 3	1435(a)
127		4274(a)
129	1-5	2500(a)-2500(e)
131	1-9	7312(a)-7312(i)
131	13	5490(m)
132	1-7	1959(a)-1959(g)
137	1-21	4925(a)-4925(u)
143	2-3	3861(a) 3861(b)
156	2-8	2304(a)-2304(g)
157		3366(f)
162		7668(a)
163	1-5	7521(d)-7521(h)
165	1-9	7472(a)-7472(i)
169	1-10	7251(a)-7251(j)
170	1-7	8081(a) 8081(g)
173	1-11	7251(k)-7251(w)
174	1-3	3846(rr)-3846(tt)
176	1, 2	4199(a) 4199(b)
177	1-15	4895(a)-4895(o)
179	17	6126(a)
183	2-4	6159(a)-6159(c)
186	1-21	2283(a)-2283(u)
189	1-25	5168(a)-5168(z)
190	1-6	5912(a)-5912(f)
198	1-5	3366(k)-3366(o)
201	1-4	4689(a) 4689(d)
208		7128(a)
210		5339(a)
211		4457(a)
212		4349(a)
216	1-4	1562(a)-1562(d)
217		6055(a)
218		6285(a)
219	1-3	6116(a)-6116(c)
220		6334(a)
222	2-4	6942(a)-6942(c)
230		1864(c)
232	1-3	7521(a)-7521(c)

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Ch.	Sec.	Code
6	1-4	2141(a)-2141(c)
20	1, 2	3884(a)
20	3	1435(a)
28		4925(e)
44	10	6625(a)
56	1	217(c)
56	2	220(r)
56	3	219(f)
56	4	224(i)
63		4018(a)
65		65(a)
74		3846(jj)
82	1, 2	7472(b), 7472(c)
86	1-4	3821(a)-3821(d)
89		5168(j)
92	9-11	597(a)-597(c)
92	15, 16	913a, 913b
92	19a	642(a)
92	20	1421(a)
94	1, 2	1435(b), 1435(c)
95	1-4	1013(a)-1013(d)
96		7979(a)
97	1-4	2621(e)-2621(h)
97	5-10	2611(a)-2611(f)
97	13	2611(g)
106	2	2969(a)

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Ch.	Sec.	Code
1	1-29	3411(a)-3411(cc)
2	1-10	7251(x)-7251(hh)
3		5168(h)
17		3366(g)
29	1-3	5842(a)-5842(c)
40	2	1582(a)
42	6, 7	6699(a), 6699(b)
47	1-9	5825(a)-5825(i)
53	1	2593(a)
58		352(a)
61		3366(h)
65	1	4103(a)
66	1, 2	766(a), 766(b)
67	2	4103(b)
68		597(b)
70	1-3	92(a)-92(c)
76	1	5030(b)
76	2	5030(c)
78		4356(a)
80	1, 2	4231(a), 4231(b)
83	1-12	2776(a)-2776(l)
84	2, 3	1684(a)
85	1-13	1864(e)-1864(q)
85	14	1864(d)
89		4511(b)
94	1-5	7516(a)-7516(d)
101		2500(b)
108	1-4	8005(a)-8005(d)
119		1343(a)
122	1-5	7312(j)-7312(m)
124	2	2621(j)
125		4426(c)
127	1	7220(f)
127	2	7220(a)
127	3-6	7220(b)-7220(e)
130		3855(a)
133	1-3	3825(a)-3825(c)
136	358-371	5780(e)-5780(r)
138	1-5	4437(a)-4437(c)
140	2	4209(a)
143	1-3	1321(a)-1321(c)
143	5-9	1321(e)-1321(i)
146	1-14	4895(p)-4895(cc)
147		3512(a)
147	15	4895(dd)
148	1, 3	222(c)
148	2	222(b)
148	5	220(a)
148	6	220(d)
148	7	220(k)
157	3	1235(a)
158	1-5	2776(m)-2776(q)
160	1	3846(j)
160	2, 3	3846(u), 3846(v)
160	4	3846(ff)
160	5	3846(z)
160	6	3846(bb)
164		7472(o)
162	1-8	7472(j)-7472(q)
165	11-13	6243(a), 6243(b)
166	2-9	2806(a)-2806(h)
167	1, 2	5099(a), 5099(b)
168	2, 3	1877(a), 1877(b)
172		7693(a)
188	1-4	7472(r)-7472(u)
191	1-3	2105(a), 2105(b)
192	2-4	2594(a)-2594(c)
194	1-4	4900(a)-4900(c)
197	1-3	7534(a)-7534(c)
199		4510(a)
202		4506(a)
210		7466(a)
211	1, 2	220(x), 220(y)
213		4330(a)
215	1-3	3366(i), 3366(j)
216	1-6	1608(f)-1608(l)
216	7-12	1608(t)-1608(y)
216	13, 14	1608(m), 1608(n)
216	15-19	1608(z)-1608(dd)
216	20-24	1608(o)-1608(s)
217	9, 10	5360(a)
220	1-16	2792(a)-2792(p)
225	1-14	225(a)-225(n)
230		4511(c)
231	1-6	5373(a)-5373(f)
236	1-18	2621(i)-2621(z)
239		1065(a)
241	2	2612(b)
243	2-4	5000(a)-5000(c)
247		3846(j)
250	1-9	2776(r)-2776(z)
250	11	2776(aa)
254	1-16	7362(a)-7362(o)
255	1-3	2621(b)-2621(d)
259		5168(aa)
260	1-8	5067(a)-5067(h)
263	1-6	3846(ii)-3846(mm)

PUBLIC LOCAL LAWS OF 1923

Ch.	Sec.	Code
611	1-15	1343(b)-1343(p)

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Ch.	Sec.	Code
4		5727(a)
11	1-4	4768(i)-4768(l)
14		1684(a)
15		65(a)
20		7593(a)
24		5394(a)
40		2399(a)
41		2417(a)
44	1-4	2492(a)-2492(d)
45		4349(b)
54		4301(a)
63		2601(a)
65		1022(a), 1022(b)
67		220(a)
68		3366(g1)
69		3846(bb)1
80		3444(a)
81		3671(e)
83		5168(g)

Ch.	Sec.	Code
85	1	1608(u), 1608(g) 1608(i), 1608(m)
85	5½	1608(k)1
85	24(a)-24(e)	1608(f)1-1608(f)5
85	24-f	1608(s)1
86	1	7173(a)
95		2831(b)
100		1291(a)
106		5168(e), 5168(f)
107		2792(b)
108		3366(g 2)
109		4317(a)
111		5168(j)
113		1321(d)
117	1-4	3443(a)-3443(c)

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Ch.	Sec.	Code
2		7412(a)
8		1435(b)
9		1608(s)1
16		597(c)
19		39(a)
21		447(a), 447(b)
33	1-7	2492(e)-2492(k)
35	2-11	3846(qq)1, 3846(qq)10
38		3970(a)
39	1	2702(a)
40		7584(a)
43		7413(a)
44		3907
45	4	7472(u)
45	45	3846(ii)
48		92(c)
50	1-3	2613(j)-2613(l)
50	4	2613(p)
51	1, 2	6163(a), 6163(b)
53		7109(a)
56		7979(b)
58	1-4	6466(a)-6466(d)
59		1181(a)
61	3	6140(b)
62	2-13	7472(q)1-7472(q)12
62	14-16	7472(r)-7472(t)
62	18	7472(q)13
68		5168(bb)
71	1-4	2793(a)-2793(d)
72	1-3	3857(a)-3857(c)
73	11	5218(a)
73	17	5209(b)
74	1-12	3846(qq)11-3846(qq)22
77	1	1224(a) 1224(f)
77	2	217(n)
80	1	8005(a)
80	2	8005(d)
84		3355(a)
85	3-6	3671(a)-3671(d)
86		176(a)
87	3, 4	6729(a), 6729(b)
87	10½	6735(a)
89	1-29	7486(j)-7486(jj)
97		7593(b)
107		220(w) 2792(b)
112	2-10	7432(a)-7432(i)
114		7251(ii)
115		6587(a)
116		3857(d)
117		219(f)
119		221(n)
119	1	220(d)
119	2	225(m)
120	1-11	7534(d)-7534(n)
121	1-4	225(o)-225(r)
122	2-22	6122(c)-6122(w)
122	22	6140(a)
122	23	6122(x) 6942(a) 6942(c)
124	1	2621(i)
124	3	2621(j)1
128	1-7	7691(a)-7691(g)
132	1-5	7472(jj)-7472(nn)
133	2	3846(ii)
133	4	7472(u)
134	2-6a	7308(b)-7308(f)
135	1-24	1608(ee) 1608(bbb)
136	1	2295(a)
141	1	2831(a)
141	2	7534(o)
124	1	2621(i)
124	3	2621(j)1
145	2-4	6316(a)-6316(c)
151	2	5646(a)
152	1, 2	8059(a) 8059(b)
154	1-6	7284(a)-7284(f)
157	1-7	6553(a)-6553(g)
158	1	7979(c)
158	4-5a	7979(e)-7979(g)
163		7707(a) 7766(a)
167	1-19	1608(ccc)-1608(uuu)
172		1608(k)
172	8	7432(g)
174	1	4688(a)
181	1-8	4768(a)-4768(h)
189	1	4414(a)
190	1-7	3924(a)-3924(g)
190	10-23	3924(j)-3924(w)
191	1	7251(z)
191	2, 3	7251(cc)
193	1,2	2141(a), 2141(b)
195	2	2969(k)
198	1,2	5825(j), 5825(k)
199	1	225(f)
201	1-8	5694(a)-5694(h)
203	1-8	5409(a)-5409(h)
205		5336(a)
207	1,2	7695(a), 7695(b)
212		2105(a), 2105(b)
213		7251(ii)
220		5394(b)
222	1	593(a)
223	1-25	5207(a)-5207(y)
225		4925(k)
228	1-8	7766(b)-7766(i)
230	2-5	7486(kk)-7486(nn)
231	1	2613(ee)
233	2-4	1585(a)-1585(c)
239	1-5	4399(a)-4399(e)
242		1608(f)
242	2	1608(t)
246	1-3	7675(a)-7675(c)
247	1	7308(a)
248		3366(j1)
249		7675(d)
250	1	1608(i)
250	2	1608(t)
250	3	1608(y)
252	2	348(a)
256	2	5821(a)
258	1, 2	7979(d)
260		3846(v)
261	1-11	7024(a)-7024(n)
262	1-3	1167(a)-1167(d)

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264	1-3	4035(a)-4035(c)
265		2618(b)
266	2-9	7516(e)-7516(l)
269		3846(v)
270	1-12	5842(d)-5842(o)
275	6	4895(t), 5067(h), 5168(g)
275	7	7486(oo)
275	9	7683(a)
277		3846(y)
279		220(a)
280		1562(e)
282	1, 2	913(a), 913(b)
286		7251(p)
288		7312(b)
289		4511(d)
291		7173(a)
292		5067(h)
294	1, 2	2618(a)
296	2	2500(b)
297	1	2618(c)
306	3	6159(a)
306	5	7362(b)
306	6	5912(b)
306	9	5775(a)
306	9a	5912(g)
306	13, 14	5912(h)
311		4768(j)
316		2613(dd)
318	1-14	5168(cc)-5168(pp)

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Ch.	Sec.	Code
6		4511(e)
7		65(a)
12	1	7432(j)
18		3411(f1)
26	1	7539(a)
28	1	6670(a)
29	1	224(b½)
30	1-25	6476(a)-6476(y)
33	1-3	3542(a)-3542(c)
42		3411(x1)
43		3784(a)
45	1, 2	2290(a), 2290(b)
46	1-9	3846(e1)-3846(e9)
47	1	216(a), 221(m)
47	2	217(a)
47	5, 6	220(a), 220(b)
47	7	220(d)
47	8	220(r)
47	10	221(j)
47	12	221(n)
47	13	222(j)
47	14	222(k)
47	15	223(f)
47	16	224(e)
47	17	224(g)
47	18	224(i)
49	1	7472(oo)
49	2, 3	7472(pp), 7472(qq)
51	1-42	2141(d)-2141(ss)
53	1-15	4703(a)-4703(o)
56		7584(a)
57	1-7	1901(a)-1901(g)
58	1-5	7284(a)-7284(c)
60	1-15	2078(a)-2078(o)
61	1-5	4335(a)-4335(e)
62		4283(a)
64		4506(b)
67		2254(a)
68	1, 2	4283(b), 4283(c)
73		5780(p)
74		1608(f)
78		2334(a)
79	23	2621(x)
81	1-44	1334(1)-1334(44)
83		7542(a)
83	1	7541(a)
87	2	7667(a)
89		8005(d)
90		2776(u)
91	1-13	1302(1)-1302(13)
91	20, 21	1302(18)-1302(19)
92		2109(a)
93	1-12	2613(i1)-2613(i12)
94	1-24	898(a)-898(x)
95	1-16	3772(a)-3772(p)
96	1, 2	5168(i), 5168(j)
96	3	5168(s)
96	4	5168(u)
100	1-24	7077(a)-7077(x)
101		5221(a)
103		1582(b), 1608(f)(3)(a)
103	1, 2	1608(s)1
105		1461(6)
107		1968(a)
112		1461(7)
113		218(c)
115		2792(b)
120		2617(a)
122	1-9	2621(1)-2621(9)
122	10-41	2621(11)-2621(42)
127		7220(d)
129		1431(a)
130		3787(a)
131	1-12	5490(a)-5490(l)
133	201	3884(a)
136	1-16	2613(j)-2613(y)
136	18	2613(aa)
136	20, 21	2613(bb), 2613(cc)
140	1	7593(c)
141		225(m)
146	1-25	1334(53)-1334(76)
148	1-65	2621(43)-2621(107)
149	1-26	3924(a)-3924(z)
152	1-14	7763(a)-7763(m)
153	2, 3	7047(a), 7047(b)
156	1, 2	1229(a)
158	1-4	6943(b)-6943(e)
158	5	6943(m)
170	1	1585(d)
170	102	1585(e)
174	1-5	4870(a)-4870(e)
175	1	5030(a1)
176		3846(qq)22
177	1-6	5694(i)-5694(n)
178	1, 2	4409(a), 4409(b)
180	1	5981(a)
182	1, 2, 3	4683(a)
183	12(a)	3846(qq)23
184	7	5409(g1)
185	1-8	193(a)-193(h)
188	1	7254(a)
194	1	3846(c4)
195	1	7472(zz)
198	1	2621(10)
199	1-8	7472(rr)-7472(yy)
200	2, 3	3846(c1)-3846(c3)
204	1-3	6397(a)-6397(c)
206	1-7	1435(d)-1435(j)
208	1-7	7284(1)-7284(7)
209	1-4a	7534(u)-7534(y)
210	1-5	1013(e)-1013(i)
213	1-7	1334(45)-1334(51)
213	8(a)	1334(52)
218	1	7667(b)
219	1-24	7343(d)-7343(aa)
221	4	8037(a)
223		3825(d)
224	1	5021(a)
225		7518(a)
226	1	6142(a)
229		4416(a)
234	1-3	7532(a)-7532(c)
235	1	3846(o1)
238		4269(a)
240	2	2500(b)
241		2792(g)
242	1-4	2621(108)-2621(111), 3846(uu)-3846(xx)

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250	1-3	2141(tt), 2141(vv)
250	4	2141(cc)
250	5, 6	2141(ww)-2141(xx)
252		6476(c)
253		2141(yy)
258		6122(y)
259		7667(c)
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Resignation, Appx. I, const. art. III, § 13.
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Bail and recognizance.
Excessive bail, Appx. I, const. art. I, § 14.
Bastardy.
Legitimation, Appx. I, const. art. II, § 11.
Bill of attainder, Appx. I, const. art. IV, § 5.
Bill of rights, Appx. I, const. art. I.
Blind, Appx. I, const. art. XI, § 10.
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Boundaries of state, Appx. I, const. art. I, § 34.
Bridges.
Power of general assembly, Appx. I, const. art. II, § 29.
Capital.
State capital, Appx. I, const. art. XIV, § 6.
Capital punishment, Appx. I, const. art. XI, § 2.
Capitation tax, see infra, "Poll Taxes."
Cemeteries.
Exemption, Appx. I, const. art. V, § 5.
Power of general assembly, Appx. I, const. art. II, § 29.
Charities.
Board of charities, Appx. I, const. art. XI, § 7.
Self supporting, Appx. I, const. art. XI, § 11.

CONSTITUTION OF NORTH CAROLINA (Cont'd)
Cities, see infra, "Municipal Corporations."
Citizenship.
Public officers, Appx. I, const. art. VI, § 8.
Restoration of citizenship, Appx. I, const. art. II, § 11.
Voters, Appx. I, const. art. VI, § 2.
Claims against the State, Appx. I, const. art. IV, § 9.
Clerks of court, Appx. I, const. art. IV, §§ 16, 17, 29, 32.
Clerk of the Supreme Court, Appx. I, const. art. IV, § 15.
Courts inferior to Supreme Court, Appx. I, const. art. IV, § 30.
Election of Superior Court Clerk, Appx. I, const. art. IV, § 16.
Removal of clerks of the various courts for inability, Appx. I, const. art. IV, § 32.
Term of office, Appx. I, const. art IV, § 17.
Vacancies in office of Superior Court Clerk, Appx. I, const. art. IV, § 29
Colored persons.
Intermarriage of whites and negroes prohibited, Appx. I, const. art. XIV, § 8.
Separate schools, App. I, const. art IX, § 2.
Constitutional convention, Appx. I, const. art. XIII, § 1.
Convention, Appx. I, const. art. XIII, § 1.
Convicts, see infra, "Prisons and Prisoners."
Coroners.
Election, Appx. I, const. art. IV, § 24.
Term of office, Appx. I, const. art. IV, § 24.
Vacancy, Appx. I, const. art. IV, § 24.
Corporations, Appx. I, const. art. VIII, §§ 1-3.
Corporations under general laws, Appx. I, const. art. VIII, § 1.
Debts of corporations, how secured, Appx. I, const. art. VIII, § 2.
General laws, Appx. I, const. art. VIII, § 1.
What corporations shall include, Appx. I, const. art. VIII, § 3.
Council of State, Appx. I, const. art. III, § 14.
Counties, Appx. I, const. art. VII.
Counties to be divided into districts, Appx. I, const. art. VII, § 3.
County officers, Appx. I, const. art. VII, § 1.
Debts in aid of the rebellion not to be paid, Appx. I, const. art. VII, § 13.
Duty of county commissioners, Appx. I, const. art. VII, § 2.
Governor to appoint justices, Appx. I, const. art. VII, § 11.
No debt or loan except by a majority of voters, Appx. I, const. art. VII, § 7.
No money drawn except by law, Appx. I, const. art. VII, § 8.
Officers of townships, Appx. I, const. art. VII, § 5.
Powers of General Assembly over municipal corporations, Appx. I, const. art. VII, § 14.
Taxes to be ad valorem, Appx. I, const. art. VII, § 9.
Townships have corporate powers, Appx. I, const. art. VII, § 4.
Trustees shall assess property, Appx. I, const. art. VII, § 6.
When officers enter on duty, Appx. I, const. art. VII, § 10.
Courts, Appx. I, const. art. IV, §§ 1-33.
Cities, Appx. I, const. art. IV, § 14.
Clerk of the Supreme Court, Appx. I, const. art. IV, § 15.
Courts shall be open, Appx: I, const. art. I, § 35.
Division of judicial powers, Appx. I, const. art. IV, § 2.
Election of Superior Court Clerk, Appx. I, const. art. IV, § 16.
In case of waiver of trial by jury, Appx. I, const. art. IV, § 13.
Judicial districts for Superior Courts, Appx. I, const. art. IV, § 10.
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CONSTITUTION OF NORTH CAROLINA (Cont'd)
Courts (Cont'd)
Officers of other courts inferior to Supreme Court, Appx. I, const. art. IV, § 30.
Open courts, Appx. I, const. art. IV, § 22.
Residences of judges, rotation in judicial districts, and special terms, Appx. I, const. art. IV, § 11.
Rotation in judicial districts, Appx. I, const. art. IV, § 11.
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Supreme Court, see infra, "Supreme Court."
Supreme court justices, Appx. I, const. art. IV, § 6.
Terms of the Supreme Court, Appx. I, const. art. IV, § 7.
Transaction of business in the Superior Courts, Appx. I, const. art. IV, § 22.
Criminal law.
Answers to criminal charges, Appx. I, const. art. I, § 12.
Appeal, Appx. I, const. art. I, § 13; art. IV, § 27.
Misdemeanor, Appx. I, const. art. I, § 13.
Confronting accusers and witnesses, Appx. I, const. art. I, § 11.
Costs and jail fees, Appx. I, const. art. I, § 11.
Cruel or unusual punishment, Appx. I, const. art. I, § 14.
Excessive bail, Appx. I, const. art. I, § 14.
General warrants, Appx. I, const. art. I, § 15.
Involuntary servitude, Appx. I, const. art. I, § 33 .
Nature of criminal actions, Appx. I, const. art. IV, § 1.
No person taken, etc., but by law of the land, Appx. I, const. art. I, § 17.
Persons restrained of liberty, Appx. I, const. art. I, § 18.
Retrospective laws, Appx. I, const. art. I, § 32.
Right of jury, Appx. I, const. art. I, § 13.
Right to be informed of accusation, Appx. I, const. art. I, § 11.
Right to have counsel, Appx. I, const. art. I, § 11.
Self crimination, Appx. I, const. art. I, § 11.
Witness fees, Appx. I, const. art. I, § 11.
Cruel or unusual punishment, Appx. I, const. art. I, § 14.
Deaf, Appx. I, const. art. XI, § 10.
Death punishment, Appx. I, const. art. XI, § 2.
Debt, see infra, "State Debt."
Debts in aid of the rebellion not to be paid, Appx. I, const. art. I, § 6; art. VII, § 13.
Declaration of rights, Appx. I, const. art. I.
Deeds, Appx. I, const. art. II, § 29; art. X, § 8.
Department of agriculture, immigration and statistics, Appx. I, const. art. III, § 17.
Establishment, Appx. I, const. art. III, § 17; art. IX, § 14.
Disseizin, Appx. I, const. art. I, § 17.
Divorce and alimony, Appx. I, const. art. II, § 10.
Drawing money, Appx. I, const. art. XIV, § 3.
Dueling, Appx. I, const. art. XIV, § 2.
Due process of law, Appx. I, const. art. I, § 17.
Education, Appx. I, const. art. I, § 27; art. IX, §§ 1-13.
Board of education, Appx. I, const. art. IX, §§ 8-13.
Children must attend school, Appx. I, const. art. IX, § 15.
Compulsory education, Appx. I, const. art. IX, § 15.
Counties to be divided into districts, Appx. I, const. art. IX, § 3.
County school fund, Appx. I, const. art. IX, § 5.
Education shall be ecouraged, Appx. I, const. art. IX, § 1.
Expenses of board of education, Appx. I, const. art. IX, § 13.

CONSTITUTION OF NORTH CAROLINA (Cont'd)
Education (Cont'd)
First session of board of education, Appx. I, const. art. IX, § 11.
General Assembly shall provide for schools, Appx. I, const. art. IX, § 2.
Powers of board of education, Appx. I, const. art. IX, § 10.
President and secretary of board, Appx. I, const. art. IX, § 9.
Property devoted to educational purposes, Appx. I, const. art. IX, § 4.
Quorum of board of education, Appx. I, const. art. IX, § 12.
Separation of races, Appx. I, const. art. IX, § 2.
Superintendent of public instruction, Appx. I, const. art. III, §§ 1, 13, 14, 15.
University of North Carolina, Appx. I, const. art. IX, §§ 6, 7.
Elections, Appx. I, const. art. VI, §§ 1-9.
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Elections by people and General Assembly, Appx. I, const. art. VI, § 6.
Elections should be frequent, Appx. I, const. art. I, § 28.
Elections to be by ballot, Appx. I, const. art. VI, § 6.
Free elections, Appx. I, const. art. I, § 10.
General assembly, Appx. I, const. art. II, § 27.
Indivisible plan; legislative intent, Appx. I, const. art. VI, § 5.
Property qualification, Appx. I, const. art. I, § 22.
Qualification for registration, Appx. I, const. art. VI, § 4.
Qualifications of voters, Appx. I, const. art. VI, § 2.
Returns of election of officers of the Executive Department, Appx. I, const. art. III, § 3.
Voters to be registered, Appx. I, const. art. VI, § 3.
Who may vote, Appx. I, const. art. VI, § 1.
Emoluments.
Exclusive emoluments, etc., Appx. I, const. art. I, § 7.
Fees, salaries and emoluments, Appx. I, const. art. IV, § 18.
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Entails, Appx. I, const. art. II, § 15.
Enumeration of rights.
Does not destroy or impair other rights, Appx. I, const. art. I, § 37.
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Equity.
Abolishes the distinction between actions at law and suits in equity, and feigned issues, Appx. I, const. art. IV, § 1.
Excessive bail, Appx. I, const. art. I, § 14.
Exclusive emoluments or privileges, Appx. I, const. art. I, § 7.
Executive department, Appx. I, const. art. III.
Annual reports from officers of Executive Department and of public institutions, Appx. I, const. art. III, § 7.
Attorney-general, see infra, "Attorney-General."
Commander-in-chief, Appx. I, const. art. III, § 8.
Compensation of executive officers, Appx. I, const. art. III, § 15.
Council of State, Appx. I, const. art. III, § 14.
Department of Agriculture, Immigration, and Statistics, Appx. I, const. art. III, § 17.
Duties of Governor, Appx. I, const. art. III, § 5.
Duties of other executive officers, Appx. I, const. art. III, § 13.
Duties of the Lieutenant-Governor, Appx. I, const. art. III, § 11.
Extra sessions of General Assembly, Appx. I, const. art. III, § 9.
In case of impeachment of Governor, or vacancy caused by death or resignation, Appx. I, const art. III, § 12.
Lieutenant-Governor, Appx. I, const. art. III, §§ 11, 12.

CONSTITUTION OF NORTH CAROLINA (Cont'd)
Executive department (Cont'd)
Oath of office for Governor, Appx. I, const. art. III, § 4.
Officers of the Executive Department; terms of office, Appx. I, const. art. III, § 1.
Officers whose appointments are not otherwise provided for, Appx. I, const. art. III, § 10.
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Returns of elections. Appx. I, const. art. III, § 3.
Seal of State, Appx. I, const. art. III, § 16.
State auditor, see infra, "State Auditor."
Exemption from execution, attachment and garnishment, Appx. I, const. art. X.
Benefit of widow, Appx. I, const. art. X, § 5.
Exemptions of personal property, Appx. I, const. art. X, § 1.
Homestead, Appx. I, const. art. X, § 2.
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How deed for homestead may be made, Appx. I, const. art. X, § 8.
Husband may insure his life for the benefit of wife and children, Appx. I, const. art. X, § 7.
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Personal property, Appx. I, const. art. X, § 1.
Property of married women secured to them, Appx. I, const. art. X, § 6.
Exemption from taxation, Appx. I, const. art. V, §§ 1, 3, 5.
Capitation tax, Appx. I, const. art. V, § 1.
Ex post facto laws, Appx. I, const. art. I, § 32.
Fees.
Criminal prosecution, Appx. I, const. art. I, § 11.
Fees, salaries, and emoluments, Appx. I, const. art. IV, § 18.
Feigned issues, Appx. I, const. art. IV, § 1.
Findings of court, Appx. I, const. art. IV, § 13.
Fines, Appx. I, const. art. II, § 29; art. XI, § 1.
Excessive fines, Appx. I, const. art. I, § 14.
Forfeitures.
Power of general assembly over, Appx. I, const. art. II, § 29.
Franchises.
Taxation, Appx. I, const. art. V, § 3.
Freedom of the press, Appx. I, const. art. I, § 20.
Free elections, Appx. I, const. art. I, § 10.
General assembly, Appx. I, const. art. II, §§ 1-29.
Apportionment, Appx. I, const. art. II, §§ 4-6.
Bills and resolutions to be read three times, etc., Appx. I, const. art. II, § 23.
Bridges, Appx. I, const. art. II, § 29.
Divorce and alimony, Appx. I, const. art. II, § 10.
Election for members of the General Assembly, Appx. I, const. art. II, § 27.
Election of officers, Appx. I, const. art. II, § 9.
Entails, Appx. I, const. art. II, § 15.
Extra session, Appx. I, const. art. II, § 28.
Forfeitures, Appx. I, const. art. II, § 29.
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Inviolability of sinking fund, Appx. I, const. art. II, § 30.
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Limitations upon power of General Assembly to enact private or special legislation, Appx. I, const. art. II, § 29.
Names, Appx. I, const. art. II, § 11.
Notice prior to passage of private laws, Appx. I, const. art. II, § 12.
CONSTITUTION OF NORTH CAROLINA (Cont'd)
General assembly (Cont'd)
Number of senators, Appx. I, const. art. II, § 3.
Oath of members, Appx. I, const. art. II, § 24.
Officers of the House, Appx. I, const. art. II, § 18.
Officers of the Senate, Appx. I, const. art. II, § 20.
Pay of members and officers of the General Assembly; extra session, Appx. I, const. art. II, § 28.
Powers of the General Assembly, Appx. I, const. art. II, § 22.
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Private laws in relation to names of persons, etc., Appx. I, const. art. II, § 11.
Protest, Appx. I, const. art. II, § 17.
Qualifications for representatives, Appx. I, const. art. II, § 8.
Qualifications for senators, Appx. I, const. art. II, § 7.
Ratio of representation, Appx. I, const. art. II, § 6.
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Regulations in relation to apportionment of representatives, Appx. I, const. art. II, § 5.
Regulations in relation to districting the State for senators, Appx. I, const. art. II, § 4.
Revenue, Appx. I, const. art. II, § 14.
Sinking fund, Appx. I, const. art. II, § 30.
Special or private legislation, Appx. I, const. art. II, §§ 11, 12, 29.
Style of the acts, Appx. I, const. art. II, § 21.
Terms of office, Appx. I, const. art. II, § 25.
Thirty days notice shall be given anterior to passage of private laws, Appx. I, const. art. II, § 12.
Time of assembling, Appx. I, const. art. II, § 2.
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Vacancies, Appx. I, const. art. II, § 13.
Yeas and nays, Appx. I, const. art. II, § 26.
General warrants, Appx. I, const. art. I, § 15.
Government, Appx. I, const. art. I, § 2.
Allegiance to the United States government, Appx. I, const. art. I, § 5.
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Governor, Appx. I, const. art. III, §§ 1-17.
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Commutation by governor, Appx. I, const. art. III, § 6.
Governor to make appointments, Appx. I, const. art. XIV, § 5.
Grants, Appx. I, const. art. III, § 16.
Habeas corpus, §§ 2203, 2204; Appx. I, const. art. I, § 21.
Habeas corpus not to be suspended, § 2204.
Remedy without delay for restraint of liberty, § 2203.
Hereditary emoluments, etc., Appx. I, const. art. I, § 30.
Holding other office, Appx. I, const. art. XIV, § 7.
Homesteads, Appx. I, const. art. X, §§ 2-5, 8.
Impeachment, Appx. I, const. art. I, § 12; art. III, § 10; art. IV, §§ 2-4.
Court for the trial of impeachments, Appx. I, const. art. IV, §§ 2-4.
Power of impeaching, Appx. I, const. art. IV, § 4.
Presentment, Appx. I, const. art. I, § 12.
Two-thirds vote, Appx. I, const. art. IV, § 4.
Imprisonment for debt, Appx. I, const. art. I, §§ 16, 17; art. XI, § 1.
Income taxes, Appx. I, const. art. V, § 3.
Indictment, information and presentment.
Necessity of indictment for presentment, Appx. I, const. art. I, § 12; art. XIV, § 1.
Prior crimes, Appx. I, const. art. XIV, § 1.
Inebriates and idiots, Appx. I, const. art. XI, §§ 9, 10.
CONSTITUTION OF NORTH CAROLINA (Cont'd)
Insane persons and incompetents, Appx. I, const. art. XI, §§ 9, 10.
Insurrection.
Debts, Appx. I, const. art. I, § 6; art. V, § 4; art. VII, § 13.
Intermarriage of whites and negroes prohibited, Appx. I, const. art. XIV, § 8.
Internal government of the state, Appx. I, const. art. I, § 3.
Involuntary servitude, Appx. I, const. art. I, § 33.
Judges, Appx. I, const. art. IV, §§ 11, 21.
By whom elected, Appx. I, const. art. IV, § 21.
Diminution of compensation, Appx. I, const. art. IV, § 18; Appx. II, const. U. S. art. III, § 1.
Election, Appx. I, const. art. IV, § 21.
Removal of judges of the various courts for inability, Appx. I, const. art. IV, § 31.
Residences of judges, rotation in judicial districts, and special terms, Appx. I, const. art. IV, § 11.
Terms of office, Appx. I, const. art. IV, § 21.
Judicial department, Appx. I, const. art. IV, §§ 1-33.
Judicial districts, Appx. I, const. art. IV, § 10.
Jurisdiction.
Jurisdiction of courts inferior to Supreme Court, Appx. I, const. art. IV, § 12.
Jurisdiction of justices of the peace, Appx. I, const. art. IV, § 27.
Supreme court, Appx. I, const. art. IV, § 8.
Jury.
Right of trial by jury, Appx. I, const. art. I, §§ 13, 19; art. IV, §§ 1, 13.
Justices of the peace.
Appointment, Appx. I, const. art. II, § 29; art. VII, § 11.
Article seven of the constitution abrogated, § 1462.
Eligibility, Appx. I, const. art. XIV, § 7.
Governor to appoint justices, Appx. I, const. art. VII, § 11.
Judicial powers, division of, Appx. I, const. art. IV, § 2.
Jurisdiction of justices of the peace, Appx. I, const. art. IV, § 27.
Jury trial, Appx. I, const. art. IV, § 27.
Municipal corporations, Appx. I, const. art. VII, §§ 5, 11.
Vacancies in office of justices, Appx. I, const. art. IV, § 28.
Justices of the supreme court.
By whom elected, Appx. I, const. art. IV, § 21.
Election, Appx. I, const. art. IV, § 21.
Terms of office, Appx. I, const. art. IV, § 21.
Law of the land, Appx. I, const. art. I, § 17.
Laws.
What laws are, and shall be, in force, Appx. I, const. art. IV, § 19.
Legislative department, Appx. I, const. art. II, §§ 1-29.
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Legislative, executive and judicial powers distinct, Appx. I, const. art. I, § 8.
Liberty.
Inalienable rights, Appx. I, const. art. I, § 1.
Persons restrained of liberty, Appx. I, const. art. I, § 18.
Recurrence of fundamental principles, Appx. I, const. art. I, § 29.
Liens.
Laborers' liens, Appx. I, const. art. XIV, § 4.
Lieutenant-governor, Appx. I, const. art. III, §§ 1, 2, 11, 12.
See infra, "Executive Department."
Marriage.
Intermarriage of whites and negroes prohibited, Appx. I, const. art. XIV, § 8.
Mechanics' liens, Appx. I, const. art. X, § 4; art. XIV, § 4.
Militia, Appx. I, const. art. I, §§ 2, 24; art. XII, §§ 1-4.
Compensation, Appx. I, const. art. XII, § 2.
Exemptions, Appx. I, const. art. XII, § 4.

CONSTITUTION OF NORTH CAROLINA (Cont'd)
Militia (Cont'd)
Governor commander-in-chief, Appx. I, const. art. XII, § 3.
Organizing, etc., Appx. I, const. art. XII, § 2.
Who are liable to militia duty, Appx. I, const. art. XII, § 1.
Mines and minerals, Appx. I, const. art. II, § 29.
Miscegenation, Appx. I, const. art. XIV, § 8.
Monopolies, Appx. I, const. art. I, § 31.
Municipal corporations, Appx. I, const. art. VII; art. VIII, § 4.
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Charters to remain in force until legally changed, Appx. I, const. art. VII, § 12.
Debts in aid of the rebellion not to be paid, Appx. I, const. art. VII, § 13.
General laws, Appx. I, const. art. VIII, § 4.
Name, Appx. I, const. art. II, § 29.
No debt or loan except by a majority of voters, Appx. I, const. art. VII, § 7.
Powers of General Assembly over municipal corporations, Appx. I, const. art. VII, § 14.
Taxation, Appx. I, const. art. V, § 5; art. VII, §§ 7, 9, 13.
Names, Appx. I, const. art. II, § 11.
Municipal corporations, Appx. I, const. art. II, § 29.
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Abatement, Appx. I, const. art. II, § 29.
Oaths.
Oaths or affirmation to support state constitution; all officers to take, § 3194.
Open courts, Appx. I, const. art. I, § 35; art. IV, § 22.
Orphan houses, Appx. I, const. art. XI, § 8.
Orphans, Appx. I, const. art. XI, § 7.
Outlawry, Appx. I, const. art. I, § 17.
Pardon, Appx. I, const. art. III, § 6.
Paupers, Appx. I, const. art. XI, § 7.
Penal institutions and public charities, Appx. I, const. art. XI.
Perpetuities, Appx. I, const. art. I, § 31; art. II, § 15.
Political power, Appx. I, const. art. I, § 2.
Poll taxes, Appx. I, const. art. V, §§ 1, 2; art. VI, § 4.
Amount, Appx. I, const. art. V, § 1.
Application of proceeds of State and county capitation tax, Appx. I, const. art. V, § 2.
Exemptions, Appx. I, const. art. V, § 1.
General Assembly may levy, Appx. I, const. art. V, § 1.
Prisons and prisoners.
Convict labor, Appx. I, const. art. XI, § 1.
Death punishment, Appx. I, const. art. XI, § 2.
Farming out convicts, Appx. I, const. art. XI, § 1.
Houses of correction, Appx. I, const. art. XI, § 4.
Houses of refuge, Appx. I, const. art. XI, § 5.
Pardon, Appx. I, const. art. III, § 6.
Penal institutions to be self-supporting, Appx. I, const. art. XI, § 11.
Penitentiary, Appx. I, const. art. XI, § 3.
Public officers, disqualification, Appx. I, const. art. VI, § 8.
Punishments, Appx. I, const. art. XI, § 1.
Right to vote, Appx. I, const. art. VI, § 2.
Separation of sexes, Appx. I, const. art. XI, § 6.
Public officers.
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